

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 22-0279

---

CREMER RODEO LIVESTOCK COMPANY,

Plaintiff and Appellee,

vs.

LINDA MCMULLEN

Defendant and Appellant.

---

**APPELLANT'S RULE 22(2) MOTION**

---

On Appeal from the Montana Sixth Judicial District Sweet Grass County

Cause No. DV-2016-23

Honorable Judge Brenda Gilbert

---

APPEARANCES

J. Devlan Geddes  
Kyle W. Nelson  
Henry J.K. Tesar  
GOETZ, GEDDES & GARDNER  
PO Box 6580  
Bozeman, MT 59771-6580  
(406) 587-0618  
[devlan@goetzlawfirm.com](mailto:devlan@goetzlawfirm.com)  
[knelson@goetzlawfirm.com](mailto:knelson@goetzlawfirm.com)  
[htesar@goetzlawfirm.com](mailto:htesar@goetzlawfirm.com)  
*Attorneys for Defendant and Appellant  
Linda McMullen*

Karl Knuchel  
Webster Crist  
KARL KNUCHEL, P.C.  
101 North E Street  
PO Box 953  
Livingston, MT 59047  
(406) 222-0135  
[karl@knuchelpc.com](mailto:karl@knuchelpc.com)  
[webster@knuchelpc.com](mailto:webster@knuchelpc.com)  
*Attorneys for Plaintiff and Appellee  
Cremer Rodeo Livestock Company*

Appellant Linda McMullen (Linda) moves pursuant to M.R.App.P. 22(2)(a) for relief from the district court's June 24, 2022 Order Re: Motion for Stay Pending Appeal (Order). Linda sought a stay in the district court, pursuant to M.R.App.P. 22(1)(a) and M.R.Civ.P. 62(c) to preserve the status quo pending appeal. The Motion and brief in support are attached hereto as Ex. A and Ex. B, respectively. The Order (Ex. C), which partially granted and partially denied the Motion, disrupts the status quo.

Linda respectfully requests this Court enter an order relieving her from the district court's Order.

### **Background and Procedural History**

In late 2016, the Appellee Cremer Rodeo Land and Livestock Company (Cremer Rodeo) filed its Complaint seeking, *inter alia*, a prescriptive easement over an abandoned Sweet Grass County Road—called the Lien Road—as it crosses Linda's property.

At the time the lawsuit was filed, Linda maintained a fence and ditch across the Lien Road as it enters her property. Linda first installed the fence in 2013 and replaced it after two occasions Cremer Rodeo removed it. Aff. of Linda McMullen, ¶¶ 2–3. Between 2015 and late August 2017, Cremer Rodeo took no action to remove Linda's fence, fill in her ditch, or—to her knowledge—otherwise use the

Lien Road on Linda's property. *Id.*, ¶¶ 3–4.

When Cremer Rodeo removed the fence again, Linda filed an unopposed, stipulated motion for preliminary injunctive relief (Ex. D). Linda asked the district court to prohibit Cremer Rodeo from “interfering with [her] property and disrupting the status quo” pending final adjudication. Cremer Rodeo did not oppose the motion and stipulated to entry of the proposed preliminary injunction.

On September 18, 2017, the district court entered the Stipulated Preliminary Injunction (Ex. E) (Injunction). The district court ordered that Cremer Rodeo was “preliminarily enjoined from interfering with or disturbing the status quo and otherwise using the Lien Road on Linda's Property during the pendency of this case, or until the preliminary injunction is lifted by order of the Court, or upon final resolution of this matter[.]” Ex. E.<sup>1</sup> In 2019, the district court denied Cremer Rodeo's motion to modify or lift the Injunction (Ex. F).

The Injunction was in-place through trial. On April 27, 2022, the court entered its Final Judgment (Ex. G) granting Cremer Rodeo prescriptive easements over both the Lien and Medley Roads, and requiring Linda to remove obstructions and replace cattle guards—effectively dissolving the Injunction.

---

<sup>1</sup> The Injunction also applied to the Medley Road because it is only accessible through Linda's property via the Lien Road. However, the Medley Road was not subject to a claim in the lawsuit at that time.

On May 26, 2022, Linda filed her notice of appeal. To preserve and protect her property pending appeal, and to alleviate the expense and need to remove fences and ditches and replace cattle guards (only to unwind that work later if her appeal is successful), Linda sought a stay in district court. Cremer Rodeo opposed the stay (Ex. H) but stipulated that, if granted, no bond or other security should be required.

The district court partially granted and partially denied Linda's motion. Ex. C. The court stayed its Final Judgment as it concerned cattle guards but determined Linda should be required to remove fencing and other obstructions so that Cremer Rodeo can use the roads on Linda's property—allowing it to travel over, and change, land that took years to return to its natural state and requiring Linda to take affirmative, and costly, action while the appeal is pending.

The district court's Order did not, as required by M.R.App.P. 22(1)(d), set forth the relevant facts or legal authority on which it is based. Therefore, it is difficult to discern with certainty whether the district court comprehensively ruled under M.R.App.P. 22(1)(a) and M.R.Civ.P. 62(c) or solely under Rule 22(1)(a)(i).<sup>2</sup>

---

<sup>2</sup> M. R. App. P. 22(1) is titled Motion for stay in the district court. M. R. App. P. 22(1)(a)(iii) is one of its subsections. The District Court noted that Linda requested reinstatement of the Stipulated Preliminary Injunction but seems to have only decided whether to stay the execution of the Judgment under 22(1)(a)(i).

In either case, good cause exists for this Court to grant Linda relief from the Order by staying the Final Judgment and restoring the Injunction pending a decision on the merits.

### **Discussion**

On grant or denial of a motion for relief under 22(1)(a), a party may file a motion for relief from the district court's order. M.R.App.P. 22(2)(a). "This Court retains the authority to review any decision by the district court regarding the stay of execution of a judgment or the denial or granting of an injunction pending appeal." *Plains Grains Ltd. P'ship v. Bd. of Cty. Comm'rs of Cascade Cty.*, 2010 MT 155, ¶ 73, 357 Mont. 61, 238 P.3d 332 (Rice, J., dissenting).

The moving party must, among other procedural requirements, demonstrate good cause. M. R. App. P. 22(2)(a)(i). "Good cause" is generally defined as a legally sufficient reason as to why the request should be granted. *Brookins v. Mote*, 2012 MT 283, ¶ 29, 367 Mont. 193, 292 P.3d 347 (internal citations omitted).

A primary purpose of a stay of a trial court order or judgment pending appeal is to preserve the status quo among the parties. *See e.g., D.C. v. Towers*, 250 A.3d 1048, 1053 (D.C. 2021); *Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Bd. of R.R. Commissioners of the State of Montana*, 247 P.2d 207 (Mem) (Mont. 1952).<sup>3</sup>

---

<sup>3</sup> This is highlighted by the fact that for a monetary judgment, a sufficient

In deciding whether to restore a preliminary injunction pending appeal, district courts apply the same standard used to evaluate motions for preliminary injunction. *See Alliance for the Wild Rockies v. Kruger*, 35 F. Supp. 3d 1259, 1263 (D. Mont. 2014). In Montana, beyond establishing one of the § 27-19-201, MCA subsections, “a district court must exercise its otherwise broad discretion only in furtherance of the limited purpose of a preliminary injunction[:] to preserve the status quo and minimize the harm to all parties pending final resolution on the merits.” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 14, 401 Mont. 405, 473 P.3d 386 (internal quotations and citations omitted).

**I. The Court should grant relief from the Order to preserve the status quo.**

Cremer Rodeo’s response was limited to two issues. First, Cremer Rodeo argued the status quo was a condition that existed before Linda installed fences in 2013. *See* Ex. H, pp. 2–4. Second, the balance of hardships did not tip in Linda’s favor—i.e., restoring the Injunction would not minimize harm to all parties. *See Id.*, pp. 4–6. The district court did not analyze either contention. Instead, it entered an

---

supersedeas bond leads to an automatic stay because it preserves the status quo pending appeal. *See* M. R. Civ. P. 62(d); *Arban v. W. Pub. Corp.*, 345 F.3d 390, 409 (6th Cir. 2003) (stay automatic under nearly identical Rule 62(d) of a former iteration of the FRCP); *Holland v. Law*, 35 F. Supp. 2d 505, 506 (S.D.W. Va. 1999); *Arban v. W. Pub. Corp.*, 345 F.3d 390, 409 (6th Cir. 2003) (the purpose of the supersedeas bond is to preserve the status quo during the appeal).

order that disrupts the status quo without explaining why.

The district court, however, partially granted the Motion. If the district court ruled on the entirety of the Motion, i.e., jointly under M.R.App.P. 22(1)(a)(i) and M.R.App.P. 22(1)(a)(iii)/M.R.Civ.P. 62(c), it misidentified the status quo and relief from the Order is appropriate. If the district court only analyzed the Motion under M.R.App.P. 22(1)(a)(i), it failed to analyze the Motion under M.R.App.P. 22(1)(a)(iii)/M.R.Civ.P. 62(c), and relief from the Order is also appropriate.

*a. The status quo should be maintained.*

The district court misidentified the status quo and relief from the Order is appropriate. *See Stapleton v. Thirteenth Judicial Dist. Court*, No. OP 20-0293, Order (Mont. May 27, 2020) (staying enforcement of preliminary injunction order to “maintain the status quo pending consideration of the issues”); *Montana Democratic Party et al. v. Jacobsen*, No. DA 22-0172, Order (Mont. May 17, 2022) (suspending preliminary injunction pending appeal to maintain the status quo).

The status quo is defined as “the last actual, peaceable, noncontested condition which preceded the pending controversy.” *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 350, 440 P.3d 4 (internal quotations and citations omitted). The status quo here is the condition established by the Injunction (which Cremer Rodeo agreed to): fences and ditches blocking access to the Lien and Medley Roads since

2015. *See* Ex. E; Aff. of Linda McMullen, ¶ 3.

Because the district court misidentified and then disrupted the status quo, there is good cause for relief from the district court's Order. The Court should stay the Final Judgment and restore the Injunction.

*b. The Stipulated Preliminary Injunction should be restored.*

The district court failed to analyze the Motion under M.R.App.P. 22(1)(a)(iii). This Court, however, may do so because the record is sufficiently developed. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1261 (10th Cir.2005).

Linda argued she met the requirements for a preliminary injunction because, among other things, she made a prima facie showing for relief. Ex. B. Linda demonstrated there was ample evidence of permissive use that would defeat Cremer Rodeo's prescriptive easement claims. She pointed to trial testimony of Elaine Allestad and the Cremer Rodeo shareholders showing that Cremer Rodeo's use of the Lien Road after the County abandoned it in 1991—and until 2013—was permissive based on an agreement among the neighbors. *See* Ex. B, pp. 8-9; Ex. I.

Cremer Rodeo did not—and could not<sup>4</sup>—dispute that Linda established one of the § 27-19-201, MCA subsections. Instead, Cremer Rodeo disputed the status

---

<sup>4</sup> “[P]ermissive use . . . cannot ripen into a prescriptive right, no matter how long it may continue, unless there is a distinct and positive assertion of a right hostile to the owner.” *Morrison v. Higbee*, 204 Mont. 515, 520, 668 P.2d 1025, 1027 (1983).



quo—discussed above—and the balance of hardships, arguing that it does not tip in Linda’s favor and that Linda would not be irreparably injured. *See* Ex. H, pp. 5–6.

Montana law does not require a party seeking the restoration of a preliminary injunction to show “irreparable injury” under § 27-19-201(1), MCA. Under that subsection, courts balance hardships to make sure that the injunction will minimize the harm to all parties—i.e., to minimize the sum of the harm.

Except for a one-off instance, Cremer Rodeo has not used the Lien or Medley Road on Linda’s property since September 2017. *Aff. of Linda McMullen*, ¶ 4. At trial, shareholder Ronda Johnston testified Cremer Rodeo may access the property for which it intends to access via the Lien and Medley Roads from other roads on Cremer Rodeo’s property. Ex. J. Use of the roads on Linda’s property may provide convenience but is not necessary for conducting its business.

Linda, on the other hand, will experience significant hardship if the Injunction is not restored. Through Linda’s hard work, the Lien and Medley Roads are full of grass and free of weeds—returned to their natural state after many years of non-use. *Aff. of Linda McMullen*, ¶ 1. Allowing Cremer Rodeo to use these roads while the appeal is pending would unwind Linda’s efforts. *Id.*, ¶ 5. It will take years to remediate the damage if Linda’s appeal is successful. *Id.* Moreover, Linda would unnecessarily expend resources complying with the Judgment.

The status quo is the condition that existed in 2015. It is best maintained by restoring the Injunction. It also minimizes the harm to all parties during the pendency of this appeal. Therefore, there is good cause for relief from the District Court's Order. This Court should restore the Injunction.

### **Conclusion**

Based on the foregoing, this Court should stay the Final Judgment and restore the Injunction pending final resolution on the merits.

DATED this 5<sup>th</sup> day of July, 2022.

GOETZ, GEDDES & GARDNER, P.C.

/s/ *Henry J.K. Tesar*  
J. Devlan Geddes  
Kyle W. Nelson  
Henry J.K. Tesar  
*Attorneys for Defendant /Appellant*

## **CERTIFICATE OF COMPLIANCE**

I certify that this Brief is printed with proportionately spaced Equity typeface of 14 points, is double spaced, and is within the 10-page limit under Rule of Appellate Procedure 22.

*/s/ Henry J.K. Tesar*

## Index of Appendix

<b>Exhibit</b>	<b>Document</b>	<b>Date</b>	<b>Page Range</b> (lower right-hand corner)
A	Defendant Linda McMullen's Motion for Stay Pending Appeal	June 2, 2022	1-4
B	Defendant Linda McMullen's Brief in Support of Motion for Stay Pending Appeal	June 2, 2022	5-42
C	Order Re: Motion for Stay Pending Appeal	June 24, 2022	43-45
D	Unopposed and Stipulated Motion for Preliminary Injunctive Relief	September 13, 2017	46-51
E	Stipulated Preliminary Injunction	September 18, 2017	52-54
F	Findings of Fact, Conclusions of Law Order Regarding Defendant's Motion for Contempt and Plaintiff's Request for Relief from Temporary Order	August 8, 2019	55-62
G	Judgment	April 27, 2022	63-65
H	Response to Defendant McMullen's Brief in Support of Motion for Stay Pending Appeal	June 20, 2022	66-73
I	Trial Testimony Regarding Permissive Use	May 2021	74-101
J	Trial Testimony Regarding Access	May 2021	102-106

## **CERTIFICATE OF SERVICE**

I, Kyle W. Nelson, hereby certify that I have served true and accurate copies of the foregoing Motion - Other to the following on 07-05-2022:

Karl Knuchel (Attorney)  
101 North E Street  
P.O. Box 953  
Livingston MT 59047  
Representing: Cremer Rodeo Land and Live Stock Company  
Service Method: eService

J. Devlan Geddes (Attorney)  
PO Box 6580  
Bozeman MT 59771  
Representing: Linda McMullen  
Service Method: eService

Henry Tesar (Attorney)  
35 North Grand  
Bozeman MT 59715  
Representing: Linda McMullen  
Service Method: eService

Electronically signed by Kaila Pelzer on behalf of Kyle W. Nelson  
Dated: 07-05-2022