IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0652

DR. KIMBERLY STRABLE,

Plaintiff and Appellant,

v.

CARISCH, INC. d/b/a ARBY'S,

Defendant and Appellee.

APPELLEE'S RESPONSE BRIEF

On Appeal from the Montana First Judicial District Court, Lewis & Clark County
The Honorable Kathy Seeley, Presiding

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I. STATEMENT OF ISSUE FOR REVIEW

Did the District Court err in granting Carisch, Inc.'s Motion for Summary Judgment finding that, as a matter of law, no enforceable contract existed between Carisch, Inc. and Dr. Kimberly Strable?

II. STATEMENT OF THE CASE

The District Court correctly determined that no enforceable contract existed between Appellee, Carisch, Inc., d/b/a Arby's ("Carisch") and Appellant Dr. Kimberly Strable ("Strable") when they attempted to negotiate a settlement during an active Montana Human Rights Bureau ("HRB") case. After the HRB issued a *reasonable cause* determination, finding that it was more likely than not that discrimination occurred, Carisch and Strable entered into the "conciliation process" as outlined by the HRB. During this process the parties were aware that the HRB facilitated the process and would impose affirmative relief provisions on Carisch as part of any settlement agreement. The parties' settlement negotiations came to a stand-still when Strable's then-attorney withdrew from the case. At the time of this withdrawal, the parties had only decided on one element of the settlement - a $25,000.00 payment. No other elements of a settlement agreement within the HRB case were finalized or agreed to.

Strable then dismissed her HRB claim and filed a District Court claim against Carisch claiming that it breached the HRB settlement. Carisch filed a *Motion for Summary Judgment*, arguing that in the context of the HRB matter, no binding settlement agreement was reached between it and Strable. The District Court granted Carisch's *Motion* finding that no enforceable settlement existed between the parties because Carisch lacked consent under Mont. Code Ann. §28-2-102 . The District Court did not err in granting Carisch's *Motion for Summary Judgment* and this Court should affirm the District Court's decision.

III. STATEMENT OF FACTS

This appeal arises from the District Court's *Order* granting summary judgment in favor of Carisch. The District Court's *Order* found that, as a matter of law, no enforceable contract existed between Carisch and Strable. *Order on Def. Mot. For S.J.*, District Court Document ("D.C. Doc.") 55 (Oct. 4, 2023), attached as Appendix A to *Appellant's Opening Brief* (Feb. 15, 2024). The underlying case has many layers as explained below.

A. Strable's Age-Discrimination Claim with the Montana Human Rights Bureau.

The underlying matter begins with an age-discrimination claim filed by Strable, against Carisch, with the HRB. Strable alleged in this administrative

matter that in August 2020, when she was under the age of eighteen, she contacted an Arby's restaurant[1] in Great Falls, Montana and asked whether she could apply for a job as a manager. *Pl.'s First Amended Compl. and Req. for Stay of Admin. Proc., Attorney's Fees ("First Amended Compl.")*, ¶¶13,15, D.C. Doc. 3 (Aug. 30, 2021). Strable went on to allege that an Arby's employee told her that she could not apply for the manager position because she was under the age of eighteen. *Id.* at ¶15. Without applying for the job or any further inquiries to Arby's, Strable filed an age-discrimination claim against Carisch with the HRB on October 19, 2020.[2] *Carisch's Br. In Support of Mot. for S.J.,* Exhibit 2, D.C. Doc. 44 (March 16, 2023). The HRB issued a *reasonable cause* determination on April 7, 2021. *Pl.'s First Amended Complaint*, ¶6.

B. The HRB Conciliation Process.

After the HRB issued its *reasonable cause* determination, Carisch and Strable entered into a settlement phase in hopes to reach what is known as a "Conciliation Agreement" pursuant to Mont. Code Ann. §49-2-504(2)(c) and

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[1] At all relevant times, the Arby's restaurant franchise was owned and operated by Carisch.

[2] Unbeknownst to Carisch, Strable filed around 300 discrimination claims against businesses across Montana, making similar allegations. Strable admitted in discovery for this matter that she never submitted an employment application to the Arby's restaurant; had no intention of submitting an application for employment; and had no intention of working as a manager at Arby's. Further, Strable disclosed that she has received approximately $350,000 in settlement proceeds from her 300 cases. *Br. in Resp. to Pl.'s Mots. in Limine*, Exhibit A, D.C. Doc. 42 (Mar. 14, 2023).

