COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203	
Arapahoe County District Court Case No. 2021CV31592 The Honorable Peter Michaelson	
Plaintiffs-Appellees: Amy Dean, Donner Dean, Jr., Merryl Learned, and John Walls, Jr. v. **Defendants- Appellants:** Stephanie Casey, Trevor Casey, Wendy Brockman, and Clifton Brockman, Jr. **Third-Party Judgment Debtors-Appellants:** Mark Cohen, Mark Cohen, J.D. LL.M, a Professional Corporation, and Stephen Fermelia.	▲ COURT USE ONLY▲
Counsel for Defendants-Appellants Bradley A. Levin, No. 13095 Nelson A. Waneka, No. 42913 LEVIN SITCOFF WANEKA PC 455 Sherman Street, Suite 490 Denver, CO 80202 P: (303) 575-9390; F: (303) 575-9385 brad@lsw-legal.com nelson@lsw-legal.com	Case No. 2023CA721
DEFENDANTS-APPELLANTS' OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

☒ It contains 9,281 words.
☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☒ For the party raising the issue: It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue: It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

s/Nelson A. Waneka
Nelson A. Waneka

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

Defendants-Appellants Stephanie Casey, Trevor Casey, Wendy Brockman, and Clifton Brockman, Jr., through their attorneys, LEVIN SITCOFF WANEKA PC, submit the following Opening Brief:

I. ISSUES PRESENTED FOR REVIEW

1. Whether the district court demonstrated actual bias depriving Defendants of a fair trial when it: (1) made inappropriate remarks to Defendants and their attorneys; (2) threatened Defendants and their counsel with contempt on at least *seven* occasions during trial; and (3) told defense counsel that he should "think about bringing a toothbrush to court," because "Monday night, that might be what you need to make yourself a little bit comfortable in where I'll send you."

2. Whether the district court abused its discretion in concluding that all of Defendants' equitable defenses and most of their counterclaims were groundless and frivolous when: (1) Plaintiffs never sought dispositive relief with respect to those defenses or claims; (2) the defenses and claims were set forth in the Trial Management Order and acknowledged by the court as issues for trial in the Trial Management

Conference; and (3) the defenses and claims were supported by evidence at trial?

3. Whether the district court abused its discretion in awarding Plaintiffs one-half of their attorney fees when, at best, only a fraction of their claimed fees were attributable to Defendants' equitable defenses and counterclaims?

4. Whether the district court erred in awarding 8% interest on its award of attorney fees and costs?

5. Whether the district court erred in determining as a matter of law that the maintenance requirements of the Conditions were collective rather than individual to each parcel owner?

6. Whether, in addition to the above, the judgment must be reversed because it grants relief against the defaulting Other Parcel Owners that was not requested in the complaint?

II. STATEMENT OF THE CASE

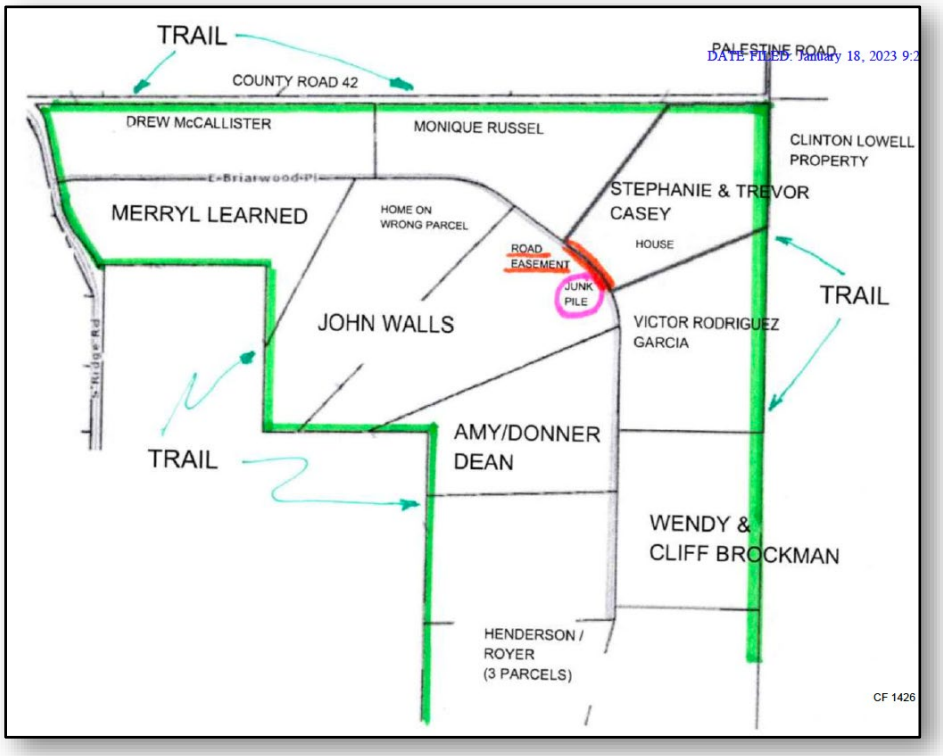
A. Nature Of The Case, Course Of Proceedings, Statement of Facts, and Disposition Below

1. The Subdivision

This is an action to quiet title to twelve parcels of land known as

Mountain View Estates. (CF, pp. 3-14).

Plaintiffs Amy Dean, Donner Dean, Merryl Learned, and John Walls, Jr., are the owners of four parcels of land in Mountain View Estates ("Plaintiffs"). (CF, p. 4). Defendants Stephanie Casey, Trevor Casey, Wendy Brockman, and Clifton Brockman, Jr., (collectively "Defendants"), own two other parcels in Mountain View Estates. (CF, p. 4). Drew McCallister, Monique Russell, Victor Manuel Rodriguez Garcia, Azucena Diaz Soto, Greg Royer, and Joyce Henderson (the "Other Parcel Owners") own or at one time owned the remaining parcels. (*Id.*).



(CF, p. 1426).

2. The Complaint

On September 15, 2021, Plaintiffs filed a complaint against Defendants and the Other Parcel Owners. (CF, pp. 3-13). The complaint alleged that all twelve parcels within Mountain View Estates contained a 40-foot-wide equestrian easement around the outside perimeter of each parcel, as well as certain conditions conveyed with the deed to each parcel (the "Conditions"). (CF, pp. 6-7).

Namely, Plaintiffs alleged that the Conditions: (1) required the easement to be kept clear in a manner that allowed for its intended use; (2) mandated that the easement be maintained in a neat and attractive manner with special attention to the control of weeds; and (3) could not be waived, abandoned, terminated, nor amended except by unanimous written consent of all parcel owners. (CF, p. 7).

The complaint alleged that Defendants Wendy and Clifton Brockman had installed six fence posts in the equestrian easement on their parcel. (CF, p. 8). It likewise alleged that the Brockmans had placed a survey stake in the middle of the entrance to the equestrian

easement. (*Id.*). Finally, the complaint alleged that the Brockmans had "placed a three foot by 15 foot pile of dirt" into the middle of the easement and had "added additional dirt" to the pile shortly before the lawsuit was filed. (*Id.*).

