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Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS

RECENT KEYNOTE DECISIONS AFFECTING THE MONTANA PRACTITIONER

1. *ARROWHEAD SCHOOL DISTRICT V. KLYAP*[1]

The Montana Supreme Court addressed the enforceability of liquidated damages contract provisions in *Arrowhead School District v. Klyap*.

James Klyap entered into a teaching contract with the Arrowhead School District of Park County in June 1998.[2] The terms of the contract included a $20,500 salary to Klyap, and, at issue here, a liquidated damages clause by which Klyap would pay the school district twenty percent of his annual salary if he breached the contract after July 1998.[3] Despite the strict consequences, Klyap sought other employment, and, on August 12, 1998, notified the school district that he had accepted a position with Dome Mountain Ranch.[4] Klyap initially wrote the school district a check for $4,100, twenty percent of his annual salary, but later stopped payment on the check.[5] The school

1. 2003 MT 294, 318 Mont. 103, 79 P.3d 250.
2. *Id.* ¶ 7.
3. *Id.* ¶ 5.
4. *Id.* ¶ 7.
5. *Id.*

district negotiated with another less experienced teacher to replace Klyap, to whom it agreed to pay $19,500 per year.[6] Arrowhead then filed suit against Klyap to enforce the liquidated damages clause in his contract.[7] The District Court found for the school district, and Klyap appealed.[8]

The Supreme Court recognized conflicting precedent concerning liquidated damages in Montana.[9] Historically, liquidated damages represent an advance calculation of expectancy damages, allowing the parties upon entering into the contract to agree upon an equitable damage amount in the event of a breach.[10] However, a conflict occurs when, as here, the liquidated damages amount exceeds reasonable expectancy damages, and the liquidated damages clause represents a penalty to the breaching party rather than fair compensation to the non-breaching party.[11] This inconsistency forces courts to balance the parties' assumed freedom to contract against potentially unconscionable contractual terms.

In determining the reasonableness of a liquidated damages provision, the court assesses on a case-by-case basis the level of difficulty involved in proving expectancy damages.[12] When difficulty of proof in itself is not determinative, the court will look to the amount of the damages themselves.[13] The Montana Supreme Court notes several fallacies in this analysis. First, determining reasonableness of damages is "circular and subjetive," as simultaneously finding anticipated damages reasonable and difficult to prove is counterintuitive.[14] Further, the simple fact that a liquidated damages case is before the court at all demonstrates the likely disparity between the contracted damage amount and reasonable expectancy damages.[15] Finally, the *Restatement (Second) of Contracts* allows courts to use either the anticipated or the actual damage amount to determine reasonableness, creating an inevitable

6. *Id.* ¶ 8.
7. *Arrowhead*, ¶ 9.
8. *Id.*
9. *Id.* ¶ 19.
10. *Id.* ¶ 20.
11. *Id.*
12. *Id.* ¶ 24 (citing MONT. CODE ANN. § 28-2-721 (2003), WILLISTON ON CONTRACTS, § 65:1 (4th ed. 2002), RESTATEMENT (SECOND) OF CONTRACTS § 356 (1965)).
13. *Arrowhead*, ¶ 24.
14. *Id.* ¶ 25.
15. *Id.* ¶ 26.

conflict between the parties as to which test to use.[16]

Until now, Montana courts have used a combination of the above analyses.[17] However, given the complexity of the tests, the state caselaw is inconsistent, making standardized conclusions "elusive at best."[18] In *Klyap*, the Supreme Court sets about eliminating the inconsistencies of its earlier precedent, and abandons the requirement concerning proof difficulties. Instead, the court holds that the enforceability of liquidated damages should turn on whether or not the provision is unconscionable. Under *Klyap*, liquidated damages provisions have a presumption of enforceability, and the party asserting the clause is unenforceable has the burden of showing the provision is unconscionable.[19]

The Supreme Court affirmed the lower court's decision. It held that despite Klyap's lack of bargaining power, the liquidated damages clause in his contract was not unconscionable, as twenty percent of his salary was a reasonable amount of compensation considering the extensive inconvenience to the school in finding a replacement teacher just two weeks before the school year began.[20]

In her dissent, Chief Justice Gray acknowledged the importance of clarifying the discrepancies in existing caselaw, but criticized the majority for taking an approach not raised by the parties, and in effect "striking out on [its] own 'new and improved' approach to the law."[21]

The *Klyap* case simplifies the determinative tests for enforceability of liquidated damages clauses, and will eliminate the long-standing confusion contractual parties in Montana have historically experienced. However, this case also represents yet another example of the current supreme court's willingness to disregard the arguments of the parties and address issues on appeal not raised in the briefs, a practice which many critics have attacked in recent years.

