DA 21-0272

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 74

COREY ALAN RUBIN and DON HAUTH,

Plaintiffs and Appellees,

v.

BRENT E. HUGHES and GRACE HUGHES,
husband and wife,

Defendants and Appellants.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DV-20-354C
Honorable Heidi J. Ulbricht, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Paul A. Sandry, Johnson, Berg, & Saxby, PLLP, Kalispell, Montana

For Appellees:

Sean S. Frampton, Frampton Purdy Law Firm, Whitefish, Montana

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Submitted on Briefs: February 16, 2022

Decided: April 12, 2022

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Brent and Grace Hughes (individually "Brent" and "Grace", collectively "the Hugheses") appeal the May 6, 2021, Judgment of the Eleventh Judicial District Court, Flathead County, awarding a total of $360,000 to Corey Rubin ("Rubin") and Don Hauth ("Hauth"). We affirm.

¶2 We restate the following issues on appeal:

1. *Whether a nuisance claim can support the recovery of parasitic emotional distress damages.*

2. *Whether the District Court erred in determining the Hugheses did not have an easement that entitled them to specific performance.*

3. *Whether the District Court erred in waiving the statutory cap on punitive damages based on the financial information provided by the Hugheses.*

4. *Whether the District Court abused its discretion in excluding evidence of Rubin's unenforceable agreement to grant the Hugheses an easement.*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Rubin, Hauth, and the Hugheses own adjacent properties in Flathead County. The Hugheses' property lies between Rubin's property to the north and Hauth's property to the south. Hauth purchased his land in 1980. The Hugheses and Rubin purchased their property in 2016 and 2018, respectively, from Jackson Moses ("Moses"). The Hugheses' land runs across Kauffman Lane and contains a gate across the road, installed by Moses. Rubin and Hauth each enjoy an easement allowing them use of Kauffman Lane for purposes of accessing their properties. At some point, the neighbors' relationship turned

contentious. For clarity, and due to the differing nature of the disagreements, we address the Hugheses' relationships with Rubin and Hauth in turn.

The Hugheses and Rubin

¶4 Rubin accesses his property via Kauffman Lane, across the northern portion of the Hugheses' property. Rubin's access road turns east before he reaches the Hugheses' residence. As the road turns east, a switchback in the road, adjacent to the Hugheses' property, turns north again. As the road continues to Rubin's cabin, it crosses a corner of the Hugheses' property.[1]

¶5 Around the time Rubin purchased his property from Moses, the Hugheses and Moses had discussed an easement across Moses's property benefiting the Hugheses. Moses sought to honor this arrangement during Rubin's closing process. The first mention of the easement occurred in the September 13, 2018, Inspection Notice completed by Rubin:

> Seller is however responsible for total expense of new property survey plat to show the correct legal description and acreage of 29.6. In addition, the expense of surveyor and attorney fees to add easement that was agreed between seller and neighboring property owner located at 244/254 Kauffman Lane. New buyer to review for final approval before recording.

Ultimately, Rubin and Moses executed an Addendum to their Buy/Sell Agreement ("Addendum") providing the following:

> Buyer acknowledges and agrees to grant an easement to Brent Hughes, owner of property known [as] 252/244 Kauffman Lane. Said easement to be granted immediately after closing of the property sale of this Buy/Sell. Easement will be the location as defined and surveyed by Eby Associates and

[1] This area was referred to in the proceedings, and hereafter, as "the trapezoid area."

> described in written easement document previously accepted by all related parties.

Moses additionally agreed to pay "all costs related to surveying and filing this easement" and to allow Rubin "final approval before recording." At the date of Rubin's closing, neither a written easement agreement nor a survey defining the easement existed and Rubin granted no easement.

¶6 Rubin testified that his relationship with the Hugheses started out amicably. Once Rubin closed and took possession of the property without granting the Hugheses an easement, he testified to more frequent disagreements between them. Brent became increasingly angry each time the gate on Kauffman Lane was left open by Rubin or a guest. On at least two occasions, Brent cut down trees located on Rubin's property. At the switchback, Brent and his son ran string and spray painted the area, narrowing the road eight to ten feet and making it difficult for Rubin to navigate. The Hugheses additionally began flagging their property line at the trapezoid area. Rubin believed that his initiation of legal proceedings caused Brent to increase the flagging and to stake the Hugheses' property along the entirety of Rubin's easement to irritate Rubin.

¶7 The Hugheses' use of a road running across Rubin's property became contested, prompting Rubin to send a text to Grace asking the Hugheses not to trespass on his land. The Hugheses' continued trespassing on the road led Rubin to contact the Flathead County Sheriff's Office. Despite law enforcement's involvement, the Hugheses continued trespassing, leading Rubin to construct a rock barrier on the road. Brent removed the

barrier. The Hugheses' use of the road only ceased when Rubin's counsel sent a cease and desist letter to the Hugheses.

