

7-1-1977

Recent Developments

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Recommended Citation

Recent Developments, *Recent Developments*, 38 Mont. L. Rev. (1977).
Available at: <https://scholarship.law.umt.edu/mlr/vol38/iss2/11>

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RECENT DEVELOPMENTS

SEX DISCRIMINATION UNDER TITLE VII

Mecklenburg v. Montana State University

In *Mecklenburg v. Montana State University*, Civil No. 74-87-BU (D. Mont. 1976), several female faculty members filed charges of discrimination against Montana State University with the Equal Employment Opportunity Commission. Upon receiving "right to sue" letters, the women filed an individual and class action discrimination suit in federal court, basing their cause of action on Title VII of the Civil Rights Act, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e and REVISED CODES OF MONTANA (1947), § 41-1307. The court held the defendant university had discriminated against women by underutilizing women in certain departments, and by applying inequitable standards regarding salary, promotion, tenure and appointment of women to prominent university committees.

Procedurally, the court determined that the requirements of Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure had been satisfied, and that a class action was, therefore, appropriate. The court further held that statistical evidence alone was sufficient both to establish a prima facie case of discrimination against a class, and to rebut the defendant employer's "pretext" showing of a legitimate nondiscriminatory reason for the employer's action in an individual Title VII suit.

In holding that Montana State University had discriminated against women as a class by underutilizing women, the court relied upon evidence showing there were no female vice presidents or deans at the university, nor any female assistant deans representing the various colleges within the university. The court rejected the university's contention that there were too few available women for those positions. The availability figures used by the university were deemed too conservative because they were based on the percentage of women doctorates, whereas over one-third of the entire faculty at the university did not possess doctorate degrees.

The court also found women were discriminated against as a class in the areas of promotion, tenure, salary and appointment to important university committees. The evidence regarding promotion decisions at the university reflected use of a nonstandardized merit system which left too much room for subjective criteria. The court commented that, in the great majority of cases, there were no women involved in the entire promotion procedure. A recommendation for promotion began at the department level and was thereafter channeled through the dean of the particular college, the Promotion and Tenure Committee, the Personnel Committee, the university president, and ultimately, the Board of Regents. At the university, there were only two female department heads out of thirty-five, no female deans, and no women on either the Promotion and Tenure or Personnel Committees.

Discrimination against women was also found through a statistical

comparison of males and females by professional degree at the university which showed that a larger percentage of males reached the ranks of professor and associate professor than did females. Statistics highlighted the fact that women spent longer time at a particular rank than did their male counterparts. This disparity occurred although the females had the same job experience as comparable males. In defense of the alleged discrimination in promotion and rank, the university maintained that women's careers were more limited by family obligations and that women were less ambitious than men. The court summarily dismissed these contentions as being "wholly conjecture."

The court determined that the university's tenure policy resulted in disproportionately fewer women achieving tenure than men. This conclusion was based on the same facts which evidenced discrimination in promotion, because tenure at the university was intimately connected to promotion. Statistical analyses persuaded the court to find that female faculty members were likely to earn substantially less money than comparable males. Finally, the court found that women at the university had little or no leadership roles on committees which formulate major fiscal, personnel and long range planning policy.

In the individual actions the court found the university had discriminated against two plaintiffs in regard to hiring and promotion. In both instances the discrimination took the form of retaliation against the plaintiffs because of their activities on behalf of women, specifically, the filing of discrimination charges with the Equal Employment Opportunity Commission. The court also determined two other plaintiffs had been discriminated against with regard to salary.

The court granted relief to the individual plaintiffs in the form of damages, and granted damages and injunctive relief to the class. Because of the issues raised and the significant procedural and substantive determinations made by the court, *Mecklenburg* stands as a landmark sex discrimination case in Montana.

Diane Rotering

"SUBSTANTIAL RISK OF DEATH" IN THE MONTANA AGGRAVATED ASSAULT STATUTE

State v. Fuger

State v. Fuger, ___ Mont. ___, 554 P.2d 1338 (1976), is the third occasion on which the Montana Supreme Court has interpreted the Criminal Code of 1973. The case confronts directly the question of what differentiates "aggravated" from "ordinary" assault under Chapter 5, Part 2 of the Code. A radical narrowing of the concept of felony assault would have resulted had the court construed the Code language strictly. Instead, the court interpreted the crucial language broadly so that conduct traditionally considered felonious assault remains so.

R.C.M. 1947, § 94-5-202(1)(a) defines the aggravated assault offense

with which defendant Fuger was charged as "purposely or knowingly caus[ing] serious bodily injury to another." The comparable category of simple, or misdemeanor, assault is defined by R.C.M. 1947, § 94-5-201(1)(a) as "purposely or knowingly caus[ing] bodily injury to another." "Serious bodily injury," as distinguished from mere "bodily injury," is the result which differentiates the offenses. The former subjects persons to maximum prison sentences of twenty years, while the latter carries a maximum term of six months in the county jail. Thus, the question before the court was what constitutes *serious* bodily injury.

In *Fuger*, defendant and his cousin were traveling along a narrow road when they met the victim, accompanied by the cousin's ex-wife. A fight over the ex-wife ensued, and the defendant was knocked unconscious. When he revived, he saw the victim with a knife in his hand, sitting on top of his cousin. He got up and kicked his victim several times in the face, then kicked him again in the head while he lay in the snow. The victim suffered severe bruises, a broken nose, and a split palate. Because doctors feared the victim might have sustained dangerous head injuries, he was under observation for several days. These fears proved groundless, however, and he recovered quickly. At Fuger's trial for aggravated assault, the jury rejected his affirmative defense of justifiable use of force in defense of another, and returned a verdict of guilty.

Several questions were raised on appeal, but the crucial issue was whether Fuger committed aggravated assault within the meaning of R.C.M. 1947, § 94-5-202 (1)(a).

Aggravated assault requires that an accused knowingly cause serious bodily injury to another. R.C.M. 1947, § 94-2-101(54) defines "serious bodily injury" as follows: "'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function or process of any bodily member or organ. . . ." Neither party in its brief suggested that the injuries of the victim might be described by the phrase "protracted loss or impairment of the function . . . of a bodily . . . organ," nor did the supreme court mention this portion of the definition in its opinion. Thus the court neglected entirely what was originally thought to be the most elastic and potentially most encompassing language of subpart (54), to concentrate instead on the phrase "substantial risk of death." This omission was enigmatic and unfortunate: a broken nose and split palate certainly are fairly describable as protracted functional impairments, but would not ordinarily be considered potentially mortal injuries. By failing to place the victim's injuries in a category where they naturally fell, the court needed to strain to find that the State had sustained its burden of proof of aggravated assault.

In his brief, the defendant contended that a person cannot be held to have committed aggravated assault under the applicable language of subpart (54) unless he knowingly causes bodily injuries to another which *in fact* create a substantial risk of death. The defendant Fuger did not inflict this kind of injury. Testimony from the attending physician established clearly that the victim in fact had never been placed in substantial risk of

death by his injuries, although the injuries were of such a character that they could conceivably have done so. The defendant argued that in adopting the new Criminal Code, with its explicit definition of the term "serious bodily injury," the legislature meant to abrogate the older common law and statutory definition of felony assault—described traditionally as assault causing "grievous bodily harm"—and to narrow the scope of the new offense to include only injuries which created in fact a substantial risk of death.

The State, on the other hand, argued that the jury thought Fuger committed felony assault, that the old common law standards apply, and that the phrase "bodily injury which creates a substantial risk of death" means "bodily injury which creates *the appearance or the possibility of a substantial risk of death.*" Whether an injury created such risk, the State contended, was for the jury to decide, as the phrase "substantial risk of death" is not defined in the Code. Because testimony of the physician clearly indicated that Fuger did cause injuries which created both the appearance and the possibility of putting the victim in substantial risk of death, the State concluded that Fuger was properly convicted.

In accepting the State's argument, the supreme court said:

The legislature has not defined "substantial risk of death" Injury which creates a "substantial risk of death" is graver and more serious [than "bodily injury", which means physical pain, illness or any impairment of physical condition], and whether or not it has been established by the evidence is generally a question of fact to be determined by the jury.

State v. Fuger, ___ Mont. at ___, 554 P.2d at 1340.

Unfortunately, the crucial language from the State's brief ("the possibility and appearance of a substantial risk of death") was not used in the supreme court's opinion. The laconic textbook formulation "graver and more serious," traditionally used to explicate the "grievous bodily harm" standard, is the heart of the holding. The court discussed the attending physician's testimony indicating that when the physician first examined the victim, he felt that due to the nature of his injuries the victim was in a potentially dangerous situation and might be facing a substantial risk of death. From this the court infers that it was competent for the jury to find that the victim had been placed in substantial risk of death. The emphasis on the role of the jury re-establishes the traditional rule that it is for the jury to decide whether the degree of injury shown by the evidence fits the "serious bodily injury" criterion for felony assault.

Though one may feel uncomfortable with the strained and circuitous character of this interpretation, the result reached is not without justification. The rule argued for by defendant, though seemingly the only one that could be reached by confining oneself to the Code language, would be entirely unworkable. It would focus the inquiry in an assault case on the narrow circumstance of how severely a person was actually injured, rather than on the character of the conduct that caused the injury.

The venerable Montana case of *State v. Laughlin*, 105 Mont. 490, 73 P.2d 718 (1937) provides an understanding of the traditional distinction

between felony and misdemeanor assault on which the *Fuger* court probably based its decision. It holds that an injury is to be described as "grievous" simply by contrast to one that is "slight or moderate"; and, addressing itself to some of the factors to be considered in evaluating the degree of the crime, it comments: "A mere trespass upon the person of another or a simple beating would clearly come under assault in the third degree [misdemeanor assault]. Defendant's crime exceeded such an assault by its ferocity, its maliciousness, and in the injuries suffered by the victim." 105 Mont. at 495-96, 73 P.2d at 720-21. Basically, *Laughlin* teaches that a felony assault is a *serious* assault, and that the question of its severity is to be determined by the jury. The focus of the jury's inquiry must be on whether the nature of the assault is such as to inflict or threaten to inflict serious harm to the one assailed.

The difficulties the court faced in *State v. Fuger* illustrate the pitfalls that may be encountered by a state's borrowing some, but not all, of the language of an integrated uniform or model code. The definition of "serious bodily injury" in the Montana Criminal Code of 1973 is taken verbatim from the Model Penal Code, § 210.0(3). The aggravated assault provision of the Model Penal Code, however, subjects one to liability for aggravated assault who "purposely or knowingly *attempts* to cause serious bodily injury to another, or causes such injury". Model Penal Code, § 211.1(2)(a) [emphasis supplied]. This use of "attempt" in a possibly different sense than that in which it appears in the chapter on inchoate offenses, prompted the Montana draftsmen to eliminate the first phrase from the aggravated assault section of the Montana Code. In doing so, however, they also eliminated the Model Code's coverage of substantially the same conduct traditionally considered felony assault, and apparently narrowed the range of conduct punishable as such. The Montana Supreme Court has now given us to understand that this was not the intent of the legislature.

Charles W. Boggs

JUDICIAL REVIEW OF INTERPRETATION OF ADMINISTRATIVE REGULATIONS

Montana Power Company v. Environmental Protection Agency

Many Montana practitioners are unfamiliar with strategies which are useful when seeking judicial review of an administrative agency's interpretation of its regulations. *Montana Power Co. v. EPA*, 34 St. Rptr. 30 (D. Mont. Jan. 27, 1977) (order granting declaratory judgment), *notice of appeal filed* (9th Cir. Mar. 28, 1977), provides a good example of the considerations a lawyer must have in mind when appealing such administrative action.

On May 23, 1976, the Environmental Protection Agency (EPA) notified the Montana Power Company (MPC) that its proposed coal-fired generating plants, Colstrip Three and Four, to be located at Colstrip, Montana, were subject to pre-construction review under the provisions of 40 C.F.R. 52.21(d) (1975). Montana Power Company sought judicial review

of this determination in the United States District Court for the District of Montana, Billings Division. The court denied MPC's request for a preliminary injunction, but granted its request for declaratory relief. It held that the EPA's order of May 23, 1976, was arbitrary and capricious within the meaning of the Administrative Procedure Act, §10e(2)(A), 5 U.S.C. §706(2)(A) (1970); that MPC had commenced construction of Colstrip Three and Four prior to June 1, 1975, within the meaning of 40 C.F.R. 52.21(b)(7) (1975), and that Units Three and Four were therefore exempt from pre-construction review. The EPA's motion for summary judgment was denied. *Montana Power Co.*, 34 St. Rptr. at 56. At the time of this decision, MPC's request for a permanent injunction was still pending. It has since been granted.

The facts of the case are extensive. On December 5, 1974, the EPA promulgated regulations providing for pre-construction review of potential pollution sources, including coal-fired generating plants, to determine if the sources would violate regional clean air standards. The standards were set out in the same regulations. 39 Fed. Reg. 42510 (1974). The regulations applied only to sources "commencing construction" on or after June 1, 1975. In March and May, 1975, the EPA had notified the Pacific Power and Light Company and the Portland General Electric Company that each of their proposed power plants was not subject to pre-construction review. The EPA determined that the contracts for services and equipment into which these companies entered prior to June 1, 1975, were such that the companies had "commenced construction" on their plants. The MPC had also contracted, prior to June 1, 1975, for services and equipment which were similar in quality to those considered by the EPA in March and May.

On September 2, 1975, the EPA notified MPC that Colstrip Units Three and Four might be subject to pre-construction review. In December, 1975, and April, 1976, before making its final determination on Colstrip Three and Four, the EPA produced and circulated two memoranda within the agency. These memoranda provided guidance as to how the phrase "commencing construction" was to be interpreted. The criteria for determining whether a company had commenced construction differed considerably from those which the EPA used in making the Pacific Power and Light and Portland General Electric decisions. The memoranda directed that a company would not be found to have commenced construction, even if it had entered into contracts for construction or equipment prior to June 1, 1975, if cancellation of those contracts would not cause a substantial loss to the company.

On May 23, 1976, after considering information supplied to it by MPC, the EPA found: a) MPC had not yet begun on-site construction; b) because the State of Montana had not yet approved construction of Units Three and Four, MPC had no authority to begin construction; c) without such permission, MPC had planned and had made commitments at its own risk; and d) regardless of the first three findings, the contractual commitments made by MPC were insubstantial as they constituted only 2.8 percent (\$22.3 million) of the total predicted cost of Colstrip Units Three and Four. The EPA concluded that MPC had not commenced construction within

the meaning of 40 C.F.R. 52.21(b)(7) (1975).

The most notable part of the case is the way in which the petitioners attacked the order. MPC sought judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970). It did not assert that the EPA's findings were arbitrary and capricious; it asserted that the change in policy upon which the decision was based was arbitrary and capricious. This contention had several advantages. The court was not required to give great deference to the EPA's findings as technical interpretations within the agency's, but not the court's, expertise. The findings were supported by facts, so there could be no assertion that they were unsubstantiated. The findings were arguably within the scope of the regulations as well.

This form of attack gave the court an opening through which it could intervene, not only in the agency's substantive decision, but in the agency's policy-making procedure as well. As the court said:

Courts are not wont to interfere with agency policy decisions for that is beyond the realm of judicial review. However, the question of fairness arises when a policy based on the apparently plain meaning of regulatory language is reinterpreted after the fact to read into the plain language requirements which are not on the face of the regulations. When the reinterpretation amounts to a policy change, it is the prerogative of the Courts to examine the record to see if there is a justifiable reason for the policy change. In this case, there is none.

Montana Power Co., 34 St. Rptr. at 54.

The court easily hurdled the only obstacle in its path, the rule that a court should give great deference to an agency's interpretation of its own regulations. It found that the EPA's Pacific Power and Light and Portland General Electric decisions were interpretations of its regulations upon which MPC was entitled to, and did, rely. The later interpretations, the court said, were based on an agency policy which arose between the time of its first interpretations and its final decision in this case, but after MPC was notified of possible pre-construction review. They were, in effect, a retroactive change in the application of the regulations, a change which was unfair to MPC.

MPC, through careful choice of its strategy, thus avoided the defenses which administrative agencies historically have employed against challenges to their orders.

Jeffrey T. Renz

VENDOR'S REPRESENTATIONS MADE OUTSIDE THE CONTRACT FOR DEED HELD AGAINST HIM

Bails v. Gar

In *Bails v. Gar*, ___ Mont. ___, 558 P.2d 458 (1976), the Montana Supreme Court held that a provision in a contract for deed which stated that the buyers had inspected the premises and disclaimed reliance on the

seller's representations as inducements to purchase a ranch did not preclude the buyers, in an action for fraud, from proving that they had relied on the prior oral representations.

The plaintiffs were Michigan residents who were interested in purchasing a ranch. Richard Bails was a factory worker, and his wife Patricia was a school teacher. They contacted a South Dakota realtor to help them find a ranch in Montana. The defendant, Stan Gar, listed his ranch with the same realtor.

Bails flew to Montana to see the ranch, located near Three Forks, and was taken on a tour of the property by Gar. Gar told Bails he could make \$50,000 to \$100,000 on grain alone. The next day Bails went on a second tour of the ranch, this time with Gar, Richardson (the South Dakota realtor), and Norman Wheeler, a local realtor who many years earlier had appraised the ranch and had later sold it to Gar. Richardson told Bails that he could make \$100,000 per year income from the ranch; Wheeler, the local realtor, cut that figure to \$80,000 per year. Bails signed a "Receipt and Agreement to Sell and Purchase" the same morning. He was in possession of the ranch for a month before he executed the formal contract for deed. During the following year Bails became dissatisfied with the ranch and sued Gar for fraudulent representations.

The plaintiffs claimed Gar made five misrepresentations: (1) that the ranch would raise and sustain 400 animal units; (2) that the ranch consisted of approximately 5,200 deeded acres; (3) that the ranch had 300 acres of hayland which produced 900 tons of hay per year; (4) that there were 600 acres of cropland which produced 21 bushels of grain per acre; and (5) that the property would produce income of at least \$80,000 per year. The first four of these representations allegedly appeared in a brochure which was included in the ranch listing Gar gave to Richardson.

The defendants contended that the plaintiffs had not relied upon these representations in making the purchase. Bails had toured the ranch twice and had made inquiries about the ranching operation. In addition, the contract for deed provided:

13. Vendees have fully inspected the premises and are familiar therewith and enter into this agreement by reason of their own inspection and judgment and acknowledge that *there are no inducements to purchase said property by reason of any representations on the part of the Vendors or persons acting by, through or for said Vendors. . . .* (emphasis added).

Defendants maintained that under the circumstances, the contract provision estopped Bails from suing on representations made outside the contract for deed.

The Montana court responded emphatically. Generally fraud will vitiate a contract even though it contains a provision that no representations have been made as an inducement to enter into it, or that neither party is bound by any representation not contained therein. Such provisions do not preclude a charge of fraud based on oral representations. Public policy and morality would be offended if the court gave effect to such an agreement. The court followed *Goggans v. Winkely*, 154 Mont. 451, 465 P.2d 328, 330

(1970), which held that a similar contract for deed provision did not preclude proof that prior oral representations were in fact relied upon. In reversing the summary judgment, the supreme court held that as a matter of law the exculpatory clause in the contract for deed did not estop Bails' action for fraud. *Bails v. Gar*, ___ Mont. at ___, 558 P.2d at 462.

The *Bails* decision also elucidated another important element in a fraud action. Defendants contended that Bails had no right to rely on the alleged representations either because he investigated the facts for himself or because he had the means to ascertain the truth. Normally a party who investigates for himself, or who has the means at hand to ascertain the truth of any representations, cannot later claim he relied upon those representations, no matter how false. *Lowe v. Root*, 166 Mont. 150, 156, 531 P.2d 674, 677 (1975).

The court focused, however, on the nature of Bails' investigation and on the means he had available to ascertain the truth. Bails had little or no experience in ranching, and "he was new to the country." The court held that the shortcomings of which he complained, including acreage and productivity, were of such a nature that a man of his experience could not be held as a matter of law to have the means at hand to discover the truth. *Bails v. Gar*, ___ Mont. at ___, 558 P.2d at 462. The court distinguished *Bails* from two other Montana cases in which the deficiencies were open and notorious and would have been revealed by a superficial inspection. *Lowe v. Root*, 166 Mont. 150, 531 P.2d 674 (1975); *Grindrod v. Anglo-American Bond Co.*, 34 Mont. 169, 85 P. 891 (1906).

The *Bails* decision thus adds strength to the proposition that a plaintiff may introduce parol evidence of fraudulent representations on which he relied, regardless of a contract provision stating that the plaintiff has not relied on inducements made outside the contract. Additionally, in an action for fraud, where the plaintiff has had an opportunity to investigate the representations made to him, the court must examine the circumstances to determine whether the plaintiff had sufficient knowledge or experience to make his investigation meaningful.

James C. Kilbourne

THE CONSTITUTIONALITY OF MONTANA'S PREJUDGMENT ATTACHMENT STATUTES

Bustell v. Bustell

Williams v. Matovich

Prejudgment attachment of property in Montana is governed entirely by statute. REVISED CODES OF MONTANA (1947), §§ 93-4301 to -4347. A creditor obtains a writ of attachment by filing an ex parte affidavit with the clerk of court stating that the defendant is indebted to the plaintiff for a stated sum, and by giving a written undertaking. The clerk of court issues the writ which directs the sheriff to take custody of some or all of the defendant's assets in order to secure payment of the debtor's obligation. The sheriff then seizes or levies upon the property; no notice or opportunity

to be heard need be given to the debtor prior to the attachment. The debtor can obtain the release of the property seized or levied upon prior to the resolution of the underlying dispute by posting a bond, by moving the court to discharge the attachment on the grounds that it was improperly or irregularly issued, or by vacating or modifying the writ any time before the actual application of the attached property to the payment of the judgment.

For a long period of time such procedures were accepted by American courts without challenge. The picture changed dramatically in 1969 when the United States Supreme Court, in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), declared prejudgment garnishment of wages without prior notice and hearing to be unconstitutional under the due process clause of the fourteenth amendment to the United States Constitution. In two subsequent cases, *Fuentes v. Shevin*, 407 U.S. 67 (1972) (consumer goods) and *North Georgia Finishing Co. v. Di-Chem. Inc.*, 419 U.S. 600 (1974) (bank account), the Supreme Court held prejudgment attachments of property without prior notice and hearing to be unconstitutional; however, in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (consumer goods), they were held to be constitutional if there were other procedural safeguards which satisfied due process.

Relying upon these United States Supreme Court decisions, the Montana Supreme Court recently addressed the constitutional problems raised by Montana's prejudgment attachment law. In *Bustell v. Bustell*, ___ Mont. ___, 555 P.2d 722 (1976), plaintiff Clarice L. Bustell commenced an action against defendants William B. Bustell and Shirley A. Bustell to collect an overdue and unpaid promissory note for \$8000, interest, and attorney fees. At the same time, she also filed an affidavit for a writ of attachment and posted the necessary undertaking. The clerk of court issued the writ to the sheriff who attached the interest of the defendant Shirley Bustell in a house owned by defendants by filing a copy of the writ and notice of attachment with the county clerk and recorder; such attachment constitutes a lien against the real estate under Montana law. Defendants received no notice prior to issuance or levy of the writ of attachment. On the basis of *Sniadach* and its progeny, defendant Shirley Bustell filed a counterclaim against the plaintiff, alleging that the attachment of her real estate was an unconstitutional deprivation of property without due process of law. The district court dismissed her motion for summary judgment on the basis that the Montana attachment statutes effect a constitutional accommodation of the conflicting interests of the parties and therefore satisfy procedural due process. Subsequently, the district court granted summary judgment to the plaintiff, striking the counterclaim of defendant Shirley Bustell.

The lien in *Bustell* differs from the type of creditors' remedies involved in *Sniadach*, *Fuentes*, *Mitchell*, and *North Georgia* in that it attaches to real rather than personal property, and does not affect the owner's possessory interest. Instead, the lien affects the owner's ability to dispose of his property at full value. The lien creates a cloud on the debtor's title, and thereby reduces the amount of money that an owner may obtain from the

sale or mortgage of the land.

In determining the character of the property deprivation caused by the lien in *Bustell*, and whether it is within the protection of the due process clause under the line of the Supreme Court decisions on prejudgment attachments, the Montana Supreme Court relied on *In re Northwest Homes of Chehalis, Inc., v. Weyerhaeuser Co.*, 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976), and *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd*, 417 U.S. 901 (1974). *Northwest Homes* held that when only real property is attached and when issuance or execution of the writ of attachment does not deprive defendant of ownership, actual use or physical possession of the attached property, there is no substantial taking of the property within the protection of the due process clause. *Spielman* held that the filing of a nonpossessory mechanics' and materialmen's lien against real property is not such a significant taking of a property interest that prior notice and an opportunity to challenge the lien in a prior hearing are required by the due process clause. Reasoning that there is no substantial or significant taking of property by virtue of the lien, and noting that the Montana attachment statutes do provide the owner with the remedy of an early hearing, the Montana Supreme Court held that the prejudgment attachment of real estate without prior notice and hearing is constitutional, thus affirming the lower court's decision.

In *Williams v. Matovich*, 34 St. Rptr. 124 (1977), the Montana attachment statutes were held unconstitutional as applied to wage garnishments. The plaintiff Williams purchased groceries on credit from defendant Matovich, pursuant to an oral agreement. Upon failure to pay, Matovich initiated suit in state court against Williams for the grocery debt in the sum of \$157.34. Matovich applied for a writ of attachment at the time the summons was issued. The clerk of court issued the writ which the sheriff presented to Williams' employer. Williams' employer then gave the sheriff a check drawn from Williams' wages for the entire amount allegedly due and owing in the complaint. Williams filed a countersuit in federal district court, alleging that the attachment constituted a denial of due process. The question certified to the Montana Supreme Court from the federal district court under Rule 1 of the Montana Rules of Appellate Civil Procedure was whether the Montana writ of attachment statutes, as applied, violated due process.

The Montana Supreme Court responded affirmatively. It found *Sniadach* to be the controlling authority for the factual situation in Williams. In both cases, wages were attached pursuant to a writ issued by a clerk of court, at the request of a creditor, without notice or an opportunity to be heard prior to the attachment. *Sniadach* had stressed that wages are a specialized type of property, deserving special protection in our economic system because their taking can cause severe hardship to the wage earner. 395 U.S. at 340. The court also held that even if *Sniadach* were not controlling, the Montana statutes would still be unconstitutional as applied, because the procedural safeguards deemed constitutionally necessary under *Mitchell* were lacking. The *Mitchell* writ of sequestration issued upon an affidavit stating more than simple conclusory allegations that a

debt was owed; in Montana no showing of such specific facts was required by statute. *Mitchell* also required judicial supervision for issuance of the writ while the Montana statute permitted the clerk of court to issue the writ. In *Mitchell*, the defendant had only to file his motion to dismiss and the burden to prove the facts substantiating the writ was placed on the plaintiff; in Montana, the statutes required the defendant to carry the burden of proving that the writ was improperly or irregularly issued. Additionally, the opportunity for a pre-seizure hearing supposedly provided under Montana attachment statutes is illusory, since the defendant is generally unaware that a writ has been issued until the property is seized.

The recent Montana cases of *Bustell v. Bustell* and *Williams v. Matovich* make it clear that Montana's attachment statutes are constitutional in regard to prejudgment attachment of real estate, but unconstitutional in regard to prejudgment garnishment of wages. Prejudgment attachment of wages and personal property must be preceded by notice and hearing to be valid.

Susan M. Lacosta

RIPARIAN RIGHTS WITHIN INDIAN RESERVATIONS

Confederated Salish and Kootenai Tribes v. Namen

United States v. Finch

Two recent federal court decisions clarify the rights of persons who own land adjacent to navigable waters on the Flathead and Crow Indian Reservations. *Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. 452 (D. Mont. 1974), *aff'd*, 534 F.2d 1376 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 336 and *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976) together establish that the owners of waterfront property on these reservations possess the common law rights of access and wharfage to the navigable waters, but do not have an unregulated right to recreational fishing.

Defendant Namen and his relatives owned property bordering Flathead Lake within the Flathead Reservation. They were the successors in interest to an Indian allottee who originally receive a patent on the land under the Indian Allotment Act of 1904, 33 Stat. 302, and subsequent amendments. Namen operated a marina at the site and maintained docks, wharves, piers and other facilities which extended beyond the high water mark and upon the bed and bank of Flathead Lake. Because significant property interests were affected, the city of Polson, Montana (located within the reservation), was permitted to intervene in *Namen* and a coalition of other riparian owners filed as *amicus curiae*.

In a tightly reasoned opinion which was later adopted by the Ninth Circuit, Judge Jameson determined that federal common law, and not statute or tribal law, governed any riparian rights associated with Namen's property. Although title to the beds of navigable water courses usually passes to the State upon admission to the Union, the court recognized an

exception where the United States has reserved title to itself in trust for the tribes. Therefore, state law was not controlling. Likewise, the court rejected the tribes' claim that tribal law controlled. Since the tribes did not receive legal title to the lake bed, the court found the tribes' position to be analogous to that of territories. The court also found that the paramount authority of the Congressional actions allotting the reservation lands overrides this application of retained tribal sovereignty.

The court thus determined that the crucial issue was one of statutory construction: "[W]hether [the acts allotting the reservation], when viewed in the context of long established common law principles governing riparian rights, indicate that Congress intended the grants of riparian lands pursuant to the allotment acts to convey the rights of access and wharfage." 380 F. Supp. at 461. The court noted the existence of a line of cases requiring narrow construction of statutes in derogation of Indian property rights. However, after reviewing the applicable treaties, statutes, and cases, the court determined that Congress had intended "to exercise its dominant power over Indian lands. . . ." The court concluded that "[w]here the United States holds land in trust for Indian Tribes, federal common law is applicable to a determination of the extent of a federal grant despite the lack of any express Congressional language to that effect." 380 F. Supp. at 466. The court then ruled that under long-standing principles of federal common law, the non-Indian riparian owners along the south half of Flathead Lake were entitled as a matter of law to rights of access and wharfage.

United States v. Finch arose from a controversy involving the authority asserted by the Crow Tribe to control hunting and fishing within reservation boundaries. James Junior Finch stood on the bank of the Big Horn River at a point within the exterior boundaries of the Crow Indian Reservation and cast a fishing lure into its waters. The State of Montana owned the bank at that spot as a successor in interest through chain of title to a Crow Indian who had received the land by allotment. Finch was licensed to fish by the State. Finch was arrested and charged with the misdemeanor offense of trespassing on Indian lands in violation of 18 U.S.C. § 1165 (1970).

In reversing the decision of the district court, the Ninth Circuit initially determined that the appeal by the United States was not barred by double jeopardy. Reaching the merits of the appeal, the court felt the threshold issue was the ownership of the riverbed of the Big Horn River. If, as the defendant contended, the title to the bed had passed to the state upon admission to the Union, no offense would have been committed as there would be no entry upon Indian land.

In resolving the issue in *Finch*, the court of appeals contrasted two Supreme Court opinions that ruled on title to the lands beneath navigable waters situated in Indian country, *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1969) and *United States v. Holt State Bank*, 270 U.S. 49 (1926). The court of appeals chose to follow the *Choctaw Nation* case which relied on an examination of treaty negotiations and events ancillary to the drafting of treaty language in order to discover the government's intentions. After

examining the negotiations and background of the 1851 and 1868 treaties with the Crow Tribe, the court of appeals decided that the federal government had intended that the tribe receive exclusive rights to the reservation lands, including the rights in the riverbed.

After rejecting a claim by defendant that title to the riverbed turned on the tribe's historical reliance on fishing for sustenance, the court of appeals addressed the defendant's contention that he had a riparian right to fish from the bank regardless of ownership of the bed. Although the court found little guidance in federal common law even as to the existence of a riparian right to fish, the court did not think the existence of the right was determinative. The court held that a riparian right to fish is subject to regulation and that such a regulatory power had been exercised:

[T]he authority to withhold permission to enter for fishing, hunting, or trapping has been expressly conferred on the tribe by the promulgation of 18 U.S.C. § 1165, an enactment clearly within the national power. The language and the history of 18 U.S.C. § 1165 show that the right of Indians to control hunting, trapping, and fishing on their lands is a prerogative of ownership which the United States recognizes as a matter of federal law.

Finch, 548 F.2d at 834.

Both *Finch* and *Namen* dictate that the determination of the rights of riparian landowners within Indian reservations requires a thorough examination of the federal statutes and treaties which establish the reservation and regulate its subsequent use.

TIME OF ATTACHMENT OF JEOPARDY

Bretz v. Crist

In *Bretz v. Crist*, 546 F.2d 1336 (9th Cir. 1976), the Ninth Circuit held that the federal rule that jeopardy attaches when the jury is sworn is applicable to the States through the due process clause of the fourteenth amendment. This determination rendered unconstitutional REVISED CODES OF MONTANA (1947), § 95-1711(3)(d), which provided that jeopardy does not attach until "after the first witness is sworn."

Appellants Bretz and Cline were named in a multiple-count information in which Count I charged grand larceny and Count II charged obtaining money and property by false pretenses. Six other counts were fragments of the alleged criminal conduct in Counts I and II. A ninth count, alleging the presentation of false proofs upon a policy of insurance, was dismissed before the first prosecution commenced.

Because of a typographical error as to the time of commission of the acts alleged in Count II, (1974 instead of 1973) Count II failed to state an offense. The relevant statute had been repealed, effective January 1, 1974. Following the impaneling and swearing of the jury, but preceding the offering of evidence, defense counsel moved to restrict the State's evidence as to the allegations of Count II. The state resisted, and moved to amend

Count II to correct the typographical error. The trial court denied this motion and *sua sponte* dismissed Count II for failing to state an offense. After the Montana Supreme Court refused to issue a writ of supervisory control, the State moved to dismiss the remaining counts in order to file a new and different information. The trial court granted this motion.

On the same day, the State filed a second, two-count information, Count I being identical to the first count of the previous information and Count II repeating the prior Count II in all respects except for the correction of the typographical error. A new jury was impaneled, appellants' motion to dismiss on grounds of double jeopardy was denied, and appellants were found guilty of obtaining money by false pretenses. After exhausting available state post-conviction remedies, appellants sought and were denied habeas corpus relief by the United States District Court for the District of Montana. *Cunningham v. District Court*, 406 F. Supp. 430 (D. Mont. 1975) (consolidated cases). See Note, *State v. Cunningham and Montana's Rule on Double Jeopardy*, 37 MONT. L. REV. 238, 249 (1976).

In reversing the federal district court's decision, the Ninth Circuit relied on *Benton v. Maryland*, 395 U.S. 784 (1969). In *Benton*, the United States Supreme Court held that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." *Benton*, 395 U.S. at 794. Once it is determined that a particular Bill of Rights guarantee is "a fundamental ideal," it is then necessary to inquire whether state procedure satisfied due process of law. Given the fundamental nature of the right (protection against double jeopardy), is a particular procedure (time of attachment of jeopardy) *essential* to the protection of that right? Or, as the Ninth Circuit queried, is the federal attachment-of-jeopardy rule "a product of constitutional exegesis or simply a nonconstitutional consequence of the Supreme Court's supervisory power over the federal courts and federal officials." *Bretz*, 546 F.2d at 1340.

If the state procedure—that jeopardy does not attach until "after the first witness is sworn"—is controlling, the *Bretz* petitioners were never put in jeopardy by the first prosecution on the original information. If, however, the federal procedure is of "constitutional dimension", then jeopardy attached at the first prosecution because federal procedure provides that jeopardy attaches when a jury is impaneled and sworn. *Serfass v. United States*, 420 U.S. 377 (1975); *Illinois v. Somerville*, 410 U.S. 458 (1973); *Downum v. United States*, 372 U.S. 734 (1963).

The court held that the federal attachment-of-jeopardy rule is indeed of constitutional dimension and "is binding on the states as well as the federal government." *Bretz*, 546 F.2d at 1343. The court reasoned, perhaps too broadly, that "[e]ach time the due process clause of the Fourteenth Amendment has been interpreted to encompass a particular guarantee of the Bill of Rights, the [Supreme] Court has explicitly reaffirmed the proposition that the same constitutional norms are to be employed in assessing the conduct of state and federal authorities." *Bretz*, 546 F.2d at 1340 (citing *Benton v. Maryland*, 395 U.S. 784 (1969); *Pointer v. Texas*,

380 U.S. 400 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Ker v. California*, 374 U.S. 23 (1963)).

In addition, the Ninth Circuit noted that the Supreme Court has consistently applied the federal attachment-of-jeopardy rule to state cases, citing *Somerville* and *Breed v. Jones*, 421 U.S. 519 (1975). Though neither of those cases unequivocally specified that the federal attachment-of-jeopardy rule applied to the States, the Ninth Circuit correctly reasoned that they leave little room for contrary argument. Moreover, the Ninth Circuit pointed out that the three other courts of appeals which have considered the time-of-attachment question have held the task of defining attachment of jeopardy to be a federal constitutional task. *United States ex rel. Gibson v. Ziegele*, 479 F.2d 773, 776 (3d Cir.), cert. denied, 414 U.S. 1008 (1973); *Smith v. Mississippi*, 478 F.2d 88, 93 (5th Cir.), cert. denied, 414 U.S. 1113 (1973); and *United States ex rel. Somerville v. Illinois*, 447 F.2d 773, 775 (7th Cir. 1971), reversed on other grounds, 410 U.S. 458 (1973).

The conclusion that jeopardy has attached only begins the inquiry whether the double jeopardy clause bars retrial. Not every declaration of mistrial prevents re-prosecution, for "a defendant's valued right to have his trial completed by a particular tribunal must in some circumstances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. 684, 689 (1949). A declaration of mistrial is proper, and retrial is thus permitted, when "there is manifest necessity for the [declaration], or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824). Adhering to the historic *Perez* rationale, the Ninth Circuit concluded that the dismissal of the original information, which resulted in mistrial, prohibited re-prosecution under the second information. The court reasoned there was no "manifest necessity" for dismissing Count I of the original information as it contained no defect and was sufficient to state an offense. The sole discernible purpose behind the State's motion for dismissal of the entire information was the State's convenience in litigating the case as a unit. "In these circumstances, the mistrial and retrial on Count I amounted to archetypal double jeopardy violation." *Bretz*, 546 F.2d at 1347 (citing *United States v. Jorn*, 400 U.S. 470 (1971)). The Ninth Circuit determined further that the dismissal of Count II of the original information (the count containing the typographical error) also prevented retrial on the ground that there was no manifest necessity. The court reached this conclusion by relying on the analyses of *Downum*, *Jorn*, and *Somerville*. *Somerville* was particularly pertinent, for in that case the United States Supreme Court held that dismissal of a defective indictment was proper because Illinois criminal procedure prevented amendment of the indictment. The dismissal resulted in a mistrial, the declaration of which satisfied the "manifest necessity" requirement, because mistrial was the only way in which the defective indictment could be corrected. Thus, the second prosecution in *Somerville* was permissible.

By contrast, the Montana statute specifically provided for the "formal" amendment of an information "any time before verdict." REVISED

CODES OF MONTANA (1947), § 95-1505. As the amendment of a typographical error, such as in Count II of the original information, would be merely a "formal" amendment, the trial court's failure to grant the State's motion for amendment was an abuse of discretion. The subsequent dismissal of the remaining counts in the original information, at the State's urging, was therefore an improper declaration of mistrial that rendered the second prosecution unconstitutional under the double jeopardy clause of the fifth amendment. On April 25, 1977, the United States Supreme Court granted the State's request for a writ of certiorari as to defendant Cline.

Diane Rotering

