

Montana Attorney Rates*

Bozeman	\$150-300
Billings	\$140-190
Great Falls	\$175-225
Hamilton	\$185
Helena	\$175-300
Kalispell	\$180-250
Missoula	\$175-250
Polson	\$200

Montana Paralegal Rates*

Billings	\$90-125
Great Falls	\$85
Helena	\$65-135
Missoula	\$60-125

*Information obtained from Montana Law Week, expert witness testimony, and Affidavits of Attorney's Fees filed as a matter of public record

John W. Larson, District Judge
Fourth Judicial District, Dept. 3
Missoula County Courthouse
200 West Broadway
Missoula, MT 59802
(406) 258-4773

FILED FEB 01 2008

SHIRLEY E. FAUST, CLERK
BY Bobbi Hairline
Deputy

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

TAMMY ARCHER,
Plaintiff,
vs.

Dept. 3
Cause No. DV-06-1155

DAVID JENKINS, d/b/a DAVE
JENKINS CONSTRUCTION,
Defendant.

ORDER ON ATTORNEY'S FEES

DAVID JENKINS, d/b/a DAVE
JENKINS CONSTRUCTION,

Cause No. DV-06-1135

vs.

JUDY JEROME and TAMARA
ARCHER, DOE DEFENDANTS
1-10,
Defendants

The Attorneys for Dave Jenkins, d/b/a Dave Jenkins Construction have filed their Affidavit of Attorney's Fees and Tammy Archer and Judy Jerome have filed their objections. After hearing the Court finds that:

1. The controlling statute and case law does not allow fees for paralegals/interns. The Court agrees their services are critical to a case such as this one, but the legislature has to change the statute, this Court cannot.

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2. The amount and character of the legal services rendered was excellent. This case was complex given the various claims and the Court adopted a fast track schedule which placed a huge burden on all counsel.

3. The attorney's fees are reasonable and appropriate given the nature of the case as well as the short time-line allowed for final discovery and trial. This case might well have gone to trial in the fall of 2008, with significantly higher fees. This Court also notes that Jerome's attorney's fees were not raised as part of her objections.

4. This was a very important case to each party. This is a home and small business at stake.

5. While the award and claim are small, the issues at stake were significant to each party. In every sense the issues outweighed the money involved.

6. The Court finds that to prepare and present these claims and defend the counter issues to have been challenging, even for an experienced trial lawyer.

7. While defense counsel has tried more cases and has an excellent approach, he was seriously challenged by the less experience attorney here. She acquitted herself well.

8. The Court also notes that counsel for Tammy Archer and Judy

1 Jerome did not compare these fees sought by Jenkins to those charged by
2 his firm.

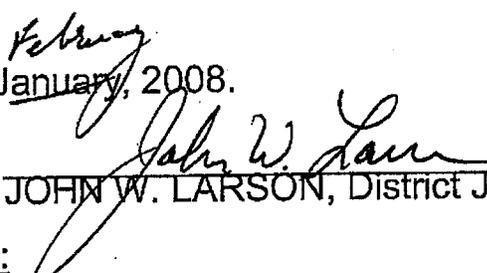
3 Therefore,

4 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that that
5 Dave Jenkins, d/b/a Dave Jenkins Construction are granted their attorney's
6 fees and costs as follows:
7

8	Costs	\$ 439.56
9	Sean Morris, Esq.	\$ 2,925.00
10	Reid J. Perkins	\$ 864.00
11	Jane E. Cowley, Esq.	\$ 3,915.00
12	Jane E. Cowley, Esq.	<u>\$10,251.50</u>
13	TOTAL	\$18,395.06

14 Tammy Archer and Judy Jerome shall pay attorney's fees and costs of
15 \$18,395.06 to Worden Thane, P.C.

16 DATED this ^{February} 31st day of ~~January~~, 2008.

17 
18 JOHN W. LARSON, District Judge

19 Copies of the foregoing were sent to:

20 Dan L. Spoon, Esq.
21 Spoon Gordon PC
22 P. O. Box 8869
23 Missoula, MT 59807-8869
24 Attorneys for Plaintiff Tammy Archer
25 Attorneys for Defendants Judy Jerome and Tamara Archer

26 Sean M. Morris, Esq.
Worden Thane PC
P. O. Box 4747
Missoula, MT 59806-4747
Attorneys for Dave Jenkins, d/b/a Dave Jenkins Construction

1 Douglas G. Harkin, District Judge
2 Department 4
3 Fourth Judicial District Court
4 Missoula County Courthouse
5 200 West Broadway Street
6 Missoula, MT. 59802-4292

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FILED DEC 17 2002

SHIRLEY E. FAUST, CLERK
By *[Signature]* Deputy

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

8 FRONTIER WEST, L.L.C., a)
9 Montana Limited Liability)
10 Company,)

11 Plaintiff,)

12 vs.)

13 THE STATE OF MONTANA,)
14 Acting by and through the)
15 MONTANA DEPARTMENT OF)
16 TRANSPORTATION, and)
17 J.T.L. GROUP, INC.,)

18 Defendants.)

19 THE STATE OF MONTANA,)
20 Acting by and through the)
21 MONTANA DEPARTMENT OF)
22 TRANSPORTATION,)

23 Cross-Plaintiff,)

24 vs.)

25 J.T.L. GROUP, INC.,)

26 Cross-Defendant.)

Department No. 4
Cause No. DV-98-86499

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

COPY

27 This matter came before the Court on Friday, November 8, 2002 for an
evidentiary hearing on the reasonableness of the bill of costs and affidavit of
attorney fees and interest filed by Plaintiff, Frontier West, L.L.C. [hereinafter,

Findings of Fact, Conclusions of Law, and Order

1 Frontier]. Frontier appeared by and through its counsel, Christopher B. Swartley.
2 Defendant, the State of Montana, Acting by and through the Montana
3 Department of Transportation appeared by and through its counsel, William Evan
4 Jones and George D. Goodrich of Garlington, Lohn & Robinson, PLLP.

5 In November of 2001, the State of Montana Department of Transportation
6 [hereinafter, MDT] and Frontier agreed to settlement of most matters between
7 them except the rights reserved by Frontier to recover interest, attorney fees, and
8 costs which Frontier asserts to be in connection with the "live load" matter and
9 the "holdback" matter. MDT reserved the right to oppose interest, attorney fees,
10 and costs relating to the "live load" and "holdback" matters.

11 On July 11, 2002, this Court issues the following order:

12 ORDER

- 13 1. MDT has not objected to Frontier's calculation of costs in this
14 matter; therefore, Frontier is GRANTED costs in the amount of
15 \$946.12.
- 16 2. MDT has not objected to Frontier's calculation of interest in this
17 matter; therefore, Frontier is GRANTED \$16,130.27 in interest
18 pursuant to Section 18-1-404, M.C.A.
- 19 3. MDT has objected to the reasonableness of attorney fees incurred
20 in representing Frontier on the "hold-back" and live-loan
21 enhancements"; thus, an evidentiary hearing to decide the
22 reasonableness of those fees is required. MDT has also objected
23 to the award of paralegal fees to Frontier's construction consultant,
24 Dwayne Nelson, and the Court shall allow Frontier to present
25 evidence at the time of the evidentiary hearing to prove that Mr.
26 Nelson is a paralegal.

27 Accordingly, the reasonableness of the attorney fees claimed on the
"holdback" and "live load" matters were the subjects of the evidentiary hearing of
November 8, 2002. In addition, the claim by Frontier that Dwayne Nelson
[hereinafter, Nelson] served as a paralegal on behalf of Frontier and, therefore,
the expense of Nelson's services to Frontier are those of a paralegal and
recoverable, was considered.

1 From the oral and documentary evidence introduced by both parties at the
2 November 8, 2002 evidentiary hearing and the matters having been submitted for
3 decision, the Court now makes the following findings of fact:

4 FINDINGS OF FACT

5 1. In this Court's order of July 11, 2002, the Court noted the following:

6 The Montana State Bar recognizes the contribution that paralegals make
7 to the legal profession and have allowed for paralegal associate
8 membership in the Montana State Bar. See Article I, Section 2(b) of the
9 Montana State Bar bylaws. The Montana State Bar has also defined the
10 term "paralegal" and has identified educational criteria for the paralegal
11 associate membership:

12 2.1.2 Any person who meets the following ABA definition of legal
13 assistant or paralegal (is entitled to membership): "A legal
14 assistant or paralegal is a person qualified by education,
15 training or work experience who is employed or retained by a
16 lawyer, law firm, corporation, governmental agency or other
17 entity who performs substantive legal work for which a
18 lawyer is responsible."

19 2.1.3 Any person who has achieved and complies with the
20 requirements to maintain the Certified Legal Assistant status
21 of the National Association of Legal Assistants.

22 2.1.4 Any person who has graduated from an ABA accredited
23 program for study for paralegals.

24 2.1.5 Any person who has received a baccalaureate or associate
25 degree in paralegal studies from an educational institution
26 approved by the Section Council.

27 2.1.6 Any paralegal educator from an educational institution
approved by the Section Council.

This Court's review of the decisions by other jurisdiction that have allowed for the recovery of paralegal fees as a component of attorney fees indicates that they have been guided by the following criteria: (1) the services performed by the paralegal are legal in nature; (2) the performance of the service must be supervised by an attorney; (3) the qualifications of the paralegal are demonstrated in the request for the paralegal fees in the form of education, training or work experience performing substantive legal work; (4) the nature of the services provided by the paralegal are specified in such a manner that the court can determine whether the services were legal rather than clerical in nature; (5) the amount of time expended by the paralegal must be set forth in the request and must be reasonable; and (6) the amount charged for time spent by the paralegal must reflect community standards or recovery. See *73 ALR 4th 938, Attorneys Fees: Costs of Service Provided by Paralegals or the Like as Compensable Element of Award in State Court.*

1 The Court notes with interest the definition of "paralegal" found in 73
2 A.L.R.4th 938:

3 For purposes of this annotation, a "paralegal" is defined as a nonlawyer,
4 qualified through education, training, or work experience, who is employed
5 or retained by an attorney, a law office, a governmental agency, or any
6 other entity in a capacity or function which involves the performance,
7 under the ultimate direction and supervision of an attorney, of specifically-
8 delegated substantive legal work, which work, for the most part, requires a
9 knowledge of legal concepts such that, absent such assistant, the
10 attorney would perform the assigned task. Conduct of client
11 interviews, preparation of pleadings, motions, and other documents
12 relating to the institution and conduct of legal proceedings, and selection,
13 compilation and interpretation of technical information from references
14 such as digests, jurisprudences, encyclopedias, treatises, and practice
15 manuals are functions of a substantive legal nature within the
16 contemplation of this definition; transcription of the work product of an
17 attorney, photocopying, preparation of correspondence, and billing
18 documents, and other similar functions are clerical in nature and do not
19 qualify as work of a substantive legal nature within the meaning of this
20 definition (Emphasis added).

21 The critical consideration appears to be legal work which, without the help
22 of the paralegal, the attorney would personally perform. This appears to be the
23 primary way a paralegal reduces the cost of legal services and the reason the
24 Montana Supreme Court supports the use of paralegals.

25 2. The nature of Nelson's legal-related work prior to this case
26 generally consisted of acting as an expert witness and technical consultant. That
27 pattern continued into the present case.

1 The work Nelson did for the Frontier was not work which, if Nelson
2 had not preformed the work, would or could have been done by Frontier's
3 attorneys. Rather, Nelson's work was, with the exception of a piece of very
4 minimal legal-related research, in the nature of providing specialized
5 construction-related information that heretofore was not known to Frontier's
6 attorneys.

7 4. MDT's expert witness, LaCinda R. Hanenburg, a Certified Legal
8 Assistant and Civil Litigation Specialist, was of the opinion that Nelson is not a
9 paralegal. As a basis for her opinion, she noted that Nelson has not taken or

1 passed the Certified Legal Assistant exam of the National Association of Legal
2 Assistants and he is not a member of the Paralegal Section of the Montana State
3 Bar. MDT also introduced without objection the affidavit of Susan A. Favro, a
4 longtime paralegal and an instructor on paralegal skills. Susan Favro is of the
5 opinion that:

6 (1) In the "world" of paralegals, there are two main professional
7 organizations: The National Federation of Paralegal Associations
8 (NFPA) and the National Association of Legal Assistants (NALA).

9 (2) NFPA places a heavy emphasis on a paralegal's education and
10 sees the level of educational requirements increasing in the future.
11 NFPA recognizes that a two-year degree with an emphasis in
12 paralegal studies is acceptable to employers in some markets as a
13 minimum criterion for individuals to enter the paralegal profession.
14 However, current trends across the country, as illustrated through
15 various surveys, indicate that formal paralegal education has
16 become a requirement to secure paralegal employment, and a four-
17 year degree is the hiring standard in many markets. Consequently,
18 NFPA recommends that future practitioners should have a four-
19 year degree to enter the profession, and individuals receiving a
20 formal paralegal education should have 24 semester hours or the
21 equivalent of Legal specialty courses to enhance their ability to
22 practice as paralegals. "It is NFPA's intent to provide the
23 necessary foundation from which paralegals may expand their roles
24 in the future. In recognizing a two-year degree and recommending
25 a four-year degree, NFPA has taken the lead in providing the
26 profession with the necessary tools to prepare for its future role in
27 the delivery of legal services."

(3) NALA is very specific in their member qualifications. In all
instances, education or on-site training (in a law office) is required
for an "active member." An active member can be:

(a) Any individual who has successfully completed the Certified
Legal Assistant (CLA) Examination of NALA, or

(b) Any individual who has graduated from an ABA approved
program of study for legal assistants, or

(c) Any individual who has graduated from a course of study for
legal assistants which is institutionally accredited but not
ABA approved and which requires not less than the
equivalent of 60 semester hours of classroom study, or

(d) Any individual who has graduated from a course of study for
legal assistants other than those set forth in (b) and (c)
above, plus not less than six months of in-house training as
a legal assistant, whose attorney-employer attests that such
person is qualified as a legal assistant, or

1 (e) Any individual who has received a baccalaureate degree in
2 any field, plus not less than six months of in-house training
3 as a legal assistant whose attorney-employer attests that
4 such person is qualified as a legal assistant, or any
5 individual who has a minimum of three years of law-related
6 experience under the supervision of an attorney, including at
7 least six months of in-house training as a legal assistant,
8 whose attorney-employer attests that such person is
9 qualified as a legal assistant, or

6 (f) Any individual who has a minimum of two years of in-house
7 training as a legal assistant, whose attorney-employer
8 attests that such person is qualified as a legal assistant.

8 NALA defines a legal assistant as someone who "through formal
9 education, training and experience" has "knowledge and expertise
10 regarding the legal system and substantive and procedural law
11 which qualify him or her to do work of a legal nature under the
12 supervision of an attorney.

11 5. The parties have stipulated that Frontier's attorney fees are
12 recoverable at \$129.00 per hour.

13 6. Credible expert witness opinion presented by MDT indicates that an
14 analysis of the billing record of Frontier's attorneys reveals all attorney fees
15 relating to "holdbacks" and "live load" enhancements amounted to \$6,506.45.
16 However, this amount should be generously increased to account for the time
17 spent on the issues connected with the settlement conference and preparation of
18 the proposed pre-trial order. Such additional charges are warranted because of
19 the very real possibility that litigation would continue.

19 From the foregoing findings of fact, the Court makes the following
20 conclusions of law:

20 CONCLUSIONS OF LAW

21 1. Nelson did not perform work as a paralegal for Frontier's attorneys;
22 therefore, the cost of Nelson's work cannot be recovered as a paralegal cost.

23 2. The reasonableness of attorney fees must be ascertained under
24 the facts of each case. Morning Star Enterprises, Inc. v. R.H. Grover, Inc.
25 (1991), 247 Mont. 105, 114, 805 P.2d 553, citing Carkeek v. Ayre (1980), 188
26 Mont. 345, 613 P.2d 1013. In determining what constitutes reasonable attorney
27 fees, the following factors should be considered as guidelines: (1) the amount

1 and character of the services rendered; (2) the labor, time and trouble involved;
2 (3) the character and importance of the litigation in which the services were
3 rendered; (4) the amount of money or the value of the property to be affected; (5)
4 the professional skill and experience called for; (6) the attorneys' character and
5 standing in their profession; and (7) the results secured by the services of the
6 attorneys. Swenson v. Janke (1995), 274 Mont. 354, 361, 908 P.2d 678; see
7 also Majers v. Shining Mountains (1988), 230 Mont. 373, 379-80, 750 P.2d 449,
8 453; Carkeek v. Ayer (1980), 188 Mont. 345, 347, 613 P.2d 1013, 1015; First
9 Security Bank of Bozeman v. Tholkes (1976), 169 Mont. 422, 429-30, 547 P.2d
10 1328, 1332. These guidelines are not exclusive; the trial court may consider
11 other factors as well. Morning Star Enterprises, Inc. v. R.H. Grover, Inc. (1991),
12 247 Mont. 105, 113, 805 P.2d 553.

13 In the instant case, the amount and character of the services rendered
14 clearly support the hourly rate; the litigation involved complicated construction and
15 apportionment of responsibility issues. The work involved was not routine and
16 required considerable attention to detail. The litigation was important to Frontier
17 from both a financial and business reputation perspective. The amount of money
18 involved was relatively large but had the potential to be considerably larger. The
19 skill required by counsel was above average for the legal community and the
20 results secured were favorable.

21 3. Given the uncertainty of reaching a resolution prior to trial, and the
22 attendant need to be prepared to proceed to litigation, it is well within the range of a
23 reasonable attorney fee to allow a total attorney fee of \$10,000.00.

24 From the foregoing findings of fact and conclusions of law, the Court makes
25 the following order:
26
27

ORDER

IT IS HEREBY ORDERED that

1. Frontier is not awarded any fee or reimbursement for work performed by Nelson.

2. Frontier is awarded attorney fees in the amount of \$10,000.00.

DATED this 17th day of December, 2002


DOUGLAS G. HARKIN
District Judge

c: Christopher B. Swartley
Susan G. Ridgeway

William Evan Jones
George D. Goodrich
GARLINGTON, LOHN & ROBINSON, PLLP

1 Douglas G. Harkin, District Judge
2 Department 4
3 Fourth Judicial District Court
4 Missoula County Courthouse
5 200 West Broadway Street
6 Missoula, MT. 59802-4292
7 (406) 258-4774

FILED SEP 24 2007

SHIRLEY E. FAUST, CLERK
Karen Johnson
Deputy

8 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

9 CLAYTON E. DEVOE,) Department No. 4
10) Cause No. DV-05-1110
11 Plaintiff,)
12 vs.) ORDER AND
13) MEMORANDUM
14 THE CITY OF MISSOULA, MONTANA,)
15 a municipality of the State of Montana;)
16 THE MISSOULA CITY BOARD OF)
17 ADJUSTMENT, an agency of the City)
18 of Missoula, Montana; CONNIE)
19 POTEN, an individual; ANDREW)
20 SPONSELLER, an individual; and)
21 JOHN DOES 1-20, inclusive,)
22 Defendants.)

22 This matter comes before the Court upon Defendant Sponseller's and
23 Defendant Poten's submission of a verified bill of costs and affidavit of
24 attorneys' fees and Plaintiff's objection to the reasonableness of the
25 claimed costs and attorneys' fees. The parties have fully briefed the above
26 matters and the matters are deemed submitted and ready for ruling.
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ORDER

[1] Defendants Sponseller and Poten are GRANTED costs in the amount of \$1,266.19.

[2] Defendants Sponseller and Poten are GRANTED \$22,483.50 in attorneys' fees incurred through January 16, 2007.

[3] The Court HEREBY ORDERS counsel for Defendants Sponseller and Poten to prepare an affidavit of attorneys' fees and a verified bill of costs incurred in formulating their February 5, 2007 brief opposing the Plaintiff's motion for leave to file an amended complaint. Counsel for the Defendants shall submit this affidavit to the Court within ten (10) days of the date of this order. The Plaintiff shall then have ten days thereafter in which to file an objection to the reasonableness of those fees and costs. The matter shall then be deemed submitted unless either party requests a hearing on the reasonableness of the attorneys' fees and costs.

MEMORANDUM

I. PROCEDURAL BACKGROUND

This case arises out of a dispute concerning a building permit issued to the Plaintiff on September 7, 2005 by the City of Missoula to construct a residential accessory building on his property. Poten and Sponseller, who own adjoining property, appealed the City's decision to issue the permit to the Missoula City Board of Adjustment (BOA) in October 2005. On October 26, 2005, the BOA heard that appeal and held that the permit should not have been issued.

Plaintiff filed his initial complaint on November 22, 2005, followed by an amended complaint filed on January 20, 2006 against the City of Missoula, the BOA, Poten and Sponseller and John Does. The first

1 amended complaint, among other things, challenges the decision of the
2 BOA and seeks to reinstate the decision of the City to issue the permit.

3 On December 22, 2006, the Court dismissed the claims against
4 Defendants Poten and Sponseller. The Court found that Defendants Poten
5 and Sponseller were neither necessary nor proper parties, as their only
6 involvement in the matter was filing an appeal with the BOA pursuant to
7 § 76-2-326(3). The Court awarded Defendants Poten and Sponseller their
8 attorneys' fees, finding that the action against them was frivolous and
9 utterly without merit.

10 **II. DEFENDANTS' VERIFIED BILL OF COSTS**

11 Pursuant to § 25-10-101 et seq., MCA, and Rule 54(d), M.R.Civ.P.,
12 Defendants Sponseller and Poten (Defendants) have submitted a verified
13 bill of costs, stating that they are entitled to recover \$1,266.19 in costs
14 incurred in defending against Plaintiff's claims. Specifically, the Defendants
15 seek recovery of the following costs:

- 16 • \$10.00 in costs for prevailing on their motion to dismiss,
17 pursuant to § 25-10-202.
- 18 • \$206.00 in deposition costs.
- 19 • \$1,050.19 in other costs, including appearance fees of \$140.00
20 payable to the Clerk of Court, the reasonable expenses of
21 keeping the Defendants reasonably informed of this matter
22 (such as copy, postage and fax costs), and the reasonable
23 costs of obtaining copies of documents, such as maps and
24 blueprints, necessary to obtain facts upon which the motion to
25 dismiss was based.

1 The Plaintiff does not object to the \$10.00 motion to dismiss fee, nor to the
2 appearance fees of \$140.00, but does object to the claimed deposition
3 costs and to the remainder of the claimed costs.

4 **A. Whether the Defendants are Entitled to Deposition Costs**

5 The Plaintiff objects to the claimed \$206.00 in deposition costs, citing
6 to Ritchie v. Town of Ennis, 2004 MT 43, ¶ 36, 320 Mont. 94, 86 P.3d 11
7 and arguing that such costs are only awardable on a summary judgment
8 motion where the facts obtained in the depositions are used in a dispositive
9 manner in deciding the motion.

10 Defendants respond that the Plaintiff absolutely insisted, without
11 compromise, that they be entitled to depose the Defendants before
12 responding to the Defendants' motion to dismiss. Defendants further argue
13 that such costs are recoverable under the Court's power to grant complete
14 relief, as stated in Foy v. Anderson (1978), 176 Mont. 507, 580 P.2d 114,
15 and § 25-10-201(9), MCA, which authorizes the Court to award "such other
16 reasonable and necessary expenses as are taxable according to the
17 practice of the court or by express provision of law."

18 Section 25-10-201, MCA provides, in relevant part: "A party to whom
19 costs are awarded in an action is entitled to include in his bill of costs his
20 necessary disbursements, as follows: . . . (2) the expenses of taking
21 depositions." However, the Montana Supreme Court has consistently
22 interpreted this statutory provision as only allowing deposition costs in
23 limited circumstances where the depositions were relied upon by the district
24 court or were used in a trial setting. Mularoni v. Bing, 2001 MT 215, 306
25 Mont. 405, 34 P.3d 497. While the Plaintiff referred to the Defendants'
26 depositions in his brief opposing the Defendants' motion to dismiss, the
27 Court did not use or rely upon the depositions in dismissing the Plaintiff's

1 claims against the Defendants. Thus, under the general rule, the
2 Defendants would not be entitled to recover deposition costs.

3 Nonetheless, the question remains as to whether the Defendants are
4 entitled to recover deposition costs pursuant to equitable power to grant
5 complete relief under Foy. This Court has already determined that the
6 Plaintiff's claims against Defendants Sponseller and Poten were utterly
7 without merit and presented a unique factual situation entitling them to their
8 attorney fees under Foy. Such lawsuits against individuals solely on the
9 basis of their lawful participation in lawful public processes only serve to
10 stifle public participation in government. The Court, quoting the
11 Defendants, explained:

12 Sponseller and Poten lawfully participated in a lawful public
13 process . . . Sponseller and Poten do not have the authority to,
14 nor did they, write the Missoula City Zoning Ordinance. Sponseller and Poten do not have the authority to, nor did they,
15 issue any determination as to whether DeVoe's [building]
16 complied with the zoning ordinance. Sponseller and Poten do
17 not have the authority to, nor did they, issue or revoke DeVoe's
18 building permit. Sponseller and Poten do not have the authority
19 to, nor did they, issue a "stop work order." Sponseller and
20 Poten do not have the authority to, nor did they, establish or
21 control the public comment or public hearing process. Sponseller
22 and Poten do not have the authority, nor did they, prohibit
23 DeVoe from attending the public hearing. Sponseller
24 and Poten do not have the authority to, nor did they, prohibit
25 DeVoe from cross-examining witnesses or submitting evidence
26 in support of his position at the public hearing. Sponseller and
27 Poten do not have the authority to, nor did they, prohibit DeVoe
from being heard by a neutral judicial officer. Sponseller and
Poten do not have the authority to, nor did they, deprive DeVoe
of his alleged right to receive timely notification of the reasons
for the action taken against him. Sponseller and Poten do not
have the authority to declare DeVoe's rights under, or the
constitutionality of, the Missoula City Zoning Ordinance and the

1 Board of Adjustment's procedures. Sponseller and Poten do
2 not have the authority to enjoin any other Missoula resident
3 from exercising their right to oppose DeVoe's building proposal.

4 Just as the Montana Supreme Court has recognized an exception to
5 the general rule disallowing attorney fees unless authorized by statute or
6 contract, an exception to the general rule regarding when deposition costs
7 may be awarded is justified when a party has been forced to defend
8 against a wholly frivolous action. The Montana Supreme Court held in Foy
9 that the district court's award of attorney fees and costs was proper so as
10 to make the defendant whole or return her to the same position as before.
11 the plaintiff sought to bring her into the law suit. In the present matter, the
12 Defendants will not be made whole unless this Court awards them their
13 deposition costs. In the interests of equity, the Court finds that the
14 Defendants are entitled to recover the claimed \$206.00 in deposition costs.

15 **B. Whether the Defendants are Entitled to the Remaining**
16 **\$910.19 in Claimed Costs**

17 The remaining \$910.19 in claimed costs consist of: \$740.85 in
18 copying costs; \$97.98 in fax costs; \$59.81 in postage; and \$11.55 in
19 mileage. The Plaintiff objects to these remaining costs, claiming that they
20 are not allowable costs as they were not required by a rule of court or for
21 maps used at trial or a hearing.

22 As the Plaintiff argues, the Montana Supreme Court has limited the
23 broad discretion of this Court under § 25-10-201(9), MCA by holding that
24 only those photocopying costs which were incurred in constructing exhibits
25 admitted at trial should be allowed. Springer v. Becker (1997), 284 Mont.
26 267, 277, 943 P.2d 1300, 1306 (citing Thayer v. Hicks (1990), 243 Mont.
27 138, 158, 793 P.2d 784, 798). The Montana Supreme Court has called for

1 the same analysis as to facsimile charges. Springer, 284 Mont. at 287, 943
2 P.2d at 1306 (remanding to the district court for a determination as to what
3 costs for facsimile transmittals were expended on exhibits admitted at trial).

4 On the other hand, mileage and postage charges may be taxed to the
5 Plaintiff under § 26-10-201(9). As the Montana Supreme Court noted in
6 Springer, postage charges are not specifically disallowed by Thayer or by
7 statute and the award of these costs is properly left to this Court's
8 discretion under § 25-10-201(9), MCA. 284 Mont. at 277, 943 P.2d at
9 1306. The Court also has discretion under § 25-10-201(9) to award
10 counsel's mileage. Id., 284 Mont. at 278, 943 P.2d at 1306.

11 In any event, as detailed above with respect to the Defendants'
12 claimed deposition costs, the Court need not rely on Montana statutory
13 provisions in determining whether to award costs in this case. The Court
14 exercises its equity power, as detailed in Foy, and finds that an award of
15 these remaining costs is proper so as to make the Defendants whole and
16 return them to the same position as before the Plaintiff sought to bring them
17 into the lawsuit.

18 While the Defendants also request the cost of filing their motion to
19 substitute a judge, their verified bill of costs did not actually include the
20 \$100 fee for the motion to substitute. As Plaintiff argues, there is no
21 express statutory authority for recovering this fee. Moreover, the Court
22 does not believe it to be equitable to require Plaintiff to cover the costs of
23 the Defendants' Motion to Substitute a Judge. The Plaintiff objected to the
24 motion to substitute, but recognized that it was the Defendants' right to
25 substitute under § 3-1-804, MCA. The substitution of a judge under § 3-1-
26 804, MCA is a discretionary action by a party and the Court finds that
27 requiring the Plaintiff to cover such costs is not in the interests of equity.

III. DEFENDANTS' CLAIM FOR ATTORNEYS' FEES

Pursuant to this Court's December 22, 2006 order, the Defendants claim \$23,781.50 in attorneys' fees through January 16, 2007. Although the Plaintiff initially voiced several objections as to whether an order awarding attorneys' fees was proper at this juncture, both parties, through their March 2, 2007 stipulation, subsequently requested that the Court determine the reasonable fees to which the Defendants are entitled. Among other things, the Plaintiff reserved the right to challenge any award of attorneys' fees on appeal.

A. Whether the Plaintiff Waived His Right to Object to the Defendants' Claim for Attorneys' Fees

As a preliminary matter, the Court must resolve the question posed by the Defendants as to whether the Plaintiff waived his right to object to the claimed attorneys' fees by not properly objecting in his initial January 22, 2007 brief. In his initial January 22, 2007 objection to the Defendants' claimed attorneys' fees, the Plaintiff argued that the requested \$23,781.50 in attorneys' fees is excessive and unreasonable considering the work performed by the Defendants' counsel in this case. The Plaintiff did not provide any additional support for this argument, but requested an evidentiary hearing.

Defendants argue that the Plaintiff did not object to hourly rates charged, to any of the specific tasks performed by counsel, or to the amount of time spent performing those tasks. Defendants, citing to Flathead County Welfare Dept. v. Endres (1975), 166 Mont. 379, 383, 533 P.2d 949, 962, conclude that the Plaintiff's failure to properly object constitutes a waiver of the right to do so, that the Plaintiff should be prohibited from submitting any evidence of other opposition to the amount

1 of their claim, and that the Plaintiff should be ordered to pay all claimed
2 fees.

3 The Court does not agree that the Plaintiff waived its right to raise
4 more specific objections by failing to raise specific objections in his January
5 22, 2007 brief. The Montana Supreme Court has consistently held that it is
6 improper to award attorney fees based solely upon an affidavit of counsel
7 without holding an evidentiary hearing on the matter. Rossi v. Pawiroredjo,
8 2004 MT 39, ¶ 29, 320 Mont. 63, 85 P.3d 776 (citing Stark v. Borner
9 (1988), 234 Mont. 254, 258, 762 P.2d 857, 860). In Stark, the defendants
10 had not objected to, nor had they even responded to, the plaintiffs' affidavit
11 of attorney's fees, but the Montana Supreme Court nonetheless found that
12 an evidentiary hearing on the claimed attorney's fees was necessary,
13 setting aside the district court's award of attorney fees. 234 Mont. at 258,
14 762 P.2d at 860.

15 In the present matter, the Plaintiff voiced a general objection and
16 specifically requested an evidentiary hearing on the claimed attorneys'
17 fees. Both parties subsequently waived the right to an evidentiary hearing
18 in their March 2, 2007 stipulation, agreeing instead to submit the issue to
19 the Court on additional affidavits and briefs. Just as the Court would have
20 considered Plaintiff's objections had they been made at an evidentiary
21 hearing, so the Court will consider any objections made in the Plaintiff's
22 additional affidavits and brief.

23 **B. Reasonableness of the Claimed Attorneys' Fees**

24 In support of their claimed attorneys' fees, the Defendants have
25 submitted itemized invoices, the affidavits of counsel Jon G. Beal and John
26 B. Horrell, and the affidavit of Dennis E. Lind, an attorney who has
27 practiced in Missoula for approximately 31 years, stating that the requested

1 fees are reasonable. By way of affidavit, Defendants' attorney Jon Beal
2 states that he is BV Peer Review Rated by Martindale-Hubbell, has
3 approximately 14 years of legal work experience and has been practicing in
4 Missoula for approximately 12 years. John Horrell is a duly-licensed
5 attorney with the Beal Law Firm who also provided legal services to the
6 Defendants.

7 The Defendants' request for attorneys' fees is based on the following
8 hourly rates charged: Jon Beal (\$150/hour through December 2005,
9 \$165/hour through December 2006, and \$175/hour thereafter); John Horrell
10 (\$135/hour); and legal assistants (\$65/hour). The affidavits of Mr. Beal and
11 of Mr. Lind state that these fees are commensurate with the rates and fees
12 charged by other firms in the Missoula area.

13 The Plaintiff does not dispute the reasonableness of the hourly rates
14 for attorneys Beal and Horrell. In fact, Plaintiff's counsel states in his
15 affidavit that his own rate is \$150.00/hour. Plaintiff's counsel, however,
16 does dispute the charged rates for the work done by the legal assistants in
17 this case.

18 In Kurth v. American Interstate Ins. Co., 2004 Mont. Dist. LEXIS
19 1786, this Court denied a request for an award of paralegal fees, finding
20 that paralegal fees are not appropriately included in a claim for attorney
21 fees. The Court noted that jurisdictions varied in their treatment of
22 paralegal fees as a component of attorney fees, but relied upon the
23 following prohibitory language of § 37-61-215, MCA:

24 Allowance of attorneys' fees to unlicensed persons forbidden. It
25 shall be unlawful for any court within this state to allow
26 attorneys' fees in any action or proceeding before said court in
27 which attorneys' fees are allowed by law to either party to such

1 action or proceeding when such party is represented by anyone
2 other than a duly admitted or licensed attorney at law.

3 The Defendants have pointed to no Montana cases which would justify a
4 departure from this Court's analysis in Kurth. Moreover, as Plaintiff's
5 counsel notes, the legal assistants' work primarily, if not entirely, consisted
6 of secretarial tasks, such as the compilation, organization, and filing of
7 documents. Such secretarial services should not be separately requested
8 in a claim for attorneys' fees, but should be included as part of office and
9 overhead expenses in an attorney's hourly rate.¹ The Court therefore
10 declines to award Defendants the requested \$1176.50 for the 18.1 hours of
11 legal assistant work.

12 In addition to objecting to the requested fees for the legal assistants'
13 work, the Plaintiff generally objects that the Defendants' attorneys spent an
14 unnecessary amount of time representing their clients. The Plaintiff does
15 not point to any specific examples in support of this general objection;
16 rather, Plaintiff simply argues that the "bottom line" is that the Defendants
17 were charged nearly double that charged to Plaintiff for attorneys' fees
18 during the relevant time period. The Plaintiff argues that comparing the
19 time spent by the attorneys for the Plaintiff and the attorneys for the
20 Defendants is a valid guide for determining both the reasonableness and
21 necessity of the time spent by the Defendants' attorneys, citing to James
22 Talcott Construction, Inc. v. P&D Land Enterprises, 2006 MT 188, ¶ 61,
23 333 Mont. 107, 141 P.3d 1200. The Plaintiff contends that its attorney fees
24 should have been higher because "Plaintiff's attorney had to defend against

25
26 ¹ A number of other Montana District Courts have similarly denied paralegal and secretarial fees as part of a claim
27 for attorney fees. See Madison v. Silver Bow Humane Society, 2004 Mont. Dist. LEXIS 3416 (finding that
attorney's hourly rate should cover office and overhead expenses, such as secretarial services); Coleman v. Kudrna,
2004 Mont. Dist. LEXIS 2807 (finding that paralegal fees are not attorney fees and are not recoverable).

1 two opposing parties during this period, not just one as did the attorneys for
2 Defendants Poten/Sponseller." The Plaintiff suggests that a reasonable fee
3 would be \$10,000.00.

4 The Court does not agree that the Defendants' reasonable attorneys'
5 fees should be determined by, or limited by, a comparison of fees charged
6 by Plaintiff's counsel. As the Montana Supreme Court stated in Chase v.
7 Bearpaw Ranch Ass'n:

8 a comparison of the parties' respective expenditures is not
9 necessarily a proper measure of reasonableness. If, due to the
10 nature of the case, one party received significantly more legal
11 services requiring more time and labor—for example, by
12 conducting extensive document review—than the other side
13 and prevailed in the end, consideration of the factors would
14 justify awarding fees irrespective of any disparity between the
15 parties' respective expenditures.

16 2006 MT 67, ¶ 38, 331 Mont. 421 133 P.3d 190. There are a number of
17 differences in the respective positions of the parties here that could result in
18 differing amounts of time and labor by their counsel. For example, as the
19 Defendants argue, the Plaintiff fails to account for the difference between
20 the Plaintiff's notice pleading burden and the Defendants' burden in proving
21 that the Plaintiff did not have a valid claim. Contrary to Plaintiff's position,
22 the Plaintiff did not have to "defend against two opposing parties"—no
23 counterclaim was filed.

24 The Court must determine the reasonableness of the claimed
25 attorneys' fees under the particular facts of this case, considering factors
26 including:

- 27 (1) the amount and character of the services rendered; (2) the
labor, time, and trouble involved; (3) the character and
importance of the litigation in which the services were rendered;
(4) the amount of money or the value of property to be affected;

1 (5) the professional skill and experience called for; (6) the
2 character and standing in the profession of the attorney; and (7)
3 the result secured by the services of the attorneys.

4 Chase v. Bearpaw Ranch Ass'n, 2006 MT 67, ¶¶ 36, 38, 331 Mont. 421,
5 133 P.3d 190.

6 Mr. Lind states in his affidavit that he has reviewed the Defendant's
7 claimed attorneys' fees and agrees that the fees were necessarily incurred
8 for the successful defense of this case and are reasonable. Mr. Lind's
9 affidavit specifically addresses each of the seven factors noted above
10 which this Court should consider in determining the reasonableness of the
11 claimed attorneys' fees, stating:

12 19. That the amount and character of the legal services rendered
13 by Beal Law Firm, PLLC, to Sponseller and Poten in
14 successfully defending against [Plaintiff's] claims was
substantial...

15 21. That the labor, time and trouble involved in successfully
16 defending [the Defendants] against [Plaintiff's] claims and in
17 researching, drafting, and preparing the motions and briefs . . .
18 was extensive, and required Beal Law Firm to, among other
19 things, research complicated Montana law regarding
20 constitutional issues of significance to every Montana citizen
and equitable grounds for recovering attorneys' fees, which
research ultimately contributed to securing a favorable result
for [the Defendants].

21 22. That the character and importance of this case is significant
22 because it involved, among other things, [Plaintiff's] claims for
23 between \$132,500.00 and \$159,500.00 in damages, plus
24 punitive damages, interest and attorneys' fees and costs, as
25 well as constitutional issues of significance to every Montana
26 citizen (e.g., the Constitutional right to participate in
government) and equitable grounds for recovering attorneys'
27 fees.

1 23. That the amount of money or property at stake in this litigation
2 exceeded \$130,000.0, plus claims for punitive damages,
interest, and attorneys' fees and costs . . .

3 24. That Beal Law Firm, PLLC, has considerable skill and
4 experience, which were necessary in successfully and diligently
5 defending [the Defendants] against [Plaintiff's] claims.

6 25. That Beal Law Firm, PLLC, its attorneys and other employees
7 exhibit exemplary character and standing.

8 26. That the results obtained with regard to [the Defendants']
9 defense of [Plaintiff's] claims were completely successful, since
10 as a result of [Defendants'] motions, briefs and other efforts in
11 defending against [Plaintiff's] claims, the Court disposed of all
12 of [Plaintiff's] claims in favor of [the Defendants] and against
13 [the Plaintiff], and found that [the Plaintiff] is obligated to pay
reasonable attorneys' fees incurred by [the Defendants] in
defending against this entire action.

14 The only evidence submitted by the Plaintiff in support of his brief in
15 opposition are two affidavits—the affidavit of Donald V. Snavely, attorney
16 for the Plaintiff, and the affidavit of George C. Devoe, son of the Plaintiff
17 and an attorney licensed to practice law in Montana. Mr. Snavely's affidavit
18 points to the disparity in the number of hours he worked on the case and
19 the number of hours spent by the Defendants' attorneys, but does not raise
20 any specific objections to the reasonableness of the numbers of hours or
21 otherwise address any of the seven factors applied by the Montana
22 Supreme Court. George C. Devoe's affidavit largely summarizes the type
23 of work that he completed for the Plaintiff and does not refer to any of the
24 Defendants' claimed fees.

25 The Court concludes that the Defendants have presented persuasive
26 testimony addressing each of the seven factors applied by the Montana
27

1 Supreme Court. A review of the affidavits of the Defendants' attorneys
2 demonstrates that they spent a total of 157.9 hours on the case as follows:

- 3 • 64.20 hours on briefing their motion to dismiss (including a
4 supporting brief, a reply brief, and a second reply brief);
- 5 • 10 hours on formulating a March 10, 2006 response in
6 opposition to the Plaintiff's motion for extension of
7 time/depositions;
- 8 • 11.4 hours on formulating an April 21, 2006 response in
9 opposition to the Plaintiff's cross-motion for summary judgment;
- 10 • 7.3 hours on their verified bill of costs;
- 11 • 9.1 hours on their attorneys' fees claim (through January 16,
12 2007); and
- 13 • 51.7 hours on other work related to the case, such as
14 deposition-related work, client communications, and factual and
15 legal investigation.

16 The Court notes that the Defendants' attorneys have already
17 excluded 4.2 hours of their work from the claimed fees. Other than some of
18 these already excluded hours, the Court finds no instances of duplicative
19 fees. With the limited exceptions detailed below, the Court concludes that
20 no unnecessary time was spent by the Defendants' attorneys and that the
21 requested fees are reasonable and should be awarded. In addition to
22 excluding the \$1176.50 for the legal assistants' work, the Court will exclude
23 the following \$121.50 in requested fees as unnecessary:
24
25
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- \$27.00 in fees for Mr. Horrell's work on December 5, 2005 relating to the Defendants' motion to substitute a judge.
- \$27.00 in requested fees for compiling and reviewing court orders on Rule 11 sanctions on March 8, 2006;
- \$67.50 in requested fees for researching the job descriptions of various city officials on March 20, 2006.

Before concluding, a brief discussion of the Defendants' request for attorneys' fees incurred in proving their attorneys' fees is necessary. The Defendants point to James Talcott Const., Inc. v. P& D Land Enterprises, 2006 MT 188, 333 Mont. 107, 141 P.3d 1200 as holding that a party who has been awarded its attorneys' fees is also entitled to the reasonable fees and costs incurred in determining and recovering the fees. Donnes v. Orlando, 221 Mont. 356, 362, 720 P.2d 233, 238 (1986) ("Time spent determining attorney fees is as much as a part of the case. . . ." as adjudicating the claim itself). While both Talcott and Donnes involved the enforcement of a construction lien and an award of attorney fees under § 71-3-124, MCA, the Montana Supreme Court recently cited to Donnes in affirming a "fees-for-fees" award under the Montana Residential Landlord and Tenant Act and the parties' lease agreement. Bugger v. McGough, 2006 MT 248, ¶¶ 42-43, 334 Mont. 77, 144 P.3d 802.² Because the Plaintiff does not object to the claimed fees-for-fees and because an

² This line of cases stands in contrast to In re the Marriage of Bliss (1980), 187 Mont. 331, 609 P.2d 1209, wherein the Montana Supreme Court stated: "We reject the notion that the court may require one party to pay opposing counsel for his time spent in seeking justification of the fees he desires. The practice of law has its burdens and its benefits, and this is one burden that counsel must bear without an expectation of compensation." But see State v. McGuckin (1990), 242 Mont. 81, 87, 788 P.2d 926, 930 (noting that a District Court may require the opposing party to bear such expenses "in order to achieve an equitable result in extraordinary circumstances"); State v. Slack, 2001 MT 137, 305 Mont. 488, 496, 29 P.3d 503, 510 (explaining that the "extraordinary circumstances" referred to in McGuckin were those in which the opposing party's objection to the claim for fees is unreasonable). See also Chase v. Bearpaw Ranch Ass'n, 2006 MT 67, 331 Mont. 421, 133 P.3d 190 (disallowing recovery of fees-for-fees under a contractual provision and distinguishing Slack in McGuckin as only relating to fees-for-fees under the statutory framework for condemnation proceedings).

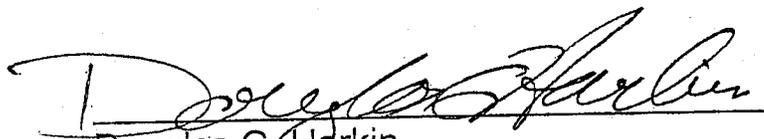
1 "award of attorney fees 'to make the injured party whole' is within the
2 discretion of a district court," Montanans for the Responsible Use of the
3 School Trust v. State of Montana, 1999 MT 263, ¶ 68, 296 Mont. 402, 989
4 P.2d 800, the Court is allowing recovery for attorneys' fees incurred
5 through January 16, 2007 in proving the Defendants' claim for attorneys'
6 fees.

7 The Defendants have also requested an award of attorneys' fees and
8 costs incurred after their January 5, 2007 verified bill of costs and their
9 January 16, 2007 claim for attorneys' fees. The Court does not believe that
10 an additional award of all subsequent costs or fees-for-fees is proper in this
11 case for a number of reasons. First, both parties submitted a number of
12 briefs on the issue of attorneys' fees, arguing points that were later made
13 moot pursuant to their March 2, 2007 stipulation. Second, the Plaintiff
14 succeeded in some of his objections to the claimed costs and attorneys'
15 fees. By awarding fees-for-fees incurred after January 16, 2007, the Court
16 could potentially create an infinite "do loop" of sorts, a never-ending cycle
17 of fees-for-fees-for-fees. As the Plaintiff has raised some reasonable
18 objections to the claimed costs and fees, no additional fees-for-fees (or
19 costs-for-fees) award is justified.

20 That said, the Court finds that the Defendants are entitled to their
21 attorneys' fees and costs incurred in formulating their February 5, 2007
22 response opposing the Plaintiff's January 30, 2007 motion for leave to file
23 an amended complaint. In an August 8, 2007 order, the Court denied
24 Plaintiff's motion for leave, finding that the Plaintiff's proposed amendment
25 would be futile. The Court had already dismissed Defendants Sponseller
26 and Poten and the Plaintiff's actions in attempting to bring the Defendants
27 back into the litigation through an amended complaint only served to

1 prolong this litigation. The Court finds that the Plaintiff "unreasonably and
2 vexatiously" multiplied the proceedings in this case and, pursuant to § 37-
3 61-421, MCA, must therefore satisfy the excess costs and attorneys' fees
4 reasonably incurred because of such conduct.

5 DATED this 24th day of September, 2007.

6 
7 Douglas G. Harkin
8 District Judge

9
10 c: ~~Donald V. Snavelly~~
11 ~~Snavelly Law Firm~~

12 William L. Crowley
13 Dean A. Stensland
14 Boone Karlberg, P.C.

15 Jon G. Beal
16 John B. Horrell
17 Beal Law Firm, PLLC

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FIFTH JUDICIAL DISTRICT COURT
BEAVERHEAD COUNTY
FILED
AUG 07 2003
SHEILA BRUNKHORST, CLERK
BY *Joan Engel*

MONTANA FIFTH JUDICIAL DISTRICT COURT, BEAVERHEAD COUNTY

SITZ ANGUS FARMS LIMITED
PARTNERSHIP, a Montana Limited
Partnership,

Plaintiff,

vs.

EDWARD J. DALLASERRA, JR., and
DONALD A. DALLASERRA,

Defendants.

Cause No. DV-99-12217

**DECISION AND ORDER
ON ATTORNEY FEES**

This case was remanded from the Supreme Court.

After apparent substantial negotiation, the parties have stipulated to a second amended judgment and the reasonableness of attorney fees and costs as set forth in John E. Bloomquist's second amended affidavit and attached Exhibit "1A" filed with the Court on June 6, 2003 except as to paralegal fees claimed in the amount of \$2,848.80. The parties further stipulated that the claim of paralegal fees should be determined by the Court without additional argument or briefing.

Plaintiff argues that it is entitled to recover attorney fees based on two Supreme Court cases which awarded paralegal fees in an ERISA case and a worker's compensation case. Those cases approved a modest amount of paralegal fees without comment or analysis. Defendants have suggested that the cases and the law upon which they were decided have special provisions regarding fees which are not applicable in this circumstance. No evidence has been provided to support or refute that position.

1 In *LaTray v. St. Peter*, 1998 Mont. ¶ 151N the Supreme Court applied Section 37-61-215
2 MCA. The legislature provided that attorney fees may be awarded only to person licensed to practice
3 law.

4 In this case, there is no evidence that the paralegal fees claimed were generated by a person
5 licensed to practice law. When Section 37-61-215 MCA is applied to this case in accord with the
6 reasoning in *LaTray*, the result is that paralegal fees may not be awarded. Moreover, the Supreme
7 Court in *LaTray*, specifically stated that the *Gullet* case upon which Plaintiff relies is not authority
8 for the proposition that paralegal fees may be awarded. This Court is bound by Supreme Court
9 interpretation of the statutes.

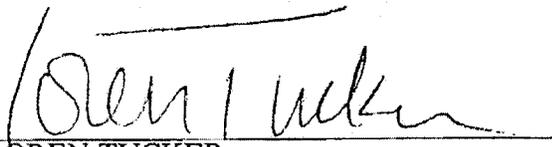
10 NOW THEREFORE, IT IS HEREBY ORDERED as follows:

11 1. Plaintiff shall be awarded attorney fees as set forth in the second amended affidavit of John
12 E. Bloomquist and attached exhibit "1A" filed with the Court on June 26, 2003 except as to the
13 paralegal fees of Nancy Zalutsky set forth as totaling \$2,848.80. The total sum of paralegal fees shall
14 be deducted from the award of attorney fees to Plaintiff.

15 2. Let judgment be entered accordingly

16 3. The Clerk of Court will please file this Order and distribute a copy to all parties.

17 Dated: August 7, 2003.

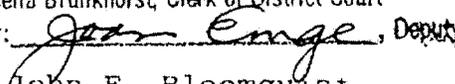
18
19 
20 LOREN TUCKER
District Judge

21 CLERK OF COURT'S CERTIFICATE OF SERVICE

22 This is to certify that the within document was
23 duly served on all parties listed below, by
24 U.S. Mail, personal delivery or attorney's mailbox
25 within the Clerk of Court's office,

26 this 8 day of Aug., 2003.

27 Sheila Brunkhorst, Clerk of District Court

28 By: , Deputy

John E. Bloomquist

Patti L. Rowland

Holly Jo Franz

MLC

CLERK OF THE DISTRICT COURT
W. A. THOMPSON
NOV 15 PM 4:35

FILED
Wendy S. Cates
CLERK
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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

BRAUN INTERTEC CORPORATION, a
Minnesota corporation,

Plaintiff,

-vs-

G & R LTD., a Montana
corporation; FOX LAND &
CATTLE COMPANY, a Montana
corporation; RICHARD FOX, and
GENE ROSS,

Defendants.

No. DV 93-1161

Judge Robert W. Holmstrom

* FINDINGS OF FACT
CONCLUSIONS OF LAW AND
ORDER *

A hearing to determine the amount of a reasonable attorneys fee to be awarded to the Plaintiff was held on Friday, July 14, 1995; evidence, oral and documentary, was offered and received and the Court having considered the evidence finds the facts to be as follows:

FINDINGS OF FACT

I

In the Fall of 1993 Plaintiff employed the firm of Crowley, Haughey, Hanson, Toole and Dietrich of Billings, Montana, to represent it in it's efforts to collect \$2,621.71 representing it's fee for preparation of an environmental assessment of the real property which is the object of this litigation.

II

The services commenced with the preparation of a construction lien pursuant to Title 71, Chapter 3 Part 5 of the Montana Code Annotated and instituting an action to foreclose said lien; the action raised an issue of first impression in our State that it

R

1 whether or not a contract to provide services in connection with an environmental
2 assessment of real property constituted a "real estate improvement contract" pursuant
3 to the provisions of Section 71-3-522, MCA; the law firm was successful in obtaining
4 favorable ruling from the Court that held that the services provided by the Plaintiff
5 were within the definition of a real estate improvement contract under the said section
6 and in obtaining a favorable ruling that it's construction lien was a valid lien upon the
7 premises and ordering the same to be foreclosed.

8 III

9 In performing it's services the law firm expended approximately 89.4 hours of
10 attorneys time and charged for it's services an hourly rate, of \$100.00 to \$135.00 per
11 hour depending upon which attorney performed the services; in addition the law firm
12 expended 10 hours of "legal assistant" time and charged \$55.00 to \$65.00 per hour
13 depending on which "legal assistant" performed the services; the total charges for
14 attorney's time and "legal assistant" time was \$9,435.00.

15 IV

16 The Court finds that the labor and time spent by the law firm was reasonable,
17 that because of the fact that the issue was one of first impression in Montana the
18 amount of time spent by the attorneys in researching the law from Montana and from
19 other states was reasonable; further the attorneys possessed the necessary professional
20 skill and experience to perform such services; that the character and standing in the
21 profession of the attorneys is not questioned and the attorneys achieved a favorable
22 result of a novel question; the Court therefore concludes that the total charge of
23 \$8,852.00 for attorney's fees is reasonable.

24 V

25 The Court finds that no evidence was presented as to the training and skill of

1 the "legal assistants" and upon examination of the billing for professional services it
2 appears that the legal assistant at times performed work which to the Court seemed
3 like work for lawyers, specifically on December 1, 1994 a "legal assistant" billed for
4 "draft motion and began drafting default judgment" on December 2, 1994 the same
5 "legal assistant" billed for "work on default judgment"; other description of work
6 performed by "legal assistants" such as those on November 23, 1993, November 24,
7 1993, November 30, 1993 and December 6, 1993 are services that are customarily
8 performed by secretaries in legal offices; there was no evidence that the use of "legal
9 assistants" reduced the time which the attorneys spent on the case.

10 Based upon the foregoing the Court concludes as follows:

11 **CONCLUSIONS OF LAW**

- 12 1. That a reasonable attorney's fee to be awarded to the Plaintiff for services in
13 connection with this cause is the sum of \$8,852.00;
- 14 2. That the charges of the law firm for it's "legal assistants" is not
15 recoverable under Section 71-3-124, MCA as part of or being included within
16 attorney's fees.

17 **ORDER**

18 Pursuant to the foregoing,

19 **IT IS HEREBY ORDERED** that \$8,852.00 be, and the same is hereby
20 determined to be a reasonable attorney's fee to be awarded to the Plaintiff for the
21 services of it's attorneys herein.

22 DATED THIS 15th day of November, 1995

23 
24 **DISTRICT JUDGE**

25 **MEMORANDUM**

The Court, in determining the amount of a reasonable attorney's fee to be

1 awarded to the Plaintiff applied the factors set forth in Crnceovich v. Georgetown Rec.
2 Corp, 168 Mont. 113, 541 P.2d 56.

3 The issue of whether or not "legal assistants" time for services are included
4 within the definition of attorney's fees as the same is used in Section 71-3-124, MCA
5 has not been decided by our Supreme Court. It appears that other States have held
6 that, under similar statutes such services are recoverable while some other States have
7 held that they are not. There are at least two cases in Montana, Audit Services v.
8 Frontier West Inc. 252 Mont. 142, 827 P.2d 1243 and Gullett v. Stanley Structures,
9 222 Mont. 365, 722 P.2d 619 wherein the Court, without comment, approved an
10 award by a District Court of "legal assistants" or "paralegal" time in connection with
11 the attorneys fee provisions of a federal statute and, the Montana Workers
12 Compensation Law. The issue was not raised by either party in the cases and the
13 Supreme Court therefore did not rule upon the issue.

14 This Court reached the conclusion that attorney's fee, as it is used in Section
15 71-3-214, MCA did not include "legal assistant" time and therefore disallowed such
16 time. The recovery of attorney's fees in such cases is strictly statutory and it seems
17 to this Court that it is a legislative function to determine whether or not "legal
18 assistant" charges are recoverable under such a statute. In other words this appears
19 to be a matter for the legislature to address.

20 cc: Leonard H. Smith - Plaintiff
21 Larry D. Herman - for G+L

22 CERTIFICATE OF SERVICE

23 This is to certify that the foregoing
24 was duly served by mail upon the
25 parties or their attorneys of record
at their last known address this
15 day of November
1995

By Bonnie Lale
Sec. to Hon. Robert W. Holmstrom

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

COLEMAN CONSTRUCTION, INC., FRED
COLEMAN, and KATHY COLEMAN,
Plaintiffs,

Cause No: DV 03-0033
Judge: Ingrid Gustafson

vs.

BEVERLY F. KUDRNA,
Defendant.

ORDER
AND
MEMORANDUM

This matter comes before the Court pursuant to Defendant's Motion for Award of Attorney Fees and Costs. Hearing was held on the 21st day of October, 2004. Defendant was represented by her counsel, Perry J. Schneider, and Plaintiffs were represented by counsel, John R. Gordan. This Motion has been fully briefed and heard and is deemed submitted and ready for decision.

IT IS HEREBY ORDERED that Defendant's Motion for Award of Attorney Fees and Costs is GRANTED.

MEMORANDUM

I BACKGROUND

This case arose on February 11, 2002 from a fire that started in the Defendant's mobile home and spread to consume Plaintiffs' trailer. Defendant owned a mobile home (hereinafter "mobile home") in Huntley, Montana and leased it to Chuck Sundstrom (hereinafter "Sundstrom"). In addition, Defendant owns property which she rents space to owners of travel trailers and mobile homes. The mobile home Defendant leased to Sundstrom was located on this property and the primary source of

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1 heating in the mobile home was a coal-fired heater. Defendant also rented space to Plaintiffs for their
2 1998 36-foot Spinnaker fifth-wheel trailer adjacent to the mobile home. Plaintiffs used the trailer as a
3 field office and for their employees' room and board who were on a job site near Huntley.

4 Plaintiffs filed this case in January, 2003, against the Defendant. Plaintiffs alleged Defendant
5 was negligent in inspecting and maintaining the chimney and the coal-fire heater in the mobile home
6 and Defendant's negligence caused the fire that destroyed Plaintiffs' trailer and personal property.
7 Plaintiffs approximated their damages to be \$85,900.

8 Defendant denied such allegations. Defendant alleged it was unforeseeable that if a fire
9 occurred in the mobile home, the Plaintiffs' property would be damaged. Defendant suggests the
10 unusual high winds caused the fire to spread and destroy Plaintiffs' trailer. Defendant also alleged the
11 fire could have been contributed by others. Defendant offered a judgment for \$27,500 on May 20,
12 2004, which was not accepted by Plaintiffs.

13 This case came to trial on the 26th of July, 2004. At the end of the two-day trial, the jur
14 returned with a verdict in favor of Defendant, finding the Defendant was not negligent. Defendant now
15 moves the court to award attorney fees and costs within the appropriate time after the verdict in her
16 favor. Defendant submitted a Memorandum of Fees, Costs, and Disbursements to the Court. (Def.'s
17 Ex. B.) Defendant is requesting attorney fees totaling \$33,806.00, paralegal fees totaling \$9,107.50,
18 and a total of \$4,472.51 in costs which include Postage/Delivery, \$114.44; Faxes, \$46.00; Copying,
19 \$225.40; Long Distance, \$15.20; Deposition Fees, \$1,307.85; Legal Research, \$11.52; Professional
20 Fees, \$1,278.28; and Travel Expenses, \$1,473.82. Therefore, Defendant requests this Court to award
21 her fees, costs, and disbursements totaling \$47,386.01. (See Def.'s Ex. B.) However, Defendant also
22 submitted a Bill of Costs in accordance to § 25-10-201, M.C.A., totaling \$1,250.32, comprised of
23 Appearance Fee, \$65.00; Mediation Fees, \$262.50; Witness Fees, \$30.00; and Copies of Trial Exhibits,
24 \$892.82. At the hearing, evidence was presented regarding the reasonableness of Defendant's fees and
25 costs by both parties.

1 Attorney, Guy Rogers (hereinafter "Rogers") of the Brown Law Firm in Billings, Montana,
2 testified as an expert witness on behalf of Defendant. Rogers is a highly competent, experienced
3 attorney and has been a member of the bar since 1986. His primary area of practice is insurance
4 defense. Rogers testified that he has taken approximately 24 cases to jury trial.

5 Rogers testified that Defendant's costs and attorney fees are reasonable for cases similar to this
6 case. Rogers explained that paralegals are used in his firm like a new associate to reduce the costs for
7 the client. In addition, Rogers testified typical client costs include legal research online, copying, long
8 distance calls, deposition fees, and professional fees. Rogers testified that as an insurance defense
9 attorney much of his work requires traveling and defending in other parts of Montana. In addition,
10 Rogers testified that it is typical to maintain contact with the insured and the insurance company in an
11 insurance defense case. Rogers also testified that in his firm it is policy for two attorneys be available
12 for each case. Finally, Rogers testified that although he believed the overall fees and costs to be
13 reasonable, he was not making any opinion as to their recoverability.

14 Attorney Dwayne Roybal (hereinafter, "Roybal") testified as an expert witness on behalf of the
15 Plaintiff. Roybal is also a highly competent, experienced attorney who has been a member of the bar
16 since June, 1967, and has been in private practice in Billings, Montana since 1970. Roybal stated that
17 his practice consists of approximately sixty percent (60%) defense work and forty percent (40%)
18 plaintiffs work. Roybal testified that he has tried approximately 75 trials. Roybal testified that he
19 reviewed all pleadings and discovery in this case to reach an opinion.

20 It was Roybal's opinion that Defendant's paralegal fees are excessive and that a significant
21 portion of said fees can be characterized as clerical work, since the work did not involve independent
22 judgment and was of the type typically performed by a secretary as opposed to a paralegal. Roybal
23 testified that this case was not document intensive and not witness intensive. Thus, in Roybal's opinion
24 the paralegal fees are not reasonable. He believed that true paralegal expenses approximated \$2,000
25 rather than the \$9,107.50 billed. Roybal also formed an opinion regarding attorney fees in this case.

1 Roybal testified that in his opinion Milodragovich was a competent, experienced trial attorney. Despite
2 this, he opined that Milodragovich's hourly billing rate of \$195.00 was in excess of that charged by a
3 similarly experienced attorney in the Billings, Montana area. Roybal testified a reasonable attorney fee
4 for an attorney with Milodragovich's experience and reputation would be approximately \$150 to \$175
5 per hour in Billings, Montana. Roybal also testified that based on his knowledge of attorney Schneider,
6 \$145.00 per hour billing rate was likewise high for the Billings area. He believed a more reasonable
7 hourly billing rate to be \$110 to \$125 per hour. Further, in Roybal's opinion, the case was simple and
8 straight forward such that it did not reasonably require two attorneys to represent Defendant at trial.
9 Finally, Roybal's opined that it was not reasonable to include attorney fees for communication with
10 Defendant's insurance company only with the insured. Roybal concluded that based on the foregoing,
11 Defendant's reasonable attorney fees would be approximately \$23,000 rather than the \$33,806 billed.

12 II. DISCUSSION

13 In this case, a jury instruction was given regarding the Residential Landlord and Tenant Act of
14 1977 (hereinafter "Act"). The jury instruction read § 70-24-303(1), M.C.A. where "a landlord shall
15 maintain in good and safe working order and condition ... heating... supplied or required to be supplied
16 by the landlord." Thus, if an action arises from the Act, "reasonable attorney fees, together with costs
17 and necessary disbursements, may be awarded to the prevailing party notwithstanding an agreement to
18 the contrary," pursuant to § 70-24-442(1), M.C.A. Under this statute, "prevailing party means the
19 party whose favor final judgment is rendered." § 70-24-442(2), M.C.A. In this case, the jury found
20 the Defendant was not negligent. Thus, final judgment was rendered in the favor of the Defendant.

21 Defendant asserts that attorney fees and costs should be awarded and are appropriate because
22 Defendant is the prevailing party. While the Plaintiffs assert attorney fees should be denied within the
23 Court's discretion, Plaintiffs also assert in the alternative that if awarded not all Defendant's requested
24 attorney fees and costs are appropriate for three reasons: 1) the requested attorney fees are not
25 reasonable; 2) the requested costs are not reasonable and not allowed under § 25-10-201, M.C.A. and

1 *Thayer v. Hicks*, 243 Mont. 138, 793 P.2d 784 (1990); and 3) requested paralegal fees are not attorney
2 fees and further are not reasonable. The Court will address these issues sequentially below.

3 **A. DEFENDANT IS ENTITLED TO REASONABLE ATTORNEY FEES.**

4 The Montana Supreme Court held and has reaffirmed that there are seven factors in
5 determining if attorney fees are reasonable. *Swenson v. Jenke*, 274 Mont. 354, 361, 908 P.2d 678, 682-
6 683 (1995); see also *First Security Bank of Bozeman v. Tholkes*, 169 Mont. 422, 429-430, 547 P.2d
7 1328,1332 (1976); *Plath v. Schonrock*, 314 Mont. 101, 110, 64 P.3d 984, 991 (2003); and *In re*
8 *Marriage of Metase*, 92 P.3d 1148, 1158, 320 Mont. 229, 244, (2004). The following factors are the
9 guidelines for reasonable attorney fees:

10 1) the amount and character of the services rendered; 2) the labor, time
11 and trouble involved; 3) the character and importance of the litigation in
12 which the services were rendered; 4) the amount of money or the value of
13 the property to be affected; 5) the professional skill and experience called
14 for; 6) the attorneys' character and standing in their profession; and 7) the
15 result secured by the services of the attorneys." *Id.*

16 It is at the discretion of the Court whether to award reasonable attorney fees. *Swenson*, 274
17 Mont. @ 360, 908 P.2d @ 682. Determining reasonable attorney fees is fact specific and should be
18 reviewed on a case-by-case basis. *Plath*, 314 Mont. @111, 64 P.3d @ 993. The Montana Supreme
19 Court held that a trial court abuses its discretion in determining reasonable attorney fees when it acts
20 "arbitrarily without the employment of conscientious judgment or exceed the bounds of reason, in view
21 of all the circumstances, ignoring recognized principles resulting in substantial injustice." *Campbell v.*
22 *Bozeman Investors of Dukuth*, 290 Mont. 374, ¶34, 964 P.2d 41, ¶34 (1998). "Proper determination of a
23 legal fee is central to the efficient administration of justice and the maintenance of public confidence in
24 the bench and bar." *Tholkes*, 169 Mont. @ 429, 547 P.2d @ 1332.

25 In this case, Plaintiff brought an action under the Residential Landlord and Tenant Act,
presumably for the possibility to recover attorney fees and costs from Defendant in the event Plaintiffs
were the prevailing party. Further, Defendant made a good faith offer of judgment in amount of
\$27,500 which Plaintiffs did not accept. As such, Defendant had no alternative but to defend herself at

1 trial and in the process incurred additional attorney fees and costs. Based on this, the Court finds that
2 Defendant is entitled to recover reasonable attorney fees.

3 The Court agrees with attorney Roybal that this was not a complex litigation. It was not witness
4 or document intensive. There was only one expert witness. Services of two attorneys to represent
5 Defendant was superfluous and it would not be appropriate to require Plaintiff to be responsible for
6 attorney fees for two defense counsel. As testified to by attorney Roybal, the attorney fees charged by
7 attorney Schneider alone are more commensurate with the nature and complexity of the case. As such,
8 the Court concludes that Defendant is awarded \$22,866.50 in reasonable attorney fees.

9 **B. THE COSTS ARE REASONABLE AND NECESSARY DISBURSEMENTS.**

10 "Not all litigation expenses that may properly be billed to a client may necessarily be recovered
11 from the opposing party." *Thayer v. Hicks*, 243 Mont. 138, 158, 793 P.2d 784, 796 (1990). In *Thayer*,
12 the Montana Supreme Court held costs that may be awarded to opposing counsel are those allowed
13 under § 25-10-201, M.C.A.; by a more specialized statute; by stipulation of the parties; or by rule of
14 court. *Id.* 243 Mont. @ 158, 793 P.2d @ 796-797; *citng, Luppold v. Lewis*, 172 Mont. 280, 292, 563
15 P.2d 538, 545 (1977); *see also, Springer v. Becker*, 949 P.2d 641, 645 (1997). § 25-10-201, M.C.A.
16 provides:

17 "A party to whom costs are awarded in an action is entitled to include in
18 his bill of costs his necessary disbursements as follows:

- 19 1) the legal fees of witnesses, including mileage, or referees and other
20 officers;
- 21 2) the expenses of taking depositions;
- 22 3) the legal fees for publication when publication is directed;
- 23 4) the legal fees paid for filing and recording papers and certified
24 copies thereof necessarily used in the action or on the trial;
- 25 5) the legal fees paid stenographers for per diem or for copies;
- 6) the reasonable expenses of printing papers for a hearing when
required by a rule of court;
- 7) the reasonable expenses of making transcript for the supreme court;
- 8) the reasonable expenses for making a map or maps if required and
necessary to be used on trial or hearing; and
- 9) such other reasonable and necessary expenses as are taxable
according to the course and practice of the court or by express
provision of law."

1 "The prevailing party has the burden of proving that each disbursement that does not fall within
2 the statutory list is within the purview of the statute." *Thayer*, 243 Mont. @ 158, 793 P.2d @ 797. "A
3 verified memorandum of costs and disbursements is prima facie evidence that the items were
4 necessarily expended and are properly taxable, unless, as a matter of law, they appear otherwise on the
5 face." *Swenson v. Buffalo Building Co.*, 194 Mont. 141, 152, 635 P.2d 978, 985 (1981). Therefore, the
6 adverse party has the burden to overcome the prima facie case that the items were not necessarily
7 expended or properly taxable. *Id.* However, the District Court has broad discretion under § 25-10-
8 201(9) to determine if items "where reasonable and necessary expenses ... according to the course and
9 practice of the court." *Springer*, 949 P.2d @ 647.

10 The Montana Supreme Court has limited the amount awarded for disbursements listed in the
11 statute, § 25-10-201, M.C.A. Such as, cost for deposition may only be recovered if the deposition was
12 used during trial. *Id.* 243 Mont. @ 159, 793 P.2d @ 797. Expert's review of paperwork or consultation
13 should be born by the party who incurred the cost. *Id.* 243 Mont. @ 160, 793 P.2d @ 798. Costs
14 incurred for exhibits shall only be awarded if the exhibit was admitted at trial. *Id.* Telephone charges
15 cannot be included as costs. *Id.* Costs incurred at the "convenience of counsel," like depositions that
16 were not used at trial, may not be charged to the other party. *Gilley v. Miller*, 270 Mont. 272, 276, 891
17 P.2d 1147, 1149. (1995). From case law review, it appears that only costs directly related to court
18 proceedings are recoverable.

19 Defendant asserts the purpose of § 70-24-442(1), M.C.A. in allowing attorney fees and costs to
20 be awarded under the Act was "to shift the cost of bringing or defending an action under the Act from
21 the prevailing party to the losing party." (Def. Brief in Reply, p.3 in 22-24). Defendant requests the
22 court to expand the interpretation of the term "costs" in the Act rather than use the narrow definition
23 under the cost statute § 25-10-201, M.C.A. At the hearing, Defendant cited the following cases to
24 support the proposition to expand the term "costs" under the Act; *Audit Services, Inc. v. Frontier-West,*
25 *Inc.*, 252 Mont. 142, 827 P.2d 1242 (1992); *Mont. Dept. of Transportation v. Slack*, 305 Mont. 488, 29

1 P.3d 503 (2001); and *Campbell*, 290 Mont. 374, 964 P.2d 41. The Court does not consider these cases
2 on point herein as each case either had a specific statute defining costs differently than § 25-10-201,
3 M.C.A. or the parties stipulated to different costs and fees.

4 Plaintiffs in opposition that the Montana Supreme Court has repeatedly interpreted that costs
5 must meet the cost statute as set forth in *Valeo v. Tabish*, 295 Mont. 34, 983 P.2d 334 (1999). In *Valeo*,
6 Respondent requested that awardable costs be expanded under Rule 68 M.R.Civ.P. from the primary
7 definition under § 25-10-201, M.C.A. *Id.* @ ¶28. The Court in *Valeo* rejected Respondent's proposal
8 and upheld their ruling in *Fisher v. State Farm Ins. Co.*, 281 Mont. 236, 934 P.2d 163, 164 (1997). In
9 both cases, the Court acknowledged Rule 68 M.R.Civ.P. does not define the term "costs;" therefore, the
10 Court interpreted the term "costs" to be those specifically delineated in § 25-10-201, M.C.A. *Valeo*, @
11 ¶ 29 and *Fisher*, 281 Mont. @ 239, 934 P.2d @ 164.

12 In this case, the Act does not define the term "costs." There is no specific statute defining
13 "costs" differently, the parties have not stipulated to a different definition for "costs," and there is no
14 rule by the court to the contrary. Thus, this Court must follow the reasoning of the *Valeo* and *Fisher*
15 decisions that the term "costs" and "necessary disbursements" must be interpreted in accordance to the
16 cost statute § 25-10-201, M.C.A.

17 Based on the foregoing Defendant is awarded the following costs: appearance fee of \$65.00 and
18 trial exhibit costs of \$3.00. The other costs set forth in Defendant's Bill of Cost are not recoverable.
19 Mediation and witness fees are not recoverable pursuant to § 25-10-201, M.C.A. Witness fees are to
20 be paid by the party subpoenaing the witness pursuant to § 26-2-506, M.C.A. While expenses for trial
21 exhibits are arguably recoverable, the expenses of \$892.82 claimed by Defendant are not reasonable
22 and it does not appear to represent the cost of Defendant's trial exhibit. At trial only one of
23 Defendant's exhibits was admitted into evidence – a copy of a three page incident report. At most
24 reproduction of this report would cost \$1.00 per page for a total of \$3.00. Thus, Defendant is awarded
25 total costs of \$68.00.

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2 C. PARALEGAL FEES ARE NOT ATTORNEY FEES AND ARE NOT RECOVERABLE.

3 Pursuant to § 37-61-201, M.C.A., "any person ... who shall engage in the business and duties
4 and perform, such acts, matters, and things as are usually done or performed by an attorney at law in the
5 practice of his profession ... shall be deemed as practicing law." § 37-61-210, M.C.A. states "if any
6 person practices law in any court without having received a license as attorney and counselor, he is
7 guilty of contempt of court." According to § 37-61-215, M.C.A., it is inappropriate for a court to
8 award attorney fees to anyone other than a duly admitted or licensed attorney at law.

9 Other than the unpublished decision in *LaTray v. St. Peter*, 971 P.2d 1249, 1998 WL 324918
10 (Mont.)¹, it does not appear the Montana Supreme Court has directly addressed the issue of recovery of
11 paralegal fees as attorney fees. However, in addition to § 37-61-215, M.C.A., the Federal Court
12 provides guidance in this area. In *Lasar v. Ford Motor Company*, 239 F.Supp.2d 1022, 1028 (2003),
13 the court refused to award paralegal or associate fees. In *Lasar*, Judge Molloy concluded that the
14 paralegals and associates were "not lead counsel, and had they not been working on this matter, they
15 would have been paid for other work." 239 F.Supp.2d @ 1028. This same reasoning appears
16 applicable in this case. If the paralegals were not working on this case, they would have been working
17 on another case and the firm would still pay these employees for their work. This Court concludes that
18 paralegal fees cannot be included as attorney fees and as such are not recoverable herein. In addition,
19 paralegal fees are not permitted as "costs" under § 25-10-201, M.C.A.

20 Additionally, the Court notes that even if paralegal fees were recoverable as attorney fees, many
21 of the paralegal fees sought by Defendant appear to be either excessive or clerical (rather than
22 paralegal) in nature.

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¹ The Montana Supreme Court in an unpublished opinion denied recovery of paralegal fees, as the legal assistant was not in fact a licensed and admitted attorney.

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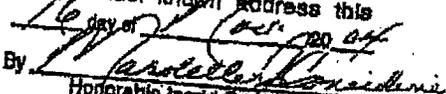
III. CONCLUSION

Defendant is awarded reasonable attorney fees in amount of \$22,866.50 and costs of \$68.00 for a total of \$22,934.50 in recoverable fees and costs.

DATED this 16th day of November, 2004.


HON. INGRID GUSTAFSON, DISTRICT JUDGE

cc: Michael J. Milobragovich, Esq. and Petry J. Schneider, Esq.
John Gordan, Esq.

CERTIFICATE OF SERVICE
This is to certify that the foregoing was duly served by mail upon the parties or their attorneys of record at their last known address this 16th day of Nov 2004
By 
Honorable Ingrid Gustafson