DOUGLAS J. WOLD

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RESUME

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Personal:

Born Billings, Montana, September 16, 1939
Married to Linda Madsen Wold, 1961
Three adult children
Reside in Polson, MT

Education:

1957 Laurel High School, Laurel, Montana
1960 Goethe Institut, Murnau, Germany
1960 University of Montana, Missoula, MT (B.S., Finance)
1962 University of Southern California, Graduate studies, Business Admin.
1965 University of Montana, (J.D.)
1965 University of Virginia, School of Law , US Army JAGC School
1968 The George Washington University (L.L.M., Taxation)

Bar Admissions:

1965 Montana
1965 U.S. District Court
1965 U.S. Court of Military Appeals
1968 U.S. Tax Court
1969 Salish & Kootenai Tribal Court
1976 U.S. Supreme Court

Publications, Teaching:

"Res Ipsa Loquitor in Montana", 29 Montana Law Review 199 (1968)
"Montana Death Taxes", 31 Montana Law Review 133 (1970)
Frequent lecturer at CLE presentations
Occasional lecturer and adjunct professor at University of Montana, School of Law

Memberships, Associations

Associate, American Board of Trial Advocates
Chairman, Montana Supreme Court Commission on Civil Jury Instructions (MPI), 1984 to 2012
State Bar of Montana; President, 1984-1985; Trustee 1978-1986
Montana Trial Lawyer's Association, Director, 1985; Convention Co-Chair 1993-2012
Co-founder: MTLA Trial Academy
9th Circuit Judicial Conference, Member 1986-1989
Montana Law Foundation, 1985-1998 (Chairman 1995-1998)
Association of Trial Lawyers of America
1984 Alberta Law Society (Honorary)
Chair, UM School of Law Capital Campaign, 2010-2012.
2013: Top Lawyers in Montana

Practice History:

1965	Smith, Boone & Karlberg, Missoula, Montana
1965-1969	U.S. Army, JAGC, Captain. Prosecutor at Fort Dix, New Jersey, 1965-1967; (approx. 160 General Courts Martial) , Appellate Defense Counsel, Washington, D.C., 1967-1969.(approx. 60 appeals)
1969	Assistant Attorney General, State of Montana, Helena, Montana.
1969-date	Private practice with offices in Polson and Kalispell, Montana.

Practice emphasis from 1969-1977 was general practice including litigation, business, taxation, and real estate. Since 1977, practice has been limited solely to civil litigation. Practice areas have emphasized personal injury, medical malpractice, toxic torts, product liability, and contracts.

Recent cases have included the ***Columbia Falls Aluminum Company Employees Pension Plan vs. Duker, et al.,*** in which I was the lead counsel for defendant Duker. That $400 million claim settled at $100 million and was then largest case of its type in Montana. In 2002-2004, I represented the defendants in ***Behling v. Darby Lumber Co.*** ultimately becoming the lead defense counsel for defendants Russell. That case involved a $28 million claim plus $8 million in fees; my clients only contribution to the settlement was $19,000.

I was lead counsel for plaintiffs in what is known as the Mullan Trail Subdivision case involving claims by homeowners against developers and Missoula County resulting from damages in approving and building the Mullan Trail subdivision adjacent to and vulnerable to flooding from Grant Creek. That case settled for $2.3 million.

Representative clients for whom we have done substantial defense litigation work in recent years include **Semitool, Inc., Cenex Harvest States, and Farmers Union Mutual Insurance Company.**

I have handled over 25 appeals to the Montana Supreme Court since 1969.

Montana Law Week publishes abstracts of trials and settlements that take place in Montana Courts. A collection of some cases in which we have been involved is attached.

Mediation and arbitration:

I have participated in hundreds of mediations and some arbitrations. Completed advanced mediation and arbitration training course, Univ. of Idaho, Summer, 2000.

MONTANA LAW WEEK EXCERPTS

Federal Trial Courts

SETTLEMENT: $97 million, CFAC profit-sharing litigation... 10%/21% attorney fees.. fairness/approval order... Shanstrom.

Columbia Falls Aluminum was initially incorporated by Atlantic Richfield which owned the Columbia Falls aluminum smelter until it was acquired by Montana Aluminum Investors in 9/85. Brack Duker was sole shareholder of MAIC at that time. One of the acquisition documents, a letter dated 9/10/85, provided that: "MAIC will ensure that the employees of CFAC will have a claim against at least 50% of the profits earned in each year by [CFAC] either by reason of stock ownership in CFAC or through profit-sharing arrangements in CFAC." In 11/85 CFAC negotiated a CBA with the hourly employees which provided: "The [CFAC Board] will determine each year the profits available for distribution. Fifty percent of the distributable profits as determined by the parent company will be distributed to the employees."

Salaried employees sued CFAC in 1/92 and the hourly employees case was filed in 4/92, alleging underpayment of profit sharing. Both cases were certified as class actions and consolidated for discovery and trial. The employees contended that the profit-sharing agreements required that profits actually distributed by CFAC be split equally between owners and employees. In their summary judgment motions this claim with interest through 1995 for all employees totaled approximately $154 million. Defendants contended that the employees were only entitled to a discretionary amount of "distributable" profits, and were owed nothing beyond the $90 million they had already been paid. Magistrate Erickson and Judge Shanstrom denied the summary judgment motions, ruling that the profit-sharing promise was ambiguous. Only breach of contract issues remained for jury trial, which was set to begin 1/12/98.

Settlement of $32 million for the 220 salaried employees and $65 million for the 800 union and hourly employees was reached 12/19/97 in mandatory settlement conference before Judge Molloy and Magistrate Anderson. Related litigation including *Mareva* injunctions over assets on the Isle of Man and Gibralter was also resolved in the settlement. Shanstrom approved the settlement following fairness hearings. The following is from his orders approving fees of 20.85% (including costs) in the salaried case and 10% in the hourly case:

This is one of the most complicated, challenging, and hotly contested cases in Montana history. Over 100 depositions were taken. More than 20 experts were retained. The case presented difficult and unusual questions of law and difficult fact issues encompassing more than a decade. It was ably and vigorously defended by more than 20 lawyers from some of the leading firms in the state and country. It presented substantial risks, especially in the earlier stages. Attorneys James Goetz and Jeffrey Renz testified that the case was exceptionally difficult, the attorney work of highest quality, and the results outstanding. Goetz opined that based on his experience and expertise in complex and class litigation a fee of 20.85% (including costs) of the $32 million recovery for salaried employees is fair & reasonable. 70 salaried employees directly retained the McGarvey firm on a 33% contingency basis. The remaining class members must share in the costs, including fees, under the common fund doctrine. The attorneys will reduce the fee charged to their individual clients to the same rate charged the class as a whole. The Aluminum Workers' Trades Council agreed in a private contract to pay its lawyers 10% after litigation expenses. Renz opined that 30% is presumptively reasonable in a common-fund case, and that 10% in the hourly case is eminently fair & reasonable.

Plaintiffs' experts: Jerald August, West Palm Beach, Fla. (S corp taxation); CPAs Ted Fiflis, Boulder, Colo., Roberta Gilmore, Whitefish, Jim Noe, Louisville, Ky., Robert Saurey, Whitefish, and Revo Somersville, Whitefish; Thomas Skeen, Hudson, Ohio (executive compensation); Thomas Terry, DC (employee benefits), Sally Weaver, Missoula (corporations); James Oldham, DC (collective bargaining); attorneys James Goetz, Bozeman, and Jeffrey Renz, Missoula (attorney fees).

Defendants' experts: Michael View, Long Beach, Calif. (taxation & accounting); Craig Langel, Missoula (taxation & accounting); economist Paul Polzin, Missoula; Gary Randall, Spokane (S corp taxation); James King, Corbridge, England (economics of metals); Jeffrey Clayton, Salt Lake City (employee benefits); Wayne Horvitz, NYC (collective bargaining); CPAs Gail Mikus, LA, and Lary Johnson, Kalispell.

***CFAC Profit-Sharing Litigation,* 23 MFR 42 & 63, fairness orders approving settlement 1/21/98, 1/22/98.**

Allan McGarvey, Roger Sullivan, and Jon Heberling (McGarvey, Heberling, Sullivan & McGarvey), Kalispell, for salaried employees; Michael LaBelle & Tom Powers (Powers & Lewis), DC, and Joan Jonkel, Missoula, for hourly/union employees; Gary Graham, Sherman Lohn & Dennis Starkel (Garlington, Lohn & Robinson), Missoula,

Harry Huge, Elliott Adler, Richard Medway, and Ralph Caccia (Powell, Goldstein, Frazer & Murphy), DC, and Richard Birmingham (Birmingham, Thorson & Barnett), Seattle, for CFAC; Douglas Wold & Leslie Budewitz (Wold Law Firm), Polson, for Duker; Dana Christensen, Mikel Moore, and James Robischon (Christensen, Moore, Cockrell & Cummings), Kalispell, for Jerome Broussard.

