IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 25-0474

BMK ENTERPRISES, INC.

Plaintiff and Appellant,

v.

BAILEY ENTERPRISES OF MONTANA, LLC, JOE BAILEY, AND MICHELLE FRANKS

Defendants and Appellees.

APPELLANT'S OPENING BRIEF

On Appeal from the 18th Judicial District Court, Cause No. DV-2022-254
The Honorable Rienne H. McElyea presiding.

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INTRODUCTION

This case arises from a 2018 contract between BMK Enterprises, Inc. ("BMK") and Bailey Enterprises of Montana, LLC ("Bailey")[1] by which BMK purchased real property in Belgrade Montana from Bailey. At the time, Bailey had two adjacent tracts: 490 Briar Place and 151 Bolinger. The contract between BMK and Bailey conveyed 490 Briar Place.

Exhibit A to the buy-sell agreement included ten additional provisions, including easements granted by BMK to Bailey, from Bailey to BMK, some logistical details, and, most significantly, the following:

> Seller grants Buyer the first right of refusal if Seller sells storage units at 151 Bolinger, Belgrade Montana.

Supplemental Appendix at 8.

In 2021, Bailey sold 151 Bolinger without affording BMK the first right of refusal. The district court granted summary judgment, on the theory that this right of first refusal is unenforceable because the subject property is insufficiently described. As is discussed below, this was error. The description is adequate to cover the transaction Bailey engaged in – there is no dispute that Bailey in fact sold the storage units at 151 Bolinger. To the extent that this might be considered ambiguous,

[1] Bailey's managing members Joe Bailey and Michelle Franks were named as defendants and are appellees here. The term "Bailey" in this brief includes the company and its managing members.

moreover, there was sufficient evidence in the record to create a genuine issue of material fact as to what the clause might mean beyond the storage units themselves.

STATEMENT OF THE ISSUES

Whether the district court erred in granting summary judgment to appellees Bailey Enterprises of Montana, LLC, Joe Bailey, and Michelle Franks.

There are three sub-issues:

> Whether Appellees met their burden of showing that there were no genuine issues of material fact.
>
> Whether Appellees met their burden of showing that they were entitled to a judgment as a matter of law.
>
> Whether the district court erred in not considering factual disputes resolved in Appellant's favor as a consequence of Appellees' failure to file an answer to Appellant's amended complaint.

STATEMENT OF THE CASE

This cases arises from part of a buy-sell agreement: BMK bought one tract from Bailey[2] and, as part of the same transaction, acquired a right of first refusal on a second tract should Bailey sell that property as well. Notwithstanding this provision, Bailey sold the second property without giving BMK an opportunity to match the sales price. BMK brought suit on the contract. The district court granted summary judgment in Bailey's favor.

[2] Bailey's managing members of Appellees Joe Bailey and Michelle Franks.

Specifically, BMK originally sued Bailey and McCaw, DeVries, Steinhauer RE LLC, (collectively "MDS") in March 2022. BMK asserted, *inter alia*, the following claims against Bailey: breach of contract (Count I) and breach of the implied covenant of good faith and fair dealing (Count V).[3] On February 22, 2023, pursuant to an order granting its unopposed motion for leave, BMK filed an amended complaint adding Security Title of Montana as a defendant, and a number of claims against Security Title. Unlike MDS, Bailey did not file an answer to the amended complaint. Summary judgment was granted to Security Title on January 30, 2024. On February 27, 2025, the district court granted summary judgment in favor of MDS based, *inter alia*, on its determination that the right of first refusal was not enforceable. Then, on May 27, 2025, the district court granted summary judgment to Bailey incorporating its ruling in the February 27, 2025 MDS order. The district court entered judgment in favor of Bailey on June 19, 2025. BMK timely noted this appeal on July 7, 2025.

BMK has settled with MDS, and is no longer pursuing claims against either MDS or Security Title. This appeal, then, concerns only BMK's two contract-based claims against Bailey.

