IN THE SUPREME COURT OF THE STATE OF MONTANA

THOMAS KONESKY, Appellant, vs. KEVIN KELLER; KAREN L REIFF; CHURCH, HARRIS, JOHNSON & WILLIAMS, P.C., Appellees. KEVIN KELLER, Third-Party Plaintiff, vs. DONITA KONESKY, Third-Party Defendant.	No. DA 21-0040

APPELLEES' ANSWER BRIEF

On Appeal from the Montana Eighth Judicial District Court
Cascade County District Court Cause No. DV 19-568
The Honorable Elizabeth Best, Presiding

May 10, 2021

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STATEMENT OF ISSUES

Did the District Court err in granting summary judgment to CHJW on Mr. Konesky's First Amended Complaint, Count I?

STATEMENT OF THE CASE

The operative pleading is Plaintiff Thomas Konesky's ("Mr. Konesky") First Amended Complaint against Karen Reiff and Church, Harris, Johnson & Williams, P.C. (collectively "CHJW") and Kevin Keller ("Mr. Keller"). Dkt. 2.

After exchanging written discovery and conducting depositions, Mr. Konesky filed his motion for summary judgment on liability against Mr. Keller, with associated supporting documents. Dkt. 21, 22, 23. CHJW did not oppose Mr. Konesky's request for summary judgment against Mr. Keller, agreeing that Mr. Keller breached his contract with Mr. Konesky and breached the covenant of good faith and fair dealing, causing Mr. Konesky's injuries and damages. Dkt. 25. Mr. Keller opposed Mr. Konesky's motion for summary judgment. Dkt 26, 27.

The Court entered its Order Granting In Part and Denying In Part Plaintiff's Motion For Summary Judgment (Konesky SJ Order). Dkt 33. The District Court granted summary judgment to Mr. Konesky and against Mr. Keller on Count II (Breach of Contract) and Count III (Breach of the Covenant of Good Faith and Fair Dealing). The District Court determined the transaction documents for the sale of Mr. Konesky's ranch to Mr. Keller unambiguously required Mr. Keller to provide

Mr. Konesky the residential interest he reserved in the transaction documents, along with related contractual benefits. Dkt. 33 at 6-8. Further, the District Court found Mr. Keller breached the transaction documents and the covenant of good faith and fair dealing when he failed to provide Mr. Konesky his reserved residential interest and related contractual benefits. *Id.* Finally, the District Court found Mr. Keller responsible for all Mr. Konesky's claimed injuries and damages. Dkt. 33 at 7-8.

Predicated on the District Court's grant of summary judgment to Mr. Konesky on his contract and covenant of good faith and fair dealing claims, CHJW sought summary judgment on Count 1 (Legal Malpractice) of Mr. Konesky's First Amended Complaint. Dkt. 35 and 36. Mr. Konesky opposed CHJW's motion for summary judgment. Dkt 41. The District Court entered its Order Granting Defendant CHJW's Motion for Summary Judgment (CHJW SJ Order). Dkt. 50.

Mr. Konesky sought Rule 54(b) certification of the CHJW SJ Order. Dkt. 65 and 66. CHJW supported Mr. Konesky's request for Rule 54(b) certification. Dkt. 71. The District Court ordered Rule 54(b) certification. Dkt. 74.

Notice of appeal was filed on January 21, 2021. Dkt 82. This Court approved the Rule 54(b) certification and appeal on February 2, 2021.

STATEMENT OF THE FACTS

In support of its motion for summary judgment, CHJW adopted, for that purpose, Mr. Konesky's statement of facts submitted in support of his motion for

summary judgment against Mr. Keller. See, Dkt. 22 and 36. Although Mr. Konesky tells a longer story in Appellant's Brief, the facts necessary and sufficient for resolution of this appeal are stated below.

CHJW assisted Mr. Konesky with the sale of his ranch to Kevin Keller. Dkt. 2, ¶¶9-10; Dkt. 3, ¶9. The sale closed in January 2013. Dkt. 22, ¶¶1-17. Integral to the purchase and sale transaction, Mr. Konesky retained a residential interest in the ranch which allowed Mr. Konesky and his wife Donita to live in the ranch house until 2027, approximately 15 years. *Id.*, ¶¶9, 13, 15, 16.

The purchase and sale transaction documents required the buyer—Mr. Keller—to secure an insurance policy covering damage to, or loss of, the ranch house. *Id.*, ¶15. The transaction documents required the mandated insurance to be acceptable to Mr. Konesky and made jointly payable to Mr. Keller and to Mr. Konesky. *Id.* Although Mr. Keller secured the mandated insurance coverage in the amount of $175,000, the acquired policy was payable only to Mr. Keller and not to Mr. Konesky, contrary to the parties' agreement. *Id.*, ¶18.

The ranch house burned on September 2, 2017. *Id.*, ¶19. The cause of, and responsibility for, the fire is now in dispute between Mr. Keller and Mr. Konesky. See, Dkt. 59. The house was a total loss. Dkt. 22, ¶19.

Instead of using the $175,000 fire insurance proceeds to replace the burned ranch house, provide substitute housing for Mr. Konesky, or pay Mr. Konesky for

damage to his retained residential interest, Mr. Keller pocketed the insurance money, ultimately using it to pay a portion of his debt on the ranch. *Id.*, ¶25.

Mr. Konesky brought this action against Mr. Keller and CHJW. Count I of Mr. Konesky's First Amended Complaint alleges a claim of legal malpractice against CHJW. Dkt. 2 at ¶¶ 30-34. Count II and Count III of Mr. Konesky's First Amended Complaint allege claims for breach of contract and breach of the covenant of good faith and fair dealing against Mr. Keller. *Id.* at ¶¶ 35-43. Count IV asserts a claim for Breach of the Montana Residential Landlord and Tenant Act of 1977. *Id.* at ¶¶ 44-48.

