DA 21-0637

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 124N

VERNON HOVEN,

Plaintiff and Appellant,

v.

DANIEL WADDELL,

Defendant and Appellee.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV-19-643B
Honorable Rienne H. McElyea, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Michael F. McGuinness, Morgan E. Tuss, Patten, Peterman, Bekkedahl & Green, PLLC, Billings, Montana

For Appellee:

Stephen C. Pohl, Attorney at Law, Bozeman, Montana

Submitted on Briefs: May 25, 2022

Decided: June 28, 2022

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Vernon Hoven appeals the Eighteenth Judicial District Court's decision and final judgment in favor of Daniel Waddell in a breach of contract claim. Hoven contends that the District Court erred by failing to make findings of fact or to otherwise address various legal theories that supported his position. We affirm.

¶3 Hoven, a certified public accountant (CPA), owns and operates Western CPE, LLC (Western), a business offering continuing education to CPAs. Western employed Waddell, also a CPA, from 2013 until July 2018. In February 2015, Hoven personally loaned Waddell $100,000. Hoven wrote the check to Waddell from his personal checking account; the memorandum line on the check stated "Loan on demand." Waddell executed an unsecured promissory note for $100,000 (the Note) the same day. The Note provided for an interest rate of three percent per annum. Both parties signed the Note. Waddell made three interest-only payments of $3,000 in January 2016, April 2017, and March 2018.

¶4 In early 2018, over sixty percent of Western's employees quit or were fired, including its chief financial officer (CFO). Around February or March 2018, Hoven asked Waddell to serve as interim CFO. According to Waddell, he proposed that he take the CFO

position in exchange for Hoven forgiving the loan, and Hoven agreed. Waddell then drafted a letter forgiving the indebtedness (the Letter). Addressed to Waddell, the undated Letter states:

> To Whom It May concern:
>
> This certifies that the Promissory Note, between Daniel Waddell and Vern Hoven, Dated February 17, 2015 is forgiven, and no additional money is due.
>
> Sincerely,
>
> Vern Hoven

Hoven's signature appears above his name on the Letter. Waddell contends that he gave the Letter to Hoven, who signed it. Hoven disputes the legitimacy of the Letter and asserts that his signature was forged. Neither party has the original letter; only a copy was presented at trial.

¶5 Waddell resigned from Western on or around July 18, 2018. In mid-September 2018, Hoven sent Waddell a demand letter, requesting repayment of the Note. Waddell refused to repay the loan balance, referencing the Letter. Hoven filed a complaint asserting two causes of action: breach of contract and unjust enrichment.

¶6 The District Court held a one-day bench trial on September 29, 2021. Hoven testified that he did not sign the Letter. He explained that, despite having memory issues, he would have remembered signing a document of such importance. Waddell presented evidence that Hoven had a history of memory loss and had just forgotten that he signed the Letter. Each party called handwriting experts. They disagreed about the legitimacy of the signature.

¶7 The District Court issued its findings of fact and conclusions of law about a month later. The court found that "Hoven signed the letter and forgave the indebtedness" as consideration for Waddell serving additional employment duties at Western. The District Court held further that the Note was "a valid and enforceable contract" that Hoven voluntarily forgave when he signed Waddell's letter, precluding the application of unjust enrichment as a theory of recovery. The District Court entered judgment in Waddell's favor. It declined to award fees given what it deemed unusual circumstances.

¶8 "When a district court sits without a jury, we review the court's findings of fact for clear error and its conclusions of law for correctness." *Truss Works v. Oswood Constr. Co.*, 2022 MT 42, ¶ 7, 408 Mont. 27, 504 P.3d 1116 (citation omitted). "A finding of fact is clearly erroneous if it is 'not supported by substantial credible evidence,' if the district court 'misapprehended the effect of the evidence,' or if our review of the record convinces us that the district court made a mistake." *Truss Works*, ¶ 7 (quoting *Norwood v. Serv. Distrib. Inc.*, 2000 MT 4, ¶ 21, 297 Mont. 473, 994 P.2d 25). We view the evidence in the light most favorable to the prevailing party in determining whether the district court's findings are supported by substantial credible evidence. *Norwood*, ¶ 21 (citation omitted). We review a district court's conclusions of law for correctness. *Welu v. Twin Hearts Smiling Horses, Inc.*, 2016 MT 347, ¶ 12, 386 Mont. 98, 386 P.3d 937 (citation omitted).

¶9 Hoven raises several issues, some of which are unpreserved. This Court generally declines to "'address issues raised for the first time on appeal, or a party's change in legal theory' from that argued at the district court." *Jacobson v. Bayview Loan Serv., LLC*,

2016 MT 101, ¶ 24, 383 Mont. 257, 371 P.3d 397 (quoting *Vader v. Fleetwood Enters., Inc.*, 2009 MT 6, ¶ 37, 348 Mont. 344, 201 P.3d 139).

¶10 Hoven argues that the court failed to analyze the elements of accord and satisfaction, asserting that he preserved the issue by briefly mentioning the phrase in the final pretrial order. But Hoven did not develop any argument regarding accord and satisfaction at trial. It is not the role of the trial court to inquire sua sponte into issues the parties raised in the pretrial order when the parties fail to raise them at trial. *See LHC, Inc. v. Alvarez*, 2007 MT 123, ¶¶ 20-21, 337 Mont. 294, 160 P.3d 502 (citations omitted). Because Hoven did not develop any argument regarding accord and satisfaction at trial, the District Court did not have an opportunity to weigh these arguments, and we decline to address them for the first time on appeal.

¶11 Hoven next asserts that the District Court's findings are not supported by substantial credible evidence. He argues that the court erred by failing to analyze whether Hoven made a knowing and intelligent waiver or release of the Note. This argument, however, misapprehends the District Court's holding that the Letter created a new agreement under which Hoven "voluntarily forgave" the Note.

¶12 An enforceable contract requires identifiable parties with the capacity to contract, consent, a lawful object, and consideration. Section 28-2-102, MCA. The primary issue at trial—the authenticity of Hoven's signature—involved the first two elements of contract formation. Hoven did not contest lawful object. Two handwriting experts testified at trial to the authenticity of Hoven's purported signature on the Letter. Hoven's expert, Brett Lund, testified that Hoven "probably did not" author the signature. Waddell's expert,

Wendy Carlson, testified that he did. The court found Carlson's "testimony and expertise credible and more reliable" than Lund's.

¶13 Carlson identified Hoven as the author of the signature to the highest degree of certainty. She pinpointed certain characteristics of signature, including a large loop in the "H," the incline and stroke of the letters, and the placement of the lowercase letters in Hoven's first name, which matched a number of example signatures provided to her by Hoven. Lund, on the other hand, was not given the additional samples Carlson reviewed, including those that directly conflicted with his opinion. The court noted that Carlson had "more specific training and experience in the field of handwriting analysis" than Lund did; that she had "reviewed twice as many handwriting samples" in examining the signature at issue than Lund had; and that she had "more sophisticated and precise instruments on which to base her determination."

¶14 A district court's role as the trier of fact is to make credibility determinations and weigh the evidence; we will not, on appeal, "reweigh conflicting evidence or substitute our evaluation of the evidence for that of the district court." *State v. Wetzel*, 2005 MT 154, ¶ 11, 327 Mont. 413, 114 P.3d 269 (citation omitted); *see also* M. R. Civ. P. 52(a)(6). The District Court's credibility determination is supported by substantial evidence, as is its finding that Hoven signed the Letter.

¶15 Though Hoven's memory loss was highlighted at trial, the District Court noted that Hoven had not alleged "that he lacked capacity" or that Waddell had taken advantage of his mental state. Hoven presented no evidence that he lacked the capacity necessary to

enter into a contract. Hoven's signature on the letter therefore establishes him as an "identifiable part[y] capable of contracting" and indicates his consent.

¶16 Addressing the element of consideration, the court found that "[t]he loan was forgiven in consideration that Waddell serve additional employment duties during a particularly difficult and stressful time for Hoven." Both parties' testimonies established that Hoven asked Waddell to assume the role of CFO after several corporate officers were terminated or quit. Hoven steadfastly denied that he had forgiven the loan in exchange for Waddell's performance as CFO, but the court credited Waddell's accounting of events given testimony from Hoven and other witnesses that Hoven had experienced memory loss during the time in question. Contrary to Hoven's contention, the District Court did not ignore facts adverse to Waddell in its findings. It noted, for example, that Waddell's discovery responses conflicted with his testimony at trial regarding how he accounted for the cancellation of indebtedness income on his income taxes. But the court found Waddell and his witnesses more credible.

¶17 Hoven contends that the District Court improperly conflated Hoven's individual actions with Western when it held that Waddell's assumption of additional employment responsibilities at Western was adequate consideration to modify the Note. The court explained, however, that "[t]he circumstances of this case were unusual" and that Waddell agreed to take on the additional duties when Hoven was going through "a particularly difficult and stressful time[.]" That the court did not distinguish between Hoven and Western does not amount to clear error when it found Waddell's actions to benefit Hoven directly and personally. The District Court's findings address each element of contract

formation, establishing that the parties entered into a new agreement under which Hoven forgave the debt in exchange for Waddell stepping in as CFO of his company. Substantial credible evidence from the record supports the court's findings.

¶18 The issue of waiver and release is distinct from the question whether Hoven and Waddell entered into a superseding contract. "Waiver is a voluntary and intentional relinquishment of a known right, claim or privilege, which may be proved by express declarations or by a course of acts and conduct which induces the belief that the intent and purpose was waiver." *VanDyke Const. Co. v. Stillwater Mining Co.*, 2003 MT 279, ¶ 15, 317 Mont. 519, 78 P.3d 844 (quoting *Tynes v. Bankers Life Co.*, 224 Mont. 350, 363, 730 P.2d 1115, 1123 (1986)). The District Court's findings do not address waiver and release because the court found that the parties entered into a new agreement under which Hoven forgave the debt in exchange for Waddell serving as CFO. The court did not err when it declined to analyze whether Hoven waived or released his right to enforce the Note.

¶19 Hoven finally asserts that the District Court should have found that Waddell was unjustly enriched when the balance of the Note was forgiven. "Unjust enrichment is an equitable claim for restitution to prevent or remedy inequitable gain by another." *Assoc'd Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 64, 392 Mont. 139, 424 P.3d 571 (citation omitted). Unjust enrichment arises "in the absence of an agreement between the parties." *Welu*, ¶ 33 (citation omitted). Because the District Court determined that the Letter created an agreement under which "Hoven forgave the loan in exchange for good and valuable consideration," it did not err when it held that "unjust enrichment [was] not an available theory of recovery." *Welu*, ¶ 33.

¶20 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. The District Court's findings of fact were supported by substantial evidence and the court did not commit an error of law. We affirm the District Court's judgment.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR