IN THE SUPREME COURT OF THE STATE OF MONTANA

CAUSE NO. 94-287

RON EDWARD VAN LOAN,

Plaintiff/Respondent,

v.

JAMES VAN LOAN,

Defendant/Appellant.

RESPONSIVE BRIEF

Appealed from the Eleventh Judicial District
of the State of Montana, in and for the
County of Kalispell

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STATEMENT OF FACTS

In October of 1992, the Defendant was arrested and charged with six counts of incest, all felonies under the laws of the State of Montana. The Defendant was booked and released on $25,000.00 bond on the condition that he have no contact with his family, especially his children. Shortly after his release on bond, the Defendant was once again arrested for violation of the conditions of his bond by following his children and attempting to spy on them. Bond was revoked and the Defendant was incarcerated. (Appendix Exhibit No. 1.)

On January 27, 1993, the Defendant plead guilty to all six counts of incest and on March 1, 1993, the Defendant was sentenced to a total of sixty years in prison. In addition to the incarceration, the Court ordered that the Defendant establish a fund for the purpose of paying for counseling and treatment for the victims of his crimes, his adopted children. Finally, the court ordered that the Defendant would not be eligible for parole until he has served a minimum of eleven years and three months, the same number of years the Defendant spent abusing his adopted children. (Appendix Exhibit No. 2.)

On May 19, 1994, the Plaintiff brought a civil action against the Defendant based upon the Defendant's criminal actions, alleging intentional torts, and seeking compensatory and punitive damages. At the same time, the

Plaintiff filed applications for an ex parte TRO and a preliminary injunction, requesting that the Defendant be prohibited from disbursing his personal assets of over $1.3 million pending the outcome of the litigation.

The case was assigned to Judge Ted O. Lympus, who was out of town at the time the Complaint was filed, and thus the application for TRO was presented to District Judge Michael H. Keedy. Judge Keedy reviewed the pleadings and signed the TRO, setting a show cause hearing for June 29, 1994, at 8:45 A.M. and continuing the TRO in effect until the hearing. (Appellant's Brief, Appendix pp. 30-32.)

On May 23, 1994, the Defendant was served with the Summons, Complaint, Application for Ex Parte TRO and Preliminary Injunction, TRO and Order to Show Cause. (Appendix Exhibit No. 3.)

On June 7, 1994, the Defendant filed a Motion to Dismiss the Complaint, without supporting memorandum. On June 9, 1994, the Defendant filed a Motion for Substitution of Judge, substituting Judge Keedy, who signed the original TRO, for Judge Lympus, who had presided over the Defendant's criminal prosecution.

On June 28, 1994, the Defendant filed a Motion to Quash the TRO along with a Motion for Affirmative Relief, Including Damages, Costs, and Attorney's Fees. Due to the Defendant's motion, the show cause hearing was cancelled and the issues were briefed. By Order dated August 15, 1994,

the district court found the Defendant's Motion to Quash moot, denied his Motion for Affirmative Relief on the grounds that "[n]either the application for the original order nor for preliminary injunction was filed without legal or factual grounds," and reset the hearing on the Plaintiff's Application for Preliminary Injunction for October 6, 1994, at 3:00 P.M. (Appellant's Brief, Appendix pp. 53-54.)

At the hearing on October 6th, the Defendant admitted liability (which was subsequently confirmed by an order granting the Plaintiff's Motion for Partial Summary Judgment), and admitted that the Plaintiff had suffered "significant damage" as a result of the sexual abuse. (Tr. pp. 6 and 15.) Moreover, as to the liquid assets at issue, the Defendant stated that they were all owned by him individually. (Tr. p. 11.)

After hearing testimony from witnesses, the district court ruled as follows:

> THE COURT: Okay. I find the argument of defense counsel informed and artful, which is what I've come to expect from him over the years. If this were not an extraordinary case, and it is one, I might find them persuasive as well. However, I am of the belief that the Plaintiff would be injured irreparably if the assets about which we're concerned today were dissipated by the defense. He is very likely to prevail on the merits of his claim against the Defendant, and the maintenance of the status quo would not only unduly burden --would not only not unduly burden the Defendant but it would satisfy and

support my definition of public policy.

