IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 25-0505

DAVID VICEVICH, GILLIAN CLARK,
LEONARD G. JANSON, JR., and LYNN M. JANSON,

Plaintiffs/Appellants,

v.
URBAN R. KULTGEN II and LUCINDA R. KULTGEN,

Defendants/Appellees.

On Appeal from the Montana Second Judicial District Court,
in and for the County of Butte-Silver Bow,
Cause No. DV-47-2020-403
Hon. Mike Salvagni, Presiding

APPELLEES' RESPONSE BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutory Authorities

Other Rules and Regulations

ISSUES ON APPEAL

I. Whether the District Court properly granted summary judgment recognizing e existence of an express access easement where that easement is clearly depicted on multiple subdivision plats and referenced in recorded deeds.

II. Whether the District Court correctly held that the loop portion of the easement had not been – and as a matter of law, could not be – abandoned because the easement was required as a condition of subdivision approval and the Kultgens undertook no act manifesting a clear intent to permanently relinquish the easement.

III. Whether the District Court abused its discretion in awarding Defendants reimbursement of their attorneys fees pursuant to the Covenants, which expressly authorize fees to the prevailing party.

IV. Whether the District Court abused its discretion in determining the amount of attorneys' fees, where the award was supported by evidence of reasonableness and the Plaintiffs presented no expert who would testify the fees were unreasonable?

STATEMENT OF THE CASE

This case concerns an express access easement shown on Plats 222-B and 727-B serving lots in the Keck Acres Subdivision. The initial Plaintiffs, David Vicevich ("David") and Gillian Clark ("Gillian"), alleging that the "loop" portion of the easement had been abandoned. *See various Compls. (Dkt. #1, 4, 5, & 25).* Defendants asserted the continued existence of the easement, objected to Plaintiffs' construction of a fence within the easement, and sought enforcement of the covenants. *Answs. (Dkt. #7& 22).* The parties filed cross-motions for summary judgment. *Motions for SJ (Dkt. #51 & 54).*

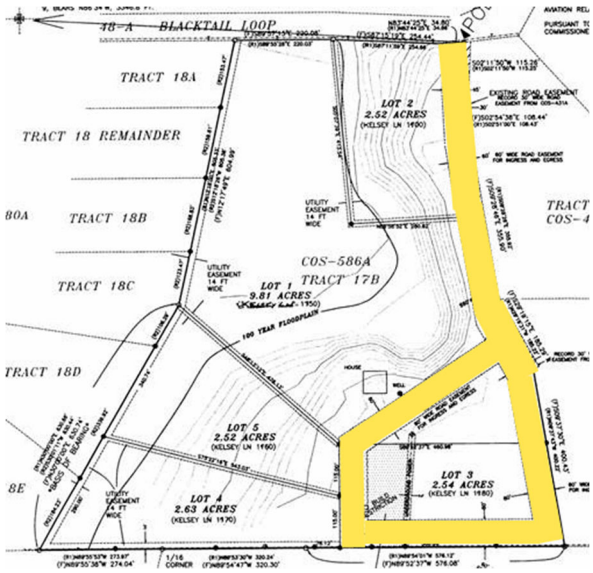
Shortly before trial, the District Court appointed a Special Master, who recommended summary judgment, finding the easement exists, was not abandoned, and the Vicevich/Clark fence unlawfully obstructed it. *See Report and Recommendations (Dkt. #75), Appendix 1.* After a hearing on July 16, 2024, the District Court adopted the Special Master's findings on September 9, 2024, and entered final summary judgment for Defendants on June 17, 2025. *(Dkt. #s 109, 110, & 142).* After briefing, a hearing, and considering both sides' evidence, the District Court awarded Defendants their reasonable attorney fees pursuant to the Covenants. Plaintiffs appealed the grant of summary judgment against them as well as the fee award.

STATEMENT OF FACTS

A. The Easement

To orient the Court, Defendants' Brief in Support of their Motion for Summary Judgment contains a depiction of the various lots and owners. *See Defs.' SJ Br., p. 2 (Dkt. #52).*

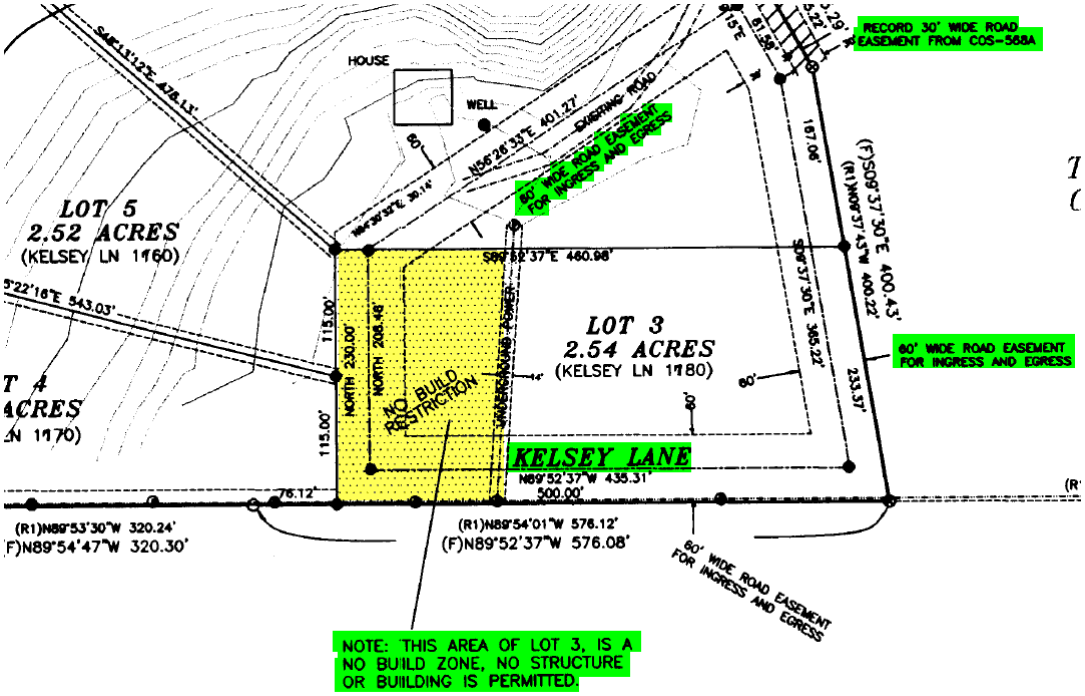
Rob ("Rob") and Lucinda ("Lucinda") Kultgen (collectively "the Kultgens") property (Lot 4) is accessed via a private road named "Kelsey Lane." *Aff. of Rob Kultgen, ¶¶12-13, Ex. A to Defs.' SJ Mot. (Dkt. #53 and 55).* Kelsey Lane appears on Plat No. 222-B and Plat No. 727-B as an inverted 'P', providing access to Lots 1 (n/k/a 1A), 2, 3 (n/k/a 1A), 4, and 5, and adjoining tracts:



Plat No. 222-B and see also Amend. Plat No. 727-B, Ex. B to Defs.' SJ Mot. (Dkt. #55). The irregular polygon to the south is the "the loop."

