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STATE OF MONTANA
Case Number: DA 22-0197

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 22-0197

MICHAEL J. O'BRIEN and LINDA S. O'BRIEN,

Plaintiffs and Appellants,

v.

RAYMOND O'BRIEN, ERIN BRENTESON, RANDY BRENTESON and J.C. O'BRIEN & SONS, INC., a Montana corporation,

Defendants and Appellees.

APPELLEES' RAYMOND O'BRIEN, ERIN BRENTESON AND RANDY BRENTESON RESPONSE BRIEF

On Appeal From the Montana Ninth Judicial District, Pondera County

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I. STATEMENT OF ISSUE FOR REVIEW

Did the District Court correctly determine the option to purchase a shareholder's stock by J.C. O'Brien & Sons, Inc., is applicable to Michael O'Brien?

II. STATEMENT OF THE CASE

Michael O'Brien ("Mike") abandoned all of the prayers for relief from his Complaint on appeal. Now, his singular issue is "[w]hether the district court erred in determining the parties' 1973 Buy and Sell Agreement controlled the terms and purchase price for the buy-out of Appellant Michael O'Brien's shares . . .." *Opening Brief of Appellants*, p. 1, Statement of the Issues.

Mike never asked for that relief.

The Complaint requests for relief included only the following:

1. Judicial dissolution;

2. That J.C. O'Brien & Sons, Inc. ("JCO") reorganize to spin off Mike;

3. Requiring JCO or Raymond O'Brien ("Ray") and Erin Brenteson ("Erin") to purchase Mike's shares at fair value, pursuant to Mont. Code Ann. §35-1-939;

4. That Mike has a prescriptive easement to a well;

5. Damages;

6. Pre-judgment interest;

7. Post-judgment interest;

8. Compensation pursuant to Mont. Code Ann. §27-1-320; and

9. Attorneys' fees and costs.

Complaint, Docket ("Dkt.") 1, p. 21-22, Request for Relief.

Nowhere in the prayer for relief did Mike request that the district court determine he was entitled to a buy-out of his shares based upon the shareholder's agreement entitled "Buy and Sell Agreement" dated April 1, 1978 ("1978 agreement"). Exhibit ("Ex.") 8.a./592. JCO has an additional shareholder agreement entitled "Buy and Sell Agreement" dated March 1, 1973 ("1973 agreement"). Ex. 524.

The district court denied all of Plaintiffs' claims. *Findings of Fact, Conclusions of Law and Order* ("FFCL&O"), Dkt. 90, p. 26, Order, 1. In its FFCL&O, the district court made an analysis of the two shareholder agreements. Appellants fail to acknowledge that the 1978 agreement (Ex. 8.a./592), does not mention the 1973 agreement (Ex. 524) and, in particular, does not eliminate section 2 of the 1973 agreement which provides for the

option to purchase any shareholder's shares at a value determined by the Board of Directors:

> The purchase price of each share of stock of the Corporation shall be its book value of said stock, **save and except in the event by a motion duly passed by a majority of the Board of Directors of the Corporation at an annual meeting of the Board of Directors of the Corporation a valuation has been placed on said stock, then in this latter event said valuation so established by the Board of Directors until changed by the Board of Directors shall supersede the book value of the Corporation for the purpose of determining purchase price.**

Ex. 524, ¶2. (Emphasis added).

Under the 1978 agreement, in the event a stockholder (Mike) desires to dispose of his stock, he shall first offer all the stock to JCO. Ex. 8a/592, ¶5. What Mike fails to inform the Court is that he never asked for that in the prayer for relief in his Complaint, nor does he inform the Court that it is at the option of the corporation as to whether it purchases Mike's shares. Finally, Mike also fails to inform the Court that the purchase price, should the corporation choose to pursue an offer by Mike to purchase his shares, is in accordance with Paragraph 3 of the 1978 agreement. The two agreements each provide the same, that the price of a share of stock of the corporation is at the amount approved at the stockholders and directors meeting of the

corporation. 1973 Agreement, ¶2 (Ex. 524); 1978 Agreement, ¶3 (Ex. 8.a./592).

Regardless of the issue not being raised by Mike at the trial, the district court did make an analysis of the 1973 and 1978 agreements and agreed with Appellees' position that the 1973 option to purchase vested in JCO was still valid, even though the bulk of the other terms, conditions and covenants of the 1973 agreement would have been superceded by the 1978 agreement. The court also determined there was not a novation or a merger of the 1973 and 1978 agreements. Dkt. 90, FF 23, 24. Further, the District Court found there was no rescission of the 1973 agreement as it relates to Paragraph 5 thereof (Dkt. 90, CL 33).

