

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

**No. DA 21-0157**

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360 Reclaim, LLC, a Montana Limited Liability Company,  
Plaintiff/Defendant/Counter-Plaintiff/Third-Party Plaintiff,  
and Appellee

v.

William M. Russell, an individual,  
Defendant/Plaintiff/Counter-Defendant, and Appellant

And

Mountain View Investments, L.C., an Idaho Limited Company,  
Co-Defendant

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**APPELLANT WILLIAM M. RUSSELL'S OPENING BRIEF**

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On Appeal from the Eleventh Judicial District  
Flathead County,  
Montana Consolidated Case(s) No. DV-19-305B (DV-19-473C)  
Honorable Robert B. Allison

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**(Appellant regrets that due to catastrophic computer issue had Friday July 30<sup>th</sup> with the processing of his Opening Brief, significant portions of his Brief was lost and could not be retrieved afterwards. Thus is the reason for lack of TOA and ultimately a large and significant portion of his Legal Arguments. It is to preserve the record that he has opted regardless, to submit what was able to be recovered despite any loss of what had been prepared for filing.)**

## STATEMENT OF THE ISSUES

### I. Whether the court proceeded with deliberate indifference and conscious disregard of facts and law; or, alternatively, whether prejudicial-error, or mistake occurred?

1. The consolidated actions involve both legal and equitable claims with issue(s) of fact common to both.
  - i) The claimed “storage rental value fees” and resultingly alleged “Agister’s lien” are centrally disputed assertions at the heart of both consolidated lawsuits.
  - ii) 360 Reclaim rejected Mr. Russell’s otherwise valid redemption because Russell refused to pay “storage rental value fees”, which are not permitted under the redemption statutes.
  - iii) Issues involving the Flathead County Zoning and Planning Office’s “Notice of Violation and Order of Abatement” exist; especially being in part, whether and/or how said ‘Notice and Order’ may affect Russell’s redemption or right thereto.
  - iv) A determination as to whether Russell substantially complied with statutory redemption procedures has yet to be determined.
2. The facts do not support statutory requirements for 360’s claim; nor enforcement and foreclosure of alleged Agister’s Lien.
  - i) Only a person “lawfully in possession” of another’s property can recover “reasonable costs” for storage under Montana Code Annotated § 71-3-1201(2)(a).

ii) Montana Code Annotated § 71-3-1203(2)(b) requires that the lienor provide an affidavit that the storage “was performed at the written or verbal request of the owner or owner's agent”.

(a) 360 Reclaim only proffered an “implied contract” exists.

(b) 360 Reclaim only proffered its letter sent to Mr. Russell that unilaterally claims a storage fee of \$500/day, followed by an unsupported increase to \$1,000/day.

3. Even *if* valid; 360’s “Agister’s Lien” claim was extinguished. By and through its own acts, 360 Reclaim forfeited any such right of claim.

i) Evidence on record testimony is replete to support its forfeiture.

a) 360 Reclaim admitted that it sold or removed items of Russell’s property that it thought valuable and destroyed or eliminated property believed to be of no value; Montana Code Annotated § 71-3-121 extinguishes any lien for property that has been sold or wrongfully converted.

## STATEMENT OF THE FACTS

This is the second interlocutory appeal on these consolidated actions. The first being DA 19-0450, MTSC and which this Court delivered its Opinion of the Court and which was filed on 05/26/20. In which at ¶11, was opined, “..we are mindful that this is an appeal from a preliminary injunction. We have cautioned that “a preliminary injunction does not determine the merits of the case.” Benefis, ¶ 19. We have stated in strong language that “we

implore trial courts to keep in mind the standards outlined in § 27-19-201, MCA, when ruling on motions for preliminary injunctions and to be careful not to resolve ultimate issues of the case.” Benefis, ¶ 32. 9 Much of the argument well-developed by Mountain View goes to ultimate legal conclusions to yet be made in the proceeding by the District Court. Here, the court was simply and correctly determining the need to preserve the status quo during the proceeding.” Ultimately ruling, at ¶13, “We.. affirm the preliminary injunction, and clarify that no opinion is expressed as to the ultimate merits of the action.” (MTSC Opinion, DA 19-0450, 5/26/20, pgs 9 & 10.) Subsequently, 360 Reclaim acknowledging the stay by the appeal, argued the consolidated cases could proceed nonetheless, stating:

29. On August 6, 2019, Mountain View Investments. L.C., intervenor in Consolidated Action, DV-15-2019-0000473-IJ, filed its Notice of Appeal of the District Court’s July 10, 2019 Order. That appeal effectively stays all action in Consolidated Action, DV-15-2019-0000473-IJ, but does not stay the proceedings in the companion consolidated action, DV-15-2019-0000305-DK, which is the action subject to this application for order to show cause.

DV-19-305(B) Appl. Order Show Cause ¶ 29, Aug. 6, 2019, Doc. 35 (“Application”).

On August 23, 2019, Mountain View Investments filed its opposition to the lien enforcement proceedings, and Russell did as well; on the grounds that the matter was stayed pending appeal and would be error for the Court to proceed on 360 Reclaim’s Application, including thereby, any determination of (any) storage fees and(or) alleged storage lien, which were subject of the then pending DA 19-0450 appeal; MVI claimed by doing so “”risks duplicative and conflicting decisions in different courts”. Doc. 38.

A hearing was held on September 18, 2019, and the Court heard testimony and took evidence regarding the validity and propriety of the asserted lien. During which, Russell presented the court with photographs (photos are being included on disc with this brief) evidencing the condition of the “Scrapyard” as of 6/3/19, in addition to others evidencing damage, destruction, and pilferage of the personal property for which 360 Reclaim alleged its claim of Agister’s lien upon; allegedly as for resulting from having “stored and protected or preserved” said personal property. Russell testified (and the court had previously been presented with an itemized list of findings) as to the condition of the real property and any initial findings of loss concerning the personal property after making a preliminary inspection of the premises during his brief re-occupation of the premises following his redemption (6/3/19- 6/5/19). The court questioned whether it was proper to decide the lien claim and/or the reasonableness of the “storage fees” being that the cases were consolidated and case 473(C) was then pending appeal. After a rather confusing statement by Mr. Fredrickson (counsel for 360 Reclaim), the court ultimately “assume[d]” the “other matters” were being decided in the then pending appeal (DA 19-0450). However, matters were not decided and no determination on the merits occurred.

### **STANDARD OF REVIEW**

Our standard of review of a district court's ruling on a motion pursuant to M. R. Civ. P. 60(b) depends on the nature of the final judgment and the specific basis of the Rule 60(b) motion. See In re Marriage of Barnes, 251 Mont. 334, 336, 825 P.2d 201, 203 (1992) (“The scope of our review of a decision to grant or deny a Rule 60(b) motion depends on the issues

involved." ). As a general rule, the district court's ruling is reviewed for abuse of discretion. See Heller v. Gremaux, 2002 MT 199, ¶ 7, 311 Mont. 178, 53 P.3d 1259; Hall v. Heckerman, 2000 MT 300, ¶ 12, 302 Mont. 345, 15 P.3d 869.

### **Equitable Relief**

Our standard of review in equity cases is set forth in § 3-2-204(5), MCA. Under that provision, we have a "duty to determine all of the issues of the case and to do complete justice." Glacier Park Co. v. Mountain, Inc., 285 Mont. 420, 427, 949 P.2d 229, 233 (1997). In reviewing a district court's exercise of its equitable powers, this Court is required to review "all questions of fact arising upon evidence presented in the record" to determine if the court's findings are clearly erroneous. Kauffman-Harmon v. Kauffman, 2001 MT 238, ¶ 11, 307 Mont. 45, 36 P.3d 408 (citation omitted). We determine if the court's interpretation of the law is correct. Kauffman, ¶ 11; see also LeMond v. Yellowstone Dev., LLC, 2014 MT 181, ¶ 22, 375 Mont. 402, 408, 336 P.3d 345, 351.

### **Bench Trials**

We review findings of fact in a civil bench trial to determine if they are supported by substantial credible evidence. DeNiro v. Gasvoda, 1999 MT 129, P 9, 294 Mont. 478, 982 P.2d 1002. This Court "must view the evidence in the light most favorable to the prevailing party." DeNiro, P 9. Conclusions of law in this context are also reviewed for correctness. DeNiro, P 9.

### **Interlocutory Appeals**

The Montana Supreme Court does not favor appellate review of an interlocutory order by a district court because due appeal is normally an adequate remedy. State ex rel. First Bank Sys. v. Dist. Court, 240 Mont. 77, 84, 782 P.2d 1260, 1264 (1989) (internal citation omitted). The

court accepts supervisory control and reviews the interlocutory order when "due appeal is an inadequate remedy" and supervisory control will "prevent extended and needless litigation." *First Bank Sys.*, 240 Mont. at 84, 782 P.2d at 1264. We do a "case by case analysis" and accept review in appropriate cases. *First Bank Sys.*, 240 Mont. at 84–85, 782 P.2d at 1264.

