

IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE DA 21-0609

WELLS FARGO BANK, N.A.,

plaintiff-appellant,

v.

ZINVEST, LLC,

defendant-appellee.

APPELLANT WELLS FARGO'S OPENING BRIEF

on appeal from the Montana Fourth Judicial District Court, Missoula County
Case DV-20-796
The Honorable John W. Larson presiding

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ISSUES PRESENTED FOR REVIEW

A. The district court erred in granting Zinvest's summary judgment motion and denying Wells Fargo's cross-motion because:

1. The district court erred in finding the tax lien certificates complied with 15-17-212(1), MCA,
2. The district court erred in finding Zinvest obtained a proper litigation guarantee and provided Wells Fargo proper notice the tax deeds will be issued in compliance with 15-18-212, MCA,
3. The district court erred in finding Zinvest provided Wells Fargo with due process when Zinvest did nothing after the notices mailed to Wells Fargo were returned undeliverable, and
4. To the extent Zinvest contends its notice by publication constitutes alternative notice to Wells Fargo, the district court erred in finding the notice complied with 15-18-212(6), MCA.

B. The district court erred in awarding Zinvest attorneys' fees because:

1. Zinvest's motion was deemed denied,
2. Zinvest failed to establish its right to attorneys' fees, and
3. The tangible parameters test does not support award of attorneys' fees.

STATEMENT OF THE CASE

This case was decided on summary judgment—granting Zinvest's motion and denying Wells Fargo's. The district court then granted Zinvest's motion for attorneys' fees over Wells Fargo's objections. Both of those decisions were error.

Zinvest acquired two parcels of real estate worth nearly \$200,000 for just a few hundred dollars through tax deeds issued by the Missoula County treasurer. Wells Fargo had a recorded deed of trust against both parcels, but was not provided notice of the tax sales. Rather than mail Wells Fargo notice to the address designated for notices in its deed of trust, Zinvest relied on litigation guarantees which promised nothing more than to provide "[t]he return addresses for mailing after recording, if any, as shown on each and every document [of record which it identified]." (emphasis added). The notices sent to this address were returned undelivered. There were reasonable steps Zinvest could have taken to locate an alternate address for Wells Fargo (including the address printed on the deed of trust designating a different address for such notices), but it admittedly did nothing.

Wells Fargo sued Zinvest and the treasurer for a declaration the tax deeds are void as to Wells Fargo and Zinvest's title is subject to Wells Fargo's deed of trust. In the alternative, Wells Fargo requested a declaration the tax deeds were void ab initio and it was entitled to redeem the properties until such time as Zinvest provided proper notice of the issuance of the tax deeds.

The treasurer was dismissed pursuant to a stipulation he comply with any declaratory relief ordered by the district court. Zinvest moved for summary judgment arguing the tax sale and issuance of the tax deed fully complied with the tax sale procedures. Wells Fargo cross-moved for summary judgment arguing (a) the tax sale certificates assigned to Zinvest materially misstate the redemption deadline, (b) Zinvest failed to obtain a proper litigation guarantee or provide notice to the "lender's address" identified in Wells Fargo's recorded deed of trust, (c) Zinvest deprived Wells Fargo of due process by failing to do anything when the notices mailed to the wrong address were returned undeliverable, and/or (d) Zinvest failed to publish proper notice when the notices it mailed to the wrong address were returned undelivered.

The district court granted Zinvest's motion and denied Wells Fargo's.

Zinvest then moved for an award of attorneys' fees pursuant to M. R. Civ. P. 54(d). Wells Fargo timely objected to Zinvest's motion on the grounds Zinvest failed to establish either "equitable considerations" or the "tangible parameters test" support an award of attorneys' fees pursuant to 27-8-313, MCA. After the district court failed to rule within 120 days, Wells Fargo filed notice Zinvest's motion was deemed denied. The district court granted Zinvest's motion over Wells Fargo's objections and entered judgment in Zinvest's favor.

STATEMENT OF FACTS

A. Factual background.

1. Wells Fargo's recorded interest in the properties clearly identifies its address for notices.

Wells Fargo holds a deed of trust against two parcels of real estate assigned tax parcels 2281204 and 2281300 by the Missoula County treasurer. (ROA.18 (ex. A, Christensen decl. at ¶ 3; ex. A-1, deed of trust at p. 14); appx. 2 at p. 14.)

The deed of trust was recorded with the Missoula County clerk. (ROA.18 (ex. A-1, deed of trust at p. 1); appx. 2 at p. 1.) It identifies Wells Fargo as the "lender" and the "lender's address" as "P.O. Box 10304, Des Moines, Iowa 50306-0304." (ROA.18 (ex. A-1, deed of trust at p. 1-2); appx. 2 at p. 1-2.) The lender's address is the address designated by Wells Fargo for receipt of notices, including tax statements. (ROA.18 (ex. A-1, deed of trust at p. 3, 10); appx. 2 at p. 3, 10.)

2. Missoula County acquires the properties at July 15, 2015 tax lien sales and assigns the tax sale certificates to Zinvest.

On March 15, 2016, the Missoula County treasurer executed a county treasurer's certificate of tax sale for both parcels. (ROA.18 (ex. B-2, certificates at 30-31); appx. 3.) The taxes assessed against each parcel for the tax year 2014 were unpaid (\$145.92 for parcel 2281204 and \$153.98 for parcel 2281300), the tax liens were offered for sale on July 15, 2015, and Missoula County was the purchaser at both sales. (ROA.18 (ex. B-2, certificates at 30-31); appx. 3.)

Montana's tax sale procedures do not require notice of a tax lien sale to mortgagees of record and Wells Fargo was not provided notice of the July 15, 2015 tax lien sale for either parcel. (ROA.18 (ex. A, Christensen decl. at ¶ 5).)

The tax sale certificates warn "a tax deed shall be issued to the purchaser on or after the 15th day of July 2017, after notification has been duly given as required by law, unless the property is redeemed in the manner as prescribed by law." (ROA.18 (ex. B-2, certificates at 30-31); appx. 3.)

The treasurer assigned the tax sale certificates to Zinvest on March 15, 2016. (ROA.18 (ex. B-2, assignments at 32-33).)

3. Zinvest fails to provide Wells Fargo with proper notice of its intent to acquire the tax deeds.

On July 11, 2018, Zinvest executed a "proof of notice" to verify it mailed a "notice of issuance of tax deed" to the "owners, current occupant and parties as required by 15-18-212, MCA, via certified mail, return receipt requested." (ROA.18 (ex. B-2, proofs of notice at 34, 40); appx. 4 at p. 1, 7.) The attached returned envelopes for the notices mailed to Wells Fargo are postmarked June 15, 2018, addressed to 3601 Minnesota Drive, Suite 200, Bloomington, Minnesota 55435 and marked "return to sender-not deliverable as addressed-unable to forward." (ROA.18 (ex. B-2, envelopes at 35, 42); appx. 4 at p. 2, 9.)

Zinvest contends it addressed the notices to the Minnesota address because that was the address listed in "litigation guarantees" obtained from Stewart Title

Guaranty Company. (ROA.18 (ex. B-2, litigation guarantees at 4-13, 17-26; ex. B-3, int. rsp. at 7-8); appx. 5.) The litigation guarantees promise only to provide "[t]he return addresses for mailing after recording, if any, as shown on each and every document referred to in part II of schedule B . . ." (ROA.18 (ex. B-2, litigation guarantees at 4, 17); appx. 5 at p. 1, 14.)

As promised, the only Wells Fargo address identified in the litigation guarantees was the "return to" address on the deed of trust. (ROA.18 (ex. B-2, litigation guarantees at 11, 24); appx. 5 at p. 8, 21.) The "return to" address was intended only as an instruction to the recorder to return the deed of trust after recording. (ROA.18 (ex. A, Christensen decl. at ¶ 7).) It was not intended as an address for the receipt of notices related to the deed of trust, including notices related to tax matters. (ROA.18 (ex. A, Christensen decl. at ¶ 7).)

Zinvest did not mail any notice to Wells Fargo at the "lender's address" identified in the deed of trust. (ROA.18 (ex. B-1, adm. rsp. at 9-10).) After the notices were returned undeliverable, Zinvest made no attempt to locate an alternative address for Wells Fargo. (ROA.18 (ex. B-1, adm. rsp. at 7).)

Wells Fargo did not receive any notice of Zinvest's intent to acquire the tax deeds or of the redemption deadline. (ROA.18 (ex. A, Christensen decl. at ¶ 6).)

4. Zinvest published notice concurrently with mailed notices.

On the same date it mailed the notices to Wells Fargo (and again on June 22, 2018), Zinvest published notice of its intent to acquire the tax deeds in the Missoulan. (ROA.18 (ex. B-2, aff't. at 37-39, 43-45); appx. 5 at p. 4-6, 10-12.) The notices identified Wells Fargo with the Minnesota "return to" address; neither identified Wells Fargo as a "party for whom the address is unknown." (ROA.18 (ex. B-2, aff't. at 37-39, 43-45); appx. 5 at p. 4-6, 10-12.)

5. Zinvest acquires the tax deeds from the treasurer despite its failure to notify Wells Fargo.

On August 31, 2018, the treasurer executed tax deeds conveying the parcels to Zinvest. (ROA.18 (ex. B-2, tax deeds at 46-49); appx. 6.) Zinvest paid \$158.65 for parcel 2281204 and \$167.33 for parcel 2281300. (ROA.18 (ex. B-2, tax deeds at 46, 48); appx. 6.) The parcels are worth \$93,000 (parcel 2281204) and \$98,900 (parcel 2281300). (ROA.18 (ex. B-2, property records at 14-16, 27-29).)

B. Procedural background.

1. Wells Fargo sues for declaratory relief.

Wells Fargo sued Zinvest and the treasurer seeking a declaration the tax deeds are void as to Wells Fargo, and Zinvest's title is subject to the deed of trust. (ROA.1 (complaint at ¶ 41).) Alternatively, Wells Fargo requested a declaration the tax deeds are void and could not be re-issued until proper notice was provided to Wells Fargo. (ROA.1 (complaint at ¶ 41).)

The treasurer was dismissed by stipulation of the parties, subject to his agreement to comply with any subsequent declaratory relief ordered by the district court regarding the subject properties. (ROA.11 (stipulation).)

2. Cross-motions for summary judgment.

Zinvest answered (ROA.8) and moved for summary judgment. (ROA.12 (motion); ROA.13 (brief); ROA.14 (aff't.)) Zinvest argued it provided Wells Fargo with proper notice under 15-18-212, MCA, because it addressed the notices to the address identified in the litigation guarantees. (ROA.13 (brief at p. 3-5).) It claimed it had no duty to look for an alternate address because the Montana's tax sale procedures did not require it do so. (ROA.13 (brief at p. 3).)

Wells Fargo cross-moved for summary judgment. (ROA.17 (cross-motion); ROA.18 (brief).) Wells Fargo argued the tax sale certificates failed to strictly comply with 15-17-212, MCA, because they misstate the date the purchaser is entitled to a tax deed. (ROA.18 (brief at ¶¶ 15-21).) The tax sale certificates state the purchaser is entitled to a tax deed on July 15, 2017, but the earliest the tax deeds could have been issued was July 15, 2018. (ROA.18 (brief at ¶¶ 18-19).)

Wells Fargo further argued Zinvest failed to comply with 15-18-212, MCA, because it did not provide notice to Wells Fargo's address disclosed in the deed of trust. (ROA.18 (brief at ¶¶ 22-27).) Zinvest was not entitled to rely on the litigation guarantees because they only guaranteed to provide the "return addresses for mailing

after recording," not the notice or mailing address even if it was identified in the deed of trust. (ROA.18 (brief at ¶¶ 23-26).)

Even if Zinvest's notice was properly addressed, Zinvest was obligated to take reasonable steps to provide alternate notice after the notices were returned undelivered. (ROA.18 (brief at ¶¶ 28-31).) Zinvest admittedly did nothing, when it is undisputed reasonable steps could have been taken, in violation of Wells Fargo's due process rights. (ROA.18 (brief at ¶¶ 30-31).) In the event Zinvest claimed there were no reasonable steps it could have taken to locate an alternate address, Wells Fargo argued Zinvest was required to publish notice in compliance with 15-18-212(6), MCA, and failed to do so. (ROA.18 (brief at ¶¶ 32-34).)

Zinvest responded to Wells Fargo's cross-motion with no additional evidence. (ROA.19 (reply).) It acknowledged the earliest the tax sale purchaser could obtain tax deeds was July 15, 2018 because "there was no [special improvement district (SID)] assessed." (ROA.19 (reply at p. 3-4).) Zinvest nevertheless argued the tax sale certificates' misstatement was proper because "[t]reasurer's in the state automatically use the shorter redemption period of twenty-four (24) months on the certificates in anticipation that there may be a [SID] assessed on the property." (ROA.19 (reply at p. 3-4).)

3. District court's summary judgment order.

Following oral argument, the district court granted Zinvest's summary judgment motion and denied Wells Fargo's on November 17, 2021. (ROA.21 (minute); ROA.22 (order); Jul. 14, 2021 transcript; appx. 1.)

With respect to the tax sale certificates, the district court acknowledged 15-18-111(2), MCA, provides the 24-month period only applies to properties "upon which special improvement district assessment or rural special improvement district assessments are delinquent" and Zinvest's admission "there was no special [improvement district]," but nevertheless ruled "the tax certificates correctly stated that the interested party, Wells Fargo, had twenty-four (24) months from the tax lien sale to redeem the parcels." (ROA.22 (order at p. 7, 9); appx. 1 at p. 7, 9.)

The district court further rejected Wells Fargo's argument Zinvest failed to provide proper notice of the issuance of the tax deeds. (ROA.22 (order at p. 10); appx. 1 at p. 10.) Without addressing the propriety of relying on litigation guarantees promising only to provide the "return to" address for interested parties, the district court determined "the statute at issue provides a litigation guarantee may satisfy the address requirement, and Zinvest requested litigation guarantees in compliance with the statutory notice." (ROA.22 (order at p. 10); appx. 1 at p. 10.)

