Montana Law Review

Volume 70
Issue 1 *Winter 2009*

Article 7

1-2009

Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. *PETERSON V. EICHHORN*[1]

In *Peterson v. Eichhorn*, the Montana Supreme Court declined to adopt Section 509 of the *Restatement (Second) of Torts*, which states that strict liability follows an animal with dangerous propensities abnormal to its class; although the Court intimated that it might, at some point in the future, be willing to adopt this section.[2] Under a separate claim, the Court ruled the clear language of Montana Code Annotated Sections 81–4–215 and 8–4–308(1) only allowed liability to follow animals which had actually broken into or wrongfully entered another's property; liability would not follow non-escaping animals.

The Petersons and the Bastas lived on adjacent properties, divided by a fence.[3] Eichhorn pastured ten horses on the Basta's property.[4] In 2002, two or three of Eichhorn's horses broke through the fence and entered the Petersons' property.[5] After securing the fence, the Petersons led the horses back to the Basta property.[6] On their way to inform the Bastas of the situation, the Petersons threw some hay to the horses on the Basta property, hoping to keep the horses away from the damaged fence.[7] After informing the Bastas of the incident, the Petersons again threw hay to the horses to keep them away from the fence.[8] The horses included both the horses which had escaped onto the Peterson property and other horses which had

1. *Peterson v. Eichhorn*, 189 P.3d 615 (Mont. 2008).
2. *Id.*
3. *Id.* at 617.
4. *Id.* at 618.
5. *Id.*
6. *Id.*
7. *Peterson*, 189 P.3d at 618.
8. *Id.*

not escaped.[9] While throwing the hay, Hannah, a mare owned by Eichhorn, reached over the fence and bit Derinda Peterson.[10] Hannah had not been among the horses which had escaped onto the Peterson's property.[11]

Peterson filed suit against Eichhorn, asserting claims of strict liability for an abnormally dangerous domestic animal, negligence, and punitive damages.[12] Peterson filed to recover medical damages relating to the horse bite, but she did not file damages relating to the fence breakage (e.g. expenses for repairing the fence).[13] Peterson alleged Eichhorn was strictly liable for damages from the bite because he owned a domestic animal with an abnormally dangerous tendency to bite people.[14] Since Eichhorn knew or should have known of Hannah's abnormal tendency, Peterson argued that Eichhorn was strictly liable for Peterson's injuries.[15]

Peterson presented two negligence theories.[16] First, she alleged Eichhorn was strictly liable for all injuries resulting from the fence breakage under Montana Code Annotated Sections 81–4–215 and 8–4–301(1) (a negligence statute), including Hannah's subsequent biting of Peterson.[17] Second, Peterson alleged Eichhorn negligently breached a legal duty of ordinary care in the management of his horses.[18] Peterson contended that Eichhorn had caused Peterson's injuries by failing to take reasonable measures to protect others from foreseeable injuries.[19] Finally, Peterson asserted that she was entitled to punitive damages.[20] The district court granted summary judgment to Eichhorn on all issues.[21]

The Court held that Section 509 of the *Restatement (Second) of Torts* imposing strict liability on owners of abnormally dangerous domestic animals was not applicable to this case because Peterson had failed to prove that Hannah was abnormally dangerous.[22] Peterson argued that Hannah's tendency to bite was a dangerous propensity unusual to mares and urged the Court to adopt Section 509 of the *Restatement*.[23] The Section 509 provides:

> (1) A possessor of a domestic animal that he knows or has reason to know has dangerous propensities abnormal to its class, is subject to liability for harm

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 618–619.
13. *Peterson*, 189 P.3d at 618–619.
14. *Id.*
15. *Id.* at 618.
16. *Id.* at 621–622.
17. *Id.* at 621.
18. *Id.* at 622.
19. *Peterson*, 189 P.3d at 622.
20. *Id.* at 618.
21. *Id.* at 618–619.
22. *Id.* at 620.
23. *Id.* at 619.

> done by the animal to another, although he has exercised the utmost care to prevent it from doing the harm.
>
> (2) This liability is limited to harm that results from the abnormally dangerous propensity of which the possessor knows or has reason to know.[24]

In response, Eichhorn argued Section 509 was inapplicable because Montana had not adopted it.[25] Justice Nelson, writing for a unanimous Court, agreed that Montana had not adopted Section 509, but that Montana had "adopted other sections of the *Restatement* . . . ." Thus, it appeared the Court might be inclined to adopt Section 509, given its approval of other sections. However, the Court ultimately determined "that this [was] not an appropriate case in which to consider and adopt Section 509."[26] The Court declined to adopt Section 509 because Peterson had failed to provide any evidence or legal authority that Hannah's tendency to bite was a dangerous propensity, that biting was abnormal to mares (her class), or that Eichhorn knew Hannah had a dangerous propensity for biting and had bitten people in the past.[27] While Peterson stated it was "unusual for a mare to bite," the Court noted that, under Section 509, "unusual" and "abnormal" are not necessarily the same.[28] The Court reasoned that there are different levels of biting—whereas biting may be normal for a class, there may also be an abnormal tendency to bite within the class.[29] Comment f of Section 509 provides:

> There are certain classes of domestic animals in which dangerous propensities are normal although abnormal in other classes of their species. Bulls are more dangerous than cows and steers . . . Certain kinds of livestock are less gentle than others. Burma cattle are more wild and dangerous than most other breeds. However, since Burma cattle have been recognized as socially desirable animals, this . . . is not enough to make them abnormally dangerous.[30]

Thus, for instance, all mares may have a tendency to bite. But only a mare with a tendency to bite that rises to the level of abnormality, thus distinguishing her from other animals of her class, will be held liable under Section 509. Because Peterson had failed to provide any evidence that Hannah had an abnormal or dangerous propensity to bite, the Court ruled there was

---

24. *Restatement (Second) of Torts* § 509 (1977).

25. *Peterson*, 189 P.3d at 619–620.

26. *Id.* at 620. *See Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007) (adopting *Restatement (Second) of Torts* § 929 and cmt. b); *Crisafulli v. Bass*, 38 P.3d 842 (Mont. 2001) (adopting *Restatement (Second) of Torts* § 316); *First Bank (N.A.)-Billings v. Clark*, 771 P.2d 84 (Mont. 1989) (adopting *Restatement (Second) of Torts* § 46, cmt. j); *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 513 P.2d 268 (Mont. 1973) (adopting *Restatement (Second) of Torts* § 402A).

27. *Peterson*, 189 P.3d at 620.

28. *Id.*

29. *Id.*

30. *Restatement (Second) of Torts* § 509 cmt. f.

no issue of material fact and affirmed the district court's ruling in favor of Eichhorn.[31]

The Court held Eichhorn was not negligent under the two theories of negligence presented by Peterson.[32] First, Peterson contended Eichhorn was strictly liable for any foreseeable injuries resulting from the horses breaking through the fence.[33] Eichhorn cited Montana Code Annotated Section 81–4–215 which provides, "If any . . . horses . . . break into any enclosure . . . the owner of the animals is liable for damages to the owner or occupant of the enclosure if the owner or person in control of the animals was negligent."[34] Peterson further cited Section 81–4–307(1): "If an animal . . . wrongfully enters the premises of a person within a herd district, the owner or person in control of the animal is liable for . . . any damages caused by the animal."[35] Peterson argued that the horses' fence breakage triggered liability for Hannah's subsequent bite of Peterson. The Court disagreed, holding that damages would only follow the horses which had actually escaped the pasture, and Hannah had not been one of those horses.[36] At the time the bite had occurred, the Petersons had already secured and fed the escaped horses.[37] The Court further noted that no damages from the fence breakage had been pled; rather, only damages from the horse bite had been pled.[38] Because the clear language of the statute referred to animals which had broken into or wrongfully entered another's property, liability would only extend to damages caused by those escaping animals.[39]

Under a second theory of negligence, Peterson asserted that Eichhorn negligently breached a duty of ordinary care regarding the management of his horses.[40] The district court found that because Peterson had been contributorily negligent by feeding not only the horses which had escaped but the other horses on Basta's land, Eichhorn was relieved of liability.[41] The Court reiterated that comparative negligence had replaced the old rule of contributory negligence in Montana.[42] Under current Montana law, "recovery is barred only if the plaintiff is found to be greater than 50 percent

31. *Peterson*, 189 P.3d at 620.

32. *Id.* at 621–622, 624.

33. *Id.* at 621.

34. *Peterson*, 189 P.3d at 621; Mont. Code Ann. § 81–4–215 (2003).

35. *Peterson*, 189 P.3d at 621; Mont. Code Ann. § 81–4–307(1).

36. *Peterson*, 189 P.3d at 618, 621.

37. *Id.* at 621 (noting that the bite only occurred when the Petersons attempted to feed the horses a second time).

38. *Id.*

39. *Id.*

40. *Id.* at 622.

41. *Id.*

42. *Peterson*, 189 P.3d at 622.

negligent."[43] However, the Court held that, while Eichhorn could not be relieved of legal liability due to Peterson's negligence, Peterson did not present substantial evidence to show Eichhorn had breached his duty of ordinary care by keeping Hannah in the corral; thus, the Court affirmed summary judgment for Eichhorn.[44]

The Court declared that its other holdings rendered punitive damages in favor of Eichhorn moot, and it affirmed the district court's ruling on summary judgment on the issue of punitive damages in favor of Eichhorn.[45]

Given the unanimous opinion's subtle signals regarding § 509 of the *Restatement (Second) of Torts*, practitioners should note that Montana may adopt § 509 in the near future. Because a close reading of § 509 distinguishes many classes of domestic animals, this is an appropriate section for Montana to adopt. Preferably, the Montana legislature will consider and adopt this section, pre-empting any need for common law adoption. Clearly, mature stallions being kept for stud will have much different propensities than mature geldings or colts. Comment f of § 509 provides, "There is no social value in keeping animals that are vicious or have other dangerous propensities that are in excess of those necessary for their utility and are abnormal to their class."[46] But there is social value in keeping useful animals that may have dangerous propensities normal to their class. Thus, the wording of § 509 is important in an agricultural state such as Montana, for it assumes that a South Devon heifer does not necessarily have the same propensities as a Black Angus heifer. Whether arguing for or against the adoption of § 509, practitioners must be aware of the various classes of domestic animals and their propensities. Only by establishing baseline propensities based on gender, breed, and age will a practitioner be able to adequately distinguish an animal that is abnormal from the rest of its class.

