APPLICATION FOR

DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name. John A. Mercer

2. [redacted]

3. [redacted]

4. [redacted]

5. [redacted]

6. Judicial position you are applying for. District Judge, 20th Judicial District

7. Date you became a U.S. citizen, if different than birthdate. N/A

8. Date you become a Montana resident. [redacted]

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

   Polson High School, Polson, Montana graduated 1975
   University of Montana, Missoula, Montana graduated 1979, BA in Business Administration
   Northwestern University, Chicago, Illinois, graduated 1982, JD

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

    Graduated University of Montana with High Honors
    Articles Editor, Northwestern Journal of International Law & Business

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

1982 to present, attorney, Turnage Mercer & Wall, 312 1st St E, Polson, Montana, in numerous former names: Turnage & Mercer; Turnage O'Neill & Mercer; French, Mercer, Grainey & O'Neill; French, Mercer, Grainey & Duckworth; Turnage McNeil & Mercer; and Turnage & McNeil. All that same location. I have been at the same law office for 42 years.

Part time for Heritage Management Co, President from 2002 to 2021, when I retired from that business. No ownership interest at any time. I worked out of the law office located 312 1st St E, Polson, MT 59860.

Worked remotely as part time salaried in-house counsel from 2004 to 2007 for Sky Research, Ashland, Oregon, when Heritage Management Co had an ownership interest in Sky Research. I worked out of the law office located 312 1st St E, Polson, MT 59860.

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

Oregon Supreme Court, limited in house counsel admission, November 3, 2004, terminated December 31, 2007, when my remote part time in house counsel work for Sky Research, Ashland, Oregon ended.

United States Ninth Circuit Court of Appeals, admitted February 13, 2001

United States Supreme Court, admitted November 4, 1985

United States District Court, Montana, admitted October 7, 1982

Montana Supreme Court, admitted October 7, 1982

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).

40% Wills, Trusts & Estates
40% Real Estate
10% Property Litigation
10% Personal Injury/Medical Malpractice

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

I have served as a Mediator, including on a Supreme Court case.

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

Court appearances have consisted of Law & Motion; Summary Judgment Hearings; and the Medical Legal Panel. A small portion of my practice these days.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

I have not.

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

A. When I was first an attorney I was appointed as a public defender for a defendant charged with the unlawful sale of dangerous drugs. On the eve of trial, I was presented with evidence that showed my client had altered time records attempting to establish an alibi. This thrusted me into the conflict between representing my client and preventing fraud on the Court. While jurors were waiting in the hallway to begin jury selection, I reminded the Court that it had not ruled on my Motion for Speedy Trial. It was granted and my angst receded, but it is burned into my memory.

B. A single engine aircraft with the pilot and a passenger crashed into the east side of the Swan Range killing them both. The pilot, who had flown for Frontier, was very experienced and careful. It just didn't make sense. We filed our case in Federal Court and argued that the altimeter had stuck misleading the pilot. This involved a great deal of complex and challenging research and thinking.

C. A husband and wife placed their lake property in an irrevocable trust. Despite their subsequent death and a directive that the trust be distributed to their children, that never occurred. Many years elapsed and all but one of the children also died. Finally, some of those who remained filed a lawsuit to partition or force a sale of the property. I was appointed by the Court as Successor Trustee and worked through numerous conflicting personalities, complex income tax issues, shared well and access disputes with the neighbor, and finally a sale of the property and division of the proceeds.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

None.

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

Not in the last 10 years.

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

2023 - 82 hours
2022 - 57 hours

Prior years would be similar, but I do not have those records. Having practiced in Lake & Sanders Counties my entire career I have worked with numerous charitable organizations pro bono, and every year for 42 years helped citizens on a pro bono basis, with real estate, probate, wills, trusts, family law, guardianships, conservatorships, business law, transfer of motor vehicles, traffic tickets, and all forms of counseling ranging from criminal charges to neighbor disputes.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

None, but in 1995 I did receive the Distinguished Service Award from the State Bar of Montana for service in the Montana Legislature.

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

None.

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

While serving on the Montana Board of Regents and Polson School Board I participated as the adjudicating authority during appeals to those Boards, usually either personnel in nature, or by students for various grievances or issues. I have also served several times on the Montana Medical Legal Panel.

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

When I worked part time with Heritage Management Co I was exposed to property management, as it owned the Polson Post Office, property development, and private lending.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

Greater Polson Community Foundation, Director 2008 to present.

Polson Scholarship & Education Foundation, Director 2002 to present.

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Polson School Board, elected, 2021-2023
Montana University System 2-Year Restructuring Review Commission, appointed, 2019-2020
Polson School Board, appointed, 2007 to 2008
Montana Board of Regents, appointed, 2001 to 2006
Montana House of Representatives, elected 1984 to 2000 (8 terms)

E. PROFESSIONAL CONDUCT AND ETHICS

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No.

28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No.

29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No.

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case

or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

No.

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

No.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

Yes.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.

A sense of duty. I feel I am best suited to provide an orderly and efficient transition between the resignation of a long serving judge and the newly elected judge for the benefit of the 20th Judicial District. It's best if the newly elected judge has time to wrap up his practice and time to properly campaign for the office, connecting and respecting the voters. I believe my career in public service demonstrates a proven ability to get work done. I think I can clear up existing back logs that will benefit current litigants and the new judge.

Also, because of the fixed and limited duration of this appointment, it provides me with the unique opportunity to serve in one of the most important public offices in Montana. An experience I know will be educational and personally satisfying, as I love to accomplish things.

36. What three qualities do you believe to be most important in a good district court judge?

Impartiality, timely rulings, and respect for the law and participants.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

The Constitution and statutes should be applied as written with deference to both their plain meaning and intended meaning. It is not the job the Courts to write laws.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.

Attached.

39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

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CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

3/26/2024
(Date)

(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by ***5:00 p.m. on Monday, April 8, 2024***

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

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MONTANA TWENTIETH JUDICIAL DISTRICT COURT, LAKE COUNTY

CHRISTINE U. STUBBINS and PAUL T. STUBBINS, **Plaintiffs,** **vs.** **FARMERS O'DELL, INC.,** **Defendant.**	**Cause No. DV-20-233** **REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

COME NOW, the Plaintiffs, Christine U. Stubbins and Paul T. Stubbins, hereinafter "Stubbins", by and through their undersigned counsel and for their Reply Brief in Support of their Motion for Partial Summary Judgment against Defendant, Farmers O'Dell, Inc, hereafter "Farmers", submit the following:

Introduction

In order for our legal system to function, words must have meaning, contracts must be binding, and Courts should not be asked, or expected, to rewrite agreements after the fact. If we follow the path suggested by Farmers, no one will be able to rely on written agreements and the legal system will be hijacked by efforts to delay and/or change written obligations after the fact.

Defendant agreed in writing to remove the two trees and root balls prior to November 2020 as part of a mediated settlement. They admit they failed to do so. Stubbins simply ask the Court to enter partial summary judgment that the settlement agreement was breached. It's a no brainer.

Farmers are clearly dissatisfied with the deal they struck and now attempt to undo the contract based on a contradiction in the contract that does not exist and based on assumptions and latent intentions that are not present in the agreement. Furthermore, Farmers attempt to excuse their own lack of diligence by claiming their performance was somehow impracticable—despite the fact they did perform, albeit long after they were required to do so. For the reasons set forth in Stubbins' original Brief and as more fully set forth below, there is no genuine issue of material fact that Farmers breached the Settlement Agreement and Stubbins are entitled to partial summary judgment as a matter of law.

Legal Standard

"[I]n order for consent to be established under Montana law, there must be 'mutual assent' or a 'meeting of the minds' on all essential terms of the contract[.]" *Riehl v. Cambridge Court GF, LLC*, 2010 MT 28, ¶ 11, 355 Mont. 161, 226 P.3d 581 (citing *Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶ 18, 349 Mont. 475, 204 P.3d 693). "[A] party to a settlement agreement is bound if he or she has manifested assent to the agreement's terms and has not manifested an intent not to be bound by that assent." *Lockhead v. Weinstein*, 2003 MT 360, ¶ 12, 319 Mont. 62, 81 P.3d 1284 (citing *Hetherington v. Ford Motor Co.*, 257 Mont. 395, 849 P.2d 1039. A party's hidden reservations about a settlement agreement are not grounds to back out of the contract: "A party's latent intention not to be bound does not prevent the formation of a binding contract." *Hetherington* at 399, 849 P.2d at 1042.

With respect to contract interpretation, the Settlement Agreement is enforceable as written. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect if it can be done without violating the intention of the parties." Mont. Code Ann. § 28-3-201. "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." Mont. Code Ann. § 28-3-401. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of this chapter." Mont. Code Ann. § 28-3-303. The written intent is only disregarded when "through fraud, mistake, or accident a written contract fails to express the real intention of the parties." Mont. Code Ann. § 28-3-304.

ARGUMENT:

The Settlement Agreement is simple and unequivocal. In exchange for Stubbins releasing their claims against Farmers, Stubbins agreed to accept payment of $25,000 along with several other bargained-for items that would be obligations to be performed by Farmers O'Dell. Paragraph 2 of the Settlement Agreement sets forth the additional consideration Farmers O'Dell agreed to in exchange for a full release from suit.

> As additional consideration for this settlement, Farmers O' Dell, Inc. (hereinafter "defendants" collectively) agree to: (a) remove, at their own expense, the agreed upon two large fallen root balls and trees on or before November 1, 2020, however, Paul & Christine Stubbins shall have the option to remove said root balls (but leave the trees) prior to August 1, 2020 at their own expense; and (b) record a restrictive covenant within 30 days of today's date, which restrictive covenant shall contain the following material terms: the restrictive covenant shall cover defendants' land between the parties' common property line and a parallel line 25 feet to the north of said property line, from the high water mark to the western terminus of the orchard fence as shown on the Certificate of Survey attached hereto as Exhibit "A" (hereinafter "buffer zone"); defendants agree to leave the buffer zone in a natural vegetative state and not put any buildings, fences or other structures on it; defendants also agree to remove any future

> fallen large trees (in excess of 8 feet in length or one foot in diameter) or large root balls (in excess of three feet in diameter) from the buffer zone within six months of their falling (but excluding the time period between December 1st and April 30th each year); if defendants fail to meet these aforesaid future obligations in a timely manner, Paul and Christine Stubbins shall have the option to hire a contractor to remove said root balls from the buffer zone, but leave the trees, at their own expense within 90 days after the expiration of said six month period[.]

(Settlement Agreement, ¶ 2). Defendants agreed to remove, at their own expense, two "agreed upon" root balls and trees, to record a restrictive covenant, to maintain the buffer zone in a natural vegetative state by prohibiting construction of buildings and fences, and to remove any further root balls and felled trees within six months of their falling.

Farmers first asks the Court to excuse its obvious breach of the agreement by arguing that the "Overriding intent of the parties...was to create ongoing condition of undeveloped, forested land between the parties' adjacent properties." (Response at 2).

This is not an issue of fact: "The interpretation of a contract is a question of law." *Anderson v. Stokes*, 2007 MT 166, ¶ 32, 338 Mont. 118, 163 P.3d 1273 (citing *Ophus v. Fritz*, 2000 MT 251, ¶ 19, 301 Mont. 447, 11 P.3d 1192). Court can determine here whether the contract provision is enforceable.

Effectively, they are trying to argue that the clause where they agreed to remove the two root balls and trees is unenforceable. Words are to be used in their ordinary sense. Mont. Code Ann. § 28-3-501. Remove means remove. The argument that they cannot "remove" the root balls because the term "remove" is not defined is unsupported. The word has an obvious and commonly understood meaning. As in, "What part of remove don't you understand?"

Farmers asks the Court to take one clause of the Settlement Agreement and determine that somehow it is the "general overriding intent of the contract." However, that argument has no support in law or in the contract language itself. The Settlement Agreement does not support Farmers' argument of a "general overriding intent," as the removal of root balls is not repugnant to the removal clause, and therefore requires no reconciliation. Mont. Code Ann. §

28-3-204. The clause Farmers relies on states that "defendants agree to leave the buffer zone in a natural vegetative state and not put any buildings, fences or other structures on it[.]" (Settlement Agreement ¶ 2). Clearly, this prohibits construction of buildings and fences in the Buffer Zone; it does not prohibit defendants from entering the buffer zone to remove root balls as they agreed to do at their own expense. The very next line specifically contemplates the removal of root balls and trees in the buffer zone: "defendants also agree to remove any future fallen large trees (in excess of 8 feet in length or one foot in diameter) or large root balls (in excess of three feet in diameter) from the buffer zone within six months of their falling." (*Id.*) Thus, the idea that the removal provision is somehow incongruous with the so-called general intent of the contract is unfounded based on the precise language of the contract. The Court need not go any further than what is written in the Settlement Agreement to determine the parties' intentions and obligations.

The Settlement Agreement clearly contemplates that removing root balls is a part of maintaining the "natural vegetative state'; it states that all root balls greater than three feet must be removed within six months.

Farmers cannot rely on self-serving "clarifications" to alter the written terms of the Settlement Agreement. Farmers argues: "Here, the Settlement Agreement and **extrinsic facts** establish a genuine dispute of facts as to whether the Settlement Agreement must be interpreted to reject the requirement that Farmers remove large root balls from the Buffer Zone." (Response at 5-6, emphasis added). However, the Court may not consider "extrinsic facts" in interpreting a contract—"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible[.]" Mont. Code Ann. § 28-3-303.

Furthermore, it is not an issue of fact, but an issue of contract interpretation, which is an issue of law to be decided by the Court. It is Farmers' position that the requirement to "remove, at their expense, the agreed upon two large root balls and trees" is inconsistent with

the so-called general intent of the agreement to keep the Buffer Zone in its natural vegetative state. That is an issue of contract interpretation, which is a question of law." *Anderson v. Stokes*, 2007 MT 166, ¶ 32, 338 Mont. 118, 163 P.3d 1273 (citing *Ophus v. Fritz*, 2000 MT 251, ¶ 19, 301 Mont. 447, 11 P.3d 1192).

In interpreting the Settlement Agreement, which is solely a question of law for the Court, the Court can see that all elements of a contract are present: identifiable parties capable of contracting, consent, a lawful object, and sufficient consideration. Mont. Code Ann. § 28-2-102. Farmers agreed in no uncertain terms to remove the two agreed upon root balls by November 1, 2020, and did not. No amount of post hoc justification excuses their breach of contract.

Farmers want the Court to excuse their non-performance because they claim they did not know all the details, or how hard it would be to remove the root balls. But that's their problem, not a problem with the contract. That's what they agreed to. Nothing precluded them from saying "Hey, we have to check on the root balls to make sure it's feasible to even have them removed" or to negotiate a lower settlement because of the difficulty of removing them (e.g. only paying $15,000 instead of $25,000 because they knew they had $10,000 worth of work to do to remove the root balls.)

The Affidavit of Sean O'Dell fails to raise any issues of fact regarding liability. Only a litany of excuses about how hard and expensive it was for Farmers to perform its agreed upon obligation. Lack of diligence on their part does not mean the contract was unenforceable. They knew as of June 3 they had nearly 5 months to remove it. Farmers even claim that "Due to freezing temperatures and mechanical problems with his excavator, Cameron was not able to attempt the project until February 25, 2021" (¶ 38 Sean O'Dell Affidavit) but those problems did not exist in June through November, when it should have been done as they agreed.

Farmers O'Dell further argue that the term "remove" is somehow ambiguous because it does not "explain the parties' intent as to the appropriate means of removal." However, the **means of removal** are collateral to the purpose of the contract, not a necessary term: "Matters which are subsidiary, collateral, or which do not go to the performance of the contract, are not essential and do not have to be expressed in the contract." *Id.* (quoting *Steen v. Rustad*, 132 Mont. 95, 313 P.2d 1014, 1020 (1957)) (Emphasis added). More importantly, it is ridiculous to say that the contract is unenforceable because, despite the unequivocal language that says defendants must remove the root balls:

> "As additional consideration for this settlement, Farmers O'Dell, Inc. (hereinafter "defendants" collectively), agree to: (a) remove, at their own expense, the agreed upon two large fallen root balls and trees on or before November 1, 2020[.]" (Settlement Agreement at ¶ 2).

There is nothing ambiguous about this requirement; Stubbins agreed to dismiss their claim against all defendants, and in return, Farmers O'Dell agreed to remove the two root balls by November 1, 2020 at their own expense.

The argument that they "agreed to the removal of the existing tress and root balls **only under the assumption that some reasonable means of removal was possible**" is not supported by the law. Quite simply, they agreed to remove the root balls at their own expense, they claim they did not inspect their own property to determine what kind of a bargain they struck. At most, this is a latent intent not to be bound; terms that are not in the contract cannot be added later to justify their own breach.

Farmers performance under the contract was not impossible or even impracticable. They agreed to remove them at their own expense. They only began in earnest seeking to remove the root balls in November, and removed them successfully in February of 2021—three months later. It was not impracticable for them to comply with the terms they agreed to, and as such, the doctrine of impracticability does not apply.

First, the doctrine of impracticability involves the occurrence of a non-anticipated event—it only applies if an unexpected event occurs after the contract is made. *See* Response at 9 (quoting Restatement (Second) of Contracts § 261 (1981)) ("Where, after a contract is made..."). As Farmers points out, the event in *Cape-France Enters. v. In re Estate of Peed*, 2001 MT 139, 305 Mont. 513, 29 P.3d 1011 that caused the impracticability occurred **after** execution of the contract: "The parties **subsequently learned** that the contamination had likely infiltrated the ground water..." (Response at 10); *see Cape-France* ¶ 10 ("Although the parties appear to have been aware of the existence of a pollution plume in Bozeman, presumably originating from a dry cleaner in the area, **they believed the property at issue to be unaffected until receiving this notice**"). The Farmers trees and root balls were down when the Settlement Agreement was negotiated and agreed upon. No non-anticipated event occurred after the fact.

While the doctrine of impossibility and impracticability does not encompass only strict impossibility, "the general rule is that, where a party to contract obligates himself to a legal and possible performance, he must perform in accordance with the contract terms." *Cape-France*, ¶ 17 (quoiting *Barrett v. Ballard*, 191 Mont. 39, 44, 622 P.2d 180, 184 (1980)). Notably, impracticability is a "high standard." *Id.* ¶ 26. "The party pleading impossibility must demonstrate that it took virtually every action within its powers to perform its duties under the contract. *Smith v. Zepp*, 173 Mont. 358, 366, 567 P.2d 923, 927 (1977) *superseded on other grounds by Garretson v. Mountain W. Farm Bureau Mut. Ins. Co.*, 234 Mont. 103, 761 P.2d 1288 (1988) (quoting *Kama Rippa Music, Inc. v. Schekeryk*, 510 F.2d 837, 842 (2d Cir. 1975)).

As a matter of law, Farmers' own lack of diligence does not amount to impracticability. In *Smith v. Zepp*, the defendant attempted to excuse its failure to mine 300 yards of material per day on the grounds that there was no gold in the mine and it was "impossible to operate

the mine at a profit." 173 Mont. at 364, 567 P.2d at 927. They relied on the "basic assumption" that the mine "contained substantial gold." *Id.* The Supreme Court affirmed the district court's grant of summary judgment to the plaintiff, holding that "the possible absence of gold at the mine was a risk of the bargain," and that the doctrine of impracticability applies "only when the promisor and promisee had no reason to know of the impossibility when they contracted. In this case, the possibility of an unprofitable mine should have been foreseen by defendants and specifically provided for in the contract." *Id.*

Here, the "impracticability" they argue exists is that the root balls could not be removed without unreasonable difficulty, expense, or risk of violating the terms of the Settlement Agreement. However, all of these terms were known to Farmers at the time of execution. Farmers admits, as if it somehow justifies their position, that they "were unaware of the extent of the fallen trees in that area and the inaccessibility of the land when we went to the settlement conference." (Aff. O'Dell ¶ 8). Their own testimony states that the wind event occurred on March 13, 2020, but they did not inspect the property prior to the June 3, 2020 settlement conference. (*Id.* ¶ 7). The fact that they did not "know" at the time of signing how difficult or expensive it would be to remove the balls does not excuse their non-performance—it was a risk of the bargain. "A party who executes a written contract is presumed to have read and understood the contract and assented to its terms. . . . . A party to a clear and unambiguous written contract 'cannot avoid [its] legal consequences . . . simply by later claiming that she did not understand' the legal consequences 'of the plain language of the contract.'" *Lenz v. FSC Sec. Corp.*, 2018 MT 67, ¶ 22, 391 Mont. 84, 414 P.3d 1262 (citations omitted). They did not have to agree to remove the root balls, nor did they have to agree to settle the case at all. But they did agree to remove the root balls, and they were therefore required to uphold their end of the agreement.

Most significantly, is unclear how performance is somehow "impracticable" when they did in fact perform under the Settlement Agreement on February 25, 2021. Clearly, there was no "unreasonable difficulty or expense," as they completed the task. According to Sean O'Dell's affidavit, the defendants did nothing until August, did minimal work between August and November, and only in earnest began to remove the root balls after the deadline had passed.

Finally, Farmers argues that it "can present substantial evidence that the parties included that obligation in the Settlement Agreement on the basic assumption that the root balls could be removed without unreasonable difficulty, expense, or risk of further litigation from the parties." Quite simply, the Settlement Agreement says no such thing—Farmers were to remove the root balls at their own expense. To the extent they now seek to rely on matters outside the contract (their apparent "intention" that the contract included a qualification that their efforts be reasonable) it is barred by the parol evidence rule. MCA 28-2-905.

Moreover, Farmers cannot argue that the root balls could not be removed without "unreasonable difficulty, expense, or risk of further litigation from the parties" when they did precisely that.

CONCLUSION

No issues of material fact exist and Plaintiff is entitled to Partial Summary Judgment as prayed for, and such other relief as the Court may deem appropriate.

Respectfully submitted this 26th day of March 2021.

TURNAGE MERCER & WALL, PLLP
Attorneys for Plaintiffs

By: _____
John A. Mercer

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on this 26th day of March 2021, I served a true and complete copy of the foregoing by depositing the same in the United States Mail, postage prepaid thereon, addressed as follows:

Nicholas J. Lofing
Luc L. Brodhead
Garlington Lohn & Robinson
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