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Civil Procedure

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MONTANA SUPREME COURT SURVEY

CIVIL PROCEDURE

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I. INTRODUCTION

Nearly every civil case that reaches the Montana Supreme Court involves, at least marginally, some issue of civil procedure. This survey discusses and analyzes the more important civil procedure decisions handed down by the Montana Supreme Court during 1983.

II. JURISDICTION

A. *Jurisdiction Over Parties*

The Montana Supreme Court temporarily stalled the expansion of Montana's long-arm jurisdiction[1] when it ruled in *Simmons v. State*[2] that the State of Oregon had not established sufficient minimum contacts with Montana to subject it to in personam jurisdiction by Montana courts.

The Montana Department of Health and Environmental Sciences (Montana Department of Health) is responsible for overseeing a test designed to detect metabolic disorders in all newborn Montanans.[3] Because of prohibitive costs of establishing test facilities, the Montana Department of Health contracted, in early 1977, for the Health Division of the Oregon Department of Human Resources (Oregon Department of Health) to perform metabolic tests on blood samples taken from the estimated 12,000 people born in Montana each year.[4] The contract price of $2.25 per test covered merely the marginal cost of performing each test, and did not provide for any profit by Oregon or any contribution towards the general maintenance of the Oregon Department of Health laboratory.[5]

Breton Simmons was born on June 22, 1977, in Missoula, Montana. Montana authorities sent his blood sample to the Oregon Department of Health laboratory in Portland, where tests revealed no metabolic disorder. When Breton was nearly three months old he was diagnosed as having congenital anthyrotic hypothyroidism, a severe metabolic disorder.[6]

Breton's father, Dan Simmons, brought suit as guardian ad litem against the State of Oregon in Oregon district court, alleging negligence by Oregon state employees for failing to detect Breton's metabolic disorder. The Oregon court subsequently dismissed the action for failure to prosecute. Dan Simmons filed a similar negligence action in Montana district court against both the State of Montana and the State of Oregon. The Montana district court dismissed the action against Oregon because it lacked in personam

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1. "Long-arm jurisdiction" is the term applied to a state court's power to bring before it parties who are not residents of the forum state. Long-arm jurisdiction is provided for in MONT. R. CIV. P. 4B(1). *See infra* note 8.

2. ___ Mont. ___, 670 P.2d 1372 (1983).

3. MONT. CODE ANN. §§ 50-19-201 to -204 (1983).

4. *Simmons*, ___ Mont. at ___, 670 P.2d at 1375.

5. *Id.*

6. *Id.*

jurisdiction.[7]

On appeal, the Montana Supreme Court traced the judicial history of the expansion of long-arm jurisdiction and determined that Oregon had neither committed a tort within Montana nor contracted to perform services within Montana;[8] nor had it established systematic and continuous contacts with Montana.[9] A Montana court, therefore, could not properly exercise in personam jurisdiction over the State of Oregon.

The court found that Oregon had not committed any tort within Montana because all of the allegedly negligent acts by Oregon state employees were performed in Oregon.[10] The court distinguished *McGee v. Riekhof*,[11] in which the patient had traveled to Utah for treatment, returned to Montana, then received a new diagnosis over the telephone from his doctor in Utah. In *McGee* the plaintiff based his claim not on the previous treatment in Utah, but on grounds that the proximate cause of his injury was the diag-

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7. *Id.*

8. MONT. R. CIV. P. 4B(1) states in pertinent part:

> All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:
>
> (a) the transaction of any business within this state;
>
> (b) the commission of any act which results in accrual within this state of a tort action;
>
> (c) the ownership, use or possession of any property, or of any interest therein, situated within this state; . . .
>
> (e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person . . . .

Rule 4B is the sole source of a Montana court's power to bring nonresident defendants before it. In order for the State of Oregon to be brought into Montana courts, Simmons had to show either: (1) that Oregon was transacting business in Montana; (2) that Oregon committed a tort within Montana; (3) that Oregon owned property within Montana; (4) that Oregon entered into a contract to perform services within Montana; or (5) that Oregon's business presence within Montana was so "systematic and continuous" that Oregon could be "found within" Montana for jurisdictional purposes.

The court stated in *Simmons* that if it finds, "as a matter of statutory construction, that the nonresident does not engage in any of the several activities enumerated in [the Montana] long-arm statute," then the court's analysis must cease and it must decline jurisdiction. *Id.* at ____, 670 P.2d at 1376.

9. "Systematic and continuous contacts" with the forum state are a means by which a nonresident defendant may be "found within" the forum's jurisdiction. "Systematic and continuous contacts" is a term of art deriving from International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). For further discussion of what constitutes "systematic and continuous contacts," see World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Reed v. American Airlines, Inc., ____ Mont. ____, 640 P.2d 912 (1982); May v. Figgins, 186 Mont. 383, 607 P.2d 1132 (1980); Harrington v. Holiday Rambler Corp., 176 Mont. 37, 575 P.2d 578 (1978).

10. *Simmons*, ____ Mont. at ____, 670 P.2d at 1382.

11. 442 F. Supp. 1276 (D. Mont. 1978).

nosis over the telephone by a doctor in Utah while his patient was in Montana.[12]

Although the long-arm statute allows Montana courts to assume in personam jurisdiction over parties who contract to provide goods or services in Montana, the court ruled that nonresident defendants do not necessarily subject themselves to long-arm jurisdiction merely by entering into a contract with a Montana resident.[13] The court implied that the nonresident defendant must establish a business presence within the state before Montana courts may exercise in personam jurisdiction based on a contract.[14] The court placed significant emphasis on the facts that the State of Oregon had no commercial interest in contracting with Montana to perform the metabolic tests, that Oregon entered the contract only after being solicited by Montana, that Oregon had no property or agents in Montana, and that Oregon was performing the tests at a low price as a public service to the State of Montana.

Although the court engaged in an elaborate long-arm jurisdiction analysis, it could have disposed of *Simmons v. State* on comity considerations alone. The court acknowledged that one state is not constitutionally immune from suit in another state.[15] The Court reasoned, however, that a Montana court's assumption of jurisdiction under the facts of *Simmons* "would impinge unnecessarily upon the harmonious interstate relations which are part and parcel of the spirit of co-operative federalism."[16] The Oregon Department of Health was performing the metabolic tests as a low-priced service to the people of Montana. The court determined that hauling the State of Oregon into court in Montana, solely for the convenience of a Montana resident who was attempting to benefit from Montana's higher statutory sovereign liability limits, did not justify jeopardizing the harmonious relationship between the sister states generally, and the interstate metabolic testing arrangement in particular.[17]

The court also took the opportunity to criticize the practice of forum-shopping. Simmons admittedly filed suit in Montana because Montana's statutory limit for a tort claim against the state is $300,000,[18] while in Oregon the limit against the state is $100,000.[19]

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12. *Id.* at 1279.
13. *Simmons*, ___ Mont. at ___, 670 P.2d at 1380.
14. *Id.*
15. *Id.* at ___, 670 P.2d at 1385 (citing Nevada v. Hall, 440 U.S. 410 (1979)).
16. *Simmons*, ___ Mont. at ___, 670 P.2d at 1385.
17. *Id.* at ___, 670 P.2d at 1385-76.
18. MONT. CODE ANN. §§ 2-9-104 (1981) (repealed); 2-9-107 (1983) (temporary).
19. OR. REV. STAT. § 30.270 (1983).

The court stated that "predicating jurisdiction on which forum provides the highest possible damage award would be conducive to the unacceptable practice of 'forum-shopping.' "[20]

B. *Effect of Invalid Long-Arm Jurisdiction on Subsequent Actions*

A fundamental principle of long-arm jurisdiction is that a judgment rendered against a party not subject to the court's in personam jurisdiction "is void in the rendering State and is not entitled to full faith and credit elsewhere."[21] In *Hughes v. Salo*[22] the Montana Supreme Court ruled that where a Colorado judgment against the defendant Montana resident was invalid for lack of in personam jurisdiction, the cause of action was not res judicata and the plaintiff could still seek recourse in Montana courts.

Salo was a Montana service station owner allegedly delinquent in his contributions to a Teamsters pension fund. Hughes brought action in Colorado to compel Salo's payment to the pension fund, which was located in a Denver bank. Salo defaulted and judgment was entered in favor of Hughes. Hughes then petitioned the Montana district court to enforce the Colorado judgment. The Montana court refused, relying on the rule of *May v. Figgins*[23] that the mailing of checks by a Montana resident to a Colorado bank did not establish sufficient minimum contacts for Colorado to exercise in personam jurisdiction over the noncomplying Montana resident.

