IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 21-0637

VERNON HOVEN,

Appellant,

v.

DANIEL WADDELL,

Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the Montana Sixteenth Judicial District Court,
Gallatin County, Montana, The Honorable Rienne H. McElyea, Presiding

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2. Whether Hoven is precluded from arguing on appeal that the District Court erred in failing to recognize the distinction between Hoven and Western CPE when he failed to raise that argument during or before the trial.
3. Whether the District Court correctly held that unjust enrichment is not an available theory of recovery in this case.
4. Whether Hoven is precluded from arguing that the District Court erred by not including an "analysis" of accord and satisfaction because he also failed to raise that issue in his complaint, the pre-trial order, or his trial brief.

STATEMENT OF FACTS

This is an appeal of a Judgment in favor of the Defendant/Appellee Daniel Waddell, following a one-day trial of a lawsuit brought against him by the owner of his former employer, Western CPE, a Bozeman firm that offers continuing education courses to certified public accountants. While Waddell agrees with many of the allegations in Hoven's opening brief, Hoven has deliberately omitted several facts which demonstrate that substantial evidence supported the District Court's findings

of fact, and that the Court's conclusions of law were correct. The following is a summary of those facts.

Hoven testified at the trial that he had never been shown copies of the 23 (there was a 24th also) signatures Waddell's expert Wendy Carlson reviewed that led her to conclude that Hoven had "no doubt" signed the letter he claims he did not sign. Tr. at 22.

Hoven's Exhibit 9 contains a copy of the cancelled check he made out to Waddell in the amount of $100,000. Hoven admitted that the loop on the left side of the H in his signature on the check to Waddell that his handwriting expert testified was missing from the 9 signatures he was asked to review was present on the check that was not given to his expert to review. Tr. at 23-24.

Hoven agreed with Ms. Carlson's testimony by testifying that he could see the loop in the H in both K20 and K21. Tr. at 31.

Exhibit 10 consists of copies of the three $3000 cancelled checks Waddell made out to Hoven for the interest that had accrued the previous year. Hoven admitted that the signatures on those checks looked nothing like his. Tr. at 26-27.

Wendy Carlson examined 25 different signatures on which she based her conclusion that Hoven was no doubt the author of the letter Hoven claims he did not sign. She identified the disputed letter as Q1, and labeled the other 24 documents with signatures Hoven admitted were his as K1-K24. Hoven admitted that he could

see the loop in the H in K20 and K21. Hoven testified that he was unaware Ms. Carlson had examined any signatures "other than the one in the document." Tr. at 22.

Hoven's handwriting expert, Brett Lund, was furnished by Hoven's counsel with the 9 signatures Ms. Carlson labeled as K 10-K19. Lund was not given a copy of what Ms. Carlson labeled as K24, the $100,000 check Hoven gave Waddell, and testified that the first time he saw it was when he was presented with a copy of it during cross-examination. Tr. at 96-97. Lund acknowledged that he saw the "very large loop" in the H in Hoven's signature on the check he had never seen before, Tr. at 98, 104, but despite the fact that Hoven admitted the signature was his, declined to testify as to (whether the questioned signature) belonged to Hoven without doing an examination of the signature, and that he would not do that "on the witness stand." Tr. at 104.

Lund was shown copies of the additional signatures Waddell provided to Wendy Carlson (K20-K24) from which she concluded that that the signature on the disputed document was "no doubt" Hoven's. Lund was never asked to comment on those signatures or update his report, but claimed he did not know why. Id.

When asked whether the signatures on the documents he was not asked to comment on contained any of the characteristics he found missing from Q1, Lund testified that "I did see some loops in the left side of the upper case H. And it looked

like two, maybe three exemplars in Ms. Carlson's report that I did not have access to when I first formulated my opinion back in 2019." Tr. at 97-98.

Hoven alleges that Waddell changed his position at trial and claimed that the $100,000 loan was a gift and that the loan was not forgiven. However, what he testified was that he "treated it as a gift," not that it was intended as a gift, because he believed that debt forgiveness does not have to be reported on a tax return if it is "considered a gift." Tr. at 60-61.

Sharon Kreider is Hoven's wife. Ms. Kreider testified that an attorney named Jensen in the Hoven law firm in Bozeman prepared the promissory note. However, at the bottom of each page is printed "This is a RocketLawyer.com document." Waddell testified that RocketLawyer is a website "that you can get legal forms from," and that when Hoven offered to lend him the money he went to the site, "pulled down the document and printed it, signed it, gave Vern the original and I kept the copy." Tr. at 148.