### **Conclusions of Law**

The Supreme Court reviews a district court's conclusions of law de novo. *State v. Steigelman*, 2013 MT 153, ¶ 10, 370 Mont. 352, 302 P.3d 396. The Supreme Court also reviews for correctness a district court's conclusion of law. *Boyne USA, Inc. v. Spanish Peaks Dev., LLC*, 2013 MT 1, ¶ 28, 368 Mont. 143, 292 P.3d 432. Over the years, the Supreme Court has often used de novo and correctness interchangeably. Refer to the section on definitions for further discussion of de novo and correctness review and the difference between the two forms of review.

- Judgment as a matter of law. *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 18, 336 Mont. 105, 152 P.3d 727.
- Whether district court's action conforms to statutory requirements. *Jacobsen v. Thomas*, 2006 MT 212, ¶ 13, 333 Mont. 323, 142 P.3d 859.

Issues of justiciability, such as standing, mootness, ripeness, and political question. *Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶ 16, 366 Mont. 450, 288 P.3d 193.

- Whether District Court correctly applied statute. See *Schuff*, ¶ 29.
- Whether District Court correctly interpreted statute. *Kreger v. Francis*, 271 Mont. 444, \_\_\_, 898 P.2d 672, 674 (1995).
- Existence of a legal duty. *Jackson v. Dept. of Family Servs.*, 1998 MT 46, ¶ 31, 287 Mont. 473, 956 P.2d 35.

- Judgment as a matter of law. *McDaniel v. State*, 2009 MT 159, ¶ 13, 350 Mont. 422, 208 P.3d 817.
- The court's determination of the appropriate measure of restitution. *In re K.E.G.*, 2013 MT 82, ¶ 9, 369 Mont. 375, 298 P.3d 1151.

Whether a party has been afforded his or her constitutional and statutory right to a trial de novo. *McDunn v. Arnold*, 2013 MT 138, ¶ 10, 370 Mont. 270, 303 P.3d 1279.

## SUMMARY OF THE ARGUMENT

360 bid on a “scrapyard” at a the Sheriff’s Sale in June of 2018, and admittedly, from the time of and prior to its bidding, was aware of the extent of personal property (i.e., scrap materials and machinery amongst other items) which was then situated upon the “scrapyard” property. 360 testified that it was aware that its “purchase” of the real property was entirely contingent upon no redemption occurring during the allotted time for redemption. Furthermore, not only was 360 informed at the time of its bidding, that Russell was actively appealing the underlying foreclosure action; but was also aware Russell had taken legal action in order to preserve his right of possession of the real property; denying however, that “anyone could have lived there”. As a means to its goal, proceeded upon its cleverly devised theories of “lien” and “abatement”; intending that either and/or both, by tacking costs-for upon the redemption price, would ultimately cause such an inflation, that Russell likely would not be able to redeem his property (real or personal). Which thereby, it hoped to attain both the real and all the personal property (or, at least the personal property it didn’t itself decide was “junk” or “garbage”). Knowing, that the Agister’s lien claim would likely be considered and determined in an expedited fashion according to its statutory nature. However, in the time it has had control over the real and personal property, by and through its own actions, any “valid” lien has been extinguished by self-executing, statutory

provision. Additionally, Russell argues that the court proceeded with deliberate indifference and utter disregard of the facts and for the law of the actions, and that it was error for the court to proceed on the Ag's lien claim without permitting the additional, claims concerning common issues of fact to be tried by jury as he requested. He further argues that the evidence does not support the courts findings of fact and conclusions of law and to the contrary, evidences otherwise.

## ARGUMENT

### **I. Whether the court proceeded with deliberate indifference and conscious disregard of facts and law; or, alternatively, whether prejudicial-error, or mistake occurred?**

1. The consolidated actions involve both legal and equitable claims with issue(s) of fact common to both.

The consolidated actions involve both legal and equitable claims with issue(s) of fact(s) common to both; therefore, Russell should be permitted trial (by jury) on his legal claims. The court, although acknowledging the actions have been consolidated, proceeded with an apparent and deliberate indifference or, otherwise utter disregard for existing issues; these issues are present, common, and stand to affect matters present in both actions. By bifurcating the issues, Russell is and remains to further be unfairly prejudiced and ultimately denied right(s) of due process.

