FILED
03/14/2022
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 21-0612

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0612

DALE YATSKO and JANELLE YATSKO
d/b/a GREEN CREEK DISPENSARY,

Plaintiffs – Appellees,

v.

CASCADE COUNTY, MONTANA,

Defendant – Appellant.

DEFENDANT – APPELLANT'S OPENING BRIEF

On Appeal from the Eighth Judicial District Court, Cause No. BDV 21-439,
the Honorable Amy Eddy presiding.

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STATEMENT OF THE CASE

Appellees Dale and Janelle Yatsko, d/b/a Green Creek Dispensary, filed this action on August 18, 2021. After one Judge recused herself and a second was substituted, Judge Amy Eddy took jurisdiction on October 26, 2021. Eight days later, Judge Eddy held a hearing on the Yatsko's application for a preliminary injunction. After several hours of testimony, Judge Eddy ruled from the bench that she was granting the injunction. Two days later, she filed an order (Docket #18), with Findings of Fact and Conclusions of Law, explaining her ruling. It is from that order that this appeal, by Cascade County, is taken.

STATEMENT OF THE FACTS

Plaintiffs Dale and Janelle Yatsko began operating Green Creek Dispensary

approximately fifteen years ago. (Hearing Transcript, Nov. 3, 2021 (hereafter, "Tr."), page 7). In late 2012, Defendant Cascade County adopted updated Cascade County Zoning Regulations. It is expressly written in those regulations that "[a]ny use not specifically permitted or otherwise provided for, is not permitted." (Ex. A, page 30). Those 2012 regulations unambiguously recite that Medical Marijuana Providers, to include the Yatskos, were limited to properties zoned I-2, Heavy Industrial. (Ex. A, page 80). The use of property for dispensing marijuana was not included in any other zoning classification. Similarly, updated County zoning regulations in 2016 again expressly allowed medical marijuana providers like the Yatskos to be located in I-2, and nowhere permitted such use in any other zoning district, including Agricultural. (Ex. B, page 119). At no time up to the present have Yatskos *ever* operated their business in I-2. (Tr. 53-54). The 2016 Code reiterates that the Code is permissive, only. (Ex. B, page 30). At hearing, Yatsko admitted that he operated a medical marijuana dispensary, that he was shown on November 9, 2018, a County memo that made it "crystal clear" that such dispensaries were not allowed anywhere except I-2 zoned properties, and that *he has never been zoned I-2*. (Tr. 65-66; 74-75).

Even though the type of business operated by the Yatskos has never been permitted in an Agricultural zone, the Plaintiffs for some reason still reached out to business associate David Dickman and asked him to acquire more property so the

property they were leasing from Dickman could be rezoned Agricultural. (Tr. 61-62; Order, Finding of Fact ("FF") #28). Pursuant to that request, Dickman filed a Zoning Change Application, requesting that the leased property be rezoned from Residential to Agricultural. (Ex. C). Inexplicably, while Dickman knew he was requesting the zoning change to somehow "help" the Yatskos, Dickman wrote on the Application "We will continue to use the property for agricultural purposes. We hay it and *would like to have the zoning match the actual use of the property* …" (italics added). (Tr. 60). The intended "actual use of the property," of course, was Yatsko's marijuana growing and dispensing operation, Dickmans knew the Yatskos intended to grow pot there (Tr. 79), yet Yatsko admitted that the application advised the County of no such use, (Tr. 60), which the Court even acknowledged. (FF# 32). The application was dated January 17, 2017; given that date, current Planning Director Charity Yonker's uncontested hearing testimony that prior Interim Planning Director Sandor Hopkins was not employed by Cascade County as a Planner prior to the "Fall of 2017" becomes significant. (Tr. 98).[1]

The lower court found that the Plaintiffs were "operating openly, obviously and with the full knowledge of the Cascade County Planning Department since the spring of 2016," and that they "were working directly with Sandor Hopkins"

[1] Lest Cascade County be criticized for not calling Hopkins as a witness at hearing, it must be noted that he has not been employed by the County for several years, and that he no longer works in Great Falls. Further, Hopkins most certainly could have been subpoenaed by the Yatskos, who bore the burden of persuasion at the hearing.

"during this period of time" (Spring of 2016). (FF# 26). The Court further found that the Plaintiffs relied upon alleged representations from Hopkins to the effect that the County "would be putting [marijuana] businesses in Agricultural zones." (FF #27). Indeed, Dale Yatsko testified that these representations about being placed in Agricultural zones occurred in "2015, '16 …" (Tr. 52), testimony that obviously found its way in to the Court's Findings of Fact (#27). Yet Charity Yonker, who succeeded Hopkins as Director, pointed out the obvious fact that Hopkins could not possibly have given Yatsko advice about needing to be in "Ag" in 2015 or 2016, because "*he was not employed by the County*." (Tr. 98).

Dale Yatsko contended, and the Court obviously agreed, that Yatsko was never adequately advised that his business was zoning non-compliant. The facts adduced at hearing, however, are these: on **November 9, 2018**—nearly three years before he filed this suit—Yatsko was given a memo that expressly stated that marijuana dispensaries such as his were not allowed in Agricultural zones. (Tr. 75). In **December of 2018,** the County again advised him that Agricultural was not an "allowable designation" for their operation. (Tr. 24). On or around **December 28**, **2018**, Dale Yatsko saw a letter from the County that again said his business was not zoning compliant, and would only be compliant if he were I-2, which he never has been. (Tr. 30-31; 53-54; 71). Yatsko admitted that on **January 8, 2019**, he saw a letter from the County that told him again that he was

zoning non-compliant, such that they were being denied a location conformance permit by the County Planning Department. (Tr. 35). Yatsko admitted that on **February 6, 2019**, he wrote a letter to the County concerning his zoning denial, noting that the required I-2 designation for his marijuana business "would be more than a financial hardship." (Tr. 51). Parenthetically, Yatsko never actually appealed that denial. (Ex. F). On **July 18, 2019**—two years before filing suit—Yatsko was forwarded an email from Sandor Hopkins, once again specifically advising him that Hopkins' "staff has NOT issued permits for Medical Marijuana grows, dispensaries, processing, etc in the AG district," the very "AG district" that Yasko occupied. (Ex. D; Tr. 25). Yatsko admitted that he knew in **November, 2020**, that the Cascade County Commissioners expressly rejected a proposal to expand zoning for marijuana operations. (Tr. 47-48). Then, on **July 21, 2021**—still before he filed suit—Yatsko admitted receiving an email from Ms. Yonker stating in clear terms that no one was to be operating a marijuana facility "in any other zoning district than the Heavy Industrial (I-2) District." (Tr. 53-54). Nonetheless, a month later, the Yatskos filed this suit, alleging that they were supposedly confused and mislead by the County vis-à-vis their zoning status. For her part, Yatsko lessor Sandra Dickman knew at least since late 2017 that the County was not in agreement with the Yatskos operating a marijuana grow operation on this property. (Tr. 81). As for Dale Yatsko, he agreed that he could

not dispute that the zoning regulations were available to him, at the County Clerk and Recorder's Office. (Tr. 49).

Current Cascade County Planning Director Charity Yonker testified extensively at the hearing. She quite cogently affirmed what Dale Yatsko admitted, that the Yatskos were told time after time that their operation was unlawful and not permitted. When asked if she ever told the Yatskos that their property was compliant with Cascade County zoning, her response was "absolutely not." (Tr. 116). She testified that she told them precisely the opposite, and that she was aware of no other County employee who told Plaintiffs that their operation was compliant. *Id*. She never even implied as much, but in fact, precisely the opposite. (Tr. 116). She has seen no documentation suggesting that the County was advising the Yatskos that they did not need a valid permit to operate this facility. (Tr. 131). Accordingly, Yonker testified, the "status quo" was *anything but* the County allowing the Yatskos to continue as is. (Tr. 117).

STANDARD OF REVIEW

The standard of review for an order granting or denying a preliminary injunction is whether the District Court abused its discretion. *Sweet Grass Farms v. Bd. Of County Commissioners*, 2000 MT 147 (2000).

SUMMARY OF ARGUMENT

The District Court seriously misapprehended the clear import of the testimony presented by the Plaintiff on the issue of whether the Yatskos reasonably believed, based upon the words and actions of the County, that their marijuana operation was zoning compliant. The lower court also clearly erred when it conducted its own investigation into this matter, off the record, and when it adopted and relied upon Requests for Admission that the County never had an opportunity to answer. Finally, several evidentiary errors plagued the injunction hearing, errors which substantially impacted the outcome of the case, all to the clear prejudice of Cascade County.

ARGUMENT

I. Fundamental, numerous factual errors form the flawed "foundation" for the District Court's Injunction Order

The District Court's rationale for granting the injunction in this case can be distilled largely to this: the actions of Cascade County, coupled with the verbiage of the zoning statutes, caused the Yatskos to justifiably believe that their medical marijuana operation was zoning compliant. When the actual facts and hearing testimony are examined, the serious flaws in the Court's rationale, respectfully, are fully evident.

To begin with, the County's recitation of facts, above, specifically set out at least eight (8) occasions, over nearly a three-year period, where the Yatskos were

plainly advised that they were noncompliant. Each of those eight encounters was discussed with Dale Yatsko at the hearing, and none was denied. This unchallenged testimony begs this question: if someone is told at least eight times that they are breaking the law, how can that person credibly testify that they were unsure of their legal status? Yet the Court found that the Yatskos were indeed confused on the subject, and used that supposed confusion against the County.

In reality, the only thing "confusing" about this whole matter is how the Yatskos could have possibly been confused by what the County did, said and wrote. Much of the self-serving testimony by Dale Yatsko does not hold up to even the mildest level of examination, yet such testimony is the backbone of the Court's ultimate conclusion. A review of Findings of Fact #25-28 is illustrative: there, the Court finds that Yatsko dealt with Sandor Hopkins of the Planning Department starting in the "spring of 2016," (FF #25), at which time Hopkins supposedly convinced them that if their landlord the Dickmans could get the property zoned Agricultural, their operation would be compliant. The first problem with the Court's analysis is that it was plainly established that Hopkins did not start with the Department *until the Fall of 2017*, such that the Yatsko testimony that the Court relied upon was highly erroneous at best, dishonest at worst. The second problem is that it is simply not credible that anyone at the Planning Department made such representations to Yatsko at that or any other

time, since, as the Court had already found, the 2012 zoning regulations (FF #3), 2016 regulations (FF #6) and the 2017 regulations (FF #12) ALL plainly limited operations of the Yatsko's type to "I-2," Heavy Industrial. So, it is simply untenable-- actually impossible--that Sandor Hopkins told Dale Yatsko what the Court found that he told him. The third major flaw in the Court's finding (FF #27) is that the supposed "putting [of] similar businesses (marijuana operations) in Agricultural zones" simply never happened. Dale Yatsko may wish that he had this conversation during that time with Hopkins, that Hopkins had told him "Ag" would be okay, and that "Ag" would soon be zoned for pot operations, but the reality is that none of those things actually happened. Yet, the Court accepted all of this as true, and built its decision based upon it. Perhaps Dale Yatsko was confused, but if so, it was confusion of his own making, if not his imagination.

The Court then erroneously concludes that the County's dealings with the Dickman landlords was "murky," (FF #34), such that this too supported the grant of an injunction due to the County's supposed inconsistency. The problems with that finding are legion. First, the Court labels these dealings as "negotiations," (FF #35), a rather baffling tag since the hearing testimony revealed no give and take on the issue. What really happened is that Dave Dickman simply submitted a zoning change application to the County (Ex. C), and asked that his property be rezoned Agricultural, so that its zoning (Ag) would "match the use of the property," which

he represented to be "haying." What is equally baffling is how Mr. Dickman's obvious deception should somehow be excused by the Court, and actually be used against the County, who was found to be not lying, but simply wishy washy. The Court relied upon the double hearsay (and highly speculative) testimony of Dickman's surviving wife to the effect that her now deceased husband surely must have told the County that he was acting to "include( ) the Yatskos' use of the property as Medical Marijuana Providers." Yet, we know that this is simply not true: what Dickman *really* told the County is that he wanted to grow more hay.

The Court's error compounds considerably in its findings concerning the various zoning codes over the years. Actually, the Court begins with a fully accurate finding that Cascade County's zoning code is a "permissive code," such that "[a]ny use not specifically permitted or otherwise provided for, is not permitted." (Order, Footnote 1). Somehow, the Court found that exceedingly clear decree "ambiguous." In Finding of Fact #8, the Court correctly notes that Medical Marijuana Providers were not listed as a "permitted principle use" in the 2016 regulations, but then finds that this created an "ambiguity," an alleged lack of clarity which, again, inured to the detriment of the County in the Order. Respectfully, the County wonders what is unclear about a written provision that states that if a use is not specifically mentioned, it is not allowed. Yet the Court cites this regulation as further justification for the Yatsko's decision to ignore the

plain dictates of the zoning rules. Similarly, Finding of Fact #16 notes that "There is no mention of Medical Marijuana Dispensaries (of which the Yatskos were one) being prohibited" in the 2017 regulations, the clear import being that this, too, understandably confused the Plaintiffs. Of course, the opposite is true. There can be no legitimate confusion: if a use is not expressly listed in a permissive code, *it is not allowed*. Somehow, other marijuana operators seemed to have understood this, but somehow the Yatskos have convinced the District Court that they did not.

Next, the injunction Order somehow finds support for the Yatsko's position that a 2018 memorandum prepared by the County gave them reasonable assurances that they were complying with the zoning laws. That memo (Ex. E), according to the Court, "clearly provides that 'Medical Marijuana Dispensaries' are only allowed in I-2 (Heavy Industrial District)," and the Court is 100% right on that finding. (FF #36). Yet as noted above, Dale Yatsko admitted under oath at the hearing that his <u>was</u> a Medical Marijuana Dispensary, and he also admitted that he has never been located in I-2. Despite such obviously damning testimony, the Court again found that this supported the Yatsko's untenable position that they <u>thought</u> they were in "compliance with local zoning regulations." (FF #37). There is obvious reversible error in such an unsubstantiated - - actually erroneous - - leap.

Other glaring examples of the incongruity of the Court's findings with the hearing testimony abound. In an obvious attempt to set the equities with the

Yatskos and to augment the supposed burden on them if they did not get an injunction, the Court made Finding of Fact #61. There, the Court speaks of the burden faced by the Yatskos if they are "forced to relocate into the I-2 district." One wonders about this illusory burden, and how the equities could somehow favor the Yatskos on this point, given the fact that their law-abiding, zoning compliant competitors "all face the burden of the I-2 district." The Court also accepted the proposition that taxis refuse "to wait outside a business that [is] located outside of city limits," citing this as a reason the Yatskos are better able to serve their disabled customers who use taxis. This finding, however, completely ignores Dale Yatsko's own testimony that his business is "about a mile outside of Great Falls." (Tr. 18). Next, the Court continues the theme about the supposed "confusion and uncertainty of zoning for medical marijuana businesses," yet in the same finding acknowledges a Hopkins email, received by the Yatskos, which stated that "(County) staff has NOT issued permits for Medical Marijuana grows, dispensaries, processing, etc in the Ag district." (FF #40; emphasis in original). Again, anyone who was paying even a modicum of attention to the issue could not possibly suffer from "confusion and uncertainty;" the Yatsko operation was not authorized by the County! Period. Yet despite this, the District Court issued an injunction because "It does not appear reasonably in dispute" that Hopkins "was making representations to the Yatskos that they were being allowed to operate in

the Ag district without a permit," just one finding (FF #41) after citing Hopkins' declaration that his office was "*NOT issuing marijuana permits … in the Ag district*."

Cascade County recognizes the considerable deference accorded a District Court that has granted a preliminary injunction. The "manifest abuse" of discretion standard presents an obvious burden to a party seeking to overturn such an Order. Yet, the evidence must obviously support the District Court's findings, and their "implicit conclusion" that "it appears that the applicant is entitled to the relief demanded." *Sandrock v. DeTienne*, 2010 MT 237, ¶ 19, citing M.C.A. 27-19-201(1). Here, as outlined at length above, the hearing testimony provides little if any support for the Court's ultimate premise that Cascade County zoning personnel said or did anything which would reasonably induce anyone into thinking that a use openly and obviously prohibited by regulation was nonetheless permissible. In fact, the consistent actions of that personnel, and the consistent language of the regulations, would fully inform any reasonable person that the Yatsko's activities were contrary to law.

II. The District Court ignored fundamental injunction principles, including its interpretation of the "status quo"

The statutes governing an application for an injunction are found at M.C.A. 27-19-101, et seq. Injunctive relief is an equitable remedy governed by general principles of equity. *Davis v. Westphal*, 2017 MT 276, ¶ 23. "Injunctive relief is

an extraordinary remedy not available as a matter of right." *Id*. Similarly, "The grant or denial of temporary … injunctive relief is highly discretionary and critically dependent on the particular facts, circumstances and equites of each case." *Id*.

In applying the injunction statute, the lower court found that the Yatskos had established that "the applicant is entitled to the relief demanded," (Conclusion of Law (hereinafter "CL") #15), that they would suffer " a great or irreparable injury" if an injunction were not granted (CL #16), and that an injunction would serve to preserve the "status quo." (CL #5). This latter conclusion will be examined first.

Preliminarily, it cannot be disputed that the injunction applicant bears the burden of proving an entitlement to an injunction under the pertinent statutes. *Van Loan v. Van Loan*, 271 Mont. 176, 182, 895 P.2d 614 (1995). The Court correctly observed that the status quo is defined as "the last actual, peaceable, uncontested condition which preceded the pending controversy." (CL #6). Planning Director Yonker testified in no uncertain terms that the County "accepting the Yatsko's use of this property" over the past six years was "absolutely the opposite of the status quo." (Tr. 117). Indeed, it has been established that the County had advised the Yatskos at least eight times over that period that their use of the property was not accepted, was not acceptable. Given these uncontested realities, it was clearly reversible error for the lower court to have found that the Yatsko's zoning

noncompliant use of this property was the "last peaceable, uncontested condition which preceded the controversy." *See Sweet Grass Farms v. Bd. Of County Commissioners*, 2000 MT 147. That use has been as "contested" as one could imagine, hence all of the interactions between these Plaintiffs and this County.

Not only was the Court's status quo analysis flawed, but those same flaws carry over to its conclusion that "Based upon the above findings, it appears that the applicant is entitled to the relief demanded …" (CL #15). First, all that the Yatskos were able to establish at hearing was that they chose to ignore warning after warning that their operation was unlawful, that they never actually read the zoning regulations, and that they were more than happy to benefit from the Dickman's misrepresentations to the County regarding the actual planned use of the property. Second, five of the "above findings" relied upon by the Court were the erroneously considered Requests for Admission discussed in Part 3, just below.

An examination of the equities is important here. The Yatskos urged the District Court that fairness and equity favored them, even though they persuaded the Dickmans to file for a zoning change to help them, an application that patently misrepresented the intended use (by the Yatskos) of the property. Planning Director Yonker specifically agreed that her Department was misled, and further stressed the need to be able to rely upon zoning applicants, given limited resources within that Department. (Tr., 114). Dale Yatsko implores that he was blameless

and the County at fault for any confusion, yet in the next breath admitted that he had never even seen or read the zoning regulations. "He who seeks equity must do equity," yet the Yatskos and their associates, who hope to also profit from this venture, have often acted with anything but equity. Even at the hearing, Dale Yatsko was anything but forthright. At page 70 of the hearing transcript, Yatsko tells the Court under oath that "The only letter I ever got that said I was not in compliance is the one that Charity sent me (in July of 2021)." Astoundingly, when pressed further on cross examination, Yatsko's memory must have improved, answering "Yes," he was told in a letter from the County in December of 2018 that he was "not in compliance." (Tr. 71).

In addition, the equities further weigh against the Yatskos because they filed this suit without first exhausting their appeal rights with the County. A review of Exhibit F reflects that they were specifically advised that they needed to appeal their zoning denial to the Cascade County Zoning Board of Adjustment. Despite that directive, the Yatskos were unable at hearing to demonstrate that they did in fact properly effectuate the necessary appeal, and in fact, they have not done so. This not only places them on the wrong side of the equites, but casts significant doubt on the Court's ultimate determination that the Yatskos will likely prevail on the merits, a necessary showing to obtain an injunction.

Finally regarding the legal flaws in the injunction order, the Court ignored substantial precedent from this Court on the issue of irreparable harm. The Court concluded that the applicants would suffer irreparable harm if the injunction were not granted. (CL #16). It cites as such irreparable harm the Yatskos losing "their investment, their lease and marketshare." (CL #21). In *Caldwell v. Sabo*, 2013 MT 240, this Court reversed the lower court's grant of a preliminary injunction. Significantly, this Court found a manifest abuse of discretion in the District Court's assignment of irreparable harm to alleged injuries that could be rectified through monetary damages. *Caldwell* found "it is well established that money damages are not considered irreparable harm, because money damages may be recovered in an action at law without resort to equity." *Id*. at ¶ 29. Here, the Yatskos expressly seek damages through the Complaint they have filed, damages because they "have invested tens of thousands of dollars into their operation," (Complaint, Docket #1, paragraph 21), because they "will essentially be forced to shut down their operation resulting in a substantial economic loss to them," (Paragraph 26), and because they will lose their interest "in the leased Business Location." (Paragraph 30). In other words, they will ask a jury to award them the precise types of monetary damages the lower court cited in CL #21 as "irreparable harm." That conclusion, like so many others, mandates reversal of the injunction order.

III. The Court erred in relying upon unanswered Requests for Admission

The lower court's Order includes Finding of Fact #42. As this Court can discern, each of the five findings is based upon Requests for Admission purportedly submitted by the Plaintiffs to the County. As this Court will also easily recognize, each "admission" is factually lethal to the County's position, and hardly expected from a party that is vigorously defending not only an injunction, but the overall merits of this dispute. As it turns out, none of these supposed facts has ever been admitted by the County, and all have in fact been denied by it, on the record.

At the outset of Finding #42, the District Court simply concludes that "Plaintiffs properly promulgated multiple Requests for Admission that the County has failed to timely respond." (sic.) Yet the 136-page transcript of the injunction hearing contains not one word about Requests for Admission, "properly promulgated" or otherwise. The issue of such Requests was simply never raised, not by the Plaintiff who obviously hopes to benefit from them to the substantial detriment of the County, and not by the Court, which relied upon them as a significant basis for its ultimate determination. Lest the County be taken to task for not bringing them up at the hearing, it simply had no notice, or reason to suspect, that the Court would use this discovery device as a prominent basis for its determination.

What the Court record *does* reflect is that on or about November 1, 2021, the Plaintiffs filed a Motion to Deem Facts Admitted (Docket #13), claiming that they had served Requests for Admission at the same they served their Complaint. By operation of Montana Uniform District Court Rule 2(b) and M.R.Civ.P. 6, the County's brief opposing that Motion was due November 15, 2021, and in fact, the County filed just such an opposition. (Docket #20). In summary, the County's filing included affidavits from four individuals, all of whom swore that they were wholly unaware of the Requests until Plaintiffs' motion. The undersigned further attested that opposing counsel made no mention of the Requests, and conducted no "meet and confer" with him, as counsel of record, prior to filing the motion. The County further supplied comprehensive legal argument to the effect that in Montana, disposition of cases on the actual merits is preferred over a default based on M.R.Civ.P. 36. *Bates v. Anderson,* 2014 MT 7. The *Bates* Court held that the inconvenience attendant withdrawal of admissions must be "something more" than a mere showing that the requesting party "now has to convince the jury" of the truth of the facts found in a Request for Admission. *Id*. at ¶ 22. *Bates* even held that Rule 36(b) "might well *require* the district court to permit withdrawal" of admissions obtained through "inadvertence." *Id*. at ¶ 25. (Italics added). Here, the County never saw the Requests; at the very worst, it was somehow "inadvertent."

Yet despite the fact that the County's brief was not due until November 15, the District Court, *ten days before that deadline*, granted the motion and deemed the Requests admitted. To make matters much worse, the Plaintiffs knew full well, and the Court record to which the District Judge had full access clearly reflected, that Cascade County expressly denied the "facts" listed in the Requests. Both parties gained that knowledge via the County's September 30 filing of its Answer, where these facts were expressly denied. (*See* Answer, Docket #4, paragraphs 10, 11, 12, 19, 20, 21). According to *Bugger v. McGough*, 2006 MT 248, a propounding party's actual knowledge that the opposition disputed the facts underlying the proposed admissions strongly supports withdrawal of admissions. Here, the Yatskos clearly knew from the County's Answer that the facts were denied by the County, long before they sought an Order establishing them as admitted. If there remained any doubt, those same "facts" for which admissions were sought through Rule 36 were vigorously denied and disputed throughout the hearing.

In summary on this argument, it is again emphasized that the "facts" deemed admitted by the lower court were not collateral, secondary points. Rather, those purported admissions were of matters absolutely central to the issues raised by the injunction request. While it is submitted that the Court would have erred even if the facts were secondary, the Court's decision to accept those critical facts and use

them so prominently in its Order mandates, it is urged, reversal of the Injunction Order.

IV. The Court's Order is based, in part, upon its own independent, thus impermissible, "investigation" outside the record

A basic tenet of the District Court's injunction Order is that County personnel frustrated the Yatsko's efforts to determine if they were zoning compliant. That pervading theory is best encapsulated by Finding of Fact #'s 30 and 31. There, the Court relies upon testimony by Dale Yatsko to the effect that the County never provided him copies of the zoning regulations. Then, the Court makes the remarkable finding that Mr. Yatsko had never even seen pertinent portions of the 2012 and 2016 zoning regulations until "the evening before the Preliminary Injunction Hearing." (FF #30). It strains all bounds of credibility to assert that someone supposedly so desperately trying to understand his status vis-à-vis written zoning regulations had never even seen them. Yet that is a finding of the Court.

Equally troubling are the measures taken by the District Court to determine if Yatsko's complaints were founded. As Finding #31 makes clear, *after* the hearing—and thus testimony and the record—were closed, the Court embarked on its own independent investigation to determine if Dale Yatsko's testimony was accurate. Rather than base its Order solely on the testimony adduced by sworn witnesses it just heard, and the fact that there was no testimony to support the

assertions, the Court tested Yatsko's testimony by contacting the Cascade County Clerk and Recorder's Office to determine if Yatsko was justified in his complaints about the alleged unavailability of the zoning codes. The Court writes of its efforts to obtain the very documents Yatsko claimed he had not seen. The Court's dissatisfaction with that process is fully evident from Finding #31, which included the observation that "this (process) was patently unworkable." Of course, what really is patent is the improper decision to rely upon "evidence" not presented through witnesses at a public hearing, but as a result of a Court's own, independent "fact gathering."

Perhaps not surprisingly, there is scant authority analyzing the propriety of the actions outlined above. Apparently, it is not a bit common for triers of fact to go out and seek to develop the facts they are to weigh. One potentially analogous situation might be found in scenarios where trial jurors have taken it upon themselves to do what the judge did here: not satisfied with what they heard from the witnesses, they go out and conduct their own investigation. In *Goff v. Kinzle*, 148 Mont. 61, 417 P.2d 105 (1966), a new trial order was affirmed by this Court where a juror, after hearing trial testimony, went to the accident scene and conducted an investigation to test the validity of that testimony. The *Goff* situation is closely analogous to what occurred here, where information gathered outside the

courtroom found its way in to the ultimate decision inside that courtroom. This Court observed:

> A "fair trial" as the term is applied to a judicial proceeding, anticipates the right to object to the admission of evidence, the right of cross-examination and to rebut the evidence introduced. All of this is denied where a juror makes an independent examination of an issue of fact …

148 Mont. at 66.

Here, there was cross examination of Dale Yatsko on the availability of the regulations at the Clerk and Recorders' office, and he admitted that he simply did not know (Tr. 49). Unfortunately, the Judge took impermissible steps to "clarify" the situation, steps that were not open to public cross examination, steps that the County had no opportunity to rebut. When the propriety of a lower court's findings is being weighed, the inquiry focusses on the evidence that is "in the record," *See Ramsey v. Yellowstone Neur. Assoc*., 2005 MT 317, ¶ 13. Whatever the trial court learned from its own investigation is most certainly not "in the record." This alone, Cascade County submits, fully supports reversal. Cascade County wants to be quite clear that it is in no way assigning an improper motive to the District Judge. Nonetheless, the conduct complained of obviously inured to the substantial prejudice of the County, and has to be brought to light.

A discussion of the pertinent regulations leads well into another significant basis for reversal of the Injunction Order. Clearly underlying the Court's rationale

is the thread that if the Yatskos were unclear or unsure whether their conduct and operation were lawful, that lack of clarity weighs not against them, but the County. Fundamentally, no less than the United States Supreme Court has held, in *McFadden v. U.S.*, 576 U.S. 186, 192 (2015), that ignorance of the law is no defense. This Court agrees, adding that ignorance of the law is not excusable "even if it is in reliance on what someone else has said." *State v. Trujillo*, 2008 MT 101. *McFadden* and *Trujillo* are criminal cases, and if that proposition is established for someone facing imprisonment, obviously it is even more compelling in this civil arena. Yet the Yatsko's supposed "confusion" over their zoning status is not only fully excused by the injunction Order, it is a primary basis supporting the grant of the injunction. To make matters worse, when County counsel attempted to cross examine Dale Yatsko on his "ignorance of the law" excuse, the Court refused to even allow the inquiry. (Tr. 50).

V. Evidentiary errors permeate the Order to the fundamental prejudice of the County

Yet another compelling factor supporting the reversal of the lower court's injunction order is the combined effect of numerous evidentiary errors arising during the hearing. In *Seltzer v. Morton*, 2007 MT 62, this Court explained that the trial court has broad discretion in handling the admission of evidence at the trial level. "A district court, however, is bound by the Montana Rules of Evidence and applicable statutes in exercising its discretion." *In re Marriage of Fossen*, 2019

MT 119, ¶ 8. The *Seltzer* opinion also pointed out that reversible error can be found where the substantial rights of the appellant are affected, that is, where the evidence in question impacts the outcome of a trial. 2007 MT at ¶ 65. The County maintains that this showing can be made here.

First, as already noted, the lower court basically permitted Yatsko's asserted ignorance of the law to work to his substantial advantage, when it foreclosed cross examination directed at that issue. That affected the "outcome of the [hearing]," it is submitted, because the Court ultimately held that the Yatskos were prejudiced in their dealings with the County because the latter did not provide them written copies of the zoning regulations, such that they became mislead or confused concerning their rights and obligations under those measures. The Court's foreclosure of evidence concerning what Dale Yatsko knew or did not know, and the fault for this real or imagined ignorance, effectively promoted the Plaintiff's theory of their case, and undercut the County's.

Further, the Court sustained valid hearsay objections by the County yet then permitted Yatsko's counsel to unashamedly circumvent those rulings. The "outcome of the hearing" was affected when the Court then relied upon the ill-gotten testimony in reaching its conclusion that an injunction was warranted. Specifically, Dale Yatsko, under questioning by his attorney, was obviously determined to tell the Court "what the County told him," and when he first tried,

the Court correctly sustained the understandable hearsay objection. (Tr. 15). Undeterred by that ruling, both Yatsko and his counsel ignored it, and in the very next exchanges Yatsko blurted, and the Court allowed, testimony that began with either "the County" or "Sandor (Hopkins, the Planner) told us…" (Tr. 16). Later, appellant counsel objected to another blatant hearsay exchange, to which the Court ruled "too late," because "we've already had the answer to the question" (Tr. 22), instead of striking and ignoring that which blatantly defied an earlier ruling. Still later, when questioned by his counsel about the impacts of this situation, Dale Yatsko volunteered "our patients … are telling us that we are shut down by the County." (Tr. 42). When an objection to this rank hearsay was made, the Court admonished "It's not hearsay, it's his understanding, Mr. Higgins." (Tr. 42). With all due respect, if "that's what someone told us" is not hearsay, it is hard to understand what is. Ironically, if Dale Yatsko was indeed being told by his customers that "the County is shutting him down," how could the Court believe and then adopt his other testimony that he did not know that the County found him noncompliant? These kinds of highly prejudicial inconsistences permeate the entirety of the injunction order.

Of course, the effects of these evidentiary errors is plainly evident from the injunction order. The Court made numerous findings and conclusions derived directly from what Dale Yatsko testified "the County told us." The Court also

made findings based upon what Yatsko told it about customer concerns if they were to be shut down (FF #61), despite the fact that not one of those phantom customers was called to testify. Had they been properly called, the County could have cross examined them. As such, the outcome of the hearing was irrefutably affected by these evidentiary mishaps, such that the *Seltzer* threshold for reversal was met.

CONCLUSION

The District Court misapprehended the clear weight of the evidence presented and incorrectly concluded that such evidence, and the equities, supported granting a preliminary injunction. The Court also improperly relied upon questionably adduced "facts" from challenged Requests for Admission and its own off the record investigation. Accordingly, the Order granting the injunction should be overturned.

DATED this 14th day of March, 2022.

MACo Defense Services

/s/ Mark F. Higgins
Mark F. Higgins

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 6,523 words, excluding certificate of compliance.

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CERTIFICATE OF SERVICE

I, Mark Higgins, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-14-2022:

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