The easement was a condition of subdivision approval. *See Subdivision Regulations of the Consolidated City and County of Butte-Silver Bow State of Montana, e's.g. p. 103 (the development shall meet the road standards established in the regulations, including safety regulations), p. 107 (minor subdivisions may require a second access if a cul-de-sac length standard is not met or the physical conditions so warrant), p. 108 (safety requirements), p. 110 (half streets are prohibited), and p. 111 (dead-end roads prohibited without an approved turn around or cul-de-sac with a minimum of 45' radius and other requirements). See, Cited Portions of Subdivision Regulations, Ex G (https://co.silverbow.mt.us/DocumentCenter/View/180/Subdivision-Regulations-2009; and Mont.R.Evid., Rule 902(5).*

Plats No. 222-B (the original subdivision) and 727-B (the 2003 plat where the Kecks relocated the common boundary line between Lots 1 and 3 to make Lot 1A) also *both* contained a "NO BUILD RESTRICTION" in the yellow area below:



See Plat No. 222-B (emphasis added); and Plat No. 727-B, attached as Ex. B to Defs.' SJ Br. (Dkt. #52). The government has not approved the elimination or alteration of the easement nor the elimination of the "no build zone" as depicted on Plats No. 222-B and 727-B.

For decades, the Kultgens used the easement for ingress and egress to their property, beginning with their purchase of Lot 5 in 1998. *Aff. of Rob Kultgen, ¶12, Defs.' SJ Br. (Dkt. #52), at Ex. A.* Lots 4 and 5 of Keck Acres Minor Subdivision, Plat No. 222-B were, at one time, both owned by Rob and Lucinda Kultgen. *Aff. of*

Rob Kultgen, ¶¶10-11. The Kultgens sold Lot 5 to Ed and Delona Mihelich shortly after this suit was filed, but still own Lot 4 to this day. *Id at ¶40.*

The Kultgens acquired Lot 5 by warranty deed, recorded on July 28th, 1998 on Roll 188, Card 497, from the developers David and Tammy Keck. The Kultgen's purchase of Lot 5 was shortly after the Kecks recorded Plat No. 222-B on June 23, 1998. *Lot 5 Deed, Ex. C to Defs.' SJ Br. (Dkt. #52).* The legal description in Defendants' deed to Lot 5 referenced the "Keck Acres Minor Subdivision." *Id.* The Kultgens later acquired Lot 4 by warranty deed, recorded on May 15th, 2014, on Roll 374, Card 161, also from David and Tammy Keck. *Id.* The deed to Lot 4 also specifically references Plat No. 222-B, which depicts the easement at issue. *Id.* A number of Montana Supreme Court cases have held that when a deed describes land by reference to a subdivision plat or a certificate of survey, and survey or plat shows an easement, then the easement shown in the survey or plat is granted or reserved by the filing of a deed referencing the plat. *See e.g. Pearson v. Virginia City Ranches Association* (2000), 298 Mont. 52, ¶18-21, 993 P.2d 688, ¶18-21. Accordingly, the easement was created -- as a matter of law -- for the benefit of both Lots 4 and 5 (as well as other lots). The express easement which was accepted by the government as a condition of subdivision approval exists as drawn on the plats.

B. Additional Detail on the Fence and Interactions

The present case can trace its inception back to when Dave Vicevich ("Dave") and his wife Gillian Clark ("Gillian") (collectively "Vicevich") indicated that they wanted to construct a fence. On October 6, 2018 – Rob met with Dave and Gillian regarding Dave's proposed plan for a fence on what was formally known as Lot 3 (now the southern portion of Lot 1A, which is owned by Dave Vicevich and Gillian Clark) and to discuss how Dave's plan would impact access to the Kultgen's Lots 4 and 5. *Aff. of Rob Kultgen*, ¶27, Ex. A to *Defs.' SJ Br. (Dkt. #52)*. Dave showed Rob a previously recorded amended plat with a hand drawn cul-de-sac in front of Lot 5, with one end of the arch ending at the lot pin between Lots 4 and 5. *Id.* at ¶28. The Kultgens rejected the cul-de-sac proposal because it did not extend far enough to the south to allow access to Lot 4. *Id.* at ¶¶ 28-29. The proposed cul-de-sac, as drawn and proposed by Vicevich, would not provide access to Lot 4 because it ended at Lot 5, rather than ending at, or very near, the Harrington property line (i.e. the property to the south of the subdivision depicted in Plat No. 222-B). *Id*.

*A number of the texts referenced after this paragraph are depicted in the Kultgens' brief in support of their motion for summary judgment (Dkt. #52). If the Court would like to verify the veracity of what is said below, it can read most of the actual texts in the body of the brief.

Approximately one month later, on November 2, 2018, Rob texted Dave and asked about the status of the proposed fence project. In Dave's response text, Dave indicated that the express easement created by Plat No. 222-B would remain but that they intended to fence and put in cattle guards or gates to allow access to Lot 4 (the southern property). *See Text, Ex. D to Defs.' SJ Br. (KUL00845-6) (Dkt. #52); Aff. of Rob Kultgen* at ¶7 (Dave portion of text in gray, Rob in blue). Dave specifically indicated/implied that the easement would not be blocked such that Lot 4 would be without access. *Id.*

Dave described that he and Gillian's preference was to place an electric cattle guard at the entrance to the Kultgen's Lot 5 (the lot with a home on it that was owned by Kultgens at that time). *Id. at Ex. A, Aff. of Rob Kultgen,* ¶ 30. Rob stated that the Kultgens opposed any gate or cattle guards on the easement. *Id*. At no point did Rob or Lucinda agree that the easement allegedly did not exist. *Id*. at ¶ 31. Rob expressly rejected any proposal to put in cattle guards or gates. *See Texts, Ex. D to Defs.' SJ Br. (Dkt. #52))(KUL00819-21) ("I would also like to add that we are not in favor of any cattle guard or gate and do not see them as an option").*

On May 30, 2019, Gillian proposed that Rob purchase the land that the easement was located on or constructing a cul-de-sac and extinguishing part of the easement. *Id. at KUL00816*. Notably, Gillian acknowledged the easement lies on their property. *Id.*

Rob said he would consider a cul-de-sac if government-approved and if access to Lot 4 was protected. *Aff. of Rob Kultgen* at ¶ 29 (KUL00816-00821). At that point, the Kultgens were waiting on a professional drawing of the cul-de-sac to ensure that it met government regulations and would provide access to Lot 4.

In response, on June 16, 2019, Gillian texted Rob and indicated that drawings of a proposal were coming and that if he did not agree, they would just install a fence. *Id. at KUL00821-22.* Rob and Lucinda did not agree to either proposal. *Id. at KUL00827*; *Aff. of Rob Kultgen* at ¶ 29.

On June 19, 2019, Gillian sent Rob a take it or leave it offer, where the Kultgens lost their existing easement either way. *Id*. *at KUL00825-27; and see also KUL0880.* Rob responded to Gillian's texts on June 20, 2019, via email, with a counter proposal. *See Email from Gillian to Rob dated 6/20/19, Exhibit E to Defs.' SJ Br.* Notably, the Kultgens disclosed that they had a loan on the property at this early date. *Id.* Gillian then responded via text and email stating that Rob and Lucinda had no choice but to comply with what the Vicevichs wanted. *See Text, Ex. D to Defs.' SJ Br. (KUL00829); See also Email from Gillian dated 6/20/19, KUL00876, Ex. E to Defs.' SJ Br.*

By arguing that the easement would have to be extinguished, Gillian tacitly acknowledged in this text that the easement had not been extinguished. *Id.* The same text string went on to explain that the Kultgens allegedly had no rights and no

say in what happened. *See Text KUL00830-32, Ex. D to Defs.' SJ Br.* The same day after these texts, on June 20, 2019, Dave withdrew the offer of a cul-de-sac and texted Rob out of the blue and indicated that he was going to tell the neighbors to move their existing fences and blame Rob. *Id. at KUL00850-51.*

