IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 24-0632

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Attorney for Appellants,
Russell Waddell and Casey Magan

Russell Waddell and Casey Magan,

Appellants,

v.

Paul Studer, Rachael Studer, and the Summer Ridge Homeowners' Association, a Montana non-profit corporation,

Appellees.

Appellants' Motion for Waiver of *Supersedeas* Bond and Stay of Judgment Pending Appeal

Appellants ("the Waddells") move this Court pursuant to M.R.App.P. 22(2) to waive the *supersedeas* bond requirement and stay the District Court's Judgment, entered in favor of Appellees and against Waddells on October 18, 2024 (Ex. 1, Doc. 379) in the amount of $417,608.37, the entirety of which is an award of attorney fees and costs arising out of a dispute between Waddells and their neighbors, the Studers, regarding Summer Ridge Homeowners' Association's restrictive and protective **viewshed covenant** intended to protect homeowner's views of the Gallatin Valley and surrounding mountains from unreasonable

obstruction by neighbors. Waddells filed this same motion in the district court. It was denied on November 20. (Ex. 2, Doc. 393).

Defendants have refused to waive the requirement of a bond pending this appeal and object to this motion.

M.R.App. 22(2) - Good cause for the requested relief.

1. It is not possible for Waddells to obtain a *supersedeas* bond. Waddells began their search for banks or bonding companies that would provide a *supersedeas* bond, a loan, or a letter of credit in June of 2023 shortly after the SRHOA filed its claim for attorney fees. *See* Decl. of Plaintiff Casey Magan at ¶ 4, *infra*. Those efforts were also detailed by Casey in her testimony at the November 14, 2024 district court hearing at page 17, line 5 through page 22, line 9. The Waddells' sole major asset is their home in the Summer Ridge subdivision, which also serves as their office. The home's taxable value is over $1.4 million and is encumbered by a trust indenture and a secured line of credit that is "maxed," both with Wells Fargo Bank, totaling $354,362.82. In addition, there is the homestead exemption of $393,702. Still, the Waddells have enough equity in their home to cover the $417,608.37 judgment liens, leaving $313,026.81 in equity in the property to cover any additional fees and costs.[1] In the interests of justice and pursuant to M.R.App. 22(3) Waddells respectfully request that this Court waive the

[1] *See* Magan Decl. at ¶ 2, *infra*, *and see* Ex. 3, Magan's Decl. filed at the District Court.

bond requirement and stay the Judgment pending the outcome of this appeal and while the Court considers the merits of this motion.

2. Waddells are likely to prevail on the merits of this appeal. We offer the arguments set forth in Plaintiffs' Adversary Submissions re: Defendants' Claims for Attorney Fees filed in the District Court. (Ex. 5, Doc. 361) (minus exhibits). We discuss further the strong likelihood of success below at pages 5-8.

3. Extreme hardship. Because of Defendants' many refusals to stipulate to a stay of this judgment pending appeal, Appellants believe that Defendants intend to foreclose on their judgment liens while this appeal is pending to satisfy their judgment and potentially moot this appeal. *See*, *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 45, 364 Mont. 390, 276 P.3d 867. Foreclosure of the Defendants' judgment liens pending the outcome of this appeal will cause Waddells to lose their home – even if they win this appeal. If Waddells prevail on this appeal, that damage would be irremediable, ensnaring these parties in further difficult litigation from which no one will emerge a "winner" other than some lawyers and their fees. Allowing foreclosure will jeopardize Appellants' health and, as they practice out of their home, will create an undue hardship to manage their other cases during a forced move. *See* Magan Decl., *infra* at ¶ 5.

4. Defendants' judgment liens are adequately secured and won't be substantially harmed by the issuance of a stay without bond. Appellees'

Judgments are secured, and there is more than enough remaining equity in Waddells' only major asset to cover any additional fees or costs. Issuance of a stay without bond will not cause substantial injury to Defendants' ability to collect on the entirety of their judgment should this Court affirm.[2] The relative inconvenience of judicial foreclosure (*versus* the convenience of a bond) does not amount to **substantial** injury to Appellees or their right or ability to fully collect their judgment. To the contrary, a sheriff sale would almost certainly devour most if not all of Waddells' equity in their home. Finally, in the event the Court affirms these judgments, it will be in Waddells' best interests to preserve the equity in this, their only major investment, by putting their house on the market in order to secure an orderly sale to a willing buyer, rather than a sheriff sale. A stay without bond should not substantially damage Appellees or their interests.

Applicable law.

In *MEIC v. Westmoreland Rosebud Mining, LLC*, DA 22-00064, *4 (Mont. Aug. 9. 2022) this Court cited the general factors governing stays of civil judgments as outlined by the United States Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 107 S.Ct. 2113 (1987):

> (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits;
> (2) whether the applicant will be irreparably injured absent a stay;

[2] "substantial" injury must be shown. *See MEIC vs. Westmoreland Rosebud Mining, infra.*

(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(4) where the public interest lies.

A strong showing of success on the merits. In addition to the arguments in Waddells' Adversary Submission (Ex. 5, Doc. 361), we make further argument here sufficient to establish this "strong showing of success" element:

The district court's most fundamental error is the conclusion that the subject viewshed covenant – which requires neighbors to consider the views of others when planning construction – creates no legal obligation or duty of any kind and does not require neighbors to do *anything* in response to another neighbor's viewshed concerns. That error flowed from these additional errors of law:

The court failed to consider the viewshed covenant in the context of the overarching purposes of the SRHOA Covenants which specifically state that they are for the purpose of *"maintaining a uniform and stable value, character, architectural design, use and development of the premises…"* in a subdivision which has always touted its views of the Gallatin Valley and its unobstructed views of the Bridgers and for which homeowners have paid a premium.

The district court erred when it would not consider evidence of two documented prior examples of viewshed covenant enforcement efforts by the SRHOA, including that documented in Judge John Brown's Order Re: Motions for Summary Judgment in *Summer Ridge Homeowner's Association vs. Bret Walker*,

DV 15-248C, (April 2017). Walker had constructed a 65' flagpole. The SRHOA sued after neighbors complained about the pole and the flag. "*The HOA's primary complaints about the flagpole are that it* ***impedes certain neighbors' viewsheds*** *and that it is noisy*." John Brown's Order at p. 21. (Ex. 6) (emphasis added).

The district court erred when it refused to consider the Declarations of four SRHOA homeowners, all of whom declared under penalty of perjury[3] and were prepared to testify that they paid a premium for the Summer Ridge views; that they are aware that the SRHOA had previously enforced the viewshed covenants; that they purchased their properties relying that their views would be protected from unreasonable obstruction by neighbors, and that they believed that the SRHOA would enforce their viewshed rights in the face of a neighbor's construction plans that might unreasonably obstruct their views. (*See* Declarations at Ex. 7).

The district court erred when it construed the viewshed covenant by resort to the Merriam-Webster dictionary definition of the word "***should***" – a critical term in the viewshed covenant and the focal point of this dispute. In concluding the covenant was without legal effect the court wrote:

> The term "should" has many uses and depends on the sentence. According to Meriam Webster, 'should' can be used to express an obligation, propriety, or expediency. "Should." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriamwebster. Accessed 21 Dec. 2020. [But in this case] "Should" is not "shall" or "must" or any of the other legal terms which connote a mandatory act or forbearance…

[3] *See* MCA 1-6-105.

(Ex. 8, District Court Order re: Pls.' Mot. for Prelim. Inj. at 8) (Doc. 23).

But here is the full the Merrian-Webster entry "***should***, past tense of SHALL":

1 used in auxiliary function to express condition

2 used in auxiliary function to express ***obligation***, propriety, or expediency (emphasis ours)

3 used in auxiliary function to express futurity from a point of view in the past

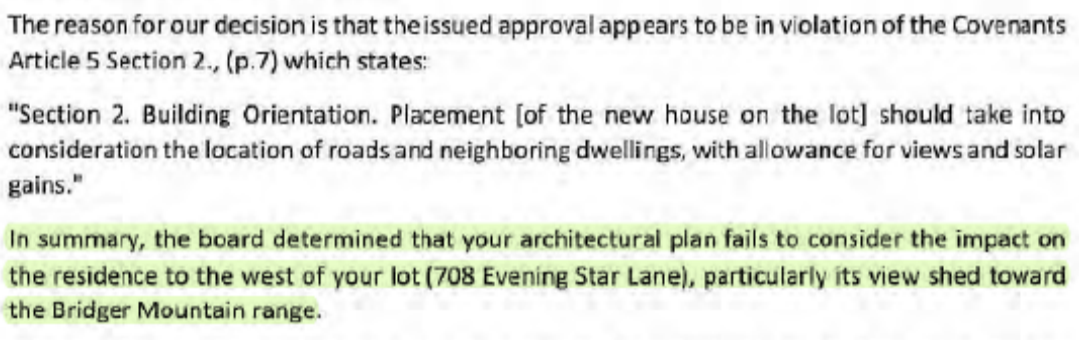
4 used in auxiliary function to express what is probable or expected

5 used in auxiliary function to express a request in a polite manner or to soften direct statement.

Synonyms: have (to), must, need, ought (to), shall.[4]

But having resorted to this dictionary evidence, the district court does not explain why it ignored altogether the 2nd definition of "should" that expresses ***obligation***, instead opting without justification for a definition that imposes no legal or contractual obligation of any kind. Instead of relying on the use of the word *should* "in the sentence", the court should have relied on the use of the word in the context of the overall goals and purposes of the Summer Ridge protective covenants; in the context of their understanding by current residents of the subdivision; in the context of the Summer Ridge HOA's prior viewshed covenant enforcement actions and in the context of SRHOA's actions <u>in this case specifically</u>: On October 30, 2020 the SRHOA sent the Studers a letter rescinding approval of their construction plans:

[4] "Should." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/should. Accessed 29 Nov. 2024.



The reason for our decision is that the issued approval appears to be in violation of the Covenants Article 5 Section 2., (p.7) which states:

"Section 2. Building Orientation. Placement [of the new house on the lot] should take into consideration the location of roads and neighboring dwellings, with allowance for views and solar gains."

In summary, the board determined that your architectural plan fails to consider the impact on the residence to the west of your lot (708 Evening Star Lane), particularly its view shed toward the Bridger Mountain range.

(Exhibit 3-60, attached here as Ex. 9).

These actions are not consistent with the district court's conclusion that the covenant imposed no obligation on the Studers or the SRHOA.

And finally, the district court erred when it declined to issue a temporary restraining order at the commencement of this action on November 20, 2020 which would have stayed construction of the Studer home *before any construction had begun* until the scheduled preliminary injunction hearing two weeks later on December 4. *See* Or. Denying TRO (Doc. 2) *and see* Adversary Submission at Ex. 5, Doc. 36.

4. The public interest includes member/homeowners of Summer Ridge and any other Montana homeowner who may be subject to similar covenants and may be interested in how the courts will construe the rights, duties and obligations of those who are, in ever increasing numbers, becoming parties to the specialized contracts known as "Covenants, Conditions & Restrictions."

Dated this 1st Day of December, 2024.

By: Michael G. Eiselein
Michael G. Eiselein

The Motion is further supported by the following Declaration of Plaintiff Casey Magan given under penalty of perjury:

§ 1-6-105, MCA DECLARATION AND AFFIRMATION
in support of DA 24-0632 on Emergency Motion for Stay

I, Elizabeth Casey Magan, declare under penalty of perjury that I have personal knowledge of the following facts and that the foregoing is true and correct:

1. Russ Waddell and I are married and are law partners, and we live and work out of our home, our only major asset. We do not have the funds or assets with which to purchase or collateralize a supersedeas bond for the $417,608.37 Judgment.

2. Our home is worth $1,478,700. Our first and second mortgages, our homestead allowance, and the Defendants' judgment liens total $1,165,673, leaving equity of $313,026.81. *See* Ex. 3, my Declaration at the District Court. The district court's conclusion about the value of the home and whether its value is less than the judgments (Ex. 2, Or. at 2) in this case is simply incorrect.

3. The District Court infers that our line of credit may be increased. *See* Ex. 2, Dist. Ct. Or./Doc. 393 at 2. This is incorrect. Exhibit 3 shows that the "Current available credit" is "$0.00." *See* Schedule H of the

financial statement signed by our CPA under penalty of perjury. (Ex. 4 to this motion; filed under seal at the district court).

4. We have tried to secure a supersedeas bond since June 2023, when Appellees filed their claim to hundreds of thousands of dollars in attorney fees and costs, but it is simply not possible. Please see my testimony from the November 14, 2024 hearing at Tr. 17:5-22:9, where I describe my unsuccessful contacts with a numerous of banks, credit unions and surety companies. We have simply been unable to secure by any means a *supersedeas* bond, a loan, sureties or other security.

5. During the pendency of this litigation, Russ was recovering from a bout of sepsis and gangrene which exacerbated other underlying chronic conditions. And within a week of learning that the Bank of Bozeman was unable to provide a loan for the letter of credit on the anticipated requirement of a supersedeas bond, I had a heart attack on August 3, 2023. A forced sale of our home would amount to a significant hardship.

Dated December 1, 2024, in Bozeman, Montana by E. Casey Magan:

By: _____
E. Casey Magan

CERTIFICATE OF COMPLIANCE

This Motion and Declaration together are not more than 10 pages of 14pt, Times New Roman font, double spaced with one-inch margins.

Dated December 1, 2024.

By: Michael G. Eiselein
Michael G. Eiselein

CERTIFICATE OF SERVICE

I, Michael G. Eiselein, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 12-01-2024:

Michael Lloyd Rabb (Attorney)
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Service Method: Conventional

Electronically Signed By: Michael G. Eiselein
Dated: 12-01-2024