DA 18-0608

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 181

KAREN C. JARUSSI,

Plaintiff and Appellant,

v.

SANDRA L. FARBER TRUST; SANDRA L. FARBER
or all persons claiming through SANDRA L. FARBER
any interest, right, title, estate, or interest in or lien or
encumbrance upon the real property described in the Complaint,
and all other persons, unknown, claiming or who might claim any right,
title, estate, or interest in or lien or encumbrance upon the real property
described in the complaint adverse to plaintiff's ownership or any cloud
upon plaintiff's title, whether the claim or possible claim is present or contingent,

Defendants and Appellees.

APPEAL FROM: District Court of the Twenty-Second Judicial District,
In and For the County of Carbon, Cause No. DV-16-101
Honorable Blair Jones, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John G. Crist, Eric Edward Nord, Crist, Krogh & Nord, PLLC, Billings, Montana

For Appellees:

Donald V. Snavely, Snavely Law Firm, Missoula, Montana

Submitted on Briefs: May 22, 2019

Decided: August 6, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Karen Jarussi (Jarussi), appeals the order entered by the Twenty-Second Judicial District Court, Carbon County, granting the motion of Defendant Sandra L. Farber Trust (Farber) to enforce the parties' punitive settlement agreement, and denying Jarussi's cross-motion for enforcement. The parties disagreed on how the agreement should be interpreted and filed opposing motions for enforcement. The District Court determined the parties must comply with the agreement as interpreted by Farber. On appeal, Jarussi argues the District Court erred by failing to adopt her interpretation of the agreement, and Farber defends the interpretation adopted by the District Court. We reach a different conclusion and reverse and remand for further proceedings, addressing the following issue:

Did the District Court err by concluding the parties formed a legally binding settlement agreement?

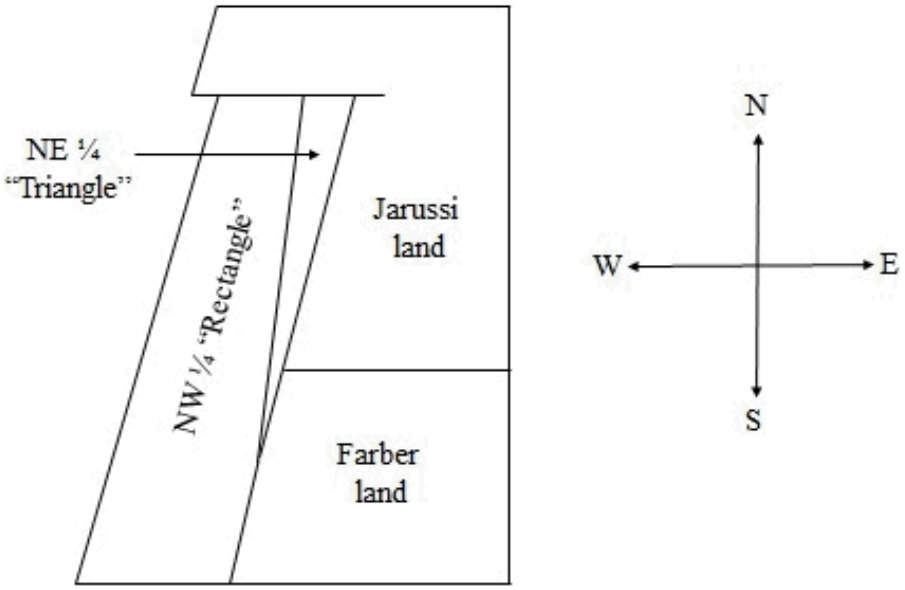
FACTUAL AND PROCEDURAL BACKGROUND

¶2 Jarussi and Farber own adjoining properties in Carbon County, Montana. The two properties share a border: the southern border of Jarussi's property is the northern border of Farber's. Historically, Burlington Northern Railroad Company held a right of way (ROW) that runs north and south along the western border of Jarussi and Farber's properties. The company abandoned the property in 1982. In 2014, the United States Supreme Court ruled that, once abandoned, a railroad right of way reverts back to the underlying fee owner. *Brandt Tr. v. United States*, 572 U.S. 93, 110, 134 S. Ct. 1257, 1268 (2014). Believing they each possess an ownership claim to the neighboring right of way

under *Brandt*, Jarussi and Farber both filed suit in 2016 to quiet title in the abandoned land, and these cases were consolidated.[1]

¶3 The District Court determined from the record that the abandoned ROW is comprised of two parcels designated as "NW¼" and "NE¼," the parameters of which were relevant to the parties' settlement negotiations. The larger of the two, NW¼, is a rectangular-shaped parcel, a portion of which lies immediately west of the NE¼ parcel, and another portion of which lies west of, and is adjacent to, Farber's land. It does not adjoin Jarussi's land. The NE¼ parcel, referred to in this litigation as the "Triangle," is a narrow triangular parcel located in the northeastern corner of the abandoned ROW. Most of the Triangle sits between Jarussi's land, on the east, and the NW¼ parcel, on the west. Its eastern border runs the entire length of the western border of Jarussi's property, while the southern tip of the Triangle extends to the west of, and adjoins, Farber's land—running along the northern portion of Farber's western border. As a result, Farber's land adjoins portions of both parcels of the abandoned ROW, whereas Jarussi's land adjoins only the Triangle parcel of the ROW and does not share a border with the NW¼ parcel. The following diagram of the subject properties is taken from the record, but is not meant to be to scale:

[1] In 2017, the Montana Department of Transportation and the City of Red Lodge, both original parties to the dispute for a claim of interest in the ROW, formally disclaimed all interest. Sandra L. Farber, individual, and the City of Red Lodge were both originally named as defendants, but in August 2018, the District Court dismissed them as party defendants.



¶4 On May 3, 2018, after more than sixteen months of litigation, Jarussi's attorney emailed Farber's attorney to discuss the current status of the case and make "one last settlement offer." Jarussi's counsel proposed:

> We stipulate that Karen obtain title to the ROW adjoining her property. Your client obtain title to the ROW which adjoins their property. The line separating Karen's share of the ROW from Farber's share will run in the same 'direction' as the property line between the respective properties. This offer remains open until 5:00 p.m. on May 8, 2018.

The following day, May 4, 2018, Farber's attorney responded by email that her client "declines your settlement offer." She continued:

> However, he is willing to offer you a counteroffer: Karen has an option to purchase the portion of the abandoned ROW adjoining her land (perpendicular line) at appraised value or $20,000, whichever is greater, provided they stipulate to the Trust's ownership of the ROW consistent with our surveyor's report. This offer is open until the end of business on May 7, 2018.

With its counteroffer, Farber included a surveyor's report, not previously disclosed, purporting to establish Farber's ownership of NW¼. On Sunday, May 6, 2018, Jarussi's attorney responded with an email that said, in total, "The counteroffer is accepted." Two minutes later, Jarussi's attorney sent another email to Farber's attorney, stating as follows:

> Please redraft [the parties' Motion for Dismissal without Prejudice and Request to Consolidate] in light of the fact that the counteroffer has been accepted. Also, it should be in the form of a stipulation. *Also, please reflect that Karen does intend to amend her complaint*. [(Emphasis added.)]

¶5 On May 7, 2018, at 7:02 a.m., Farber's attorney emailed Jarussi's attorney, asking, "Can you expand on why Karen intends to amend her complaint if the parties have come to a settlement agmt [sic]?" No response to this email was made by Jarussi before Farber's attorney nonetheless emailed the District Court, at 1:06 p.m. the same day, advising that the parties had "reached an agreement on their claims against each other," copying Jarussi's attorney. At 3:25 p.m. that day, Farber's counsel sent another email to Jarussi's attorney, as follows:

> It seems to me that the court needs to quiet title to [the] railroad triangle (the 1.81 acre piece). This is illustrated in green on Exhibit BB, attached. I believe I can go through the [Secretary of State] to serve a (now defunct) company that no longer exists.
>
> Please advise your position/thoughts on the same.

Two minutes later, Farber's counsel sent another email to Jarussi's counsel forwarding a second expert opinion for his review.

¶6 The next day, May 8, 2018, Jarussi's attorney replied to the email Farber's attorney had sent to the District Court the previous day advising of the parties' settlement, as follows:

> Judge Jones,
>
> [Farber's attorney's] statement that the parties 'have recently reached an agreement on their claims against each other' is not accurate.
>
> If and when such an agreement is reached, we will be in touch.

¶7 On May 9, 2018, at 10:27 a.m., Farber's counsel replied to Jarussi's counsel's email to the District Court, as follows:

> Dear Judge Jones,
>
> Evidently, 'The counteroffer is accepted' is open to different interpretations. In light of the same . . . . I will move to enforce settlement against Karen Jarussi.

¶8 At 1:29 p.m., that day, Jarussi's attorney replied to this email from Farber's attorney, as follows:

> Dear Judge Jones,
>
> Rather than argue this matter by email, I want to inform the Court that the parties have reached a settlement of some claims (but not all) raised by the parties; but there are still issues pertaining to title which need to be resolved. I need to amend Karen Jarussi's pleadings to clearly define the remaining issues, in light of the partial settlement.
>
> Thus, I believe that we still need to sign the stipulation containing the terms agreed to at the conference recently held.[2] I recall (and my notes reflect) that the stipulation would allow each party to amend their pleadings, and then proceed . . . .
>
> When I receive the stipulation from [Farber's attorney] which she agreed to prepare, I will sign it and file it with the Court.

[2] This is an apparent reference to a scheduling conference the parties attended on May 1, 2018, wherein proposed stipulations were discussed and agreed to.

¶9 Farber filed a motion seeking to enforce the settlement agreement, arguing it had "clearly articulated the material terms" of the counteroffer, which Jarussi "unequivocally accepted." Farber asserted that under the agreement, Jarussi had the option to purchase the portion of the right of way adjoining her land at $20,000 or the appraised value, whichever is greater, provided Jarussi stipulated to Farber's ownership consistent with the surveyor's report.[3] According to Farber's interpretation of the settlement agreement, Jarussi "must drop its claims against Farber, Farber move to quiet title" to the Triangle, "and then Farber and Jarussi effectuate their settlement agreement for the entire 'rectangle' adjacent to Jarussi's property." In Farber's view, Jarussi had "no grounds to continue to litigate over a slice of property that has already been 'sold' to her under the terms of the settlement agreement."

¶10 Jarussi opposed Farber's motion and filed a cross-motion to enforce the agreement as only a partial settlement, arguing that Farber lacks standing to bring a quiet title claim against the Triangle and even if a claim were maintained, Farber lacked evidence to prevail against Jarussi's claim that she is the Triangle's true owner. Jarussi argued: "Even after the Agreement was reached, both parties recognized that further litigation would be required to resolve title to the triangle. Nothing in the Agreement purported to resolve that title, or to limit either party in the pursuit of their existing quiet title claims." To Jarussi, the partial agreement meant that both parties "should simply continue to litigate their respective quiet title claims until a final determination of title to the triangle is made, with

[3] Jarussi eventually stipulated to Farber's ownership of the NW ¼, or rectangular parcel, of the ROW.

the outcome determining the parties' respective rights and obligations under the Agreement"—that is, if Farber succeeded in acquiring title, then only the Triangle's southern tip would be included in the purchase agreement, but if Jarussi prevailed in quieting title, she would be entitled to purchase from Farber "the portion of the abandoned ROW [the rectangular parcel] adjoining her land."

¶11 The District Court found that Farber had standing to bring its quiet title action and granted Farber's enforcement motion after determining that the parties had a "valid and binding contract under Montana law" comprised of "an offer by Farber and an unconditional acceptance of that offer by Jarussi." The court held, "Jarussi waived her right to continue with the quiet title litigation by unconditionally accepting Farber's counteroffer," and ordered the parties to comply with the agreement as follows: "Farber shall seek to quiet title to the triangular NE¼. Jarussi shall have the option thereafter to purchase adjoining property pursuant to the terms of the Settlement Agreement once title to the NE¼ is determined by the Court."

¶12 Jarussi appeals.

STANDARD OF REVIEW

¶13 Determining whether a contract exists—a central issue in this case—is a combined question of fact and law. *AAA Constr. of Missoula, LLC v. Choice Land Corp.*, 2011 MT 262, ¶ 17, 362 Mont. 264, 264 P.3d 709. We review the factual findings of a district court sitting without a jury under a clearly erroneous standard. *AAA*, ¶ 17. A district court's factual findings are clearly erroneous if they are unsupported by substantial evidence, if the court has misapprehended the effect of the evidence, or if reviewing the record leaves

this Court with the definite and firm conviction that a mistake has been made. We review evidence in the light most favorable to the prevailing party when determining whether the district court's findings were supported by substantial credible evidence. We review a district court's conclusions of law for correctness. *AAA*, ¶ 17.

DISCUSSION

¶14 *Did the District Court err by concluding the parties formed a legally binding settlement agreement?*

¶15 As the District Court noted, and as evidenced by the appellate briefing, "[t]he parties agree that the Settlement Agreement is a binding and enforceable contract, however, they advocate for starkly different interpretations of the Agreement." Before considering these interpretational arguments, however, we first consider whether a binding settlement agreement was formed by Jarussi and Farber. *Stensvad v. Miners & Merchs. Bank*, 196 Mont. 193, 204, 640 P.2d 1303, 1309 (1982) (before considering how to interpret a contract, this Court first determined "whether the District Court erred in finding that a contract existed"). We have previously held that settlement agreements are contracts, subject to the provisions of contract law. *Dambrowski v. Champion Int'l Corp*., 2003 MT 233, ¶ 9, 317 Mont. 218, 76 P.3d 1080.

¶16 Consistent with their shared perspective that a settlement agreement was reached, the parties offer no arguments for or against the existence of a contract. As a general rule, "we will not consider unsupported issue or arguments" because "this Court is under no obligation to locate authorities or formulate arguments for a party in support of positions taken on appeal." *In re Marriage of McMahon*, 2002 MT 198, ¶ 6, 311 Mont. 175, 53 P.3d

1266. However, although we "use this approach sparingly," this Court may "consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." *Leichtfuss v. Dabney*, 2005 MT 271, ¶ 37 n.8, 329 Mont. 129, 122 P.3d 1220 (*quoting United States Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 447, 113 S. Ct. 2173, 2178 (1993)). The District Court briefly mentioned the formation issue, reasoning only that "[w]hile the differing interpretations of the Agreement cast some doubt on the presence of the necessary meeting of the minds required for a valid contract, the parties' mutual assertion that an enforceable contract exists compels the Court to determine the parties' intent." However, in the proceeding, the parties largely assumed that a contract was formed—in their individual favor—and have not focused on the formation issue. We conclude that contract formation is an "antecedent and ultimately dispositive" issue of the dispute before this Court.

¶17 To be enforceable, a contract must contain four essential elements: 1) identifiable parties capable of contracting; 2) consent between those parties; 3) a lawful object; and 4) consideration. *Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶ 18, 349 Mont. 475, 204 P.3d 693 (citing § 28-2-102, MCA). "It is a well-established rule that there must be mutual assent or a meeting of the minds on all essential elements or terms to form a binding contract." *Chadwick v. Giberson*, 190 Mont. 88, 92, 618 P.2d 1213, 1215 (1980). "Consent is established when there has been an offer and an acceptance of that offer. More specifically, this Court has stated that in order to effectuate a contract there must be not only a valid offer by one party, but also an unconditional acceptance, according to its terms, by the other." *Keesun Partners v. Ferdig Oil Co.*, 249 Mont. 331, 337, 816 P.2d 417, 421

(1991) (citation omitted) (holding that "the purported contract fails for lack of consent" because "although some of the terms of the [contract] may have been agreed upon," the record indicated that "the parties were involved in an ongoing negotiation process regarding many essential terms of the contract and no finalized agreement was ever reached").

¶18 In *Patton v. Madison County*, 265 Mont. 362, 877 P.2d 993 (1994), two contracting parties argued on appeal whether their agreement was binding. We stated that "the intention of the parties, made clear on the record, was that the final settlement documents and covenants . . . . would not be effective until signed" and held that as a result, neither the offer nor acceptance was unconditional. *Patton*, 265 Mont. at 367, 877 P.2d at 996. In addition to the language of the contract, we considered the parties' actions following the asserted oral agreement. The Plaintiffs' attorney added restrictions to a list of already amended covenants. Defendants' counsel provided another set of amendments and responded with a letter stating that further discussion would be appreciated. Plaintiffs' counsel never responded to this letter but instead contacted the district court to schedule a trial date. We reasoned that "[t]hese activities are not those of two parties who have had a 'meeting of the minds.' The matters still at issue were not 'subsidiary,' or 'collateral,' they were central to the very performance of the contract." *Patton*, 265 Mont. at 367, 877 P.2d at 996 (quoting *Hetherington v. Ford Motor Co.*, 257 Mont. 395, 400, 849 P.2d 1039, 1043 (1993)). We concluded there was no meeting of the minds and, thus, no binding settlement agreement because "[t]he terms of the covenant were the essential matters at issue," which "could only have been drafted and approved by the parties" and could not "easily have

been settled by the court's ruling." *Patton*, 265 Mont. at 368, 877 P.2d at 996. The communications of counsel in the case *sub judice* bear similar characteristics to those in *Patton*.

¶19 In contrast, we enforced an agreement in *Hetherington* despite an argument that there was no meeting of the minds. Defendant Ford offered to pay a financial settlement in exchange for Hetherington releasing all claims against it. Hetherington accepted, asking for Ford and another co-defendant to send "settlement drafts and the appropriate releases" within ten days. *Hetherington*, 257 Mont. at 397, 849 P.2d at 1041. Before Ford delivered the payment and documentation, Hetherington sought to withdraw from the settlement and Ford filed a claim for specific performance. On appeal, Hetherington argued there was no meeting of the minds between the parties as to what "appropriate release" meant. We disagreed, reasoning that Ford's offer to pay a certain sum in exchange for a "full and final release of all claims" accepted by Hetherington, were "material elements [] capable of being carried into effect and will not violate the intentions of the parties," regardless of the parties' alleged misunderstanding of the term "appropriate release." *Hetherington*, 257 Mont. at 400, 849 P.2d at 1043 ("Matters which are subsidiary, collateral, or which do not go to the performance of the contract, are not essential and do not have to be expressed in the contract.") (citation omitted). We concluded that, because the District Court could enforce the agreement "by ruling that a simple release" of all claims be executed, there was a meeting of the minds between the parties. *Hetherington*, 257 Mont. at 401, 849 P.2d at 1043.

¶20 Jarussi argues the District Court erred by concluding she knowingly waived her right to further litigate title to the Triangle because her "single act of accepting Farber's offer to sell land . . . [was] not a 'course of acts and conduct' or 'acts inconsistent with' Jarussi's unrelated right to continue with her existing quiet title litigation" (quoting *Idaho Asphalt Supply v. State*, 1999 MT 291, ¶ 24, 297 Mont. 66, 991 P.2d 434). Jarussi argues the agreement had "no express provision . . . for any waiver," nor was there any evidence she agreed to waive her right to litigate further matters, or that she had even discussed it with Farber. She contends only a partial settlement was formed because "the only material terms in Farber's offer concerned the sale of land" but did not "contain all the essential terms of the parties' contract." Jarussi argues she "had no reason to believe" Farber was offering "full resolution of all litigation between the parties," nor was she "obligat[ed] to clarify that which she was unaware of."

¶21 Farber argues: "Certainly the agreement did not finally resolve the 'litigation.' A quiet title action with stipulated ownership of property subject to the action remained. But it did resolve the dispute between the parties over ownership of the Triangle." Farber agrees the agreement did not contain express language referencing the termination of all litigation, but insists this is not because the agreement was only partial. Farber argues language of express waiver was not used because "the quiet title action still has to be resolved based upon the stipulated facts," but the settlement itself is nonetheless complete because Jarussi "stipulated to certain facts which would control the result in the quiet title action." Specifically, Farber explains that by accepting its counteroffer, Jarussi agreed to stipulate, and not contest, Farber's position before the District Court that ownership of the

Triangle was vested in the defunct railway company and should thus pass to the adjoining landowners. Farber offers that, after Jarussi's stipulation, "all that remained" was for the District Court to quiet title to the Triangle, resulting in each party receiving title to the portion of the Triangle adjoining their respective properties and then executing the land sale option. Jarussi replies that Farber's use of the phrase "adjoining her land," when describing the stipulation, meant that "the Agreement does not apply to land that is not adjacent to Jarussi's current property." According to Farber, the agreement would allow the District Court to quiet title to the entire Triangle, but, according to Jarussi, further litigation will be required because title to the Triangle's southern tip, which is not adjacent to her land, would remain "outside the scope of Farber's offer and the resulting Agreement."

¶22 We conclude that the parties did not mutually assent to the scope of their proposed agreement. While they both believed there was unconditional agreement to their respective interpretation, the record demonstrates they disagreed about the nature of the litigation that would continue, and what land Jarussi would be able to purchase under the agreement. A review of the language of the purported agreement and the parties' actions immediately afterward, *see Patton*, 265 Mont. at 367, 877 P.2d at 996, demonstrates this. Virtually simultaneous with accepting Farber's counteroffer, Jarussi expressed her intention to amend her complaint, to which Farber's counsel, in obvious puzzlement, asked, "[c]an you expand on why [Jarussi] intends to amend her complaint if the parties have come to a settlement agmt [sic]?" Then, without receiving a clarifying response from Jarussi, Farber's counsel sent a second expert report to Jarussi's counsel for review and asked for

further advisement about Jarussi's position, while advising the District Court the parties had settled their claims—to which Jarussi's counsel promptly responded that Farber's counsel's statement was "not accurate. . . . If and when such an agreement is reached, we will be in touch." That led directly to an email debate by counsel to the District Court about what the parties had actually agreed upon, including a suggestion by Jarussi that the parties needed to finalize a stipulation regarding terms the parties had apparently verbally agreed to during a recent scheduling conference.

¶23 These are not the actions "of two parties who have had a 'meeting of the minds.'" *Patton*, 265 Mont. at 367, 877 P.2d at 996. The parties' rights to litigate issues in the case, and to buy or sell specific portions of the abandoned right of way, are matters "central to the very performance of the contract." *Patton*, 265 Mont. at 367, 877 P.2d at 996. They are not "subsidiary" or "collateral." *Hetherington*, 257 Mont. at 400, 849 P.2d at 1043. Consequently, there was no meeting of the minds in this case and no binding settlement.

¶24 The parties offer extensive arguments on how their communications line up with their interpretation of the agreement. While the District Court adopted Farber's theory, we believe that contract formation is the threshold issue and, having determined that no enforceable agreement existed between the parties, it is unnecessary for us to further interpret the agreement or address the parties' competing arguments. We do, however, agree with the District Court that Farber had standing to bring its quiet title claim pursuant to a plain reading of § 70-28-101, MCA ("An action [to quiet title] may be brought . . . by *any* person or persons, whether in actual possession or not, *claiming* title to real estate . . . .") (emphasis added).

¶25 We affirm the District Court's ruling on Farber's standing, but we reverse the remainder of its order enforcing the settlement agreement and remand this matter for further proceedings.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR