

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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PETER THOMPSON,

*Petitioner,*

v.

CATTAIL CREEK COMMUNITY ASSOCIATION,  
A MONTANA NONPROFIT CORPORATION,

*Respondent.*

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On Petition for a Writ of Certiorari to the  
Supreme Court of Montana

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. People in Montana often encounter judicial despotism<sup>1</sup> which results in favorable ruling for Montana's deep-rooted special interests and their associates. This case is acute because the state judiciary goes beyond their customary indifference to controlling precedent by willfully disregarding the principles of natural law, the terms of the contract, and the outcome that is required when the applicable law is applied to the undisputed facts.

What can the U.S. Supreme Court do to help make natural justice available to this petitioner and all the people of Montana?

2. In this case issues of justiciability were not resolved before reaching other merits of the case and petitioner's efforts to have all justiciability issues resolved prior to trial were not granted.

Does the Montana Supreme Court's practice of sanctioning their district courts to reserve issues of justiciability and contested pretrial matters for trial and post-trial agglomerative<sup>2</sup> appeals, violate the people's constitutional right to have the jurisdiction of the court lawfully invoked at the outset of proceedings in a speedy, just and inexpensive manner?

3. Did the Montana Supreme Court violate the petitioner's constitutional right to a fair trial by an impartial judiciary without the appearance of improp-

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1 "Despotism" is "a system of government in which the ruler has unlimited power." <http://www.Merriam-Webster.com/dictionary/despotism>.

2 "agglomerative" 1. A confused or jumbled mass; a heap: <https://www.thefreedictionary.com/agglomerative>.

priety when the Montana Supreme Court sanctioned their district court judge to continue presiding over pretrial proceedings that involved allegations of fraudulent incorporation by clients of the bench's former law firm and, *inter alia*, proceedings that also prevented petitioner from asserting interrelated counter claims which named the district court judge's former partner at law as a suspect alongside more than a half dozen of the bench's former law firm's other clients?

4. Has the Montana Supreme Court erred in not speaking to the merits of petitioner's pre and post-trial assertion that respondent's counsel violated his duty of candor under rule 11 while committing fraud upon the court because respondent's counsel knowingly relied on unlawful articles of incorporation to assert his clients standing?

5. Did the Montana judiciary procedurally error or violate the petitioner's civil rights in their management of the proceedings? Petitioner attended trial without his asserted counter claims being recognized under rule 8, without being allowed to join other necessary parties, without the benefit of an appropriate schedule, without the benefit of discovery, without undisputed facts, without being allowed free use of exhibits that were provided long before trial. After the trial, the court cited local rules precluding petitioner from submitting proposed findings of fact and conclusions of law based on admitted evidence and trial testimony. Petitioner's initial post-judgment motion work was denied by the district court without reply from the respondent. The district court then issued an order precluding petitioner from filing

the other post-trial motions that were described in the initial post judgement motions.

6. Does the Montana Supreme Court sanctioning their district court's order authorizing the respondent to obtain a writ of assistance to remove the petitioner, his wife and their two children from the family's home of the past decade for failure to complete some exterior deck work within one year of beginning construction, represent constitutionally prohibited cruel and unusual punishment?

7. Did the Montana Supreme Court error in affirming their district court's determination to fashion a civil remedy not previously known to equity jurisprudence and a remedy not specifically authorized by the legislature, because the court was otherwise incapable of returning the parties to their original positions?

## **LIST OF PROCEEDINGS**

Supreme Court of the State of Montana

DA 18-0539 2019 MT 233N

*Cattail Creek Community Association, a Montana Nonprofit Corporation v. Peter Thompson*

Date of Entry of Opinion: October 1, 2019

Date of Rehearing Denial: November 5, 2019

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District Court of Gallatin County, Montana

DV-15-636CX

*Cattail Creek Community Association, a Montana Nonprofit Corporation v. Peter Thompson*

Date of Judgment: July 3, 2018

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U.S. District Court, District of Montana (Butte)

Case 2:18-cv-00075-BMM-KLD

*Peter Thompson v. Sullivan et al.  
a.k.a Peter Thompson v. City of Bozeman,  
a Montana Municipal Corporation, et al.*

Filed on October 9, 2018. This case remains at the pre-answer stage of litigation.

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## **PETITION FOR A WRIT OF CERTIORARI**

Peter Thompson for himself and in effect on behalf of his wife and two children who were not parties to the proceedings, but who are identified as people upon which the final judgement operates, petition for a writ of certiorari to review the Opinion of the Montana Supreme Court in this case.



## **OPINIONS BELOW**

The corrected version of the originally issued Montana Supreme Court "Opinion-Noncite-Memorandum" (2019 MT 233N, DA 18-0539) is attached to the Petition at App.1a. Order of the Supreme Court of the State of Montana Denying Request for Disqualification dated on September 19, 2018 is added at App.15a. Finding of Fact, Conclusions of Law and Order of the Eighteenth Judicial District Court of Montana reported on April 23, 2018 and is reproduced in the Appendix at App.17a. Final Judgement of the Eighteenth Judicial District Court of Montana dated April 23, 2018 is attached to this petition at App.57a.

Order of the Supreme Court of the State of Montana Denying Petition for Supervisory Control dated January 31, 2018 is a reproduction of the Montana Supreme Court's pretrial order denying petitioner's application for a supervisory writ to situate the district court proceedings for trial in Montana's 18th judicial district Court Case No. DV-15-636CX, and is attached to this petition at App.48a.

Order of the Supreme Court of the State of Montana Denying Petition for Rehearing in Court Case DA 18-0539 dated November 5, 2019 is added at App.51a.

Order of the Supreme Court of the State of Montana Denying Petition for Rehearing of Request to Disqualify Judge McElyea in Court Case PR 06-0120, is a reproduction of the Montana Supreme Court's post trial denial of Petitioner's motion for rehearing regarding matters that were not considered in the initial denial of what was construed as petitioner's motion for recusal of the 18th judicial district Court judge for bias and conflicts of interest, reported on October 9, 2018 and is attached to this petition at App.53a.



## **JURISDICTION**

This petition seeks review of the decision of the Supreme Court of Montana dated October 1, 2019, following the denial of petition for reconsideration from the Supreme Court of the State of Montana on November 5, 2019.

The March 19, 2020 COVID-19 order extended the time to file any "petition for a writ of certiorari due on or after the date of this order to 150 days from the date of the lower court . . . order denying a timely petition for rehearing. *See* rules 13.1" Thus the 90 day jurisdictional time period of 28 U.S.C. § 2101(c) was changed from 90 days to 150 days. Adjustment of the 90 day § 2101(c) period to 150

days plus the 60 day extension of time granted under Application 19A839 operates to make this petition timely filed on or before June 2, 2020.

This petition is timely filed. This court has jurisdiction of all timely filed petitions pursuant to 28 U.S.C. § 1257.



**CONSTITUTIONAL PROVISIONS,  
STATUTES, RULES OF PROCEDURE AND  
ORDINANCES INVOLVED**

**U.S. Const., amend. IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**U.S. Const., amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

due process of law; nor shall private property be taken for public use, without just compensation.

**U.S. Const., amend. VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**U.S. Const., amend. XIV § 1**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**The Due Process Clause of the Fourteenth Amendment.**

This Court's precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

Under Canon 3E(1)(b), a judge is disqualified from a case if "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter . . .," even if the judge did not work on the case and even if the party is now represented by a different lawyer. Moreover, several states have adopted a *per se* rule that prohibits a

judge from hearing a case involving the judge's former partner or law firm for a set period even in cases that were not handled by the attorney or firm during the judge's association. Quoted from "Ethical Issues For New Judges" By Cynthia Gray, pg.23 at top right.

*Reichert v. State ex rel. McCulloch*, 278 P.3d 455, 2012 M.T. 111, 365 Mont. 92 (2012):

"Recusal of judges in Montana is governed by § 3-1-803, MCA, and Supreme Court Rule 2.12 of the Code of Judicial Conduct."

*Olmstead v. United States*, 277 U.S. 438-Supreme Court 1928:

"They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the rights most valued by civilized men."; and as

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself . . . "

**MONTANA RULES OF CIVIL PROCEDURE**

**Rule 8. General Rules of Pleading**

**Rule 9. Pleading Special Matters**

**Rule 16. Pretrial Conferences; Scheduling; Management**

**Rule 17.**

Plaintiff[s] . . . Capacity . . . (b) Capacity to Sue or be Sued. Capacity to sue or be sued is determined by appropriate statutory provisions.

**MCA 35-2-510(2)** requires a person's consent to be admitted as a member bound under articles of incorporation"

**MCA 28-2-301(3)** demands that consent be "communicated by each to the other"

**MCA § 50-60-107**

Certificate of occupancy . . . (2) Every certificate of occupancy, unless and until set aside or vacated by a court of competent jurisdiction, is binding and conclusive upon all county, city, or town agencies as to all matters set forth, and an order, directive, or requirement at variance with the certificate of occupancy may not be made or issued by any other state agency or county, city, or town agency.



## STATEMENT OF THE CASE

### I. General Background

In February of 2008 Petitioner Peter Thompson (Thompson) purchased vacant land for construction of a multi-family home. The land was encumbered by a 2003 covenant contract.

In March of 2008, Respondent Cattail Creek Community Association, a Montana nonprofit corporation (CCCA Inc) approved construction plans which depicted Petitioner's intended basement apartment.

In 2010, after substantially completing exterior finishes of the building, the Petitioner received a certificate of occupancy for the basement apartment portion of his home and moved in with his family while they continued to work on the interior upper portions of the home.

Identifying themselves as the "Cattail Creek Community Association", in 2011 the Respondent wrote Petitioner complaining that construction was taking longer than one year to complete and asserting that the presence of Petitioner's horse trailer (which was in use for construction support) was a violation of the covenant that recreational vehicles shall not be stored in open view. This letter demanded removal of the trailer and completion of the exterior plans, landscaping and driveway within 2 months. In response, Petitioner contacted Respondent's agent and during this 2011 meeting it was noticed that the agent was not administering the 2003 covenants, but rather a May 2008 version. So, *inter alia*, Petitioner asked for

a written explanation of how the covenants had been changed during his ownership without his knowledge or consent.

Petitioner began the process of working with an attorney to file a title insurance claim in the 2011/2012 time period. This claim was about perceived errors in the encumbrances of title and area zoning documents that were produced by the developer Sandan LLC, the City and the Respondent. Since making contact with this attorney, Petitioner has been beset by many years of worth of unusual problems with the Respondent and the City of Bozeman.

Preparations for the title insurance claim involved various document requests from the City of Bozeman and the Respondent. Petitioner failed to get access to requested documents because the documents could not be found, were statutorily unavailable and otherwise reported to be in the possession of the City's outside counsel "Mike Lilly, Attorney" of "1 W. Main St" <sup>3</sup>.

Petitioner visited Mr. Lilly's office and his staff could not find the files either, but while there his staff did disclose<sup>4</sup> that Sandan LLC (Respondents

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<sup>3</sup> The September 19, 2016 Judgeship application of the Honorable Rienne McElyea (our Presiding Judge) explained that since 2000 she has been "an officer in Berg, Lilly and Tollefson, P.C. and in One West Main, LLC."

<sup>4</sup> Affidavit statement of record to this effect is in the pretrial writ that was served and filed to Respondent, the Montana Supreme Court and the presiding District Court judge. Cited reference on pg. 14 below; In the judgeship application McElyea explains "My father taught me integrity, empathy, and a duty to one's client . . . My father taught me that the law should not be mysterious or difficult to understand. Our legal system is

Incorporator) was also a client of the Berg, Lilly & Tollefsen P.C. of 1 West Main, Bozeman Montana.

Not having any answer to the 2011 request for written explanations, Petitioner wrote the Respondent a March 23, 2012 letter reiterating the 2011 request for explanations.

In a March 30, 2012 letter, now describing themselves as the Cattail Creek Homeowners Association, Counsel for the Respondent threatened they would obtain a court order precluding Petitioner from continuing to live in his home if their various demands were not agreed to within 7 days. An exchange of communications followed and an impasse was reached. Petitioner offered to engage in mediation if Respondent answered questions about how the covenants were changed. Petitioner also offered that until the validity of the May 2008 covenant filing was evidenced, he was willing to work on resolving issues with the Respondent under the 2003 covenant contract.

Respondent ended the 2012 communications with a June 4, 2012 letter that demanded Petitioner “sit down with a mediator or we go to court”.

In the years that followed the 2012 communications, though the Respondent no longer engaged in direct communications with Petitioner, they did make “voluminous” complaints about the Petitioners construction activities to the City of Bozeman Building department. In response to an email from the Respondent,

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based on common sense. Our system of justice must be accessible to all and not just to those with knowledge or means. My father was a champion of equal rights . . . I work hard to follow my father’s lessons.”

the City terminated their construction permission agreement with Thompson a year earlier than was specified due to an ambiguity in the agreement that was pointed out by the Respondent.

During 2013, Petitioner engaged in correspondence with the Bozeman City Attorney's office endeavoring to repair the construction permission agreement. The City would acknowledge receipt of Petitioners letters but they avoided answering questions in the letters and they refused to repair the agreement with any terms that Petitioner could comply with. The last of these letters, was a January 1, 2014 letter.

Without making any direct response to the January letter, the City attorney swore out an affidavit of criminal complaint against Thompson in June of 2014. The affidavit spoke to the substance of the January 2014 letter. The City cited voluminous complaints from the Respondent as moving them to bring the criminal action. Discovery production of the City produced documentation that proved the affidavit was falsely sworn. Petitioner motioned to dismiss for fraud upon the court<sup>5</sup> based on the falsely sworn affidavit of the City attorney; and then the case was promptly dismissed without prejudice on another pending procedural motion in March of 2015. On March 16, 2015 the Respondent, representing themselves as "Cattail Creek HOA" purchased records of the 2014 criminal court proceedings.

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<sup>5</sup> Copy of this 2014 fraud upon the court motion is in Case 2:18-cv-00075-BMM-KLD, at Doc.9-7.

In March of 2015 Petitioner provided Respondent with a notice of complaint<sup>6</sup> letter.

On July 28, 2015 Respondent filed a civil complaint against their former president who first wrote Petitioner in 2011. The prompt final adjudication of this civil action became a decree<sup>7</sup> that resolved disputed parking policies which Petitioner had protested to the former president in 2011 and 2012. These civil proceedings were also judicially noticed in the present case as proving the Respondent's legitimacy because their former president did nothing to contest the validity of the May 2008 covenants. These are the same covenants that the former president was asked to provide Petitioner with proof of the validity of in 2011.

