

DA 22-0257

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 184N

CHARLES SPRAGUE, by and through Paulette
Sprague, and PAULETTE SPRAGUE,

Plaintiffs, Counterclaim Defendants,
and Appellees,

v.

TIM BEARD,

Defendant, Counterclaim Plaintiff,
and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDV-2019-1354
Honorable Michael F. McMahon, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Erin M. Lyndes, Jackson, Murdo & Grant, P. C., Helena, Montana

For Appellee:

David B. Gallik, Gallik Law Office, PLLC, Helena, Montana

Submitted on Briefs: July 26, 2023

Decided: September 26, 2023

Filed:

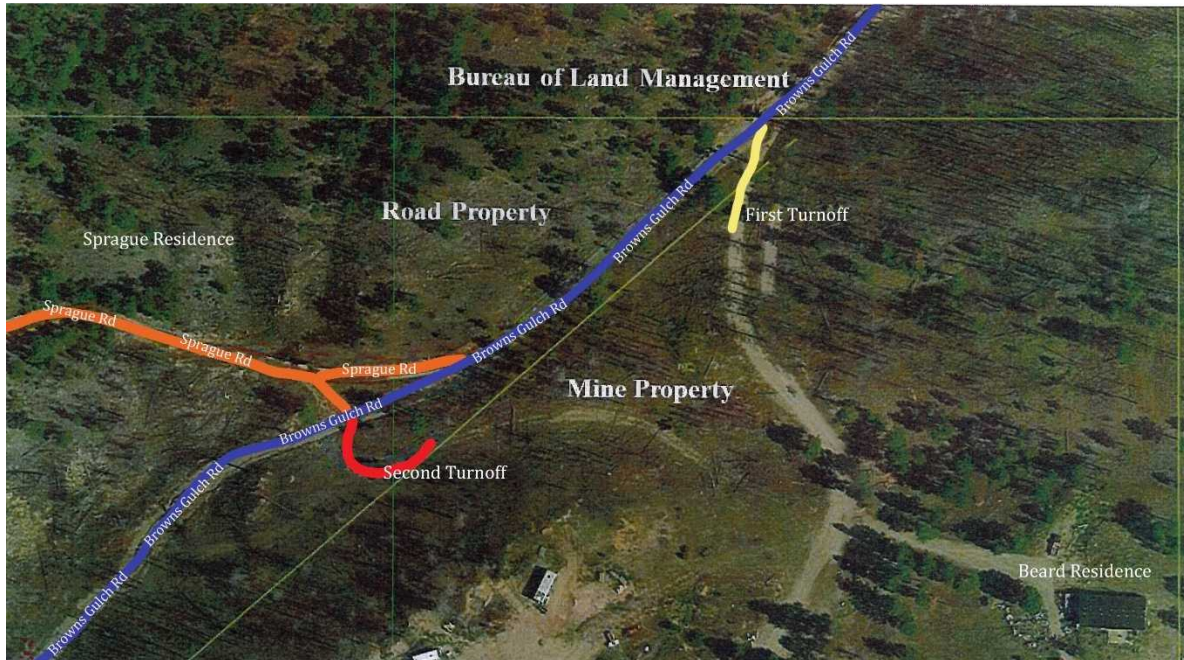

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, we decide this case by memorandum opinion. It 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 Tim Beard appeals the First Judicial District Court's findings of fact, conclusions of law, and order following a bench trial regarding an easement dispute with his neighbors, Charles Sprague (now deceased) and Paulette Sprague. Tim argues that the District Court: (1) erred in finding that Tim's use of Browns Gulch Road was permissive, and therefore Tim did not hold a prescriptive easement; (2) granted an excessively restrictive injunction against Tim's maintenance of Browns Gulch Road on Sprague property; (3) incorrectly concluded that Tim had trespass liability to Paulette, or alternatively, incorrectly calculated trespass damages; and (4) abused its discretion by not awarding attorney's fees to Tim. We affirm.

Figure 1: Composite of Plaintiff's Exhibits 1 and 2. The District Court noted that Plaintiff's Exhibit 1 contained inaccurate geodata which misidentified Browns Gulch Road. Browns Gulch Road is the road following the lowest point of the Browns Gulch drainage and is correctly marked in Figure 1 below. The "Second Turnoff" is the "Fishhook."



¶3 Tim Beard and Charles and Paulette Sprague were neighboring landowners on Browns Gulch Road north of Helena, Montana. The Spragues and Tim accessed their residences over a roadway commonly known as "Browns Gulch Road." To access his property, Tim has an express easement over ninety feet of Sprague property. The roadway within the scope of this agreement is described as the "First Turnoff." The "Fishhook" is a rudimentary road that forks southeast off Browns Gulch Road at a ninety-degree angle. Tim claims that he has a prescriptive easement over the Fishhook and another section of Browns Gulch Road past the First Turnoff.

¶4 Tim and Charles got along for several years, but their relationship deteriorated beginning around 2009 or 2010. On July 13, 2020, Tim and Charles had a confrontation,

during which Charles pulled out a handgun and threatened Tim. Law enforcement was called, and Charles was criminally charged with assault. Charles passed away on January 29, 2021, before the criminal action went to trial.

¶5 The Watts and Hoplers are neighboring residents who hold express easements over Browns Gulch Road on Sprague property. Tim has provided roadwork for the Hoplers on Browns Gulch Road.

¶6 Paulette claimed that Tim's roadwork obstructed her access to Browns Gulch Road on four occasions: early September 2019, mid-September 2019, July 2020, and March/April 2021. Tim admitted that the obstructions in September 2019 resulted from his attempts to install two culverts on Browns Gulch Road on Sprague property. After the second blockage, Charles and Paulette filed for injunctive relief and declaratory judgment and obtained a temporary restraining order against Tim to stop him from blocking the access road. As a result of the fourth blockage, Tim was charged with and convicted of disorderly conduct.

¶7 Among other claims, Paulette sought a permanent injunction to prevent Tim from using Browns Gulch Road on Sprague property, except for the first ninety feet granted by express easement. Paulette also contended that Tim's blockage of the Spragues' access road constituted a trespass. Tim filed a counterclaim for civil assault stemming from the July 2020 encounter with Charles and sought a prescriptive easement over Browns Gulch Road and the Fishhook.

¶8 The District Court held a bench trial on February 22 and 24, 2022. On extensive written findings, it concluded that Tim holds a prescriptive easement over the Fishhook but not over Browns Gulch Road, only the ninety-foot express easement described above. The court held that Paulette established three trespass claims against Tim but that the fourth incident occurred on Bureau of Land Management—not Sprague—property. The District Court awarded Paulette \$15,000 in damages for those three incidents. Tim, in turn, had proven a civil assault claim against Charles, and the court awarded him \$15,000 in damages for that. The damage awards thus were mutually off-setting. The District Court recognized that the Hoplers had used Tim in the past to conduct maintenance work, and Woody Hopler testified that he would continue to do so. The District Court entered a permanent injunction against Tim prohibiting his use of Browns Gulch Road and enjoining him from maintaining the road, except at the explicit request of someone holding an express easement over Browns Gulch Road on Sprague property. Tim appeals.

¶9 We review the factual findings of a district court sitting without a jury to determine if its findings were clearly erroneous. *Ray v. Nansel*, 2002 MT 191, ¶ 19, 311 Mont. 135, 53 P.3d 870 (citing M. R. Civ. P. 52(a)). A finding is clearly erroneous “if substantial credible evidence does not support [it], if the trial court has misapprehended the effect of the evidence[,] or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been committed.” *Ray*, ¶ 19 (citation omitted). “Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting.” *Skelton Ranch, Inc. v. Pondera*

Cty. Canal & Reservoir Co., 2014 MT 167, ¶ 27, 375 Mont. 327, 328 P.3d 644 (quoting *Arnold v. Boise Cascade Corp.*, 259 Mont. 259, 265, 856 P.2d 217, 220 (1993)). “Additionally, we must view the evidence in the light most favorable to the prevailing party when determining whether substantial credible evidence supports the district court’s findings.” *Ray*, ¶ 19 (citation omitted).

¶10 We review a trial court’s conclusions of law de novo for correctness. *Lyndes v. Green*, 2014 MT 110, ¶ 14, 374 Mont. 510, 325 P.3d 1225 (citation omitted). Whether an easement has been created is a question of law. *Reichle v. Anderson*, 284 Mont. 384, 387, 943 P.2d 1324, 1326 (1997).

¶11 A party seeking to establish a prescriptive easement must show “open, notorious, exclusive, adverse, continuous[,] and uninterrupted use of the claimed easement” for a period of five years. *Lemont Land Corp. v. Rogers*, 269 Mont. 180, 183, 887 P.2d 724, 726 (1994) (citation omitted). “Because the theory of prescriptive easement is based on adverse use, if the owner of the servient estate shows that use was permissive, no such easement can be acquired.” *Leisz v. Avista Corp.*, 2007 MT 347, ¶ 17, 340 Mont. 294, 174 P.3d 481 (citation omitted). The party seeking to establish the easement must prove all elements by clear and convincing evidence. *Wareing v. Schreckendgust*, 280 Mont. 196, 206, 930 P.2d 37, 43 (1996) (citations omitted). If the claimant satisfies this burden, “a presumption of adverse use arises and the burden shifts to the landowner affected by the prescriptive claim to establish that the claimant’s use was permissive.” *Wareing*, 280 Mont. at 209, 930 P.2d at 45 (citations omitted). The District Court held that Tim had a

prescriptive easement to the Fishhook but not over Browns Gulch Road because his use of Browns Gulch Road was permissive, thereby failing the element of adversity.

¶12 Tim argues that, in finding his use of Browns Gulch Road permissive, the District Court improperly disregarded a declaration from Charles in opposition to Tim’s motion for partial summary judgment. Charles stated, “Tim Beard has never been given permission to cross my property past the ‘first turnoff.’” Tim contends that the District Court should have taken Charles’s sworn statement as a conclusive judicial admission in considering Tim’s claim to adverse use of Browns Gulch Road.

¶13 “A judicial admission is an express waiver made to the court by a party or its counsel ‘conceding for the purposes of trial the truth of an alleged fact.’” *Bilesky v. Shopko Stores Operating Co., LLC*, 2014 MT 300, ¶ 12, 377 Mont. 58, 338 P.3d 76 (quoting *Kohne v. Yost*, 250 Mont. 109, 112, 818 P.2d 360, 362 (1991)). Whether a statement is a judicial admission depends upon the circumstances of each case. *Kohne*, 250 Mont. at 113, 818 P.2d at 362 (citation omitted). For a statement to constitute a judicial admission, three factors must be met: 1) there must be a statement made to the court; 2) the statement must be made by a party or by the party’s attorney; and 3) the statement must be a statement of fact and not a statement of opinion or law. *Bilesky*, ¶ 13. “For a judicial admission to be binding upon a party, therefore, the admission must be ‘an unequivocal statement of fact’ rather than a conclusion of law or the expression of an opinion.” *Conagra, Inc. v. Nierenberg*, 2000 MT 213, ¶ 43, 301 Mont. 55, 7 P.3d 369 (quoting *DeMars v. Carlstrom*, 285 Mont. 334, 337-38, 948 P.2d 246, 248-49 (1997)).

¶14 Because of the likely finality that results from the application of this doctrine, it must be applied with caution and a degree of skepticism. *Conagra*, ¶ 43 (citation omitted). In *DeMars*, we held that a party’s testimony that a car accident was “all her fault” was either a legal conclusion or an expression of her personal opinion, and therefore not a statement of fact. 285 Mont. at 338, 948 P.2d at 249. In like fashion, Charles stated his opinion that Tim did not have permission, and the statement was not a binding judicial admission of fact.

¶15 Notwithstanding Charles’s declaration, there is substantial evidence in the record—largely found in Tim’s deposition and trial testimony—that Tim used Browns Gulch Road by permission. The District Court noted the following deposition testimony regarding Tim’s permission to maintain the road on Sprague property:

Q: Do you have permission from [Charles] or Paulette Sprague to maintain the property—the road on their property?

A: I have all along.

Q: Their permission?

A: Yes.

¶16 Later in the deposition, Paulette’s counsel again asked, “Did you understand that you had [Charles] Sprague’s permission to use that road and work on that road?” Tim responded, “Yes.” Tim initially denied this at trial. When discussing Browns Gulch Road, however, Paulette’s counsel asked, “And that is the road that you were identifying as having permission from Mr. and Ms. Sprague; correct?” Tim responded, “I guess.”

¶17 The District Court recognized in its factual findings that Tim never asked the Spragues' permission to use Browns Gulch Road or the Fishhook. This is consistent with Tim's testimony at trial that "[Charles and Paulette] knew I was using it, so it wasn't actual verbal permission." Rather, the District Court found that Tim's permission to use Browns Gulch Road was implicit "based on Charles[s] knowledge of and even assistance with road maintenance." It specifically referenced Tim's deposition testimony:

Q. Tell me when you got [Charles and Paulette Sprague's] permission.

A. They've allowed me to do it. He's helped me do it, as far as allowing me to use the loader, when I went and did on the one. When I was doing for Hoppers down there, I used—we were working together. And so I used the loader, which was his, when we were mining together, to do that down there for Hoppers. He sit there, come down, and inspected it, and saw everything, and was right along with it.

Q. And that was Mr. Sprague?

A. Yes.

¶18 The District Court drew its findings from this evidence, concluding that Tim's use of Browns Gulch Road was primarily for purposes of maintenance and that he did so with Charles's permission. Tim argues, however, that the District Court "took some inferential leaps" when defining "the road" in its findings and conclusions. The District Court recognized that the use of the definite article "the road" denotes one specific road, but more than one road is at issue in this case. The District Court interpreted Sprague's counsel's reference to "the road" during Tim's deposition and Tim's answer as meaning Browns Gulch Road. The record supports this interpretation; Tim has not demonstrated clear error in the court's findings.

