IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 23-0394

DAN H. WOODARDS, JR.,
Plaintiff/Appellant,

v.

GARY WOODARDS, CAROL WOOD, TERRI LASELL, BARBARA WOODARDS, ESTATE OF DAN HOOVER WOODARDS, SR., and ESTATE OF DORIS WOODARDS
Defendants/Respondents.

Appeal from the Second Judicial District Court, Silver Bow County
Cause No. DV-20-385
The Honorable Robert J. Whelan, Presiding

APPELLANT'S REPLY BRIEF

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Appellant Dan H. Woodards, Jr. addressed in his opening brief the merits of why the three District Court rulings at issue were incorrect. Now, after failing to get this appeal dismissed based on the claim that the July 14, 2023 Order was not appealable, the Appellee siblings claim that the prior to Orders from the District Court are also not appealable. In the alternative, the Appellee siblings argue that the Orders were correct, despite the compelling, applicable case law presented by Dan in his opening brief.

A. <u>The October 4, 2022 Order was interlocutory.</u>

The Appellee siblings argue that their Motion for Partial Summary Judgment, which the District Court granted, was immediately appealable, therefore must be appealed or cannot be later reviewed.

In support of that argument, they cite *Carl v. Chilcote*, 255 Mont. 526. That case does not support the Appellee siblings' argument, other than that it recites the words "This Court cannot, on appeal from the judgment, review an order from which an appeal could have been taken." *Id.* at 534. In *Carl*, the Appellant filed a Notice of Appeal which designated a 1992 summary judgment ruling as the subject matter of the appeal. *Id.* The Appellant then included in his briefing argument as to why a 1990 summary judgment ruling was also incorrect. *Id.* The Supreme Court concluded that the issues raised in

the 1990 summary judgment ruling were not properly before the Court. *Id.* Here, Dan did identify the October 4, 2022 summary judgment ruling in his Notice of Appeal.

Additionally, the Appellee siblings claim that the October 4, 2022 summary judgment ruling was immediately appealable under M.R.App.P. 6(3)(i) or 6(4)(d). The plain language of M.R.App.P. 6(3)(i) dispels that notion. "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. . . From an order in a partition action directing or refusing to direct a partition to be made." M.R.App.P. 6(3)(i).

The October 4, 2022 was not a final decision. From a simplistic view, there are two obvious reasons it was not a final decision:

1) It granted partial summary judgment to the Appellee siblings, with partial meaning less than the full number of issues being resolved, and
2) The Court entered two more Orders after October 4, 2022, which would be unnecessary if October 4 was the final decision.

From a more nuanced perspective, the October 4 Order was not a final decision because additional rulings were necessary, and therefore it was not immediately appealable.

When real property is owned by joint tenants or tenants in common, one or more of those persons may exercise their right to bring an action to partition the real property under M.C.A. § 70-29-101. *Britton v. Brown*, 2013 MT 30, ¶ 24, 368 Mont. 379, 300 P.3d 667. "An order partitioning property 'extinguishes a tenant's rights in the whole property, and establishes the tenant's exclusive right of ownership in the part of the property set off to him.' " *Britton*, ¶ 24 (quoting *McCarthy v. Lippitt*, 150 Ohio App.3d 367, 781 N.E.2d 1023, 1029 (2002)). "Because a partition action divests a person of her property, her interests are protected by the Due Process Clause of the Montana Constitution." *Britton*, ¶ 25.

The October 4, 2022 Order did not constitute an order to partition the properties, which served to divest Dan from his interest in the property. The effect of the October 4 Order was to determine that the property should be partitioned under the Uniform Heirs Act. However, the Uniform Heirs Act requires several additional steps enumerated in M.C.A. § 70-29-411,

including an opportunity for each cotenant to buy out the interests in the property of the other cotenants.

The language of the October 4 Order is clearly phrased in a way which contemplates future action to be taken by the Court, defeating the argument that it was a final decision:

> The Court finds that all required elements for a determination of heirs property are present, therefore, statute requires that the property **be partitioned** under the Uniform Partition of Heirs Property Act, unless all cotenants agree otherwise. Mont. Code Ann. § 70-29-403(2). Defendants do not agree otherwise.
>
> Defendants motion that property be partitioned under Mont. Code Ann. Title 70, Chapter 29, Part 4, the Uniform Partition of Heirs Property Act, is hereby granted. This partition action **shall proceed** under Mont. Code Ann. Title 70, Chapter 29, Part 4, the Uniform Partition of Heirs Property Act.

Doc. 42, pg. 6 (emphasis added).

If the District Court intended for the October 4 Order to partition the property, it could have said that. Instead, it stated that the property would "be partitioned" and the case "shall proceed" consistent with the Uniform Heirs Act. That Act requires further steps, and further rulings, before the property can properly be partitioned (which it eventually was, on July 14, 2023, *see Doc. 58*).

M.R.App.P. 6(4) requires an immediate appeal for certain orders, including "An order directing or refusing to direct the partition, sale, or conveyance of real property." For the same reasons the October 4, 2022 was not a final decision on a partition action which allows for an immediate appeal under M.R.App.P. 6(3)(i), it is also not a final decision which mandates an immediate appeal.

Notably, in the Order denying the Appellee siblings' Motion to Dismiss this appeal, this Court determined that regarding "the July 14, 2023 Order for Partition for Sale of Heirs Property, we agree with Dan that this order is immediately appealable either under M. R. App. P. 6(3)(i) or 6(4)(d) as it directs partition and sale of the property in question."

It is incongruent that the October 4, 2022 Order partitioned the property **and** the July 14, 2023 Order partitioned the property. Rather, by both the authority cited previously in this section and by common sense, the October 4 Order was interlocutory, and the July 14 Order was a final appealable order.

B. Appellee siblings did not meet their burden on summary judgment.

In an effort to comply with M.R.App.R. 12(3) and only address "new matter raised in the brief of the appellee", Dan will not reiterate his arguments detailing why and how the Appellee siblings failed to meet their burden of

proof in front of the trial court to show an absence of material facts regarding existence of partnership, or to rebut Dan's evidence of a partnership.

However, Dan must address the accusation that his use of Gary's admissions to establish a partnership "takes liberties." *Appellees' Brief, pg. 9.* In his Complaint, Dan referred to his efforts to "put together a family ranch." *Doc. 1, pg. 1.* That was correctly noted by the Appellee siblings. *Appellees' Brief, pg. 9.* The Appellee siblings then claim that by using the term 'Family Ranch' with capitals and single quotes it should have been clear that the disagreed with that term. *Id.* Despite diligent searching, Dan can find no authority for the proposition that use of single quotes is universally understood to be sarcastic or otherwise clearly mocking his use of the term in lower case letters. While accusing Dan of making a "purposeful misstatement", for use of the term employed rather than entailed (which does not affect the meaning of the sentence) Gary claims to have referred to the ranch in his Answer to the Complaint as the "supposed 'Family Ranch' ". Rather, the Answer refers to the "so called 'Family Ranch' ", which can have a significantly different connotation.

Though case law is inconclusive, a survey of dictionary definitions shows the term "so-called" can be used in two different ways: 1) to show what

something is commonly referred to (such as a "so-called pocket veto", since "pocket veto" is not the formal name for that action, or 2) as a way to express disapproval of something having that name (such as "so-called friend" to designate that the person does not behave as one would expect a friend to). *See, e.g. Merriam Webster's Dictionary.* For the Appellee siblings to claim Dan was being disingenuous by reading the term "so called" in reference to the Family Ranch as meaning that Family Ranch is not an official name, but rather a title to identify it, instead of treating it as sarcasm, is out of line and uncalled for.

All that said, however, Dan finds the Appellee siblings' claim that use of the term 'Family Ranch' to show disapproval of the term is questionable given their statement that "Defendants agree for all the reasons stated herein that the need for Court intervention to partition the 'Family Ranch' is at hand." *Doc. 13, pg. 2.*

C. <u>The April 24, 2023 Order is appealable as an intermediate order.</u>

To justify their argument that Dan waived any objection to entry of a sanctions order without a legal basis or opportunity to be heard, the Appellee siblings ask the Court to only read the general introductory statement to his objection withdrawal and completely ignore the following sentence which

limits the scope of the withdrawal. *Appellee's Brief, pg. 13.*

This request is contrary to general accepted practices in reviewing and interpreting legal writings. For example, Courts have consistently held that:

> In construing a statute, this Court must read and construe each statute as a whole so as to avoid an absurd result "and to give effect to the purpose of the statute." *Christenot v. State, Dept. of Commerce* (1995), 272 Mont. 396, 401, 901 P.2d 545, 548. Indeed "[s]tatutes do not exist in a vacuum, [but] must be read in relationship to one another to effectuate the intent of the statutes as a whole." *Marsh v. Overland* (1995), 274 Mont. 21, 28, 905 P.2d 1088, 1092.

The Appellee siblings ask the Court to ignore: "Plaintiff will accept the determination of value of the properties at issue as set forth by Defendants in the exhibits to their March 20 motion. As such, Plaintiff respectfully requests the Court vacate the evidentiary hearing scheduled for May 4, 2023." *Doc. 53, pg. 1.* Instead, the Appellee siblings want to focus on the withdrawal of objection to property values to obtain an unjustified sanctions award that contained no legal analysis, no separate motion, and no order with findings specific to the request.

