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Recent Decisions Affecting the Montana Practitioner

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LEGAL SHORTS

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. *Montana Cannabis Industry Association v. State*[1]

In *Montana Cannabis Industry Association v. State*, the Montana Supreme Court held the rational basis test applies when reviewing portions of the Montana Marijuana Act ("MMA"),[2] codified at Montana Code Annotated §§ 50–46–308(3), (4), (6)(a), and (6)(b).[3] The Court examined whether the MMA infringed upon three fundamental rights found in the Montana Constitution: the right to employment; the right to seek health; and the right to privacy.[4] The Court concluded the statutory provisions did not implicate any of the fundamental rights at issue and the district court incorrectly applied strict scrutiny review to the MMA.[5] This case answers important constitutional questions about medical marijuana at a time when Montana courts are just beginning to sort through the legal implications of the controversial and relatively new law.

In 2004, Montana voters passed Initiative 148 (the "Initiative").[6] The Initiative was codified as the Medical Marijuana Act and authorized limited use of medical marijuana.[7] Over the next seven years, Montana experienced a rapid increase in medical marijuana providers and patients.[8] In response to the increase, the 2011 Legislature repealed the Initiative and replaced it with the MMA.[9] The MMA placed tighter restrictions on the

1. *Mont. Cannabis Indus. Ass'n. v. State*, 286 P.3d 1161 (Mont. 2012), *reh'g denied* (Oct. 23, 2012).
2. Mont. Code Ann. § 50–46–301 (2011).
3. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1168.
4. *Id.* at 1165.
5. *Id.* at 1166–1168.
6. *Id.* at 1163.
7. *Id.*
8. *Id.*
9. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1163.

cultivation and distribution of medical marijuana compared to what was previously allowed under the Initiative.[10] On May 13, 2011, a group of plaintiffs, including the Montana Cannabis Industry Association, filed suit seeking to enjoin implementation of the MMA.[11]

The district court issued a preliminary injunction on June 30, 2011, enjoining several sections of the MMA.[12] The district court found the MMA violated the plaintiffs' fundamental rights to pursue employment, seek health care, and privacy.[13] Using a strict scrutiny analysis because fundamental rights were at issue, the district court reasoned the plaintiffs would suffer irreparable harm without the injunction.[14]

On appeal, the Montana Supreme Court only analyzed portions of the MMA, including §§ 50–46–308(3), (4), (6)(a), and (6)(b).[15] Section 50–46–308(3) limits the number of patients a provider may assist to three (two if the provider is also a patient), while §§ 50–46–308(4), (6)(a), and (6)(b) prevent providers from accepting any reimbursement or value in exchange for marijuana, with the exception of reimbursement for the provider's registry identification card application or renewal fee.[16]

The Court began its analysis by determining the proper level of scrutiny for each right implicated in the Montana Constitution.[17] Laws affecting fundamental constitutional rights (rights found in the Declaration of Rights) are evaluated under strict scrutiny.[18] Laws affecting rights found elsewhere in the Montana Constitution (but not in the Declaration of Rights) are evaluated under middle-tier scrutiny.[19] Remaining laws are evaluated under the rational basis test.[20]

Looking first at the right to employment, the Court noted Article II, section 3 implies a fundamental right to employment because "it is a right without which other constitutionally guaranteed rights would have little meaning."[21] The Court then pointed out two significant limitations on the right.[22] First, it does not include the right to a specific form of employ-

10. *Id.*

11. *Id.*

12. *Id.* at 1163–1164.

13. *Id.* at 1164.

14. *Id.*

15. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1164.

16. *Id.* at 1163–1164.

17. *Id.* at 1165.

18. *Id.* (citing *Snetsinger v. Mont. U. Sys.*, 104 P.3d 445, 450 (Mont. 2004)).

19. *Id.*

20. *Id.*

21. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1165 (citing *Wadsworth v. State*, 911 P.2d 1165, 1171–1172 (Mont. 1996)).

22. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1165–1166.

ment.[23] Second, it does not grant individuals the right to employment in violation of the State's police power.[24] As a result, the Court held the MMA does not implicate the fundamental right to employment.[25]

Moving on, the Court pointed out that similar to employment, the right to seek health is subject to the State's police power.[26] The right to seek health is an enumerated fundamental right; however, the text of the Constitution specifically limits the right to "all lawful ways."[27] The Court firmly concluded the right to health "does not extend to give a patient a fundamental right to use any drug, regardless of its legality."[28]

Finally, the Court examined the right to privacy. The Court distinguished the purported privacy right to use medical marijuana from the privacy right in *Armstrong v. State*,[29] noting the privacy right implicated in *Armstrong* (the right to have an abortion) is constitutionally protected at both the state and federal level.[30] The Court recognized the affirmative right to access a particular drug is not protected under the right to privacy in Montana or in any other jurisdiction.[31] The Court concluded by explicitly stating the Legislature was acting within its authority when it replaced the Initiative with the MMA.[32]

After deciding the district court erred in finding the MMA implicates the above-mentioned fundamental rights, the Court remanded with instructions to apply rational basis review to §§ 50–46–308(3), (4), (6)(a), and (6)(b).[33] The Court pointed out "the new medical marijuana framework does not suddenly raise the affirmative right to access a particular drug to a fundamental right protected by our Constitution."[34] The Court also added, "Plaintiffs cannot seriously contend that they have a fundamental right to medical marijuana when it is still unequivocally illegal under the [federal] Controlled Substances Act."[35]

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23. *Id.* (citing *Wadsworth*, 911 P.2d at 1173).

24. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1165–1166 (citing *Wiser v. State*, 129 P.3d 133, 139 (Mont. 2006)).

25. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1166.

26. *Id.* (citing *Wiser*, 129 P.3d at 139).

27. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1166; Mont. Const. art. II, § 3.

28. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1166.

29. *Armstrong v. State*, 989 P.2d 364 (Mont. 1999).

30. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1167.

31. *Id.* (citing *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 495 F.3d 695, 710 n. 18 (D.C. Cir. 2007)).

32. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1168.

33. *Id.*

34. *Id.*

35. *Id.*

In a lone dissent, Justice Nelson stated the issue did not present a justiciable controversy because of federal preemption.[36] He reasoned that since actions legalized by the MMA are still unequivocally illegal under federal law, the Court's ruling is "purely academic," and even if the Court had decided in favor of the plaintiffs, it would be "meaningless because their activities are illegal regardless."[37] Justice Nelson firmly concluded Montana courts "should not be required to devote any more time trying to interpret and finesse" the MMA because of preemption issues.[38] Yet, he recognized a permissible exception would occur in cases where the State has instituted a civil or criminal action against an individual and the MMA would provide an affirmative defense.[39] Had the case been justiciable, Justice Nelson stated he would have disagreed with the Court's analysis of the fundamental rights at issue.[40] He criticized the Court for not using strict scrutiny review and for suggesting fundamental rights could be limited by the State's police power.[41]

Montana Cannabis Industry Association rejects the argument that medical marijuana implicates the fundamental rights of employment, health, and privacy. It also establishes rational basis as the standard of review for provisions of the MMA. Rational basis review is the easiest constitutional hurdle for legislative acts to jump, as statutes need only be rationally related to a legitimate government interest.[42] Based on this decision, the Legislature has great latitude to regulate medical marijuana, and patients and providers receive no special constitutional protections. Montana attorneys should be aware of the Legislature's seemingly broad authority to regulate this controversial drug and the possibility that more regulations are on the horizon.

—Trevor Carlson

II. *IN RE ESTATE OF AFRANK*[43]

In *In re Estate of Afrank*, the Montana Supreme Court established, as a matter of first impression, that indebtedness encumbering property held by joint tenants with right of survivorship is not exonerated upon the death of

36. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1168–1170 (Nelson, J., dissenting) (citations omitted).

37. *Id.* at 1169–1171 (citation omitted).

38. *Id.* at 1172.

39. *Id.* at 1171.

40. *Id.* at 1172.

41. *Id.* at 1172–1173.

42. *Mont. Cannabis Indus. Ass'n.*, 286 P.3d at 1165 (majority) (citing *Snetsinger*, 104 P.3d at 450).

43. *In re Est. of Afrank*, 291 P.3d 576 (Mont. 2012).

one of the joint tenants.[44] The Court overruled the district court's[45] application of the common-law rule and instead applied the nonexoneration provision of Montana's Uniform Probate Code,[46] which provides that "[a] specific devise passes subject to any security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts."[47]

In June 2009, Dennis Afrank died of injuries sustained in an accident.[48] At that time, he and his wife Deborah owned a motor home as joint tenants with right of survivorship.[49] The motor home was subject to a $124,000 debt, for which the Afranks were jointly and severally liable.[50] After Dennis's death, Deborah filed a claim against the Estate for half of the amount of the loan.[51] Leslie Afrank, the Personal Representative and Dennis's daughter from a previous marriage, denied the claim.[52] Consequently, Deborah filed a claim in district court.[53]

Applying what it deemed to be the "better-reasoned" common-law majority rule from other states, the district court held the Estate had an equitable duty to pay its share of debts on all jointly-held property, including the motor home.[54] Under the common-law approach, absent exigent circumstances, the decedent's estate has "[a]n equitable duty to pay its aliquot share of debts on jointly-held property held by the decedent's spouse and the decedent at death."[55] Subsequently, the Personal Representative appealed.[56]

When an equitable decision comes before the Montana Supreme Court, it determines "whether the findings of fact are clearly erroneous and whether the conclusions of law are correct."[57] In the instant case, the Court reversed the district court and decided it should not have allowed Deborah's claim against her deceased husband's estate for one-half of the loan amount on the motor home.[58]

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44. *Id.* at 577.
45. *Id.*
46. *Id.* (citing Mont. Code Ann. § 72–2–617 (2011)).
47. Mont. Code Ann. § 72–2–617.
48. *In re Est. of Afrank*, 291 P.3d at 577.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *In re Est. of Afrank*, 291 P.3d at 577.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*

The Court first acknowledged that, because Dennis and Deborah held the motor home as joint tenants with right of survivorship, Dennis's interest in the motor home automatically passed to Deborah upon Dennis's death.[59] It did not pass to Deborah under Dennis's will.[60]

The Court then looked to Montana statutes to find the applicable policy regarding the reconciliation of debt encumbering non-probate property. Citing Montana Code Annotated § 72–2–617, a provision of Montana's Uniform Probate Code, the Court noted that Montana has a public policy favoring the nonexoneration of debts.[61] The Court reasoned that, had Dennis specifically devised the motor home to Deborah by will, Deborah would have received the motor home subject to the entire debt.[62]

Both Deborah and the lower court relied on an American Law Report annotation from 1961[63] that proffered a surviving spouse's right to exoneration.[64] The Court, however, dismissed this notion because it predated Montana's adoption of the Uniform Probate Code.[65]

In re Estate of Afrank determined that a surviving joint tenant, who is jointly and severally liable on a debt encumbering property held in joint tenancy with right of survivorship, takes the property subject to the entire amount of the indebtedness. By operation of the common law governing property held in joint tenancy with right of survivorship, and supported by public policy, the Court held the surviving joint tenant is not exonerated from the decedent's half of any debt.[66]

—Michel Fullerton

III. *MALPELI V. STATE*[67]

In *Malpeli v. State*, the Montana Supreme Court examined the scope of the Montana Department of Transportation's ("MDT") duty to provide reasonable access to property as part of an inverse condemnation action brought after an MDT highway safety improvement project.[68] Though a jury concluded MDT had not taken a property right, the Court held, as a

59. *Id.* at 577–578.

60. *In re Est. of Afrank*, 291 P.3d at 578.

