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LEGAL SHORTS

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. *STATE V. KINGMAN*[1]

In *State v. Kingman*, the Montana Supreme Court articulated the high standard necessary to establish juror prejudice and reconciled the state's approach with that of the federal courts on this issue. The Court held that the defendant, Miles Kingman ("Kingman"), failed to show that pre-trial media coverage of his crimes inherently prejudiced an entire pool of potential jurors.[2] Kingman could not establish that the media displaced the judicial process and predetermined the community's decision regarding his guilt or innocence.[3] Accordingly, the Court determined that the district court did not abuse its discretion in denying Kingman's motion for a change of venue on both United States and Montana constitutional grounds.[4]

This case arose from a violent exchange between Kingman and Paul Overby ("Overby") following a night of drinking at the Scoop Bar in Bozeman, Montana.[5] During the early morning hours of September 17, 2008, Kingman and his companion, Ryan Dibert ("Dibert"), left the bar and proceeded to push another patron's motor scooter around the bar's parking lot.[6] Overby recognized the scooter as belonging to a friend and confronted Kingman and Dibert.[7] The interaction escalated into a heated argument, which ended after Kingman punched Overby in the face between 15 and 20 times.[8] As a result, Overby sustained life-threatening head trauma, includ-

1. *State v. Kingman*, 264 P.3d 1104 (Mont. 2011).
2. *Id.* at 1122.
3. *Id.*
4. *Id.*
5. *Id.* at 1107.
6. *Id.*
7. *Kingman*, 264 P.3d at 1107.
8. *Id.*

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ing facial lacerations and skull fractures.[9] His extensive injuries required reconstructive surgery, a month-long hospital stay, and an additional month of rehabilitation.[10]

Following the altercation, Kingman fled to his home where he proceeded to call his friend Zane to discuss the fight.[11] Unable to reach Zane, Kingman left a voicemail message boasting that he "beat this guy to death" and that "it feels so good."[12] Kingman later obtained a ride to Zane's house from another friend, Katelin, who noticed that Kingman was covered in blood and acting strangely.[13] She called the police, and Kingman was arrested shortly thereafter.[14] The State charged Kingman with attempted deliberate homicide.[15] A three-day jury trial commenced on November 12, 2009.[16]

Prior to trial, local media including newspapers, television, and radio, reported on the factual details of the incident and the charges levied against Kingman.[17] Specifically, a local newspaper ran nine articles, and the evening news aired nine broadcasts.[18] Most of the coverage occurred within the first few weeks following the altercation; however, sporadic coverage continued through 2008 and early 2009.[19] Additionally, members of the community conducted various publicized fundraising activities on Overby's behalf.[20] His friends placed donation jars in local businesses, set up a bank fund, and hosted a benefit in Big Sky, Montana.[21]

On June 29, 2009, Kingman moved for a change of venue due to the inflammatory nature of the media coverage in the Gallatin County area and the prevailing prejudice in the community.[22] Kingman argued that the Sixth and Fourteenth Amendments to the United States Constitution and Article II, §§ 17 and 24 of the Montana Constitution required a change in venue to guarantee a fair and impartial trial.[23] To resolve this issue, the district court sent questionnaires to 150 prospective jurors designed to assess the level of prejudice against Kingman by the media.[24] Ninety-six ju-

9. *Id.* at 1107–1108.
10. *Id.* at 1108.
11. *Id.*
12. *Id.*
13. *Kingman*, 264 P.3d at 1108.
14. *Id.*
15. *Id.*
16. *Id.* at 1109.
17. *Id.*
18. *Id.* at 1118.
19. *Kingman*, 264 P.3d at 1109.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

rors admitted that they had seen, read, or heard about the case, but 108 jurors responded that they had not formed an opinion that would affect their ability to serve as jurors.[25] Based on these responses, the district court concluded that the pretrial publicity "had not been inflammatory" and that Kingman failed to show that the jurors would not set aside what they had heard and decide his guilt impartially.[26] Kingman was eventually convicted of aggravated assault and sentenced to 20 years imprisonment.[27]

On appeal, the Montana Supreme Court addressed whether Kingman's motion to change venue should have been granted in response to the prejudicial effect of the pretrial publicity.[28] The Court's analysis focused primarily on reconciling the change of venue approaches utilized under the United States Constitution and the Montana Constitution.[29]

The Sixth and Fourteenth Amendments to the United States Constitution guarantee "'a fair trial by a panel of impartial, indifferent jurors.'"[30] A federal court must transfer a proceeding to a different district if so much prejudice exists against the defendant that he cannot obtain a fair and impartial trial.[31] Likewise, Article II, §§ 17 and 24 of the Montana Constitution assure that the defendant receives a "fair trial by an impartial jury."[32] Under Montana law, if such prejudice exists that a fair trial cannot be obtained, the court is required to "transfer the cause to another county, direct that a jury be selected from another county, or take any other action designed to ensure that a fair trial may be had."[33] The common prerequisite for obtaining a change of venue under both the federal and Montana systems is that "there is such prejudice as will prevent a fair and impartial trial in the current venue."[34]

The Court then explained that federal courts recognize two types of prejudice: presumed prejudice and actual prejudice.[35] Presumed prejudice exists where "'pretrial publicity is so pervasive and prejudicial that [the district court] cannot expect to find an unbiased jury pool in the community.'"[36] To meet this standard, publicity must be both "extensive and sensational."[37] Only in rare situations where publicity "in essence displace[s]

25. *Kingman*, 264 P.3d at 1109.
26. *Id.* at 1109.
27. *Id.* at 1109–1110.
28. *Id.* at 1110.
29. *Id.*
30. *Id.* (quoting *Hayes v. Ayers*, 632 F.3d 500, 507 (9th Cir. 2011)).
31. *Kingman*, 264 P.3d at 1110 (citing Fed. R. Crim. P. 21(a)).
32. *Id.*
33. *Id.* (citing Mont. Code Ann. § 46–13–203 (2011)).
34. *Id.* at 1111.
35. *Id.*
36. *Id.* at 1111 (quoting *House v. Hatch*, 527 F.3d 1010, 1023 (10th Cir. 2008)).
37. *Kingman*, 264 P.3d at 1111.

the judicial process" will a court find presumed prejudice.[38] In contrast, actual prejudice exists "when voir dire reveals that the jury pool harbors actual partiality or hostility against the defendant."[39] Mere knowledge of a case is insufficient to support a finding of actual prejudice, since intelligent jurors will almost always be informed of significant events in their communities.[40]

Next, the Court engaged in a lengthy discussion of Montana cases that decided issues of prejudice similar to the federal approach. The Court ultimately concluded, pursuant to Montana precedent and federal law, that it will only presume prejudice "in extreme situations where there are such pervasive and strong passions of anger, hatred, indignation, revulsion, and upset in the community" that jurors' claims of impartiality cannot be trusted.[41] The Court provided several examples from Montana cases. In *State ex rel. Coburn v. Bennett*, community members marching on the courthouse in conjunction with the printing of biased newspaper articles constituted prejudice.[42] In *State v. Spotted Hawk*, numerous citizens vowing to take the law into their own hands if the defendant was acquitted established prejudice.[43] And in *State v. Dryman*, prejudice was found where the district court judge, sheriff, and Prison Commission all agreed that the defendant "might have been lynched" in response to inflammatory media coverage.[44] Factors to consider in determining presumed prejudice include the size of the community, the community's sentiment, the nature of the publicity, the amount of time that has elapsed between the crime and the trial, and whether jurors' actions ran counter to a presumption of prejudice.[45]

On the other hand, in Montana, actual prejudice will only be found where jurors "actually could not set aside what they have heard or read in the media and decide the defendant's guilt impartially and based solely on the evidence admitted at trial."[46] In most cases, voir dire will serve as the primary method of proving that potential jurors are incapable of rendering a fair verdict.[47]

Applying these standards to Kingman's constitutional claims, the Court held that the district court did not abuse its discretion in denying

38. *Id.* at 1112.
39. *Id.*
40. *Id.* at 1113.
41. *Id.* at 1115.
42. *State ex rel. Coburn v. Bennett*, 655 P.2d 502, 503–507 (Mont. 1982).
43. *State v. Spotted Hawk*, 55 P. 1026, 1031–1032 (Mont. 1899).
44. *State v. Dryman*, 269 P.2d 796, 797–800 (Mont. 1954).
45. *Kingman*, 264 P.3d at 1118.
46. *Id.* at 1115.
47. *Id.*

Kingman's motion for a change of venue.[48] The Court rejected Kingman's argument that media reports discussing the altercation with Overby and his voicemail confession inherently biased jurors against him.[49] None of the media reports cited by Kingman went "beyond an objective dissemination of information, nor [did] they inflame an already angry populace."[50] The details of Kingman's voicemail confession received only passing discussion on very few occasions, long before the start of the trial.[51] The Court also found insufficient evidence to support Kingman's argument that the fundraising efforts instigated by Overby's friends created a presumption of "communitywide antipathy toward Kingman."[52] Additionally, the results of the questionnaire submitted to potential jurors belied a "presumption that the entire jury pool was corrupted."[53] In short, Kingman failed to show that the population of Gallatin County was so incensed as to preclude a fair trial.[54]

Montana practitioners should be aware of the extremely high bar that must be met in order to establish juror prejudice. Absent a showing of "a circus atmosphere or lynch mob mentality,"[55] the Court will not presume that the jury pool of an entire community is incapable of rendering an impartial decision. And where voir dire reveals that most jurors are not biased against a defendant, the Court will not find that actual prejudice exists.

—Mac Bloom

II. *PATCH V. HILLERICH & BRADSBY CO.*[56]

In *Patch v. Hillerich & Bradsby Co.*, the Montana Supreme Court held that a pitcher killed by a baseball was a "user" or "consumer" of the baseball bat that gave the lethal ball an unusually high exit speed.[57] The Court also affirmed the denial of an assumption-of-risk defense offered by the defendant baseball bat manufacturer.[58] Finally, the Court reiterated its approval of a flexible standard of proof for causation in failure-to-warn cases.[59]

48. *Id.* at 1122.
49. *Id.* at 1119–1120.
50. *Id.* at 1119.
51. *Kingman*, 264 P.3d at 1120–1121.
52. *Id.* at 1121.
53. *Id.*
54. *Id.* at 1122.
55. *Id.*
56. *Patch v. Hillerich & Bradsby Co.*, 257 P.3d 383 (Mont. 2011).
57. *Id.* at 388.
58. *Id.* at 390.
59. *Id.*

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On July 25, 2003, eighteen-year-old Brandon Patch ("Brandon") died from a blow to the head from a baseball hit by one of manufacturer Hillerich & Bradsby's ("H & B") model CB 13 aluminum bats during an American Legion baseball game.[60] Some studies conclude that pitchers need 0.4 seconds to react to a batted ball; analysis of a sound recording of the game indicated that Brandon only had 0.376 seconds.[61] The CB 13 bat caused a significant increase in the velocity of the ball compared to other bats, leaving less time for Brandon to react.

Brandon's parents, individually and as representatives of their child's estate, filed a strict products liability lawsuit against H & B for survivorship and wrongful death damages.[62] They asserted various products liability claims, including failure-to-warn and manufacturing and design defects.[63] The district court granted summary judgment on the manufacturing defect claim but allowed the design defect and failure-to-warn claims to proceed to trial.[64] The jury rejected the design defect claim but concluded that the bat was in a defective condition because of H & B's failure to warn baseball players of the enhanced risks associated with the CB 13 bat.[65] At the conclusion of the trial, the district court denied H & B's Rule 50(b) motion for judgment as a matter of law.[66] The jury awarded the plaintiffs $850,000 in damages, and H & B appealed.[67]

The Montana Supreme Court first concluded that the district court did not err in denying H & B's summary judgment motion on the failure-to-warn claim.[68] Although the lower court and both parties referred to Brandon as a bystander, the Court did not directly do so, instead reasoning that Brandon was a user or consumer as defined by the *Restatement (Second) of Torts* § 402A.[69] The Court concluded that H & B had construed the terms "user" and "consumer" too narrowly.[70] Because the Court deemed Brandon a user or consumer, the Court avoided the central conflict of the lower court: whether a failure-to-warn claim is available to bystanders.[71]

The *Restatement (Second) of Torts* § 402A, adopted as Montana's strict products liability law in *Brandenburger v. Toyota Motor Sales*,[72]

60. *Id.* at 386.
61. *Id.* at n. 2
62. *Patch*, 257 P.3d at 386.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 386–387.
67. *Id.* at 386.
68. *Patch*, 257 P.3d at 388.
69. *Id.* at 387 n. 3.
70. *Id.* at 387.
71. *Id.* at 387.
72. *Brandenburger v. Toyota Motor Sales, U.S.A., Inc.*, 513 P.2d 268 (Mont. 1973).

broadly defines "consumer" and "user."[73] These terms may include persons who did not actually purchase or use a product if such persons are sufficiently exposed to potential harm.[74] The Court explained that a "warning of the bat's risks to only the batter standing at the plate inadequately communicates the potential risk of harm posed by the bat's increased exit speed."[75] The Court explained that "all of the players, including Brandon, were users or consumers placed at risk by the increased exit speed caused by H & B's bat."[76] Justice Wheat, who authored the Court's opinion, later wrote that despite the use of the term "bystander" in the jury instructions, "[t]he jury obviously determined Brandon was a user of the product."[77]

The Court rejected H & B's argument that warning those who are not the immediate user or consumer of the product was "unworkable."[78] Pointing to *Macrie v. SDS Biotech Corp.*,[79] where the Court rejected the manufacturer's argument that a warning was not feasible after exposure to a toxic fungicide injured employees who had not used or consumed the product, the Court similarly held that the workability of a warning is a proper question for the jury.[80]

The Court also rejected H & B's argument that a warning on the bat would not have prevented Brandon's death because he would not have seen, read, and heeded such a warning.[81] The Court dismissed H & B's assumption that effective warnings must be placed directly on the bat.[82] Warnings are not limited to placement on the product itself.[83] The Court suggested several alternatives, including oral warnings, releases to be read and signed, and warnings placed in advertisements, posters, and media releases.[84]

Next, the Court affirmed the order in limine denying H & B's assumption-of-the-risk defense.[85] As the Court has previously explained, "the [assumption-of-the-risk] defense is inapplicable as a matter of law without evidence the victim actually knew he or she would suffer serious injury or death . . . ."[86] The defense presented no such evidence and thus failed to

73. *Patch*, 257 P.3d at 387; *Restatement (Second) of Torts* § 402A cmt. l (1965).
74. *Patch*, 257 P.3d at 388.
75. *Id.*
76. *Id.*
77. *Id.* at 391.
78. *Id.* at 388.
79. *Macrie v. SDS Biotech Corp.*, 630 A.2d 805, 807–808, 810 (N.J. Super. App. Div. 1993).
80. *Patch*, 257 P.3d at 388–389.
81. *Id.* at 388.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 390.
86. *Patch*, 257 P.3d at 390 (citing *Lutz v. Natl. Crane Corp.*, 884 P.2d 455, 461–462 (Mont. 1994)).

meet the burden of proof that Brandon knew of the enhanced risks of the CB 13 bat.[87]

H & B also challenged the denial of its Rule 50(b) motion for judgment as a matter of law on the issue of causation.[88] The defense argued that, for a plaintiff to prove the causation element after *Riley v. American Honda Motor Co.*,[89] plaintiffs must "present evidence that a warning would have altered their conduct."[90]

Once again, the Court rejected H & B's argument.[91] The Court reiterated its approval of a flexible standard of proof for causation in products liability cases.[92] *Riley* established one valid means of proving causation, not the only way to do so.[93] Other factors can influence the plaintiff's requisite standard of proof, including the death or inability of a plaintiff to testify.[94] After pointing out the injustice of requiring a plaintiff to prove what a deceased person would have done if warned, the Court accepted testimony that Brandon followed guidelines and that his team began using wooden bats after his death as sufficient to permit an inference that Brandon would have heeded a warning.[95] Because that inference could sufficiently prove causation, the issue of whether the failure to warn of the potential risks associated with the bat caused the injury correctly went to the jury.[96]

Justice Rice concurred with the Court's judgment but wrote a separate opinion to comment that he remained troubled by the evidentiary basis for failure-to-warn claims.[97] Plaintiff's counsel did not clearly articulate how a warning could have changed the outcome here or what message that warning should have contained.[98] Justice Rice believes the jury was asked to make a stretch in assuming that a warning would have prevented Brandon from pitching to the CB 13 bat.[99] But in the end, Justice Rice concluded that the issues were correctly submitted to the jury, and he deferred to the jury's verdict.[100]

87. *Id.*
88. *Id.* at 389.
89. *Riley v. Am. Honda Motor Co.*, 856 P.2d 196, 198–199 (Mont. 1993).
90. *Patch*, 257 P.3d at 389.
91. *Id.* at 389–390.
92. *Id.* at 390.
93. *Id.* at 389.
94. *Id.* at 389–390.
95. *Id.*
96. *Patch*, 257 P.3d at 390.
97. *Id.* at 391 (Rice, J., concurring).
98. *Id.* at 391–392.
99. *Id.* at 392.
100. *Id.*

Patch offers valuable and innovative precedent to plaintiffs hoping to take advantage of expansive definitions of the "user" or "consumer" of a product. Manufacturers should pay close attention to the Court's indication that warnings placed directly on a product may be inadequate to warn everyone at risk. Finally, parties should be aware of the flexible standard of proof for causation in failure-to-warn cases to avoid making the same mistake H & B made by assuming *Riley* always requires the plaintiff to demonstrate that a warning would have altered their conduct.

Patch received much attention in the legal community, perhaps because of the seeming absurdity of requiring a pitcher to be warned that a ball might fly in his direction at a dangerous speed. Yet, after a closer look, *Patch*'s real importance lies in its potential to significantly change Montana products liability law by expanding the definition of "user" and "consumer" to include virtually anyone placed at risk by a product.

—Paul Burdett

III. *STATE V. UPDEGRAFF*[101]

In *State v. Updegraff*, the Montana Supreme Court clarified Montana's common-law approach to analyzing the authority of out-of-jurisdiction peace officers to conduct warrantless arrests.[102] The Court affirmed the district court's denial of the defendant's motion to dismiss, or alternatively, to suppress the evidence against him on the grounds that it was unlawful for law enforcement officers to arrest him outside their territorial jurisdiction.[103] Reconciling the purposes of Montana's private person arrest statute with a peace officer's jurisdictionally limited authority, the Court held that "an out-of-jurisdiction peace officer must meet the standard [for arrest] that would apply to a private person in the same circumstances."[104] Specifically, an out-of-jurisdiction peace officer must have "probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest."[105] If met, the officer may proceed to arrest the individual in accordance with the procedures applicable to peace officers.[106]

Around 1:00 a.m. on July 12, 2009, Jefferson County Reserve Deputy Francine Janik observed a car parked in a "day use only" fishing access site in neighboring Madison County while returning to Jefferson County after

101. *State v. Updegraff*, 267 P.3d 28 (Mont. 2011).
102. *Id.* at 32, 36.
103. *Id.* at 32, 35.
104. *Id.* at 32.
105. *Id.* at 44 (quoting Mont. Code Ann. § 46–6–502(1) (2011)).
106. *Id.*

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an encounter that led her across county lines.[107] Deputy Janik decided to initiate a welfare check on the vehicle to "make sure there was nothing going on that might need some attention."[108] She did not contact Madison County law enforcement because she did not believe there were any officers in the area at the time.[109] Upon making contact with the vehicle, Deputy Janik observed that the driver, Floyd Thomas Updegraff ("Updegraff"), had his head back against the seat, his eyes closed, and was not moving.[110] After several failed attempts to wake Updegraff, Deputy Janik finally caught his attention; however, he seemed "disoriented and confused" and had slurred speech.[111]

Deputy Janik's welfare check under the community caretaker doctrine ripened into an investigation for driving under the influence ("DUI").[112] She made several observations of Updegraff's person and vehicle which gave her probable cause to determine Updegraff was, or had been, driving while under the influence of alcohol.[113] Deputy Michael Wharton, also from Jefferson County, responded to the scene to assist Deputy Janik in Updegraff's arrest.[114] Deputy Janik attempted to perform field sobriety tests to further the DUI investigation, but Updegraff refused.[115] The deputies placed Updegraff under arrest on suspicion of DUI and transferred him to jail.[116]

Updegraff was charged with three criminal offenses, including felony DUI (sixth offense).[117] Updegraff moved to dismiss or, in the alternative, suppress evidence from the stop, challenging the legality of Deputy Janik's out-of-jurisdiction arrest.[118] The district court denied Updegraff's motion, presuming Deputy Janik and Deputy Wharton "were 'merely private citizens' while they were in Madison County," and found the arrest lawful under the private person arrest statute.[119] A jury convicted Updegraff on all charges.[120] Updegraff appealed to the Montana Supreme Court to review the district court's denial of his motions to dismiss and suppress.[121]

107. *Updegraff*, 267 P.3d at 32.
108. *Id.* at 32–33.
109. *Id.* at 32.
110. *Id.* at 33.
111. *Id.*
112. *Id.*
113. *Updegraff*, 267 P.3d at 33.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 31, 36.
118. *Id.* at 31, 35.
119. *Updegraff*, 267 P.3d at 35.
120. *Id.* at 36.
121. *Id.* at 31.

The Montana Supreme Court found the district court's treatment of on-duty Deputies Janik and Wharton as private persons "difficult to square with reality."[122] The Court determined the deputies conducted themselves as peace officers, not private persons, when they investigated Updegraff for DUI.[123] The Court reasoned that a sworn peace officer is not a private person, and the private person arrest statute applies only to actual private persons.[124] Therefore, an arrest made by a peace officer cannot be analyzed under the private person arrest statute.[125]

Before outlining the proper analysis for arrests made by out-of-jurisdiction peace officers, the Court began with a brief overview of the private person arrest statute.[126] Noting that it was developed in the interest of public safety, the Court explained that the purposes of the private person arrest statute[127] are:

> (1) to provide a mechanism whereby a person, who is not a peace officer, may lawfully arrest another under the limited circumstances described in the statute and (2) to require that the nearest available law enforcement agency or peace officer immediately be given notice and custody of the arrestee.[128]

Given these purposes, the Court found that the statute applies only to arrests by non-peace officers "whose arrest authority is, by statute, limited to that of a 'private person.'"[129]

The Court then turned its analysis to precedent governing the authority of an out-of-jurisdiction peace officer to make an arrest. The Court found its holding in *State v. McDole*[130] and the cases following it controlling.[131] *McDole* and its progeny defined the scope of a peace officer's jurisdictional limits and recognized exceptions.[132] The Court extracted and reaffirmed the following key principles:

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122. *Id.* at 36.

123. *Id.*

124. *Id.*

125. *Updegraff*, 267 P.3d at 39.

126. *Id.* at 36.

127. Arrest by private person. "(1) A private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest. The private person may use reasonable force to detain the arrested person. (2) A private person making an arrest shall immediately notify the nearest available law enforcement agency or peace officer and give custody of the person arrested to the officer or agency." Mont. Code Ann. § 46–6–502 (2011).

128. *Updegraff*, 267 P.3d at 38.

129. *Id.* at 39.

130. *State v. McDole*, 734 P.2d 683 (Mont. 1987).

131. *Updegraff*, 267 P.3d at 39–41. The Court relied on the following caselaw in its analysis of *McDole*'s progeny: *State v. Sunford*, 796 P.2d 1084 (Mont. 1990), *Maney v. State*, 842 P.2d 704 (Mont. 1992), *State v. Hendrickson*, 939 P.2d 985 (Mont. 1997), and *State v. Williamson*, 965 P.2d 231 (Mont. 1998).

132. *Updegraff*, 267 P.3d at 42.

