

## MODERN MONTANA REMEDIES

Prof. Cynthia Ford  
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### I. M.R.Civ.P. 54c

The Court has the authority to enter any judgment appropriate under the law, even if neither party requested that particular relief

#### A. Rule 54c

In civil cases, the court is authorized to award the type and amount of relief it deems just, even if that relief was not what either party requested or wanted, and even if the pleadings omit the customary prayer for “such other and further relief as the court may deem just in the premises.” M.R.Civ.P., which is identical to the federal corollary, states:

**Rule 54(c). Demand for judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.  
**History:** En. Sec. 54, Ch. 13, L. 1961; amd. Sup. Ct. Ord. May 1, 1990, eff. May 1, 1990.

#### B. FEDERAL CASES

The leading federal case on Rule 54(c) is *Garland v. Garland*, which was decided shortly after the Federal Rules of Civil Procedure were adopted. Mrs. Garland owned a ranch in New Mexico. She entered into a contract with her son by which he took over the mortgage and most of the property but she retained a life estate in the home. When the son locked her out of the home, she sued for rescission. The son's answer merely denied liability. After trial, the court found for the mother, but decreed specific performance rather than rescission. The 10<sup>th</sup> Circuit affirmed.

The prayer was that all contracts and conveyances executed by plaintiff be cancelled and set aside; that defendants be required to reconvey all of the property to plaintiff; that defendants be required to return to its previous location all personal property which they had removed; that defendants be required to account for all money which they had expended in connection with the property; that

there be offset against any money for which defendants might be entitled to reimbursement the damages due plaintiff for the loss of the possession and use of such property; that plaintiff have judgment for any excess in her damages above any amount due defendants; and that plaintiff have such other and further relief as might be just and equitable in the premises. By answer, defendant denied the alleged breach of the contract and otherwise joined issue.

The court did not rescind the contract or cancel any of the conveyances. But the court decreed to plaintiff the possession and use of the Orchard Ranch for the remainder of her life as a home, together with such furniture and furnishings as might be reasonably necessary to such occupancy and use; provided in the judgment that plaintiff be let into the immediate possession of such property; provided further that defendants pay all taxes levied against such property and the reasonable cost of maintenance and repair during the remainder of the life of plaintiff; and provided further that plaintiff recover from defendants the sum of \$2400 for the use of such property during the period in which she was excluded therefrom. Defendants appealed.

Prior to the adoption of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, it was the general rule in the United States Courts that where a plaintiff alleged only equitable grounds for relief and on the trial the allegations were not sustained by the evidence, it was the duty of the court to dismiss the action in toto, both as to the primary relief sought and other relief sought incidental thereto. ... And it was the further rule that where a cause of action cognizable at law was entertained in equity on account of its relation to the relief in equity sought in the bill, on failure of proof to maintain the action in equity, the court should deny relief at law without prejudice. ... **But Rule of Civil Procedure 54(c), supra, provides in substance that in a case of this kind contested throughout, the final judgment shall grant to the party in whose favor it is rendered the relief to which the party is entitled even though relief of that kind was not demanded in the pleadings of such party.** Plaintiff sought equitable relief- rescission and cancellation of the contract and of the subsequent conveyances. The court granted her equitable relief- specific performance of a certain provision in the contract. Equitable relief of one kind was sought. Equitable relief of another kind was granted. And each had its source in the contracts, conveyances, and conduct of the parties involved in the action. Under the wide sweep of the Rule 54(c), supra, it was within the jurisdiction and power of the court to grant plaintiff equitable relief by

way of specific performance of the contract relating to the possession and use of the residential premises on the Orchard Ranch as well as the furniture and furnishings reasonably necessary to that end, even though she sought rescission and cancellation. ... And it is well settled that in addition to decreeing specific performance of a contract relating to land, a court of equity may award legal damages for the injury proximately suffered from refusal or delay in the performance of the contract.

Garland v. Garland 165 F.2d 131, \*133 -134 (C.A.10 1948) (Citations omitted; emphasis added)

### **C. Montana cases:**

The Montana cases cite, and are in accord with, Garland.

#### **1. Smith v. Zepp, 173 Mont. 358, 567 P.2d 923 (1977)**

The underlying dispute involved a contract for the sale of mining property. The purchasers were supposed to produce a specified amount of material each day; they did not. The sellers sued. The purchasers' defense was that there was no gold. The Montana Supreme Court held that the absence of gold was a risk of the bargain, and was no excuse for non-performance. The sellers argued that they were entitled to forfeiture of the contract because of the buyers' breach. The trial court cancelled the deed and the contract, so all the property reverted to the seller.

The Montana Supreme Court reversed, even though it found that the trial court was correct in holding that buyers were in material breach, because it held that forfeiture was not the appropriate remedy. As a matter of law, the Court observed, forfeitures are not favored, and any contractual provision authorizing forfeiture must be strictly construed. In this case, the contract did provide for forfeiture for non-payment of the purchase price, but the buyers had fully performed this condition. Instead, the Court held that damages were the only remedy which would be appropriate, because the sellers were supposed to be paid a monthly fee based on the amount of profit which would have been earned if the buyers had produced the specified amount of material.

On appeal the Court held that although the proof at trial did not justify forfeiture, it did require an award of damages, even though the plaintiff had not requested such relief. The Court cited the federal case of Garland v. Garland (see above):

**Although plaintiffs in their complaint asked solely for forfeiture as a remedy for defendants' contract breach, the trial judge must grant such other relief as is proper under the proven facts of the case.** Rule 54(c), M.R.Civ.P., which is identical with Rule 54(c), Fed.R.Civ.P., provides:

" \* \* \* Except as to a party against whom a judgment is entered by default, every

final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." In *Garland v. Garland*, 10th Cir., 165 F.2d 131, the plaintiff, in her complaint, asked solely for rescission and cancellation of a contract. The court held that Rule 54(c), Fed.R.Civ.P., authorized the trial court to grant the plaintiff damages, as well as specific performance, even though the plaintiff did not request that relief in her pleadings. **In the case at bar, plaintiffs have proven that defendants breached their contract and have made a case for possible damages, though this was not the relief they requested. Although they are not entitled to forfeiture, under Rule 54(c), M.R.Civ.P., the trial judge has the duty to give plaintiffs a hearing on damages, the remedy to which they are entitled under the facts proven at trial. ...**

The district judge's findings that defendants breached their contract is affirmed. The judge's ruling that defendants forfeited all rights and money paid under the contract is reversed. The cause is remanded, with instructions to proceed in accordance with this opinion.

173 Mont. at 370-371, 567 P.2d at 930. The Supreme Court reversed the forfeiture and remanded the case for a hearing on the amount of damages which would place the seller in the position he would have been in if the defendant in fact had produced the requisite amount of material from the beginning of the transaction.

**2. Niles v. Carbon County**, 174 Mont. 20, 568 P.2d 524 (later in 1977 than Smith)

This case involved the redemption of a tax deed. The plaintiff sued to quiet title after he bought the property at a tax sale. Meanwhile, the defendant/original owner redeemed. The trial judge granted summary judgment for the defense, but did not award her attorney's fees. The defendant cross-appealed on this issue.

The defendant's amended answer omitted a prayer for attorney's fees. Before the summary judgment, the new defense moved for leave to file a second amended answer to include this prayer, but the court never ruled on the amendment motion, so the second amendment did not occur. Nonetheless, the Montana Supreme Court approved awarding attorney's fees:

Rule 54(c), M.R.Civ.P., provides in part: " \* \* \* Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

We recently considered this rule in *Smith v. Zepp*, (1977). In *Smith*, the plaintiffs' only prayer was for forfeiture of a contract. Although the facts at trial showed that the plaintiffs were not entitled to forfeiture, they did show plaintiffs were entitled to a damage award. We held that Rule 54(c) required such an award even though the plaintiffs had not prayed for it.

The same rule is applicable here. Section 84-4167, R.C.M.1947, provides that in an action for a tax deed "The court shall allow the successful party his costs to be fixed by the court including a reasonable attorney's fee in all cases where the county is not the applicant." (Emphasis added.) Defendant was the successful party. **Even though defendant had not prayed for a reasonable attorney fee, the district court under Rule 54(c), M.R.Civ.P., should have allowed her one. The cause must therefore be remanded to determine a reasonable attorney fee ...**

*Niles v. Carbon County* 174 Mont. at 25, 568 P.2d at 526 - 527.

**3. Eide v. Eide**, 250 Mont. 490, 821 P.2d 1036 (1991).

In this dissolution case, the trial judge awarded the petitioner wife more maintenance than she had requested. The Supreme Court affirmed, citing Rule 54c:

Did the District Court err in awarding maintenance in an amount exceeding the amount requested by the wife in her petition for dissolution of marriage? The husband contends that even if this Court finds that the maintenance award is supported by the evidence, the award is void. The husband's basis for this contention is that the District Court abused its discretion in awarding maintenance in an amount greater than the amount requested by the wife in her petition. We disagree.

The wife contends that although she only requested \$300 per month maintenance in her petition, the court was not precluded from granting other appropriate relief if such relief was supported by the record. The wife's request in her petition for "other and further suitable arrangements as the Court may deem just and proper" was a sufficient request to award maintenance in an amount greater than requested by the wife. Further, the wife also cites Rule 54(c), M.R.Civ.P., in support of the court's authority....Rule 54(c), M.R.Civ.P., grants the court discretion which must be viewed according to the circumstances of the case. *In re Marriage of Hughes* (1989), 236 Mont. 427, 430, 770 P.2d 499, 501.

**In light of our discussion on the first issue above, the District Court had the power to award maintenance in an amount greater than the wife sought in her**

**petition because such an award was supported by the evidence. Therefore, we hold that the court did not err and the judgment of the District Court on this issue is affirmed.**

250 Mont. at 494-495.

**4. In re Marriage of Taylor, 257 Mont. 122, 848 P.2d 478 (1993)**

In this family ranch dissolution, the trial court awarded and the Montana Supreme Court affirmed an award of attorney's fees to wife, even though she had not asked for them in her pleadings. She did include in her petition the customary language asking for "such other and further" . The Supreme Court found that the trial court had looked at the parties' respective financial resources, and that it was not error to award fees to wife based on this foundation, citing Eide.

Stephen maintains that the court's award of attorney fees was in error because Judith did not request attorney fees in the pleadings and no evidence was presented to determine if an award of attorney fees was necessary.

[8] Section 40-4-110, MCA, grants the district court the discretion to award reasonable attorney fees after considering the financial resources of both parties. Absent an abuse of discretion, this Court will not overturn the district court's decision denying attorney fees. *In re Marriage of Manus* (1987), 225 Mont. 457, 733 P.2d 1275.

We have stated that although the statute does not specifically require that attorney fees be pled, it would be good practice to so. *In re Marriage of Johnsrud* (1977), 181 Mont. 544, 572 P.2d 902.

[9] Judith did not request attorney fees in her pleading. However, at the end of her complaint she did request "for such further relief as the Court deems just and proper." In a recent case, we held that such language allowed the District Court to grant a larger maintenance award than that pled by the wife. *In re Marriage of Eide* (1991), 250 Mont. 490, 821 P.2d 1036. We concluded that Rule 54(c), M.R.Civ.P., provided:

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

*Eide*, 821 P.2d at 1039. **Rule 54(c), M.R.Civ.P., grants the district court discretion which must be viewed according to the circumstances of the case.** *Eide*, 821 P.2d at 1039.

**In its findings, the court considered the financial resources of the parties and concluded that Stephen should pay Judith's reasonable attorney fees. We hold that the District Court did**

**not err in awarding reasonable attorney fees to Judith.**  
We affirm.

In re Marriage of Taylor 257 Mont. @ 129, 848 P.2d 478.

#### **D. LIMITS ON THE COURT'S AUTHORITY TO CHOOSE THE REMEDY**

The facts and issues necessary to support the relief must have been addressed at trial.

**1. In Matter of Raymond W. George Trust**, 253 Mont. 341, 345, 834 P.2d 1378 (1992), a testamentary trustee originally petitioned for approval of a sale of the trust's real property. The trial court approved the sale. However, the trustee then moved to withdraw the petition and to cancel the sale. The trial judge refused the motion, and went on to order specific performance of the sale. The trial judge also enjoined the trustee from logging or committing other waste on the property to the detriment of the buyer.

On appeal, the Supreme Court agreed with the trial court that the trustee had the right and authority to sell the property, but disagreed that the trial court had the power to head off further litigation by adjudicating the potential dispute between trustee and the hopeful buyer:

Rule 54(c) M.R.Civ.P., allows the court to grant relief to which a party is entitled even if such relief was not demanded in the party's pleading. **However, the court may not grant relief not specifically requested when the facts and issues necessary to support such relief have not been tried and proven at trial.** *Smith v. Zepp* (1977). Long ago we stated that the **court could grant "any relief to which the plaintiffs are entitled upon the allegations of the complaint and the proof introduced at trial"**. [emphasis supplied], *Merk v. Bowery Mining Co.* (1904), 31 Mont. 298, 78 P. 519.

[4] This is neither a proceeding for specific performance nor an action to litigate the rights between the trust and Double AA. No opportunity was ever provided to the parties to present evidence relative to the enforcement of the agreement. The validity of the contract between the trust and Double AA and any rights of the parties resulting from the contract were not the subject of the litigation. The evidence presented only regarded the fairness and reasonableness of Double AA's offer and the agreement that the parties entered. Whether or not any or all of the conditions of that agreement have been met such that specific performance is appropriate is beyond the scope of both the pleading and proof introduced.

253 Mont. at 345.

The Supreme Court rejected the argument that the trial court's order of specific performance was a legitimate use of its equitable power to supervise the trustee:

Double AA contends the court's order to proceed with the sale to Double AA was a proper exercise of its equitable supervisory authority over the internal affairs of the trust. Section 72-35-301, MCA. However, it remains that **any relief provided by the court must be based on evidence presented before the court. The equitable question of specific performance was not properly raised and litigated.** Therefore, we conclude that the District Court's order to proceed with the sale was in error and the District Court is reversed on this point.

253 Mont. at 346.

2. See also, *Old Fashioned Baptist Church v. MDOR*, 206 Mont. 451, 671 P.2d 625 (1983).

The Church sued to invalidate the Department's classification of several lots of real estate as not used for religious purposes. Both the Church and the Department put on evidence at trial about these specific lots. After trial, the court ruled on the exempt status of these lots, and went further to set aside the exempt status of several other lots which the DOR had exempted, and thus which were not the subject of the plaintiff's lawsuit.

The Montana Supreme Court reversed, not under Rule 54c, but because it held that the District Court lacked jurisdiction over the issue of the exempt status of the other lots:

**A District Court does not have jurisdiction to grant relief outside of the issues presented by the pleadings unless the parties stipulate that other questions be considered or the pleadings are amended to conform to the proof.** *Heller v. Osburnsen* (1973), 162 Mont. 182, 510 P.2d 13, *National Surety Corp. v. Kruse* (1948), 121 Mont. 202, 192 P.2d 317; *Welch v. All Persons* (1927), 78 Mont. 370, 254 P. 179; *Wallace v. Goldberg* (1925), 72 Mont. 234, 231 P. 56. In *National Surety Corp.*, this Court recognized that "[t]he rule in Montana as well as in other jurisdictions seems to be well settled that **a judgment must be based on a verdict or findings of the court and must be within the issues presented to the court.**" 121 Mont. at 205-206, 192 P.2d at 319. (Emphasis added.) This rule was clearly upheld in *Heller*, 162 Mont. at 188, 510 P.2d at 16. [5] We hold the District Court had no jurisdiction to remove the exempt status originally granted by DOR. In this case the original action was to quiet title on lots 6, 7, 8 and 9, as the tax deed clouded the Church's title.

*Old Fashion Baptist Church v. Montana Dept. of Revenue*, 206 Mont. at 457.

## II. COMPENSATORY DAMAGES

### A. General Overview

Damages are intended to restore the plaintiff to the plaintiff's "rightful position," the position the plaintiff would have occupied but for the wrongful conduct of the defendant. Thus, damages are measured by the loss suffered by the plaintiff, rather than by the benefit gained by the defendant (restitution; see below). This is probably the most common form of remedy in civil actions. Damages are a legal remedy, entitling the parties to trial by jury upon a timely request.

"The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party." *United States v. Hatahley*, 257 F.2d 920, 923 (10<sup>th</sup> Cir., 1958).

### B. Montana Statutes

#### 27-1-202. Right to compensatory damages

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.

#### 27-1-302. Damages to be reasonable

Damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered.

### C. Montana Cases

Purpose of Damages: Rightful Position

*Smith v. Zepp* applies the rightful position standard in a contract context.

The legislature intended, in section 17-301, R.C.M.1947, to insure that one who is injured by another's wrongful breach of contract has a right to recover **such damages as will make him whole again**. *Bos v. Dolajak*, 167 Mont. 1, 534 P.2d 1258. The contract in this case provided that plaintiff Perl Smith, his wife, or son would receive consultation fees or commissions for a limited period of time, measured by how long they should live. Plaintiffs can never recover those lost years of fees or commissions from net profits except by way of damages. The proper measure of damages so as to make the seller in this case "whole again", therefore, is the amount which the district judge finds that plaintiff Perl Smith

would have received in consultation fee royalties from net mining profits if defendants had produced 300 yards of material each working day since the property was made ready to be mined in 1972, plus interest from the date the royalties would have accrued.

Smith v. Zepp 173 Mont. 358, 369-370, 567 P.2d 923, 929 (1977).

### **Standard of Proof: to a Reasonable Certainty**

The plaintiffs have the burden of proving their damages. However, if the defendant's conduct makes that proof difficult, the Court will allow some leeway to the plaintiff. In Smith v. Zepp, 173 Mont. 358, 567 P.2d 923, 930 (1977) (discussed above), the Court held:

Plaintiffs have the burden of proving, by competent evidence, the amount of damages which they suffered due to defendants' failure to produce 300 yards of material during each working day. Rigney v. Swingley, 112 Mont. 104, 113 P.2d 344. Plaintiffs will not be denied recovery merely because the damages in this case are difficult to ascertain, as long as they prove damages with reasonable certainty. In Brown v. Homestake Exploration Co., 98 Mont. 305, 337, 39 P.2d 168, 179, this Court stated plaintiff must provide the district judge with: "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 \* \* \*." (Bracketed material substituted.)

Such evidence may include, but is not limited to, the testimony of geologists and geophysicists who test the mine's soil, the past history of the mine, the cost of mining 300 cubic yards of gravel per day and the value of gold and other noble metals in the soil during the time that defendants failed to mine.

See also, Johnson v. Murray, 201 Mont. 495, 656 P.2d 170 (1982), where the Montana Supreme Court held that if there is strong evidence of the fact of damage, a defendant may not avoid liability because of the plaintiff's inability to prove damages with precision.

### **AMOUNT OF DAMAGES APPEALED, UPHELD**

#### **1. Onstad v. Payless Shoesource, 2000 MT 230, 301 Mont. 259, 9 P.3d 38.**

Plaintiff was awarded \$500,000 in compensatory damages and \$1,000,000 in punitive damages by a jury, both of which were affirmed on appeal. Defendants argued on appeal that the compensatory damages were excessive and unsupported by the evidence. Plaintiff's proof of special damages at trial was only that she expected to incur counseling costs of up to \$18,000. The Supreme Court affirmed nonetheless:

Damages must in all cases be reasonable. Section 27-1- 302, MCA. "Thus, an award must be reduced when it substantially exceeds that which the evidence can sustain." *Maurer v. Clausen Distributing Co.* (1996), 275 Mont. 229, 237, 912 P.2d 195, 199. However, this Court's scope of review of jury verdicts is limited. The amount to be awarded as damages is properly left to the jury, and the court on appeal will not substitute its judgment for that of the jury-particularly where, as here, the trial court has approved the verdict by denying a new trial. Only when the amount awarded is so grossly out of proportion to the injury as to shock the conscience will an appellate court intervene.

301 Mont. at 270-271, 9 P.3d at 46.

The Court cited Katie Onstad's testimony about her terror of being raped and killed while she was being held in the back room of the Payless Shoe Store, the fact that she had dropped out of college, and the testimony from both her mother and her counselor about the profound impact the incident had had on her life justified the jury's verdict:

The jury was properly instructed that Onstad was entitled to reasonable compensation for any pain and suffering she experienced and would reasonably probably experience in the future, and that the law does not set a definite standard by which to calculate compensation for mental pain and suffering. After considering all of the evidence under the applicable standard of review, we conclude that the amount of compensatory damages awarded by the jury is not so grossly out of proportion to Onstad's posttraumatic stress injury as to shock the conscience

301 Mont. at 271, 9 P.3d at 46.

**2. Anderson v. Werner Enterprises, Inc.**, 1998 MT 333, 292 Mont. 284, 972 P.2d 806

This case involved a semi-truck collision on an icy road. The jury awarded the plaintiff \$690,000. On appeal, the defendant argued that there was insufficient evidence to support the verdict. The Montana Supreme Court disagreed, saying:

It is not a question of the amount this Court would have awarded under the circumstances. It is not the amount which in our opinion would compensate the injured party; rather, it is a question of what amount of damages will the record in the case support when viewed ... in the light most favorable to the plaintiff. *Barrett v. Larsen* (1993), 256 Mont. 330, 339, 846 P.2d 1012, 1018 (citations omitted). This same rule was established in *Maurer*. In *Maurer*, we held that the district court did not err in granting a new trial because "an award must be reduced when it substantially exceeds that which the evidence can sustain." *Maurer*, 275 Mont. at 237, 912 P.2d at 199.