61. *Id.*

62. *Id.*

63. Marvel, C.C., *Right of Surviving Spouse to Contribution, Exoneration, or Other Reimbursement out of Decedent's Estate Respecting Liens on Estate by Entirety or Joint Tenancy*, 76 A.L.R. 2d 1004 (West 1961).

64. *In re Est. of Afrank*, 291 P.3d at 578.

65. *Id.*

66. *Id.*

67. *Malpeli v. State*, 285 P.3d 509 (Mont. 2012).

68. *Id.* at 510.

matter of law, that Faith Malpeli's use of a public right-of-way to turn vehicles around did not create a compensable property interest.[69] The Court thus affirmed the judgment for MDT after concluding the district court should have granted summary judgment in favor of MDT.[70]

MDT widened a portion of Highway 191 in the summer and fall of 2008 and 2009 as part of a highway safety improvement project.[71] The project included the addition of a left-turn lane and eight-foot-wide paved shoulders.[72] Faith Malpeli's ("Malpeli") residence lies adjacent to the reconstructed portion of the road.[73] The entire project stayed within the existing right-of-way, and the widening of the road did not encroach onto Malpeli's property.[74] However, after the improvements, Malpeli's garage was only one foot from the edge of the right-of-way.[75] Additionally, Malpeli could no longer turn vehicles around without backing directly onto the highway or the paved shoulder.[76]

Malpeli filed an inverse condemnation action against MDT in January 2010.[77] She alleged that MDT took "reasonable and safe access to her residential property to and from Highway 191" and "violated its own 'approach standards' in the reconstruction of the highway."[78] Malpeli argued that MDT took her right to reasonably access her property because she could no longer maneuver her vehicles around before entering Highway 191.[79]

MDT filed a motion for summary judgment following discovery, arguing that "Malpeli did not have a property interest in the use of the public right-of-way for maneuvering vehicles, and using the public right-of-way in such a manner was unrelated to any right of access that a landowner might possess."[80] The district court denied MDT's motion, concluding that Malpeli had a right of "reasonable ingress and egress" to and from her property and that the question of whether the project constituted a taking of this property right was one of fact for a jury.[81]

After a jury found MDT had "not taken a property right belonging to Malpeli," she appealed on claims of trial error.[82] MDT filed a cross-appeal,

69. *Id.* at 514.
70. *Id.* at 510.
71. *Id.*
72. *Id.* at 510–511.
73. *Malpeli*, 285 P.3d at 510.
74. *Id.* at 511.
75. *Id.*
76. *Id.*
77. *Id.* at 510–511.
78. *Id.* at 511.
79. *Malpeli*, 285 P.3d at 511.
80. *Id.*
81. *Id.*
82. *Id.* at 510.

arguing the district court erred "by denying its motion for partial summary judgment before trial."[83] The Montana Supreme Court, affirming the judgment in favor of MDT, concluded that the district court should have granted the motion for summary judgment.[84] As such, the Court did not address Malpeli's claims of trial error.[85]

In support of its holding, the Court began by noting that in order for an inverse condemnation claim to stand, there must be a protected property interest.[86] Thus, the Court summarized the issue as whether "Malpeli had a compensable property interest in the use of the public's right-of-way to turn her vehicles around."[87] The Court disagreed with the district court's reliance on *State ex. rel. State Highway Commission v. Keneally*[88] for the proposition that whether MDT took Malpeli's property interest was a question of fact for the jury. Rather, the Court distinguished *Keneally*, noting the parties in this case disputed whether a compensable property right even existed.[89]

The Court looked to regulations adopted by MDT governing access to highways in determining the extent of property interests to which Malpeli was entitled.[90] Through these regulations, MDT seeks to balance the adjacent landowner's reasonable and safe access to the highway with the safety and utility of the highway.[91] The regulations provide abutting landowners with instructions for obtaining a permit when constructing approaches similar to Malpeli's driveway, including design specifications.[92] The design specifications require "sufficient storage area off the highway right-of-way" that is "provided by the landowner . . . to prevent a vehicle from backing out of an approach onto the traveled way."[93] The regulations suggest a setback of at least 15 feet but recommend a larger distance where the free movement of large vehicles is anticipated, particularly in rural areas.[94] However, Malpeli never applied for an approach permit.[95] The Court found that these provisions clearly dictate that it is the landowner's responsibility

83. *Id.*

84. *Id.*

85. *Malpeli*, 285 P.3d at 510.

86. *Id.* at 511–512.

87. *Id.* at 512.

88. *State ex. rel. State Hwy. Commn. v. Keneally*, 384 P.2d 770 (Mont. 1963).

89. *Malpeli*, 285 P.3d at 512. In *Keneally*, the parties recognized a right for adjacent landowners to "reasonable ingress and egress from the abutting highway" and essentially stipulated a compensable property right existed. *Id.* (citing *Keneally*, 384 P.2d at 772).

90. *Malpeli*, 285 P.3d at 513.

91. *Id.* (citing Admin. R. Mont. 18.5.101(1), (2) (2012)).

92. *Malpeli*, 285 P.3d at 513.

93. *Id.* (citing Admin. R. Mont. 18.5.112(9)(b)).

94. *Malpeli*, 285 P.3d at 513 (citing Admin. R. Mont. 18.5.112(9)(a)).

95. *Malpeli*, 285 P.3d at 513.

to provide the room to maneuver vehicles on their own property and not on the right-of-way.[96]

The Court rejected Malpeli's claim that she was entitled to safe and reasonable access, not just basic access, noting Malpeli provided no authority to support her position.[97] The Court pointed to her failure to provide sufficient space on her property prior to her special use of the right-of-way in determining her use did not establish a compensable property interest.[98] While her approach was less safe than before the reconstruction project, the undisputed facts established it was not due to the expansion project but rather the lack of adequate space between the garage on Malpeli's property and the right-of-way.[99]

Montana practitioners should note that it is the landowner's responsibility to provide enough room off of a right-of-way to maneuver vehicles. Prior use of a right-of-way in this manner does not establish a compensable property interest, even if such use is necessary to safely maneuver vehicles to and from the adjacent property. While Malpeli did not acquire an approach permit, the Court suggested that having a permit or license of such a nature would still not create a compensable property interest.[100]

—Pamela Garman

IV. *Brookins v. Mote*[101]

In *Brookins v. Mote*, the Montana Supreme Court clarified the circumstances in which a hospital may be sued under consumer protection laws and recognized negligent credentialing as a new cause of action in Montana.[102] The Court held that Montana's Consumer Protection Act[103] can be used against hospitals only with respect to the entrepreneurial aspects of their operations, which does not include credentialing.[104] Recognizing negligent credentialing as a new and valid tort, the Court enumerated its elements, which require a plaintiff to establish the standard of care, demonstrate a deviation from that standard, and show resultant damages.[105]

Dr. Frederick Mote, an obstetrician, moved from Oregon to Superior, Montana in 1992 to work at Mineral Community Hospital (the "Hospi-

96. *Id.*
97. *Id.* at 514.
98. *Id.*
99. *Id.* at 514–515.
100. *Id.* at 514.
101. *Brookins v. Mote*, 292 P.3d 347 (Mont. 2012).
102. *Id.* at 359–361.
103. Mont. Code Ann. § 30–14–101 (2011).
104. *Brookins*, 292 P.3d at 360.
105. *Id.* at 361.

tal").[106] Dr. Mote's work was cut short when he returned to Oregon in April of 1992 to answer charges of sexual abuse of a minor and endangering the welfare of a minor.[107] Dr. Mote subsequently pled guilty to misdemeanor sexual abuse of a child and attended a rehabilitation facility specializing in sexual addiction.[108]

In September 1992, Dr. Mote returned to Superior after entering into an agreement with the Montana Board of Medical Examiners that allowed him to retain his license but subjected him to a probationary period and restricted his ability to treat minor patients.[109] After the Hospital decided not to rehire him, Dr. Mote opened a private practice in his home but secured credentials from the Hospital allowing use of its facility as an independent physician.[110]

Upon his return to Superior, Ann Brookins hired Dr. Mote as her obstetrician when she was four months pregnant.[111] In February 1993, Dr. Mote delivered Brookins's son at the Hospital.[112] During the birth, complications arose that may have resulted in developmental problems for the baby, who has since been diagnosed with brain damage.[113]

In 2005, Brookins sued both Dr. Mote and the Hospital.[114] Against Dr. Mote, Brookins claimed malpractice, unauthorized sexual contact with the baby, and assault and battery for unnecessary pelvic exams.[115] Against the Hospital, Brookins alleged vicarious liability for Dr. Mote, direct liability pursuant to the Consumer Protection Act, and negligence based on the credentialing process the hospital used to approve Dr. Mote's use of its facility.[116] Brookins settled her claims against Dr. Mote, who was dismissed from the suit in 2007.[117] Following discovery, Brookins and the Hospital both moved for summary judgment, which the district court granted to the Hospital on all claims.[118] Subsequently, Brookins appealed.[119]

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106. *Id.* at 351.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Brookins*, 292 P.3d at 351.

111. *Id.*

112. *Id.* (the published opinion states here that he was born in 1992, but elsewhere indicates it was actually 1993).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Brookins*, 292 P.3d at 351.

117. *Id.*

118. *Id.* at 353.

119. *Id.*

The most notable holding from *Brookins* involves Brookins's claim for negligent credentialing under Montana's Consumer Protection Act ("CPA").[120] The CPA states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."[121] The Court discussed the historical debate that has surrounded the interplay of consumer protection legislation and the practice of medicine, noting the profession of medicine has traditionally been exempt from such laws because it does not directly deal with trade and commerce.[122] Rather, the Court noted that the traditional purpose of the practice of medicine is providing necessary services, not realizing profit.[123]

Ultimately, the Court looked to other jurisdictions in deciding that while there is no blanket exemption for hospital liability under consumer protection laws, there is liability for those activities relating to the business aspects of hospital practices, as opposed to the "actual practice" of medicine.[124] The Court held that the credentialing practices of the Hospital had nothing to do with the entrepreneurial aspects of the Hospital's business and, as such, affirmed summary judgment regarding the CPA claim.[125]

Though the Court rejected Brookins's CPA claim, it recognized a common law claim for negligent credentialing.[126] This "new" tort is a form of professional negligence not previously recognized in Montana.[127]

The Court surveyed both Montana case law and sister jurisdictions to determine if the gradual evolution of the common law supported recognizing negligent credentialing as a valid cause of action in Montana.[128] Citing *Hull v. North Valley Hospital*,[129] the Court explained that hospitals already have a duty to ensure patient safety when accrediting physicians and granting privileges.[130] Noting that at least 30 other states recognize the tort of negligent credentialing, the Court concluded the evolution of common law supports the adoption of negligent credentialing as a valid cause of action in Montana.[131] The Court then established the elements of negligent credentialing that a plaintiff must prove: "(1) the applicable standard of care; (2) the defendant departed from that standard of care; and (3) the departure

120. *Id.* at 357.
121. Mont. Code Ann. § 30–14–103.
122. *Brookins*, 292 P.3d at 358.
123. *Id.* (citing *Nelson v. Ho*, 564 N.W.2d 482, 484 (Mich. App. 1997)).
124. *Brookins*, 292 P.3d at 359–360.
125. *Id.* at 360.
126. *Id.*
127. *Id.* at 359–360.
128. *Id.* at 360 (citing *Saaco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 426 (Mont. 1995)).
129. *Hull v. N. Valley Hosp.*, 498 P.2d 136 (Mont. 1972).
130. *Brookins*, 292 P.3d at 360 (citing *Hull*, 498 P.2d at 140).
131. *Brookins*, 292 P.3d at 361.

proximately caused plaintiff's injury."[132] Since the process of physician credentialing is complicated, the Court held that expert testimony is required to establish the applicable standard of care as well as a deviation from that standard.[133]

Addressing the case at hand, the Court held that while Brookins's proffered expert established the standard of care applicable to the Hospital's credentialing protocols, he did not demonstrate that the standard was breached.[134] As such, the Court held that the district court correctly granted summary judgment to the Hospital on the negligent credentialing claim.[135]

The Montana practitioner should be aware of *Brookins* because it clarifies the manner in which the CPA may be used by plaintiffs against health care providers. Further, *Brookins* is notable because the Court recognized the tort of negligent credentialing and held that expert testimony is required to demonstrate both the standard of care owed by hospitals in credentialing as well as any deviation from that standard.

—Dylan Jensen

V. *Briese v. Montana Public Employees' Retirement Board*[136]

In *Briese v. Montana Public Employees' Retirement Board*, the Montana Supreme Court held, as a matter of first impression, that a temporary restraining order ("TRO") prohibiting parties to a marriage dissolution from changing beneficiaries for insurance or other benefit plans includes a beneficiary change for survivorship benefits under the Montana Sheriff's Retirement System ("SRS").[137] In reaching this conclusion, the Court avoided establishing a bright-line rule rendering any beneficiary change in violation of such TROs automatically void, but it held that equitable powers may provide for "a return to the status quo when a party violating a [TRO] has died."[138]

David Briese, a deputy sheriff for Yellowstone County and a member of the SRS, designated his wife, Erene Briese, as his primary beneficiary in 2001.[139] In 2004, David filed a petition for dissolution of marriage, and, pursuant to Montana Code Annotated § 40–4–121,[140] the dissolution court

132. *Id.* (citing *Est. of Willson v. Adison*, 258 P.3d 410, 414 (Mont. 2011)).
133. *Brookins*, 292 P.3d at 362.
134. *Id.* at 362–363.
135. *Id.* at 364.
136. *Briese v. Mont. Pub. Employees' Ret. Bd.*, 285 P.3d 550 (Mont. 2012).
137. *Id.* at 555.
138. *Id.* at 558–559 (footnote omitted).
139. *Briese*, 285 P.3d at 552–553.
140. Mont. Code Ann. § 40–4–121 (2011) (controlling temporary orders for maintenance or support, temporary injunctions, and temporary restraining orders during marriage dissolution proceedings).

issued a TRO prohibiting the couple from "changing the beneficiaries of 'insurance or other coverage . . . held for the benefit of a party.'"[141] However, in August 2006, David replaced Erene as beneficiary, designating their two minor children in her stead.[142] In November 2006, David was killed in the line of duty.[143]

Erene learned of the changed SRS beneficiary designation in early 2008 and informed the Montana Public Employees' Retirement Administration ("MPERA") that the 2006 change violated the TRO.[144] MPERA responded that it was bound by statute to honor the 2006 change and instructed Erene to choose a payment option on behalf of the children.[145] Erene then submitted forms to activate monthly payments.[146] In 2009, Erene realized that payments to the children resulted in adverse tax consequences, so she again requested that MPERA recognize David's 2001 designation of herself as beneficiary, was again denied, and was denied yet again on appeal to the Montana Public Employees' Retirement Board ("MPERB").[147] In December 2009, Erene requested a formal review of MPERB's decision under the Montana Administrative Procedure Act,[148] which resulted in a final order that:

> (1) Erene waived her right to contest the validity of the 2006 beneficiary designation when she applied for benefits on behalf of her children; (2) the issue was moot because, once benefits were granted to her children, the parties could not be restored to their original positions; and (3) the [TRO] in the dissolution proceedings was not applicable to an SRS beneficiary designation.[149]

Erene then sought review in the First Judicial District Court, which, without addressing either the waiver or mootness arguments, affirmed the final order, finding the TRO inapplicable to David's designation of SRS beneficiaries.[150] Erene appealed.

The Montana Supreme Court began by addressing whether application for and acceptance of benefits on behalf of the children mooted or waived Erene's right to challenge the beneficiary designation.[151] MPERB argued

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141. *Briese*, 285 P.3d at 553 (quoting Mont. Code Ann. § 40–4–121(3)).

142. *Briese*, 285 P.3d at 553.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Mont. Code Ann. §§ 2–4–101 to 2–4–711 (providing, *inter alia*, guidance and standards with respect to agency rulemaking, contested cases, and judicial review of agency rules and final agency decisions).

149. *Briese*, 285 P.3d at 553.

150. *Id*.

151. *Id.* at 553–554.

that under § 19–2–803,[152] once payments commenced, it had fulfilled its statutory obligations.[153] However, the Court explained § 19–2–803 was not applicable because, when read as a whole, its intent was to protect "MPERB from a minor's direct claims for *additional* payments *after* proper payment had already been made to a surviving parent or other designated recipient"; it neither rendered Erene's claim moot nor prevented the Court from granting relief.[154] Because Erene had elected monthly payments rather than a lump sum, the Court held that effective relief could be granted by issuing future monthly payments to her rather than the children.[155] Rejecting MPERB's waiver argument, the Court explained, "Waiver is the voluntary and intentional relinquishment of a known right, and must be manifested in some unequivocal manner."[156] Noting that MPERA did not inform Erene of her due process right to appeal its decision to MPERB until July 2009, more than a year after insisting she choose a payment option, the Court concluded that Erene's application for and acceptance of benefits in order to support the children was not a voluntary and intentional waiver of her claim.[157]

Having rejected MPERB's mootness and waiver arguments, the Court moved on to address the merits of Erene's claim. As MPERB was unaware of the dissolution proceedings, the Court acknowledged that MPERB had no reason to question David's 2006 change of beneficiaries.[158] The Court further confirmed that § 19–2–801[159] allows members of public employee benefit plans the option to revoke former beneficiaries and to make new designations and also provides "the most recent [designation] is effective for all purposes." However, the Court noted this option was available "'[u]nless otherwise provided by statute.'"[160] In returning to the scope of § 40–4–121(3) and pointing to its broad and expansive language, the Court held that this statute did apply to a change in beneficiary status for an SRS account.[161] The Court buttressed its holding by applying the *ejusdem generis* doctrine of statutory construction, which means that if a list of specific things precedes a general word or phrase, the general word or phrase is

152. Mont. Code Ann. § 19–2–803 (controlling payments to custodians of minor beneficiaries).

153. *Briese*, 285 P.3d at 554.

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

155. *Id.*

156. *Id.* (citing *Tvedt v. Farmers Ins. Group of Cos.*, 91 P.3d 1 (Mont. 2004)).

157. *Briese*, 285 P.3d at 554–555 (referencing Admin. R. Mont. 2.43.1501(2) (2003); *Pickens v. Shelton-Thompson*, 3 P.3d 608 (Mont. 2000)).

158. *Briese*, 285 P.3d at 555.

159. Mont. Code Ann. § 19–2–801 (controlling designation of beneficiaries under public employees' retirement plans).

160. *Briese*, 285 P.3d at 555 (quoting Mont. Code Ann. § 19–2–801).

161. *Briese*, 285 P.3d at 556.

confined to those things "similar in nature" to those in the list.[162] The Court observed that David's SRS plan paid benefits to a beneficiary designated by the member upon the member's death, was "'similar in nature' to life insurance,"[163] and was therefore included within § 40–4–121(3) and the dissolution court's TRO.[164]

The Court rejected MPERB's argument that the TRO was too vague by again citing § 40–4–121(3) for its prohibition of "any change of beneficiaries for 'any . . . coverage . . . held for the benefit of a party'" and by noting that David's 2001 designation of Erene as beneficiary rendered the account "for the benefit" of Erene.[165] The Court conceded that MPERB was not a party to or directly restrained from particular acts under the TRO, but the Court explained that this was not the issue.[166] Rather, David's 2006 designation violated the "statutorily-mandated" TRO to which he was a bound party, thereby violating § 19–2–801(2).[167] Rejecting MPERB's public policy and legislative intent arguments, the Court responded that MPERB's two principal referenced cases were inapplicable as neither involved a TRO or interpretation of § 40–4–121(3). Rather, the first involved a surviving spouse's claim who had never been designated a beneficiary, and the second did not involve a beneficiary's claim for death benefits but instead involved the division of retirement benefits under a marriage dissolution decree.[168]

The Court next addressed a question of first impression: should David's violation of the TRO automatically void the beneficiary change?[169] Although the remedy would normally target the violator, "[s]uch a remedy, however, is 'no remedy at all in this context; it evaporates [with the death of the violator] the instant it is needed.'"[170] Looking to other jurisdictions, the Court found support for automatically voiding the change,[171] but it also found courts preferring to apply equitable powers to grant relief.[172] The

162. *Id.* (citing *Mattson v. Mont. Power Co.*, 215 P.3d 675 (Mont. 2009) (quoting *Cir. City Stores v. Adams*, 532 U.S. 105, 114–115 (2001))).

163. Life insurance is among the list of specific types of coverage included under § 40–4–121(3).

164. *Briese*, 285 P.3d at 556.

165. *Id.* at 557 (quoting Mont. Code Ann. § 40–4–121(3)(b)).

166. *Id.* at 557.

167. *Id.*

168. *Id.* at 558 (citing *Sowell v. Teachers' Ret. Sys. of Mont.*, 693 P.2d 1222 (Mont. 1984); *State ex rel. Neuhausen v. Nachtsheim*, 833 P.2d 201 (Mont. 1992)).

169. *Briese*, 285 P.3d at 558.

170. *Id.* (quoting *Aither v. Est. of Aither*, 913 A.2d 376, 380 (Vt. 2006)).

171. *Briese*, 285 P.3d at 558–559 (citing *Webb v. Webb*, 134 N.W.2d 673, 674–675 (Mich. 1965); *N.W. Mut. Life Ins. Co. v. Hahn*, 713 N.W.2d 709, 712 (Iowa App. 2006); *Aither*, 913 A.2d at 381; *Stand. Ins. Co. v. Schwalbe*, 755 P.2d 802, 806 (Wash. 1988)).

172. *Briese*, 285 P.3d at 559 (citing *Valley Forge Life Ins. Co. v. Delaney*, 313 F. Supp. 2d 1305, 1308–1309 (M.D. Fla. 2002); *Davis v. Prudential Ins. Co. of Am.*, 331 F.2d 346, 349–351 (5th Cir. 1964); *Am. Fam. Life Ins. Co. v. Noruk*, 528 N.W.2d 921, 923–924 (Minn. App. 1995)).

Court sided with those jurisdictions applying equitable powers to return to the pre-violation status quo when the violator has died.[173] As such, the Court reversed and remanded for an entry of judgment declaring David's 2006 beneficiary change invalid and ordered Erene reinstated as designee.[174] In choosing to apply equitable powers, the Court noted that "Erene is not asking MPERB to pay twice, nor is she asking for a recipient who was wrongfully paid benefits to return them."[175]

Montana practitioners representing parties to a marriage dissolution or representing administrators of benefit plans should take heed of the Court's willingness to extend the reach of a TRO issued under dissolution proceedings and be aware of the Court's standard in deciding the types of property and interests included under § 40–4–121(3). In order to avoid administrative and litigation costs, administrators of benefit plans may wish to condition beneficiary designation changes upon disclosure of any TRO issued under a marriage dissolution or similar proceeding.

—Quinton King

VI. *American Zurich Insurance Company v. Montana Thirteenth Judicial District Court*[176]

In *American Zurich Insurance Company v. Montana Thirteenth Judicial District Court*, the Montana Supreme Court held, as a matter of first impression, that in a claim for workers' compensation benefits, attorney-client privilege and work product protection are waived when an attorney's communication to his client insurer is voluntarily disclosed to the non-client employer.[177] The Court held that the employer in the underlying workers' compensation claim did not have sufficient shared legal interest with its workers' compensation insurer for attorney-client privilege to extend to the employer.[178] It similarly held that the lack of shared legal interest made it unreasonable for the insurer to expect the employer to keep communications from the insurer to the employer confidential.[179]

Phillip Peters was injured on the job while working for Roscoe Steel & Culvert Co. ("Roscoe") and filed a workers' compensation claim.[180] Roscoe was insured by American Zurich under Plan II of the Montana Work-

173. *Briese*, 285 P.3d at 559.
174. *Id.*
175. *Id.* at 562 n. 3.
176. *Am. Zurich Ins. Co. v. Mont. Thirteenth Jud. Dist. Ct.*, 280 P.3d 240 (Mont. 2012).
177. *Id*. at 244, 248–249.
178. *Id*. at 248.
179. *Id*. at 249.
180. *Id*. at 243.

ers' Compensation Act.[181] American Zurich outsourced the claims adjustment to Employee Benefit Management Solutions ("EBMS").[182] A claims adjuster for EBMS, Jim Kimmel, had ultimate authority over resolution of the claim.[183] In the process of attempting to settle Peters's workers' compensation claim, disputes arose between Peters and American Zurich over the extent of his impairment and other issues.[184] Attorney Joe Maynard of the Crowley Law Firm advised American Zurich on various legal issues regarding Peters's claim.[185]

In advance of a settlement conference, attorney Maynard prepared an opinion letter for the adjuster, Kimmel.[186] Upon receipt of the letter, Kimmel wrote various notes on it regarding a conversation with Maynard.[187] Without the knowledge or permission of Maynard or anyone at American Zurich, Kimmel provided a copy of the annotated letter to the employer, Roscoe.[188] The claim eventually settled, but Peters filed a subsequent claim against Kimmel and American Zurich for unfair claim settlement practices.[189] Peters served Roscoe with a subpoena *duces tecum* requesting all documents related to Peters's employment and his workers' compensation claim, including any correspondence between Roscoe and EBMS, Zurich, or the Crowley Law Firm.[190] Roscoe moved to quash the subpoena claiming attorney-client privilege and the work product doctrine.[191]

The Montana Thirteenth Judicial District Court, Yellowstone County, Gregory R. Todd, J., denied the motion and ordered Roscoe to produce the letter.[192] American Zurich then filed its own motion seeking relief from the order to produce.[193] The court denied American Zurich's motion, and American Zurich petitioned the Montana Supreme Court for a writ of super-

181. *Id.*
182. *Am. Zurich Ins. Co.*, 280 P.3d at 243.
183. *Id.*
184. *Id.* at 244.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Am. Zurich Ins. Co.*, 280 P.3d at 244.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 240, 244.
193. *Id.* at 244.

visory control.[194] The Court held that, despite incorrect work product analysis, the district court reached the proper conclusion.[195]

The Court first looked at American Zurich's contention that Maynard's letter was protected by attorney-client privilege. The privilege generally extends only to communications between an attorney and a client.[196] There are circumstances, however, where communications to third parties are protected by the privilege.[197] These circumstances—often characterized as "joint defense agreements," "joint prosecution privilege," or the "common interest doctrine"—occur when a third party has a common legal interest with the client that brings communications between the attorney and the third party under the attorney-client privilege.[198] The Court noted workers' compensation claims present unique circumstances for purposes of attorney-client privilege.[199] While employers are required to cooperate and assist their insurers in workers' compensation matters, with certain rare exceptions, the employer is statutorily immune from the personal injury claims of its employees.[200] Employers are not parties in workers' compensation claims.[201] For those reasons, the Court noted "[i]t is thus improper for an insurer and an employer to collaborate on settlement of a worker's claim for benefits."[202] While the employer and the insurer share an interest in keeping premiums and litigation costs to a minimum, those shared interests are insufficient to extend the attorney-client privilege beyond the attorney-client relationship.[203] The Court noted "the relationship between an insurer and insured is permeated with potential conflicts."[204] The Court further noted that Kimmel's disclosure of the letter to Roscoe was not nec-

194. *Am. Zurich Ins. Co.*, 280 P.3d at 244. Article VII, section 2(2) of the Montana Constitution allows the Montana Supreme Court to exercise supervisory control over other courts when "urgency or emergency factors exist, making the normal appeals process inadequate, when the case involves purely legal questions, and when . . . the other court is proceeding under a mistake of law and is causing a gross injustice." *Id.* (quoting Mont. R. App. P. 14(3)). The Court held that review of American Zurich's contentions was appropriate because "compelled discovery of potentially-privileged material presents unique issues that, under certain circumstances, are sufficient to invoke original jurisdiction." *Id.* (quoting *Inter Fluve v. Mont. Eighteenth Jud. Dist. Ct.*, 112 P.3d 258 (Mont. 2005)). The Court found the circumstances sufficient to invoke original jurisdiction because later appeal of the district court's ruling "would provide no relief for Zurich because the purportedly confidential contents of the letter would be exposed." *Id.*

195. *Am. Zurich Ins. Co.*, 280 P.3d at 244–245.

196. *Id.* at 245.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 245, 246.

201. *Am. Zurich Ins. Co.*, 280 P.3d at 246.

202. *Id.*

203. *Id.*

204. *Id.* (quoting *In re Rules of Prof. Conduct and Insurer Imposed Billing Rules and Conduct*, 2 P.3d 806, 813 (Mont. 1999)).

essary for American Zurich to obtain legal advice.[205] Although Roscoe had an obligation to provide information to American Zurich to assist the insurer in handling the workers' compensation claim, that flow of information was one-way.[206] Because the law bars employers in Plan II from participating in the adjustment of the employee's claim, the Court held it was neither necessary nor appropriate for American Zurich to communicate its settlement strategy to Roscoe.[207]

The Court then looked at whether American Zurich waived attorney-client privilege by sending the letter to Roscoe.[208] Disclosure to third parties waives the privilege unless the disclosure is necessary for the client to obtain informed legal advice.[209] The Court held disclosure was not necessary for American Zurich to obtain legal advice.[210] American Zurich argued, however, that Kimmel did not have authority to waive the privilege because he was not an officer or a director of American Zurich, and the privilege is normally only exercised or waived by officers and directors.[211] The Court found this argument unpersuasive because, under Montana law, claims adjusters have extensive authority when examining and managing settlement claims.[212] Kimmel himself admitted in his deposition that he had "absolute authority" over Peters's claim.[213] Thus, the Court held that Kimmel had authority to waive attorney-client privilege and his transmittal of the letter to Roscoe constituted such waiver.[214]

The Court next looked at whether the work product doctrine protected the letter from disclosure. The Court acknowledged that disclosure to non-adversaries does not necessarily waive confidentiality of attorney work product.[215] Disclosure to a non-adversary constitutes waiver if the recipient is either a conduit to an adversary, or if there is no confidentiality agreement or other assurance that would give the disclosing party a reasonable expectation the recipient would keep the work product confidential.[216] The Court held Roscoe's overlapping relationship with both Peters and American Zurich made any expectation of confidentiality unreasonable.[217] Thus,

205. *Am. Zurich Ins. Co.*, 280 P.3d at 246.
206. *Id.*
207. *Id.*
208. *Id.* at 247.
209. *Id.*
210. *Id.*
211. *Am. Zurich Ins. Co.*, 280 P.3d at 247.
212. *Id.*
213. *Id.*
214. *Id.* at 248.
215. *Id.*
216. *Id.* at 249.
217. *Am. Zurich Ins. Co.*, 280 P.3d at 249.

the Court held disclosure of Maynard's letter to Roscoe waived work product protection.[218]

The Court held the district court reached the correct conclusion that production of the letter should be compelled despite the district court's failure to fully analyze American Zurich's work product argument.[219] The Court therefore dismissed the petition for writ of supervisory control.[220] The Court's holding makes clear that the relationship between a workers' compensation insurer and the insured employer does not give rise to sufficient common legal interests between the two to extend either attorney-client privilege or the work product doctrine to communications between the insurer and the employer.

This case is significant to anyone practicing in the workers' compensation field in Montana because it clarifies that communications to the employer from either the insurer or counsel for the insurer will not be protected from disclosure by either attorney-client privilege or the work product doctrine. In the wake of *American Zurich*, insurance defense attorneys will want to caution adjusters and other insurance company representatives not to share any communications between the attorney and the insurer with the employer. Attorneys representing employees in workers' compensation matters will want to subpoena any communications from the insurer, or counsel for the insurer, to the employer. The Court's holding may also be applicable to other contexts in which the insurer and insured do not have significant shared legal interests. The Court was careful to note, however, that its holding in *American Zurich* does not impact work product protection where an insurer and insured have a common legal interest in the underlying litigation.[221]

—Paul M. Leisher

VII. *City of Missoula v. Paffhausen*[222]

In *City of Missoula v. Paffhausen*, the Montana Supreme Court recognized, as a matter of first impression, involuntary intoxication as an affirmative "automatism"[223] defense to the absolute liability offense of driving

218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *City of Missoula v. Paffhausen*, 289 P.3d 141 (Mont. 2012).
223. Automatism "refers to behavior performed in a state of unconsciousness or semi-consciousness such that the behavior cannot be deemed volitional. This unconscious or semi-conscious state may be brought about by any one of a variety of circumstances including epilepsy, stroke, concussion, or involuntary intoxication." *Paffhausen*, 289 P.3d at 148 (citing Wayne R. LaFave, Substantive Criminal Law vol. 1, § 9.4(a), (b) (2d ed. 2003)).

under the influence of alcohol ("DUI").[224] The Court held that Paffhausen could assert automatism to challenge the voluntary act element of her DUI charge because Montana's voluntary act statute applies to all crimes, not just those with a mental state element.[225] In justifying its recognition of automatism, the Court also relied on the existing defense of compulsion to assert that under Montana law, "'absolute liability' is not necessarily absolute."[226]

In the early morning hours of January 18, 2010, Missoula City Police Officer Christian Cameron pulled over Leigh Paffhausen after observing her drive through one stop sign and prematurely brake before another.[227] After stopping Paffhausen, Officer Cameron noticed her speech was slow and slurred.[228] Officer Cameron was unable to administer a field sobriety test, and Paffhausen refused to provide a breath sample.[229] Officer Cameron subsequently arrested Paffhausen for DUI.[230] After she was charged, Paffhausen informed the Missoula Police Department that she believed someone slipped her a "date rape" drug, which caused her impairment.[231]

At her initial appearance, Paffhausen filed notice that she intended to assert involuntary intoxication as an affirmative defense to the DUI charge.[232] The City of Missoula (the "City") filed a motion before trial to prevent Paffhausen from asserting involuntary intoxication, arguing that it can only be used in cases where mental state is an element of the charged crime.[233] Paffhausen responded that she was not challenging the mental state and was only asserting the defense to demonstrate that she did not commit a voluntary act by driving.[234] Paffhausen acknowledged consuming a small amount of alcohol the night of her arrest but insisted that she should not be responsible for driving under the influence because she had been unknowingly drugged by a third party.[235] The Municipal Court sided with the City and prevented Paffhausen from asserting an involuntary intoxication defense.[236] Paffhausen appealed the ruling, first to the District

224. *Paffhausen*, 289 P.3d at 147–148.

225. *Id.* at 146, 148.

226. *Id.* at 146–148.

227. *Id.* at 144.

228. *Id.*

229. *Id.*

230. *Paffhausen*, 289 P.3d at 144.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Paffhausen*, 289 P.3d at 144.