Missing from Mr. Konesky's statement of facts is reference to the controlling portions of the District Court's Konesky SJ Order. Dkt. 33. Predicate to resolution of CHJW's motion for summary judgment are the following rulings within the District Court's Konesky SJ Order, Dkt 33:

> Taken as a whole, it is clear that the Mortgage provisions governing insurance required Keller to obtain replacement value insurance payable to Konesky for the "Improvements," which include the house, and that he failed to obtain adequate insurance, failed to purchase insurance payable to Konesky "in a manner satisfactory to [Konesky]" in the event of a loss, and failed to use the proceeds to pay the cost of repairing or replacing the loss. Instead, he obtained insurance with proceeds payable to himself, applied the proceeds to pay down his own debt, and failed to even attempt to determine whether this was satisfactory to Konesky.
>
> The Lease expressly terminates "November 30, 2027, or such earlier date as [Konesky] no longer wishes or is able to reside in the leased premises and permanently vacates the premises."

> Lease, ¶9. It further expressly provides for a procedure in the event of total destruction or damage by fire. First, a determination of whether the premises can be repaired within thirty working days was necessary. Second, following a determination in the negative, Keller was required to give Konesky ten days' notice of his intent to terminate the Lease. Keller did neither.
>
> Moreover, reading the Residential Lease Agreement together with the Mortgage and other agreements which were part of the same transaction to determine the true intent of the parties, it is clear that the parties intended for Konesky to live in the house until November 30, 2027, rent free. ¶¶3 and 4, Lease. … The Mortgage required Keller to repair or replace the house to Konesky's satisfaction, and to carry enough insurance to cover replacement. ¶¶4.3, 9, Mortgage. Taking all of the agreements together, the intent of the parties to allow Konesky a rent-free abode until November 30, 2027, is clear. By inadequately insuring the property, by not consulting Konesky after the fire, by receiving the proceeds from the fire himself, by not investigating whether the house could be replaced, by not giving notice to Konesky, and by using the proceeds to pay down the debt, Keller breached the contract with Konesky. Konesky lost his home and his residence without compensation.

Konesky SJ Order, Dkt. 33 at 6-7.

The District Court further held:

> …It is undisputed that Konesky's financial losses and loss of his home are the direct consequence of Keller's breach. It was not the fire that caused the damages, because the agreements provided for a process to keep Konesky in a repaired or replaced home. It was Keller's breach of the agreements. Keller presented no evidence, material or otherwise, to dispute this conclusion. However, the parties do have genuine material fact disputes as to the amount of damages.
> …
> The undisputed facts show that Keller unilaterally terminated the Lease despite the requirements in the Lease and the Mortgage

> protecting Konesky's right to a residence through November 30, 2027, and safeguards for insurance in the event of fire which protected Konesky's right to have the house repaired or replaced. Moreover, regardless of the Lease, the Mortgage itself protected Konesky's right to live on the premises through November 30, 2027, and to have insurance proceeds used to repair or replace the house.
>
> Keller does not dispute that he unilaterally breached the Lease, or that he violated the provisions of ¶4.1 of the Mortgage. These actions violated the intent and purpose of the agreements as a whole. Under these facts, Konesky is entitled to judgment as a matter of law on his claim that Keller violated the covenant of good faith and fair dealing and caused him damages.

Konesky SJ Order, Dkt. 33 at 7-9.

The Konesky SJ Order confirms Mr. Konesky's entitlement to recover his damages, fees, and costs against Mr. Keller for breach of contract. This ruling establishes as a matter of law that CHJW did not breach any duty to Mr. Konesky. Further, the District Court's Konesky SJ Order confirms CHJW's conduct did not cause Mr. Konesky damages.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's grant or denial of a summary judgment motion de novo. *Crane Creek Ranch, Inc. v. Cresap*, 2004 MT 351, ¶8, 324 Mont. 366, 103 P.3d 535. A district court's legal conclusions are reviewed for correctness. *Id*.

SUMMARY OF ARGUMENT

Mr. Keller's breach of contract and breach of the covenant of good faith and

fair dealing caused Mr. Konesky's claimed injuries and damages. Dkt. 33 at 5-9. The Konesky Ranch purchase and sale transactional documents, concerning which CHJW provided professional services, secured to Mr. Konesky the rights and remedies he could reasonably expect from CHJW's representation of him. *Id.* The District Court's Konesky SJ Order also confirmed CHJW satisfied its duty of care and did not cause Mr. Konesky's claimed injuries and damage; Mr. Keller did. *Id.*

Building on its earlier Konesky SJ Order, the District Court confirmed CHJW owed no additional duties on which Mr. Konesky could base his claim for CHJW's liability. Dkt. 50. CHJW, having secured to Mr. Konesky his contractual rights and remedies, and having no further duties, cannot be liable to Mr. Konesky for professional negligence. *Id.*

Apparently seeking to recover duplicative remedies from separate defendants, Mr. Konesky argues for CHJW's liability based on nonexistent duties. Mr. Konesky argues the District Court erroneously determined CHJW had no duty and that he was deprived of the opportunity to present necessary expert testimony supporting the "scope" of CHJW's duty. Mr. Konesky speculates that if CHJW had lived up to the "scope of duty," as his undisclosed expert would define it, he would have never endured Mr. Keller's contract breach and more readily recovered damages. Mr. Konesky's arguments related to "scope of duty" are contrary to Montana law and lack any admissible evidentiary support.

The question of duty, including the scope of any duty, is a question of law for Montana courts. This principle of Montana negligence law is longstanding and not subject to reasonable challenge. Despite this, Mr. Konesky argues for a "two-part" duty formulation, with the second part of the analysis determining the "scope of duty" through a battle of experts. He seeks this "two-part" duty formulation in an effort to avoid his failure to identify any genuine issues of material fact regarding CHJW's alleged breach of its duty of care. He also ignores the reality that his duty formulation would surrender to his undisclosed expert the courts' obligation to define CHJW's duty. Mr. Konesky's unsupported arguments would upend the structure of Montana negligence law.

Even if CHJW's "scope of duty" were determined through expert testimony (it is not), other than unsupported speculation, and general references to undisclosed expert testimony, Mr. Konesky proffered no evidence to support his arguments CHJW breached its duty of care. Instead, he speculates about the possible effect of an unutilized draft lease on the final, signed transactional documents and the effect of non-existent document terms on his ability to prove his damages. Mr. Konesky's speculation is not a substitute for admissible evidence. He failed in his burden under Rule 56, M.R.Civ.P.

