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IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 10-0097

LARRY DIMARZIO,

Appellant,

vs

CRAZY MOUNTAIN CONSTRUCTION, INC. a Montana corporation, F.L. DYE COMPANY, a Montana corporation, BRIDGER GLASS & WINDOWS, INC, a Montana corporation,

Appellees.

APPELLANT LARRY DIMARZIO'S OPENING BRIEF

On Appeal from the Montana Eighteenth Judicial District Court, Gallatin County

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John M. Kauffman
Kasting, Kauffman & Mersen, P.C.
716 S. 20th Ave. Suite 101
Bozeman, MT 59715
(406) 586-4383
jkauffman@kkmlaw.net
Attorneys for Appellant
Larry DiMarzio

William A. D'Alton
D'Alton Law Firm, P.C.
P.O. Drawer 702
Billings, MT 59103-0702
(406) 245-6643
bdalton@aol.com
Attorney for Crazy Mountain
Construction, Inc.

Edward Guza
Guza, Williams & Nesbitt
25 Apex Dr. Suite B
Bozeman, MT 59718
(406) 5862222
eguza@gwnlaw.com
Attorneys for F.L. Dye Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

I. STATEMENT OF THE ISSUES 1

II. STATEMENT OF THE CASE 1

III. STATEMENT OF FACTS 4

IV. STANDARD OF REVIEW 11

V. SUMMARY OF ARGUMENT 12

VI. ARGUMENT 14

A. The Court Abused Its Discretion When it Refused to Allow DiMarzio to Present the Expert Testimony of William Lynch, P.E. in its Case in Chief 14

B. The District Court Erred by Allowing the Jury To Decide Dye's Breach of Contract Claim 19

C. The District Court Erred by Giving Instruction No. 23 Because it Unreasonably and Incorrectly Elevated CMC's and Dye's Status as General Contractor and Subcontractor 23

D. The District Court Erred by Giving Instruction No. 24 on the Relationship between General Contract and Subcontractor 27

VII. CONCLUSION AND REQUEST FOR RELIEF 29

CERTIFICATE OF COMPLIANCE 30

CERTIFICATE OF MAILING **30**

APPENDIX (SEPARATELY BOUND)

TABLE OF AUTHORITIES

MONTANA SUPREME COURT DECISIONS

Becker v. Rosebud Operating Services, Inc.,
2008 MT 285, 345 Mont. 368, 191 P.3d 435 ..... **21**

Benson v. Diverse Computer Corp.,
2004 MT 114, 321 Mont. 140, 89 P.3d 981 ..... **12**

Bjorndal v. Lane,
157 Mont. 543, 487 P.2d 527 (1971) **28**

Brown v. Thorton,
150 Mont 150, 432 P.2d 386, (1967) **23**

Cechovic v. Hardin & Associates, Inc.,
273 Mont. 104, 902 P.2d 520, (1995) **28**

Circle S Seeds of Montana, Inc. v. T&M Transporting, Inc.,
2006 MT 25, 331 Mont. 76, 130 P.3d 150, ... **11, 17**

Edie v. Gray,
2005 MT 224, 328 Mont. 354, 121 P.3d 516 ..... **12**

Estate of Pruyn v. Axmen Propane, Inc.
2009 MT 663, 354 Mont. 208, 223 P.3d 845 ..... **23**

Giambra v. Kelsey,
2007 MT 158, 338 Mont. 19, 162 P.3d 134 ..... **11**

Hawkins v. Harney,
2003 MT 58, 27, 314 Mont. 384, 66 P.3d 305 ..... **17-18**

Hendricksen v.State,
2004 MT 20, 319 Mont. 307, 84 P.3d 38 ..... **18**

Hulse v. State Dept. of Justice
1998 MT 108, 289 Mont. 1, 961 P.2d 75 ..... **17**

Keneally v. Orgain,
186 Mont. 1, 606 P.2d 127, 129, (1980) **23**

Kiely Const., L.L. C. v. City of Red Lodge,
2002 MT 241, 312 Mont. 52, 57 P.3d 836 ..... **12**

Lockhead v. Weinstein
2003 MT 360, ¶ 7, 319 Mont. 62, 81 P.3d 1284 ..... **23**

Massman v. City of Helena,
237 Mont. 241, 773 P.3d 1206 (1989) **15, 17**

Moralli v. Lake County,
255 Mont. 23, 839 P.2d 1287 (1992) **26**

Murphy Homes, Inc. v. Muller,
2008 MT 140, 337 Mont. 411, 162 P.3d 106 ..... **26**

Ragland v. Sheehan,
256 Mont. 322, 327, 846 P.2d 1000, 1004 (1993) **23**

Marriage of Robison,
2002 MT 207, 311 Mont. 246, 53 P.3d 1279. ..... **11**

Scott v. E.I. Dupont De Nemours & Co.
240 Mont. 282, 286-87, 783 P.2d 938 (1989) **18**

Travelers Indem. Co. v. Anderson,
1999 MT 201, 295 Mont. 438, 983 P.2d, 999 ..... **16**

Tripp v. Jeld-Wen, Inc.,
2005 MT 121, 327 Mont. 146, 112 P.3d, 1018 ..... **18**

VonLutzow v. Leppek,
2003 MT 214, 317 Mont. 109, 75 P.3d 782 ..... **11**

Weston v. Montana State Hwy , Commn,
186 Mont. 46, 606 P.2d 150 (1980) **23**

CASES FROM OTHER JURISIDICTIONS

National R.R. Passenger Corp v. Expresstrak, LLC,
Slip Copy 2006 WL 2711533 (D.D.C., 2006) **19**

Summers v. Missouri Pacific Railroad System,
132 F.3rd 599, 604 (10th Cir. 1997) **17**

MONTANA CODE ANNOTATED

§28-2-2101, MCA **13, 26**

§28-2-2102, MCA **25, 26**

§28-2-2107, MCA **26**

MONTANA RULES OF CIVIL PROCEDURE

Rule 26(b)(4) **12**

Rule 26(e)(1)(B) **15**

MONTANA RULES OF EVIDENCE

Rule 702 ..... **14**

Appellant Larry DiMarzio ("DiMarzio") identifies 4 issues of error on appeal and requests that this Court reverse and remand this case for a new trial.

I. STATEMENT OF THE ISSUES

1. Did the district court abuse its discretion when it prevented DiMarzio from calling William M. Lynch, P.E. as an expert in his case in chief?

2. Did the district court err by allowing the jury to reach the question of a breach of contract between DiMarizo and Defendant F.L. Dye when everyone agreed no contract existed between these parties?

3. Did the district court err by giving Instruction #23 when no party had properly invoked the provisions of §28-2-2101, MCA et seq.?

4. Did the district court improperly comment on evidence that was in controversy when it gave Instruction #24?

II. STATEMENT OF THE CASE

This cases arises out of a construction project at DiMarzio's home in Bozeman, Montana. DiMarzio hired Crazy Mountain Construction, Inc. ("CMC") as the general contractor pursuant to a Cost Plus Contract dated May 14, 2003 (the "CMC Contract"). CMC, in turn, hired F.L. Dye Company ("Dye") as the subcontractor to do the air conditioning and humidification work in the home and the new atrium being added to the existing home. CMC also hired Bridger

Glass & Windows, Inc. ("Bridger") to construct the glass/metal atrium and S.L. Pynn ("Pynn") to do the heating portion of the project.

On October 24, 2004 DiMarzio filed suit after CMC walked off the job. DiMarzio claimed CMC had breached its contract and was negligent because of a variety of defects in CMC's work and the work of its subcontractors, including the installation of air conditioning systems that did not function, humidification system that did not meet the proper levels and an atrium that leaked in many locations. DiMarzio also filed negligence claims against CMC's subcontractors Dye, Bridger and Pynn. DiMarzio has settled with Pynn and with Bridger. They are not involved in this appeal. *See Case Register Report ("CR")* at 236 & 106.

CMC filed a counterclaim against DiMarzio for breach of the CMC Contract. Dye filed counterclaims against DiMarzio for breach of a contract and unjust enrichment. None of the other defendants filed counterclaims.

The parties filed expert disclosures on December 31, 2006, pursuant to the court's scheduling order, as amended. DiMarzio filed one for an air conditioning expert, Kevin Amende ("Amende"). On June 20, 2007, DiMarzio filed a supplemental expert disclosure by William Lynch ("Lynch") on the air conditioning issue and later asked the district court for leave to substitute Lynch for Amende because Amende would not testify at trial. The district court struck

the supplement and prevented DiMarzio from calling Lynch in his case in chief on the grounds that the supplement was untimely, even though Lynch's opinion and report was provided in June 2007 and trial was not until August 2009.

The parties tried the case before a jury from August 25, 2009 through September 1, 2009 when the jury returned its special verdict. *CR 187; Appendix ("App.") 1.* A summary of the verdict is as follows:

<u>DiMarzio's Claims</u>		
Breach of Contract against CMC	-	No breach
Negligence against CMC	-	Negligent - award $7,902.44
Negligence against Dye	-	Not Negligent
Negligence against Bridger	-	Not Negligent
<u>CMC's Counterclaim</u>		
Breach of Contract against DiMarzio	-	Breach - award $5,361.78
<u>Dye's Counterclaim</u>		
Breach of Contract against DiMarzio	-	Breach - award $10,740.00
Unjust Enrichment against DiMarzio		No unjust enrichment

CMC and Dye requested costs and on October 26, 2009 the district court granted some, but not all of the costs each had requested. I also set a hearing on CMC's request for attorney's fees. *Order, CR 209, App. 2.*

On February 3, 2010, following a hearing, the Court issued its order awarding CMC some, but not all, of the attorney's fees requested. It also issued its final judgment in the case. *(CR 220, 221; App. 3, 4).* Thereafter, DiMarzio filed a timely Notice of Appeal. CMC and Dye have both cross appealed.

III. STATEMENT OF FACTS

This case involves construction defects related to the remodeling of DiMarzio's home in Bozeman, Montana. DiMarzio hired CMC to do the remodeling pursuant to a Cost Plus Contract, which both parties signed on May 15, 2003 (the "CMC Contract"). *Trial Exhibit ("Ex.") 1, App. 5; Transcript ("TR") Day 1 at 201.*

DiMarzio had moved to this home at 48 Gardner Park in Bozeman, Montana in 1994 with his wife and two young daughters. *TR Day 2 at 228-232.* DiMarzio does not work in the construction industry. *Id. at 229-230.* Rather, following high school he was a musician, fixed guitars, taught guitar lessons and eventually started a company that manufactures electronic guitar pickups. *Id. at 230-231.* When he came to Montana, he brought with him some very valuable vintage guitars which needed special humidification from between 30-35%. *Id. at 233-35.*

In 2002, the DiMarzios decided to remodel their home to add a new kitchen and a glass "atrium" to the back of the house. *Id. at 235-36.* They wanted the atrium to be an "all-year, all-weather room added to the house" that would look very open. *Id. at 236.*

DiMarzio submitted some initial drawings from an architect to CMC, who asked for better drawings, and those were provided. *TR Day 2 at 237 and TR Day 1 at 265.* CMC is owned by Butch Keyes ("Keyes"). *TR Day 1 at 200.* Keyes

then put his 22 year old son, Ryan Keyes, in charge as forman of the project. *See id.*[1]

Under the CMC Contract, CMC agreed to hire all of the subcontractors. *TR Day 1 at 201.* CMC hired Dye, Bridger and Pynn as its subcontractors. *Id. at 206-207* and *Pretrial Order at Agreed, (CR 111), Fact 4.* CMC was to receive a payment of 12% on top of whatever the subcontractors charged CMC. *App 5.* The payment was for scheduling the subcontractors and making sure each did its job in a workman like manner. *TR Day 1 at 208.* CMC's obligations to DiMarzio included building an atrium that did not leak and making sure the systems in the remodel and atrium worked properly. *Id. at 208 and 263.*

For the air conditioning and humidification work at DiMarzio's home, CMC sought out and hired Dye. *Id. at 213 and TR Day 3 at 269.* At trial, Dye appeared through one of its owners, Ron Schaeffer ("Schaeffer"). *TR Day 4 at 236.* No one else from Dye testified, and Schaeffer never actually did any physical work at the DiMarzio residence. *TR Day 4 at 15.* Dye was to design and install air conditioning systems for the main floor, second floor and atrium and upgrade an existing humidification system for the main floor and atrium. *TR Day 2 at 284-285.* The existing home did not have air conditioning, but did have

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[1] The trial testimony states that Ryan was 28 at the time of trial in 2009. The work was done in 2003, six years earlier.

humidification that needed to be modified to work with the remodel. *Id.* Because of his guitar collection, DiMarzio wanted the humidification to be set at 35% and told this to CMC and Dye early on in the project. *TR Day 2 at 240-42.*

In August 2003, Dye submitted proposals to CMC to provide and install the necessary air conditioning and humidification systems in DiMarzio's home. *Ex. 24, 25, 29, 404 (App. 6), TR Day 1 at 213-214 & Day 3 at 99.* Though the air conditioning and humidification portions of the project were not part of the initial CMC Contract, DiMarzio and CMC agreed to modify that agreement to add Dye's work as a subcontractor. *TR Day 1 at 257.* CMC, Dye and DiMarzio all understood that Dye's contractual relationship was with CMC, the general contractor, not DiMarzio, the owner. *TR Day 1 at 214-215* (CMC's understanding); *TR Day 3 269-270* (Dye's understanding); *TR Day 2 at 239-240* (Dimarzio's understanding) *see also* correspondence, *Ex 37, 38, 52 and 53 (App. 7) and and 43 (App. 9)* and *TR Day 4 at 14, 40-41*; bills with Dye charges *Ex 10C & 13 (App 8);* and bills from CMC to DiMarzio with all subcontractors' bills *TR Day 1 at 216 and App 8 (Ex. 10, 10A, 10B, 10C, 11, 12, 13, and 13A).*.

At the time CMC walked off the job, CMC had billed and DiMarzio had paid $280,108 under the CMC Contract, of which $23,499 was for work Dye had billed CMC. CMC charged DiMarzio 12% on top of the $23,499. *TR Day 1 at 232 and Day 2 at 295-96; TR Day 2 at 30-31 and App 8* (bills). Dye had

submitted two bills to CMC totaling the $23,499 figure, one for $16,073 and the other for $7,426. *App 8 at Ex 10C and 13.* DiMarzio had paid CMC for both of these charges, however according to Dye CMC only passed along to Dye $16,073. *TR Day 2 at 31-32.* As to the $7,426 DiMarzio had paid, it asked CMC to hold that amount back until Dye's systems were operational. Apparently, CMC not only held the funds back, but kept the money for itself. *TR 32-33.*

At trial DiMarzio called Russell Olsen to explain the relationship between a general contractor/ subcontractor. Mr. Olson had been a veteran of the construction industry for more than 29 years in various roles and at the time of trial an owner of R&R Taylor, a general contractor. *TR Day 2 at 178.* He explained that a general contractor oversees a project, bids a project, and selects and solicits subcontractors, among other things. *Id. at 179-80.* General contractors "solicit and select or bid out projects to subs and suppliers, and then they'll sign them under contract, and pay them, and watch over and oversee their work and the scheduling of the work." *Id. at 180.*

> Q. Okay. And what do you feel the responsibilities of a general contractor are to the owner relative to the subs?
> A. Well, to protect the owner's assets, I guess, or build the building in a timely manner and of a quality.
> Q. Okay. And if the quality of the subs is not up to standard, what is your response as a general contractor?
> A. Well, to put the pressure on them to either pick up the quality or find someone else to replace them if they can't.

Id. at 180.

According to its own time records, CMC did not begin working on the DiMarzio home until July 28, 2003, though Keyes claimed it started on May 3. *TR Day 1 225-226.* However, CMC estimated the work on DiMarzio's home would be ***done*** by August 1, 2003. *TR Day 2 at 270* and CMC Contract, *App. 5* at 5. In fact, CMC had not finished working on the DiMarzio home by April of 2004, when it walked off the job - quit. *TR Day 1 212-213, 233; see also TR Day 3 at 16.* CMC did so without any warning to DiMarzio. *TR Day 2 at 299.* Despite the fact CMC claimed to warranty its work, it had no intention of ever going back to the DiMarzio home it quit. *TR Day 1 at 256.*

Before CMC quit in April 2004, DiMarzio had promptly paid all bills CMC had submitted. *TR Day 1 at 232.* Before it quit, CMC did not complain or warn DiMarzio about problem it was having. *TR Day 2 at 273-274.* When CMC quit DiMarzio did not have a functioning air conditioning system or a humidification system that worked to his specifications, though he had been billed and paid for them. He also had an atrium that was leaked.

With respect to Dye's work (air conditioning/humidification), CMC conceded that DiMarzio notified it that he wanted the humidity to be set at between 30-35% early on in the project and, in turn, CMC had informed Dye of this requirement. *TR Day 1 at 260-61.*[2] At trial, both CMC and Dye acknowledged that the system Dye designed ***and installed*** would not, and could not, reach this level. For example, Shaeffer testified as follows:

> Q. ...Can the system you installed maintain a humidification of 30 to 35 percent?...
> A. It was not designed for that.

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[2] Contrary to Keyes' testimony, Schaeffer claim he was not told about the humidification level until after the humidifiers were installed. *TR Day 4* at 15.

Q. And you designed it, correct?
A. Correct.

TR Day 2 at 29 and *TR Day 4 at 35.*

The air conditioning systems that Dye installed were inoperable. *TR Day 3 at 11-12; TR Day 2 at 291, 293.* DiMarzio's proposed expert, William Lynch, was prepared to testify and give his expert opinion on why Dye's systems did not work. Lynch's Expert Report, *CR 88, App. 11.* Part of Lynch's opinion would have addressed Dye's approach to the duct work. Dye had initially recommended an 18" duct and DiMarzio did not like the look of an 18" duct, so it was reduced to a 12" duct. *TR Day 2 at 285-90.* Dye's plans noted that "Contractor and owner are aware that the 12-inch duct depicted is not per mechanical contractor's recommendations and only a trial to test feasibility." *TR Day 4 at 9 and Ex 3.* Lynch would have also testified about the fundamental problems in Dye's approach to the air conditioning needs of DiMarzio from the beginning. *See* Report, *App. 11.* However, Lynch was not allowed to testify in DiMarzio's case in chief, but only in a limited manner as a rebuttal witness. *See* discussion in Section VI(A) below; in chambers discussion of Lynch's rebuttal testimony, *TR Day 5 at 194-202*; Lynch rebuttal testimony, *id at. 207-217.*

At trial, Dye argued there were a number of potential solutions, but each would have required destruction to part of the completed atrium, extra expense, unacceptable noise and/or cold air blowing across the floor (and occupants' feet) as opposed to, as normal, coming from above. *See TR Day 3 at 154-56*; *see also TR Day 5 at 124-125* (Schaeffer admits some of the problems with Dye's solutions). As a result of the various problems with Dye, CMC wrote a letter to Dye explaining many of the defects and noting that "[s]ince the beginning of

installation, the installation has been plagued with problems." *Ex. 43, App. 9.* DiMarzio helped with the letter. *TR Day 2 at 299-300.* At trial, Keyes confirmed the statements in the letter noting Dye's defective work were accurate. *TR Day 2 at 19, 27-28.*

The leaks in the atrium occurred where the atrium attached to the house; where the glass and aluminum structure met the cement wall, through the cement, and through the seams. *See TR Day 2 at 258-259; 268; TR Day 3 at 172; see also Ex 7; App. 10* (look for blow up used at trial). *See also, TR Day 1 at 276 -279.* DiMarzio's expert, Olson, also testified to seeing a number of other defects in CMC's construction work. *See e.g. TR Day 2 at 183-190 (*construction defects & leaking in the atrium); *id. at 195-196* (leaking so problematic that the atrium should be torn down). There was a dispute about the cause of the leaks, but not about the existence of the leaks after CMC quit.

When CMC walked off the job in April, 2004 it sent DiMarzio a final bill for $1,729.66 dated May 24, 2004. *See Day 1 at TR 232-233 and Ex. 14, App. 8.* This bill reflected credits for subcontractors Dye and Pynn. Yet, at trial, CMC claimed that DiMarzio owed it an additional $15,528.78, though Keyes could not why CMC was due this amount, particularly with the credits. *See TR Day 1 at 242-245.*

Dye also claimed it was owed $10,740 for work it had performed, it was not operational. $7,426 was for the amount DiMarzio paid CMC, but which CMC never paid Dye and an additional $3,314 for what Dye said was done and for which it was not paid. *See App. 8. Ex 13* (CMC bill), *TR Day 5 at 98-99.* Dye never cross claimed against CMC, nor did CMC cross claim against Dye.

The jury found that CMC was negligent and awarded DiMarzio $7,902.44. However, it also concluded CMC had not breached the CMC Contract. Verdict, *App 1*. On CMC's claim, it found that DiMarzio had breached the CMC Contract and awarded CMC $5,361.78. There does not appear to be any relationship between the figures awarded by the jury and those claimed by DiMarzio or CMC.

The jury awarded Dye $10,740 for breach of a putative contract with DiMarzio (*App. 1)*, despite the testimony at trial that Dye's contractual relationship was with CMC, not DiMrazio, and DiMarizo could use very little of the goods or services Dye brought to his house despite having paid CMC $23,499 for Dye's work. *TR Day 2 at 296-97, App. 8, Ex 10C & 13.* .

IV. STANDARD OF REVIEW

The district court's decision preventing DiMarzio from calling his expert, William Lynch, P.E. ("Lynch") in his case in chief was an abuse of discretion. "The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *Circle S Seeds of Montana, Inc. v. T & M Transporting, Inc.*, 2006 MT 25 ¶14, 331 Mont. 76, 130 P.3d 150 citing *VonLutzow v. Leppek*, 2003 MT 214, ¶ 14, 317 Mont. 109, 75 P.3d 782.

The district court's decision to allow Dye to proceed with a breach of contract claim was an error in law. For the review of any legal error, the proper standard is *de novo*. *In re Marriage of Robison*, 2002 MT 207, ¶15, 311 Mont. 246, 53 P.3d 1279. DiMarzio had made a motion for directed verdict on Dye's counterclaim for breach of contract. At to that issue, the review is also *de novo*. *Giambra v. Kelsey*, 2007 MT 158, ¶26-27, 338 Mont. 19, 162 P.3d 134. The fact that the Court also gave an instruction on the issue, in the form of an implied

contract instruction, is reviewed under an abuse of discretion standard. *Edie v. Gray*, 2005 MT 224, ¶ 12, 328 Mont. 354, 121 P.3d 516. In this regard, this Court will view the instructions in their entirety, as well as in connection with the other instructions given and with the evidence introduced at trial. *See Kiely Const., L.L. C. v. City of Red Lodge,* 2002 MT 241,¶ 62, 312 Mont. 52, 57 P.3d 836. Finally, on the breach claim made by Dye, DiMarzio requests that the jury verdict should be overturned because of an absence of substantial credible evidence to find a contract between Dimarzio and Dye. *Benson v. Diverse Computer Corp.*, 2004 MT 114, ¶20, 321 Mont. 140, 89 P.3d 981. " The test of substantial credible evidence allows for reversal only if there is an absence of probative facts to support the verdict." *Id. [internal citations omitted].*

The abuse of discretion standard also applies to the district court's decision to give Instructions #23 and 24, discussed in Section VI (C) and (D) below. *Edie and Kiely, supra.*

V. SUMMARY OF ARGUMENT

1. DiMarzio was entitled to present expert testimony to the jury to demonstrate Dye's failures in designing and installing the air conditioning systems and the fundamental defects in the putative remedies suggested by Dye. These failures would not only demonstrate Dye's negligence but also CMC's breach of the CMC Contract and its negligence in failing to properly supervise and coordinate Dye's work.

DiMarzio filed a Rule 26(b)(4) disclosure for the testimony of William Lynch, P.E. on June 20, 2007. The district court set the trial, initially for the beginning of 2009 and then, *sua sponte*, reset it for the end of August 2009. The Lynch disclosure was made before mediation and before the trial was set. It was

initially made as a supplement to an earlier disclosure and then as a substitute for the earlier disclosure. The district court refused to let DiMarzio call Lynch as an essential expert in his case in chief. This was manifestly unjust and an abuse of the district court's discretion. The district court did not permit DiMarzio to present the complete story to the jury.

2. CMC and Dye both testified that CMC had hired Dye as its subcontractor. DiMarzio also believed that any contractual relationship with Dye was with CMC. All bills from Dye were sent to CMC and DiMarzio paid CMC for those charges. CMC paid Dye. Correspondence from Dye was sent to CMC. The district court should never have permitted the jury to consider Dye's breach of contract claim against DiMarzio as there was no contract between the two that could be breached. The district court improperly instructed the jury on implied contract with Instruction No. 22. The existence of a contract is a question of law and there was no credible evidence to find there was a contract that could be breached.

3. Instruction No. 23 is derived from Montana's Prompt Payment Act found at §28-2-2101, MCA et seq. No party properly invoked its provisions and its provisions were not properly available to Dye or CMC. The instruction improperly elevates the rights of a contractor over the rights of an owner in a breach of contract case where there are cross claims on breach. By giving this instruction, the district court unfairly prejudiced DiMarzio.

4. Instruction No. 24 improperly commented on the evidence. The evidence at trial was that CMC was responsible for the work Dye did on the DiMarzio project. The instruction gave the jury the incorrect impression that CMC was not responsible, thereby unfairly prejudicing DiMarzio.

VI. ARGUMENT

A. The Court Abused Its Discretion When it Refused to Allow DiMarzio to Present the Expert Testimony of William Lynch, P.E. in its Case in Chief

DiMarzio, Dye and CMC all agreed that the air conditioning system installed by Dye did not work. *TR Day 2 at 11-12, 291, and 293.* The system was installed by Dye as the subcontractor for CMC. The reasons why the air conditioning system did not work, the proper design of a system and what an experienced air conditioning equipment and services person would know, are all within the province of an expert because it involves technical or specialized knowledge, particularly when it comes to the applicable standard of care. *See Rule 702 M.R.Evid.*

In order to prove Dye's negligence and CMC's breaches, DiMarzio needed this type of expert testimony. However, the district court prevented DiMarzio from presenting the testimony of William Lynch ("Lynch"); testimony he had disclosed more than 2 years before the trial. (*CR 88, App 11).* The district court held that the disclosure of Lynch was untimely in 2007 (*CR 92, App 12)* and again in 2009 (*CR 140, App 14).* The district court abused its discretion in so holding.

The date for disclosing experts changed throughout the proceedings and eventually became December 31, 2006. *CR 67.* DiMarzio filed an expert disclosure for air conditioning expert Kevin Amende ("Amende") on December

26, 2006. *CR 69.* Because of intervening events, discussed below, DiMarzio filed a supplemental report by Lynch on June 20, 2007. *App 11.* This also complied with DiMarzio's obligation under *Rule 26(e)(1)(B) M.R.Civ.P.*

Dye, however, moved to strike the Lynch supplement as being untimely. *CR 89.* DiMarzio responded by noting (i) his obligation to supplement; (ii) new information he had been provided during Schaeffer's deposition taken after the disclosure deadline; (iii) there was no pretrial order or trial date; and (iv) the parties had yet to mediate. *See CR 90 (DiMarzio's Opp. to Dye's Motion to Strike).* Thus, DiMarzio not only needed to supplement, his supplement could not unreasonably prejudice Dye. Nevertheless, the district court agreed with Dye and on November 21, 2007 held that DiMarzio could not present Lynch in his case in chief, though it invited the parties to discuss Lynch as a rebuttal witness. *App. 12.*

In response to the district court's invitation, DiMarzio filed an affidavit from Amende stating he would not testify as an expert in the case and that Lynch would need to be substituted for Amende. *See CR 96, App. 13.* In a February 15, 2008 Order, the district court confirmed Lynch could not testify in DiMarzio's case in chief without mention of substitution, but held Lynch might be allowed to testify as a rebuttal witness only. *CR 102.*

Rebuttal evidence is evidence offered to counteract new matter presented by the adverse party. *Massman v. City of Helena*, 237 Mont. 234, 243, 773 P.2d

1206, 1211 (1989). "Evidence in a plaintiff's case-in-chief is not "new matter" to be counteracted with rebuttal evidence." *Travelers Indem. Co. v. Andersen*, 1999 MT , ¶36, 295 Mont. 438, 983 P.2d 999 (citation omitted)(overruled on other ground). By relegating and limiting Lynch's testimony to rebuttal, the district court denied DiMarzio the opportunity to show Dye's (and by association CMC's) misconduct in his case in chief - factors critical to DiMarzio's case. *See TR Day 5 at 194-202* (in chambers discussion of limitation on Lynch testimony); Lynch rebuttal testimony, *id at. 207-217.*

On March 20, 2008 the district court set the trial for February 17, 2009 (*CR 112)*, but then on January 30, 3009, *sua sponte*, vacated the trial and reset it for August 25, 2009. *CR 133.* DiMarzio again moved for leave to use Lynch in his case in chief. *CR 134.* The Court again denied the request, referring to its earlier orders. *CR 140. App 14.* A summary of the relevant dates is as follows:

10/19/04	DiMarzio files Complaint (*CR 1)*
12/26/06	DiMarzio files Amende Report (*CR* 69)
4/4&5/07	DiMarzio deposes Schaeffer *TR Day 3 at 272-73*
6/20/07	DiMarzio files Lynch Report (*CR 88)*
11/21/07	Court Order re Motion to Strike Lynch *(CR 92)*
1/10/08	DiMarzio files Amende Affidavit & asks to substitute (*CR 96i)*
2/15/08	Court Order limiting Lynch to rebuttal (*CR 102)*
3/20/08	Court issues Pretrial Order and sets trial for 2/17/09 (*CR 110)*
1/30/09	Court vacates 2/17/09 trial date and resets 8/25/09 (*CR 133)*
8/25/09	Jury trial begins

The district court's rationale for denying the request "exceeded the bounds of reason resulting in substantial injustice" to DiMarzio and therefore was an

abuse of discretion. *See Circle S Seed, supra.* "[D]istrict courts have broad discretion in determining what evidence will be allowed at trial, that discretion nonetheless is not unlimited and must be exercised in such a manner as to afford a fair trial to all parties." *Circle S Seed, ¶24 citing Hulse v. State, Dept. of Justice*, 1998 MT 108, ¶15, 289 Mont. 1, 15, 961 P.2d 75. "The decision to exclude evidence is a drastic sanction." *Summers v. Missouri Pacific Railroad System*, 132 F.3rd 599, 604 (10th Cir. 1997). In this case it was particularly drastic as it prevented DiMarzio from proving through his own witness a breach in Dye's duty, an essential element of his negligence claim.

The purposes of expert disclosures is to avoid unfair surprise and to allow an opposing party to prepare its cross examination. DiMarzio's June 20, 2007 disclosure met these purposes. *App 11.* No meaningful policy was advanced in this case by denying DiMarzio the opportunity to call his expert in his case in chief, especially when considering when DiMarzio made the disclosure.

The district court's rigid adherence to its amended scheduling order, when reality took a different course, deprived DiMarzio of a fair trial. While DiMarzio appreciates the need for dates to be set and met, courts must be flexible so as not to put form before substance and deprive parties of fair trials. *See e.g. Hawkins v. Harney*, 2003 MT 58, 314 Mont. 384, 66 P.3d 38.

> We further note that while we do not condone Hawkins' tardiness in answering the Respondents' interrogatories, such tardiness did not prejudice the Respondents. At the time the Respondents received Hawkins' supplemental answer, this case had yet to be scheduled for trial. Consequently, the Respondents would have had adequate time to prepare their cross-examination of Dr. Collins. [citation omitted] Additionally, the Respondents could have elected to depose Dr. Collins at some point prior to trial in order to elicit further information regarding his anticipated testimony.

¶27 (district court abused its discretion when it barred the testimony of the expert because of a tardy disclosure.) *see also Hendricksen v. State*, 2004 MT, 20, ¶57, 319 Mont. 307, 84 P.3d 38; *Scott v. E.I. Dupont De Nemours*, 240 Mont. 282, 286-87, 783 P. 2d 938, 941 (1989); and *Massman, supra.*

In addition to error associated with denying the supplement, the district court also erred in not allying DiMarzio to substitute Lynch for Amende, a practical solution in light of the circumstances. *See Tripp v. Jeld-Wen, Inc.*, 2005 MT 121, 327 Mont. 146, 112 P.3d, 1018. In *Tripp*, the defendant substituted one of its lay witnesses for a previously listed expert witness. *Id.* ¶23. The plaintiffs argued that the substitute expert should not be allowed to testify. The district court disagreed and allowed him to testify. This Court affirmed the decision and held that although the new expert was not disclosed as a witness until late in the litigation, he was disclosed to the plaintiffs six months before trial. *Id. at ¶25.* This Court also noted that absent a claim that the plaintiffs would be surprised by the new expert's testimony at trial, objecting was 'hyper-technical'. *Id. see also*

National R.R. Passenger Corp v. Expresstrak, LLC, Slip Copy 2006 WL 2711533 (D.D.C., 2006) (granting leave to substitute experts even when party claimed prejudice).

The substantial harm to DiMarzio resulting from the limitation on Lynch could have been avoided by allowing Lynch to testify. Neither Dye nor CMC would have been surprised or unprepared to cross examine him and both could have supplemented their own disclosures or deposed him in the intervening 2-year period.

Because of the district court's abuse of discretion, DiMarzio respectfully requests this Court to reverse and remand the matter for a new trial to allow him the right to present the evidence he should have been aloowed to present when this matter was initially tried.

B. The District Court Erred by Allowing the Jury to Decide Dye's Breach of Contract Claim

The parties all recognized there was no contract between DiMarzio and Dye. Yet the district court disregarded the parties' testimony, as well as the letters, bills and statements from Dye and CMC that confirmed that the contractual relationship with Dye was with CMC. It erred, as a matter of law, when it allowed the jury to decided if a contract existed between DiMarzio and Dye. It also erred when it gave Instruction No. 22 on implied contracts. Instruction 22, *App. 15.*

The jury was incorrect in by finding a contract when there was no substantial evidence to support such a finding. There was simply no contract between DiMarzio and Dye that could have been breached. While Dye had a tort/equitable theory, it should not have been allowed to present a contract/legal .

It is undisputed that CMC hired Dye. DiMarzio only signed some of Dye's proposals to acknowledge he had seen them, as reflected in Keyes' testimony.

> Q. Now, you'll notice on 24, on that second page of 24 there's a signature. I believe it's Mr. DiMarzio's signature on it, on the proposal, right.
> A. Correct.
> Q. And maybe a couple of the other ones have also his signature on it. But you didn't expect him to hire F.L. Dye, correct?
> A. No, we did not.
> Q. In fact you – he just signed those to acknowledge that that was the kind of equipment he wanted, right?
> A. That is correct. Those were give [sic] to him so that - - and my son Ryan took them to him and he read through them with him, and so Larry understood what the equipment was he was going to get.
> Q. Right, But you actually hired F.L. Dye, correct?
> A. Crazy Mountain did.[3]
> ...
> Q It was never your intention for Mr. DiMarzio to hire them, correct?
> A. That was not the intention, no.

TR Day 1 at 214-215. See also TR Day 2 at 29-30 (CMC admited it breached its obligation to DiMarzio by not getting Dye to design a system that would meet DiMarzio's specific requests). CMC sent the letter to Dye complaining about Dye's work. *Ex 43, App. 9.*

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[3] Keyes acknowledged that CMC should have signed the documents. *TR Day 1 at 223.*

Dye's Shaeffer also knew that CMC hired it to do the DiMarzio work.

Q: And when did Crazy Mountain hire you to do the job?
A: In the fall of 2003
Q: Okay. And to whom did you send the bills that you had for the work you did?
A: To Crazy Mountain Construction.
Q: And so you contracted with Crazy Mountain to do the work at the DiMarzio residence?
...
Q: Contract with Crazy Mountain to do the DiMarzio residence.
A: I assume that's a "yes" or "no"?
Q: Did you, "yes" or "no", yes
A: Yes.

TR Day 3 at 269-270. Dye's bills were all sent to CMC as well as its correspondence about the job. *See App. 7 (Ex 37, 38, 410, 52 and 53) and TR Day 4 at 14 and 40-41.* Moreover, Dye knew of no other contracts in this matter other than the CMC Contract with DiMarzio nor was he contending there was another contract. *TR Day 5 at 112-13.*[4]

DiMarzio understood that it was CMC that hired Dye, and acted accordingly. He paid CMC for bills submitted by Dye, as well as all other subcontractors, and worked through CMC when he had a complaint with Dye. *See* CMC Bills, *Ex 10C & 13 (App 8) and* CMC letter to Dye, *Ex 43 (App 9); TR Day 2 at 299-300.* In fact, the parties' billing arrangement called for CMC to send a

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[4] If this testimony were presented from depositions and used in a motion for summary judgment, neither Dye nor CMC would have been permitted to submit testimony to contradict their own to create a factual dispute. *See* e.g. *Becker v Rosebud Operating Services, Inc.*, 2008 MT 285 ¶22, 345 Mont. 368, 191 P.3d 435. It makes little sense to let them do it at trial and get to a jury on the matter.

bill to DiMarzio for work done by itself, its subcontractors, and materials suppliers and then CMC would pay the subcontractors. *TR Day 1 at 216 and App 8 (Ex. 10-13A).* This further separated DiMarzio from any contractual relationship with any of the subcontractors.

Even the district court ultimately recognized that there was no contract between DiMarzio and Dye, albeit after trial.

> In this case, there was a dispute as to whether a contract existed between DiMarzio and Dye. There was no express contract between them. <u>All parties agreed that the contract for Dye's services were between Crazy Mountain Construction and Dye and not with DiMarzio</u>.

Order re: Fees and Costs, App. 2 at 14. (emphasis added).

DiMarzio moved for a directed verdict on Dye's counterclaim for breach of contract claim because of the foregoing admissions, but that was denied. *TR Day 5 at 180, 185, 186.* He also objected when Dye offered the new instructions on implied contract, but those objections were overruled. *Id. at 181-186.* Finally, he objected again when the Court decided to give the instruction on implied contract. *Id. at 287-293; 296.* The objection was also overruled.

The district court compounded the problem by giving the jury instructions on express contracts (Instructions 15-19), an instruction on implied contract and instructions on unjust enrichment, thereby confusing legal and equitable theories.

An implied contract is an unjust enrichment claim. Contracts are either express or implied, but "there can be no express and implied contract for the same

thing existing at the same time. *Weston v. Montana State Hwy , Commn*, 186 Mont. 46, 49, 606 P.2d 150, 152 (1980). "The existence of a valid express contract is a question of law." *Lockhead v. Weinstein*, 2003 MT 360, ¶ 7, 319 Mont. 62, 81 P.3d 1284 (citation omitted); (Dye's counsel concedes this point. *TR Day 5 at 17 -18.)*

An implied contract, however, is only another manner of describing unjust enrichment when no agreement exists. *Estate of Pruyn v. Axmen Propane, Inc.*, 2009 MT 663, 354 Mont. 208, 223 P.3d 845

> "Unjust enrichment is an obligation created by law in the absence of an agreement between the parties." [citation omitted] In other words, courts have applied the theory of unjust enrichment when no contract exists between the parties, but a contract in law is implied.

Id. ¶63 (emphasis added). *See also Ragland v. Sheehan*, 256 Mont. 322, 327, 846 P.2d 1000, 1004 (1993) ("An implied contract does not arise from the consent of the parties-it springs from the principle of natural justice and equity, based on the doctrine of unjust enrichment.".) *Brown v. Thorton*, 150 Mont 150, 156, 432 P.2d 386, 390 (1967).

Had there been an express contract between Dye and DiMarzio, Dye could sue in quantum meruit and use the contract as proof of the reasonable value of services. *Keneally v. Orgain*, 186 Mont. 1, 4, 606 P.2d 127, 129, 37 (1980). Here,

Dye's breach of contract claim rested on the breach of an express contract, until end of the trial,[5] but as demonstrated at trial, there was no express contract.

The district court erred in giving Instruction No. 22 (*App 1*) and, in the process, confused the jury as there was no credible evidence to support a finding that a contract existed between DiMarzio and Dye. Dye should have only been able to go to the jury on his claim for unjust enrichment, and then only after meeting the elements of that tort. The unjust enrichment instructions are markedly different from the implied contract instruction the district court gave. *c.f.* Instruction 22 with Instructions No. 33, 34, 35. The jury did not find DiMarzio had been unjustly enriched. *App. 1 at Question 20.*

DiMarzio, therefore, requests that this Court reverse the district court's ruling on Dye's contract theory and remand the matter for a new trial so that the jury will have the correct law to follow when it finds facts.

C. The District Court Erred by Giving Instruction No. 23 Because it Unreasonably and Incorrectly Elevated the CMC's and Dye's Status as General Contractor and Subcontractor

DiMarzio and CMC each brought breach of contract claims against each other based upon the CM Contract and, as noted above, Dye brought a breach of

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[5] Dye alleged an express contract all along as the term "implied contract" does not show up anywhere in Dye's contentions in the pretrial order or anywhere in the pretrial order. *see Pretrial order (CR 111) at 16-17.* The theory was new at the end of trial, as reflected by the fact that Dye offered implied contract instructions, for the first time, at the end of the trial. *TR Day 5 at 181. CR 178.*

contract claim against DiMarzio under another theory. The jury concluded CMC was negligent, but inexplicably not in breach under the CMC Contract. *App. 1.* The only work CMC did for DiMarzio was through the CMC Contract, as amended. In fact, CMC and DiMarzio agreed, as did the district court, that DiMarzio's contract and negligence claims against CMC were inextricably linked - arising out of the same set of facts. *See e.g.* 2/3/10 Order, Conclusion #2 at 9 *(App. 3)*. The same jury, however, held that DiMario had breached its contractual obligations to CMC. *App. 1.* The foregoing results are inconsistent.

DiMarzio respectfully submits that the jury was confused when the district court unreasonably and improperly gave the jury the impression that a contractor has some special elevated status over owners in contract disputes with Instruction No.23 (*App. 15)*. That instruction stated:

> Performance by a contractor of a CMC Contract in accordance with the provisions of the contract entitles a contractor to payment from the owner.

While the foregoing is an accurate recitation of §28-2-2102(1), MCA, it is taken out of a statutory framework that does not apply in this case. Prior to trial, DiMarzio objected to the instruction:

> DYE No. 23. Objection. This unnecessarily favors the contractor in the very issue to be decided by the jury. If there is a breach of contract, then the non-breaching party is entitled to recover appropriate damages, as pled. Dye tried once before to incorporate the provisions of §28-2-2100 et seq. in the pretrial order, but was unsuccessful. Dye had not pled these types of allegations nor had it satisfied the prerequisites to invoke its protections.

More over the evidence will reflect that Dye was a subcontractor of CMC. The instruction, as from Dye's standing, does not apply as Dye's instruction *(CR 149)*

Section §28-2-2102, MCA is part of the larger statutory framework some times called the "Prompt Payment Act". *§28-2-2101 et seq.* ; *see also Murphy Homes, Inc. v. Muller,* 2008 MT 140, ¶81, fn1, 337 Mont. 411, 162 P.3d 106. No one in this case alleged a cause of action under the Prompt Payment Act. In fact, the amount paid for the DiMarzio project did not meet the $400,000 jurisdictional threshold required to invoke the Act's provisions.

> "The provisions of this part do not apply to residential projects or improvements to real property intended for residential purposes with a total cost of <u>less than $400,000.</u>"

*§28-2-2107, MCA (*emphasis added)*; see TR Day 1 at 232* (total paid $280,108).

While an instruction may be a correct statement of the law, it still may be inappropriate if not supported by the facts in the case. *See e.g. Moralli v. Lake County*, 255 Mont. 23, 30, 839 P.2d 1287, 1291 (1992) (affirming district court decision to reject instruction, though a correct statement of the law). By giving Instruction No. 23, the district court not only erred, but its error unfairly prejudiced DiMarzio by giving the jury the incorrect impression that contractors have some higher status than owners when it comes to breach of contract claims. The court should reverse the district court's decision to give Instruction No. 23 and remand the case for a new trial.

D. The District Court Erred by Giving Instruction No. 24 on the Relationship between General Contractor and Subcontractor

The district court instructed the jury on the relationship between a general contractor and a subcontractor in Instruction No. 24 rather than relying on the testimony presented at the trial. Instruction No 24 (*App. 15)* stated:

> An subcontractor is a person who is hired to produce a specific result but who is not subject to the right of control of the general contractor as to the way he brings about that result. Generally, a person who hires an independent contractor is not liable for his actions.

DiMarzio objected to the instruction on the grounds that is was contrary to CMC's testimony admitting its responsibility for its subcontractors; it was misleading and improperly commented on the evidence. *TR Day 5 at 282-283.*

DiMarzio had put CMC's responsibilities for its subcontractors directly at issue by claiming CMC breached the CMC Contract and was negligent in its supervision of Dye. CMC contracted with DiMarzio to hire all of the subcontractors. *App. 5 at 1.* As modified, the CMC Contract included Dye. *TR Day at 1 at 257.* Moreover, CMC acknowledged its responsibility to DiMarzio for its subcontractors. For example, it acknowledged receiving 12% extra for coordinating and scheduling subcontractors and making sure their "work was done in a workmanlike manner...". *TR Day 1 at 208; see also Day 2 at 30 (*CMC admitted it breached its obligation to DiMarzio because of Dye's failure). Olson

also testified about CMC obligations to an owner for the problems caused by a subcontractor.

This Court has held that it is improper for a district court to comment on the evidence within the instructions given to the jury. *See Cechovic v. Hardin & Associates, Inc.*, 273 Mont. 104, 117, 902 P.2d 520, 528 (1995) (proper to refuse an instruction that comments on evidence) and *Bjorndal v. Lane,* 157 Mont. 543, 487 P.2d 527, 529 (1971) (proper to refuse an instruction that comments on evidence). At issue was CMC's contractual duty to manage and be responsible for its subcontractors; a duty acknowledged by CMC.

Instruction No. 24 was not only incorrect, given the evidence, but also improperly commented on the evidence. The final sentence of that instruction was not only wrong, it gave the jury the incorrect impression that CMC was not responsible for its subcontractors when under the law and facts of this case it was. As a result of the foregoing error and the errors in giving Instructions No. 22 and or 23 as discussed above, DiMarzio was prejudiced because the jury could have found that CMC had breached the CMC Contract by failing to properly supervise or coordinate Dye or other subcontractors. The jury could have awarded DiMarzio greater damages that would have also resulted in an award of attorney's fees. *See App. 5 at 5* (prevailing party entitled to attorney's fees). The district court's

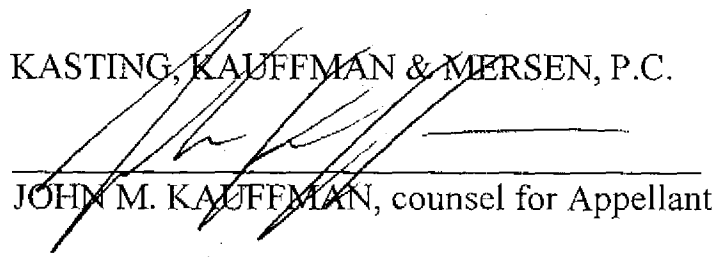
decision regarding Instruction No. 24 should be reversed and the case remanded for a new trial consistent.

VII. CONCLUSION AND REQUEST FOR RELIEF

Based upon the foregoing errors, whether considered individually or collectively, DiMarzio was deprived of a fair trial. He respectfully requests that this Court reverse the district court's decisions as set forth above and remand the matter for a new trial on the merits.

DATED this 21st day of June, 2010.

KASTING, KAUFFMAN & MERSEN, P.C.



JOHN M. KAUFFMAN, counsel for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; the word count calculated by WordPerfect is 7,609, excluding the certificates; and the brief does not average more than 280 words per page.

DATED this 21st day of June, 2010

KASTING, KAUFFMAN & MERSEN, P.C.

JOHN M. KAUFFMAN

CERTIFICATE OF MAILING

The undersigned hereby certified that on June 21, 2010, a true and correct copy of the Opening Brief of Appellant Larry DiMarzio, was mailed, by U.S. Mail, postage prepaid, to the following counsel of record:

William A. D'Alton
D'Alton Law Firm, P.C.
P.O. Drawer 702
Billings, MT 59103-0702

Edward Guza
Guza, Williams & Nesbitt
25 Apex Dr. Suite B
Bozeman, MT 59718

By: