

Steve J. Fitzpatrick, Esq.
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
Liberty Center, Ste. 302
9 Third Street North
Great Falls, MT 59401
Telephone: 406.403.0041
Fax: 406.453.1634
stevef@bkbh.com

Attorneys for Josh Gosney and Infinity Wellness

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 25-0617

EDWARD BUTCHER and
RANDY PINOCCI,

Plaintiffs/Appellants,

v.

JOSH GOSNEY and INFINITY
WELLNESS, INC.,

Defendants/Appellees.

**MOTION TO DISMISS APPEAL
WITHOUT PREJUDICE**

MOTION TO DISMISS

Appellees Infinity Wellness, Inc. and Josh Gosney move the Supreme Court of the State of Montana under Mont.R.App.P. 16 to dismiss the appeal filed by Appellants Edward Butcher and Randy Pinocci without prejudice.

Pursuant to Rule 16(1), Appellees state opposing counsel has been contacted concerning the motion and has been informed opposing counsel opposes the motion.

STATEMENT OF ISSUE

In September 2019, Infinity Wellness, a business owned by Gosney, executed a lease agreement with Butcher to lease property for a marijuana dispensary west of Lewistown. In June 2022, Gosney closed the dispensary. On January 30, 2023, Pinocci and Butcher filed this action against Infinity Wellness and Gosney alleging two claims: breach of contract and fraud – breach of covenant of good faith and fair dealing.

On January 10, 2025, Infinity Wellness and Gosney filed a motion for summary judgment asking the District Court to dismiss Butcher and Pinocci's lawsuit with prejudice. The motion argued the parties executed an illegal lease agreement because the lease agreement lacked a lawful object and failed to provide sufficient consideration in the form of a lawful commercial building. According to the undisputed facts, neither Pinocci, nor Butcher obtained a certificate of occupancy for the building. According to the state building inspector, a person may not use or occupy a building or structure until the building inspector issues a certificate of occupancy.

On August 7, 2025, the Court entered an order granting Infinity Wellness and Gosney’s motion for summary judgment and denying Butcher and Pinocci’s motion for summary judgment. According to the District Court, “[a]t no time following the execution of the Lease did Plaintiffs provide Defendants with a building that complied with the building codes required to operate a commercial business.”

On August 11, 2025, Infinity Wellness and Gosney filed their Memorandum of Costs and Disbursements. To date, the District Court has not entered an order granting Infinity Wellness and Gosney costs. Likewise, on August 14, 2025, Infinity Wellness and Gosney filed a Motion for Attorney Fees and Costs pursuant to § 25-7-105, MCA. Butcher and Pinocci filed a brief in opposition to the motion. To date, the District Court has not ruled on the Motion for Attorney Fees and Costs.

Because the District Court has not ruled on the Motion for Attorney Fees and Costs and the Memorandum of Costs and Disbursements, Infinity Wellness and Gosney request the Supreme Court dismiss this appeal without prejudice to allow the District Court to resolve motion for attorney fees and the request for costs before appeal.

ARGUMENT

THIS APPEAL IS PREMATURE AND SHOULD BE DISMISSED TO ALLOW THE DISTRICT COURT TO ISSUE A RULING ON THE

APPELLEES' MOTION FOR ATTORNEY FEES AND COSTS AND MEMORANDUM OF COSTS AND DISBURSEMENTS.

The Supreme Court should dismiss this action because the District Court has not rendered a “final judgment or order” resolving all issues before the District Court. Pursuant to Mont.R.App.P. 6(3)(a), a party may appeal from an order made after final judgment. “A final judgment conclusively determines the rights of the parties and settles all claims in controversy in an action or proceeding, including any necessary determination of the amount of costs and attorney fees awarded or sanction imposed.” Mont.R.App.P. 4(1)(a) (emphasis added); see also Mont.R.Civ.P. 58(e) (stating a “judgment, even though entered, is not considered final for purposes of appeal under Rule 4(1)(a), M. R. App. P., until any necessary determination of the amount of costs and attorney fees awarded, or sanctions imposed, is made.”).

The Supreme Court should dismiss this appeal and allow the District Court to rule on the Appellees’ Motion for Attorney Fees and Costs and Memorandum of Costs and Disbursements. Under Mont.R.App.P 4(5)(a)(iii), a “notice of appeal filed prior to the district court's ruling on any necessary determination of the amount of costs and attorney fees awarded, or sanctions imposed, may be dismissed sua sponte and shall be dismissed upon the motion of any party.” (emphasis added). In this situation, the motion for attorney fees and costs was filed several weeks ago and the time for ruling on the motion has not expired. See

Ballou v. Walker, 2017 Mont. 197, ¶¶ 22-23, 338 Mont. 283, 400 P.3d 234

(holding a motion for attorney fees is subject to the limitations of Rule 59(e)).

Therefore, pursuant to Mont.R.App.4, the Court should dismiss this action without prejudice to allow the District Court to rule on the issues of attorney fees and costs.

STATEMENT OF RELIEF SOUGHT

For these reasons, the Supreme Court should dismiss this appeal without prejudice and direct the District Court to rule on Infinity Wellness’s and Gosney’s Motion for Attorney Fees and Costs and Memorandum of Costs and Disbursements.

DATED this 4th day of September, 2025.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By /s/ Steve Fitzpatrick
Steve Fitzpatrick, Esq.
Attorneys for Josh Gosney and Infinity Wellness

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellees' Motion to Dismiss Appeal Without Prejudice is proportionately spaced in 14-point font and contains less than 1,250 words excluding the Caption and Certificate of Compliance, according to the word processing system used to prepare this Motion.

/s/ Steve Fitzpatrick
BROWNING, KALECZYC, BERRY & HOVEN,
P.C.

CERTIFICATE OF SERVICE

I, Steven J. Fitzpatrick, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 09-04-2025:

Samuel Loveridge Martin (Attorney)
34 W 6th Ave Unit 2E
Helena MT 59601
Representing: Edward B. Butcher, Randy Pinocci
Service Method: eService

Electronically Signed By: Steven J. Fitzpatrick
Dated: 09-04-2025