Further, and independently sufficient to defeat his claim against CHJW, Mr. Konesky cannot establish a causal relationship between CHJW's alleged conduct

and the damages he has already been determined to have the right to recover from Mr. Keller. Mr. Keller breached his contract with Mr. Konesky, and Mr. Keller breached the associated covenant of good faith and fair dealing. Mr. Keller caused all Mr. Konesky's damages. Mr. Konesky can recover for all his claimed damages, and his fees, from Mr. Keller. He cannot recover a second time from CHJW.

CHJW is entitled to summary judgment on Mr. Konesky's First Amended Complaint, Count I.

ARGUMENT

I. The District Court Correctly Addressed CHJW's Duty To Mr. Konesky.

A. The Determination of Duty is a Question of Law For The Courts.

1. Duty is a question of law.

Contrary to Mr. Konesky's argument, "[t]he question of whether a legal duty is owed by one person to another, **as well as the scope of any such duty**, are questions of law." *Webb v. T.D.,* (1997) 287 Mont. 68, 72, 951 P.2d 1008, 1011, (emphasis added), citing *Nautilus Ins. Co. v. First Nat'l Ins., Inc.,* (1992) 254 Mont. 296, 837 P.2d 409, 411.

This Court has explained the framework within which Montana courts determine duty as a matter of law: "...[A]ctionable negligence arises only from the breach of a legal duty; the existence of a legal duty is a question of law to be determined by the district court." *Estate of Strever v. Cline*, (1996) 278 Mont. 165,

171, 924 P.2d 666, (internal quotations and citations omitted). "The existence of a duty of care depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against the imposition of liability. *Id.* at 173 (citing *Maguire v. State*, (1992) 254 Mont. 178, 189, 835 P.2d 755, 762. "In analyzing whether a duty exists, (the court) consider(s) whether the imposition of that duty comports with public policy, and whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff." *Fisher v. Swift Transp. Co., Inc.*, 2008 MT 105, ¶17, 342 Mont. 335, 181 P.3d 601 (citing *Henricksen v. State*, 2004 MT 20, ¶21, 319 Mont. 307, 84 P.3d 38). "The policy considerations weighed to determine whether to impose a duty include:

> (1) the moral blame attached to the defendant's conduct; (2) the desire to prevent future harm; (3) the extent to of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (4) the availability, cost and prevalence of insurance for the involved.

Henricksen, 2004 MT 20, ¶21 (quoting *Estate of Strever*, 278 Mont. at 173).

These oft-repeated principles of law provide the foundation of negligence liability and are not subject to reasonable challenge. Given this truth, Mr. Konesky's criticism of the District Court's reliance on *Rhode v. Adams*, 1998 MT 73, ¶9, 288 Mont. 278, 957 P.2d 1124, is misplaced. Appellant's Brief at 21. While *Rhode* on its facts did concern the question of a lawyer's duty to a non-client, this Court, as predicate to its analysis of that issue made the unassailable statement: "We have

further held that the question of whether a legal duty is owed by one person to another is a question of law. See, *Webb v. T.D.*, (1997) 287 Mont. 68, …" *Id.* The District Court's reference to *Rhode* in its CHJW SJ Order, Dkt. 50 at 4, (and the reference in *Rhode* to *Webb*, and the reference in *Webb* to *Nautilus*, and so on) is nothing less than a reference to the deeply rooted and unbroken line of authority reserving to Montana courts the issue of duty, including the scope of duty.

Despite these long-standing authorities, Mr. Konesky argues the District Court incorrectly analyzed CHJW's duty to Konesky. Appellant's Brief at 19-28. Mr. Konesky's argument fails to provide the proper context for the District Court's Order and finds no support in Montana law.

2. Konesky's proffered "two-part" duty analysis finds no support in Montana law and does not convert duty into a fact question resolved through a battle of experts.

Konesky urges the Court to adopt an analytical approach which divides the issue of duty in legal malpractice cases into two subparts—(1) existence of duty and (2) scope of duty--with the "scope of duty" subpart dependent on competing expert testimony. Appellant's Brief at 19-20. The purpose for Mr. Konesky seeking application of this formulation is to provide the foundation for his next argument – that the District Court improperly determined the scope of CHJW's duty.

Mr. Konesky's arguments fail because his duty formulation is wrong. This Court has not followed Mr. Konesky's argued-for formulation of duty. Instead, it

has adhered to its longstanding practice of requiring the District Court, in the first instance, to determine duty "[considering] whether the imposition of that duty comports with public policy, and whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff." *Fisher* at ¶17 (citing *Henricksen* at ¶21).

Mr. Konesky embarks on his "two-part" duty analysis with a perfunctory reference to a law review article written in 1976 and a "see also" reference to *Aetna Finance Co. v. Ball*, (1989) 237 Mont. 535, 538, 774 P.2d 992, 994. Appellant's Brief at 19-20. These authorities cannot bear the weight of Mr. Konesky's novel duty analysis.

This Court's decision in *Aetna* does not support Mr. Konesky's proffered duty formulation. On its facts, *Aetna* is distinguishable. On the law, *Aetna* stands for the well-established proposition that whether a party satisfied her duty of care can be circumstance specific.

Foremost, the *Aetna* opinion is distinguishable on its facts and procedural circumstances. *Aetna* involved a trial to the District Court, not summary judgment proceedings, in which the Court was required to resolve a dispute about the scope of professional services an attorney agreed to perform for his former client. In findings of fact, the District Court determined the involved lawyer fulfilled his agreed-to duty

to the client. *Aetna*, 237 Mont. at 536-538. This Court affirmed, concluding the District Court's findings were not clearly erroneous. *Id*. at 540.

This case is different procedurally, factually, and legally. This case concerns summary judgment proceedings. The parties agree CHJW was engaged to provide, and did provide, professional services related to Mr. Konesky's sale of his ranch, including issues related to the reserved residential interest. These professional services gave rise to, as Mr. Konesky alleged in his First Amended Complaint: "a duty to negotiate, draft, and review the documents involved in this Property transaction so that they effectuated the bargain reached by [Mr. Konesky] and Mr. Keller, protected [Mr. Konesky's] financial interest in the Property, and secured [Mr. Konesky's] stated interest in living on the Property rent-free through 2027." Dkt. 2 at ¶ 31.

