In the Supreme Court of Montana

Cause No. DA 19-0534

WILLIAM E. RIDEG,

Appellee.

v.

ROBERT BERLETH AND NADIA BERLETH,

Appellants,

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable Karen S. Townsend, Presiding.
Fourth District Court Case No. DV-18-1186

APPELLANT'S BRIEF ON THE MERITS

Robert W. Berleth, Esq.
BERLETH & ASSOCIATES, PLLC
MTSBN: 53919739
9950 Cypresswood Dr., Ste. 200
Houston, Texas 77070
(713) 588-6900 (telephone)
(713) 481-0894 (facsimile)

Counsel for Appellants

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IDENTITY OF PARTIES AND COUNSEL

Robert Berleth Nadia Berleth	Defendants/Appellants/Tenants

Mr. Robert W. Berleth
Bar No. 53919739
BERLETH & ASSOCIATES, PLLC
9950 Cypresswood Dr., Ste. 200
Houston, Texas 77070
(713) 588-6900 (telephone)
(713) 481-0894 (facsimile)
rberleth@berlethlaw.com

Counsel for Petitioners at Trial and in the Montana Supreme Court

William E. Rideg[1]
P.O. Box 701
Missoula, MT 59806

Plaintiff/Appellee/Landlord

Thomas Charles Orr, Esq.
Mathew A. McKeon
THOMAS C. ORR LAW OFFICES, P.C.
523 S. Orange St.
P.O. Box 8096
Missoula, MT 59807
Phone: (406) 543-0999
tom@tcorrlaw.com
matthew@tcorrlaw.com

Counsel for Appellee at Trial

[1] The trial court merely refers to Rideg as "William" in the orders being appealed.

MEDIATION AND ORAL ARGUMENT

The Berleths have sought mediation multiple times prior to, during, and after the trial litigation, but the Landlord refuses. No mediation has yet occurred between the parties in this or any other of the litigations brought by Rideg.

No oral argument is requested by the Appellant.

RECORD REFERENCES

Court Order Dated 09/26/2018 titled Findings of Fact, Conclusions of Law and Order of Possession is cited as FOF# (page and line number).

Court Order Dated 02/11/2019 titled Order on Damages is cited as OOD# (page and line number).

Court Order Dated 08/19/2019 titled Final Judgment and Satisfaction of Judgment is cited as SOJ# (page and line number).

Trial Exhibits by the enclosed tabbed binders (exhibit number and page).

TO THE HONORABLE SUPREME COURT OF THE STATE OF MONTANA:

ISSUES PRESENTED

II. The trial court erred in determining the Berleths committed a "material breach" of the lease and basing eviction upon such. Rideg's exacerbated complaints were pretextual for eviction and the Order of Possession should not have been rendered by the trial court.

III. The trial court erred in reducing the damages amount sought by Appellants to their 2005 Yukon Denali when it failed to consider the cost to rent a replacement vehicle during repairs and award depreciated value.

IV. The trial court erred in failing to find that the excessive inspections and other behaviors by Rideg constituted harassment by a Landlord upon a Tenant, and the trial court failed to award exemplary damages for such.

V. The trial court erred in finding the Early Termination Fee was not a prohibited accelerated rent provision, and the trial court failed to award exemplary damages for such.

STATEMENT OF THE CASE

This case is a dispute between Appellants-Defendants Robert Berleth and Nadia Berleth (hereinafter collectively referred to as the "Tenants", "Berleths", or individually as Mr. or Ms. Berleth, respectively) and Appellee-Plaintiff William Rideg (hereinafter "Rideg"[2] or "Landlord") related to the property located at 21524 Nine Mile Road in Missoula County (hereinafter "Property"). A Residential Lease/Rental Agreement was executed by the parties for a 12-month term on March 15, 2018. The Berleths took possession on or about May 4, 2018.

[2] The trial court merely refers to Rideg as "William" in the appealed orders.

On August 29, 2019, Nadia Berleth's petition for injunctive relief against William Rideg for stalking and harassing her at the Property was denied.

Rideg retaliated by filing for eviction. By court order, the Berleths moved out of the premises on September 30, 2018.

On February 11, 2019, the trial court issued an Order for Damages. The trial court ordered Rideg to pay the Berleths $5,197.69 for damages.

On August 19, 2018, the court issued a Final Judgment and Satisfaction of Judgment. The check written to the Berleths supporting a Final Judgement has since been returned insufficient.

Since the initial litigation, Rideg has now sued Robert Berleth twice more in Missoula, and filed a baseless grievance with the state bar—*in Texas*. He continues to harass and belittle the Berleths through other means. The Berleths have since purchased 305 acres in another mountain state and simply want Rideg to leave them alone (they always have).

The Berleths now appeal the trial court's Findings of Fact, Conclusions of Law, and Order of Possession as well as the Order on Damages to the Montana Supreme Court. The Berleths assert the Final Judgment was obtained by Rideg fraudulently, by representing to the Court the damages were paid as ordered.

STATEMENT OF FACTS

Following Hurricane Harvey in August, 2017, Robert and Nadia Berleth elected to move from Houston, Texas and rebuild their lives in Missoula, Montana.[3] Despite being licensed a short time, Mr. Berleth has distinguished himself as a "top lawyer, 2019" in Texas and runs a successful specialty practice.[4] He is also licensed to practice law in Montana[5] and as a licensed paramedic[6] in Texas. After visiting several properties in February and March of 2018, the Berleths leased and moved in May 2018 to the subject Property located at 21524 Nine Mile Road, Huson, Montana 59846, hereinafter the "Property".[7] The relationship between Rideg and Berleths was terse from the beginning, with the Rideg requiring a very large security deposit—despite exemplary credit—and demanding that the Berleths lease the Property from April 15, 2018 regardless of knowledge they could not be in Missoula until the middle of May, 2018.[8] The Property is remote and gorgeous.[9]

On May 16, 2018, four days after moving into the Property, the water well supply line was severed by springtime flood waters. [10] The Berleths went nearly

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[3] FOF pg. 2, ln. 12-13.
[4] https://www.houstoniamag.com/arts-and-culture/2020/02/houstonia-top-lawyers-2019
[5] https://www.montanabar.org/members/?id=53919739
[6] https://vo.ras.dshs.state.tx.us/datamart/detailsTXRAS.do?anchor=73920.0.1
[7] OOD pg. 2, ln. 10-16.
[8] Exhibit 27, pg. 142.
[9] Exhibit 25, *passim.*
[10] FOF pg. 6, ln. 19.

three weeks without any running water at the Property, and another week without septic service.[11] The Berleths assert that the water could have been repaired in a much quicker fashion had Rideg elected to use a professional contractor.[12] Rather, Rideg used his biologic brother Mark Rideg, a notorious member of the Missoula County Building Code enforcement division's "Wall of Shame"; and essentially had the water repaired at the cost of materials—at the cost of time and quality.[13] While unpacking from a move across the country, the Berleths were forced to buy bottled water, use laundromats, and take showers at a truck stop[14] for the first month of occupancy.[15] They persisted with optimism about their new lives in Montana.[16]

Despite the lack of basic human necessities for the first month, the Berleths remained as cordial as possible with Rideg.[17] Rather than provide any compensation for the water difficulties to the Berleths, Rideg insisted on sending demanding, abrasive, insulting, and downright nasty emails several times per week to the Berleths.[18] Partially due to Rideg's equally abrasive relations with his neighbors, the water system was repaired by placement of a cistern on the Property

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[11] FOF pg. 6, ln. 7-13, ln. 20-21.
[12] FOF pg. 5, ln 26; pg. 6, ln. 1.
[13] FOF pg. 6, ln. 1.
[14] Trial Exhibit 27, pg. 89-90.
[15] Defendant's Request for Damages, pg. 5.
[16] FOF pg. 5, ln. 22-23.
[17] Trial Exhibit 28, *passim.*
[18] Trial Exhibit 27, *passim.*

(rather than through a new shared well), and Rideg began having water delivered weekly to the Property by a professional water service.[19] Delivery costs were estimated at $1,000- $1,200 per month. Rideg increased his abrasiveness.[20]

In June, 2018, still trying to be cordial, the Berleths allowed Rideg to stay several nights in the garage apartment once the cistern was installed and septic working.[21] Rather than appreciating the Berleth's kindness, Rideg mistook it as weakness and continued to berate and harass the Berleths over nominal issues, such as where to park vehicles on the driveway,[22] wandering all around the property (not staying on the garage side), demanding that only a single load of laundry per week was allowed, and asking the Berleths to urinate outside to conserve water. At no point did the Berleths obstruct or prevent Rideg from accessing the garage apartment for overnight stays or storage.

Over the summer and into early August the Berleths noticed increasing abrasiveness in the emails from Rideg,[23] as well as him stalking around the Property several times per week during unannounced visits and taking photographs through their windows.[24] The Property is approximately seven miles up 9-mile

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[19] FOF pg. 5, ln. 14-18.
[20] Trial Exhibit 27, pg. 5-6.
[21] FOF pg. 6, ln 25.
[22] Trial Exhibit 27, pg. 1.
[23] Trial Exhibit 27, *passim.*
[24] FOF pg. 9, ln 4-16.

road (a dirt road). A trip to the property takes approximately 45 minutes from Missoula. Berleths assert Rideg's trips to the Property were dedicated and intentionally timed.[25] In accordance with the terms of the lease, the Berleths revoked Rideg's permission to use the property beyond access to the garage apartment and verbally asked him to leave several times when he would "wander" [26]onto their deck or into their backyard.[27] The Berleths expressed their desire to Rideg multiple times for him to "simply leave us alone".[28] Rideg refused, and it was apparent he was getting a perverse glee out of the fact that his appearance and presence would irritate them.[29]

On August 6, 2018, Rideg, again without permission to be on the Property, and again during an unannounced visit, "accidentally" damaged the Berleth's vehicle while he was at the Property by dropping a door on the hood and fender.[30] Since the conclusion of the trial court's order, the damages check tendered to support the final order has since been returned insufficient, and the Berleths have not yet been indemnified for the damages.[31]

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[25] FOF pg. 9, ln 12-13.
[26] Trial Exhibit 17.
[27] Trial Exhibit 27, pg. 4.
[28] Trial Exhibit 28, pg. 11. See also, OOD pg. 7, ln. 7-12, testimony of Craig Dyar [sic].
[29] Trial Exhibit 23, the landlord taunting the Berleths by waving a middle finger gesture from inside his vehicle.
[30] FOF pg. 7, ln. 26; pg. 8, ln. 1.
[31] OOD, pg. 6, ln. 4-7. *See also*, cause no. 194100468229, styled *Berleth & Associates v. Allstate Insurance Company*, in the Justice Court in and for Harris County, Texas.

