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10 **IN THE SUPREME COURT OF THE STATE OF MONTANA**
11 **SUPREME COURT CAUSE NO. DA 18-0627**
12

13 **BARBARA A. NEEDHAM, individually and as**)
14 **Personal Representative of THE ESTATE OF**)
15 **CHARLES KELLY KLUVER,**)
16)
17 **Plaintiffs and Appellees,**)

Appellant Opening Brief

18 **v.**)
19)
20)

21 **KARSON KLUVER and GENIE LAND**)
22 **COMPANY, a Montana Corporation,**)
23)
24 **Defendants and Appellants.**)

25 **ON APPEAL FROM THE MONTANA SIXTEENTH**
26 **JUDICIAL DISTRICT COURT, ROSEBUD COUNTY**
27 **THE HONORABLE NICKOLAS C. MURNION PRESIDING**
28

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to Montana Rules of Appellate Procedure Rule 6 and Montana Rules of Appellate Procedure Rule 4. District Court Judge Nickolas C. Murnion signed an Order Certifying Summary Judgment as Final Judgment for Purposes of Appeal on the 16th day of October, 2018 which certified the Order Granting Plaintiff’s Motion for Summary Judgment and Order Denying Defendant’s Cross Motion for Summary Judgment which was duly executed on April 5, 2018 and filed with the Clerk of Court’s office on April 6, 2018 all of which were in Cause No. DV 17-35. The Appellant timely filed a notice of appeal.

II. STATEMENT OF THE ISSUES

District Court Judge Nickolas C. Murnion made numerous errors in his decision which was set forth in the *Order Granting Plaintiff’s Motion for Summary Judgment and Order Denying Defendant’s Cross Motion for Summary Judgment* in Cause No. DV 17-35. The issues can be summed as follows:

1. The District Court committed reversible error when it considered hearsay testimony in the context of a summary judgment proceeding.
2. The District Court committed reversible error when in a summary judgment proceeding, knowing that there are facts in dispute the Court entered judgment in favor of the Plaintiffs.
3. The District Court committed reversible error in entering a summary judgment order that is not in compliance with the Bylaws of the Corporation or Montana Corporation Law.

STATEMENT OF THE CASE

A. *Nature of the Case and Course of Proceedings.*

119 This case came before the District Court, in front of the Honorable Nickolas
120 C. Murnion for hearing on cross-motions for summary judgment related to the shares
121 and their distribution in the Genie Land Company. The District Court entered an
122 *Order Granting Plaintiff's Motion for Summary Judgment and Order Denying*
123 *Defendant's Cross Motion for Summary Judgment* which was appealed from in this
124 matter.

125 B. *Disposition in Below*

126 The District Court made the following Orders (1) for a Declaratory Judgment
127 directing the transfer of all stock in Genie Land Company owned by Charles Kelly
128 Kluver on the date of his death to Barbara A. Needham. *Order Granting Plaintiff's*
129 *Motion for Summary Judgment and Order Denying Defendant's Cross Motion for*
130 *Summary Judgment ("Order")* at Pg. 2. (2) for Summary Judgment regarding the
131 breach of Contract claims in favor of Plaintiff's and against the Defendant Karson
132 Kluver. *Id.* at Pg. 3. The Court in making these orders made the following errors:

133 1. The District Court took the affidavit and the supplemental affidavit of Barbara
134 Needham as having met the burden of evidence for the granting of a summary
135 judgment. *Order* at pg. 3-5.

136 2. That even though the Court acknowledged that the "By-Laws that were in
137 place at the time of the death of Charles Kluver" were those attached to both parties'
138 *Motions for Summary Judgment. Order* at pg. 7 Line 5. The Court did not enforce
139 the By-Laws.

140 3. That the District Court stated that the Genie Land Copay did not keep
141 corporate minutes and did not maintain a central corporate records file. *Id.* at 7. This
142 in combination with Paragraph 1 above was an error by the District Court.

143 4. That the District Court stated that "Karson denies involvement in such
144 discussions or concerns relating to the transfer restrictions, such denial is not
145 credible in view of the execution of the Agreement dated November 16, 2012,

146 between Kelly and Karson.” *Id.* at pg. 8. That this statement by the District Court
147 when the testimony is not presented is inappropriate in the context of a summary
148 judgment proceeding. Credibility is not on trial at the time of a summary judgment
149 proceeding. When the party moving for Summary Judgment has MET their burden
150 then it is the responsibility of the other party to provide information in opposition.
151 This argument will again be combined with paragraph one (1) above.

152 5. That the Court found that the “Agreement is clear and unambiguous. At the
153 time of the execution of the agreement Karson and Kelly were both married.” *Id.* at
154 pg. 8. The Court in this matter has supplemented its’ judgment about ambiguous
155 and unambiguous terms in the context of the agreement, completely ignoring the By-
156 Laws of the corporation and its’ requirements.

157 6. That the Court found that “no medical records have been produced
158 memorializing Karson’s medical condition.” *Id.* at pg. 9. Again, when this is
159 combined with paragraph one (1) above as will be demonstrated the Court made a
160 mistake by discounting the personal knowledge of Karson Kluver in favor of hearsay
161 statements made by Barbara Needham.

162 7. That the Court further stated that “The agreement was unambiguous with
163 regard to this term and Karson cannot now renege on his agreement by his contention
164 that he thought the term meant lineal descendants.” *Id.* at pg. 14. However, this
165 combined with paragraph one (1) above once again demonstrates that the Court took
166 the hearsay statements of Barbara Needham as competent evidence.

167 IV. STATEMENT OF FACTS

168 For purposes of this appeal there are relevant facts that are set forth in both
169 the *Affidavits* of the parties and in the *Oral Arguments*. These shall each be set forth
170 in the paragraphs below.

171 A. *Statement of Relevant Facts Related to Affidavits.*

172 The Court in this matter made a mistake as set forth above related to
173 competent evidence. To make a determination as to how this could be resolved on
174 Summary Judgment the Court must look at the Relevant Facts in this matter that
175 were presented to the Court. Attached to the Defendant's *Response to Motion for*
176 *Partial Summary Judgment and Defendant's Motion for Summary Judgment* was the
177 Affidavit of Karson Kluver which set forth facts that neither party disputed in
178 paragraphs one (1), two (2), three (3), four (4)

179 The issue as to relevant facts come in related to the following paragraphs:

180 5. During the time we operated Genie Land Company, prior to my brother's
181 death we had numerous meetings regarding the corporation and its operation. It is
182 not surprising that Barbara Needham does not have knowledge of this as neither her
183 nor my own wife were involved in the operations. Neither of them were consulted
184 and neither of them were ever present at a meeting. *Affidavit of Karson Kluver*
185 paragraph 5.

186 6. At no point in time did Charles Kelly Kluver and myself discuss amending
187 the bylaws of the corporation other than to ensure that my son, Abner Kluver or a
188 blood descendant of the founder would receive the shares in the ranch. At no point
189 in time was there ever a discussion of either Barbara Needham nor my wife being
190 able to inherit the shares of the Ranch. *Id.* at paragraph 6.

191 7. In 2012 I was suffering from significant medical issues. I was informed I was
192 dying. On the day that the document the Plaintiff claims was an "agreement" to
193 amend the bylaws was signed I was being rushed to the hospital. I did not draft this
194 "agreement". This was not done pursuant to any discussion. My brother ran out of
195 the house and brought the paper to me and urged me to sign it as I believed I was
196 dying. *Id.* at paragraph 7.

197 8. At no point in time did I approach Charles Kelly Kluver to request a written
198 agreement that would allow the shares in the corporation to be distributed to any
199 person's spouse. This includes my own. *Id.* at paragraph 8.

200 9. At no point in time did I request Barbara Needham type up any "agreement."
201 I was dying, I was not even considering anything at that time. This "agreement" was
202 presented to me by Charles Kelly Kluver and was previously typed up. I do not
203 know where it came from. *Id.* at paragraph 9.

204 10. I was not given a copy of this "agreement." I did not see it again until Charles
205 Kelly Kluver passed away. *Id.* at paragraph 10.

206 11. There was never any discussion to change the bylaws of the corporation.
207 Neither Charles Kelly Kluver nor myself had any desire to have shares in the Ranch
208 pass to our spouses. *Id.* at paragraph 11.

