IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 23-0200

MARK HUELSKAMP,

Defendant/Appellant/Cross-Appellee,

v.

MATTHEW OLDS,

Plaintiff/Appellee/Cross-Appellant

# CROSS-APPELLANT'S REPLY BRIEF

On Appeal from the Fourth Judicial District Court, Missoula County
Cause No. DV-19-1036
The Honorable Jason Marks, Presiding

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## INTRODUCTION

This case turned on the believability of the parties and their diametrically opposed versions of fact. But distilled, Huelskamp admitted on video to punching Olds and breaking his nose, then denied it at trial. The Jury simply did not believe his changed story, finding him liable of two intentional torts: assault and battery. The jury found he acted with malice and awarded $75,000 in punitive damages. Nonetheless he would not abandon Justifiable Use of Force (JUF) as a complete affirmative defense. The District Court awarded prevailing party attorney's fees to Olds, as required by statute. MCA § 27-1-722(4).

The District Court erred as a matter of law by determining attorney's fees are punitive damages, and added those fees to the jury's punitive award to render the punitive damage award "grossly excessive". Doc. 105, p. 16. The District Court compounded the error by refusing legitimate discovery on net worth, then relying on a false financial statement prepared by Huelskamp that omitted a valuable duplex and refusing Olds' cross-examination on that which plainly existed in the public record. *Id.*

## I. THE DISTRICT COURT ERRED BY DETERMINING STATUTORY ATTORNEY'S FEES UNDER MCA § 27-1-722(4) ARE PUNITIVE AND IMPROPERLY APPLIED THE LAW TO REDUCE THE JURY'S PUNITIVE DAMAGES AWARD

In his briefing, Huelskamp fails to refute that punitive damages may only be awarded when a defendant acts with malice or fraud proven by clear and

convincing evidence. Mont. Code Ann. § 27-1-221(1). Nor does Huelskamp dispute that the prevailing party entitled to attorney's fees in an action in which a JUF defense is asserted under Mont. Code § 27-1-722 does not have to prove malice or fraud by clear and convincing evidence.

Tellingly, Huelskamp ignores *Plath v. Schonrock*, wherein the Court concluded that the Montana Consumer Protection Act (MCPA) does not require proof of malice, oppression, or fraud, and treble damages thereunder are not punitive. 2003 MT 21, ¶ 26, 314 Mont. 101, 109, 64 P.3d 984, 990. Rather, Huelskamp seizes on an inconsistency of language in *T & W Chevrolet*, which conflated treble damages with "exemplary damages" to assert punitive damages can exist absent a defendant being found guilty of fraud or malice by clear and convincing evidence. Huelskamp's Reply to Cross-Appeal Br. p. 14.

The inconsistent semantics are irrelevant because the damages at issue in *T&W Chevrolet* were still treble damages under the MCPA. *T&W Chevrolet v. Darvial*, 196 Mont. 287, 293, 641 P.2d 1368, 1371 (1982). *T&W Chevrolet* remains consistent with *Plath* and does not hold statutory attorney's fees are a species of punitive damages.

*T&W Chevrolet* upheld treble damages despite the plaintiff not proving malice, fraud or oppression to a jury. In its opinion, the Court recited a district court's characterization of MCPA statutory treble damages as "exemplary." *T&W*

*Chevrolet v. Darvial*, 196 Mont. 287, 293, 641 P.2d 1368, 1371 (1982). Huelskamp seizes on the word exemplary to equate *treble* to *exemplary* to *punitive*. The context of the word *exemplary* was as treble damages, not punitive damages under MCA § 27-1-221(1). Huelskamp argues the opposite of what *Plath* and *T&W Chevrolet* stand for.

It is a clear reversable error for a district court to use attorney's fees to offset punitive damages, as the District Court did here. *Britton v. Farmers Ins. Grp. (Truck Ins. Exch.)*, 221 Mont. 67, 97–98, 721 P.2d 303, 322–23 (1986). This Court has long rejected conflating attorney's fees with punitive damages. "The office of punitive damages is not to make up for attorney's fees. . . ." *Id*. The fact that punitive damages are awarded is not a basis for denying attorney's fees or other costs. *Id*.

In *Britton*, the plaintiff sued his insurer and was awarded punitive damages by a jury for bad faith. The district court recognized the law in effect at that time legally entitled the plaintiff to his attorney's fees pursuant to the MCPA statute, but refused to award those fees, reasoning that the jury's punitive damages award would cover the attorney's fees and other unrecoverable costs under a contingency fee agreement. This Court rejected such reasoning as reversible error, holding that punitive damages are not a substitute for otherwise collectible attorney's fees or unrecoverable costs. *Id*.

*Britton* applies to this case because, here too, the District Court wrongly conflated attorney's fees with punitive damages. Olds cited *Britton* as authority against including attorney's fees in a punitive damage evaluation in prior briefing. *See* Doc. 97 p. 5. However, the District Court erred when it did not address *Britton* in its ruling on Punitive Damages. Doc. 105. This Court must again reject that reasoning as wrong as a matter of law.

Punitive damages are imposed for the sake of example and by way of punishing the defendant; their function is not to make up for attorney's fees or noncollectible expenses to which a litigant may feel entitled. Thus, it was error to deny an insured attorney's fees on the ground that a punitive damages award was sufficient to pay his attorney's fees and nonallowable costs. *Britton*, 221 Mont. at 97-8, 721 P.2d at 322-3.

This is the exact mistake made by the District Court:

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Here, although the Court finds factors i–viii weigh in favor of leaving the jury's punitive damage award undisturbed, it ultimately finds the total amount that Huelskamp would be required to pay in this matter would be violative of the Due Process Clause. Stated differently, the Court reiterates that it found the award of punitive damages, on its own, did not violate the Due Process Clause. However, the Court finds that should Huelskamp be ordered to pay the attorneys' fees ordered by the Court ($91,300) plus the jury's award of punitive damages ($75,000), the total amount ($166,300), well more than 3% of his net worth, would be grossly excessive as compared to the interest in punishing Huelskamp and deterring him from any similar conduct. To remedy this issue, the Court orders that the jury's award of punitive damages be reduced to $13,700. The Court feels that essentially doubling the damages awarded to Olds is sufficiently punitive in light of the attorney's fees award.

Finally, to note, the Court finds that the award of attorneys' fees under Mont. Code Ann. § 27-1-722(4) to be punitive. The Montana Legislature added subsection (4) requiring the prevailing party to receive attorneys' fees in an action where the civil justifiable use of force defense is asserted. It stands to reason that

Doc. 105 p. 16. The district court made clear that – but for the attorney's fees award – the Jury's punitive damage award of $75,000 should be upheld.

Contrary to Huelskmap's argument, "any other circumstance" does not give a district court *carte blanche* discretion to alter a jury's judgment. A district court cannot use the catch all (ix) "any other circumstance" to reduce punitive damages if the reasoning contravenes the law. *Finstad v. W.R. Grace & Co*., 2000 MT 228, ¶ 49, 301 Mont. 240, 253, 8 P.3d 778, 787. There, the Court refused (ix) "[a]ny other circumstances" because such circumstances cannot contravene the law. In *Finstad*, this Court reversed a district court's reliance on highly speculative evidence as a basis to reduce a punitive damage award. In that asbestos case

Defendant WR Grace argued for a reduction in the jury punitive damage award for an individual plaintiff because WR Grace faced 97,000 nationwide claims and needed to have money to pay the same damages to every case against it. Reversing the district court, this Court recognized that argument was highly speculative and refused to allow it as "any other circumstance" under factor (ix). *Id*. District Court's cannot justify changing a Jury's award based on evidence or reason contrary to existing law.

It was an abuse of discretion to allow speculative fictional average settlement amounts as evidence at the punitive damages mini-trial because it contravened the law. *Finstad*, ¶ 49. Similarly, here, it contravenes the law to categorize attorney's fees as punitive damages in violation of the express requirements of MCA § 27-1-221(1).

Huelskamp cites *Maloney* to assert that the catch all provision of (ix) gives the district court unlimited discretion to consider *any* other circumstance. However, *Maloney* also limits the discretion of a district court to any other circumstance "not improper as a matter of law." *Maloney v. Home & Inv. Ctr., Inc*., 2000 MT 34, ¶ 76, 298 Mont. 213, 235–36, 994 P.2d 1124, 1138 ("Because the Special Master's consideration of the prior case was not improper as a matter of law, we will not disturb the District Court's adoption of the Special Master's recommendation regarding punitive damages.")(emphasis added). *Maloney*

pronounces a good rule of thumb – "any other circumstances" cannot include reasoning that is not legally proper.

The Ninth Circuit also recognizes Montana statutory attorney fee authorizations that do not specifically reference punitive damages are not punitive damages. The Ninth Circuit reversed the lower court's refusal to consider a plaintiff's motion for what it characterized as "exemplary" (read: treble) damages and attorneys' fees under the Montana Uniform Trade Secrets Act (MUTSA) because a jury determined punitive damages should not be awarded on the verdict form. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp*., 259 F.3d 1101, 1111–12 (9th Cir. 2001). The Court reasoned:

> the Montana legislature has shown that it knows how to reference the punitive damages section specifically. Other Montana statutes allow for punitive damages by specifically referring to section 27–1–221, e.g., Montana Unfair Trade Practices Act § 33–18–242(4), or by borrowing language directly from 27–1–221, e.g., Montana Wrongful Discharge Act, § 39–2–905(2). In contrast, in the MUTSA, the legislature used the words, "willful and malicious," words that are defined differently and separately from § 27–1–221 in the "General Definitions" part of Montana's statute. §§ 1–1–204(3), 1–1–204(5). Furthermore, the official commentary to the MUTSA establishes that the exemplary damages provision "follows federal patent *1112 law in leaving discretionary trebling to the judge even though there may be a jury...." Mont.Code Ann. § 30–14–404 commissioner's notes.[1] *Id*.

The Ninth Circuit abides the logic Olds argues:

[1] Interestingly, MUTSA also conflates "exemplary" damages with treble damages. See also 35 U.S.C. § 284.

> that the Montana legislature did not incorporate the definition of punitive damages into the trade secrets act. First, under § 27–1–221(5), general punitive damages must be proved "by clear and convincing evidence." Nothing in the MUTSA suggests that exemplary damages and attorneys' fees need to be proved by clear and convincing evidence. By deferring to the jury, the district court implicitly imported not only the substantive definition of "actual malice," but also the heightened quantum of proof requirement. This was legal error.

*Id*. Without the "heightened quantum of proof" of clear and convincing evidence, it was "legal error" to treat MUTSA exemplary damages as punitive damages.

These cases make crystal clear attorney's fees are not punitive damages. The District Court erred by artificially inflating its total punitive damage calculation by adding attorney's fees to the jury's punitive damage award and determining the total number was grossly excessive and violative of Due Process. A District Court is limited to considerations which are *proper as a matter of law*, i.e. legally correct, in decreasing a jury's punitive damage award under the catch all provision (ix) of MCA 27-1-221(b).

For this reason, Olds restates *why* the District Court correctly determined attorney's fees were *proper as a matter of law*. There is no serious debate the District Court properly determined that Huelskamp asserted the JUF defense under MCA § 27-1-722, when he sought attorney's fees and raised JUF in his answer, and argued JUF immunity in his proposed jury instructions. In fact, Huelskamp asserted JUF all through trial, only to have it dismissed after Huelskamp rested his

case in chief. The JUF defense was dismissed over Huelskamp's objection only after Huelskamp himself testified inconsistently with what his attorney's thought he would say on the witness stand. Nonetheless, he proposed jury instructions and argued JUF. Trans. 1. p. 492-497.

In his proposed jury instructions, Huelskamp asserted JUF under § MCA 45-3-102. Doc. 51 p. 13(Proposed JI #9). Huelskamp asserted the JUF "immunity" defense by reciting verbatim language from MCA § 27-1-722 (1) and (3). Doc. 51. P. 16 (Proposed JI #12). Huelskamp asserted he had no duty to retreat by reciting verbatim language from § MCA 45-3-110. Doc. 51 p. 17 (Proposed JI #13). Huelskamp continued to argue JUF in discussing the verdict form and in settling jury instructions. Trans.1 p. 494; 506-7. For these reasons, the District Court properly determined Huelskamp asserted JUF under MCA § 27-1-722 and awarded $91,300 in attorney's fees to Olds, after holding a hearing, taking expert testimony, and taking counsel's testimony on their work. Doc. 104. This statutory fee shifting is appropriately not punitive exactly because of cases like this where JUF is serves as merely a litigation tactic instead of a valid defense.

## II. THE FACTS IMPLICIT IN THE JURY'S VERDICT SUPPORT REINSTATING THE JURY'S $75,000 PUNITIVE DAMAGE AWARD.

This Court must look to "substantial record evidence," which is evidence "that a reasonable mind might accept as adequate to support a conclusion, even if

weak and conflicting". When the sufficiency of evidence is challenged, an appellate court must probe the record for evidence to support the fact-finder's determination and view the evidence in favor of the prevailing party. *Romo v. Shirley,* 2022 MT 249, ¶ 20, 411 Mont. 111, 122, 522 P.3d 401, 409. The District Court agreed the $75,000 punitive verdict was proper under the first eight factors of § 27-1-221, properly relying on findings implicit in the jury's verdict. Doc. 105 p. 17:4-5; *Marie Deonier & Assocs. v. Paul Revere Life Ins. Co*., 2004 MT 297, ¶ 38, 323 Mont. 387, 397, 101 P.3d 742, 749.

Huelskamp asks this Court to do the opposite and not defer to the jury's fact finding. The jury found Huelskamp punched Olds and threatened him with a pistol. Olds submits the District Court dutifully analyzed the facts implicit in the jury's findings. Doc. 105. The District Court agreed that factors (i)-(viii) under MCA § 27-1-227(b) favor leaving the jury's punitive damage award undisturbed and affirmed without change. *Id.*

However, *de novo* review is appropriate when the district court determines a punitive damage award is grossly excessive, especially when the determination is based on an incorrect conclusion of law. An appellate court must apply the *Gore* guideposts to the jury's punitive damages verdict *de novo*. *Seltzer v. Morton*, 2007 MT 62, ¶ 152, 336 Mont. 225, 279, 154 P.3d 561, 601. This Court need not look further than the error of adding $91,300 in attorney's fees to the jury's punitive

damages of $75,000, to push the total punitive award into the realm of "grossly excessive." *Id*. Notably, the District Court reduced punitive damage below what even Huelskamp asserted was reasonable, as Huelskamp argued the award should be reduced to $25,000, not $13,700. Doc. 105 p. 2:5-7.

The "guideposts" support deference to the jury: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity, or ratio, between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Seltzer v. Morton*, 2007 MT 62, ¶ 151, 336 Mont. 225, 278–79, 154 P.3d 561, 600 (*Campbell*, 538 U.S. at 418, 123 S.Ct. at 1520.19). The District Court simply misapprehended these guideposts in reducing punitive damages to $13,700. Regarding the first factor, an intentional physical attack and threat to life with a pistol, absent murder or torture, is as reprehensible as it gets. This is the most critical *Gore* guidepost. The District Court determined Hueslkamp's conduct was extremely reprehensible under (i) because it was a physical attack and threat to Olds' life by a weapon. Huelskamp acted with violence, which is the most serious and reprehensible species of malice. Doc. 105 p.6:14-22 (citing *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 575-6 (1996)).

The District Court properly determined that it was implicit in the jury's verdict that both intentional torts were committed: battery (punch to the face) and assault (threat of death with a pistol). Even Huelskamp concedes the jury was presented with these theories in closing arguments and could have accepted it. Huelskamp's Response to Cross-Appeal p. 16.

Regarding the second guidepost, the ratio for $75,000 is within the 3% cap – even based on Huelskamp's false financial disclosure. Only by adding statutory attorney's fees did the Court determine the ratio exceeded 3%.

Regarding the third guidepost, the District Court did not analyze similar civil cases. The $75,000 punitive damages awarded are modest compared to other punitive damage cases. *Seltzer*, ¶ 167 ($9.9 Million). If anything, the fee award should be part of the compensatory damages to *lower* the ratio, not raise it. The district court did not engage in analysis of the "potential harm" suffered by Olds – which is death by a bullet to the head. Without the error of including attorney's fees in punitive damages, the District Court found the amount of damages awarded by the jury were not "grossly excessive or arbitrary punishments" and determined the punitive damages ratio was 5.474:1. Doc. 105 p. 9-11. The District Court even determined (vi), was within the statutory cap and 3% of Huelskamp's inaccurate net worth.

Huelskamp tries to justify his intentional torts by testifying he reacted to Olds spitting at him. The jury rightfully did not believe this because of credible evidence (a photo) of Huelskamp walking menacingly towards Olds with a toothpick still hanging from the corner of his mouth – right where he testified Olds spat. Trans. 1. p. 469. Ultimately the jury simply did not find Huelskamp credible and chose to believe Olds' and not Huelskamp. This Court must afford the jury the same deference.

Huelskamp faults the Special Verdict form for instructing the jury to skip the negligence questions if it answered "yes" on the intentional torts. However, Huelskamp did not object to the language of the Special Verdict form, and instead worked with the District Court and opposing counsel to draft it. Trans. 1. p. 504-511. Moreover, Huelskamp cannot use alleged negligence by Olds to reduce liability for his intentional acts. *Id*. p. 503.

The District Court detailed the significant evidence implicit in the jury's findings. Doc. 105. As to (ii) the District Court determined Huelskamp engaged in continued threatening behavior against Olds. Doc. 105 p. 7:1-23. As to (iii), the District Court noted the jury determined Huelskamp committed <u>two intentional torts</u> against Olds. Doc. 105 p. 8-9. Moreover, even if the ratio exceeds 9:1, in cases of violence, the US Supreme Court does not set a rigid benchmark ratio. Doc. 105:11:14-25 (citing *Campbell*, 538 U.S. at 425). The District Court

accurately assesses *Campbell*, noting there that economic harm was $1 million for 1.5 years of emotional distress without any physical assault or trauma. Contrary, Olds suffered physical assault and trauma with physical injuries, and was a finger-twitch from death. Olds must drive that same road knowing Huelskamp could act at any point. $13,700 is nothing to Huelskamp, who describes his own net-worth as $2,721,842.80, and purchased a brand-new Corvette after the altercation and trial. Doc. 66 p. 6-8. Though the District Court was made aware of Huelskamp's new car and fraudulently omitted duplex, it relied on Huelskamp's statement of net worth. Even with that grossly-undervalued net worth, the District Court determined the jury could have awarded up to $85,000 in punitive damages. Absent the error of adding attorney's fees to punitive damages, the District Court reasoned it "respects the jury's determination that $75,000 was an appropriate punitive sanction for such conduct." Doc. 105 p. 15:9-12.

## III. THE DISTRICT COURT IGNORED KEY POLICY REASONS IN USING ATTORNEY'S FEES TO REDUCE THE JURY'S PUNITIVE DAMAGE AWARD.

The Rules of Professional Conduct prohibit lawyers from sharing attorney's fees with non-lawyers. As such, reducing punitive damages awarded to Olds because of a fee award puts Olds and his lawyers in conflict. MRPC 5.4 states that lawyers shall not share fees with non-lawyers. Olds argued as much to the District Court, but the District Court did not address the issue. Doc. 97 p. 2-3, 6.

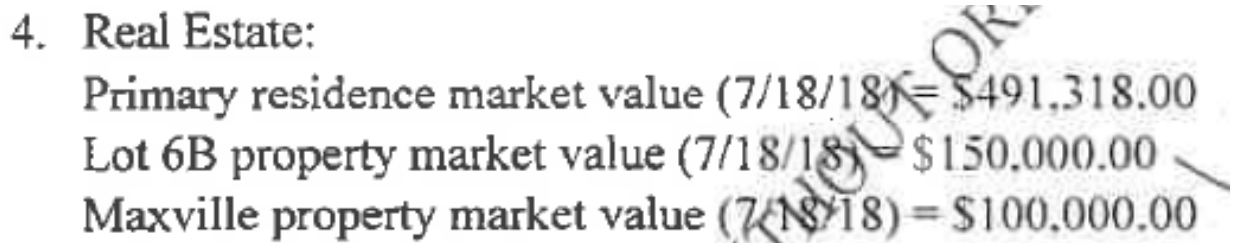
It is patently inequitable for a district court to place attorney and client in a position of financial conflict. The District Court has created a scenario where the attorney who abides by MRCP 5.4 profits at the client's expense. Olds should not lose consideration because attorney's fees are awarded.

Next, conflating statutory attorney's fees under MCA § 27-1-722 with punitive damages shifts covered damages to uncovered. Holding that attorney's fees are punitive materially shifts risk onto insureds. Moreover, doing so puts insurance defense counsel in the untenable position of arguing that the attorney's fees award against Huelskamp is now uncovered punitive damages under most homeowners policies. Doc. 97 p. 3-4. As State Farm has filed a declaratory judgment action against Huelskamp, he should be careful what he asks for.

## IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT RELIED ON A FALSE FINANCIAL STATEMENT TO ASSESS HUELSKAMP'S NET WORTH AND FIND PUNITIVE DAMAGEs GROSSLY EXCESSIVE.

A defendant should not gain advantage from failing to produce evidence of net worth. *Rubin v. Hughes*, 2022 MT 74, ¶ 48, 408 Mont. 219, 507 P.3d 1169. The defendant bears the burden of providing a truthful and reliable basis to limit the punitive damages award. *Blue Ridge Homes, Inc. v. Thein*, 2008 MT 264, ¶ 69, 345 Mont. 125, 143, 191 P.3d 374, 387. Self-prepared and unaudited statements of net worth submitted by a defendant equal failure to produce any information on a defendant's net worth. *Rubin,* ¶ 52. Considering the defendant's financial condition

is clearly "the only way to make an informed decision which ensures that the punitive damages award is properly tailored so as not to be too harsh or too lenient." *Seltzer*, ¶ 135. Huelskamp made the following disclosure of his real estate "Assets as of July 18, 2018":


4. Real Estate:
Primary residence market value (7/18/18) = $491,318.00
Lot 6B property market value (7/18/18) = $150,000.00
Maxville property market value (7/18/18) = $100,000.00

Trans 1. P. 27, (Huelskamp Bates 00137).[2] Huelskamp omitted property owned at 550 and 560 River Court, (Lot 5B) within the City of Missoula.

[2] Document not attached due to financial records confidentiality.

IT-53069
SUID NO. - 3087304

**WARRANTY DEED**

FOR VALUE RECEIVED,

Grantor: GARY J HOWARD and RHONDA S MAUN

do(es) hereby grant, bargain, sell and convey unto

Grantee: MARK HUELSKAMP
10300 HORSEBACK RIDGE
MISSOULA MT 59804

RETURN TO:

his heirs and assigns, the following described premises, in MISSOULA County, Montana, to-wit:

Lot 5B of RIVER COURT ADDITION, LOT 5, an amended subdivision of Lot 5, River Court Addition, a platted subdivision in the City of Missoula, Missoula County, Montana, according to the official recorded plat thereof.

SUBJECT TO: Taxes and assessments, if any, for current and subsequent years thereafter and covenants, conditions, restrictions and easements apparent and/or of record.

TO HAVE AND TO HOLD the said premises, with its appurtenances unto the said Grantee, his heirs and assigns forever. Grantor(s) covenant with the Grantee that the Grantor(s) are now seized in fee simple absolute of said premises; that the Grantor(s) have full power to convey same; that the same is free from all encumbrances excepting those set forth above; that the Grantee shall enjoy the same without any lawful disturbance; that the Grantor(s) will, on demand, execute and deliver to the Grantee, at the expense of the Grantor(s), any further assurance of the same that may be reasonably required, and, with the exceptions set forth above, that the Grantor(s) warrant to the Grantee and will defend for him all the said premises against every person lawfully claiming all or any interest in same.

200418037
Page: 1 of 2
06/29/2004 11:08A
Missoula County Vickie M Zeier WD
Bk-735 Pg-344

Public records show a warranty deed recorded June 29, 2004. Doc. 66 Ex. A.

Those records show the same property was sold May 19, 2020. *Id.*

202009324 B: 1030 P: 954 Pages: 2 Fees: $14.00
05/19/2020 02:42:08 PM Warranty Deed
Tyler R. Gernant, Missoula County Clerk & Recorder
eRecording

**AND WHEN RECORDED MAIL TO:**
Marya I. Marvin
550 River Court
Missoula, MT 59801

Filed for Record at Request of:
Insured Titles, LLC

Space Above This Line for Recorder's Use Only

Order No.: 892722-IT
Parcel No.: 3087304

**WARRANTY DEED**

FOR VALUE RECEIVED,

**Mark Huelskamp**

hereinafter called Grantor(s), do(es) hereby grant, bargain, sell and convey unto

**Marya I. Marvin**

whose address is: **550 560 River Court, Missoula, MT 59801**

Hereinafter called the Grantee, the following described premises situated in **Missoula** County, **Montana**, to-wit:

Lot 5B of RIVER COURT ADDITION, LOT 5, an amended subdivision of Lot 5 River Court Addition, a platted subdivision in the City of Missoula, Missoula County, Montana, according to the official recorded plat thereof.

SUBJECT TO covenants, conditions, restrictions, provisions, easements and encumbrances apparent or of record.