A review of the record in the instant case reveals that Anderson produced substantial evidence to support the jury's damage award....

the evidence supporting Anderson's damage claims was substantial and straight forward. The record is void of any attempt by Anderson to expand the record for purposes of creating passion or prejudice against Werner/Freeman. We hold that the District Court did not abuse its discretion in denying Werner/Freeman's renewed motion for judgment as a matter of law and motion for a new trial

292 Mont. at 297, 972 P.2d at 815.

The Supreme Court expressly rejected defendant's attempt to compare the jury verdict with other cases reported in a jury verdict research publication:

With respect to excessiveness, ... Werner/Freeman analogizes *Maurer* to the instant case, noting that Anderson requested \$100,000 for loss of established course of life but was awarded \$225,000, more than twice the amount requested. On the basis of *Maurer*, Werner/Freeman argues that Anderson's damage award was excessive and that the District Court erred in denying its motion for a new trial.

Werner/Freeman also cites a compilation from a publication entitled "Jury Verdict Research" wherein \$88,000 is the reported statistical median average of total damage awards for hip fracture cases in which the medical expenses incurred are \$25,800, the amount incurred by Anderson in this case. Werner/Freeman argues that because \$690,800 is more than eight times the statistical average for similar cases, Anderson's total damage award was excessive. Additionally, Werner/Freeman cites a 1973 Montana case where the plaintiff suffered a fractured pelvis and dislocated hip and received a total damage award of \$45,000, an amount fifteen times less than the amount received by Anderson. *See McGuire v. Nelson* (1973), 162 Mont. 37, 508 P.2d 558.

We reject Werner/Freeman's arguments concerning excessive damages. **The mere fact that a damage award exceeds that requested by a plaintiff is not in itself a ground for the grant of a new trial.** *Gibson*, 210 Mont. at 290, 682 P.2d at 738. **"It is only when the excessive damages appear to have been given by the jury under the influence of passion or prejudice that a new trial may be granted."** *Gibson*, 210 Mont. at 290, 682 P.2d at 738. Werner/Freeman has failed to present any evidence that the jury was influenced by passion or prejudice. Moreover, the authorities on which Werner/Freeman relies are not persuasive. **The jury verdict research publication is not legal**

**authority and most certainly would be excluded from a trial as inadmissible hearsay. See Rule 408, M.R.Evid....**

Lastly, Werner/Freeman's reliance on *Maurer* is misplaced. In *Maurer*, we held that the defendant was entitled to a new trial not because the damage award exceeded that requested by the plaintiff, but because the evidence did not support the jury's damage award. *Maurer*, 275 Mont. at 237, 912 P.2d at 199.

292 Mont. at 296-297, 972 P.2d at 814 - 815.

## **JURY FAILURE TO AWARD DAMAGES SET ASIDE:**

**Reville v. Taylor**, 2000 MT 217, 301 Mont. 99, 7 P.3d 400.

This was a rear-end car accident. The plaintiff received substantial treatment for the ailments she suffered as a result of the collision, including cervicothoracic and lumbosacral strain injuries, myofascial pain syndrome, and a major depressive disorder with mood and anxiety disturbance affecting her myofascial pain syndrome and muscle contraction headaches. At the time of trial, in December 1998, her past medical expenses had exceeded \$17,357.

The jury awarded her \$17,357, but no more. She moved the court for entry of judgment n.o.v., but the motion was denied by the passage of time. On appeal, the Montana Supreme Court held that the jury had erred in ignoring uncontroverted evidence of damages other than the medical expenses. The case was reversed and remanded for a new trial confined to the issue of damages:

Even though the jury was instructed to award damages for past and future medical expense, loss of earnings and earning capacity, pain and suffering, loss of ability to pursue an occupation, and loss of ability to pursue an established course of life, the jury's general verdict was limited to the amount of the past medical expenses.

### **1. STANDARD OF REVIEW**

The function of this Court is not to agree or disagree with a jury's verdict. This Court's role is to determine whether there was substantial evidence to support the verdict. If conflicting evidence exists, we do not retry a case because the jury chose to believe one party over another. However, a jury may not disregard uncontradicted, credible, nonopinion evidence.

We have previously held that "where a jury fails to award any damages when the only evidence of record supports an award, that verdict is not supported by substantial evidence and may be set aside." *Thompson v. City of Bozeman* (1997), 284 Mont. 440, 446, 945 P.2d 48, 52. In *Thompson*, we concluded that there was insufficient evidence to support the jury's award of zero damages for Thompson's pain and suffering, and stated:

Thompson presented evidence that the City's negligence caused her injury and the City presented conflicting evidence through its causation witnesses. The jury found in Thompson's favor on that issue. Thompson also presented substantial evidence that she experienced pain and suffering for at least several months as a result of being injured in the vehicle accident. The City did not controvert her evidence on pain and suffering. Because no substantial evidence supports the jury's failure to award damages for pain and suffering, the jury's verdict in this regard was impossible. *Thompson*, 284 Mont. at 446-47, 945 P.2d at 52.

Similarly, in this case Maria presented evidence that Taylor's negligence caused her injury and Taylor presented evidence that the injury was less severe than claimed. The jury found that Maria had been injured in the collision. Maria also presented substantial evidence that she experienced pain and suffering since the time of the accident in 1995. The testimony of Maria, her mother, and the physicians assistant Lutz clearly supported an award for pain and suffering. Moreover, the testimony of Dr. Wilson corroborated the fact that Maria suffered a painful injury as a result of the accident. While Dr. Stratford's testimony questioned the extent of her pain and suffering, it did not controvert the evidence that she had pain and suffering as a result of the accident.

We have previously held that, although it is within the jury's province to weigh the evidence and determine credibility, a jury is not free to disregard uncontradicted, credible, nonopinion evidence. *Thompson*, 284 Mont. at 443, 945 P.2d at 50. We conclude that Maria was entitled to some award of damages for the pain and suffering proven in this case. We further conclude that the jury's award limited to past medical expenses is not supported by substantial evidence and should be set aside.

The Court reversed and remanded for a new trial.

See also, *Thompson v. City of Bozeman* , 284 Mont. 440, 945 P.2d 48 (1997).

## **JURY AWARD SET ASIDE AS EXCESSIVE**

**Maurer v. Clausen Distributing Co.**, 275 Mont. 229, 912 P.2d 195 (1996).

This case arose from a dui accident, which was the third dui for the intoxicated driver. This time, he was driving home from his sales route for a Helena liquor distributor with five or six beers under his belt. Company policy allowed drinking on the job, in the discretion of the employee. After this employee hit a parked Montana State Patrol vehicle from behind, he and his employer admitted liability. The sole issue at trial was the amount of damages claimed by the passenger who had been seated in the MSP patrol car, after a traffic stop. The plaintiff rancher

alleged that the resulting neck and back pain caused him to suffer severe depression, quit his family's ranch, and leave Montana.

With regard to compensatory damages, the plaintiff asked for \$90,000 for loss of established course of life; the jury awarded \$500,000 on the special verdict form. The jury also awarded \$50,000 for pain and suffering, but denied the plaintiff's request for lost earnings. The trial judge held that the award was excessive and ordered a new trial. The plaintiff appealed.

Applying the abuse of discretion standard of review, the Montana Supreme Court affirmed the trial judge's decision with regard to the amount of compensatory damages, holding that a new trial was warranted.

Maurer produced evidence to support an award of \$90,000 for loss of established course of life. Instead, the jury awarded \$500,000. Unreasonable damages cannot be recovered. Section 27-1-302, MCA. Thus, an award must be reduced when it substantially exceeds that which the evidence can sustain. *Safeco Ins. Co. v. Ellinghouse* (1986), 223 Mont. 239, 254, 725 P.2d 217, 226. The record does not support the jury's award of \$500,000 for loss of established course of life. Therefore, the District Court did not abuse its discretion in ordering a new trial for compensatory damages on this issue and we affirm that portion of the District Court's order.

275 Mont. at 237.

### III. RESTITUTIONARY REMEDIES

#### A. General Overview

Restitutionary remedies are designed to return the **defendant** to the defendant's rightful position, by taking away any benefit the defendant may have gained as a result of his/her/its wrongful conduct, often called "disgorging the profit." Restitution may occur either under the substantive law of unjust enrichment, or as a remedy in a case of intentional tort or breach of fiduciary duty, and sometimes in a case of a statutory tort such as infringement of intellectual property and sometimes even breach of contract.

Justice Cardozo said the defendant must return any benefit "received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." *Atlantic Coast Line Railroad v. Florida*, 295 U.S. 301, 309 (1935).

In many cases, obviously, the defendant has not received any benefit. E.g., a negligence case where a plaintiff suffers personal injury does not produce any positive benefit to the

defendant. In such cases, restitution does not make sense, and the plaintiff's only choice is to pursue monetary damages by proving her loss.

In other cases, however, there is both detriment to the plaintiff and benefit to the defendant. In these circumstances, the plaintiff will choose restitution instead of damages when:

1. The defendant's benefit exceeds the plaintiff's loss;
2. The defendant is insolvent, because some restitutionary remedies such as constructive trust or equitable lien allow the plaintiff to "move to the head of the line" of creditors by reclaiming a specific asset in toto rather than having to share proportionally with other creditors; or
3. There is no other substantive cause of action; the defendant's conduct warrants neither a tort nor a contract claim, but is still "wrongful" and results in unjust enrichment.

Restitutionary remedies developed through several different mechanisms, including:  
quasi-contract;  
constructive trust (equitable);  
accounting for profits (equitable);  
rescission (available at plaintiff's option for contracts where plaintiff proves fraud, substantial breach, mutual mistake of fact, unilateral mistake not relied on, or duress);  
equitable lien;  
subrogation;  
indemnity;  
contribution;  
replevin; and  
ejectment.

They all accomplish the same goal of reducing the defendant to her rightful position. The modern trend is to combine them all into the single remedy of restitution; this trend began with the Restatement of Restitution (1937) and continues into the current draft of the Restatement 3d.

Three helpful law review articles are: Burnham, Contract Damages in Montana Part II: Reliance and Restitution, 45 Mont.L.Rev. 1 (1984); Mark P. Gergen, What Renders Enrichment Unjust?, 79 Tex. L. Rev. 1927 (2001); and Saul Levmore, Explaining Restitution, 71 Va. L. Rev. 65 (1985).

There are several issues inherent in measuring the remedy if restitution is appropriate. One is whether to measure the defendant's gain by the full measure of the profits defendant earned, including consequential gains, or instead by some measure of market value? Another is how much should the defendant's culpability affect the measure? Many courts have a far easier time awarding the entire amount of defendant's gain when the defendant consciously acted wrongfully, but only the market value when the conduct was negligent or in good faith, even though illegal. A third issue is how much of the gain is due to defendant's wrongful act? Many

transactions involve the use both of plaintiff's property, wrongfully, and of the defendant's own property and effort, rightfully. In a copyright infringement case, the United States Supreme Court held that apportionment of the profits was required, so as to award only those which were attributable to the wrongful conduct. See, *Sheldon v. MGM*, 309 U.S. 390 (1940). But see, *Snepp v. United States*, 444 U.S. 507 (1980), where the Court affirmed an award of constructive trust on 100% of the profits earned by a former CIA agent who published a book about the CIA in violation of express provisions of his employment contract. The Montana Supreme Court clearly requires apportionment where possible. See, *Robertus v. Candee*, below.

## **B. Montana Statutes**

MCA §27-1-602:

...<sup>1</sup> where a plaintiff has suffered actual damage due to fraud or deceit or a defendant has been unjustly enriched, the plaintiff may maintain an action for fraud or deceit or unjust enrichment and recover therein only the actual damage proved or for the benefit wrongfully obtained or restitution of property wrongfully withheld where such action otherwise is maintainable under existing law.

## **C. Selected Montana Cases**

### **1. Robertus v. Candee**, 205 Mont. 403, 670 P.2d 540 (1983)

Plaintiffs were lessees of farmland in Rosebud County. The lessor wrongfully evicted them, and then sold and retained the proceeds from the wheat the lessees had planted. The lessees sued for unjust enrichment and quantum meruit. The trial court awarded them \$55,000. When defendant appealed, the Montana Supreme Court affirmed the award of unjust enrichment:

The trial court found that in this case the Statute of Frauds precluded plaintiffs from suing on the lease. **Where the labor or money of a person has been expended in a permanent improvement which enriches the property of another, under an oral agreement which cannot be enforced under the Statute of Frauds, that person is entitled to an award for the amount by which such improvements unjustly enriches the property.** *Smith v. Kober* (Neb.1922), 189 N.W. 377; Restatement of the Law, Contracts 2d § 375.

However, it is not necessary to reach the question of whether this agreement is within the Statute of Frauds. For, **where one party repudiates a contract or**

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<sup>1</sup>The bad news is that the omitted part of this statute abolishes the cause of action for breach of contract to marry. :)

**breaches it by non-performance, the injured party may seek restitution of the unjust enrichment whether the Statute of Frauds applies or not.** *Gregory v. Peabody* (1928), 149 Wash. 227, 270 P. 825; Restatement of the Law, Contracts 2d § 373; *Epletveit v. Solberg* (1946), 119 Mont. 45, 57, 169 P.2d 722, 729. By defendant's own admission, the plaintiffs were not required to farm the 1250-acre tract during any particular season. Thus the trial court was correct in concluding that the *defendant* breached and terminated the lease by his actions in March of 1978. There is no question that plaintiff may seek restitution for the unjust enrichment conferred upon the breaching and repudiating defendant in this case.

205 Mont. at 407, 670 P.2d at 542.

The defendant also challenged the amount of the award. The Supreme Court said it could not determine exactly how the trial judge had arrived at his figure, and took this opportunity to set forth the correct measure of the award in unjust enrichment cases:

**The theory of unjust enrichment requires that a person who has been unjustly enriched at the expense of another must make restitution to the other.** Restatement of the Law, Restitution § 1; *Tulalip Shores, Inc. v. Mortland* (1973), 9 Wash.App. 271, 511 P.2d 1402; 66 Am.Jur.2d Restitution and Implied Contracts § 3 (1973). **The measure of this equitable restitution interest is either the *quantum meruit* value of plaintiff's labor and materials or the value of the enhancement to the defendant's property.** Restatement of the Law, Contracts 2d § 371; 12 Williston, Contracts § 1480. To award both would be to give double damages.

...

There may be cases where the enhancement to the defendant's property will be far less than the *quantum meruit* value of the plaintiff's efforts. For example, where the improvement did not enhance the value of the property but did result in a pecuniary saving to the defendant, the enhancement measure would not reflect the unjust enrichment. Conversely, there may be cases where the value of the enhancement greatly exceeds the cost of the improvement, as in this case.

Thus **the rule has evolved that the proper measure of damages in unjust enrichment should be the *greater* of the two measures.** Restatement of Law, Contracts 2d § 371 comment b; 12 Williston, Contracts § 1480.

We adopt this rule. But this rule must be **tempered with the idea that it is only so much of the *enrichment* which is *unjust* that may be awarded the plaintiff.** *Madrid v. Spears* (10th Cir.1957), 250 F.2d 51, 54. For example, the cost of surveying a tract of land into lots may be \$5,000, while the total value of the

subdivided lots may be \$50,000 greater than the undivided tract. The landowner is *justly* entitled to the majority of the increase in value for his risk, idea, decision making and development activity. He is only *unjustly* enriched to the extent that the unpaid surveyor contributed to or caused the increase.

205 Mont. at 408-409, 670 P.2d at 543.

## 2. **Schweigert v. Fowler**, 240 Mont. 424, 784 P.2d 405 (1990)

Here, the trial court and Montana Supreme Court both denied rescission and restitution to a purchaser who defaulted on a ranch purchase contract, finding no fraud which would justify rescission and further holding that:

Restitution is normally denied to a defaulting purchaser. Burnham, *Contract Damages in Montana Part II: Reliance and Restitution*, 45 Mont.L.Rev. 1, 19 (1984). This view was implicitly acknowledged in *Robertus*, where the non-breaching injured party was allowed restitution from the party that breached or repudiated an oral contract.

Additionally "[u]njust enrichment is an equitable doctrine wherein the plaintiff must show some element of misconduct or fault on the part of defendant, or that the defendant somehow took advantage of the plaintiff." *Randolph V. Peterson v. J.R. Simplot Co.* (Mont.1989), 778 P.2d 879, 883, 46 St.Rep. 1463, 1468; *Brown v. Thornton* (1967), 150 Mont. 150, 156, 432 P.2d 386, 390. While this standard may state an "overly restrictive view of the availability of restitution," Burnham, at 12, it is appropriate in the present case. The Schweigerts failed to establish misconduct on the part of Fowlers, and the equities of the present case do not support a theory of unjust enrichment.

We conclude that Schweigerts have failed to present any basis for restitution.

240 Mont. at 411, 784 P.2d at 433.

## IV. INJUNCTIONS

### A. Overview

The injunction is the quintessential equitable remedy. Rather than substitutionary relief after the wrong and injury occur, it seeks to operate prospectively to avoid the occurrence of wrong, injury, or both. Historically, there has been a strong preference for legal over equitable remedies, because of the restriction on the liberty of the defendant presented by an injunction. Thus, the oft-stated rule that equity will not lie where money damages are adequate to compensate the wronged defendant after the fact, otherwise known as the "irreparable injury" rule.

## **B. The three types of injunctions, per chronology of proceedings:**

### 1. Temporary Restraining Orders

Very limited duration, because of dearth of information and urgency of decision facing trial judge who is asked to issue a t.r.o.;

### 2. Preliminary Injunctions: until the conclusion of the trial

3. Permanent Injunctions: the final judgment, entered after trial. May be finite or infinite in duration.

## **C. The three types of injunctions, per purpose:**

1. Preventive: purpose is to prevent bad act and/or harm from occurring in first place, obviating need for assessment of damages later;

2. Reparative: purpose is to repair the harm occurring from a bad act which has already occurred;

3. Structural: purpose is to restructure a governmental organization, usually to end and repair a chronic unconstitutional condition. These often involve a mixture of preventive and reparative injunctive relief.

Montana examples:

Noren v. Straw: Billings city jail case brought in U.S. District Court;

Windy Boy: Big Horn County Native American voting rights case, brought in U.S. District Court

Ihler v. Chisholm: Warm Springs State Hospital conditions case, brought in Montana state district court.

## **D. Montana Statutes**

**27-19-101:** Definition of Injunction—by whom granted. An injunction is an order requiring a person to refrain from a particular act.<sup>2</sup> The order may be granted by the court in which the action is brought...

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<sup>2</sup>An injunction may either prohibit or order an affirmative act; it is not necessary that it be negative, despite the apparent language of the statute.

**27-19-102. When final injunction may be granted to prevent breach of obligation**

Except where otherwise provided by the provisions of the code governing specific and preventive relief (chapter 1, part 4, of this title and Title 28, chapter 2, parts 16 and 17), a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant where:

- (1) pecuniary compensation would not afford adequate relief;
- (2) it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
- (3) the restraint is necessary to prevent a multiplicity of judicial proceedings; or
- (4) the obligation arises from a trust.

**27-19-103. When injunction may not be granted**

An injunction cannot be granted:

- (1) to stay a judicial proceeding pending at the commencement of an action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;
- (2) to stay proceedings in a court of the United States;
- (3) to stay proceedings in another state upon a judgment of a court of that state;
- (4) to prevent the execution of a public statute by officers of the law for the public benefit;
- (5) to prevent the breach of a contract the performance of which would not be specifically enforced;
- (6) to prevent the exercise of a public or private office, in a lawful manner, by the person in possession;
- (7) to prevent a legislative act by a municipal corporation;
- (8) in labor disputes under any other or different circumstances or conditions than if the controversy were of another or different character or between parties neither or none of whom were laborers or interested in labor questions.

**27-19-105. Form and scope of injunction or restraining order**

An order granting an injunction or a restraining order shall:

- (1) set forth the reasons for its issuance;
- (2) be specific in its terms;
- (3) describe in reasonable detail, and not by reference to the complaint or any other document, the act or acts sought to be restrained; and
- (4) be binding only upon the parties to the action; their officers, agents, employees, and attorneys; and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

### **27-19-201. When preliminary injunction may be granted**

An injunction order may be granted in the following cases:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;
- (4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;
- (5) when it appears that the applicant has applied for an order under the provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

### **27-19-301. Notice of application -- hearing**

- (1) No preliminary injunction may be issued without reasonable notice to the adverse party of the time and place of the making of the application therefor.
- (2) Before granting an injunction order, the court or judge shall make an order requiring cause to be shown, at a specified time and place, why the injunction should not be granted, and the adverse party may in the meantime be restrained as provided in 27-19-314.

### **27-19-303. Time of granting injunction, evidence required**

- (1) The injunction order may be granted after the hearing at any time before judgment.
- (2) Upon the hearing each party may present affidavits or oral testimony. An injunction order may not be granted on affidavits unless:
  - (a) they are duly verified; and
  - (b) the material allegations of the affidavits setting forth the grounds for the order are made positively and not upon information and belief.
- (3) Upon the hearing of a contested application for an injunction order, a verified answer has the effect only of an affidavit.

#### **27-19-314. Temporary restraining order**

Where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the adverse party, until the hearing and decision of the application, by an order which is called a temporary restraining order.

#### **27-19-315. When restraining order may be granted without notice**

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

- (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that a delay would cause immediate and irreparable injury to the applicant before the adverse party or his attorney could be heard in opposition; and
- (2) the applicant or the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

#### **27-19-316. Contents and filing of restraining order granted without notice**

Each temporary restraining order granted without notice must:

- (1) be endorsed with the date and hour of its issuance;
- (2) be filed immediately in the clerk's office and entered in the record;
- (3) define the injury and state why the injury is irreparable and why the order was granted without notice; and
- (4) except as provided in 40-4-121 or Title 40, chapter 15, expire by its terms within the time after entry, not to exceed 10 days, as the court or judge fixes.

#### **27-19-319. Motion to dissolve or modify restraining order**

On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice as the court or judge may prescribe, the adverse party may appear and move that the order be dissolved or modified. The court shall hear and determine such motion as expeditiously as the ends of justice require.

#### **27-19-401. Application to dissolve or modify injunction**

The party enjoined may apply to the judge who granted the injunction order or to the court in which the action is brought to dissolve or modify the same. The application may be made upon reasonable notice or upon an order to show cause returnable at a specified time or immediately after service thereof. The application must be supported by an affidavit showing that

there is not sufficient ground for the injunction to continue or that the scope of the injunction is too broad.

## E. MONTANA CASES

**State ex rel Cook v. District Court**, 105 Mont. 72, 69 P.2d 746 (1937).

The trial court issued a t.r.o. without notice which was purportedly still in effect six years after its issuance; trial on the underlying case had not occurred. The Montana Supreme Court held that the t.r.o. was valid when issued, but that it had long since expired:

Under the laws of Montana we have three classes of injunctions: A temporary restraining order, an injunction pendente lite, and a permanent injunction. A "temporary restraining order" is one designed to maintain conditions in statu quo until a hearing can be had on notice to determine whether an injunction pendente lite should be issued. ... The "injunction pendente lite" affords restraint during the pendency of the action and until final determination of the cause. A "temporary restraining order" may be granted without notice, but "in no case shall an injunction order or restraining order be issued without notice, unless it appears to the court or judge that irreparable injury would result by the delay of giving notice." Section 9245, Rev.Codes.

When a temporary restraining order is issued there can be no possibility of injury during the time required to give notice for an injunction pendente lite. **It is the duty of the court, upon granting a temporary restraining order without notice, to set the matter for hearing for an injunction pendente lite at a very early date, to the end that "a temporary expedient may not, in fact, become an injunction."** ... And six weeks has been held an **unreasonable time to restrain without notice and a hearing.**<sup>3</sup> Wetzstein v. Boston & Montana C. C. & S. M. Co., supra. Hence, while the court had jurisdiction to grant the restraining order to preserve conditions in statu quo for a reasonable time until a hearing could be had on notice for an injunction pendente lite, it had no jurisdiction without notice to attempt to make an order pendente lite.

69 P.2d at 747 -748. The court then held that the defendant's violation of the order was not contempt, because the purported order had long ago lost its validity.

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<sup>3</sup> The statute now limits the duration of a tro without notice to 10 days.

See, also, *Witzstein v. Boston & Mont. Consol. Copper & Silver Mining Co.*, 25 Mont. 135, 63 P. 1043.

**Montana Tavern Assoc. v. State**, 224 Mont. 258, 729 P.2d 1310 (1986).

Tavern owners and their association sued to enjoin MDOR from enforcing emergency administrative rules under the video draw poker machine control law. The MDOR adopted its regulation on June 27, to go into effect on July 1. The trial court issued a tro and a preliminary injunction. The Montana Supreme Court affirmed, holding that the plaintiffs would have suffered irreparable injury under the circumstances because they risked losing their used, unmodified video poker machines because modification kits were not available given the short amount of time before the rule went into effect.

We do not find any abuse of discretion in the District Court's final order. An injunction is an equitable remedy fashioned according to the circumstances of the case. *Madison Fork Ranch v. L & B Lodge Pole Timber Products* (1980), 189 Mont. 292, 615 P.2d 900, 906, 37 St.Rep. 1468, 1474; *Brown v. Voss* (1986), 105 Wash.2d 366, 715 P.2d 514, 517. In this case, the Department adopted its emergency rules on June 27, to be effective July 1. The plaintiffs risked losing their used, unmodified machines on July 1 unless they could buy modification kits or new machines within three days. New kits were not available at that time. Their only remedy was to seek injunctive relief. Under these circumstances the District Court found that plaintiffs would suffer irreparable injury if they lost the use of the used, unmodified machines since the old machines would have to be abandoned or, alternatively, the owners would be forced to buy considerably more expensive new machines. The issuance of an injunction under these circumstances was not unreasonable. It was also proper for the court to structure the terms of the final order so as to protect the licensees and also limit the time for them to come into compliance with the new law.

224 Mont. at 265, 729 P.2d at 1315.

**Sweetgrass Farms v. Bd. of County Commissioners**, 2000 MT 147, 300 Mont. 66, 2 P.3d 825 (2000).

This case arose from a proposed subdivision. After the Sweetgrass County Board of Commissioners conditionally approved the subdivision, the neighbors sued for declaratory and injunctive relief. The plaintiffs also requested and obtained a t.r.o. on September 1, prohibiting the Board from taking any steps to issue final approval of the J & W Minor Subdivision pending a ruling on Sweet Grass Farms' motion for preliminary injunction. The court held a hearing on the motion for the preliminary injunction on September 15, and then denied the preliminary injunction. The Supreme Court reversed the order denying the preliminary injunction:

The standard of review for an order granting or denying a preliminary injunction is whether the district court abused its discretion. *See Van Loan v. Van Loan* (1995), 271 Mont. 176, 178-79, 895 P.2d 614, 615 (citation omitted). We will not interfere with the district court's ruling unless a manifest abuse of discretion has been shown. *See Knudson v. McDunn* (1995), 271 Mont. 61, 64, 894 P.2d 295, 297 (citation omitted).

300 Mont. at 70, 2 P.3d at 828.

The court addressed the statutory requirements, saying that only one of the several conditions must be satisfied in order for a preliminary injunction to issue:

Section 27-19-201, MCA, specifies when an injunction order may be granted:

- (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;
- (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;
- (3) when it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

....

**We have previously stated that the subsections of this statute are disjunctive, "meaning that findings that satisfy one subsection are sufficient." *Stark v. Borner* (1987), 226 Mont. 356, 359, 735 P.2d 314, 317. Consequently, **only one subsection need be met for an injunction to issue.****

300 Mont. at 72, 2 P.3d at 829.

The requirements for obtaining a preliminary injunction are:

**An applicant for a preliminary injunction must establish a prima facie case or show that it is at least doubtful whether or not he will suffer irreparable injury before his rights can be fully litigated." *Porter v. K & S Partnership* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839. In deciding whether an applicant has established a prima facie case, a court should determine whether a sufficient case has been made out to warrant the preservation of the property or rights in status quo until trial, without expressing a final opinion as to such rights. *See Fox Farm Estates Landowners Ass'n v. Kreisch* (1997), 285 Mont. 264, 268, 947 P.2d 79, 82. **"Status quo" has been defined as "the last actual, peaceable, noncontested condition which preceded the pending****

**controversy."** *Porter*, 192 Mont. at 181, 627 P.2d at 839  
(quotation and citations omitted).

300 Mont. at 72, 2 P.3d at 829.

The District Court denied the preliminary injunction because it concluded that the plaintiff had not showed irreparable injury. The Supreme Court reversed, holding that the failure to show irreparable injury was not fatal because another of the subsections of 27-19-201 had been satisfied:

Jackson testified at the preliminary injunction hearing that if the District Court did not grant the preliminary injunction he intended to immediately market the properties.

This evidence demonstrates that during the litigation J & W was threatening or was about to do or was procuring or suffering to be done an act in violation of Sweet Grass Farms' rights with respect to its appeal of the Board's conditional approval of the J & W Minor Subdivision, which would tend to render the judgment ineffectual. In anticipation of final approval of the subdivision, J & W was preparing to sell the lots in the subdivision during the litigation. The sale of any of these lots to third party purchasers would render an adverse decision regarding the Board's approval of the J & W Minor Subdivision ineffective and nullify Sweet Grass Farms' right to challenge the Board's approval.

In addition, allowing the sale of these lots prior to a determination of whether the Board's approval of the J & W Minor Subdivision was proper would impact Sweet Grass Farms' property rights. The impacts associated with the introduction of a subdivision into a primarily agricultural area include increased property taxes, increased traffic, noise, and dust, a reduction in the quality of local services, and an irreparable loss of the agricultural character of the area. These impacts support the issuance of a preliminary injunction pursuant to § 27-19-201(3), MCA.

Moreover, Sweet Grass Farms has made a prima facie showing that the J & W Minor Subdivision fails to comply with the Master Plan in several respects...

300 Mont. at 73, 2 P.3d at 829 - 830.

The Supreme Court remanded, with instructions to the trial court to issue a preliminary injunction. The Court declined the request of plaintiffs to go further and instruct the trial court how to rule on the ultimate issue:

In determining the merits of a preliminary injunction, "[i]t is not the province of either the District Court or the Supreme Court on appeal to determine finally matters that may arise upon a trial on

the merits." *Dreyer v. Board of Trustees* (1981), 193 Mont. 95, 100, 630 P.2d 226, 229 (citation omitted). "In granting temporary relief by injunction, courts of equity should in no manner anticipate the ultimate determination of the questions of right involved." *Porter*, 192 Mont. at 183, 627 P.2d at 840.

At this point in the litigation, no trial has been held and no final judgment adjudicating the ultimate rights of the parties has been made. Therefore, we decline Sweet Grass Farms' invitation to anticipate the ultimate determination of issues currently pending before the District Court.

300 Mont. at 74-75, 2 P.3d at 830.

**Shammel v. Canyon Resources Corp.**, 319 Mont. 132, 82 P.3d 912, 2003 MT 372 (Dec. 24, 2003)

A downstream property owner sued the upstream mining company for pollution of the water. During the litigation, the mining company auctioned off the mining property. The plaintiffs sought a tro and preliminary injunction to prevent the defendant from dissipating the proceeds of the sale of Montana property. The trial judge granted both, after conducting several hearings. The Montana Supreme Court affirmed, 5-2.

The first issue the Court tackled was the appropriate standard of review of a trial court's decision on a preliminary injunction<sup>4</sup>:

It has come to our attention that **there is confusion in our case law regarding the standard of review where an injunction has been granted or denied. The standard first used was an abuse of discretion standard.** *Nelson v. O'Neal* (1871), 1 Mont. 284, 187 Mont. LEXIS 4. "The granting or refusing an injunction was discretionary with the court below ... it was [not] an abuse of discretion in refusing an injunction." *Nelson*, 1 Mont. at 286. Later, a manifest abuse of discretion standard was introduced. *Craver v. Stapp* (1902), 26 Mont. 314, 67 P. 937. "The granting or dissolving of an injunction is so largely within the discretion of the lower court, that the supreme court will never disturb its action, unless there has been a **manifest abuse of discretion.**" *Craver*, 26 Mont.

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<sup>4</sup> Temporary restraining orders are not appealable, because of their short duration. The only remedy an aggrieved party has is to move the issuing court to dissolve the tro under MCA §27-19-319. An order granting or denying a motion for a preliminary injunction is appealable. M.R.App.P. 1.

at 314, 67 P. at 937. These two different standards have been used interchangeably over the last hundred years.

319 Mont. at 136, 82 P.3d at 916. The Court then held that it would henceforth use the more deferential “manifest abuse” standard:

It is incumbent upon us to rectify this century-old confusion and provide consistency to the law and guidance to the bar by adopting one standard of review. Unfortunately, none of our prior decisions discuss the difference between the two standards nor state a reason for adopting one over the other. In light of the high degree of discretion vested in district courts to maintain the status quo through injunctive relief, we determine that **the more deferential "manifest abuse of discretion" is the appropriate standard for reviewing the granting of a preliminary or permanent injunction. A "manifest" abuse of discretion is one that is obvious, evident or unmistakable.** Black's Law Dictionary, 6th Ed. To the extent that the cases listed below are inconsistent with this holding, they are overruled...

319 Mont. at 136-137, 82 P.3d at 916.

The Supreme Court concluded that the plaintiff had met two of the disjunctive subsections of MCA 27-19-201, but observed that the plaintiff’s only injury, should the defendant spend its sale proceeds prior to judgment, was economic, which appeared to be reparable with the legal remedy of money damages. Injunctive relief may still be appropriate, but only if the petitioner satisfies a four part test:

**Generally, injunctive relief is not granted where an action for monetary damages will afford an adequate remedy.** *Boyer*, 178 Mont. at 31, 582 P.2d at 1177 (citing *State v. Krieg* (1965), 145 Mont. 521, 402 P.2d 405). In *Van Loan*, this Court adopted a four-part test to determine "whether a preliminary injunction should issue when a party's monetary judgment may be made ineffectual by the actions of the adverse party thereby irreparably injuring the applicant. The moving party has the burden of proving these elements." The test is:

- (1) the likelihood that the movant will succeed on the merits of the action;
- (2) the likelihood that the movant will suffer irreparable injury absent the issuance of a preliminary injunction;
- (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party (a balancing of the equities); and
- (4) the injunction, if issued, would not be adverse to the public interest.

*Van Loan*, 271 Mont. at 182, 895 P.2d at 617.

319 Mont. at 138-139, 82 P.3d at 917. The trial judge held an initial hearing, and concluded then that the damage to the plaintiff if the injunction were not granted would be greater than the damage to defendant if the injunction were granted. He later held another hearing to consider more evidence on the balancing of the equities, and reached the same conclusion. The trial judge also concluded that the public interest favored the injunction. The Montana Supreme Court affirmed these conclusions.

The defendant then argued that the trial court's injunction should be set aside because his findings and conclusions did not sufficiently set forth the reasons for its issuance. The Court held, however, that the trial judge's reasoning was adequate and affirmed the preliminary injunction. (Justices Gray and Rice dissented).

Generally, injunctive relief is not granted where an action for monetary damages will afford an adequate remedy. *Boyer*, 178 Mont. at 31, 582 P.2d at 1177 (citing *State v. Krieg* (1965), 145 Mont. 521, 402 P.2d 405). In *Van Loan*, this Court adopted a four-part test to determine "whether a preliminary injunction should issue when a party's monetary judgment may be made ineffectual by the actions of the adverse party thereby irreparably injuring the applicant. The moving party has the burden of proving these elements." The test is:

- (1) the likelihood that the movant will succeed on the merits of the action;
- (2) the likelihood that the movant will suffer irreparable injury absent the issuance of a preliminary injunction;
- (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party (a balancing of the equities); and
- (4) the injunction, if issued, would not be adverse to the public interest.

*Van Loan*, 271 Mont. at 182, 895 P.2d at 617.

319 Mont. at 138-139, 82 P.3d at 917.

The Court affirmed the preliminary injunction over the defendant's objection that the trial judge's order was not specific enough about the reasons for its issuance:

Canyon correctly points out that **Rule 52(a), M.R.Civ.P., requires that a court must set forth the findings of fact *and* conclusions of law which constitute the grounds of its action in granting or refusing interlocutory injunctions.** However, we have held that "the extent of such findings and conclusions is necessarily dependent on the facts and circumstances of each case ... the litmus test in such cases is whether the District Court's order sets forth its reasoning in a manner sufficient to allow informed

**appellate review."** *Lake v. Lake County* (1988), 233 Mont. 126, 134, 759 P.2d 161, 165 (citing *Clemans v. Martin* (1986)), 221 Mont. 483, 487, 719 P.2d 787, 789-90. We determine, based on the above discussion, that the District Court set forth its reasoning in this case in a manner sufficient to allow informed appellate review.

319 Mont. at 141-142, 82 P.3d at 919.