Rob had never suggested moving the fences existing at that time. *Aff. of Rob Kultgen* at ¶ 34. Those fences have been there since Rob and Lucinda purchased their Lot 5 in 1998. The fences run parallel to Kelsey Lane to the north county road and do not obstruct access to Rob and Lucinda's properties. The following day, on June 21, 2019, Rob responded that he was not asking anyone to move the fences existing at that time (i.e. the old fences and not the new fence currently at issue in this case). *See Text KUL00851, Ex. D to Defs.' SJ Br.* Also on June 21, 2019, Gillian followed up with an email to Rob again asserting that Rob and Lucinda had no rights "other than the ingress and egress easement": *See Email from Gillian to Rob dated 6/21/19, Ex. E to Defs.' SJ Br. (KUL00877).*

Around June 19, 2019 and continuing into September of 2019, Plaintiffs Vicevich and Clark constructed new fencing on portions of Kelsey Lane. *Aff. of Rob Kultgen, ¶ 36-40; and Ex. D-17 (KUL00826).* Plaintiffs Vicevich and Clark's fence is located within the easement, and the portion in front of Lots 4 and 5 is located in the no-build zone described in Plats No. 222-B and 727-B. *Id.* The fence runs along the boundary line between Lots 4 and 5 and Plaintiffs Vicevich and

Clark's southern portion of Lot 1A (formally that portion that was Lot 3). *Id.* The fence goes along the entire border (within a few inches) between what was formally Lot 3 and Kultgen's Lot 4. *Id.* at ¶ 39.

Rob Kultgen's Affidavit, filed on February 24, 2023 (Ex. A to Dkt. #53) contains before and after photos of the fence along Lots 4 and 5. *See Aff. of Kultgen, ¶¶ 35-38.* This Court can see for itself that the "large cotton wood trees" referenced on page six (6) of Appellants' opening brief are located entirely on the Kultgen's property and do not block the access to Lots 5 and 4:

Id. The easement is to the right of the fence and trees in the above photographs, directly in front of the photographer. The home on the left is on Lot 5 and the home on the right is the Vicevich home. The Kultgens did not intentionally block the easement nor did they obstruct the easement to Lot 4, much less take any action that destroyed the ability to ever use the easement. *Id.*

The allegation that the "Kultgens planted large groves of Aspen trees within the easement" (Opening Br., p. 7) is simply not true. The trees in the photograph above are on Lot 5 and are not within the easement. There are no trees in the loop portion of the easement. The Vicevich's fence, however, is partially blocking the easement in some locations relative to Lot 5 (there is a driveway to Lot 5) and entirely blocking access to and from Kultgen's Lot 4 (as well as other lots). *Id.*

On July 31, 2019, after fence construction had begun, Gillian texted Rob again acknowledging that an easement for "ingress and egress" still existed. *See Text, Defs.' SJ Br. at Ex. D (KUL00836) (Dkt. #55).*

On October 8, 2020, the Kultgens sent Vicevich/Clark a formal demand letter requesting that they remove the obstructions (fence and other items) in the easement. *See Ltr. from Perkins to Vicevich, Ex. F to Defs.' SJ Br. (Dkt. #52).* On December 1, 2020, Vicevich and Clark filed the present suit against the Kultgens, arguing "[t]he West Loop was abandoned" and that "post-plating activities extinguish the easements." *See Compl. (Dkt. #1); and Third Amend. Compl. (underlined sub-section headings)(Dkt. #21).* The "post-platting activities" were described as the Keck's (the original developer) adjusting a boundary between their own Lots 1 and 3 to make it Lot 1A and the Kultgens owning (but not aggregating or combining) Lots 4 and 5. *Id. at ¶¶35-39.*

Contrary to the Plaintiffs' allegations in this suit, the Kultgens have never blocked their own access, and have not manifested a clear intent to abandon the beneficial use of the easement. Rather, the documents establish that they have asserted that they intend to keep the easement. *See e.g. Texts, Ex. D to Defs.' SJ Br. (Dkt. #52).* The Kultgens have taken no affirmative act that would permanently prevent Lot 4 from ever using the easement. *Aff. of Rob Kultgen, ¶¶ 26 & 33, and photographs in same.* The District Court was correct when it adopted the Special

Master's recommendation to grant summary judgment dismissing the abandonment claim.

Covenants and Attorneys Fees

On December 5, 1977, the original developers of the larger area of property (not just Keck Acres) -- McGuinnesses and the Brittons -- recorded a Declaration of Restrictive Covenants (the "Covenants") on Roll 8, Card 602, which covered the property described in those Covenants. *See Defs.' Mot. for Attorneys Fees, pp. 5-6 (Dkt. #112).* The Plaintiffs admitted that both the Plaintiffs' and Defendants' properties are located in what used to be tracts 16 and 17 of COS 4. *See Answ. to 3rd Amend. Compl.*, ¶ 29 (alleging that "these covenants cover Plaintiffs and Defendants properties, which are in Tracts 16 and 17 of COS 4") (Dkt. #22); and *c.f. Pls.' Answ. to Counterclaims*, ¶ 29 ("Plaintiffs admit the allegations of Paragraph 29") (Dkt. #26). Because the properties at issue in this lawsuit are within Tracts 16 and 17, the Covenants apply to those properties. *Id.*

The Covenants are attached to Defendants' Motion for Attorneys' Fees as Exhibit A. *Defs.' Mot. for Fees, Ex. A (Dkt. #112).* Section 8 of the Covenants prohibits the building of fences or other obstructions in the easements located within the area which is subject to the Covenants as follows:

Section 8. Road Easements. Certain access routes and roads within the real property have been established by easements and are not dedicated. The owners or their assigns may dedicate such routes and roads. No fence or other obstruction shall be built on such easements.

See Covenants, § 8, Ex. A. Section 12 of the Covenants provides for: (1) enforcement of the Covenants by the owner of any tract that is subject to the Covenants, and (2) provides that the prevailing party to any litigation involving the Covenants is entitled to recover their reasonable attorney's fees and costs as follows.

Section 12. Enforcement. Failure to enforce any of the restrictions, rights, reservations, limitations, and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof. All deeds shall be given and accepted upon the express understanding that the said real property has been carefully planned as a choice rural suburban tract area exclusively and to assure owners that under no pretext will there be an abandonment of the original plan to preserve the property as a choice suburban tract area. Upon the breach of any of the said covenants and restrictions, anyone owning any land in the real property described in Exhibit "A" may bring a proper action in the proper court to enjoin and restrain said violation or to collect damages or other dues on account thereof. In the case the violation results from a failure to take affirmative action required by these covenants and restrictions, then the use for any purpose of a tract on which such violation occurs may be enjoined. In the event of litigation, the prevailing party shall be entitled to a reasonable attorney's fee, together with costs of suit expended.

Id. at § 12. The reimbursement language states "shall", which is mandatory -- and not permissive -- language. *Id.* Section 12 also contains an anti-waiver provision. *Id.*

Procedural History

On or around October 16, 2020, the Kultgens agreed to sell their Lot 5 to the

Michelichs. On December 1, 2020, the Dave and Gillian filed the Complaint in this case and Notice of Lis Pendens, presumably trying to stop the sale to put pressure on the Kultgens. *Compl. and Notice (Dkt. #1 & 2).* This first Complaint falsely alleged that "[c]ovenants and a homeowners' association were established for Blacktail Loop but are now abandoned and defunct." *Id.* at ¶ 14. On December 7, 2020, the Plaintiffs filed an Amended Complaint, naming the Jansons as additional Plaintiffs and again claiming the covenants were defunct. *Amend. Compl., ¶16 (Dkt. #4).* The same day, December 7, 2020, the Mihelichs closed on their purchase of Lot 5. *See Kultgen's Resp. to Pls.' SJ, pp. 2-3 (Dkt. #62).* On December 10, 2020, after closing on Lot 5, the Miheichs and Vicevich/Clark entered into a written easement agreement providing access to Lot 5, but specifically excluding Lot 4. *Id. at Ex. H.*

On December 17, 2020, the Plaintiffs filed a Second Amended Complaint, naming the McClaffertys as additional Plaintiffs, again claiming the covenants and homeowners' association were allegedly defunct. *Second Amend. Compl., ¶18 (Dkt. #5).* On January 18, 2021, the Kultgens filed an answer and counterclaims. *Answ. (Dkt. #7).* In their Answer, the Kultgens pointed out that the homeowners' association was not defunct. *Id. at ¶ 13 and 9th Aff. Def.* The Kultgens raised a Rule 19 defense that -- if the Plaintiffs were going to claim the homeowners' association was defunct -- the Plaintiffs needed to name the homeowners' association as a

party so it could defend itself and similarly needed to name every person subject to the covenants to claim that the covenants are "defunct." *Id. at ¶ 13 and 9th Aff. Def.* Between January 25-29, 2021, after the Plaintiffs had the benefit of seeing the Kultgen's Answer, Affirmative Defenses, and Counterclaims (and after the Mihelichs had owned Lot 5 for nearly two months), the Plaintiffs drafted up a second "easement agreement", which they then then recorded and later used to argue that the Kultgens's claims in this lawsuit were "moot" because all of the Plaintiffs reached an agreement (without the Kultgens). *See Defs.' Response to Pls.' SJ, p. 5 (Dkt. #62); and Pls.' Answ. to CCs, Affirm. Def. No. 2 (Dkt. #26).* The Special Master later characterized this litigation strategy as "a quintessential illustration of unclean hands and an unlawful deprivation of [] property rights." *See Report and Recommendation, p. 15 (Dkt. #75), Appendix 1.*

On February 18, 2021, the Plaintiffs filed a Third Amended Complaint, naming the Mihelichs as Plaintiffs and dropping the claim that the covenants and homeowners' association were defunct. *Third Amend. Compl. (Dkt. #21).* In other words, rather than being forced to litigate the truth of their claim that the Covenants were "defunct" in front of all of the interested persons, the Plaintiffs chose to voluntarily remove that claim. *Id.*

The Kultgens served discovery on the Plaintiffs on August 11, 2021. *See Mot. to Compel (Dkt. #37).* The Plaintiffs did not answer discovery for over a year.

Id. On October 31, 2022, the Kultgens moved to compel answers to discovery and requested sanctions. *Id.* The Plaintiffs deliberately multiplied the litigation to increase Defendants' fees[1]. *Id.*

On December 22, 2022 (after this lawsuit was filed and approximately three (3) months before filing for summary judgment), David Vicevich, Gillian Clark, and the Jansons recorded an "AMENDED PLAT", amending Plat Nos. 222-B and 727-B, relocating some of their boundary lines. *See Defs.' Resp. to Pls.' Mot. for SJ, p. 11, and Ex. K to same (Dkt. #62).* The Amended Plat referenced the "EXISTING 60' WIDE KELSYE LANE (COS 727-B)" and "KELSEY LANE AS SHOWN ON PLAT 222-B" and also depicted the full easement, including the loop, as existing. *Id.* Vicevich, Clark, and the Jansons signed Amended Plat 1144-A-RB on December 14, 2022 certifying that they would not deviate from the conditions of approval of the subdivision, which necessarily included the easement loop as that – or a cul-de-sac meeting the regulations -- is required for safety. *Id.* Vicevich/Clark and the Jansons also recorded quitclaim deeds referencing that plat, thereby re-creating the easement by reference. *Id.*

On February 24, 2023, the Kultgens and the Plaintiffs both simultaneously

[1] Plaintiffs' attorney at the time – Lawerence Henke – was later sanctioned by another Court for multiplying litigating to increase the fees. *See* Order *in Granite County Cause Number DG-20-2023-2, attached as Appendix 2.*

moved for summary judgment. *SJ. Motions (Dtk. #51 & 54).* On July 31, 2023, mere weeks before trial was scheduled, the District Court appointed the Honorable Greg Pinski as Special Master to decide the summary judgment motions. *COS (Dkt. #72). On* October 5, 2023, Judge Pinski gave his Report and Recommendations Re: Cross Motions for Summary Judgment, recommending summary judgment in favor of the Kultgens on all issues. *Report and Recommendations, Appendix 1 (Dkt. #75). On* October 18, 2023, the Plaintiffs objected to the Special Master's recommendations. *Objections (Dkt. #77).* After the Defendants' responded to the objections, the Plaintiffs filed an "Amended" objection without leave of Court. *Resp. to Obj. and Amend. Obj. (Dkt. #80 & 85).*

One week before the hearing on Plaintiffs' objections, the Plaintiffs attempted to name a surveyor as an expert witness and tried to introduce new evidence that was not previously raised (witnesses and documents). *See 6/20/24 Decision and Order Re: Mot. to Bar Pls.' Recently Disclose Expert Opinion and Mot. to Call Witness and Introduce Exhibits (Dkt. #106).* The District Court did not allow Plaintiffs' introduction of new evidence, including the recently disclosed expert testimony. *Id.* The District Court held a hearing on the objections on July 16, 2024. *Minute Entry (Dkt. #109).* The District Court adopted the Special Master's findings on September 9, 2024. Decision and Order, Appendix 3 *(Dkt. #110).*

The Kultgens then moved for reimbursement of their attorneys fees. *Defs.' Mot. for Fees (Dkt. #112).* At the attorneys' fees hearing, the Kultgens had Rob Cameron[2] testify as to the reasonableness of fees. *See Trans. at Pls.' Appendix 3, 13:17-25; 14-31.* The Plaintiffs had no similar counter testimony (from an attorney or otherwise) as to the reasonableness of fees.[3] *Id.* at 42:5-7 (Q. "And you did not have any testimony, correct, Mr. Ballard? A. Correct, Your Honor."). The District Court granted the Kultgens' reimbursement of their fees on June 17, 2025. *See FOF/COL, (Dkt. #141), Appendix 4.* Final judgment was entered in favor of the Kultgens on June 17, 2025, almost six (6) years after Vicevich/Clark constructed their fence. *See Final SJ (Dkt. #142).*

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[2] Although Appellants characterize Rob Cameron as undisclosed (Opening Br. p. 3), after making their objection at the attorneys' fees hearing and being given an opportunity to question Rob in the hallway, Appellees consented to Rob Cameron's testimony at the hearing. *See Transcript, Appellants' Appendix 3, 10:14-20; 11-12; 13:1-13* (Ballard: "…I would like to lodge an objection to this undisclosed expert witness. I have not heard of Rob Cameron before today…"); (Court to Perkins: "Well, I knew you were having an expert because you requested a continuance of this hearing because your expert couldn't be available." … Court after asking Mr. Ballard to question Cameron in the hallway: "Mr. Ballard, did you have an opportunity to visit with him?" Ballard: "I did, your Honor. Thank you." … Court: "So your motion, then, to exclude?" Ballard: "Well, yeah. I'll withdraw any challenge to Mr. Cameron testifying today.")(emphasis added).

[3] Although Appellants state that they were "denied an opportunity to present a rebuttal expert witness on attorney fees" (Opening Br. p. 3), that is not accurate. The Appellants did not offer an expert nor other testimony relative to fees. In fact, they offered no testimony at all at the attorneys' fees hearing and mostly relied on their legal arguments in their various briefs. *Id.* at 42:5-7

On May 21, 2025, after summary judgment was granted in favor of the Kultgens, the Office of Disciplinary Counsel filed a formal Complaint against Dave Vicevich and Lawerance Henke, arising from a complaint made by the Mihelichs arising from the present case. *See Com. on Practice Compl., ODC File No. 23-209.*

On September 2, 2025, Gillian Clark, supposedly acting *pro se*, filed a new lawsuit in Silver Bow Cause Number DV-2025-207 against that the Kultgens, as well as the McGuiness Tracts Roadway Association, Inc. ("HOA"), and Carl McQueary (the HOA's President). *See Gillian Compl., Appendix 5.* That new lawsuit alleged that the HOA "failed to take any steps to enforce" the Covenants against the Kultgens. *E.g. Id. at ¶¶ 27 & 35.* In other words, the HOA did not bring the meritless suit that that Gillian lost in the present case. Starting in paragraph 56 of the Complaint, Gillian outlines her version of the easement dispute with the Kultgens, claiming, in part, that the Kultgens forced her construct the fence blocking off the easement. *Id. at ¶¶56-103.* Gillian also complained about -- and misrepresented the substance of -- settlement discussions held in the present case as a basis for a cause of action in her new lawsuit. *Id. at ¶¶ 104-143.* Although she was a plaintiff in the present entirely meritless suit against the Kultgens (in other words, she chose to sue the Kultgens, not the other way around), Gillian claimed that there was a "conspiracy" between the Kultgens and the HOA to obtain the

attorneys' fees award in the present case. Id. Gillian also alleges that the HOA, Rob Kultgen, and Carl McQueary committed "fraud" against the District Court in the present case by claiming that the Covenants were enforceable. *Id. at ¶144-158.* The basis for Gillian's claims in the new suit is one of the same issues the Plaintiffs are now trying to raise here appeal. *Id.* On September 24, 2025, Gillian asked the Kultgen's attorney to accept service of the new lawsuit on behalf of Rob as an individual.

On October 1, 2025, this Court issued an Order of Discipline against David Vicevich, including an order to pay all of the other Plaintiffs' attorneys' fees. *See Order, Appendix 6.* On October 9, 2025, Gillian served her new Complaint on Rob as officer (Treasurer) of the HOA. Contrary to the Complaint, Rob is not a Director of the corporation. He had no power nor a vote on issues. On November 5, 2025, Gillian served Rob written discovery in the new lawsuit. On November 26, 2025, the Kultgens answered the complaint in the new lawsuit. On January 17, 2026, the HOA sent out an assessment letter to pay for the legal defense against Gillian's new lawsuit. *See HOA Ltr, Appendix 7.*

On December 15, 2025, Gillian served written discovery on Lucinda Kultgen. The Kultgens have answered that first round of discovery (to both Rob and Lucinda) because it was less time consuming than filing a motion for a protective order, but Gillian has recently sent a Rule 37 letter. Two days ago, on

February 18, 2025, Gillian also served a second set of discovery (to Rob Kultgen as an office or the association). Yesterday, on February 19, 2025, Gillian served a third set of discovery (to Rob Kulten as an individual). The written discovery to Rob, as an individual (and not counting the discovery sent to him as the Treasurer of the HOA), totals at least 48 Requests for Production, 35 Requests for Admission, and 80 Interrogatories (counting Interrogatory No. 46 asking for facts for each denial of requests for admission). *See 2nd Discovery in other case, Appendix 8.* Gillian's second lawsuit has already cost the Kultgens additional tens of thousands of dollars as well as substantial time. Given it arises out of this suit, this Court should order that reimbursement of the Kultgens fees for that other lawsuit is also appropriate.

According to the Health Department, a person named "Gillian Clarke" from Superior Title recently called the Health Department and made a complaint against Lot 5 (the Mihelich's lot) regarding a septic system that was installed in 1998. *See Email from Health Dept, Appendix 9.* Superior Title is the title company owned by Dave Vicevich or Vicevich Law. *See www.superiortitlemt.com (showing "Vicevich Law" logos and acknowledging common ownership).*

Although the Court's final order required the Vicevice/Clark fence to be removed, the fence remains to this day. The Kultgens have not been able to access Lot 4 since 2019. Meanwhile, Kultgen/Clark have gained approximately an extra

acre for their horses at no cost for almost seven (7) years.

STANDARD OF REVIEW

This court reviews summary judgment rulings *de novo* for conformance with M.R.Civ.P. 56. *Myers v. Klienhans*, 2024 MT 208, ¶ 7, 418 Mont. 113, 556 P.3d 529. Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Mont. R. Civ. P. 56(c)(3).*

An award of attorneys fees is a discretionary function of the District Court and its decision will not be overturned absent an abuse of discretion. *Mont. Env. Info. Ctr. v. Governor (MEIC)*, 2025 MT 112, ¶ 7, 422 Mont. 136, 569 P.3d 555; and *Renville v. Farmers Ins. Exch.*, 2004 MT 366, ¶ 24, 324 Mont. 509, 105 P.3d 280. A district court abuses its discretion if the court acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason, resulting in substantial injustice. *MEIC, ¶ 7 (citation omitted).*

APPEAL ARGUMENT

Summary of Argument

The District Court correctly granted summary judgment because the undisputed record establishes the existence of an express easement depicted on the governing subdivision plats and incorporated by reference into the relevant deeds.

Montana law provides that reference in a conveyance to a plat showing an easement creates that easement as a matter of law, and no material factual dispute exists regarding the location, dimensions, or purpose of the easement. The Special Master and the District Court properly applied this rule and correctly concluded that the easement exists.

Plaintiffs' abandonment theory fails as a matter of law. An easement that is a condition of subdivision approval cannot be unilaterally abandoned by one property owner and without government consent. Factually, abandonment of an express easement requires proof of both nonuse and an affirmative act demonstrating a clear intent to relinquish the easement. Mere nonuse is insufficient. Plaintiffs presented no admissible evidence showing any act by the Kultgens incompatible with continued use of the easement. To the contrary, the record demonstrates that the Kultgens consistently asserted their easement rights, objected to Plaintiffs' obstructions, and sought enforcement shortly after the Vicevich/Clark fence was erected.

The District Court also correctly awarded attorneys' fees pursuant to the recorded Covenants. Section 12 mandates fees in favor of the prevailing party in actions involving enforcement of the Covenants, and Plaintiffs' obstruction of the easement directly violated the roadway provisions contained therein. The existence or activity level of the homeowners' association is immaterial because the

Covenants authorize individual owners to enforce them. The Covenants also contain an anti-waiver provision.

Finally, the amount of attorneys' fees awarded was within the District Court's discretion. Plaintiffs presented no expert testimony or evidence challenging reasonableness, leaving the District Court with unrebutted evidence supporting the hours expended and counsel's rates. The award was supported by substantial evidence, does not meet the standard of being an abuse of discretion, and should be affirmed. Moreover, the Kultgens should be awarded further fees after prevailing on this appeal.

A. The District Court Was Correct When it Adopted Judge Pinski's Recommendation and Granted Summary Judgment.

1. An Express Easement Exists as Depicted on the Plats.

Relative to the existence of the easement, the Special Master's analysis is correct. [R]eference in documents of conveyance to a plat which describes an easement establishes the easement." *Report and Recommendations Re: Cross Motions for Summary Judgment, p. 8 (Dkt. #75)* citing *Bache v. Owens*, 276 Mont. 279, 284, 883 P.2d 817 (1994) (citations omitted). The instrument of conveyance (i.e. the deed) and the referenced documents (i.e. the plats), "must be sufficient together to express clear and unambiguous *grantor intent* to grant or reserve an easement in a manner that clearly and unambiguously describes or otherwise manifests with reasonable certainty the intended dominant and servient estates,

use, and location of the easement." *Id.* at pp. 8-9 *citing Burleson v. Kinsey-Cartwright*, 2000 MT 278, ¶ 13, 302 Mont. 141, 13 P.3d 384. Additionally, the instrument must "(1) identify the grantor and the grantee, (2) adequately describe what is being conveyed, and (3) contain language of conveyance, and (4) be signed." *Id. citing Burleson* ¶ 13.

In this case, several plats (including Plat 1144-A-RB filed by Vicevich after this litigation was filed) expressly reference a 60-foot private road easement. See Ex. B to Defs.' SJ Br. The Special Master relied on Plat 222-B, which is the plat referenced in the deed to Lot 4. *Id.* As the Special Master correctly recognized, "[t]he plat define the dominant and servient estates, define the easement boundaries, clearly depicts the easement on the map, labels the easement in numerous locations, and expresses an unambiguous intent to create a road that comports with municipal requirements and allows for ingress and egress to the subdivision for both public and private use." *Report and Recommendations, pp. 9-10 (Dkt. #75).* The March 12, 2014 Warranty Deed conveying Lot 4 from Keck to the Kultgens expressly provides language of conveyance, specifically referencing and incorporating "plat No. 222-B" and including "existing easements and rights-of-way." *Id.* All of the necessary elements are met. The easement is clearly depicted on the plat and adequately described. The purpose, an ingress and egress roadway, is clearly stated. The deed language is equally clear. Accordingly, the

Special Master reached the correct conclusion and the District Court was correct when it adopted the Special Master's recommendation.

2. The Special Master and District Court correctly held that the Kultgens did not "abandon" the easement.

Because the easement was required for subdivision approval, it cannot be abandoned without government consent. In other words, one or more property owners cannot chose to "abandon" an easement that was required as a condition of subdivision approval. *See Special Master Report and Recommendation, p. 15 (Dkt. #75).* The theory of "abandonment" cannot legally apply to easements created through reference to a subdivision plat. Allowing abandonment of platted easements would let developers secure subdivision approval and late alter the required easements to increase saleable land. This Court would create a loophole around subdivision regulations, which are largely for health and safety. As such, the Court should affirm the District Court's decision on legal grounds alone.

a. There are no genuine issues of material fact; Mere allegations that are contrary to facts do not create genuine issues of fact.

The Special Master correctly determined that there were no genuine issues of material fact relative to the abandonment theory. A principal purpose of summary judgment is 'to isolate and dispose of factually unsupported claims.'" *Holy Trinity Greek Orthodox Church v. Church Mut. Ins. Co.,* 476 F.Supp.2d

1135, 1138 (D.Ariz. 2007), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* Conclusory allegations unsupported by the actual facts are insufficient to create a triable issue of fact so as to preclude summary judgment. *See e.g., Cape v. Crossroads Corre. Ctr.,* 2004 MT 265, ¶ 12. 323 Mont. 140, 99 P.3d 171. Self-serving statements and assertions "do not constitute facts that are 'material and of a substantial nature' that would prevent summary judgment." *Dollar Plus Stores, Inc. v. R-Montana Associates, L.P.*, 2009 MT 164, ¶ 29, 350 Mont. 476, 209 P.3d 216. Mere allegations, without any supporting evidence, are not sufficient to go to trial. Even mere allegations that were made in affidavits, with no actual evidence supporting the allegation, have been treated as "conclusory statements", which are insufficient evidence in a summary judgment proceeding. *See e.g. Hathaway v. Zoot Enterprises, Inc.,* 2021 MT 292, ¶ 33, 406 Mont. 239, 498 P.3d 204.

Vicevich's fence goes across the entirety of the boundary between Lot 4 and Vicevich's Lot 1A. *See Kultgen Aff., Ex. A to Defs.' SJ Br., ¶¶ 36-40.* Contrary to Plaintiffs' argument, there is no genuine dispute of material fact over "what portion of the Vicevich and Clark fence actually obstructs access…to Lot 4…." *Opening*

Br., p. 13. Because the fence runs the entire length of Lot 4, the entire fence between Lot 4 and Lot 1A is a portion that obstructs access. Similarly, the fence across other boundary lines also necessarily obstructs access. For example, the Vicevich/Clark fence completely blocks access to the easement that extends south from the junction to Harington's fence. This is why "all" Vicevich/Clark fencing needs to be removed. There is no need to waste a jury's time on this issue nor should it be a subject of future litigation. This Court should make it clear that "all" Vicevich/Clark fencing in the loop area needs to be removed.

The "loop" portion of the easement is the portion at issue. See e.g. Amend Compl., ¶ 20 (describing "the loop" and "they abandoned this part of the easement"); and Defs.' SJ Mot., p. 2 (Dkt. #51) ("Plaintiff Vicevich and Clark's installation of a fence within the loop area…(as Plaintiff Vicevich and Clark placing other items in the loop area of the easement) is obstructing the easement"…requiring Plaintiffs to remove the fence obstruction (as well as any other obstructions they have placed) within *the loop*…")(emphasis in original). Plats 222-B, 727-B, and the Plat Vicevich filed after this lawsuit do not, and indeed cannot, contradict themselves as to the "loop" portion (the only portion at issue) because they are sixty (60) feet from the property lines between Lots 4 and 1A and the other lots. *See Defs.' Br. in Support of SJ, Ex. B (Dkt. 52) and See Defs.' Resp. to Pls.' Mot. for SJ, p. 11, and Ex. K (Dkt. #62).* The "loop" portion is described

and drawn as a 60-foot easement in each of those plats. Because the "loop" portion is next to property lines, one can simply travel perpendicular sixty (60) feet out from the lot boundary lines around the "loop" to determine the location of the easement. Again, there is no, and can be no, genuine of issue of material fact as to the location of the "loop."

The record does not show that the Kultgens intended to extinguish the easement. Although a cul-de-sac was discussed it was never agreed to and does not constitute waiver. *See Texts and emails, Defs.'SJ Br. Exhibits (Dkt. #52).* Relative to the alleged "blockage" by Rob Kultgen, the only evidence in the record is that the alleged "blockage" was entirely on Lot 4 (not the easement) and was for a few days because someone was driving on Lot 4 without permission. *See Aff. of Kultgen, Ex. A to Defs. SJ Br., ¶ 24.* Trying to prevent trespassing for a week by taking action entirely off of the easement does not establish a clear intent to permanently abandon the easement itself.

Contrary to the Plaintiffs' position, a jury could reach no other conclusion but that the Vicevich/Clark fence blocks the easement and that the Kultgens took no affirmative action to permanently block the easement. The District Court and the Special Master both reached this conclusion after reviewing the record, considering Plaintiffs' objections, and holding an evidentiary hearing.

The plat the Special Master relied upon was the plat referenced in the deed, Plat 222-B. *See Report and Recommendation.* The plat, relative to the "loop" portion at issue, is not at all ambiguous. It clearly depicts and describes a sixty foot (60') easement. If the Plaintiffs' surveyor, who was disclosed years after the expert disclosure deadline, was going to testify that he could not determine where the sixty (60) feet (perpendicular to Lot 4) ended relative to the loop, he should lose his license. A layperson with a square and tape-measure could figure it out. Any person could walk sixty (60) feet at a 90-degree angle to the boundary line between Lots 4 and 1A and see where the easement ends. The attempt to manufacture an issue for trial through a surveyor who was not disclosed within the time allowed should be rejected. There is no need to waste a jury's time.

Plaintiffs' next argument is that, if they lose on appeal, they intend further litigation to get jury instruction on how to remove the Vicevich/Clark fence. *See Opening Br.* If the Plaintiffs truly do not understand how to remove the Vicevich/Clark fence, this Court should allow the Kultgens to remove the fence. This Court should give the Kultgens permission to hire a crew, at Vicevich/Clark's expense, to remove the Vicevich/Clark fence constructed in 2019 and remove any other obstructions in the easement and/or "NO BUILD" area. There is no need for further litigation after this appeal. The Kultgens' contractors should know how to remove the fence and other items. Alternatively, Plaintiffs can simply comply with

the Court order and remove the Vicevich/Clark fence and other obstructions in the Kelsey Lane easement.

b. Both the Special Master and the District Court applied the correct legal standards.

Plaintiffs' entire argument boils down to the "loop" portion of the road being allegedly "abandoned" because the road was not yet constructed for the benefit of the vacant Lot 4. As a matter of law, however, nonuse does not demonstrate abandonment of an express easement. *Report and Recommendations,* pp. 13 (Dkt. #75); *citing Woods v. Shannon*, 2015 MT 76, ¶ 17, 378 Mont. 365, 344 P.3d 413; and *Mason v. Garrison*, 2000 MT 78, ¶38, 299 Mont. 142, 998 P.2d 531. "The holder of an easement 'is not required to make use of the easement as a condition to retaining his interest in the easement." *Id. citing Pearson v. Virgina City Ranches Ass'n,* 2000 MT 12, ¶ 47, 298 Mont. 52, 992 P.2d 688.

As the Special Master correctly recognized, "[a]n easement can be extinguished only if the servitude owner and servient tenant are the same person, the servient tenement is destroyed, the servitude is acquired by enjoyment, or the owner of the servitude performs an act or assents to an act which is incompatible with its nature or exercise." *Report and Recommendations*, pp. 11-12 (Dkt. #75) citing *Burleson ¶ 24 (supra)*. Not only does Kultgen's affidavits and the actual texts, letters, and emails establish an objection to the fence, Plaintiffs' own

affidavits and the recent new suit filed by Gillian Clark "reflect Kultgen objected to fencing and gating the easement." *Id.* at p. 13; and see *Gillian Compl*., ¶ 68-73, Appendix 5.

The Special Master was also correct when he stated "[t]here is no evidence Kultgen performed or assented to an act that is incompatible with the nature of the easement." *Id.* Contrary to the Plaintiffs' position, the record was not "replete with evidence of the Kultgens taking affirmative actions indicating an intent by the Kultgens to abandon the loop portion of the easement." *Pls.' Opening Br.,* p. 19. Rather, the Plaintiffs made mere conclusory allegations of abandonment and/or tried to mischaracterize the evidence to state conclusions that are not supported by the actual evidence. As the Special Master recognized, the Kultgens repeatedly asserted that they had access (including hiring an attorney to send a demand letter to remove the fence mere months after it was constructed against their ongoing written objections).

The Plaintiffs also assert that they never saw the Kultgens use the "loop" for "vehicular traffic." *Opening Br.,* p. 20. They reference "vehicular" presumably because they acknowledge that the Kultgens walked the easement for ingress and egress. Mere non-use, however, is not sufficient to establish abandonment as a matter of law. *Woods v. Shannon*, 2015 MT 76, ¶ 17, 378 Mont. 365, 344 P.3d 413; and *Mason v. Garrison*, 2000 MT 78, ¶38, 299 Mont. 142, 998 P.2d 531.

As the Court can see for itself from the photos in the fact section of this brief and Rob Kultgen's Affidavit (Dkt. #52, Ex. A), no fence posts or logs were on the easement prior to Vicevich/Clark building their fence (which is entirely on Lot 1A). The Kultgens also did not plant anything in the easement. There were aspen suckers that were a few inches high as a result of nature. The mature trees in the photographs are clearly on Lot 5, which has a driveway coming off of the loop. The trees on Lot 5 did not block access to Lot 4, nor did they block access to Lot 5 because there is a driveway directly off the northern portion of the loop. The photographs also establish that, if there were tree suckers in the easement, they were mere inches tall and not "planted" by Rob. *Id.*

Contrary to Plaintiffs' allegation, cotton woods were also not "planted across the *entire* 60 feet of the easement serving to block it…" as Plaintiffs' claim. *Opening Br., p. 21.* There are literally no trees (of any species) in the loop portion of the easement. The Court can see for itself from the photos that there are no trees in the loop portion of the easement next to the Kultgen's Lot 4, much sixty (60) feet across the entire easement. *Aff. of Kultgen.* Either the Plaintiffs are confused as to where the easement is located (after six (6) years of litigating over the easement) or they are deliberately misstating the record trying to confuse this Court into reversing the District Court thinking a field is a forest. In either event, they are flat wrong.

The Special Master and District Court were absolutely correct when they held that nothing the Kultgens did manifested a clear intent to abandon the easement. At no point did the Kultens indicate that they intended to landlock their Lot 4, much less take an affirmative action to destroy the ability to ever again use the easement. The Plaintiffs' mere allegations of facts contrary to reality that are not supported by actual evidence do not create genuine issues of fact.

B. The District Court Correctly Awarded Attorneys Fees Because Reimbursement is Mandatory Pursuant to the Covenants.

The District Court also correctly ruled that the Kultgens should be reimbursed their attorneys' fees. Whether a party is entitled to attorneys' fees is a question of law. *Lewistown Lauderdale Const. Co. v. Martin*, 2011 MT 325, ¶ 30, 363 Mont. 208, 271 P.3d 48. Attorneys' fees are only recoverable where a statute, contract, or other binding document so provides. *Nw. Nat. Bank of Great Falls v. Weaver-Maxwell, Inc*., 224 Mont. 33, 44, 729 P.2d 1258, 1264 (1986). In this case, the Covenants provide for a cause of action if a fence or other obstruction is constructed on a road or easement. *See Covenants, § 8, Ex. A.* The Covenants specifically provide that any individual owner may enforce the Covenants, that a failure to enforce the Covenants in one instance cannot be a waiver in another instance, and that attorneys' fees are available to the prevailing party. *Id.* at § 12. As such, the Kultgens, as individuals, had the right to file their counterclaims for

the Vicevich/Clark fence blocking the easement, the Kultgens' claims could not be waived by prior fences not being the subject of litigation nor any action or inaction of the association, and attorneys fees were mandatory.

1. The homeowners' association's status is not material to this dispute.

Plaintiffs' primary argument/assumption appears to be that the HOA is somehow necessary to enforce the Covenants. Specifically, Plaintiffs' argue that the District Court's reliance on the Covenants was allegedly an abuse of discretion because the "*homeowners' association*" has allegedly "been defunct for 25 years and has not followed a single covenant…therefore attorney fees should not have been awarded based on the Covenants." *Opening Br., p. 24.* The Plaintiffs' premise -- that the homeowners' association is needed to enforce the Covenants -- is fundamentally flawed.

First, factually the homeowners' association does exist (see e.g. HOA letter Appendix 9). The HOA has been registered with the Montana Secretary of State every year since its inception. Plaintiff Gillian Clark recently sued the association, thereby recognizing it exists. *See Gillian Compl.,* Appendix 5. Plaintiffs cannot simultaneously sue the association as an entity in one suit and take the position on appeal in this case that the entity does not exist.

Second, the existence or nonexistence of the HOA is not relevant to the enforceability of the Covenants. The Covenants are distinct from the homeowners' association. One is not required for the other to exist. The HOA's status is irrelevant to the enforcement of the Covenants. Put another way, there is no legal requirement to have a homeowners' association in order for an individual to enforce the covenants. *See Covenants, § 12.* Accordingly, the Special Master and District Court were correct when they determined that the existence, or non-existence, of the homeowners' association, is not relevant.

