DA 21-0436

In the Supreme Court of the State of Montana

THE ESTATE OF CHARLOTTE MANDICH, via Susan G. Mathews, its Personal Representative,

Plaintiff/Appellee,

v.

MARK and KATHLEEN FRENCH,

Defendants/Appellants.

Appeal from the Montana Twentieth Judicial District Court
Sanders County
Hon. Robert G. Olson, DV-19-87

APPELLEE'S RESPONSE BRIEF

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Introduction

This case is a straightforward matter of contract interpretation. It has nothing to do with the Montana Water Use Act or water rights in general. The only reason we are here is that the Frenches are unhappy with the bargain their predecessor in interest struck in 1997, which unambiguously contemplated that his use of a shared well would be limited to one single-family dwelling. Now that the Frenches own that property and are seeking to develop an RV park, however, they wish to invalidate that agreement and grossly expand their right to use of the shared well. That is the entire basis of this case.

Setting all that aside, the Frenches' statement of the case and statement of facts—and, by extension, their arguments—are egregiously misleading because most of the facts and law they rely on were never properly before the district court when it entered summary judgment in favor of Charlotte Mandich. This is because the majority of the facts they rely on and repeatedly call "undisputed" were contained in an affidavit filed after the time allowed under Rule 56 and after briefing on the summary judgment motion was complete. Likewise, nearly all of the Frenches' primary legal arguments were raised in a Rule 59 motion to alter or amend the district court's order granting summary judgment in Charlotte's favor.

Thus, nearly every time the Frenches claim to be citing an "unrefuted" fact in support of their position—that fact was not properly before the Court at the time the operative decision was mad**e**. And

nearly every significant legal argument raised by the Frenches was presented to the district court only *after* the court had already decided the only fundamental legal issue before it at the time: whether the parties' contract limiting the Frenches use of the well to one single-family dwelling was enforceable as written. The district court concluded that the Shared Well Agreement was unambiguous and enforceable as written, and entered a corresponding injunction.

Now, however, the Frenches essentially ask the Court to create an entirely new legal doctrine that prohibits parties from entering into private contracts about the shared use of a means of conveyance related to a water right in Montana. But based on the straightforward facts of this case and the legal issues that were properly before the district court at the time it granted summary judgment in Charlotte's favor, the Court need not consider the Frenches' expansive and novel theory that every shared well agreement is subordinate to the Montana Water Use Act. Instead, the Court can affirm based on the record that was actually in front of the district court at the time it made its decision.

Statement of the Case

- Charlotte Mandich filed her three-count complaint, alleging the Frenches breached the parties' Shared Well Agreement. She sought (1) a declaratory judgment that the Frenches' use of the well be limited to a single-family dwelling, as stated in the Shared Well Agreement; (2) corresponding injunctive relief; and (3) a

determination that the Frenches' actions materially breached the Shared Well Agreement, and that the agreement should therefore be rescinded. Because her arguments were almost entirely legal, she filed a motion for summary judgment at the same time as the complaint. (Docs. 1, 4.)

- The Frenches filed an answer, and a response to Charlotte's motion for summary judgment. At the same time, they also filed a "motion to –dismiss in lieu of arbitration." (Docs. 7–8.)
- After Charlotte filed her reply brief, the Frenches filed a "motion for hearing and oral argument" where they requested "a hearing to introduce witnesses regarding disputed facts, and hold oral argument on Plaintiff's Motion for Summary Judgment." (Doc. 12.)
- Charlotte objected to the idea that a "mini-trial," with witnesses, was appropriate at a summary judgment hearing. (Doc. 13.)
- The district court issued an order setting argument on Charlotte's motion for summary judgment, and suggested that "French should file affidavits in support of their position that material facts are in dispute."[1] (Doc. 16.)

[1] It is not clear why the district court invited the parties to file additional affidavits after the briefing on Charlotte's summary judgment motion was closed. It was likely related to the fact that the pre-2011 version Rule 56 allowed parties to present affidavits or other evidence up until the day before the hearing. But Rule 56 was amended in 2011, and now requires the party opposing summary judgment to submit affidavits at the same time as their response brief. M.R.Civ.P. 56(c)(1)(B). Thus, the district court could not have erred procedurally by not

- In response, the Frenches filed 67 pages worth of evidence, which included a 15-page, single-spaced affidavit from Kathleen French. That affidavit is located at the Appellants' Appendix 3, and is the source for the Frenches' repeated claims that certain facts are "undisputed." (Doc. 17.)
- Three days later, the district court held an argument on Charlotte's motion for partial summary judgment. By this point, the Frenches had retained counsel. At no point during the argument, did the Frenches ever mention the Montana Water Use Act.
- The district court then issued an opinion and order, which granted Charlotte's request for a declaratory judgment that the Frenches' use of the well is limited to domestic purposes for a single-family home, and permanently enjoined the Frenches from using it for any other purpose. The order denied Charlotte's motion to the extent it requested the court rescind the Frenches' right to use the shared well at all. (Doc. 22.)
- Following the entry of that order, the Frenches filed a Rule 59 motion to alter or amend the judgment. In that motion, the Frenches raised expansive new legal theories about why the parties could not have legally entered into the Shared Well Agreement, which Charlotte opposed. (Doc. 24.)

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considering the materials the Frenches submitted long after the summary judgment briefing was complete.

- Two weeks later, the Frenches filed a motion for leave to amend their answer, which Charlotte also opposed. (Doc. 25.)
- Ultimately, the district court denied the Frenches motion for leave to amend, and their Rule 59 motion was deemed denied via the passage of time. (Doc. 30.) The district court also issued an order clarifying the scope of its earlier injunction. (Doc 29.)
- Charlotte then moved to dismiss her remaining count (material breach), and have final judgment entered. (Doc. 32.)
- Final judgment was entered (Doc. 35.) and the Frenches timely appealed.

Issues Presented

I. Did the district court properly grant summary judgment to Charlotte and limit the Frenches' use of a shared well to one single-family dwelling, when the parties' Shared Well Agreement spelled out that limitation in plain language; and then properly enjoin the Frenches from violating that limitation?

II. Did the district court properly deny the Frenches' motion to alter or amend the judgment and their request to amend the complaint after it had already granted Charlotte summary judgment on the majority of her claims?

Statement of Facts

The relevant facts of this are straightforward and undisputed, and while the Estate disagrees with many of the Frenches' contentions, the facts that matter for purposes of the district court's grant of summary judgment are limited and simple:

1. The parties own adjoining properties in Sanders County.
2. In 1997, Charlotte Mandich and her husband entered into a Water Line Easement and Shared Well Agreement with Paradise Valley, Inc. Paradise Valley is the Frenches' predecessor in interest. (Appellants' App. at 1-1.)
3. The Shared Well Agreement provided that the grantor—Paradise Valley—was entitled to use of the shared well "for domestic purposes only for one, single family dwelling." (Appellants' App. at 1-1.) It further provided that it would be binding on the parties successors.
4. In 2004, the Mandiches and the Frenches entered into a Water System Use Agreement. (Appellants App. at 2-1.) By its own terms, the Use Agreement "provides for the continued maintenance [and] operation" of a "Water System" for use by the parties. It says nothing about modifying the 1997 Shared Well Agreement.
5. In 2019, Charlotte was 96 years old. Without her consent, the Frenches cut off her only water supply from the shared well, and

connected her house to an alternative water supply, which precipitated this case. (Doc. 1 at ¶¶ 25–28.)

6. The Frenches now assert that they are entitled to use the shared well for commercial purposes, or for anything else they want.

Standards of Review

The Estate agrees with the standards of review set forth by the Frenches.

Summary of the Argument

There were many disputed facts below, but none of them are related to the relief the district court granted, which was limited to a declaratory judgment and a simple injunction necessary to enforce that declaratory judgment. All the district did—and all it was required to do—was interpret two related agreements based on their plain meaning. And the district court correctly determined that the Shared Well Agreement limited the Frenches' use of the shared well to a single-family dwelling. Likewise, the district court properly exercised its discretion when it entered a permanent injunction barring the Frenches from using the shared well for any other purpose.

Next, the Court can reject outright the Frenches' claims that the district court's order somehow violates the Montana Water Use Act. First, this argument was only raised in a Rule 59 motion after the district court had already entered summary judgment in Charlotte's

favor. Second, the argument is without merit, because nothing in the Water Use Act or in any previous decision by this Court even hints that two parties cannot enter into contracts involving shared wells or other shared water conveyance systems, and it is common practice throughout Montanan to do so. Finally, for the same reasons, the district court properly exercised its discretion when it denied the Frenches' motion to amend their answer, which was also filed after the district court had already granted summary judgment in Charlotte's favor.

Argument

At the outset, because so much of this case involves the Rules of Civil Procedure and the litigation process, Charlotte's Estate must address the fact that the Frenches were pro se at the beginning of this case—including during the summary judgment briefing. The Estate recognizes that this Court has sometimes held that pro se litigants should be given some latitude with regard to pleadings requirements, but "they must still strictly comply with procedural rules." *Nolan v. RiverStone Health Care*, 2017 MT 63, ¶ 15, 387 Mont. 97, 391 P.3d 95.

Beyond that, this is a unique case, because the Frenches are not new to litigation. Indeed, Mark French, acting pro se, convinced this Court to reverse and remand for a new trial arising out of a conviction from a speeding ticket. *State v. French*, 2018 MT 289, 393 Mont. 364, 431 P.3d 332. And, in more complex cases, the Frenches retained

competent counsel to mount a constitutional challenges to Montana's laws about judicial-campaign speech. *French v. Jones*, 876 F.3d 1228, 1230 (9th Cir. 2017). Thus, to the extent this Court grants some latitude to pro se litigants, no such latitude is called for here, because the Frenches are experienced litigants, both with and without counsel.

I. The district court considered the facts that were properly before it and did not err when it concluded that the Shared Well Agreement limited the Frenches' use of the well to one single-family dwelling and entered a corresponding injunction.

A. The district court properly granted summary judgment on Mandich's request for a declaratory judgment that the Frenches' use of the shared well was limited to one single-family dwelling.

As the Frenches correctly recognize, there are two related contracts between the parties, in addition to a Certificate of Survey showing the well and waterline easement for the benefit of Charlotte's property. The first contract is the 1997 Water Line Easement and Shared Well Agreement. The second contract is the 2004 Water System Use Agreement. (Appellants' App. 1-1 and 2-1.)

During the summary judgment briefing, the Frenches' arguments focused almost exclusively on the language of the 1997 Shared Well Agreement. Their argument was that the language limiting the use of the well to "one single-family dwelling" was a limitation on *Charlotte's* use of the well, rather than the Frenches. In fact, their entire argument is summed in essentially one sentence, where, discussing that 1997

Agreement, they state it "does not limit the Frenches to any type of development of [the Frenches' property] but rather limited the Mandiches by stipulating they could only use the water from the well for a single family dwelling unit." (Doc. 7 at 7.)

Now, however, the Frenches have abandoned that argument, and instead argue that there is some ambiguity about the two agreements, which they mentioned briefly at oral argument on Charlotte's motion for summary judgment. But as the district court recognized, this Court has routinely held that "when the terms of an agreement have been reduced to writing, the writing is considered to contain all necessary terms, and no evidence of terms of the agreement other than contents of the writing should be considered." *Whitefish Congregation of Jehovah's Witnesses, Inc. v. Caltabiano*, 2019 MT 228, ¶ 28, 397 Mont. 284, 449 P.3d 812. And whether an ambiguity exists in a contract is a matter of law. *Richards v. JTL Grp., Inc.*, 2009 MT 173, ¶ 26, 350 Mont. 516, 212 P.3d 264. An ambiguity's existence must be determined on an objective basis. *Id.*

While the Frenches argue that the 2004 Use Agreement is ambiguous, nothing in it purports to alter the 1997 Shared Well Agreement that plainly limited the Frenches' use of the well to a single-family dwelling. Instead, the 2004 Use Agreement simply added additional terms to clarify that the Frenches would conduct any necessary maintenance on the shared well. Indeed, the 2004 Use

Agreement recites that it "provides for the *continued* maintenance, operation and replacement of a Water System for use by" the parties to this case. (Emphasis added.)

The Frenches argue, however, that language in the 2004 Agreement contemplating "proposed improvements" on the Frenches' creates an ambiguity about the parties' intent. But that can be easily explained by the fact that the Frenches admit that they had never used the well for any purpose until that time. If, as they claim, the Mandiches were aware of their plans for commercial development and were agreeable to it, it would have been simple enough to say so, and there are many ways it could have been done. But nothing in that 2004 Agreement even hints that it is superseding the 1997 Agreement, and the latter specifically states that the terms of the agreement "shall be binding upon the parties, their successors, heirs and assigns." (Appellants' App. at 1-2.)

This Court has long held that mere disagreement as to the interpretation of a written agreement does not automatically create an ambiguity. *Richards*, ¶ 26. Thus, to establish ambiguity, the Frenches are required to show that the Agreements, when considered together, are subject to two reasonable, but different meanings. *Richards*, ¶ 28. They have not done so, especially because the 2004 Agreement incorporated the 1997 Shared Well Agreement by reference to the "continued" maintenance and use of the existing system that was

subject to the single-family dwelling restriction.

To be sure, there were disputed facts below about whether the Frenches materially breached the two agreements. The district court recognized those disagreements when it declined to grant Charlotte summary judgment on her material breach claim. (Appellants' App. at 4-5.) But, seeking to put an end to the litigation, Charlotte dismissed that claim, and it is not before the Court. Instead, the only issues before the Court are whether the district court property granted Charlotte's request for a declaratory judgment related to the interpretation of the two agreements and then entered a corresponding injunction. It did.

B. The district court properly exercised its discretion when it enjoined the Frenches from using the shared well for anything other than a single-family dwelling.

The district court's injunction was straightforward and consistent with its declaratory judgment that the Frenches were only permitted to use the shared well for a single-family dwelling. It is unclear why the Frenches are pointing out that injunctions are improper where money damages are available, because Charlotte's request for a declaratory judgment had nothing to do with money damages.

Section 27–19–102 explains that an injunction is appropriate "to prevent the breach of an obligation" where pecuniary compensation would not afford adequate relief, and where the restraint is necessary to prevent a multiplicity of judicial proceedings. The injunction here satisfies both of these criteria. This Court has recognized that

injunctions are proper in cases involving disputes over real property, "when it appears that the commission or continuance of an act will produce irreparable injury to the party seeking such relief." *Ducham v. Tuma*, 265 Mont. 436, 442, 877 P.2d 1002, 1006 (1994), *overruled on other grounds by Shammel v. Canyon Res. Corp.*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912.

Here, the Frenches insist they have a right to use the shared well in whatever manner they want, regardless of the limitation in the Shared Well Agreement. The district court disagreed, and so entered the injunction. The injunction is narrow and satisfies the requirements of § 27–19–105, which only requires that the injunction set forth the reason for its issuance, be specific in its terms, describe the act sought to be restrained, and be binding only on the parties to the action. The Frenches have not shown that the district court manifestly abused its discretion in granting the injunction. Such a showing would require the Frenches to establish that the district court abused its discretion in a manner that was "obvious, evident or unmistakable." *Shammel*, ¶ 12. There is no obvious or evident mistake in the district court's order.

II. The district court did not abuse its discretion by failing to alter or amend its judgment and by denying the Frenches' motion to amend their pleadings.

A. The entirety of the Frenches' Rule 59 motion was an attempt to start over with completely new arguments, but even if the Court considers those arguments, they still fail.

The first time the Frenches raised their argument that the Shared Well Agreement violated the Montana Water Use Act was in its Rule 59 motion to alter or amend the order granting summary judgment to Charlotte. The Court should reject this argument for that reason alone, because Rule 59 relief is not available to relitigate previously litigated matters, for reconsideration of arguments previously made, or to raise new arguments which a party reasonably could and should have previously made. *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 15 n.13 402 Mont. 92, 475 P.3d 748. Instead, Rule 59 provides an opportunity for relief only in "extraordinary circumstances." *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 76, 304 Mont. 356, 22 P.3d 631. The Frenches have not even attempted to show why they should be entitled to such extraordinary relief in a garden-variety contract dispute, and they have not shown the district court abused its discretion in denying their motion to alter or amend the summary judgment order.

Even if the Court considers the Frenches' arguments, however, it should not change the result, because nothing in the Montana Water Use Act or in any case this Court has ever decided suggests that two

private parties cannot enter into a shared well agreement.

For the novel and sweeping claim that parties cannot enter into shared well agreements, the Frenches rely on *Elk Grove Dev. Co. v. Four Corners Cty. Water & Sewer Dist.,* 2020 MT 195, 400 Mont. 515, 469 P.3d 153. *Elk Grove*, however, was not about a private shared well agreement. Instead, it was about subdivision covenants that purported to control where water rights associated with that subdivision could be used forever—even after a different entity came to own that water right. *Elk Grove*, ¶ 4. The Court thus considered whether those covenants constituted an unreasonable restraint on alienation. *Elk Grove*, ¶ 10. Ultimately, the Court held that the covenant's restriction that purported to "preclude any attempt by the Water Right holder to apply to change or potentially expand the right" was an unreasonable restraint on alienation that would not be enforced. *Elk Grove*, ¶¶ 18–21.

Here, however, the Shared Well Agreement does not restrain the use of any water right in any way, and the parties do not share any water right. Rather, the Shared Well Agreements simply limits the Frenches to using *the well* for one, single-family dwelling. It also does not restrain future use indefinitely. If, for example, the Frenches came to own the Mandich property, they could obviously do whatever they wanted with the shared well, subject only to existing state laws. Moreover, this Court has approved of shared well agreements, and the Frenches' argument would call into question hundreds—or maybe

thousands—of shared well agreements across the state. *See, e.g., Williams v. Schwager*, 2002 MT 107, ¶ 26, 309 Mont. 455, 47 P.3d 839.

B. The district court did not abuse its discretion when it denied the Frenches' motion to file an amended answer.

The district court property denied the Frenches' motion for leave to amend that was not filed until after summary judgment had been granted in Charlotte's favor. While it is true that Rule 15 provides that "leave to amend shall be freely given when justice so requires," this does not mean that a court must automatically grant a motion to amend. *Kershaw v. Montana Dep't of Transp.*, 2011 MT 170, ¶ 25, 361 Mont. 215, 257 P.3d 358. Instead, the decision to grant or deny a motion to amend is within the discretion of the district court. *Id.*

This Court has long held that a party must show extraordinary circumstances to amend after a motion for summary judgment has been filed. *Peuse v. Malkuch*, 275 Mont. 221, 227, 911 P.2d 1153, 1156 (1996). Here, summary judgment had already been *granted* by the time the Frenches move to amend, and again, they have not attempted to show there were any extraordinary circumstances preventing them from moving to amend earlier, such as before the Court decided the summary judgment motion.

Likewise, courts are within their discretion to deny motions to amend where the party opposing amendment would suffer substantial prejudice. *Id.* That is clearly the case here.

Finally, district courts can deny motions to amend where the amendment would be futile. *Id.* For all the reasons discussed above, this case presents a simple and straightforward question of contract interpretation, and the Frenches attempts to turn it into an examination of or a referendum on the Montana Water Use Act are futile. The Frenches have therefore failed to show that the district court abused its discretion when it denied their post-summary judgment motion to amend.

Conclusion

The district court should be affirmed.

February 11, 2022.

/s/ Jesse C. Kodadek

Certificate of Compliance

The undersigned hereby certifies that the body of this brief contains 3826 words, as calculated by Microsoft Word. The brief is double-spaced in size 14 Century Schoolbook typeface.

/s/ Jesse C. Kodadek

CERTIFICATE OF SERVICE

I, Jesse C. Kodadek, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-11-2022:

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