—K.V. Aldrich

II. MICHALAK V. LIBERTY N.W. INS. CO.[47]

The Montana Supreme Court recently held that an employee injured while riding a wave runner at his employer's company picnic acted within the course and scope of his employment and was, therefore, entitled to workers' compensation benefits.[48]

43. *Id.*
44. *Id.*
45. *Id.* at 624.
46. *Restatement (Second) of Torts* § 509 cmt. f.
47. *Michalak v. Liberty N.W. Ins. Co.*, 175 P.3d 893, 899 (Mont. 2008).
48. *Id.*

In July 2005, Plaintiff Curtis Michalak attended a company picnic hosted by his employer, Felco, and Felco's president, John Felton.[49] Since 1980, Felton had hosted annual company picnics at his home.[50] Felco traditionally informed its employees of the date of the picnic by posting notices around the business and by inserting notices into the employees' pay stubs.[51] At the July, 2005 picnic, Michalak's supervisor asked Michalak to oversee the operation of the wave runners.[52] Michalak's responsibilities included "providing riders with safety instructions, monitoring the wave runners' fuel and oil levels, instructing others on how to ride the wave runners, and enforcing the time limits on the wave runners' use."[53] While fulfilling these responsibilities, Michalak rode one of the wave runners and crashed, sustaining serious injuries, including several vertebrae fractures.[54]

The Workers' Compensation Act, codified at Montana Code Annotated Sections 39–71–101 *et seq.*, provides that an "insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer . . . who receives an injury arising out of and in the course of employment."[55]

Under the 2005 Workers' Compensation Act, effective at the time of Michalak's injury, the definition of "employee" excluded a person "participating in a recreational activity and who at the time is relieved of and is not performing prescribed duties."[56]

To determine whether the employee was injured within the course of employment, the Montana Supreme Court applied the four-factor test set out in *Courser v. Darby School District. No. 1.*[57] The factors are:

> (1) whether the activity was undertaken at the employer's request;
>
> (2) whether the employer, directly or indirectly, compelled the employee's attendance at the activity;
>
> (3) whether the employer controlled or participated in the activity; and (4) whether the employer and the employee mutually benefited from the activity.[58]

---

49. *Id.* at 894.

50. *Id.*

51. *Id.* at 894–895.

52. *Id.* at 896.

53. *Michalak*, 175 P.3d at 895.

54. *Id.*

55. Mont. Code Ann. § 39–71–407(1) (2007).

56. *Id.* at § 39–71–118(2)(a) (2005).

57. *Michalak*, 175 P.3d at 895 (citing *Courser v. Darby Sch. Dist. No. 1*, 692 P.2d 417, 419 (Mont. 1984)).

58. *Id.* (citing *Connery v. Liberty Northwest Ins. Corp.*, 929 P.2d 222, 225 (Mont. 1996)).

The Court further pointed out that the factors "may or may not be determinative, and each factor's significance must be considered in the totality of all attendant circumstances."[59]

The *Michalak* Court broadly interpreted the term "activity" contemplated in the four-factor test. The Court found:

> In *Courser*, we determined that Courser was within the course and scope of his employment when he was injured in a motorcycle accident while commuting from graduate school to his home in Dillon, Montana. We applied the four factor 'course and scope' analysis and focused on the activity of attending graduate school, not the motorcycle ride.[60]

Applying the *Courser* test, the Montana Workers' Compensation Court (WCC) determined that these facts satisfied all factors of the test, and therefore agreed that Michalak injury occurred within the course and scope of his employment.[61] The Montana Supreme Court agreed.[62]

Regarding the first factor, the Montana Supreme Court considered several case-specific facts. The picnic had been a yearly tradition at Felco since 1980. Felco and its president, Felton, always paid all the costs of the picnic. Felton traditionally chose the date of the picnic. Felco provided paddle boats and wave runners to entertain the employees. Lastly, Felco notified employees of the picnic with announcements posted throughout the plant and with notices placed in their pay stubs.[63]

The second factor—whether Felco or Felton had compelled Michalak's attendance—was also satisfied.[64] The Court concluded that Michalak felt induced to attend because of his supervisor's request that Michalak direct the operation of the wave runners. Michalak testified that, when his supervisor asked him to oversee the wave runners, he understood that the supervisor made this request in a managerial capacity, rather than as a personal request. Michalak prepared for his supervision of the wave runners by acquiring and reviewing a copy of Montana boating regulations.[65] Michalak also felt compelled to attend the picnic "so that he could fulfill his obligation and respect his employer."[66]

The Court held that the third factor was satisfied as well, concluding that Felco "controlled and participated"[67] in the company party. The Court noted that Felco paid for the costs of the picnic. Indeed, Felco's policy

59. *Id.* (citing *Connery*, 929 P.2d at 226) (internal quotations omitted).
60. *Id.* at 897 (citing *Courser*, 692 P.2d at 419).
61. *Id.* at 899.
62. *Id.*
63. *Michalak*, 175 P.3d at 896.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

restricted employees from bringing anything to the picnic. The Court also considered that Felton held the annual picnic at his home and received an annual tax deduction for the picnic costs.[68]

Lastly, the fourth factor—whether the employer and the employee mutually benefited from the activity—was satisfied because of extensive testimony that the "company picnics were good for the company and that the picnic promoted good relations."[69] The WCC concluded that both Felco and Felco's employees "mutually benefited" from the company picnic, in part because it allowed employees to gather together with their families.[70] The Montana Supreme Court agreed.

Liberty argued that these facts did not satisfy the *Courser* test, and therefore Michalak's injury did not occur within the course and scope of his employment.[71] The Court determined that Liberty's argument relied mistakenly on the assumption that the "activity" contemplated in the *Courser* analysis was Michalak's ride on the wave runner, rather than the picnic as a whole.[72] Following *Courser*, where the analysis focused on the broader "activity of attending graduate school, not the motorcycle ride,"[73] the Court concluded that the appropriate interpretation of "activity" in this context was the picnic as a whole, as opposed to the wave runner ride.[74]

Liberty next contended that the Court should overrule *Courser* because the factors were based on the "liberal construction" statute, Montana Code Annotated Section 39–71–104 (1985), since repealed by the Montana Legislature.[75] Instead, Montana Code Annotated Section 39–371–105(5) (2005),[76] like the current 2007 statute, directed that the Workers' Compensation Act "must be construed according to its terms and not liberally in favor of any party."[77] Liberty argued that the *Courser* test defies this legislative directive by liberally construing the Act.

The Court disagreed, pointing out that the *Courser* test focuses on the factors a court should analyze to determine if an employee's injury occurred within the course and scope of employment, while the Legislature's directive instructs how courts should interpret the Workers' Compensation Act.[78] The *Courser* factors and the statutory directives thus address two

68. *Id.*
69. *Michalak*, 175 P.3d at 896.
70. *Id.*
71. *Id.* at 897.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Michalak*, 175 P.3d at 897.
76. Mont. Code Ann. § 39–71–105(5) (2005).
77. *Id.* at § 39–71–105(5) (2007).
78. *Michalak*, 175 P.3d at 897.

different concerns and, therefore, can be applied in conjunction with one another. The factors and the directive "are not mutually exclusive."[79]

Liberty also asserted that applying the *Courser* factors to determine the meaning of "prescribed duties"—contained in the definition of "employee" at Montana Code Annotated Section 39–71–118(2)(a) (2005)—amounted to "judicial abracadabra."[80] The Court disagreed, stating that the term was deliberately left undefined because the definition of the term depends on the specific facts of each case.[81] The Court explained the four-factor *Courser* test provides an appropriate analysis of those facts.

Finally, the Court dismissed Liberty's last argument that Michalak operated the wave runner recklessly when he was injured and that he thus abandoned his employment.[82] The Court found that the WCC made no findings concerning Michalak's operation of the wave runner.[83]

The Court ultimately affirmed the WCC's judgment, concluding that Michalak's injury occurred within the course and scope of his employment, and relying on the satisfaction of the four-factor *Courser* test.[84]

Although the Court did not address Montana's current public policy statute, that policy lends support for the Court's decision. The Montana Workers' Compensation statute provides:

> An objective of the Montana workers' compensation system is to provide, without regard to fault, wage-loss and medical benefits to a worker suffering from a work-related injury or disease. Wage-loss benefits are not intended to make an injured worker whole but are intended to assist a worker at a reasonable cost to the employer.[85]

The 2005 Workers' Compensation Act provided the same policy.[86] Additionally, the burden rests on the employer or workers' compensation insurer to prove that an employee acted outside the course and scope of his employment when he sustained the injury.[87] Here, the Court's decision comports with Montana's public policy, especially where Liberty carried the burden, and failed to meet it.

—Kari Cluff

79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* at 897–898.
83. *Michalak*, 175 P.3d at 898.
84. *Id.* at 897, 899.
85. Mont. Code Ann. § 39–71–105(1) (2007).
86. Mont. Code Ann. § 39–71–105(1) (2005).
87. *Van Vleet v. Mont. Assn. of Cos. Workers' Comp. Trust*, 103 P.3d 544, 549 (Mont. 2004).

III. IN THE MATTER OF B.A.M.[88]

Even though a state actor unconstitutionally conducts a warrantless search, a Montana court will not suppress a defendant's use of violence after the search under the "fruit of the poisonous tree" doctrine.[89]

On November 5, 2006, B.A.M., a minor, was arrested and charged with assault, obstructing a peace officer, resisting arrest, disorderly conduct, and a minor in possession of alcohol (MIP).[90]

Earlier that evening, Fergus County sheriff deputies were alerted to an underage drinking party at a ranch about 25 miles outside of Lewistown.[91] Upon arrival the deputies observed "several seemingly underage people inside the house and a large quantity of liquor bottles and beer cans."[92]

The partygoers noticed the deputies outside the home and "began rushing around the house, attempting to hide the beverage containers."[93] Some of them began running out of the house "into the darkness."[94]

The deputies demanded to speak to the homeowner but received no response.[95] The deputies then called in their observations, discussed the possibility of obtaining a telephonic warrant to search the house, and ultimately decided to enter the home without obtaining a warrant.[96] The deputies apprehended approximately 15 minors, including B.A.M.[97]

As the deputies gathered the minors outside the home and began to issue MIP tickets, B.A.M. refused to stand with the others.[98] Instead, B.A.M. returned to the house shouting that "if he was going to get a ticket, he was going to be drunk."[99] The deputies observed B.A.M. "grabbing every bottle he could find . . . and chugging."[100] B.A.M. reportedly resisted arrest by fighting and injuring one of the deputies on the scene.[101]

B.A.M. moved to suppress the evidence on the grounds that the deputies conducted an unconstitutional warrantless search of the house.[102] Specifically, B.A.M. argued exigent circumstances did not exist to justify the

88. *In re B.A.M.*, 192 P.3d 1161 (Mont. 2008).
89. *Id.* at 1165.
90. *Id.* at 1162.
91. *Id.*
92. *Id.*
93. *Id.*
94. *In re B.A.M.*, 192 P.3d at 1162.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *In re B.A.M.*, 192 P.3d at 1162.
101. *Id.*
102. *Id.*

warrantless search, and—absent a valid search—the State "legally could not sustain any of the charges against him."[103]

The Youth Court denied the motion, finding that exigent circumstances did exist.[104] The Youth Court reasoned that the deputies first "observed the underage drinkers before entering the house" and then watched them flee as they approached the house. Second, the location of the house "was remote and the weather was cold."[105] Thus, in order to preserve injury and to protect the minors from injury, the Youth Court reasoned that exigent circumstances justified the deputies' warrantless search of the home.[106] B.A.M. pleaded "true" to all charges but reserved his right to appeal the evidentiary question.[107]

B.A.M.'s issue on appeal is whether exigent circumstances existed to justify the warrantless search.[108] The Supreme Court, however, refused to address the Fourth Amendment violation and instead resolved the issue of whether or not the evidence was admissible based on one of the established exceptions to the exclusionary rule.[109]

Evidence obtained from an unconstitutional search or seizure under the Fourth Amendment constitutes "fruit of the poisonous tree" and is excluded.[110] However, Montana recognizes the following three exceptions to the doctrine: if the evidence is "(1) attenuated from the constitutional violation so as to remove its primary taint; (2) obtained from an independent source; or (3) determined to be evidence which would have been inevitably discovered apart from the constitutional violation."[111]

Evidence is "sufficiently attenuated from the alleged constitutional violation" when a separate offense is committed in response to illegal search and seizure.[112] In *Montana v. Rookhuizen*, two bail agents illegally entered into the defendant's girlfriend's house.[113] The defendant threatened the bail agents with a gun and fled.[114] The State charged the defendant with assault and the defendant moved to suppress the evidence because the agents entered his home illegally.[115] The Court denied the motion, reasoning the criminal conduct committed in response to the improper search was so "at-

103. *Id.*
104. *Id.*
105. *Id.*
106. *In re B.A.M.*, 192 P.3d at 1162.
107. *Id.*
108. *Id.*
109. *Id.* at 1162–1163.
110. *Mont. v. Therriault*, 14 P.3d 444, 454 (Mont. 2000).
111. *Id.* (citing *Mont. v. New*, 817 P.2d 919, 923 (Mont. 1996)).
112. *In re B.A.M.*, 192 P.3d at 1163.
113. *Id.* (citing *Mont. v. Rookhuizen*, 172 P.3d 1257, 1258 (Mont. 2007)).
114. *Id.* (citing *Rookhuizen*, 172 P.3d at 1258).
115. *Id.* (citing *Rookhuizen*, 172 P.3d at 1258).

tenuated from the claimed improper search or stop that it los[es] its primary constitutional taint . . . and that the evidence is, therefore, not subject to the exclusionary rule."[116] Furthermore, the Court held the "failure to exclude such evidence could have the unwanted effect of encouraging violence toward state actors in response to illegal stops and searches."[117]

The Court also relied on *Montana v. Courville*.[118] In *Courville*, the defendant severely injured a police officer who illegally stopped the defendant because he lacked particularized suspicion.[119] The Court held "the exclusionary rule does not apply to evidence of criminal conduct committed in response to a claimed Fourth Amendment violation."[120]

Similarly, in *Montana v. Ottwell* the defendant was charged with assault when she threatened two officers with a weapon after the officers entered her motel room without a warrant.[121] The *Ottwell* Court found "such evidence does not constitute the 'fruit of the poisonous tree' and thus the purpose of the exclusionary rule—to protect a person from unreasonable searches and seizures through suppression of evidence—would not be accomplished by its application in such a situation."[122]

Here, B.A.M.'s actions "likewise constituted criminal conduct committed in response to an alleged Fourth Amendment violation."[123] As in *Rookhuizen, Courville,* and *Ottwell,* all of B.A.M.'s actions occurred in the deputies' presence—after the alleged violation took place.[124]

B.A.M. attempted to distinguish the nature of his actions from those in *Rookhuizen, Courville*, and *Ottwell.*[125] He argued that the "lack of specificity in the record regarding his violent conduct precludes" the analogy of the mentioned case law.[126] The Court dismissed this argument because B.A.M. neither cited authority nor denied committing violence toward a state actor.[127] Further, the Court refused to distinguish the application of the exception to the exclusionary rule based on the "degree or nature of the violent conduct."[128] The Court concluded that the policy behind the cases is to

116. *Id.* (citing *Rookhuizen*, 172 P.3d at 1259–1260).
117. *Id.* (citing *Rookhuizen*, 172 P.3d at 1259).
118. *In re B.A.M.*, 192 P.3d at 1163 (citing *Mont. v. Courville*, 61 P.3d 749 (Mont. 2002)).
119. *Id.* (citing *Courville*, 61 P.3d at 752).
120. *Id.* (citing *Courville*, 61 P.3d at 754).
121. *Id.* (citing *Mont. v. Ottwell*, 779 P.2d 500, 502 (Mont. 1989)).
122. *Id.* (citing *Ottwell*, 779 P.2d at 502).
123. *Id.* at 1163–1164.
124. *In re B.A.M.*, 192 P.3d at 1164.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*

discourage *all* violence against state actors, not to "allow certain kinds of violence, but not others."[129]

In conclusion, any violence, regardless of degree, committed toward a state actor after an illegal search or seizure in violation of the Fourth Amendment, falls under a clearly established exception to the "fruit of the poisonous tree" doctrine—the evidence is so removed from the constitutional violation so as to remove its primary taint.[130]

—Annie DeWolf

IV. *MONTANA v. ROSLING*[131]

In *Montana v. Rosling*, the Montana Supreme Court extended the scope of aggravated kidnapping to include the movement of a victim within her home during a deliberate homicide. The Court upheld the restraint element of aggravated kidnapping because evidence demonstrated that Rosling attacked his victim in the bedroom before ultimately stabbing her to death in the bathroom.[132]

After a night of partying in Helena, Jared Rosling drove Jessica Dooley to her vehicle at the Valley Hub bar and then stopped at her house.[133] One of Dooley's neighbors witnessed a car being parked at 6:00 a.m., identified the car as Rosling's, and testified that she saw Rosling quickly leave Dooley's home around 8:00 a.m.[134]

Between 8:35 a.m. and 11:15 a.m. that morning, Rosling purchased several items from Wal-Mart, Target and Shopko.[135] Rosling then met friends to ski at the Great Divide Ski Area.[136] One friend broached the subject of Dooley's murder, but Rosling refused to discuss it, indicating that the prior night he had left Dooley at the Valley Hub bar and then slept in his car for a couple of hours.[137]

Jessica's father, Richard Dooley, arrived at his daughter's home at about 8:00 a.m. and smelled smoke upon entering.[138] He found Jessica's naked body on her bathroom floor,[139] with a plastic bag fastened around her

129. *Id.*
130. *In re B.A.M.*, 192 P.3d at 1165.
131. *Mont. v. Rosling*, 180 P.3d 1102 (Mont. 2008).
132. *Id.* at 1114–1115.
133. *Id.*
134. *Id.* at 1106–1107.
135. *Id.*
136. *Id.*
137. *Rosling*, 180 P.3d at 1106–1107.
138. *Id.* at 1105.
139. *Id.*

head and burning magazines underneath her legs.[140] It appeared that Dooley had been strangled in her bedroom, possibly causing her to defecate, and then stabbed multiple times in her bathroom.[141] Investigators found hardly any blood in the bedroom, but found fecal matter on the bed and on a piece of clothing.[142] In the bathroom, blood stained the bathroom walls, countertop, sink, and around the bathtub.[143] Soiled shorts belonging to Dooley soaked in the sink.[144]

Dooley's autopsy showed evidence of strangulation or neck compression before her death. During the trial, the medical examiner testified that it is "not uncommon" for people to defecate while being strangled.[145] The pathologist testified that strangulation was not the cause of Jessica's death; her death was caused by 67 stab wounds and 28 cutting wounds, some of which appeared to be defensive wounds. This indicated that she was still alive and resisting during the stabbing.[146]

The day after the incident, officers arrested Rosling. Rosling was charged with deliberate homicide, aggravated kidnapping, aggravated burglary, tampering with or fabricating physical evidence, and criminal possession of dangerous drugs.[147] During the trial, the district court questioned the prosecutor on the aggravated kidnapping charge.[148] The prosecutor responded that the movement of Jessica by force from her bedroom to the bathroom satisfied kidnapping and that her bathroom qualified as "a place of isolation" as required by statute.[149] The prosecutor also offered three theories on the statutory restraint requirement: Jessica's killer restrained her while strangling her; he restrained her by forcing her into the bathroom; and he restrained her by the terrorizing effect of the non-fatal stab wounds.[150]

A jury convicted Rosling on all charges. On appeal, Rosling challenged a number of the district court's decisions, but most importantly, that the district court erred in denying his motion to dismiss all the charges for insufficient evidence.[151] The Montana Supreme Court focused on this issue, and found sufficient evidence to find Rosling guilty on all counts.[152] In so holding, the Court paid particular attention to the aggravated kidnap-

140. *Id.*
141. *Id.*
142. *Id.*
143. *Rosling*, 180 P.3d at 1105.
144. *Id.*
145. *Id.* at 1106.
146. *Id.*
147. *Id.* at 1105.
148. *Id.* at 1109.
149. *Rosling*, 180 P.3d at 1109.
150. *Id.*
151. *Id.* at 1118.
152. *Id.* at 1113–1115.

ping conviction. Aggravated kidnapping is governed by Montana Code Annotated Section 45–5–503(1):

> [a] person commits the offense of aggravated kidnapping if the person knowingly and purposely and without lawful authority restrains another person by either secreting or holding the other person in a place of isolation or by using or threatening to use physical force, with any of the following purposes . . (c) to inflict bodily injury on or to terrorize the victim or another.[153]

Rosling argued the State failed to prove restraint either in a place of isolation or by using or threatening physical force.[154] The Court, unconvinced by Rosling's argument, held that the jury properly exercised its discretion in accepting the State's interpretation of the evidence.[155]

Rosling additionally argued that stabbing Dooley did not satisfy the restraint element because any restraint was incidental to the act of homicide.[156] Rosling cited cases in surrounding jurisdictions holding that kidnapping statutes do not apply to incidental movements during the commission of another felony.[157] Rosling argued that adopting a broad interpretation would allow every intentional homicide to also be charged as an aggravated kidnapping.[158] The Court disagreed, stating that evidence in this case supported "entirely distinct" charges.[159] Thus, the evidence was sufficient to satisfy the elements of aggravated kidnapping, independently of deliberate homicide.[160]

Justice Warner, joined by Justices Morris and Cotter, dissented from the Court's holding on the aggravated kidnapping conviction.[161] The dissent was concerned with the extension of the scope of aggravated kidnapping such that "almost every murder could justify a kidnapping charge."[162] While agreeing that the offense committed by Rosling was horrific, the dissent found no evidence that moving Dooley within the house had "any purpose other than to complete the act of deliberate homicide."[163] The movement between the two rooms was simply part of the attack that led to her death, and thus was incidental to her homicide.[164] The dissent would have preferred to hold that movement of the victim incidental to the commission

153. Mont. Code Ann. § 45–5–503(1) (2007).
154. *Rosling*, 180 P.3d at 1113.
155. *Id.* at 1106.
156. *Id.*
157. *Id.* (citing *Md. v. Stouffer*, 721 A.2d 207, 212 (Md. 1998); *Vt. v. Goodhue*, 833 A.2d 861, 864–865 (Vt. 2003); *Hoyt v. Commonwealth*, 605 S.E.2d 755, 757 (Va. App. 2004); *Tenn. v. Fuller*, 172 S.W.3d 533, 536–538 (Tenn. 2005)).
158. *Id.*
159. *Id.*
160. *Rosling*, 180 P.3d at 1115.
161. *Id.* at 1119.
162. *Id.*
163. *Id.* at 1120.
164. *Id.*

of another crime fails to satisfy the requirements of aggravated kidnapping.[165]

Montana criminal law attorneys should be aware of the Court's extension of the aggravated kidnapping statute in *Rosling*. Many homicides occur within the victim's home and involve some movement during the attack. Thus, as the dissent and Rosling point out, this extension could result in a significant increase in the amount of aggravated kidnapping charges and convictions. Attorneys representing defendants charged with homicide, and possibly other violent crimes, must be particularly aware of the Court's broad interpretation of the restraint element of aggravated kidnapping—particularly where there has been a struggle within the victim's home.

—Katy Furlong

V. *MORDJA V. MONTANA ELEVENTH JUDICIAL DISTRICT COURT*[166]

In *Mordja v. Montana Eleventh Judicial District Court*, the Montana Supreme Court held that a criminal defendant is subject to a statutory amendment extending the period of limitations for an offense, so long as the offense was not barred at the time of amendment.[167] The Court's determination turned on whether extending a statute of limitations was a "retroactive" law and would thus have to comply with Montana Code Annotated Section 1–2–109.[168] Although at first glance the Court appears to scale back on the repose that a statute of limitation is supposed to confer upon a prospective defendant, the Court provides a well reasoned analysis as to why it is a different case when the statute of limitations in question has not yet run.

On January 29, 2007, the state charged Keith Mordja with one count of sexual intercourse without consent.[169] Between 1994 and 2000, Mordja had allegedly engaged in the continual rape of a minor.[170] The victim did not reach the age of 18 until March 25, 2001.[171] At the time of the alleged rape, Montana law provided that, if the victim was a minor, a prosecution could be effected any time within a five-year window after the minor reached the age of 18.[172] In 2001, the Legislature amended Montana Code Annotated Section 45–1–205, extending the limitations period for prosecu-

165. *Id.*
166. *Mordja v. Mont. Eleventh Jud. Dist. Ct.*, 177 P.3d 439 (Mont. 2008).
167. *Id.* at 443.
168. *Id.* at 442.
169. *Id.* at 440.
170. *Id.* at 440; Mont. Code Ann. § 45–5–503 (2005).
171. *Mordja*, 177 P.3d at 440.
172. *Mordja*, 177 P.3d at 440; Mont. Code Ann. § 45–1–205(1)(b) (1999).

tions to ten years.[173] At the time that the prosecution was initiated, five years and ten months had elapsed from the date of the victim's 18th birthday.[174]

Mordja moved for dismissal, arguing that he was subject to the five-year statute of limitations in effect prior to the 2001 amendment, and his prosecution was time-barred.[175] The district court determined that Mordja was subject to the 10-year statute of limitations under Montana Code Annotated Section 45–1–205, and thus denied the motion.[176] The district court reasoned that an amended statute of limitations was a procedural change which did not implicate any *ex post facto* issues.[177] Mordja then petitioned the Montana Supreme Court for a writ of supervisory control.[178]

Mordja argued his case was distinguishable from previous case law which had held amended statutes of limitation to be retroactively applicable.[179] The critical difference, Mordja argued, was that the 2001 extension of the statute of limitation had not complied with the statutory requirement that the Legislature expressly declare its intent to make the law retroactively applicable under Montana Code Annotated Section 1–2–109.[180] The 2001 amendment was not accompanied by any legislative pronouncement that the new statute of limitations was to be retroactive.[181] Both parties concentrated on whether the express retroactive intent applied to both substantive and procedural laws or solely to substantive ones.[182] Conflicting case law exists as to whether Montana Code Annotated Section 1–2–109 applies to both procedural and substantive laws or if it applies only to substantive laws.[183] Ultimately, the Court refused to answer the substantive versus procedural question.[184]

Instead, the Court's decision turned on whether an extension of a statute of limitations, which was had not run at the time of amendment, was actually a "retroactive" law under the meaning of Montana Code Annotated Section 1–2–109.[185] Relying on *Montana v. Coleman*,[186] the Court determined that, the "retroactive" nature of the extension turned on a two-part

173. *Id.*; Mont. Code Ann. § 45–1–205(1)(b) (2001).
174. *Mordja*, 177 P.3d at 440.
175. *Id.*
176. *Id.*
177. *Id.* at 441.
178. *Id.* at 440.
179. *Id.*
180. *Mordja*, 177 P.3d at 441; Mont. Code. Ann. § 1–2–109 (2005).
181. *Mordja*, 177 P.3d at 441; Mont. Code Ann. § 45–1–205(1)(b) (2001).
182. *Mordja*, 177 P.3d at 441–442.
183. *Id.* at 441.
184. *Id.* at 442.
185. *Id.* at 442.
186. *Montana v. Coleman*, 605 P.2d 1000 (Mont. 1979).

inquiry.[187] First, the Court asked whether Mordja, "ha[d] any vested right in the statute of limitations."[188] Here, Mordja had a vested interest in the use of the affirmative defense that accompanies the statute of limitations.[189] Second, the Court asked whether the extension of the limitations period stripped him of that right, or imposed some "new duty, obligation or disadvantage upon him."[190]

In determining that Mordja had no vested right in the statute of limitations, the Court relied on two cases, *Cosgriffe v. Cosgriffe*[191] and *Stogner v. California*, which held together that a defendant's vested rights were not disturbed by the extension of a statute of limitations.[192] The *Cosgriffe* Court held that retroactive application of an amended statute of limitations did not necessarily "disturb vested rights."[193]

Since *Cosgriffe* was a civil case, the *Mordja* Court looked to *Stogner* as well, and examined due process and *ex post facto* issues that may arise in a criminal case.[194] First, the Court noted that the *Stogner* Court differentiated between amendments that would extend expired statutes of limitation, and amendments that would extend limitations periods that were still open.[195] While those amendments that extended an expired limitations period ran afoul of the *ex post facto* clause, those that simply extended an open limitations period did not.[196] Second, the Court added *Stogner* had been interpreted to include, "a defendant has no vested right in a statute of limitations until it expires, and the prosecution is banned."[197] With these considerations, the Court determined that Mordja could not have had a vested right in the affirmative defense of an expired statute of limitations because the statute had been extended before the period had run.[198]

The Court next turned to the question of whether the extended statute of limitations imposed some new duty, obligation or disadvantage on Mordja.[199] Central to the Court's analysis was *Montana v. Wright*.[200] In *Wright*, the Court upheld a retroactive extension of an open limitations period because it neither altered the definition of the crime, nor did it increase

187. *Mordja*, 177 P.3d at 442.
188. *Id.*
189. *Id.* at 443.
190. *Id.* at 442.
191. *Cosgriffe v. Cosgriffe*, 864 P.2d 776 (Mont. 1993).
192. *Stogner v. Cal.*, 539 U.S. 607 (2003).
193. *Mordja*, 177 P.3d at 442–443 (quoting *Cosgriffe*, 864 P.2d at 779).
194. *Mordja*, 177 P.3d at 443.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 442, 443.
200. *Montana v. Wright*, 38 P.3d 772 (Mont. 2001).

the punishment for that crime.[201] Instead, in Mordja's case, the amendment merely extended an already open statute of limitations.[202] Both the crime and the punishment set forth in Montana Code Annotated Section 45–1–205, were exactly the same before and after the 2001 amendment.[203] Thus, the amendment placed no new duty, obligation or disadvantage upon Mordja.[204] Therefore, the extended statute of limitations period was not "retroactive" as defined in Montana Code Annotated Section 1–2–109.[205]

Mordja demonstrates an attempt by the Court to distinguish when a defendant can claim a vested right in a statute of limitations. While this decision may perturb prospective defendants, bear in mind that the repose that accompanies the expiration of a statute of limitations comes into existence only when the period finally runs out. The statute itself is simply a time period that gives a probable date of repose—it does not guarantee an actual date of repose.

More broadly, Montana practitioners should be cautioned that anytime they seek to label a law "retroactive" under the rule of Montana Code Annotated Section 1–2–109, they will have to provide the initial showing that a defendant's vested right was extinguished, or that the defendant was burdened with a new duty, obligation or disadvantage. Furthermore, the practitioner should keep in mind that the Court's decision may be somewhat tempered by the criminal nature of *Mordja*. The analysis suggests that the Court may exercise further leniency in the context of civil statutes of limitation when due process and *ex post facto* issues are not involved.

—Andres Haladay

VI. *Billings Gazette v. Montana*[206]

In *Billings Gazette v. Montana*, the Montana Supreme Court affirmed that the district court did not have jurisdiction to interpret or apply attorney disciplinary rules.[207] The Court also stated the principles of due process prohibit disclosure of disciplinary records when a lawyer tenders an admission under Lawyer Disciplinary Enforcement Rule 26.[208]

Because the Court only addressed the district court's subject matter jurisdiction, the Court never addressed the constitutionality of the rules as

201. *Mordja*, 177 P.3d at 443.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Billings Gaz. v. Mont.*, 190 P.3d 1126 (Mont. 2006).
207. *Id.* at 1129.
208. *Id.*

urged by the Billings Gazette (Gazette).[209] Rather, the Court discouraged the Gazette from filing an original claim and re-raising the constitutional issue.[210] In doing so, the Court side-stepped a ripe opportunity to conduct a thorough constitutional analysis of Lawyer Disciplinary Enforcement Rule 26, thereby leaving this important question unanswered.

In 2003 and 2004, complaints were filed against Billings Deputy City Attorney Moira D'Alton with the Office of Disciplinary Counsel (ODC).[211] After a private hearing before the Montana Supreme Court in November 2005, Ms. D'Alton filed a Conditional Admission and Affidavit of Consent with the Montana Commission on Practice (Commission).[212] In 2006, the Court approved Ms. D'Alton's Admission.[213] Consequently, Ms. D'Alton was publicly censured, her license was suspended for thirty days, and she was put on probation for two years.[214] In its Order, the Supreme Court revealed the rules of professional conduct that Ms. D'Alton violated but did not disclose the specific conduct leading to disciplinary action.[215]

In April 2006, the Gazette requested the public documents from the ODC pertaining to Ms. D'Alton's disciplinary proceedings.[216] The ODC denied this request, citing Rules 20 and 26 of the Lawyer Disciplinary Enforcement Rules.[217] The Gazette then requested Ms. D'Alton's file from the Commission.[218] Citing the same rules, the Commission again denied the request.[219]

In May 2006, the Gazette filed a Petition to Obtain Public Documents in district court.[220] The First Judicial District Court held it lacked subject matter jurisdiction and had no authority to compel the release of Ms. D'Alton's file.[221] As a result, the Gazette appealed the decision.[222]

In its brief analysis, the Court affirmed its original and exclusive jurisdiction over all attorney disciplinary matters pursuant to Article VII, Section 2(3) of the Montana Constitution.[223] Also, the Court declined to affirm

209. Br. of Appellant at 1, *Billings Gaz. v. Mont.*, 190 P.3d 1126 (Mont. 2006).
210. *Billings Gaz.*, 190 P.3d at 1129.
211. *Id.* at 1128.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Billings Gaz.*, 190 P.3d at 1128.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Billings Gaz.*, 190 P.3d at 1128.
223. *Id.* at 1129. The Court also cited the following two cases as authority for its original and exclusive jurisdiction: *Boe v. Ct. Adminstr. Mont. Jud. Branch Personnel Plan & Policies*, 150 P.3d 927 (Mont. 2007); *Goetz v. Harrison*, 457 P.2d 911 (Mont. 1969).

Ms. D'Alton's file to be "public record[ ]." It reasoned that such a declaration, without prior notice, would violate her due process rights.[224] In making this determination, the Court analyzed the same two Rules of Lawyer Disciplinary Enforcement. Under Rule 20(a), all disciplinary proceedings prior to the filing of a formal complaint are confidential.[225] Furthermore, all tendered admission proceedings are confidential under Rule 26.[226]

Contrary to the judiciary's obligation to state "what the law is," this decision leaves questions unanswered.[227] For example, the Court ignored important issues raised by limiting its holding to a jurisdictional determination. The Court should have invited the Gazette to file an original petition for Ms. D'Alton's records with the Court. Although the Court determined Ms. D'Alton's file was not public record, it did so without analyzing several critical issues:

> (1) Whether the confidentiality provisions in Rules 20(a) and 26 violate the "right to know" provision of Article II, Section 9 of the Montana Constitution;[228]
>
> (2) Whether the OCD and the Commission are "public bodies or agencies" within the meaning of Article II, Section 9 of the Montana Constitution;[229]
>
> (3) How Montana's statutory provisions that classify judicial records as "public writings" would apply.[230]

First, the Court should have applied Article II, Section 9 of the Montana Constitution to Rules 20(a) and 26. This section states: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."[231] However, the Court never addressed whether Ms. D'Alton's right to privacy exceeded the merits of public disclosure of her file. If indeed this were the case, the Court should have made this point explicit.

Second, the Court should have ruled that the ODC and Commission are public entities. The Gazette properly argued this point.[232] Both entities were established by the Court and are under its direct supervision.[233] As part of the attorney regulatory regime in Montana, both entities are an ex-

224. *Id.* at 1130.

225. *Id.*; R. Law. Disc. Enforcement 20(a).

226. R. Law. Disc. Enforcement 26.

227. *Marbury v. Madison*, 1 U.S. 137, 177 (1803).

228. Mont. Const. art II, § 9.

229. Br. of Appellant at 1, *Billings Gaz.*, 190 P.3d 1126.

230. Mont. Code Ann. § 2-6-101(3)(b) (2007).

231. Mont. Const. art II, § 9.

232. Br. of Appellant at 7-8, *Billings Gaz.*, 190 P.3d 1126.

233. Tim Strauch, *Busy Beginning for Discipline Counsel*, 28 Mont. Law. Rev. 10, 10 (Apr. 2003).

tension of the Court. Therefore, the ODC and Commission should be subject to the public records provision of Montana's Constitution.

Because the ODC and Commission are public bodies, by statute, their written records are deemed public. Montana Code Annotated Section 2–6–101(2)(a) defines a public writing as "the written acts or records of the acts of sovereign authority, of official bodies and tribunals, and public officers, legislative, *judicial*, and executive . . . except records that are constitutionally protected against disclosure."[234] Here, the documents at issue were the disciplinary records of a public official. Those documents were held by a public body. Absent a compelling privacy interest outweighing the benefits of disclosure, the Court should have made Ms. D'Alton's file public.

The policy reasons for keeping the proceedings confidential until guilt is established are sound. This ensures a lawyer's reputation will not be tarnished by frivolous claims. But, once the hurdle of proving malpractice has been met, there remains no justification for confidentiality. The public deserves a reasoned explanation as to why attorneys in Montana can admit their guilt in confidence when a high school teacher, for instance, cannot.[235]

Different and seemingly preferential treatment for lawyers adds to the public's already-grim perception of the legal profession. Ms. D'Alton was engaged in professional misconduct in her official capacity as a Billings Deputy City Attorney and was compensated with public tax dollars. The public is entitled to know the particulars of her misconduct.

—Helia Jazayeri

VII. *IN RE MARRIAGE OF HARDIN*[236]

In *In re Marriage of Hardin*, the Montana Supreme Court held that a party is not always entitled to a continuance of trial in a divorce proceeding when his attorney withdraws on the first day of trial.[237]

More specifically, the Court held that the party opposing the unrepresented party need not comply with the written notice requirement in Montana Code Annotated Section 37–61–405 and Montana Uniform District Court Rule 10 ("Rule 10") when: (1) the unrepresented party consents to his attorney's withdrawal by way of discharge shortly before trial; (2) the un-

234. Mont. Code Ann. § 2–6–101(2)(a) (emphasis added).

235. *In re Petition of Billings High Sch. Dist. No. 2 v. Billings Gaz.*, 149 P.3d 565 (Mont. 2006). Here, the Court held high school teachers "have no reasonable expectation of privacy in their conduct as public employees and—even if they did have a reasonable expectation of privacy—the privacy expectation did not clearly exceed the merits of public disclosure." *Id.* at 571.

236. *In re Marriage of Hardin*, 184 P.3d 1012 (Mont. 2008).

237. *Id.* at 1013, 1017.

represented party has actual notice of the proceeding; (3) the court accommodates the unrepresented party by granting a reasonable amount of time to obtain new counsel; and (4) the unrepresented party fails to obtain new counsel within the time allotted by the court.[238]

In support of this holding, the Court pointed out that the policy behind the written notice requirement is to ensure a party is not abandoned and left to fend for himself in the midst of trial.[239] Because the unrepresented party consented to his attorney's withdrawal as counsel, the party in essence chose to go to trial unrepresented and was "abandoned" solely because he decided to discharge his attorney days before trial.[240]

On May 3, 2004, Michael Hardin petitioned for dissolution of his marriage in the Eighteenth Judicial District Court.[241] The proceedings were postponed for nearly two and a half years after the petition, but the trial date was finally set for September 20, 2006.[242] Michael discharged his attorney (McKenna) on September 6, 2006, only two weeks before trial.[243] Michael justified this discharge by claiming McKenna failed both to provide him certain documents and to file motions of contempt against Michael's wife Tania.[244] Within eight days of the discharge, McKenna filed a notice with the district court of his intent to withdraw.[245] He informed the court that he mailed Michael a consent form, but he had not yet heard back.[246] On September 20, 2006—the first day of trial—McKenna moved to withdraw from representing Michael because Michael had fired him.[247] The district court granted McKenna's motion, but it refused to grant Michael's motion to delay trial so he could find representation.[248] In denying Michael's motion, the court attempted to accommodate Michael by forcing McKenna to stay on as stand-by counsel; however, Michael declined the accommodation.[249]

The district court then allowed Tania's attorney to question Tania and enter the uncontested facts on the record.[250] Although allowed to participate, Michael refused because he felt prejudiced, commenting that he was not "going to act like" an attorney.[251] The district court recessed the trial

238. *Id.* at 1016–1017.
239. *Id.* at 1016.
240. *Id.*
241. *Id.* at 1013.
242. *In re Marriage of Hardin*, 184 P.3d at 1013.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *In re Marriage of Hardin*, 184 P.3d at 1013.
249. *Id.*
250. *Id.* at 1014.
251. *Id.*

early and allowed Michael to search for an attorney for the rest of the day.[252]

Michael returned the next day without an attorney.[253] He had spoken to several attorneys, but all refused to take his case.[254] Michael requested a continuance, and again the district court denied his request.[255] The district court supported this decision by the facts that (1) the case had already been continued numerous times, (2) the trial date had been set for "a length of time," and (3) the case needed resolution because it affected not only Michael and Tania—but also their children.[256] The trial proceeded with Michael objecting to the entire proceeding.[257] After the trial concluded, the district court accommodated Michael by giving him an additional thirty days to find a new attorney and file a notice of appearance with the court.[258] The court specifically warned Michael that if he did not find an attorney within a reasonable amount of time, it would render a judgment based on the record before it.[259]

More than fifty days later, Michael's new attorney filed a notice of appearance.[260] Neither Michael nor his attorney filed any additional motions or presented any evidence to the district court after that filing.[261] Consequently, the district court issued its decree of dissolution on December 26, 2006.[262] Michael appealed that order.[263]

On appeal, Michael relied on *Quantum Electric, Inc. v. Schaeffer*, arguing the case supported his contention that he was entitled to the written notice requirement in Montana Code Annotated Section 37–61–405 and Rule 10.[264] The majority, however, held that *Quantum Electric* was distin-

252. *Id.*
253. *Id.*
254. *In re Marriage of Hardin*, 184 P.3d at 1014.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. *In re Marriage of Hardin*, 184 P.3d at 1014.
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* at 1015 (citing *Quantum Electric, Inc. v. Schaeffer*, 64 P.3d 1026 (Mont. 2003)); Mont. Code Ann. § 37–61–405 (2007) ("When an attorney dies or is removed or suspended or ceases to act as such, a party to an action for whom he was acting as attorney must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or appear in person."); Mont. Unif. Dist. Ct. R. 10(b)(1)–(3), (d) ("When the attorney representing a party to an action or proceeding dies, is removed, withdraws, or ceases to act as such, that party, before any further proceedings are had against him must be given notice by any adverse party: (1) That such party must appoint another attorney or appear in person, and (2) The date of the trial or of the next hearing or action required in the case, and (3) That if he fails to appoint an attorney or appear in person by a date certain, which may not be less than twenty days from the date of the notice, the action or other proceed-

guishable from the present case because *Quantum Electric* presupposes that the proceedings will not begin for twenty or more days in the future, which allows the proceeding to be stayed or rescheduled.[265] Based on this distinction, the Court concluded that *Quantum Electric* was inapplicable and did not relate to the scenario faced in the present case—counsel withdrawing during trial.[266]

Because Michael was physically in the courtroom at the time of the proceeding, the Court concluded that giving Michael notice of the proceeding was unnecessary.[267] Not only did Michael have actual notice of the proceeding, but he was unrepresented only because he chose to discharge his attorney right before trial.[268] The Court concluded that a strict application of *Quantum Electric* would allow Michael to discharge his attorney on the first day of every re-scheduled trial in order to postpone a trial.[269] Such an application would be absurd and would negatively affect judicial economy.[270] The Montana Supreme Court affirmed the district court's denial of a continuance but included a strong dissent from Justice Nelson—the author of *Quantum Electric*.[271]

Justice Nelson argued that the district court's accommodations to Michael were simply "illusory," and as such, Michael was entitled to a written notice and continuance pursuant to Montana Code Annotated Section 37–61–405 and Rule 10.[272] The accommodations were illusory because Michael only received thirty days to find a new attorney "*after* the trial had ended."[273] Entering a contested battle midway through trial without adequate preparation, "or, even worse, try[ing] to salvage a case after the trial is over and the damage has been done," begs a malpractice claim.[274]

Moreover, Justice Nelson argued that the language of Montana Code Annotated Section 37–61–405 and Rule 10 unambiguously require written notice to an unrepresented party whenever that party's attorney "is removed" or "ceases to act" in his representative capacity, without exception.[275] Moreover, there is no rule prohibiting a party from discharging his

---

ing will proceed and may result in a judgment or other order being entered against him, by default or otherwise. . . . (d) If said party does not appoint another attorney or appear in person within twenty days of the service or mailing of said notice, the action may proceed to judgment . . ").

265. *Id.* at 1016.

266. *In re Marriage of Hardin*, 184 P.3d at 1016.

267. *Id.*

268. *Id.*

269. *Id.* at 1017.

270. *Id.*

271. *Id.*

272. *In re Marriage of Hardin*, 184 P.3d at 1017 (Nelson, J., dissenting).

273. *Id.* (emphasis in original).

274. *Id.*

275. *Id.*

attorney right before trial, nor is there any language limiting the notice requirements in such a situation.[276] Indeed, Montana courts have a long history of strictly enforcing the plain language of Montana Code Annotated Section 37–61–405 and Rule 10, and to prove it, Justice Nelson cited a number of cases.[277]

Two policy arguments support Justice Nelson's argument. First, courts favor deciding cases on the merits.[278] Second, the small burden of extending the proceedings another twenty days and requiring opposing counsel to serve written notice on an unrepresented party is insignificant compared to the potential prejudice suffered by a client forced to proceed without the aid of an attorney.[279] According to Justice Nelson, the majority's holding—creating time and "intention" requirements—does nothing more than (1) muddle up firmly established precedent, (2) encourage arguments by attorneys that ignore the law, and (3) increase the number of appeals burdening an already over-worked court.[280]

On the other hand, Justice Cotter concurred, seeking to rectify whether the majority or dissent properly applied *Quantum Electric*.[281] She concluded that the majority's application of *Quantum Electric* was correct and its holding proper.[282] Cotter relied on *McPartlin v. Fransen*, a Montana Supreme Court case cited in *Quantum Electric*.[283]

In *McPartlin*, the Court held that the purpose behind the requirement is to notify a party who would not otherwise know of the upcoming proceeding absent the notice.[284] As Justice Cotter points out, *McPartlin* speaks specifically to an "eleventh hour" withdrawal by counsel: "[T]he over-riding purpose of our statute is to impose some duty on the opposing party to notify if he determines such party is, *without his consent*, no longer represented by counsel."[285] Written notice, therefore, must be issued when the withdrawal occurs because of an action taken by counsel without the client's consent, as in *Quantum Electric* and *McPartlin*.[286]

---

276. *Id.* at 1017.

277. *Id.* at 1017–1018 (citing *Endresse v. Van Vleet*, 169 P.2d 719 (Mont. 1946); *McPartlin v. Fransen*, 582 P.2d 1255 (Mont. 1978); *In re Marriage of Whiting*, 854 P.2d 343 (Mont. 1993); *In re Marriage of Neneman*, 703 P.2d 164 (Mont. 1985); *Mont. Bank v. Benson*, 717 P.2d 6 (Mont. 1986); *Stanley v. Holms*, 934 P.2d 196 (Mont. 1997)).

278. *In re Marriage of Hardin*, 184 P.3d at 1018 (citing *Quantum Electric, Inc. v. Schaeffer*, 64 P.3d 1026 (Mont. 2003)); *see also Maulding v. Hardman*, 847 P.2d 292 (Mont. 1993).

279. *Id.*

280. *Id.* at 1019.

281. *Id.*

282. *Id.* at 1020–1021.

283. *Id.* at 1020.

284. *In re Marriage of Hardin*, 184 P.3d at 1020.

285. *Id.* (citing *McPartlin*, 582 P.2d at 1259) (emphasis added).

286. *Id.*

That notice is not required, however, when "the client having full knowledge of the impending trial date fires his attorney just before the trial is to commence."[287]

—Aaron Neilson

VIII. *MODROO V. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY*[288]

In *Modroo*, the Montana Supreme Court enforced a choice-of-law provision in a personal automobile insurance policy—even though application of the chosen law gave force to anti-stacking[289] and offset provisions that are likely contrary to Montana public policy.[290]

The central issue in *Modroo* was the amount of insurance coverage available to the estate and family of Mamie Hardy, who was killed in a single-vehicle automobile accident in Mineral County, Montana, on February 15, 2003.[291] At the time of her death, Hardy was an Ohio resident attending the University of Montana.[292] Mary Modroo, Hardy's mother and personal representative of her estate, collected the $50,000 policy limit from Allstate Insurance Company, who insured the driver of the vehicle in which Hardy was killed.[293] Modroo then filed suit against Nationwide Mutual Fire Insurance Company, Nationwide Agribusiness Insurance Company, and Farmland Mutual Insurance Company (collectively Nationwide), her underinsured motorist (UIM) carriers.[294]

Modroo sought UIM coverage from Nationwide under both a commercial and personal automobile policy.[295] The Nationwide commercial policy provided a UIM limit of $1,000,000 per accident.[296] The personal policy insured two vehicles and provided UIM coverage limits of $300,000 per person.[297] Both policies originated in Ohio and expressly provided that Ohio contract law would govern their interpretation.[298] Both policies also

287. *Id.* at 1021.

288. *Modroo v. Nationwide Mut. Fire Ins. Co.*, 191 P.3d 389 (Mont. 2008).

289. "Anti-stacking provisions violate Montana public policy if they allow an insurer to charge separate premiums for multiple underinsured motorist (UIM) coverages but limit the amount an insured may recover to the limits available under a single UIM coverage." *Id.* at 403. These provisions are viewed as beyond the reasonable expectations of the insured; therefore, insureds are entitled to stack the number of UIM premiums he or she pays. *Id.*

290. *Id.* at 402.

291. *Id.* at 393.

292. *Id.*

293. *Id.*

294. *Modroo*, 191 P.3d at 393.

295. *Id.*

296. *Id.*

297. *Id.* at 394.

298. *Id.*

contained anti-stacking language and mandated that the UIM limits be offset by any payments made by a legally responsible party.[299] Despite the policies' directive, Modroo sought a ruling that the contract should be interpreted under Montana law and the anti-stacking and offset provisions declared void.[300]

Following cross motions for partial summary judgment, the trial court conducted a conflict-of-law analysis and determined that Ohio law should be used to interpret the policies.[301] Accordingly, it ruled that while Modroo was entitled to UIM coverage under the Nationwide personal policy, she could not stack the UIM limits, and Nationwide was entitled to any available offsets.[302] The trial court also found that Modroo was not entitled to UIM coverage under the Nationwide commercial policy because the named insured was a partnership;[303] "thus, no coverage extended to Mamie under the . . policy."[304] Modroo appealed these findings.[305]

On appeal, the Montana Supreme Court first dealt with the district court's denial of UIM coverage under the commercial policy. The Court found a discrepancy between the policy's named insured block, which listed the individual members of the partnership, and the form of business language that indicated the insured was a partnership.[306] The Court held this discrepancy created an ambiguity in the policy, and the ambiguity must be "construed against the insurer and in favor of extending coverage."[307] Accordingly, the Court found that Modroo was a named insured under the commercial policy and the UIM coverage extended to Hardy as a "family member" of a named insured.[308]

After disposing of the coverage issue under the commercial policy, the Court turned its attention to the most controversial issue on appeal: Whether the district court was correct in interpreting the Nationwide personal policy under Ohio contract law, thereby enforcing its anti-stacking and offset pro-

299. *Id.* at 393–394.

300. *Modroo*, 191 P.3d at 394.

301. *Id.*

302. *Id.*

303. The commercial policy was issued to "CASSIUS H & MARY J HARDY & HARRY MODROO DBA MODROO FARM." *Id.* at 393. The declaration page of the policy also contained the language "FORM OF BUSINESS: PARTNERSHIP." *Id.*

304. *Id.* at 394. It was important for the Court to determine whether the named insured was an individual or a partnership. If the named insured was an individual, coverage would extend to the named insured and the named insured's family members; conversely, if the named insured was a partnership, coverage only extended to those occupying the insured vehicle (which was not in the accident). *Id.* at 395.

305. *Id.* at 394.

306. *Modroo*, 191 P.3d at 394.

307. *Id.* at 397.

308. *Id.*

visions.[309] Interestingly, Modroo did not directly appeal the lower court's decision to apply Ohio law; rather, she claimed the policy's choice-of-law provision was ambiguous, and Ohio law therefore called for application of the state law that most favored the insured.[310] Alternatively, Modroo argued Ohio contract law should not apply because the resulting interpretation offended Montana's public policy prohibiting offset and anti-stacking provisions.[311]

The Court quickly rejected Modroo's argument that the choice-of-law provision in the personal policy was ambiguous. The subject language obligated Nationwide to pay the damages that an insured was "legally entitled to recover from the owner or driver of an underinsured motor vehicle under the tort law of the state where the motor vehicle accident occurred."[312] The policy further provided that "contract law of the State of Ohio governs the interpretation of this contract."[313] The Court determined that, when read together, the clauses clearly stated Montana tort law and Ohio contract law would govern any dispute.[314] Because "the amount of coverage available under a UIM provision is defined under principles of contract law, not tort law," Ohio contract law was implicated by Modroo's claim.[315]

Next, the Court addressed Modroo's public policy argument. The Court characterized Modroo's argument as a challenge to the effectiveness of the parties' choice-of-law agreement, and provided the following test from the *Restatement (Second) of Conflict of Laws* § 187(2)(b) to determine the validity of the agreement:

> We will not apply the law of the state chosen by the parties if three factors are met: (1) if, but for the choice-of-law provision, Montana law would apply under § 188 of the *Restatement*; (2) if Montana has a materially greater interest in the particular issue than the state chosen by the parties; and (3) if applying the state law chosen by the parties would contravene a fundamental policy of Montana.[316]

The Court proceeded to strictly apply each factor of the conjunctive test. Section 188 of the *Restatement* provides that, absent an effective choice of law, contract interpretation issues should be resolved by the law of the state that has the "most significant relationship" to the parties and the transaction.[317] The *Restatement* further provides that a court will follow the "stat-

309. *Id.*
310. *Id.*
311. *Id.* at 398.
312. *Modroo*, 191 P.3d at 398.
313. *Id.*
314. *Id.* at 399.
315. *Id.*
316. *Id.*
317. *Restatement (Second) of Conflict of Laws* § 188 (1971).

utory directive of its own state on choice of law."[318] Montana law mandates that the law of the place of performance shall be used in contract interpretation.[319] The Court reasoned that since the insurance policy contemplated performance in Montana, and since Hardy lived in Montana, worked in Montana, paid taxes in Montana, was injured in Montana, and incurred medical expenses in Montana, Montana law would apply under *Restatement* Section 188.[320]

Although the Court determined that Montana had the most significant relationship to the dispute under Section 188, it refused to find that Montana had a materially greater interest in the dispute than Ohio.[321] The Court accorded weight to five factors from the *Restatement* Section 188(2) to balance the respective interests of Montana and Ohio: "(1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties."[322] After determining that the place of performance carries little weight when it is uncertain or unknown at the time of contracting (as it was in this instance), and the remaining contacts were neutral or favored application of Ohio law, the majority concluded Montana did not have a "materially greater interest that would warrant applying Montana law over the parties express choice" for Ohio law.[323]

Upon concluding Montana did not possess the requisite interest in the matter to justify applying Montana law, the majority refused to reach the issue of whether or not application of Ohio law would violate Montana's public policy.[324]

In her dissent, Justice Cotter challenged the majority's "reflexive and rote" application of the *Restatement* factors.[325] She argued that the majority erred by construing the *Restatement* language too strictly and advocated for a more holistic application of the *Restatement* factors to balance the interests of the individual states.[326] The dissent further argued that Ohio's interest in the dispute was limited to the state's general need to protect the justified expectations of the insurer.[327] Montana's materially greater interest, on

318. *Id.* at § 6.

319. Mont. Code Ann. § 28–3–102 (2007).

320. *Modroo*, 191 P.3d at 401.

321. *Id.* at 402.

322. *Restatement (Second) of Conflict of Laws* § 188(2).

323. *Modroo*, 191 P.3d at 402.

324. *Id.* However, the majority did suggest in dicta that it was unlikely that the policy language was contrary to Modroo's reasonable expectations because it only charged a single premium for UIM coverage. *Id.* at 403.

325. *Id.* at 407 (Cotter, J., dissenting).

326. *Id.* at 408.

327. *Id.*

the other hand, was protecting the reasonable expectations of the named insured who was attending a Montana university, paying taxes in Montana, and was protected by the laws and constitution of the state.[328] The dissent concluded by cautioning that a mechanical application of the *Restatement* factors would overlook important public policy concerns and give rise to a situation where "Montana's interest [could] be trumped by foreign insurers at the stroke of a pen."[329]

Modroo displays the Court's reluctance to invalidate UIM anti-stacking and offset provisions in favor of Montana public policy. The distinct difference between *Modroo* and factually similar situations where the Court has voided such provisions is the express choice-of-law provision in the Nationwide policy.[330] On its face, *Modroo* suggests an out-of-state insurer may circumvent Montana's public policy favoring stacking of UIM coverage for accidents occurring within state boundaries by placing a choice-of-law provision in all policies issued to customers residing outside the state.

—Ross Sharkey

IX. *ALLSTATE INSURANCE COMPANY V. WAGNER-ELLSWORTH*[331]

In *Allstate Insurance Company v. Wagner-Ellsworth*, the Montana Supreme Court held that an insurance policy defining "bodily injury" as "physical harm to the body, sickness, disease, or death," includes "mental injuries with physical manifestations."[332] The Court overruled *Jacobson v. Farmers Union Mutual Insurance Company*.[333]

In light of this holding, third party actions, such as negligent infliction of emotional distress, may be compensated under an automobile insurance policy.[334] Further, because emotional distress is included as bodily injury under the policy, claimants are not limited to recovery of the "each person" policy limit.[335] If two individuals have suffered "bodily injury" because of

328. *Id.* The dissent goes on to note that anti-stacking provisions violate Montana public policy as a "matter of constitutional principle." *Id.* at 410. Such principles are of far greater import than the self interest of a national insurer. *Id.*

329. *Modroo*, 191 P.3d at 410 (Cotter, J., dissenting).

330. *See e.g. Wamsley v. Nodak Mutual Ins. Co.*, 178 P.3d 102 (Mont. 2008) (invalidating a UIM anti-stacking provision in coverages issued by a North Dakota insurer to a North Dakota insured where accident occurred in Montana and policy did not contain a choice-of-law provision); *Mitchell v. State Farm Ins. Co.*, 68 P.3d 703 (Mont. 2003) (applying Montana law to allow stacking of UIM coverages issued by national insurer to California insureds where injurious accident occurred in Montana and policy did not contain choice-of-law provision).

331. *Allstate Ins. Co. v. Wagner-Ellsworth*, 188 P.3d 1042 (Mont. 2008).

332. *Id.* at 1051.

333. *Id.* (overruling *Jacobson v. Farmers Union Mut. Ins. Co.*, 87 P.3d 995 (Mont. 2004)).

334. *Id.*

335. *Id.* at 1048.

an accident, claimants may recover up to the "each accident" or "each occurrence" policy limit listed on the declarations page.[336]

On February 22, 2000, Terry Wagner-Ellsworth's vehicle struck Matthew Rusk as he crossed the street in front of his elementary school.[337] Brandon, Matthew's brother, was with him and saw the collision.[338] Tiffany Rusk, their mother, arrived immediately after the accident to pick up her sons from school. She was unaware of the incident until she saw her son lying in the street.[339] Matthew was hospitalized and suffered severe trauma.[340]

Under Wagner-Ellsworth's Allstate automobile policy, Matthew received $50,000 for his injuries—the policy's per-person limit for liability.[341] Tiffany, on behalf of herself and Brandon, filed an action against Wagner-Ellsworth.[342] Tiffany contended that both Brandon and she suffered emotional and physical injuries when Matthew was struck because Brandon saw his brother hit by the car, and Tiffany, without warning, saw her son lying injured in the street.[343] Both Tiffany and Brandon suffered emotional injuries, which had physical manifestations.[344] Brandon suffered shock and fright, which lead to physical symptoms, and Tiffany suffered physical pain as well as migraines and elevated heart beat whenever she heard sirens.[345]

Allstate filed a declaratory action seeking adjudication relieving its obligation to either indemnify or defend the action against Wagner-Ellsworth for Tiffany or Brandon's claims.[346] The district court followed *Jacobson* where the Court held that emotional injuries suffered by the plaintiff—though accompanied by physical manifestations—were not bodily injury under the policy.[347]

The Montana Supreme Court, however, accepted Tiffany's invitation to revisit the holding in *Jacobson*, which it found to be "manifestly wrong."[348] Bodily injury, when defined broadly as in the Allstate policy,

336. *Id.*
337. *Wagner-Ellsworth*, 188 P.3d at 1044.
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. *Wagner-Ellsworth*, 188 P.3d at 1044.
344. *Id.*
345. *Id.* at 1044, 1048.
346. *Id.* at 1044.
347. *Id.* at 1045.
348. *Id.* at 1051.

does include emotional distress when accompanied by physical manifestations.[349]

The *Jacobson* Court erred in following *Aetna Casualty and Surety Company v. First Security Bank of Bozeman*.[350] In *Aetna*, a federal district court interpreted Montana law, without the benefit of allowing the Montana Supreme Court to decide such an issue, and held bodily injury did not include emotional distress in an insurance policy.[351] The *Wagner-Ellsworth* Court, after a thorough and comprehensive investigation of the authority relied upon by the federal district judge in *Aetna*, found the *Jacobson* Court erred in following such precedent;[352] none of the cases cited in *Aetna* involved emotional distress coupled with physical symptoms or manifestations.[353] The Court stated that "reliance on *Aetna* may well have led the *Jacobson* Court to overlook [the] later development in the law which addressed the distinction between" emotional injuries that are accompanied by, or lack, a physical element.[354]

The Court looked to sister jurisdictions and identified a "clear development in the law which distinguished mental injuries from mental injuries with physical manifestations."[355] This investigation provided insight as to what counts as a physical manifestation because the Court acknowledged "distinguishing between injuries which have physical manifestations from those which do not can be challenging."[356] In *Trinh v. Allstate*, the Washington Court of Appeals found headaches, nausea, and hair and weight loss that accompanied the emotional distress suffered after witnessing her friend's death to be "physical manifestations."[357] Further, the requisite physical element is satisfied by dry throat, rise in body temperature, and a knot in the stomach, as well as high blood pressure, sleep loss, stomach pains and muscle aches.[358]

The definition of physical manifestation is not all-encompassing, however. The Court cited cases holding "bodily injury does not encompass damages for humiliation, mental anguish and mental suffering."[359] Also, "crying, shaking and sleep difficulties are not enough."[360] The Court

349. *Wagner-Ellsworth*, 188 P.3d at 1049.
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Wagner-Ellsworth*, 188 P.3d at 1050.
356. *Id.* at 1051.
357. *Id.* at 1050.
358. *Id.*
359. *Id.* at 1052 (citing *Farm Bureau Mut. Ins. Co. of Mich. v. Hoag*, 356 N.W.2d 630, 633 (Mich. App. 1984)).
360. *Id.* (citing *Econ. Preferred Ins. Co. v. Jia*, 92 P.3d 1280, 1284 (N.M. App. 2004)).

stated, "When an emotional distress claim is not supported factually, the insurer can and should move to dismiss the meritless claims," and "each case must necessarily be judged by its own facts to determine whether the alleged injuries are sufficiently akin to physical injuries to fall within coverage for 'bodily injury.'"[361]

When a third party has suffered sufficient physical manifestations of emotional distress, a claim under the insured's policy is not limited to the "per person" coverage.[362] The insured's "per occurrence" or "per accident" limitations are available to satisfy both the claims of the insured injured in the accident and any other insured who has suffered emotional distress accompanied by physical manifestations.[363]

—Justin Stalpes

X. *STATE v. GOETZ*[364]

In *State v. Goetz*, the Montana Supreme Court took an affirmative step towards protecting Montanans' constitutional rights by holding that the State can no longer monitor or record conversations in a criminal investigation without a warrant or warrant exception.[365] The *Goetz* majority expressed that monitoring and recording of conversations, even if one of the parties consents, violates Montana's constitutional right to privacy and right to be free from unreasonable searches and seizures.[366] The opinion explicitly overruled the Court's twenty-year precedent that electronic monitoring and recording of a conversation does not require a warrant.[367]

This case arose as the result of similar incidents involving two different defendants.[368] In the first, a detective with the Missouri River Drug Task Force wired a confidential informant before she purchased methamphetamine from Michael Goetz.[369] Unbeknownst to Goetz, officers recorded and monitored his conversations with the confidential informant through use of a body wire.[370] In the second incident, officers recorded and monitored Joseph Hamper's conversations with a confidential informant as he sold the informant marijuana.[371] Goetz's conversation took place inside

361. *Wagner-Ellsworth*, 188 P.3d at 1052.
362. *Id.* at 1047–1048.
363. *Id.*
364. *Mont. v. Goetz*, 191 P.3d 489 (Mont. 2008).
365. *Id.* at 504; Mont. Const. art. II, §§ 10–11.
366. Mont. Const. art. II, §§ 10–11.
367. *Mont. v. Brown*, 755 P.2d 1364, 1368 (Mont. 1988).
368. *Goetz*, 191 P.3d at 492.
369. *Id.* at 492–493.
370. *Id.*
371. *Id.* at 493.

his house, whereas Hamper's took place both inside his home and in a vehicle.[372] In neither case, however, did investigators seek or obtain a search warrant.[373]

Both Goetz and Hamper were charged with drug-related counts as a result of their monitored and recorded conversations with the confidential informants.[374] Both defendants moved, unsuccessfully, to suppress the evidence based on their right to privacy and right to be free from unreasonable searches and seizures, as guaranteed by Article II, Sections 10 and 11 of the Montana Constitution.[375] Goetz and Hamper were convicted, and both appealed to the Montana Supreme Court.[376]

The admissibility of monitored and recorded conversations is by no means a matter of first impression for either Montana or federal courts.[377] In 1971, the U.S. Supreme Court held that electronic monitoring and recording of face-to-face conversations—with the consent of one of the parties—did not constitute a search and did not violate the Fourth Amendment.[378] Montana, though, does not "march lock-step"[379] with federal courts on constitutional issues and has repeatedly recognized that its constitution affords greater protection from searches and seizures than the U.S. Constitution.[380] In fact, in 1984, the Montana Supreme Court held that warrantless electronic monitoring and recording of conversations with an undercover law enforcement officer violated Article II, Sections 10 and 11 of the Montana Constitution, which provide individuals with a right to privacy and protection from unreasonable searches and seizures.[381] Four years later, though, and consistent with federal jurisprudence, the Court held that monitoring and recording does not constitute a search when one party to the conversation (e.g., an undercover officer or informant) consents to the monitoring and recording.[382] With *Goetz*, the Court took the opportunity to reexamine these prior holdings in light of its historical protectionist posture towards the right to privacy and right to be free from unreasonable searches and seizures.

As it has in other search and seizure cases, the majority applied a three-prong framework in analyzing the constitutionality of the monitoring

372. *Id.* at 492–493.
373. *Id.*
374. *Goetz*, 191 P.3d at 493.
375. *Id.*
376. *Id.*
377. *See e.g. Mont. v. Solis*, 693 P.2d 518 (Mont. 1984); *Brown*, 755 P.2d 1364; *U.S. v. White*, 401 U.S. 745 (1971).
378. *White*, 401 U.S. at 754.
379. *Mont. v. Bullock*, 901 P.2d 61, 75 (Mont. 1995) (citations omitted).
380. *Id.* (citations omitted).
381. *Solis*, 693 P.2d at 522.
382. *Brown*, 755 P.2d at 1368.

and recording.[383] The first two prongs are directed at determining whether a search or seizure occurred in light of the right to privacy articulated in Article II, Section 10 of the Montana Constitution. The first prong requires the Court to determine "whether the person challenging the state's action has an actual subjective expectation of privacy."[384] Under the second prong, the Court must determine "whether society is willing to recognize that subjective expectation as objectively reasonable."[385] The state's intrusion is a search or seizure if the person had the actual subjective expectation of privacy, and society is willing to recognize that expectation as objectively reasonable.[386]

The third prong of the search and seizure analysis is aimed at determining whether the search or seizure was reasonable, as required by Article II, Section 11 of the Montana Constitution.[387] In making this analysis, the Court looks to the "nature of the state's intrusion."[388] If the intrusion is a search, it must be in furtherance of "a compelling state interest" and, generally, must be accompanied by a search warrant or warrant exception.[389] In the absence of a compelling state interest and a search warrant or warrant exception, the search is *per se* unreasonable.[390]

Applying the analytical framework to the facts of Goetz and Hamper, the majority found the monitoring and recording of their conversations violated their right to privacy and right to be free from unreasonable searches and seizures. Of paramount importance to the majority was that the conversations in question took place in "private" settings.[391] Under the first prong of the framework, the majority concluded that both Goetz, in his house, and Hamper, in a house and in a private vehicle, had actual, subjective expectations of privacy in their conversations with the informants.[392]

In examining the facts under the second prong, the majority concluded society was willing to recognize their expectations of privacy as reasonable.[393] Constitutional protections, the Court noted, "extend to all of Montana's citizens including those suspected of a criminal act or charged with one."[394] The majority reasoned that protections against eavesdropping and electronic surveillance were intrusions that members of the 1972 Montana

383. *Goetz*, 191 P.3d at 497–498 (citations omitted).
384. *Id.* at 497.
385. *Id.*
386. *Id.* at 497–498.
387. *Id.* at 500.
388. *Id.*
389. *Goetz*, 191 P.3d at 500–501.
390. *Id.*
391. *Id.* at 498–499.
392. *Id.*
393. *Id.* at 500.
394. *Id.* at 499 (citing *Mont. v. Hardaway*, 36 P.3d 900, 905 (Mont. 2001)).

Constitutional Convention specifically sought to prevent in the absence of a warrant.[395] The majority reasoned these clear expressions were evidence that society recognizes protection from electronic monitoring and recording in-person conversations.[396]

In short, Goetz and Hamper had been searched when their conversations with the informants were monitored and recorded.[397] But, were those searches unreasonable? The majority answered this question by analyzing the third prong of the framework—the nature of the state's intrusion.[398] While there might have been a compelling state interest to record the conversations with Goetz and Hamper, the state did not obtain a search warrant before doing so.[399] In the absence of a warrant exception, then, the searches were *per se* unreasonable and violated Article II, Section 10 of the Montana Constitution.[400]

The state argued there were two warrant exceptions that applied to electronic monitoring and recording of in-person conversations.[401] First, consistent with the Court's prior holding, the state maintained a warrant was not required where one of the parties to the conversation (i.e., the informant) consented to the monitoring and recording.[402] The majority summarily overruled that prior holding and expressed that all parties to a conversation must consent to monitoring and recording before the exception could apply.[403] The majority analogized this principle to that of premises searches, where all occupants of a premise who are present when a search is requested must consent before the search can be performed without a warrant.[404]

Second, the state argued the searches should only have been subject to a "particularized suspicion" standard rather than a "probable cause" standard.[405] If this were true, a search warrant would not have been required.[406] For only "minimally intrusive" invasions, the state should not have to meet the required probable cause standard before a search warrant will be issued.[407] As a result, the state argued, these types of searches should not

395. *Goetz*, 191 P.3d at 499 (citations omitted).
396. *Id.* at 500.
397. *Id.*
398. *Id.*
399. *Id.* at 493.
400. *Id.* at 500–501.
401. *Goetz*, 191 P.3d at 501–502.
402. *Id.* at 501.
403. *Id.* at 502.
404. *Id.* at 501–502 (citing *Georgia v. Randolph*, 547 U.S. 103, 120 (2006)).
405. *Id.* at 502.
406. *Id.* at 503–504.
407. *Goetz*, 191 P.3d at 503–504.

require a warrant.[408] The majority rejected this argument because, unlike other scenarios where a particularized suspicion standard is appropriate, the Goetz and Hamper searches "intruded into the sanctity" of homes and private settings.[409] Neither of the conversations was exposed to the public.[410] For such invasions, the majority held, the state must establish probable cause and obtain a warrant.[411]

Having found that a search occurred without a warrant or warrant exception, the majority concluded the State violated Article II, Sections 10 and 11 of the Montana Constitution when it monitored and recorded the Goetz and Hamper conversations.[412] The opinion was not unanimous, though. Justices Nelson and Leaphart concurred, but believed the prohibition should apply to conversations in public settings, as well as private ones.[413] Justices Morris, Rice, and Warner dissented.

The principle thrust of the dissents was two-fold. First, the dissenting Justices maintained the majority's opinion violated the principle of *stare decisis* by ignoring the Court's previous, controlling holding that the consent of one party obviated the need for a warrant when monitoring and recording conversations.[414] Second, even if a warrant were required for private conversations, the conversations involving Goetz and Hamper were not private—they were *commercial* drug deals.[415] Justice Rice reasoned that commercial transactions and conversations are not attended by the same level of privacy that accompanies social conversations among friends and family.[416] Thus, the conversations with Goetz and Hamper were not searches and did not necessitate a search warrant.[417] For these reasons, among others, the dissenting Justices believed the majority reached the wrong conclusion.

Goetz explicitly overruled a twenty-year precedent by finding that electronic monitoring and recording of private conversations constitute a search and require a warrant, even if one of the parties consents. Whether it be infrared sensors, drug dogs, or satellite photographs, technology undeniably plays an important role in modern criminal investigations. The *Goetz* opinion highlights that the State must use those technologies in a provident manner that is consistent with Montanan's constitutional rights. The Mon-

408. *Id.* at 502.
409. *Id.* at 503.
410. *Id.* at 504.
411. *Id.*
412. *Id.*
413. *Goetz*, 191 P.3d at 504.
414. *Id.* at 507, 510.
415. *Id.* at 511–512.
416. *Id.* at 512–513.
417. *Id.* at 517, 519.

tana practitioner should be aware of the potential intrusions that technology brings with it. At least in terms of monitoring and recording private conversations, there is little doubt that the State should have a warrant in hand, or a warrant exception in mind, if it intends to offer those monitored and recorded conversations as evidence in criminal cases.

—Randy Tanner