209 These presented facts are based on personal knowledge. Are competent and
210 were not considered by the Trial Court as the only competent evidence presented.
211 The trial court was presented with an *Affidavit of Barbara A. Needham* which was
212 attached to the *Plaintiff's Motion for Partial Summary Judgment and Brief in*
213 *Support*. The trial Court considered this affidavit and made rulings on it which were
214 set forth above, which were errors as the information was all presented based off of
215 hearsay statements from Barbara Needham. In examining the *Affidavit of Barbara*
216 *A. Needham* there is no dispute as to paragraphs one (1), three (3), four (4).
217 However, with the remaining paragraphs there are significant issues that the Court
218 allowed for incompetent testimony and evidence to be considered in the context of
219 a summary judgment proceeding.

220 Paragraph five (5) of the *Affidavit of Barbara A. Needham* is hearsay
221 statements. It was undisputed that Barbara Needham was never present for any
222 meeting. This is not competent evidence and as the Defendant stated in paragraphs

223 five (5) and six (6) (which was based on personal knowledge) this created a fact in
224 dispute to be resolved at the time of trial.

225 Paragraph six (6) of the *Affidavit of Barbara A. Needham* is hearsay
226 statements. It was undisputed that Barbara Needham was never present for any
227 meeting. This is not competent evidence and as the Defendant stated in paragraphs
228 five (5) and six (6) (which was based on personal knowledge) this created a fact in
229 dispute to be resolved at the time of trial.

230 Paragraph seven (7) of the *Affidavit of Barbara A. Needham* is in agreement
231 with the statements of Karson Kluver. Interestingly, no one disputed that Karson
232 Kluver was suffering from significant medical issues. This again creates a fact that
233 must be fleshed out at the time of trial as to competency to sign any document.

234 Paragraph eight (8) of the *Affidavit of Barbara A. Needham* is hearsay
235 statements. It was undisputed that Barbara Needham was never present for any
236 meeting. This is not competent evidence and as the Defendant stated in paragraphs
237 five (5) and six (6) seven (7) and eight (8) (which were based on personal
238 knowledge) this created a fact in dispute to be resolved at the time of trial.

239 Paragraph nine (9) of the *Affidavit of Barbara A. Needham* is in dispute
240 between the parties this created a fact in dispute to be resolved at the time of trial.

241 The additional facts that must be considered are set forth in the *Supplemental*
242 *Affidavit of Barbara A. Needham*. Paragraphs two (2) and three (3) are both
243 continuing hearsay statements and are not competent evidence for a summary
244 judgment proceeding. Paragraph four (4) of the *Supplemental Affidavit of Barbara*
245 *A. Needham* simply demonstrates that both Charles Kelly Kluver and his wife were
246 well aware of what was required to amend the By-Laws. Instead, at the time that
247 Karson Kluver was suffering from significant medical issues they attempted to
248 circumvent the requirements. The paragraph does not add much to anything in this

249 matter other than to demonstrate that once again there are facts that must be resolved
250 by the trier of fact and not on summary judgment.

251 Paragraph five (5) of the *Supplemental Affidavit of Barbara A. Needham*
252 actually contradicts paragraph nine (9) of the *Affidavit of Barbara A. Needham* in
253 that at one time she is stating that Karson requested the drafting of an agreement and
254 in the next paragraph (paragraph nine (9)) she is stating that Charles Kelly Kluver
255 requested the drafting. This at a minimum is once again hearsay but it again creates
256 a fact that must be resolved at the time of trial and one that Barbara Needham created
257 a fact in dispute for herself.

258 B. *Statement of Relevant Facts as to Oral Arguments*

259 The majority of the oral argument presented is not evidence for the Court to
260 consider. However, it is important to note that even the District Court suggested that
261 there are facts in dispute. This occurred on Page five (5) at lines 8-10 of the
262 *Transcript* in this matter. The Court went on to state that there was a factual dispute
263 on pages 9-10 as to drafting of the documents. *Id.* The Court further seemed to
264 indicate that there were disputed facts at page 67 at lines 6-8 and page seventy-four
265 (74). *Id.* The Court noted disputed facts on medical treatment and competence at
266 pages 74-75 and at page 77-79. *Id.*

267 The Court also made several inquiries in this matter that demonstrates that the
268 Court was considering hearsay statements and incompetent evidence. This occurred
269 at page 18 on lines 3-17, pages 23-25 and pages 25 lines 16-20 and page 26 at lines
270 1 – 3. *Id.* The Court went on to further consider hearsay statements on pages 32-
271 33; page 41 at lines 5 – 16 and lines 19-20 and then again on page 42 lines 1-9. *Id.*
272 The Court not only allowed the hearsay statements but seems to indicate in its Order
273 that somehow statements of Counsel in Oral arguments are proof. The only actual
274 evidence before the Court at the time of the hearing were the following documents:

275 - Affidavit of Barbara Needham

- 276 - Affidavit of Karson Kluver
- 277 - Supplemental Affidavit of Barbara Needham
- 278 - By-Laws of Genie Land Company
- 279 - Will of Charles Kelly Kluver

280 Everything outside of these documents, whether or not referenced by Counsel
281 are hearsay or incompetent for the purposes of a summary judgment proceeding.
282 When looking at the actual evidence presented by Barbara Needham that was not
283 hearsay in nature (and thus not allowed to be considered) other than stating that she
284 was the wife of Charles Kelly Kluver; is the personal representative of his estate and
285 as set forth above... she had no personal knowledge. This creates numerous facts in
286 dispute and summary judgment was inappropriate.

287

288 IV. STANDARD OF REVIEW

289 The Montana Supreme Court review the granting of a motion for summary
290 judgment *de novo*, using the same standards applied by the District Court
291 under M.R.Civ.P. 56. *Capital One, NA v. Guthrie* 2017 MT 75, ¶ 11, 387
292 Mont. 147, 149, 392 P.3d 158, 161.

293

294 Summary Judgment is appropriate if the pleadings, depositions, answers to
295 interrogatories, and admissions on file, together with the affidavits, if any,
296 show that there is no genuine issue as to any material fact and that the moving
297 party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3); *Roe*
298 *v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200. *Id.*

299

300 The moving party has the burden of establishing the absence of a genuine
301 issue of material fact and entitlement to judgment as a matter of law. *Harmon*,
302 ¶ 14. Once established the non-moving party must then present substantial
303 evidence that raises a genuine issue of material fact essential to one or more
304 elements of the case. *Apple Park LLC v. Apple Park*
305 *Condominiums, LLC*, 2008 MT 284, ¶ 11, 345 Mont. 359, 192 P.3d 232. *Id.*

306

307 We review evidentiary rulings made in the context of
308 a summary judgment **162 proceeding de novo, and need not defer to the
309 judgments and decision of the district court, in order to determine whether
310 evidentiary requirements for summary judgment have been satisfied. *Smith v.*
311 *Farmers Union Mut. Ins. Co.*, 2011 MT 216, ¶ 15, 361 Mont. 516, 260 P.3d
312 163; *Harmon*, ¶ 14; *PPL Mont., L.L.C. v. State*, 2010 MT 64, ¶ 84, 355 Mont.
313 402, 229 P.3d 421, *rev'd on other grounds in PPL Mont., LLC v. Montana*,
314 565 U.S. 576, 132 S.Ct. 1215, 182 L.Ed.2d 77 (2012); *Boyne USA, Inc. v.*
315 *Lone Moose Meadows, LLC*, 2010 MT 133, ¶ 11, 356 Mont. 408, 235 P.3d
316 1269. *Id.* at 161-162.

317 V. SUMMARY OF THE ARGUMENT

319 First, the facts of this case establish that during the hearing on the
320 Plaintiff's / Appellee's motion for summary judgment the District Court
321 considered evidence that would not be admitted at a trial and thus is not
322 admissible at the time of the hearing on summary judgment. *Smith v.*
323 *Burlington N. & Santa Fe Ry. Co.*, 2008 MT 225, ¶ 39, 344 Mont. 278, 292,
324 187 P.3d 639, 649. The District Court considered affidavits of the Plaintiff /
325 Appellee that set forth as facts those matters to which she would have no
326 personal knowledge. See *Affidavit of Barbara Needham* and *Supplemental*
327 *Affidavit of Barbara Needham*. Second, the District Court in granting
328 summary judgment is setting forth that there are no material facts in dispute
329 which is a requirement for granting the summary judgment. However, in
330 deciding that there are no material facts in dispute the District Court relied on
331 hearsay statements of the Plaintiff / Appellee and completely discounted the
332 affidavits of the Defendant, Karson Kluver, who has personal knowledge of
333 the facts in dispute. This is a circular argument set forth by the District Court
334 in that the District Court states that the Plaintiff's / Appellee's affidavits are
335 well-taken (page 5 of the *Order*). However, there is never a requirement of
336 the District Court for the Plaintiff / Appellee to present competent evidence

337 that would be admissible at trial. Third, the District Court ignored corporate
338 law in this matter. The District Court and the Plaintiffs both relied on the
339 *Larson v. Larson*, 2017 MT 299, 389 Mont. 458, 406 P.3d 975 case to set
340 forth that this is a similar situation wherein a closely held corporation did not
341 strictly comply with corporate law in Montana. However, this ignores the
342 facts of the *Larson* case and this case and how they are completely
343 distinguishable. In the *Larson* case it was dealing with the stamping of the
344 word VOID on documents. In this case, the District Court found that it could
345 re-write the entire foundational documents of the corporation. Due to the
346 errors made by the District Court this matter should be overturned, the
347 Plaintiff's granted summary judgment should be vacated and this matter
348 should be remanded to the District Court.

349
350

VI. ARGUMENT

351 A. *District Court Considered Incompetent Evidence.*

352 By reference the arguments set forth in paragraphs B and C above related to
353 facts both in the affidavits and in oral argument are incorporated herein but will not
354 be each restated. The Court has an obligation of only considering competent
355 evidence at the time of the summary judgment proceedings. When this Court
356 reviews the *Plaintiff's Motion for Partial Summary Judgment and Brief in Support*
357 with the attached *Affidavit of Barbara A. Needham* this Court can identify, without
358 anything further that paragraphs 5, 6, 7, 8, 9, and 10 are not based on personal
359 knowledge of the Affiant but is instead based on hearsay statements. The
360 *Supplemental Affidavit of Barbara A. Needham* also does not comply with this
361 requirement and as set forth previously actually contradicts her first affidavit.

362 It is well settled that for summary judgment proceedings the parties have to
363 limit affidavits to evidence that would be otherwise admissible pursuant to the rules

364 of evidence. *Smith v. Burlington N. & Santa Fe Ry. Co.*, 2008 MT 225, ¶ 39, 344
365 Mont. 278, 292, 187 P.3d 639, 649. The Court went on to state that the “personal
366 knowledge” must be based on ‘firsthand observation or experience, as distinguished
367 from a belief based on what someone else has said.” *Id.*

368 The District Court in this matter did not require the Plaintiff, Barbara A.
369 Needham to meet its burden. There is instead a circular argument presented wherein
370 the Court considered incompetent evidence... then stated that Karson Kluver did not
371 provide any evidence to contradict it other than his own statements... and then for
372 that reason Karson Kluver did not present evidence required to defeat summary
373 judgment. However, this ignores that at the outset, the Court can only consider
374 competent evidence by the Plaintiff, Barbara A. Needham to demonstrate that she
375 had met her burden in establishing that there is no genuine issue as to material fact.
376 Only, once she has met the burden by presenting competent evidence would there
377 be a requirement that Karson Kluver is not able to rely on his personal knowledge.
378 *Gonzales v. Walchuck*, 2002 MT 262, ¶ 9, 312 Mont. 240, 59 P.3d 377. While the
379 Court goes on to state in its *Order* that “Mere denials will not prevent an entry of
380 summary judgment.” *Ponderosa Pines Ranch, Inc., v. Hevner*, 2002 MT 184, ¶ 24,
381 311 Mont. 82, 53 P.3d 381. It ignores the requirement of considering competent
382 evidence.

383 It appears that where the District Court may have confused the issue related
384 to the requirements is most fully demonstrated on page 5 of the *Order*. Wherein it
385 states that the affidavits submitted by Plaintiffs comply with Rule 56(e), in that they
386 affirm the information within the Affidavits is true, accurate and complete based on
387 the knowledge of the affiant. *Id.* It fails to address the fact, the briefed argument
388 and the oral argument that these are all hearsay statements that are not allowed to be
389 considered.

390 B. *Summary Judgment was Inappropriate*

391 There are two reasons that summary judgment was inappropriate in this
392 matter. The first has been explored in paragraph A above related to the Court
393 considering incompetent evidence. The second argument is that there were at the
394 time of the Summary Judgment hearing material facts in dispute. This was
395 demonstrated by the Court’s own statements in the transcript as set forth in the
396 *Statement of Facts as to Oral Arguments* above. On one hand, at the time of the
397 hearing, the Court is acknowledging repeatedly that there are material facts in
398 dispute but then it grants summary judgment which requires that there be no material
399 facts in dispute. *Bruner v. Yellowstone County*, 272 Mont. 261, 264, 900 P.2d 901,
400 903 (1995).

401 C. *Violation of Corporate Structure and Law*

402 The arguments that have been set forth above are incorporated as to the
403 consideration of incompetent evidence and the material facts being in dispute. The
404 argument goes further though when looked at through the lens of the By-Laws of the
405 corporation.

406 It is clear from the affidavit of Karson Kluver, something that was not ever
407 competently contradicted by Barbara A. Needham that she was never present for a
408 single meeting of the corporation. The District Court and the Plaintiff’s relied on
409 the case of *Larson v. Larson*, 2017 MT 299, 389 Mont. 458, 406 P.3d 975. Where
410 it said in the *Order* that “when dealing with a closely held corporation which failed
411 to specifically follow corporate and by-law procedures ruled that the fact “void” was
412 not written on previously issued stock certificates, was an insufficient basis to
413 invalidate a gift of shares to a shareholder. The Court reasoned that to do so would
414 elevate what are essentially just a private corporations’ internally created rules to the
415 same status as a statute passed or a code adopted by this State’s legislature.” *Id.*
416 However, this case and the reliance on it by the Court is distinguishable. In the case
417 of *Larson v. Larson* the Court is interpreting the stamping of the word “void” on a

418 share certificate to be the same as amending the entire By-Laws of a corporation
419 based on a “one-sentence agreement” as the Court found in this matter.

420 To follow this logic, it is necessary for this Court to look at the By-Laws of
421 the Corporation for reference. In doing so the Court would destroy Section 5,
422 Section 7 and Section 8 of Article 1. The Court would also destroy Section 4 of
423 Article IV including the transfer restrictions of the corporation. In fact, the Trial
424 Court in granting Summary Judgment has substituted its’ own interpretation into the
425 By-Laws and the “one-sentence agreement” completely ignoring that the By-Laws
426 constitute their own contract and can only be modified, changed, altered, etc... if
427 corporate formalities are followed.

428 The trial Court further eliminated Section 1 under Article VII by its *Order* as
429 it has eliminated the process for amendments to the By-Laws. This again is all based
430 on a “one-sentence agreement” as the Trial Court indicated at Oral Argument.

431 The Trial Court further relied on Montana Code Annotated 35-1-432 and 35-
432 1-519.

433

434 Montana Code Annotated 35-1-432 provides:

435

436 (1) Unless the articles of incorporation or bylaws provide otherwise, action
437 required or permitted by this chapter to be taken at a board of directors'
438 meeting may be taken without a meeting if the action is taken by all members
439 of the board. The action must be evidenced by one or more written consents
440 describing the action taken, be signed by each director, and be included in the
441 minutes or filed with the corporate records reflecting the action taken.

442

443 (2) Action taken under this section is effective when the last director signs the
444 consent unless the consent specifies a different effective date.

445

446 (3) A consent signed under this section has the effect of a meeting vote and
447 may be described as a vote in any document.

448

449 In this matter as set forth at the time of Oral Argument in the rebuttal provided
450 by Christopher J. King it is clear that Section (1) does not provide as in the context
451 of the Summary Judgment proceeding as (1) there was no evidence presented of
452 written consents describing the action taken; (2) nothing was included in the minutes
453 or filed with the corporate records reflecting any action taken. This provision does
454 not apply and as set forth in the *Order* is not a correct application of the law.

455

456 Montana Code Annotated 35-1-519 provides:

457 (1) Action required or permitted by this chapter to be taken at a shareholders'
458 meeting may be taken without a meeting if the action is taken by all the
459 shareholders entitled to vote on the action. The action must be evidenced by
460 one or more written consents describing the action taken, signed by all the
461 shareholders entitled to vote on the action, and delivered to the corporation
462 for inclusion in the minutes or filing with the corporate records.

463

464 (2) If not otherwise determined under 35-1-518 or 35-1-522, the record date
465 for determining shareholders entitled to take action without a meeting is the
466 date the first shareholder signs the consent under subsection (1).

467

468 (3) A consent signed under this section has the effect of a meeting vote and
469 may be described as a vote in any document.

470

471 (4) If this chapter requires that notice of proposed action be given to nonvoting
472 shareholders and the action is to be taken by unanimous consent of the voting
473 shareholders, the corporation shall give its nonvoting shareholders written
474 notice of the proposed action at least 10 days before the action is taken. The
475 notice must contain or be accompanied by the same material that, under this
476 chapter, would have been required to be sent to nonvoting shareholders in a
477 notice of meeting at which the proposed action would have been submitted to
478 the shareholders for action.

479

480 This provision also does not apply as section (1) was not followed. There
481 were no signed consents. There was nothing included in the minutes. The Court
482 further ignored the well-established law in Montana that both the Klivers were

483 bound by the Articles and Bylaws of the association and must follow the rules. The
484 Montana Supreme Court has stated

485

486 The District Court properly relied on *Appeal of Two Crow Ranch, Inc.*, 159
487 Mont. 16, 494 P.2d 915 (1972), for its determination that, as members of the
488 Association, the Davises are bound by the Articles and Bylaws of the
489 Association and must follow the rules and regulations established by the
490 Association's Board. In *Two Crow Ranch*, this Court held that “[o]n becoming
491 a member of a corporation or association and subscribing to its bylaws, one
492 thereby agrees to submit to its rules and regulations.” *Two Crow Ranch*, 159
493 Mont. at 23, 494 P.2d at 919 (citing *King v. Farmers Electric Coop.*, 56 N.M.
494 552, 246 P.2d 1041 (1952); *Model Land & Irrigation Co. v. Madsen*, 87 Colo.
495 166, 285 P. 1100 (1930); *Greene v. Board of Trade*, 174 Ill. 585, 51 N.E. 599
496 (1898)).

497

498 *Eastgate Vill. Water & Sewer Ass'n v. Davis*, 2008 MT 141, ¶ 25, 343 Mont. 108,
499 114, 183 P.3d 873, 877.

500

501 A factor that the Court did not discuss in this matter other than in passing and
502 acknowledging that both parties have submitted the By-Laws and the Court
503 acknowledging that the By-Laws were in place at the time of Charles Kelly Kluver’s
504 death in it’s own *Order*. This creates a requirement that the By-Laws are followed.
505 What the Plaintiff is arguing for is not something as simple as not stamping VOID
506 on share certificates... they are arguing to destroy corporate law and functioning as
507 a whole.

507 It is a well-established precedent that the bylaws of a corporation, together
508 with the articles of incorporation, the statute under which it was incorporated,
509 and the member's application, constitute a contract between the member and
510 the corporation. When duly enacted, the bylaws are binding upon all members
511 of the corporation or association who are presumed to know them
512 and contract in reference to them.

513

514 *Two Crow Ranch*, 159 Mont. at 23, 494 P.2d at 919 (citing *115 18
515 Am.Jur.2d, *Corporations* § 168).

516

517 If this Court is to follow the argument presented by the Plaintiffs then it is a
518 complete destruction of any closely held corporation and it cannot be what this Court
519 intended when making its' decision in *Larson v. Larson*.

520

521 VII. CONCLUSION

522 The District Court in this matter made numerous errors which can be summed
523 up as follows:

- 524 1. The Court considered incompetent evidence presented by the Plaintiffs.
- 525 2. The Court failed to recognize material facts in dispute.
- 526 3. The Court inappropriately granted Summary Judgment.
- 527 4. The Court ignored the By-Laws and Corporate Structure along with long-
528 established case-law and the Montana Code Annotated in not only changing the By-
529 Laws of a corporation, but then also inserting its' own definitions into a contract that
530 it found to be valid.

531 For the foregoing argument, reasons, statutes and case law this matter should
532 be overturned, the Plaintiff's granted summary judgment should be denied and this
533 matter should be remanded to the District Court.

534

535 DATED this 3rd day of February, 2019.

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CERTIFICATE OF SERVICE

I, Christopher J. King, hereby certify that on the 3rd day of February, 2019 a true and correct copy of the foregoing document was emailed to the following attorneys along with a true and correct copy being mailed:

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CERTIFICATE OF COMPLIANCE

I, Christopher J. King, Attorney for the Appellant herein, hereby certifies that this document is proportionately spaced with a typeface of Times New Roman in 14 point. There is a total word count for this brief of 5,759 words.

Christopher King

Christopher J. King

APPENDIX

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Plaintiff's Motion for Partial Summary Judgment and Brief in Support (43 Pages)

Response to Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment (38 Pages)

Plaintiff's Combined Reply Brief in Support of Motion for Partial Summary Judgment and in Response to Defendant's Motion for Summary Judgment (37 Pages)

Order Granting Plaintiff's Motion for Summary Judgment and Order Denying Defendant's Cross Motion for Summary Judgment (17 Pages)

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