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LEGAL SHORTS

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. JOHNSON v. COSTCO WHOLESALE

In Johnson v. Costco Wholesale, the Montana Supreme Court cleared up inconsistencies as to the proper standard for reviewing a trial court’s decision granting or denying a motion for judgment as a matter of law. The Court decided that a district court’s decision to grant judgment as a matter of law constituted a legal question for which the de novo standard of review was appropriate. After announcing the de novo standard of review, the Court tackled four issues on appeal in a wrongful discharge case.

Ellery Johnson had been employed as a baker at the Billings Costco bakery for just over ten years when he was discharged on March 1, 2003. His discharge resulted from his violation of a Costco “grazing” policy. Costco’s grazing policy prohibited employees from eating food they had not purchased while at work. For most of Johnson’s time at Costco, the grazing policy was interpreted “quite liberally.” Employees commonly ate food to test its quality or as a snack.

Cindy Petersen became general manager of Costco in July 2001. Petersen strictly enforced the grazing policy and held a meeting where she notified employees that violations of the graz-

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2. Id. at 732.
4. Johnson, 152 P.3d at 729.
5. Id.
6. Id. at 730.
7. Id.
8. Id.
ing policy could result in immediate termination. On February 25, 2003, Johnson took a bite of a "salvage" Danish and threw the rest of the box away. "Salvage" was the designation given to baked goods which had not been sold within a certain amount of time. These leftover goods would eventually be thrown out or donated to a rescue mission. Another baker reported Johnson's violation of the grazing policy to a supervisor, who then reported the violation to Petersen. After instructing Johnson to take three days off, Petersen spoke with various Costco executives about the incident. Eventually, word of the situation reached Costco's executive vice-president. Costco's personnel policy requires an executive vice-president to make the decision to terminate an employee with ten years of experience, such as Johnson. The executive vice president instructed Peterson to terminate Johnson for violating the grazing policy.

Johnson sued Costco under the Wrongful Discharge from Employment Act (WDEA). During the jury trial, Costco moved for and was granted judgment as a matter of law, on the ground that the grazing policy violation was good cause for termination. Johnson appealed this ruling.

Of primary legal importance in Johnson v. Costco Wholesale is the Montana Supreme Court's discussion of the standard of review regarding judgments as a matter of law. In a footnote at the beginning of the Court's decision, Justice Nelson noted the parties to the action were confused about the correct terminology to be used in a motion under Rule 50(a) of the Montana Rules of Civil Procedure. He explained that the correct title of the motion should be a "Motion for Judgment as a Matter of Law" rather than a "Motion for Directed Verdict," but that any errors in the identification of the motion should be treated as "merely formal."

The Court began its discussion regarding the standard of review by outlining the legal principles that govern trial courts

9. Id. at 730.
10. Johnson, 152 P.3d at 730.
11. Id. at 729-30.
12. Id. at 730.
13. Id.
14. Id.
15. Id.
18. Johnson, 152 P.3d at 730.
19. Id. at 729 n. 1.
20. Id.
when they consider granting judgment as a matter of law, specifically the rule that judgment as a matter of law should be granted only when it appears that the plaintiff will be unable to recover "upon any view of the evidence."21 The Court noted that it is "well settled" that the Montana Supreme Court and the district court should implement the same standard of review when considering motions for judgment as a matter of law.22 The Court recognized, however, that it had employed "two inconsistent approaches" in reviewing cases where a district court had granted judgment as a matter of law.23

The Court's initial approach had been the application of the de novo standard of review. This standard treats the trial court's decision as a legal question.24 The second approach applied the abuse of discretion standard of review, "effectively treating the court's decision as an evidentiary issue."25 After citing case law supporting the de novo standard of review,26 the Court traced the roots of their mistaken jurisprudence applying the abuse of discretion standard of review to a case named Wallin v. Kinyon’s Estate.27 Justice Nelson noted that, after Wallin, the Court had primarily used the de novo standard, but that recently the Court had "reverted back to the abuse of discretion standard of review."28

Writing for the Court, Justice Nelson affirmed the principle that the Court should resolve issues "controlled by inconsistent lines of authority . . . regardless of whether the parties raised the issue."29 The Court ruled that whether judgment as a matter of law should be granted or denied is a question of law which should be reviewed under the de novo or plenary standard of review.30 The Court gave two reasons for this decision: first, "appellate review of the trial court's decision to grant or deny a motion for judgment as a matter of law involves not only assessment of the suffi-

22. Id. at 731 (citing Williams v. Union Fidelity Life Ins. Co., 123 P.3d 213, 218 (Mont. 2005)).
23. Id.
24. Johnson, 152 P.3d at 731.
25. Id.
26. Id.
27. Id. (explaining that the source of confusion began with a holding that the "granting of the motion for judgment as a matter of law was not an abuse of the trial court's discretion," in Wallin v. Kinyon's Est., 519 P.2d 1236, 1239 (Mont. 1974)).
28. Id. at 731.
29. Id. at 732.
ciency of the evidence but also the application of the aforemen-
tioned settled principles of law to that quantum of evidence;31
and second, most federal appellate courts review judgments as a
matter of law under the de novo standard of review.32 The Court
explicitly overruled prior case law to the extent it mistakenly ap-
plicated the abuse of discretion standard instead.33

Having resolved the standard of review questions, the Court
proceeded to the merits of Johnson’s appeal. As mentioned above,
four primary issues were raised regarding Johnson’s discharge: (1)
whether Costco had good cause to discharge Johnson;34 (2)
whether Costco had violated the terms of its own personnel policy
when it fired Johnson;35 (3) whether Costco used Johnson’s viola-
tion of the grazing policy as a pretext to fire him for other rea-
sons;36 and (4) whether attorney fees should have been awarded to
Costco.37

After examining the evidence presented at trial, the Court
concluded that the district court erred in granting judgment as a
matter of law to Costco under the “good cause” standard because
material issues of fact existed in that “reasonable persons could
differ regarding the conclusions which could be drawn from the
evidence.”38 However, the Court upheld the district court’s grant
of judgment as a matter of law based on Johnson’s pretext argu-
ment, under which he claimed Costco actually fired him to elimi-
nate his salary, and Johnson’s argument that Costco violated its
personnel policy when firing him.39 By vacating Costco’s award of
attorney fees, the Court did not reach the issue of whether the
district court erred in granting attorney fees or the final issue

31. Id.

32. Id. (noting federal case law was instructive because Rule 50(a) of the Montana

33. Id. (overruling in part Wallin v. Kinyon’s Est., 519 P.2d 1236, 1239 (Mont. 1974);
Somont Oil Co. v. A & G Drilling, Inc., 137 P.3d 536, 540 (Mont. 2006); Glacier Tennis Club
v. Treweek Const., 87 P.3d 431, 440 (Mont. 2004); In re Mental Health of D.L.T., 67 P.3d
189, 190 (Mont. 2003); Onstad v. Payless Shoesource, 9 P.3d 38, 42 (Mont. 2000); Buhr on
Behalf of Lloyd v. Flathead Co., 886 P.2d 381, 391 (Mont. 1994); Nelson v. Flathead Valley
Transit, 824 P.2d 263, 267 (Mont. 1992); and Davis v. Sheriff, 762 P.2d 221, 226 (Mont.
1988)).

34. Id. at 733.

35. Id. at 735.

36. Johnson, 152 P.3d at 734.

37. Id.

38. Id. (considering Mont. Code Ann. § 39-2-904(1)(b) (2007)).

39. Id. at 735 (the argument that Costco violated its personnel policy was considered
under Mont. Code Ann. § 39-2-904(1)(c)).
presented on appeal—whether the WDEA’s arbitration and attorney fees statutes were unconstitutional.  

Ultimately, Johnson v. Costco Wholesale’s primary importance lies in its discussion of the applicable standard of review for cases involving judgment as a matter of law. The case clears up inconsistent case law and firmly establishes the de novo standard of review as the proper standard for the Court’s review of a district court’s grant or denial of a motion for judgment as a matter of law. Practitioners on either side of such a motion must be aware that a trial court judge who grants a motion for judgment as a matter of law will not be given any deference by the Montana Supreme Court.

—Christopher Decker

II. In re Marriage of Fontenot

The Montana Supreme Court held in In re Marriage of Fontenot that the Parental Kidnapping Prevention Act (PKPA) applies in determining which state has jurisdiction in a custody dispute.

Jacob Fontenot, a Louisiana resident stationed in Great Falls, Montana with the United States Air Force, married Jennifer Fontenot on June 30, 2001. Their only child, Wyatt, was born on January 31, 2001. On November 6, 2002, Jennifer filed a petition for dissolution in Cascade County District Court, in Great Falls, Montana. At the time, Jacob was serving in Louisiana while Wyatt lived with Jennifer in Great Falls.

On December 21, 2002, the Department of Public Health and Human Services removed Wyatt from Jennifer’s care because it suspected her of child abuse. Wyatt, then two years old, was placed with Jacob in Louisiana. On December 30, 2002, Jacob filed his own petition for dissolution in Louisiana. A custody

40. Id. at 735–36.
41. In re Marriage of Fontenot, 149 P.3d 28, 32 (Mont. 2006).
43. Fontenot, 149 P.3d at 32.
44. Id. at 29.
45. Id.
46. Id.
47. Id.
48. Id.
49. Fontenot, 149 P.3d at 29.
50. Id.
hearing followed shortly thereafter, and the Louisiana court determined it had jurisdiction over child custody proceedings based on the Uniform Child Custody Jurisdiction Act (UCCJA). In a telephone conference on February 11, 2003, the Cascade County District Court transferred jurisdiction over the case to the Louisiana court based on the “best interest” of the child. Jennifer appealed the transfer, and on September 11, 2003, the Montana Supreme Court held that the district court erred when it failed to hold a hearing to determine proper jurisdiction prior to transferring to Louisiana. The case, known as Fontenot I, was reversed and remanded to the district court to hold a proper hearing. The Louisiana court, in the interim, entered a default judgment against Jennifer and granted sole custody to Jacob.

The Montana district court held a jurisdictional hearing on April 2, 2004, and determined that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) required jurisdiction to remain in Montana. Jacob appealed this holding in the fall of 2005 after both district courts had issued numerous orders. These orders included: a Louisiana court ruling in favor of Jacob for permanent custody and child support; a Montana district court order holding Jacob in contempt of court for continuing to pursue legal proceedings in Louisiana; a Louisiana court order granting full custody to Jacob in response to the Montana district court granting sole custody to Jennifer; and the issuance of a civil warrant for Jacob’s arrest from the Montana court.

Prior to Jacob’s appeal, Jennifer moved the district court to order Jacob to show cause why he had not fulfilled the requirements of a prior Montana district court order granting her full custody. Jacob subsequently filed a motion to dismiss the contempt charge based on lack of jurisdiction of the Montana district court. After the district court issued a second order in July 2005 finding Montana had jurisdiction, Jacob was given thirty days to

51. Id.
52. Id. at 29–30.
53. Id. at 30 (citing In re Marriage of Fontenot, 77 P.3d 206 209 (Mont. 2003)).
54. Id.
55. Fontenot, 149 P.3d at 30.
56. Id.
57. Id.
58. Id.
59. Id.
60. Id.
relinquish physical custody of Wyatt to Jennifer. He failed to comply, and the Montana district court issued another warrant for arrest for civil contempt, leading to Jacob's appeal.

On appeal, Jacob argued the Montana Supreme Court's holding in Fontenot I was that the district court merely failed to hold a proper fact-finding hearing in determining whether Montana had jurisdiction. Jennifer contended that the Montana Supreme Court's holding in Fontenot I determined Montana had jurisdiction over the custody dispute. The Montana Supreme Court agreed with Jacob, reiterating two distinct holdings in Fontenot I: first, the district court erred by relying on an "interest of the child" standard in its jurisdictional determination, and second, the district court erred in failing to hold a hearing to make determinations of fact and law prior to its jurisdictional determination. The Montana Supreme Court concluded that the Cascade County District Court made its determination based on dictum in Fontenot I.

The dictum at issue concerned the differing standards of the UCCJEA and the UCCJA with regard to the "best interest of the child." Montana adopted the UCCJEA in 1999, which repealed and replaced the UCCJA provisions in Montana law. Louisiana, however, employs the UCCJA. This is important because the UCCJA considers the "best interest of the child" standard when determining proper jurisdiction, but the UCCJEA has eliminated that standard. Still considered "uniform" acts, they are not actually uniform and it is unclear which standard to apply in jurisdictional conflicts.

The Montana Supreme Court faced a similar issue in Paslov v. Cox, in which a Montana district court and the High Court of American Samoa issued competing jurisdictional rulings in a custody dispute. To resolve that matter, the Court applied the

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62. Id.
63. Id.
64. Id. at 31.
65. Id.
66. Id.
67. Fontenot, 149 P.3d at 31.
68. Id.
69. Id.
70. Id.
71. Id.
73. Id. at 1027–28.
PKPA to determine which court properly possessed jurisdiction. 74 “The purpose of the PKPA is to prevent the issuance of competing child custody decrees in sister states”; therefore, it provides national standards under which courts can determine proper jurisdiction and “what effect to give the decisions by courts of other jurisdictions.” 75 Courts must accord full faith and credit to decisions by a court that appropriately exercised jurisdiction under the PKPA. 76

In the current case, the Court applied the PKPA to determine proper jurisdiction between Montana and Louisiana courts. 77 Because the Montana district court improperly relied on dictum from Fontenot I, it erred in concluding that it had jurisdiction over the custody dispute as a matter of law. 78 The Court reversed the district court’s order and remanded for a new hearing on the jurisdictional issue, applying the standards of the PKPA. 79 The contempt of court order, arrest warrant, and custody order against Jacob were reversed without prejudice. 80

In his dissent, Justice Rice faulted the Court for addressing the issue of competing state custody decrees prematurely, as the actual issue was whether the “initial custody decree could be validly issued in Montana.” 81 Justice Rice would have affirmed the decision of the district court and encouraged the parties to then “litigate the proper application of the PKPA to two competing custody decrees for a determination of which custody order must prevail.” 82

Fontenot establishes that the PKPA is the required standard for determining jurisdiction in custody disputes between competing states. In the interest of efficiency and consistency, practitioners must consult the PKPA in order to file custody disputes in the proper jurisdiction.

—Julie McFarland

74. Id. at 1029–30.
75. Fontenot, 149 P.3d at 31 (internal citations omitted).
76. Id. at 31 (citing 28 U.S.C. § 1738A(a) (2000)).
77. Id. at 32.
78. Id.
79. Id.
80. Id.
81. Fontenot, 149 P.3d at 32.
82. Id. (Rice, J., dissenting).
III. WOLF v. OWENS

Outdoor recreation is popular in Montana, and it is common for individuals to cross private land to access recreational opportunities on public land. The question of proper access often arises in these cases. In Wolf v. Owens, the Montana Supreme Court held sporadic recreational use was sufficient to establish a prescriptive easement.

Wolf involved a dispute over access rights between a group of landowners and their neighbor, Jerry Owens (Owens). The landowners owned lots in the Hawkes Nest Subdivision (Hawkes Nest). Owens owned three parcels surrounding Hawkes Nest. The access dispute revolved around Owens’s five-acre South Parcel (the South Parcel), which lies between Hawkes Nest and the Middle Fork of the Flathead River (the Middle Fork).

Hawkes Nest and the South Parcel were originally a single piece of property owned by one individual. In 1957, the property was subdivided into Hawkes Nest, leaving “the South Parcel as a remainder.” The owner sold the Hawkes Nest lots and forfeited the South Parcel for failure to pay taxes. In 1970, Owens received a tax certificate for the South Parcel. He acquired a tax deed for the property in 1988. The Hawkes Nest landowners acquired their lots between 1969 and 1994.

In 1971, “Owens began visiting the South Parcel a couple of times a year.” Owens claimed he accessed the South Parcel by driving on a road that crossed various Hawkes Nest lots. At some point, one of the Hawkes Nest landowners placed a chain and a “no vehicle” sign across the road and told Owens he could not use the road to access the South Parcel. After this, Owens claimed he accessed the South Parcel either by parking on other
Hawkes Nest lots and walking to the South Parcel or by parking outside Hawkes Nest and walking to the South Parcel.98 "Because Owens's visits to the South Parcel were infrequent," his contact with the landowners was sporadic.99 Most of the landowners claimed to have met Owens in the late 1980's or early 1990's.100

On December 18, 2003, the landowners sued for an injunction forbidding Owens from crossing their property to access the South Parcel.101 The landowners also claimed they had a prescriptive easement across the South Parcel to access the Middle Fork for recreational purposes.102 Owens counterclaimed, asking the court to enjoin the landowners from crossing the South Parcel, and claiming he had an implied easement across the landowner's property to access the South Parcel.103

The district court held the landowners' use of the South Parcel established a prescriptive easement.104 The court also held Owens did not have an implied easement by use or an easement by necessity to access the South Parcel by crossing the landowners' property.105 Owens appealed the district court's decision.106

The Montana Supreme Court considered two issues on appeal: first, whether Owens had an implied easement across the landowners' property; and second, whether the landowners established a prescriptive easement across the South Parcel.107 In order to succeed on his implied easement claim, Owens had to prove strict necessity existed "at the time when Hawkes Nest and the South Parcel were severed."108 He also had to prove there was a pre-existing use and intent for that use to continue when the severance occurred.109 The Court found Owens failed to make either of these required showings and, therefore, affirmed the district court's decision that Owens did not have an "implied easement by necessity or existing use to the South Parcel."110

98. Id.
99. Id.
100. Id.
101. Wolf, 172 P.3d at 127.
102. Id.
103. Id.
104. Id.
105. Id. at 127–28.
106. Id. at 128.
107. Wolf, 172 P.3d at 128.
108. Id. at 128–29.
109. Id. at 129.
110. Id.
The Court also affirmed the district court's decision that the landowners had a prescriptive easement across the South Parcel to access the Middle Fork for recreational purposes. To establish a prescriptive easement, "the party claiming the easement must show open, notorious, exclusive, adverse, continuous and uninterrupted use of the easement claimed for the full statutory period." The Court found that the landowners' claim satisfied each of these elements.

With regard to the requirement of adverse use, seems to contradict an earlier ruling from where the Court held "[r]ecreational use is insufficient to raise a presumption of adverse use." However, is distinguishable from . In , two landowners "gated, fenced and posted their properties" to keep the general public out. However, these landowners did not object to their neighbors using the road through their properties to recreate on the public and private land south of the landowners' properties. The landowners never gave their neighbors explicit permission to use the road, but both parties understood use of the road was a "neighborly thing." The Court determined this "neighborly accommodation" created implied permission that prevented the use from ripening into a prescriptive easement.

 did not involve "neighborly accommodation." threatened to fence the South Parcel to keep the landowners from crossing his property to recreate on the Middle Fork. Because knew the landowners were crossing his property, and the landowners ignored threats and continued to cross the South Parcel to access the Middle Fork, the landowners satisfied the open and adverse use requirements necessary for a prescriptive easement. Further, the Court determined the continuous use requirement of a prescriptive easement can be satisfied

111. Id. at 130.
112. Id. at 129 (internal quotations omitted).
113. Wolf, 172 P.3d at 130.
115. Id. at 869 (internal citations omitted).
116. Id.
117. Id.
118. Id.
119. Id.
121. Id.
without constant use, so long as the claimant uses the easement whenever he desires. The landowners established a prescriptive easement for recreational purposes because they crossed the South Parcel without Owens's permission, whenever they desired, for a period of more than five years.

Based on the Kessinger Court's holding that the neighbors' recreational use failed to establish a prescriptive easement, Montana practitioners may believe recreational use can never establish a prescriptive easement. However, Wolf demonstrates how a party can establish a prescriptive easement for recreational purposes. Of course, a party seeking to establish an easement for recreational use must still satisfy all the requirements necessary to ripen that use into a prescriptive easement, and the party will only be allowed to use the easement for the type of recreational use that ripened the easement. For example, a party who establishes a prescriptive easement by riding his horse across a parcel of property each September during hunting season probably cannot use the same easement for snowmobiling in January.

Wolf indicates a party can establish a prescriptive easement for recreational purposes. However, Montana practitioners should note Kessinger as a reminder that express permission or "neighborly accommodation" is fatal to establishment of a prescriptive easement.

—Tyson O'Connell

IV. State v. St. Germain

The right of a defendant to be present at all critical stages of his or her trial is "one of the most basic rights," and is protected by both the Sixth Amendment of the U.S. Constitution and Article II, section 24 of the Montana Constitution. Although it is well-established that a defendant has the right to be present at all critical stages of trial, State v. St. Germain was a case of first impression in Montana that asked whether Article II, section 24 of the Montana Constitution also guarantees a defendant the right to be present at stages of a trial that the defendant believes should have occurred, but did not. The Montana Supreme Court deci-

122. Id.
123. Id.
125. Id. at 596.
126. Id. at 595.
sively answered in the negative, holding that Article II, section 24 only applies to situations in which there was an actual court event.\textsuperscript{127}

Joe Alfred St. Germain lived with his stepdaughter, H.M., from the time she was seven until age nineteen.\textsuperscript{128} St. Germain used severe physical and psychological techniques to discipline H.M. and repeatedly sexually abused her over the twelve years they lived together.\textsuperscript{129} The State charged St. Germain with four counts of incest and four counts of sexual intercourse without consent.\textsuperscript{130} On the second day of his trial, in an in-chambers meeting, St. Germain's counsel informed the district court that a juror ("Juror No. 7") spoke with H.M.'s biological father in the courthouse hallway.\textsuperscript{131} The district court did not ask St. Germain if he wanted to question Juror No. 7 about the conversation, and neither St. Germain nor his attorney insisted on questioning the bailiff.\textsuperscript{132} In another in-chambers meeting, St. Germain's attorney informed the court that not only was there a considerable amount of talk about the trial in the hallways, but the bailiff was seen talking with a member of the jury.\textsuperscript{133} Defense counsel also alleged that several witnesses were meeting and discussing the case.\textsuperscript{134}

Although the Judge issued a cautionary instruction to the jury, St. Germain moved for a mistrial.\textsuperscript{135} The district court denied the motion, and the jury found St. Germain guilty of all counts.\textsuperscript{136} St. Germain appealed to the Montana Supreme Court, alleging a violation of his rights under the Sixth Amendment of the U.S. Constitution and Article II, section 24 of the Montana Constitution.\textsuperscript{137} The Montana Supreme Court disagreed.\textsuperscript{138}

St. Germain argued the district court should have advised him of his right to call Juror No. 7 to an in-chambers meeting to discuss the alleged conversation that took place with H.M.'s fa-

\begin{itemize}
  \item \textsuperscript{127} Id. at 597.
  \item \textsuperscript{128} Id. at 594.
  \item \textsuperscript{129} Id. at 594-95.
  \item \textsuperscript{130} St. Germain, 153 P.3d at 595.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id. at 595-96.
  \item \textsuperscript{133} Id. at 595.
  \item \textsuperscript{134} Id. at 596.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} St. Germain, 153 P.3d at 595-96.
  \item \textsuperscript{137} Id. at 594.
  \item \textsuperscript{138} Id. at 597.
\end{itemize}
St. Germain relied on *State v. Bird*, in which the Montana Supreme Court held the district court must "explain to the defendant, on the record, his or her constitutional right to be present at all critical stages of the trial, including in-chambers individual *voir dire*." In *Bird*, prior to trial, there were individual *voir dire* examinations in-chambers with prospective jurors. The defendant was not present, and was not told about the proceedings. On appeal, the Montana Supreme Court held the district court's actions violated the defendant's constitutional right to be present, reversed the decision, and remanded.

The Court noted the key distinction between *Bird* and *St. Germain* was that in *Bird* the meeting actually took place. According to the U.S. and Montana Constitutions, the defendant had a right to be present at the meeting, unless he waived it. Thus, in *St. Germain*, if the State or defense counsel had questioned Juror No. 7, the district court would have had to intervene and advise St. Germain of his constitutional right. However, there was no such meeting addressing Juror No. 7's conversation with H.M.'s father. Since there was no meeting, the district court did not have to instruct St. Germain that he had a right to be present.

Simply put, Article II, section 24 and the Sixth Amendment of the U.S. Constitution do not apply to claims based on events that *should have* occurred. The Montana Supreme Court concluded that because St. Germain was present at every stage of the trial, including the in-chambers meetings, "there is no basis to grant him relief on federal or state constitutional grounds because the right he ... assert[ed] [was] premised on stages of the trial that never occurred."

This case is a clear example of basic constitutional interpretation. The Montana Supreme Court used the plain language of the constitutional provision at issue to determine that, although defendants have a right to be present at all critical stages of their

139. Id.
142. Id. (citing *Bird*, 43 P.3d at 268).
143. Id. at 596 (citing *Bird*, 43 P.3d at 273).
144. Id.
145. Id. at 596–97.
146. Id. at 597.
148. Id.
trial, there is no mention of having a right to be present at stages of a trial that should have occurred. Extending Article II, section 24 of the Montana Constitution to protect such a right would be overreaching, and would open the door for interpreting basic rights in ways that were never intended by the Constitution's drafters.

—Philip Rohlfing

V. STEIGER v. BROWN

In January 2004, Terry and Tammy Steiger (the Steigers) sued Mary Brown (Brown) in the Nineteenth Judicial District Court of Montana, Lincoln County, for encroachment and trespass. The Steigers and Brown owned adjacent lots, and the catalyst for the Steigers' action was their belief that Brown's garage and driveway lied partly on their property. The Steigers asked the district court to determine the boundary line.

Brown claimed that if the garage was partly on the Steigers' land, she acquired any land the garage occupied through adverse possession, or, alternatively, she acquired a prescriptive easement to use the garage and driveway. Either Brown or members of her family owned Brown's lot since 1958. At all times the garage had been in the same place on the lot, except when it was torn down in the early 1970s and when it burned down in 1977. After both events, the garage was immediately rebuilt in the same location.

The Steigers argued that the "open and notorious" element of a prescriptive easement could not be established. The year before the Steigers purchased the lot, the boundary marking pin between the Steigers' and Brown's lots was inadvertently removed by the City of Troy during expansion of its sewer system. Therefore, the Steigers argued, they did not become aware of the encroachment until they had their land surveyed in 2002, a year

150. Id. at 707.
151. Id.
152. Id.
153. Id. at 706-07.
154. Id. at 707.
155. Steiger, 152 P.3d at 707.
156. Id. at 708.
157. Id. at 707.
after they purchased the lot.158 As such, they contended, Brown could not show that her use of the land was “open and notorious” for the five-year statutory period.159

The district court found that the boundary marking pin that was removed by the City of Troy provided the Steigers’ predecessors in interest the requisite notice to establish a prescriptive easement.160 The district court found that “[f]or a period exceeding five years, Browns’ predecessors in interest used the disputed strip of land in an open, notorious, exclusive, adverse, continuous and uninterrupted manner for the purposes of maintaining their garage and accessing [their] lot.”161 Therefore, Browns’ predecessors in interest established a prescriptive easement as to the portion of the driveway and garage that rested on the Steigers’ lot.162 According to the district court, Brown was entitled as the current owner to enjoy the prescriptive easement.

The district court also denied the Steigers’ request for the cost of their survey. The survey was not conducted in the course of, or in anticipation of, litigation. Therefore, under Montana Code Annotated § 25-10-201,163 the Steigers were awarded only those costs incurred after filing their complaint, which amounted to approximately ninety dollars.164

The Steigers subsequently moved the court to convert the judgment into a declaratory judgment, which would allow them to receive attorney fees under Montana’s version of the Uniform Declaratory Judgments Act.165 The district court denied this request, as the case “[did] not involve the interpretation of a deed, will, written contract, statute, ordinance, franchise, or other writing.”166 The Steigers appealed the district court’s finding of a prescriptive easement and its denial of the Steigers’ request for attorney fees.167

In Montana, to establish a prescriptive easement, a party must prove by clear and convincing evidence open, notorious, exclusive, adverse, continuous and uninterrupted use of the ease-

158. Id. at 708.
159. Id.
160. Id. at 707.
161. Steiger, 152 P.3d at 707.
162. Id.
164. Steiger, 152 P.3d at 707.
165. Id. at 707, 709.
166. Id. at 707.
167. Id.
ment for five years. The adverse element cannot be established if the claimant has a license to use the land from the servient estate; rather, adverse use must be exercised under a claim of right. The adverse element is presumed if the claimant establishes the remaining elements of a prescriptive easement by clear and convincing evidence. Once this presumption arises, "the burden then shifts to the owner to show the use was permissive."

The open and notorious element was the only element at issue on appeal. "Open and notorious use is a distinct and positive assertion of a right, hostile to the rights of the owner and brought to the attention of the owner." If the owner of the property is deceived as to the location of the easement, then the claimant cannot establish the open and notorious element. However, the owner of the servient estate is presumed to have actual knowledge of the easement if the open and notorious use "is of such character as to be obvious because the owner could not then be deceived."

The Steigers did not contest that the location of Brown's driveway and garage remained unchanged since 1958 or that they had been continually and openly used since that time. Because Terry Steiger admitted that their predecessors in interest must have known of the encroachment, and because the Steigers failed to present evidence that they or their predecessors in interest were ever deceived as to the location or existence of the encroachment, the open and notorious element was established by clear and convincing evidence. Consequently, the burden shifted to the Steigers to prove the use was permissive, which they did not do. Terry Steiger testified that Brown's garage and driveway were located on his property the entire time he lived there, and that Brown never obtained his consent. Therefore, Brown established a prescriptive easement, and the Montana Supreme Court affirmed the district court on this issue.

169. Steiger, 152 P.3d at 708 (citing Combs-DeMaio, 109 P.3d at 256).
170. Id. (citing Combs-DeMaio, 109 P.3d at 255).
171. Id.
172. Id.
173. Id. (citing Gelderloos v. Duke, 88 P.3d 814, 819 (Mont. 2004)).
174. Id. (citing Combs-DeMaio, 109 P.3d at 255–56).
175. Steiger, 152 P.3d at 709.
177. Steiger, 152 P.3d at 709.
The general rule in Montana requires that litigants pay their own attorney fees unless otherwise provided for in a contract or a statute.\textsuperscript{178} The Steigers argued that Montana's version of the Uniform Declaratory Judgments Act contains such a statute, and they should be awarded attorney fees.\textsuperscript{179}

For that particular statute to apply, the action must have been a declaratory judgment action.\textsuperscript{180} To be a declaratory judgment action, the parties must be seeking a declaration of their rights under, or a construction of, "a deed or another instrument, statute, ordinance, contract or franchise."\textsuperscript{181} This case involved the determination of a boundary line by comparing different surveys, not by constructing deeds.\textsuperscript{182} Therefore, this was not a declaratory action, and the Steigers were not entitled to attorney fees.

The Steigers also argued that under Montana's version of the Uniform Declaratory Judgments Act they should be awarded their full costs, including that of obtaining a survey and the surveyor's court appearance costs.\textsuperscript{183} This argument was based on Montana Code Annotated § 27-8-311, which allows a district court to award equitable costs in a declaratory action.\textsuperscript{184} However, the Court determined this was not a declaratory action. Consequently, the Steigers were not awarded their costs.\textsuperscript{185} Because the Steigers did not provide any other justification or statutory support as to why they should be awarded attorney fees or costs, the Court affirmed the district court on this issue.\textsuperscript{186}

\textit{Steiger v. Brown} highlights the importance of property owners and potential property owners knowing exactly where their respective property boundaries are located and whether an adjacent landowner is encroaching on their property. Further, \textit{Steiger} demonstrates that a claimant may establish a prescriptive easement if the claimant proves that the servient estate's predecessors in interest knew of the encroachment for a period exceeding five years before the prescriptive easement claim. This is true regard-

\textsuperscript{178} Id. (citing \textit{Big Spring v. Jore}, 109 P.3d 219, 227 (Mont. 2005)).

\textsuperscript{179} Id.; Mont. Code Ann. § 27-8-313 (2007) (providing that in cases of a declaratory judgment or decree, further relief may be granted whenever "necessary or proper").

\textsuperscript{180} \textit{Steiger}, 152 P.3d at 709.

\textsuperscript{181} Id.

\textsuperscript{182} Id.

\textsuperscript{183} Id.

\textsuperscript{184} Id.

\textsuperscript{185} Id.

\textsuperscript{186} Id.
less of when the current owner becomes aware of the encroach-
ment, if at all.

—Christopher T. Sweeney

VI. MONTANA V. MADPLUME¹⁸⁷

In Montana v. Madplume, the Montana Supreme Court held
evidence of a third party's DNA on a defendant's hands, coupled
with the inability of the police to memorialize the evidence, consti-
tuted exigent circumstances justifying a warrantless search.¹⁸⁸

On October 1, 2004, police arrested Preston A. Madplume for
crimes he was alleged to have committed the previous night, in-
cluding trespass, criminal mischief, and contributing alcohol to a
fifteen-year-old female (M.F.).¹⁸⁹ The police took Madplume to the
Tribal Police Office in Pablo, where he was held in a jail cell that
had neither a toilet nor access to water.¹⁹⁰ Meanwhile, M.F. in-
formed a victim's advocate that "Madplume had touched her
breasts and put his finger in her vagina."¹⁹¹ The advocate in-
formed police, who entered Madplume's cell and, without a search
warrant or Madplume's consent, collected DNA evidence from his
hands and fingers.¹⁹²

The trial court suppressed the evidence obtained from Mad-
plume's hands under an earlier Montana Supreme Court decision,
State v. Hardaway.¹⁹³ Hardaway held unconstitutional a war-
rentless search that consisted of swabbing blood from the hands of
a suspect who was in police custody.¹⁹⁴ On appeal, the State con-
tended exigent circumstances existed due to the "transient, eva-
nescent, and highly destructible" nature of M.F.'s DNA on Mad-
plume's fingers and hands.¹⁹⁵ Additionally, the State argued the

¹⁸⁷ Mont. v. Madplume, 150 P.3d 956 (Mont. 2007).
¹⁸⁸ Id. at 959 (holding the seizure of a third party's DNA evidence from the defendant's
hands did not violate the defendant's constitutional right to freedom from a warrantless
search).
¹⁸⁹ Id. at 957.
¹⁹⁰ Id.
¹⁹¹ Id.
¹⁹² Id.
¹⁹³ Mont. v. Hardaway, 36 P.3d 900 (Mont. 2001) (holding the seizure of the defen-
dant's DNA evidence from his hands violated his constitutional right to freedom from a
warrantless search).
¹⁹⁴ Id. at 914.
¹⁹⁵ Madplume, 150 P.3d at 958.
trial court “misinterpreted and misapplied” Hardaway’s holding.\textsuperscript{196}

In response, Madplume highlighted the “incredibly similar” facts of his situation and that of the defendant in Hardaway, as well as the fact that Madplume was both asleep and oblivious to the possible charges and DNA evidence on his hands.\textsuperscript{197} Consequently, Madplume argued that no exigent circumstances existed, and the police had not only an opportunity to obtain a warrant, but the “responsibility” to follow such a procedure.\textsuperscript{198}

The Madplume Court relied primarily on Hardaway and Montana Code Annotated § 46-5-102 in determining whether an unconstitutional search occurred. Montana Code Annotated § 46-5-102 states:

> When a lawful arrest is effected, a peace officer may reasonably search the person arrested and the area within such person’s immediate presence for the purpose of:
> (1) protecting the officer from attack;
> (2) preventing the person from escaping;
> (3) discovering and seizing the fruits of the crime; or
> (4) discovering and seizing any persons, instruments, articles, or things which may have been used in the commission of or which may constitute evidence of the offense.\textsuperscript{199}

Hardaway interpreted this statute under the theory of exigent circumstances.\textsuperscript{200} The Court defined exigent circumstances as:

> Those circumstances that would cause a reasonable person to believe that prompt action was necessary to prevent physical harm to police officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.\textsuperscript{201}

The Hardaway Court found no exigent circumstances existed because Hardaway’s hands were photographed,\textsuperscript{202} the police knew the blood on Hardaway’s hands was his own,\textsuperscript{203} and Hardaway was in custody and without sufficient means to destroy the blood evidence.\textsuperscript{204} The Court stated, “Hardaway could either consent to the swab, or wait in discomfort until a warrant was obtained. Ei-
ther way, the evidence was going nowhere." Furthermore, if the police were worried that Hardaway might destroy the desired evidence, they could have bagged Hardaway's hands until they obtained a warrant.

With respect to the facts in _Madplume_, the Montana Supreme Court focused on the inability of the police to capture the existence of evidence through photography—the DNA evidence on Madplume's hands was invisible. The Court also recognized Madplume had the ability to destroy the DNA evidence by licking his fingers, rubbing his fingers on the wall, or simply sweating.

As a result of the factual differences between _Hardaway_ and _Madplume_, the Madplume Court held a warrantless search was justified if police could not photograph the evidence and it could be impossible to obtain at a later time. Such a warrantless search was allowed despite the fact that Madplume was in police custody in a jail cell.

Justice Rice concurred with the opinion of the Court and disagreed only with the majority's statement that no exigent circumstances existed in _Hardaway_. Justice Warner concurred for the same reasons.

_Montana v. Madplume_ demands attention from Montana practitioners because it has created an exception to the previously established rule. Montana practitioners must now focus on the facts of each case and determine whether there is a possibility that material evidence may disappear. Consequently, evidence from a third party that is both on the defendant and invisible will likely fall within the exigent circumstances search warrant exception.

—Ryan Weldon

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205. Id.
206. _Mont. v. Hardaway_, 36 P.3d at 914.
207. _Mont. v. Madplume_, 150 P.3d 956, 959 (Mont. 2007).
208. Id.
209. Id.
210. Id. at 957.
211. Id. (Rice, J., concurring); see also _Hardaway_, 36 P.3d at 920–22 (Rice, J., dissenting).
212. _Madplume_, 150 P.3d at 957 (Warner, J., concurring).