**No. DA 20-0232**

IN THE SUPREME COURT OF THE STATE OF MONTANA

JAMES DAVID SIMPSON,
Petitioner and Appellant,

v.

MUSSELSHELL COUNTY BOARD OF COMMISSIONERS,
Respondent and Appellee.

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# APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE MONTANA FOURTEENTH JUDICIAL DISTRICT COURT, MUSSELSHELL COUNTY, HONORABLE MATTHEW J. WALD, PRESIDING

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## ARGUMENT

The County did not address the issue on appeal: whether the mere passage of time precludes a court from considering a claim, let alone declaring, that a government action, in this case abandonment of a public road, that is void *ab initio,* is incapable of being enforced or otherwise being given effect. Stated in general terms, the issue is not "what is the statute of limitations," rather the issue is "is there a statute of limitations." The County leaps over the question whether there is a statute of limitations for Simpson's cause of action, assumes a time limit exists, and bases its argument and analysis exclusively on the label of Simpson's cause of action (writ of review), ignoring the substance of Simpson's complaint. The County does not explain how the label given, rightly or wrongly, to Simpson's cause of action (writ of review) overcomes fundamental rules of civil procedure governing motions to dismiss and the maxim of jurisprudence statutorily recognized in Montana in 1895 that "[t]ime does not confirm a void act." Mont. Code. Ann. § 1-3-230 (2019). The maxim plays out in Montana Supreme Court case law and applies in this case.

### I. THE PLED FACTS, TAKEN AS TRUE, ESTABLISH THAT THE ABANDONMENT PROCESS WAS DEFECTIVE AND THEREFORE VOID. AT THE VERY LEAST, SIMPSON IS ENTITLED TO PURSUE THIS CLAIM.

When a court considers a Rule 12(b)(6) motion to dismiss, the facts pled by the claiming party are taken to be true. *Blackburn v. Blue Mt. Women's Clinic* (1997), 286 Mont. 60, 68, 951 P.2d 1, 5. As Simpson observed in his Opening Brief, he pled in his Complaint that the County failed to substantially comply with Montana law governing abandonment of public roads. Among the defects Simpson pleads in his Complaint was the County's failure to provide mandated notice to Simpson's predecessor. **(Pl's 1st Amend. Compl. at ¶¶ 9, 11.)**

Without any supporting authority, the County makes the blatantly erroneous assertion that the Court should presume the County's 1961 abandonment to be valid. **(Def.'s Ans. Br. 3-4 (Jan. 15, 2021).)** This directly contradicts this Court's holdings on the standard of review for Rule 12(b)(6) motions to dismiss. The County cited no law to support its rather bizarre position. The law is clearly established that the facts plead by the claiming party are to be taken as true for purposes of a motion to dismiss. Taking the facts pled by Simpson to be true, the abandonment would, as a matter of law, likely be declared void and deemed to be of no effect. At the very least, the law supports his ability to confirm the presumption that his claim is true.

## II. A CHALLENGE PREMISED ON THE ABANDONMENT BEING JURISDICTIONALLY DEFECTIVE IS NOT BARRED BY THE PASSAGE OF TIME.

The County erroneously compares this action to appeals, often taken in the form of writs of review, from judicial rulings or administrative decisions for which there are definitive time limits. This case is not an appeal that questions a decision of a lower court, an agency, or another governmental entity. Rather, this case is about a county taking an action for which it did not have jurisdiction because it failed to follow the statutorily proscribed substantive process.

As Simpson thoroughly discussed in his Opening Brief, the County's failure to follow the mandates of the abandonment statutes, notably the failure to provide notice, is a jurisdictional defect, and a jurisdictionally defective action is void *ab initio* and has no effect. **(Pl.'s Opening Br. 14-17 (Oct. 16, 2020).)**

Simpson discussed the case *Chennault v. Sager,* in his Opening Brief and it warrants further discussion. In *Chennault,* the Gallatin County commissioners initially granted a request for abandonment. *Chennault v. Sager* (1980), 187 Mont. 455, 457, 610 P.2d 173, 174. Three years later the county attorney became aware the process used by the county to declare the road abandoned was defective. *Id.* The county then invalidated the abandonment. *Id.* at 458, 610 P.2d at 174. The parties who requested the initial abandonment appealed the district court's ruling upholding the county's abandonment reversal. *Id.* at 459, 610 P.2d at 175. They claimed the county was estopped from reversing the abandonment resolution. *Id.*

The Montana Supreme Court ruled that the county was not estopped from reversing the abandonment. *Id.* at 463, 610 P. 2d.at 178. In so ruling the Court stated:

> The reluctance to apply equitable estoppel to governmental entities is founded upon public policy considerations. *It is generally thought that lands held by the public are to be protected and only disposed of where there has been compliance with the law.* The interests of the general public should not be defeated, for example, by the unauthorized or unlawful acts of public agents or officers. *See*, *Norman v. State (1979), 182 Mont. 439, 597 P.2d 715*.