> First, the scope of a peace officer's authority is limited by the territorial jurisdictional limits of the law enforcement entity for which the officer works, which means an officer outside his or her territorial jurisdiction may not make arrests as a peace officer and may not use criminal procedure statutes expressly limited in application to "peace officers." Second, Montana recognizes two exceptions to this general rule: (a) an out-of-jurisdiction officer may use his or her authority as a peace officer if authorized to do so by statute and (b) an out-of-jurisdiction officer may make an arrest under circumstances which would authorize a private citizen to do so.[133]

The second exception concerning the authority of out-of-jurisdiction officers to make arrests is not covered specifically by any statutory provision, but has been carved out by caselaw.[134] The Court stated this authority has been inaccurately characterized to lead state courts to assume "that an out-of-jurisdiction officer's actions must comply with the private person arrest statute *in toto*."[135] Because peace officers "are 'always' peace officers" and do not suddenly forget all of their training and experience by crossing "an imaginary jurisdictional line in the sand," an out-of-jurisdiction peace officer does not morph into a private person to fall within the grasp of statutory law.[136] Instead, the Court applied the principle that "a peace officer acting outside the territorial limits of his [or her] authority does not have *less* authority to arrest than a person who is a private citizen."[137]

Finally, the Court harmonized the purposes of the private person arrest statute with a peace officer's jurisdictionally limited authority. The Court concluded that an out-of-jurisdiction peace officer may not make an arrest in the same capacity as a peace officer within his respective jurisdiction, but must meet the same necessary standard to make an arrest as a private person in the same circumstance.[138] The standard requires "probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest."[139] An out-of-jurisdiction peace officer who meets this burden may then conduct criminal investigation functions including investigating the scene, "gathering evidence, and transporting the arrestee to the nearest detention facility," within the confines of the constitutional and statutory mandates governing warrantless arrests.[140]

Under the revised approach, the Court affirmed the district court's denial of Updegraff's motion to dismiss or suppress, and found Updegraff's

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133. *Id.*
134. *Id.* at 44.
135. *Id.* at 42–43.
136. *Id.* at 43–44.
137. *Id.* at 44 (quoting *People v. Wolf*, 635 P.2d 213, 216 (Colo. 1981) (emphasis added)).
138. *Updegraff*, 267 P.3d at 44.
139. Mont. Code Ann. § 46–6–502(1) (2011).
140. *Updegraff*, 267 P.3d at 44.

arrest lawful.[141] Deputies Janik and Wharton acted as out-of-jurisdiction peace officers who initiated an arrest under circumstances that would have justified an arrest by a private person: they had probable cause that Updegraff committed an offense and the situation required his immediate arrest.[142] The Court also found Deputy Janik's initial contact with Updegraff justified under the community caretaker doctrine, analogizing the unrestricted right of a private person to simply approach a vehicle to conduct a welfare check to an out-of-jurisdiction peace officer in the same circumstance.[143] Therefore, the Court found proof Deputy Janik met the criteria of the community caretaker doctrine when she initiated a welfare check on Updegraff, and that her subsequent observations ripened into a lawful DUI investigation giving rise to "probable cause of a criminal offense involving an immediate, real danger to Updegraff and other motorists."[144]

The Montana practitioner should take note of the clarified approach to analyzing the lawfulness of warrantless arrests made by out-of-jurisdiction peace officers. Out-of-jurisdiction peace officers are still sworn officers even beyond their jurisdictional lines and should not be treated as "private persons" under the private person arrest statute.[145] An out-of-jurisdiction officer may make an arrest if the circumstances presented allow for a private person to make an arrest under the private person arrest statute—the officer has "probable cause to believe that a person is committing or has committed an offense and the existing circumstances require the person's immediate arrest."[146] If the burden is met, the officer "may follow the procedures applicable to peace officers in processing the arrest."[147] This ruling is significant since Montana statutory law is silent on this specific issue.

—Jessica Finley

IV. *Weber v. BNSF Railway Corporation*[148]

In *Weber v. BNSF Railway Corporation*, the Montana Supreme Court rejected a railroad company's application of a Ninth Circuit decision regarding the Locomotive Inspection Act ("LIA"). In so doing, the Court plainly affirmed that the standard for causation in Montana LIA cases is whether an injury was, in any way, caused by a safety violation. This stan-

141. *Id.* at 46.
142. *Id.* at 45.
143. *Id.* at 46.
144. *Id.* at 45–46.
145. *Id.* at 44.
146. *Updegraff*, 267 P.3d at 45.
147. *Id.* at 45.
148. *Weber v. BNSF Railway Co.*, 261 P.3d 984 (Mont. 2011).

dard specifically rejected the proximate cause standard proposed by the defendant railway company.

BNSF employed Heather Weber as a locomotive engineer.[149] On February 4, 2007, Weber and Chad Ferguson, a conductor, drove a coal train from Gillette, Wyoming to Guernsey, Wyoming.[150] The train was powered by two locomotives in the front and two in the rear; this arrangement is referred to as "distributed power" ("DP"). The DP is controlled by the engineer in the front of the train, and the engineer is able to disable, or "isolate," the DP.[151] Isolation became necessary during the trip at issue as the train approached a tunnel known as "Tunnel 3."[152] As Weber's train neared Tunnel 3, she realized that she had not isolated the DP. She stopped the train to isolate the DP, but the quick stop caused "bunching and stretching between the railcars," which, in turn, caused a knuckle (a railcar coupling mechanism) to break. The broken knuckle caused the train to stop and go into "emergency" mode, and a default code flashed on a screen.[153] A mechanical assistance team replaced the knuckle, but the default code proved more obstinate. Even with the help of BNSF operators, Weber and Ferguson could not determine the source of the code and were unable to restart the train.[154]

Trainmaster and supervisor Houston Cullison was called to the site and was told that the code read "BLD."[155] The code refers to the application of brakes to the DP, but no one on site at the time knew its meaning.[156] Cullison instructed Weber to connect with DP to move the train toward the tunnel. She did so, but the train stopped again when Weber isolated the DP inside the tunnel. Cullison directed Weber to stay in the cab while he and Ferguson prepared the train to reverse out of the tunnel; the two front locomotives continued to run while she waited. Varying witness estimates suggest that Weber spent from ten to forty minutes in the tunnel.[157]

The next day, Weber and Ferguson drove another train back toward Gillette. Before the train left Guernsey, Weber began to complain of nausea.[158] Over the next several months, she experienced more nausea, along with "headaches, fatigue, disorientation, tremors, forgetfulness and diffi-

149. *Id.* at 987.
150. *Id.*
151. *Id.*
152. *Id.* at 988.
153. *Id.*
154. *Weber*, 261 P.3d at 988.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*

culty focusing her eyes."[159] On July 31, 2007, she filed suit under the Federal Employers' Liability Act ("FELA") to recover for injuries she allegedly suffered during the time she spent in the tunnel.[160] Weber's four-part complaint alleged that BNSF breached its duty under FELA, and violated the LIA, the Safety Appliance Act ("SAA") and other federal regulations and standards.[161]

After examining Weber in March 2008, Dr. Hugh Batty formed a working diagnosis that Weber had suffered carbon monoxide poisoning from her time in the tunnel.[162] Batty referred Weber to Dr. Daniel Alzheimer who, at Batty's request, performed a PET scan of Weber on August 14, 2008. Alzheimer found the scan "consistent with [carbon monoxide] exposure with no corroborative findings on the CT scan as discussed."[163] Batty then formally diagnosed Weber as having permanent brain damage secondary to carbon monoxide exposure.[164]

Before trial, the district court granted BNSF's motion to exclude the PET scan evidence.[165] BNSF later moved to dismiss Weber's LIA and SAA claims. The court denied the motion but also refused to include both Weber's special verdict form and jury instructions regarding LIA and SAA. As the Supreme Court noted, "[the] jury was thus not presented with Weber's claim that BNSF violated the LIA or SAA."[166] On May 7, 2010, the jury found BNSF not negligent, and Weber subsequently appealed.[167]

The first issue the Supreme Court considered was whether the district court erred when it granted BNSF's motion for judgment as a matter of law on Weber's LIA claim.[168] The LIA imposes an absolute duty on railroads to provide their employees with properly working equipment.[169] The LIA itself does not contain a cause of action, but an employee may sue under FELA citing a statutory violation of the LIA.[170] The LIA provides, in pertinent part:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

159. *Id.*
160. *Weber*, 261 P.3d at 988–989.
161. *Id.*
162. *Id.* at 989.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Weber*, 261 P.3d at 989.
167. *Id.*
168. *Id.* at 990.
169. *Id.* (citing *Plouffe v. Burlington N.*, 730 P.2d 1148, 1153 (Mont. 1987)).
170. *Id.* (citing *Dallas v. Burlington N.*, 689 P.2d 273, 276 (Mont. 1984)).

> (1) are in proper condition and safe to operate without unnecessary danger of personal injury.[171]

To establish a violation of the LIA, the plaintiff must show that those parts or appurtenances did not "perform properly in an intended service for which [they were] being used."[172]

Given those standards, the Court determined that the district court erred when it refused to present Weber's LIA claim to the jury.[173] Because witness testimony indicated that the two front locomotives had sufficient power to move the train under normal circumstances, the Court concluded that the locomotives could not have been properly performing their intended services if they could not move the train during the trip at issue.[174] That testimony, according to the Court, should have been sufficient to send the alleged LIA violation to the jury.[175]

The Court next addressed BNSF's claim that Weber could not recover under the LIA because her injuries were caused by incidental circumstances—specifically, Cullison ordering her to stay in the running locomotive while it sat in the tunnel—and not by any deficiency in the equipment.[176] BNSF relied on *Oglesby v. Southern Pacific Transportation Company*,[177] which held that the alleged defects first must be deemed unsafe to constitute an LIA violation.[178] In *Oglesby*, an engineer injured his back when he tried to lift a seat in his locomotive. The seat was secured by different sort of mechanism than Oglesby had expected, and he injured himself attempting to remove it.[179] The Ninth Circuit Court of Appeals denied Oglesby's claim that a violation could be proven by simply showing that the seat was not working efficiently; rather, a violation only occurs under the statute when a part is deemed "unsafe."[180]

Rejecting BNSF's application of *Oglesby* to the instant case, the Court noted that the seat on Oglesby's train was not functioning improperly—it was simply functioning in a way different from what Oglesby expected.[181] Evidence suggested that Weber's locomotive, on the other hand, was functioning improperly when it failed to propel the train forward.[182] Additionally, even if Cullison's order that Weber remain in the train contributed to

171. 49 U.S.C. § 20701 (2006).
172. *Weber*, 261 P.3d at 990–991 (citing *S. Ry. Co. v. Bryan*, 375 F.2d 155, 158 (5th Cir. 1967)).
173. *Id.*at 991.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Oglesby v. S.P. Transp. Co.*, 6 F.3d 603 (9th Cir. 1993).
178. *Weber*, 261 P.3d at 991–992.
179. *Id.* at 992 (citing *Oglesby*, 6 F.3d at 604).
180. *Id.* (citing *Oglesby*, 6 F.3d at 610).
181. *Id.*
182. *Id.*

her eventual injuries, Weber could still prevail under a FELA claim because a defendant can be held liable if its negligence "played a part—no matter how small—in bringing about the injury."[183] Therefore, the standard of proof in FELA cases is not the proximate cause standard argued by BNSF, but rather whether the defendant's negligence played any part whatsoever in the injury.

The Montana practitioner should note that the standard the Court will follow in FELA (and, by extension, LIA and SAA) cases is not the proximate cause standard found in most negligence cases but whether the defendant's negligence played any role, no matter how small, in the plaintiff's injuries. The Montana Supreme Court appears to be following the advice of the United States Supreme Court that the LIA's purpose as a safety statute requires it to be "liberally construed" in favor of an injured worker.[184] Though the Ninth Circuit denied application of the LIA protection in *Oglesby*, it would be hasty to characterize that court as hostile toward the United States Supreme Court's "liberally construed" standard. Rather, the *Oglesby* decision more likely reflects the Ninth Circuit's reluctance to grant relief based on nothing more than an individual employee's inability to use perfectly sound equipment. Thus, the Montana Court's holding in *Weber* should not be viewed as an outright rejection of the Ninth Circuit but merely, as the Court wrote, a refusal to "expand the application of *Oglesby* beyond its particular facts."[185]

—Justin Harkins

V. *Montana Trout Unlimited v. Beaverhead Water Company*[186]

In *Montana Trout Unlimited v. Beaverhead Water Company*, the Montana Supreme Court held that Montana Trout Unlimited ("Trout Unlimited") had both standing and a sufficient "ownership interest" in the Big Hole River Basin waters to require the Water Court to hold a hearing on Trout Unlimited's objections to certain claims in the preliminary decree of water rights in that basin.[187] The Court concluded that there is no statutory or regulatory restriction regarding who is allowed to file an objection to a water right claim contained in a temporary preliminary decree.[188]

In April 2007, the Water Court issued a temporary preliminary decree for the Big Hole River Basin containing all water right claims that existed

183. *Id.* at 991 (citing *CSX Transp. Inc. v. McBride*, 131 S.Ct. 2630 (2011)).
184. *Weber*, 261 P.3d at 990 (citing *Lilly v. Grant Trunk W. R.R. Co.*, 317 U.S. 481, 485 (1943)).
185. *Id.* at 992.
186. *Mont. Trout Unlimited v. Beaverhead Water Co.*, 255 P.3d 179 (Mont. 2011).
187. *Id.* at 186.
188. *Id.* at 184.

prior to July 1, 1973.[189] Trout Unlimited filed timely objections to certain claims contained therein.[190] The claimants moved to dismiss Trout Unlimited's objections, asserting that Trout Unlimited did not actually possess any water rights in the Basin, and therefore, did not have standing to object.[191] After converting the motion to dismiss to a motion for summary judgment, the Water Court granted summary judgment to the claimants, agreeing that Trout Unlimited did not have standing to file objections to the water rights claims.[192]

Trout Unlimited is a statewide organization dedicated to preserving and restoring Montana's coldwater fisheries.[193] It has actively participated in restoration efforts for wild fish in the Big Hole River Basin and is a participant in the Big Hole Watershed Committee.[194] Trout Unlimited has also made monetary contributions to support a voluntary drought plan on the Big Hole River in an effort to maintain minimum instream flows.[195] According to Trout Unlimited, unsupported large water rights claims could undermine its significant efforts at river and fish protection and restoration.[196]

Despite acknowledging Trout Unlimited's "historical contributions" and noting it had "contributed much to the outcomes" in the Basin, the Water Court nevertheless found that the provisions of Montana Code Annotated § 85–2–233 required objectors to demonstrate "good cause" by showing "an ownership interest in water or its use."[197] The Water Court found no evidence that Trout Unlimited or any of its members possessed any pre-1973 water rights claims, nor that the organization subsequently applied for any new use certificates or permits.[198] It went on to hold that in the absence of an "*ownership interest in water or its use*," "personal environmental and recreational interests" cannot establish the "personal stake" required for standing on objections to claims contained in a preliminary decree.[199] The Water Court also rejected Trout Unlimited's argument that it had a "legitimate role to play" in assessing statements the Department of Natural Resources and Conservation added to water rights abstracts which identify legal or factual issues associated with those claims.[200]

189. *Id.* at 180.
190. *Id.*
191. *Id.*
192. *Mont. Trout Unlimited*, 255 P.3d at 180.
193. *Id.* at 181.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Mont. Trout Unlimited*, 255 P.3d at 182.
199. *Id.* (emphasis in original).
200. *Id.*

Trout Unlimited raised two issues on appeal. First, it asserted the Water Court wrongly held that only the Department of Fish, Wildlife, and Parks ("DFWP") "may represent public recreational and conservation interests in water adjudication proceedings." Second, it argued that parties who do not hold water rights must still be allowed to request hearings on any of their objections in adjudication proceedings.[201]

Beginning with the first issue, the Montana Supreme Court found the Water Court's application of § 85–2–223 overbroad, and held that while the statute did limit DFWP as the sole party that could *establish* those uses, Trout Unlimited's goal was only to *enhance* the amount of instream flows available for recreation and fish habitat.[202] The Court then addressed the Water Court's holding that the same statute precluded an organization such as Trout Unlimited from filing objections in the water rights adjudication process. The Court traced the statutory process for the filing of objections and noted that the process required broad public notice, allowed objections for at least 180 days without limiting who could file those objections, required notice to those claimants whose rights had been objected to, and then required the Water Court to hold a hearing on the objections.[203] In conclusion, the Court held that "there is no statutory or regulatory restriction on who is entitled to file an objection to a claim of water right contained in a temporary preliminary decree . . . ."[204]

Next, the Court addressed the issue of who may request a hearing on objections in adjudication proceedings. Section 85–2–233 provides that the Water Court must hold a hearing "for good cause shown" on the objection to water rights claims.[205] "Good cause" is defined as "a written statement [showing] that a person has an ownership interest in water or its use that has been affected by the decree."[206] The Water Court interpreted Trout Unlimited's lack of explicit water rights as insufficient ownership interest which did not entitle Trout Unlimited to a hearing.[207]

The Court disagreed with this interpretation.[208] It first addressed the established rules of standing, and cited the general test that a "complaining party must clearly allege past, present or threatened injury to a property or civil right, and the alleged injury must be distinguishable from the injury to the public generally, but it need not be exclusive to the complaining

201. *Id.*
202. *Id.* at 183.
203. *Id.*
204. *Mont. Trout Unlimited*, 255 P.3d at 184.
205. *Id.* (citing Mont. Code Ann. § 85–2–233(1)(a)).
206. *Id.* (citing Mont. Code Ann. § 85–2–233(1)(b)).
207. *Id.*
208. *Id.*

party."[209] The Court also relied on the fact that it has allowed citizen organizations to challenge governmental actions.[210] It also disagreed with the Water Court's application of common law rules of standing and concluded that Trout Unlimited had standing only to challenge the constitutionality of agency decisions or governmental acts.[211] The Court further disagreed with the Water Court's reasoning that due to lack of water right ownership, Trout Unlimited had not demonstrated a "personal stake" in the adjudication process sufficient to challenge the claims of other water rights holders.[212]

Beginning its analysis with the Montana Constitution, the Court stated that all waters in Montana are the property of the State for the use of its people.[213] Further, the public owns instream rights to the recreational use of all navigable waters of the State, and both the Montana Constitution and the public trust doctrine "do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters."[214] The Court then quoted from a litany of statutes recognizing that the State holds Montana's waters for the benefit of the people and the State's responsibilities under the public trust doctrine.[215] It noted that "water is a public resource that cannot be owned by the individual users" and that water rights are usufructory—that is, they confer a right only to *use* water—not to own it.[216] Relying on these sources, the Court concluded that the claimants' assertion that a water right is the only method of establishing an "ownership interest" in the use of water was in error.[217]

Because Trout Unlimited demonstrated "personal environmental and recreational interests in the Big Hole River Basin" and because those interests were distinct from the public at large and could be adversely affected by the preliminary decree, the Court held Trout Unlimited had standing.[218] The Court also found that Trout Unlimited complied with all statutory requirements of requesting notice and properly objected to specific claims in the preliminary decree.[219] Therefore, because the State owns the waters of Montana and holds them in public trust for its citizens, and Trout Unlimited had demonstrated "undisputed specific interests" in the Big Hole Basin,

209. *Id.*

210. *Mont. Trout Unlimited*, 255 P.3d at 184.

211. *Id.*

212. *Id.*

213. *Id.* (citing Mont. Const. art. IX, § 3).

214. *Id.* at 184–185.

215. *Id.* at 185.

216. *Mont. Trout Unlimited*, 255 P.3d at 185 (quoting Albert W. Stone, *Montana Water Law* 70 (State Bar of Montana 1994)).

217. *Id.*

218. *Id.* at 185–186.

219. *Id.* at 186.

Trout Unlimited had an ownership or use interest sufficient to trigger a hearing on its objections.[220]

After addressing the specific issues of the case, the Court went on to clarify the scope of the Water Right Adjudication Rules. It noted that policy, statutory language, and caselaw supported a broad reach of the statutes as a whole.[221] It also found the Water Court had previously held that the process was designed "in the interest of resolving all potential disputes that could arise" in the process, and had specifically adopted a "broad tent" policy when considering objections to water compacts.[222] In other cases, the Water Court had actually invited widespread participation, notably in the *Bean Lake*[223] series of cases, and had even required DFWP to bear the costs of other parties with the goal of ensuring "full presentation of all public interests."[224]

Finally, the Court addressed the Water Court's concerns that the consequences of allowing Trout Unlimited to object would "open the process" such that it would "overwhelm the process" of adjudicating water rights.[225] Again, the Court disagreed with the Water Court, and found that the Water Court had previously invited widespread participation.[226] It also noted the Water Court had "sufficient procedural tools and powers" to streamline the process, including the power to order settlement conferences and appoint special masters.[227]

There were two dissents. Justice Rice dissented to the overall holding, and agreed with the Water Court that Trout Unlimited's lack of water rights should deny them the "ownership interest" requirement necessary to file objections in the adjudication process.[228] Justice Nelson also dissented in part, citing the broad scope of the decision.[229] While he agreed with the overall holding because Trout Unlimited had satisfied "constitutional, prudential, and statutory standing requirements," he noted that the broader ramifications of the decision will "expand the recognized parameters of standing beyond sustainable limits."[230]

Whether or not these concerns come to pass remains to be seen, but it is clear that the Court has definitively opened the water rights adjudication

220. *Id.*
221. *Id.* at 186–187.
222. *Mont. Trout Unlimited*, 255 P.3d at 187.
223. *In the Matter of the Dearborn Drainage*, 766 P.2d 228 (Mont. 1988).
224. *Mont. Trout Unlimited*, 255 P.3d at 187.
225. *Id.* at 188.
226. *Id.*
227. *Id.*
228. *Id.* at 193–194 (Rice, J., dissenting).
229. *Id.* at 188 (Nelson, J., concurring in part and dissenting in part).
230. *Id.* at 193.

process to a wider spectrum of interested parties. At a minimum, environmental groups or individuals who have participated in any water issues in a specific basin may now challenge preliminary adjudication decrees.

—*Jesse Kodadek*

VI. *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*[231]

In *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, the Montana Supreme Court addressed, as an issue of first impression, whether an employer can enforce a covenant not to compete after the employer ends the employment relationship.[232] The Court answered that question in the negative and added a threshold requirement that an employer establish a legitimate business interest in order to enforce a covenant not to compete.[233] This holding demonstrates the Court's general disfavor for covenants not to compete, particularly when the employer ends the employment relationship.[234]

In 1987, Junkermier, Clark, Campanella, Stevens, P.C. ("JCCS"), an accounting firm, hired Dawn Wrigg ("Wrigg"), a certified public accountant, to work as a staff accountant in its Helena office. Wrigg was promoted to shareholder status in 2003.[235] Prior to 2009, Wrigg signed three Shareholder Agreements, all featuring the same covenant not to compete.[236] The covenant provided that if the Agreement is "terminated for any reason" and the shareholder "provides professional services in a business . . . in competition with JCCS", the shareholder must compensate JCCS if she serves one of JCCS's clients within one year of the termination.[237]

In May 2009, Wrigg received a letter from JCCS's CEO stating that JCCS would not renew her most recent Agreement, due to expire June 30, 2009.[238] The letter stated the decision was best for all parties, "[g]iven the culture in the Helena office . . . " and concluded with a reminder of the JCCS covenant.[239] When Wrigg began searching for employment elsewhere, other accounting firms expressed concerns about the JCCS covenant.[240] Eventually, Wrigg accepted employment with Rudd and Company ("Rudd") at a significant pay cut ($87,000 at Rudd compared to $154,000 at

231. *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 265 P.3d 646 (Mont. 2011).
232. *Id.* at 648, 650.
233. *Id.* at 650.
234. *Id.* at 652.
235. *Id.* at 648.
236. *Id*.
237. *Wrigg*, 265 P.3d at 648.
238. *Id.*
239. *Id.*
240. *Id.*

JCCS); the pay cut was directly related to concerns Rudd had with the JCCS covenant.[241]

Wrigg conceded that she solicited business from, and worked for, JCCS's clients within a year of her termination, and JCCS subsequently sent her a demand letter seeking compensation pursuant to the JCCS covenant.[242] Wrigg sought judicial determination of the enforceability of the covenant.[243] The district court found the covenant reasonable and enforceable, and Wrigg appealed.[244]

In a unanimous opinion written by Justice Morris, the Montana Supreme Court reversed the district court and remanded the case for the district court to enter judgment in favor of Wrigg.[245] The Court addressed the issue of whether an employer can enforce a covenant not to compete when the employer ends the employment relationship.[246] The Court began its analysis by stating the well-established principle that "Montana law strongly disfavors [and strictly construes] covenants not to compete."[247] The Court also reads covenants in a light most favorable to the employee[248] and voids covenants that act as a full restraint on trade.[249] The Court reviews covenants that impose a partial restraint on trade, like the JCCS covenant, for reasonableness.[250] Under the Court's decision in *Dobbins, De Guire & Tucker, P.C. v. Rutherford, MacDonald & Olson*,[251] a covenant is considered reasonable if it meets the following three elements:

> (1) The covenant should be limited in operation either as to time or place;
> (2) the covenant should be based on some good consideration; and
> (3) the covenant should afford reasonable protection for and not impose an unreasonable burden upon the employer, the employee, or the public.[252]

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241. *Id.*

242. *Id.*

243. *Wrigg*, 265 P.3d at 648.

244. *Id.*

245. *Id.* at 654.

246. *Id.* at 648.

247. *Id.* (citing *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 902 (Mont. 2008) (stating that "[s]ince Montana's public policy strongly disfavors agreements in restraint of trade . . . we construe non-compete agreements strictly")).

248. *Id.* at 649 (citing *Dumont v. Tucker*, 822 P.2d 96, 98 (Mont. 1991) (quoting 54 Am. Jur. 2d *Monopolies and Restraints of Trade* § 521, which reads: "Contracts not to compete are by their nature in restraint of trade and are not favorably regarded by the courts. In interpreting or construing contracts which impose restrictions on the right of a party to engage in a business or occupation, the court is governed by a strict rule of construction. The agreement will not be extended by implication, and it will be construed in favor of rather than against the interest of the covenantor.")).

249. *Wrigg*, 265 P.3d at 649 (citing *Mungas v. Great Falls Clinic*, LLP, 221 P.3d 1230, 1237–1238 (Mont. 2009).

250. *Id.* (citing *Mont. Mt. Prods. v. Curl*, 112 P.3d 979, 980–982 (Mont. 2005).

251. *Dobbins, De Guire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, 708 P.2d 577 (Mont. 1985).

252. *Wrigg*, 265 P.3d at 649 (citing *Mungas*, 221 P.3d at 1237 (citing *Dobbins, De Guire & Tucker, P.C.*, 708 P.2d at 580)).

Although the district court found the JCCS covenant reasonable under this standard, Wrigg argued on appeal that JCCS should have to assert a legitimate business interest in order to enforce the covenant.[253] Wrigg further argued that an employer lacks such an interest when it ends the employment relationship.[254] JCCS argued only that Montana caselaw bound the Court to rule in its favor, without citing any caselaw finding a covenant enforceable when the employer ended the employment relationship or providing a "policy argument to offset Montana's public policy against restrictive covenants."[255] JCCS argued that the covenant was reasonable *per se* because it mirrored the language in *Dobbins*, but the Court determined that JCCS misinterpreted *Dobbins*.[256] *Dobbins* did not declare covenants with particular language enforceable as a matter of law.[257] "Dobbins simply held that covenants . . . should be subject to a reasonableness analysis under appropriate circumstances. . . . [which] require that legitimate business reasons exist to justify the covenant."[258]

The Court acknowledged that whether an employer must establish a legitimate business interest in order to enforce a covenant was an issue of first impression.[259] Such a requirement "acknowledges the long standing principle that a covenant that serves no legitimate business interest necessarily is oppressive and invalid."[260] The Court recognized the "deep, historical roots"[261] of the requirement and that a lack of legitimate business interest necessarily equates to a "greater restraint than is needed."[262] It noted that in other jurisdictions a legitimate business interest is a threshold inquiry in reviewing a covenant,[263] and other "[c]ourts will not enforce covenants if an employer lacks a legitimate business interest."[264] Finally, the Court clarified that while the *Dobbins* test does not explicitly require a legitimate business interest, the Court in *Dobbins* did cite the American Law Reports, which requires such an interest.[265] Given these conclusions, the Court "adopt[ed] expressly the requirement that an employer must establish a le-

253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 649–650.
258. *Wrigg*, 265 P.3d at 650.
259. *Id.*
260. *Id.* (citing Richard A. Lord, *Williston on Contracts* vol. 6, § 30:4, 164–175 (4th ed., West 2009)).
261. *Id.*
262. *Id.* (citing Restatement (Second) of Contract § 188(1)(a) (1981)).
263. *Id.* (noting *Syncom Indus., Inc. v. Wood*, 920 A.2d 1178, 1185 (N.H. 2007); *Freiburger v. J-U-B Engrs., Inc.*, 111 P.3d 100, 105 (Idaho 2005)).
264. *Wrigg*, 265 P.3d at 650 (noting *Am. Inst. of Chem. Engrs. v. Reber-Friel Co.*, 682 F.2d 382, 387 (2d Cir. 1982); *Hess v. Gebhard & Co.*, 808 A.2d 912, 922 (Pa. 2002)).
265. *Id.* (citing *Dobbins, De Guire & Tucker, P.C.*, 708 P.2d at 580).

gitimate business interest as a threshold step to [the] analysis of the reasonableness of a covenant."[266]

To determine whether the JCCS covenant served a legitimate business interest, the Court looked to other jurisdictions to define the nature of the business interest that a covenant serves.[267] First, the Court concluded that in order to have a legitimate business interest in a covenant, it must serve to "protect an employer's good will, customer relationships, or trade information."[268] Second, the Court recognized that the disfavor for covenants not to compete is heightened when an employer chooses to end the employment relationship because "termination creates inequitable circumstances for an employee" and enforcement of a covenant "could impoverish an employee who has done nothing to warrant his termination."[269] Accordingly, the Court confirmed that a stricter standard for enforcement applies when an employee is terminated without cause.[270] Third, the Court established that "an employer assumes the risk of competition from a former employer when it chooses to end the employment relationship" and therefore lacks a legitimate business interest in enforcing a covenant.[271]

The Court clarified its holding in two ways. First, it did not preclude all employers that end an employment relationship from seeking to enforce a covenant not to compete.[272] Some employee conduct or misconduct that is detrimental to the employer or its clients—such as the employee using trade secrets, customer relationships, or proprietary information to compete with the employer—could give an employer a legitimate reason to enforce a covenant; although the employer bears the burden of establishing such a reason.[273] Second, in response to JCCS's argument that it did not terminate Wrigg, but that her contract expired, the Court declared that its "analysis

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266. *Id.* The Court went on to say: "This approach comports with the disfavor of covenants not to compete expressed in Montana law." *Id.*

267. *Id.*

268. *Id.* at 651 (noting Restatement (Second) of Contracts at § 188, cmt. b; *Guardian Fiberglass, Inc. v. Whit Davis Lumber Co.*, 509 F.3d 512, 516 (8th Cir. 2007); *Rao v. Rao*, 718 F.2d 219, 224 (7th Cir. 1983); *United Labs., Inc. v. Kuykendall*, 370 S.E.2d 375, 381–382 (N.C. 1988); *Boisen v. Petersen Flying Serv., Inc.*, 383 N.W.2d 29, 34–35 (Neb. 1986)). The Court went on to explain: "This limitation ensures that businesses will use a covenant only when less restrictive measures will not suffice." *Id.*

269. *Id.* at 652 (noting *Morris v. Schroder Capital Mgt. Intl.*, 859 N.E.2d 503, 506–507 (N.Y. 2006); *Ma & Pa, Inc. v. Kelly*, 342 N.W.2d 500, 503 (Iowa 1984); *Post v. Merrill Lynch, Pierce, Fenner, & Smith*, 397 N.E.2d 358, 360–361 (N.Y. 1979)).

270. *Wrigg*, 265 P.3d at 652 (noting *C. Monitoring Serv., Inc. v. Zakinski*, 553 N.W.2d 513, 520 (S.D. 1996); *C. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 35 (Tenn. 1984)).

271. *Id.* at 653 (noting *Rao*, 718 F.2d at 224; *Insulation Corp. of Am. v. Brobston*, 667 A.2d 729, 736 (Pa. 1995)).

272. *Id.*

273. *Id.* (noting *Whitmyer Bros., Inc. v. Doyle*, 274 A.2d 577, 583 (N.J. 1971) ("refusing to enforce a covenant where the employer had failed to make an adequate evidentiary showing that it needed to enforce the covenant to protect against the employee using trade secrets to compete with the company")).

concerning an employer's legitimate interest in the enforceability of covenants applies to both a terminated contract and an expired contract."[274] Accordingly, the Court held that JCCS could not enforce its covenant against Wrigg because it ended the employment relationship and failed to provide any evidence giving rise to a legitimate business interest for enforcement.[275]

Wrigg establishes that, as a threshold matter, an employer must have a legitimate business interest in a covenant not to compete for it to be reasonable under the *Dobbins* test. *Wrigg* also establishes there is generally no legitimate business interest in a covenant not to compete when the employer ends the employment relationship. Consistent with its precedential disfavor for covenants not to compete, the Court in *Wrigg* made it much more difficult for employers to enforce those covenants.

—Stephanie Holstein

VII. *STOKES V. MONTANA THIRTEENTH JUDICIAL DISTRICT COURT*[276]

In *Stokes v. Montana Thirteenth Judicial District Court*, the Montana Supreme Court held that Montana's statute prohibiting evidence of seatbelt use in civil cases does not apply to negligence or products liability claims based on the design or conditions of seatbelt restraint systems.[277] After determining that supervisory control was appropriate, the Court concluded that Montana Code Annotated § 61–13–106 did not preclude Dennis Stokes ("Stokes") from presenting evidence of seatbelt use in his negligence and products liability claims, which were both based on allegations of a defective seatbelt.[278]

The underlying case arose out of a motor vehicle accident that killed Peter Carter ("Carter").[279] Stokes, the Personal Representative of Carter's Estate, filed a wrongful death and survival action against the other driver, Todd Durham ("Durham"); the manufacturer, Ford; and the rental car company, Overland West, Inc. ("Overland").[280] Though Durham admitted to negligently causing the crash, Stokes maintained that Carter would have only sustained minor injuries but for the malfunctioning of his seatbelt.[281] Stokes claimed Ford negligently designed, developed, and tested the

274. *Id.* at 654.
275. *Id.*
276. *Stokes v. Mont. Thirteenth Jud. Dist. Ct.*, 259 P.3d 754 (Mont. 2011).
277. *Id.* at 759.
278. *Id.* at 757, 759.
279. *Id.* at 755.
280. *Id.*
281. *Id.* at 756.

seatbelt and alleged strict products liability for Ford's defective design.[282] He also asserted Overland negligently maintained the vehicle and was strictly liable for inserting the vehicle in the stream of commerce.[283]

Following the language of § 61–13–106,[284] which prohibits evidence of seatbelt use in civil claims, and the reasoning in *Chapman v. Mazda Motor of America, Inc.*,[285] the district court ruled the seatbelt use evidence was admissible in Stokes's products liability claims, but inadmissible in the negligence claims.[286] The court reasoned that admitting the seatbelt use evidence solely for the products liability claims would confuse the jury too much, even with a limiting instruction.[287] Accordingly, it instructed Stokes that he would have to drop his negligence claims against all three defendants if he planned on using the evidence in his products liability claims.[288]

The Montana Supreme Court granted Stokes's petition for supervisory control after emphasizing that such control is only exercised in "extraordinary circumstances."[289] The Court determined: preparation and presentation would be significantly affected if both legal theories were allowed; the ruling could determine if Stokes's claims would be tried alone, together, or at all; the course of litigation would be altered dramatically depending on resolution of the question; the district court's conclusions, if incorrect, would impact the entire proceedings including settlement negotiations and trial; appeal would be an insufficient remedy because of the costs and delay of a retrial; and, denial of a speedy remedy through supervisory control on such clear-cut legal issues would cause a substantial injustice.[290]

The Court analyzed *Chapman*'s application of § 61–13–106 and subsequently discussed the purpose of the statute.[291] The *Chapman* Court held that § 61–13–106 did not apply to product liability claims after it determined that the statute focused on conduct, which relates to negligence, and not on the condition of the vehicle, which relates to strict liability.[292] The Court agreed with *Chapman*'s conclusion that § 61–13–106 does not apply "when a defective or inoperable restraint system is at issue in a design

282. *Stokes*, 259 P.3d at 756.
283. *Id.*
284. Mont. Code Ann. § 61–13–106 (2011) reads: "Evidence of compliance or failure to comply with 61–13–103 [the Seatbelt Use Required law] is not admissible in any civil action for personal injury or property damage resulting from the use or operation of a motor vehicle, and failure to comply with 61–13–103 does not constitute negligence."
285. *Chapman v. Mazda Motor of Am., Inc.*, 7 F. Supp. 2d 1123 (D. Mont. 1998).
286. *Stokes*, 259 P.3d at 756.
287. *Id.*
288. *Id.*
289. *Id.* at 757 (citing *Safeco v. Mont. Eighth Jud. Dist. Ct.*, 2 P.3d 834, 837 (Mont. 2000)).
290. *Id.*
291. *Id.* at 757–758.
292. *Chapman*, 7 F. Supp. 2d at 1126–1127.

case," and it expounded that the statute is not limited to products liability claims when the issue is the condition of the seatbelt.[293] Since Stokes directly alleged that the seatbelt's failure caused Carter's injuries, the Court held that evidence relating to seatbelt use must be allowed in Stokes's claims of negligent design and maintenance.[294] The Court reasoned further that the intention of the Seatbelt Use Act is to promote seatbelt use, not to create civil liability arising from fault for not wearing a seatbelt.[295]

The Court discussed how most state courts have held that seatbelt use evidence is admissible in defective design or seatbelt condition cases when interpreting statutes similar to § 61–13–106.[296] Disagreeing with Ford's contentions that it would suffer prejudice from the admission of seatbelt use evidence, the Court predicted that the jury would unavoidably discover the seatbelt use because of the nature of the claims.[297] The Court also dismissed Ford's parallel argument that the Court's holding would create a "one-way street" by always allowing evidence of use but never evidence of nonuse.[298] It approvingly cited similar cases from sister jurisdictions in which the negligent designs of seat backs and restraint systems were at issue.[299] In these cases, the defendants successfully introduced evidence of seatbelt nonuse, despite seatbelt use statutes similar to § 61–13–106.[300] The Court concluded that § 61–13–106 does not prohibit evidence of seatbelt use or nonuse in a claim sounding in negligence or strict liability that is based on a defect in the occupant restraint system.[301] Interestingly, the Court did not specify how related the seatbelt nonuse must be to the alleged crashworthiness defect, but the nonuse evidence apparently could be admissible in claims alleging defective or negligently designed airbags or seat backs.

Finally, the Court addressed the necessity of formulating a limiting instruction to clarify for the jury the permissive purposes for which the evidence may be used.[302] The Court resolved that the district court could

293. *Stokes*, 259 P.3d at 758.

294. *Id.*

295. *Id.*

296. *Id.* at 758–759 (*see Bridgestone/Firestone, Inc. v. Glyn–Jones*, 878 S.W.2d 132 (Tex. 1994); *Bishop v. Takata Corp.*, 12 P.3d 459 (Okla. 2000)).

297. *Id.* at 759.

298. *Id.*

299. *Stokes*, 259 P.3d at 759 (s*ee e.g. Gen Motors Corp. v. Wolhar*, 686 A.3d 170, 172–173 (Del. 1996) (affirmative defense that injuries caused by plaintiff's failure to wear seatbelt allowed); *Clark v. Mazda Motor Corp.*, 68 P.3d 207, 209 (Okla. 2003) (seatbelt nonuse admissible where seat back and seat design at issue); *Gardner v. Chrysler Corp.*, 89 F.3d 729, 732 (10th Cir. 1996) (seatbelt nonuse admitted where plaintiff claimed defective restraint system).

300. *Id.*

301. *Id.*

302. *Id.* at 759–760.

fashion a suitable limiting instruction without risking substantial jury confusion and provided examples of instructions used in similar cases from other states.[303]

In sum, *Stokes* clarified that § 61–13–106 does not apply to claims alleging negligent design or strict products liability based on conditions of the restraint systems. The Montana practitioner should recognize that in these types of claims, § 61–13–106 will not preclude plaintiffs from showing that people injured in vehicle accidents were wearing seatbelts. The practitioner should also note that evidence of seatbelt nonuse will be admissible in claims arising out of the condition of vehicular restraint systems, apparently including allegations of defective or negligently designed airbags. Thus, in claims based on the condition of vehicular restraint systems, *Stokes* will likely operate to benefit both plaintiffs and defendants, depending on whether the injured person was wearing his or her seatbelt.

—*Peter Ivins*

VIII. *CALDWELL V. MACO WORKERS' COMPENSATION TRUST*[304]

In *Caldwell v. MACo Workers' Compensation Trust*, the Montana Supreme Court declared a workers' compensation statute unconstitutional for violating the Equal Protection Clause of the Montana Constitution.[305] Montana Code Annotated § 39–71–710 eliminated rehabilitation benefits to claimants old enough to qualify for Social Security retirement benefits.[306] The Court held that cost alone was insufficient to justify disparate treatment of similar classes.[307] Additionally, the Court determined that "eligibility for Social Security benefits bears no rational relationship to a worker's ability or willingness to return to work."[308]

On November 25, 2005, Harold Caldwell ("Caldwell") slipped and fell on an icy airport taxiway and suffered traumatic head injuries while working as the Ravalli County airport manager.[309] At the time of the accident, Caldwell was 77 years old.[310] He worked 57 years of his life and only stopped due to the injury.[311]

303. *Id.* at 760.
304. *Caldwell v. MACo Workers' Compen. Trust*, 256 P.3d 923 (Mont. 2011).
305. *Id.* at 931.
306. *Id.* at 925.
307. *Id.* at 928.
308. *Id.* at 931.
309. *Id.* at 924.
310. *Caldwell*, 256 P.3d at 924.
311. *Id.*

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MACo, the airport's insurer, paid Caldwell's claim of medical and wage-loss benefits.[312] On February 11, 2008, Caldwell reached medical stability and asked MACo to initiate rehabilitation services pursuant to Montana law, so that he could re-enter the workforce.[313] MACo denied the rehabilitation benefits to Caldwell based on § 39–71–710, which classifies any disabled worker eligible for Social Security retirement benefits as retired.[314] Under the statute, retired workers are precluded from receiving permanent partial disability benefits ("PPD"), permanent total disability benefits ("PTD"), and rehabilitation benefits for disabling injuries.[315]

Caldwell challenged the constitutionality of § 39–71–710 in Workers' Compensation Court ("WCC").[316] He argued that the statute violated equal protection by prohibiting benefits based solely on the claimant's eligibility for Social Security; the WCC agreed.[317] The WCC ruled that the statute treated two similarly situated classes disparately without a reasonable relation to a legitimate government interest.[318] MACo appealed the WCC's ruling.[319]

In the majority opinion authored by Justice Morris, the Court began by articulating the three-step test for equal protection challenges.[320] First, the Court considers whether the statute creates similarly situated classes; second, it determines the appropriate level of constitutional scrutiny; and finally, it evaluates the challenge under the appropriate level of scrutiny.[321]

Here, the parties conceded that the statute "creates two similarly situated classes and treats them differently."[322] The classes consist of claimants who are eligible for Social Security retirement benefits in addition to their rehabilitation benefits and those who are not.[323] The parties also agreed that rational basis was the appropriate level of scrutiny to apply to the statute.[324] The parties' sole dispute was whether the statute passed rational basis review, which requires that it "bear a rational relationship to a legitimate governmental interest."[325]

312. *Id.*
313. *Id.* at 925 (citing Mont. Code Ann. § 39–71–1006 (2011)).
314. *Id.*
315. *Id.*
316. *Caldwell*, 256 P.3d at 925.
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.* at 926.
321. *Id.*
322. *Caldwell*, 256 P.3d at 926.
323. *Id.*
324. *Id.*
325. *Id.*

Before analyzing the constitutionality of § 39–71–710, the Court reviewed previous constitutional challenges to the statute.[326] In *Reesor v. Montana State Fund,* the Court held that denying a claimant PPD benefits based solely on eligibility for Social Security benefits did not pass rational basis review.[327] But, in *Satterlee v. Lumberman's Mutual Casualty Company*, the Court held that the "age-based elimination of permanent total disability benefits . . . [were] rationally related to the legitimate governmental interest of providing wage-loss benefits that bear a reasonable relationship to actual wages lost."[328] The difference is that Montana law limits PPD benefits to a period of 375 weeks and to a percentage of a worker's lost wages, whereas PTD benefits are paid for the duration of the worker's disability.[329] The *Satterlee* Court concluded that because PTD benefits could turn into a lifetime benefit when their purpose is to assist the worker over his work life, § 39–71–710 was a rational way to limit the benefit; therefore, it passed constitutional review.[330] The *Satterlee* Court did not overturn *Reesor*, rather it concluded that the benefits were too different to be analyzed in the same way.[331] *Caldwell* presented a challenge to the third type of benefit barred to workers classified as retired under § 39–71–710: rehabilitation benefits.[332]

Applying rational basis review, the Court first noted that like PPD benefits, rehabilitation benefits are limited to a set number of weeks.[333] Therefore, there is no risk that rehabilitation benefits could become a lifetime benefit, as was the concern in *Satterlee* with PTD benefits.[334] The Court then analyzed whether there is a legitimate governmental interest rationally related to the elimination of the rehabilitation benefits.[335] The Court noted that although cost containment of the workers' compensation system is a legitimate governmental interest, it cannot be the only reason for disparate treatment.[336]

The Court summed up the arguments of MACo and amicus Montana State Fund ("MSF") as follows:

> MACo argues that the legislature has a legitimate interest in (1) creating a wage replacement system, (2) assisting the worker at a reasonable cost to the employer, (3) controlling the costs of the workers' compensation program in

326. *Id.* at 926–927.
327. *Reesor v. Mont. St. Fund*, 103 P.3d 1019, 1024 (Mont. 2004).
328. *Satterlee v. Lumberman's Mut. Cas. Co.*, 222 P.3d 566, 574 (Mont. 2009).
329. *Caldwell*, 256 P.3d at 927 (citing Mont. Code Ann. §§ 39–71–703 and 39–71–702(1)).
330. *Id.* at 927–928 (citing *Satterlee*, 222 P.3d at 573–574).
331. *Satterlee*, 222 P.3d at 573.
332. *Caldwell*, 256 P.3d at 925.
333. *Id.* at 928 (citing Mont. Code Ann. § 39–71–1006).
334. *Id.*
335. *Id.*
336. *Id.*

order to continue providing benefits, and (4) avoiding duplication or overlapping of benefits. Amicus MSF adds that the legislature has a legitimate interest in (5) providing wage-loss benefits that bear a reasonable relationship to actual wages lost, (6) creating reasonably constant rates for employers, and (7) tailoring benefit entitlement to need.[337]

In response to each argument, the Court determined that most of the interests were not separate from the overall issue of cost-containment.[338] Additionally, the Court stressed that rehabilitation benefits serve an entirely separate purpose from Social Security benefits, and therefore there is no duplication of benefits for Social Security-eligible claimants.[339] The Court also rejected MACo and MSF's underlying argument that older workers do not deserve rehabilitation because they are not a good investment.[340]

In conclusion, the Court agreed with the WCC's determination that the elimination of rehabilitation benefits in § 39–71–710 does not rationally relate to any legitimate governmental interest and is therefore unconstitutional.[341] It noted that eligibility for Social Security retirement benefits turns solely on age, not whether a worker is able or willing to return to work (the purpose of rehabilitation benefits).[342]

Justice Beth Baker dissented from the majority, finding that, like *Satterlee*, the challenged statute "rationally advances the governmental purpose of providing wage-loss benefits that bear a reasonable relationship to actual wages lost."[343] The dissent found that it is rational to withhold benefits from older workers because "statistically speaking" most people's work life ends upon eligibility for Social Security.[344] In response, the majority declared that "the statistical majority holds no monopoly on equal protection guarantees"[345]

The Montana practitioner should take note of *Caldwell* and the Court's analysis of Montana Code Annotated § 39–71–710 under rational basis review. *Caldwell* held that the statute was unconstitutional for violating equal protection by denying rehabilitation benefits to workers eligible for Social Security retirement benefits. The Court rejected that cost on its own is a legitimate governmental interest, and concluded that there is no rational basis for denying such benefits to workers eligible for Social Security.

—*Amy McNulty*

337. *Id.* at 929.
338. *Caldwell*, 256 P.3d at 929.
339. *Id.* at 929–930.
340. *Id.* at 930.
341. *Id.* at 931.
342. *Id.*
343. *Id.* at 933 (Baker, J., dissenting).
344. *Caldwell*, 256 P.3d at 933.
345. *Id.* at 930 (majority).

IX. *Flynn v. Montana State Fund*[346]

On November 29, 2011, the Montana Supreme Court issued *Flynn v. Montana State Fund* ("*Flynn III*"), its third opinion on a workers' compensation case brought by Robert Flynn.[347] The Court's latest decision clarifies the retroactive application of judicial decisions to workers' compensation cases.[348] Previous cases held that new judicial decisions would be applied retroactively to pending cases, but not to those already "final or settled."[349] A settled claim is "a department-approved or court-ordered compromise of benefits between a claimant and an insurer or *a claim that was paid in full*."[350] *Flynn III* clarifies the meaning of "paid in full" by affirming the Workers' Compensation Court's ("WCC") determination that a claim is settled when all scheduled benefits have been paid prior to the new judicial decision.[351]

Robert Flynn was diagnosed as being totally disabled in 1993 due to an occupational disease.[352] He filed a claim with State Fund, which accepted his claim and paid him benefits.[353] Flynn also filed a claim with Social Security seeking disability benefits.[354] A judge retroactively awarded Flynn Social Security benefits.[355] In response to Flynn's receipt of Social Security benefits, State Fund reduced its own payments and applied an offset to compensate for prior over-payments caused by the retroactive application of Social Security benefits.[356] In *Flynn v. State Compensation Insurance Fund* ("*Flynn I*"), the Court determined that State Fund must contribute proportionally to the litigation costs of a claimant who secures Social Security benefits that reduce State Fund's liability.[357]

In *Flynn III*, both Flynn and State Fund challenged the WCC definition of "paid in full" for purposes of determining retroactive application of judicial decisions.[358] The WCC determined that a claim paid in full is:

> A claim in which all benefits to which a claimant is entitled[,] pursuant to the statutes applicable to that claim, are paid prior to the issuance of a judicial decision. If any benefits are paid on the claim after the issuance of a judicial

346. *Flynn v. Mont. St. Fund*, 267 P.3d 23 (Mont. 2011) [hereinafter *Flynn III*].
347. *Id.* at 24.
348. *Id.*
349. *Id.* at 24, 25.
350. *Id.* at 25 (emphasis added) (quoting *Flynn v. Mont. St. Fund*, 197 P.3d 1007, 1009 (Mont. 2008) [hereinafter *Flynn II*].
351. *Flynn III*, 267 P.3d at 25.
352. *Flynn v. St. Compen. Ins. Fund*, 60 P.3d 397, 398 (Mont. 2002) [hereinafter *Flynn I*].
353. *Id.* at 398.
354. *Id.* at 399.
355. *Id.*
356. *Id.*
357. *Id.* at 400.
358. *Flynn III*, 267 P.3d at 24, 27.

> decision, the claim can no longer be considered "paid in full" and is subject to retroactive application of the judicial decision.[359]

Flynn objected to the first sentence of this standard and appealed the determination that his claim was "paid in full" once all benefits to which he was entitled were paid.[360] State Fund objected to the second sentence and appealed the determination that a claim could be reopened if any benefits were paid after a judicial decision.[361]

Flynn argued that his claim should not be considered "paid in full" because he retained the right to seek future benefits.[362] He argued that a claim may be inactive when all scheduled payments are made, but that it is not "paid in full" because the claimant may still receive future compensation under Montana Code Annotated § 39–71–739 if the disability becomes aggravated.[363] Therefore, a claim is only "paid in full" when it is the subject of a judgment or settlement.[364] The Court rejected this theory because the theory failed to recognize the definition of a settled claim under § 39–71–107(7)(a) which states that "'settled claim' means a department-approved or court-ordered compromise of benefits between a claimant and an insurer or a claim that was paid in full."[365] The Court explained that under Flynn's theory, no claim could be paid in full unless it qualified under the first part of the definition, thus the inclusion of the phrase "paid in full" would have no independent significance.[366] Instead, the Court interpreted the law to give significance to all the statutory language.[367]

State Fund argued that the WCC decision undermined the finality of the "paid in full" standard by allowing a previously finalized claim to become "un-finalized," thus creating uncertainty in the claims process.[368] The Court rejected that argument because, under § 39–71–739 and its prior decision in *Flynn v. Montana State Fund* ("*Flynn II*"), a claim is not considered final if it is adjusted due to an aggravation of the disability.[369] Furthermore, the Court distinguished a case that is "closed" or "inactive" from one that is "final or settled."[370]

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359. *Id.* at 25 (brackets in original) (quoting Or. Re: Paid in Full, *Flynn v. Mont. St. Fund*, 2010 MTWCC 20, ¶ 1 (July 1, 2010).

360. *Id.* at 25–26.

361. *Id.* at 27.

362. *Id.* at 26.

363. *Id.*; Mont. Code Ann. § 39–71–739 (2011).

364. *Flynn III*, 267 P.3d at 26–27.

365. *Id.* at 26; Mont. Code Ann. § 39–71–107(7)(a) (2005) (recodified as Mont. Code Ann. § 39–71–107(10)(a)).

366. *Flynn III*, 267 P.3d at 26.

367. *Id.*

368. *Id.* at 27.

369. *Id.*; *Flynn II*, 197 P.3d at 1012.

370. *Flynn III*, 267 P.3d at 27.

The Court acknowledged that "[t]he workers' compensation system is by nature open-ended."[371] Nevertheless, it reasoned it must apply some standard of finality to workers' compensation cases.[372] The Court affirmed the WCC decision which "properly gives credit to the necessary balance between finality and fairness."[373] In particular, the Court agreed that " 'it is the *actual* payment of benefits, as opposed to the *potential* payment of benefits, that renders a claim no longer 'paid in full,' and subject to retroactive application of *Flynn I*.' "[374] Thus, the existence of actual payment is controlling for both the claimant and State Fund. Where it is lacking, the claimant cannot seek the application of a new judicial standard; where it is present, State Fund is subject to new judicial standards, even if the claim had previously been classified as finalized.

Flynn III solidifies the determination of the WCC that a workers' compensation claim will be considered paid in full if and only if there are no further actual payments on the claim. This rule applies a clear standard to determine when new judicial decisions will apply to old claims; however, that standard is fluid because a claim's finality may be temporary. Even Flynn's much litigated claim may yet be subject to subsequent judicial decisions if a change in circumstances requires State Fund to make additional payments to Flynn. Thus, Montana practitioners in workers' compensation should be aware that retroactivity does not apply to claims that have been fully paid, but that any new payments on a previously finalized claim will open that claim to retroactive application of judicial decisions.

—Samuel Preta

X. *Lampi v. Speed*[375]

Before the Montana Supreme Court decided *Sunburst School District No. 2 v. Texaco, Inc.*[376] in 2007, plaintiffs whose property was damaged were limited to diminution in market value as compensation.[377] In *Sunburst*, the Court made a substantial shift in its jurisprudence by "rejecting a one-size-fits-all approach to property damages"[378] and adopting § 929 of the *Restatement (Second) of Torts*, which, in addition to diminution in market value damages, also allows for restoration damages in "appropriate

371. *Id.* at 26.
372. *Id.*
373. *Id.*
374. *Id.* at 27 (emphasis in original) (quoting Or. Re: Paid in Full, ¶ 9).
375. *Lampi v. Speed*, 261 P.3d 1000 (Mont. 2011).
376. *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.2d 1079 (Mont. 2007).
377. *Lampi*, 261 P.3d at 1004 (citing *Burk Ranches, Inc. v. Mont.*, 790 P.2d 443, 445 (Mont. 1990)).
378. *Id.* at 1004.

cases."[379] In *Lampi v. Speed*, the Montana Supreme Court applied the *Sunburst* restoration damages rule for the first time.[380] The *Lampi* decision clarified the elements a plaintiff must establish to receive restoration damages and demonstrated that restoration damages may be applied in circumstances besides the toxic contamination seen in *Sunburst*.

The case arose from a fire that burned much of Rohnn Lampi's property in Red Lodge, Montana.[381] Lampi purchased the forty acres as a vacation and retirement home because of "its aesthetic beauty and wild setting," rather than for investment purposes.[382] He especially liked an aspen grove behind his home "that provided shade, privacy, and wildlife viewing."[383] Lampi's neighbor, Allen Speed, admitted he negligently dumped ashes, causing a wildfire that burned Lampi's property.[384] Although firefighters saved Lampi's house, the fire extensively damaged the rest of the property, killing hundreds of pine and aspen trees.[385] Lampi testified that he wanted to take all available measures to restore his property and he hoped to one day pass the land to his children and grandchildren.[386]

Because Speed admitted liability for the fire, the only issue in the case was the measure of Lampi's damages.[387] Lampi filed several motions, including two motions for summary judgment, seeking to establish restoration damages as the correct measure of damages.[388] But the district court denied the motions.[389] At trial, experts for Lampi and Speed disagreed on the amount required to restore the property. Lampi's restoration expert estimated it would cost $1,050,000, while Speed's estimated it would cost roughly $550,000.[390] Additionally, Speed's property expert testified that the property value diminished by $193,800 as a result of the fire.[391] The district court gave the jury two alternative instructions regarding damages.[392] The first said the jury could award the diminution in market value resulting from the fire as damages.[393] The second said the jury could award restoration damages if the jury found that diminution in market value failed

379. *Id.* at 1004–1005.
380. *Id.* at 1004.
381. *Id.* at 1002.
382. *Id.*
383. *Lampi*, 261 P.3d at 1002.
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.* at 1002–1003.
389. *Lampi*, 261 P.3d at 1002.
390. *Id.* at 1002–1003.
391. *Id.* at 1003.
392. *Id.*
393. *Id.*

to "fully compensate the plaintiff."[394] Without specifying whether the damages were due to diminution in value or restoration damages, the jury awarded Lampi $250,000.[395] Lampi appealed the award.[396]

On appeal, the parties' arguments focused on their interpretations of the restoration damages rule from *Sunburst*.[397] Speed argued that restoration damages should only apply to toxic contamination, like in *Sunburst*, or similar situations where the injury could not naturally restore itself.[398] He argued that the Court should instead apply *Kebschull v. Nott*,[399] which said diminution in market value was the correct measure of damages for vegetation destroyed by fire.[400] The Court quickly dismissed Speed's argument, saying *Kebschull* was inapplicable because it predated the adoption of restoration damages in *Sunburst*.[401] Lampi argued that, based on his interpretation of *Sunburst*, he should receive restoration damages as a matter of law because he established four elements: (1) he suffered a temporary injury; (2) he had "reasons personal" to restore the property; (3) he genuinely intended to restore the property; and (4) restoration costs were not disproportionate to the value of the property.[402] The Montana Supreme Court also rejected Lampi's interpretation of the requirements for restoration damages and further refined the *Sunburst* rule.[403]

