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Significant Montana Cases

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LEGAL SHORTS

SIGNIFICANT MONTANA CASES

I. INTRODUCTION

Eighty years since its inception, the *Montana Law Review* remains committed to publishing on "matters of Montana law or matters of especial interest to Montana lawyers."[1] Beginning with its initial publication in the spring of 1940, this journal has striven to provide its readers with, among other things, "criticisms of recent decisions."[2] The precise form this goal has taken has varied across the years. Most recently, a discussion of recent decisions could be found in *Recent Decisions Affecting the Montana Practitioner* published routinely from 2004 to 2013. Now, the *Montana Law Review* is pleased to introduce *Significant Montana Cases*, a series of pieces analyzing several recent decisions from the Montana Supreme Court.

In publishing *Significant Montana Cases*, the *Montana Law Review* seeks to reintroduce into each volume a discussion of cases likely to affect the ordinary attorney practicing law in the Treasure State. The cases selected for publication have been deemed "significant" because they involve the advancement of Montana law in a manner likely to affect a wide range of practitioners across the state. Such a determination stands in contrast to decisions that are well known for reasons unrelated to practical importance, such as surrounding media attention or a litigant's notoriety.

The editorial board of the *Montana Law Review* would like to express its appreciation for the students who established this journal eighty years ago along with the students, then and now, who have spent countless hours preparing each issue for publication. Most of all, the *Montana Law Review* would like to thank its readers for their continued support. We hope that you enjoy the following case summaries, along with the rest of the issue,

1. *Establishment of the Montana Law Review*, 1 MONT. L. REV. 1 (1940).
2. *Id.*

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and we look forward to continuing to fulfill our role as the only law review dedicated exclusively to Montana legal issues.

II. *CROSS V. WARREN*[3]

In *Cross v. Warren*, the Montana Supreme Court held that: (1) plaintiffs cannot "stack" third-party liability coverage for vehicles covered under the same insurance policy; and (2) the third-party liability coverage at issue was not illusory.[4]

On January 8, 2015, eighteen-year-old Taylor Warren ("Warren") injured Kenneth Cross, Henley Brady, and Roland Redfield in an accident he caused while driving a vehicle owned by his parents.[5] At the time of the accident, both Warren and the vehicle were insured under a Progressive Direct Insurance Company ("Progressive") motor vehicle insurance policy covering all four members of the Warren family.[6] The policy included separate liability coverages for each of the family's four vehicles, including identical bodily injury liability coverage limits of $100,000 for each person.[7]

Following the accident, Progressive paid $100,000 in liability coverage to each of the three plaintiffs injured in the accident for a total $300,000.[8] The plaintiffs, however, claimed they were entitled to recover $400,000 per person based on the combined, or stacked, liability coverage for all four of the Warrens' vehicles insured under the policy.[9] Progressive refused to stack the four liability coverages, asserting the plaintiffs already received the maximum amount of the liability coverage available under the policy.[10] Litigation on the issue ensued.

The district court granted summary judgment to the defendants, noting the Montana Supreme Court had not ruled third-party liability coverages were stackable, and federal courts applying Montana law had denied stacking in previous rulings.[11]

On appeal, the plaintiffs argued Montana Code Annotated § 33–23–203, as amended in 2007, allowed stacking of all automobile insurance coverage, including liability coverage, and a Montana court must apply the controlling Montana statute.[12] Progressive argued the statute was

3. 435 P.3d 1202 (Mont. 2019).
4. *Id.*
5. *Id.* at 1204.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1204–05.
12. *Id.* at 1205.

always anti-stacking and remained so after the amendment.[13] Additionally, Progressive argued prior precedent never permitted "stacking for non-insureds seeking benefits under a policy they did not purchase," so "the only reasonable explanation is the Legislature intended to continue prohibiting stacking" and provided insurers "a way to prevent stacking that Montana common law would otherwise require."[14]

The Court began its analysis with the statute's initial clause, which reads "[u]nless a motor vehicle liability policy specifically provides otherwise, the limits of insurance coverage available under each part of the policy must be determined as follows . . . ."[15] Given this language, the Court considered whether this statute or the relevant policy determines the coverage limits when the two conflict.[16]

The plaintiffs argued that, based on the Court's decision in *Christensen v. Mountain West Farm Bureau Mutual Insurance Company*,[17] the statute only defers to conflicting provisions included in policies when such provisions permit stacking, not policy provisions that prohibit it.[18] However, the Court decided *Christensen* before the statute's revision in 2007.[19] Here, the Court concluded "the initial clause of the statute now defers to insurance policies that provide alternate coverage stacking determinations to those provided by the statute."[20] The Court further noted the declarations page of the Warrens' insurance policy specifically and unambiguously provided that stacking of coverages would not be permitted.[21]

Next, the plaintiffs challenged the enforceability of the anti-stacking provisions of the insurance policy on public policy grounds, asserting there was no difference between first-party coverages, such as uninsured motorist, underinsured motorist, or medical payment coverages, and third-party coverages.[22] The Court has permitted stacking of first-party coverages that are "personal and portable," including uninsured motorist, underinsured motorist, and medical payment coverages.[23] Coverage is "personal and portable" when it "is applicable without regard to the ownership or use of a motor vehicle."[24]

13. *Id.*
14. *Id.* at 1205–06.
15. *Id.* at 1206–07 (quoting MONT. CODE ANN. § 33–23–203(1)).
16. *Id.* at 1207.
17. 22 P.3d 624 (Mont. 2000).
18. *Cross*, 435 P.3d at 1207.
19. *Id.*
20. *Id.* (quoting MONT. CODE ANN. § 33–23–203(1)(c)).
21. *Id.* at 1207–08.
22. *Id.* at 1208.
23. *Id.*
24. *Id.*

Here, the Court noted liability insurance is not portable or applicable in all circumstances; instead, as provided in Progressive's policy, liability insurance applies only to an accident arising from the ownership, maintenance, or use of an automobile or trailer.[25] The Court explained Progressive's policy would not follow the insured in other scenarios; for example, if Taylor Warren had injured the plaintiffs in a negligent act unrelated to the ownership, maintenance, or use of a vehicle.[26] Even so, the Court noted there is limited portability with liability coverage to the extent it follows insureds when they drive a car owned by another party who is not insured under the same policy.[27]

Still, the Court stressed coverage is triggered by and dependent on the use and involvement of a motor vehicle.[28] As liability coverage is vehicle dependent, the coverage is triggered solely because a vehicle is involved in the accident.[29] Therefore, the Court reasoned, "each additional insured vehicle presents a separate and additional risk: that by using it, another driver could cause an additional liability-incurring accident."[30] While an individual could not drive multiple motor vehicles at once, it is possible for multiple vehicles driven by permissive drivers to be involved in different liability-creating accidents at the same time, with each vehicle's use triggering liability coverage for damages incurred in each separate accident pursuant to the premium paid for that vehicle.[31] Against this backdrop, the Court held that because Progressive paid the full amount of liability coverage for the vehicle involved in the accident and continued to assume the risk of paying claims for the Warrens' other vehicles, the separate premiums paid on the other vehicles secured protection for the Warrens and was not illusory.[32]

The Court also held it was unreasonable to expect Progressive to pay more than the coverage limit for the vehicle involved in the accident because: (1) liability coverage is tied to a particular vehicle's use and is not personal and portable; (2) the policy did not contain illusory coverage; and (3) the policy unambiguously and repeatedly stated coverages on separate vehicles could not be stacked.[33]

Additionally, the Court noted the plaintiffs were strangers to the insurance contract, and, at most, could have reasonably expected a vehicle injur-

25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 1209.
31. *Id.*
32. *Id.*
33. *Id.*

ing them would carry liability insurance in the amount required by Montana law—$25,000 per person and $50,000 per accident[34]—and the Warrens had more than the required minimum insurance.[35] In the end, the Court held the anti-stacking provisions of Progressive's policy, as applied to liability coverage, did not violate public policy and the district court did not err in granting Progressive summary judgment on the issue of whether it was required to stack liability coverage under the policy.[36]

In a concurring opinion, Justice Laurie McKinnon emphasized her focus on the distinction between optional first-party coverage, which is personal and portable and meant to protect the insured personally, and legally mandated third-party coverage, where the claimant is not a named insured and therefore can never have a reasonable expectation of the right to stack coverage limits.[37]

In his dissent, Justice Dirk Sandefur, joined by Justice Ingrid Gustafson, disagreed that the four policies were not stackable and said the Court's holding "oddly and illogically" allowed insurers to preclude stacking outside of the statute enacted in response to the Court's decision invalidating such preclusion unless clearly provided by the Legislature.[38] The dissent further argued that third-party liability coverage is no less personal and portable than first-party coverage because mandatory liability insurance goes with the insured driver no matter what vehicle they are driving.[39] Additionally, Justice Sandefur reasoned that, regardless of whether third-party claimants are parties to the insurance contract, the important purpose of third-party liability coverages is to protect the public from injuries caused by the tortious conduct of others.[40] Consequently, the dissent argued anti-stacking provisions for third-party liability coverages is against public policy.[41]

Montana practitioners should be aware of the Court's determination that automobile insurance policy provisions prohibiting the stacking of third-party liability coverage are legal under Montana law. The Court's holding in *Cross* likewise provides additional guidance on what types of coverages it will determine to be "personal and portable," and, therefore, stackable under Montana law in future cases.

—Kelsey Dayton

34. MONT. CODE ANN. § 61–6–103(1)(b)(i)–(ii).
35. *Cross*, 435 P.3d at 1209.
36. *Id.* at 1209–10.
37. *Id.* at 1211–12 (McKinnon, J., concurring).
38. *Id.* at 1212 (Sandefur & Gustafson, JJ., dissenting).
39. *Id.* at 1214.
40. *Id.* at 1215.
41. *Id.*

III. *STATE V. KURTZ*[42]

In *State v. Kurtz*, the Montana Supreme Court held a 422-day delay between a defendant's arrest for driving under the influence and his guilty plea was sufficient to trigger the four-part balancing test for a speedy trial violation, and, upon analysis under the test, the delay violated the defendant's constitutional right to a speedy trial.[43]

On May 3, 2015, a Montana Highway Patrol trooper arrested David Kurtz in Yellowstone County for driving with a suspended license and operating a motor vehicle while under the influence of alcohol.[44] Kurtz pleaded not guilty but was unable to post the $20,000 bond set by the district court.[45] The district court scheduled a trial for August 17, 2015, and on July 22, 2015, Kurtz filed a motion to suppress challenging the traffic stop's legality.[46] A week later, the State moved to postpone the trial because it had not received toxicology results from the crime lab.[47] Kurtz agreed to postponing the trial until the toxicology results could be obtained.[48] On August 31, 2015, the district court held a hearing on Kurtz's motion to suppress, which it subsequently denied in November.[49] On December 14, 2015, the district court reset the trial date for January 4, 2016.[50] Four days after the district court set the new trial date, Kurtz's counsel requested the district court "not call a jury for January 4, 2016," and the judicial assistant said if there was not going to be a trial, Kurtz needed to "file a motion to continue with a waiver."[51]

On December 21, 2015, Kurtz filed a status report and requested the district court vacate the January trial and set a change of plea hearing.[52] No hearing was set, and the January trial date passed.[53] On April 12, 2016, the State requested the district court reset the trial, and the district court set a new trial date for May 23, 2016.[54] On May 11, 2016, Kurtz filed a motion to dismiss on the basis that his right to a speedy trial had been violated.[55] The May trial date passed, and the district court held a hearing on Kurtz's motion to dismiss on June 1, 2016, ultimately denying it three weeks later.

42. 443 P.3d 479 (Mont. 2019).
43. *Id.* at 488.
44. *Id.* at 482.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

The district court explained that the length and reasons for the delay weighed in favor of finding a speedy trial violation, but Kurtz's response to the delay and the prejudice the delay caused his defense mitigated any prejudice he sustained.[56] Consequently, the district court found no constitutional speedy trial violation.[57]

Kurtz entered a change of plea with the district court four days later and pleaded guilty to felony driving under the influence of alcohol. The district court sentenced him to the maximum 13-month sentence with the Department of Corrections, followed by a five-year suspended sentence.[58] Because Kurtz's pretrial incarceration was 26 days longer than his sentence, he was immediately released and awarded a $2,470 credit toward his $5,000 fine.[59] Kurtz appealed the ruling claiming he was denied his right to a speedy trial.[60]

The Sixth Amendment of the United States Constitution and Article II, section 24 of the Montana Constitution both guarantee criminal defendants a right to a speedy trial.[61] When the delay between an accusation and trial exceeds two hundred days, the Court uses a four-factor balancing test developed in *State v. Ariegwe*[62] to determine if the defendant was denied a speedy trial.[63] The test balances: (1) the length of the delay; (2) the reason for the delay; (3) the accused's response to the delay; and (4) the prejudice to the accused.[64] No factor is dispositive; instead, the factors must be considered together with all other relevant circumstances.[65]

In looking at the first factor, the length of the delay, the Court found the 422 days between Kurtz's arrest and plea intensified the presumption of prejudice and increased the State's burden to justify the delay.[66]

Under the second factor, the reasons for the delay, Kurtz challenged the 64-day delay between the September trial date and the district court's denial of his suppression motion, and the 99-day delay between the January 1, 2016, trial date and the date the State asked to reset the trial.[67] "Delay is charged to the State unless the accused caused the delay or affirmatively waived his speedy trial right for that period."[68]

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 481–82.
61. U.S. CONST. amend. VI; MONT. CONST. art. II, § 24.
62. 167 P.3d 815 (Mont. 2007).
63. *Kurtz*, 443 P.3d at 482–83.
64. *Id.* at 483.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

Regarding the 64-day delay, the State argued Kurtz's failure to follow up after the judge revealed a potential conflict and told Kurtz's attorney to advise the court if it was an issue delayed the district court's ruling.[69] Kurtz argued the delay was due entirely to the State's lack of diligence, and because he had no issue with the potential conflict, he correctly followed the court's instructions to only follow up if there was a problem.[70] The Court determined Kurtz reasonably assumed the trial would proceed if he expressed no concern about the potential conflict.[71] The Court rejected the State's alternate explanation that the delay was due to a training session because the delay continued 22 days after the judge returned.[72] In sum, the Court attributed this delay to the State.[73]

Kurtz argued the 99-day delay was also the State's fault because, after he requested a change of plea hearing, the State had the burden to ensure a hearing was set.[74] In response, the State claimed the defendant bore some responsibility for representing a plea deal had been reached without entering a plea.[75] The Court held that once Kurtz filed his motion to vacate the January trial and set a change of plea hearing, it was the State's responsibility to schedule the hearing.[76] Because Kurtz did not try to further delay the process, and ongoing negotiations for deferred prosecution or a plea bargain do not relieve the prosecution's burden to bring the defendant to trial in a timely fashion, the Court found the State responsible for the delay.[77]

The Court also found the third factor, the accused's responses to the delay, weighed in Kurtz's favor.[78] The State argued Kurtz failed to demonstrate the desire for a speedy trial when he made no attempt to pursue a change of plea hearing.[79] Kurtz argued he was not required to repeatedly ask for the case to proceed, as a defendant does not abandon his right to a speedy trial by engaging in plea negotiations.[80] The Court evaluated the totality of the circumstances and found Kurtz affirmatively sought resolution of the case through a change of plea hearing, and it was the State's burden to move forward with either a trial or change of plea.[81]

69. *Id.* at 484.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 485.
77. *Id.*
78. *Id.* at 485–86.
79. *Id.* at 486.
80. *Id.* at 485–86.
81. *Id.* at 486.

The Court evaluates the fourth factor, the prejudice to the accused, by considering the interests a speedy trial is meant to protect: "(i) preventing oppressive pretrial incarceration, (ii) minimizing anxiety and concern caused by the presence of unresolved criminal charges, and (iii) limiting the possibility that the accused's ability to present an effective defense will be impaired."[82]

The Court explained Kurtz's pre-trial incarceration exceeded the maximum sentence for his charged offense, a simple driving under the influence offense, where the room for tolerable delay is relatively low.[83] While incarcerated, Kurtz was denied both prescribed pain and mental health medication. After four months, Kurtz was given his mental health medication at a significantly lower dose than prescribed, but was never allowed to resume taking the prescribed pain medication.[84] The Court found his lack of medical treatment, along with the fact he was incarcerated for longer than the maximum sentence for the offense, supported the conclusion his incarceration was oppressive.[85]

The Court also found the delay prolonged the disruption of Kurtz's life and aggravated the anxiety inherent with being accused of a crime.[86] While the State argued Kurtz's depression existed before his incarceration, Kurtz testified his anxiety levels while incarcerated increased and his depression worsened.[87] Additionally, while incarcerated, Kurtz lost his home when he was unable to pay rent.[88] Kurtz did not claim the delay impaired his defense, but, when evaluating all the interests, the Court found the fourth factor nonetheless weighed in Kurtz's favor.[89]

Balancing the four factors, the Court held Kurtz's constitutional right to a speedy trial was violated, and the State did not provide a compelling justification for the delay or show the delay did not prejudice the defendant.[90] The Court remanded the case for dismissal of the charges.[91]

Because there is no set length of time that *per se* violates an accused's right to a speedy trial, Montana practitioners should be aware of how the Court uses the four-factor balancing test pronounced in *Ariegwe*. Additionally, Montana practitioners should note how the Court weighs factors such as the length of pretrial incarceration exceeding the maximum sentence as-

82. *Id.* (citing State v. Ariegwe, 167 P.3d 815, 848 (Mont. 2007)).
83. *Id.* at 486–87.
84. *Id.* at 487.
85. *Id.*
86. *Id.* at 487–88.
87. *Id.* at 487.
88. *Id.* at 488.
89. *Id.*
90. *Id.*
91. *Id.*

sociated with the charge and the accused's heightened anxiety and deprivation of medication while incarcerated, as well as the State's burden to show a compelling interest and that the delay did not prejudice the defendant.

—Kelsey Dayton

IV. *CITY OF KALISPELL V. SALSGIVER*[92]

In *City of Kalispell v. Salsgiver*, the Montana Supreme Court held that a defendant charged with a serious offense did not waive his federal constitutional right to a jury trial by failing to appear at his omnibus hearing.[93]

On March 18, 2015, Salsgiver pled not guilty to partner or family member assault ("PFMA") and was released on his own recognizance.[94] As a condition of his release, the municipal court ordered Salsgiver to personally appear for all court proceedings and warned him that failing to do so would result in waiver of a jury trial.[95] The municipal court informed him of his upcoming omnibus hearing scheduled for May 5, 2015, and Salsgiver signed an acknowledgment of his conditions of release.[96] When the municipal court issued a notice of omnibus, it reiterated Salsgiver's personal presence was required and his failing to appear would result in a waiver of a jury trial.[97] Nonetheless, Salsgiver failed to appear at the omnibus hearing, although his defense counsel was present.[98] Based on Salsgiver's failure to attend the omnibus hearing, the municipal court concluded he waived his right to a jury, set a date for a bench trial, and issued a bench warrant for Salsgiver's arrest.[99]

Salsgiver was arrested on October 15, 2015, before being arraigned and released on his own recognizance the next day.[100] The municipal court informed Salsgiver his bench trial would take place November 12, 2015.[101] On October 28, 2015, Salsgiver's counsel filed a motion for a jury trial, which the court denied on November 10, 2018.[102] At his bench trial, Salsgiver's counsel again objected to the assertion that Salsgiver had waived his right to a jury trial, but the bench trial proceeded.[103] Salsgiver was

92. 443 P.3d 504 (Mont. 2019).
93. *Id.* at 513.
94. *Id.* at 508.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 508–09.

found guilty of PFMA and criminal mischief and sentenced to 364 days of incarceration, with 362 days suspended, and two days credit for his time served.[104] Salsgiver appealed the denial of his motion for a jury trial to the district court, which affirmed the municipal court's ruling.[105] Salsgiver then appealed to the Montana Supreme Court.[106]

The lower courts found Salsgiver's failure to appear at his omnibus hearing constituted a waiver of his right to a jury trial under Article II, section 26 of the Montana Constitution and Salsgiver knowingly, intelligently, and voluntarily waived his right to a jury trial under the Sixth Amendment because he understood he was required to appear for all court proceedings as a condition of his release.[107]

The Sixth Amendment of the United States Constitution provides a right to a speedy and public trial by an impartial jury for all criminal proceedings.[108] The Fourteenth Amendment guarantees a right to a jury trial in criminal cases that, if tried in federal court, would come within the Sixth Amendment's guarantee.[109] Article II, section 26 of the Montana Constitution provides a right to a trial by jury but includes that, upon default of appearance or by consent of the parties, all cases may be tried without a jury.[110]

The State argued Salsgiver's failure to appear for the omnibus hearing constituted a valid waiver of his right to a jury trial.[111] Salsgiver argued that because a PFMA is a "serious offense" he retained his Sixth Amendment right to a jury trial and asserted the lower courts improperly relied on the Montana Constitution and cases interpreting its right to a jury provision, to conclude that an automatic waiver had occurred through a "default of appearance."[112]

To waive the constitutional right to a trial by jury under the Sixth Amendment, a defendant must waive the right knowingly, intelligently, and voluntarily.[113] The state bears the burden of proving by a preponderance of the evidence that such a waiver has been made.[114] The Sixth Amendment requires that a defendant charged with a "serious" crime be afforded the right to a jury trial unless the right is waived by the defendant.[115] An of-

104. *Id.* at 509.
105. *Id.*
106. *Id.*
107. *Id.* at 511.
108. U.S. CONST. amend VI.
109. *Id.* at 510.
110. MONT. CONST. art. II, § 26.
111. *Id.* at 511–12.
112. *Id.* at 512.
113. *Id.* at 510.
114. *Id.*
115. *Id.* at 511 (quoting Lewis v. United States, 518 U.S. 322, 327 (1996)).

fense is considered serious when the charges carry a maximum prison sentence of more than six months.[116] The PFMA Salsgiver was charged with carried a maximum sentence of one year.[117]

Prior to *Salsgiver*, the Court had not previously addressed the implications of the Sixth Amendment for serious crimes, having only established that, for misdemeanor charges, a defendant can waive his right to jury trial by failing to appear as directed by the trial court.[118] Here, the Court found that Salsgiver's failure to appear at the omnibus hearing was sufficient to waive his right to a jury trial under the "default of appearance" provision of Article II, Section 26 of the Montana Constitution.[119] The Court concluded, however, that the district court erred when it deemed Salsgiver's failure to appear at the omnibus hearing constituted a valid waiver of his right to a jury trial under the United States Constitution.[120]

The Court held a Sixth Amendment waiver of the right to a jury trial cannot be presumed solely from a defendant's knowledge of his release conditions and his subsequent failure to appear, nor did the record show Salsgiver knowingly, intelligently, and voluntarily waived his right.[121] In fact, Salsgiver never represented he wanted to waive his right—he requested a jury trial, and he objected to the bench trial.[122] Accordingly, the Court found that Salsgiver's Sixth Amendment rights had been violated, reversed his conviction, and remanded his case to the municipal court for a jury trial.[123]

In his dissent, Justice Jim Rice argued Salsgiver knowingly, intelligently, and voluntarily waived his right to a jury trial because he signed "the Order on Conditions of Release, which, in bold and underlined typeface, virtually screamed to Salsgiver that he must 'Personally appear for all court proceedings. Failure to appear shall result in a waiver of jury trial.'"[124] This, according to Justice Rice, was not an "automatic waiver," however, when Salsgiver had the opportunity to explain why he missed the hearing he "offered no explanation whatsoever for his disobedience of the court's orders and for his failure to participate in the process."[125] Justice Rice concluded by stating he found the totality of the circumstances sufficient to support a knowing, intelligent, and voluntary waiver by Salsgiver,

116. *Id.*
117. *Id.* at 512 (citing MONT. CODE ANN. § 45–5–206(3)(a)(1)).
118. *Id.* at 511.
119. *Id.* at 512.
120. *Id.* at 512–13.
121. *Id.* at 513.
122. *Id.*
123. *Id.*
124. *Id.* at 517 (Rice, J., dissenting).
125. *Id.* at 517–18 (Rice, J., dissenting).

before expressing concern that "the courts should not be held captive to the whims of voluntarily non-cooperating, non-participating parties."[126]

Salsgiver is the first time the Montana Supreme Court has analyzed the waiver of a jury trial in the context of a serious offense. Montana practitioners should be aware the federal analysis for serious offenses—those charges carrying a sentence of six months of jail time or more— compared to petty offenses, is now applicable in state court. Further, the failure of a defendant charged with a serious offense to show up for a hearing, even if he affirmatively acknowledged his failure to appear in person waived his right to a jury trial, does not automatically meet the knowingly, intelligently, and voluntarily standard required to waive the right under the Sixth Amendment.

—Kelsey Dayton

V. *BAM VENTURES, LLC V. SCHIFFERMAN*[127]

In *BAM Ventures, LLC v. Schifferman*, the Montana Supreme Court took steps to reconcile "seemingly inconsistent statements" made by the Court in previous cases interpreting Montana Code Annotated § 27–19–201, which provides the standards governing the issuance of preliminary injunctions.[128] The Court held that all requests for preliminary injunctive relief require some demonstration of threatened harm or injury, before concluding landowners made such a demonstration upon the *prima facie* showing of a prescriptive easement.[129] While the landowners did not establish a great or irreparable injury as required under Montana Code Annotated § 27–19–201(2), the landowners established they would suffer continuing harm by not being able to access their property by way of the access route they had used for many years.[130] Entering a preliminary injunction under Montana Code Annotated § 27–19–201(1), which permitted the landowners to continue using the access route pending the outcome of the litigation, fulfilled the purpose of equitable injunctive relief by preserving the status quo and minimizing the harm to all parties pending a final resolution on the merits.[131]

In 2003, Reed and Robin Schifferman ("Schiffermans") purchased property in Wise River, Montana.[132] At the time of purchase, the Schif-

126. *Id.* at 519.
127. 437 P.3d 142 (Mont. 2019).
128. *Id.* at 144–45.
129. *Id.* at 146–47.
130. *Id.* at 147.
131. *Id.*
132. *Id.* at 143.

ferman lot lacked physical access.[133] In 2004, the Montana Department of Transportation completed an improvement project for Montana Highway 43, which added a paved section extending from the highway toward the border of the property and installed a gate nearby.[134] The Schiffermans made use of these improvements and installed additional improvements over the years, eventually constructing a house on the lot in 2016.[135] During this time, the Schiffermans believed the access was on their lot, and they received no complaints as to its use.[136]

In 2017, BAM Ventures, LLC ("BAM") purchased the lot adjacent to the Schiffermans.[137] BAM, believing the Schiffermans' driveway ran across BAM's property, fenced off the driveway.[138] In response, the Schiffermans removed part of the fencing and began driving across a grassy area to access their driveway.[139] BAM then filed a quiet title action against the Schiffermans to resolve the property ownership of the disputed area.[140] The Schiffermans disputed the boundary allegations and filed a counterclaim for a prescriptive easement over the access route.[141] The Schiffermans also sought injunctive relief under Montana Code Annotated § 27–19–201(1)–(3) to bar BAM from restricting access to their lot pending outcome of the litigation.[142]

Following a preliminary injunction hearing, the district court granted the Schiffermans a preliminary injunction pursuant to Montana Code Annotated § 27–19–201(1), holding the Schiffermans had made a *prima facie* showing of their claim for prescriptive easement.[143] While the district court agreed with BAM that the Schiffermans had not established they were likely to suffer irreparable harm without the injunction, the district court reasoned the Schiffermans did not need to establish such harm because it was only required for preliminary injunctive relief sought under Montana Code Annotated § 27–19–201(2).[144] Subsequently, BAM appealed.[145]

District courts enjoy a high degree of discretion to grant or deny preliminary injunctions.[146] As such, the Court will not overturn a district

133. *Id.*
134. *Id.* at 143–44.
135. *Id.* at 144.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

court's decision on a preliminary injunction absent a manifest abuse of discretion.[147] Additionally, the Court reviews injunctions based on conclusions of law for correctness.[148] In determining whether to overturn a preliminary injunction, the Court does not determine the underlying merits of the case, as such an inquiry is reserved for a trial on the merits.[149] In the instant case, the Court concluded the district court did not abuse its discretion by entering the preliminary injunction permitting the Schiffermans to continue to use the access route pending the outcome of the litigation.[150]

In support of its holding, the Court began by recognizing the subsections of Montana Code Annotated § 27–19–201 are written disjunctively.[151] As such, the criteria enumerated in only one subsection will suffice to authorize a court to grant equitable, preliminary injunctive relief.[152] In other words, "only one subsection need be met for an injunction to issue."[153]

The Court then addressed whether Montana Code Annotated § 27–19–201, as a whole, contains an injury requirement.[154] First, the Court observed that only subsection (2) specifically addresses "great or irreparable injury."[155] Under subsection (2), a preliminary injunction may be granted "when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant."[156] Essentially, subsection (2) authorizes relief where it appears that the commission or continuation of an act during the litigation would produce an injury so significant it could not be adequately redressed later, even by means of the litigation.[157] Importantly, however, the Court noted that "the prevention of some degree of harm or injury is an overlapping concept that is implied within all of the subsections of the statute."[158] The Court then addressed each additional subsection in turn.[159]

Under subsection (1), a preliminary injunction may be granted where "it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continu-

147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*at 147.
151. *Id.*at 145.
152. *Id.*at 145–46.
153. *Id.*at 146 (quoting Sweet Grass Farms, Ltd. v. Board of Cty. Comm'rs, 2 P.3d 825, 829 (Mont. 2000)).
154. *Id.*
155. *Id.*
156. MONT. CODE ANN. § 27–19–201(2) (2019).
157. *BAM Ventures*, 437 P.3d at 146.
158. *Id.*
159. *Id.* at 146–47.

ance of the act complained of, either for a limited period or perpetually."[160] The Court explained that, pursuant to this subsection, injunctive relief is authorized to stop the continuing illegal act as well as any related harm.[161]

Under subsection (3), a preliminary injunction may be granted where "it appears during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual."[162] Here, the Court explained injunctive relief is authorized to prevent the act as well as the implied harm that would result from such circumstances.[163]

Under subsection (4), when "it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of the adverse party's property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition."[164] Hence, the Court reasoned that subsection (4) authorizes relief to prevent the threatened removal or disposal of the adverse party's property with intent to defraud and the obvious harm such actions would cause.[165]

Finally, under subsection (5), a preliminary injunction may be granted "when it appears that the applicant has applied for an order under the provisions of 40–4–121 or an order of protection under Title 40, chapter 15."[166] As in the aforementioned sections, without explicitly mentioning "harm" or "injury," subsection (5) protects against threatened harm by authorizing relief to protect applicants from economic loss and from physical abuse or intimidation in domestic and order of protection proceedings.[167]

The Court concluded by asserting that, while previous Montana cases have not always used precise language, "collectively they correctly stand for the principle that all requests for preliminary injunctive relief require some demonstration of threatened harm or injury, whether under the 'great or irreparable injury' standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27–19–201, MCA."[168]

Ultimately, while the Court rejected BAM's argument reading a requirement of irreparable injury into each of the five subsections contained in Montana Code Annotated § 27–19–201, the Court continues to require a showing of some degree of harm consistent with the degree of injury im-

160. MONT. CODE ANN. § 27–19–201(1).
161. *BAM Ventures*, 437 P.3d at 146.
162. MONT. CODE ANN. § 27–19–201(3).
163. *BAM Ventures*, 437 P.3d at 146.
164. MONT. CODE ANN. § 27–19–201(4)
165. *BAM Ventures*, 437 P.3d at 146.
166. MONT. CODE ANN. § 27–19–201(5).
167. *BAM Ventures*, 437 P.3d at 146.
168. *Id.*

plied under each subsection. Montana practitioners should take note of *BAM Ventures, LLC*, including its clarification of the applicable standards under Montana Code Annotated § 27-19-201 and ensure they demonstrate the requisite degree of harm when seeking preliminary injunctive relief.

—Lindsay Mullineaux

VI. *City of Missoula v. Metz*[169]

In *City of Missoula v. Metz*, the Montana Supreme Court held that an officer's initial contact with a defendant, in response to a 911 call requesting a welfare check on the driver of a running but parked vehicle, was a proper community caretaker stop under Montana law.[170] However, the Court also recognized that the officer lacked the particularized suspicion necessary at the completion of welfare check to extend the stop to a DUI investigation.[171] Because the officer did not have the requisite particularized suspicion to conduct a DUI investigation at the time he was assured the driver was not in peril or in need of assistance, the driver was illegally seized and the driver's motion to suppress evidence from that point forward should have been granted.[172]

On the morning of April 18, 2017, Missoula County deputy county attorney Selene Koepke ("Koepke") called 911 to request a welfare check on the driver of a vehicle parked near Franklin Park in Missoula, Montana.[173] Koepke reported that the vehicle was running, and she could not tell if the driver was moving or not.[174] Koepke informed the 911 operator that she did not want to get too close to the vehicle but provided the vehicle's license plate information.[175] Shortly after Koepke's call, law enforcement and emergency medical services arrived at the scene.[176] The vehicle was legally parked in a designated parking space.[177]

Officer Erickson was the first to make contact with the driver, later identified as Bryan Allan Metz ("Metz"), and Officer Erickson's body and dash cameras recorded the interaction.[178] As Officer Erickson approached the vehicle, he observed the vehicle was not running, and Metz sat up and

169. 451 P.3d 530 (Mont. 2019).
170. *Id.* at 532, 535.
171. *Id.* at 538.
172. *Id.* at 539.
173. *Id.* at 532.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*

rolled down the window to speak with him.[179] Officer Erickson informed Metz that a caller thought he was sleeping and was concerned about his safety, but the officer did not personally inquire about Metz's welfare at this time.[180] Officer Erickson then told Metz to step out of the car to allow medical personnel to evaluate him.[181] As Metz exited the vehicle, three additional police officers present at the scene asked Officer Erickson if the situation was a "210," meaning an intoxicated driver.[182] Officer Erickson responded "possibly" and asked Metz for his identification.[183] After calling in Metz's identification to dispatch, Officer Erikson asked Metz a series of questions, including why he had been at the park and for how long.[184] Metz responded he had been at the park a couple of hours and was trying to take a nap.[185] Officer Erickson did not inquire as to Metz's welfare until medical personnel began walking over to see if medical attention was needed.[186] At that point, Officer Erickson asked Metz if he needed any medical attention.[187] Metz responded that he did not require medical attention, and Officer Erickson sent the medical personnel away.[188]

Officer Erickson then told Metz to "hang tight" as he stepped away to discuss the situation with two other officers, including Officer Kamerer.[189] Officer Erickson explained the vehicle was not running when he arrived, but Metz attempted to start the vehicle when he approached.[190] Additionally, Officer Erickson told Officer Kamerer Metz had bloodshot eyes and a little bit of a slur.[191] When Officer Erickson asked the other officers if they saw anything while looking in Metz's vehicle, Officer Kamerer responded, "not seeing anything."[192] Officer Kamerer told Officer Erickson that, if "there is enough, we can process, if not, then we have him walk and come back and get it later."[193] Officer Erickson responded that he was "not terribly worried," and he stated, "I don't really want to pursue it."[194]

While Officer Erickson went to take another look in Metz's car windows, Officer Kamerer and another officer approached Metz and began

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 533.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

questioning him.[195] Officer Kamerer told Metz he could smell alcohol on him, and Metz denied drinking before parking his car.[196] Upon further questioning, Metz admitted he was on probation.[197] Officers Kamerer and Erickson then discussed whether Metz would provide a breath test upon the request of his probation officer.[198] However, without speaking to his probation officer, the officers told Metz he had no choice but to provide a sample, which Metz refused.[199] The officers stepped away once again to discuss the situation.[200] Officer Erickson then stated, "the more I think about it, the more I think I do have enough to push through with the DUI."[201]

After deciding to proceed with the DUI investigation, Officer Erickson began conducting the field sobriety tests.[202] Metz was eventually able to complete the horizontal gaze nystagmus test but was arrested before any further field sobriety tests were conducted.[203] During the arrest, the officers questioned Metz about a beer cup found in his car.[204] Metz was then placed in the back of Officer Erickson's police cruiser, where he again declined to provide a breath test.[205] Multiple reports made at the time of arrest falsely indicated Metz was passed out in his running vehicle.[206] Metz was charged with misdemeanor DUI and failure to carry proof or exhibit insurance.[207]

On April 18, 2017, Metz pleaded not guilty to the charges in Missoula Municipal Court.[208] On June 29, 2017, he filed a motion to suppress and dismiss, alleging that any evidence obtained should be suppressed due to a lack of particularized suspicion.[209] On August 2, 2017, the municipal court held a hearing on the motion, and Officer Erickson testified and his body camera footage was entered into evidence.[210] Officer Erickson testified that Metz admitted to drinking alcohol "the night prior, before parking his vehicle to sleep."[211] On cross-examination, Officer Erickson testified that he did not remember whether he mentioned the odor of alcohol to the other of-

195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 534.

ficers or not.[212] Officer Erickson further testified on cross-examination that, based on his observations of Metz, he did not wish to pursue a DUI investigation after his conversation with Officer Kamerer.[213] Following the hearing, the municipal court denied the motion.[214] On August 16, 2017, Metz pleaded *nolo contendere* to the DUI charge, reserving his right to appeal the municipal court's denial of the motion.[215] After briefing by the parties, the district court, functioning as the intermediate appellate court, affirmed the municipal court's decision.[216] Metz appealed.[217]

Where district courts function as intermediate appellate courts for appeals from lower courts of record, the Court examines the record independently of the district court's decision.[218] Here, the Court examined the municipal court's findings under the clearly erroneous standard[219] and determined the municipal court erred when it determined that particularized suspicion to conduct a DUI investigation existed at the completion of the community caretaker stop.[220]

The Court began its analysis of the common caretaker doctrine by citing the following test adopted in *State v. Lovegren*:[221]

> First, as long as there are objective, specific and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, then that officer has the right to stop and investigate. Second, if the citizen is in need of aid, then the officer may take appropriate action to render assistance or mitigate the peril. Third, once the officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure implicating not only the protections provided by the Fourth Amendment, but more importantly, those greater guarantees afforded under Article II, Sections 10 and 11 of the Montana Constitution as interpreted in this Court's decisions.[222]

The Court then rejected Metz's argument that Officer Erickson should have realized Metz was not in danger when he investigated the vehicle and found neither of the conditions indicated in the 911 call present.[223] Having been assured Metz was not in peril, Metz argued that Officer Erickson

212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 539.
221. 51 P.3d 471 (Mont. 2002).
222. *Metz*, 451 P.3d at 535 (quoting *Lovegren*, 51 P.3d at 475–76.)
223. *Id.*

should have terminated the stop at this time.[224] The Court found "such an interpretation of the community care doctrine too restrictive."[225] Instead, under the first prong of the *Lovegren* test, the Court held Officer Erickson had the right to stop and investigate because the community caretaker role is "an affirmative duty of police officers."[226] Because Officer Erickson could not be assured that Metz was not in need of assistance solely based on the fact that Metz was moving, his initial contact with Metz constituted a proper community caretaker stop.[227]

Having determined Officer Erickson's initial seizure of Metz to conduct a welfare check as valid, the Court turned to the question of particularized suspicion for the investigatory stop.[228] The Court recognized that, where an officer makes a valid stop pursuant to the community caretaker doctrine, events may occur during the stop that give rise to the particularized suspicion necessary for that officer to make a further investigatory stop pursuant to Montana Code Annotated § 46–5–401.[229] However, the Court also stressed an important limitation on the community caretaker doctrine set forth in *Lovegren*:

> [once an] officer is assured that the citizen is not in peril or is no longer in need of assistance or that the peril has been mitigated, then any actions beyond that constitute a seizure implicating not only the protections provided by the Fourth Amendment, but more importantly, those greater guarantees afforded under Article II, Sections 10 and 11 of the Montana Constitution as interpreted in this Court's decisions.[230]

Moreover, a community caretaker encounter must be terminated once the officer is assured the citizen is not in peril or in need of assistance.[231]

First, the Court rejected the municipal court's finding that the welfare check lasted well beyond where Officer Erickson told Metz to step out of the car.[232] While the initial contact was valid, "virtually immediately upon arriving and speaking with Metz, it's obvious Officer Erickson was assured that Metz was not in peril or in need of assistance."[233] Additionally, none of the other officers on the scene approached Metz to see if he needed help.[234] Instead, these officers began to look into his windows and inquired about

224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at 536.
229. *Id.* at 535.
230. *Id.* (quoting State v. Lovegren, 51 P.3d 471, 476 (Mont. 2002)).
231. *Id.* at 536.
232. *Id.* at 537.
233. *Id.* at 536.
234. *Id.*

whether he was a "210."[235] While Officer Erickson asked Metz to exit the vehicle so the medical personnel could assess him, no medical personnel conducted a medical assessment of Metz or even spoke to him.[236] Recognizing under the third prong of the *Lovegren* test that a welfare check must "actually involve a welfare check," the Court determined Officer Erickson's community caretaker stop was completed before he told Metz to exit his car.[237] At the point Officer Erickson asked Metz to get out of the car, produce identification, and answer questions, the matter moved beyond a welfare check to a DUI investigation.[238]

The Court next rejected the State's argument that Officer Erickson obtained particularized suspicion to perform a DUI-related investigatory stop prior to the completion of the welfare check.[239] At the suppression hearing, Officer Erickson testified to five indicators giving rise to particularized suspicion, including a strong odor of alcohol, bloodshot eyes, a dazed expression, a beer cup in the car, and Metz admitting having been drinking.[240] However, at the time Officer Erickson's welfare check was completed, Officer Erickson had only observed Metz had bloodshot eyes and a dazed expression.[241] While Officer Erickson indicated Metz spoke with a slight slur at this time, the slur is not evident on the body camera footage.[242] The Court held that these objective factors, in the absence of the additional factors observed later, failed to support an inference that Metz had committed, was committing, or was about to commit a crime.[243]

Additionally, at this time, Officer Erickson stated he did not wish to pursue a DUI investigation and the other officers on the scene indicated they saw nothing illegal in the car.[244] Based on the limited objective factors present at the completion of the community caretaker stop and because Officer Erickson himself did not believe he had particularized suspicion to conduct a DUI investigation,[245] the Court held Officer Erickson did not have particularized suspicion to conduct a DUI investigation at the time he was assured Metz was not in peril or in need of assistance.[246] Therefore, Officer Erickson illegally seized Metz when he conducted such an investi-

235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* at 535.
240. *Id.* at 538.
241. *Id.*
242. *Id.* at 537.
243. *Id.* at 538.
244. *Id.* at 537.
245. *Id.* at 539.
246. *Id.*

gation.[247] Consequently, the Court held the municipal court's denial of Metz's motion to suppress should be reversed, with Metz's conviction for misdemeanor DUI vacated and the matter remanded with instructions to dismiss with prejudice.[248]

In her dissent, Justice Beth Baker took issue with the Court's characterization of the municipal court's holding as "flatly wrong"[249] and asserted that the municipal court clearly understood the difference between the officer's welfare inquiries and the ensuing DUI investigatory stop.[250] Justice Baker stressed that the record contained substantial credible evidence to support the finding that Officer Erickson had an objective, articulable basis to pursue a DUI investigation at the time the community caretaker stop concluded.[251] Justice Baker further asserted that the majority failed to afford Officer Erickson the "latitude to react and follow up on [his] observations."[252] Because the brief amount of time Officer Erickson took with Metz to ask him questions prior to the approach of the medical personnel was appropriate to ensure that Metz did not require assistance, Justice Baker went on to note that the community caretaker stop concluded when Officer Erickson sent away the medical personnel, not when Officer Erickson first asked Metz to exit the vehicle.[253] At the time Officer Erickson sent the medical personnel away, he had observed Metz's dazed expression on initial contact, a strong odor of alcohol, red and bloodshot eyes, and Metz's inability to recall or refusal to explain how long he had been at the park.[254] Therefore, Justice Baker concluded the record supported the municipal court's finding that Officer Erickson had specific and articulable facts which, together with rational inferences, reasonably warranted concern that Metz was under the influence of alcohol and gave rise to particularized suspicion for further investigation by the time the welfare check concluded.[255]

The Court responded to Justice Baker's dissent by noting the municipal court held that Officer Erickson "had become aware of evidence (including the Defendant's own admission) that the driver had consumed alcohol" before completion of the welfare check, which was not supported by the body camera footage.[256] While the Court agreed it is within the munici-

247. *Id.*
248. *Id.*
249. *Id.* at 538 n.3.
250. *Id.* at 540 (Baker, J., dissenting).
251. *Id.*
252. *Id.* at 541 (quoting State v. Seaman, 124 P.3d 1137, 1142 (Mont. 2005)).
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* at 538 n.3 (majority opinion).

pal court's province to assess the credibility and weight of Officer Erickson's testimony, the Court held that nothing in Montana case law requires the Court to disregard video evidence which contradicts testimony apparently found credible by a lower court.[257] The Court acknowledged that, while it has not yet squarely addressed a situation in which an officer's testimony is contradicted by video evidence, other jurisdictions prove instructive on the matter,[258] and "[w]e cannot blind ourselves to the videotape evidence simply because an officer's testimony may, by itself, be read to support the lower court's holding."[259]

In light of *Metz*, Montana practitioners should be aware that, where an investigatory stop stems from a valid stop under the community caretaker doctrine, particularized suspicion for the investigatory stop must be present prior to the conclusion of the welfare check. Should an officer lack the particularized suspicion necessary to extend the welfare check in an investigatory stop at the conclusion of the welfare check, the investigatory stop will represent a seizure implicating the protections provided by the Fourth Amendment as well as the protections afforded under Article II, Sections 10 and 11 of the Montana Constitution.

—Lindsay Mullineaux

VII. *Bucy v. Edward Jones & Company, L.P.*[260]

In *Bucy v. Edward Jones & Company, L.P.*, the Montana Supreme Court found an employee's post-termination claims against a federally registered securities broker mandatorily arbitrable[261] where the employee had voluntarily entered into arbitration agreements in 1998 and 2003.[262] The Court held that the 2003 arbitration agreement was not illusory, unconscionable, lacking in mutuality, or unreasonably one-sided so as to prevent its enforceability.[263] Accordingly, the Court held the employee's claims were within the scope of the arbitration agreements and therefore mandatorily arbitrable pursuant to Financial Industry Regulatory Authority ("FINRA") regulations.[264]

In 1996, Adam Bucy ("Bucy") began working for Edward Jones in St. Louis.[265] In 1998, Bucy applied for National Association of Securities

257. *Id.* at 539.
258. *Id.*
259. *Id.* (quoting Carmouche v. State, 10 S.W.3d 323, 332 (Tex. Crim. App. 2000)).
260. 445 P.3d 812 (Mont. 2019).
261. *Id.* at 828.
262. *Id.* at 818, 824.
263. *Id.* at 828.
264. *Id.*
265. *Id.* at 817.

