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CIVIL PROCEDURE

Gregory C. Black

The Montana Supreme Court and this state’s federal district courts continued to expand the quantum of case law interpreting Montana’s range of procedural rules and statutory provisions for civil litigation during the survey period. This article highlights the important holdings and examines many of the issues in these recent opinions.

I. JURISDICTION

The reach of Montana’s long-arm statute over nonresident defendants continues to be lengthened. McGee v. Riekhof, a recent decision by a federal district court for the District of Montana, establishes that a diagnosis rendered telephonically to a patient in Montana by a nonresident doctor is sufficient minimum contact with the state to require that doctor to defend an action for alleged medical malpractice in this state.

Dr. Riekhof performed surgery in Salt Lake City to repair plaintiff’s detached retina and instructed plaintiff’s wife to phone him to report on her husband’s progress upon their return to Montana. During one of these reports, Dr. Riekhof advised her that plaintiff could safely return to work. On the strength of this advice, plaintiff resumed working and immediately suffered a redetachment and massive retinal tear. Plaintiff based his complaint, which alleged medical malpractice, on the telephone diagnosis rendered to plaintiff’s wife in Montana, not on the surgical treatment performed in Utah. Defendant countered with a motion to dismiss for lack of personal jurisdiction.

Senior District Judge W.D. Murray denied this motion, relying on a two-tiered analytical approach: (1) determining whether the alleged act brought defendant within the grasp of Montana’s long-arm statute, and (2) then assessing whether an exercise of in personam jurisdiction by Montana would comport with due process.

1. M. R. Civ. P. 4B(1) provides in part:

   [A]ny person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

   (b) the commission of any act which results in accrual within this state of a tort action.

3. Id. at 1279.
4. Id. at 1277, 1279.
requirements. Contrasting the case at bar with an earlier Ninth Circuit opinion, Judge Murray held that defendant's conversation represented a new diagnosis in Montana rather than a continuation of the Salt Lake City treatment within the meaning of Montana Rule of Civil Procedure 4B. Analyzing the due process issue, the court reasoned that Montana's interest in protecting its citizens from potential negligent diagnosis would justify subjecting the non-resident doctor to this forum's in personam jurisdiction.

II. VENUE

The supreme court provided some clarification of Montana's venue statutes in three decisions during the survey period.

*Clark Fork Paving, Inc. v. Atlas Concrete and Paving* provides guidelines for determining venue in contract actions. Plaintiffs brought suit in Sanders County, seeking the value of property held by defendants as plaintiffs' transferees under an oral contract negotiated and entered in that county. Defendants, all residents of Missoula County, moved for a change of venue to Missoula County, which the district court denied.

Relying on prior decisions to affirm this ruling, Justice Sheehy, writing for the court, held that under the language of the venue provisions, plaintiff has the option of bringing an action based upon contract either in the county of defendant's residence or the county of performance when the contract clearly shows, by express terms or necessary implication, that the contracting parties mutually agreed to a county for performance of the contract. In *Clark Fork Paving*, the court correctly implied that performance of the

5. *In Wright v. Yackley, 459 F.2d 287 (9th Cir. 1972)*, a South Dakota doctor mailed a prescription, without alteration, to a former patient who moved from South Dakota to Idaho. The *Wright* court held this act to be a continuation of the South Dakota diagnosis and prescription, not a new prescription, and concluded that an Idaho federal district court was without its jurisdiction in the matter. *Id.* at 288-89.


7. *Id., citing Wright v. Yackley, 459 F.2d 287, 289 n.4 (9th Cir. 1972).*

8. *--- Mont. ---, 582 P.2d 779 (1978).*


   Actions upon contracts may be tried in the county in which the contract was to be performed. . . .

   In all other cases, the action shall be tried in the county in which the defendants or any of them may reside at the commencement of the action. . . . (Emphasis added.)

11. *--- Mont. at ---, 582 P.2d at 782, citing Love v. Mon-O-Co Oil Corp., 133 Mont. 56, 61, 319 P.2d 1056, 1059 (1957).*
contract would occur in Sanders County, since the parties negotiated and entered the contract there and the property was transferred to defendants there. When plaintiffs exercised their option of either Missoula or Sanders County for venue purposes, neither the defendants nor the court could interfere with that choice.

The supreme court resolved two venue disputes involving interpretation of Montana Code Annotated §§ 25-2-104 and 105 (1978), which provide:

\[
\text{Actions for the recovery of a penalty or forfeiture imposed by statute must be tried in the county where the cause or some part thereof arose.} \ldots .^{14}
\]

\[
\text{Actions against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office or against a person who, by his command or in his aid, does anything touching the duties of such officer must be tried in the county where the cause or some part thereof arose.} \ldots .^{15}
\]

McGrath v. Dore affirms that venue is proper in a mandamus action where the public official resides officially. In McGrath, the Silver Bow County Assessor brought an action in that county against the Director of the Montana Department of Revenue to compel the Department to pay him the amount of salary which he claimed the Department owed him. The district court denied defendant’s motion for change of venue to Lewis and Clark County, but the supreme court reversed that decision. Writing for the unanimous court, Justice Harrison rejected plaintiff’s argument that the cause of action arose in Silver Bow County because that county determined his salary and he received the checks for the alleged wrong amount there. From McGrath, one should conclude that a mandamus action against a state official is properly brought in Lewis and Clark County, while such an action against a local or county official should be brought in that county.

