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## PREVIEW; Childress v. Costco Wholesale Corp.: *Parasitic Emotional Distress – Will Montana Courts Soon be Flooded by Litigation over Hurt Feelings?*

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**PREVIEW; *Childress v. Costco Wholesale Corp.*: Parasitic Emotional Distress – Will Montana Courts Soon be Flooded by Litigation over Hurt Feelings?**

**Katrina Thorness\***

The United States Court of Appeals for the Ninth Circuit is scheduled to hear oral arguments on this matter on Friday, September 4, 2020, at 9 a.m., in Courtroom 3 on the 5th Floor of the William K. Nakamura Courthouse, Seattle, WA. Susan Moriarity Miltko will likely appear on behalf of the Appellant Costco Wholesale Corp. Quentin M. Rhoades will likely appear on behalf of the Appellees Randall and Claudia Childress.

**I. INTRODUCTION**

This case involves recovery for parasitic negligent infliction of emotional distress (“NIED”) damages. The question presented is whether a lower standard of review can apply to a parasitic NIED claim when its original host cause of action—an independent NIED claim—has been withdrawn.<sup>1</sup> This decision has the potential to overturn *Sacco v. High Country Independent Press, Inc.*,<sup>2</sup> where independent NIED claims are held to a serious or severe standard of proof.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

On September 24, 2016, Randall and Claudia Childress took their vehicle to the Missoula Costco Tire Center to have its tires rotated.<sup>3</sup> An unidentified male allegedly posed as their son, stole the vehicle, a loaded gun and documents containing the Childresses’ home address from the vehicle.<sup>4</sup> The thief abandoned the vehicle at a Muralt’s Travel Plaza where the Childresses found it unoccupied later that same day.<sup>5</sup> Due to fear of a thief having their home address and a loaded gun, the Childresses delayed returning to their home in Idaho by five days.<sup>6</sup> Randall Childress is a military veteran and experienced renewed post-traumatic stress disorder (“PTSD”) symptoms triggered by these events.<sup>7</sup> Claudia experienced sleeplessness, stress, fear, and nightmares.<sup>8</sup>

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<sup>1</sup> Opening Brief of Defendant-Appellant at \*10, *Childress v. Costco Wholesale Corp.*, (9th Cir. Sep. 3, 2019) (No. 19-35441, 19-35493) [hereinafter Appellant’s Brief].

<sup>2</sup> *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 421–422 (Mont. 1995).

<sup>3</sup> Trial Tr. Vol. 1, 254:12–13, *Childress v. Costco Wholesale Corp.*, (D. Mont. April 22, 2019) (No. 9:18-cv-00183-DWM) (Direct Examination of Claudia Childress).

<sup>4</sup> Trial Tr. Vol. 2, 304:9–12, *Childress v. Costco Wholesale Corp.*, (D. Mont. April 23, 2019) (No. 9:18-cv-00183-DWM).

<sup>5</sup> Trial Tr. Vol. 1, 267:1–5.

<sup>6</sup> Trial Tr. Vol. 2, 315:3–12.

<sup>7</sup> *Childress v. Costco Wholesale Corp.*, CV 18-183-M-DWM, 2019 WL 1455479, at \*4 (D. Mont. Apr. 2, 2019).

<sup>8</sup> *Id.*

During trial, the United States District Court for the District of Montana, Missoula Division, denied Costco's motion for summary judgment on emotional distress and permitted the Childresses to proceed with their NIED claims.<sup>9</sup> The district court instructed the jury to award parasitic emotional distress damages based upon personal property loss without an independent NIED claim and consider "[t]he mental, physical, and emotional pain and suffering experienced and that with reasonable probability will be experienced in the future."<sup>10</sup> However, the Childresses withdrew Randall's NIED claim during trial before it went to the jury.<sup>11</sup> Costco appealed to the Ninth Circuit on three issues: 1) the permissance of Claudia's parasitic NIED claim; 2) the admission of expert testimony beyond the scope of pretrial disclosures; and 3) the denial of evidence from the "May Offer" list.<sup>12</sup> The crux issue on appeal is the permissance of Claudia's NIED claim.

### III. SUMMARY OF THE ARGUMENTS

#### A. Defendant-Appellant Costco Wholesale Corp.'s Argument

Costco's main argument on appeal is that the district court violated Montana law by permitting Claudia's NIED claim because it was solely premised on personal property damage.<sup>13</sup> Under *Sacco v. High Country Independent Press, Inc.*,<sup>14</sup> independent causes of action exist for NIED claims and are subject to a serious or severe standard of review.<sup>15</sup> During trial, Costco argued that there is no Montana authority for property damage as the host cause of action for emotional distress claims.<sup>16</sup> Costco clarified that there are exceptions for real property, such as in bad faith cases.<sup>17</sup>

First, Costco argues that Montana law does not allow recovery for parasitic emotional distress when the distress arises from damage to personal property.<sup>18</sup> In *Sacco*, the Montana Supreme Court overturned a line of cases creating exceptions to the rule on property damage absent physical injury.<sup>19</sup> Costco relies on *Sacco's* review of these cases to

<sup>9</sup> *Id.* at \*5–6.

<sup>10</sup> Jury Instructions 15: 2–11, *Childress v. Costco Wholesale Corp.*, (D. Mont. 2019) (No. 9:18-cv-00183-DWM) ("If you find for the Childresses on their claim of negligence, you must determine the amount of money that will reasonably and fairly compensate them for any injury you find was caused by Costco. In determining the measure of damages, you should consider: The nature and extent of the claimed injuries; the mental, physical, and emotional pain and suffering experienced and that with reasonable probability will be experienced in the future . . .").

<sup>11</sup> Trial Tr. Vol. 2, 442:9–12, *Childress v. Costco Wholesale Corp.*, (D. Mont. April 23, 2019) (No. 9:18-cv-00183-DWM).

<sup>12</sup> Appellant's Brief, *supra* note 1, at \*5.

<sup>13</sup> Appellant's Brief, *supra* note 1, at \*1.

<sup>14</sup> 896 P.2d 411 (Mont. 1995).

<sup>15</sup> *Id.* at 426.

<sup>16</sup> Trial Tr. Vol. 2, 455:3–12, *Childress v. Costco Wholesale Corp.*, (D. Mont. April 23, 2019) (No. 9:18-cv-00183-DWM).

<sup>17</sup> Trial Tr. Vol. 2, 455:3–12, *Childress v. Costco Wholesale Corp.*, (D. Mont. April 23, 2019) (No. 9:18-cv-00183-DWM).

<sup>18</sup> Reply and Response Brief of Defendant-Appellant at \*10, *Childress v. Costco Wholesale Corp.*, (9th Cir. Sep. 3, 2019) (No. 19-35441, 19-35493) [hereinafter Appellant's Reply Brief].

<sup>19</sup> *Sacco*, 896 P.2d at 421–426.

illustrate that the Montana Supreme Court has never allowed parasitic NIED damages for damage to personal property.<sup>20</sup> Costco asserts that Montana allows recovery for parasitic emotional distress damages for some, but not all torts, and that the Childresses failed to cite any cases where the Montana Supreme Court held that emotional distress damages are available for all torts.<sup>21</sup>

Second, Costco argues that the Montana Supreme Court has repeatedly held that emotional distress damages are not appropriate for all cases.<sup>22</sup> Costco refers to the Restatement Third of Torts with the Restatement Second of Torts to show consistency with the principles of tort law.<sup>23</sup> The Restatement Second of Torts did not permit recovery for emotional distress related to harm to chattels.<sup>24</sup> The Restatement Third of Torts does not allow “recovery for emotional harm from negligently caused harm to personal property.”<sup>25</sup> Costco shows Montana’s alignment with the Restatement of Torts by emphasizing that the Montana Supreme Court undeviatingly declines to extend recovery for NIED claims arising from property damage absent physical injury.<sup>26</sup>

Third, Costco argues that Claudia’s NIED claim ought to have been viewed as an independent NIED claim, and to do otherwise eradicates *Sacco*’s heightened standard of review.<sup>27</sup> *Sacco* requires a heightened standard of review for independent NIED claims.<sup>28</sup> Costco observes that the Montana Pattern Instruction for compensation for damage to personal property has a formula long upheld by Montana courts, “either (a) the cost of repair, or (b) the difference in value of the property immediately before and immediately after the damage, whichever is less.”<sup>29</sup> Regarding emotional distress damages, Costco maintains that the emotional distress was a reasonably foreseeable consequence of negligence and the jury instruction ought to have required a showing of serious or severe emotional distress.<sup>30</sup> Costco insists that the district court erred in jury instruction when they directed the jury to calculate damages based on the “the mental, physical, and emotional pain and suffering experienced and that with reasonable probability will be experienced in the future.”<sup>31</sup>

Fourth, Costco argues that the district court erred in determining that the Montana Supreme Court’s recognition of recovery for certain

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<sup>20</sup> Appellant’s Brief, *supra* note 1, at \*16–17.

<sup>21</sup> Appellant’s Reply Brief, *supra* note 18, at \*11–12.

<sup>22</sup> *Id.* at \*12.

<sup>23</sup> *Id.* at \*18.

<sup>24</sup> RESTATEMENT (SECOND) OF TORTS § 928 (Am. Law Inst. 1965).

<sup>25</sup> Appellant’s Brief, *supra* note 1, at \*18 (citing RESTATEMENT (THIRD) OF TORTS § 47 cmt. m (Am. Law Inst. 2013)).

<sup>26</sup> *Id.* (citing *Day v. Montana Power Co.* 789 P.2d 1224, 1227 (Mont. 1990) (where the Montana Supreme Court “decline[d] to extend recovery for emotional distress damages to cases where the defendant negligently damages or destroys real property and the plaintiff suffers no physical injury”).

<sup>27</sup> *Id.* at \*21.

<sup>28</sup> *Id.* at \*20.

<sup>29</sup> *Id.* at \*19.

<sup>30</sup> *Id.* at \*16.

<sup>31</sup> *Id.*

types of torts therefore implies that damages are always recoverable, particularly that Claudia's claim is not akin to emotional distress in discrimination and insurance bad faith claims.<sup>32</sup> Costco contends that the intent behind *Sacco* was to prevent the floodgates of litigation from opening.<sup>33</sup> Costco concludes that the Childresses' parasitic claim would eliminate the heightened legal standard for independent NIED claims and Montana public policy governing emotional distress claims because the property claim cannot serve as a host cause of action to Claudia's NIED claim.<sup>34</sup>

### B. Plaintiff-Appellee Childresses' Argument

The Childresses' main argument is that the district court did not err in instructing the jury because parasitic emotional distress damages need not be "serious or severe."<sup>35</sup> During trial, the Childresses asserted that parasitic NIED damages are permitted where only monetary damages have been claimed, even without personal injury, so long as the negligence leads to the property damage or the monetary damage claim.<sup>36</sup>

While the Childresses acknowledge that *Sacco's* heightened standard of review is precedent for Montana's independent NIED claims, they argue that *Jacobsen v. Allstate Ins. Co.* is precedent for parasitic NIED claims.<sup>37</sup> The Childresses rely on *Jacobsen* to show that the district court's jury instructions followed Montana precedent.<sup>38</sup> In *Jacobsen*, the Montana Supreme Court established a lower standard of proof for parasitic NIED claims and adopted the Montana Pattern Jury Instruction 25.02 ("M.P.I.2d 25.02").<sup>39</sup> M.P.I.2d 25.02 is intended to be used "where emotional distress damages are allowed in the absence of independent tort claims for negligent or intentional infliction of emotional distress."<sup>40</sup> M.P.I.2d 25.02 also states that the law does not set forth a standard for calculating parasitic NIED damages.<sup>41</sup> The Childresses argue that the district court did not err when they modified M.P.I.2d 25.02 to allow the jury to consider whether the Childresses experienced emotional pain.<sup>42</sup>

Next, the Childresses argue that emotional distress damages are allowed for all parasitic emotional distress claims resulting from general torts and the severity or seriousness should only determine the amount of

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<sup>32</sup> *Id.* at \*21.

<sup>33</sup> 896 P.2d 411, 428 (Mont. 1995); Clinch & Johnson, *Compensation of Emotional Distress in Montana: Distinctions Between Bystanders and Direct Victims*, 47 MONT. L. REV. 479 (1986); Rodriguez v. State 472 P.2d 509, 518 (Haw. 1970).

<sup>34</sup> Appellant's Brief, *supra* note 1, at \*26.

<sup>35</sup> Appellee Childresses' Answering Brief at \*19, *Childress v. Costco Wholesale Corp.*, (9th Cir. Nov. 27, 2019) (No. 19-35441, 19-35493) [hereinafter Appellee's Brief].

<sup>36</sup> Trial Tr. Vol. 2, 453:7-11, *Childress v. Costco Wholesale Corp.*, (D. Mont. April 23, 2019) (No. 9:18-cv-00183-DWM).

<sup>37</sup> Appellee's Brief, *supra* note 35, at \*9-10.

<sup>38</sup> *Id.* at \*9-17.

<sup>39</sup> *Jacobsen v. Allstate Ins. Co.*, 215 P.3d 649, 480 (Mont. 2009).

<sup>40</sup> *Lorang v. Fortis Ins. Co.*, 192 P.3d 186, 223 (Mont. 2008).

<sup>41</sup> *Jacobsen*, 215 P.3d at 664.

<sup>42</sup> Appellee's Brief, *supra* note 35, at \*7.

recovery, not the ability to recover.<sup>43</sup> The Childresses rely heavily on *Jacobsen* and interpret that any underlying tort can give rise to parasitic NIED damages as long as there are other damages.<sup>44</sup> They assert that Claudia's claim is parasitic to their bailment and negligence claims.<sup>45</sup> The Childresses conclude that *Sacco*'s heightened standard does not apply to their case because they presented a parasitic, rather than independent, emotional distress claim.<sup>46</sup>

#### IV. ANALYSIS

The primary issue before the Court is Claudia's parasitic NIED claim for emotional damages.<sup>47</sup> Analysis of Claudia's claim differs depending on whether viewed as parasitic to an underlying claim or as an independent NIED claim held to lower standard of proof.<sup>48</sup> Further, historically speaking, Montana NIED claims have been difficult to prove due to concern over the potential for fraudulent claims and immeasurable damages.<sup>49</sup> The Montana Supreme Court established precedent that prevents a floodgate of claims and fraud through *Sacco*.<sup>50</sup> Under *Sacco*, independent causes of action exist for NIED claims and are subject to a serious or severe standard of proof.<sup>51</sup> Montana courts would likely resist such change due to concerns about unlimited liability for defendants and fraudulent claims flooding Montana courts.<sup>52</sup>

##### A. *Property Damage as a Host Cause of Action for NIED Claims*

Parasitic damages are emotional distress damages with a host cause of action.<sup>53</sup> According to the Restatement Third of Torts, property damage without physical injury does not suffice as a host cause of action.<sup>54</sup> In *Day v. Montana Power Co.*, Montana Power Company was found liable for negligently destroying a restaurant from a fire that traveled along an underground natural gas line. The Court reversed, declining to allow for recovery where the plaintiff suffered no injury.<sup>55</sup> Here, the host cause of action was withdrawn, leaving the only prospective host cause of action for Claudia's parasitic NIED claim as property damage.<sup>56</sup> Therefore, the

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<sup>43</sup> *Id.* at \*15.

<sup>44</sup> Trial Tr. Vol. 2, 454:19–20, *Childress v. Costco Wholesale Corp.*, (D. Mont. April 23, 2019) (No. 9:18-cv-00183-DWM).

<sup>45</sup> Appellee's Brief, *supra* note 35, at \*5; *Childress v. Costco Wholesale Corp.*, CV 18-183-M-DWM, 2019 WL 1455479, at \*4 (D. Mont. Apr. 2, 2019).

<sup>46</sup> Appellee's Brief, *supra* note 35, at \*19.

<sup>47</sup> Appellant's Brief, *supra* note 1, at \*10–11; Appellee's Brief, *supra* note 35, at \*5.

<sup>48</sup> Appellant's Brief, *supra* note 1, at \*16; Appellee's Brief, *supra* note 35, at \*9.

<sup>49</sup> Randy J. Cox & Cynthia H. Shott, *Boldly into the Fog: Limiting Rights of Recovery for Infliction of Emotional Distress*, 53 MONT. L. REV. 197 (1992) (outlining the history of Montana's reluctance to award emotional distress damages due to its speculative nature).

<sup>50</sup> *Id.*

<sup>51</sup> *Sacco*, 896 P.2d 411 at 426 (Mont. 1995).

<sup>52</sup> *Id.* at 428.

<sup>53</sup> *Id.* at 418.

<sup>54</sup> RESTATEMENT (THIRD) OF TORTS § 47 cmt. m (Am. Law Inst. 2013).

<sup>55</sup> *Day v. Montana Power Co.* 789 P.2d 1224, 1227 (Mont. 1990).

<sup>56</sup> Trial Tr. Vol. 2, 442:9–12, *Childress v. Costco Wholesale Corp.*, (D. Mont. April 23, 2019) (No. 9:18-cv-00183-DWM).

Ninth Circuit will likely not view Claudia's claim as parasitic to property damage because she suffered no physical injury.

*B. Heightened Review: The Serious or Severe Standard of Proof*

In Montana, “[a]n independent cause of action for infliction of emotional distress will arise under circumstances where a serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant’s negligent or intentional act or omission.”<sup>57</sup> To meet the serious or severe standard, the emotional distress must be ‘so severe that no reasonable person could be expected to endure it.’<sup>58</sup> Serious or severe emotional distress can be evidenced by physical manifestations or an intense or extended duration of distress.<sup>59</sup>

The Childresses cite to cases that strengthen Costco’s argument in favor of the standard set forth in *Sacco*. For example, in *Jacobsen*, plaintiff sued Allstate Ins. Co. for bad faith after sustaining injuries in an automobile accident by an Allstate insured driver.<sup>60</sup> There, the issue on cross-appeal was whether the district court erred in ruling that Plaintiff was required to prove serious or severe emotional distress to recover emotional distress damages from the underlying bad faith claim.<sup>61</sup> The Montana Supreme Court held that the serious or severe standard only applies to independent intentional infliction of emotional distress (“IIED”) or NIED claims.<sup>62</sup> The Court adopted a standard set of jury instructions for parasitic NIED claims in Montana Pattern Jury Instruction 25.02 and, accordingly, remanded for a new trial.<sup>63</sup> Similar to *Jacobsen*, *Lorang v. Fortis Ins. Co.* held that one set of jury instructions exists for *Sacco* claims and is based on the serious or severe standard, while separate instructions exist for emotional distress damages in cases not involving NIED or IIED claims.<sup>64</sup> *Seltzer v. Morton* perhaps distinguishes emotional distress damages, providing, “the language from *Sacco* does not define the standard for proving emotional distress damages incurred pursuant to torts in general; rather, it defines an element of proof necessary to maintain an independent action for intentional or negligent infliction of emotional distress.”<sup>65</sup> Thus, given that case law on both sides of the argument supports the standard set forth in *Sacco*, it is likely that the Ninth Circuit will decide for Costco.

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<sup>57</sup> *Sacco*, 896 P.2d 411 at 429.

<sup>58</sup> *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (Am. Law Inst. 1965)).

<sup>59</sup> *Id.* (citing *Feller v. First Inter. Bank, Inc.*, 299 P.3d 338, 345 (Mont. 2013) ( where the Montana Supreme Court held that it is for the court to determine whether serious or severe emotional distress can be found on the evidence and that it is for the jury to determine, on the evidence, whether the emotional distress existed)).

<sup>60</sup> *Jacobsen v. Allstate Ins. Co.*, 215 P.3d 649 (Mont. 2009).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Lorang v. Fortis Ins. Co.*, 192 P.3d 186, 223 (Mont. 2008) (citing M.P.I.2d 25.02, 15.01–03).

<sup>65</sup> *Seltzer v. Morton*, 154 P.3d 561, 594 (Mont. 2007).

### C. Policy Considerations

*Childress v. Costco* provides an opportunity to consider whether Montana is ready to rely on the traditional rules of causation and evidence to streamline litigation, remove the heightened serious or severe standard, and allow for greater breadth of emotional distress claims.<sup>66</sup> Upholding the district court's decision could achieve this while potentially deterring exceptionable behavior by broadening claims that can be brought against defendants.<sup>67</sup> Although *Sacco*'s limitations ease concern over opening the floodgates of litigation and fraud, it limits the range of emotional harm cases when neuroscience is proving the validity of emotional harm.<sup>68</sup> As neuroscience advances, it buttresses the argument that emotional harm *is* actual harm and presents physical consequences.<sup>69</sup> Medical and legal professionals alike have been working to normalize and validate emotional harm.<sup>70</sup>

The Ninth Circuit tends toward progressive decisions and therefore might uphold the district court's decision, which supports a more progressive path forward. However, in *Bylsma v. Burger King Corp.*, the Ninth Circuit was reluctant to create ambiguity by answering a State law question regarding the Washington Product Liability Act. Instead, they certified to the Washington Supreme Court the question of whether emotional distress damages in the absence of physical injury are permitted.<sup>71</sup> Here, it is less likely that the Ninth Circuit will certify the question to the Montana Supreme Court, because the question present is based on case law, not a bill enacted by Montana Legislature.

## V. CONCLUSION

If the Ninth Circuit upholds the district court's decision, this could result in (1) higher success rates for NIED claims, which historically have been difficult to prove in Montana, or (2) Montana courts being flooded by litigation.<sup>72</sup> Both outcomes have the potential to substantially impact the average Montana practitioner's caseload and litigation strategies. Ultimately, Costco's legal arguments are likely stronger than the Childresses' arguments. Therefore, the Ninth Circuit will likely reverse the district court and grant Costco's request for a new trial.

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<sup>66</sup> *Id.* at 2615.

<sup>67</sup> Betsy J. Grey, *The Future of Emotional Harm*, 83 *FORDHAM L. REV.* 2605 (2015) (arguing (1) justifications for curtailing emotional harm have been discredited by neuroscience and (2) juries should be entrusted with determining the validity of emotional distress claims).

<sup>68</sup> *Id.* at 2652.

<sup>69</sup> *Id.* at 2625–29 (referencing acute stress's impact on cellular changes as an example for the physical impact of emotional distress).

<sup>70</sup> *Id.* at 2625; John Diamond, *Rethinking Compensation for Emotional Distress: A Critique of the Restatement (Third) §§ 45-47*, 16 *VA. J. SOC. POL'Y & L.* 141, 175–178 (2008).

<sup>71</sup> *Bylsma v. Burger King Corp.*, 293 P.3d 1168 (Wash. 2013) (certifying the question, “[d]oes the Washington Product Liability Act permit relief for emotional distress damages, in the absence of physical injury, caused to the direct purchaser by being served and touching, but not consuming, a contaminated food product?”).

<sup>72</sup> Cox & Shott, *supra* note 49, at 198.