

DA 21-0251

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 13

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DAVID RAFES,

Plaintiff and Appellant,

v.

JOSH McMILLAN,

Defendant and Appellee.

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APPEAL FROM: District Court of the Sixth Judicial District,  
In and For the County of Sweet Grass, Cause No. DV-2018-17  
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

David Rifes, Self-represented, Bozeman, Montana

For Appellee:


James B. Lippert, Jim Lippert Attorney at Law, P.C., Big Timber, Montana

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Submitted on Briefs: December 15, 2021

Decided: January 18, 2022

Filed:

  
Clerk

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Justice Jim Rice delivered the Opinion of the Court.

¶1 David Rafes (Rafes) appeals the Findings of Fact, Conclusions of Law and Judgment of the Montana Sixth Judicial District Court, Sweet Grass County, ordering Rafes to pay the attorney fees and costs of Josh McMillan (McMillan), the defendant and prevailing party in a construction defect suit initiated by Rafes. Rafes also appeals the District Court's failure to grant his motion to dismiss his co-plaintiff, Bairstow, Ltd. (Bairstow), following withdrawal of Plaintiffs' counsel of record. We consider the following issues:

- 1. Did the District Court err by determining that McMillan had a reciprocal right to an award of attorney fees under § 70-19-428, MCA, and § 28-3-704, MCA?*
- 2. Did the District Court err by not granting Rafes' motion to dismiss Bairstow as his co-plaintiff, following withdrawal of counsel?*

¶2 We reverse and remand on Issue 1 and affirm on Issue 2.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

¶3 Rafes manages Bairstow, a Texas limited liability company. Bairstow owns real property in Bozeman, Montana, on which Rafes resides. Rafes and Bairstow hired McMillan and Rick Dawson (Dawson) to provide assistance in constructing a house on the property, pursuant to an oral agreement they entered in 2016. In May 2018, Rafes and Bairstow filed an action against McMillan and Dawson alleging negligence, breach of contract, or in the alternative, unjust enrichment, and breach of express and implied warranty. Attorney Matthew Sack (Sack) represented the Plaintiffs at the time the proceeding was initiated.

¶4 The Complaint alleged the parties entered an oral agreement under which, “[i]n exchange for payment by [Rafes and Bairstow], [McMillan and Dawson] were to complete a scope of construction work.” Plaintiffs alleged there were “numerous and severe defects and deficiencies with the construction work” performed by McMillan and Dawson, and that when these issues were raised by Rafes, McMillan and Dawson walked off the job.<sup>1</sup> The Complaint sought “costs of suit and attorneys’ fees pursuant to Mon. Code Ann. § 70-19-428.” In his Answer, McMillan asked for an award of attorney fees and costs “as a reciprocal right under § 70-19-428, MCA.”

¶5 In October 2019, the District Court granted Sack’s motion to withdraw as counsel for both Rafes and Bairstow. Rafes proceeded pro se and Bairstow remained as his co-plaintiff. The District Court conducted a bench trial in March 2020. In its Findings of Fact, Conclusions of Law and Order, the District Court stated, “David Rafes [] was personally present in his individual capacity [at trial] and was appearing on behalf of Bairstow, Ltd., both self-represented litigants.” On the merits, the District Court determined that “McMillan and Dawson were working for hourly wages on the construction project for which Rafes was the General Contractor . . . . any defects that do exist with regard to the construction are a product of Rafes own making,” and held in favor of the Defendants on all of Plaintiffs’ claims. The District Court awarded attorney fees and costs to McMillan, reasoning:

Rafes claimed in his Complaint that he is entitled to an award of attorneys fees and costs pursuant to § 70-19-428, MCA. Rafes is not entitled to an

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<sup>1</sup> At trial, Rafes testified the Complaint should have stated that only McMillan walked off the job.

award of attorneys fees as he has not prevailed on any of his claims. The Defendant, Josh McMillan, in his Answer to the Complaint, sought an award of his attorneys fees and costs in defending this action as a reciprocal right under § 70-19-428, MCA. As a prevailing party, McMillan is entitled to an award of reasonable attorneys fees and costs.

The District Court entered an Interim Order with its findings and conclusions that granted McMillan's request for reasonable attorney fees and costs in defending the action.