Roundup National Bank v. Department of Revenue provides a more flexible rule than does McGrath. Plaintiff brought an action in Lewis and Clark County to recover taxes it had paid under protest after an additional assessment by the Department of Revenue. The

12. ______ Mont. at ______, 582 P.2d at 782.
14. MCA § 25-2-104 (1978) (formerly codified at R.C.M. 1947, § 93-2902 (1)).
15. MCA § 25-2-105 (1978) (formerly codified at R.C.M. 1947, § 93-2902 (2)).
18. ______ Mont. at ______, 580 P.2d at 1386.
district court, however, granted defendant's motion for change of venue to Musselshell County. The applicable venue statute required the supreme court to examine the facts to determine where the cause of action arose.

The unanimous court agreed that under these facts venue should be in Musselshell County. A Department of Revenue audit produced the additional tax, but the bank was located, the audit conducted, and the taxes paid under protest and held in a special tax protest fund in Musselshell County.

III. Limitations

In the absence of statutory limitations, time limits exist to insure that parties assert their legal rights in a timely manner. During the survey period, the Montana Supreme Court affirmed two lower court decisions—one denying a motion to intervene and one dismissing a third party complaint for want of prosecution.

Plaintiff brought an action in March 1973 to foreclose a promissory note executed by the president of defendant corporation in Archer v. LaMarch Creek Ranch. The corporation's secretary sought to intervene when the matter came to trial in June 1975, but the trial court refused his motion to intervene as untimely. The supreme court affirmed this denial. Justice Haswell stated that failure to intervene or to take action to rescind the note until some two and one-half years after learning of its existence constituted a waiver of the right to intervene.

Montana recognizes that a party's failure to prosecute his claim, absent a showing of excuse for the delay, will result in dis-

20. MCA § 25-2-104 (1978) (formerly codified at R.C.M. 1947, § 93-2902(1)).
21. Previous supreme court decisions established that proper venue can be determined by examination of the nature of the cause of action and the place where it arose. See, e.g., Billings Associated Plumbing v. Emerson, Mont., 563 P.2d 1123, 1124 (1977). Often, the former factor will be determinative. See, e.g., Clark Fork Paving, Inc. v. Atlas Concrete and Paving, Mont., 582 P.2d 779 (1978) (contract action); McGrath v. Dore, Mont., 580 P.2d 1385 (1978) (mandamus action). If this inquiry fails, one must resort to the latter factor, which requires a factual analysis of each case to determine proper venue. The Roundup Nat'l Bank decision exemplifies this approach.
22. Mont. at 572 P.2d at 911.
23. Id.
25. See M. R. Civ. P. 24. Both intervention of right, Rule 24(a), and permissive intervention, Rule 24(b), require timely application to intervene. The Archer court did not distinguish between these two forms of intervention.
26. Mont. at 571 P.2d at 382.
27. Id.
mission of the claim.\textsuperscript{23} \textit{Calaway v. Jones}\textsuperscript{29} extends the rule to third party complaints. Defendant Jones filed a third party complaint against several third party defendants and issued interrogatories to each of them. He failed, however, to expedite his claim in any other way. In fact, his inaction forced the court to order his appearance at a deposition and to compel him to answer interrogatories. The supreme court affirmed the district court's dismissal of Jones's third party complaint,\textsuperscript{30} with Justice Daly emphasizing that Jones failed to offer an excuse for his procrastination and his inaction was unreasonable under the circumstances.\textsuperscript{31}

The party moving to dismiss for want of prosecution need not demonstrate actual injury by the inaction. His motion forces the dilatory party to present a reasonable excuse for his delay.\textsuperscript{32} The question of unreasonable delay is dependent upon the facts in each case. Limitations not based upon statute are matters within the discretion of the trial court and its rulings on timeliness of motions and prosecution of claims will not be overturned on appeal absent a showing of abuse of discretion.\textsuperscript{33}

\section*{IV. Pleading}

The Montana Supreme Court continued to enforce liberal pleading requirements by embracing the basic tenets of notice pleading in \textit{Tobacco River Lumber Co. v. Yoppe}.\textsuperscript{34} The district court dismissed without opinion or explanation plaintiff's complaint for breach of contract, but the supreme court reversed this ruling.\textsuperscript{35} Justice Shea asserted that the complaint sufficiently apprised defendants of the nature of plaintiff's claim and even if the complaint lacked clarity, the appropriate remedy should be a motion for a more definite statement,\textsuperscript{36} not dismissal of the complaint.\textsuperscript{37}

\begin{footnotesize}
\begin{itemize}
\item[29.] \textit{---} Mont. \textit{---}, 582 P.2d 756 (1978).
\item[30.] \textit{Id.} at \textit{---}, 582 P.2d at 759.
\item[31.] \textit{Id.}
\item[32.] \textit{Id.} at \textit{---}, 582 P.2d at 758; Cremer v. Braaten, 151 Mont. 18, 20, 438 P.2d 553, 554 (1968).
\item[34.] \textit{---} Mont. \textit{---}, 577 P.2d 855 (1978). For other aspects of this case, \textit{see infra} note 117.
\item[35.] \textit{Id.} at \textit{---}, 577 P.2d at 857.
\item[36.] M. R. Civ. P. 12(e), which reads in part:
\begin{quote}
If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading,
\end{quote}
\end{itemize}
\end{footnotesize}
Defendants also attacked plaintiff's claim for damages, contending that the claim involved special damages, requiring specific pleading.\textsuperscript{38} The unanimous court applied the simplicity of notice pleading to Rule 9(g), holding that claims for special damages are sufficient, "if they are definite enough to enable the opposing party to prepare his responsive pleading and his defense."\textsuperscript{39}

These Tobacco River Lumber holdings signify that the court is unwilling to allow litigation to be terminated at the initial pleading stage if the pleadings provide sufficient notice of plaintiff's claims for relief and damages, both general and special. This opinion fully complies with the spirit of the Rules of Civil Procedure.

Whittaker v. Schreiner\textsuperscript{40} indicates that a party who elects to bring a later, independent action rather than assert a permissive cross-claim\textsuperscript{41} in a prior action is not barred by res judicata from initiating the later action.\textsuperscript{42} The high court determined that a Rule 13(g) cross-claim is always permissive, contrasting it with the mandatory requirements of a compulsory counterclaim under Rule 13(a).\textsuperscript{43}

V. SUMMARY JUDGMENT

Yecny v. Day\textsuperscript{44} delineates the burdens of proof for the respective parties under a motion for summary judgment. The initial burden attaches to the movant. Then,

[w]here the record discloses no genuine issue of material fact the burden shifts from the moving party. Under that circumstance, the party resisting the motion must come forward with substantial evidence raising the issue. . . . Once the burden has shifted, the

\textsuperscript{38} See M. R. Civ. P. 9(g).
\textsuperscript{40} Mont., 570 P.2d 299 (1977).
\textsuperscript{41} M. R. Civ. P. 13(g) states in part:
A pleading may state as a cross-claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. (Emphasis added.)
\textsuperscript{42} Whittaker v. Schreiner, Mont., 570 P.2d 299, 301 (1977).
\textsuperscript{43} M. R. Civ. P. 13(a) provides in part:
A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . . (Emphasis added.)
\textsuperscript{44} Mont., 571 P.2d 386 (1977).
party opposing the motion is held to a standard of proof about equal to that initially imposed upon the moving party: . . . the party opposing motion must present facts in proper form—conclusions of law will not suffice; and the opposing party’s facts must be material and of a substantial nature. . . .

Rule 56(c) allows partial summary judgment, interlocutory in nature, to be rendered on the issue of liability. Graveley v. MacLeod establishes that when an order granting partial summary judgment, interlocutory by its own terms, also mandates entry of judgment directing the transfer of property, that order is directly appealable to the supreme court before final judgment. Justice Shea, in his opinion for the unanimous court, recognized that an order granting partial summary judgment is not directly appealable unless it fits into the exceptions enumerated in Rule 1 of the Montana Rules of Appellate Civil Procedure. The order in question clearly fit one of these exceptions; thus a direct appeal to the supreme court was proper.

The Graveley court further held that the grant of summary judgment itself was improper, as the district court had relied on an improper evidentiary basis in granting plaintiff’s motion. The district court had received evidence during oral argument on defendants’ previous motion to dismiss. Because the defendants presented no evidence at the hearing on plaintiff’s motion for summary judgment, the district court relied on the evidence presented on the motion to dismiss to determine that no factual issues existed on the issue of specific performance. Justice Shea acknowledged that a motion to dismiss can be treated as a motion for summary judgment, but ruled that the district court could not rely on the motion to dismiss evidence to decide the summary judgment motion with-

46. M. R. Civ. P. 56(c).
47. ___ Mont. ___, 573 P.2d 1166 (1978).
48. Id. at ___, 573 P.2d at 1168.
50. In relevant part M. R. App. Civ. P. 1 provides:
   A party aggrieved may appeal from a judgment or order, except when expressly made final by law, in the following cases:
   
   (b) . . . from an order directing the delivery, transfer, or surrender of property.
51. ___ Mont. at ___, 573 P.2d at 1169.
52. Id. A motion to dismiss can be treated as a motion for summary judgment under M. R. Civ. P. 12(b) if matters outside the pleadings are presented and not excluded by the court and if all parties are given reasonable opportunity to present materials pertinent to a motion for summary judgment under M. R. Civ. P. 56.
out giving defendants notice that the motion to dismiss would determine whether issues of material fact existed.\textsuperscript{53}

VI. JURY PRACTICE

The supreme court examined such jury practice issues as peremptory challenges, jury misconduct and inadequate jury instructions during the survey period.

Montana jury challenge statutes allow each party four peremptory challenges.\textsuperscript{54} \textit{Kudrna v. Comet Corp.}\textsuperscript{55} affirms that where the positions of codefendants are hostile and antagonistic to each other, each defendant is entitled to four peremptory challenges.\textsuperscript{56} The supreme court originally held that multiple defendants are allowed only four peremptory challenges.\textsuperscript{57} This decision was later modified so that when a multiple defendant can show, by pleadings, evidence or representations that his posture in the lawsuit is hostile to the other defendants, he is entitled to four peremptory challenges.\textsuperscript{58}

\textit{Erickson v. Perrett}\textsuperscript{59} establishes more guidelines to determine when jury misconduct is sufficient grounds for a new trial. Montana statutory grounds for a new trial give the trial judge discretion to grant a new trial if jury misconduct materially affects the substantial rights of the complaining party.\textsuperscript{60} The parties presented conflicting testimony and evidence as to the extent of damages to defendant’s car during the trial, but the trial judge denied defendant’s motion that the jury be allowed to view his car. Subsequently, several jurors inadvertently saw defendant’s car outside the courthouse during a noon recess.

Justice Haswell rejected plaintiff’s claim that prejudicial conduct occurred, stressing that the jury’s view inadvertently and innocently happened, that the jurors conducted no tests or measurements to assess the damage, and that no juror who viewed the car disclosed any new or different information about the car’s condition to the remaining jurors.\textsuperscript{61}
The supreme court’s review of *Billings Leasing Co. v. Payne* emphasizes the need for trial courts to give precise and adequate jury instructions. Although counsel is initially responsible for proposing instructions, the trial judge has the ultimate task of insuring that jurors are sufficiently instructed on all matters of law necessary to render a verdict.

The *Billings Leasing* court overturned the lower court decision because the court gave a completely inadequate instruction on defendant’s counterclaims. Plaintiff brought the action to recover bank rent due him on a truck leased by defendant. He also garnished defendant’s wages by writ of attachment, then launched a claim and delivery action for possession of the truck. Plaintiff sold the truck at a private sale without notifying defendant. In both actions defendant counterclaimed, asserting unlawful repossession, improper garnishment, and failure to sell the truck in a commercially reasonable manner.

In his opinion, Justice Shea was critical of counsel’s failure to crystallize their respective theories of recovery in their pleadings and of the trial court’s neglect in not calling a pre-trial conference in the wake of this failure. He also pointed to irregularities in the settling of instructions which added to the confusion.

**VII. JUDGMENT**

**A. Default Judgment**

Default judgments are not favored by courts; this maxim is generally adhered to by the Montana Supreme Court. During the survey period the court continued to scrutinize closely default judgments entered by trial courts.

Entry of default judgment against a party who fails to appear at trial was held to be proper under Rule 55(a) by a unanimous
court in Archer v. LaMarch Creek Ranch. 69

The propriety of entering a default judgment in Archer should be contrasted with the errors of the trial court in granting a default judgment in Big Spring v. Blackfeet Tribe. 70 In this libel action defendant failed to appear by either answer or motion within twenty days after service of plaintiffs' complaint and summons, 71 but the plaintiffs did not file their proof of service until twenty-two days after service. 72 Contemporaneous with the filing of proof of service, plaintiffs made a written request for default judgment, which the trial court entered the same day.

Defendant responded with a motion to set aside the default judgment, alleging that lack of proof of service made ascertaining the exact date of service impossible. 73 Plaintiffs noticed defendant's motion for hearing, but failed to allow enough time between the notice and the date set for hearing. 74 Although neither defendant nor its attorney was present at that hearing, the trial court heard plaintiffs' argument. Defendant's attorney later asserted that, although he was out of the state when he learned of the notice for hearing, he called the court and requested a continuance, which was granted. The trial court never denied this claim. 75 Defendant's attempt subsequently to notice their motion for hearing was met by a motion to quash, with plaintiffs stressing defendant's failure to appear at the prior hearing as grounds therefor. The trial court accepted this argument, granted the motion to quash, entered the judgment for the Big Springs and denied defendant's motion to set aside the judgment. 76

Faced with the many procedural errors committed by

71. M. R. Civ. P. 12(a) mandates that an answer be filed within twenty days after service of the complaint and summons. If a motion filed within twenty days by defendant is denied by the court, defendant has twenty days more in which to file a responsive pleading.
72. M. R. Civ. P. 5(f) requires proof of service to be filed within ten days after service; failure to make proof of service, however, does not affect the validity of the service completed.
73. The trial court has discretionary power to set aside an entry of default for good cause shown under M. R. Civ. P. 55(b). The failure of plaintiffs to file proof of service until the twenty-day period for defendant's responsive pleading had expired should have been sufficient to satisfy the good cause requirement of Rule 55(b). In another erroneous act, the trial court granted plaintiffs' ex parte motion to strike defendant's motion on the basis of the previous entry of default by the court. Big Spring v. Blackfeet Tribe, ___ Mont. ____ , 573 P.2d 655, 657 (1978).
74. Id. When a motion is noticed by mail for hearing, it must be served at least eight days in advance of the date set for hearing by virtue of M. R. Civ. P. 6(d) and 6(e). In Big Spring, plaintiffs provided only seven days notice.
75. Id.
76. Id. at ___, 573 P.2d at 658.
plaintiffs and acquiesced in by the trial court, the supreme court correctly reversed the entry of default judgment.\textsuperscript{77}

\textbf{B. Entry of Judgment}

Many time limitations imposed on post-trial procedures are calculated from the date of entering the judgment. \textit{Poeppel v. Fisher}\textsuperscript{78} affirms that entry of judgment is accomplished when the court records the judgment, not when it orally announces the judgment.\textsuperscript{79}

\textbf{C. Partial Satisfaction of Judgment}

The supreme court has established in several cases that a party cannot accept partial satisfaction of a judgment while concomitantly prosecuting an appeal of that judgment.\textsuperscript{80} This rule is subject to the exception that where appellant's right to benefits from the partial satisfaction of judgment cannot be affected by a reversal of the judgment, a simultaneous appeal of the judgment is permitted.\textsuperscript{81}

\textit{Ferguson v. Town Pump, Inc.}\textsuperscript{82} clearly fits this exception. Plaintiffs received a judgment against defendants from the trial court and executed against one joint tortfeasor. Cross-appealing from defendants' appeal of the lower court judgment, plaintiffs sought to increase the damage award. Justice Harrison found no inconsistency in prosecuting an appeal of a damage award and accepting partial satisfaction in the interim.\textsuperscript{83}

\textbf{D. Enforcement of Judgment}

\textit{Smith v. Foss}\textsuperscript{84} recognizes that a district court has the jurisdictional power to issue such orders as are necessary to enforce its judgments.\textsuperscript{85} Orders issued by virtue of this inherent power are interlocutory, not final, and are not subject to the time limitations for relief from a judicial order imposed by Rules 59 and 60.\textsuperscript{86}

\begin{flushleft}
\textsuperscript{77} \textit{Id. at \_, 573 P.2d at 658, 660.}
\textsuperscript{78} \textit{\_ Mont. \_, 572 P.2d 912 (1977).}
\textsuperscript{79} \textit{Id. at \_, 572 P.2d at 915, citing Davis v. Trobrough, 139 Mont. 322, 326, 363 P.2d 727, 729 (1961).}
\textsuperscript{80} \textit{See, e.g., Niles v. Carbon County, \_ Mont. \_, \_, 568 P.2d 524, 525-26 (1977); Peck v. Bersanti, 101 Mont. 6, 8, 52 P.2d 168, 169 (1935).}
\textsuperscript{81} \textit{See, e.g., Peck v. Bersanti, 101 Mont. 6, 9, 52 P.2d 168, 169 (1935); \textit{In re Black's Estate}, 32 Mont. 51, 54, 79 P. 554, 555 (1905).}
\textsuperscript{82} \textit{\_ Mont. \_, 580 P.2d 915 (1978).}
\textsuperscript{83} \textit{Id. at \_, 580 P.2d at 918.}
\textsuperscript{84} \textit{\_ Mont. \_, 582 P.2d 329 (1978).}
\textsuperscript{85} \textit{Id. at \_, 582 P.2d at 331-32. See also Fuller v. Gibbs, 122 Mont. 177, 183, 199 P.2d 851, 854 (1948).}
\textsuperscript{86} \textit{M. R. Civ. P. 60(c) provides that a motion for relief from an order is subject to the time limitations imposed by M. R. Civ. P. 59 for motions for new trial and amendment of}
\end{flushleft}
VIII. POST-TRIAL MOTIONS

A. New Trial

Rule 77 and Rule 598 require a moving party to state with particularity the grounds for a new trial. Montana Williams Double Diamond Corp. v. Hill90 dictates that this requirement is mandatory.90 A motion for a new trial cannot merely recite the statutory grounds for a new trial91 or simply request a new trial without an accompanying affidavit or a memorandum in support of the motion.92 Failure to comply with the particularity requirement is grounds for dismissal of the motion for a new trial.93

When a trial court grants a motion for a new trial, Rule 5994 also requires the court to state the grounds for such relief. Ballantyne v. Anaconda Co.95 recognizes that when the trial court fails to specify the grounds upon which it relies in granting a new trial, the cause must be remanded for the trial court to delineate its reasons. Justice Shea emphasized that proper orders establishing the grounds for the court's grant of a new trial are necessary to narrow the issues on appeal.96

Newly discovered evidence, one of the statutory grounds for a new trial,97 received lengthy discussion by the supreme court during the survey period.98 In Kartes v. Kartes,99 Chief Justice Hatfield

judgment. Rule 59 requires such motions to be served within ten days after service of notice of entry of judgment. M. R. Civ. P. 59(b) and 59(g).
87. M. R. Civ. P. 7(b) (1) states in part:
    An application to the court for an order shall be by motion which ... shall state
with particularity the grounds therefor. ... .
88. M. R. Civ. P. 59(a) provides in part:
    A motion for new trial shall state with particularity the grounds therefor, it not
being sufficient merely to set forth the statutory grounds ... .
90. Id. at ___, 573 P.2d at 654.
92. Montana Williams Double Diamond Corp. v. Hill, ___ Mont. ___, ___, 573 P.2d
93. Id. at ___, 573 P.2d at 654; Halsey v. Uithof, 166 Mont. 319, 326, 532 P.2d 686,
690 (1975).
94. M. R. Civ. P. 59(f) provides:
    Any order of the court granting a new trial, shall specify the grounds therefor
with sufficient particularity as to apprise the parties and the appellate court of the
rationale underlying the ruling. ... .
95. ___ Mont. ___, 574 P.2d 582 (1978).
96. Id. at ___, 574 P.2d at 583.
97. See supra note 91.
98. MCA § 25-11-102(4) (1978) (formerly codified at R.C.M. 1947, § 93-5603(4)), states
in part:

The former verdict or other decision may be vacated and a new trial granted
on the application of the party aggrieved for any of the following causes materially
affecting the substantial rights of such party:
reviewed the necessary criteria for granting a new trial on the basis of newly discovered evidence. He concluded that where the party moving for a new trial has possession of the documents and books from which the alleged new evidence is derived, his motion for a new trial is properly denied, notwithstanding the materiality of the evidence.

Yerkich v. Opsta, upholding a prior decision, advises that when a jury relies upon one line of conflicting testimony in reaching a verdict, the trial judge commits error if he relies on the other line of testimony solely to grant a motion for new trial.

B. Time Limitations

The time limitations for post-trial motions in Rule 59 have been strictly enforced in previous Montana cases. The Montana Supreme Court continued to view these time provisions as mandatory in Kelly v. Sell & Sell Paint Contractors, but demonstrated some degree of flexibility in applying time limits when confronted with numerous procedural mistakes of both court and counsel in Pierce Packing Co. v. District Court.

The district court in Kelly granted defendant's motion to amend the court's judgment thirty-six days after hearing arguments on the motion, but the supreme court reversed this ruling. Justice Shea emphasized the rigid mandate of Rule 59(d) and held that

(4) newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial.

100. Id. at 193-94. The Montana statute and procedural rules require that the substantial rights of the moving party be materially affected, the new evidence must be material to the issue in the trial and the new evidence could not have been discovered and produced at trial with the exercise of reasonable diligence. Montana case law also requires that the materiality of the new evidence be so great that it would probably produce a different result on retrial and that it be not merely cumulative or tending only to impeach or discredit witnesses in the case. See, e.g., Kerrigan v. Kerrigan, 115 Mont. 136, 144, 139 P.2d 533, 535 (1943); Ebaugh v. Burns, 65 Mont. 21, 219 P. 892, 894 (1922) (collecting cases).