During the 2012 communications with the Respondent, the parties agreed to acknowledge receipt of emails and regular US Postal mail; and that if Respondent had any documents that needed formal service, Petitioner would voluntarily pick them up and sign for them at the office of Respondent's counsel. In conformance with this agreement, in a March 24, 2015 email, the Respondent acknowledged receipt of the Petitioner's 2015 notice of complaint.

In contravention of the 2012 communication agreement and the terms of the 2008 Covenants that parties should engage in mediation prior to litigation,

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<sup>6</sup> Copy of this notice of complaint letter is in Case 2:18-cv-00075-BMM-KLD, at Doc.133-13.

<sup>7</sup> Copy of the substance of this decree that was filed in the subdivision documents of the county court house is in 2:18-cv-00075-BMM-KLD, at Doc.133-19.

Respondent sent a process server to Petitioner's home and served a summons and complaint in the present matter in August of 2015. A day later Petitioner received a citation summons notice to face criminal charges from the City of Bozeman<sup>8</sup>.

## II. Procedural Background of the Present Case

Petitioner Peter Thompson (Thompson) filed a January 24, 2018 petition for a writ for supervisory control with the Montana Supreme Court in an effort to have the District Court proceedings dismissed for procedural failure to lawfully invoke the jurisdiction of the Court as a threshold matter and this pretrial petition presented a range of other reasons why supervision was needed.

The Montana Supreme Court denied this petition. *See* order (App.49a). Their order summarized Thompson's issues which the appellate court said could be adequately addressed after trial. In a light most favorable, the implied advice of the order was that the wide ranging affidavit statements within the petition asserting judicial bias and the 4 pages of case law regarding bias represented matters that needed to be handled via direct pretrial motion work by Thompson. In district court Thompson had been

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<sup>8</sup> Copy of the 2015 criminal citation which opened up the cause of action for the City of Bozeman is in Case 2:18-cv-00075-BMM-KLD, at Doc.9-10. The criminal citation is a statutorily authorized witness affidavit of Captain Veltkamp that he saw Thompson commit the accused crime at a specific time when the supporting police investigation says Thompson was out of state and the supporting police report (Doc.9-9) timeline says that the citation was issued and then an investigation was conducted to support the citation.

ordered not to file any more motions without first asking for leave of the court to do so.

The presiding District Court Judge disassociated herself from ownership interests in Berg Lilly & Tollefsen P.C. and their building at 1 West Main on December 31, 2016 and then on January 5, 2017 took over the immediate proceedings which named her former partner Mike Lilly as a person of interest in counter claims along with direct complaints against a cabal of their law firm's long standing clients, including the Respondent's creator Sandan LLC.

The January 2018 petition for a supervisory writ was in the form of an affidavit statement by Thompson and filed both with the Montana Supreme Court and also served and filed to the presiding Judge of the District Court<sup>9</sup>. Some of the express affidavit allegations concerning the appearance of improprieties as follows:

"That denial of leave to amend prevents [Thompson] from . . . naming Mike Lilly. . . , the presiding judge's former law-firm partner and several other individuals who were\are employees or principals of corporations who are\were clients of the same law-firm, . . . [has] . . . the appearance of improprieties . . ." From pg.25.

"That this court's denial of [Thompson]'s motion to compel discovery keeps [Thompson] from a clear view of the truth, which includes discovery that may link clients of

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<sup>9</sup> Copy of this petition is the record of the immediate matter as Doc.144.

the presiding Judge's former law-firm and or former partner, Mr. Lilly, to the counter and or third party [claims] . . . has the . . . appearance of impropriety . . ." From pgs. 28&29.

"The record in the open criminal litigation implies that the constitution is nothing more than a piece of paper to the range of municipal workers [Mr. Lilly and company clients] involved in bringing the criminal complaint against [Thompson]. A zoning history report from the City, named Mike Lilly as a person holding documents that [Thompson] failed to get access to, while at Mr. Lilly's office it was learned that Sandan LLC (Sandi Hamilton and Daniel S. Madison owners . . . [CCCA Inc's incorporators]) were this firm's clients. The City claimed lawyer client privilege [with Mr. Lilly and company] in the face of discovery requests of [Thompson], the honorable Judge Carl Seal then granted [Thompson]'s motion to compel answers, which the City continues to evade answering. If discovery reveals that Mike Lilly provided counsel to City workers conspiring against [Thompson] . . . , [Mike Lilly] would be reasonably named as an abettor or coconspirator . . . In the criminal trial, Mr. Risk [Mr. Lilly's current client] perjured himself, this is evident in the record. That [Respondent's Counsel] has led the 18th dist. Court [judge is Mr. Lilly's recent partner] to adjudicate without a hearing [thus preventing cross examination of Mr.

Risk] and then publish finding of fact and conclusions of law upon Mr. Risks impeachable affidavit testimony [hearsay], on the same subjects which the City failed to establish as viable facts in the municipal court, implies error and the . . . appearance of impropriety." From pg.31.

"At the [preliminary] pretrial conference, [Thompson] was denied the right to amend counter claims to include claims that have presented since the objected to schedule window for amendment had closed; and the court denied misdesignated affirmative defenses that the parties had already recognized and argued as counter claims to be live counter claims; *i.e.*, the court denied every effort of [Thompson] to make counter claims and get the proper parties before the court, . . . the . . . appearance of impropriety that the presiding judge has silenced counter claims against her former law firm's . . . client[s] and partner [is] present . . ." Cited from pgs. 34&35.

Each of the quotes above included references to 4 pages of case law that all spoke to the constitutional principle that "A state ruled by law cannot afford any perceived notion that justice is not being served by the judiciary."

The Montana Supreme Court denied the petition (App.49a). This January 31, 2018 order implied the issue of bias needed to be raised pre-trial. So on January 31, 2018, Thompson motioned for leave in District Court to file a motion for pretrial recusal

referencing the affidavit statements of record<sup>10</sup> cited above. The motion cited Rule 12(c) asserting that the motion must be heard and decided before trial. Respondent promptly replied to the recusal motion on 2/2/2018. Three weeks later on the first day of the trial the District Court denied leave to motion for recusal (Day 1 transcript, page 6 lines 21 thru 24).

On day one of the trial, the Court denied the open motion for leave to have a jurisdictional hearing that was based on contested standing of the plaintiff and the record lacking competent evidence of standing; and the Court also denied the open motion for leave to have a hearing regarding CCCA Inc's lack of standing. This motion was based on affidavit statements of record that proved CCCA Inc's corporate filing concealed the unlawful nature of their formation from the Secretary of State.

The Court reserved ruling on the open motion regarding the threshold justiciability issue that the relief sought was not authorized by statute and in contravention of controlling published maxims of the US Supreme Court. The motions discussed above were filed within days of the Montana Supreme Court's order and about 3 weeks before the scheduled trial. All these motions cited Rule 12(c) asserting that the motions must be heard and decided before trial.

During Day one of the trial, Thompson moved the Court to "try the issues of justiciability and mootness first. I believe you said that we're still open to discussing the injunctive relief sought by the Plaintiff

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<sup>10</sup> Copy of this motion for leave regarding recusal is in the record of the immediate matter as Doc.146.

as a question. And I would also like to add that I believe standing is a threshold jurisdiction question" (from Day 1 pg. 12 lines 12 thru 19). The Court reminded "I have already ruled and denied your motion for leave on the standing questions, so we are proceeding with respect to the injunctive relief. That is a question for this Court and I'll allow you to make closing arguments"

At trial, *inter alia*, Thompson advised the Court that the undisputed testimony is that CCCA Inc was formed without the knowledge or consent of members in violation of state law. Thompson provided the exact state laws that were violated in a post-trial statutory reference filing as the Court had allowed he could.

Having been brought through "the crucible of trial" without the benefit of discovery, without meeting and conferring to establish undisputed facts and having been denied use of the number one witness on his witness list, Wayne Jennings, Respondent's counsel; Thompson was very surprised to then be denied<sup>11</sup> permission to file post trial proposed findings of fact and conclusions of law. After the Court issued its findings and conclusions based on the trial, Thompson's objections to the findings of fact were denied prior to any response from opposing counsel. Then Thompson was denied the right to make post trial filings regarding errors in the conclusions of law.

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<sup>11</sup> At Day 3 of the trial transcripts on page 249 Lines 11-13 the Court explained "the Gallatin County District Court Judges have all agreed that we're no longer accepting Revised Findings and that is to keep things moving along."

On appeal, Thompson motioned under Rule 29 for suspension of the rules for efficiencies sake. The Montana Supreme Court had previously ruled that the pretrial supervisory writ issues could be adequately addressed after trial, so taking them at their word, *inter alia*, Thompson resubmitted the pretrial writ documents along with the Rule 29 motion for adjudication. Before the trial, the Montana Supreme Court summarized the pretrial writ issues as Thompson requesting them “to review whether the District Court abused its discretion in denying his motions for dismissal of the action on grounds of procedural improprieties, to amend the pleadings or alternatively grant him default judgment, for summary judgment, and for a determination that the subdivision covenant contract is a contract of adhesion; in ordering trial without discovery; in the proceedings leading to and in denying his demand for a jury trial; in managing the litigation; and in denying his motion for a Rule 11, M.R. Civ. P. hearing.”

The pre-trial petition, *inter alia*, presented the prior error of the lower court in denying the laches motion because CCCA Inc had repeatedly threatened the consequences of legal action and demanded “mediation or we go to court” in 2012 but then CCCA Inc remained silent for 3 years until they received Thompson’s 2015 notice of complaint letter<sup>12</sup>. Within the laches argument, the prior error of the lower court in denying dismissal for the much lower threshold under the prevention doctrine was also presented as a part of the pretrial petition, citing “*Moore*

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<sup>12</sup> Copy of this notice of complaint letter is in Case 2:18-cv-00075-BMM-KLD, at Doc.133-13.

*Bros. Co. v. Brown & Root, Inc.*, 207 F.3d 717 (4th Cir. 2000):

“The prevention doctrine does not require proof that the condition would have occurred ‘but for’ the wrongful conduct of the promisor; instead it only requires that the conduct have ‘contributed materially’ to the non-occurrence of the condition.”

In consideration of how CCCA Inc’s “voluminous” complaints materially contributed to Thompson’s ongoing struggle to maintain legal permission to complete the work, the petition sought review of the prior laches motion content which argued that CCCA Inc is estopped from seeking an injunction for failure to complete within one year based on the “prevention doctrine”.

Thompson filed a timely rule 29 motion for suspension of the rules as an application for expedited process of appeal. This motion was in the form of an affidavit statement which was filed on December 5, 2018. The point of the rule 29 motion was that the Montana Supreme Court had previously said they could address the complaints of the pretrial writ after the trial, so after the trial the pretrial writ was resubmitted for consideration of the issues therein.

Thompson filed a supplemental notice explaining that the pretrial writ problem of the district court not joining parties and recognizing the asserted counter and third party claims of the interrelated matters no longer needed their attention because

these matters had been removed to U.S. District court with Thompson now as the Plaintiff.<sup>13</sup>

The rule 29 motion summarized the dispositive issues presented in the pretrial petition and it included a full copy of the pretrial writ with its original supporting documents. The rule 29 motion also reserved the right to adjudication on the merits should the court not concur with Thompson on the issues he asserted as dispositive.

The rule 29 motion cover provided notice of constitutional issues under M.R. App. Rule 27. The cover referenced sections of the motion that presented issues like violation of the right to equal protection, violation of due process rights being defeated in the name of local practice, violation of the constitutional right to a fair trial by an unbiased judiciary, violation of the right to have the jurisdiction of the court lawfully invoked by determining constitutional justiciability matters as threshold issues, violation of the right to be free from grossly excessive punishment, *etc.*

One example of a dispositive issue presented in the Rule 29 motion:

The district court judge was accused of abetting her former law firm's client because:

"the record contains no evidence to support the district court's decision that the client of her former law firm filed legally sufficient [articles of incorporation] in 2006 . . .

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<sup>13</sup> Copy of this notice of removal with case law discussing the relevant statute is in Case 2:18-cv-00075-BMM-KLD, at Doc.80-14.

A court may also abuse its discretion when the record contains no evidence to support its decision. *MGIC Indem. Corp. v. Moore*, 952 F.2d 1120 (9th Cir. 1991).

"When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension." *Codd v. Velger*, 429 U.S. 624-Supreme Court 1977 . . .

. . . Conventional application of the space-time continuum to the facts within the affidavits of the HOA and Peter Thompson require[s] the . . . conclusion that the HOA's articles of incorporation and their 2006 filing represent forged documents secretly filed without the knowledge of the property owners bound thereunder . . .

*McCormick v. Market Bank*, 165 U.S. 538-Supreme Court 1897:

"When . . . the corporation is formed under general laws, by the recording or filing in a public office of the required articles of association and certificate, any person dealing with the association is bound to take notice of the documents recorded or filed, upon which, as authorized and controlled by the general laws, depend the existence of the corporation . . .

The forgoing stare decisis underscores this appellate court's . . . obligation as persons dealing . . . with the

HOA to . . . admit that the HOA's existence depends on articles of incorporation which natural justice dictates to be fraudulently filed documents . . . ”

The rule 11 hearing requests of the pretrial petition that was discussed in the reply to response to the Rule 29 motion revolved around the fact that Respondent's counsel knows CCCA Inc was illegally formed, but they brought the proceedings in the name of CCCA Inc anyway.

When CCCA Inc introduced their articles of incorporation, Respondents counsel was asked to withdraw because the undisputed facts prove CCCA Inc is claiming standing on void documents, but Respondents counsel continued with the litigation.

The reply to response explained “Mr. Jennings has said that none of the covenant contracts prohibited the formation of an incorporation, yet Mr. Jennings has offered no evidence or argument to contradict the declaration of Thompson that the corporate charter which his client claims standing on before this honorable court is a nugatory document due to its forged origins.”

When the Montana Supreme Court published their noncitable memorandum (App.1a), they summarized Thompson's arguments about the undisputed facts of CCCA Inc's illegal formation as

“To the extent discernible from his appellate “brief,”<sup>7</sup> Thompson challenges the Association's standing based on alleged irregularities in the incorporation of the Association as a distinct legal entity and the 2008 amendment of the original phase-specific covenant sets. He essentially asserts that, due to those

irregularities, the Association had no authority to enforce the one-year construction deadline against him."

Above, the Montana Supreme Court is willfully blind to the undisputed facts in evidence that the cause of action they were adjudicating has been brought by a plaintiff that purposefully claimed standing on a void corporate charter, which the facts and law when fairly applied, prove to be nugatory forged articles of incorporation because the documents conceal the truth of their illegal nature from the Montana Secretary of State's office.