¶6 The fee award was actively litigated in the year following trial. McMillan's attorney submitted an affidavit of fees and costs to which Rafes objected, and Rafes filed multiple motions on behalf of both himself and Bairstow disputing the court's award of fees to McMillan. Rafes filed a premature appeal to this Court, which was dismissed. Throughout this period, both Rafes and Bairstow were referenced by the parties and the District Court as plaintiffs in the action.

¶7 The District Court held a fee reasonableness hearing in March 2021, at which both Rafes and Bairstow were considered plaintiffs. McMillan called attorney Vuko Voyich (Voyich) as an expert witness regarding reasonableness of the fees. After the hearing, Rafes filed a "Motion to Remove Bairstow as Co-Plaintiff" and a "2nd Motion" to deny a fee award to McMillan. The combined Motion was headed "David Rafes/Bairstow, Pro se." The District Court issued its Findings of Fact, Conclusions of Law and Judgment reaffirming McMillan's reciprocal right to obtain fees and costs as the prevailing party under § 70-19-428, MCA, and awarding attorney fees and costs of \$7,060 and costs of \$1,200 for Voyich's expert witness fees, for a total judgment of \$8,260 against Rafes and Bairstow. The District Court denied Rafes' pending motions, including the 2nd Motion to deny fees, reasoning they constituted impermissible motions to reconsider. The court did

not expressly address Rafes' motion requesting removal of Bairstow as his co-plaintiff, and entered judgment against both Plaintiffs.

¶8 Only Rafes appeals. He does not dispute that McMillan is the prevailing party on the merits of the litigation, and challenges only McMillan's entitlement to an attorney fee award.<sup>2</sup> Rafes also contends the District Court erred by not granting his motion to dismiss Bairstow from the action.

### STANDARD OF REVIEW

¶9 "Whether or not a party is entitled to recover attorney fees is 'strictly a question of law.' Thus, 'we review a district court's conclusions of law pertaining to the recovery of attorney's fees to determine whether those conclusions are correct.'" *Chase v. Bearpaw Ranch Ass'n*, 2006 MT 67, ¶ 14, 331 Mont. 421, 133 P.3d 190 (quoting *Transaction Network v. Wellington Techs.*, 2000 MT 223, ¶ 17, 301 Mont. 212, 7 P.3d 409).

### DISCUSSION

¶10 1. *Did the District Court err by determining that McMillan had a reciprocal right to an award of attorney fees under § 70-19-428, MCA and § 28-3-704, MCA?*

¶11 As an initial matter, it appears Rafes argues there was no contract between the parties, asserting the District Court found there was "no substantive contract or agreement to have been breached in the first place" between him and McMillan. He therefore reasons McMillan is not entitled to reciprocal fees under a non-existent contract. However, this is

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<sup>2</sup> Rafes offers no argument regarding the District Court's award of expert witness costs or general litigation costs, and therefore we do not consider these issues. Further, Defendant Dawson was not awarded fees and is not a party to the appeal.

an incorrect understanding of the District Court’s findings. The District Court did not find there was no contract; rather, it found there was no *written* contract between the parties and no contract for any business relationship *beyond* McMillan and Dawson “agreeing to work for wages on a day-to day basis, and Rafes agreeing to pay them on an hourly basis.” These findings did not diminish the court’s determination that there was indeed a contract between the parties—an oral contract for the performance of construction work by McMillan and Dawson. *See* § 28-2-101, MCA (defining a contract as “an agreement to do or not to do a certain thing”); § 28-2-102, MCA (essential elements of a contract include: “identifiable parties capable of contracting; their consent; a lawful object; and a sufficient cause or consideration”). Indeed, Rafes referenced the parties’ “oral agreement” in the Complaint, claimed breach of contract, and sought attorney fees thereunder. To clarify, he cannot now argue there was no contract.

¶12 “A party in a civil action generally may not recover attorney’s fees absent a specific contractual or statutory provision that allows for those fees.” *Horace Mann Ins. Co. v. Hanke*, 2013 MT 320, ¶ 33, 372 Mont. 350, 312 P.3d 429 (citation omitted). Rafes also argues McMillan does not have a reciprocal right to attorney fees under § 70-19-428, MCA, because Rafes himself did not have a right to attorney fees under the statute. In answer, McMillan argues that “[b]ecause Plaintiffs’ claims arise from a contract, McMillan is entitled to a reciprocal right, upon an applicable order of the trial court, to recover his attorney fees under § 28-3-704(1), MCA.”

¶13 As would be the normal course, and as the parties acknowledge, there was no “provision” of the parties’ oral contract granting attorney fees for any reason. Section 28-3-704, MCA, Montana’s reciprocal attorney fees statute, provides as follows:

[W]henever, *by virtue of the provisions of any contract* or obligation in the nature of a contract . . . one party to the contract or obligation has an *express right to recover attorney fees* from any other party to the contract or obligation in the event the party having that right brings an action upon the contract or obligation, then in any action on the contract or obligation all parties to the contract or obligation are considered to have the same right to recover attorney fees and the prevailing party in any action, whether by virtue of the express contractual right or by virtue of this section, is entitled to recover reasonable attorney fees from the losing party or parties.<sup>[3]</sup> [(Emphasis added.)]

¶14 The plain language of this statute provides a reciprocal right to the prevailing party to recover reasonable fees when, “by virtue of the provisions of any contract,” a party “has an express right to recover attorney fees” when “bring[ing] an action upon the contract.” In light of this language, McMillan argues that § 28-3-704, MCA, “does not require that the ‘express right’ be contained in the contract or obligation. Rafes[’] express right, as claimed in his Complaint, is set forth in § 70-19-428(1)(d), MCA.” However, McMillan’s argument is incorrect. The plain language of § 28-3-704, MCA, makes only *contractual* attorney fees reciprocal, not *statutory* attorney fees. It says nothing about reciprocal rights for statutory fee awards. An express right to recover attorney fees set forth within a contract is a clear prerequisite for the reciprocal right of fee recovery by the prevailing

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<sup>3</sup> The District Court did not cite § 28-3-704, MCA, in support of its determination that McMillan was entitled to reciprocal attorney fees. Both parties’ arguments assume the fee award was premised upon § 28-3-704, MCA, and therefore we take up the statute’s application.

contractual party to arise under § 28-3-704, MCA. Neither party asserts their oral agreement contained any fee provision. Rafe therefore had no *contractual* right to recover attorney fees, and therefore McMillan had no reciprocal right under the statute. While McMillan argues the Legislature provided a “clear[] . . . public policy” that “a statutory right to a reasonable attorney fee in a contract setting is reciprocal,” citing § 28-3-704, MCA, we must disagree in view of the plain language of the provision. While the Legislature may want to consider making attorney fees reciprocal in such cases, we cannot extend the statute’s reach beyond its terms.<sup>4</sup>

¶15 We addressed this issue in *Valeo v. Tabish*, 1999 MT 146, 295 Mont. 34, 983 P.2d 334, where the defendant argued that “if one party is entitled as a matter of right to attorney’s fees because of a contractual or statutory provision, the other party, if successful, is entitled to the same right.” We rejected the contention, noting that our previous holdings did not “equate a unilateral statutory right to attorney’s fees as analogous to the express right to recover pursuant to a contract or other obligation so as to trigger the application of § 28-3-704, MCA.” *Valeo*, ¶ 21. Our cases have consistently applied § 28-3-704, MCA, to situations where there was a contractual provision granting the right to attorney fees. *See Kenyon-Noble Lumber Co. v. Dependant Founds., Inc.*, 2018 MT 308, ¶ 21, 393 Mont. 518, 432 P.3d 133 (contract between parties contained provision providing for attorney

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<sup>4</sup> Rafe may well have had a statutory right to recover attorney fees under § 70-19-428(1)(d), MCA, a provision applicable to prevailing claimants in construction defect actions, but he was not the prevailing party. That provision does not grant reciprocal attorney fees to a non-claimant prevailing party, as McMillan acknowledges.



fees if one party sued to enforce the contract; we found the right to be reciprocal for the prevailing defendant); *Mont. Health Network, Inc. v. Great Falls Orthopedic Assocs.*, 2015 MT 186, ¶¶ 27-28, 379 Mont. 513, 353 P.3d 483 (same); *Chase*, ¶ 25 (same); *Valeo*, ¶ 25 (“there was no provision in the contract between the [parties] that provides one party the express right to recover attorney’s fees from the other party which would then require us to apply the reciprocity requirement of § 28-3-704, MCA”); *McDonald v. Washington*, 261 Mont. 392, 406-07, 862 P.2d 1150, 1159 (1993) (“Section 28-3-704, MCA, requires that the losing party pay reasonable attorneys’ fees *if* there is an express right to recover attorneys’ fees in the contract. No evidence of an express right in a contract was presented here.”) (emphasis original); *Rauch v. Michel*, 221 Mont. 1, 6, 716 P.2d 617, 620 (1986) (“The effect of Section 28-3-704, MCA, is to give a reciprocal right to attorney fees to all parties to a *contract which provides for attorney fees*.”) (citation omitted). (Emphasis added.)

¶16 McMillan offers the alternative argument that his attorney fees should be granted under the equitable, or “Foy,” exception, citing *Braach v. Graybeal*, 1999 MT 234, ¶ 9, 296 Mont. 138, 988 P.2d 761 (citing *Foy v. Anderson*, 176 Mont. 507, 511-12, 580 P.2d 114, 116-17 (1978)). As McMillan acknowledges, the District Court did not award fees on this basis, and it is a notably narrow exception to application of the American Rule. *See JRN Holdings, LLC v. Dearborn Meadows Land Owners Ass’n*, 2021 MT 204, ¶ 48, 405 Mont. 200, 493 P.3d 340 (“Montana generally follows the American Rule that a party may not recover attorney fees in a civil action absent a specific contractual or statutory

provision.”) (internal quotation and citation omitted). As we have explained concerning the *Foy* exception, “we have expressly limited its applicability to situations where a party has been forced to defend against a wholly frivolous or malicious action.” *Braach*, ¶ 9 (citations omitted). An award of fees under this exception “is within the lower court’s discretion and will not be overturned absent a showing of abuse of discretion.” *State ex rel. Wilson v. Department of Natural Resources and Conservation, Water Resources Div.*, 199 Mont. 189, 196, 648 P.2d 766, 769 (1982).

¶17 While the District Court did not undertake consideration of an award of attorney fees under the *Foy* exception, McMillan asserted a claim to *Foy* fees in his response to Rafes’ “Motion to Vacate Findings and Judgment for the Defense and Vacate Legal Fees Against Plaintiff.”<sup>5</sup> He alleged “the claims made against him by [Rafes] were wholly frivolous or malicious and on that basis the [c]ourt was within its legal right to award attorney fees.” Having reversed the District Court’s statutory award of fees, we conclude it is now necessary for the District Court to consider McMillan’s *Foy*-related allegations and to determine whether there is an appropriate basis for an equitable award of fees under our precedent.

¶18 However, McMillan’s request for attorney fees on appeal must be denied, as Rafes’ appellate challenge to the fee award is obviously not frivolous in that he has prevailed.

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<sup>5</sup> Rafes served this Motion on McMillan on April 10, 2020, the day after McMillan filed his Affidavit of Costs and Fees pursuant to the court’s Interim Order. McMillan then filed his response on April 14, 2020. Thus, the District Court was aware of McMillan’s claim by the time it entered its Judgment in April 2021.

¶19 2. *Did the District Court err by not granting Rafes’ motion to dismiss Bairstow as his co-plaintiff, following withdrawal of counsel?*

¶20 Both Rafes and McMillan correctly note that Rafes should not have represented Bairstow once Sacks withdrew as counsel. “A pro se litigant cannot represent or appear on behalf of another person or entity.” *Lucas v. Stevenson*, 2013 MT 15, ¶ 17, 368 Mont. 269, 294 P.3d 377 (citations omitted). A non-lawyer who appears on behalf of another in district court is potentially subject to contempt of court under § 37-61-210, MCA (practicing law without a license).

¶21 The District Court entered judgment against Bairstow as a party to the action. As a limited liability company, Bairstow is a separate legal entity from Rafes and would require legal representation to pursue an appeal. Rafes cannot appeal the Judgment on Bairstow’s behalf or represent Bairstow before this Court. Rafes is now improperly attempting to do so. When a pro se individual invalidly appeals issues on behalf of another, we only consider the issues that pertain to the pro se individual. *Weaver v. Graybill, Ostrem, Warner & Crotty*, 246 Mont. 175, 178, 803 P.2d 1089, 1091 (1990); *Lucas*, ¶ 1, n.1. We therefore decline further consideration of the motion to dismiss Bairstow from the proceeding.

¶22 Reversed in part, affirmed in part, and remanded for entry of an amended judgment following consideration of McMillan’s right to attorney fees under the *Foy* equitable exception.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH

/S/ LAURIE McKINNON

/S/ INGRID GUSTAFSON

/S/ DIRK M. SANDEFUR