IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA-19-0058

SCOTT LEE BENEDICT,

Appellant,

-vs-

KRISTEN TUTTLE,

Appellee,

APPELLEE'S RESPONSE BRIEF

On Appeal form the District Court of the Eighth Judicial District
Of the State of Montana, In and for the County of Cascade
Before the Honorable District Judge Elizabeth A. Best

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IN THE SUPREME COURT OF THE STATE OF MONTANA

SCOTT LEE BENEDICT, Appellant, vs. KRISTEN TUTTLE, Appellee.	No: DA-19-0058 **APPELLEE'S ANSWER BRIEF**

COMES NOW Appellee, Kristen Tuttle, by and through her counsel of record, Molly K. Howard of the law firm of Datsopoulos, MacDonald & Lind, P.C., pursuant to Rule 12(2), M.R.App.P., and respectfully files this Answer Brief.

ISSUES PRESENTED FOR REVIEW[1]

1. Whether Judge Best violated the Montana Code of Judicial Conduct 2.12(A)(5)(d) by presiding over a criminal matter (Cause No. BDC-15-479) and a civil matter (Cause No. BDV-17-0051) arising from the same set of underlying facts.
2. Whether the amount of civil damages awarded to Kristin Tuttle ("Ms. Tuttle") in the civil matter violated the Eighth Amendment prohibition against Excessive Fines.
3. Whether the statute of limitations in § 27-2-216(1)(b), M.C.A., constitutes a valid defense to Scott Lee Benedict's ("Mr. Benedict") civil action for damages stemming from childhood sexual abuse.

STATEMENT OF THE CASE

On March 13, 2017, the Hon. Elizabeth A. Best of the Montana Eighth Judicial District Court (Cascade County), entered a Sentencing Order and Judgment sentencing Mr. Benedict to the Montana State Prison for a period of 30 years, with 15 years suspended, following his conviction for Incest, a Felony, in violation of §

[1] Appellee makes a statement of issues because she is dissatisfied with the lack of clarity in Appellant's statement. Rule 12(2), M.R.App.P.

45-5-507, M.C.A., (Sentencing Order and Judgment, BDC-15-479, CR 73).[2] Ms. Tuttle is the victim of Mr. Benedict's crime.

On January 19, 2017, Ms. Tuttle filed a civil Complaint and Demand for Jury Trial against Mr. Benedict in the Montana Eighth Judicial District Court (Cascade County). Ms. Tuttle alleged childhood sexual abuse, intentional infliction of emotional distress, and punitive damages. (Complaint, BDV-17-0051, CR 1). Judge Best was assigned to preside over the civil action as well. Ms. Tuttle subsequently filed an Amended Complaint and Demand for Jury Trial on May 30, 2017 (BDV-17-0051, CR 2).

Mr. Benedict was served with process in the civil action on June 8, 2017. After Mr. Benedict failed to plead or otherwise defend, Ms. Tuttle filed a Request for Entry of Default Pursuant to Rule 55(b), M.R.Civ.P., and requested a hearing to determine the amount of recoverable damages. (Request for Entry of Default, BDV-17-0051, CR 3) (Exhibit 1, attached hereto). A hearing was held on April 20, 2018 (Minute Entry, BDV-17-0051, CR 14.) (Exhibit 2, attached hereto). Mr. Benedict appeared pro se and participated in the hearing. Following the hearing, the District Court made Findings of Fact and Conclusions of Law, and accordingly entered an

[2] "CR" refers to the district court clerk's case register report followed by the applicable document number.

Order of Judgment. (FOF, COL & Judgment, BDV-17-0051, CR 15). The District Court entered judgment in favor of Ms. Tuttle and against Mr. Benedict in the amount of $800,000.00. *Id.* at P. 6.

On January 24, 2019, Mr. Benedict filed a petition for an out-of-time appeal. In a February 5, 2019 Order, this Court granted the petition. In a February 26, 2019 Order, this Court ordered Mr. Benedict to "prepare, file, and serve a Notice of Appeal in accordance with this Court's Rules of Appellate Procedure within fifteen days from the date of this Order, or by March 13, 2019. Mr. Benedict filed his Notice of Appeal on March 14, 2019 in this Court, and on March 15, 2019 in District Court. On March 14, 2019, Mr. Benedict filed his Opening Brief.

STATEMENT OF THE FACTS

The case from which Mr. Benedict appeals is a civil matter (BDV-17-0051) arising from an underlying criminal matter, Cause No. BDC-15-479, Eighth Judicial District Court. In that case, Mr. Benedict entered a guilty plea to Incest, in which Ms. Tuttle was the victim (Plea Agreement, BDC-15-479, CR 54). He is now serving prison time at the Montana State Prison for that offense. The Eighth Judicial District Court took judicial notice of this criminal matter in its *Findings of Fact, Conclusions of Law, and Order of Judgment* (BDV-17-0051, CR 15), the Order which Mr. Benedict now appeals to this Court.

Ms. Tuttle endured childhood sexual abuse at the hands of Mr. Benedict, surreptitious recording by Mr. Benedict, as well as both negligent and intentional infliction of emotional distress by Mr. Benedict. *Id.* at ¶ 3. Ms. Tuttle served Mr. Benedict with an Amended Complaint and Demand for Jury Trial; Summons: Amended Complaint and Demand for Jury Trial; and First Discovery Requests at 1:06 p.m. on June 8, 2017. *Id.* at ¶4. Mr. Benedict failed to respond. Ms. Tuttle subsequently requested entry of default and a hearing and served Mr. Benedict at the Great Falls Regional Prison. *Id.* at ¶ 6.

At Ms. Tuttle's request, the hearing date was continued to April 20, 2018, at 10:00 a.m. The Court issued an Order (BDV-17-0051, CR 9) reflecting this change, and Mr. Benedict was provided notice. (BDV-17-0051, CR 15 at ¶ 7). Ms. Tuttle filed a Notice of Perpetuation Deposition of Dr. William Stratford on January 10, 2018 (BDV-17-0051, CR 7), again serving Mr. Benedict with notice at the Great Falls Regional Prison. (BDV-17-0051, CR 15 at ¶ 8). He did not appear for the deposition, and the deposition transcript (BDV-17-0051, CR 13) was filed with the Court on April 18, 2018. (BDV-17-0051, CR 15 at ¶¶ 9-10).

On April 21, 2018, the District Court held a hearing on Ms. Tuttle's Motion for Entry of Default (BDV-17-0051, CR 3, Exhibit 1), and to determine damages. Ms. Tuttle and her counsel, Molly Howard, appeared personally. Mr. Benedict appeared personally, pro se.

Dr. William Stratford testified, *via* his perpetuation deposition and to a reasonable degree of medical certainty, that Ms. Tuttle would require lifetime psychological and psychiatric treatment, including inpatient treatment, due to the psychological and emotional harm caused by Mr. Tuttle. (BDV-17-0051, CR 15 at ¶ 12); *see also Stratford Deposition* (BVD-17-0051, CR 13 31:19–32:8). His report further outlined that Ms. Tuttle's need for intervention is immediate and that her prognosis is "abysmal" without proper psychological and psychiatric intervention. *Id*. at 29:5-13; *see also* (BDV-17-0051, CR 15 at ¶ 12).

Ms. Tuttle testified that the cost of this one-year inpatient program outlined by Dr. Stratford is between $40,000 and $50,000 per 30 to 45-day treatment regimen, and that the recommended outpatient treatment will cost more than $10,000. She further testified that she would lose an entire year's income in order to attend inpatient treatment, because doing so would delay graduation from her nursing program. Ms. Tuttle testified that her anticipated wage upon completion of her nursing program in 2020 would be approximately $62,000. *Id*. at ¶ 13. Ms. Tuttle must obtain this crucial treatment because she is uninsured and does not have sufficient income to make medical payments. *Id.* at ¶ 14.

Ms. Tuttle also testified about the effects of Mr. Benedict's actions, including her depression, self-harm and other risk-taking behaviors, suicidal ideation, substance abuse, and ongoing difficulties with trust, intimacy, and relationships. *Id.*

at ¶ 14. The Court found Ms. Tuttle to be credible and recognized the likely permanent nature of the harm and damage caused by and resulting from Mr. Benedict's actions. *Id.* at ¶ 15. In addition, the Court considered Dr. Stratford's deposition, including his testimony that victims of childhood sexual abuse can have a shortened lifespan of up to 20 years.

In consideration of her extensive damages, Ms. Tuttle requested entry of default in the amount of $800,000. The Court found the request to be "likely conservative", and it granted the requested amount in its Order of Judgment. *Id.* at ¶ 15. Mr. Benedict testified in opposition to Ms. Tuttle's request for Entry of Judgment in the amount of $800,000, denied committing the acts to which he had previously pled guilty, and offered no exhibits or other evidence in support of his arguments. *Id.* at ¶ 17.

Mr. Benedict petitioned this Court for an out-of-time appeal on January 24, 2019, which this Court granted. Appellant filed a motion for appointment of counsel, which this Court denied. Appellant has not obtained an order staying execution of the judgment, nor has he posted a supersedeas bond to secure any damages and costs which may be awarded against him on appeal.

STANDARDS OF REVIEW

I. Challenges to findings of fact and conclusions of law

Mr. Benedict generally challenges the Court's Findings of Fact and Conclusions of Law (BDV-17-0051, CR 15). "A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence or if, upon reviewing the record, this Court is left with the definite and firm conviction that the district court made a mistake." *In re S.T.*, 2008 MT 19, ¶¶ 8, 341 Mont. 176, 176 P.3d 1054 (citation omitted). This Court reviews a district court's conclusions of law de novo to determine whether they are correct. *Giambra v. Kelsey*, 2007 MT 158, ¶¶ 28, 338 Mont. 19, 162 P.3d 134 (citations omitted).

II. Recusal

The well-established common law rule is that recusal is required when a judge has a direct, personal, substantial, or pecuniary interest in a case. In Montana, recusal is addressed and governed by the Montana Code of Judicial Conduct:

> Montana's Code of Judicial Conduct Rule 2.12 requires that a judge disqualify [herself] "in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." A judge shall also disqualify [herself] if the judge "served as a lawyer in the matter in controversy."

Bullman v. State, 2014 MT 78, ¶¶ 14, 374 Mont. 323, 321 P.3d 121 (citations

omitted) (citing Mont. R. Jud. Cond. Rule 2.12(A)(5)(a)).

III. Constitutional violations and damages award

Mr. Benedict also asserts violations of the Eighth Amendment prohibition on excessive fines. The question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in that context de novo review of that question would be appropriate. *State v. Forfeiture of 2003 Chevrolet Pickup*, 2009 MT 25, ¶¶ 5, 349 Mont. 106,202 P.3d 782.

However, if the damages awarded constitute civil damages, this Court reviews a district court's award of damages for abuse of discretion. *Czajkowski v. Meyers*, 2007 MT 292, ¶¶ 13, 339 Mont. 503, 172 P.3d 94; see also *Mustang Holdings, LLC v. Zaveta*, 2010 MT 139N, ¶¶ 17, 236 P.3d 3. The decision of the district court will not be disturbed "unless the amount awarded is so grossly out of proportion to the injury as to shock the conscience." *Harding v. Savoy*, 2004 MT 280, ¶¶ 45, 323 Mont. 261, 100 P.3d 976, (internal citations omitted). Further, while a damages judgment "must be supported by substantial evidence that is not mere guess or speculation," "mathematical precision is not required." *In re Mease*, 2004 MT 59, ¶¶ 42, 320 Mont. 229, 92 P.3d 1148. Finally, "proof of damages must consist of a reasonable basis for computation and the best evidence obtainable under the circumstances which will enable a judge to arrive at a reasonably close estimate of

the loss." *In re Mease*, ¶¶ 42; see also *Tractor & Equip. Co. v. Zerbe Bros.*, 2008 MT 449, ¶¶ 27, 348 Mont. 30, 199 P.3d 222, 231.

IV. Statute of limitations

Mr. Benedict asserts a statute of limitations defense as well. A statute of limitations defense is a question of law and this Court reviews for correctness the district court's application of the statute of limitations. *Gulf Ins. Co. v. Clark*, 2001 MT 45, ¶¶ 13, 304 Mont. 264, 20 P.3d 780; see also *Johnson v. Dist. VII, Human Res. Dev. Council*, 2009 MT 86, ¶¶ 18, 349 Mont. 529, 204 P.3d 714; see also *Grant Creek Heights, Inc. v. Missoula Cnty.*, 2012 MT 177, ¶¶ 13, 366 Mont. 44, 285 P.3d 1046.

SUMMARY OF ARGUMENT

This Court should decline to hear this appeal on the merits and dismiss it with prejudice pursuant to Rule 16, M.R.App.P., because Mr. Benedict failed to timely file his Notice of Appeal in accordance with this Court's Rules of Appellate Procedure and its February 26, 2019 Order. Mr. Benedict's failure to file the Notice of Appeal on or before March 13, 2019 is a fatal defect that cannot be cured in the absence of extenuating circumstances. Even though Mr. Benedict is acting pro se, he still must adhere to procedural rules. Mr. Benedict failed to take advantage of the latitude afforded to him when this Court granted his petition for an out-of-time

appeal. Allowing this appeal to proceed on the merits would result in prejudice to Ms. Tuttle.

ARGUMENT

I. The Court should dismiss this appeal with prejudice pursuant to Rule 16, M.R.App.P., because Mr. Benedict failed to timely file his Notice of Appeal.

On January 24, 2019, Mr. Benedict, pro se, filed a petition for an out-of-time appeal of an April 25, 2018 Cascade County District Court decision. In a February 5, 2019 Order, this Court granted Mr. Benedict's petition for an out-of-time appeal. In a subsequent February 26, 2019 Order, this Court noted that "it failed to order Appellant to file a Notice of Appeal after the granting of his petition." Accordingly, this Court ordered Mr. Benedict to "prepare, file, and serve a Notice of Appeal in accordance with this Court's Rules of Appellate Procedure within fifteen days from the date of this Order, or by **March 13, 2019**." (emphasis supplied). This Court also noted that it "has the ability to entertain a motion to dismiss under M.R.App.P. 16." Mr. Benedict filed his Notice of Appeal on March 14, 2019 in this Court, and on March 15, 2019 in District Court.

"The time limits for an appeal are mandatory and jurisdictional." *First Sec. Bank v. Harmon*, 255 Mont. 168, 172, 841 P.2d 521, 524 (1992). "An appellant has a duty to perfect an appeal in the manner and within the time limits provided by law. Absent such compliance, this Court does not acquire jurisdiction to entertain and

determine an appeal." *Id.* (citing *Price v. Zunchich*, 188 Mont. 230, 235, 612 P.2d 1296, 1299 (1980); *Anderson v. Bashey*, 241 Mont. 252, 787 P.2d 304 (1990) (plaintiff's motion to reconsider was filed one day too late and therefore failed to suspend the thirty-day limit for filing notice of appeal); *Easeley v. Burlington Northern R.R.*, 234 Mont. 290, 762 P.2d 870 (plaintiff's appeal denied because he filed notice of appeal more than thirty days after his motion for reconsideration was deemed denied)). "Failure to timely file notice of appeal is a fatal defect cured only by the 'most extenuating circumstances.'" *Harmon*, 255 Mont. at 173, 841 P.2d at 525 (citing *Montana Power Co. v. Fondren*, 226 Mont. 500, 505, 737 P.2d 1138, 1141 (1987)).

In *Harmon*, the "critical issue" was "whether Harmon's untimely notice of appeal prevent[ed] the Supreme Court from obtaining jurisdiction over the appeal." *Harmon*, 255 Mont. at 171, 841 P.2d at 523. This Court rejected Harmon's argument that his being unaware of timing requirements constituted the "most extenuating circumstances" necessary to cure the fatal defect of failing to timely file notice of appeal. *Id.* This Court dismissed the appeal as untimely. *Id.*

"While pro se litigants may be given a certain amount of latitude, that latitude cannot be so wide as to prejudice the other party, and it is reasonable to expect all litigants, including those acting pro se, to adhere to procedural rules. *Greenup v. Russell*, ¶¶ 15, 300 Mont. 136, 3 P.3d 124 (2000) (citing *First Bank (N.A.) Billings*

v. Heidema, 219 Mont. 373, 376, 711 P.2d 1384, 1386 (1986)).

This Court routinely holds pro se litigants to procedural rules and deadlines. For example, in *Greenup*, the district court refused to set aside a pro se party's untimely motion to set aside a default judgment. The pro se party argued "that as a pro se litigant he should be accorded extra latitude." *Greenup*, ¶¶ 13. This Court rejected his argument and affirmed the District Court's ruling. "We conclude that Greenup's motion to set aside the default judgment against him is fatally tardy. We hold that the District Court did not err in denying Greenup's motion to set aside the default judgment against him." *Id.*, ¶¶ 15.

Here, Mr. Benedict was required to perfect his appeal within the time limits provided by law and ordered by this Court. Specifically, he was required to "prepare, file, and serve a Notice of Appeal in accordance with this Court's Rules of Appellate Procedure within fifteen days from the date of this Order, or by March 13, 2019." Since he failed to do so, this Court did not acquire jurisdiction to entertain his appeal. Mr. Benedict's pro se status does not change the fact that his Notice of Appeal was fatally tardy. Nor does it change the fact Ms. Tuttle will suffer prejudice in being forced to respond to an untimely appeal on the merits. Mr. Benedict was already afforded latitude when this Court granted his petition for an out-of-time appeal. No further latitude is warranted. The appeal should be dismissed with prejudice as not having been timely filed.

II. Judge Best did not violate Mont. R. Jud. Cond. 2.12(5)(d).

Mr. Benedict argues that Judge Best violated Rule 2.12(A)(5)(d) of the Judicial Code of Conduct by presiding over his criminal and civil cases. Rule 2.12(A)(5)(d) additionally provides that a judge must disqualify herself in any proceeding in which her "impartiality" might reasonably be questioned, including but not limited to a situation in which the judge previously presided as a judge over the matter in another court. The Montana Code of Judicial Conduct defines "impartial," "impartiality," and "impartially" to mean "absence of bias or prejudice in favor of or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."

Mr. Benedict's argument fails for two (2) separate and independently dispositive reasons. First, he failed to raise this issue in District Court and, therefore, did not properly preserve it for this appeal. Second, recusal was not required.

a. Mr. Benedict failed to preserve the recusal issue.

It is well-established that this Court will not address an issue presented for the first time on appeal. *In re M.A.L.*, 2006 MT 299, ¶¶ 55, 334 Mont. 436, 148 P.3d 606 (citing *In re T.E.*, 2002 MT 195, ¶¶ 20, 311 Mont. 148, 54 P.3d 38 (2002)). The general rule for the necessity of presentation of issues in the lower court for preservation for appeal is:

"[W]here a party fails to raise an issue in the pleadings, does not present

> argument on the issue during the hearing on the merits of the case, does not move to amend the pleadings to conform to any evidence presented and raises the issue for the first time in a post-hearing memorandum which the district court does not address in its order, the issue has not been timely raised and may not be raised on appeal."

In re M.A.L., ¶¶ 55 (citing *Nason v. Leistiko*, 1998 MT 217, ¶¶ 18, 290 Mont. 460, 963 P.2d 1279).

Similarly, the Code of Judicial Conduct requires a party to bring a motion to recuse within a reasonable time after the party acquires knowledge of a potential basis for recusal. *State v. Dunsmore*, 2015 MT 108, ¶¶ 6, 378 Mont. 514, 347 P.3d 1220 (citing ***State v. Jacobson***, 2008 ND 73, 747 N.W.2d 481, 483 (N.D. 2008) ("[W]hen a party has knowledge of information relevant to disqualification and waits until the final decision of the judge to object to the judge's involvement in the case, the objection is untimely and results in a waiver."); ***Bean v. Bailey***, 280 S.W.3d 798, 803 (Tenn. 2009) ("The failure to seek recusal in a timely manner may result in the waiver of any complaint concerning the judge's impartiality."); *Tierney v. Four H Land Co. Ltd. P'ship*, 281 Neb. 658, 798 N.W.2d 586, 592 (Neb. 2011) ("A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.").

Here, Mr. Benedict did not properly preserve the recusal issue in District Court. He did not file an Answer or any other pleading asking Judge Best to recuse

herself. The District Court did not address the issue in the Findings of Fact and Conclusions of Law from which this appeal was taken. Mr. Benedict knew from the inception of the civil case that Judge Best also presided over his prior criminal case, but the first time he raised the issue was in a Complaint of Judicial Bias & Request for Stay of Order in this Court in September of 2018. Mr. Benedict did not raise the issue within a reasonable time after learning of a potential basis for recusal. The Court should reject Mr. Benedict's recusal argument and refuse to address the issue.

b. Montana Rule of Judicial Conduct 2.12 or interpretive case law does not mandate recusal.

In *In re Markegard*, 2006 MT 111, ¶¶ 23-24, 332 Mont. 187, 136 P.3d 532, this Court held that the plain language of Mont. Code Ann. § 3-1-803 only requires disqualification where representation and adjudication both occurred in the same action, and therefore, a judge is not required to disqualify herself in a separate and urelated action.

Recognizing that Mont. R. Jud. Cond. Rule 2.1 is not as narrow, in *Bullman* this Court held that when the judge has personal knowledge of disputed facts, disqualification is required if the judge previously represented a person involved in the matter in controversy. *Bullman*, ¶¶ 16. A "matter" for purposes of applying Mont. R. Jud. Cond. 2.12 is defined as "[s]omething that is to be tried or proved; an allegation forming the basis of claim or defense. . . ." *Bullman*, ¶¶ 16 (citing *Black's*

Law Dictionary 999 (Bryan A. Garner ed., 8th ed., West 2007). Here, Judge Best has not previously represented Mr. Benedict or Ms. Tuttle in either matter or controversy. Recusal or disqualification was not required.

III. Mr. Benedict's Fifth Amendment and Fourteenth Amendment due process rights have not been violated.

To the extent Mr. Benedict does not articulate an argument under the Fifth or Fourteenth Amendments, but cites them in his Table of Authorities, Ms. Tuttle addresses them herein in an abundance of caution.

Under Montana's due process clause, every person must be afforded an opportunity to explain, argue, or rebut any information that may lead to a deprivation of life, liberty or property. *Bauer v. State*, 1999 MT 185, ¶¶ 22, 295 Mont. 306, 983 P.2d 955 (1999). Mr. Benedict fails to explain how his Fifth and Fourteenth Amendment right to Due Process has been violated in this matter, but it is assumed he is objecting to either the entry of default (BDV-17-0051, CR 15) against him of the writ of execution (BDV-17-0051, CR 20) obtained by Ms. Tuttle.

In this case, Mr. Benedict was provided notice and an opportunity to be heard at each juncture in the proceedings. He failed to respond to the Amended Complaint (BVD-17-0051, CR 2) in this case. He failed to appear for Dr. Stratford's perpetuation deposition. He appeared at the hearing on the Motion for Default Judgment, had an opportunity to explain, argue, and rebut information offered by

Ms. Tuttle, and he failed to offer any exhibits or evidence to rebut Ms. Tuttle's evidence of her damages. The Court considered his arguments and entered a default judgment against him. His Petition should be denied.

IV. The Excessive Fines Clause is not implicated in this civil action for damages to a victim of sexual abuse.

Mr. Benedict refers to the damages assessed against him as "restitution" several times in his brief.[3] This is an action for civil damages to compensate Ms. Tuttle for Mr. Benedict's wrongful actions. While the Eighth Amendment protects against excessive civil fines, including forfeitures, the damages awarded to Ms. Tuttle by the Court in this case are not excessive, nor are they damages extracted by the federal government or governmental entity of the State of Montana. *See Hudson v. United States,* 522 U.S. 93, 103, (citing *Alexander v. United States,* 509 U.S. 544, 125 L.Ed.2d 441, 113 S.Ct. 2766 (1973); *Austin v. United States,* 509 U.S. 602, 125 L.Ed. 2d 488, 113 S.Ct. 2801 (1993)).

At the time of the drafting and ratification of the Eighth Amendment, the word "fine" was understood to mean a payment to a sovereign as punishment for some offense. *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S.

[3] He also cites the federal statute governing restitution, 18 U.S.C. §2259, which is inapplicable here.

257, 265, n.6., L.Ed.2d 219, 109 S.Ct. 2909 (1989). The Excessive Fines Clause, U.S. Const. amend. VIII and Article II, Section 22 of the Montana Constitution, does not apply, as the excessive fines clause and Montana's equivalent thereof limits "the *government's* power to extract payments, whether in cash or in kind, as punishment for some offense." *Alexander*, 509 U.S. at 558 (italics added). Here, where the damages in this case are to be paid directly to Ms. Tuttle to compensate her for damage inflicted upon her by Mr. Benedict, the damages do not constitute a "fine" and therefore the excessive fines clause is not implicated.

In civil actions arising out of criminal conduct of the defendant, it is the victim's burden to substantiate the dollar amount of their pecuniary losses and prove their recoverability. *State v. Johnson*, 2018 MT 277, ¶¶ 28, 393 Mont. 320, 430 P.3d 494 (internal citations omitted). Even if this was an action for criminal restitution, the purpose of such restitution would be to remediate and compensate the victim for her losses, and would not constitute punishment so as to implicate the U.S. Const. Amend. VIII or Montana's equivalent. *See, e.g., State v. Johnson,* 2018 MT 277, ¶¶ 36-37, 393 Mont. 320, 430 P.3d 494.

The judgment entered against Mr. Benedict does not implicate the Excessive Fines Clause because the underlying cause is a civil action for the damages Ms. Tuttle sustained from Mr. Benedict's actions.. Even if the Excessive Fines Clause was implicated, the damages assessed would not be excessive in light of the actual

damages incurred by Ms. Tuttle and the gravity of Mr. Benedict's offenses. Furthermore, the dollar amount of Ms. Tuttle's damages was established with credible testimony and supported by an expert opinion from Dr. Stratford. The Court made specific findings of fact with respect to the credibility of the testimony presented and even stated that the dollar figure was "likely conservative." (BDV-17-0051, CR 15, ¶ 15). Mr. Benedict should not be able to escape the financial consequences of the permanent damage he has inflicted upon Ms. Tuttle. His Petition should be denied.

V. Mr. Benedict waived the statute of limitations defense.

Rule 8(c), M.R.Civ.P., provides in relevant part:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction…statute of limitations…and any other matter constituting an avoidance or affirmative defense…."

The statute of limitations is one of the affirmative defenses set forth in Rule 8(c), M.R.Civ.P. It must be affirmatively pled in the defendant's answer, or it is waived as a defense. *Bennett v. Dow Chemical Co.*, 220 Mont. 117, 122, 713 P.2d 992, 996 (1986). In *Bennett*, this Court explained that "Rule 8(c), M.R.Civ.P., provides that a defense of the running of the statute of limitations is an affirmative defense and **can only be raised by answer**." *Bennett*, 713 P.2d at 995-96 (emphasis added). Thus, this Court held: "Rancher's has never filed an answer nor provided this Court

with any reason for this failure. We can perceive no reason to excuse it from filing an answer. The request is denied." *Id.*

Similarly, in *Estabrook v. Baden*, 284 Mont. 419, 423, 943 P.2d 1334, 1336-37 (1997), this Court concluded:

> "…under Rule 8(c), M.R.Civ.P., a 'party' must raise the affirmative defense of the statute of limitations. If the party fails to appear or, having appeared, fails to raise the statute as a defense, the defense is waived and may not thereafter be raised by the court, sua sponte, on the party's behalf."

Here, Mr. Benedict never filed an Answer in District Court nor has he ever provided any valid reason for this failure. By failing to file an Answer, Mr. Benedict in turn failed to raise the defense of the running of the statute of limitations. The defense was waived and Mr. Benedict failed to properly preserve the issue for appeal. His argument should be accordingly rejected.

VI. The statute of limitations defense also fails on the merits.

Even assuming, *a fortiori*, that he had preserved this argument for appeal, it would still fail. Mont. Code Ann. § 27-2-216(1)(b) provides:

> **27-2-216. Tort actions -- childhood sexual abuse.** (1) An action based on intentional conduct brought by a person for recovery of damages for injury suffered as a result of childhood sexual abuse must be commenced not later than:
>
> (a) 3 years after the act of childhood sexual abuse that is alleged to have caused the injury; or
>
> (b) 3 years after the plaintiff discovers or reasonably should have discovered that the injury was caused by the act of childhood sexual abuse.

Mont. Code Ann. § 27-2-216 (underlining added)

Even after his guilty plea to Incest, Mr. Benedict continues to attempt to avoid responsibility for the harm he caused Ms. Tuttle. He asserts that the statute of limitations has run:

> Ms. Tuttle clearly gave up the right to blame her losses on the appellant when she informed the Social Worker of these issues when she was (18 years) old and then during her counseling in the Montana Air Guard when she filed charges against another guardsman, for sexual assault and then could not support those allegations and the charges were dropped. But apparently she was developing a learning curve. So the problem is here that she has clearly run the stautue [sic] of limitations out for recovery,

Appellant's Brief, p. ii. Mr. Benedict fails to acknowledge that Ms. Tuttle's Complaint and Demand for Jury Trial (BDV-17-0051, CR 1) which was filed on January 19, 2017, was properly filed within the statute of limitations, because Ms. Tuttle discovered Mr. Benedict was taking pictures of her and recording her naked in her room on August 20, 2015. In addition, she subsequently learned that Mr. Benedict has previously taken unauthorized, sexually explicit pictures and recordings of her. (BDV-17-0051, CR 2, ¶¶ 14-15). Further, she discovered ongoing injury and trauma from which she continues to suffer well within the time limits afforded by the statute of limitations, which requires a connection of damages to abuse to trigger the statute. As Dr. Stratford's testimony clearly outlines, Ms. Tuttle has only begun to understand and connect her injuries and damages to Mr. Benedict's abuse. (BDV-17-0051, CR 13, 18:3-22, 27:22- 28:24). Disclosure of her

abuse does not equate to discovery and connection of injuries and damages to abuse.

VII. The District Court did not abuse its discretion in granting Ms. Tuttle's motion for default judgment.

While pro se litigants should arguably be given more latitude in regard to procedural oversights, "that latitude cannot be so wide as to prejudice the other party, and it is reasonable to expect all litigants, including those acting pro se, to adhere to procedural rules." *Greenup v. Russell,* 2000 MT 154, ¶¶ 12, 300 Mont. 136, 3 P.3d 124. Ms. Tuttle is aware of this Court's disfavor of default judgments and preference that cases be tried on the merits. *Hall v. Hall,* 2015 MT 226, ¶¶ 16, 380 Mont. 224, 354 P.3d 1224.

This Court should not accommodate Mr. Benedict's request for relief on appeal. Mr. Benedict has already entered a guilty plea to a charge of Incest in the underlying criminal matter, and he was properly afforded a chance to defend himself before a default judgment was entered against him in the civil action at issue.

In *Hall,* this Court granted an out-of-time appeal after a pro se litigant claimed that entry of default judgment against him was unjust. *Hall*, ¶¶ 18, 22. However, in *Hall,* the Defendant made an effort to answer the Complaint, and there was no hearing to establish the amount of damages. *Id.* Here, Mr. Benedict made no effort to answer the Amended Complaint (BDV-17-0051, CR 2) or otherwise mount a meaningful defense, and he appeared at the hearing on damages and presented

argument in opposition to the amount of damages. He was given notice and an opportunity to be heard at all stages of the proceedings. His appeal should be dismissed.

CONCLUSION

The District Court in this matter entered well-reasoned Findings of Fact and Conclusions of Law regarding the nature and extent of Ms. Tuttle's damages resulting from Mr. Benedict's actions. The Court ultimately found that Ms. Tuttle's estimate of damages is "likely conservative" given the severity of the trauma inflicted upon her by the Mr. Benedict's ongoing sexual abuse. Mr. Benedict attended the hearing on the Motion for Entry of Default and argued in opposition to the entry of default and the damages sought by Ms. Tuttle. The District Court did not abuse its discretion in entering a judgment of default. Now, in another attempt to avoid remitting to Ms. Tuttle any part of the judgment he owes her, Mr. Benedict has appealed this matter to this Court, asserting inchoate and meritless arguments which were never preserved for appeal. His Appeal should be dismissed.

RESPECTFULLY SUBMITTED this 5th day of April, 2019.

DATSOPOULOS, MacDONALD & LIND, P.C.
Attorneys for Appellee

By: /s/ Molly Howard
Molly Howard

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellee's Response Brief is printed using proportionately space Times New Roman typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2010 is not more that 10,000 words, excluding the parts of the brief exempted by Mont. R. App. P. 11(4)(d)

Pursuant to Mont. R. App. P. 12(11), a digital copy of the Brief is contained on the accompanying DVD-R in PDF format.

Dated this 5th day of April, 2019.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Molly Howard
Molly K. Howard
Attorney for Appellee

CERTIFICATE OF SERVICE

I, Molly K. Howard, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-05-2019:

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Service Method: Conventional

Electronically signed by Taylor Jordan on behalf of Molly K. Howard
Dated: 04-05-2019