IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 82112

TY ALBISU, ROSIE ALBISU, and
ANCHOR S-RANCH AND RENTALS, LLC.

Appellants,

v.

KIMBLE WILKINSON,

Respondent.

Appeal from a Bench Trial Findings of Fact and Conclusions of Law and Judgment
The Sixth Judicial District Court of Nevada
The Honorable Michael Montero, District Judge
District Court Case No. CV-0021509

APPELLANTS' OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The Sixth Judicial District Court entered a Bench Trial Findings of Fact and Conclusions of Law and Judgment on October 9, 2020. Joint Appendix Volume 2 (JA v.2) at 196. Appellants Ty Albisu, Rosie Albisu, and Anchor S-Ranch and Rentals, LLC filed a Notice of Appeal on November 6, 2020, JA v. 2 at 385. Jurisdiction lies with this Court pursuant to NRAP 3A (b)(1)(a).

II. ROUTING STATEMENT

This is an appeal of judgement after bench trial of a civil matter; therefore, this appeal is presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17 (b) (1).

III. STATEMENT OF LEGAL ISSUES PRESENTED

A. The district court erred by failing to rule upon the motion of Appellants to dismiss the action before him for the Respondent's failure to join necessary parties.

B. The district court erred in finding that Respondent met each of the elements necessary to obtain a prescriptive easement across Appellants' property as to seasonal cattle driving and as to the movement of vehicles and farm equipment for Respondent's convenience.

IV. STATEMENT OF THE CASE

This is an appeal from a final judgment after a bench trial conducted via the Zoom format due to the COVID 19 pandemic.[1] The trial addressed Respondent's Amended Complaint raising nine causes of action, and Appellant's Amended Answer and Counterclaim raising defenses to claims and five counterclaims. JA v. 1 at 58 and 135, respectively.

The district court denied Respondent's claims for Trespass to Land or Chattels; Declaratory Judgment; damages for interference with Respondent's Water Rights; Preliminary and Permanent Injunctive Relief; Easement by Necessity; and Unauthorized Use of Water. The district court granted Respondent's claim for Prescriptive Easement.

The district court dismissed the Appellants' counterclaims for damages related to Trespass to Real Property, Forage and Fences, and Loss of Livestock; and Intentional Infliction of Emotional Distress. The district court did not address Appellant's claim that Respondent failed to join all necessary parties under NRCP (19)(a)(1).

V. STATEMENT OF FACTS

Respondent Kimble Wilkinson (Mr. Wilkinson) is a part owner of 120 acres of land located on both sides of Nouque Road and east of U.S. Highway 95 in

[1] There was no court reporter at the trial. The Zoom platform was challenging as the parties and the court were in three different locations. The court reporter retained by Appellants did her best to transcribe the proceeding under the unique challenges of 2020.

Humboldt County near the town of McDermitt ("Wilkinson Property"). JA v. 1 at 197; JA v. 6 at 543. Mr. Wilkinson is also a co-owner of property commonly known as the Minor Ranch on the west side of U.S. Highway 95. JA v. 1 at 197. Mr. Wilkinson and his associates purchased the Minor Ranch and the Nouque Road property in 1994. The Wilkinson Property and Minor Ranch ownership structure is as follows: An undivided 25% interest to Mr. Wilkinson; an undivided 25% interest to Mr. Wilkinson's wife, Susan Wilkinson; and a 50% undivided interest to the Wilkinson Article 5 Trust (collectively, the Wilkinsons). JA v.3 at 452. The Wilkinsons' ranch holdings also include property across the Nevada border, in Malheur County, Oregon (the "Oregon Property"). *Id*.

The Appellants own real property surrounding the Wilkinson Property on three sides ("Albisu Property"). JA v. 6 at 543. The Albisu Property is significantly larger than the Wilkinson Property, consisting of approximately 3,000 acres on the east side of U.S. 95, and approximately 2,400 acres on the west side. JA v.4 at 652. The Albisu Property was formerly federal public land managed under the United States Department of the Interior, Bureau of Land Management ("BLM"). Ty Albisu's grandfather, Frank Albisu, purchased the Albisu Property from the BLM in or about 1984. JA v. at 454. On or about April 1, 1985, Frank Albisu recorded what would now be considered a tentative subdivision map wherein he divided the Albisu Property into 26 approximately 40-acre parcels, and where he did "hereby grant the

easements as indicated hereon." JA v.14 at 772; JA v.6 at 543; JA v.5 at 401 et. seq. The parcel map offered for dedication 60' easements for existing roads, and 30' easements for roads and utilities for the subdivision. JA v.14 at 772. Frank Albisu never developed the subdivision, nor did he deed any parcel therein to anyone outside of the Albisu family. On June 5, 1997, John and Rosie Albisu purchased the Albisu Property via Quitclaim Deed. JA v.1 at 198. John and Rosie Albisu commissioned a survey of the Albisu Property shortly after acquiring it, and a new fence line was installed in accordance with the survey that allowed the Albisus to gain additional land from the Wilkinsons. JA v.4 at 609. Ty Albisu purchased two 80-acre parcels of the Albisu Property from his parents in 2010, prior to marriage. *Id*. 652. Over time, Ty's parents deeded the remaining parcels to Ty, and later Ty quitclaimed them to himself and his wife, Linda Walker Albisu, as joint tenants.

Mr. Wilkinson is a co-owner of a cow/calf operation wherein cattle are moved seasonally from the Wilkinson Property to the Wilkinson Ranch's Oregon Property. Mr. Wilkinson testified that the Minor family had driven cattle across the Albisu Property when it was BLM land. JA v.3 at 422. Mr. Wilkinson purchased the Wilkinson Property in 1994, and he testified that the Wilkinson Ranch drove cattle seasonally through the Albisu Property since that time. JA v.3 at 427. Specifically, Mr. Wilkinson testified that the Wilkinson Ranch does one cattle drive in the spring of approximately 400 head of cattle, and in the fall, they conduct two drives of

approximately 300 and then 200 head of cattle. *See e.g.*, JA. v.3 at 423 – 426. Mr. Wilkinson testified that he attempts to utilize existing dirt and gravel roads as he travels through the Albisu Property. *Id*. at 426. Mr. Wilkinson's son, Barry Wilkinson, testified that whether a spring drive occurred was dependent upon the year. In addition, Mr. Wilkinson testified that he has utilized the Albisu Property near Gate 1 for the movement of farm equipment during irrigating season to get to Nouque Road. JA v.3 at 435.

Mr. Wilkinson testified that without a mutual agreement as to a specific cattle drive, the custom in the region is that "a lot of people would like to know when you're moving through so that you can – they can have their cattle out of the way, or obstructions out of the way, just for courtesy on their parts as far as mine. It's [been] that way for a hundred years, 70 years that I've been here." JA. v.3 at 433. In discussing the custom of moving cattle through another's property, Mr. Wilkinson noted how he would treat gates, "If you find it open, you normally leave it open, unless you've discussed it with the owner, and he requests that you would close it after to help him, so he didn't have to do it." *Id.* at 434. Mr. Wilkinson testified that the first time his access to the Albisu Property was blocked was on April 5, 2018 when a boulder was placed in front of a gate. *Id*. at 437. "After several disputes of going through the blocked fence, I had to keep cutting the fence to move and use access to that ground. And in one trip through there I received a flat tire, and started

searching around, and there were spikes thrown in – driven into the form of my path in four different places." *Id*. at 438. Mr. Wilkinson's son, Barry, also testified that their access was first denied in 2018. *Id*. at 509.

Mr. Wilkinson admitted that he had never had any association with Frank Albisu, who owned the property until 1997. *Id*. at 454. "… we weren't moving cattle across that land under Frank Albisu's time." *Id*. Mr. Wilkinson admitted that the Amended Complaint he filed was incorrect in asserting that John and Rosie Albisu "did not allow or consent to the plaintiff moving his cattle across their land." *Id*. at 455. He denied that this ever happened. Mr. Wilkinson testified that John Albisu used to help Gary [Minor] go through the Albisu Property when it was BLM land. *Id*. at 489. Mr. Wilkinson testified that upon inheriting the Albisu Property, John and Rosie Albisu put up fences around 1998. *Id.* at 490. John and Rosie Albisu maintained the fencing of the Albisu Property and the No Trespass signage. John Albisu leased the Albisu Property to Mr. Wilkinson's cousins, Fred and Nick Wilkinson from 2011 to 2018. *Id*. at 468, 546. Mr. Wilkinson admitted that during that time, his cousins gave him permission to move cattle across the Albisu Property, and he would let them know when he intended to do a drive as per custom and courtesy. *Id.* Nick Wilkinson testified that John Albisu gave him instruction to get the dates from Mr. Wilkinson of his cattle drives and notify him of such. *Id*. at 551.

Ty and Linda Albisu own a cow/calf operation that utilizes all of the Albisu Property and certain BLM allotments. Ty Albisu testified that he had not witnessed any cattle drive of the Wilkinson Ranch across the Albisu Property from 2010 through 2018. He testified that the Albisu Property was fenced, gated, locked, and had No Trespass signage. Further, he testified that no one ever made the "customary" call to request access. *Id*. at 586. On March 26, 2019, the district court entered an order that allowed Mr. Wilkinson to drive cattle through the Albisu Property. JA v.1 at 173. The order allowed Mr. Wilkinson to drive cattle along the east and west boundaries of Ty's two 80- acre parcels. Ty testified that no cattle drive had gone along that route since he purchased those parcels in 2010. Ty testified that historically he saw the Wilkinson Ranch drive cattle down U.S. Highway 95 as well as by trucking cattle. Rosie Albisu was a housewife during their marriage. She testified that she never gave consent to Mr. Wilkinson to run cattle over the Albisu Property. JA v.4 at 637. John Albisu died by suicide prior to the trial of this matter, so there is no court record of his position.

Upon transfer of the remaining Albisu Property to Ty Albisu beginning in 2018, Ty and Linda Albisu have continuously and forcibly attempted to eject Mr. Wilkinson from using the Albisu Property for the spring and fall cattle drives, and for Mr. Wilkinson's use of the Albisu Property to move certain farm equipment in a manner convenient to him. To say the relationship between the Appellants and the

Respondent is hostile would be an understatement. The Albisus have suffered greatly at the hands of the Wilkinson family and continue to suffer to this day.

VI. SUMMARY OF THE ARGUMENT

The court district court erred in failing to join numerous parties as both Plaintiffs and Defendants in the case below, pursuant to Nev. Civ. P. 19(a). Specifically, Respondent is only one owner out of at three owners and interested parties of the estate the district court found to be dominant, and Linda Walker Albisu is a co-owner of the estate the district court found to be servient. This issue was raised before trial and during trial; however, the district court never ruled on the issue. In fact joinder of the Respondent's parties was ultimately uncontested. This failure has the distinct potential to result in duplicitous and harmful re-litigation.

An easement by prescription is perfected after five years of adverse, continuous, open and peaceable use. *Sloat v. Turner,* 93 Nev. 263 (1977). Mr. Wilkinson's use of the property in question had been historically permissive, not adverse. He ran no cattle across the Albisu Property until it was acquired by John and Rosie Albisu. Under John Albisu's ownership, any use of the Albisu Property by Mr. Wilkinson was permissive. Even if there were sufficient evidence to indicate that Mr. Wilkinson's use of John Albisu's property was adverse, the lease of the Albisu Property to Mr. Wilkinson's cousins, who then permitted Mr. Wilkinson to run his cattle thereon, broke any chain of continuity for adverse use. When the Albisu

Property transferred to Ty Albisu's possession, Appellants asserted their lawful right of exclusivity in the Albisu Property. At that time, Mr. Wilkinson's actions to maintain permissive use were not peaceable, as the evidence presented showed that it was indeed hostile. Mr. Wilkinson's use was not open and notorious. The district court found the Appellants to be on constructive notice during the statute of limitations period of cattle drives conducted by Respondent when the property was held in a leasehold by Respondent's family who consented to his use of it. Moreover, the Albisu Property is over 5,000 acres, and actions by Respondent are not in plain sight, even if conducted during the day, when Appellants have leased a large amount of land to Respondent's family. Mr. Wilkinson cannot establish that he has met the elements required to obtain a prescriptive easement over a continuous five year period. Thus, the district court erred in finding that Mr. Wilkinson had properly established an easement by prescription.

VII. ARGUMENT

A. Necessary Joinder.

1. Standard of Review.

A district court's legal conclusions, including matters of statutory interpretation are subject to *de novo* review by this Court. *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007). "Court rules, when not inconsistent with the Constitution or certain laws of the state, have the effect of

statutes." *Margold v. District Court*, 109 Nev. 804, 806, 858 P.2d 33, 35 (1993). The Court also conducts *de novo* review as to legal conclusions regarding court rules. *Id.*

2. Argument.

NRCP 19(a) states:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if
> (1) in his absence complete relief cannot be accorded among those already parties, or
> (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may
> (i) as a practical matter impair or impede his ability to protect that interest or
> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

A district court is obligated to, *sua sponte*, join a necessary party, if the litigants have not done so, and failure to join a necessary party does not constitute a waiver of the issue. *Blaine Equip. Co. v. State*, 122 Nev. 860, 864 (2006). Failure to join an indispensable party at the trial level does not render the claim unreviewable at the appellate level. *Johnson v. Johnson*, 93 Nev. 655, 656 (1977) (finding that transferee is an indispensable party in an action to set aside the conveyance of transferred property).

In the instant case, not only did the district court fail to join indispensable parties *sua sponte*, but it also failed to even address the issue after it was raised by

both parties. Appellants raised the issue of joinder in four separate pleadings. It was raised first as a defense in the Amended Answer to the Complaint and Counterclaim filed on June 11, 2020. JA v. 1 at 147. It was next raised in Appellants' Response to Respondent's Motion for Summary Judgment. JA v. 2 at 277. It was raised again in Appellants' Trial Statement. JA v. 2 at 301. Finally, it was raised in Appellants' Post Trial Statement. JV v. 2 at 344. In addition, Respondent conceded that he failed to join indispensable parties on his side. JV v. 2 at 338. Respondent acknowledged that he had presented a stipulation to Appellants to join his wife, Sue Wilkinson, and the trustees and beneficiaries of the Wilkinson Article 5 Trust. However, Respondent did not address the necessary joinder of Linda Walker Albisu. Nevertheless, the district court did not acknowledge the argument of necessary joinder it the final judgement, and no ruling was made thereon. This is reversable error.

In *Rose, LLC v. Treasure Island, LLC*, 135 Nev. Adv. Rep. 19; 445 P.3d 860 (2019), the Court addressed the question of whether a sub-tenant was a necessary party in a lease default and termination matter, ultimately finding that it was not. The Court defined necessary parties under NRCP 19 to include any third-party beneficiary of the property interest at issue and without whom, complete relief becomes unavailable to either the plaintiff or the defendant. 135 Nev. Adv. Rep. at 25. "The court must decide if complete relief is possible among those already party

to the suit. This analysis is independent of the question whether relief is available to the absent party." *Id.* (*citing* Humphries v. Eighth Jud. Dist. Ct., 129 Nev. 788, 796 (2013).

All owners of the dominant and servient estates in this matter should have been joined as each one's interests cannot be adequately represented by others. In Eureka County v. Seventh Jud. Dist. Ct., 134 Nev. Adv. Rep. 37, 417 P.3d 1121 (2018), the Court stated, in part, "…we conclude that real property rights including water rights are unique forms of property, and those with an ownership interest cannot be adequately represented by others." 134 Nev. Adv. Rep. at 11 (*citing* Dixon v. Thatcher, 103 Nev. 414, 416 (1987).

In this case, the Wilkinson Article 5 Trust is the 50% owner of the Wilkinson Property and thus has a clear interest in the prescriptive easement that the district court found exists over the Albisu Property. The failure to include the trustees and beneficiaries of the Wilkinson Article 5 Trust could result in future litigation with the Albisus. Beneficiaries and trustees are necessary parties in actions relating to trust property. Robinson v. Kind, 23 Nev. 330, 337 (1897).

In addition, Kimble Wilkinson retains only an undivided 25% interest in the Minor Ranch. His wife, Sue Wilkinson, has an undivided 25 % interest as well. All parties were necessary to any litigation involving real property rights. While Mr. Wilkinson stated that he is a beneficiary under the Wilkinson Article 5 Trust as to

the Wilkinson Property, life does not always go according to plan. The Wilkinson Article 5 Trust can be amended, and Mr. Wilkinson could not survive the vesting of the Wilkinson Property to him as a beneficiary under the trust.

Furthermore, Linda Walker Albisu is the owner of a one-half undivided interest in the Albisu Property which the district found to be the servient estate to a prescriptive easement. Linda Albisu's property interest is directly affected by this judgment. The district court stated in its final judgment that "claimant's use must 'be hostile to the title of the owner of the servient estate.'" JA v. 2 at 373 (citing *Howard v. Wright*, 38 Nev. 25, 29 (1914). The litigation could not stand if it failed to address the rights of all owners of the servient estate. The failure to comply with Rule 19 is fatal to Mr. Wilkinson's civil action, and the district court erred by failing to join indispensable parties or to dismiss this case accordingly.

B. Prescriptive Easement.

1. Standard of Review.

A district court's legal conclusions, including matters of statutory interpretation are subject to *de novo* review by this Court. *Douglas Disposal, Inc. v. Wee Haul, LLC*, *supra*. The standard of proof required to establish an easement by prescription is clear and convincing evidence. *See Jordan v. Bailey*, 113 Nev. 1038, 944 P.2d 828 (1997); *Jackson v. Nash*, 109 Nev. 1202, 866 P.2d 262 (1993; *Wilfon*

v. Hampel 1985 Trust, 105 Nev. 607, 608, 781 P.2d 769 (1989); and *Stix v. LaRue*, 78 Nev. 9, 368 P.2d 167 (1962).

2. Argument.

"The elements of an easement by prescription are five years' adverse, continuous, open, and peaceable use." *Stix,* 78 Nev. at 11. Respondent failed to meet all required elements to establish a prescriptive easement across the Albisu Property.

a. Respondent's use of the Albisu Property was not adverse under Nevada law until ownership passed to Ty Albisu, and thus the district court erred in finding that the elements of adverse use for the statutory period of five years had been met.

Adverse use is established by asserting a right to use the land. *Michelsen v. Harvey*, 107 Nev. 859, 863, 822 P.2d 660 (1991). In the case of a prescriptive easement, if there is cause to believe the use is merely permissive, it does not meet the threshold of being adverse. "Courts are reluctant to find prescriptive easements over open and unclosed land since such use tends to be permissive in nature and does not imply a hostile or adverse use." *Wilfon,* 105 Nev. at 609. In the case of *Wilfon*, "The mere fact that Hampel and his predecessors crossed over a corner of Wilfon's property does not show any hostile claim of right on Hampel's part." *Id.*

The Respondent's historic use of the land, and that of his predecessors, is not to be presumed evidence of adverse use. The opposite is true. It must first be presumed to have been *permissive*. It is undisputed that when Mr. Wilkinson helped

the Minor Ranch as a boy in his first cattle drive across what later became the Albisu Property, it was BLM land: It was public land and open range. Respondent did not argue before the district court, nor did the district court find, that Respondent perfected a prescriptive easement across public land. In fact, Mr. Wilkinson testified that John Albisu joined in cattle drives across the land with the Minor Ranch and Wilkinson Ranch hands during the time the property was held by BLM.

Shortly after Frank Albisu purchased the Albisu Property from BLM, he recorded a plat map with easements for proposed roads and utilities that were never constructed. The roads were never dedicated to the county, and no subdivision was ever finalized. The roads that exist on the Albisu Property remain private. Nevertheless, the granting of roadway easements in the plat map reflects the permissive nature of the crossing, as set forth clearly in Nevada law. Mr. Wilkinson testified that never drove cattle across Albisu Property while Frank Albisu owned it. Frank Albisu died in 1997. Mr. Wilkinson stated that when he did use the Albisu Property, presumably then after 1997, he used primarily existing dirt and gravel roads to move his cattle across the Albisu Property. The Court in *Wilfon* addressed a similar claim of prescriptive easement over an established road:

> Where a road is established by the landowner, there arises a presumption that its use by others is with the permission of the landowner. *See* *Jackson v. Hicks*, 95 Nev. 826, 604 P.2d 105 (1979); *Turrillas v. Quilici*, 72 Nev. 289, 303 P.2d 1002 (1956); *Howard v. Wright*, 38 Nev. 25, 143 P. 1184 (1914).**2**

> The mere fact that Cavanagh Road was used to service a propane tank and a billboard for a long period of time does not justify the creation of a prescriptive easement. A case in point is that of *Turrillas v. Quilici*, 72 Nev. 289, 303 P.2d 1002 (1956), in which the prescriptive easement claimants show extended use by the public "for more than 30 years." To this the court responded by citing an earlier Nevada case.
>
> As stated in *Howard v. Wright*, 38 Nev. 25, 143 P. 1184, 1187, "[The] mere use of a passage over another's land for a long time with his knowledge is not necessarily an adverse use. The circumstances may be such as to authorize an inference that the use is adverse, but they may also be such as to intimate that the use was by permission."
>
> *Turrillas*, 72 Nev. at 291, 303 P.2d at 1003.
>
> The court then continued in language most apropos to the case before us:
>
> Where a roadway is established or maintained by a landowner for his own use, the fact that his neighbor also makes use of it, under the circumstances which in no way interfere with use by the landowner himself, does not create a presumption of adverseness. *The presumption is that the neighbor's use is not adverse but is permissive and the result of neighborly accommodation on the part of the landowner*.
>
> *Turrillas*, 72 Nev. at 291-92, 303 P.2d at 1003 (our emphasis).

Mr. Wilkinson argued that the existence of the recorded plat map made the easement areas within it public, because they were set forth to create roads and utility easements within the subdivision. However, the roads and utility easements were never dedicated to the county, and thus remain privately held by the Albisus. NRS 278.4725.

Mr. Wilkinson's testimony supports the same finding. While he contended that there have never been any express agreements allowing him to move cattle across the Albisu Property, he acknowledged that the custom in the area, as it pertains to cattle drives across another's property, is to simply inform the landowner of when the planned cattle drive will take place so that the landowner can move their own cattle out of the way and remove any obstructions. Thus, with this custom and understanding, it cannot be claimed that Mr. Wilkinson has a prescriptive right to all the land he traverses with his cows — he simply presumes the ability to use the land out of neighborly permissiveness.

When the Albisu Property was transferred to John and Rosie Albisu, the property was fenced, gated, locked, and posted with No Trespass signage. Fred and Nick Wilkinson then leased it for years. Mr. Wilkinson acknowledged that he had the consent of Nick Wilkinson to run his cattle across the Albisu Property, and thus the use of the Albisu Property was permissive and not adverse. Nick Wilkinson's testimony confirms that John Albisu, to the extent he knew of Mr. Wilkinson's use of the Albisu Property when it was subject to a leasehold with Fred and Nick Wilkinson, was also permissive and in line with the "custom" of notifying landowners of passage. He allegedly asked to be informed of such events. Only upon the transfer of Albisu Property to Ty Albisu, and later to Ty and Linda Albisu

in 2018, was the use of the property by Mr. Wilkinson adverse, under the law, to the owners.

The district court erred in finding that Respondent met his burden of clear and convincing evidence that his use of the Albisu Property had been adverse prior to 2018. Mr. Wilkinson himself admits that his access to "Gate 1" had never been interfered with until April 5, 2018. Mr. Wilkinson's use of the land had only been adverse since 2018, failing to meet the statutory timeframe of five years adverse use. Peaceable.

b. The district court erred in finding that Respondent's use of the Albisu Property was peaceable.

In finding that Mr. Wilkinson's use of the Albisu Property was "peaceable", the district court stated that "Nevada law does not provide a working definition for the peaceable requirement." JA v. 1 at 206. The district court relied on two definitions from Merriam Webster dictionary in its analysis. *Id.* FN 1 & 2. The district court noted that Merriam Webster defines "peaceable" as "free from strife or disorder." The district court then relied on the definition of "strife" as a "bitter sometimes violent conflict or dissention." *Id.* Despite the modifier of "sometimes", the district court confined its analysis of the instant case to whether Mr. Wilkinson exhibited violence. This analysis is erroneous. First, "peaceable possession" is a well-known legal term as to real property law. It is defined in Black's Law Dictionary as "[p]ossession (as of real property) not disturbed by another's *hostile*

or legal attempts to recover possession; esp., wrongful possession that the rightful possessor has appeared to tolerate." *Peaceable Possession, Black's Law Dictionary* (10th ed. 2014) (emphasis added). There is no requirement of violence. This definition is cited in the unpublished opinion of *CSA Dev., LLC v. Bryant*, 2016 Nev. Unpub. LEXIS 1009. In that case, the Court found a landscape easement to have been peaceable because for the statutory period no owner of the vacant lot whereon the landscape was installed had ever "interrupted or prevented" the altercations made to the property by the disseisor, nor "ever tried to recover possession" of the land in question.

While this case differs in scope as it deals with a seasonal easement claim, the fact remains the same: The Albisus indeed tried to prevent Respondent from using the Albisu Property beginning in 2018 when Respondent's usage became known and adverse. The district court found that Appellants "had chained and padlocked gates", "parked vehicles and placed boulders in front of gates" to prevent Respondent's access to the Albisu Property. JA v. 1 at 199. The district court also found that Respondent had "cut fences and chain links and placed his own locks on gates to circumvent [Appellants'] security mechanisms and access the land." *Id.* Mr. Wilkinson testified that Appellants had thrown down spikes at gates which caused a flat tire. Mr. Wilkinson acknowledged tearing up lines of fencing on the Albisu Property. Barry Wilkinson testified to removing surveyor stakes on the Albisu

Property. Rosie Albisu testified as to the extreme hostility between the Wilkinsons and the Albisus. She testified that on several occasions Mr. Wilkinson and his son physically assaulted John Albisu, her husband. Rosie Albisu also describes a contentious confrontation between herself and the Wilkinsons, in which she feared for her personal safety. Mr. Wilkinson acknowledged the confrontation. While the district court found that Mrs. Albisu's testimony was not corroborated beyond her own testimony, admitted into the record was the Sheriff report she filed contemporaneously to the altercations. JA v.14 at 774.

The district court found that Respondent's actions of cutting locks and fences and locking out the Albisus from their property was "not violent." Even under the district court's adopted definition of "peaceable", the actions of Mr. Wilkinson were certainly "bitter," as were the altercations between the Albisus and the Wilkinsons. Under the legal definition of "peaceable possession," the analysis crumbles entirely. The attempts by the Albisus to retain their land, and Mr. Wilkinson's attempts to access it, were hostile by any definition.

The district court's reliance on *Ennor v. Raine*, 27 Nev. 178 (1903) does not save its analysis. In *Ennor*, the Court addressed the right of a water rights holder to enter the land of another to maintain his ditch or flow. While the Court did look at the issue under a prescriptive easement lens, the law in 1903 did not include the requirement of "peaceable," thus the Court at the time did not rule on the issue the

district court was attempting support. *Ennor*, 27 Nev. at 219 (finding that to prove a prescriptive easement, it must be shown that the use is "uninterrupted, adverse, under claim of right, and with the knowledge of the owner".)

c. The district court erred in finding that Respondent's use of the Albisu Property was open and notorious.

The district court stated that Mr. Wilkinson's use of the Albisu Property was open and notorious since 2018. The district court found that the Albisus did not have actual notice of the use prior to 2018, but that they had constructive notice. In so holding, the district court found that prior to 2018, the Albisus should have noticed the trampling of grass and movement of hundreds of cattle in plain sight. This finding is not supported by the facts revealed at trial. The Albisu Property is over 5,000 acres, and activities on such a large ranch cannot necessarily be seen by the naked eye. It is undisputed that Mr. Wilkinson was not driving cattle down the highway, visible to passersby. Rather, he was driving it across the Albisu Property specifically leased by his cousins who gave him permission to do so. The Albisus, while landowners, gave over a leasehold to Mr. Wilkinson's family for almost a decade. It was only after the leasehold expired that Ty Albisu discovered the cattle drives. Moreover, Mr. Wilkinson never gave the Albisus the "customary" courtesy call of advising them when he would access their ground. It was error for the district court to find that Respondent's use of the Albisu Property was open and notorious for the statutory period.

VIII. CONCLUSION

The judgment of the district court cannot stand. It was undisputed by the parties that all owners, trustees and beneficiaries of the Wilkinson Property and the Wilkinson Article 5 Trust should have been joined as necessary parties. Linda Walker Albisu is also an indispensable party as co-owner of the Albisu Property. Further, the district court erred in determining that Respondent met each required element of a prescriptive easement to drive his cattle across the Albisu Property and to utilize portions of the Albisu Property by his farm equipment. The judgment must be reversed.

IX. CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32 (a) (4), the typeface requirements of NRAP 32 (a) (5) and the typeface requirements of NRAP 32 (a) (6) in that this brief is prepared with proportionately spaced typeface using Times New Roman in 14-point font. This brief complies with the page/type volume limitations set forth in NRAP 32 (a) (7), because it is proportionately spaced, utilizing a 14-point typeface and contains a total of 6154 words.

I hereby certify that I have prepared this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable NRAP proce-

dures, including NRAP 28 (e) (1), which requires every assertion in the brief regarding matters on the record be supported by reference to the page of the appendix where the matter relied upon may be found. I understand that I may be subject to sanctions if this brief is not in conformity with the requirements of the NRAP.

DATED this 19th day of April, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 19th day of April, 2021. Electronic service of the foregoing document was made in accordance with the Master Service List as follows:

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DATED this 19th day of April, 2021.

/s/ Carolyn E. Tanner

CAROLYN E. TANNER