No. 19-5155

IN THE
SUPREME COURT OF THE UNITED STATES

William M. Russell, Petitioner
vs.
KS Ventures, LLC, an Arizona Limited Liability Company, Respondents

ON PETITON FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S DECLARATION IN SUPPORT OF ITS MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

QUESTION(S) PRESENTED

1) Did the findings of the lower courts result in a violation of certain rights of due process?

2) Did the court(s) properly conclude that there were no genuine issues of material fact?

LIST OF PARTIES

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this of this petition is as follows:

Petitioner:
William M. Russell

Respondents:
KS Ventures, LLC, an Arizona Limited Liability Company;
K.E. SMITH REVOCABLE TRUST;
MYERS REVOCABLE TRUST;
KIM RUSSELL;
SHARON HUFF;
BEN WEIDLING;
THE LAMAR COMPANIES;
U.S. TREASURY by and through the INTERNAL REVENUE SERVICE;
MONTANA SWEETGRASS RANCH HOMEOWNERS' ASSOCIATION, INC.;
DOE DEFENDANTS I THROUGH X, inclusive

NOTICE IS GIVEN however, only Petitioner, William M. Russell, and Respondent, KS Ventures, LLC were parties appearing on the appeal case heard in the Montana Supreme Court, under Cause No. DA 18-0238. And, for the reason that the following respondents defaulted by failing to appear in the original case which was tried in the Eleventh Judicial District Court, of Flathead County, in the State of Montana under Cause No. DV-16-389B, petitioner does not believe that these respondents will have an interest in this review:

K.E. SMITH REVOCABLE TRUST;
MYERS REVOCABLE TRUST;
KIM RUSSELL;
SHARON HUFF;
BEN WEIDLING;
THE LAMAR COMPANIES;
MONTANA SWEETGRASS RANCH HOMEOWNERS' ASSOCIATION, INC.;
DOE DEFENDANTS I THROUGH X, inclusive

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

There are no cases from federal courts.

Cases involved are from **state courts**:

The opinion of **The Supreme Court of the State of Montana** is the highest state court to review the merits, and appears at **Appendix A** to the petition, and **is reported** at **432 P. 3d 715 (2019)**; and **2019 MT 4N**.

The opinion of the **Eleventh Judicial District Court, County of Flathead, in the State of Montana**, appears at **Appendix E** to the petition, and **is unpublished.**

JURISDICTION

There are no cases from federal courts.

Cases from **state courts**:

The date on which the highest state court decided my case was **January 8, 2019**. A copy of that decision appears at **Appendix A.**

A timely petition for rehearing was thereafter denied on the following date: **February 5, 2019**, and a copy of the order denying rehearing appears at **Appendix B.**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth, Seventh, and Fourteenth Amendments to the Constitution of the United States

STATEMENT OF THE CASE

This case presents the following questions:

1) Did the findings of the lower courts result in a violation of certain rights of due process? and
2) Did the court(s) properly conclude that there were no genuine issues of material fact?

The court denied hearing oral arguments on the MSJ motion, and granted summary judgment for plaintiff in December. Russell filed a timely request for relief from order denying hearing oral arguments and requested that the MSJ be vacated. Plaintiff filed its proposed judgment.

On January 31st, 2018 Russell filed a notice opposing the proposed judgment and requested that a hearing be set.

The Court, on February 16th, 2018, granted Russell's request for relief from the order denying oral arguments and vacated the original order granting summary

judgment. Within which, it scheduled a hearing for March 2nd, 2018 to hear oral arguments on the summary judgment motion.

Russell, was working in Arizona when the court finally granted and scheduled the March 2nd hearing, and only became aware of the hearing after receiving a text message on the evening of Friday, March 2nd, from a relative, indicating that they'd 'heard' that Russell had failed to show up for the scheduled hearing which took place earlier that day. The following morning, Russell left Arizona for Columbia Falls, Montana; driving 1,256 miles through the pre-Spring's typical, blizzard-weather road conditions, in hopes that should he file an immediate request with the court, the court perhaps would be merciful and permit the missed hearing to be rescheduled. Monday morning, March 5th, 2018, Russell filed such request.

In the request to the court, Russell explained that he had been out of state working and did not receive notice that the hearing had been granted and scheduled; having in fact, only just retrieved the wet and frozen notice from within his mailbox the night before. Russell explained to the court that he had been routinely phoning the court clerks office, being that he was not home to receive his mail,in order to inquire of the case's status. He explained that on numerous occasions, he'd requested of the clerk to notify him by email of any update or new filing in the case. The clerk did oblige on one occasion, however, upon future inquiries and requests made to the clerk, the clerk advised it was unable to accommodate such request without a

formal request being made in writing and payment being rendered ahead of time. As Russell further explained to the court, he had even on the day of February 16th, (the day the Court apparently granted the hearing) phoned the clerk to inquire of the case's status; but most regrettably, failed to inquire late enough on that day, and unfortunately, not after, February 16th.

On March 29th, 2018, the court denied Russell's immediate and timely request to reschedule the hearing, stating Russell's right to a hearing was "deemed waived" at the close of the hearing on March 2nd, after his failure to attend the hearing for oral arguments which he had so vehemently sought throughout the summary proceedings. The court found that the reasons Russell explained for not attending the hearing did not amount to any "excusable neglect" and rather was the result of failing to properly monitor the status of litigation. Therefore, on March 2nd, 2018, the court again granted summary judgment in favor of KSV finding that no genuine issues of material facts had been presented, thus, KSV was entitled to summary judgment as a matter of law. Russell filed a notice of appeal immediately following the court's denial to reschedule hearing oral arguments on April 3, 2018.

No mention, nor any indication was ever made by the court in further proceedings regarding Russell's January 31st opposition to the proposed judgment and request for a hearing.

The appeal (MTSC DA 18-0238, was submitted on briefs November 28, 2018.

On January 8, 2019, the Court's decision was rendered affirming the district courts findings.

A petition for rehearing was subsequently denied.

REASONS FOR GRANTING THE PETITION

Russell suggests that the cases of Dredge Corporation v. Penny, 338 F. 2d 456 - Court of Appeals, 9th Circuit 1964; Cole v. Flathead County, 236 Mont. 412, 771 P.2d 97 (1989); and Virginia City v. Olsen, 52 P. 3d 383, Mont (2002) support his contention that by granting summary judgment while deeming Russell "waived" his right to be heard, results in violation of his procedural due process rights afforded by the Fifth, the 14th, Sixth, and Seventh Amendments. The Fifth Amendment provides no person shall, "be deprived of life, liberty, or property, without due process of law." The 14th Amendment prohibits state governments from encroaching on the individual's rights without due process of law. The Sixth Amendment provides, among other rights, for confrontation with adverse witnesses. And, the Seventh Amendment provides, that in all Civil suits involving controversy in value exceeding $20, the right to a trial by jury.

In Russell's cases, his argument was the same as those argued in *Dredge*, "that the district court erred in acting upon the motions for summary judgment without first hearing oral argument." In Russell's case however, oral argument was initially denied (December 1, 2017) just prior to granting summary judgment (December 8, 2017). (In Dredge, "..oral argument was denied at the same time that summary

judgments ... were entered.")In its order denying oral arguments rendered December 1, 2017, the court deemed Russell's October 17th, 2017 request for a hearing on the motion, "untimely"; despite Russell's numerous requests previously made for a hearing on the motion. After granting summary judgment, Russell filed a Motion for Relief ofOrderDenying Oral Arguments("Motion for Relief") on December 21, 2017, in which he pointed out the court its error; that his October 17th request was not untimely and he had in fact, requested a hearing on summary judgment in every pleading that followed KSV's initial motion for summary judgment. In pleading for relief, Russell further advised the court:

> This matter at hand is not frivolous nor is it about one single property but rather all of my property, personal and otherwise and again I assert that there *are* disputes of material fact at hand. As a result of this matter, all of my resources have been tied up, I am unable to afford legal counsel and/or representation. And, although it has not been stated to the Court prior, but I suffer from A. D. D. This condition prevents me from writing proficiently as well as greatly inhibits my ability to read and comprehend long written statements. I simply am requesting that I be allowed an afforded any due process.
>
> (Motion for Relief, 69-74, p3.)

Russell further proposed "*that any judgment entered be opened; that a hearing be set allowing for additional, verbal testimony to be made and oral arguments be allowed.*" (*Id.*, 75-76, p3.) Subsequently on December 31, 2017, Russell (being in the 'salvage' business)temporarily left Montana due to weather conditions then being un-conducive to his line of work, in order to be able to work down in Arizona.On January 31, 2018, Russell filed an opposition and supporting brief to plaintiff's motion for entry of final judgment; in which he again denied owing the claimed debt, further disputed specific entries on KSV's purported accounting of the alleged

debt, and again claimed that he and Ms. Smith (KSV's agent) were partners not "lender" and "borrower" in joint ventures, and again requested a hearing for oral arguments.

While in Arizona, throughout January and into the middle of February, Russell made routine inquires of the Clerk of District Court in Flathead County, as to any status updates on the proceedings. Regrettably, after Russell's phone inquiry to the clerk on the morning of February 16, 2017 (which notably, on that same afternoon, was the day the court then granted Russell's motion and set a hearing date for oral arguments), in the week and a half that followed, Russell unintentionally failed to make inquiry. That day, unbeknownst to Russell, the court scheduled a hearing to occur on March 2nd at 11am.

On the evening of Friday, March 2nd, and much to his dismay, Russell was notified by a family member, they'd heard he had failed to show up for the hearing which he had so desperately been requesting.Upon hearing, Russell immediately drove the 1300 miles north, in treacherous early spring road & weather conditions, in order to be able to be at the courthouse on Monday morning so that he could explain he did not know of the hearing and did not intentionally fail to appear. That Monday, March 5th, Russell filed a request to re-schedule the hearing for oral arguments, in which he explained he did not know about or intend to miss the previous business day's hearing.

On March 29th, 2018, the district court denied Russell's request to reschedule the hearing for oral arguments. The order indicated, referring to the March 2nd hearing, in which summary judgment was again granted, "Before concluding the hearing, the court waited approximately ten minutes for defendant to appear, and he did not .. Thus, the Court deems that Defendant waived oral

argument.."(Order Denying Motion to Reschedule, 16-19, p2.) Russell contends it was inappropriate for the court to have deemed any such waiver. In SVKV, LLC v. Harding, 148 P. 3d 584, MT (2006), ¶32 the Court citing Cole states: "..a party must have "specifically waived" the right to a hearing on a summary judgment motion, that statement also includes the parenthetical phrase "and not waived simply by the failure to file briefs." Cole, 236 Mont. at 419, 771 P.2d at 101.The order further states: "Additionally, Defendant's arguments regarding the substantive reasons why ... Summary Judgment should not have been granted simply asks for reconsideration, and motions for reconsideration are not allowed under Montana Law." (Id., at 8-12, p5.) and determined ""..the Court sees no reason that justifies vacating the judgment and rescheduling the hearing" (Id., at 18-19, p5). Russell filed his timely notice of appeal on April 3rd, 2018 with this district court in Flathead County.

The Montana Supreme Court, in considering whether it was error not to grant a continuance for a hearing on summary judgment indicates in Fair Play Missoula v. City of Missoula, 52 P. 3d 926 MT(2002), "In making this determination, the trial court should consider "the circumstances of the particular case, weighing the right of the party requesting the continuance to a fair hearing against the prejudice that may result from delay."; further, it said, "Other jurisdictions have recognized that "it is well established that the unexpected absence of a party is generally a good reason for granting a continuance." "See e.g. Cherry Creek Sch. Dist. No. 5 v. Voelker, 859 P.2d 805, 809 (Colo.1993)" [Id. at ¶ 14]. To these statements, Russell contends the courts did not consider the circumstances of the particular case, e.g., Russell's ADD, the fact that he had from the beginning been requesting a hearing in

order to present his evidence in the best manner he was able, and the fact that he made an immediate plea upon the court to reschedule upon learning he'd missed the hearing. In Fisher v. Perez, 947 So.2d 648, 653 (Fla.Dist.App.2007), the appeals court said, " A strong preference exists in law for live testimony. See, e.g., Silverman v. Millner, 514 So.2d 77, 79 (Fla. 3d DCA 1987)(reversing denial of motion for continuance where the unavailable defendant's testimony was "necessary for a fair and adequate presentation of his case")... LoBue v. Travelers Ins. Co., 388 So.2d 1349, 1351 (Fla. 4th DCA 1980)(noting that the right to present evidence and call witnesses is perhaps the most important due process right of a party litigant)." Secondary authority on the matter regarding an individual's ability to present evidence and what a court should consider to that effect provides: "Letting a pro se plaintiff speak at an early conference can also provide an opportunity to make sense of pleadings that may be so poorly drafted it appears certain that the plaintiff has no case. However, "what it was, was that the person couldn't convey in writing what they could convey when they came before the court ... That is our job - not to make the case for the pro se litigant, but to allow the pro se litigant the opportunity to make the case."' ("Pro Se Case Management for Nonprisoner Civil Litigation", p7&8)

In his reply brief on appeal to the state Supreme Court, Russell asserted:

> "As indicated, Russell does not dispute Smith made advances, nor that payments were made toward those advances (pg.8); but maintains Smith made such advances as her contributions in their joint venture arrangement.

Russell at no time has suggested that Smith is not entitled to recover what she is rightfully entitled to recover. Russell simply asserts that Smith is not entitled to intentionally deceive the Court and with unclean hands present this matter as one of a lender, borrower type situation. Such is not the case. She decided she wanted a divorce, and with the help of a team of legal counsel, she devised a strategy to not only recoup her financial investments, but in the process of doing so, also profit greatly by the complete and utterly devastating, financial and character injury of Russell. As it stands on this date, Smith has not only effectively got her invested funds back, but has also taken every property of Russell's; smearing his name in the process, assaulting his character by making false allegations in order to get an order of protection against him; and if that wasn't enough, she has even defrauded him out of his residence along with his clothing, food, all his personal and business records, etc.."

(MTSC DA 18-0238, Appellant's Reply, p6&7)

Russell maintained his disputed contentions at issue from the earlier case, stating:

"The repeated mention of partnership in this case is primarily to bring to light that Smith had/has a duty to Russell to deal fairly and in good faith with him. Smith knew Russell's weaknesses. Smith knew Russell, admittedly, due to ADD, does not pay attention to the 'fine print' of documents, and cannot when under pressure, comprehend what he reads of long documents. She knew Russell trusted her completely in matters during their marriage. They did have the agreement; she was to contribute her 'executive talents' (having gone to law school) in order to help him rehabilitate his business matters, and along with Russell's talents, their goal was to ultimately increase profits, assets, and value. In exchange for doing so, was agreed (as Exhibit A of the 'Loan Agreement' evidences ,below) that Smith was to receive 50 percent of the profits on top of her initial investment."

(Id., p5)

Here, Russell contends that the Court in both cases, failed to grant Russell the benefit of every inference as being evidence in support of the issues he raised. The

issues he did raise should have been deemed genuine issues of material fact and prevented summary judgment. Russell claimed they acted upon and that the "Loan Agreement" document was intended to support, their agreement to participate jointly in Russell's business endeavors. The courts indicated Russell failed to raise any evidence to suggest a partnership existed. "`A joint adventure has been aptly defined as a "special combination of two or more persons, where in some specific venture a profit is jointly sought without an actual partnership or corporate designation". * * * It is purely the creature of our American courts.' 33 C.J. 841. A joint adventure has also been termed `commercial enterprise by several persons jointly.' Joring v. Harriss, 2 Cir., 292 F. 974. [further, "A joint adventure partakes of the nature of a partnership for a certain specific purpose, but does not have all the qualities of a partnership. `A "joint adventure" may exist where persons embark in an undertaking without entering on the prosecution of the business as partners strictly, but engage in a common enterprise for their mutual benefits; they each have the right to demand and expect from their associates good faith in all that relates to their common interests'." Jackson v. Hooper, 76 N.J.Eq. 185, 74 A. 130. See also, Reid v. Schaffer, 6 Cir., 249 F. 553."] Eagle Star Ins. Co. V. Bean, 134 F. 2d 755 – Court of Appeals, 9th Circuit, 1943 further supports Russell's contention with, "In the instant case, the contract between O'Leary and the company did not indicate that O'Leary had no right of control or no voice in the operations of the enterprise. It did provide that actual control of the dismantling operations would be in the company. We think this is merely the case where one of the parties entrusted

actual control to another, and that fact does not negative the holding that there was a joint adventure." All considered, the courts should have deemed Russell raised enough evidence, even if solely by inference, that a genuine issue exists.

The substantive facts necessary in the foreclosure action were, proof of: debt, ownership of debt, and non payment of the debt. Russell from the beginning disputed that KSV was a "lender" , claiming rather, a partnership existed, and thus, KSV owed Russell a duty of fair dealing; he further pointed out KSV had not proved the debt was valid or actual debt owed by Russell. For these reasons, Russell requests the aid of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William M. Russell, petitioner

Date: May 6, 2019