

DA 20-0232

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 144N

JAMES DAVID SIMPSON,

Petitioner and Appellant,

v.

MUSSELSHELL COUNTY BOARD OF
COUNTY COMMISSIONERS,

Respondent and Appellee.

APPEAL FROM: District Court of the Fourteenth Judicial District,
In and For the County of Musselshell, Cause No. DV 19-40
Honorable Matthew J. Wald, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Paul Grigsby, Grigsby Law, PLLC, Bozeman, Montana

For Appellee:

Kevin R. Peterson, Musselshell County Attorney, Roundup, Montana

Submitted on Briefs: April 7, 2021

Decided: June 8, 2021

Filed:


Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Appellant James David Simpson appeals a Fourteenth Judicial District Court order dismissing a petition for writ of review ("Petition") that challenged the Musselshell County Board of County Commissioners' ("the County") 1961 abandonment of several county roads. Simpson contends that the County's initial 1961 abandonment was *void ab initio* and the District Court therefore erroneously dismissed his Petition as barred by the statute of limitations. We affirm.

¶3 In 1960, the Musselshell County Attorney initiated a petition to abandon County Roads #121, 217, and 281 ("the Roads"). The abandonment petition failed to identify the owners of plots adjacent to the Roads and did not record whether the landowners consented to the abandonment. The abandonment petition further stated, incorrectly, that the residents in the area where the Roads are located do not use the Roads to access their property. The County held a hearing on the matter in October 1960 but provided notice to only five of the twelve landowners abutting the Roads. Edith Plum and William Rue Brychta, who shared interest in a parcel of real property ("the Property") abutting the Roads, were among the landowners who did not receive notice of the hearing;

they had moved to Oregon in the 1950s. In January 1961, the County voted to abandon the Roads. Edith Plum passed away in the late eighties, and William Brychta inherited her one-half interest in the Property. Plum’s heirs learned in 2005 that the Roads abutting the Property were abandoned.

¶4 In late 2015, Simpson, representing himself as a potential purchaser of the Property, sent a letter to the County requesting that it set aside the abandonment. The County responded that it did not have the authority to do so. Simpson nevertheless purchased the Property from Plum’s heirs in 2017. Approximately two years later, Simpson filed a declaratory judgment action, later amended to the Petition, arguing that the County failed to properly abandon the Roads and therefore the District Court should declare the abandonment *void ab initio*. The County moved to dismiss the Petition on the ground that it was filed after the applicable statute of limitations had run. The District Court held that the five-year statute of limitations found in § 27-2-231, MCA, applies to writs of review regarding road abandonment issues, and the cause of action to challenge the County’s 1961 abandonment of the Roads accrued in 2005, when Plum’s heirs learned of the abandonment. The District Court thus concluded that the Petition was filed after the applicable statute of limitations had expired and ordered its dismissal pursuant to M. R. Civ. P. 12(b)(6).

¶5 “We review de novo a district court’s ruling on a M. R. Civ. P. 12(b)(6) motion to dismiss.” *Reavis v. Pa. Higher Educ. Assistance Agency*, 2020 MT 181, ¶ 13, 400 Mont. 424, 467 P.3d 588 (quoting *Hein v. Sott*, 2015 MT 196, ¶ 7, 380 Mont. 85,

353 P.3d 494). We will affirm a district court’s dismissal only if the appellant “is not entitled to relief under any set of facts that could be proven in support of the claims.” *Giese v. Blixrud*, 2012 MT 170, ¶ 14, 365 Mont. 548, 285 P.3d 458 (citations omitted). “The determination that a complaint fails to state a claim is a conclusion of law that we review to determine whether the [district] court’s interpretation of the law is correct.” *Cowan v. Cowan*, 2004 MT 97, ¶ 10, 321 Mont. 13, 89 P.3d 6 (citing *City of Cut Bank v. Tom Patrick Constr., Inc.*, 1998 MT 219, ¶ 6, 290 Mont. 470, 963 P.2d 1283).

¶6 The sole issue Simpson asserts on appeal is “whether government action that is *void ab initio* is insulated from a later challenge by a statute of limitations.” Simpson did not, however, raise this issue or make this argument before the District Court. Even though his Petition asserted that the County’s action was void, in his Response in Opposition to Motion to Dismiss, Simpson relied exclusively on § 27-2-231, MCA, arguing that the five-year limitation period it prescribes for actions “not otherwise provided for” does not apply to writs of review. Simpson argued in the alternative that he timely commenced the action in any event because his cause “did not accrue until either 2015 at the earliest or 2019 at the latest.” Simpson’s briefing before this Court states:

The district court’s reasoning and analysis was erroneously predicated on the assumption that there is a statute of limitations that applies to the review of an official act that is *void ab initio*. This was plain error as there is no applicable statute of limitations for government action which was void at its inception.

In his reply brief, Simpson makes explicitly clear that “the issue is not ‘what is the statute of limitations,’ rather the issue is ‘is there a statute of limitations[?]’” In responding to the

County's motion to dismiss, however, Simpson argued only against applying the five-year limitation period found in § 27-2-231, MCA, to petitions for writs of review and urged the court to find that he met the five-year requirement regardless. There is a substantial difference between arguing that the statute of limitations found in a specific statute does not apply to the issue at hand and arguing that no statute of limitations can apply because the County's action was void and of no effect. See *Anderson v. Stokes*, 2007 MT 166, ¶¶ 24-25, 338 Mont. 118, 163 P.3d 1273 (when a plaintiff asserts an affirmative defense but fails to brief or argue it on summary judgment, he does not preserve the issue for appeal); *State v. Tichenor*, 2002 MT 311, ¶ 48, 313 Mont. 95, 60 P.3d 454 (merely using a term or phrase is not sufficient to raise an argument—parties must make their argument clear to the court). Simpson's trial court briefing invited the District Court to reach a conclusion based on § 27-2-231, MCA's, applicability to his Petition—which the District Court did.

¶7 “It is well established that we do not consider new arguments or legal theories for the first time on appeal.” *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 20, 373 Mont. 1, 313 P.3d 839 (citations omitted). “This restraint is ‘rooted in fundamental fairness to the parties.’ . . . It is fundamentally unfair for a party to withhold an argument at trial, take a chance on a favorable outcome, and then assert a separate legal theory when the trial strategy fails.” *Pilgeram*, ¶ 21 (citations omitted). It likewise is fundamentally unfair to fault a district court for failing to correctly rule upon an issue it was never asked or given the opportunity to consider. *Schlemmer v. N. Cent. Life Ins. Co.*,

2001 MT 256, ¶ 22, 307 Mont. 203, 37 P.3d 63. Should these rules be otherwise, a party could “withhold an argument at trial, take a chance on a favorable outcome, and then assert a separate legal theory when the trial strategy fails.” *Pilgeram*, ¶ 21. This is precisely what Simpson does here.

¶8 Simpson characterizes the District Court’s failure to consider whether a statute of limitation applies at all as “plain error,” despite characterizing its dismissal as merely a “reversible error” in his conclusion. “[T]he plain error doctrine permits review of errors not objected to at trial which result in substantial injustice by denying a party a fair trial.” *State ex rel. State Comp. Mut. Ins. Fund v. Berg*, 279 Mont. 161, 173, 927 P.2d 975, 982 (1996) (citations omitted). Plain error, however, “generally involves an act or omission of a more serious nature than ‘reversible error,’ and only on rare occasion is the former doctrine invoked in civil cases.” *Berg*, 279 Mont. at 174, 927 P.2d at 982 (citation and internal quotation marks omitted). This act or omission must implicate a party’s “fundamental constitutional rights” to such an extent that failure to review the alleged error would result in a “manifest miscarriage of justice, leave the question of fundamental fairness of the proceedings unsettled, or compromise the integrity of the judicial process.” *State v. Rovin*, 2009 MT 16, ¶ 29, 349 Mont. 57, 201 P.3d 780 (citation omitted).

¶9 Simpson develops no argument as to how the District Court’s analysis constitutes plain error. He admits that his predecessor-in-interest received actual knowledge of the Roads’ abandonment in 2005 and that he had actual knowledge of the abandonment and

the County’s refusal to rescind it at least two years before he purchased the Property. Given Simpson’s and his predecessors’ knowledge of the Roads’ status and their failure to take earlier action, we conclude that Simpson has not shown a “manifest miscarriage of justice” or fundamental unfairness of the proceedings. We therefore decline to invoke plain error review to address the issue Simpson raises on appeal.

¶10 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. Simpson has not carried his burden on appeal to demonstrate error warranting reversal. The order dismissing the Petition pursuant to M. R. Civ. P. 12(b)(6) is affirmed.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON
/S/ JIM RICE