IN THE SUPREME COURT
OF THE STATE OF MONTANA

Supreme Court No. DA 22-0676

HEIDI A. GABERT,

Plaintiff and Appellee,

v.

GARRY DOUGLAS SEAMAN,

Defendant and Appellant,

APPELLANT'S BRIEF

On Appeal from the Nineteenth Judicial District Court, Lincoln County,
the Honorable Judge Shane Vannatta Presiding
State of Montana, District Court Cause No. DV-22-95

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_____, Clerk

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ISSUES PRESENTED

I. Did the District Court abuse its discretion by anticipating and adjudicating issues that go to the ultimate merits of Ms. Gabert's underlying tort claims when issuing its findings of fact and conclusions of law appointing a receiver?

II. Did the District Court abuse its discretion when it upheld the appointment of a receiver in a tort case despite the plaintiff's failures to provide clear and convincing evidence of any of the Mont. Code Ann. § 27-20-102 criteria or that extraordinary circumstances precluded any other remedy to prevent harm or loss prior to a final judgment in the tort case?

III. Did the District Court abuse its discretion when it upheld the *ex parte* appointment of the receiver despite the fact the District Court lacked jurisdiction over the defendant at the time the receiver was appointed?

STATEMENT OF THE CASE

This appeal is focused on the appointment of a receiver to control the property and assets of Garry Seaman ("Mr. Seaman"). In May of 2021, the State of Montana filed criminal charges against Mr. Seaman, alleging that Mr. Seaman shot Heidi Gabert ("Ms. Gabert"). Based on the same incident, Ms. Gabert also filed multiple tort claims against Mr. Seaman on June 16, 2022. (Compl. Dem. Jury Trial, June 16, 2022.) Ms. Gabert then filed an application for the appointment of a receiver to preserve Mr. Seaman's property for purposes of collecting on the

hypothetical monetary judgment she was seeking in the tort case. (Ver. App. for Appt. Rec., June 29, 2022.)

On July 5, 2022, prior to Mr. Seaman being served with the Summons and Complaint in the tort action, the Nineteenth Judicial District Court, Lincoln County (the "District Court") granted the appointment of Christy Brandon ("Receiver"), an attorney residing in Big Fork, Montana, as a receiver. (Order Appt. Rec. and Setting Show Cause Hearing, Jul. 5, 2022.) After the Receiver had been appointed, Mr. Seaman made an appearance in the tort litigation. The parties then submitted briefing on the issue of whether it was appropriate for a receiver to have been appointed. (Def. Resp. Ver. App. for Appt. Rec., July 13, 2022; Reply Supp. App. Rec., June 21, 2022; Hearing Br. Rec., Aug. 29, 2022; Def. Resp. Pl. Hearing Br. Rec., Sept. 19, 2022; Rep. Br. Supp. Hear. Br. Rec., Oct. 3, 2022.) A hearing was held on August 29, 2022. On October 3, 2022, the parties submitted proposed findings of fact and conclusions of law. (Def. Prop. Find. Fact Concl. Law and Order Vac. Rec. and Granting Stay, Oct. 3, 2022; Pl. Find. Fact Concl. Law and Order Appt. Rec., Oct. 3, 2022.)

On November 1, 2022, the District Court upheld the appointment of the Receiver, confirming her authority to locate, manage, and control all of Mr. Seaman's property and assets. (Find. of Fact, Concl. of Law, Order Appt. Perm. Rec. p. 18, Nov. 1, 2022.) Mr. Seaman now appeals the District Court's order

upholding the appointment of the receiver.

STATEMENT OF FACTS

On May 31, 2022, the State filed an Affidavit in Support of Motion for Leave to File Information Direct against Mr. Seaman in the Montana Nineteenth Judicial District Court, Cause Number DC-22-44. In the Affidavit, the State alleged, in part, that:

> On May 21, 2022, law enforcement officers from Lincoln County Sherriff's Office responded to a report of a shooting at Alexander Cree Campground north of Libby, near Libby Dam.
>
> ...
>
> Sergeant Hauke and Deputy Avila made contact with an injured female, Heidi A. Gabert. Sergeant Hauke and Deputy Avila observed that Ms. Gabert had suffered multiple gunshot wounds, and the officers assisted with emergency treatment.
>
> Heidi Gabert stated to Sergeant Hauke and Deputy Avila, "The man who shot us was Garry Seaman, driving a black Denali with Kalispell plates."

(Affidavit in Support of Motion for Leave to File Information Direct ¶¶ 2, 4-5, *State v. Seaman*, (No. DC-27-2022-44).) The Information, in turn, charged attempted deliberate homicide in violation of Mont. Code Ann. § 45-4-102 and 103 and tampering with or fabricating physical evidence in violation of Mont. Code Ann. § 45-7-207. (Information at pp. 1-2, *State v. Seaman*, (No. DC-27-2022-44).)

Mr. Seaman was subsequently arrested and has been incarcerated since. Mr. Seaman has pled not guilty, and is presumed innocent until proven guilty beyond a reasonable doubt. *State v. Rossbach*, 2022 MT 2, ¶ 33, 407 Mont. 55, 501 P.3d 914 (McKinnon, J., dissenting) ("The fair trial right is tethered to the basic principle of American jurisprudence that a person accused of a crime is presumed innocent until his guilt has been established beyond a reasonable doubt.") (citations omitted).

On June 16, 2022, Rita M. Blades, acting as conservator for Ms. Gabert, filed a Complaint and Demand for Jury Trial in Montana Nineteenth Judicial District Court Cause Number DV-22-95. (Compl. Dem. Jury Trial, June 16, 2022.) In the Complaint, Ms. Gabert alleged Mr. Seaman committed intentional torts arising from the alleged shooting. (*Id.* ¶¶ 20-55.) Despite the fact Mr. Seaman was incarcerated and thus could have been easily located, Ms. Gabert chose to not serve the Complaint on Mr. Seaman. Instead, on June 29, 2022, Ms. Gabert first filed a Verified Application for Appointment of Receiver. (Ver. App. for Appt. Rec.) In the Application, Ms. Gabert represented that she had contacted Mr. Seaman's criminal defense attorney who stated that he did not represent Mr. Seaman in this civil action. (*Id.* ¶ 5.) Ms. Gabert also represented that she wanted the order appointing a receiver granted "ex parte, if necessary." (*Id.* at 7.)

