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Counsel for Plaintiff/Appellant Kole Fitzpatrick

IN THE SUPREME COURT OF THE STATE OF MONTANA**Supreme Court Cause No. DA 20-0237**KOLE FITZPATRICK, DBA
FITZPATRICK TRUCKING,

Plaintiff/Appellant,

v.

TRAIL CREEK ENTERPRISES, LLC,
JASON SUBATCH, WEST STATES
EQUIPMENT COMPANY, AND JOHN
DOES 1-60,

Defendants.

WESTERN STATES EQUIPMENT
COMPANY,

Defendant/Appellee

**RESPONSE BRIEF IN
OPPOSITION TO SUBATCH'S
MOTION TO DISMISS APPEAL****INTRODUCTION**

COMES NOW Plaintiff Kole Fitzpatrick, DBA Fitzpatrick Trucking ("Fitzpatrick" or "Plaintiff"), by and through counsel of record, Terryl T. Matt, Matt Law Office, and hereby submits this Response Brief in Opposition to Trail Creek Enterprises, LLC and Jason Subatch's Motion to Dismiss Appeal. As set forth herein, Subatch is not a party to this appeal and has no

basis for seeking its dismissal. The district court entered a final judgment pursuant to M.R. Civ. P. 54(b) dismissing Fitzpatrick's claims against Defendant/Appellee Western States Equipment Company ("CAT"). Pursuant to M.R. App. 6(6) and M.R. Civ. P. 54(b), the final judgment against CAT is a final appealable judgment *as to CAT*. Subatch is not a party to this appeal and its motion to dismiss the appeal lacks merit.

PROCEDURAL HISTORY

On July 16, 2019, Fitzpatrick filed a Complaint against Trail Creek Enterprises LLC, Jason Subatch ("Subatch," collectively), and Western States Equipment Company ("CAT") in Sanders County District Court Cause No. 2016-CA-120 alleging: Claim and Delivery of Personal Property, Conversion, Mental Anguish/Emotional Distress, and Punitive Damages. A copy of the Complaint, without exhibits, is attached hereto as **Exhibit 1**. These claims arose from Subatch's improper removal of Fitzpatrick's 2006 930G CAT loader ("Loader"), from the CAT facility where it was being repaired, with no right or authority to do so. CAT moved to dismiss Fitzpatrick's claims against CAT pursuant to M.R. Civ. P. 12(b)(6). On February 13, 2020, the District Court granted CAT's motion to dismiss, removing CAT from the case on the grounds that it did not have reason to know that Mr. Subatch was not authorized to take possession of the Loader after it completed repairs. A copy of the District Court's Order Granting CAT's Motion to Dismiss is attached hereto as **Exhibit 2**. Fitzpatrick contested that assertion in the proceedings below and does so again in this Appeal.

Following the District Court order granting CAT's motion to dismiss, CAT filed a Motion for Entry of Final Judgment pursuant to M.R. Civ. P. 54(b). On April 10, 2020, the District Court granted CAT's M.R. Civ. P. 54(b) motion and entered a final judgment in CAT's favor. A copy of the District Court's Order granting CAT's Motion for Entry of Final Judgment is attached hereto as **Exhibit 3**. In its order, the District Court conducted an M.R. Civ. P. 54(b)

analysis and held:

There is no just reason for delaying entry of final judgment. The Order represents the final determination by this Court on the issue between Plaintiff and Western Sttes. A review of the factors considered by the Montana Supreme Court leads decisively to this conclusion...

Ex. 3 at 3. In addition to entering its order granting CAT's M.R. Civ. P. 54(b) motion, the District Court also entered a judgment on the same date, stating, in relevant part:

JUDGMENT is hereby entered as follows:

Plaintiff's complaint against Defendant Western States Equipment Company is hereby DISMISSED WITH PREJUDICE.

A copy of the District Court's Judgment is attached hereto as **Exhibit 4**.

Because the District Court entered a final judgment under M.R. Civ. P. 54(b), Fitzpatrick filed a Notice of Appeal on April 24, 2020. The Notice of Appeal lists Trail Creek Enterprises LLC and Jason Subatch as defendants, but names CAT, and only CAT, as the appellee. Fitzpatrick's claims against Subatch remain pending before the District Court in Cause No. 2016-CA-120.

ARGUMENT

I. SUBATCH'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE DISTRICT COURT ENTERED A FINAL JUDGMENT AS TO CAT AND SUBATCH IS NOT A PARTY TO THIS APPEAL.

In seeking dismissal of this appeal, Subatch is simply confused on some basic procedural facts. First of all, Subatch is not a party to this appeal and does not have standing to seek its dismissal. Fitzpatrick's claims against Subatch remain pending before the District Court in Cause No. 2016-CA-120, and the present appeal does nothing to deprive the District Court of continuing jurisdiction over those claims. This appeal relates only to the District Court's dismissal of Fitzpatrick's claims against CAT.

Secondly, contrary to Subatch's assertions, the District Court in fact did enter a final

appealable judgment as to Fitzpatrick's claims against CAT pursuant to M.R. Civ. P. 54(b). Ex. 3 and 4. Therefore, Subatch's motion too dismiss should be denied and Fitzpatrick should be permitted to proceed with the present appeal.

As a general rule, this Court assumes jurisdiction of an appeal in a civil matter only where a final judgment has been entered. See Rule 1(b)(1), M.R. App. P. In an action involving multiple parties, such as the underlying case here, a final judgment as to one or more but fewer than all of the parties may be entered only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. See M.R. Civ. P. 54(b); *Shull v. First Interstate Bank of Great Falls*, 262 Mont. 355, 357, 864 P.2d 1268, 1269 (1993).

Pursuant to M.R. App. P. 6(6):

a district court may direct the entry of final judgment as to an otherwise interlocutory order or judgment, only upon an express determination that there is no just reason for delay, pursuant to M. R. Civ. P. 54(b). In so doing, the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final, and the court shall, in accordance with existing case law, articulate in its certification order the factors upon which it relied in granting certification, to facilitate prompt and effective review.

M.R. Civ. P. 54(b) provides, in turn, that "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."

Ignoring the facts of this case, Subatch asserts "it is clear that the Court's Order was not a final judgment that ends the litigation on the merits" and "[t]he Court's dismissal of CAT does not expressly determine that there is no just reason for delay pursuant to [M.R. Civ. P. 54(b) and M.R. App. 6]." Subatch apparently did not see or review the District Court's Order Granting Defendant Western States Equipment Company's Motion for Entry of Final Judgment. Ex. 3. In

that Order, the District Court holds specifically “[t]here is no just reason for delaying entry of final judgment” and, one by one, analyzes “[t]he specific factors that a Court must weigh in reviewing the propriety of a Rule 54(b) motion”. Ex. 3.

The District Court concludes its order holding:

Accordingly, based on review of the factors set forth above, the Court certifies as final its Order Granting Western States Equipment Company's Motion to Dismiss as final and hereby directs that Judgment be entered against Plaintiff in favor of Western States' dismissing Plaintiff's complaint against Western States with prejudice and Western States is entitled to recover its costs.

Ex. 3 at 5. The District Court therefore entered a final judgment meeting the requirements of M.R. Civ. P. 54(b) as to Fitzpatrick’s claims against CAT. Pursuant to M.R. App. 6(6), that final judgment is appealable. Subatch’s argument to the contrary simply disregards the existence of the District Court’s Order Granting [CAT’s] Motion for Entry of Final Judgment. Ex. 3.

Additionally, Subatch lacks standing to intervene in this appeal with its motion to dismiss. “In order to have standing on appeal, a party must be able to show an interest in the subject matter of litigation which has been injuriously affected by the judgment or order.”

Daniels-Sheridan v. Bellanger, 2001 MT 235, ¶ 22, 307 Mont. 22, ¶ 22, 36 P.3d 397, ¶ 22.

Subatch has made no such showing here, and therefore lacks standing to challenge this appeal.

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CONCLUSION

As set forth herein, Subatch's motion to dismiss is premised on a misapprehension of the record and procedural posture of this appeal. The District Court entered a final judgment as to Fitzpatrick's claims against CAT pursuant to M.R. Civ. P. 54(b). That final judgment is appealable pursuant to M.R. App. 6(6). Additionally, Subatch is not a party to this appeal and lacks standing to intervene. Therefore, it is respectfully requested that the Court deny the Motion to Dismiss Appeal.

Dated this 22nd day of May, 2020.

Respectfully submitted,



Terry T. Matt
Counsel to Appellant Kole Fitzpatrick

CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of May, 2020, I served a true copy of the foregoing Response Brief to Motion to Dismiss upon all parties to the action that is subject of this appeal by electronic delivery:

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Dated this 22nd day of May, 2020.



Terryl T. Matt
Counsel to Appellant Kole Fitzpatrick

CERTIFICATE OF SERVICE

I, Terryl T. Matt, hereby certify that I have served true and accurate copies of the foregoing Brief - Other to the following on 05-22-2020:

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Electronically Signed By: Terryl T. Matt
Dated: 05-22-2020