Hoven argues that the party asserting waiver must demonstrate the other party's knowledge of an existing right, acts inconsistent with that right, and resulting prejudice to the party asserting waiver. Hoven further asserts that the District Court cited no substantial evidence which supports the elements of waiver, and that the Court erred by not finding that Hoven made a "knowing and intelligent waiver." Hoven testified that he never would have signed an agreement forgiving the note

without "going through an attorney and dating the forgiveness." Tr. at 30. However, it was Dan Waddell who prepared the Note, so there is no reason to believe Hoven would have gone through an attorney or that he needed an attorney to draft the simple letter Waddell prepared by which Hoven forgave the note.

Both Waddell and Western's former COO Stu Goodner testified that Hoven frequently experienced memory lapses and confused thought. One example was that, after he was hired, but still working after giving his old employer his two-week notice, Hoven called Goodner in a frenzy and told him he needed to "get up here" to fire his accountant. Goodner immediately bought an airline ticket and flew to Bozeman. But when Waddell picked him up at the airport, he told Goodner that he had already fired him. Tr. at 19-20.

Another incident Goodner described was that, after attending a meeting at 5 p.m. in which he presented financial statements, Hoven telephoned him at 9 o'clock that evening and criticized him for not preparing financial statements. When Goodner reminded Hoven that he had given those to him earlier that day, Hoven "just kind of blew off my answer." Tr. at 118.

Waddell also described instances in which Hoven suffered from memory loss or confusion. One such incident occurred when Hoven suspected that former COO Mike Powell and other employees were trying to buy the company and had stolen Western's customer list and other computer programs. Hoven told Waddell that his

attorney had hired a forensic computer expert and that his attorney had the results, and ordered Waddell and several other employees to meet him at his attorney's office to discuss the results. But when Waddell and the others arrived and told him what they were there for, Hoven's attorney told them that he had not even hired an expert yet. Tr. at 151.

Both Waddell and Goodner testified about separate incidents when Hoven could not find a blue satchel he always carried around with him that no one knew what he had in it. Tr. at 117. The incident Goodner remembered was the day Hoven got to the office and could not find it, and swore someone had stolen it. But it turned out that he had actually left it in his closet and forgotten it. Id.

Waddell remembered another incident in which Hoven lost the blue satchel and again swore someone had stolen it. Hoven later found it in his truck. Tr. at 151-52.

Appellant noted that the District Court found that based upon Waddell's expert's opinion, Hoven signed the letter forgiving the note and that he had simply forgotten doing so. Findings of Fact, ¶¶ 12, 25. Appellant then argues that the Court erred by not making any findings concerning Hoven's "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it," and that Hoven could not have waived repayment of the note because Waddell did not testify as to what plaintiff claims to be he elements of waiver. However, the

issue in this case is whether Hoven forgave the note, and thus the term "waiver" is not relevant to that issue. The District Court recognized this and addressed only the issue of whether the debt was forgiven and whether Hoven received consideration for the forgiveness. The Court found both, and determined that "The loan was forgiven in consideration that Waddell serve additional employment duties during a particularly difficult and stressful time for Hoven." Findings of Fact, ¶ 27. Based on that evidence, the Court concluded that the Note was "a valid and enforceable contract, which Hoven voluntarily forgave." Conclusions of Law, ¶ 4.

The Court further noted that Hoven had approached Waddell after Mike Powell and other officers and employees had left the company in early 2018 and asked him if he would take on additional responsibilities. Tr. at 149. Right before Waddell prepared and signed the note, Hoven gave him a $40,000 bonus, and told him the bonuses would "take care of paying off the note." But Waddell never received another bonus, so when Hoven asked him to take over additional duties, he told Waddell "don't tell anybody anything because he's going to forgive the Note, don't worry about it, we'll treat it as a gift." Id. Waddell immediately prepared the letter forgiving the Note and brought it to Hoven, which he signed, and forgave the indebtedness." Tr. at 154-55.

In February or March each year, Hoven and his spouse typically take a long trip of several weeks. Waddell believes in 2018, they went on a cruise to Viet Nam.

And while they were gone, "nobody was there and he asked me if I would step up, fill in and help out." Tr. at 153-54. In exchange for helping out, Waddell asked for forgiveness of the Note, and Hoven agreed. Tr. at 153.

In Conclusion of Law No. 3, the District Court stated that no breach of contract occurred because "Hoven signed the letter by which he forgave the loan for good and valuable consideration."

