

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 18-0386

KALISPELL AIRCRAFT COMPANY, LLC,

Appellee/Cross-Appellant,

v.

BRUCE PATTERSON, LEROY LEPLEY, BILL GRIFFIN, DOES I-V,

Appellants/Cross-Appellees.

CROSS-APPELLANT'S REPLY BRIEF

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INTRODUCTION

In KAC's Response and Cross-Appellant's Opening Briefs, KAC explained to this Court that the Appellants included several pages of irrelevant and inflammatory facts, intentionally to prejudice this Court against KAC. In Appellant's Response Brief, they did not deny that they violated Rule 12(1)(d) of the Rules of Appellate Procedure by including facts that are not relevant to the issues presented for review; these facts were presented with the purpose of prejudicing this Court against and harassing KAC; and that this conduct is sanctionable under Rule 19, Rules of Appellate procedure. Thus, KAC renews its request to this Court to strike the Appellants facts, starting on the last paragraph on page 4 through the first full paragraph on page 10, as sanctions for the Appellants' wrongful conduct.

ARGUMENT

1. Whether the District Court Erred when it Concluded as a Matter of Law and Found that a Contract was Not Formed to Extend the Discovery Deadline?

A. The District Court's Findings of Fact Regarding the Formation of the Contract were Clearly Erroneous

A district court's findings of facts are reviewed to determine whether they are clearly erroneous. *In re Baird*, 2009 MT 81, ¶ 7, 349 Mont. 501, 204 P.3d 703. Either a district court misapprehended the effect of the evidence, or if, after

reviewing the record, the Court is left with a firm conviction that a mistake has been made. *In re Guardianship of Saylor*, 2005 MT 236, ¶ 10, 328 Mont. 415, 121 P.3d 532.

The court erred because it did not conclude/analyze whether an informal contract had been formed to extend the discovery deadline, even though contract formation is a conclusion of law. Instead, the court erroneously made findings of fact instead of conclusions of law regarding the contract formation. A contract to extend discovery was formed and KAC's counsel was wrongfully sanctioned due to the courts mistaken findings on the issue.

Regarding the actual elements of contract formation, Appellants only included one half of a page of analysis on the issue. Appellant's Response and Reply Brief, pp. 16-17. Their analysis also completely leaves out the fact that they were the ones who requested a discovery extension for their own convenience, which they were granted and they were solely the reason the conference was not scheduled. Then, when things did not go the way they wanted, they attempted to rescind the contract, which would again be to their benefit.

The district court erred when it did not conclude whether or not as a matter of law that a contract to informally extend discovery had not been formed between

the parties. A contract was formed between Plaintiff's counsel and Buyers' counsel to informally extend discovery by the parties' objective manifestations of assent.

2. Whether the District Court Erred when it Ordered Sanctions Against KAC?

The district court's conclusion that KAC's representations in its Motions *in Limine* either negligently or intentionally mislead the court is clearly erroneous.

In their Response, Appellants rely on the following conclusion of the district court:

The above findings lead to the conclusion that plaintiff's counsel either: i) did not diligently investigate the correspondence with opposing counsel before filing the instant motion, which would have shown there was a dispute concerning whether there had been a discovery extension; or ii) Plaintiff's counsel knew of the dispute and knowingly omitted it from the instant motion.

However, the court was incorrect here, because, as previously explained, KAC's counsel did review the correspondence regarding this issue and concluded that a contract to extend discovery had been formed before he ever filed KAC's Motions in *Limine*. Dkt 69, pp. 10-11. KAC's counsel included what he believed demonstrated to the court, clearly and concisely, that an informal discovery extension had been reached. *Id.* KAC's counsel determined that it would be a waste of the court's limited time and resources to include the hundreds of pages of emails that had gone back and forth between himself and Buyers' counsel that did

nothing to change the conclusion that a contract to informally extend discovery had been reached. *Id.* On page 10 of their Reply and Response Brief, Appellants represent that “KAC attached a single email from KAC’s counsel dated June 27, 2017, which stated: ‘Good to go on informally extending discovery until the end of August.’” Appellants Reply and Response Brief, pg. 10. In fact, KAC’s counsel attached an email chain that started with Buyers’ counsel requesting a discovery extension and a reply email granting the requested discovery extension. Dkt. 59, Exh. 1. This is a blatant fabrication by Buyers who are again trying to demonize KAC’s counsel who did nothing wrong.

The court was clearly mistaken because it concluded that KAC’s counsel must have either negligently or intentionally misled the court. Dkt. 71, pg. 4. The court’s conclusion that if counsel would have diligently investigated the correspondence it would have shown there was a dispute concerning whether there had been a discovery extension, is wrong. There was no dispute concerning whether or not there had been a discovery extension which KAC made clear in its Motions in *Limine* and Reply Supporting its Motions in *Limine*. Dkt., 59 and 69. Further, the inclusion of all of the correspondence between counsel makes this even more clear that a contract to informally extend discovery had been formed. Dkt. 69, pg. 11. However, the court refused to review the correspondence the way KAC’s

counsel had, regarding contract formation, and then wrongfully sanctioned him for it. Dkt. 71, pg. 4. KAC's counsel did not negligently or intentionally mislead the court or fail to act with anything but candor toward the tribunal.

3. Whether the District Court Erred when it Concluded as a Matter of Law that KAC was not Entitled to Pre-Judgment Interest?

A. KAC is Entitled to Prejudgment Interest as a Matter of Law.

Each person who is entitled to recover damages certain or capable of being made certain by calculation and the right to recover that is vested in the person upon a particular day is entitled to recover interest on the damages from that day except the time that the debtor is prevented by law or by the act of the creditor from paying the debt. Mont. Code Ann. § 27-1-211 (2018). “[T]he statute has three requirements: (1) an underlying monetary obligation, (2) an amount of recovery that is certain or capable of being made certain by calculation, and (3) a right to recover that vests on a particular day.” *Amour v. Collection Prof’ls, Inc.*, 2015 MT 150, ¶ 24, 379 Mont. 344, 350 P. 3d 71.

After KAC's Motion for Judgment on the Pleadings was granted and liability determined, KAC filed its Motion for Summary Judgment on Damages which included, as a matter of course, a request for prejudgment interest. Dkt. 24 and 30. KAC requested the damages alleged its Amended Complaint, a loss of \$25,000, that vested on December 6, 2013, when KAC was able to sell the

Airplane to another buyer, plus carrying costs. Dkt. 5, ¶¶ 12 - 17. The Court denied the motion and determined that disputed issues of material fact existed making damages potentially uncertain or disputed due to a failure to mitigate and complications with another lawsuit regarding the same Airplane. Dkt. 36, pp. 3-4. Thus, the court also concluded that as damages were uncertain, as a matter of course, could not be determined or awarded at the summary judgment stage. *Id.*

Then, the parties came to an agreement that is crucial to the prejudgment interest analysis; the parties entered a Stipulation as to damages. Dkt. 73. Specifically, Buyers stipulated that the amount of KAC's damages is \$25,791. *Id.* To put it another way, the Buyers agreed to KAC's damages, as outlined in the Complaint, which vested on a particular day, specifically, December 6, 2013. These damages represent the difference between Buyers original contract and what KAC was eventually able to sell the Airplane for, plus storage fees of \$791, on December 6, 2013. Dkt. 5, ¶¶ 12 - 17.

Of note, the parties did not stipulate to allow Buyers to continue to argue, in any capacity, that KAC's damages are still uncertain or disputed; these arguments became invalid when the parties signed the stipulation and the court approved it. Thus, it was completely illogical for the Buyers to argue in their Response and

Objection to KAC's Motion for Prejudgment Interest that damages were still uncertain; as they had stipulated that damages were exactly \$25,791. Dkt. 78. It was even more illogical for the court to consider those arguments, knowing damages were certain. However, the court denied KAC's statutory right to prejudgment interest for the following reasons:

1. Prejudgment interest was brought up in KAC's motion for summary judgment, it was the law of the case and it could not be relitigated;
2. Filing a stipulation cannot alter the law of the case; and
3. "None of these [prejudgment interest] criteria can be satisfied until the court approves the amount of attorneys' fees and costs."

Dkt. 80, pg. 2.

B. A Denial of a Determination of Damages at the Summary Judgment Stage is not the Law of the Case.

When a Plaintiff moves for summary judgment on damages, he is asking the court to make a determination on a specific amount of damages. If the court refuses to do that and denies the motion, the case isn't over. No final judgment has been rendered, the case simply continues to proceed toward trial. If damages are disputed, prejudgment interest also cannot be awarded or denied at that stage. When the case goes to trial, a final damage award is determined and prejudgment interest is also then awarded as a matter of law. M.C.A., §27-1-211. Here, the

court incorrectly concluded that because prejudgment interest was brought up in KAC's motion for summary judgment, it cannot be relitigated. Dkt. 80, pg. 2. The facts between the summary judgment motions and KAC's Motion for Prejudgment Interest have completely changed. Before, the damages were disputed by the Buyers, now the parties have stipulated that damages are \$25,791, i.e., they are no longer disputed.

Further, prejudgment interest was never specifically denied by the court, as it is secondary to damages being finally determined, and therefore, cannot be specially denied at the summary judgment stage as Appellant's contend. *See* Appellant's Response Brief, pp. 9-10. Thus, the court incorrectly concluded that its determination regarding prejudgment interest at the summary judgment stage was the law of the case and could not be re-litigated. Further, the court's second, related conclusion that filing a stipulation cannot alter the law of the case, is likewise incorrect for all of the above stated reasons. Dkt. 80, pg. 2.

C. When Buyers Stipulated as to Damages, any other Arguments Regarding Damages became Invalid.

The court denied KAC's motion for summary judgment on damages because it concluded that there were potentially issues remaining that made the amount of damages uncertain. Dkt. 36, pp. 3-4. When Buyers entered into the stipulation as

to damages, they knowingly waived the right to argue or litigate the issues that potentially make damages uncertain. That is, those arguments became invalid.

After the damages had been made certain and the court approved the stipulation, KAC moved the court for the prejudgment interest that it is entitled to under the law. MCA, §27-1-211. However, the Buyers again argued that the amount of damages was uncertain. This is illogical, because they had stipulated that the amount of damages was \$25,791; damages do not get any more certain than that. Dkt. 73. Now, here, on Appeal, the Buyers have again erroneously renewed their argument that damages are still uncertain. Appellant's Response Brief, pp. 20-21.

Unfortunately, Appellants have brought this issue up multiple times in different ways in their Response Brief. For example, Appellants have illogically argued that because KAC's damages were uncertain at the summary judgment stage that it was appropriate for the District Court to rely on its previous determination and decline to address the issue. *See Buyer's Response Brief*, pg. 19. This ignores their stipulation, which amounts to an admission that the damages were \$25,791. Lastly, the Buyers allege that a final determination regarding prejudgment interest had been made at the summary judgment stage and KAC did not appeal it and has thus lost its right too. *See Buyer's Response Brief*, pg. 19. This argument fails for

two reasons. First, KAC is not attempting to appeal the summary judgment order, only the court's order specifically regarding prejudgment interest after the stipulation on damages was entered. Second, the summary judgment order regarding damages and prejudgment was not the "law of the case", that needed to be appealed. These arguments have no merit and should be disregarded.

D. Prejudgment Interest Should Be Calculated from December 6, 2013 to the Present.

Section 27-1-211, MCA requires a court to award an injured party prejudgment interest "from the particular day that the right to a sum certain in damages vests." *Dew v. Dower*, 258 Mont. 114, 126, 852 P. 2d 549, 556 (1993). "[N]o interest can run until a fixed amount of damages has been arrived at, either by agreement, appraisal, or judgment." *Lincoln County Port Authority v. Amanz Global Risks U.S. Ins. Co.*, 2013 MT 365 ¶ 64, 373 Mont. 60, 315 P.3d 934. "A numerical amount for damages actually must be calculated, or be capable of calculation, before interest can begin to accrue. *Id.* at 68.

In this case, after Buyers breached the contract, KAC was able to sell the plane on December 6, 2013 for \$65,000, \$25,000 less than the contract with Buyers. Dkt. 5, ¶¶ 13-17. It was also known at that time there was \$791 in hanger storage fees. Dkt. 30, 75. As such, December 6, 2013 is the date that total damages were capable of being calculated and those are the damages that Buyers agreed to which

were calculable on December 6, 2013. Dkt. 73. Therefore, prejudgment interest should begin to accrue on December 6, 2013. The Buyers agreed to that calculation, stemming from that particular day, thus, prejudgment interest vested on that day. If the stipulation had been for less than \$25,791, it would have shown that there were other complicating factors that lowered KAC's damages and that KAC's damages did not vest on a particular day. The Defendants could have insisted that the damages be lowered by mitigation or the other factors and tried their arguments to a jury. Instead, they gave up their chance at making these arguments and agreed on KAC's damages. Dkt. 73.

Finally, the court incorrectly concluded that, "None of these [prejudgment interest] criteria can be satisfied until the court approves the amount of attorneys' fees and costs." Dkt. 80, pg. 2. The court essentially denied KAC's statutory right to prejudgment interest because it had not determined the amount of attorney's fees and costs. This is incorrect for two reasons; first, the underlying monetary obligation from Buyers' breach of contract is \$25,791. Prejudgment interest will accrue at the statutory rate based on the underlying monetary obligation, \$25,791. Paying attorney's fees doesn't change the amount underlying monetary obligation that prejudgment interest attaches to. Second, even if KAC assumes, which it doesn't, that the attorney's fees and costs had to be settled before prejudgment

interest could be awarded, when the court denied this motion, it had in its possession Buyers Amended Affidavit of Attorneys' Fees, that was unopposed, that was filed on April 4, 2018, a month and a half before the court denied this motion on May 16, 2018. Dkt. 77, Dkt. 80.

This was an inappropriate and erroneous result. The district court erred when it concluded as a matter of law that KAC was not entitled to prejudgment interest. Thus, the court's Order on Plaintiff's Motion for Prejudgment Interest should be reversed.

CONCLUSION

The court incorrectly determined and concluded that a contract to informally extend discovery was not formed between KAC's counsel and Buyer's counsel and wrongfully sanctioned KAC's counsel as a result. KAC's counsel reviewed all the relevant communications and presented what he believed to be relevant, the email chain forming a contract. Thus, the court's Order denying Plaintiff's Combined Motions *in Limine*, specifically, denying the existence of a contract and granting sanctions against Plaintiff's counsel, should be overturned. Further, the court erroneously denied Plaintiff's right to prejudgment interest, based on misinformation and inapplicable case law and authority. The court's Order

Denying Plaintiff's Motion for Prejudgment interest should be overturned, so KAC's prejudgment interest can finally be appropriately determined.

RESPECTFULLY SUBMITTED this 1st day of April, 2019.

/s/ Ashley C. McCormack

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately-spaced Times New Roman text typeface of 14 points; is double-spaced; and is not more than 5,000 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance and Appendix.

Dated this 1st day of April, 2019.

/s/ Ashley C. McCormack

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CERTIFICATE OF SERVICE

I, Ashley C. McCormack, attorney for the Plaintiff/Appellee/Cross-Appellant, hereby certify that on the 1st day of April, 2019, I have served, by e-Service, true and accurate copies of the foregoing on the following:

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