Additionally, the Appellee siblings want this Court to rely on the "fact" they were "prepared to introduce evidence at hearing of discovery requests, answers to interrogatories, email exchanges with opposing counsel, etc. in support of his sanctions request. He was denied that opportunity when Dan

requested the District Court vacate hearing on the matter." *Appellee's Brief, pg. 16.* It was incumbent on the Appellee siblings to provide evidence and argument to support their sanctions request as part of a motion, to provide Dan an opportunity to respond, not to hide behind the log until a hearing.

As discussed at length *supra,* there was one final, appealable order in this case, on July 14, 2023. Under M.R.App.P. 6(1), "[u]pon appeal from a final judgment entered in an action or special proceeding in a district court, this court may review the judgment, **as well as all previous orders and rulings excepted or objected** to which led to and resulted in the judgment." (emphasis added). An objection was made to the request for sanctions. Therefore, the April 23, 2023 Order is appealable.

D. No notice of entry of judgment was ever sent by the Appellee siblings.

The Appellee siblings also argue that no appeal was made within 30 days of entry of the either the October 4, 2022 Order or April 23, 2023 Order, which makes it too late to appeal both of them now. *Appellees' Brief, pgs. 5 and 15.* However, if the Appellee siblings truly believed that the October 4, 2022 Order or April 23, 2023 Order was a final judgment which triggered the 30-day time to appeal, they would have file a Notice of Entry of Judgment

back then, rather than trying to avoid an appellate ruling on the merits of the case now with *ex post facto* justifications.

"We require prevailing parties to serve a notice of entry of judgment "before the thirty day deadline for filing notice of appeal begins to run." *Quantum Electric, Inc., v. Schaeffer*, 2003 MT 29, ¶ 29, 314 Mont. 193, ¶ 29, 64 P.3d 1026, ¶ 29 (citations omitted).

The Appellee siblings did not file a Notice of Entry of Judgment following any Orders issued in this case, therefore the time limit to appeal the October 4, 2022 Order or April 23, 2023 Order did not begin to run.

As a public policy matter, Dan's approach in this case makes sense. Until the July 14, 2023 Order to Partition was signed, any number of circumstances could have altered the trajectory of the case, including Dan making the choice to buy out one or more of his siblings, or one or more of his siblings buying up interests in the properties. The July 14 Order was the first one that reached the point of no return; once the properties were listed for sale there was a risk that a bona fide purchaser would be harmed by an appeal regarding the partition of the property.

"Our policy is to encourage only one appeal from any case and to discourage piecemeal interlocutory appeals." *In re Marriage of Killpack*, 2004

MT 55, ¶ 10, 320 Mont. 186, 189, 87 P.3d 393, 395 (internal citations omitted).

If Dan had appealed the October 4, 2022 Order granting partial summary judgment to his siblings and the Supreme Court had affirmed the ruling, on remand Dan would have still preserved his right and ability to challenge the determination of value of the properties and then appeal that ruling. Thus, Dan waited for the last possible decision that was appealable to file his notice, using M.R.App.P. 6(1) to bring back the October 4, 2022 and April 23, 2023 intermediate orders for review, rather than appeal one interlocutory order at a time.

CONCLUSION

Based on the foregoing facts and arguments, Plaintiff respectfully request this Court vacate the District Court's "Order for Partition for Sale of Heirs Property" dated July 14, 2023 and "Order for Determination of Value and Partition by Sale" dated April 24, 2023, and reverse "Order on Cross Motions for Partial Summary Judgment" and Motion for Determination of Heirs Property" dated October 4, 2022. Furthermore, Plaintiff requests that this Court remand the case with an order to grant Plaintiff's Cross Motion for Summary Judgment on his claim for dissolution of partnership, with

distribution of real and personal property made in accordance with M.C.A. § 35-10-101 *et seq.*.

RESPECTFULLY SUBMITTED this 10th day of January, 2024.

/s/ David L. Vicevich
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate procedure, I certify that this brief is printed with a proportionately spaced Times New Roman non-script text typeface of 14 points; is double spaced except for quoted and indented material; and the word count calculated by Microsoft Word totals 2,599 words, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 10th day of January, 2024.

/s/ David L. Vicevich
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of January, 2024, the foregoing APPELLANT'S REPLY BRIEF was e-served on all interested parties by the Montana Supreme Court's ePass MT to the following:

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I, David L. Vicevich, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 01-10-2024:

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