TO HAVE AND TO HOLD the said premises, with its appurtenances unto the said Grantees and to the Grantee's heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that the Grantor is the owner in fee simple of said premises; that said premises are free from all encumbrances except current years taxes, levies, and assessments, and except U.S. Patent reservations, restrictions, easements of record, and easements visible upon the premises, and that Grantor will warrant and defend the same from all lawful claims whatsoever.

Dated: May 18, 2020

Despite the public records establishing Huelskamp owned this property as of July 18, 2018, Huelskamp omitted it from his financial statement. That property is *not* Lot 6B on Horseback Ridge, as Huelskamp admits by asserting that Lot 6B is "a lot in the subdivision where he lives. . ." Huelskamp's Cross-Appeal Resp. p. 21.

Olds' was deprived of verified discovery of Huelskamp's financial condition. Trans. 1 p. 24, Doc. 40 p. 3-4. Olds had no way to confirm the truth of the financial statement other than to look at the public record. Doc. 44; Doc. 66 p.

11-14, and Ex. A. The unverified statement that reflected his financial condition "as of July 18, 2018" is false on its face.

Olds' discovery requests were timely, violated no Scheduling Order, and became extremely relevant to the District Court's analysis of Mont. Code Ann. § 27-1-227(7)(b)(ix). The statement provided no basis for the figures as required by the District Court. Under *Rubin* and *Blue Ridge Homes* Huelskamp's submission was a failure to produce any information on a defendant's net worth.

During the punitive phase, the District Court prohibited Olds from cross-examining Huelskamp's net worth because he did not have a "market analysis." Trans. 1. p. 617. Yet the District Court allowed Huelskamp's back-of-the napkin estimate despite no expert-prepared "market analysis." Allowing Huelskamp to present a valuation without expert evidence then requiring Olds to provide expert evidence was a clear abuse of discretion.

It is common knowledge that real estate values shot up between 2018 and 2021. This is not the realm of experts nor did the District Court require expert testimony when he allowed Huelskamp to formulate his guestimate. Further, Olds should have been allowed to continue his line of questioning about the undervaluation and falsely omitted duplex located at 550 and 560 River Court (not Horseback Ridge Road). Huelskamp bought the duplex in 2004 and sold it in 2020. It should have been but was not included in his net worth. As such, his

personal financial statement fraudulently withholds this asset. The District Court refused critical discovery and cross-examination concerning Huelskamp's net worth. Trans. 1. p. 617.

Compounding the error, the District Court's relied upon the inaccurate financial disclosure to determine the Jury's award was "grossly excessive" and violative of Due Process. It cannot be disputed that Huelskamp omitted an entire duplex from his financial statement. Doc. 66, Ex. A. Caselaw clearly requires this misrepresentation be treated as a nondisclosure. *Rubin*, ¶ 53. It is too late to re-panel the jury. The only remedy is to reinstate the Jury's award of $75,000.

## CONCLUSION

The District Court erred by adding the $91,300 attorney's fees to the $75,000 jury punitive damages award to determine a total punitive damage amount of $164,000 as grossly excessive. Categorizing attorney's fees as punitive damages is legally improper as a matter of law. The District Court erred as a matter of law by holding MCA § 27-1-722(4) to be punitive in nature and a basis to reduce the Jury's punitive award. The District Court abused its discretion by relying on Huelskamp's misrepresented net worth to determine what amount was grossly excessive. The District Court abused its discretion by denying Olds an opportunity to cross-examine Huelskamp on his net worth during the punitive damages mini trial. Olds is convinced this greatly reduced the punitive damage

award in this case. At this point, this Court should mitigate the harm by at least reinstating the Jury's punitive damage amount of $75,000.

Finally, on March 3, 2023, the District Court entered Judgment. Doc. 109. However, The Court never ruled on Olds' asserted costs of $3,150.98, of which Huelskamp stated should be "at most" $2,070. Doc. 65. Costs should be included in the judgment as well.

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing Cross-Appellant's Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for quoted and indented material, and contains approximately 4,209 words, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

Dated December 18, 2023.

SCHMIDT BERKOFF LAW FIRM PLLC.

/s/ Carey Schmidt
Counsel for appellee / Plaintiff Matthew Olds

## CERTIFICATE OF SERVICE

I, Carey Schmidt, hereby certify that I have served true and accurate copies of the foregoing Brief - Cross Appellant Reply to the following on 12-18-2023:

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