

FILED

11/24/2020

Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 20-0105

DA 20-0105

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 298N

---

MUFFIE B. MURRAY and W. STEPHEN MURRAY,  
HELD FAMILY TRUST, and WILLIAM A. SARRAZIN,

Plaintiffs, Counter-Defendants, and Appellees,

v.

NATHAN G. JUDD,

Defendant, Counter-Plaintiff, and Appellant.

---

APPEAL FROM: District Court of the Sixth Judicial District,  
In and For the County of Park, Cause No. DV 17-114  
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Mark D. Parker, Parker, Heitz & Cosgrove, PLLC, Billings, Montana

For Appellees:

Maggie W. Stein, Malcolm H. Goodrich, Darya Bril, Goodrich & Reely,  
PLLC, Billings, Montana

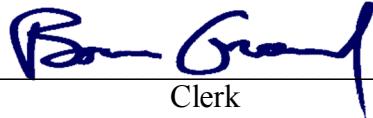
Jon E. Doak, Doak & Associates, PC, Billings, Montana

---

Submitted on Briefs: September 23, 2020

Decided: November 24, 2020

Filed:

  
\_\_\_\_\_  
Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited and does not serve as precedent. Its case title, 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 Nathan Judd appeals from the order of the Sixth Judicial District Court, Park County, entering judgment and awarding attorney fees and costs in favor of Muffie B. Murray, W. Stephen Murray, Held Family Trust, and William A. Sarrazin (collectively, "the Murrays"). We restate and address the following issues on appeal: (1) whether the District Court erred in denying Judd's demand for a jury trial as untimely; (2) whether the District Court erred in finding the existence of a prescriptive easement over Judd's property; and (3) whether the District Court abused its discretion in awarding attorney fees and costs to the Murrays. We affirm.

¶3 In December 2016, Judd acquired real property from the Youngberg Family Trust. Running through Judd's property is the Held Ditch, which carries water from Cottonwood Creek and irrigates pastures on neighboring properties. The ditch's point of diversion from Cottonwood Creek, as well as the headgate and appropriation works, are located on Judd's property. The point of diversion and route of the Held Ditch have remained the same since 1975.

¶4 Muffie and W. Stephen Murray own real property west of Judd's property. The Murrays acquired their property in 1999. Appurtenant to the Murray Property are multiple irrigation water rights from Cottonwood Creek carried through the Held Ditch.

¶5 The Murray Property has been managed by Drew and Steven Carrigan since 2013. At the direction of the previous property managers, the Carrigans continued the cleaning, maintenance, operation, and repair of the Held Ditch commencing with the 2014 irrigation season.

¶6 The Held Family Trust owns real property south of the Murray Property. Appurtenant to the Held Property are water rights providing for irrigation from Cottonwood Creek via the Held Ditch.

¶7 Since the 1970s, William Sarrazin and his family have leased the Held Property and have been involved with the seasonal opening, closing, repair, maintenance, and operation of the Held Ditch.

¶8 For at least five continuous years prior to 2017, the Murrays and their predecessors would traverse a route through Judd's (formerly Youngberg's) property, referred to as the "pasture route," in order to operate, repair, and maintain the ditch throughout irrigation seasons. The Murrays never sought permission from the Youngbergs or gave notice of their intent to traverse the pasture route to access the ditch and appropriation works.

¶9 In December 2016, Judd acquired the Youngberg Property by warranty deed. The deed provided that conveyance of the property was subject to broad exceptions for easements obvious by visual inspection; claims of easements which could be ascertained by inspection or inquiry; and encumbrances that would be disclosed by an accurate and complete survey of the land.

¶10 Before closing, Judd toured the property with John Youngberg. Youngberg identified the Held Ditch and informed Judd that the Murrays needed to traverse the property to access the ditch and appropriation works during irrigation seasons.

¶11 In early 2017, Judd erected electric fences across the pasture route, denied the Murrays entry to his land via any route, and otherwise blocked access to the Held Ditch throughout the 2017 irrigation season.

¶12 The Murrays filed a Complaint against Judd for interfering with their purported ditch easement. The Murrays also filed an application for a preliminary injunction seeking to enjoin Judd from “taking any action that would potentially interfere with or impede the [Murrays] or other owners/users of the Held Ditch, its headgate and water appropriations works which are located on and over Defendant’s property . . . from between now and the trial or other disposition . . .” The Murrays’ application further requested Judd be ordered to remove any obstructions from the Murrays’ purported easement.

¶13 While the case was pending, Judd began excavating along the ditch bank. On September 15, 2017, the District Court issued a temporary restraining order, directing Judd to immediately cease all activities on his property or neighboring properties that interfered with the “pasture route.” The District Court set a hearing on the Murrays’ application for a preliminary injunction.

¶14 On September 28, 2017, the District Court granted the preliminary injunction and ordered Judd to open his fences along the pasture route and remove all obstructions to allow reasonable access to repair, maintain, and operate the Held Ditch and works.

¶15 Judd filed his Answer to the Complaint on October 12, 2017. The Answer did not include a demand for a jury trial.

¶16 After a scheduling conference on March 12, 2018, the District Court entered a Non-Jury Trial Preparation Order setting the matter for a non-jury trial.

¶17 On April 6, 2018, Judd filed a counterclaim against the Murrays, which included a demand for jury trial.<sup>1</sup> The Murrays moved to dismiss Judd's counterclaim pursuant to M. R. Civ. P. 12(b)(6). The District Court granted the Murrays' motion and dismissed Judd's counterclaim. Judd did not appeal the District Court's pretrial dismissal of his counterclaim.

¶18 On April 9, 2018, the Murrays filed an Amended Complaint alleging that, in addition to interfering with their access to the Held Ditch, Judd's excavation of the ditch bank in September 2017 had jeopardized the ditch's appropriation works.

¶19 On April 25, 2018, Judd filed an Answer to Amended Complaint. Judd's Answer did not include a demand for a jury trial with respect to the issues raised by the Murrays in the Amended Complaint.

¶20 Through the summer of 2018, Judd continued to impede the Murrays' access to the ditch and resumed excavation along the ditch bank in violation of the District Court's restraining order.

---

<sup>1</sup> Along with his counterclaim against the Murrays, Judd filed a third-party complaint against Sarrazin which was resolved in Sarrazin's favor at trial. Judd does not raise any issues regarding his third-party complaint against Sarrazin in this appeal.

¶21 On November 14, 2018, Judd moved to reset the matter as a jury trial. The District Court denied the motion as untimely.

¶22 The case proceeded to bench trial in January 2019. Several witnesses testified, including Judd. Judd admitted he had inspected the property with Youngberg and exercised due diligence before closing, but also asserted he did not know that the Murrays accessed the ditch via the pasture route. In the alternative, he believed any such access was permissive.

¶23 On June 7, 2019, the District Court issued its Findings of Fact, Conclusions of Law, and Order. The District Court held that the Murrays “established a prescriptive easement for the Held Ditch and its adjacent banks over its existing route and course across Judd’s property.” The District Court further held that Judd had no basis to interfere with the Murrays’ ditch easement and permanently enjoined him from further impairing the Murrays’ access to the Held Ditch or appropriation works. The District Court awarded attorney fees and costs to the Murrays upon finding Judd “unreasonably and vexatiously multiplied and complicated the proceedings in this case.”

¶24 On December 16, 2019, the District Court held a hearing regarding the reasonableness of attorney fees and costs. The District Court ordered Judd to pay \$256,790 in attorney fees and \$2,083.75 in costs.

¶25 We review a district court’s findings of fact for clear error. *Roland v. Davis*, 2013 MT 148, ¶ 21, 370 Mont. 327, 302 P.3d 91. A finding is clearly erroneous if it is not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if we have a definite and firm conviction that the district court made a mistake.

*Roland*, ¶ 21. We review a district court’s conclusions of law de novo for correctness.

*Roland*, ¶ 21.

¶26 The standard of review in appeals regarding prescriptive easements is whether substantial evidence supports the findings of the district court. *Oates v. Knutson*, 182 Mont. 195, 200, 595 P.2d 1181, 1184 (1979).

¶27 We review a district court’s award of attorney fees pursuant to § 37-61-421, MCA, for an abuse of discretion. *In re Estate of Bayers*, 2001 MT 49, ¶ 9, 304 Mont. 296, 21 P.3d 3.

¶28 Judd contends the District Court erred in denying his request for a jury trial. His argument with respect to this issue is sparse, at best, but appears to be two-fold. Principally, Judd argues that the Murrays’ Amended Complaint alleged new facts that revived his right to demand a jury trial. Judd also appears to argue that his separate counterclaim against the Murrays, with which he did demand a jury trial, provides an alternative basis for his right to a jury. We find both arguments unavailing.

¶29 A party may demand a jury trial no later than 14 days after “the last pleading directed to the issue is served.” M. R. Civ. P. 38(b). Failure to serve a timely demand in accordance with Rule 38 constitutes a waiver of the right to a jury trial. M. R. Civ. P. 38(d); *Goodover v. Lindey’s*, 255 Mont. 430, 436, 843 P.2d 765, 768 (1992).

¶30 Judd did not demand a jury trial with either his Answer to the Murrays’ original Complaint or with his Answer to the Murrays’ Amended Complaint. Even assuming, as Judd argues, that the newly alleged facts in the Amended Complaint revived his right to demand a jury, Judd failed to exercise this right in his Answer. The issues raised by the

Murrays in their Complaint and Amended Complaint were not subject to trial by jury, as Judd's responsive pleadings directed to the issues raised in both complaints did not include jury demands. M. R. Civ. P. 38(b).

¶31 Judd also appears to contend that his separate counterclaim against the Murrays, which did include a jury demand, provides an alternative basis for his right to a jury. However, the District Court dismissed Judd's counterclaim pretrial pursuant to M. R. Civ. P. 12(b)(6). Judd has not appealed the dismissal of his counterclaim. Assuming, for the sake of argument, that Judd was entitled to a jury trial on his counterclaim, this right was rendered moot by the pretrial dismissal of his counterclaim.

