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IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23 - 0656

<p>WESLEY and KAREN TUSCANO, Appellants, v. SIDNEY and JULIAN HELVIK, Appellees,</p>	<p>TUSCANOS' EMERGENCY MOTION TO RECONSIDER</p>
<p>WESLEY and KAREN TUSCANO, Appellants, v. JACQUELINE CONNER, Appellee.</p>	

COME NOW, Appellants Wesley and Karen Tuscano (“Tuscanos”), through their counsel of record Hertha L. Lund and Peter B. Taylor of Lund Law, PLLC, and move the Court to Reconsider the December 19, 2023 Order denying Tuscanos’ M.R.App.P. 22(2)(a) Motion. **Tuscanos’ counsel consulted with Counsel for Appellees, and they oppose this motion.**

Tuscanos believe this is an emergency because they cannot comply with the

District Court's Order and based on interactions with the Supreme Court Clerk's office, Tuscanos' understanding is that this Court did not have the full record before them at the time it decided on Tuscanos' Rule 22(2)(a) Motion and Brief.

GROUNDS FOR THE MOTION

Below is a timeline regarding communications related to Tuscanos' filing of the documents related to Rule 22(2)(a) requirements (hereafter "Appendix 1"), which is also filed with this Motion to assist the Court:

1. November 28, 2023 -- District Court Denied Tuscanos' Motion to Stay Judgment and Approval of Security. Exhibit 4, Appendix 1.
2. December 5, 2023 – Tuscanos filed a M.R.App.P. 22(2) motion for relief from the District Court's 11/29 Order Denying Tuscanos' Motion to Stay and Approval of Security.
3. December 7, 2023 – Appellees Helviks filed an objection to Tuscanos' Rule 22(2) Motion.
4. December 7, 2023 – Tuscanos' counsel realized that their paralegal had failed to attach Appendix 1 with the documents when she filed the Rule 22(2) Motion on December 5, 2023.
 - a. Lund Law paralegal Genevieve Martin immediately called the Clerk's Office to discuss how to remedy her oversight. Brent Webber from the Clerk's Office told her to send the Appendix in an email and it would

be filed with the Rule 22(a) Motion and Brief. Email chain between Genevieve Martin and Brent Webber attached as Exhibit A, Appendix 2.

- b. Tuscanos' counsel, Peter Taylor, emailed Helviks' attorney to discuss the mistake and to confer on how to correct the unfortunate oversight. December 7, 2023 Email from Peter Taylor to Barbara Harris attached as Exhibit B, Appendix 2.
5. December 8, 2023 – Helviks' counsel, Barbara Harris, emailed Tuscanos' counsel, Peter Taylor, stating: “Helviks oppose your motion regarding filing additional documents with the Montana Supreme Court. No motion was provided for review and documents are already filed...” Email chain between Barbara Harris and Hertha Lund and Peter Taylor, attached as Exhibit C, Appendix 2, 9:12 a.m. entry.
- a. Approximately 15 minutes later, Ms. Harris stated: “Actually, I just spoke with a Montana Supreme Court clerk, who reported she sees shows [sic] no documents filed with the Court yesterday. Please confirm what your reference in the email below is to as to documents Tuscanos wish to file in support of their motion to stay filed December 6, 2023, and which were allegedly already filed with the Court.” *Id*, 9:30 a.m. entry.

- b. Approximately 30 minutes later, Ms. Lund stated: “My office also checked with the clerk’s office and our review finds the documents are attached to our brief.” *Id*, 10:04 a.m. entry.
 - c. Paralegal Genevieve Martin had contacted the Clerk’s Office after realizing that Mr. Webber had mistakenly attached Tuscanos’ Appendix to Helviks’ document instead of to Tuscanos’ Rule 22(a) Motion and Brief. After Ms. Martin’s conversation with the Clerk’s Office, Brent Webber at the Clerk’s Office emailed her “I knew that you kind of just did not understand (Or made a honest mistake) so I took the blame here. Don’t worry. It is all RIGHT now ... so that is all that matters. LOL.” Exhibit A, Appendix 2, 1:16 p.m. entry.
6. December 8, 2023 --Tony Urso, Appellate Case Manager at the Supreme Court Clerk’s Office emailed Lund Law and stated that they were returning the Appendix, and that Lund Law would have to file a motion to Supplement. December 8, 2023 Email from Tony Urso attached as Exhibit D, Appendix 2.
7. December 8, 2023 – Tuscanos filed an opposed Motion to Supplement Rule 22 Motion and Brief.
8. December 8, 2023 – Appellee Conner filed Notice of Joinder in Helviks’ Objection to Tuscanos’ Rule 22(2) Motion to Stay Pending Appeal.

9. December 8, 2023 – Appellees Helviks filed a Withdrawal of Objection to Tuscanos’ Motion to Supplement the Record, which means their Motion to Supplement was now unopposed.

Based on the foregoing, Tuscanos did everything they could to file the Appendix within the Rule 22 deadline of 11 days to fix their inadvertent error of not attaching a document to their filing. Also, Helviks withdrew their opposition to Tuscanos’ Motion to Supplement their Motion and Brief with the Appendix, which Tuscanos’ counsel believed had already been filed, based on communications with the Clerk’s Office.

If the Court had reviewed the Appendix, the Court would have been able to see that the District Court issued a Findings of Fact, Conclusions of Law, and Final Order and Judgment (Exhibit 1 to Appendix 1) that contradicts and nullifies the Jury Verdict (Exhibit 2 to Appendix 1). Further, the Court would have been able to review the Jury Verdict form, which was based on Helviks’ submitted jury form and amended by the Court to add: “1. Are the Helviks and Tuscanos bound to follow the terms of the **Agreement to Sell and Purchase Real Property** dated April 30, 2020 (**Agreement**)?” *Id.*(Emphasis in the Jury Verdict form). The Jury answered that question “yes” and found that the Agreement was not “the result of **undue influence** on the part of the Tuscanos.” *Id.*

In Tuscanos' Response and Objection to Helviks' Proposed Findings of Fact and Conclusions of Law, Tuscanos argued their rights to a jury trial pursuant to the Montana and U.S. Constitutions' guarantee of the right to a trial by jury, which includes the right to a judgment in accordance with the verdict." Tuscanos' Response and Objection to Helviks' Proposed Findings of Fact and Conclusions of Law, Attached as Exhibit E, Appendix 2 at p. 1. Tuscanos further briefed that pursuant to a plethora of supporting case law, the determination of the facts is the providence of the jury. *Id* at pp. 2-4. In that brief, Tuscanos argued:

This Court conducted a jury trial pursuant to the Plaintiffs' demand. Both parties filed pleadings, conducted discovery, participated in the framing of the Pretrial Order, and submitted proposed jury instructions, including Helviks' Special Verdict form. During that process, Helviks had ample opportunity to refine their claims and bases for the remedies they sought. They consistently asserted two bases for rescission of the April 30, 2020 Agreement: fraud and undue influence. They also asserted that Tuscanos had breached that Agreement and sought money damages if the jury found the Agreement enforceable.

After both parties presented evidence on the claims and defenses laid out in the Pretrial Order, the jury rendered its verdict on the form which the Court created based on Helviks' proposal. That verdict squarely rejected the two grounds Helviks had asserted for rescission, finding there was neither fraud nor undue influence by Tuscanos in the April 30, 2020 Agreement, and that the Agreement was binding on both parties. The verdict did find that Tuscanos had breached the contract and awarded damages to Helviks for that breach amounting to 30% of the total purchase price. There was no breach by Tuscanos of the other provisions of the Agreement; as it provided, Helviks have been allowed to reside in the house on the premises rent-free, Tuscanos have paid the taxes and insurance on the home, and Tuscanos have rendered non-monetary assistance to the Helviks. Prior to the trial, Tuscanos had attempted to make payment but were

rebuffed by Mr. Helvik. Since the verdict, Tuscanos have tendered both the damages and an additional installment, along with a promissory note for the remaining balance in accordance with the terms of the Agreement. Thus, Helviks have received all the benefit of the bargain that they voluntarily entered.

The Helviks have had their days in Court. Helviks now wish the trial had gone differently and argued other theories for rescission, which were available all along but never adequately raised in pleadings or at trial. The Court cannot simply enter Findings of Fact or Conclusions of Law on issues not addressed at or before trial. The Helviks' Proposed Findings and Conclusions should be rejected in order to preserve the Tuscanos' right to trial by jury and the integrity of the civil trial process. Instead, the Court should enter Judgment following the jury's verdict, as proposed by Tuscanos, and end this protracted litigation.

Id at pp. 24-25. Also, if the Court had reviewed the Appendix, the Court would have been able to review Tuscanos' Notice of Compliance with Jury Verdict and Motion for Entry of Judgment and Satisfaction of Judgment. Exhibit 3, Appendix 1.

On appeal, Tuscanos will continue to argue that the District Court exceeded its authority to determine issues of fact that were not argued and that were not decided by the Jury. Specifically, Tuscanos argued:

The Montana Supreme Court has "long recognized that it is 'the sole province of the jury to determine questions of fact.'" *Cleveland v. Ward*, 2016 MT 10, ¶ 16, 382 Mont. 118, 123, 364 P.3d 1250, 1255. "Questions of fact are for the jury to resolve and should not be taken from the jury when reasonable men might draw different conclusions from the evidence." *Griffel v. Faust*, 205 Mont. 372, 376, 668 P.2d 247, 249 (1983). "[Q]uestions of fact come within the sole province of the jury and the jury verdict prevails." *Britton v. Farmers Ins. Grp.*, 221 Mont. 67, 74, 721 P.2d 303, 307-08 (1986); *State ex rel. Indus. Indem. Co. v. Dist. Court*, 169 Mont. 10, 14, 544 P.2d 438, 440 (1975)

(“Unless a jury trial is waived, the jury, not the judge, is the ultimate trier of fact. If a fact issue exists, Rule 38(a), M.R.Civ.P., specifically reserves the right to trial by jury.”). In addition, claims involving mixed questions of law and equity do not waive a party’s right to a jury trial. *Gray v. Billings*, 213 Mont. 6, 13-14, 689 P.2d 268, 272 (1984).

Exhibit E at pp. 3-4 Appendix 2.

M.R.Civ.P. 19 requires joinder of parties who are indispensable to the case. Here, the bank that holds the debt was not party to the case. The lien of credit/mortgage is a contract between the bank and Tuscanos. This mortgage is a multi-year note. Yet, the District Court ordered that Tuscanos pay off the debt to a third-party that is not involved in the case. This is an issue that was not tried and a remedy that goes way beyond the Jury Verdict and its factual findings.

On a practical note, Tuscanos cannot afford to pay off the mortgage. Second Affidavit by Wes Tuscano attached as Exhibit F, Appendix 2. Tuscanos do not have the ability to raise cash to pay more than \$200,000 to pay off this debt. *Id.* The note is secured by the property at issue that was deeded to Tuscanos based on a Gift Deed. The bank who lent money to Tuscanos was able to secure title insurance based on the Gift Deed. *Id.* Tuscanos’ plan was that they would pay off the debt over multiple years, not within 60 days as ordered by the District Court. *Id.*

Based on the issues tried before the jury, the District Court does not have the legal authority or practical ability to require Tuscanos to pay money they do not have. The District Court's Order to pay the mortgage is a violation of Tuscanos' Constitutional Due Process rights. The United States Supreme Court held, "To the contrary, our cases show that even the temporary or partial impairments to property rights that attachments, as with liens, 'are subject to the strictures of **due process**.'" *Connecticut v. Doe*, 501 U.S. 1, ¶ 12, 111 S.Ct. 2105 (1991)(citing *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 85, 108 S.Ct. 896 (1988)). Tuscanos have a due process right in their property, money, and mortgage. The District Court issued an order that they pay the mortgage without legal briefing or factual findings regarding the mortgage. Further, the bank that holds the note is not a party to this case and would be a necessary party.

The Jury found that the Parties entered into a contract and found that "Helviks and Tuscanos [are] bound to follow the terms of that Agreement. Upholding the District Court's Order requiring Tuscanos to pay off a multi-year mortgage would be a gross miscarriage of justice that will not be enforceable. The District Court held no hearings, and the Jury found no facts regarding the issue of whether Tuscanos had the financial means to pay off a multi-year lien within sixty days.

Additionally, it is a violation of Tuscanos' due process rights for the District

Court to order them to do something they cannot perform. As Tuscanos have proven, they were willing to do everything possible to comply with the Jury Verdict. Tuscanos' Notice of Compliance with Jury Verdict and Motion for Entry of Judgement and Satisfaction of Judgment, Ex. 3, Appendix 1. Tuscanos are not able to pay off the mortgage as ordered by the District Court, even though they believe they could have paid the \$150,000 ordered by the Jury Verdict because they would have retained the land as collateral under that Verdict. Exhibit F.

Therefore, based on the entire record, there is good cause to grant Tuscanos' Motion for Stay. Sidney Helvik continues to live in his house freely as he has for years. The Tuscanos pay the taxes on the property. *Id.* While Helviks continue to use the property for their home, Tuscanos have not been able to use the property for their purposes because of the lawsuit and costs of litigation. *Id.* Tuscanos have filed a Lis Pendens on the property protecting both party's interests from either party selling the property during the Supreme Court appeal. *Id.*

The status quo for both parties is Tuscanos continuing to pay all the expenses of the property and Helviks continuing to occupy their residence rent free with assistance from Tuscanos to plow their road and care for them as required by the Agreement the Jury found valid. Also, a stay, and a bond of \$32,775.53 better protects the Helviks than the next round of Helviks litigating to enforce a judgment requiring Tuscanos to pay off a mortgage that they cannot afford to pay off at this

time. If this Court does not stay that District Court's Order, the parties will be involved with more expensive litigation that will inevitably find its way to this Court and may be moot if Tuscanos prevail on the merits in their appeal challenging the constitutionality and legality of the District Court's Findings of Fact and Conclusions of Law that nullifies the Jury Verdict in this case.

If this Court requires Tuscanos to pay by cashier's check \$32,775.53 to the District Court, as Tuscanos moved the District Court, then if Tuscanos do not prevail on their appeal, Helviks will be paid their damages during the pendency of the appeal, which is the purpose of the bonding requirement. After the appeal under that scenario, the District Court and the parties would have to resume litigation at the trial court level to unwind the mortgage in a process that protects Tuscanos' and the Bank's due process rights.

If this Court grants Tuscanos' Motion to Stay, to substitute the bond, and pay \$32,775.53 into the District Court, then Helviks and the status quo are protected. Further, the Parties will not be engaged in expensive litigation regarding the Court's Order of something that Tuscanos cannot comply with. Helviks are represented by Montana Legal Services, but Tuscanos, who were sued in this matter, have to pay for their legal services.

Based on the foregoing, Tuscanos respectfully request this Court reconsider its December 19, 2023 Order denying Tuscanos' M.R.App.P. 22(2)(a) Motion,

review the Appendices Tuscanos filed with the Court, and find that Helviks will be protected; the parties and the Courts will avoid litigation over the scope of the District Court's authority to issue an Order that is impossible for Tuscanos to comply with and violates their Due Process Rights. Should Tuscanos prevail on appeal or not, if the Court grants Tuscanos' Motion, the parties will have maintained the status quo pending the appeal.

DATED this 21st day of December, 2023.

Lund Law, PLLC


Hertha L. Lund

CERTIFICATE OF SERVICE

I, Hertha Louise Lund, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 12-21-2023:

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Electronically signed by Genevieve Martin on behalf of Hertha Louise Lund
Dated: 12-21-2023