IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-22-0063

MICHAEL SANTACROCE,

Plaintiff/Appellee,

vs.

KENNITH G. FERRON,

Defendant/Appellant.

On Appeal from the Montana Eleventh Judicial District Court
County of Flathead
Cause No. DV-19-1029(A)
Honorable Amy Eddy Presiding

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

The Appellee, Santacroce, filed his complaint seeking enforcement of covenants, restraint of nonresidential activities, and damages resulting from violations. (Document #1). After answering (Document #4), the Appellant, Ferron, secured a judicial substitution. Then, after Ferron's counsel secured the Judge's permission to try the case [Documents # 27, 28 and 29], the matter went to trial on May 6th and May 7th of 2021. (Documents #44 and 47). The court issued its Findings of Fact, Conclusions of Law and Order (Document #48) awarding injunctive relief and attorney's fees but not damages. Santacroce filed his bill of costs and affidavit of attorney's fees. (Documents #49 and 50). Ferron objected to the fees and costs and requested a hearing. (Document #51). Ferron also sought a new trial or relief from judgment. (Document #53). Both of those motions were denied. (Document #59). Ferron withdrew his request for hearing on his objections to attorney's fees. (Document #63). A judgment was entered on January 7, 2022 granting a permanent injunction and attorney's fees as supported by uncontested affidavits. (Document #67). From that Judgment and the Findings of Fact and Conclusions of Law, Ferron appealed. There is no cross-appeal but, Santacroce is requesting additional attorneys fees and costs incurred in this appeal.

ISSUES PRESENTED

Addressing Issues Raised by the Appellant:

1. Ferron phrases the first issue as: "Did the District Court err in finding that the Ferron property has been used for commercial purposes in violation of ¶¶ 1 and 3 of the covenants?" Santacroce rephrases the issue to:**"Were the District Court's Findings supported by substantial evidence?"**

2. Ferron's second issue is: "Did the District Court err when it concluded that Plaintiff is entitled to injunctive relief?"

Appellee's Request for Attorneys Fees. Santacroce will also address the following: 3. Santacroce Is Entitled to His Attorney Fees on Appeal.

STANDARD OF REVIEW

This Court reviews "findings of fact entered after a bench trial in a civil action to determine whether they are supported by substantial credible evidence. . . .in the light most favorable to the prevailing party and leav[ing] the credibility of witnesses and weight assigned to their testimony to the determination of the district court. . . .a district court's conclusions of law to determine whether they are correct. . . . Even when there is a conflict in the evidence, . . . [this Court] will uphold a district court's

decision where there is substantial credible evidence to uphold its findings of fact and conclusions of law." ***Masters Grp. Int'l, Inc. v. Comerica Bank***, 2021 MT 161, ¶19, 491 P.3d 675 (Citations omitted). In conducting its review, this Court does not "disturb the weight that the fact finder has assigned to the testimony of each witness." ***Shephard v. Widhalm***, 2012 MT 276, ¶ 31, 290 P.3d 712, 717; ***State v. Thorp***, 2010 MT 92, ¶ 24, 231 P.3d 1096,[See also: ***Cameron v. Cameron*** , 179 Mont. 219, 228, 587 P.2d 939, 945 (1978)].

Further, this Court "will not disturb on appeal the fact finder's determination of witness credibility. ***Thorp***, at ¶ 24. The determination of witness credibility rests exclusively within the province of the finder of fact and will not be disturb on appeal. ***Hendricks v. State***, 2006 MT 22, ¶ 16, 128 P.3d 1017. ***Varano v. Hicks,*** 2012 MT 195,¶ 9, 285 P.3d 592.

The standard of review for granting an injunction is, as Ferron stated, that the granting of an injunction is a matter of discretion resting in the District Court and it will be sustained unless an abuse of discretion is shown. ***Madison Fork Ranch v. L & B Lodge Pole Timber Prods.,*** 189 Mont. 292, 302, 615 P2d. 900, 906 (1982),

A decision on a request for an award of attorney fees is reviewed for an abuse of discretion unless a contract requires an award of fees [as required by the covenants

here], in which case a court lacks the discretion to deny the request. ***Gibson v. Paramount Homes***, 2011 MT 112, ¶ 10, 253 P.3d 903. "[I]f a contract includes a provision stating that a prevailing party is entitled to cost and attorney fees arising from litigation under the contract, appellate cost and attorney fees are included under the provision." ***Boyne USA, Inc. v. Lone Moose Meadows, LLC,*** 2010 MT 133, ¶¶ 26-27, 235 P.3d 1269. "[A]n attorney's fee award that is based on competent evidence will not be disturbed on appeal." ***Renville v. Farmers Ins. Exchange***, 2004 MT 366,¶ 20, 105 P.3d 280 citing ***Cochran v. State***, 2003 MT 318, ¶ 8, 80 P.3d 423.

STATEMENT OF THE FACTS

Prior to restating the facts, Santacroce points out that Ferron's primary source for his statements of fact, which contradict the court's findings, is Mr. Ferron testimony [Trans. pgs. 230 - 299, 325-326] which the court found less than credible. (Finding 15). For that reason, Santacroce will focus on the credible evidence.

The parties' properties are governed by covenants. Those covenants include those listed by Judge Eddy in her finding number six (Document# 48). The amended covenants provide at ¶ 3:

> *No land or buildings may be used except for residential purposes only, and no type of buildings may be erected, altered placed or permitted to remain except for residential purposes, to exclude garages, livestock barns and shelter, and storage. No dwelling, building or other structure may be*

occupied as a multi-family dwelling. No part of the subject property shall be used at any time for any business, trade, manufacture or any other commercial purpose whatsoever, except as follows:

a. Sales activity necessary to promote the development of the subject property.

b. Personal home office activity for a professional business person.

c. Normal agricultural use shall be maintained on areas not immediately occupied for residential purposes. Agricultural products and crops may be grown. Farm Animals such as livestock and found may be kept and raised, only for personal use. In order to avoid a large number of large animals concentrated in a small area, feed lots, poultry and swine lots are expressly prohibited."

Not only is commercial use of the property prohibited with a few exclusions, the property may only have structures which are residential. The properties under the covenants were to provide "country residential living." (Trans. pg. 176, lns. 3 -7; Exhibit 3. Finding 5). Relevant to these proceedings, the home has a detached gymnasium/shop which was built in 2004. This structure was built to replace a commercial gym space they had lost in town. It was not to simply store gym equipment. [Trans. pg. 39, lns. 2 - 21; Find 9; Trans. pg. 39, lns. 5 -22; pg. 24, ln. 8 - pg. 26, ln. 22].

In 2015, during the course of the Defendant's dissolution proceedings in Flathead County Cause No. DR-13-163 (C), the court determined that Kennith and

Mahilom, the defendant's girl friend, operated a business known as Edge Fitness from the gymnasium and Kennith rebuilt cars for resale from the shop in the building. (Plaintiff's Exhibit 9). Judge Ulbricht also determined: "Gina Mahlum [sic], also resides in the marital home with her children and she operates a massage business from the premises." (Finding 8)

There was no real dispute that prior to 2016, Ferron was operating a "private" gym to provide personal training services to clients. Both Ferrons testified they knew this activity was in violation of the covenant limiting use of the property to "residential purposes." [See for example: Trans. pg. 39, Finding 10]. Ferron said he ended the business because he did not want it taken from him, but the property had already been divided when Exhibit 9 was issued by the divorce court. (Contrast Exhibit 9 and Trans. pg. 238).

Vergena ("Gena") Mahilom has lived on the property with Ferron since 2012. Although she testified she was unaware of any individual ever paying for training services at the gym, and that use of the gym has been limited to friends and family members, her testimony conflicted with her social media postings, made since 2016, advertizing 60-minute fitness sessions for $50 at her facility in Kalispell. (Exhibit 23,

combined with testimony at Trans. pgs. 140- 151[1]). This also conflicted with that of Diane Ferron who testified that she currently has friends who are still paying to train at the gym, and Ferron who admitted to a commercial purpose prior to 2016. [Trans. pgs.139 -149; 156-157, Finding12]. It conflicted with Exhibit 9.

