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Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS

RECENT DECISIONS AFFECTING THE MONTANA PRACTITIONER

I. *Parish v. Morris*[1]

In *Parish v. Morris*, the Montana Supreme Court held that insureds are not entitled to stack[2] coverage when they pay one premium for uninsured motorist ("UM") coverage for multiple vehicles unless the policy states otherwise.[3] Prior to *Parish*, the Court held that insureds are entitled to stack UM coverage when they pay individual UM premiums for multiple vehicles under an insurance policy.[4] Though *Parish* does not alter prior holdings on stacking, it clarifies Montana's anti-stacking statute, Montana Code Annotated § 33–23–203.

From May 2007 through September 2008, United Financial Casualty Insurance Company ("United") provided motor vehicle insurance coverage to Cassadie and Chris Parish.[5] During that time, the Parishes insured either one or two vehicles depending on the specific period.[6] Regardless of the number of vehicles the Parishes insured on the policy, they paid a flat UM premium of $73.00 for the first year and $82.00 for the second year of coverage.[7] The policy provided UM coverage of $50,000 for each person and $100,000 for each accident.[8] The Parishes' policy prohibited the stacking of UM coverage with a provision stating that "policy limits shown for

1. *Parish v. Morris*, 278 P.3d 1015 (Mont. 2012).

2. Stacking is the practice of "add[ing] the policy limit of UM, underinsured motorist ("UIM"), or medical pay coverage from an insurance policy on one vehicle with the UM, UIM and medical pay policy limits from the policy on another vehicle." *Parish*, 278 P.3d at 1017, n. 1.

3. *Parish*, 278 P.3d at 1019–1020.

4. *Id.* at 1019.

5. *Id.* at 1016.

6. *Id.*

7. *Id.*

8. *Id.*

an auto may not be combined with the limits for the same coverage on another auto, unless the policy contract allows the stacking of limits."[9]

The Parishes were struck and injured by an uninsured motorist in a car accident on December 31, 2007.[10] United paid Cassadie and Chris $50,000 each in UM benefits and $10,000 each in medical payment benefits.[11] Chris's injuries did not exceed $60,000, but Cassadie's injuries did.[12] Because the Parishes had two vehicles insured at the time of the accident, they claimed they were each entitled to stack UM benefits up to $100,000.[13] United denied the Parishes' request to stack benefits, so the Parishes sued seeking a declaratory judgment that they were entitled to stack.[14]

United moved for summary judgment, claiming the Parishes were not allowed to stack benefits because: 1) the policy was legal under § 33–23–203; 2) the Parishes' policy explicitly did not allow stacking; and 3) existing case law only required stacking if the Parishes paid separate premiums for each vehicle.[15] The Parishes argued UM benefits could be stacked because: 1) the policy was filed with the Insurance Commissioner too late to comply with § 33–23–203; 2) the policy was ambiguous and should therefore be construed against United; and 3) the Parishes reasonably believed they could stack benefits.[16]

The district court found United's policy to be in compliance with § 33–23–203 and granted summary judgment for United on the grounds that the Parishes paid only one UM premium regardless of how many vehicles were on the policy.[17] The Parishes appealed to the Montana Supreme Court.[18] The most significant question presented on appeal was whether an insured may stack uninsured motorist benefits when only one premium has been paid for multiple vehicles.[19]

The Montana Supreme Court affirmed the district court, holding that insureds are not entitled to stack benefits when one premium has been paid for multiple vehicles.[20] The Court distinguished previous cases where it held insureds were allowed to stack coverage by pointing out that those holdings were based on situations where insureds were paying separate pre-

9. *Parish*, 278 P.3d at 1016–1017.
10. *Id.* at 1016.
11. *Id.* at 1017.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Parish*, 278 P.3d at 1017.
16. *Id.*
17. *Id.*
18. *Id.* at 1017–1018.
19. *Id.* at 1018.
20. *Id.* at 1019–1020.

miums for each insured vehicle.[21] In those cases, the Court held that an anti-stacking provision that allows an insurer "to receive valuable consideration for coverage that is not provided violates Montana public policy."[22] The Court distinguished the Parishes' situation, recognizing they paid one flat rate for UM coverage and did not pay separate consideration for each vehicle on the policy.[23]

The Court proceeded to discuss Montana's anti-stacking statute, § 33–23–203, which was amended in 2007 and went into effect on April 17, 2007.[24] In pertinent part, the statute provides:

> (1) Unless 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, regardless of the number of motor vehicles insured under the policy, the number of policies issued by the same company covering the insured, or the number of separate premiums paid:
>
> . . .
>
> (c) the limits of the coverages specified under one policy or under more than one policy issued by the same company may not be added together to determine the limits of insurance coverages available under the policy or policies for any one accident if the premiums charged for the coverage by the insurer actuarially reflect the limiting of coverage separately to the vehicles covered by the policy and the premium rates have been filed with the commissioner.[25]

The Court recognized that after the statute was amended, the Insurance Commissioner issued an Advisory Memorandum on August 29, 2007, informing insurers of the changes to § 33–23–203.[26] The Advisory Memorandum informed insurers they may avoid stacking if they meet filing requirements and provide actuarial documentation showing the rates reflect the limiting of coverage.[27] Though United claimed it had complied with the statute and the advice set out in the Advisory Memorandum,[28] the Court did not directly address whether this was important to its holding and ultimately focused on the fact that the Parishes had only paid one UM premium.[29]

The *Parish* decision significantly limits the amount an injured party may receive from a motor vehicle liability policy in Montana. Unless a policy states otherwise, § 33–23–203 prohibits insureds from stacking benefits in cases where one premium is paid for multiple vehicles. Because the Court did not expressly rely on the statute, it remains to be seen how

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21. *Parish*, 278 P.3d at 1019 (citing *Hardy v. Progressive Specialty Ins. Co.*, 67 P.3d 892, 899 (Mont. 2003); *Bennett v. State Farm Mut. Auto. Ins. Co.*, 862 P.2d 1146, 1148 (Mont. 1993)).

22. *Parish*, 278 P.3d at 1019 (quoting *Hardy*, 67 P.3d at 899; *Bennett*, 862 P.2d at 1148).

23. *Parish*, 278 P.3d at 1019–1020.

24. *Id.* at 1018.

25. Mont. Code Ann. § 33–23–203 (2007).

26. *Parish*, 278 P.3d at 1018.

27. *Id.*

28. *Id.* at 1018–1019.

29. *Id.* at 1019–1020.

§ 33–23–203 will affect insureds paying separate premiums under a policy that has complied with statutory requirements. Montana practitioners should be aware that *Parish* reinforces the policy allowing insurers to deny stacking where insureds paid only one UM, UIM, or medical payments premium, regardless of the number of vehicles insured under the policy.

—Trevor Carlson

II. *MILLER V. STATE*[30]

In *Miller v. State*, the Montana Supreme Court maintained the heavy burden placed on convicted defendants who seek postconviction relief based on claim(s) of ineffective assistance of counsel.[31] Despite Defendant Michael Miller's numerous claims of ineffective counsel, the Eighth Judicial District dismissed his petition for postconviction relief.[32] Miller appealed to the Montana Supreme Court, which affirmed the lower court's ruling.[33]

On June, 26, 2006, Lamar Windham ("Windham"), Al Johnson ("Johnson"), and Defendant Michael Miller ("Miller") drank alcohol and drove around Great Falls.[34] Eventually, Windham parked his van at the Rainbow Dam Overlook of the Giant Springs area.[35] Windham and Miller departed the van and began walking down a trail leading to the river and dam.[36] From the van, Johnson observed them arguing as they walked.[37] After less than an hour, Miller returned to the van alone.[38] In response to Johnson's questions regarding Windham's whereabouts, Miller failed to provide consistent answers.[39] Miller and Johnson waited an hour and a half for Windham to return; then, Miller delivered Johnson home and conveyed his intention to return to the area to search for Windham.[40]

During the ensuing days, Miller used Windham's van and offered varying stories about what happened to Windham.[41] After growing increasingly concerned, Windham's family contacted Johnson, who relayed the events of June 26th.[42] Accompanied by Windham's family, Miller and

30. *Miller v. State*, 280 P.3d 272 (Mont. 2012).
31. *Id.* at 278 (citing *Baca v. State*, 197 P.3d 948, 952 (Mont. 2008)).
32. *Miller*, 280 P.3d at 276.
33. *Id.* at 275.
34. *Id.* at 276.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Miller*, 280 P.3d at 276.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

Johnson drove to Giant Springs and searched for Windham.[43] Having been unsuccessful in its search, the group reported Windham missing to the police.[44] After finding Windham's body on the river bottom below the cliff at the Rainbow Scenic Overlook, law enforcement arrested Miller.[45] He was charged with, and later convicted of, deliberate homicide.[46]

After Miller's unsuccessful appeal, he filed a petition for postconviction relief in district court.[47] Miller alleged ineffective trial counsel based on his lawyer's failure to: 1) object to the State's PowerPoint presentations; 2) request the State's PowerPoint presentations be entered into the record; 3) object to the prosecutor's closing argument and rebuttal; 4) impeach Johnson; 5) impeach Ray Little Youngman, another witness; and 6) object to the State's comments made during Miller's motion to dismiss for insufficient evidence.[48] In addition, Miller alleged ineffective appellate counsel based on the failure to raise the issue of his trial counsel's ineffectiveness.[49]

The district court dismissed Miller's petition for postconviction relief for failure to state a claim for relief.[50] The district court reasoned Miller had exhausted his opportunity to appeal by having raised, or having missed the opportunity to raise, his claims of ineffective counsel on appeal.[51]

The district court ruled that Miller's claims against appellate counsel were procedurally barred, though on appeal the State conceded his claims were not procedurally barred.[52] On appeal, Miller requested the Court remand his case, grant an evidentiary hearing, and provide him counsel.[53] However, the Montana Supreme Court agreed with the State, that neither remand nor an evidentiary hearing was necessary because the record provided sufficient information to analyze the merits of Miller's claims against trial counsel.[54] Because Miller's claims against trial counsel provided the foundation for his claims against appellate counsel, the Court similarly held the record was sufficient to analyze the merits of those claims.[55] Consequently, the Court proceeded to review Miller's claims against trial counsel.

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43. *Id.*
44. *Miller*, 280 P.3d at 276.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Miller*, 280 P.3d at 276.
51. *Id.*
52. *Id.* at 277.
53. *Id.* at 276.
54. *Id.* at 277.
55. *Id.*

When a convicted defendant claims ineffective counsel, mixed questions of law and fact are reviewed de novo by the appellate court.[56] The Montana Supreme Court analyzes a convicted defendant's claim of ineffective counsel (appellate or trial) by applying a two-part test, both parts of which must be met for a claim to be successful.[57] First, the defendant must show counsel's performance was deficient.[58] In analyzing the alleged deficiency, the Court determines "[w]hether counsel's representation fell below an objective standard of reasonableness considering prevailing professional norms and all the circumstances."[59] If the first prong is met, the defendant must then prove counsel's deficient conduct prejudiced him.[60] In analyzing prejudice, the Court applies a cause-in-fact test[61] to determine "[w]hether there is a reasonable probability that, but for counsel's unprofessional errors, the petitioner would have prevailed on appeal."[62]

Furthermore, the Court recognized, a petitioner who seeks postconviction relief based on ineffective appellate counsel bears a heavy burden.[63] The Court recognized appellate defense attorneys enjoy a presumption of effective assistance of counsel, which can only be overcome if the petitioner can show the alleged "[i]gnored issues are clearly stronger than those issues presented" on appeal.[64]

In ultimately holding the district court did not err because all of Miller's allegations lacked merit, the Court only twice reached the second prong of the two-part test.[65] Regarding Miller's claim about the State's PowerPoint presentations, the Court held Miller failed to demonstrate that prejudice resulted from either trial counsel's failure to object to the presentations themselves or failure to timely move to enter the presentations into the record.[66] The Court held Miller's claim regarding trial counsel's failure to object during the State's closing argument lacked merit because the prosecutor properly referenced Johnson's credibility and Miller's lack thereof.[67]

Next, the Court held Miller's four-part claim regarding failure to impeach Johnson lacked merit.[68] The Court found trial counsel appropriately

56. *Miller*, 280 P.3d at 277 (citing *Whitlow v. State*, 183 P.3d 861, 864 (Mont. 2008)).
57. *Miller*, 280 P.3d at 277.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* (quoting *St. Germain v. State*, 276 P.3d 886, 890 (Mont. 2012)).
62. *Miller*, 280 P.3d at 277 (quoting *DuBray v. State*, 182 P.3d 753, 758 (Mont. 2008)).
63. *Miller*, 280 P.3d at 277–278 (quoting *Baca*, 197 P.3d at 952).
64. *Miller*, 280 P.3d at 277–278 (quoting *DuBray*, 182 P.3d at 758).
65. *Miller*, 280 P.3d at 278–282.
66. *Id.* at 278.
67. *Id.*
68. *Id.* at 278–279.

highlighted Johnson's inconsistent statements about the location of the parked van through cross-examinations of both Johnson and Officer Phillips and again during closing argument.[69] Similarly, the Court found trial counsel appropriately stressed Johnson's inconsistent statements regarding the duration of time Johnson slept in the van during cross-examinations of both Johnson and Officer Phillips.[70] Further, the Court found no prejudice to Miller resulted from trial counsel's missed opportunities to reemphasize Johnson's conflicting testimony regarding drinking alcohol.[71] Lastly, the Court held trial counsel's alleged failure to impeach Johnson based on his shaky memory regarding the van's keys lacked merit because trial counsel did, in fact, impeach Johnson on cross-examination.[72]

Despite Miller's contention to the contrary, the Court also held trial counsel sufficiently impeached Ray Little Youngman.[73] Miller argued his counsel failed to impeach Youngman on two separate issues.[74] First, while on the stand, Youngman presented conflicting testimony about the location of a conversation between him and Miller.[75] The Court held trial counsel effectively highlighted this during cross-examination of Mary Griffin and again during closing argument.[76] Second, Miller argued trial counsel failed to challenge Youngman's testimony regarding Miller's behavior during the Windham family's search.[77] The Court rejected Miller's argument again because the record showed trial counsel impeached Youngman during Griffin's cross-examination and appropriately referenced it during closing argument.[78]

Finally, the Court held Miller's claim of ineffective counsel based on failure to object to the State's characterization of its forensic pathologist's testimony lacked merit.[79] In responding to Defendant's motion to dismiss, the State cited its forensic pathologist's testimony as supporting Miller's guilt.[80] Although the forensic pathologist had testified the cause of Windham's death was "undetermined," the Court held the State's reference to this testimony as supportive of its case did not prejudice Miller.[81]

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69. *Id.* at 279.
70. *Id.*
71. *Miller*, 280 P.3d at 279–280.
72. *Id.* at 280.
73. *Id.* at 280–281.
74. *Id.* at 280.
75. *Id.*
76. *Id.* at 280–281.
77. *Miller*, 280 P.3d at 281.
78. *Id.*
79. *Id.* at 281–282.
80. *Id.* at 281.
81. *Id.* at 281–282.

Miller reinforces the high threshold required for a convicted defendant to successfully claim ineffective counsel. Defense attorneys do not have a constitutional obligation to raise every non-frivolous issue on appeal.[82] Furthermore, both trial and appellate defense attorneys enjoy a presumption of effective assistance of counsel.[83] When the record supports defense counsel's sufficiency in cross examination, objections, and impeachments, the Court appears disinclined to grant a convicted defendant's petition for postconviction relief.

—Michel Fullerton

III. *Reichert v. State ex rel. McCulloch*[84]

Reichert v. State ex rel. McCulloch clarified the Montana Supreme Court's ability to intervene on constitutional referendum issues and highlighted the requirements governing recusal of justices.[85] The Court held unconstitutional proposed amendments in Legislative Referendum No. 119 ("LR–119"), which would have eliminated statewide elections for Supreme Court justices and would have required justices to be elected from specific districts.[86] Though the issue was only raised by amicus curiae, the Court held that recusal of certain justices was not necessary.[87] Additionally, the Court held the complaint was justiciable, despite the fact the electorate had not yet had the opportunity to vote on the referendum.[88]

On April 18, 2011, Senate Bill No. 268 ("SB 268") was filed with the Secretary of State.[89] SB 268, enacted by the 62nd Montana Legislature, would have submitted LR–119 to voters, asking whether changes should be made to the process of electing Montana Supreme Court justices.[90] The voters were to consider LR–119 in a special election to be held concurrent with the primary election on June 5, 2012.[91]

LR–119 would have made three changes to the law governing the election of Montana Supreme Court justices.[92] First, it would have eliminated the statewide election for each justice.[93] Instead, the state would have been

82. *Id.* at 277 (quoting *DuBray*, 182 P.3d at 758).
83. *Miller*, 280 P.3d at 277 (quoting *DuBray*, 182 P.3d at 758).
84. *Reichert v. State ex rel. McCulloch*, 278 P.3d 455 (Mont. 2012).
85. *Id.* at 483.
86. *Id.* at 481.
87. *Id.* at 463–464, 471.
88. *Id.* at 483.
89. *Id.* at 458.
90. *Reichert*, 278 P.3d at 458.
91. *Id.*
92. *Id.* at 459.
93. *Id.*

divided into seven districts, with each district having an approximately equal population.[94] Each justice's seat would have corresponded to a district, and only eligible voters in each district could have voted for that district's justice.[95] Second, LR–119 mandated that each candidate for justice reside in, and be a registered voter in, the district corresponding to the specific seat.[96] Finally, the selection of the chief justice would have shifted from the current statewide election to selection by the elected justices themselves.[97] Electors would only be able to vote for one justice every eight years rather than each of the seven justices as they come up for re-election.[98]

The plaintiffs challenging the constitutionality of LR–119 were "Montana citizens, taxpayers, and electors who historically have participated in elections for justices of the Montana Supreme Court and who reside in each of the seven districts proposed by LR–119."[99] The plaintiffs named the State as the defendant through the Secretary of State, Linda McCulloch.[100] The plaintiffs asked for a declaratory judgment ruling LR–119 constitutionally defective and for the district court to decertify the referendum and prevent the State from placing it on the ballot.[101] The State responded that the constitutional challenge was not ripe and that LR–119 was not constitutionally defective.[102] Before the plaintiffs moved for summary judgment, seven Montana legislators ("Legislators") filed a motion to intervene as defendants pursuant to Montana Rule of Civil Procedure 24.[103] Though the district court denied the Legislators' motion, it permitted the Legislators to participate as amicus curiae.[104] After the Legislators' petition for writ of supervisory control challenging the denial of their motion to intervene failed, the Supreme Court noted the Legislators could file an amicus brief by March 19, 2012.[105]

The district court held the summary judgment hearing on March 14.[106] The Legislators did not file an amicus brief, but the district court considered documents previously filed by the Legislators due to an earlier request.[107]

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94. *Id.*
95. *Id.*
96. *Reichert*, 278 P.3d at 459.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Reichert*, 278 P.3d at 459.
103. *Id.* at 459–460.
104. *Id.* at 460.
105. *Id.*
106. *Id.*
107. *Id.*

On March 20, the district court granted the plaintiffs summary judgment.[108] The district court ordered the Secretary of State to decertify LR–119, thereby preventing it from being placed on the ballot for the June 5, 2012, election.[109]

On March 21, the State appealed the district court's order to the Montana Supreme Court and moved the district court for an immediate stay of the order.[110] The State argued that if LR–119 was not certified by 5:00 p.m. on March 22, the production of voter information pamphlets on the issue would cease and ballots would not include LR–119.[111] If the district court granted a stay, the pamphlets and ballots would already be prepared if the district court's order was reversed.[112] The State, however, did not request the motion be brought to the district court's attention within a certain timeframe or make clear there was such a deadline.[113] The motion was not presented to the district court until March 23, and, as the deadline had already passed for certification, the motion was denied.[114]

Finally, the State filed a motion with the Montana Supreme Court to expedite the appeal in order to comply with deadlines for overseas and absentee ballots.[115] The Court granted the State's motion on April 5 and issued an order affirming the district court on April 12; the Court's opinion, analysis, and rationale followed on May 18, 2012.[116]

In its opinion, the Court first discussed the issue of recusal for the four non-retiring justices.[117] Ultimately, the Court held recusal was not required for the four non-retiring justices in this case.[118] This holding is particularly interesting because the Legislators, as amici curiae, raised this issue.[119] As a general rule, amici curiae cannot raise separate issues not addressed by a party.[120] Only in rare instances does the Court deviate from this rule.[121] The Court concluded, however, the importance of the recusal issue made it one of the rare exceptions allowing deviation.[122]

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108. *Reichert*, 278 P.3d at 460.

109. *Id.*

110. *Id.*

111. *Id.* at 460–461.

112. *Id.* at 461.

113. *Id.*

114. *Reichert*, 278 P.3d at 461.

115. *Id.*

116. *Id.*

117. *Id.* at 463. Chief Justice McGrath and Justice Morris recused themselves, and Justice Nelson had already announced his retirement, leaving only four non-retiring justices.

118. *Id.* at 471.

119. *Id.* at 464.

120. *Reichert*, 278 P.3d at 463.

121. *Id.* at 464; *see Crabtree v. Mont. St. Lib.*, 665 P.2d 231, 234–235 (Mont. 1983).

122. *Reichert*, 278 P.3d at 464.

Quoting the United States Supreme Court, the Court recognized that due process requires recusal when "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable."[123] This objective inquiry asks whether an average judge would be unable to remain impartial enough as to hold the balance "nice, clear and true."[124] Under this standard, the Court explained the issues in *Reichert* did not rise to those of a constitutional nature and recusal was not necessary under due process.[125] Further, the Court held recusal was not necessary under Montana Code of Judicial Conduct Rule 2.12(A), which requires recusal when a judge's impartiality may reasonably be questioned.[126] The Court reasoned that the potential for the justices to have an interest in the case was too tenuous and that such theoretical interests did not require recusal.[127] Refuting the Legislators' argument that district court judges could fill in for recused Supreme Court justices, the Court pointed out that district court judges have the same ability to run for a justice seat.[128]

On the next issue, the Court held the challenge to LR–119 was ripe.[129] The Court recognized that although judicial review of election referenda or initiatives should not be routinely conducted, it may be appropriate when a challenged measure is facially defective.[130] The Court further reasoned that placing such a measure on the ballot would be a waste of time and money and would give voters the false impression their vote could matter.[131]

In addressing the substance of LR-119, the Court held LR–119 imposes a set of impermissible amendments to the Montana Constitution. The Court found the new qualifications for Supreme Court justices established in LR–119 amounted to a constitutional amendment.[132] Similarly, the Court held LR–119 further amended the Montana Constitution by altering the statewide election system into a system of seven districts.[133] LR–119 would have eliminated the current right Montana voters have to participate in the election for every Montana Supreme Court justice.[134] The Court noted the Montana Constitution provides for this right by mandating the statewide election of Supreme Court justices and permitting a candidate to

123. *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

124. *Reichert*, 278 P.3d at 464 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 879 (2009)).

125. *Reichert*, 278 P.3d at 469.

126. *Id.* at 471 (citing Mont. Code of Jud. Conduct R. 2.12(A)).

127. *Reichert*, 278 P.3d at 468, 471.

128. *Id.* at 469.

129. *Id.* at 474.

130. *Id.* at 473–474.

131. *Id.* at 474.

132. *Id.* at 481.

133. *Reichert*, 278 P.3d at 481.

134. *Id.*

reside anywhere within the state.[135] The Court held these de facto constitutional amendments proposed in LR–119 could not be made by statutory referendum.[136] Rather, the Court explained, the Montana Constitution may only be amended by the detailed methods laid out in the Constitution.[137] Moving on, the Court concluded these facially unconstitutional provisions could not be severed from the rest of the referendum because the remaining provisions did not fulfill the purpose behind LR–119.[138]

Justice Baker concurred with the majority on the issue of recusal but dissented from the decision to decertify LR–119.[139] Justice Baker argued the referendum process involves two steps and the Court should only rule on the constitutionality if, and only if, the challenged law has been enacted.[140] She contended decertification was inappropriate because the only time a pre-election challenge to the constitutionality of a law should be reviewed by a court is when it would create a change that could only be remedied by another election.[141] After she found LR–119 did not meet this requirement for a pre-election challenge, Justice Baker further reasoned the majority's reliance on the election's consumption of resources was misguided because it did not outweigh the people's right to vote.[142]

Montana practitioners should be aware of *Reichert* because it clarified the Court's ability and willingness to intervene on pre-election legislative referenda. If a measure is facially unconstitutional, it need not be duly enacted before a court may declare it unconstitutional. *Reichert* also clarified that the recusal of justices or judges may not be necessary when the possibility they will have an interest in the outcome of a case is purely speculative. The *Reichert* Court also expanded the scope of issues the Court may consider when presented solely by amicus curiae. These issues may be examined in a case if they reach a level of extreme importance to the Court. Finally, changes to the election requirements of Montana Supreme Court justices must follow the constitutional amendment guidelines in order for any measure to be effective. A legislative referendum alone is inadequate.

—Pamela Garman

135. *Id.* at 475.

136. *Id.* at 481.

137. *Id.* at 478 (citing Mont. Const. art. XIV, §§ 1, 2, 8, 9).

138. *Reichert*, 278 P.3d at 482–483.

139. *Id.* at 483.

140. *Id.*

141. *Id.* at 484.

142. *Id.* at 485.

IV. *In re Marriage of Funk*[143]

In *In re Marriage of Funk*, the Montana Supreme Court took steps to eliminate inconsistencies in its approach to the distribution of inherited property during dissolution proceedings.[144] The Court held that Montana Code Annotated § 40–4–202(1) obligates a court to equitably apportion all assets and property of the spouses regardless of when or how they were acquired, including inherited property.[145] Further, a court must demonstrate it analyzed the enumerated statutory considerations when making decisions with respect to inherited property.[146]

Kevin and June Funk married in late 1990. Within three years, June had become a homemaker while Kevin worked for Montana Rail Link.[147] In 1996, Kevin inherited over 115 acres of real property from his father, 2.5 acres of which were lakefront property on Flathead Lake.[148] The Funks had a child in 1997, and ten years later Kevin quit his job with Montana Rail Link.[149] After Kevin left his job, he and June lived off of the proceeds of his individual retirement account (IRA) while Kevin unsuccessfully attempted to day trade.[150] In 2009, June filed for dissolution of marriage after separating from Kevin several months earlier.[151]

In its decree, the district court followed the guidelines of Montana Code Annotated § 40–4–202 when dividing the marital property.[152] The court awarded June one-half the value of the lakefront property Kevin had inherited and one-third of the increased value of the non-lakefront property for a total amount of $344,167.[153] The court ordered Kevin to pay the sum within six months, unless he needed to sell the property to finance the amount, in which case he would have two years after the dissolution to pay June.[154] The court also awarded June a portion of Kevin's railroad retirement, an automobile, and a sum of money representing the value of a second automobile Kevin purchased after the couple had separated.[155] Finally, the court directed Kevin to pay June monthly maintenance of $500, retroac-

143. *In re Marriage of Funk*, 270 P.3d 39 (Mont. 2012).
144. *Id.* at 43.
145. *Id.* at 44.
146. *Id.*
147. *Id.* at 40.
148. *Id.*
149. *Funk*, 270 P.3d at 40.
150. *Id.*
151. *Id.*
152. *Id.* at 41.
153. *Id.*
154. *Id.*
155. *Funk*, 270 P.3d at 41.

tive to March 2009, until June received her entire award or for a period of 5 years.[156] Kevin appealed the district court's rulings.[157]

During oral arguments before the Montana Supreme Court, both parties drew attention to the conflicting results created by the Court's jurisprudence pertaining to § 40–4–202(1).[158] While some courts have excluded inherited property from the marital estate unequivocally, others have automatically included it or decided the matter on a basis of various criteria.[159] Both parties asserted that, under § 40–4–202(1), a district court should be allowed to determine if the non-inheriting spouse is entitled to a portion of the property when considering the statutory factors, and inherited property should *not* be automatically excluded from the marital estate.[160]

The Montana Supreme Court reviews a district court's interpretation of a statute governing the distribution of a marital estate de novo for correctness, only reversing a decision in instances in which there are clearly erroneous findings considering the unique circumstances of the case.[161] The *Funk* Court began its analysis by citing § 40–4–202, which provides in pertinent part:

> (1) In a proceeding for dissolution of a marriage . . . the court, without regard to marital misconduct, shall . . . finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired. In dividing property acquired . . . by gift, bequest, devise, or descent; property acquired . . . in exchange for property acquired by gift, bequest, device, or descent; the increased value of property acquired prior to marriage . . . the court shall consider those contributions of the other spouse to the marriage including:
> (a) the nonmonetary contribution of the homemaker;
> (b) the extent to which such contributions have facilitated the maintenance of this property; and
> (c) whether or not the property division serves as an alternative to maintenance arrangements.[162]

The Court noted that § 40–4–202 is taken from the Uniform Marriage and Divorce Act ("UMDA"), which Montana adopted in 1975.[163] In prior cases the Court concluded that the first three sentences outline the general purpose of the statute, which is to allow for equitable apportionment of property and assets to either or both parties.[164] The Court acknowledged it has historically treated inherited property differently from other property, not-

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 43.
160. *Id.* at 41.
161. *Funk*, 270 P.3d at 41 (citing *In re C.D.H.*, 201 P.3d 126 (Mont. 2009)).
162. Mont. Code Ann. § 40–4–202(1) (2011).
163. *Funk,* 270 P.3d at 42.
164. *Id.* (citing *In re Marriage of Herron*, 608 P.2d 97 (Mont. 1980)).

ing that the last three sentences of the statute seem to set it apart. The Court opined that the main issue in uniformly applying § 40–4–202 comes from its unclear structure and drew attention to the fact that the confusing language was not a part of the amended UMDA, but was added by the Montana Legislature without reason.[165] Because the last three sentences have led to such inconsistency, the Court endeavored to make a final determination on the meaning of the statute in hopes it would facilitate more uniform application.[166]

In setting forth the new rule, the Court stated § 40–4–202(1) obligates courts to apportion all assets and properties between spouses, *including* inherited and previously acquired property.[167] The Court went on to say that, even though the directive applies to *all* property, the three factors set forth in § 40–4–202(1) regarding inherited property must be affirmatively considered and analyzed when a court determines how it is distributed.[168] Finally, the Court put great emphasis on the notion that while the statutory factors must be considered when making a decree, they are never to be considered limitations on the court's obligation to make decisions in light of the unique factors that each case presents.[169]

Redirecting its attention to the case at hand, the Court addressed Kevin's argument, based on *In re Marriage of Smith*,[170] that June was not entitled to the inherited property because she did not help to preserve the property or increase its value.[171] In *Smith*, the Court first limited its power to apportion assets by ruling it could not distribute inherited property to a non-acquiring spouse without a showing of such a contribution.[172] *Funk* overruled *Smith* and its progeny, with the Court concluding that such a bar on the Court's power would work in opposition to the dominant purpose of the statute and would be incompatible with the new rule.[173]

Reviewing the district court's decree regarding the Funks, the Court noted that most of the statute's general purpose factors were referenced but pointed out that the district court did not indicate what contributions June made to the preservation of the inherited property or whether the monthly payments Kevin was ordered to make were provisional or independent maintenance payments.[174] As such, the Court upheld the original valua-

165. *Funk*, 270 P.3d at 43–44.
166. *Id.* at 44.
167. *Id.*
168. *Id.*
169. *Id.* at 44.
170. *In re Marriage of Smith*, 871 P.2d 884 (Mont. 1994).
171. *Funk*, 270 P.3d at 44–45 (citing *Smith*, 871 P.2d at 885).
172. *Funk*, 270 P.3d at 45 (citing *Smith*, 871 P.2d at 885).
173. *Funk*, 270 P.3d at 45.
174. *Id.*

tions of the property but remanded the case so the district court could comply with the new rule by assessing the factors of § 40–4–202(1) explicitly in its decision.[175]

The Montana practitioner should be aware of *Funk* because it clarifies the manner in which § 40–4–202(1) is applied and overrules a precedent that has been used in no less than 20 previous decisions. Parties can no longer successfully argue that their spouses are not entitled to inherited property simply because there is no evidence that they contributed to the preservation or increase in the value of the property. This lack of evidence is now simply a consideration for a court to make when distributing the property rather than a limitation on its power to equitably apportion assets amongst spouses.

—Dylan Jensen

V. *MONTANANS OPPOSED TO I–166 V. BULLOCK*[176]

Montanans Opposed to I–166 v. Bullock clarified the difference between the Montana Supreme Court's treatment of a challenge to the procedural submission and approval of a proposed ballot measure as opposed to a challenge to the substantive legality of a proposed ballot measure.[177] Initiative 166 ("I–166") aimed to establish the policy that, in Montana, corporations are not persons and are not entitled to constitutional rights.[178] The Court held that the I–166 explanatory statements satisfied requirements specified in Montana Code Annotated §§ 13–27–312(2)[179] and (4)[180] and that the Attorney General's legal sufficiency determination was proper under § 13–27–312(7),[181] which prohibits consideration of the substantive legality of a proposed ballot measure.[182] The Court refused to entertain the

175. *Id.* at 47.

176. *Montanans Opposed to I-166 v. Bullock*, 285 P.3d 435 (Mont. 2012).

177. *Id.* at 436.

178. *Id.* at 435.

179. Section 13–27–312(2) requires ballot statements to "explain the purpose of the measure in 100 words or less and the implications of votes for or against, in 25 words or less." *Montanans Opposed to I-166*, 285 P.3d at 436 (citing Mont. Code Ann. § 13–27–312(2) (2011)).

180. Mont. Code Ann. § 13–27–312(4) states: "The ballot statements must express the true and impartial explanation of the proposed ballot issue in plain, easily understood language and may not be arguments or written so as to create prejudice for or against the issue."

181. Mont. Code Ann. § 13–27–312(7) provides in part: "The Attorney General shall review the proposed ballot issue for legal sufficiency. As used in this part, 'legal sufficiency' means that the petition complies with statutory and constitutional requirements governing submission of the proposed issue . . . [but excludes] consideration of the substantive legality of the issue if approved by the voters."

182. *Montanans Opposed to I-166*, 285 P.3d at 436.

challengers' arguments targeting the substantive legality of I–166 because the issue had been improperly pled.[183]

The proponents of I–166 ("Proponents") sought to charge Montana's elected officials with establishing a policy that corporations are not persons and are not entitled to constitutional rights by limiting political spending in elections and prohibiting corporate political campaign spending.[184] The measure further charged Montana's congressional delegation with proposing an amendment to the United States Constitution likewise declaring that corporations are not persons entitled to constitutional rights.[185]

Pursuant to § 13–27–202,[186] the Proponents submitted the text and explanatory statements of I–166 to the Secretary of State on February 28, 2012.[187] The Secretary of State forwarded the text and explanatory statements to the Legislative Services Division for review, which recommended revisions to the Proponents.[188] After the Proponents responded to these recommendations, the Secretary of State then forwarded the I–166 text and explanatory statements to the Attorney General for a determination of legal sufficiency and approval of the statements.[189] On April 19, an Assistant Attorney General informed the Secretary of State that the proposed measure and ballot statements met statutory requirements.[190] On April 20, the Secretary of State authorized Proponents to begin collecting signatures; the legal challenge to I–166 was subsequently filed on July 23, 2012.[191]

In an original proceeding before the Montana Supreme Court pursuant to § 13–27–316,[192] the petitioners, opponents of I–166 ("Opponents"),[193]

183. *Id.*

184. *Id.* at 435.

185. *Id.*

186. Mont. Code Ann. § 13–27–202 sets out the procedure for the submission of proposed ballot measures. It defines the respective duties of the Secretary of State, the Legislative Services Division, and the Attorney General in reviewing the proposed measure prior to authorizing its proponents to begin gathering the signatures necessary to place the measure on the ballot.

187. Amend. Pet. for Rev. of Atty. Gen. Determ. of Leg. Sufficiency & Ballot Issue State. at 6, *Montanans Opposed to I-166 v. Bullock*, http://supremecourtdocket.mt.gov/view/OP%2012-0439%20Writ%20-%20Review%20—%20Petition?id{7DE3C2D9-2EF5-4B74-90B4-8C30C35F995B} (Mont. Jul. 23, 2012) (No. OP 12-0439).

188. *Id.*

189. *Id.*

190. *Id.* at 6–7.

191. *Id.* at 7.

192. Mont. Code Ann. § 13–27–316(2) sets out the procedure by which challengers may file an original proceeding in the Montana Supreme Court to contest the Attorney General's approval of explanatory statements or the Attorney General's legal sufficiency determination for a proposed ballot measure.

193. The petitioners were: "Montanans Opposed to I-166, a Political Committee, Senator Dave Lewis, Individually, and as an Elected Member of the Montana Legislature, [and] Phil Lilleberg, Individually, and as an Owner of FP, Inc., a Montana Corporation." *Montanans Opposed to I-166*, 285 P.3d at 435.

challenged the adequacy of the I–166 explanatory statements and the Attorney General's legal sufficiency determination.[194] In addition, the Opponents argued the measure itself was legally defective because: 1) it sought to enact "a resolution and not a law"; 2) it sought to "improperly [amend] the Montana Constitution"; and 3) it sought to "improperly [direct] elected representatives how to vote."[195]

The Attorney General responded that the "[r]esolution of these allegations . . . would involve 'consideration of the substantive legality of [I–166],' which is explicitly excluded from legal sufficiency review."[196] The Attorney General further responded that the Opponents failed to specifically identify any portion of the approved ballot statements as being "untrue, prejudicial or argumentative," and that the Opponents' proposed alternative statement of purpose impermissibly reflected their substantive legality arguments rather than a challenge to the form of the approved statement.[197]

The Montana Supreme Court began its analysis of the Opponents' challenge by citing Article III, section 4 of the Montana Constitution, which grants Montanans the right to directly propose and enact laws via citizen initiative.[198] The Court discussed the process for the submission and approval of proposed initiatives under § 13–27–202, which requires: 1) proponents to submit the text of the proposed measure, a statement of purpose, and a statement of implications of a vote for or against the measure to the Secretary of State; 2) the Secretary of State to submit the measure to the Legislative Services Division for review; 3) the Secretary of State to submit the measure to the Attorney General for review; and 4) following review by the Legislative Services Division and approval by the Attorney General, the Secretary of State to authorize proponents to begin collecting signatures.[199]

The Court then explained that the Attorney General's review of a statement for legal sufficiency is limited under § 13–27–312 for statutory and constitutional compliance.[200] Within the word number constraints provided in § 13–27–312(2), statements must explain the purpose of the measure and the implications of votes for or against the measure.[201] Citing

194. *Id.* at 435–436.

195. *Id.* at 436.

196. Atty. Gen. Response to Amend. Pet. for Rev. of Determ. of Leg. Sufficiency & Ballot Issue State. at 4, *Montanans Opposed to I-166 v. Bullock*, http://supremecourtdocket.mt.gov/view/OP%2012-0439%20Court%20Order%20-%20Response/Objection?id={D097628A-3283-4412-BF05-EC059DCF19EC} (Mont. Aug. 3, 2012) (No. OP 12-0439) (quoting Mont. Code Ann. § 13–27–312(7)).

197. *Id.* at 13.

198. *Montanans Opposed to I-166*, 285 P.3d at 435.

199. *Id.* at 435–436.

200. *Id.* at 436.

201. *Id.*

§ 13–27–312(7), the Court reiterated that the Attorney General's legal sufficiency review expressly excludes consideration of a proposed measure's substantive legality if approved by the electorate.[202]

Continuing, the Court noted that since the Opponents both sued under § 13–27–316(2) and sought "no other relief," they were limited to contesting "the adequacy of the explanatory statements and . . . the Attorney General's determination of legal sufficiency."[203] Disagreeing with the Opponents' challenge of the legal sufficiency review, the Court stated that the Opponents sought "to have this Court require that the Attorney General undertake precisely the substantive legal review that is excluded by law."[204] The Court concluded that, as the Opponents did not allege and the Court did not find legal insufficiency in the procedural submission of I–166 under § 13–27–312, the Attorney General's review of I–166 was not legally insufficient.[205]

Addressing the Opponents' challenge to the I–166 explanatory statements, the Court noted that the Attorney General's approval of explanatory statements is controlled by § 13–27–312(4), which requires statements be "true and impartial," in "easily understood language," and not argumentative or prejudicial.[206] The Court then summarily concluded that the I–166 explanatory statements satisfied the requirements of both §§ 13–27–312(2) and (4).[207] In closing, the majority referred to precedent where it held a proposed initiative facially unconstitutional and reiterated that it would not consider substantive challenges to I–166 when the Opponents' only properly pled challenge was presented pursuant to a statute that expressly precluded consideration of a ballot measure's substantive legality.[208]

Justice Baker concurred with the Court's holding, but declared in a separate opinion that her agreement was not confined to the Opponents having "failed to request the proper form of relief."[209] Rather, Justice Baker argued, the relevant statutes indicate a "clear preference to defer ruling on the constitutionality of a proposed initiative petition until *after* the results of the election at which it is submitted to voters."[210] She observed that the

202. *Id.*

203. *Id.*

204. *Montanans Opposed to I-166*, 285 P.3d at 436.

205. *Id.*

206. *Id.* (quoting Mont. Code Ann. § 13–27–312(4)).

207. *Montanans Opposed to I-166*, 285 P.3d at 436.

208. *Id.* (citing *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984)). In *Harper*, the Montana Supreme Court granted the plaintiff's request to enjoin the Secretary of State from placing the challenged initiative on the ballot. The Court also held the proposed initiative unconstitutional as it coercively sought to compel the Montana Legislature to act in a specific way, which violated Article V of the United States Constitution. *Harper*, 691 P.2d at 827–829.

209. *Montanans Opposed to I-166*, 285 P.3d at 437 (Baker, J., concurring).

210. *Id.* (emphasis in original) (citing Mont. Code Ann. §§ 3–2–202(5) & 13–27–316(6)).

Opponents' claim that I–166 was constitutionally defective did not meet the Court's requirements to exercise its original jurisdiction and that the Opponents' challenge would be justified only if and after the electorate approved I–166.[211] Justice Baker concluded by noting that, if and after I–166 was approved by the voters, the Court's holding should not preclude the Opponents from seeking "declaratory judgment against I–166 in district court and pursuing the 'normal appeal process' in this Court."[212]

In the lone dissent, Justice Nelson contended that I–166 should not be submitted to the electorate.[213] As I–166 did not seek to enact a law, but rather sought to establish a policy, Justice Nelson argued it violated the scope of initiative power granted to citizens under Article III, section 4 of the Montana Constitution.[214] Consequently, he asserted, the Attorney General should have found I–166 facially unconstitutional because it did not comply with "constitutional requirements governing submission of the proposed issue to electors."[215] Justice Nelson also asserted that the Court could address the substantive merit of a proposed ballot measure, as it recently did in *Reichert v. State ex rel. McCulloch*,[216] where it affirmed its right to declare invalid proposed ballot measures that are facially unconstitutional.[217] He noted the *Reichert* Court reasoned that allowing a defective measure to proceed to voters "creates a sham out of the voting process . . . when in fact the measure is invalid regardless of how the electors vote."[218]

Addressing its substance, Justice Nelson referred to I–166 as "a feel-good exercise exhibiting contempt for the federal government and, particularly, the United States Supreme Court."[219] Justice Nelson argued that I–166 would be ineffective in this exercise because "the Supreme Court did not rely on corporate 'personhood' in its decision in *Citizens United* [*v. Federal Election Commission*],"[220] and thus I–166's proposition to establish that corporations are not "persons" would accomplish "absolutely nothing for First Amendment purposes."[221] Furthermore, he argued, I–166's

211. *Montanans Opposed to I-166*, 285 P.3d at 437 (citing Mont. Rs. App. P. 14(2), (4)).

212. *Montanans Opposed to I-166*, 285 P.3d at 437–438 (quoting Mont. R. App. P. 14(4)).

213. *Montanans Opposed to I-166*, 285 P.3d at 444 (Nelson, J., dissenting).

214. *Id.*

215. *Id.* (quoting Mont. Code Ann. § 13–27–312(7)).

216. *Reichert v. State ex rel. McCulloch*, 278 P.3d 455 (Mont. 2012).

217. *Montanans Opposed to I-166*, 285 P.3d at 444 (citing *Reichert*, 278 P.3d at 473–474). In *Reichert*, the Montana Supreme Court upheld a district court order enjoining the Secretary of State from placing Legislative Referendum 119 on the ballot. The *Reichert* Court declared that pre-election review was not simply an option, but was the Court's duty when encountering a facially unconstitutional ballot measure. *Reichert*, 278 P.3d at 473–474.

218. *Montanans Opposed to I-166*, 285 P.3d at 441 (quoting *Reichert*, 278 P.3d at 474).

219. *Montanans Opposed to I-166*, 285 P.3d at 438.

220. *Citizens United v. Fed. Election Commn.*, 558 U.S. 310, 130 S. Ct. 876 (2010).

221. *Montanans Opposed to I-166*, 285 P.3d at 439–440 (citing *Citizens United*, 130 S. Ct. at 898–908).

scheme to circumvent *Citizens United* would likely face the same fate as Montana's Corrupt Practices Act, which was struck down by the United States Supreme Court in *American Tradition Partnership, Inc. v. Bullock*.[222] Given the improbability that I–166 could successfully overcome these obstacles, Justice Nelson concluded that it was "little more than a source of false hope for many voters" and was a waste of "the electorate's time and resources."[223]

The *Montanans Opposed to I–166* Court appeared to elevate form over substance when considering the Opponents' pre-election challenge to the constitutionality of I–166. By doing so the Court underscored the importance of the pled cause of action within a pre-election challenge to a ballot measure and distinguished its recent opinion in *Reichert*, where it found unconstitutional a proposed legislative referendum before it was submitted to voters. In the future, opponents of ballot measures seeking to challenge the procedural submission or administrative approval of the measure may still obtain relief under § 13–27–316(2). However, opponents who wish to challenge the substantive legality of a proposed ballot measure would apparently be best served by directly challenging the measure's substantive constitutionality within a declaratory judgment action and by seeking the appropriate injunctive relief.

—Quinton King

VI. *Montana Wildlife Federation v. Montana Board of Oil & Gas Conservation*[224]

In *Montana Wildlife Federation v. Montana Board of Oil & Gas Conservation*, the Montana Supreme Court clarified the standards for an environmental assessment ("EA") under the Montana Environmental Policy Act ("MEPA").[225] Specifically, the Court upheld the district court's ruling that the Montana Board of Oil & Gas Conservation ("Board") made adequate environmental assessments and acted reasonably when it issued 23 gas well permits to Fidelity Exploration and Production Company ("Fidelity") in the Cedar Creek Anticline ("CCA") area of Eastern Montana.[226] The Court held that the Board properly tiered[227] the EAs to two previous environmen-

222. *Montanans Opposed to I-166*, 285 P.3d at 440 (citing *Am. Tradition Partn., Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

223. *Montanans Opposed to I-166*, 285 P.3d at 440.

224. *Mont. Wildlife Fedn. v. Mont. Bd. of Oil & Gas Conserv.*, 280 P.3d 877 (Mont. 2012).

225. *Id.* at 884, 891–892.

226. *Id.* at 891–892.

227. Tiering "is the process of incorporating by reference coverage of general matters in broader environmental impact statements, such as national program or policy statements, into subsequent nar-

tal impact statements ("EIS") issued in 1989 and 2003, despite the fact that the EAs did not explicitly reference those EISs.[228] The Court also held that the EAs sufficiently evaluated the cumulative impacts of the proposed gas wells under MEPA's "hard look" requirement.[229]

In 2008, both the Montana Wildlife Federation and the National Wildlife Federation ("Federations") brought suit against the Board after it issued 23 permits for infill gas wells to Fidelity.[230] The Federations sought to enjoin the Board from issuing the permits, contending that the EAs that it is required to prepare when it issues permits on private/fee and State owned lands did not comply with MEPA standards.[231] In particular, the Federations alleged the Board failed to take into consideration the effect new gas wells would have on populations of sage grouse and did not properly tier its assessments to previous studies or evaluate the cumulative impact of more wells in the CCA.[232] After suit was filed, the district court permitted Fidelity and the Montana Petroleum Association to intervene as defendants in the action.[233] Both parties moved for summary judgment, and the Board responded to the Federations' allegations by arguing that the approval of infill gas wells was not a significant enough action to justify more than checklist EAs[234] under MEPA.[235]

The district court found that, under Montana Code Annotated § 82–11–144, it had the power to set aside the 23 permits if it found the Board's actions to be "arbitrary, unreasonable, capricious, and [sic] abuse of discretion or otherwise not in accordance with the law."[236] It also recognized tiering as an accepted method of incorporating the analysis of issued EISs into other documents as a means of eliminating unnecessary repetition.[237] Declaring that the Board's issuance of permits passed the "hard look" test, the district court noted the large number of gas wells already present at the proposed drilling sites and the existing presence of the infra-

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rower environmental analyses, such as site-specific statements." *Id.* at 888 (quoting *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1088 (9th Cir. 2001) (citing 40 C.F.R. § 1508.28)).

228. *Mont. Wildlife Fedn.*, 280 P.3d at 888–889.

229. *Id.* at 891.

230. *Id.* at 884.

231. *Id.* at 881, 884.

232. *Id.* at 887.

233. *Id.* at 884.

234. The checklist forms used by the Board had ten categories for review: "(1) Operator and Well Location; (2) Air Quality; (3) Water Quality; (4) Soils/Vegetation/Land Use; (5) Health Hazards/Noise; (6) Wildlife/Recreation; (7) Historical/Cultural/Paleontological; (8) Social/Economic; (9) Remarks or Special Concerns for the Site; (10) Summary: Evaluation of Impacts and Cumulative Effects." *Mont. Wildlife Fedn.*, 280 P.3d at 882. The Board may use checklist EAs when it "determines a routine action with limited environmental impact is at stake." *Id.* at 889.

235. *Id.* at 884–885.

236. *Id.* at 884 (citing Mont. Code Ann. § 82–11–144(2)(a) (2011)).

237. *Mont. Wildlife Fedn.*, 280 P.3d at 884.

structure required to support new wells.[238] The district court granted summary judgment to the Board and refused to set aside the permits it issued because the court found that the EAs were properly tiered to earlier programmatic EISs and that the addition of infill gas wells to a pre-existing gas field was a routine action that only required a checklist EA.[239]

On appeal, the Montana Supreme Court first considered tiering and cumulative effects under the "hard look" standard.[240] It explored in detail the programmatic EISs ("PEIS") issued by the Board in 1989 and 2003 and recognized that both EISs analyzed the impact of gas and oil production on wildlife, particularly their effects on sage grouse.[241] The Court noted that the overall goal of the 1989 PEIS was to establish an efficient way to integrate MEPA into its decision making.[242] The 1989 PEIS contained a section that established specific guidelines for protecting sage grouse from oil and gas development, such as creating a buffer zone around strutting grounds and restricting operations in the early morning hours of spring when sage grouse are strutting.[243]

The Court further recognized that the 2003 EIS built upon the 1989 PEIS by evaluating the effects of coal-bed natural gas development ("CBNG") in Montana.[244] In addition to CBNG, the Court noted that the 2003 EIS also looked into the damage conventional oil and gas drilling might have on wildlife, mentioning specifically the habitat necessary for sage grouse and their potential for becoming an endangered species.[245] The Court also referred to the 2003 EIS's statement that it "'may be tiered from or incorporate by reference other documents' including the 1989 PEIS."[246]

The Court affirmed the district court's ruling that the Board properly tiered the EAs to the 1989 and 2003 EISs[247] and satisfied MEPA standards in evaluating the cumulative effects of permitting new gas infill wells.[248] The Court reasoned that even though the EAs made for the review of the 23 permits issued to Fidelity contained no explicit reference to the earlier PEISs, the Board nonetheless clearly relied on them and thus satisfactorily tiered to them.[249] The Court disagreed with Federations' assertion that to appropriately tier to a previous statement an EA must specifically mention

238. *Id.* at 884–885.
239. *Id.*
240. *Id.* at 888, 889.
241. *Id.* at 887–888.
242. *Id.* at 882.
243. *Mont. Wildlife Fedn.*, 280 P.3d at 882, 887.
244. *Id.* at 882–883.
245. *Id.* at 887.
246. *Id.* at 883.
247. *Id.* at 888–889.
248. *Id.* at 891–892.
249. *Mont. Wildlife Fedn.*, 280 P.3d at 888–889.

the documents it wishes to incorporate.[250] It pointed out that the authority Federations relied on only addressed EISs and that EAs, by contrast, do not have as lofty of requirements to satisfy.[251] The Court reasoned that because the Board's administrative actions on record documented its reliance on the 1989 and 2003 EISs, the EAs implicitly tiered to them.[252] Finally, even though it felt the EAs should make the public aware of the information used in issuing permits, the Court held that ordering a remand solely on that ground would accomplish little but further delay.[253]

Addressing its environmental review, the Court held that the Board met MEPA requirements by being sufficiently thorough in examining the cumulative effects of drilling under the "hard look" standard.[254] The "hard look" standard requires a court to focus "on the validity and appropriateness of the administrative decision making process without intense scrutiny of the decision itself."[255]

Federations argued that the 23 EAs prepared for the gas infill wells were virtually identical, made no site specific analyses, and failed to consider cumulative impacts because the checklist format of the EAs ignored the existence of the other wells Fidelity intended to drill in the area.[256] To show the Board's lack of thoroughness, Federations pointed to an EA performed by the Department of Natural Resources and Conservation ("DNRC") in the area at issue.[257] In that EA, the DNRC found sage grouse habitats that the Board did not identify in its environmental review.[258]

Notwithstanding Federations' contentions, the Court held the administrative record demonstrated that the Board systematically considered enough cumulative impacts to constitute a hard look at the matter.[259] Specifically, the Court reasoned that both the checklist EAs and the 1989 and 2003 EISs used to create the checklist EAs referenced the cumulative effects of drilling and that the "institutional body of knowledge" upon which the Board staff based its decisions provided adequate background for the Board to determine that "the addition of twenty-three wells in a heavily developed field would have limited impact."[260]

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250. *Id.* at 888 (citing *Village of False Pass v. Watt*, 565 F. Supp. 1123 (D. Alaska 1983)).

251. *Mont. Wildlife Fedn.*, 280 P.3d at 888 (citing *Village of False Pass*, 565 F. Supp. at 1141).

252. *Mont. Wildlife Fedn.*, 280 P.3d at 888–889.

253. *Id.* at 889.

254. *Id.* at 891–892.

255. *Id.* at 890 (citing *Clark Fork Coalition v. Mont. Dept. of Envtl. Quality*, 197 P.3d 482, 492 (Mont. 2008)).

256. *Mont. Wildlife Fedn.*, 280 P.3d at 890.

257. *Id.*

258. *Id.*

259. *Id.* at 891–892.

260. *Id.*

In a lone dissent, Justice Wheat argued the EAs were unlawful because they failed to tier to the previous EISs under National Environmental Policy Act ("NEPA") standards, failed to inform the public of potential impacts, and gave only generalized statements about the cumulative effects of the proposed wells.[261] Justice Wheat criticized the majority for ignoring the fact that although MEPA does not require explicit tiering in the EAs, the plain language of NEPA does, and that standard should have been used to determine whether the EAs in question were properly tiered to the EISs of 1989 and 2003.[262] Further, he argued the legislature made it clear that the purpose of EAs was to "inform the public and public officials of potential impacts resulting from decisions made by state agencies."[263] According to Justice Wheat, allowing the Board to hide its decision-making process within the confines of institutional knowledge does not inform the public.[264] To that end, Justice Wheat contended, neither does the majority's acceptance of one-line authoritative statements as sufficiently thorough assessments of cumulative effects.[265]

In *Montana Wildlife Federation*, the Court seemingly watered down the "hard look" that the Board must take to comply with MEPA. The Court also established that EAs may satisfy MEPA standards without expressly tiering to EISs and that the Board may pass the "hard look" standard with assertions supported by arguably tenuous historical administrative actions. Even though the Court insisted that agencies like the Board must inform the public of environmental impacts, it provided that the Board's failure to do so may not amount to reversible error. The Court's holding seems to establish that as long as the agency in question can point to a systematic method of addressing an environmental issue, the actual proficiency of the agency's methods may remain unquestioned, unmonitored, and unchecked without aggressive research and perhaps litigation. Montana practitioners should recognize that the Court's affirmation of the lack of procedural transparency in the EAs and EISs at issue in *Montana Wildlife Federation* may provide a basis for greater deference to agencies, making future MEPA challenges much more difficult.

—Russell Michaels

261. *Id.* at 894–895 (Wheat, J., dissenting).
262. *Mont. Wildlife Fedn.*, 280 P.3d at 894–895.
263. *Id.* at 894 (quoting Mont. Code. Ann. § 75–1–102(3)(a)).
264. *Mont. Wildlife Fedn.*, 280 P.3d at 894.
265. *Id.*

VII. *NORRIS V. FRITZ*[266]

In *Norris v. Fritz*, the Montana Supreme Court held that treating physicians acting as non-retained expert witnesses need not provide heightened disclosures containing complete statements of their opinions.[267] The Court concluded the parties typically have an idea of non-retained experts' opinions because of the experts' confluent role with the case's facts.[268] However, the Court noted, the opposing party must have notice about the subject matter of a non-retained expert's intended testimony in order to prevent unfair surprise.[269]

T.M.N., the child of Kathryn and Joe Norris ("Norris"), experienced a cyanotic episode after a premature birth by C-section on October 11, 2001.[270] Dr. Strizich, the treating physician, admitted T.M.N. to a Special Care Nursing Unit and ordered an IV with glucose.[271] He tested T.M.N.'s blood glucose and received a reading of 63, which caused him to both increase the amount of glucose being supplied by the IV and order a retest for the next morning.[272]

The results of the retest arrived the next evening when T.M.N. was under the supervision of Dr. Reynolds, a colleague of Dr. Strizich.[273] The second test showed T.M.N.'s glucose levels to be 38; identified as "critical" by the lab report.[274] However, T.M.N. was now breastfeeding, and Dr. Reynolds discontinued the IV without ordering any further glucose tests.[275]

Another doctor from the same clinic, Dr. Fritz, took over T.M.N.'s care at noon on October 13.[276] Although informed of the earlier glucose results, he did not restart the IV or order any tests because he believed T.M.N. was receiving sufficient glucose from his mother's milk, which could be ascertained by visual inspection.[277] However, T.M.N. became unresponsive the following morning, and tests revealed his glucose level to be zero.[278] T.M.N. was transported to Benefis Hospital in Great Falls; he suffered severe, permanent developmental issues.[279]

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266. *Norris v. Fritz*, 270 P.3d 79 (Mont. 2012).
267. *Id.* at 83.
268. *Id.*
269. *Id.* at 84–85.
270. *Id.* at 81.
271. *Id.*
272. *Norris*, 270 P.3d at 81.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Norris*, 270 P.3d at 81.
279. *Id.*

On May 5, 2005, Norris filed a complaint against St. Peter's Hospital, Dr. Reynolds, and Dr. Fritz.[280] Pretrial proceedings included a deposition of Dr. Strizich, who was questioned by counsel for Norris and the defendants.[281] In 2006, Norris filed a disclosure identifying their expert witnesses, which included all of T.M.N.'s treating physicians.[282] The district court declared the treating physicians were not retained for purposes of litigation and thus expert disclosure pursuant to 26(b)(4) was unnecessary.[283]

At trial, Norris's counsel said in her opening statement that Dr. Strizich would testify that a glucose level of 50 was the threshold for a baby like T.M.N. and that T.M.N. was hypoglycemic on October 13 when tests showed his glucose levels to be 38.[284] Dr. Fritz subsequently moved to limit the scope of Dr. Strizich's testimony, stating that until Norris' opening statement, he had been unaware that Dr. Strizich intended to testify about the standard of care in relation to glucose levels.[285] The district court granted Dr. Fritz's motion, and Dr. Strizich was instructed he was only allowed to testify regarding his personal practice, not the standard of care.[286]

The jury found in favor of Dr. Fritz, and Norris appealed.[287] The Montana Supreme Court reversed the district court's ruling, which limited Dr. Strizich's testimony, determining the district court should not have precluded Dr. Strizich's testimony about the appropriate standard of care.[288]

The Court began distinguishing between retained and non-retained expert witnesses by pointing out that Montana Rule of Civil Procedure 26(b)(4) ("Rule 26") only requires disclosures for retained experts, whose facts and opinions are "acquired or developed in anticipation of litigation or for trial."[289] The Court referred to the federal rule regarding retained experts, which is identical to the Montana rule.[290] The Court explained the Federal Advisory Committee limited application of the federal rule to retained experts and not experts whose information is acquired on account of personal experience with the occurrence that is the basis for a particular lawsuit.[291]

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280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.* at 82.
284. *Norris*, 270 P.3d at 82.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 88.
289. *Id.* at 83.
290. *Norris*, 270 P.3d at 83.
291. *Id.*

The Court reasoned that the purpose of Rule 26 is to provide an opposing party access to a retained expert's identity and opinions, which would otherwise remain unknown.[292] A non-retained expert, the Court explained, is a hybrid witness, who has both personal knowledge of relevant factual events and specialized training allowing him to form expert opinions about those facts.[293] Therefore, the Court continued, his identity and opinions are typically readily available to both parties.[294]

The Court cited sister jurisdiction courts' determinations that parties should be aware of the existence and potential opinions of a treating physician because they can subpoena medical records that identify treating physicians.[295] These courts concluded the information within the medical records is sufficient to prevent unfair surprise from a treating physician's testimony.[296]

The Court recognized that few jurisdictions have determined whether a treating physician could testify about the standard of care in medical malpractice cases without an expert disclosure.[297] Some courts have held a physician's opinion on the standard of care requires full disclosure because such an opinion may not be an obvious deposition inquiry as it would not ordinarily be necessary for a physician to formulate such an opinion in order to treat the patient.[298] However, the Court noted, other jurisdictions have held a physician may form an opinion about the standard of care during the course of treatment if he formed his opinion during the patient's treatment.[299]

The Court concluded Dr. Strizich's opinion fell into the second category and it was necessary for him to determine what standard of care to follow when he monitored and treated T.M.N.'s glucose levels.[300] Therefore, the Court determined he should be considered a hybrid witness and should be permitted to testify about the standard of care applicable to treating T.M.N.[301]

While the federal rule only requires a complete statement of opinions from retained experts, it requires non-retained experts to provide a summary of their expected testimony to prevent unfair surprise.[302] The Court stated

292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at 83 (citing *Drew v. Lee*, 250 P.3d 48, 55 (Utah 2011)).
296. *Norris*, 270 P.3d at 83 (citing *Drew*, 250 P.3d at 55).
297. *Norris*, 270 P.3d at 83.
298. *Id.* at 83–84 (citing *Hansen v. C. Hosp. Corp*., 686 N.W.2d 476, 481–482 (Iowa 2004)).
299. *Norris*, P.3d at 84 (citing *Schreiber v. Est. of Kiser*, 989 P.2d 720, 726 (Cal. 1999)).
300. *Norris*, 270 P.3d at 84.
301. *Id.*
302. Fed. R. Civ. P. 26(a)(2).

that Rule 26 does not have any disclosure requirements regarding the identities or opinions of non-retained experts.[303] The Court referred to its *Faulconbridge v. State*[304] opinion, where it held that full Rule 26 disclosure must be made for retained experts, but for non-retained experts it is only required that the opposing party have adequate notice of the testimony.[305]

The Court observed that Dr. Fritz did not contend he was unaware of Dr. Strizich's identity, but instead argued he did not know of Dr. Strizich's opinions and was surprised to learn Dr. Strizich would be testifying about the standard of care for an infant's blood glucose level.[306] Norris' expert disclosure did not include a level-specific glucose standard, however, the Court noted, it did state Dr. Strizich would testify about the standard of care he would employ generally.[307] The Court considered it likely Dr. Strizich would formulate his opinions on the standard of care based on his medical training, current medical literature, and national practice.[308] In addition, the Court reasoned Dr. Fritz had access to T.M.N.'s medical records, which contained reports by Dr. Strizich, nursing notes detailing the care Dr. Strizich provided, and lab reports.[309] Based on this information, the Court concluded it was likely Dr. Strizich had formed an opinion on the standard of care for a newborn blood glucose level.[310]

Though Dr. Fritz redeposed several expert witnesses after expert disclosures were filed, the Court pointed out Dr. Fritz did not redepose Dr. Strizich despite notice in Norris's disclosure that Dr. Strizich would testify as to his own standard of care and his central role in the occurrence.[311] The Court noted Dr. Fritz was aware T.M.N.'s blood glucose level was a central issue in the case, as he presented three experts who discussed the standard of care in relation to blood glucose levels.[312]

The Court concluded Dr. Fritz had adequate notice about Dr. Strizich's opinions to prevent unfair surprise.[313] It determined the exclusion of Dr. Strizich's testimony prejudiced Norris's case because it affected a material issue.[314] The Court reversed and remanded to the district court with in-

303. *Norris*, 270 P.3d at 85.

304. *Faulconbridge v. State*, 142 P.3d 777 (Mont. 2006).

305. *Faulconbridge*, 142 P.3d at 786.

306. *Norris*, 270 P.3d at 85.

307. *Id.* at 85–86.

308. *Id.* at 86.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Norris*, 270 P.3d at 87.

313. *Id.* at 86.

314. *Id.* at 88.

structions to vacate the prior judgment and order a new trial, in which Dr. Strizich could testify regarding the standard of care.[315]

In *Norris*, the Court looked to the Federal Rules of Civil Procedure to fill in the gap in Rule 26 in relation to non-retained experts.[316] It also made a more concrete rule out of the suggestion in *Faulconbridge* that opposing counsel have notice of a non-retained expert's expected testimony.[317] Indeed, *Norris* makes it clear that an opposing party must have adequate notice of a non-retained expert's identity and scope of testimony.[318] This is a significant interpretation to the scope of Rule 26 because it will increase opportunities for parties to rely on treating physicians as experts. In light of this holding it will be important for parties to employ broad discovery procedures in order to learn of any potential opinions of a treating physician.

—Kathleen Molsberry

VIII. *BNSF Railway Company v. Feit*[319]

In *BNSF Railway Company v. Feit*, the Montana Supreme Court held that, if a person's weight exceeds normal range and affects at least one body system, obesity may constitute a physical or mental impairment—even without an underlying physiological disorder or condition.[320] The Court's holding was in response to a certified question regarding the phrase "physical or mental impairment," and its possible application to obesity, as found in Montana Code Annotated § 49–2–101(19)(a).[321] The Court also held that contemporaneous federal laws and regulations can provide guidance for interpreting the Montana Human Rights Act ("MHRA").[322]

On February 27, 2009, Eric Feit filed a complaint with the Montana Department of Labor and Industry ("Department") against Burlington Northern Santa Fe Railway Company ("BNSF").[323] Feit alleged that BNSF discriminated against him because of his weight.[324] In March 2010, the Department ruled in Feit's favor and awarded him damages.[325] BNSF then appealed the decision with the Montana Human Rights Commission, which

315. *Id.*
316. *Id.* at 84–85.
317. *Id.* at 85.
318. *Norris*, 270 P.3d at 85.
319. *BNSF Ry. Co. v. Feit*, 281 P.3d 225 (Mont. 2012).
320. *Id.* at 231.
321. *Id.* at 226–227.
322. *Id.* at 230–231.
323. *Id.* at 227.
324. *Id.*
325. *BNSF Ry. Co.*, 281 P.3d at 227.

affirmed the Department's finding.[326] Finally, BNSF petitioned the United States District Court for review, and both parties moved for summary judgment.[327] The Honorable Donald W. Molloy then certified the following question to the Montana Supreme Court: "Is obesity that is not the symptom of a physiological condition a 'physical or mental impairment' as it is used in Montana Code Annotated § 49–2–101(19)(a)?"[328]

Judge Molloy also certified the following set of facts.[329] First, BNSF extended Feit a conditional employment offer, partly dependent on successful completion of a physical examination and BNSF's Medical History Questionnaire.[330] On February 6, 2008, BNSF told Feit he was unqualified for the position because of the "significant health and safety risks associated with extreme obesity."[331] BNSF then informed Feit that, for further employment consideration, he would need to either lose 10% of his body weight or complete supplemental physical examinations "at his own expense."[332] At no point did BNSF promise Feit a job, regardless of the exam outcomes.[333] Feit completed all of the additional physical examinations except for a sleep study, which BNSF required before it would further consider him for the job.[334] Finally, because Feit could not afford the sleep test, he attempted to lose 10% of his body weight; a genuine dispute surrounds the documentation of Feit's weight loss.[335]

The Montana Supreme Court began its analysis by noting its "job" was to answer the certified question, not to "apply the law to the facts presented . . . ."[336] Accordingly, the Court first observed that, within the MHRA, employers cannot discriminate against potential employees because of "physical or mental disability."[337] The Court then looked further into the MHRA, which defines a "physical or mental disability" as:

> (i) *a physical or mental impairment* that substantially limits one or more of a person's major life activities;
> (ii) a record of such an impairment; or
> (iii) a condition regarded as such an impairment.[338]

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326. *Id.*
327. *Id.*
328. *Id.* at 226.
329. *Id.* at 227.
330. *Id.*
331. *BNSF Ry. Co.*, 281 P.3d at 227.
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *BNSF Ry. Co.*, 281 P.3d at 228 (citing Mont. Code Ann. § 49–2–303(1)(a) (2011)).
338. *BNSF Ry. Co.*, 281 P.3d at 228 (citing Mont. Code Ann. § 49–2–101(19)(a)) (emphasis in original).

Next, the Court opined that it had never interpreted the word "impairment" and would need to look at federal discrimination law under the Americans with Disabilities Act ("ADA") for direction.[339] Additionally, the Court observed that the Montana Legislature desires courts to interpret the MHRA uniformly with federal law.[340] Furthermore, because the MHRA definition of "physical or mental disability" is nearly verbatim to the ADA version, the Court concluded that federal law would guide its analysis.[341] More specifically, the Court also decided that federal Equal Employment Opportunity Commission ("EEOC") regulations and interpretative guidelines would be both useful and permissible in formulating its analysis.[342]

The Court then discussed how Congress recently passed the ADA Amendments Act of 2008 ("ADAAA"); however, the ADAAA did not substantively change the definition of "disability," which consequently remains nearly identical to the MHRA version.[343] However, the Court noted that the ADAAA did reiterate "a broad scope of protection to be available under the ADA" and that "[t]he definition of disability . . . shall be construed in favor of broad coverage . . . to the maximum extent permitted."[344] Finally, the Court acknowledged that Congress also passed the ADAAA because it saw federal courts limit the "broad scope of protection" that the ADA provides.[345]

Because neither the ADA nor the ADAAA defines "physical or mental impairment," the Court looked to the EEOC's definition of "impairment": "Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems . . . ."[346] Moreover, the Court acknowledged that the EEOC's Interpretative Guidance "distinguishes between conditions that are impairments and conditions that are simply physical characteristics . . . ."[347] The Court then focused on the following language in the Interpretative Guidance:

> The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder.[348]

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339. *BNSF Ry. Co.*, 281 P.3d at 228 (citing Mont. Code Ann. § 49–2–101(19)(a)).

340. *BNSF Ry. Co.*, 281 P.3d at 228.

341. *BNSF Ry. Co.*, 281 P.3d at 228 (citing 42 U.S.C. § 12102).

342. *BNSF Ry. Co.*, 281 P.3d at 228 (citing *Sleath v. W. Mont Home Health Servs., Inc.*, 16 P.3d 1042, 1048 (Mont. 2000)).

343. *BNSF Ry. Co.*, 281 P.3d at 228 (citing 42 U.S.C. §§ 12102(2), (3)).

344. *BNSF Ry. Co.*, 281 P.3d at 228 (citing Pub. L. No. 110-325, 122 Stat. 3553 at 3554–3555).

345. *BNSF Ry. Co.*, 281 P.3d at 228 (citing Pub. L. No. 110-325, § 2(a)(4)).

346. *BNSF Ry. Co.*, 281 P.3d at 229 (citing 29 C.F.R. § 1630.2(h)(1)).

347. *BNSF Ry. Co.*, 281 P.3d at 229.

348. *Id.* (citing 29 C.F.R. pt. 1630 app. § 1630.2(h)).

The Court reasoned that, while weight is seemingly distinguished as a physical characteristic (and not an impairment), "by using the conjunctive '*and*,' the regulation excludes weight from the definition of impairment only if it is *both* 'within normal range' *and* 'not the result of a physiological disorder.' "[349] Essentially, the Court held that obesity may constitute an impairment if it is beyond "normal range" and affects at least one body system even if there is no underlying physiological disorder.[350]

To supplement its analysis, the Court remarked that the EEOC Compliance Manual, while not binding, provides additional guidance and, therefore, "[t]his Court affords an agency's interpretation of its rule 'great weight' . . . ."[351] One section of the EEOC Compliance Manual states that "severe obesity . . . is clearly an impairment," which the Court used to support its conclusion that "weight outside the 'normal range' may constitute a physiological condition within the definition of impairment if it 'affects one or more body systems.' "[352] Finally, the Court cited recent federal cases that have adopted similar conclusions.[353]

The Court dismissed BNSF's argument—that other federal courts have held that obesity is not an impairment unless accompanied by an underlying physiological disorder—by noting BNSF's selection of cases were all decided before Congress passed the ADAAA, which reiterated broad interpretation of disability.[354] BNSF also contended that, because Montana had not adopted the ADAAA, the Court should disregard the changes and that the ADAAA is not retroactive and is therefore impermissible to apply.[355] The Court rejected those arguments by bluntly stating: "we are interpreting Montana statutes, not the ADAAA . . . and we are construing 'impairment' for the first time."[356] The Court also took the opportunity to reiterate its conclusion that "prior case law directs us to use federal interpretations as guidance, without confining our review to authority in place on the date the MHRA was first enacted."[357]

Justice Morris, while agreeing that federal law should provide guidance, filed a dissent and asserted that a "plain reading" of the definition for "impairment" indicates that a "physiological condition must be present

349. *BNSF Ry. Co.*, 281 P.3d at 229.

350. *Id.* at 231.

351. *Id.* at 229–230 (citing *Easy v. Mont. Dept. of Nat. Resources & Conserv.*, 752 P.2d 746, 748 (Mont. 1988)).

352. *BNSF Ry. Co.*, 281 P.3d at 230 (citing *EEOC Compl. Man.* § 902.2(c)(5)(ii)).

353. *BNSF Ry. Co.*, 281 P.3d at 230 (citing *EEOC v. Resources for Human Dev., Inc.*, 827 F. Supp. 2d 688, 694 (E.D. La. 2011); *Lowe v. Am. Eurocopter, LLC*, 2010 WL 5232523 at **7–8 (N.D. Miss. 2010)).

354. *BNSF Ry. Co.*, 281 P.3d at 229.

355. *Id.* at 230.

356. *Id.*

357. *Id.* at 230–231 (citing *Hafner v. Conoco, Inc.*, 886 P.2d 947, 951 (Mont. 1994)).

before an impairment exists."[358] Further, Justice Morris argued the majority misconstrued the language found in the EEOC's Interpretative Guidance.[359] Justice Morris, like BNSF, noted that various courts have held that obesity must be first associated with a physiological condition before being considered an impairment.[360] According to Justice Morris, the ADAAA did not change the definition of "impairment," and thus the Court's reliance on the ADAAA "provides no justification to ignore the definition's plain language" or prior case law.[361] Chief Justice McGrath joined Justice Morris's dissent.[362]

Justice Rice filed a separate dissent, arguing that the Court erred by basing its analysis on the ADAAA, which did not take effect until after the alleged discrimination took place.[363] Therefore, Justice Rice asserted that pre-ADAAA federal jurisprudence should guide the Court's analysis, which largely requires a physiological condition to be present before examining the impairment issue.[364]

Montana practitioners and employers should take notice of *BNSF Railway Company v. Feit* and its permissive interpretation. Essentially, obesity may constitute an impairment if it is outside "normal range" and affects at least one body system—regardless if an accompanying physiological condition exists. Furthermore, practitioners need to keep abreast of changes to federal ADA regulations because the Court will look to them for guidance, even when the Montana Legislature has not explicitly adopted the amendments.

—Jordan Peila

IX. *STATE V. COOK*[365]

In *State v. Cook*, the Montana Supreme Court held that a criminal defendant's suspended sentence could be revoked even if the violation of a condition was not willful, so long as the State is not responsible for any portion of his failure.[366] This holding reiterated the decision in *State v.*

358. *BNSF Ry. Co.*, 281 P.3d at 231 (Morris & McGrath, JJ., dissenting).
359. *Id.*
360. *Id.* at 231–232.
361. *Id.* at 232.
362. *BNSF Ry. Co.*, 281 P.3d at 233 (Rice, J., dissenting).
363. *Id.*
364. *Id.* at 235–236.
365. *State v. Cook*, 272 P.3d 50 (Mont. 2012).
366. *Id.* at 57–58.

Lee[367] that fault-based analysis is the exception rather than the rule.[368] Criminal attorneys should be aware of *Cook* as it affirms that the State may, absent limited exceptions, revoke a suspended sentence when a violation of, or failure to meet, a condition is by no fault of the defendant.

In 1999, after pleading guilty via an *Alford* plea,[369] Rozell Roland Cook ("Cook") was sentenced to two concurrent, 20-year terms with the Department of Corrections ("DOC") with ten years suspended for two counts of sexual assault.[370] He was designated as a tier III sexual offender.[371] The suspended portion of his sentence contained 25 conditions.[372] Important among these conditions were requirements that Cook follow all the rules and regulations of Adult Probation and Parole; obtain counseling or evaluations at his own expense as required by his supervising officer and follow all recommendations; obtain sex offender counseling by a Montana Sex Offender Treatment Association ("MSOTA") recognized therapist at his own expense and comply with all conditions and recommendations; and live "at least 1,500 feet away from schools, playgrounds, toy stores, etc."[373]

In January 2010, six months before his ten-year commitment was up, Cook was notified that his proposed residence upon release in Great Falls was within 1,500 feet of a prohibited place, which would be a violation of his suspended sentence conditions.[374] The possibility of staying at a rescue mission in Great Falls was also eliminated as an option due to its proximity to a women's athletic center, so Cook's probation officer told him he could be released as a transient.[375] Three days before his scheduled release, he was notified that his outpatient treatment provider was dropping him due to a lack of adequate housing.[376] On June 17, 2010, two days before Cook was scheduled to be released from custody, the State moved to revoke the suspended portion of his sentence for being in violation of his sentencing

367. *State v. Lee*, 31 P.3d 998 (Mont. 2001) (holding that due process requires the consideration of alternatives to incarceration when failure to complete a condition of sentence suspension is solely the fault of the State).

368. *Cook*, 272 P.3d at 57 (citing *Lee*, 31 P.3d at 1002).

369. An *Alford* plea is one where the defendant chooses to plead guilty while professing his innocence, believing the evidence against him would likely result in conviction and the plea agreement would be in his best interest. *See N.C. v. Alford*, 400 U.S. 25, 37–38 (1970).

370. *Cook*, 272 P.3d at 53.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Cook*, 272 P.3d at 53.

conditions.[377] Cook was arrested while still incarcerated and held pending further hearings on the matter.[378]

During the pendency of the hearings, Cook found two different treatment providers willing to treat him in either Helena or Great Falls.[379] The State refused to allow Cook to be treated in Helena, as he could not be supervised there by his parole officer.[380] The treatment provider in Great Falls was ruled out because she was not a member of MSOTA.[381] Cook also found potential housing options in both cities, but all were ruled out by the State as being potentially near where children lived or congregated.[382] Despite two months of diligent searching, Cook was unable to find any one option that would satisfy all his release conditions.[383]

The district court found that Cook was in violation of three of the suspended sentence conditions; revoked his suspended sentence and sentenced him to two concurrent, ten-year commitments with five years suspended; and reimposed the original conditions of his suspended sentence, along with 16 new conditions.[384] The court noted that the difficulty Cook faced in finding appropriate housing and treatment options was "a result of his conduct and record. And that is not something that the Court can remedy or overlook."[385]

Cook raised three issues on appeal: first, he argued the State could not petition to revoke his suspended sentence before the period of suspension had begun;[386] second, he argued he could not be found to be in violation of his conditions when he was still in custody and when the failure to meet the conditions was not by any willful act on his part; and third, he argued the court could not impose additional conditions that were not part of his origi-

377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.* at 54.
381. *Id.*
382. *Cook*, 272 P.3d at 53–54.
383. *Id.* at 54.
384. *Id.*
385. *Id.*
386. Cook based this argument on the Court's ruling in *State v. Stiffarm*, 250 P.3d 300 (Mont. 2011), decided January 26, 2011, during the district court proceedings. *Cook*, 272 P.3d at 55. In *Stiffarm*, the Court held that, contrary to prior case law, Mont. Code Ann. § 46–18–203(2) did not allow for a petition to revoke to be filed before the suspension began. *Id.* (citing *Stiffarm*, 250 P.3d at 303). On April 20, 2011, the legislature amended Mont. Code Ann. § 46–18–203(2) to specifically allow a petition to be filed before the period of suspension has begun. *Cook*, 272 P.3d at 55. The Court held in *Cook* that the new rule from *Stiffarm* would only apply prospectively as it was procedural and not substantive. *Id.* at 56. Thus, only petitions to revoke filed between January 26, 2011, and April 20, 2011, were subject to dismissal for being filed prior to the suspension period. Justice Nelson disagreed with this holding, instead arguing that the rule from *Stiffarm* was always the rule because the statute was clear and unambiguous. *Id.* at 59–60 (Nelson, J., dissenting). Since the State filed the petition before the suspension began, he would have reversed on this issue and not addressed the others. *Id.* at 60.

nal sentence.[387] The Montana Supreme Court affirmed the district court's revocation of Cook's suspended sentence,[388] but reversed and remanded to the district court on the third issue.[389]

Cook argued that his right to due process was violated because he did not willfully violate the conditions of his suspended sentence and alternatives to revocation existed to meet the State's penological interests.[390] The State countered that Cook violated the conditions of his suspended sentence, that due process does not require that violations be willful, and that the district court considered but rejected alternatives to revocation.[391]

Addressing Cook's arguments, the Court first recognized that the Due Process Clause requires consideration of alternatives to incarceration when revocation is based on a failure to pay a fine or restitution and the defendant cannot do so "through no fault of his own."[392] The Court explained, however, that this exception did not prohibit a revocation in other contexts, even if the failure to obey a condition is not intentional or willful.[393]

The Court next distinguished its holding in *State v. Lee*.[394] In *Lee*, the defendant was required to complete a sexual offender program while incarcerated as a condition of his suspended sentence.[395] After spending several years on a wait list for sexual offender treatment and being delayed by a sit-down strike, Lee was unable to finish the treatment before his release date, so his suspended sentence was revoked.[396] The Montana Supreme Court ultimately held that due process requires a court to consider alternatives to incarceration that would satisfy the State's penological interests when the failure to complete a condition of probation is "solely the fault of the State."[397]

In *Cook*, the Court held that despite the exception identified in *Lee*, an analysis based upon fault is not necessary where the violation is "of conditions related to the defendant's rehabilitation or the protection of the public."[398] Despite a lack of culpability on his part, Cook's failure to satisfy

387. *Cook*, 272 P.3d at 54 (majority).

388. *Id.* at 59.

389. *Id.* at 58–59. The Court upheld all but one of the conditions as being reasonably related to the objectives of rehabilitation and the protection of society. The Court remanded to have the lower court strike a condition requiring GPS monitoring for the entirety of his supervision as it was not a service provided in Montana and thus impossible to satisfy. *Id.* at 59.

390. *Cook*, 272 P.3d at 54.

391. *Id.* at 56.

392. *Id.* (citing *Lee*, 31 P.3d at 1000–1001 and quoting *Bearden v. Ga.*, 461 U.S. 660, 668–669 (1983)).

393. *Cook*, 272 P.3d at 56–57 (citing *Bearden*, 461 U.S. at 668).

394. *Cook*, 272 P.3d at 57.

395. *Id.* (citing *Lee*, 31 P.3d at 999).

396. *Cook*, 272 P.3d at 57.

397. *Id.* (citing *Lee*, 31 P.3d at 1002).

398. *Cook*, 272 P.3d at 57 (citations omitted).

his sentence conditions frustrated the purpose of his suspended sentence—rehabilitation—because he was still determined to be an "extremely dangerous sex offender . . . in need of the highest level of supervision."[399] Since Cook could present no evidence that his failure to satisfy the conditions was in any way attributable to the State, the *Lee* exception did not apply, and the district court did not abuse its discretion by revoking his suspended sentence.[400]

Practitioners should be aware of *Cook* and the possible implications for revocation of suspended sentences. *Cook* involved a failure to meet conditions over which the State had final approval, such as housing and treatment locations. Despite the fact that the State refused to accept options Cook's probation officer had approved, the Court did not identify this as a "fault of the State" pursuant to the *Lee* exception. Instead, the Court refused to conduct a fault-based analysis when the violation of conditions relates to "rehabilitation or protection of the public." It remains to be seen what conditions would not fall under such a wide umbrella.

—Fallon Stanton

X. *STATE V. COVINGTON*[401]

In *State v. Covington*, the Montana Supreme Court determined the Montana Constitution does not require a jury to make a factual determination that a prior conviction existed before it is then used to enhance a defendant's sentence.[402] The Court affirmed the district court's decision to sentence defendant Richard Covington to life without parole based on his prior convictions.[403] In doing so, the Court outlined the burden a defendant must meet to establish that the Montana Constitution provides broader protection for a particular right than that provided under the United States Constitution.[404] The Court also upheld the district court's decision to deny Covington's motion to suppress a binder and notebooks seized by the police.[405]

In April 2007, a man wearing a dark mask and jacket held a knife to a woman and stole her purse as she walked to her car after work.[406] Witnesses reported seeing the man, later determined to be Richard Covington, enter the Billings Brewpub. The Billings Police Department recovered a

399. *Id.*
400. *Id.* at 57–58.
401. *State v. Covington*, 272 P.3d 43 (Mont. 2012).
402. *Id.* at 48.
403. *Id.* at 45–46, 48, 49.
404. *Id.* at 47.
405. *Id.* at 49.
406. *Id.* at 44–45.

number of items related to the robbery from the Brewpub bathroom, including a makeshift pantyhose mask, a knife, handcuffs, and pepper spray.[407]

After conducting a DNA test on the pantyhose, the police were able to link Covington to the crime and sought a search warrant for his residence to locate further evidence, including specific items from the robbery such as unique postage stamps and possible pawn receipts.[408] Upon searching Covington's home, the police seized items related to the robbery and located a binder and notebooks containing information relevant to a contemporaneous homicide investigation in which Covington was a person of interest.[409] The police later seized the binders and notebooks under a second search warrant.[410]

Covington was charged with several offenses, including robbery and homicide.[411] The district court denied Covington's motion to have the binder and notebooks suppressed.[412] The jury convicted Covington on all charges.[413] At sentencing, the district court noted that Covington had been convicted of robbery in 1981 and 2009.[414] Montana Code Annotated § 46–18–219 requires a court to give a life sentence without parole to a defendant sentenced for certain violent felonies—including robbery—if the defendant has two previous violent felony convictions.[415] Thus, the district court issued a life sentence without a possibility of parole based on Covington's two previous robbery convictions.[416]

On appeal, the Montana Supreme Court first concluded the district court did not err when it issued a life sentence without the possibility of parole.[417] In *Almendarez-Torres v. United States*,[418] the United States Supreme Court held a court may determine a prior conviction exists in order to enhance a defendant's sentence beyond the statutory maximum without infringing on a defendant's Sixth Amendment right to a jury trial.[419] First, Covington argued that more recent decisions have eroded the Supreme Court's holding in *Almendarez-Torres*.[420] Covington primarily relied on

407. *Covington*, 272 P.3d at 45.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.*
413. *Covington*, 272 P.3d at 45.
414. *Id.*
415. Mont. Code Ann. § 46–18–219 (2011).
416. *Covington*, 272 P.3d at 45–46.
417. *Id.* at 48.
418. *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998).
419. *Id.* at 243–244.
420. *Covington*, 272 P.3d at 46.

Justice Thomas' concurrence in *Apprendi v. New Jersey*,[421] in which Justice Thomas stated *Almendarez-Torres* was incorrectly decided.[422] Although Covington raised *Apprendi* to call into doubt the *Almendarez-Torres* ruling, he conceded that *Almendarez-Torres* remains good law.[423] Failing in his first contention, Covington went on to argue Article II, sections 24 and 26 of the Montana Constitution provide a broader level of protection than the Sixth Amendment, requiring a jury to determine the existence of a prior conviction before that conviction may be used to enhance a defendant's sentence beyond the statutory maximum.[424]

Although the Montana Constitution can provide broader protection than the United States Constitution,[425] the Court determined a defendant must establish "sound and articulable reasons" that the Montana Constitution provides greater protection for the particular right at issue.[426] The Court found such reasons may be established if a defendant can demonstrate: 1) unique textual language within the Montana Constitution dictating enhanced protection;[427] 2) evidence of historical intent to provide broader protection;[428] or 3) evidence that the right in question can only be read in conjunction with other rights that are distinctly Montanan.[429] The Court will only undertake this state constitutional analysis when the defendant demonstrates the existence of one or more of these factors.[430]

In *Woirhaye v. Montana Fourth Judicial District Court*,[431] the Montana Supreme Court determined the Montana Constitution provides an enhanced right to a jury trial in at least one circumstance.[432] The defendant in *Woirhaye* challenged a statute limiting a defendant charged with a misdemeanor and tried in justice court to only one jury trial.[433] The Court found this violated an individual's right to a jury trial under the Montana Constitu-

421. *Apprendi v. N.J.*, 530 U.S. 466 (2000).

422. *Covington*, 272 P.3d at 46 (citing *Apprendi*, 530 U.S. at 520 (Thomas, J. concurring)).

423. *Covington*, 272 P.3d at 46–47.

424. *Id.* at 47.

425. *Id.* (citing *State v. Hardaway*, 36 P.3d 900, 909 (Mont. 2001)).

426. *Covington*, 272 P.3d at 47 (citing *State v. Rosling*, 180 P.3d 1102, 1117 (Mont. 2008)).

427. *Covington*, 272 P.3d at 47 (citing *State v. Ellis*, 210 P.3d 144, 148 (Mont. 2009) (noting an enhanced right to privacy exists in the text of the Montana Constitution)).

428. *Covington*, 272 P.3d at 47 (citing *State v. Goetz*, 191 P.3d 489, 499–500 (Mont. 2008) (finding the Montana Constitution provides greater protection from electronic monitoring based on fear of technology's infringement on individual privacy expressed by delegates in the 1972 Constitutional Convention records)).

429. *Covington*, 272 P.3d at 47 (citing *State v. Bullock*, 901 P.2d 61, 75 (1995) (finding the Montana Constitution provides greater protection against illegal searches and seizures because Article II, section 11 must be read in conjunction with the privacy rights included under Article II, section 10)).

430. *Covington*, 272 P.3d at 47.

431. *Woirhaye v. Mont. Fourth Jud. Dist. Ct.*, 972 P.2d 800 (Mont. 1998).

432. *Id.* at 802–803.

433. *Id.* at 800–801.

tion.[434] In finding the Montana Constitution provided broader protection than the Sixth Amendment, the Court examined the history and text of the Montana Constitution as it pertained to this particular right.[435] The Court found that the delegates at the 1972 Constitutional Convention expressed a desire for greater jury trial rights for misdemeanor defendants and that the text of the Montana Constitution guarantees "an absolute right not to be convicted of a misdemeanor by less than a unanimous jury."[436]

In *Covington*, the Court distinguished *Woirhaye* by reasoning that Covington failed to provide any reason that the Montana Constitution provides broader protection for jury trials regarding the factual determination of prior convictions than those provided under the United States Constitution as determined in *Almendarez-Torres*.[437] The Court also noted Covington failed to make an argument under any of the "sound and articulable reasons" previously outlined.[438] Thus, the Court affirmed the decision of the district court and upheld Covington's sentence.[439]

The Court also affirmed the district court's denial of Covington's motion to suppress the binder and notebooks seized under the second search warrant.[440] As part of their initial search of Covington's residence, officers reviewed a binder and notebooks they believed could contain specific evidence linking him to the April robbery, including stamps stolen from the victim's purse and pawn receipts showing Covington had possession of other items recovered after the robbery.[441] The Court agreed with the district court that the "remaining contents of the binder and notebooks became subject to plain view during the officer's [sic] authorized search for the stamps and receipts[,]" giving officers sufficient probable cause for a second warrant to seize these items.[442]

Justice Cotter concurred with the Court's judgment and wrote a separate opinion in which Justice Nelson joined. Justice Cotter argued against the necessity of the extensive analysis performed by the Court on the first issue.[443] Justice Cotter quoted the United States Supreme Court's *Blakely v. Washington*[444] opinion, where it held that "*[o]ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the pre-

434. *Id.* at 803.
435. *Id.* at 802.
436. *Id.* at 802.
437. *Covington*, 272 P.3d at 48.
438. *Id.*
439. *Id.* at 49.
440. *Id.*
441. *Id.* at 45.
442. *Id.* at 49.
443. *Covington*, 272 P.3d at 49 (Cotter & Nelson, JJ., concurring).
444. *Blakely v. Wash.*, 542 U.S. 296 (2004).

scribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt . . . ."[445] Justice Cotter pointed out the Montana Supreme Court previously followed *Blakely* in its holding in *State v. Vaughn*.[446] According to Justice Cotter, Covington did not overcome the holdings of *Blakely* or *Vaughn* because he failed to argue the district court's findings of his two prior robbery convictions were erroneous and did not make an argument that a jury determination of his convictions was constitutionally necessary.[447]

Ultimately, Montana practitioners should take note of the Court's decision in *Covington* as it clearly demonstrates the Court will consider whether or not the Montana Constitution provides broader protection for a particular right than that provided under the United States Constitution only if the defendant provides "sound and articulable reasons."[448] Additionally, it is important for a defendant to realize a court can determine, as a matter of law, the existence of prior convictions in order to enhance his or her sentence beyond the statutory maximum.[449]

—Samantha Stephens

XI. *PATTERSON ENTERPRISES, INC. V. JOHNSON*[450]

In *Patterson Enterprises, Inc. v. Johnson*, the Montana Supreme Court held the defense of assumption of risk may be used in cases involving voluntary participation in an abnormally dangerous activity.[451] In doing so, the Court declined to extend the subjective knowledge standard applied to products liability cases.[452] The Court clarified that both the law and legal principles of strict products liability do not necessarily apply to cases involving abnormally dangerous activities.[453]

In the fall of 2006, private landowners hired Patterson Enterprises, Inc. ("Patterson") to construct a road.[454] Due to the mountainous terrain, Patterson needed to first drill and blast rock outcroppings for the planned road.[455] Having no personnel who were trained or knowledgeable in blasting, Patter-

445. *Covington*, 272 P.3d at 49 (emphasis in original) (quoting *Blakely*, 542 U.S. at 301 (internal citation omitted)).

446. *Covington*, 272 P.3d at 49 (citing *State v. Vaughn*, 164 P.3d 873, 883–884 (Mont. 2007), *overruled in part on other grounds*, *Whitlow v. State*, 183 P.3d 861, 866–867, n. 4 (Mont. 2008)).

447. *Covington*, 272 P.3d at 49.

448. *Id.* at 47 (majority).

449. *Id.* at 48.

450. *Patterson Enters., Inc. v. Johnson*, 272 P.3d 93 (Mont. 2012).

451. *Id.* at 99.

452. *Id.* at 97 (citing *Lutz v. Natl. Crane Corp*., 884 P.2d 455, 461 (Mont. 1994)).

453. *Patterson*, 272 P.3d at 100–101.

454. *Id.* at 94.

455. *Id.* at 94–95.

son contracted with Archie Johnson Contracting ("AJC") to conduct the blasting.[456] Patterson's project superintendent, Adam Pummill ("Pummill"), worked as the excavator operator to remove blasted material.[457]

On February 26, 2007, AJC blasted 500 yards of rock, which created an overhang that concerned both AJC and Patterson personnel.[458] Archie Johnson met with the project owners to discuss "[h]ow to deal with the overhang," although it is unclear if AJC made any attempts to bring the overhang down.[459] On March 1, 2007, AJC's driller, Henry Bentley ("Bentley"), noticed Pummill excavating the blasted rock near the overhang; yet, Bentley failed to warn Pummill of any danger.[460] More than an hour later, Bentley noticed Pummill excavating directly under the overhang, so he "signaled for Pummill to exit the excavator."[461] Almost immediately, the overhang collapsed and crushed the excavator; Pummill was not harmed.[462] Pummill testified that prior to the incident he discussed the overhang's hazards with the blasters.[463] Pummill further testified it would have been very dangerous to reach and properly clear the debris from underneath the overhang.[464]

After AJC denied liability for the damaged excavator, Patterson filed suit on September 11, 2007, claiming negligence, breach of contract, breach of the implied covenant of good faith and fair dealing, and strict liability.[465] AJC counterclaimed for breach of contract and sought money still owed for its performance.[466] In addition, AJC asserted the affirmative defenses of contributory negligence and assumption of risk.[467]

The district court denied Patterson's motion for summary judgment on strict liability and AJC's motion for partial summary judgment for its affirmative defenses.[468] The court found there were questions of fact for a jury to decide based on "strict liability under the abnormally dangerous activity legal theory" and the delay between the blasting and when the damage to the excavator occurred.[469] At trial, the jury concluded that the excavator damage was caused by AJC's blasting, that Patterson and its employ-

456. *Id.* at 95.
457. *Id.*
458. *Id.*
459. *Patterson*, 272 P.3d at 95.
460. *Id.*
461. *Id.*
462. *Id.*
463. *Id.* at 99.
464. *Id.*
465. *Patterson*, 272 P.3d at 95.
466. *Id.*
467. *Id.*
468. *Id.* at 96.
469. *Id.*

ees assumed the risk of harm, and that Patterson was 49% and AJC was 51% at fault for the incident.[470] Patterson was awarded $50,000 in damages and AJC was awarded damages on its counterclaim in the amount of $19,255.16.[471] Patterson appealed, and the Montana Supreme Court affirmed.[472]

On appeal, Patterson argued that AJC should have been held strictly liable for all damages resulting from the creation of a dangerous condition and that Pummill lacked the knowledge to properly assess the condition.[473] AJC countered that there was sufficient evidence to show Pummill knew about the overhang's dangers and that he assumed the risk while underneath the overhang.[474]

Despite Patterson's urging, the Montana Supreme Court declined to extend its holding from *Lutz v. National Crane Corporation*,[475] which established a subjective standard for assumption of risk in product liability cases.[476] In *Lutz*, the defendant's crane cable operator recognized the life-threatening hazard of overhead power lines that he contacted.[477] The *Lutz* Court determined the assumption of risk defense did not apply because Lutz inadvertently came into contact with the power lines.[478] The *Patterson* Court held *Lutz* was distinguishable because Pummill intentionally excavated beneath the overhang and knew the dangers associated with doing so.[479] Pummill testified about his discussion with the blasters regarding the overhang and "[e]xpressed [his] concerns that [he], also, felt it was very hazardous."[480]

Supporting its holding, the Court cited *Matkovic v. Shell Oil Company*,[481] where it extended the defense of assumption of risk to strict liability based on abnormally dangerous activities.[482] The *Matkovic* Court saw "[n]o reason to apply a different standard to strict liability" that arises from an abnormally dangerous activity or from a defective product.[483] The *Patterson* Court then discussed *Restatement (Second) of Torts* § 523 comment d, which provides that a person who voluntarily participates in an abnor-

470. *Id.*
471. *Patterson*, 272 P.3d at 96.
472. *Id.* at 96, 101.
473. *Id.* at 95–96.
474. *Id.* at 97.
475. *Lutz*, 884 P.2d 455.
476. *Patterson*, 272 P.3d at 98 (citing *Lutz*, 884 P.2d at 457).
477. *Patterson*, 272 P.3d at 97 (citing *Lutz*, 884 P.2d at 457).
478. *Patterson*, 272 P.3d at 98 (citing *Lutz*, 884 P.2d at 457).
479. *Patterson*, 272 P.3d at 98.
480. *Id.* at 99.
481. *Matkovic v. Shell Oil Co.*, 707 P.2d 2 (Mont. 1985).
482. *Patterson*, 272 P.3d at 99 (citing *Matkovic*, 707 P.2d at 4).
483. *Patterson*, 272 P.3d at 99 (citing *Matkovic*, 707 P.2d at 2).

mally dangerous activity assumes the risk.[484] Although the Court conceded § 523 was not effectively raised during trial, it nevertheless held that comment d of § 523 correctly sets forth the standard establishing when assumption of risk applies to abnormally dangerous activities.[485] The Court also held the district court did not err when it modified the jury instruction regarding assumption of risk by referencing a condition, rather than a product.[486] Finally, the majority disagreed with both the dissent's and Patterson's position that strict products liability principles govern abnormally dangerous activities under such facts.[487]

In his dissent, Justice Wheat argued that the two statutorily-defined elements of the assumption of risk defense, as applied in *Lutz*, were not met.[488] Pursuant to Montana Code Annotated § 27–1–719(5), a defendant asserting the assumption of risk defense must first prove "[t]he injured party discovered the defect, or the defect was open and obvious . . . ."[489] Second, a defendant must prove "[t]he injured party unreasonably made use of the product (or condition)."[490] Justice Wheat argued Pummill did not understand the danger of the overhang because he lacked both specialized knowledge and experience in blasting.[491] Furthermore, Justice Wheat deemed Pummill's work under the overhang reasonable.[492]

Patterson clarified when the assumption of risk defense may be raised in strict liability cases when abnormally dangerous conditions exist. To prove assumption of risk, the Montana practitioner must first demonstrate the injured party was aware of the danger. Second, the Montana practitioner must show the injured party voluntarily came into contact with the danger. Finally, the Montana practitioner should recognize *Patterson* indicates that strict products liability law is likely to have limited future applicability in cases involving abnormally dangerous conditions.

—Carina Wilmot

484. *Patterson*, 272 P.3d at 99 (citing *Restatement (Second) of Torts* § 523 cmt. d (1977)).
485. *Patterson*, 272 P.3d at 99.
486. *Id.* at 100.
487. *Id.* at 100–101.
488. *Id.* at 102 (Wheat, J., dissenting).
489. *Id.* at 101 (citing Mont. Code Ann. § 27–1–719(5) (2011)).
490. *Id.*
491. *Patterson*, 272 P.3d at 102.
492. *Id.*