Thompson filed a petition for reconsideration requesting consideration of the following issues that were not addressed in the noncitable order:

1. The Opinion overlooked the question of the district court self-adjudicating Thompson's pretrial motion for recusal being dispositive of the proceedings.
2. The Opinion overlooked the question regarding failure to adjudicate thresholds of justiciability at the requisite time in the proceedings mandating dismissal.
3. The Opinion overlooked the fact that parts of their findings of fact are based on hearsay evidence which are contradicted by substantial admissible evidence, testimony and the MCA.
4. The Opinion conflicts with § 25-10-501, MCA and *Total Indus. Plant v. Turner*.

5. The affirmed injunction conflicts with the US Supreme Court's prohibition against cruel and unusual punishment.
6. The affirmed injunction conflicts with the terms of the various contracts involved.
7. The Opinion overlooked the fact that equity required the Court to determine which contract the adjudication is based on.
8. The Opinion overlooked the questioned propriety of adjusting the controversy between Thompson and the City without the City being a party to the suit.

The Montana Supreme Court denied the petition for reconsideration and issued remitter to the district court on November 6, 2019.

On January 21, 2020, CCCA Inc filed a motion in the district court asking for a writ of assistance to have the sheriff evict the Thompson family. *Inter alia*, Thompson's response moved the district court as follows:

Thompson moves the Court to take judicial notice of M.R. Civ. P. 17.(b) and to determine CCCA Inc's standing in conformance with this rule of civil procedure M.R. Civ. P. 17.(b) controls the Court to determining CCCA Inc's standing in conformance with the appropriate statutes . . . The undisputed testimony<sup>14</sup> is that CCCA Inc was formed with-

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<sup>14</sup> CCCA Inc was formed without the knowledge and consent of members, *see* the doc.41 affidavit of Sandra Rummel, *see also* Transcript of Day 2, page 42 line 25 Jaymie Larson learned of the 2006 incorporation in the fall of 2007. Transcripts Day 1

out the knowledge or consent of hundreds of claimed members. The formation was in violation of the law, specifically MCA 35-2-510 (2) requires a person's consent to be admitted as a member bound under articles of incorporation; and MCA 28-2-301(3) demands that consent be "communicated by each to the other". By secretly forming a corporation that bound hundreds of other property owners, the founding members of CCCA Inc created an infinitely incurable mess.

The parties agree that none of the original covenant contracts authorized incorporation of their resulting entities. CCCA Inc has argued that none of these contracts prohibit their incorporation, but the reality is that from their four corners all of the original covenant contracts prohibit action of their respective associations without first establishing quorum at a meeting to conduct business and the undisputed testimony<sup>15</sup> is that none of the original organizations ever had any meetings with quorum authorizing the act of incorporation prior to the 2006 formation of

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page 113 lines 1-6 Sandra Rummel testifies she learned she was a member of a nonprofit corporation the week before the trial.

15 *See* trial transcripts Day 1, page 101 line 22 thru page 102 line 20 Sandra Rummel testifies the first organizational meeting of the original covenant contract associations occurred in 2007. *See also* page 173 at line 8, the first member attended meeting occurred in June of 2006 without quorum. *See* page 116 Line 21 thru page 117 at Line 10 the June 2006 meeting was without quorum. Exb.7 Says the nonprofit was formed on April 26, 2006.

CCCA Inc. Thus, the people who purported to represent the corporation<sup>16</sup> lacked the capacity to contract in the formation of CCCA Inc.

It is long and well settled that all association acts taken without the requisite authority of quorum are null and void<sup>17</sup>. Also, MCA 35-2-611 . . . (2) requires that when member approval is not required to make the articles of merger, then a statement to this effect must be present in the filing; no such statement is present in CCCA's articles of incorporation (*see* Plaintiff's Exhibit 9 for full copy of the Corporate Charter).

At trial, Jaymie Larsen testified that she believed the original members lack of consent to form the non-profit corporation could be cured by a later ratification of members<sup>18</sup>, but the law says<sup>19</sup> the original lack of

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<sup>16</sup> *Larry C. Iverson, Inc. v. Bouma*, 639 P.2d 47, 195 Mont. 351 (1981): . . . “the parties who represented the corporation at the time [the corporate charter was formed] were without authority to act for the [members of the] corporation. Thus, the people who purported to represent the corporation lacked the capacity to contract. *Worman Motor Co. v. Hill* (1939), 54 Ariz. 227, 94 P.2d 865; 17 C.J.S. Contracts, § 27 at 630.” . . .

<sup>17</sup> “Plain and simple, actions taken without a quorum are void and unenforceable.” Cited from <https://www.lawoforderblog.com/2017/07/4-myths-about-roberts-rules-and-quorum-and-why-the-truth-matters/>.

<sup>18</sup> *See* Jaymie Larsen testimony Day 1 page 257 line 5 thru 21.

<sup>19</sup> *Larry C. Iverson, Inc. v. Bouma*, 639 P.2d 47, 195 Mont. 351 (1981): . . . [CCCA Inc] contend[s] that [the members] by [their] actions ratified the contract . . . It has been held that a contract entered into without the power to contract cannot be ratified or enforced and that the incapacity to contract cannot be removed by estoppel. *Granzow v. Village of Lyons* (7th Cir. 1937), 89 F.2d

capacity to have formed the corporation cannot ever be cured by a future consent. Similarly, MCA § 28-2-304 says “A contract which is voidable solely for want of due consent may be ratified by a subsequent consent.” However the annotated cases explain this statute may not be used to cure prior illegal acts, such as CCCA Inc filing their corporate charter in violation of the law under the Montana Nonprofit act.

*Please see Plaintiff's Exhibit 7 at page 6 in section 4.2, here we can see that this 2008 document endeavors to cure the past ultra vires action of the 2006 incorporation. Similarly, CCCA Inc's doc.1 complaint in ¶1 notices the Court of the 2008 covenants (Exb.7) authorize CCCA Inc (a 2006 entity of Exb.9) to administer the 2008 covenant contract. The problem that precludes anyone from ever curing and lawfully doing anything as CCCA Inc, *inter alia*, like obtaining a judgement in the name of CCCA Inc is that the incorporation is statutorily an incurably unauthorized act. See *Sibert v. Community College of Flathead County* (1978), 179 Mont. 188, 191, 587 P.2d 26, 28 (labeling a statutorily unauthorized act as ultra vires). See also *McCormick v. Market Bank*, 165 U.S. 538-Supreme Court 1897:*

“The doctrine of ultra vires, by which a contract made by a corporation beyond the scope of its corporate powers, is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a

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83. See also *Granzow v. Village of Lyons*, stating “Ratification is impossible if there is no power to contract.”

corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

In response to the motion cited above, CCCA Inc did not dispute the facts or law asserted. Rather they accused Thompson of trying to re-litigate the matter and said nothing more about the above cited material.

Endeavoring to have the court follow the rules, Thompson motioned for a hearing citing the rules of procedure requiring the parties to provide proposed findings of fact and conclusion of law for the hearing.

Thompson then moved the court to take judicial notice of the undisputed facts, law and rules of civil procedure and immediately dismiss the case. Summary of undisputed facts, conclusions of law\proposed order as follows:

### III. Facts

1. "CCCA Inc" was formed without the knowledge and consent of hundreds of property owners claimed as members . . .

2. CCCA Inc is a corporate entity created by Sandan LLC . . .

3. Sandan LLC and its owners Sandi (AKA Sandra) Hamilton and Dan Madison are longstanding clients of the Berg, Lilly & Tollefson law firm . . .

#### IV. Conclusions of Law

On January 21, 2020 CCCA Inc filed a motion for an order to enforce judgement. Thompson responded, *inter alia*, by moving the Court to take judicial notice of M.R. Civ. P. 17.(b) which requires the Court to determine CCCA Inc's standing under state law and Thompson provided statements of fact which CCCA Inc has not disputed.

Thompson cited "*Palmer v. Bahm*, 2006 MT 29-Mont: Supreme Court 2006" as a standard of review for the proposition that standing is a necessary component of the court's subject matter jurisdiction and its absence can be raised at any time. The Court concurs. The case law cited by Thompson operates under M.R. Civ. P. Rule 12(h)(3) "Lack of Subject Matter Jurisdiction . . . If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action". Emphasis added.

The undisputed facts in this matter evidence that CCCA Inc was formed in violation of state law, MCA § 35-2-510(2), upon which their standing as an entity depends, the Court finds that CCCA Inc lacks standing to maintain the immediate action under state law and that the rules of civil procedure require immediate dismissal.

**IT IS ORDERED, ADJUDGED AND DECREED** that these proceedings are void for lack of subject matter jurisdiction and herewith dismissed without prejudice.

Rather than allowing the due process that Thompson had positioned CCCA Inc (so they would have to respond to the facts and law of the proposed order above). In the district court promptly scheduled a

hearing on CCCA Inc's motion to order for the sheriff to evict the Thompson family for August 6, 2020. Doing so before procedure required CCCA Inc to have responded to motion cited above.



### **REASONS FOR GRANTING THE PETITION**

Petitioner Peter Thompson (Thompson) spoke with a few candid attorneys regarding the facts and issues summarized in the March 2015 notice of complaint[7 above] to Respondent Cattail Creek Community Association, a Montana nonprofit corporation (CCCA Inc). So Thompson understood from these attorneys that regardless of the facts & law and regardless of whether or not Thompson could afford to spend a hundred thousand dollars on litigation costs; Thompson had no hope of prevailing in state court because he was aligned against the hometown crowd.

Thompson had to bring the 2015 issues in federal court to have a reasonable expectation that the matter would be decided upon the facts and the law vs the affiliations of the parties. CCCA Inc's counsel demonstrated their similar understanding when they controlled the venue of the noticed 2015 complaints from Thompson, by avoiding mediation and initiating action as the Plaintiff in state court. Natural justice requires courts to produce the same results with the same facts under the same statutes.

Natural justice is not available to the people of Montana who confront Montana's oligarchy<sup>20</sup>.

A few people have become outspoken about the problem of Montana's courts and particularly Bozeman, suffering "banana republic" style government. Professor Robert G. Natelson, a senior lawyer who has practiced in Montana explained in his 2019 article titled "America's worst appeals court" that the Montana Supreme Court "frequently displays palpable political bias. There is a common saying among Montana lawyers: If you know who the parties are, you know how the court will rule . . . Many Montanans are concerned about their supreme court's banana-republic conduct . . . No court is perfect. But Montana's bench may be unique for its disregard of basic standards of justice . . . and its high-handed use of power."

Some people have expressed grave concerns regarding the frequency with which the Montana Supreme Court overturns its own precedent. In one such article (Jeffrey T. Renz, *Stare Decisis in Montana*, 65 Mont. L. Rev. (2004)) the author explains judges are elected officials in Montana and the author shows that Montana overturns its own precedent at a double digit rate higher than any other state in the United States of America. With understated western politeness the author concludes "the court's activity can be explained only by a lack of adherence to principle when overruling its precedent."

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20 "Oligarchy" is "government by the few"; "a government in which a small group exercises control especially for corrupt and selfish purposes." <http://www.MerriamWebster.com/dictionary/oligarchy>.

What Mr. Renz, implies is that Montana judges are not administrators of the law but rather its master and if the law does not suit the master's desire it need not be adhered to. Most of the time, this truth can be concealed within the bounds of judicial discretion, but in the immediate case the court system of Montana had to be willfully blind to the truth, the law and the rules of civil procedure to produce the results of its preference.

This petition complains that Respondent CCCA Inc and their lawyer both know they are an illegal enterprise, but because they are of the well-connected hometown crowd, they knew from the beginning that the state court system will find a way for them to prevail regardless of the law and undisputed facts.

Review of the full case file in this matter will show, *inter alia*, that Thompson has presented 13 affirmative defenses and that the unbiased adjudication of any of these defenses should have resulted in dismissal many years ago. Further, review of the case file will prove that Montana's judiciary cannot be controlled by published U.S. Supreme Court Maxims, Federal or State constitutional encumbrances, the rules of procedure, maxims of law, state statutes or even U.S. Supreme Court precedent, if such constraints would prevent them from granting judgement as they prefer to. In the following case cite, the U.S. Supreme Court speaks to similar problems.

*Luther v. Borden*, 48 U.S. 1-Supreme Court 1849-cited in *Hodes & Nauser, MDs, PA v. Schmidt*, 2019 and 40 similar citations;

“Likewise, if ‘the people . . . should ever think of making judges supreme arbiters in political

controversies . . . they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic. . . .”

Plato explained the mechanics of this reoccurring social problem as “[I]f law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.”

In the immediate case, Thompson purchased property under a 2003 covenant contract that required a several hundred member strong quorum to conduct its business. Without hundreds of property owners agreeing to allow others to conduct the business of the 2003 entity, the majority of owners were let alone to live within City limits, pay City taxes, receive City services and be like everyone else in Bozeman.

This 2003 contract theoretically created an association called “Cattail Creek Community Association” it provided procedures for creating a governing body. The contract prescribed annual meetings but the large quorum requirements estopped a small hometown crowd of about 10 people from taking control and doing as they pleased to hundreds of their neighbors. CCCA Inc is a sound-alike corporation that began managing the 2003 covenant contract, *inter alia*, by mailing out thousands of letters pretending they were the legitimate officers and directors of the 2003 organization. *See* one letter example as Exhibit 11, copy of this document is available in Case 2:18-cv-00075-BMM-KLD, at Doc.9-12 on pg.83.

Public records show that between 2009 and into 2011 people representing themselves as "Cattail Creek Community Association" were filing liens against property owners within the 2003 covenant contract area. Then in mid 2011 Thompson asked for a written explanation of how the covenants were changed during his ownership without his knowledge or permission. CCCA Inc's board then met with attorney Wayne Jennings.

Respondent's counsel Mr. Jennings has participated in creating case law that says if a new set of covenants is found to be invalid an older set of covenants are still binding.

In late 2011, CCCA Inc stopped filing liens in the name of Cattail Creek Community Association and started using names that sounded more like the older covenant contracts, such as "Cattail Creek Community Owner's Association" and sometimes they were "Cattail Creek Community Homeowners Association".

The undisputed facts are that the 2003 covenant contract entity, "Cattail Creek Community Association" never formed via a meeting duly held with quorum to allow legitimate members to select their own board of directors and officers to act on behalf of the 2003 entity; Thompson purchased under this 2003 covenant contract with the lawful expectation that the people participating in managing the 2003 entity were doing so in conformance<sup>21</sup> with the governing policies of the 2003 entity.

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<sup>21</sup> "...a fundamental right to contract freely with the expectation that the terms of the contract will be enforced. This freedom is as fundamental to our society as the right to write and to speak without restraint." Emphasis added, cited from

CCCA Inc's board of directors are very well connected and very well-funded. With usurped funds this illegal entity freely enjoys use of our legal system as a weapon.



### CONCLUSION

In Montana municipal court judges are statutorily required to receive annual training on how to be good at their job, but this requirement does not apply to Montana's district court judges nor state Supreme Court judges.

On October 31, 2016 Thompson served CCCA Inc with his discovery requests. CCCA Inc waited thirty days and then responded saying they would not answer the discovery requests because they were not timely served. (Thompson was pro se defending spurious criminal charges and he had taken time to file a complaint with the FBI and request prosecution from the US Attorney general regarding institutional corruption that was allegedly driven by CCCA Inc). CCCA Inc said the delayed discovery service prejudiced against them, Thompson argued that days of delay after many years of waiting was not prejudicial. Thompson motioned to compel CCCA Inc to answer the served discovery. This motion was denied on January 25, 2017. Then in February of 2018 Thompson suffered trial without the benefit of discovery.

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*Nottingdale Homeowners' Assn., Inc. v. Darby*, 33 Ohio St. 3d 32—Ohio: Supreme Court 1987.

In the concurrent criminal action, though Thompson had complained to federal agencies of the municipal court judge joining the institutional corruption because he was witnessing it and did nothing to stop it. In hindsight, the municipal judge would not give Mr. Lilly's client, the City of Bozeman, what the District Court and the Montana Supreme Court did. The Montana Supreme Court adjudicated that on "July 30, 2013, the City revoked" Thompson's certificate of occupancy.

At trial in the immediate matter Thompson's uncontradicted testimony was that CCCA Inc's evidence that alleged Thompson's certificate of occupancy had been revoked was nothing more than an illegal hand note of the Chief building official on his carbon copy of Thompson's 2010 certificate of occupancy. Plaintiff's exhibit 33, was in fact evidence that "proves the illegal activity . . . of Mr. Risk." (Day 3 trial transcript pg.107).

Mr. Risk did not have the legal authority to pretend Thompson's Certificate of Occupancy had been revoked when he made his personal hand notes on the carbon copy. Bozeman City Attorney Tim Cooper was in the gallery and an approved rebuttal witness, but CCCA Inc did not call him to contradict Thompson's testimony.

Statutory compliance with certain facts can be as simple as the lights are on or the lights are off. The criminal proceedings, TK-15-03459, were a subject of Thompson's counter and third party claims, originally filed in the immediate matter as Doc.21 on April 2, 2016, *see* pg.26 accusing the City attorney of conspiring to commit fraud upon the court, mail fraud, institutional corruption, etc. with alternate pleadings as RICO crimes. The City was served with

this complaint as notice, but no summons were issued because the schedule window closed before the required time for their response to the noticed complaint had closed and the district court refused to open up the schedule for amendment and or joining parties. It follows that the events described below occurred with the acting parties having notice of the existing allegations against them.

At a 2016 hearing in TK-15-03459, City Attorney Tim Cooper advised the municipal court judge that the City had adopted an international building code which allegedly said their Chief Building official had the right to revoke Thompson's building permit. Mr. Cooper explained that the City had revoked Thompson's certificate of occupancy in 2013 because it was allegedly issued in error and that Thompson had waived his right to due process in the alleged revocation because he did not seek post deprivation review from the City's building division review committee, which Chief Building Official Bob Risk chairs. These were the alleged reasons for the City bringing criminal charges. In 2015 via TK-15-03459, Thompson was alleged to be living in his home without a valid certificate of occupancy.

Thompson showed a copy of his original 2010 Certificate of Occupancy and advised the municipal court judge that state law granted the city authority to issue building permits and that their revocation was statutorily prohibited by the same state law.

The law in Montana is clear that a certificate of occupancy is a conclusive document which is binding on everyone once issued (50-60-107. Certificate of occupancy (2)). It is a simple conclusion as to whether or not any particular C of O is valid because, no matter what anyone says or writes, or even if the original document cannot be found, once issued the C of O remains valid in perpetuity until a court of competent jurisdiction sets aside or vacates the document. The only lawful way to revoke a Certificate of Occupancy without predeprivation due process is for immediate safety concerns of officials relative to the occupants of the building. These facts were laid bare in the first hearing of TK-15-03459.

After Mr. Cooper failed to prevail, in the prior hearing where the City had argued the C of O was temporary and revocable 3 years after it was issued, Chief Building Official Bob Risk testified in the next hearing about safety concerns for children due to open electrical boxes at the City's last inspection of the Thompson home as grounds for revoking Thompson's C of O; and Mr. Risk testified that he himself was not a court of competent jurisdiction.

Thompson wrote a post hearing memo, *inter alia*, showing code enforcement officer site visit notes which evidenced Mr. Risk was perjuring himself and that the City attorney knowingly solicited his perjured testimony regarding safety issues at the Thompson home.

It follows that Berg Lilly & Tollefson clients getting an August 2017 affidavit of the Bozeman's Chief Building Official into the record of the immediate proceedings; where their hearsay evidence was impeached by Thompson's admissible testimony, the

exhibits of record, statutory provisions and controlling 9th circuit law<sup>22</sup>; and for the Montana Supreme Court to then publish these false statements which in 2020 is a supporting basis for CCCA Inc's motion to Mr. Lilly's former partner at law (the Honorable Rienne McElyea, our Presiding Judge) to issue an order for the Sheriff of Gallatin County to evict the Thompson family represents a tiny glimpse of the remarkable power that is wielded by the oligarchy of Montana.

The theme of Thompson showing the facts and the law and the Court not being controlled by them is evident in every filing. The pretrial supervisory writ, the Rule 29 motion, response and reply and the petition for reconsideration tell the story sufficiently well and can be easily provided for the Courts consideration.

The full document set review makes sense because Thompson did not make any frivolous filings and despite the filings being construed as confusing, they should make sense to a practical unbiased reader.

*Jones v. Montana University System*, 155 P.3d 1247, 2007 M.T. 82, 337 Mont. 1 (2007): . . . Justice JAMES C. NELSON, dissenting . . .

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<sup>22</sup> *Kerley Industries, Inc. v. Pima County*, 785 F.2d 1444 (9th Cir. 1986): "the Deputy Air Quality Control Officer lacked the authority to revoke the permit . . . Kerley's mistaken belief that the Deputy Air Quality Control Officer's letter constituted an annulment of its permit does not give that letter operative legal effect": Likewise Chief Building Official Bob Risk writing a letter and privately vandalizing a carbon copy of Thompson's Certificate of Occupancy is without operative legal effect because in and of himself, Mr. Risk is not a court of competent jurisdiction. Please see MCA § 50-60-107. Certificate of occupancy(2).

¶ 74 . . . As Justice Sandra Day O'Connor observed in a similar context:

"[W]e understand as well as the next court how to . . . articulate the correct legal principle, and then perversely fit into that principle a set of facts to which the principle obviously does not apply. [All judges] know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences."

The 3K plus page record in the immediate proceedings provides this Court with an opportunity to see the inner working of case law in Montana and perhaps create some case law that makes it harder for our judicial system to be used the way it has in this matter. Case 2:18-cv-00075-BMM-KLD, at Doc.9 and its supporting exhibits represents the present pre answer scope of the counter and third party claims that Thompson removed from these proceedings to U.S. district Court in December of 2018.

"The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."—Anthony Kennedy

Thompson prays for relief this Court deems just and fitting to the circumstances.

Respectfully submitted,

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JUNE 2, 2020

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OPINION OF THE SUPREME COURT  
OF THE STATE OF MONTANA  
(OCTOBER 1, 2019)

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IN THE SUPREME COURT OF THE  
STATE OF MONTANA

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CATTAIL CREEK COMMUNITY ASSOCIATION,  
a Montana Nonprofit Corporation,

*Plaintiff and Appellee,*

v.

PETER THOMPSON,

*Defendant and Appellant.*

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No. DA 18-0539

2019 MT 233N

Appeal From: District Court of the  
Eighteenth Judicial District, in and for the  
County of Gallatin, Cause No. DV-15-636CX,  
Honorable Rienne McElyea, Presiding Judge

Before: James Jeremiah SHEA,  
Beth BAKER, Laurie MCKINNON, Jim RICE,  
Dirk M. SANDEFUR, Justices.

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Justice Dirk M. Sandefur delivered the Opinion of the  
Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Peter Thompson (Thompson) appeals the 2018 judgment of the Montana Eighteenth Judicial District Court, Gallatin County, granting Cattail Creek Community Association (Association) specified injunctive relief enforcing a subdivision covenants building restriction. We affirm.

¶3 Cattail Creek Subdivision is a major, multi-phase, mixed-use subdivision in Bozeman, Montana. The developer obtained subdivision approval in three phases—Phase 1 in 2002 (37 lots), Phase 2A/2B in 2003 (73 lots), and Phase 3 in 2005 (66 lots). Upon filing each final plat, the developer recorded a set of protective covenants governing that phase. All three covenant sets were substantially similar in pertinent part.

¶4 Each covenant set provided that all land in each plat “shall be held, sold, conveyed, . . . occupied, and improved subject to” those covenants and any subsequent amendments thereto. Each set provided that the covenants:

are intended to enhance the desirability and attractiveness of the land . . . [and] shall run with the land and shall be binding upon all person[s] having or who acquire any right, title or interest in and to the land, and shall inure to the benefit of the Declarant, the

### App.3a

Association and each person who becomes an owner of the land.

Each set defined the “Association” as the “Cattail Creek Community Association” and “empowered [it] with” all “rights” and duties specified therein and as may be subsequently amended. Each set provided that every owner or contract purchaser of a subdivision lot is “a member of the Association” and that “[m]embership shall be appurtenant to . . . the ownership of any lot.”

¶5 *Inter alia*, each covenant set expressly prohibited building on subdivision land except in accordance with “plans and specifications” previously approved by the Association. The building restriction further expressly required that an approved structure “must be erected and completed within one year from the date of approval.”<sup>1</sup> Each set included the following remedies for enforcement of the building restriction:

If any structure is commenced and is not completed in accordance with the [approved] plans and specifications within one year, the Directors of the Association, at their option, may take such action as may be necessary, in their judgment, to improve the appearance so as to make the property harmonious with other properties and to comply with these Covenants, including completion of the exterior or the combination thereof, or removing the uncompleted structure or similar operations. The amount of any expenditure made in so doing shall be an obligation of the owner.

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<sup>1</sup> Each set provided for a Cattail Creek Design Committee vested with the “the right to exercise control over all construction in the Cattail Creek Subdivision.”

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A lien on the property may be recorded and shall be enforceable by an action at law. In lieu thereof, the Association may take such action as is available by law, including an injunction, or for damages.

¶6 In 2006, an agent of the subdivision developer incorporated the referenced Association as a Montana non-profit corporation. Upon a meeting of the membership of all three phases, the combined membership elected a single nine-member board of Association directors—three elected by the membership of each phase. In 2007, a question arose as to whether the board should be administering the larger subdivision in unison as a single subdivision or, alternatively, as three separate subdivisions. Acting pursuant to an affirmative advisory vote of the combined membership of each phase, the board subsequently drafted a single set of proposed covenants, substantively similar to those originally governing each individual phase, for submission to a membership vote as a consolidating amendment of the original covenant sets. Upon appropriate approval, the new single set of covenants would supersede the original three sets and govern all three phases of the larger subdivision under the administration of the consolidated Association. In January 2008, the board submitted the proposed single-subdivision covenants to a membership vote by mail ballot election. Upon the affirmative vote of 75% of the members of all three phases, as counted at a noticed board meeting on March 26, 2008, the board declared the proposed single-subdivision covenants amendments duly approved.<sup>2</sup> The board subsequently recorded the

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<sup>2</sup> It is unclear on the record whether the affirmative vote count consisted of 75% of the membership of each phase or merely

## App.5a

new covenants in the official real property records of Gallatin County on May 15, 2008. In pertinent part, the new covenants carried forward, as applied to the larger subdivision as a whole, the same or substantially similar provisions and restrictions set forth in the original covenant sets for governance of each respective subdivision phase.

¶7 On February 8, 2008, while mail voting was still in progress on the 2008 covenants amendment,<sup>3</sup> Thompson purchased Lot 7 in Block 9 of Phase 2A/2B. While aware that the covenants amendment issue was pending, he did not have the opportunity to vote on the proposed covenants amendment because the prior Lot 7 owner (Richard Embry) had voted in the election prior to the conveyance. After acquiring the lot, Thompson applied for Association approval of his proposed building plans and specifications for a new home.<sup>4</sup> The Association design committee subsequently approved Thompson's building plans and specifications on March 6, 2008. Thompson thereafter accordingly commenced

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75% of the membership of all three phases. Each set of original covenants defined and referenced only a single homeowners association and then provided that the requisite vote for amendment was "three-quarters (3/4) of the total votes of each class of Owners of lots then within Cattail Creek Covenants." Each set defined the term "Cattail Creek" as the land described for each phase. The Association heard no objection from any subdivision lot owner regarding the 2008 election procedure or outcome.

<sup>3</sup> The mail ballots and informational packet went out into the mail to the membership in January 2008. The specified deadline for return of the ballots was March 10, 2008.

<sup>4</sup> Thompson thus applied for and received design approval from the Association's design review committee under the original 2003 covenants for phase 2A/2B.

construction under a building permit independently issued by the City of Bozeman (City).

¶8 Despite the one-year construction deadline, construction remained incomplete a year later. Though it contemplated having to pursue covenant enforcement remedies against Thompson, the Association board took no immediate action. In 2010, after extending or renewing Thompson's building permit when construction was still incomplete earlier that year, the City issued him a limited occupancy permit authorizing occupancy of the lower level of the home pending completion of the rest of the project. When construction was still incomplete in 2012, Thompson asked for the Association's continued forbearance based on his representation that he could complete construction by February 2013. When construction was still incomplete on July 30, 2013, the City revoked the limited occupancy permit but took no other action. Thompson then continued to reside in the incomplete home.