"While Ferron denies any commercial activity since, it begs the question how he has been supporting himself. He has not had to file any taxes since 2015. He did sell an oriental silk rug for $65,000 in 2016 and has had to borrow money since then to support himself." (Finding 15) [Trans. pgs. 318-25 for an example of the confusing and inconsistent economic testimony he offered]. Mr. Ferron has no earnings but does

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[1] Mahilom testified that she formed Advanced Functional Fitness in 2019 (Trans. pg. 140). She used the property at issue and the address for that business. (Trans. pg. 141). She made the posts using the name at about the time she formed the LLC. Actually when she first formed the LLC (Trans. pgs. 142-143). Exhibit 23, pgs. 1,4 "train for the quality of life" "48 strong" was posted on July 31, 2020.(Trans pg. 144). An older post, pg 2 of 12, Ex 23, said she had done massage for 19 years in a comment labeled February 9. She at trial had been in her profession 23 years, meaning the post was done 4 years before the trial.(2017). [Trans. pg. 273] She then discussed the equipment she advertized at being in the gym but said that was not to equipment she was offering to her customers and they were not to come to the "private gym in Kalispell" as she advertized. [See: Trans. pgs. 144 to 149]. When she worked her job at Iron Horse — mobile massage, it was done in her <u>own name</u> and not the LLC. [Trans. Pg. 151]. She uses the property address to "let people know" **<u>she is in Kalispell</u>**. [Trans. pg. 153]. She tried to change her testimony after being contacted between her two times testifying by Ms. Breck. [Trans. pgs. 271-273].

have counsel and is processing this appeal. His counsel has also used the gym "for free." (Trans. pgs. 8-22, Exhibits 17, 30, and 32).

There was an increase in traffic up and down the road, people parking and going into the gym with gym bags, social media postings, etc. [Trans. pgs. 84, 85, 205 for example] (Finding16). The gym was not a livestock barn or shelter. It did not store equipment, the equipment was being used and only a portion of the building was a garage. (Trans. pg. 176, ln. 11 - pg. 177, ln. 6).

Kathy Redd moved to the Santacroce property in 2010. (Trans. pg. 52, lns. 10-12). Santacroce, who purchased his property in 2009, moved there in 2014 (Trans. pg. 122, ln. 15, Exhibit 1.) Kathy was refereed to Ferron for physical therapy in 2014 and he worked with her there. He was paid for the work. (Exhibit 38, Finding 11). Kathy saw the gym was well equipped, even more equipped than the prior commercial gyms she previously worked out. Kathy further testified: From 2012-2016 there was a lot of activity at the gym. There were 7 - 10 cars a day coming to the gym. (Trans. pgs. 59-61; pg. 88, ln. 9 - 14). The traffic at a similar rate continued even after suit was filed until the settlement conference. (Trans. pg. 61).

The gym is 24 by 60 which is a foot print even bigger than the home. It was not built for family use. (Trans. pg. 40, ln. 23 - pg. 41, ln. 24). The gym building was

constructed so that one could not see the gym from the outside. (Trans. pg. 57, lns. 22 - pg. 58, ln. 9). Mahilom after 2019 advertised working in the gym. (Trans. pg. 76, ln. 14 - pg. 79, ln. 5). The parking area near the gym and used with the gym was immediately plowed when it snowed. (Trans. pg. 85, lns. 1 - 15). Santacroce testified that since moving in he saw 8- 10 vehicles daily going into the Ferron property. There were over a thousand photographs of the traffic taken. (Trans. pg. 91, ln. 3 - pg. 92, ln.2).

In addition to activity at the gym, there was extensive testimony about vehicles being repaired on the Ferron property. That the area which is a parking lot is cleared of snow first. (See: Trans. pg. 89, lns. 9 - 90, ln. 12; pg. 95 ln. 20 - pg. 96, ln. 4; pg. 119, lns. 18 - 120, ln. 1; pg. 130, ln. 7 - pg. 133, ln.11; pg. 167, ln.11 - ln. 25; pg. 174, ln. 20 - pg. 178, ln. 15; Exhibit 36, 37, 18, 19 and particularly page 6, and Exhibit 20.)

More of the facts will be detailed in the first argument.

SUMMARY OF ARGUMENTS

None of the standards set forth in ***Skelton Ranch, Inc. v. Pondera Cty. Canal & Reservoir Co.***, 2014 MT 167, ¶ 27, 328 P.3d 644, support reversal of the district court's decision. The court's findings were supported by evidence that a reasonable mind might accept to support a conclusion. ***Curry v. Pondera Cty. Canal & Reservoir***

Co., 2016 MT 77, ¶ 20, 37 P.3d 440. Santacroce will review the specific findings and reference the Court to the substantial evidence supporting them. This Court should ignore the testimony which the trial court found not credible.

Substantial evidence is "more than a mere scintilla of evidence but may be less than a preponderance." ***In re S.S.***, 2022 MT 75, ¶ 12, ____ P3d_____ citing ***In re J.H.***, 2016 MT 35, ¶ 24, 367 P.3d 339. This Court is to view the evidence in the light most favorable to the prevailing party, Santacroce. 2022 MT 75, ¶ 12; 2016 MT 35, ¶ 24. Substantial evidence supports the decision of the District Court to grant injunctive relief.

The court could easily disbelieve Ferron, when he was dishonest about installing his gymnasium on property on which commercial gym was prohibited, continued to be dishonest about disclosing any income therefrom. Similarly Ferron's girlfriend could not keep her story straight as to when she was advertising and for what she was advertising. As the court heard all of this, it saw an attempt to deceive. It saw on an attempt to hide direct evidence which was successful. It recognized that there was proof Ferron was hiding facts through pertinent and admissible circumstantial evidence.

The court did not err when it concluded that Santacroce was entitled to

injunctive relief. Injunctive relief was specifically provided as a remedy in the covenants. Here, pecuniary relief would not allow continuation of nonresidential use and continued violation of the covenant could result in multiple suits. Thus, §27-19-102, MCA allows the court to grant the injunction.

ARGUMENT

1. Were the District Court's Findings Supported by Substantial Evidence?

There was clearly substantial evidence supporting the court's findings. An examination of the particular findings and the evidence, as stated in the Statement of Facts, demonstrates the court clearly had adequate support for its findings and conclusions. The court in fact could have imposed a much more significant penalty than the injunction.

This Court will hold factual findings clearly erroneous if they are not supported by substantial evidence, if the court below misapprehended the effect of the evidence, or if, upon review, the justices are left with the definite and firm conviction that a mistake has been made. ***Skelton Ranch, Inc. v. Pondera Cty. Canal & Reservoir Co.***, 2014 MT 167, ¶ 27, 328 P.3d 644. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion, even if the evidence is weak or conflicting." ***Curry v. Pondera Cty. Canal & Reservoir Co.***, 2016 MT 77, ¶ 20, 383

Mont. 93, 37 P.3d 440. See: ***Twin Creeks Farm & Ranch, LLC v. Petrolia Irrigation Dist.***, 2022 MT 19,¶21; ***State v. Henrich,*** 268 Mont. 258, 268, 886 P.2d 402, 408 (1994).

The gym was constructed so that Ferron and his prior spouse could move the commercial gym they had started elsewhere to their property, knowingly violating the covenants. This was not just the storage of gym equipment as alluded to in Ferron's brief. (Trans. pg. 39, lns. 5 -22; pg. 24, ln. 8 - pg. 26, ln. 22). The properties under the covenants were to provide "country residential living." (Trans. pg. 176, lns. 3 -7; Exhibit 3.) In Judge Eddy's Finding 6, the covenants are restated. (Doc #48). The amended covenants provide at ¶ 3 that not only is commercial use of the property prohibited with a few exclusions, the property may only have structures which are residential." In Montana "residential" means "used as a residence or by residents." The transient use by non-residents of the property is not a residential use. See: ***Thisted v. Country Club Tower Corp***., 146 Mont. 87, 93-94, 405 P.2d 432 (1965) overruled on other grounds ***Gray v. City of Billings*** 213 Mont. 6, 689 P.2d 268 (1984). Our Court has defined "residential" as "dwelling in a place for some time," ***Tipton v. Bennett,*** 281 Mont. 379, 382, 934 P.2d 203, 205 (1997) cited by ***Craig Tracts Homeowners' Ass'n v. Brown Drake, LLC*** 2020 MT 305, ¶14. Though the court may have ordered removal of the structure, it did not.

Judge Eddy found[2]:

> *(8) In 2015, during the course of the Defendant's dissolution proceedings in Flathead County Cause No. DR-13-163 (c), Judge Ulbricht found that Kennith and Mahilom operated a business known as Edge Fitness from the gymnasium. She also found Kennith rebuilt cars for resale from the shop in the building. (Plaintiff's Exhibit 9). Judge Ulbricht also determined: "Kennith is operating two businesses out of the marital home and surrounding property: Edge Fitness, a personal training business and KGF Paint and Trim, a business engaged in repairing motor vehicles for resale. His girlfriend, Gina Mahlum [sic], also resides in the marital home with her children and she operates a massage business from the premises."* **[Plaintiff 's Exhibit 9]**
>
> *(9) Relevant to these proceedings, the home has a detached gymnasium/shop which was built in 2004. Diane Ferron testified this structure was built to replace a commercial gym space they had lost in town.* **[Trans. pg. 39, lns. 2 - 21]**. *Once finished, she choreographed and taught dance lessons and the Ferron provided personal training services.* **[Trans. pg. 240]**
>
> *(10) There does not appear to be any real dispute that prior to 2016, Ferron was operating a "private" gym to provide personal training services to clients. Both Ferron testified they knew this activity was in violation of the covenant limiting use of the property to "residential purposes."* **[Trans. pg. 39]**
>
> *(12) Vergena ("Gena") Mahilom has lived on the property with Ferron since 2012. She testified she is unaware of any individual ever paying for training services at the gym, and that use of the gym has been limited to friends and family members. This testimony is in conflict with her social media postings advertising 60-minute fitness sessions for $50 at her facility in Kalispell. These posts were made since 2016. Ex. 23. This testimony is also in conflict with that of Diane Ferron who testified that she currently has friends who are still paying to train at the gym, and*

[2]Brackets indicate support in the record but not necessarily all the support.

Ferron who admitted to a commercial purpose prior to 2016. **[Trans. pgs. 139 -149; 156-7; 269-278].**

(14) Ferron vaguely testified that they had stopped offering any personal training, other than to family and friends who have access to the gym, at some point after 2014. This is also in conflict with that of Diane Ferron who testified that she currently has friends who are still paying to train at the gym. **[Trans. pg. 48]**

(15) While Ferron denies any commercial activity since, it begs the question how he has been supporting himself. He has not had to file any taxes since 2015. He did sell an oriental silk rug for $65,000 in 2016 and has had to borrow money since then to support himself. **[Trans. pgs. 318-25 for example of the confusing and inconsistent economic testimony he offered].**

(16) Santacroce and Redd testified credibly as to the increased traffic up and down the road, people parking and going into the gym with gym bags, social media postings, etc. **[Trans. pgs. 84, 85, 205 for example]**

(17) The Ferron property has been used for commercial purposes in violation of ¶¶1 and 3.

The evidence was just as Judge Eddy found. Ms. Mahilom testified that for the five years prior to the trial, neither she nor Ferron owned property other than that at issue. (Trans. pg. 139, lns. 2 -12). She had formed *Advanced Functional Fitness, LLC* in June 2019. (Exhibit 21, Trans. pg. 140, lns. 2-13; pg. 142 lns. 24-25). She had been a massage therapist at the time of trial for 23 years. (Trans. pg. 139, lns. 16-7). Her testimony showed that at a minimum an unsuccessful business was being run from and advertized from the property between 2017 and 2019, the year this suit was filed. (Trans. pgs. 139 - 149). As the judge noted although Mahilom denied any commercial activity was conducted on the property since she moved on the property

in 2012, but commercial activity was found to be occurring on the property in 2015.[3](Trans. pgs. 155-56; Plaintiff's Exhibit 9, page 3 of 5; Finding 10).

The gym was not a livestock barn or shelter. It did not store equipment, the equipment was being used and only a portion of the building was a garage. (Trans. pg. 176, ln. 11 - pg. 177, ln. 6). Thus, supporting the commercial use determination.

Redd saw the gym was well equipped, even better equipped than the prior commercial gyms where she would work out. From 2012-2016 there was significant activity at the gym. There were 7 - 10 cars a day coming to the gym. (Trans. pgs. 59-61; (pg. 88, lns. 9 - 14). The traffic volume continued even after suit was filed until the settlement conference[4]. (Trans. pg. 61).

The mortgage payments on the property are a total of approximately $1,650.00 a month. (Trans. pg. 37, ln 22 - pg. 38, ln 2). Ferron, who was not credible, had no income according to his testimony. [Trans. pgs. 318-325].

The gym is 24 by 60 which is a foot print even bigger than the home. It was not built for family use. (Trans. pg. 40, ln. 23 - pg. 41, ln. 24). The gym building was constructed so that one could not see the gym from the outside. (Trans. pg. 57, ln. 22 - pg. 58, ln. 9). Mahilom after 2019 advertised working in the gym. (Trans. pg. 76, ln. 14 - pg. 79, ln. 5). Santacroce testified that since moving in he saw 8- 10 vehicles going into the Ferron property daily. There were over a thousand photographs of the traffic taken and provided to Ferron in discovery. (Trans. pg. 91, ln. 3 - pg. 92, ln.2).

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[3]The witness was recalled and tried unsuccessfully to retract some of her testimony after being called by Ms Breck the night before because there were concerns about her testimony. (See: Trans. pgs. 271 - 280).

[4]See: Only for the date Doc. #19, Settlement Master's Report, October 26, 2020.

In addition to activity at the gym there was extensive testimony about vehicles being repaired on the Ferron property. The parking area near the gym and used with the gym was immediately plowed when it snowed. (Trans. pg. 85, lns. 1 - 15). (See: Trans. pg. 89, lns. 9 - 90, ln. 12; pg. 95 ln. 20 - pg. 96, ln. 4; pg. 119, lns. 18 - 120, ln. 1; pg. 130, ln. 7 - pg. 133, ln.11; pg. 167, lns.11 - ln. 25; pg. 174, ln. 20 - pg. 178, ln. 15).

On appeal, as in the district court, Ferron tried to attack Santacroce's integrity with his discussion of Santacroce pounding on the door and making accusations of Ferron having sex with "his wife." [Ferron Brief page 11, Section III, 2nd paragraph]. When Santacroce sought to respond to this attack below, this was the exchange with the court:

> THE COURT: Mr. DeJana, do you have any rebuttal?
>
> MR. DeJANA: I'm going to call Kathy and --
>
> THE COURT: What is going to be the scope?
>
> MR. DeJANA: Scope is going to deal with the alleged altercation where supposedly Michael said quit doing something with my wife.
>
> THE COURT: I think he already denied that happened.
>
> MR. DeJANA: She had denied.
>
> THE COURT: I know from their prior testimony that they deny that whole thing happened.
>
> MR. DeJANA: Okay. It's just whether he used the language to explain right. And then Michael -- well the only thing he talked about is threatening to shoot and a few things, I'm not even sure they're relevant, but he would like to deny those.
>
> THE COURT: They're not relevant to my decision because there's no counterclaim.
>
> MR. DeJANA: With that, we don't have to provide anything.

[Trans. pgs. 344-45].

Again, we see the court was not concerned with Ferron's personal attacks on Santacroce. It determined the extent those had been addressed because Ferron's claims carried no weight. This foretold the court's view of Ferron's credibility.

There is clearly substantial evidence to support the court's findings. Substantial evidence is "more than a mere scintilla of evidence but may be less than a preponderance." ***In re S.S.***, 2022 MT 75, ¶ 12, ____ P3d_____ citing ***In re J.H.***, 2016 MT 35, ¶ 24, 367 P.3d 339. When determining whether substantial credible evidence supports the district court's findings, this Court is to view the evidence in the light most favorable to the prevailing party, Santacroce. 2022 MT 75, ¶ 12; 2016 MT 35, ¶ 24. "In reviewing a district court's findings, [this Court will] not consider whether the evidence could support a different finding; nor [will it] substitute [its] judgment for that of the fact-finder regarding the weight given to the evidence." ***In re S.S.***, 2022 MT 75 ¶17 citing ***In re M.B.***, 2004 MT 304, ¶ 12, 100 P.3d 1006 (in turn citing ***In re L.S.,*** 2003 MT 12, ¶ 10, 63 P.3d 497). There is no misapprehension of the evidence. The circumstantial evidence shows, Ferron built his gym in a way that attempted to hide the activity. The gym was built to do business and not as a rural residential use. The traffic did not diminish from the time he was found to be doing business on the premises. Gym bags were carried from car to the gym and back. His

significant other did not tell the truth about the existence of commercial activities as shown by the prior court determination. Ferron's own testimony as to how he paid his mortgage and income was not credible. There was clearly substantial evidence the supported the court's decision.

2. DID THE DISTRICT COURT ERR WHEN IT CONCLUDED THAT PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF?

Ferron's arguments under these issues are based upon his premise the court's decision was not supported by substantial evidence, as he argued under the first issue. Here, Santacroce relies upon his first argument and supplements it briefly with the following.

The parties' covenants, Trial Exhibit 3, provide at §13: *"The parties hereto and every person here after receiving any right, title or interest in any tract in the subject property, shall have the right to prevent or stop violation of any of the covenants by injunction or other lawful procedure, in law or in equity, against the persons or persons violating or threatening to violate these covenants. Any person who shall prosecute any action successfully may recover any damage resulting from such violation*." Upon finding a breach the covenants, the equitable relief, injunction was clearly provided for by contract and was be granted.

Ferron concedes that §27-19-101 and §27-19-102, MCA allow in this situation, if supported by substantial evidence, an injunction. The injunction as argued above was supported by substantial evidence.

3. ***SANTACROCE IS ENTITLED TO HIS ATTORNEY FEES ON APPEAL.***

The parties' properties were subject to a set of covenants (Book 645 Page 514, Flathead County) which were later amended (Book 759, Page 544, Flathead County). The covenants and the amendment, Plaintiff's Exhibits 3 and 4, were stipulated into evidence. The pertinent portion of the covenants is:

Covenants: ¶ 14: *"Should suit be brought on these covenants and restrictions, a reasonable attorney's fee shall be awarded to the prevailing party."*

The district court awarded fees. (Docs. # 46 & 67). This award and its amount have not been contested on appeal. Thus, it should stand. A decision on a request for an award of attorney fees is reviewed for an abuse of discretion unless a contract requires an award of fees [as required by the covenants here], in which case a court lacks the discretion to deny the request. ***Gibson v. Paramount Homes***, 2011 MT 112, ¶ 10, 253 P.3d 903. "[I]f a contract includes a provision stating that a prevailing party is entitled to cost and attorney fees arising from litigation under the contract, appellate cost and attorney fees are included under the provision." ***Boyne USA, Inc.***

v. Lone Moose Meadows, LLC, 2010 MT 133, ¶¶ 26-27, 235 P.3d 1269. "[A]n attorney's fee award that is based on competent evidence will not be disturbed on appeal." ***Renville v. Farmers Ins. Exchange***, 2004 MT 366,¶ 20, 105 P.3d 280 citing ***Cochran v. State***, 2003 MT 318, ¶ 8, 80 P.3d 423.

Santacroce requests this Court award fees and costs for this appeal. He is entitled to costs by rule of this court[5]. Here, upon prevailing, Santacroce is also entitled to his attorney fees. "A court must award attorney fees if a contract provides for their recovery." ***Hill Cnty. High Sch. Dist. No. A v. Dick Anderson Constr., Inc.***,2017 MT 20, ¶27, 390 P.3d 602. When the contract, here the declaration of covenants, expressly allows an award of attorney fees, a court lacks the discretion to deny the requests. ***Wittich Law Firm, P.C. v. O'Connell,*** 2013 MT 122 ,¶29, 304 P.3d 375 citing ***Emmerson v. Walker***, 2010 MT 167, ¶ 20, 236 P.3d 598 and ***Gibson v. Paramount Homes***, 2011 MT 112, ¶ 10, 253 P.3d 903.

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[5]*Rule 19 (3) M. R App. Civ. P. "Costs. (a) Costs on appeal. Costs on appeal will be awarded to the prevailing party unless otherwise specifically provided by the supreme court in its decision. Taxable costs include costs of reproducing briefs and necessary appendices, costs incurred in transmission of the record, cost of the reporter's transcript if necessary for the determination of the appeal, and the fee for filing the notice of appeal. In the event that a dispute arises over which party has prevailed, that dispute, as well as the matter of costs, shall be resolved by the district court."*

An appeal was "simply another step in litigation and, as such, it is presumed that the contracting parties contemplate that an award of attorney fees would include fees on appeal." ***Boyne USA, Inc. v. Lone Moose Meadows, LLC,*** 2010 MT 133, ¶ 27, 235 P.3d 1269. "[I]f a contract includes a provision stating that a prevailing party is entitled to cost and attorney fees arising from litigation under the contract, appellate cost and attorney fees are included under the provision." 2010 MT 133, ¶ 26. When an entitlement to costs and attorney fees arises from contract, that entitlement includes costs and attorney fees on appeal. ***Gibson v. Paramount Homes***, 2011 MT 112, ¶ 21, 253 P.3d 903. This Court on remand should award costs and fees on appeal as determined by the District Court.

CONCLUSION

Ferron is correct. It is difficult to find direct evidence. He has succeeded in hiding that from his ex-wife, from the IRS and until now from neighbors being able to prove that he was violating the covenants. He set it up that way. He designed the premises so that the gym could not be seen from the outside. He had to bring his girlfriend back to testify to attempt to straighten up her confused story. He pays no taxes and has no records. And although he and his girlfriend were not credible, there was credible evidence that showed what Ferron was doing.

First, the traffic increased from when the court found there was business on property. Pictures show numerous vehicles on Ferron's property with some being repaired. Pictures show large trucks bringing in damaged vehicles and taking out repaired ones. At the very worst from Santacroce's position, Ferron's girlfriend established that in the years just prior to the suit being filed they were advertising for an unsuccessful business but still a business, still commercial practice and still on the Ferron property. How Ferron could support himself without any work, left a great question in the court's mind. His explanations were not credible. He was not credible. Santacroce watched the traffic as it increased and then decreased after the settlement conference. Kathy Reed watched the traffic and watched people heading with gym bags into the gym. Diane Ferron could only be attacked by leaving the record and putting none of the evidence cited against her in the record. Exhibit 23 provided a great deal of evidence and the clear indication was Gina was not being honest. There was sufficient evidence.

One must wonder how with no income, one appeals an injunction against doing what he says he does not do. Why did he even contest the issue in the lower court?

Here, after the proverbial snowstorm, the evidence like a horse walked along the sidewalk. Its tracks are clearly visible, we have a classic circumstantial evidence case. Ferron did not succeed this time in hiding violations of the covenants.

Ferron is not entitled to relief on appeal. He may disagree with the weight the court applied to different parties' testimony, but that is not grounds to set aside the court's findings. Here, Santacroce and Redd were found to be credible. Ferron was not. His girl friend was not. The Findings of Fact And Conclusions of Law along with the Judgment of the District Court should be affirmed. This Court should then award attorneys fees and costs for this appeal and direct the District Court to determine the amounts. The Judgment should be affirmed with a remand to determine costs and fees on appeal.

Dated this 22nd day of July 2022.
Richard De Jana & Associates, PLLC
by/s/ ***Richard De Jana***
Richard De Jana Esq.
Attorney for Santacroce

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that the Appellant's Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Corel WordPerfect X5, is not more than 5,700 words, not averaging more than 250 words per page, excluding the Table of Contents, Table of Authorities, Certificate of Service and this Certificate of Compliance.

Dated: July 22nd , 2022

/s/*Richard DeJana*

Richard De Jana, Esq.

CERTIFICATE OF SERVICE

I, Richard P. DeJana, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-22-2022:

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