Hughes then filed an original action in Montana district court. Salo argued that the Colorado judgment, although invalid for lack of in personam jurisdiction, was valid for purposes of barring Hughes' Montana action. Salo contended that Hughes' Montana action was barred by the doctrine of merger and the rule against splitting causes of action.[24] The Montana Supreme Court reasoned that the Colorado judgment was a nullity in all respects, enforceable nowhere, not a judgment on the merits, and therefore not a bar to plaintiff Hughes' refiling the action in a court with in personam jurisdiction over Salo.

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20. *Simmons*, ___ Mont. at ___, 670 P.2d at 1383.

21. World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 291 (1980) (citing Pennoyer v. Neff, 95 U.S. 714, 732 (1878)).

22. ___ Mont. ___, 659 P.2d 270 (1983).

23. 186 Mont. 383, 607 P.2d 1132 (1980).

24. *Hughes*, ___ Mont. at ___, 659 P.2d at 271.

III. Dismissal of Action

A. *Pleading Affirmative Defenses*

Under certain circumstances, affirmative defenses may be raised in a motion to dismiss filed prior to the answering of the complaint. In *Beckman v. Chamberlain*,[25] the Montana Supreme Court adopted the federal courts' interpretations of Rules 8(b) and 12(b)(6),[26] holding that

> A motion to dismiss for failure to state a claim on which relief may be granted will lie when the complaint on its face establishes that the claim is barred by the statute of limitations, and the usual requirement that such a defense be affirmatively plead [sic] need not be followed.[27]

The supreme court also ruled that the defendant could raise the affirmative defense of estoppel by judgment in the motion to dismiss, as the judgment relied upon was made in the very court asked to pass upon the motion.[28]

Beckman involved a dispute over ownership of six acres of wheat land. In 1978, Beckman sued Myllymaki, who exercised rights of ownership over the disputed property, and lost because of the plaintiff's complete failure to prove his allegations of trespass. Beckman filed a second lawsuit in 1981, making the same allegations of wrongdoing covering the same time period as in the previous suit. The only change was that Beckman sued Chamberlain, the tenant, instead of Myllymaki, the landlord. Instead of filing an answer to the second complaint, Chamberlain filed a motion to dismiss and raised the affirmative defenses in that motion. The district court granted the motion to dismiss and the supreme court affirmed.

B. *Conversion of Motion to Dismiss to Motion for Summary Judgment*

When matters outside the pleadings are presented to and considered by the court, Rule 12(b) allows a motion to dismiss for failure to state a claim upon which relief may be granted to be treated as a Rule 56 motion for summary judgment. The rule further

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25. ___ Mont. ___, 673 P.2d 480 (1983).

26. Fed. R. Civ. P. 8(b) and 12(b)(6) are substantially the same as Mont. R. Civ. P. 8(b) and 12(b)(6).

27. *Beckman*, ___ Mont. at ___, 673 P.2d at 482.

28. *Id.* at ___, 673 P.2d at 481.

states that "all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56."[29] In *Gebhardt v. D.A. Davidson & Co.*,[30] the supreme court held that the trial court has the duty affirmatively to notify the parties that the materials outside the pleadings were not excluded and that the motion to dismiss was converted to a motion for summary judgment.[31]

The supreme court noted that the parties are assumed to know about the automatic conversion requirements of Rule 12(b). But because the trial court has discretion to admit or exclude the extra-pleading materials, the supreme court reasoned, it is imperative that the non-moving party know of the existence and consequences of the automatic conversion and have a reasonable opportunity to present all materials relevant to the Rule 56 motion for summary judgment.[32]

IV. VENUE

A. *Action to Collect Attorney Fees*

In *Whalen v. Snell*[33] the supreme court held that the proper venue for an action, brought by an attorney against a client to recover delinquent attorney fees, is either the county where the fees should have been paid or the county of defendant's residence. The court reasoned that the very nature of the attorney's business dictates that the client must fulfill his part of the bargain and pay fees at the attorney's office.[34] A client's failure to pay attorney fees is usually considered either a breach of contract[35] or a tortious[36] breach of duty to pay for services consumed. In either case the breach occurred at the attorney's office, and the county in which the breach occurred is a proper venue for the resulting action.[37]

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29. MONT. R. CIV. P. 12(b).

30. ___ Mont. ___, 661 P.2d 855 (1983).

31. *Id.* at ___, 661 P.2d at 858.

32. *Id.*

33. ___ Mont. ___, 667 P.2d 436 (1983).

34. *Id.* at ___, 667 P.2d at 438.

35. Venue for actions in contract is provided for at MONT. CODE ANN. § 25-2-101 (1983).

36. Venue for actions in tort is provided for at MONT. CODE ANN. § 25-2-102 (1983).

37. *Whalen*, ___ Mont. at ___, 667 P.2d at 437 (1983).

B. *Action Involving Breach of Warranty to Deliver Real Property*

The Montana Supreme Court held in *Letford v. Kraus*[38] that an action alleging breach of warranty to deliver real property without defective title is a contract action, not a real property action, and therefore the proper venue is either the county of performance or the county of defendant's residence. The fact that the property subject to litigation was located in Granite County necessarily implied that performance of the contract by delivery of title free of defect would take place in Granite County.[39]

The court stopped short of ruling that the action was one for the recovery of real property or for determining rights or interest therein. Such determination would automatically have set venue in the county in which the real property was located.[40] The court did, however, note that in contract actions involving real property, the location of the real property is an important consideration in determining venue.[41]

V. STATUTES OF LIMITATIONS

A. *Legal Malpractice*

The Montana statute of limitations for a legal malpractice action is three years from the date the plaintiff discovers or reasonably should have discovered the event or events giving rise to the action.[42] In *Burgett v. Flaherty*,[43] the court held that "what is critical in determining when a legal malpractice action accrues is knowledge of the facts essential to the cause of action, not knowledge of the legal theories upon which an action may be brought."[44] The court reasoned that once the plaintiff has acquired facts that would cause a reasonable person to question the competency of his representation, he is on notice that a cause of action may exist and the statute of limitations begins to run.[45]

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38. ___ Mont. ___, 672 P.2d 265 (1983).
39. *Id.* at ___, 672 P.2d at 267.
40. Venue for actions involving real property is the county in which the property is located. MONT. CODE ANN. § 25-2-103 (1983).
41. *Letford*, ___ Mont. at ___, 672 P.2d at 267.
42. MONT. CODE ANN. § 27-2-206 (1983). In no case may an action be commenced more than 10 years after the date of the alleged malpractice.
43. ___ Mont. ___, 663 P.2d 332 (1983).
44. *Id* at ___, 663 P.2d at 334.
45. *Id.*

B. *Fraud*

The Montana statute of limitations for fraud is two years from "the discovery by the aggrieved party of facts constituting fraud or mistake."[46] In *Mobley v. Hall*[47] the court held that the "law does not contemplate such discovery as would give positive knowledge of the fraud, but such discovery as would lead a prudent man to inquiry or action."[48]

Mobley purchased a ranch from Hall, whose agents represented a certain number of the ranch's acres to be farmland. Mobley first became suspicious in 1976, when the acreage meters on both his seed drill and a borrowed plow showed significantly fewer acres had been farmed than Hall had listed in sales brochures and the contract for deed. Mobley had acreage measurements taken by the Agricultural Soil Conservation Service (ASCS) and received the results on August 29, 1977. The results showed significantly fewer acres of cropland than Hall had originally represented. Mobley then requested an aerial survey, and on November 1, 1977, he received results similar to those from the earlier survey.

The supreme court ruled that the statute of limitations began to run on August 29, 1977, when Mobley became aware that an official ASCS survey showed that the acreage measurements represented by Hall were significantly overstated. Mobley argued that the statute of limitations began to run on November 1, 1977, when he received the results of the aerial survey. The court reasoned that the August 29 ASCS survey results were sufficient information to put Hall on inquiry; therefore, he had actual knowledge of the facts relevant to the action.[49] The fraud action, filed on October 18, 1979, was barred by the two-year statute of limitations.[50]

VI. DEFAULT

Rule 60(b) permits a court to relieve a party from a default judgment if the default was caused by "excusable neglect."[51] The defaulting party, however, must make a motion for such relief within sixty days after the entry of default judgment. In *Elk Run*

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46. MONT. CODE ANN. § 27-2-203 (1983).

47. ___ Mont. ___, 657 P.2d 604 (1983).

48. *Id.* at ___, 657 P.2d at 607 (quoting 37 AM. JUR. 2D *Fraud & Deceit* § 410 (1968)).

49. *Mobley*, ___ Mont. at ___, 657 P.2d at 607.

50. The court noted that the plaintiff "should not be precluded from amending the complaint to include a cause of action for breach of contract." *Id.* The statute of limitations for an action based on a written contract is eight years. MONT. CODE ANN. § 27-2-202(1) (1983).

51. MONT. R. CIV. P. 60(b).

Ranch v. Green Line Implement Co.,[52] the Montana Supreme Court refused to waive the sixty-day motion period, even though the plaintiff quietly waited through the sixty-day period before attempting to execute on the default judgment entered against the defendant. By waiting to execute, the plaintiff succeeded in not bringing the default judgment to the defendant's attention. The court recognized "the inequity of permitting a plaintiff to passively participate in securing a windfall default judgment resulting from the excusable neglect of a defendant,"[53] but refused to depart from the sixty-day limit until the rule is properly changed.

VII. INTERVENTION

Rule 24(a) requires that a person be allowed to intervene as a party to an action when: (1) a statute confers an unconditional right to intervene; or (2) the person claims an interest relating to the property or transaction in issue, and his interest will likely be impeded or impaired by disposition of the action.[54] Rule 24(c) requires a party wishing to intervene to file a motion with the trial court requesting leave of court to intervene.[55] "The purpose of the motion for leave to intervene is to give the District Court the opportunity to determine whether the parties seeking intervention may intervene as a matter of right or by permission of the court."[56]

The supreme court held in *Schulz, Davis & Warren v. Marinkovich*[57] that a party's failure to file a motion to intervene is not necessarily fatal to its intervention.

Patricia Ori was a shareholder and director of M & M Enterprises, which owned and operated a hotel. Her husband, Dominic, was not a shareholder but he had performed labor at the hotel before M & M Enterprises sold the hotel. The plaintiff was a law firm acting as trustee to hold the proceeds from the hotel sale, pay the corporate debts, and make final disbursement of the corporate assets among the shareholders. The various corporate directors gave conflicting orders to the plaintiff regarding distribution of the assets, so plaintiff brought an interpleader action against individual directors Patricia Ori, George Marinkovich, and Ann Marinkovich. Patricia and Dominic Ori, without filing a motion for leave of court for Dominic to intervene, filed a third party com-

52. ___ Mont. ___, 668 P.2d 258 (1983).
53. *Id.* at ___, 668 P.2d at 260.
54. MONT. R. CIV. P. 24(a).
55. MONT. R. CIV. P. 24(c).
56. Schulz, Davis & Warren v. Marinkovich, ___ Mont. ___, 661 P.2d 5, 8 (1983).
57. ___ Mont. ___, 661 P.2d 5 (1983).

plaint and cross-complaint against M & M Enterprises for unpaid wages, and against George Marinkovich for improperly relinquishing corporate personal property to the hotel buyer.

Neither the law firm nor Marinkovich objected to Dominic Ori's de facto intervention in their answers to the third party complaint and cross-complaint. The first objection to Dominic Ori's intervention was made by Marinkovich's attorney at the opening of the trial. The trial court overruled the objection.

The supreme court reasoned that Dominic Ori could intervene as a matter of right because his wage claim could only be paid out of the remaining assets of the corporation that was being liquidated.[58] The court held that the parties' failure to object to Dominic Ori's intervention prior to trial effectively waived any objections to his intervention.[59] Although the decision appears to expand the right to intervene and somewhat informalizes the intervention process, the court warned future litigants against attempting "to use this opinion to circumvent the clear requirements of the rule."[60]

VIII. DISCOVERY

Rule 35(a) provides for independent medical examinations of parties whose mental or physical condition is at issue in a lawsuit.[61] In *Mohr v. District Court*,[62] the supreme court ruled that a party subject to an independent medical examination is entitled to have counsel present during the history taking portion of the examination. The court reasoned that a "lay person should not, without the assistance of counsel, be expected to evaluate the propriety of every question" asked in the history taking portion of the independent medical examination.[63] By having counsel present during the history taking portion of the examination, a party can protect his right to refrain from making statements or admissions that might adversely affect his position.[64]

The court refused to extend the right to have counsel present at all stages of the independent medical examination, reasoning that the need for efficiency in the court-ordered examination ex-

58. *Id.* at ____, 661 P.2d at 8.
59. *Id.*
60. *Id.* (quoting *In re* Beef Industry Antitrust Litigation, 589 F.2d 786, 789 (5th Cir. 1979)).
61. MONT. R. CIV. P. 35(a).
62. ____ Mont. ____, 660 P.2d 88 (1983).
63. *Id.* at ____, 660 P.2d at 89.
64. *Id.*

ceeds the right to counsel.[65] The court held that the trial court should exclude from evidence any statements regarding medical history that the doctor elicits from the party during the non-history taking portion of the independent medical examination.[66]

IX. SUMMARY JUDGMENT

Rule 56(c) provides that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of fact as to any material fact and that the moving party is entitled to a judgment as a matter of law."[67] The Montana Supreme Court has consistently ruled that, in considering a motion for summary judgment, all reasonable inferences drawn from the offered proof are to be drawn in favor of the party opposing summary judgment.[68]

In the landmark products liability case of *Brandenburger v. Toyota Motor Sales, Inc.*,[69] the supreme court held that proof sufficient to avoid summary judgment may be made from inferences drawn from circumstantial evidence. In 1983, the court further defined the *Brandenburger* rule in *Fauerso v. Maronick Construction Co.*,[70] holding that speculative or conjectural inferences were insufficient to raise a material issue of fact.[71]

Plaintiff was a passenger in a car that collided with a retaining wall in a dead-end alley. Maronick Construction had recently completed work on the alley. Plaintiff's primary witness, who lived in a house adjacent to the alley, testified that he noticed the "dead-end" sign had been taken down, and that he assumed that it was removed by Maronick Construction employees during the construction project. The court ruled that such an inference was too speculative to raise a material issue of fact; therefore the district court appropriately granted summary judgment.

In *Rogers v. Swingley*,[72] the court held that summary judgment is not appropriate where the testimony of a party opposing the motion may reasonably be interpreted in more than one way, and at least one of these interpretations leads to a material issue of

65. *Id.*
66. *Id.*
67. MONT. R. CIV. P. 56(c).
68. Rogers v. Swingley, ___ Mont. ___, 670 P.2d 1386, 1388 (1983).
69. 162 Mont. 506, 517, 513 P.2d 268, 274 (1973).
70. ___ Mont. ___, 661 P.2d 20 (1983).
71. *Id.* at ___, 661 P.2d at 23.
72. ___ Mont. ___, 670 P.2d 1386 (1983).

fact.

Swingley leased live mink from Rogers and the mink later became diseased. The case revolved on whether or not Swingley knew of the disease in early 1981, when he executed a promissory note to purchase the mink. At Swingley's deposition in an earlier case the following exchange occurred between Swingley and an opposing attorney:[73]

> Attorney: At one time you indicated that you had 70% of your herd were [sic] infected with this particular disease. Is that correct?
> Swingley: Yes.
> Attorney: What year was that?
> Swingley: That was November of 1980.

The Montana court ruled that Swingley's earlier statements could reasonably be interpreted in two ways: (1) that in November 1980, Swingley knew that the mink were diseased; or (2) that at the time of his deposition in 1981, Swingley knew that the mink had become diseased in November 1980. The court reasoned that the latter interpretation raised a material issue of fact, and because the rule required that all reasonable inferences be drawn in favor of the party opposing summary judgment, summary judgment did not lie.[74]

X. JURIES

A. *Jury Selection*

By statute,[75] each party in a civil action is entitled to exercise four peremptory challenges when empaneling a twelve-member jury. In 1981, the Montana Supreme Court approved the trial court's granting of four peremptory challenges to each defendant where codefendants occupy hostile positions.[76]

In 1983, the supreme court in *Adams v. Cheney*[77] upheld a trial court's order granting four peremptory challenges to each of two sets of defendants, even though the defendants were represented by the same law firm. The court implored attorneys and district courts to determine the allocation of peremptory challenges at the pretrial conference, and reaffirmed the rule from

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73. *Id.* at ____, 670 P.2d at 1388-89.
74. *Id.* at ____, 670 P.2d at 1389.
75. MONT. CODE ANN. § 25-7-224 (1983).
76. Lauman v. Lee, ____ Mont. ____, 626 P.2d 830 (1981).
77. ____ Mont. ____, 661 P.2d 434 (1983).

Hunsaker v. Bozeman Deaconess Foundation:[78]

> The trial court should, as a bare minimum, rule on the peremptory challenge issue before the questioning of the jurors begins. To afford a basis for review, [the trial court] should expressly set forth in the record the reasons for its ruling and the facts on which it relies in making its decision.[79]

Adams did not object to the court's apportionment of peremptory challenges until questioning of the jurors was complete. Because counsel dispensed with recording of voir dire, the supreme court was restricted in its analysis to determine whether or not Adams could show: (1) that he used all of his own peremptory challenges; (2) that the trial court's action caused him material injury; and (3) that as a result of the injury, at least one objectionable juror sat on the case.[80] Because Adams failed to convince the court that he had suffered any material injury from the questionable distribution of peremptory challenges, the court refused to find reversible error.

B. *Jury Instructions*

Justice Weber wrote that the state of affairs in *State Bank of Townsend v. Maryann's, Inc.*[81] had made "it almost impossible to analyze the confused record."[82] *Maryann's, Inc.* began as an action by the bank on a delinquent promissory note. The defendant counterclaimed for fraudulent misrepresentation and breach of the loan agreement. The pretrial order indicated that fraudulent misrepresentation was the main issue to be raised by Maryann's. By the end of the trial, Maryann's had changed the basis of its counterclaim to negligent misrepresentation. The pretrial order was never amended to reflect Maryann's change in strategy.

The case went to the jury with instructions and a verdict form that were confusing because, as is often the case,[83] they included: (1) a question asking if the defendant was negligent; (2) a question asking if the plaintiff was negligent; (3) a question asking the jury to apportion responsibilities for plaintiff's injuries between plain-

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78. 179 Mont. 305, 588 P.2d 493 (1978).

79. *Adams*, ___ Mont. at ___, 661 P.2d at 443 (quoting *Hunsaker*, 179 Mont. at 318, 588 P.2d at 501).

80. *Adams*, ___ Mont. at ___, 661 P.2d at 442 (citing Leary v. Kelly Pipe Co., 176 Mont. 511, 549 P.2d 813 (1976)).

81. ___ Mont. ___, 664 P.2d 295 (1983).

82. *Id.* at ___, 664 P.2d at 298.

83. The trial court submitted a similar sequence of instructions and verdict form to the jury in Harry v. Elderkin, 196 Mont. 1, 637 P.2d 809 (1981).

tiff and defendant; (4) a question asking what plaintiff's damages were, but which was not clear whether it meant damages before being discounted by plaintiff's own negligence, or after such discount; and (5) an instruction that essentially quoted the Montana comparative negligence statute.[84] Notwithstanding the confusing instructions, the *Maryann's, Inc.* jury came to a decision. It awarded the defendant $150,000 for the bank's negligent misrepresentation, less $16,015.87 found to be due and owing to the bank on the promissory note.

Because the instructions led to a denial of "substantial justice," the supreme court reversed the judgment.[85] The court went on to treat the source of the problem by apparently adopting the dissent of Justice Sheehy in *Harry v. Elderkin*.[86] The rule to be derived from that case and *Maryann's, Inc.* appears to be that when a special verdict is used, the jury must be specifically instructed in how to use it.[87] Because a jury should not be given an instruction designed to be used with a general verdict when a special verdict is in fact used, the instruction based on Montana's comparative negligence statute should not have been given.[88]

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84. *Maryann's, Inc.*, ___ Mont. at ___, 664 P.2d at 298. In the instant case, the questions actually involved defendant's counterclaim, so the usual roles of plaintiff and defendant were reversed. The Montana comparative negligence statute is found at MONT. CODE ANN. § 27-1-702 (1983).

85. *Maryann's, Inc.*, ___ Mont. at ___, 664 P.2d at 300-01. The court applied the "plain error" doctrine in the absence of adequate objections and alternate instructions offered by the parties. *Id.*

86. 196 Mont. 1, 9, 637 P.2d 809, 814 (1981) (Sheehy, J., dissenting).

87. In his *Elderkin* dissent, *id.* at 13, 637 P.2d at 816, Justice Sheehy suggested the following instruction derived from BAJI 15.15 (1975):

> You shall now retire and select one of your number to act as foreman who will preside over your deliberations.
>
> In this case you will not return a general verdict in favor of either party. Instead, it will be your duty to return only a special verdict in the form of written answers to such of the issues upon which you have been directed to make findings as are required according to the directions in the form of special verdict which will be submitted to you.
>
> As soon as eight or more identical jurors have agreed upon every answer required by such directions, so that each of those eight or more may be able to state truthfully that every answer is his or hers, you shall have your verdict signed and dated by your foreman and then shall return with it to this room.

In *Maryann's, Inc.*, the court stated that a "similar" instruction "properly could be used." *Id.* at ___, 664 P.2d at 301. The latest version of the relevant California instruction is BAJI 15.52 (1982 New). Use of the California comparative negligence special verdict form, BAJI 14.96 (1977 Revision), would also mitigate jury confusion.

88. *Maryann's, Inc.*, ___ Mont. at ___, 664 P.2d at 301; *Elderkin*, 196 Mont. at 10-13, 637 P.2d at 814-16 (Sheehy, J., dissenting).

C. *Jury Practice*

The Montana Supreme Court clearly described the jury's responsibility in *Jarussi v. Board of Trustees*,[89] when it stated: "The law requires only that the trier of fact exercise calm and reasonable judgment and the amount of the award rests of necessity in the sound discretion of the trier of fact."

Jarussi, a popular teacher and school administrator, sued the St. Ignatius School Board for violating the Montana open meeting laws,[90] improper termination, and unlawful retaliation. The jury awarded Jarussi $16,500 for his loss on the sale of his property and $2300 moving expenses, all of which Jarussi incurred as a result of his termination and subsequent move to new employment in Alaska. The court reasoned that, because the amount of damages was clear and uncontradicted, "a short period of jury deliberation and a unanimous verdict will not support a claim of excessive damages influenced by passion or prejudice."[91]

XI. APPELLATE PROCEDURE

In 1979, the Montana Supreme Court accepted a trial court's certification of reasons for granting a new trial, even though the trial court filed its certification after it entered its final order and the appellant filed its notice of appeal.[92] In 1981, the court ruled in *Churchill v. Holly Sugar Corp.*[93] that, except for ancillary matters, the trial court loses its jurisdiction once a party has filed a notice of appeal with the supreme court. Therefore, the *Churchill* court reasoned, the trial court may not file supplemental findings explaining its reasons for its decision. The court found it prejudicial against the appellant to allow the trial court to cover its tracks by cleaning up the evidentiary and legal record after the appellant files notice of appeal.[94]

In 1983, the supreme court twice faced the issue of the propriety of the trial court's filing supplemental findings after it had entered its final order and the appellant had filed notice of appeal. In

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89. ___ Mont. ___, 664 P.2d 316, 318 (1983).

90. MONT. CONST. art. II, § 9; MONT. CODE ANN. §§ 2-3-201 to -203; 20-3-322 (1983).

91. *Jarussi*, ___ Mont. at ___, 664 P.2d at 319.

92. Giles v. Flint Valley Forest Products, 179 Mont. 382, 588 P.2d 535 (1979). The *Giles* court did not expressly rule on the propriety of accepting the subsequent certification of reasons; it merely accepted the certification after discussing the grounds necessary for ordering a new trial pursuant to MONT. R. CIV. P. 59(f).

93. ___ Mont. ___, 629 P.2d 758 (1981).

94. *Id.* at ___, 629 P.2d at 760. The *Churchill* court flatly stated that it would not consider such findings filed subsequent to the final order. *Id.*

the first case, the court cited *Churchill* as controlling and ruled in *Shannon v. Hulett*[95] that a trial court's findings and order, entered after the trial court's order granting a new trial, as a matter of law fail to elucidate the trial court's reasons for granting a new trial. Therefore, the supreme court ruled that it would not consider such subsequent findings on appeal.[96]

Nine days later, in *Klaudt v. Flink*,[97] the supreme court expressly overruled the short-lived *Churchill* decision. The court held that the trial court's certification of reasons for its decision, entered subsequent to the filing of the notice of appeal, could be considered on appeal, so long as the trial court's subsequent certification complied with Rule 54(b).[98] Even though the court devoted three full paragraphs in *Churchill* to explain its reasoning, the court in *Klaudt* gave very little, if any, reasoning for overruling *Churchill*.

95. ___ Mont. ___, 656 P.2d 825 (1983).

96. *Id.* at ___, 656 P.2d at 826. Chief Justice Haswell dissented, relying on *Giles* in reasoning that the subsequent certification satisfies MONT. R. CIV. P. 59(f), which requires that reasons for a new trial be stated with particularity in either the body of the order or in an attached opinion.

97. ___ Mont. ___, 658 P.2d 1065, 1066 (1983).

98. MONT. R. CIV. P. 54(b) allows trial courts to enter, where appropriate, final judgment concerning less than all the claims for relief or less than all the parties to an action, provided there are multiple claims for relief or multiple parties to the action. The purpose of this rule is to allow for immediate appeal upon distinctly separate claims, rather than waiting for final judgment regarding all the claims or all the parties to the action. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2654 (2d ed. 1983).