IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 19-0629

ALFRED DESCHAMPS, BAR II ENTERPRISES, L.L.C.,

Plaintiffs and Appellants,

v.

FARWEST ROCK, LTD, FARWEST ROCK PRODUCTS, FARWEST PRODUCTS, LLC, LUNDE BASTON, MIKE BASTON and DOES 1-10,

Defendants and Appellees.

APPELLEES' ANSWERING BRIEF

On Appeal from the Montana Fourth Judicial District Court
County of Missoula, Cause No. DV-18-1647
Honorable Elizabeth A. Best, Presiding

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Plaintiffs and Appellants Alfred Deschamps (hereinafter "Deschamps") and Bar 11 Enterprises, LLC (hereinafter "Bar 11") appealed this matter to the Montana Supreme Court after the district court granted summary judgment in favor of Defendants and Appellees Lunde Baston (hereinafter "Baston") and Farwest Rock Products (hereinafter "Farwest" and collectively "Baston and Farwest"). The issues raised by Deschamps and Bar 11 on appeal are restated as follows:

1. Did the district court properly grant summary judgment for Baston and Farwest when it found that Bar 11 lacked standing to bring a breach of contract claim because it was involuntarily dissolved in 2012?

2. Did the district court properly grant summary judgment for Baston and Farwest when it found that Deschamps lacked standing to bring a breach of contract claim because Deschamps was not an intended third-party beneficiary of the Sublease?

3. Did the district court properly grant summary judgment for Baston and Farwest when it found that Deschamps lacked standing to bring torts claims?

STATEMENT OF THE CASE

The district court properly granted summary judgment to Baston and Farwest on the grounds that neither Bar 11 nor Deschamps had standing to bring the claims asserted in this action. On December 10, 2018, Deschamps, on behalf

of himself and Bar 11, filed a Complaint in the Fourth Judicial District Court against Defendants Baston and Farwest, as well as FarWest Rock, LTD, Farwest Products, LLC, Mike Baston, and Does 1-10. Deschamps never served any other party other than Baston and Farwest.

During discovery, it was discovered that Bar 11 had been administratively dissolved by the Montana Secretary of State on December 3, 2012 - over six years before Deschamps filed the Complaint - for failing to file Annual Reports as required by state law. Despite Deschamps false statements to the contrary, Bar 11 has remained dissolved, and statutorily precluded from conducting any business in the state of Montana since that time. Consequently, Baston and Farwest moved for summary judgment on the grounds that Bar 11, as a dissolved entity, did not have standing to prosecute the case. Further, Baston and Farwest moved for summary judgment against Deschamps' claims on the grounds that he lacked standing in his personal capacity.

In ruling that Bar 11 lacked standing, the district court correctly concluded that the administrative dissolution of Bar 11 precluded the defunct entity from prosecuting the case. Further, in answer to Deschamps' argument that Bar 11 was authorized to "wind-up" its affairs, the district court properly concluded that the five-year "safe harbor" for entities to reinstate an administratively dissolved limited liability company was a reasonable time in which a company should wind-

up its affairs. The district also found that Deschamps, forming a new entity called Bar 11 Enterprises LLC after learning at his deposition that Bar 11 had been dissolved, did not place the original Bar 11 in good standing with the state of Montana. Rather, the district court correctly determined that the entity named in the lawsuit remained dissolved, and Deschamps' filing did not reinstate the dissolved LLC.

The district court also properly concluded that Deschamps himself lacked standing to bring claims against Baston and Farwest. Deschamps claimed that he was a third-party beneficiary to the purported sublease agreement between Bar 11 and Baston and Farwest. The district court properly determined the sublease agreement did not contemplate Deschamps as an intended third-party beneficiary because Deschamps could not show from the face of the agreement that the agreement was intended to benefit him personally. The district court also correctly concluded that Deschamps did not have standing to bring tort claims against Baston and Farwest because Baston and Farwest did not owe Deschamps a duty of care. Thus, the district court correctly determined that Deschamps did not have standing to prosecute the asserted claims against Baston and Farwest.

In sum, the district court properly and correctly determined Bar 11 did not have standing because it was a dissolved busines entity, and Deschamps did not have standing because he was not an intended third-party beneficiary of the

sublease agreement. The Court should therefore affirm the district court's granting of summary judgment to Baston and Farwest.

STATEMENT OF THE FACTS

On June 3, 1997, Deschamps, in his personal capacity, submitted an application for an opencut mining permit to the Montana Department of Environmental Quality ("MDEQ") for an opencut mine located in Section 1, Township 14 North, Range 21 West, Missoula County, Montana. [CR 34[1], ¶ 22; CR 35, Exhibit 17]. The site was referred to as the Crowfoot Site, and was assigned permit number DES-001. [*Id*.].

On June 4, 2003, Deschamps organized Bar 11 by filing Articles of Organization with the Montana Secretary of State. [CR 34, ¶ 1; CR 35, Exhibit 1]. On April 20, 2006, Deschamps and his wife, Rosemary F. Deschamps, entered into a Lease Agreement with Bar 11 on April 20, 2006, to lease five acres of land located within the NE¼NW¼ of Section 1, Township 14 North, Range 21 West, Missoula County, Montana. [CR 34, ¶ 6; CR 35, Exhibit 8]. Section 3 of the lease expressly provided Bar 11 with the authority to sublease the leased premises without the prior written consent of the Deschamps for any purpose, including gravel pit operations. [*Id*.]. On the same day, Bar 11 subleased the premises to

[1] Baston and Farwest are using the same numbering system to refer to the record as used by Deschamps. Thus, CR 34 refers to document number 34 in the Case Register (Baston and Farwest's Statement of Undisputed Facts).

FarWest Rock, LTD. [CR 34, ¶ 7; CR 35, Exhibit 9]. Mike Baston signed the sublease on behalf of Farwest Rock, LTD as its President. [CR 35, Exhibit 9]. The sublease described the subleased premises as the same five-acre parcel as was described in the lease between Deschamps and Bar 11. [*Id*.]. Mike Baston, as the principal shareholder of FarWest Rock, LTD provided Bar 11 with a personal guarantee for the payment and performance of the Lessees' obligations under the sublease. [*Id*.].

On November 10, 2007, the Deschamps entered into a First Amended Lease Agreement with Bar 11, which increased the leased premises from five acres to ten acres. [CR 34, ¶ 10; CR 35, Exhibit 10]. Bar 11 then executed a First Amended Gravel Pit Sublease Agreement with FarWest Rock, LTD on December 5, 2007, to increase the leased premises from five acres to the ten-acre parcel described in the amended sublease agreement. [CR 34, ¶ 11; CR 35, Exhibit 11]. As he did under the 2007 sublease, Mike Baston again provided Bar 11 with a personal guarantee for the payment and performance of the Lessees' obligations under the sublease. [*Id*.].

On November 6, 2009, Mike Baston, on behalf of FarWest Rock, LTD, submitted an Application for Assignment of Opencut Mining Permit to MDEQ requesting MDEQ assign opencut mining permit DES-001 to FarWest Rock, LTD. [CR 34, ¶ 23; CR 35, Exhibit 18]. The Application for Assignment was signed by

Deschamps and Mike Baston. [Id.]. By signing the application, Mike Baston and FarWest Rock, LTD attested they were assuming all responsibility for "outstanding permit and site issues." [CR 35, Exhibit 18]. The MDEQ issued a completeness letter to FarWest Rock, LTD for the amendment on November 13, 2009, which noted the site as the Crowfoot site #1918. [CR 34, ¶ 23; CR 35, Exhibit 19].

On February 24, 2010, FarWest Rock, LTD submitted an amendment to the MDEQ seeking to change the operator name on the Crowfoot site permit to FarWest Rock, LTD, and to increase the mine permit area to 50.9 acres. [CR 34, ¶ 24; CR 35, Exhibit 20]. The MDEQ approved the amendment by letter dated April 26, 2010, which confirmed the operator as FarWest Rock, LTD, and the permitted mine site as 50.9 acres. [CR 34, ¶ 24; CR 35, Exhibit 21]. The opencut mining permit was never transferred to any other party, and remains to this day in the name of FarWest Rock, LTD. [CR 34, ¶ 24; CR 35, Exhibit 7].

On October 14, 2011, Bar 11 and Lunde Baston d/b/a Farwest Rock Products signed a document titled "Gravel Pit Sublease Agreement," which purportedly subleased 50.9 acres of land to Baston and Farwest located in the NE¼NW¼ of Section 1, Township 14 North, Range 21 West, Missoula County, Montana. [CR 34, ¶ 14; CR 35, Exhibit 12]. The purported sublease did not assign the Crowfoot permit to Baston and Farwest, and makes no mention of Deschamps other than his signature on behalf of Bar 11. [CR 35, Exhibit 12].

In late 2011, Baston and Farwest ceased mining operations on the property because it was no longer economically feasible to mine gravel from the site, and, with the exception of the gravel wash plant, moved all the mining equipment off of the site by June 2012. [CR 34, ¶ 18; CR 35, Exhibit 7].

On December 3, 2012, Bar 11 was involuntarily dissolved by the Montana Secretary of State for failing to file Annual Reports as required by Montana statute. [CR 34, ¶ 2; CR 35, Exhibits 2, 3, and 4]. When Deschamps filed the Complaint in this cause on December 10, 2018, Bar 11 had been dissolved as a business entity for more than five years. [CR 34, ¶ 29; CR 35, Exhibit 22 (response to Request for Admission No. 13)].

STANDARD OF REVIEW

The Court reviews an order to grant or deny a motion for summary judgment *de novo*. *McClue v. Safeco Ins. Co. of Illinois*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604. A party seeking summary judgment must establish both the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Rule 56(c), M.R.Civ.P. The initial burden is on the moving party to demonstrate a complete absence of any genuine issue as to all facts considered material in light of the substantive principles that entitle the moving party to judgment as a matter of law. *McLeod v. State ex rel. Dep't of Transp.*, 2009 MT 130, ¶ 12, 350 Mont. 285, 206 P.3d 956. "All reasonable inferences that may be drawn from the offered

evidence should be drawn in favor of the party opposing summary judgment; however, inferences requiring a 'speculative leap' are inappropriate for summary judgment." *New Hope Lutheran Ministry v. Faith Lutheran Church of Great Falls, Inc.*, 2014 MT 69, ¶ 19, 374 Mont. 229, 328 P.3d 586.

If the moving party on a motion for summary judgment meets its initial burden, then the burden shifts to the nonmoving party to establish with substantial evidence, as opposed to mere denial, speculation, or conclusory statements, that a genuine issue of material fact does exist. *McLeod*, ¶ 12. Because the purpose of the summary judgment procedure is to promote streamlining of judicial process through "screening-out" and elimination of questions that do not merit resolution by litigation, the burden imposed upon the party opposing judgment is as substantial as that initially imposed upon the movant. *Duncan v. Rockwell Mfg. Co.*, 173 Mont. 382, 386, 567 P.2d 936, 938 (1977). If the court determines that no genuine issues of fact exist, the court must determine whether the moving party is entitled to judgment as a matter of law. *Gliko v. Permann*, 2006 MT 30, ¶ 12, 331 Mont. 112, 130 P. 3d 155.

SUMMARY OF ARGUMENT

The district court correctly determined that neither Bar 11 nor Deschamps had standing to bring the asserted claims against Baston and Farwest. Standing is a threshold jurisdictional requirement in every case brought before a Montana court,

which requires the plaintiff to have a personal stake in the outcome of the controversy at the commencement of the litigation. Thus, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute.

Here, Bar 11, which Deschamps had formed as a limited liability company under the Montana Limited Liability Company Act (the "Act") in June 2003, was administratively dissolved by the Montana Secretary of State in December 2012 because it failed to file annual reports as required by the Act. Despite Deschamps false assertion that Bar 11 was reincorporated in 2019 and therefore in good standing with the state of Montana, the district court correctly found that Bar 11 lacked standing by the time Deschamps filed the Complaint in the present action because Bar 11 was dissolved in 2012, and had no authority to act, including standing to sue, after that time.

The district court also properly analyzed Deschamps' argument that Bar 11 retained standing during its "wind-up" phase after dissolution. The district court properly found that the wind-up period provided under the Act was not perpetual, and even though the legislature had not provided a limit for wind-up, the period needed to be "reasonable." The district court therefore properly found that the five-year period provided in the Act to reinstate an administratively dissolved limited liability company was a reasonable time in which a dissolved company

should complete its wind-up. Thus, the court concluded that because this suit was filed more than five years after Bar 11 had been dissolved, Bar 11 lacked standing.

The district court also correctly concluded that Deschamps himself lacked standing to pursue contract claims against Baston and Farwest because he was not party to the putative sublease agreement between Bar 11 and Baston and Farwest. Further, the district court was correct in concluding that Deschamps lacked standing as a third-party beneficiary of that agreement because there was nothing on the face of the sublease that indicated Deschamps was an intended beneficiary of that agreement.

The district court was also correct in concluding that Deschamps lacked standing to prosecute tort claims against Baston and Farwest because Baston and Farwest did not owe Deschamps a duty of care. Further, Baston and Farwest were not parties to the contracts between FarWest Rock, LTD and were not party to the opencut mining permit with DEQ. Thus, the district court property concluded that Baston and Farwest did not owe Deschamps a duty of care under those contracts or the opencut mining permit.

And finally, Deschamps argument that the sublease was somehow reformed by agreement of the parties should be rejected by this Court because that issue was not raised by Deschamps at the district court.

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For these reasons, the Court should affirm the district court's granting of Baston and Farwest's Motion for Summary Judgment.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT BAR 11 DID NOT HAVE STANDING TO PROSECUTE THE CASE AGAINST BASTON AND FARWEST.

Standing is a threshold jurisdictional requirement in every case brought before a Montana court. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80 (citing *Bryan v. Yellowstone County Elementary Sch. Dist. No. 2*, 2002 MT 264, ¶ 19, 312 Mont. 257, 60 P.3d 381). The question of standing is whether the litigant is entitled to have the court decide the merits of the dispute. *Heffernan*, at ¶ 30. Standing requires the plaintiff to have a personal stake in the outcome of the controversy at the commencement of the litigation. *Heffernan*, at ¶ 30.

A. The District Court Correctly Determined That Bar 11 is not "In Active Good Standing."

There is no dispute that Deschamps formed Bar 11 as a limited liability company in June 2003 under the Act. [CR 34, ¶ 1]. There is also no dispute that Bar 11 was administratively dissolved by the Montana Secretary of State in December 2012. [CR 34, ¶ 2; CR 35, Exhibits 2, 3, and 4]. Deschamps, however, asserts that Bar 11 was reincorporated in September 2019 when Deschamps filed

new articles of incorporation. Deschamps' Appellate Brief at p. 33. Deschamps further asserts that Baston and Farwest's standing argument is somehow moot because of this supposed "reincorporation." *Id*. These statements are false, and the district court correctly recognized that fallacy, and found the entity Deschamps created in 2019 was a new entity, and not a reinstatement of the original entity, which did not have standing to enforce the sublease agreement with Baston and Farwest. District Court Order Granting Defendants' Motion for Summary Judgment [CR 52] ("Order") at p. 4.

As discussed above, there is no dispute that the Montana Secretary of State administratively dissolved Bar 11 in December 2012 because Bar 11 had failed to file annual reports as required by Montana law. [CR 34, ¶ 2; CR 35, Exs. 2, 3, and 4]. Deschamps apparently learned this fact at his deposition, which resulted in his filing new articles of incorporation mere minutes after his deposition was concluded. [CR 43, ¶ 3 and Exhibit A attached thereto]. Based on this filing, Descamps argued to the district court, falsely, that Bar 11 had been reincorporated, and was in "active good standing," which Deschamps asserted mooted Baston and Farwest's contention that Bar 11 lacked standing. [CR 38, pp. 8-10]. Deschamps makes the identical false argument to this Court. Deschamps' Appellate Brief at pp. 33–34.

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Montana statute is very specific as to the procedure to reinstate a limited liability company that has been administratively dissolved. Under the Act, reinstatement of an administratively dissolved limited liability company must be accomplished within five years in order to restore the company's right to carry on business in this state. § 35-8-912(1), MCA. The statute requires the dissolved entity to file an application with the Secretary of State that has been executed by a member or manager of the dissolved company. § 35-8-912(1), MCA. In seeking reinstatement, the company must also set forth the name of the limited liability company, state the assets of the limited liability company that have not been liquidated, and state that a majority of its members have authorized the application for reinstatement. § 35-8-912(1), MCA. Further, the application must submit a certificate from the Montana Department of Revenue stating that all taxes have been paid, and submit all of the annual reports that had not been filed with the Secretary of State. § 35-8-912(2), MCA. When all of the requirements are met, the Montana Secretary of State will issue a certificate of reinstatement, which authorizes the company to transact business in the state. § 35-8-912(3), MCA.

Here, Deschamps did none of these things. Deschamps did not file an application for reinstatement, did not provide the Secretary of State any of the statutorily required information, did not pay the delinquent taxes, and did not file the required annual reports. Thus, the Bar 11 entity that purportedly subleased

property to Baston and Farwest was not reinstated, and Bar 11 is not "in active good standing" with the state of Montana. Thus, Deschamps' assertions regarding the standing of Bar 11 to prosecute claims in this case are patently false.

As correctly identified by the district court, the entity formed by Deschamps in September 2019 was a new entity, and that entity is not named as a plaintiff in the present lawsuit. Order at p. 4. The district court's conclusion that the Bar 11 does not have standing to prosecute this case was therefore correct.

B. The District Court Correctly Determined that Five Years is a Reasonable Time for Bar 11 to Wind-Up and Liquidate.

Deschamps argues that Bar 11 has standing because it retained the authority to prosecute the present lawsuit after dissolution as part of the company wind-up process. Deschamps' Appellate Brief at p. 26. Under the Act, a limited liability company that has been administratively dissolved may carry on business only as necessary to wind-up and liquidate its business and affairs. §§ 35-8-914(6) and 35-8-901(2), MCA. The Act further specifies the acts that may be taken in winding up the affairs of the limited lability company, which include, among other things, the prosecution and defense of lawsuits. § 35-8-903(2)(a), MCA. The Act, however, does not specify a time limit within which the wind-up must be completed.

Deschamps apparently takes the position that the wind-up period for a dissolved limited liability company is perpetual. [CR 38 at pp. 6–8; Deschamps'

Appellate Brief at pp. 26–29]. The district court, however, reviewed Montana statutes and caselaw, as well as caselaw from other jurisdictions with similar statutory programs, and concluded that the wind-up period must be completed within a reasonable time. Order at p. 6. As noted by the district court, when a statute does not specify a time in which an act must be completed, the rules of statutory construction mandates that the allowed time shall be reasonable. *Id*., *citing Flint Cold Storage v. Dep't. of Treasury*, 285 Mich. App. 483, 496, 776 N.W.2d 387, 395 (2009) ("when a statute does not provide a specific time limit for the completion of a particular task, a reasonable time is implied."). The district court also looked to *Fletcher Cyclopedia of Corporations* for the proposition that "Where a state's business corporation laws do not provide an express time limitation for the winding up of corporate affairs, a dissolved corporation must finish liquidating its business and complete the winding up process within a reasonable time. What constitutes a reasonable time for a dissolved corporation to wind-up its affairs before ceasing to exist altogether is generally a question of law for the court."). 16A *Fletcher Cyclopedia of Corporations* § 8173.

In analyzing what would constitute a reasonable time to complete the wind-up of a dissolved limited liability company, the district court turned to the Act itself to find the five-year window provided for reinstatement. Order at p. 6 (referencing § 35-8-912, MCA). The district court thus concluded "because the

Montana Legislature deemed five years to be a reasonable time frame in which to seek reinstatement, the court determines that it is also reasonable for Bar 11 to have would up its affairs within that time period." Order at p. 7.

Further, the district court's five-year determination is generous in comparison to other jurisdictions with similar statutory schemes. For example, the state of Washington has determined that an administratively dissolved company that did not seek reinstatement needed to wind-up its affairs within the two-year statutory period in which the company could seek reinstatement. *Chadwick Farms Owners Association v. FHC LLC*, 166 Wash.2d 178, 189, 207 P.3d 1251, 1257 (2009). Further, once the statutory reinstatement period has expired and the company is cancelled, it can no longer prosecute and defend suits because it no longer exists as a legal entity. *Chadwick Farms*, 166 Wash.2d at 189, 207 P.3d at 1257.

Alabama provides administratively dissolved limited liability companies with two years to wind-up its business and affairs. *See Berks v. Cade*, 158 So.3d 438, 445 (2014) ("The date of the limited liability company's dissolution also triggers a limitation on its ability to commence an action or proceeding against third parties and provides protection from claims against the company. The period of time within which a dissolved limited liability company is to wind-up its business and affairs is two years from the date of dissolution.").

Under Oklahoma law, a limited liability company that fails to timely file its annual certificate and pay the required fee ceases to be in good standing, and may not maintain any action, suit, or proceeding until it has been reinstated. *In re White*, 556 B.R. 489, 494 (Bankr. N.D. Okla. 2016). However, if the company fails to file its annual certificate and pay its annual fee for three years in a row, the company's articles of organization are deemed cancelled and the company ceases to exist. *In re White*, 556 B.R. at 494. The company therefore has three years to wind-up its affairs.

By statute, all domestic business entities in Texas, including limited liability companies, must wind-up their affairs within three years of entity's termination. Tex. Bus. Orgs. Code Ann. § 11.356. Similarly, in Nevada, during the wind-up process, any remedy or cause of action available to or against a dissolved limited liability company or its managers or members arising before its dissolution must be commenced within two years after the date of the dissolution. *Gale v. Carnrite*, 559 F.3d 359, 363 (5th Cir. 2009) (citing Nev. Rev. Stat. Ann. § 86.505). Generally, "[o]nce the reinstatement/winding up period passes and the limited liability company's certificate of formation is canceled, it can no longer sue or be sued because it ceases to exist." 54 C.J.S. Limited Liability Companies § 74 (June 2020).

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As noted, Deschamps does not contest the district court's reasonableness analysis. Instead, Deschamps simply restates, nearly verbatim, the argument made to the district court regarding the right to wind-up the affairs of Bar 11. In support of his argument, Deschamps cites *Mejie v. Burlington Northern Santa Fe Railway Company*, Mont. Dis. LEXIS 2786 (8th Jud. Dist. Ct. 2004), and *In re Jefferson River Basin*, 1994 Mont. Water LEXIS 17 (Water Court 1994). Neither case, however, is relevant to the issue at bar. First, neither case is authoritative because they both deal with the statutory scheme for corporations, not limited liability companies. And second, neither case addresses the issue of what is a reasonable time in which a dissolved company must complete the wind-up of its business. Thus, neither of the cases cited by Deschamps address the question of what is a reasonable wind-up period for an administratively dissolved limited liability company.

The district court's analysis on the issue of a reasonable time in which Bar 11 could wind-up and liquidate its business was sound, and, importantly, Deschamps does not challenge the district court's analysis. The Court should therefore affirm the district court, and find that five years is a reasonable time in which an administratively dissolved limited liability company must wind-up and liquidate the business.

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II. THE DISTRICT COURT CORRECTLY DETERMINED THAT ALFRED DESCHAMPS DID NOT HAVE STANDING TO PROSECUTE THE CASE AGAINST BASTON AND FARWEST.

The district court correctly determined that Deschamps does not have standing to pursue contract claims against Baston and Farwest because Deschamps was neither a party to the agreement, nor an intended third-party beneficiary of the agreement. The district court also correctly determined that Deschamps lacked standing to bring tort claims for negligence and gross negligence because Baston and Farwest did not owe Deschamps a duty of care. Because the district court's analysis and conclusions regarding Deschamps' standing were correct, the Court should affirm the district court's granting of summary judgment on those issues.

A. Deschamps was not an Intended Third-Party Beneficiary of the Agreement.

Deschamps admits that he was not a party to the sublease between Bar 11 and Baston and Farwest. Deschamps' Appellate Brief at p. 29. Nonetheless, Deschamps argues that he has standing as a third-party beneficiary of the purported sublease between Bar 11 and Baston and Farwest. *Id*. Deschamps is incorrect because he cannot show from the face of the sublease that the agreement was ***intended*** to benefit him. Thus, the district court was correct to conclude that Deschamps does not have standing to enforce the sublease agreement.

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As recognized by the district court, the law regarding the requirements to prove third-party beneficiary status is well settled. In order to establish standing, a party claiming to be a third-party beneficiary of a contract must demonstrate that he is an ***intended*** beneficiary of the contract. *See Turner v. Wells Fargo Bank, N.A.*, 2012 MT 213, ¶ 15, 366 Mont. 285, 291 P.3d 1082 ("A stranger to a contract lacks standing to sue for breach of that contract unless he is an intended third-party beneficiary of the contract.") (citing *Kurtzenacker v. Davis Surveying, Inc.*, 2012 MT 105, ¶ 20, 365 Mont. 71, 278 P.3d 1002 ("A stranger to a contract lacks standing to sue for breach of that contract unless he is an intended third-party beneficiary of the contract."); and *Dick Anderson Const., Inc. v. Monroe Const. Co., L.L.C.*, 2009 MT 416, ¶ 46, 353 Mont. 534, 221 P.3d 675 ("This Court has held that unless he is an *intended* third-party beneficiary of the contract, a stranger to a contract lacks standing to bring an action for breach of that contract.")). In *Turner*, the Court set out the following criteria for a third-party beneficiary:

> Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Turner, ¶ 17.

In explaining the difference between the performance of a promise that benefits a third-party, and a promise made expressly for the benefit of a third-party, the Court stated:

> There is a plain distinction between a promise, the performance of which may benefit a third party, and a promise made expressly for the benefit of a third party. A plaintiff cannot merely assume that he is an intended third-party beneficiary to a contract; rather, ***he must show from the face of the contract*** that it was intended to benefit him. [Emphasis added, internal citations and quotations omitted].

Turner, ¶ 18 (citing *Kurtzenacker*, ¶ 20 ("A plaintiff cannot assume that he is an intended third-party beneficiary; rather, he must show from the face of the contract that it was intended to benefit him."); and *Williamson v. Montana Public Service Com'n*, 2012 MT 32, ¶ 40, 364 Mont. 128, 272 P.3d 71 ("A plaintiff cannot assume that he is an intended third-party beneficiary; rather, he must show from the face of the contract that it was intended to benefit him.")).

Here, Deschamps claims the sublease agreement was intended to benefit him. But as the district court property observed, Deschamps failed to produce any evidence from the face of the agreement to show the agreement was ***intended*** to benefit him. Thus, the district court property determined that Deschamps was not a

third-party beneficiary of the sublease agreement, and had no standing to enforce its terms.

B. The District Court Properly Dismissed Deschamps' Negligence Claims Because Baston and Farwest Did Not Owe a Duty to Deschamps.

Deschamps argues that the district court improperly dismissed his claims for negligence and gross negligence. Deschamps' Appellate Brief at p. 18. More specifically, Deschamps asserts that the district court conflated two distinct legal concepts: standing to sue on a contract and standing to sue in tort. *Id.* The district court, however, correctly identified that Deschamps' negligence and gross negligence claims were nothing more than an attempt to disguise the third-party beneficiary contract claim as a tort claim. The district court saw through the illusion, and correctly determined that Baston and Farwest owed no duty to Deschamps because Deschamps was not an intended beneficiary of the sublease agreement. Order at 8.

Deschamps does not dispute that a legal duty is one of the integral elements of a claim for negligence. Deschamps' Appellate Brief at p. 18. Throughout this case, however, Deschamps constantly identifies the sublease agreement as the source of the legal duty he asserts he is owed by Baston and Farwest. *See* Deschamps' Brief in Opposition to Defendants Motion for Summary Judgment [CR 38] at p. 11 ("The making of the sublease created a relation between

Defendants and Mr. Deschamps which is sufficient to impose a tort duty to reasonable care."); Deschamps' Appellate Brief at p. 23 ("Appellees owed Deschamps a duty not to negligently perform under the Sublease…"); Deschamps' Appellate Brief at p. 24 ("Appellees knew or should have foreseen that Deschamps was at risk in relying on Appellees to fulfill their contractual obligations."). Knowing that he was neither a party to the sublease agreement nor a third-party beneficiary of the sublease, Deschamps proceeds to argue that Baston and Farwest nonetheless owe him a duty to perform under the contract under a tort theory of negligence. Deschamps' Appellate Brief at pp. 22–25. Deschamps' tort claims, however, are nothing more than dress-up contract claims.

Deschamps begins the retailoring of his third-party beneficiary contract claim by arguing that privity of contract is not required to maintain an action in tort. Deschamps' Appellate Brief at pp. 20–23. The purpose of Deschamps' privity argument is to find a way to enforce the terms of a contract to which he is neither a signatory nor an identified beneficiary. Deschamps fails to recognize, however, that by not being in privity with Baston and Farwest, he must establish an independent source of duty in order to sustain a tort action against Baston and Farwest.

In the absence of privity, Deschamps must establish that Baston and Farwest owed him a legal duty independent of any contractual agreement. *See Garden City*

Floral Co. v. Hunt, 126 Mont. 537, 255 P.2d 352 (1953) (stating that "where there is no duty except such as the contract creates, the plaintiff's remedy is for breach of contract," and that to support a tort claim, "[t]here must be some breach of duty distinct from breach of contract."). When a party's claim is based solely on a breach of the specific terms of an agreement, the action sounds in contract. *Dewey v. Stringer*, 2014 MT 136, ¶ 8, 375 Mont. 176, 179, 325 P.3d 1236, 1239. Separate tort liability depends on whether there was a breach of a legal duty that would exist in the absence of a contract. *Dewey*, ¶ 8. To support an independent tort claim, there must be active negligence or misfeasance by the breaching party. *Dewey*, ¶ 8.

Here, Deschamps attempts to conger a duty by turning to professional negligence cases to assert that Baston and Farwest "knew or should have foreseen that Deschamps was at risk in relying on Baston and Farwest to fulfill their contractual obligations." Deschamps' Appellate Brief at p. 24. The "knew or should have foreseen" standard proffered by Deschamps comes directly from professional negligence caselaw, which is used to determine when a professional owes a duty to third-parties for the negligent performance of a contract. Deschamps' Appellate Brief at pp. 21–22 (citing *Redies v. ALPS*, 2007 MT 9, ¶ 50, 335 Mont. 233, 150 P.3d 930 ("[i]n recognizing tort liability in the absence of privity, we have concomitantly limited the class of plaintiffs to identifiable third

parties - typically, those who are known or are reasonably foreseeable by the professional…."); and Justice Nelson's descent in *Western Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶ 106, 359 Mont. 34, 249 P.3d 3 ("[t]he better standard, which is consistent with the public policy of this state, is the one that we have already adopted an applied to other professionals: the 'knew or should have foreseen' standard.")). This case, of course, is not a professional negligence case.

So rather than establishing an independent duty outside of the sublease agreement, Deschamps says Baston and Farwest are liable because they "knew or should have foreseen" that Deschamps could be harmed by their performance under the sublease agreement. This standard, which is only applicable to professional negligence cases, does not establish a legal duty separate from the contract to establish tort liability. *See Dewey*, ¶ 8. Thus, the district court recognized Deschamps' tort claim as nothing more than third-party beneficiary contract claims, and correctly determined that Baston and Farwest did not owe Deschamps a duty. Order at p. 8. The Court should therefore affirm the district court's dismissal of Deschamps' tort claims.

C. Deschamps' Negligence Claim is Simply an Attempt to Enforce the DEQ Permit.

Deschamps' tort claim also fails as to Baston and Farwest because they are not parties to the contract Deschamps is actually trying to enforce. Deschamps' negligence claim asserts that Baston and Farwest were negligent "when they failed

to remediate the mine site." Complaint [CR 1] at ¶ 27. As noted by the district court, the obligation to reclaim the mine site arises not from the sublease agreement, but from the permit with the DEQ. Order at p. 8, n. 2. While Deschamps contends that Baston and Farwest had a duty to exercise ordinary care during the reclamation process (Deschamps' Appellate Brief at p. 23), Baston and Farwest are not parties to the DEQ permit, and Deschamps has not established an independent legal duty requiring Baston and Farwest to reclaim the mine site. Baston and Farwest therefore owe no duty to Deschamps to reclaim the mine site, and the Court should affirm the district court's dismissal of Deschamps tort claims against Baston and Farwest.

D. Deschamps Failed to Serve the Defendants who are Legally Responsible for Reclamation of the Crowfoot Site.

For unknown reasons, Deschamps chose to not serve the Defendants who are legally responsible for the reclamation of the Crowfoot site. It is undisputed that FarWest Rock, LTD is the Operator under the Crowfoot Site Opencut Mining Permit, and therefore FarWest Rock, LTD and Mike Baston, as FarWest Rock, LTD's president, are the parties legally responsible for the restoration of the Crowfoot Site. [CR 34, ¶¶ 23-24; CR 35, Exhibits 18, 19, 20, and 21]. The original opencut gravel mining permit for the Crowfoot Site was submitted to the DEQ by Alfred Deschamps in October 1997, and the DEQ signed the reclamation contract with Deschamps on December 28, 1997. [CR 34, ¶ 22; CR 35, Exhibit

17]. On November 6, 2009, Mike Baston, as the president of FarWest Rock, LTD, submitted an Application for Assignment of Opencut Mining Permit to the DEQ to transfer the permit from Deschamps to FarWest Rock, LTD. [CR 34, ¶ 23; CR 35, Ex. 18]. The DEQ determined the application to be complete on November 13, 2009. [CR 35, Ex. 19].

Under the Opencut Mining Act, the "Operator" is the person who holds a permit issued pursuant to the Act. § 82-4-403(8), MCA. Thus, under the Opencut Mining Act, FarWest Rock, LTD is the "Operator" of the Crowfoot Site. Administrative rules adopted under the Opencut Mining Act require that the Operator comply with all provisions of the permit, as well as the Act itself and all regulations adopted thereunder. ARM 17.24.225(1). Further, the regulations provide that an Operator may allow another person to mine and process materials on the mine site, but the Operator remains responsible for compliance with the permit, regulations, and statutes. ARM 17.24.225(2).

Here, it is undisputed that FarWest Rock, LTD is the Operator under the Crowfoot Site permit, and the permit was never transferred to either Lunde Baston or Farwest Rock Products. Further, Mike Baston, as the president and principal shareholder of FarWest Rock, LTD, signed a personal guarantee for the Crowfoot Site when he leased the property from Bar 11 in 2006 and 2007. [CR 35, Exs. 9 and 11]. And while Lunde Baston did mine and process materials on the Crowfoot

Site for a short time under the FarWest Rock, LTD permit, the permit was never assigned to Baston or Farwest Rock Products. Consequently, it is FarWest Rock, LTD, as the holder of the MDEQ opencut mine permit and Operator of the Crowfoot Site, that is legally responsible for all restoration activities required pursuant to the permit, the Opencut Mining Act, and the regulations adopted thereunder. As such, it is FarWest Rock, LTD and Mike Baston, and not Lunde Baston or Farwest Rock Products, who may have a duty to Deschamps to restore the Crowfoot site. And it is presently unknown why Deschamps chose not to serve FarWest Rock, LTD and Mike Baston in this lawsuit.

III. DESCHAMPS' ARGUMENT THAT THE SUBLEASE WAS MODIFIED WAS NOT RAISED BELOW AND SHOULD BE REJECTED BY THIS COURT.

Deschamps asserts that the sublease between Bar 11 and Baston and Farwest was modified by an oral agreement. Deschamps' Appellate Brief, at pp. 31-33. Deschamps never made this argument to the district court. Because Deschamps raises this issue for the first time on appeal, the Court should decline to address it here.

It is well settled that the Montana Supreme Court will not address either an issue raised for the first time on appeal or a party's change in legal theory. *Becker v. Rosebud Operating Service, Inc.*, 2008 MT 285, ¶ 17, 345 Mont. 368, 191 P.3d 435; (citing *Day v. Payne*, 280 Mont. 273, 276, 929 P. 2d 864, 866 (1996) ("[a]n

issue which is presented for the first time to the Supreme Court is untimely and cannot be considered on appeal.")); *see also Nelson v. Davis*, 2018 MT 113, ¶ 13, 391 Mont. 280, 417 P.3d 333 ("[i]t is well established that we will not address an issue raised for the first time on appeal."); *Maier v. Wilson*, 2017 MT 316, ¶ 22, 390 Mont. 43, 409 P.d 878 ("[a]s a threshold matter, it is well-established we will not address an issue raised for the first time on appeal, or will we address a party's change in legal theory."). The basis for the rule is that "it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. *Becker*, at ¶ 17.

Here, Deschamps never made the argument to the district court that the subleased agreement was somehow modified by either an oral agreement or by the conduct of the parties. As such, Deschamps is raising the issue for the first time on appeal. The Court should therefore decline to address Deschamps argument regarding modification.

CONCLUSION

For the foregoing reasons, the district court's Order Granting Defendants Lunde Bason and Farwest Rock Products' Motion for Summary Judgment should be affirmed in its entirety.

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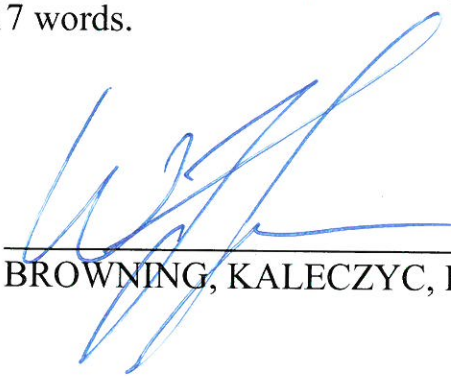
Dated this 30th day of July, 2020.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By _____
W. John Tietz

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), M.R.App.P., I certify that ***Appellees' Answering Brief*** is double spaced, is a proportionately spaced 14-point Times New Roman typeface, and contains 6,917 words.



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CERTIFICATE OF SERVICE

I, William John Tietz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-30-2020:

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