IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0289

PHOENIX CAPITAL GROUP HOLDINGS, LLC, a Delaware limited liability company,

Plaintiff/Appellant/Cross-Appellee,

vs.

BOARD OF OIL AND GAS CONSERVATION OF THE STATE OF MONTANA,

Defendant/Appellee/Cross-Appellant,

and

KRAKEN OIL AND GAS, LLC,

Intervenor-Defendant/Appellee/Cross-Appellant.

REPLY BRIEF OF THE BOARD OF OIL AND GAS CONSERVATION OF THE STATE OF MONTANA

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Colette B. Davies, Presiding

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INTRODUCTION

This Court should reverse the district court's exclusion of Lindsey Meszaros's testimony. In October 2017, Katherine Solis, Phoenix's predecessor in interest, stated affirmatively to Meszaros that she did not wish to participate in any wells drilled by Kraken. Meszaros offered that evidence before the Board of Oil and Gas Conservation (the "Board"), and Phoenix did not object. Nevertheless, the district court, on review, excluded the testimony as hearsay. That ruling was in error.

First, because Phoenix waived its objection by failing to timely raise it. Phoenix relies on the fact that the court's review is *de novo*, but *de novo* review, even under Mont. Code Ann. § 82-11-144, does not eliminate the preservation requirement. Second, because Meszaros's testimony was not hearsay. Under the verbal act doctrine, testimony that a statement was made is non-hearsay evidence, so long as it is based on the speaker's personal knowledge. Therefore, in the event this Court cannot find that Solis "failed" to pay her share of the drilling costs under Mont. Code Ann. § 82-11-202(2)(b), it should reverse the district court's ruling and find that she "refused" to pay.

ARGUMENT

I. Phoenix waived its hearsay objection by failing to timely raise it.

By failing to raise its hearsay objection immediately, Phoenix waived it. Phoenix argues that it raised the objection in its Application for Rehearing. *See*

Phoenix's Reply/Answer Brief (Phoenix's Ans. Br.) at 16. This is accurate, *see* Board of Oil and Gas Conservation's Combined Opening/Answer Brief (Board's Comb. Br.) at 7, but it is not material. Under Montana's Rules of Evidence, an objection is timely if it is "made as soon as the ground for the objection becomes apparent." *Kizer v. Semitool*, 251 Mont. 199, 207, 824 P.2d 229, 234 (1991) (citing *McCormick on Evidence*, § 53 at 126 (3rd ed. 1984)). Otherwise, the objection is waived. The hearing at which Lindsey Meszaros offered her testimony to the Board occurred on October 14, 2021; Phoenix filed its Application for Rehearing more than two weeks later, on October 29, 2021. Phoenix fails to explain why the grounds for objection were not apparent on October 14, as soon as the testimony was offered. Its objection is untimely, and the Board correctly determined that Phoenix had waived it.

Phoenix also continues to rely, misguidedly, on the fact that a court's review of a Board order under Mont. Code Ann. § 82-11-144 is *de novo*. It argues that its appeal to the district court "was not an administrative appeal under MAPA where the parties were bound by objections or evidence submitted below"—and therefore its failure to timely object is irrelevant. Phoenix's Ans. Br. at 16. The Board has not argued that MAPA applies; only the basic, generally accepted definition of *de novo* review, which is consistent with section 144. *See* Board's Comb. Br. at 29–30.

Under the ordinary *de novo* standard, the appellate court reviews the legal conclusions of the lower court without deference; it conducts the same inquiry anew. *See, e.g., Lorang v. Fortis Ins. Co.,* 2008 MT 252, ¶ 52, 345 Mont. 12, 192 P.3d 186. Factual findings are reviewed for clear error. *See Watson v. Mont. Dep't of Fish, Wildlife & Parks, 20*23 MT 239, ¶ 12. Evidentiary rulings are reviewed for an abuse of discretion. *See Lorang*, ¶ 52. And, as this Court recently held, "Under the common law, a party cannot raise an issue for the first time on appeal unless the court accepts plain error review." *Watson*, ¶ 17 (comparing to MAPA review).

Although worded differently, the provisions of Mont. Code Ann. § 82-11-144 do not substantially change the ordinary meaning of *de novo* review. A district court's review of a Board order "shall be tried de novo and disposed of as an ordinary civil suit and not upon the record of any hearing before the board." Mont. Code Ann. § 82-11-144. Findings of fact are "not binding on the court" and it should "consider all the evidence." Mont. Code Ann. § 82-11-144, (3). The district court "shall decide all relevant questions of law" and set aside orders that are, *inter alia*, "unwarranted by the facts." Mont. Code Ann. § 82-11-144, (2)(e). In other words—like any "ordinary civil suit"—the reviewing court conducts the same legal inquiry as the Board. It is not bound by the Board's factual findings and may review the evidence to test whether it is sufficient to support the Board's legal

conclusions. What section 144 does not do is change the objection-preservation requirement. Rather than creating an entirely new definition of *de novo*, section 144 follows in the footsteps of the existing standard.

In this case, the district court erred in reviewing Phoenix's hearsay objection at all. The objection was not preserved, and, as discussed in the Board's Combined Brief (at 28–31), plain error review was not appropriate. Furthermore, in conducting its review, it applied the wrong standard. There was no evidentiary ruling by the Board to review (because Phoenix did not timely raise the issue to the Board), so the abuse of discretion standard did not apply. Therefore, in order to reverse, the district court was required to find that the Board's factual finding based on Meszaros's testimony was clearly erroneous. The district court made no such finding, and there was no basis for it to do so. The district court misinterpreted the meaning of *de novo* review under Mont. Code Ann. § 82-11-144 and should be reversed.

II. Meszaros's testimony was not hearsay because it was based on her personal knowledge.

Finally, the verbal act doctrine applies in this context, for the same reason that Phoenix's citation to *Smith v. Burlington N. & Santa Fe Ry. Co.*, 2008 MT 225, ¶ 39, 344 Mont. 278, 187 P.3d 639, is inapposite. *See* Phoenix's Ans. Br. at 16–17. The key is the personal knowledge of the speaker. "Personal knowledge" means "knowledge gained through firsthand observation or experience, as

distinguished from a belief based on what someone else has said." BLACK'S LAW DICTIONARY (9th ed. 2009). As this Court has held many times, because affidavits supporting a summary judgment motion must be limited to otherwise-admissible evidence, a statement not based on the affiant's personal knowledge is excludable hearsay. *See, e.g., Smith*, ¶ 39 ("Affidavits made without personal knowledge and based on hearsay evidence should not be considered in a motion for summary judgment.") (emphasis added); *Thornton v. Songstad*, 263 Mont. 390, 398, 868 P.2d 633, 638 (1994); *Hiebert v. Cascade County*, 2002 MT 233, ¶¶ 29–30, 311 Mont. 471, 56 P.3d 848; *In re Estate of Harmon*, 2011 MT 84A, ¶ 25, 360 Mont. 150. Because Meszaros observed Solis's statement firsthand, her testimony about what she heard is not hearsay, just as her testimony about seeing a car accident or smelling smoke would not be hearsay.

Meszaros's testimony *would* be hearsay if, for example, it were offered to prove that Solis's husband was sick or that Solis received public benefits. Meszaros has no personal knowledge of those facts. However, her testimony was offered only to prove the relevant operative fact: that Solis stated, to a Kraken representative, that she was refusing to participate in any wells. The testimony of that Kraken representative—Lindsey Meszaros—is based on her personal knowledge and observation. The district court erred in finding that the testimony was hearsay.

CONCLUSION

The district court erred in excluding Meszaros's testimony about her phone call with Solis. If this Court cannot otherwise find that Solis "failed" to pay, it should reverse the district court's ruling and find that Solis "refused" to pay.

Respectfully submitted this 20th day of December 2023.

AGENCY LEGAL SERVICES BUREAU

/s/ Liz Leman
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 1,270 words, excluding certificate of service and certificate of compliance.

/s/ Liz Leman
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CERTIFICATE OF SERVICE

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