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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 25-0272

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA-25-0272

SPENCER MELBY, an individual and
COLLETTE MELBY, an individual,

Plaintiffs and Appellees,

vs.

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

Defendants and Appellants.

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

Melbys' Opposition to Doerings' Motion to Strike

APPEARANCES

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Although Doerings contend they revised the contract for deed for protection, Doerings' Br. 16, in fact, their outlandish demands were simply a means to effectuate their prior decision to terminate. *See* Suppl. App. 20, pp. 302-303 (demanding easement over entire property was "just a means to effectuate" prior decision to dishonor the contract). The Doerings now seek to compel a decision based upon misleadingly incomplete information.

FACTS

I. ORIGINAL MOTION AND ORDER.

Doerings voluntarily forwarded to their broker (Maddux) and the scrivener (Sullivan), communications from their lawyer (Casillas), but redacted the substance in discovery. Melbys sought to compel a waiver as to specific documents and the "entire subject matter." Doc. 78, p. 6; Exs. C-L thereto.

Doerings convinced the court that Maddux and Sullivan were within the "magic circle" because they were agents, "not potential … adversaries." Doc. 96, p. 9. Obviously, a real estate agent can be an adversary: Maddux and Doerings since sued each other. Docs. 184, 210. And having convinced the court Maddux was such a "closely related person" that "her involvement … was appropriate," Doc. 96, p. 9, Doerings testified that Maddux was not involved in their decision to terminate. *See* Exhibit 1, p. 84 (Doering claiming it was their sole decision to terminate contract); pp. 332-333 ("litigation land" plan was not based on anything

Maddux said or did).

The Court denied Melbys' motion for Rule 54(b) certification of this order. Doc. 275, p. 2; Doc. 283, p. 2 (refusing to "certify … any of its other orders….").

II. THE SULLIVAN SUBPOENA.

Roughly contemporaneously with the foregoing motion, Sullivan produced the documents, unredacted, without objection from the Doerings. Doerings claim production was "inadvertent," Doerings' Mot., p. 5, but cite no evidence. In fact, Doerings assented to production of, and questioning on, these documents.

- Melbys gave Doerings an advance copy of the subpoena to Sullivan. *See* Doc. 140, Ex. 5.
- Melbys gave Doerings the actual subpoena served upon Sullivan. Doc. 140, Exs. 5 and 7.
- That subpoena clearly required production of the documents at issue, seeking Sullivan's entire file, and all communications with the Doerings or Casillas. *Id*.
- Doerings confirmed awareness of the subpoena and that Sullivan was "preparing a response…." Doc. 140, Ex. 8.
- Doerings did not object. *See* record.
- Sullivan produced the documents at issue here. Doc. 140, Exs. 9 and 10 (SULLIVAN 1 through 284 produced).

- Melbys forwarded that response to Doerings to access the documents. Doc. 140, Ex. 11.
- Doerings still did not object *See* record.
- Doerings did not object as the documents at issue were marked as deposition exhibits and the subject of extensive questioning. *See* Doc. 140, Ex. 12 (Sullivan depo.); Ex. 13 (Casillas depo.).
- The Doerings have never invoked M.R.Civ.P. Rule 26(b)(6)(B) to demand return or destruction of the three documents at issue.

III. DOERING DEPOSITION.

Mr. Doering was deposed in October 2022, after the briefing on the motion to compel (Docs. 78, 79, 80) but before the order (Doc. 96). He had intentionally forwarded the communications, knowing it would be a waiver. Regarding Supp. App. 11 (depo. ex. 64), he "forwarded it … intentionally" to someone whom he knew was not his attorney, "[u]nderstanding that disclosing your attorney's advice can be a waiver…." Ex. 1 hereto, pp. 252-253; *see also, id*., at 81-83 (Doering "would think that it opens the door to make it public.").

IV. CASILLAS DEPOSITION.

Doerings claim Suppl. App. 21 is improper because the Doerings objected. Doerings' Mot., p. 4. Doerings selectively asserted the privilege, instructing the witness not to answer. *See, e.g.,* pp. 80:5-6; 80:18-19; 106:1-6; 113:6-12. But they

allowed questions about the key email, Suppl. App. 12. *Id.*, pp. 53-54.

V. MOTION FOR CLARIFICATION.

Melbys sought clarification about the documents Doerings had allowed Sullivan to produce without objection and which were already deeply embedded in the litigation. Doc. 140. The court did not rule.

VI. MELBYS SUBMITTED THE FEW DOCUMENTS AT ISSUE, DOERINGS DID NOT OBJECT, AND THE COURT CITED ONE OF THEM.

Melbys submitted the disputed documents to the court with the substantive briefing, with the Doerings making no objection.

- **Suppl. App. 11:** Melbys' opposition to Doerings' motions for summary judgment and reconsideration. Docs. 165, ex. 9; 245, ex. 3. Doerings' replies, Docs. 199 and 247, did not object.
- **Suppl. App. 12:** Melbys' summary judgment motion. Doc. 139, ex. 13. Doerings' opposition, Doc. 175, did not object.
- **Suppl. App. 13:** Melbys' opposition to Maddux' summary judgment motion. Doc. 169, ex. 14. Doerings joined in Maddux's motion, Doc. 147, but did not object.

The court also did not object, but specifically cited one of them in support of its substantive decision, App. A. *Id.*, p. 7 (discussing Suppl. App. 12). In fact, the court had "considered all of the … attached exhibits …." App. A, p. 2.

VII. DOERINGS SUBMITTED ONE OF THE DOCUMENTS THEY CONTEND IS PRIVILEGED.

Doerings contended deposition exhibit 69 was among the privileged "magic circle" documents. *See* Doc. 177, pp. 3, 13-14. Yet they submit it as App. D in this Court. They do not appear to believe their own arguments.

ARGUMENT

I. DOERINGS ARE INCORRECT THAT THE DISTRICT COURT CONSIDERED THESE MATERIALS STILL PROTECTED.

The Doerings' premise—that the district court considered use of these materials improper—is incorrect. Having the motion for clarification before it, the court relied upon some of the materials.

II. DOERINGS WAIVED THEIR ARGUMENT.

Doerings did not object when Melbys submitted these documents for consideration below. And their principal brief did not argue the district court erred by citing the allegedly improper material.

That is a waiver. *See Nason v. Leistiko*, 1998 MT 217, ¶ 11, 290 Mont. 460, 963 P.2d 1279 (argument waived if not raised below); *Mt. W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 9, 315 Mont. 231, 69 P.3d 652 ("we will deem the issue [not raised in brief] waived"); *Beery v. Grace Drilling*, 260 Mont. 157, 162, 859 P.2d 429, 432 (1993) (same). Doerings may not omit mention of supposed error below or in their principal brief but take a second bite via motion.

III. DOERINGS WAIVED ANY PRIVILEGE.

A. Doerings waived by forwarding the communications.

Voluntary disclosure waives a privilege. *Palmer v. Farmers Ins. Exch.*, 261 Mont. 91, 111, 861 P.2d 895, 907 (1993); Rule 503, M.R.Evid. Even unintentional disclosure can be a waiver. *See* Rule 503, M.R.Evid., Comm' Comments ("Once conduct reaches a certain point, fairness requires an objective finding of waiver, despite any subjective intentions of the holder …."); *PacifiCorp v. Dep't of Revenue*, 254 Mont. 387, 396, 838 P.2d 914, 919 (1992). Although Doerings knew exactly what they were doing, *supra*, fairness would require waiver even were it otherwise. *See State v. Payne*, 2021 MT 256, ¶ 23, 405 Mont. 511, 496 P.3d 546.

B. Doerings waived by not objecting to production and use.

Doerings did not object when these materials were subpoenaed, produced, or the subject of questioning. *Supra*. That is another waiver.

C. The Doerings have not attempted a "claw back."

Rule 26(b)(6)(B), M.R.Civ.P., allows a party to "claw back" inadvertently produced materials. A party "must give notice to the receiving party." Fed. R. Civ. P. 26(b)(5) advisory committee's note to 2006 amendment. Doerings have given no such notice.

CONCLUSION

All parties knew these documents were in play. Thus, Doerings did not object to their production, questioning at depositions, attachment to briefs, or citation by the court.

Dated January 9, 2026.

BALDWIN LAW, PLLC

By: /s/ 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 contains 1,241 words excluding the caption and the certificates of compliance and service.

Baldwin Law, PLLC

Robert K. Baldwin