Dealers, Inc. ("NASD") registration as a representative of Edward Jones.[266] As part of his application, Bucy submitted a signed NASD Form U4 for registration in association with Edward Jones.[267] In accordance with NASD regulations in effect at the time, the NASD Form U4 contained a standard NASD arbitration agreement that provided:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of [NASD] as may be amended from time to time and that any arbitration award rendered against me may be entered as a [judgment] in any court of competent jurisdiction.[268]

In 2003, Bucy moved to the new Edward Jones office in Missoula, Montana.[269] At this time, Bucy voluntarily executed a new employment agreement with Edward Jones to work as a registered investment representative.[270] This 2003 employment agreement contained a similar standard NASD arbitration clause.[271] Further, directly above the signature line, the agreement stated, "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTES."[272]

By spring of 2015, Bucy had become "disaffected" by the "culture" at Edward Jones and "began looking for new employment."[273] Bucy alleged that while he was negotiating with a competitor firm, LPL Financial, Edward Jones intercepted his emails or phone calls and learned of his intent to leave.[274] He further asserted that Edward Jones had developed a "corporate pattern and practice of blackballing 'breakaway' brokers" to prevent them from working with competitors.[275]

In May 2015, one of Bucy's clients filed a complaint with FINRA, alleging Bucy had conducted an unauthorized transaction on the client's account.[276] This complaint triggered an internal review by Edward Jones as well as a separate investigation by FINRA.[277] As part of its internal review, Edward Jones contacted several of Bucy's clients, some of whom later testified that Edward Jones personnel told them that Bucy had given them bad

266. *Id.*
267. *Id.*
268. *Id.* at 818.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id*. (emphasis original).
273. *Id*.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.* at 819.

advice and mishandled their accounts.[278] While the Edward Jones internal review and the FINRA investigation were pending, Bucy finalized negotiations with LPL Financial and executed a contract for prospective employment.[279] Bucy informed Edward Jones of his intent to resign effective July 31, 2015.[280]

On July 30, 2015, a second client filed a FINRA complaint against Bucy.[281] Following Bucy's termination, Edward Jones circulated an internal memo indicating that Bucy had been voluntarily terminated as he had accepted a job at another firm.[282] However, Edward Jones also filed a FINRA Form U5 stating Bucy was permitted to resign while "under an internal review that started after the firm received a client complaint alleging unsuitable recommendations and discretionary trading."[283] FINRA Form U5 filings are made publicly available through the FINRA website.[284] Three weeks later, LPL Financial rescinded its employment contract with Bucy.[285]

Following Bucy's departure from Edward Jones, his successor contacted a number of Bucy's past clients.[286] Six of these clients eventually filed FINRA complaints against Bucy alleging that he mishandled their accounts.[287] Several of the complainants testified that Edward Jones personnel encouraged them to file the FINRA complaints.[288]

On June 27, 2016, Bucy filed suit against Edward Jones, asserting claims for statutory blacklisting, statutory defamation, and common law tortious interference with prospective business relationships.[289] On August 31, 2016, FINRA notified Bucy that it had closed his file without further action.[290] On September 26, 2016, Edward Jones moved the district court to dismiss and compel arbitration, asserting that the claims were subject to arbitration under FINRA regulations.[291] Bucy responded, arguing that his claims were post-termination claims beyond the scope of the arbitration clauses included in the arbitration agreements.[292] Additionally, Bucy argued the arbitration agreements were unenforceable as a matter of law.[293]

278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*

In January 2017, the district court compelled arbitration as to transactions occurring during Bucy's employment but denied arbitration of the post-employment claims, pending further discovery.[294] In July 2017, following further discovery, Edward Jones renewed its motion to compel arbitration on the post-termination claims.[295] The district court denied the motion on the basis that Edward Jones had failed to develop any additional facts indicating that the claims were within the scope of the 1998 and 2003 arbitration agreements.[296] Edward Jones appealed. Bucy responded in opposition but did not cross-appeal.[297]

The Montana Supreme Court reviews district court rulings on motions to compel arbitration de novo for correctness under the standards of the Federal Arbitration Act ("FAA")[298] or the Montana Uniform Arbitration Act,[299] where applicable.[300] Because Edward Jones is a federally registered securities broker,[301] the Court turned its attention to the FAA in support of its holding.[302] The Court stressed that arbitration agreements governed by the FAA are "valid, irrevocable, and enforceable" except "upon such grounds as exist at law or in equity for the revocation of any contract."[303] Consequently, arbitration agreements are subject to all generally applicable contract defenses, including lack of mutual assent or consideration, fraud, duress, and unconscionability.[304] Essentially:

> upon a contested petition or motion to compel arbitration, the court must consider, as properly placed at issue in a particular case, whether the arbitration agreement is enforceable under generally applicable principles of contract law and, if so, whether the terms of the agreement require arbitration of the particular matter or type of matter at issue.[305]

The Court began its analysis of the arbitration agreements by rejecting Bucy's assertion that the 2003 employment agreement lacked mutuality because it required him to waive ordinary judicial remedies while unfairly preserving a limited injunctive relief remedy for Edward Jones.[306] The Court explained that Bucy's argument failed to recognize that the FINRA regulations authorized either or both parties so seek limited preliminary or

294. *Id.* at 820.
295. *Id.*
296. *Id.*
297. *Id.*
298. 9 U.S.C. §§ 1–307 (2018).
299. MONT. CODE ANN. §§ 27–5–101 to 27–5–324 (2019).
300. *Bucy*, 445 P.3d at 820.
301. *Id.* at 816–17.
302. *Id.* at 820.
303. *Id.* at 821 (quoting 9 U.S.C. § 2).
304. *Id.*
305. *Id.*
306. *Id.* at 823.

permanent injunctive relief as an adjunct to arbitration.[307] Additionally, the FAA independently provides that such relief is available to either party.[308] Finally, the Court noted Bucy failed to recognize the limited nature of such a right, which protects only against misappropriation of trade secrets and other property information pending arbitration.[309] Against this backdrop, the Court explained that Bucy had made no factual or legal showing that the limited injunctive remedy preserved to Edward Jones in the 2003 employment agreement rendered the agreement either illusory or oppressive.[310] As such, the Court held that, whether asserted as a condition of unconscionability or a stand-alone formation defect, the 2003 arbitration agreement was not illusory, lacking in mutuality, or unreasonably oppressive.[311]

The Court then shifted its focus to whether the arbitration agreements were illegal or void due to a lack of explicit explanation and waiver of Montana constitutional rights.[312] While arbitration agreements must comply with Montana constitutional standards generally applicable to contracts, the Court has never required an explicit explanation or waiver of Montana constitutional rights in arbitration agreements.[313] Instead, the Court identifies such explanations, *inter alia*, as considerations that may be relevant to whether a valid contract waiver occurred in a particular case.[314] Turning to the case at hand, the Court acknowledged that Bucy correctly pointed out that neither agreement was the product of arms-length negotiations and that he had no significant bargaining power in relation to the other party.[315] Moreover, neither agreement included an explicit explanation or waiver of Bucy's rights under the Montana Constitution.[316] However, the Court recognized that it is beyond dispute Bucy was a highly intelligent, educated individual when he entered into such agreements and is thus presumed to have read and understood the meaning of the clear and unambiguous language.[317] The Court further stressed that the record contained no evidence that Bucy did not have the ability to consult with counsel prior to executing either of the agreements or that he entered into either agreement under undue economic, social, or practical duress.[318] In the end, the Court concluded the lack of explicit reference to Montana constitutional rights was insignifi-

307. *Id.*
308. *Id.* (citing 9 U.S.C. § 13).
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.* at 824.
316. *Id.*
317. *Id.*
318. *Id.*

cant as Bucy provided no authority or analysis for his implied assertion that Montana constitutional waiver requirements can override federal securities regulations.[319]

In support of its holding, the Court further determined that the arbitration agreements were not unenforceable in equity as unconscionable.[320] While the preprinted, standard forms were unquestionably contracts of adhesion, the Court found neither arbitration agreement unreasonably favorable to NASD or Edward Jones or unduly oppressive to Bucy.[321] Once again, the Court found Bucy to be a highly intelligent and educated person who knowingly sought professional licensing and employment as a representative of a securities broker in a highly regulated industry.[322] The Court found no evidence demonstrating Bucy was incapable of understanding the clear and unambiguous language or the pertinent requirements of the then-governing NASD regulations regarding arbitration.[323] Additionally, Bucy made no showing that the agreements did not conform to the then-governing NASD regulations.[324] As arbitration agreements in accordance with procedures approved by the Securities and Exchange Commission are not unconscionable as a matter of law,[325] the Court held the subject arbitration agreements were not unconscionable in equity.[326]

Finally, the Court held that Bucy's claims were mandatorily arbitrable within the express scope of the arbitration agreements.[327] Both arbitration agreements contained arbitration language as required by the applicable NASD or FINRA regulations in place at the time of execution.[328] Essentially, both arbitration agreements required arbitration of any disputes between or among members or associated persons arising out of or in connection with the business activities of a member or an associated person.[329] The Court reasoned that the predicate factual allegations, implicated legal duties, and alleged breaches or violations underlying Bucy's claims all directly related to the conduct of Edward Jones' business activities, both before and after termination of Bucy's employment. Similarly, Bucy's claims directly related to his business activities as an employee of Edward Jones.[330] Thus, the Court held that Bucy's claims were mandatorily arbitra-

319. *Id.* at 825.
320. *Id.* at 827.
321. *Id.* at 825–26.
322. *Id.* at 826.
323. *Id.*
324. *Id.* at 827.
325. *Id.* at 826.
326. *Id.* at 827.
327. *Id.* at 828.
328. *Id.* at 827.
329. *Id.* at 828.
330. *Id.* at 827–28.

ble pursuant to the applicable FINRA rules and within the scope of the arbitration agreements.[331] Consequently, the Court reversed the district court's judgment denying Edward Jones' motion to compel Bucy's post-termination claims and remanded the matter for entry of an order compelling arbitration of all of Bucy's claims and dismissing the action.[332]

Montana practitioners should take note of *Bucy*, as it demonstrates a slow shift in the Montana Supreme Court away from hardline disfavor of arbitration agreements toward general acceptance.[333] Currently, arbitration agreements generally represent valid and enforceable contracts under Montana law. As seen in *Bucy*, when faced with a question of arbitration clause enforceability, the Court will evaluate the arbitration clause using ordinary state-law rules of contract formation and interpretation and generally applicable contract law defenses, such as fraud, duress, or unconscionability.

—Lindsay Mullineaux

VIII. *IN RE ESTATE OF COTE V. SMITH-COTE*[334]

In *In re Estate of Cote v. Smith-Cote*, the Montana Supreme Court held damages from conversion of stock certificates are compensatory in nature and can give rise to punitive damages upon a finding of actual malice.[335] The Court examined whether the damages from the failure to return wrongfully transferred stock were compensatory and constituted an immediate restoration of monetary value to the appellee.[336] The Court concluded that, because the stock had an immediately ascertainable cash value, its return functioned as compensatory damages.[337] Upon this finding, the Court affirmed the award of punitive damages against Farmers State Financial Corporation ("Farmers"), a named defendant, concluding the district court did not err in determining it acted with actual malice.[338] This case gives a comprehensive analysis of punitive damages, including when and to what extent punitive damages are appropriate and reasonable.[339]

This is the most recent decision stemming from the litigation of the estate of John Cote Sr. ("John") by his son John Cote Jr. ("JP"), his sister

331. *Id.* at 828.
332. *Id.*
333. Scott J. Burnham, *The War against Arbitration in Montana*, 66 MONT. L. REV. 139, 156 (2005) ("In Montana, arbitration is the legal equivalent of the wolf, a critter much despised except by a fringe group that would spread it widely").
334. 433 P.3d 221 (Mont. 2019).
335. *Id.* at 224, 229.
336. *Id.* at 229.
337. *Id.* at 228–29.
338. *Id.* at 232.
339. *Id.*

Katherin Clemmence, and the trustees of the Ruth Cote Trust.[340] John and Janice Smith-Cote ("Smith-Cote") were married in 2009 after John was diagnosed with terminal cancer.[341] A month before his death, John executed a will disinheriting JP and Katherin from everything but a broken-down El Camino and two Navajo blankets, while bequeathing the remainder of his estate to Smith-Cote, including real property in Ravalli county to which the Ruth Cote Trust held title.[342] Smith-Cote also initiated a stock transfer of nearly 200 shares of stock in Farmers, which John and JP held as joint tenants with right of survivorship.[343] This wrongful transfer is what gave rise to the damages discussed herein.[344]

Shortly before John's death in late January 2011, Smith-Cote communicated with Farmers about transferring stock ownership from John and JP to John only.[345] John purportedly signed two separate stock power forms in late January and early February, respectively, before his death on February 5, 2011.[346] Both of these forms were signed after the execution of his January 5, 2011 will, which the Court had previously held he lacked capacity to execute.[347] To effectuate these transfers, Farmers' policy required a medallion signature guarantee endorsement to guarantee the genuineness and legal capacity of the signatory; however, no medallion guarantee was affixed to the January form at the time of its execution and the February form was stamped at an uncertain point in time.[348]

Edward Jones, the transferring institution, did not witness the execution of the stock power forms, and, therefore, could not properly guarantee the signatures provided.[349] Farmers never received the January form and only received the February form after John's death; however, the February form was backdated for February 3, 2011, and the stock was subsequently transferred in full to Smith-Cote.[350] When JP sought return of his stock, Farmers claimed the transfer was effective on February 3, 2011, and it would return half of the shares of stock in return for a release of liability,

340. *Id.* at 224–25; *see also* In re Estate of Cote v. Smith-Cote, No. DA 16-0295, 2017 WL 203681 (Mont. Jan. 17, 2017) (prior related decision finding undue influence in the execution of John Sr.'s will by his widow, Smith-Cote, and removing her as personal representative of his estate).

341. *Smith-Cote*, 2017 WL 203681 at *1.

342. *Id.*

343. *In re Estate of Cote*, 433 P.3d at 225.

344. *Id.* at 226.

345. *Id.* at 225.

346. *Id.*

347. *Smith-Cote*, 2017 WL 203681 at *1–2.

348. *In re Estate of Cote*, 433 P.3d at 225–26.

349. *Id.* at 225.

350. *Id.* at 225–26.

but it refused to return the remaining half, which it had transferred to Smith-Cote.[351]

The Court found the backdated February form could not have been effective before John's death, and since John and JP held the stock as joint tenants with right of survivorship, JP was the rightful owner of all of the shares of Farmers stock.[352] The Court also held the wrongful deprivation of the use and value of stock met the requirements for compensatory damages.[353] Compensatory damages are designed to compensate an injured party for actual loss, including lost profits if the amount can be determined with reasonable certainty.[354] The lost profits and value of the stock could be determined with exact certainty and were considered monetary damages, justified by the fact that securities have an immediate use value similar to cash.[355] The Court found the return of the stock and lost profits from that stock were meant to compensate JP and make him whole.[356]

The Court further found Farmers acted with actual malice in its wrongful transfer of the stock and its failure to return the stock in the eight years preceding this decision.[357] Actual malice exists when a defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and either deliberately acts in conscious or intentional disregard of that probability or deliberately acts with indifference to that probability of injury.[358] In awarding punitive damages, the district court must demonstrate consideration of factors such as the nature and reprehensibility of the defendant's wrongdoing, the extent and intent of defendant's wrongdoing, the amount of actual damages, and the defendant's net worth.[359] All of the elements of a claim for punitive damages must be proven by clear and convincing evidence.[360]

Farmers argued it had merely made a good faith mistake and punitive damages were not warranted.[361] The Court, however, affirmed the district court's findings that Farmers had proceeded with actual fraud and/or actual malice.[362] The Court honed in on the fact that Farmers knew the medallion guarantee had not been affixed until after John's death, JP had not consented to transferring any of the shares to Smith-Cote, and most egre-

351. *Id.* at 226.
352. *Id.* at 231–32.
353. *Id.* at 227.
354. *Id.* (citing MONT. CODE ANN. § 27–1–317).
355. *Id.* at 229.
356. *Id.*
357. *Id.* at 231–32 (citing MONT. CODE ANN. § 27–1–221).
358. MONT. CODE ANN. § 27–1–221(2).
359. MONT. CODE ANN. § 27–1–221(7)(b).
360. MONT. CODE ANN. § 27–1–221(5).
361. *In re Estate of Cote*, 433 P.3d at 231.
362. *Id.*

giously, that Farmers had not actually transferred the stock until after John's death and had backdated the form in order to transfer the stock to Smith-Cote.[363] Beyond that, the Court noted Farmers had disregarded JP's rights as a shareholder and ignored its statutory obligation to return the stock to its rightful owner.[364] Farmers' willful disregard of its own policies, Montana law, and JP's rights as a shareholder were sufficient for the district court to establish punitive damages.[365]

Farmers also challenged the punitive damages as excessive and violative of its Due Process rights under the Fourteenth Amendment.[366] The district court awarded punitive damages of $1.1 million, which falls well within the statutory cap of $10 million or three percent of a defendant's net worth, whichever is less.[367] The Court noted the punitive damages were within a reasonable ratio when compared to the amount of compensatory damages.[368] Moreover, despite advice of its own counsel, Farmers proceeded with deliberate indifference in violating both its own policies and Montana law, warranting punitive damages that were not excessive when compared to other analogous cases.[369]

Justice McKinnon dissented, joined by Justices Baker and Rice, disagreeing with the majority's definition of compensatory damages.[370] Justice McKinnon did not agree with the majority's view that the stock shared the same immediate cash value as money, and, thus, the stock did not satisfy the statutory requirements for an award of punitive damages.[371] In her dissenting opinion, Justice McKinnon asserted the stocks themselves are unique and do not have the same monetary value required by statute, and payments or distributions on the stock may or may not be considered compensatory.[372] She further considered the interest on the wrongfully held property to be the only true compensatory damages awarded in this case.[373] Accordingly, because the interest award was negligible compared to the full value, she would have found the award of punitive damages to be excessive when combined with the district court's justifications for the award.[374]

363. *Id.*

364. *Id.*

365. *Id.* at 231–32.

366. *Id.* at 232; *see also* BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996) (holding that a grossly excessive award of punitive damages may violate a party's rights under the Fourteenth Amendment).

367. *In re Estate of Cote*, 433 P.3d at 233 (citing MONT. CODE ANN. § 27–1–220(3)).

368. *Id.* (citing MONT. CODE ANN. § 27–1–220(3)).

369. *Id.*

370. *Id.* at 234 (McKinnon, Baker, & Rice, JJ., dissenting).

371. *Id.*

372. *Id.* at 236.

373. *Id.* at 238.

374. *Id.* at 243–44 (noting that, of the nine statutory factors for determining punitive damages, the district court focused on only three in its determination).

Regardless of the dissenting opinion in this case, the majority recognized an award of punitive damages can be sustained when the damages awarded in a case are non-monetary, so long as the damages are based on something fungible, transferrable, and that has a redeemable, immediately liquid ascertainable cash value like the stock at issue here.[375] Montana practitioners should take note of the Court's discussion of compensatory damages and its analysis of the current scope of punitive damages under Montana law.

—Remy Orrantia

IX. *HOWARD V. REPLOGLE*[376]

In *Howard v. Replogle*, the Montana Supreme Court determined whether a physician's failure to disclose his financial interest in a surgical products company prevented his patient from being able to give informed consent in a medical malpractice case.[377] The appeal arose from the district court's denial of both a motion for judgment as a matter of law and a motion for a new trial after a jury verdict for the defendant.[378] The Court ultimately held the question presented was one properly before the jury and no substantial evidence existed to warrant a new trial.[379]

Around the year 2000, Kathy Howard ("Howard") was injured in a car accident as well as a slip and fall down a set of stairs, resulting in chronic back pain.[380] In 2008, Howard was referred to Dr. Replogle, who performed a decompression procedure with minimal success.[381] Dr. Replogle then suggested and performed a multi-level fusion on Howard's spine in 2009.[382] This procedure unfortunately did not solve all of Howard's back pain, and, in early 2010, Dr. Replogle further suggested a minimally invasive fusion of her L5-S1 vertebrae using an OptiMesh graft.[383] This procedure as well failed to solve Howard's chronic pain, and in 2012, another doctor performed a revision surgery on her spine and discovered problems with the OptiMesh used in Dr. Replogle's procedure.[384]

375. *Id.* at 228–29 (majority opinion).
376. 450 P.3d 866 (Mont. 2019).
377. *Id.* at 869.
378. *Id.*
379. *Id.* at 871.
380. *Id.* at 867.
381. *Id.*
382. *Id.*
383. *Id.* at 867–68.
384. *Id.* at 868.

OptiMesh is a medical device designed, manufactured, and marketed by Spineology, Inc. ("Spineology").[385] OptiMesh is used in interbody fusions, like the one Dr. Replogle performed on Howard, as a containment device, which is inserted into the disc space and filled with bone graft material.[386] "Off-label" OptiMesh had been used in interbody fusions in the United States and Europe since 2003, but it is not regulated by the FDA.[387] Significantly, Dr. Replogle had first used OptiMesh in 2007, and he later purchased $110,000 worth of Spineology stock and entered into a consulting agreement with Spineology.[388]

Howard filed claims against Dr. Replogle alleging negligence and breach of the standard of care owed to a patient, specifically asserting Dr. Replogle's failure to disclose his financial interest in Spineology constituted a failure to obtain her informed consent for the procedure.[389] Howard initially presented the informed consent issue as a question of fact for the jury, asking that it find she had not given informed consent.[390] Howard's appeal instead asked the Court to determine the issue of informed consent as a matter of law.[391] The Court, however, noted the issue of informed consent should properly be presented to the jury to determine whether the plaintiff could establish: (1) the applicable standard of care; (2) that the defendant had departed from the standard of care; and (3) the departure had cause the plaintiff's injuries.[392]

At trial, both parties presented expert opinions on whether a financial interest must be disclosed.[393] Notwithstanding Howard's testimony, the jury found she had given her informed consent to the procedure and Dr. Replogle had acted within the applicable standard of care.[394] Further, because there was no substantial evidence to the contrary, and because Howard was able to fully present her case that she did not give informed consent to the jury, the Court refused to disturb the verdict.[395] The denials of both Howard's motion for a new trial and for judgment as a matter of law were affirmed.[396]

Howard v. Replogle affirms a jury verdict that a physician's failure to disclose their financial interest in a surgical product being used does not

385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.* at 869.
392. *Id.* at 870 (citing Estate of Wilson v. Addison, 258 P.3d 410, 414 (Mont. 2011)).
393. *Id.* at 871.
394. *Id.*
395. *Id.*
396. *Id.*

affect a patient's ability to give informed consent. This decision indicates that medical practitioners throughout the state do not need to disclose their financial interests in order to gain valid informed consent for medical procedures and serves as an example of how the Court will review the appeal of a jury verdict on the issue in the future.

—Remy Orrantia

X. *UNITED STATES SPECIALTY INSURANCE COMPANY V. ESTATE OF WARD*[397]

In *United States Specialty Insurance Company v. Estate of Ward*, the Montana Supreme Court answered the certified question of whether the passenger of an aircraft crash can stack the limits of three separate aircraft liability policies issued to the pilot.[398] The Court found the plain language of the insurance contract limited its application to each occurrence and each plane insured, preventing the policy from being stacked.[399]

Darrell Ward was a passenger in a plane piloted by Mark Melotz ("Melotz") before it crashed, killing them both.[400] Melotz carried separate liability policies for each of his three planes, which included coverage for bodily injury to each passenger for each occurrence involving the plane insured under each policy.[401] Following the crash, U.S. Specialty Insurance Company ("USSIC") paid the Estate of Darrell L. Ward (the "Estate") its single passenger maximum of $100,000, but the Estate argued it was entitled to stack Melotz's insurance policies and receive the maximum amount under all three policies.[402] USSIC filed a declaratory judgment action in the United States District Court for the District of Montana, which then certified this question to the Montana Supreme Court.[403]

The Court applied the general rules of contract law to interpret USSIC's insurance contracts.[404] The plain meaning of a contract applies unless its language is ambiguous.[405] The Court held the plain language of USSIC's policy, as understood from the viewpoint of a consumer with average intelligence, limited the coverage to both the specific aircraft involved and each individual occurrence that resulted in bodily injury.[406] Consequently, the

397. 444 P.3d 381 (Mont. 2019).
398. *Id.* at 382.
399. *Id.* at 388.
400. *Id.* at 382.
401. *Id.* at 382–83.
402. *Id.* at 383.
403. *Id.*
404. *Id.*
405. *Id.* (quoting Fisher v. State Farm Mut. Auto. Ins. Co., 305 P.3d 861, 865 (Mont. 2013)).
406. *Id.* at 383–84.

Court found the policy to be unambiguous, but noted an unambiguous insurance contract may still be unenforceable if it violates public policy.[407] Here, the Estate contended public policy required the stacking of third-party liability insurance.[408]

In Montana, public policy is prescribed by the legislature through its enactment of statutes, and insurance policies that violate statutory provisions are contrary to public policy and thus unenforceable.[409] The Estate likened aviation insurance to motor vehicle insurance, which must be stacked in certain instances, but the Court recognized the statutory definition of a motor vehicle is limited to vehicles meant for travel on highways.[410] Lacking any persuasive public policy, the Court rejected this argument as well.[411]

The Estate also argued that, under the reasonable expectation doctrine, the three premiums could be stacked to provide further coverage to any of Melotz's passengers.[412] The reasonable expectation doctrine depends on both the reasonable expectations of the claimant as well as his status under the insurance policy.[413] The Estate argued the aircraft liability policy is personal and portable to Melotz, thereby allowing the stacking of passenger coverages under his policies.[414] The Court disagreed with this, falling back on the plain, unambiguous language of the contract itself, which limited the coverage to the involved aircraft.[415]

On this point, Justice McKinnon specially concurred to further distinguish the differences between first-party motor vehicle coverages and third-party aviation insurance.[416] Her concurrence highlights the fact that the Court has never stacked third-party liability coverage because it is fundamentally not personal and portable to the claimant.[417] Indeed, insurance coverage is not illusory if a third-party cannot stack liability insurance because that third party should have no reasonable expectation of stacking liability coverage on vehicles not involved in the accident.[418] Further, although an insurer may not prohibit stacking when doing so would defeat coverage for which an insurer paid valuable consideration, the Estate was

407. *Id.* at 384.
408. *Id.*
409. *Id.* (quoting Hardy v. Progressive Specialty Ins. Co., 67 P.3d 892, 898 (Mont. 2003)).
410. *Id.* (citing MONT. CODE ANN. § 33–23–204(1)(a)).
411. *Id.* at 384–85.
412. *Id.* at 385.
413. *Id.*
414. *Id.* at 387.
415. *Id.*
416. *Id.* at 388 (McKinnon, J. concurring).
417. *Id.*
418. *Id.* at 389.

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not the named insurer under the policy and was not entitled to stack liability coverages as a third-party claimant.[419]

United States Specialty Insurance Company, in combination with *Cross v. Warren*, provides definitive answers to how the Court approaches insurance stacking cases. For a policy to be stackable, the coverage must be personal to the claimant and reasonably expected to cover the accident. Because of this, stacking is generally not applicable in the context of third-party liability policies. Ultimately, the plain language of an insurance contract will govern unless contravening circumstances prevent its enforcement. Montana practitioners should take care to understand the current analytical framework governing the stacking of insurance policies in Montana, so that they may adequately argue issues involving applicable insurance coverage.

—Remy Orrantia

419. *Id.*