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STATE OF MONTANA
Case Number: DA 25-0436

DA 25-0436

In The Supreme Court of the State of Montana

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.

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

TOMPKINS' COMBINED REPLY/CROSS-APPEAL RESPONSE BRIEF (THIRD BRIEF ON CROSS-APPEAL)

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

A. The Tompkins' appeal.

The Court can reverse on the first issue and stop there because the district court erred when it denied the parties' cross-motions for summary judgment on whether Brock had an express easement across the Tompkins' property. Brock does not even argue that the Tompkins were incorrect on the merits. Instead, she claims that the Tompkins' motion was merely *too early*, but glosses over that she filed a cross-motion on the same issue—and only that issue. Brock then agreed that discovery and all other deadlines should be stayed because the resolution of the cross-motions would end the dispute. She then joined a notice of issue again informing the district court that a ruling on those cross-motions would resolve the entire case.

In sum, Brock went all-in on her express easement theory and never hinted that she was pursuing any other theory until after the district court denied the cross-motions and improperly suggested several new theories to her. That was error, and the case should have been over at that point.

Next, the district court's conclusion that the relevant severance for purposes of creating an implied easement occurred in 1950 is both a legal and literal impossibility because the relevant parcels were not created or severed until decades later. And by the time Brock's residence parcel was severed from common ownership with what is now the Tompkins' parcel,

Brock's parcel bordered Sawmill Lane, an undisputed county road. The required elements of an implied easement could therefore never be satisfied, and the district court did not, in any event, make findings that support its legal conclusion that an implied easement was created.

B. The Court need not reach Brock's cross-appeal but if it does, Brock cannot succeed because there was no unconditional offer of settlement and because she did not cite the fee-shifting statute in her proposal.

Brock's claim that she is entitled to fees under the "offer of settlement" statute at § 25–7–105, MCA, fails for two independent reasons. First, the settlement offer she claims she made did not cite this statute, which is required before it can apply. Any other conclusion would eviscerate the American Rule and provide that any time a party makes a settlement proposal that is rejected, they are entitled to attorney fees if they ultimately prevail—even if the purported offer says nothing about fee-shifting. That is obviously incorrect, and it would have a chilling effect on settlement negotiations.

Second, and more fundamentally, Brock's argument fails Contracts 101. Her so-called offer was not really an offer at all, because it did not include a necessary term: the amount of attorney fees Brock was requesting. There was therefore no unconditional offer that the Tompkins could have accepted that would have created a binding settlement agreement. Instead, Brock's proposal was merely an

invitation to continue negotiating a possible settlement.

ARGUMENT

At the outset, the Tompkins are compelled to address two incorrect "facts" Brock repeatedly recites that are material to the resolution of this appeal because they were adopted by the district court.

First, Brock continues to represent that she has no access to her properties other than Forgotten Lane, and that without some kind of access on Forgotten Lane, her properties would be "landlocked."

Nothing could be further from the truth. Ever since her parcels were created, Brock's residence property has bordered Sawmill Lane, an undisputed county road, and her other property has always been accessed via Hoofbeats Lane, which is in turn accessed via Sawmill Lane.

Here is a portion of the aerial image in the district court's findings of fact,[1] which shows Brock's 2.5-acre parcel bordering Sawmill Lane, which the parties *agree* is a county road that connects directly to Conner Cutoff, a state highway:

[1] This is an excerpt of an image taken from the district court's Finding of Fact and Conclusions of Law. AA1-028 at FOF 11. The image Brock uses to show the relative location of the parcels covers up the label of Sawmill Lane (Response Brief at 2), even though the district court correctly found after trial that "the parties agree [Sawmill Lane] is a county road." AA1-028 at FOF 10. Brock's response says nothing about the status of Sawmill Lane or the fact that her property borders it—a staggering omission in the context of this case.

Indeed, the settlement discussions that are the subject of Brock's cross-appeal expressly recognize this fact, and part of Brock's own proposal was that she would abandon use of Forgotten Lane and construct a driveway across her own pasture to reach Sawmill Lane. Brock even included an annotated image showing that a "new access driveway from Sawmill Lane" would have been one way to resolve this case:

AR-1076.[2]

Seven years into this case, Brock's insistence that either of her parcels would be "landlocked" without access via Forgotten Lane cannot be an innocent misrepresentation; it appears to be a deliberate effort to mislead the Court. Brock nevertheless invokes the "landlocked" trope to backstop her argument that the district court properly denied the Tompkins' initial motion for summary judgment. But this misconception appears to have been *the* motivating factor in the district court's belief that Brock must have had some form of access on Forgotten Lane, even after concluding that she did not have an express easement.

