ORIGINAL

FILED
01/23/2019
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 18-0238

IN THE SUPREME COURT OF
THE STATE OF MONTANA
Cause No. DA 18-0238

KS VENTURES, LLC, an Arizona limited liability company,
Plaintiff/Appellee
~vs~
WILLIAM M. RUSSELL (; *et al.*)
Defendant/Appellant

FILED
JAN 23 2019
Bowen Greenwood
Clerk of Supreme Court
State of Montana

PETITION FOR REHEARING

ON APPEAL FROM THE MONTANA

ELEVENTH JUDICIAL DISTRICT COURT,

FLATHEAD COUNTY,

THE HONORABLE:

JUDGE ROBERT B. ALLISON, Presiding

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Consideration given of this Court's Opinion, leaves one no choice but to respectfully opine, apparently "Lady Justice" has experienced a 'miracle'… a healing most rare in occurrence.. Vision.. once blinded has been restored!! Sadly though, this occasion calls not for celebration; lest the people should accept, that to her blindfold shed.. inherently attached.. all impartiality. Oh yes, it is quite obvious, justice now sees. But while it seems her vision has been restored, it is not "20/20".. it has an affliction, a veritable myopia. The Court's Opinion reflects that justice sees what she wants, then wields her sword.. without conscientious objectivity, the force of her almighty power falls hard.. delivering a most destructive blow, and, seeing not the plight of the pro se.. without the slightest of mercy.. extirpating all trust and faith so reverently placed at her feet… she moves on.

This Court's Opinion, evidences a critical omission of facts, facts crucial to the issues; and by not affording appellant the benefit of every inference gleaned, thereby it has also failed to properly administer fundamental requirements of the law.. namely, due process. We the people come to you.. painstakingly carrying upon our shoulders not only the burden of being pro se... knowing that-in-itself places the scarlet letter upon us from the onset; but most importantly, we tow with disquietude, the enormity of our matters, a package containing all that is at stake in our common lives. Then, falling humbly to our knees in supplication, we place all this faithfully before you, alongside any remaining hope for justice.. praying for your impartial discernment after thorough and thoughtful review of the record.. and ask by means of your insight.. we be found worthy of a grant of due process.

Appellant, intending with all respect due, Petitions for Rehearing for these pecific points of error:

Factual errors opined by the Court, but not supported by record.

The Opinion indicates, ***"The material facts [are] not in dispute"***, including:

1. (¶5) *"Between 2013 and 2016, KS Ventures loaned Russell over $1,921,008 to pay creditors for claims arising prior to the marriage and to protect his collateral."*

This finding is the *most* concerning indication of the court's omission of the facts! This is the one material fact that is without a doubt in dispute.

"Defendant contests the entire amount being claimed in this action under the "Loan Agreement", specifically the $1,378,378.81, plus costs, expenses and attorney fees....Had defendant been given the opportunity for oral arguments prior to ruling, all items listed as "Advances and Credits on Loan Agreement/Exhibit A.." would've been contested." ("Defendant's Notice of Opposition and Supporting Brief to 'Plaintiff's Proposed Final Judgment and Motion for Entry of Final Judgment", filed 01/31/18, pg. 5)

"[Smith] has indicated this alleged "Loan Agreement.." afforded me the availability to borrow up to $5,000,000.00. This is and was never the case. For (1) the deed of trust was not given to her as guarantee of a promise to pay. It was to protect her as my wife. (2) She never loaned me money. She has no evidence showing she paid to William Russell, $1.3 million dollars. (3) As she has testified, she controlled the money she spent. I never was "loaned" money – she willingly participated as my

wife and partner in matters." ("Defendant's Amended Answer to Plaintiff's Second Amended Complaint and Response to Plaintiff's Reply to Def.'s Opposition to Motion for Summary Judgement", (p.7, 185-190)

(Id., p.7-8, 193-222) (excerpts from day 2 of trial testimony recorded of Cause No(s): TK-16-1551; TK-16-1484; TK-16-1485; TK-16-1650; TK-16-1689) (submitted as "Exhibit B Audio Transcript from Justice Court, Flathead County" by Ms. Smith:

> [1:39:29] *WR (William Russell): But, the deal we made, I had the right to borrow $5,000,000.00, is that correct?*
> [1:39:36] KS (Karen Smith): Um, you had a revolving line a credit that went up to a maximum of five million dollars, *and you had the right to, um, with my approval,* take disbursements, *um over time*, as a revolving line of credit.
> [1:39:52] WR: So, why wouldn't I have borrowed five million dollars then?
> [1:40:07] KS: Because...I, eh, um, *I don't know* why you didn't borrow five million dollars.
> [1:40:10] WR: Did you have five million dollars?
> [1:40:13] *KS: I didn't have five million dollars.*
> [1:40:14] WR: Who made that Deed of Trust?
> [1:40:17] KS: I don't know what you mean?
> [1:40 :20] WR: Who, who drew up that Deed of Trust?
> [1:40:22] KS: Who, drew it up? Who wrote it out?
> [1:40:23] WR: Yes
> [1:40:25] KS: Typed it up?
> [1:40:27] WR: Yes
> [1:40:28] KS: I did.
> [1:40:30] WR: And, why did you pick five million dollars?
> [1:40:32] KS: You picked five million dollars.
> [1:40:34] WR: So, I picked five million dollars, and you typed it up, is that correct?
> [1:40:36] KS: That's right.
> [1:40:50] *WR: And, when you made that, was it you intention, that, if I wanted to borrow five million dollars, I had the ability to borrow five million dollars?*
> [1:40:51] *KS: To the extent that I had five million in assets, the, um, possibility, was, you could borrow up to that amount of money. The way it was structured is, that, I was supposed to make income on the loan and you were*

gonna make payments to me, and it was quite possible, that, over time, my assets would have increased, that was my original vision, and you would have continued to borrow money.

(Inferences must also be drawn in the light most favorable to the nonmoving party. Anderson, 106 S.Ct. at 2513; Matsushita, 106 S.Ct. at 1356-57. Inferences may be drawn from underlying facts that are not in dispute, such as background or contextual facts, see id. at 1356; Cities Serv., 391 U.S. at 285-86, 88 S.Ct. at 1590-91, and from underlying facts on which there is conflicting direct evidence but which the judge must assume may be resolved at trial in favor of the nonmoving party. Assuming the existence of these underlying facts, however, an inference as to another material fact may be drawn in favor of the nonmoving party only if it is "rational" or "reasonable" and otherwise permissible under the governing substantive law. Anderson, 106 S.Ct. at 2513; Matsushita, 106 S.Ct. at 1356-57; Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 680-81 (9th Cir.1985).)

Fundamental error in the opinion skew analysis

1. Itemizations on "Advances and Credits on Loan Agreement/Exhibit A.." purportedly reflecting Smith's "*pay[ments to] creditors for claims arising prior to the marriage and to protect his [Russell's] collateral*", contradict ¶5 Opinion, (exampled below)

3/4/13	$4260 Personal	Setting for Engagement Ring
4/12/13	$52 Personal	Dinner at Houston's
4/16/13	$136 Personal	Dinner at Whitefish Lodge
6/6/13	$1499 Sweetgrass	New Mattress for Sweetgrass
6/18/13	$2152 Travel	Flight to London
7/1/13	$3000 Travel	Cruise
7/17/13	$821 Travel	Onboard Ship Expenses
12/31/13	$500 Cash	Loan to pay Mexicans
12/31/13	$2760 Cash	Mexicans in Hood
5/2/14	$150 Personal	SixFlags

6/5/14	$228 Travel	Ranch and Home Pasco
6/6/14	$228 Personal	Ranch and Home Pasco
6/18/14	$296 Sweetgrass	Lowe's Porch Rocking Chairs
12/14/14	$906 Travel	Southwest ticket to Orlando for Xmas
3/26/15	$3468 Personal	Mild Fence, burning down fence
6/9/15	$5269 Sweetgrass	Murdochs Coral Panels
6/22/15	$1648 Sweetgrass	New LG W/D for Sweetgrass
7/15/15	$1500 Sweetgrass	Bedroom Set Sweetgrass
7/17/15	$238 Sweetgrass	Moving Expenses for Bedroom Set
8/18/15	$8000 Sweetgrass	Advanced Fence Payment
9/24/15	$7625 Sweetgrass	Advanced Fence Payment
10/7/15	$322 Legal	Filing fee for name change
11/3/15	$16,000 Personal	Transfer out of my IRA living expenses
11/4/15	$27 Legal	Certified copy of Name change order
2/16/16	$4000 Legal	Est Legal Fees for Rock Quarry
6/7/16	$438 Legal	Purchase of Belk TRO transcript
10/2016	$12 Legal	Check to MT to repossess 2014 Ram Truck

2. Opinion at (¶9), is a critical misstatement, or misapprehension of the record. At *no time* was it "specifically" argued Russell was not obligated to repay due to the Loan Agreement establishing joint venture, nor that the Loan Agreement itself established joint venture. Relying upon *Shell Oil Co. V. Prestidge*, 249 F. 2d 413 – Court of Appeals, 9th Circuit (1957), appellant argued inferences of evidence in its entirety provides meets requirements in Shell, for evidencing joint venture. Citing, "*Even where the parties acknowledge that they intend to hammer out details of an agreement subsequently, a preliminary agreement may be binding* (see Teachers Ins. & Annuity Assn. of Am. v

Tribune Co., 670 F Supp 491, 498 [1987])(citing, Richbell Info. V. Jupiter, 309 AD 2d 288 – NY App. Div., 1st Dept. 2003)."

The brief did evidence separate, codified agreements, by "Exhibit 'A'" (Loan Agreement).

Amount	Additional Purpose	Security	Terms	Current Status
32,[illegible]	Mortgage of small residential [illegible]	[illegible] W. Adams & 137 [illegible] Ave	Agreement of Sale in Default	[illegible]
33,[illegible]	To purchase [illegible]	[illegible]	[illegible] terms not identified	[illegible]
34,500.00	To [illegible]	[illegible]	Purchased [illegible]	[illegible]
1,558.00	Funds for MT Scrap yard	Items Purchased Scrap [illegible]	50/50 split of profits	[illegible]
2,000.00	[illegible]	None	None specified	unpaid
4,252.07	Setting for Engagement Ring	None	[illegible]	unpaid
4,500.00	Funds for MT Scrap yard	Items Purchased Scrap [illegible]	50/50 split of profits	[illegible]
[illegible]	[illegible] for Sara's property	None	[illegible] interest	[illegible]
4,500.00	Funds for MT Scrap yard	Items Purchased Scrap [illegible]	50/50 split of profits	[illegible]
337.53	[illegible] to MT	None	None specified	unpaid
500.00	Loan to [illegible] MT	None	None specified	unpaid
2,000.00	Funds for MT Scrap yard	Items Purchased Scrap [illegible]	50/50 split of profits	[illegible]
75,000.00	[illegible]	[illegible] deed of trust	Deed of Trust against All MT [illegible]	[illegible]
52,000.00	[illegible]	None	to be paid first from Scrap [illegible]	[illegible]
2,000.00	[illegible]	Items Purchased Scrap [illegible]	to be paid first from Scrap [illegible]	[illegible]
54,[illegible]	[illegible]	None	None specified	paid [illegible] on 4/23/15
525,[illegible]	[illegible]	Land & personal property	[illegible]	unpaid

"The entries..outline exactly what the parties agreed would be.. "the terms and conditions by which the parties agree[d] to split profits, increase in value and equity"(¶4.1, p.1 Prenup), for {Smith] having "contribute[d] her executive efforts, together, with [Russell] to increase the value and equity in those business assets."(¶4,p.1, Prenup). In fact, five different entries clearly state the "terms" were to be "50/50 split of profits"."

3. The record does not support the Opinion at (¶14), *"<u>Russell borrowed $1,921,008.</u>"*

<u>Failure to adhere to the requirements of the Standards of Review</u>

The Opinion at ⁋14, 15, and 16, reflects that appellant was not given the benefit of every inference the evidence presented. Enough evidence was presented that, if only by inference, raise genuine issues of material fact(s), summary judgment should not have been granted. See *Shell Oil Co. V. Prestidge, 249 F. 2d 413 – Court of Appeals, 9th Circuit (1957), and Anderson v. Liberty Lobby, ⁋3, "the Court held....Hence, the inquiry focuses on whether the nonmoving party has come forward with sufficiently "specific" facts from which to draw reasonable inferences about other material facts that are necessary elements of the nonmoving party's claim. Were we to construe the Court's statements as requiring a court to ask whether a jury could find in favor of the nonmoving party viewing all of the evidence — both that presented by the nonmoving party and that presented by the moving party — such a construction would contradict the clear instruction that a court may not weigh the evidence or assess its credibility."* and, *US v. Shumway, 199 F. 3d 1093 - Court of Appeals, 9th Circuit 1999: "..the district court was bound, on summary judgment, to determine only whether there was a genuine issue of material fact, and was not empowered to weigh the evidence or determine the truth of the matters asserted.[61] When a respondent to a motion for summary judgment submits proper affidavits by individuals with personal knowledge and other cognizable and significantly probative evidence, such that a reasonable juror drawing all inferences in favor of the respondent could return a verdict in the respondent's favor, the judge must treat that fact as genuinely at issue.[62]"; "These determinations are within the province of the factfinder at trial. Therefore, at summary judgment, the judge must view the evidence in the light most favorable to the nonmoving party: if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact. Put another way, if a rational trier of fact*

might resolve the issue in favor of the nonmoving party, summary judgment must be denied. *Matsushita, 106 S.Ct. at 1356; Cities Serv., 391 U.S. at 289, 88 S.Ct. at 1592.*

Referencing Fair Play, Opinion at ¶11, states, *"Here, there is no [such]showing of prejudice.".*

There is no correlation between Fair Play at ¶10, and this case. They are not comparable.

Fair Play had counsel. Persons operating under "Fair Play, Inc." were allowed to rely upon counsel to handle litigation on their behalf, enabling them focus on their daily lives, responsibilities, and earning a living.

Appellant represented pro se. Due to simultaneous litigations, all resources were tied up and appellant was unable to afford counsel. Thus, to be pro se required learning legal process, as litigation progressed, in all actions, simultaneously; affecting daily life, and while still having to providing for himself. Explaining he'd been out of state working when he learned a hearing *was* granted; that day, the day learned.

Fair Play's "second motion to vacate the hearing", ¶40, was appealed. ¶38, "Fair Play filed this action solely to obstruct, stall, and postpone.." and "could have been present" had "elected".

It wasn't appellant's decision to not be present; appellant didn't attempt to "obstruct, stall, and postpone" matters. Appellant unknowingly and "unintentionally" missed the hearing. Summary judgment had already been granted; oral arguments previously denied. Appellant consistently pled for a hearing; the record evidences multiple requests.

{1} "Defendant's ... Opposition to ..MSJ", 08/10/17, pg. 10;

{2} "Declaration of William Russell" , 9/25/17, pg. 10;

{3} "Defendant's Amended Answer..", 10/18/17, pg. 9 & 11;

{4} "Request for Oral Arguments..", 10/16/17.

- The district court denied Oral Arguments 12/01/17 then granted summary judgment 12/8/17.

{5} "Motion for Relief of Order Denying Request for Oral Arguments" 12/21/17, informing he suffers from A.D.D., preventing writing proficiently, and inhibiting ability to read and comprehend; he prayed a hearing be granted to allow verbal testimony to be given.

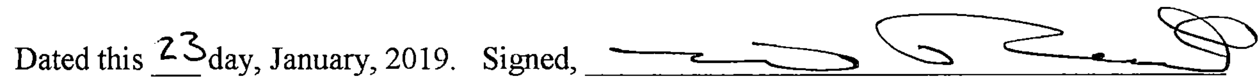
{6} On 1/31/18, after no ruling, Russell, working out of state in Arizona, drove to Montana to file "Defendant's Notice of Opposition.." again requesting hearing, and (pg.2), "his un-waived right to be heard". Stressing, this matter "includes a lifetime of work achievements.."

¶39, Fair Play "misrepresented the conflict". Fair Play "had ample time" to return to present argument but elected not. Their claim was "disingenuous and an abuse of the appellate process".

Russell never misrepresented the conflict. He urged, his unintentional failure to be present should not be deemed as waiver of his right. [From Virginia City, cited in this Court's Opinion] "*¶ 15, ...a hearing is contemplated from which the district court will consider ...whether there exists genuine issues of material fact." Cole v. Flathead County (1989), 236 Mont. 412, 418, 771 P.2d 97, 101. Therefore, we have held ... parties have a right to a summary judgment hearing unless the hearing is explicitly waived. Linn, ¶ 8.*

Clearly this Court's Opinion at ¶11, reflects fundamental error resulting in prejudice; denial of protection of the law; deprivation of fundamental right to hearing on summary judgment motion; and denial of constitutional due process before being deprived of property. [From Virginia] *"We stated in Cole, 236 Mont. at 418, 771 P.2d at 101, ... a district court may not, by rule or otherwise, ..deny such a request when made by a party opposing the motion ...."*

This matter involved not a mere spat between spouses… but an entire life's achievements.. not only appellant's.. but his father's.. and grand-father's.. <u>all</u> taken without allowing appellant to plead his case in the manner he was most able.. verbally. The hearing would have enabled him, by testimony, to effectively present evidence. Appellant lost not only real property, but all personal belongings, every financial resource, even (despite statutory rights) the home which he'd been residing.



Dated this 23 day, January, 2019. Signed, ______________________

William M. Russell, Appellant pro se

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(b) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionally spaced, Times New Roman font typeface of 14 points; is double spaced; Microsoft Word 2010, is not more than 2,500 words, excluding certificate of service and certificate of compliance.

Dated this 23 day of Jan, 2019.

Signed,

William M. Russell, Appellant Pro Se

CERTIFCATE OF SERVICE

I, ____William Russell____, Appellant pro se, do hereby certify that on the _23_ day of ____Jan____, 2019, I served a true and correct copy of the foregoing document upon the person(s) named below, at the address set out below, by mailing, in a properly addressed envelope, postage prepaid, a true and correct copy of said document.

Martin S. King, Esq. WORDEN THANE P.C. Attorneys at Law P.O. Box 4747 Missoula, Montana 59806-4747 Telephone: (406) 721-3400 Facsimile: (406) 721-6985 mking@wordenthane.com **Attorneys for Plaintiff/Appellee**	[ ] U.S. Mail (first class) [ ] Federal Express [ ] Hand Delivered [ ] Tele facsimile [X] Email Other:____________