IN THE SUPREME COURT OF THE STATE OF MONTANA
OP 24-0461

MARVIN LEROY TIDWELL & JOSEMERY BECKER TIDWELL

Petitioners/Defendants/Third-Party Plaintiffs,

v.

MONTANA SIXTH JUDICIAL DISTRICT COURT,
HON. BRENDA R. GILBERT,

Respondent.

SUMMARY RESPONSE OF THIRD-PARTY DEFENDANTS BAYLOR CARTER, JULIE KENNEDY, TOM GIERHAN, AND ROBYN L. ERLENBUSH REAL ESTATE P.C. D/B/A ERA LANDMARK WESTERN LAND TO DEFENDANTS' PETITION FOR WRIT OF SUPERVISORY CONTROL

From the Sixth Judicial District Court, Park County
Cause No. DV-34-2022-76-OC
The Honorable Brenda R. Gilbert, Presiding

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INTRODUCTION

Petitioners Marvin Leroy Tidwell and Josemery Becker Tidwell (the "Tidwells") are dissatisfied with the District Court's Order granting partial summary judgment to Third-Party Defendants Baylor Carter, Julie Kennedy, Tom Gierhan, and Robyn L. Erlenbush Real Estate P.C. d/b/a ERA Landmark Western Land (collectively, "ERA Defendants") on the limited issue of dual agency. Rather than wait until final judgment to appeal the ruling, as required by law, the Tidwells, in their own words, have filed this "appeal challeng[ing] an Order from the District Court finding the Realtors were not dual agents 'as a matter of law.'" *See* Petition, p. 7.

"A writ of supervisory control is not to be used as a means to circumvent the appeal process." *State v. Mont. First Jud. Dist. Ct.*, 2023 Mont. LEXIS 592, *4, 412 Mont. 554, 531 P.3d 546. This is precisely what the Tidwells are attempting to do—appeal an unappealable order and call it a Petition for Writ of Supervisory Control. Unsurprisingly, they have failed to establish any of the requirements necessary for a Writ of Supervisory Control to issue. The District Court's decision should be left undisturbed, and the Tidwells' Petition should be denied.

STATEMENT OF THE ISSUES

I. Whether this Court should exercise the extraordinary remedy of supervisory control?

   a. Whether the Tidwells have sufficiently demonstrated urgency or that emergency factors exist making the normal appeal process inadequate?

   b. Whether the District Court's Order presents purely legal issues?

   c. Whether the Tidwells have sufficiently demonstrated the District Court is proceeding under a mistake of law and is causing a gross injustice?

STATEMENT OF THE FACTS

This case involves a series of bad acts committed by the Tidwells, beginning with their concealment of structural defects in the home Marvin Tidwell constructed and that they sold to the plaintiff, Aaron Hurvitz, Trustee of the Hurvitz Family Trust Dated January 10, 2014 ("Hurvitz"). *See* First Amended Complaint, **Exhibit A**.

The Tidwells purchased real property located at 5 Shoshoni Way, Pray, Montana ("Property" or "House") in 2004 for $119,000. Marvin Tidwell Deposition Excerpts, **Exhibit B**, p. 208:17-18. Mr. Tidwell built the house on the Property in 2005 and added onto it in 2012, performing most of the work himself both times. Ex. B, pp. 167:14-169:12, 205:12-206:19-21. The Tidwells sold the

Property to Hurvitz in 2021 for $1.3 million. Ex. A, ¶ 12. They provided Hurvitz an Owner's Property Disclosure Statement representing the Property was free of adverse material facts. *Id.*, ¶ 18. The sale closed on December 29, 2021. *Id.*, ¶ 12. Pursuant to the purchase agreement, the Tidwells remained on the Property post-closing while they prepared to move to their new property in Eureka, Montana. Ex. B, pp. 237:24-238:14, 210:1-4.

After the sale closed, while planning renovations on the Property, Hurvitz discovered the House is a pole barn structure, lacking a complete foundation, with rim joists sitting directly on the ground—adverse material facts the Tidwells went to great lengths to conceal from him pre-closing. Aaron Hurvitz Deposition Excerpts, **Exhibit C**, pp. 72:20-75:15. Specifically:

- Mr. Tidwell skirted the perimeter of the House with a thin stucco-like material to conceal the lack of a foundation. Ex. C, pp. 161:6-162:4.

- Mr. Tidwell approached his friend and neighbor, James Tiscione, post-closing to implore him not to tell Hurvitz the House was a pole barn lacking a complete foundation. Tiscione, a custom builder, knew these details because he had observed Mr. Tidwell building the addition in 2012. James Tiscione Deposition Excerpts, **Exhibit D**, pp. 50:11-51:8; Les Mathson Deposition Excerpts, **Exhibit E**, pp. 39:9-40:24, 13:23-15:16.

- Hurvitz learned Tiscione was a reputable custom home builder and reached out to Tiscione for advice on his renovation plans. Despite Mr. Tidwells' admonitions, Tiscione advised Hurvitz to hire a forensic structural engineer to evaluate the condition of the House given its lack of foundation. Mr. Tidwell subsequently learned of the conversation, went to Tiscione's house, pounded on the front door,

> and threatened to harm him. Tiscione reported the trespass incident to law enforcement, and Mr. Tidwell was permanently barred from Tiscione's property. Ex. D, pp. 43:22-45:25; 54:18-59:25; **Exhibit F**, Law Enforcement Report.

Hurvitz followed Tiscione's advice and hired a forensic structural engineer. The engineer determined the House is "dangerous" because it has insufficient resistance to meet minimum required wind, seismic activity, and snow loading. Sam Hensler Deposition Excerpts, **Exhibit G**, 119:5-121:22; 168:7-175:14. Hurvitz sued the Tidwells for misrepresenting—and actively concealing—the condition of the House that Mr. Tidwell had constructed himself. *See* Ex. A.

Tellingly, upon being served with the lawsuit, the Tidwells' very first move—even before filing their Answer—was to begin transferring $855,000 in installments to a bank account in Brazil, the nonextradition country where Mrs. Tidwell is from. **Exhibit H**, Marvin Tidwell Supplemental Discovery Responses. The Tidwells subsequently moved for summary judgment on all Hurvitz's claims against them. To support their Motion, counsel for Tidwells drafted an affidavit for their seller agent in the sale of the Property, Baylor Carter ("Carter"), to sign. The affidavit declares, "**I was the sellers' (Marvin and Josemery Tidwell) real estate agent in connection with the sale of 5 Shoshoni Way, Pray, Montana 59605 ("Property")**. **Exhibit I**, Baylor Carter Affidavit. The Tidwells had Carter

"solemnly affirm under the penalties of perjury that the contents of this affidavit are true . . . ," and attached it as an exhibit to their summary judgment briefing. *Id.*

The District Court declined to rule on the Tidwells' Motion for Summary Judgment pending completion of discovery. **Exhibit J,** 8/15/22 Order. Five months later, the Tidwells filed their Third-Party Complaint, claiming the real estate agents involved in the sale of the Property were liable for the Tidwells' own bad acts. **Exhibit K**, First Amended Third-Party Complaint. Specifically, they claimed their seller agent, Carter, and Hurvitz's buyer agent, Julie Kennedy ("Kennedy"), were actually dual agents in the transaction, that they breached their duties as dual agents to the Tidwells, and that Carter's supervising broker, Tom Gierhan, and ERA Landmark, the brokerage firm for which Kennedy and Carter work as independent contractors, were jointly and severally liable. *Id.*

On May 1, 2024, the Tidwells moved for partial summary judgment, asking the District Court to determine as a matter of law that Kennedy and Carter were dual agents. **Exhibit L**, 7/24/24 Order, pp. 4-5. The ERA Defendants filed a cross-motion, proving that Kennedy was Hurvitz's buyer agent, Carter was the Tidwells' seller agent, and that they owed duties consistent with those roles. Ex. L, p. 5. The District Court ruled in the ERA Defendants' favor, concluding Kennedy and Carter were not dual agents as a matter of law. *Id.*, pp. 13-16. In doing so, the Court simply clarified the duties the real estate agents owed in this

transaction. *Id.* As of the date of this filing, all six of the Tidwells' claims for relief against the ERA Defendants remain, as do seven of Hurvitz's eight counts against the Tidwells, and trial is set to begin on April 15, 2025.

In response to the District Court's ruling, the Tidwells filed this appeal/Petition for Writ of Supervisory Control.

ARGUMENT

Supervisory control is an extraordinary remedy. *Accident Fund Gen. Ins. Co. v. Mont Eighth Jud. Dist. Ct.*, 2024 Mont. LEXIS 609, *7, 550 P.3d 789. It "is not to be used as a means to circumvent the appeal process." *State v. Mont. First Jud. Dist. Ct.*, 2023 Mont. LEXIS 592, *4, 412 Mont. 554, 531 P.3d 546. Accordingly, this Court "refrain[s] from exercising supervisory control when the petitioner has an adequate remedy of appeal." *Id.*, 2023 Mont. LEXIS at *3. Supervisory control is justified only in the "most extenuating circumstances," when (1) urgency or emergency factors exist making the normal appeal process inadequate; (2) the case involves purely legal questions; and (3) the lower court is proceeding under a mistake of law and is causing a gross injustice.[1] *Id.* (citing

[1] The Tidwells also assert this case presents legal issues of statewide importance for consumers in real estate transactions. This misapprehends the applicable law. The Tidwells bring this Petition under Mont. R. App. P. 14(3)(a), not 14(3)(b), since this case does not implicate the Constitution at all. Regardless, even if an issue of statewide importance existed here (it does not), the Tidwells do not explain how the Court's ruling, which depended on facts specific to this case, applies to consumers statewide. Thus, the Tidwells provide no support showing this case presents legal issues of statewide concern for consumers. *See Sisters of Charity of Leavenworth Health Sys. v. Mont. Sixteenth Judicial Dist. Court*, 2018 Mont. LEXIS 223, *3, 393 Mont. 537.

Mont. R. App. P. 14(3)). "All three elements must be established in order for a writ of supervisory control to issue." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Twentieth Jud. Dist. Ct.*, 2018 Mont. LEXIS 340, **2-3, 393 Mont. 541. "The burden of persuasion is on the petitioner to convince the Court to issue a writ." *T.K. v. Mont. Seventeenth Jud. Dist. Ct.*, 2024 Mont. LEXIS 136, *5, 416 Mont. 551, 545 P.3d 1067. The Tidwells have failed in every respect to demonstrate that supervisory control is warranted. Their Petition should be denied.

I. The Tidwells Have Not Demonstrated Urgency or Emergency Factors Exist Making the Normal Appeal Process Inadequate.

The Tidwells have failed to make even the threshold showing that urgency or emergency factors make the normal appeal process inadequate. In fact, the Tidwells gloss over this threshold requirement entirely. *See* Petition, p. 1. At best, the Tidwells make passing reference to judicial economy and avoidance of "undue cost," including for "additional time and expense for resolution of the controlling issues on appeal . . . ." as reasons warranting this Court's intervention. Petition, pp. 6-7. But this Court has "repeatedly held that conserving resources, without more, is insufficient grounds to justify supervisory control where a party can seek review of the lower court's ruling on appeal and there is no evidence that relief on appeal would be inadequate." *Simkins-Hallin, Inc. v. Mont. Eighteenth Jud. Dist. Ct.*, 2021 Mont. LEXIS 660, *2, 405 Mont. 538, 495 P.3d 422.

The Tidwells provide no explanation why the normal appeal process is inadequate in this case. Nor could they, since taking such a position directly conflicts with Montana law. Mont. R. App. P. 6(5)(a) provides that "[i]n cases involving multiple parties or multiple claims for relief, an order or judgment which adjudicates fewer than all claims as to all parties, and which leaves matters in the litigation undetermined" are "not appealable." And under Mont. R. App. P. 6(5)(b), orders granting motions for partial summary judgment are not immediately appealable but may ultimately be reviewed on appeal from a final judgment under Mont. R. App. P. 6(1). *Northwestern Corp. v. Mont. Second Jud. Dist. Ct.*, 2023 Mont. LEXIS 1090, **3-4, 414 Mont. 386, 539 P.3d 1091.

This case involves multiple parties and multiple claims for relief, and the District Court's Order granting ERA Defendants' motion for partial summary judgment adjudicates fewer than all claims as to all parties, leaving multiple issues unresolved. Thus, the District Court's Order is unappealable under both rules. If having to wait for a final judgment to appeal the Order was inadequate, "Rule 6(5)(b) would not include orders granting partial summary judgment as a type of order not immediately appealable." *Id.*, 2023 Mont. LEXIS at *4. This Court's reasoning in *Northwestern Corp.* applies just as well to Rule 6(5)(a).

In summary, the Tidwells have failed to make the threshold showing that urgency or emergency factors exist making the normal appeal process inadequate.

This is fatal to their Petition. *Simkins-Hallin, Inc.* 2021 Mont. LEXI at *2. The Court need not consider whether the remaining elements have been met. *See, e.g., Yellowstone Elec. Co. v. Mont. Seventh Jud. Dist. Ct.*, 2019 Mont. LEXIS 312, *3, 397 Mont. 87, 552, 449 P.3d 7 (denying petition for writ of supervisory control where petitioner failed to demonstrate the normal appeal process is inadequate). The ERA Defendants respectfully request the Court deny the Tidwells' Petition for failure to demonstrate the existence of urgency or emergency factors which the normal appeal process cannot remedy.

II. The Case Does Not Involve Purely Legal Questions.

The Tidwells' Petition should be dismissed for the additional reason that it does not raise an issue that is purely legal. This Court has declined to exercise supervisory control where, as here, the lower court has granted partial summary judgment on some issues, but the case is still "replete with factual issues that remain to be decided." *Watchtower*, 2018 Mont. LEXIS at *3. Whether the District Court was correct in making a factual finding that the Realtors were not dual agents in the subject real estate transaction does not constitute a purely legal question because "the decision was driven entirely by the District Court's consideration of the facts." *BSA v. Mont. Eighth Jud. Dist. Ct.*, 2017 Mont. LEXIS 757, *5, 390 Mont. 426, 410 P.3d 171; *see also* Doc. 94, pp. 14-15 (relying on

facts in determining that Kennedy and Carter were not dual agents in the subject real estate transaction).

Two of the cases the Tidwells cite in their Petition reinforce this point. In *Plumb v. Fourth Jud. Dist. Ct.*, 279 Mont. 363, 367, 927 P.2d 1011 (1996), the Court exercised supervisory control over a case involving the purely legal issue whether the opportunity for a defendant to reduce its liability by asserting an affirmative defense that plaintiffs' damages have been caused or contributed to by unnamed third parties pursuant to Mont. Code Ann. § 27-1-703(6) (1995) violates substantive due process. And in *Truman v. Mont. Eleventh Jud. Dist. Ct.*, 2003 MT 91, ¶¶ 16-17, 315 Mont. 165, 68 P.3d 654, the Court exercised supervisory control to address the purely legal issue whether a defendant may present evidence of a plaintiff's subsequent accident with a non-party to disprove liability for damages. The issues in *Plumb* and *Truman* were purely legal because they did not depend on—and could be resolved without consideration of—the specific facts in the record. Here, the determination whether Kennedy and Carter acted as dual agents necessarily hinges on the facts in the record. In other words, it is <u>not</u> purely legal.

The Tidwells have not established the issues for which they seek supervisory control involve purely legal questions. This supplies yet another reason to deny their Petition. *See Goldsteen v. Mont. Thirteenth Jud. Dist. Ct.*, 2024 Mont. LEXIS

672, *5, 550 P.3d 807 (petition unsuitable for disposition via writ where it would require this Court to make a factual determination).

III. The Tidwells Have Failed to Demonstrate the Lower Court Is Proceeding Under a Mistake of Law and Is Causing a Gross Injustice.

A. The District Court Is Not Proceeding Under a Mistake of Law.

Even if the Tidwells had demonstrated that emergency factors that cannot be remedied on appeal exist and that this case presents purely legal issues (they have not), their Petition should be denied because, fundamentally, the District Court is not proceeding under a mistake of law. The District Court determined, "as a matter of law, that Kennedy and Carter were not dual agents" in the subject transaction. It reached this conclusion by correctly applying the law to the undisputed material facts.

In Montana, a single real estate broker or salesperson can represent both the buyer and the seller in the same real estate transaction. This is known as "dual agency." Mont. Code Ann. § 37-51-102(10). The Tidwells' Third-Party Complaint alleges that Kennedy and Carter served as dual agents in the subject transaction. The ERA Defendants have maintained that Kennedy served exclusively as Hurvitz's buyer agent, while Carter served exclusively as the Tidwells' seller agent.

A "buyer agent" is defined under Montana law as "a broker or salesperson who, pursuant to a buyer broker agreement, is acting as the agent of a buyer . . . ." Mont. Code Ann. § 37-51-102(6). The ERA Defendants argued—and the District Court agreed—that Kennedy met this definition because she is a broker who entered a buyer broker agreement with Hurvitz (the buyer), never entered a listing agreement with the Tidwells, and acted as Hurvitz's buyer agent, communicating with Hurvitz (not the Tidwells) about the transaction while it was pending, referring to Hurvitz as "my buyer," and working diligently to achieve his objectives. For example, she hired a vacation rental consultant to facilitate Hurvitz's plans to make the Property a more suitable vacation rental.

Mont. Code Ann. § 37-51-102(22) defines a "seller agent" as "a broker or salesperson who, pursuant to a written listing agreement, acts as the agent of a seller . . . ." The ERA Defendants argued—and the District Court again agreed—that Carter met this definition based on the specific facts of the transaction. Carter is a salesperson who entered a listing agreement with the Tidwells (the sellers), never entered a buyer broker agreement with Hurvitz, and acted as the Tidwells' seller agent. Throughout the transaction, Carter communicated solely with the Tidwells—never directly with Hurvitz. He worked to achieve the Tidwells' objectives alone. Carter saw to it, for example, that his clients netted more than $1,245,000 from the sale as they requested.

For all the same reasons, the District Court concluded that neither Kennedy nor Carter served as a dual agent in the subject sale. As the District Court noted, this conclusion was supported by the Tidwells' own real estate standard of care expert, who testified that "the true definition of dual agency is where one agent represents both the buyer and the seller in the same transaction, and that did not happen in this transaction." Ex. L, p. 9.

The Tidwells' Petition is nothing more than an attempt to rehash these fact-dependent determinations. They argue, as they did in briefing below, that Kennedy and Carter had a duty under Mont. Code Ann. § 37-51-314(5) "to disclose the nature of their relationship and the relationship they disclosed was that of dual agent." Petition, p. 8. This is incorrect. Section 37-51-314(5) requires real estate agents to disclose specific information about the various agency relationships that *may* arise in a real estate transaction, including the *potential* for dual agency. *See* Mont. Code Ann. § 37-51-314(5). The District Court concluded that disclosure of the *potential* for dual agency does not mean that dual agency occurred, only that Carter and Kennedy were complying with their disclosure obligations under Montana law.

The Tidwells also claim the District Court "erred in disregarding the language of the relationship and consents forms and the buy-sell agreement." The District Court did not "disregard" these documents. It simply disagreed with the

Tidwells that the contents of these documents make Kennedy and Carter actual dual agents pursuant to § 37-51-102(10) given that Carter, pursuant to the listing agreement, acted as the Tidwells' seller, while Kennedy, pursuant to her buyer-broker agreement with Hurvitz, acted as his buyer agent.

The District Court got it right. Supervisory control is unwarranted.

B. The Tidwells Have Failed to Establish the District Court's Grant of Partial Summary Judgment on the Limited Issue of Dual Agency Has Caused Them a Gross Injustice for Which an Appeal Is an Inadequate Remedy.

Even assuming for the sake of argument the District Court made a mistake of law, the Tidwells have failed to demonstrate, as they must, the mistake caused "a significant injustice for which an appeal is an inadequate remedy." *Accident Fund Gen. Ins. Co.*, 2024 Mont. LEXIS at *7. They do not specify what "gross" or "significant" injustice they face. Though they refer in broad strokes to "procedural complication[,]" "undue cost, delay, and the like" while this case "barrel[s] toward trial" and "an appeal and subsequent litigation," *see* Petition, pp. 6, 12, none of these warrants supervisory control.

Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct., to which the Tidwells cite, is illustrative. In that case, the lower court summarily adjudicated liability against the petitioner, MSU, not on the merits, but as a spoliation sanction pursuant to Mont. R. Civ. P. 37(e). *Id.*, 2018 MT 220, ¶ 12, 392 Mont. 458, 426 P.3d 541. MSU petitioned for a writ of supervisory control, and this Court granted

it, observing that the sanction "precluded a determination on the genuinely-disputed merits of the pivotal issue of whether MSU [was negligent], thus leaving for trial only proof of causation and damages." *Id.*, ¶ 16. The Court further explained that "[b]ecause the remaining course of litigation dramatically pivots on a discovery sanction, the issue in this case is not akin to a typical assertion of error on a summary judgment ruling where the losing party had a full and fair opportunity to either preclude summary judgment or prevail by making a sufficient factual or legal showing on the available evidence." *Id.*, ¶ 17.

Here, in sharp contrast, the District Court did not summarily adjudicate liability. Instead, it determined the scope of the ERA Defendants' duties to the Tidwells based on the genuinely disputed merits after affording the Tidwells a full and fair opportunity to make a sufficient factual or legal showing on the available evidence to preclude summary judgment. What's more, of the six claims for relief in the Third-Party Complaint, five sound in negligence. For these claims, the issues of breach, causation, and damages are still in play. So is the Tidwells' breach of contract claim against ERA. So are all of Hurvitz's claims against the Tidwells.

Thus, the District Court's ruling does not "dramatically" alter the course or cost of this litigation. The case would still be "barreling toward trial" on all the same claims if the Court had ruled in the Tidwells' favor on the partial motion for

summary judgment on dual agency. The Tidwells have failed to establish any procedural complications, undue costs, or undue delays that rise to the level of a "gross injustice" warranting supervisory control. *See Yellowstone Elec. Co.*, 2019 Mont. LEXIS at *3 ("[T]he time and expense of a trial before appealing are factors inherent with any case where a post-trial appeal is taken.").

The Tidwells have also failed to show the normal appeal process is inadequate under the circumstances for the same reasons discussed in Section I above. *See Accident Fund Gen. Ins. Co.*, 2024 Mont. LEXIS at *7 (petitioner must show the district court "is proceeding based on a mistake of law which, if uncorrected, would cause significant injustice for which an appeal is an inadequate remedy.") (Emphasis added.)). As discussed, Rules 6(5)(a) and 6(5)(b) preclude the Tidwells from appealing the District Court's Order until final judgment in this case. Other than their passing reference to judicial economy, the Tidwells provide no argument or authority showing why these rules should not apply to them. It is undeniable that they do. *Northwestern Corp.*, 2023 Mont. LEXIS at *4 (if participation in a trial constituted an "irreparable harm" for which the normal appeal process was inadequate, these rules would include these types of orders among those not immediately appealable).

This Petition is fundamentally flawed in multiple respects. There is no urgency nor emergency factors present that make the normal appeal process

inadequate. This case does not present purely legal questions, and the District Court is not proceeding under a manifest mistake of law which, if uncorrected, would cause a gross injustice that cannot be remedied on appeal. The Tidwells have not even bothered to address all the elements required for a Writ of Supervisory Control to issue, much less satisfy them. The Tidwells are appealing an unappealable Order and calling it a Petition for Writ of Supervisory Control. Their Petition should be denied.

CONCLUSION

For any one or all of the foregoing reasons, Defendants/Third-Party Plaintiffs' Petition for Writ of Supervisory Control should be denied.

DATED: September 6, 2024

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(e), I certify that this response is printed with a proportionately spaced Times New Roman script text typeface of 14 points; is double spaced (except for quoted and indented material); and the word count is not more than 4,000 words, being 3,947 words (excluding the Caption, Table of Contents, Table of Authorities, Certificate of Compliance, Index of Exhibits, and Certificate of Service).

DATED: September 6, 2024

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INDEX OF EXHIBITS

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