IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 22-0515

INGE RUDBACH,

Petitioner,

v.

TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY, HONORABLE JENNIFER B. LINT, Presiding,

Respondent.

ORDER

Petitioner Inge Rudbach seeks a writ of supervisory control to reverse the August 1, 2022 Opinion & Order Re: Motion to Dismiss of the Twenty-First Judicial District Court, Ravalli County, in the District Court's Cause No. DV 19-433, *Travis and Jodie Spencer v. Inge Rudbach, et. al*. At our invitation, Justin Kirkbride, Mad Jack Enterprises LLC, d/b/a Win Home Inspection Five Valleys (collectively "Kirkbride"), co-defendants with Rudbach in the underlying case, responded in favor of Rudbach's petition, while Travis and Jodie Spencer (collectively, "Spencers"), Plaintiffs in the underlying case, responded in opposition to Rudbach's petition.

In the litigation, the Spencers pled various tort claims against Rudbach, from whom they purchased a residential property in Hamilton, and against Kirkbride, the home inspector who inspected the property prior to the Spencers' purchase. The Spencers allege the house was so severely infested with bats they were forced to demolish the home and that, while Rudbach had disclosed that bats were found in the home "occasionally," she failed to disclose the extent to which the residence was infested. Spencers further alleged that Kirkbride negligently failed to detect the infestation during its home inspection. Spencers demolished the home prior to initiating this litigation.

Rudbach moved to dismiss the Spencers' Complaint pursuant to M. R. Civ. P. 37, arguing that by demolishing the structure prior to notifying Rudbach about the bat

infestation, the Spencers deprived her of the opportunity to examine the evidence, thus placing her at an unfair disadvantage in the pending litigation. Rudbach asserted that the Spencers photographed "pieces of select evidence during the demolition" but deprived Rudbach of the opportunity to do the same. Rudbach also asserted that she lacked the opportunity to have experts examine the structure, while the Spencers' experts may testify about their firsthand impressions of the structure's condition at trial. Citing § 25-20-37(b)(2)(A)(v), MCA, the statutory citation to Rule 37, the District Court reasoned that the sanction of dismissal was not available in this situation because the statute authorizes dismissal only when a party violates a court order, and here, no litigation had been commenced or order issued at the time Spencers demolished the home. The District Court further concluded that it was "not reasonable to expect the Plaintiffs to preserve an allegedly uninhabitable home on the property where they needed a residence in which to live."

Supervisory control is an extraordinary remedy that is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when the other court is proceeding under a mistake of law and is causing a gross injustice, constitutional issues of state-wide importance are involved, or, in a criminal case, the other court has granted or denied a motion to substitute a judge. M. R. App. P. 14(3). Whether supervisory control is appropriate is a case-by-case decision. *Stokes v. Mont. Thirteenth Judicial Dist. Court*, 2011 MT 182, ¶ 5, 361 Mont. 279, 259 P.3d 754 (citations omitted). Consistent with Rule 14(3), it is the Court's practice to refrain from exercising supervisory control when the petitioner has an adequate remedy of appeal. *E.g., Buckles v. Seventh Judicial Dist. Court*, No. OP 16-0517, 386 Mont. 393, 386 P.3d 545 (table) (Oct. 18, 2016); *Lichte v. Mont. Eighteenth Judicial Dist. Court*, No. OP 16-0482, 385 Mont. 540, 382 P.3d 868 (table) (Aug. 24, 2016). Generally, pretrial discovery disputes are not appropriate for exercise of supervisory control and this Court will only "sparingly" exercise control over such matters, "under truly extraordinary circumstances where the lower court is proceeding under a demonstrable mistake of law and the failure to do so will place a party at a significant

disadvantage in litigating the merits of the case." *Mont. State Univ.-Bozeman v. Mont. First Judicial Dist. Court*, 2018 MT 220, ¶ 17 n.12, 392 Mont. 458, 426 P.3d 541 (citation and internal quotation omitted).

Here, Rudbach asserts that urgency and emergency factors exist because she is "an 83-year-old widow" who will have to "endure extended and needless litigation" due to the District Court's denial of her motion to dismiss. She alleges she has no adequate remedy on appeal for being forced to participate in ongoing litigation that she asserts should have been dismissed pursuant to her motion. In response, Spencers argue Rudbach's age and marital status do not create urgent or emergent factors, and that such an argument would entitle virtually all litigants who have a dispositive motion denied by a trial court to supervisory control.

We conclude this matter is not appropriate for exercise of supervisory control under the Rules of Appellate Procedure and the Court's long-held practices. We have stated that conserving resources, without more, is insufficient grounds to justify supervisory control where a party can seek review of the lower court's ruling on appeal and there is no evidence that relief on appeal would be inadequate. *Yellowstone Elec. Co. v. Mont. Seventh Judicial Dist. Court*, No. OP-19-0348, 397 Mont. 552, 449 P.3d 787 (table) (Aug. 6, 2019). We are not persuaded that allowing the District Court's ruling to stand would in and of itself cause irreparable harm. *E.g. Barrus v. Mont. First Judicial Dist. Court*, 2020 MT 14, ¶ 22, 398 Mont. 353, 456 P.3d 577 (defendant would have no adequate remedy of appeal if he were involuntarily medicated prior to appellate review of lower court's order allowing involuntary medication); *Park v. Mont. Sixth Judicial Dist. Court*, 1998 MT 164, ¶¶ 15-16, 289 Mont. 367, 961 P.2d 1267 (supervisory control appropriate regarding court order requiring criminal defendant to submit to mental evaluation and answer questions related to the charges against him because appeal cannot restore constitutional right not to be a witness against oneself).

We recognize the issue here has potential significance, and note that the only relief Rudbach sought from the District Court was dismissal of the action, which we have described as "an extreme sanction" for which the movant carries a heavy burden. *MSU-*

Bozeman, ¶ 25 (also stating factual elements to be proven for dismissal). Nonetheless, we have recognized the discovery rules "give rise to a common-law duty to preserve evidence when a party in control knows or reasonably should know that existing items or information may be relevant to pending or reasonably foreseeable litigation," and that the determination of when litigation became reasonably foreseeable "is an objective, *fact-specific standard* 'that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry.'" *MSU-Bozeman,* ¶ 23 (emphasis added) (citation omitted). Thus, a court's discretion concerning pre-litigation destruction of evidence is not necessarily limited to violation of a court order under Rule 37(b)(2)(A), and a court possesses authority to assess sanctions based upon its factual determinations under the governing standards, as stated in *MSU-Bozeman. See also, e.g. Flora v. First Judicial Dist. Court*, OP No. 20-0200, Order (June 9, 2020) (reh'g denied July 22, 2020) (district court found sanction of dismissal "too extreme" and instead limited the evidence the sanctioned party could present at trial). This Court is unable to take up such fact-specific considerations upon supervisory control. Therefore,

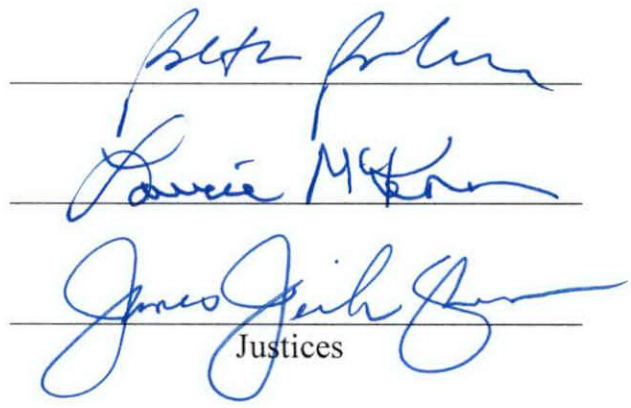
IT IS ORDERED that the petition for writ of supervisory control is DENIED and DISMISSED.

IT IS FURTHER ORDERED that the stay of proceedings imposed by this Court's September 20, 2022 Order is VACATED.

The Clerk is directed to provide immediate notice of this Order to counsel for Petitioner, all counsel of record in the Twenty-First Judicial District Court, Ravalli County, Cause No. DV-2019-433, and the Honorable Jennifer B. Lint, presiding.

DATED this 13th day of December, 2022.

Chief Justice



Justices