In the end, the district court determined that if JCO desires to purchase Mike's shares in accordance with the 1973 agreement, that Mike shall sell his shares at the value set by the Board of Directors of $761.87/share in accordance with the terms and conditions found in the 1973 agreement.

III. STATEMENT OF FACTS

Plaintiff J.C. O'Brien & Sons, Inc. (hereinafter "JCO") is a closely held Montana corporation formed on July 22, 1960. Dkt. 90, FF 1.

Michael O'Brien ("Mike"), Raymond O'Brien ("Ray") and Erin Brenteson ("Erin") are all siblings. Randy Brenteson ("Randy") is Erin's husband. Dkt. 90, FF 2. Ray and Erin have been shareholders since the 1970s. Mike was once a shareholder, but was bought out in 2001.

In May 2001, JCO reorganized and conducted a corporate split-off and gave Mike his own farm and forgave $70,000 in debt Mike owed JCO. Exs. 520 and 522. The reason was the parties' father, Richard "Buck" O'Brien, was mad at Mike. Tr. p. 127, l. 11 - p. 128, l. 5. In fact, the corporate minutes state "[t]here has been dissension and disagreement among the shareholders concerning the operation of O'Brien & Sons so that an agreement has now been arranged whereby O'Brien & Sons will transfer certain of its assets to a newly organized subsidiary, CWC, Inc. (Referred to herein as "CWC") in exchange for all of the capital stock of CWC, Inc." Ex. 522, Exhibit A thereof, "Agreement and Plan of Corporate Reorganization and Separation of J.C. O'Brien & Sons, Inc."

Keith Tokerud, a lawyer with extensive experience in estate-planning and administration, was the attorney for Buck O'Brien. Mr. Tokerud testified credibly and his testimony was uncontroverted (counsel did not cross examine Mr. Tokerud). Dkt. 90, FF10, Tr. p. 434, l. 3. In a meeting

with Buck on April 14, 2014, Buck explained his belief that it was not desirable for Mike to own shares in the corporation. Transcript ("Tr.") p. 431, l. 25 - p. 432, l. 18; Dkt. 90, FF10. Buck also said his estate planning provided an option to Ray and Erin to buy Mike's shares under the 1973 agreement. Tr. p. 432, l. 19 - p. 433, l. 5; Dkt. 90, FF 10; and Ex. 536. Mr. Tokerud testified it was Buck's desire for JCO to buy Mike's shares. Id., Ex. 536. Dkt. 90, FF 10.

Shortly thereafter, on April 27, 2014, Buck gifted 348 shares in JCO to his children, including 116 shares to Mike. Dkt. 90, FF 11. Buck died January 6, 2015. Dkt. 90, FF 13.

After Buck's death, Mike, Ray and Erin received the balance of Buck's shares to create the totals and percentages below:

Ray O'Brien	540 Shares
Erin Brenteson	540 Shares
Michael O'Brien	252.33 Shares
Total	1,332.33 Shares

Exhibit ("Ex.") 500.

Ray O'Brien	40.53%
Erin Brenteson	40.53%
Michael O'Brien	18.94%
	100.00%

Dkt. 90. FF 14.

All current shareholders received their shares as gifts or inheritance from Buck. Dkt. 90, FF 15.

Mike claimed he should be awarded the "fair value" of his shares in JCO due to alleged oppression, pursuant to Mont. Code Ann. §35-1-939. Mike testified he desired that the entire land, assets, and machinery of JCO be appraised. He desires that a fair market value of all those assets be determined and that his shares then be awarded to him by a transfer of the equivalent value of acres. Dkt. 90, FF 34. Mike alleged that the defendants are trying to force him into selling his shares to the corporation at "fire sale prices". Dkt. 90, FF 33.d.

The Court found none of Mike's allegations persuasive. Dkt. 90, FF 35. In February 2016, JCO offered to buy Mike's shares in accordance with the 1973 agreement. Ex. 524. Mike refused the offer. Dkt. 90, FF 48.

The two shareholder agreements have slightly differing terms. Both agreements are signed by the same shareholders, i.e., Buck O'Brien, Anna Mae O'Brien (the parties' deceased mother), Michael O'Brien, Ray O'Brien and Erin O'Brien (Brenteson). Both agreements provide for the purchase of stock on death of a shareholder and the terms of that post-death re-purchase

by JCO. Dkt. 90, FF 49. The post-death purchase price is set at a value determined by the Board of Directors. Ex. 524, ¶2; Ex. 8.a./592, ¶3.

