

DA 18-0447

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 96N

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JAY COCHRAN FBFS, INC., a Montana corporation,

Plaintiff and Appellee,

v.

KURT JAMES FAUTH and SY SALES, LLC, a Montana  
limited liability company d/b/a FAUTH AGENCY,

Defendants and Appellants.

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APPEAL FROM: District Court of the Thirteenth Judicial District,  
In and For the County of Yellowstone, Cause No. DV-17-0075  
Honorable Gregory R. Todd, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Ben Sather, Sather Law, PLLC, Billings, Montana

For Appellee:


Stephen C. Mackey, Towe, Ball, Mackey, Sommerfeld & Turner, PLLP,  
Billings, Montana

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Submitted on Briefs: February 20, 2019

Decided: April 23, 2019

Filed:

  
Clerk

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Justice Ingrid Gustafson 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 Defendants Kurt James Fauth and SY Sales, LLC, d/b/a Fauth Agency (Fauth) appeal from the Thirteenth Judicial District Court's: May 3, 2017 order denying Fauth's motion for summary judgment; January 17, 2018 order denying Fauth's motion for summary judgment and combined motions in limine; May 1, 2018 findings of fact, conclusions of law, and judgment; June 29, 2018 order amending; and July 17, 2018 final judgment. We affirm in part, and reverse and remand in part for further proceedings consistent with this opinion.

¶3 The crux of the parties' dispute centers around the meaning of the language used in a November 3, 2008 appointment agreement (Agreement) between Fauth and Farm Bureau Mutual Insurance Company and/or Farm Bureau Life Insurance Company (Farm Bureau).

¶4 Cochran is a financial services provider administering the sale of property, life, casualty, and other insurance products underwritten and insured by Farm Bureau. In 2008, Cochran hired Fauth as an employee. Fauth later became an independent contractor. No written employment or independent contractor agreement ever existed between Fauth and Cochran. The Agreement between Fauth and Farm Bureau enabled Fauth to sell Farm

Bureau insurance products and is the only written agreement between Fauth and Farm Bureau.

¶5 The Agreement contained a confidentiality clause prohibiting Fauth from appropriating any confidential information, including customer data, for his own use at any time. The Agreement further contained a non-solicitation clause prohibiting Fauth from selling or soliciting replacements or exchanges of insurance products:

with respect to any policyholder of [Farm Bureau], their subsidiaries or affiliates, or with any company with whom [Farm Bureau has] a marketing agreement, within any counties in which Appointee sold or serviced any products pursuant to this [Agreement] . . . enforceable for a period of eighteen months following the termination of this [Agreement].

Beneath a section of the Agreement titled “FOR HOME OFFICE USE ONLY” was a listing of three distinct Farm Bureau subsidiary companies and three distinct checkable boxes. On the executed Agreement, the only box checked was the box next to the heading for Farm Bureau Life Insurance Company. The box next to the heading for Farm Bureau Mutual Insurance Company was not checked.

¶6 On September 19, 2016, Fauth left Cochran to start his own insurance agency. Prior to doing so, Fauth removed confidential information from Cochran’s business. In early October 2016, legal counsel for Farm Bureau, Randall G. Nelson, requested by letter (Nelson letter) that Fauth return the confidential information. On October 27, 2016, Fauth returned the confidential information to Cochran. Fauth then requested that Farm Bureau clarify whether Fauth could sell insurance products to Farm Bureau insurance policy holders. In response, Fauth received a November 4, 2016 letter (Swinton letter) from Farm

Bureau Financial Services attorney, Paul Swinton, stating that the Agreement only limited Fauth from selling *life insurance* to existing Farm Bureau *life insurance* policy holders. After leaving Cochran, Fauth did not sell life insurance to Farm Bureau life insurance policy holders. Swinton therefore opined that Fauth had not violated the Agreement.

¶7 On January 12, 2017, Cochran filed a complaint against Fauth alleging: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) conversion of customer information; (4) misappropriation of trade secrets and confidential information; (5) interference with contractual relationships or prospective contractual relationships; (6) unjust enrichment; and (7) fraud. Specifically, Cochran sought to enforce the Agreement as a third-party beneficiary, asserting the Agreement precluded Fauth from selling life insurance *and* casualty and property insurance to Farm Bureau life insurance *and* casualty and property insurance policy holders. Fauth filed a brief and motion for summary judgment asserting Cochran was not a party to the Agreement and could not seek relief thereunder, and that Fauth did not breach the Agreement because it unambiguously applied only to Fauth's sale of life insurance products to Farm Bureau life insurance policy holders.

¶8 On May 3, 2017, following a hearing, the District Court denied Fauth's February 8, 2017 motion for summary judgment and dismissed Cochran's request for a preliminary injunction. On January 17, 2018, the District Court denied Fauth's December 14, 2017 motion for summary judgment and combined motions in limine, concluding Cochran was a third-party beneficiary of the Agreement, and that the Agreement was ambiguous,

requiring consideration of extrinsic evidence. The District Court therefore concluded genuine issues of material fact existed precluding summary judgment.

¶9 The District Court held a bench trial from February 28, 2018, through March 1, 2018. Because the District Court concluded the Agreement was ambiguous, it permitted Cochran to present extrinsic evidence in support of his argument that the Agreement applied to Farm Bureau life, property, and casualty insurance products and policy holders. Cochran's extrinsic evidence included Cochran's own testimony, the Nelson letter requesting the return of Cochran's confidential information, and a September 20, 2016 letter to Fauth from Betty Hand, Farm Bureau's Agency Services Vice President (Hand letter). Cochran testified that he had mistakenly checked only the life insurance box under the notation "FOR HOME OFFICE USE ONLY" of the Agreement. Cochran presented no evidence that he called this to the attention of Farm Bureau or did anything further to amend, modify, or correct his error. At the April 13, 2017 preliminary injunction hearing, the District Court admitted the Nelson letter into evidence over Fauth's hearsay objection. At the same hearing, the Hand letter was similarly offered into evidence, then withdrawn and never entered into the record.

¶10 The District Court did not allow Fauth to present extrinsic evidence supporting his conclusion that the Agreement prevented him from selling only life insurance to Farm Bureau life insurance policy holders. Specifically, Fauth wished to submit the Swinton letter along with Swinton's testimony. On May 1, 2018, the District Court issued its findings of fact, conclusions of law, and judgment granting Cochran damages for Fauth's

breach of contract and intentional interference, punitive damages, and attorney fees and costs.

¶11 This Court reviews de novo a district court's ruling on motions for summary judgment, using the same M. R. Civ. P. 56 criteria used by the district court. *Chapman v. Maxwell*, 2014 MT 35, ¶ 7, 374 Mont. 12, 322 P.3d 1029. The "de novo standard of review of summary judgment decisions allows [this Court] to review the record and make [its] own determinations regarding the existence of disputed issues of fact and entitlement to judgment as a matter of law." *Chapman*, ¶ 12. This Court applies de novo review to a district court's evidentiary rulings made while resolving a motion for summary judgment. *Smith v. Burlington Northern & Santa Fe Ry.*, 2008 MT 225, ¶ 41, 344 Mont. 278, 187 P.3d 639.

¶12 The District Court denied Fauth's motion for summary judgment on the basis that Cochran was a third-party beneficiary of the Agreement and that issues of material fact remained because the Agreement was ambiguous and required consideration of extrinsic evidence. Although we may not have reached the same conclusions as the District Court, we cannot on the record before us conclude the District Court erred in concluding Cochran was a third-party beneficiary of the Agreement.

¶13 When a contractual agreement is ambiguous on its face, consideration of extrinsic evidence is necessary to determine the mutual intent of the parties to the agreement. *Estate of Irvine v. Oaas*, 2013 MT 271, ¶ 22, 372 Mont. 49, 309 P.3d 986. The District Court concluded the Agreement was ambiguous, requiring extrinsic evidence. We agree.

Therefore, the District Court correctly denied Fauth's motion for summary judgment and proceeded to trial on the basis that genuine issues of material fact existed.

¶14 This Court reviews a district court's evidentiary rulings at trial for an abuse of discretion. *Murray v. Talmage*, 2006 MT 340, ¶ 10, 335 Mont. 155, 151 P.3d 49. In determining whether a district court abused its discretion, this Court reviews a district court's findings of fact for clear error and conclusions of law for correctness. *In re Marriage of Olson*, 2008 MT 232, ¶ 20, 344 Mont. 385, 194 P.3d 619. A factual finding is clearly erroneous if it is not supported by substantial evidence, the district court misapprehended the evidence, or this Court's review of the record convinces this Court that the district court made a mistake. *In re Marriage of Olson*, ¶ 20. Whether extrinsic evidence is admissible at trial is a question of law reviewed by this Court for correctness. *Oaas*, ¶ 22.

¶15 At trial, the District Court permitted Cochran to present extrinsic evidence, including his own testimony, showing that the intent of the Agreement was to apply to Farm Bureau property and casualty products and policy holders as well as Farm Bureau insurance products and policy holders. However, when Fauth sought to present extrinsic evidence showing the intent of the Agreement, the District Court disallowed such evidence. Fauth specifically sought to admit testimony and evidence from Paul Swinton, Farm Bureau's legal counsel, to show that the Agreement applied only to life insurance products and policy holders. The District Court denied this evidence because Farm Bureau was not a party to the lawsuit between Cochran and Fauth. The District Court misconstrued the

difference between a party to the lawsuit and a party to the Agreement. Although Farm Bureau was not a named party in the lawsuit between Cochran and Fauth, it was a party to the Agreement Cochran presently wishes to enforce as a third-party beneficiary. Once the District Court determined consideration of extrinsic evidence was necessary to determine the intent of the parties to the Agreement, the District Court incorrectly refused to consider Swinton's testimony and evidence demonstrating Farm Bureau's intent in entering the Agreement. As such, we reverse the District Court's denial of presentation and consideration of this evidence.

¶16 In considering extrinsic evidence and reaching the conclusion that the Agreement precluded Fauth from soliciting Farm Bureau life, casualty, and property policy holders, the District Court relied in part on the Nelson and Hand letters. Cochran argues Farm Bureau's intent and understanding as to the scope and applicability of the Agreement was made clear in the Nelson letter. Fauth objects to consideration of the Nelson letter as hearsay. At the April 13, 2017 preliminary injunction hearing, during Fauth's testimony, the District Court admitted the Nelson letter into evidence over Fauth's hearsay objection because Fauth admitted he had received the letter. Contrary to his current argument, Cochran's counsel clarified the Nelson letter was not being admitted for the truth of its contents but to show Fauth was given notice. Nelson did not testify and did not subject himself to cross-examination. Without Nelson's testimony, the Nelson letter was hearsay and should not have been admitted or used for the truth of the matters contained therein.



The District Court incorrectly admitted and relied on the Nelson letter to support its conclusion.

¶17 Fauth further objects to the District Court's reliance on the Hand letter because it was withdrawn as an exhibit and never entered into the record.<sup>1</sup> As the Hand letter was never entered into evidence, the District Court incorrectly quoted, referenced, and relied upon it as extrinsic evidence regarding the interpretation of the Agreement. Our review of the record convinces us that the District Court made a mistake. As such, it is appropriate to reverse the District Court's evidentiary rulings regarding presentation and consideration of extrinsic evidence consistent with this opinion, vacate the court's findings of fact, conclusions of law and judgment, and remand to the District Court for a new trial.

¶18 The record supports the District Court's conclusion that Cochran was a third-party beneficiary to the Agreement and that the Agreement was ambiguous, requiring consideration of extrinsic evidence in its interpretation. However, the District Court erred in failing to consider extrinsic evidence demonstrating Farm Bureau's intent in entering the Agreement and improperly relied on evidence containing hearsay and a document not of record to interpret the Agreement and support its conclusion. This Court affirms the District Court's denial of Fauth's motion for summary judgment, reverses the District Court's evidentiary rulings regarding the presentation and consideration of extrinsic

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<sup>1</sup> A review of the record from the April 13, 2017 preliminary injunction hearing confirms Fauth's assertion—Cochran offered the Hand letter as Exhibit 15, then withdrew it and never entered it into the record.

evidence consistent with this opinion, vacates the District Court's findings of fact, conclusions of law, and judgment, and remands this matter to the District Court for a new trial.

¶19 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶20 Affirmed in part, and reversed and remanded in part for further proceedings consistent with this opinion.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH  
/S/ JAMES JEREMIAH SHEA  
/S/ DIRK M. SANDEFUR  
/S/ JIM RICE