104. Mont. at 577 P.2d at 859.


109. Id. at 1004.

110. M. R. Civ. P. 59(d) provides in part:

[T]he court shall rule upon and decide the motion [for new trial or to alter or amend the judgment] within 15 days after the same is submitted. If the court shall
the district court had no jurisdiction for entering the amended judgment beyond fifteen days after its submission.111

*Pierce Packing* acknowledges that time restraints on post-trial motions will not be strictly enforced when the party seeking to enforce the time limitations has not complied with the Rules of Civil Procedure. Judgment had been entered for *Pierce Packing*, plaintiff in an action against *Western Insulfoam*. The district court granted defendant's *ex parte* motion for an extension of time to file its post-trial motions eleven days after entry of judgment. Technically, both counsel and the court violated Rule 6(b) with this motion for a filing extension.112 Plaintiff's motion to strike all post-trial motions as untimely was denied, as were all of defendant's motions except for stay of execution pending appeal. Plaintiff then applied for a writ of prohibition to vacate and annul the court's order granting and denying defendant's motions.

Chief Justice Haswell, writing for the unanimous court, denied the writ and refused to enforce the post-trial time limits against defendant or the court.113 He cited petitioner's own violation of Rule 77(d)114 as the reason for its unwillingness to enforce the time limits against defendant, which would have effectively prevented it from appealing from the district court's previous judgment.115

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111. *Mont. at ___, ___,* 574 P.2d at 1003, 1004.

112. *M. R. Civ. P. 6(b)* prevents the court from extending the time for taking action under Rules 50(b), 52(b), 59(d), 59(e), 59(f) and 60(b).


114. *M. R. Civ. P. 77(d)* provides in part:

Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party. . . . Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules. . . .

Counsel for plaintiff-petitioner was in violation of Rule 77(d) because he served notice of entry of judgment upon opposing counsel himself rather than having the clerk of court serve such notice.

115. *Mont. at ___, ___,* 579 P.2d at 762. Because of the Rule 77(d) violation, Justice Haswell determined that the district court was not in error in ruling on defendant's post-trial motions and granting the stay of execution. Defendant had also failed to file his notice of appeal within the thirty-day limit contemplated by *M. R. App. Civ. P. 5*. A previous case, however, had established that if service of notice of entry of judgment is faulty under Rule 77, the thirty-day period does not begin to run until proper service is made. *Haywood v. Sedillo,* 167 *Mont. 101, 104, 535 P.2d 1014, 1016 (1975)*. Thus, defendant's notice of appeal was timely filed. *Pierce Packing Co. v. Dist. Ct., ___ Mont. ___, ___,* 579 P.2d 760, 762 (1978).
IX. APPELLATE PROCEDURE

A. Appealable Orders

Rule 11 enumerates specific judgments and orders which may be appealed to the Montana Supreme Court. Although a court order dismissing one count of a complaint is not listed as an appealable order in that rule, Tobacco River Co. v. Yoppe reiterates that such an order may be reviewed by the supreme court when it results in a party being out of court as if judgment had been entered against him.

B. Time Limits for Notice of Appeal

The supreme court has clearly established that an untimely notice of appeal under Rule 5 is a jurisdictional defect which renders it powerless to hear the appeal. The court applied this rule to dismiss appeals in Easton v. Easton and First National Bank of Lewistown v. Fry.

The basic thirty-day limit for filing a notice of appeal is not without an exception. Keller v. Llewellyn affirms that a party may have sixty days in which to request a time extension if excusable neglect for failure to comply with the time period can be shown to the trial court. In Keller, the court deemed counsel’s illness

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117. Id. at , 577 P.2d 856 (1978). For other aspects of this case, see supra note 34.
118. Id. at , 577 P.2d at 856, citing Local #8 Int’l Ass’n v. City of Great Falls, , 568 P.2d 541, 546 (1977); Prentice Lumber Co. v. Hukill, 161 Mont. 8, 12, 504 P.2d 277, 279 (1972).
   The time within which an appeal from a judgment or an order must be taken shall be 30 days from the entry thereof, except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the Montana Rules of Civil Procedure the time shall be 30 days from the service of the notice of entry of judgment... 
121. Id. at , 574 P.2d 989, 992 (1978). For other aspects of this case, see infra note 127.
122. Id. at , 575 P.2d 1325, 1326 (1978).
123. M. R. App. Civ. P. 5 provides in part:
   Upon showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the original time prescribed by this rule.
124. Id. at , 573 P.2d 166 (1977).
125. Id. at , 573 P.2d at 168, citing Zell v. Zell, , 565 P.2d 311, 313 (1977). In Zell, the court determined that an appellant could request an extension for filing his notice either before or after the expiration of the thirty-day period. This effectively gives the appellant sixty days from the date of service of notice of entry of judgment (where required) to request the extension.
sufficient to satisfy the excusable neglect requirement.126

C. The Record on Appeal

Parties to a lawsuit can stipulate that a court reporter need not be present to record court proceedings. If an appeal is perfected from the court's entry of judgment, lack of a record is not a fatal error. Easton v. Easton127 establishes that the burden of securing a court reporter to make a record of proceedings is upon counsel, not the court.128 Justice Harrison asserted that when a party stipulates to proceed in a hearing without the presence of a court reporter, he has waived the right to have the reporter make a record and cannot claim the lack of a record as error.129

Rule 9(c)130 provides a procedure for drafting a bystander's bill in lieu of a transcript of proceedings when parties have waived their right to a record of the trial. Martinez v. Martinez131 demonstrates the difficulty of relying upon a bystander's bill to determine if substantial evidence exists to support a lower court decision.132 The Martinez court suggested that the collective memories of the attorneys and the trial judge are inadequate to reconstruct trial testimony.133

Yetter v. Kennedy134 indicates that a party's failure to order a transcript from the court reporter is fatal error and results in dismissal of the appeal when the transcript is necessary for a determination of the issues raised on appeal.135 Defendants appealed from a judgment n.o.v. but failed to order a transcript within ten days.136
Because the appellants questioned the sufficiency of the evidence to support the judgment n.o.v., the supreme court needed the entire transcript of the proceedings to determine if the district court correctly reached its decision.\textsuperscript{137}

D. Supersedeas Bond To Stay Execution of Judgment

Rule 7(a)\textsuperscript{138} allows an appellant, upon service of the appeal notice, to apply for a stay of execution of judgment pending appeal by filing an undertaking in an amount sufficient to satisfy the judgment. \textit{Erdman v. C & C Sales, Inc.}\textsuperscript{139} establishes that when an appellant posts the supersedeas bond as soon as practicable following an order denying his post-trial motions, his property is not subject to execution in satisfaction of the judgment.\textsuperscript{140} In \textit{Erdman}, appellant's posting of the bond the same day he received the order denying his post-trial motions was sufficient to prevent disbursement of funds from a bank account upon which the opposing party had executed that same day.\textsuperscript{141}

E. "Plain Error" Doctrine

Many Montana cases have recognized that an objection raised for the first time on appeal is not timely.\textsuperscript{142} Other jurisdictions have adopted an exception to this rule.\textsuperscript{143} Under the "plain error" doctrine, an appellate court may consider questions raised for the first time on appeal if the error affects the substantial rights of the parties.

\textit{Halldorson v. Halldorson}\textsuperscript{144} heralds Montana's adoption of the "plain error" doctrine.\textsuperscript{145} During the trial, the judge called a recess, but the trial never resumed. The district court then filed proposed findings of fact and conclusions of law. Neither party objected to the...
discontinuance of the trial or to the proposed findings and conclusions. An appeal followed, but respondent moved to dismiss the appeal, claiming that appellant waived any error by the trial court in failing to object to the district court proceedings. In adopting the "plain error" doctrine, Justice Harrison announced that appellate courts have the duty to determine whether the trial court deprived a litigant of substantial justice, even though the litigant had not objected to the alleged erroneous conduct. The court further held that the "plain error" doctrine will not provide protection to counsel who consciously or intentionally fails or refuses to raise the issue in the trial court.

X. MISCELLANEOUS

A. Amended Federal District Court Rules

In an order dated December 9, 1977, Montana's four federal district court judges announced changes in the Revised Rules of the United States District Court for the District of Montana. Rule 2 has been amended so that the Havre-Glasgow Division has been eliminated; it has been redistributed between the Billings Division and the Great Falls Division. Under the amendment to Rule 5, the clerk of court's office for the Helena Division has been transferred from the Butte Division to the Billings Division. Rule 7(d), as amended, has eliminated specified days and places for law and motion day; hereafter, hearings on motions may be set at any time and place which the district court approves. Rule 21 has been amended to provide for a three-judge panel when the constitutionality of the apportionment of Congressional or Montana legislative districts is challenged, in addition to other statutory three-judge cases.

B. Prejudgment Attachment

Prejudgment attachment is allowed in Montana in actions upon contracts for the direct payment of money. Miller v. Fox

146. Id.
147. Id.
149. Id.
150. Id. at 1608-09.
151. Id. at 1609.
152. Id. This amended rule embodies 28 U.S.C. § 2284 (1976). Other situations requiring statutory three-judge panels are sprinkled throughout the United States Code.
recognizes that prejudgment attachment is wrongful when a contract calls for further performance as a condition of payment.\textsuperscript{155} Plaintiff sold five horses to defendant, who failed to pay the full amount for them. In applying for a prejudgment writ of attachment, plaintiff stated in his affidavit that the contract called for the direct payment of money. At trial, the judge found that the contract required the presentation of registration papers on a stud horse as a condition precedent to payment and awarded exemplary damages for plaintiff's wrongful attachment.\textsuperscript{156} The Montana Supreme Court upheld both the determination of wrongful attachment and the award of exemplary damages.\textsuperscript{157}

C. Injunctions

Two survey period cases provide insight into injunctive relief under Montana law.

\textit{Eliason v. Evans}\textsuperscript{158} establishes that substantive water rights cannot be adjudicated at a show cause hearing following the issuance of a temporary restraining order.\textsuperscript{159} Justice Shea announced that the district court could not enter findings of fact and conclusions of law which asserted that plaintiffs did not have the water rights they claimed after hearing the testimony of several witnesses at the show cause hearing.\textsuperscript{160}

\textit{Boyer v. Karagacin}\textsuperscript{161} examines the propriety of and appealability of a temporary restraining order. Rule 1(b)\textsuperscript{162} allows an appeal from an order granting or refusing to grant an injunction. Ordinarily, a temporary restraining order is not an appealable order.\textsuperscript{163} When, however, the restraining order has the effect of permanently enjoining a party from some action, it is directly appealable to the

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\begin{enumerate}
\item[155.] \textit{Id. at} _____, 571 P.2d at 808.
\item[156.] \textit{Id.} The supreme court recognized that if the attaching party knows the attachment was wrongful at the time he makes it, the malice requirement of the exemplary damage statute is satisfied. \textit{See} MCA § 27-1-221 (1978) (formerly codified at R.C.M. 1947, § 17-208).
\item[157.] Miller v. Fox, _____ Mont. _____, 571 P.2d 804, 808 (1977).
\item[158.] _____ Mont. _____, 583 P.2d 398 (1978).
\item[159.] \textit{Id. at} _____, 583 P.2d at 402. The supreme court had previously held that title to real estate may not be adjudicated in an injunctive action. \textit{See}, \textit{e.g.}, Davis v. Burton, 126 Mont. 137, 139, 246 P.2d 236, 237 (1952).
\item[160.] _____ Mont. at _____, 583 P.2d at 402-03. The restraining order is only designed to preserve the status quo for a reasonable time necessary to determine the appropriateness of an injunction pendente lite. \textit{See}, \textit{e.g.}, \textit{State ex rel. McKenzie v. Dist. Ct.}, 111 Mont. 241, 247, 107 P.2d 885, 888 (1941); \textit{State ex rel. Cook v. Dist. Ct.}, 105 Mont. 72, 75, 69 P.2d 746, 748 (1937).
\item[161.] _____ Mont. _____, 582 P.2d 1173 (1978).
\item[162.] M. R. APP. CIV. P. 1(b).
\item[163.] \textit{See}, \textit{e.g.}, Guardian Life Ins. Co. v. State Board of Equalization, 134 Mont. 526, 529-32, 335 P.2d 310, 312-13 (1959).
\end{enumerate}
\end{footnotesize}
Montana Supreme Court. In *Boyer*, the supreme court held the district court's continuation of a temporary restraining order to be appealable, as it had the effect of permanently enjoining defendant's conduct.

Defendant also asserted that the court improperly issued the restraining order because plaintiff failed to establish the irreparable nature of the injury caused by defendant's parking. The gravamen of defendant's claim was that plaintiff's complaint sought money damages, compensable at law without resorting to injunctive relief in equity. Justice Harrison responded that in a nuisance action, relief can be granted in the form of enjoining the nuisance, as well as money damages.

D. *Substitution of Counsel*

Montana statutes allow an attorney to withdraw from a case at any time with his client's consent or by order of court. The statutes also require that when a party loses the services of his counsel, his adverse party must notify him to obtain another attorney or to proceed *pro se*. A previous Montana case had held that where the attorney withdraws with his client's consent, the notice mandated by statute from the adverse party is not necessary.

165. *Mont.* at ____, 582 P.2d at 1176. Plaintiff sought to enjoin defendant from parking his car in front of an entrance to plaintiff's business and claimed damages for loss of business.
166. MCA § 27-19-201 (1978) (formerly codified at R.C.M. 1947, § 93-4204), provides in part:
   
   (2) when it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff.

   A nuisance is the subject of an action. Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.
168. MCA § 37-61-403 (1978) (formerly codified at R.C.M. 1947, § 93-2102) provides:

   The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:
   
   (1) upon consent of both client and attorney, filed with the clerk or entered upon the minutes;
   (2) upon the order of the court, upon the application of either client or attorney, after notice from one to the other.
169. MCA § 37-61-404 (1978) (formerly codified at R.C.M. 1947, § 93-2104) states:

   When an attorney dies or is removed or suspended or ceases to act as such, a party to an action for whom he was acting as attorney must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or appear in person. (Emphasis added.)
McPartlin v. Fransen\textsuperscript{171} establishes that when an attorney, after petitioning the district court, withdraws from a case without his client’s consent, the opposing party must request a personal appearance by the unrepresented party or a substitution of counsel before proceeding further.\textsuperscript{172} Justice Shea, writing for the majority,\textsuperscript{173} reasoned that although an attorney is required to notify his client when he withdraws without his client’s consent,\textsuperscript{174} the client might not receive the notice of withdrawal, or if he receives it, the notice might be insufficient to inform him of the status of his pending litigation.\textsuperscript{175} Requiring the opposing party to provide information on the status of the litigation and of the right of the unrepresented party to obtain new counsel protects the due process rights of the unrepresented party and insures a fair trial.

In McPartlin, defendant obtained a new attorney the day before the scheduled date of the trial. When the new attorney discovered that trial was set for the next day, he contacted opposing counsel, who refused to stipulate to a continuance. The trial court refused to grant a continuance the next day. When neither defendant nor his new attorney appeared at the trial, default was entered. The supreme court reversed the entry of default and granted a new trial.\textsuperscript{178}

\textsuperscript{171} ___ Mont. ___, 582 P.2d 1255 (1978).
\textsuperscript{172} Id. at ___, 582 P.2d at 1259, distinguishing Sikorski and Son v. Sikorski, 162 Mont. 442, 512 P.2d 1147 (1973).
\textsuperscript{173} Justice Daly concurred with Justice Shea. Justice Harrison filed a separate concurring opinion, castigating defendant for his delaying tactics. District Judge B.W. Thomas, sitting in for a vacancy in the court, dissented from the majority on the basis of its rejection of Sikorski as applied to these facts.
\textsuperscript{174} See supra note 168.
\textsuperscript{175} Id. at ___, 582 P.2d at 1259. This was the precise situation in McPartlin. Although the defendant received notice of withdrawal of his attorney, granted by the trial judge, the notice did not inform him that a full trial was scheduled to commence in three weeks. He was never informed of the trial date by his former counsel, opposing counsel or the trial court.
\textsuperscript{176} Id.