Mont. Admin. R. 24.8.301(1).[3] Carisch's then-attorney, Thomas Revnew, and Strable's then-attorney, Raph Graybill, began negotiations in an attempt to reach a voluntary resolution agreement. *Carisch's Br. In Support of Mot. for S.J.*, Exhibit 3, *Affidavit of Thomas R. Revnew*, ¶7, D.C. Doc. 44. After several rounds of negotiations, the parties reached an "agreement in principle," which at that time, only contained one component - a monetary amount of $25,000.00. No other terms of a voluntary resolution agreement were negotiated or agreed upon. *Id.* at ¶¶9, 10; *Pl.'s First Amended Complaint*, ¶25. Mr. Revnew stated to Mr. Graybill in a June 14, 2021 email:

> Raph,
>
> We have an agreement to resolve this matter at $25,000, **subject to a mutually agreeable settlement agreement**. I understand you'll reach out to Ms. Beck. Let me know if you wish to discuss. Thanks.
>
> Tom

Pl.'s First Amended Complaint, ¶22 (emphasis added).

Mr. Graybill relayed this information to the HRB's Office of Administrative Hearings'("OAH") legal secretary, Sandra Page, on June 14, 2021, writing:

> Dear Sandra –

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[3] A "conciliation agreement" is "any voluntary resolution agreed to after the Human Rights Bureau issues a reasonable cause finding." Mont. Admin. R. 24.8.301(1).

> The parties in Strable v. Arby's have reached an **agreement in principle** to resolve Charging Party's claims. They are currently in the process of drafting settlement documents. In the interest of judicial economy and in light of tomorrow's deadline to file preliminary pre-hearing statements, the parties jointly request that the Hearing Officer continue that deadline by 30 days to allow the parties time to formalize settlement and move to dismiss Charging Party's claims.
>
> Counsel for Arby's is CC'd on this email.

Carisch's Br. in Support of Mot. for S.J., Exhibit 3, *Affidavit of Thomas R. Revnew*, ¶10, D.C. Doc. 44 (emphasis added). Ms. Page responded the next day by writing,

> Good morning,
>
> Thank you for letting me know. We will dismiss the matter **once HRB has approved the settlement and any affirmative relief** & closed the case at HRB.

Id.; *Pl.'s First Amended Complaint*, ¶26 (emphasis added).

Upon receiving notice of this "agreement in principle," Clarice Beck, HRB's conciliator, sent the attorneys a "DRAFT Conciliation Agreement" for their review and changes on June 15, 2021. *Carisch's Br. In Support of Mot. for S.J.*, Exhibit 3, *Affidavit of Thomas R. Revnew,* ¶11, D.C. Doc. 44. The draft agreement left the monetary amount blank, contained stock affirmative relief provisions, and had four signature lines – one for Strable, one for Carisch, one for Clarice Beck, and one for Marieke Beck, Bureau Chief of the HRB. *Id.* Prior to this document being

negotiated, changed, formalized, and/or signed, Mr. Graybill withdrew from his representation of Plaintiff. *Id.* at ¶12.

Plaintiff then sought to finalize the negotiations pro se. *Id.* at ¶13. She asked Mr. Revnew if "[Carisch] still intends on settling this case." *Id.* Clarice Beck emailed Mr. Revnew stating,

> Good morning Tom,
>
> I have had a number of emails and a phone call from Ms. Strable asking about your client. She seems to think that the case may be settled.
>
> I have not received any information regarding a settlement and as you know if there is a settlement **the Bureau must be involved for the targeted equitable relief aspect**.
>
> If it is not settled then the venue of the [OAH] is where the parties should be and I will let her know that again.
>
> Thank you for your help.
> Clarice

Id. at ¶14 (emphasis added). No changes were made to this "draft" document, nor were the terms, other than a monetary amount, discussed amongst the parties. *Id.* at ¶16.

