

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**WCC No. 2015-3585**

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**TIM REULE**

**Petitioner**

**vs.**

**ANDREW N. BROCK and CHRIS M. ALBRECHT and  
UNINSURED EMPLOYERS' FUND**

**Respondents.**

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**APPEALED TO MONTANA SUPREME COURT – 06/23/17  
DISMISSED BY PARTIES – 10/03/17**

**ORDER DISMISSING THE UNINSURED EMPLOYERS' FUND'S ALTERNATIVE  
CROSSCLAIM AGAINST RESPONDENT ANDREW N. BROCK AND ORDER  
CERTIFYING FINAL JUDGMENT UNDER ARM 24.5.348(2)**

¶ 1 This Court denied Respondent Uninsured Employers' Fund's (UEF) motion to certify its grant of summary judgment in its favor and against Petitioner Tim Reule as final under M.R.Civ.P. 54(b) because the UEF's crossclaim against Respondent Andrew N. Brock was still pending. In response, the UEF notified this Court it was voluntarily dismissing its crossclaim against Brock under M.R.Civ.P. 41. Petitioner Tim Reule objects. Reule argues that since this Court held a hearing and considered evidence, M.R.Civ.P. 41(c) does not allow the UEF to voluntarily dismiss its crossclaim. This Court held a hearing on May 22, 2017, at which time Reule and the UEF presented their respective positions as to whether the UEF's crossclaim against Brock should be dismissed.

¶ 2 For the following reasons, this Court dismisses the UEF's crossclaim against Brock. Moreover, since there are no longer any claims to adjudicate, this Court certifies its grant of summary judgment to the UEF as a final judgment.

**PROCEDURAL HISTORY**

¶ 3 On June 16, 2015, Reule filed his "Corrective Petition Disputing Uninsured Employers' Fund Decision." Reule asked this Court to reverse the UEF's determinations that he was liable for Albrecht's workers' compensation benefits under § 39-71-405, MCA,

and obligated to reimburse the UEF for all benefits it paid or will pay under § 39-71-504(1)(b), MCA. Reule stated, “The nature of the dispute is whether or not Chris Albrecht was an employee of Petitioner on the date of Mr. Albrecht’s injury.” Reule also named Brock, his uninsured subcontractor, and Chris M. Albrecht, the worker injured on his jobsite, as Respondents. However, Reule did not make any claim against Brock or Albrecht, nor seek any relief from them.

¶ 4 On July 6, 2015, the UEF filed its Response to Reule’s Corrected Petition. The UEF maintains that Reule was liable for Albrecht’s workers’ compensation benefits under § 39-71-405, MCA, and that Reule was obligated to reimburse it for all benefits it has paid, or will pay, under § 39-71-504(1)(b), MCA. The UEF also filed alternative counterclaims against Reule and an alternative crossclaim against Brock in which it alleged, “If Brock is found to be Albrecht’s direct employer, then Brock is liable to repay the UEF ‘an amount equal to all benefits paid or to be paid from the fund to or on behalf of an injured employee.’ ”<sup>1</sup>

¶ 5 The UEF attempted to serve Brock, but the Yellowstone County Sheriff was unable to locate Brock. Brock has not appeared in this case.

¶ 6 On April 11, 2017, this Court granted summary judgment in favor of the UEF, and against Reule. This Court ruled that Reule is liable for Albrecht’s workers’ compensation benefits under § 39-71-405(2), MCA, and, since he was uninsured, to reimburse the UEF under § 39-71-504(1)(b), MCA. This Court decided all the disputes between Reule and the UEF.

¶ 7 On May 16, 2017, this Court affirmed its grant of summary judgment to the UEF in its Order Denying Petitioner’s Motion for Reconsideration.

¶ 8 On May 17, 2017, this Court denied the UEF’s request to certify its grant of summary judgment to the UEF as a final judgment under M.R.Civ.P. 54(b) because the UEF’s crossclaim against Brock was still pending.

¶ 9 On May 19, 2017, the UEF notified this Court that it was dismissing its crossclaim against Brock under M.R.Civ.P. 41.

¶ 10 Reule objects to the UEF’s notice of dismissal.

### LAW AND ANALYSIS

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<sup>1</sup> Citing § 39-71-504(1)(b), MCA.

¶ 11 This Court does not have a rule on dismissal and, therefore, it is guided by the Montana Rules of Civil Procedure.<sup>2</sup>

¶ 12 M.R.Civ.P. 41 states, in relevant part:

**Rule 41. Dismissal of Actions.**

**(a) Voluntary Dismissal.**

**(1) *By the Plaintiff.***

(A) Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable state statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

....

**(c) Dismissing a Counterclaim, Crossclaim, or Third-Party Claim.** This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

(1) before a responsive pleading is served; or

(2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.<sup>3</sup>

....

¶ 13 Since Brock has neither appeared nor filed a responsive pleading to its crossclaim, the UEF maintains that it can dismiss its crossclaim simply by notifying this Court that it is doing so, as set forth in M.R.Civ.P. 41(a)(1)(A)(i).

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<sup>2</sup> ARM 24.5.352 (stating, "If no express provision is made in these rules regarding a matter of procedure, the court is guided, where appropriate, by considerations and procedures set forth in the Montana Rules of Civil Procedure.").

<sup>3</sup> Emphasis in original.

¶ 14 Reule counters the UEF by pointing to M.R.Civ.P. 41(c)(2). Reule maintains that since this Court held a hearing on the UEF's summary judgment motion and considered evidence, the UEF cannot dismiss its crossclaim against Brock via notice.

¶ 15 Applying M.R.Civ.P. 41(c)(2), this Court agrees with Reule that because this Court held a hearing at which evidence was introduced, the UEF cannot dismiss its crossclaim against Brock by notice. However, under M.R.Civ.P. 41(2), this Court has the authority to dismiss the UEF's crossclaim "on terms that the court considers proper." The Montana Supreme Court has explained that trial courts have wide discretion as to whether to dismiss a claim under M.R.Civ.P. 41(2), and of the conditions of a dismissal.<sup>4</sup> To determine whether to dismiss a claim, the trial court is to consider the prejudice to the opposing parties and, if so, whether any conditions could cure the prejudice.<sup>5</sup>

¶ 16 Under the facts and circumstances of this case, and established Montana law, Reule will not be prejudiced by dismissing the UEF's crossclaim against Brock. Reule maintains that he will be prejudiced because "Brock is the actual employer of Albrecht and is the real party responsible to Albrecht and the UEF" and that the UEF must "go through the process of pursuing Brock in order to completely resolve this matter." Reule, however, is attempting to relitigate the same issue this Court has already decided. Reule has argued throughout this case that he is not liable for Albrecht's benefits, nor liable to reimburse the UEF. Reule has also argued that Brock is liable for Albrecht's benefits and to reimburse the UEF. Notwithstanding, as this Court has explained, Reule's argument that he is not liable for Albrecht's benefits is without merit under the plain language of § 39-71-405(2), MCA. Under the plain language of § 39-71-405(2), MCA:

(2) Where an employer [Reule] contracts to have any work to be done by a contractor other than an independent contractor [Brock], and the work so contracted to be done is a part or process in the trade or business of the employer [Reule], then the employer [Reule] **is liable** to pay all benefits under this chapter to the same extent as if the work were done without the intervention of the contractor [Brock], and the work so contracted to be done shall not be construed to be casual employment. Where an employer [Reule] contracts work to be done as specified in this subsection, the contractor [Brock] and the contractor's [Brock's] employees shall come under that plan of compensation adopted by the employer [Reule].<sup>6</sup>

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<sup>4</sup> *U.S. Fidelity & Guar. Co. v. Rodgers*, 267 Mont. 178, 184, 882 P.2d 1037, 1040-41 (1994); *Teal, Inc. v. Wiedrich*, 259 Mont. 323, 326, 856 P.2d 543, 545 (1993); *Cantrell v. Henderson*, 221 Mont. 201, 204, 718 P.2d 318, 319-20 (1986); *Petriz v. Albertsons, Inc.*, 187 Mont. 102, 107-08, 608 P.2d 1089, 1092 (1980).

<sup>5</sup> See *Petriz*, 187 Mont. at 107-08, 608 P.2d at 1092 (citations omitted).

<sup>6</sup> Emphasis added.

The Montana Supreme Court has explained that this statute imposes “ultimate liability” upon the prime contractor<sup>7</sup> — in this case, Reule.<sup>8</sup> In short, although Brock was Albrecht’s direct employer, as a matter of law under § 39-71-405(2), MCA, Reule is liable for Albrecht’s workers’ compensation benefits as Albrecht’s “statutory” employer. This Court has also explained that since Reule was an uninsured employer when Albrecht was injured, he is liable to reimburse the UEF for benefits it has paid, or will pay, to Albrecht under § 39-71-504(1)(b), MCA. The outcome of the UEF’s crossclaim against Brock will not change Reule’s “ultimate liability” for Albrecht’s workers’ compensation benefits, nor his liability to the UEF for the benefits the UEF has paid, or will pay, on Albrecht’s claim.

¶ 17 Reule’s other arguments are without merit. Despite Reule’s claim, there is no law requiring the UEF to prosecute its crossclaim against Brock. While the UEF maintains that Brock is jointly and severally liable for Albrecht’s benefits, the UEF, like any litigant, can use its discretion to forgo or abandon a claim if, for example, it determines that the person against whom the claim is made is judgment proof. Moreover, while Reule asserted at the hearing that he wants to “join” in the UEF’s crossclaim, his request is untimely and, as explained above, is futile because he would remain ultimately liable for Albrecht’s benefits even if this Court were to conclude that Brock was jointly and severally liable.

¶ 18 Accordingly, this Court enters the following:

#### ORDER

¶ 19 The UEF’s crossclaim against Brock is **dismissed**.

¶ 20 Since there are no longer any claims or issues left to for this Court to adjudicate, this Court’s Order Granting the Uninsured Employers’ Fund’s Motion for Partial Summary Judgment and Denying Petitioner’s Cross Motion for Partial Summary Judgment dated April 11, 2017, is certified as a final judgment for purposes of appeal under ARM 24.5.348(2), and this Order shall be considered as notice of entry of judgment.

DATED this 26<sup>th</sup> day of May, 2017.

(SEAL)

/s/ David M. Sandler  
JUDGE

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<sup>7</sup> *State Comp. Ins. Fund v. Castle Mountain Corp.*, 227 Mont. 236, 240, 739 P.2d 461, 464 (1987) (quoting 1C Larson, Workmen’s Compensation Law, § 49.11 at 9-21, 9-22).

<sup>8</sup> Reule meets the definition of “employer” under the WCA, as § 39-71-117(1)(a), MCA, provides that an “employer” includes a “prime contractor . . . who has a person in service under an appointment or contract of hire, expressed or implied, oral or written . . . .”

c: Eric Edward Nord  
Chris M. Albrecht  
R. Russell Plath (courtesy copy)  
Quinlan O'Connor

Submitted: May 22, 2017