

In the Supreme Court of the State of Montana

Case No. DA 22-0585

Timothy J. Whalen,
Plaintiff and Appellant,
and Elizabeth Bridges,
Plaintiff,

v.

Beartooth Electric Co-op, Inc.,
defendant and Appellee.

Brief of Appellant

On Appeal from the Montana 2nd Judicial District Court
Stillwater County, The Honorable Matthew Wald, Presiding

Appearances:

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Order Requiring Plaintiffs to Hire Counsel
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(docket 43)

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Judgment + Request for additional time
to seek Counsel (docket 44)

Order Denying Request for Ruling and
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Supplemental Appendix

Power of Attorney / Assignment of Claims
from Bridges to Whalen, dated Aug. 26, 2010

Correspondence Christopher Young to Judge Jones
dated Sept. 20, 2018 (incorporated into record
TR 9-20-18, p. 6 lines 11-16)

Elizabeth Bridges letter to Stinson, Young &
Whalen dated Jan. 2, 2019 with Envelope

Correspondence Scott Stinson to Judge Wald
dated April 29, 2019

Statement of the Issues

1. Did the District Court err in refusing to rule on Whalen/Bridges Motion for Summary Judgment which should have been granted
2. Did the District Court improperly rule that Whalen had no cognizable interest in the proceedings
3. Did the District Court Whalen and Bridges Due Process Rights under Article II Section 17 of the Montana Constitution by Dismissing all of their Claims with Prejudice

Statement of the Case

On August 17, 2011 Whalen/Bridges filed Complaint against Beartooth Electric Co-op for damages suffered as a result of the "Eagle Mountain Fire" which Beartooth caused when a negligently maintained Power Line was downed. That Fire destroyed all of the trees, fencing & other property on lot 15, Columbus Heights Subdivision, Stillwater County (Docket 1, DV 11-87)

Simultaneously, Whalen filed a companion case seeking relief for his loss of personal property situated on lot 15, styled as Ondessonk/Whalen v Beartooth, DV 11-88. (Docket #48)

On June 27, 2013 Beartooth was Sumsmons & Complaint (docket 9) and Beartooth filed Answer on July 8, 2013 (docket 10)

Whalen immediately began restoration work on the property including planting and watering trees, establishing a new cabin and schooling himself in Forestry practices (docket 16, 19 & 24). He prepared a Forest restoration plan and had it approved by the DNRC (docket 24)

Throughout this time Whalen also made a number of unsuccessful attempts to settle

the case with Beartooth and when these efforts failed tried unsuccessfully to hire legal counsel to represent himself and Bridges (docket 16, 19, 24, 37)

Whalen's neighbors and Stillwater County also filed lawsuits against Beartooth Electric claiming damages for loss of trees and fire fighting costs respectively, (Complaints and Answers in those cases are attached to docket 27) Beartooth Admitted Legal Responsibility for those Plaintiffs Damages (docket 27)

On the other hand Beartooth Denied liability in Whalen/Bridges case (docket 1 & 10)

Whalen asked Beartooth in Discovery the basis for that Denial of liability & none was provided (docket 27 attachments)

Whalen filed Motion for Summary Judgment on June 11, 2018 (docket 23) based upon the prior Admissions of Beartooth & the failure to provide any basis for denying liability in Discovery (docket 27)

Whalen made it clear that a ruling on his Summary Judgment Motion was key to bringing the case to trial (docket 29, page 5, last para)

Whalen also repeatedly asked for a ruling on

his Summary Judgment Motion - Aug. 2, 2018
(docket 30) - November 24, 2020 (docket 37, item 2)
and - August 22, 2022 (docket 44)

On August 30, 2022 the lower court claimed
that it was premature to rule on the Summary
Judgment Motion until the issue of (Legal) Counsel
was dealt with (docket 45, p 1, line 28 - p 2 line 3).

The lower court raised this issue of - Legal
Counsel for the first time on April 29, 2022.
(docket 45, p 2, lines 7+8 and TR 4-28-22, p 9
line 19-23, p 10 line 23 - p 11, line 2)

Prior to April 28, 2022 the court was more
than willing to entertain Whalen / Bridges Summary
Judgment Motion, even scheduling a hearing for it
on November 20, 2018 at 1:30 pm (docket 31)

Then at Whalens request that hearing was
reserved because he had several attorneys
reviewing the case with the possibility of
entering an appearance (TR 9-20-18, p 4, lines 7-20)
& Coogan letter to the court (lodged in the court
file) and Young letter to the court dated 9-20-18
(lodged in the court file) (TR 9-20-18, p. 6 line 11-16)
Both letters attached hereto for the courts reference.
This reservation was intended to allow Counsel
if retained to participate in the hearing
on this motion (TR 9-20-18, p 4 line 19 & 20)
(TR 4-28-22, p 8 lines 2-12)

On March 30, 2022 the lower court set a hearing for April 28, 2022, under Rule 9 requiring Whalen "to show cause" why the case was not moving forward. (docket 38)

At the time of that hearing on April 28, 2022 the court forbid Whalen from introducing evidence concerning Rule 9 Failure to prosecute, under threat of being held in Contempt (TR 4-28-22 pp 5-10; docket 44, items 1-5)

On August 16, 2022 the court ordered Whalen to find legal counsel or the case would be dismissed (docket 43)

The Court Dismissed the Case on Sept. 13, 2022 (Docket 49)

Statement of Facts

Whalen purchased Lot 15, Columbus Heights Subdivision (hereafter "the property") located NW of Columbus MT from his parents (docket 41, item 1-3) in January 1982.

Whalen transferred the property to Elizabeth Bridges on November 9, 1983 (docket 41, item 4)

From the time of the transfer to Bridges until September 2009, when a wildfire destroyed the property and everything on it, Whalen continued to treat the property as his own. For example he visited the property throughout that time along with members of his family (docket 25, Coogan Deposition pp 9-11, 14, 19-20; Docket 26, Jerry Whalen Deposition pp 18, 20, 25-27, 27-29). He paid all the property taxes throughout that period of time (docket 41, items 5-32), paid the burn permits (docket 41, item 35) obtained the physical address from the GIS office (docket 41, item 34) and paid the share of Lot 15 of the cost to bring electrification to the subdivision in the amount of \$2,740 in 2007 (docket 41, items 39-44) and was otherwise trying to improve the property (Jerry Whalen depos. p. 21, lines 16-17)

After the fire on September 3, 2009 (Eagle Mountain Fire), Whalens neighbors filed suit against

Beartooth Electric for negligence amongst other claims (docket 27 attachments) and Beartooth promptly admitted legal Responsibility for these neighbors damages which consisted solely in lost trees (docket 27, attachments - Complaint & Answer in Cause DV11-28) and Beartooth's Insurer promptly paid these neighbors \$6,803,459.51 for the loss of those trees on Feb. 23, 2012. (docket 27, last 2 exhibits)

Whalen/Bridges suit (DV11-87) filed on August 17, 2011 was therefore known to Beartooth Electric and its Insurer, Federated Insurance, the Complaint being a matter of Public record, even though not yet served. The prayer for relief in Whalen/Bridges Complaint, sought damage for loss of trees in the potential amount of \$3 Million (docket 1, para 2) Nevertheless, Federated paid out all of the policy limits 6 months later, reserving only \$40,000 for Whalen/Bridges claim. (docket 24, p. 5, item 15) This, even though the damage sustained on the Whalen/Bridges property was caused by the same Fire, for which Beartooth had accepted legal Responsibility.

On August 26, 2010 Bridges executed both an Assignment of all of her interest in any loss, along with Power of Attorney to prosecute those claims & do any & all things connected therewith to Whalen (docket 3, item 1 - copies attached hereto)

Standard of Review

Preface

Whalen is no longer with access to a law office or any of the research tools typically available to Courts and Lawyers and only has access to Google Internet searches at the Columbus library

Having said that Whalen believes the Standard of Review on the issues he raises are as follows:

1. Motions for Summary Judgment are reviewed De Novo on Appeal because the Appellate Court is in just a good position as the lower court to review the record for issues of Fact

2. The refusal to allow Whalen the opportunity to establish his interest in the Claims against Beartooth is a legal Issue

3. The refusal to allow Whalen to present evidence on Rule 9 after the Court ordered a "Show Cause" hearing on same is either a De Novo issue (concerning any Facts) and a legal Issue concerning Whalen / Bridges Due Process Rights

Summary of Argument

re:

Summary Judgment

Summary Judgment in favor of Whalen/Bridges on the issue of liability was proper because their allegations concerning liability were identical to those previously pled by Stillwater County & Whalens neighbors in earlier lawsuits (DV 11-26 & DV 11-28). In both those cases Beartooth admitted "Legal Responsibility" for all those parties proven damages.

Furthermore, Beartooth provided No justification or basis for denying liability in Response to Discovery served by Whalen/Bridges.

Rule 11(b)(1) M.R.Civ.P provides that a lawyers certification of a pleading (Beartooths Answer in DV 11-26 & DV 11-28 is not presented for any improper purpose. They are bound by their Admission of "Legal Responsibility"

The courts delay and then refusal to rule on Whalen/Bridges Motion for 4 Years, delayed the proceedings for 4 Years and prevented Whalen/Bridges from obtaining legal Counsel

Argument - Summary Judgment

The purpose of both the Pleadings (Complaint and Answer) and Rule 56 (Summary Judgment) is to narrow and define the issues to be tried.

Rule 56(a) does not require a movant to provide supporting affidavits in order for relief to be granted.

Whalen/Bridges in their claim against Beartooth alleged 4 basis for relief. Namely: Negligence, Negligence per-se, Strict Liability, Spoilation of Evidence (Count II, Count I, Count III, Count IV - Docket 1)

In Cause DV 11-26 Stillwater County alleged identical claims for relief, seeking reimbursement for fire fighting costs against Beartooth (complaint attached to docket 27)

Likewise, in Cause DV 11-29 styled Paulino et al. v. Beartooth Whalen's neighbors alleged identical claims (complaint attached to docket 27)

In other words, Whalen/Bridges pleadings were identical to those of Stillwater County & his neighbors Complaints.

Beartooth Admitted "Legal Responsibility" for any damages Stillwater County could prove

that they suffered as a result of the fire (called the Eagle Mountain Fire) (docket 27 & attachments)

But in Whalens case Beartooth denied liability (Docket 2, p 2, items 8-13)

Since Whalen/Bridges property was destroyed by the same fire which destroyed his neighbors property and caused Stillwater County to incur firefighting costs, it follows that they were also liable, "legally responsible" for any damages proven by Whalen/Bridges

Based upon these Admissions (Legal Conclusions) of Beartooth, without any evidence of liability whatsoever being furnished, Beartooth paid out to Whalens neighbors, the sum of \$6,803,459.51 (Docket 27, last 2 exhibits)

In Fact all Insurance Proceeds available under Beartooths Insurance Policy with Federated was paid out in a "Global Settlement" to Whalens neighbors and Stillwater County, Excepting the sum of \$40,000. (docket 24, p 5, item 15)

The refusal of Beartooth to admit liability (Legal Responsibility) impairs Whalens ability to retain legal counsel to represent himself and Bridges because the amount available under

the Insurance Policy with Federated is less than the estimated cost of proving liability which is \$25-50,000 (docket 44, p. 3, item 10). This is particularly true because Whalen is an indigent party (Appellate Motion to Proceed without payment of filing fee). And Bridges has no interest in the property or litigation & refuses to be responsible for any costs incurred in establishing liability (Bridges letter dated Jan. 2, 2019, docket 41, item 33).

This tactic by Beartooth was obviously designed to force Whalen to accept a tiny payment in relation to his actual damages, even though Beartooth has freely admitted responsibility for starting the fire that destroyed Whalen's property.

If the Rules of Civil Procedure are to mean anything, both Rule 56 pertaining to Motions for Summary Judgment and Rule 8, specifically Rule 8(e) requiring admissions in pleadings to be construed to do justice, then Whalen (Bridges) are entitled to Summary Judgment on liability.

This Court is in as good a position to examine the Pleadings and Record as is the lower Court & should issue order requiring admitted liability of Beartooth upon remitur.

Summary of Argument re:

Real Party in Interest

Although Bridges was the owner of record of Lot 15, Columbus Heights Subdivision, she openly disclaimed any interest whatsoever in the property both before and after the fire caused by Beartooth on Sept. 3, 2009.

Whalen on the other hand, who had transferred the property to Bridges in 1983, continued to exercise dominion over the property and treat it as his own, including paying all the property taxes and other assessments against the property including paying for access to the right to tie into Beartooth Electric lines, and he otherwise improved the property before the fire. Therefore at the time of the fire he had the sole interest in the property & was the only (sole) person damaged by the fire loss.

Nevertheless, if Bridges did have any interest or loss from the fire by virtue of her recorded interest that interest was transferred to & merged with Whalens prior to suit being filed.

The lower court refused any opportunity to Whalen to establish his interest prior to ruling he had no interest & Dismissing the Case

permits (docket 41, item 35) and paid for the share of lot 15 of the cost to bring electrification to the subdivision in 2007 (docket 41, items 39-44)

In denying that Whalen had no interest in the property the court relied solely on Rudloff v. City of Billings, 260 Mont. 371, 374, 860 P.2d 140, 142 (1993) which contains no analysis & in an offhand way merely states that in a dispute involving real property, the party vested with legal title is the real party in interest (p. 4 of the decision; S. Ct. No 93-046). The court's main issue with Rudloff was that he had not amended his pleadings when he sold the property to another in order to mitigate his damages. In Rudloff, you had the real issue of a new owner coming into the picture. The Appellate Court never found that Rudloff was no longer a Real Party in Interest even though he no longer owned the property. Only that he should have added the new party when he sold his interest.

The fact is, that a person who has an equitable interest in property is also a Real Party in Interest. To hold otherwise would negate naming as parties, those with possible claims in quiet Title Actions, or those claiming Adverse Possession or Prescriptive Easements from ever being able to bring claims & file actions to obtain judgment.

on those claimed rights.

Obviously Beartooth understood this, because in their Brief on the issue (docket 42, p 2) they argued that Bridges should be dismissed - wrongly of course - but added "whether Mr. Whalen has any viable claims in his own name can be addressed later".

Later never came.

Whalen was never given an opportunity to establish his interest in the property - by Hearing or otherwise.

Regardless, any interest Bridges had was transferred to Whalen by virtue of the Assignment & POA.

The lower court disposes of that fact by relying on Sagorin v. Sunrise Heating & Cooling LLC, 2022 MT 58, ¶ 18, 408 Mont. 119, 127. But that case is inapposite because it does not involve private parties, but rather a business that was an LLC and an assignment to circumvent a clear statutory requirement. No such situation exists here.

Although the Court expressed concern in its order (docket 43, p 4) that without Bridges participation disposing of the action could leave an existing party exposed to double, multiple or inconsistent obligations, Beartooth showed no such concern.

and argued strenuously in its brief for Bridges dismissal (docket 42, p2) At the same time Beartooth acknowledged Whalens interest could be determined at a later date (ibid)

Interestingly, the court was completely unconcerned about Bridges interests, dismissing all her claims without any actual notice to her (docket 47)

In its order the lower court never addressed the substance of Whalens arguments (docket 43, p 3) regarding the assignment & merger of Bridges interests, if any, with Whalens by virtue of the assignment. The lower court seems to mock Whalens Constitutional Authorities, stating Whalen has offered no "cases" to support his position as if the Montana Constitution is the poor step-child to "cases".

Similarly the lower court denigrates the AM Jur authorities offered in Whalens brief, without analysis.

But the AM Jur. authorities demonstrate what the general consensus among the states on the affect of assignments and there should be some ground for diverging from this consensus. Particularly since they are based upon the Common Law which has been enshrined to be the law of Montana.

absent contrary statutory enactment 1-1-109 MCA
Montana also follows the laws of other
jurisdictions in the country where nothing has
been promulgated in Montana 1-1-107 MCA

The common law rule on Assignments is set
forth in Whalens Brief as an attachment to it
(docket 40) and provides that the assignee

"may use the name of the assignor
in an action at law" where the "whole
of an entire demand is assigned to one
person or party"

6 AM Jur. 2d Assignments §132 at p. 313
(1963 Edition)

That is precisely the case here. Bridges
assigned her entire interest to Whalen

Articles II, section 16 & 17 of the Montana
Constitution guarantee Parties access to the
Courts (no gate keeper such as an Attorney
is provided for) and speedy remedy afforded
for every injury of person, property or character
and no person shall be deprived of property
without Due Process of law.

The AM Jur author re-enforces these fundamental
rights when it states with respect to Parties
as follows:

"... a party is entitled to prosecute a civil action as the real party in interest when he or she establishes an actual and justiciable interest in the subject matter of the litigation, and that a real party in interest is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with the action."

"It has also been held that the equitable owner of a claim may sue upon it in his own name as the real party in interest."

59 AM Jur. 2d Parties § 36, p 431 (1987 Edition)
(copy attached to docket 40, last page)

In Montana, form is not to be elevated over substance where to do so deprives a person of their constitutional rights.

Summary of Argument

re:

Denial of Due Process

On November 24, 2020, Whalen/Bridges renewed their Request that their Summary Judgment Motion be heard by the lower court (docket 37). The lower court ignored that request and instead ordered Whalen/Bridges to "Show Cause" on April 28, 2022 why they had failed to "prosecute" their case.

At the time of the "show Cause" Hearing the lower court forbid Whalen/Bridges from offering any evidence concerning the "Show Cause Order" (dated March 30, 2022 - docket 38) and instead ordered Whalen/Bridges to brief the issue, raised for the first time & by the court - not Beartooth - why the entire case should not be dismissed upon the grounds that Whalen was not the legal owner of the property & Bridges had not retained legal counsel.

Intertwined with that fact was the facts that Beartooth was denying liability; the court was refusing to Rule on Whalen/Bridges Summary Judgment Motion; the cost to establish liability was estimated to be \$25,000 - \$50,000; Bridges had no interest in the property & was therefore not interested in providing surety to prospective

Attorneys to represent her in a proceeding in which she had no interest; and Whalen was indigent, effectively making it impossible to hire any legal counsel whatsoever.

Both, Beartooth and the Court, playing upon those facts denied both Whalen & Bridges (assuming she had any interest or claim) of all rights they had against Beartooth for Property loss - admittedly caused by Beartooth in other proceedings.

Furthermore, the Court ruled, without any hearing or opportunity to be heard and present evidence as to his interest in the property (Lot 15) and in claims against Beartooth - even though Beartooth conceded he had such interest - to Whalen.

The refusal to Rule on the Motion For Summary Judgment on liability & the refusal to give Whalen an opportunity to demonstrate his interest in the property and claims being asserted before Dismissing the entire Lawsuit Denied Whalen his rights to Due Process protected by Article II Section 17 of the Montana Constitution.

Argument - Denial of Due Process

Article II, section 17 of the Montana Constitution guarantees Due Process of law

On March 30, 2022 the lower court set a hearing for April 28, 2022 on whether Whalen was guilty of Failing to prosecute his case against Beartooth

At the time of that hearing the court forbid Whalen to offer any evidence on the issue of Failure to prosecute under penalty of Contempt, (TR 4-28-22, p 5 lines 20-24 and Docket 44, p2, item 2)

At that time the court was well aware that there was an outstanding Motion for Summary Judgment Filed by Whalen 3 1/2 years prior (TR 4-28-22, p 8, line 2-12, & line 3)

The lower Court also knew that a ruling on that Summary Judgment Motion was key to Whalen/Bridges ever being able to retain Legal Counsel, (docket 44, p3, item 10)

While refusing to rule on that Motion the Court gave Whalen/Bridges 26 days to retain legal Counsel or Face Dismissal of their Claims. (docket 44, item 7)

the actions of the lower court just recited prevented Whalen/Bridges from being able to get legal counsel, because the cost of proving liability exceeded the amount of Insurance proceeds available if there was a successful outcome (docket 44, p 3, item 10 and docket 24, p 5, item 15)

The lower court then used that Failure (to obtain legal counsel) as the basis for Dismissing the entire Action with Prejudice.

No Hearing was ever granted to Whalen to allow him to establish his interest in the property.

No Actual Notice was ever provided to Bridges that her claims (if any) were subject to Dismissal if she did not obtain counsel.

Notice and Opportunity to be heard are Fundamental to a persons Due Process Rights.

Conclusion

This cause arises out of a wildfire admittedly caused by Beartooth Electric's Negligence

Without any legal Proceedings other than to file an Answer in 2 other legal Actions - one by Stillwater County and one by Whalens neighbors, Beartooths Insurer, Federated paid out the Policy limits of 7 Million Dollars, minus \$40,000.

Now however after a Dozen years of litigation, discovery & numerous attempts to find legal counsel (unsuccessful) Whalen is told by the lower court on its own Motion and without hearing that he has no interest in the property or legally cognizable claims for his loss of over 2 Million Dollars in damage. Something even Beartooth doesn't claim. And something that is patently False.

This Court should Remand this case to the lower Court with instructions to enter liability in Whalens Favor and set a trial date for Whalen to present his evidence on Damages before a Jury of his peers.

Certificate of Compliance

This Appellants Brief is submitted in handwritten form as is apparently contemplated under Rule 12 (ii) Appellate Rules without DVD-R. Because it is handwritten it complies with the spirit of the remainder of the rule making the Brief as easy to read as possible under the circumstances. The Brief does comply with the page limitation & word limitation & Margin Requirements contain in Rule 12 as well as in all other respects

Dated March 8, 2023.

Timothy J. Whalen
Timothy J. Whalen Appellants

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Appellants Brief & Appendixes was served by First class mail post affixed to Maxon Davis, Esq. at his Law office in Great Falls, Montana this 8 day of March 2023.

Timothy J. Whalen
Timothy J. Whalen