On Wednesday, June 29, 2022, Ms. Gabert's counsel emailed Mr. Seaman's son a letter with the Verified Application for Appointment of a Receiver enclosed. (Def. Resp. Ver. App. for Appt. Rec. Ex. A.) Mr. Seaman never personally received copies directly from Ms. Gabert, despite the fact he was in Lincoln County Detention Center before she filed the application for receivership on June 29, 2022. The Application was based on a sealed document that was not shared with Mr. Seaman's son or with Mr. Seaman's criminal defense counsel. That sealed document, which was later obtained by Mr. Seaman's civil defense counsel once he was hired, turned out to be an unverified double-hearsay email from the prosecutor (who is adverse to Mr. Seaman in the criminal matter) stating what she heard her paralegal say the paralegal allegedly heard while listening to hours of phone conversations between Mr. Seaman and his son. (Ver. App. for Appt. Rec. Ex. 5.) The email itself was three sentences long and merely states "they are discussing selling the plane, an A-frame, lake property, etc." (*Id.*) Notably, the email did not state there *were* selling the property, only that they were *discussing* having to potentially sell property. (*Id.*) Moreover, the email did not highlight the fact those same phone conversations also included discussions of Mr. Seaman's need to pay his significant legal fees and other bills while he was incarcerated and unable to work. (*Id.*) Prior to the appointment of the Receiver, Mr. Seaman was detained with no direct access to his own property. Mr. Seaman spoke with his son

numerous times over the phone regarding potentially selling property to fund litigation and pay bills, but ultimately no property was listed for sale, transferred, or sold. (Transcripts of Recorded Phone Calls between Garry Seaman and Clark Seaman Files 1-94 (Jan. 17, 2023).)

Ms. Gabert initially premised her application for the appointment of a receiver on two theories: (1) that she was a creditor of Mr. Seaman's due to a child support agreement that she and Mr. Seaman entered into shortly before Mr. Seaman was arrested; and (2) that she had a "likely" interest in Mr. Seaman's property if she later obtained favorable judgments in her tort case against him. (Ver. App. for Appt. Rec. ¶¶ 7, 10.) In short, Ms. Gabert argued she would recover fewer assets in the event the civil case was decided in her favor if a receiver were not appointed.

The District Court -- the Honerable Mathew J. Cuffe at that time -- appointed the Receiver on July 5, 2022, prior to Mr. Seaman having been served the Complaint. (Order Appoint. Rec. Setting Show Cause Hearing.) After the Receiver was appointed, Mr. Seaman made an appearance in Ms. Gabert's tort lawsuit, moved to substitute the judge, and objected to the appointment of the Receiver. (Def. Resp. Ver. App. for Appt. Rec.) The District Court -- Judge Vannatta at that point -- allowed briefing and held a hearing. The District Court then issued Findings of Fact and Conclusions of Law upholding the appointment

the Receiver on November 1, 2022. (Find. of Fact, Concl. of Law, Order Appt. Perm. Rec. p. 18, Nov. 1, 2022.)

Much as Mr. Seaman planned to do, after her appointment, the Receiver began listing property for sale to pay various bills. For example, the airplane (i.e. the same airplane mentioned in the paralegal's email) is currently listed for sale by the Receiver. There have also been discussions of the Receiver selling the A-Frame property (i.e. the same A-frame property mentioned in the paralegal's email), as well as potentially selling other real property in Great Falls, to pay for Mr. Seaman's ongoing financial obligations. Mr. Seaman has most recently been unable to pay for his criminal and civil defense attorneys because the Receiver, whose fiduciary duty obligates her to obtain fair market value for Mr. Seaman's property, has been unable to sell the airplane and other property at the prices for which they are listed. (Def. Counsel's Dec. Supp. Mot. Cont. Trial Mots. Deadline at ¶ 5, *State v. Seaman*, (No. DC-22-44).) Mr. Seaman has experienced actual prejudice as a result of the receivership. (*Id.* ¶ 6.)

STANDARD OF REVIEW

District court orders granting appointment of a receiver or refusing to vacate an order appointing a receiver are immediately appealable. Mont. R. App. P. 6(3)(g). The scope of review under Mont. R. App. P. 6(3)(g) "is limited to the appealable issue and the evidentiary basis, pertinent conclusions or applications of

law, and ultimate rationale for the action or ruling of the court." *Gottlob v. DesRosier*, 2020 MT 212, ¶ 7, 401 Mont. 72, 470 P.3d 194 (internal citations omitted). Court appointments of receivers are reviewed for an abuse of discretion under the standards of Mont. Code Ann. § 27-20-101 *et al. Id.* (citations omitted). "A court abuses its discretion if it exercises granted discretion based on a clearly erroneous finding of material fact, an erroneous conclusion of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *Gottlob*, ¶ 7 (internal citations omitted). Conclusions and applications of law are reviewed *de novo* for correctness. *Id.* (citations omitted).

SUMMARY OF ARGUMENT

The District Court misinterpreted the law and abused its discretion when it appointed a receiver in this case, which resulted in a substantial injustice to Mr. Seaman. First, the District Court abused its discretion by anticipating and adjudicating issues that go to the ultimate merits of the underlying tort claim in its findings of fact and conclusions of law. Second, Ms. Gabert failed to provide clear and convincing evidence of any of the required criteria for the appointment of a receiver pursuant to Mont. Code Ann. § 27-20-102. Moreover, Ms. Gabert failed to demonstrate that extraordinary circumstances existed in this case which precluded any other remedy to prevent harm or loss prior to final judgment. The District

Court also misinterpreted the law when it held that a receiver is appropriate in a tort case where no judgment has been issued yet. Third, even if Ms. Gabert had met her burden for the appointment of a receiver, such appointment was improper because the District Court lacked jurisdiction over Mr. Seaman at the time the receiver was first appointed, and such appointment violated Mr. Seaman's due process rights.

ARGUMENT

I. The District Court abused its discretion by anticipating and adjudicating issues that go to the ultimate merits of Ms. Gabert's underlying claims.

At this very early stage of the case, prior to discovery and a trial, the District Court has issued a finding that Mr. Seaman did indeed shoot and kill James Freeman and that Mr. Seaman also shot Ms. Gabert. (Find. of Fact, Concl. of Law ¶ 12.) A district court's findings when appointing a receiver while litigation is pending should be as limited as possible and the court should not decide the merits of the underlying case. The District Court abused its discretion by issuing findings that went toward Mr. Seaman's ultimate liability.

As a general rule, preliminary findings should be as limited as possible. For example, in *City of Whitefish v. Bd. of County Comm'rs of Flathead County ex rel. Brenneman*, the City of Whitefish sued Flathead County seeking a preliminary injunction. 2008 MT 436, ¶ 1, 347 Mont. 490, 199 P.3d 201. In *City of Whitefish*,

the district court denied the injunction. *Id.* The City appealed, and the Montana Supreme Court reversed the district court, concluding the district court erred when it decided the merits of the underlying case—whether an agreement between the parties was valid—instead of ruling solely on the application for a preliminary injunction. *Id.* ¶ 17. In making its holding, this Court reasoned that by "chronologically resolving the merits of the case first and the resulting propriety of the requested preliminary injunction second," the district court "put the cart before the horse." *Id.*

Pursuant to its reasoning in *City of Whitefish*, the Montana Supreme Court in *Gottlob v. DesRosier (supra)* later held that a district court abused its discretion when it appointed a receiver for Glacier County based on findings that adjudicated the ultimate merits of the case. ¶ 18. The plaintiffs in *Gottlob*, a group of taxpayers, sought appointment of a financial receiver pendente lite under to Mont. Code Ann. § 27-20-102(3) to ensure Glacier County officials complied with budgeting and tax levying laws. *Id.* ¶ 4. The first three counts in the plaintiffs' complaint sought declaratory judgment that various county officials disbursed protested taxes prior to a final determination of the plaintiffs' suit, improperly levied taxes, and breached their fiduciary duties. *Id.* ¶ 3. The district court held that appointment of limited receivership was warranted based on a series of findings and conclusions. *Id.* ¶ 6. One such finding was that taxpayers' property interests were in danger of

being removed or materially injured by county officials based on the County's "prior unlawful release of protested tax payments" and its "alleged intermingling of public school funding and other public funds." *Id.*

The Montana Supreme Court reversed the district court's appointment of the receiver, holding that "...courts must appoint receivers pendente lite *based only on the limited appointment criteria without anticipating or adjudicating issues that go to the ultimate merits of the underlying claim*." *Id.* ¶ 15 (emphasis added). The Court reasoned that the "prior unlawful release of protested tax payments" was an essential element of proof of the first three counts included in the plaintiffs' complaint. *Id.* ¶ 15. The appointment of a receiver therefore anticipated, presumed, and concluded that the county officials were personally liable for those claims. *Id.* This preliminary adjudication of the ultimate merits of the underlying claims—to which the receivership was only auxiliary—was therefore improper. *Id.* "As in *City of Whitefish*," the Court reasoned, "the District Court erroneously put the proverbial cart before the horse." *Id.*

Here, too, the cart was put before the horse. At the outset, it should be noted that before issuing the District Court's findings and conclusions, Judge Vannatta himself acknowledged that anticipating or adjudicating Mr. Seaman's ultimate liability would be improper. At the hearing, Judge Vannatta stated:

> THE COURT: So, Mr. Cotner, I would take some brief findings of fact, conclusions of law and order from both parties. I would caution the parties about expansive findings of fact. I know, in recent appeals, there -- the Supreme Court has expressed concern about the Court, as a matter of preliminary injunctions or other matters that come before the Court in a preliminary fashion, recognizing a fuller, more complete hearing, or jury trial must come later, *we have been appropriately cautioned about making findings of fact that are not absolutely necessary for the determination, in this case, of a receivership*.
>
> So, with that in mind, I would keep any findings of fact brief. Note that these are preliminary findings based upon what has been seen today. And, again, that *issues of the penultimate question of liability, perhaps, are couched in an appropriate terminology that does not require the Court to find, as a judicial fact, that penultimate question*.

(Transcript of Hearing on Mot. to Stay and Rec. p. 155-156, Aug. 29, 2022 (emphasis added).) Nonetheless, in its findings of fact and conclusions of law, the District Court improperly anticipated and adjudicated the merits of Ms. Gabert's criminal and civil claims against Mr. Seaman, which resulted in the wrongful appointment of a receiver.

Mr. Seaman is charged with deliberate homicide, the elements of which are purposely or knowingly causing the death of a human being. Mr. Seaman is also charged with attempted deliberate homicide, the elements of which are a voluntary act toward the commission of an offense. In the civil suit, Ms. Gabert alleged assault, battery, and infliction of emotional distress. These claims are all predicated on Mr. Seaman allegedly shooting Ms. Gabert and her boyfriend James Freeman.

In its twelfth finding of fact, the District Court summarily determined Mr. Seaman did indeed shoot and kill Mr. Freeman and that he shot Ms. Gabert:

> 12. On May 21, 2022, Mr. Seaman drove into the campsite, stepped out of his black Denali pickup and immediately started shooting Jim Freeman with a shotgun. Initially, he shot Jim Freeman approximately five times killing him immediately. Mr. Seaman then proceeded to shoot Heidi between five and seven times with a shotgun.

(Find. of Fact, Concl. of Law ¶ 12.) By making the above finding, the District Court preemptively determined Mr. Seaman caused the death of Freeman and that he shot Ms. Gabert. Both determinations are elements of the crimes and torts alleged against Mr. Seaman.

Despite the fact no judgment has been issued against Mr. Seaman in the civil case, the District Court also issued the following conclusion of law:

> G. Heidi has asserted a claim against Mr. Seaman for various intentional torts she alleges he committed relating to the shooting. Heidi's tort claims have significant value. Based upon the uncontested testimony at the hearing, *it is highly probable that Heidi will establish liability and receive a substantial award for compensatory damages* - her significant medical bills, loss of income, pain and suffering, inconvenience, emotional distress and a change in her course of life and disfigurement. Heidi may also recover punitive damages.

(Find. of Fact, Concl. of Law ¶ 14 (emphasis added).) Again, the court improperly anticipated the merits of Ms. Gabert's underlying claims against Mr. Seaman by determining it is "highly probable" Ms. Gabert will prevail in the civil case. Similarly, the District Court found the following with respect to the tort claims:

> H. Heidi's Complaint, bolstered by her uncontested testimony at hearing, gives her a "right to payment" even though her claim currently is unliquidated, contingent, and not reduced to a judgment. Heidi has a contingent, unliquidated claim against Defendant Seaman *based on his tortious conduct, which upon a finding of liability against Mr. Seaman, will entitle her to a right to payment or monetary obligation from Mr. Seaman, for which the appointment of a receiver is appropriate*.

(Find. of Fact, Concl. of Law ¶ H.) However, no court had previously found that Mr. Seaman committed any of the torts alleged. At the stage the case was at when the Findings of Fact and Conclusions of Law were issued, Mr. Seaman had not yet even filed an Answer to the Complaint, much less had a trial.

Just as the taxpayer plaintiffs did in *Gottlob*, Ms. Gabert sought the appointment of a receiver to control Mr. Seaman's property because she feared any future judgments against him would result in less money available for her to execute on after a judgment. Just as the lower court determined in *Gottlob*, the District Court here appointed the receiver based on a series of findings and conclusions going toward the ultimate merits. And, just as in *Gottlob*, the court's findings and conclusions anticipated and adjudicated issues that go to the various claims against Mr. Seaman. Therefore, the Court should come to the same conclusion as it did in *Gottlob* and hold that the District Court abused its discretion in appointing the Receiver.

II. The District Court abused its discretion by upholding the appointment of the Receiver when Ms. Gabert failed to provide clear and convincing evidence of Mont. Code Ann. § 27-20-102 criteria and that extraordinary circumstances precluded any alternative remedy to prevent harm or loss prior to final judgment.

Ms. Gabert failed to produce evidence of the statutory criteria for the appointment of a receiver or that there was no alternative remedy to receivership. Receivership is an extraordinary and harsh remedy, and courts in various jurisdictions, including Montana, have described it as a severe, dangerous, drastic, and radical remedy. 75 C.J.S. Receivers § 4; *Thisted v. Tower Mgt. Corp.*, 147 Mont. 1, 14, 409 P.2d 813, 821 (1966) ("Receivership is an extraordinary remedy and the power of the court to appoint a receiver is to be exercised with extreme caution."); *State ex rel. Larry C. Iverson, Inc. v. Dist. Ct. of Ninth Jud. Dist. In and For Pondera County*, 146 Mont. 362, 371, 406 P.2d 828, 832 (1965) ("The demand of any party for appointment of a receiver is generally very carefully considered by the courts, for this is a 'drastic' remedy which deprives the lawful owner of property the right to manage and control his own interests."). Appointment should therefore be exercised sparingly, and even if cause for appointment is demonstrated, a court's decision to appoint "must be exercised with conservation and caution." *State ex rel. Larry C. Iverson, Inc.*, 146 Mont. at 371, 406 P.2d at 832-33.

The Montana Supreme Court has also made clear that receivership applicants must make a showing of even more than the requirements of the receivership statutes. "Courts may appoint a receivership pendente lite only with the utmost caution and conservatism upon clear and convincing evidentiary proof of one of the applicable criteria specified by § 27-20-102(1)-(4), MCA, *and* extraordinary circumstances where no other legal or equitable remedy is adequate to prevent a manifest risk of imminent or irreparable harm or loss prior to final judgment on the merits of the underlying claim for relief." *Gottlob*, ¶ 10 (*emphasis* in original)(emphasis added) (citing *Sandrock v. DeTienne*, 2010 MT 237, ¶ 25, 358 Mont. 175, 243 P.3d 1123; *Crowley v. Valley W. Water Co.*, 267 Mont. 144, 150-51, 882 P.2d 1022, 1025-26 (1994); *Little v. Little*, 125 Mont. 278, 285, 234 P.2d 832, 835-36 (1951); *Scholefield v. Merrill Mortuaries, Inc.*, 93 Mont. 192, 205, 17 P.2d 1081, 1084 (1932); *Mont. Ranches Co. v. Dolan*, 53 Mont. 397, 402, 164 P. 306, 307 (1917); *Brown v. Erb-Harper-Rigney Co.*, 48 Mont. 17, 27, 133 P. 691, 694 (1913); *Jacobs Mercantile Co.*, 37 Mont. 321, 333-35, 96 P. 723, 727 (1908)).

Here, the District Court upheld the appointment of the receiver to control all of Mr. Seaman's property and assets based on erroneous findings of fact and conclusions of law and based its decision on a flawed ultimate rationale. First, Ms. Gabert failed to provide clear and convincing evidence of any of the seven possible

criteria for receivership in Mont. Code Ann. § 27-20-102. Second, Ms. Gabert failed to demonstrate that extraordinary circumstances existed where no other remedy could prevent a manifest risk of imminent or irreparable harm or loss prior to final judgment. Accordingly, the District Court's appointment of a receiver was an abuse of discretion.

A. Ms. Gabert failed to provide clear and convincing evidence of any of the seven possible criteria for receivership provided by Montana law.

Receiverships are authorized by a statute that sets forth seven circumstances in which a receiver may be appointed. Mont. Code Ann. § 27-20-102. On the day of the receivership hearing, Ms. Gabert submitted a Hearing Brief on Receivership in which she focused her argument from being a creditor as a result of the child support agreement (which was current at that time) to being a "creditor" due to her anticipated win relative to the tort claims she was bringing. (Hearing Br. Rec. p. 6-9.) The primary statutory basis Ms. Gabert is relying on can be found in subsection (2) of the receivership statute, which provides that "[a] receiver may be appointed by the court in which an action is pending when the action is…by a creditor to subject any property or fund to the creditor's claim." Mont. Code Ann. § 27-20-102(2). Mr. Seaman responded that a hypothetical *future* judgment in a tort case did not convert the plaintiff into a *present* "creditor" as contemplated by the statute. (Def. Resp. Pl. Hearing Br. Rec. p. 2-11.) Ultimately, the District Court

interpreted this law and concluded that tort claimants constitute "creditors" under the Uniform Fraudulent Transfer Act ("UFTA") and therefore are also "creditors" for purposes of the receivership statute. The District Court's interpretation of the law was incorrect because the UFTA definition of creditor is limited to application in the UFTA.

Additionally, the District Court erred when it concluded Ms. Gabert was a creditor of Mr. Seaman's by virtue of their child support agreement because Ms. Gabert is, at most, a simple contract creditor. If prior case law is honored, applications for receiverships are not granted in Montana in such cases. Finally, even if Ms. Gabert could be considered a "creditor" for purposes of Mont. Code Ann. § 27-20-102(2), the Court disallows receiverships for existing judgment debts. It should not allow receiverships for hypothetical future tort judgments, when they are not allowed for actual tort judgments. Accordingly, the District Court misinterpreted the law, and Ms. Gabert failed to provide clear and convincing evidence of any of the criteria which would warrant appointment of a receiver in this case.

1. Ms. Gabert is not a "creditor" for purposes of Mont. Code Ann. § 27-20-102(2).

The receivership statutes do not define the term "creditor." Because the receivership statutes do not define "creditor," the District Court adopted the UFTA

definition of the term, despite the fact the present case is a receivership case and not a UFTA case. (Find. of Fact, Concl. of Law ¶¶ E-F.) The District Court erred when it concluded Ms. Gabert showed by clear and convincing evidence she was a "creditor" for purposes of Mont. Code Ann. § 27-20-102(2) because the court misapplied the UFTA definition of a creditor.

The UFTA "strengthens creditor protections by providing remedies for certain transactions by a debtor that are unfair to the debtor's creditors." *A Few Facts about The Uniform Voidable Transactions Act (2014 Amendments)*, Uniform Law Commission (updated Oct. 21, 2019). Under the UFTA, "creditor" means a person who has a claim, which is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, legal, equitable, secured, or unsecured." Mont. Code Ann. § 31-2-328(3)-(4). This statute, however, also clearly states that the UFTA definitions apply "[a]s used in this part." Mont. Code Ann. § 31-2-328. In other words, a creditor may be defined as a person with a contingent right to payment *when the term is used within the UFTA statutes*—not outside of UFTA. Definitions within Montana Code Annotated are applicable to the same word or phrase wherever it occurs, "*except where a contrary intention plainly appears*." Mont. Code Ann. § 1-2-107 (emphasis added). Here, the Montana Legislature did not intend the broad creditor definition in the UFTA to apply in contexts outside the scope of UFTA.

Because "contrary intention plainly appears" based on the language of the statute itself, use of the UFTA creditor definition to meet the statutory elements for appointment of a receiver, was a misapplication of law.

Moreover, if the District Court concluded the UFTA definition of a creditor was applicable in the present case, then the court should have required Ms. Gabert to seek one of the remedies available under UFTA, not under Mont. Code Ann. § 27-20-102(2). As the Montana Supreme Court has recognized, "because of the extraordinary harshness of the remedy (by receiver) courts of equity have been reluctant to apply it. If the applicant has any other remedy, the application will be denied, since the remedy by receivership is an extraordinary one, never to be allowed except upon a showing of necessity therefore." *Little* (supra) at 284, 835. A receiver cannot be appointed "if there is another way to protect the property in question or otherwise achieve the desired outcome." *Crowley v. Valley W. Water Co.*, 267 Mont. 144, 151, 882 P.2d 1022, 1026 (1994) (citing *State ex. Rel. Larry C. Iverson, Inc. v. District Court*, 146 Mont. 362, 371, 406 P.2d 828, 833 (1965)). If the UFTA applied, then Ms. Gabert had another remedy and a receiver would not be appropriate.

The District Court also erred when it concluded Ms. Gabert was a creditor of Mr. Seaman's by virtue of their child support agreement. "[I]t is generally the rule that a general or simple contract creditor who has not reduced the claim to

judgment; who has no right or interest in, or lien on, the property of the debtor; and whose interest or position does not differ from that of any other ordinary creditor has no standing to obtain the appointment of a receiver of such property." 75 C.J.S. Receivers § 16. Indeed, the Court held in *Berryman v. Billings Mut. Heating Co.* that "[i]t would be a most dangerous doctrine to hold that a receiver can be appointed...to recover a simple contract debt..." 44 Mont. 517, 121 P. 280, 283 (1912). Accordingly, Montana courts generally do not grant receiverships simply because child support payments are one or two months past due, especially when the child support claim is *not* part of the underlying lawsuit. Nonetheless, the District Court in this case concluded that Ms. Gabert and Mr. Seaman hold a creditor-debtor relationship by virtue of their child support agreement. (Find. of Fact, Concl. of Law ¶ E.)

The child support agreement obligates Mr. Seaman to pay Ms. Gabert $3,000 per month to support their son, meaning even if the payments had been behind Ms. Gabert would be nothing more than a simple contract creditor seeking to recover a simple contract debt. (Ver. App. Rec., Ex. 1.) Here, the child support was one month behind when the Receiver was appointed because the payment was due several days after Mr. Seaman was arrested. Child support was fully paid by the time of the hearing. (Transcript of Hearing p. 130.) Prior to the District Court's appointment of the Receiver, Mr. Seaman made every attempt to ensure payment

of his child support obligations continued, as indicated by multiple phone conversation with his son. (Find. of Fact, Concl. of Law ¶ 45.) Specifically, on multiple occasions, Mr. Seaman asked his son whether Mr. Seaman had enough funds to pay the child support, and Mr. Seaman's son assured Mr. Seaman that he would make the payments. (*Id.*) The late payment was not legitimate grounds for appointing the Receiver.

It would make no sense to interpret a "creditor" under MCA § 27-20-102(2) as being a tort claimant who has no judgment yet when the Montana Supreme Court has previously disallowed receiverships for judgment debts. Since 1894, the Court has consistently held that Mont. Code Ann. § 27-20-102 does not provide authority for appointments of receivers for the mere collection of a judgment debt. *State v. Eighth Jud. Dist. Ct.*, 14 Mont. 577, 37 P. 969, 971 (1894) (annulling an appointment of a receiver in a "simple action of debt, asking only a straight money judgment"); *Little*, 125 Mont. at 284, 234 P.2d at 835 (holding "no such authority exists under the laws of this state, or can be found in the text or context of the statute" for the authority to appoint a receiver in an action on debt); *Crowley*, 267 Mont. at 151, 882 P.2d at 1026 ("A receiver cannot be appointed in an action merely for the purpose of collecting a judgment debt."). Even if Ms. Gabert were at the end of the suit and had her future hypothetical judgment, a receiver would still not be appropriate. Holding that a tort claimant is a "creditor" up to the time they

obtain their hypothetical judgment, at which point they are no longer a creditor, is illogical.

Here, Ms. Gabert has filed a complaint against Mr. Seaman alleging various intentional torts. As relief, she has requested special, general, consequential, and punitive damages, and her costs of litigation. The appointment of a receiver for Ms. Gabert's collection of a judgment debt that does not yet exist was improper under decades of prior Montana case law. Accordingly, Ms. Gabert failed to provide clear and convincing evidence she was a "creditor to subject any property or fund" for purposes of Mont. Code Ann. § 27-20-102(2).

2. The real property is not in danger of being lost, removed, or materially injured for purposes of Mont. Code Ann. § 27-20-102(3).

The District Court's conclusion that Ms. Gabert satisfied the requirements of subsection (3) of the receivership statute was also in error because Ms. Gabert does not jointly own Mr. Seaman's property and Mr. Seaman's phone conversations with his son fail to show Mr. Seaman's property is in danger of being removed or injured. A receivership may also be appropriate:

> *...between partners or others jointly owning or interested in any property or fund*, on the application of the plaintiff or of any party whose right to or interest in the property or fund or the proceeds of the property or fund is probable and *when it is shown that the property or fund is in danger of being lost, removed, or materially injured*.

Mont. Code Ann. § 27-20-102(3) (emphasis added). The Montana Supreme Court has held that the language of Mont. Code Ann. § 27-20-102(3) "means that the action must be in regard to property in which the parties are jointly interested" because the statute explicitly includes the phrases "between partners," "others jointly owning," and "others jointly interested." *State v. Eighth Jud. Dist. Ct.*, 14 Mont. 577, 37 P. 969, 971 (1894). This provision of the receivership statute therefore does not apply in the present case because the property in question is not jointly owned by Mr. Seaman and Ms. Gabert and also is not the subject of the action. *Id.*

Even if Ms. Gabert did jointly own property with Mr. Seaman (which she does not), Mr. Seaman's phone conversations with his son—the District Court's only support for concluding Mr. Seaman was attempting to allegedly fraudulently transfer his property—fail to meet the requirements of Mont. Code Ann. § 27-20-102(3). In *Stoner v. Hannan*, the parties entered into a general partnership to sell gasoline products and other merchandise. 113 Mont. 210, 127 P.2d 233, 235 (1942). The partners purchased property for the purposes of running the business. *Id.* One of the partners alleged another partner attempted to conceal misappropriation of partnership profits. *Id.* The defendant partner explained that it was the partners' general practice to draw from the partnership funds and that he made no attempts to conceal any of the amounts he withdrew. *Id.* at 236. The Court

held the defendant's affidavit, along with the other evidence before the Court, did not support the plaintiff's claims. *Id.* In fact, the Court went further and explained that *even if* a partner's appropriation of partnership funds was fraudulent, appointment of a receiver is improper without a showing the funds would ultimately be lost to the plaintiff seeking receivership. *Id.* (citing *Masterson v. Hubbert*, 54 Mont. 613, 173 P. 421, 422 (1918)).

Here, the evidence in this case fails to show Mr. Seaman's property is in danger of being lost, removed, or materially injured. Real property ownership is a matter of public record. The real property itself (i.e. the location) could not be removed or hidden. It is impossible for real property to be removed or lost.

The District Court's findings in this regard included references to snippets of nine separate conversations between Mr. Seaman and his son. The snippets generally fall into two topics of discussion: (1) ensuring Mr. Seaman's assets are distributed according to his updated will, presumably in the event he is incarcerated long-term; and (2) the sales of certain properties to pay Mr. Seaman's law firm's bills and his own legal defense, and to support Mr. Seaman's children. No topic of discussion indicated that Mr. Seaman's properties were in danger of being lost, removed, or materially injured. To the contrary, when the transcripts of the calls are viewed in full and in context, the conversations actually demonstrate Mr. Seaman was intent on preserving his assets and preventing losses.

The following snippets fall into the first category regarding the preservation of Mr. Seaman's estate:

- That all of his assets should be transferred to his son Clark (Call No. 2);
- That Mr. Seaman's interest in the Flathead property would be "yours" (a reference to Clark) (Call Nos. 2, 7);
- That there was a need to "keep the vultures away because they're coming ... before the vultures fill up and start liquidating" (Call No. 3);
- That Mr. Seaman's minority interest in a development complex could go to his son Clark (Call No. 5);
- That Mr. Seaman acknowledged that his son Clark could identify what he wanted and it would be his (Call No. 5).

(Find. of Fact, Concl. of Law at ¶ 43.)

Mr. Seaman certainly spoke numerous times with his son about the recipients of several of his assets. But when viewed in their entirety, the calls indicate Mr. Seaman's goal was to ensure his updated will indicated his actual intent for his estate, which was in part to transfer some assets to his son:

> GARRY: ...We gotta get a will, right? And maybe I'll just – you know since you're doing all this, maybe I'll just put everything to you, leave it all – leave the whole thing to you, then you can decide whatever everybody deserves, right?
>
> CLARK: That's a discussion for another time. We'll figure that out later.
>
> GARRY: All right. We gotta take care of that, though, because otherwise we're back in the old [will], right? We can't have that.

(Tr. Rec. Phone Calls Files 1-94 p. 91 Jan. 17, 2023.) This conversation in particular demonstrates Mr. Seaman attempted to *prevent* his assets from being lost, removed, or materially injured by updating his will.

Additionally, Mr. Seaman's use of the term "vulture" appears to refer to Mr. Seaman's brother, who jointly owned assets with Mr. Seaman. The phone conversations show Mr. Seaman was again attempting to preserve his interests in the jointly owned properties:

> GARRY: Mike thinks…he gets Patty Seaman Homes, and I get half of everything else. That's not what [their mother's will] says.
> …
> GARRY: I get equal share, right? And now it's being liquidated, I get my equal share for what I didn't get from Patty Seaman Homes, okay?
> …
> CLARK: …We just gotta maintain what's going on.
>
> GARRY: Right, I agree…before the vultures show up…

(*Id.* at 104-115.) Notably, the Receiver has subsequently hired an attorney to negotiate with Mr. Seaman's brother regarding some of this property.

Additionally, in a separate conversation, Mr. Seaman again used the term "vultures" to refer to the attorneys who took over management of his firm's cases:

> CLARK: For the ones that are pretty much settled, they're willing to…give us 80 percent and they take 20…
>
> GARRY: If we get those [cases], we got that money, and then we don't have to deal with those vultures, right?

(Tr. Rec. Phone Calls Files 61-80 p. 8-13.) When viewed in context, the transcripts containing these snippets show Mr. Seaman was not referring to Ms. Gabert as a "vulture." At any rate, attempts to "transfer" assets to Mr. Seaman's son or protect his properties from "vultures" show Mr. Seaman was working to preserve his property, not damage or destroy it.

The remaining phone call snippets upon which the District Court based its findings and conclusions were discussions about paying Mr. Seaman's law firm's bills, legal fees, and supporting his children. Those considerable expenses necessarily required the sales of certain properties because of Mr. Seaman's inability to earn income from jail:

- That there was a need to "make a deal with Mike" (Mr. Seaman's brother) (Call No. 2);
- That Patty Seaman Homes Property needs to be sold (Call Nos. 5, 6, 14, 15, 16);
- That Mr. Seaman is not charging rent to his brother for property in which Mr. Seaman owns a half interest (Call No. 7);
- That his son should sell the A-frame (Call Nos. 12, 15);
- That his son should sell lots in Great Falls (Call No. 15)[1].

(Find. of Fact, Concl. of Law at ¶ 43.)

The transcripts show Mr. Seaman discussed the sales of the Patty Seaman subdivision, the A-frame, and the Great Falls properties in the context of paying Mr. Seaman's expenses. For example:

CLARK: The main thing right now is getting…some money so we can operate.

GARRY: We gotta sell something. We gotta make a deal with Mike. We gotta get that land appraised.

…

CLARK: You think it's worth about 2?

GARRY: Yeah. Probably more, you know.

…

GARRY: Mike wants half of what it's appraised for, right? That's what he'll want to do…

…

GARRY: Just do what's in our best interest, not his.

…

GARRY: …We got those lots in Great Falls, right?

…

CLARK: I think that's what we do then, the Great Falls stuff.

…

GARRY: You got enough money more a hamburger now, right?

CLARK: Yeah.

GARRY: I want you living good. I want you eating good. I want you getting sleep. I want you seeing your girlfriend too, okay? Don't let this screw up that deal, right?

(Tr. Rec. Phone Calls Files 1-22 p. 97-99, 166-167, 169.)

Specifically, Mr. Seaman discussed the need for funds to pay his multiple attorneys' bills, health insurance premiums for his law firm, child support obligations, life insurance premium, malpractice insurance premium, mortgage payments, bond, and phone and internet bills. (*Id.* at 39, 65, 92; Tr. Rec. Phone

Calls Files 23-40 p. 58-59, 170-171; Tr. Rec. Phone Calls Files 41-60 p. 10, 14-15, 125-26, 207-08, 214.)

At times (and currently), Mr. Seaman's legal defense was actually stalled due to the fact he lacked the funds to pay his bills:

> GARRY: Steve won't talk to me because he hasn't been paid.
> ...
> GARRY: So you need to...get down to Missoula and get him paid whatever he needs for his retainer so we can get an appearance, so he appears. He needs to file a notice of appearance, right.
>
> CLARK: Yeah.
>
> GARRY: I mean, that's the most important thing right now, more important than the law firm.
>
> CLARK: Okay.
> ...
> GARRY: This discovery is further information from the prosecutor that they sent the email to Steve today. He hasn't even opened it up. He's not even going to open it up. He's not going to come down and see me. He doesn't even want to talk to me until he gets paid. He says, that's how it works, Garry...

(Tr. Rec. Phone Calls Files 41-60 p. 125-26.) This conversation in particular shows Mr. Seaman's need for additional funds was urgent. Without the ability to earn income from his law practice, Mr. Seaman inevitably would have needed to sell certain of his assets to cover his costs. Nonetheless, the District Court made the following finding of fact:

> 43. ...The jailhouse conversations convey the clear intention of Mr. Seaman and his son...to transfer assets out of Mr. Seaman's name, or

> to otherwise liquidate some properties. Although estate planning—specifically a reference to a new will—is mentioned, that discussion is a sideline to the other discussions of transferring/liquidating property.

(Find. of Fact, Concl. of Law ¶ 43.) That finding apparently resulted in the following conclusion of law:

> M. The jailhouse calls between [Mr. Seaman's son] and Mr. Seaman were more than mere discussions about liquidating assets to generate cash for payment of Mr. Seaman's criminal and civil defense teams, or to needed maintain Mr. Seaman's real and personal property. The parties in the conversations specifically avoided talking about certain assets, and in one conversation, [Mr. Seaman's son] actively dissuaded his father from talking about an asset that exceeded $50,000. The Court suspects that Mr. Seaman and his son are concealing assets.

(*Id.* ¶ M.)

The District Court made clear error by misinterpreting the effect of these snippets of phone conversations between Mr. Seaman and his son. When taken together, these exchanges do show that Mr. Seaman intended to sell some of his property. However, Mr. Seaman explicitly discussed these sales with his son during the calls, even naming specific assets such as the lakefront A-frame. Mr. Seaman also sought fair value for the assets. The language in the snippets of conversation therefore contradicts the District Court's conclusions. As in *Stoner*, Mr. Seaman's explicit mention of the sales of some of his assets show he made no attempts to conceal any of the sales, contrary to the District Court's finding and conclusion.

Because he is currently incarcerated and unable to earn income, the most logical method of ensuring his various expenses are paid is for Mr. Seaman to sell certain assets and apply the proceeds to those expenses. Mr. Seaman's monthly expenses are substantial, adding up to between $10,000 and $15,000. (Find. of Fact, Concl. of Law ¶¶ 35-36.) Those expenses include his monthly child support payments owed to Ms. Gabert under their agreement. Additionally, Mr. Seaman is currently defending two lawsuits, which have and will continue to cost a significant amount of money. Similar to the circumstances in *Stoner*, it is common practice to sell one's assets to fund one's own defense during litigation, which Mr. Seaman was attempting to do per the conversations.

In sum, Ms. Gabert failed to provide clear and convincing evidence Mr. Seaman's property is in danger of being lost, removed, or materially injured for purposes of Mont. Code Ann. § 27-20-102(3). Ms. Gabert's failed to establish that any of the seven possible criteria for receivership provided by Montana law applied. The District Court's appointment of the Receiver relied on a misinterpretation of the law and was an abuse of discretion.

B. Ms. Gabert failed to show extraordinary circumstances precluded any other remedy that could prevent a manifest risk of harm or loss prior to a final judgment on the merits.

The Montana Supreme Court has made clear that if an appropriate remedy other than receivership exists, courts should elect the alternative remedy due to the

extreme and drastic nature of receivership. Here, ample alternative remedies existed. Accordingly, Ms. Gabert failed to meet this second element required for appointment of a receiver.

A receivership applicant must show not only clear and convincing evidence of one of the Mont. Code Ann. § 27-20-102 criteria, but also that the case presents *extraordinary circumstances where no other adequate legal or equitable remedy exists*. *Gottlob*, ¶ 10. In fact, the Montana Supreme Court has held the general rule is that if the desired outcome may be achieved in any other way, rather than through the appointment of a receiver, then that remedy should be granted instead of receivership. *State ex rel. Larry C. Iverson, Inc.*, 146 Mont. at 371, 406 P.2d at 833.

In *State ex rel. Larry C. Iverson, Inc.*, various stockholders of Larry C. Iverson, Inc., a farming corporation, pledged their stock to Farmers State Bank of Conrad. 146 Mont. at 366, 406 P.2d at 830. The Bank sought the appointment of a receiver because the stockholders and the corporation were named defendants in various lawsuits, and other interested parties held a mortgage on corporation assets. *Id.* All of these factors, the Bank claimed, affected its security in the stock. *Id.* The Court concluded, however, that the Bank could have easily followed the usual legal procedure of suing to foreclose the pledges on the stock. *Id.* at 367, 406 P.2d at 830. Moreover, the Bank's contention that the value of the stock would be

substantially lessened if a receiver was not immediately appointed seemed "hollow" in light of the substantial value of the corporation's assets. *Id.* at 371, 406 P.2d at 833.

Similarly, the Court held in *Forsell v. Pittsburg & Montana Copper Co.* that because the plaintiff could have sued or otherwise obtained the relief he sought himself, appointment of a receiver was unnecessary and unjustified. 42 Mont. 412, 113 P. 479, 482 (1911). The Court reasoned, "What additional steps can a receiver take that may not be taken by the plaintiff himself?" *Id.* (citations omitted).

Here, the District Court was in error when it found there was "no other legal or equitable remedy adequate to prevent this material risk of loss or harm prior to a final judgment on the merits." (Find. of Fact, Concl. of Law ¶ R.) Assuming the court determined Ms. Gabert was entitled to damages in the civil case, and assuming Mr. Seaman had actually sold any of his property, Ms. Gabert could have followed the usual legal procedure for executing on any award as explained in *State ex rel. Larry C. Iverson, Inc.* Specifically, Ms. Gabert could have requested the court serve a writ upon Mr. Seaman's accounts holding any proceeds from said hypothetical sales. Ms. Gabert also could have requested a debtor's exam pursuant to Mont. Code Ann. § 25-14-101. And, despite the District Court's unfounded assumption "there [was] no reason to believe Mr. Seaman would comply," Ms. Gabert could have sought an order from the court, which would have provided

adequate relief. (Find. of Fact, Concl. of Law ¶ O.) The UFTA would also apply if any actual fraudulent transfer were made. Ample alternative remedies existed. Accordingly, Ms. Gabert failed to show extraordinary circumstances precluded any other remedy preventing risk of harm or loss prior to a final judgment on the merits. Thus, the District Court abused its discretion in appointing the receiver.

III. The District Court abused its discretion in appointing the receiver because it lacked jurisdiction over Mr. Seaman, and such appointment violated Mr. Seaman's rights under Mont. Code Ann. § 27-20-201 and the federal and Montana constitutions.

Finally, even if Ms. Gabert had met her burden to show a receivership was appropriate, appointment of one in this case was improper because the District Court lacked jurisdiction at the time of the appointment, and Ms. Gabert failed to provide the requisite notice to Mr. Seaman, in violation of state law and Mr. Seaman's due process rights.

A. Ms. Gabert failed to provide notice of her application for receivership in violation of Mont. Code Ann. § 27-20-201 and Mont. R. Civ. P. 4.

Montana's receivership statutes require the applicant to follow a specific procedure, including providing notice to the adverse party. Mont. Code Ann. § 27-20-201. The only circumstances under which the applicant is not required to provide such notice is if the adverse party has failed to appear in the action or "there is immediate danger that the property or fund will be removed beyond the

jurisdiction of the court or lost, materially injured, destroyed, or unlawfully disposed of." *Id.* In the present case, Mr. Seaman was not served so had not failed to appear. The majority of the assets were real property (largely bare land), which cannot be moved beyond the jurisdiction of the court, lost, or destroyed. Transferring real property is done through the public record and there is always a paper trail. The real property itself does not move. Accordingly, neither circumstance where an *ex parte* receiver may be appointed applied.

In *State v. Second Jud. Dist. Ct. of Silver Bow County*, the Montana Supreme Court examined the appointment of a receiver based on an *ex parte* motion. 20 Mont. 284, 50 P. 852, 853 (1897). The plaintiff in that case filed the application based on the defendant corporation's officers' refusals to abide by a stockholders' resolution to wind up the corporation's business. *Id.*, 50 P. at 854. The officers, however, had already been carrying on the corporation's business for nearly a year before the plaintiff filed the application. *Id.* The Court held the facts failed to show the property of the corporation was actually in "immediate danger" as required by Mont. Code Ann. § 27-20-201. *Id.* According to the Court, the question of appointing a receiver was "too important and serious a matter to be attempted by any court without notice to the parties interested" unless the facts showing the property was in immediate danger were "clear and conclusive." *Id.* In that case, the

Court held no such facts existed. *Id.* This case is no different. No such facts exist nor could they exist given the nature of real property.

The Court also did not have jurisdiction over Mr. Seaman when the receivership was created. Rule 4 of the Montana Rules of Civil Procedure requires the plaintiff to serve an individual by either "(1) delivering a copy of the summons and complaint to the individual personally; or (2) delivering a copy of the summons and complaint to an agent authorized by appointment or law to receive service of process." Mont. R. Civ P. 4(e). In *Fonk v. Ulsher*, the Montana Supreme Court held that the nature of service is twofold: "it serves notice to a party that litigation is pending, *and it vests a court with jurisdiction*. *Improper service undermines a court's jurisdiction*, and a default judgment subsequently entered is thereby void." 260 Mont. 379, 383, 860 P.2d 145, 147 (1993) (emphasis added).

Here, the District Court abused its discretion by appointing a receiver (and later upholding the appointment) despite the fact Mr. Seaman never received the statutorily required notice of Ms. Gabert's application *prior* to the appointment. On June 29, 2022, Ms. Gabert's counsel emailed the civil complaint, summons, and the application for the appointment of a receiver to Mr. Seaman's son. (Def. Resp. Ver. App. for Appt. Rec. Ex. A.) Ms. Gabert never personally served Mr. Seaman with the civil complaint or summons, or the application for receivership, despite the fact she knew precisely where he was located, in the Lincoln County Detention

Center. Ms. Gabert then filed the application for receivership on June 30, 2022. Despite it not yet having jurisdiction over Mr. Seaman, the District Court issued its Order Appointing Receiver and Setting Show Cause Hearing on July 5, 2022, the Tuesday after the Monday, July 4 holiday. (Order Appoint. Rec. Setting Show Cause Hearing.)

The District Court upheld the appointment on November 1, 2022, concluding there was an immediate danger Mr. Seaman would remove his property or transfer it out of his name because of he owned "significant assets and resources" and because of his phone conversations with his son. (Find. of Fact, Concl. of Law ¶ J.) The court further concluded that even if Mr. Seaman was not incarcerated, he somehow did "not have the requisite knowledge to preserve, protect and maintain his [own] estate" even if Mr. Seaman was released on bail, despite the fact he was a practicing attorney. (Find. of Fact, Concl. of Law ¶ L.)

The fact Mr. Seaman owns a significant number of real properties should have no bearing on whether the property is in immediate danger of being lost or destroyed. The District Court also misinterpreted the effect of Mr. Seaman's phone conversations with his son, as described above. While Mr. Seaman may have discussed selling certain properties, he emphasized the importance of obtaining fair market value for any properties sold, and even instructed his son to not sell the properties for less than fair market value. (Tr. Rec. Phone Calls Files 1-22 p. 97-

98.)

As in *Second Jud. Dist. Ct. of Silver Bow County*, the facts here do not show "clear and conclusive" evidence Mr. Seaman's properties were in danger for purposes of Mont. Code Ann. § 27-20-201. Equally if not more important, the District Court did not yet have jurisdiction over Mr. Seaman at the time it appointed the receiver because Ms. Gabert had yet to serve Mr. Seaman as required by Rule 4. In sum, the District Court lacked jurisdiction over Mr. Seaman at the time it issued the appointment of a receiver and such appointment was in violation of Mont. Code Ann. § 27-20-201.

B. The District Court's *ex parte* appointment of a receiver violated Mr. Seaman's right to procedural due process.

The District Court's grant and upholding of the receivership appointment not only violated state law, but also Mr. Seaman's right to due process. Under the United States Constitution, "[n]o person shall be…deprived of life, liberty, or property, without due process of law…" U.S. Const. amend. V. Montana's constitution prohibits the same: "No person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art. II, § 17. The Montana Supreme Court has clarified that under both federal and state jurisprudence, "the requirements for procedural due process are (1) notice, and (2) opportunity for a hearing appropriate to the nature of the case." *Montanans for J. v. State ex rel.*

McGrath, 2006 MT 277, ¶ 30, 334 Mont. 237, 146 P.3d 759.

Here, the District Court's appointment of a receiver violated Mr. Seaman's right to due process because he received no notice or opportunity for a hearing on whether a receivership was necessary or appropriate *prior* to the appointment of the Receiver. The District Court issued the order appointing the Receiver two days after the application was filed, and one of those days was right before the Fourth of July holiday.

At the time the District Court issued its order, Mr. Seaman did not yet even have legal representation in the civil case. Mr. Seaman had no opportunity to request a hearing on receivership prior to the receiver being appointed. Even if he had received proper notice, Mr. Seaman would have had just one business day to review the documents filed against him and request a hearing before the court. The court appointed a receiver to control Mr. Seaman's property and assets without proper notice and prior to the district court having jurisdiction over Mr. Seaman, depriving him of his own property. This *ex parte* appointment was therefore an abuse of discretion because it violated Mr. Seaman's rights to due process.

CONCLUSION

The District Court abused its discretion by preemptively adjudicating the merits of the underlying claim for relief in this case and concluding Ms. Gabert met her burden of proof for appointment of the receiver. In addition, at the time of

appointment, the District Court lacked jurisdiction over Mr. Seaman and he had not received notice Ms. Gabert filed the application. Not only did the District Court erroneously conclude Ms. Gabert had met her burden of proof for appointment of the receiver, Mr. Seaman's due process rights and his right to notice under Montana law were violated. At the very least, he suffered a substantial injustice. The District Court also misinterpreted the law by holding that a tort claimant is a "creditor" and entitled to a receiver to effectively obtain a prejudgment attachment and asset discovery. Thus, because the District Court misinterpreted the law and abused its discretion, this Court should vacate the Order upholding the appointment of the receiver.

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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 a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 9,950 words, not averaging more than 280 words per page, excluding the certificate of service and certificate of compliance.

Dated this 30 day of January, 2023.

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I certify that on January 30, 2023, I served a copy of the preceding document by U.S. mail and email on the following:

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I, Reid J. Perkins, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-30-2023:

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