¶19 The record substantiates the District Court’s finding that Tim’s use of Browns Gulch Road was permissive. The court thus did not err in declining to further consider whether he established the elements of adverse use. *Leisz*, ¶ 17 (citation omitted). We conclude that the District Court did not err when it denied Tim a prescriptive easement over Browns Gulch Road.

¶20 Tim next asserts that the District Court’s injunction restricting the periods during which the owners of the Watt and Hopler properties could utilize Tim’s repair work “placed an excessive restriction on [the Watts’ and Hoplers’] secondary easement rights.” The District Court ordered that the dominant tenement owner shall provide Paulette written notice within thirty days of their intent to have Tim perform maintenance work on Browns Gulch Road. Further, except in emergencies, Tim is allowed to perform such road maintenance on Browns Gulch Road during only two annual seasonal windows, from June 15-25 and from October 15-25, and the work may last no more than three days within each seasonal window.

¶21 We review a permanent injunction order to determine whether the trial court manifestly abused its discretion. *Simpkins v. Speck*, 2019 MT 120, ¶ 8, 395 Mont. 509, 443 P.3d 428 (citation omitted). “A manifest abuse of discretion is one that is obvious, evident, or unmistakable.” *Bitterrooters for Planning v. Bd. of Cnty. Comm’rs*, 2008 MT 249, ¶ 12, 344 Mont. 529, 189 P.3d 624 (citation omitted).

¶22 “[A]n order granting an injunction must (1) set forth the reasons for its issuance; (2) be specific in its terms; (3) describe in reasonable detail, and not by reference to the

complaint or any other document, the act or acts sought to be restrained; and (4) be binding only upon the parties to the action; their officers, agents, employees, and attorneys; and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” *Guthrie v. Hardy*, 2001 MT 122, ¶ 58, 305 Mont. 367, 28 P.3d 467 (citing § 27-19-105, MCA). The District Court noted that Tim’s three obstructions on Sprague property were large enough to prevent motorized transit and lasted a combined five to six weeks, finding this much interference with the servient tenement unreasonable. The order made clear that “[n]othing in this order is to be construed as determining or limiting these third-party easement holders or their agents, other than [Tim], from engaging in roadwork to the full extent of their legal rights” and that the restrictions are “designed to keep the peace.” The Watts and Hoplers, as non-parties to this case, are not bound by the District Court’s injunction. To the extent it restricts Tim’s actions, he has not demonstrated that the District Court manifestly abused its discretion.

¶23 Third, Tim alleges that the District Court erred in holding him liable for trespass to Paulette, and alternatively, that the District Court incorrectly calculated trespass damages. The District Court awarded Paulette \$15,000 in damages for Tim’s three civil trespasses. Because Tim did not prove he had a prescriptive easement over Browns Gulch Road, and because Tim admitted to placing or creating all three obstructions that prevented vehicles from traveling along Browns Gulch Road, he has not established an abuse of discretion. We affirm on this issue.

¶24 Finally, Tim asserts that the District Court erred in not analyzing and awarding Tim reasonable attorney's fees as required under § 27-1-722(4), MCA. The District Court found that Charles, while on his own property, "was justified to 'threaten force' to prevent yet another trespass by [Tim]." Accordingly, it determined that, even though Charles committed civil assault against Tim on July 13, 2020, his actions were justified under § 45-3-104, MCA, to prevent Tim from once again trespassing on Charles's property. But the court held that once Tim retreated onto his own property and Charles chased after him in his vehicle down the Fishhook and onto Tim's property, Charles's actions were not justified under § 45-3-104, MCA.

¶25 Section 27-1-722(1), MCA, "provides immunity to the person using the [justified] force from civil damages for injury to any person or property arising from injury to the person, or damage to the property of the person, against whom the force was used." "The prevailing party in an action in which a defense is asserted under this section is entitled to costs and reasonable attorney fees." Section 27-1-722(4), MCA. Tim asserts on appeal that he is entitled to reasonable attorney's fees under this provision.

¶26 This Court generally does not consider a party's new arguments or change in legal theory on appeal. *Mt. W. Bank, N.A. v. Glacier Kitchens, Inc.*, 2012 MT 132, ¶ 13, 365 Mont. 276, 281 P.3d 600. Tim did not assert a claim for fees in the District Court under the authority he now argues. Tim's only claim for attorney's fees, noted in the final pretrial order, related to his claim for declaratory judgment that he held a prescriptive easement.

¶27 As Tim did not raise his now-asserted theory before the District Court, we do not address it on appeal.

¶28 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. The District Court's judgment is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE