IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No.
DA 23-0716

RODNEY BRANDT and HEIDI BRANDT,
MARSHALL FLADAGER and NEVA
FLADAGER, and LARRY LAUTARET and RENA LAUTARET,

Plaintiffs/Counter-Defendants/
Appellees/Cross-Appellants,

v.

R&R MOUNTAIN ESCAPES, LLC,

Defendant/Counterclaimant/
Appallant/Cross-Appellee.

On Appeal from the Montana Eleventh Judicial District
Flathead County Cause No. DV-22-1201E, Hon. Danni Coffman

COMBINED APPELLEES' RESPONSE BRIEF AND CROSS-APPELLANTS' OPENING BRIEF

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STATEMENT OF ISSUES

The issues on appeal are as follows:

1. WHETHER THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT THAT THE RESTRICTIVE COVENANT OF "RESIDENTIAL LIVING" PROHIBITED SHORT-TERM RENTAL USE BASED ON THIS COURT'S HOLDING IN *CRAIG TRACTS* AND THE CIRCUMSTANCES PRESENTED.

2. WHETHER THE DISTRICT COURT ERRED IN FAILING TO AWARD ATTORNEYS' FEES TO APPELLEES AS THE PREVAILING PARTY.

STATEMENT OF THE CASE

Appellant, whose members are from Florida, bought a second home in a small subdivision near Whitefish on property subject to a Declaration of Covenants, Conditions, and Restrictions, did not bother to read the restrictive covenants, and began marketing its home on Airbnb.com and vrbo.com for short-term rental use. Appellees are the remaining owners and neighbors ("Neighbors") in the small seven-lot subdivision who had historically fought to prevent short-term rental use in the subdivision. Neighbors filed this action to enforce the Declaration and permanently enjoin R&R Mountain Escapes, LLC's ("R&R") use of its property as a short-term rental. The District Court followed the rationale in *Craig Tracts* and ruled that R&R's use as a short-term rental violated the Declaration. (*Order,* Doc. 45, APP. A) R&R appealed. The District Court denied Neighbors'

claim for an award of attorneys' fees pursuant to the language in the Declaration. Neighbors cross-appealed.

STATEMENT OF THE FACTS

The Declaration

On or about November 20, 1990, Edna Mae Astrope recorded against her property a Declaration of Covenants, Conditions, and Restrictions ("Declaration"). (APP. B)

The protections in the Declaration were designed "to encourage the development of said property for country residential living." (APP. B, § A) The Declaration restricted the property to "only [] country residential purposes," buildings were restricted to "single-family residences," and it expressly prohibited "any business, trade, [] or other commercial purpose whatsoever." *Id.,* §§A(1), A(1)(a) and A(2)(a). In addition, the Declaration provided that no structure may be "applied to, used, or occupied, as an apartment or multi-family structure." *Id.,* §A(2)(a). Finally, the Declaration stated that no more than one single-family dwelling unit may be permitted on each five-acre parcel. *Id*, §§A(4) and A(4)(a).

The Subdivision

Today, through a couple of subdivisions, seven different parcels comprise the former Astrope property. Neighbors are all successors-in-interest to the

Astrope property who wish to enforce the restrictions. The Brandts own 15 acres commonly known as 190 E. Blanchard Lake Road; the Fladagers own five acres commonly known as 160 E. Blanchard Lake Road; and the Lautarets own five acres commonly known as 178 E. Blanchard Lake Road. The Appellees are collectively referred to as "Neighbors."

Plaintiff Larry Lautaret, a pastor in Kalispell, was the first property owner to purchase property from Ms. Astrope in 1990 and the first to build a home in the area. (Aff. Lautaret, Doc. 42) He also built the road that is now known as East Blanchard Lake Road. *Id.* The road is, in reality, a small driveway that connects the area to Highway 93. *Id.* It is sandwiched between two commercial buildings on the highway and is neither part of an intersection nor served by a turn lane, so it is unlikely that any person would slow down on Highway 93 to turn onto East Blanchard Lake Road unless they knew the road existed and had a purpose. *Id.* As a result, East Blanchard Lake Road receives almost no traffic other than from the owners who live in the area serviced by the road. *Id.*

Given the area's remoteness and lack of vehicular traffic, the area serviced by East Blanchard Lake Road is very remote and quiet. *Id.* Only about seven homes are located on East Blanchard Lake Road and some of the properties are not subject to the Declaration. *Id.* The properties that are subject to the Declaration are made up of large-acre pasture lands enclosed by fences. *Id.* East Blanchard

Lake Road is a very narrow single-lane driveway that is not suitable for two cars to pass. *Id.* Many residents use the road to walk with their family and pets. (*Id.;* Aff. S. Dillon, Doc. 41)

R&R Mountain Escapes, LLC's purchase and short-term rental use.

R&R's property is also a successor-in-interest to the Astrope property. Russell Palmer and Ramona Stewart are from Florida. In November 2020, they acquired five acres of real property commonly known as 186 E. Blanchard Lake Road. Their warranty deed is subject to "all reservations and exceptions of record." (Deed, APP. C) In February 2022, Palmer and Stewart conveyed their property to R&R Mountain Escapes, LLC via quitclaim deed.

In June 2022, R&R applied for a conditional use permit from Flathead County to use its property as a short-term rental. (Application, APP. D) The Application stated that as many as four cars may be present during each guest rental, indicating that R&R expected to rent its property to large groups and/or multiple families at one time. *Id.,* § 2(D)(2). In addition, the architectural drawings revealed that the dwelling located on the R&R Property has as many as five bedrooms and included an independent dwelling unit above the garage of the dwelling which was labeled as an "Apartment". *Id.,* p. 7.

R&R's property is or was available on VRBO. (APP. E) R&R's short-term rental actively is marketed and managed by I Love Whitefish Vacation Rentals, a

vacation rental company in Whitefish. On April 14, 2022, R&R entered into a Management Rental Agreement with I Love Whitefish. (Management Agreement, APP. F) The management company is paid 35% of gross monthly rental income, thus incentivizing it to book as many rentals as possible. *Id.*, ¶ 12. The home was advertised through national companies like VRBO and Airbnb, as well as through I Love Whitefish Vacation Rental's local website. (APP. E, G, H) These advertisements advertise for up to **10 guests** per night. *Id.* In the limited seven months of 2022, R&R earned over $55,000 in gross rental income. (APP. I and J) As of February 2023, R&R had bookings for 88 nights and a projected gross income of $45,599. (APP. K)

Neighbors' prior enforcement of the Declaration against short-term rental use.

The properties subject to the Declaration have never had approved short-term rental use, and the Neighbors have taken steps to ensure that no short-term rental use has occurred. (Aff. Lautaret, Doc. 42, ¶ 7; Aff. 2nd Brandt, Doc. 43, ¶ 4) If the Neighbors believed a property was being used as a short-term rental use, they would immediately object based on their understanding of the Declaration which restricts use to "country residential living" and prohibits "any commercial use whatsoever." (Aff. Lautaret, ¶ 7; Aff. 2nd Brandt, ¶ 9; Aff. Gene Hill, Doc. 40, ¶ 7; Aff. Dillon, Doc. 41, ¶ 6) In fact, this occurred on two prior occasions. In 2017, Dr. Brandt and his wife, Heidi, along with Larry and Rena Lautaret, met with Dale

and Tony Hernandez, previous owners to Defendant's property, to object to the Hernandez's position on short-term rentals and clarified that the neighbors did not approve of short-term rentals. (Aff. Lautaret, Doc. 43, ¶ 7; Aff. Brandt, ¶ 4, Doc. 17) Hernandez sold to Adam Hammett, who started remodeling/construction over the garage space to allow for short term tenants in spring of 2018. *Id.* Again, Dr. Brandt and his wife spoke to the Hammetts immediately about the Declaration and reminded them about short term rentals prohibition. *Id.* Mr. Hammett eventually sold his home to the principals of R&R.

When R&R's principals, Russel S. Palmer and Ramona Stewart, purchased their property in 2020, Ms. Stewart admitted that she and her husband were unaware of the Declaration or that their property was subject to it: "I didn't realize we had covenants." (R. Stewart email, APP. L)

As soon as Dr. Brandt discovered that R&R had applied for a short-term rental permit, he spoke with Ramona Stewart about his objection to short term rental use and the restrictions in the covenants. (Aff. 2nd Brandt, Doc.43, ¶ 9)

Impact from R&R's short-term rental use.

Since its approval in the summer of 2022, several neighbors have testified to the negative impacts caused by R&R's short-term rental use. Larry Lautaret testified:

a. "Since R&R started renting on a short-term basis, the neighborhood has certainly changed in a negative way from

the way it has been for the past 35 years. The primary negative impact has been the traffic. The single lane road is narrow and more often used by the local residents as a place to walk with their families and pets. Since the short-term rental was allowed, there have been a number of incidents where there are suddenly a number of vehicles coming and going, often times at high speeds, as though the occupants don't respect the other landowners.

b. On July 20, 2023, I observed a side-by-side unit, two 4-wheeler ATVs, and a Jeep going up and down East Blanchard Lake Road from the highway to Defendant's property. It had been going on since mid-morning and continued throughout the afternoon. The vehicles operated at a high rate of speed.

c. I have observed several close calls where those vehicles almost hit pedestrians or their pets. I have felt some irritation about having vehicles in our neighborhood that speed and are reckless, and the quality of the neighborhood seems like it has diminished since the short-term rentals began.

d. Overall, I have some anxiety with the short-term rental. I never used to think about my neighbors, other than general well-being. I was never concerned with whether they were home or not. Now, I find myself wondering if R&R's property has guests. When I come out of my long driveway that intersects with East Blanchard Lake Road, I wonder if someone will be speeding down the road – something I have never had to think about. Overall, R&R's short-term rental is a negative impact to our neighborhood. Our area was better and more comfortable without it.

(Aff. Lautaret, Doc. 42, ¶¶ 8-11)

Dr. Brandt also testified to the negative impacts caused by R&R's short-term rental activity:

a. "Since R&R started renting on a short-term basis, the neighborhood has certainly changed in a negative way. We

have had people come onto our property in the middle of the night thinking our property was R&R's property. On July 8, 2022, I observed that six unattended children staying at R&R's property had entered my pasture that had a bull in it. I had to act quickly to remove them. On August 7, 2022, I observed teenagers who were staying at R&R's place racing down my driveway and East Blanchard Lake Road with Texas plates.

b. "A primary negative impact from R&R's short-term rental has been the traffic. The road is a narrow, single lane road that is used more by the local residents as a place to walk with their families and pets. Excessive traffic from R&R's short-term rental causes unnecessary road congestion. Since the short-term rental was allowed, a number of incidents have occurred where there are suddenly a number of people coming and going. Often times, the vehicles travel at high speeds, as though the occupants don't appreciate or respect the country living we all abide by."

c. "Overall, R&R's short-term rental has interfered with my use and enjoyment of my property. Instead of enjoying the beauty of the 1.0 mile drive to my house, I now wonder if R&R's property has guests staying the night. When I know they have guests, I wonder if they will be speeding down the road. Our area is better and more comfortable without it."

(Aff. 2nd Brandt, Doc. 43, ¶¶ 6-8)

Another resident who lives along East Blanchard Lake Road but who is not governed by the Declaration, testified to the negative impacts from R&R's short-term rental activity. Gene Hill and his wife, Teri, own property located at 145 East Blanchard Lake Road, which is adjacent and to the north of the Neighbors' properties. They have owned their home and property for 26 years.

a. "We have a wonderful neighborhood with beautiful neighbors. Allowing short term rentals would negatively affect all of our properties and interferes without our enjoyment of them.

b. For example, on many occasions, people staying at R&R's place cannot locate it so they turn into our property and come down our driveway, ignoring the "private driveway" sign. They do this at all hours, including two and three in the morning. This has happened about 10 or 12 times.

c. The people who drive into our driveway are always rude, both verbally and non-verbally.

d. Recently, people staying at R&R's property rented about six side-by-sides, and they all came into my driveway and went around our loop. Their conduct was rude and disrespectful.

(Aff. Hill, Doc. 40, ¶¶ 3-6)

Sean Dillon, who has owned property at 117 East Blanchard Lake Road for the past 25 years, though not subject to the Declaration, testified to the negative impacts:

a. "We raised our children in this home and have walked three different golden retrievers the mile up and down the road twice a day for at least 20 of those years. My children learned to ride their bikes on this road, caught frogs in the pond at the end of the road, walked their girlfriends and now wives down this road - the list of fond memories goes on and on.

b. "In the summer of 2022, we noticed a sudden increase in the number of unrecognized vehicles. We were confused and disappointed to learn that these unwelcome visitors were guests at a newly approved short-term rental located at 186 East Blanchard Lake Road. Adding a short-term rental property at the far end of our neighborhood presents a significant safety concern and dramatically changes the

dynamic and character of the neighborhood. The road known as East Blanchard Lake is only the width of one vehicle, not two. Instead of a friendly meeting with a neighbor on the road as often happens, I'm trying to pull my dog and my grandchild off the road to let an unfamiliar vehicle go by - often at uncomfortable speeds!

c. "I have observed nuisance-like behavior as well. In July 2023, a big family rented the Defendant's home. They had a number of side-by-side and four-wheeler type vehicles. They ran these vehicles constantly up and down the road at excessive speeds from noon until 6 pm. I actually had to speak to them to ask them to stop and they admitted to being from a big city and thinking that driving on our road was off-roading in the country in these ATV-type vehicles.

d. "Overall, Defendant's short-term rental has had a negative impact on our neighborhood. Although I am not a Plaintiff in this case, I strongly support a finding that prohibits short-term rentals in this area.

(Aff. Dillon, Doc. 41, ¶¶ 2, 4-6)

STANDARD OF REVIEW

A district court's grant or denial of summary judgment is reviewed de novo, applying the same criteria of M.R.Civ.P. 56 as a district court. *Quarter Circle JP Ranch, LLC* v. *Jerde*, 2018 MT 68, ¶ 7, 391 Mont. 104, 414 P.3d 1277. Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. *Id*.; M.R.Civ.P. 56(c)(3). A district court's conclusions of law are reviewed to determine whether they are correct. *Jerde*, ¶ 7.

This Court reviews the district court's construction and interpretation of a contract to determine whether it was correct. *In re Szafryk*, 2010 MT 90, ¶ 19, 356 Mont. 141, 232 P.3d 361.

A decision on a request for an award of attorney fees is reviewed for abuse of discretion unless a contract requires an award of fees, in which case a district court lacks discretion to deny the request. *Emmerson v. Walker*, 2010 MT 167, ¶ 20, 357 Mont. 166, 236 P.3d 598.

SUMMARY OF ARGUMENT

When neighbors who own property subject to covenants make efforts to enforce their covenants against short-term rental use, *Craig Tracts* should and will protect the property from any violations caused by such use. On the other hand, when owners do not enforce their covenants and protect their properties against short-term rental use, *Craig Tracts* will not afford any protection.

In this case, Neighbors have steadfastly enforced their Declaration to prevent short-term rental use. The District Court properly followed this Court's holding in *Craig Tracts* and ruled that R&R's short-term rental use violated the "country residential living" and "country residential purposes" restrictions. Accordingly, this Court should affirm the District Court's ruling.

R&R wants this Court to ignore *Craig Tracts* rather than use it as guidance since it is detrimental to its case. Instead, it relies on non-primary authority like district court opinions and cases from jurisdictions rejected by this Court. Yet, *Craig Tracts* is the seminal case on the issue presented and must be followed.

ARGUMENT

A. RULES FOR INTERPRETING COVENANTS

The interpretation of restrictive covenants is a question of law. *Czajkowski v. Meyers*, 2007 MT 292, ¶ 21, 339 Mont. 503, 172 P.3d 94. When interpreting restrictive covenants, courts apply the same rules of construction as are applied to contracts. *Micklon v. Dudley*, 2007 MT 265, ¶ 10, 339 Mont. 373, 170 P.3d 960 (citation omitted). "Restrictive covenants, like contracts, are interpreted to ascertain the intention of the parties. Where language is clear and explicit, the Court will apply the language as written." *Craig Tracts Homeowners' Ass'n v. Brown Drake*, LLC, 2020 MT 305, ¶ 9, 402 Mont. 223, 477 P.3d 283 (citations omitted); *Grassy Mt. Ranch Owners' Ass'n v. Gagnon*, 2004 MT 245, ¶ 10, 323 Mont. 19, 98 P.3d 307 (citation omitted).

Courts read declarations of covenants on their four corners as a whole and terms are construed in their ordinary or popular sense. *Windemere Homeowners Assn. v. McCue,* 1999 MT 292, ¶ 13, 297 Mont. 77, 990 P.2d 769. Where the

language of the covenants is clear and explicit, that language will govern a court's interpretation of the covenants as a whole. *Hillcrest Homeowners Assn. v. Wiley,* 239 Mont. 54, 56, 778 P.2d 421, 423 (1989). While restrictive covenants are strictly construed and ambiguities are to be construed to allow for free use of the property, free use of the property must be balanced against the rights of other purchasers in the subdivision. *Windemere Homeowners Assn.* ¶ 13.

B. *CRAIG TRACTS V. BROWN DRAKE, LLC*

In Montana, the only reported case addressing short-term rentals vis-à-vis the language found in restrictive covenants is *Craig Tracts Homeowners' Ass'n v. Brown Drake*, LLC, 2020 MT 305, 402 Mont. 223, 477 P.3d 283. Undoubtedly, *Craig Tracts* will guide this Court's decision. Therefore, a proper review of that case is important.

1. Facts.

The Craig Tracts HOA recorded Original Covenants in 1983 that both restricted use to "residential purposes only" and prohibited any "commercial or business use or for the use of a motel, hotel or apartment house, except for professional occupations." *Id.,* ¶ 3. However, important to the Court's analysis, the following year the HOA recorded Amended Covenants deleting the prohibition on commercial, business, or hotel/motel/apartment house uses. *Id.*, ¶ 4.

Brown Drake, LLC owned property that is part of the HOA. At the time of its purchase in 2017, a real estate agent informed them that at least one other home subject to the covenants had previously been used for a short-term rental. *Id.*, ¶ 4. Brown Drake then built a fishing lodge. *Id.*, ¶ 3.

The HOA filed an action to declare that lodge violated the "residential purposes only" restriction in the Amended Covenants. *Id.*, ¶ 6. On summary judgment, the district court ruled in favor of the lodge. *Id.* The HOA appealed. *Id.*

2. Principal Holding.

The first decision reached in *Craig Tracts* was this Court's interpretation of a "residential use only" restriction. *Craig Tracts,* ¶¶ 9-13. Importantly, the Court's interpretation was *not* dependent upon the facts presented. *Id.* Rather, it was a pronouncement of Montana law after surveying the law from many other jurisdictions.

First, the Court considered the majority of jurisdictions that interpreted "residential purposes," based on *what* was being done at a particular premises rather than *how long* any particular individual was doing the activity, as allowing short term rentals. *Id.*, ¶ 10. Next, the Court considered the minority of jurisdictions that focused on the *duration* of the stay in interpreting the "residential only" restriction as prohibiting short-term rentals. *Id.* Then, the Court made its

principal holding, again independently of the facts, that Montana will follow the minority of jurisdictions that define "residential use" as going beyond just the activity and must consider the duration of the stay:

> We agree with these jurisdictions that the common understanding of the word "residential" often goes beyond the mere existence of an activity at a fleeting instant in time to imply a pattern of regularity or duration.

Id., ¶ 13.

In siding with the minority, the Court specifically relied upon *Hensley v. Gadd,* 560 S.W.3d 516, 524 (Ky. 2018), which held that "[O]ne-night, two-night, weekend, weekly inhabitants cannot be considered 'residents' within the commonly understood meaning of the word, or the use by such persons as constituting 'residential.'", and *Eager v. Peasley,* 322 Mich. App. 174, 911 N.W.2d 470, 478 (Mich. Ct. App. 2017), which held that "Defendant's transient, short-term rental usage violates the restrictive covenant requiring 'private occupancy only' and 'private dwelling.'" *Craig Tracts*, ¶ 13. To make its point, this Court explained, "most weekend vacationers, after booking a place to spend the night, would probably not list their local place of accommodation as their 'residence.'" *Id.*

3. Ultimate Holding.

Having determined that a "residential use" restriction implies a "pattern of regularity or duration" of some time, the Court held that the Amended Covenants

were ambiguous because they did not explicitly say *how long* a person must remain within a property in order for it to serve a residential purpose. *Id*, ¶ 15. To resolve the ambiguity, the Court followed well-settled law by considering extrinsic evidence. *Id.*, ¶ 16. The primary evidence relied upon by the Court was the fact that the prohibition on commercial use was removed in the Amended Covenants suggesting that the parties "intended to take a less restrictive approach." *Id.*

The second most important evidence relied upon by the Court was the fact that at least one other home subject to the Amended Covenants had been rented out for a period of eight years. *Id.*, ¶ 17. The Court stated, "This prior use not only sheds light on the interpretation of the Amended Covenants but raises issues of Brown Drake's reasonable expectation of the use of its property." *Id.*

Thus, having interpreted the covenants as intending to be less-restrictive and allowing short-term use based on prior history, the Court then held there was no evidence that Brown Drake's use was the source of disturbance or intrusive, nuisance-like activity or that the Lodge's use detracted from the other neighborhood members' enjoyment of their own property. *Id.,* ¶ 18.

C. R&R's USE OF ITS PROPERTY AS A SHORT-TERM RENTAL VIOLATES THE "COUNTRY RESIDENTIAL LIVING" AND "COUNTRY RESIDENTIAL PURPOSES" RESTRICTIONS AS INTERPRETED BY THIS COURT IN *CRAIG TRACTS*.

The District Court followed the rationale in *Craig Tracts* in ruling that

R&R's proposed use violated the Declaration. Just as in *Craig Tracts*, the District Court ruled that the "residential purposes" and "residential living" restrictions were ambiguous because the Declaration did not explicitly state a duration. (*Order,* APP. A, p. 4) It then followed the rationale in *Craig Tracts* to resolve the ambiguity.

1. A more restrictive interpretation.

Unlike the HOA in *Craig Tracts*, the Declaration never removed the prohibition against commercial use. The District Court correctly ruled that, "Since the Declaration in this case contains a prohibition against commercial use, it suggests that the declarant (Astrope) and Plaintiffs, along with other language, intended for her restriction on 'residential use' to be more restrictive." *Order*, p. 4; *Cf. Craig Tracts,* ¶ 16 (finding the removal of a commercial use prohibition suggested that the parties intended to take a "less restrictive approach.").

Unlike the covenants at issue in *Craig Tracts* that apparently only had restrictive language for "residential use," the Astrope Declaration set forth substantial language on Ms. Astrope's intentions to protect and restrict her property to country living, no commercial use whatsoever, and no apartment-type use:

> PROTECTIVE COVENANTS: The following Protective Covenants are designed to . . . preserve, insofar as practical, the natural beauty of said property and to encourage the development of said property for country residential *living*.

1. Land Use: All of the parcels of land within the property are designed and intended as and for small farm or ranch tracts, and shall be used *only* for country residential purposes.

   a) No place, parcel, tract, or any part of the property shall be used at any time for any business, trade, manufacture, or any *other commercial purpose whatsoever*, including such as junk or wrecking lots, mobile home parks, etc.

2. Building Types & Use: . . .

   a) Any dwelling erected or placed upon any of said property shall be used *only* as a private single-family residence, and no dwelling building or structure may be applied to, used or occupied, as an apartment or multi-family structure.

(APP. B (emphasis added))

A more restrictive approach requires that Astrope's restriction – "All parcels of land . . . shall be used only for country residential purposes" – be interpreted as requiring "a pattern of regularity or duration" such that "weekly inhabitants cannot be considered 'residents' within the commonly understood meaning of the word, or the use by such persons as constituting 'residential.'" *Craig Tracts,* ¶ 13 (citing *Hensley v. Gadd, supra*). R&R's guests "book" their accommodations for five nights, which cannot be reasonably interpreted as any meaningful duration for a restriction to "country residential living."

A more restrictive interpretation compels this Court to focus on "living" rather than on "use." Astrope used the phrase "residential living" in her stated

purpose, and designed the covenants to "preserve … the natural beauty . . . and to encourage the development of said property for country residential living." (APP. B, Declaration §A or SOF, ¶ 3) R&R admitted that those using its property are "vacationing," not "living" as Astrope envisioned. (*Cross-Mot.*, Doc. 36, at 4)

A more restrictive interpretation also requires enforcement of the provisions that prohibit commercial use "whatsoever" and all related provisions. The purpose of the Declaration is to "preserve . . . the natural beauty of said property and to encourage the development of said property for country residential living." (SOF, ¶ 3) Astrope was clear that, "No piece, parcel, tract or any part of the herein described property shall be used at any time for business . . . or any commercial purpose whatsoever. . . ." (APP. B, Declaration ¶ 1(a)) In accord with this prohibition, Astrope further restricted use as follows: "[N]o dwelling, building or structure may be applied to, used, or occupied, as an apartment or multi-family structure." *Id.* ¶ 2, 2(a).

R&R's short-term rentals violate these restrictions. Without a doubt, a short-term rental falls under the provision of "*any* business" and certainly under *any* commercial purpose *whatsoever.* Unlike a home to *live* in, R&R advertises and markets its property on national commercial websites to *stay* overnight or on a short-term basis. Unlike an owner or long-term tenant, R&R has customers by the day or week. Unlike residential living where a tenant moves all their personal

belongings, R&R's customers don't move in at all. Unlike an owner or long-term tenant, R&R pays a company to manage its occupancy and collect its income. R&R makes substantial income from its product, just as any commercial enterprise would, and its income is much higher than the market rate for long-term residential living, as R&R conceded. *Resp. to MSJ*, Doc. 25, at 12 (renting on a short-term basis, even for a limited time of the year, generates more income than renting on an extended term). Undisputedly, R&R earned income of $55,000 in 2022 and $45,599 in 2023. (APP. I and K; *Plfs' MSJ*, Doc. 15) Astrope intended to prevent all of this when she included the adverb "whatsoever" to underscore her intention to prohibit *all* types of commercial purposes. While it is true that the Declaration sets forth some examples of commercial enterprises, the restriction was written as broadly as possible and encompasses everything – "*any* business" and *"any other commercial purpose whatsoever.*"

Therefore, the District Court correctly ruled:

> Based on this broad and substantial language, and in particular the broad prohibition against "any" commercial use "whatsoever," the Court interprets this language as prohibiting short-term rental use. A person, family, or group that stays only five nights is not *living* on the property; rather, they are just staying for a few nights. Unlike residential living where a tenant moves all their personal belongings, Defendant's occupants don't move in at all. Furthermore, unlike a person who lives in a home, Defendant uses the property in arguably a commercial nature, including advertising and marketing on national commercial websites for overnight or short-term stays, hiring a company to manage its occupancy and collect its income, and it

> makes substantial income. This use is inconsistent with and violative of the broad commercial prohibition. Finally, Defendant's use is not as a "private single-family residence" but more akin to an apartment where more transient-type use is expressly prohibited.

(*Order*, APP. A, p. 5)

2. No history of prior short-term rental use.

In *Craig Tracts*, the Court next considered the history of short-term rental use in the HOA. *Id.*, ¶ 17. Unlike the history of prior short-term rentals in *Craig Tracts*, the Neighbors have thwarted any attempt at short-term rentals. On two separate occasions, the Neighbors enforced the "country residential living" restriction in the Declaration to prevent the two prior owners of R&R's property from making short-term rentals.[1] The Neighbors immediately objected to R&R's attempt to obtain permitting for a short-term rental. The Neighbors' efforts to prevent short-term rentals favor an interpretation that they are prohibited under the Declaration. *See Craig Tracts,* ¶ 17.

Additionally, unlike Brown Drake's reasonable expectation at the time of purchase that short-term rentals were allowed in light of the covenants, R&R

[1] R&R argued that Neighbors offered no evidence of enforcement against short-term rentals. *Opening Br.* at 10, 34. Actually, witness testimony is evidence. § 26-1-301, MCA ("The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.") R&R argued that Neighbors presented no evidence of "enforcement" because they presented no evidence that they filed litigation or took legal action, which is absurd. Residential, and especially country residential, neighbors can and should resolve their differences amicably, without resorting to litigation, which is what occurred twice with prior neighbors. Legal action is necessary only when a neighbor refuses to comply, as in the case of R&R.

admitted it did not even know that its property was subject to restrictions. (R. Stewart email, APP. L)

Therefore, the District Court correctly ruled:

> Unlike the HOA in *Craig Tracts* which allowed the former president of the HOA to rent his home on a short-term basis for approximately eight years, the homeowners in this case have never allowed any home to be rented on a short-term basis and twice objected and thwarted efforts by predecessors to R&R's property from doing so. It is also significant that the Plaintiffs are all the remaining homeowners subject to the Declaration. As for R&R's expectation, the record is undisputed that its principals were not even aware of the Declaration.

(*Order*, APP. A, p. 6)

3. Negative impacts on the neighborhood.

Unlike Brown Drake's use which had no negative impacts on its neighbors, R&R's use is negatively impacting Neighbors' use of their property and the neighborhood. Many of the neighbors have testified that R&R's short-term rental use is negatively impacting their neighborhood. This is perhaps the most significant evidence.

The District Court correctly ruled:

> Further, unlike the HOA in *Craig Tracts* that did not claim the owner's use was a source of disturbance or intrusive, nuisance-like activity, all of the Plaintiffs as well as long-time homeowners in the neighborhood not subject to the Declaration testified that R&R's use is a nuisance and distracts from their use and enjoyment of their own property. The adverse impacts include noise, speeding cars, inability to enjoy walks on the single-lane road, disregarding property rights, etc.

Id., p. 6.

4. Length of owner occupation.

Finally, unlike Brown Drake who stayed on their property for approximately nine months, or "a majority" of the year, R&R's principals only stay on their property eight weeks a year. *Craig Tracts*, ¶ 18, fn.1; *Resp. to M.S.J.*, Doc. 25, at 2; *Aff. R. Stewart*, Doc. 26, ¶ 3. This makes short-term rentals potentially available 44 weeks a year.

In sum, the District Court correctly followed the rationale in *Craig Tracts* and ruled that under the circumstances of this case, the Declaration prohibited short-term rental use. For the reasons stated above, the District Court should be AFFIRMED.

D. RESPONSE TO R&R'S ARGUMENTS.

1. The District Court properly defined the violative use consistent with the short-term rental permit issued.

R&R argued that the District Court interpreted the Declaration as imposing a 30-day duration limitation. *Opening Br.* at 1, 4, 11, 38-39. Actually, the ruling stated, "the Court interprets this language as prohibiting short-term rental use" and "this Court finds that R&R's short-term rental [use] violates the Astrope Declaration." (*Order*, APP. A, p. 5, l.12; p.6, 1.10) The District Court then

defined "short-term rental" consistent with the permit that Flathead County issued since it was R&R's use under that permit that was violative. *Id.*, p. 6, l.11.

Placing a duration not only makes sense for proper enforcement, it is also necessary under *Craig Tracts*. There, this Court held that the word "residential . . . impl[ies] a pattern of regularity or duration" and "the Amended Covenants' text does not explicitly say how long—if at all—a given person or their belongings must remain within a particular property in order for the property to serve a residential purpose." *Craig Tracts*, ¶¶ 13, 15. In crafting a ruling that comports with *Craig Tracts*, it makes sense to rule on the duration by which a violation occurs. R&R's use was up to 30 days, as permitted, and thus it was proper to define the violation consistently. If R&R 's use had been longer, and if the Court found a violation, presumably it would have defined that period as the violation.

In sum, the District Court denied the use, which happened to be 30 days as permitted, and in doing so did not interpret the Declaration with an arbitrary time limit.

2. The District Court properly considered extrinsic evidence to resolve an ambiguity.

R&R argued that the District Court erred by not automatically resolving the ambiguity in favor of allowing short-term rentals. *Opening Br.* at 4, 29-30. R&R misunderstands how a court resolves ambiguities.

"[I]f the court determines that an ambiguity is present in the instrument, then the extrinsic evidence may be introduced at trial to allow the trier of fact to determine the intent of the parties in entering into the contract." *Mary J. Baker Revocable Tr. v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶ 55, 338 Mont. 41, 164 P.3d 851; *Olson v. Jude*, 2003 MT 186, ¶ 47, 316 Mont. 438, 73 P.3d 809 ("Where a written instrument is ambiguous, extrinsic evidence may be utilized to discover the parties' intent."). The requirement to make a factual determination to determine the parties' intent is in accord with statutory contract interpretation rules, namely, that the Court may consider evidence of the circumstances under which the contract was made and the matter to which it relates in its interpreting so as to give effect to the mutual intention of the parties as it existed at the time of contracting. *Id.*; §§ 1-4-103, 28-3-301, -303, -402, MCA.

It is only if extrinsic evidence cannot determine the intent that ambiguities are resolved either against the drafter or in favor of free use of property. *Wicklund v. Sundheim*, 2016 MT 62, ¶ 16, 383 Mont. 1, 367 P.3d 403 ("In the absence of relevant extrinsic evidence, any ambiguity in a written contract is resolved by the court as a matter of law.") (citing 11 Richard A. Lord, *Williston on Contracts* § 30:7, 124-27 (4th ed. 2012)); § 28-3-206, MCA ("In cases of uncertainty not removed by parts 1 through 5 of this chapter [which includes the statute on considering extrinsic evidence], the language of a contract should be interpreted

most strongly against the party who caused the uncertainty to exist.") Otherwise, under R&R's reasoning to just default on the free use of property, there would be no point in considering extrinsic evidence.

This resolution process was followed in *Craig Tracts*: "Because the language of the restrictive covenant in question is ambiguous, we look to evidence beyond the face of the document." *Craig Tracts*, ¶ 16. This Court did not, as R&R suggests, simply rule in favor of Brown Drake for the free use of property once an ambiguity was determined. *Id.*, ¶¶ 16-18. Rather, it examined the extrinsic evidence in paragraphs 16-18.

R&R's argument should be rejected.

3. The District Court properly considered evidence of and impacts from short-term rental use in the subdivision in its interpretation analysis.

R&R argued that the District Court improperly relied upon "post-drafting events." *Opening Br.* at 29, 32-34. In *Craig Tracts*, the covenants were drafted in 1983 and this Court considered evidence near 2018 of the history of property that had been rented out on a short-term basis by the former president of the HOA. *Craig Tracts*, ¶¶ 3, 17. Likewise, the District Court in this case considered evidence of the history of the Neighbors' objections and efforts to prevent short-rental use. (*Order*, APP. A, pp. 5-6) This Court also considered Brown Drake's use of the property, whether the HOA claimed that use was a source of disturbance

or intrusive, nuisance-like activity, and whether that use "detracts from the other neighborhood members' enjoyment of their property or the area's 'residential' character." *Craig Tracts*, ¶ 18. Likewise, the District Court in this case considered evidence of whether R&R's use detracted from the Neighbors' enjoyment of their property or the area's residential character." (*Order*, APP. A, p. 6)

R&R cited to *Higdem v. Whitham*, 167 Mont. 201, 536 P.2d 1185 (1975) for the proposition that covenants are strictly construed and should not be extended by implication or enlarged by construction. *Opening Br.* at 31-34. But this Court in *Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 740 P.2d 668 (1987), in construing these same rules, held, "However, the free use of the property must be balanced against the rights of the other purchasers in the subdivision." *Id.* at 492, 740 P.2d at 671. "Each purchaser in a restricted subdivision is both subjected to the burden and entitled to the benefit of a restrictive covenant." *Id.*

Just as this Court did in *Craig Tracts* and as necessary per *Town & Country* to properly balance the Neighbors' rights to the benefits of the Declaration, the District Court properly considered evidence of the Neighbors' objections and efforts to prevent short-rental use and whether R&R's use detracted from the Neighbors' enjoyment of their property or the area's residential character.

4. R&R misconstrues and misinterprets *Craig Tracts.*

R&R argued:

> *First*, the District Court misunderstood the inquiry commanded by *Craig Tracts* ***once a provision is determined to be ambiguous***. According to the District Court, *Craig Tracts* held that "the common understanding of the word 'residential' in covenants . . . impl[ies] a pattern of regulatory or duration." SJ Order at 4. Then, because the covenant at issue "did not explicitly say how long, if at all, a given person or their belongings must remain within a particular property in order for the property to serve a residential purpose, the Court held that language of the restrictive covenant was ambiguous and it looked to evidence beyond the face of the document." *Id.*
>
> But that is not what *Craig Tracts* said or meant.

Opening Br. at 36.

Actually, it's exactly what *Craig Tracts* said and meant.

> We agree with these jurisdictions that the common understanding of the word "residential" often goes beyond the mere existence of an activity at a fleeting instant in time to imply a pattern of regularity or duration. . . .
>
> While the HOA's interpretation of the Amended Covenants is reasonable, the Amended Covenants' text does not explicitly say how long—if at all—a given person or their belongings must remain within a particular property in order for the property to serve a residential purpose. . . . Since there are multiple reasonable interpretations of this language, we join with those courts to have found such language ambiguous in this context.
>
> Because the language of the restrictive covenant in question is ambiguous, we look to evidence beyond the face of the document.

Craig Tracts, ¶¶ 13-16.

R&R next argued:

> Faced with two diametrically opposed readings of the same provision, the Court did not select one; it instead declared the covenant ambiguous.

Opening Br. at 37.

R&R is wrong. This Court did select one:

> What appears to be the majority of other jurisdictions to have considered this issue have found that "residential purposes" provisions do not prohibit short term rentals….These decisions focus on *what* is being done at a particular premises, not *how long* any particular individual is doing the activity for.
>
> In contrast, other jurisdictions looking at similar language have reached different conclusions. . . . These determinations appear to align with dictionary definitions that frequently describe these terms with reference to an expectation of regularity over time....
>
> We agree with these jurisdictions that the common understanding of the word "residential" often goes beyond the mere existence of an activity at a fleeting instant in time to imply a pattern of regularity or duration.

Craig Tracts, ¶¶ 10-13.

R&R also argued, "Construing the Covenants according to their plain meaning, what matters is not the length of duration, but how the property is used." *Opening Br.* at 19. This argument is directly contrary to this Court's holding in *Craig Tracts* which rejected the majority of jurisdictions that "focus on *what* is being done at a particular premises, not *how long* any particular individual is doing the activity;" the holding that "the common understanding of the word 'residential'. . . impl[ies] a pattern of regularity or duration;" and the holding that the Brown Drake "Amended Covenants' text does not explicitly say how long – if

at all—a person or their belongings must remain with a particular property in order for the property to serve a residential purpose." *Craig Tracts*, ¶¶ 10, 13, 15. Similarly, this Court should reject R&R's reliance upon *Slaby v. Mtn. River Est. Residential Ass'n, Inc.* (Ala. Civ. App. 2012), 100 So.3d 569 and *Pinehaven Planning Bd. v. Brooks* (Id. 2003), 70 P.3d 664, since this Court rejected both cases. *Id.*, ¶ 10. Finally, this Court should reject R&R's reliance upon *Hillcrest Homeowners Ass'n v. Wiley*, 239 Mont. 54, 778 P.2d 421 (1989) and *Tipton v. Bennett*, 281 Mont. 379, 934 P.2d 203 (1997), since this Court already found their holdings consistent with the holding in *Craig Tracts*. *Id.*, ¶ 15.

5. A Covenant authorizing a "for rent" sign is not properly interpreted as authorizing short-term rentals, especially under a "more restrictive approach."

Trying to make a mountain out of a molehill, R&R argued that the Declaration "expressly contemplate rental use" and "unambiguously permit short-term rentals." *Opening Br.*, 6, 11, 16. Of course, whether a party can rent their property or post a "for rent" sign is not the issue. Rather, the issue is whether the "country residential living" restriction and "commercial use" prohibition in the Declaration prohibit short-term rental use. Therefore, R&R's entire argument is misplaced.

More specifically, R&R argued that since the Declaration permits "for rent" signs but does not contain a duration on rentals, they "necessarily and

unambiguously permit short-term rentals." *Opening Br.*, 11, 16-17. This argument violates basic contract interpretation principles. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone." § 28-3-303, MCA. The "terms of a contract . . . extend[] only to those things concerning which it appears the parties intended to contract." *Id.*; § 28-3-305, MCA. A court may neither insert nor omit terms to the contract. *Sayegusa v. Rogers*, 256 Mont. 269, 271, 846 P.2d 1005, 1006 (1993).

Based on these rules of interpretation, Astrope's intention of the language in paragraph 6 was merely to prohibit signs except signs for sale or rent. § 28-3-303, MCA. The terms of paragraph 6 extend only to signs and no further. *Id.*; § 28-3-305, MCA. No rule of contract interpretation would allow this Court to stretch this limited exception to conclude that short-term rentals are allowed, as such an interpretation would require the court to insert terms into the contract that do not exist.

Further, a "contract must receive such an interpretation as will make it . . . reasonable" and "not involve an absurdity." §§ 28-3-201, 401, MCA. A reasonable interpretation of allowing "for rent" signs would be to allow owners to advertise their property for rent to people driving around looking for a long-term rental. It would be unreasonable, if not absurd, to think that a visitor would travel

to Whitefish without securing accommodations and then drive around looking for a "FOR RENT" sign to find a place to stay for the night or weekend.

Further, the intention of the parties to an agreement must be determined from circumstances that existed at the time of contracting and in the same light which the parties possessed when the contract was made. *Lewis & Clark County v. Wirth*, 2022 MT 105, ¶ 17, 409 Mont. 1, 510 P.3d 1206; § 28-3-402, MCA. Since short-term rentals are a recent phenomenon that did not exist when the Declaration was drafted, a covenant allowing rental signs cannot be interpreted as permitting short-term rental use.

Finally, R&R relied on *Wilkinson v. Chiwawa Cmtys. Ass'n Non-Profit Corp.* (Wash. 2014) as support for their argument. *Opening Br.* at 16. However, the holding in *Wilkinson* was expressly rejected by this Court in *Craig Tracts* in favor of the minority view that "residential use" implies a pattern of regularity or duration. *Craig Tracts*, ¶¶ 10, 13. If the holding in *Wilkinson* was rejected, so was its rationale.

In sum, the covenant on signage should be interpreted as allowing a "for rent" sign and nothing more. This interpretation and rejection of R&R's interpretation is consistent with the "more restrictive interpretation" approach necessitated by this Declaration.

6. Whether a short-term rental is a "commercial use" is not at issue.

R&R spend nearly a fourth of its brief arguing that the commercial use prohibition has not violated its use of short-term rentals. *Opening Br.* at 20-28, 32. Most of its argument is to the point that short-term rental use is not a commercial use. In large part, this argument is misplaced based on the holding in *Craig Tracts*.

A proper contract interpretation requires a court to give effect to every part of a contract, each clause helping to interpret the other. § 28-3-202, MCA. This Court applied this rule in *Craig Tracts* to interpret "residential use" when it noted that the restriction against commercial use was removed in the Amended Covenants, "suggesting that the parties intended to take a less restrictive approach." *Craig Tracts*, ¶ 16. Following this holding, the District Court correctly ruled that since the Declaration contained a prohibition against commercial use, it suggested that the declarant intended for her restriction on "residential use" to be more restrictive. (*Order*, APP. A, p.4, ll.9-20) The District Court did not rule one way or another on whether short-term rental use is a commercial use. *Id.* Given this analysis, the broad prohibition on "any business, trade, [] or other commercial purpose whatsoever" in the Declaration controls and the specific examples listed are irrelevant. *See Opening Br.* at 21.

This Court does not need to determine whether a short-term rental is a commercial use because the issue presented in this case and under *Craig Tracts* is

whether a short-term rental is a *residential* use. To the extent an argument is needed for a finding that a short-term rental is a commercial use, the analysis is set forth on pages 19-20 above. Finally, while R&R made a general argument on long-term rentals, the evidence in the record establishes that its use is commercial in nature and there is no evidence in the record that long-term rental use has the same characteristics. Finally, R&R relies on *Wilson v. Maynard* (S.D. 2019), 961 N.W.2d 596, for authority that short-term rentals do violate the commercial use restriction, however, this state is in the majority of jurisdictions that define "residential use" and that *Craig Tracts* rejected.

Finally, although Neighbors cannot follow R&R's argument on page 21, Neighbors are confirming, contrary to R&R's statement, that they are *not* asking this Court to reverse *Craig Tracts,* but instead to follow it.

7. This Court should decline to consider the district court rulings submitted by R&R.

With *Craig Tracts* being the only precedent and it being contrary to R&R's position, they submit a number of district court cases. This Court should decline to consider them in its analysis for three reasons. First, "[i]t is axiomatic that a District Court case is not binding precedent upon this Court." *Bordas v. Va. City Ranches Ass'n,* 2004 MT 342, ¶ 20, 324 Mont. 263, 102 P.3d 1219. Second, they are not part of the record. *Anderson v. Stokes*, 2007 MT 166, ¶ 57, 338 Mont. 118,

163 P.3d 1273 (parties on appeal are bound by the record). Third, this Court is unaware of the record that gave rise to those ruling, and as stated in *Bordas*:

> Furthermore, we have not received a record of the previous case which would allow us to be persuaded as to its applicability. Thus, we decline to consider it in our analysis.

Bordas, ¶ 20.

Additionally, *Criag Tracts* made clear that extrinsic evidence is necessary to properly interpret the term "residential use" in each set of covenants, meaning the ultimate holding will depend largely upon the language of each subdivisions' covenants, the subdivision's history of prior short-term rental use, and the impact of short-term rentals or consistency of use within the neighborhood.

8. Brandt's cattle operation is not a defense.

R&R mentioned Plaintiff Brandt's cattle operation. *Opening Br.* at 2, 7-8. However, the Brandt's cattle operation, which has been shut down since August 15, 2022, provides no defense. (Aff. 2nd Brandt, Doc. 43, ¶ 10) The Brandts own adjacent property which is not subject to the Declaration and their cattle operation was located on the non-restricted property, even though the address of the company was the same as their home. *Id.* In addition, all beef cattle were sent to the butcher and then customers retrieved their product from the butcher. *Id.* The Brandts did not have customers at the property. *Id.*

CROSS-APPEAL

A. THE DISTRICT COURT ERRED IN NOT AWARDING PLAINTIFFS THEIR ATTORNEY FEES.

The Declaration provided that, "Any person who shall prosecute an action successfully may recover any damages resulting from such violations, and IT IS EXPRESSLY UNDERSTOOD by any person purchasing this property that if an action is successfully brought against him for a violation of these covenants, that a reasonable attorney's fee may be assessed against him in addition to any other damages." (Declaration, APP. B, ¶ B(2), p. 6)

"A district court lacks the discretion to deny a request for attorney's fees where a contract requires an award of fees." *Gibson v. Paramount Homes*, 2011 MT 112, ¶ 10, 360 Mont. 421, 253 P.3d 903. Even where language provides for "may award fees," it is still mandatory. *Wittich Law Firm, P.C. v. O'Connell*, 2013 MT 122, ¶ 29, 370 Mont. 103, 304 P.3d 375 ("because the contract expressly allowed the award of attorney fees … the court lacked the discretion to deny the requests.") Here, where the language is conspicuously typed, says "EXPRESSLY UNDERSTOOD," and speaks of "successful actions," the language was mandatory and the District Court erred in denying Appellees' their fees. Even if it was discretionary, the District Court abused its discretion in not awarding fees under the circumstances of this case.

If this Court agrees to reverse on this issue, the Neighbors request their fees incurred on this appeal. *Boyne USA, Inc. v. Lone Moose Meadows, LLC*, 2010 MT 133, ¶ 27, 356 Mont. 408, 235 P.3d 1269 ("We presume that contractual provisions that provide the prevailing party with attorney's fees cover fees arising from appellate costs and fees.")

CONCLUSION

The Neighbors have steadfastly enforced their Declaration to prevent short-term rental use. The District Court properly followed this Court's holding in *Craig Tracts* and ruled that R&R's short-term rental use violated the "residential living" and "residential purposes" restrictions. Accordingly, this Court should AFFIRM the District Court's ruling.

This Court should also REVERSE the District Court's denial of an award of fees to the Neighbors as the successful party, award such fees for this appeal as well, and remand to the District Court for a hearing on fees.

DATED this 8th day of July, 2024.

FRAMPTON PURDY LAW FIRM

By: _____
Sean S. Frampton
Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

I, Sean S. Frampton, attorney for Appellees, hereby certify that Appellee's Opening Brief complies with the Montana Rules of Appellate Procedure:

A: Document has double-line spacing and is proportionately spaced in Times New Roman text typeface of 14 points;

B: Word count, exclusive of tables and certificates, does not exceed 10,000;

C: Margins are 1";

D: Document is 8 ½ x 11 inches in size.

I am relying on the word count of the word processing system used to prepare the brief (Microsoft Office Word) in calculating the document's length.

DATED this 8th day of July, 2024.

FRAMPTON PURDY LAW FIRM

By: 

Sean S. Frampton
Attorneys for Appellees

CERTIFICATE OF MAILING

The undersigned does hereby certify that on the 8th day of July, 2024, a true and correct copy of the foregoing document was served upon the persons named below, at the addresses set out below their names, as indicated below.

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APPENDIX

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Appendix

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