Montana Law Review

Volume 44
Issue 2 *Summer 1983*

Article 11

July 1983

Civil Procedure

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CIVIL PROCEDURE

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INTRODUCTION

This survey examines Montana Supreme Court decisions concerning civil procedure issued from January 1, 1982, through December 31, 1982. Selected opinions are discussed to highlight new developments and current trends. Cases applicable solely to administrative or family law are discussed in those surveys.

I. JURISDICTION

The Montana long-arm statute[1] continues to be broadly construed in order to reach non-resident defendants. In *Reed v. American Airlines, Inc.*,[2] a case certified from the United States District Court, the Montana Supreme Court substantially extended the reach of personam jurisdiction when a plaintiff's claim for relief does not arise out of activities of the non-resident defendant in the forum state.[3]

In *Reed*, the plaintiff traveled to New York City from Missoula, Montana, on Northwest Airlines and intended to transfer flights and continue on British Airways to Nepal. Plaintiff lost a case carrying professional camera equipment during the transfer between airlines, and the case was later discovered empty.[4] Plain-

1. MONT. R. CIV. P. 4B(1) provides in part: "All persons found within the state of Montana are subject to the jurisdiction of the courts of this state."

2. ___ Mont. ___, 640 P.2d 912 (1982).

3. *Id.* The court determined the in personam jurisdiction of the non-resident defendant to be encompassed in the words "found within" of MONT. R. CIV. P. 4(B)(1).

4. *Reed*, ___ Mont. ___, 640 P.2d at 913.

tiff filed a diversity action in federal district court against American Airlines[5] for the damages resulting from the lost camera equipment.[6] Upon certification the Montana Supreme Court held that American Airlines was "found within Montana" under Montana Rules of Civil Procedure 4B(1) so that the United States District Court for the District of Montana had jurisdiction over the non-resident airlines.[7]

American Airlines, a Delaware corporation, did not fly into or out of Montana except for an infrequent charter flight, had no property or personnel in Montana, and paid no taxes in Montana. American Airlines did solicit business in Montana by listings in nineteen Montana telephone directories, telephone advertising in Montana, furnishing material to Montana travel agents, and by affording a toll free number for Montana residents. In addition, American Airlines personnel occasionally came to Montana to instruct Montana travel agents.[8] Relying in part on New York and Tennessee federal district cases,[9] the court determined that American Airlines' activities were so "substantial, continuous, and systematic" that they constituted a physical presence in Montana, even though the claim for relief had arisen in New York.[10]

This case marks an extension of the reach of long-arm jurisdiction since the only contact American Airlines had with the forum state was through advertising activities. Traditional contacts of a non-resident defendant, such as maintenance of an office or ownership of land, were lacking. Instead, promotional activities directed at Montana in the hopes of making a profit were determined to be a sufficient link to confer long-arm jurisdiction.

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5. Plaintiff alleged that American Airlines somehow gained possession of the camera case. *Id.*

6. *Id.*

7. *Id.* at ____, 640 P.2d at 913-15.

8. *Id.*

9. *See* Ladd v. KLM Royal Dutch Airlines, 456 F. Supp. 422 (S.D.N.Y. 1978) and Gullett v. Quantas Airways, 417 F. Supp. 490 (M.D. Tenn. 1975). In *Ladd* the defendant airlines had its principal place of business in the Netherlands and was not authorized to fly into Tennessee. The court determined that the Tennessee court had jurisdiction over the airlines even though the airlines paid no taxes in Tennessee and had no office, bank account, nor property in Tennessee. The airlines did maintain toll free numbers within Tennessee, advertise in Tennessee telephone directories, supply promotional materials to Tennessee travel agents, and personally instruct Tennessee travel agents. Similarly, in *Gullet*, the federal district court held that jurisdiction of the defendant Quantas Airways, Ltd., was established when the airlines maintained toll free telephone listings, placed advertisements in national media circulating in the state, supplied travel agents with promotional materials, and sent personnel to the forum state, even though the airline owned no property nor maintained any offices within the state.

10. *Reed*, ____ Mont. ____, 640 P.2d at 915.

II. VENUE

The Montana Supreme Court considered for the first time whether a third-party defendant has the right to a change of venue under Montana venue statutes.[11] In *Novco v. Grainger*[12] plaintiff initiated an action against defendants Harold and Howard Grainger to recover money owed from Sunset Carburetor and Electric, Inc. Graingers filed a third-party complaint against Sunset Carburetor, alleging that the corporation was the real party in interest and liable to the plaintiff. Sunset Carburetor moved for a change of venue, asserting that a third-party defendant has an independent right to a change of venue of the original action.[13] Writing for a unanimous court, Justice Haswell followed the reasoning of federal courts[14] and held that the privilege of objecting to venue in a main action is a personal privilege belonging to the defendant in the principal action. Any third-party proceeding arising out of the main action and involving similar facts is ancillary to the principal action, and venue is determined from the main action.[15]

The Montana statutes pertaining to venue have no specific provisions regarding a third-party defendant's right to object to venue. The Montana Supreme Court has now made it clear that a third-party defendant cannot object to venue.

III. STATUTE OF LIMITATIONS

The law favors a right of action over a right of limitation.[16] The Montana Supreme Court continues to liberally construe the Montana statutes of limitations and, in a recent case, held that a cause of action does not accrue, and the statute of limitations does

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11. MONT. CODE ANN. § 25-2-108 (1981) states:

> In all other cases, the action shall be tried in the county in which the defendants or any of them reside at the commencement of the action or where the plaintiff resides and the defendants or any of them may be found; or if none of the defendants reside in the state or, if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint, subject, however, to the power of the court to change the place of trial as provided in this code.

See also MONT. CODE ANN. §§ 25-2-101 to -107 (1981).

12. ___ Mont. ___, 649 P.2d 445 (1982).

13. *Id.* Sunset Carburetor and Electric, Inc. asserted this reasoning since under MONT. R. CIV. P. 14(a), a third-party defendant is entitled to assert against a plaintiff any defenses that a third-party plaintiff might have asserted.

14. *See, e.g.*, Brandt v. Olson, 179 F. Supp. 363 (N.D. Iowa 1959).

15. *Novco*, ___ Mont. ___, 649 P.2d at 446. *See, e.g.*, Peninski v. Goodyear Tire & Rubber Co., 499 F. Supp. 1092 (N.D. Ill. 1980); Seafood Imports, Inc. v. A. J. Cunningham Packaging Corp., 405 F. Supp. 5 (S.D.N.Y. 1975); Season-All Indus., Inc. v. Merchant Shippers, 385 F. Supp. 517 (W.D. Pa. 1974).

16. *See, e.g.*, In re Goldworthys' Estate, 45 N.M. 406, 115 P.2d 627 (1941).

not begin to run until damages due to a rising water table are stabilized.[17]

In *Blasdel v. Montana Power Co.*,[18] plaintiffs filed suit for inverse condemnation of plaintiff's farm. Montana Power began operating the Kerr Dam on Flathead Lake in 1940, and plaintiffs claimed that operation of the dam caused the water table to rise and severely damage plaintiffs' farm. Plaintiffs first notified Montana Power of damage to their land in 1941, yet the first complaint was not filed until December 1, 1960.[19] Defendants alleged that since the cause of action started running in 1941, the suit was barred by the statute of limitations.[20] The Montana Supreme Court had previously ruled that a rising water table is a "taking" or permanent invasion of land.[21] This case, however, marked the first time that the court decided when that cause of action accrued. The court relied on a 1947 United States Supreme Court case[22] which determined that a suit can be postponed until the situation becomes stabilized. In the *Blasdel* case, the district court had found that permanent damage could not be ascertained until the growing season of 1959-1960. Since the damages did not stabilize until 1959-1960, the supreme court determined that the cause of action did not accrue until that time, and the action initiated December 1, 1960, was not barred by the statute of limitations.[23] This holding allows a property owner to wait to sue until damages are stabilized and have become permanent without being penalized by the statute of limitations.

Another statute of limitations case addressed the tolling of the statute of limitations against a minor.[24] In *Smith v. Sturm, Ruger, & Co.*,[25] the United States District Court certified a question to the

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17. Blasdel v. Montana Power Co., ___ Mont. ___, 640 P.2d 889 (1982).

18. *Id.*

19. *Id.* at ___, 640 P.2d at 891-92. Plaintiffs filed four amended complaints.

20. *Id.* at ___, 640 P.2d at 893. Montana Power pleaded as an affirmative defense that any of the following applicable statutes of limitations had run: MONT. CODE ANN. §§ 27-2-203(3), -207, -215 (1981).

