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STATE OF MONTANA
Case Number: DA 24-0075

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0075

VERNON K. STENSVAD,

Plaintiff and Appellee,

v.

NEWMAN AYERS RANCH, INC.

Defendant and Appellant.

ON APPEAL FROM ORDER GRANTING PRELIMINARY INJUNCTION
ENTERED IN THE SEVENTH JUDICIAL DISTRICT COURT OF
PRAIRIE COUNTY IN THE STATE OF MONTANA
BEFORE HONORABLE OLIVIA RIEGER

REPLY BRIEF OF APPELLANT NEWMAN AYERS RANCH, INC.

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Pursuant to Mont. R. App. P. 12(3), Appellant Newman Ayers Ranch ("Ayers Ranch") hereby submits its Reply to Appellee's Brief as follows:

I. Appellee's Claims and Argument Re: Unconstitutionality of the Agister Lien Statute, Mont. Code Ann. Title 71, Chapt. 3, Part 12, Were Not Preserved Below and Should not be Considered.

"This Court has consistently held that it will not consider issues raised for the first time on appeal… In order to preserve a claim or objection for appeal, an appellant must first raise that specific claim or objection in the district court." *In re T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38 (citations omitted). Appellee failed to raise, or even mention, the constitutional claims below, that it now attempts to assert.

The Appellant Ayers Ranch did not raise this constitutional issue below either. "In order to preserve an issue not raised by an appellant, a respondent must file a notice of cross appeal." *Walker v. State,* 2003 MT 134, ¶48, 316 Mont. 103, 68 P.3d 872, citing *Billings Firefighters Local 521 v. City of Billings,* 1999 MT 6, ¶ 31, 293 Mont. 41, 973 P.2d 222, *Gabriel v. Wood,* 261 Mont. 170, 178, 862 P.2d 42, 47 (1993); *See also* Mont. R. App. P. 4(2)(c). Appellee did not file the required Notice of Cross Appeal and again, the issue is not properly before this Court.

Appellee Stensvad did not comply with either Mont.R.Civ.P. 5.1(a) or Mont.R.App.P. 27 and did not provide notice to the Montana Attorney General or this Court of his present claim that the statute is unconstitutional. This Court should

not consider the constitutionality of a Montana statute without opportunity for input and intervention from the Montana Attorney General.

Last, ignoring all the above, Montana "[s]tatutes carry the presumption of constitutionality; therefore the party making the constitutional challenge bears the burden of proving, beyond a reasonable doubt, that the statute is unconstitutional, and any doubt must be resolved in favor of the statute." *City of Great Falls v. Morris,* 2006 MT 93, ¶12, 332 Mont. 85, 134 P.3d 692. Appellee has not carried this burden.

II. The Holdings of *Rose v. Myers* and *Cox v. Yellowstone County* are not Relevant to the Issues Presented for Review.

Appellee argues Mont. Code Ann. § 71-3-1213 "provides a property owner with no opportunity to contest it" and is therefore "an unconstitutional denial of procedural due process." Appellee's Brief at page 9 citing *Cox v. Yellowstone County,* 795 F.Supp.2d 1128 (2011) and Justice Hunt's concurring opinion in *Rose v. Myers,* 223 Mont. 13, 724 P.2d 176 (1986). Appellee then identifies that subsequent to *Rose* and *Cox,* the Legislature amended § 71-3-1203 and enacted § 71-3-1213. Those changes occurred in 2013 with the additional enactment of §§ 71-3-1211, 1212 and 1214.

Appellee's argument fails because although § 71-3-1213 is more specifically geared to the enforcement of Agister's liens regarding livestock, § 71-3-1203(8) which states "the owner of the property may request a hearing in district court to contest any matter regarding the sale of the property" expressly provides an

opportunity to contest them. There is no bar against an emergency hearing and this hearing provides the due process opportunity to contest *any* Agister Lien, livestock or otherwise. Since the amendment to Mont. Code Ann. § 71-3-1203 (subsequent to the *Rose* and *Cox* decisions) and at all times relevant to this case below and this appeal, such a hearing was available to Appellee Stensvad upon request and in lieu of an injunction, pursuant to Mont. Code Ann. § 71-3-1203(8).

Additionally, neither *Rose* nor *Cox* made a determination the Agister Lien statute was unconstitutional. *Cox* urged "greater protections" such as a "pre-deprivation hearing" may be sufficient. *Cox* at 1142. This was accomplished by the amendment to Mont. Code Ann. § 71-3-1203. The *Rose* majority went a step further than Appellee indicated and held, "[i]f in a future case this statute was found to be unconstitutional, it would invite chaos and confusion in this area of law." *Rose*, 223 Mont. at 16, 724 P.2d at 178. This statement holds today, especially with the greater protections provided in the amended statute, and also implies the *Rose* majority believed the prior statute to be constitutional. Regardless, the Agister Lien Statutes have been amended and *Rose* and *Cox* do not apply to the statutes presented by this appeal.

III. *Rose v. Myers* does not Support Appellee's Position that an Injunction is an Appropriate Mechanism to Avoid the Legislature's Agister Lien Provisions.