Court, which affirmed the Municipal Court's ruling, and then to the Montana Supreme Court.[237]

On appeal, the Court reversed the district court's ruling and held that Paffhausen could use the automatism defense to challenge the voluntary act element of her DUI charge.[238] In recognizing automatism, the Court noted that *State v. Korell*[239] provides that Montana's statutory code leaves room for an automatism defense, even without explicit judicial recognition.[240] In light of *Korell*, the Court examined Montana Code Annotated § 45–2–202, which states that "[a] material element of every offense is a voluntary act," and § 45–2–101(33), which defines an involuntary act, in part, as "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual."[241] The Court also quoted the Criminal Law Commission Comments to § 45–2–202, which state that "a muscular movement may be voluntary ('willed') or involuntary—a physical reflex or compelled motion which is not accompanied by the volition of the person making the motion. Only the voluntary act gives rise to criminal liability."[242]

The Court provided policy reasons for recognizing the automatism defense and analogized it to the codified defense of compulsion.[243] The Court noted the automatism defense falls squarely in line with criminal law policy as embodied in Montana's statutes precluding the faulting of people for the acts of others or for acts performed without criminal intent.[244] Applying this policy, the Court held that if Paffhausen could prove by admissible evidence that she did not act voluntarily because a third party drugged her, she may not be guilty of DUI.[245] The Court further validated the automatism defense by comparing it to compulsion, which allows a defendant to evade conviction for a crime despite conduct that fits the offense if the defendant is in imminent danger and needs to escape from harm.[246] The Court relied on *State v. Leprowse*,[247] which allowed a compulsion defense in a DUI case, as precedent supporting the principle that " 'absolute liability' does not necessarily mean absolute."[248]

237. *Id.*

238. *Id.* at 149–150.

239. *State v. Korell*, 690 P.2d 992 (Mont. 1984).

240. *Paffhausen*, 289 P.3d at 146 (citing *Korell*, 690 P.2d at 1001).

241. *Paffhausen*, 289 P.3d at 146 (quoting Mont. Code Ann. §§ 45–2–101(33), 45–2–202).

242. *Paffhausen*, 289 P.3d at 146 (quoting the Criminal Law Commission Comments to Mont. Code Ann. § 45–2–202).

243. *Paffhausen* 289 P.3d at 146–147.

244. *Id.* at 147 (citing Mont. Code Ann. §§ 45–1–102(1)(b), 1–3–211, 1–3–217).

245. *Paffhausen* 289 P.3d at 148.

246. *Id.* at 146–147.

247. *State v. Leprowse*, 221 P.3d 648 (Mont. 2009).

248. *Paffhausen*, 289 P.3d at 147 (citing *Leprowse*, 221 P.3d at 651).

In his dissent, Justice Rice criticized the Court for contradicting the Legislature's intent by injecting a mental state element into an absolute liability offense.[249] As evidence of this contradiction, Justice Rice looked to the Annotator's Notes to the Montana Criminal Code of 1973, which state that the voluntary act statute should not apply to absolute liability offenses.[250] Despite reorganization of the Montana Criminal Code in 1979, no substantive changes were made to the voluntary act statute, and, according to Justice Rice, its application should continue to be consistent.[251] He pointed out that, until *Paffhausen*, the Court applied the voluntary act statute only to crimes having a mental state element and never to an absolute liability crime.[252]

Justice Rice also disagreed with the Court's rationale regarding compulsion as a basis upon which to justify automatism and warned that the Court's holding opened the door to frivolous voluntary act defenses.[253] He argued that the Court drew unwarranted similarities between compulsion and involuntary intoxication, quoting the reasoning of *New Mexico v. Gurule*,[254] a case that compared involuntary intoxication to "duress."[255] *Gurule* recognized duress but disallowed involuntary intoxication on the grounds that duress justifies an illegal act within the totality of the circumstances, whereas involuntary intoxication only attempts to rectify the mental state of the accused.[256] Justice Rice also noted that involuntary intoxication (under the umbrella of automatism) has not yet been codified in Montana, while compulsion has.[257] Finally, Justice Rice expressed concern that the Court's holding will unnecessarily complicate the prosecution of DUI charges by giving rise to "pretextual defenses" that waste time and frustrate the State's attempts to curtail drunk driving.[258]

The Montana Practitioner should be aware that *Paffhausen* potentially weakens the meaning of "absolute liability" under Montana law. It makes automatism a judicially recognized defense that is available not only to challenge the mental state element but to challenge the voluntary act element of an offense as well. The decision immediately impacts the prosecution of DUI cases with potentially positive and negative consequences. On

249. *Paffhausen*, 289 P.3d at 151–152 (Rice, J., dissenting).

250. *Id.* at 152 (citing to Annotator's Note, Mont. Crim. Code of 1973, Annotated at 90 (1973 ed.)).

251. *Paffhausen*, 289 P.3d at 152.

252. *Id.*

253. *Id.* at 154–155, 156.

254. *N.M. v. Gurule*, 252 P.3d 823 (N.M. App. 2011).

255. *Paffhausen*, 289 P.3d at 154–155. "Duress" functions similarly to compulsion in that it "is available as a defense when the defendant committed the prescribed act, with the requisite intent, in order to avoid a harm of greater magnitude." *Id.* at 155 (quoting *Gurule*, 252 P.3d at 829).

256. *Paffhausen*, 289 P.3d at 155 (quoting *Gurule*, 252 P.3d at 829).

257. *Paffhausen*, 289 P.3d at 155.

258. *Id.* at 156.

the one hand, persons charged with DUI after they have been unwittingly drugged may receive more just results if they can show they did not act voluntarily. However, Justice Rice's concerns about the erosion of absolute liability and negative effects on the State's attempts to control drunk driving are valid because of the broad scope of the Court's ruling. Not only does *Paffhausen* open the door to involuntary intoxication defenses against DUI, the decision could also serve as precedent to apply automatism defenses to other absolute liability crimes in the future.

—Russell Michaels

VIII. *DONALDSON V. STATE*[259]

In *Donaldson v. State*, the plaintiffs asked the Montana Supreme Court to find that Montana's statutory scheme unconstitutionally prevented same-sex couples from enjoying benefits that opposite-sex couples enjoy.[260] The Court upheld the district court's dismissal of the plaintiffs' claims—that a particular statutory scheme denied them rights guaranteed by the Montana Constitution because they were in same-sex relationships[261]—on the basis that such a broad determination was beyond the scope of the judiciary's power, would be speculative, and would not resolve an actual controversy.[262] According to the Court, the Declaratory Judgments Act does not give Montana courts the power to determine matters of this nature.[263]

The plaintiffs were twelve individuals in committed same-sex relationships.[264] In 2010, they sued the State, arguing the statutory structure prevents them from enjoying the same relationship and family obligations and protections that similarly situated different-sex couples enjoy.[265] The plaintiffs argued this statutory structure is unconstitutional because it interferes with their rights to equal protection, due process, privacy, dignity, and pursuit of life's necessities, which are guaranteed under Article II of the Montana Constitution.[266] They sought both a declaration that the current statutory scheme denies them Article II rights and an injunction prohibiting the State from continuing to deny them access under the statutory scheme.[267]

259. *Donaldson v. State*, 292 P.3d 364 (Mont. 2012).
260. *Id.* at 365–366.
261. *Id.*
262. *Id.* at 366.
263. *Id.* at 366–367.
264. *Id.* at 377.
265. *Donaldson*, 292 P.3d at 365.
266. *Id.*
267. *Id.*

The plaintiffs did not seek the opportunity to marry or receive marriage designations for their relationships.[268]

The district court granted the State's motion to dismiss, reasoning that, as the plaintiffs did not challenge specific statutes, the relief sought would require ordering a new statutory scheme, which would violate the separation of powers.[269] According to the court, the proper method of litigating the plaintiffs' concerns would be specific suits directed at specifically identified statutes.[270] Additionally, the court denied the plaintiffs' motion to alter or amend their complaint.[271]

On appeal, the plaintiffs reasserted their request for declaratory and injunctive relief, arguing their constitutional challenges should be assessed under a strict level of review and that, even under a low level of scrutiny, the State could not show a legitimate government interest in the current statutory scheme.[272] The Montana Supreme Court agreed with the district court's assessment that granting such broad declaratory and injunctive relief was beyond the judiciary's power.[273] The Court noted the requested relief was so broad that granting it would not solve the controversy but would instead lead to confusion and further litigation.[274] It also bluntly declared, "Courts do not function, even under the Declaratory Judgments Act, to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions."[275]

Nonetheless, the Court rejected the district court's dismissal of the plaintiffs' claims, stating the plaintiffs should have been given the opportunity to amend their complaint by listing specific statutes and developing arguments about the nature of the State's interest in these statutes and what level of constitutional scrutiny the courts should apply.[276] Accordingly, the Court remanded the case with instructions to allow the plaintiffs to amend their complaint.[277]

Justice Rice wrote a concurring opinion, arguing the Marriage Amendment to the Montana Constitution provided another basis for dismissal of the plaintiffs' complaint.[278] He argued, "The question thus posed by Plaintiffs' equal protection claim is whether the State is barred by the Constitu-

268. *Id.*
269. *Id.*; *see* Mont. Const. art. III, § 1.
270. *Donaldson*, 292 P.3d at 366.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at 366–367.
276. *Donaldson*, 292 P.3d at 367.
277. *Id.*
278. *Id.* at 368 (Rice, J., concurring).

tion from using marriage as an exclusive basis for granting any concrete legal entitlement."[279] Justice Rice contended the historical exclusive reservation of marriage and its corresponding benefits and obligations to different-sex couples prevented the plaintiffs from being similarly situated, provided a compelling state interest, and defeated their basis for an equal protection claim.[280] According to Justice Rice, to decide otherwise would render the Marriage Amendment superfluous.[281]

In his dissent, Justice Nelson took issue with the Court's refusal to adjudicate the plaintiffs' claims under the Uniform Declaratory Judgments Act.[282] The purpose of the Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered."[283] Declaratory relief is appropriate, Justice Nelson contended, in situations where an actual controversy exists and no specific injury has yet taken place, but where it is nonetheless necessary to have the issue speedily determined because the delay of ordinary judicial proceedings could result in injury to the parties.[284]

Referring to their Prayer for Relief, Justice Nelson noted the plaintiffs' first five paragraphs sought a declaration that the State's exclusion of same-sex couples from the protections and obligations available to different-sex couples violated five rights they held under the Montana Constitution.[285] The next two paragraphs sought injunctive relief, requesting the State be enjoined from preventing same-sex couples from having access to a statutory structure that provides them equal protection and the State be required to offer them a statutory structure granting these protections and obligations.[286] Justice Nelson pointed out that, in deciding the issue was nonjusticiable, the district court focused solely on whether the injunctive relief requested could be granted.[287] Further, the district court did not know what specific statutes would be affected by such a decision and determined that issuing an injunction ordering the Legislature to alter them would be an inappropriate exercise of judicial power.[288] Therefore, Justice Nelson agreed with the district court's decision declining to order injunctive relief,

279. *Id.*

280. *Id.* at 372–374.

281. *Id.* at 374.

282. *Donaldson*, 292 P.3d at 391 (Nelson, J., dissenting).

283. Mont. Code. Ann. § 27–8–102 (2011).

284. *Donaldson*, 292 P.3d at 385 (citing *Automation Sys., Inc. v. Intel Corp.*, 501 F. Supp. 345, 347 (S.D. Iowa 1980)).

285. *Donaldson*, 292 P.3d at 386.

286. *Id.*

287. *Id.*

288. *Id.* at 386–387.

but he stated its reasons for doing so should not have prevented it from issuing declaratory relief.[289]

Justice Nelson went on to note that the majority also failed to differentiate between the plaintiffs' requests for declaratory and injunctive relief.[290] He contended the plaintiffs' request for declaratory relief raised the justiciable question of whether it is "constitutionally permissible for the State to deny same-sex couples the opportunity to obtain the benefits and protections made available to different-sex couples."[291] This controversy could be resolved, Justice Nelson argued, through a declaration that sexual orientation is a suspect class and laws that provide disparate treatment between same-sex couples and different-sex couples should be subjected to strict scrutiny review.[292] Nor would issuing declaratory relief be speculative, he contended, because there was no denial the plaintiffs had suffered discrimination or they were being treated differently than similarly situated different-sex couples under Montana law.[293]

Under *Secret Grand Jury Inquiry*,[294] Justice Nelson noted, the test the Court previously used for determining whether a justiciable controversy exists for the purpose of issuing a declaratory judgment is: 1) whether "the parties have existing and genuine, as distinguished from theoretical, rights or interests"; 2) whether the controversy is one "upon which the judgment of the court may effectively operate, as opposed to a debate resulting in a purely political, administrative, philosophical, or academic conclusion"; and 3) whether judicial determination will have the effect of a final judgment on the rights, status, or legal relationships of one or more of the parties involved or in the absence of this be of such overriding public importance as to constitute their legal equivalent.[295] The plaintiffs' request satisfied this test, Justice Nelson contended, because the rights the plaintiffs invoked were existing and genuine rights as opposed to theoretical ones.[296] The Court could settle the issue by making a judgment on whether the State could offer certain benefits to different-sex couples but deny them to same-sex couples.[297] Finally, according to Justice Nelson, a judgment stating what legal obligations and benefits same-sex couples are entitled to would

289. *Id.* at 387.

290. *Id.* at 389.

291. *Donaldson*, 292 P.3d at 389–390.

292. *Id.* at 390.

293. *Id.*

294. *Secret Grand Jury Inquiry*, 553 P.2d 987, 990 (Mont. 1976).

295. *Donaldson*, 292 P.3d at 390 (citing *Secret Grand Jury Inquiry*, 553 P.2d at 990).

296. *Donaldson*, 292 P.3d at 390–391.

297. *Id.* at 391.

determine the constitutional rights, status, and legal relationships of the parties.[298]

In light of *Donaldson*, the Montana practitioner should be aware that claims seeking determination of the constitutionality of laws generally must reference particular statutes, as opposed to statutory schemes, in order to be considered justiciable. This will allow the courts to assess the nature of the State's interest and decide what level of judicial scrutiny should be applied to each statute. While a failure to do so is unlikely to be fatal to the complaint due to the subsequent opportunity to amend, practitioners will want to compose the complaint correctly the first time, rather than rely upon the court's generosity.

—Kathleen Molsberry

IX. *Northern Plains Resource Council, Inc. v. Montana Board of Land Commissioners*[299]

In *Northern Plains Resource Council, Inc. v. Montana Board of Land Commissioners*, the Montana Supreme Court held the State can enter into coal leases without first conducting an environmental impact study ("EIS") because the studies are merely deferred until the permitting stage.[300] Additionally, the Court declined to apply strict scrutiny to the EIS exception at issue because it concluded the act of issuing leases did not interfere with the right to a clean and healthful environment under Article II, section 3 of the Montana Constitution.[301]

The suit commenced when the Northern Plains Resource Council, the National Wildlife Federation, the Montana Environmental Information Center, and the Sierra Club (collectively "NPRC") sought declaratory rulings that the State Land Board wrongfully neglected to perform environmental studies before entering into mining leases with Arch Coal in March 2010, which covered lands in the Otter Creek drainage.[302] The leases at issue provide that mining activity cannot commence until Arch Coal acquires all the mandatory permits from the State.[303] Moreover, the State can rescind the leases if Arch Coal fails to meet its obligations.[304] During the proceedings, both parties agreed coal mining and burning could increase the carbon dioxide levels in the atmosphere and thus "exacerbate global warm-

298. *Id.*
299. *N. Plains Resource Council, Inc. v. Mont. Bd. of Land Commrs.*, 288 P.3d 169 (Mont. 2012).
300. *Id.* at 174.
301. *Id.*
302. *Id.* at 171.
303. *Id.*
304. *Id.* at 172.

ing and climate change."[305] Ultimately, the district court granted the State's summary judgment motion by concluding, "Arch Coal, by leasing the Otter Creek tracts from the State, acquired 'nothing more than the exclusive right to apply for permits from the State.'"[306] The district court reasoned the requisite environmental reviews would occur prior to any actual coal mining or burning, and therefore, the State would still "meet its constitutional and trust responsibilities, both environmentally and financially."[307]

After NPRC appealed, the State maintained that environmental review will occur before Arch Coal obtains the requisite permits and begins mining.[308] The State relied on Montana Code Annotated § 77–1–121(2), which excuses the State Land Board from conducting an EIS prior to issuing a lease.[309] Essentially, the statute "defer[s] preparation of an environmental impact statement (EIS) until later in the development process."[310]

NPRC contended that coal mining and its subsequent burning cause detrimental effects such as pollution and global warming.[311] Therefore, NPRC argued § 77–1–121(2) is unconstitutional because the Montana Constitution requires the State to regulate activities that can affect citizens' right to a clean and healthful environment.[312] In essence, NPRC contended that without the § 77–1–121(2) exception, the State Land Board would have been compelled to perform an EIS before awarding the coal leases.[313] Additionally, NPRC argued that because § 77–1–121(2) impacts the right to a clean environment under the Montana Constitution, the statute must survive strict scrutiny.[314]

The Montana Supreme Court framed the issue as "whether the State Land Board properly issued leases . . . without first conducting environmental review under the Montana Environmental Policy Act."[315] The Court began its analysis by noting that the Montana Constitution guarantees all citizens the right to a clean and healthful environment.[316] The Legislature is responsible for administering this right and fulfills this duty through the Montana Environmental Policy Act ("MEPA").[317] MEPA "requires State

305. *N. Plains Resource Council, Inc.*, 288 P.3d at 172.
306. *Id.* at 171, 173.
307. *Id.* at 173.
308. *Id.* at 172.
309. *Id.*
310. *Id.*
311. *N. Plains Resource Council, Inc.*, 288 P.3d at 172.
312. *Id.*
313. *Id.*
314. *Id.* at 174.
315. *Id.* at 171.
316. *Id.* at 173; Mont. Const. art. II, § 3.
317. *N. Plains Resource Council, Inc.*, 288 P.3d at 173.

agencies to review, through an EIS, major actions that significantly affect the quality of the human environment so that the agencies may make informed decisions."[318] Citing *North Fork Preservation Association v. Department of State Lands*,[319] the Court noted that merely granting oil and gas leases does not significantly affect the environment because the State is not bound to an "irretrievable commitment of resources" since permits must be acquired before ground-disturbing activities commence.[320] The Court further reasoned Arch Coal's lease expressly prohibits the commencement of mining before acquiring permits from the State, a process that includes conducting an EIS.[321]

Next, the Court turned to NPRC's argument that the § 77–1–121(2) exception must survive a strict scrutiny analysis.[322] The Court cited *MEIC v. DEQ*,[323] where it held a statute that permitted the discharge of arsenic-tainted water without an EIS impacted the right to a clean environment and thus forced the State to demonstrate a compelling interest.[324] Distinguishing *MEIC*, the Court explained the Arch Coal leases do not circumvent the EIS requirement, but only defer the reviews "from the leasing stage to the permitting stage."[325] Thus, issuing the leases does not affect the fundamental right to a clean environment because the permitting process will eventually require an EIS.[326] Accordingly, § 77–1–121(2) does not necessitate a strict scrutiny analysis that requires the State to demonstrate a compelling interest.[327]

After concluding no constitutional interests were implicated, the Court held rational basis scrutiny applies to § 77–1–121(2).[328] Holding § 77–1–121(2) satisfied rational basis review, the Court discussed the logic behind deferring an EIS until the permitting stage, finding that deferring "eliminate[s] duplicate and speculative studies and review, while preserving all environmental protections required by law."[329] The Court then reiterated that a mining lease simply grants a company the exclusive right to apply for a permit from the State, which will require the preparation of an

318. *Id.*

319. *N. Fork Preservation Assn. v. Dept. of State Lands*, 778 P.2d 862 (Mont. 1989).

320. *N. Plains Resource Council, Inc.*, 288 P.3d at 174 (citing *N. Fork Preservation Assn.*, 778 P.2d 862).

321. *N. Plains Resource Council, Inc.*, 288 P.3d at 174.

322. *Id.*

323. *MEIC v. DEQ*, 988 P.2d 1236 (Mont. 1999)).

324. *N. Plains Resource Council, Inc.*, 288 P.3d at 174 (citing *MEIC*, 988 P.2d 1236).

325. *N. Plains Resource Council, Inc.*, 288 P.3d at 174.

326. *Id.*

327. *Id.*

328. *Id.* at 174–175.

329. *Id.* at 175.

EIS.[330] Finally, the Court noted that the statute at issue generates significant income for the public school system, including a windfall of $85 million in the present case.[331]

Montana practitioners should take notice of *Northern Plains* because it upholds the § 77–1–121(2) exception and extends it to coal leases, allowing the State and operators to defer environmental studies until the permitting stage. In sum, *Northern Plains* will limit litigation regarding environmental impact statements during the leasing stage of natural resource development on State lands.

—Jordan Peila

X. *City of Whitefish v. Jentile*[332]

In *City of Whitefish v. Jentile*, the Montana Supreme Court held that pleading guilty to a criminal violation does not preclude a defendant from invoking the defense of comparative negligence in a restitution proceeding.[333] In determining restitution, a court must consider the alleged negligence of other parties, including police officers pursuing a fleeing suspect.[334] *Jentile* demonstrates that although the imposition of restitution is required when a convicted criminal offender's conduct results in loss to a victim,[335] the fact that loss resulted from the criminal offender's conduct does not automatically make the offender responsible for the entire loss—the negligence of all parties involved must be balanced.[336]

On October 28, 2009, the Helena Veteran's Administration ("VA") called the Whitefish Police Department ("Police") to report concerns that Ralph Jentile ("Jentile"), a VA client, might be suicidal.[337] The VA stated Jentile called asking questions about the lethality of lithium and the lack of an antidote.[338] Officer Ryan Zebro called Jentile and explained that he needed to turn himself in because the VA ordered an evaluation for him.[339] Jentile refused to turn himself in and stated he was not suicidal and wanted to be left alone.[340] The Police issued an "attempt to locate" for Jentile after

330. *Id.*
331. *N. Plains Resource Council, Inc.*, 288 P.3d at 171, 175.
332. *City of Whitefish v. Jentile*, 285 P.3d 515 (Mont. 2012).
333. *Id.* at 518, 520.
334. *Id.* at 520.
335. Mont. Code. Ann. § 46–18–201(5) (2011).
336. *Jentile*, 285 P.3d at 520.
337. *Id.* at 516.
338. *Id.*
339. *Id.* at 517.
340. *Id.*

failing to find him at his residence during two separate welfare checks.[341] Shortly after the alert was issued, an officer reported seeing Jentile's vehicle driving through town.[342]

Three patrol cars stopped Jentile.[343] One unit blocked traffic while a second car pulled alongside Jentile and a third stopped behind him.[344] Though Jentile initially stopped, he pulled back into traffic before officers could get out of their vehicles, and the three patrol cars followed.[345] The vehicles sped through a 25 mile-per-hour zone at an estimated 45–50 miles per hour.[346] Jentile turned left onto a side street in a residential zone and then made another immediate left turn into his own driveway.[347] The first patrol car was able to stop several feet behind Jentile's vehicle but was immediately rear-ended by Officer Zebro.[348] Jentile was tasered as he exited his vehicle, handcuffed, and transported to the hospital for a mental health evaluation.[349]

The Montana Highway Patrol ("MHP") investigated the crash and issued a report concluding that Officer Zebro following too closely caused the crash.[350] No citations were issued to Officer Zebro, but a letter of reprimand was placed in his file.[351]

The county attorney charged Jentile with resisting arrest, reckless driving, and eluding a peace officer, all misdemeanors.[352] The City of Whitefish ("City") requested restitution for the damage to both police cars.[353] Pursuant to a plea agreement, Jentile pled guilty to eluding a police officer, and the remaining two charges were dropped.[354] The plea agreement allowed for a restitution hearing to be held separate from the sentencing.[355]

Jentile moved to dismiss the restitution hearing, arguing he should not have to pay for damage to the patrol cars.[356] To support his claim that he did not cause the accident, Jentile cited the MHP report finding Officer Zebro to be at fault for following too closely.[357] Jentile also argued the

341. *Id.*
342. *Jentile*, 285 P.3d at 517.
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Jentile*, 285 P.3d at 517.
349. *Id.*
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. *Jentile*, 285 P.3d at 517.
355. *Id.*
356. *Id.*
357. *Id.*

City was wrongfully involved in a civil matter and violated its own policies by initiating a pursuit of Jentile's vehicle.[358] The motion was denied, and a restitution hearing was held in municipal court.[359] At the hearing, Jentile argued that the Police were negligent *per se* for pursuing him though he was not under arrest, for not conducting the pursuit in a safe manner, and for not discontinuing the pursuit.[360] Jentile also argued the City was negligent *per se* for not adopting the Montana Law Enforcement Training Center's suggested policies for dealing with persons with mental disorders.[361]

The municipal court awarded the City's request for restitution and ordered Jentile to pay $7,327.81.[362] It found the collision to be "a direct consequence of Jentile's erratic unlawful driving that required defensive, reactive, emergency maneuvering by police in visual pursuit."[363] Jentile first appealed to the district court, which also rejected Jentile's claims and affirmed the municipal court's ruling, before appealing to the Montana Supreme Court.[364]

On appeal, Jentile argued that eluding a police officer does not preclude a comparative negligence analysis and that the restitution amount was reached in error because the municipal court failed to take into consideration Officer Zebro's alleged negligence.[365] The City argued the accident was caused by Jentile's illegal conduct rather than any negligence on the part of the officers.[366] It further argued that even if a comparative negligence analysis should be allowed in a criminal restitution hearing, Jentile waived the defense by failing to raise it at the hearing.[367]

The Montana Supreme Court reversed and remanded to the municipal court for a comparative negligence determination in light of the statutes and case law regarding emergency responders.[368] The Court pointed out that while Montana Code Annotated § 61–8–107 allows a police officer to exceed the speed limit or disregard other traffic laws when in pursuit or responding to an emergency call, it "does not relieve the officer from the duty to drive with due regard for the safety of all persons, nor does it protect the

358. *Id.*
359. *Id.*
360. *Jentile*, 285 P.3d at 517.
361. *Id.*
362. *Id.* at 518.
363. *Id.*
364. *Id.*
365. *Id.*
366. *Jentile*, 285 P.3d at 518.
367. *Id.*
368. *Id.* at 518–519, 521.

officer from the consequences of the officer's reckless disregard for the safety of others."[369]

The Court also rejected the City's argument that Jentile waived the defense of comparative negligence by failing to raise it at the hearing.[370] The Court noted that although Montana Rule of Civil Procedure 8(c), cited by the City for support, requires an affirmative defense to be raised in the answer or be deemed waived, a restitution hearing for a criminal case does not require an answer.[371] Montana Code Annotated § 46–18–244(2) allows a criminal defendant to "assert any defense that the offender could raise in a civil action for the loss for which the victim seeks compensation."[372] Despite the fact that he never specifically stated the phrase "comparative negligence," Jentile did present arguments regarding negligence *per se* on the part of the City and Officer Zebro.[373] The Court held these statements were sufficient to raise the defense.[374] Because comparative negligence merely compares the negligence of the various parties, the municipal court should have considered the alleged negligence on the part of the City and Officer Zebro in making a determination on restitution.[375]

Justice Rice dissented.[376] He agreed with the majority's holding that a comparative negligence analysis was appropriate and that Jentile's statements regarding negligence *per se* were sufficient to raise the defense.[377] However, Justice Rice took issue with the majority's ultimate conclusion that the municipal court, and the district court on appeal, did not do such an analysis.[378]

A lower court's findings of fact regarding restitution are reviewed for clear error.[379] Justice Rice noted that the municipal court reviewed briefs on Jentile's motion to dismiss, heard opening and closing arguments from both sides, reviewed the video of the pursuit and crash, and heard testimony from Officer Zebro and Jentile.[380] After consideration of all this, the municipal court determined "the entire pursuit 'was an unbroken course of

369. *Id.* at 519 (citing Mont. Code Ann. § 61–8–107; *Stenberg v. Neel*, 613 P.2d 1007, 1010 (Mont. 1980); *Elklund v. Trost*, 151 P.3d 870, 879 (Mont. 2006)).

370. *Jentile*, 285 P.3d at 519.

371. *Id.*

372. *Id.* (citing Mont. Code. Ann. § 46–18–244(2)).

373. *Jentile*, 285 P.3d at 517, 519.

374. *Id.* at 519.

375. *Id.* at 519–520.

376. *Id.* at 521.

377. *Id.* at 521 (Rice, J., dissenting).

378. *Id.* at 521–522.

379. *Jentile*, 285 P.3d at 518 (citing *State v. Johnson*, 265 P.3d 638, 641 (Mont. 2011) (internal citations omitted)).

380. *Jentile*, 285 P.3d at 522.

events that was caused by Jentile's unlawful conduct.' "[381] It further determined that the officers had acted reasonably and in a "controlled way," and the accident was "a direct consequence of Jentile's erratic unlawful driving."[382] The order clearly noted that after consideration of Jentile's "civil law defenses," none of them "would bar the imposition of a full measure of restitution."[383] Justice Rice would have affirmed the municipal court's decision on the amount of restitution.[384] In his opinion, Justice Rice pointed out that the Court's disagreement with the municipal court's factual findings "essentially directs a 'verdict' in favor of Jentile."[385]

Montana practitioners should be aware that in a criminal restitution proceeding, a convicted defendant has the right to raise the defense of comparative negligence. An admitted violation of the law, on its own, does not subject the defendant to sole responsibility for loss associated with his or her conduct. *Jentile* also suggests that a "but-for" test regarding the defendant's actions is inappropriate when there is alleged negligence on the part of others.

—Fallon Stanton

XI. *STATE V. COOKSEY*[386]

In *State v. Cooksey*, the Montana Supreme Court affirmed the district court's conviction of Defendant Bobby Cooksey for deliberate homicide.[387] In doing so, the Court determined Montana Code Annotated § 45–3–112 does not require law enforcement to conduct an independent investigation into every justifiable use of force situation; rather, law enforcement must merely make available for disclosure to the defense any evidence supporting a justifiable use of force defense that arises during an investigation.[388] Justice Nelson dissented from this portion of the Court's decision, stating such a view "completely emasculates [the] statute."[389] Although the Court addressed four issues on appeal,[390] the Court's disposition of the justifiable

381. *Id.* at 521.
382. *Id.* at 523.
383. *Id.*
384. *Id.*
385. *Id.*
386. *State v. Cooksey*, 286 P.3d 1174 (Mont. 2012).
387. *Id.* at 1176.
388. *Id.* at 1181.
389. *Id.* at 1183 (Nelson, J., concurring in part and dissenting in part). Justice Nelson also dissented from the Court's determination that Cooksey failed to raise credible concerns regarding possible taint of the jury pool under the first issue. Justice Rice joined Justice Nelson's dissent as to the Court's opinion regarding the justifiable use of force statute.
390. *Id.* at 1176 (majority).

use of force issue will have the greatest impact on the practice of law in Montana.

Bobby Cooksey lived next to Tracey Beardslee outside of Roundup, Montana.[391] The only way Beardslee accessed his property was via a road easement across Cooksey's property.[392] During the several years Beardslee lived there, the two men had several verbal arguments.[393] On July 7, 2009, Cooksey alleged he heard his dogs barking and left his house armed with a large-bore, lever-action rifle.[394] He saw Beardslee clearing weeds along the edges of the easement with a weed-whacker.[395] Cooksey approached Beardslee and asked him what he was doing on Cooksey's property.[396] According to Cooksey, Beardslee "went off" on him, threatening him and ultimately saying he would kill Cooksey.[397] Using his rifle, Cooksey shot Beardslee in the chest, killing him.[398] Cooksey then returned to his house and called 911, reporting that he had shot Beardslee.[399]

Beardslee never physically attacked Cooksey.[400] When the incident occurred, a fence stood between the two men, and Beardslee was moving away toward his home.[401] Although Cooksey saw Beardslee had a folding knife on his belt, Cooksey never saw him pull it out.[402] Officers ultimately investigated the relationship between Cooksey and Beardslee, reviewed Cooksey's version of Beardslee's actions on the day in question, and obtained an analysis of Beardslee's blood.[403]

A jury in the Fourteenth Judicial District Court, Musselshell County, convicted Cooksey of deliberate homicide, and the district court sentenced him to fifty years in the Montana State Prison.[404] The most notable issue raised by Cooksey on appeal was whether the State improperly failed to investigate evidence surrounding his defense of justifiable use of force.[405] Along these lines, Cooksey argued the district court's exclusion of evidence regarding the presence of anti-depressants in Beardslee's blood prevented him from presenting this defense.[406]

391. *Id.*
392. *Cooksey*, 286 P.3d at 1176.
393. *Id.*
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *Cooksey*, 286 P.3d at 1176.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*
404. *Cooksey*, 286 P.3d at 1176.
405. *Id.*
406. *Id.* at 1179.

Cooksey contended the district court improperly excluded the defense's offered evidence concerning the presence of the drug Paxil in Beardslee's blood, which the defense believed could be linked to Beardslee's aggressive behavior.[407] The Court held the district court did not abuse its discretion when it excluded this evidence on the grounds that the defense failed to disclose it to the prosecution in violation of § 46–15–323(5) and failed to show good cause for not doing so.[408]

The Court also addressed the proper interpretation of § 45–3–112, the statute governing the investigation of alleged offenses involving claims of justifiable use of force.[409] Section 45–3–112 provides:

> When an investigation is conducted by a peace officer of an incident that appears to have or is alleged to have involved the justifiable use of force, the investigation must be conducted so as to disclose all evidence, including testimony concerning the alleged offense and that might support the apparent or alleged justifiable use of force.[410]

Initially, the district court "refused to construe [the statute] to impose any new and independent duty for law enforcement to investigate cases involving justifiable use of force."[411] Rather, the district court equated the statute with the long-established *Brady* disclosure, which requires the prosecution to disclose any exculpatory evidence to the defense.[412] According to the district court, the statute only creates an obligation "to conduct a thorough investigation, which may or may not include issues regarding self defense [sic]. If [investigators] do gather evidence that is potentially exculpatory, or supports the affirmative defense of self-defense, then they [have] a duty to disclose it to the defense."[413]

Cooksey contended law enforcement admitted to doing "nothing" to investigate his self-defense claim in violation of the statute, and thus Beardslee's Paxil use was not uncovered until a month before the trial, resulting in its exclusion by the district court.[414] However, the Court agreed with the district court's construction, holding the statutory language is "plain and clear on its face."[415] The Court explained that Cooksey failed to demonstrate that it required law enforcement to conduct an independent investigation regarding his self-defense claim or that any actual or potential evidence was lost, withheld, or went undiscovered during the investiga-

407. *Id.*
408. *Id.*
409. *Id.* at 1180–1181.
410. Mont. Code Ann. § 45–3–112 (2009).
411. *Cooksey*, 286 P.3d at 1181.
412. *Id.* at 1180 (citing *Brady v. Md.*, 373 U.S. 83 (1963)).
413. *Cooksey*, 286 P.3d at 1181.
414. *Id.* at 1186 (Nelson, J., concurring in part and dissenting in part).
415. *Id.* at 1181 (majority).

tion.[416] The Court concluded the statute only requires that "evidence" that would support the defense be made available for disclosure to the defendant and that Cooksey failed to point to any evidence that would have supported his defense that was not disclosed.[417]

Justice Nelson dissented from the Court's holding as to this issue and noted his disagreement with the Court in its application of the same statute in its previous decision in *State v. Mitchell*.[418] Justice Nelson began his analysis by asserting the presumption that the legislature does not pass meaningless or useless laws.[419] Justice Nelson agreed with the majority that § 45–3–112 is clear and unambiguous, and thus legislative intent may be determined through the plain meaning of the words in the statute.[420] However, Justice Nelson noted § 45–3–112 does not mention "prosecutors" but rather refers specifically to "peace officers," implying the statutory duties extend to both prosecutors and investigators.[421] He further contended these duties extend beyond the existing protections provided by the *Brady* disclosure, noting the purpose of the statute "is to clarify and secure the ability of people to protect themselves."[422] According to Justice Nelson, interpreting it as merely reflecting existing protections would essentially render it meaningless.[423]

Justice Nelson also addressed two additional arguments made by the State: firstly, its contention that peace officers should not have a duty to investigate on behalf of the defense; and secondly, that the remarks of two senators during a 2009 subcommittee hearing regarding the justifiable use of force language demonstrate the code provision was meant to be merely duplicative of current law.[424] As to the first, Justice Nelson noted that although the criminal justice system is based on an adversarial model, the legislature has the ability to modify that system, and such a modification could take the form of a statute requiring peace officers to assist the defendant with the investigation in cases involving justifiable use of force.[425] As

416. *Id.*

417. *Id.*

418. *Id.* at 1183 (Nelson, J., dissenting in part and concurring in part); *see State v. Mitchell*, 286 P.3d 1196 (Mont. 2012) (rejecting the defendant's contention that law enforcement failed to properly investigate his justifiable use of force claim that the other individual reached for a potential weapon during the confrontation).

419. *Cooksey*, 286 P.3d at 1186–1187.

420. *Id.* at 1187

421. *Id.* at 1188.

422. *Id.*

423. *Id.*

424. *Id.* at 1190–1191.

425. *Cooksey*, 286 P.3d at 1190.

to the second, Justice Nelson maintained that the plain language of the statute controls over any conjectured meaning by a couple of senators.[426]

Justice Nelson, however, did not contend the statute imposes an affirmative obligation to commence an investigation (as argued by Cooksey and Mitchell), but it dictates that when a peace officer conducts an investigation and questions regarding justifiable use of force arise, § 45–3–112 imposes a duty to conduct the investigation in a particular manner.[427] As such, the statute requires "the peace officer to conduct his investigation so as to expose or make known 'all' evidence—*including evidence that the State has not yet uncovered and does not yet have in its possession*."[428] Justice Nelson ultimately determined the statute was triggered in both *Cooksey* and *Mitchell* and was violated in both cases.[429] Regarding *Cooksey*, Justice Nelson specifically noted the investigators' admission to making "*no effort at all*" to investigate Cooksey's claim.[430]

Ultimately, Montana practitioners should take note of *Cooksey* as it clearly demonstrates § 45–3–112 merely requires peace officers to comply with previously existing disclosure obligations.[431] However, Justice Nelson's dissent raises serious concerns regarding whether fact situations falling outside *Brady* disclosure protections may trigger a violation of the statute and what the proper remedy will be if and when a court finds such a violation has occurred.[432]

—Samantha Stephens

XII. *Pastimes, LLC v. Clavin*[433]

In *Pastimes, LLC v. Clavin*, the Montana Supreme Court held that the value of the Estate of Lila M. Clavin's interest in Pastimes, LLC was properly valued as of the date of trial rather than the date of her death.[434] Specifically, the Court determined the Estate had member rights under Montana Code Annotated § 35–8–803(10) and the parties properly executed an oral modification to Pastimes's Operating Agreement ("Agreement"). Based on the finding about the oral modification, the Court determined there was

426. *Id.* at 1191–1192.

427. *Id.* at 1188.

428. *Id.* at 1189 (emphasis in original).

429. *Id.* at 1193–1194.

430. *Id.* at 1193 (emphasis in original).

431. *Cooksey*, 286 P.3d at 1181 (majority).

432. *Id.* at 1194–1195 (Nelson, J., concurring in part and dissenting in part).

433. *Pastimes, LLC v. Clavin*, 274 P.3d 714 (Mont. 2012), *reh'g denied* (Apr. 10, 2012).

434. *Id.* at 719.

nothing in the Montana Limited Liability Act (the "Act") that automatically dissociated "the Estate upon Lila's death".[435]

Robert Gilbert ("Robert") and Lila Clavin ("Lila") founded Pastimes, LLC ("Pastimes") in July 1996 and executed the Agreement in August 1996.[436] The Agreement identified Robert and Lila as the only members, each holding 50 percent ownership interest in the company.[437] Furthermore, it stated that "Pastimes shall terminate 'upon the death, retirement, resignation, bankruptcy, court declaration of incompetence with respect to, or dissolution of, a Member,' unless at least two members remain who agree to continue the business of Pastimes."[438] Lila died on November 1, 2000.[439] Her son, Tim Clavin ("Tim"), was the personal representative of the Estate of Lila M. Clavin (the "Estate").[440] Robert and Tim could not agree on the value of Lila's share in Pastimes so Robert continued to run the business while the valuation issue was determined.[441] Robert has run the business since Lila's death.[442] Additionally, Robert provided notice that Lila's 50 percent interest in Pastimes (and thus her 50 percent interest in its liquor license) had been transferred to the Estate, and Robert charged 50 percent of Pastimes's tax liability to the Estate each year.[443]

In 2005, Robert filed a complaint for declaratory relief requesting that the district court determine the value of Lila's share as of the date of her death.[444] In 2007, the parties filed cross-motions for summary judgment; both parties, in effect, requested the court to declare the status of Pastimes either as a partnership or a limited liability company.[445] Without ruling on the cross-motions, the district court ruled that the Estate should be awarded more than Lila's original investment.[446] The valuation issue was argued on February 17, 2009, and the court determined that Lila's interest should be based on "present-day" value.[447]

Not until trial in January of 2010 did the district court rule that Pastimes was "at all times" a limited liability company.[448] But, the court found that the Estate did not dissociate from Pastimes at the time of Lila's

435. *Id.* at 718.
436. *Id.* at 716.
437. *Id.*
438. *Id.*
439. *Pastimes*, 274 P.3d at 716.
440. *Id.*
441. *Id.*
442. *Id.*
443. *Id.*
444. *Id.*
445. *Pastimes*, 274 P.3d at 716.
446. *Id.*
447. *Id.*
448. *Id.*

death.[449] Additionally, the court found: (1) Lila and Robert each owned 50 percent of Pastimes;[450] (2) the methods by which Pastimes's assets were to be distributed under the Agreement supported present-day valuation;[451] and (3) Robert and Tim continued to operate Pastimes so they could each get a "return on their investments."[452] Based on these findings, the court concluded that the valuation issue was not governed by the Agreement and should be determined by present-day value.[453]

Robert did not provide an independent opinion regarding Pastimes's present-day value, arguing that he could only provide an opinion of the value at the time of Lila's death.[454] Thus, the district court adopted the valuation of the Estate's expert—$682,442.00.[455] Although the court recognized Robert's contributions to Pastimes after Lila's death, the court also observed that Lila and Robert co-founded the company, and "without Lila's initial contribution to the business it would not be in existence today."[456] Moreover, the court explained that Robert escaped nearly a decade of partial tax liability by attributing 50 percent of the income tax to the Estate.[457] Pastimes appealed.[458]

On appeal, Pastimes argued the district court erred when it determined the Agreement did not control the valuation date.[459] Pastimes also argued that Lila's member interest was an estate asset and urged the Court to adopt the reasoning in *In re Estate of Snyder*,[460] which held that the value of estate assets should be determined as of the date of the decedent's death.[461] The Montana Supreme Court construed Robert and Tim's arrangement to continue running the business as an oral modification to the Agreement and agreed with the district court that the dissolution provision of the Agreement no longer applied.[462] Furthermore, the Court stated that *Snyder* interpreted the probate code and did not apply to the issue in this case—business valuation.[463] Instead, the Court determined this was a matter of contract

449. *Id.* at 716–717.
450. *Id.* at 717.
451. *Pastimes*, 274 P.3d at 717.
452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.*
457. *Pastimes*, 274 P.3d at 717.
458. *Id.*
459. *Id.* at 718.
460. *In re Estate of Snyder*, 162 P.3d 87 (Mont. 2007).
461. *Pastimes*, 274 P.3d at 718 (citing *Snyder*, 162 P.3d at 94).
462. *Pastimes*, 274 P.3d at 717–719.
463. *Id.* at 718.

interpretation, and the Agreement must be interpreted according to the statutes governing limited liability companies.[464]

The Court analyzed the Agreement under the limited liability company statutes[465] and the statutory and common law of contracts and affirmed the district court on the issue of present-day valuation. Specifically, the Court held that the Agreement no longer governed valuation due to an oral modification made after Lila's death.[466] As evidence of the modification, the Court looked to the following facts: (1) Pastimes was not liquidated upon Lila's death; (2) the Estate forwent a payout in 2001 "in order to wait for a potentially higher return on Lila's initial investment"; and (3) Robert continued to manage Pastimes.[467] Based on these facts and the Court's conclusion that the parties orally modified the Agreement, the Court affirmed the district court on the valuation issue.[468]

Notably, the Court held the oral modifications only related to the valuation of Pastimes and reversed the district court's ruling regarding the rate of interest to which the Estate is entitled.[469] Additionally, the Court reversed the district court on the two remaining issues before it: (1) the Estate was not entitled to attorney's fees, either under the Agreement or under any statutory provision;[470] and (2) the Estate was not entitled to costs.[471]

Ultimately, in *Pastimes*, the Montana Supreme Court appears to have construed § 35–8–803(10) in a way that divests § 35–8–803(8) of any real meaning. The decision also grants the same member rights to the deceased member's estate as the member had in life, which, at a minimum, includes the right to amend an operating agreement. Consequently, some of the protections and convenience sought by people forming LLCs (especially over other forms of companies) may not be as strong as assumed. As such, Montana practitioners must be vigilant when forming LLCs and drafting

464. *Id.*

465. Montana Code Annotated § 35–8–803(8)(a) provides that an individual member of an LLC is dissociated upon her death. The statutes further provide that a member's right to participate in "the management *and conduct* of the company" terminates upon her dissociation. Mont. Code Ann. § 35–8–805(2)(a) (emphasis added). Thus, in order to reach the conclusion that "members" could orally modify the Agreement, the Court had to conclude that Lila did not dissociate upon her death despite the plain language of the statute to the contrary. The Court found support for that conclusion in § 35–8–803(10), *Pastimes*, 274 P.3d at 718, which provides that "a member that is an estate or is acting as a member by virtue of being a personal representative of an estate [dissociates upon] distribution of the estate's entire rights to receive distributions from the company." Mont. Code Ann. § 35–8–803(10). In this instance it appears that the Court substituted the Estate for Lila Clavin, individually, to bypass the provisions of § 35–8–803(8).

466. *Pastimes*, 274 P.3d at 718.

467. *Id.* at 718–719.

468. *Id.* at 719.

469. *Id.*

470. *Id.* at 719–720.

471. *Id.*

operating agreements to make certain the members' intentions concerning dissociation and dissolution are clear and not susceptible to judicial interpretation.

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