*Chennault,* 187 Mont. at 460, 610 P.2d at 176 (emphasis added). The *Chennault* court went on to point out the issue was one of a state constitutional importance:

> *The policy of protecting public lands and making statutes the exclusive method for the disposition of public lands is well recognized by our Constitution*. Article X, Section 11 of the 1972 Montana Constitution states:
> "(1) All lands of the state that have been or may be granted by congress, or acquired by gift or grant or devise from any person or corporation, shall be public lands of the state. They shall be held in trust for the people, to be disposed of as hereafter provided for the respective purposes for which they have been or may be granted, donated or devised.
> "(2) *No such land or any estate or interest therein shall ever be disposed of except in pursuance of general laws providing for such disposition,* or until the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state."

*Id.* (first emphasis added, second emphasis in original).

The *Chennault* court ruled that because the county failed to comply with the abandonment statutes, the abandonment "was void initially" and that the county was "without authority to act with respect to the abandonment." *Id.* at 463, 610 P.2d at 177. As the Court noted, where the procedures are not complied with, the governing body does not have jurisdiction. *Id.* (citing *Current v. Current,* 72 Ind.App. 363, 125 N.E. 779 (1920)).

In the other Montana cases Simpson cited in his Opening Brief, the substantial defects in the proceedings in question operated to deprive the governing body of jurisdiction to act thereby making the underlying proceeding null and void. *See e.g. Nilson Enterprises, Inc. v. City of Great Falls* (1980), 190 Mont. 341, 348, 621 P.2d 466, 471.

As in *Chennault* and the other cases dealing with the governing bodies, failure to substantially comply with the required process, the failure in this case of the County to substantially comply with the abandonment statutes means the County did not have jurisdiction to abandon the public road. Lacking jurisdiction, the County's 1961 abandonment resolution has no effect because it was a nullity to begin with—it was void *ab initio*.

As established in Simpson's Opening Brief, statutes of limitations do not apply to actions that are void *ab initio*. Dealing with a challenge based on a court's lack of jurisdiction, the United States Supreme Court, in a 2002 case, stated:

> This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, *can never be forfeited or waived.* Consequently defects in subject matter-matter jurisdiction require correction of whether the error was raised in district court.

*United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 1785 (2002) (emphasis added, citations omitted). While the primary issue in *Cotton* was whether the particular defect was a jurisdictional defect, the case illustrates that the United States Supreme Court looks with disfavor on there being a time bar to challenging defects that are jurisdictional in nature. Citing the maxim of jurisprudence that "time does not confirm a void act," the Montana Supreme Court also stated it does not recognize a time bar to challenging void proceedings:

> If the order of July 1 is void, all proceedings founded upon it are ineffective for any purpose. It was open to collateral attack, and *may be set aside at any time*. (*Oregon Mortgage Co. v. Kunneke,* 76 Mont. 117, 245 P.539; *Heater v. Boston Montana Corp.*, 75 Mont. 532, 244 P. 501.) "Time does not confirm a void act." (Sec. 8768, Rev. Codes 1921.)

*State ex rel. Brink v. McCracken* (1931), 91 Mont. 157, 163, 6 P.2d 869, 871 (emphasis added).

The concept and maxim that "time does not confirm a void act," codified since 1895 (currently §1-3-220 Mont. Code Ann.), is present in Montana jurisprudence dealing with attempts to declare public roads abandoned due to non-use over time. Boiled down to its essence, the County's argument is the 1961

abandonment should be recognized as valid, despite its uncontested jurisdictional deficiencies, simply because of the passage of time.