¶9 In August 2015, with significant exterior features still substantially incomplete after seven years, the Association filed a district court complaint seeking an injunction enjoining Thompson from further occupancy of the home pending completion of construction, recovery of delinquent association dues, and attorney fees.<sup>5</sup> Upon service of process, Thompson appeared and filed a series of *pro se* motions for dismissal, judgment on the pleadings, summary judgment, and Rule 11 sanctions. After he unsuccessfully petitioned this Court for supervisory control, the case proceeded to bench trial. The District Court subsequently issued

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<sup>5</sup> The complaint also sought an injunction enjoining Thompson from parking a large truck on subdivision property.

detailed findings of fact, conclusions of law, and judgment rejecting Thompson's various asserted defenses, finding him in breach of the one-year construction completion deadline,<sup>6</sup> concluding an injunction enjoining him from further occupancy pending completion of various outstanding exterior features was necessary to remedy the breach, and determining that the Association was entitled to attorney fees pursuant to the attorney fees provision in the covenants. After conducting an attorney fees hearing, the court entered a final judgment enjoining Thompson from further occupancy of the home unless he completed construction of certain exterior features in 90 days. The court awarded the Association \$88,532.50 in attorney fees with costs and interest. After a series of unsuccessful post-trial motions, Thompson timely appealed.

¶10 We review lower court findings of fact only for clear error. *Ray v. Nansel*, 2002 MT 191, ¶ 19, 311 Mont. 135, 53 P.3d 870. Findings of fact are clearly erroneous only if not supported by substantial evidence, the court misapprehended the effect of the evidence, or, based on our review of the record, we have a definite and firm conviction that the lower court was mistaken. *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241; *Interstate Prod. Credit Ass'n of Great Falls v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). We review conclusions and applications of law de novo for correctness. *In re Marriage of Bessette*, 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894; *Steer, Inc. v. Mont. Dep't of Revenue*, 245 Mont. 470, 475, 803 P.2d 601, 603 (1990). We review

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<sup>6</sup> The court noted that the Association's claims for recovery of delinquent association dues and other injunctive relief were moot due to corrective action taken by Thompson prior to trial.

discretionary rulings, including rulings on trial administrative issues and post-trial motions, for an abuse of discretion. *City of Missoula v. Girard*, 2013 MT 168, ¶ 10, 370 Mont. 443, 303 P.3d 1283. An abuse of discretion occurs if a court exercises granted discretion based on a clearly erroneous finding of material fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice. *Larson*, ¶ 16; *City of Missoula v. Mountain Water Co.*, 2018 MT 139, ¶ 9, 391 Mont. 422, 419 P.3d 685.

¶11 District court findings of fact, conclusions of law, and exercises of discretion are presumed correct. *Hellickson v. Barrett Mobile Home Transp., Inc.*, 161 Mont. 455, 459, 507 P.2d 523, 525 (1973). The appellant has the burden of demonstrating error on appeal. *In re Marriage of McMahon*, 2002 MT 198, ¶ 7, 311 Mont. 175, 53 P.3d 1266; *Hellickson*, 161 Mont. at 459, 507 P.2d at 525.

¶12 Thompson first asserts that the District Court erroneously failed to dismiss the Association's claim for enforcement of the covenants due to lack of standing. "A plaintiff has legal standing to assert an otherwise cognizable claim only if (1) the claim is based on an alleged wrong or illegality that has in fact caused, or is likely to cause, the plaintiff to personally suffer specific, definite, and direct harm to person, property, or exercise of right and (2) the alleged harm is of a type that available legal relief can effectively alleviate, remedy, or prevent." *Larson*, ¶ 46. To the ex-

tent discernible from his appellate “brief,”<sup>7</sup> Thompson challenges the Association’s standing based on alleged irregularities in the incorporation of the Association as a distinct legal entity and the 2008 amendment of the original phase-specific covenant sets. He essentially asserts that, due to those irregularities, the Association had no authority to enforce the one-year construction deadline against him.

¶13 However, like the 2008 single subdivision covenants that superseded them, the original 2003 Phase 2A/2B covenants expressly vested the referenced homeowners association with authority to enforce the covenants’ building restriction by judicial action for monetary and injunctive relief. Nothing in the express language of the 2003 covenants, or superseding 2008 covenants, precludes the referenced homeowners association from incorporating. Thompson has not demonstrated that the alleged incorporation irregularities precluded the Association from enforcing the covenants’ construction deadline as the association referenced in the covenants. To the extent that the 2008 amendment vote may have been insufficient to amend and supersede the original Phase 2A/2B covenants, Thompson and his lot would nonetheless remain bound and subject to the original 2003 covenants and included one-year building restriction and enforcement remedies. We hold that the District Court did not erroneously fail to dismiss the Association’s claim against Thompson due to lack of standing.

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<sup>7</sup> Thompson did not file an appellate brief in conformance with M. R. App. P. 1(1) and 12. At the extreme outer limit of reasonableness, we have generously construed his “Rule 29 Motion to Dismiss” as an appellate brief.

¶14 Thompson next asserts that the District Court erroneously failed to dismiss the Association's complaint, grant him judgment on its claims, or grant post-trial relief from judgment. Whether asserted under M. R. Civ. P. 12(b)(6), 12(c), 56, 59(b), or 60(b), Thompson essentially asserts that the injunctive relief sought by the Association was not an available or proper remedy either as a matter of law on the pleadings or on the subsequently developed factual record in this case. However, our review of the pleadings and the record clearly indicates that the Association had standing to enforce the one-year construction deadline under the 2003 or 2008 covenants, Thompson clearly breached and remained in breach of the deadline, the 2003 and 2008 covenants authorized injunctive relief to enforce the deadline, and Thompson has not shown that the injunction imposed by the District Court was an abuse of discretion under § 27-19-102, MCA.<sup>8</sup> We hold that the District Court did not erroneously grant the Association the imposed injunctive relief.

¶15 Thompson next asserts that the District Court abused its discretion under M. R. Civ. P. 16, and violated his constitutional right to due process of law, by: (1) ordering the parties *sua sponte* to submit a proposed pretrial order without explicitly ordering them to confer; (2) issuing the Association's proposed scheduling order without conducting a scheduling

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<sup>8</sup> A district court may grant a "final injunction . . . to prevent the breach of an obligation existing in favor of the applicant where: (1) pecuniary compensation would not afford adequate relief; (2) it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; [or] (3) the restraint is necessary to prevent a multiplicity of judicial proceedings." Section 27-19-102, MCA.

conference; and (3) not postponing litigation in this matter pending resolution of his related building code dispute with the City of Bozeman. However, Rule 16 does not require district courts to conduct a pretrial conference prior to issuing a scheduling order in every case. *See M. R. Civ. P. 16(a)-(b).* In pertinent part, Rule 16 generally provides only that:

Upon request . . . [and] except in categories of actions exempted by district court rule, the judge must issue a scheduling order after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by . . . other means.

M. R. Civ. P. 16(b)(1) (emphasis added).

¶16 The record reflects that Thompson did not request a scheduling conference before the District Court issued a scheduling order. The court did not act *sua sponte* until seven and a half months after he first appeared and until after he had engaged in substantial motion practice prior to answering the Association's complaint. When it did act *sua sponte* in accordance with customary practice, the District Court ordered the parties to submit a stipulated scheduling order within 30 days. Upon their failure to reach an agreement, the Association timely filed a proposed scheduling order. Thompson did not.

¶17 The District Court duly considered Thompson's subsequent objections to the scheduling order. He has not shown that the court acted arbitrarily or without conscientious judgment. He has further not shown that his building code/permit compliance dispute with the City of Bozeman had any bearing as a matter of law or fact on whether he was in

compliance with the construction deadline independently imposed by the governing private covenants. We hold that Thompson has not met his burden of showing that the District Court abused its discretion, or otherwise denied him due process of law, in administering the pretrial schedule or proceedings.

¶18 Thompson next asserts that the District Court abused its discretion, and denied him due process of law, by denying his request for a jury trial. However, in the wake of his pretrial payment of delinquent association dues and an adverse summary judgment ruling disposing of his counterclaim in tort, the only claim or remedy still at issue prior to trial was the Association's claim for injunctive enforcement of the covenants. In that circumstance, the District Court denied Thompson's request for a jury trial pursuant to *Talley v. Flathead Valley Cnty. Coll.*, 259 Mont. 479, 491, 857 P.2d 701, 708 (1993) ("injunction is an equitable remedy fashioned according to the circumstances of a particular case . . . addressed to the discretion of the trial court"), and *City of Great Falls v. Forbes*, 2011 MT 12, ¶ 18, 359 Mont. 140, 247 P.3d 1086 (right to jury trial in "litigation involving both equitable and legal claims" but not regarding a "purely equitable action"). We hold that the District Court did not abuse its discretion, or otherwise deny Thompson due process of law, by denying him a jury trial on the Association's claim for injunctive enforcement of the covenants.

¶19 Thompson finally asserts that the District Court abused its discretion, and denied him due process of law, when it eventually barred him from filing additional post-trial motions. However, prior to the court foreclosing any further motion practice, Thompson was able to file a series of post-trial motions

including two motions for sanctions pursuant to M. R. Civ. P. 11, a Rule 59(b) motion, and three separate Rule 60(b) motions. In denying Thompson's second and third Rule 60(b) motions and then barring him from any further post-judgment motion practice, the District Court found that:

this action [started] three years ago. Since that time, [Thompson] has done everything in his power to delay these proceedings. [He] continues to file motions raising arguments that have previously been addressed by this Court's [ol]ders, requiring both the Plaintiff and the Court to expend unnecessary time and resources in addressing frivolous motions. [Thompson's] Rule 59(b) Motion and first Rule 60(b) Motion were more of the same, especially considering the motions were identical. . . . [His] attempts to further delay full resolution of this matter must come to an end. [Thompson] may seek relief from the Montana Supreme Court in accordance with the Appellate Rules of Procedure, but he has exhausted the post-judgment remedies available from this Court.

Despite this clear and unambiguous admonition, Thompson filed yet another Rule 59(b) motion on September 4, 2018.

¶20 While the District Court did not explicitly act pursuant to M. R. Civ. P. 11, it nonetheless had broad discretion to sanction frivolous or vexatious conduct under Rule 11(b). Thompson has not shown, and there is no record indication, that the court's failure to conduct a show cause hearing prejudiced his substantial rights in any material regard. Under

the particular circumstances of this case, we hold that the District Court did not abuse its discretion, or otherwise deny Thompson due process of law, by foreclosing any further motion practice after his second and third motions for Rule 60(b) relief.

¶21 We further hold that, pursuant to the attorney fees provision in the covenants, the Association is further entitled to the cost of reasonable attorney fees incurred on appeal. We therefore remand this matter for determination of the cost of reasonable attorney fees incurred by the Association on appeal.

¶22 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶23 Affirmed and remanded.

/s/ Dirk M. Sandefur

We concur:

/s/ James Jeremiah Shea

/s/ Beth Baker

/s/ Laurie McKinnon

/s/ Jim Rice

**ORDER OF THE SUPREME COURT OF  
THE STATE OF MONTANA DENYING  
REQUEST FOR DISQUALIFICATION  
(SEPTEMBER 19, 2018)**

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**IN THE SUPREME COURT OF THE  
STATE OF MONTANA**

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**CATTAIL CREEK COMMUNITY ASSOCIATION,  
a Montana Nonprofit Corporation,**

*Plaintiff,*

v.

**PETER THOMPSON,**

*Defendant.*

---

**PR 06-0120**

**No. DV-15-636CX**

**Before: Mike MCGRATH, Chief Justice.**

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Peter Thompson has filed several post-judgment pleadings with the Eighteenth Judicial District Court, some suggesting that the Honorable Rienne McElyea be disqualified for personal bias from presiding in the above-entitled matter, Gallatin County Cause No. DV-15-636CX.

Section 3-1-805, MCA, requires that a request to disqualify a district judge for cause must be supported by affidavit and must allege facts showing personal

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bias by the presiding judge. Moreover, this section is applicable to current ongoing court proceedings.

Thompson's pleadings are not in compliance with § 3-1-805(1)(b), MCA, because they are moot. The captioned case has proceeded to final judgment and the post-trial motions were denied on August 15, 2018.

**IT IS ORDERED** that the request for disqualification of Judge McElyea pursuant to § 3-1-805, MCA, **IS DENIED AS MOOT.**

The Clerk is directed to provide copies of this Order to the Clerk of Court of Gallatin County for immediate notification to Peter Thompson, all counsel of record in Gallatin County Cause No. DV-15-636CX, and the Honorable Rienne McElyea, former presiding judge.

Electronically signed by:

Mike McGrath  
Chief Justice,  
Montana Supreme Court

September 19 2018

cc: Peter Thompson  
Wayne Jennings  
Hon. Rienne McElyea

**FINDING OF FACT, CONCLUSIONS OF LAW  
AND ORDER OF THE EIGHTEENTH JUDICIAL  
DISTRICT COURT OF MONTANA  
(APRIL 23, 2018)**

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**MONTANA EIGHTEENTH JUDICIAL  
DISTRICT COURT, GALLATIN COUNTY**

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**CATTAIL CREEK COMMUNITY ASSOCIATION,  
a Montana Nonprofit Corporation,**

*Plaintiff,*

v.

**PETER THOMPSON,**

*Defendant.*

---

**Cause No. DV-15-636CX**

**Before: Hon. Rienne H. MCELYEA, District Judge.**

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This matter was tried before the Court, sitting without a jury, on February 20, 21 and 22, 2018. Present were officers of the Cattail Creek Community Association, (CCCA) and Wayne Jennings, attorney for Plaintiff. Defendant Peter Thompson (Thompson) was also present representing himself. From the evidence presented, the Court makes the following findings of fact:

## FINDINGS OF FACT

1. Cattail Creek Subdivision is a subdivision in Bozeman, Montana, consisting of three phases.
2. The final plat for the first phase, consisting of 37 lots designated for multi-family use, residential-office or light manufacturing, was filed in the office of the Gallatin County Clerk and Recorder on August 20, 2002, as document no. 2078629. Plaintiff's Exh. 1.
3. The plat for phases 2A and 213, consisting of 73 single-family and multi-family lots, was filed in the office of the Gallatin County Clerk and Recorder on November 12, 2003, as document no. 2131566. Plaintiff's Exh. 3.
4. The plat for phase 3, consisting of 66 single-family, multi-family, residential office and light manufacturing lots, was filed in the office of the Gallatin County Clerk and Recorder on October 20, 2005, as document no. 2206251. Plaintiff's Exh. 5.
5. On the same day as each plat was filed, covenants were recorded for that particular phase. The covenants for phase 1, titled Cattail Creek Subdivision-Phase I Declaration of Covenants and Restrictions, were recorded as document no. 2078633. Plaintiff's Exh. 2. The covenants for phases 2A and 213, titled Cattail Creek Subdivision-Phase II Declaration of Covenants and Restrictions, were recorded as document no. 2131569. Plaintiff's Exh. 4. The covenants for phase 3, titled Cattail Creek Subdivision-Phase III Declaration of Covenants and Restrictions Final, were recorded as document no. 2206253, all in the records of Gallatin County, Montana. Plaintiff's Exh. 6.

6. The individual sets of covenants for the three phases all provide, in the third paragraph of each set of covenants, that:

Declarant hereby declares that all land described in Exhibit "A" shall be held, sold, conveyed, encumbered, leased, occupied, and improved subject to the Cattail Creek covenants meaning the limitations, covenants and restrictions set forth in this declaration and any subsequent amendments hereto, all of which are intended to enhance the desirability and attractiveness of the land. These limitations, covenants and restrictions shall run with the land and shall be binding upon all person [sic] having or who acquire any right, title or interest in and to the land, and shall inure to the benefit of the Declarant, the Association and each person who becomes an owner of the land.

7. Article I, of each set of covenants described above, which is titled "DEFINITIONS," states in paragraph b. that:

"Association" shall mean the Cattail Creek Community Association, and its successors and assigns which shall serve and may be referred to as the Homeowners' Association.

8. Article II, Section 2 of each set of covenants states:

Section 2. The Declarant may, pursuant to the following provisions of the section, from time to time and in Declarant's sole discretion, annex to Cattail Creek all or any part of the land described in future exhibits (not then

constituting a part of Cattail Creek) owned by Declarant at the time of such annexation.

- a. The annexation of such land shall be effectuated by Declarant recording a declaration describing the land to be annexed; setting forth-such additional limitations, restrictions, covenants and conditions as are applicable to such land; and declaring the land is to be held, sold, conveyed, encumbered, leased, occupied and improved subject to Cattail Creek covenants.
9. In addition, except as noted below, the individual sets of covenants state, in Article VI of each set of covenants, as follows:

SECTION 1. The Cattail Creek Community Association is charged with the duties and empowered with the rights set forth herein and By-Laws that may be adopted for governing the Board of Directors.

SECTION 2. Every owner or contract purchaser of a lot shall be a member of the Association. Membership shall be appurtenant to and may not be separate from the ownership of any lot. Each owner shall be responsible for advising the Association of their acquisition of ownership, of their mailing address, and of any changes of ownership or mailing address. The initial address of the Association shall be P.O. Box 1254 Bozeman, Montana 59771-1254. The address of the Association may be changed by the Board of Directors upon notice to the owners.

SECTION 3. The Association, acting through its Board of Directors, shall have the power and authority to take such actions as shall be necessary or reasonable to care for, protect and maintain the easements, parkways, boundary fences, drainage easements, [and]<sup>1</sup> open space; to enforce these Covenants; to collect assessments; to set annual and/or special meetings; and to act in any other matters set forth herein or which may serve the development, including the formation of special improvement districts, either public or private, for such improvements as the Association shall approve.

10. The individual sets of covenants for the three phases all list the address of the Association as P.O. Box 1254, Bozeman, Montana 59771-1254.

11. The individual sets of covenants for the three phases all state that there shall be a Cattail Creek Design Committee (CCDC). The CCDC "has the right to exercise control over all construction in the Cattail Creek Subdivision." Article V, Section 2.

12. The address of the CCDC stated in each of the individual sets of covenants for the three phases is P.O. Box 1254, Bozeman, Montana 59771-1254. Article IV, Section 2.

13. Articles of Incorporation were filed with the Montana Secretary of State on April 25, 2006, to create a non-profit corporation named Cattail Creek Community Association, Plaintiff herein. Plaintiff's Exh. 9.

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<sup>1</sup> The word "and" is not found in the covenants for Phase 1, but is contained in the covenants for phases 2 and 3.

14. By its terms, the Articles of Incorporation apply to the three phases of Cattail Creek Subdivision that were in existence at that time and were created, in part, “[t]o implement, administer, and enforce the Covenants, Conditions and Restrictions for the Subdivision [Cattail Creek] . . . .” Sandi Hamilton, Daniel Madison and Rob Pertzborn signed the Articles of Incorporation. Sandi Hamilton and Daniel Madison are principals in Sandan, LLC, the developer of the subdivision, and Rob Pertzborn is an architect who is a longstanding member of the Cattail Creek Design Committee.

15. An organizational meeting of the CCCA was held in June of 2006. The parties present discussed the effects of three sets of covenants within the subdivision, in spite of the Articles of Incorporation envisioning a single association and that the initial covenants for each phase state the owners within such phase shall be members of the Cattail Creek Community Association (“CCCA”).

16. In the course of that organizational meeting, three directors were chosen from each phase of the subdivision and they constituted the one CCCA board. The members consisted of volunteers. There were not separate boards for each phase.

17. In the course of that organizational meeting, a discussion was held concerning the difficulties in having three different vendors for the three different phases of CCCA. The board held a number of meetings trying to determine the best way to move forward.

18. In 2007, an effort was made to consolidate all three covenants and a meeting of the homeowners was called. A letter was sent on July 1, 2007 and

included a mail in ballot. Plaintiff's Exh. 10. The purpose was to ask the owners of all three phases to combine the three phases into one. Although the covenants for the subdivision do not specifically provide for a mail ballot, the decision was made to conduct the vote by mail due to the fact that there were many owners who did not have houses within the subdivision and many owners lived out of the state of Montana, making attendance at a meeting of the association problematic. Without the ability to get enough owners together in a meeting, the initial directors believed that it would be virtually impossible to obtain a quorum for a valid vote to consolidate.

19. As part of the process for the second consolidation ballot, the letter also advised of a meeting scheduled for August 7, 2007 for owners to attend and ask questions. Owners were also allowed to turn in their ballots during that meeting.

20. The result of that 2007 vote was that the number of owners deemed necessary to pass the measure voted and the proposal passed. The board considered the 2007 vote an advisory vote to authorize the board to work toward consolidation. The board members continued to work as one board.

21. At no time prior to, during, or following the 2007 vote to consolidate did any owner object to the procedure followed for that vote.

22. Following the 2007 vote to consolidate, the board then started the process to amend the covenants for consolidation in keeping with the vote that was taken, and create a single set of covenants that would be binding on the subdivision as a whole, rather than separate covenants for each phase.

23. By January 25, 2008, the new, proposed amended and restated covenants and bylaws were completed. CCCA sent each owner a cover letter and ballot. The cover letter described some of the changes included in the consolidated covenants and advised owners how to secure a copy of the full documents for review. Plaintiff's Exh. 13. The ballot included a notice that it served as a waiver of the meeting. Plaintiff's Exh. 14. By the terms of the cover letter, all ballots were to be returned by March 10, 2008, in order to be counted. However, the ballot enclosed with the cover letter indicated the counting of the ballots would be taken at the meeting. The ballot states, "[t]his is a proxy vote and waiver of attendance at the meeting. This vote shall be counted at the special meeting called by the Board of Directors and shall be held on March 26, 2008 at 6:30 p.m. at Borders Book Store, Bozeman, Montana." Plaintiff's Exh. 14.

24. The ballots and the cover letter by which the ballots were transmitted to the owners within Cattail Creek Subdivision stated the purpose of the vote, provided an opportunity for owners to vote for or against the proposal and provided a date by which ballots were to be returned.

25. The ballots did not directly state the percentage of votes needed to pass the measure. The ballots did not state a quorum requirement but did ask all owners to vote.

26. The covenants for all three phases of Cattail Creek Subdivision all contain the same language with respect to the requirements to amend the covenants:

The vote of Owners having not less than three-quarters (3/4) of the total votes of each

class of Owners of lots then within Cattail Creek Covenants at a meeting of the Association duly held. For the purposes of this section, an Owner will be allowed a number of votes equal to the number of dwelling units assessed to his/her lot at the time of the proposed election. The notice of the meeting shall state that the purpose of the meeting is to consider the amendment or repeal of the Cattail Creek Covenants, giving the substance of any proposed amendments or indicating the provisions to be repealed, as the case may be.

27. The meeting was held on March 26, 2008. When the ballots for the proposal to amend and restate the covenants were counted, it was calculated that 294 votes constituted 75% of the eligible votes. A total of 314 votes were received. 10 votes were cast in opposition to the proposal. 294 votes were received in favor of amending and restating the covenants and that the measure was deemed passed by the board of directors. Plaintiff's Exh. 15.

28. Following the counting of the ballots for amending the covenants in 2008, the Cattail Creek Amended & Restated Covenants Phases 1, 2 & 3 were recorded in the office of the Gallatin County Clerk and Recorder as Document No. 2300076, on May 15, 2008. Plaintiff's Exh. 7.

29. By the terms of those Amended & Restated Covenants, the Cattail Creek Community Association constituted a part of the "Declarant" named therein and those covenants provide:

NOW THEREFORE, Declarant does hereby amend the previously recorded Covenants for each Phase of Cattail Creek Subdivision as more particularly described above, and impose upon the property the following amended and Restated Covenants, which run with the land and shall be binding upon and be for the benefit and value of the Declarant and persons claiming under them, their grantees, successors and assigns, and shall be for the purpose of maintaining a uniform and stable value, character, architectural design, use and development of the property. The Amended and Restated Protective Covenant [sic] shall apply to the entire property and to all improvements placed or erected thereon unless otherwise specifically excepted and shall have perpetual existence, unless terminated by law or amended as herein provided.

30. The duties of the Cattail Creek Community Association stated in those Amended & Restated Covenants were similar to the duties stated in the original covenants for the three phases, as stated in section 4.1 of the Amended & Restated Covenants:

The Cattail Creek Community Association is charged with the duties and empowered with the rights set forth herein and in the Cattail Creek Community Association Bylaws.

The Association, acting through its Board of Directors, shall have the power and authority to take such actions as shall be necessary or reasonable to care for, protect and maintain the parks, open spaces, common areas and facilities, ponds, watercourses, easements, and

boundary fences; to enforce these Covenants; to adopt a development review fee schedule; to collect assessments and fines; to adopt a fine schedule; to set annual and/or special meetings; and to act in any other matters set forth herein or which may serve the development, including the formation of special improvement districts, either public or private, for such improvements as the Association shall approve.

31. Following the January 25, 2008 mailing of ballots for the proposal to amend and restate the covenants, Peter Thompson acquired his interest in a lot within Cattail Creek Subdivision by means of a warranty deed executed on February 8, 2008, describing the following real property:

Lot 7 in Block 9 of the Plat of Cattail Creek Subdivision, Phases 2A & 2B, City of Bozeman, Gallatin County, Montana. [Plat J-369]

32. The warranty deed by which Peter Thompson acquired his interest in the property described above was recorded on February 27, 2008, as Document No. 2292799, records of Gallatin County, Montana. Plaintiff's Exh. 16.

33. At the same time the warranty deed described above was recorded, a Deed of Trust was also recorded in the office of the Clerk and Recorder of Gallatin County, Montana, as document no. 2292800. Plaintiff's Exh. 17.

34. By the terms of that Deed of Trust, Peter Thompson gave to US Bank, N.A., as "Lender," a security interest in Lot 7 in Block 9 of the Plat of Cattail Creek Subdivision, Phases 2A & 2B, City of

Bozeman, Gallatin County, Montana. [Plat J-369], which is the same property Mr. Thompson obtained from Richard Embry.

35. The interest given to US Bank, N.A. was to secure a loan in the sum of \$380,000, plus interest, with a 30-year term.

36. Peter Thompson was not sent a ballot in January of 2008. Mr. Thompson was not an owner at the time the ballots were sent to owners of lots within Cattail Creek. Richard Embry was the owner of Lot 7 in Block 9 of the Plat of Cattail Creek Subdivision, Phases 2A & 2B, at the time the ballots were mailed.

37. Prior to the purchase of his lot, Peter Thompson was aware of the 2007 vote to consolidate and that an effort was underway to amend the covenants for the subdivision. Peter Thompson was aware of the covenants for Phase II prior to his purchase of the property.

38. Mr. Thompson testified Rob Pertzborn told him not to worry about completing his property within one year. Mr. Thompson testified he had this conversation with Mr. Pertzborn before he purchased the property. Mr. Thompson understood Rob Pertzborn was on the design review board. Mr. Thompson testified that he estimated it would take him 18 months to complete the property if he was able to work 60 hours per week. He further testified it might take him 5 to 7 years to complete construction. Mr. Thompson admitted that he had nothing in writing from Mr. Pertzborn, any other member of the design review board, or any other member of the board.

39. No owner within Cattail Creek Subdivision complained about the mail ballot conducted in 2008 to amend the covenants until Peter Thompson began complaining about the process years later, after the CCCA sought to enforce the covenants against Mr. Thompson.

40. Peter Thompson submitted his building plans for the house he wanted to construct on the lot described above. Those plans were approved by the Cattail Creek Design Committee March 6, 2008. Plaintiff's Exh. 20.

41. A construction permit was issued to Peter Thompson by the City of Bozeman on April 30, 2008 and construction began. Plaintiff's Exh. 21.

42. By the terms of Section 1 of Article IV of the covenants for Phase II of Cattail Creek Subdivision, in effect at the time of Mr. Thompson's purchase of his lot, no structure was to be built in Cattail Creek Subdivision without the prior approval of the CCDC.

43. By the terms of Section 3 of Article IV of the original Phase II covenants, "[a]ny structure to be erected in accordance with an approval so given must be erected and completed within one year from the date of approval." Identical language is found in the covenants for Phases I and III of Cattail Creek Subdivision. Peter Thompson confirmed his familiarity with this requirement prior to his purchase of the lot.

44. Section 3 of Article IV of the covenants for Phases I, II, and III of Cattail Creek Subdivision also provide that the CCCA may take such action as the board of directors deems appropriate, including finishing the exterior of the building, and the cost of doing so shall be the responsibility of the owner. In lieu of

such an action, the covenants further provide that “the Association may take such action as is available by law, including an injunction, or for damages.” Plaintiff’s Exh. 2, 4 and 6.

45. By the terms of the Amended & Restated Covenants from 2008, all developments within Cattail Creek Subdivision were made subject to the Cattail Creek Design Regulations, which were contained in a separate writing.

46. Section 5.7 of the Design Regulations referenced in the Amended & Restated Covenants, contains the same language with respect to completion as the original covenants, in that “[a]ny structure to be erected in accordance with an approval so given must be erected and completed within one (1) year from the date of approval.” Plaintiff’s Exh. 7.

47. Section 5.7 of the Design Regulations also provides remedies for failure to complete a structure in a timely manner in accordance with the approved plans that is almost exactly the same language found in Section 3 of Article IV of the original Phase II covenants with respect to the available remedies, including the provision that “the Association may take such action as is available by law, including an injunction, or action for damages.”

48. By March of 2009, or one year after Mr. Thompson received approval for his house plans, the Thompson residence was not complete and remained incomplete through the time of trial in this matter.

49. Jaymie Larsen served as a board member for CCCA. Ms. Larsen testified the Board for CCCA agreed to pursue the enforcement process for exterior problems of buildings, landscaping and the like. The

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Board agreed they did not need to pursue covenant compliance for the interior of buildings.

50. On April 30, 2010, a notice of trustee's sale was recorded in the office of the Gallatin County Clerk and Recorder, as document no. 2359896, for the sale of Mr. Thompson's former residence in Cimarron Subdivision No. 2, Gallatin County, Montana. Plaintiff's Exh. 39.

51. By the terms of that notice, Mr. Thompson failed to make his monthly payment for his former house, beginning on October 1, 2009 and continuing through the date of the notice.

52. By the terms of the notice, the sale of Mr. Thompson's former residence was to take place on September 7, 2010.

53. On September 8, 2010, a Trustee's Deed was recorded in the office of the Gallatin County Clerk and Recorder as Document No. 2369520. Plaintiff's Exh. 40.

54. By the terms of that trustee's deed, Peter Thompson's interest in his former residence in Cimarron Subdivision No. 2, Gallatin County, Montana, was conveyed to US Bank, N.A., as the highest bidder at the trustee's sale on September 7, 2010.

55. On September 24, 2010, Mr. Thompson obtained a certificate of occupancy from the City of Bozeman Building Inspection Division allowing him and his family to occupy a portion of their house, characterized as the "lower area." The Certificate was revoked on July 30, 2013. Plaintiff's Exh. 33.

56. Upon receiving the certificate of occupancy, Mr. Thompson and his family began residing in the

house, even though portions of the interior and the exterior were incomplete.

57. On April 28, 2011, CCCA sent a letter to Peter Thompson asking him to complete the exterior plans, landscaping and driveway" by June 30, 2011. Plaintiff's Exh. 22. This letter was sent 3 years after Peter Thompson began his construction. Ms. Larsen testified she expected a follow-up response from Mr. Thompson if he was unable to comply with this timetable. The April 28, 2011 letter indicates Peter Thompson was sent prior notices of his failure to comply with the covenants. However, CCCA was unable to locate a copy of the prior notices and Peter Thompson denies receiving any. The April 28, 2011 letter sent by Above and Beyond is addressed to Peter Thompson at his former address.

58. Peter Thompson wrote a letter to Travis Munter on March 23, 2012. Peter Thompson believed Mr. Munter was the acting president of HOA board. Defendant's Exh. M. In that letter, Peter Thompson refers to various disputes he had with the management companies for the homeowner's association.

59. At the time CCCA sent Peter Thompson the compliance letter dated April 28, 2011, CCCA was also dealing with several developers who had built foundations for structures, but found themselves unable to complete the structures due to the nationwide recession that was hampering the building industry. CCCA put pressure on all owners who owned incomplete structures, including Peter Thompson.

60. Peter Thompson responded to the demands of the association by questioning the validity of the Amended & Restated Covenants and by voicing numer-

ous complaints about the CCCA board and the activities of other members within the subdivision, which eventually resulted in the association hiring legal counsel in an attempt to move Mr. Thompson along with his construction. Mr. Thompson personally spoke with the management company, Above and Beyond property management. As a result of his behavior with Above and Beyond staff, Above and Beyond advised CCCA they would no longer assist with enforcement issues concerning Peter Thompson and his property.

61. CCCA board hired attorney Wayne Jennings. Mr. Jennings sent a letter to Peter Thompson on March 30, 2012 requiring terms for the completion of the house and a response within seven days. Plaintiff's Exh. 28.

62. In response, Mr. Thompson sent a letter to attorney Jennings on April 12, 2012. Plaintiff's Exh. 29. Mr. Thompson likened the association to a terrorist group and indicated he would not voluntarily comply with the covenants. Mr. Thompson also complained that the efforts of the association were interfering with his ability to complete his house because he had to spend so much time dealing with the complaints of his neighbors. In the five-page letter, Mr. Thompson includes his suggestion that the consolidation of the covenants was not properly completed.

63. In his letter on page 3, Mr. Thompson suggested that the association give him until February of 2013 to finish his landscaping, exterior decks, and get his paving going, which he said he would likely complete over the upcoming summer. Plaintiff's Exh. 29.

64. At about that same time, CCCA learned that Mr. Thompson had entered into an agreement with

the City of Bozeman Building Inspection Division on June 9, 2011, concerning his house and the unfinished work. Plaintiff's Exh. 32.

65. The June 9, 2011 agreement with the Building Inspection Division stated that Mr. Thompson no longer had a valid building permit for the property and no occupancy of the structure was approved at that time, but that the Building inspection Division was trying to work with Mr. Thompson to allow him and his family to continue living in the structure upon certain conditions. The agreement provided that Mr. Thompson was to complete the structure 18 months from the date of the agreement, although it went on to erroneously state that the ending date was to be December 20, 2013, which was actually just over 30 months from the date of the agreement.

66. The CCCA decided to wait to pursue legal action in the hope that Mr. Thompson would complete the structure as agreed with the City of Bozeman Building Inspection Division.

67. Mr. Thompson did not complete the work on his house by December of 2012. On or about July 30, 2013, a copy of Mr. Thompson's certificate of occupancy for the "lower area" was sent to him marked "Revoked." However, Mr. Thompson and his family continued to live in the house.

68. In spite of the representation contained in his April 12, 2012 letter, Mr. Thompson did not complete the exterior work on his house by February 2013.

69. By the spring of 2015, most of the other owners with incomplete projects had either completed their construction work, or were in the process of

completing their projects. Peter Thompson's exterior problems remained. Specifically, the work remaining to be completed on the Thompson property at that time was completion of the driveway, completion of a top floor balcony, construction of a railing around another balcony that was partially constructed, and staining the wood on the house.

70. In August of 2015, the present case was initiated by the CCCA, seeking money damages from Mr. Thompson for his failure to pay his required dues to the CCCA, seeking an injunction against Mr. Thompson for parking a horse trailer in his yard, and an injunction against Mr. Thompson preventing him from continuing to live in his house until it was finished.

71. Mr. Thompson alleges the case should be dismissed on the basis of laches. Mr. Thompson argues he received no notification of enforcement regarding the exterior of his home from March 30, 2012, when he received the letter from Wayne Jennings, until 2015, when he was served in this action. Mr. Thompson also argues there was no effort to mediate the matter prior to bringing a lawsuit.

72. Ms. Larsen testified the board was hopeful Mr. Thompson would resolve his completion issues with the City of Bozeman. She testified the board did not think it was fair to pursue Mr. Thompson when the City was actively addressing the construction issues. The board pursued this matter when the City's actions failed.

73. Mr. Jennings made an additional effort to secure compliance from Mr. Thompson prior to filing the lawsuit. Mr. Jennings sent Mr. Thompson a cer-

tified return receipt letter on June 3, 2015 addressed to Mr. Thompson at his preferred address, 2988 Blackbird Dr., Bozeman, MT 59718. The letter requested mediation. The certified return receipt letter was returned unopened to Mr. Jennings. Plaintiff's Exh. 43. Mr. Thompson testified he refuses to accept certified return receipt letters because they are an inconvenience to him.

74. Although Mr. Thompson initially disputed owing the dues and has continually denied the validity of the CCCA and its ability to prosecute the present action against him, in December of 2016, Mr. Thompson paid the dues that were being sought by the CCCA and also paid his dues for 2017.

75. The dues sought by the CCCA in this case were only the dues charged to each member and did not include any late fees. In the course of paying his dues, Mr. Thompson acknowledged that the amount paid was undisputed and contended that the CCCA had prevented him from paying such undisputed amount to that point, although Mr. Thompson was unable to provide any competent evidence to that effect.

76. At some point prior to initiation of this case, Mr. Thompson removed his horse trailer from the subdivision and the horse trailer has not been seen within the subdivision during the time that this case has been pending.

77. Since the initiation of this case, Mr. Thompson has also completed the concrete work for his driveway, which was one of the items sought by the CCCA to be completed.

78. As of the time of trial in this matter, however, Mr. Thompson did not have a valid certificate of occu-

pancy to occupy the premises as a residence, he did not have a valid building permit, and the exterior of the house was incomplete. Specifically, one upper deck of the house was partially constructed, but in need of a railing, and another deck, which was not included in the approved plans for the house approved by the CCDC, had not been started.

79. Although the covenants for Cattail Creek Subdivision all provide that the CCCA may enter the property and take such steps to complete the project as it may deem necessary, the CCCA did not elect to follow that procedure due to the hostility displayed by Mr. Thompson, Mr. Thompson's demand that the CCCA representatives not enter his property, and a concern that after causing any work to be done on the Thompson residence, the CCCA would be inundated with warranty claims by Mr. Thompson, or by claims of injuries to persons or property resulting from such work.

80. The covenants also provide that the CCCA may seek a claim for money damages, but the CCCA felt that it would be extremely difficult to place a monetary value on the failure of Mr. Thompson to complete his house.

81. In addition, the CCCA believed that with the existing mortgage in place on the Thompson property, and the fact that Mr. Thompson's previous residence was the subject of a trustee's sale, a money judgment would be of no value.

82. The CCCA felt that it could not simply ignore the violation by Mr. Thompson due to the concern that if, in the future, it initiated a claim against other members of the CCCA, they would contend that the

CCCA had failed to enforce the covenants and that the covenants were therefore waived, which was one of the defenses raised by Mr. Thompson in the present case.

83. Mr. Thompson confirmed he can complete the exterior work necessary to satisfy the requirements of the CCCA in ninety days.

84. Article VI, Section 13 of each of the initial sets of covenants for the three phases contains a provision for the recovery of attorney fees in the event of litigation, as does Article 7, Section 7.1 of the Amended and Restated Covenants.

85. Mr. Thompson claims CCCA does not have standing to sue. Mr. Thompson testified that the Cattail Creek Phase II Covenants do not give authority to secure incorporation.

86. Cattail Creek phase II Covenants defines "Association" in Article I, Section 1 as, "shall mean the Cattail Creek Community Association, and its successors and assigns . . ." Plaintiff's Exh. 4. The Articles of Incorporation for the Cattail Creek Community Association apply to "Cattail Creek subdivision . . . Phases I, II and III." Plaintiff's Exh. 9. Nothing in the Cattail Creek Phase II Covenants prevents the Association from incorporating. The Cattail Creek Community Association nonprofit corporation is an "assign" of the Cattail Creek Community Association.

87. Peter Thompson argues CCCA is not complying with state law concerning nonprofit corporations and should not have authority to enforce the covenants.

88. Any factual findings contained in the following conclusions of law are hereby incorporated into these findings of fact.

From the foregoing findings of fact, the Court makes the following conclusions of law:

#### **CONCLUSIONS OF LAW**

1. The Court has jurisdiction over this matter.
2. Cattail Creek Subdivision is a subdivision located in Gallatin County, Montana, created in three phases between August 20, 2002 and October 20, 2005.
3. As the final plat for each phase was recorded, the developer of the subdivision also recorded protective covenants for each phase in accordance with § 70-17-201, MCA, et seq. The covenants for each phase all ran with the land, as provided for in § 70-17-20, MCA, which states, "every covenant contained in a grant of an estate in real property that is made for the direct benefit of the property or some part of the property then in existence runs with the land."
4. All of the properties contained within the Cattail Creek Subdivision were initially bound by the Declaration of Covenants and Restrictions applicable to the particular phase as the time such covenants were recorded in the office of the Gallatin County Clerk and Recorder, by the terms of the Declarations.
5. Peter Thompson became the owner of Lot 7 in Block 9 of the Plat of Cattail Creek Subdivision, Phases 2A & 2B, City of Bozeman, Gallatin County, Montana. [Plat J-369], on February 27, 2008. Peter Thompson's lot was subject to the Cattail Creek Subdivision Phase II Declaration of Covenants and Restrictions,

recorded in the office of the Gallatin County Clerk and Recorder as Document No. 2131569, on November 12, 2003 at the time of his purchase.

6. When Peter Thompson purchased his interest in the property described above, he took title to such property subject to the covenants described in Conclusion of Law no. 5, above, which constituted a contract between the owners within the subdivision. *See Creveling v. Ingold*, 2006 MT 57, 331 Mont. 332, 132 P.3d 531.

7. Each set of the original covenants, including the covenants for Phase II, provided that “[t]he Cattail Creek Community Association is charged with the duties and empowered with the rights set forth herein and By-Laws that may be adopted for governing the Board of Directors.”

8. The Amended & Restated Covenants, Phases 1, 2 & 3, recorded May 15, 2008, as document no. 2300076, records of Gallatin County, Montana, contain language almost identical to the language in the first three sets of covenants, to-wit: “The Cattail Creek Community Association is charged with the duties and empowered with the rights set forth herein and in the Cattail Creek Community Association Bylaws.”

9. When interpreting documents containing restrictive covenants, courts are to apply the same rules of construction as are applied to contracts, reading the covenants as a whole in order to ascertain their meaning, understanding the language in its ordinary and popular sense. At the same time, however, restrictive covenants are to be strictly construed. *Micklon v. Dudley*, 2007 MT 265, ¶ 10, 339 Mont. 373, 170 P.3d 960.

10. In the course of interpreting restrictive covenants, "it is not the proper role of the judiciary to insert modifying language into clearly written and unambiguous instruments where the parties to the instrument declined to do so." *Creveling v. Ingold*, 2006 MT 57, ¶ 12, 331 Mont. 332, ¶ 12, 132 P.3d 531, ¶ 12.

11. Regardless of whether one is examining the original covenants for Phase II, or the Amended and Restated Covenants adopted in 2008, it is clear that by the terms of the covenants, the Cattail Creek Community Association is granted the right and the authority to enforce the terms and conditions of the covenants.

12. The Plaintiff, Cattail Creek Community Association, therefore has a personal stake in this litigation and has standing to enforce the terms and conditions of the above-referenced covenants, regardless of the applicable version of the covenants. *See, Bryan v. Yellowstone County Elementary School District No. 2*, 2002 MT 264, 312 Mont. 257, 60 P.3d 381.

13. Mr. Thompson has contended that the corporate entity which is the Plaintiff in this matter was improperly formed and/or that the combination of the boards for the three phases into a single board was improper. That contention is without merit for the following reasons:

- a. In order to conclude that there were to be three associations and/or boards contemplated by the developer when the covenants for Cattail Creek Subdivision were created, it is necessary to add language to the covenants. As stated in each set of covenants, an owner within Cattail Creek Subdivision is a member

of the Cattail Creek Community Association. The developer did not describe three different associations, each particular to a certain phase. Mr. Thompson's contention would require that the covenants for Phase II describe the association as the Cattail Creek Community Association-Phase II. None of the covenants for any of the phases reference an association particular to that phase. "In the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." § 1-4-101, MCA

- b. "Several contracts relating to the same matters, between the same parties, and made as parts of one transaction are to be taken together." § 28-3-203, MCA. As stated in *Knutson v. Bitterroot Intern. Systems, Inc.*, 2000 MT 203, 300 Mont 511, 5 P.3d 554, that statute is generally not applicable in cases in which no ambiguity exists in the writing, but in looking at all of the covenants for the entire subdivision, Plaintiff's position is bolstered. All of the covenants for Cattail Creek Subdivision, whether original or amended, consistently describe the Cattail Creek Community Association as the single association of owners within Cattail Creek and the Articles of Incorporation for the Cattail Creek Community Association reference a single association for all three phases of Cattail Creek Subdivision.

- c. In addition to the foregoing, all of the initial covenants contemplate that additional land could be added to the subdivision and the covenants for Phase III include the word "Final" in the title. "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other." § 28-3-202, MCA. If the covenants for each phase in Cattail Creek Subdivision were to be independent of the others, then the word "Final" in the Phase III covenants is meaningless.

14. In the present case, the payment of the association dues by Peter Thompson and the removal of the horse trailer from the subdivision have rendered those issues moot, leaving only the issue of whether Peter Thompson has breached the covenant requiring the completion of his house within one year, and the appropriate remedy in such situation.

15. It is unnecessary for the Court to determine whether the 2008 Amended and Restated Covenants are valid in this situation, since the language requiring construction to be completed within one year of plan approval is virtually identical in all three sets of phase covenants and the Amended and Restated Covenants. If the Amended and Restated Covenants are valid, then they govern in this instance. A determination of invalidity of the Amended and Restated Covenants would leave the initial Phase II covenants operative. *Bordas v. Virginia City Ranches Association*, 2004 MT 342, 324 Mont. 263, 102 P.3d 1219. Therefore, regardless of the version of the covenants applicable

in this case, the outcome will be the same and the version to be applied is immaterial.

16. The language in the covenants concerning completion of construction is unambiguous. Peter Thompson received approval for his construction plans on March 6, 2008 and was therefore required to complete his construction on or before March 6, 2009. When Mr. Thompson failed to complete his construction by that date he was in breach of the covenants and the CCCA was authorized to seek appropriate remedies. From the evidence presented, the Court concludes that the breach by Mr. Thompson was intentional and continues to be intentional.

17. Even after Mr. Thompson failed to complete his construction in a timely manner, he was given opportunities to comply with the covenants, but he failed to avail himself of those opportunities. When he entered into the agreement with the City of Bozeman Building Inspection Division in June of 2011, he had been constructing his house for more than three years. By the terms of that June 2011 agreement, he was to complete his construction in an additional 18 months. Although Mr. Thompson was not in compliance with the covenants, the CCCA was willing to go along with that plan in the hope that Mr. Thompson would get his house completed.

18. At about the same time as the CCCA learned about the agreement with the Building Inspection Division, it also received a letter from Mr. Thompson in which he represented that he could finish his house by February of 2013. The CCCA was working on getting Mr. Thompson to finish his house, along with several other projects that were incomplete, so the CCCA reasonably gave Mr. Thompson additional

time. In fact, this case was not filed until 2015, when it appeared that Mr. Thompson would be the last to complete his project and that he would not do so until forced.

19. It is the conclusion of this Court that the reasons given by CCCA for delaying action against Peter Thompson are reasonable, as are the reasons given for not suing Mr. Thompson for monetary damages or engaging in self-help to complete the Thompson residence. The Court finds that pecuniary compensation would not afford adequate relief in this case and that money damages would be difficult to ascertain in any event.

20. "For every wrong there is a remedy." § 1-3-214, MCA. The Court concludes that the remedy in this matter is injunctive relief. The elements of § 27-19-102, MCA have been met by the Plaintiff and injunctive relief is appropriate. This case can be distinguished from *Westland Enterprises, Inc. v. Boyne, USA, Inc.*, 237 Mont. 186, 772 P.2d 309 (1989), in which it was determined that injunctive relief was inappropriate, due to the fact that the underlying contract could not be specifically enforced. In that case, Westland Enterprises acknowledged that its rights under the contract in question were not clear. The Court responded that if Westland's rights were not clear, then Boyne's corresponding duties were not clear. *Westland*, 237 Mont. at 191, 772 P.2d at 312. As a result, the contract in question was found to be ambiguous and not specifically enforceable. The covenants for Cattail Creek, regardless of the phase or the version, all provide that constriction must be completed within one year of plan approval. There is no ambiguity in that covenant and there is no reason that it cannot

be specifically enforced. Therefore, neither the *Westland* case, nor § 27-19-103(5), MCA, upon which *Westland* was decided, are applicable in the present case.

21. The Court further concludes that until he is forced to do so, Mr. Thompson will not complete his exterior construction. Mr. Thompson has not met the conditions of the Cattail Creek covenants and he failed to meet the conditions of his June 2011 agreement with the City of Bozeman Building Inspection Division. It has been more than five years since the date by which Mr. Thompson agreed to complete construction on his house with the City. It has been more than 2 1/2 years since this case was initiated and Mr. Thompson has not completed the work that he has indicated could be completed within 90 days. Absent an order from this Court, there is no reason to believe that Mr. Thompson will complete the work on his house.

22. The Court therefore concludes that the only way to prevent the continuing breach of the covenants by Mr. Thompson and to prevent Mr. Thompson from benefitting from his own wrongdoing, is to issue an injunction precluding Mr. Thompson from residing in his house while he remains in breach of the Cattail Creek covenants. The Court further concludes, however, that requiring Mr. Thompson and his family to immediately vacate the premises while work is completed, without giving him an opportunity to correct the problem, would work an unnecessary hardship on Mr. Thompson and his family. Therefore, the Plaintiff is entitled to a mandatory injunction requiring Mr. Thompson to complete his exterior construction within 90 days, or vacate the premises. In order to avoid any arguments over whether the terms of the judgment are met, Mr. Thompson shall complete the upper level

deck on the east side of his house and shall complete a deck or stairway beneath the unapproved second floor door on the south side of his house, above the back side of the garage, within ninety days of the date of this Order. Such work shall be inspected and approved by the City of Bozeman Building Inspection Division and Mr. Thompson shall submit a copy of the inspection approval to the Plaintiff and the Court within that ninety-day period. If Mr. Thompson cannot obtain an approved inspection within that ninety-day period, then he and his family shall immediately remove themselves from the premises until such approval is obtained.

23. Plaintiff is entitled to recover its reasonable attorney fees and court costs, regardless of the applicable version of the covenants. Within fourteen (14) days from the date of this Order, counsel for Plaintiff shall provide Mr. Thompson, and file with the Court, an affidavit of Plaintiff's reasonable attorneys' fees and costs incurred in this action.

24. Within fourteen (14) days thereafter, Mr. Thompson shall either pay the attorneys' fees and costs as stated by Plaintiff, or file with this Court a notice of objection, specifying his objections to Plaintiff's requested attorney's fees and costs. In the event of such an objection, Plaintiff's attorney shall request a hearing date from the Court.

Dated this 23 day of April, 2018.

/s/ Hon. Rienne H. McElyea  
District Judge

cc: Wayne E. Jennings  
Peter Thompson

ORDER OF THE SUPREME COURT  
OF THE STATE OF MONTANA DENYING  
PETITION FOR SUPERVISORY CONTROL  
(JANUARY 31, 2018)

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IN THE SUPREME COURT OF THE  
STATE OF MONTANA

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PETER THOMPSON,

*Petitioner,*

v.

MONTANA EIGHTEENTH JUDICIAL DISTRICT  
COURT, GALLATIN COUNTY, MONTANA, and  
THE HONORABLE RIENNE H. MCELYEA,

*Respondents.*

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OP 18-0060

Before: Mike MCGRATH, Chief Justice,  
Beth BAKER, Laurie MCKINNON,  
Ingrid GUSTAFSON, Jim RICE,  
Dirk M. SANDEFUR, Justices.

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Peter Thompson has asked this Court to take  
supervisory control over the Eighteenth Judicial District  
Court in Gallatin County Cause No. DV-15-636CX.  
Thompson asks us to address "a range of questions"  
in that injunction action against him, and to stay  
proceedings in the District Court. Thompson asks us

to review whether the District Court abused its discretion in denying his motions for dismissal of the action on grounds of procedural improprieties, to amend the pleadings or alternatively grant him default judgment, for summary judgment, and for a determination that the subdivision covenant contract is a contract of adhesion; in ordering trial without discovery; in the proceedings leading to and in denying his demand for a jury trial; in managing the litigation; and in denying his motion for a Rule 11, M. R. Civ. P. hearing.

Supervisory control is an extraordinary remedy that is sometimes justified when (1) urgency or emergency factors make the normal appeal process inadequate, (2) the case involves purely legal questions and (3) in a civil case, the other court is proceeding under a mistake of law and is causing a gross injustice or constitutional issues of state-wide importance are involved. M. R. App. P. 14(3).

The issues over which Thompson has asked us to exercise supervisory control do not meet the criteria that sometimes justify our intervention in a trial court matter before final judgment is entered. Thompson has raised no issues for which the normal appeal process would be inadequate, nor has he convinced us that the trial court is proceeding under a mistake of law and causing a gross injustice or that constitutional issues of statewide importance are involved.

Therefore,

IT IS ORDERED that the petition for a writ of supervisory control is DENIED and DISMISSED.

The Clerk is directed to provide copies of this Order to all counsel of record, to the Clerk of Court

App.50a

for Gallatin County, and to the Honorable Rienne H.  
McElyea, presiding judge.

Dated this 31st day of January, 2018.

/s/ Mike McGrath  
Chief Justice

/s/ Beth Baker

/s/ Laurie McKinnon

/s/ Ingrid Gustafson

/s/ James A. Rice

Justices

ORDER OF THE SUPREME COURT OF THE  
STATE OF MONTANA DENYING PETITION FOR  
REHEARING IN COURT CASE DA 18-0539  
(NOVEMBER 5, 2019)

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IN THE SUPREME COURT OF THE  
STATE OF MONTANA

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CATTAIL CREEK COMMUNITY ASSOCIATION,  
a Montana Nonprofit Corporation,

*Plaintiff and Appellee,*

v.

PETER THOMPSON,

*Defendant and Appellant.*

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DA 18-0539

Before: James Jeremiah SHEA,  
Beth BAKER, Laurie MCKINNON,  
Jim RICE, Dirk M. SANDEFUR, Justices.

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By pro se petition filed October 15, 2019, Appellant Peter Thompson (Thompson) petitions this Court for rehearing on our prior decision, issued October 1, 2019, affirming the 2018 judgment of the Montana Eighteenth Judicial District Court and remanding for a determination and award of attorney fees incurred by the Appellee on appeal. Upon review of our prior decision, the parties' briefing and record on appeal,

Thompson's asserted grounds for rehearing, and the Appellee's response, we find and conclude that Thompson has failed to show sufficient grounds for rehearing under M. R. App. P. 20(1)(a).

Accordingly,

IT IS ORDERED that Thompson's petition for rehearing is DENIED.

The Clerk of the Supreme Court is directed to provide a copy of this Order to counsel of record and to Peter Thompson, *pro se*.

DATED this 5th day of November, 2019.

/s/ Dirk M. Sandefur

/s/ Laurie McKinnon

/s/ Beth Baker

/s/ James Jeremiah Shea

/s/ James A. Rice

Justices

**ORDER OF THE SUPREME COURT OF THE  
STATE OF MONTANA DENYING PETITION FOR  
REHEARING OF REQUEST TO DISQUALIFY  
JUDGE MCELYEA IN COURT CASE PR 06-0120  
(OCTOBER 9, 2018)**

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IN THE SUPREME COURT OF THE  
STATE OF MONTANA

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CATTAIL CREEK COMMUNITY ASSOCIATION,  
a Montana Nonprofit Corporation,

*Plaintiff,*

v.

PETER THOMPSON,

*Defendant.*

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PR 06-0120

Before: James Jeremiah SHEA,  
Beth BAKER, Laurie MCKINNON,  
Jim RICE, Dirk M. SANDEFUR, Justices.

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On September 19, 2018, Chief Justice Mike McGrath issued an Order denying as moot what was deemed to be Peter Thompson's request to disqualify the Honorable Rienne McElyea from presiding in the above-entitled matter, Gallatin County Cause No. DV-15-636CX. On October 3, 2018, Thompson filed a Petition for Rehearing. Thompson contends that the post-

judgment pleadings he filed in the District Court which, among other things, suggested that Judge McElyea be disqualified for personal bias, “were not drafted for the purpose of disqualifying [Judge McElyea].” Rather, Thompson contends that Judge McElyea violated his due process rights by denying him leave to file a motion for recusal that would have been in compliance with § 3-1-805, MCA. Thompson concludes: “It follows that in denying Thompson use of the safeguards within § 3-1-805 prior to trial that the district court deprived itself of jurisdiction prior to the commencement of trial.” In his Petition for Rehearing, Thompson requests this Court “to issue an order declaring the district court proceedings and the related appeal moot for lack of jurisdiction prior to trial.”

M. R. App. P. 20(1)(d) provides that [a]bsent clearly demonstrated exceptional circumstances, the supreme court will not grant petitions for rehearing of its orders disposing of motions or petitions for extraordinary writs.”

Chief Justice McGrath denied Thompson’s request for disqualification of Judge McElyea as moot because Thompson’s case had proceeded to final judgment and the post-trial motions he filed had been denied. Indeed, Thompson has filed a Notice of Appeal with the Court in this case. Thompson’s arguments can be addressed in his appeal. He therefore has not clearly demonstrated exceptional circumstances justifying rehearing.

Having reviewed Thompson’s Petition for Rehearing, we conclude that rehearing is not warranted under the standards of M. R. App. 20(1)(d). Accordingly,

IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED.

The Clerk of Court is directed to mail copies of this Order to Peter Thompson, to all counsel of record in Gallatin County Cause No. DV-15-636CX, and the Honorable Rienne McElyea, former presiding judge.

DATED this 9th day of October 2018.

/s/ James Jeremiah Shea

/s/ Laurie McKinnon

/s/ Beth Baker

/s/ Dirk M. Sandefur

/s/ James A. Rice

Justices