IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 13-0439

Daniel and Valery O'Connell,

PRO SE Plaintiffs and Appellants,

V.

Glastonbury Landowners Association, Inc., Board of Directors

Defendants and Appellees

On Appeal from the District Court of the Sixth Judicial District
Hon. Judge Brenda Gilbert

APPELLANTS' PETITION FOR REHEARING

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Petition for Rehearing & Brief

As pursuant to M.R.App.P, Rule 20, this Petition for Rehearing the summary judgment presents four issues raised in the lower court material to the decision yet overlooked by this court that would have proven decisive to the case, as follows:

I. The court overlooked the question of whether O'Connells were improperly denied requested discovery and hearing.

II. The court overlooked O'Connells' affidavit showing material facts were in dispute and failed to review *de novo* the lower court's conclusion that all O'Connells' complaint claims were based on uncontested facts.

III. This court overlooked this Bylaw XII, D. GLA that refutes the finding for all issues that Bylaws somehow trump Covenant authority.

IV. The court overlooked uncertainty in the contracts AND overlooked the question of whether the GLA can interpret its governing contracts absent any ambiguity: which conflicts with contract law on all issues.

I. The court overlooked the question of whether O'Connells were improperly denied requested discovery and hearing.

Memorandum Opinion of Dec. 3rd said (pg. 3-4), "District Court received extensive briefing and exhibits on these issues and held a hearing.... and properly granted summary judgment to the Association on all issues."

Contrary to the above memorandum Opinion, Orders on appeal (pg. 2) said "no hearing was held" except for "oral arguments." This court overlooked the question of whether the court's 30 minutes limit on their oral arguments unjustly denied O'Connells a real & fair hearing that prevented them giving rebuttal, witnesses, & time to even fully present their issues orally. Lack of a real & fair hearing obviously would have proven decisive to challenging GLA's summary motion.

Also the court overlooked the question of whether O'Connells were improperly denied requested discovery, especially because O'Connells motion was only a partial summary motion that did not include 8 contract violation issues and did not include the Erickson issue because of discovery needed.

II. The court overlooked O'Connells' affidavit showing material facts were in dispute, and failed to review *de novo* the lower court's conclusion that all O'Connells' complaint claims were based on uncontested facts.

GLA's own answer to the complaint contested facts in dispute, and then AFTER summary motion, O'Connells affidavit in response refuted facts in dispute. Yet no one ever considered their affidavit wherein affirmative statements of fact directly disputed Summary Judgment. This court should have, but failed to review *de novo (*non-deferential standard of review) the lower court's conclusion that all issues were based on uncontested facts, because this affidavit did represent conflicting facts in dispute against Summary judgment, as follow:

1. Minnick contract issues:

This court memorandum Opinion said, "O'Connells sought relief based upon their claims that ... [GLA] Association improperly entered a contract with an outside entity to provide administrative functions (the Minnick Contract issue)...The District Court found that the Association had the authority under state law and its By-Laws to enter the Minnick contract and that doing so was necessary to its operation."

To the contrary, GLA's authority to enter the Minnick contract was not the issue. This issue disputes whether it was "necessary" and authorized for GLA to

give one hundred and eleven GLA "administrative duties" AND "officer duties" given over to Minnick Corp. Such facts were disputed by:

O'Connell Affidavit ¶ (a) "Minnick as an agent given GLA [administrative] authority/powers of the Board and Officers [duties] is contrary to Bylaw VI.B.(6) and more" such as **BylawVI(I)** that says "Only Committees of Directors...may exercise the authority or powers of the Board...." & **Covenant 10.01**, "The Association is the sole administrative authority in the Community" & **Covenant 11.05, "**The Association has a duty to perform the responsibilities provided in these covenants..." and GLA Bylaws VII.E–H, GLA Articles IV(E), & §35-2-440 MCA., & § 35-2-118(1); which authorities also say GLA **officer** duties must be performed by a GLA officer, not an agent-Minnick.

2. Erickson contract issues:

This court's memorandum Opinion said, "O'Connells sought relief based upon their claims that ... [GLA] Association wrongly granted a variance to another landowner ... applicable rules gave the Association the discretion to approve or deny [Erickson] variance requests... O'Connells had not demonstrated any basis for overturning the decision."

On the contrary, whether GLA has discretion to approve Erickson variance was not the issue in dispute. This memorandum Opinion quotes the District Court that completely failed to address the real Erickson issue in dispute as follows:

O'Connell Affidavit ¶ (aa, page 3) (Erickson issue) "Ericksons "in-perpetuity" agreement "to never construct anything on their lot 90" is illegal, non-enforceable agreement in violation of existing GLA covenants that run with the land allowing a max. of 2 residences on lot 90." The affidavit also said 'all member and O'Connell's common land property is adjacent to Ericksons property.'

There was no evidence of consideration given to all landowners for the Erickson covenant modification allowing 4 houses on one parcel (2 more than the

Masterplan limit) and as a result, the modification benefitted the Ericksons only. O'Connells reply brief (DKT.No.24) pg. 13 also said, "Plaintiffs **deny** this Erickson issue [DV 12-164] is ripe for summary judgment... Plaintiffs request a hearing & discovery before the court considers the issue.

3. Guest House issues:

This court's memorandum opinion said, "O'Connells sought relief based upon their claims that ... [GLA] Association improperly applied several provisions of the By-Laws in ... (the Guest House Assessment issue).... The District Court found that there were no disputed facts as to the Guest House Assessment issue... and that the Association had engaged in a "straightforward interpretation" of the applicable covenants."

To the contrary, the guest house facts were disputed by:

O'Connell Affidavit ¶ (cc, page 3) (Guest house issue) "NO concerns were raised before last fall about residence residing full time in guest houses, nor any action taken for covenant violations for "guest house," "intended for occasional guest use and not as a permanent residence, not to exceed 1,200 square feet" a term created in 2007 Masterplan [6.0] adopted as part of the covenants. Before 2007, members could add [guest house] residences if they fit on a parcel ... The GLA ... opted to charge "guest house" assessments for the first time in 17 years possibly to avoid enforcement of this alleged covenant violation."

This court also overlooked disputed facts that (per *Edwards v. Cascade County),* the court should not have denied the guest house issue under laches, etopple, & waiver, because the lower courts failure to find any evidence of inequitable prejudice or injurious delay. In fact for this issue, the GLA never claimed inequitable prejudice or injurious delay, but O'Connell members are potentially damaged by this guest house assessment, in that their future plans for a

guest house will cost them hundreds of dollars per year (a full dwelling unit assessment) while denying them full rights under a dwelling unit, because guest house use is limited to no more than 6 months and no more than 1200 sq. feet. Thus any inequitable prejudice or injurious delay of claim only harms members like the O'Connells, not the GLA.

4. Election issues:

This court's Memorandum Opinion said, O'Connells sought relief based upon their claims that ... [GLA] Association improperly applied the By-Laws regarding the number of votes allowed to each membership (the Election Procedures issue)... The District Court determined that the Association has the authority under its By-Laws to administer elections, and that the current method of allocating votes to members has been in place since 1997 without objection from the O'Connells."

On the contrary this was factually disputed by:

O'Connell Affidavit ¶ (ee, page 4) (Election issue) "The following GLA language is nowhere within the GLA governing documents, yet GLA admits it solicited 'up to 3 votes for each membership' "for three separate vacancies," in violation of Covenant 3.20, which only allows "one vote per membership interest." The Board can not dole out member votes for electing themselves based on so called "**vacancies,**"in violation of Covenant 3.20 AND Bylaw VI.A. that allows less than 12 Board seats and as few as 4 seats to be filled: which would seem to allow up to 8 so called "vacancies" on the Board." and affidavit (f) "O'Connells Nov. 4-6 email exhibits attached to this complaint states they only recently found out GLA election practice is in violation of its governing documents" that show confidential election results until 2011 prevented members from knowing that GLA counted 3 votes, not as 1/3 of a vote but 3 whole votes contrary to Covenant 3.20.

Only a complaint discovery revealed GLA's "confidential election results" as contrary to exact contract language that says (covenant 3.12) "each membership

interest is entitled to one vote." It is undisputed that within 8 years of O'Connell's 2005 membership starting date, they could not have known until 2011 complaint discovery that GLA's "confidential election results" hid GLA's action allocating three votes per membership interest. The court overlooked this question decisive to this issue that cited such recent discovery & O'Connells 2005 membership that factually refutes waiver of election claim and should toll the time for such claim.

III. This court overlooked this Bylaw XII, D. GLA that refutes the finding for all issues that Bylaws somehow trump Covenant authority.

The court overlooked GLA Bylaw (pg. 17) that states "WHEREAS, Article XII, D, of the Bylaws expressly provides that in such case of conflict, the Covenants shall control;" including 3.12 that says "each membership interest is entitled to one vote." This court overlooked this Bylaw XII, D. GLA that refutes findings for all issues that Bylaws somehow trump Covenant authority as would have proven decisive to this case. In fact the lower court over looked this Bylaw XII. D. that directly refutes Orders on appeal as absent any covenant authority.

IV. The court overlooked uncertainty in the contracts and overlooked the question of whether the GLA can interpret its governing contracts absent any ambiguity: which conflicts with contract law on all issues.

Under Montana law, if any uncertainty in a contract exists, that uncertainty must be construed against the drafter, or against the GLA. As such O'Connells contend that any uncertainty in the contracts must be construed against the GLA.

The court overlooked all contract uncertainty construed against O'Connells:

especially since the court found that no language specifically allowed the issues of guest house assessments, nor election 3 votes per membership, nor Ericksons "inperpetuity" contract against building on lot 90, nor agent-Minnick to have GLA administrative and officer duties of the Board. All these issues were uncertainty in the contracts, and must be construed against covenants cited above AND against the GLA as drafter to the contracts.

This court memorandum opinion said, "The District Court found... the [GLA] Association had engaged in a "straightforward interpretation" of the applicable covenants..." and June 19th Orders (pg. 8) on appeal admitted GLA actions regarding the election issue and guest house issue were based **solely** upon their "interpretation of GLA's governing documents...."

Yet "The construction and interpretation of a contract is a question of law for the court to decide." *Schwend v. Schwend*, 1999 MT 194, ¶ 36, 295 Mont. 384, ¶ 36, 983 P.2d 988, ¶ 36 (citing *Stutzman v. Safeco Ins. Co. of America* (1997), 284 Mont. 372, 376, 945 P.2d 32, 34).

This contract law imposed on the District Court, and this Court on appeal, the duty of interpreting the GLA governing contracts, but this law does not impose that the GLA can interpret its contracts.

The court overlooked the lower court's "interpretation" analysis of all issues involving the GLA's "interpretation" of its contracts **absent any ambiguity** that conflicts with contract law, and improperly expanded GLA rights available under applicable contract law that would have proven decisive to this case, including:

"We construe restrictive covenants under the same rules as are applied to contracts. Windemere Homeowners Ass'n Inc. v. McCue, 1999 MT 292, 297 Mont. 77, 990

P.2d 769. "When the language of a contract is clear and unambiguous, the language alone controls and there is nothing for the court to construe or interpret." Morning Star Enterprises v. R. H. Grover (1991), 247 Mont. 105, 111, 805 P.2d 553, 557. "Restrictive covenants must be strictly construed and should not be aided or extended by implication or enlarged by construction." Hisdem v. Whitham (1975), 167 Mont. 201, 208, 536 P.2d at 1189-90.

As Justice Rice and Cotter said in the Harris v. Smartt (2003) Opinion, "well-established precedent has sometimes been too easily sacrificed to achieve case-by-case results desired by a majority." contract law was sacrificed here.

The plain and unambiguous language of the covenant limits the waiver, abandonment, termination, modification, alteration or changing of any covenant, condition, restriction and use to those "created and established" in the original declaration of restrictive covenants. There is simply no way to read the cited language above in any other fashion without extending the language "by implication," without enlarging the language "by construction" and without "broadening" the covenant by adding that which is not contained therein.

Members who purchase real property covered by restrictive covenants do so with the reasonable and justifiable expectation that the covenants will be enforced as written. As part of the purchase bargain they rightfully expect that such covenants will not be waived, abandoned, terminated, modified, altered or changed by other property owners except in strict compliance with the provisions of the declaration of covenants themselves or in accordance with supervening statutory law. This court's memorandum Opinion to conclude otherwise simply means that

the "contract" between the property purchasers (members) and the developer (GLA) as represented by the declaration of covenants is composed of essentially unenforceable promises and obligations. It provides no protection whatsoever; it is worthless. Obviously, that is not the law of contracts, nor is it the law of covenants--as this courts own jurisprudence clearly reflects.

CONCLUSION

The court overlooked these four issues raised in the lower court as material to the decision and would have proven decisive to the case; which included affidavit facts and Covenant authority disputing summary judgment, and lower court's "interpretation" analysis that allowed GLA's "interpretation" of its contracts **absent any ambiguity** that conflicts with contract law, and improperly expanded GLA rights available under applicable law & contracts; any of which warrant granting this petition for rehearing.

DATED this **13th** day of December, 2013.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 & 3 of the Montana Rules of Appellant Procedure, We certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; & the word count calculated by Microsoft Word 2009, is not more than 2,500 words, excluding all titles (in bold), certificate of service, & certificate of compliance.

Daniel O'Connell (Appellant) Valery O'Connell (Appellant)

CERTIFICATE OF SERVICE

We hereby certify that a true & accurate copy of the foregoing Appellant Brief is filed with the Clerk of the Montana Supreme Court; & we have served true & accurate copies of the foregoing upon each attorney of record, & each party not represented by an attorney in the above-referenced Mt. Supreme Court action, as follows via first class mail this **13th** day of December, 2013 to:

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