Amanda K. Eklund.

16. *Id.*
17. *Id.* ¶ 31.
18. *Id.* ¶ 46.
19. *Arrowhead,* ¶ 49.
20. *Id.* ¶ 71.
21. *Id.* ¶ 82 (J. Gray, concurring in part and dissenting in part).

2. *STATE V. RAY*[22]

In *State v. Ray*, a case of first impression, the Montana Supreme Court faced two conflicting interpretations of the aggravated burglary statute.[23] The issue presented concerned whether a defendant who steals firearms in the course of committing a burglary is considered "armed with a weapon."

Police arrested Christopher Ray in February 1999 in connection with three residential burglaries in Ravalli County.[24] Among the various stolen items were a significant number of firearms, both loaded and unloaded.[25] Ray was initially charged with three counts of burglary, which prosecutors later amended to include a fourth burglary charge and increase the original three counts to aggravated burglary.[26] The trial court denied Ray's motion for a directed verdict, finding that mere possession of a weapon was sufficient to fulfill the requirements of the aggravated burglary statute.

On appeal, the Montana Supreme Court looked to other states' law and determined that nearly all jurisdictions define "armed" as "readily accessible and available for use."[27] The Montana statute defines "weapon" as any object or material that is "readily capable of being used to produce death or serious bodily injury."[28] Such a broad definition potentially includes nearly any tangible object, and thus, strictly construed, any burglar could theoretically be found to possess a weapon. Thus, a plain language interpretation of the statute would produce two troubling results: 1) equating the terms "armed" and "weapon"; and 2) eradicating the burglary offense.[29] The court was not willing to allow either result, and instead held that in order to

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22. 2003 MT 171, 316 Mont. 354, 71 P.3d 1247.

23. MONT. CODE ANN. § 45-6-204(2)(a) (2003). The statute provides in part:

> (2) A person commits the offense of aggrevated burglary if he knowlingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therin:
>
> (a) in effecting entry or in the course of committing the offense or in immediate flight thereafter, he or another person in the offense is armed with explosives or a weapon.

24. *Ray*, ¶ 8.

25. *Id.* ¶ 5-7.

26. *Id.* ¶ 9.

27. *Id.* ¶ 41, citing State v. Merritt, 589 A.2d 648, 650 (N.J. Super. Ct. App. Div. 1991); Wesolic v. State, 837 P.2d 130, 133-34 (Alaska Ct. App. 1992); State v. McCaskill, 468 S.E.2d 81, 82 (S.C. Ct. App. 1996).

28. MONT. CODE ANN. § 45-2-101(78).

29. *Ray*, ¶ 40.

be armed with a weapon, a defendant must have intended to use the weapon. The court made clear that its opinion was limited to the theft of firearms,[30] and made a further distinction between loaded and unloaded firearms. Specifically, the court held that because a burglar who steals a loaded gun in the process of a burglary is equally as dangerous as a burglar who brings a loaded gun with him to the burglary, the State need not prove the intent to use a loaded weapon; mere possession is sufficient to meet the requirements of the aggravated burglary statute.[31] In the case of the theft of an unloaded gun, the prosecution must prove the defendant intended to use the gun.[32]

The court held that the State had met its burden in only one of Ray's aggravated burglary convictions when it proved the gun Ray had stolen was loaded.[33] However, in the other aggravated burglary conviction, the State failed to prove Ray intended to use the unloaded gun.[34] The Court, finding the State had not met its burden of proof, reduced the conviction to burglary.[35]

This case marks the first judicial interpretation of "armed with a weapon," resolving the bizarre result that under the technical statutory definitions, a defendant who stole nearly anything in the course of a burglary could be charged with aggravated burglary. However, the distinction between loaded and unloaded firearms is artificial and impractical, as burglars are unlikely to check to see whether the guns they are stealing are loaded. Intent to use an unloaded gun is no less sinister than intent to use a loaded one. After *State v. Ray*, a defendant who unknowingly steals a loaded gun is deemed to have the intent to use that gun, and can be charged with aggravated burglary. Such punishment is severe for a scenario governed too much by chance.

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30. *Id.* ¶ 42.
31. *Id.* ¶ 49.
32. *Id.* ¶ 52.
33. *Id.* ¶ 57.
34. *Id.* ¶ 58.
35. *Ray*, ¶ 58.

3. *STATE V. TACKITT*[36]

In *State v. Tackitt*, the Montana Supreme Court was again asked to balance Montanans' privacy expectations and law enforcement's commitment to stem the flow of illegal drugs into the state. The court specifically classified the use of a drug-detecting canine as a search, and in the same breath declared the use of a drug-detecting canine as an exception to the warrant requirement.

In June 2000, officers from the Northwest Drug Task Force received an anonymous tip that James Tackitt of Kalispell, Montana, was transporting and selling large quantities of marijuana. The informant told the officers where Tackitt lived and that he drove a white Subaru Legacy. The officers corroborated the address and vehicle make. It was also discovered another informant had previously reported to the Flathead County Sheriff's office that Tackitt was involved in drug trafficking in the 1990s and had a 1993 misdemeanor conviction for possession of drug paraphernalia.[37]

Based on the tips and law enforcement's corroboration of the information given, a law enforcement canine, Dantz, was enlisted to conduct a sniff survey of the exterior of the Subaru registered to Tackitt. Dantz was walked around the vehicle by his handler and "alerted" on the trunk of the car, indicating the presence of drugs.[38] Using Dantz's alert at the trunk of the vehicle and the previously mentioned information, law enforcement applied for search warrants for the Subaru and Tackitt's home. The search warrants were issued based on that information. Although no drugs were found in the vehicle, three and one-half pounds of marijuana and a bong were found in Tackitt's home.[39]

Following the searches, Tackitt was charged with criminal possession of dangerous drugs with intent to distribute, a felony in violation of Montana Code Annotated Section 45-9-103.[40] Tackitt moved to suppress the evidence seized from his home, claiming the use of a canine-sniff constituted a search in violation of his privacy rights. Despite the fact that none of the officers involved could remember who the informant was, the

36. 2003 MT 81, 315 Mont. 59, 67 P.3d 295.
37. *Id.* ¶ 6.
38. *Id.* ¶ 7.
39. *Id.* ¶ 8.
40. *Id.* ¶ 9 (citing MONT. CODE ANN. § 45-9-103 (2003)).

district court ruled Tackitt had no expectation of privacy in his vehicle, as it was parked in an area readily accessible to the public. Further, sufficient particularized suspicion existed to deploy the drug-detecting canine.[41] Subsequent to the denial of his motion to suppress, Tackitt pled guilty with a reservation of his right to appeal.[42]

On appeal, the Montana Supreme Court distinguished the facts of *Tackitt* from those of *State v. Scheetz*[43] using the analysis from *State v. Elison*.[44] In *Scheetz*, the court held no expectation of privacy exists in odors emanating from checked luggage at an airport; therefore a canine-sniff for drug odors was not a search.[45] In distinguishing between the two cases, the court focused on an individual's expectation of privacy. In *Scheetz*, travelers voluntarily relinquish possession of their luggage, and with it a degree of privacy. In *Tackitt*, the canine-sniff was of a vehicle, and "Montana's citizens have a reasonable expectation of privacy in areas of their vehicles that are out of plain view."[46] Under the analysis in *Elison*, Tackitt had an expectation of privacy in the contents of his trunk.[47] Therefore, the court concluded that the canine-sniff of Tackitt's vehicle was indeed a search under article II, sections 10 and 11 of the Montana Constitution.[48]

After the court declared the canine-sniff a search, it analyzed the nature of the state's intrusion in order to evaluate whether Tackitt's rights had been unreasonably violated by the canine-sniff. The court looked to other states' laws and found the most compelling cases created an exception to the warrant requirement for drug-detecting canines used during police investigations. The court required only particularized suspicion as a prerequisite to the use of drug-detecting canines as the "government's interest in discouraging illegal drug trafficking is substantial."[49]

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41. *Id.*

42. *Tackitt*, ¶ 10.

43. 286 Mont. 41, 950 P.2d 722 (1997).

44. 2000 MT 288, 302 Mont. 228, 14 P.3d 456.

45. *Tackitt.*, ¶ 18 (citing *Scheetz*, 286 Mont. at 50, 950 P.2d at 727).

46. *Id.* ¶ 20 (citing State v. Elison, 2000 MT 288, ¶ 46, 302 Mont. 228, ¶ 46, 14 P.3d 456, ¶ 46).

47. *Id.* ¶ 21.

48. *Id.* ¶ 22 (Article II, Sections 10 and 11 of the Montana Constitution are the specific privacy provisions within the document).

49. *Tackitt*, ¶ 29-30.

Finally, the court looked to the four corners of the search warrant application and held there was inadequate particularized suspicion to conduct the investigatory search of Tackitt's vehicle.[50] The court focused on law enforcement's inability to produce the name or history of the anonymous informant and the inability to substantially corroborate the report of drug activities.[51] The court stated that the criminal history information considered in the original search warrant application was stale and should not have been considered.[52] Tackitt's conviction was reversed based on the lack of particularized suspicion prior to the use of the drug-detecting canine.[53]

The court's decision in *Tackitt* marks yet another battle in the ongoing war between law enforcement's rights and the rights of individuals in Montana. In this instance the court chose to protect privacy by classifying a canine-sniff as a search, but at the same time categorized a canine-sniff within the few exceptions to the search warrant requirement. The *Tackitt* decision could be the first step in the court's shift towards a more narrow approach to the interpretation and application of Montana's constitutional privacy provisions.

Jessica T. Kobos.

4. *HARDY V. PROGRESSIVE SPECIALTY INSURANCE COMPANY*[54]

In *Hardy v. Progressive Specialty Insurance Company*, the Montana Supreme Court determined the constitutionality of Montana Code Annotated section 33-23-203, the Montana "anti-stacking" provision. The court held that based upon clearly established public policy the anti-stacking provision was unconstitutional, and the ambiguous language of the insured's policy entitled him to "stack" his underinsured motorist policies.

On December 26, 2000, Ned Hardy and his wife were injured in an auto accident. Their vehicle was struck by another vehicle driven by Gary Marr. As a result of the accident Hardy suffered serious injuries. The expenses associated with Hardy's

50. *Id.* ¶ 33.
51. *Tackitt,* ¶ 37.
52. *Id.* ¶ 39.
53. *Id.* ¶¶ 42-43.
54. 2003 MT 85, 315 Mont. 107, 67 P.3d 892.

injuries far surpassed Marr's liability coverage of $50,000. Hardy claimed he was entitled to $150,000 by stacking his coverage from his three underinsured motorists polices with Progressive Specialty Insurance Company. Progressive based its denial of the claim on Montana Code Annotated section 33-23-203.[55] Hardy filed suit in United States District Court, which in turn certified three questions to the Montana Supreme Court: 1) Is the offset provision in the Progressive policy void in Montana because it violates the public policy of this state; 2) Given that under-insured motorist coverage is portable in Montana, is it against public policy in Montana to charge separate premiums for that coverage for separate vehicles insured on the same policy if the insured can only collect one amount of coverage; 3) Are insurance policies such as the one in question here, against public policy in Montana when they include provisions that defeat coverage for which the insurer has received valuable consideration?[56]

Hardy argued that the offset provision and the policy's definition of underinsured motorist were in conflict with the declarations page of the Progressive policy.[57] The court looked to the policy's purpose and intent, construing any ambiguities in favor of the insured, and thus of extending coverage.[58] The court found that the declarations page established that Hardy paid three premiums for $50,000 of underinsured motorist coverage on three separate vehicles.[59] However, the policy's underinsured motorist definition limits coverage to situations where the tortfeasor's liability insurance limit is less than the stated amount of underinsured motorist coverage.[60] The court construed the ambiguity in the policy and the declaration page in favor of Hardy.[61]

It next turned to whether or not the offset provision in the Progressive policy violated public policy in Montana. The court looked to holdings from *Bennett v. State Farm Mutual Automobile Insurance Company*,[62] *Transamerica Insurance*

55. *Id.* ¶ 1-7.

