DA 22-0620

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 244N

CHARLES ROBERT MASOLO and
GAY ANN MASOLO,

Plaintiffs and Appellees,

v.

CHRISTOPHER "GREGG" THOMAS and
MARGARET THOMAS,

Defendants and Appellants.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Broadwater, Cause No. CDV-2022-27
Honorable Kathy Seeley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:s

Christopher "Gregg" Thomas, Self-Represented, Bozeman, Montana

Margaret Thomas, Self-Represented, Bozeman, Montana

For Appellees:

Michael Kauffman, DarAnne Dunning, Drake Law Firm, Helena, Montana

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Submitted on Briefs: August 30, 2023

Decided: December 19, 2023

Filed:

Clerk

Justice Laurie McKinnon 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 and 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 Christopher "Gregg" Thomas and Margaret Thomas (Thomases) appeal the Order on Preliminary Injunction entered on September 29, 2022, in the Montana First Judicial District Court, Broadwater County. Thomases argue the District Court manifestly abused its discretion in granting Charles and Gay Ann Masolo (Masolos) a preliminary injunction preventing Thomases from entering Masolos' property to access their landlocked parcel. Thomases argue the District Court did not adequately consider various arguments and facts raised by Thomases at the hearing, including a mineral survey and land patent, abandonment of a county road on Masolo land, contractual language in Masolos' conservation easement, and Masolos' use of the land. Masolos argue the District Court did not abuse its discretion when it found that the Masolos satisfied three statutory bases for granting relief in the form of a preliminary injunction. We affirm.

¶3 Charles and Gay Ann Masolo are long-time ranchers and residents of Broadwater County. In 1976, the couple purchased land known as the "Sweeney Place," roughly 1,450 acres. They have ranched this land ever since. The Sweeney Place deed granting the property to Masolos contains a note about grazing privileges and lists water rights, but it

does not list or describe any easements encumbering the property. Masolos entered Sweeney Place into a conservation easement agreement with the Montana Land Reliance in 2019 and enrolled the property in the Block Management Program with Montana Fish, Wildlife, and Parks. Under Block Management, Masolos allow hunters to park outside their gate and access their property on foot. Signs posted at their gate indicate to visiting hunters that "driving beyond this point is prohibited" and that access to the land is allowed "on foot only." The conservation easement with Montana Land Reliance provides for "[r]etention of significant open-space lands for a variety of other purposes, including for the benefit of plants, biotic communities, fish and wildlife. . . ." The agreement prevents "any use of, or activity on, the Property that will significantly impair the Conservation Values." For the use of roads on the property, the agreement provides:

> Consistent with sound agricultural and management practices, Grantor may use and create unimproved tracks, trails, and roads that are necessary for farming, ranching, and other agricultural purposes protected by this Easement. Such unimproved tracks, trails, and roads may include, but shall not be limited to, two-track byways used by farm equipment and off-road vehicles for crop cultivation, field access, for livestock management and monitoring purposes, and for access to irrigation ditches, pumps, and infrastructure.

The agreement states that Masolos "may grant right-of-way easements to neighbors over existing roads or over new roads that are constructed pursuant to the terms of [the agreement and Conservation Values]."

¶4 Masolos' property and Bureau of Land Management (BLM) land completely surround another area of land, a 31.8-acre tract known as the "Stabler Parcel." This landlocked parcel, owned for many years by the Stabler family, is described as:

> The Iron King and Great Western Quartz Lode Mining Claims, No. 10332, situated in Township Nine (9) North, Range One (1) West, of M.P.M., in said county and state.

These mining claims were located in 1905, surveyed in 1923, and patented in 1924. The 1923 Mineral Survey field notes describe a frame cabin and note that a road exists on the Iron King parcel. This road is pictured and labeled as a road on the Mineral Survey map of the Stabler Parcel, but it does not bear any other description, and the map does not show the surrounding land. Additionally, this road is not in the same place as the track the Thomases used to cross Masolos' land.

¶5 The 1924 Patent granted the Stabler Parcel to George, Addison, and Henry Reed. The Patent states that "[n]othing herein contained shall authorize the grantees herein to enter upon the surface of a claim owned or possessed by another." It granted the "mining premises, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said grantees above named and to their heirs and assigns forever; subject, nevertheless, to the above mentioned and to the following conditions and stipulations" including water rights and future laws passed by the Montana legislature.

