

## Montana Law Review

---

Volume 63  
Issue 1 *Winter* 2002

Article 6

---

1-2002

# Rescuing Your Attacker: State of Montana ex rel. Kuntz v. Montana Thirteenth Judicial District Court

Penny Lee Merreot

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Penny Lee Merreot, *Rescuing Your Attacker: State of Montana ex rel. Kuntz v. Montana Thirteenth Judicial District Court*, 63 Mont. L. Rev. (2002).

Available at: <https://scholarship.law.umt.edu/mlr/vol63/iss1/6>

This Note is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

# NOTE

## **RESCUING YOUR ATTACKER: *STATE OF MONTANA EX REL. KUNTZ V. MONTANA THIRTEENTH JUDICIAL DISTRICT COURT***

**Penny Lee Merreot**

### I. INTRODUCTION

Imagine you are in a tumultuous and abusive relationship. You have finally gathered enough strength and resources to get out. Right before you make your move, however, a violent altercation ensues. Your almost-ex repeatedly slams your head into the stove while he threatens to kill you. You are out of your mind with fear and pain. In the midst of the assault, you catch a glimpse of a knife nearby. Instinctively, you reach for it. Because of your partner's rage and fixation on hurting you, he fails to immediately realize what you are doing. Seconds later, he is on the floor bleeding to death from a stab wound to the chest.

You are in a state of shock and unable to comprehend or accept what has happened. Your only thought is to get out and distance yourself from the situation. You take his car keys and start driving. After traveling several miles, you reach a friend's house. You call your mom on the telephone and, in disbelief and bewilderment, tell her what happened. She arranges for medical and law enforcement personnel to go to the residence

where your former lover lies dying.

After you have some time to absorb what happened and talk through it, you realize that what you did was justified. If you hadn't noticed the knife at the moment you did, it would probably be you lying on the floor bleeding to death. Since leaving the house, you have been aware of this fact deep inside yourself, and your family is now reassuring you of this. However, you have a difficult time accepting that you had to kill your partner in order to save yourself. Nevertheless, you tell the officers who arrive what happened the best way you can, including the fact that you used the knife because you were in overwhelming fear for your own life.

Can an individual in this situation legitimately argue justifiable use of force? Of course. However, the adoption of *State ex. rel. Kuntz v. Montana Thirteenth Judicial Dist. Court*<sup>1</sup> stands for the proposition that a person who justifiably uses force to fend off an attacker may be found criminally culpable for failing to summon aid for that attacker.<sup>2</sup> This note addresses the issue of duty and its relationship to the justifiable use of force defense in Montana. Part II of this note describes the facts of *Kuntz* and the holding of the Montana Supreme Court. Part III sets forth the history of the two relevant duties in the case: the duty based on personal relationship and the duty based on creation of the peril. Part IV analyzes the imposition of a legal duty to aid one's attacker and examines the Montana Supreme Court's reasoning behind the controversial decision. Part IV also examines another recent case where the court imposed a legal duty and which the *Kuntz* decision expanded upon. Finally, the conclusion summarizes the court's analysis and comments on the possible impact the decision may have on future cases involving the affirmative defense of justifiable use of force in Montana.

---

1. 2000 MT 22, 298 Mont. 146, 995 P.2d 951. This note will not address the underlying and important issue of domestic violence that is present in the case.

2. *Id.* at ¶ 38.

II. STATE OF MONTANA, EX REL. KUNTZ V. MONTANA  
THIRTEENTH JUDICIAL DISTRICT COURT

A. *Summary of Facts*

Bonnie Kuntz (Kuntz) and Warren Becker (Becker) were involved in a tempestuous relationship and lived together for approximately six years.<sup>3</sup> They were never married.<sup>4</sup> Verbal and physical altercations transpired between them consistently throughout their relationship.<sup>5</sup> Kuntz sought medical attention at least twice for injuries caused by Becker.<sup>6</sup> There is also evidence that Kuntz injured Becker during a squabble.<sup>7</sup>

At the time of the events at issue, Kuntz and Becker were in the process of ending their relationship.<sup>8</sup> On the morning of April 18, 1998, Kuntz and Becker had an argument,<sup>9</sup> but then parted and did not see each other again that day until Kuntz arrived home shortly before midnight.<sup>10</sup> Upon entering the residence, Kuntz immediately noticed Becker had trashed it: the phone was pulled from the wall and disabled,<sup>11</sup> pictures had been ripped off the wall, and a chair and mementos belonging to Kuntz were placed in the wood burning stove.<sup>12</sup> Kuntz began preparing a pot of coffee prior to cleaning up the mess.<sup>13</sup>

While Kuntz was making the coffee, Becker attacked her.<sup>14</sup> Becker's appearance and the power of the attack made Kuntz fear for her life.<sup>15</sup> Becker shook her, grabbed her by the hair, and slammed her into the stove.<sup>16</sup> While Kuntz does not clearly remember what happened next, she apparently grabbed a knife nearby and stabbed Becker once in the chest.<sup>17</sup> Kuntz

---

3. Supplemental Brief of Relator at 2, *Kuntz* (No. 99-055).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Supplemental Brief of Relator at 3, *Kuntz* (No. 99-055).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. Supplemental Brief of Relator at 3, *Kuntz* (No. 99-055).

14. *Id.*

15. *Id.*

16. *Kuntz*, 2000 MT 22, ¶ 5, 298 Mont. 146, ¶ 5, 995 P.2d 951, ¶ 5.

17. Supplemental Brief of Relator at 3, *Kuntz* (No. 99-055).

remembers going outside through the back door to “cool off.”<sup>18</sup> Becker walked through the living room and out to the front porch.<sup>19</sup> A short time later, Kuntz entered the house and saw blood on the floor that trailed out onto the front porch, where Becker was lying face down.<sup>20</sup> Kuntz rolled him over, but he was unresponsive.<sup>21</sup> Kuntz took Becker’s car keys from his pocket and drove to a friend’s house several miles away where she called her mother.<sup>22</sup> Kuntz’s mother arranged for law enforcement and medical personnel to be notified and advised her to go back to the residence to wait for them, which she did.<sup>23</sup>

On June 23, 1998, Kuntz was charged with negligently causing the death of Warren Becker by stabbing him in the chest.<sup>24</sup> Kuntz entered a plea of not guilty.<sup>25</sup> On November 6, 1998, the State amended the Information to charge Kuntz with the same offense, but added the charge of criminal culpability for failing to call for medical assistance.<sup>26</sup> Again, Kuntz entered a plea of not guilty.<sup>27</sup> On December 18, 1998, Kuntz moved to dismiss the Amended Information, or in the alternative, to strike the allegation that her failure to seek medical assistance constituted negligent homicide.<sup>28</sup>

Kuntz asserted she would rely upon the affirmative defense of justifiable use of force.<sup>29</sup> Because justified use of force is a

---

18. *Id.*

19. *Id.*

20. *Id.* at 4.

21. *Kuntz*, 2000 MT 22, ¶ 6, 298 Mont. 146, ¶ 6, 995 P.2d 951, ¶ 6.

22. *Id.* at ¶ 7.

23. Supplemental Brief of Relator at 4, *Kuntz* (No. 99-055).

24. Application for Writ of Supervisory Control and Memorandum of Authorities in Support at 1, *Kuntz* (99-055). A person commits the offense of negligent homicide if the person negligently causes the death of another human being. MONT. CODE ANN. § 45-5-104 (1999). A person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when the person consciously disregards a risk that the result will occur or that the circumstance exists or when the person disregards a risk of which the person should be aware that the result will occur or that the circumstance exists. The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation. “Gross deviation” means a deviation that is considerably greater than lack of ordinary care. MONT. CODE ANN. § 45-5-104 (1999).

25. Application for Writ of Supervisory Control and Memorandum of Authorities in Support at 1, *Kuntz* (No. 99-055).

26. *Id.*

27. *Id.*

28. *Id.*

29. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to

complete defense, Kuntz argued it would confuse the issues to allow the jury to consider what happened after the stabbing in terms of criminal negligence, as well as subject her to the unconstitutional risk of conviction for behavior that is not criminal.<sup>30</sup> By attempting to prove criminal negligence, the prosecution would be able to appeal to the passions, sympathies, and prejudices of the jurors by not only circumventing Kuntz's justifiable use of force argument as a complete defense, but also, by directing the jury's focus on Kuntz's *failure to save* Becker, asserting Kuntz is criminally liable for her inaction.<sup>31</sup> The State filed a brief in response, arguing that Becker's death was caused by Kuntz's actions as a whole, that is, both the stabbing and the failure to seek aid.<sup>32</sup> The State further argued that even if Kuntz was justified in stabbing Becker, "the right to use force in self-defense is extinguished when the threat is ended; a person has no right to sit and watch the assailant die."<sup>33</sup>

On January 8, 1999, the district court denied Kuntz's motion to dismiss the Amended Information.<sup>34</sup> The district court concluded that although justifiable use of force is a complete defense, Kuntz had a duty to act as a reasonable person following her use of the defense.<sup>35</sup> Kuntz then applied to the Montana Supreme Court for a writ of supervisory control.<sup>36</sup> On March 23, 1999, the Montana Supreme Court accepted original jurisdiction at the request of both parties.<sup>37</sup>

---

defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself or another or to prevent the commission of a forcible felony. MONT. CODE ANN. § 45-3-102 (2000).

30. Application for Writ of Supervisory Control and Memorandum of Authorities in Support at 1, *Kuntz* (No. 99-055).

31. *Id.* at 16.

32. Response to Application for Writ of Supervisory Control at 2, *Kuntz* (No. 99-055).

33. *Id.*

34. Application For Writ of Supervisory Control and Memorandum of Authorities in Support at 1-2, *Kuntz* (No. 99-055).

35. Order and Memorandum at 6, *Kuntz* (No. 98-531).

36. Application For Writ of Supervisory Control and Memorandum of Authorities in Support at 2, *Kuntz* No. (99-055). A writ of supervisory control is issued only to correct erroneous rulings made by the lower court within its jurisdiction, where there is no appeal, or the remedy by appeal cannot afford adequate relief, and gross injustice is threatened as the result of such rulings. BLACK'S LAW DICTIONARY 1605 (7<sup>th</sup> ed. 1999).

37. *Kuntz*, 2000 MT 22, ¶ 11, 298 Mont. 146, ¶ 11, 995 P.2d 951, ¶ 11.

### B. Holding

The two primary holdings by the Montana Supreme Court are: (1) One who justifiably uses deadly force nevertheless has a legal duty to summon aid for the mortally wounded attacker;<sup>38</sup> and (2) One who justifiably uses deadly force and fails to summon aid for her attacker may be criminally culpable for that failure.<sup>39</sup>

The court stressed the duty to aid one's attacker is only "revived" after the victim "has fully exercised her right to seek and secure safety from personal harm."<sup>40</sup> Kuntz argued such a duty should not exist if justifiable use of force is established by the jury because it is a complete defense.<sup>41</sup> As a complete defense, Kuntz argued a finding of justifiable use of force would entail the conclusion that she was warranted to act as she did without peril.<sup>42</sup> However, the court agreed with the State that a duty to aid an attacker should be imposed on a victim after the victim has secured safety.<sup>43</sup>

The court also ruled that a victim who fails to summon aid for her attacker may be found criminally negligent "*only where the failure to summon aid is the cause-in-fact of death, rather than the use of force itself* (emphasis added)."<sup>44</sup> The dissent states this concept is unworkable and makes poor public policy, for how can a victim be justified in taking an attacker's life at one point in time, then later be held criminally liable for the attacker's death for failing to aid him?<sup>45</sup> It will undoubtedly be interesting to see how this rule unfolds in future justifiable use of force cases in Montana, especially when considering that past case law sheds little light on the matter.

### III. DISCUSSION OF PRIOR LAW

To find a person liable for a failure to act, there must be a duty to act imposed by the law, and the person must be

---

38. *Id.* at ¶ 33.

39. *Id.* at ¶ 38.

40. *Id.* at ¶ 33.

41. Application For Writ of Supervisory Control and Memorandum of Authorities in Support at 11, *Kuntz* (No. 99-055).

42. *Id.* at 14.

43. *Kuntz*, 2000 MT 22, ¶ 33, 298 Mont. 146, ¶ 33, 995 P.2d 951, ¶ 33.

44. *Id.* at ¶ 38.

45. *Id.* at ¶ 50 (Trieweiler, J., dissenting).

physically capable of performing the act.<sup>46</sup> The “American bystander rule” imposes no legal duty on a person to rescue or summon aid for another person who is at risk or in danger.<sup>47</sup> This is true regardless of moral obligations in society or “when that aid can be rendered without danger or inconvenience to” the potential rescuer.<sup>48</sup> However, there are exceptions to the American bystander rule, two of which are primarily relevant to the facts of *Kuntz*: (1) the duty based on a personal relationship; and (2) the duty based on creation of the peril.<sup>49</sup> Criminal liability may be imposed when one fails to take action and one of these duties is present.<sup>50</sup> This part of the note discusses past case law regarding these two duties. It is important to point out, however, that there is virtually no authority that addresses whether or not a legal duty arises following an act of self-defense. This issue is one of first impression in Montana.<sup>51</sup>

### A. Duty Based on Personal Relationship

Social policy may justify a duty to rescue when some type of special relationship exists between individuals.<sup>52</sup> The foremost authority on the personal relationship duty in Montana stems from the case of *State v. Mally*.<sup>53</sup> In *Mally*, the Montana Supreme Court held that a husband has a duty to summon medical aid for his wife, and a failure to render such aid could make the husband criminally liable if the “failure to act was the proximate cause of the death.”<sup>54</sup> Kay Mally suffered from several physical conditions, including hepatitis, cirrhosis, osteoarthritis, and diseases of the liver and kidney.<sup>55</sup> One evening, she fractured both bones in her upper arms.<sup>56</sup> Instead of immediately providing medical attention for his wife, Mally placed her in the bedroom for a few days.<sup>57</sup> When Mally finally

---

46. MONT. CODE ANN. § 45-2-202 (1999).

47. *Kuntz*, 2000 MT 22, ¶ 14, 298 Mont. 146, ¶ 14, 995 P.2d 951, ¶ 14.

48. *Id.* [quoting *Pope v. State*, 396 A.2d 1054, 1064 (Md. 1979) quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW*, at 183 (1972)].

49. *Id.* at ¶ 15.

50. *Id.*

51. *Id.* at ¶ 13.

52. 57A AM. JUR. 2D *Negligence* § 99 (1989 & Cum. Supp. 2001).

53. 139 Mont. 599, 366 P.2d 868 (1961).

54. *Id.* at 610, 366 P.2d at 874.

55. *Id.* at 600, 366 P.2d at 869.

56. *Id.*

57. *Id.*



summoned an ambulance for Kay, medical personnel found her unconscious and her head, face, and arms badly bruised and swollen.<sup>58</sup> Kay Mally never regained consciousness and died a few days later from degeneration of the kidneys, brought on by the severe shock she suffered after fracturing both arms.<sup>59</sup>

Mally's conviction of involuntary manslaughter was compatible with the court's previous holding in *Territory v. Manton*.<sup>60</sup> In *Manton*, the court ruled a husband's drunkenness was no excuse for his failure to summon medical aid on behalf of his ill-clad wife, who perished outside in the cold.<sup>61</sup> *Manton's* manslaughter conviction was also upheld by the Montana Supreme Court because he, like Mally, let his wife languish speechlessly while making no effort to summon medical assistance.<sup>62</sup>

In the more recent case of *State v. Decker*,<sup>63</sup> however, the court concluded a husband was not liable for failing to summon aid for his wife who was passed out on the floor of a bar after being intoxicated and complaining of a headache the previous night.<sup>64</sup> *Decker's* wife, Hyacinth, like Kay Mally, was generally in poor health and suffered from high blood pressure and cirrhosis of the liver.<sup>65</sup> In this instance, the court determined the defendant husband did not depart "from the conduct of an ordinary and prudent man"<sup>66</sup> by (1) putting his wife to bed after she complained of a headache and fell; (2) putting her to bed a second time after finding her in a bar passed out the next day; and (3) finally, contacting a nurse and ambulance the following morning because of concern for his wife's condition.<sup>67</sup>

Significantly, the personal relationship duty does not only apply to married persons as the above cases have illustrated. In the 1910 case of *State v. Rees*,<sup>68</sup> which involved a couple who was living together, but not married, the Montana Supreme Court declared that, "even if the deceased was not defendant's wife, if

58. *Mally*, 139 Mont. at 601, 366 P.2d at 869.

59. *Id.*

60. 8 Mont. 95, 19 P. 387 (1888).

61. *Id.* at 109, 19 P. at 394.

62. *Id.*

63. 157 Mont. 361, 485 P.2d 695 (1971).

64. *Id.* at 365, 485 P.2d at 697-698.

65. *Id.* at 363, 485 P.2d at 697.

66. *Id.*

67. *Id.*

68. 40 Mont. 571, 107 P. 893 (1910).

he was guilty of the assault, the legal duty rested upon him to protect, care for, and shelter her after that act to the same extent as though she had been his wife.”<sup>69</sup> This rule is applicable under the personal relationship exception to the American bystander rule, as well as the next exception I will address, the duty based on creation of the peril.

The notion that unmarried couples in a relationship may still fall under the personal relationship exception was disputed in *People v. Beardsley*.<sup>70</sup> The Supreme Court of Michigan determined the married defendant did not have a legal duty to assist his “experienced”<sup>71</sup> mistress who had voluntarily ingested morphine and later died.<sup>72</sup> The rule from *Beardsley*, however, is now generally viewed as outdated,<sup>73</sup> probably because of the increasing number of unmarried couples involved in intimate relationships. Accordingly, in *Kuntz*, the Montana Supreme Court disregarded the rule from *Beardsley* and asserted that Kuntz and Becker “owed each other the same personal relationship duty as found between spouses under our holding in *Mally*.”<sup>74</sup>

### B. Duty Based on Creation of the Peril

Courts have consistently held that a defendant who positively acts to carelessly cause physical damage to the plaintiff (or his property) is always held to owe a duty of care to the plaintiff.<sup>75</sup> In other words, when a person puts another in a position of danger, he creates for himself a duty to rescue the person from that danger.<sup>76</sup> The Montana Supreme Court recognized this duty to be more significant to the facts of *Kuntz* than the duty derived from a personal relationship.<sup>77</sup>

In *United States v. Hatatley*, the Tenth Circuit Court of Appeals found the defendant criminally liable for failing to

69. *Id.* at 575, 107 P. at 894.

70. 113 N.W. 1128 (Mich. 1907).

71. *Id.* at 1131.

72. *Id.* at 1129.

73. *Kuntz*, 2000 MT 22, ¶ 18, 298 Mont. 146, ¶ 18, 995 P.2d 951, ¶ 18.

74. *Id.* at ¶ 19.

75. Jane Stapleton, *Duty of Care Factors: A Selection From the Judicial Menus*, in *THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JANE STAPLETON* 61, 72 (Peter Cane & Jane Stapleton eds., 1998).

76. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 3.12 n.84 (2d. ed. 1986).

77. *Kuntz*, 2000 MT 22, ¶ 20, 298 Mont. 146, ¶ 20, 995 P.2d 951, ¶ 20.

rescue the victim after beating him and leaving him injured and shirtless in the freezing desert.<sup>78</sup> Moreover, a recent Washington court held a husband criminally liable for recklessly causing the death of his wife by injecting her with a lethal dose of cocaine, then failing to summon aid until 10-15 minutes after she suffered a second seizure.<sup>79</sup> The court in the latter case held the defendant “had a statutory duty to provide medical care, a natural duty to provide medical help to his wife, and a duty to summon aid for someone he helped place in danger.”<sup>80</sup>

While no pronouncement of the legal duty to summon or render medical aid after using justifiable use of force has been established in Montana or elsewhere in the United States, a few jurisdictions have applied the duty based on creation of the peril in cases where self-defense is an issue.<sup>81</sup> For example, in *People v. Fowler*,<sup>82</sup> the defendant argued he struck decedent in self-defense, then left him “lying helpless and unconscious in a public road, exposed to that danger.”<sup>83</sup> The court stated “[t]his conduct of the defendant would then be criminal or not, according to the character of the blow he gave [the victim]. If it was done in self-defense, it would be justifiable. If it was felonious, it would be murder or manslaughter. . . .”<sup>84</sup> While the court did not expand any further on the defendant’s duty or non-duty to rescue his victim from the public street following an act of self-defense, from the court’s statement, it appears that if the defendant was justified in using deadly force against the victim, he did *not* have a duty to rescue him from the busy street.

In *King v. Commonwealth*,<sup>85</sup> the defendant was deemed justified in shooting another individual, but the jury found him guilty of voluntary manslaughter by unlawfully neglecting to provide or refusing to permit others to provide medical attention for the victim when the defendant should have known the seriousness of the victim’s wounds.<sup>86</sup> However, the court declared the particular jury instruction improper on which the

78. 130 F. 3d 1399, 1406 (10<sup>th</sup> Cir. 1997).

79. *State v. Morgan*, 936 P.2d 20, 23 (Wash. 1997).

80. *Id.*

81. *Kuntz*, 2000 MT 22, ¶ 22, 298 Mont. 146, ¶ 22, 995 P.2d 951, ¶ 22.

82. 174 P. 892 (Cal. 1918).

83. *Id.* at 896.

84. *Id.*

85. 148 S.W.2d 1044 (Ky. 1941).

86. *Id.* at 1045.

conviction was based.<sup>87</sup> The instruction required the shooting be “unlawful,”<sup>88</sup> in order to find the defendant had hastened the victim’s death by “willful neglect or willful failure to provide medical attention.”<sup>89</sup> Accordingly, the court reversed the defendant’s conviction of voluntary manslaughter and stated that the condition precedent to defendant’s guilt was not met as required in the instruction because defendant did not *unlawfully* shoot the victim.<sup>90</sup>

Significantly, exceptions to the American bystander rule are not absolute.<sup>91</sup> For example, a person is not required by law to risk her own life to save another—whether she has a legal duty to rescue another because of a personal relationship or whether she placed another in a position of peril.<sup>92</sup> This point was made decades ago in *Yockel v. Gerstadt*,<sup>93</sup> where the Maryland Court of Appeals stated, “[u]nder any and all circumstances, the law places upon a man the duty of exercising reasonable care for his own protection.”<sup>94</sup> The Montana Supreme Court supports this rule of self-preservation, asserting that “the law does not require that he or she risk serious bodily injury or death in order to perform a legal duty,”<sup>95</sup> even though such person may still be held accountable for the peril bestowed on the other.<sup>96</sup>

#### IV. ANALYSIS

##### A. *The Legal Duty to Aid One’s Attacker*

The Montana Supreme Court limited its analysis of whether a victim must aid her attacker following an act of self-defense to circumstances when the exception of either a personal relationship or creation of the peril exists.<sup>97</sup> The court relied on *Flippo v. State*<sup>98</sup> to declare that “whether inflicted in self-defense

---

87. *Id.* at 1046.

88. *Id.* at 1045.

89. *Id.*

90. *King*, 148 S.W.2d at 1046-47.

91. *Kuntz*, 2000 MT 22, ¶ 25, 298 Mont. 146, ¶ 25, 995 P.2d 951, ¶ 25.

92. *Id.* at ¶¶ 25-26.

93. 140 A. 40 (Md. 1928).

94. *Id.* at 42.