The district court also found Zinvest's publication notice was timely published. (ROA.22 (order at p. 10-11); appx. 1 at p. 10-11.) The district court did

not address Wells Fargo's due process complaint, other than to conclude "[t]he court finds that there is no genuine issue of material fact the statutory requirements for tax lien procedure were met and no due process violations." (ROA.22 (order at p. 11); appx. 1 at p. 11.) Wells Fargo appealed. (ROA.27 (notice).)

4. Zinvest's motion for attorneys' fees.

On November 22, 2022, Zinvest moved to recover attorneys' fees. (ROA.24 (motion).) It argued it was entitled to attorney fees as supplemental relief in a declaratory judgment action. (ROA.24 (motion at p. 2).)

Wells Fargo objected to Zinvest's motion. (ROA.26 (objection).) It pointed out the only authority to award attorneys' fees in a declaratory judgment action required Zinvest establish there were "equitable considerations" to support the award and, if so, then satisfy the three-part tangible parameters test. (ROA.26 (objection at ¶¶ 7-20).) Zinvest's made no argument and provided no evidence supporting either element. (ROA.24 (motion); ROA.26 (objection at ¶¶ 7-20).)

The district court held a hearing on Zinvest's motion on January 5, 2022, but inadvertently failed to provide notice to the parties. (ROA.32 (minute); ROA.36 (minute); Jan. 5, 2022 transcript at 25:9-25:25.) The district court retained jurisdiction over Zinvest's motion and continued the hearing to January 26. (ROA.32 (minute); ROA.33 (order); Jan. 5, 2022 transcript at 27:9-29:16.)

At the January 26 hearing, the district court continued the hearing to March 2 to allow the parties to brief the legal basis to recover fees in light of an unreported case. (Jan. 26, 2022 transcript at 36:4-38:23.)

Zinvest filed a supplemental brief on February 2 and Wells Fargo responded on February 18. (ROA.37 (suppl. brief); ROA.39 (resp. to suppl. brief).) At the March 2 hearing, Zinvest requested permission to further reply and was granted permission to do so. (ROA.40 (minute); Mar. 2, 2022 transcript at 43:15-44:18, 45:8-45:10.) The court would then consider the matter submitted. (ROA.40 (minute); Mar. 2, 2022 transcript at 46:14-46:20.)

Zinvest's reply, for the first time, attempted to present evidence of the relative size disparity of Wells Fargo and Zinvest. (ROA.41 (suppl. reply); ROA.42 (aff't.)) Wells Fargo objected on the grounds the district court could only consider the "statute, rule, or other grounds entitling the movant to the award" specified by Zinvest within 14 days of the court's entry of judgment. (ROA.43 (objection).) Wells Fargo objected to any statute, rule or other grounds argued by Zinvest in any other briefing. (ROA.43 (objection).)

On March 31, Wells Fargo filed a notice advising the district court Zinvest's motion was deemed denied because it was not ruled on by March 22 pursuant to M. R. Civ. P. 59(f). (ROA.44 (notice).)

On May 10, the district court granted Zinvest's motion for attorneys' fees. (ROA.49 (order); appx. 7.) The district court rejected Wells Fargo's argument Zinvest's motion was deemed denied because "timelines under rule 59 for motions to alter or amend are not applicable to the court's ability to still rule on the pending motion for attorneys' fees." (ROA.49 (order at p. 6); appx. 7 at p. 6.) The district court found rule 58 controlling—"[t]he court is not deprived jurisdiction on a motion for attorney fees under rule 58." (ROA.49 (order at p. 6); appx. 7 at p. 6.)

The district court "determined that 'equitable considerations support an award' given the court's order granting Zinvest motion for summary judgment and denying Wells Fargo cross-motion for summary judgment." (ROA.49 (order at p. 6-9); appx. 7 at p. 6-9.) The district court did not otherwise make any findings explaining what equitable considerations support an award of attorneys' fees. (ROA.49 (order at p. 6-9); appx. 7 at p. 6-9.)¹ Nor did the district court explain how the tangible parameters test was met. (*Id.*)

A judgment was entered on May 13, 2022 awarding Zinvest attorneys' fees in the amount of \$11,214, court costs of \$290.49 and a judgment fee of \$50. (ROA.52

¹ The district court noted "[i]n supplemental brief[ing], Zinvest argues equitable considerations support an award of attorneys' fees because Wells Fargo is a large bank and Zinvest is a small family-owned business." (ROA.49 (order at p. 7); appx. 7 at p. 7.) But it also stated "any assertions made in supplemental briefing that Wells Fargo's now objects do not serve as the primary basis for the court's award of fees and costs." (ROA.49 (order at p. 10-11); appx. 7 at p. 10-11.)

(judgment); appx. 8.) Wells Fargo filed a supplemental notice to appeal the order awarding attorneys' fees. (ROA.53 (notice).)

SUMMARY OF ARGUMENT

Wells Fargo was entitled to summary judgment, not Zinvest. No facts are in dispute, and the law applied to those facts shows the tax sale procedures were not strictly complied with and Wells Fargo's due process rights were violated.

The tax sale certificates materially misstated the date on which the purchaser is entitled to a tax deed. The correct date should have been July 15, 2018 (36 months from the July 15, 2015 tax lien sale pursuant to 15-18-111(1), MCA), not July 15, 2017. July 15, 2017 would only be correct if the properties were "lot[s] upon which special improvement district assessment or rural special improvement district assessments are delinquent." 15-18-111(2), MCA. As Zinvest admitted there were no special improvement district assessments, the district court should have concluded the tax sale certificates did not state the correct date. The failure to strictly comply with 15-18-111(2), MCA, renders the tax deeds void.

Zinvest also failed to comply with the statutory requirements for providing notice of the issuance of the tax deeds. While the statutes allow Zinvest to provide notice to "the address disclosed . . . in the litigation guarantee," 15-18-212(4)(b), MCA, the litigation guarantee must "list[] the identities and addresses of the parties of record that have an interest or possible claim of an interest in the property . . ."

15-18-212(4)(a)(iii), MCA. The litigation guarantees relied on by Zinvest did not do this or even purport to do so—they promised only to identify "[t]he return addresses for mailing after recording, if any" in recorded documents. The litigation guarantees, and Zinvest, ignored Wells Fargo's notice address clearly identified in the deed of trust.

Zinvest's failure to do anything to correct the mistake after the notices were returned undeliverable was more egregious. Once Zinvest learned the notices were not delivered to Wells Fargo, due process required it take reasonable steps to provide alternative notice to Wells Fargo. *Jones v. Flowers*, 547 U.S. 220, 226 (2006). Zinvest does not dispute there were reasonable steps it could have taken to locate an alternative address for Wells Fargo—including examining the deed of trust to locate the "lender's address,"—and that it did nothing. Doing nothing was unreasonable and violated Wells Fargo's right to due process. *Id.* at 229-230. Although Zinvest is not a state actor, it was responsible for providing Wells Fargo with due process because Montana state law created a legal framework which delegated the notice requirements to private parties. *See e.g., Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191-192 (1988).

Zinvest's publication notice did nothing to correct its failures. Notice by publication alone is constitutionally insufficient to provide notice to a party whose address is of record. And Zinvest cannot claim it published notice to Wells Fargo

because its address was unknown in compliance with 15-18-212(6), MCA, as the notices were published before the mailed notices were returned undeliverable and do not identify Wells Fargo as a "party for whom the address is unknown."

The district court also erred in awarding Zinvest attorneys' fees pursuant to 28-7-313, MCA. Wells Fargo, not Zinvest, should have been the prevailing party. Even if this Court finds Zinvest should prevail, the district court erred in granting Zinvest's motion because no "equitable considerations" supporting the award were present, the tangible parameters test is inapplicable, and the motion was deemed denied pursuant to M. R. Civ. P. 59(f).

STANDARD OF REVIEW

A district court's grant or denial of summary judgment is reviewed de novo under the standard set forth in M. R. Civ. P. 56. *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." M.R. Civ. P. 56(c). If the movant demonstrates no genuine issues of material fact exist and entitlement to judgment as a matter of law, the burden shifts to the non-movant to prove, by more than mere denial or speculation, that a genuine factual issue does exist. *McConkey v. Flathead Elec. Co-op.*, 2005 MT 334, ¶ 19, 330 Mont. 48, 125

P.3d 1121. The non-movant cannot rely on mere allegations in the pleadings but must present evidence raising genuine issues of material fact. *Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, ¶ 14, 323 Mont. 295, 100 P.3d 137. When cross-motions for summary judgment are filed, each party's motion is evaluated on its own merits. *Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, 403 P.3d 664.

This Court reviews for correctness a district court's determination of whether legal authority exists to award attorney fees, as it is a conclusion of law. *Davis v. Jefferson Cty. Election Off.*, 2018 MT 32, ¶ 8, 390 Mont. 280, 412 P.3d 1048. If legal authority to award attorney fees exists, this Court reviews a district court's decision to grant or deny attorney fees for an abuse of discretion. *Id.* An abuse of discretion occurs when the district court acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 62, 394 Mont. 135, 433 P.3d 1230.

ARGUMENTS & AUTHORITIES

A. The district court erred in granting Zinvest's summary judgment motion and denying Wells Fargo's cross-motion.

The district court erred in granting Zinvest's summary judgment motion and denying Wells Fargo's cross-motion because (1) the tax lien certificates did not comply with 15-17-212(1), MCA, (2) Zinvest failed to obtain a proper litigation

guarantee and provide Wells Fargo proper notice the tax deeds will be issued in compliance with 15-18-212, MCA, (3) Zinvest deprived Wells Fargo of due process when it did nothing after the mailed notices were returned undeliverable, and (4) to the extent Zinvest contends its notice by publication constitutes alternate notice to Wells Fargo, the notice did not comply with 15-18-212(6), MCA.

1. The district court erred in finding the tax lien certificates complied with 15-17-212(1), MCA.

The evidence established the earliest the tax deeds could have issued was July 15, 2018, 36 months after the tax lien sales. The tax lien certificates misstated this deadline, claiming the purchaser would be entitled to a tax deed on July 15, 2017. This defect rendered the tax deeds void. *Zinvest v. Anderson*, 2015 MT 204, ¶ 16, 380 Mont. 139, 353 P.3d 1192 (voiding tax deed based on errors in tax sale certificate and assignment).

Delinquent property taxes are secured by a statutory lien against the property assessed. 15-16-403, MCA. The property is subject to a tax lien sale after notice of the delinquency is given to the owner. 15-17-211, MCA. The county is deemed to be the purchaser of the tax lien if no one else pays the delinquent taxes and costs on the first day of the sale. 15-17-214(1), MCA.

Following the sale, the county treasurer "shall identify and list all property tax liens that were sold" and "shall also record that the county is the purchaser of all property remaining unsold . . ." 15-17-214(2)(a), MCA. "The record of the property

in which the county is listed as the purchaser may be made by the treasurer by a separate tax lien sale certificate of each property or by reference to the property as recorded in the list [of tax delinquent properties] required under 15–16–301." 15-17-214(2)(b), MCA.

Missoula County was deemed the purchaser of the tax liens at issue. (ROA.18 (ex. B-2, certificates at 30-31; ex. B-2, assignments at 32-33); appx. 3.) There is no evidence Missoula County recorded a "list" of the properties it acquired at the July 15, 2015 tax lien sales; it instead prepared and recorded tax sale certificates for each parcel. (ROA.18 (ex. B, Haywood decl. at ¶ 4; ex. B-2, certificates at 30-31; ex. B-4, Missoula County doc. prod. at 1-81); appx. 3.)

Tax lien sale certificates must include "a statement specifying the date on which the purchaser will be entitled to a tax deed." 15-17-212(1)(h), MCA. The tax sale certificates are defective because they do not correctly specify this date. They correctly state the tax lien sale occurred July 15, 2015, but then state "[a] tax deed shall be issued to the purchaser on or after the 15th day of July 2017 after notification has been duly given as required by law, unless the property is redeemed in the manner as described by law." (ROA.18 (ex. B-2, certificates at 30-31); appx. 3.) The earliest a tax deed can issue is 36 months after the tax lien sale. 15-18-111(1), MCA. As the tax lien sale occurred July 15, 2015, the earliest the tax deeds could have issued was July 15, 2018, not 2017. *Id.*

July 15, 2017 would only be the correct date if the property was "subdivided as a residential or commercial lot upon which special improvement district assessment or rural special improvement district assessments are delinquent and upon which no habitable dwelling or commercial structure is situated." 15-18-111(2), MCA. As the district court correctly noted, Zinvest conceded "there was no SID assessed." (ROA.19 (reply at p. 3-4); ROA.22 (order at p. 7); appx. 1 at p. 7.) Because no special improvement district assessment was delinquent, the two-year redemption period provided by 15-18-111(2) did not apply and redemption period identified in the tax lien certificates was incorrect.

"Tax deed proceedings implicate a property owner's fundamental interests." *Catherine E.W. Hansen Tr. v. Ward*, 2015 MT 131, ¶ 26, 379 Mont. 161, 349 P.3d 500. This Court has "firmly maintained the position that procedural requirements set forth in tax deed statutes must be strictly observed." *Zinvest v. Anderson*, 2015 MT at ¶ 16 (quoting *Isern v. Summerfield*, 1998 MT 45, ¶ 10, 287 Mont. 461, 956 P.2d 28 (collecting cases)); *see also Catherine E.W. Hansen Tr.*, 2015 MT at ¶ 26 ("Due to the important interests at stake, every essential and material step required by the tax deed statutes must be strictly followed.") (quoting *Moran v. Robbin*, (1993) 261 Mont. 478, 482, 863 P.2d 395, 398). "Such exacting scrutiny is a necessity, as tax deed sales involve a citizen's right to property being challenged by the government and can result in the loss of property at well below its full value."

Id.; *Catherine E.W. Hansen Tr.*, 2015 MT at ¶ 26 ("[o]ften, very valuable property is lost for a mere pittance.")

The misstatement of the redemption deadline renders the tax deeds void. *Zinvest v. Anderson*, 2015 MT at ¶ 16 (voiding tax deed based on errors in tax sale certificate and assignment); *Isern*, 1998 MT at ¶ 10 ("Even typographical errors in a document may be sufficient grounds to set aside a resulting tax deed.") (citing *Tax Lien Servs. v. Hall*, (1996) 277 Mont. 126, 133, 919 P.2d 396, 400).

2. The district court erred in finding Zinvest obtained a proper litigation guarantee and provided Wells Fargo proper notice the tax deeds will be issued in compliance with 15-18-212, MCA.

Wells Fargo was entitled to notice mailed to the notice address disclosed on its recorded deed of trust. Zinvest instead mailed the notices to the deed of trust's "return to" address. Zinvest did not properly rely on the litigation guarantees because they did not identify Wells Fargo's address or even purport to do so; the litigation guarantees expressly state they will only provide "[t]he return addresses for mailing after recording." (ROA.18 (ex. B-2, litigation guarantees at 4, 17); appx. 5 at p. 1, 14.) "The failure to provide adequate notice in compliance with the statute renders a tax deed void." *Catherine E.W. Hansen Tr.*, 2015 MT at ¶ 27.

The tax lien sale begins a 36-month period during which the property may be redeemed before a tax deed is issued. 15-18-111(1), MCA. "Not more than 60 days prior to and not more than 60 days following the expiration of the redemption period

provided in 15–18–111," Zinvest was required to notify "the current occupant, if any, of the property and [] each party, other than a utility, listed on a litigation guarantee" that "a tax deed will be issued to the purchaser or assignee unless the property tax lien is redeemed prior to the expiration date of the redemption period." 15-18-212(1)(b), (4)(a), MCA.

"The address to which the notice must be sent is, for each party, the address disclosed by the records in the office of the county clerk and recorder or in the litigation guarantee and, for the occupant, the street address or other known address of the subject property." 15-18-212(4)(b), MCA.

Wells Fargo's deed of trust identifies it as the "lender" and the "lender's address" as "P.O. Box 10304, Des Moines, Iowa 50306-0304." (ROA.18 (ex. A-1, deed of trust at p. 1-2); appx. 2 at p. 1-2.) The lender's address is the address designated by Wells Fargo for receipt of notices related to the deed of trust. (ROA.18 (ex. A-1, deed of trust at p. 10); appx. 2 at p. 10 ("Any notice to lender shall be given by delivering it or by mailing it by first class mail to lender's address stated herein . . . ").) The deed of trust specifically requests tax statements be delivered to this address. (ROA.18 (ex. A-1, deed of trust at p. 3); appx. 2 at p. 3 ("Any notice to lender shall be given by delivering it or by mailing it by first class mail to lender's address stated herein . . . ")

Zinvest did not mail any notice to Wells Fargo at the deed of trust's designated notice address. (ROA.18 (ex. B-1, adm. rsp. at 9-10; ex. B-2, proofs of notice at 34-45); appx. 4.) Zinvest mailed notices to Wells Fargo at "3601 Minnesota Drive, Suite 200, Bloomington, Minnesota 55435," the "return to" address listed on the deed of trust. (ROA.18 (ex. A-1, deed of trust at p. 1; ex. B-2, envelopes at 35, 42); appx. 2 at p. 1; appx. 4 at p. 2, 9.)

Zinvest obtained this address from Stewart Title's litigation guarantees. (ROA.18 (ex. B-2, litigation guarantees at 11, 24; ex. B-3, int. rsp. at 7-8); appx. 5 at p. 8, 21.) Zinvest may only properly rely on a litigation guarantee if it "lists the identities and addresses of the parties of record that have an interest or possible claim of an interest in the property . . ." 15-18-212(4)(a)(iii), MCA. The litigation guarantees did not list Wells Fargo's address or even purport to do so.

The litigation guarantees promised only to provide "[t]he return addresses for mailing after recording, if any, as shown on each and every document referred to in part II of schedule B . . ." (ROA.18 (ex. B-2, litigation guarantees at 4, 17); appx. 5 at p. 1, 14.) This address was intended only as an instruction to the recorder to return the deed of trust after recording; it was not intended as an address for the receipt of notices related to the deed of trust. (ROA.18 (ex. A, Christensen decl. at ¶ 7).) Delivery to a "return to" address rather than the "lender's address" identified in a

recorded deed of trust is not proper notice. *See e.g., U.S. Bank, Nat'l Ass'n ND v. Resources Group, LLC*, 135 Nev. 199, 203, 444 P.3d 442, 446 (Nev. 2019).

A right of redemption is "a vested property right" protected by the due process clause of the United States constitution. *Tax Lien Servs.*, *supra*, 277 Mont. at 133, 919 P.2d at 400 (citing *Lowery v. Garfield County*, (1949) 122 Mont. 571, 582, 208 P.2d 478, 484). "Before a property owner may redeem the tax lien, he or she must know of its existence; therefore, notice is of utmost importance in these proceedings." *Catherine E.W. Hansen Tr.*, 2015 MT at ¶ 27. "The failure to provide adequate notice in compliance with the statute renders a tax deed void." *Id.*; *Isern v. Summerfield*, *supra*, 1998 MT 45, ¶ 28 ("if the legal requirements with respect to the notice are not complied with, a county treasurer may not legally issue a tax deed.") (citing *Tax Lien Servs.*, 277 Mont. at 133, 919 P.2d at 400 (quoting *Moran v. Robbin*, *supra*, 863 P.2d at 398)).

3. The district court erred in finding Zinvest provided Wells Fargo with due process when Zinvest did nothing after the notices mailed to Wells Fargo were returned undeliverable.

Due process requires notice and an opportunity to be heard before a person can be deprived of its property. Once Zinvest became aware the notices mailed to Wells Fargo had not been delivered, due process required it take reasonable steps to provide Wells Fargo with alternate notice. *Jones v. Flowers*, *supra*, 547 U.S. at 226. There is no dispute there were reasonable steps Zinvest could have taken to identify

an alternate address (including the address designated for notices in the deed of trust) and did nothing. The deprivation of due process renders the tax deeds void. *Isern*, supra, 1998 MT at ¶¶ 20-21.

"Both Montana's constitution and the constitution of the United States provide that no person shall be deprived of property without due process of law." *Isern*, 1998 MT at ¶ 9 (citing U.S. const. amend. XIV, § 1; Mont. const. art. II, § 17).² "One deprived of his property must be given notice and an opportunity to defend." *Ball v. Gee*, (1990) 243 Mont. 406, 413, 795 P.2d 82, 86; *Jones*, 547 U.S. at 223 ("Before a state may take property and sell it for unpaid taxes, the due process clause of the fourteenth amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'") (quoting *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)).

