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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 25-0719

<p>DAN PATRICK McCAUL,</p> <p style="text-align: center;">Appellant,</p> <p>v.</p> <p>TOBIN CAPP, BEN CARTER, JENNIFER CARTER, VENTURE 1, LLC, CS CONSTRUCTION, BT CONSTRUCTION MT INC., CHRISTINE MACDONALD, JIM NESS, FIRST SECURITY BANK, ABC CORPORATION 1-5, and DOES 1-5,</p> <p style="text-align: center;">Appellees.</p>	<p>TOBIN CAPP’S, BEN CARTER’S, JENNIFER CARTER’S, AND VENTURE 1, LLC’S RESPONSE TO MCCAUL’S “COMBINED DISTRICT COURT AND SUPREME COURT SUPPLEMENTAL STATEMENT AND JUDICIAL NOTICE REGARDING DISCOVERY MISCONDUCT AND SUMMARY JUDGMENT BRIEFING FULLY BRIEFED AND READY FOR DECISION”</p>
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Appellees Tobin Capp, Ben Carter, Jennifer Carter, and Venture 1 LLC
(collectively “Venture 1 Defendants”) submit this response to McCaul’s
“Combined District Court and Supreme Court Supplemental Statement and
Judicial Notice Regarding Discovery Misconduct and Summary Judgment Briefing

Fully Briefed and Ready for Decision” (“Motion”). In light of the relief McCaul requests and the lack of argument on the order he is appealing from, the Venture 1 Defendants assume the Motion is a motion rather than McCaul’s opening brief. The Venture 1 Defendants make this response pursuant to M. R. App. P. 16(2).

INTRODUCTION

McCaul asks the Court to preempt the District Court, resolve factual disputes at issue in the ongoing District Court proceedings, and grant McCaul relief on his claims pending before the District Court. Without offering any competent evidence, he claims that some written contract exists between the parties; claims that the Venture 1 Defendants, their attorneys, and their attorneys’ staff made fraudulent statements about; asks the Court to take judicial notice of this alleged contract; asks the Court to take judicial notice of the Venture 1 Defendants’ “bad faith and intentional concealment”; and asks the Court to refer the Venture 1 Defendants’ attorneys and their attorneys’ staff for “disciplinary review.” (Motion at 3, 5-6). The Court should deny these requests and McCaul’s Motion for the following reasons.

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DISCUSSION

1. The Motion raises issues that this Court should not consider unless and until they are presented to, decided by, and properly appealed from the District Court.

This Court is, of course, an “appellate court.” *E.g.*, M. R. App. P. 14(1).

This matter is not an original proceeding and, instead, is an appeal from a District Court decision. *See* Notice of Appeal. Accordingly, this Court’s role is limited to reviewing the District Court’s decision.¹ It is well-established that this Court has no part in developing the record, resolving factual disputes, or making decisions in the first instance. *E.g.*, *Hutzenbiler v. RJC Investment, Inc.*, 2019 MT 80, ¶ 14, 395 Mont. 250, 439 P.3d 378 (declining to “conduct an independent review of the summary judgment record to decide *sua sponte*” an issue that “was not litigated by the parties, developed in the record, [or] decided by the District Court”); *Meyer v. Jacobsen*, 2022 MT 93, ¶ 6 n.1, 408 Mont. 369, 510 P.3d 52 (declining to consider an issue raised “for the first time on appeal . . . [w]ithout benefit of a record, developed argument, and district court consideration”).

Nevertheless, McCaul asks the Court to resolve factual disputes at issue in the underlying matter before they have been briefed, argued, and decided in the District Court. (Motion at 2-6). He asks the Court to do so without a complete

¹ Assuming that the Court has a role at all in this premature, interlocutory appeal. *See* Venture 1 Defendants’ Motion to Dismiss.

record to consider and, indeed, without offering any competent evidence in support of his arguments. (*Id.*) This lack of competent evidence is unsurprising considering that this matter is in its very beginning stages before the District Court. The Venture 1 Defendants filed their answer to McCaul's Complaint on October 6, 2025 and no scheduling order has been entered. (Dkt. 48; Docket Sheet).

Underscoring the prematurity of his Motion and the lack of any District Court review, McCaul simultaneously filed his Motion in both this Court and the District Court. (*Id.* at 1). McCaul also specifically acknowledges that a motion for summary judgment is pending before the District Court, apparently on issues related to his present Motion. (*Id.* at 6-7). Ultimately, by his present Motion and pending summary judgment motion, McCaul is not just attempting to convince the District Court to rule before discovery has been completed. He is asking this Court to preempt the District Court process altogether.

2. McCaul's allegations are false.

The Venture 1 Defendants steadfastly deny and dispute the allegations and claims McCaul makes in his Motion. As they have already explained in their briefing to the District Court, nothing about their representations to the District Court has been misleading, false, fraudulent, or deceptive, as McCaul claims. (Dkt. 54; *see also* Dkt. 46). They continue to expect that discovery will reveal that no written contracts exist to support McCaul's baseless claims, and McCaul has not

presented any evidence to the contrary. (*See* Motion). He likewise has not presented any evidence that the Venture 1 Defendants misled or deceived the Court or anyone else. (*Id.*) He does not even present the alleged contract that he asks the Court to take judicial notice of. (*Id.*)²

3. Even if the Court could weigh in on the subjects of McCaul’s Motion, it cannot resolve McCaul’s factual disputes by judicial notice, as he requests.

A Court may take judicial notice of a fact only if that fact is “not subject to reasonable dispute” and either “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” M. R. Evid. 201(b). None of McCaul’s alleged facts meet this standard. McCaul has offered little more than mere allegation and inuendo about disputed and disputable facts.

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² The Venture 1 Defendants have not submitted evidence with this Motion, except by reference to Dkt. 54, because (a) McCaul has not carried his burden of production to support his claims, (b) no burden of production has, therefore, arisen for the Venture 1 Defendants, and (c) there is little competent evidence in the District Court record for this Court to review at this preliminary stage. *See In re Estate of Mead*, 2014 MT 264, ¶ 32, 376 Mont. 386, 336 P.3d 362 (discussing burden of production in context of motion for summary judgment). The Venture 1 Defendants will be responding to McCaul’s claims and allegations in more detail in their briefing to the District Court, which will be filed in response to the copy of the Motion McCaul filed in the District Court.

Dated this 30th day of October, 2025.

CROWLEY FLECK PLLP

By /s/ Griffin B. Stevens
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Jennifer Carter

CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 16(3), I certify that the foregoing filing is typed in 14-point Times New Roman Font, a proportionally spaced typeface, and contains 1,000 words, as calculated by Microsoft Office Word.

/s/ Griffin B. Stevens
Griffin B. Stevens

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following by the means designated below this 30th day of October, 2025.

<input checked="" type="checkbox"/> U.S. Mail	Dan Patrick McCaul
<input type="checkbox"/> Hand Delivery	3602 Laredo Drive
<input type="checkbox"/> Electronic/ECF	Bozeman, MT 59718
<input type="checkbox"/> FedEx	danmccaul97@gmail.com
<input checked="" type="checkbox"/> E-Mail	

/s/ Griffin B. Stevens

CERTIFICATE OF SERVICE

I, Griffin Brooks Stevens, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 10-30-2025:

Patrick C. Riley (Attorney)
1705 West College
Bozeman MT 59715
Representing: Christine MacDonald, First Security Bank
Service Method: eService

Daniel P. McCaul (Appellant)
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Bozeman MT 59715
Service Method: Conventional

Electronically Signed By: Griffin Brooks Stevens
Dated: 10-30-2025