

IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. _____

WESLEY and KAREN TUSCANO

Petitioners,

v.

MONTANA SIXTH JUDICIAL
DISTRICT COURT, SWEET GRASS COUNTY,
HONORABLE BRENDA GILBERT, presiding,Respondent.

**PETITION FOR WRIT OF SUPERVISORY CONTROL, WRIT OF
REVIEW, AND STAY OF DISTRICT COURT CONTEMPT PROCEEDINGS**

Sweet Grass County District Court Cause No. DV-2021-39

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FACTS PERTINENT TO THE SUPREME COURT’S JURISDICTION

The district court has held Tuscanos in contempt for failing to make a payment, which the uncontroverted evidence shows they do not have the power to do. The district court bypassed statutorily mandated judgment execution procedures and property exemptions, and ordered defendants to perform “actions...including, but not limited to, sale, transfer, or encumbrance of their ownership rights in any item, account, holding, or other item of value.” Exhibit 1, Order Regarding Contempt.

One year ago, a week-long jury trial was held in Sweet Grass County. The jury rendered its special verdict, holding that while the “gift deed” was invalid, the written Agreement between the parties for the sale of the land from Helviks to Tuscanos was binding on both parties and that Tuscanos were liable to Helviks for the past-due installments in the amount of \$150,000.00. Exhibit 2, Jury Verdict ¶¶ 1, 5.

On June 30, 2023, Tuscanos filed a Notice of Compliance and Motion for Entry of Judgment and Satisfaction of Judgment, proposing to immediately pay the damage award that Helviks sought and were awarded by the jury. Exhibit 3. During that time, based on the jury’s verdict finding the parties were bound by the land sale agreement, Tuscanos utilized a line of credit secured by the property to obtain the funds necessary to make the past-due payments, and to partially pay

their attorneys.

On October 11, 2023, without ruling on Tuscanos' Motion for Entry of Judgment, the District Judge issued a Judgment which essentially set aside the jury's fact-finding and verdict, holding the land transfer invalid and ordering Tuscanos to obtain a release of the mortgage on the property before deeding it back to Helviks. Exhibit 4, Findings of Fact, Conclusions of L., Final Order, and Judgment 12:21-13:13 [hereinafter "Final Order & J."] (Tuscanos have appealed this judgment and are currently waiting for the trial transcript before briefing the appeal. The docket number for the appeal is DA 23-0656.).

As a sanction, the Court ordered Tuscanos to sell all their property, without regard to homestead or other exemptions, which is not an authorized sanction even if there were contempt, which there was not in this case.

LEGAL QUESTIONS AND ISSUES

I. WRIT OF SUPERVISORY CONTROL

Rule 14 of the Montana Rules of Appellate Procedure provides that "[s]upervisory control is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist:

- (a) The other court is proceeding under a mistake of law and is causing a

gross injustice;

(b) Constitutional issues of state-wide importance are involved.”

M.R. App. P. 14(3)(a)-(b).

A. The Sixth Judicial District Court is Proceeding Under a Mistake of Law and is Causing a Gross Injustice.

Title 25 of the Montana Code sets out a clear and exclusive path for execution on a civil judgment. Mont. Code Ann. § 25-13-101 through 25-13-825. Montana law does not allow either a party or a court to enforce a judgment through contempt proceedings.

Throughout the case, Helviks argued as an alternative to their fraud and undue influence claims that the April 30, 2020, Agreement was valid and that the contract was breached. *See, e.g.*, Exhibit 5, Pls.’ Am. Complaint ¶¶ 61-68; Exhibit 6, Helviks’ Proposed Jury Instructions, 2:21-22. Nowhere in the pleadings did Helviks ever raise Mont. Code Ann. §§ 28-2-1711 or 28-2-1714 as basis for rescission. Prior to trial on June 5, 2023, the court ruled that “the Amended Complaint does not raise, as a claim, the issue of failure of the Gift Deed for lack of consideration.” Exhibit 7, Order Regarding Disputed Provisions of Pre-Trial Order. The jury found that “Helviks and Tuscanos [are] bound to follow the terms of the Agreement to Sell and Purchase Real Property dated April 30, 2020 (Agreement)?” [sic] Jury Verdict ¶ 1. Also, the jury found that this Agreement was not the result of fraud or undue influence. *Id.* ¶ 4.

Months after trial, the court judicially rescinded the Agreement, ordering Tuscanos to give the property back to Helviks and pay off the mortgage. Final Order & J. 9:5-20, 11:19-21. The district court relied on language from *Renz v. Everett-Martin* that courts sitting in equity have the authority to set aside jury verdicts by fashioning remedies “necessary to the entire adjustment of the subject matter of the litigation.” 2019 MT 251, ¶ 15, 397 Mont. 398, 450 P.3d 892. However, *Renz* held that “a judgment must be based on a verdict or findings of the court and must be within the issues presented to the court.” *Id.* ¶ 10 (quoting *Nat’l Sur. Corp. v. Kruse*, 121 Mont. 202, 205-06, 192 P.2d 317, 319 (1948)). Based on *Renz*, the court erred because here the Jury found the Agreement binding, and the issue of rescission due to lack of consideration was never presented to the jury.

When Tuscanos did not pay off the mortgage, Helviks filed for contempt based on the October 11, 2023 Order. Consistent with federal law, Montana’s civil contempt statute explicitly states that a person cannot be held in contempt for failure to perform acts which are not in their power to perform. “When the sanction imposed for a contempt seeks to compel the contemnor to perform an act that is in the power of the contemnor to perform...” Mont. Code Ann. § 3-1-520. Further, the statute “provide[s] exclusive sanctions for contempt.” *Huffine v. Mont. Sixth Jud. Dist. Ct.*, 285 Mont. 104, 109, 925 P.2d 927, 930 (1997). Here, the district court violated MCA 3-1-520 both by holding Tuscanos in contempt and in the

sanctions imposed.

After the hearing on contempt in which the only two witnesses were Wes and Karen Tuscano, the court ordered:

Wesley and Karen Tuscano must immediately do all acts necessary to accomplish and complete a release of the Mortgage and the Modification placed on the real property . . . This Order requires actions by Tuscanos, including but not limited to, sale, transfer, or encumbrance of their ownership rights in any item, account, holding, or other item of value.

Contempt Order 8:10-11, 25-27. The court went outside the sanctions allowed by Mont. Code Ann. § 3-1-520 to order Tuscanos to sell their personal and real property and provided that Helviks could sell the property. Contempt Order 8:6-9:25.

B. The Constitution Precludes Contempt When the Act is Impossible for the Defendant to Perform

The United States Supreme Court has held that “a court may not impose punishment ‘in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.’” *Hicks v. Feiock*, 485 U.S. 624, 638, n. 9, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988); *Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507 (2011).

At the contempt hearing, the only witnesses were Wes and Karen Tuscano. Both testified that it is financially impossible for them to make the more than \$240,000 payment necessary to comply with the court’s order. No evidence

contravened their testimony and there was no evidence that supported the court's finding that they acted in bad faith.

C. Tuscanos' Constitutionally Protected Rights to Due Process and Their Homestead Rights are Both Being Violated by the District Court.

1. Due Process Violations

Tuscanos' constitutional rights have been violated by the District Court's order that they immediately sell their real and personal property. Contempt Order 8:10-11, 25-27. If the court had followed the statutory process for execution of a judgment, the Tuscanos would have had the due process of notice, the ability to claim an exemption, and other statutory protections. Mont. Code Ann. §§ 25-13-101 through 25-13-825. "Montana debtors have a property interest in those statutory exemptions protected by the due process guarantees of the Montana Constitution found at Article II, Section 17." *Dorwart v. Caraway*, 2002 MT 240, ¶ 75, 312 Mont. 1, 58 P.3d 128, 132. The court violated Tuscanos' constitutionally- and statutorily-protected due process rights to claim exemptions when the court found contempt and ordered Tuscanos to sell their personal and real property to pay off the mortgage that is now more than \$240,000.

2. Homestead Protection

Since statehood, the Constitution of Montana has required the Legislature to "enact liberal homestead and exemption laws." 1972 Mont. Const. art. XIII, Sec. 5;

J&L Lands, LP v. Nezat, 2022 MT 111, ¶¶ 7-12, 409 Mont. 45-51, 511 P.3d 303, 305-06. The Tuscanos have a homestead declaration to protect their property from an execution of judgment.

The district court has totally ignored Montana’s constitutional and statutory provisions on contempt and on execution of judgments, including exempting specific property so that people like the Tucanos are not driven into total financial oblivion due to a wrongful court holding. This matter is urgent, has emergency factors making the normal appeal process inadequate, and involves purely legal questions. The lower court is proceeding under a mistake of law that is causing a gross injustice and is also unconstitutional. M.R. App. P. 14(3)((a)-(b). Therefore, this Court should grant Tuscanos’ Petition for a Writ of Supervisory Control and stay the lower court’s proceedings requiring Tuscanos to sell all their property, in violation of their constitutional rights. *Dorwart*, 2002 MT at ¶ 75.

II. WRIT OF REVIEW

Pursuant to Montana Code Ann. § 27-25-102, “a writ of review may be granted by . . . the supreme court and any justice of the supreme court, in proceedings for contempt in the district court . . .”. A writ of review is “the exclusive method of review of a contempt § in civil proceedings.” *LaFountain v. Mont. Eighth Jud. Dist. Ct.*, 2020 Mont. LEXIS 1329 * 2; Mont. Code Ann. § 3-1-523(1). The standard on review is whether substantial evidence supports the

judgment of contempt, and whether the district court had jurisdiction to enter the order. *Id.* * 3.

At broadest, “there are three requisites that must be satisfied before a writ of certiorari may be issued: 1) the inferior court lacked or exceeded its jurisdiction; 2) a right to appeal from the disputed order does not exist, and 3) there lacks any other plain, speedy and adequate remedy.” *Valley Unit Corp. v. Bozeman*, 232 Mont. 52, 54, 754 P.2d 822, 823 (1998); Mont. Code Ann. § 27-25-102. As a matter of law, the second and third elements are met “since the only review available for a contempt proceeding is . . . through a writ of certiorari.” *Id.* at 54, 824. Therefore, only a lack of, or act exceeding, jurisdiction need be proven for issuance of a writ in contempt reviews.

To prove that a lower court acted without, or in excess of, its jurisdiction, a petitioner is “not solely limited to whether the court acted within its subject matter and personal jurisdiction,” but can meet the burden by showing “whether [the court] acted within its authority under the governing procedural and substantive law” *Fouts v. Mont. Eighth Jud. Dist. Ct.*, 2022 MT 9, ¶ 11, 407 Mont. 166, 502 P.3d 689. Thus, the appropriate inquiry is whether the court had the authority to issue its contempt order as it did.

A. The District Court did not have Jurisdiction to Enforce a Judgment by Contempt Proceedings.

Instead of following Mont. Code Ann. § 3-1-520, governing contempt

proceedings, the District Court ordered that Tuscanos do whatever it takes, including selling everything they own, to immediately release the mortgage encumbering the property at issue in this case and filed a Quitclaim deed.

Contempt Order 8:25-27. The district court acted outside of the governing statute confining contempt sanctions to those listed in Mont. Code Ann. § 3-1-520. It was outside the court's jurisdiction to disregard the statute and prescribe the court's own sanctions to enforce the court's previous court order that Tuscanos have also appealed as being an error of law.

B. Tuscanos were not Contemptuous and the District Court's Contempt Finding is not Supported by Substantial Evidence.

1. Substantial Evidence at the Hearing Proved that Tuscanos are Unable to Comply with the Order.

Based on the 2022 case, *Fouts*, “a court may not impose coercive civil sanction unless the subject act ‘is in the power of the contemnor to perform.’” *Fouts* at ¶ 15 (citing Mont. Code Ann. § 3-1-520; *VanSkyock*, ¶ 13). This Court has also held that “inability to render obedience” to a court order “is a good defense to a charge of contempt for its violation” unless “the person charged has voluntarily and contumaciously brought the disability upon himself.” *State ex. rel. McLean v. Dist. Ct.*, 37 Mont. 485, 487, 97 P. 841, 842 (1908).

The United States Supreme Court has also held that “a court may not impose punishment ‘in a civil contempt proceeding when it is clearly established that the

alleged contemnor is unable to comply with the terms of the order.” *Hicks v. Feiock*, 485 U.S. 624, 638, n. 9, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988); *Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507 (2011). When the alleged contemnor does not have the power to make a monetary payment ordered by the court, imposing a sanction until they have performed the impossible would amount to debtors’ prison. Mont. Const. Art. II, Sec. 27 (“No person shall be imprisoned for debt.”).

At the hearing, both Wes and Karen Tuscano testified that they would have complied with the court’s order if it were possible, but that they were financially incapable of doing so. Exhibit 9, Contempt Hearing Transcript 19:14-23:

Transcript 24:14-20: Transcript 60:17-19: Transcript 63:2-9. The Tuscanos testified that all of their other assets are subject to purchase money debts and are not a viable source of cash to comply with the court’s Order. Transcript 21:4-25; 22:1-25; 23:1-5. The sole exception is Wes’s pickup, which has a Kelley Blue Book value of less than \$5,000. Transcript 22:15. Under Montana’s exemption laws, Wes is entitled to exempt \$4,000 of that value. Mont. Code Ann. § 25-13-609(2). Thus, this asset would yield only \$1,000 of the \$240,000 (now more due to interest) necessary to release the mortgage.

Wes testified that he had not been paid “an annual return of 1% on his capital account,” as the CW Bar Operating Agreement provided because the company has not made a profit. Transcript 20:20-25. His interest is underwater,

meaning that he cannot raise any funds by selling his interest. Transcript 20:22-25; 21:1-3; 59:5-13. Wes affirmatively testified that he cannot liquidate his interests. Transcript 58:21-25. Wes does not have any retirement or other account from which he could raise funds to comply with the court's Order. Transcript 23:3-5.

Karen testified she is an employee of the U.S. Forest Service. Transcript 61:12-13. The Tuscanos testified that although both Karen and Wes Tuscano work full-time, their take-home income every month barely covers their living expenses. Transcript 23:1-2; 62:2-3.

Karen and Wes testified their savings accounts total less than \$1,500. Transcript 23:15-17. They testified that their oldest child graduated from high school in May 2024 as the valedictorian of her class. Transcript 24:1-13. Her parents are unable to contribute to her college education; luckily, she is funding the entire expense through scholarships. *Id.*

The court stated that "Tuscanos present no evidence to support their claim they cannot liquidate certain assets, including CW Bar Machinery, LLC, stock, equipment, livestock and other Tuscano holdings." Contempt Order 5:4-6. On the contrary, Tuscanos testified consistently that all their assets are encumbered, except the two vehicles and that Wes has no equity in the business at this time. Transcript 58:21-59:13; 61:3-6. Therefore, the court erred.

Also, Wes provided a declaration discussing his finances and both he and

Karen testified at the hearing regarding their assets and debt. Wesley Tuscano's Prehearing Declaration ¶ 6; Transcript 20:24-23:17; 61:1-63:5. Helviks provided no evidence contravening Wes and Karen's testimony under oath that they did not have the means to pay off the more than \$240,000 mortgage. Also, Tuscanos testified that much of the debt they have incurred is due to their attempt to perform their end of their Agreement with Helviks. Transcript 81:14-25 & 82:1-7.

2. Tuscanos Inability to Pay Was Not Caused by Their Own Actions After the Court Ordered Payment.

This Court adopted: "The rule is thus stated: 'The foundation for the process of attachment for failing or refusing to obey an order or decree of court is the ability to perform, unless the party has brought about his inability intentionally to avoid the performance of the obligation.'" *McLean*, 37 Mont. at 489, 97 P. at 842 (citing *Adair v. Gilmore*, 106 Ala. 436, 17 So. 544). Such intentional avoidance of performance has to occur after the court order is issued and there has to be evidence of "evil motives or with the intention to evade [a court order]. *McLean*, 37 Mont. at 487-89. The legal standard is whether Tuscanos have voluntarily and contumaciously brought the disability to pay the more than \$240,000 as ordered by the court. *Id.*

Instead of following the correct standard of law, the court determined that the standard "is not whether or not Tuscanos have money, but whether or not the circumstances on which they now rely are of their own making." Contempt Order

7:9. Even though all of acts that the court found were of the Tuscanos own making occurred years before the court's October 11, 2023 Order, the court found Tuscanos in contempt because:

1. The Tuscanos caused the signing of the Gift Deed in June of 2020;
2. Tuscanos sought and secured a mortgage on the property in July of 2021;
3. Tuscanos increased the mortgage in July of 2023; and,
4. Wes Tuscano transferred his business interests to CW Bar Machinery in December of 2020.

Id at 7-8:11. None of Tuscanos' actions cited by the court can be in contempt of the court's 2023 Order because all of these actions occurred before the court's order. *Goodover v. Lindsey's Inc.*, 257 Mont. 38, 847 P.2d 699 (1993) (finding "If there is no command, there is no disobedience").

Further, Tuscanos testified that as part of their agreement with Helviks, the Tuscanos obtained a line of credit based on Helviks' gift deed, so that Tuscanos could put in agricultural infrastructure and raise enough hay and cattle to pay a total of \$500,000 over time to Helviks. Transcript 81:14-25; 82:1-7. Tuscanos testified they have incurred several other debts to make the land productive, including purchase money loans on farm equipment Tuscanos bought for agricultural activities on the property and a lien against their cattle. Transcript 21:23-25; 22:1-2.

Tuscanos testified that, after the June 15, 2023, Jury Verdict determining that Tuscanos and Helviks were bound by the Agreement and that Tuscanos owed Helviks \$150,000, they modified their mortgage on the property with Citizens Bank to increase their line of credit in an effort to ensure their ability to comply with the jury's verdict. Transcript 18:1-10. Tuscanos intended to use this line of credit to make the \$150,000 payment to Helviks awarded by the jury. *Id.*; Wesley Tuscano's Prehearing Declaration at ¶ 6. Tuscanos testified they believed they would have been able to draw on the line of credit to obtain the funds necessary to pay the \$150,000 damage award to Helviks. *Id.*

In *State ex rel. McLean v. District Court*, this Court found that the relatrix acted in good faith relying upon the court's order. 37 Mont. 485, 489, 97 P. 841, 843 (1908). This case is similar to *McLean* because Tuscanos acted in good faith reasonably relying upon the jury verdict retaining title in them when they borrowed on the line of credit, before they had any inkling the Court would enter a judgment in direct contradiction of the verdict. *McLean*, 37 Mont. at 489, 97 P. at 843.

Tuscanos acted in good faith. Karen Tuscano testified they have not and there was no evidence provided that they have increased the line of credit since the court issued its final Order and Judgment in October of 2023. Transcript 75:7-16.

The court also determined that Wes's willful contempt related back to him transferring his business assets to CW Bar Machinery prior to the court finding him

in contempt. Contempt Order 7:24-8:2. Hearing Exhibit No. 4 proves that Wes “contributed his entire equity interest in Tuscano Machine, LLC,” when he and his business partner joined to create their current business on December 30, 2020, which was also prior to the court’s October 11, 2023 Order.

Wes works at Tuscano Machine LLC, of which the sole member is CW Bar Machinery, LLC. Exhibit 10, Operating Agreement of Tuscano Machine, LLC, Hearing Exhibit No. 3. CW Bar Machinery, LLC’s Operating Agreement establishes that Tuscano was a member of the CW Bar Machinery, LLC and that to become a member, Wes “contributed his entire equity interest in Tuscano Machine, LLC.” Exhibit 11, Hearing Exhibit No. 4. While the Operating Agreement of CW Bar Machinery, LLC, states that “Tuscano shall be deemed to have contributed US\$ (1) million to the Company,” it does not state that he actually paid that much, or any actual cash, to the Company. *Id.* (emphasis added). Further, this transfer occurred before any lawsuit had been filed and had nothing to do with the transaction with Helviks. *See id.*

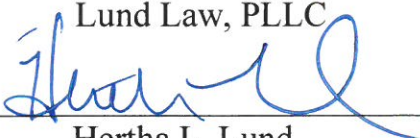
At no time did Helviks allege, or the court find that Tuscanos acted with deliberate intention to defy the court’s order. There simply is no evidence indicating that Tuscanos acted in bad faith or contumaciously after the court issued its Order on October 11, 2023. Therefore, the court erred in finding that Tuscanos acted in contempt because all of the actions the court found were contemptuous

occurred before the order was issued. Nowhere has the court determined that Tuscanos acted in bad faith with “evil motives or with the intention to evade [a court order].” *McLean*, 37 Mont. at 487-89. Also, Helviks provided no evidence that it is within Tuscanos’ power to comply with the court’s order. Lastly, the court erred in imposing coercive civil sanctions because there is no substantial evidence that Tuscanos can perform what the court has ordered. *Fouts* at ¶ 15 (citing Section 3-1-520, MCA; *VanSkyock*, ¶ 13).

CONCLUSION

Based on the foregoing, Tuscanos respectfully ask the Court to immediately grant the Writ and a stay of the district court contempt order and proceedings. Pursuant to Mont. Code Ann. § 27-25-201, an affidavit in support of this petition is attached hereto.

DATED this 24th day of July, 2024.

By:  Lund Law, PLLC
Hertha L. Lund
Attorney for Tuscanos

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word, is not more than 4,000 words, excluding the table of contents, appendix of exhibits and certificate of compliance.

DATED this 24th day of July, 2024.

Lund Law, PLLC

By: /s/ Hertha L. Lund
Hertha L. Lund
Attorney for Tuscanos

IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. _____

WESLEY and KAREN TUSCANO

Petitioners,

v.

MONTANA SIXTH JUDICIAL
DISTRICT COURT, SWEET GRASS COUNTY,
HONORABLE BRENDA GILBERT, presiding,

Respondent.

**PETITIONERS' AFFIDAVIT IN SUPPORT OF PETITION FOR WRIT OF
REVIEW**

Sweet Grass County District Court Cause No. DV-2021-39

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STATE OF MONTANA)
 : ss
COUNTY OF SWEET GRASS)

BEFORE ME, the undersigned authority, on this day personally appeared Wesley Tuscano and Karen Tuscano, who under oath stated as follows:

WESLEY TUSCANO:

1. My name is Wesley Tuscano. I am over eighteen (18) years of age and am legally competent to make this Affidavit, which is true and correct, is based on my personal knowledge, and is made voluntarily and not under duress.
2. I, Wesley Tuscano, am with my wife Karen Tuscano a Defendant in Cause No. DV-2021-39 in the Sixth Judicial District Court in Sweet Grass County, Montana.
3. I have read the Petition for Writ of Review filed herewith (the "Petition"), and affirm that the facts referenced in the Petition are true and correct.

KAREN TUSCANO:

1. My name is Karen Tuscano. I am over eighteen (18) years of age and am legally competent to make this Affidavit, which is true and correct, is based on my personal knowledge, and is made voluntarily and not under duress.
2. I, Karen Tuscano, am with my husband Wesley Tuscano a Defendant in Cause No. DV-2021-39 in the Sixth Judicial District Court in Sweet Grass County, Montana.
3. I have read the Petition for Writ of Review filed herewith (the "Petition"), and affirm that the facts referenced in the Petition are true and correct.

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Signature Pages Follow

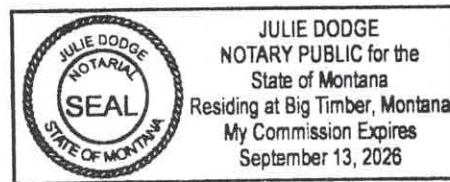
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For WESLEY TUSCANO:


Wesley Tuscano

SWORN AND SUBSCRIBED TO before me on this 24th day of July, 2024.


Notary Public

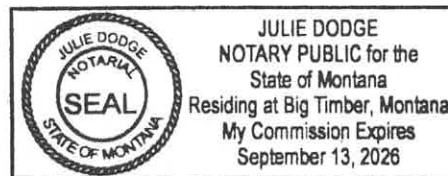


For KAREN TUSCANO:


Karen Tuscano

SWORN AND SUBSCRIBED TO before me on this 24th day of July, 2024.


Notary Public



CERTIFICATE OF SERVICE

I, Hertha Louise Lund, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 07-24-2024:

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Electronically signed by Genevieve Martin on behalf of Hertha Louise Lund
Dated: 07-24-2024