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Contract Damages in Montana Part I: Expectancy Damages

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ARTICLES

CONTRACT DAMAGES IN MONTANA
PART I: EXPECTANCY DAMAGES

Scott J. Burnham*

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Researchers into Montana contract law are deeply indebted to the compilers of MONTANA ANNOTATIONS TO THE RESTATMENT OF THE LAW OF CONTRACTS (1940) prepared by the faculty of the School of Law under the auspices of the Montana Bar Association. In recognition of the accuracy and the continuing value of the work, this article cites few of the pre-1935 cases discussed in the Annotations sections on damages prepared by Dean C. W. Leaphart. The intervening years have seen the publication of the Restatement (Second) of Contracts (1981). Occasional footnotes indicate the location of the topic in the Annotations (and thus in the Restatement) and in the Restatement (Second).
I. Introduction

When an attorney is analyzing the potential outcome of a contract dispute, or when a judge has found that a breach has occurred, each must consider the measure of damages. In most contract cases, the plaintiff is entitled to the "expectancy": the damages which will place the plaintiff in the same position as if the defendant had fully performed. For example, in Mitchell v. Carlson, where Carlson promised to build Mitchell a home of first-class construction for $11,000, but used inferior materials, the court upheld a jury award of $2000, "the cost of making the repairs necessary to complete the house in accordance with the parties' agreement." According to the expectancy theory, the $2000, if applied to repairs, would give Mitchell what he bargained for: a home of first-class construction at a net cost to him of $11,000.

The term "expectancy" is misleading, for it does not represent a party's actual expectations. Parties to a contract expect performance. If they get breach rather than performance, they do not get what they expected. To the extent a system of contract damages does not deter breach, actual expectations will not be satisfied. The system is therefore deficient if it only ameliorates and does not deter. Furthermore, the symmetry of the expectancy theory rests on the assumption that plaintiffs will collect the damages that give them the benefit of the bargain at no cost to themselves—that Mitchell will net $2000 in his action against Carlson. The tenuousness of this assumption was elegantly demonstrated by the New Hampshire Supreme Court in a case involving the rule that a creditor's acceptance of part payment does not discharge a debt because the creditor was entitled to the payment and received nothing more:

   
   Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

   
   No person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides unless a greater recovery is specified by statute.


4. Unless otherwise stated, "the court" refers to the Montana Supreme Court.

5. Mitchell, 132 Mont. at 7, 313 P.2d at 720.

If costs always equal the expense of litigation, if interest is always full recompense for delayed payment, and if an execution is always equivalent to money in hand, then a present part payment of a debt in cash is in fact never beneficial to the creditor or detrimental to the debtor, and can never be a consideration for a discharge of the balance. Whatever the conclusions of scholastic logic, as men having some acquaintance with affairs of judges are bound to know that none of these propositions are always, if ever true.7

Knowing "that none of these propositions are always, if ever true," the promisor has little incentive to perform.8 At the time Mitchell discovered the defects, Carlson had a choice: perform according to the terms of the contract at a cost of about $2000, or breach the contract and pay damages, which should amount to about $2000.9 Because breach would be no more costly than performance, Mitchell's threat of legal action would have little effect on Carlson's choice.10 Of greater effect would be less quantifiable considerations: the effect of the dispute on future relationships between the parties and on the reputation of the parties in the community.11 Such considerations aside, because legal action will cost Mitchell an immediate loss of time, attorneys' fees, expenses, the loss of use of money, and possible further proceedings to enforce a judgment, he will probably settle the dispute for an amount considerably less than his expectancy.12

One would expect two consequences to follow from these observations: (1) parties disappointed in their expectations will not pursue their remedies through the legal system; and (2) if they do utilize the legal system, they will seek damages other than or in addition to loss of the benefit of the bargain.13 The first hypothesis

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8. See infra notes 295-332 and accompanying text.
   Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract . . . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.
10. See Leff, Injury, Ignorance and Spite—The Dynamics of Coercive Collection, 80 YALE L.J. 1, 5 (1970) [hereinafter cited as Leff]: "Under the American law of contracts, after the other party has fully performed his obligations it is absolutely irrational for you fully to perform yours." The irrationality may disappear once reputation is considered. Id. at 6 n.13.
11. "Most people carry out their agreements because they carry out their agreements, not because awful things will happen to them if they don't." Id. at 27. Leff presents an excellent economic analysis of the collection process.
13. Another possibility is that parties use the legal system when they cannot resolve
is beyond the scope of this article, but is supported by the limited empirical data that has been collected.\textsuperscript{14}

This article examines the second hypothesis by gathering and commenting upon Montana statutes and case law in the area of expectancy damages for breach of contract.\textsuperscript{15} The nineteenth-century formalists sought to lay down fixed rules that could be followed for the resolution of any factual dispute that might arise.\textsuperscript{16} Regrettably for those who seek such orderly consistency, no clear statement of rules to guide future decisions will emerge from this study. In this perhaps more than any other area of law, the results depend on the particular fact situation. As Corbin put it: "The supposed ‘rules’ within this field have always been stated, ever since the abolition of the common law forms of action, as tentative working rules so worded as to give the court a considerable amount of discretion in their application to the specific facts of a case."\textsuperscript{17}

II. FORESEEABILITY

Prior to 1854, a party in breach could be held liable for all the losses sustained by the aggrieved party.\textsuperscript{18} The absence of guidelines subjected commercial enterprises to risks for breach of contract similar to tort liability.\textsuperscript{19} In 1854, the English Court of the

\textsuperscript{14} See, e.g., L. FRIEDMAN, CONTRACT LAW IN AMERICA (1965); Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55 (1963). Even a cursory examination of the contract cases decided by the Montana Supreme Court reveals that they generally involve one-shot deals or marginal enterprises where future relationships are not an issue. The substantial business organization involved in frequent contractual relationships with suppliers, customers, and personnel does not utilize the court system—and perhaps not even the principles of contract law—to resolve the disputes that arise. This interesting phenomenon merits further inquiry.

\textsuperscript{15} A future article will examine restitution, reliance, rescission, and specific performance, among other alternative remedies. Available remedies are discussed at ANNOTATIONS, supra note 2, § 326; RESTATEMENT (SECOND) OF CONTRACTS § 345 (1981).

\textsuperscript{16} An entertaining and challenging view of the construction—and demolition—of the formalist edifice is found in G. GILMORE, THE DEATH OF CONTRACT (1974).

\textsuperscript{17} 5 A. CORBIN, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW III (1964) [hereinafter cited as A. CORBIN, CONTRACTS]. Cf. the Montana court, in deciding which formula to use for the determination of damages for property loss: "While such methods serve as useful guides, the final answer rests in good sense rather than mechanical application of such formulas." Spackman v. Ralph M. Parsons Co., 147 Mont. 500, 506, 414 P.2d 918, 922 (1966).


\textsuperscript{19} 5 A. CORBIN, CONTRACTS § 1019 (1964). MONT. CODE ANN. § 27-1-317 (1981) provides:

For the breach of an obligation not arising from contract, the measure of damages,
Exchequer in Hadley v. Baxendale\textsuperscript{20} established standards for contract damages that have become universally accepted.\textsuperscript{21}

Under the first rule of Hadley, the aggrieved party may recover those damages "as may fairly and reasonably be considered . . . arising naturally, i.e., according to the usual course of things from such breach of contract itself."\textsuperscript{22} Application of this rule has posed few problems, for it allows recovery for risks that any reasonable person would have contemplated. For example, in Hadley itself, plaintiff miller claimed losses for defendant shipper's late delivery of a millshaft. The damages ordinarily resulting from this breach would be loss of the rental value of the millshaft.\textsuperscript{23}

Montana codified the first Hadley rule in the first sentence of what is now section 27-1-311 of the Montana Code Annotated:

For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary course of things would be likely to result therefrom. Interpretation of this rule has been generally straightforward. For example, in Green v. Wolff\textsuperscript{24} the breaching party claimed that the loss of profits on breach of an agreement to deliver steers was not within its contemplation. The court properly held that loss of profits resulted in the usual course of things from the breach of an agreement to share in the proceeds of a business endeavor.\textsuperscript{25} This situation may be compared to that in Hall v. Advance-Rumley Thresher Co.,\textsuperscript{26} where plaintiff claimed that defendant's late delivery of equipment caused him to lose profits on a contract he had entered in reliance on the delivery. The court held that plaintiff failed to prove that the defendant knew about the contract. Be-

\textsuperscript{20} Ex. 341 (1854).

\textsuperscript{21} See generally Annotations, supra note 2, § 330; Restatement (Second) of Contracts § 351 (1981). On the special case of the foreseeability of the expense of litigation, see Annotations, supra note 2, § 334; Restatement (Second) of Contracts § 351, comment c (1981).

\textsuperscript{22} Hadley, 9 Ex. at 354.

\textsuperscript{23} In Martel Constr., Inc. v. Gleason Equip., Inc., 166 Mont. 479, 534 P.2d 883 (1975), the court held that rental value of a crane was the proper measure of damages for late delivery of parts necessary to operate it, but did not award damages where time of delivery was not of the essence.

\textsuperscript{24} 140 Mont. 413, 372 P.2d 427 (1962).

\textsuperscript{25} Id. at 418-20, 372 P.2d at 431.

\textsuperscript{26} 65 Mont. 566, 212 P. 290 (1923).
cause the defendant had no knowledge of these special circumstances, it could be held liable, like the defendant in Hadley, only for the natural result of delay—loss of the rental value of the equipment. 27

The significance of Hadley is not in defining where liability attaches, for prior to Hadley liability attached to all consequences. The significance is that the second rule of Hadley limits damages to losses “such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract as the probable result of the breach of it.” 28 That is, the parties are presumed to have assumed the “natural” risks under the first rule. Under the second rule, they are presumed to have assumed only the risks that could be contemplated either expressly or impliedly from the circumstances. Risks they do not wish to assume may be limited by contractual provision. 29 For example, in Hadley itself, plaintiff sought lost profits for the period that he was not able to operate the mill. The court held that in the absence of notice, defendant could not have contemplated this loss; he did not know that plaintiff did not have a spare millshaft available or that the mill was not stopped for other reasons. 30

The court in Hadley stated that “it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these

27. Id. at 576-77, 212 P. at 292-93. The court found that defendant lacked knowledge under the now-discredited “tacit agreement” test. See infra notes 47-48 and accompanying text.

In addition, the court held that plaintiff did not prove that the detriment—the loss of profits on the contract—was proximately caused by defendant’s breach. Plaintiff apparently would not have been able to perform his contract even if the equipment had arrived on time. Hall, 65 Mont. at 577-78, 212 P. at 293.

28. Hadley, 9 Ex. at 354.

29. An unusual application of the Hadley doctrine appeared in Hardin v. Hill, 149 Mont. 68, 423 P.2d 309 (1967). Plaintiff sought lost profits resulting from a shortage in acreage in land defendant sold him. Defendant had promised plaintiff that the land would support about 300 head of cattle; the trial court found that the acreage as reduced would still support more than 300 head. The court held that because the parties’ expectation—enough land to support 300 head—was met, plaintiff lost no profits as a result of the breach. Id. at 74-76, 423 P.2d at 312-13. This result makes sense when the Hadley rule is viewed as a means of allocating risk. Here, the express promise was a limitation on defendant’s liability. For another limitation by contractual provision, see State ex rel. Mountain States Tel. and Tel. Co. v. Dist. Court, 160 Mont. 443, 503 P.2d 526 (1972). See infra notes 286-88 and accompanying text.

30. Hadley, 9 Ex. at 355-56. The suggestion in the reporter’s notes that defendant had this special knowledge has caused considerable confusion in the application of the rule. See Danzig, Hadley v. Baxendale: A Study in the Industrialization of the Law, 4 J. LEGAL SRUD. 249, 262 n.53 (1975) [hereinafter Danzig].
special circumstances were here never communicated by the plaintiffs to the defendants." But is it obvious? Surely reasonable persons could differ as to whether millers generally have spare millshafts at their disposal. Therein lies one of the difficulties in the application of the Hadley rules: deciding what is a "natural" consequence and what is not.

The second Hadley rule has been adopted by case law in Montana, but finding the line between damages arising under the first rule, which have become known as "general" damages, and those arising under the second rule, which have become known as "special" damages, has proved elusive. For example, in Baden v. Curtiss Breeding Service, where defendant sold plaintiff defective bull semen, plaintiff claimed as damages two years' lost calf crops. The court allowed damages for the loss of the first calf crop. These losses fell under both rules; they ordinarily followed the use of defective semen, and the parties had reason to foresee them. However, the court would not award damages for the loss of the second year's crop. A reasonable person would not foresee the loss of a second crop as a proximate result of the defective semen. Even though the loss would indisputably occur without intercession, the breaching party would expect the plaintiff to take steps to remedy the situation when he became aware of it. The contemplation of these steps limits the otherwise "natural" consequences of the breach.

31. Hadley, 9 Ex. at 356.
32. The judge's determination that the trade practice was "obvious" underscores another aspect of Hadley: what should be a question of fact has been preempted by the judge. See Danzig, supra note 30, at 254.
34. The terms are by no means widely accepted. E. A. Farnsworth, Contracts § 12.14 n.5 (1982) advises that the terms "general" and "special" should be reserved for pleading, with "consequential" being the proper name for substantive liability under the second Hadley rule. On the other hand, 5 A. Corbin, Contracts § 1011 at 87 (1964) maintains that the use of the term "consequential" should be abandoned.
36. General" and "special" damages are discussed in Restatement of Contracts § 330 special note following comment e (1932). See infra notes 50-57 and accompanying text.
Baden illustrates another difficulty in the application of the rules. The test for application of the second rule is an objective one. The issue is not the parties' actual contemplation, but whether a reasonable person would have foreseen special damages under the circumstances. Contemplation inferred from the circumstances may be seen in Garden City Floral Co. v. Hunt, where plaintiff hired defendant to erect a new building next to plaintiff's old building, using a wall of the old building in common. The contract expressly recited the specifications for excavation, including underpinnings for the common wall. When defendant did not comply with the required specifications, the common wall collapsed. Plaintiff sought damages for the loss of the old building. The court held that it was reasonably within the contemplation of the parties that if the wall was not properly underpinned, injury to the wall might result; and that if the wall collapsed, the entire old building would be damaged. Even though the parties never discussed these consequences, the detailed instructions for underpinning that were written into the contract indicated that they were contemplated.

In Richardson v. Crone, the court incorrectly applied a subjective test to the facts before it. Plaintiff agreed to use five combines to harvest defendant's wheat when mature. Plaintiff returned with only one combine four days after receiving defendant's notice to harvest. Four days after plaintiff began work with the single combine, a hailstorm damaged the standing wheat. Plaintiff furnished the other four combines two days after the storm, ten days later than agreed. In plaintiff's suit for the contract price, defendant counterclaimed, arguing that had plaintiff started with five combines as agreed, the wheat would have been harvested before the hail fell. At trial, defendant testified that at the time of contracting she did not expect plaintiff to assume responsibility for damage to her crops by hail. A majority of the court held that under the second Hadley rule, it was not within the contemplation of the parties that plaintiff should pay for any crop losses due to

38. 5 A. Corbin, Contracts § 1009 (1964).
39. The test has become known as one of "foreseeability" even though that term is not used in Hadley. Use of the term "foreseeable" is probably more compatible with the objective test, for it suggests what is able to be foreseen while the term "contemplation" suggests actual awareness.
41. Id. at 539-40, 255 P.2d at 353-54.
42. Id. at 542, 255 P.2d at 355.
43. 127 Mont. 200, 258 P.2d 970 (1953).
44. Id. at 202-03, 258 P.2d at 971-72. 
the weather. A dissenting opinion found that having the grain harvested as quickly as possible to avoid the possibility of damage through storms was within the contemplation of the parties. This opinion was based not on application of an objective test, but on a finding that defendant's testimony contained an express communication.

Both the majority and dissenting opinions in Richardson applied a stricter interpretation of the second rule than had been announced in Hadley. According to Richardson, special damages will not be awarded unless the parties expressly or impliedly manifested an intent to accept the contract with the special conditions attached. This "tacit agreement" test looks subjectively at the expressions of the parties rather than objectively at what a reasonable man would have foreseen. This stricter test was adopted by Justice Holmes as federal law but is not generally followed in the state courts. The better view of Richardson is that a reasonable person knowing that hail storms were not unlikely, and that five combines had been specified to get the job done faster, would foresee that crop loss from a storm is likely to occur if performance is substantially delayed.

In Hein v. Fox, plaintiff paid defendant $1650 to drill a well that would provide a constant flow of water. Failing after two attempts to strike water, defendant ended all further drilling. Plaintiff, who had received a license to sell grade "A" milk on the strength of the well promised by defendant, lost the license. In addition to $1650 general damages, plaintiff pleaded special damages of $1000 resulting from loss of the license and loss of water for domestic purposes. The jury awarded total damages of $1000. Apparently no evidence was offered to show that defendant knew or had reason to know that the well was needed to retain the milk license. While the court did not explain how the $1000 award was calculated, presumably it was restitution for the value of the partially completed well and not special damages. It would not be reasonable to expect the defendant to foresee this loss under the cir-

45. Id. at 203-04, 258 P.2d at 972.
46. Id. at 205, 258 P.2d at 973.
47. Id. at 203-04, 209-10, 258 P.2d at 972, 975.
49. While Hadley framed the rule in terms of the contemplation of the parties at the time of contracting, the issue is the contemplation of the breaching party. 5 A. CORBIN, CONTRACTS § 1007 (1964).
50. 126 Mont. 514, 254 P.2d 1076 (1953).
51. Id. at 519, 254 P.2d at 1079.
cumstances. If plaintiff had communicated these facts to defendant, then defendant might have been held liable for the special damages arising from the breach.

Not only is it difficult for judges to apply the rules on a case by case basis, but it is also necessary for attorneys to recognize the classification of damages for purposes of pleading. In Purington v. Sound West,\textsuperscript{53} the court explained the distinction: “[S]pecial damages are the natural but not necessary result of the wrong or breach; whereas general damages are damages the law would impute as the natural, necessary and logical consequence of the wrong or breach.”\textsuperscript{53} Here, plaintiff, a professional musician, claimed losses resulting from the purchase of a defective sound system from defendant. The district court awarded damages for the purchase price and for loss of wages, use, and reputation. The supreme court reversed as to all but the purchase price, holding that the other losses were not general damages but special damages.\textsuperscript{54} Special damages must be specifically pleaded under Rule 9(g) of the Montana Rules of Civil Procedure: “When items of special damage are claimed, they shall be specifically stated.” The rule is sensible, for parties may be taken by surprise if damages are awarded for losses they did not contemplate, especially where, as in Purington, the damages are awarded on default. “Special damage,” however, is not defined in the statute. An attorney seeking damages under the second Hadley rule would be wise to specifically state all items of loss in the pleadings.

In the Annotations, Dean Leaphart observed that “[m]any of the decisions seem to draw a different line between ‘general’ and ‘special’ damages than would the framers of [the Restatement] if they were distinguishing them.”\textsuperscript{55} Comment b to section 351 of the Restatement (Second) of Contracts notes that the terms are often misleading and are not necessary for the purposes of the rule as presently incorporated in the Restatement.\textsuperscript{56} The terms will never-

\begin{itemize}
\item \textsuperscript{52} 173 Mont. 106, 566 P.2d 795 (1977).
\item \textsuperscript{53} Id. at 111-12, 566 P.2d at 798 (citation omitted).
\item \textsuperscript{54} Id. at 111, 566 P.2d at 798.
\item \textsuperscript{55} Annotations, supra note 2, § 330, at 174.
\item \textsuperscript{56} Restatement (Second) of Contracts § 351 (1981) provides:
\begin{enumerate}
\item Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
\item Loss may be foreseeable as a probable result of a breach because it follows from the breach;
\begin{enumerate}
\item in the ordinary course of events, or
\item as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
\end{enumerate}
\end{enumerate}
\item A court may limit damages for foreseeable loss by excluding recovery for
\end{itemize}
theless continue to be used in practice. It is the concepts rather than the terms that will undoubtedly continue to cause as much difficulty as they did at the time of Dean Leaphart's observation. 

III. CERTAINTY

A plaintiff seeking to recover expectancy damages must establish not only the fact of damage but also the amount of damage with reasonable certainty. Montana has codified the certainty rule in the second sentence of section 27-1-311 of the Montana Code Annotated: "Damages which are not clearly ascertainable in both their nature and origin cannot be recovered for a breach of contract."

The requirement of an ascertainable "origin" means that plaintiff must prove that the loss is the result of the breach. In Rogers v. Relyea, plaintiff claimed defendant drove off a potential investor, preventing plaintiff's development of a mine. Plaintiff claimed as losses the profits he would have earned had the mine been developed. The supreme court affirmed the trial court's holding that plaintiff's claim was too speculative. Another investor might have expressed interest in the mine or the first investor might have decided not to invest in the mine regardless of defendant's acts.

In addition to proving the cause of the loss, plaintiffs must also prove with certainty that they were damaged. In Brown v. First Federal Saving and Loan Association of Great Falls, plaintiff borrowers alleged that defendant lender had breached a con-

57. McCormick approves of the flexibility of the doctrine as facilitating commercial enterprise: "[T]his plastic principle generally proves adequate, in the hands of skillful trial and appellate judges, to prevent the recovery for breach of contract of damages beyond the standardized range, whenever such recovery seems unjust or unduly burdensome to business enterprise." McCormick, supra note 18, at 510. This view accords with the thesis that the Hadley decision was "a judicial invention in an age of industrial invention." Danzig, supra note 30, at 250. Danzig would probably view McCormick's observation as naive, for he sees Hadley as irrelevant to the modern commercial enterprise that limits its liability through contractual limitations and self-insurance. Id. at 280-81.

58. Annotations, supra note 2, § 331; Restatement (Second) of Contracts §§ 348, 352 (1981).


60. Id. at ___, 601 P.2d at 42.


struction loan agreement by disbursing money to a contractor who had performed work on their house and then skipped town. Because the contractor had actually performed and plaintiffs did not allege that the performance was defective, plaintiffs failed to prove that any loss resulted from the lender's acts.63

Once the cause and existence of damage have been established, the apparently stringent statutory requirement of a clearly ascertainable "nature" has been considerably eased in application. Recovery will not be denied where damages are difficult to ascertain as long as they are reasonably certain.64 The issue becomes one of proof: whether the evidence offered is "sufficient to afford a reasonable basis for determining the specific amount awarded."65 Such a guideline is extremely flexible, making the outcome in a given fact situation largely unpredictable.

In Smith v. Zepp,66 plaintiff sold defendant a gold mine on a contract for deed with the provision that defendant would mine 300 yards of material each working day and pay plaintiff royalties from the net mining profits. After one month, during which he mined only thirty to forty yards per day and recovered only one ounce of gold, defendant ceased operations. Plaintiff claimed default and forfeiture. The court held that this default did not trigger the contract's forfeiture provision. The court found that the proper measure of damages was the amount that plaintiff would have received had defendant mined 300 yards per day.67 The fact that the damages were difficult to ascertain would not deprive plaintiff of a recovery as long as he could prove them with reasonable certainty.68 The court stated that to prove reasonable certainty, a plaintiff must provide: ""[a] reasonable basis for computation and the best evidence obtainable under the circumstances and which will enable [the judge] to arrive at a reasonably close estimate of the loss . . . .""69 The court suggested that such evidence might include the testimony of geologists and geophysicists who had tested the mine's soil, the history of the mine, the cost of mining 300 yards per day, and the value of the noble metals in the soil

63. Id. at 88-89, 460 P.2d at 102.
64. Brown v. Homestake Exploration Corp., 98 Mont. 305, 337, 39 P.2d 168, 178 (1934). A few courts have gone further, taking the view that it is only the "probability" and not the "amount" of damage that must be proven with reasonable certainty. See Locke v. United States, 283 F.2d 521, 524 (Ct. Cl. 1960).
67. Id. at 370, 567 P.2d at 929.
68. Id. at 370, 567 P.2d at 930.
69. Id. (quoting Brown, 98 Mont. at 337, 39 P.2d at 179).
during the time of the default.\textsuperscript{70}

In \textit{Sikorski v. Olin},\textsuperscript{71} plaintiff, a sales representative, testified as to commissions he would have received but for defendant's breach. The court implied that the evidence was speculative, but held that because defendant's attorney had not objected at trial, the matter could not be raised for the first time on appeal. The jury, therefore, had some evidence on which it could base its verdict: "[A]ny award of damages is necessarily grounded to some degree, upon conjecture and surmise. However, the question of damages is clearly to be determined by the intelligence and common sense of the jury."\textsuperscript{72} The result appears erroneous, for certainty is a substantive rather than an evidentiary rule.\textsuperscript{73} The evidence should have been excluded even in the absence of objection. On the other hand, courts may relax the rules when dealing with agents' commissions, for the employer knows that it will be difficult for the discharged agent to prove the amount of lost earnings.\textsuperscript{74} In such a case of competing considerations, the court may well resort to the fundamental principle that doubts should be resolved against the wrongdoer.\textsuperscript{75}

\section*{IV. Lost Profits}

Damages for lost profits pose little problem when the profits are the object of the contract itself.\textsuperscript{76} If a contractor agrees to perform work for $11,000, of which $10,000 is for labor and materials and $1000 is profit, the damages for breach by the owner will be the lost profit of $1000.\textsuperscript{77} In this situation, the lost profits are general damages that necessarily result from the breach and do not

\begin{thebibliography}{99}
\bibitem{Smith} Smith, 173 Mont. at 370, 567 P.2d at 930.
\bibitem{Mont} 174 Mont. 107, 568 P.2d 571 (1977).
\bibitem{Id} Id. at 113, 568 P.2d at 574.
\bibitem{Corbin} 5 A. CORBIN, CONTRACTS § 1022 (1964).
\bibitem{Cases} See cases discussed in 5 A. CORBIN, CONTRACTS § 1025 (1964).
\bibitem{Id2} Id. at § 1020. In Olson v. Carter, 175 Mont. 105, 572 P.2d 1238 (1977), decided a few months after \textit{Sikorski}, the court reviewed the sufficiency of the evidence to support the damage award. The court remanded the case for a determination of damages where there was a contradiction in the evidence, even though there was evidence to support the verdict. \textit{Id.} at 108-10, 572 P.2d at 1240-41. In \textit{Olson} the court was sitting without a jury. It is likely that a jury would have been given wider latitude to determine the facts. 5 A. CORBIN, CONTRACTS § 1022 (1964). The court also found that attorneys' fees were improperly computed. Olson, 175 Mont. at 110-12, 572 P.2d at 1241. \textit{See infra} text accompanying notes 311-19.
\bibitem{Loss} The term "lost profits" may be misleading. The plaintiff is claiming not a subtraction from wealth but, under the expectancy theory, the gains plaintiff would have made on the transaction. \textit{See generally} 5 A. CORBIN, CONTRACTS § 1022 (1969).
\end{thebibliography}
have to be specially pleaded. The situation becomes more complex when plaintiff claims more than the profit that would have resulted from performance. Such additional damages include lost profits on subsequent transactions, remote consequences, and future business dealings. Courts must then wrestle with a chain of events reminiscent of Poor Richard's adage: "A little neglect may breed great mischief... for want of a nail the shoe was lost; for want of a shoe the horse was lost; and for want of a horse the rider was lost." To decide how much of the mischief the defendant is responsible for, the Hadley rule and the rule that speculative and uncertain profits may not be recovered as damages are carefully applied.

In Stensvad v. Miners and Merchants Bank of Roundup, plaintiff, operator of a cattle-feeding operation, sought profits allegedly lost when defendant bank breached a contract to continue financing the operation. The court stated the rules for the recovery of lost profits:

Damages for loss of profits may be awarded if not speculative. The rule that prohibits speculative profits does not apply to uncertainty as to the amount of such profits but to uncertainty or speculation as to whether the loss of profits is the result of the wrong and whether such profit would have been derived at all. Once liability is shown, that is the certainty that the damages are caused by the breach, then loss of profits on a reasonable basis for computation and the best evidence available under the circum-

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79. For example, profits lost on a contract which would have used the undelivered article were claimed in Hall v. Advance-Rumley Thresher Co., 65 Mont. 566, 212 P. 290 (1923). See supra notes 26-27 and accompanying text.
80. For example, profits lost on a dairy business were claimed for failure to drill a well in Hein v. Fox, 126 Mont. 514, 254 P.2d 1076 (1953). See supra notes 50-51 and accompanying text.
81. For example, profits lost in future years were claimed in Laas v. Montana State Highway Comm'n., 157 Mont. 121, 483 P.2d 699 (1971). See infra notes 112-15 and accompanying text.
82. B. Franklin, Poor Richard's Almanac (1758). The adage was taken further in Cain v. Vollmer, 19 Idaho 163, 112 P. 686 (1910), where plaintiff racehorse owner sought damages for purses he might have won in races he might have entered if the rider had not been injured—not by a lost nail—but by defendant's dog. It was a long shot and he lost.
83. It should be borne in mind that it is not the profits that are speculative or uncertain; it is the evidence introduced to prove them. See supra notes 64-65 and accompanying text.
84. In theory, the tests are separate; whether the loss was foreseeable being applied at the time of contracting and whether the damages are ascertainable being applied at the time of trial. On occasion, courts have merged the tests into one of whether at the time of contracting the parties contemplated that profits were necessarily certain to occur. See Archer-Daniels-Midland Co. v. Paull, 293 F.2d 389 (8th Cir. 1961).
stances will support a reasonably close estimate of the loss by a District Court. But no damages are recoverable which are not clearly ascertainable both in nature and origin, and only profits which are reasonably certain may be awarded. 86

In other words, once a plaintiff shows damage as a result of the breach, courts relax the uncertainty doctrine, requiring proof of lost profits that varies with the circumstances. 87 In Stensvad, the court held that the record did not establish with reasonable certainty that the breach caused profits to be lost or that the business was profitable at all. 88 While the court characterized the damages as "speculative," 89 it would be more accurate to say that insufficient evidence was offered to prove that profits would have been made but for the breach. Because plaintiff failed to clear that hurdle, he never reached the second: whether the estimate of the damages was reasonable.

In Bos v. Dolajak, 90 the court affirmed an award of damages for the loss of use of a silo, erection of which was delayed by defendants. 91 These damages probably fell under the second Hadley rule. The court alluded to the requirement that special damages must have been within the contemplation of the parties but need not have been actually agreed to 92 when it noted that defendant Dolajak was "aware . . . of the damages which would result from loss of use of the silo as he also owns and operates a dairy farm in North Dakota." 93 The computation of those damages, however, was not discussed in the opinion. They could have been the rental value or lost profits on crops. In Havre Daily News, Inc. v. Flora, 94 the court held that the measure of damages for breach of a restrictive covenant is the total profits lost as a result of the breach. The aggrieved party requested $500 per month for the life of the covenant, but since he offered no proof of lost profits, the court made no award.

In Lovely v. Burroughs Corp., 95 plaintiff claimed that defendant's faulty computer damaged his accounting business at two locations. The trial court calculated the damages on the basis of

86. *Id.* at __, 640 P.2d at 1310 (citations omitted).
87. See *supra* notes 64-65 and accompanying text.
88. *Stensvad,* __ Mont. at __, 640 P.2d at 1310.
89. *Id.*
90. 167 Mont. 1, 534 P.2d 1258 (1975).
91. See *infra* text accompanying notes 242-50.
92. See *supra* notes 38-39 and accompanying text.
93. *Bos,* 167 Mont. at 8, 534 P.2d at 1261-62.
losses from the sale of the businesses. The damage award was sustained with respect to one business, where the cause, origin, and nature of the damage was clear. The business had been in operation for only two years and the computer had been purchased to assist with that business. But the court dismissed as speculative an award for damage to the other business which was based on expert testimony as to the difference between the actual gross and the projected gross without the computer. Damages for lost profits cannot be based on gross income, for profits cannot be computed without consideration of costs as well. Proof was similarly inadequate in *Credit Counsellors, Inc. v. Jones.* Defendant, claiming loss of motel business due to faulty heaters, attempted to prove losses through his tax returns for the four years of operation with the heaters and the two years after he removed them. The trial court allowed the loss for the first year but not for subsequent years because of a failure to mitigate. Citing *Lovely,* the supreme court without discussion held that the loss figure was "too speculative and too remote." The result is correct, for there were many variables other than the heaters in the business. Significantly, defendant did not offer the tax returns for the years before the heaters were installed. Perhaps it was a new business for which no record of profit could be established.

There are many Montana cases involving proof of profits lost on crops. In *Agrilease v. Gray,* where defendant lost most of two years' hay crop because of plaintiff's failure to install an irrigation system, the trial court awarded the gross value of the crops. The supreme court reversed, holding that only the net value could be recovered. The gross value was estimated on the basis of crops

96. Id. at 216, 527 P.2d at 561.
97. Id. at 217, 527 P.2d at 562.
98. Id. at 217-18, 527 P.2d at 562.
99. Goetschius v. Losich, 137 Mont. 465, 353 P.2d 87 (1960). The rule that gross income does not provide lost profits was not followed in one tort case, McCollum v. O'Neil, 128 Mont. 584, 281 P.2d 493 (1954). There the court found that expenses remained the same regardless of the amount of business done. Any variation was considered circumstantial, for proof of lost profits does not have to be precise but need only provide the basis for a reasonable estimate.
100. 169 Mont. 311, 548 P.2d 158 (1976).
101. Id. at 314, 548 P.2d at 160. On the duty to mitigate, see infra text accompanying notes 122-41.
102. *Credit Counsellors,* 169 Mont. at 315, 548 P.2d at 160.
planted but burned up through lack of irrigation.\textsuperscript{106} While this may have resulted in an accurate estimation of the quantity lost, it failed to take the cost into consideration.

Where the breach causes total loss of the crop, it is more difficult to estimate the quantity lost. One method of estimating gross losses is use of the records of prior years.\textsuperscript{107} In \textit{Smith v. Fergus County},\textsuperscript{108} defendant unsuccessfully claimed it was error to admit testimony of the experience of other farms in the vicinity during the years in question instead of the experience of the land in question during prior years. The court held that profits from farming were reasonably certain when evidenced by the value of matured crops of like kind in the same period in the same vicinity under substantially similar conditions.\textsuperscript{109}

Damages for loss of future profits of a business may be awarded if the evidence shows that the loss is caused by the breach and there is a basis for estimating future losses. In \textit{Zook Bros. Construction Co. v. State},\textsuperscript{110} plaintiff claimed that losses on the litigated project forced it to sell equipment which caused it to lose profits in future years. The supreme court affirmed denial of those alleged damages as "vague and speculative."\textsuperscript{111} But in \textit{Laas v. Montana State Highway Commission},\textsuperscript{112} the court affirmed an award of future profits for three years that were lost because losses on the litigated project caused plaintiff to lose its bonding capacity. The court found that under the \textit{Hadley} rule, the loss of bonding capacity was foreseeable and likely to result from breach.\textsuperscript{113} While these damages could not be estimated with certainty, the court cited Corbin approvingly for the proposition that the defendant as wrongdoer should not escape liability "if there is any reasonable way in which the amount that he should pay as damages can be determined."\textsuperscript{114} The court was impressed with the proof offered, which included: (1) a showing that plaintiff had made a

\textsuperscript{106} \textit{Id.} at 153-54, 566 P.2d at 1115.
\textsuperscript{107} In Blaustein v. Pincus, 47 Mont. 202, 131 P. 1064 (1913), the court based anticipated profits of an established business on past experience. \textit{Cf.} Jurcec v. Raznik, 104 Mont. 45, 64 P.2d 1076 (1937).
\textsuperscript{108} 98 Mont. 377, 39 P.2d 193 (1934).
\textsuperscript{109} \textit{Id.} at 385-86, 39 P.2d at 195. In \textit{Jurcec}, 104 Mont. at 51, 64 P.2d at 1078, where a new rooming house business would have been operated a few blocks from the old one, the court held it was error to admit proof of profits that might have been made from a new business in a new and untried location.
\textsuperscript{110} 171 Mont. 64, 556 P.2d 911 (1976).
\textsuperscript{111} \textit{Id.} at 76, 556 P.2d at 918.
\textsuperscript{112} 157 Mont. 121, 483 P.2d 699 (1971).
\textsuperscript{113} \textit{Id.} at 131, 483 P.2d at 704.
\textsuperscript{114} \textit{Id.} at 130-31, 483 P.2d at 704 (citing 5 A. \textsc{Corbin}, \textit{Contracts} § 1029 (1964)).
profit on every job for twenty-two years, (2) an analysis by accountants for each side, and (3) a limitation of three years on the losses claimed by plaintiff.\textsuperscript{115} This kind of proof and limitation was apparently lacking in \textit{Zook Bros.}

Lost profits on a going business were also allowed in \textit{Nevin v. County of Silver Bow},\textsuperscript{116} where defendant wrongfully terminated plaintiffs' five-year restaurant lease.\textsuperscript{117} In addition to lost profits of $5000 per year, the trial court sitting without a jury awarded $5000 for loss of good will. While this award was not specifically discussed by the court, it appears erroneous. Good will was not defined in the case, but is defined in section 30-13-121 of the Montana Code Annotated as “the expectation of continued public patronage.”\textsuperscript{118} The trial court found that plaintiffs had established good will “from which plaintiffs could reasonably have enjoyed continued profitable operation.”\textsuperscript{119} In this context, the loss of good will is indistinguishable from the loss of profits, for the $5000 per year lost profits presumably took “continued public patronage” into account.\textsuperscript{120} The error was immaterial, however, for the trial court found that the lost profit was $12,000 per year but awarded only $5000.\textsuperscript{121} The additional $5000 for good will was well within the evidence of lost profits.

V. Avoidable Consequences

While an aggrieved plaintiff's expectation damages include both the gains prevented and the losses suffered because of defendant's breach, a plaintiff cannot recover those losses which he or she “could have avoided without undue risk, burden, or humiliation.”\textsuperscript{122} Likewise, if the breach presented an opportunity that plaintiff could have grasped by reasonable effort, and without un-

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\textsuperscript{115}. \textit{Id.} at 129-30, 483 P.2d at 703.
\textsuperscript{117}. \textit{See also} Cruse v. Clawson, 137 Mont. 439, 352 P.2d 989 (1960) (where a similar award was made in a tort action).
\textsuperscript{118}. \textit{See also} Spheeris v. Spheeris, 37 Wis. 2d 497, 504-05, 155 N.W.2d 130, 135 (1967).
\textsuperscript{119}. \textit{Nevin}, 172 Mont. at 507, 565 P.2d at 317.
\textsuperscript{120}. In Sol-O-Lite Laminating Corp. v. Allen, 223 Or. 80, 92, 353 P.2d 843, 849 (1960), the court held that there was a duplication of damage claims where a party who received defective plastic claimed lost profits on items “he would have sold had his customers not become disgusted with him” in addition to loss of good will. \textit{Cf.} Baldwin v. Stuber, ___ Mont. ___, 610 P.2d 160 (1980), in which the value of good will was allowed in quantum meruit where plaintiff's good will was transferred to defendant under a void contract.
\textsuperscript{121}. \textit{Nevin}, 172 Mont. at 507, 565 P.2d at 317-18.
\end{flushright}
due risk, expense or humiliation, the gains plaintiff could have made are deducted from the damages.\textsuperscript{123} This principle is called either the doctrine of "avoidable consequences" or the "duty to mitigate."\textsuperscript{124} Montana has not codified the avoidable consequences doctrine\textsuperscript{125} but has adopted it in case law.\textsuperscript{126}

The doctrine requires only a reasonable effort to mitigate damages. It does not require that plaintiff use every means possible nor does it require that the efforts be successful.\textsuperscript{127} In \textit{Business Finance Co. v. Red Barn, Inc.},\textsuperscript{128} plaintiff repossessed equipment leased to defendant and sued on the contract. Defendant claimed plaintiff failed to mitigate its damages because the repossession took place seventeen months after defendant’s default. The court found that where plaintiff sent frequent notices of default to defendant, even though plaintiff was not successful in obtaining payments from defendant, the efforts were reasonable under the circumstances and did not "unnecessarily enlarge damages caused by the default."\textsuperscript{129}

In \textit{McEwen v. Big Sky of Montana, Inc.},\textsuperscript{130} plaintiff leased a truck to defendant, who agreed to repair it before returning it. Plaintiff was not successful in getting defendant to repair the truck and return it for almost two years. Plaintiff sued to recover the

\textsuperscript{123} 5 A. \textsc{Corbin}, \textit{Contracts} § 1039 (1964). It follows that opportunities not presented by the breach are not deducted from damages. For example, if a teacher is wrongfully discharged from a day school job paying $15,000 per year and is immediately offered a night school job paying $13,000 per year, the gain from the second job is not deducted if the teacher could have performed both jobs prior to the breach. \textit{See infra} notes 167-68 and accompanying text.

\textsuperscript{124} The term "duty to mitigate" is misleading, for there is no affirmative obligation to act. Whether plaintiffs \textit{actually} reduce their losses or increase their gains will not affect their recovery. In the example above, if the discharged teacher were immediately offered a comparable day school job paying $13,000 per year, the damages are exactly the same—$2000—whether the teacher takes the second job or not. While it might be worth the effort to avoid reference to the "duty," its use is ingrained among attorneys and judges.


\textsuperscript{127} 5 A. \textsc{Corbin}, \textit{Contracts} § 1039 (1964); \textit{Restatement (Second) of Contracts} § 350(2) (1981).

\textsuperscript{128} 163 Mont. 263, 517 P.2d 383 (1973).

\textsuperscript{129} \textit{Id.} at 267-68, 517 P.2d at 384.

\textsuperscript{130} 169 Mont. 141, 545 P.2d 665 (1976).
truck and lease payments. The district court held that when plaintiff refused delivery of the unrepaid truck, he had abandoned it and failed to mitigate his loss. The supreme court reversed, finding that plaintiff had not intended to abandon the truck but to have it repaired by defendant. Plaintiff made sufficient efforts to demand the repair and hasten return of his truck when he contacted defendant twice and when he retained a lawyer who more than once contacted defendant. These acts met the "reasonable effort" standard.

The doctrine of avoidable consequences does not require plaintiffs to mitigate damages if in so doing they place themselves in situations involving risk or unreasonable expense. In Spackman v. Ralph M. Parsons Co., a tort case which has been influential in contract disputes, the court stated that the test for determining the limits of the duty to mitigate is: "What would an ordinarily prudent person be expected to do if capable, under the circumstances?" Here, plaintiff was not required to wade into raw sewage which flooded his motel in order to save his personal property and thus mitigate his losses.

The burden of proving avoidable consequences is borne by the party who breached the contract. In A. T. Klemens & Son v. Reber Plumbing and Heating Co., where plaintiff claimed that defendant breached an agreement to use plaintiff as a subcontractor, defendant argued that it was up to plaintiff to offer evidence of the savings that resulted from the breach. The court held that the burden was on the defendant, which failed to carry the burden when it offered no proof on the subject.

131. Id. at 148, 545 P.2d at 669.
132. Id. at 149, 545 P.2d at 669.
133. RESTATEMENT (SECOND) OF CONTRACTS § 350, comment g (1981).
134. 147 Mont. 500, 414 P.2d 918 (1966).
135. See infra notes 230-31 and accompanying text.
136. The court erroneously characterized the duty as a "positive" one. See supra note 124.
137. Spackman, 147 Mont. at 505, 414 P.2d at 921 (citation omitted).
138. Id.
139. 5 A. CORBIN, CONTRACTS § 1039, at 251 (1964). See also McEwen, 169 Mont. at 148-49, 545 P.2d at 669, where the court held that damages would not be reduced when defendant had not offered substantial credible evidence that plaintiff failed to mitigate.
141. Id. at 125, 360 P.2d at 1010.
VI. DAMAGES IN PARTICULAR ACTIONS

A. Employment Agreements

A wrongfully discharged employee is entitled to his or her expectancy: the salary the employee would have earned during the remainder of the term less amounts actually earned or that could have been earned.\(^\text{142}\) This latter factor takes into account the employee's duty to mitigate damages.\(^\text{143}\)

In the leading Montana case on breach of an employment agreement, Wyatt v. School District No. 104, Fergus County,\(^\text{144}\) plaintiff moved from Colorado to Lewistown after accepting a teaching position paying $3600 per year plus rent-free living quarters. Wrongfully discharged after approximately one month, she incurred expenses seeking other work, eventually obtaining part-time employment as a substitute teacher in Billings.

The court properly denied plaintiff's claim for the expense of moving from Colorado to Montana. She would have incurred that expense even if defendant had performed, so reimbursement was not required to satisfy the expectancy goal of putting her in the position she would have been in had defendant performed.\(^\text{146}\) The court had difficulty, however, justifying damages for the loss of living quarters and for the expenses of seeking new employment. Defendant urged the court to limit the damages to the lost salary under what is now section 27-1-312 of the Montana Code Annotated: "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon."

Finding no cases construing the statute or its California counterpart, the court drew on a California case construing the counterpart of what is now section 27-1-315 of the Montana Code Annotated.\(^\text{146}\) The California Supreme Court held that in an action for breach of an agreement to purchase real estate, expenses in addition to those provided in the statute could be recovered.\(^\text{147}\) The Montana court then cited Orford v. Topp,\(^\text{148}\) for the proposition that the specific statutes applicable to determine the damages for

\(^\text{143.}\) See supra text accompanying notes 122-41.
\(^\text{145.}\) Id. at 91, 417 P.2d at 225.
\(^\text{146.}\) See infra text accompanying notes 213-18.
\(^\text{147.}\) Wyatt, 148 Mont. at 88, 417 P.2d at 223-24 (citing Royer v. Carter, 37 Cal. 2d 544, 233 P.2d 539 (1951)).
breach of an agreement to convey real property "must be read in light of [now section 27-1-311 of the Montana Code Annotated], the purpose of which is to compensate an aggrieved party for the loss he sustains." In Wyatt, the court turned this dicta from a case strictly limiting damages into a broad statement of "its philosophy on damages":

In effect, what the court has said is that the statutes are to be regarded as guides in the estimation of damages to be recovered, and that the respondent should receive a sum which, when added to the benefits already received under the contract, will give her an economic status identical to that which she would have enjoyed had the contract been performed.

This statement of basic expectancy principles is correct and laudable, but overly broad for purposes of this case, which could have been decided in a less roundabout fashion. The present section 27-1-312 cited by defendant could have been distinguished as appropriate for an obligation such as a promissory note rather than a promise to pay for services.

The court affirmed the award for the loss of living quarters for a variety of reasons, but principally as a natural consequence of the breach which defendant could reasonably have foreseen plaintiff would have to replace on breach. It does not seem necessary to regard the loss as something more than the value of the promised performance itself. The court might simply have added the value of the living quarters to the promised cash salary to arrive at the amount of the expectancy. The issue of whether these damages were additional to the statutory damages could thus have been avoided. The expenses incurred in seeking other employment were allowed as part of plaintiff's successful attempt to mitigate. In fact, there is authority for award of those expenses even if no alternate employment is found.

In other cases, the first issue that had to be resolved was whether the plaintiff was an employee. In McNulty v. Bewley Corp., plaintiffs remained as managers of a restaurant on the promise of defendant that things would be "made 'right.'" The court held that in the absence of an express agreement, the con-

149. Wyatt, 148 Mont. at 89, 417 P.2d at 224.
150. Id.
151. Id. at 89-90, 417 P.2d at 224-25.
152. Id. at 90-91, 417 P.2d at 225.
153. 5 A. CORBIN, CONTRACTS § 1044, at 277 (1964).
155. Id. at 263, 596 P.2d at 475.
duct of the parties implied a contract which entitled plaintiffs to reasonable compensation. While the court did not explain how the damages were measured, it is significant that the finding that plaintiffs were employees entitled them to recover attorneys’ fees under what is now section 39-3-214.1

In *Cartwright v. Joyce*, plaintiff sued defendant’s estate for the reasonable value of services she had performed for the deceased in the six years preceding the death of the alleged employer. The court held that there was not an express contract but a contract implied in fact from the actions of the parties. Significantly, attorneys’ fees were awarded for the recovery of the wages. Dissenting, Justice Castles found the evidence “totally lacking as clear, convincing, strong and satisfactory,” which suggests a higher standard of proof than a preponderance. While some states have adopted a higher standard of proof in cases involving contracts between relatives, it is questionable whether a higher standard could have been imposed—if such was Justice Castles’ intention—in the face of Montana’s statutory standard of a preponderance of the evidence in civil cases. Justice Castles also argued that even if compensation was properly awarded, the services were professional services, recovery of which should not entitle plaintiff

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156. *Id.* at 264-66, 596 P.2d at 476-77. See also *Keith v. Kottes*, 119 Mont. 98, 172 P.2d 306 (1946), in which the court denied recovery where plaintiffs alleged an implied contract at the same time they had an express contract with defendant.


(1) Whenever it is necessary for the employee to enter or maintain a suit at law for the recovery or collection of wages due as provided for by this part, a resulting judgment must include a reasonable attorney’s fee in favor of the successful party, to be taxed as part of the costs in the case. (2) Any judgment for the plaintiff in a proceeding pursuant to this part must include all costs reasonably incurred in connection with the proceeding, including attorneys’ fees.


159. 155 Mont. at 484-85, 473 P.2d at 518-19, citing what is now MONT. CODE ANN. § 28-2-103 (1981), which provides:

A contract is either expressed or implied. An express contract is one the terms of which are stated in words. An implied contract is one the existence and terms of which are manifested by conduct.


163. MONT. CODE ANN. § 26-1-403(1) (1981) provides:

The jury is to be instructed by the court on all proper occasions: (1) that in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory, the decision must be made according to the preponderance of the evidence. . . .
to attorneys' fees.\textsuperscript{164}

\section{Construction Contracts\textsuperscript{165}}

\subsection{Breach by the Owner}

If the owner breaches the contract before the contractor has begun performance, damages are simply the expectancy: the profit the contractor would have made had there been performance. In \textit{A. T. Klemens \& Son v. Reber Plumbing and Heating Co.},\textsuperscript{166} the court corrected a common mathematical error made in computing profit. If the contract amount is $11,000 and a reasonable profit is ten percent, the profit is not $1100 (ten percent of $11,000). This computation gives the contractor profit on a profit. The contract amount is the cost of materials and labor plus a profit computed on the cost. In the example of the $11,000 contract, the cost of materials and labor is $10,000 and the profit is $1000 (ten percent of $10,000). In \textit{Klemens}, the court also held that because defendant failed to offer proof on the subject, it was not entitled to a deduction on account of plaintiff's failure to mitigate.\textsuperscript{167} While the result is correct, the doctrine of avoidable consequences is generally not applied to construction contracts, on the theory that by subcontracting, a contractor can perform more than one contract at the same time.\textsuperscript{168}

At the other end of the scale, when performance is completed, the contractor is entitled to no more than the contract amount.\textsuperscript{169} It is a frequently disputed question of fact whether performance has been completed. Often determination of this question is left to

\textsuperscript{164} Cartwright, 155 Mont. at 493, 473 P.2d at 523.

\textsuperscript{165} See Annotations, supra note 2, § 346; Restatement (Second) of Contracts §§ 347, 348 (1981).

\textsuperscript{166} 139 Mont. 115, 360 P.2d 1005 (1961).

\textsuperscript{167} Id. at 125, 360 P.2d at 1010. See supra text accompanying notes 139-41.


\textsuperscript{169} 5 A. Corbin, CONTRACTS § 1110 (1964); Myers v. Bender, 46 Mont. 497, 129 P. 330 (1913).

An interesting question arises when plaintiff's full performance is prevented by defendant. Plaintiff may recover in quantum meruit, but is the recovery limited by the contract price? The majority rule is that the contract price is not a limit. \textit{See} Palmer, The Contract Price as a Limit on Restitution for Defendant's Breach, 20 OHIO ST. L.J. 264, 269-71 (1959). Montana appears to follow the minority rule that the agreed price limits the quantum meruit. Puetz v. Carlson, 139 Mont. 373, 364 P.2d 742 (1961). \textit{Puetz} was distinguished in \textit{DeFord} v. Wansink, 152 Mont. 487, 452 P.2d 73 (1969), where plaintiff received more than the pro-rated contract price when defendant breached a three-year cattle-sharing contract after eighteen months. In \textit{DeFord}, the contract was not divisible, so plaintiff had performed more than half the value of the promised performance during the first half of the contract term.
the owner or the architect and manifested by the issuance of a certificate for payment. An issue then arises as to the standard employed by the issuing party. In Figgins v. Stevenson, an owner who had the authority to issue the certificate claimed that issuance was a condition precedent to payment. The court dismissed the argument curtly: "Under that argument, apparently Stevenson would have us believe that so long as he never issued a certificate he would not be required to pay. Obviously that is incorrect."

There is no Montana case that more fully addresses the questions that can arise in these situations: whether the standard of satisfaction in a construction contract is objective or subjective; whether the architect's refusal of a certificate is conclusive. As to the first question, the majority of states, including California, apply an objective standard: would a reasonable person have been satisfied. Even when the subjective standard is applied, the tests become very similar because the party must act in good faith. As to the second question, an architect is considered a quasi-arbitrator whose decision can be attacked on the same grounds as that of any other arbitrator: only where there is fraud, bad faith, or failure to exercise honest judgment. The contractor in Figgins was unwise to leave issuance of the certificate up to the owner. Nevertheless, this alone would not avoid the contractual provision. The court might have included another step in its analysis by recognizing that since the contractor did complete the work in a satisfactory manner, the owner's refusal to issue the certificate was incorrect.

In some cases, completion of the contract may be delayed by the owner. In two Montana cases, the state caused delay in the performance of highway construction contracts by its failure to obtain rights-of-way. In Laas v. Montana State Highway Commission, the significant elements of the damage award were the rental value of equipment idled by the delay and the loss of future profits. In Zook Brothers Construction Co. v. State, the district court awarded damages of approximately $141,000. The supreme court, finding no basis to support the award, modified and awarded over $1,320,000. The elements of the damage award were

171. Id. at 429, 517 P.2d at 737.
174. Figgins, 163 Mont. at 429, 517 P.2d at 737.
176. See supra text accompanying notes 112-15.
177. 171 Mont. 64, 556 P.2d 911 (1976).
the rental value of the equipment ($613,000), increased performance costs ($619,000), and lost profits on the contract ($88,000). The calculation of the performance costs indicates the lack of exactness often found in the computation of damages, for Zook offered at least three methods of determining its loss.\textsuperscript{178} Dissenting, Justice Haswell would have affirmed the district court decision as supported by sufficient evidence. The district court had found that Zook's underestimation of the time for performance was responsible for most of the loss.\textsuperscript{179}

2. Breach by the Contractor

The general rule for defective construction is that the damages equal the cost of remedying the defect to give the owner the benefit of the bargain.\textsuperscript{180} In \textit{Kirby v. Kenyon-Noble Lumber Co.},\textsuperscript{181} the court remanded the matter for a new trial where the district court used as the measure of damages the difference in market value of the house as promised and as delivered.\textsuperscript{182} The court found no statutory provision for damages for breach of construction contracts, but noted that under section 27-1-311 of the Montana Code Annotated, the cost of completion has been equated with the "detriment proximately caused" by the breach.\textsuperscript{183}

In \textit{Haggerty v. Selsco},\textsuperscript{184} a contractor installed defective shower units in a campground. The owner claimed as the measure

\textsuperscript{178} Id. at 74-75, 556 P.2d at 917. In Bohrer v. Clark, 180 Mont. 233, 890 P.2d 117 (1978), the court held that trial courts may not increase the damages awarded by a jury. Disapproving as well of the supreme court increasing a trial court award, the court distinguished the result in \textit{Zook Bros.} as applicable only where the case was tried without a jury and the award was "merely the result of an error in mathematical calculation." Id. at 241, 590 P.2d at 122.

\textsuperscript{179} Zook Bros., 171 Mont. at 78, 556 P.2d at 919. It follows that no recovery may be obtained for an unprofitable contract, for there would then be no expectancy.

\textsuperscript{180} See, e.g., Carriger v. Ballenger, ___ Mont. ___, 628 P.2d 1106 (1981). In Prudential Fed. Sav. & Loan v. McDougall, 173 Mont. 263, 567 P.2d 445 (1977), defendants signed a note to pay a contractor for the refurbishing of a log home. The refurbishing was unsatisfactory and defendants stopped making payments. Plaintiff received judgment on the note against defendants, who received judgment against the contractor in a third-party action. While the value of the performance was not discussed, it must have been worthless if defendants were awarded the difference between what they were promised and what they received.

\textsuperscript{181} 171 Mont. 329, 558 P.2d 452 (1976).

\textsuperscript{182} The district court actually found that the value of the house was reduced "to" $2085 and awarded that amount as damages. The supreme court held that that award was not logical. \textit{Id.} at 333, 558 P.2d at 454. The district court probably applied the correct measure of damages—the cost of repair—and meant that the value was reduced by $2085.

\textsuperscript{183} Id. at 332-33, 558 P.2d at 453-54 (citing Mitchell v. Carlson, 132 Mont. 1, 313 P.2d 717 (1957) and Haggerty v. Selsco, 166 Mont. 492, 534 P.2d 874 (1975)).

\textsuperscript{184} 166 Mont. 492, 534 P.2d 874 (1975).
of damages the cost of removal and replacement of the showers, while the contractor claimed the cost of repairing the showers to bring them up to specification. In a particularly confusing opinion, the court upheld the application of the latter measure on the expectancy theory. The result was made easier by two factors. First, the contract provided for a particular brand or its equivalent. This weakened the owner's argument that he was entitled to a particular brand. Second, the contract provided that a consulting engineer would "determine all questions as to acceptable fulfillment of the contract." At a meeting of the parties and the engineer, it was agreed that the contractor would attempt to improve the showers. It was the estimate of the engineer that was adopted by the trier of fact. Even in the absence of these factors, it is likely that the same result would have been reached under the "economic waste" theory.

The general rule that the damages are equal to the cost of repair is subject to an exception when the cost of repair exceeds the value of the property. This exception in circumstances involving economic waste is well-known to insurance adjusters and the Internal Revenue Service. The principle was well stated by Justice Cardozo in Jacob & Younsg, Inc. v. Kent: "The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value." In Jacob & Younsg, a builder installed Cohoes pipe in a dwelling instead of the Reading pipe called for in the contract. Cardozo held that because it would be economically wasteful to tear down the structure to replace the pipe, the correct measure of damage was the difference in the value of the house with and without the pipe. Because the parties had stipulated that the pipe was of equal value, the owner had no recovery.

In Chandler v. Madsen, the court held a builder liable for a defective house under an implied warranty of habitability. The district court awarded damages of $97,500 for repair of the house. The supreme court affirmed the award and restored $3200 of a

185. Id. at 500, 534 P.2d at 878. At the beginning of headnote [1], "Plaintiffs" should read "Defendants."
186. Id. at 496, 534 P.2d at 876.
187. Id.
189. 230 N.Y. 239, 129 N.E. 889 (1921).
190. Id. at 244, 129 N.E. at 891.
191. Id.
$4000 award for temporary rental while repairs were made and an award of $3487.51 for moving and storage that had been deleted by the trial court on a post-trial motion. The purchase price—and presumably the value—of the house was $90,280. The award makes no sense under the theory of economic waste. Under that theory, the damages would be the difference between the value as promised ($90,280) and the value as delivered. This may have been only salvage value plus value of the land, but the salvage value in a new house is probably substantial.

Before dismissing the court’s reasoning altogether, it may be argued that the economic waste theory does not apply in Chandler. In Jacob & Youngs, because the substituted pipe was of equal value, replacement would have been absurd. In Haggerty v. Selsco, the repaired showers were apparently as good as the promised ones. But in Chandler, substantial replacement was undoubtedly required. Furthermore, the New York Court of Appeals created an exception to Jacob & Youngs when the structure is unusable or unsafe. In Bellizzi v. Huntley Estates, the court ordered a builder to pay the cost of redoing a driveway where he constructed it with a dangerous twenty-five percent grade instead of the promised ten percent grade.

Nevertheless, the fundamental principle behind the doctrine of economic waste is the prevention of unjust enrichment of the owner. In Jacob & Youngs, had the owner recovered damages, he could not reasonably be expected to have used the money to tear out the offensive pipe. The recovery would be a windfall. In Bellizzi, the payment did not exceed the price of the house and for their safety and convenience, the owners might reasonably be expected to make the repairs. If they did not, the resale value of the house would certainly be diminished. Chandler seems closer to Jacob & Youngs than to Bellizzi. A reasonable owner of the Chandler property would sell the property for the value of the land and salvage, pocketing much of the damages as windfall. If the economic waste theory had been applied, recovery would have been limited to the difference between the value as reflected in the sale price and the value of the land plus salvage value. After repairs, the owner would have the expectancy, an accretion to wealth of $90,280.

193. Id. at __, 642 P.2d at 1034.
C. Real Property

Transactions involving real property are complicated because the parties often establish the damages by agreement or they seek alternative remedies such as specific performance or rescission. This discussion is limited to those transactions which involve the expectancy doctrine.

1. Breach of an Executory Agreement to Convey Real Property.

If the seller fails to convey real property because of a title problem, the "English rule" allows the buyer to recover only the expenses he or she has incurred. The "American rule" allows the buyer to recover the benefit of the bargain: the difference between the value of the land and the contract price. Montana has essentially adopted both rules in section 27-1-314 of the Montana Code Annotated, the "English rule" generally applying and the "American rule" applying when the seller's breach is in bad faith:

The detriment caused by the breach of an agreement to convey an estate in real property is considered to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon. If the breach was in bad faith and the agreed price was less than the value of the estate, the detriment is also considered to include the difference between the agreed price and the value of the estate at the time of the breach and the expenses properly incurred in preparing to enter upon the land.

Application of the rule proved perplexing in Orford v. Topp. The facts were simple. Defendant contracted to convey real property to plaintiffs for $20,000 and sold it to a third party for $20,900. Plaintiffs bought other property and offered proof that it would cost them $2,059.50 to build a two-car garage on the property. Instructed under what is now section 27-1-314, the jury found that the breach was in bad faith and awarded plaintiffs $2,959.50, a figure arrived at by adding the difference in the sale price to the cost of the garage. The jury had also been instructed that they could award damages under what is now section 27-1-305 for the loss of property which had a "peculiar value" to plaintiffs. Not-
ing that "it is doubtful that this is the type of case where the instruction on 'peculiar value' is applicable," the court did not squarely face this issue, finding no evidence of peculiar value in this case.\textsuperscript{200} The court's inclination was probably correct, for the statute should be reserved for cases such as the loss of an heirloom or a photograph, where market value is far less significant than value to the owner.\textsuperscript{201}

While the instruction under what is now section 27-1-305 was error, the remaining instructions still posed a problem. The jury was instructed under section 17-602 of the Revised Codes of Montana that "market value" was "the price at which [the buyer] might have bought an equivalent thing in the market."\textsuperscript{202} As discussed above,\textsuperscript{203} the court stated that section 17-602 was not to be read alone, but in conjunction with what is now section 27-1-314 of the Montana Code Annotated to compensate the aggrieved party for the loss.\textsuperscript{204}

But what was the loss: the amount for which seller re-sold the property or the amount buyer was required to spend to acquire similar property? The court did not have to face this issue, finding that the property ultimately purchased was not similar and that the only proof offered of the value of similar property was the resale for $20,900. Section 17-602 was repealed in 1963.\textsuperscript{205} This should make the question easier to resolve today. The actual resale price is strong evidence of "the value of the estate at the time of the breach" under section 27-1-314. Even if there is not a sale, the appraised value would be better evidence than the price of other property on a market which consists of such non-interchangeable items as parcels of real estate.\textsuperscript{206} The holding that—in the absence of liquidated damages or specific performance—plaintiffs were entitled to the $900 is correct.

The rule of section 27-1-314 was applied in Stovall v. Watt,\textsuperscript{207} where defendant agreed to convey 960 acres to plaintiffs at twenty dollars per acre. Defendant sold the property to a third party at twenty dollars per acre. The trial court found that the breach was

\begin{itemize}
  \item\textsuperscript{200} Orford, 136 Mont. at 233-34, 346 P.2d at 569.
  \item Orford, 136 Mont. at 229, 346 P.2d at 567.
  \item See supra notes 147-48 and accompanying text.
  \item Orford, 136 Mont. at 230-31, 346 P.2d at 588.
  \item Repeal was in connection with the adoption of the UCC. 1963 Mont. Laws 264 § 10-102. Because the UCC would not apply to this transaction, there is presently no applicable statute.
  \item Palladine v. Imperial Valley Farm Lands, 65 Cal. App. 727, 225 P. 291 (1924).
  \item Mont. ___ 610 P.2d 164 (1980).
\end{itemize}
in bad faith. The actual sale price, while evidence of the market value, was not presumptive evidence and was rebutted by expert testimony which showed the value to be thirty dollars per acre. The measure of damages was the difference between the value as found by the trial court (960 x $30) and the contract price (960 x $20), or $9600.208

Dissenting, Justice Sheehy did not find bad faith. He would nevertheless have left open the possibility of damages under the theory that section 27-1-314 is not necessarily exclusive but must be read in the light of section 27-1-311.209 He cited as authority Wiseman v. Holt.210 Wiseman held that what is now section 27-1-315 of the Montana Code Annotated was not exclusive, but was subsequently overruled in Whitney v. Bails.211 Whitney held that what is now section 27-1-315 is the exclusive measure of damages for breach of an agreement to purchase real property.

2. Breach of an Executory Agreement to Purchase Real Property

On the surface, the rule in section 27-1-314, seems to be reflected in the rule for breach by purchasers set forth in section 27-1-315: “The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him.” If S agreed to sell property worth $19,000 to P for $20,000 and P breached, the damages would be $1000, the excess of the contract price over the value of the property; in other words, the damages are the benefit of the bargain. This makes sense as long as the contract price exceeds the value of the property. But the rule has been applied to sales under contract for deed, where the contract price diminishes while the value generally appreciates over time.

In Wiseman v. Holt,212 purchasers under a contract for deed began demolishing the premises and then defaulted. The trial court awarded sellers damages for waste, but purchasers claimed that additional damages were not permissible under what is now section 27-1-315. The court held that additional damages are permissible to give sellers the benefit of the bargain under the general principles of what is now section 27-1-311 of the Montana Code

208. Id. at ___, 610 P.2d at 169-70.
209. Id. at ___, 610 P.2d at 171.
Annotated.\textsuperscript{213} In \textit{Wiseman}, the court used \textit{Royer v. Carter}\textsuperscript{214} as authority for the proposition that additional expenses have been allowed under the California equivalent of what is now section 27-1-315. That case involved not a contract for deed but a sale where the contract price equalled the market price. Under a strict reading of the statute, a seller in this position would not recover such expenses as brokers' fees or fees for the preparation of instruments. To give the seller the benefit of the bargain, the California Supreme Court allowed recovery of the expenses.\textsuperscript{215} This holding is far narrower than the holding in \textit{Wiseman}, which allowed substantial additional damages for waste.

\textit{Wiseman} was specifically overruled as to additional damages in \textit{Whitney v. Bails}.\textsuperscript{216} In \textit{Whitney}, purchaser under a contract for deed defaulted and seller claimed damages for waste. The court held that because the market price at the time of breach exceeded the contract price, under what is now section 27-1-315, seller was entitled only to the benefit of the bargain: "The damage done may be used, as it was here, to reduce the market value of the land but it may not be used, as urged here, to allow damages where none would be due under the statutory measure."\textsuperscript{217} As an example of the application of \textit{Whitney}, assume real property worth $70,000 was purchased for $10,000 down and $60,000 on contract, and at the time of default two years later, the value was $80,000 and $58,000 remained payable on the contract. There is no excess of the amount due under the contract over the value of the property, so there are no damages. In fact, the purchaser would have to destroy over $22,000 worth of value before becoming liable for damages under the statute.

These cases are variations on a thorny issue: to whom does the equity belong in a default on a contract for deed? The suggestion in \textit{Whitney} seems to be that the seller has an interest only to the extent of the amount the seller has financed, which would be the situation under mortgage financing. While no solution is suggested here, as a first step the court might restrict section 27-1-315 to agreements breached before partial performance, as in \textit{Royer}, and approach contracts for deed as an area with special considerations.

\begin{thebibliography}{9}
\bibitem{213} Id. at 391-92, 517 P.2d at 714 (citing Orford v. Topp, 136 Mont. 227, 346 P.2d 566 (1959) and Wyatt v. School Dist., 148 Mont. 83, 417 P.2d 221 (1966)).
\bibitem{214} 37 Cal. 2d 544, 233 P.2d 539 (1951).
\bibitem{215} Id. at ---, 233 P.2d at 543. \textit{See also} 5 A. CORBIN, CONTRACTS § 1036 (1964).
\bibitem{216} 172 Mont. 121, 560 P.2d 1344.
\bibitem{217} Id. at 125, 560 P.2d at 1347.
\end{thebibliography}
requiring fresh approaches. 218

3. Other Situations Involving Real Property

Real property transactions often raise issues other than the difference between the value and the contract price. In Julian v. Buckley, 219 defendant sold real property to plaintiff and promised to construct a road to the property. When defendant failed to construct the road, plaintiff was required to replace a loan commitment at an interest rate of 9.75% over thirty years with a commitment at 11.5%. The court upheld an award of the discounted difference between the amounts payable at each rate. 220 While this is proper, the court cited Walton v. City of Bozeman 221 as authority for an award of "future damages." 222 In Walton, the court erroneously awarded plaintiff a sum to be paid each year rather than the discounted present value of the damages. 223 While the court in Julian did not make this error, specifically stating that "[r]espondent cannot be expected to sue appellants every time the interest rate changes," 224 it would be salutary if Walton were allowed to rest in peace.

While the remedy of specific performance is beyond the scope of this article, it is notable that in Sawyer-Andecor International v. Anglin, 225 the trial court awarded specific performance or the alternative award of a judgment for $144,000. Plaintiff had secured a resale of the property for $144,000 more than it had promised to pay defendant, so it stood to lose that amount as a result of the breach. The court held that the money award was "not damages in the true sense," but was an equitable device to enforce the decree of specific performance. 226 This device is contrary to the principle that equity is available only when the remedy at law is inadequate, but it does indeed serve the purpose of "judicial economy." 227 The same interest in economy was behind the dubious award in Walton, where the court gave defendant the choice of either honoring

220. Id. at __, 625 P.2d at 529. See ANNOTATIONS, supra note 2, § 343 (no Montana cases found); RESTATEMENT (SECOND) OF CONTRACTS § 351, comment e (1981).
222. Julian, __ Mont. at __, 625 P.2d at 529.
223. Walton, 179 Mont. 351, 588 P.2d 518.
224. Julian, __ Mont. at __, 625 P.2d at 529.
225. __ Mont. __, 646 P.2d 1194 (1982).
226. Id. at __, 646 P.2d at 1202.
227. Id.
D. Personal Property

Damages for the loss of personal property caused by a breach of contract are the market value of the property lost plus any special costs or fees incurred. While there is no statute specifying this measure of damages, it is another form of the expectancy rule expressed in section 27-1-311 of the Montana Code Annotated. In Brown v. Webb, plaintiff brought a tort action for the loss of three cows during shipment by trailer. The court affirmed an award of the market value of the cows plus the sale commission and transportation costs per cow. It is submitted that the result would have been the same in contract.

Spackman v. Parsons was a tort action for damage to real and personal property caused by sewage flooding. The case is significant because it has been cited frequently in contract cases for guidance on damages. Application of Spackman to contract cases is reasonable under the facts, for damages would probably have been awarded for the same losses if defendant contractor had been in privity of contract with plaintiff owners.

The significant difference between damages in contract and in tort is the limitation of contract damages to losses which were foreseeable while losses in tort need not have been anticipated to be compensable. In fact situations such as Spackman, if there had been a contract between the parties, water damage to property would probably have been a natural consequence of breach. Another significant difference is that the compensatory remedy in tort is designed to place the injured party in the condition he or she enjoyed before the injury, while the expectancy remedy in contract is designed to place the injured party in the position he or she would have been in had performance occurred. In situations where the losses are foreseeable, the damages are the same; both

228. Walton, 179 Mont. at 359, 588 P.2d at 522.
230. 147 Mont. 600, 414 P.2d 918 (1966).
233. 5 A. CORBIN, CONTRACTS § 992 (1964).
remedies are designed to confer no unanticipated benefit upon the injured party. Another significant difference is the availability of exemplary damages in a tort action under section 27-1-221 of the Montana Code Annotated, which expressly prohibits exemplary damages in contract. In Spackman, the court reversed an award of exemplary damages, making the award similar to a contract award. As long as these distinguishing factors are borne in mind, the discussion of damages in Spackman may be useful in contract cases.

After reaffirming the simple compensatory rule, the court in Spackman eloquently expressed the difficulty of application: “Ingenious men have propounded ingenious methods, systems and formulas for determining in monetary terms the value of property partially damaged or destroyed. While such methods serve as useful guides, the final answer rests in good sense rather than mechanical application of such formulas.” The court then recognized two formulas: (1) in the event of destruction, the market value of the property at the time of the loss; (2) in the event of damage less than destruction, the difference in market value before and after the injury. If, however, repair is possible at less cost than the diminution in value, the measure is the cost of repair plus the value of the loss of use. In neither case may the recovery ordinarily exceed the value at the time of injury. As a further rule, in cases where property of a peculiar value—such as clothing, heirlooms, or portraits—has no market value, the value can be the value to the owner, so long as it is not fanciful or unreasonable. The court held that the trial court’s valuation was “totally improper and beyond usual test-measures and common sense,” principally because the plaintiff was awarded the replacement cost of used items. Application of the test-measures and common sense was to prove particularly difficult in a number of contract cases that followed.

234. If there had been a contract in Spackman, the defendant would have had to complete the work at his expense or pay plaintiff the cost of completion. See supra notes 180-83 and accompanying text. The property loss would be consequential damages resulting from the breach.

235. See infra notes 298-99 and accompanying text.

236. The availability of tort and contract damages arising out of the same transaction is beyond the scope of this article. See infra notes 303-10 and accompanying text. See also Comment, Punitive Damages in Ordinary Contracts, 42 Mont. L. Rev. 93 (1981).

237. Spackman, 147 Mont. at 506, 414 P.2d at 921-22.


239. Spackman, 147 Mont. at 507, 414 P.2d at 922.

240. Id. at 509-10, 414 P.2d at 923. See supra note 199.

241. Id. at 508, 414 P.2d at 922.
If Spackman presented the kind of routine facts that encourage a court to make orderly rules, then Bos v. Dolajak presented the bizarre turn of events that necessitates stretching those rules. In Bos, plaintiffs purchased a secondhand silo in California for an unstated cost, had it shipped to Montana, and hired defendants, North Dakota contractors, to erect it. After four days work, when the silo was just about up, the wind blew it over. Defendants went back to North Dakota. Plaintiffs sued in contract and in tort, and the trial court gave instructions with respect to both claims. The court held that the instructions were not error where negligence in the performance of the contract was the proximate cause of the loss.

Defendants argued that the Spackman rules limited plaintiffs’ damages to the value of the property before the loss less the salvage value, or the cost of repair plus the loss of use, not to exceed the value before the loss. The court limited this rule to fact situations “dealing with readily replaceable items with an established market value.” The court noted that in Spackman it had stated that the overriding consideration in computing damages was “good sense rather than mechanical application of such formulas.”

Even though there was no jury instruction on this point, the court also used the rationale that the silo may well have been property of a peculiar nature, with no market value. This last rationale is off the mark, but not far off. It does not seem tenable to argue that by its nature the property had no market value, as is the case with heirlooms or photographs. It is simply that plaintiffs picked up a bargain where there was no market. In other words, the value before destruction was not what plaintiffs paid for it, but the value they created through their efforts. The court finally acknowledged this in holding that the verdict was not contrary to the law under jury instructions in both tort and contract:

The evidence in the record established that plaintiffs had acquired a secondhand silo which was equivalent to a new silo at a considerable savings. Thus, the jury could quite properly find

243. Id. at 8, 534 P.2d at 1261 (citing Gunderson v. Brewster, 154 Mont. 405, 466 P.2d 589 (1970)). The citation is curious, for the claim in Gunderson was purely in tort.
244. The opinion regrettably omits the cost to plaintiffs, making the computations impossible to comprehend.
245. Bos, 167 Mont. at 8, 534 P.2d at 1261.
246. Id. at 9, 534 P.2d at 1262 (quoting Spackman, 147 Mont. 500, 506, 414 P.2d 918, 922).
247. Bos, 167 Mont. at 7, 534 P.2d at 1261. See supra note 240 and accompanying text.
that the ‘market value’ (actual value) of the silo at the time of the loss was between $30,000 and $40,000.\textsuperscript{248}

The decision is probably correct when viewed in light of the expectancy interest. The court made the common error of stating that the purpose of the legislative enactment of the expectancy interest, what is now section 27-1-311, is to make the injured party whole.\textsuperscript{249} In contract, that goal is to give parties what they would have had if the contract had been performed, not to restore them to the status quo prior to contracting, as making the injured party “whole” suggests.\textsuperscript{250}

In Chandler v. Madsen,\textsuperscript{251} defendant urged that the Spackman rules be applied to prevent plaintiffs from recovering more than the value of the property. The court cited Bos for the proposition that the Spackman rules did not apply “[w]here an item was not readily replaceable, did not have an established market value, and was integral to a larger operation . . . .”\textsuperscript{252} When the expectancy interests in the two cases are compared, this analogy is seen to be faulty. In Bos, the jury awarded its estimation of the cost of replacing the downed silo plus the incidental damages for loss of use, less the value of defendants’ work in constructing a foundation. Plaintiffs ended up with exactly what they bargained for. If they had not resurrected the fallen silo, they would have been left with less money than they needed to replace it. There was no windfall.\textsuperscript{253} In Chandler, the jury awarded the cost of repair and the supreme court restored the damages for loss of use. The value supplied by defendant—the land and salvage value—was not subtracted. Whether plaintiffs used the money for repair or not, they got more than they bargained for: a windfall.\textsuperscript{254}

E. The Uniform Commercial Code

There are few Montana cases which cite the provisions of the Uniform Commercial Code (UCC).\textsuperscript{255} In Baden v. Curtiss Breeding

\begin{footnotes}
\item[248.] Bos, 167 Mont. at 10, 534 P.2d at 1262. It was established that a new silo would have cost $40,000. Id. at 7, 534 P.2d at 1259.
\item[249.] Id. at 6, 534 P.2d at 1260.
\item[250.] 5 A. Corbin, Contracts § 992 (1964).
\item[251.] — Mont. ___ , 642 P.2d 1028 (1982).
\item[252.] Id. at ___ , 642 P.2d at 1033. The latter factor refers to damages in Bos for losses resulting from inability to use the silo that were apparently part of the jury’s award, although the amount was not specified. See supra notes 22-23 and accompanying text.
\item[253.] Except for the silo, which fell over in the wind.
\item[254.] See supra notes 192-95 and accompanying text.
\end{footnotes}
Service, defendant sold plaintiff defective semen, resulting in the loss of a cow crop. The applicable statute was what is now section 30-2-715(2) of the Montana Code Annotated which adopts the second Hadley rule:

(2) Consequential damages resulting from the seller's breach include:
(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and
(b) injury to person or property proximately resulting from any breach of warranty.

The issue was where to draw the line, for as a result of the breach, plaintiff lost not only the next crop but the succeeding crops that the lost crop would have produced. The court limited the loss to one crop, reasoning that the further losses were not foreseeable and that the risks associated with producing one crop were reasonably ascertainable but that eventually "the degree of uncertainty permitted becomes a question of law." The court might have reached the same result by firmer application of the doctrine of mitigation, which the court suggested was not the basis of its decision. The statute provides for damages for losses "which could not reasonably be prevented by cover or otherwise." At the time plaintiff discovered the loss, he might not technically have been able to cover, but he could have minimized the loss by replacing the crop. In this way, only the crop for the one year would have been lost.

An unusual application of the UCC was found in Hirst v. Elgin Casket Co. When the body of the deceased relative of plain-

257. See supra notes 35-37 and accompanying text. Defective sperm was also found to be a breach of warranty in Waddell v. Am. Breeders Serv., Inc., 161 Mont. 221, 505 P.2d 417 (1973). While the jury instruction on damages was appealed and held not error, the amount of damages was not discussed.
259. In a footnote, the judge stated, "I am not discussing a duty to cover but rather what persons in the ranching industry might reasonably foresee." 380 F. Supp. at 245 n.1. It would appear that the foreseeable behavior—replacement of the herd—is required to avoid the consequences of the breach. The case illustrates the close relationship between the Hadley rules and the doctrine of avoidable consequences. In Whitaker v. Farmhand, Inc., 173 Mont. 345, 355, 567 P.2d 916, 922 (1977), Baden is cited for the proposition that "[i]t is the law of Montana that consequential damages cannot accrue past the time the injured party has knowledge of the failure of the equipment and a reasonable time thereafter within which to make other arrangements."
tiffs was exhumed, it was discovered that the casket sold by defendant had leaked. The leak in the casket constituted a breach of an express warranty under what is now section 30-2-313(1) of the Montana Code Annotated. Consequential damages for breach of warranty may be awarded under what is now section 30-2-714(3) and section 30-2-715(2)(b). Here the only injury was the mental suffering of the family members who viewed the damaged body. While liability for mental suffering in the absence of physical injury is rare, the court found that cases involving services furnished in connection with deaths and funerals "have created exceptions to the general rule." The court nevertheless reduced the jury's award, finding that plaintiffs had a responsibility to mitigate damages by limiting the family's exposure to the body.

A more pedestrian but well-reasoned application of the UCC is found in Carl Weissman & Sons, Inc. v. Pepper. Defendant breached an agreement to buy crushed auto bodies from plaintiff. Plaintiff incurred expenses in finding another buyer, sold the goods at a lower price, and suffered vandalism to its equipment. The court applied the expectancy rule as stated in the UCC at section 30-1-106(1) of the Montana Code Annotated:

(1) The remedies provided by this code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this code or by other rule of law.

Damages for the sale at a lower price were awarded under section 30-2-703 and section 30-2-706, which permit the aggrieved seller to resell and recover the difference between the resale price and the contract price. Under section 30-2-710, the aggrieved seller is entitled to incidental damages and expenses reasonably incurred as a result of the breach; here, the cost of finding another buyer. The vandalism loss was properly denied under section 30-2-715, for "the damage did not stem from consequences which were reasonably contemplated by the breaching party at the time the agree-

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261. See supra text accompanying notes 256-58.
265. Id. at 1369.
266. Id. It may be noted that outside of the UCC, Montana statutes do not contain such a provision, but the court has generally upheld awards for such damages under Mont. Code Ann. § 27-1-311 (1981). See supra notes 148-51 and accompanying text.
ment was made."^{267}

*Modern Machinery, Inc. v. Flathead County*^{268} represents the Montana Supreme Court’s first word on contract damages under the UCC. In *Modern* the court held that a contract was formed when the county commissioners accepted plaintiff’s bid to sell a rock crusher in spite of the county’s later attempts to repudiate the transaction,^{269} but the court reversed and remanded the damage award. The trial court’s instructions had given the jury broad discretion to determine damages.^{270} Finding these instructions erroneous, the supreme court properly tracked the UCC provisions on seller’s remedies while bypassing some thorny issues raised by those provisions. The court held that the verdict was not supported by substantial credible evidence, for measured under either section 30-2-703 or 30-2-706, the loss was far in excess of the damages awarded.^{271}

Section 30-2-703 of the Montana Code Annotated catalogues the seller’s remedies, which include damages measured by (1) the difference between resale price and contract price under section 30-2-706^{272} and (2) the difference between market price and contract price or lost profits under section 30-2-708.^{273} The court did

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269. *Id.* at ___, 656 P.2d at 210.

270. *Id.*

271. *Id.* at ___, 656 P.2d at 211.

272. MONT. CODE ANN. § 30-2-706(1) (1981) provides:

(1) Under the conditions stated in 20-2-703 on seller’s remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this chapter (30-2-710), but less expenses saved in consequence of the buyer’s breach.

273. MONT. CODE ANN. § 30-2-708 (1981) provides:

(1) Subject to subsection (2) and to the provisions of this chapter with respect to proof of market price (30-2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (30-2-710), but less expenses saved in consequence of the buyer’s breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done when the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (30-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.
not address the conflict between these two code sections. In stead, the court applied section 30-2-708(2) which is applicable “if the measure of damages provided in subsection (1) is inadequate to put seller in as good a position as performance would have done. . . .” In that event, lost profits may be awarded. This provision is designed to assist the volume seller who in effect suffers a loss because, when goods are resold for the contract price, the resale represents an independent sale which the seller might have made. While the court found section 30-2-708(2) applicable, there was no indication that plaintiff was a volume seller or how lost profits were computed. In any event, because the loss on resale was greater than the lost profits, plaintiff's recovery should have been computed under section 30-2-306 in order to satisfy the expectancy principle that “the aggrieved party may be put in as good a position as if the other party had fully performed. . . .”

The trial court in Modern, also gave an instruction on the seller's duty to mitigate which the court found to be erroneous under section 30-2-704(2). That section concerns a situation where the buyer effectively repudiates while the goods are still unfinished; the seller must then determine whether abandoning or completing manufacture would cause less economic loss. In light of the court's findings, this provision does not seem relevant, for the county never effectively communicated its repudiation. Plaintiff therefore properly completed manufacture not because of a duty to mitigate after repudiation, but because there was no repudiation. The court blamed the mitigation instruction for what seems to have been a compromise verdict—the jury apparently thinking plaintiff should have delayed production until the defendant made up its mind. The instruction on mitigation was proper with respect to sellers' resale, for section 30-2-706(1) provides for recovery “[w]here the sale is made in good faith and in a commercially reasonable manner. . . .”

VII. DAMAGES FIXED BY THE PARTIES OR BY THIRD PARTIES

Liquidated damages are those damages established by the parties at the time of contracting. The traditional hostility to liqui-

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275. Id. at §§ 7-9, 7-11.
276. Modern, Mont. at ___ 656 P.2d at 210.
277. Id. at ___, 656 P.2d at 211.
278. Id. at ___, 656 P.2d at 210.
279. See Annotations, supra note 2, § 339; Restatement (Second) of Contracts §
dated damages provisions is seen in section 28-2-721 of the Montana Code Annotated, which declares them void subject to an exception:

1. Every contract by which the amount of damage to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided in subsection (2).

2. The parties to a contract may agree therein upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

The statute reinforces the expectancy doctrine: if the liquidated damages are out of proportion to the expectancy, the provision will be voided as a penalty. On its face, the statute allows liquidated damages where the damages are “impracticable or extremely difficult to fix” at the time of contracting; in that event, the liquidated amount is presumed to be the amount of damage. The presumption is, however, rebuttable. Courts often permit it to be rebutted not on the basis of the situation at the time of contracting, but on the basis of a comparison of the liquidated damages with the actual damages. In Morgen & Osoood Construction Co. v. Big Sky of Montana, Inc., the parties provided for liquidated damages of $500 per day for construction delays. The owner, Big Sky, was able to meet the comparative test by presenting evidence showing how it calculated the $500 figure. It also presented evidence of the actual losses, which exceeded $500. This case illustrates the senselessness of the comparative test. According to the statute, it is appropriate to provide for liquidated damages when damages cannot be accurately fixed. Whether actual damages turn out to be close to that amount is not relevant. And as a policy matter, liquidated damages are an alternative to litigation. Having provided for them, Big Sky was compelled to prove in court that it would have recovered more without them.


280. Liquidated damages are generally permitted for breach of an agreement to convey real property. Hart v. Honrud, 131 Mont. 284, 309 P.2d 329 (1957). In Hart, even though the parties had provided for liquidated damages in the event of breach, the court awarded specific performance on the grounds that the vendor had acted in bad faith.


282. Id. at 271, 557 P.2d at 1019-20.

Big Sky made one mistake, although not a fatal one. In drafting the contract, it referred to the $500 figure as a penalty. The court held that use of the term was not dispositive of the issue. Just as damages termed “liquidated damages” may on closer inspection be a penalty, so may those termed “penalty” prove to be liquidated damages. The decision is a carefully reasoned endorsement of the concept of liquidated damages, although use of the comparative test can only discourage potential users. It is hoped that the concept will meet with continuing judicial approval in other circumstances where the parties freely bargain.

In State ex rel. Mountain States Telephone and Telegraph Co. v. District Court, the court found that Mountain States’ contractual limitation of liability for the omission of advertising from the “Yellow Pages” to the amount of the charge for the ad was not liquidated damages but a “maximum recovery.” The customer argued that the contract was unconscionable given the lack of bargaining power and the monopolistic nature of the telephone company. The court found this argument unpersuasive, given the public nature of the monopoly, the lack of an opportunity to correct the error, and the similarity of the service to a listing in the white pages:

Without a demonstration of bad faith, fraud, or willful or wanton conduct by Mountain States, a limitation of liability for errors and omissions in its advertising expressed in a written and signed contract is reasonable and nowise against public policy and it is within the power of the company and subscribers to its directory to make such contracts and they become a valid and binding limitation.

Another means of fixing damages is to refer the question to a third party. In Polley’s Lumber Co. v. United States, an estimate of damages was “to be made under the direction of the officer


288. Mountain States, 160 Mont. at 451, 503 P.2d at 531. The customer was not listed in the white pages either; the court held that recovery for that omission was limited to the amount of the charge by the Public Service Commission tariff. Id. at 445-48, 503 P.2d at 528-29.

289. 115 F.2d 751 (9th Cir. 1940).
approving this contract." The breaching party challenged the procedure as violating what is now section 28-2-708 of the Montana Code Annotated: “Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void.” Applying Montana law, the court noted that this section has been held to bar the arbitration of disputes. The court held that damages are a question of fact and an arbitrator’s resolution of factual questions does not oust the courts of jurisdiction. The determination was held to be conclusive absent bad faith, gross mistake, or failure to exercise honest judgment. It is worth noting that arbitration could assist in the orderly resolution of damage disputes, particularly in complex areas such as construction contracts.

VIII. RECOVERY IN ADDITION TO DAMAGES FOR BREACH

A. Preface

As noted in the introduction, in practice the expectancy theory does not put the plaintiff in the position he or she would have been in had defendant performed. The theory equalizes the cost of performance with the cost of breach, ignoring the fact that performance costs the plaintiff nothing but the contract price while breach costs the plaintiff the additional expense of a lawsuit. For example, the author criticized the court for conferring a windfall upon the plaintiffs in Chandler v. Madsen. One can imagine the Chandlers’ indignant response:

What windfall? Get out of your ivory tower and look at what we had to cope with. After putting up with the hassles with the builder, trying to live in that godawful house, paying our lawyer, being dragged through discovery and trial, taking time off work, trying to collect the money, getting it at a crummy interest rate, not recovering out-of-pocket costs, and worst of all, waiting, wait-

290. Id. at 752.
293. Polley’s Lumber, 115 F.2d at 754-55.
295. See supra notes 6-12 and accompanying text.
ing, waiting, you are trying to tell us we got something for nothing?

Of course, they are right. If breach costs less than performance, a party motivated largely by economic considerations will generally choose breach. But as the list of grievances indicates, the fault may lie not so much with the theory of contract damages as with the system within which the theory is applied. That is, if the system compelled the losing party to pay the expenses of the lawsuit, a true expectancy would be achieved. While each aspect of expenses merits full inquiry, they are surveyed here only to indicate the parameters within which the legal system allows recovery in addition to contract damages.

B. Exemplary Damages

The Montana rule on exemplary damages is consonant with American jurisprudence: exemplary damages may not be awarded in an action based on a breach of contract. 297 Section 27-1-221 of the Montana Code Annotated provides that:

In any action for a breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

The rule rests on the underlying theory of compensatory damages: the promisee should be placed only in as good a position as if the promisor had performed. 298

The rule is applied irrespective of the motive of the breacher, or the willfulness or fraudulence of his or her actions. Corbin justifies this principle with relation to other wrongs:

Breaches of contract . . . do not in general cause as much resentment or other mental and physical discomfort as do the wrongs called torts and crimes. Therefore, the remedies to prevent them and to prevent disorder and breach of the peace by satisfying the injured parties, are not so severe upon the wrongdoer. 299


298. 5 A. CORBIN, CONTRACTS § 992 (1964).

299. Id. § 1077, at 438. In Westfall, 140 Mont. 564, 374 P.2d 96, the court held that fraudulent procurement of a release as part of a contract transaction was a breach of an obligation arising out of contract.
There is undoubtedly insufficient empirical data to evaluate this explanation. It is arguable that the harm done by the system is so great that those most affected by it, businesses engaged in constant interaction, simply ignore it.\(^{300}\) Other explanations of the rule are also possible, such as the need for law in a capitalist system to protect the interest in having money flow freely to where it is most efficiently utilized.\(^{301}\) Whatever the reason, there is no question but that the sanctity of promise as such is not protected.\(^{302}\)

In order to secure an award of exemplary damages in Montana, a plaintiff must generally affirm the contract to sue on the tort.\(^{303}\) It appears that this requirement is not strictly applied. Montana courts have awarded exemplary damages in tort actions involving a contract\(^{304}\) where defendant breached a duty independent of the contractual duty and defendant’s behavior was proscribed by section 27-1-221.\(^{305}\) In Harrington v. Holiday Rambler,\(^{306}\) the court stated that “an action on the contract and an action for fraud or misrepresentation in the inducement of the contract are not incompatible.”\(^{307}\) Apparently when plaintiff alleged that the exemplary damages were justified by defendant’s misrepresentations to the general public, the tort was separate and distinct from the contract.\(^{308}\) In Jardine, Stephenson, Blewett & Weaver v. United States Fidelity & Guaranty Co.,\(^{309}\) the court denied a motion to strike plaintiff’s claim for exemplary damages, holding that under Montana law, delay in paying attorneys’ fees on completion of the contract was a tort independent of the contract.\(^{310}\)

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300. See supra note 14 and accompanying text.
302. See supra notes 9-11.
305. See supra notes 297-98 and accompanying text.
307. Id. at 46, 575 P.2d at 583. See also Falls Sand & Gravel Co. v. W. Concrete, Inc., 270 F. Supp. 495, 500 (D. Mont. 1967).
308. Harrington, 176 Mont. at 46-47, 575 P.2d at 583. This factor does not seem sufficient to distinguish the case from Ryan, 146 Mont. at 302-03, 406 P.2d at 374-75, where the court denied punitive damages for fraudulent inducement to enter a contract.
310. The court did not state how defendant’s behavior allegedly fell within the proscriptions of MONT. CODE ANN. § 27-1-221 (1981).
C. Attorneys' Fees

In the absence of contractual agreement or specific statutory authority, each party pays its own attorneys' fees. Attorneys' fees are generally not recoverable even when the losing party caused the plaintiff unnecessary expenses during litigation and discovery. But if by contractual provision, one party is entitled to recover attorneys' fees, that provision is reciprocal to all other parties to the contract.

Often such a provision creates an issue as to what is a "reasonable" fee. In Olson v. Carter, the court remanded an award where plaintiff's attorney spent fifteen hours on the case but billed his client on a contingency fee basis; to a damage award of $20,037.41, the district court had added attorneys' fees of $6,679.14. Where such fees are recoverable by statute or by agreement, fees for appeal to the supreme court are recoverable as well.

D. Costs

While attorneys' fees are usually the greatest expense of litigation, they are not a "cost." Costs are allowed as a statutory matter of right when a plaintiff in a contract action recovers over fifty dollars or when judgment is entered in favor of defendant. But the particular costs allowable are strictly limited in section 25-10-201 of the Montana Code Annotated. Even the allowable costs


315. Id. at 110-11, 572 P.2d at 1241 (citing guidelines for the computation of attorneys' fees found in Crncevich v. Georgetown Recreation Corp., 168 Mont. 113, 541 P.2d 56 (1975). The guidelines are essentially those of the Model Code of Professional Responsibility DR 2-106(B) (1980)).

316. See, e.g., Diehl & Assoc., Inc. v. Houtchens, 180 Mont. 48, 588 P.2d 1014 (1979) (prevailing party under agreement, $1000 award); Figgins v. Stevenson, 163 Mont. 425, 517 P.2d 735 (1973) (foreclosure on lien, $500 award).


A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows:

(1) the legal fees of witnesses, including mileage, or referees or other officers;
may be limited or obsolete. For example, the fees of witnesses are allowable, but by statute the fees of an expert witness are the same as any other witness; that fee is ten dollars per day plus mileage at the rate of three cents per mile less than the mileage rate allowed by the Internal Revenue Service for the preceding year.\(^{320}\)

Costs on appeal are automatically recoverable by the successful party, but are subject to the discretion of the court when a new trial is ordered or a judgment is modified.\(^{321}\) If the discretion is not exercised, each party pays its own costs.\(^{322}\)

### E. Interest

Interest as damages is includable in a judgment.\(^{323}\) Section 27-1-211 provides: "Every person who is entitled to recover damages certain or capable of being made certain by calculation and the right to recover which is vested in him upon a particular day is entitled also to recover interest thereon from that day..." The rationale is that because money has a "use" value, interest reflecting this "use" by the defendant is a legitimate element in providing the plaintiff with full compensation.\(^{324}\)

The right to recover interest does not vest until the defendant

(2) the expenses of taking depositions;
(3) the legal fees for publication when publication is directed;
(4) the legal fees paid for filing and recording papers and certified copies thereof necessarily used in the action or on the trial;
(5) the legal fees paid for stenographers for per diem or for copies;
(6) the reasonable expenses of printing papers for a hearing when required by a rule of court;
(7) the reasonable expenses of making transcript for the supreme court;
(8) the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and
(9) such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law.


321. MONT. R. APP. CIV. P. 33; MONT. CODE ANN. § 25-10-104 (1981). Interesting questions may arise as to whether one is a "successful party." In State ex rel. Nesbitt v. Dist. Ct., 119 Mont. 198, 173 P.2d 412 (1946), the court held that plaintiff was the successful party even when the court held the judgment excessive and reduced it. See also State ex rel. O'Sullivan v. Dist. Ct., 119 Mont. 189, 172 P.2d 816 (1946), where the court held that a party who obtained a supreme court order reversing dismissal of a petition was not a successful party when a new petition could have been filed.


324. 5 A. CORBIN, CONTRACTS §§ 1045-46 (1964).
knows or should know of the sum certain due the plaintiff,\textsuperscript{325} which is not necessarily at the time of breach. For example, in \textit{United States v. Fuller},\textsuperscript{326} interest ran from the date the injury occurred where a defendant could have ascertained the amount by consulting plaintiff; but in \textit{Lapke v. Hunt},\textsuperscript{327} interest commenced running against a surety upon the filing of the complaint when no previous demand had been made upon the surety.

When the sum is not certain until fixed by the finder of fact, interest commences running from the date of the decision. For example, in \textit{Carriger v. Ballenger},\textsuperscript{328} where a homeowner brought an action against a contractor who failed to complete the excavation and installation of his basement, the court held that while plaintiff was theoretically entitled to recover interest damages from the date of breach, interest would not begin to run until the damages were determined by the trial court.\textsuperscript{329} Similarly, in an action in quantum meruit, the plaintiff is not entitled to interest until the finder of fact determines the amount due, for in quantum meruit, it is axiomatic that the damages would not be ascertainable until trial.\textsuperscript{330}

The legal rate of prejudgment interest is stated in section 31-1-106 of the Montana Code Annotated: \textquotedblleft[U]nless there is an express contract in writing fixing a different rate . . . interest is payable on all moneys at the rate of 6\% a year. . . .\textquotedblright The supreme court has overruled district court decisions which awarded a higher rate of interest.\textsuperscript{331} But when the interest rate on deposits exceeds the statutory rate, plaintiffs are not fully compensated for the use of their money, and defendants may be encouraged to wait until judgment before paying money and interest owed to plaintiffs.\textsuperscript{332}

\textsuperscript{325} While this is the majority (and Montana) rule, a significant number of jurisdictions allow interest on unliquidated claims. \textit{See} 5 A. Corbin, \textit{Contracts} § 1048, at 294-300 (1964).

\textsuperscript{326} 250 F. Supp. 649 (D. Mont. 1965).

\textsuperscript{327} 151 Mont. 450, 443 P.2d 493 (1968).

\textsuperscript{328} __ Mont. ___, 628 P.2d 1106 (1981).

\textsuperscript{329} \textit{Id.} at ___, 628 P.2d at 1110.

\textsuperscript{330} \textit{See}, e.g., Am. Sur. Co. of N.Y. v. Cove Irr. Dist., 54 F.2d 197 (9th Cir. 1931); Eskestrand v. Wunder, 94 Mont. 57, 20 P.2d 622 (1933).

\textsuperscript{331} Big Sky Livestock v. Herzog, 171 Mont. 407, 558 P.2d 1107 (1976) (ten percent interest erroneously included in judgment); Purington v. Sound West, Inc., 173 Mont. 106, 566 P.2d 795 (1977) (eight percent interest erroneously included in judgment). In \textit{Purington}, the statutory rate was not cited as authority for the holding; the interest rate was reduced to the six percent prayed for in the complaint under \textit{Mont. R. Civ. P. 54(c)}. \textit{Id.} at 111, 566 P.2d at 798.

\textsuperscript{332} The interest rate on judgments is ten percent. \textit{Mont. Code Ann.} § 25-9-205 (1981). Because interest is not compounded, even this rate may be below the return on investments. The Internal Revenue Service has taken steps to avoid this loan of money at
IX. Conclusion

Although this article has been confined to a discussion of Montana law, there is nothing unique in Montana's approach to the problem of contract damages. Montana may have more statutory law than many jurisdictions, but the statutes largely codify the common law. While the problems and concepts are universal, looking at the microcosm of one state facilitates study of how rules have been developed and applied by the courts and how the system might be improved.

In his monumental treatise, Corbin uses the phrase “working rules” to describe contract law.333 The qualification is significant. One hesitates before attempting to establish fixed rules of contract damages for two reasons. First, one would quickly discover the inadequacy of the rules in varying fact situations; and second, as a function of the first, the rules would be so inconsistently followed as to cease to be rules at all. This poses a dilemma for reform of the system. To suggest new rules is to avoid dealing with the complex fact situations confronting the courts; to suggest consistency in the application of the old rules is to sacrifice the flexibility required to achieve just and reasonable results.

Reform might take the direction of encouraging performance by would-be breachers. In a pure expectancy situation, breach is not discouraged, for it costs no more than performance. If consequential damages are added, the cost of breach may increase significantly. The system is, however, reluctant to increase the damages. In applying the Hadley rules, courts have generally found that the parties did not foresee extensive losses. Those that were foreseen may be limited by the doctrine of avoidable consequences. And at trial, losses may be limited by application of the doctrine of certainty. With all these barriers to the enforcement of promises, is it any wonder that aggrieved parties might be tempted to engage in “private wars” to resolve their disputes?334

Another alternative is for the attorney and client to practice preventive law by anticipating the problem and providing for it at the time of contracting. The parties might agree, for example, to

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The phrase “private war” is from 5 A. CORBIN, CONTRACTS § 1002 (1964). Corbin recognizes that in the absence of judicial remedies, persons will resort to self-help. But he may underestimate the frustration that can result from inadequate and inefficient judicial remedies. See Leff, supra note 10.
pay the winner's attorneys' fees in the event of litigation, to arbitrate disputes, or to liquidate the damages. These suggestions, while providing for less expensive and more expedient resolution of disputes, are themselves fraught with difficulties. The first assumes a disposition not to be the contract breaker; the second assumes the other party will not become aware that agreements to arbitrate future disputes are unenforceable in Montana; and the third contains such obstacles that it may itself be the subject of litigation.

In spite of such difficulties, to focus on keeping the parties out of court—either by discouraging breach or by resolving disputes—would seem more productive than to focus on solving the problems in court. Changes that might discourage breach by facilitating recovery of the aggrieved party's actual losses include realistic awards of costs and attorneys' fees, market interest rates, and expedited collection of judgments. Changes that might facilitate the resolution of disputes include the court's relaxation of strict review of liquidated damages and the legislature's repeal of the statute barring arbitration.