IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 20-0047

IN RE THE MARRIAGE OF:

CHARLENE G. PAYNE,

Petitioner/Appellee,

and

WILLIAM H. PAYNE,

Respondent/Appellant.

APPELLANT'S REPLY BRIEF

On appeal from the Montana Nineteenth Judicial District Court,
County of Lincoln,
Cause No. DR-94-83,
Honorable Matthew J. Cuffe Presiding

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I. SUMMARY OF APPELLANT'S ARGUMENTS IN REPLY

Paragraph 6(e)(3) of William and Charlene's Property Settlement Agreement ("PSA"), which Charlene refers to in her Answer Brief as the "30% clause," cannot be read and interpreted in a vacuum, devoid of context provided by the language of the PSA as a whole and the circumstances surrounding its execution. Nor can the 30% clause be read and interpreted without taking into account the provisions of the September 5, 1995 appraisal.

II. ARGUMENTS AND AUTHORITIES IN REPLY

A. The District Court Failed to Consider Evidence of the Circumstances Surrounding the Parties' Execution of the PSA, as Required by Montana Law:

In holding that the 30% clause was clear and unambiguous, the District Court erroneously determined that "[o]nly after the court finds that contract language is ambiguous may (sic.) consider extrinsic or parol evidence to resolve the ambiguity." (Dist. Ct. Dkt. #54, p. 2). However, Montana law requires the Court to consider the circumstances surrounding the execution of a document, "so that the judge is placed in the position of those whose language the judge is to interpret." Mont. Code Ann. § 1-4-102. *See also* Mont. Code Ann. § 28-3-402 ("A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.")

Although William repeatedly requested a hearing for purposes of presenting

evidence regarding the interpretation of the PSA (Dist. Ct. Dkt. #50 and #53), the Court determined that no hearing was needed because interpretation of the PSA was a "question of law." (Dist. Ct. Dkt. #54, p. 1). It is true that the interpretation of a contract is a question of law. *Mary J. Baker Rev. Trust v. Cenex Harvest States Cooperatives, Inc.*, 2007 MT 159, ¶19, 338 Mont. 41, 50, 164 P.3d 851, 857. But that does not render the facts surrounding the parties' execution of the PSA irrelevant:

> It is thus stated in the *Restatement (Second) of Contracts* § 212 cmt. b (1981): "It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, **but meaning can almost never be plain except in a context**." Accordingly, the Restatement takes the position that
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> > [a]ny determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.

Restatement (Second) of Contracts § 212 cmt. b (cross-references omitted). *Mary J. Baker Rev. Trust v. Cenex Harvest States Cooperatives, Inc., supra,* 2007 MT 159, ¶48, 338 Mont. at 62, 164 P.3d at 864 (emphasis added). *See also Broadwater Development, L.L.C. v. Nelson*, 2009 MT 317, ¶22, 352 Mont. 401, 411, 219 P.3d 492, 501 (holding that "[a] court is not required to conduct its

analysis in a vacuum. For purposes of interpreting a writing granting an interest in real property, evidence of the surrounding circumstances, including the situation of the property and the context of that parties' agreement, may be shown so that the judge is placed in the position of those whose language the judge is to interpret.").

Here, William was never afforded an opportunity to show the transaction "in all its length and breadth" so the District Court could determine the meaning or ambiguity of the PSA. His request for an evidentiary hearing was disregarded, and the Court ruled the 30% clause was clear and unambiguous based solely "on review of the pleadings, the PSA, and the applicable law." (Dist. Ct. Dkt. #54, p. 1). This was clearly erroneous under Mont. Code Ann. §§ 1-4-102 and 28-3-402.

In her Answer Brief, Charlene asserts that the even if the Court held a hearing as William requested, it would not have made any difference because "the best evidence of the parties' intent was William's performance of the contract." *Appellee's Brief*, pp. 36-38. What Charlene is referring to is the fact that William paid Charlene a portion of the proceeds from the sale of several parcels of real estate in 1996, and the payments Charlene received were not applied to reduce the balance of William's $225,000 installment payment obligation to Charlene under the PSA. Charlene takes this to mean that William believed the 30% clause created an additional obligation to her above and beyond the $225,000 installment

payment obligation. As stated in William's Appellate Brief, his position is that these payments should have been so applied, but were not due to an accounting error. *Appellate Brief*, p. 7.

But Charlene's argument cuts both ways. If we are to look at William's actions in performance of the PSA, we also need to look at Charlene's actions. By and through Charlene's attorney, Debra D. Parker, William executed a Montana Trust Indenture with respect to certain real property in Lincoln County, Montana, including the land upon which the assets of Payne Machinery, Inc. were located, for purposes of securing his $225,000 installment payment obligation to Charlene. *(Appellant's Brief*, Appendix, Exhibit C). After William paid Charlene in full, a Quitclaim Deed was recorded whereby Charlene conveyed to William all her right, title and interest to a parcel of real property which includes the land upon which the assets of Payne Machinery, Inc. were located. *(Appellant's Brief*, Appendix, Exhibit D). The fact this real property was used as security for William's $225,000 payment obligation, and that Charlene's Quitclaim Deed with respect to the property was recorded upon William's satisfaction of his obligation to her, runs directly contrary to Charlene's argument that the property is subject to the 30% clause of the PSA.

Furthermore, as discussed below, the September 6, 1995 appraisal referenced in Paragraph 6(e)(3) of the PSA values the <u>assets</u> of Payne Machinery,

Inc., with separate values calculated for shop and improvements, inventory, machinery, automobiles, office equipment and computers, and goodwill. *Doc. 56*, Exhibit G. If Charlene believed in good faith that the 30% clause created an additional obligation on William's part that survived the satisfaction of his $225,000 installment payment obligation, then why didn't she ever claim to be entitled to 30% of the proceeds of any sale of assets such as machinery, automobiles or office equipment over the past 20-plus years? The actions of both William and Charlene are evidence of the "length and breadth" of their transaction relative to the PSA, which the District Court must consider for purposes of interpreting the 30% clause.

B. The District Court Misapplied the "Four Corners" Doctrine, By Failing to Consider the PSA as a Whole For Purposes of Determining Whether the PSA Was Ambiguous:

In its December 19, 2019 Order, the District Court acknowledged that "[a]n ambiguity exists where the language of a contract, **as a whole**, reasonably is subject to two different interpretations." (Dist. Ct. Dkt. #54, p. 2) (citing *Mary J. Baker Rev. Trust v. Cenex Harvest States Cooperatives, Inc.,* 2007 MT 159, ¶19, 338 Mont. 41, 164 P.3d 851 (emphasis added)). However, the Court proceeded to rule that:

> Paragraph 6(e), **as a standalone paragraph**, provides for additional terms. There in the third paragraph, without qualification or condition, it provides that if Respondent sells any of the property identified on the September 6, 1995 appraisal, Petitioner is entitled to 30% of the net sale

proceeds. **There is no ambiguity as to this provision**.

Dist. Ct. Dkt. #54, pp. 2-3 (emphasis added).

Reading and interpreting a specific provision of a contract (*i.e.*, the 30% clause) vis-a-vis a "standalone paragraph" does not constitute an evaluation of the contract as a whole, for purposes of determining whether an ambiguity exists. It is a fundamental rule of contractual construction that "[p]articular clauses of a contract are subordinate to its general intent." Mont. Code Ann. § 28-3-307. Furthermore:

> 'It is [a] well-established rule of contractual construction that in interpreting a written instrument, the court will not isolate certain phrases of the instrument to garner the intent of the parties, but will grasp the instrument by its four corners and in the light of the entire instrument, ascertain the paramount and guiding intent of the parties. **Mere isolated tracts, clauses and words will not be allowed to prevail over the general language utilized in the instrument.**'

Krajacich v. Great Falls Clinic, LLP, 2012 MT 82, ¶13, 364 Mont. 455, 459-60, 276 P.3d 922, 926 (emphasis added). *See also* Mont. Code Ann. § 28-3-202 ("The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other.").

As discussed in William's Appellate Brief, the other three subsections of Paragraph 6(e) clearly pertain to his $225,000 installment obligation under Paragraph 6(c). Charlene's argument to the contrary in her Answer Brief is nonsensical. She asserts that William's right of prepayment under Paragraph 6(a)

could just as easily refer to his agreement to pay off the balance owing on the 1990 Buick under Paragraph 6(d), instead of his $225,000 installment payment obligation under Paragraph 6(c). *Appellee's Brief*, pp. 28-29. In Paragraph 6(d) of the PSA, William simply agrees to pay the outstanding balance due on the 1990 Buick, which Charlene is to receive under Paragraph 6(b) of the PSA along with the 1988 Toyota pickup. How and when William pays off the balance owing on the 1990 Buick is irrelevant, so long as he pays it. The balance is owed to a third party, not Charlene. William's right to prepayment without penalty under Paragraph 6(a) has no logical bearing whatsoever on his agreement to pay the outstanding balance due on the 1990 Buick pursuant to Paragraph 6(d).

Charlene's assertion that William's interpretation of the 30% clause would create an "unresolvable conflict" between Paragraphs 6(e)(3) and (4) of the PSA and result in a "twisted and nonsensical interpretation" of the 30% clause *(Appellee's Brief*, pp. 26-27) also falls flat. Paragraph 6(e)(3) of the PSA provides that Charlene is to receive 30% of the net sales proceeds from any sale of "any of the property identified on the September 6, 1995 appraisal," except for "the sale of inventory in the ordinary course of business." Paragraph 6(e)(4) provides that the entire unpaid principal and accrued interest shall be paid to Charlene "[i]n the event William H. Payne sells Payne Machinery, Inc."

There is a fundamental difference between a sale of specific business assets

under Paragraph 6(e)(3) and a sale of Payne Machinery, Inc. under Paragraph 6(e)(4). The September 6, 1995 appraisal referenced in Paragraph 6(e)(3) of the PSA values the assets of Payne Machinery, Inc., with separate values calculated for shop and improvements, inventory, machinery, automobiles, office equipment and computers, and goodwill. (Dist. Ct. Dkt. #56, Exhibit G). For purposes of Paragraph 6(e)(4), the parties defined a sale of Payne Machinery, Inc. as "a sale of 50% or more of the assets and/or outstanding stock in Payne Machinery, Inc., or a voluntary or involuntary dissolution or winding up of Payne Machinery, Inc.".

William's agreement to pay Charlene 30% of the net proceeds from the sale of individual assets of Payne Machinery, Inc. (except inventory sold in the ordinary course of business) is consistent with his agreement to pay the entire unpaid principal and accrued interest due to Charlene upon the sale of Payne Machinery, Inc. If William were to sell assets securing his $225,000 installment payment obligation, Charlene would receive a portion of the sale proceeds, to be applied toward the amount owed. But if William were to sell Payne Machinery, Inc. itself (as defined in Paragraph 6(e)(4)), then the entire balance owing to Charlene became due and payable. Reading and interpreting the 30% clause in this manner–*i.e.*, as providing security for William's $225,000 installment payment obligation--is fair and reasonable and consistent with the PSA as a whole.

C. The 30% Clause of the PSA Must be Read and Interpreted in Conjunction With the September 6, 1995 Appraisal, Which the

District Court Failed to Do:

The reference to the September 6, 1995 appraisal in the 30% clause illustrates another issue which cannot be resolved without considering evidence beyond the four corners of the PSA. As stated in William's Appellate Brief, this appraisal was never made part of the PSA, as an exhibit or otherwise, nor was it of record with the Court when Judge Cuffe issued his December 19, 2019 Order. *Appellate Brief*, p. 19. Nevertheless, the Court held that "[t]he business Payne Machinery, Inc. and the real property it is located on were identified on the appraisal." (Dist. Ct. Dkt. #54, p. 2). Without ever seeing the appraisal, the Court simply accepted at face value the unverified representation of Charlene's attorney that "[t]he 1995 appraisal includes Payne Machinery, the residence, and all of the other property identified in the PSA." (Dist. Ct. Dkt. #46, p. 2, ¶8). In so doing, the Court essentially considered "evidence" beyond the four corners of the PSA. But it wasn't really evidence at all--it was simply an allegation made by Charlene's counsel, without any evidentiary support.

In what appears to be a last-ditch effort to deny William any opportunity for review of District Court's Order and Judgment entered on December 19, 2019 and February 3, 2020, Charlene claims that William never contested her representation to the Court regarding the 1995 appraisal, and thus failed to preserve the issue for appeal. *Appellee's Brief*, pp. 24-25. This is incorrect.

Although William repeatedly requested an evidentiary hearing prior to the Court's December 19, 2019 Order, the Court determined that no hearing was needed. But even more importantly, William put this precise issue squarely before the District Court in his Response Brief filed on February 3, 2020:

> If we are to apply the language as written, the 30% applies to the property identified in the appraisal. Payne Machinery was not appraised as a whole but as individual components. It is those components which were identified on the September 6, 1995 appraisal. It is those components which were addressed by the Respondent in his submission to the Court (footnote omitted). The equipment has new equipment included which was not part of the property appraised. Inventory has new acquisitions acquired after September 6, 1995, which were not appraised. Goodwill is not the same as existed at the time of the appraisal and thus was not appraised. Goodwill is an accounting entry measuring the difference between the acquisition price of a business and its tangible assets. It is carried on the books and at one time was amortized. The difference between the tangible asset value and the selling price at this time could not exist at the time of the appraisal. Similarly, new inventory which did not exist at the time of the appraisal could not have been appraised.
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> (Dist. Ct. Dkt. #63, pp.3-4).

Unfortunately, however, the Court never even considered William's Response Brief because it signed the proposed Judgment drafted by Charlene's counsel the same day. (Dist. Ct. Dkt. #64). Under Rule 2(a), Unif.Dist.Ct.R., William had 14 days to file his Brief, which was in response to Charlene's Brief in Support of Motions for Entry of Judgment and For Award of Fees and Costs, filed on January 24, 2020. But the Court entered its Judgment against William before his Response Brief was due, and in fact, the same day as he filed it with the Court.

Charlene's representation that William failed to preserve this issue for appeal is simply untrue.

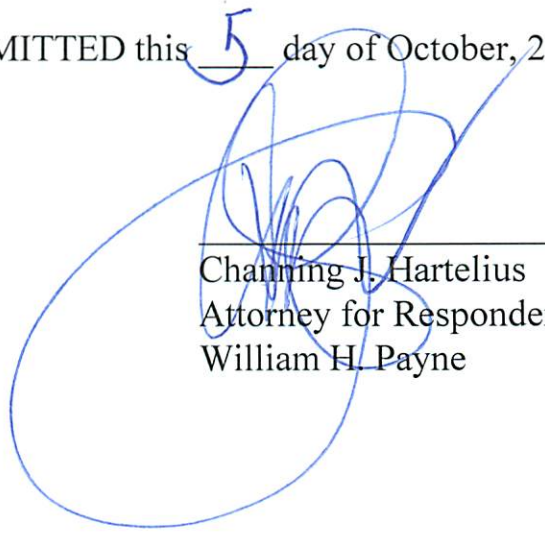
D. William Should Be Awarded His Attorney Fees on Appeal:

In her Brief, Charlene requests an award of fees and costs on appeal pursuant to Paragraph 19 of the PSA. *Answer Brief*, p. 44. Paragraph 19 of the PSA only pertains to attorney fees, not costs as Charlene claims. However, this provision of the PSA is reciprocal, thus entitling William to recover his reasonable attorney fees if successful on appeal.

III. CONCLUSION:

"[C]ontracts are not created in a vacuum." *Broadwater Development, L.L.C. v. Nelson, supra*, 2009 MT 317, ¶20, 352 Mont. at 410, 219 P.3d at 500. Therefore, they cannot be interpreted in a vacuum. Contrary to Charlene's allegations in her Answer Brief, William is not seeking to *create* ambiguity in the PSA. Instead, he is seeking to *resolve* ambiguity by reading and interpreting the 30% clause in the context of the PSA as a whole and the circumstances surrounding its execution, rather than in isolation. For the reasons set forth herein and in Appellant's Brief, William respectfully requests that the District Court's Order and Judgment entered on December 19, 2019 and February 3, 2020 be reversed and this proceeding remanded so that William and Charlene's intent as to the 30% clause of the PSA can be properly determined.

RESPECTFULLY SUBMITTED this 5 day of October, 2020.



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CERTIFICATE OF SERVICE

I certify that I filed this **Appellant's Reply Brief** with the Clerk of Montana Supreme Court and that I have mailed a copy to each attorney of record and any other party not represented by counsel as follows:

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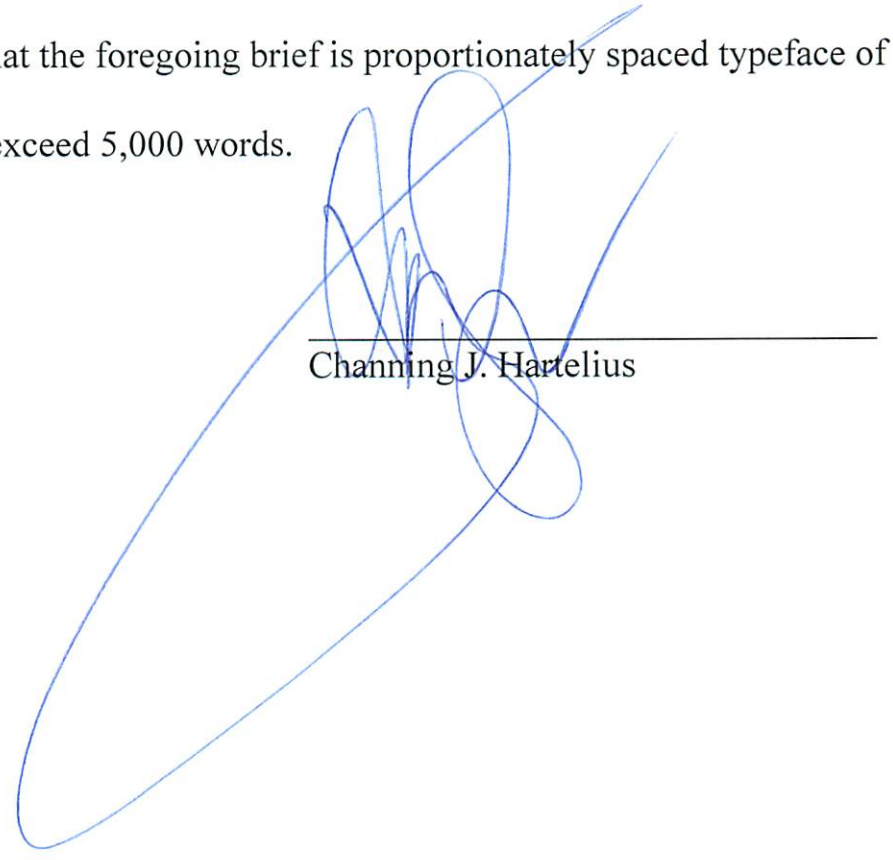
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is proportionately spaced typeface of 14 points and does not exceed 5,000 words.



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I, Channing J. Hartelius, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-05-2020:

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