

IN THE SUPREME COURT OF THE STATE OF MONTANA

**Supreme Court No. DA-25-0272**

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SPENCER MELBY, an individual and  
COLETTE MELBY, an individual,

Plaintiffs and Appellees,

vs.

BRUCE DOERING, an individual and  
KIM DOERING, an individual,

Defendants and Appellants,

and

DAWN MADDUX, an individual, and  
WESTERN FRONTIER, LLC,  
a Montana limited liability company,  
d/b/a ENGEL & VÖLKERS WESTERN FRONTIER,

Defendants.

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On Appeal from the Fourth Judicial District Court, Missoula County,  
Cause No. DV-21-671, Hon. Judge Jason Marks

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**Appellees' Answer Brief**

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## STATEMENT OF ISSUES

The Doerings contracted to sell real property to the Melbys, financed by a contract for deed. The signed Buy-Sell Agreement, as amended, specified the property, the parties, the price, the amount of the down payment, the amortization period, the interest rate, and the maturity date. The parties did not condition their contractual obligations upon the contemplated contract for deed.

After getting a higher backup offer, the Doerings formulated a plan to cancel the Melby contract by requiring, as part of the contract for deed, an unacceptable easement over the entire property. The Doerings believed that, if they could provoke some objection from the Melbys, that would entitle them to terminate. When the Melbys suggested the easement was “problematic,” the Doerings did terminate.

The Melbys sued for damages. The Doerings appeal from the district court’s entry of summary judgment that the Doerings had breached the contract and, in their conclusion, request judgment in their favor.

This presents two issues:

1. Were the Melbys entitled to summary judgment in their favor?
2. Are the Doerings entitled to summary judgment in their favor?

## STATEMENT OF THE CASE

The Melbys generally agree with the Doerings' statement of the case. The district court granted summary judgment that the Doerings had breached the contract and denied their motion for reconsideration. *See* Docs. 224, 265. The grant of summary judgment was certified as final and the Doerings timely appealed.

The district court denied the Melbys' motion to certify other orders as final. *See* Doc. 275. Thus, although Melbys objected to various other orders below, this appeal is confined to the order certified as final.

## STATEMENT OF FACTS

### **I. CONTRACT FORMATION: THE DOERINGS CONTRACTED TO SELL THEIR PROPERTY TO THE MELBYS.**

1. Dr. Melby had gotten a job with Providence Health in Missoula and his family needed a home. *See* Supplemental Appendix ("Suppl. App.") 23 (Spencer Melby Dep.), pp. 9-10; Suppl. App. 24 (Colette Melby Dep.), pp. 12-13.

2. The Doerings contracted to sell 156 acres (the "Property") to the Melbys. *See* App. B (hereafter "the Buy-Sell Agreement"). The Property, sometimes referred to as Marshall Mountain, was a popular spot for various recreational activities, including mountain biking. *See* Suppl. App. 20 (B. Doering Dep.), p. 77; Suppl. App. 25 (K. Doering Dep.), pp. 39-40; Suppl. App. 19 (D. Maddux Dep.), p. 112.

3. The Doerings knew the Melbys were purchasing the Property for their

family home. *See* Suppl. App. 2 (Letter, Melbys to Doerings, expressing Melbys' excitement to purchase the Property for their home); *see also* Suppl. App. 20 (B. Doering Dep.), pp. 138-139; Suppl. App. 25 (K. Doering Dep.), p. 71.

**II. THE BUY-SELL AGREEMENT SPECIFIED THE CONDITION OF TITLE. IT WAS SILENT ABOUT ANY EXISTING OR FUTURE EASEMENTS FOR PUBLIC RECREATIONAL USAGE.**

4. The Buy-Sell Agreement was contingent upon the Melbys' approval of the condition of title to the Property. *See* App. B, p. WFLLC000386, lns. 190-203. It required a preliminary title commitment showing the condition of title, after which the Melbys could object or approve. *Id.*

5. The Doerings provided a commitment that did not reflect any easement for recreational activities. *See* Suppl. App. 3. It did not mention any easement over the entire 156 acres. *Id.* It did not mention any type of practices, races, or other hosted events, whether for mountain biking, cycling, skiing, or otherwise. *Id.*

6. The Buy-Sell Agreement precluded the Doerings from changing the condition of title of the Property, including by adding any easement.

**CONDITION OF TITLE:** ... Seller agrees that no additional ... easements ... will be placed against the title to the Property subsequent to the effective date of the preliminary title commitment approved by the Buyer.

App. B, p. WFLLC000388, lns. 298-301.

7. It contained an integration clause, stating it was the “**ENTIRE**

**AGREEMENT**” and “shall constitute the entire agreement between Seller and Buyer.” *Id.*, p. WFLLC000390, lns. 425-427. It could “be modified only in writing, signed by” the parties. *Id.*, ln. 427.

**III. AFTER ENCOUNTERING DIFFICULTY WITH CONVENTIONAL FINANCING FROM A LOCAL LENDER, THE PARTIES AMENDED THE BUY-SELL AGREEMENT TO CALL FOR A CONTRACT FOR DEED.**

8. The Buy-Sell Agreement originally provided that the Melbys would obtain conventional financing. App. B, p. WFLLC000383, ln. 50.

9. The bank from which the Melbys applied for a loan backed out, however, citing “non-economic” “challenges” concerning “the future of community recreational access to and through the property,” adding “complexity and risk.” Suppl. App. 5, p. 1. It telegraphed that it would not finance the purchase. *Id.* at 2.<sup>1</sup>

10. The Melbys communicated that to the Doerings. Suppl. App. 6.

11. The parties thereafter executed an amendment:

Seller shall offer seller financing with contract for deed with the following terms: 20% downpayment, 6% interest amortized over 25 years with ballon [sic] payment/payoff due in 7 years from closing. There is no pre-payment

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<sup>1</sup> The bank communicated those “challenges” only after *Doerings*’ attorney spoke to the bank, expressing skepticism about maintaining public activities after the sale. *See*, Suppl. App. 4 (Casillas’ partner, attorney Trent Baker, spoke to the lender); Suppl. App. 22, pp. 13-14, 30 (Baker worked on behalf of local mountain biking group to prevent private ownership of Marshall Mountain); 21 (Baker was also representing the Doerings in this transaction).

penalty. Buyer shall pay cost of writing contract for deed, seller shall pay opening escrow fees, buyer shall pay monthly escrow fees. Parties shall mutually agree upon long term escrow agency if Western Title and Escrow cannot provide escrow services. Final contract for deed to be mutually agreed upon by both parties.

App. C (hereafter the “Amendment”).

12. The Amendment did not change any other provisions of the Buy-Sell Agreement. *See* App. C. In fact, it specified that it amended only two lines of the original document and that “All terms and conditions of the [Buy-Sell] Agreement are hereby incorporated by reference except as amended....” *Id.*, lns. 22-23.

13. One such incorporated term was that “[t]his is a legally binding contract.” App. B, p. WFLLC000383, lns. 1-2.

**IV. THE INITIAL DRAFTING PROCESS FOR THE CONTRACT FOR DEED WAS NORMAL, YIELDING A VERSION WITH WHICH THE DOERINGS WERE SATISFIED.**

14. The Doerings’ broker, defendant Dawn Maddux (“Maddux”),<sup>2</sup> retained attorney Zane Sullivan (“Sullivan”) to draft the contract for deed between the Doerings and the Melbys. *See* Suppl. App. 7, p. Sullivan–20.