With regard to the Caseys, the complaint alleged that they had installed fencing across a portion of the equestrian easement on their parcel such that "there is now only a six foot opening on the equestrian trail." (CF, p. 9). The complaint likewise averred that the Caseys had called the sheriff to report a trespass when the equestrian easement was being mowed. (*Id.*).

Against this backdrop, the complaint asserted claims against the Brockmans and the Caseys for trespass and nuisance as a result of their alleged interference with the equestrian easement. (CF, pp. 10-11). Furthermore, the complaint asserted a claim for declaratory relief against the Brockmans, the Caseys, and the Other Parcel Owners seeking a declaration that: (1) the equestrian easement ran with the land; (2) the owners of all parcels were not to interfere with or obstruct the equestrian easement; (3) any such interference or obstruction could

be subject to injunctive relief; (4) the immediate removal of all fence posts, fencing, or dirt piles in the equestrian easements on the Brockman and Casey parcels; (5) the Plaintiffs and other parcel owners have the right to maintain the equestrian easement for mowing and general maintenance; and (6) the equestrian easement applies to all parcel owners within Mountain View Estates. (CF, pp. 11-12).

Importantly, the complaint was never amended, and nowhere did it seek any relief against Defendants or the Other Parcel Owners based on a separate easement concerning a private roadway providing access to Mountain View Estates known as East Briarwood Place. (CF, pp. 3-13).

3. The Other Parcel Owners Default

The Other Parcel Owners did not respond to the complaint and collectively defaulted. (CF, pp. 253, 286-87). Plaintiffs, however, never filed a motion for entry of default judgment against any of them. (*See generally*, CF pp. 1-2145). Further, Plaintiffs never requested a default judgment damages hearing against the Other Parcel Owners, and such a hearing was never conducted by the district court. (*Id.*).

4. The Brockmans And Caseys Assert Equitable Defenses And Counterclaims

In their Verified Answer to the complaint, the Brockmans asserted defenses of waiver, equitable estoppel, laches, and unclean hands. (CF, p. 198-99). All of these defenses were based, in part, on the fact that although Plaintiffs were seeking equitable relief to enjoin the Brockmans and the Caseys from placing gates or fencing across the equestrian easements on their parcels, there had been a longstanding practice among the parcel owners of Mountain View Estates of both placing fences or gates across the equestrian easement and allowing livestock to graze on it. (*Id.*). Indeed, the Verified Answer alleged that "[s]ome of the Plaintiffs themselves have cattle and have constructed fences and gates [across the easement] to contain those cattle." (CF, p. 198).

Several months later, the Brockmans amended their Verified Answer to assert counterclaims against Plaintiffs for abuse of process, declaratory relief, and injunctive relief. (CF, p. 519-26). Specifically, the Amended Verified Answer alleged that after the Brockmans refused to consent to extensive amendments to the Conditions, the Plaintiffs filed this lawsuit and conspired to engage in a pattern of harassment and retaliation against them. (CF, p. 523).

As to the abuse of process claim, the Brockmans alleged that "[t]he principal reason for the [Plaintiffs] filing of this action was to coerce the Brockmans into agreeing to the changes to the Conditions that the [Plaintiffs] had earlier sought and that the Brockmans had rejected." (CF, p. 524). They further asserted that the filing of the action was attended by circumstances of fraud, malice, or willful and wanton conduct. (*Id.*). With regard to their declaratory relief claim, the Brockmans alleged that there was a dispute as to whether the equestrian easement was exclusive or nonexclusive. (*Id.*). And, concerning their claim for injunctive relief, the Brockmans sought to enjoin the Plaintiffs from entering their property for any purpose other than the permitted use of the easement. (CF, p. 525).

The Caseys followed suit. (CF, pp. 215-49). In their Answer and Counterclaim, the Caseys alleged that Plaintiffs' claims were barred by the doctrines of unclean hands, waiver, equitable estoppel, and laches. (CF, p. 222). And, similar to the Brockmans, the Caseys alleged counterclaims for: (1) invasion of privacy by intrusion; (2) trespass; (3) breach of the Conditions; (4) abuse of process; (5) civil conspiracy; (6)

declaratory judgment; and (7) injunctive relief. (CF, pp. 231-35). Unlike the Brockmans, however, the Casey's abuse of process claim was based on Plaintiff Amy Dean's filing of an unsuccessful action for a protective order against Defendant Stephanie Casey predicated on innocuous conduct. (CF, p.233).

Consistent with their answers and counterclaims, Defendants alleged in the Case Management Order that—despite filing the action to enjoin the Brockmans and the Caseys from placing a fence or gate across the easement to contain livestock—"Plaintiffs Amy and Donner Dean have fencing and gates over the portion of the equestrian easement on their property, and [Plaintiff] Merryl Learned has completely blocked the equestrian easement with fencing on his property." (CF, p. 297). In other words, Defendants averred that Plaintiffs lacked the equity necessary to receive equity. (*See id.*).

Importantly, at no point in the underlying proceedings did Plaintiffs attempt to dismiss any of the defenses or counterclaims filed against them by the Brockmans or the Caseys. Plaintiffs filed no motion to dismiss. They filed no motion for summary judgment seeking this

relief. And they never raised a motion for directed verdict at trial. (*See generally*, CF, pp. 1-2145).

5. The Summary Judgment Orders

The Brockmans and the Caseys collectively filed four dispositive motions and prevailed on several. (CF, pp. 599-603, 884-900, 901-13, 914-25).

First, the Brockman's filed a Motion for Determination of Law that the equestrian easement was nonexclusive such that Defendants could use it in any manner that did not unreasonably interfere with its intended use and enjoyment by the Plaintiffs. (CF, pp. 599-603). In granting this relief, the district court concluded:

> a. The Easement unambiguously states it is nonexclusive, and therefore Defendants retain the right to use the property in common with the Plaintiffs.
>
> b. The nature and purpose of the Easement is also unambiguous: the commonly understood use of the word "equestrian" means the Easement is for horseback riding and related activities.
>
> c. The Easement may be used by both the owners of the servient estate (the Defendants herein) provided Defendants' use permits full use and enjoyment of the easement for horseback

> riding and related activities by the owners of the dominant estate (the Plaintiffs).

(CF, p. 646).

Second, the Caseys filed a Motion for Partial Summary Judgment alleging that Plaintiffs had violated the Conditions in numerous respects. (CF, pp. 884-900). For example, the Caseys produced photographic and testimonial evidence that Plaintiff Wall had violated the Conditions by using his parcels as a junk yard to store and sell unsightly vehicles, boats, equipment, trash, and scrap materials. (CF, pp. 799-804, 805-07). They produced evidence that Plaintiff Wall had built a residence on one of his parcels without obtaining any permits. (CF, p. 801). They produced evidence that Plaintiff Wall and Plaintiff Learned had violated the Conditions by improperly displaying signage on their parcels. (CF, pp. 799-804, 807, 808). They produced photographs and testimony that Plaintiff Learned—despite filing this action to enjoin the Brockmans and Caseys from doing the same—had <u>completely blocked off the equestrian easement on his parcel at the time he filed this lawsuit</u>. (CF, pp. 803, 808). And they produced evidence that Amy Dean had repeatedly violated a Condition that all pets be contained and controlled by allowing

her dogs to be off-leash on the equestrian easement. (CF, pp. 802, 809-12).

In ruling on this Motion, the district court held that certain of the Plaintiffs had, in fact, violated the Conditions.

> The Court concludes:
>
> a. It is undisputed that Walls and Learned have violated the sign conditions of the Easement.
>
> b. It is undisputed that Learned blocked the equestrian Easement.
>
> c. The remaining allegations in the Motion are disputed issues of genuine material facts.

(CF, p. 1323).

Third, the Brockmans and the Caseys each filed a dispositive motion concerning whether maintenance of the easement was an *individual* responsibility falling upon each parcel owner with respect to their land or a *collective* responsibility of all parcel owners. (CF, pp. 901-13, 914-25).

Importantly, the Conditions do not provide for the formation of a Homeowner's Association nor the creation of another entity to collectively perform maintenance tasks. (*Id.*). The Conditions do not allow such an

entity to collect money from all parcel owners in order to effectuate collective maintenance. (*Id.*). And they certainly do not contemplate the assessment of annual fees from each parcel owner and the appointment of a receiver to perform that collective maintenance. (*Id.*).

Despite that the plain language of the Conditions required *each parcel owner* to maintain the easements *on their land*, the district court concluded that maintenance was a collective responsibility of all parcel owners.

> The Court concludes:
>
> a. The Easements are unambiguous and not silent as to maintenance.
>
> b. Rather, reasonable maintenance of the Easement is a right and obligation of all of the lot owners, specifically, maintained in a neat and attractive manner, with special attention given to the control of weeds, and otherwise kept clear of obstructions.
>
> c. Further, reasonable maintenance of the Road Easement is, similarly, the right and obligation of all of the parcel owners.
>
> d. Reasonable maintenance of both Easements must be in accordance with the First Summary Judgment Order concerning the respective rights of the dominant and servient estates.

> e. The parties shall, within twenty-one days (21) days, after conferral as required by C.R.C.P. Rule 121, 1-15 (8), file a Joint Status Report stating each party's consent or objection, and if consent, the nomination, and payment for the services of a person to be appointed indefinitely as a Receiver, to manage the maintenance of the Easements in conformity with the Orders of the Court pursuant to C.R.C.P. Rule 66(a)(3).

(CF, pp. 1319-20).

Following the order, the Brockmans and the Caseys objected to the appointment of a receiver as being inconsistent with the Conditions. (CF, p. 1324-27). In addition, this relief could not be ordered against the defaulting Other Parcel Owners given that the complaints against them did not request such relief and, indeed, did not seek to adjudicate any rights whatsoever with respect to East Briarwood Place. (CF, pp. 3-13).

6. The Trial Management Order And Trial Management Conference

The litigation progressed, and the district court entered a Trial Management Order. (CF, pp. 1432-48). In the TMO, the parties outlined and explained the claims and defenses remaining for trial—including Defendants' equitable defenses of waiver, estoppel, and laches—as well

as Defendants' counterclaims. (*Id.*).

Then, at the Trial Management Conference, Defendants explained these defenses and counterclaims to the district court. (TR, 1/20/23, pp. 21:21-32:12). After hearing argument from the Brockman's counsel regarding the defenses of waiver, estoppel, and latches based on Plaintiffs' prior conduct of placing gates on the easement and fencing across it to graze livestock, the district court observed:

> Hmm. Call me skeptical; I've done an awful lot of these – cases as a lawyer, a few as a judge, but you may persuade me. <u>There is some law on your side there.</u>

(TR, 1/20/23, p. 28:4-6) (emphasis added).

Regarding the claims for abuse of process, the district court made similar observations:

> I'm pretty skeptical about that claim too. I've seen quite a few cases that would run contrary, <u>but that's why we're going to have a trial, I guess.</u> And I'll read your trial brief and see if you can cue me in.

(TR, 1/20/23, p. 29:21-25) (emphasis added).

Finally, after the Caseys explained their invasion of privacy and civil conspiracy claims—which involved coordinated conduct by the

Plaintiffs to harass and intimidate them—the district court identified no concerns with the claims and understood that they would take time to flesh out at trial:

> Okay. I understood that generally. I – I see what your focus is. Thank you.
>
> All right. Okay. I don't have any other questions about the claims. I understand what the scope is here, it's pretty broad. All the claims the Caseys are bringing – not all – many of these claims that Mr. Fermelia was just describing relating to civil conspiracy take some time to [flesh] out.

(TR, 1/20/23, p. 32:11-18).

7. The District Court Sua Sponte Determines That The Equitable Defenses And Counterclaims Are Invalid And Threatens Defendants And Their Counsel With Contempt On At Least Seven Occasions

Ten days after the Trial Management Conference, the parties proceeded to a 3-day bench trial. At least initially, the district court recognized that evidence concerning whether Plaintiffs had placed gates upon, or fencing across, the equestrian easement was relevant to whether Defendants' engaging in the same conduct constituted an unreasonable interference with Plaintiffs' use and enjoyment of the easement. Indeed, in response to an objection to this type of evidence during the Plaintiffs'

first witness, the district court stated:

> Yeah, I thought so. So noted in the trial management order is that at least the Brockmans' verified answers include the defense of unclean hands, also, equitable estoppel [and] laches in waiver. I'm not sure, Mr. Fermelia, if I see that description of defenses or if they even exist on behalf of the Caseys. But the trial is joined, so it's not all that important . . . .

(TR, 2/1/23, p. 89:6-13).

Immediately thereafter, the Casey's counsel pointed out they too had pled defenses of unclean hands, waiver, estoppel, and laches. (TR, 2/1/23, p. 91:21-23). Moments later, the district court held that because these equitable defenses had, in fact, been pled by the Brockmans and the Caseys since the beginning of the case, evidence that Plaintiffs had gated and fenced across the equestrian easement was relevant to their claims that Defendants' doing so would constitute an unreasonable interference with Plaintiffs' use and enjoyment of the easement:

> So if they're pled as defenses, it's relevant. I'll make a decision whether or not (indiscernable) if there's any evidence that the prior acts of the Plaintiffs and/or others who were met without objection matter in this case [sic]. It's clearly even part of the Defense's posture from the initial pleadings. So as I said in shorthand 15 minutes

> ago, the objection is overruled and you can proceed.

(TR, 2/1/23, p. 93:10-20).

The district court paused for lunch a few minutes later, and when court resumed, everything changed. The district court did an about-face and *sua sponte* concluded—without a motion, briefing, or argument—that Defendants' equitable defenses (save for unclean hands) were invalid and would not be entertained:

> So we are dealing with a recorded, platted set of rights to a road and an equestrian easement. The only defense that was focused on before the break that conceivably could apply to that kind of request for enforcement of those rights would possibly be unclean hands, which requires a finding of unconscionable conduct by the Claimant. Unconscionable conduct.
>
> If I'm going to hear, for two and a half more days, a dispute among neighbors in the face of historic use based on consent, and that's it, don't expect a positive result. [I] will increasingly interfere with what I find to be irrelevant lines of questioning, I will limit this case down to what is, I – as I've just indicated, the reasons we're here, and I will do it in an increasingly impatient way, I'm sorry to say.
>
> I just know myself. Been doing this for decades, folks, and I don't have much patience for waste of my time. If you want to write big checks to your

> lawyers for three days so you can make a show of it, it's not going to be with my consent.
>
> So, Mr. Fermelia, continue your cross-exam (of the first witness), keep my comments in mind, and don't expect anything except what I just said to happen if you don't.

(TR, 2/1/23, pp. 114:12-115:16).

Over the remaining two-and-one-half days of trial, the district court repeatedly engaged in inappropriate conduct that can only be described as biased and unbecoming of a judicial officer.

For example, with the time remaining on the first day of trial, the district court stated:

- "I – oh my goodness, Counsel. I don't care about Palestine Road. I don't care about County Road 42. I do care about East Briarwood Place and the allegations that affect use of that road. [T]his exhibit is cumulative and it's irrelevant. It's not going to be admitted by the Court's sua sponte decision. Move on and focus on what matters." (TR, 2/1/23, p. 117:12-25).
- "So the question would be, did you, Ms. Dean, make a statement to Officer Peterson, saying whatever it is you allege? That's the

form of the question, Counsel. Try to comply with the Rules of Evidence and ask a proper question." (TR, 2/1/23, p. 124:7-9).

- "Ask a proper question, Counsel." (TR, 2/1/23, p. 124:24).

At the close of the first day of trial, the district court reiterated that it had made the *sua sponte* decision that Defendants' equitable defenses were invalid. (TR, 2/1/23, pp. 218:14-222:23). The court then threatened Defendants and their counsel with *contempt* if there was any more examination concerning the defenses it found inapplicable:

> [I]f I hear any more examination from anybody that goes to these defenses, which I am finding are inapplicable to any fact that I'm – heard in evidence or which has been pled or even alleged, without your ability to show cause why this – through an offer of proof why the law I just cited is inapplicable, you may run into a contempt.

(TR, 2/1/23, p. 221:14-19).

Not wishing to be put in jail, Defendants and their attorneys released three witnesses from subpoena who could provide additional evidence that Plaintiffs' claims for unreasonable interference with the equestrian easement were totally inconsistent with their own historical uses of that easement for well over a decade. (TR, 2/2/23, p. 147:2-5).

On the second day of trial, the district court tried to back away from its threat of contempt, and indicated (again, *sua sponte*) its newfound belief that the defenses might be groundless and frivolous. (TR, 2/2/23, p. 5:17-25). But this didn't last. Shortly into the second day of trial, the district court resumed making improper remarks to Defendants and their counsel:

- "Yeah, I know – I know – my God, man, we've been here for two days. It's Exhibit 2 or 3. In fact, it's condition 2 – or Exhibit 2." (TR, 2/1/23, pp. 90:25-91:2).
- "I'm not going to sit here while you read the whole document to the witness." (TR, 2/1/23, pp. 99:21-100:1).
- Mr. Fermelia: "But may I make a further offer of proof on the intent?" Court: "Nope. I already asked you your position, you told me what you wanted to tell me. You can tell the rest to the Court of Appeals. We're winding down two days of trial. We're running out of time, counsel. When I ask a question, give me an answer." (TR, 2/1/23, pp. 152:24-153:6).

On the third and final day of trial, the district court ramped up its

threats to put Defendants' counsel in jail if they presented evidence or arguments concerning the defenses and counterclaims raised in their pleadings, preserved in the Trial Management Order, acknowledged at the Trial Management Conference as issues for trial, and for which none of the Plaintiffs had sought dispositive relief.

- "It just astounds me that that never – that wasn't done in this trial. That's just a footnote to a lot of things that just baffle me." (TR, 2/3/23, p. 70:20-22).
- "Because if you're trying to again, for God knows how many times, present evidence to suggest that I should vitiate terms of these conditions based on concepts of laches, waiver, estoppel, or unclean hands, I have ruled repeatedly, they are not effective defenses to the claim of an easement I've already found is valid and enforceable. [S]o tell me – I'll give you one last chance. And then we're starting to get really close to the contempt lines. And I don't mean frivolous and groundless, I mean contempt." (TR, 2/3/23, p. 160:11-22).
- "If you continue to take Court time on defenses I have

repeatedly told you do not apply, unless you have legal authority, sir, not only are you crossing groundless and frivolous, you better explain to the Brockmans what that means for their checkbook. And you're getting very close now to me finding you in contempt. Because I've said it ten times. It feels like a thousand. (TR, 2/3/23, pp. 161:23-162:4).

- "But don't push it, Mr. Cohen, or we're going to have a contempt proceeding, and you're walking the Brockmans into writing a check to the Plaintiffs. Do you understand me?" (TR, 2/3/23, p. 162:9-11).
- "[Y]ou better well have a case to cite me that says I'm wrong about this, Mr. Cohen. Or we're going to have a separate [contempt] proceeding." (TR, 2/3/23, p. 167:21-23).
- "What is your legal authority, Mr. Cohen? I swear to God, I'm trying not to hold you in contempt. And I am biting my lip." (TR, 2/3/23, p. 168:8-10).

Moments before the trial ended, this culminated in a final threat by the district court that counsel should think about bringing a toothbrush

to court in order to be a little more comfortable in jail:

> I'm – I'm – if – if you don't respect the Court's order about the relevancy of that aspect of the case again, you will be held in contempt. And you'd better be thinking about bringing a toothbrush. Because Monday night, that might be what you need to make yourself a little bit comfortable in where I'll send you. Do you understand me?

(TR, 2/3/23, pp. 169:25-170:5).

8. The Final Order And Judgment

On March 17, 2023, the district court entered a final order and judgment. (CF, pp. 1638-53). The district court concluded that Plaintiffs were entitled to nominal damages for their easement trespass claim against Defendants. (CF, p. 1652). The court concluded that Plaintiff Walls was entitled to nominal damages against Defendants for damages to his person and tractor. (*Id.*). The court concluded that the Caseys prevailed on their trespass claim against Plaintiff Walls and awarded $800 in damages. (*Id.*).

In addition, the district court issued injunctive relief affecting all of the Mountain View Estate parcel owners. (*Id.*). For example, the court issued a mandatory injunction requiring the Brockmans and Caseys to

remove obstructions placed on or across the equestrian easement, including the removal of any fencing, gates, or berms. (*Id.*). The court issued a mandatory injunction prohibiting any person on the subdivision from shooting firearms while any person is engaged in equestrian activities or at any time in the direction of the equestrian easement. (*Id.*). The court issued a mandatory injunction prohibiting any person from allowing cattle to graze on the equestrian easement. (*Id.*). The court issued a mandatory injunction requiring all parcel owners to comply with all Conditions. (*Id.*).

Further, the district court appointed a receiver to manage all future maintenance of the equestrian easement and East Briarwood Place. (*Id.*). The court ordered that the receiver had the authority to hire contractors, accountants, and other professionals necessary for the performance of this work. (*Id.*). The court ordered that every Mountain View Estate parcel owner "shall be assessed an initial retainer fee of $1,000," and thereafter, that each lot owner shall be assessed an annual fee of $2,000 in perpetuity. (*Id.*).

Moreover, the district court stated that its Order and Final

Judgment "may be recorded in the real property index for Arapahoe County, State of Colorado by any person." (CF, p. 1653). It likewise ordered that any person who violated any injunction set forth in the order may be subject to contempt. (*Id.*).

Finally, the district court ordered that all of Defendants' equitable defenses and most of their counterclaims were frivolous, groundless, and vexatious. (CF, pp. 1651-52). Then the district court granted judgment in Plaintiffs' favor and against the Brockmans, the Caseys, and their attorneys for one-half of Plaintiffs' attorney fees and costs in the litigation. (CF, p. 1653).

9. The District Court Orders That Defendants And Their Counsel Are Jointly And Severally Liable For $97,651.68 In Attorney Fees And Costs

Despite that only a fraction of Plaintiffs' attorney fees could even arguably be attributed to the defenses and counterclaims, the district court subsequently entered judgment against the Brockmans, the Caseys, and their counsel for $97,651.68 with 8% interest accruing annually. (CF, p. 1925-26). After entering the final judgment, the district court *sua sponte* recused itself from further proceedings

regarding the receivership. (CF, p. 2008). This appeal followed.

III. SUMMARY OF THE ARGUMENT

The orders and judgment on appeal should be reversed for at least five reasons.

First, by repeatedly threatening to put Defendants' attorneys in jail, the district court deprived Defendants of a fair trial. The conduct amounted to actual bias, infected every aspect of the trial and resulting judgment, and alone warrants reversal.

Second, the district court abused its discretion in concluding that Defendants' counterclaims and equitable claims were substantially frivolous, groundless, and vexatious. The counterclaims and defenses were supported by law, evidence, or at bottom a good-faith argument for the modification of existing law.

Third, the district court abused its discretion in awarding Plaintiffs one-half of their attorney fees and costs, and it erred in applying 8% interest to that award. The district court's fee award bears no relation to the amount of time or expenses incurred by Plaintiffs in addressing the counterclaims and defenses, and interest on fees is prohibited.

Fourth, the district court erred in its pre-trial legal determination that the Conditions provide for the collective maintenance of all easements. The plain language of the Conditions mandate a different result.

Fifth, in addition to the above, the Final Order and Judgment is legally infirm and must reversed because it grants relief against the defaulting Other Parcel Owners that was never requested in the complaint against them.

IV. ARGUMENT

A. The District Court Demonstrated Actual Bias And Deprived Defendants Of A Fair Trial

1. Standard Of Review And Preservation Of Issue

No Colorado case addresses the standard of review applying to a claim of judicial bias in the civil context. In the criminal realm, the Colorado Supreme Court has held that a defendant asserting judicial bias must establish that the judge had "a substantial bent of mind against him or her." *People v. Drake*, 748 P.2d 1237, 1249 (Colo. 1988). Further, the record must establish such bias clearly, and speculative statements or conclusions are insufficient. *Id.* Numerous statements of a judge

during trial demonstrating irritation or intolerance toward defense questioning can render a trial unfair. *People v. Coria*, 937 P.2d 386, 391 (Colo. 1997).

It is equally unclear how a defendant can preserve (or waive) a claim of judicial bias arising during trial. In the criminal context, judicial bias is considered structural error requiring automatic reversal without individualized analysis of how the error impacted the judgment. *Hagos v. People*, 288 P.3d 116, 119 (Colo. 2012). Here, because the judicial bias originated from the district court during trial, it was not (and could not have been) raised and ruled on. *Rinker v. Colina-Lee*, 452 P.3d 161, 168 (Colo. App. 2019) (holding that appeal of a *sua sponte* decision by a trial court is preserved regardless of whether it was objected to).

2. The District Court's Repeated Threats To Hold Defendants In Contempt Demonstrated A Substantial Bent Of Mind Against Them

The administration of justice is rooted in the principle that all litigants are entitled to a fair trial before a neutral judge. *Geer v. Stathopulos*, 309 P.3d 606, 609 (Colo. 1957). The integrity of the courts,

and the fairness of a trial, are impugned when a trial judge demonstrates a substantial bent of mind against a defendant. *See id.*

"The test is whether the judge's conduct departed from the required impartiality to such an extent as to deny the defendant a fair trial." *Coria*, 937 P.2d at 391. The judge must be free of any bias, prejudice, or interest directed toward any party or witness, and must avoid making rude comments or evidencing irritation. *Id.*; *People v. Vialpando*, 809 P.2d 1082, 1084 (Colo. App. 1990) (reversing first-degree murder conviction where judge made numerous statements during trial evidencing his irritation and intolerance of defense questioning).

These principles are incorporated in the Colorado Code of Judicial Conduct which requires a judge to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. C.J.C. 2.11(A); *see also People v. Richardson*, 2020 CO 46, ¶36. As relevant here, circumstances that might reasonably call into question a judge's impartiality include where "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." C.J.C.

2.11(A)(1). Similarly, C.J.C. 1.2 states, "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

While a judge's potential violation of the rules is not grounds for reversal, evidence demonstrating actual bias is. *Richardson*, 2020 CO 46, ¶39. In the both the civil and criminal contexts, actual bias exists if a judge has a bias or prejudice that in all probability will prevent him or her from dealing fairly with a party. *Bocian v. Owners Ins. Co.*, 2020 COA 98, ¶14; *see also People v. Julien*, 47 P.3d 1194, 1197 (Colo. 2002); *Adams Cnty. Housing Auth. v. Panzlau*, 2022 COA 148, ¶20. Even when there is no actual bias, a judge must recuse if his or her involvement with a case might create the *appearance* of impropriety. *Bocian*, 2020 COA 98, ¶14; *People in Interest of A.G.*, 262 P.3d 646, 650 (Colo. 2011).

The notion that a judge cannot preside over any civil or criminal case in which he or she has actual bias is likewise incorporated into Colorado law. Namely, C.R.S. section 16-6-201(1)(d) states that a judge "shall be disqualified" if he or she "is in any way interested or prejudiced

with respect to the case, the parties, or counsel." Indeed, this is so fundamental to fairness that, "[a]ny judge who knows of circumstances which disqualify him in a case shall, on his own motion, disqualify himself." C.R.S. § 16-6-201(2) (2022) (emphasis added).

Secondary sources echo these concerns. Francis C. Amendola, et al., 23A C.J.S. CRIMINAL PROCEDURE AND RIGHTS OF ACCUSED § 2004 (2023 Update) ("A judge's conduct or speech demonstrating bias in favor of the prosecution, or a trial infected with intimidation by a judge's rude or impatient remarks to counsel or witnesses, can constitute judicial misconduct."); Francis C. Amendola, et al., 23A C.J.S. CRIMINAL PROCEDURE AND RIGHTS OF ACCUSED § 1651 (2023 Update) ("On the other hand, a remark or conduct by the judge conveying an unwarranted reprimand, or a severe criticism on the methods of or discrimination against the defendant's counsel, clearly prejudicial action towards the defendant's attorney, or an attack on the motives of counsel with respect to particular conduct during the trial is improper."); Francis C. Amendola, et al., 23A C.J.S. CRIMINAL PROCEDURE AND RIGHTS OF ACCUSED § 1648 (2023 Update) ("The concept of judicial independence

does not equate to unbridled discretion on the judge's part to bully and threaten, disregard the requirements of the law, or ignore the defendant's constitutional rights.").

Here, the district court's comments and threats crossed the line. No litigant, and no attorney, should be subjected to near-constant criticism by the judge presiding over their case, coupled with daily threats of being jailed for contempt. This is doubly true when, as here, the judge is also serving as the finder of fact. And it's even more true when those criticisms and remarks are based on the court's misunderstanding of the governing law.

There was no way the district court could deal fairly with Defendants and their counsel when he threatened them with contempt on no less than seven occasions during a three-day trial. At the very least, the district court's on-the-record statement that counsel "better be thinking about bringing a toothbrush" because "Monday night, that might be what you need to make yourself a little bit more comfortable in where I'll send you"—had a chilling effect on Defendants' case, gave rise

to the appearance of impropriety, and should be disapproved of by this Court.

Nor were the district court's threats and remarks justified. After acknowledging on the first day of trial that evidence of Plaintiffs' conduct was relevant to the defenses in the initial pleadings, the district court returned from the lunch break and *sua sponte* determined that all of the defenses were invalid such that evidence concerning them would not be tolerated.

This appears to have been based on the district court's belief that the written terms of the Conditions could not be modified by Plaintiffs' conduct. But nobody was saying they could be. Following the court's summary judgment orders on the *legal import* of the Conditions, the issues remaining for trial on Plaintiffs' declaratory claim was whether Defendants had *unreasonably interfered* with Plaintiffs' use and enjoyment of the easement. This was equitable relief, and a party that seeks equity must do equity. Further, reasonableness is always based on the circumstances. Rather than having anything to do with modifying the written terms of the Conditions, the fact that Plaintiffs were claiming

Defendants had unreasonably interfered with their use and enjoyment of the equestrian easement—when Plaintiffs themselves had fenced and gated that same easement on their properties for more than a decade—is plainly relevant to whether Plaintiffs could in equity assert that the exact same conduct amounted to an unreasonable interference.

In addition to all of this, a review of the record will not reveal any instances of Defendants or their counsel acting inappropriately. Defendants and their counsel made no rude comments. They were not pugnacious or argumentative with the court in any respect. Their examinations of witnesses were at least as structured and professional as those of the Plaintiffs. And Defendants certainly didn't waste anyone's time. Indeed, over the course of just three days, Plaintiffs and Defendants were able to elicit testimony from ten witnesses—including two experts. The trial was scheduled for three days, and it was completed in three days.

All of this is to say that the district court demonstrated actual bias against Defendants and their lawyers and, at bottom, engaged in conduct giving rise to the appearance of impropriety. Nothing demonstrates this

better than the fact that, immediately following its Final Order and Judgment, the judge *sua sponte* recused himself from further proceedings concerning the receivership. (CF, p. 2008). Shortly thereafter, he resigned.

B. The District Court Abused Its Discretion In Concluding That All Of The Equitable Defenses And Most Of The Counterclaims Were Substantially Frivolous, Groundless, and Vexatious

1. Standard Of Review And Preservation Of Issue

The determination whether a claim is substantially frivolous, groundless, or vexatious is within the district court's discretion. *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 299 (Colo. App. 2009). A court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair. *Churchill v. Univ. of Colo. at Boulder*, 285 P.3d 986, 1008 (Colo. 2012).

The Brockmans and Caseys preserved this issue in their Responses to Plaintiffs' Motion for Attorney Fees and Costs. (CF, pp. 1828-33, 1834-37). The district court ruled on the issue in its Final Order and Judgment. (CF, pp. 1638-53).

2. The Equitable Defenses Were Not Substantially Frivolous,

Groundless, Or Vexatious

A claim or defense is frivolous for purposes of awarding attorney fees and costs if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984). A claim or defense is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial. *Id.* A vexatious claim is one brought or maintained in bad faith. *Hamon*, 229 P.3d at 301. None of these standards are met with respect to the equitable defenses raised by Defendants.

First, the only aspect of Plaintiffs' declaratory claim remaining for trial was equitable in nature. Specifically, Plaintiffs sought a declaration that any fencing, gates, or berms placed by Defendants in or across the equestrian easement constituted an unreasonable interference with Plaintiffs' use and enjoyment of the equestrian easement. (CF, p. 1351). A party who seeks equity must do equity. *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000); *Ajay Sports, Inc. v. Casazza*, 1 P.3d 267, 276

(Colo. App. 2000). Plaintiffs equitable defenses were based on the fact that, although Plaintiffs were asserting Defendants had unreasonably interfered with the equestrian easement by placing fencing or gates across it, or by signaling their intent to graze cattle upon it, Plaintiffs themselves had done these things for well over a decade. (CF, p. 198). There's nothing frivolous, groundless, or vexatious about Defendants' assertion that Plaintiffs' engaging in the same conduct barred them from equitable relief.

