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STATE OF MONTANA
Case Number: DA 24-0530

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-24-0530

SLOWAY CABIN LLC, a Montana limited liability company,

Plaintiff/Counter-Defendant/Appellee,

vs.

KEVIN EXTREME and JEANNINE EXTREME,

Defendants/Counterclaimants/Appellants.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana Fourth Judicial District Court
Mineral County, Cause No. DV-2021-68
Honorable Jason Marks

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

Other Authorities

I. STATEMENT OF THE ISSUES

A. Did the District Court manifestly abuse its discretion by enjoining Extremes from violating waived and otherwise unenforceable Covenants?

B. Did the District Court abuse its discretion by awarding attorney fees to Sloway in the absence of the required equitable considerations?

II. STATEMENT OF THE CASE

This case involves a dispute over the enforceability of certain restrictive covenants. On October 4, 2021, Appellee, Sloway Cabin LLC ("Sloway"), filed a Complaint for Declaratory and Injunctive Relief (Dkt. 1), seeking to enjoin Appellants, Kevin and Jeannine Extreme ("Extremes"), from running their commercial towing and diesel repair business on their property.[1]

Sloway initially requested a TRO, restraining order, and a preliminary injunction (Dkt. 2), but later eschewed this request after Extremes responded and submitted evidence calling into question the enforceability of the covenants. (Dkt. 11, 13-20).

Extremes' Answer asserts several affirmative defenses "including, without limitation, estoppel, quasi-estoppel, unclean hands, laches, and waiver and acquiescence." (Dkt. 12, pp. 6-7). "Sloway's Complaint for Declaratory Judgment is

[1] Sloway's Complaint (Dkt. 1) also seeks to enjoin Extremes from other alleged violations of the covenants. Only that procedural background which is relevant to the issues raised is included in this Statement of the Case. M. R. App. P. 12(1)(c).

barred, in whole or in part, by estoppel, laches, waiver, abandonment, and/or selective enforcement."). (Dkt. 12, p. 7). Extremes counterclaimed against Sloway, seeking a declaration that the covenants are unenforceable. (Dkt. 12, pp. 8-15).

The District Court held a bench trial on May 16 and 17, 2024. On August 7, 2024, the District Court filed its Findings of Fact, Conclusions of Law, and Order. (Dkt. 87). Despite substantial evidence demonstrating that the property has been continuously and openly used for commercial purposes since at least 1975 with no objections or attempts at enforcement from prior owners, neighbors, or the community, the District Court erroneously concluded that the covenants "are still in force" and that Extremes violated them. (Dkt. 87, p. 12).

The District Court granted Sloway "a declaration of rights under Montana Code Annotated § 27-8-202 that the Extremes are bound by the Covenants and that the Extremes are violating the Covenants and their planned actions would further violate the Covenants." (Dkt. 87, pp. 12-13). The District Court issued "a permanent injunction prohibiting the Extremes from ongoing or further violations of the Covenants," and entered judgment for Sloway "identifying the remedial steps the Extremes are to take to bring the property back into compliance with the Covenants." (Dkt. 87, p. 13).

The District Court erroneously awarded Sloway "its legal fees and costs for bringing this action under the Uniform Declaratory Judgments Act, as set forth at

Montana Code Annotated §§ 27-8-101, *et seq*." (Dkt. 87, p. 13). The District Court did so in the absence of the required equitable considerations and by misapplying the applicable test. (Dkt. 87, 12-13).

Sloway filed a Notice of Entry of Order on August 7, 2024. (Dkt. 88). Extremes filed a timely appeal to this Honorable Court. (Dkt. 95).

III. STATEMENT OF THE FACTS

The property at issue is a tract within the Sloway Flats minor subdivision located in Mineral County, Montana (the "Property"). (Tr. 8:19-21). The Sloway Flats minor subdivision was established with a recorded plat and covenants (the "Covenants") that ostensibly restricted, *inter alia*, the use of the Property to non-commercial purposes (Tr. 31:2-22).

However, substantial evidence demonstrates that the Property's longstanding commercial use was well-known and unchallenged by neighbors or other parties for many years before Extremes bought it.

The Property was originally owned by Peter Martin ("Martin"), who beginning in 1975 continuously operated a business that later became known as Precision Sawmill Systems on-site. (Tr. 94:22 – 99:9). Martin built a factory on the Property in the late 1970's to manufacture equipment that he had invented and patented. (Tr. 95:16-23, 97:10-21). The business generated substantial commercial activity and traffic to and from the Property. (Tr. 112:25 – 114:5).

In 2001, Martin sold the business to Jerry McConnell ("McConnell"), who continued to operate it on the Property. (Tr. 99:7-15). Martin went to work for McConnell as a salesman for the next 5-7 years. (Tr. 99:16-18). McConnell later sold the business to Steve Freeman ("Freeman") in 2006, and Freeman still currently owns it. (Tr. 99:19-25, 116:7).

In 2004, Martin sold the Property to Bryan and Robin Foster ("Fosters"). (Tr. 101:6-16). The sale mistakenly included a separate riverfront parcel that the parties intended for Martin to retain. (Tr. 101:20-23). Mineral County approved a subdivision for Martin and indicated that the County Commissioners wanted to review any proposed covenants. But Martin did not submit any covenants with his application. (Tr. 103:8 – 104:14). Martin was able to regain ownership of the riverfront parcel without putting covenants in place. (Tr. 105:19-24).

During their ownership, Fosters continued leasing the 6,000-square-foot shop for commercial purposes, first to McConnell and later to Freeman. (Bryan Foster Depo. 14:2 – 16:5).[2] Freeman continued building sawmill equipment in the commercial shop. (Tr. 116:21 – 117:25). Freeman operated the business consistently through 2012 and more sporadically thereafter until Fosters sold the Property to Extremes in 2021. (Tr. 118:17-21, 120:15 – 122:14). Up to the point when Freeman vacated the Property in 2021, he was never once told he could not operate a

[2] The depositions of Bryan and Robin Foster were admitted as evidence at trial. (Tr. 129:11-21).

commercial business. (Tr. 123:9-13). Indeed, Freeman had two employees working in the shop besides himself and his operations continued generating commercial traffic. (Tr. 127:20 – 128:6, 193:14: - 194:11).

The Covenants were mysteriously recorded on February 1, 2006. (Tr. 106:16 – 107:4). There was an active commercial business on the Property at that time. (Tr. 107:5-10, 193:14-22). Martin has no clue why the Covenants were established in the first place, thus underscoring that they were never truly intended to be enforceable. (Tr. 107:11-13).

Bryan Foster also does not know why Covenants were necessary, but believes they were just part of the process of returning the riverfront parcel to Martin that had been erroneously included in Fosters' purchase. (Bryan Foster Depo. 21:19 – 26:9).

It made no sense to Fosters why they were asked to sign Covenants purporting to prohibit commercial use given the open and obvious historical and ongoing operation of a commercial business on the Property. (Bryan Foster Depo., 27:14 – 28:8).

Robin Foster testified that establishing Covenants "seems counterintuitive" in light of the longstanding presence of a business. (Robin Foster Depo. 8:22 – 9:12). Fosters and Martin never even discussed the underlying purpose of the Covenants – another significant indicator of the parties' lack of intent to enforce them. (Robin Foster Depo. 9:13-16). Fosters were utterly confused because Martin "always had"

a business on the Property and was still personally involved with the business when they took ownership. (Robin Foster Depo. 9:17 – 10:11, 13:10-12).

Fosters sold the Property to Extremes in 2021. (Tr. 172:3-5). Fosters' initial listing for the Property featured the 6,000 square foot shop as suitable for "business or personal use." (Tr. 66:10 – 67:2). Extremes have no work-related real estate knowledge or experience. (Tr. 155:3-5, 178:17-21). They had a clear commercial intent from the outset, and were only interested in buying property that would allow them to live on it and run their business. (Tr. 157:5-7).

At the time of the sale to Extremes, the Property continued to display clear signs of its industrial and commercial history, including the presence of large equipment and remnants of past projects in and around the commercial shop. (Tr. 136:3-9, 138:25 – 139:1, 158:13 – 160:10, 161:7-19).

Kevin Extreme testified about several visible indicators of commercial use including without limitation, an electric roll door on the shop, office space, a lengthy bench roller, a 30-foot hydraulic press, toolboxes, various vehicles, a plasma cutter, welders, presses, milling remnants, scrap metal, employee notices and other paperwork (i.e., W-2s), as well as OSHA and other legal signage and postings. (Tr. 158:13 – 159:25). Photographs were admitted into evidence corroborating Kevin Extreme's testimony. (Tr. 160:1-6, 161:7-23).

Nobody ever discussed the Covenants with Extremes before they closed on the Property regardless of any references in the title commitment or insurance paperwork. (Tr. 132:2-3, 160:11-21). Copies of the Covenants were not included in any documentation Extremes received before closing. (Tr. 169:2-7). Had Extremes understood the Covenants were enforceable, they would not have bought the Property. (Tr. 169:5-23).

Kevin Extreme testified,

> No. I said I didn't know anything about covenants. If it was covenants on there and I knew what it was and they were actually blank, I would never have bought the place. I put my whole life savings into this place. You know, it drained everything we had…(Tr. 160:11-21).

Extremes chose the Property because of the commercial shop and its ideal location next to the interstate for a towing business (Tr. 156:21 -158:2, 180:8-18). Regarding the Property's more attractive features, Kevin Extreme testified, "Basically the 6,000 square foot shop, it was at the end of the road so nobody was constantly coming through. You know, I didn't have to worry about people, you know, messing around with my equipment or anything like that." (Tr. 157:15-20).

The financing package Extremes procured to buy the Property specifically included a business loan in anticipation of being able to run a profitable business on the Property. (Tr. 165:19 – 166:17). Extremes also obtained insurance on the Property for both residential and commercial purposes. (Tr. 166:7 – 14). Their

alleged violations of the Covenants are largely not visible from Sloway's parcels. (Tr. 173:3-8).

Jeannine Extreme echoed her husband's testimony. "We were wanting somewhere to run the towing and mechanic [sic] business out of…we had the 6,000 square foot shop that was perfect for running the business out of. I mean, that was the big seller." (Tr. 180:13-18). Jeannine confirmed that neither the realtors nor anyone else ever communicated that commercial use would be prohibited. (Tr. 181:5-9). To the contrary, Jeannine also saw evidence of pre-existing commercial use. (Tr. 182:7-20). Fosters never advised Extremes they could not run a business despite having signed the Covenants back in 2006, 15 years earlier. (Tr. 184:16-19). Jeannine testified about Extremes' willingness to address the 310 violations at issue during the trial. (Tr. 185:21 – 186:13).

The realtors involved also confirmed Extremes' reasonable expectations of being able to run a business on the Property. Craig Otte ("Otte") was Extremes' buyer agent. (Tr. 200:12-14). Otte knew Extremes owned a towing company and needed a property where they could operate it. (Tr. 201:1-11). "Well, he has a tow company. So need a place to put vehicles, he also was a diesel mechanic so work on big rigs. The place had 6,000 square foot fully commercial with – I don't even know what you call them, giant lifts that pick up heavy things and slide them all over in the building. Just pretty fantastic. I think I heard the shop alone was probably, if you

were to build that today it would be close to a million dollars, maybe more." (Tr. 201:4-11).

Otte understood the Property had been used historically to "manufacture sawmills," – an obvious form of commercial business - for at least 20 years prior. (Tr. 201:16 – 202:7). Otte believed the Covenants were unenforceable due to the lengthy passage of time involving commercial activity without objection. (Tr. 202:19 – 203:12). Otte reasonably believed the Property "fit perfectly" for Extremes' commercial needs. (Tr. 203:13:-18). "I knew there were covenants but obviously there was a business already there so I just thought they had not been abandoned but no one could – no one cared. All the neighbors obviously knew." (Tr. 204:7-10). "There's a giant 6,000 square foot commercial business right on the [P]roperty. I figured no one was enforcing them and this was a great fit and perfect property for what they wanted to do." (Tr. 208:15-18). Otte could see how the shop had been used commercially. (Tr. 208:25).

George Bailey ("Bailey") and his wife Anita acted as Fosters' seller agent. (Tr. 216:1-7). Bailey believed he and Anita were marketing and selling property suitable for mixed (i.e., commercial and residential) use. "There was a business that was operating out of there." (Tr. 216:22 – 217:1). Bailey never discussed the Covenants with his clients, Fosters. (Tr. 217:2-5). Bailey testified that he had no idea there were Covenants in place. (Tr. 217:23 – 218:12).

The Covenants conflict with the surrounding area's character. For example, the Covenants state, "No horses, cows or any other barnyard animals will be allowed on said properties. This includes any exotic type animals." The property located about 600 yards from Sloway's properties maintains goats, pigs, chickens, ducks, geese, sheep, and other barn animals. (Tr. 167:18 – 168:2, 81:7-14). Sloway's adjacent cabin property allows horses. (Tr. 80:22-24).

The Covenants state, "No lot or tract or part thereof shall be used for any commercial business." However, there are marijuana grow facilities located on property in close proximity to the Sloway Flats minor subdivision, which produce and sell product to various dispensaries. (Tr. 168:3-11). Sloway uses its adjacent cabin property as a vacation rental. (Tr. 72:11-13, 79:21-23). Sloway's cabin property is subject to its own separate covenants which allow commercial business. (Tr. 75:15 – 76:18).

The Covenants state, "No discharging of firearms will be allowed." There is a shooting range located directly across the river from the Sloway Flats minor subdivision where loud firearms are discharged "[a]ll the time," including "later in the night" and "early in the morning." (Tr. 168:12-24).

IV. STANDARD OF REVIEW

"The granting or dissolving of an injunction is so largely within the discretion of the lower court, that the supreme court will never disturb its action, unless there

has been a manifest abuse of discretion." *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶ 11, 319 Mont. 132, 82 P.3d 912 (quoting *Craver v. Stapp*, 26 Mont. 314, 67 P. 937 (1902)). A "manifest" abuse of discretion is one that is obvious, evident or unmistakable. *Shammel*, ¶ 12 (citing *Black's Law Dictionary*, 6th Ed.).

This Court reviews for correctness a District Court's decision as to whether legal authority exists to award attorney fees. *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 42, 354 Mont. 50, 221 P.3d 1230. This Court reviews for abuse of discretion a District Court's order granting or denying attorney fees if legal authority exists for the fees. *Renville v. Farmers Ins. Exch.*, 2004 MT 366, ¶ 20, 324 Mont. 509, 105 P.3d 280.

V. SUMMARY OF ARGUMENT

The District Court erred in its interpretation and enforcement of the Covenants associated with the Property, failing to recognize substantial evidence of waiver and abandonment due to decades of non-enforcement and consistent commercial use by previous owners and lessees. Despite the Covenants being recorded, the intention behind their establishment and the surrounding circumstances reveal that the original owner and subsequent declarants did not intend for them to be enforceable. The community's longstanding acknowledgment of the commercial activities on the Property further indicates a tacit acceptance that undermines the Covenants' validity.

Additionally, the District Court abused its discretion by awarding attorney fees to Sloway without the requisite equitable justification. Under Montana law, such fees are not warranted in routine disputes between neighbors over Covenants unless there are extraordinary circumstances, which are absent in this case. The lack of clear findings supporting the fee award, coupled with the absence of bad faith from Extremes and their willingness to mitigate certain issues, renders the award inequitable. Therefore, both the injunction and the fee award should be reversed, as they do not align with established legal principles and equitable considerations.

VI. ARGUMENT

A. The District Court manifestly abused its discretion by enjoining Extremes from violating waived and otherwise unenforceable Covenants.

A District Court's interpretation of the Covenants is a conclusion of law which this Court reviews to determine whether the conclusion is correct. *Pablo v. Moore*, 2000 MT 48, ¶ 12, 298 Mont. 393, 995 P.2d 460.

General rules of contract interpretation apply to restrictive covenants. *Creveling v. Ingold*, 2006 MT 57, ¶ 8, 331 Mont. 322, 132 P.3d 531 (citing *Toavs v. Sayre*, 281 Mont. 243, 245, 934 P.2d 165, 166 (1997); *Hanson v. Water Ski Mania Estates*, 2005 MT 47, ¶ 15, 326 Mont. 154, 108 P.3d 481. Any person having an interest under a writing constituting a contract – like a restrictive covenant – may

seek declaratory relief concerning any question of construction arising under the instrument. *Creveling*, ¶ 8 (citing Mont. Code Ann. § 27-8-202).

Where a contract, and by extension a restrictive covenant, has been reduced to writing, the intention of the parties is to be ascertained, if possible, from the writing alone. Mont. Code Ann. § 28-3-303; *Wurl v. Polson School Dist. No. 23*, 2006 MT 8, ¶ 16, 330 Mont. 282, 127 P.3d 436 (citation omitted). It is a fundamental rule that courts may look "not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." *Kitner v. Harr*, 146 Mont. 461, 472, 408 P.2d 487, 494 (1965); *Lewis & Clark Cnty. v. Wirth*, 2022 MT 105, ¶ 17, 409 Mont. 1, 510 P.3d 1206.

Restrictive covenants are strictly construed and ambiguities in covenants are resolved to allow free use of property. *Creveling*, ¶ 8 (citing *Newman v. Wittmer*, 277 Mont. 1, 6, 917 P.2d 926, 929). Where the language of a covenant is clear and explicit, the Court must apply the language as written. *Wurl*, ¶ 16; *see also Carbon County v. Dain Bosworth, Inc.,* 265 Mont. 75, 87, 874 P.2d 718, 726. The language of a restrictive covenant should be understood in its ordinary and popular sense. *Creveling*, ¶ 8 (citing *Fox Farm Estates Landowners v. Kreisch*, 285 Mont. 264, 268, 947 P.2d 79, 82).

Waiver of a covenant may operate to render it unenforceable. To establish waiver, the party asserting waiver must demonstrate that the other party knew of and acted inconsistently with a covenant, and that prejudice resulted to the party asserting waiver. *McKay v. Wilderness Dev., LLC*, 2009 MT 410, ¶ 28, 353 Mont. 471, 221 P.3d 1184. Waiver may be either express or demonstrated by a course of conduct. If waiver is demonstrated by a course of conduct, whether waiver occurs and which covenants are affected by the waiver will depend "upon the circumstances of each case and the character and materiality of the permitted breach." *Kelly v. Lovejoy*, 172 Mont. 516, 520, 565 P.2d 321, 324 (1977); *Kosel v. Stone*, 146 Mont. 218, 404 P.2d 894 (1965).

Laches is a concept of equity that can apply when a person is negligent in asserting a right. Laches exists where there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable, and is appropriate when a party is actually or presumptively aware of his or her rights but fails to act. A party is held to be presumptively aware of his or her rights where the circumstances of which he or she is cognizant are such as to put a person of ordinary prudence on inquiry. *Cole v. State ex rel. Brown*, 2002 MT 32, ¶¶ 24-25, 308 Mont. 265, 42 P.3d 760.

Here, the Covenants purporting to restrict commercial use of the Property are invalid and unenforceable due to substantial evidence of waiver, abandonment, and

a complete lack of intent to enforce them by the original owner (Martin) and the declarants (Fosters) from the inception. The County preferred that Martin establish covenants as part of the subdivision process, but he was granted final plat approval without doing so. The only reason the Covenants were later recorded was to placate the County and allow Martin to retake title to the riverfront parcel that had been mistakenly included in the sale to Fosters. Nobody ever intended for the Covenants to be enforceable.

The longstanding commercial use of the Property, coupled with the actions and inactions of prior owners, commercial lessees, neighbors, and realtors, demonstrates that the Covenants were not enforced, were effectively abandoned, and should not serve as a basis for injunctive or declaratory relief against Extremes. The District Court's decision to enjoin Extremes from operating their business improperly disregards these critical facts and important principles of equity.

Like *Kelly*, Sloway was well aware of the Covenants in question when it purchased the riverfront parcel in 2012. (Tr. 65:3-22). Sloway voluntarily and intentionally waived its right to enforce the Covenants by its acquiescence to the longstanding commercial use of the Property which predated Extremes' ownership. In view of such waiver, Sloway is estopped from suddenly and selectively asserting the Covenants against Extremes just because the parties do not get along. *Kelly*, 172 Mont. at 520, 565 P.2d at 324. Never once did Sloway seek to enforce the Covenants

against Fosters or their commercial lessees between 2012 and 2021 when Extremes took ownership.

The Covenants were duly waived through decades of non-enforcement. Since 1975 the Property had been used for commercial purposes without interruption or objection. Martin established and operated a commercial business on-site, including the construction of a factory to manufacture sawmilling equipment. (Tr. 94:22 – 99:9, 95:16-23). The subsequent owners of the business and/or the Property – McConnell, Freeman, and Fosters – continued this commercial open and obvious use, including leasing the 6,000 square foot shop for business purposes. (Tr. 99:7-25, 116:21 – 117:25). Employees worked on-site and commercial traffic to and from the Property was commonplace.

Even well after the Covenants were recorded in 2006 for reasons Martin and Fosters did not understand, the commercial business remained active and openly visible, with no objections or enforcement actions. (Tr. 118:17-21, 123:9-13). The Covenants were never enforced against any prior owner or operator of the Property. (Tr. 127:20 – 128:6, 193:14 – 194:11). The lack of enforcement over such a lengthy period of time constitutes a clear waiver of any rights under the Covenants.

Both Martin and Fosters testified they had no understanding of the Covenants' purpose, further evidencing a lack of true intent to enforce them. (Tr. 107:11-13; Bryan Foster Depo. 21:19 – 26:9). Robin Foster described the establishment of the

Covenants as "counterintuitive" given the longstanding commercial operations on the Property, including at the time they bought it and took possession subject to a commercial tenancy. (Robin Foster Depo. 8:22 – 9:12).

The Covenants were abandoned through acquiescence to commercial use. When the Covenants were recorded in 2006, a commercial business was actively operating on the Property. (Tr. 107:5-10). This underscores the Covenants' irrelevance and abandonment from the inception. Covenants are rendered ineffective when they conflict with longstanding, openly conducted uses that predate and continue after creation. The Covenants were recorded merely as part of a procedural process to facilitate a subdivision involving a riverfront parcel mistakenly included in Fosters' purchase.

Moreover, the evidence presented at trial indicates that the Covenants were loosely applied, if at all, between 2006 and 2021 when Extremes bought the Property. The general character of the restricted area and neighborhood is such that the purpose and intent of the restrictions are totally defeated. The longstanding commercial use of the Property is permanent so as to neutralize the benefits of the restrictions. *See Fitz v. Hanson*, 1994 Mont. Dist. LEXIS 688, **6-9 (Mont. Dist. Ct., 2nd Jud. Dist., Silver Bow Cty, February 11, 1994) (citing 7 Thompson on Real Property Ch. 48, Sec 3174 (pages 211-216); 5 Powell on Real Property Ch. 60,

Section 684; 20 Am.Jur.2d Covenants, Conditions and Restrictions, Sections 281, 282). The Covenants cannot be equitably enforced.

Adjacent properties have horses, cows, and other barnyard animals. Sloway's cabin property allows commercial use and there is commercial marijuana grow facilities in close proximity to the Property. There is a shooting range directly across the river. There is a long history of the Covenants being violated. The Covenants are not valid because they neither tend to maintain or enhance the character of the surrounding area nor are they being used in connection with some general plan or scheme. *See Town & Country Estates Ass'n v. Slater*, 227 Mont. 489, 492, 740 P.2d 668, 671 (1987).

The District Court's decision violates Montana's rules of contract interpretation. The District Court glossed over substantial evidence of longstanding commercial use of the Property which predated Extremes' ownership. "The character of that [prior] commercial use and associated impacts on the subdivision was vastly different than the current use." (Dkt. 87, p. 5). Stated differently, the District Court found that the historical "operation of a commercial fabrication business on the [P]roperty" did not violate the Covenants, but Extremes' subsequent towing and diesel repair business did violate them. (Dkt. 87, pp. 4-5).

"In the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert

what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-4-101; *Anderson v. Stokes*, 2007 MT 166, ¶ 46, 338 Mont. 118, 163 P.3d 1273 (relying on the plain language in an easement grant and declining to insert additional words into the grant). The Covenants must be given a reasonable interpretation, and their interpretation may not result in absurdity. Mont. Code Ann. § 28-3-201; *Mont. Health Network, Inc. v. Great Falls Orthopedic Assocs.*, 2015 MT 186, ¶ 20, 379 Mont. 513, 2015 Mont. LEXIS 323.

The Covenants state in relevant part, "No lot or tract or part thereof shall be used for any commercial business." They do not identify specific types of commercial business or draw distinctions between them. It was unreasonable for the District Court to interpret the Covenants to allow for a "commercial fabrication business" but to prohibit Extremes' towing and repair business. It was not the proper role of the District Court to insert modifying language into the Covenants to allow for some types of commercial business but not others. *See Cortese v. Cortese*, 2008 MT 28, ¶ 10, 341 Mont. 287, 176 P.3d 1064.

B. The District Court abused its discretion by awarding attorney fees to Sloway in the absence of the required equitable considerations.

"Montana generally follows the American Rule regarding attorney fees, 'where each party is ordinarily required to bear his or her own expenses absent a

contractual or statutory provision to the contrary.'" *Mlekush v. Farmers Ins. Exch.*, 2015 MT 302, ¶ 10, 381 Mont. 292, 358 P.3d 913.

While Mont. Code Ann. § 27-8-313 allows attorney fees in declaratory judgment actions when "necessary or proper," this exception is construed narrowly. This Court has stated that only "extreme circumstances" support an award under § 27-8-313, such as when the award of fees "prevented the anomalous result of [a party] having been better off had she never brought the claim." *Nautilus Ins. Co. v. Farrens*, 2024 U.S. Dist. LEXIS 76710, **6-7 (citing *Horace Mann Ins. Co. v. Hanke*, 2013 MT 320, 372 Mont. 350, 312 P.3d 429, 436; *Renville*, *supra*).

As explained in *Davis v. Jefferson County Election Office*, 2018 MT 32, ¶ 12, 390 Mont. 280, 412 P.3d 1048, the scope of an award of attorney fees under § 27-8-313 "is narrow, as the statute serves as an exception to the general rule that each party pay its own attorney fees. Thus, an award of attorney fees under the UDJA is not justified in every garden variety declaratory judgment action, and an award is only appropriate where such relief is "necessary or proper.'"

The threshold consideration in determining whether an award of attorney fees is necessary or proper is whether equitable considerations support the award. *United Nat'l Ins. Co. v. St. Paul Fire Marine Ins. Co.*, 2009 MT 269, ¶ 38, 352 Mont. 105, 214 P.3d 1260. Only if the equities support an award do Montana courts then apply the three-part "tangible parameters test" adopted in *Trustees of Indiana University*

v. Buxbaum, 2003 MT 97, ¶¶ 43-45, 315 Mont. 210, 69 P.3d 663, to determine whether an award of attorney fees is necessary or proper under the statute.

In *Hughes v. Ahlgren*, 2011 MT 189, 361 Mont. 319, 258 P.3d 439, a dispute arose over plaintiffs' use of a roadway that crossed defendants' properties. Plaintiffs brought a declaratory judgment action to establish an easement. *Hughes* held that the District Court erred by awarding defendants' attorney fees under the UDJA pursuant to § 27-8-313 because equity did not support an award as nothing in the record indicated plaintiffs acted in bad faith in bringing the action. This Court explained that "[e]quity generally does not support an award of attorney fees under the UDJA…if similarly situated parties genuinely dispute their rights." *Hughes*, ¶ 16 (citing *United Natl. Ins.*, ¶ 38; *Mungas*, ¶ 46).

Here, there is no equitable basis for the District Court's award of attorney fees. Like *Wagner v. Woodward*, 2012 MT 19, ¶ 31, 363 Mont. 403, 270 P.3d 21, there is no written attorney fee provision between Extremes and Sloway or a statutory requirement that fees awarded. This case involves two similarly situated neighbors in Mineral County who genuinely dispute the interpretation of Covenants. The parties are on equal footing in litigating their dispute. The litigation does not present unique circumstances justifying attorney fees. Extremes advocated their position in good faith even though the District Court ruled against them.

In *Horace Mann Ins. Co.*, this Court denied attorney fees under similar circumstances, holding that litigation to enforce private obligations, like subdivision Covenants, does not inherently justify fee awards. Awarding fees here risks creating a precedent that penalizes homeowners like Extremes who are engaged in genuine disputes over ambiguous or contested Covenants. The record fails to support an award of attorney fees to Sloway under the extreme circumstances presented in *Renville*. This is a garden variety declaratory judgement action. The necessary and proper inquiry should not be triggered in the first instance.

But even assuming, *arguendo,* that equitable considerations support an award of fees, the District Court also misapplied the tangible parameters test. The District Court's conclusion that fees were "necessary and proper" lacks sufficient findings. The general assertion that violations occurred does not establish that awarding fees was essential to achieving justice or enforcing the Covenants. Declaratory and injunctive relief coupled with remediation directives were sufficient to address Sloway's concerns. The District Court's Order put Extremes out of business and paralyzed their ability to earn a living.

The District Court relied on its discretion to award fees without properly applying the limiting principles outlined in *Buxbaum*. In *Buxbaum*, this Court emphasized that awarding fees must be justified by the specific circumstances. *Buxbaum* cited *McConnell v. Hunt Sports Ent.*, 132 Ohio App. 3d 657, 725 N.E.2d

1193 (Ohio Ct. App. 1989), to articulate some tangible parameters for trial courts forging through declaratory judgment action thereafter. Here, the District Court failed to articulate why this case presented unique or compelling circumstances warranting fees. Enforcement of subdivision Covenants is a routine contractual matter and does not inherently rise to the level of necessity required for an extraordinary award of fees.

Indeed, the relief sought by Sloway - enforcement of subdivision Covenants - is a private matter limited to the parties. Enforcement of Covenants does not inherently confer public benefits or affect the broader community, thus failing the second prong of the test.

Public policy also militates against an award of fees. Awarding fees for routine disputes over Covenants risks encouraging excessive litigation over minor grievances, contrary to public policy. Montana courts have consistently sought to limit fee awards to avoid this chilling effect.

There is also a lack of prevailing party justification for the fee award. While Sloway succeeded in securing injunctive relief, the record indicates that Extremes were willing to engage in certain remedial actions. Jeannine Extreme testified about their willingness to address the 310 violations, for example. A complete fee award ignores these mitigating factors and imposes undue hardship. As a matter of policy,

genuinely disputed Covenants should not serve as a basis for penalizing non-prevailing parties.

This Court has consistently declined to award attorney fees absent strong equitable justification. Discretionary fee awards must not result in inequity or injustice. The record in this case shows that Sloway was adequately protected by the District Court's injunctive and remedial Order, and the additional burden of attorney fees on Extremes is inequitable.

The test for abuse of discretion is whether the District Court acted arbitrarily or exceeded the bounds of reason resulting in substantial injustice. *State v. Brasda*, 2003 MT 374, ¶ 14, 319 Mont. 146, 82 P.3d 922. The District Court failed to provide detailed findings justifying the award, address why injunctive and declaratory relief was insufficient, or consider the absence of public or equitable interests in this entirely private dispute. This failure to apply Montana's restrictive standards for awarding attorney fees constitutes an abuse of discretion. Sloway would not have been better off had it never filed suit. The District Court declared the Covenants enforceable just as Sloway requested.

VII. CONCLUSION

In light of the District Court's manifest abuse of discretion in enjoining Extremes from violating the waived and unenforceable Covenants, and in awarding

attorney fees to Sloway without adequate equitable justification, Extremes respectfully request that this Court reverse the District Court's rulings.

DATED this 14th day of January, 2025.

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By: / s / *J.R. Casillas*
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Certificate of Compliance

Pursuant to M.R. App. P. 11(4)(e), I certify that the foregoing APPELLANTS' OPENING BRIEF is printed with a proportionately spaced Times New Roman text typeface of 14 points and is double-spaced, except for footnotes which are single-spaced in 12-point type. The page length is 30 pages and the word count, as calculated by Microsoft Word for Office 365, is fewer than 10,000 words, exclusive of table of contents, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters.

DATED this 14th day of January 2025.

ORR MCDONNELL LAW, PLLC

By: */s/ J.R. Casillas*
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Certificate of Service

I, the undersigned, hereby certify and affirm that a true and correct copy of the foregoing was provided at Missoula, Montana this 14th day of January 2025 to all parties by electronic service. Each attorney of record is registered for electronic service through the Court's eService system.

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CERTIFICATE OF SERVICE

I, Joseph Ray Casillas, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-14-2025:

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