In addition to the purchase of stock by JCO on the death of a shareholder, the 1973 agreement provides for an "Option to Purchase Stock" (Section 5) for purchasing the stock of a living stockholder by JCO, which is absent in the 1978 agreement. The Option to Purchase states:

> 5. OPTION TO PURCHASE STOCK: It is hereby provided that the corporation shall have the option to purchase the stock of any stockholder in all or any amount that it sees fit upon giving 30 days notice of its intention to so purchase said stock; said purchase to be in accordance with the provisions of paragraphs 1, 3 and 4, above.

Dkt. 90, FF 50; Ex. 592, ¶5.

The 1978 agreement makes no mention of JCO's "Option to Purchase", it does not state that the 1973 agreement is no longer valid, does not substitute the 1978 agreement for the 1973 agreement, and does not incorporate the 1973 agreement into the 1978 agreement. Dkt. 90, FF, 51.

A table of the material terms of the two agreements is as follows:

Contract Term	1973 Agreement	1978 Agreement
Purchase of Shares on Death of Shareholder	¶1 (all or a portion of shares)	¶2 (all, not a portion of shares)
Formula for Purchase Price (Book Value or set by Board of Directors)	¶2	¶3

Payment of Purchase Price	¶3 10% down and pay over 25 years @ 5%	¶4 10% down and pay over 30 years @ 6%
Option to Purchase shares of JCO	¶5	None.
Sales to Third Party (must offer to JCO first)	¶5	¶5
Endorsement on Stock Certificates	¶6	¶7

Dkt. 90, FF 52.

The terms of the 1973 and 1978 agreements are significantly similar, except the purchase price is extended from 25 to 30 years; the interest rate is increased from 5% to 6%; and the option to purchase a shareholder's stock is absent from the 1978 agreement. Dkt. 90, FF 53. The 1973 agreement has never been voided as shown by JCO's minutes. Dkt. 90, FF 54.

Keith Tokerud testified Buck's understanding was that the 1973 option to purchase stock was still in effect shortly before Buck O'Brien's death and was material to Buck's decision to give shares back to Mike. Tr. pp. 431-433; Ex. 536. That testimony was uncontroverted. The District Court found, "It would defy logic for Buck to ask Mike to leave originally due to Mike's behavior and damaging actions toward JCO; spin off part of JCO's assets exclusively for Mike; and then let him back into JCO without

the ability of Ray and Erin to buy him out. Buck's desires are material to the Court's decision regarding the option to purchase Mike's shares." Dkt. 90, FF 55.

Gary Bjelland, JCO corporate counsel, testified that his February 14, 2016, letter containing JCO's offer to buy Mike's shares in accordance with the 1973 Agreement was made without knowledge of the existence of the 1978 Agreement. Tr. p. 460, ll. 9 -21. That letter included JCO's accountant Jim Meier's determination of the book value of the corporation at $674,144. Ex. 590; Dkt. 90, FF 57.

Notwithstanding the book value determined by Jim Meier, the directors set the share purchase price considerably higher at $761.87/share at the annual shareholder and director meeting in 2017. Ray testified how the Board of Directors determined the price:

Q. . . . the board of directors set a value for the shares of stock for purposes of these agreements in the -- do you remember which year it was?

A. 2015 [sic, 2017], I believe.

Q. Okay. And so how did you arrive at that number and vote on it?

A. We took the net worth of the company, the corporation from the 2000 -- from the balance sheet, I think it was -- was it 2015 [sic, 2017]? I can't remember for sure. We took the net worth of the

corporation, divided it by the number of outstanding shares, came up with a value per share, and then we took half of it, the value per share, and that's the number we put on the agreement.

Q. . . . So why did you set the value at half of the net worth of the corporation?

A. We've done that for many years. What we want to do is get some value to the survivor, whether it's my wife, Mike's wife, or Randy, but not make it so difficult that J.C. O'Brien & Sons can't continue farming, that they would have to sell land to pay off the surviving spouse.

Q. Right. So it's equally applicable to all of you?

A. Yes.

Q. All of the shareholders?

Q. Yes.

A. So if you die first, Jana [Ray's wife] is only going to get paid out over 25 years your shares at 761 and change?

A. Yeah, that's what she would get paid.

. . .

Q. So in there at the bottom, last, or second to the last paragraph on the first page, it talks about the December 31st of '16 balance sheet was reviewed by the shareholders, and you made a motion to set the value at $761.87. Do you see that there?

A. Yes.

Q. And that's what you were talking about is that the net worth would be double that?

A. Yes.

Q. So why not set that number higher?

A. Yeah, it just would be too difficult for J.C. O'Brien & Sons to stay in business, and we want to keep it in the family and keep farming it.

Q. Isn't that the object of these agreements where, you know, if you die now, and I don't know if Jana is going to live for 30 years, but the payout is over 30 years regardless?

A. Yes.

Q. So that's the objective of the document is so JCO can keep on going?

A. Yes.

Q. With the O'Brien family?

A. Yes.

Q. So at this point sitting here, do you think JCO did anything that was different from Mike than any of the rest of you --

A. No.

Q. -- there's two of you, but the two other shareholders?

A. No, it's the same for all of us.

Tr. p. 418, l. 23 - p. 421, l. 25 (edited for clarity).

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That testimony results in Mike's shares being valued at $192,242.66, an increase of $64,155.30 from the book value determined by JCO's accountant, Mr. Meier. Ex. 517. Dkt. 90, FF. 58.

Gary Bjelland[1] opined that the purchase price and methodology in the two agreements were commonplace. He testified:

> Q. . . . Gary, have you done similar or created similar documents for your clients over the 40 some years in practice?
>
> A. Yes.
>
> Q. And so in this particular circumstance it talks about utilizing book value or a value set by the directors.
>
> A. That is correct.
>
> Q. Okay. And why are those numbers set, in your experience, as opposed to just saying, well, we'll just go out and get an appraisal of the farm and pay you a percentage?
>
> A. Well, one, nobody likes to pay for an appraisal, okay. That costs money. And if they can decide among themselves on a proper formula, whether it be book value or percentage of underlying value or something like that, and not have the cost of

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[1] Gary Bjelland is an attorney and licensed as a CPA. He graduated from Gonzaga University law school in 1979. He has practiced since then with the Great Falls law firm, Jardine, Stephenson, Blewett and Weaver, P.C. Mr. Bjelland was raised on a farm east of Conrad, Montana. The farm has been in the Bjelland family for over 110 years. Mr. Bjelland's practice areas include estate planning, probate and trust administration, business planning, tax planning, transactional work and real estate transactions. Mr. Bjelland testified he advises small family farm corporations on a weekly basis. Mr. Bjelland is also JCO's corporate counsel. Tr. 435-466.

> professionals, that's good. Most oftentimes you see some sort of formula in the document that gives the right to the corporation or the other shareholders to buy it at a value less than the full underlying value depending on your share of ownership. And the whole idea is to not kill the goose that is laying the golden egg. I mean you want the corporation to go on, yet you want to give it value to the decedent's family, some value, albeit maybe at a reduced amount, but give it some value up there for the widow and the children and that sort of thing. And that's why you have those clauses in there to purchase stock upon death.

Tr. p. 454, l. 9 - p. 455, l. 13.

Mr. Bjelland's testimony as to the purchase price and methodology was uncontroverted. Mike had no expert witness on those issues.

Mr. Bjelland and Ray explained that once the 1978 Agreement was discovered, the issue of JCO purchasing Mike's stock and at what price, was dropped as a matter for the Court to decide. Dkt. 90, FF 67.

IV. STANDARDS OF REVIEW

"We review a district court's findings of fact to determine if they are clearly erroneous. M.R.Civ.P. 52(a)(6); *Letica Land Co., LLC v. Anaconda–Deer Lodge Cnty.*, 2015 MT 323, ¶13, 381 Mont. 389, 362 P.3d 614. A finding is clearly erroneous if not supported by substantial evidence, if the district court misapprehended the effect of the evidence, or if our review of the record convinces us that the district court made a mistake.

Letica Land Co., LLC, ¶13. We review a district court's conclusions of law to determine if they are correct. *Letica Land Co., LLC*, ¶13." *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C.*, 216 MT 2018, ¶17, 384 Mont. 464, 380 P.3d 747.

V. SUMMARY OF ARGUMENT

"It is well established that we do not consider new arguments or legal theories for the first time on appeal . . ." *Pilgeram v. Greenpoint*, 2013 MT 354, ¶20, 373 Mont. 1, 313 P.3d 839 (extensive citations omitted).

The district court determined that the 1973 shareholder agreement option to purchase stock found at Paragraph 5 was not subject to novation by the 1978 agreement nor was it a merger of the two agreements.