Second, the equitable defenses were supported by substantial evidence at trial.[1] Among other things, Plaintiff Amy Dean testified that there was a gate across the equestrian easement on her lot when she moved there in 2006, and that she kept the gate for approximately 10 years thereafter. (TR, 2/1/23, p. 27:17-25, 85:2-25). Ms. Dean testified that a gate was installed across the equestrian easement on Plaintiff Walls' lot to contain livestock for approximately 12 years. (TR, 2/1/23, p. 28:5-20; 34:1). Ms. Dean testified that Greg Royer (who owned three

[1] It is also unfair for the district court to refuse to entertain any evidence of these defenses while subsequently holding that they were not supported by sufficient evidence.

parcels) had a gate on the easement for approximately 10 years, and that the gate was still present on the easement at the time of trial. (TR, 2/1/23, pp. 31:2-32:19; 34:2-5). Ms. Dean testified that Ms. Russell, who owned parcel two, had fencing across the portion of the equestrian easement on her property. (TR, 2/1/23, p. 33:18-21). Ms. Dean testified that prior to the lawsuit, having livestock graze on the equestrian easement was an accepted practice among the parcel owners at Mountain View Estates. (TR, 2/1/23, pp. 82:18-83:3, 95:2-10, 103:19-21). Ms. Dean testified that prior to the lawsuit, it was an accepted practice that parcel owners would have gates and fencing across the equestrian easement. (TR, 2/1/23, p. 84:20-24). Ms. Dean testified that Plaintiff Learned had fenced off the equestrian easement and grazed cattle on it. (TR, 2/1/23, pp. 156:22-157:5). Ms. Dean testified that Drew McCallister had likewise fenced the equestrian easement on his parcel. (TR, 2/1/23, p. 158:6-12). Finally, Ms. Casey testified that all of the Plaintiffs had recently put fence posts down the middle of the equestrian easement on their lots. (TR, 2/3/23, p. 127:7-12).

With specific regard to the laches defense, Ms. Dean testified that

she was aware of the Conditions (TR, 2/1/23, p. 23:1-7), was aware of certain violations like fencing and cattle grazing on the easement, but that she did nothing to enforce them for approximately 15 years. (TR, 2/1/23, pp. 158:23-159:1). And, with regard to the equitable estoppel defense, Defendant Wendy Brockman testified that she notified Ms. Dean she was putting a gate across the equestrian easement as other parcel owners had done, that Ms. Dean twice told her this was acceptable, and that Ms. Brockman relied on those representations. (TR, 2/3/23, pp. 154:12-155:9). The list goes on.

Third, Colorado law specifically states that a party does not necessarily interfere with the use and enjoyment of an easement by placing a gate across it to contain livestock. *Schold v. Sawyer*, 944 P.2d 683, 685 (Colo. App. 1997). Thus, Plaintiffs' placement of fencing and gates across the equestrian easement and allowing livestock to graze upon it was relevant to whether they were barred in equity from enjoining the same conduct by Defendants, as well as whether such conduct amounted to an unreasonable interference. Further, while the district court concluded that the equitable defenses were vexatious

because Defendants continued to pursue them after the court (erroneously) held they were inapplicable, the court retained discretion to revisit this ruling. A litigant does not act vexatiously "for attempting to convince the court to reconsider its view of the applicable law." *Hamon*, 229 P.3d at 301.

All of this is to say that the district court abused its discretion in determining that the equitable defenses were substantially frivolous, groundless, or vexatious and awarding attorney fees and costs as a result.

3. The Counterclaims Were Not Substantially Frivolous, Groundless, Or Vexatious

For similar reasons, Defendants' counterclaims for invasion of privacy, conspiracy, and abuse of process were not substantially frivolous, groundless, or vexatious.

With regard to their conspiracy and invasion of privacy claims, the Caseys presented evidence that Plaintiffs conspired to harass them and get them in trouble with the law. Chief among this was a group text message between the Plaintiffs trying to collectively goad Ms. Casey into a situation in which she would trespass while the police were on standby. (Exhibits, pp. 661-63; admitted at TR, 2/3/23, p. 14:8-12). In addition,

Ms. Casey testified that, after he filed this lawsuit against her, Plaintiff Walls repeatedly drove in front of her house displaying either a rifle or a dead animal mounted to his vehicle while honking, screaming, or yelling at her. (TR, 2/2/23, p. 245:19-23; TR, 2/3/23, p. 56:14-25). She likewise testified that Plaintiff Walls would sit and stare at her young daughters in an intimidating fashion. (TR, 2/3/23, p. 93:1-14).

Finally, the Caseys presented evidence that the Plaintiffs had collectively sent them a letter misrepresenting that an HOA-like entity had been formed and demanding the payment of money from the Brockmans and Caseys for road maintenance. (Exhibits, pp. 761-65). None of this is allowed pursuant to the Conditions, and it is, of course, unlawful to misrepresent that such an entity has been formed for the purpose of collecting money which the Plaintiffs knew they had no legal right to collect. In other words, it's fraud.

With specific regard to their abuse of process claim, the Caseys alleged that Ms. Dean had filed an unsuccessful action for a protective order predicated on an incident during which Ms. Casey was simply *driving on her own land*. (TR, 2/1/23, p. 77:19-21). This was in stark

contrast to Exhibit 165—a text message involving Ms. Dean which *acknowledged* that Ms. Casey was allowed to drive on her own property. (Exhibits, pp. 661-63; admitted at TR, 2/3/23, p. 14:8-12). Likewise, both the Brockmans and the Caseys presented evidence that Plaintiffs had filed the instant lawsuit with the improper purpose of trying to coerce them into consenting to drastic modifications to the Conditions which they had every right to oppose. (Exhibits, pp. 753-59). At a minimum, Colorado law supports the notion that an abuse of process claim may lie where a party uses a lawsuit for a coercive goal. *Am. Guar. & Liability Ins. Co. v. King*, 97 P.3d 161, 170 (Colo. App. 2003).

In sum, the counterclaims were not so lacking in evidence and law to be considered substantially frivolous, groundless, or vexatious. Presumably, that's why Plaintiffs never sought to dismiss them at any point, and it's why the district court acknowledged the claims as being appropriate for trial at the Trial Management Conference.

C. The District Court Abused Its Discretion In Awarding Plaintiffs One-Half Of Their Attorney Fees And Costs With Eight Percent Interest

1. Standard Of Review And Preservation Of Issue

The reasonableness of a trial court's award of attorney fees is reviewed for an abuse of discretion. *Payan v. Nash Finch Co.*, 310 P.3d 212, 216 (Colo. App. 2012).

The Brockmans and Caseys preserved this issue in their Responses to Plaintiffs' Motion for Attorney Fees and Costs. (CF, pp. 1828-33, 1834-37). The district court ruled on the issue in its Order Granting Attorney Fees. (CF, p. 1924).

2. There Is No Rational Relationship Between The Defenses And Counterclaims And The Fees And Costs Awarded

"An award of attorney fees must be reasonable." *Tisch v. Tisch*, 2019 COA 41, ¶84. Here, this standard is not met.

In its Final Order and Judgment, the district court awarded Plaintiffs one-half of their attorney fees and costs incurred in the lawsuit based on its conclusion that the Brockmans and Caseys had pursued frivolous, groundless, and vexatious claims and defenses. Prior to the trial however, Plaintiffs had sought no dispositive relief with respect to those claims and defenses. In addition, at least half of the trial was devoted to Plaintiffs' presentation of evidence. Further, Defendants

prevailed on many of their claims on summary judgment. The Caseys likewise prevailed at trial on their trespass claim against Plaintiff Walls. And both the Brockmans and the Caseys prevailed in obtaining other relief, such as the exclusion of certain expert testimony. (CF, pp. 994-95).

None of Plaintiffs' pre-trial fees and expenses can be attributed to any of the allegedly frivolous claims and defenses, and much of Plaintiffs' fees and costs related to the trial were incurred in connection with presenting their case-in-chief. In other words, the amount of attorney fees and costs awarded by the district court was arbitrary, unreasonable, and unfair. At a minimum, the award should be vacated for a determination of the fees and costs actually expended by Plaintiffs in addressing the claims and defenses. In addition, the trial court's imposition of 8% interest on the fee award is *per se* improper. *Farmers Reservoir & Irr. Co. v. City of Golden*, 113 P.3d 119, 133-35 (Colo. 2005).

D. The District Court Erred In Holding That The Conditions Impose A Collective Maintenance Obligation

1. Standard Of Review And Preservation Of Issue

De novo review applies to a district court's legal determinations concerning an easement. *Brown v. Faatz*, 197 P.3d 245, 249 (Colo. App. 2008).

The Brockmans and Caseys preserved this issue in their dispositive motions regarding easement maintenance. (CF, pp. 901-13, 914-25). The district court ruled on the issue in its Order resolving those motions. (CF, pp. 1318-20).

2. The Conditions State That "Each" Lot Owner Is Responsible For Maintenance

Colorado courts adhere to general principles of contract interpretation when examining the language in a deed. *Owens v. Tergeson*, 363 P.3d 826, 830 (Colo. App. 2015). Where a deed is unambiguous, it must be enforced as written. *Id.* Further, a contract should never be interpreted to yield an absurd result. *EnCana Oil & Gas (USA), Inc. v. Miller*, 2017 COA 112, ¶28.

Here, the district court interpreted the language of the Conditions to impose a collective obligation on all parcel owners to maintain the equestrian and roadway easements. It later appointed a receiver, and

imposed the annual assessment of fees on all parcel owners for maintenance. This was error.

The Conditions plainly state that maintenance is the obligation of each individual parcel owner with respect to their lot. For example, the Conditions relating to lot maintenance state:

> **11. Lot Maintenance**
> The structures and grounds, including any open space, equestrian trails, and landscape or greenbelt area, of each lot shall be maintained in a neat and attractive manner. Special attention shall be given to the control of weeks, which may constitute a fire hazard.
>
> **12. Exterior Maintenance**
> All owners shall keep all exteriors of all buildings in good repair and appearance.
>
> **15. Equestrian Trail**
> The 40 foot equestrian trail will be measured [from] lot lines as provided on the boundary survey for each individual lot. Owners are responsible for the accurate measurement or the hiring of [a] survey company to maintain accuracy.
>
> **18. Road Maintenance**
> Purchasers of each lot in the Mountain View Estates Subdivision are responsible for the maintenance of the private road known as East Briarwood Plaice. This excludes any and all lots owned by Kenlou, LLC.

(CF, p. 17) (emphasis added).

Individually and in aggregate, the Conditions evidence an intent that *each parcel owner* will maintain any easements on *their land*. The Conditions do not provide for an HOA or collective maintenance entity. They do not allow for a receiver to collectively perform maintenance duties. And they do not allow for the assessment of fees against each lot owner to effectuate collective maintenance. The district court's interpretation runs contrary to the plain language of the Conditions and effectively re-writes the contract.

It also yields an absurd result. In addition to maintenance of the equestrian trail and roadway easements, the Conditions state that "all owners" shall keep the exteriors of all buildings in good repair and appearance. This, like the other maintenance obligations, cannot reasonably be interpreted to be collective. Certainly it does not allow one parcel owner to trespass on the land of another to ensure that their home is in good repair and appearance. When considered in their entirety, as they must be, the Conditions impose individual rather than collective maintenance obligations.

Accordingly, the district court's Order re Motions Concerning Maintenance should be reversed.

E. In Addition To The Above, The Judgment Must Be Reversed Because It Grants Relief Against The Defaulting Parcel Owners That Was Never Requested In The Complaint

1. Standard Of Review And Preservation Of Issue

Jurisdictional questions are reviewed de novo and may be addressed for the first time on appeal. *Black v. Black*, 2020 COA 46M, ¶90.

The district court's injunctive relief with respect to the defaulting Other Parcel Owners was issued *sua sponte* in the Final Order and Judgment. (CF, pp. 1638-53). No party asked for this relief in their initial pleadings or proposed findings of fact or conclusions of law. (CF, pp. 3-13, 194-202, 215-249, 519-26, 1529-71, 1572-1601, 1602-37). The Brockmans and Caseys, however, specifically advised the district court that the appointment of a receiver regarding maintenance was inappropriate with respect to the defaulting Other Parcel Owners because such relief was not requested in the complaint. (CF, pp. 1325-26).

2. The District Court Lacked The Ability To Enter Relief Against The Defaulting Other Parcel Owners That Differed From That Requested In The Complaint

C.R.C.P. 54(c) directs that "a judgment by default shall not be different in kind from that prayed for in the demand for judgment." Along these lines, the Colorado Supreme Court has held that a court is "powerless" to impose relief against a defaulting party that differs from that requested in the complaint against it. *Toplitzky v. Schilt*, 146 Colo. 428, 361 P.2d 970, 972-73 (Colo. 1961).

Here, in addition to never seeking a default judgment, the Plaintiffs neither sought the appointment of a receiver, nor the assessment of maintenance fees, nor any form of injunctive relief against the Other Parcel Owners with respect to the maintenance of East Briarwood Place. In its Final Order and Judgment, however, the district court fashioned a remedy that: (1) imposed maintenance obligations on the Other Parcel Owners; (2) enjoined them from violating any Conditions; (3) appointed a receiver for maintenance of the equestrian and roadway easements; (4) imposed an initial fee of $1,000 and perpetual annual fees of $2,000 on all parcel owners; (5) enjoined all parcel owners from shooting in the

direction of the equestrian easement at any time; (6) provided that any parcel owner violating the Order is subject to contempt, and (7) allowed anyone to record the Order with Arapahoe County.

Simply put, these remedies were unavailable to the district court with respect to the defaulting Other Parcel Owners such that, in addition to the error outlined above, the Final Order and Judgment must be reversed.

V. CONCLUSION

For these reasons, Defendants-Appellants Stephanie Casey, Trevor Casey, Wendy Brockman, and Clifton Brockman, Jr., respectfully request that the Court reverse the judgment below and remand the case for further proceedings. The Brockmans and Caseys join in the briefs filed by the other appellants.

DATED this 13th day of November 2023.

Respectfully submitted,

LEVIN SITCOFF WANEKA PC

s/ Nelson A. Waneka
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November 2023, a true and correct copy of the foregoing **DEFENDANTS-APPELLANTS' OPENING BRIEF** was served via Colorado Court E-Filing to the following:

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