The County argues nullifying abandonments that occurred well in the past will create turmoil:

> If an abandonment is overturned on procedural grounds without regard to passage of time and to real estate property interests, present day landowners would likely apply for a writ of review to challenge the establishment of a county road to counter a decision contrary to present day interests regarding an abandonment decades earlier. A Board cannot abandon what was not properly established to begin with would be the theory which would trigger cereal [sic] litigation depending on whose interests were adversely affected.

**(Def.'s Ans. Br. 13.)** This argument, in addition to being convoluted, contradicts this Court's holdings on attempts to abandon public roads. The Court has squarely rejected the argument that the passage of time and non-use renders a road abandoned. *Soup Creek LLC v. Gibson,* 2019 MT 58, 395 Mont. 105, 439 P.3d 369; *McCauley v. Thompson-Nistler*, 2000 MT 215, ¶¶ 30-31, 301 Mont. 81, ¶¶ 30-31, 10 P.3d 794, ¶¶ 30-31. The clear holding in these cases is that neither the passage of time, non-use, or other circumstances can be a substitute for an unequivocal abandonment by a county of a public road.

The conduct claimed to demonstrate a county's intent to abandon a road "must be of a character so decisive and conclusive as to indicate a clear intent to abandon." *Soup Creek*, ¶5 (citing *McCauley,* ¶30). A defective abandonment is of no effect and cannot be deemed to be "decisive and conclusive." If the process is

defective, the abandonment never happened. Neither the passage of time nor non-use of the road can cure the fact that County's 1961 abandonment never had effect because it was defective. MCA § 1-3-230 ("[t]ime does not confirm a void act.")

Simpson's argument, outlined both in his Opening Brief and above, is consistent with a 1978 Montana Attorney General opinion. One question addressed in the AG opinion was "what effect does the lack of notice [in an abandonment proceeding] have on the proceedings." 37 Mt. Op. Atty. Gen. No. 130, at 552 (1978). After analyzing the 1959 case of *Shaw v. City of Kalispell* (1959), 135 Mont. 284, 340 P.2d 523, the attorney general concluded "[a]n abandonment order is effective only as to interested parties properly notified." *Id.* at 554.

## III. THE COUNTY PRESENTED NO RELEVANT AUTHORITY FOR ITS ARGUMENT.

The County relies on two Montana Supreme Court cases, one Montana State District Court case, and an Oregon Court of Appeals case for its argument that Simpson's case is barred by the statue of limitations: *Jones v. Montana Nineteenth Judicial Dist. Ct.,* 2001 MT 276, 807 Mont. 305, 37 P.3d 682; *Shaffroth v. Lamere* (1937), 104 Mont. 175, 65 P.2d 610; *Watts v. R.&R. Ranch, Inc.,* 1995 Mont. Dist. LEXIS 948 (May 1, 1995); and *Emerson v. Deschutes County Board of Comm'rs,* 46 Ore. 247, 610 P.2d 1259 (Or. App. 1980). None of the cases deal with

challenges based on jurisdictional defects. All of the cases are distinguishable from this case.

*Shaffroth* reviewed a defendant's challenge to a debt collection default judgment in a justice court six years after the default. *Shaffroth,* 104 Mont. at 177, 65 P.2d at 610. The defendant filed a petition for writ of review in district court. *Id.* at 177, 65 P.2d at 611. The district court denied the defendant's writ, ruling the five-year statute of limitations for a writ of review had passed. *Id.* at 180, 65 P.2d at 612. The key factor relied on by the Montana Supreme Court was the fact that there is a clearly established appeal process, with a clearly established time limit, and the issues raised in the defendant's petition for writ of review could have been raised in a timely filed appeal. *Id*. In other words, the defendant had the opportunity to use a clear and defined appeal process, he choose not to use that process, and therefore he could not later use the writ of review process. *Shaffroth* is in no way analogous or applicable to this case. The only similarities between this case and *Shaffroth* is they are both labeled as "writs of review." That similarity is superficial and has no substantive effect or, for that matter, any effect.

In *Jones,* the issue was whether the five-year statute of limitations for writs of review, as confirmed by *Shaffroth*, applied in appeals from contempt proceedings. *Jones,* 2001 MT 276, ¶ 7, 807 Mont. 305, ¶ 7, 37 P.3d 682, ¶ 7.

Discussing and analyzing the nature of and process for contempt proceedings, the Court ruled the time period for writs of review for contempt proceedings is thirty-days, thus ruling that *Shaffroth* does not apply in contempt proceedings. *Jones*, ¶¶ 22-23. As with *Shaffroth*, any similarity to this case is superficial and of no effect.

The *Watts* case is a 1995 Ravalli County state district court case. Among numerous other issues, the district court was presented with a "writ of mandate or review" challenging a board of county commissioners denial of a petition to abandon a right of way. *Watts v. R.&R. Ranch, Inc.,* 1995 Mont. Dist. LEXIS 948 at **28-30 (May 1, 1995). The petition was brought significantly more than five years after the denial. *Id.* at *30. The challenge to the abandonment petition denial was not based on procedural or jurisdictional defects. *Id.* at **28-30. The fact that *Watts* deals with a county's denial of a petition, a process which the aggrieved party itself initiated, makes *Watts* entirely distinct and in applicable to this case. By its very nature, *Watts* did not involve a jurisdictional defect. The petitioner is *Watts* could not be alleging jurisdictional defect because the petitioner is the party who availed itself of the county's jurisdiction. *Watts* has no bearing on this case.

The last case cited by the County is *Emerson v. Deschutes County Board of Comm'rs,* a 1980 Oregon Court of Appeals case. The County asserts *Emerson* is "on point" with this case. **(Def.'s Ans. Br. 15.)** Not only is *Emerson* not on point

with this case, it, like the other cases, provides no guidance and is not applicable. In *Emerson* the petitioner was a landowner located near a proposed subdivision. *Emerson,* 46 Ore. at 249, 610 P.2d at 1260. The petitioner should have received notice before preliminary plat approval. *Id.* He did not. *Id.* He received notice six months later but one year before the plat approval. *Id.* The time period for petitioner to seek a writ of review was 60 days after he received notice. *Id.* Rather than seek a writ of review after receiving notice the petitioner undertook to have numerous interactions with the county, trying to persuade the county to invalidate the preliminary plat. *Id.* at 249, 610 P.2d at 1260. Final plat approval occurred nearly twelve months after petitioner received notice. *Id.* at 249, 610 P.2d at 1260. Petitioner did not file for writ of review until after final plat approval—approximately nine to ten months too late. *Id*. The trial court refused to issue the writ of review and the Oregon Court of Appeals affirmed. *Id*. Facts making *Emerson* clearly distinguishable from this case are that the petitioner in *Emerson* received notice, the petitioner was involved in the process, and a clearly mandated review process was available to petitioner but which process the petitioner ignored. An even more important distinguishing factor is no significant interests, property or otherwise, were at stake for the petitioner in *Emerson*, as noted by the Oregon court:

> In contrast, the only damage petitioner contends that he and others in the area have suffered is that they did not get their chance to voice their views on the subdivision.

*Id.* at 250, 610 P.2d at 1261. The factors present in *Emerson* do not exist in this case. Even though the event precipitating *Emerson* was a county's failure to give timely notice, the petitioner ultimately received notice before the process completed and he received it time to avail himself of the opportunity to seek a writ of review. There was not a jurisdictional defect in *Emerson*. If there was, it was cured by the county in time for the petitioner's interest to be protected.

## CONCLUSION

Simpson pled facts, which if taken as true, show that the County's 1961 abandonment was severely defective, with the defects being jurisdictional in nature. Such defects render the abandonment void *ab initio.* Being void *ab initio* Simpson's challenge to the abandonment is not barred by a statute of limitations. No statute of limitations applies and time cannot and does not cure the defects.

The County does not recognize this and it skirted the real issue in this case, namely whether any statute of limitations applies to review of a government action that is null and void because of jurisdictional defect. Rather than looking at the nature and substance of Simpson's claim, the County focuses, superficially, on the procedural label used in this case. The County's analysis focuses on comparing this

case with other cases with the same procedural label. The case law cited by the County is not relevant or applicable and provides no guidance for the Court.

DATED this 19th day of February 2021.

/s/ Paul Grigsby
Paul Grigsby
Attorney for Appellant

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; Microsoft MS Word, consists of 3051 words which does not exceed the 5,000 word limit (excluding the Table of Contents, Table of Cases, Statutes, and Other Authorities, Certificate of Service, Certificate of Compliance, and any attached Appendix.

DATED this 19th day of February 2021.

/s/ Paul Grigsby
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## CERTIFICATE OF SERVICE

I, Paul Grigsby, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 02-19-2021:

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