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SETTLEMENT: $5,022,000, ERISA, insurance coverage/bad faith, WARN Act, bankruptcy, attorney fee claims, real property dispute, all other litigation relating to Darby Lumber ESOP and closure of mill... $1,923,000 to ESOP, $600,000 to bankruptcy estate, $2,498,000 attorney fees/costs.

In 8/94 Robert & Peggy Russell formed an ESOP for employees of Darby Lumber Inc., of which they were 100% owners. The ESOP purchased 56% of the company stock from Russells for $6.5 million. Russells served as selling shareholders, officers, and directors of the Company and fiduciaries of the trust at the time of the trust's purchase of their shares. Russell personally guaranteed a loan from US Bank, which the ESOP used for the purchase. DLI closed in 1998 due to a drop in the finished lumber market. In 1999 several of DLI's 100+ employees sued Russells alleging ERISA violations, mainly that they failed to act as prudent fiduciaries in establishing the stock price, resulting in its overvaluation.

Plaintiffs asserted claims on behalf of the entire ESOP and its associated trust pursuant to ERISA. They alleged that Russells failed to obtain and review an independent appraisal in advance of the Trust's purchase of DLI as required by law. They alleged that the untimely appraisal contained numerous errors, including double counting of company timber and failing to recognize environmental liabilities. They claimed $28 million+ damages. In discovery responses in 1/04 Plaintiffs claimed approximately $8.4 million attorneys fees & costs on the amounts allegedly owed. Throughout 5 years of litigation Russells asserted that they had committed no wrong and they made no settlement offers.

Russells tendered defense to Indiana Lumbermens Mutual Ins., which refused to provide coverage or defense. Russells filed a coverage action against ILM and Judge Molloy ruled that it owed them a defense. ILM appealed. Russells sued ILM for insurance bad faith.

In 3/02, a month before trial in the ERISA case, DLI filed Ch. 7. The bankruptcy trustee and ERISA Plaintiffs filed additional claims allegedly on behalf of DLI and the ESOP, directed at DLI's financial and legal advisors, who were all testimonial witnesses and/or defense counsel in the ERISA case, including John Menke (an ERISA lawyer who had advised DLI in establishing the ESOP), Moss Adams (DLI's accounting firm), Independent Appraisal, JC Buck Corp. (financial advisor to DLI), and Reep, Spoon & Gordon (Russell's defense counsel and corporate counsel).

The bankruptcy trustee also asserted a claim directly against Russells and the law firms which represented them, seeking recoupment of several million dollars (exact amount not specified by the trustee) of fees paid to fund their defense by ILM. These fees had been paid by ILM to Russells and their counsel after Molloy's declaratory judgment establishing ILM's duty to defend. The trustee claimed that these funds were assets of the bankruptcy estate.

ILM also asserted a $1 million+ claim for reimbursement against Russells. It claimed that it would prevail in reversing Molloy's coverage decision on appeal. It asserted that it would pursue Russells to repay all funds paid in their defense if it did prevail.

Russell's contended that the stock had been valued correctly and that their valuation was confirmed by the independent appraiser prior to the ESOP transaction. The advisors contended that the claims against them were barred by the statute of limitations and that they had committed no wrongs.

After 3 settlement conferences before Judges Cebull, Erickson, and Ostby, a global resolution of all cases was reached for a total of $5,022,000 including $1,923,000 to the ESOP, $600,000 to the bankruptcy estate from Indiana Lumbermens, and $2,498,000 attorney fees/costs. Russells contributed $19,000 to the settlement, receiving releases from all parties, including a release of claims for reimbursement of fees asserted by ILM and the bankruptcy trustee. ILM contributed $4,153,000, conditioned on release of the coverage and bad faith claims against it. The remainder of the settlement funds was collectively contributed by the group of other defendants including the appraisal firm, accountants, and legal counsel. The bankruptcy estate also settled separately for $35,000 from land swap litigation.

On 7/27/04 Judge Kirscher approved a $25 million proof of claim against the bankruptcy estate on behalf of ESOP Plaintiffs. However, the estate has only $635,000, which must be paid pro rata to all claimants after administrative expenses.

Plaintiffs' motion for reconsideration of Judge Molloy's order denying enforcement of an earlier settlement with Russells that was reached before Cebull for $4.5 million (MLW 12/6/03:7) was pending at the time the global settlement was achieved.

***Behling et al v. Russell et al,* CV-99-165-M; *Torgenrud et al v. Moss Adams LLP et al,* CV-04-06-M; *Behling et al v. Reep et al,* CV-02-15-M; settlement approved by Judge Molloy 7/7/04 and by Judge Kirscher 7/27/04.**

Patrick HagEstad & Lon Dale (Milodragovich, Dale, Steinbrenner & Binney), Missoula, Monte Beck & John Amsden (Beck, Richardson & Amsden), Bozeman, and Philip Carstens & Michael Black (Lukins & Annis), Spokane, for Plan Plaintiffs; Ch. 7 Trustee Donald Torgenrud (Torgenrud Law Office), St. Ignatius, for Darby Lumber Estate; Jean Faure, Kenneth Dyrud, and Michelle Mudd (Church, Harris, Johnson & Williams), Great Falls, Douglas Wold & Leslie Budewitz (Wold Law Firm), Polson, Robert Bell & Richard Reep (Reep & Bell), Missoula, and James Cossitt (Cossitt Law Firm), Kalispell, for Russells; Douglas Wold & Leslie Budewitz (Wold Law Firm), Polson, for Buck; William Mattix (Crowley, Haughey, Hanson, Toole & Dietrich), Billings, for Menke & Associates; Jon Beal (Beal Law Firm), Missoula, for Independent Appraisals; Keith Strong (Dorsey & Whitney), Great Falls, for Moss Adams; James Goetz & Devlen Geddes (Goetz, Gallik, Baldwin & Dolan), Bozeman, for Richard Reep; Guy Rogers (Brown Law Firm), Billings, Mark Williams (Williams Law Firm), Missoula, and Andy Hull, Indianapolis, for Lumbermens Mutual.

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VERDICT: Rescission of one metrology system contract but not a second, $32,500 balance due on second.

The parties entered into an agreement seeking to integrate Philips Analytical's metrology system into a Semitool plating tool known as Paragon, for measuring plating thickness on silicone wafers. Semitool agreed to purchase an Impulse 300 for $650,000 and an Integrated Metrology System for $325,000, to be paid in installments, of which $692,500 had been paid. Semitool claimed that the tools failed to perform as represented and sought rescission and return of the $692,500 plus interest. Alternatively, it claimed that Philips breached the contracts by delivering tools that failed to meet agreed performance and reliability, or that they were subject to certain express & implied warranties which were breached by their failure to meet the required standards. Philips claimed that its system worked and that rescission is not appropriate because Semitool failed to promptly rescind and accepted the tools. It denied that it breached the contract and warranties. It counterclaimed for the unpaid portion of the purchase price of $282,500 plus interest.

A Missoula jury found that Semitool is entitled to rescind purchase of the Impulse but not the IMS. It found that Philips did not breach any contract or warranty relating to the IMS and accordingly awarded no damages to Semitool. It found that Philips is entitled to be paid the $32,500 balance of the IMS.

Plaintiff's experts: Robert Batz, Kalispell (metrology).

Defendant's experts: Chris Moore, Boston (metrology).

Jury deliberated 1½½ hours 8th day; Magistrate Erickson.

***Semitool v. Philips Analytical,* CV-02-54-M, 6/18/03.**

Douglas Wold, Polson, and Chad Wold, Kalispell (Wold Law Firm), for Semitool; Michael Milodragovich (Milodragovich, Dale, Steinbrenner & Binney), Missoula, for Philips.

State Courts:

BENCH JUDGMENT: Defense, auto/pedestrian, crossing outside of crosswalk, knee/bruising... Lympus.

On 9/28/00 Carol Lockwood, crossing 1st Ave. E. near 3rd St. E. in a westerly direction on her way to work, was struck by a vehicle driven by Howard Trainer and owned by Treweek Const. Trainer had been parked across from City Hall heading north on 1st. Ave. He entered the outside lane, signaled, then entered the inside lane, maintaining his attention toward the forward path of travel. A vehicle parked on 1st. Ave. in front of the library obscured his view of Lockwood as she stepped into the street in front of him. The time that it took her to walk in front of him was insufficient for him to perceive and then react by either stopping or taking other evasive action to avoid colliding with her. They collided 9½-12½ north of the crosswalk. John Baker testified that it was ``virtually impossible'' for her to have been within the crosswalk. Trainer kept a proper outlook and acted as quickly as a reasonable person would or could and exercised reasonable care in operating his vehicle.

Lockwood breached the duties imposed on her as a pedestrian by §§ 61-8-501(2), 502, and 503 and Kalispell Ordinance Art. VIII, 17-106 when she crossed 1st. Ave. E. outside of the designated crosswalk, which breach constituted negligence and resulted in the collision. Trainer was not negligent. Lockwood's negligence is the sole cause of the collision. She is not entitled to any damages.

Lockwood, 53, claimed bruising, torn knee ligaments, knee surgery, and use of a cane. She claimed $50,000 medicals plus pain & suffering and inability to work.

Plaintiff's experts: none.

Defendant's expert: PE John Baker.

Demand at settlement conference with Tracy Axelberg, $300,000; offer at settlement conference, $1,250, offer of judgment, $5,000.

***Lockwood v. Treweek Const.,* Flathead DV-00-623(A), 10/4/02.**

David Lauridsen & Kevin Duff (Bothe & Lauridsen), Kalispell, for Lockwood; Douglas Wold & Chad Wold (Wold Law Firm), Polson, for Treweek (Farmers Union Mutual Ins.).

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VERDICT: $200,000, propane fire, product liability/ negligence, leg burns.

A Libby jury found that Cenex sold Mike Fuchs the propane which caught fire in his camper, it was sold in a defective condition, its sale in a defective condition was a cause of his damages, and he unreasonably misused the propane tank and his misuse was a cause of his damages, and apportioned cause 52% to Cenex and 48% to Fuchs. It also found that Cenex was negligent in filling the tank and its negligence was a cause of Fuchs's damages and that he was negligent in his use of the tank and his negligence was a cause of his damages, and apportioned negligence 51% to Cenex and 49% to Fuchs. It awarded $200,000 damages. Judge Prezeau ruled post-trial that misuse could not be used as a defense in a product liability case, and threw out the misuse apportionment. He allowed Fuchs to recover under either product liability or negligence; Fuchs chose product liability without the apportionment. Prezeau also dismissed Fuchs's punitives claim. Jury votes ranged from 12-0 to 10-2.

Fuchs claimed that he bought propane at the Kalispell Cenex station. He brought in a very old bottle that had not been re-certified in many years and was designed only for vertical position but which had no warnings to that effect. He lived in Libby but had been working in Kalispell during the week and living in his camper. He installed the tank in his camper in a horizontal position. He awakened shortly after midnight 11/25/97 and smelled propane. It ignited, causing burns on his legs and feet. Plaintiffs' theory was that the propane tank had leaked due to bad threads and because it was in a horizontal position. He alleged that the industry had a duty to warn about using the tank only in one position and to use labels indicating "right side up," and that Cenex should not have filled the tank under these circumstances. Cenex denied selling the propane to Fuchs based largely on sales records, and contended that even if it had filled the tank it had complied with all guidelines and the fire was Fuchs's fault.

Fuchs, 35, suffered 2nd degree burns over 30% of his body. He incurred $60,000 medicals and has recovered from his injuries. His wife Sally claimed consortium damages.

Plaintiffs' experts: Dan Smith, Kalispell (fire cause & origin); Mel Beick, Great Falls (propane).

Defendant's experts: Jack Garrett, Idaho (fire cause & origin and propane).

Demand pre-trial, $400,000; offer, $15,000. On Friday of the first week of trial there were no witnesses and Prezeau wanted the parties to negotiate. Cenex stated that if Fuchs would offer $100,000 and work down it would negotiate. There were no further negotiations. Jury request, $4 million; jury suggestion, 0.

Jury deliberated 8 hours 6th day including lunch & dinner.

Cenex is appealing whether there should be an offset for Fuchs's fault. Fuchs is appealing dismissal of his punitives claim.

***Fuchs v. Cenex,* Lincoln DV-00-70, 10/23/01.**

Lee Henning & Kathy Burch (Henning & Keedy), Kalispell, for Fuchs; Douglas Wold & Chad Wold (Wold Law Firm), Kalispell, for Cenex.

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Federal Trial Courts

PROCEDURE: Bankruptcy not good cause for failing to timely serve defendants... dismissal without prejudice rather than extension... new defendants in amended complaint timely served... leave not required for amended complaint... consolidation premature... Molloy.

In 1999 several Darby Lumber employees sued Darby and controlling shareholders Robert & Peggy Russell alleging that they had violated ERISA when they established the ESOP causing Plaintiffs to pay too much for shares of Darby stock. The case was set for trial in 4/02. In 1/02 Plaintiffs filed a second suit naming several consultants, advisors, and appraisers involved in establishing the ESOP as defendants and Darby was joined as an involuntary plaintiff. Plaintiffs had the Clerk issue 15 summonses. In 2/02 the original defendants moved to vacate deadlines and consolidate. In 3/02 Darby filed Ch. 7 and the Court vacated the trial date. In 5/02 Magistrate Erickson vacated the pretrial conference. In 10/02 the Court consolidated the original cases and the consultants case and set trial for 11/03 and an expedited discovery and motions schedule. Plaintiffs filed an amended complaint in the consultants case naming Richard Reep and his law firm as additional defendants. They then began serving defendants in the consultants case. Defendants moved to quash service, vacate the consolidation order, and dismiss for failure to serve within 120 days. Plaintiffs responded that they had good cause for the delay because the §362 automatic stay was in effect. Plaintiffs contend that claims in the consultants case should have been brought by Darby, making them part of the estate, and because the consultants case seeks to ``exercise control over property of the estate" the automatic stay prevented service, thereby establishing good cause.

Plaintiffs have failed to establish good cause for failing to timely serve the consultant defendants. Plaintiffs, relying on *De Tie* (9th Cir. 1998), argue that Darby's bankruptcy filing alone establishes good cause for failing to serve the consultant defendants within 120 days --- that any attempt to continue the action would have violated the automatic stay. However, *De Tie* is fact-specific, and the consultants case does not involve an action to take control of property of the bankruptcy estate as contemplated by §362(a)(3), but is more like an action to recover property of the estate. The case was not initiated by Darby, but it is named as an involuntary plaintiff. Any damages obtained would be paid to Darby and Plaintiffs. Thus the suit is not precluded by the automatic stay. Nor are Plaintiffs' arguments supported by the policies behind the automatic stay, which is to give debtors breathing room, prevent piecemeal disbursement of assets, and allow the debtor time to reorganize. *White* (9th Cir. 1995). Nor do customs & practices of the Montana bankruptcy bar establish good cause for Plaintiffs' failure to timely serve their complaint. Don Torgenrud, Ch. 7 Trustee for Darby, stated that

> it is the custom and practice of the bankruptcy bar to treat the debtor's pre-petition causes of action as stayed pending bankruptcy court or district court approval for the matters to go forward, for the reason that the Trustee needs time to make a decision whether or not to pursue the causes.

However, he could have requested ``a discretionary stay from the bankruptcy court pursuant to § 105." *Merrick* (9th Cir. 1994). Likewise, if Plaintiffs believed that the Trustee needed time to evaluate the claims before they could attempt service, they could have asked the Court for an extension under Rule 6(b) before the 120 days expired.

Given the Court's broad discretion it is appropriate to dismiss the consultant defendants without prejudice to refiling, rather than grant an extension. More than a month passed between filing of the consultants case and Darby's bankruptcy. Despite having multiple summonses issued, Plaintiffs did not attempt to serve any. Although it may be custom & practice to treat cases involving a party that has filed bankruptcy as stayed, this does not toll any time limits relevant to the litigation. *White* (9th Cir. BAP 1995). Even if Plaintiffs believed that the action was stayed, either by §362 or local custom & practice, they could have moved for additional time or asked Bankruptcy Court to lift the stay. They admitted at a hearing before Judge Kirscher that the complaint had not been served for ``good, legitimate trial strategy reasons," not because they believed that the stay applied. Much of their argument is based on Kirscher's statement that ``with respect to actions against [Darby Lumber] and property of the estate, all the pending litigation is stayed." However, this is a general statement of law that paraphrases §362(a). Kirscher did not say that the consultants case is an action against property of the estate or that the automatic stay applied.

Because Plaintiffs filed an amended complaint and served Reep and his firm within 120 days, service was timely as to them and the claims against them will not be dismissed.

The Reep defendants contend that they should be dismissed because Plaintiffs filed an amended complaint without leave of court. They argue that because the consolidation order placed the case on the trial calendar, leave was required. This argument is based on a misreading of Rule 15(a), which states that

> [a] party may amend [a] pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.

The language ``and the action has not been placed upon the trial calendar" refers to a pleading ``to which no responsive pleading is permitted," such as an answer. It does not apply to a complaint, which is addressed in the first clause. Because no responsive pleadings had been served when Plaintiffs filed their amended complaint, leave was not necessary.

The reasons for consolidation remain convincing. However, LR 4.3(a) provides that ``proof of service of all papers required or permitted to be served ... shall be filed in the clerk's office promptly and in any event before action is to be taken by the Court or the parties." It was improper to consolidate and set a discovery and trial scheduled before the parties were served. The 10/02 consolidation order is vacated.

***Behling et al v. Russell*, 31 MFR 45, 5/5/03.**

Michael Black (Datsopoulos, MacDonald & Lind), Missoula, Lon Dale & Patrick HagEstad (Milodragovich, Dale, Steinbrenner & Binney), Missoula, Monte Beck (Beck, Richardson & Amsden), Bozeman, Philip Carstens (Lukins & Annis), Spokane, and Donald Torgenrud (Torgenrud Law Office), St. Ignatius), for Plaintiffs; Kenneth Dyrud & Jean Faure (Church, Harris, Johnson & Williams), Great Falls, Douglas Wold & Leslie Budewitz (Wold Law Firm), Polson, Robert Bell & Richard Reep (Reep, Spoon & Gordon), Missoula, William Mattix (Crowley, Haughey, Hanson, Toole & Dietrich), Billings, Jon Beal (Beal Law Firm), Missoula, Keith Strong (Dorsey & Whitney), Great Falls, and James Goetz (Goetz, Gallik, Baldwin & Dolan), Bozeman, for Defendants.

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State Courts

WRONGFUL DISCHARGE: Denial of leave to file discovery not designated in notice of appeal, not preserved for appeal... failure to follow assigned schedule good cause for termination... Christopher affirmed (unpublished).

NCE \d 4Semitool lab tech Bruce Bourdelais worked 4 10-hour shifts. In 9/99 a new supervisor, Paola Cagnoni, assigned 5 8-hour shifts, to which Bourdelais persistently refused to adhere. In 2000 he was transferred to the production floor. He was suspected of leaving hygiene items such as toothpaste on Cagnoni's desk. He was fired in 2/00 after being caught on a security camera leaving soap on her desk. He sued alleging wrongful discharge. Semitool moved for summary judgment in 5/02. In 6/02 Bourdelais moved for leave to file discovery. Judge Christopher denied his motion, then granted it, then denied it, and subsequently granted summary judgment for Semitool. Bourdelais appeals.

Bourdelais makes no reference in his notice of appeal to Christopher's order denying his motion for leave to file discovery as required by Appel. Rule 4(c). Therefore, we decline to consider this issue.

Christopher did not err in granting summary judgment for Semitool. It claimed 2 reasons for firing Bourdelais: failure to follow Cagnoni's lawful & reasonable instructions regarding his work schedule, and harassment of her. We need only consider the first. We have previously held that an employer who terminated an employee for failing to follow instructions had good cause. *Mysse* (Mont. 1996); *Miller* (Mont. 1992). Semitool has provided a good cause reason for the termination. Bourdelais offered no proof to contradict its claim that he failed to follow his assigned schedule. While he asserts that it was the result of ``miscommunications," it is undisputed that he was repeatedly informed orally and in writing of his schedule and chose not to adhere to it. A party cannot create a disputed fact issue merely by putting his own interpretations & conclusions on an otherwise clear set of facts. *Koepplin* (Mont. 1999).

Warner, Gray, Regnier, Leaphart.

Nelson, Cotter, and Rice concurred as to summary judgment and **dissented** as to Bourdelais's motion to file discovery. His motion, the denial, his motion for reconsideration, and the ultimate denial are all interlocutory, intermediate orders preceding the final --- and appealable --- summary judgment. Appel. Rule 2(a) allows review of an ``intermediate order or decision" as part of our review of the final judgment. *Ruana* (Mont. 1996). The only criteria is that the objection at issue be properly preserved. It was preserved in this case.

***Bourdelais v. Semitool*, 03-8, 9/8/03.**

Gary Crowe (Crowe Law Firm), Kalispell, for Bourdelais; Douglas Wold & Leslie Budewitz (Wold Law Firm), Polson, for Semitool.

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