¶32 Judd failed to demand a jury trial in either his Answer to the original Complaint or to the Amended Complaint. His demand for a jury trial with his counterclaim was rendered moot by the pretrial dismissal of that claim, which Judd does not appeal. The District Court did not err by denying Judd's untimely request for a jury trial.

¶33 Next, Judd argues the District Court erred in determining that the Murrays established a prescriptive easement via the pasture route. A party seeking to establish a prescriptive easement must prove by clear and convincing evidence that there was open, notorious, exclusive, adverse, continuous, and uninterrupted use for five years. *Lyndes v. Green*, 2014 MT 110, ¶ 17, 374 Mont. 510, 325 P.3d 1225. “If the claimant establishes the elements of prescriptive use, there is a presumption that the use is adverse to the servient estate and the burden shifts to the owner of the servient estate to show that the use was permissive.” *Lyndes*, ¶ 17. When a prescriptive easement is established before

transfer of the servient property to another, the transferee takes title subject to the prescriptive easement. *Lyndes*, ¶ 23.

¶34 The District Court issued extensive findings of fact and conclusions of law determining that the Murrays established by clear and convincing evidence that their use of the pasture route was open, notorious, exclusive, adverse, continuous, and uninterrupted for at least five years prior to Judd's acquisition of the servient property. In reaching its determination, the District Court considered Judd's own testimony and found his assertions that he was unaware of the Murrays' access to the ditch when he acquired the property, or that he alternatively believed such access was permissive, was not credible and unpersuasive. The District Court was in the best position to observe the credibility of witnesses and we decline to "second guess its determination regarding the strength and weight of conflicting testimony." *Lyndes*, ¶ 23. The District Court did not err in its determination that the Murrays established a prescriptive easement via the pasture route.

¶35 Finally, Judd argues the District Court abused its discretion in awarding attorney fees and costs to the Murrays under § 37-61-421, MCA.<sup>2</sup> Essentially, Judd alleges that the finding of vexatious litigation was procedurally error-ridden, such that an award of attorney fees amounted to a due process violation.

¶36 Section 37-61-421, MCA, authorizes an award of attorney fees as a sanction against a party to any court proceeding who is determined to have "multiplie[d] the proceedings in

---

<sup>2</sup> As an alternative basis, the District Court also awarded fees and costs to the Murrays pursuant to § 70-17-112(5), MCA, having concluded the Murrays were the "prevailing party" by successfully enforcing their easement. Since we affirm the award of fees under § 37-61-421, MCA, we need not consider whether the Murrays were entitled to fees under § 70-17-112, MCA.

any case unreasonably and vexatiously . . . .” *Estate of Bayers*, ¶ 16; *Rocky Mountain Ent. v. Pierce Flooring*, 286 Mont. 282, 301, 951 P.2d 1326, 1338 (1997). Because fees awarded pursuant to § 37-61-421, MCA, are discretionary, this Court “generally defers to the discretion of the district court regarding sanctions because it is in the best position to know whether parties are disregarding the rights of others and which sanctions are most appropriate.” *Estate of Bayers*, ¶ 9.

¶37 “The point in court proceedings at which the vexatious conduct occurs is not the issue. Rather, it is the unreasonable multiplication of court proceedings that is germane.” *Estate of Bayers*, ¶ 13. In determining whether a party is vexatious under § 37-61-421, MCA, a district court evaluates the litigant’s conduct throughout the totality of the litigation. *Estate of Bayers*, ¶ 9; *McKenzie v. Scheeler*, 285 Mont. 500, 949 P.2d 1168 (1997); *In re Estate of Boland*, 2019 MT 236, ¶ 52, 397 Mont. 319, 450 P.3d 849.

¶38 Judd’s argument regarding procedural defects is misplaced. Judd fails to make a distinction between trial on the merits and the separate determination of unreasonable and vexatious multiplication of proceedings by a litigant under § 37-61-421, MCA, made at the discretion of the District Court. The District Court held a lengthy hearing on the attorney fees issue, where both sides had the opportunity to present expert testimony as to the reasonableness of the fee award.

¶39 Based on our review of the record, we conclude that the District Court did not abuse its discretion regarding attorney fees. The District Court entered extensive findings demonstrating that Judd’s conduct had been “consistently manipulative” throughout litigation and had vexatiously multiplied the proceedings. Such findings include, among

other things: Judd's submission of several post-trial motions in an attempt to re-litigate issues without good cause, thereby delaying entry of final judgment by more than a year after trial; baseless complaints to the DNRC regarding water use in Cottonwood Creek; relentless refusal to permit access to the Held Ditch in violation of the restraining order; and failure to comply with discovery requests. The District Court determined that Judd's vexatious and unreasonable conduct increased the costs and fees incurred by the Murrays, thus meeting the requirements set forth in § 37-61-421, MCA. Such determination was within the District Court's discretion.

¶40 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. Affirmed.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH  
/S/ INGRID GUSTAFSON  
/S/ DIRK M. SANDEFUR  
/S/ BETH BAKER