A mortgagee is entitled to no less due process than the property's owner. "A mortgagee possesses a substantial property interest that is significantly affected by a tax sale." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983); *Zinvest LLC v. Gunnersfield Enterprises, Inc.*, 2017 MT 284, ¶ 30, 389 Mont. 1270, 405 P.3d 1270 ("a mortgagee with a legally protected property interest is entitled by due process to notice of a tax sale.") (citing *Mennonite*).

² U.S. Supreme Court decisions on due process such as *Jones*, supra, *Mullane v. Central Hanover Bank* and *Mennonite Bd. of Missions v. Adams* are binding on this Court. *City of Missoula v. Shea*, (1983) 202 Mont. 286, 293, 661 P.2d 410, 413.

"Ultimately, the tax sale may result in the complete nullification of the mortgagee's interest, since the purchaser acquires title free of all liens and other encumbrances at the conclusion of the redemption period." *Mennonite*, 462 U.S. at 798. "Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale." *Id.* "When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." *Id.*

"[W]hen mailed notice of a tax sale is returned unclaimed, the state must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Jones*, 547 U.S. at 226. What additional steps are required depends on the circumstances of the case. *Jones*, 547 U.S. at 234 ("What steps are reasonable in response to new information depends upon what the new information reveals.") Wells Fargo presented evidence there were simple, reasonable steps Zinvest could have taken to locate an alternate address for Wells Fargo and Zinvest did not dispute any of them.

Zinvest could have examined the deed of trust to identify the address designated for such notices; images of the deed of trust are readily available online at <http://missoulacounty.us> at no cost and in a matter of minutes. (ROA.18 (ex. B, Haywood decl. at ¶ 5; ex. B-5, webpage).) It could have found an additional mailing

address on Wells Fargo's website at <https://www.wellsfargo.com/help/addresses/>; again, at no cost and in a matter of minutes. (ROA.18 (ex. B, Haywood decl. at ¶ 6; ex. B-6, webpage).) Or it could have located Wells Fargo's registered address on the Montana's secretary of state's website at <https://biz.sosmt.gov/search/business>; also at no cost and with instant results. (ROA.18 (ex. B, Haywood decl. at ¶ 7; ex. B-7, webpage).) *See e.g., Wells Fargo Financial Colorado, Inc. v. Olivas*, 2017 COA 158, ¶ 33 n.3, 410 P.3d 1284 (Colo. App. 2017) (search of the business database of the Colorado Secretary of State's website could quickly reveal a current address.)

Zinvest did not argue any of these actions were unreasonable or dispute it could have quickly and easily located an alternate address for Wells Fargo if it had taken any one of them. It's admitted failure to do anything after learning the notices mailed to Wells Fargo were returned undelivered was unreasonable and violated Wells Fargo's right to due process. *Jones*, 547 U.S. at 234 ("In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the state did—nothing. For the reasons stated, we conclude the state should have taken additional reasonable steps to notify Jones, if practicable to do so."); *see also Hardy v. D.C.*, 283 F.R.D. 20, 27 (D. D.C. 2012) ("The district has presented no evidence that, for any particular notice that was mailed and returned unsigned during the relevant period, the district actually followed up at the time and determined that it was impracticable to send any further notices. Although it is clear

under *Jones v. Flowers* that the government cannot be faulted for doing nothing if there were no 'reasonable additional steps the government could have taken,' this does not excuse the District from doing nothing at all.")

While the fourteenth amendment generally speaks to the obligation of the state, a private party becomes a state actor when it "makes use of state procedures with the overt, significant assistance of state officials." *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486 (1988); *see also Tarkanian*, *supra*, 488 U.S. at 192 (private action constitutes state action "if the state creates the legal framework governing the conduct, if it delegates its authority to the private actor, or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior.") (internal citations omitted).

In *Plemons v. Gale*, for instance, the fourth circuit held a tax sale purchaser was a state actor under a statutory scheme nearly identical to Montana's. 396 F.3d 569, 572, n.3 (4th Cir. 2005) ("Under West Virginia's statutory scheme, the state is the initial seller of the tax lien; thereafter, the state provides the tax lien purchaser with the mechanism to provide notice to interested parties. The state also extinguishes the owner's rights to the property by issuing the tax deed to the property. In order to accomplish a tax sale, then, private parties must 'make use of state procedures with the overt, significant assistance of state officials,' and, thus, there is state action.") (quoting *Pope*, 485 U.S. at 486); *see also Davis Oil Co. v. Mills*, 873

F.2d 774, 786-787 (5th Cir. 1989) (private party's foreclosure of mortgage using state's procedures required private party provide notice to interested third-parties to comply with due process).

Zinvest is a state actor given the significant involvement of state officials to complete the tax sale. The county treasurer was responsible for conducting the tax lien sale, issuing the tax lien certificates and assignments to Zinvest and providing the tax deed to Zinvest. 15-17-211 *et seq.*, 15-18-211 *et seq.*, MCA. Zinvest's delegated role was to provide notice to interested parties, without which the county treasurer could not issue the tax deed. 15-18-212, MCA; *Lowery v. Garfield County*, 122 Mont. 571, 580, 208 P.2d 478, 483 ("The statute requiring what notice shall be given and the filing of the affidavit are a limitation upon the power of the county treasurer to issue the tax deed and render void any deed issued by him unless and until the statutory requirements have been fully complied with.")

4. To the extent Zinvest contends its notice by publication constitutes alternate notice to Wells Fargo, the district court erred in finding the notice complied with 15-18-212(6), MCA.

When an interested party's address is known or readily discoverable, notice by publication alone does not comply with due process; it must be supplemented by notice mailed to the mortgagee's last known available address or by personal service. Notice by publication may be sufficient when an interested party's address is unknown or readily discoverable. The published notice must identify "the name of

the party for whom the address is unknown." Zinvest's published notice did not identify Wells Fargo as a party for whom the address was unknown. The fact it was published at the same time the notices were mailed—*i.e.*, before Zinvest knew the mailings were returned undeliverable—belies any claim the publication was intended to provide alternate notice to Wells Fargo.

"When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." *Mennonite*, 462 U.S. at 798; *see also Showell v. Brosten*, 2008 MT 261, ¶ 18, 189 P.3d 1210, 1214 ("Notice of a pending tax sale by publication must be supplemented by personal service or notice mailed to the last known address of interested parties.") (citing *Tax Lien Servs.*, *supra*, 919 P.2d at 399; *Mennonite*, 462 U.S. at 798).

Zinvest's notice by publication does not cure its failure to take reasonable steps to provide alternate notice to Wells Fargo by mail. *Jones*, 547 U.S. at 237 (rejecting argument notice by publication was sufficient follow up to returned notice by mail). Notice by publication would only arguably be sufficient if there were no reasonable steps Zinvest could have taken to notify Wells Fargo by mail, an argument Zinvest has never made or presented evidence to support.

Even in this instance, Zinvest's publication notice failed to comply with 15-18-212(5), MCA. 15-18-212(5), MCA, requires notice by publication "[i]n all cases

in which the address of an interested party is not known." If Wells Fargo's address was unknown, Zinvest was required to publish notice once a week for two successive weeks containing the information required by [15-18-212(6), MCA], plus:

(a) the name of the party for whom the address is unknown, (b) a statement that the address of the party is unknown, (c) a statement that the published notice meets the legal requirements for notice of a pending tax deed issuance, and (d) a statement that the party's rights in the property may be in jeopardy.

15-18-212(6), MCA; *see also Harris v. Larson*, 2008 MT 289, ¶ 13, 210 P.3d 701 ("Since Larson was an interested party whose address was unknown after the two certified mailings failed, the Harrises were required to publish notice of the tax deed sale once a week for two successive weeks within the time frames described in § 15–18–212(5), MCA.")

Zinvest published notice beginning June 15, 2018, the same date it mailed notice to Wells Fargo. (ROA.18 (ex. B-1, adm. rsp. at 6, 8; ex. B-2, proof of notice at 34-45); appx. 4.) It could not have intended to provide notice to Wells Fargo as a "party for whom the address is unknown" because the publication identifies an address for Wells Fargo (the same Minnesota address used in the mailed notices) and the mailed notices had not yet been returned. (ROA.18 (ex. B-2, envelopes at 35, 42); appx. 4 at p. 2, 9.) The treasurer could not legally issue the tax deeds in light of this failure. *Harris*, 2008 MT at ¶ 13 (citing *Tax Lien Servs.*, 277 Mont. at 133; *Moran*, 261 Mont. at 483).

B. The district court erred in awarding Zinvest attorneys' fees.

The district court erred in awarding Zinvest attorneys' fees because Wells Fargo should have been the prevailing party. Even if Zinvest should prevail, awarding attorneys' fees was error because (1) Zinvest's motion was deemed denied pursuant to M. R. Civ. P. 59(f), (2) no "equitable considerations" supported an award of attorneys' fees, and (3) the tangible parameters test was not satisfied.

1. Zinvest's motion was deemed denied.

Zinvest's motion for attorneys' fees is treated as a rule 59(e) motion to alter or amend the judgment. *Ballou v. Walker*, 2017 MT 197, ¶ 22, 388 Mont. 283, 400 P.3d 234 ("Ballou filed a motion for attorneys' fees pursuant to M. R. Civ. P. 54(d) on January 14, 2016, after the judgment was entered and filed on December 30, 2015. Since the motion was entered subsequent to judgment, her motion is treated on review as a rule 59(e) motion to alter or amend the judgment.") Rule 59(f) requires the district court rule on a rule 59(e) motion within 60 days from its filing or it is deemed denied. M. R. Civ. P. 59(f). This deadline may be extended to 120 days from filing if the district court issues an order within the first 60 days extending the time to rule on the motion. *Id.*

Assuming the district court timely issued an order extending the time to rule on Zinvest's motion, the latest date it could have been granted was March 22, 2022. *Id.* The district court erred by granting it on May 10, 2022. *Ballou*, 2017 MT at ¶

22; *Green v. Gerber*, 2013 MT 35, ¶¶ 25, 27, 369 Mont. 20, 303 P.3d 729 ("While many of the cases cited herein erroneously conclude that the district court lost jurisdiction after failing to meet a time bar, these cases also stand for the proposition that the time limits set forth in rules 59 and 60 are mandatory and should be strictly enforced . . . Thus, though the district court had jurisdiction to act after the 60-day 'deemed denied' deadline had passed, it erred in categorically ignoring the expiration of the deadline and granting the motion to set aside the default judgment.")

2. Zinvest failed to establish its right to attorneys' fees.

Montana follows the American Rule for attorney fees, which prohibits fee-shifting in most cases, absent statutory or contractual authority to the contrary. *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, supra, 2019 MT at ¶ 63. Zinvest claims attorneys' fees "as supplemental relief" to the denial of Wells Fargo's declaratory judgment action. (ROA.24 (motion at p. 2).)

27-8-311, MCA, "authorizes a court to award attorney fees when the court, in its discretion, deems such an award 'necessary or proper.'" *Trustees of Indiana Univ. v. Buxbaum*, 2003 MT 97, ¶¶ 30-31, 315 Mont. 210, 69 P.3d 663. "The threshold consideration in determining whether an award of attorney fees is necessary or proper under § 27-8-313, MCA, is whether equitable considerations support the award." *Davis v. Jefferson Cty. Election Off.*, 2018 MT 32, ¶ 13, 390 Mont. 280, 412 P.3d 1048. If the equities support an award, the court must then apply the three-

part "tangible parameters test" adopted *Buxbaum* to determine whether an award of attorney fees is necessary or proper under 27-8-313. *Id.*

"Such relief is rarely afforded." *Whitefish Congregation of Jehovah's Witnesses, Inc. v. Caltabiano*, 2019 MT 228, ¶ 42, 397 Mont. 284, 449 P.3d 812; *W. Tradition P'ship, Inc. v. Att'y Gen. of State*, 2012 MT 271, ¶ 11, 367 Mont. 112, 291 P.3d 545 ("While § 27–8–313, MCA, may provide a statutory basis for awarding fees, its reach is narrow."); *Horace Mann Ins. Co. v. Hanke*, 2013 MT 320, ¶ 35, 372 Mont. 350, 312 P.3d 429 (the court has "limited the circumstances under which a court may award attorney's fees in a declaratory judgment action.")

Zinvest's motion merely argues it is entitled to attorneys' fees because Wells Fargo filed a declaratory judgment action and lost on summary judgment. (ROA.24 (motion at p. 2).) But 27-8-313, MCA, does not authorize attorneys' fees simply because a party prevailed in a declaratory judgment action or by defending its property rights. *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶¶ 44, 354 Mont. 50, 221 P.3d 1230 ("simply because a party filed an action seeking a declaratory judgment it is not automatically presumed that an award of attorney fees is necessary and proper."); *JRN Holdings, LLC v. Dearborn Meadows Land Owners Ass'n, Inc.*, 2021 MT 204, ¶ 2, 405 Mont. 200, 493 P.3d 340 ("Merely prevailing 'in defending private property rights cannot qualify as a sufficiently compelling reason to justify an award of attorney fees under § 27-8-313, MCA.") (quoting *Hughes v.*

Ahlgren, 2011 MT 189, ¶ 20, 361 Mont. 319, 258 P.3d 439). "If such were the case, an award of fees to the prevailing party would be warranted in every garden variety declaratory judgment action and the American Rule on attorney fees would be eviscerated." *Mungas*, 2009 MT at ¶¶ 44.

In supplemental briefing filed well after rule 54(d)(2)(B)(i)'s 14-day deadline, Zinvest argued for the first time the alleged disparity in size between Wells Fargo and Zinvest is an equitable consideration sufficient to support an award of attorneys' fees. (ROA.37 (suppl. brief at p. 3); ROA.41 (suppl. reply); ROA.42 (aff't).)³ This belated argument appears intended to address this Court's repeated admonishment equitable considerations are not present when similarly situated parties are genuinely disputing their rights. *Whitefish Congregation*, 2019 MT at ¶ 42 ("The equities generally do not support an award of attorney fees 'if similarly situated parties genuinely dispute their rights.'") (quoting *Hughes*, 2011 MT at ¶ 16); *Mungas*, 2009 MT at ¶ 46 ("In this case, we have similarly situated parties disputing whether a contract provision is void. In applying equitable considerations to the facts of this case, the court concludes that the equities do not support an award of attorney fees.");

³ Zinvest does not dispute it "is in the business of purchasing assignments of tax sale certificates." (ROA.26 (objection at p. 5) (quoting *Zinvest, LLC v. Hudgins*, 2014 MT 201, ¶ 5, 376 Mont. 72, 330 P.3d 1135.) Or that it has been involved in dozens of transactions involving tax lien certificates and tax deeds over the last 10 years in Missoula County alone, and has litigated at least five cases related to tax sale certificates in this Court. (ROA.26 (objection at p. 5-6 & ex. 1).)

United Nat. Ins. Co. v. St. Paul Fire & Marine Ins. Co., 2009 MT 269, 352 Mont. 105, 214 P.3d 1260 ("Here we have two similarly situated parties disputing the interpretation of a contract. Under these circumstances, the equities do not support an award of attorney fees to St. Paul."); *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 2014 MT 69, ¶ 76, 374 Mont. 229, 328 P.3d 586 ("We also agree with the district court's assessment that the parties were not unequal in their respective status or position."); *JRN Holdings, LLC*, 2021 MT at ¶ 2 ("The record does not support the district court's conclusion that the parties were on unequal footing.")

This Court has found the disparity of the parties' position was so great it constituted an equitable consideration in only exceptional circumstances not present here. *City of Helena v. Svee*, 2014 MT 311, 377 Mont. 158, 339 P.3d 32; *Montana Immigrant Just. All. v. Bullock*, 2016 MT 104, ¶ 50, 383 Mont. 318, 371 P.3d 430 (describing *Svee* as "one of the rare instances in which equitable considerations did support an award of attorney fees in a declaratory judgment action" and rejecting argument it "changed significantly" the standard for authorizing attorney fees in declaratory judgment actions.)

Nor was there any evidence Wells Fargo was not genuinely disputing the validity of the tax lien certificates and tax deeds. This Court routinely finds equitable considerations are lacking in the absence of bad faith or an ulterior motive. *Hughes*,

2011 MT at ¶ 16 ("Nothing in the record indicates that Hughes acted in bad faith in bringing the declaratory judgment action."); *New Hope Lutheran*, 2014 MT at ¶ 76 ("We agree with the district court that this case involved a genuine dispute between the rights of the parties that required complex legal analysis of competing claims . . . the parties were similarly situated and both were, as noted by the district court, 'exceptionally well represented by competent legal counsel in the face of settled, but uncommonly litigated, law."); *JRN Holdings*, 2021 MT at ¶ 2 ("The record also does not support the district court's apparent conclusion that JRN acted in bad faith. It is evident in the record that JRN pursued this lawsuit with the intention of lawfully and peacefully resolving the parties' dispute."); *Associated Mgmt. Servs., Inc. v. Ruff*, 2018 MT 182, ¶ 83, 392 Mont. 139, 424 P.3d 571 (although "Ruff prevailed on AMS's declaratory judgment claim, [] the claim was not frivolous" and there was no evidence "AMS instituted this action in furtherance of an improper motive.")

Zinvest was required to show more than it was the prevailing party. As there is no evidence (or findings by the district court) Zinvest was an unsophisticated party who was at any disadvantage litigating these claims or that Wells Fargo was not genuinely asserting its rights, the district court erred in finding equitable considerations supported the award of attorneys' fees.

3. The tangible parameters test does not support award of attorneys' fees.

Even if equitable considerations supported an award of attorneys' fees, the district court was still required to apply the three-part "tangible parameters test" to determine whether an award of attorney fees is necessary or proper under § 27-8-313, MCA. *Davis*, 2018 MT at ¶ 13; *Ruff*, 2018 MT at ¶ 82. There is no evidence it did so; if it did, it did provided no findings explaining how the test applied.

Zinvest's motion and later briefing is mostly silent as to the tangible parameters test. The only mention is in Zinvest's initial reply, where it takes the position "such test is not required" when the defendant prevails in a declaratory judgment action. (ROA.30 (reply).) This is clearly wrong. *Martin v. SAIF Corp.*, 2007 MT 234, ¶¶ 27-28, 339 Mont. 167, 167 P.3d 916 ("SAIF [a prevailing defendant] cannot satisfy at least two elements of the tangible parameters analysis. The district court's reliance on the fact that SAIF prevailed, and therefore, should be entitled to attorney fees does not comport with the 'necessary and proper' requirement set forth in *Buxbaum*."); *see also Hughes*, 2011 MT at ¶ 13 (reciting two-step analysis for prevailing defendant to recover attorneys' fees under 27-8-313); *JRN Holdings*, 2021 MT at ¶ 62.

Proper application of the test shows Zinvest cannot be awarded attorneys' fees. The parameters identify "situations in which 1) [the defendant] possesses what the plaintiffs sought in the declaratory relief action, 2) it is necessary to seek a

declaration showing the plaintiffs are entitled to the relief sought, and 3) the declaratory relief sought was necessary in order to change the status quo." *Svee*, 2014 MT at ¶ 22. The test cannot support an award to Zinvest because it was Wells Fargo, not Zinvest, who filed the declaratory action. *Martin*, 2007 MT at ¶ 27 ("SAIF cannot satisfy even the first prong of the tangible parameters test as it actually sought proceeds from Martin's settlement," not the other way around.)

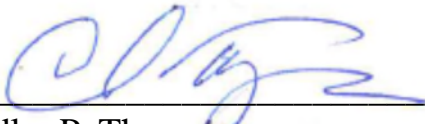
CONCLUSION

This Court must reverse and render judgment in favor of Wells Fargo. Wells Fargo is entitled to a judgment declaring the tax deeds to Zinvest are null and void or, in the alternative, Zinvest's title is subject to Wells Fargo's deed of trust. Even if the district court correctly determined the underlying issues in favor of Zinvest, it erred in awarding attorneys' fees. In the alternative, this Court must reverse and remand to the district court for further proceedings.

Dated July 8, 2022

Respectfully submitted,

AKERMAN LLP

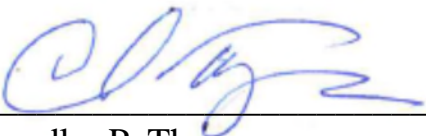
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CERTIFICATE OF COMPLIANCE

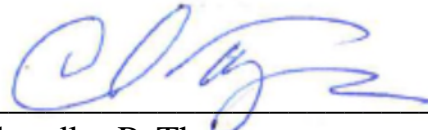
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I certify I mailed a copy of **APPELLANT WELLS FARGO'S OPENING BRIEF** to each attorney of record on July 8, 2022 as follows:

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