Appellee also cites *Rose* for the proposition, "[T]he [Montana Supreme] Court has previously determined that injunctive relief is an available, albeit imperfect, tool with which to obtain court review of agister's liens prior to enforcement." Appellee's Brief at page 8. The *Rose* majority opinion, which is the law, provides no such support for this claim. Whatever support is in the concurring opinion of Justice Hunt, is in the portion of the opinion which Justice Hunt prefaces, "I concur in the result reached by the majority, but cannot agree with its analysis of the constitutional challenge raised by appellants." *Rose*, 223 Mont. at 14, 724 P.2d at 180 (J. Hunt, concurring). His concurrence was limited to the result reached by the majority and in all other respects he disagreed with the majority. Justice Hunt expressly wrote his separate opinion to state his disagreement with the *Rose* majority. Even then, Justice Hunt, in *dicta*, only said "…and injunctions or other extraordinary remedies are discretionary with the trial court and thus lack the certainty necessary to insure a hearing prior to permanent deprivation." *Rose*, 223 Mont. at 23, 724 P.2d at 182, (J. Hunt, concurring). Justice Hunt never mentioned the word injunction again, and nowhere in the *Rose* majority or concurrence is there any discussion of Title 27. *Rose* has never been extended, discussed, interpreted, or even cited, in a published opinion issued by this Court. This Court has never determined injunctive relief is an available

tool with which to obtain court review of agister's liens prior to enforcement. The Legislature provided the tools to obtain court review of an Agister lien prior to enforcement, in Mont. Code Ann. § 71-3-1203(8).

IV. Appellee's Arguments Ignore the District Court's Obvious, Evident, and Unmistakable Abuse of Discretion.

The District Court below made a conclusion of law that Appellee Stensvad was entitled to an injunction pursuant to Mont. Code Ann. § 27-19-201(1)(b), because he had made prima facie showing he would suffer irreparable injury before his rights had been fully litigated. *See* Order at Appendix A, App. 1, Conclusions of Law Section, ¶5, at page 6:1-6:3. The District Court below quoted and applied *Sweet Grass Farms, Ltd v. Board of County Commissioners*, 2000 MT 147, ¶27, 300 Mont. 66, 2 P.3d 825 as follows: "…findings that satisfy only one subsection are sufficient. Consequently, only one subsection need be met for an injunction to issue'…" *See* Order, App. 1, Conclusions of Law Section, at ¶4, page 5:21-5:25. The Statute interpreted in *Sweet Grass Farms*, Mont. Code Ann. § 27-19-201 (1995), was abrogated, repealed and rewritten. Mont Code Ann. § 27-19-201 (2023) was in effect at all times relevant to the proceedings below and in this Court as well. The District Court's application of an abrogated and repealed statute amounted to an obvious, evident, and unmistakable abuse of discretion. Appellee Stensvad did not address this issue.

Whatever evidence was or was not presented below, the District Court's findings of fact were limited to only a finding that Stensvad satisfied the irreparable injury element, Mont. Code Ann. § 27-19-201(1)(b) (2023), no other findings were made regarding the other elements and mandatory prerequisites for injunctive relief, in Mont. Code Ann. § 27-19-201(1) (2023). A District Court must make these findings prior to issuing an injunction. The District Court expressly found only one element had been met in the case below, Mont. Code Ann. § 27-19-201(1)(b), and did not find, and Stensvad did not establish, the remaining elements set forth in § 27-19-201(1)(a), (c) and (d).

Appellee cannot now attempt to establish the remaining elements, with claims there are "serious questions" which were not answered at the injunction hearing. Appellee does not attempt to do so and, like the district court below, instead improperly relies on caselaw interpreting the now repealed 1995 version of Mont. Code Ann. § 27-19-201.

V. Application of General Versus Specific Statutes.

This Court has held "[i]t is a well-settled rule of statutory construction that 'when a general statute and a specific statute are inconsistent, the specific statute governs, so that a specific legislative directive will control over an inconsistent general provision.'" *Betts v. Gunlikson,* 2019 MT 183, ¶9, 396 Mont. 509, 445 P.3d

1223, quoting *Whalen v. Mont. Right to Life Ass'n*, 2002 MT 328, ¶ 9, 313 Mont. 204, 60 P.3d 972 (other citations omitted).

Mont. Code Ann. § 71-3-1211 (definition and creation of agister lien and establishment of right to retain cattle) and § 1213 (enforcement of agister lien) and § 1203(8) (providing for a hearing prior to the sale of the property) are very specific statutes that apply to very specific circumstances and those circumstances were present below.

Conversely, Mont. Code Ann. § 27-19-201 (2023) is a general statute. In addition, the District Court below applied the wrong version of the statute, applying instead Mont. Code Ann. § 27-19-201(1) (1995). In doing so the District Court failed to employ the conjunctive "and" in considering whether Stensvad established all the elements including whether the injunction was "in the public interest" as required by Mont. Code Ann. § 27-19-201(1) (2023). *See Also,* Section V(b)(1) of Appellant's Opening Brief.

Appellee Stensvad's remedy was under Mont. Code Ann. § 71-3-1203(8) not Mont. Code. § 27-19-201 (2023). To the extent relief may have been available under Title 27, the injunction requested and granted to Appellee Stensvad was clearly not in the public interest, the District Court did not find **all** the elements present as required by Mont. Code. § 27-19-201(1) (2023), and abused its discretion in entering the Order anyway, and its abuse is obvious, evident, and unmistakable.

VI. Conclusion.

Appellant Ayers Ranch requests the following relief, (1) the judgment of the District Court as articulated in its Order Granting Preliminary Injunction be reversed; (2) the Application for Injunction be denied; and (3) for such other and further relief as the Court deems appropriate.

Respectfully submitted this 10th day of July, 2024.

/s/ Shandor S. Badaruddin

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Shandor S. Badaruddin

Attorney for Appellant Newman Ayers Ranch, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) 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 for Mac version 16.47 is 1,747 words, excluding table of contents, table of citations, certificate of service, certificate of compliance and the appendices per M. R. App. P. 11(4)(d).

So certified this 10th day of July, 2024.

/s/ Shandor S. Badaruddin
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CERTIFICATE OF SERVICE

I, Shandor Badaruddin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 07-10-2024:

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Dated: 07-10-2024