Additionally, the reference in *Aetna* to the 1976 law review article, at most, relates to the unremarkable proposition that duty can be circumstance-specific. This principle is long-standing in Montana law and does not signal the adoption of Mr. Konesky's proffered "two-part" duty analysis. Instead, this reference underscores that determining whether a lawyer has breached her duty of care will depend on the specific circumstances of the representation. See, e.g., *Schuff v. Jackson*, 2002 MT 215, ¶¶36-37, 311 Mont. 312, 55 P.3d 387(jury instructions should include complete statement of duty which could, in the right circumstances, include circumstance-

specific duties); *Dale v. Three Rivers Telephone Cooperatives, Inc.*, 2004 MT 74, 320 Mont. 401, 87 P.3d 489 (same).

In addition to being contrary to long-standing Montana law, Mr. Konesky's formulation of the duty analysis has the effect of rendering the issue of duty an issue of fact in all cases, requiring competing expert testimony for resolution. His proffered approach has at least two practical impacts: (1) it deprives Montana courts of their authority to determine duty; and (2) it surrenders to expert witnesses and the fact finder the issue of duty. Apparent on their face, these impacts are unacceptable.

Understood in the proper context of Montana law, the "scope of duty" "element" of Mr. Konesky's proffered duty analysis is not a duty question at all. Instead, it concerns the second element of legal malpractice – breach of duty. When resolving breach of duty, a fact finder would ascertain, based upon admissible evidence of the specific circumstances and proper instructions on the law, whether a lawyer acted in conformance with the lawyer's duty.

3. Konesky failed to properly raise genuine issues of material fact.

Even if this Court were to employ Mr. Konesky's never-adopted "two-part" duty formulation, the District Court correctly granted summary judgment on the Rule 56 M.R.Civ.P. record. Mr. Konesky offered no admissible evidence regarding the question of whether CHJW satisfied its duty of care.

The District Court determined that the language used in the purchase and sale

transaction documents was clear, Mr. Keller violated it, and caused Mr. Konesky's damages. Dkt. 33. Mr. Konesky's assertion that different contract language might have caused Mr. Keller to refrain from breaching, where the present unambiguous language did not, is unsupported speculation and cannot satisfy Rule 56, M.R.Civ.P. See, *McLeod v. State ex rel. Dept of Transp.*, 2009 MT 130, ¶12, 350 Mont. 285, 206 P.3d 956 ("If the moving party 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.")(internal citations omitted). CHJW fulfilled its duty to Mr. Konesky by imposing upon Mr. Keller clear and unambiguous contractual duties to perform, which duties the District Court has found he breached. Dkt. 33.

Further, even if CHJW's not using alternative contract language were a breach of duty—it was not—there is no admissible evidence Mr. Keller would have behaved any differently. The only admissible evidence confirms that Mr. Keller breached his clear duties under the contract. In the absence of admissible evidence, Mr. Konesky's claim against CHJW fails for lack of proof of causation.

Mr. Konesky next complains the District Court's ruling was "premature" because the deadline for disclosure of expert testimony had not expired. Appellant's Brief at 22-23. His argument is contrary to Rule 56 M.R.Civ.P.

If Mr. Konesky sought to oppose summary judgment with expert testimony, he was obligated to do so timely, and in accordance with Rule 56(e), M.R.Civ.P. If he could not timely provide that evidence, then he was obligated in accordance with Rule 56(f), by affidavit, to identify the specific evidence and the reason why it could not be timely presented in opposition to summary judgment and to ask for relief in order to allow the collection and presentation of that evidence. *See, e.g., Rosenthal v. County of Madison*, 2007 MT 277, ¶¶38-43, 339 Mont. 419, 170 P.3d 493 (Appropriate to deny party opposing summary judgment the opportunity for further discovery when that party does not establish, by affidavit pursuant to Rule 56(f), M.R.Civ.P., how the proposed discovery could preclude summary judgment). Mr. Konesky wholly failed to satisfy these requirements. Having so failed, Mr. Konesky cannot now rightfully contend the District Court's CHJW SJ Order should be reversed as "premature."

B. The District Court's Order Is Premised On CHJW's Admitted Duty.

Mr. Konesky argues (Appellant's Brief at 20-22) that the District Court concluded CHJW had no legal duty to him. The record, understood in proper context, demonstrates otherwise.

CHJW specifically stated it owed a duty to Mr. Konesky and Mr. Konesky agreed with CHJW's statement of duty. Dkt. 2 at ¶ 31; Appellant's Brief at 21-22; Dkt. 41 (Mr. Konesky's Response in Opposition To CHJW's Motion For Summary

Judgment) at 4-5; Dkt. 36 at 4, 6. Despite the parties' agreement regarding CHJW's duty and the District Court's recognition of and reliance upon the agreed-to duty, Mr. Konesky contends the District Court "plainly erred by ignoring [CHJW's agreement it had a duty to Mr. Konesky] and ruling that "[n]o legal duty has been shown." Appellant's Brief at 22.

In its Brief In Support of Summary Judgment, CHJW specifically described its duty as follows:

> CHJW's duty exists in the context of their representation of Mr. Konesky—representation in a real estate sale-and-purchase transaction. A real estate sale-and-purchase transaction is effectuated through multiple interrelated contracts. Thus, CHJW's duty was to reasonably secure to Mr. Konesky, under the circumstances, the rights and remedies which real estate sale-and-purchase contracts can reasonably be expected to secure. Correspondingly, CHJW's duty cannot include the obligation to secure, through its document drafting and review, rights and remedies beyond what contracts can secure under Montana law. Thus, limitations on contractual rights and remedies translate into limitations on CHJW's duty to Mr. Konesky.

Dkt. 36 at 4–5. The District Court's discussion of duty assumed the existence of the admitted duty and explained the limitations on CHJW's duty. Dkt. 50 at 4-7.

Until he opposed CHJW's request for summary judgment, Mr. Konesky agreed with CHJW's articulation of its duty to him. See, Dkt. 2, ¶ 31; see, also, Dkt. 41. In his First Amended Complaint he alleged CHJW had "a duty to negotiate, draft, and review the documents involved in this Property transaction so that they effectuated the bargain reached by [Mr. Konesky] and Mr. Keller, protected [Mr.

Konesky's] financial interest in the Property, and secured [Mr. Konesky's] stated interest in living on the Property rent-free through 2027." Dkt. 2 at 7, ¶ 31; Dkt. 41 at 4-5.

Despite the stated congruity between Mr. Konesky's allegation of CHJW's duty in his First Amended Complaint (Dkt. 2 at ¶ 31) and CHJW's admission of that duty in its Brief In Support of Motion For Summary Judgment (Dkt. 36 at 4-5), Mr. Konesky argued in response to CHJW's Motion For Summary Judgment what he claimed were additional specific elements of duty CHJW owed to him: "Konesky maintains that he is also entitled to expect that the documents prepared by Church Harris to effectuate this transaction would reflect his interests, that they would be internally consistent (thereby preventing Keller from taking advantage of ambiguities or perceived conflicts among various documents), and that the value of the residential lease would be reasonably ascertainable in the event Keller did breach the contract." Dkt. 41 at 5. Mr. Konesky proposed to prove these matters with undisclosed expert testimony. *Id.* at 9. At the time he made these statements, Mr. Konesky correctly characterized them as questions related to "[w]hether Church Harris' representation of Konesky fell below the standard of care. . ." *Id.* As the District Court correctly concluded, these arguments do not address the existence of a duty or the scope of that duty, as Mr. Konesky now argues, but whether CHJW

breached its duty of care. Dkt. 50 at 5("[A] standard of care opinion would be used to prove a breach of a duty.")

Mr. Konesky arguments rely on the District Court's statements regarding duty out of their proper context. Instead of determining CHJW had no duty at all, as Konesky argues, the District Court's CHJW SJ Order assumed the duty CHJW admitted and concluded that, because Mr. Konesky received (through the District Court's Konesky SJ Order) all the rights and remedies he could reasonably expect, CHJW satisfied its duty of care.

From this predicate, the District Court then addressed the additional duties the Court would have to find for Mr. Konesky's arguments to succeed. Dkt. 50. It was both appropriate and necessary for the District Court to address the question whether the asserted bases for CHJW's liability were grounded in duties that exist under Montana law. The District Court found no support in Montana law for Mr. Konesky's argued-for additional duties. See, Dkt. 50 at 5-7.

C. CHJW Satisfied Its Duty Of Care.

The District Court's Konesky SJ Order established "that Keller breached the mortgage terms and caused Konesky damages, yet to be proven." Dkt. 50 at 6. This is the District Court's confirmation CHJW satisfied its duty of care.

1. CHJW's duty to Mr. Konesky was to obligate Mr. Keller to perform or pay damages.

CHJW argued below and admits that its duty exists in the context of its representation of Mr. Konesky—representation in a real estate sale-and-purchase transaction effectuated through multiple interrelated contracts. A contract is an agreement to do a certain thing or pay damages. In *Nicholson v. United Pacific Ins. Co*., (1985) 219 Mont. 32, 41, 710 P.2d 1342, 1348, this Court recognized this inherent limitation on the scope of contractual rights and remedies. The Court stated:

> Historically, a party to a contract generally had the right to breach and pay damages rather than perform. The non-breaching party, theoretically, is "made whole" from the damages paid following the breach and thus still receives benefits from the agreement.

Further, "[e]ach party to a contract has a justified expectation that the other will act in a reasonable manner in its performance or efficient breach." *Story v. City of Bozeman*, (1990) 242 Mont. 436, 450, 781 P.2d 767, 775 (emphasis added); see also, e.g., *Phelps v. Frampton*, 2007 MT 263, ¶38, 339 Mont. 330, 170 P.3d 474 (same); *Conagra, Inc. v. Nierenberg*, 2000 MT 213, ¶70, 301 Mont. 55, 7 P.3d 369 (same); *McNeil v. Currie*, (1992) 253 Mont. 9, 830 P.2d 1241 (Same). Thus, the most any individual can secure in a contract is an obligation on the part of another to perform or pay damages. *Federal Deposit Ins. Corporation v. Peterson*, (1937) 104 Mont. 447, 447, 67 P.2d 305, 307 ("No one can be prevented from breaching any contract but may be held liable when he rescinds without legal justification").

Montana law appropriately recognizes the inherent limitations on the rights a contract can secure to a contracting party. It follows that, beyond securing and protecting Mr. Konesky's residential interest and remedies in the event this interest was injured and damaged, CHJW's negotiation and drafting of the Konesky ranch sale-and-purchase documents did not impose any duty upon CHJW to assist or enable performance of the object of the contract. *Boles v. Simonton*, (1990) 242 Mont. 394, 401, 791 P.2d 755, 759 ("'In any professional negligence action, the plaintiff must prove that the professional owed him a duty.' (Internal citation omitted). Absent a finding that Mr. Simonton was retained for services other than preparing the contract, the attorney had no duty to monitor the activities of his client."). Further, in addition to being unable as a practical matter to ensure Mr. Keller's performance, CHJW had no duty to prevent Mr. Keller from breaching his contracts with Mr. Konesky. See *Peterson*, 104 Mont at 447 (No one can be prevented from breaching a contract, but breach incurs liability for damages; *Story*, 242 Mont. at 450 (inherent in every contract is the expectation of performance or breach).

Applying these principles, the District Court correctly concluded the most Mr. Konesky could expect from CHJW's representation was that the ranch sale documents would obligate Mr. Keller to perform or pay damages. Specifically, the most Mr. Konesky could expect from CHJW's representation was that the contracts

CHJW drafted/reviewed would reasonably secure (1) Mr. Konesky's right to reside on the property until 2027, and (2) remedies in the event there was an injury to Mr. Konesky's residential interest, and/or Mr. Keller failed or refused to perform.

It is apparent from the documents themselves, as the District Court concluded, that Mr. Keller was required to perform or, if he did not, to pay damages. Specifically, the sale-and-purchase documents secured Mr. Konesky's residential interest. *See generally*, Dkt. 22, Plaintiff's Exhibit 4, Residential Lease Agreement; *see also*, *e.g.*, Dkt. 22, Plaintiff's Exhibit 8, ¶4.1 ("Mortgagor shall procure and maintain policies of fire insurance... covering all Improvements on the Mortgaged Property... with Mortgagor's loss payable clause in favor of Mortgagee..."), ¶4.3 ("...Mortgagor shall repair and/or replace the damaged or destroyed improvements in a manner satisfactory to Mortgagee and shall, to the extent necessary, use the insurance proceeds to pay the cost thereof..."), ¶6 ("...Upon the occurrence of any Event of Default and at any time thereafter, Mortgagee may exercise any one or more of the following rights and remedies in addition to any other remedy which may be available at law, in equity, or otherwise..."); Dkt. 22, Plaintiff's Exhibit 10, Promissory Note, p. 1 (incorporating the provisions of the Mortgage by reference).

Further, CHJW secured for Mr. Konesky, in the event of breach, the right to recover all damages, attorney fees, and costs against Mr. Keller. *See*, Dkt. 22, Plaintiff's Exhibit 4, Residential Lease Agreement, p. 2, ¶16 ("In the event of default

by either party, the aggrieved party shall be entitled to recover... all costs and expenses, including court costs and expenses, together with a reasonable attorney's fee, arising from such default..."); Dkt. 22, Plaintiff's Exhibit 8, Mortgage, pp. 8-9, ¶7.2 (Mr. Konesky can recover attorney's fees and costs arising from breach of the Mortgage); Dkt. 22, Plaintiff's Exhibit 11, Buy-Sell Agreement, p. 8:383-385 ("In any action brought... to enforce any of the terms of this Agreement, the prevailing party in such action shall be entitled to such reasonable attorney fees as the court or arbitrator shall determine just.").

The District Court's Konesky SJ Order (Dkt. 33), provides the necessary predicate for the remainder of the District Court's analysis and grant of CHJW's motion for summary judgment. The District Court held Mr. Konesky was entitled to receive the rights and remedies he sought in the ranch purchase and sale transaction, based on what it concluded were unambiguous transaction documents:

> Taken as a whole, it is clear that the Mortgage provisions governing insurance required Keller to obtain replacement value insurance payable to Konesky for the "Improvements," which include the house, and that he failed to obtain adequate insurance, failed to purchase insurance payable to Konesky "in a manner satisfactory to [Konesky]" in the event of a loss, and failed to use the proceeds to pay the cost of repairing or replacing the loss. Instead, he obtained · insurance with proceeds payable to himself, applied the proceeds to pay down his own debt, and failed to even attempt to determine whether this was satisfactory to Konesky.
>
> The Lease expressly terminates "November 30, 2027, or such earlier date as [Konesky] no longer wishes or is able to reside in the leased premises and permanently vacates the premises." Lease, ~9. It further

> expressly provides for a procedure in the event of total destruction or damage by fire. First, a determination of whether the premises can be repaired within thirty working days was necessary. Second, following a determination in the negative, Keller was required to give Konesky ten days' notice of his intent to terminate the Lease. Keller did neither.
>
> Moreover, reading the Residential Lease Agreement together with the Mortgage and other agreements which were part of the same transaction to determine the true intent of the parties, it is clear that the parties intended for Konesky to live in the house until November 30, 2027, rent free. ,I,I 3 and 4, Lease. See, *Houden v. Todd*, 2014 MT 113, ,131, 385 Mont. 1,324 P. 3d 1157. The Mortgage required Keller to repair or replace the house to Konesky's satisfaction, and to carry enough insurance to cover replacement. ,I,14.3, 9, Mortgage. Taking all of the agreements together, the intent of the parties to allow Konesky a rent-free abode until November 30, 2027, is clear. By inadequately insuring the property, by not consulting Konesky after the fire, by receiving the proceeds from the fire himself, by not investigating whether the house could be replaced, by not giving notice to Konesky, and by using the proceeds to pay down the debt, Keller breached the contracts with Konesky. Konesky lost his home and his residence without compensation.

Dkt. 33 at 6-7.

Because the District Court found the obligations imposed upon Mr. Keller within the transaction documents to secure both Mr. Konesky's residential interests and remedies and damages for the breach of that interest, the District Court created the necessary predicate for granting CHJW's motion for summary judgment.

2. The District Court correctly determined what CHJW's duty was not.

CHJW's duty was to reasonably secure to Mr. Konesky, under the circumstances, the rights and remedies which real estate sale-and-purchase contracts

can reasonably be expected to secure. Correspondingly, CHJW's duty cannot include the obligation to secure, through its document drafting and review, rights and remedies beyond what contracts can secure under Montana law. Thus, limitations on contractual rights and remedies translate into limitations on CHJW's duty to Mr. Konesky. The District Court correctly so concluded.

Relying on long-standing Montana authority, the District Court correctly determined:

- CHJW had no duty to draft a contract that could not be breached or for which performance was ensured (Dkt. 50 at 6);
- CHJW had no duty to prevent a party to a contract from breaching that contract (Dkt. 50 at 7);
- CHJW had no duty to draft a contract to which the parties did not mutually agree (Dkt. 50 at 6);
- CHJW had no duty to compel parties to a transaction to sign particular agreements or documents (Dkt. 50 at 5); and
- CHJW had no duty to force a compromise or to force an opposing party to accept particular terms (Dkt. 50 at 6).

It was essential for the District Court to address the issue of CHJW's duty by identifying the duties CHJW *did not* have because the gravamen of Konesky's First Amended Complaint and argument before this Court is that CHJW should have

utilized and compelled signature on contracts containing alternative language intended to preserve Mr. Konesky's residential interest and the related remedies. By defining those duties CHJW *did not* have in the preparation of the Konesky ranch purchase and sale transaction documents, the District Court effectively defined CHJW's duty and determined that CHJW satisfied its duty.

Summary judgment for CHJW was correct.

D. The District Court Did Not Misunderstand The Facts.

Mr. Konesky's contention that the District Court "misunderstood" the material facts in ruling on CHJW's motion for summary judgment amounts to nothing more than quibbling. The District Court, having already concluded that the purchase and sale transaction documents provided to Konesky all of his rights and remedies, including his residential interest, simply noted that detailed factual discussion regarding prior lease drafts or matters of negotiation and compromise which resulted in the final signed transaction documents are not material to whether CHJW breached its duty to Mr. Konesky. Dkt. 50 at 4-5.

Mr. Konesky contends that the draft lease Karen Reiff prepared did not contain the language upon which Mr. Keller allegedly relied in breaching both the transaction contract and the covenant of good faith and fair dealing. Mr. Konesky's identification of this asserted factual misunderstanding has no bearing on the District Court's resolution of CHJW's motion for summary judgment. As the District Court

correctly noted, it was the final transaction documents – created through the process of negotiation and compromise – which were controlling. Dkt. 50 at 4-7.

Ironically, this appears to be a point Mr. Konesky concedes when he states that Ms. Reiff admitted the professional obligation to review the lease which ultimately became part of the final transaction and to ensure *that* lease (as distinct from the lease she initially prepared) preserved Mr. Konesky's rights and remedies. See, Appellant's Brief at 27. With this statement, Mr. Konesky agrees the draft of the lease Ms. Reiff prepared is of no ultimate importance because the final transaction documents controlled. The immaterial nature of this quibbling is fully revealed in the fact that the Court's Konesky SJ Order determined as a matter of law the final transaction documents fully protected Mr. Konesky's rights and remedies.

Similarly, that Ms. Reiff never showed Mr. Konesky the lease she drafted but that was not negotiated and ultimately utilized in the transaction is immaterial. The final documents, which proved sufficient to provide Mr. Konesky his claimed rights and remedies, controlled.

E. CHJW Did Not Cause Mr. Konesky's Claimed Injuries And Damages.

The District Court's Konesky SJ Order also revealed that the causation and damage elements of Mr. Konesky's claims against CHJW cannot be proved. CHJW did not cause Mr. Konesky's damages, Mr. Keller did:

> It is undisputed that Konesky's financial losses and the loss of his home are the direct consequence of Keller's breach. It was not the fire that caused the damages, because the agreements provided for a process to keep Konesky in a repaired or replaced home. It was Keller's breach of the agreements.

Konesky SJ Order, p. 7.

Not only did CHJW not cause Mr. Konesky's damages, CHJW's representation secured to Mr. Konesky his right to recover from Mr. Keller:

> ...The undisputed facts show that Keller unilaterally terminated the Lease **despite the requirements in the Lease and the Mortgage protecting Konesky's right to a residence through November 30, 2027, and safeguards for insurance in the event of fire which protected Konesky's right to have the house repaired or replaced. Moreover, regardless of the Lease, the Mortgage itself protected Konesky's right to live on the premises through November 30, 2027, and to have insurance proceeds used to repair or replace the house.**

Konesky SJ Order, p. 9 (emphasis added).

Mr. Konesky's professional negligence claim fails without CHJW causing him damages. *See*, *Merzlak v Purcell*, (1992) 252 Mont. 527, 529, 830 P.2d 1278, 1279 (citing *Kinniburgh v. Garrity*, (1990) 242 Mont. 350, 355, 798 P.2d 102, 105).

F. The District Court Did Not Err In Its Application Of The Well-Established Elements Of A Legal Malpractice Action.

Mr. Konesky contends the District Court erred by applying a "litigation" malpractice standard to a "transactional" malpractice case. This argument mis-applies Montana law and fails to acknowledge the District Court's analysis was specifically tailored to his claims against CHJW.

Mr. Konesky claims that the framework established decades ago, discussed in *Labair v. Carey,* 2012 MT 312, 367 Mont. 453, 291 P.3d 1160 (*Labair I*) and *Labair v. Carey*, 2016 MT 272, 385 Mont. 233, 383 P.3d 226 (*Labair II*), upon which the District Court relied, is applicable only to legal representation involving litigated matters and not to representation involving transactional matters. Mr. Konesky too-narrowly reads this controlling authority and fails to acknowledge the history of these principles.

Montana cases have applied the elements of legal malpractice to all types of underlying representations—litigated and transactional. See, e.g., *Lorash v. Epstein*, (1989) 236 Mont. 21, 24, 767 P.2d 1335, 1337 (alleged failure to foreclose mechanic's lien); *Grenz v. Prezeau*, (1990) 244 Mont. 419, 426, 78 P.2d 112, 116 (alleged negligence in handling worker's comp claim); *Merzlak*, 252 Mont. at 529 (alleged inadequate settlement recovery); *Moore v. Does 1-25,* (1995) 271 Mont. 162, 164-165, 895 P.2d 209, 210 (issues related to contract). The elements of a legal malpractice claim, as this Court has articulated over time, are uniform but sufficiently flexible to accommodate all types of underlying representations. A legal malpractice plaintiff must prove: duty, breach of duty, causation, and damages. See, *Labair I* and *Labair II*. The causation element requires proof that "but for" the lawyer's conduct the client's matter would have resulted more favorably for the client than it did. *Id.*

In *Stott v. Fox*, (1990) 246 Mont. 301, 305-306, 805 P.2d 1305, 1307-1306, this Court perhaps first made the express statement that the "but for" element of causation is the "suit-within-a-suit" requirement of proving a legal malpractice claim. *Id.* This Court stated: "Some courts, in describing this procedure, have termed it as a 'suit within a suit'." *Id.*, citing *Liebrman v. Employers Insurance of Wausau,* (1980) 84 N.J. 325, 419 A.2d 417, 426. This Court applied the "suit within a suit" formulation of causation in *Labair I*, and *Labair II*, although it recognized that "[d]ifferent types of legal malpractice cases will require **different types of evidence and presentation**." See, *Labair I* at ¶ 44(emphasis added); see also, *Labair I,* ¶¶ 25-26, 36, 41-44 and *Labair II*, ¶¶ 17-18. Review of this Court's authority leads to this conclusion: This Court has recognized the need for flexibility in application of the "suit-within-a-suit" requirement, but it has not rejected, or neglected to apply, the "suit-within-a-suit" requirement to all legal malpractice claims.

Also, fatal to Mr. Konesky's argument, in accordance with the direction in *Labair I,* ¶ 44, the District Court specifically tailored the "suit within the suit" framework to Mr. Konesky's claim based on the ranch purchase and sale transaction. The District Court stated: "[The 'suit-within-the-suit' framework] requires the jury to determine if the outcome would have been different if the representation by the lawyer was performed properly. To prevail, in other words, Konesky must prove

that, but for the conduct of CHJW, he would have been successful against Keller." Dkt. 50 at 4. The District Court then correctly concluded Mr. Konesky had already been adjudicated successful against Mr. Keller. Dkt. 50 at 6. In other words, Mr. Konesky had received all he could expect from CHJW's representation--ranch sale documents that obligated Mr. Keller to perform or pay damages.

Mr. Konesky next argues this Court's decision in *Babcock Place LP vs. Berg, Lilly, Andriolo and Tollefsen*, 2003 MT 111, 315 Mont. 364, 69 P.3d 1145 provides an example of case in which the "suit-within-the-suit" framework was not employed. Appellant's Brief at 29, 32. Similarly, seeking to build on his inaccurate statement that Montana legal malpractice law invokes a "two-part" duty analysis in which the second part—scope of duty—involves and requires expert testimony, Mr. Konesky argues this Court's opinion in *Babcock Place* is an example of this analysis. Appellant's Brief at 22. Mr. Konesky's two-fold reliance on *Babcock Place* is misplaced.

First, this Court unmistakably employed the "but for" causation requirement, including the "suit-within-the-suit" framework, in its *Babcock Place* opinion. This Court specifically analyzed the plaintiff's legal malpractice claim through the lens of this Court's prior decision in *Lorash v Epstein*, 236 Mont. 21, and subsequent decisions. *Babcock Place* at ¶¶ 20, 23-30. This Court's decision in *Lorash* is one of the earliest decisions requiring a legal malpractice plaintiff to prove that "but for"

the lawyer's allegedly negligently conduct, the client would have been successful or received a better outcome from the representation. As this Court's opinions make clear, it is this "but for" causation element which requires examination of what has been characterized as the "suit-within-the-suit" analysis but which has been applied more broadly to actually mean that the Court must examine the earlier representation giving rise to the malpractice claim to determine whether the lawyer's conduct caused the client's injury and damages. *Labair I,* ¶¶ 25-26, 36, 41-44 and *Labair II*, ¶¶ 17-18. Thus, Mr. Konesky's premise for his reliance on *Babcock Place*—that this Court did not apply the "suit-within-a-suit" requirement—is without legal basis.

Further, nowhere in *Babcock Place* does this Court adopt, employ, or even discuss the "two-part" duty analysis urged by Mr. Konesky. Instead, the *Babcock Place* Court analyzed whether there were genuine issues of material fact on the breach of duty element of legal malpractice. While the Court referenced the breach of duty element as "standard of care," it is evident from the *Babcock Place* opinion that "standard of care" means breach of the duty of care. This is illustrated in several places in the opinion. *See, e.g., Babcock Place*, ¶¶12, 21, 22, and 31. In each of these instances the Court was specifically analyzing whether genuine issues of material fact existed concerning whether a "breach of the standard of care" (e.g. ¶12) had occurred. The referenced expert affidavit was not utilized in any way to establish the law firm's duty; it related only to the issue of breach of duty. *Id.*

Relying on *Babcock Place*, Mr. Konesky asserts additional erroneous positions. Mr. Konesky argues that by applying the "suit-within-the-suit" framework, the District Court incorrectly concluded that Mr. Konesky could "only succeed in his malpractice claim against Church Harris if he failed in his breach of contract claim against Keller." Appellant's Brief at 32. This statement is incorrect. Instead, the District Court correctly concluded that if the transaction documents CHJW assisted in preparing on Mr. Konesky's behalf secured to Mr. Konesky all of his rights and remedies in his ranch purchase and sale transaction, then Mr. Konesky's claim against CHJW failed, because, having fully secured to Mr. Konesky all of his attendant rights and remedies, CHJW could not have breached its duty of care to Mr. Konesky. Contrary to Mr. Konesky's characterization, this analysis does not compel him to choose between claims but forbids him from simultaneously successfully contending that CHJW breached its duty even though he is entitled, as a matter of law, to all of the rights and remedies of the transaction with which CHJW assisted him. See, e.g., *Brown v. Small*, (1992) 251 Mont. 414, 419, 825 P.2d 1209, 1212 (because he had "already been compensated," he could not recovery under a different theory against his lawyers).

Mr. Konesky next complains that he is foreclosed from proceeding against CHJW for what he claims were deficiencies in the documents which he speculatively claims Mr. Keller took advantage of. This argument urges pursuit of a claim which

has caused no injury to him, something legal malpractice law does not allow. *Merzlak*, 252 Mont. at 529 ("Failure to prove damages is fatal to an attorney malpractice action.")(citing *Kinniburgh*, 244 Mont. at 355). Further, even if Mr. Konesky's argument had admissible evidence to support it, which it does not, it would still be immaterial because whether or not Mr. Keller allegedly capitalized on asserted deficiencies in the transaction documents, Mr. Konesky secured all of his rights and remedies under those documents and CHJW's conduct could not have caused him harm.

Finally, Mr. Konesky's new contention that Mr. Keller's counterclaim regarding the house fire cause and origin could have been prevented through CHJW's actions (Appellant's Brief at 34-35) is without basis in fact or law. Mr. Keller's counterclaim relates solely to the cause and origin of the house fire. Nothing in the transaction documents related to that issue in any way, nor could it have.

CONCLUSION

In its Konesky SJ Order, Dkt. 33, the District Court determined the ranch purchase and sale transaction documents secured to Mr. Konesky all his rights and remedies. Further, it determined Mr. Keller breached these contracts, causing all Mr. Konesky's damages. Predicated on its Konesky SJ Order, the District Court correctly determined CHJW, having secured to Mr. Konesky all his rights and remedies, satisfied its duty of care, and did not cause Mr. Konesky's damages. The

District Court correctly granted CHJW summary judgment on Mr. Konesky's First Amended Complaint, Count I. Dkt. 50.

Appellee CHJW respectfully requests that this Court affirm the District Court's Summary Judgment Order (Dkt. 50).

DATED this 10th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Answer Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Windows, is 8473, excluding the caption, the certificate of service, the certificate of compliance, the table of contents and the table of authorities.

DATED this 10th day of May, 2021.

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