

ORIGINAL

Kenneth A. Connors
Connors Law Firm, PLLC
212 East Park Avenue
Anaconda, MT 59711
Telephone: (406) 563-5297
Facsimile: (406) 563-5298
Email: ken@connorslaw.net

Attorney for Plaintiff and Appellee

FILED

FILED

10/22/2021

OCT 22 2021

Bowen Greenwood
Clerk of Supreme Court
State of Montana

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 21-0318

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 21-0318

DANIEL L. MORLEY,

Plaintiff and Appellee,

v.

CYNTHIA J. MORLEY and
KENNETH E. MORLEY,

Defendants and Appellants.

**MOTION TO STRIKE
CERTAIN EXHIBITS OF
APPELLANTS AND BRIEF
IN SUPPORT THEREOF**

COMES NOW Daniel L. Morley, Plaintiff and Appellee, by and through his Counsel of record, Kenneth A. Connors, of Connors Law Firm, PLLC, and moves this Court to strike certain exhibits presented by Appellants for the first time on appeal, as follows:

Motion to Strike Certain Exhibits of
Appellants and Brief in Support Thereof

Appellants submitted an Appendix to Brief of Appellants to the Court when they filed their opening brief in this matter. In their Appendix, they included seven exhibits labeled Exhibits A through G. Exhibit E is an appraisal prepared by Shaun Moore of S P Moore Appraisal, PLLC with an effective date of July 11, 2019 (hereinafter “the Moore Appraisal”). Exhibit G is an appraisal completed by Mike Zimmerman of Zimmerman Appraisal Services with an effective date of August 14, 2020 (hereinafter “the Zimmerman Appraisal”).

Appellants never filed or presented the Moore Appraisal in the District Court proceedings. Appellee never did so, either. As a result, the Moore Appraisal is not in the District Court record and has never been before the District Court. With regard to the Zimmerman Appraisal, Appellee acknowledges that the fourth page of the Zimmerman Appraisal (also identified in the bottom, right corner of the page as Page 1 of 21) was filed in the District Court as Exhibit A to Appellants’ Reply Brief in Support of Defendants’ Objection to Referees’ Report and Request for Hearing and Opposition to Plaintiff’s Motions. (Doc. No. 25 in Case Register Report). However, Appellants never filed or presented the other pages of the Zimmerman Appraisal in the District Court proceedings. Appellee never filed or presented the Zimmerman Appraisal, or any portion thereof, in the District Court proceedings. Consequently, only the fourth page of the Zimmerman Appraisal is in the District Court record and all of its other pages have never been before the District Court.

Rule 8(1) of the Montana Rules of Appellate Procedure states the following:

“Composition of the record on appeal – generally. Except as otherwise provided in these rules, the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases. . . .”


In addition, in *Miners and Merchants Bank v. Dowdall*, 158 Mont. 142, 148, 489 P.2d 1274, 1277 (1971), this Court held that an exhibit introduced for the first time on appeal is not entitled to consideration on appeal because it was not before the district court at the time of the district court’s entry of the order from which the appeal was taken. *Id.* In that case, the Respondent filed an affidavit and supporting exhibit in its appendix to its appellate brief. *Id.* Such documents were never presented to the district court and, therefore, were never before the district court when it entered its judgment and order from which the appellant appealed. *Id.* During oral argument, the appellant moved this Court to strike the documents from the files and records of the case and this Court granted the motion. *Id.*

With the foregoing in mind, Appellee respectfully requests this Court to strike the Moore Appraisal and all but the fourth page of the Zimmerman Appraisal (also identified in the bottom, right corner of the page as Page 1 of 21) from the files and records of this case. The District Court never had an opportunity to review these documents and they should not be considered on appeal as a basis for reversing the District Court’s decision.

Counsel for Appellee did not contact Counsel for Appellants regarding this Motion because Counsel for Appellee expects Appellants to contest it vigorously.

Respectfully submitted this 22nd day of October, 2021.

CONNORS LAW FIRM, PLLC


By: 
Kenneth A. Connors, Attorney for
Daniel L. Morley, Plaintiff and Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Strike Certain Exhibits of Appellants and Brief in Support Thereof and the proposed Order Granting Motion to Strike Exhibits were served upon the following by mailing a true and correct copy thereof on the 22nd day of October, 2021, postage prepaid and addressed as follows:

Craig D. Charlton
Lewis K. Smith, III
Smith Law Firm, P.C.
Attorneys at Law
26 West Sixth Avenue
P.O. Box 1691
Helena, MT 59624

Attorneys for Defendants and Appellants



Melissa D. Hansen