Stu Goodner attended the first meeting of creditors after Hoven filed for Chapter 11 bankruptcy. At that meeting, Hoven testified that that he wrote a personal check to his former partner, Dr. Paul Larson, for the purchase of Larson's ownership interest in the company. Goodner did not think that sounded "quite right," because he had seen "checks coming out from Western, being the controller I see those things. And those – There were checks to Dr. Larson. And it did turn out that the company was funding it, not Vern personally." Tr. at 116. Hoven did not dispute Goodner's testimony.

STANDARD OF REVIEW

This Court reviews findings of fact in a civil bench trial to determine if they are supported by substantial credible evidence. *DeNiro v. Gasvoda,* 1999 MT 129, ¶ 9, 294 Mont. 478, 982 P.2d 1002. The Court "must view the evidence in the light most favorable to the prevailing party." Id. The Court reviews a district court's conclusions of law by determining whether the district court's interpretation and

application of the law was correct. *Alexander v. Montana Development Ctr.,* 2018 MT 271, ¶ 10, 393 Mont. 272, 430 P. 3d 90.

SUMMARY OF ARGUMENT

Plaintiff/Appellant Vernon Hoven and his wife Sharon Kreider own Western CPE, a Bozeman firm that provides continuing education courses to CPAs, accounting professionals and financial advisers. Defendant/Appellee Dan Waddell is a CPA, worked for Western from April 2013 to July 2018 and is now retired. Waddell worked in several different positions for Western, but for the last several months of his employment he worked as the chief financial officer, and was responsible for the financial operations of the business.

In February 2015, Hoven offered to loan Waddell $100,000 to help him make the down payment on a house. Hoven wrote Waddell a check from his personal checking account on which he wrote "loan on demand." That same day, Waddell prepared and executed an unsecured promissory note in the sum of $100,000, with interest at the rate of 3% per annum. Waddell made three annual interest payments of $3000 in 2016, 2017 and 2018.

In early 2018, Western went through what the District Court referred to as a "tumultuous period" in which 37 out of 58 employees quit or were fired. Among those who resigned were the chief operating officer and the chief financial officer. After those departures, Hoven asked Waddell to serve as his chief financial officer,

in addition to his existing responsibilities. Waddell agreed to do so, if Hoven forgave the loan. Hoven agreed, upon which Waddell typed a letter for Hoven's signature saying that the loan had been "forgiven."

Hoven asserted in the proceedings in the District Court that his signature on the letter was a forgery. Hoven hired a handwriting expert, who examined 9 signatures on documents provided to him by Hoven's counsel, none of which exhibited the large and clearly visible loop on the left side of the H that can be seen in the letter Waddell prepared for Hoven's signature, from which Hoven's expert concluded that the disputed signature was probably not Hoven's.

Waddell's handwriting expert examined 25 signatures provided to her by Waddell, including the 9 examined by Hoven's expert, all of which Hoven admitted were his save for the disputed letter. She testified that the loop on the H was visible in five of the signatures she examined, and that there was "no doubt" Hoven was the author of the letter Hoven claims he did not sign. Hoven admitted that he could see the loop in three of those signatures.

Hoven's expert was shown copies of the additional signatures Waddell provided to his expert by Hoven's attorney, but was never asked to comment on those signatures or update his report. But he declined to testify as to whether the questioned signature belonged to Hoven without first examining the additional signatures, and asserted that he would not do that on the witness stand.

The District Court correctly found based on substantial evidence that the signature on the letter was Hoven's and that he had forgiven the indebtedness.

Additional issues addressed by Appellant in his Brief were either not raised in the proceedings below, and should not be considered by this Court in its decision, or, in the case of Appellant's unjust enrichment argument, is not an available theory of recovery based on the undisputed facts.

ARGUMENT

A. Substantial Evidence Existed For the District Court's Finding That Hoven Signed the Letter and Forgave the Indebtedness

The only issue in this case is whether Hoven signed the letter forgiving the Note. While a promisee of a note can obviously forgive repayment of the note without consideration, in this case the District Court found that no breach of contract occurred, and that Hoven signed the letter in exchange for good and valuable consideration. Hoven claimed to have no memory of signing the letter. Accordingly, given the District Court's findings and conclusions that Hoven did sign the letter despite his insistence that he did not, Waddell's undisputed testimony explaining the circumstances in which Hoven signed the letter established that Hoven forgave the note in exchange for valuable consideration.

Hoven's next argument appears to be that substantial evidence did not exist for the District Court's decision because the Court failed to address the issue of

waiver. However, Waddell has never contended that Hoven waived his right to enforce the note, but that he forgave the note in writing in exchange for consideration. Accordingly, the District Court did not err in not addressing an issue that was not raised by Hoven either before or during the trial.

Further, application of the elements of waiver would make no sense here, since the third element of waiver cited by Appellant is "resulting prejudice to the party asserting waiver." Obviously, Waddell was benefitted, not prejudiced, by Hoven's forgiveness of the Note, and Hoven's reliance on the definition of waiver is misplaced.

Finally, the cases cited by Appellant in support of his waiver argument have nothing to do with forgiveness of a note. Three of those cases dealt with waiver of a contractual right to compel arbitration, and one involved waiver of a criminal defendant's Fifth Amendment privilege against self-incrimination and right to counsel. The District Court committed no error in failing to make findings regarding an issue that was not relevant to the issue in the case.

B. Hoven is Precluded from Arguing On Appeal That The District Court Erred By Failing To Recognize The Legal Distinction Between Hoven And Western CPE Because He Failed To Raise That As An Issue In His Complaint, The Pretrial Order, Or Plaintiff's Trial Brief.

This Court does not address issues that were not properly raised before the District Court. *Lane v. Smith,* 255 Mont. 218, 221, 841 P.2d 1143, 1145 (1992), *Marsh v. Overland,* 274 Mont. 21, 29, 905 P.2d 1088, 1093 (1995), *Nelson v.*

Leistiko, 1998 MT 217, ¶ 5, 290 Mont. 460, 963 P.2d 1299. In the present action, Hoven did not raise the issue of the distinction between Hoven and Western CPE in the Complaint, the Pre-Trial Order, his Trial Brief filed a week before the trial, or during the trial, and consequently, the District Court did not mention that issue in its decision. This Court should therefore decline to consider that issue.

If the Court were to address the issue, Stu Goodner's testimony that Western and not Hoven was funding the purchase of Dr. Larson's interest, which Hoven did not dispute, established that Hoven was commingling his and Western's funds and treating Western as his personal bank account. Because Hoven failed to distinguish between himself and his company when it came to spending the company's money to pay his personal debts, no basis exists for Hoven's new argument that the District Court erred by failing to address that issue. Accordingly, the District Court's Conclusion that the loan was forgiven in consideration of Waddell's agreement to take on additional employment obligations was correct.

C. The District Court Correctly Held That Unjust Enrichment Is Not An Available Theory Of Recovery In This Case.

The District Court held that the note was an enforceable contract which Hoven voluntarily forgave. As noted by the Court, unjust enrichment is an obligation created by law in the absence of an agreement between the parties, *Welu v. Twin Hearts Smiling Horses, Inc.,* 2016 MT 347, ¶¶ 35-36, 386 Mont. 98, 386 P.3d 937, and because the parties had an agreement, unjust enrichment was not an available

theory of recovery. Here, the parties had two agreements, the Note and the forgiveness of the Note in the letter Waddell prepared and Hoven signed. Accordingly, the District Court's conclusion that unjust enrichment was not an available theory of recovery was correct.

D. Hoven Is Precluded From Arguing On Appeal That The District Court Erred By Not Including An "Analysis" Of Accord And Satisfaction Because He Also Failed To Raise That Issue In His Complaint, The Pre-Trial Order Or His Trial Brief.

After discussing unjust enrichment for the first time in his brief, Appellant goes on to address the issue of Accord and Satisfaction, another argument not made before filing his opening brief. But even if that issue had been raised in the District Court, it is not applicable here because the facts do not support that argument.

"An accord is an agreement to accept in extinction of an obligation something different than that to which the person agreeing to accept is entitled. Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed." Mont. Code Ann. § 28-1-1401. "Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is called satisfaction." Mont. Code Ann. § 28-1-1402.

An accord did not exist here, because Hoven did not accept something different or less than what the Note provided he would receive, he forgave the note. This Court should therefore decline to consider this issue.

CONCLUSION

For the reasons set forth above, this Court should affirm the Judgment of the District Court.

Dated this 12th day of April, 2022.

By___*/s/ Stephen C. Pohl*
Attorney for Defendant/Appellee Daniel Waddell

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that this 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 is 3521 words excluding certificate of service and certificate of compliance.

By___*/s/ Stephen C. Pohl*
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing Appellee's Answer Brief was served upon the persons named below by electronic mail on the 12th day of April, 2022, as follows:

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I, Stephen C. Pohl, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-12-2022:

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