95. *Kuntz*, 2000 MT 22, ¶ 27, 298 Mont. 146, ¶ 27, 995 P.2d 951, ¶ 27.

96. *Id.*

97. *Id.* at ¶ 29.

98. 523 S.W.2d 390 (Ark. 1975).

or accidentally, a wound that causes a loss of blood undoubtedly places a person in some degree of peril, *and therefore gives rise to a legal duty to either: (1) personally provide assistance; or (2) summon medical assistance* (emphasis added).<sup>99</sup> However, upon a thorough reading of *Flippo*, there is no mention whatsoever of self-defense by the Supreme Court of Arkansas, nor does the court enunciate or seemingly imply that such a duty would be applicable following the use of self-defense. In *Flippo*, the court merely found sufficient evidence existed to hold the defendants criminally negligent after unintentionally shooting and killing a man while hunting, then failing to render timely aid after promising the victim's father they would do so.<sup>100</sup>

The Montana Supreme Court made it clear that when a person justifiably uses self-defense, she does not have to aid her attacker if doing so would place her in harm's way.<sup>101</sup> This rule logically flows from the basic theory underlying the notion of self-defense, that is, the right to protect oneself. The court compared the person that justifiably uses force to the American bystander rule's innocent bystander.<sup>102</sup> Both the person that justifiably uses force and the innocent bystander have no legal duty to render aid; each simply has the duty to protect herself.<sup>103</sup>

Somehow, from this scant analysis that some may argue tends to call for the opposite conclusion, the Montana Supreme Court determined that a duty to summon aid may be "revived" as the State contends, but only after the victim has fully exercised her right to seek and secure safety.<sup>104</sup> The court stressed that imposition of this duty requires: (1) the victim is physically capable of such action; and (2) the victim has knowledge of the facts indicating a duty to act.<sup>105</sup> Accordingly, the court ruled a legal duty may be "revived" after a victim uses self-defense, but the two requirements of knowledge and physical capability must be met first.<sup>106</sup> Moreover, when the legal duty to aid is "revived," the victim may still not be liable for negligent homicide, the charge at issue in *Kuntz*, because it

---

99. *Kuntz*, 2000 MT 22, ¶ 30, 298 Mont. 146, ¶ 30, 995 P.2d 951, ¶ 30.

100. *Flippo*, 523 S.W. 2d at 394.

101. *Kuntz*, 2000 MT 22, ¶ 31, 298 Mont. 146, ¶ 31, 995 P.2d 951, ¶ 31.

102. *Id.* at ¶ 32.

103. *Id.*

104. *Id.* at ¶ 33.

105. *Id.*

106. *Id.*

requires a gross deviation from a reasonable standard of care—a standard that may not be met by failing to render aid—especially under the circumstances generally present in a situation calling for self-defense.<sup>107</sup>

The Montana Supreme Court wrongly determined that a victim may have a “revived” duty to aid her attacker following her justifiable use of force against him. The dissenting opinion is correct by stating “[t]his result is simply unworkable as a practical matter and makes poor public policy.”<sup>108</sup> How can justified use of force against an attacker reconcile with a later obligation to assist him? There is no rationale behind this duty. It makes little sense to permit a victim to justifiably use deadly force against another when in a life or death situation, then place a legal duty on that victim to aid the other, who just previously threatened the victim with serious bodily injury or death.

Certainly, one could argue that a *moral* duty may arise when and if the victim feels safe and is physically and emotionally able to call for help if her attacker is in need. However, a moral duty is not the same as a legal duty, as the Restatement makes clear.<sup>109</sup> A moral duty generally cannot be imposed on one individual to aid another, even if assistance could easily be invoked.<sup>110</sup> Thus, it follows that such a duty should not be placed on a victim to aid her attacker after the use of self-defense.

Furthermore, the majority’s stipulation that the duty to aid shall be revived only after the victim is “safe”<sup>111</sup> is, at best, vague. How does a person who is completely removed from such a violent and extreme situation (such as a judge) decide when the victim felt safe enough to elicit the duty to render aid to her aggressor? It would be impossible, as far as I can tell, for someone unrelated to the incident to later determine when (and if) a victim felt safe from her attacker to, at some particular point in time, give rise to a legal duty to rescue her attacker.

Justifiable use of force is authorized only in very limited

---

107. *Kuntz*, 2000 MT 22, ¶ 34, 298 Mont. 146, ¶ 22, 995 P.2d 951, ¶ 22.

108. *Id.* at ¶ 50 (Trieweiler, J., dissenting).

109. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

110. *Kuntz*, 2000 MT 22, ¶ 14, 298 Mont. 146, ¶ 14, 995 P.2d 951 ¶ 14 [quoting *Pope v. State*, 396 A.2d 1054, 1064 (Md. 1979) quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW, at 183 (1972)].

111. *Id.* at ¶ 33.

circumstances.<sup>112</sup> It is applicable only when necessary to prevent imminent death, serious bodily harm to oneself or another, or to prevent the commission of a forcible felony.<sup>113</sup> However, in these limited instances, the use of deadly force is acceptable.<sup>114</sup> “It is inherently contradictory to provide by statute that under certain circumstances deadly force may be justified, but that having so acted, a victim has a common law duty to prevent the death of her assailant.”<sup>115</sup> Furthermore, it should not be forgotten that justifiable use of force is a complete defense, which must result in an acquittal if proven.<sup>116</sup>

### B. Criminal Liability for Failing to Aid One’s Attacker

Since the Montana Supreme Court ruled a victim that has justifiably used force may have a “revived” duty of care to her attacker, it follows that the court held a failure to perform this duty can give rise to criminal liability.<sup>117</sup> A victim under these circumstances, however, may be criminally liable for failing to render aid only if the failure was the “cause in fact” of the aggressor’s death, rather than the justified use of force.<sup>118</sup> Therefore, if the justified use of force *directly* led to the aggressor’s death, the victim cannot be criminally liable for failing to render aid. To make the rule even more complicated, the court notes that “a breach of the legal duty to summon aid may be the cause-in-fact of death, but is still not necessarily a crime”<sup>119</sup> under Montana’s negligent homicide statute because a *gross deviation* from an ordinary standard of care must be shown.<sup>120</sup> Once again, the court has set forth a hazy rule that is difficult to apply.

This rule is impractical for two reasons. First of all, it could be extremely arduous to determine whether or not the failure to summon aid was the cause-in-fact of the aggressor’s death, rather than merely the injuries received from the victim’s

112. *Id.* at ¶ 51.

113. MONT. CODE ANN. § 45-3-102 (1999).

114. *Kuntz*, 2000 MT 22, ¶ 51, 298 Mont. 146, ¶ 51, 995 P.2d 951, ¶ 51.

115. *Id.* (Trieweiler, J., dissenting).

116. *Park v. Montana Sixth Judicial Dist. Court*, 1998 MT 164, ¶ 42, 289 Mont. 367, ¶ 42, 961 P.2d 1267, ¶ 42.

117. *Kuntz*, 2000 MT 22, ¶ 36, 298 Mont. 146, ¶ 36, 995 P.2d 951, ¶ 36.

118. *Id.*

119. *Id.* at ¶ 39.

120. *Id.*; see also *supra* text accompanying note 24.

justified use of force. In the cases where this information is not easily ascertainable, one could convincingly argue either way. For instance, one may assert the aggressor died simply as a result of the force necessarily used by the victim, and he would have died even if medical aid had been quickly administered. On the other hand, one could argue the aggressor died as a cause-in-fact of the victim's failure to summon medical aid soon enough (after feeling safe, of course), rather than dying from the injuries received from the victim through the use of self-defense.

The former argument has merit because "where a person is placed in peril by another's justified use of force it can never be said that the failure to summon aid, rather than the original act of force, is the cause in fact of death, because presumably death would never have occurred but for the original act of self-defense."<sup>121</sup> The latter argument also appears worthwhile, because is it not true that virtually anytime a person is seriously injured, the lack of immediate medical attention directly contributes to the quicker expiration of that person's life than if such aid had been readily administered?

The second reason the court's rule that imposes criminal liability is impractical results from its contradictory nature as it relates to the affirmative defense of justifiable use of force. When self-defense is proven, the victim is *justified* in taking the attacker's life. How can the same victim be held criminally liable for failing to render aid to the attacker later, and for the injuries inflicted *justifiably* by the victim while defending herself? Clearly, the court's rule in *Kuntz* and Montana's self-defense statute are at odds.<sup>122</sup>

The dissent was correct by asserting that a legal duty under the circumstances in the present case should not be capable of being revived, nor should the victim be held criminally liable for failing to render aid to her attacker if such revival has taken place.<sup>123</sup> *Kuntz* is an unusual case in which imposing liability is troublesome for public policy reasons. In cases such as this, it is recommended that judges screen the plaintiff's claim under the direction of duty.<sup>124</sup> To illustrate, the Restatement presents a situation where there is an obvious problem in allowing suit

---

121. *Id.* at ¶ 52.

122. *Id.* at ¶ 51; see also *supra* text accompanying note 29.

123. *Kuntz*, 2000 MT 22, ¶ 54, 298 Mont. 146, ¶ 54, 995 P.2d 951, ¶ 54 (Triewiler, J., dissenting).

