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***Bassett v. Lamantia*: Deciding the Scope or Viability of Montana's Public Duty Doctrine**

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**PRECAP; *Bassett v. Lamantia*: Deciding the Scope or Viability of
Montana’s Public Duty Doctrine**

Rebecca Stursberg

Oral arguments are scheduled for Wednesday, November 29, 2017, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, in Helena, Montana.

I. INTRODUCTION

This case bears on an ongoing debate regarding the constitutionality of Montana’s public duty doctrine. Plaintiff Robert Bassett (Bassett) sued Defendants Billings City Police Officer Paul Lamantia (Lamantia) and City of Billings (City) after Lamantia mistook Bassett for a fleeing suspect, tackled him to the ground, and tore his rotator cuff.¹ Defendants have asserted that they are shielded from liability by the public duty doctrine.² In response, Bassett has asked this Court to create an exception to the doctrine when government defendants are the direct and sole cause of a plaintiff’s injury.³

Predicated on the proposition that “a duty owed to all is a duty owed to none,”⁴ the public duty doctrine immunizes government actors from liability to individual plaintiffs when, barring any other special relationship between the parties, the duty the government owes is a duty to the public at large and not to individual members of the public.⁵ When applied, the doctrine prevents individual plaintiffs from establishing a prima facie negligence claim by negating the legal duty element; absent any legal duty, a negligence claim necessarily fails.⁶ Application of the

¹ Order Certifying Question to the Montana Supreme Court at 3–4, *Bassett v. Lamantia*, <https://perma.cc/N4G4-FXLD> (<https://supremecourtdocket.mt.gov/view/OP%2017-0322%20Order-Certifying%20Question%20--%20Rulings%20-%20Other%20Courts?id=%7B2058605C-0000-CD1F-98A0-1562855BD401%7D>) (9th Cir. May 30, 2017) (D.C. No. 1:13-cv-00091-SEH).

² Answer Brief of Defendant-Appellee Paul Lamantia, *Bassett v. Lamantia*, <https://perma.cc/4ZJ5-NDR8> (<https://supremecourtdocket.mt.gov/view/OP%2017-0322%20Appellee's%20Response%20--%20Brief?id=%7B70C90F5E-0000-C812-8E65-E1D329CDE577%7D>) (Mont. Aug. 23, 2017) (OP 17-03222); Defendant-Appellee City of Billings’ Answer Brief, <https://perma.cc/PE89-FNBD> (<https://supremecourtdocket.mt.gov/view/OP%2017-0322%20Appellee's%20Response%20--%20Brief?id=%7BA037115E-0000-CD1D-98A1-1523FA38EB5C%7D>) (Mont. Aug. 23, 2017) (OP 17-03222).

³ Plaintiff-Appellant’s Opening Brief, *Bassett v. Lamantia*, <https://perma.cc/3SWP-3MWN> (<https://supremecourtdocket.mt.gov/view/OP%2017-0322%20Certified%20Question%20-%20Opening%20--%20Brief?id=%7B8050515D-0000-CB3D-B00F-02E7514EDFCD%7D>) (Mont. Jul. 17, 2017) (OP 17-03222).

⁴ *Nelson v. Driscoll*, 983 P.2d 972, 977 (Mont. 1999).

⁵ *Massee v. Thompson*, 90 P.2d 394, 403 (Mont. 2004).

⁶ Plaintiff-Appellant’s Opening Brief, *supra* note 3, at 5.

public duty doctrine has therefore functioned to deny plaintiffs redress for harm suffered as a result of government negligence.⁷

Opponents of the public duty doctrine, retired justices Nelson and Cotter chief among them, submit that it directly violates Article II, section 18, of the Montana Constitution,⁸ which provides that:

The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature.⁹

The delegates to the 1972 Montana Constitutional Convention deliberately eliminated sovereign immunity, which they found repugnant to the fundamental premise of American justice.¹⁰ The delegates sought to ensure fair and just redress, regardless of whether the injuring party was a private citizen or a governmental agency.¹¹ Opponents contend that the Court's adoption and application of the public duty doctrine has revived governmental tort immunity in direct contravention of Article II, section 18, infringing both the constitutional right of persons to sue a governmental entity for injury to person or property, and the province of the Legislature.¹²

Despite this continuing debate regarding the viability of the public duty doctrine, including vocal opposition from recently retired justices of this Court, Bassett declines to challenge its constitutionality in his briefs. Instead, he asks the Court to recognize a new exception to the doctrine.¹³ As a result, the public duty doctrine stands to survive challenges by amici in light of judicial custom to address and decide only those issues raised by the parties.¹⁴ Ultimately, therefore, the immediate fate of the public duty doctrine rests in the Court's hands.

⁷ *Massee*, 90 P.3d at 407 (Nelson, J., dissenting).

⁸ *Amicus Curiae* Brief of the Montana Trial Lawyers Association at 6-8, *Bassett v. Lamantia*, <https://perma.cc/9UFM-K7Y5> (<https://supremecourtdocket.mt.gov/view/OP%2017-0322%20Amicus%20-%20Brief?id={00A3515D-0000-CF2B-8743-530DAD328E31}>) (Mont. Jul. 17, 2017) (OP 17-0322); e.g. *Massee*, 90 P.3d 394 (Nelson, J., dissenting); *Gonzales v. City of Bozeman*, 217 P.3d 487 (Mont. Aug. 2009) (Leaphart, J., concurring and dissenting) (Cotter, J., concurring and dissenting) (Nelson, J., dissenting).

⁹ MONT. CONST. art. II, § 18.

¹⁰ *Massee*, 90 P.3d at 408-09 (Nelson, J., dissenting).

¹¹ *Id.*

¹² *Id.* at 412.

¹³ Plaintiff-Appellant's Opening Brief, *supra* note 3, at 7; Plaintiff-Appellant's Reply Brief at 6, *Bassett v. Lamantia*, <https://perma.cc/23HH-YFNV> (<https://supremecourtdocket.mt.gov/view/OP%2017-0322%20Certified%20Question%20-%20Reply%20-%20Brief?id=%7BE050595E-0000-C816-8199-CB07CA9F3AC2%7D>) (Sept. 6, 2017) (OP 17-0322).

¹⁴ *Gonzales*, 217 P.3d at 495-96 (Leaphart, J., concurring and dissenting) (Cotter, J., concurring and dissenting).

II. FACTUAL AND PROCEDURAL BACKGROUND

While responding to a call about a neighborhood disturbance, Lamantia began on-foot pursuit of an unidentified male suspect.¹⁵ The chase took Lamantia through Bassett's backyard, and after hearing some commotion, Bassett emerged from his house to investigate.¹⁶ Uncertain as to Bassett's identity and unable to see well in the dark, Lamantia tackled Bassett to the ground.¹⁷ As a result, Bassett sustained a torn rotator cuff.¹⁸ The fleeing suspect was never apprehended.¹⁹

Bassett filed suit against Lamantia and the City in state district court. He alleged a state law claim of negligence against Lamantia for failing to exercise reasonable care in the performance of his duties, as well as a claim under 42 U.S.C. § 1983, the federal statute that allows a civil action against the government for deprivation of civil rights.²⁰ Defendants removed the case to federal district court, and the judge granted their motions for summary judgment on both claims.²¹ Concerning the negligence claim, the court held that Defendants were shielded from liability by the public duty doctrine.²²

Bassett appealed the dismissal of the negligence claim to the Ninth Circuit Court of Appeals.²³ Finding no controlling precedent of this Court regarding the issue raised on appeal, the Ninth Circuit certified the following question for resolution: whether, under Montana law, the public duty doctrine shields a law enforcement officer from liability for negligence where the officer is the direct and sole cause of the harm suffered by the plaintiff.²⁴

III. SUMMARY OF ARGUMENTS

A. Plaintiff-Appellant Bassett

Bassett urges the Court to narrow the scope of the public duty doctrine by carving out an exception to the rule for instances in which an officer is the direct and sole cause of harm to the plaintiff.²⁵ As the Court has articulated it, the public duty doctrine expresses the policy that a police officer's duty to protect and preserve the peace is owed to the public at

¹⁵ Order Certifying Question to the Montana Supreme Court, *supra* note 1, at 3–4.

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*; 42 U.S.C. § 1983 (2017).

²¹ Order Certifying Question to the Montana Supreme Court, *supra* note 1, at 4.

²² *Id.*

²³ *Id.* at 5.

²⁴ *Id.* at 7.

²⁵ Plaintiff-Appellant's Opening Brief, *supra* note 3, at 4.

large and not to individual members of the public.²⁶ Yet, Bassett argues, Montana courts have never applied the public duty doctrine where a law enforcement officer is the sole cause of the plaintiff's injury; rather, the doctrine shields law enforcement from liability for failing to protect the plaintiff from harm caused by a third party or outside source.²⁷

Bassett points to other jurisdictions that have reached this same conclusion and have explicitly held that the public duty doctrine does not apply where officers are the sole cause of a plaintiff's harm.²⁸ For example, Bassett cites *Moses v. Young*,²⁹ in which a police officer accidentally struck and killed a motorcyclist by negligently merging into his lane while in pursuit of another speeding driver.³⁰ In that case, the Court of Appeals of North Carolina held that the public duty doctrine cannot be used to shield a defendant from acts directly causing injury or death.³¹ Bassett urges the Court to recognize a similar exception to the public duty doctrine and to use traditional negligence principles in deciding this case.³²

Crucially, Bassett does not challenge the constitutionality of the public duty doctrine. Indeed, he explicitly avoids such a challenge in his reply brief:

Bassett does not argue that governments should be liable when they fail to protect a member of the public from harm resulting from a third party, or from some outside force. Bassett's only request is that when an innocent bystander, who was standing in his own yard, is negligently injured by a police officer after direct physical contact, that the government and the officer accept responsibility for that injury.³³

Instead of asking the Court to abolish the public duty doctrine, Bassett requests that it carve out an additional exception to the rule.

B. Defendant-Appellees

1. Defendant-Appellee Lamantia

Lamantia first disputes the characterization—proffered by both Bassett and the Ninth Circuit—of Lamantia as the sole cause of Bassett's

²⁶ *Nelson*, 983 P.2d at 977.

²⁷ Plaintiff-Appellant's Opening Brief, *supra* note 3, at 6–8 (citing *Nelson*, 983 P.2d 972; *Latray v. City of Havre*, 999 P.2d 1010 (Mont. 2000); *Prindel v. Ravalli Cty.*, 133 P.3d 165 (Mont. 2006); *Gonzales v. City of Bozeman*, 217 P.3d 487 (Mont. 2009)).

²⁸ Plaintiff-Appellant's Opening Brief, *supra* note 3, at 6–8 (citing *Moses v. Young*, 561 S.E.2d 332, 334 (N.C. 2002); *Liser v. Smith*, 254 F.Supp.2d 89, 102 (D.D.C. 2003); *Jones v. State*, 38 A.3d 333, 347 (Md. 2012)).

²⁹ 561 S.E.2d 332 (N.C. 2002).

³⁰ *Id.* at 333.

³¹ *Id.* at 334.

³² Plaintiff-Appellant's Opening Brief, *supra* note 3, at 10-11.

³³ Plaintiff-Appellant's Reply Brief, *supra* note 13, at 6.

harm. At the very least, he argues, the unknown male suspect and Bassett himself were comparatively at fault.³⁴

The thrust of Lamantia's argument presumes that the public duty doctrine is sound and that his conduct falls squarely within its ambit. Specifically, Lamantia cites the Court's holding that where the government's conduct constitutes a uniquely governmental activity, it is shielded from liability by the public duty doctrine.³⁵ He then argues that he was performing a quintessentially unique governmental activity when he encountered Bassett—investigating a potential crime—and is therefore protected by the public duty doctrine.³⁶ To bolster his argument, Lamantia further contends that, notwithstanding recent decisions limiting the doctrine's sweep, the Court has reaffirmed its application to circumstances involving law enforcement.³⁷

Next, Lamantia refutes the claim that the public duty doctrine only applies where a plaintiff's harm is caused by a third party, rather than a government actor.³⁸ Whether the doctrine applies hinges not on the distinction between direct and third-party harm, but on that between a duty to an individual and a duty to the public at large.³⁹

Lamantia also challenges Bassett's reliance upon precedent from other jurisdictions.⁴⁰ Finally, he points out that the constitutionality of the public duty doctrine was not raised by the parties, and is therefore not at issue.⁴¹

2. *Defendant-Appellee City of Billings*

The City reiterates many of Lamantia's arguments. It further argues that, contrary to Bassett's assertions, the Court has applied the public duty doctrine where the government is the direct and sole cause of the plaintiff's injuries.⁴² To support its proposition, the City cites to *Eklund v. Trost*⁴³ and *Eves v. Anaconda-Deer Lodge County*.⁴⁴ In *Eklund*, an incarcerated youth escaped a detention center and stole his uncle's vehicle.⁴⁵ During the ensuing high-speed police chase, the youth drove the stolen car into the plaintiff, causing severe injuries.⁴⁶ In *Eves*, a young man committed himself to the Montana State Hospital, but then left the hospital

³⁴ Answer Brief of Defendant-Appellee Paul Lamantia, *supra* note 2, at 6–7.

³⁵ *Id.* at 10–11.

³⁶ *Id.*

³⁷ *Id.* at 9.

³⁸ *Id.* at 13.

³⁹ *Id.*

⁴⁰ *Id.* at 16–17.

⁴¹ *Id.* at 25–26.

⁴² Defendant-Appellee City of Billings' Answer Brief, *supra* note 2, at 4.

⁴³ 151 P.3d 870 (Mont. 2006).

⁴⁴ 114 P. 3d 1037 (Mont. 2005).

⁴⁵ *Eklund*, 151 P.3d at 875.

⁴⁶ *Id.*

grounds without telling anyone and wandered into the countryside.⁴⁷ Despite being alerted to the disappearance, neither police nor hospital staff initiated a search, and the young man subsequently died from exposure.⁴⁸ The City suggests that the government defendants were the direct and sole causes of the plaintiffs' injuries in both *Eklund* and *Eves*.⁴⁹ Therefore, the Court's consideration of the public duty doctrine in those cases justifies its application in the case at bar.⁵⁰

The City also urges the Court to refrain from further narrowing the scope of the public duty doctrine, as Bassett has asked it to do.⁵¹ The Court already recognizes an exception to the public duty doctrine where a special relationship exists between a governmental defendant and individual plaintiff.⁵² A special relationship may arise in one of four circumstances: (1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; (4) under certain circumstances, when an agency has actual custody of the plaintiff or a third person who causes harm to the plaintiff.⁵³ The City contends that Bassett never attempts to argue the existence of a special relationship in the instant case, and furthermore, that none applies.⁵⁴

In the same vein as its co-defendant, the City asks the Court to confine its analysis to the certified question, and refrain from addressing the constitutionality of the public duty doctrine.⁵⁵

C. *Amici Curiae*

While Bassett declines to challenge the viability of the public duty doctrine, amici flesh out this issue in detail in their briefs.

1. *Appellant's Amicus Montana Trial Lawyers Association (MTLA)*

MTLA attacks the public duty doctrine as unconstitutional. Because it provides governmental immunity, it defies Article II, section 18, of the Montana Constitution, which abrogated sovereign immunity.⁵⁶ MTLA further challenges the two policy rationales traditionally advanced

⁴⁷ *Eves*, 114 P.3d at 1038.

⁴⁸ *Id.*

⁴⁹ Defendant-Appellee City of Billings' Answer Brief, *supra* note 2, at 4.

⁵⁰ *Id.* at 4–5, 11.

⁵¹ *Id.* at 3, 6.

⁵² *Id.* at 6.

⁵³ *Id.*; *Nelson*, 983 P.2d at 978.

⁵⁴ Defendant-Appellee City of Billings' Answer Brief, *supra* note 2, at 6–7, 11.

⁵⁵ *Id.* at 20–21.

⁵⁶ *Amicus Curiae* Brief of the Montana Trial Lawyers Association, *supra* note 8, at 6–8.

in support of public duty doctrine: first, that it insulates against excessive lawsuits and the immense attendant financial burden; second, that the doctrine ensures the government can perform its duties without interference.⁵⁷ MTLA counters that the financial burden can be addressed through insurance, and is further mitigated by existing statutory limitations on government tort liability.⁵⁸ MTLA also argues that traditional tort principles provide sufficient tools for assessing a government's legal duty and should therefore be used to decide this case.⁵⁹

2. *Defendants' Amici MCAA, MSPOA, MPPA, and MACOP*

Amici MCAA, MSPOA, MPPA, and MACOP, respond that MTLA seeks relief not sought by the parties.⁶⁰ Should the Court address the viability of the public duty doctrine, it would break with its own practice by exceeding the scope of the certified question.⁶¹

3. *Defendants' Amici Montana League of Cities and Towns, International Municipal Lawyers association, and Montana Association of Counties*

Amici Montana League of Cities and Towns, International Municipal Lawyers Association, and Montana Association of Counties, articulate the purposes of the public duty doctrine and the potential ramifications of further limiting or destroying it.⁶² They raise the argument that the public duty doctrine is a vital part of Montana law which allows governmental entities to more effectively provide critical services to their residents.⁶³ Moreover, amici contend, the public duty doctrine serves as a necessary bulwark against potentially unlimited liability; without it, Montana municipalities would be mired in constant litigation, and negligence lawsuits would consume the government's finite resources.⁶⁴ Finally, amici argue, any statutory limitations on liability are grossly inadequate to curtail the financial detriment.⁶⁵

⁵⁷ *Id.* at 8.

⁵⁸ *Id.* at 8–9.

⁵⁹ *Id.* at 9.

⁶⁰ Brief of Amici MCAA, MSPOA, MPPA, and MACOP at 9–10, *Bassett v. Lamantia*, <https://perma.cc/BL9A-GGR4> (<https://supremecourtdocket.mt.gov/view/OP%2017-0322%20Amicus%20--%20Brief?id=%7BA00B165E-0000-C11C-A14B-94F360AC09C8%7D>) (Mont. Aug. 24, 2017) (OP 17-0322).

⁶¹ *Id.* at 10.

⁶² Brief of Amici the Montana League of Cities and Towns, International Municipal Lawyers Association, and Montana Association of Counties, *Bassett v. Lamantia*, <https://perma.cc/LJ9D-BTBX> (<https://supremecourtdocket.mt.gov/view/OP%2017-0322%20Amicus%20--%20Brief?id=%7B00BB1A5E-0000-C41D-B914-54B2728BF87D%7D>) (Mont. Aug. 25, 2017) (OP 17-0322).

⁶³ *Id.* at 13.

⁶⁴ *Id.* at 16.

⁶⁵ *Id.*

IV. ANALYSIS

A. Limiting the Public Duty Doctrine

Defendants correctly contend that the current exception to the public duty doctrine does not obtain under these facts. None of the four special relationships exists here, and Bassett makes no attempt to dispute this analysis.⁶⁶ Bassett does, however, make a strong case for a new exception. He accurately points out that Montana courts have never applied the public duty doctrine where a law enforcement officer is the sole cause of the plaintiff's injury, but rather exclusively to shield law enforcement from liability for failing to protect the plaintiff from a third party or outside source.⁶⁷

Defendants dispute this contention but strain the facts of the two cases they cite, *Eklund* and *Eves*, to fit their argument. In *Eklund*, unlike in the instant case, the plaintiff was injured by a third party, and not the government defendant.⁶⁸ In *Eves*, the plaintiff died from exposure to the elements, an outside source, after choosing to leave the hospital without informing any staff.⁶⁹ Therefore, while the government defendants were negligent in monitoring the plaintiff and in failing to search for him when he was reported missing, they were not the direct cause of Eves' injury. Furthermore, their conduct is better characterized as inaction, which is distinguishable from Defendant Lamantia's conduct in the case at bar. As a result, the City's argument that this Court has applied the public duty doctrine to shield a government defendant from liability where it is the sole cause of harm to the plaintiff does not find support in Montana's public duty doctrine jurisprudence.

Out-of-state decisions cited by Bassett can guide the Court in carving out the exception he requests. For instance, the facts of *Moses v. Young* are analogous to the facts in this case and, there, the North Carolina court determined that the public duty doctrine cannot immunize police officers who directly cause the plaintiff's injury.⁷⁰ It is worth noting that North Carolina's state constitution is silent on the issue of governmental tort immunity.⁷¹ Arguably, then, the holding of the *Moses* Court carries even more force in Montana, where the state constitution expressly abolishes sovereign immunity.

⁶⁶ Defendant-Appellee City of Billings' Answer Brief, *supra* note 2, at 6–7, 11.

⁶⁷ See e.g. *Nelson*, 983 P.2d 972; *Massee*, 90 P.3d 394; *Eklund*, 151 P.3d 870; *Gonzales*, 217 P.3d 487.

⁶⁸ *Eklund*, 151 P.3d at 873.

⁶⁹ *Eves*, 114 P.3d at 1038.

⁷⁰ *Moses*, 561 S.E.2d 332.

⁷¹ See generally N.C. CONST.

Moreover, there are broader policy reasons not mentioned in the briefs to support the requested exception to the public duty doctrine. As Lamantia points out, this action arises out of a fairly innocent case of mistaken identity, and caused relatively minor damages to the plaintiff.⁷² But as we are painfully aware today, many encounters between law enforcement and citizens do not end so innocently.

Ultimately, given the Court's record on public duty doctrine cases, it seems doubtful that it will carve out Bassett's exception. True, the Court has previously limited the scope of the public duty doctrine, holding that it should not be applied simply because the defendant is a governmental entity.⁷³ However, the Court has consistently applied the doctrine where the defendant is a law enforcement officer. Here, not only is Lamantia a police officer, but he was also in the midst of pursuing a fleeing suspect, presumably to preserve and protect the peace, when he mistakenly tackled and injured Bassett. Shielding law enforcement officers from liability for conduct during the performance of their duties is precisely the kind of activity the doctrine—as fashioned over time by the Court—aims to protect. In these ways, the instant case seems an unlikely contender for the reform Bassett seeks.

In deciding the question presented, the Court might bear in mind the following statement made by MTLA in its amicus brief: “[t]his Court has previously held that ‘a law enforcement officer has no duty to protect a particular person absent a special relationship because the officer’s duty to protect and preserve the peace is owed to the public at large and not to individual members of the public.’ This Court has never, however, held that a law enforcement officer has no duty to refrain from negligently harming a person.”⁷⁴

B. *Abrogating the Public Duty Doctrine*

As a general rule, the Court considers briefs of *amici curiae* only insofar as they coincide with issues raised by the parties to the action.⁷⁵ Although the Court rarely departs from this rule, it will consider issues raised by amici when, for example, the impact is widespread, functions as the centerpiece of the problem, or is potentially dispositive.⁷⁶

The Court could overturn the public duty doctrine based on the arguments proffered by the Montana Trial Lawyers Association. Article II, section 18, of the Montana Constitution, provides that, absent legislative enactment, government defendants are liable for their negligent

⁷² Answer Brief of Defendant-Appellee Paul Lamantia, *supra* note 2, at 2.

⁷³ Gatlin-Johnson v. City of Miles City, 291 P.3d 1129, 1134 (2012).

⁷⁴ *Amicus Curiae* Brief of the Montana Trial Lawyers Association, *supra* note 8, at 4.

⁷⁵ Reichert v. State, 278 P.3d 455, 463-65 (Mont. 2012).

⁷⁶ *Id.*

acts.⁷⁷ This provision aims to ensure plaintiffs have legal recourse for injuries caused by government defendants.⁷⁸ The public duty doctrine is incompatible with Montana's Constitution. Although Bassett has not raised this challenge himself, as Defendants and their amici correctly indicate, the Court could make one of its rare exceptions and abolish the public duty doctrine.

V. CONCLUSION

Opponents of the public duty doctrine, including at least two retired justices, have laid the groundwork for parties to mount a constitutional challenge to it. Because the plaintiff in this case has declined to make such a challenge, the Court will have to decide whether to carve out an exception to the doctrine instead, namely, that it does not apply when the government is the direct and sole cause of a plaintiff's harm. Given the Court's prior public duty doctrine decisions, it seems likely that the Court will answer the certified question affirmatively.

⁷⁷ Lee C. Baxter, Note, *Gonzales v. City of Bozeman: The Public Duty Doctrine's Unconstitutional Treatment of Government Defendants in Tort Claims*, 72 Mont. L. Rev. 299, Summer 2011, at 309.

⁷⁸ *Id.*