15. Sullivan was Maddux’s personal attorney. *See* Doc. 38 (Maddux Affidavit), ¶ 2; Doc. 39 (Sullivan Affidavit), ¶ 3; Doc. 54 (Second Maddux Affidavit), ¶ 2. Even though Sullivan was hired to draft the contract for deed at the

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<sup>2</sup> Maddux and her company, Western Frontier, LLC, are defendants, but neither appealed.

Melbys' expense, the district court refused to allow discovery about communications between him and Maddux. Doc. 77.

16. Melbys were unaware that the selected scrivener was actually Maddux's attorney. Suppl. App. 26 (Rosbarsky Dep.), 14:6-10. It would have mattered because of the potential bias. *Id.* at 15:16 – 16:2. Indeed, as Maddux gloated, “the buyer is paying ... but we are directing. :)” Suppl. App. 1, p. 142A (smiley emoticon in original).

17. Sullivan prepared an initial draft which embodied the parties' terms about the amount, the interest rate, the payments, and the balloon. *See* Suppl. App. 8 (cover email); Suppl. App. 9 (draft contract for deed). It contained no provision to place any additional easement on the Property. Suppl. App. 9. Quite the opposite: it recounted the prior title commitment, the Melbys' approval, and required the Doerings to transfer title in that condition. *Id.* at Sullivan–45.<sup>3</sup>

18. Mr. Doering suggested minor changes to the draft, including language that “Buyers are prohibited to signing any easements with the City, County, bike groups....” . *See* Suppl. App. 10, pp. Sullivan–149-150.

19. The Doerings' attorney, J.R. Casillas (“Casillas”), reviewed and redlined Sullivan's draft. *See* Suppl. App. 11 (cover email) and Suppl. App. 12

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<sup>3</sup> Melbys have highlighted some of the supplemental appendices to call attention to the relevant text.

(redlined contract for deed bearing Casillas’ proposed edits). Casillas explained that the draft from Sullivan (Suppl. App. 9) “looks good and in line with the usual provisions....” Suppl. App. 11. While he had “made some changes ... to add some clarity to a few of the provisions,” “[n]one of them [were] deal breakers.” *Id.* He concluded: “you should be good to go.” *Id.*

20. Casillas did not suggest insertion of any language requiring public access or granting easements to recreational groups. *Id.* Instead, and consistent with Mr. Doerings’ comment, he added language disallowing the Melbys from adding an encumbrance—like a recreational easement,—on the Property. Suppl. App. 12, p. Sullivan–200. Like Sullivan’s initial draft, Casillas’ redlined draft contained only 10 substantive pages. *See* Suppl. Apps. 9 and 12.

**V. THE DOERINGS THEN DECIDED TO MANIPULATE THE PROCESS TO CREATE AN EXCUSE TO CANCEL THE BUY-SELL AGREEMENT.**

21. As the contract for deed was being drafted, Maddux told Doerings of another interested purchaser and asked how committed the Doerings were to the Melbys. Suppl. App. 1, p. 145A. The Doerings said the Melby’s would “have to be made whole. They have \$ and time in this project.” *Id.* at 146A.

22. Maddux responded that, according to Sullivan, the Doerings were “pretty much locked in *unless there’s a dispute.*” *Id.* at 146A (emphasis added). Thus, from Maddux’s attorney (whom Melbys were paying) emanated the idea that a dispute would allow the Doerings to back out. The Doerings still did not “feel

good about kicking [the Melbys] out,” noting that “[t]hey have acted in good faith.” *Id.*

23. Maddux dangled another hint, noting that the backup offer from Wishcamper would be a “quick solution” “if anything goes funky w/ Melby’s.” *Id.* at 149A. Doerings thought that was “[p]erfect.” *Id.*

24. Upon receipt of the offer, Maddux advised the Doerings that the Wishcamper backup offer was for \$10,000 more and “much stronger.” *Id.* at 150A. And she forwarded another hint from her attorney for whom the Melbys were paying: “Zane said that if [the Melbys] don’t agree to the contract for deed *we can get out of it* and move to the back up offer...” *Id.* at 150A (emphasis added).

25. The Doerings received Wishcamper’s higher and “stronger” offer and decided that, in Mr. Doering’s words, selling Marshall Mountain to the Melbys would no longer “fulfill Marshall’s mission.” Suppl. App. 20 (B. Doering Dep.), p. 302; Doc. 139, Ex. 19 (Wishcamper offer).

26. The seeds Maddux had planted with Doerings took root, and Mr. Doering told Maddux to tell Sullivan to stop drafting the contract for deed because he and Ms. Doering “have an idea that should keep us out of litigation land.” Suppl. App. 1, p. 151A. That idea to “keep it legal” and avoid a potential lawsuit was to “present it to the Melbys where they need to accept [an] easement for public access and deal with it or back out.” Suppl. App. 20 (B. Doering Dep.), p. 258. The

Doerings believed that if the Melbys objected to such a proposed easement, the Doerings could terminate the Contract. *Id.* at 260, 285.

**VI. THE DOERINGS IMPLEMENTED THEIR PLAN, CREATING A “PAPER TRAIL” IN AN EFFORT TO STAY “OUT OF LITIGATION LAND.”**

27. The Doerings’ “idea to keep it out of litigation land was to put an easement into the contract for deed and if the Melbys disagree [the Doerings] can then terminate.” Suppl. App. 20 (B. Doering Dep.), p. 261.

28. Although the idea had come from Sullivan, he wanted the Doerings’ personal attorney to do the dirty work. Thus, Maddux conveyed to Doerings that “Zane [Sullivan] wants” them to have Casillas make the changes to the contract for deed so “we have a paper trail that the changes came from JR, your independent counsel.” Suppl. App. 1, p. 152A. Mr. Doering thought that was a “great idea.” *Id.*

29. Per that plan, Casillas made extensive modifications, ballooning the contract from 10 to 21 pages. App. D. The changes included: covenants about liquidity (*id.* at Sullivan–107); a required “debt service reserve” (*id.*); a covenant against further indebtedness (*id.*); and an extensive environmental indemnification provision (*id.* at Sullivan–116-120).

30. The core of the poison pill, however, was the provision headed “Public Access,” stating the Melbys must “reasonably permit” public use of the Property, “including, without limitation, use by Zootown Derailleurs, the National Interscholastic Cycling Association, MT Alpha Cycling, MTB Missoula, and

MTCX for practice, races, and other hosted events.” *Id.* at Sullivan–110. The Property the Melbys were purchasing for their home was to be open to the public.

31. Casillas later testified that the terms of the original Sullivan draft were “more in line with what I’m used to seeing,” whereas the terms he inserted in this draft were not typical. Suppl. App. 21, p. 99.

32. True to the “paper trail” plan, Casillas forwarded that to the Doerings, who sent it to Sullivan, who sent it to Maddux, to send to the Melbys’ broker. Suppl. App. 13.

**VII. WHEN THE POISON PILL PROVED NONFATAL, THE DOERINGS INCREASED ITS POTENCY.**

33. The Melbys, nonetheless, tried to salvage the deal. Their attorney, Del Post, advised Casillas that the Melbys “really want to do the deal” and would agree to the bulk of Casillas’ revisions, with a few “surgical” edits. *See* Suppl. App. 21 (Casillas Dep.), pp. 97-98.

34. Upon learning that the first provision, requiring public access to the Property during the term of the contract for deed, had not provoked the desired “dispute” to make the deal go “funky” giving them an excuse to terminate, the Doerings upped the ante. While Post was finalizing the Melbys’ suggested edits, Casillas announced the imposition of a new recreational  *easement over the entirety of the Property*:

**[S]ellers are granting** the following listed groups, which includes but is not limited to, Zootown Derailleurs, the National Interscholastic Cycling Association, MT Alpha Cycling, MTB Missoula, and MTCX for practice, races and other hosted events, ***an easement for any part of the 156 acres.***

This easement may be rescinded by sellers at anytime during the life of this contract.

App. E (emphasis added).

35. Mr. Doering acknowledged the easement would allow users, for example, to use the Melbys' front porch or restroom, take a nap in the master bedroom, or even spend the night in their house. *See* Suppl. App. 20, pp. 284-285.

36. The Doerings admit that their demand for that easement was just a means to provoke disapproval from the Melbys so that the Doerings could implement a decision they had already made to terminate:

Q. And the issue of proposing that easement and having it disapproved was just a means to effectuate that decision. Is that what you're saying?

A. Yes.

Suppl. App. 20, p. 303:13-17.

**VIII. HAVING PROVOKED THE DESIRED OBJECTION, DOERINGS SPRUNG THEIR TRAP.**

37. Melbys responded with their proposed edits. Suppl. App. 15.<sup>4</sup>

Regarding the newly-demanded easement over the entirety of the Property, Post

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<sup>4</sup> This is a more legible copy of the Doerings' App. F.

commented that “adding an easement at this stage will be problematic” and observed that the Buy-Sell Agreement precluded granting an easement after the preliminary title commitment had been approved. *Id.* at Doering-1674.

38. Doerings responded by terminating the Buy-Sell Agreement and the transaction, giving Melbys no further opportunity to confer. *See* Suppl. App. 16. The Doerings made that decision. Suppl. App. 20, p. 84.

#### **IX. THE MELBYS STILL TRIED TO SAVE THE DEAL BY PAYING CASH.**

39. Despite the Doerings’ termination, the Melbys attempted to save the deal, securing alternative financing, being “ready, willing, and able to close this transaction” on the original closing date. Suppl. App. 18, p. Sullivan-192; Suppl. App. 14.

40. The Doerings knew the Melbys were trying to save the deal by paying cash at closing and formed a plan to rebuff them. *See* Suppl. App. 17. Casillas emailed that “if he tries to come back with all the money we will” reject that effort. *Id.*<sup>5</sup>; *see also* Suppl. App. 20, pp. 303 (Mr. Doering testifying that the Melbys offered to pay cash), 308 (Dornings rejected cash payment because they “did not wish to do the deal with Melby”). The Doerings never considered the Melbys’

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<sup>5</sup> The Doerings’ rejection would be based on the claim that the “now controlling addendum” calls for owner financing, Suppl. App. 17, contradicting their litigation position that the Amendment is a nullity.

attempt to close with cash. *Id.* at 311.

## STANDARD OF REVIEW

Melbys agree with Doerings that this Court conducts a *de novo* review.

Doerings appealed from the order granting summary judgment in favor of Melbys but, in their conclusion, also contend that the “District Court erred in not” granting their summary judgment motion on the breach of contract claim.

Doerings’ Br. 34.

When faced with cross-motions for summary judgment, a court should not grant one motion simply because it has denied the other. Instead, a court must analyze contemporaneous cross motions for summary judgment on their individual merits “taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.” *Ike v. Jefferson*, 267 Mont. 396, 399-400, 884 P.2d 471, 474 (1994); *Kilby Butte Colony, Inc. v. State Farm Mut. Automobile Ins. Co.*, 2017 MT 246, ¶ 7, 389 Mont. 48, 403 P.3d 664. On cross-motions, “where the district court is not called to resolve factual disputes and only draw conclusions of law, we review the district court's conclusions of law to determine whether they are correct.” *Kilby*, ¶ 7.

## SUMMARY OF ARGUMENT

**Argument I:** Doerings’ imposition of an impermissible easement for the specific purpose of triggering an objection to give them an excuse to terminate was

an abuse of any discretion they might have had under the contract, depriving the Melbys of the benefit of the bargain. That breach of the implied covenant of good faith was also a breach of contract.

**Argument II:** Doerings also breached the contract's express terms. The contract contained all essential terms. The parties' omission of further details demonstrates those other terms were collateral. The Amendment did not clearly condition its efficacy upon agreement on a final contract for deed. The Doerings' miscellaneous arguments do not change that result. Even if the Amendment were invalid, the Doerings were still obligated to perform the unamended contract.

**Argument III:** The Court should disregard the Doerings' throw-away argument that summary judgment ought to be entered in their favor.

## **ARGUMENT**

Summary judgment requires consideration of whether any material facts are genuinely disputed and whether the Melbys are entitled to judgment as a matter of law. Rule 56(c)(3), M.R.Civ.P.; *Timpano v. Cent. Mont. Dist. Six Human Res. Dev. Council*, 2022 MT 169, ¶ 7, 409 Mont. 536, 516 P.3d 655. The Doerings do not argue that a genuine issue of material fact requires reversal. Thus this brief also focuses on the legal entitlement to judgment.

**I. THE DOERINGS BREACHED THE CONTRACT BY BREACHING THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.**

All other considerations aside, the Doerings abused any discretion they may have had in negotiating a contract for deed when they intentionally demanded an unacceptable easement for the specific purpose of getting the Melbys to object so that the Doerings could back out of the contract. That is a breach of the implied duty of good faith and fair dealing, constituting a breach of contract.

Every contract contains an implied covenant of good faith and fair dealing. *Story v. Bozeman*, 242 Mont. 436, 450, 791 P.2d 767, 775 (1990) *overruled on other grounds by Arrowhead Sch. Dist. No. 75 v. Klyap*, 2003 MT 294, ¶ 54, 318 Mont. 103, 79 P.3d 250. A breach of the covenant constitutes a breach of the contract. *Hardy v. Vision Service Plan*, 2005 MT 232, ¶ 13, 328 Mont. 385, 120 P. 402.

The implied covenant of good faith and fair dealing is “a mutual promise implied in every contract that the parties will deal with each other in good faith, and not attempt to *deprive the other party of the benefits* of the contract through dishonesty *or abuse of discretion in performance.*” *Beaverhead Bar Supply, Inc. v. Harrington*, 247 Mont. 117, 124, 805 P.2d 560, 564 (1991) (emphasis added) (citing, *Story*, 791 P.2d at 775); *see also* M.C.A. § 28-1-211 (the implied covenant requires “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”).

A court “measure[s] the nature and extent of the obligations of good faith and fair dealing by the parties’ *justifiable expectations*.” *Hardy*, ¶ 13 (emphasis added). “[W]hen one party uses discretion conferred by the contract to ... deprive the other party of the benefit of the contract, the contract is breached.” *Weldon v. Mont. Bank*, 268 Mont. 88, 94, 885 P.2d 511, 515 (1994) (quoting *Story*, 242 Mont. at 450, 791 P.2d at 775).

Upon signing the Amendment, the Melbys and the Doerings had a contract by which they would sell/purchase the Property via a contract for deed. The Melbys justifiably expected the Doerings to act in good faith to implement a standard contract for deed. The Doerings violated their duty of good faith and fair dealing when they used the drafting process as an excuse to insert a poison pill—an unrestricted and patently ridiculous easement<sup>6</sup>—specifically to provoke an objection so that they could terminate and sell to the backup purchaser.