¶6 In 1968, the Reeds deeded the property to Nancy Stabler and Ben G. Stabler. The deed does not describe any easements, and no addendums, attachments, or exhibits accompany the deed. Thomases allege that the Stablers accessed the parcel once in July of 1999. To Masolos' knowledge, the Stablers have never accessed their parcel through the Sweeney Place property at any time in Masolos' 46 years of ownership because Masolos

have kept the gate in question locked for many decades. Nancy Stabler passed away in 1975, and her estate was resolved in probate.

¶7 Masolos wrote to Ben Stabler[1] in 2005 to inquire about purchasing the Stabler Parcel. In 2007, Jim Stabler, one of Nancy and Ben's sons, responded that his father had died several years ago, and the property passed to Jim and his two brothers. Jim expressed interest in selling the property but stated, "there are several things we need to do first, such as getting the title in order so that the property can be conveyed." Jim elaborated:

> You stated in your November 13, 2005 letter that the mines are landlocked by your property and therefore have "no access." I'm not sure whether that means you could legally bar access to the property, which would obviously impact the market value, so I suppose I also need to obtain a legal opinion on that point as well.

¶8 On June 13, 2022, Gregg Thomas wrote a letter to Masolos informing them that he was "about to become the new owner" of the Stabler Parcel, that he had accessed the property by helicopter on June 1, and that he had observed a road that could be used to access the land across Masolos' property. The letter asserted that Thomases had "a right to use the road to access [their] parcel" and that they intended to build a residence on the land and engage in hobby farming. Thomases expressed their intention to "get temporary living quarters and contractors to improve/create access suitable for us" and install their own lock on one of Masolos' gates.

¶9 In response to this letter, Masolos' counsel emailed Thomases' then-attorney and explained, at length, that under Montana law and the facts as understood by the Masolos,

[1] We presume, although the record does not clearly establish, that the correspondence was to Benjamin G. Stabler, Sr.

no basis existed for an express easement, prescriptive easement, or unity of ownership for an easement by necessity. The email further explained that the terms of the Masolos' conservation easement would not allow for the creation of new roads or use of existing roads to the extent necessary to build a new residence on the Stabler Parcel. On July 5, Thomases' counsel sent a letter acknowledging that they had not yet located evidence of an express easement but warning that they may pursue claims for a prescriptive easement or easement by necessity. The letter offered Masolos $7,500 in exchange for an express easement. If Masolos would not agree to the express easement, Thomases asserted that they intended to engage in mining and small-scale commercial agriculture on the Stabler Parcel and would bring an eminent domain and condemnation proceeding for the public uses of mining and farming under § 70-30-102(33), MCA and § 70-30-102(36), MCA. The letter noted, "[u]ntil the parties' respective rights are more clearly established, the Thomases do plan to use the road occasionally without alterations to access their parcel." Later, Thomases offered Masolos $100,000 for an express easement.

¶10 Masolos' attorney replied that Thomases could not assert an eminent domain claim benefiting only an individual landowner with no benefit to the public good in order to build a private home and fulfill their "debatable future intent" for small-scale mining and agriculture. Counsel further explained that Masolos did not wish to grant an express easement and would not give permission for the Thomases to cross their land "for purposes of conducting any due diligence for their prospective purchase, or once they own the land, for purposes of accessing the Stabler parcel."

¶11 Around July 20, 2022, Thomases entered a gate on land owned by another neighbor, Todd Moldenhauer, without his permission and crossed Masolos' land to move a fifth-wheel trailer onto the Stabler Parcel. Masolos assert that the fifth-wheel created a new track where none previously existed, causing erosion and plant damage. On July 21, Masolos' attorney reminded Thomases' counsel that they did not have permission to cross their land and asked that they vacate immediately. Moldenhauer began locking his gate after this incident.

¶12 Despite knowing that access to the Stabler Parcel was contested and that Masolos were unwilling to grant an express easement, Thomases moved forward with the purchase. A warranty deed dated July 25, 2022, purportedly granted the Stabler Parcel to Gregg Thomas from Ben G. Stabler, Jr. for the sum of $100.[2] The deed does not list or describe any easements, either benefiting or burdening the Stabler Parcel.

¶13 A few days later, Masolos discovered that Thomases had cut the chain and lock on the Masolos' gate and entered their land to move a second trailer onto the Stabler Parcel, again causing damage and cutting a new track into the land. The Masolos called the Sheriff, but Thomases told the responding deputy that they owned the Stabler Parcel and had an easement across Masolos' land. The deputy appears to have declined to become involved in the civil dispute. Around July 28, Thomases again cut the locked chain and drove a truck and flatbed trailer through Masolos' property.

[2] Masolos raised serious concerns regarding chain of title when they filed for a preliminary injunction to support their claim to the requested relief. Based on our disposition of this proceeding, it is not necessary to address issues with Thomases' chain of title.

¶14 On July 29, 2022, Masolos applied for a Temporary Restraining Order (TRO) and Preliminary Injunction to prevent Thomases from accessing or using Masolos' land until final adjudication of the case. The District Court granted the TRO the same day and set a show cause hearing for August 8. On August 1, Thomases removed one of the Masolos' gates completely, took the gate back to Belgrade, and left a second gate open, allowing the heifers Masolos had separated to go into a different pasture.

¶15 At the August 8 hearing, Thomases appeared *pro se* and requested more time to prepare their defense. Both parties agreed to extend and abide by the TRO, and the hearing was rescheduled for September 16. The District Court instructed Thomases to return the gate, which they had taken "to repair it," to the Masolos' property. Thomases did so.

¶16 At the September 16 hearing, Masolos argued they were entitled to a preliminary injunction under three of the potential bases listed in § 27-19-201, MCA (2021). These include:

> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
>
> (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual.

Section 27-19-201(1)-(3), MCA (2021).

¶17 Masolos offered affidavit testimony and photographic evidence that Thomases' actions damaged their land and plant life where they drove trailers over the area. Masolos argued that they had not found any evidence of an express easement and a search by a title company also found none. They noted that the language on a plat or survey necessary for an easement by reference also did not appear in the Mineral Survey, which simply pointed out the existence of a road on the Stabler Parcel. Finally, Masolos argued that Thomases also could not claim a prescriptive easement because neither Thomases nor the prior owners of the Stabler Parcel could show open, exclusive, adverse, continuous, and uninterrupted use over a five-year period. At the time of the hearing, Thomases had not filed any affirmative claims to an easement.

¶18 In response, Thomases contested whether a county road leading onto Masolo property was properly abandoned. Joshua Obert, County Works Supervisor for Broadwater County, testified that parts of the county road, including portions of the L.F. Baum Road and Quarter Circle Road, at one point existed on Masolos' land, but none extended from Masolos' property onto Thomases' property. Instead, the former county road headed east toward Quarter Circle Road, which is not near Thomases' parcel. Obert testified that any roads that previously existed on the Masolos' land had been abandoned by the county for longer than 40 years. Masolos objected to the relevance of testimony about a county road, abandoned or not, that does not lead to the Stabler Parcel. When Thomases continued to argue that the road still provides access, the District Court pointed out:

> But that is not access to your plot. That is access, if I even accept that that's the county road up to a point there where he gestured to me. It does not go

> across the Masolos' property to your property. It doesn't. And so it is somewhat irrelevant for you to go on and on about whether it was properly abandoned or not.

Thomas responded, "Well, Your Honor, by that logic, no road is used to access my parcel." The District Court acknowledged that was the crux of the Masolos' argument.

¶19 Thomases further argued that the patented mining claim conveys the interests in the land held by the government at the time the claim was located. They asserted that an express easement by reference exists from the road depicted on the Mineral Survey and written in the survey's field notes. Thomases also argued that the terms of Masolos' conservation easement agreement do not prevent them from granting an easement for their neighbors to cross their land.

¶20 The District Court granted the preliminary injunction, enjoining Thomases from entering Masolos' property until Thomases acquire a license or express easement from Masolos or until final adjudication of the case. The District Court found that Masolos were entitled to relief under each of the first three subsections of § 27-19-201, MCA. First, it determined that Masolos were entitled to the relief requested because "[a]t this time, there is not sufficient evidence to conclude Thomas has an easement, right-of-way, or any other interest establishing a right to access the Stabler Parcel by traversing Masolo land." Section 27-19-201(1), MCA. Second, the District Court found Masolos sufficiently showed that continued access by the Thomases during the pendency of the litigation would produce irreparable injury to Masolos' property rights and the land itself. Section 27-19-201(2), MCA. Finally, it found that an injunction was necessary because Thomases continued to

enter the property despite Masolos' repeated orders to the contrary and would likely continue to do so without an injunction, rendering an eventual judgment ineffectual against the resulting harm to Masolos' land, property rights, and contractual obligations under the conservation easement agreement. Section 27-19-201(3), MCA. A preliminary injunction would preserve the status quo as the last peaceable state before Thomases began entering Masolos' land. Thomases appealed.

¶21 Though on appeal Thomases raise other issues regarding the District Court's consideration of the letter from Jim Stabler, the conservation easement agreement, and testimony regarding Masolos' use of their own land, none of these arguments impact the District Court's consideration of the preliminary injunction. We address only whether the District Court manifestly abused its discretion in granting the preliminary injunction.

¶22 "The grant or denial of a preliminary injunction is so largely within the discretion of the district court that we will not disturb its decision, barring a manifest abuse of discretion." *Yockey v. Kearns Properties, LLC*, 2005 MT 27, ¶ 12, 326 Mont. 28, 106 P.3d 1185. A manifest abuse of discretion must be "obvious, evident, or unmistakable." *Yockey*, ¶ 12. To the extent that a district court's decision on a preliminary injunction is based on conclusions of law, we review those conclusions for correctness. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386. When considering a preliminary injunction decision, neither this Court nor a district court will determine the merits of the underlying case, which are reserved for adjudication at trial. *Stand Up Mont. v. Missoula Cnty. Pub. Sch.*, 2022 MT 153, ¶ 6, 409 Mont. 330, 514 P.3d 1062. A district court may

grant a preliminary injunction when a party can demonstrate at least one of five disjunctive subsections of § 27-19-201, MCA.[3] A district court may grant a preliminary injunction when a "sufficient case has been made out to warrant the preservation of the property or rights in status quo until trial." *Flying T. Ranch, LLC v. Catlin Ranch, LP*, 2022 MT 162, ¶ 18, 409 Mont. 478, 515 P.3d 806.

¶23 Thomases first argue that the Mineral Survey and field notes constitute an express easement by reference and, alternatively, that an implied easement by necessity exists. Easements are created in three ways: by an instrument in writing, by operation of law, or by prescription. *Blazer v. Wall*, 2008 MT 145, ¶ 26, 343 Mont. 173, 183 P.3d 84. An express easement created by reference to a written instrument in a plat or survey must be adequately described. *Blazer*, ¶ 43. "It is axiomatic, however, that an easement appurtenant has not been 'adequately described' when the identity of the dominant tenement has been omitted and cannot be ascertained from the documents of conveyance." *Blazer*, ¶ 51.

¶24 An implied easement by necessity arises by operation of law when the proponent of the easement can show both unity of ownership and strict necessity. *Yellowstone River, LLC v. Meriwether Land Fund I, LLC*, 2011 MT 263, ¶¶ 25-26, 362 Mont. 273, 264 P.3d 1065. Although public policy does, as Thomases argue, weigh against minimizing the utility of isolated tracts of land, "we have never implied an easement based solely on the notion that a tract of land should not be isolated." *Yellowstone River, LLC*, ¶¶ 32-33. Implied easements by necessity are not, and have never been, "intended to provide access

[3] This statute was recently amended to require four conjunctive elements, but the 2021 law governs Masolos' request for a preliminary injunction. Section 27-19-201(1), MCA (2023).

across the land of others to benefit any and all landlocked property." *Yellowstone River, LLC*, ¶ 33 (quoting *Frame v. Huber*, 2010 MT 71, ¶ 10, 355 Mont. 515, 231 P.3d 589). Unity of ownership for an implied easement by necessity occurs "when the alleged dominant and servient tenements are severed *from common ownership* and the dominant estate is left isolated as a result." *Yellowstone River, LLC*, ¶ 38 (emphasis added).

¶25 The District Court concluded that Thomases have not shown that any document depicts a road leading from Masolos' gates to the Stabler property. By Thomases' own admission, the old county roads and the road on the Mineral Survey are not the same as the track used by Thomases to cross Masolos' land and enter the Stabler Parcel. In any case, the existing track terminates before the Stabler Parcel property line. Even if we assume for the sake of argument the existence of such a road, no document describes the road as an easement. At most, Thomases have shown that the Mineral Survey and accompanying notes show a road, labeled only as "Road" on their own land, but it offers no reference to an easement encumbering Masolos' land. The 1924 Patent also does not contain language describing an easement across Masolos' land. Thomases argue that *Our Lady of the Rockies, Inc. v. Peterson* acknowledges that an express easement by reference can arise from "an instrument of conveyance to a plat or certificate of survey adequately describing the easement. . . ." 2008 MT 110, ¶ 57, 342 Mont. 393, 181 P.3d 631. However, *Our Lady of the Rockies, Inc.* stands for the premise that a public easement cannot be established "by referring in a federal land patent to a mineral survey which depicts a road labeled 'Road.'" *Our Lady of the Rockies, Inc.*, ¶ 61. An easement by reference in a mineral survey may

only be found when "the intent to create an easement [is] clearly and unmistakably communicated on the referenced plat or certificate of survey using labeling or other express language." *Our Lady of the Rockies, Inc.*, ¶ 57. Contrary to Thomases' argument, labeling a road on a survey map as "Road" and describing its location does not make it an easement. The easement-by-reference doctrine requires that both the dominant and servient tenements be identified "with reasonable certainty from the referenced plat or certificate of survey." *Blazer*, ¶ 56. We have declined to find an express easement by reference even when the deed in question stated "SUBJECT TO 30 foot road easement as shown on Certificate of Survey No. 4446" because this language did not sufficiently identify both the dominant and the servient tract. *Blazer*, ¶¶ 60-63. Therefore, Thomases' Mineral Survey and accompanying field notes depicting a road do not demonstrate that the District Court manifestly abused its discretion.

¶26 Thomases further argue that Masolos drive on the two-track path on their property and even drive from their gate to the Stabler parcel. However, as the District Court pointed out, Masolos' use of their own land is not relevant to whether others may use it in the same way. Finally, any alleged procedural defects in the County's abandonment of the road on Masolos' land more than 40 years ago have no impact on Thomases' assertion of an easement because the road never led from Masolos' property to the Stabler Parcel.

¶27 Although Thomases raise the implied easement by necessity argument for the first time on appeal, no evidence offered by the Thomases on this subject, either during the hearing or in their appellate brief, contradicts the District Court's findings. At the time of

the hearing, Thomases had not provided "sufficient evidence to conclude Thomas has an easement, right-of-way, or any other interest establishing a right to access the Stabler parcel by traversing Masolo land." Because Thomases acknowledge that common ownership did not exist at the time of the Stabler Parcel's severance when the Reeds obtained the mining claim patent in 1924, their assertion of an implied easement by necessity is insufficient to demonstrate a clear mistake in the District Court's conclusions. Thus, the District Court did not manifestly abuse its discretion in determining that Masolos were entitled to relief preventing Thomases from entering their land under § 27-19-201(1), MCA.

¶28 Finally, Thomases argue that their continued access to the Stabler Parcel through Masolos' land would not cause an irreparable injury to Masolos. Regarding the definition of irreparable injury or harm under § 27-19-201(2), MCA, we have held that "while only mentioned explicitly by subsection (2) in terms of a great or irreparable injury, the prevention of some degree of harm or injury is an overlapping concept that is implied within all of the subsections of the statute." *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 16, 395 Mont. 160, 437 P.3d 142. "[A]ll requests for preliminary injunctive relief require some demonstration of threatened harm or injury, whether under the 'great or irreparable injury' standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA." *BAM Ventures, LLC*, ¶ 16. Where the purpose of equitable relief has been fulfilled, "that is, to 'preserve the status quo . . . pending final resolution on the merits[,]'" a district court does not abuse its discretion in its decision

to grant or deny a preliminary injunction. *BAM Ventures, LLC*, ¶ 18 (quoting *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73) (emphasis omitted).

¶29 Here, Thomases have repeatedly and flagrantly disregarded Masolos' and the District Court's clear instructions not to enter their property. Over a few short weeks, Thomases cut Masolos' lock and gate chains on several occasions, caused land erosion and plant damage on a little-used track, and cut a new track into the land where none previously existed. After the District Court had already issued a TRO preventing Thomases from entering Masolos' property, they removed the gate entirely and left another open. Masolos offered affidavit testimony that this action endangered their cattle and allowed them to move into a different pasture. Even if, as Thomases argue, Masolos' livestock would have been prevented from exiting the pasture by the cattle guard where the stolen gate usually hung, their other actions provided ample evidence for the District Court to conclude that the Masolos' requested relief was warranted. By issuing the preliminary injunction, the District Court preserved the status quo, namely, the last peaceable state of matters before Thomases began entering Masolos' land, until the case can be resolved. The District Court did not manifestly abuse its discretion when it determined that Thomases' continued access to Masolos' land through the pendency of the litigation would cause Masolos irreparable harm.

¶30 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.

¶31 Affirmed.

/S/ LAURIE McKINNON

We Concur:

/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR