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Hereford v. Hereford: Granting Summary Judgment to a Non-Moving Party

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NOTES

HEREFORD v. HEREFORD: GRANTING SUMMARY JUDGMENT TO A NON-MOVING PARTY

I. INTRODUCTION

The summary judgment procedure under Rule 56, Federal Rules of Civil Procedure, which is identical to Rule 56, Montana Rules of Civil Procedure, was intended to provide a method of promptly disposing of actions in which there is no genuine issue of any material fact.[1] The Montana Supreme Court has approved the summary judgment procedure but only when the express provisions of Rule 56[2] have been complied with in district court.[3] Further, the supreme court has held that, assuming compliance with Rule 56, a motion for summary judgment should be denied if any doubt remains as to the propriety of granting it.[4]

The recent decision of *Hereford v. Hereford*[5] expands the scope of Rule 56 and the power of courts to grant summary judgments in Montana. The supreme court therein adopted the majority rule of federal courts that summary judgment may be granted to a non-moving party under certain conditions, which the court found to be unsatisfied in *Hereford*.[6] This note will discuss the *Hereford* decision, the rationale of the rule adopted, and un-

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1. Original Committee Note of 1937 to Rule 56, *reprinted in* 6 MOORE'S FEDERAL PRACTICE ¶ 56.01[2], at 56-14 (2d ed. 1976).

2. MONT. R. CIV. P. 56(c) provides in part:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

3. *See* Scott v. Robson, ___ Mont. ___, 597 P.2d 1150, 1154 (1979); Hansen v. Transamerica Ins. Co., 175 Mont. 273, 276, 573 P.2d 663, 665 (1978); Engebretson v. Putnam, 174 Mont. 409, 412-13, 571 P.2d 368, 370 (1977); Anderson v. Applebury, 173 Mont. 411, 414-15, 567 P.2d 951, 953-54 (1977); Duncan v. Rockwell Mfg. Co., 173 Mont. 382, 386, 567 P.2d 936, 938 (1977); Johnson v. Johnson, 172 Mont. 150, 154, 561 P.2d 917, 919 (1977); Dean v. First Nat'l Bank of Great Falls, 152 Mont. 474, 483, 452 P.2d 402, 407 (1969).

4. Cheyenne Western Bank v. Young, ___ Mont. ___, 587 P.2d 401, 404 (1978); Fulton v. Clark, 167 Mont. 399, 403, 538 P.2d 1371, 1373 (1975); Kober v. Steward, 148 Mont. 117, 122, 417 P.2d 476, 479 (1966).

5. ___ Mont. ___, 598 P.2d 600 (1979).

6. *Id.* at ___, 598 P.2d at 602.

resolved issues related to its application in Montana.

II. HEREFORD v. HEREFORD

A. *Facts*

On July 28, 1977, Charles Hereford filed an action against his ex-wife, Margaret, for an accounting and judgment for excess child support payments. The Herefords' 1972 divorce decree ordered him to make monthly payments to Margaret for the support of their minor child.[7] The decree also required that children's benefits received by Margaret from Charles's social security allowance be credited toward his support obligation. In his complaint Charles alleged he had not been given full credit for benefits over a five year period, resulting in an overpayment to Margaret.[8]

Margaret filed an answer admitting receipt of support payments and social security benefits without alleging the amounts received. Interrogatories were filed and answered by both parties. Charles then moved for summary judgment, pursuant to Rule 56(a),[9] based on the issue of excess support payments. Margaret resisted the motion, pointing to areas of contested fact, but made no cross-motion or request for summary judgment. The district court, however, entered summary judgment for Margaret based on four grounds,[10] none of which had been addressed by Charles in his motion or at the subsequent hearing on the motion.

B. *The Court's Opinion*

Charles appealed the summary judgment entered against him to the Montana Supreme Court. In an opinion by Justice Sheehy, the court held that it was error for the district court to grant sum-

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7. The divorce decree, entered in the Fourth Judicial District Court, County of Ravalli, ordered Charles to pay $100 per month until December 4, 1977 when James Hereford, the son of the parties, reached legal age. The total amount of child support due under the divorce decree was $7,113.33.

8. Margaret allegedly received social security children's benefits totaling $5,558.10 and support payments from Charles totaling $4,042.88. The alleged overpayment to Margaret was $2,487.65.

9. MONT. R. CIV. P. 56(a) provides:

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

10. The four stated grounds were as follows: Charles was guilty of laches; any overpayments were voluntary; Margaret had made sacrifices to assure full visitation rights for Charles; and Charles had a duty to support his son and all payments went for the support of his son.

mary judgment to Margaret, a non-moving party, on grounds other than the issue addressed by Charles in his motion for summary judgment or at the hearing on the motion, without first affording him notice and a reasonable opportunity to be heard.[11] The supreme court also found the summary judgment entered for Margaret to be unsupported by the record on the four grounds relied upon by the district court.[12] The court refused to direct the district court to enter summary judgment in favor of Charles, however, holding that before it could do so, all the facts bearing on the issues must be before the supreme court.[13] The order granting summary judgment to Margaret was reversed and the cause was remanded for further proceedings consistent with the court's opinion.[14]

In deciding the basic procedural issue of whether the district court properly granted summary judgment to the non-moving party, the court stated:

> By the great weight of authority, no formal cross-motion is necessary for the court to enter summary judgment. The invocation of the power of the court to render summary judgment in favor of the moving party gives the court power to render summary judgment for his adversary provided the case warrants that result. However, the court must be very careful that the original movant had a full and fair opportunity to meet the proposition, that there is no genuine issue of material fact and the other party is entitled to judgment as a matter of law.[15]

The court applied this statement of the majority federal rule to the facts in *Hereford* and found the summary judgment entered for Margaret failed to meet the rule's requirements.[16] First, the case did not warrant the result of granting summary judgment to Margaret; she was not entitled to judgment as a matter of law and issues of material fact existed on each of the four grounds stated.[17] Second, Charles was not afforded an opportunity to resist the summary judgment by showing that genuine issues of material fact existed and that Margaret was not entitled to judgment as a matter of law.[18]

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11. Hereford, ___ Mont. ___, 598 P.2d at 602.
12. *Id.* at ___, 598 P.2d at 602-03.
13. *Id.* at ___, 598 P.2d at 603.
14. *Id.*
15. *Id.* at ___, 598 P.2d at 602, *citing* 6 MOORE'S FEDERAL PRACTICE ¶ 56.12, at 56-331 and 56-334 (2d ed. 1976).
16. Hereford, ___ Mont. ___, 598 P.2d at 602.
17. *Id.*
18. *Id.*

The supreme court also recognized in *Hereford* that it had the power not only to reverse the summary judgment entered for Margaret but also to direct the district court to enter summary judgment in favor of Charles.[19] The court applied another majority federal rule which requires all the facts bearing on the issues to be before the appellate court before it may direct the trial court to enter summary judgment in favor of a party.[20] The supreme court found the facts of this case were not clear enough to enter summary judgment for Charles and therefore remanded the case for further proceedings in the district court.[21]

III. The Rationale of the Rule

Rule 56 does not expressly allow granting summary judgment to a non-moving party.[22] An amendment to Rule 56(c)[23] that would have permitted such a result in a proper case was proposed by the Advisory Committee in 1955 but never adopted.[24] In addition, the language of Rule 56(c)[25] can reasonably be construed to require a motion as a prerequisite for granting summary judgment.[26]

Nevertheless, a substantial majority of federal courts construing Rule 56 have held that summary judgment may be granted to a non-moving party where the case warrants, provided the opposing party has been given notice and a reasonable opportunity to be heard.[27] There is some contra authority.[28] In states incorporating the federal rules into their own, a majority conform to the position of the federal courts,[29] but a significant minority require that a

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19. *Id.* at ___, 598 P.2d at 603.

20. *Id., citing* 6 Moore's Federal Practice ¶ 56.12, at 56-337 (2d ed. 1976).

21. Hereford, ___ Mont. ___, 598 P.2d at 603.

22. *See* Mont. R. Civ. P. 56(c) *and* Mont. R. Civ. P. 56(a).

23. Fed. R. Civ. P. 56(c).

24. Advisory Committee on Rules of Civil Procedure, Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts (1955), *reprinted in* 6 Moore's Federal Practice ¶ 56.01[8], at 56-17 (2d ed. 1976).

25. Fed. R. Civ. P. 56(c), which is identical to Mont. R. Civ. P. 56(c).

26. *See, e.g.,* Estate of Campbell, 253 N.W.2d 906, 907-08 (Iowa 1977).

27. *E.g.,* Morrissey v. Curran, 423 F.2d 393, 399 (2d Cir. 1970), *cert. denied,* 399 U.S. 928 (1970); Missouri Pacific R. R. Co. v. National Milling Co., 409 F.2d 882, 884-85 (3d Cir. 1969); Betts v. Coltes, 467 F. Supp. 544, 546 (D. Hawaii 1979); Moss v. Ward, 450 F. Supp. 591, 594 (W.D. N.Y. 1978); Watkins Motor Lines, Inc. v. Zero, 381 F. Supp. 363, 367-68 (N.D. Ill. 1974); *aff'd,* 525 F.2d 538 (7th Cir. 1975), *cert. denied,* 425 U.S. 952 (1976); Peoples Trust Co. v. United States, 311 F. Supp. 1197, 1201 (D. N.J. 1970), *aff'd,* 444 F.2d 193 (3d Cir. 1971).

28. *E.g.,* Denton v. Mr. Swiss of Missouri, 564 F.2d 236, 242 (8th Cir. 1977); Sharlitt v. Gorinstein, 535 F.2d 282, 283 (5th Cir. 1976).

29. *E.g.,* Trimmer v. Ludtke, 105 Ariz. 260, 263, 462 P.2d 809, 812 (1969); Markel v. Transamerica Title Ins. Co., 103 Ariz. 353, 358-59, 442 P.2d 97, 102 (1968), *cert. denied,* 393 U.S. 999 (1968); Flint v. MacKenzie, 53 Hawaii 672, 673, 501 P.2d 357, 358 (1972); Houk v.

formal cross-motion be made before granting summary judgment against the original movant.[30]

State and federal courts adopting the majority rule often cite, in support of their position, the purpose of Rule 56: prompt disposition of actions where no material facts are disputed.[31] They contend there is no need for the mere mechanics of a cross-motion when the power of the court to render summary judgment has been properly invoked.[32] Potential prejudice to the original movant is minimized, according to this view, by the requirements of notice and an opportunity to be heard.[33] Some decisions have also relied on Rule 54(c)[34] which grants a court power to enter final judgment to which the prevailing party is entitled even if that party has not demanded such relief in his pleadings.[35]

IV. Application of the Rule in Montana

The *Hereford* decision departs from prior Montana case law on summary judgments by approving a form of procedure beyond the express provisions of Rule 56.[36] The *Hereford* rule, permitting courts to grant summary judgment to a non-moving party, also poses questions and one apparent conflict on related procedural issues, in view of prior decisions of the Montana Supreme Court.

The first of those related issues is whether summary judgment may be granted upon an oral cross-motion made at the hearing held on the original motion for summary judgment. The majority position in the federal courts is that an oral cross-motion is sufficient in a proper case.[37] This view is essentially a corollary to the majority rule adopted in *Hereford* because if summary judgment may be granted without a cross-motion, a fortiori, it may be

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Ross, 34 Ohio St.2d 77, 80-85, 296 N.E.2d 266, 271-72 (1973); Thomas v. Transport Ins. Co., 532 S.W.2d 263, 266 (Tenn. 1976); Christensen v. Farmers Ins. Exch., 21 Utah 2d 194, 200, 443 P.2d 385, 389 (1968).

30. *E.g.*, Southern Pacific Co. v. Fish, 166 Cal. App. 2d 353, 333 P.2d 133, 137 (1958); Estate of Campbell, 253 N.W.2d 906, 907-08 (Iowa 1977); Seire v. Police and Fire Pension Comm'n, 4 N.J. Super. 230, 235, 66 A.2d 746, 748 (1949); Dixon v. Shirley, 531 S.W.2d 386, 387-88 (Tex. 1975).

31. Local 33, Int'l Hod Carriers v. Mason Tenders Dist. Council, 291 F.2d 496, 505 (2d Cir. 1961); Smith v. McDonald, 116 F. Supp. 158, 159-60 (M.D. Pa. 1953); Flint v. MacKenzie, 53 Hawaii 672, 673, 501 P.2d 357, 358 (1972).

32. *E.g.*, Hennessey v. Federal Sec. Adm'r., 88 F. Supp. 664, 668 (D. Conn. 1949).

33. *See, e.g.*, Houk v. Ross, 34 Ohio St. 2d 77, 80-85, 296 N.E.2d 266, 271-72 (1973).

34. Fed. R. Civ. P. 54(c).

35. *See, e.g.*, Hooker v. New York Life Ins. Co., 66 F. Supp. 313, 318 (N.D. Ill. 1946), *rev'd on other grounds*, 161 F.2d 852 (7th Cir. 1947), *cert. denied*, 332 U.S. 809 (1947).

36. *See* Mont. R. Civ. P. 56(c).

37. *See* Tripp v. May, 189 F.2d 198, 200 (7th Cir. 1951); Dyek v. Blair, 390 F. Supp. 1291, 1309 (N.D. Ill. 1975); Baird v. Lynch, 390 F. Supp. 740, 746 (W.D. Wis. 1974).

granted upon an oral cross-motion provided the same conditions are satisfied in both cases.

In *Audit Services, Inc. v. Haugen*,[38] however, the Montana Supreme Court stated in dictum that Rule 56 does not allow oral motions for summary judgment. There, the appellee had filed a written motion and supporting brief for summary judgment based on one issue but argued for summary judgment at the subsequent hearing on different grounds. The court held that under those circumstances, summary judgment may properly be granted on grounds other than those stated in the motion and brief.[39] Appellants contended that summary judgment had been granted upon an oral motion at the district court hearing. The supreme court rejected that contention, but agreed that Rule 56 does not allow oral motions for summary judgment.[40]

The court's statement in *Haugen* conflicts with the majority rule adopted in *Hereford* requiring no formal cross-motion to grant summary judgment. The resolution of the conflict most consistent with the *Hereford* rule is that an oral motion cannot initially invoke the court's power to render summary judgment. Once that power has been properly invoked by written motion of one party, however, an oral cross-motion at the subsequent hearing is sufficient to grant summary judgment to the opposing party.[41] The court's dictum in *Haugen* should therefore be limited to situations where, unlike *Haugen*, no previous written motion has properly invoked the power of the court.

Another issue related to the *Hereford* rule is whether summary judgment may be granted to a non-moving party without affording the moving party notice or further opportunity to be heard, provided the summary judgment is based on the same grounds addressed by the moving party in his own motion. It can be argued that if the movant has alleged there is no dispute of material fact on a specific issue, he could not subsequently argue against summary judgment by asserting a dispute of material fact exists on the same issue.[42]

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38. ___ Mont. ___, 591 P.2d 1105 (1979).

39. *Id.* at ___, 591 P.2d at 1108.

40. *Id.*

41. The facts of Sequoia Union High Dist. v. United States, 245 F.2d 227 (9th Cir. 1957), the case cited as authority for the supreme court's dictum in *Haugen*, support this resolution of the conflict. There, the court held that Rule 56 does not authorize oral motion for summary judgment. The facts of the case can be distinguished from the facts in *Haugen* or *Hereford* because no written motion had ever been filed by either party to properly invoke the court's power to render summary judgment.

42. *See generally*, Mourning v. Family Publication Serv., Inc., 411 U.S. 356, 362 (1973).

This argument was rejected in *Faith Lutheran Retirement Home v. Veis.*[43] There, the Montana Supreme Court held that the fact that both parties have moved for summary judgment does not establish the lack of a genuine issue of material fact.[44] The court relied on the principle that a party may concede there is no issue of material fact based on his own legal theory but properly assert a dispute of material fact if based on his opponent's legal theory.[45] This principle, in a factual context similar to *Hereford,* requires the court to afford the movant notice and further opportunity to be heard before granting summary judgment to the non-movant even though the summary judgment is based on grounds addressed previously by the movant.

Finally, a procedural issue related to the *Hereford* rule arises when one party files a Rule 12(b)(6)[46] motion to dismiss for failure to state a claim upon which relief can be granted, but matters outside the pleadings are considered by the court. If this occurs, Rule 12(b)[47] reqires the motion to be disposed of as one for summary judgment. The issue raised by *Hereford* is whether the non-moving party could be granted summary judgment under those circumstances.

In two prior Montana cases,[48] the court reversed summary judgment granted to the moving party, where a motion to dismiss had been treated as a motion for summary judgment, because the opposing party was not afforded an opportunity to resist the motion as one for summary judgment. Those cases would not prevent granting summary judgment to the non-moving party under the rule adopted in *Hereford,* provided the rule's requirements of notice and an opportunity to be heard for the moving party are satisfied.

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43. 156 Mont. 38, 473 P.2d 503 (1970).

44. *Id.* at 47, 473 P.2d at 507, *citing* 3 BARRON & HOLTZOFF § 1239, at 176-78 (Rules ed. 1958).

45. Veis, 156 Mont. 47, 473 P.2d at 507.

46. MONT. R. CIV. P. 12(b)(6).

47. MONT. R. CIV. P. 12(b) provides in part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all the parties shall be given reasonable opportunity to present all the material made pertinent to such motion by Rule 56.

48. Graveley v. Macleod, 175 Mont. 338, 344, 573 P.2d 1166, 1169 (1978); State ex rel. Dept. of Health & Environmental Sciences v. City of Livingston, 169 Mont. 431, 435-36, 548 P.2d 155, 157-58 (1976).

V. CONCLUSION

The majority federal rule adopted by the Montana Supreme Court in *Hereford* allows granting summary judgment to a non-moving party, and thereby expands the scope of Rule 56 beyond its express provisions. The rule is within the express purpose of Rule 56, however, and is sound in principle and supported by substantial authority. Several related procedural questions are raised by the *Hereford* decision and the application of the new rule in light of prior Montana case law. An apparent conflict exists on the issue of granting summary judgment upon an oral cross-motion.

The questions posed and the conflict can be logically resolved by relying on the rationale of the adopted rule. The *Hereford* rule incorporates the essential ingredients of properly invoking the power of the court to render summary judgment, satisfying the substantive requirements of Rule 56, and providing the procedural safeguards of notice and an opportunity to be heard. Potential conflicts and inconsistent results in the future can be avoided by adhering to the rule and its rationale.

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