It should also be noted that the Plaintiffs specifically dropped the argument that the HOA was defunct to avoid having to litigate it. As is explained in the fact and procedural history section earlier, the Plaintiffs chose to drop this very claim in their Third Amended Complaint. The Plaintiffs originally alleged that the homeowners association was defunct, but then removed that claim to avoid having to name the association in this lawsuit. *C.f. Second Amend. Compl. ¶ 18 and Third Amend Compl.* The Plaintiffs knowingly and voluntarily waived this very argument early on by removing it from their Third Amended Complaint and should not be allowed to now litigate it on appeal.

Finally, the Plaintiffs are relying on a statute that did not exist until years after the Complaint was filed. The statute Plaintiffs cite in support of their argument -- M.C.A. § 70-17-210 – (Opening Br., p. 26) did not exist in the 2019

version of the Montana Code Annotated in effect when the Complaint was filed. M.C.A. § 70-17-210 was codified after the 2023 Legislative session and amended after the 2025 session. The Complaint was filed on December 1, 2020. The 2019 Code, not the 2023 Code, was applicable when the Complaint was filed. Applying the statute retroactively would violate Article II, Section 31 of the Montana Constitution (Declaration of Rights).

Notably, however, M.C.A. § 70-17-210 also provides that an "owner of an interest in real property burdened or benefited by a covenant, condition, or restriction" may "initiate a legal action to enforce covenants, conditions, or restrictions." *See Mont. Code Ann. § 70-17-210(1)(b)(2025).* In other words, the statute Plaintiffs rely on for the proposition that an "association or governing body of a real property development" cannot enforce the covenants if they have not met for 15 years also specifically provides that individual owners may still enforce the covenants. *Id.* Accordingly, if the statute did apply retroactively to this case, the Kultgens would still be entitled to enforcement of the Covenants as individuals.

2. The District Court's reliance on the evidence presented when determining the amount of fees is not an abuse of discretion.

There is insufficient room in this brief to fully cover all of the factual details of this litigation, but if this Court reviews the Kultgens' brief in support of their

motion for fees and costs and associated affidavits, each of Plaintiffs' arguments are refuted in detail.

- As is explained in the Fact Section of this Brief, at the hearing on the reasonableness of the attorneys fees, the Plaintiffs withdrew their objection to Rob Cameron testifying. *See Footnote 2, supra.* The Plaintiffs chose to not have their own expert testify and/or they could not find an attorney who believed the fees were unreasonable. *Id.* The Plaintiffs presented no witnesses, and the absence of contrary evidence does not establish an abuse of discretion.
- At the time of the fee request (and currently), the Kultgens have paid every invoice in full. Even if they had not, the Kultgens would still be entitled to their fees.
- Settlement discussions cannot support liability pursuant to Montana Rule of Evidence Rule 408.
- If this Court does consider the settlement negotiations, the facts do not support Plaintiffs' version of events. As this Court recognized in the disciplinary proceeding against Dave Vicevich, the settlement blew up because Vicevich law failed to communicate with its clients, specifically the Mihelichs. See 2nd Aff. of Kultgen, Ex. F to Defs.' Reply on Fees (Dkt. #121). The Mihelichs have a right of first refusal

on Lot 4, which the Kultgens raised early on as an issue. *Id.* The Plaintiffs refused to address the right of first refusal until the end and then would not sign a release, which is why the negotiations failed. *Id.*

- The Plaintiffs, not the Kultgens, changed their mind on a release and wanted the Kultgens to settle without one (presumably because they knew Mihelichs were likely to bring a claim against the Kultgens if they breached the right of first refusal).
- This Court is encouraged to read the Kultgens' brief in support of their request for fees and their reply brief, as well as the emails attached to that motion. The Kultgens were not to blame for the negotiations failing. There was no "bad faith" negotiating (at least on the part of the Kultgens).
- No party is obligated to settle. Holding that a party who is sued without merit has to settle with the other side or they waive reimbursement of their fees is horrible precedent to set.
- The Kultgens hired their attorneys prior to suit being filed by the Plaintiffs. The work was in anticipation that there could be a lawsuit. The Kultgens are entitled to those fees incurred as they were part of this litigation. If the Plaintiffs wanted to avoid those fees, they could

have simply not filed a meritless lawsuit against their neighbors to leverage additional grazing land.

- The Kultgens provided copies of the invoices for attorneys' fees in support of their request for reimbursement. In almost every instance, there were detailed narratives with an indication of how much time was spent on specific portions of the work. Most of the narratives over the years of litigation broke time down into chunks less than two hours. There was no "block billing", as the narratives show.
- The Plaintiffs do not specify the monetary amount of alleged block billing because their "examples" would constitute only a small percentage of the overall bill. As Plaintiffs' acknowledge, "[b]lock billing was acceptable, but…the majority of the [alleged] block billing entries were less than two hours." *Opening Br. at 34.* Plaintiffs, however, count entries such as "(2.1)" as "block billing." *Id.* To the extent a handful of entries were not broken down into sections of drafting, the Plaintiffs do not complain that the actual time was excessive. The client could clearly see the work done and the amount billed.
- The Plaintiffs' acknowledge that they "could not find any Montana case law prohibiting block billing." *Opening Br., p. 33.*

- There were nine (9) months of back-and-forth on the settlement negotiations that ultimately failed because of Vicevich Law not communicating with its clients. That effort cost the Kultgens tens of thousands of dollars due to Vicevich Law's failure to follow ethics rules.
- This case was originally under Judge Kim Christopher. Although the parties briefed discovery disputes and filed for summary judgment, Judge Christopher did not decide those motions. The parties, therefore, prepared for trial. After the initial trial materials were submitted to the Court, Judge Christopher woke up and cancelled the trial date. She then appointed Judge Pinski as the Special Master. The parties were weeks away from trial at that point. The Kultgens were preparing for trial. Looking at the big picture, it is not unusual to be around $100,000 leading to a trial in a heavily contested case. The amount billed was well within reason of what would be expected in 2019 to 2025.
- There was also unusual briefing, such as the Mihelichs requesting to be dismissed from the lawsuit due to the ethics violations. The Plaintiffs also deliberately took actions to increase the fees, such as randomizing identical discovery sent to Rob and Lucinda to make it

take more time to answer. *See Mot. to Compel.* The Plaintiffs also took liberties that multiplied the litigation, such as filing their objections to the Special Master's recommendation, then filing an "amended" version after the Kultgens responded to the first version. While there were no depositions, there was plenty of work all of which was the result of the Plaintiffs' decision to file a meritless lawsuit.

CONCLUSION

The Court should affirm the District Court's award of summary judgment as well as reimbursement of the Kultgens' attorneys' fees. The Kultgens are similarly requesting that they receive reimbursement for their fees on appeal as well as fees incurred in Gillian's new lawsuit.

Dated: February 20, 2026 WORDEN THANE, P.C.

By */s/ Reid J. Perkins*
Reid J. Perkins
Attorneys for Defendants/Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.P., I certify that this brief is double-spaced in 14 point Times New Roman, a proportionally-spaced font. The word count, excluding the table of contents, table of authorities, the certificate of service, and this certificate of compliance is 10,000 words, as calculated by Microsoft Word.

Dated: February 20, 2026 By */s/ Reid J. Perkins*
Reid J. Perkins

CERTIFICATE OF SERVICE

I, Reid J. Perkins, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-20-2026:

Ryan Adam Ballard (Attorney)
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Electronically signed by Christina DiMuro on behalf of Reid J. Perkins
Dated: 02-20-2026