The (305(B)) Complaint Russell filed prior to the redemption period expiring, sought a determination of the real property's redemption price; as well as its determination and declaration as to any legality or validity (if any) of 360 Reclaim's "Agister-lien" counterclaim. Furthermore, Russell's(305(B)) Complaint included or includes ((?) as the actual status of Russell's Complaint including his Amended Complaint is entirely unclear)

claims of conspiracy and unjust enrichment based upon allegations of theft and conversion of his personal property, as well as a claim for fraudulent filing of lien by 360 Reclaim, LLC and/or its agents. None of Russell's claims have been addressed, considered, or tried.

360 Reclaim initiated DV-19-473(C) during pendency of all issues/matters raised in the 305(B) action; its filing immediately followed Russell's redemption and reoccupation of his real property. In (473(C)) which, 360 disputed the redemption procedures performed, the price Russell paid to redeem, as well as his re-occupation of the real property thereafter. 360 Reclaim rejected Mr. Russell's otherwise valid redemption because Russell refused to pay "storage rental value fees", which are not permitted under the redemption statutes. 360 Reclaim's counterclaim in 305(B), having issues of fact and law which are identical to or at minimum, in-common with issues yet to be decided or tried in the DV-19-473(C) action; however, they have and are being proceeded upon.

It is either mistake, error or deliberate indifference to proceed as if matters concerning the two actions remain bifurcated when, previously, the actions (DV-19-305B and DV-19-473C) were justly, "*consolidated for all purposes relating to the issues to be litigated within both cases.*" (FCDC "Order Consolidating Cases", DV-19-473(C) DV-19-305(B), 7/20/2019.) Proceeding upon an apparent bifurcation of issues, with disregard for its own, prior consolidation of the two actions without first determining or trying common factual or legal issues stands to result in inconsistent rulings and conversely affect or deny due process rights.

Additionally, the evidence and testimony does not support the findings of the district court's Findings of Fact, Conclusions of Law and Order Re Agister's Lien, filed 1/11/21.

Only a person “lawfully in possession” of another’s property can recover “reasonable costs” for storage under Montana Code Annotated § 71-3-1201(2)(a). It remains in dispute whether 360 “lawfully” possessed the personal property considering Russell’s repeated requests and demands made to retrieve the property, as well as for consideration of 360’s own testimony admitting it sold, burned, “borrowed”, “used” (which amounts otherwise to ‘converted’), and disposed of the property it claimed to be “storing” and “protecting” or “preserving”, “all at significant cost to 360 Reclaim, LLC.” Furthermore, “reasonable costs” have yet to be determined. During the 10/19/20 hearing, testimony was heard by Mr. Frownfelter who simply stated the costs seemed reasonable – ultimately basing such opinion upon a weekend gathering had amongst beer-drinking, storage and towing service providers, at which time he recollected talking about it (costs). Otherwise, 360 Reclaim only proffered its letter sent to Mr. Russell that unilaterally claims a storage fee of \$500/day, followed by an unsupported increase to \$1,000/day. The court in its introduction at said hearing even commented on his own-questioning as to the reasonability of the “storage” costs .

Additionally, as a pre-requisite to enforcement, Montana Code Annotated § 71-3-1203(2)(b) requires that the lienor provide an affidavit that the storage “*was performed at the written or verbal request of the owner or owner’s agent*”. This was not done, and neither was any testimony given otherwise in support of the statutory requirement. 360 Reclaim only proffered an “implied contract exists between...” the parties; basing its argument upon Hicks vs. Hicks and disregarding the admitted disposal (or alleged and apparent actual conversion) by 360 Reclaim, the court ruled it was proper in this instance (citing Hicks) to find that an implied contract exists entitling 360 to an Agister’s Lien. Russell argued that

Hicks is not comparable in these matters in his Opposition and Objection to 360's Motion for Enforcement of Agister's Lien.

Most important, and of greatest weight and effect; *even if* 360's "Agister's Lien" claim *could* be determined to be valid (despite its statutory failure at inception), any such claim was "extinguished" (Montana Code Annotated § 71-3-121). By and through its own acts, 360 Reclaim forfeited any such right of claim. Evidence on record testimony is replete to support extinguishment by its own forfeiture. 360 Reclaim admitted that it sold or removed items of Russell's property that it thought valuable and destroyed or eliminated property believed to be of no value; Montana Code Annotated § 71-3-121 extinguishes any lien for property that has been sold or wrongfully converted. Justice Nelson wrote a very appropriate dissent in JCP vs. Not Afraid (being included in part with this brief); appropriate for both that case and this matter. Wherein at ¶68 he wrote:

**¶68 To "forfeit" means "to lose or lose the right to by some error, offense, or crime." Merriam-Webster's Collegiate Dictionary 457 (10th ed., Merriam-Webster 1997). "Forfeiture" has a well-understood meaning in the law. It involves "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." Black's Law Dictionary 722 (9th ed.). In other words, forfeiture means that a person loses a right or privilege as a consequence of having done or omitted to do an act. It is a divestment as a consequence of default or offense; a loss by reason of misdeed or transgression. In the usual context, forfeiture occurs simultaneously with the act, error, omission, or violation of the condition precedent. Examples of these principles appear repeatedly in our cases. See e.g. State v. Riggs, 2005 MT 124, ¶ 45, 327 Mont. 196, 113 P.3d 281 (juror might have to forfeit airline tickets that he held for a flight which was scheduled to depart the following morning); State v. Sanchez, 2008 MT 27, ¶ 47, 341 Mont. 240, 177 P.3d 444 (criminal defendant forfeits his constitutional right to confront the victim at trial when he admittedly and deliberately kills the victim); State v. Cotterell, 2008 MT 409, ¶ 88, 347 Mont. 231, 198 P.3d 254 (a person convicted of unlawfully taking, killing, possessing, or transporting a deer, antelope, elk, or mountain lion "shall forfeit" his or her license for 24 months); Mungas v. Great Falls Clinic, 2009 MT 426,**

¶¶ 8-9, 354 Mont. 50, 221 P.3d 1230 (contract provided that doctors forfeit accounts receivable and interest in surgery center if they violate covenant not to compete).

JCP vs. Not Afraid MTSC, paragraph 68.

In further, he explained “..the question arises as to what consequences flow from this action.” (Id., p.37 at 63); stating:

¶63+ “...the question arises as to what consequences flow from this action. ..¶64 As noted, Article VII, Section 10 states that the holder of a judicial position “forfeits that position” either by filing for an elective public office other than a judicial position or by absenting himself from the state for more than 60 consecutive days. **This language is both mandatory and prohibitory. It dictates that forfeiture occurs upon either of the two stated events. Correspondingly, it deprives the officeholder of his or her power to act in a judicial capacity. As Delegate Dahood observed during the Constitutional Convention: [C]onstitutions are based on the premise that they are presumed to be selfexecuting, particularly within the Bill of Rights. If the language appears to be prohibitory and mandatory, . . . then in that event, the courts in interpreting the particular section are bound by that particular presumption and they must assume, in that situation, that it is self-executing.** Montana Constitutional Convention, Verbatim Transcript, Mar. 7, 1972, p. 1644. **Thus, once it is clear that either of the two events described in Article VII, Section 10 has occurred, then forfeiture of the judicial position is automatic.**”

JSC vs. Not Afraid, MTSC, p. 37 at paragraphs 63 and 64.

Thus, it cannot be argued that according to its own acts, any actual claim of Agister’s lien against the personal property – has been extinguished. 360 Reclaim forfeited. It is error at best, or deliberate indifference and with utter disregard for the court to not find 360 Reclaim forfeited and any Agister’s lien is extinguished. Russell (and Mountain View Investments both) have presented this “self-executing” statutory directive. However again, this also has been repeatedly disregarded by the court (in both actions, 305 and 473).

## CONCLUSION

For the reasons presented herein, Appellant prays The Court will find 360 Reclaim's Agister Lien to be extinguished. Additionally, reverse any other findings of the lower court and remand for jury trial in order that a trial based on merits be had; alternatively, that This Court take Supervisory Control over all the issues involved in the consolidated actions and render judgment accordingly in favor.

Signed this 30 day in <sup>July</sup>~~August~~, 2021



William Russell, Appellant pro se

## CERTIFICATE OF SERVICE

I certify that on the 30 day in July 2021, I am mailing by standard U.S. first-class mail, mailed an actual copy of the preceding document to the following:

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2010, is not more than 5000 words, excluding certificate of service and certificate of compliance.

Dated this 30 day of July 2021.

  
William M. Russell, Appellant, pro se