

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 25-0480

MICHAEL JOHNSON and TERESA JENISCH,

Plaintiffs/Appellants/Cross-Appellees,

v.

SPIRE HOME INSPECTION, L.L.C. and KEVIN KIVELA,

Defendants/Appellees/Cross-Appellants.

APPELLANTS' MOTION TO STRIKE SPIRE'S RESPONSE BRIEF

On Appeal from the Montana Fourth Judicial District Court, Missoula County,
Honorable John W. Larson Presiding.

Nicole L. Siefert
Matt Rossmiller
SIEFERT & WAGNER PLLC
1135 Strand Avenue, Suite A
Missoula, MT 59801
Phone: (406) 226-2552
nicole@swl.legal
matt@swl.legal
*Attorneys for Michael Johnson
and Teresa Jenisch*

G. Patrick HagEstad
David J. HagEstad
Brien B. Birge
Patricia N. Morse
HAGESTAD LAW GROUP, PLLC
2425 W. Central Ave., Suite 200
Missoula, MT 59801
gpatrick@hagestadlaw.com
david@hagestadlaw.com
brien@hagestadlaw.com
patricial@hagestadlaw.com
*Attorneys for Spire Home Inspection, LLC
and Kevin Kivela*

MOTION

Plaintiffs/Appellants/Cross-Appellees Michael Johnson and Teresa Jensich (collectively “Johnson), respectfully move for an order striking Defendants/Appellees/Cross-Appellants Kevin Kivela and Spire Home Inspection, L.L.C.’s (collectively “Spire”) Response Brief and Cross-Appeal for referencing matters outside of the record. Spire has been contacted and opposes this Motion, which is supported by the following:

BRIEF

FACTUAL BACKGROUND

1. Johnsons filed their Notice of Appeal in this matter on July 7, 2025. (Doc. 88.)
2. This appeal proceeded in the normal course, with Johnsons filing their Opening Brief on December 10, 2025.
3. Spire’s Response/Opening Brief was due on March 11, 2026, via stipulation of the parties.
4. Spire filed a Motion to Supplement the Appellate Record in the District Court pursuant to M. R. Civ. P. 8(6) on March 10, 2026, at 5:08 p.m. (Doc. 96). Johnsons have opposed this Motion which has yet to be decided by the District Court.
5. Spire seeks to supplement a “Satisfaction of Judgment,”

“Acknowledgement of Receipt,” and a photocopy of a check for \$954 into the record. Spire’s only explanation as to why these documents were not filed earlier is its own negligence. (Doc. 96).

6. Spire’s Response Brief and Cross Appeal makes multiple references to the documents Spire is still seeking to supplement into the record. (Spire’s Resp. Br., p. 4, 16.)

7. Spire’s representations regarding these additional documents is intentionally misleading. For example, Spire claims a Satisfaction of Judgment was filed “after entry of judgment and before briefing in this appeal.” (Spire’s Resp. Br., p. 4.) This is not true. The Satisfaction of Judgment was not filed until March 10, 2026, three months after Johnsons filed their Opening Brief and on the eve before Spire filed its Response Brief.

8. The Satisfaction of Judgment also includes an Acknowledgement of Receipt. (Doc. 96.) The Acknowledgement of Receipt was the only document received and reviewed by counsel for Johnsons. As the District Court ruled on July 1, 2025, the parties’ “Settlement is enforceable for the sole purpose of appealing the Court’s previous ruling limiting damages to \$955.” (Doc. 85.) The check from Spire arrived after the case was appealed, and Johnsons’ counsel acknowledged receipt on July 17, 2025. The Satisfaction of Judgment was added and filed on March 10, 2026, and Appellant objected to the filing.

DISCUSSION

The appellant and any cross-appellant have the duty to present the supreme court with a record sufficient to enable it to rule upon the issues raised. M. R. App. P. 8(2). The record is generally comprised of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court. M. R. App. P. 8(1). It is well established that this Court may not rely on facts outside of the record in resolving an issue before it. *State v. Robinson*, 2009 MT 170, ¶ 25, 350 Mont. 493, 208 P.3d 851; *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 25, 333 Mont. 331, 142 P.3d 864 (citing *Huffine v. Boylan*, 239 Mont. 515, 517, 782 P.2d 77, 78 (1989)). If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, on motion of a party or upon its own motion, either before or after transmission of the record to the supreme court, may order that the omission or misstatement be corrected and, if necessary, that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the supreme court. M. R. App. P. 8(6).

In this case, Johnsons are entitled to know what the record is before responding to Spire's Cross-Appeal. Spire's argument on appeal, *inter alia*, is that Johnsons waived any right to appeal by virtue of the parties' agreement pursuant to

Mont. Code Ann. § 25-7-105. As such, the representations made in Spire's Satisfaction of Judgment are material, and as discussed in Johnsons' objection to the same they are not accurate.¹ Regardless of the parties' contentions regarding the accuracy of Spire's statements in the documents it seeks to supplement into the record, it is beyond dispute they were not in the record prior to the filing of Spire's Brief, nor are they in the record now.

Spire had approximately 8 months between Johnsons' Notice of Appeal and the filing of its Response Brief in which to seek supplementation of the record, yet it strategically did not supplement until the evening before it filed its Response Brief. This sharp practice should not be allowed. Basic principles of fairness require that Spire's eleventh-hour attempt to supplement the record not prejudice Johnsons by compelling them to respond when there is uncertainty about the record.

In terms of a remedy, however, Rule 8's jurisprudence does not offer much guidance. Other parties have pursued motions to strike when matters outside of the record are presented to the Court. *See, e.g., State v. Passmore*, 2021 Mont. LEXIS 540, *3 (2021) (denying State's motion to strike where a pro-se party had attached duplicative exhibits to a motion to amend judgment); *State v. Alford*, 2025 Mont. LEXIS 224 (2025) (taking a motion to strike under advisement in light of the case

¹ Johnsons have not elaborated on their objection to the inclusion of the Satisfaction of Judgment herein since it is an issue for the District Court pursuant to M. R. App. P. 8(6).

being fully briefed and ready for the Court's consideration). Whether Spire's Response Brief should be stricken for referencing matters outside of the record is best left to the Court's sound discretion.

It is beyond question that the record in this case is currently disputed. Johnsons would face substantial prejudice by being compelled to respond to Spire's Cross-Appeal when they are unsure as to what is or is not included in the record. Further, Spire is creating a record that is disputed by filing a "Satisfaction of Judgment" when all that was signed by Appellants' counsel was receipt of a check sent after the District Court determined the case was settled for purposes of appeal only. Johnsons already have limited space for their combined Response/Reply Brief, and as such whether they have to address the representations in Spire's Satisfaction of Judgment therein is significant. Moreover, permitting Spire to present matters outside of the record to this Court prior to the disposition of its Motion to Supplement would defeat the purpose of having the district court decide motions to supplement under Rule 8(6). Accordingly, Spire's Response Brief should be stricken.

CONCLUSION

For the foregoing reasons, the Court should strike Spire's Response Brief and Cross Appeal, and Order that Spire not be allowed to argue matters outside the Record.

DATED this 13th day of March 2026.

Respectfully Submitted:

SIEFERT & WAGNER, PLLC

By: /s/ Matt Rossmiller
Nicole L. Siefert
Matt Rossmiller
*Attorneys for Michael Johnson
and Teresa Jenisch*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion is proportionately spaced in 14-point roman, non-script text and contains 1134 words excluding the brief's cover, certificate of compliance and certificate of service.

DATED this 13th day of March 2025.

SIEFERT & WAGNER, PLLC

By: */s/ Matt Rossmiller* _____
Nicole L. Siefert
Matt Rossmiller
*Attorneys for Michael Johnson
and Teresa Jenisch*

CERTIFICATE OF SERVICE

I, Nicole Lynn Siefert, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 03-13-2026:

Matthew Rossmiller (Attorney)
1135 Strand Ave.
Ste. A
Missoula MT 59801
Representing: Teresa Jenisch, Michael Johnson
Service Method: eService

David J. HagEstad (Attorney)
2425 W. Central Ave.
Suite 200
Missoula MT 59808
Representing: Kevin Kivela, Spire Home Inspection, LLC
Service Method: eService

G. Patrick HagEstad (Attorney)
2425 W. Central Ave.
Suite 200
Missoula MT 59808
Representing: Kevin Kivela, Spire Home Inspection, LLC
Service Method: eService

Justin P. Stalpes (Attorney)
610 Professional Drive
Bozeman MT 59718
Representing: Montana Trial Lawyers Association
Service Method: eService

Britton Joseph Fraser (Attorney)
101 East Front Street, Suite 402
Missoula MT 59802
Representing: Montana Defense Trial Lawyers Association
Service Method: eService

Brien B. Birge (Attorney)
2425 W Central Ave
Suite 200

Missoula MT 59801
Representing: Kevin Kivela, Spire Home Inspection, LLC
Service Method: eService

Patricia N. Morse (Attorney)
2425 W. Central Ave.
Suite 200
Missoula MT 59801
Representing: Kevin Kivela, Spire Home Inspection, LLC
Service Method: eService

Electronically signed by Lily Tate on behalf of Nicole Lynn Siefert
Dated: 03-13-2026