IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 19-0534

ROBERT BERLETH and NADIA BERLETH,
Appellants,

v.

WILLIAM RIDEG,
Appellee.

On Appeal from the Montana Fourth Judicial District Court
Missoula County, Cause No. DV-18-1186
Before Hon. Karen S. Townsend

APPELLEE'S ANSWER BRIEF

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ISSUES PRESENTED FOR REVIEW

Appellee William E. Rideg ("William") restates the issues presented for review as follows:

1. Did the District Court correctly find that the Berleths materially breached the Lease?

2. Did the District Court apply the correct measure of damages for injury to the Berleths' vehicle?

3. Did the District Court correctly deny the Berleths' request for punitive damages for William's alleged harassment?

4. Did the District Court correctly interpret the liquidated damages provision of the Lease?

STATEMENT OF THE CASE

The District Court, following a bench trial, issued a Findings of Fact, Conclusions of Law and [an] Order of Possession (the "Eviction Order") on September 26, 2018. Register of Action ("R.A."), No. 15. The Order granted William immediate possession of the house located at 21524 Nine Mile Road in Huson, Montana, which he owned and had rented to Robert Berleth ("Robert") and Nadia Berleth ("Nadia" and, with Robert, the "Berleths") pursuant to a Residential Lease/Rental Agreement executed on March 15, 2018 (the "Lease").

On November 30, 2018, William requested a hearing on damages and attorneys' fees. R.A., No. 17. Following a plethora of filings by the Berleths, the District Court held a hearing on January 23, 2019, at which it heard argument on, and denied, the Berleths' request for a jury trial on damages, and set a hearing on damages for January 28. R.A., No. 34 (Minute Entry).

The hearing on damages began on January 28 and concluded on January 31, 2019. R.A., Nos. 41.1, 48 (Minute Entries). The District Court issued its Order on Damages dated February 11, 2019 (the "Damages Order" and, with the Eviction Order, the "Orders"). R.A., No. 50. The Court awarded compensatory damages to the Berleths for overpayments under the Lease and accidental damage to their vehicle. The Berleths also sought punitive damages for landlord harassment and under a liquidated damages provision of the Lease. The District Court denied these claims. The provisions of the Orders relevant to the issues on appeal are discussed in the Statement of Facts.

The District Court entered Final Judgment and Satisfaction of Judgment on August 19, 2019 (the "Judgment"). R.A., No. 61. The Berleths appeal various findings of fact and conclusions of law in the Orders.[1]

[1]The Berleths also claim that the Judgment was procured through fraud, but the "Prayer" section of their opening brief, which states the relief they seek from this Court (apparently in lieu of the "conclusion" required by M.R.App.P. 12(1)(h)), does not address the Judgment.

STATEMENT OF THE FACTS

The Property is 2.6 acres in size and includes a 4,200 square foot residence with a 2-car garage and a small, finished apartment with a separate entrance, attached to the residence. Eviction Order, Findings of Fact ("Ev. FOF"), ¶ 3. William testified that there is no access to the house from the apartment or from the apartment to the house. Transcript (09/19/18) ("Tr. 9/18"), 12:2-11. William has resided at times in the house and at times in the apartment. Ev. FOF, ¶ 3. Prospective tenants can elect to rent both the house and apartment or just the house without the apartment. Eviction Order, Findings of Fact ("Ev. FOF"), ¶ 3.

The Berleths lived in Houston, Texas, when they began corresponding with William about renting the Property, in February 2018. The parties discussed renting the separate apartment for Nadia's mother for an additional $500, but they ultimately decided not to rent the apartment. Ev. FOF, ¶ 4.

The parties executed the Lease on March 15, 2018. It provided for occupancy to begin on April 15, 2018, for a term of 12 months. The Berleths moved in on May 11, 2018. Ev. FOF, ¶¶ 6-7.

The District Court described three Lease provisions pertinent to the parties' dispute:

- The Berleths are responsible for payment of utilities, including internet. Ev. FOF, ¶ 8.
- "When required by this Agreement, lawn care includes weeding, trimming and raking as necessary as well as mowing at least every 14 (fourteen) days during June 1 – Sept. 15 and watering of lawn, plants and trees." Ev. FOF, ¶ 10.
- The Lease allowed for "the following described pets for which additional rent is paid: 1 dog, a German Shepard and 1 cat. Ev. FOF, ¶ 11.

Testimony concerning utilities centered on an email dated March 20, 2018, in which William wrote: "So, as I'm figuring out all my stuff here and storage I'm thinking that I will likely be in the side apartment 2 nights a week and in that regard wanted to offer keeping the $80 per month internet charge on my credit card to save you the bill." Robert responded: "Works for me." Ev. FOF, ¶ 9, *citing* Trial Ex. 3. Robert testified at trial that "Works for me" applied only to William's payment of the internet charges, and that he had not given William "permission" to spend time in the apartment. Upon questioning by the Court, Robert could not explain how the email exchange could be interpreted as he contended. Ev. FOF, ¶ 24.

THE COURT: [W]hen Mr. Rideg basically said, I'm going to be occupying the apartment up to two nights a week, and in return I'll cover the Internet. Is that not what that e-mail said?

ROBERT: In hindsight, that's what it says but that's not what I understood at the time, Your Honor. I didn't –

THE COURT: What about those words . . . . [did you] not understand?

ROBERT: At the time, Your Honor, I didn't put it together that they were associated at all. And –

THE COURT: You just thought you were getting a bonus that he was not going to make you pay for the internet?

ROBERT: Frankly, I did, Your Honor. I was –

THE COURT: Lucky for you.

Tr. 9/18, 168:8 – 169:1.

The parties also discussed pets before the Berleths took occupancy. Robert asked William to consider waiving fees for his dogs, writing in an email dated March 6, 2018: "Because they are service animals, both our dogs are subject to the ADA. In the past, pet fees have been waived." William declined to waive the pet fee, which he said was $50 per month/per pet. Under questioning from the Court, Robert stated that he considered his dogs—the German Shepherd mentioned and a beagle/corgi mix—to be service dogs because they had some service training. On questioning by the Court, Robert admitted that the Shepherd ("Judge") was in an Army bomb-sniffing program but flunked out and was scheduled to be euthanized when Robert rescued him and that neither dog had been trained to work or perform tasks for an individual with a disability. Ev. FOF, ¶¶ 11-12. When the

Court pressed him on the meaning of "service dog" and his reference to the "ADA," Robert said a prior landlord in Lubbock, Texas, "waived our pet fees . . . so I was asking for the same courtesy from Mr. Rideg." Sept. Tr. 170:20 – 172:7.

The parties disputed whether William knew about the beagle/corgi, but the Court found that William was aware of the dog's residence at the Property and concluded that it was not an unauthorized pet. Eviction Order, Conclusions of Law ("Ev. COL"), ¶ 8. William does not contest this ruling.

Soon after the Berleths moved into the house, there were two system failures that disrupted their occupancy. On May 16, 2018, William's brother Mark, who lives across Nine Mile Road from the Property, told him the well that served William's, Mark's, and another neighbor's properties had a significant problem (had "crapped out"), as a result of unusually high seasonal run-off. Ev. FOF, ¶ 14. William contacted the Berleths and arranged for Mark, who is a contractor, to install a cistern on the Property. Mark completed the installation, and water was running to the house, by May 25. Ev. FOF, ¶ 14. While Mark was installing the cistern, William delivered drinking water and water for the hot tub and other holding tanks on the Property. Ev. FOF, ¶ 16. Thereafter, William arranged for the cistern to be filled weekly, at a cost of about $240 per week, which he pays. Ev. FOF, ¶ 19.

On May 29, the Berleths experienced septic system back-up into a shower in the house. William hired a service to pump the tank and another service to jet out the lines. The problem was resolved in two days. Ev. FOF, ¶ 20.

The District Court found that William had not "purposefully or negligently caused the failure of the well or septic system" and that his "[e]fforts to correct the problems were as timely as they could be." Ev. FOF, ¶ 22.

In August, matters deteriorated in several respects. First, Robert shut off the water to the apartment, which was controlled by a spigot in the house. Ev. FOF, ¶ 25. William testified that he could not use the apartment without water and that he tried to get the Berleths to turn it back on through "[n]umerous e-mails, telephone calls, conversations." Tr. 9/18, 33:6-15.

The Court concluded that shutting off the water and refusing to turn it back on breached the Berleths' obligation under the Lease to use facilities, including plumbing facilities, in a reasonable manner. Ev. COL, ¶ 8. The Court ruled that the Lease had been altered by the agreement in the March 20 email, to allow William to stay in the apartment two nights a week in return for payment of internet, which was the responsibility of the Berleths under the Lease. The Court found specifically that William did not require permission from the Berleths to stay in the apartment, as they had contended. Ev. COL, ¶¶ 5-7.

The second August occurrence was damage to the Berleths' SUV, caused when William accidentally dropped a wooden door he was moving. Robert obtained an estimate for repair, which William submitted to his insurance company. Ev. FOF, ¶ 28. The District Court awarded compensatory damages to the Berleths in the amount of $1,785.20, the estimated repair cost. The District Court declined to award other damages requested by the Berleths—$1,671 for renting a full-size luxury vehicle while their vehicle was being repaired, and $500 for reduction in value of their vehicle because of the damage—ruling that the award "is not justified." Damages Order, Findings of Fact ("Dam. FOF"), ¶ 33; Conclusions of Law ("Dam. COL"), ¶ 25.

The District Court described the third event in August 2018 as "[a] watershed in the relationship." On August 15, William was on the Property and discovered damage to two aspen trees, caused by the "removal of multiple branches, deeply excised below the bark." Ev. FOF, ¶ 29. He described one of the trees as having been "hacked pretty well." Tr. 9/18, 25:7-13. He testified that he was "a little bit shocked" when he saw the damage to both trees and that he was concerned enough about the effect of the damage to hire an arborist to examine the trees. *Id*., 25:20 – 26:4.[2] He was particularly concerned because he

[2] William testified that the arborist planned to prepare a written report about the damage, but had not yet done so at the time of trial. Tr. 9/18, 28:9-15.

observed cuts into the cambium layer of the trees, which could expose them to infestation, rot, and disease. He described the damage as "flagrant" and a "mutilation," and said he "found it quite offensive that someone would do this to my trees." *Id*., 28:15-22.

When he first discovered the damage, William began taking pictures of the trees and saw that Robert was in the house watching him. William went to the house to try to get Robert to come out and talk to him, but Robert refused. William went to his brother Mark's house, and was there when a sheriff's deputy arrived and spoke with him "regarding a complaint for trespass made by Berleths." Robert later mailed him a "Trespass Notice" which stated that William was forbidden from entering any occupied structure at the Property, purported to require 24-hour notice of inspection, and warned of arrest and criminal prosecution. Ev. FOF, ¶ 30, *citing* Trial Ex. O.

On August 20, 2018, William's counsel sent the Berleths a "3 Day Notice of Intent to Terminate for Unauthorized Animal, 14 Day Notice of Intent to Terminate for Damage or Destruction to Landscaping, 14 Day Notice for Impair[ment to Premises]" based on their termination of water to the apartment (the "Notice"). Ev. FOF, ¶ 36; *see also* Trial Ex. 8. William testified that he asked his attorney to send the Notice because he determined "that their violations

of lease were significant, significant enough that I didn't want them any longer." He said that "[i]t's a business transaction, effectively," whereby "I give them a house, they pay me money" and "we both have obligations." He believed that "if I fail in my obligations, I'm accountable" and "[i]f they fail in theirs, they are." He felt that the three issues addressed in the Notice "were sufficient" to support eviction, and that "enough is enough; I don't want these individuals in my home any longer." Tr. 9/18, 6-12; 61:3-13.

Nadia applied for a Temporary Order of Protection ("TOP") against William on August 29, 2018, alleging harassment, excessive emailing, and trespass. Her application was denied the same day. Ev. FOF, ¶ 39. The District Court noted that the allegations in Nadia's TOP application were "similar to those she testified to" at trial. Ev. FOF, ¶ 39.

The Berleths testified at the eviction trial that William "began trying to harass them out of the property starting in early to mid-July by showing up, walking around the property and threatening to shut off an essential service, the internet;" and that, "[s]tarting early in July, William's emails became abrasive and . . . began admonishing Nadia and Robert to limit their water use." They alleged that "[h]is tone in emails became very harsh, he peered in windows, looked under hot tub covers and was being 'creepy.'" Nadia testified she was "uncomfortable when

Robert was out of town because she did not know if William would show up or not." Robert testified that he had "video and photos of William skulking around the property but the evidence was not presented" at trial. Ev. FOF, ¶ 31.

Nadia further testified as to alleged harassment at the hearing on damages. Dam. FOF, ¶ 28. On cross-examination, she identified videos in support of her stalking and harassment claims. Dam. FOF, ¶ 29. The Court asked Nadia some questions after she testified about the videos. Nadia had testified that, in one of the videos, she was "hiding in the corner because I was scared" of William. Transcript (01/31/19) ("Tr. 1/31/19"), 91:24 – 92:6. Upon questioning by the Court, Nadia admitted that Robert was with her when that video was recorded. *Id*., 94:6-10. Nadia also had testified that William should not have been on the Property "especially coming out at night, knowing I'm home alone." *Id*., 92:15-18. In response to the Court's questioning, Nadia acknowledged that none of the videos were taken at night. *Id*., 94:1-16.

The District Court found as follows:

> The videos do not support Nadia's claims of stalking and harassment. The videos show William, his parked vehicle, his vehicle pulling into and leaving the Property, William photographing trees and William walking to the end of the driveway and looking towards the back of the Property before getting into his vehicle and leaving. The videos do not show any creeping, snooping, stalking, harassing, aggressive or combative conduct on William's part.

Dam. FOF, ¶ 30.

The Lease included the following provision:

> EARLY TERMINATION OF LEASE: Tenants agree that they shall pay manager the sum of $1850 with an early termination of the lease. In addition to this fee, Tenants remain liable to Manager for damages, cleaning and rent that shall accrue until the dwelling is re-rented at the equivalent price.

Dam. FOF, ¶ 34. The amount of the termination fee was one month's rent. Dam. FOF, ¶ 1.

William said he included this provision in the Lease "primarily to protect myself in a financial respect" from early termination when his "damages are unknown" and "I don't know when it could be relet." Tr. 9/18, 51:17-22. William did not seek to enforce this provision against the Berleths. *Id*., 51:23-24; Dam. FOF, ¶ 35.

William did seek various other damages. The District Court allowed some of the damages he claimed and disallowed others. See Dam. FOF, ¶¶ 37-41; COL, ¶¶ 7-11. William does not contest the Court's decisions. The Berleths do not contest these matters on appeal, either.

William notes that the statement of facts in the Berleths' Opening Brief ("Op. Br.") includes "facts" that are not part of the record on appeal, including events that allegedly have occurred since the entry of judgment. This Court has held that it

"may not rely on facts outside of the record in resolving an issue before it." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 25, 333 Mont. 331, 142 P.3d 864 (citation omitted). "[T]he burden of showing error by reference to matters of record is upon the appellant. Unless the record that he brings before the court of appeals affirmatively shows the occurrence of the matters upon which he relies for relief, he may not urge those matters on appeal." *Huffine v. Boylan*, 239 Mont. 515, 517, 782 P.2d 77, 78 (1989). William's failure to address or counter such "facts" in this statement of facts is not intended and should not be construed as agreement with the Berleths' statements. To the extent any such "facts" are relevant to the issues on appeal, they are addressed in the Argument.

STANDARDS OF REVIEW

The Berleths claim that the District Court erred in finding that their breach of the Lease was material. "The determination of whether a material breach exists is a question of fact." *Norwood Serv. Distrib., Inc.*, 2000 MT 4, ¶ 35, 297 Mont. 473, 994 P.2d 25 (citation omitted). This Court reviews a trial court's findings of fact "to determine whether those findings are clearly erroneous." Findings of fact are clearly erroneous "if substantial credible evidence does not support them, if the trial court has misapprehended the effect of the evidence or if a review of the record leaves this

Court with the definite and firm conviction that a mistake has been committed." *Norwood*, ¶ 21 (citation omitted).

To determine whether the District Court's findings, in this case, are supported by substantial credible evidence, this Court should view the evidence "in the light most favorable to the prevailing party." *Stave v. Estate of Rutledge*, 2005 MT 332, ¶ 13, 330 Mont. 28, 127 P.3d 365 (citations omitted); *see also Eschenbacher v. Anderson*, 2001 MT 206, ¶ 43, 306 Mont. 321, 34 P.3d 87 (standard of review for finding of material breach of contract "requires us to consider the evidence in a light most favorable to the prevailing party") (citation omitted).

"It is not this Court's function, on appeal, to reweigh conflicting evidence or substitute [its] evaluation of the evidence for that of the district court." This Court "defer[s] to the district court in cases involving conflicting testimony" in recognition "that the court had the benefit of observing the demeanor of witnesses and rendering a determination of the credibility of those witnesses." *Czajkowski v. Meyers*, 2007 MT 292, ¶ 15, 339 Mont. 503, 172 P.3d 94 (citation omitted). M.R.Civ. P. 52(a)(6) also provides that "[f]indings of fact, whether based on ora or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."

Varying standards of review apply to the District Court's award of compensatory damages to the Berleths for harm to their vehicle and refusal to award them punitive damages for William's alleged harassment.

Generally, the standard of review for an award of damages is abuse of discretion, which "occurs when a district court acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason." *DeTienne v. Sandrock*, 2017 MT 181, ¶ 23, 388 Mont. 179, 400 P.3d 682; *Czajkowski*, ¶ 13 (citation omitted). Included within this standard is "review to determine that the discretion was not guided by erroneous legal conclusions." *Wohl v. City of Missoula*, 2013 MT 46, ¶ 28, 369 Mont. 108, 300 P.3d 1119 (citation and internal quotation marks omitted).

At the same time, the court's "determination of damages" is reviewed under the clearly erroneous standard applicable to findings of fact. *DeTienne*, ¶ 24 (citation omitted). A jury's decision not to award punitive damages is reviewed under this standard. *Sandman v. Farmers Ins. Exch.*, 1998 MT 286, ¶ 39, 291 Mont. 456, 969 P.2d 277. It would appear that a District Court's decision not to award punitive damages would be reviewed under the same standard. *Cf. DeTienne*, ¶ 26 (finding that substantial evidence supported the trial court's findings that punitive damages were appropriate).

This brief will address the award of compensatory damages and refusal to award punitive damages under both standards.

The question of whether "a stipulated damages provision in a contract constitutes enforceable liquidated damages or an unenforceable penalty is question of law," which this Court reviews for correctness when, as here, the underlying facts are not in dispute." *Arrowhead Sch. Dist. No. 75, Park Cty. v. Klyap*, 2003 MT 294, ¶ 10, 318 Mont. 103, 79 P.3d 250 (citation omitted).

SUMMARY OF ARGUMENT

Substantial credible evidence supports the District Court's findings that the Berleths breached the Lease by damaging the aspen trees and shutting off the water supply to the apartment on the Property. The judge cited this evidence in the Eviction Order, which also made clear that the Berleths' excuses were not credible. The evidence supports the District Court's order of possession in favor of William.

The District Court did not abuse its discretion in denying the Berleths' claims for damages to their vehicle measured by the reduction in value following the repair or by the cost of renting a replacement vehicle. The only evidence the Berleths presented in support of these damages were their own estimates, which were insufficient as a matter of law.

The Berleths had ample opportunity to present evidence to support their claims that William harassed them and that this harassment entitled them to punitive damages. The District Court heard the evidence and concluded that William did not harass the Berleths. They point to no finding of fact on this issue that is "clearly erroneous." They do not even address the legal standard for an award of punitive damages. The District Court did not abuse its discretion in denying this claim.

The Berleths' failure to present legal argument is sufficient grounds for this Court to disregard his challenge to the District Court's ruling that the early termination fee in the Lease is not an unconscionable provision. Even if the Court considers the issue, there are sufficient distinctions between the penalty addressed in *Summers v. Crestview Apartments*, 2010 MT 164, ¶ 22, 357 Mont. 123, 236 P.3d 586, and the fee in this case to support the District Court's conclusion.

ARGUMENT

1. The Court correctly found that the Berleths breached the Lease, warranting their eviction.

The Berleths claim the District Court erred in concluding that they breached the Lease by damaging the aspen trees and by turning off the water supply to the apartment. The District Court resolved factual issues to determine that these

breaches were sufficiently material to warrant eviction. *Norwood*, ¶ 35. (determination of material breach a question of fact).

The Berleths do not even come close to meeting their burden to show that the District Court's findings were clearly erroneous, whether because "substantial credible evidence does not support them," because the Court "misapprehended the effect of the evidence," or because "a review of the record leaves this Court with the definite and firm conviction that a mistake has been committed." *Norwood*, ¶ 21.

Attacking the District Court's finding that they breached the Lease by damaging the trees, the Berleths assert that William actually was on the Property to spy on Nadia on the day he noticed the tree damage and used the complaint of damage as a pretext to cover up his photographing her in the shower. Op. Br. at 5, 7. In support of these "facts," the Berleths cite material from the Eviction Order in which the District Court is describing the parties' conflicting depictions of the events. Eviction Order at 8-9.

The Berleths testified as to Williams' alleged harassment and spying at the eviction trial and the hearing on damages. The District Court allowed them to introduce videos at the damages hearing that they had neglected to produce at the eviction trial. Ev. FOF, ¶ 31; Dam. FOF, ¶¶ 28-29. The judge questioned Nadia specifically about these videos, in an examination that made clear the judge's

skepticism about Nadia's claims. Jan. 31 Tr., 91-94. Based on the testimony, the District Court specifically found that the "videos do not support Nadia's claims of stalking and harassment." Dam. FOF, ¶ 30. The court also found that the "Berleths are not entitled to damages for . . . harassment." Dam. COL, ¶ 3.

There was ample testimony for the District Court to conclude that William considered the damage to the trees to be a material—and, in fact, potentially irremediable—breach of the Lease. This testimony supports the District Court's conclusion that "[c]utting tree branches is not lawn care" allowed by the Lease, and the Berleths "violated the Lease when they cut tree branches without [William's] prior written consent. Ev. COL, ¶ 2.

The Berleths provide equally insufficient support for their challenge to the District Court's findings that "[t]he Lease was altered [when the parties] agreed by email on March 20, 2018 that William could stay in the side apartment two nights a week in exchange for paying the internet utilities," and that the Berleths violated the Lease as amended by "shutting off the water to the apartment and refusing to turn it back on." Ev. COL, ¶¶ 5, 8.

The Berleths claim that they, not William, paid the internet bill. They do not point to any evidence anywhere in the record to back up this claim, which directly contradicts the District Court's finding that "William provided internet service as

agreed." Ev. COL, ¶ 6. The only support they cite in support of their argument is an email from Robert to William stating that "[a]ny permissions you may have had at one point have since been revoked due to your behavior." Op. Br. at 17, n. 73. This email presupposes that William did not have "permission" to be on the Property, ignoring the District Court's ruling that William did not need permission because the March 20 email amended the Lease to confirm his right to occupy the apartment two nights a week. Ev. COL, ¶ 7.

If Robert actually paid the internet bill, he certainly had the opportunity to so testify at trial—particularly when the judge herself was questioning him about his "Works for me" response to William's offer to pay the bill. Instead, he testified that he thought William was going to pay the bill as a "bonus" to the Berleths. Tr. 9/18, 168:8 – 169:1.

The Berleths also argue that the Court erred in finding a breach based on their refusing access to William because they leased a "premises," defined as "a dwelling unit and the structure of which it is a part, the facilities and appurtenances to the structure, and the grounds, areas, and facilities held out for the use of tenants generally or promised for the use of a tenant. Op. Br. at 18, n. 75, *citing* Mont. Code Ann. § 70-24-103(11). The problem with this argument is that rental of the apartment appurtenant to the "premises" they rented –that is, the

house—was not "promised for the use of [the] tenant." The Berleths and William discussed possible rental of the apartment for Nadia's mother, but the Berleths declined. Even if the Lease somehow incorporated the apartment despite these discussions, the District Court held that the March 20 email amended the Lease, trading William's ability to stay in the apartment for his payment of the internet. The argument thus comes full circle to the unsupported argument that the only effect of the March 20 email was to give the Berleths the "bonus" of free internet.

The District Court heard evidence at three hearings, where the judge was able to observe the demeanor of the witnesses and assess their credibility. This Court defers to trial courts on these matters. *Czajkowski*, ¶ 15. The judge's exchange with Nadia about the videos, as well as her questioning of Robert about his understanding of the March 20 email (and his claim about his "service dogs") indicate that these witnesses tended to obfuscate the "facts" and squirm away from hard questioning.[3]

[3] In the Damages Order, the District Court made note of a false representation by Robert that also bears on his credibility. At the hearing on January 28, Robert stated that he was appearing remotely from Washington, D.C. Appearing remotely from Texas at a hearing on January 31, he admitted that he had not been in Washington, but in Texas. Dam. Order at 1-2. He did not make this admission freely, but attempted to change the subject under questioning by William's attorney and the judge. Tr. 1/31/19, 68:16 – 70:18. The Berleths also play fast and loose with the facts in their Opening Brief. For example, in addition to reciting "facts" that do not appear in the record, they claim that William filed the eviction proceeding to retaliate against the Berleths because Nadia sought the TOP against him, on August 29, 2018. Op. Br. at 2 (2019 is a typographical error). William commenced this action for eviction and damages on August 27, 2018, before Nadia sought the TOP, and could not have been retaliating for it. Moreover, William's attorney sent the eviction Notice on August 20, 2018.

The District Court evidently gave credence to William's testimony about the damage to the trees and its severe effect on him, his payment of the internet bills, and his inability to use the apartment without access to water.

A breach of contract is "material" if it "touches the fundamental purposes of the contract and defeats the object of the parties in making the contract." *Norwood*, ¶ 29 (citation omitted). The District Court found that the Berleths' damage to the aspens and interference with William's use of the apartment entitled him "to give notice to terminate the Lease." Ev. COL, ¶ 9. The Berleths have not shown that the District Court's findings that led to this ultimate conclusion were "clearly erroneous."

2. The District Court applied the correct measure of damages for injury to the Berleths' vehicle.

The District Court awarded compensatory damages of $1,785.20 for the harm William accidentally caused to the Berleths' vehicle. The award was based on a repair estimate Robert obtained. The District Court did not award additional damages the Berleths requested for the reduction in value of their vehicle resulting from the damage, and for the expense of renting a vehicle while theirs was being repaired. Dam. FOF, ¶ 33.

The Berleths acknowledge "that in order for the damages to be recovered, there must be proof of the extent and amount thereof." Op. Br. at 21, *citing Farmers Ins. Exch. v. Goldan,* 2016 MT 196, ¶ 19, 384 Mont. 301, 378 P.3d 1163. The Statement of Facts in the Berleths' Opening Brief does not identify any evidence submitted at the eviction trial or the hearing on damages to support the claim for these additional damages. Op. Br. at 23. In Argument, the Berleths state that they claimed $3,956.22 as total damages for harm to the vehicle, "based on documentary and oral evidence," but once again they do not identify any such evidence. Op. Br. at 21. The Findings of Fact in the Damages Order acknowledged that they did ask for $3,956.22 (Dam. FOF, ¶ 33), but the Conclusions of Law make clear that the costs other than repair were only "*estimated* by Berleths." Dam. COL, ¶ 5 (emphasis added).

The Berleths also have failed to provide any legal authority for an award of damages to compensate them for any alleged reduction in value of their vehicle. This Court discussed such "residual diminished value" ("RDV") damages in *Hop v. Safeco Ins. Co. of Illinois*, 2011 MT 215, ¶ 1, 361 Mont. 510, 261 P.3d 981, where a third party whose car was damaged in an accident with a Safeco insured sought advance payment of RDV damages under *Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 941 P.2d 987 (1997) and *Dubray v. Farmers Ins. Exchange*, 2001 MT

251, 307 Mont. 134, 36 P.3d 897. The *Hop* Court defined RDV damages as "the difference between the value of a vehicle immediately before an accident and the value of the vehicle after post-accident repairs have been made." *Hop*, ¶ 1. Holding that "RDV does not qualify as the type of damage that must be paid in advance as 'not reasonably in dispute'" under *Ridley* and *Dubray*, this Court also observed that it "has not yet addressed the question of whether insurers in Montana have an obligation to pay RDV claims *at all*, much less in advance." *Hop*, ¶ 18 (emphasis added).

The Berleths cite *Hop* for the definition of RDV, but do not discuss the holding. Instead, they rely on cases that have nothing to do with vehicles or with RDV damages. Op. Br. at 23.

The pertinent question in *Agrilease, Inc. v. Gray* was the measure of damages to an irrigation pump. The Court found that the plaintiff was not entitled to any damages, because the plaintiff had failed to "show its value before and after *or* the cost of repair." 173 Mont. 151, 157, 566 P.2d 1114, 1117 (1977) (emphasis added). If *Agrilease* teaches anything relevant to this case, it is that the Berleths decidedly would not be entitled to damages representing the value of their vehicle "before and after" the damage and, in addition, to damages for the "cost of repair." They were awarded damages for the cost of repair.

In *Spackman v. Ralph M. Parsons Co.*, this Court considered the correct measure of damages to real and personal property caused by flooding of a sewage line. 147 Mont. 500, 502, 414 P.2d 918, 919 (1966). The Court observed that one measure, which it did not adopt, would be "the difference in market value at the place before and after injury, [b]ut if repair is possible, and this cost is less than the diminution in value under the general test, this cost plus the value of the loss of use may be employed as the measure." *Id*. at 507, 414 P.2d at 922. The Court found that the appropriate measure, in that case, would be "the market value of the property destroyed" in the flooding, but also found that the plaintiff's evidence on value was suspect and cautioned that "[a] haphazard guess at the value will not suffice." *Id*. at 507-08, 414 P.2d at 922-23. Even if the measure the Court did not adopt in *Spackman* was adopted in this case, the fact remains that the Berleths do not point to any evidence of the difference in value of their vehicle before and after the repair. Their estimate is nothing more than a "haphazard guess."

The same deficiency precludes the Berleths' claim for loss of use. Even assuming that they were legally entitled to these damages in addition to their repair costs, they do not cite any evidence of the amount they paid for a replacement vehicle while theirs was being repaired.

In the absence of any evidence on which to base an award, the District Court did not abuse its discretion when it denied these claims. The court did not act

"arbitrarily, without employment of conscientious judgment, or excee[d] the bounds of reason." *DeTienne*, ¶ 23; *Czajkowski*, ¶ 13. In the absence of any evidence on which to base an award, the District Court's refusal to award the damages also was not clearly erroneous. The award of compensatory damages in the amount of the repair costs, only, should be affirmed.

3. The District Court correctly denied the Berleths' claim for punitive damages for "harassment."

The Berleths assert that the District Court erred in failing to assess punitive damages against William, charging that "excessive inspections and other behaviors constituted harassment." Op. Br. at 1. The only legal authority they cite is Mont. Code Ann. § 70-24-312(3), which provides that a "landlord may not abuse the right of access or use it to harass the tenant." Op. Br. at 13. They do not cite the standards for awarding punitive damages or acknowledge that a plaintiff must prove "actual fraud" or "actual malice" by clear and convincing evidence. Mont. Code Ann. § 27-1-221 (1) and (5).

The Berleths falsely state that "[t]he trial court Order on Damages is silent" on the question of harassment. The District Court acknowledged and specifically denied their claim. The Court wrote that "Nadia testified that William harassed them with emails and by coming to the Property unannounced," and specifically found that "[t]he videos do not support Nadia's claims of stalking and harassment." Dam.

FOF, ¶¶ 28, 30. The District Court also heard evidence about the alleged harassment from both Robert and Nadia at the eviction trial. Ev. FOF, ¶ 31; *see also* ¶ 39 (describing Nadia's allegations in support of the TOP as "similar to those she testified to here, of harassment, excessive emailing and trespass"). Having heard the Berleths' testimony, and apparently having reviewed Nadia's application for the TOP, the District Court specifically concluded that the "Berleths are not entitled to damages for illegal ouster or harassment." Dam. COL, ¶ 3.

The Argument section of the Opening Brief on this issue is a rambling account of William's alleged harassing behavior, with the only legal reference a passing nod to a tenant's right to quiet enjoyment. Op. Br. at 24-28. Both in the Argument and in their Statement of Facts, the Berleths fail to point to a single finding of fact that could be considered "clearly erroneous." They similarly fail to show that the District Court in any was abused its discretion in denying their claim for punitive damages. The District Court properly denied their claim for punitive damages.

4. The District Court correctly interpreted the "early termination" provision of the Lease.

The District Court rejected Robert's argument that the provision in the Lease titled "Early Termination of Lease" is an unenforceable penalty that would entitle the Berleths to recover three months' rent as damages under Mont. Code Ann. § 70-24-403 (if a party "purposefully uses a rental agreement containing provisions

known by the party to be prohibited," the other party may recover "an amount up to 3 months' periodic rent"). The Lease provides that the "Tenants agree that they shall pay manager the sum of $1850 with an early termination of the lease." The amount of the termination fee was one month's rent. Dam. FOF, ¶ 1.

The party seeking to avoid a liquidated damages provision "has the burden of proving the clause is unconscionable." *Arrowhead*, ¶ 54. This Court applied the unconscionability analysis from *Arrowhead* in deciding that a lease provision requiring the tenant to pay all rent remaining due following the tenant's termination of lease was unconscionable, in *Summers*.

The Berleths did not meet their burden. Robert does not point to any legal argument in the record concerning unconscionability. At the January 23 hearing, Robert complained that the Eviction Order did not address the early termination provision or his claim of harassment, but he made no legal argument. Transcript, 1/23/19, 12:22 – 13:15. The Damages Order states only that Robert "*testified* that as provided in [*Summers*], the Lease contains a prohibited" early termination provision. Dam. FOF, ¶ 34 (emphasis added).

The District Court acknowledged this Court's ruling in *Summers*, and concluded that "the early termination fee [in the Lease] is distinguishable from the accelerated rent provision in *Summers*." The Court explained that the *Summers*

Court "reasoned that the accelerated rent provision undermined the landlord's duty to mitigate because the landlord would have possession of the property and a guarantee of payment of the full amount owed under the lease," while in this case the Lease "provides an early termination fee equivalent to one month's rent." Dam. COL, ¶ 4, *citing Summers*, ¶ 27 (emphasis added).

The Berleths' Opening Brief does not discuss the District Court's reasoning or otherwise address unconscionability, leaving this Court to guess as to their legal arguments. This is impermissible. This Court has "stated on numerous occasions" that it is "not obligated to develop arguments on behalf of parties to an appeal, nor are we to guess a party's precise position, or develop legal analysis that may lend support to his position." *McCulley v. Am. Land Title Co.*, 2013 MT 89, ¶ 20, 369 Mont. 433, 300 P.3d 679.

On these grounds alone, this Court should disregard this issue entirely. *McCulley*, ¶ 20 (because of appellant's failure "to develop any legal argument, authority or analysis," Court did "not address the argument further"); *see also Mitchell v. Glacier Cty.*, 2017 MT 258, n. 1, 389 Mont. 122, 406 P.3d 427 (Court declined to address an issue that was not supported by argument). In addition, as Arrowhead made clear, William does not have the burden "to prove a liquidated damages clause is enforceable." *Arrowhead*, ¶ 54. Nevertheless, William will

undertake the unconscionability analysis of *Arrowhead* and *Summers* to show that the District Court's conclusion was, in fact, correct. Underlying this analysis is the principle that "[l]iquidated damages clauses are presumed enforceable." *Arrowhead*, ¶ 54.

"Unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions." *Summers*, ¶ 54, *citing Arrowhead*, ¶ 48 (other citation omitted).

In this case, as in *Summers*, the landlord drafted the Lease. In this case, however, William was renting only one premises and engage in some negotiation with the Berleths, including whether they would rent the apartment for Nadia's mother and how much they would pay for a pet fee. Here, too, Robert is an attorney, licensed in Montana as well as Texas. Op. Br. at 3. He should be held to have understood the import of the clause. "[F]orm contracts are [not] automatically unacceptable." *Arrowhead*, ¶ 61.

Even if the Berleths had no meaningful choice whether to accept the Lease provision, the other prong of the analysis resolves in William's favor for the reasons stated by the District Court. This question is "whether the accelerated rent provision unreasonably favors" the landlord. *Summers*, ¶ 54.

The District Court focused on the question of mitigation of damages, as this Court did in *Summers*. The *Summers* Court noted that the accelerated provision in that lease allowed the landlord to benefit unreasonably by collecting *all* of the remaining rent "while simultaneously offering the apartment for rent." *Summers*, ¶ 24. This Court held that the provision conflicted with the "duty to mitigate damages" imposed by Montana's Residential Landlord and Tenant Act (the "Act"). *Summers*, ¶ 24, *citing* Mont. Code Ann. 70-24-401(1). At the same time, that lease required the tenant to "pay for the remaining term of the lease before the rent would otherwise be due and without receiving any of the attendant benefits of possession of the apartment." *Summers*, ¶ 27. It is hardly surprising that the Court found the provision to unreasonably favor the landlord.

In this case, the early termination fee provides for payment of only one month's rent. The District Court's conclusion that the provision does not undermine the landlord's duty to mitigate makes sense: If the most William could collect under that provision would be one month's rent, he would not have any incentive to put off reletting the Property.

The District Court did not rely on the early termination fee to release William from the obligation to mitigate damages—as would have been the case if this Court had upheld the clause in *Summers*. For one thing, William did not even attempt to

enforce the fee. Dam. FOF, ¶ 35.[4] The provision consequently could not have had this effect on him. It also did not have this effect, as a factual matter. William presented evidence that he did attempt to mitigate damages. The District Court specifically rejected these efforts as insufficient, primarily because he offered the Property at a higher rent than the Berleths had paid. Dam. COL, ¶¶ 8-11. The point is, however, that William did not sit back and do nothing because of the prospect that he could recover one month's rent as liquidated damages.

In this case the District Court was right in ruling that the provision is different from the one invalidated in *Summers*. Because the clause is not invalid, neither is the Lease. The *Summers* Court's holding that the landlord could not enforce any provisions of the lease is that case was premised on its decision that the provision was unconscionable. *Summers*, ¶¶ 35-36.

CONCLUSION

The Berleths have failed completely to satisfy any of the standards necessary to succeed in this appeal. The District Court's Orders should be affirmed in all respects.

[4] The Berleths contradict the District Court's finding that "William did not seek an early termination fee." Dam. FOF, ¶ 35. Without attribution to the record, they state that "Rideg originally sought to keep the Berleths' security deposit under this provision of the lease, but only resigned the claim once he realized the error." Op. Br. at 29.

DATED this 14th day of April 2020.

Thomas C. Orr Law Offices, P.C.

/s/ Thomas C. Orr

By: _____

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Rule 11(4)(e) of the Montana Rules of Appellee Procedure. The document is double-spaced and printed in Times New Roman, proportionately spaced, 14-point typeface (except for footnotes, which are in 12-point typeface). The total word count does not exceed 10,000 words, as calculated by this party's word processing system, excluding the tables, certificates, and appendix.

DATED this 14th day of April 2020.

Thomas C. Orr Law Offices, P.C.

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CERTIFICATE OF SERVICE

I, Thomas Charles Orr, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-14-2020:

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