

FILED

01/03/2022

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 21-0181

JAVIER BAUTISTA-SCHEUBER

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JAN 03 2022

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Clerk of Supreme Court
State of Montana

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 21-0181

JAVIER BAUTISTA-SCHEUBER, Appellant and Respondent

**Motion to Avoid Rewarding Appellee (by either dismissing Appellee's
Response Brief's second, improved submission or dismissing it altogether) for
Appellee's Failure to Comply with Mont. R. of App. P. and the Court's orders**

V.

ALIA DAY FLOREN, Appellee and Petitioner

Appellee was contacted and informed about this motion. Although Appellee neglected to reply, it seems reasonable to assume that Appellee objects to the motion.

I hereby respectfully move the Court to avoid rewarding Appellee for Appellee's failure to comply with the Montana Rules of Appellate Procedures (MRAP) and the Court's orders.

On October 25th 2021, the Court granted Appellee a time extension giving Appellee "until December 1st 2021 to prepare, file and serve Appellee's Response Brief". However, per the Court's order of December 2nd 2021, Appellee's Response Brief, as prepared and submitted by Appellee's counsel on December 1st 2021, substantially failed to comply with MAPR Rules 11 and 12 (11(6)(b)(ii), 12(1)(a), 12(1)(d), 12(1)(g)). These deficiencies are not merely limited to minor formatting issues, but also refer to substantial weaknesses in the depth and solidness of the brief; as it, for example, "lacks, throughout the argument section, of sufficient citations to legal authorities, statutes and facts in the record". Furthermore, Appellee did not serve Appellee's Response Brief on Appellant, as required by the aforementioned Court order of October 25th 2021 (while Appellee mailed me a copy of the Court's December 2nd 2021 order, which the Clerk of Court had already provided, Appellee never served, neither by email nor ordinary mail, the non-compliant Response Brief due by December 1st).

Per the Court's December 2nd 2021 order, Appellee received instructions on how to improve their Appellee's Response Brief and was granted ten (10) additional days to re-submit it. However, it constitutes an unfair and undeserved advantage to reward Appellee with a second chance, specialized feedback and additional time to improve their brief, in return to their failure to meet the law and the Court's requirements. This is particularly so considering that the benevolence Appellee is

now receiving is in strict contradiction with District Court's and Appellee's counsel's own very severe standards against me (Appellant). Indeed, District Court did not allow me to appear at my dissolution final hearing, and Appellee got an all-wishes-come-true default ruling, just because District Court received my request to appear telephonically less than 15 minutes late (but still within the usual 15 minutes grace period). In that occasion, Appellee's counsel opposed my request to be allowed to appear telephonically, arguing that I should take responsibility and be held accountable for my lack of commitment with the case, because his client did not want to wait while I was "sitting in Spain doing whatever" I was doing. Fact of the matter was that I was not sitting in Spain, idle and disengaged, doing nothing. Rather I was locked down in New York City, struggling to survive through the worst days of the COVID crisis. I am blind and COVID finally made it completely impossible for me to travel to Montana for the hearing. Yet, even though District Court is normally expected to allow some wider latitude to self-represented litigants like myself, those less than 15 minutes of delay and District Court's very severe criteria left me no other option than to file the present appeal, in order to get relief from District Court's default judgement; regrettably for the burden it represents not only on me but also on the Court and the state.. From District Court Transcript:

Page 4:

"10 THE COURT: Well, I traditionally give people a

11 15-minute grace period in case there's difficulties with 12 parking
downtown.

13 MR. PAUL: That seems reasonable, Judge.

14 (Off the record.)

15 THE COURT: So while giving Mr. Bautista 15 minutes to appear for the
hearing that was set with him on the

17 phone when we scheduled it, the clerk received an e-mail from

18 him indicating he was not in the state"

Page 5:

"MR. PAUL: If he

11 cannot even appear today or make the effort to timely make his

12 motion and request such an appearance, I object that my client

13 is going to have to spend a considerable amount of time sitting

14 here while he sits in Spain and does whatever he does. But I

15 object on the basis that that motion for a phone appearance is

16 not timely."

"THE COURT: I would agree that his

motion to appear by phone is not timely as it came in after the time set for the
hearing to start"

Page 21:

"17 Q. Do you wish The Court to adopt this as your marital and

18 property settlement?

19 A. Yes."

Page 16:

"8 Q. Is it correct that your proposal was that he may have

9 those property items if he arranges contact through a third

10 party --

11 A. Yes.

12 Q. -- to collect them?

13 A. Yes.

14 Q. But that he should only have 60 days to do this, otherwise you need to
dispose of his items; is that what you

16 wish?

17 A. Yes.

18 Q. Okay."

Page 12:

"4 Q. If you motion The Court for an Order of Protection

5 would you wish The Court to grant that?

6 A. Yes.

13 THE COURT: And I will grant a lifetime Order of

14 Protection and have you draft that."

As the transcript's excerpts above show, less than 15 minutes of delay was all what Appellee's counsel needed to demand and proceed with my merciless slaughter, without even respecting my most basic right to be heard. Yet, now, on the other hand, as Appellee substantially fails to comply with MRAP requirements and the Court's order to serve the Response Brief, I have to see that not only is Appellee not help accountable, but it is even rewarded with a second chance and additional time to improve the quality of their brief. Myself (Appellant), I ran out of time to prepare my opening brief and had certainly made good use of additional time to improve it.

In summary, Appellee's substantial negligence to comply with the standards set forth by MRAP should not be rewarded with a second chance and additional time to improve Appellee's Response Brief; since it would constitute an unfair and undeserved advantage. Instead, at the most, Appellee's initial Response Brief should be taken 'As Is' (as it was initially submitted on the December 1st 2021 due date). Still, given that the Court's time and resources are limited, if it is the Court's opinion that Appellee's Response Brief's failure to meet the minimum standards of quality set forth by MRAP render it unworthy of the Court's time and consideration, then it should be reasonable that Appellee's Response Brief is

dismissed accordingly.

Respectfully submitted this 20th day of December of 2021.

Signature: JB

Printed Name: Javier Bautista-Scheuber

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief is proportionally spaced typeface of
14 points and does not exceed 1250 (1072) words.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2021, I filed this Motion with

the Clerk of the Montana Supreme Court and that I served copy to Appellee's counsel:

William J. Paul

210 East Pine St., Ste. 200, Missoula, MT 59802

Email Address: bcpaullaw@gmail.com

Signature: JB

Printed Name: Javier Bautista-Scheuber