IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

KIMBLE WILKINSON,

Respondent.

Supreme Court Case No.: 82112

ANSWERING BRIEF

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DISCLOSURE STATEMENT

As Kimble Wilkinson is an individual, no corporate disclosure is required pursuant to NRAP 26.1.

The following law firm represented Respondent Kimble Wilkinson in the proceedings below:

Miller Law, Inc.

Dated this 2nd day of June 2021.

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ROUTING STATEMENT

The Supreme Court should retain this appeal to resolve the novel issue of whether the addition of a spouse as an owner of property for the apparent purpose of *creating* a purported lack of "indispensable party" can require dismissal of an action, particularly where said additional owner was present throughout the trial, and made no effort to be joined as a party. Determining the requirements of standing and necessary joinders for actions involving real property presents an issue of statewide public importance warranting this Court's review. NRAP 17(a)(11)–(12).

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT PROPERLY DECLINED TO DISMISS THE CASE AS THERE WAS NO INDISPENSABLE PARTY.

II. THE DISTRICT COURT'S FINDINGS WERE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

Respondent Kimble Wilkinson ("Mr. Wilkinson", "Respondent Kimble Wilkinson", or "Kimble Wilkinson"), through his counsel of record, Greenberg Traurig, LLP, respectfully submits his Answering Brief.

INTRODUCTION

As relevant to this appeal,[1] this litigation arose from the attempts by Appellant Ty Albisu ("Mr. Albisu" or "Ty Albisu")[2] to stop Respondent Kimble Wilkinson from running his cattle across a portion of the Albisu family's land, despite Mr. Wilkinson and his family having done so for decades. The Appellants' activities led to the filing of the litigation, and Mr. Wilkinson ultimately prevailed, with the Court finding that Mr. Wilkinson had a prescriptive easement to access the Albisu land three times per year to move cattle.

This Court should affirm the District Court's Judgment. The District Court's finding of a prescriptive easement is fully supported by ample evidence presented at trial. And, despite Appellants' claims, there is no merit to the claim that necessary parties were not joined. Moreover, even if there had been necessary

[1] In addition to issues relating to the prescriptive easement, both parties raised other claims below, and the Judgment includes rulings on other claims. However, Appellants' challenge to the Judgment was limited to the issues of necessary parties and the sufficiency of the evidence to support the finding of a prescriptive easement.

[2] Appellants also include Rosie Albisu and Anchor-S Ranch and Rentals, LLC. However, as Rosie Albisu is a *former* owner of the servient estate, and as Anchor-S Ranch and Rental, LLC does not appear to have any interest in the property, the reason for their inclusion as Appellants is unclear.

parties who should have been joined, the remedy would be a remand for the District Court to order their joinder.

STATEMENT OF RELEVANT FACTS

Respondent Kimble Wilkinson is the owner, along with his wife, Sue Wilkinson ("Sue Wilkinson" or "Ms. Wilkinson"), and the Wilkinson Article 5 Trust (the "Trust") a family trust of which Mr. Wilkinson is the beneficiary, of parcels of land located in Humboldt County, Nevada.[3] **III APP 449:10-454:9, IV APP 774:17-22.**[4] Land located between the Wilkinson's parcels has been owned by members of the Albisu family since approximately 1984; since 1994, most parcels were owned by John and Rosie Albisu, while their son, Ty, acquired ownership of some parcels in 2010. ***Id.*** **at 422:3-9, 424:17-19, 455:10-15; IV APP 608:24-609:23, 604:9-16, 644:7-19.** Rosie Albisu testified that she quitclaimed her interests to Ty Albisu in 2018 after John Albisu's death, and that Ty Albisu then quitclaimed it to himself and Linda Albisu. ***Id.*** **at 644:7-19.**

[3] Appellants asserted below that Sue Wilkinson and the Trust should have been joined as parties. Kimble Wilkinson, along with Sue Wilkinson and the Trust, agreed to such joinder, and in fact, prepared a stipulation to that effect. However, despite Appellants' counsel having stated to the Court that he believed the parties would work out the issue by stipulation, Appellants subsequently refused to execute the stipulation. **II APP 287.** Mr. Wilkinson further expressed both the willingness of his co-owners to be joined as parties in his Trial Brief, wherein Mr. Wilkinson asked that they be made parties. ***Id.*** **at 338-339.**

[4] Because the Appendix of the Excerpts of Record does not appear to have been consistently numbered sequentially, both the Volume and the Page number are provided for record citations.

However, the quitclaim deeds introduced into evidence show that she transferred her interests to Ty and Linda Albisu on January 10, 2020**. V APP 401-473.** The transfers occurred approximately six to eighteen months[5] after Ty and Linda Albisu were married. **IV APP 64:3-10.**

Relevant Statements in Pleadings and Pretrial Filings Answer

In his original and Amended Complaints, Mr. Wilkinson alleged that the first Albisu owner, Frank Albisu, never gave permission for the Wilkinsons to run cattle across his land. **I APP 2, ¶ 14; 59, ¶14.** In both their original and Amended Answer to the Complaints, Appellants neither admitted nor denied this allegation, and thus, it must be deemed admitted pursuant to NRCP 8(b)(6). **I APP 135-159.** In his Complaints, Mr. Wilkinson also alleged that John and Rosie Albisu never gave permission to him to run his cattle across the Albisu land, but they eventually quit complaining. **I APP 2, ¶ 21; 60, ¶ 21.** In both of their Answers, Appellants admitted that no permission was given by John and Rosie Albisu, denying only that John and Rosie Albisu had stopped complaining about it. **I APP. 136, ¶ 8; 148, ¶ 8**.

In Appellants' Trial Statement filed by the Appellants, the following "Admitted Fact" was included:

[5] Ty Albisu was uncertain whether he was married in 2018 or 2019. **IV APP 649:1-10.**

> 5. JOHN ALBISU , deceased, and ROSIE ALBISU did not allow or consent to KIMBLE moving cattle across their land.

II APP 301, ¶ 5 (capitalization original).

Relevant Evidence Presented at Trial

The bench trial was conducted remotely. **III APP 239:2-7.** Linda Albisu, wife of Ty Albisu, was present throughout the trial, as Appellants' counsel stated she was essential to assisting him with the remote access technology. ***Id.*** **at 393:24-394:21; 396:1-397:5.**

Several witnesses testified that Mr. Wilkinson's family has run cattle across the Albisu land three times per year for decades, with Mr. Wilkinson having personal knowledge of such runs since 1960, and having personally engaged in the runs each year since 1994. **III APP 419:11-421:1, 422:3-424:6, 425:17-426:10,430:1-431:6, 501:3-503:12, 505:3-8,579:19-581:7.** Mr. Wilkinson moves the cattle through during the morning hours in daylight, and has never tried to hide the movement of the cattle. ***Id.*** **at 432:13-20; 505:20-506:7. While** Ty Albisu claimed that no cattle had been run across the land before 2018, ***id.*** **at 586:1-14,** his mother testified that she had observed Mr. Wilkinson run cattle across the land while she and John Albisu owned it several times. **IV APP 637:9-14.**

Mr. Wilkinson testified that the Albisu land has been fenced since the late 1990s. ***Id.*** **at 490:10-23.** Ty Albisu testified that, at least since 2010, his own

portion of the land was fenced; gated and locked; had no trespassing signs on it; and he was never asked for permission to cross it with cattle. ***Id.* at 586:10-14.**

Under cross examination regarding the allegation concerning the lack of permission by John and Rosie Albisu, Mr. Wilkinson's testimony was that the allegation was not accurate, and "that never happened. However, it is unclear precisely *what* never happened, i.e., was it permission that never happened, or the cessation of complaints. However, Mr. Wilkinson clearly testified no prior owners of Ty Albisu's properties had given him permission to run cattle across that property. ***Id.* at 433:13-18.** Furthermore, in accordance with Appellants' admitted fact, Rosie Albisu testified that neither she nor John Albisu had given permission to the Wilkinsons to run cattle across their land. **IV APP 637:17-22, 639:89-14.** Ty Albisu testified that his father always told Mr. Wilkinson to stay off their land. ***Id.* at 657:17-24.** Rosie and Ty Albisu also both testified that leases for the property precluded tenants from allowing others to run cattle across the land. ***Id.* at 637:23-638:10; 658:13-19.**

Mr. Wilkinson denied ever being violent towards the Albisus. ***Id.* at 456:8-22; IV APP 728:20-729:1.** Rosie Albisu claimed her husband told her that Mr. Wilkinson had beaten him**.** ***Id.* at 634:16-635:7.** She claimed to have photos of John Albisu's purported injuries and that a police report concerning the incident

had been filed, but no evidence of either was submitted. ***Id.*** **at 648:5-9.** No witness testified to any purported violence ever occurring during any cattle runs.

Mr. Wilkinson testified that in 2018, the Albisus had attempted to prevent his use of the land by blocking gates and sabotaging the pathways with spikes, forcing Mr. Wilkinson to remove the blockages or cut through fence lines to allow him to enter the land to move the cattle and maintain his water rights.[6] ***Id.*** **at 436:18-439:12; 441:22-444:4.**

The Court's Findings of Fact and Conclusions of Law

On October 9, 2020, the District Court issued its Findings of Fact and Conclusion of Law and Judgment. **I APP 196.** As relevant here, the District Court found that Mr. Wilkinson had established the elements of a prescriptive easement. Specifically, the Court found that the Albisus had never consented to Mr. Wilkinson's use of their land; that Mr. Wilkinson's family had been running cattle across the land for approximately 140 years, and that Mr. Wilkinson had personally done so openly since 1994. ***Id.*** **at 197-198, ¶¶12, 13.** The District Court found that the Albisus did not consent to their land being crossed but had notice of the practice. ***Id.*** **at 198, ¶¶20-21.** The District Court found that Mr. Wilkinson "did not engage in violent behavior to assert his right to use the

[6] In a portion of the Judgment not challenged by Appellants, the District Court affirmed the existence of adjudicated water rights belonging to Mr. Wilkinson and granted a right of way to maintain the points of diversion. **I APP 213, ¶ (2), (3).**

[Albisus's] land" and that his "use of the [Albisus's] land was historically peaceable." ***Id.*** **at 201, ¶¶ 47-48.** The District Court clearly did not find the testimony of Rosie Albisu regarding purported violence against John Albisu credible. ***Id.*** **at 201, ¶¶ 49-50.** Based on these findings, the District Court concluded that a prescriptive easement had been established by clear and convincing evidence, as it had been shown that Mr. Wilkinson's use of the land was adverse, continuous, open, peaceable, and had continued for longer than five years. ***Id*****. at 203:7-2-8:2.**

The District Court did not order any parties joined to the action.

STANDARD OF REVIEW

This court has not expressly stated the standard of review applicable to issues relating to joinder of necessary parties under NRCP 19. The Ninth Circuit, however, has determined that review of district court decisions relating to FRCP 19 is for an abuse of discretion. *Walsh v. Centeio*, 692 F.2d 1239, 1242 (9th Cir. 1982). That court reasoned that the abuse of discretion standard was appropriate because decisions relating to necessity and indispensability

> must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests there is no prescribed formula for determining indispensability.

692 F.2d at 1242. (9th Cir. 1982).

A district court's factual findings should be given deference and will be upheld if not clearly erroneous and if supported by substantial evidence. *International Fid. Ins. v. State of Nevada,* 122 Nev. 39, 42, 126 P.3d 1133, 1134–35 (2006). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008). This court reviews a district court's conclusions of law de novo. *Grosiean v. Imperial Palace*, 125 Nev. 349, 359, 212 P.3d 1068, 1075 (2009).

SUMMARY OF THE ARGUMENT

The judgment should be affirmed, as there was no need to either join additional parties, or to dismiss the action for lack of necessary parties. Here, the claimed absent parties were not necessary, as complete relief could be afforded without their participation. Additionally, the district court need not act to join necessary parties or dismiss them where their absence is the result of their own waiver. Here, Sue Wilkinson and the Trust expressed a willingness to be made parties (an offer rejected by Appellants) but did not seek to intervene. And similarly, Linda Albisu participated in the trial by assisting Appellants' counsel with technology, but despite her obvious knowledge of the dispute, she made no effort to intervene to protect any interests.

Additionally, the absence of these parties did not impede their ability to protect their rights, as they chose not to do so. And, there is no danger of the existing parties facing future relitigation of the same issues, as these absent parties are in privity with the existing parties, and therefore, would be barred by issue and/or claim preclusion. Accordingly, the District Court did not err in refraining from ordering joinder of the cited persons.

The Court should also affirm the finding of a prescriptive easement, as the evidence presented was sufficient to establish clearly and convincingly that Mr. Wilkinson used the Albisu land to move his cattle for more than twenty years. He did so without permission from the Albisus, and he did so in an open and peaceable manner. As there was substantial evidence to support the findings of fact made by the District Court, the Judgment should be affirmed.

LEGAL ARGUMENT

I. THE DISTRICT COURT PROPERLY DECLINED TO DISMISS THE CASE AS THERE WAS NO INDISPENSABLE PARTY

This Court should affirm the Judgment, as the District Court had no obligation to join any parties or to dismiss the action. Neither Sue Wilkinson nor the Trust were necessary parties to this litigation, wherein a prescriptive easement in gross was deemed established. Because an easement in gross has no dominant estate, it was not necessary for the co-owners of Mr. Wilkinson's estate to be parties to the litigation. Nor was it necessary to join Linda Albisu as a party after

she became a co-owner with Ty Albisu, as it is not necessary to join an interested party who is known to be aware of the litigation, but fails to make any effort to join the assert her rights.

Furthermore, even if this Court deemed any of the parties cited by Appellants to have been necessary, the appropriate remedy would not be dismissal of the action. Instead, the remedy would be to remand the matter to the District Court, to join the parties to the action and to the Judgment.

A. The Co-Owners of Mr. Wilkinson's Property Were not Necessary Parties to the Determination of the Prescriptive Easement Here.

Under NRCP 19, as it existed at the time the Complaint was filed, provided:

> Rule 19. Required Joinder of Parties
>
> (a) Persons to Be Joined if Feasible. 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 the person's absence, complete relief cannot be accorded among those already parties; or
>
> (2) the person claims an interest relating to the subject of the action and is so situated that the disposing of the action in the person's absence may
>
> (i) as a practical matter impair or impede the person's 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 the claimed interest.

> If the person has not been so joined as required, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made either a defendant, or, in a proper case, an involuntary plaintiff.

NRCP 19(a) (2018). Whether a party is necessary comprises a highly fact-specific inquiry. Rule 19 "calls for courts to make pragmatic, practical judgments that are heavily influenced by the facts of each case." *Rose, LLC v. Treasure Island, LLC*, 445 P.3d 860, 867 (Nev. App. 2019) (citations omitted). No precise formula exists to determine whether a nonparty must be joined under Rule 19(a). *Id.* If a necessary party is not joined, the district court has an obligation to join that party *sua sponte*. *See Blaine Equip. Co. v. State*, 122 Nev. 860, 864-65 (Nev. 2006).

Appellants contend that Sue Wilkinson, the trustee of the Trust, and Linda Albisu were each necessary parties because of their respective interests in the Wilkinson or Albisu properties. However, none of these persons was necessary for a complete judgment here.[7] Moreover, even if one or more of these persons were necessary, they have waived their right to participate by failing to join. As they

[7] Respondent is mindful that he asserted in his Trial Brief that it was "likely" that his co-owners were necessary parties and requested that the Court either join them or otherwise bind them to the Judgment. **II APP 338.** However, speculation about an outcome does not constitute a concession.

waived any right to join the proceedings, the District Court had no obligation to join them.

A. None of the Persons cited by Appellant were Necessary Parties, as Complete Relief could be Afforded the Parties despite the Absence of Co-owners of the Properties.

For purposes of Rule 19(a)(1), "the sufficiency of relief available is determined on the basis of those persons who are already parties, and not as between a party and the absent party whose joinder is sought." *Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *5 (D. Ariz. Nov. 3, 2016) (interpreting FRCP 19(a)(1)). Specifically, the subsection is directed at "whether a court can grant a plaintiff complete relief on all claims it is bringing, and not whether a defendant can have all potential claims against it resolved in one proceeding." *Wheeler Peak, LLC v. L.C.I.2, Inc.*, No. CIV-07-117-JB-WDS, 2009 WL 2982817, at *9-10 (D. N.M. Aug. 15, 2009); *see also Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1255 (9th Cir. 1983) (finding that court could provide complete relief in action over title to property without joining other parties who might also claim an interest in the same property). Here, the District Court was able to resolve the claims raised by Mr. Wilkinson, without the purported missing parties.

The Judgment entered affords complete relief among the existing parties. As relevant to the issues appealed, the primary issue to be determined below was

whether the historic driving of cattle by Kimble Wilkerson across the Albisu land had occurred for a continuous five-year period, was adverse, was open, and was peaceable.[8] Indeed, while Mr. Wilkinson testified as to his ownership of land adjoining the Albisu properties, no such ownership would be necessary to create a commercial easement in gross, the existence of which is fully supported by the evidence presented here. *See Crane v. Crane*, 683 P.2d 1062, 1064 (Utah 1984) (finding commercial easement in gross for cattle to be driven across land twice per year). The only difference between an easement in gross and an easement appurtenant is that an easement in gross is created to benefit its owner independently of his ownership of specific land. 3 R. Powell, J. Blackman, *The Law of Real Property*, ¶ 405 (1991). In other words, an easement in gross has no dominant estate. If there is no dominant estate, then the interests of Sue Wilkinson or the Trust would not be implicated and they could not be a necessary party to the claim.

Nor was the participation of Linda Albisu required to afford relief among the existing parties. Ms. Albisu acquired her interest long after the easement here had been established by Mr. Wilkinson's use. Her interests are identical to that of her

[8] The other claims below, judgment on which was not directly challenged, either revolve around the same issues relating to Mr. Wilkinson's use of Albisu land, or alleged tortious acts. The trustee, Ms. Wilkinson, and Ms. Linda Albisu would not have been parties to the tort claims.

husband Ty Albisu, and those interests are identical to the interests previously held by Rosie Albisu. Indeed, the quitclaim deeds used to transfer the interests to Ty and Linda Albisu provide that the grantees receive "all the estate, right, title, interest, lien, equity, and claim whatsoever: held by the grantor." ***See, e.g.*****, V APPP 401**. As their interests were identical, Linda Albisu's interests were adequately represented by her husband's status as a party in the case.

Appellants rely on *Eureka Conty. v. Seventh Jud. Dist. Ct*, 134 Adv OP 37, 417 P.3d 1121 (2018) for the proposition that real property is unique and therefore, the interests of owners cannot be represented by others. In *Eureka*, where water rights were at issue, this Court likened water rights to real property rights, and held that all persons with junior water rights were entitled to notice of the disputed issues so they could protect their own interests, based on the uniqueness of real property. *See Eureka Cnty.* 417 P.3d at 1126, citing *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029 (2018) (holding that injury to land was irreparable, due to the unique nature of real property). However, in *Eureka,* the other owners did not own the *same* property as the existing parties, and thus, each had a unique right.

Here, in contrast, there is no uniqueness. Linda Albisu has an undivided interest in the same parcels of land in which her husband Ty Albisu has an undivided interest. And, while relevant only to the extent the easement could be deemed appurtenant, Sue Wilkinson and the Trust have an undivided interest in the

same land as Kimble Wilkinson. Thus, with respect to the issue of the prescriptive easement and the determination of a servient, and perhaps also, a dominant estate, each of the absent parties stands in the same shoes as their respective co-owner/existing party.

Because the Judgment affords complete resolution of the issues, regardless of the presence of the absent parties, there were no necessary parties to be joined.

B. None of the Persons cited by Appellant were Necessary Parties, as none claimed an interest in the property from which they were impeded from protecting.

The record is clear that each of the absent persons was aware of this litigation, but none file a motion to intervene to assert their rights. Thus, each waived their right to participate in the proceedings.

As Appellants note, this Court has determined that the joinder of a necessary party cannot waived by the existing parties in the litigation. *See University of Nevada v. Tarkanian*, 95 Nev. 389, 396, 549 P.2d 1159 (Nev. 1979) (failure of existing parties to raise the issue of joinder of necessary parties not a waiver of the issue). But here, the waivers in question were made by the purported necessary parties, who demonstrated disinterest in claim an interest in the easement issues related to their respective properties.

The Ninth Circuit, in interpreting the near identically worded FRCP 19, stated that joinder is "contingent . . . upon an initial requirement that the absent

party *claim* a legally protected interest relating to the subject matter of the action." *Altmann v. Republic of Austria*, 317 F.3d 954, 971 (9th Cir. 2002). Accordingly, where "a party is aware of an action and chooses not to claim an interest, the district court does not err by holding that joinder was "unnecessary." *Id.*

"If an allegedly necessary party believes it has an interest in a pending action, it may seek to intervene in the action." *Rose, LLC v. Treasure Island, LLC*, 445 P.3d at 865, *citing* NRCP 24. Here, Sue Wilkinson and the Trust were *willing* to be joined, but they did not seek to intervene. Similarly, Linda Albisu actually participated in the trial by assisting Appellants' trial counsel with technology during the trial. Accordingly, she was obviously fully aware of the dispute, but she did not seek to intervene. In these circumstances, there is no error in declining to join these parties, because, as shown above, none were "so situated" as to have their ability to protect any interests impeded.

Nor is there any fear that the existing parties could be subjected to future litigation over the existence of the prescriptive easement, as the absent parties would be barred by issue or claim preclusion from relitigating the issue due to their privity with the existing parties. *See Tafoya v. Morrison*, 389 P.3d 1098, 1110 (N.M. App. 2016) (finding privity in easement based on the parties having the same interest in the real property); *Stratosphere Litig. L.L.C. v. Grand Casinos,*

Inc., 298 F.3d 1137, 1142, n.3 (9th Cir. 2002) (finding privity when a party is "so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved"); *Shaw v. Hahn*, 56 F.3d 1128, 1131-32 (9th Cir. 1995)(finding privity when the interests of the party in the subsequent action were shared with and adequately represented by the party in the former action*)*; *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983) (privity may exist when there is sufficient commonality of interest). As the absent parties share the same interest in their respective real property as the existing parties do, any relitigation of the prescriptive easement issue based upon the Wilkinson and Albisu properties would be barred.

Examination of the specific circumstances here, and the manner in which the purported necessary parties are situated, shows that there is no basis for finding that Linda Albisu, Sue Wilkerson, or the Trust were necessary parties. Accordingly, the Judgment should be affirmed.

C. Even if Any of the Absent Parties Could be Deemed Necessary, the appropriate remedy is a remand with instructions to join or otherwise bind the missing parties to the Judgment.

The addition of the purported necessary parties, whose interests would be identical to that of their respective co-owners already parties to the case, would have had no effect on the case on the progress of the case. Significantly, Sue Wilkinson and the Trustee were willing to be joined and would have been joined

had but for Appellants backing out of the stipulation. Given these circumstances, while it is unclear why the District Court declined to expressly address the issue of joinder and determine the necessity of the parties, however, a finding that these parties were not necessary is implicit. Moreover, to the extent that the District Court's inaction could be deemed error, then such error is harmless. *Delaware v. Rowatt,* 244 P.3d 765, 26 (Nev. 2010). ("An error is harmless when it does not affect a party's substantial rights. NRCP 61.").

As shown above, the purported necessary parties had ample opportunity to participate in the litigation. And due to the identical nature of the interests, it is clear that complete relief can and was afforded by the District Court, despite the absence of the names of these persons from the caption. And, for the same reason, no viable risk of future re-litigation looms. Accordingly, vacation of the Judgment and dismissal of the action would be a waste of judicial resources. The action would be refiled, with parties duly added, and then the same evidence would inevitably be presented, likely to the same fact finder, as this was a bench trial.

There is no reason to suspect that any evidence would differ on retrial, given that the issue would remain whether Mr. Wilkinson's decades long use of the Albisu property was sufficient to establish a prescriptive easement. The presence of Sue Wilkinson and the Trust would have no bearing on that issue. And, Linda Albisu's ownership of the property came long after the requirements for an

easement had been fulfilled, so there is no reason to suspect that she would offer any unique evidence. Indeed, Appellants willingly agreed that she would not be called as a witness, in order to retain her technical services during the trial. **III APP 393:24-394:21; 396:1-397:5.**

Accordingly, in the event, this Court determines that any of the absent persons were necessary parties and should have been joined, the result should not be, as Appellants imply, the vacation of the Judgment and the dismissal of the action. Instead, the District Court should be directed to reopen the bench trial, order the parties joined, and then, after a suitable opportunity for the new parties to present additional evidence, if any exists, proceed to judgment. *See* NRCP 59 (a)(2).

II. THE DISTRICT COURT PROPERLY FOUND THAT THE EXISTENCE OF A PRESCRIPTIVE EASEMENT

This Court should affirm the Judgment, as the evidence presented at trial amply supports the District Court's findings and conclusions. "A prescriptive easement is created through five years of adverse, continuous, open, and peaceable use of land." *Wilfon v. Hampel 1985 Trust*, 105 Nev. 607, 608, 781 P.2d 769, 770 (1989). In order to find that a prescriptive easement exists, there must be clear and convincing evidence that the elements have been met. *Michelsen v. Harvey*, 107 Nev. 859, 863 (Nev. 1992). Clear and convincing evidence "need not possess such a degree of force as to be irresistible, but there must be evidence of tangible

facts from which a legitimate inference ... may be drawn" *In re Discipline of Drakulich,*111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995).

Appellants challenge only three of the elements: adversity, peaceable use, and open use. However, the evidence supports the District Court's findings on these elements. Accordingly, the Judgment should be affirmed.

A. Appellants Admitted that Mr. Wilkinson's Use of the Land was Adverse.

While on appeal the Appellants contend that Mr. Wilkinson's use of the land was permissive, they had long ago conceded that issue. In their answers, they admitted that neither John nor Rosie Albisu had given permission for Mr. Wilkinson to use the land. **I APP. 136, ¶ 8; 148, ¶ 8**. Furthermore, the lack of permissive use was listed as an admitted fact in Appellants' trial brief. **II APP 301, ¶ 5.**

A party cannot challenge facts they have admitted. *Williams v. Lamb*, 77 Nev. 233, 236 (Nev. 1961) ("Allegations in pleadings admitted by an adversary need no evidence to support the court's finding of their truth."); *see also, Nenzel v. Rochester Silver Corporation*, 50 Nev. 352, 358 (Nev. 1927) (holding that a challenge to a fact admitted in the answer was without merit). Moreover, even if Appellants had not admitted to the lack of permission, there was ample evidence to support the District Court's findings. Mr. Wilkinson testified that he had not received permission. **III APP 433:13-18.** Rosie Albisu testified that neither she nor

John Albisu had given permission to use the land. **IV VOL 639:89-14.** Ty Albisu's testimony that his father always told Mr. Wilkinson to stay off their land, ***Id.*** **at 657:17-24,** further supports the lack of permissive use, as does the testimony that leases for the property did not permit tenants to allows others to use the land. ***Id.*** **at 637:23-638:10; 658:13-19.**

1. No Presumption of Permissive Use Arose Here.

Appellants contend that permissive use is presumed, citing to ***Wilfon*** 105 Nev. at 609. *See* Opening Brief, at 14. However, that case provides that the use of land that is "*open and unclosed*" is deemed permissive. *Id.* (emphasis added). Here, the land has been fenced since the late 1990's. **III VOL 490:10-23.** And, according to Ty Albisu's testimony, gates were locked and "No Trespassing" signs were posted, at least since 2010. ***Id.*** **at 586:10-14**. Furthermore, the Appellants conceded that permission had not been given. In these circumstances, there can be no presumption of permissive use.

2. **The Albisus' Tenants Could Not Give Permission.**

Similarly, unavailing is Appellants' argument that the use was permissive due to agreement by tenants who leased the property from 2011 to 2018.[9] Opening Brief, p. 17. First, by 2011, Mr. Wilkinson had already been using the land for 17 years - well beyond the five years required for a prescriptive easement. *See Dean v.*

[9] *See* **III APP 468:5-19.**

Pollard, 93 Nev. 105, 107 (Nev. 1977) (noting that use for more than the prescribed five years before the signing of a purported agreement regarding use rendered the agreement null, as an easement had already been established). Second, both Rosie and Ty Albisu testified that the tenants had no right to grant permission for Mr. Wilkinson to use the land. ***Id.*** **at 637:23-658:13-19.** Accordingly, there could not have been any permission.

The evidence was sufficient to show clearly and convincingly that Mr. Wilkinson's use of the land was adverse to the rights of the Albisus. Accordingly, the District Court properly found that this element had been satisfied.

B. The Evidence Was Sufficient to Support of Finding that the Use Had been Peaceable.

Appellants contend that the evidence showed that use had not been peaceable. However, this claim fails for several reasons.

The District Court found the Albisus's testimony of purported violence to be unsubstantiated. As the trier of fact, the District Court's ruling may be overturned only if clearly erroneous. NRCP 52(a)(6) "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." *See also, Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018) (appellate court will not overturn the district court's findings

of fact following a bench trial unless those findings are "clearly erroneous or not supported by substantial evidence").

Here, the District Court clearly found Mr. Wilkinson's testimony on this issue to be more credible. "[E]valuating the credibility of witnesses and the weight to be given their testimony is within the fact finder's province." *In re T.R.*, 119 Nev. 646, 649-50, 80 P.3d 1276, 1278 (2003).

Moreover, even if the evidence presented by the Albisus had been credible, that evidence purported to describe events occurring in recent years, rather than throughout the twenty plus years Mr. Wilkinson had been using the land. Accordingly, the claimed non-peaceable activities occurred long *after* a prescriptive easement had already been established. *See Dean v. Pollard*, *supra; see also, Silverstein v. Byers*, 114 N.M. 745, 747, 845 P. 2d 839, 841 (1992) (finding prescriptive easement where the use had been peaceable for sufficient period before owners of servient estate began to refuse to allow passage).

And finally, even applying Appellants' proposed replacement of the element "peaceable use," with that of "peaceable possession," *i.e.,* "possession . . . not disturbed by another's hostile or legal attempts to recover possession," Opening Brief, p. 19, the evidence supports the District Court's finding. From 1994 until 2018, Mr. Wilkinson used the Albisu land without any attempt by the Albisus to "recover possession." Accordingly, the evidence satisfied the "peaceable" element.

The evidence was sufficient to show clearly and convincingly, that Mr. Wilkinson's use of the land was peaceable for the required time period. Accordingly, the District Court properly found that this element had been satisfied.

C. Kimble Wilkinson's Use of the Albisu Land was Open.

The requirement that use be open is intended "to give the owner of the servient estate ample opportunity to protect against the establishment of prescriptive rights." Restatement (Third) of Properly § 2.17 cmt. h (Am. Law Inst. 2000)." For purposes of a prescriptive easement, use is open when it is not hidden or surreptitious. *Howard v. Wright*, 38 Nev. 25, 29, 143 P. 1184, 1186 (1914) (use must be open, not clandestine). There is no necessity to show the landowner had actual knowledge of the use, but merely constructive knowledge. *4 Powell on Real Property § 34.10* (2021).

Here, the evidence showed that for decades, Mr. Wilkinson would run his more than a hundred head cattle across Albisu land three times per year. He did so in broad daylight, in full sight of the cars passing in the nearby roads, making no effort to hide his activities. ***Id.*** **at 432:13-20; 505:20-506:7.** Rosie Albisu testified that she observed Mr. Wilkinson run cattle across the land she and John Albisu owned several times. **IV APP 637:9-14.** And, as Mr. Wilkinson testified, "cattle do make an imprint wherever they go." **III APP 421:16-23.**

Other courts have found that moving cattle along a pathway, even if it occurs only a few times per year, is sufficiently open to satisfy the openness element. *See Ellington v. Becraft*, 534 S.W.3d 785, 800 (Ky. 2017) (finding use of a passway to move cattle once or twice a year sufficient establish prescriptive easement); *Crane*, 683 P.2d at 1066. (annual use to move cattle sufficiently open to satisfy element).

Because substantial evidence in the record supports the District Court's finding, that that Mr. Wilkinson's use of the Albisu land was open, the judgment should be affirmed.

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted this 2nd day of June 2021.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

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 type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2003 in Times New Roman 14.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5609 words.

Finally, I hereby certify that I have read 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 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of June 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Greenberg Traurig, LLP, that in accordance therewith, I caused a true and correct copy of the foregoing ***Answering Brief of Respondent Kimble Wilkinson*** to be served via this Court's e-filing system, on counsel of record for all parties to this matter on June 2, 2021.

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An employee of Greenberg Traurig, LLP.