The Doerings planned and schemed to deprive the Melbys of the benefit of their bargain. That is a breach.

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<sup>6</sup> The easement the Doerings demanded of the Melbys was apparently unacceptable to the Doerings themselves. Thus, they included a provision allowing *them* to terminate that very easement. *See* App. E, p. 2.

**II. THE BUY-SELL AGREEMENT, AS AMENDED, CONTAINED ALL MATERIAL AND ESSENTIAL TERMS.**

An analysis of the contract’s explicit terms (as opposed to the implied covenant) confirms the Doerings’ breach. The contract expressly required the Doerings to sell the Property to the Melbys. App. B, p. WFLLC000383, lns. 5-13. The Doerings breached when they refused to do so.

**A. The parties agreed upon all essential terms.**

The essential elements of a contract are: “(1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration.” M.C.A. § 28-2-102. And “[a] contract must contain all its essential terms.” *Hurly v. Lake Cabin Dev., LLC*, 2012 MT 77, ¶ 17, 364 Mont. 425, 276 P.3d 854, (quoting *Findley v. Mont. Thirteenth Jud. Dist. Ct.*, 277 Mont. 242, 247, 921 P.2d 870, 873 (1996)). “An agreement that requires the parties to agree to **material** terms in the future is not an enforceable agreement.” *GRB Farm v. Christman Ranch, Inc.*, 2005 MT 59, ¶ 11, 326 Mont. 236, 108 P.3d 507 (emphasis added). To be enforceable, a contract “must be complete and certain in **all essential matters** included within its scope.” *Steen v. Rustad*, 132 Mont. 96, 106, 313 P.2d 1014, 1020 (1957) (emphasis added).

But those “essential” terms are only those that encompass “critical issues” as opposed to “mere details.” *Hurly*, ¶ 17 (citing *Zier v. Lewis*, 2009 MT 266, ¶ 23, 352 Mont. 76, 218 P.3d 465).

[A]bsolute certainty and completeness in every detail is not a prerequisite of specific performance, only reasonable certainty and completeness being required. Those matters which are merely subsidiary, collateral, or which go to the performance of the contract are not essential....

*Steen*, 132 Mont. at 106, 313 P.2d at 1020 (internal citations omitted). Ultimately, there must be sufficient information provided in a contract “to make the parties’ obligations ‘clearly ascertainable.’” *Hurly*, ¶ 21 (quoting *GRB Farm*, 2005 MT 59, ¶ 11, 326 Mont. 236, 108 P.3d 507).

The requisite “material” terms are relatively few, including “the parties, the subject matter, a ... description of the property affected, the purchase price ... and some indication of mutual assent. *Olsen v. Johnston*, 2013 MT 25, ¶ 21, 368 Mont. 347, 301 P.3d 791.

The Buy-Sell Agreement, as amended, contains all of those material terms. The parties are Doerings as sellers and Melbys as buyers. The subject matter of both documents is certain. The Property is described. The purchase price *and* the terms of financing (down payment, interest rate, amortization period, and balloon payment) are specified. The parties’ consent is evidenced by their signatures.

While the precise verbiage of the contract for deed was yet to be worked out, only “reasonable certainty and completeness is required.” *Steen*, 132 Mont. at 106, 313 P.2d at 1020 (internal citations omitted). The Amendment made the terms of the financing very clear: the amount, interest rate, amortization period, and

maturity date. The Amendment expressly subsumed the terms of the original agreement, providing certainty about the parties, price, property description and condition of title, as well as the agreement that “[t]his is a legally binding contract.” App. B, p. WFLLC000383, lns. 1-2. The remaining provisions of a standard contract for deed would be merely subsidiary and collateral—nonessential for the formation of an enforceable contract. *See Kluver v. PPL Montana, LLC*, 2012 MT 321, 368 Mont. 101, 293 P.3d 817 (rejecting argument that a memorandum of understanding was unenforceable because the referenced global release, deed, lease, and option agreement were yet to be drafted); *see also Gen. Metal Fabricating Corp. v. Stergiou*, 438 S.W.3d 737, 744, (Tex. Ct. App. 2014) (agreement contemplating execution of a promissory note, a deed of trust, a security agreement, and a financing statement was enforceable because their precise terms were not essential to contract formation); *Markowski v. Markowski*, 2017 Conn. Super. LEXIS 4937\*, at \*16-17, (Conn. Super. Ct. Nov. 21, 2017) (Term Sheet enforceable notwithstanding that it contemplated future promissory note, mortgage, and settlement agreement).

The Buy-Sell Agreement featured all terms essential to formation of a contract for the sale of real estate. The parties had an enforceable contract, which the Doerings breached when they terminated.

**B. Provisions that the parties omitted from the Amendment further demonstrate their understanding those terms were not material.**

When they switched from conventional to seller financing, the parties spelled out: the amount to be financed (price minus 20% down payment); the interest rate; the amortization period (thus fixing the payment amount); the maturity date; and even that there would be no prepayment penalty and the identity of the escrow agent.

*Hurly* found a binding agreement between a real estate developer and a landowner even though some of the terms were to be filled in later. *Hurly*, ¶¶ 21-22. The parties’ contract stipulated Hurly would sell his property to Lake Cabin in return for cash and the construction of certain structures. *Id.* ¶ 7. The court determined that there was sufficient information provided in the contract “to make the parties’ obligations ‘clearly ascertainable.’” *Id.* ¶ 21 (quoting *GRB Farm*, 2005 MT 59, ¶ 11, 326 Mont. 236, 108 P.3d 507). “[T]he fact the parties provided for general plans in the contract but left the specifications to be settled later indicates their understanding that these additional terms were not material.” *Id.* ¶ 21.

The Amendment—specifying the amount, interest rate, amortization period and maturity date—stated all material terms. *See Olsen*, ¶ 21. The parties included the essential terms in the Amendment, and anything they left out demonstrates “their understanding that these additional terms were not material.” *Hurly*, ¶ 21.

Doerings would distinguish *Hurly* because it involved “already-written” [contract] terms” but that, here, the “attorneys” “acknowledged” that the contract for deed would “supersede” the prior agreements. Doerings’ Br. 21. This argument is wrong for several reasons.

First, this case also involves an “already-written” contract by which the parties signed off on the essential contract terms. *See* Apps. B and C.

Second, the Doerings make too much of the communications between the parties’ attorneys, as the Melbys sought to salvage a deal, not knowing that the Doerings’ were playing an entirely different game, making a “paper trail” to support their decision to deprive the Melbys of the benefit of the bargain. The Doerings improperly rely upon their bad-faith paper trail to justify itself.

Third, that the final document would have superseded the Buy-Sell Agreement does not mean the latter lacks material terms. It is always the case that the actual final documents supersede the essential terms of the prior agreement.

It is a general tenet of contract law that all provisions in a contract for sale of real property are merged into the deed. Thus, when a deed has been executed, the purchaser’s rights are generally found in the deed covenants, not the executed contract.

*Richman v. Gehring Ranch Corp.*, 2001 MT 293, ¶ 21, 307 Mont. 443, 37 P.3d 732 (quoting *Urquhart v. Teller*, 1998 MT 119, ¶ 28, 288 Mont. 497, 958 P.2d 714). If, as the Doerings argue, the primacy of the final document renders a contract for sale

of real property unenforceable, then no contract will ever be valid.

