IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 24-0151

SCOTT LARSEN AND KAREN LARSEN,
Plaintiffs and Appellants,

v.

KEITH SAYERS AND DANIELLE SAYERS,
Defendants and Appellees.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana Second Judicial District Court, Butte-Silver Bow County, Cause No. DV-2021-00000217, the Honorable Kurt Krueger presiding.

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STATEMENT OF THE ISSUES

1. Is a freestyle motocross course an "appurtenance necessary to the enjoyment of a dwelling house"?
2. Is the use of a property as a freestyle motocross course a "residential use" within the meaning of the Declaration of Restrictive Covenants?
3. Is the manufacturing of motocross ramps within McGuinness Tracts a breach of the Declaration of Restrictive Covenants' prohibition against manufacturing?
4. Are the Larsens the prevailing party in this action?

STATEMENT OF THE CASE

Thirty-four years ago, Plaintiffs/Appellants Scott and Karen Larsen purchased land in a development subject to restrictive covenants, limiting all properties to use for "residential and agricultural purposes." The covenants assured lot owners that under no circumstances would there be any abandonment of "the original plan to preserve the property as a choice suburban tract area." The Larsens intended to retire on the property. In the intervening years, a motocross professional named Keith Sayers moved in next door. Sayers built a motocross course and a two-story freestyle motocross jump in the middle of this "choice" suburban residential neighborhood. Sayers uses the property for the purpose of practicing his craft, driving motorcycles over the jump and around the track

repeatedly. At times, he uses the motocross operation along with his subcontractors, who he tours with.

When the Larsens constructed their retirement home, they soon learned that the character of the neighborhood had been destroyed by the excessive noise and dust caused by the motocross operation that Sayers had installed. Sayers also took up the practice of driving golf balls directly toward the Larsens' house during the winter months, then trespassing on their property to retrieve them. After unsuccessfully seeking cessation of these nuisances, the Larsens commenced litigation. Judge Kurt Krueger held after a bench trial that Sayers had committed trespass and violated the Declaration of Restrictive Covenants by driving golf balls onto the Larsens' property and entering without permission. The trial court erred, however, by holding that freestyle motocross is a residential purpose under Montana law.

The trial court's holding is unable to be reconciled with this Court's binding authority. Appellants can locate no case law holding that motocross or similar activities constitute a residential purpose. This Court has previously held that the construction of a 3,200 personal storage building is not a "residential purpose." If personal storage is not a residential purpose, then professional motocross is not either.

The Larsens also learned that Mr. Sayers manufactures motocross ramps in his garage and in his driveway. The Declaration of Restrictive Covenants expressly forbids any manufacturing within the development. Despite clear evidence, clear evidence, and even Mr. Sayers's own admission, the trial court held that Mr. Sayers was not engaged in manufacturing on the property. The holding is in clear error and should be reversed.

Finally, since the Larsens prevailed in their attempt to secure an injunction against the Sayerses' trespassing, they are the prevailing party for the purpose of the attorney fee provision found in the restrictive covenants. The Larsens moved for an award of fees, but the motion was deemed denied under Second Judicial District Local Rule 19(a) (motions deemed denied 45 days after filing if not ruled upon).

The Court should hold that motocross is not a residential purpose, hold that the Larsens are the prevailing party and entitled to fees, and remand for further proceedings.

STATEMENT OF FACTS

A. The Parties.

Scott and Karen Larsen reside at real property located at 89 Trestle View Road, Butte, Montana. Dkt. 76, Findings of Fact and Conclusions of Law, & Order, Finding of Fact ("FOF") ¶ 1, (APP. 12). The Larsens are the owners of lots

27A and 27B on Certificate of Survey 101B within the McGuinness Tracts Roadway Association ("McGuinness Tracts"), as reflected on Trial Exhibit 3, Annotated Plat Map. Dkt. 76, FOF ¶ 2, (APP. 12). Mr. Larsen purchased both lots by 1989. *Id.* ¶ 3. He purchased the lots with the intention of eventually building a home for his retirement. Trial Transcript ("T.") at 94:25-95:2. In November 2019, the Larsens completed the construction of their home on Lot 27B. Dkt. 76, FOF ¶ 4, (APP. 13).

Defendants Keith and Danielle Sayers reside at 2535 Apex Lane, Butte. *Id.* ¶ 5. They are the owners of lots 26C and 26D of Certificate of Survey 197A within the McGuinness Tracts. *Id.* ¶ 6. The Sayerses' two lots are immediately south of the Larsens' lots. Trial Ex. 3.

The McGuinness Tracts, where both sets of parties live, is on the south end of Butte along Blacktail Loop. T. 88:14-19. It is a highly desirable area with minimum 2.5-acre lots, tremendous views, and a peaceful environment. *Id.* at 88:20-24.

Mr. Sayers had been a freestyle motocross professional for approximately 19 years. Dkt. 76, FOF ¶ 11, (APP. 13). Freestyle motocross is a variation on the sport of motocross in which motorcycle riders perform aerial tricks and stunts off a large ramp. *Id.* This can be done in front of judges in competitions such as the X-Games or as exhibition for spectators. *Id.* Mr. Sayers characterizes freestyle

motocross as his business. T. 204:9-11. He is paid to perform in stadiums and arenas around the world. *Id.* 204:12-205:8. He receives endorsement contracts from companies like Monster Energy and Parts Canada. *Id.*

The Sayerses' ten-year-old son, Gavin, is also a motocross professional. Gavin performs in professional motocross competitions and has endorsements from Parts Canada and a Canadian dealership. T. 222:7-223:5. Mr. Sayers testified that Gavin will likely continue to use the Apex Property for motocross for at least another five or six years, until he requires a larger track. *Id.* at 223:18-224:18

B. The McGuinness Tracts Declaration of Restrictive Covenants.

The lots owned by both sets of parties are governed by the McGuinness Tracts Declaration of Restrictive Covenants ("Declaration"). *See* Ex. 1. The covenants "attach to the land and run with the title thereto and shall be binding on all owners of tracts in the said real property." *Id.* § 12. "All deeds shall be given and accepted upon the express understanding that the said real property has been carefully planned as a choice rural suburban tract area exclusively and to assure owners that under no pretext will there be an abandonment of the original plan to preserve the property as a choice suburban tract area." *Id.*

Section 1 of the Declaration of Restrictive Covenants governs land use. It states in relevant part, "The real property described in Exhibit 'A' shall be used for

residential and agricultural purposes only, except as hereinafter provided, and no business, trade, manufacture, or other commercial activity shall be conducted thereon," with limited exceptions not relevant here. *Id.* § 1 (emphasis added).

Section 6 of the Declaration of Restrictive Covenants governs nuisance. It states, "No noxious or offensive activity shall be carried on or permitted on any tract; nor shall the property be used in any way which may endanger the health or safety of or unreasonably disturb the owners of tracts located in the said real property." *Id.* § 6.

Section 12 provides individual lot owners with the authority to enforce the Declaration. "Upon the breach of any of the said covenants and restrictions, anyone owning any land in the real property described in Exhibit 'A' may bring a proper action in the proper court to enjoin and restrain said violation or to collect damages or other dues on account thereof." *Id.*

The Larsens purchased their two lots with the reasonable expectation that the Declaration of Restrictive Covenants would be honored by all other owners within the McGuinness Tracts. Dkt. 76, FOF ¶ 23, (APP. 23).

C. The Sayerses' Construction of a Motocross Course and Freestyle Motocross Ramp.

After the Sayerses purchased Lot 26D in 2012, Keith Sayers constructed a large motocross ramp on the property, along with a motocross track with smaller jumps across the lot. *Id.* ¶ 26. The Sayerses extended the motocross track onto Lot

27C upon purchasing it in 2019. The Sayerses' Lot 26C and the Larsens' Lot 27A share a border. Trial Ex. 3. The motocross track on Lot 26D extends almost all the way to the property line shared with Lot 27A. *See* Trial Ex. 2, Aerial View. It includes metal ramp and a large landing mound, approximately two stories tall:

Trial Ex. 8, Photo of Ramp, as viewed from the Larsen home. Mr. Sayers practices freestyle motocross by speeding toward the black ramp, propelling himself into the air, and landing on the mound. In doing so, his exhaust pipe points directly toward the Larsen residence on the other side of the fence. T. 99:5-22, 209:13-21. Sayers testified that the noise from his motorcycle blows back toward the Larsens' home. *Id.* at 209:22-25.

D. Noise and Dust Caused by the Sayers Noncompliant Use.

The Sayers family's use of the Apex property for motocross has shattered the ability of the Larsens and other neighbors to quietly enjoy their own property. The Larsens built their house intending to utilize their outdoor space. They installed a patio, a deck, and a sunroom for the purpose of spending time outdoors. T. 94:14-95:2 (discussing Trial Ex. 28). They learned in the process of building the house that the noise emanating from the Sayers property would be a problem. T. 98:22-99:3. Mr. Larsen described the noise as "roaring, … real thunderous." *Id.* at 100:14-17. Sayers would be using the ramp two-to-three times per week during the summertime. *Id.* at 100:6-12.

The Larsens have endured motorcycle noise when hosting guests several times. *Id.* at 105:2-14. "[I]t's embarrassing…we can wait until it stops so we can hear each other talk or we can go inside and hide." *Id.* at 186:2-19. Karen Larsen is unable to enjoy activities like gardening due to the noise. She has tried using earplugs without success. *Id.* at 186:20-25. Mr. Larsen began documenting the Sayerses' use of the property for motocross and presented video evidence at trial. *See* Trial Exs. 9-16.

The noise caused by the motorcycles is not the only problem with their use. The motorcycles kick up an extraordinary amount of dust into the air during use. *See, e.g.,* Trial Ex. 15. Even when the motorcycles are not in use, they prevent the

dirt from "crusting over." T. 106:12-107:2, 116:3-118:12. Thus, during any windstorm, dust blows around the neighborhood from the Sayers property, but not the adjacent lots. *See* Trial Exs. 49-51. Karen Larsen testified regarding her concern that the dust will prevent the Larsens from eventually selling the lot bordering the Sayers property. T. 189:18-190:2.

Paul Iverson, a neighbor of the Sayerses, testified about the impact of the motocross course. Mr. Sayers moved in and built the course and jump without consulting his new neighbors. Iverson testified that Sayers would use the course as late as 9:00 p.m., waking Iverson's son. T. 13:8-18. Iverson asked Sayers to stop using the course that late and Sayers refused. *Id.* at 13:21-14:4. Iverson testified that he had "never encountered motorcycles as loud as these motorcycles." *Id.* at 14:16-15:1. At times, Iverson could not even hear his television inside his own house over the motorcycles. *Id.* at 15:2-17. Like the Larsens, when the Iversons would have company over, they found that "[i]t was too loud to stay outside and carry on a conversation." *Id.* at 15:18-24.

Keith Sayers and his son are not the only ones who use the course and jump. Mr. Sayers practices with the employees that he performs with as well. T. 19:4-8, 103:14-21, 111:1-10, 187:11-188:6. For example, in Trial Exhibit 13, four riders are seen on video riding over the jump repeatedly, while the Sayerses' son rides alongside:

Trial Ex. 13 (screenshot of video).

Before resorting to litigation, the Larsens attempted to mitigate the sound themselves. The Larsens left a large dirt berm from construction between their house and the Sayers property. They even added boards to the top of the berm, but to no avail. T. 104:3-105:1. Karen Larsen would use earplugs when gardening to cancel out the noise. *Id.* at 105:18-106:1. Unable to avoid the noise in their own house, they would close windows and turn up the television. *Id.* 106:2-11.

E. The Sayers Family's Second Motocross Course.

Mr. Sayers does not need to practice his profession in the McGuinness Tracts. He owns—in his words—"one of the most known pieces of property in the freestyle motocross world" on a 14-acre lot in Racetrack, Montana, near Deer Lodge. Trial Ex. 4, *Hard work pays off for stunt motorcyclist Keith Sayers*, Mont. Standard, July 26, 2013; T. 229:15-21. Sayers has six different ramps at the Racetrack property, including a supercross track, outdoor track, and freestyle

ramps. T. 229:22-230:5 In terms of motocross practice, there is nothing he can do at the Apex property that he cannot do at Racetrack. *Id.* 230:6-19. Unlike the Apex property, the Racetrack property is not subject to restrictive covenants. *Id.* at 231:7-11. Racetrack is 30 to 35 minutes from the Apex property. *Id.* at 231:25-232:2.

Mr. Iverson previously asked Mr. Sayers if he would practice at his course near Deer Lodge instead. Sayers told Iverson that he found it too inconvenient to drive there. T. 18:5-15.

F. Expert Testimony.

1. James Black, Acoustical Engineering.

At trial, the Larsens presented the testimony of two experts. James Black is an acoustical engineer with a master's degree from the Technical University of Denmark. T. 52:13-21. He presently teaches acoustical engineering at Montana State University and operates a consulting company. *Id.* at 56:1-19. Since Montana nuisance law includes no objective noise standard, Black performed tests from the two properties and used an Environmental Protection Agency study and Missoula County's noise ordinance as criteria. T. 60:2-62:17. In the context of recording sound from a motorcycle, the fact that a person knows he is being tested potentially affects the test. Thus, Black also considered decimeter measurements of Sayers's motocross at a time when Mr. Sayers did not know the sound was

being recorded. *Id.* at 65:20-69:13. Black checked the Larsens' decimeter and found that it met accuracy requirements and had been properly calibrated. *Id.* at 67:12-68:24; Trial Ex. 46. Mr. Sayers rode his motorcycles in a manner that is up to 6 decibels louder when he was unaware of the testing. T. 69:22-70:20. Applying the two criteria to this data, Black determined that the noise would not violate EPA criteria—which evaluates noise over a 24-hour period—but would violate the Missoula County criteria. In summary, Sayers's use for more than 15 minutes in an hour would be a violation at any time of day. Any use would be a violation between 7:00 and 10:00 p.m.:

Table 7 – Results of Comparison to Missoula Municipal Code Criteria

Time Period	Time Duration (Hours)	A-Weighted Noise Level [dB]	
		58.8	63.8
7AM to 7PM	≤ 15 Minutes in Any Hour	OK	OK
	> 15 Minutes in Any Hour	OK	Violation
7PM to 10PM	≤ 15 Minutes in Any Hour	OK	Violation
	> 15 Minutes in Any Hour	Violation	Violation

EXHIBIT 47

Trial Ex. 47.

2. Eric Ossorio.

Eric Ossorio is a real estate broker based in Big Sky. He has been in the business of buying and selling realty in Montana since 1993. T. 30:16-17. Ossorio has served on the Montana Board of Realty Regulation for seven years. T. 31:23-32:21. He also serves as the Chairman of the board's screening panel, which evaluates real estate licensing complaints. *Id.*

Real estate salespersons are required by law to identify adverse material facts affecting a property and disclose them to prospective buyers. Mont. Code Ann. § 37-51-313(3)(a). An adverse material fact is one which should be recognized by a salesperson as being significant enough to affect a person's decision to enter a contract to buy real property. Mont. Code Ann. § 37-51-102(1). This includes any fact that "materially affects the value" of the property. *Id.*; T. 36:10-17. Having evaluated the video and documentary evidence of the Sayerses' use of the Apex property, Ossorio testified that the proximity of the motocross track and jump would materially affect the value of both the Larsens' lots—especially the vacant south lot bordering the motocross track. *Id.* at 38:21-40:15, 41:14-42:7. The existence of the track and jump are adverse material facts that would materially affect the Larsens' property value. The proximity of the track would significantly reduce the pool of potential purchasers. *Id.*

G. Ramp Manufacturing on the Apex Property.

Keith Sayers also uses Lot 26D for manufacturing motocross ramps despite the Declaration's prohibition on manufacturing within McGuinness Tracts. T. 137:11-139:141:2; Trial Ex. 1, § 1. Mr. Larsen testified that he is able to hear Mr. Sayers building ramps from the Larsen property. *Id.* at 141:16-20. The Larsens expressed concern that a manufacturing operation, like a motocross operation,

would negatively affect the Larsens' own property values. *Id.* at 137:11-139:141:2.

The Sayerses denied this allegation in their Answer. *See* Dkt. 7, Answer ¶ 2 (denying Dkt. 1, Complaint ¶¶ 31-33). Mr. Sayers then deleted posts and photographs of the manufacture of motocross ramps on the Apex Property from his Facebook page, which the Larsens preserved. Dkt. 57, Order Re: Mtn. for Spoliation Sanctions at 2-3 (finding Sayers breached duty to preserve evidence by deleting Facebook posts).[1] At trial, the Larsens presented Mr. Sayers's own social media posts, documenting the manufacture of motocross ramps. Example:

[1] The Larsens moved for spoliation sanctions due to Mr. Sayers's deletion of these and other relevant posts. Dkts. 50, 51, Mtn. for Spoliation Sanctions. The trial court held that Sayers had indeed committed spoliation, but denied the request for sanctions. Dkt. 57 at 3.

See Trial Exs. 26 and 27. In one such post, Mr. Sayers represented that the ramp he was building at the time was on its way to Saudi Arabia. *Id.* Despite his Answer, Sayers admitted to manufacturing ramps at trial. T. 220:10-221:4. He has built as many as twelve and rents them to third parties. *Id.*

H. The Sayerses' Use of the Larsens' Property as a Driving Range.

The Larsens also learned soon after completing their home that Mr. Sayers has a habit of driving golf balls onto their property and toward their new residence. Dkt. 76, FOF 46, (APP. 18). During the winter months, Mr. Sayers would open his garage, which faces the Larsen home, and practice driving golf balls. *Id.* FOF 47, (APP. 18). He would do this a couple times per week. *Id.* at FOF 48, (APP. 18). He would then enter the Larsens' property without permission, retrieve his golf balls, and repeat the activity. *Id.* at FOF 49, (APP. 18). Upon the snow melting, the Larsens would find hundreds of golf balls on their property. *Id.* at FOF 50, (APP. 18); Trial Ex. 17. Mr. Sayers had posted videos of himself engaging in this activity on Facebook. *See, e.g.,* Trial Ex. 21.

When the Larsens filed suit, Sayers denied trespassing or hitting golf balls onto the Larsens' land. Dkt. 76, FOF 61, (APP. 19); Dkt. 7, Ans. ¶ 2 (denying Dkt. 1, Compl. ¶¶ 22-24). Sayers also deleted the evidence of his activities from Facebook, which the Larsens had preserved. Dkt. 57, Order Re: Mtn. for Spoliation Sanctions at 2-3 (finding Sayers breached duty to preserve evidence by

deleting Facebook posts). At trial, the Larsens presented the preserved Facebook posts and video of Sayers entering the Larsen property without permission. *See* Trial Exs. 19-21, 22-25.

I. Procedural History.

The Larsens filed their Complaint on July 29, 2021, asserting claims for Breach of Restrictive Covenant, Nuisance (Mont. Code Ann. § 27-3-101), and Trespass. Dkt. 1, Compl. ¶¶ 46-63. The Larsens also requested a permanent injunction against the Sayerses' trespassing and noncompliant use of the Sayers property.

The trial court issued its Findings of Fact and Conclusions of Law on October 19, 2023, after a June 12 and 13, 2023 trial. The court issued no findings regarding the effect of the Sayerses' activities on the Larsens or any mention of Mr. Iverson's testimony. The court disregarded Mr. Ossorio's testimony because he sells property in Big Sky instead of Butte. Dkt. 76, FOF 68, (APP. 20-21). The court similarly disregarded Mr. Black's testimony due to Butte's lack of a noise ordinance. *Id.* FOF 63-67, (APP. 19-20). The court held that freestyle motocross is a residential purpose under Montana law and that the use of the Sayerses' property for motocross is not a nuisance. *Id.* Conclusion of Law ("COL") 7, 19.

Though Mr. Sayers admitted to manufacturing ramps on the property, the trial court held that Mr. Sayers did not "manufacture" ramps because they did not

"sell any ramps built on their property." *Id.* COL 15-16. The trial court denied the Larsens' request for an injunction against manufacturing on the Apex Property.

As to Mr. Sayers's trespassing, the Court held that Mr. Sayers's practice of driving golf balls onto the Larsens' property and unauthorized entry onto their property to retrieve them is a breach of § 6 of the Declaration of Restrictive Covenants. *Id.* COL 13. This practice also constitutes nuisance and trespass. *Id.* COL 20, 22. The court denied the Larsens' request for injunctive relief against the use of the Sayers property for motocross, but granted the Larsens an injunction against the Sayerses for trespassing. *Id.* Order p. 15, ¶ 2. The court awarded $300 in damages. *Id.* ¶ 3.[2]

Upon entry of judgment, since the trial court determined that Mr. Sayers breached the Declaration of Restrictive Covenants by trespassing on the Larsens' property, the Larsens filed a motion for an award of attorney fees. Dkt. 82, Mtn. for Award of Attorney Fees. The trial court did not rule on the motion. Pursuant to Local Rule 19(a), the motion was deemed denied 45 days after filing. *See* Dkt. 52, Order (denying other motions due to failure to rule based on L.R. 19(a)).

[2] Plaintiffs also filed a counterclaim for Intentional Infliction of Emotional Distress against the Larsens. The court denied the claim, which is not at issue on appeal. *Id.* COL 23-28.

STANDARD OF REVIEW

The standard of review for questions of law is to determine whether the district court has correctly interpreted the law. *Schaub v. Vita Rich Dairy*, 236 Mont. 389, 391, 770 P.2d 522, 523 (1989). "We apply de novo review to mixed questions of law and fact and, thus, while the District Court's factual findings are reviewed for clear error, whether those facts satisfy the legal standard is reviewed de novo." *Montana Digital, LLC v. Trinity Lutheran Church*, 2020 MT 250, ¶ 9, 401 Mont. 482, 473 P.3d 1009 (quotations omitted). "The standard of review of a grant or denial of injunctive relief is whether the court manifestly abused its discretion." *Davis*, ¶ 10.

SUMMARY OF THE ARGUMENT

The Declaration restricts the use of McGuinness Tracts properties to agricultural or residential purposes. The trial court erred by holding that the use of the property for freestyle motocross is "residential" purpose. The motocross course is not an "appurtenance necessary to the enjoyment of a dwelling house." The trial court's legal conclusion is contrary to this Court's binding authority and must be reversed. The trial court further erred by effectively adding words to the restriction to reach this conclusion. The covenant has no incidental/accessory use clause.

Notwithstanding any of the above, the Larsens are the prevailing party for the purpose of the attorney fee provision of the Declaration of Restrictive Covenants. The Court held that Keith Sayers violated the Declaration by intentionally driving golf balls onto the Larsens' property and entering their property without permission. The Larsens are entitled to an award of their reasonable attorney fees.

ARGUMENT

I. THE SAYERSES VIOLATED THE DECLARATION OF RESTRICTIVE COVENANTS BY USING THE PROPERTY AS A PROFESSIONAL MOTOCROSS COURSE RATHER THAN FOR "RESIDENTIAL" OR "AGRICULTURAL" PURPOSES.

A. Montana Law Governing Restrictive Covenants.

"General rules of contract interpretation apply to restrictive covenants." *Brewer v. Hawkinson*, 2009 MT 346, ¶ 22, 353 Mont. 154, 221 P.3d 643. Under Montana law, "All covenants shall be considered to run with the land, whether marked or noted on the subdivision plat or contained in a separate instrument recorded with the plat." Mont. Code Ann. § 76-3-306. The Montana Supreme Court "interprets restrictive covenants by looking first to the language of the covenant to ascertain its meaning. If the language is clear and explicit, the language will govern." *Fox Farm Ests. Landowners Ass'n v. Kreisch*, 285 Mont. 264, 268, 947 P.2d 79, 82 (1997). "Restrictive covenants should be strictly construed and ambiguities resolved to allow free use of the property. However,

such free use must be balanced against the rights of other purchasers." *Id.* "The language of restrictive covenants should be understood in its ordinary and popular sense." *Id.* Restrictive covenants that can be "understood in their ordinary and popular sense" are "not ambiguous." *Id.* at 269. "Generally, restrictive covenants are considered valid if they maintain or enhance the character of the subdivision." *Id.*

B. The McGuiness Tracts Declaration of Restrictive Covenants limits use to residential/agricultural uses and authorizes individual owners to enforce the covenants.

Both 2535 Apex and 89 Trestle View are located within the McGuinness Tracts HOA. Dkt. 76, FOF 17, (APP. 17). The McGuinness Tracts are governed by a Declaration of Restrictive Covenants ("Declaration"). Ex. 1. These covenants "attach to the land and run with the title thereto and shall be binding on all owners of tracts in the said real property." *Id.* § 12. The Declaration requires that all deeds be "given and accepted upon the express understanding that the said real property has been carefully planned as a choice rural suburban tract area exclusively and to assure owners that under no pretext will there be an abandonment of the original plan to preserve the property as a choice urban tract area." *Id.* (emphasis added).

Section 1 of the Declaration of Restrictive Covenants governs land use. It states in relevant part, "The real property described in Exhibit 'A' shall be used for

residential and agricultural purposes only, except as hereinafter provided, and no business, trade, manufacture, or other commercial activity shall be conducted thereon," with limited exceptions. *Id.* § 1 (emphasis added). Section 6 of the Declaration of Restrictive Covenants governs nuisance. It states, "No noxious or offensive activity shall be carried on or permitted on any tract; nor shall the property be used in any way which may…unreasonably disturb the owners of tracts located in the said real property." *Id.* § 6 (emphasis added). The restrictive covenants do not mention recreation at all. *See id. generally.*

Section 12 of the Declaration of Restrictive Covenants provides that any person owning land within McGuinness Tracts may enforce these covenants:

> Section 12. Enforcement. Failure to enforce any of the restrictions, rights, reservations, limitations, and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof.…Upon the breach of any of the said covenants and restrictions, anyone owning any land in the real property described in Exhibit "A" may bring a proper action in the proper court to enjoin and restrain said violation or to collect damages or other dues on account thereof. In the case the violation results from a failure to take affirmative action required by these covenants and restrictions, then the use for any purpose of a tract on which such violation occurs may be enjoined. In the event of litigation, the prevailing party shall be entitled to a reasonable attorney's fee, together with costs of suit expended.

Id. § 12 (emphasis added). Thus, under the unambiguous language of Section 12, if any McGuinness Tracts owner breaches the Declaration, any other owner may enjoin and restrain the violation. *Id.* This language has never been amended.

C. Freestyle Motocross is not a "residential purpose" under the Declaration of Restrictive Covenants.

Freestyle motocross is not a "residential" or "agricultural" purpose. Mr. Sayers readily agreed with this proposition at trial.[3] Therefore, the use of the Apex Property for freestyle motocross is a violation of the Declaration. There is no dispute that motocross is not an agricultural purpose. No party contends that any part of the Declaration, including § 1, is ambiguous. The lower court's holding that motocross is a residential purpose is contrary to this Court's prior rulings and incorrect as a matter of law. This Court should reverse.

1. *Tipton v. Bennett* controls the evaluation of residential use pursuant to restrictive covenants.

The controlling case in Montana governing "residential purposes" clauses in restrictive covenants is *Tipton v. Bennett*, 281 Mont. 379, 382, 934 P.2d 203, 205 (1997). In that matter, this Court addressed the meaning of the word "residential" in the context of restrictive covenants. "Residential" means "used as a residence or by residents." *Tipton v. Bennett*, 281 Mont. 379, 382, 934 P.2d 203, 205 (1997).

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[3] Mr. Sayers's testimony reads as follows:

> Q. …Do you know what the word "residential" means?
> A. I do.
> Q. What's "residential" mean to you?
> A. Homes.
> Q. Okay. Can we agree that a freestyle motocross course is not an agricultural use of the property?
> A. Yes.
> Q. Okay. Can we agree that a freestyle motocross course is not a residential use of the property?
> A. Yes.

T. 218:6-16.

"Residence" is "the act or fact of dwelling in a place for some time." *Id.* When evaluating whether a use is residential, the Supreme Court instructed that the covenant be read as a whole and in light of the popular and ordinary meaning of the word "residential." *Id.* at 205.

In *Tipton*, the Bennetts constructed a 3,200 square-foot storage building on a property subject to a covenant limiting use to "residential purposes." *Id.* at 204. The Bennetts had a residence on an adjoining lot. *Id.* As with the McGuinness Tracts, the neighborhood in the immediate vicinity of the property consisted of single-family residences. *Id.* The Court noted that the building was used for personal storage, not commercial. A neighboring landowner brought an action to enforce a "residential purposes" covenant against the Bennetts' construction of the building. The First Judicial District Court held that the facility was a violation of the "residential purposes" covenant, but held that the Bennetts could cure the violation by building a residential dwelling on the same lot.

On appeal, this Court affirmed that the storage building violated the "residential purposes" clause, but *reversed* the trial court's order that allowed the Bennetts to keep the storage building on the condition that they construct a residence on the same lot:

> We hold that this interpretation of the covenant is too broad. The covenant clearly and unambiguously restricts usage to "residential purposes." The question is whether a large storage building qualifies as "for residential purposes." The District Court's own factual findings

> do not support such a conclusion. In *Hillcrest*, we recognized that a garage "is a proper appurtenance necessary to the enjoyment of a dwelling house...." *Hillcrest*, 778 P.2d at 423. In the present suit, the District Court acknowledged that the structure is not a garage; rather it is a 3,200 square foot storage building. With or without a residence, a 3,200 square foot storage building is **not an appurtenance necessary to the enjoyment of a dwelling house**. The building violates the covenant, not only because it stands alone without a dwelling, but also due to the fact that a 3,200 square foot storage building is not consistent with "residential purposes." In that it allows the Bennetts to keep the storage building on the condition that they construct a dwelling within one year, the court's order is reversed.

Id. at 383 (emphasis added).

2. A professional freestyle motocross course is not an "appurtenance necessary to the enjoyment of a dwelling house."

The central question here is whether the Sayerses' motocross track is "an appurtenance necessary to the enjoyment of a dwelling house." *Id.* But the trial court did not address this Court's *Tipton* test at all. It cited *Tipton* for its definition of "residence," but went no further. Dkt. 76, COL 5. As this Court instructed, the covenant should be taken as a whole. The McGuinness Tracts may be used for "residential and agricultural purposes only." Ex. 1 § 1. The drafters were adamant that the McGuinness Tracts were planned as a "choice rural suburban tract area exclusively." *Id*. § 12. "Choice" means "selected with care" or "of high quality."[4] Reinforcing this notion, the Declaration promises that there will be absolutely no

[4] "Choice." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/choice. Accessed 11 Jun. 2024.

abandonment of the plan to preserve the property as a "choice suburban tract area." *Id*.

With this question in mind, *Tipton* requires analysis of whether the motocross jump and track are an "appurtenance necessary to the enjoyment of a dwelling house." *Tipton*, 934 P.2d at 205. The Court had previously held that a private garage is a proper appurtenance. *Hillcrest Homeowners Ass'n v. Wiley*, 239 Mont. 54, 56, 778 P.2d 421, 423 (1989). In *Tipton*, this Court distinguished a garage from the proposed storage building.

While appurtenances like a garage or shop may be consistent with the enjoyment of a dwelling, a motocross course is not. As the trial court stated, residential use certainly includes more than "eating and sleeping." Dkt. 76, COL 6. It does not, however, include riding motorcycles off two-story ramps or racing around a motocross course. *Id.* Applying *Tipton*, if a 3,200 square-foot storage building used exclusively for personal storage is not an appurtenance necessary to the enjoyment of a dwelling house, then it is difficult to conceive how a professional motocross course could be. It is impossible to reconcile *Tipton* with the trial court's holding. The Court should reverse for this reason alone.

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3. The use of the motocross course by Sayerses' employees/subcontractors further demonstrates that the course is not an appurtenance necessary to the enjoyment of a dwelling house.

The Court further erred by ignoring the undisputed evidence that the Sayerses' use of the motocross course is for professional purposes, as opposed to personal. Keith Sayers is not an amateur who occasionally rides around the property for personal enjoyment. This is his livelihood—so much so that he owns one of the "one of the most known pieces of property in the freestyle motocross world" a short drive away from the Apex Property. Trial Ex. 4; T. 229:15-21. He is paid to perform and receives product endorsements for doing so. At trial, he admitted that his employees/subcontractors who tour with him on the road also use the motocross course in preparation for their performances. T. 19:4-8, 103:14-21, 111:1-10, 187:11-188:6.[5] Larsen presented video evidence of Sayers and his associated professionals practicing on the Apex property. *See* Trial Ex. 13.

4. The trial court's holding is not consistent with the preservation of McGuinness Tracts as a "choice rural suburban tract."

The trial court gave no consideration to the Declaration's requirement that the development be preserved as a "choice suburban tract area." Ex. 1, § 12. Reading this language in conjunction with the limitation to residential and

[5] Sayers classified these other motocross professionals as "employees" at his deposition. *Id.*

agricultural purposes only serves to further limit the manner and type of activities that would be allowed within McGuinness Tracts. Mr. Larsen correctly understood this provision to mean that McGuinness Tracts would be preserved as a "highly desirable area." T. 93:7-11. The Sayerses have not explained at any point in the proceeding how the use of their lots for motocross is consistent with this express requirement of the Declaration. The trial court did not attempt to reconcile the "choice" restriction with this particular use of the property.

The use of the two lots for professional motocross is wholly inconsistent with the preservation of the McGuinness Tracts as a "high quality" development, free from "unreasonabl[e] disturb[ances]" of the owners of the tracts. Ex. 1, §§ 6, 12. Mr. Ossorio's expert testimony is key to this provision. The use of the property for motocross not only detracts from the suburban character of the neighborhood, but would constitute an adverse material fact under the Real Estate Licensing Act. This noncompliant use of the property materially affects the value of the tracts surrounding the Sayerses. T. 36:10-37:6, 38:13-39:10. His testimony was uncontested. The Court erred as a matter of law by failing to give effect to this restriction.

5. Authority from other jurisdictions demonstrates that freestyle motocross is not a residential purpose.

Other courts have assisted in drawing the line between what constitutes a residential purpose and what does not. A water treatment facility, though it

provides water to a neighborhood, is not a residential purpose. *Kramer v. Dalton Co., LLC*, 235 Or. App. 494, 502, 234 P.3d 1008, 1012 (2010). Use of land as a dog park has been held to be a violation of a deed restriction limiting land to residential purposes. *Bloomfield Ests. Improvement Ass'n, Inc. v. City of Birmingham*, 479 Mich. 206, 215, 737 N.W.2d 670, 675 (2007). Neighboring homeowners were entitled to an injunction against construction of a tennis court where a restrictive covenant limited use to residential purposes. *Pelosi v. Wailea Ranch Ests.*, 91 Haw. 522, 534, 985 P.2d 1089, 1101 (Ct. App.), aff'd, 91 Haw. 478, 985 P.2d 1045 (1999). If none of these purposes fall within the scope of "residential" purposes, then a motocross track for use by a motocross professional and his subcontractors certainly does not either. Since freestyle motocross is not a residential purpose, as that term had been construed in Montana and other jurisdictions, the Court should reverse the trial court's order.

D. The trial court erred by effectively adding words to the Declaration.

In sidestepping *Tipton*, the trial court instead held that "[r]esidential use encompasses engaging in recreational activities incident to human habitation." Dkt. 76, COL 6. The trial court then concluded that "[m]otocross is a residential purpose when used for recreation." *Id.* ¶ 7. The trial court cited no authority for this proposition. To be clear, if the Sayerses' motocross course itself is not an "appurtenance necessary to the enjoyment of a dwelling house," then the course

itself is in violation of the restrictive covenants regardless of whether motocross could be characterized as "recreation." The Court's analysis should end there.

Notwithstanding this question, the trial court made two critical errors in reaching this conclusion. First, the court effectively added words to the restrictive covenants by including uses "incident" to recreational use. Dkt. 76, COL 6. Second, the court reached this conclusion without any explanation, analysis, or citation to authority.

1. The McGuinness Tracts covenants do not include an "incidental" or "accessory" use provision.

Simply labeling motocross as "recreation" does not automatically render the activity a residential purpose. Some restrictive covenants and zoning regulations do expressly include uses "incidental" or "accessory to" residential purposes. The McGuinness Tracts covenants do not. Courts cannot add words to a contract which are not to be found in it. *McConnell v. Pickering Lumber Corp*., 217 F.2d 44, 47 (9th Cir. 1954). Therefore, the trial court erred as a matter of law by holding that motocross is "incident" to residential use since the Declaration does not include any incidental or accessory use clause.

2. Motocross is not an "incidental" or "accessory" use of a residence.

That said, even restrictions that *do* include incidental/accessory use language are held to exclude activities like motocross. For example, in *Cavaciuti v. Zoning*

Bd. of Appeals of Town of Granby, 2014 WL 4638008 (Conn. Super. Ct. Aug. 13, 2014) (Appx. 1), a zoning official ordered the plaintiff to cease using his residential-zoned property for dirt biking "on the grounds that dirt biking is not a permitted activity in a residential zone and is not an accessory use, customarily incidental to the permitted uses in a residential zone." *Id.* at *1. The plaintiff appealed to Superior Court. The court rejected the plaintiff's argument:

> Connecticut has a well-developed body of Supreme Court law concerning accessory uses. This law was recently restated and illuminated in the case of *Loring v. Planning & Zoning Commission*, 287 Conn. 746 (2008)… "[An] accessory use [is] a use which is customary in the case of a permitted use and incidental to it ... An accessory use under a zoning law is a use which is dependent on or pertains to the principal or main use ... The word incidental as employed in a definition of accessory use incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance ... But, incidental, when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of incidental would be to permit any use which is not primary, no matter how unrelated it is to the primary use….
>
> . . .
>
> Unlike lawn mowing, leaf blowing, power washing and other similar maintenance tasks performed on residential property with noisy equipment, dirt biking has not habitually and by long practice been established as reasonably associated with a residential use. In other words, the ZBA was entitled to find that dirt biking does not have a reasonable relationship with residential uses.

Id. (emphasis added).

In the matter of *In re Fowler*, No. 159-10-11 VTEC, 2013 WL 582243 (Vt.Super. Feb. 04, 2013) (Appx. 6), a Vermont zoning administrator issued a violation to the appellant, Fowler, for using dirt bikes on property zoned "for residential purposes." Fowler argued that "dirt biking and/or motocross" is a "customary activity" associated with residential use. *Id.* Like the trial court in this matter, the superior court began with the proposition that use of residential property "includes more than the use of a house and grounds for food and shelter." *Id.* The court further recognized that pursuit of a hobby is a customary part of recreational activities. *Id.* But the court concluded that motocross is not an incidental use of residential property. Dirt bikes "have no inherent association with the residential use of property." *Id.* "We hold as a matter of law that riding a dirt bike, even occasionally, is not an occasional, customary activity associated with the residential use of property in the same way as lawn mowing or 'garden cultivating'…" *Id.*

The trial court's holding and this Court's review have substantial implications for neighborhoods governed by restrictive covenants across Montana. As is true of the Declaration in this matter, most residential restrictive covenants are crafted for the purpose of preserving the character and value of properties in residential neighborhoods. If motocross is a residential purpose in the McGuinness Tracts, then it is a residential purpose in any homeowners association or

landowners corporation with similar "residential use" restrictions. Affirmation of the trial court's holding would eviscerate the protection that similarly situated neighborhoods rely on across the State. The Court should reverse and order the issuance of an injunction.

II. THE TRIAL COURT ERRED IN HOLDING THAT SAYERSES DID NOT BREACH THE DECLARATION'S PROHIBITION AGAINST MANUFACTURING WITHIN MCGUINNESS TRACTS.

Section 1 of the Declaration expressly prohibits any manufacturing on properties within McGuinness Tracts. Trial Ex. 1, § 1. Although Mr. Sayers initially denied manufacturing motocross ramps on his property and intentionally destroyed evidence of his manufacturing operation, Mr. Sayers ultimately admitted to manufacturing ramps at trial. *See* Dkt. 7, Answer ¶ 2 (denying Dkt. 1, Complaint ¶¶ 31-33); Dkt. 57, Order Re: Mtn. for Spoliation Sanctions at 2-3; Trial Exs. 26 and 27; T. 220:10-221:4. Despite this admission, the trial court ruled as follows:

> "Manufacture" can be defined as "the operation of making goods or wares of any kind; the production of articles for use from or prepared materials by giving to those materials new forms, qualities, properties or combinations, whether by hand labor or by machinery; used more especially of production in a large way by machinery or by many hands working collectively." *State v. Hennessy Co.* (1924), 71 Mont. 301, 304-05, 230 P. 64. The terms "goods" and "wares" implies that manufacturing entails creating a product for sale.
>
> The Sayers [sic] are not selling any ramps built on their property. Therefore, they are not manufacturing ramps within the McGuiness [sic] Tracts and are not in breach of the Declaration of Restrictive

Covenants.

Dkt. 76, COL 15-16.[6]

The trial court erroneously construed the Declaration. Section 1 already prohibits any "business, trade,…or other commercial activity" within the McGuinness Tracts. If the covenant was concerned solely with the sale of goods from within the development, then there would be no need to include the word "manufacture." The drafters expressly included a prohibition on manufacturing. The definition of the word offered by this Court in *Hennessy* makes no mention of sale as an essential element of manufacturing. 71 Mont. at 304-05. Rather, this Court focused on the "operation of *making*" goods, or the "*production* of articles." *Id.* (emphasis added). Mr. Sayers himself recognized that his activities constituted manufacturing and admitted this at trial. T. 220:10-221:4.

Furthermore, the Larsens' concern has nothing to do with Mr. Sayers *selling* ramps. Their concern is the effect that the manufacture of three-story ramps in the driveway of a neighboring property has on their own property values. This type of activity is not consistent with the preservation of McGuinness Tracts as a "choice rural suburban tract area." Trial Ex. 1, § 12. The trial court's conclusion of law is in error. This Court should reverse the trial court and instruct the court to issue an

[6] The trial court further asserted that the "Larsens operate their business, ABC Mini Storage, from their home in McGuiness Tracts." *Id.*COL 17. This is not accurate or supported by substantial evidence. The Larsens testified that they sometimes bring mail home and occasionally receive business text messages while at home. T. 141:3-15. They do not operate a storage facility within McGuinness Tracts. *Id.*

injunction against any manufacturing on the Apex Property.

III. THE LARSENS ARE ENTITLED TO ENFORCE THE DECLARATION OF RESTRICTIVE COVENANTS REGARDLESS OF THE HOMEOWNERS' ASSOCIATION'S FAILURE TO DO SO.

Underlying the trial court's error is another misunderstanding of the Declaration of Restrictive Covenants. As Section 12 states, any property owner within the McGuinness Tracts may bring an action to enjoin violations or collect damages. The trial court noted this provision, but curiously cited a 1992 amendment to the restrictive covenants which created a homeowners association. Dkt. 76, FOF 21-22, (APP. 15). The amendment charged the HOA board with enforcement of the restrictive covenants. Section 12, however, has never been amended. Homeowners retain the right to enforce the Declaration of Restrictive Covenants. Ex. 1, § 12.

Even though Section 12 unambiguously vests the right to enforce in the individual property owners, the trial court stated in Conclusion of Law No. 4, "The Sayers [sic] were unable to get any other neighbors to join in their attempted enforcement of the Restrictive Covenants. This demonstrates a lack of intent of the Association to enforce these covenants."

The trial court never actually held that only the HOA may enforce these covenants, nor did the Sayerses argue that only the HOA may do so. Section 12 is not only clear that individual lot owners are entitled to commence an action to

enforce the Declaration, the provision also expressly states that the failure to enforce these rights does not waive the lot owners' right to enforce the Declaration. Trial Ex. 1, § 12. "Failure to enforce any of the restrictions, rights, reservations, limitations, and covenants contained herein shall not in any event be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof." *Id.*

Conclusion of Law No. 4 suggests that the trial court disregarded the Larsens' rights under § 12 of the Declaration altogether because a handful of distant neighbors situated elsewhere in the neighborhood do not take issue with the Larsens' use of their lots. In doing so, the trial court erred as a matter of law.

IV. THE LARSENS ARE THE PREVAILING PARTY AND ENTITLED TO AN AWARD OF THEIR ATTORNEY FEES.

The trial court held that both parties' lots are governed by the Declaration. Dkt. 76, FOF 17, (APP. 14). According to § 12 of the Declaration, in an action to enjoin or restrain a violation of the Declaration or to collect damages, "the prevailing party shall be entitled to a reasonable attorney's fee, together with costs of suit expended." Ex. 1, § 12. Under Montana law, the "prevailing party is the one who has an affirmative judgment rendered in his favor at the conclusion of the entire case." *Avanta Fed. Credit Union v. Shupak*, 2009 MT 458, ¶ 49, 354 Mont. 372, 223 P.3d 863.

Second Judicial District Court Local Rule 19(a) states that if a "motion is not

ruled upon within forty-five (45) days of the date the motion was filed, the motion is deemed denied." *Compare with* Mont. R. Civ. P. 59(f) (motion for new trial deemed denied after 60 days).

In the Findings of Fact and Conclusions of Law, the trial court found that during the winter months, Keith Sayers would intentionally drive golf balls from his garage directly toward the Larsens' house. Dkt. 76, FOF 47, (APP. 18). He would then illegally trespass on the Larsens' property, collect his golf balls, and repeat the activity. *Id.* FOF 49, (APP. 18). He would do this once or twice per week. *Id.* FOF 48, (APP. 18).

The trial court held that Keith Sayers's practice of driving golf balls onto the Larsens' property and the unauthorized entry onto their property for the purpose of retrieving them constitutes trespassing. More importantly, the court held that the activity is noxious, offensive, and unreasonably disturbs the owners of tracts within the McGuinness Tracts. Dkt. 76, FOF 13, (APP. 13-14). "This is a breach of § 6 of the Declaration of Restrictive Covenants." *Id*. The Court granted the Larsens' request for a permanent injunction against entry on the Larsens' real property or hitting golf balls onto their property. *Id.*, Order ¶ 1. The Larsens are the prevailing party and are therefore entitled to an award of their attorney fees under § 12.

The Larsens filed a motion for attorney fees on January 9, 2024. Dkt. 82. The trial court did not rule on the motion within 45 days. Pursuant to L.R. 19(a),

the motion was deemed denied on February 23, 2024.[7] The Court should hold as a matter of law that the Larsens are the prevailing party and entitled to an award of reasonable attorney fees. The Court should then remand on this issue for a hearing on fees.

CONCLUSION

Freestyle motocross is not a residential purpose. This Court should reverse the trial court's Findings of Fact and Conclusions of Law, order the issuance of a permanent injunction, and remand for further proceedings on damages. The Court should further hold that the Larsens are the prevailing party in the underlying matter and therefore entitled to an award of attorney fees.

DATED: June 12, 2024.

CROWLEY FLECK PLLP

By /s/ Brett P. Clark
Brett P. Clark
Attorneys for Plaintiffs and Appellants Scott Larsen and Karen Larsen

[7] Earlier in the action, the Larsens filed a motion to dismiss the Sayerses' counterclaim and a motion for temporary injunction. The trial court issued an order shortly before trial holding that both motions were deemed denied under L.R. 19(a) by virtue of the court's failure to rule on either. Dkt. 52, Order Denying Motions.

CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Times New Roman typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 8499 words including footnotes. Rule 11(4).

/s/Brett Clark

CERTIFICATE OF SERVICE

I, Brett Patrick Clark, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-12-2024:

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