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STATE OF MONTANA
Case Number: 94-586

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Ed Smith
CLERK OF SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

ROD EDWARD VAN LOAN, Plaintiff/Appellee,

-vs-

JAMES E. VAN LOAN, Defendant/Appellant.

Case No. 94-586

RESPONSIVE MEMORANDUM IN OPPOSITION TO MOTION TO RETAIN TRIAL SETTING

The Plaintiff, Rod Edward Van Loan, has filed a document entitled "Motion to Retain Trial Setting and Supporting Brief". The "Motion", apparently is to be treated as an application for a writ of supervisory control under Rule 17, M.R.App.P. It must be denied.

This Court will not accept original jurisdiction unless:

> "(1) Constitutional issues of major statewide importance are involved;
>
> (2) The case involves purely legal questions of statutory and constitutional construction; and
>
> (3) Urgency and emergency factors exist, making the normal appeal process inadequate.

Butte-Silver Bow Local Government v. State, 235 Mont. 398, 768 P2d 327 (1989). *State ex rel Racicot v. District Court*, 244 Mont. 521, 798 P2d 1004 (1990).

When fact issues are involved this Court usually will deny the request to take supervisory control because it is not the role of the Supreme Court to function as the primary fact-finder. And more importantly when the usual procedures for appeal are in place, there is no reason to find an emergency to justify departure from the normal course of litigation. Only in the most extenuating circumstances will a writ of supervisory control be granted. *State ex rel Ward v. Schmall*, 190 Mont. 1, 617 P2d 140 (1980).

In the case of *Department of Revenue v. State Tax Appeal Board*, 185 Mont. 172, 605 P2d 170 (1980), this Court denied a request for a writ of supervisory control since the decision of the District Court had been appealed to the Supreme Court. The fact that the appeal was made established that there was a remedy by appeal adequate to preclude review by supervisory control.

Here, no review is requested. This Court is asked to direct the District Court to conduct a jury trial despite the Appeal. Rule 17, M.R.App.P. requires a review of some decision, and it is not to be used as some kind writ of mandate.

Resolution of Appeal does have a direct bearing on the issues to tried before the Court and decided by the District Court Jury.

The commencement of an action at law does not entitle a plaintiff to an injunction restraining a defendant from disposing of his property, even though such disposition of property might

prevent the collection of the judgment in the event that the plaintiff should recover one. Pre-judgment writ of attachments are limited to contracts for the direct payment of a sum certain, and constitutional provisions have strictly limited the ability of a plaintiff/litigant to seize property before judgment is entered. To permit personal injury plaintiffs to freeze assets pre-judgment surely tramples constitutional rights and is a serious infringement on the due process provisions of the United States and Montana constitutions. A ruling in favor of the Plaintiff on the Appeal will certainly cause havoc in the personal injury litigation arena. When insurance coverage is not available for a defendant it would become routine for the personal injury plaintiff to obtain a preliminary injunction to freeze the assets of the Defendant. Therefore it is respectfully submitted that it is more likely than not that this Court will reverse Judge Keedy's preliminary injunction. With a favorable result from this Court, the Defendant will have a mandatory counterclaim against the Plaintiff for issuance of the wrongful injunction and for all damages flowing to him.

To save multiplicity of actions, it is appropriate for the Appeal to proceed in due course without the intervention of the Supreme Court in the docket of the trial court.

The case must be bumped from the term for failure to hold a settlement conference.

Most importantly, this case would be bumped from the term

and would not take place because of the failure to have a settlement conference prior to November 11, 1994. In the Target Order, paragraph 7, the parties were to have held a settlement conference with a report of the settlement master to be filed no later than Friday, November 11, 1994. The Notice of Appeal was filed on November 2, 1994. The District Court lost jurisdiction at that time. No pretrial order was prepared by Plaintiff's counsel prior to the deadline of November 25, 1994 for the same reason. And in paragraph 11 of the Target Order, in all capitol letters, is the sentence

"NO TRIAL WILL BE HELD WITHOUT A SETTLEMENT CONFERENCE."

Thus, under the District Court's local rules, this case would be bumped from the jury calendar. Intervention by this Court is inappropriate. This Court does not know the number of cases set for the three-week jury term, and it should not tell the trial court which of the cases are to be tried within the three-week term.

Reference to disputed facts precludes relief.

The Plaintiff argues that the burden of having a preliminary injunction imposed on him will go away more quickly by losing the jury trial. Again, Plaintiff ignores the fact that if the injunction was issued wrongfully there is a mandatory counterclaim to be heard. It was the Plaintiff who chose to seek a preliminary injunction, knowing it was an appealable issue, rather than to forego that effort

and simply wait for the jury trial.

The Plaintiff argues that if the trial is postponed for six months to a year pending the outcome of the Appeal, he will be severely damaged. It is sufficient to note here that the Plaintiff himself is charged with a sexual felony for conduct upon his sister. To differentiate whether the Plaintiff's mental problems are those of a victim or those of a perpetrator still needs to be litigated and resolved. It is not for this Court to hear such issues. Should this Court consider the Affidavit by Dr. Brown, dated November 28, 1994, which was not served upon defense counsel until it was attached to the Motion to Retain Trial Setting and Supporting Brief, then this Court must give the Defendant time in which to counter the Affidavit, to depose Dr. Brown, or to submit affidavits or depositions concerning Defendant's health. By accepting original jurisdiction, this Court would become a fact-finder. The need to cross-examine the witnesses is crucial in every case, especially in a case where the plaintiff is a victim and a perpetrator. This Court has always declined to intervene to avoid the role of fact-finder.

Pretrial motions were not filed after the Appeal was taken.

Further, had the Appeal not been taken, the Defendant would have filed a pretrial motion for change of venue out of Flathead County because of an inability to obtain a fair civil trial resulting from the adverse publicity given in the criminal trial and for the

1 convenience of witnesses — namely the Defendant himself is
2 incarcerated in Deer Lodge County. Other pretrial motions, from
3 either party, such as motions in limine would have been considered
4 and filed.

5 **Bankruptcy is a distinct possibility.**

6 To have this Court intervene at this stage would mean the end
7 of settlement negotiations. The Defendant would be forced to
8 decide whether to sit for trial or to resolve all claims of all victims in
9 one forum — bankruptcy court.
10
11 It is represented to the Court that there are three other
12 children who have potential claims against the Defendant, and at
13 least one of those children has a potential claim against the Plaintiff,
14 Rod Van Loan, who is now an adult. Settlement negotiations have
15 been ongoing with counsel for the other three children, Bruce
16 McEvoy, as shown by his letter marked Exhibit "A" attached hereto
17 and by this reference made a part hereof. It is represented to the
18 Court that if settlement cannot take place for the benefit of all four
19 children, the Defendant has the benefit of the bankruptcy law, which
20 will totally exempt all of his IRA funds from the reach of creditors,
21 and he can designate his remaining sums for payment to his
22 creditors, which would include his four children. In the bankruptcy
23 court, the validity of any proof of claim filed by any creditor would be
24 decided by Judge Peterson. The damages of the four children is
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determined at one hearing, with the corpus of the non-exempt property available for payment under an approved plan.

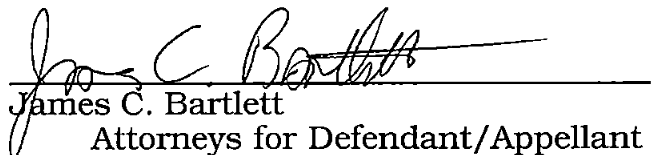
For this reason alone — all settlement negotiations would come to a halt — this Court must not assume original jurisdiction and direct Judge Curtis to conduct a trial. It is better to let settlement negotiations among Plaintiff's counsel, Mr. McEvoy and Defendant's counsel continue while the Appeal is heard in due course. This suit concerns not only the Plaintiff and Defendant, but three other members of the household.

CONCLUSION

There is no extraordinary circumstance to permit this Court to assume original jurisdiction in this case. Were the Court to do so, nonetheless without the settlement master having conducted a hearing, the local district court rules would still prevent the jury trial from taking place in January. Any intervention by this Court interferes with ongoing settlement negotiations. Finally, the Appeal has a statewide significance. The Montana Defense Trial Lawyers Association has been invited by Defendant to file an Amicus Curiae Brief.

DATED this 15th day of December, 1994.

HASH, O'BRIEN & BARTLETT



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CERTIFICATE OF MAILING

I, ANDREA E. HALDEN, secretary to James C. Bartlett of the law firm of HASH, O'BRIEN & BARTLETT, do hereby certify that on this 15th day of December, 1994, I served a copy of the foregoing instrument upon counsel of record by mailing a copy thereof, first class mail, postage prepaid, as follows, to-wit:

David W. Lauridsen
BOTHE & LAURIDSEN, P.C.
P. O. Box 2020
Columbia Falls, MT 59912

ANDREA E. HALDEN