21. Rauser v. Toston Irr. Dist., 172 Mont. 530, 565 P.2d 632 (1977).

22. United States v. Dickinson, 331 U.S. 745 (1947).

23. *Blasdel*, ___ Mont. ___, 640 P.2d at 893-94.

24. MONT. CODE ANN. § 27-2-401(1) provides:

> (1) if a person entitled to bring an action mentioned in part 2, except 27-2-211(3), is, at the time the cause of action accrues, either a minor, seriously mentally ill, or imprisoned on a criminal charge or under a sentence for a term less than for life, the time of such disability is not part of the time limited for commencing the action. However, the time so limited cannot be extended more than 5 years by such disability except minority or, in any case, more than 1 year after the disability ceases.

25. ___ Mont. ___, 643 P.2d 576 (1982).

Montana Supreme Court concerning a suit filed two years and three and a half months after petitioner reached the age of majority. Petitioner had been injured by an allegedly defective revolver manufactured by Sturm, Ruger and Co. when petitioner was two years and ten months under the age of majority.[26]

Petitioner alleged that he was entitled to the full three-year statutory period[27] after he reached majority since the statute was tolled during his period of disability and began to run when he reached majority.[28] Defendant argued that the last sentence of Montana Code Annotated section 27-2-401(1) (1981) creates an absolute one-year period of limitations after reaching majority: "[T]he time so limited cannot be extended more than 5 years by any such disability except minority or, in any case, more than 1 year after the disability ceases."

The court followed a prior Montana case[29] and held that the one-year limitation is not relevant until the person is under the disability for the full statutory period. Since the petitioner was not under a disability for the full three years (only 2 years and ten months), the petitioner was afforded the entire statutory period after attaining majority.[30]

This case illustrates that the court will strictly adhere to its earlier ruling that a person must be under a disability for the full statutory period before the one-year limitation is utilized. In *Smith*, plaintiff was only two months short of the three-year statute of limitations before reaching majority and was still afforded the entire three-year period after he reached eighteen years.

IV. RES JUDICATA

The doctrine of res judicata precludes a court from considering issues raised in a second collateral attack when the issues could have been raised in a first collateral attack.[31]

In 1982, the Montana Supreme Court affirmed its adherence to the doctrine of res judicata in a case involving a complex factual

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26. *Id.* at ____, 643 P.2d at 577.

27. MONT. CODE ANN. § 27-2-204(1) (1981) provides: "The period prescribed for the commencement of an action upon a liability not founded upon an instrument in writing is within 3 years."

28. *Sturm, Ruger & Co.*, ____ Mont. ____, 643 P.2d at 577.

29. State ex rel. Hi-Ball Constr., Inc. v. District Court, 154 Mont. 99, 460 P.2d 751 (1969). The statute of limitations was tolled during the period that the plaintiff was insane.

30. *Sturm, Ruger & Co.*, ____ Mont. ____, 643 P.2d at 577.

31. *See, e.g.*, Royal Coachmen & Color Guard v. Marine Trading, 398 A.2d 383 (Me. 1979).

scenario. In *Wellman v. Wellman*,[32] a default judgment in favor of E. G. Wellman was entered in 1971 which granted him relief beyond the scope of the pleadings. Dalton and Anna Wellman, plaintiffs in the subsequent 1981 action, moved in 1971 to set aside the default judgment on the grounds of mistake, inadvertence, or excusable neglect pursuant to rule 60(b)(1). The district court denied the motion. No further action was taken until February 27, 1981, when plaintiffs Dalton and Anna Wellman filed a complaint that raised a jurisdictional issue concerning the 1971 action. The Montana Supreme Court relied on two Maine cases[33] in determining that the case was barred by res judicata since plaintiffs had ample opportunity to litigate the jurisdictional question in 1971 when they moved to set aside the default judgment.[34] This case specifically addressed the policies underlying the doctrine of res judicata and the doctrine's application to a complex case.

V. DISCOVERY

The Montana Supreme Court may be retreating from its tough stance that emerged in 1981 concerning abuses of the discovery process. During 1981, several cases were decided that emphasized a tougher, less tolerant attitude towards parties who frustrate, rather than facilitate, discovery. Beginning with *Calaway v. Jones*,[35] the Montana Supreme Court affirmed a district court judgment in favor of the plaintiff when the defendant failed to appear at a pretrial conference.[36] The court held that the defendant had displayed an "attitude of unresponsiveness" evidenced by his failure to timely respond to interrogatories, his failure to appear at depositions, and his failure to seek substitute counsel.[37] Because of these deficiencies, the district court had the discretion to impose sanctions of default and dismissal for defendant's failure to attend a pretrial conference.[38]

In another 1981 case, *Owen v. F. A. Buttrey Co.*,[39] the court strongly reprimanded defense counsel for failing to comply with discovery requests, including a series of district court orders to

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32. ___ Mont. ___, 643 P.2d 573 (1982).

33. Royal Coachman & Color Guard v. Marine Trading, 398 A.2d 383 (Me. 1979); Willette v. Umhoeffer, 268 A.2d 617 (Me. 1970).

34. *Wellman*, ___ Mont. ___, 643 P.2d at 574-76.

35. ___ Mont. ___, 624 P.2d 991 (1981).

36. *Id.* at ___, 624 P.2d at 992. Defendant had received information concerning the time and place of the pretrial conference.

37. *Id.*

38. *Id.*

39. ___ Mont. ___, 627 P.2d 1233 (1981).

compel discovery. Defendant had appealed sanctions imposed by the district court under rule 37(d),[40] and the Montana Supreme Court affirmed the district court judgment, noting that "when litigants use willful delay, evasive response, and disregard of court direction as part and parcel of their trial strategy, they must suffer the consequences."[41]

During the survey period, the Montana Supreme Court has not stringently enforced sanctions against parties who violate discovery procedures. In *Johnson v. Young Men's Christian Association of Great Falls*,[42] plaintiff moved for a new trial based partly on defendant's failure to supplement its interrogatory answers. The court noted that actions by attorneys on both sides were not commendable since they were lax in keeping the other party informed of pretrial developments and in supplementing answers to interrogatories. Yet, defendant's actions were not held sufficient to constitute reversible error. The previous strict attitude of the court towards parties that frustrate or delay the discovery process was not evident and *Owen v. F. A. Buttrey Co.* was not cited.[43]

The court again failed to adopt the harsh approach that had been evident in 1981 in *Thibaudeau v. Uglam*,[44] where defendant failed to accurately answer interrogatories and attempted to impeach plaintiff by using the omitted information. The court stated that defense counsel violated their duty to supplement interrogatories and to amend incorrect responses,[45] but no harsh language was utilized to reprimand counsel and no sanctions were imposed on

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40. MONT. R. CIV. P. 37(d) provides in relevant part:
If a party or an officer, director, or managing agent of a party or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure *as are just*, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. (emphasis added).

41. *Owen*, ___ Mont. ___, 627 P.2d at 1236.

42. ___ Mont. ___, 651 P.2d 1245 (1982).

43. *Id.* at ___, 651 P.2d at 1249.

44. ___ Mont. ___, 653 P.2d 855 (1982).

45. MONT. R. CIV. P. 26(e)(2) states:
a party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is not longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

defense counsel.[46]

VI. Juries and Jury Practice

In *Abernathy v. Eline Oil Field Service, Inc.*,[47] the Montana Supreme Court determined that the forced use of a peremptory challenge to excuse a juror that should have been excused for cause is not always sufficient grounds for reversal. In that case, potential juror indicated during voir dire strong negative feelings against allowing suits to recover money for the death of a child,[48] and the district court refused to dismiss the juror for cause. Plaintiff exercised one peremptory challenge to remove the juror and plaintiff contended that it was prejudicial error to compel a party to waste a peremptory challenge. The court rejected the reasoning of Arizona and Utah cases[49] that held that the forced use of a peremptory challenge to strike jurors who should have been dismissed for cause, in and of itself, is sufficient grounds for reversal of a judgment. Instead, the court stated that a new trial should be granted for the forced use of a peremptory challenge only when there is an abuse of discretion of the trial judge.[50] In *Abernathy* the court found an abuse of discretion by the trial judge that constituted reversible error.

In another case, *Safeco Insurance Co. v. Lovely Agency*,[51] the Montana Supreme Court held that a party may not unilaterally waive a jury trial withdrawing a demand for a jury trial. In *Safeco Insurance Co.* the trial court ordered that the case be tried without a jury after the defendants waived their demand for a jury trial and the plaintiff refused to consent. Recognizing that rule 38(d)[52] states that a demand for trial by jury cannot be withdrawn without the consent of the parties, the court relied on Colorado and Alaska law[53] and held that where one party has made a proper demand for a jury trial, the opposing party has the right to insist on a jury.[54]

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46. *Thibaudeau*, ___ Mont. ___, 653 P.2d at 858.

47. ___ Mont. ___, 650 P.2d 772 (1982).

48. Mont. Code Ann. § 25-7-223 (1981) provides in part: "Challenges for cause may be taken on one or more of the following grounds . . . (b) having an unqualified opinion or belief as to the merits of the action. . . ."

49. Crawford v. Manning, 542 P.2d 1091 (Utah 1975); Wasko v. Frankel, 116 Ariz. 288, 569 P.2d 230 (1977).

50. *Abernathy*, ___ Mont. ___, 650 P.2d at 777-78.

51. ___ Mont. ___, 652 P.2d 1160 (1982).

52. Mont. R. Civ. P. 38(d) provides in part: "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

53. Forester v. Superior Court, 488 P.2d 202 (Colo. 1971); Hill v. Vetter, 525 P.2d 529 (Alaska 1974).

54. *Safeco Ins. Co.*, ___ Mont. ___, 652 P.2d at 1162.

VII. JUDGMENTS

A. *Relief from Judgment: Rules 60(b) and 60(c)*

Rule 60(b) provides in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . (6) any other reason justifying relief from the operation of the judgment . . . .

The Montana Supreme Court continues to require substantial reasons to support a setting aside of a judgment under rule 60(b). In *Schmidt v. Jomac, Inc.*,[55] a default judgment was entered against defendants when counsel for defendants did not file an answer because counsel mistakenly relied on the automatic stay provision of the Bankruptcy Code.[56] The court rejected defendants' argument that the default judgment should be vacated under rule 60(b)(1) because of a mistaken reliance on the automatic stay provision of the Bankruptcy Code.[57] Under rule 60(b)(1) a "mistake" refers to a mistake of fact, not a mistake of law, such as a mistaken reliance on an automatic stay.[58] The court further rejected the application of rule 60(b)(6). Distinguishing a 1949 United States Supreme Court case,[59] the court held that a rule 60(b)(6) motion must be made within a reasonable time. Further, the court held that rule 60(b)(6) is exercised at the discretion of the trial court and is guided by accepted legal principles in light of all relevant circumstances. In *Schmidt* the motion to set aside the default judgment was not made within a reasonable time (231 days after the judgment was entered), so that use of rule 60(b)(6) was not proper.[60]

Tesch v. Tesch[61] illustrates the type of circumstances which the court will use to relieve a party from a final judgment under rule 60(b)(6). A default judgment giving the husband all the wife's interest in their farm was entered when the severely handicapped wife failed to appear at the divorce proceeding. The court noted that rule 60(b)(6) is a "catch-all provision" designed for use in "ex-

55. ___ Mont. ___, 639 P.2d 517 (1982).
56. *Id.* at ___, 639 P.2d at 519.
57. *Id.*
58. *Id.*
59. Klapprott v. United States, 335 U.S. 601 (1949).
60. *Schmidt*, ___ Mont. ___, 639 P.2d at 519-20.
61. ___ Mont. ___, 648 P.2d 293 (1982).

traordinary circumstances." Extraordinary circumstances were apparent in this case: the wife was totally disabled by multiple sclerosis and nothing in the record proved the wife's competency or her voluntary relinquishment of her interests in the farm.[62]

The catch-all language of rule 60(b)(6) also permits relief if the client's counsel grossly neglects the case due to personal problems. In *Ring v. Hoselton*,[63] the Montana Supreme Court reversed the district court's denial of a motion for relief from findings, conclusions, and judgment. Counsel for defendant Aetna suffered emotional problems and failed to adequately defend the rights of his clients before and during the trial. The court determined that equity required the district court to hold a hearing and determine if the judgment should be vacated.[64]

The Montana Supreme Court continues to require strict compliance with the time requirements set forth in rule 60(c) for a motion to vacate a default judgment. Rule 60(c) provides that motions under rules 60(a) and 60(b) must comply with the time provisions of rule 59 for motions for new trials.[65] Rule 59(d) requires that a hearing on a motion shall be had within ten days after it is served, except that a court may continue the hearing for thirty days.[66] If any of the time limitations are ignored, the court loses jurisdiction to hear the motion.

In *Wallinder v. Lagerquist*,[67] the Montana Supreme Court affirmed the district court's denial of a rule 60(b) motion to vacate a default judgment. Defendants Marwicks moved the court to vacate a default judgment on June 25, 1981, seven days after the entry of default judgment. The district court originally set the motion for hearing on July 6, 1981, and by stipulation continued the hearing to July 17, using eleven of the thirty days allowed for a continu-

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62. *Id.* at ___, 648 P.2d at 295-96.

63. ___ Mont. ___, 643 P.2d 1165 (1982).

64. *Id.* at ___, 643 P.2d at 1172.

65. MONT. R. CIV. P. 60(c) provides: "Motions provided by subdivisions (a) and (b) of this rule shall be heard and determined within the times provided by Rule 59 in the case of motions for new trial and amendment of judgment."

66. MONT. R. CIV. P. 59(d) provides in part:

> Hearing on the motion shall be had within 10 days after it has been served . . . except that at any time after the notice of hearing on the motion has been served the court may issue an order continuing the hearing for not to exceed 30 days. In case the hearing is continued by the court, it shall be the duty of the court to hear the same at the earliest practicable date thereafter. . . . If the court shall fail to rule upon the motion within said time, the motion shall, at the expiration of said period, be deemed denied. . . . If the motion is not noticed up for hearing and no hearing is held thereon, it shall be deemed denied as of the expiration of the period of time within which hearing is required to be held under this rule 59.

67. ___ Mont. ___, 653 P.2d 840 (1982).

ance under rule 59. On July 17, the district court again continued the hearing to October 7 due to a conflict in the court's calendar. When the hearing was held on October 7, the district court denied defendant's motion since the court lacked jurisdiction due to the passage of more than thirty days. Defendants appealed and the Montana Supreme Court affirmed the denial, holding that the district court could continue the motion on July 17 for a maximum of nineteen days (until August 5), so the October 7 date placed the motion beyond the jurisdiction of the court. When the thirty-day period ended on August 5, the motion was deemed denied under rule 59(c). At this point, defendants had thirty days in which to appeal under Montana Rules of Appellate Civil Procedure rule 5,[68] and the appeal was not filed within the allowable time period.[69] Writing for the court, Justice Weber specifically warned attorneys and district courts that rules 59 and 60 are significantly stricter than the companion rules in the Federal Rules of Civil Procedure and that a failure to comply results in a loss of jurisdiction and inability of the trial court to consider the case on the merits.[70]

B. *Amendment of the Judgment*

Rule 52(b)[71] allows a court to amend findings and judgment upon the motion of a party. The Montana Supreme Court in *Marta v. Smith*,[72] determined that a court cannot amend a judgment without a motion by a party. In *Marta* the district court amended its conclusions of law and omitted an alternative previously allowed to plaintiffs. This amendment was done without holding an evidentiary hearing and without making findings of fact and conclusions of law. The supreme court held that the district court abused its discretion when it did not hold an evidentiary hearing.[73]

VIII. Findings of Fact and Conclusions of Law

The Montana Supreme Court continues to criticize the district court practice of verbatim adoption of the proposed findings of

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68. Mont. R. Civ. P. 5, provides in part: "The time within which an appeal from a judgment or an order must be taken shall be 30 days from the entry thereof. . . ."

69. *Wallinder*, ___ Mont. ___, 653 P.2d at 841-43.

70. *Id.*

71. Mont. R. Civ. P. 52(b) provides in part: "Upon motion of a party made not later than 10 days after notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly."

72. ___ Mont. ___, 650 P.2d 1387 (1982).

73. *Id.* at ___, 650 P.2d at 1389.

fact and conclusions of law submitted by the prevailing party in non-jury trials.[74] In *Sawyer-Adecor International, Inc. v. Anglin*,[75] the district court adopted verbatim the findings of fact and conclusions of law presented by plaintiff Sawyer. The court noted that this practice remains a "sore point in this state" and that the verbatim adoption is disapproved of "heartily and stoutly." Yet, the court held that the practice does not mandate automatic reversal.[76] The court further held that the "clearly erroneous" standard of rule 52(a)[77] still applies to verbatim adoption.[78]

IX. Appellate Procedure

Rule 54(b) states that when multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment concerning less than all claims or parties upon an express direction for entry of judgment. The basic purpose of rule 54(b), modeled after federal rule 54(b), is to avoid the possible injustice of delay by making an immediate appeal available upon distinctly separate claims, or as to fewer than all the parties, instead of waiting until final adjudication.[79]

In a 1980 case, *Roy v. Niebauer*,[80] the Montana Supreme Court stated the steps required to certify a partial summary judgment or partial judgment for appeal. In a 1982 case, *Taylor Rental Corporation v. Ted Godwin Leasing, Inc.*,[81] the court dismissed an appeal of a partial summary judgment under rule 54(b) when the district judge failed to adhere to the strict standards set forth in *Niebauer*. The court issued a warning that if parties refuse to comply with the rules and court decisions, sanctions for frivolous appeals will be imposed under Montana Rules of Appellate Civil Procedure 32.[82]

In a case which is appealed, an appellant's brief must contain a separate statement of issues presented for review under rule

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74. *See also* Speer v. Speer, ___ Mont. ___, 654 P.2d 1001 (1982).

75. ___ Mont. ___, 646 P.2d 1194 (1982).

76. *Id.* at ___, 646 P.2d at 1197-98.

77. Mont. R. Civ. P. 52(a) provides in relevant part: "Findings of fact shall not be set aside unless clearly erroneous. . . ."

78. *Sawyer-Adecor Int'l.*, ___ Mont. ___, 646 P.2d at 1198.

79. 10 Wright and Miller, Federal Practice and Procedure ¶ 2654 (1973).

80. ___ Mont. ___, 610 P.2d 1185 (1980).

81. ___ Mont. ___, 648 P.2d 1168 (1982).

82. *Id.* at ___, 648 P.2d at 1169. Mont. R. App. Civ. P. 32 provides: "If the supreme court is satisfied from the record and the presentation of the appeal, that the same was taken without substantial or reasonable grounds, but apparently for purposes of delay only, such damages may be assessed on determination thereof as under the circumstances are deemed proper."

23(a)(2).[83] The Montana Supreme Court requires strict compliance with these rules, and in a recent case, *Johnson v. Young Men's Christian Association of Great Falls*,[84] the court noted that the appellant's brief did not contain a separate statement of issues for review. The court admonished counsel to conform their briefs to rules 23 through 27.[85]

X. Disqualification of Judges

The issue of whether a judge may reassume jurisdiction when the reason for disqualification ceases to exist was recently addressed by the Montana Supreme Court in *State ex rel McKendry v. the District Court of the Fourth Judicial District of the State of Montana*.[86] Respondent Judge Harkin of the Fourth Judicial District, due to a heavy trial schedule and case load, had invited Judge Holter to assume jurisdiction of the pending action. The defendant moved for substitution of Judge Holter and again moved for substitution of the successor Judge Allen. Respondent Judge Harkin then reassumed his original jurisdiction because he was no longer experiencing scheduling difficulties. Defendant petitioned the court for a writ of supervisory control directing respondent Judge Harkin to relinquish all further jurisdiction in the case. The Montana Supreme Court rejected defendant's assertion that respondent was divested of all jurisdiction by showing that there actually was no disqualification or that the disqualification had been removed.[87]

The Montana Supreme Court affirmed its strict stance prohibiting a motion for substitution of judge that is filed merely to "hinder, delay and cloud the issues." In *Hart v. New Park Hotel, Inc.*,[88] a notice of entry of judgment was served on the parties in May, 1980 and plaintiff filed a motion for substitution of judge on July 7, 1980. The supreme court affirmed the district court order requiring plaintiff and his attorney jointly and severally to pay $500 as a sanction and to pay reasonable attorney's fees incurred by the defendant, since the plaintiff's only purpose behind the purported disqualification was to hinder and delay the proceedings.[89]

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83. Mont. R. App. Civ. P. 23(a) provides in part: "Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated: . . . (2) a statement of the issues presented for review."

84. ___ Mont. ___, 651 P.2d 1245 (1982).

85. *Id.* at ___, 651 P.2d at 1247.

86. ___ Mont. ___, 653 P.2d 847 (1982).

87. *Id.* at ___, 653 P.2d at 848-49.

88. ___ Mont. ___, 638 P.2d 1068 (1982).

89. *Id.* at ___, 638 P.2d at 1069.