**C. The Amendment did not condition its efficacy upon execution of the final contract for deed.**

Doerings emphasize the language of the Amendment that a contract for deed is to be “mutually agreed upon....” Doerings’ Br. 5. Rather than recognizing that as a binding contractual obligation to act in good faith, the Doerings’ viewed it as their ticket “out of litigation land,” allowing them to provoke the “dispute” Maddux had mentioned, so that Melby would balk at their terms, and “we can get out of it....” Statement of Facts (hereafter, “SoF”), ¶¶ 21-26, *supra*. Doerings thus argue that, without such mutual agreement, there is no binding agreement. *See* Doerings’ Br. 11-14. The Doerings ignore, however, the district court’s analysis (App. A, pp. 16-27), and do not even cite the controlling cases.

The parties’ contemplation of a further document does not mean their Buy-Sell Agreement was unenforceable.

Even if a contemplated more formal superseding agreement does not materialize due to subsequent party recalcitrance or disagreement regarding other ancillary or related terms, *the terms of an informal settlement agreement are still independently enforceable as a contract if the informal agreement both satisfies the essential elements required for contract formation and the terms of the agreement do not clearly and unambiguously require the parties to execute a more formal superseding agreement as a condition precedent to contract formation* (i.e., a condition precedent to the parties’ mutual assent to be bound by the tentatively agreed settlement terms).

*Hanson v. Town of Fort Peck*, 2023 MT 208, ¶ 27, 414 Mont. 1, 538 P.3d 404 (emphasis added).<sup>7</sup> That test has two prongs. The Melbys address the first—that the Buy-Sell Agreement as amended contained all essential contract terms—above. Doerings do not contend that the amendment lacked any term which the Montana Supreme Court has identified as essential.

The second prong is whether the “terms of the [Buy-Sell Agreement] clearly and unambiguously require” execution of the contract for deed “as a condition precedent to contract formation.” *Hanson*, ¶ 27. They do not. Although the parties contemplated a contract for deed, the Amendments’ terms do not clearly say that execution of that later document was a condition precedent of contract formation. *Hanson*, and many other cases, demonstrate that mention of a subsequent agreement is not the same as a “clear[] and unambiguous[] require[ment]” that the more formal agreement be signed before the first agreement is valid. Thus, “a party to a settlement agreement is bound if he or she has manifested assent to the agreement’s terms and has not manifested in intent not to be bound by that assent.” *Lockhead v. Weinstein*, 2003 MT 360, ¶ 12, 319 Mont. 62, 81 P.3d 1284. Doerings manifested their assent by signing the Amendment. Mere mention of a contract for

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<sup>7</sup> Although *Hanson* concerned a settlement agreement, it was governed by standard contract law. See *Kluver*, ¶ 31 (“Settlement agreements are contracts, subject to the provisions of contract law”).

deed does not manifest intent not to be bound by the Buy-Sell Agreement as amended.

In *Hanson*, the parties mediated their disputes, entering into “an informal typewritten MOU” containing various “points of agreement...” *Hanson*, ¶ 4. The “parties verbally agreed that Developers’ counsel would draft a formal settlement agreement incorporating the MOU provisions for formal” consideration and approval. *Id.* ¶ 5. As in this case, the parties had an agreement but referenced a subsequent document. Disputes arose and the town argued “the informal MOU was not a valid and enforceable contract because it was only a tentative agreement subject to... formalization in a superseding final agreement...” *Id.* ¶ 12. This Court disagreed, observing that an agreement is binding even if it contemplates a more formal document, unless it “clearly and unambiguously” requires the subsequent document as a condition precedent to contract formation. *Id.* ¶ 27. The court then discussed other cases.

*Hanson*, ¶ 27, discussed *Kluver*, where the parties had executed a memorandum of understanding that required execution of a yet-to-be-drafted “global release,” deed, lease, and “perpetual first option to purchase...” *Kluver*, ¶ 4. Like Doerings, the Kluvers argued that “the MOU is an unenforceable agreement to agree, and... the parties’ statements and conduct indicate their intent not to be bound.” *Id.* ¶ 33. This Court disagreed.

First, settlement agreements are analyzed just as any other contract. *Id.* ¶ 31. Notwithstanding that the MOU required yet-to-be-drafted documents, there was “nothing on the face of the MOU suggesting that the Kluvers did not intend to be bound by it...” *Id.* ¶ 35. Mere mention of future documents is irrelevant. “[W]here parties intend to form a binding agreement, the fact that they plan to incorporate it into a more formal contract in the future does not render it unenforceable.” *Id.* ¶ 36 (citing *Steen v. Rustad*, 132 Mont. 96, 104, 313 P.2d 114, 1019 (1957)).

[A]bsolute certainty and completeness in every detail is not a prerequisite..., only reasonable certainty and completeness being required. Those matters which are merely subsidiary, collateral, or which go to the performance of the contract are not essential, and therefore need not be expressed in the informal agreement.

*Kluver*, ¶ 36 (quoting *Steen*). “[T]he MOU contains all the information necessary to create the documents and to make the parties’ obligations ‘clearly ascertainable.’” *Kluver*, ¶ 38.

*Hanson* next summarized *Marta Corp. v. Thoft*, 271 Mont. 109, 894 P.2d 333 (1995), as holding that an agreement to various “general terms” was “valid and enforceable” notwithstanding the subsequent “refusal to sign [the] contemplated final settlement agreement.” *Hanson*, ¶ 27.

In *Hetherington v. Ford Motor Co.*, 257 Mont. 395, 849 P.2d 1039 (1993), plaintiffs’ counsel had written a letter offering to settle for a certain amount. He specifically contemplated “settlement drafts and the appropriate releases” to be

provided in the future. *Id.*, 257 Mont at 397, 849 P.2d at 1041. The plaintiffs sought to avoid the agreement, arguing there had been “no meeting of the minds” on the final contract. *Id.*, 257 Mont at 398, 849 P.2d at 1041. Again, this Court disagreed. An intent to not be bound “until a written agreement was reviewed, agreed upon and signed” did not prevent an agreement because the underlying agreement “disclosed no ... manifestations of conditional intent.” *Id.*, 237 Mont. at 399, 849 P.2d at 1042. “Such condition, that it will not be effective until signed, must be part of the agreement between the parties.” *Id.*

Moreover, the precise terms of the release were not material elements of the contract. *Id.*, 257 Mont at 400, 849 P.2d at 1042-1043. “Subsidiary [or] collateral,” matters are “not essential and do not have to be expressed in the contract.” *Id.* 275 Mont at 400, 849 P.2d at 1043. The district court could require “a simple release of all claims.” *Id.*, 257 Mont at 400-401, 849 P.2d at 1042-1043. The defendant did “not have the right to add conditions such as confidentiality ... [or] indemnification....” and the plaintiffs did not “have the right to impose such a condition as acknowledgement of liability.” *Id.*, 257 Mont. at 401, 849 P.2d at 1043. Likewise, the Doerings did not have the right to demand additional terms in the contemplated contract for deed.

This Court reiterated these principles while enforcing a contract to settle a dispute and sell real property for \$2.8 million based upon a series of text messages.

*Perl v. Grant*, 2024 MT 13, 415 Mont. 61, 542 P.3d. 396. The texts satisfied the elements for creation of a contract and the statute of frauds because they identified the parties, the purchase price, the property, and indicated mutual assent. *Id.* ¶ 15-21. “Subsidiary matters, collateral matters, or matters that go to the performance of the contract, do not constitute material terms.” *Id.* ¶ 22 (quoting *Olsen v. Johnston*, 2013 MT 25, ¶ 21, 368 Mont 347, 301 P.3d 791).

*Perl* reiterated that a party is bound if she manifests assent to the agreement’s terms “and has not manifested an intent not to be bound by that assent.” *Id.* ¶ 25 (citing cases). And although it was “clear that the parties’ attorneys were tasked with actually creating the formal documents necessary to memorialize” the agreement, “the fact that [the parties] plan to incorporate it into a more formal contract in the future does not render it unenforceable.” *Id.* ¶ 25 (quoting *Kluver*, ¶ 36). “[N]othing in the text messages ... indicates the parties’ intent was for it to be anything but an enforceable agreement.” *Id.* (quoting *Kluver*, ¶ 39).

The Doerings cannot avoid responsibility for their conduct by pointing to the failure to reach agreement on the contract for deed, particularly given that they intentionally created that lack of agreement.

**D. The Doerings' various arguments do not alter this conclusion.**

1. *Patton v. Madison County*.

The Doerings claim that *Patton v. Madison County*, 265 Mont. 362, 877 P.2d 993 demonstrates that “continued negotiations” evidence a lack of agreement. Doerings’ Br. 24-25. *Patton* was nothing like this case.

First, the future document at issue in *Patton* was the restrictive covenants that would govern usage of the property in perpetuity. The precise terms of the future document *were exactly the issue, the essence of the agreement*. Here, in contrast, the future document—the contract for deed—was not the essence of the agreement, but merely a vehicle to carry out the essence, i.e., the transfer of the Property for a specified price. It was like the contemplated settlement agreements in *Hanson* and *Hethrington*, the deed, lease and option agreement in *Kluver*, and the deed and release in *Perl*. The covenants in *Patton* were not subsidiary or collateral, but “the essential matters at issue” which “could [not] easily have been settled by the court’s ruling” for appropriate covenants. *Id.*, 265 Mont. at 367-368, 877 P.2d at 996. In this case, in contrast, as Doerings’ own attorney recognized, the initial draft Sullivan proposed was normal and typical.

Second, the parties in *Patton* expressly dictated into the court record that their tentative oral settlement agreement was “*conditioned upon the approval of the appropriate settlement documents and covenants by the parties of record and their*

*attorneys.*” *Id.*, 265 Mont. at 366, 877 P.2d at 995 (emphasis in original). “The condition that the settlement would not be effective until signed *was* a part of the agreement between the parties.” *Id.*, 265 Mont. at 367, 877 P.2d at 996. It thus satisfied the *Hanson* test that it “clearly and unambiguously” conditioned assent upon the final documents. In this case, the Amendment mentioned a subsequent document (as did the agreements in *Hanson*, *Kluver*, *Marta*, *Hetherington*, *Hanson*, and *Perl*) but did not expressly condition its efficacy upon execution of the subsequent document. This case is not like *Patton*.

Third, in spite of the Doerings’ efforts to equate the back-and-forth in *Patton* to this case, it was very different. It was the plaintiff/respondent in *Patton* who contended that the oral settlement agreement was enforceable. But the plaintiffs’ counsel had put on the record that the covenants at issue had to be “drawn [up and] .... approved.” *Id.* When the court asked if there was “going to be a settlement,” plaintiffs’ counsel said, “I think so.” *Id.*, 265 Mont. at 367, 877 P.2d at 995. And, it was plaintiffs’ attorney who added “extra restrictions” and eventually wrote to the judge demanding a trial date—a demand utterly at odds with the plaintiffs’ later position that the case was settled via the oral agreement. *Id.*, 265 Mont. at 367, 877 P.2d at 996. In this case, although the Doerings’ “paper trail” features various demands by their counsel, it is devoid of any admission by the Melbys that the Buy-Sell Agreement is not valid.

## 2. *Snyder v. Miniver*.

The Doerings cite an opinion of an intermediate Idaho court, *Snyder v. Miniver*, 6 P.3d 835 (Idaho App. 2000). Doerings' Br. 21. *Snyder* involved a contract for the sale of a parcel of a property in Idaho and, predictably, applied Idaho law. Controlling Idaho law provided:

Where an agreement for the sale of real property manifests the parties' intent to sign a more formal document in the future and no such document is signed, the agreement militates against an award of specific performance.

*Id.*, 6 P.3d at 838 (citing *Karterman v. Jameson*, 980 P.2d 574, 578 (Idaho App. 1999)). *Karterman* had held:

Where an agreement for the sale of real property manifests the parties' intent to sign a more formal document in the future and no such document is signed, ***the agreement will not support an award of specific performance as a matter of law.***

*Id.*, 980 P.2d at 578 (emphasis added).

Compare that to the law that governs this case. “[T]he fact that [the parties] plan to incorporate [the initial agreement] it into a more formal contract in the future ***does not*** render it unenforceable.” *Perl*, ¶ 25 (emphasis added); *see also Hanson, Kluver, Marta and Hetherington*.

*Snyder* illustrates that where the controlling law is directly opposite of Montana law, a different result might ensue.

3. The Doerings' alleged "upmost" concern for public access.

Doerings claim that public access was "of the upmost [sic – utmost] importance" to them. Doerings' Br. 3; *see also id.* at 6 (claiming Doerings became concerned about whether Melbys would allow public access); 7-8 (Doerings insisted upon terms in contract for deed to grant public access)<sup>8</sup>; 9 (Doerings terminated contract to vindicate public access). They riddle their brief with references to public access, as if that concern justifies their conduct, but without ever explaining how or why. In fact, this is irrelevant—*immaterial* in summary judgment parlance—and no reasonable inference can be drawn from this alleged "fact" to defeat summary judgment.

First, the Amendment did not reopen all terms for renegotiation. When the parties amended the original agreement to provide for seller financing, they specified that they modified only "Line 50" and "Line 51" of the original agreement. *See* App. C, lns. 24-25. "[E]xcept as amended" in the Amendment, they "incorporated by reference" ... "[a]ll terms and conditions of the Agreement." *Id.*,

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<sup>8</sup> The Doerings also claim that they "directed their attorney to draft a public access easement ... to protect their interest for the public." Doerings' Br. 7. That is an intentional waiver of the privilege—revealing what they instructed their attorney to do and why. *See* Rule 503, M.R.Evid. But they obstructed discovery into what they actually told Casillas. *See* Suppl. App. 21, p. 105. Regardless, their claim is highly suspect, given their testimony that their purpose was to provoke an objection to give them an excuse to terminate and that they were using Casillas to make a "paper trail." *See, supra.*

Ins. 22-23. That includes the provisions about the condition of title.

Second, the Doerings' supposed concern about access is legally irrelevant. The parties' intent "is to be ascertained from the writing alone if possible." M.C.A. § 28-3-303; *see also Saylor v. Yan Sun*, 2023 MT 175, ¶ 14, 413 Mont. 303, 536 P.3d 399. Because the contract contained no requirement that Melbys open the Property to the public, the Doerings' supposed wishes in that regard are immaterial.

Similarly, under the integration clause and the parol evidence rule, evidence of the Doerings' secret intent, or even any verbal agreement regarding public access, is improper. The Buy-Sell Agreement was the "ENTIRE AGREEMENT," displacing all other written or oral agreements. App. B, p. WFLLC000390, Ins. 425-427. The law allows "no evidence of the terms of the agreement other than the contents of the writing...." M.C.A. § 28-2-905; *see also Martin v. Laurel Cable TV, Inc.*, 215 Mont. 229, 233, 696 P.2d 454, 457 (1985) ("[W]hen the terms of parties' agreement are reduced to writing, the writing is considered to contain all the terms, thus representing the entire transaction. No evidence can be admitted of the terms other than the writing itself.").

#### 4. Doerings' "pay and take" argument.

Doerings seek to differentiate this transaction from a simple "pay and take" deal. Doerings' Br. 17. They argue that additional terms were required to protect

the parties, such that this was not a simple “collateral” matter. *Id.* They overlook several things.

First, undisputedly, Doerings did not terminate because of some good faith disagreement about the terms of the contract for deed that were arguably necessary to protect their security. Instead, they intentionally triggered disagreement by demanding an easement that even they found repugnant—the reserved the right to rescind it—precisely to provoke an objection so they could terminate *to effectuate a decision they had already made* independent of any contract terms. *See* SoF, ¶ 36, *supra*. This Court may someday have to decide a case in which a transaction goes off the rails over honest disagreement about the terms of the security instrument, but this is not that case.

Second, even if the Court decides to address those issues, *Kliver* provides guidance. The MOU there contemplated a deed, a multi-year lease, and a first option to purchase. That was not a simple “pay and take,” but this Court, nonetheless, deemed those matters to be collateral, such that the MOU was enforceable in its own right. Just as Doerings’ counsel recognized (prior to the “paper trail” plan) that the standard provisions Sullivan had drafted were “in line” and the transaction was “good to go,” SoF, ¶ 19, so should this Court.

Third, when the Doerings sprung their trap and terminated, the Melbys offered to pay cash but the Doerings refused. The Doerings refused the very “pay

and take” that would have unquestionably and fully protected them, eviscerating the suggestion that they were motivated to protect their security.

5. The alleged “back and forth negotiation.”

The Doerings claim that the fact that they proposed, and Melbys responded to, various terms means those terms were material. *See, e.g.*, Doerings’ Br. 14 (“back-and-forth negotiation” ... demonstrates that the parties had not agreed...”); 23-26, 26 (“mere fact that negotiations were ongoing demonstrates” materiality and lack of agreement).

This argument clearly does not create a genuine issue of material fact precluding summary judgment. “[M]ere disagreement about the interpretation of a fact or facts does not amount to genuine issues of material fact.” *Mont. Bd. of Pharm. v. Kennedy*, 2010 MT 227, ¶ 9, 358 Mont. 57, 243 P.3d 415 (internal quotations omitted). The issue is “whether the material facts are actually disputed ... or whether the parties simply interpret the facts differently.” *Id.* (internal quotations omitted). At most, the Doerings simply put their interpretation on the facts; indeed, they do not claim there is any genuine factual dispute.

This is actually an inference that Doerings ask the Court to draw, i.e., that the Melbys would not have responded to the Doerings’ outlandish draft contract for deed if the new terms were immaterial. Courts will “draw reasonable inferences in favor of the party opposing summary judgment.” *Hutzenbiler v. RJC Inv., Inc.*,

2019 MT 80, ¶ 7, 395 Mont. 250, 439 P.3d 378. But, they “are not required to draw unreasonable inferences...” *Mirabella v. Town of Lexington*, 64 F.4th 55, 58 (1st Cir. 2023); *Davis v. City of Little Rock*, 122 F.4th 326, 332 (8th Cir. 2024) (“courts do not accept unreasonable inferences” on summary judgment). As one court observed, “[a]t summary judgment, this court need not draw all possible inferences in [nonmovant’s] favor, but only all reasonable ones.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 n.10 (9th Cir. 2002) (citing *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1466-67 (9th Cir. 1986)).

In this case, it would be unreasonable to infer from the “back-and-forth” that the additional terms were material. That is so for several reasons.

First, this argument simply makes no sense. There is no logical connection between the premise (the Melbys responded to the Doerings’ “paper trail” draft) to the conclusion (therefore, the terms that the Doerings demanded were material to the underlying Buy-Sell Agreement.) This is such a logical disconnect that it is difficult to deconstruct it further. Indeed, Doerings do not explain how parties could possibly reach agreement on the terms of implementing documents—even those dealing with collateral and subsidiary matters—without communicating about them. Doerings’ logic would, nonsensically, make every term material if the parties communicate about it.

Second, it runs counter to a plethora of opinions from this Court that parties

to an agreement containing the material terms are bound even if there were subsequent communications about the implementing documents. *See, e.g., Hanson*, ¶¶ 6-8 (developer proposed a draft which the town edited and responded); *Kluver*, ¶ 6 (communications about the documentation to implement the MOU). If the Doerings were correct that merely responding to proposed drafts made those terms material, then every one of those cases should have held that there was no enforceable agreement.

Third, this argument unreasonably equates negotiation about terms that might vary a contract with an actual agreement doing so. That is not the law. As of the parties' execution of the Amendment, they had a contract that Doerings would sell to the Melbys for a stated price, and that they would execute a financing document implementing the contractually-stated down payment, interest rate, amortization, and maturity, with no prepayment penalty, and allocating responsibility to pay for drafting the document. Apps. B and C. That contract could "be modified only in writing, signed by the" parties. App. B, ln. 427; *see also* M.C.A. § 28-2-1602 ("A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise."). Even an oral agreement would not suffice until fully performed. *See, e.g., Winkel v. Family Health Care, P.C.*, 205 Mont. 40, 45, 668 P.2d 208, 210 (1983).

Fourth, it would not be reasonable to infer that, by responding to the

Doerings, the Melbys conceded the extraneous terms the Doerings demanded were material to the parties' obligations under the Buy-Sell Agreement. Dr. Melby had already quit his job, they had sold their house, and they were packing up their belongings for a move to Montana. Suppl. App. 23, 130:20 – 131:5. It is unreasonable to draw the inference that, when they attempted to keep the transaction alive, the Melbys conceded that there was no contract.

6. The attorneys' alleged opinions.

Doerings argue that the district court erred by disagreeing with certain attorneys that the contract for deed was a "condition precedent." Doerings' Br. 31-34. This argument is wrong on many levels.

First, even were that counsels' opinions, it would be contrary to Montana law under which an agreement is "independently enforceable" unless its terms "clearly and unambiguously require the parties to execute a more formal superseding agreement as a condition precedent..." *Hanson*, ¶ 27.

Second, the legal opinion of Maddux's lawyer is not evidence. *See Wicklund v. Sundheim*, 2016 MT 62, ¶ 15, 383 Mont. 1, 367 P.3d 403 ("expert opinion that states a legal conclusion or applies the law to the facts is inadmissible.").

Third, Doerings' argument simply does not flow from the cited facts and testimony:

- They cite real estate agent Rosbarsky that Sullivan teaches continuing

education and works for real estate agents. Doerings' Br. 32. That proves nothing.

- Sullivan was Maddux's attorney. *See* SoF, ¶ 15, *supra*. She hand-selected him, gloating that the Melby's "pay, but we direct." *See* SoF, ¶ 16, *supra*. And when Dawn Maddux coached the Doerings about how they could get out of the deal if only the Melbys could be made to object to something, she attributed that plan to Sullivan. *See* SoF, ¶¶ 21-28, *supra*. Even the idea to have Casillas take lead in creating a "paper trail" came from Sullivan. SoF, ¶ 28. Unsurprisingly, the mastermind of this plan thinks it was a good one.
- As for Casillas, he created the "paper trail" and his law firm represented the Doerings for the first several years of this litigation. We would not expect him to be any more unbiased than Sullivan.
- Doerings quote the Melbys' attorney about how the Melbys had instructed him to attempt to keep the transaction alive. Doerings' Br. 33. Nothing establishes that Post agreed that the Doerings acted properly.

This is just an example of the Doerings' attempt to use the "paper trail" that they created. The Melbys' attempt to keep the deal alive does not mean they agreed Doerings were acting properly.

**E. Even if the amendment were invalid, the parties still had a contract.**

Doerings' arguments presume that, if the Amendment were unenforceable, the parties had *no* contract for them to breach. That overlooks that a valid and enforceable Buy-Sell Agreement preceded the Amendment and sufficed, by itself, to obligate the Doerings to sell the Property to the Melbys.

The parties to a contract may fail or neglect to amend that contract for any number of reasons, but they still are bound by that contract. *Heckman v. Shell & Wilson*, 158 Mont. 47, 58-59, 487 P.2d 1141, 1147 (1971) (parties did not validly amend their contract, so the original contract continued to govern). If they attempt, but fail, to negotiate an amendment, that does not vitiate the underlying contract. Instead, it remains as it was, un-amended. The parties had a Buy-Sell Agreement. Their failure to amend it would not, under law or logic, vitiate it.

The Doerings' conduct shows that they knew they had a contract. When the Doerings decided to spring their trap—the culmination of their idea “to keep us out of litigation land”—they did not announce simply that the negotiations had failed to arrive at an enforceable contract. Instead, they provided a “written notice of termination of the parties' Buy-Sell Agreement, any applicable Amendments and/or Addendums thereto, and the transaction as a whole.” Suppl. App. 16. One does not “terminate” a contract that does not exist.

Whether or not the Amendment was valid, the Doerings breached their

obligations under the Buy-Sell Agreement. When it became obvious that the Doerings were using the contract for deed process as an excuse to manufacture a reason to terminate the contract, the Melbys offered to pay cash. *See* SoF, ¶¶ 39-40, *supra*; *see also* Suppl. App. 21, p. 80 (refusing to allow Casillas to testify as to communications with *Maddux*—recall that his clients were the Doerings—about the Melby’s attempt to pay cash). The Doerings refused. SoF, ¶ 40, *supra*.

Plainly, even if the Amendment were the mere invalid agreement to agree that Doerings claim, Doerings’ Br. 14, 32, their refusal to close on the original, unamended, terms breached the Buy-Sell Agreement.

### **III. THE COURT SHOULD NOT ENTER JUDGMENT IN DOERINGS’ FAVOR.**

In their conclusion, the Doerings accuse the district court of error in not granting their summary judgment motion. Doerings’ Br. 34. They did not list that as an issue.

#### **A. The Doerings did not argue this.**

The Doerings have not developed this argument. This Court should not do so. *See* M.R.App.P. 12(1)(g) (appellant’s brief must ‘contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations...’); *Penado v. Hunter*, 2024 MT 216, ¶ 20, 418 Mont. 167, 557 P.3d 434 (this Court will not consider unsupported arguments); *Estate of Harris v. Reilly*, 2025 MT 126, ¶ 16, 422 Mont. 383, 570 P.3d 552 (we are not obligated to

develop arguments) (citation/quotation omitted).

It was incumbent upon Doerings to support their request for reversal of the ruling on their motion. This Court should not do so. And the Melbys cannot reasonably be expected to refute an argument they cannot see.

**B. In any event, and at minimum, factual disputes and inferences prevent granting the Doerings' motion.**

Even if the Court reverses summary judgment for the Melbys, it does not follow that summary judgment should be entered for Doerings. Instead, the Court should evaluate independently whether Doerings met their own burden. *See Ike v. Jefferson*, 267 Mont. 396, 399-400, 884 P.2d 471, 474 (1994).

The Melbys believe that the *undisputed* facts (including that Doerings' admission that they manufactured a disagreement over the contract for deed for the express purpose of terminating because they wanted to accomplish a purpose that was not in the contract) establish that the Doerings breached. If, however, the Court believes the undisputed facts do not establish that the Doerings *did* breach the contract, it does not follow that those facts establish that the Doerings *did not* breach. *See Ike*. Certainly, there is a plethora of evidence from which a jury could find that the Doerings breached. That evidence includes the Doerings' "idea ... [to] keep us out of litigation land" by intentionally provoking an objection and the evidence showing that they did exactly that. A jury could conclude that the Doerings acted intentionally, dishonestly, and abused their discretion, to deprive

the Melbys of the benefit of their bargain. That would be a breach of contract. *See Weldon*, 268 Mont. 88, 885 P.2d 511 (1994). Because the jury could reach that conclusion, it would be improper for this Court to enter summary judgment, taking that issue away from the jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (summary judgment is only proper if “under the governing law, there can be but one reasonable conclusion as to the verdict”); *Lopez v. Great Falls Pre Release Services, Inc.*, 1999 MT 199, ¶ 35, 295 Mont. 416, 986 P.2d 1081 (summary judgment proper “only when reasonable minds could reach but one conclusion”).

Moreover, to the extent the Doerings rely upon their “upmost” concern for public access, that is disputed:<sup>9</sup>

- Prior to the Melbys’ offer, the Doerings had received an offer from the City of Missoula. The Doerings did not counter because the dollar amount “wasn’t close enough....” *See* Suppl. App. 20 (B. Doering depo.), p. 112.
- The Doerings did not insert any provisions regarding public access in the Buy-Sell Agreement, which included provisions regarding

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<sup>9</sup> This factual dispute is immaterial to the Melbys’ motion because it is not part of the parties’ Buy-Sell Agreement. *See, supra*. Because Doerings raise it, however, they bore the burden to show it is undisputed to obtain summary judgment.

condition of title. *See* App. B. In fact, the contract required Doerings to preserve the condition of title, without any additional encumbrances or easements. *See* App. B, Ins. 298-301; *see generally* SoF, ¶¶ 4-7, *supra*. The Doerings similarly did not include any provisions regarding public access in the Amendment. *See* App. C.

- When Sullivan provided the initial contract for deed (the “normal” version, *see* SoF, ¶¶ 14-20), the ***Doerings sought to prevent any grant of public access***. *See* Suppl. App. 10 (B. Doering requiring language prohibiting an easement for the “City, County, bike groups...”); Suppl. App. 12, p. Sullivan-200 (Casillas’ original revisions, tightening up prohibitions on any such easements).
- When the Doerings proposed their poison pill—the Property-wide easement—they specified that they could rescind it. App. E, p. Doering-1673.

Given these facts, a jury could reasonably doubt the Doerings’ assertion regarding public access, and this cannot support judgment in Doerings’ favor.

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court’s orders:

- Granting summary judgment to the Melbys (and implicitly denying the Doerings' motion for summary judgment) (Doc. 224); and
- Denying the Doerings' motion to reconsider (Doc. 265).

Dated December 8, 2025.

Baldwin Law, PLLC



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Robert K. Baldwin

## CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 11(4), M. R. App. P., that the foregoing brief is proportionally spaced, printed in a 14-point Times New Roman (a Roman-style, non script) type-face, is double spaced, and is not more than 10,000 words (containing 9993 words) and excluding the Caption, Table of Contents, Table of Authorities, and this Certificate of Compliance.

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## CERTIFICATE OF SERVICE

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