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Attorneys for Charles D. King

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 23-0149

FIRST INTERNET BANK OF
INDIANA,

Plaintiff, Counter-Defendant,
and Appellee,

vs.

PONTUS SK PORTFOLIO, LLC, and
MICHAEL K. PRESS,

Defendants, Counter-Plaintiffs,
and Appellants,

vs.

CHARLES D. KING

Intervenor and Appellee.

**APPELLEE CHARLES D. KING'S
MOTION TO DISMISS APPEAL**

STATEMENT OF ISSUE

Appellee, Charles D. King (“King”), submits this Motion to Dismiss Appeal on two grounds: (1) the appeal is moot, and (2) Appellants Pontus SK Portfolio, LLC and Michael K. Press (collectively, “Pontus”) voluntarily waived the right to appeal. Although finding that either the appeal is moot or Pontus voluntarily waived the right to appeal is sufficient to dismiss the appeal, both occurred.

The appeal is moot because Pontus failed to request a stay of judgment, the Sheriff of Richland County recorded a Sheriff’s Deed, and King subsequently transferred the property to SK Holdings LLC. Intrinsically, it is impossible for this Court to grant effective relief.

Pontus voluntarily waived the right to appeal because it requested and received a refund of its alleged redemption from the Clerk of District Court. By voluntarily accepting the benefit of the judgment, Pontus waived the right to appeal that judgment. Opposing counsel was contacted and objects to this motion.

PROCEDURAL BACKGROUND

Pontus owned property in Sidney, Montana and lost it through foreclosure at a sheriff’s sale to King as the purchaser. Pontus attempted to redeem the property by tendering an insufficient redemption amount. King sued, alleging the redemption amount was deficient. After conducting a hearing, the Seventh Judicial District Court, Richland County, Montana, in Cause No. DV-19-149 (the

“Action”) granted King’s Motion for Summary Judgment, ruling that Pontus tendered insufficient funds to redeem. At the conclusion of the hearing, after the Court ruled for King, counsel for Pontus requested that the order “direct the sheriff to return the money to [Pontus].” *Transcript*, p. 30.

King submitted a proposed order stating Pontus was entitled to reimbursement “upon the conclusion of any appeal or expiration of the deadline to appeal.” *Docket No. 97*. Pontus objected. *Id.* Ultimately, the Judgment entered allowed Pontus to “request...reimbursement of the improper redemption tender, \$1,281,308.43.” *Docket No. 99*, p. 2. Pontus then requested and received the deficient redemption funds. **Appendix A**; *see generally, Adkins v. City of Livingston*, 121 Mont. 528, 531, 194 P.2d 238, 239 (1948) (“The appellate court may receive proof or take notice of facts appearing outside the record for the purpose of determining the moot character of a question presented to it.”).

The Judgment also ordered the Sheriff to issue a Sheriff’s Deed to King. Pontus did not move to stay the Judgment or post a supersedeas bond. Absent a stay, the Sheriff recorded the Sheriff’s Deed. **Appendix B**. Thereafter, King transferred the property to SK Holdings LLC. **Appendix C**.

ARGUMENT

I. The Appeal is Moot Because this Court Cannot Effectuate Proper Relief.

“Mootness is a threshold issue which must be dealt with before addressing the underlying dispute.” *See Shamrock Motors, Inc. v. Ford Motor Co.*, 1999 MT 21, ¶ 17, 293 Mont. 188, 192, 974 P.2d 1150, 1153. This Court’s decision in *Turner v. Mountain Eng’g & Const., Inc.*, 276 Mont. 55, 915 P.2d 799 (1996) describes the interplay between mootness and voluntary waiver. An appeal is moot when the Court cannot grant effective relief. *Id.* at 63, 804.