56. *Id.* ¶ 2-5.

57. *Id.* ¶ 13.

58. *Id.* ¶ 14 (citing Farmers Alliance Mut. Ins. Co. v. Holeman, 1998 MT 155, ¶ 25, 289 Mont. 312, ¶ 25, 961 P.2d 114, ¶ 25).

59. *Id.* ¶ 16.

60. *Hardy*, ¶ 16.

61. *Id.* ¶ 19.

62. 261 Mont. 386, 389, 862 P.2d 1146, 1148 (1993) (the purpose of UIM coverage is to

Group v. Osborn, [63] and *Chafee v. United States Fidelity & Guaranty Co.*[64] The court concluded that based upon the already discussed ambig-uities in the Progressive document's language, it violated Montana's public policy by rendering illusory coverage, thus defeating the insured's reasonable expectation of coverage.[65]

The court then turned to the contradiction in underinsured motorist's personal and portable and an insured's inability to stack separate vehicles coverage when separate premiums were paid.[66] Hardy argued that Montana Code Annotated section 33-23-203, the "anti-stacking" provision, denies equal protection of the law and violates the right to substantive due process in Montana.[67] To pass substantive due process analysis, a statute enacted by the legislature must be reasonably related to a permissible legislative objective.[68] In this case Progressive argued section 33-23-203 was reasonably related to keeping insurance premiums low in Montana. The court disagreed and instead found the "charging of customers for non-existent coverage is the antithesis of affordable coverage."[69] The court concluded section 33-23-203 was not rationally related to its stated objective and violated substantive due process in that it allowed charging premiums for illusory coverage.[70]

After determining the statute in question was constitutionally infirm, the court evaluated Progressive's anti-stacking provision in light of Montana's judicially developed public policy.[71] In *Bennett*, the court held that underinsured motorist coverage was personal and portable, creating a reasonable expectation in an insured that coverage existed up to the aggregate limit for each separate policy for which a premium

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provide a source of indemnification when the tortfeasor does not provide adequate indemnification through its own policy).

63. 627 F.Supp. 1405 (1986 D. Mont) (the UIM definition and the policy's offset provision contradicted the declarations page and the reasonable expectation of the insured).

64. 181 Mont. 1, 591 P.2d 1102 (1979) (an insured's UIM coverage cannot be limited to one vehicle when multiple premiums have been paid on multiple policies).

65. *Hardy*, 29.

66. *Id.* ¶ 30.

67. *Id.* ¶ 31.

68. *Id.*

69. *Id.* ¶ 37.

70. *Id.* ¶ 38.

71. *Hardy*, ¶ 39.

was paid.[72] In *Chaffee*, the court concluded that insurers may not limit the insured's recovery to one vehicle if an insured pays separate premiums.[73] Based upon the decisions in *Bennett* and *Chaffee*, the court concluded "an anti-stacking provision in an insurance policy that permits an insurer to receive valuable consideration for coverage that is not provided violates Montana public policy."[74]

The holding in *Hardy* solidifies the shift in insurance policy in Montana. Holdings in *Bennett*, *Transamerica*, and *Chaffee* marked the shift towards the stronger protection of the insured than the insurer. However, *Hardy* leaves more questions than answers. For example, can *Hardy* be applied retroactively, and how far can the portable and personal nature of underinsured motorist coverage be construed? Insurance defense attorneys will have to look to future Montana Supreme Court decisions to narrow and clarify the holding in *Hardy*.

Jessica T. Kobos.

72. *Id.* ¶ 39 (citing *Bennett*, 261 Mont. at 389-90, 862 P.2d at 1148-49).
73. *Id.* ¶ 40 (citing *Chaffee*, 181 Mont. at 6, 591 P.2d at 1104).
74. *Id.* ¶ 42.