[2] AR-1076 is in Volume V of Brock's appendices.

Second, contrary to Brock's timeline, this case did not "begin" with the Tompkins installing fences on Forgotten Lane in 2017. Rather, as addressed at length in the Tompkins' opening brief, it began in 2016 when Janet Brock tore down a fence on the parties' property line so she could drive around the log and fenceposts that had blocked the western end of Forgotten Lane on the Tompkins' property for at least two decades. The later installation of "fences" merely restored the status quo. Brock does not dispute this; she simply ignores it. But that is a concession that the Tompkins are correct on this important issue, and the Tompkins' position is supported by all the available evidence, including aerial imagery and Brock's own testimony. *See, e.g., Barrett v. State,* 2024 MT 86, ¶ 42, 416 Mont. 226, 547 P.3d 630 (failing to respond to arguments concedes that they are correct). All these factual errors were repeated throughout the case, and they led directly to the legal errors that compel reversal.

I. The only issue the Court needs to address is that the district court should have granted the Tompkins' motion for summary judgment on Brock's single claim that she had an express easement, and that should have ended this case.

The order denying the parties' cross-motions for summary judgment on Brock's express easement claim and suggesting new theories for Brock to plead was wrong because whether an express easement exists is a question of law, not fact. *Wiegele v. W. Dry Creek*

Ranch, LLC, 2019 MT 254, ¶ 15, 397 Mont. 414, 450 P.3d 879. Brock does not argue that there were disputed material facts when the district court denied the parties' cross-motions for summary judgment, nor has she ever. Instead, Brock simply abandoned her express easement claim and now claims that the allegedly disputed facts justifying the denial of the cross-motions were relevant to other theories that were never even hinted at in her complaint.

A. Brock's original complaint did not plead or hint at any theory other than an express easement.

Brock seems to suggest that her original verified complaint included other causes of action. Here is her entire first count:

FIRST CLAIM FOR RELEIF
DECLARATORY JUDGMENT

13. Plaintiff, realleges and incorporates herein by reference each and every allegation contained in the preceding Paragraphs 1-12.

14. Plaintiff requests a declaratory judgment that she has an express easement as shown on Certificate of Survey No. 4026 for the entire width as platted including access to Sawmill Lane for ingress, egress, access, maintenance and utility purposes.

AA1-56. Her second:

SECOND CAUSE OF ACTION
INJUNCTIVE RELIEF

15. Plaintiff, realleges and incorporates herein by reference each and every allegation contained in the preceding Paragraphs 1-14.

16. Defendants, Shan L. Tompkins and Dana L. Tompkins, have purposely and willfully blocked the Plaintiff's access and interfered with her express easement as depicted on Certificate of Survey No. 4026.

17. The Defendants actions have caused, and will continue to cause, interference, hardship, and injury to the Plaintiff.

18. Plaintiff is entitled to injunctive relief to protect her easement across Parcel 1, Certificate of Survey No. 4026 for access, ingress, egress, maintenance, and utilities from interference by the Defendants and/or their relatives, agents, and assigns.

Id. And her prayer for relief:

WHEREFORE, Plaintiff prays for judgement on her Complaint as follows:

a. For a declaratory judgment that Plaintiff, Janet M. Brock, has an express easement as depicted on Certificate of Survey No. 4026.

Id.

Brock's verified complaint does not allege any other easement theories, and the term "implied" is nowhere to be found. The closest Brock gets to even hinting at any other theory is the claim that Forgotten Lane was "considered by local residents as a county road." AA1-054. But like

her express easement claim, she abandoned and conceded[3] her county road claim after the Ravalli County Attorney and the Ravalli County Commissioners resolved the federal court litigation by signing a settlement agreement conceding that Forgotten Lane had *never* been a county road.[4]

B. There district court's refusal to grant the Tompkins' motion for summary judgment was error.

Brock now argues that the district court "correctly found that there were disputed material facts," but the only facts the district court cited for that proposition were for claims that Brock did not plead and that had nothing to do with her express easement claim. To be sure, the Tompkins do not suggest that the mere presence of cross-motions for summary judgment *requires* a district court to grant one of the competing motions, because cross-motions do not necessarily establish the absence of genuine disputed facts. *Hajenga v. Schwein*, 2007 MT 80, ¶¶ 18–19, 336 Mont. 507, 155 P.3d 1241. But, at the same time, this Court has consistently held that a "district court's ruling on a summary judgment is not a discretionary function that merits deferential review." *City of Helena v. Svee*, 2014 MT 311, ¶ 7, 377 Mont. 158, 339 P.3d 32; *Lorang v. Fortis Ins.*

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[3] Doc. 83 at 5–6, 10–11.

[4] Brock's insistence and the district court's conclusion that the County's formal federal court settlement—which is recorded—is somehow not binding on anyone is baffling and obviously wrong, but ultimately irrelevant to the issues before the Court.

Co., 2008 MT 252, ¶ 53, 345 Mont. 12, 192 P.3d 186.

Thus, when a party demonstrates that there is an absence of material fact related to the legal issue subject to the motion, Rule 56(c)(3) provides that a court "should" grant the motion, and Rule 56 "requires district courts to make a series of legal conclusions regarding the applicable law[.]" *Lorang*, ¶ 53. Where, as here, "the material facts are undisputed, the court must simply identify the applicable law, apply it to the uncontroverted facts, and determine who prevails." *Perl v. Grant*, 2024 MT 13, ¶ 12, 415 Mont. 61, 542 P.3d 396. That is what should have happened here, and it almost did, until the district court suggested new theories for Brock to assert.

Contrary to Brock's assertion that, because the cross-motions were filed before discovery, they were somehow improper, Rule 56 provides that a party can move for summary judgment "at any time." Mont. R. Civ. P. 56(c)(1)(A). Likewise, Brock's argument that the motions were "devoid of affidavits"[5] is irrelevant because Rule 56 provides that a party can move for summary judgment "with or without supporting affidavits[.]" Mont. R. Civ. P. 56(a). And her claim that the district court's decision was "limited to the pleadings"[6] is wrong because the parties submitted and the district court considered the relevant evidence related to her express easement claim, including deeds and the certificate of survey that Brock

[5] Response Brief at 16.
[6] *Id.*

claimed created the easement. AA1-005–06.

Based on those recorded documents, the district court correctly concluded 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*[.]" AA1-010 (emphasis added). In other words, the district court concluded the Tompkins were correct and Brock was wrong about her express easement claim. All it needed to do was follow through and grant the Tompkins' motion. That would have—and should have—ended the case, and it would have been consistent both with Rule 56 and the first Montana Rule of Civil Procedure, which explains that the Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Mont. R. Civ. P. 1.

C. The district court relied on irrelevant evidence to reach the incorrect conclusion that without Forgotten Lane, Brock's properties would be "landlocked."

When the district court considered evidence that was not relevant to whether Brock had an express easement, that too was error. That irrelevant evidence led the district court to conclude, and then continue to repeat throughout this case, that Brock's only possible access to her home was via Forgotten Lane. Indeed, the district court stated in its order denying the cross-motions that Brock's "residence was situated on a 2.5-acre parcel," "[t]his parcel does not adjoin any road other than

Forgotten Lane," and it "does not extend to Sawmill Lane to the west." AA1-006–07. As shown above, this is simply false, and Brock's insistence otherwise is inexplicable.

The effect of Brock's misrepresentation and the district court's adoption of this incorrect fact can hardly be overstated, because it led the district court to mistakenly conclude that without access on Forgotten Lane, Brock's property would be "landlocked." AA1-011. This concern appears to be what led the district court to go well beyond its role as a neutral arbiter and suggest additional theories that Brock should raise so that the district court could "grant summary judgment to [Brock]." AA1-12.

Still, the district court did not deny the parties' cross-motions based on disputed facts about whether Brock had an express easement. Instead, it concluded that Brock had *not* met her burden to establish that she had an express easement, but its denial of the Tompkins' motion turned entirely on questions of fact related to *other* theories that Brock had not pleaded or otherwise raised. That is error, and the Court need not go further than to reverse on this issue and conclude that the district court should have granted the Tompkins' motion for summary judgment and the case should have ended at that point. *Clark v. Sweeney*, 607 U.S. 7, 9 (2025) ("To put it plainly, courts 'call balls and strikes'; they don't get a turn at bat.") (citation omitted).

II. The district court's conclusion that a 1950 severance created an implied easement is legally and factually impossible.

Over seven years after this case began, and after several dispositive motions and a bench trial, it is still unclear what kind of implied easement Brock claims she has. Is it an implied easement by necessity, or an implied easement by existing use? From the district court's order, it is impossible to say. But Brock's two properties are so differently situated that they could not have the same kind of implied easement, and the district court's conclusions about the timing of the relevant severances are incorrect as a matter of law.

At the outset, Brock suggests the Tompkins are raising new arguments on appeal. But the Tompkins have consistently argued that the "relevant severance" could not have occurred until the 1970s when the Tompkins' and Brock's property were severed from the common ownership of the Shooks, because that is when the Brocks purchased their property from the Shooks. *E.g.* AR-614–616.[7] As the Tompkins have shown at length, Brock has relentlessly conflated the relevant times of

[7] Located in Volume 3 of Brock's Appendix. The Tompkins explain—at length—that the only severances that were relevant occurred in the 1970s because the Shooks owned both the Tompkins' parcel and Brock's 2.5-acre parcel before that time. Moreover, to the extent that Brock's argument was that the relevant severance occurred in 1950, that claim is absent from Brock's expert "report," which does not even mention an "implied" easement of any kind, let alone how one could have been created. AA1-116–17.

ownership and severance of her differently situated parcels.

A. Brock's Hoofbeats Lane parcel was created out of a single 1,600-acre parcel in 1978 that did not have unity of ownership with the Tompkins' parcel.

Brock continues to assert that all the relevant severances giving rise to the claimed implied easement occurred in 1950. But she concedes that she acquired her Hoofbeats Lane property in 1978 from the Saxes in a parcel that "was created from lands included in Certificate of Survey No. 595."[8] She further asserts that at the time that parcel was created, "the only legal access was via Forgotten Lane."[9]

Brock's own expert does not even agree with this assertion. In fact, COS 595 shows 1,600 acres as a single parcel spanning seven sections, and Brock's expert agreed that enormous parcel bordered both Conner Cutoff and Sawmill Lane—a state highway and a county road, respectively. T.Tr. 89:5–9, 88:12–89:21; AA2-223–227.

The district court did not conclude, and Brock does not argue, that there was an easement by necessity on Forgotten Lane for the benefit of the entire 1,600 parcel in 1978. Nor could an easement by necessity have existed for that parcel's benefit on Forgotten Lane, because the property bordered two separate public roads. This means that there could not have been strict necessity—one of the required elements of an implied

[8] Response Brief at 8.
[9] *Id.*

easement by necessity. *Yellowstone River, LLC v. Meriwether Land Fund I, LLC*, 2011 MT 263, ¶ 26, 362 Mont. 273, 264 P.3d 1065.

Moreover, the larger parcel containing Brock's Hoofbeats Lane parcel was created when the Saxes carved off a piece of their 1,600-acre parcel in 1978. The Saxes did not own what is now the Tompkins' property at that time—the Shooks did. This is fatal to Brock's implied easement claim, because an implied easement requires "unity of ownership of the servient and dominant tenements by the grantor at the time of the grant." *Kullick v. Skyline Homeowners Ass'n, Inc.*, 2003 MT 137, ¶ 27, 316 Mont. 146, 69 P.3d 225. Thus, to the extent an easement by necessity to reach what became the Hoofbeats Lane parcel could have been created as a matter of law, that easement would have been over the lands retained by the Saxes, and not over lands owned by a third party.

Finally, the Hoofbeats Lane parcel could not have benefitted from an implied easement by preexisting use, because Brock conceded that she has never been able to physically access her Hoofbeats Lane parcel from Forgotten Lane. *JRN Holdings, LLC v. Dearborn Meadows Land Owners Ass'n, Inc.*, 2021 MT 204, ¶ 28, 405 Mont. 200, 493 P.3d 340 (easement by preexisting use requires, among other things, apparent, continuous, and reasonably necessary use of the servient tenement at the time of severance).

B. The relevant severance of Brock's 2.5-acre parcel was in 1976, and the parcel bordered a county road.

Brock's 2.5-acre parcel was, until 1976, owned by the Shooks, who also owned what is now the Tompkins' parcel. When the Shooks owned both parcels, no easement could have existed because a property owner cannot have an easement on their own land. Thus, any implied easement could only have come into being at the severance in 1976. But when the Shooks sold the parcel to the Brocks in 1976, the property bordered Sawmill Lane, and therefore there was no strict necessity. *Wolf v. Owens*, 2007 MT 302, ¶ 16, 340 Mont. 74, 172 P.3d 124.

Brock does not dispute that the district court's ultimate finding that she had an implied easement was inextricably bound up with her theory that relevant severances occurred in 1950. But that finding is clearly erroneous, and Brock offers nothing in response. The district court also made no findings that Brock had satisfied the elements of an easement by preexisting use, let alone that she met her burden of proving those elements by the required clear and convincing evidence. *Apecella v. Overman*, 2025 MT 219, ¶ 31, 424 Mont. 202, 577 P.3d 133. Brock failed to meet her burden, and the district court's erroneous findings do not support its conclusions, which are therefore incorrect as a matter of law.

III. Brock's cross-appeal lacks merit because her "settlement offer" was not an unconditional offer and because she never mentioned § 25–7–105 or its fee-shifting provisions in her settlement proposal.

Brock's only argument for attorney fees is § 25–7–105, MCA. Under that statute, "a party may serve upon the adverse party a written offer to settle a claim for the money or property or to the effect specified in the offer." Section 25–7–105(1)(a), MCA. If a party rejects the offer and "the final judgment is less favorable to the offeree than the offer," the offeror is entitled to costs and attorney fees from the date of the offer going forward. Section 25–7–105(c) and (3).

The alleged "offer" that Brock claims satisfies this statute suffers from two problems, either of which is fatal. First, the purported "offer" was not an offer at all, it was merely an offer to continue negotiations, because an agreement is only binding if there is an unconditional acceptance of an unconditional offer. *Smith v. Lindemulder*, 2022 MT 119, ¶ 11, 409 Mont. 69, 512 P.3d 260.

Second, the proposal does not mention § 25–7–105, MCA, and therefore did not put the Tompkins on notice of the potential fee-shifting. Instead, Brock's proposal refers only to Rule 408 of the Montana Rules of Evidence. For either of these reasons, Brock cannot be entitled to fees under § 25–7–105, MCA.

A. Brock's settlement proposal did not contain an unconditional offer and could not have created a binding settlement agreement when it proposed the Tompkins pay an unspecified "portion" of Brock's attorney fees.

Settlement agreements are contracts and are subject to the provisions of contract law. *Strable v. Carisch, Inc.*, 2024 MT 186, ¶ 12, 418 Mont. 18, 555 P.3d 241. A settlement agreement is binding only if it is made by an unconditional offer and accepted unconditionally. *Strable*, ¶ 12. To form a binding contract, there must be mutual consent on all essential terms, which requires "the parties all agree upon the same thing in the same sense." *Strable*, ¶ 15.

Here, Brock's proposal included two primary elements. The first was that the Tompkins would "pay for a new access driveway from Sawmill Lane to the current Brock driveway" as shown on an accompanying annotated aerial image. AR1076. Brock would choose her own contractor, but the Tompkins would "be responsible for all costs" including all permitting and construction costs. *Id.* That proposal, on its own, is too vague and conditional to constitute a valid offer.

The second part—where an even larger problem lies—was that the "Tompkins shall pay a portion of Brock's attorney fees." AR-1077. The proposal did not state the amount of attorney fees Brock had incurred nor what "portion" of that unspecified amount Brock was requesting. AR-1076–77. This meant that there was no unconditional offer that the

Tompkins could unconditionally accept, because the amount of attorney fees that would satisfy Brock's demand and create a binding agreement was left open to further negotiation.

Thus, even if the Tompkins had "accepted" the proposal, it still could not have created a binding contract because it left out a critical element that would need to be negotiated further: the *amount* of attorney fees. An agreement that requires the parties to agree to additional material terms in the future is not an enforceable agreement. *GRB Farm v. Christman Ranch, Inc.*, 2005 MT 59, ¶ 11, 326 Mont. 236, 108 P.3d 507. Put another way, Brock's proposal was not a valid offer because it left open too many variables, and for a settlement offer to be complete, "nothing must be left to negotiate." *J & L Tire & Alignment Ctr. v. Peak*, 247 Mont. 169, 171, 805 P.2d 571, 573 (1991); *see also* Williston on Contracts § 4:22 (4th ed.) ("If an offer contemplates an acceptance merely by an affirmative answer, the offer itself must contain all the terms necessary for the required definiteness.").

Brock's settlement proposal was not an unconditional offer, and the first required element of § 25–7–105—that a party make an offer—was not satisfied.

B. A valid offer under § 25–7–105 must cite the statute and put the other side on notice that attorney fees are on the table.

Even if Brock's proposal had included a specific dollar amount of

attorney fees, it would still not satisfy the requirements of § 25–7–105, MCA. This statute implicitly requires that the offeror provide notice to the offeree that, if they do not accept the offer and the offeror later achieves a better result, that the party rejecting the offer could be liable for the other side's attorney fees later. Here, Brock's proposal does not reference or cite § 25–7–105, MCA. Nor was it characterized as a statutory offer of settlement, and nothing in her proposal would notify the Tompkins of a potential fee award if Brock achieved a more favorable result later.

This Court has not specifically addressed whether a party must cite this statute in a settlement proposal before it can be enforced and attorney fees can be awarded under it. But in every case in which the Court has affirmed a fee award under this statute, the Court has recognized that the prevailing party has notified the other of the potential for attorney fees in the settlement offer itself. For example, in *Low v. Rieck*, the Court recognized the importance of notifying the other party "of their potential liability for attorney's fees and costs under § 25–7–105, MCA" and affirmed the resulting fee award. *Low v. Reick*, 2016 MT 167, ¶ 52, 384 Mont. 101, 376 P.3d 777. Likewise, in *Fox v. BHCC II, Inc.*, 2017 MT 218, 388 Mont. 443, 401 P.3d 705, the Court affirmed a fee award under the statute when "BHCC made, and Fox did not respond to,

an offer of settlement under" the statute. *Fox*, ¶ 38.[10]

The Court has long recognized that settlement is encouraged and that the "declared public policy" is to encourage settlement. *Miller v. State Farm*, 2007 MT 85, ¶ 14, 337 Mont. 67, 155 P.3d 1278. If the Court reaches this issue, this case presents an ideal opportunity to clarify that if a party is making a statutory offer of settlement under § 25–7–105, MCA, it must notify the other party that it is being made under the specific statute. As other courts have recognized, statutory offers of settlement with cost- or fee-shifting provisions must be strictly construed because settlement is not encouraged "if one side might reasonably be unaware that an offer of settlement is being made." *Sachsenmaier v. Mittlestadt*, 429 N.W.2d 532, 535–37 (Wis. Ct. App. 1988).

Further, if the side 'rejecting' a settlement offer is penalized by having to pay the other party costs beyond what they would normally be liable for, as a matter of fairness the recovering party should at least be required to expressly state that it is extending an offer of settlement under the statute—and so such offers must designate the relevant statute "on its face." *Id.*; *see also Hofer v. Young*, 45 Cal. Rptr. 2d 27, 30

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[10] If the opinion in *Fox* leaves any doubt, the appellee's brief in that case makes clear that they served on Fox an "Offer of Settlement Pursuant to MCA § 25–7–105." 2017 WL 2200489. And even in memorandum decisions, this Court has found it worthwhile to recognize that an offer made under this statute did, in fact, reference this statute. *Stockwell v. Windham*, 2009 MT 278N, ¶ 3, 352 Mont. 552, 218 P.3d 499.

(Cal. App. 1995) (recognizing multiple cases holding that because a party to whom a statutory offer of settlement is made might bear additional costs if the offer is not accepted, the offeree must have had the opportunity to recognize that the offer is being made pursuant to a fee-shifting statute).

Adopting Brock's position here would eviscerate the American Rule and discourage settlement. The Court can take judicial notice that throughout the litigation process, settlement overtures are made, offers are proposed, they are countered, and are reevaluated as a case progresses. Allowing a party to wait in the weeds to ambush its opponent by raising § 25–7–105, MCA, for the first time post-judgment would chill this negotiating process. Parties and their counsel should be free to continue informal settlement discussions without having to worry that at some point, a document "neither intended nor understood to be a formal offer of settlement" might lead to the assessment of attorney fees when they are not otherwise available via contract or statute. *Sachsenmaier*, 429 N.W.2d at 536. If a party claims the right to obtain attorney fees from the other side in a case like this, they should be required to put the other party on notice of that claim, rather than waiting in the weeds to ambush them later.

CONCLUSION

The Tompkins are entitled to judgment that Brock has no easement of any kind across their property.

The Tompkins therefore request that the Court direct entry in their favor and remand for a determination of whether the Tompkins are entitled to any further relief, including on their trespass counterclaim.

March 6, 2026.

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/s/ Jesse Kodadek
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains 4885 words, as calculated by Microsoft Word, excluding the caption, tables of contents and authorities, and certificate of compliance, but including words in screenshots. The brief is double-spaced in size 14 Century Schoolbook typeface.

/s/ Jesse Kodadek

CERTIFICATE OF SERVICE

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