

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA-23-0247

DANIEL BRIAN BURKE, Appellant/Defendant, v. BILLY ANN MERILA, Appellee.	APPELLANT'S OPENING BRIEF
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On Appeal from the District Court of the
Fourth Judicial District of the State of Montana,
In and for the County of Missoula,
Before the Honorable Jason Marks

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None.

ISSUE PRESENTED FOR REVIEW

- I. Did the District Court err in determining that it was no longer reasonably practicable to carry on the business of the partnership?**

STATEMENT OF THE CASE

Appellant Daniel Burke (“Dan”) and Appellee Billy Ann Merila (“Billy”) equally own MBC Partnership. MBC Partnership own one piece of commercial real property near malfunction junction in Missoula, Montana. Billy sued Dan to expel him from the partnership because Dan had withheld access to partnership funds from Billy. Dan did so because Billy had withdrawn partnership funds without Dan’s consent and failed to properly account for the withdrawals.

After the Complaint was filed, Dan returned the partnership funds to the partnership account. No harm has come to the partnership or to Billy. Billy accuses Dan of the exact same thing that Billy did to Dan in the previous year. For all intents and purposes, the partnership is fully operational and has not suffered any setbacks as a result of Dan's actions.

The District Court's conclusion that it is no longer reasonably practicable to carry on the business of the partnership is incorrect and should be overturned.

STATEMENT OF FACTS

In July of 1993, Dan Burke, Billy Ann Merila, and Gordon Campbell formed a partnership called MBC Partnership. *Amended Complaint* (doc. #10). Not long thereafter, Gordon Campbell was expelled from the partnership. *Transcript*, p. 8, lns. 14-15. Since then, Billy and Dan have been the only partners in MBC Partnership. They are equal partners. *Transcript*, p. 9, ln. 4.

In approximately 1997, Billy and Dan started another partnership with two other partners, called BMW Partnership. BMW Partnership continues to operate and is fully functional without any pending legal disputes. *Transcript*, p. 25, lns. 8-9; *Declaration of Daniel Burke*, p. 7, ¶20 (doc. #36).

The purpose of MBC Partnership is to own and manage real property located at 2502 Brooks St., Missoula, Montana, 59801. *Transcript*, p. 26, lns. 11-16. The property currently has a single tenant – Acme Management Company, LLC.

Transcript, p. 26, ln. 18. At the time that the *Amended Complaint* was filed, Acme Management Company, LLC, paid \$3,500 per month for rent. *Transcript*, p. 27, ln. 1. Dan has historically collected the rent and then \$1,000 per month would be distributed to each of Dan and Billy to constitute their monthly owner draw.

Transcript, p. 27, lns. 6-11. The remaining amount (\$1,500) would stay in the partnership account and eventually get applied to real estate taxes, capital improvements, maintenance, or distributed equally between the partners.

Transcript, p. 28, lns. 1-4. Rent has typically been paid in cash. *Transcript*, p. 27, lns. 6-11. Dan would collect the rent, deposit \$2,500 into the partnership account, and keep \$1,000 for himself which would constitute his monthly draw. *Transcript*, p. 27, lns. 6-11.

Dan has done the vast majority of work needed to operate the partnership. He has worked with the tenants to negotiate commercial leases, collected rent, and handled tenant concerns. Until recently, Billy has not performed these tasks. He also managed the parties' capital accounts and prepared the tax return for the partnership each year.

In 2020, Dan was indicted for tax fraud. Billy responded by removing \$12,500 from the MBC Partnership account. *Transcript*, p. 19, lns. 5-16. The withdrawal was not authorized by Dan. It was not discussed between the partners. It did not constitute normal partnership business or accounting. *Id.*

In December of 2020, Billy made a deposit into the partnership account of \$10,500, presumably to partially pay back the unauthorized withdrawal of \$12,500 in the spring of 2020. Upon inquiry from Dan, Billy refused to provide an explanation for the withdrawal of \$12,500 or the deposit of \$10,500. *Transcript*, p. 21, lns. 5-6. She did not provide an explanation of why the amounts were different except to generally state that it was to pay taxes. *Transcript*, p. 10, lns. 3-5.

In January of 2021, Dan sent a letter to Billy stating that he had concerns about her unauthorized withdrawal of cash and that he intended to use an alternate account for partnership receipts pending some resolution pertaining to Billy's actions. Billy responded by filing the *Complaint* against Dan and requesting that he be expelled from the partnership.

On April 6, 2021, the District Court held a hearing on Plaintiff's *Motion to Appoint Receiver*. *Minute Entry* (April 6, 2021) (doc. #15). The Court determined that it would not appoint a receiver so long as Dan deposited the rent money into the partnership account and the parties found a neutral third party to do the partnership tax return. *Transcript*, p. 46, lns. 2-25; *Transcript*, p. 47, ln. 1. The parties immediately agreed to the latter. *Notice to the Court* (doc. #16); *Order* (doc. #20).

On August 31, 2021, Billy filed a *Motion for Summary Judgment* (doc. #22). Dan responded and Billy filed a reply brief. (Docs. #25, #27).

On March 2, 2023, the District Court issued its *Order Granting Plaintiff's Motion for Summary Judgment* (doc. #30).

None of the facts asserted by Billy, even if true, satisfy the statutory standard for dissociating a partner.

STANDARD OF REVIEW

The Montana Supreme Court reviews a district court's rulings on summary judgment de novo, applying the same criteria as the district court under Mont. R. Civ. P. 56. *Krajacich v. Great Falls Clinic, PLLP*, 2012 MT 82, ¶ 8, 364 Mont. 455, 276 P.3d 922.

“Summary judgment is appropriate only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.” *Id.*

“A material fact is one that concerns the elements of the cause of action or defenses at issue to an extent that requires resolution of the issue by a trier of fact.” *Id.*

“The district court's conclusion that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law is a conclusion of law which [is reviewed] for correctness.” *Id.*

SUMMARY OF ARGUMENT

Lack of trust and minor financial transgressions do not make it impracticable to run a partnership.

ARGUMENT

I. Did the District Court err in determining that it was no longer reasonably practicable to carry on the business of the partnership as a matter of law?

The District Court's conclusion that it was no longer reasonably practicable to carry on the business of the partnership is incorrect. This conclusion is not supported by the undisputed facts. Even if all of the transgressions alleged by Billy were true, it would not constitute grounds to expel Dan.

A partnership is an association of two or more persons to carry on as co-owners a business for profit. Mont. Code Ann. § 35-10-102(5)(a); *McCormick v. Brevig*, 2004 MT 179, ¶ 35, 322 Mont. 112, 96 P.3d 697. The partnership agreement, if one exists, will generally govern the relations of the partners. *Id.* The parties do not dispute the existence of the partnership agreement in this matter. Statutory rules are default rules, which apply in the absence of a partnership agreement to the contrary. Mont. Code Ann. § 35-10-106; *McCormick*, ¶ 35.

The District Court relied solely on Mont. Code Ann. § 35-10-616(5)(c) in issuing its *Order*, which reads:

A partner is dissociated from a partnership upon...the partner's expulsion by judicial decree, made on application by the partnership or another partner, because...the partner engaged in conduct relating to the partnership business that made it **not reasonably practicable** to carry on the business of the partnership with that partner.”

Mont. Code Ann. § 35-10-616(5)(c) (emphasis added).

The District Court cites the following facts to justify dissociation under Mont. Code Ann. § 35-10-616(5)(c):

1. Alternate account. Dan “unilaterally created a new depository account.” *Order*, p. 11, ln. 3. Billy does not dispute that in 2020 she withdrew \$12,500 from the partnership account and did not return all of it. *Transcript*, p. 21, lns. 5-6. It is Billy’s conduct that caused Dan to deposit the rental payments into a different account until Billy properly accounted for the money she withheld. *Transcript*, p. 39, lns. 4-5. During that time, Dan continued to pay Billy her share of the rental income (\$1,000 per month). *Affidavit of Patrick Burke*, p. 3, ¶ 7 (doc. #26). No damages were incurred by either party. *See Transcript*, p. 23, lns. 15-16. Billy is more guilty than Dan is because he has properly accounted for the money he withheld and Billy has not. Thus, if either party should be dissociated from the partnership it should be Billy, not Dan.
2. Use of partnership funds. Dan “attempted to instruct [Billy] that she needed his consent to use MBC funds in any way except to pay ordinary business expenses.” *Order*, p.11, lns. 20-21. This was a normal standard for their partnership. Plus, Dan was referring to the amount that Billy had withdrawn but not returned to the partnership account. *Transcript*, p. 38, lns. 19-23.

Thus, there is no reason that such a statement should disrupt the operation of the business.

3. Dan “demanded that [Billy] not interact with MBC’s tenants. *Order*, p.11, lns. 21-22. Billy does not communicate well with the tenants. Dan asked her not to interact with the tenant, but that does not mean that she cannot interact with the tenant.
4. Dan “unilaterally appointed an agent—his son, Patrick Burke—to act on his behalf in MBC matters.” *Order*, pp.11-12, lns. 21-22, 1. Billy’s objection to the power of attorney was noted with the District Court. However, Billy has failed to identify any harm that resulted from the power of attorney. In fact, it is easier for her to interact with Patrick Burke than Dan Burke. Thus, the power of attorney has actually been beneficial to the partnership.
5. Dan “has refused to personally interact with [Billy]. *Order*, p.12, lns. 8-9. Dan does not dispute this, but it is not grounds for dissociation. Again, Billy has not alleged any harm to herself or the partnership. In fact, the operation of the partnership has probably been better as a result.
6. There is a lack of trust between Dan and Billy. *Order*, p.12, ln. 10, 18. Dan does not dispute this, but it is not grounds for dissociation. In fact, it is fairly standard for most business partnerships.

7. Billy has claimed that Dan’s “actions have jeopardized MBC’s future and caused [Billy] to lose faith in [her] partner, [Dan], and [their] business.” *Order*, p.12, Ins. 19-21. Neither Billy nor the District Court identify *how* MBC’s future has been jeopardized or harmed in any way. Dan should not be dissociated because there is mere possibility that the business has been jeopardized. The fact that the partnership is fully operational to this day should be enough to prove that the partnership has not been jeopardized.
8. Dan “unilaterally decided to file a second tax return for 2020 after Ms. Merila had already done so via Campbell & Associates, P.C.” *Order*, p.13, Ins. 1-3. First, Gordon Campbell of Campbell & Associates, P.C., was expelled from the MBC Partnership. *Declaration of Daniel Burke*, pp. 4-5, ¶12 (March 30, 2023) (doc. #36). As a result, Gordon Campbell carries deep resentment toward Dan Burke. *Id.* Second, the District Court ordered to have the partnership tax return prepared by a mutually agreeable third party. *Order* (April 14, 2021) (doc. #20). Dan Burke would never agree to Gordon Campbell preparing his tax return. *Declaration of Daniel Burke*, pp. 4-5, ¶ 12 (March 30, 2023) (doc. #36). Billy clearly chose Gordon Campbell to spite Dan. *Id.* Third, Billy’s accounting of the capital accounts are wrong. Dan filed the correct tax return but is still committed to having a

mutually agreeable third party review the return and file an amended return if necessary.

9. Dan's "incarceration further frustrates the practical ability of the parties to carry on MBC as partners." *Order*, p.13, lns. 9-10. This is untrue. While Dan was incarcerated, there were no frustrations in the operation of the partnership. Plus, he returned almost a year ago in September of 2022, six months before the *Order* was issued. Thus, it should not have any bearing on the legal question of whether it is reasonably practicable to carry on the business of the partnership.

The above stated facts do not constitute grounds to dissociate a partner from a partnership.

The District Court further stated that Dan's misconduct constituted a breach of paragraph 11 of the partnership agreement because Dan has "made it almost impossible for [Billy] to have an equal voice in MBC Business." *Order Granting Plaintiff's Motion for Summary Judgment*, p. 10, lns. 1-7. However, if a breach of the partnership agreement has occurred, there must be damages. Here, there are no damages. Furthermore, none of the conduct identified above has actually restricted Billy's voice.

MBC collects rent, pays bills, and makes distributions to the partners. That is all that it needs to do (aside from the occasional lease renewal). Billy's claim

that it is not reasonably practicable to carry on the business of the partnership fails because MBC is fully operational. It is not only practicable to continue the business, the business of the partnership is continuing to operate in real time. Billy's *Declaration* does not provide any evidence to the contrary.

The district court incorrectly rejected Dan's argument by stating that "operationality is not the relevant standard." *Order*, p. 13, lns. 15-16. Indeed, the ability to operate has a significant bearing on whether it is "reasonably practicable to carry on the business of a partnership."

Practicable is defined as "capable of being put into practice or of being done or accomplished: feasible." <https://www.merriam-webster.com/dictionary/practicable>.

It is undisputed that it is feasible for Billy and Dan to operate MBC Partnership together.

Billy has not provided any evidence that MBC Partnership's ability to do its business successfully has been compromised. It is undisputed that the parties have continued to operate MBC Partnership successfully. The *Order* also admits that MBC is fully operational. *Order Granting Plaintiff's Motion for Summary Judgment*, p. 13, lns. 15-16 ("[t]here is no dispute that MBC is fully operational").

As a matter of public policy, the threshold for expelling a partner from a partnership must be higher than the allegations made by Billy.

In a motion for summary judgment, the facts must be construed in a manner that is most favorable to the non-moving party. *Tonner v. Cirian*, ¶ 9, 367 Mont. 487, 291 P.3d 1182. Negligence actions are generally not susceptible to summary judgment because they ordinarily involve questions of fact. *Id.* Similarly, the question of whether it is reasonably practicable to carry on the business of a partnership is largely a question of fact that is not conducive to resolution through summary judgment.

The moving party has the burden of establishing no genuine issue of material fact. *Id.* ¶ 8. Here, Billy has failed because even if the facts that she has alleged are true, it would not warrant dissociation of Dan from the partnership. She has not alleged irreparable harm. In fact, she has not alleged any harm.

Assuming arguendo that Billy has provided sufficient facts to meet her burden of proof, Dan need only submit evidence of sufficient facts to support a genuine issue of material fact to preclude summary judgment in favor of the movant. *Id.*

Billy and the district court admit that MBC Partnership is fully operational. *Order Granting Plaintiff's Motion for Summary Judgment*, p. 13, lns. 15-16 (“[t]here is no dispute that MBC is fully operational”). This factual admission alone is sufficient to support a genuine issue of material fact and preclude summary judgment.

CONCLUSION

The District Court's *Order Granting Plaintiff's Motion for Summary Judgment* constitutes reversible error. The District Court incorrectly determined that it was no longer reasonably practicable to carry on the business of the partnership.

This matter would set bad precedent for all partnerships in the state of Montana if this matter is not reversed. If partners can be expelled from a partnership for such minor transgressions, it would wreak havoc on the business community in Montana.

If this matter is reversed, the parties will undoubtedly go back to operating MBC Partnership as they always have. On the other hand, if it is not reversed, there will be other significant legal issues that will require resolution at the district court level and at the Supreme Court level, including, but not limited to, valuation of Dan's share of his partnership interest, Dan's rights to collect income from MBC Partnership between the date of the *Order* and the buy-out, and Billy's liability to Dan for amending the lease with the tenant that reduces the recapture of expenses paid by MBC Partnership but for which the tenant owes reimbursement to MBC Partnership under the triple net lease.

WHEREFORE,

Appellant respectfully requests that this Court issue an order that:

1. Reverses the District Court's *Order Granting Plaintiff's Motion for Summary Judgment* (March 3, 2023) (doc. #30);
2. Remands this matter for further proceedings consistent with the Court's opinion;
3. Authorizes an award of costs to Appellant on appeal; and
4. For such other and further relief as the court deems just.

REQUEST FOR ORAL ARGUMENT

Dan requests oral argument.

DATED this 11th day of August, 2023.

IRWIN LAW OFFICE, P.C.

By: /s/ Clifford B. Irwin
Clifford B. Irwin

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Appellant's Opening Brief* is printed with a proportionately double-spaced Times New Roman text typeface of 14 points (exclusive of footnotes) and that the word count calculated by Microsoft Word Professional Edition is not more than 10,000 words excluding *Table of Contents*, *Table of Authorities*, *Certificate of Compliance*, and *Certificate of Service*.

DATED this 11th day of August, 2023.

IRWIN LAW OFFICE, P.C.

By: /s/ Clifford B. Irwin
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CERTIFICATE OF SERVICE

I, Clifford B. Irwin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-11-2023:

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