

DA 09-0601

IN THE SUPREME COURT OF THE STATE OF MONTANA

2010 MT 238N

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PHYLLIS JAMISON,

Petitioner and Appellant,

v.

FRED VAN VALKENBURG, MISSOULA COUNTY COMMISSION,  
BILL CAREY, COMMISSIONER, JEAN CURTISS, COMMISSIONER,  
JAMES MCCUBBIN, DEPUTY COUNTY ATTORNEY, DENA L. LUND,  
JACK S. LUND, RICHARD B. WHEATLEY, TAMBRY T. WHEATLEY,

Defendants and Appellees.

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APPEAL FROM: District Court of the Fourth Judicial District,  
In and For the County of Missoula, Cause No. DV-08-1047  
Honorable Edward P. McLean, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Phyllis Jamison, self-represented litigant; Clinton, Montana

For Appellees:

Alan F. McCormick; Garlington, Lohn & Robinson, PLLP, Missoula,  
Montana (for Appellee Missoula County)

Paul Sharkey; Phillips Law Firm, P.C. Missoula, Montana  
(for Appellees Dena L. Lund and Jack S. Lund)

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Submitted on Briefs: October 13, 2010

Decided: November 9, 2010

Filed:

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Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(d), Montana Supreme Court 1996 Internal Operating Rules, as amended in 2003, the following memorandum decision shall not be cited as precedent. It shall be filed as a public document with the Clerk of the Supreme Court and its case title, Supreme Court cause number and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Phyllis Jamison filed a complaint against Missoula County Attorney Fred Van Valkenburg, the Missoula County Commission, Commissioner Bill Carey, Commissioner Jean Curtiss, Deputy County Attorney James McCubbin, Dena Lund, Jack Lund, Richard Wheatley and Tambry Wheatley, regarding the County's abandonment of portions of a right-of-way Jamison utilizes to access her property. Defendants moved to dismiss pursuant to M. R. Civ. P. 12(b)(6). The District Court granted the motion, concluding that Jamison's pleading failed to state a claim upon which relief could be granted. We affirm.

¶3 "A claim may be dismissed under M. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted only if it appears beyond a doubt that the plaintiffs can prove no set of facts in support of the claim which would entitle them to relief." *Sikorski v. Johnson*, 2006 MT 228, ¶ 11, 333 Mont. 434, 143 P.3d 161. There is no legal basis for Jamison's request that Missoula County be obliged to plow, sand or otherwise maintain a right-of-way that has never been operated as a county road. Additionally, Jamison points

to no authority that would require the County to construct barriers, reflectors and a retaining wall on the right-of-way. Moreover, Jamison fails to identify any authority preventing her neighbors from placing fences, trees and other structures on the portions of their private property that the County has contractually agreed to abandon.

¶4 On appeal, Jamison raises new issues of law for the first time in her appellate brief. However, we review a district court's order granting a motion to dismiss pursuant to M. R. Civ. P. 12(b)(6) based on the sufficiency of the complaint alone. *Cowan v. Cowan*, 2004 MT 97, ¶ 11, 321 Mont. 13, 89 P.3d 6. Only the complaint and any documents incorporated by reference are relevant to our review on appeal. *Id.* Moreover, we will not consider issues raised for the first time on appeal. *Jones v. Montana University System*, 2007 MT 82, ¶ 23, 337 Mont. 1, 155 P.3d 1247.

¶5 We have determined to decide this case pursuant to Section I, Paragraph 3(d) of our 1996 Internal Operating Rules, as amended in 2003, which provides for memorandum opinions. It is manifest on the face of the briefs and the record that the issues are clearly controlled by settled Montana law.

¶6 Affirmed.

/S/ MIKE McGRATH

We concur:

/S/ PATRICIA COTTER

/S/ MICHAEL E WHEAT

/S/ W. WILLIAM LEAPHART

/S/ JIM RICE