[3] BMK's other claims against Bailey were dismissed over the course of the litigation, and are not at issue in this appeal. *See* Feb. 27, 2025 Order at 3.

STATEMENT OF RELEVANT FACTS

As noted above, this case arises from the sales of two adjacent properties in Belgrade, Montana: the Briar property at 490 Briar and the Bolinger property at 151 Bolinger. Both properties were primarily used for storage units – part of a storage unit complex. The Bolinger property also had a rental dwelling, but 10 of the 13 buildings on the property were ministorage units. These storage units were fixtures of the Bolinger property as defined by section 70-15-103(3) & (4) M.C.A.

On May 16, 2018, the principals of Bailey met with the principals of BMK to discuss the sale of the Briar property. The very next day, BMK entered into a buy-sell agreement to purchase the Briar property. Of direct significance in this case, the agreement included, in an addendum, the following grant:

> [Bailey] grants [BMK] the first right of refusal if [Bailey] sells storage units at 151 Bolinger, Belgrade Montana.

Supplemental Appendix at 8. 151 Bolinger had not been subdivided at the time, nor did Bailey ever subdivide it. *See* Franks Dep. 17:9-13.[4] Bailey understood the clause to mean that before it could accept an offer to buy the Bolinger property, it was required to first contact BMK to see if BMK wanted to purchase the property on the same terms. *Id.* at 18:24-25, 19:1-13, 61:13-18. At the time of this sale, the Bolinger property included 198 ministorage units. *Id.* at 16:6-9, 21. The Bolinger property was

[4] Transcripts of the depositions of Michelle Franks, Joe Bailey, and Myron Kovash were all attached to BMK Enterprises, Inc.'s Brief in Opposition to Bailey Defendants' Motion for Summary Judgment, Dkt. 154, March 25, 2025.

listed for sale as a mini-storage complex. *Id.* at 25:20-23; *see also* Amended Complaint Ex. B. This was the main selling point for the property. Franks Dep. at 25:24-25, 26:1-4. Ten of the thirteen structures on the property were ministorage units. Bailey Dep. at 33:2-11.

As a matter of fact, and the contemporaneous understanding of the parties, the right of first refusal applied to the entire Bolinger property: it was all one. *See* Kovash Dep. at 43:1-4.

In 2021, Bailey entered into a buy-sell agreement to sell the Bolinger property to a third party. Bailey did not notify BMK of this agreement, or give it an opportunity to match the third-party offer. Franks Dep. at 103:20-25, 104:1, 19-22, 105:9-17.[5] Instead, Bailey sold the property outright to the new buyer.[6]

STANDARD OF REVIEW

The Court "review[s] summary judgment rulings *de novo* for conformance with M. R. Civ. P. 56. *Myers* [*v. Kleinhans,* 2024 MT 208], ¶ 7 (citation omitted). 'The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any

[5] Bailey did not fail to give BMK an opportunity to match the offer because it could not understand what property the right of first refusal clause applied to, but rather because it thought its performance obligations under the clause had been satisfied. *See* Franks Dep. at 96:11-12, 97:10-12, 116:13. Nothing in the district court's decisions supports this rationale.

[6] The sale actually proceeded in two stages. First, Bailey conveyed the property to its managing members. They then conveyed it in turn to the third-party buyer. Franks Dep. 35:18-25, 36:12-20, 37:8-11. This resulted in tax savings of $500,000.

material fact and that the movant is entitled to judgment as a matter of law.' M. R. Civ. P. 56(c)(3)." *Brandt v. R&R Mt. Escapes, LLC*, 2025 MT 155 ¶ 10. When determining whether there is a genuine issue of material fact, "all facts considered material in light of the substantive principles that entitle the moving party to judgment as a matter of law and all reasonable inferences are to be drawn in favor of the party opposing summary judgment." *Weber v. Interbel Tel. Coop., Inc.*, 2003 MT 320, ¶ 5. The Court makes its own review of the record to make its own determination whether disputes of fact exist. *Norbeck v. Flathead County*, 2019 MT 84 ¶ 12. This Court, like a district court, "makes no factual findings and resolves no factual disputes" in ruling on summary judgment motions or appeals from summary judgment. *McAtee v. Morrison & Frampton PLLP*, 2021 MT 227 ¶ 12 (ellipsis omitted).

The party moving for summary judgment bears the initial burden of proving both that there are no genuine issues of material fact and that on those facts it is entitled to judgment as a matter of law. *Farmers Ins. Exchange v. Wessel*, 2020 MT 319 ¶ 11. If, but only if, the moving party has met this burden, the non-moving party must then present sufficient evidence to show that there is a genuine issue of material fact or that the moving party is not entitled to judgment as a matter of law. *Id.*

A district court's legal interpretations of contracts are reviewed *de novo*. *Morley v. Morley*, 2022 MT 12 ¶ 12.

In sum, the boilerplate recited above can be reduced to two well established propositions: (1) this Court owes the decisions of the court below no deference whatsoever and (2) if, after its independent review of the record, the Court finds either that there is a genuine issues of material fact ***or*** that Bailey is not entitled to judgment as a matter of law on the undisputed facts, it ***must*** reverse the judgment below.

SUMMARY OF THE ARGUMENT

The district court misapplied the controlling law both for determining whether a contract in general is unenforceably vague, and specifically whether a right of first refusal clause is unenforceably vague. In context, applying the law correctly, the contract clause at issue was clear and enforceable.

Even if it had been vague, the supposed ambiguity was resolvable based on the evidence in the record. Resolution of disputed facts would have been inappropriate on summary judgment. This Court can and should examine the record de novo, and apply the summary judgment standard appropriately.

The district court misapplied the law concerning the elements for a claim of breach of the covenant of good faith and fair dealing that sounds in contract. BMK's amended complaint, and the evidence in the record, shows that the elements were met. Bailey's motion was based on a misunderstanding of the law. The district court's summary dismissal of this claim was improper.

Finally, the district court failed to apply the rules of civil procedure both as to whether Bailey was required to file an answer to the amended complaint, and what the rules themselves provide as a consequence of failure to make the required filing.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT BAILEY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW

As is well established, a court's task in reviewing a contract is to apply contract language as written. *Cabin v. Extreme*, 2025 MT 161 ¶ 16 (*citing Creveling v. Ingold*, 2006 MT 57 ¶ 8). When, however, a contract term is ambiguous, the fact-finder must resolve a question of fact regarding the intent of the parties. *Lewis & Clark County v. Wirth*, 2022 MT 105 ¶ 19 (*citing Bradley v. Crow Tribe*, 2005 MT 309 ¶ 28). In so doing, the court must reject contract interpretations that lead to absurdities. *Kratzer v. Hardy Constr. Co.*, 2025 MT 140 ¶ 20 (*citing Rubin v. Hughes*, 2022 MT 74 ¶ 43). Courts must interpret contractual provisions in a manner to give effect to each of them. *Hennen v. Omega Enterprs.*, 264 Mont. 505, 509 (1990); *see also* § 28-3-202 M.C.A.. Only after it has determined that no non-absurd meaning of a contract clause can be divined from the contract language, and all the facts surrounding the formation of the contract, may a court determine that the contract is unenforceably vague. *See* 28-2-603 & *Mathis v. Daines*, 196 Mont. 252, 255-56 (1982). This is because a contract is not invalid just because it is missing some details parties might have added. *Somont Oil Co. v. Nutter*, 228 Mont. 467, 472-73 (1990).

Here, there was a non-absurd interpretation of the clause at issue: that BMK had a right of first refusal on the undivided Bollinger property, including its fixtures. This is the property that existed at the time the right of first refusal was granted, and it is the property that was sold, to which BMK contends that the right should be applied. That is, the property that was advertised for sale as "151 Bolinger Mini Storage Complex."

The only other possible interpretation of the clause – that it applied only to the fixtures on the property and not the underlying property – is absurd. It is also, as is discussed below, a question of fact, and thus not suitable for resolution on summary judgment.

The district court's holding that the right of first refusal was unenforceable relied entirely on its application of a single case: *Klein v. Brodie*, 167 Mont. 47, 51 (1975). The district court, however, completely misapplied *Klein*: it should instead have concluded that *Klein* compelled denial of Bailey's motion for summary judgment. *Klein* arose from the sale of a parcel near Condon, Montana and included a right of first refusal "on any additional tracts Seller may offer." *Id.* at 48. The Court found that this language was

> Fatally defective because it is impossible to determine the description of property to which the right applies with accuracy, even though resort is had to extrinsic evidence.

Id. at 50. The Court cited a California case with approval, in which finding that the extrinsic evidence showed which property was intended. *Id.* (*citing Mercer v, Lemmens*, 230 Cal. App.2d 167, 40 Cal Rptr. 803 (1964)). In contrast, the Brodies did not just own a property adjacent to the Kleins, but also in three different sections, each of which was many miles away from the Klein's property.[7] In this context, the Court could not ascertain exactly what property the clause was intended to pertain to. It is clear enough that had the contract specified that it applied to Brodie's other lands in section 4 township 20 north range 16 west, where the Kleins bought, the Court would have enforced the clause. It was the wide ranging nature of the Brodies' holdings, and the absence of any extrinsic evidence that this clause was really intended to reach all of the Brodies' land wherever it might be located that made the contract unenforceable.

In this case, there is no such difficulty: the street address of the property to which the right applied was given in the contract text. This is certainly good enough under *Klein*. The clause is not so vague as to be wholly unascertainable under the Court's holding and methodology set forth in *Mathis*. Nor did the district court show that it was.

[7] Two of the Brodies' properties were in the hills south of Missoula, which the third was northeast of Lincoln, in Lewis & Clark County. Applying the contract clause to these other properties, absent some sort of extrinsic evidence, would have been an absurdity.

Instead, the district court found that the clause was ambiguous because it was susceptible to two different meanings: it might have applied only to the storage units themselves on the specific tract, or it might mean the tract which included the storage units. Reliance on this ambiguity is misplaced: whichever meaning is ultimately applied, Bailey failed to meet it. In a single transaction, it sold both the storage units and the land upon which the storage units were located. The object of the contract – the grant to BMK of a right of first refusal – was readily "'ascertainable [at] the time the contract [was] to be performed."' *Klein* at 51 (quoting section 13-402 R.C.M. 1947); see also § 28-2-602 M.C.A. Under any reasonable interpretation of the provision, as even Bailey's manager's understood, BMK had a right of first refusal when the sale of 151 Bolinger was about to be consummated.

Whether or not the sale included property that was not subject to the right of first refusal cannot be the determining factor. If this was the law, any right of first refusal could be negated simply by adding some additional consideration: a right of first refusal to buy a specific apartment, bargained for and supported by consideration, would be defeated if the seller sold two apartments (the one subject to the right and an adjacent one). Even if somehow this was not a breach of the contract granting the right of first refusal – and so holding would be error – it would certainly amount to a breach of the implied covenant of good faith and fair dealing.

And it is on this covenant that the district court judgment, already erroneous, completely runs aground. Whatever the first refusal clause meant, assuming that there was a basis for a bona fide disagreement about its meaning, it is evident that Bailey had a good faith duty to give BMK notice and an opportunity to respond prior to agreeing to a sale of the property.

The district court did not offer any detailed analysis in support of its rejection of BMK's breach of implied covenant claim. It did not examine the elements of such a claim, and show that, on the undisputed facts, Baliey had met its burden of showing that the element could not be proven at trial. There was a valid contract between Bailey and BMK, this is not disputed. What is at issue is whether having obtained all the consideration set forth in that contract, Bailey acted in good faith with regard to the provision of the contract, its last performance obligation to BMK, that it claims after the fact was ambiguous.

Bailey's motion for summary judgment on the implied covenant was also legally flawed. In the single substantive paragraph in Bailey's brief addressed to this claim, Bailey asserted that BMK was obligated to show a special relationship between the parties in order for such a claim to lie. There are two species of claim for an implied breach of covenant claim. *See Missoula County v. State*, 2024 MT 98 ¶ 21. To proceed in tort, a plaintiff must show a special relationship between the parties. *Id.*; *see also Story v. Bozeman*, 242 Mont. 436, 450 (1990) (holding that to recover on a tort theory

of breach of the covenant, a plaintiff needed to show a special relationship). However, to proceed under contract, the plaintiff need only show a valid contract. In ruling on BMK's constructive fraud claim against Bailey's realtor, the district court's February 2025 order granting summary judgment found that BMK did not have the requisite special relationship with the realtor. Feb Order at 11. In its subsequent motion for summary judgment, Bailey asserted that this ruling foreclosed BMK's breach of covenant claims against it. The district court's ruling, even if it was relevant, would not be 'law of the case' here, because it was made as to the relationship between different parties and applied to a different claim.

However, this was not relevant to BMK's breach of covenant claim against Bailey. As between Baliey and BMK, there was a valid contract, supported by substantial consideration, with most of the performance obligations undoubtedly already fulfilled. At issue in this case is that one last performance obligation, and in this claim, whether Bailey's conduct can be characterized as good faith. Indeed, because this is a summary judgment motion, the question is whether, on undisputed facts, Baliey's conduct ***must*** be considered good faith.

In addition, as is discussed below, the district court erred in resolving both of BMK's claims on summary judgment. The parties offered extrinsic evidence – and the Klein and Mercer courts both considered in determining whether the provisions at issue were so ambiguous as to be unenforceable – which was contradictory.

II. THE DISTRICT ERRED IN FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT

If there is an ambiguity in the contract, the district court was, as the courts in *Klein* and *Mercer* did, obligated to consider the extrinsic evidence to resolve the issue. And if the extrinsic evidence was contradictory, the district court was obligated to draw all inferences in favor of BMK in determining whether the matter needed to be resolved at trial.

In opposing summary judgment, BMK offered the following evidence:

1. The storage units were real property fixtures, and selling them separately would have been non-sensical.
2. The entire Bolinger property was marketed, honestly and correctly, as a ministorage complex.
3. Bailey did in fact sell "the storage units" when it sold the Bolinger property.
4. BMK toured the Bolinger property and considered buying it prior to entering into the buy-sell agreement. There is no reason at all for presuming that the right of first refusal clause did not apply to the property that BMK had viewed just one day before the contract was entered into.

In BMK's view, these propositions are self-evidently correct. If, however, there was some reason to doubt one or the other point, that reason would amount to a genuine issue of material fact.

The district court's conclusion that even with all the evidence in the record, it just could not determine whether "the storage units" means *just the storage units* or *the ministorage complex* is both untenable, and inappropriate under the summary judgment standard. Ascertaining what the parties intended is and must be an evidence-based decision. Rejecting BMK's evidence that the clause was intended to mean the latter, and its position that it could not have reasonably meant the former was far beyond the district court's remit.

III. THE DISTRICT COURT DID NOT PROPERLY APPLY RULE 8(b)(6) OF THE MONTANA RULES OF CIVIL PROCEDURE

Almost a year into the case, BMK filed an amended complaint. Leave of court was sought and obtained to do so. *See* Rule 15(a)(2). The amended complaint was complete in that it did not offer merely a supplement to the original complaint, but rather completely restated BMK's claims against Bailey, and added claims against Security Title of Montana. "[A]n amended pleading that is complete in itself and does not refer to or adopt a former pleading as a part of it supersedes or supplants the former pleading." 61A Am. Jur. Pleading § 729. Under Rule 15(a)(3), if the amended pleading is one that requires a response – i.e. if it is a complaint[8] and not an answer –

[8] Under Rule 7, only seven types of pleadings are permitted, including a complaint. Rule 7(a)(1). A complaint is a pleading to which a response is required. Rule 12(a)(1)(A). Any of the seven pleadings may be amended, as permitted by Rule 15, and amended pleadings have the same character – either requiring response or not requiring response – as the original pleading. An answer does not require a response: if a party wishes to file one, it must obtain leave of court. Rule 7(a)(7).

then defendants must respond within 14 days after service of the amended pleading. This requirement applies even when the amended complaint does not add claims against the existing parties: otherwise, a trial court would have "multiple versions of the complaint operative against different defendants." *Hyatt v. Experian Info. Sols. Inc.,* 2024 US. Dist. LEXIS 74425 (D. Ariz. 2024).

The amended complaint was served on Bailey by means of the district court's electronic filing system. Although the amended complaint included factual allegations and claims against Bailey, Bailey did not file an answer. The Rules of Civil Procedure provide two distinct consequences for this, one of which requires court action and the other of which is self-executing. The first, and most common, is described in Rule 55: the clerk is to enter a judgment of default, either on her own, or on motion of the non-defaulting party. This is not the only potential consequence, however. Rule 8(b)(6) provides that "An allegation . . . is admitted if a responsive pleading is required and the allegation is not denied."

There is no dispute here about any of the above. BMK's position in the district court was that in ruling on the motion for summary judgment, the district court was obligated to treat the allegations of the amended complaint as admitted. The district court correctly recited the law up to this point. Then, without any reasoning based on

the rules of civil procedure or citation to any decision from this Court,[9] the district court simply concluded that Bailey was not required to respond to the amended complaint. Certainly no prior order from the district court excused Bailey from the obligation to answer, and Bailey never sought either leave or an extension to respond. Instead, Bailey just ignored the rules, and the district court, for no sound reason based in the law, let it do so.

The district court further held that this does not matter, because it was making a determination of law, and not a determination of fact. This describes the district court's error. As is clear from *Klein*, the district court was obligated to examine the extrinsic evidence to see if the intent of the contract could be ascertained. Any legal determination it might make could necessarily only follow from a determination of the facts. Here, to reach the conclusion it did, the district court needed to decide that, taking the extrinsic evidence into account, the clause at issue was susceptible to at least two different meanings. It is not possible to make a legal determination about enforceability of the contract clause without making a determination of the facts. In *Klein*, this meant examining the Brodies' other holdings, to see if the contract language was truly ambiguous.

[9] At common law, a defendant was allowed to elect not to answer an amended complaint. *See Gettings. v. Hauser*, 17 Mont. 581 (1896). This option was already no longer available by the time *Hansen v. Goodrich*, 56 Mont. 140 (1919), was decided.

Here, the district court should have taken the factual averments that the Bolinger property that Bailey sold is the same as the Bolinger property to which the right of first refusal applies as admitted. Its failure to do so is reversible error.

CONCLUSION

For any of the above-stated reasons, the Court should reverse the grant of summary judgment in favor of Appellees, and remand the matter for trial on the merits.

Respectfully submitted this 8th day of August, 2025.

/s/ Charles H. Carpenter

Attorney for Appellant

Certificate of Compliance

I certify that the foregoing Brief is proportionally-spaced typeface of 14 points and does not exceed 10,000 words.

/s/ Charles H. Carpenter

Certificate of Service

I hereby certify that on August 8, 2025 I served a copy of the foregoing upon the Clerk of the Supreme Court and counsel of record using the Court's electronic filing system.

/s/ Charles H. Carpenter

CERTIFICATE OF SERVICE

I, Charles H. Carpenter, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-08-2025:

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