On August 15, 2018, Rideg again made an unannounced visit and was observed by Mr. Berleth to be photographing Ms. Nadia Berleth with his cell phone through a bathroom window while she was showering.[32] Once the Landlord realized he was being watched and videoed by Mr. Berleth from another window, Rideg became extremely irate, pretended to be suddenly fascinated with recently trimmed trees, and began challenging Mr. Berleth to "come outside and talk to me like a man".[33] Despite having decades of military experience, specifically being a combat Army infantryman and having no qualms about employing violence in the profession of arms, Mr. Berleth demurred. Rideg then walked around the outside of the house and began banging on the front door, again inviting Mr. Berleth to "come out here like a man". [34] Nadia was visibly shaking from fear; Mr. Berleth armed himself when the structural integrity of the front door was questionable under Rideg's "knocking".[35] Rideg's abusive and aggressive behavior prompted the Berleths to call the Missoula County Sheriff's Department.[36] The Berleths issued Rideg a no-trespass notice, and demanded he not return to their side of the Property for any reason other than announced inspections in accordance with both

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[32] FOF pg. 8, ln. 5-26; pg. 9, ln. 1- 21.
[33] FOF pg. 8, ln. 8-16.
[34] OOD pg. 7, ln 20-26.
[35] Trial testimony of William Rideg
[36] FOF pg. 8, ln. 15-17.

the Lease and MONT. CODE. §70-24-312.[37] The Berleths agreed that Rideg could continue to access the garage apartment for storage and for inspections of the Property with proper notice.[38]

On August 26, 2018, again during an unannounced visit, Rideg threatened to forcibly enter the primary residence of the Property citing "emergent circumstances",[39] which again prompted the Berleths to call the Missoula County Sheriff's Department. Rideg was again advised by the Missoula County Sheriff's Department not to come back to the property, and to only communicate with the Berleths through their legal counsel.[40] The Berleths were then forced to block Rideg from texting their cell phones, due to texts from him several times per day.

The Berleths retained outside legal counsel and sought a peaceful resolution through mediation several times.[41] All the Berleths ever sought was a peaceful and enjoyable tenancy.[42] Rather, Rideg formally filed an eviction as a retaliation, and on or about August 20, 2018,[43] the Berleths were served with a notice of eviction, citing three issues: 1) an unauthorized dog on the premises; 2) damage to trees on

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[37] FOF pg. 8, ln. 17-24.
[38] Trial Exhibit 28, *passim.*
[39] Trial Exhibit 27, pg. 2-4.
[40] Trial Exhibit 29, Letter dated August 20,2018 from Christopher Friones to William Rideg, at pg. 2.
[41] Trial Exhibit 29, Letter dated August 21, 2018 from Christopher Friones to Tom Orr, at pg. 1.
[42] Trial Exhibit 28, pg. 11.
[43] FOF pg. 10, ln. 19-23.

the Property, and; 3) restriction of access to the guest apartment as reasons for the eviction.

On or about September 19, 2018, the trial Court held oral hearing for possession of the property. At the time of the hearing, retained counsel for the Berleths had less than 24 hours to prepare for what would essentially be a full-day trial, with over 50 exhibits and multiple witnesses. The Court ordered "immediate" possession of the property to Rideg, which the Berleths complied with and peacefully vacated the property by the end of September, 2018.[44]

On October 3, 2018, Rideg prepared the "Addendum to Property Checklist/Move Out Inspection" enumerating damages to items in the Property and listing missing items. Many of the damages were highly exaggerated and outright fabrications (e.g. a dead bug behind the refrigerator constituted the kitchen floor being "filthy", and claiming non-existent ladders as "missing").[45]

On February 11, 2019 the trial court issued an Order on Damages. After testimony from the witnesses of both parties, the Missoula trial court found that ["t]here is no prevailing party where both parties gain a victory but also suffer a loss", but also ordered Rideg to pay the Berleths $5,197.69.[46] The Order on

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[44] FOF, *passim.*
[45] OOD, pg. 4, ln 24.
[46] SOJ pg. 1, ln 26; pg. 2, ln 6.

Damages is silent to the Berleth's claims of the inspections[47] being used as harassment, and found that the "Early Termination Fee" equivalent to one month's rent was not a prohibited provision of the Lease without further explanation.[48]

Since the initial litigation, Rideg has sued Robert Berleth twice more[49] in Missoula,[50] and filed a baseless grievance with the state bar —*in Texas*.[51] He continues to harass and belittle the Berleths through other means.[52] The Berleths have since purchased 305 acres in another mountain state and simply want Rideg[53] to leave them alone (as they always have).[54]

The Berleths now appeal the trial courts Findings of Fact, Conclusions of Law, and Order of Possession as well as the Order on Damages to the Supreme Court of the State of Montana.

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[47] Trial Exhibit 2.
[48] FOF pg. 9, ln. 11-19.
[49] See Cause No. DV-19-552, styled William E. Rideg v. Berleth & Associates, et. al, in the Missoula Municipal Court, in and for Missoula County, Montana.
[50] See Cause No. DV-18-1317, styled William E. Rideg v. Robert Berleth, in the Montana Fourth Judicial District, in and for Missoula County, Montana.
[51] See Texas State Bar Office of Chief Disciplinary Counsel, grievance no. 201907176, dismissed as "Filed for purposes of harassment; dismissed as unfounded." Rideg also filed a grievance with the Montana State bar, but that grievance was dismissed as baseless without notice to Berleth.
[52] www.robert-berleth.com see also, www.robertwilliamberleth.com
[53] Trial Exhibits 33, 34, & 35.
[54] Trial Exhibit 28, pg. 11; *passim.*

STANDARD OF REVIEW

I. In determining remedies for breach of contract, Montana distinguishes between "material" breaches, which entitle the non-breaching party to terminate the contract, and "incidental" breaches, which only entitle the non-breaching party to sue for damages.[55] A material breach is one that touches the fundamental purpose of the contract and defeats the object of the parties in making the contract.[56] The party claiming a material breach must show the deficient performance on the part of the other party is, in fact, material to the contract.[57]

II. When an automobile has been damaged by the negligence of another and can be repaired, the proper measure of damages is the cost of the repairs and the value of the loss of the use of it while it is being repaired.[58] A third party is entitled to compensation for a rental vehicle during the repairs and for the diminished value of the vehicle after repairs. [59]

III. MONT. CODE § 70-24-312 (3) states "A landlord may not abuse the right of access or use it to harass the tenant".

IV. MONT. CODE § 70-24-403(2) states "[i]f a party purposefully uses a rental agreement containing provisions known by the party to be prohibited, the

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[55] *Norwood v. Service Distributing Inc.*, 2000 MT 4, P 29, 297 Mont. 473, P 29, 994 P.2d 25, P 29.
[56] *Id., P 29.*
[57] *Id.*, P 33.
[58] *Hop v. Safeco Ins. Co.*, 2011 MT 215, ¶ 1, 361 Mont. 510, ¶ 1, 261 P.3d 981, ¶ 1.
[59] *Hoenstine v. Rose* (1957), 131 Mont. 557, 312 P.2d 514

other party may recover, in addition to the other party's actual damages, an amount up to 3 months' periodic rent." As a matter of law an accelerated rent provision in a lease agreement conflicts with the landlord's duty to mitigate damages under § 70-24-401(1), MCA." [60]

SUMMARY OF ARGUMENT

I. A material breach of a contract "touches the fundamental purpose of the contract".[61] The Berleths did not fundamentally breach the Lease, and did everything they could to keep Rideg pacified. The grounds for the eviction are pretextual exaggerations brought by Rideg in retaliation to keep from having to pay for water delivery or some other much more sinister reason. The trees were such a de minimis issue, Rideg didn't even annotate them in his detailed damages checklist, and actually listed a tree saw in his list of damages, presumptively to trim the exact same trees. Rather, the trial court should have ordered the tree damages to be offset against the ample security deposit and erred by ordering the eviction.

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[60] MONT. CODE § 70-24-401(1).

[61] In determining remedies for breach of contract, Montana distinguishes between "material" breaches, which entitle the non-breaching party to terminate the contract, and "incidental" breaches, which only entitle the non-breaching party to sue for damages. *Norwood v. Service Distributing Inc.*, 2000 MT 4, P 29, 297 Mont. 473, P 29, 994 P.2d 25, P 29. A material breach is one that touches the fundamental purpose of the contract and defeats the object of the parties in making the contract. *Norwood*, P 29. The party claiming a material breach must show the deficient performance on the part of the other party is, in fact, material to the contract. *Norwood*, P 33.

II. The trial court erred by failing to award the rental car fees and diminished value on the damaged vehicle. This is particularly important given that the check put forth by Rideg to get the Final Judgment issued has since been returned insufficient and no funds have yet been received towards damages.

III. Rideg scheduled a dozen or more inspections of the Property during the month of August, 2018 with the sole intent of harassment. The trial court Order on Damages is silent to the issue, despite specifically being raised by Berleth during the accompanying hearing and in pleadings. The trial court erred by failing to address the issue, finding the inspections were for harassment, and award the Berleths exemplary damages for the violations. Rideg lived in Missoula 45 minutes away; any activity by Rideg outside accessing the apartment constitutes an illegal entry by the Landlord under MONT. CODE. §70-24-312.

IV. The "early termination fee" equivalent to one month's rent provided in the Lease is a prohibited accelerated rent provision[62] by a different name. The trial court erred by giving the accelerated rent provision in the Lease a different nomenclature and denying relief to the Berleths, apparently by a finding that "William did not seek an early termination fee".[63] The statute is very clear and damages are appropriate regardless of Rideg's abandonment of the claim.

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[62] Summers v. Crestview Apartments, 2010 MT 164, ¶ 11, 357 Mont. 123, ¶ 11, 236 P.3d 586,
[63] Order on Damages, pg. 9 at ¶35.

ARGUMENT

This is a case about the landlord from Hell. Tenants in Montana deserve better and have a right to peaceful enjoyment. The Berleths had honest intentions to move to Montana and assimilate into being productive and welcomed members[64] of the community; those desires have since left the state. By filing this appeal, the Berleths hope to achieve some measure of justice for a landlord that gleefully tortured[65] them for *months*, and give warning to others that Rideg's behavior is not to be tolerated regardless of the landlord's local connections.

I. The trial court erred in determining the Berleths committed a "material breach" of the lease and basing eviction upon such. Rideg's exacerbated complaints were pretextual for eviction and the Order of Possession should not have been rendered by the trial court.

The Berleths had but two main obligations under the lease; (1) to pay rent timely and in full, and (2) to maintain their "obligation to use [the Property] in a reasonable manner."[66] Rideg had but one duty, to leave them alone. Other than Rideg and his brother, all witnesses said the same thing: That the Berleths took excellent care of the property and it was clean.[67] The trial court correctly found that Rideg and his brother were fully aware of the Corgi at all times during the

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[64] Robert Berleth asserts the main reason he got the Montana bar license was to provide *pro bono* services to the community while running his Texas practice from afar. He also initiated service at the local volunteer fire department. He now continues *pro bono* and volunteer services elsewhere.
[65] See trial exhibit 23 of Rideg waiving the middle finger at the Berleths through the kitchen window.
[66] Finding of Fact, pg 12, ¶ 8.
[67] Order on Damages at ¶21, testimony of Kim Wilson; Order on Damages at ¶22, testimony of Randy Spackman; Order on Damages at ¶25; Order on Damages at ¶27.

tenancy despite his absolute contentions otherwise, both in pleadings and under oath.

"The Lease required the Berleths to perform lawn care and snow removal. Lawn care includes weeding, trimming and raking as necessary as well as mowing at least every 14(fourteen) days during June 1-September 15 and watering of lawn, plants and trees."[68] It would be sensible for a person—even an attorney—to interpret that lease provision that light pruning of the lower branches of the trees in a professional manner, specifically to clear access to the walkway, so as not to have to avoid branches on slippery surfaces is reasonable under the Lease. The trial court found otherwise after a detailed analysis of every word in the sentence. However, a minor oversight regarding a highly detailed interpretation of an ambiguous sentence is *not* a material breach of a contract. The Landlord was holding a security deposit to cover the damages, so he had already been made whole by the de minimis damages. The "tree damages" were so small, Rideg didn't even include them on his damages appraisal.[69] Obviously, after such a ruckus was made by Rideg about the issue, the Berleths would not have touched the trees a second time, so there was no risk of future damages to them. The trial

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[68] Finding of Fact 1, at pg. 11.

[69] During one of his unannounced visits, Rideg brought a tree expert to the property to examine the trees, but did not present the witness at trial. It is strongly suspected that the expert opined the trees were correctly trimmed and that no damage was done.

court further ignored the fact that by merely inspecting the trees, Rideg was admittedly on the Berleth's property illegally. Other trees on the Property clearly have been derelict for years.[70] They were broken, damaged, leaning, and overgrown. The two trees in question have scars from previous similar trimmings to clear the walkway—presumptively by the Landlord—in exactly the same manner. For the Landlord to claim a right of eviction on a purely subjective standard—because he doesn't appreciate the manner (timing?) in which they were trimmed—is again a pretextual excuse for the Landlord to illicitly regain possession of the Property.

"The determination of the existence of genuine issues of material fact is one that is not always easily ascertained. Important in this determination is whether the material facts are actually disputed by the parties or whether the parties simply interpret the facts differently."[71] In the case at hand, the timing of the "discovery" of the tree trimming at exactly the same time Rideg was witnessed taking photos through a bathroom window of Ms. Berleth should cast some serious light as to the sincerity of his alleged material breach of contract by the Berleths. The fact that he then admittedly "engaged" the Berleths from outside by yelling through the

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[70] Trial Exhibits 4 – 12.
[71] *Sprunk v. First Bank System* (1992), 252 Mont. 463, 466, 830 P.2d 103, 105.

windows and banging on the door[72] is more than circumstantial evidence that Rideg was looking for any reason to remove the Berleths from the Property.

The trial court further erred by determining that the "data" amendment to the Lease was a non-revocable contract. In fact, the Berleths had paid for the majority of the data for the entire tenancy, and attempted to change the billing to pay the full amount, but Rideg refused to allow them to do so and even went so far as to change it back into his name for the month of August, 2018. This is beyond reasonable proof that the contract amendment was revoked.[73] Additionally, the Berleths clearly revoked the amendment to the Lease multiple times and in writing in an attempt to keep Rideg from intruding into their home. The data amendment had a monetary value of approximately $40 per month; the Berleths mental sanctuary was worth many times that amount. The Berleths had a right to cancel the agreement allowing Rideg to stay the night at the apartment, and properly did so. Because the contract amendment was parole to the Lease, no other amendment or ratification was necessary, and the contract should have remained intact within its four corners. The trial court erred in finding that Rideg had a right to be at the property under the "data" amendment, and certainly erred in finding that eviction

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[72] Findings of Fact, pg. 8 at ¶30.

[73] Trial Exhibit 27 & 28, Email dated Sat, Aug 18, 2018, 8:30 AM from Berleth to Rideg which states "Any permissions you may have had at one point have since been revoked due to your behavior." The email continues to direct Rideg that he is not welcome at the Property.

was appropriate based on the Berleths refusal to grant Rideg access to their side of the property. The photos and videos clearly show Rideg on the Berleths side of the property without dispute.[74]

The Lease very clearly states that the Tenants leased the premises located at 21524 Nine Mile Road, Huson, Montana 59846. As a show of good faith, the Tenants did allow the Landlord to stay a few nights in the garage apartment in early summer and for him to use the garage apartment as storage. At all times during the tenancy, the Landlord had unfettered access to the garage apartment—the Tenants did not even have a key. The Tenants also invited the Landlord over for dinner. The Landlord is now extrapolating the Tenant's generosity to mean that he is allowed to roam the entirety of the property—including the Tenant's bathroom windows—at will for the rest of the tenancy, despite the Tenant's objections and revocation of the "data" amendment email. The Tenants would be no more required to serve him dinner every night for the rest of the tenancy. The Lease has plain and clear terms, the statute[75] is unambiguous. The Landlord claims to the Missoula County Tax District that the property is a single-family residence. The Tenants leased the entire Property and guests visit at their sole discretion. Not

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[74] Trial Exhibit 23.

[75] MONT. CODE § 70-24-103(11)-"Premises" means a dwelling unit and the structure of which it is a part, the facilities and appurtenances in the structure, and the grounds, areas, and facilities held out for the use of tenants generally or promised for the use of a tenant.

surprisingly, the Berleths would ask any guest—Rideg or otherwise—that is damaging their vehicles, stalking the Property, and photographing them through the bathroom window to leave immediately.

II. The trial court erred in reducing the damages amount sought by Appellants to their 2005 Yukon Denali when it failed to consider the cost to rent a replacement SUV during repairs and award depreciated value.

The Montana Supreme Court has long held the value of the loss of use of the vehicle during the period reasonably necessary for repairs is a proper measure of damages. In an automobile damages appeal, *Hoenstine v. Rose* (1957), 131 Mont. 557, 312 P.2d 514, the Montana Supreme Court observed that "'[w]hen an automobile has been damaged by the negligence of another and can be repaired, the proper measure of damages is the cost of the repairs and *the value of the loss of the use of it while it is being repaired.*'" *Id.* (emphasis added) (quoting *Marland Refining Co. v. Duffy* (1923) 94 Okla. 16, 220 P. 846, 851). The *Hoenstine* court further noted that "'[i]f plaintiff had had the automobile repaired, it would not have diminished [plaintiff's] damages . . . which in this case was the difference in market value 'before and after,' *plus the value of the loss of use of the automobile during the period reasonably necessary for repairs.*'" *Id.* at 565 (emphasis added) (quoting *Newman v. Brown* (1955), 228 S.C. 472, 90 S.E.2d 649).

Further, in *Bos v. Dolajak* (1975), 167 Mont. 1, 534 P.2d 1258, where the court reviewed the awarded damages to plaintiff farmers for negligence and breach of contract by defendants in the construction of a silo, the court heavily relied on and cited to *Reynolds v. Bank of America National Trust and Savings Ass'n* (1959) 53 Cal.2d 49, 345 P.2d 926. *Id.* Per the *Bos* court, the sole issue in *Reynolds* was "whether the owner of personal property which was wrongful[ly] destroyed is limited in damages to the value of the property at the time of destruction or may he also recover for the loss of use during the period reasonably required for replacement." *Id.* at 9. The *Reynolds* court concluded that in addition to the value of the property destroyed such loss of use is also recoverable, reasoning that:

> 'There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable, and [the courts] have concluded that *when the owner of a negligently destroyed commercial vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled, upon proper pleading and proof, to recover for loss of use in order to 'compensate for all the detriment proximately caused' by the wrongful destruction.'*

Id. (emphasis added).

Thus, relying on *Reynolds,* the *Bos* court affirmed the trial court's decision awarding damages to the plaintiff farmers for the value of the property and for loss of use of the property due to the defendant's negligence and breach of contract. *Id.* at 10.

However, "'in order for the damages to be recovered, there must be proof of the extent and amount thereof.'" *Farmers Ins. Exch. v. Goldan*, 2016 MT 196, ¶ 19, 384 Mont. 301, ¶ 19, 378 P.3d 1163, ¶ 19 (quoting *Rigney v. Swingley*, 112 Mont. 104, 110, 113 P.2d 344, 347 (1941)).

In the present case, the Berleths claimed $3,956.22 as damages to their 2005 Yukon based on documentary and oral evidence. But the Missoula trial court only awarded $1,785.20 as damages to their 2005 Yukon, which was subsequently returned. Per the Court, Rideg had to pay damages "in the amount of $5,197.69 which includes $3,412.49 for last month's rent, the balance of the security deposit and pet rent plus to $1,785.20 for damages sustained to their 2005 Yukon." [76] The court did not give any reason for reduction of damages claimed by the Berleths on account of loss of use of vehicle during the period of repair.

In Montana, it is settled that the proper measure for damages also includes the loss of use of vehicle during the period while the vehicle is being repaired. However, the court denied the Berleths' claim for damages related to the cost they incurred by renting a replacement luxury SUV for a week while their Yukon was being repaired. Per the circumstances of this case, the value of the loss of the use

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[76] Final Judgment and Satisfaction of Judgment, p. 1, August 18, 2019

of their 2005 Yukon while it is being repaired is equivalent to the cost to rent a replacement luxury SUV for one-week, amounting to $1,671.

To recover the damages to their 2005 Yukon, the Berleths provided ample proof of renting a luxury SUV for a week while their Yukon was being repaired. Further, Appellant Robert Berleth testified that their Yukon is a luxury vehicle due to the trim, and so no question arises regarding the additional cost of renting a luxury vehicle as the damaged vehicle was a luxury vehicle. Also, the Berleths sought $1,671 as damages for the one-week period they suffered injury for being deprived of the use of their 2005 Yukon which compelled them to rent another vehicle for their use. Thus, the Berleths are entitled to recover damages for the loss of use thereof, i.e, the cost incurred by renting a replacement vehicle based on their pleadings and records related to the same in this case.

However, the Missoula trial court declined to include the cost for renting a full-size luxury SUV as damages for the loss of the use of their Yukon during repairs, stating such was not justified without providing any reason for its conclusion. Thus, the trial court clearly erred in reducing the damages amount sought by the Berleths to their Yukon by $1,671. Had the trial court allowed this replacement rent as damages the Berleths would have received $3,486.2 instead of $ 1,785.20 for damages sustained to their 2005 Yukon.

Therefore, the trial court's award of reduced damages to Appellants by failing to consider the cost to rent a replacement luxury SUV while their automobile was being repaired should be set aside and the case be remanded.

"[Residual diminished value] is the difference between the value of a vehicle immediately before an accident and the value of the vehicle after post-accident repairs have been made." *Hop v. Safeco Ins. Co.*, 2011 MT 215, ¶ 1, 361 Mont. 510, ¶ 1, 261 P.3d 981, ¶ 1.

In Montana, "[t]o recover the party seeking damages for loss of personal property must show its value before and after or the cost of repair." *Agrilease, Inc. v. Gray*, 173 Mont. 151, 157, 566 P.2d 1114 (1977) (citing *Bos v. Dolajak*, 167 Mont. at 1). Generally, the measure of damages concerning property damaged but not totally destroyed, "is the difference in market value at the place before and after injury." *Spackman v. Ralph M. Parsons Co.* (1966), 147 Mont. 500, 507, 414 P.2d 918, 922. "But if repair is possible, and this cost is less than the diminution in value under the general test, this cost plus the value of the loss of use may be employed as the measure." *Id.*

The Montana courts have found that the proper measure of damages where the property can be repaired is the difference of the value of the property before and after the injury. Thus, to determine the damages to 2005 Yukon, the trial court should have calculated the difference of the value of 2005 Yukon before and after

the damage caused by Rideg. In this case, the Berleths have claimed $500 as the reduction in the value of their 2005 Yukon due to the repair. However, the trial court, without providing any reason, failed to do so stating it as not justifiable. Further, *Hoenstine*, supra, shows that the fact that Berleths' 2005 Yukon is repaired does not reduce their damages because the market value of 2005 Yukon will certainly diminish after the repairs have made. Thus, the Berleths assert that the amount of $1,785.20 as the cost of repairing 2005 Yukon does not fully compensate them because it did not include damages for reduction in value.

Therefore, the trial court erred in determining the reduction in value of the Yukon as unjustifiable.

Based on the foregoing, the Berleths are entitled to an amount of $3,956.22 for damage to their 2005 Yukon Denali. Therefore, Defendants-Appellants' appeal should be allowed, setting aside the Final Judgment and Satisfaction of the Judgment dated August 18, 2019, and the case should be remanded for considering proper measure of damages in furtherance of justice.

III. The trial court erred in failing to find that the excessive inspections and other behaviors by Rideg constituted harassment by a Landlord upon a Tenant, and the trial court failed to award exemplary damages for such.

Tenants have a right to quiet peaceable enjoyment of the property they rent.[77] The Rideg did absolutely everything in his power to disrupt the Berleth's daily life, and then made them evacuate the property in less than 72 hours. The Berleths were out of town (ironically looking for land to purchase) at the time the order for "immediate possession" was issued by this Court. *The Berleths were then homeless for over a week (emphasis added).* The Landlord sent 73 emails to the Tenants in the first 90 days of occupancy, many of them terse and demanding; some with outright insults. One even physically threatened that the Landlord would arrive at the property and "straighten out [Mr. Berleth's] Texas brain",[78] which cannot be construed any other way than a physical threat. He visited the Property at least 19 times during the occupancy, many of the visits unannounced and intentionally intrusive. Of the ~175 days of the occupancy, the Tenants only actually peacefully occupied the property, with all services and without interaction from the Landlord at total of six (6) days. *Six.* Excluding text messages, the Landlord made at least 143 intrusions into their daily lives during the occupancy.[79] The Tenants repeatedly asked the Landlord to simply leave them alone and let them peaceably enjoy the Property, to which he has only responded by amplifying

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[77] MONT. CODE ANN. § 70-24-321(g).
[78] Trial Exhibit 27, at pg 4-5.
[79] *See* Exhibit 2, a day-by-day summary of the Landlord's intrusions.

his efforts to disrupt their daily lives. The Tenants assert that Rideg gets some sort of perverse glee out of knowing the Berleths were powerless to stop him from intruding into their otherwise remarkable lives.[80]

The Landlord threatened multiple times to the Tenants that he would forcibly enter the Property, specifically to turn on the water in the garage apartment. Firstly, the water was turned off in the garage apartment because Rideg failed to repair the plumbing, which leaked badly. In an attempt to conserve water, the Tenants kept the water to the garage side of the house turned off. They would have far preferred to keep it on and not interact with Rideg, but not at the cost of precious cistern water. Secondly, Rideg stated that should the Tenants fail to turn on the water to the garage apartment, he "will consider it an emergency" and force his way through their kitchen into the maintenance room to turn on the water. It should be noted the Tenants went three weeks without water, which Rideg *never* considered an emergency. In fact, during the tenancy Rideg did not stay a single night at the Property without running water. Somehow Rideg expects this Court to believe when he doesn't have water it is an "emergency", yet when the Tenants go weeks without water it is "not that big of a deal" and "you get used to [living without water]". Rideg speaks with two tongues.

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[80] Nadia Berleth is a Ph. D; Robert Berleth is licensed in two states with a successful specialty practice. William Rideg failed the Montana bar exam five times. See trial exhibits 33 to 35.

The Berleths assert that Rideg was fully aware that turning on the water to the garage side of the house would quickly deplete the cistern water. Why would he need continuous water to a storage apartment? The Tenants assert that the Landlord offered no other solutions, and that if they had turned on the water the cistern would have quickly run out, causing an intentional disruption in water service to the main residence and giving the Landlord fodder to argue a lack of conservation. The Tenants could not win and not only did the Landlord know it; he orchestrated the conditions. The Landlord created a condition that the Berleths were trapped in regardless of what they did, then cried foul to the trial court[81] for their breach. Such a decision flies in the face of justice.

The Appellants seek to have the Court determine the number of days that they paid for occupancy, but that Rideg prevented their peaceful enjoyment of the property either through lack of basic services, through harassment, or eviction, and to credit them for such time in the form of actual economic damages.

Leading up to the Order for Possession, the Landlord scheduled no less than a dozen "inspections"—for which he did not appear.[82] These false inspections are clear violations of Mont. Code § 70-24-312 (3), which states "A landlord may not abuse the right of access or use it to harass the tenant". The Landlord scheduled

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[81] The Berleths sought a jury trial for the damages portion of the trial, which was denied by the trial court.
[82] *See* Exhibit 2 and Exhibit 27, *passim*.

these multiple inspections of the Property with apparently no task or purpose. Of those scheduled, he only arrived for one, and for that didn't actually inspect the issue (sinkholes caused by incorrectly installed plumbing at the cistern). The Landlord intentionally harassed the Tenants by scheduling inspections—which required Tenant's attendance—and then failed to arrive. It is plainly clear that the Landlord intentionally harassed the Tenants in every way possible, through unnecessary inspections, abusive emails, and copious text messages.

The Tenants seek the Court determine that these inspections by the Landlord were scheduled with the purpose of harassment, and order the damages remanded to the trial court to determine the damages and award exemplary damages.

IV. The trial court erred in finding the Early Termination Fee was not a prohibited accelerated rent provision, and the trial court failed to award exemplary damages for such.

Summers[83] restatement of the Mont. Code Ann § 70-24-403(2) is very clear: "[i]f a party purposefully uses a rental agreement containing provisions known by the party to be prohibited, the other party may recover, in addition to the other party's actual damages, an amount up to 3 months' periodic rent." *Summers* goes on to detail how all landlords are "put on notice" by the ruling. Such notice

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[83] *Summers v. Crestview Apartments*, 2010 MT 164, 357 Mont. 123, 236 P.3d 586.

extends to every landlord and apartment complex statewide. It would certainly extend to a practicing attorney like Rideg. Simply calling a prohibited accelerated rent provision an "Early Termination Fee" does not absolve Rideg of his responsibilities to the statute. The Lease contains a prohibited liquidated damages clause at lines 218-220. Rideg originally sought to keep the Berleth's security deposit under this provision of the lease, but only resigned the claim once he realized the error. §70-24-403(2) allows for no such provision or correction, nor does the trial court ruling "William did not seek an early termination fee" [84] release the Landlord from the damages. The Lease contained the clause, and by statute the Berleths are entitled to statutory damages. Any other ruling would only incentivize landlords to include the language under disguise and then abandon the fee once facing the scrutiny of a district court judge. Public policy mandates the damages.

PRAYER

Montana has a long and proud history of protecting tenants against this exact kind of landlord. People should have the right to peaceful enjoyment of houses that they are paying to live in. The tenants did nothing to provoke or incite

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[84] Order on Damages, pg. 9, at ¶35.

this type of behavior out of the landlord. Having a pretty wife[85] shouldn't subject an entire family to stalking, harassment, and eviction from a creepy landlord.[86]

The appellants seek the following relief from the Supreme Court of Montana:

1) To reverse the finding of material breach by the tenants in the order of possession, and to remand the case to the trial court for further proceedings to calculate damages by the landlord by forcing the tenants to move unexpectedly and wrongful ouster.
2) To award damages to the vehicle in an amount to cover the depreciated value and rental vehicle replacement during the anticipated term of repairs. Further, to order the be check returned insufficient be finally paid by Rideg or his insurance company.
3) To find that the court erred in failing to address the intentional harassment of the Berleths, and that find that Rideg was using inspections as a mechanism of harassment. The Appellants asks the case be remanded for damage calculations and award exemplary damages upon the Berleth moving damages.

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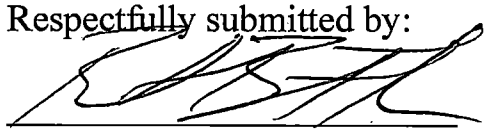
[85] The Landlord has clearly violated MONT. CODE § 70-24-431, by bringing an action for possession after the Tenant has complained of "has complained of a violation applicable to the premises materially affecting health and safety". The Tenants are entitled to "an amount not more than 3 months' periodic rent or treble damages, whichever is greater."

[86] Order on Damages, Pg. 7 at ¶28.

4) To find the early termination fee of the lease constituted a prohibited accelerated rent provision and award exemplary damages in accordance with Montana statute.

In the alternative, the Berleths seek damages awarded by this Court in the amount of $137,635,[87] which reflects moving expenses, exemplary damages, statutory damages, and expenses associated with the insufficient check, as well as a reversal of the Order for Possession, and for any other relief to which they may be entitled, plead or not, in this Court or otherwise.

Respectfully submitted by:



BERLETH & ASSOCIATES
Robert W. Berleth
Texas Bar # 24091860
SDOT #: 3062288
rberleth@berlethlaw.com
William "Chance" Marshall
Texas Bar # 24102142
chance@berlethlaw.com
9950 Cypresswood, Ste. 200
Houston, Texas 77070
E-mail: rberleth@berlethlaw.com
Tele: 713-588-6900
Fax: 713-481-0894

Counsel for Appellants

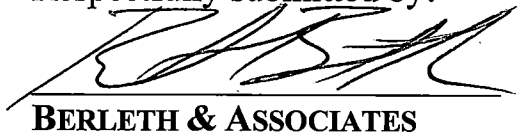
[87] See Trial Exhibit 32, calculations on damages.

CERTIFICATE OF SERVICE

I certify that on Monday, February 10, 2020, I physically mailed the foregoing Appellants' Opening Brief to the following:

Thomas Charles Orr, Esq.
Mathew A. McKeon,
THOMAS C. ORR LAW OFFICES, P.C.
523 S. Orange St.
P.O. Box 8096
Missoula, MT 59807
Phone: (406) 543-0999
tom@tcorrlaw.com
matthew@tcorrlaw.com

Respectfully submitted by:



BERLETH & ASSOCIATES
Robert W. Berleth
MT SBN: 53919739
SDOT #: 3062288
rberleth@berlethlaw.com
William "Chance" Marshall
Texas Bar # 24102142
chance@berlethlaw.com
9950 Cypresswood, Ste. 200
Houston, Texas 77070
E-mail: rberleth@berlethlaw.com
Tele: 713-588-6900
Fax: 713-481-0894

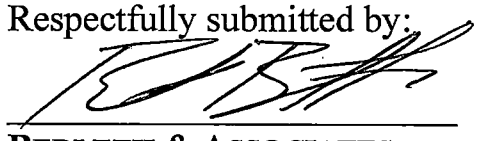
COUNSEL FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately-spaced Times New Roman text typeface of 14 points; is double spaced except for lengthy quotations or footnotes, is 8,428 by Word calculation and does not exceed 10,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my Microsoft Word software.

Dated this 10th day of February, 2020.

Respectfully submitted by:



BERLETH & ASSOCIATES
Robert W. Berleth
Texas Bar # 24091860
SDOT #: 3062288
rberleth@berlethlaw.com
William "Chance" Marshall
Texas Bar # 24102142
chance@berlethlaw.com
9950 Cypresswood, Ste. 200
Houston, Texas 77070
E-mail: rberleth@berlethlaw.com
Tele: 713-588-6900
Fax: 713-481-0894

COUNSEL FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

Pursuant to the Order issued by the Supreme Court of Montana on January 7, 2020, I hereby certify the only changes or addendums made to this brief were to the citations in the Statements of Facts section, specifically by adding cites to the Trial Court's orders and exhibits. No other changes were made.

Dated this 10th day of February, 2020.

Respectfully submitted by:

BERLETH & ASSOCIATES
Robert W. Berleth
Texas Bar # 24091860
SDOT #: 3062288
rberleth@berlethlaw.com
William "Chance" Marshall
Texas Bar # 24102142
chance@berlethlaw.com
9950 Cypresswood, Ste. 200
Houston, Texas 77070
E-mail: rberleth@berlethlaw.com
Tele: 713-588-6900
Fax: 713-481-0894

COUNSEL FOR APPELLANTS