Strable, with her current attorney, then sought to stay her HRB matter while she filed a breach of contract claim in District Court. *Carisch's Br. In Support of*

Mot. for S.J., Exhibit 4, *Order Denying Charging Party's Motion to Sever,*[4] D.C. Doc. 44. The OAH Hearing Officer, Caroline Holien, denied this Motion finding,

> No evidence has been offered showing that a written voluntary resolution agreement has been entered into by the parties.[5] While the parties may have had an informal agreement that was not reduced to writing, such an agreement is not in conformance with the rules governing the resolution of human rights complaints. **Further, there has been no evidence offered showing the Human Rights Bureau was ever presented an agreement that included affirmative relief.** As noted above, the Human Rights Bureau must approve any voluntary resolution agreement before the matter will be dismissed. Absent such a showing, Strable has failed to show that severing Carisch from Strable-1 and staying the proceedings is appropriate under Rule 42 of the Montana Rules of Civil Procedure.

Id. (emphasis added). Following this ruling, Strable voluntarily dismissed her HRB claim against Carisch on February 10, 2022. *Br. in Supp. Of Def.'s Mot. for Sanctions and Mot. to Compel Disc. Resp.*, Exhibit 3, D.C. Doc. 19 (Aug. 24, 2022).

C. Strable's Breach of Contract Claims and the District Court's Order on Summary Judgment.

Before Stable voluntarily dismissed her HRB claim against Carisch, Strable filed the underlying claim with the Montana First Judicial District, Lewis & Clark

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[4] Strable's numerous HRB claims had been consolidated into one caption. Strable sought to sever and stay her individual case with Carisch.

[5] Under the HRB's administrative rules, a "voluntary resolution agreement reached by the parties must be in writing, signed by the parties, and approved by the Human Rights Bureau." Mont. Admin. R. 24.8.301(5).

County claiming breach of contract, bad faith and equitable estoppel, alleging that Carisch was in breach of an enforceable settlement agreement. *See, Pl.'s First Amended Complaint.* Carisch filed its *Motion for Summary Judgment* on all of Strable's claims arguing that no enforceable contract existed between the parties. *Def.'s Mot. for S.J.*, D.C. Doc. 43 (Mar. 17, 2023). In briefing, Strable agreed that no material issues of fact existed. *Pl.'s Br. in Resp. to Def.'s Mot. for S.J.*, p. 1, D.C. Doc. 48 (Apr. 10, 2023).

The District Court issued its *Order* granting Carisch's *Motion* on October 3, 2023. D.C. Doc. 55. In its order, the court analyzed whether Carisch and Strable's actions had satisfied the four statutory elements of a valid contract pursuant to Mont. Code Ann. §28-2-102. In analyzing these elements, the court found that the consent element of Mont. Code Ann. §28-2-102 had not been met and thus, a valid contract did not exist between Carisch and Strable. The court reasoned that:

> The parties both understood that the agreement on material terms was subject to approval by the HRB, and that, before such approval would be given, the HRB would require the inclusion of affirmative relief provisions to be imposed on Defendant. Pl.'s First Am. Compl. and Req. for Stay of Admin. Proceedings, ¶6, Aug. 30, 2021. The parties received a copy of a stock conciliation agreement, were aware that the agreement would have to be agreed upon, altered, and signed, but never did so. *Id.* at ¶27; Br. Supp. Mot. For Summ. J. ¶3, Mar. 16, 2023. No agreement was ever presented to the HRB for approval, which both

> parties recognized at the time was the next necessary step in the conciliation process. *Id.* at ¶3-4. There was a mutual understanding that the conciliation process as the parties had left it was unfinished, and there could have been no "meeting of the minds as to [the] existence and the respective requirements for fulfillment of" the terms of affirmative relief yet to be imposed. *Martel Constr. v. Montana State Bd. of Examiners*, 205 Mont. 332, 342, 668 P.2d 222 (1983). Defendant, at this point in the process, could not have feasibly consented to contract, because Defendant had not yet had affirmative relief provisions imposed on them, and therefore could not consent to perform conditions of which they had not yet been made aware. The Court, therefore, finds no factual basis to support Plaintiff's assertion that Defendant had consented to contract in the same manner contemplated by Plaintiff.

Order on Def. Mot. For S.J., pp. 5-6, D.C. Doc. 55. The District Court also noted the role the HRB played in any settlement between Carisch and Strable. The court stated:

> Although the facts of this case are here analyzed in the context of a breach of contract claim under Montana law, the reality is that these negotiations were occurring amidst an ongoing HRB case, which both parties understood to require more than what they had compromised on. Consent by the parties to a contract must be "conditional. . . according to its terms. . .", and there can be no unconditional consent to the terms of a contract that has yet to be fully defined and agreed upon. *Keesun Partners v. Ferdig Oil Co.*, 249 Mont. 331, 337, 816 P.2d 417 (1991). Applying the uncontested facts of this case to the well-established requirements for parties to consent to a contract, this Court finds the element of consent lacking.

Id. at p. 6.

Strable now appeals the District Court's *Order*.

IV. STANDARD OF REVIEW

The Supreme Court reviews a District Court's grant of summary judgment de novo "for conformance to the applicable standards specified in M.R.Civ.P. 56." *Lawrence v. Pasha*, 2023 MT 150, ¶8, 413 Mont. 149, 533 P.3d 1029. "Whether a genuine issue of material fact exists or whether a party is entitled to judgment as a matter of law are questions of law subject to de novo review for correctness." *Hanson v. Town of Fort Peck*, 2023 MT 208, ¶16, 414 Mont. 1, 538 P.3d 404 (citing *Ereth v. Cascade Cty.*, 2003 MT 328, ¶11, 318 Mont. 355, 81 P.3d 463).

V. SUMMARY OF ARGUMENT

The District Court correctly rooted its decision on summary judgment in Montana contract law and not the statutes and regulations governing the HRB. The District Court correctly stated and analyzed the elements of Mont. Code Ann. §28-2-102 and applied this law to the undisputed facts of the case to determine that Carisch lacked consent to contract. The District Court correctly observed that while its decision was rooted solely in Montana contract law, the undisputed facts showed that the parties' negotiations took place during an active HRB matter, which required additional procedural steps including Carisch's agreement to affirmative relief provisions within the settlement agreement. Strable's appeal attempts to confuse the District Court's *Order* to create issues of fact and law.

However, Strable willingly filed her age-discrimination case with the HRB and cannot now assert that required HRB provisions placed upon Carisch during settlement negotiations are not essential elements of their settlement agreement. For these reasons, this Court should affirm the District Court's *Order*.

VI. ARGUMENT

A. The District Court Correctly Determined No Valid Contract Existed Between Carisch and Strable Pursuant to Montana Code Annotated §28-2-102, Despite Strable Raising Issues of Conditions Precedent on Appeal.

The District Court correctly analyzed the legal elements of a valid contract and applied them to the undisputed material facts of this case to determine that no valid contract existed between the parties. In responding to Strable's arguments on appeal, Carsich argues that 1) the District Court correctly determined that the parties' attempts to negotiate a settlement in the midst of an ongoing HRB matter did not amount to a valid and enforceable agreement, and 2) Strable raises her argument that no condition precedent to contract formation existed between the parties for the first time on appeal and thus should not be considered by this Court.

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i. The District Court Correctly Analyzed the Undisputed Facts to Determine that No Enforceable Contact Existed Between the Parties Under Montana Law.

The District Court correctly analyzed the parties' dispute in terms of whether or not an attempted settlement agreement met the elements of a contract under Mont. Code Ann. §28-2-102. Carisch concurs with the District Court that "settlement agreements are contracts, subject to the provisions of contract law," *Jarussi v. Sandra L. Farber Trust*, 2019 MT 181, ¶15, 396 Mont. 488, 445 P.3d 1226 (citations omitted), and that a valid contract requires 1) identifiable parties capable of contracting; 2) their consent; 3) a lawful object; and 4) a sufficient cause or consideration. Mont. Code Ann. §28-2-102. The court's *Order* applied each of these elements to the undisputed facts of the case and found, as a matter of law, that no enforceable contract existed between the parties. *See*, *Order on Def. Mot. For S.J.*, pp. 4-7, D.C. Doc. 55.

Contrary to Strable's assertion on appeal,[6] Carisch contended in its summary judgment briefing with the District Court that the elements of Mont. Code Ann. §28-2-102 had not been met in the parties' settlement negotiations. *Reply Br. in Supp. of Mot. for S.J.*, pp. 2-3 D.C. Doc. 50 (Apr. 24, 2023). The District Court

[6] Strable argued that Carisch "never disputed the existence of a preliminary agreement under Mont. Code Ann. §28-2-102." *Appellant's Opening Brief*, pp. 15 and 20. This is simply untrue.

found that all elements of Mont. Code Ann. §28-2-102 had been met *except* the element of consent. The court stated the law regarding consent as follows:

> The consent of the parties to a contract must be (1) free, (2) mutual, and (3) communicated by each to the other. Mont. Code Ann. §28-2-301. The requirement that consent to contract be mutual requires that the parties "agree upon the same thing in the same sense. . ." *American v. Fid. Nat'l Title Ins. Co.*, 2009 MT 212, ¶15, 351 Mont. 292, 210 P.3d 691. Further, "[a] contract is not made so long as, in the contemplation of both parties thereto, something remains to be done in order to establish contract relations." *Schwedes v. Romain*, 179 Mont. 466, 470, 587 P.2d 388 (1978). Here, the undisputed facts show that both parties understood that, although an agreement had been reached on the monetary amount to be awarded in settlement, something remained to be done.

Order on Def. Mot. For S.J., p. 5, D.C. Doc. 55. That "something" were the additional provisions and procedural steps required by the HRB. Strable acknowledged this fact in her *First Amended Complaint and Request for Stay of Administrative Proceedings, Attorney's Fees*, by stating:

> 29. Since any agreement reached in Conciliation is subject to the HRB's approval, any conciliation agreement sent by the HRB always includes stock "affirmative relief" provisions aimed at educating and preventing respondents from future discrimination. In this matter, these provisions were included in paragraphs 3 and 4 of the Conciliation Agreement, and **both parties were aware** that affirmative relief provisions would be imposed by the HRB.

D.C. Doc 3, ¶29 (emphasis added). With this mutual understanding, the District Court concluded that the conciliation process was left unfinished and therefore

there could be no "'meeting of the minds as to [the] existence and respective requirements for fulfillment of' the terms of affirmative relief yet to be imposed." *Order on Def. Mot. For S.J.*, pp. 5-7, D.C. Doc. 55 (quoting *Martel Constr. v. Montana State Bd. Of Examiners*, 205 Mont. 332, 342, 668 P.2d 222 (1983)).

Strable, on appeal, contends that the only essential term to the agreement between herself and Carisch was the monetary settlement amount of $25,000.00 and that somehow the parties' "agreement in principle" met the required elements of a contract. *Appellant's Opening Brief*, p. 18. However, this argument fails to acknowledge the undisputed fact that Carisch was required to consent to additional settlement terms - i.e, affirmative relief provisions - as a part of the settlement within the HRB matter. Carisch had not agreed to any such provisions and therefore, did not consent to all of the essential terms of the settlement agreement. "It is a well-established rule that there must be mutual assent or a meeting of the minds on all essential elements or terms to form a binding contract." *Jarussi*, *supra*, ¶17 (quoting *Chadwick v. Giberson*, 190 Mont. 88, 92, 618 P.2d 1213, 1215 (1980)). Further, "[a]n agreement that requires the parties to agree to material terms in the future is not an enforceable agreement whereby specific performance will be granted." *GRB Farm v. Christman Ranch, Inc.*, 2005 MT 59, ¶11, 326 Mont. 236, 108 P.3d 507 (citing *Steen v. Rustad*, 132 Mont. 96,

105, 313 P.2d 1014, 1020 (1957)). Finally, "[a]n agreement, the terms of which are not sufficiently certain to make the act which is to be done clearly ascertainable, cannot be specifically enforced." *Holter Lakeshores Homeowners Ass'n, Inc. v. Thurston*, 2009 MT 146, ¶23, 350 Mont. 362, 207 P.3d 334 (citing *Quirin v. Weinberg*, 252 Mont. 386, 393-94, 830 P.2d 537, 541 (1992)). The District Court did not err in determining that Carisch lacked consent under Mont. Code Ann. §28 -2-102 given its requirements to further agree to affirmative relief provisions.

ii. The Court Should Not Consider Strable's Condition Precedent Arguments.

For the first time on appeal, Strable asserts that there is a valid, enforceable contract between the parties because the elements of Mont. Code Ann. §28-2-102 are met *and* there is no condition precedent to contract formation. *Appellant's Opening Brief*, p. 21. Strable argues that Mr. Revnew's email to Mr. Graybill on June 14, 2021 stating that the $25,000 settlement amount was "subject to a mutually agreeable settlement agreement" is not a condition precedent to contract formation. *See*, *Pl.'s First Amended Complaint*, ¶22. In making this argument however, Strable acknowledges the District Court never addressed this legal question. *Id.* at p. 22. Because the District Court never addressed the issue of a

condition precedent to contract formation, the Court should not consider the argument on appeal.

It is well established that the Montana Supreme Court does 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 (citing *State v. Ferguson,* 2005 MT 343, ¶38, 330 Mont. 103, 126 P.3d 463; *State v. Peterson,* 2002 MT 65, ¶24, 309 Mont. 199, 44 P.3d 499; *Schlemmer v. N. Cent. Life Ins. Co.,* 2001 MT 256, ¶22, 307 Mont. 203, 37 P.3d 63; *Unified Indus., Inc. v. Easley,* 1998 MT 145, ¶¶15-17, 289 Mont. 255, 961 P.2d 100; *Snetsinger v. Mont. Univ. Sys.,* 2004 MT 390, ¶120, 325 Mont. 148, 104 P.3d 445 (Rice, J. & Gray, C.J., dissenting)). This Court has stated:

> 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*, [2012 MT 283] ¶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.

Id. at ¶21 (emphasis added). Strable makes no argument that any extenuating circumstances justify making this argument on appeal. Strable's attempt to insert new legal theories that she admits the District Court did not have a chance to consider should be rejected by this Court.

However, if the Court were to consider this theory on appeal, the argument fails because as discussed above, the required consent element under Mont. Code Ann. §28-2-102 has not been met. Alternatively, in the event this Court considers Strable's condition precedent to contract formation argument, it is clear from the undisputed facts of this case that Mr. Revnew's email stating that the monetary settlement amount is "subject to a mutually agreeable settlement agreement" is a condition precedent to contract formation because as discussed above, Carisch was required to further agree to material settlement provisions, namely the affirmative relief provisions.

> "A contract condition is the subsequent occurrence of a specific uncertain act, event, or circumstance." *Davidson v. Barstad*, 2019 MT 48, ¶¶20-23, 395 Mont. 1, 435 P.3d 640 (citing §28-1-401, MCA, and Restatement (Second) of Contracts §224 (1981)). As distinct from a condition precedent to a performance of an obligation required by the terms of an already validly formed contract, "[a] condition precedent to contract formation is a specific condition, usually an extraneous event or circumstance or third-party act, the occurrence upon which the reciprocal promises constituting the contract consideration depend." *Davidson*, ¶20. See also §28-1-403, MCA (a "condition precedent" inter alia includes a condition to be satisfied "before some right

> dependent thereon accrues"). "[F]ailure or non-satisfaction of a condition precedent to contract formation renders the contemplated contract non-existent as never [fully] formed[,] and thus non-binding and unenforceable." *Davidson*, ¶21. In other words, an agreement satisfying the essential elements required for valid contract formation (i.e., identifiable parties capable of contracting, communicated mutual assent of the parties to the same contract terms and conditions, sufficient reciprocal consideration, and lawful object, terms, and conditions), but which is subject to a condition precedent to formation, is a valid contract that is conditionally binding and enforceable (i.e., effective) only upon satisfaction of the agreed condition precedent to formation. See §28-1-403, MCA (a "condition precedent" inter alia includes a condition to be satisfied "before some right dependent thereon accrues"); *Davidson*, ¶¶20-21.

Hanson v. Town of Fort Peck, *supra*, ¶31.

Strable neglects to acknowledge in her *Opening Brief*, the undisputed fact that Carisch was obligated to agree to specific affirmative relief provisions in any settlement agreement within the HRB matter. This obligation was a condition that had to be satisfied before any contract could be binding on Carisch, including the monetary settlement amount negotiated with Strable. Both Strable and Carisch were aware of this requirement when they began negotiating a settlement during an active HRB matter. *Pl.'s First Amended Complaint*, ¶29. Strable cannot now ignore a fact which she asserted in her *Amended Complaint*. Therefore, if this Court determines the negotiations between Strable and Carisch meet the required elements of Mont. Code Ann. §28-2-102, the Court should also find that Carisch's

obligation to agree to affirmative relief provisions, subject to the HRB's approval, amounts to a condition precedent to contract formation.

B. Strable Misconstrues the District Court's Order on Summary Judgment to Require the Montana Human Rights Bureau's Approval to Secure a Binding Settlement Agreement.

Strable further attempts to argue on appeal that the District Court somehow based its decision on the HRB's regulatory approval of the parties' settlement agreement, and that this decision was in error. However, the District Court made no such finding. Instead the District Court correctly observed that:

> Although the facts of this case are analyzed in the context of a breach of contract claim under Montana law, the reality is that these negotiations were occurring amidst an ongoing HRB case, which both parties understood to require more than what they had compromised on.

Order on Def. Mot. For S.J., p. 6, D.C. Doc. 55. The District Court's findings were not based on the actions of the HRB but on the actions and consent of Carisch pursuant to Mont. Code Ann. §28-2-102. Carisch attempted to make the argument in its *Brief in Support of Summary Judgment* that Mont. Admin. R. 24.8.301(5)[7] played a role in whether a binding settlement agreement was reached between the parties, but the District Court rejected this argument. *Def.'s Br. in*

[7] Pursuant to Mont. Admin. R. 24.8.301(5), a binding conciliation agreement must include a writing, signed by the parties, and approved by the HRB.

Supp. of Mot. for S.J., pp. 6-8, D.C. Doc. 45. The District Court correctly analyzed and determined that under the elements of Mont. Code Ann. §28-2-102, the only parties capable of contracting were Strable and Carisch (not the HRB) and that Carisch could not fully consent to the parties' agreement in principle because Carisch (not the HRB) had to be informed of, and agree to, affirmative relief provisions. *Order on Def. Mot. For S.J.*, D.C. Doc. 55, pp. 4-6.

Again, Strable attempts to bring the contractual legal theories of condition to performance of the contract and condition precedent to contract formation in analyzing the District Court's decision. Strable further attempts to link the rules and regulations[8] of the HRB to the District Court's decision. However, a plain reading of the District Court's *Order* shows no basis for this analysis and this Court should reject these arguments.

C. The Parties Agreed That The Montana Human Rights Bureau Would Impose Affirmative Relief Provisions On Carisch, Which Required Carisch's Consent.

It is undisputed that Strable's and Carisch's settlement negotiations took place during an active HRB matter and that the HRB would impose affirmative

[8] Carisch notes that Strable accurately cited the applicable statutes and regulations of the HRB, however none of these provisions played a role in the District Court's decision to grant summary judgment in favor of Carisch.

relief provisions on Carisch. Strable acknowledges this fact in her *Amended Complaint* stating:

> 17. After the *reasonable cause* determination, the parties entered the Conciliation process wherein the HRB facilitates the negotiation and settlement of the Plaintiff's claim.
>
> . . .
>
> 29. Since any agreement reached in the Conciliation is subject to the HRB's approval, any conciliation agreement sent by the HRB always includes stock "affirmative relief" provisions aimed at educating and preventing respondents from future discrimination. In this matter, these provisions were included in paragraphs 3 and 4 of the Conciliation Agreement, **and both parties were aware that affirmative relief provisions would be imposed by the HRB.**

Pl.'s First Amended Complaint, ¶¶17, 29 (emphasis added). Now, however, Strable is asserting that there was no certainty that the HRB would impose affirmative relief provisions on Carisch and that the HRB could have taken other procedural avenues in imposing the provisions, which would not have involved Strable. *Appellant's Opening Brief*, pp. 33-35. Despite the regulatory language cited by Strable on appeal, it was an undisputed fact in the District Court *Order* that the HRB would impose affirmative relief provisions on Carisch and that Carisch's consent would be required to complete such relief within the HRB

settlement process. The District Court correctly relied on this undisputed fact and Strable cannot now, on appeal, try to dispute this fact.

VII. CONCLUSION

For the reasons stated above, the District Court correctly granted summary judgment in favor of Carisch. The undisputed facts showed, that as a matter of law, the consent element of Mont. Code Ann. §28-2-102 was not met as Carisch was required to agree to additional essential elements of the settlement agreement, namely affirmative relief provisions required by the Montana Human Rights Bureau. This Court should affirm the District Court's *Order*.

Respectfully submitted this 14th day of March, 2024.

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CERTIFICATE OF COMPLIANCE

I, Amber Henning, one of the attorneys for Appellee, hereby certify that:

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

(3) Said APPELLEE'S RESPONSE BRIEF, has a word count of 5,165 as counted by WordPerfect X9 for Windows, not averaging more than 280 words per page, not including the Table of Contents and Table of Authorities.

DATED this 14th day of March, 2024.

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CERTIFICATE OF SERVICE

I, Amber Henning, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-14-2024:

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