In *Turner*, the district court entered a Decree of Foreclosure, the lien creditor appealed without staying judgment or posting a supersedeas bond, then the sheriff sold the property. *Id.* at 58, 801. This Court found the appeal moot because property had been transferred and third-party interests were involved. *Id.* at 63, 804. The purchaser was the original foreclosing party; however, he was a “third-party” because the nature of his property interest changed. *Id.*

While exceptions to mootness apply in certain circumstances, “[a] party may not claim an exception to the mootness doctrine where the case has become moot through that party’s own failure to seek a stay of the judgment.” *Id.* at 60, 803; *accord, Mountain W. Bank, N.A. v. Cherrad, LLC*, 2013 MT 99, 369 Mont. 492, 301 P.3d 796 (warning of the “particular danger of dismissal for mootness” and the “special need for seeking a stay” when transfers of property are involved).

Importantly, the appellant in *Turner* maintained an interest in the property – the right to redeem – under Mont. Code Ann. § 25-13-801(1)(b). Moreover, the

purchaser was a party to the underlying lawsuit; yet, it remained “impossible for this Court to grant effective relief.” *Turner*, 276 Mont. at 63, 915 P.2d at 804.

King presents an even stronger case for dismissal. Here, recording the Sheriff’s Deed divested Pontus of all interest in the property. Pontus lost all immediate, direct, pecuniary, or substantial interest in the property through its own abstention. *See RN & DB, LLC v. Stewart*, 2015 MT 327, ¶ 18, 381 Mont. 429, 433, 362 P.3d 61, 65. Likewise, King has no interest in the property. SK Holdings LLC, a non-party to the Action and this appeal, now owns the property. As such, this Court cannot effectuate appropriate relief. It cannot unring this bell.

II. Pontus Voluntarily Waived its Right to Appeal.

The doctrine of voluntary waiver is separate and distinct from mootness. *Turner*, 276 Mont. at 61, 915 P.2d at 803. Voluntary compliance with, or performance of, a judgment “may result in a waiver of that party’s right to appeal.” *Id.* at 64, 805; *accord, Tempel v. Benson*, 2015 MT 84, ¶ 9, 378 Mont. 401, 403, 346 P.3d 342, 343 (“a party who voluntarily accepts a judgment’s benefits waives the right to appeal that judgment”).

An exception to the voluntary waiver rule exists where the benefit accepted is severable from the issues appealed. *Tempel*, 2015 MT 84, ¶ 9, 378 Mont. at 403, 346 P.3d at 343. The test for determining whether the exception applies requires

consideration of whether reversal “can possibly affect the appellant’s right to the benefits already accepted.” *Id.*

Here, the Judgment allowed Pontus to “request...reimbursement of the improper redemption tender, \$1,281,308.43.” *Docket No. 99*, p. 2. Pontus voluntarily accepted the benefit of the Judgment by providing the Clerk a prepaid Fed Ex envelope and requesting distribution to Pontus. *Exhibit A*. Pontus was under no compulsion to request the improper redemption tender.

Moreover, the exception to voluntary waiver does not apply. A reversal necessarily implicates Pontus’ right to the deposited funds. Any conceivable success for Pontus requires transferring these funds to King. By pulling the funds, Pontus abandoned its redemption.

The proper procedure was for Pontus to leave the deposited funds alone and request a stay of judgment. King foreshadowed this issue in his proposed order; yet, Pontus haphazardly elected to pursue a refund. Pontus abandoned its redemption and waived its right to appeal by requesting and receiving reimbursement of the invalid redemption payment.

CONCLUSION

Pontus jeopardized this appeal both by its inaction (mootness) and its action (waiver). Pontus exhibited every intention of abandoning its redemption claim and its right to appeal. Pontus did not (1) contest the Judgment provision directing the

Sheriff to issue King a Sheriff's Deed, (2) move to stay the Judgment, or (3) post a supersedeas bond. Instead, it immediately requested and received a refund of its deficient redemption payment.

In the meantime, the Sheriff issued a Sheriff's Deed to King, who then deeded the property to SK Holdings LLC – a non-party to the Action and this appeal. Pontus failed to maintain the status quo, and the parties cannot be restored to their original position.

WHEREFORE, King respectfully requests that this Court dismiss the appeal in its entirety, and for such further relief as this Court deems just and proper.

Dated this 24th day of April, 2023.

CROWLEY FLECK PLLP

By: //s// David F. Knobel

DAVID F. KNOBEL

MICHAEL J. KLEPPERICH

CROWLEY FLECK PLLP

500 Transwestern Plaza II

490 North 31st Street

P.O. Box 2529

Billings, MT 59103-2529

Attorney for Charles D. King

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double spaced; and the word count calculated by Microsoft Word is not more than 1,250 words, excluding the caption, signature block, certificate of service, and certificate of compliance.

CROWLEY FLECK PLLP

By: //s// David F. Knobel

DAVID F. KNOBEL

MICHAEL J. KLEPPERICH

CROWLEY FLECK PLLP

500 Transwestern Plaza II

490 North 31st Street

P.O. Box 2529

Billings, MT 59103-2529

Attorney for Charles D. King

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2023, a copy of the foregoing document was served on the following persons by the following means:

_____	Hand Delivery	PARKER, HEITZ & COSGROVE, PLLC
_____	E-Mail	Attn: Mark D Parker
<u> X </u>	U.S. Mail	P.O. Box 7212
_____	Facsimile	Billings, MT 59103-7212

CROWLEY FLECK PLLP

By: //s// David F. Knobel

DAVID F. KNOBEL

MICHAEL J. KLEPPERICH

Attorneys for Charles D. King



Seventh Judicial
District

**Janice Klempel
Clerk of District Court**

Richland County
300 12th Ave. NW Suite 3
Sidney, MT 59270
(406) 433-1709
Clerkofcourt.richland@mt.gov



AFFIDAVIT OF CLERK OF COURT

STATE OF MONTANA)
 :SS.
County of Richland)

I, Janice Klempel, being first duly sworn, depose and state as follows:

1. I am the Clerk of District Court for the Seventh Judicial District, Richland County, Montana.
2. All facts herein positively alleged are within my personal knowledge, except such allegations as are expressly stated as made upon information and belief.
3. On or about February 3, 2023, I spoke on the telephone with Mark D. Parker, counsel for Pontus SK Portfolio, LLC, and Michael K. Press in Cause No. DV-19-149 before the Seventh Judicial District Court (the "Action"), regarding reimbursement of the \$1,281,308.43 held by the Office of the Clerk of Court. He advised me to make the check payable to Pontus Capital.
4. Mr. Parker's office staff advised me they would send to the office of the Clerk of District Court, a Fed Ex prepaid envelope for Pontus Capital.
5. On February 6, 2023, a prepaid Fed Ex envelope addressed to Pontus Capital 875 Prospect St., Suite 303, La Jolla CA 92037 was received by the office of the Clerk of District Court.

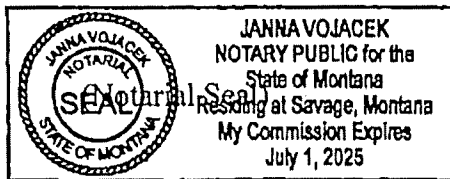
6. Check number 59104084 was issued in the amount of \$1,281,308.43 to Pontus Capital. The envelope was then placed in the Fed Ex drop box located at the Town Pump 3100 S. Central Ave. Sidney, Montana on the morning of February 7, 2023.

7. As of today's date, the Clerk of Court is not in possession of any funds earmarked for any party in the Action.

Dated this 19th day of April, 2023.

Janice Klempel
Janice Klempel

SUBSCRIBED AND SWORN to before me on this 19th day of April, 2023, by Janice Klempel.



Janna Vojacek
Print Name: Janna Vojacek
Notary Public for the State of Montana
Residing at Savage, MT
My commission expires: July 01, 2025

After recording, return to:
Crowley Fleck PLLP
Attn: Michael J. Klepperich
P.O. Box 2529
Billings, MT 59103-2529

BOOK A170 PAGE 427



617045 BOOK: 170 DEEDS PAGE: 427 Pages: 3
STATE OF MONTANA RICHLAND COUNTY
RECORDED: 02/03/2023 9:54 KOI: SHERIFFDEE
STEPHANIE VERHASSELT CLERK AND RECORDER
FEE: \$24.00 BY: Meagan Weber
TO: CROWLEY FLECK PLLP ATTN MICHAEL J KLEPPERICH, PO BOX 2529,

SHERIFF'S DEED

This Deed is made this 3rd day of February, 2023, by JOHN K. DYNNESEN, Sheriff of Richland County, Montana, ("Grantor"), to CHARLES D. KING, an individual with mailing address of 734 Indian Trail, Billings, MT 59105, ("Grantee").

WITNESSETH:

WHEREAS in and by the Amended Judgment and Decree of Foreclosure in favor of Plaintiff, First Internet Bank of Indiana, dated April 19, 2021 (the "Foreclosure Judgment") out of the Montana Seventh Judicial District Court, Richland County, Cause No. DV-19-149 and duly docketed in Richland County, Montana, it was, among other things, ordered, adjudged and decreed that the real property described in the Judgment in said action (the "Real Property") be sold at public auction by the Sheriff of Richland County in the manner directed by law;

WHEREAS in obedience to said Foreclosure Judgment, and after due publication and posting of notice given as required by law, the said Sheriff did, on the 8th day of June, 2021, at 10:00 o'clock a.m. at the Law and Justice Center, Richland County, 300 12th Ave. NW, Sidney, MT 59270, duly sell at public auction the Real Property;

WHEREAS at such sale the Real Property, was fairly sold to the Grantee for the sum of \$1,100,001.00, the Grantee being the highest bidder and that sum being the highest bid therefor; and

WHEREAS in and by the Judgment in favor of Intervenor, Charles D. King, dated February 2, 2023 (the "Redemption Judgment") out of the Montana Seventh Judicial District Court, Richland County, Cause No. DV-19-149 and duly docketed in Richland County, Montana, it was, among other things, ordered, adjudged and decreed that Grantor issue Grantee a Sheriff's Deed to the Real Property.

NOW, THEREFORE, in consideration of the sum bid by the Grantee as described above, and pursuant to the Redemption Judgment, and in compliance with statute and the Judgment, said Grantor as Sheriff of Richland County, Montana, does hereby grant, bargain, sell and convey to said Grantee, and to its successors and assigns, forever, all of that property situated in Richland County, Montana, and described on the attached **Exhibit A**.

TO HAVE AND TO HOLD the above-described premises, with all appurtenances, unto Grantee, and Grantee's successors and assigns, forever.

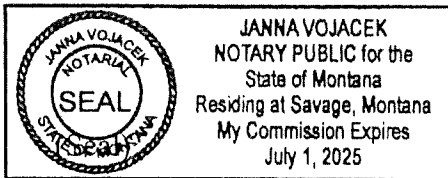
IN WITNESS WHEREOF, Grantor, as Sheriff of Richland County, Montana, has executed this Sheriff's Deed the day and year first written above.

SHERIFF OF RICHLAND COUNTY, MONTANA

By *John K. Dynneson*
John K. Dynneson, Sheriff

STATE OF MONTANA)
 : ss.
County of Richland)

This instrument was acknowledged before me on this 3rd day of February, 2023, by John K. Dynneson in his capacity as Sheriff of Richland County, Montana.



Janna Vojacek
Printed Name: Janna Vojacek
Notary Public for the State of Montana
Residing at Savage, Montana
My commission expires July 01, 2025

EXHIBIT A**Real Property:****Parcel A:**

Lot 5 in Block 1 of the Final Plat of Augustus Vaux Subdivision to Sidney, Montana, located within Tract I of C.O.S. 27-864, Lots 6-13 of Block B, Lots 1-12 of Block C & Lots 1-2 of Block D of the Richfield Addition, located within the S½SW¼ of Section 28, Township 23 North, Range 59 East, P.M.M., filed in the office of the Clerk and Recorder of Richland County, Montana, as Document No. 577201.

Parcel B:

Together with the access rights created in that certain Grant of Easements and Declaration of Covenants Conditions and Restrictions by Shops at Fox Run, LLC, dated June 19, 2013, recorded June 19, 2013 in Book E397, at Page 017, as affected by First Amendment recorded May 15, 2014 in Book E410 at Page 822 and by Second Amendment recorded August 21, 2015 in Book E422, at Page 384, and by Third Amendment, recorded October 7, 2016 in Book E427, Page 919.

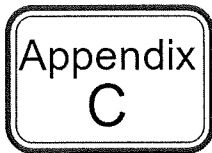
Parcel C:

Together with the easement rights created in that certain Footing and Support Easement Agreement by and among Shops at Fox Run, LLC, Shops at Fox Run II, LLC and ALCO Stores, Inc. dated February 6, 2015, recorded February 10, 2015 in Book E418, at Page 782.

The Real Property may also be associated with the address of 500 N. Central Avenue, Sidney, MT 59270.

Upon recording, return to:
SK Holdings LLC
Attn: Skip King
1551 Zimmerman Trail
Billings, Montana 59102

COPY



QUITCLAIM DEED

FOR VALUABLE CONSIDERATION, receipt of which is acknowledged, the undersigned,

Charles D. King, as Grantor, with an address of 1551 Zimmerman Trail, Billings, Montana 59102,

hereby quitclaims to

SK Holdings LLC, a Montana limited liability company, as Grantee, with an address of 1551 Zimmerman Trail, Billings, Montana 59102,

all right, title and interest of Grantor, if any, in that real property in Richland County, Montana, described as follows:

Parcel A:

Lot 5 in Block 1 of the Final Plat of Augustus Vaux Subdivision to Sidney, Montana, located within Tract I of C.O.S. 27-864, Lots 6-13 of Block B, Lots 1-12 of Block C & Lots 1-2 of Block D of the Richfield Addition, located within the SV2SW1/4 of Section 28, Township 23 North, Range 59 East, P.M.M., filed in the office of the Clerk and Recorder of Richland County, Montana, as Document No. 577201.

Parcel B:

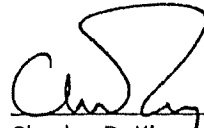
Together with the access rights created in that certain Grant of Easements and Declaration of Covenants Conditions and Restrictions by Shops at Fox Run, LLC, dated June 19, 2013, recorded June 19, 2013 in Book E397, at Page 017, as affected by First Amendment recorded May 15, 2014 in Book E410 at Page 822 and by Second Amendment recorded August 21, 2015 in Book E422, at Page 384, and by Third Amendment, recorded October 7, 2016 in Book E427, Page 919.

Parcel C:

Together with the easement rights created in that certain Footing and Support Easement Agreement by and among Shops at Fox Run, LLC, Shops at Fox Run II, LLC and ALCO Stores, Inc. dated February 6, 2015, recorded February 10, 2015 in Book E418, at Page 782.

TO HAVE AND TO HOLD unto the Grantee, and Grantee's heirs, successors and assigns, forever.

DATED: March 8, 20 23.



Charles D. King

STATE OF Montana)

) ss:

County of Yellowstone)

This instrument was acknowledged before me on 3/8, 2023, by Charles D. King.

Carol M. Terwilliger

Print Name: Carol m. Terwilliger

Notary Public for the State of Montana

Residing at Billings, MT

My Commission expires Oct 13, 20 25

[SEAL]



CAROL M. TERWILLIGER
NOTARY PUBLIC for the
State of Montana
Residing at Billings, Montana
My Commission Expires
October 13, 2025

CERTIFICATE OF SERVICE

I, David Francis Knobel, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 04-24-2023:

Michael Joseph Klepperich (Attorney)
490 N. 31st St. Ste. 500
Billings MT 59101
Representing: First Internet Bank of Indiana, Charles D. King
Service Method: eService

Geoffrey Thomas Cunningham (Attorney)
401 N 31st St Suite 805
PO Box 7212
Billings MT 59103
Representing: Pontus SK Portfolio, LLC, Michael K. Press
Service Method: eService

Mark D. Parker (Attorney)
401 N. 31st St., Ste. 805
P.O. Box 7212
Billings MT 59103
Representing: Pontus SK Portfolio, LLC, Michael K. Press
Service Method: eService

Electronically signed by Debbie Kobold on behalf of David Francis Knobel
Dated: 04-24-2023