The *Sunburst* Court adopted § 929 of the *Restatement (Second) of Torts*, in the context of toxic contamination in Sunburst, Montana.[404] In that case, gasoline leaks from a refinery contaminated soil and groundwater with the carcinogen benzene.[405] The contamination essentially rendered the plaintiffs' property unsalable.[406] The Court recognized that without restoration damages in excess of the diminution in value of the property, tortfeasors would have little incentive to prevent such contamination and the Court's refusal to apply restoration damages would essentially create "a private right of inverse condemnation."[407] For those reasons, the *Sunburst* Court adopted § 929, which allowed a plaintiff to choose between diminution in market value and restoration damages, but only in "appropriate

394. *Id.*
395. *Lampi*, 261 P.3d at 1003.
396. *Id.*
397. *Id.*
398. *Id.* at 1003–1004.
399. *Kebschull v. Nott*, 714 P.2d 993 (Mont. 1986).
400. *Lampi*, 261 P.3d at 1005.
401. *Id.* at 1005.
402. *Id.* at 1003.
403. *Id.* at 1004.
404. *Id.*
405. *Id.*
406. *Lampi*, 261 P.3d at 1004.
407. *Id.*

case[s]."[408] The Court also adopted comment b to § 929, which clarifies what qualifies as an appropriate case.[409] Although the Court acknowledged that comment b only requires a reason personal if the restoration costs are "disproportionate to the diminution in value,"[410] it adopted a simplified rule requiring temporary damage and reasons personal to the plaintiff to award restoration damages in all circumstances.[411]

The Court definitively rejected Lampi's four-element interpretation of *Sunburst*'s restoration damages rule, and instead adopted a two-element rule construction.[412] The Court held a plaintiff must establish that his injury was temporary and he had reasons personal to restore the property to receive restoration damages.[413] The Court recognized that Lampi's suggested "genuine intent to restore property" element was incorporated into the reasons personal analysis because "[t]he reasons personal analysis requires plaintiff to establish that the award actually will be used for restoration."[414] Yet the Court failed to discuss Lampi's suggested fourth element, which would have required restoration costs not be disproportionate to the land values.[415]

After setting out the two elements required for restoration damages, the Court analyzed whether Lampi satisfied those elements in his summary judgment motion. The Court first found that Lampi had established that the fire damage to his property qualified as a temporary (restorable) injury.[416] An injury is temporary if the injury would disappear after remediation is completed or the tortfeasor could restore the property to substantially its original condition.[417] The Court noted cases from four other jurisdictions—Alaska, California, New Jersey and Maryland—had held damage to trees could be restored and is therefore a temporary injury.[418] Importantly, Speed acknowledged that the damaged trees "eventually would regenerate over time with minimal restoration efforts."[419] Thus, Speed implicitly recognized that damage to trees could be restored, establishing the injury was temporary.[420]

408. *Id.* at 1004–1005.
409. *Id.*
410. *Id.* at 1005.
411. *Id.*
412. *Lampi*, 261 P.3d at 1005.
413. *Id.*
414. *Id.* at 1006.
415. *See id.* (not mentioning proportionality of damages).
416. *Id.*
417. *Id.*
418. *Lampi*, 261 P.3d at 1006.
419. *Id.*
420. *Id.*

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The Court also found that Lampi had presented enough evidence to establish he had reasons personal to him for restoring the property.[421] Restoration damages are generally the most appropriate measure of damages for landowners who desire to continue to use the damaged property rather than sell it. They are inappropriate damages, however, for plaintiffs who own property merely as an investment because restoration damages would provide a cash windfall.[422] The Court examined three cases from other jurisdictions that found the plaintiff had a reason personal to restore the property,[423] including the Alaska case *Osborne v. Hurst*.[424] In that case, the Alaska Supreme Court reversed a trial court decision holding diminution in market value was the appropriate measure of damages because the plaintiffs' trees had noncommercial value and the plaintiffs had chosen the property as a place to retire because of its wooded character.[425] Relying on those cases, the Court ruled that Lampi established his reasons personal though his testimony that he had selected the property for its vegetation, he never intended to sell the property, and he intended to retire on the property.[426]

Although the Court pointed out that these are normally questions of fact, it determined that Speed had failed to show there was a dispute of material fact regarding either whether the injury was temporary or whether Lampi had a reason personal to desire to restore the property.[427] The Court presumed Speed made a tactical decision to contest the applicability of restoration damages, rather than present factual evidence disputing the elements necessary to grant restoration damages.[428] Because there were no material issues of fact, the Court reversed the district court's denial of summary judgment on the restoration damages issue and remanded the case for a new trial in which the jury could decide a reasonable amount of restoration damages.[429]

In *Lampi*, the Montana Supreme Court clarified the requirements for an award of restoration damages. For a plaintiff to receive restoration damages, the plaintiff must establish that he suffered a temporary, or restorable, injury and that he had a reason personal to him to restore the property to its pre-injury state. Montana practitioners should regard *Lampi* as the first application of the *Sunburst* doctrine beyond toxic contamination and a clear

421. *Id.* at 1008.
422. *Id.* at 1007.
423. *Id.* at 1007–1008.
424. *Osborne v. Hurst*, 947 P.2d 1356 (Alaska 1997).
425. *Lampi*, 261 P.3d at 1007–1008.
426. *Id.* at 1008.
427. *Id.*
428. *Id.*
429. *Id.* at 1009.

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articulation of the elements of the restoration damages doctrine. Yet *Lampi* did not address how the proportionality of restoration damages and diminution in value affects the applicability of the doctrine, so practitioners should also be aware that the Court may make further refinements to the doctrine in the future.

—*Gale Price*

XI. *State v. Daniels*[430]

In *State v. Daniels*, a deliberate homicide case, the Montana Supreme Court discussed the effect of legislation passed by the 2009 Montana Legislature on the affirmative defense of justifiable use of force and the foundational requirements for the admission of character evidence of a victim.[431] The Court concluded that justifiable use of force still operates as an affirmative defense, and that a defendant must lay a proper foundation for character evidence in accordance with the requirements of the Rules of Evidence and Montana caselaw.[432]

The case arose when Larry Daniels and his son, Buddy Daniels, became embroiled in a family argument at their shared residence.[433] The Daniels family consisted of four members: Larry Daniels ("Daniels"), Daniels's son Buddy, Daniels's son Logan, and Buddy's son Hagen.[434] The family lived in Fromberg, Montana, on property that included a main house where Buddy, Logan, and Hagen lived and an apartment and attached shop where Daniels lived.[435] On May 21, 2009, Daniels and Buddy became intoxicated and started fighting.[436] Daniels refused to leave the main house until Buddy physically removed him.[437] Buddy followed Daniels to his apartment.[438] Logan and Hagen also followed but did not witness the events inside.[439]

Once home, Daniels got a beer and took his .22 pistol out of its holster.[440] Buddy entered the apartment and challenged Daniels.[441] Daniels told him to leave; when Buddy refused and moved toward him, Daniels

430. *State v. Daniels*, 265 P.3d 623 (Mont. 2011).
431. *Id.* at 628–630, 633.
432. *Id.*
433. *Id.* at 627.
434. *Id.* at 626.
435. *Id.* at 626–627.
436. *Daniels*, 265 P.3d at 627.
437. *Id.*
438. *Id.*
439. *Id.*
440. *Id.*
441. *Id.*

pulled the trigger "to protect [himself]."[442] Daniels told police that he was ten feet from Buddy when he fired three shots and that "[a]nytime you pick up a gun and you pop a cap, your intent is to kill."[443] The police arrested Daniels at the scene.[444]

The State charged Daniels with deliberate homicide and alternatively with mitigated deliberate homicide.[445] Daniels pleaded not guilty, and he gave notice of his intention to rely on the defense of justifiable use of force.[446] The State filed a motion in limine to prevent Daniels from mentioning Buddy's alleged character for violence until Daniels laid a proper foundation.[447] According to Montana law, a proper foundation would include the defendant's testimony that "he knew he was shooting [the victim], that he knew of [the victim's] past violent conduct, and that his knowledge of this conduct led him to use the level of force he did."[448] Daniels sought an order excluding any argument by the prosecution shifting the burden of proof regarding an element of the charged offense to Daniels.[449] The district court issued preliminary rulings and deferred final rulings until trial.[450] After a six-day trial, the jury found Daniels guilty of deliberate homicide, and the district court sentenced Daniels to sixty years in prison.[451] Daniels appealed his conviction.[452]

The Court first addressed the effect of the 2009 legislation on the defense of justifiable use of force.[453] The stated purpose of House Bill 228 was to "preserve[ ] and clarify[ ] laws relating to the right of self-defense and the right to bear arms."[454] Previously, the State's burden of proof did not require proving the absence of justification.[455] House Bill 228, however, included a provision (since codified) requiring the State to prove beyond a reasonable doubt that a defendant's actions were not justified whenever a defendant in a criminal trial offers evidence of justifiable use of force.[456] According to Daniels, House Bill 228 reversed the rule that justifiable use of force is an affirmative defense.[457] An affirmative defense is

442. *Daniels*, 265 P.3d at 627.
443. *Id.*
444. *Id.* at 628.
445. *Id.*
446. *Id.*
447. *Id.*
448. *Daniels*, 265 P.3d at 633 (citing *State v. Montgomery*, 112 P.3d 1014, 1018 (Mont. 2005)).
449. *Id.* at 628.
450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.* at 628–629.
454. *Daniels*, 265 P.3d at 629.
455. *Id.*
456. *Id.*; Mont. Code Ann. § 46–16–131 (2011).
457. *Daniels*, 265 P.3d at 629.

defined as a defense that "admits the doing of the act charged, but seeks to justify, excuse or mitigate it."[458]

The Court rejected Daniels' argument as "overstat[ing] the effect of the legislation" because House Bill 228 did not amend the Montana Code Annotated provision explicitly naming justifiable use of force an affirmative defense.[459] The Court said that "while the Legislature provided that the burden of proof can ultimately be shifted to the State," justifiable use of force still operates as an affirmative defense.[460] This means that the initial burden of evidence production is on the defendant.[461] The Court determined that Daniels did not satisfy this initial burden by simply providing pre-trial notice of his intention to rely on justifiable use of force as a defense.[462]

The second important issue in *Daniels* was the necessary foundation for admission of evidence of the victim's character.[463] Daniels argued that the district court erred in ruling that his testimony was necessary to lay the foundation for admission of Buddy's character evidence.[464] He argued that House Bill 228 had overruled the caselaw requiring a defendant's testimony.[465] The Court, however, upheld the foundational requirements for admission of character evidence of a victim.[466] Though the Court acknowledged that House Bill 228 shifted the burden to the prosecution to prove absence of justification, "this burden does not eliminate the need to satisfy foundational requirements for the admissibility of evidence pursuant to the Rules of Evidence."[467] Thus, the Court affirmed the lower court's decision that Daniels's testimony was necessary to lay a foundation for the evidence; Daniels did not provide such testimony.[468]

The Court also rejected Daniels' constitutional argument that the lower court violated his Fifth Amendment right to remain silent by requiring him to lay the foundation for his justification evidence.[469] The record did not contain any references to the Fifth Amendment as it related to Daniels' argument on appeal.[470] The Court determined that Daniels' willingness to

458. *Id.*
459. *Id.*
460. *Id.* at 629–630.
461. *Id.* at 629.
462. *Id.* at 630.
463. *Daniels*, 265 P.3d at 630.
464. *Id.* at 631.
465. *Id.* at 633.
466. *Id.*
467. *Id.*
468. *Id.* at 634.
469. *Daniels*, 265 P.3d at 635.
470. *Id.*

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testify precluded his ability to object on appeal.[471] Though the Fifth Amendment argument was not applicable in this case, lawyers could raise it in the future since there is clearly tension between the right to remain silent and the requirement to testify.

This case is important for Montana practitioners because it clarifies the foundation required for admission of evidence of a victim's character and the burden of proof for the affirmative defense of justifiable use of force. Though the 2009 Montana Legislature did require that the State prove the absence of justifiable use of force, the impact of House Bill 228 was not as sweeping as Daniels asserted; a defendant must still offer the proper foundation for evidence of character of the victim and must produce the initial evidence for the justifiable use of force defense.

—Hannah Tokerud

471. *Id.*