IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 19-0448

ROBERT SAYERS,

Cross-Claim Defendant and Appellant,

v.

CHOUTEAU COUNTY,

Cross-Claimant and Appellee.

APPELLANT'S REVISED BRIEF

On Appeal from Montana Twelfth Judicial District Court
Chouteau County, Cause No. DV-17-28
Before Hon. David Cybulski

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B. Whether a Rule 60(b)(4) motion to dismiss a judgment granted on the basis of a defective cross-claim violates Rule 11 M.R.Civ.P.

3. STATEMENT OF THE CASE

This case is an appeal of Judge Cybulski's denial of Appellant, Robert Sayers ("Sayers"), motion to dismiss and grant of Chouteau County's ("County") Rule 11 motion. The underlying litigation was initiated when Sayers, pro se, filed a complaint against Harvey Worral ("Worrall"), Dale Hankins ("Hankins"), and Steve Gannon ("Gannon") in the Twelfth Judicial District Court, Chouteau County. Court Record ("CR") 1, Complaint, p. 1. On November 1, 2017, the County filed a motion to intervene and brief in support as a cross-claimant. CR 4. On that same date, the County also filed an answer and cross-claim. CR 3. On November 28, 2017 the County's motion to intervene was granted and the County was improperly entered into the action as a cross-claimant. CR 13, p. 2.

Sayers later filed a motion to dismiss his claims on February 8, 2018. CR 47. Defendants Worrall, Hankins and Gannon consented to Sayers' motion. CR 48, p. 2. However, the County filed a notice that it intended "to proceed with the filed cross-claim". *Id*. at 3. Judge Cybulski granted Sayers' motion, and dismissed the Complaint and Demands for Jury Trial on March 5, 2018. CR 53, p. 2.

The County filed its motion for summary judgment on its "cross-claim" of vexatious litigation. CR 65, p. 2. Judge Cybulski, after briefing and hearing, ruled in the County's favor and found Sayers to be a vexatious litigant. CR 77, pp. 12-13.

Sayers, still proceeding pro se, appealed the district court's judgment on November 13, 2018. Appellant Not. Of App. (Nov. 13, 2018). Sayers, during his appeal, obtained representation. CR 80. Sayers then voluntarily dismissed his appeal with this Court and filed the subject Rule 60(b)(4) motion to dismiss the vexatious litigant judgment as void. CR 81. The County responded by filing a motion for sanctions pursuant to Rule 11. CR 83.

After briefing and hearing on both motions Judge Cybulski ruled in favor of the County by denying Sayers' Rule 60(b)(4) motion and granting, in part, the County's Rule 11 motion. Judge Cybulski found in favor of Sayers only with respect to the Rule 11 motion made against Sayers' attorneys. CR 101.

4. STATEMENT OF THE FACTS

The County actually never presented a claim upon which the district court could grant relief in the cross-claim it presented in its Answer and Cross-Claim, filed on November 1, 2018. CR 3, pp. 7-8. The County filed said Answer and Cross-Claim contemporaneously with their motion to intervene on that same date. CR 4. On the contrary, what they present in their Answer from Cross-Claim Facts through to their

prayer for relief is entirely defensive and presents no affirmative pleading. *Id*., pp. 7-8. Quoting verbatim:

> Cross-Claim Facts
> 1. Plaintiff's claims arise out of facts which are all associated with Lippard Road, a judicially affirmed petitioned county road, located in Chouteau County Montana [sic].
> 2. Plaintiff is an individual having ownership of real property within Chouteau County, Montana.
> 3. Plaintiff has sued the County and its agents multiple times and used the court system inappropriately, which is an abuse of the judicial system.
> 4. Cross-Claimant, Chouteau County, has defended each and every filing of Plaintiff and now Plaintiff sues individuals, who at all times were acting under their color of employment without a single fact supporting the Plaintiff's multiple allegations.
> 5. The present case is filed based upon conclusions without fact forcing individual defendants, being accused without fact, to defend themselves for actions which were adjudicated and which were all taken pursuant to their employment with Chouteau County; to file answers and motions to resolve this matter.
> 6. The Plaintiff's abuse of the judicial system are numerous, without merit and frivolous.
>
> WHEREFORE, Cross-Claimant County prays this court for the following relief:
>
> A. That the Court deny Plaintiff's request for relief;
> B. That Plaintiff take nothing and that the Court enter Judgment in favor of Cross-Claimant County on all allegations of the cross-claim.
> C. That Plaintiff be required to pay all of County's attorney's fees and costs, as well as the individual Defendants' costs, incurred in this matter.
> D. The Court enter an order requiring any future filings from Plaintiff to be reviewed and approved by the Court prior to presentation to the Clerk and issuance of Summons to Answer or requiring any other responsive pleading.
> E. For such other relief as the Court deems equitable." *Id.*, pp. 7-8.

On November 28, 2017, Judge Boucher recuses and Judge Cybulski accepts jurisdiction. CR 11. That same date, Judge Cybulski, having accepted jurisdiction, denies Sayers' motions for default judgments against Defendants. CR 12. And on that same date, Judge Cybulski granted the County's motion to intervene, in contradistinction to the meaning of "cross-claimant" and to a cross-claimant's proper role in such proceedings. CR 13.

On February 8, 2018 Sayers, having failed to be able to take the depositions he had requested and still filing pro se, moved to dismiss his case: "Comes now, Plaintiff Robert Sayers, Through Council, and Files this Motion to Dismiss Case No DV17- 17 – 28 and Brief." CR 47.

Defendants and the County leaped at this opportunity. The Defendants almost immediately consented to the motion, with caveat that it be dismissed with prejudice. CR 48, p. 2. The County, on the other hand, refused the dismissal and instead noticed the district court that it intended to proceed with its improper cross-claim. *Id.* at 2-3. On March 5, 2018 Judge Cybulski granted Sayers motion to dismiss, but did so on the terms of the Defendants and the County. CR 53.

Having improperly intruded upon the case as a cross-claimant, the County then filed their motion for summary judgment, brief in support, and request for hearing in hopes of fully eliminating any possibility that the triers of fact in this matter regarding Sayers' might conceivably be an impartial jury of peers. CR 65. Up

until that point the County had not actually presented a claim. Nonetheless, Judge Cybulski ruled in the County's favor and found Sayers to be a vexatious litigant. CR 77.

Still filing pro se, Sayers' appealed. CR 79. Subsequently, Sayers' retained counsel. CR 80. Sayers', by and through his counsel, moved the district court to dismiss its vexatious litigant judgment pursuant to Rule 60(b)(4) on the clear and simple basis that it was void:

> "Here, because Chouteau County intervened by way of an improper crossclaim, the Court has the authority to dismiss the Order resulting therefrom because that Order is void." CR 81, p. 2.

Not to be outdone, the County filed its motion for Rule 11 sanctions against both Sayers and Sayers' attorneys. CR 83. Judge Cybulski would not countenance any redress of the original error committed by virtue of the improper cross-claim and ruled in favor of the County on both. CR 101.

> "Sayers' withdrawal on December 26, 2018 of his Montana Supreme Court appeal in this case served as the final judgment on the issues decided by the District Court." CR 101, p. 8.

And

> "The issues raised in Sayers' Rule 60 Motion are barred by the doctrine of res judicata…" *Id.* at p. 10.

And,

> This Court held a hearing in the action and Chouteau County's cross-claim request that Sayers be declared a vexatious litigant." *Id.* at p. 4.

And,

"Sayers had full due process." *Id.* at p. 4.

And,

> "Sayers filed his motion under Rule 60(b)(4), which requires compliance with the deadlines of Rule 59(b), giving Sayers only 28 days after the entry of judgment to file the Rule 60 Motion." *Id.* at p. 5.

And,

Ultimately ignoring what constitutes a proper cross-claim or cross-claimant, Judge Cybulski decries Sayers' elevation of "form over substance" while perpetuating the fiction that the County's role was ever anything other than form over substance:

> "Sayers' Rule 60 Motion elevated form over substance. It made the unfounded claim that the Court had no jurisdiction over Chouteau County's intervention because of the name of the claim by which it is intervening rather than the claim's substance. Sayers alleged that the Court's jurisdiction and power to rule on Chouteau County's vexatious litigant claim was removed or never attached because of how Chouteau County styled the caption of its claim." *Id.* at p. 5.

5. STANDARDS OF REVIEW

The standard of review under a motion based upon Rule 60(b)(4) is de novo, since the determination that a judgment is or is not void is a conclusion of law. *In re Marriage of Wendt*, 2014 MT 174, ¶ 7; *Greater Missoula Area Federation of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 18.

This Court reviews de novo a district court's determination that a motion violated Mont. R. Civ. P. 11. *Kristine Davenport v. Odlin*, 2014 MT 109, ¶ 9; Byrum v. Andren, 2007 MT 107, ¶ 19. The underlying findings of fact are reviewed to determine whether they are clearly erroneous. *Id*.

6. SUMMARY OF ARGUMENT

For the want of a nail the shoe was lost,
For the want of a shoe the horse was lost,
For the want of a horse the rider was lost,
For the want of a rider the battle was lost,
For the want of a battle the kingdom was lost,
And all for the want of a horseshoe-nail.
Benjamin Franklin

The County's improper intervention as a cross-claimant never vested Judge Cybulski with the authority to hear any claims on behalf of the County. Even assuming arguendo that it was proper, the County never actually plead a claim. Therefore, for the want of the County appearing, Judge Cybulski's judgment is void.

Because Sayers' arguments regarding dismissal of a void judgment were grounded in existing law and based upon admitted facts, the Rule 11 motion granted in the County's favor was clearly inappropriate.

7. ARGUMENT

A. The Judgment Against Sayers is Void as a Matter of Law

A party is entitled to relief from a final judgment if that judgment is void. Mont. R. Civ. P. 60(b)(4). It does not matter when such relief is sought because "an

invalid judgment is no judgment at all" and therefore has no preclusive effect. *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir.1991).

Judgments and orders have been challenged as "void" under Rule 60(b)(4) for reasons including, but not limited to, lack of jurisdiction, due process violations, and mootness. *Greater Missoula Area Fedn. of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 21 (internal citations omitted).

Here, because Chouteau County intervened by way of an improper crossclaim, the judgment should be dismissed as void.

i. The County never became a party and the judgment is therefore void.

Rule 24 allows a person to intervene themselves into existing litigation by right or permission. M.R.Civ.P. 24. Thus a stranger to the litigation can become a party. By way of comparison, cross-claiming presupposes that the person is already party and may only be asserted against a co-party. M.R.Civ.P. 13(g) ("A pleading may state as a crossclaim any claim by one party against a coparty") (see also § 1431 Crossclaims—In General, 6 Fed. Prac. & Proc. Civ. § 1431 (3d ed.)).

For purposes of comparison, "a crossclaim that does not assert a plea for affirmative relief but merely alleges a complete defense against the opposing party's claim does not fall within Rule 13(g). A pleading of this type, although it contends that the crossclaimant is completely blameless and not subject to any liability with respect to plaintiff's claim, does not raise any issue between the coparties and is not properly assertable under the crossclaim provision." *Id.*

If the County had intervened as a co-party with Sayers it could have plead a cross-claim against Sayers. Alternatively, the County (after intervention), Worrall, Hankins or Gannon could have plead a counter-claim against Sayers for vexatious litigation[1]. However, there is literally no procedure by which a party can intervene as a cross-claimant against an adverse party. Moreover, a cross-claim cannot be a defense in disguise.

While this Court has not had an opportunity to directly address the issue of whether a party can plead crossclaims and counter-claims interchangeably, the federal courts have. The US District Court of Montana addressed the issue of against whom cross claims could be made. *Keller Transp., Inc. v. Wagner Enters.*, 873 F. Supp. 2d 1342, 1353-54 (D. Mont. 2012). There the court ruled that, "[u]nder Mont. R. Civ. P. 13(g), cross claims are permissive in nature — vesting a party with discretion to either assert any cross claim it may have against a coparty, or reserve it for later independent litigation. *Id. a*t 1353 (citing *Whittaker v. Schreiner*, 174 Mont. 232, 570 (Mont. 1977)). Chouteau County was never a coparty with Sayers. It did not become a coparty as a result of its crossclaim. The judgment in Chouteau County's favor is void as a matter law and should be dismissed.

ii. The County never plead a cross-claim or counter-claim against Sayers and therefore the judgment is void.

[1] The County, Worrall, Hankins and Gannon all failed to plead any claims against Sayers.

Assuming arguendo, that the district court should have deemed the improper cross-claim as a counterclaim, the judgment would still be void because, regardless of the title, the County never actually plead a claim. Because the County never plead a claim, the dismissal of Worrall, Hankins and Gannon also had the effect of dismissing the County.

Mont. R. Civ. P. 13(a), (b) and (g) all govern claims within pleadings. M.R.Civ.P. 13(a), (b) and (g). Pursuant to M.R.Civ.P. 8(a), a pleading must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." M.R.Civ.P. 8(a). A plain reading of the statute makes clear that there must actually be a claim asserted. Here, the County failed to allege any claim whatsoever. In other words, Judge Cybulski allowed the County to, sua sponte, allege a claim after the case had been dismissed.

By way of comparison, in Halloran v. Trex Co., this Court determined that a claim should be dismissed for failure to state a claim upon which relief may be granted where a party that expressly stated a claim for relief failed to allege a factual basis for the claim. *Halloran v. Trex Co.*, 2007 MT 91N, ¶¶ 16-18. In so finding this Court interpreted M. R. Civ. P. 8(a) to require a pleading contain three simple elements: (1) a disclosure of the facts that are intended to be proven, (2) the facts must disclose the necessary elements of the claim, and (3) a demand for relief. *Id.* at ¶ 16 (citing Kunst v. Pass, 1998 MT 71, ¶ 35,).

This case is similar to Halloran with the exception that the County never actually stated a claim. Moreover, one could not expect a pro se party to be able to discern a claim from the factual allegations of the County. When Worrall, Hankins and Gannon were dismissed, for want of a cognizable claim, so too was the County.

Jurisdiction is the right to hear and determine an issue. *Corban v. Corban*, 161 Mont. 93, 96-7 (Mont. 1972). The judgment was based on an issue that was not presented and therefore the court lacked jurisdiction. Without jurisdiction, the judgment is void.

B. Sayers Motion to Dismiss Had a Good Faith Basis in Law and in Fact.

Rule 11, Montana Rules of Civil Procedure, governs the filing of pleadings and papers in an action. Rule 11 provides in pertinent part that:

> By presenting to the court a… written motion… an attorney or unrepresented party certifies to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;…

Mont. R. Civ. P. 11(a)

Rule 11 provides two essential bases for imposition of sanctions. First, there is the frivolousness prong, which requires that a pleading be "1) well grounded in

fact; or 2) warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *D'Agostin v. Swanson*, 240 Mont. 435, 445 (1990).

The district court concluded that Sayers violated Rule 11 by failing to have a good faith basis in fact for his Rule 60(b)(4) motion to dismiss. Sayers explanation as to why the motion to dismiss is proper is presented at length above. As such, Sayers will address the district court's specific findings of fact and not repeat the legal basis for the claim.[2]

i. Sayers' Rule 60(b)(4) Motion to Dismiss was not precluded by law.

Judge Cybulski concluded incorrectly that a Rule 60(b)(4) motion could be barred by time, appellate preclusion, and res judicata. As is argued above, Sayers position is that the frivolous litigant judgment is void. Each of the three foregoing conclusions of the district court mistakenly presume that the motion to dismiss is based on a valid judgment.

Judge Cybulski found that Sayers' Rule 60(b)(4) motion was required to comply with the deadlines set forth in Rule 59(b) and that the voluntary dismissal of Sayers appeal precluded the motion. "In order to have a preclusive effect, a final judgment must be a valid judgment because an invalid judgment is no judgment at all." *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir.1991). As a result,

[2] The district court's factual findings or interspersed in its findings of fact and conclusions of law. All such findings, regardless of placement, are addressed below.

"[t]here is no time limit on an attack on a judgment as void under Rule 60(b)(4). *Shields v. Pirkle Refrigerated Freightlines*, 181 Mont. 37, 45 (1979).

Mont. R. Civ. P. 60(c) controls the timing of Rule 60(b)(4) motions to dismiss. M.R.Civ.P. 60(c). While it restricts the time for filing the other Rule 60(b) motions there is no such restriction on Rule 60(b)(4).

As to res judicata barring Sayers' motion to dismiss, "only a valid judgment may be the basis of the application of res judicata." *Mt. W. Bank, N.A. v. Glacier Kitchens, Inc.*, 2012 MT 132, ¶ 14. (citing James Wm. Moore, Moore's Federal Practice, Vol. 18, § 131.30(1)(a) (3d ed., Matthew Bender 2012)). That is the case because a void judgment is not a judgment at all and therefore always subject to dismissal. *Mountain West Bank, N.A. v. Glacier Kitchens, Inc.*, 2012 MT 132, ¶ 16.

ii. Sayers' Rule 60(b)(4) Motion to Dismiss was made on the basis that the improper cross-claim invalidate the County's claim.

The district court conflates the rules on intervention and cross-claims in concluding that Sayers' Rule 60(b)(4) motion to dismiss had no basis in fact. Judge Cybulski mistakenly ruled that Sayers' motion to dismiss was made on the basis that the County was an improper party. Sayers' motion to dismiss was narrowly tailored; "Choteau County's cross-claim was improper. Therefore this Court's findings of Fact, Conclusions of Law and Order re Cross-Claimant Choteau's Motion for Summary Judgment/Vexatious Litigant stemming from that cross-claim is void as a matter of law." CR. 81, p. 4. Or, as Judge Cybulski concluded "Sayers

deliberately…asserted that Chouteau County's intervention was an improper cross-claim that could only be brought against a co-party."[3] CR 101, p.8.

Therefore, the Robert Sayers Group's Rule 60 motion was made in good faith and proper pursuant to all of its legal authority and reasoning they presented to opposing counsel and, most importantly, to this Court.

8. CONCLUSION

The County, and Judge Cybulski, are clearly frustrated with Sayers. But, frustration does not justify disregarding the rules of civil procedure. The County erred in how it came into the litigation and that relied upon that error to conclude it entirely in its own favor while Sayers proceeded pro se. The Rule 60(b)(4) motion was made to correct that error and the Rule 11 motion for sanctions was improper. The district court committed reversible error on both accounts.

DATED this 20 January 2020.

Respectfully submitted,

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[3] Sayers disagrees with the omitted portion of the quote that the assertion was "without candor". Sayers was very much open and honest in this contention.

CERTIFICATE OF SERVICE

I hereby certify, this 20 January 2020, that a true and accurate copy of the foregoing document was served on the following persons by the following means:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 365, is not more than 3,995 words, excluding certificate of service and certificate of compliance.

Dated this 20th day of January, 2020.

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