¶8 Rubin later testified to multiple instances of perceived spying by Brent, including one instance where Rubin visited Hauth. As Rubin and Hauth spoke, Brent parked nearby and stood outside his truck for the duration of the conversation. When Rubin left, Brent cut him off on the road and slowed down to "two miles an hour" in front of Rubin. Rubin additionally testified that Brent used binoculars to watch Rubin while he worked on his property.

¶9 Rubin testified to the "intimidat[ing] and annoy[ing]" effects of the flagging and the Hugheses' behavior. He described the property as a "dream" and testified that the Hugheses' behavior ruined that dream and caused unrelenting anxiety. Rubin testified that the Hugheses' behavior instilled a sense of fear in him and caused him to change his route to avoid passing the Hugheses' residence on his visits to Hauth. Rubin testified to incurring therapy expenses associated with the Hugheses' behavior.

¶10 Brent did not dispute receiving notice from Rubin regarding his use of the road or removing the rock barrier Rubin placed. He contended that Rubin had previously given him permission to use the road and testified to his continued use of the road even after Rubin texted Grace not to trespass. Brent conceded that a text saying "don't trespass" would be a revocation of permission. However, Brent testified that he did not believe Rubin expressly revoked permission but, rather, was just complaining about his use of the road. Brent offered that he had attempted to contact Rubin for several months while Rubin was out of state, but never heard from him.

¶11 Brent testified that he traditionally drives slowly on gravel roads and denied cutting Rubin off after a visit with Hauth. He explained he used binoculars to identify trees to cut down, and that the flags helped him identify his property line for construction purposes. He further testified that he would have removed the flags had he known the effect on Rubin. Brent did not dispute that he continued flagging after Rubin and Hauth filed suit which alleged Brent's flagging was done out of spite.

The Hugheses and Hauth

¶12 Hauth's relationship with the Hugheses also began amicably. Hauth testified that the relationship began to sour after Brent told him "Well, you've been here 40 years, now it's my turn," and asked to buy Hauth's land. Hauth rejected the offer, and thereafter Brent began flagging his property line. Hauth testified that he found the flagging offensive because the placement of flags interfered with memories of his father. Hauth additionally noted concerns that the flags would interfere with the area's riparian nature. The Hugheses posted "No Trespassing" signs and painted a line across Hauth's driveway demarking the property line, despite Hauth's easement. Hauth estimated Brent repainted the line approximately three times.

¶13 On several occasions, the Hugheses photographed or filmed Hauth as he drove down his easement, which passed in front of the Hugheses' residence. Hauth said this made him uncomfortable. Hauth further testified regarding an altercation with Brent wherein Brent angrily approached Hauth's vehicle as he drove on the easement, shouting "he was gonna get [Hauth]" and "spraying sputum" in Hauth's face. Hauth perceived this as a threat and testified that the incident caused him to feel intimidated by Brent. Hauth unsuccessfully

applied for an order of protection following this incident, citing fears of being verbally and physically assaulted by Brent as he accessed his property.

¶14 Hauth testified to observing Brent approach Hauth's visitors on the road and, following brief encounters with Brent, witnessing the visitors turn around and leave without reaching Hauth's residence. One of Hauth's neighbors testified that he no longer visits Hauth due to Brent's behaviors. Hauth experienced difficulties receiving deliveries. Donald Guerrero, a delivery driver for UPS, testified that Brent informed him he could no longer use the Hugheses' driveway, which prevented the driver from delivering to Hauth. Instead, Hauth would receive a phone call from the driver and walk to pick up his package at Kauffman Lane.

¶15 Hauth attempted to continue with normal activities. He testified to one occasion where he walked to check his mail, which required walking past the Hugheses' residence. Hauth testified that Brent got in his truck and followed Hauth, "traveling at the same speed [Hauth] was walking." Brent parked his truck and observed Hauth in his rearview mirror as he retrieved his mail, and again followed Hauth as he returned home. Hauth testified to similar "hovering" behavior by Brent on the property line approximately 45 feet from the only window in Hauth's home.

¶16 Hauth testified that he found the Hugheses' behavior offensive and intimidating. He experienced anxiety and felt threatened by Brent, causing him to carry bear spray and not to use the easement after dark for fear of a confrontation. He further testified to the negative impact of the Hugheses' behavior on his life and enjoyment of his property, which included some physical manifestations.

¶17 Brent testified that he only photographed Hauth because Hauth photographed him. He explained the "hovering" behavior arose from work he was doing on his property and explained he would occasionally park his truck near the property line and adjust his rearview mirror or drop tools for work he intended to complete. He denied threatening Hauth and stated that the altercation with Hauth arose from Hauth's dog lunging out of Hauth's truck. Brent further denied interfering with Hauth's easement or any of Hauth's visitors or deliveries. Brent generally testified to occasions where Hauth demonstrated anger toward him and that he believed Hauth was not frightened of him.

The District Court proceedings

¶18 Rubin and Hauth initiated proceedings against the Hugheses on April 15, 2020, seeking a declaratory judgment as to their respective easements as well as a temporary restraining order ("TRO") and injunction against the Hugheses. Rubin and Hauth additionally alleged the Hugheses' behavior constituted a nuisance, interfered with the use of their respective easements, and caused them mental distress. The District Court issued a TRO against the Hugheses on April 16, 2020.[2] The District Court entered a preliminary injunction against the Hugheses on May 8, 2020, enjoining them from several behaviors, including "obstructing the common easement road or the road and easement" to Rubin and Hauth's respective properties. Later that day, the Hugheses filed their Answer. The

[2] The Hugheses' behavior escalated following the TRO, leading Hauth to file a motion to hold the Hugheses in contempt. The District Court granted this motion on May 21, 2020, holding the Hugheses in contempt and ordering them to abide by the preliminary injunction issued on May 8.

Hugheses denied the claims and filed a counterclaim for specific performance, asserting Rubin breached an agreement by failing to grant an easement to the Hugheses.

¶19 Before trial, Rubin filed a motion for partial summary judgment on the Hugheses' counterclaim. The District Court granted Rubin's motion and dismissed the counterclaim, concluding any agreement concerning the easement was unenforceable. The Hugheses sought to introduce evidence of the easement agreement at trial, arguing the evidence explained their mindset and behaviors. Rubin and Hauth filed a motion in limine to exclude evidence of "any alleged promise by Corey Rubin to grant Brent an easement." Rubin and Hauth argued that the evidence was irrelevant, any promise by Rubin was legally unenforceable, and that the evidence addressed the Hugheses' already-dismissed counterclaim. The Hugheses argued the evidence was relevant to demonstrate they did not act maliciously. The District Court granted the motion in limine, citing the concern of confusing the issues, misleading the jury, relitigating matters previously decided, and wasting time. The District Court noted "[a] belief that a property owner should grant you an easement is not the same as a belief that you possess an easement."

¶20 Due to their intent to seek punitive damages, Rubin and Hauth requested the Hugheses disclose their net worth. The Hugheses first objected to the relevance of the information. At Brent's deposition, the Hugheses stipulated to provide a statement of net worth should Rubin and Hauth's claims survive past the deadline for pretrial motions. The District Court's January 28, 2021, Pretrial Order noted this stipulation and required the Hugheses to disclose their net worth within ten days. The Hugheses finally provided a

one-page, self-prepared statement of Brent's net worth on February 21, 2021, one day before trial.

¶21 Trial began on February 22, 2021, and lasted three days. Before resting their case, Rubin and Hauth withdrew their claim alleging interference with an easement and proceeded to the jury solely on the nuisance claim. Rubin and Hauth clarified the damages suffered involved parasitic emotional distress based on the nuisance claim.[3] The Hugheses moved for a directed verdict, arguing Rubin and Hauth failed to prove damages they suffered to justify a nuisance claim, relying on reasoning set forth in our unpublished opinion in *Fitzpatrick v. Trail Creek Enterprises, LLC*, 2021 MT 32N, 403 Mont. 545, 479 P.3d 992. The District Court denied the Hugheses' motion and allowed the case to proceed to the jury.

¶22 The jury found the Hugheses' conduct constituted a nuisance to Rubin and Hauth and that the Hugheses acted with malice. The jury initially awarded damages totaling $180,000 to Hauth and $50,000 to Rubin. After returning the verdict, the jury foreperson sent a note to the District Court indicating that the jury believed punitive damages were included in their award. The District Court conferred with the parties and ultimately informed the jury that punitive damages required consideration of the Hugheses' net worth. Rubin and Hauth stipulated to the statement of net worth provided but preserved their objection regarding the statement's production.

[3] Parasitic damages are those "claimed as an element of damage for an underlying tort claim." *McKay v. Wilderness Dev., LLC*, 2009 MT 410, ¶ 56, 353 Mont. 471, 221 P.3d 1184.

¶23 After receiving instructions on punitive damages, the jury returned a verdict of $90,000 in general damages and $180,000 in punitive damages for Hauth and $30,000 in general damages and $60,000 in punitive damages for Rubin. Post-trial, Rubin and Hauth filed a motion to waive the statutory cap on punitive damages. The District Court granted the motion and affirmed the jury's award of punitive damages, concluding the Hugheses' statement of net worth failed to meet their burden of providing credible evidence of their net worth.

¶24 The District Court entered its Judgment against the Hugheses on May 6, 2021, in the amount of $270,000 in favor of Hauth and $90,000 in favor of Rubin. The Judgment additionally permanently enjoined the Hugheses from maintaining a gate across Kauffman Lane. The Hugheses appeal.

STANDARD OF REVIEW

¶25 We review the district court's denial of motions for summary judgment and directed verdict de novo. *Tacke v. Energy West, Inc.*, 2010 MT 39, ¶ 16, 355 Mont. 243, 227 P.3d 601. When considering a summary judgment motion, we apply the criteria of M. R. Civ. P. 56. *Tacke*, ¶ 16. A motion for directed verdict is proper only when there is a complete absence of evidence warranting submission to a jury. *Tacke*, ¶ 16.

¶26 A district court's findings of fact are reviewed to determine if they are clearly erroneous, and its conclusions of law are reviewed for correctness. *McCulley v. U.S. Bank*, 2015 MT 100, ¶ 19, 378 Mont. 462, 347 P.3d 247. A district court's order in limine, and other evidentiary rulings, are reviewed for an abuse of discretion. *McCulley*, ¶ 21.

DISCUSSION

¶27 *1. Whether a nuisance claim can support the recovery of parasitic emotional distress damages.*[4]

¶28 Section 27-30-101(1), MCA, provides that a nuisance constitutes "[a]nything that is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property[.]" We have recognized, "the Montana statute does not otherwise limit this broad definition of what may or may not constitute a nuisance." *Bennett v. Hill*, 2015 MT 30, ¶ 20, 378 Mont. 141, 342 P.3d 691. Thus, a nuisance action may be based upon conduct of a defendant that is either intentional, negligent, reckless, or ultrahazardous. *Barnes v. City of Thompson Falls*, 1999 MT 77, ¶ 16, 294 Mont. 76, 979 P.2d 1275. We have also recognized that "[n]uisance includes all wrongs which have interfered with the rights of a citizen in the enjoyment of property[,]" and a nuisance action may give rise to injunctive relief and damages. *Haugen v. Kottas*, 2001 MT 274, ¶ 15, 307 Mont. 301, 37 P.3d 672.

¶29 The Hugheses first contend that allowing parasitic damages on a nuisance claim would undermine the heightened standard of proof we required in *Sacco v. High County*

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[4] Preliminarily, we decline to address the Hugheses contention that the jury's verdict is contrary to the instructions and law. As the parties settled Instruction No. 13, the following discourse occurred:

> [District Court]: I want to make sure Mr. Sandry is still objecting.
> [Mr. Sandry]: I'm still objecting to that one, uh-huh.
> [Mr. Frampton]: Do you know why you're objecting?
> [Mr. Sandry]: I'm seriously thinking of that.
> [Mr. Frampton]: Well, I think the objection was that it's a little bit redundant.

We repeatedly have held that a complaining party must make a timely objection and state the specific grounds for the objection for purposes of the appeal. *In re Kessler*, 2011 MT 54, ¶ 27, 359 Mont. 419, 251 P.3d 147. The Hugheses failed to lodge a clear objection and waived review of the jury instructions on appeal.

Indep. Press, 271 Mont. 209, 896 P.2d 411 (1995). In *Sacco*, we explained that negligent and intentional infliction of emotional distress constitute independent causes of action. *Sacco*, 271 Mont. at 220, 896 P.2d at 417-18. Parasitic emotional distress damages, however, are not independent causes of action and thus do not require the heightened standard of proof required for an independent, standalone claim of negligent or intentional infliction of emotional distress. *Childress v. Costco Wholesale Corp.*, 2021 MT 192, ¶ 9, 405 Mont. 113, 493 P.3d 314.

¶30 The Hugheses further argue parasitic damages are unavailable on a "host" nuisance claim because nuisance arises out of protecting property rights and thus requires some evidence of damage to the property or its economic value. We disagree. The Hugheses urge us to read a limitation into the nuisance statute, which we have consistently refused to do. *See Bennett*, ¶ 20 (refusing to read a limitation that "anything that has a beneficial or reasonable use cannot also be a nuisance."); *Tarlton v. Kaufman*, 2008 MT 462, ¶ 24, 348 Mont. 178, 199 P.3d 263 (refusing to read a limitation that would prevent aesthetic considerations from constituting nuisances). The plain language of Montana's nuisance statute provides no such requirement for property damage. Rather, by its plain language, the nuisance statute requires "interfere[nce] with the comfortable enjoyment of life or property[.]" *See* § 27-30-101(1), MCA. This understanding is consonant with the history of nuisance actions.

¶31 Contrary to the Hugheses' contentions, the action for private nuisance arose from the necessity to protect against "an indirect damage to the land *or* an interference with its use and enjoyment." *Nelson v. C & C Plywood Corp.*, 154 Mont. 414, 423, 465 P.2d 314,

319 (1970) (emphasis added, citations omitted); *see also Baltimore & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 329, 2 S. Ct. 719, 726 (1883) (a nuisance constitutes that "which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him."). In *Nelson*, we traced the roots of a private nuisance claim to the twelfth century and noted nuisance claims "secure . . . free enjoyment [of property]." *Nelson*, 154 Mont. at 423, 456 P.2d at 318-19. Interference with the enjoyment of one's property has long been understood to constitute an acceptable basis for a nuisance claim.

¶32 In *Maloney v. Home and Investment Center, Inc.*, we upheld an award for emotional distress damages based on the Maloneys' "subjective relationship with the property on a personal-identity level." *Maloney*, 2000 MT 34, ¶ 71, 298 Mont. 213, 994 P.2d 1124 (internal quotations omitted). The emotional distress damages were "based on the fact that the Maloneys own property adjacent to the 74.6 acres where they have painfully watched Krasemann build a 3,000 square-foot home on the precise location where they envisioned their own retirement home would rest one day" and the listing price for the adjacent property of nearly six times what the Maloneys would have paid. *Maloney*, ¶ 70. While *Maloney* concerned an independent claim for emotional distress damages, not a parasitic claim as here, *Maloney*'s recognition of the use and enjoyment of land as a protected interest, meriting recovery of emotional distress damages, proves applicable. *Maloney*, ¶¶ 68-69.

¶33 Rubin and Hauth both testified to the negative effects of the Hugheses' behavior on their enjoyment of their property. Rubin testified that he no longer viewed his property as

a "dream" and that the Hugheses' actions caused him unrelenting anxiety and fear. Hauth testified to increased anxiety and physical manifestations of stress brought on by the Hugheses. Hauth stated that he felt discomfort on his own property and that the flagging had a deleterious impact on personally significant memories with his father on the property. Hauth no longer receives visitors and provided evidence of the Hugheses' interference with deliveries. Rubin and Hauth demonstrated interference with the enjoyment of their property to support their nuisance claim. Their testimony further demonstrated a subjective relationship with their property on a "personal-identity level" supporting emotional distress damages. *See Maloney*, ¶ 71.

¶34 The District Court properly denied the Hugheses' motion for a directed verdict. A host nuisance claim demonstrating an interference with the enjoyment of property may support an award of parasitic emotional distress damages.

¶35 *2. Whether the District Court erred in determining the Hugheses did not have an easement that entitled them to specific performance.*

¶36 Summary judgment is appropriate when no genuine issues of material fact exist, and the movant is entitled to judgment as a matter of law. *Totem Beverages, Inc., v. Great Falls-Cascade Cty. City-Cty. Board of Health*, 2019 MT 273, ¶ 10, 397 Mont. 527, 452 P.3d 923. The movant bears the burden of establishing that no genuine issue of material fact exists; the burden then shifts to the non-moving party, who must establish specific facts showing there is a genuine issue for trial. *Estate of Willson v. Addison*, 2011 MT 179, ¶ 13, 361 Mont. 269, 258 P.3d 410.

¶37 The Hugheses concede that a written agreement granting Brent an easement should have been drafted and recorded. Nonetheless, they argue the specificity of the terms of the Addendum merited specific performance and thus partial summary judgment was improper. The Hugheses further argue that Rubin's right of final approval before recording the easement fails to constitute a condition precedent, contrary to the District Court's conclusion, and that the Addendum need not be supported by additional consideration to be enforceable. Rubin and Hauth respond that the Statute of Frauds bars the Hugheses' argument, the Addendum lacked specificity, certain conditions precedent had not been met, and that no consideration supported the amendment of the Addendum. We address each contention in turn.

Specificity of the Addendum

¶38 "An agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable cannot be specifically enforced." *Quirin v. Weinberg*, 252 Mont. 386, 393, 830 P.2d 537, 541 (1992) (internal quotations omitted). An agreement to agree to terms in the future is not an enforceable agreement meriting specific performance. *Steen v. Rustad*, 132 Mont. 96, 104, 313 P.2d 1014, 1019 (1957). Where a contract has been reduced to writing, the intent of the parties is ascertained from the writing alone. Section 28-3-303, MCA.

¶39 An express easement must be in writing, and the grantor's intent to create an easement for the benefit of another must be clearly communicated. *Blazer v. Wall*, 2008 MT 145, ¶ 43, 343 Mont. 173, 183 P.3d 84. "[U]nreferenced documents and post-transaction testimony as to what the parties intended" fail to create an easement.

Blazer, ¶ 49. Nor may "extrinsic evidence . . . provide the property description in the first instance or add terms to an insufficient description." *Blazer*, ¶ 71.

¶40 The Hugheses argue, notwithstanding the lack of a written agreement, the parties understood the easement's location based on Certificate of Survey 20006 ("COS 20006"). The terms of the Addendum provided as follows:

> Buyer acknowledges and agrees to grant an easement to Brent Hughes, owner of property known [as] 252/244 Kauffman Lane. Said easement to be granted immediately after closing of the property sale of this Buy/Sell. Easement will be the location defined and surveyed by Eby Associates and described in written easement document previously accepted by all related parties.

The Addendum's terms fail to provide an adequate description of the land. COS 20006 was completed and recorded in 2015. If the parties intended to rely on COS 20006 to provide the description, they could have done so by expressly referencing the land description contained therein. Their failure to do so could not be overcome by Brent Hughes's post-transaction testimony as to what the parties intended. *See Blazer*, ¶ 49. The Addendum's description of the land was insufficiently specific.

The existence of a condition precedent

¶41 The obligation to grant an easement may be subject to conditions precedent. *Holter Lakeshores Homeowners Ass'n v. Thurston*, 2009 MT 146, ¶ 22, 350 Mont. 362, 207 P.3d 334. A condition precedent is one which is to be performed before some right or obligation dependent thereon accrues. Section 28-1-403, MCA. If the uncertain event upon which the obligation hinges fails to occur, the obligation does not materialize. *Thurston*, ¶ 22.

¶42 The Hugheses argue that no conditions precedent existed because the parties intended to rely upon COS 20006 to define the easement and Rubin's right of final approval before recording lacked the express conditional qualifier "if". The Hugheses gloss over the District Court's conclusion that the easement was contingent upon both the completion of a survey by Eby Associates *and* the creation of a written easement document accepted by all parties before closing. The Hugheses additionally gloss over their concession that no written easement agreement was drafted and recorded. Accordingly, we address whether the survey's completion constituted a condition precedent.

¶43 The express language assigning "all costs related to surveying and filing this easement" to Moses betrays the Hugheses' contention that the parties intended to incorporate by reference COS 20006 and thus no additional survey was necessary. Assuming the parties intended to incorporate the 2015 survey, both Rubin's right of final review before recording and the assignment of costs to Moses, in 2018, "related to surveying" would be superfluous and void. *See* § 1-3-232, MCA, ("An interpretation which gives effect is preferred to one which makes void."). Moreover, "Montana law compels us to reject a contract interpretation that would lead to absurdities." *First Nat'l Props., LLC v. Joel D. Hillstead Trust*, 2020 MT 211, ¶ 30, 401 Mont. 59, 472 P.3d 134 (internal punctuation and citations omitted). Assigning Moses responsibility to pay for a survey completed three years earlier constitutes an absurd result.[5] Rubin and his realtor

[5] Accepting the Hugheses' contention that the parties intended to incorporate the 2015 survey would require simultaneously giving effect to the clause's assignment of costs to Moses relating to the easement. Giving effect to that assignment would necessarily defeat the Hugheses'

testified that he neither reviewed nor approved any survey or written easement document. The Hugheses introduced no evidence to contradict Rubin's testimony. Indeed, the Hugheses have conceded no written easement document exists. The completion of a new survey, not the preexisting COS 20006, served as a condition precedent to both Rubin's final review before recording and Rubin's obligation to grant an easement. The record indicates no survey occurred, and thus Rubin's obligation did not materialize.

Whether consideration supported the amendment

¶44 Specific performance is unavailable "if the party has not received an adequate consideration for the contract[.]" Section 27-1-415(1), MCA. An existing legal obligation is only good consideration for promises to the extent of that obligation. Section 28-2-802, MCA. Past consideration is insufficient to support a promise. *Access Organics, Inc. v. Hernandez*, 2008 MT 4, ¶ 21, 341 Mont. 73, 175 P.3d 899.

¶45 The Hugheses contend a price reduction from $525,000 in the Buy-Sell Agreement to $495,000 in the Addendum constitutes de facto evidence of consideration for Rubin's promise to grant an easement. The first mention of the easement in the Inspection Notice referenced a preexisting agreement between Moses and the Hugheses. The Inspection Notice assigned costs related to the easement to Moses and reserved Rubin final approval of the easement but failed to impose the obligation to grant the easement upon Rubin. The Seller's Response to Rubin agreed to pay all costs regarding the easement and allowed Rubin final approval but again failed to obligate Rubin to grant the easement. Only

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contention that Moses's promise to pay for the costs "related to surveying" the easement, for a survey completed in 2015, constituted consideration for Rubin to grant the easement.

the Addendum imposed the obligation upon Rubin. Neither the Inspection Notice, the Seller's Response, nor the Addendum set forth any additional consideration provided by Moses to Rubin for the obligation of granting the easement. Rubin and his realtor testified that the price reduction related to the condition of the property, not the easement. Rubin further testified that he received no consideration for the easement. The Hugheses produced no evidence to rebut Rubin's testimony or support their contentions regarding the price reduction. The Addendum imposed a new obligation on Rubin, for which he did not receive adequate consideration.

¶46 The District Court correctly granted Rubin partial summary judgment on the Hugheses' counterclaim concerning the easement.

¶47 *3. Whether the District Court erred in waiving the statutory cap on punitive damages based on the financial information provided by the Hugheses.*

¶48 Punitive damages are capped at "$10 million or 3% of a defendant's net worth, whichever is less." Section 27-1-220(3), MCA. This cap "protects defendants from punitive damage awards inconsistent with their ability to pay." *Blue Ridge Homes v. Thein*, 2008 MT 264, ¶ 69, 345 Mont. 125, 191 P.3d 374. However, the defendant "should not gain an advantage from failing to produce evidence" of net worth. *Cartwright v. Equitable Life Assurance Soc'y of the U.S.*, 276 Mont. 1, 37, 914 P.2d 976, 999 (1996). Accordingly, the defendant bears the burden of providing "a truthful and reliable basis to limit the punitive damage award." *Blue Ridge Homes*, ¶ 69. Failure to do so "[does] not provide a specific amount of net worth" upon which a district court can apply the 3% punitive damage cap. *Blue Ridge Homes*, ¶ 70.

¶49 In *Blue Ridge Homes*, the defendant produced a self-prepared, unaudited financial statement of net worth deemed incomplete, inaccurate, and in conflict with evidence presented at trial. *Blue Ridge Homes*, ¶ 66. The evidence showed that the defendants wrongly subtracted nonexistent liabilities from their net worth, failed to account for appreciation of their property holdings, misrepresented one defendant's interest in the property, and concealed additional property holdings from the district court. *Blue Ridge Homes*, ¶ 66. The defendants "also attempted to evade Blue Ridge's attempts to discover more information . . . [and] refused to respond to requests for production and interrogatories on this issue." *Blue Ridge Homes*, ¶ 65. We affirmed the district court's conclusion that the limited statement of net worth was not credible and concluded the Theins failed to meet their burden of demonstrating an accurate calculation of net worth. *Blue Ridge Homes*, ¶ 70.

¶50 Our conclusion under Issue One nullifies the Hugheses' argument that no actual damages were awarded to support waiving the punitive damages cap. The Hugheses argue Rubin and Hauth stipulated to the statement of net worth the Hugheses produced and thus the District Court erred in waiving the statutory cap. However, continuing the pattern, the Hugheses gloss over the fact that Rubin and Hauth simultaneously preserved their objection regarding production of net worth information. The timing and limited information produced in the Hugheses' statement of net worth left Rubin and Hauth with no choice but to stipulate to the information provided. Rubin and Hauth preserved their objection for our review.

¶51 The District Court correctly waived the statutory cap on punitive damages. The Hugheses failed to meet their burden of producing a truthful and reliable basis upon which the District Court could limit punitive damages. The Hugheses failed to produce evidence of their net worth throughout the seven-month discovery process preceding trial, despite Rubin and Hauth's direct requests. The Hugheses stipulated that they would provide an "accountant's assessment of net worth" should Rubin and Hauth's punitive damages claims survive summary judgment. Rubin and Hauth's claims survived summary judgment, and the Hugheses failed to provide documentation, despite their stipulation. The District Court's pretrial order required the Hugheses to disclose information on their net worth, and the Hugheses again failed to do so. One day before trial, the Hugheses finally disclosed a self-prepared, unaudited single-page statement of Brent's net worth, with no additional information supporting the calculation. The Hugheses provided no information concerning Grace's net worth. The late financial disclosure and the limited information disclosed bestowed upon the Hugheses precisely the advantage we discouraged in *Cartwright*. 276 Mont. at 37, 914 P.2d at 999. The jury considered only the limited statement of Brent's net worth in awarding punitive damages.

¶52 The Hugheses unconvincingly attempt to distinguish *Blue Ridge Homes* by arguing they did not intentionally conceal assets, misrepresent a party's interest in property, or wrongfully subtract nonexistent liabilities. The Hugheses effectively present a straw man argument. Based on the limited information provided, no viable path exists to either disprove the Hugheses' argument or legitimately verify their net worth. More fundamentally, the Hugheses again gloss over unfavorable facts. As in *Blue Ridge Homes*,

the Hugheses attempted to evade efforts to discover their net worth. *See Blue Ridge Homes*, ¶ 65. As in *Blue Ridge Homes*, the Hugheses' statement of net worth was self-prepared and unaudited. *See Blue Ridge Homes*, ¶ 66. Here, the Hugheses did not intentionally misrepresent Grace's net worth or interest in property—they failed to produce any information on her net worth at all.

¶53 The Hugheses further attempt to shift the burden, arguing there has been no specific finding their statement of net worth is inaccurate and that Rubin and Hauth should have inquired into their net worth and proven its inaccuracy during the punitive phase of the trial. This argument fundamentally misconstrues our holding in *Blue Ridge Homes*. The Hugheses, not Rubin and Hauth, bore the burden of demonstrating a truthful and reliable basis for limiting punitive damages. *See Blue Ridge Homes*, ¶ 69. We will not fault the District Court for failing to expressly indicate the deficiencies in the Hugheses' statement when the Hugheses failed to meet their burden of providing truthful and reliable information in the first place. The District Court did not err when it waived the statutory cap on punitive damages.

¶54 *4. Whether the District Court abused its discretion in excluding evidence of Rubin's unenforceable agreement to grant the Hugheses an easement.*

¶55 A motion in limine prevents the introduction of evidence which is irrelevant, immaterial, or unfairly prejudicial. *Cooper v. Hanson*, 2010 MT 113, ¶ 38, 356 Mont. 309, 234 P.3d 59. Accordingly, the authority to grant or deny a motion in limine rests in a court's inherent power to admit or exclude evidence and to take such precautions as

necessary to afford a fair trial for all parties. *State v. Krause*, 2002 MT 63, ¶ 32, 309 Mont. 174, 44 P.3d 493.

¶56 The Hugheses argue the District Court abused its discretion when it granted Rubin's motion in limine to exclude evidence supporting the Hugheses' belief that Rubin granted them an easement. The Hugheses contend their belief that Rubin granted an easement justified their behavior and the exclusion of such evidence impaired their defense and precluded their ability to present the whole picture of the parties' relationship to the jury.

¶57 Rubin and Hauth respond that, assuming such a promise was made, the Statute of Frauds renders it unenforceable and that the District Court correctly excluded the evidence. The Hugheses concede that evidence of an unenforceable agreement would typically be excluded but argue an exception is necessary to explain their conduct to the jury.

¶58 The District Court did not abuse its discretion. Rubin and Hauth brought a nuisance claim against the Hugheses. The existence, or lack thereof, of an easement is not probative to whether the Hugheses' behavior interfered with Rubin and Hauth's enjoyment of their property or whether the Hugheses acted with actual malice. A nuisance claim does not ask whether a party believed its actions were justified. *See* § 27-30-101(1), MCA. Nor may the Hugheses defeat the evidence of actual malice by arguing they had a good reason for their actions. As the District Court noted, a distinction exists between believing a property owner should grant you an easement and actually possessing an easement. The Hugheses' relentless hostility and intimidating behavior would not in any event have been justified by the evidence they sought to introduce.

¶59 Moreover, the District Court granted Rubin's motion for partial summary judgment on the Hugheses' counterclaim for specific performance. Allowing the Hugheses to admit evidence concerning the existence of an easement would have raised the possibility of the jury determining Hauth and Rubin's nuisance claim based on its determination concerning the easement. The District Court noted this concern, as well as the concern of confusing the issues and misleading the jury, and excluded evidence relating to the existence of an easement. The District Court did not abuse its discretion in granting Rubin's motion in limine.

CONCLUSION

¶60 Rubin and Hauth's nuisance claim supports the jury's award of parasitic emotional distress damages. The District Court correctly determined the Hugheses did not have an easement and were not entitled to specific performance as requested in their counterclaim. The District Court correctly waived the statutory cap on punitive damages based on the limited financial information provided. The District Court did not abuse its discretion in granting Rubin's motion in limine. The District Court's Judgment is affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ BETH BAKER
/S/ JIM RICE