Mike conflates the valuation of his shares in JCO, with the actual provisions of the 1973 and 1978 agreements. Never have Appellees contended that the 1978 agreement is not valid. However, they did contend that the option to purchase vested on JCO found in the 1973 agreement survived the 1978 agreement, because the 1978 has no option to purchase vested in JCO. That is why the discussion of novation, merger, and rescission were all mentioned in the Conclusions of Law.

Appellees have never contended that, if Mike wishes to sell his shares that he could not offer them to JCO or his fellow shareholders per the 1978 agreement. However, JCO, Ray and Erin are not obligated to purchase Mike's shares. Regardless of whether the 1973 agreement option to purchase vested in JCO or Paragraph 5 of the 1978 agreement are followed, if Mike "desires to dispose of his stock," the purchase price for the shares is at the value set by the Board of Directors. Mike ignores that provision entirely in his briefing. In this circumstance, there was a value set by the Board of Directors at the 2017 annual meeting of JCO at a purchase price of $761.87 per share. Dkt. 90, FF 58. The book value determined by JCO's accountant, Mr. Meier, is less than the price set by the Board of Directors in 2017. Dkt. 90, FF 57, 58. In fact, the price set by the Board of Directors results in Mike's shares being valued at $192,242.66, an increase of $64,155.30 as compared to the book value. Dkt. 90, FF 58, Ex. 517.

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VI. ARGUMENT

A. APPELLANTS' SINGULAR ISSUE OF THE "APPLICABILITY OF THE 1973 AGREEMENT VERSUS THE 1978 AGREEMENT" WAS RAISED FOR THE FIRST TIME ON APPEAL AND THE APPEAL SHOULD BE DISMISSED.

Mike raises the issue of applicability of the 1973 agreement versus the 1978 agreement for the first time on appeal. "It is well established that we do not consider new arguments or legal theories for the first time on appeal . . ." *Pilgeram v. Greenpoint*, 2013 MT 354, ¶20, 373 Mont. 1, 313 P.3d 839 (extensive citations omitted).

> This restraint is "rooted in fundamental fairness to the parties...." *Gary & Leo's Fresh Foods, Inc. v. State*, 2012 MT 219, ¶16, 366 Mont. 313, 286 P.3d 1218; See also, *Brookins*, ¶24; *Day v. Payne*, 280 Mont. 273, 276–77, 929 P.2d 864, 866 (1996); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1144 (5th Cir. 1981). It is fundamentally unfair for a party to withhold an argument at trial, take a chance on a favorable outcome, and then assert a separate legal theory when the trial strategy fails. *Day*, 280 Mont. at 276–77, 929 P.2d at 866. New issues should only be reviewed on appeal if extenuating circumstances justify the party's failure to assert their legal theory at trial, such as the emergence of new precedent on the issue. *Marcus Daly Memorial Hosp. Corp. v. Borkoski*, 191 Mont. 366, 369, 624 P.2d 997, 999 (1981); *State v. Carter*, 2005 MT 87, ¶13, 326 Mont. 427, 114 P.3d 1001.

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Id. at ¶21. See, also, *Kellogg v. Dearborn Information Services, LLC*, 2005 MT 188, ¶15, 328 Mont. 83, 119 P.3d 20 (citing *State v. Gouras*, 2004 MT 329, ¶26, 324 Mont. 130, 102 P.3d 27).

This is exactly what has happened on this appeal. Mike's Complaint asked for nine prayers of relief *Complaint*, Dkt. 1, p. 21-22, Request for Relief. Nowhere in the prayer for relief did Mike ever request that the court determine what the value of his shares are in accordance with equity principles.

Mike wanted the court to do one of three things, (1) dissolve JCO, (2) reorganize and spin him off into his own corporation, or, (3) require Ray and Erin to buy him out at "fair value." The district court found no oppression and denied all of Mike's claims. Admittedly, Mike did request that as an alternative to judicial dissolution (pursuant to Mont. Code Ann. §35-1-938 (now §35-14-1430)), or a reorganization with a corporate spinoff of JCO to Mike, that he receive a judgment requiring JCO or Ray and Erin to purchase his shares. However, that request was at "fair value" pursuant to the terms of Mont. Code Ann. §35-1-939, i.e., his oppression theory.

Now, on appeal, Mike, for the first time, suggests that JCO purchase his shares at "fair value" under equitable principles. He argues "the

demands of equity demand a determination in Mike's favor." Appellants' Opening Brief, p. 19. Respectfully, there are no new issues that should be reviewed on appeal for extenuating circumstances such as the emergence of a new precedent on the issue. It is fundamentally unfair for Mike to withhold that argument at trial, and to have taken his chance of a favorable outcome, but when he was not successful, force JCO or Ray and Erin to buy his shares at a price he demands. Mike never presented testimony on "fair value", nor did he present testimony on an alternate valuation to that of the Board of Directors. Mike's trial strategy failed. *Pilgeram* at ¶21.

For the these reasons alone, the Court should dismiss Mike's appeal.

B. THE 1973 AGREEMENT OPTION TO PURCHASE VESTED IN JCO WAS NOT SUPERCEDED BY THE 1978 AGREEMENT.

The 1973 agreement, unlike the 1978 agreement, contains an option to purchase the shares of any stockholder in all or any amount that it sees fit upon giving 30 days notice. Dkt. 90, FF 50; Ex. 592, ¶5.

That option to purchase vested in JCO is absent from the 1978 agreement. The 1978 agreement provides that if a shareholder (Mike) "desires to dispose of his stock, he or she shall first offer all stock for sale to the corporation." If Mike makes that offer, then, JCO has the option to

purchase all but not less than all of Mike's shares of stock. 1978 agreement, ¶5, Ex. 8a/592.

In either case, the price is determined in accordance with Paragraph 3, in the case of the 1978 agreement, or Paragraph 2 in the case of the 1973 agreement. Either one provides that the purchase price is at the valuation placed on the stock by the Board of Directors at an annual meeting. In other words, the entire notion of Mike contending that the purchase price should be "fair value" or based upon an appraisal, does not follow the terms, conditions and covenants contained in either agreement. Neither of the agreements is ambiguous. In this case, a price was set at an annual meeting of JCO in 2017 at $761.87 per share (which was more than the book value determined by JCO's accountant). There can be no other price for the shares, whether it be that Mike chooses to sell his shares to the corporation, or that JCO exercises its option to purchase Mike's shares, the price is $761.87 per share. Dkt. 90, FF 58. Any discussion by Mike in his briefing regarding "fair value," or "net worth of JCO" is completely irrelevant and impertinent to the issues before the court at trial and certainly before the Montana Supreme Court.

1. Appellants Conflate the Issues of the Validity of the 1973 Agreement Versus the 1978 Agreement, with Whether There was a Novation.

The 1978 agreement makes no mention of JCO's "Option to Purchase" and it does not state that the 1973 agreement is no longer valid. It is acknowledged that the principles of novation are subject to the rules concerning contracts in general as argued by Mike. For example, "'Novation' is the substitution of a new obligation for an existing one." Mont. Code Ann. §28-1-501. "Novation is made by the substitution of: (1) a new obligation between the same parties with intent to extinguish the old obligation; . . ." Mont. Code Ann. §28-1-502(1). "Novation is made by contract and is subject to all the rules concerning contracts in general." Mont. Code Ann. §28-1-503.

However, Mike argues that an intent to effect a novation may be evidenced by the existence of the subsequent agreement alone, citing 15 S. *Williston on Contracts*, §1869 (3rd ed. 1972). That is not always the case. Sometimes the intent of the parties is important.

As more than one court has stated:

> A novation may be made by the substitution of a new obligation or contract between the same parties, with the intent to extinguish the old obligation or

> contract, but it does not result from the substitution of one paper writing for another, or one evidence of debt for another, or one contract for another, unless substitution **is made with the intention of all the parties concerned to extinguish the old one.**
>
> Thus, in order to effect a novation, all of the parties concerned must have the clear and definite intention to do so by their agreement. . . . Thus, a situation can arise where there are two contracts and the second contract will operate as a novation of the first contract; but this will occur only when the parties to both contracts intend and agree that the obligation of the second will be substituted for and operated as a discharge of the obligations of the first.

30 *Williston on Contracts*; §76:12 (4th ed.) (emphasis added).

The reason that the intent of Buck O'Brien was necessary evidence at trial was to determine whether the parties intended for the 1978 agreement to be a novation of the 1973 agreement, i.e., to be a complete substitution "with intent to extinguish the old obligation." The district court found attorney Tokerud's testimony important to its decision:

> Keith Tokerud testified Buck's understanding was that the 1973 option to purchase stock was still in effect shortly before Buck O'Brien's death and was material to Buck's decision to give shares back to Mike. Ex. 536. That understanding was uncontroverted. It would defy logic for Buck to ask Mike to leave originally due to Mike's behavior and damaging actions toward JCO; spin off part of JCO's assets exclusively for Mike; and then let him back into JCO without the ability of Ray and Erin to buy him out. **Buck's desires are material to the**

Court's decision regarding the option to purchase Mike's shares.

> Mike signed the 1973 Buy Sell Agreement with that option to purchase for the purchase price to be determined by the book value of the corporation. Mike testified that he was 17 years old when he signed the 1973 Agreement and that he did so at Buck's direction. **That fact only reinforces Buck's desires.**

Dkt. 90, FF 55, 56 (emphasis added).

There is no dispute that the 1973 agreement and the 1978 agreement are each valid shareholder agreements of JCO. They are both signed by the same shareholders of JCO. The issue is whether the 1978 agreement served as a novation of the 1973 agreement. The 1978 agreement makes no mention of JCO's "Option to Purchase" and it does not state that the 1973 agreement is no longer valid.

Here, Buck O'Brien clearly intended that there was no novation, i.e., a complete substitution of the 1973 agreement by the 1978 agreement, based upon the testimony of Keith Tokerud. It should be noted, there is an exception to the attorney-client privilege rule regarding litigation after the decedent's death:

> The general rule with respect to confidential communications . . . is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs. *Osborn*, 561

> F.2d at 1340. The rational for such disclosure is that it furthers the client's intent. *Id.* at 1240, n. 11.

Swidler & Berlin v. U.S., 524 U.S. 399, 405 (1998).

Thus, the intent as shown by Keith Tokerud's notes from working on estate planning for Buck O'Brien, was that at least Paragraph 5, "Option to Purchase Stock" from the 1973 agreement was still intended to be valid. In other words, it is not a novation and the 1973 agreement is not extinguished.

> When parties enter into a subsequent agreement completely covering the same subject matter as the original contract, but containing inconsistent terms, the effect is to supercede and rescind the earlier contract, **but if the subsequent agreement does not completely cover the same subject matter, then the provisions in the original agreement still control, absent a distinct provision such as a merger clause.**

30 *Williston on Contracts*, §76:46 (4th ed.) (emphasis added).

There is no merger clause in the 1978 agreement. The doctrine of a merger does not apply here anyway. "The applicable rule is found in 17 CJS, Contracts, §381, p. 872: 'A valid written contract merges all prior and contemporaneous negotiations on the subject, *but distinct agreements are not merged*,' etc." *Story v. Montforton*, 112 Mont. 24, 30-31, 113 P.2d 506, 508 (1948)(italicizing emphasis in original). Here, there are two distinct

agreements that have different provisions. As a result, the 1973 agreement option to purchase vested in JCO is still valid.

2. Neither Should the 1973 Agreement and the 1978 Agreement be Consolidated, Thereby Effecting an Elimination of the Option to Purchase.

Mike argues the 1978 agreement is unambiguous. Appellees agree. The problem with Mike's argument, is the 1973 agreement is unambiguous as well. The real issue is whether, the 1978 agreement supercedes the 1973 agreement, as it relates to the Option to Purchase vested in JCO. When two agreements are unambiguous, the Montana Supreme Court has determined the terms of each agreement should not be consolidated (or superceded in the case at bar), if the effect of doing so would "avoid an essential part of the contract."

> Each of these agreements is clear and unambiguous. None, by its terms, depends on any other. The authorities relied on by Bitterroot do not permit courts to avoid the plain language of a complete, unambiguous contract by consolidating it with another writing if the effect of doing so would be to avoid an essential part of the contract. See *Gerdes*, 89 N.W.2d at 856. Therefore, we hold that the District Court did not err when it concluded that shareholders agreement was enforceable independent of the stock exchange between Bitterroot and Knutson.

Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203, ¶18, 300 Mont. 511, 5 P.3d 554.

That is the point of the district court's decision. An essential term of the 1973 agreement, the option to purchase vested in JCO, not found in the 1978 agreement, would be abrogated if the agreements were consolidated. Accordingly, the 1973 agreement option to purchase is still valid.

3. Regardless of Whether the Value of Shares Was Set by the Board of Directors for Purposes of the 1973 Agreement or 1978 Agreement, the Result is the Same; Every Shareholder is Bound by the Same Value and Same Payment Terms.

The JCO shares of stock were valued by the Board of Directors at the 2017 annual meeting at a purchase price of $761.87 per share. Dkt. 90, FF 58; Ex. 517. As a result, regardless of which agreement is utilized for the determination of the purchase price of shares of stock, at the time of trial the price was $761.87/share.

Mike wants this Court to set aside the district court's Findings of Fact and Conclusions of Law, by stating that the "demands of equity demand a determination in Mike's favor" even when a valid agreement sets a value. For that proposition, Mike posits this Court should follow an Iowa case, *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663 (Ia. 2013) and look to statutory relief from *Kulko v. Davail, Inc.*, 2015 MT 340, 381 Mont. 511, 363 P.3d 430. That argument is short sighted.

First, the district court found no oppression of Mike.

Second, the argument does not take into consideration why the JCO Board of Directors set the value at $761.87/share. The value was not set just for Mike, it is applicable to all shareholders, including Ray and Erin. As Ray testified, the reason for the valuation was so JCO could remain in the O'Brien family for future generations, without the need to sell its land in order to pay a shareholder. Upon a shareholder's death, the shareholder's survivors, whether it be Ray, Erin or Mike's respective spouses, will receive the value set by the Board of Directors, over the course of 30 years, at 6% interest, per the 1978 agreement. Ex. 8.a./592. The same price per share is utilized to value a purchase of shareholder's shares while alive.

Third, the argument does not take into consideration the uncontroverted testimony of Gary Bjelland that such valuation and methodology is commonplace in close corporations.

Fourth, in determining whether the price set by the Board of Directors was equitable, the trial court took into consideration all of the evidence before it. That is why the court found "Buck's desires are material to the Court's decision regarding the option to purchase Mike's shares." Dkt. 90, FF 55. The court specifically took note that "[i]t would defy logic for Buck

to ask Mike to leave originally due to Mike's behavior and damaging actions toward JCO; spin off part of JCO's assets exclusively for Mike; and then let him back into JCO without the ability of Ray and Erin to buy him out." Dkt. 90, FF 55.

That finding is not clearly erroneous. M.R.Civ.P. 52(a)(6); *Letica Land Co., LLC v. Anaconda–Deer Lodge Cnty.*, 2015 MT 323, ¶13, 381 Mont. 389, 362 P.3d 614.

This case is akin to a divorce. In valuing shares of stock, all the facts and circumstances of the corporation and its shareholders need to be taken into consideration.

> Furthermore, so long as the existing shareholders' agreement is in effect, James cannot transfer his stock for more than the price set forth in that agreement. Therefore, we hold that if the shareholders have employed an accepted method of valuation and there is no evidence that the valuation was undertaken in bad faith or for the purpose of avoiding marital or debtor/creditor responsibilities, there is a presumption that the valuation of stock set forth in a shareholders' agreement is the real value of a shareholder's interest in a closely held corporation.
>
> In this case, Dorothy's expert testified that he did not consider the 1985 shareholders' agreement in any of the four methods he used to calculate the value of James's interest in Gallatin Valley Furniture. Therefore, pursuant to the reasoning of Amodio, the only evidence before the District Court of the stock's "actual value" was Neil's valuation in the amount of $310,453.48. That value, negotiated in a good faith arms-length transaction,

> represents the price to which James would be limited should he attempt to transfer or sell his stock to satisfy the judgment against him. It also represents the amount that would have passed to James's estate had he died while married to Dorothy during that period of valuation. See *Marriage of Jorgensen*, 180 Mont. at 300, 590 P.2d at 610.

In re Marriage of DeCosse, 282 Mont. 212, 219, 936 P.2d 821, 825 (1997).

The same holds true in this case. The Board of Directors employed an accepted method of valuing the shares. There was no evidence that the valuation was undertaken in bad faith. There was also no evidence of the book value of JCO, other than it was considerably lower than the price set by the Board of Directors two years after the JCO accountant determined the book value. As a result "there is a presumption that the valuation of stock set forth in a shareholders' agreement is the real value of a shareholder's interest in a closely held corporation." Mike never presented any evidence to overcome that presumption. The valuation of stock set by the Board of Directors in compliance with the 1973 and 1978 agreements is the real value of all shareholders' interest in this close corporation. Appellants' appeal should be denied.

VII. CONCLUSION

Appellees request this Court affirm the district court's decision.

DATED this 25th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

I, Kirk D. Evenson, attorney for Appellee, hereby certifies that:

(1) Said APPELLEES' RESPONSE BRIEF, filed herewith has a line spacing of 2.0, except for footnotes and quoted, indented material, which have a line spacing of 1.0;

(2) Said APPELLEES' RESPONSE BRIEF, is proportionately spaced and uses a 14 point Times New Roman typeface; and

(3) Said APPELLEES' RESPONSE BRIEF, has a word count of 6,407 as counted by WordPerfect X9 for Windows, not including the Table of Contents, Table of Authorities and Certificate of Compliance.

DATED this 25th day of July, 2022.

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CERTIFICATE OF SERVICE

I, Kirk D. Evenson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-25-2022:

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