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Attorneys for Respondent/Appellant

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 21-0153

In re the Marriage of:

CHRISTOPHER J. WEIGAND,

Petitioner and Appellee,

and

BRYTANY ANNE CATTANEO,

Respondent and Appellant.

**RESPONSE TO APPELLEE'S
MOTION TO DISMISS APPEAL**

On Appeal from the Montana Sixth Judicial District Court,
Park County, The Honorable Brenda R. Gilbert, Presiding

COMES NOW, Brytany Anne Cattaneo ("Bryt"), Appellant and Respondent herein, by and through her counselors of record, Caitlin Pabst and Kristofer Baughman of Element Law Group, PLLC, and respectfully moves this Court to summarily deny Appellee's Motion to Dismiss.

Appellant is further requesting attorney fees and costs incurred as a result of having to respond to this motion pursuant to M.R.App. P., Rule 19(5) because Appellee's Motion to Dismiss was frivolous, vexations, and was filed without substantial or reasonable grounds, even *after* having been advised of the application of M.R.Civ.P., Rule 58(e) in the instant action by undersigned counsel.

RESPONSE BRIEF

Montana Rules of Appellate Procedure, Rule 6(3)(j) provides in pertinent part:

(3) In civil cases, an aggrieved party may appeal from the following, provided that the order is the court's final decision on the referenced matter:

[...]

(j) From a contempt order in a family law proceeding when, and only when, the judgement or order appealed from includes an ancillary order entered as a result of the contemptuous conduct which affects the substantial rights of the parties involved.

Montana Rules of Civil Procedure, Rule 58(e) provides:

A judgment, even though entered, is not considered final for purposes of appeal under Rule 4(1)(a), M. R. App. P., until any necessary determination of the amount of costs and attorney fees awarded, or sanctions imposed, is made. The district court is not deprived of jurisdiction to enter its order on a timely motion for attorney fees, costs, or sanctions by the premature filing of a notice of appeal. **A notice of appeal filed before the disposition of any such motions shall be treated as filed on the date of such entry.** (emphasis added)

In Appellee's Motion to Dismiss, he incorrectly asserts that Appellant's *Notice of Appeal* was prematurely filed because the district court's March 30, 2021 *Findings of Fact, Conclusions of Law and Order* is not final because the amount of attorney's fees and costs

is yet to be determined. This argument fails because although the order is not yet final, there remains a carveout exception under Rule 58(e) that applies in this exact circumstance.

The district court's Findings of Facts, Conclusions of Law and Order granted Appellee's motion for attorney fees by providing an award of attorney's fees and costs for Appellee. There are no more pending motions at the district court level. That which remains to be determined is solely the *amount* of attorney's fees, and, pursuant to Rule 58(e), M.R.Civ.P., the district court still has jurisdiction to make that determination, but *only* that determination.

Rule 58(e), M.R.Civ.P. contemplates such situations in which a notice of appeal is filed after the final order is issued, but *before* the amount of attorney's fees and costs is determined. Notably, the remedy is not a dismissal of the appeal. Instead, if a notice of appeal is filed before the disposition of any such motions it “**shall be treated as filed on the date of such entry.**”

The Montana Supreme Court is clear on the application of Rule 58 in cases where a notice of appeal has been filed prior to the district court issuing an order for fees and/or costs.

Entry of judgement begins the time period in which appeal may be made. **No provision in law mandate that costs must be finally taxed before appeal may be had.** Because of this and because costs are not substantially linked to the merits of and procedures leaning to judgment, there is no meaningful reason why the filing of notice of appeal should strip the jurisdiction of the District Court to issue an order on a pending bill of costs. (emphasis added)

Powers Mfg. Co. v. Leon Jacobs Enters., 216 Mont. 407, 412, 701 P.2d 1377, 1380, 1985 Mont. LEXIS 814, *8.

Further, “the time limits for filing an appeal are mandatory and jurisdictional. Absent compliance, [the Montana Supreme Court does] not acquire jurisdiction to determine an appeal on the merits.” *See O’Connell v. Heisdorf*, 202 Mont. 89, 91, 656 P.2d 199, 200, 1982 Mont. LEXIS 1005, *3-4 (internal citation omitted). It follows that merely filing an objection to the amount of attorney fees and costs claimed does not suspend the running of a judgement for purposes of filing an appeal.

Here, had Appellant waited until after the district court’s determination of the *amount* of attorney’s fees and costs to be awarded, her appeal would have been dismissed as untimely because it would have been filed well-after the 30-day deadline, which fell on April 30, 2021. Additionally, attorney’s fees and costs are not *substantially linked* to the merits of the issues currently on appeal. Because an appeal in this exact situation is clearly contemplated under M.R.Civ.P., Rule 58(e), it is appropriate for this Court to summarily deny Appellee’s Motion to Dismiss.

M. R. App. P. 19(5) provides that this Court may “award sanctions to the prevailing party in an appeal . . . determined to be frivolous, vexatious, filed for purposes of harassment or delay, or taken without substantial or reasonable grounds.” *Davis v. Smith (In re N.C.D)*, 2019 MT 169N, P17, 2019 Mont. LEXIS 267, *10-11, 397 Mont. 551, 455 P.3d 439, 2019 WL 3297000. Here, undersigned counsel previously addressed the application of M.R.Civ.P., Rule 58(e) with opposing counsel via email

correspondence on April 21, 2021, but she filed her meritless Motion to Dismiss anyway. She even cited to Rule 58(e) in her own motion. Appellant has now been tasked with respondent to the frivolous and vexations Motion to Dismiss. Accordingly, Appellant requests the Court for attorney's fees and costs incurred by having to respond to the Motion.

CONCLUSION

WHEREFORE, Appellant respectfully requests the Court for the following relief:

- 1) That this Court DENY Appellee's Motion to Dismiss and any request for attorney fees and costs therein;
- 2) That this Court GRANT Appellant's request for attorney fees and costs incurred as a result of having to respond to the Motion to Dismiss; and
- 3) For any such further relief this Court deems just and proper.

Dated this 6th day of May 2021.

ELEMENT LAW GROUP, PLLC

/s/ Caitlin Pabst
Attorney for Respondent/Appellant

RESPONSE TO APPELLEE’S MOTION TO DISMISS APPEAL

I hereby certify that I have filed a true and accurate copy of the foregoing RESPONSE TO APPELLEE’S MOTION TO DISMISS APPEAL with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing RESPONSE TO APPELLEE’S MOTION TO DISMISS APPEAL upon the Clerk of the District Court, each attorney of record by eService or email as follows:

Dated this 6th day of May 2021.

Anna Williams
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/s/ Caitlin Pabst
Caitlin Pabst
Element Law Group, PLLC

CERTIFICATE OF SERVICE

I, Caitlin Terese Pabst, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to Dismiss to the following on 05-06-2021:

Kristofer S Baughman (Attorney)
113 E. Oak Street, Suite 2D
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Representing: Brytany Anne Cattaneo
Service Method: eService

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Electronically Signed By: Caitlin Terese Pabst
Dated: 05-06-2021