

**IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 22-0614**

**ABBIGAIL STRAUB, BRITTNEY GRITTEN, BRITTNEY MILL, S.D.,
AND K.H.,**

Plaintiffs/Appellees,

v.

**CHIEN “HOWARD” HWA SHEN, SHEN PROPERTIES, LLC, CARNE,
INC. d/b/a CARNE BRAZILLIAN GRILL, ASIAN SEA GRILL, INC.,
WILD GINGER, INC., and TING TING “TINA” WU,**

Defendants/Appellants.

APPELLANT CHIEN “HOWARD” HWA SHEN’S OPENING BRIEF

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone
County, Docket No. DV 20-1233, the Honorable Judge Michael G. Moses,
Presiding

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. WHETHER TESTIMONY OF ONE PLAINTIFF, OUT OF SIX, ALLEGING SEXUAL ASSAULT, WITHOUT MORE, IS SUFFICIENT TO SUSTAIN A FINDING OF PROBABLE SUCCESS IN OBTAINING A MONEY JUDGMENT TO SUPPORT A PRELIMINARY INJUNCTION.
2. WHETHER A FINDING OF PROBABLE CAUSE TO FILE A CRIMINAL INFORMATION HAS ANY EVIDENTIARY VALUE WHATSOEVER IN AN INJUNCTION HEARING.
3. WHETHER THE COURT ABUSED ITS DISCRETION IN ISSUING A BROAD INJUNCTION AND ORDERING THE REVERSAL OF A PREVIOUS TRANSACTION.

II. STATEMENT OF THE CASE

The Plaintiffs filed a civil suit alleging assault and workplace discrimination against Chien “Howard” Hwa Shen (“Howard Shen”); the following numerous business entities: Shen Properties, LLC (“Shen Properties”), Carne, Inc. d/b/a Carne Brazilian Grill (“Carne”), Asian Sea Grill, Inc. (“Asian Sea Grill”), Wild Ginger, Inc. (“Wild Ginger”); and Ting Ting “Tina” Wu (“Tina Wu”). During the course of the proceedings and without amending their Complaint to include a prayer for injunctive relief, the Plaintiffs moved for injunctive relief on July 25, 2022, essentially freezing Howard Shen’s finances. (Doc. 56, *Pls.’ Prelim. Inj. Mot.*). Howard Shen resisted. From the Order Granting the Preliminary Injunction and further reversing a completed transaction, Howard Shen brings this appeal.

III. STATEMENT OF THE FACTS

The facts in this case are largely procedural, as there has been no trial yet. The Plaintiffs filed a wide-ranging Complaint alleging all manner of offenses, but the allegations of only one of the Plaintiffs are relevant here. This Plaintiff will be referenced by her initials, “B.M.” B.M.’s Complaint is the only one relevant to this inquiry and appeal because she is the only Plaintiff to file an affidavit on her own behalf and there is no admissible evidence in the record supporting the claims of the other Plaintiffs.

B.M. swears she was sexually assaulted on February 19, 2019, while employed with Wild Ginger. (Doc. 61, *Reply BIS of Pls.’ Prelim. Inj. Mot., Ex. 1*). No further details are averred to. (*Id.*). There is no averment as to any damages being sustained by way of mental distress, medical bills, lost wages, etc. (*Id.*). As it relates to the sexual assault Complaint, B.M.’s affidavit contained a simple, single sentence, with which she and her fellow Plaintiffs sought to freeze the assets of all the Defendants—Howard Shen, his employers, and his wife, Tina Wu—by way of an injunction.

The Plaintiffs filed for their injunction incorporating references to B.M.’s Complaint and further suggesting that the finding of probable cause in the criminal case against Howard Shen should be considered evidentiary. (Doc. 57, *BIS of Pls.’ Prelim. Inj. Mot.*). In other words, they asserted without any authority that a

finding of probable cause was sufficient to make a finding of likely success on the merits.

The injunction hearing was held September 30, 2022. The Plaintiffs called three witnesses, none of whom were Plaintiffs themselves. The first witness was the process server who served subpoenas on Howard Shen and Tina Wu. (Shen Appx. 24, *Hr'g. Tr.*). The District Court made no findings based on the process server's testimony; thus, it is of no consequence to this appeal. The Plaintiffs called Howard Shen, solely to force him to invoke his right against self-incrimination, and the District Court made no findings based on Howard Shen's invocation of the privilege. This was a correct ruling under Rule 505 of the Montana Rules of Evidence, which reads as follows:

Rule 505. Comment upon inference from claim or privilege. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the court or counsel. No inference may be drawn therefrom.

Rule 505, M.R.Evid. The Plaintiffs called Tina Wu who did not testify as to any facts germane to the underlying case against Howard Shen.

None of the Plaintiffs were called to testify by either party. After a brief argument, the District Court issued a wide-ranging ruling barring Howard Shen and others from transferring or concealing assets. Further, the District Court sought to undo transfers of wealth by Howard Shen to Tina Wu, and transfers with third parties. The District Court's ruling went so far as to admit it was relying on

Judge Colette Davies’ finding of probable cause in the concurrent criminal matter. (Shen Appx. 6, *FOF, COL, and Order Granting Pls. ’ Prelim. Inj. Mot.*).

IV. STANDARD OF REVIEW

A “‘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.” *Shammel v. Canyon Res. Corp.*, 2003 MT 372, ¶ 12, 319 Mont. 132, 82 P.3d 912 (citing BLACK’S LAW DICTIONARY (6th ed. 1990)).

To meet the exception to Montana’s general rule that, in regard to injunctive relief, issues involving money damages are not considered irreparable harm, a court must find injunctive relief to be warranted based upon its analysis of the following four factors:

- (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 v. Van Loan, 271 Mont. 176, 182, 895 P.2d 614, 617 (1995). However, this Court has cautioned that this “analysis is to be narrowly interpreted . . . [and that] courts cannot countenance routine, meritless, or vindictive petitions for preliminary injunctions of this sort. [Rather, a]n injunction is to be issued only under the most clear facts that fully satisfy the four-part test” *Id.* at 271 Mont. 183–85, 895 P.2d 618–19

V. SUMMARY OF THE ARGUMENT

One Plaintiff’s conclusory statement that she was sexually assaulted is insufficient to support a finding that the Plaintiffs are likely to prevail on the merits in their case. The District Court manifestly abused its discretion by relying on a different court’s finding of probable cause based on “affidavits” which themselves would have been, by statute, insufficient to support any findings. Lastly, the District Court issued an injunction to undo all that had already been done, which the Court does not have the power to do in an injunction hearing.

VI. ARGUMENT

A. THE FINDINGS OF FACT IN THIS CASE ARE INSUFFICIENT TO SUPPORT THE INJUNCTION

1. Merely Reciting the Contents of Other Filings is Not Fact Finding.

In *In re Mental Health of E.P.B.*, this Court stated “[m]erely reciting witness Fischer’s testimony and stating it was consistent with another professional person’s evaluation is in no way equivalent to making findings of fact” 2007 MT 224, ¶ 13, 339 Mont. 107, 168 P.3d 662.

In its “Findings of Fact,” the District Court makes no contested and relevant findings whatsoever. In its first full paragraph, the District Court merely recites the Plaintiffs’ allegations from the Complaint. (Shen Appx. 2, *FOF, COL, and Order Granting Pls.’ Prelim. Inj. Mot.*). The District Court went on to recognize that criminal charges have been filed and that B.M. filed an affidavit. (Shen Appx. 3). The only factual finding made by the District Court is that Tina Wu and Howard Shen sold their house and Tina Wu took the money before any injunction was issued. (Shen Appx. 4). But, on the critical issue of whether the Plaintiffs have established a likelihood of success on the merits, the District Court only recited the contents of filings and affidavits. With no actual factual findings made, the injunction must fail under the first factor from *Van Loan*.

2. Relying on Judge Davies’ Finding of Probable Cause was an Abuse of Discretion.

“Injunction proceedings are prescribed and regulated by Chapter 19, Title 27, of the Montana Code Annotated.” *Bowman v. Prater*, 213 Mont. 459, 462, 692 P.2d 9, 11 (1984).

Upon the hearing [to review a request for injunctive relief,] 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.

Id. at 213 Mont. 462, 692 P.2d 11 (quoting § 27-19-303, MCA).

Affidavits must be based on personal knowledge ensuring that perjury is assignable. *See, e.g., Saunders Cash-Way Lumber & Hardware Co. v. Herrick*, 179 Mont. 233, 237, 587 P.2d 947, 949 (1978) (finding an affidavit deficient where the affiant “did not have personal knowledge . . . and therefore could not absolutely swear to the validity of the statement[,] . . .” thus perjury was not assignable and the verification was insufficient). The purpose of an affidavit is “to furnish a sanction for it in such an oath as will subject the affiant to punishment for perjury if it be false in material particulars.” *Id.* at 179 Mont. 236 (quoting *Crane & Ordway Co. v. Baatz*, 53 Mont. 438, 164 P. 533, 535 (1917)). “[A] test of the sufficiency of the affidavit to a mechanic’s lien is whether perjury is assignable upon the verification to it.” *Id.* (citing *Gregg v. Sigurdson*, 67 Mont. 272, 215 P. 662, 663 (1923)).

The District Court did not base its finding on the affidavit of probable cause filed in the criminal case—and for good reason. This affidavit was signed by the

County Attorney who clearly could not meet the personal knowledge requirement of an affidavit for the injunction statute.

The District Court went on to base its finding on the determination made by Judge Davies, stating “Judge Davies has already made a judicial determination that probable cause existed for the State of Montana to charge the defendant Shen with one felony count of sexual intercourse without consent and one misdemeanor count of sexual assault for his acts at issue in this lawsuit.” (Shen Appx. 6, *FOF, COL, and Order Granting Pls.’ Prelim. Inj. Mot.*). But Judge Davies’ finding of probable cause was based solely on the County Attorney’s affidavit which itself would have been inadmissible. Thus, there was little or nothing to suggest that the Plaintiff would prevail at trial on liability, let alone damages. This proof that one of six Plaintiffs was assaulted—proof which yielded no suggestion of damages—should not satisfy the burden of proving a likely success on its merits.

The Plaintiffs and the District Court relied heavily on the *Van Loan* case. *See* (Shen Appx. 5–6). However, in *Van Loan*, whether the petitioner was likely to have success on the merits was settled by the existence of a conviction, wherein the defendant had “pled guilty to six counts of felony incest and was sentenced to sixty years in prison.” 271 Mont. at 178, 895 P.2d at 615. *Van Loan* fails to present any useful factual analog to the present case on this issue because, in the criminal and civil actions, liability and damages are very much in dispute at this time.

Furthermore, a criminal finding of “probable cause” has no preclusive effect. *See generally Bradley v. Reno*, 749 F.3d 553, 555 (6th Cir. 2014) (“Does the trial court’s probable-cause finding trigger issue preclusion—the rule that a party who litigates and loses an issue in one case may not re-litigate it again in another—even though the acquittal insulated the finding from appeal? No, we hold.”); *Gouskos v. Griffith*, 122 F. App’x 965, 974 (10th Cir. 2005) (citations omitted) (“Thus, under these circumstances, we conclude that Oklahoma would not give preclusive effect to the probable-cause determination.”).

B. THE COURT ABUSED ITS DISCRETION IN UNDOING A TRANSACTION ALREADY COMPLETED

“An injunction will not issue to restrain an act already committed; it is not an appropriate remedy to procure relief for past injuries.” *State v. BNSF Ry. Co.*, 2011 MT 108, ¶ 19, 360 Mont. 361, 254 P.3d 561 (citing *Bouma v. Bynum Irr. Dist.*, 139 Mont. 360, 364, 364 P.2d 47, 49 (1961); *Mustang Holdings, LLC v. Zaveta*, 2006 MT 234, ¶ 15, 333 Mont. 471, 143 P.3d 456). “Where the entire injury is in the past, an injunction cannot issue.” *Id.*, ¶ 19 (citing *Billings Associated Plumbing, Heating & Cooling Contractors v. State Bd. of Plumbers*, 184 Mont. 249, 255, 602 P.2d 597, 601 (1979); *Mustang Holdings*, ¶¶ 15–16).

Howard Shen and his wife, Tina Wu, transferred money first to Tina and then to the seller of the Washington house. Thereafter, the District Court issued an Order attempting to undo this transaction, ordering the money to be returned to

Montana and placed in Yellowstone Bank. This Order is improper and contrary to Montana law, and it should be reversed.

VII. CONCLUSION/RELIEF SOUGHT

B.M.'s affidavit is the only potential evidence submitted in regard to the merits of the claim, and it offered nothing in the way of evidence of damages. The sworn statement of "assault" is so abrupt and conclusory that no findings of fact can be drawn from it. As a matter of law and sound policy, an *ex parte* finding of probable cause should be of no evidentiary value in an injunction hearing. Howard Shen prays that the injunction against him be reversed.

DATED this 29th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and quoted and indented material; and the word count calculated in Microsoft Word is 2,215 words excluding the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

DATED this 29th day of November, 2022.

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I hereby certify that I have filed a true and accurate copy of the foregoing Appellant's Opening Brief with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing Appellant's Opening Brief upon each attorney of record in the above-referenced District Court action as follows:

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I, Mark D. Parker, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-29-2022:

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Dated: 11-29-2022