124. RESTATEMENT (THIRD) OF TORTS § 7 cmt. a (2001).



against a property owner who is clearly negligent, but a plaintiff who is injured while deliberately trespassing on the owner's property.<sup>125</sup> The difficulty with this lawsuit is similar to the problem faced in *Kuntz*. In both cases, the defendant should generally not be held liable for the plaintiff's harm because of the plaintiff's role and the surrounding circumstances. By recognizing liability in such instances, courts take on a bold task that is potentially problematic.<sup>126</sup>

### C. Another Recent Montana Supreme Court Decision and Future Implications of *Kuntz*

The Montana Supreme Court is clearly expanding the circumstances of when one person owes a legal duty to rescue another. Prior to *Kuntz*, the court broadened the concept of a legal duty in *Nelson v. Driscoll*.<sup>127</sup> In *Nelson*, the court held a police officer had a legal duty of care to a female driver following a traffic stop.<sup>128</sup> The officer was aware the female and her male passenger had been drinking alcohol, but the driver did not appear intoxicated.<sup>129</sup> However, because the officer knew both the driver and passenger consumed alcohol earlier that night, he prohibited them from driving home and offered them a ride.<sup>130</sup> The couple did not accept the ride and stated they would call a friend for help.<sup>131</sup> The officer then left the area, but subsequently drove by the couple several times to make sure they did not attempt to get back into their vehicle.<sup>132</sup> A short while later, the female was killed after being struck by a car, and the Montana Supreme Court held the police officer had a duty to protect her from harm because he affirmatively took steps to voluntarily provide a service to her.<sup>133</sup>

While there is authority that a special relationship exists between an officer and a prisoner in custody,<sup>134</sup> which imposes a duty on the officer to protect the prisoner, this was not the

---

125. *Id.*

126. *Id.*

127. 1999 MT 193, 295 Mont. 363, 983 P.2d 972.

128. *Id.* at ¶ 40.

129. *Id.* at ¶ 10.

130. *Id.* at ¶ 38.

131. *Id.*

132. *Nelson*, 1999 MT193, ¶ 38, 295 Mont. 363, ¶ 38, 983 P.2d 972, ¶ 38.

133. *Id.*

134. 57A AM. JUR. 2D *Negligence* § 99 (1989 & Cum. Supp. 2001).

situation in *Nelson*. In *Nelson*, the officer did not place the female driver under arrest. The general rule is that a police officer “has no duty to protect a particular individual absent a special relationship.”<sup>135</sup> However, the court found the officer assumed a duty to protect the driver merely because the officer took affirmative and voluntary steps to prevent the couple from driving home.<sup>136</sup> The court also concluded the officer’s actions constituted a foreseeable risk of harm to the female because of icy conditions, darkness, and the fact the female had been drinking alcohol.<sup>137</sup>

The outcome of *Nelson* is off the mark. An officer that simply takes away one’s driving privileges because of alcohol use should not then be burdened with a duty to protect that person. In this case, the officer offered the couple a ride home and was refused. The couple told him they would call a friend for a ride home, and a pay phone was only a little more than a block away.<sup>138</sup> The officer drove around in the vicinity where the couple was located in order to check on them and make sure they were not driving.<sup>139</sup> How would it be foreseeable to the officer that the female would be struck by a car and killed? She did not display enough characteristics to be charged with a DUI, though she and the passenger admitted drinking.<sup>140</sup> Therefore, regardless of the weather conditions, the officer did what he could to assist the couple and should not be held responsible for any harm to them. After all, the driver and passenger were both adults who were accountable for their own actions.

In both *Kuntz* and *Nelson*, the court found a legal duty where there should be none. Certainly, the court has expanded the circumstances in which a legal duty exists. By finding that a police officer owes a duty to rescue a possibly-impaired driver and a victim owes a duty to rescue her attacker, it is hard to say where the court will draw the line in the future. The court is clearly leaning towards applying a legal duty wherever possible instead of enforcing the American bystander rule, an arguably more appropriate precept for cases concerning self-defense and officer discretion.

---

135. *Nelson*, 1999 MT193, ¶ 21, 295 Mont. 363, ¶ 21, 983 P.2d 972, ¶ 21.

136. *Id.* at ¶ 38.

137. *Id.* at ¶ 39.

138. *Id.* at ¶ 11.

139. *Id.*

140. *Id.* at ¶¶ 8-9.

## V. CONCLUSION

The legal duty the Montana Supreme Court applied in *Kuntz* is not supported by existing case law. For the most part, this is because of the lack of any case law on point. However, the court's decision does not logically flow from the few cases the majority did cite in its analysis. The rule that after a person justifiably uses force to fend off an attacker she must then render aid to that attacker, is truly unfeasible. The revival of a duty to rescue under such circumstances cannot legitimately be imposed. If it is determined that an individual justifiably used force to fend off an attacker, the inquiry should stop there. It is simply incomprehensible to imagine a scenario unfolding as the court suggests—that a person would defend herself by wounding an attacker during a vicious struggle, regain composure and feel safe, then personally aid her attacker or call for help in order to save him. One can only hope the current trend by the Montana Supreme Court of imposing a legal duty where there should be none soon will be reexamined, and thus, short-lived.