> The relative harm to be suffered by James Van Loan if an injunctive order is entered would be vastly exceeded by the harm to be suffered by Plaintiff if it were not. And on that basis, I'll grant your request for an injunctive order. You can draw it up. [Emphasis added.] (Tr. pp. 25-26.)

A written order was signed on November 1, 1994, establishing a permanent injunction and the next day the Defendant filed a Notice of Appeal. Within a week, the Defendant, through his counsel, warned the Plaintiff that "either before or after the Appeal is resolved" he was going to file bankruptcy in an effort to limit the Plaintiff's recoverable damages to no more than one quarter of $270,000.00. (Appendix Exhibit No. 4.) The remaining $1,000,000.00 in assets would be preserved for the Defendant in exempt IRA accounts.

This case is currently set for trial by jury during the first week of April, 1995.

STANDARD OF REVIEW

When reviewing orders granting preliminary injunctions, the Supreme Court has stated the general rule as follows:

> "The allowance of a preliminary injunction is vested in the sound legal discretion of the District Court, with the exercise of which the Supreme Court will not interfere except in instances of manifest abuse." Atkinson v. Roosevelt County, 66 Mont. 411, 421, 214 P. 74, 76-77 (1923).

When reviewing denials of motions for Rule 11 sanctions, this Court has stated that it "will give the

district courts wide latitude to determine whether the factual circumstances of a particular case amount to frivolous or abusive litigation tactics . . ." D'Agostino v. Swanson, 240 Mont. 435, 446, 784 P.2d 919, _____ (1990). Findings of fact, whether granting or denying Rule 11 sanctions, will not be overturned unless they are clearly erroneous. (Id.) Moreover, a district court's conclusions of law will be affirmed unless there is evidence showing an abuse of discretion. (Id.)

When the aforementioned standards of review are applied to the facts of this case, it is clear that there is insufficient evidence to disturb either of the lower court's rulings. As such, the Plaintiff would submit that this Court must affirm the lower court's issuance of the preliminary injunction and the denial of Rule 11 sanctions.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY INITIALLY ISSUING A TRO OR SUBSEQUENTLY ISSUING A PRELIMINARY INJUNCTION.

The Defendant asserts that the lower court abused its discretion by issuing both the TRO and preliminary injunction because an injunction cannot issue "[w]hen monetary damages will fully compensate a plaintiff . . ." (Defendant's Brief, p. 7.) Accordingly, the Defendant argues that without a showing of "irreparable injury," the lower court was without authority to issue the injunctions.

The Defendant's argument is without merit for several reasons.

First, contrary to the Defendant's assertion, there is nothing in the applicable statute which prohibits the issuance of an injunction in a personal injury action. The only stated circumstances under which an injunction may not be issued are as follows:

> **27-19-103. When injunction may not be granted.** An injunction cannot be granted:
>
> (1) to stay a judicial proceeding pending at the commencement of an action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;
>
> (2) to stay proceedings in a court of the United States;
>
> (3) to stay proceedings in another state upon a judgment of a court of that state;
>
> (4) to prevent the execution of a public statute by officers of the law for the public benefit;
>
> (5) to prevent the breach of a contract the performance of which would not be specifically enforced;
>
> (6) to prevent the exercise of a public or private office, in a lawful manner, by the person in possession;
>
> (7) to prevent a legislative act by a municipal corporation;
>
> (8) in labor disputes under any other or different circumstances or conditions than if the controversy were of another or different character or between parties neither or none of whom

were laborers or interested in labor questions. §27-19-103, MCA (1993).

Second, while the Defendant is correct in noting that money damages are not considered "irreparable harm" thereby supporting the issuance of an injunction, the Defendant wrongly applies that principle to the facts of this case.

In the cases cited by the Defendant, the parties seeking injunctions were at the time of the application suffering a monetary loss which they were attempting to stop by having some conduct of the other party enjoined. For example, in New Club Carlin, Inc. v. City of Billings, 237 Mont. 194, 772 P.2d 303 (1989), the plaintiff alleged that it was loosing patrons and therefore money because the city was preventing it from having nude dancing. The plaintiff's application for an injunction was denied. The Court reasoned that any lost income (monetary damages) the plaintiff was suffering due to the actions of the defendant could be recovered in an action at law and therefore an injunction was not warranted.

In other words, since the plaintiff's lost income (monetary damages) could be remedied either immediately by enjoining the defendant, or subsequently by receiving an award of damages after a resolution of the dispute on the merits, an injunction should not issue. In such a case, the party seeking the injunction is not suffering any greater harm if the injunction is denied, because he can recover the ongoing lost income by suing the defendant and recovering

his calculable damages at that time.

The same analysis and rationale is found in the case of Dickens v. Shaw, 255 Mont. 231, 841 P.2d 1126 (1992). In that case, the plaintiff had leased office space from the defendant. The defendant subsequently decided not to continue the lease and had the locks changed. The plaintiff sued to enjoin the defendant from leasing the office to anyone else during the pendency of the plaintiff's suit for breach of contract and other claims. Both the lower court and the Supreme Court denied the application for injunctive relief upon a finding that the only damage the plaintiff was seeking to avoid was the amount of increased rent for the same size office if she were forced to relocate. The Supreme Court noted that since any ongoing monetary loss due to the breach could be calculated and paid by the defendant at a later date pursuant to a suit at law, there was no need to issue an injunction.

The holdings of the foregoing cases can be summarized as follows: When a plaintiff's money damages can be remedied either by an injunction stopping the action which is causing the money damages, or by a favorable judgment awarding the amount of money damages suffered, an injunction should not issue. This is consistent with the stated purpose of an injunction which is "to preserve the status quo and to minimize the harm to all parties pending full trial." [Emphasis added.] Porter v. K & S Partnership, 38

St. Rptr. 648, 653 (1981). In such a case, the plaintiff suffers no greater harm by waiting and obtaining an award of damages, then by getting the defendant's action enjoined.

The same is not true, however, when the question is not the availability of a remedy at law, but the ability of the defendant to respond in damages when that remedy is pursued. In such cases, the choice is not between monetary damages or an injunction as in the aforementioned cases, but between an injunction or nothing. The Plaintiff submits that in such a situation, it is possible for the Plaintiff to suffer "irreparable harm". The facts of this case present just such a situation.

In the present case, the risk of harm to the Plaintiff was great had the junction been denied. It meant the difference between assets of approximately $1.3 million[1] and assets of zero from which to satisfy a judgment. While there is no guarantee when suit is filed that there will be money to satisfy a favorable judgment, when it is proven that assets exist from which a judgment can ultimately be paid, a plaintiff should not have to sit by and watch those assets disappear when it is within the power of the court to prevent such an outcome.

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[1] This was the value of the subject assets at the time of the hearing. The Plaintiff does not know the current values of these assets because, contrary to the court's Order, the Defendant has never provided the Plaintiff with copies of any quarterly reports stating the current values of these assets. (Appellant's Appendix, pp. 58-59.)

The Plaintiff has been unable to find a Montana case factually similar to the case at bar. Other jurisdictions, however, have permitted injunctions in cases presenting similar facts. For example, in Zonghetti v. Jeromack, 541 N.Y.S.2d 235 (A.D. 2 Dept. 1989), an employer brought suit against its former bookkeeper and others for conversion of funds. The employer then sought an injunction prohibiting the employee from selling or transferring any of her assets pending completion of the civil action. In allowing the injunction to stand the court reasoned as follows:

> We conclude that the plaintiffs have discharged their burden of proving: (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of a preliminary injunction, and (3) that a balancing of the equities favors their position [citations omitted]. The plaintiffs' application . . . supports the plaintiffs' contention that the uncontrolled sale and disposition by the defendants of their assets would threaten to render ineffectual any judgment which the plaintiffs might obtain (CPLR 6301). Given 'the underlying realities of this particular situation' [citations omitted], we find the status quo is best preserved by the granting of the preliminary injunction . . . [Emphasis added.] (Id. at 237.) (Appendix Exhibit No. 5.)

The facts of the present case are even more compelling than those in Zonghetti. When granting the injunction, the lower court observed that this was an "extraordinary case." The court's observation was correct for a number of reasons. First, unlike other personal injury cases where a

plaintiff's right to recover is speculative, the Plaintiff's rights in this case are certain. The Defendant has already plead guilty to the criminal acts which form the basis of the Plaintiff's claim for damages in this civil action. Moreover, at the injunction hearing, the Defendant admitted both liability and that the Plaintiff had suffered "significant damage." The Plaintiff's right to damages, therefore, is neither abstract nor speculative. The only unknown factor at this point in time is the amount of such damages.

Second, the Defendant's concern that a ruling upholding the injunction will result in mass use of prejudgment injunctions in personal injury cases is a smoke screen. Unlike the vast majority of personal injury cases, there is no insurance in this case. When there is insurance available to satisfy an anticipated judgment, whether in whole or in part, a plaintiff rarely considers looking to the personal assets of the tortfeasor to supplement the judgment. In most instances the time and money spent pursuing such assets is too great compared to the return. It is the rare individual defendant (versus corporate defendant) in personal injury cases who has assets of any significance. This is one of those rare cases, which raises the third distinguishing factor in this case.

The Defendant here had, at the time of the injunction hearing, over $1.3 million in liquid assets, all of which

were owned individually by him. It is extremely uncommon to have a defendant with such vast resources. However, it is not just the amount of the resources which supports the issuance of the injunction, but the nature of their ownership. The Defendant has sole ownership of these assets and thus in the time it takes to place a phone call to his broker, the Defendant could voluntarily become indigent.

Fourth, the Defendant is currently serving a 60 year sentence at the Montana State Correctional Facility at Deer Lodge. He is 52½ years old, and not eligible for parole until he is 62. He has no current need and possibly no future need for money. To the Defendant, the value of these assets is not in their dollar amount, but in their use as tools to further dominate and manipulate the person who turned him in, the Plaintiff. Why else would the Defendant threaten bankruptcy when he has no creditors and over $1.3 million in liquid assets?

Fifth, the Defendant's actions prior to the injunction hearing evidenced a continuing desire to cause further injury to the Plaintiff. As a condition of his bail, the Defendant was prohibited from having any contact with his family. Shortly after his release on bond, however, the Defendant was arrested after he had been caught following his children and attempting to spy on them. The Defendant's actions in failing to abide by the conditions of his bail bond show that he is capable of continuing to cause great

injury to the Plaintiff. From these facts, it is clear that given the chance the Defendant would, in all likelihood, violate the Plaintiff's rights by hiding his assets in an attempt to render any judgment obtained in this matter ineffectual.

The foregoing facts clearly establish that the Plaintiff would have suffered irreparable harm had the injunction not been issued. At the time of the injunction hearing liability and damages were both admitted by the Defendant. It was further established that significant assets existed to satisfy a possible judgment; the Defendant was the sole owner of these assets; the Defendant had no use for the money to support himself; and the Defendant's past actions showed he was an opportunist and fully capable and desirous of causing further injury to the Plaintiff.

This is not a case in which the Plaintiff can be compensated for the wrongs done him by the Defendant by some means other than monetary compensation. While certainly insufficient for the harm done, monetary damages are the only form of damages which could come close to providing the Plaintiff with an adequate remedy. The Plaintiff would prefer to have the Court erase the eleven years of abuse he has suffered at the hands of the Defendant. Absent such power, the Plaintiff requests that the Court allow the injunction to stand. There is no evidence of manifest abusive of discretion by the lower court, and thus, no

authority in this Court to dissolve the injunction.[2]

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION FOR AFFIRMATIVE RELIEF.

The Defendant argues that he is entitled to Rule 11 sanctions as a result of damages suffered due to wrongful issuance of both the TRO and the preliminary injunction. (Appellant's Brief, p. 19.) Neither the pleadings submitted by the Plaintiff requesting the injunctive relief, nor the court's orders granting those applications warrant the imposition of Rule 11 sanctions. So ruled the lower court, and there has been no showing by the Defendant on appeal of an abuse of discretion. The Defendant's argument to the contrary is without merit.

In response to the Defendant's Motion for Affirmative Relief, the lower court ruled as follows:

> Defendant also moves for damages, costs and attorney's fees pursuant to Rule 11, M.R.Civ.P. Rule 11 requires that an attorney make a reasonable inquiry into the facts and law that serve as the basis of any pleading, motion or other paper before signing and filing it with the Court. Plaintiff's application for a preliminary injunction is valid, and therefore does not serve as the basis for Rule 11 sanctions. Neither the application for the original order nor for preliminary injunction was filed without legal or factual grounds. (Appellant's Appendix, p. 54.)

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[2] The Defendant's jurisdictional argument is also without merit. The remedy of injunction is in personam, and where the court has jurisdiction of the parties it may enjoin the prosecution of an action in another state or country. Hand v. Hand, 131 Mont. 571, 312 P.2d 990 (1957).

Rule 11, M.R.Civ.P., requires an attorney to make a reasonable inquiry into the facts and law which serve as the basis of any pleading, motion or other paper of the party, before signing the same and filing it with the court. If a pleading, motion, or other paper of a party is signed in violation of Rule 11, the rule allows for the imposition of sanctions by the court. The rule itself does not specify the form such sanctions should take.

In discussing the use and application of Rule 11, the Montana Supreme Court has noted that the purpose of the rule is to "'discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.'" [Citations omitted.] D'Agostino, 240 Mont at 444. In order to achieve Rule 11's dual purpose of punishment and deterrence, this Court has noted that the rule provides for sanctions where the pleading or other paper is not (1) well grounded in fact; (2) warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; or (3) if a pleading or other paper is interposed for an improper purpose, such as harassment, delay or increasing the cost of litigation. The standard for determining whether a violation of Rule 11 has occurred is an objective one, that is, reasonableness under the circumstances. D'Agostino, supra. Finally, it should be noted that this Court has only

allowed the imposition of Rule 11 sanctions in a handful of cases, despite increasing requests for such sanctions from Montana attorneys.

The Defendant claims that sanctions are warranted based upon the form of the Plaintiff's application for TRO, as well as the contents of the Complaint. The previous discussion regarding the validity of the Plaintiff's Motion for Preliminary Injunction, and thus by association the validity of the application for TRO, indicates that the pleading was not filed without legal or factual grounds. Moreover, there is no evidence that either the TRO or the motion for preliminary injunction were filed for any improper purpose, such as harassment or delay.

The application for TRO and motion for preliminary injunction were filed by the Plaintiff to preserve the status quo until resolution of this lawsuit. This suit was filed because of the Defendant's criminal acts in clear violation of the Plaintiff's rights. All that the Plaintiff was attempting to do was to stop the Defendant from disposing of his assets so that when the Plaintiff is successful in obtaining a verdict, the Defendant will not be able to escape his legal responsibilities by claiming poverty.

Based upon the foregoing analysis, it is clear that the Plaintiff has not violated the dictates of Rule 11 in any manner. Not only are each of the causes of action stated in

the Plaintiff's Complaint well founded in fact and supported by the law, but there is no evidence that any pleadings signed by the Plaintiff were interposed for any improper purpose. Moreover, both applications were favorably ruled upon by the lower court and thus must have been meritorious.

While the Defendant has every right to disagree legally with the Plaintiff's application for a TRO and motion for a preliminary injunction and to challenge the correctness of the lower court's issuance of those orders, the proper procedure is to do so through means of an appeal, not by requesting Rule 11 sanctions. The conduct complained of by the Defendant is hardly the kind of egregious conduct at which Rule 11 sanctions are directed. It is difficult to see how a pleading adopted by the lower court can subsequently be considered frivolous or without merit.

Because of the legally nonexistent grounds for the request for Rule 11 sanctions, and the Defendant's failure to present any evidence establishing that the lower court abused its discretion by denying the Defendant's motion, the Plaintiff would request that the lower court's order be affirmed.

CONCLUSION

In order to dissolve the preliminary injunction, this Court must find that the lower court abused its discretion in granting the same. The Defendant has failed to present

any evidence of such abuse and thus the order establishing the injunction must be affirmed. Likewise, the Defendant has failed to present any evidence that the lower court abused its discretion when it denied the Defendant's motion for Rule 11 sanctions. Accordingly, that order must also be affirmed.

WHEREFORE, for the foregoing reasons, the Plaintiff respectfully requests that the Court affirm the orders of the lower court.

DATED this 1 day of March, 1995.

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CERTIFICATE OF MAILING

I, Robin Stephens, do hereby certify that on the 1st day of March, 1995, I served a true and accurate copy of the foregoing instrument by U.S. mail, first class, postage prepaid to the following:

James Bartlett
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Robin Stephens

Robin Stephens