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Recent Decisions Affecting the Montana Practitioner

LEGAL SHORTS

RECENT KEYNOTE DECISIONS AFFECTING THE MONTANA PRACTITIONER

1. *WAGES V. FIRST NAT'L INS. CO. OF AMERICA*[1]

In *Wages v. First Nat'l Ins. Co. of America*, the Montana Supreme Court ruled that a parent of a minor child who does not witness an accident, wherein the child is seriously injured, is entitled to maintain an independent, non-derivative claim for negligent infliction of emotional distress (NIED).

Gerald Wages' son, Skylar, was roller-blading in front of his parents' home when Phillip Pegar ran over him.[2] Wages did not witness the accident and was not home at the time; he was notified by telephone at work.[3] As a result of the accident, Skylar experienced bilateral pelvic fractures and complete urethral disruption, which required him to undergo at least four major invasive and expensive surgeries as well as considerable physical therapy.[4] Because the surgeries were not entirely successful, Wages must catheterize his son three to four times a day with a large catheter tube.[5] Also, Wages has had to take his son to the children's hospital in Salt Lake City for medical treatment sev-

1. 2003 MT 309, 318 Mont. 232, 79 P.3d 1095.
2. *Id.* ¶ 3.
3. *Id.*
4. *Id.* ¶ 4.
5. *Id.*

eral times, resulting in absences from work and lost income.[6]

Pegar was insured with First National Insurance Company (FNIC) on the day he struck Skylar; he had $25,000/$50,000 liability coverage.[7] Through a court-appointed guardian and conservator, Skylar settled his claim for the $25,000 limit.[8] Wages then submitted a claim to FNIC for $25,000 for NIED.[9] FNIC denied the claim, maintaining that under Montana law, Wages could not sustain an independent non-derivative claim for NIED without witnessing the accident.[10] Wages then filed suit for declaratory relief against FNIC. Both FNIC and Wages filed motions for summary judgment. The district court granted FNIC's motion for summary judgment, concluding that "duty in a NIED case . . . exists only to those who actually witness the accident" and awarded FNIC its costs of defense with ten-percent interest.[11] Wages appealed to the Montana Supreme Court.

On appeal, Wages argued that in *Sacco v. High Country Independent Press, Inc.*,[12] the Supreme Court overruled the prior requirement of *Versland v. Caron Transport*,[13] that only a bystander can recover for NIED. Under *Sacco*, an independent cause of action for NIED arises under circumstances where 1) serious or severe emotional distress to the plaintiff was 2) the reasonably foreseeable consequence of 3) the defendant's negligent act or omission.[14] As the court in *Sacco* explained "serious or severe emotional distress" is defined by employing the definition of these terms found in the Restatement (Second) of Torts, which provides in pertinent part:

> [Emotional distress] includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it. The intensity and the duration of the dis-

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6. *Id.*
7. *Wages*, ¶ 6.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* ¶ 8
12. 271 Mont. 209, 896 P.2d 411 (1995).
13. 206 Mont. 313, 671 P.2d 583 (1983).
14. *Sacco*, 271 Mont. at 234, 896 P.2d at 426.

tress are factors to be considered in determining its severity. Severe distress must be proved. . . .[15]

Wages asserted that all three elements were satisfied as he had suffered serious or severe emotional distress that was a reasonably foreseeable consequence of Pegar's act.[16] Wages highlighted that the second element, foreseeability, was satisfied as it is "indisputably foreseeable" that a parent could suffer NIED from having his or her child severely injured as a result of someone's negligent driving.[17]

FNIC responded that in *Treichel v. State Farm Mutual Automobile Ins. Co.*,[18] decided two years after *Sacco,* the Supreme Court reintroduced the bystander requirement of *Versland* which requires that one have "sensory and contemporaneous perception of the accident" in order to recover on a claim of NIED.[19] In *Treichel*, a woman was bicycling with her husband when she witnessed a car fatally hit him.[20] She brought an independent non-derivative claim for NIED.[21] The court ruled that the wife could maintain her claim because, among other things, she had witnessed the accident.[22] FNIC urged the court to craft a "*Treichel* rule" that only those who witness the accident and have "personal, on the scene, direct physical and emotional impact" can bring a claim of NIED.[23] According to FNIC, the existence of duty depends on the foreseeablilty of harm and that foreseeablility requires on-the-scene witnessing of the accident.[24] Therefore, because Wages had not witnessed the accident, FNIC maintained that Pegar had no established legal duty to Wages and therefore breached no legal duty to him.[25]

First, the court noted that although *Versland* did require a person have "sensory and contemporaneous perception of the accident" in order to recover on a claim for NIED, *Sacco* expressly overruled *Versland* and its bystander requirement.[26] The court

15. *Sacco*, 271 Mont. at 234, 896 P.2d at 426 (quoting Restatement (Second) of Torts, § 46, comment j at 77-78).
16. *Wages*, ¶ 13-14.
17. *Id.* ¶ 15.
18. 280 Mont. 443, 930 P.2d 661 (1997).
19. *Wages*, ¶ 17.
20. 280 Mont. 444-45, 930 P.2d 662.
21. 280 Mont. 445, 930 P.2d 663.
22. 280 Mont. 449, 930 P.2d 665.
23. *Wages*, ¶ 17.
24. *Id.*
25. *Id.*
26. *Id.* ¶ 21.

rejected FNIC's argument that it reintroduced the bystander requirement in *Treichel*.[27] The court explained that in *Treichel*, the issue was whether the "Each Person" or "Each Accident" limits of liability set forth in the State Farm insurance policy held by the wife and her deceased husband in *Treichel* applied to her claim for NIED.[28] The court maintained that its fundamental ruling of *Sacco* was undisturbed.[29]

The court explained that in *Sacco*, it severed the previously mandatory nexus between witnessing the accident and foreseeability, and established that a defendant can owe a duty to a NIED claimant even in circumstances where the claimant was not at the scene of the accident.[30] Therefore, the Supreme Court ruled that the district court had erred in premising its conclusions solely on the fact that Wages did not witness the accident. Consequently it reversed and remanded the matter to the district court to "determine once again, under *Sacco* and not *Treichel*, whether Wages was a foreseeable plaintiff."[31] For such a determination, the court advised district courts to consider the following factors: 1) the closeness of the relationship between the plaintiff and victim; 2) the age of the victim; 3) the severity of the injury of the victim; and 4) any other factors bearing on the question.[32] Also, the court advised that while a district court may consider whether the plaintiff was a bystander to the accident, it may not rely exclusively on the fact that a plaintiff was not a bystander to conclude that such a plaintiff is unforeseeable.[33]

In *Wages*, the court made it clear that the bystander requirement is no more and that claims of NIED must be analyzed under *Sacco*. The abolition of the bystander requirement, of course, greatly expands the "who" in who is a foreseeable plaintiff and therefore entitled to bring a claim of NIED. The court, however, attempted to narrow its ruling by emphasizing that the resulting emotional distress must be serious or severe under the Restatement definition. Although many a parent or spouse of an accident victim may bring a NIED claim under *Wages*, re-

27. *Id.*
28. *Id.*
29. *Id.*
30. *Wages*, ¶ 25.
31. *Id.* (Emphasis added).
32. *Id.*
33. *Wages*, ¶ 25.

lief will only be granted to those whose have suffered serious or severe emotional distress as a result.

James D. Johnson

2. *JACOBSEN V. FARMERS UNION MUTUAL INS.*[34]

In *Jacobsen v. Farmers Union Mutual Ins.*, the Montana Supreme Court ruled, in a matter of first impression, that an emotional injury suffered by a driver who witnessed an accident was not a "bodily injury" within the meaning of the driver's uninsured motorist coverage.

In July 2000, Robert Jacobsen was driving his vehicle near Vaughn, Montana, when he saw an oncoming vehicle cross the center median and come to a stop in a wheat field.[35] Jacobsen pulled over to assist the driver, Kenneth Keyser.[36] Jacobsen found Keyser unconscious with blood flowing from his head.[37] Jacobsen attempted to stop the bleeding by applying pressure to the wound.[38] The paramedics arrived several minutes later and transported Keyser to the hospital.[39] When the paramedics extricated Keyser from the vehicle, Jacobsen saw a handgun.[40] Keyser died a few days later in the hospital.[41] His cause of death was determined to be suicide from a self-inflicted gunshot wound.[42]

Jacobsen sought counseling in September of 2001 for the emotional distress that he had suffered as a result of the incident with Keyser.[43] Keyser was not insured at the time of his death.[44]

In February of 2002, Jacobsen filed a complaint for both emotional distress damages and medical pay benefits against his

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34. 2004 MT 72, 320 Mont. 375, 87 P.3d 995.
35. *Id.* ¶ 4.
36. *Id.*
37. *Id.* ¶ 5.
38. *Id.*
39. *Id.*
40. *Jacobson*, ¶ 5.
41. *Id.*
42. *Id.*
43. *Id.* ¶ 6.
44. *Id.*

insurer, Farmers Union Mutual Insurance Company (Farmers Union), under his uninsured motorist (UM) coverage.[45] Jacobsen claimed that his emotional distress constituted "bodily injury" under his policy, thereby qualifying him for UM coverage.[46] Farmers Union insisted that Jacobsen's emotional injuries were not compensable under the language of his UM policy.[47]

Both Jacobsen and Farmers Union filed for summary judgment, which was granted to Farmers Union by the district court.[48] The district court concluded that Jacobson's emotional distress and its physical manifestations did not constitute bodily injury, and that even if it did, his emotional distress was not caused by Keyser's use of an uninsured vehicle, but from his use of a handgun.[49] Jacobson appealed the district court's order granting summary judgment to Farmer Union to the Montana Supreme Court.

On appeal, Jacobsen argued that the district court had erred in finding that he did not suffer "bodily injury" as defined under the Farmers Union UM policy. The relevant portions of that policy provide:

> We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle." The damages must result from "bodily injury" sustained by the "insured" caused by the "accident." The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle."[50]

Consistent with the statutory language in Section 33-23-201, MCA, the policy defied "bodily injury" as: "bodily injury, sickness or disease sustained by a person including death resulting from any of these."[51]

Jacobsen argued that the court has long recognized that mental or emotional injuries may be compensable absent physical injury or physical contact, citing to *Treichel v. State Farm Mutual Automobile Ins. Co.*[52] In *Treichel*, a woman was bicycling with her husband when she witnessed a car fatally hit

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45. *Id.* ¶ 7.
46. *Jacobson*, ¶ 7.
47. *Id.*
48. *Id.*
49. *Id.* ¶ 12.
50. *Id.*
51. *Id.*
52. 280 Mont. 443, 930 P.2d 661 (1997).

him.[53] She brought an independent non-derivative claim for NIED.[54] The court ruled that the wife could maintain the claim even though she herself has not sustained physical injury or physical contact.[55] Jacobson urged the court to recognize that his claims for emotional distress were, like the wife's in *Treichel*, compensable under his UM policy.[56]

Jacobsen also directed the court's attention to Workers' Compensation case law and the Act itself, which clearly excludes emotional distress as "bodily injury."[57] Jacobsen asserted that, unlike the Workers' Compensation Act, his UM policy does not unambiguously exclude emotional distress in its definition of bodily injury, and therefore, the ambiguity should be interpreted in his favor.[58]

In response, Farmers Union recognized that the Montana Supreme Court had never directly addressed the issue of whether emotional injuries constitute "bodily injury" as defined in a particular policy and directed the court to *Aetna Cas. And Sur. Co v. First Sec. Bank of Bozeman*.[59] In *Aetna*, the Federal District Court for Montana considered a UM policy containing an identical definition of "bodily injury."[60] Applying relevant Montana law, the *Aetna* court determined that given the Montana Supreme Court's previous recognition that there is a difference between physical injury and mental distress, that the Montana Supreme Court would hold that the term bodily injury as used in the liability insurance policy at issue limits coverage to physical injury, sickness, or disease.[61]

First, the Montana Supreme Court distinguished Jacobsen's authorities. As the court explained, in *Treichel*, the issue was whether the wife's emotional injury was a separate injury independent of that of her husband's.[62] Unlike Jacobsen's policy with Farmers Union, the policy at issue in *Treichel* did not define bodily injury and therefore the wife was able to recover for

53. 280 Mont. 444-45, 930 P.2d 662.
54. 280 Mont. 445, 930 P.2d 663.
55. 280 Mont. 449, 930 P.2d 665.
56. *Jacobson*, ¶ 13.
57. *Id.* ¶ 21.
58. *Id.*
59. 662 F.Supp. 1126 (D. Mont. 1987)
60. 662 F. Supp. at 1127.
61. 662 F. Supp. at 1128-29.
62. 280 Mont. at 449, 930 P.2d at 635.

her separate emotional injury.[63] Next, the court dismissed the Workers' Compensation case law cited by Jacobsen as not being relevant because they were not purely contractual in nature.[64]

Recognizing that federal decisions are not binding on it, the court agreed with the rationale of the Montana Federal District Court in *Aetna* and similarly concluded that "the term 'bodily injury,' as defined in the Farmers Union UM policy, is limited to physical injury to a person caused by an accident and does not include emotional and psychological injuries stemming therefrom."[65]

Because the court concluded that Jacobsen's emotional injuries did not satisfy the definition of "bodily injury" under the UM policy, and therefore coverage did not exist, the court did not have to address the issue of whether his injuries resulted from Keyser's ownership, maintenance, or use of his uninsured motor vehicle.[66]

In its ruling that emotional injury absent physical contact does not constitute "bodily injury" within the meaning of an uninsured motorist policy, the court correctly refused to mix contract principles with those of torts in cases involving serious emotional distress.

James D. Johnson

3. *UMLAND V. NATIONAL CASUALTY CO.*[67]

In *Umland v. National Casualty Co.*, the Montana Supreme Court applied Montana Code Annotated Section 1-1-215[68] to de-

63. *Jacobson*, ¶ 16.
64. *Id.* ¶ 22.
65. *Id.* ¶ 29.
66. *Id.* ¶ 30.
67. 2003 MT 356, 319 Mont. 16, 81 P.3d 500.
68. MONT. CODE ANN. § 1-1-215 provides:

> (1) [A person's place of residence] is the place where a person remains when not called elsewhere for labor or other special or temporary purpose and to which the person returns for repose.
>
> (2) There may only be one residence. If a person claims a residence within Montana for any purpose, then that location is the person's residence for all purposes unless there is a specific statutory exception.
>
> (3) A residence cannot be lost until another is gained.
>
> (4) The residence of a minor's parents or, if one of them is deceased or they do not share the same residence, the residence of the parent having legal custody or, if neither parent has legal custody, the residence of the parent with whom

termine dependant minor residency. Justice Nelson, writing for the court, affirmed the district court's grant of summary judgment to National Casualty on *de novo* review.[69] The court held residency of minor children is to be determined by case by case application of facts to the guideline residency factors listed in the statute.[70]

The court, reviewing the district court's legal conclusions for correctness, held Montana Code Annotated Section 1-1-215 provided the applicable guidelines for minor residency determination.[71] Therefore, the court declined to review the district court's analysis of four additional factors under *Farmers Union*[72] or analyze the insurance agreements themselves. The court's decision affirmed the district court's authority to determine the residence of an unmarried minor and clarified that Montana does not allow dual residency.[73]

The plaintiff in this case, Wallace Umland, is the father of Virgil Umland, a deceased minor passenger killed in a car accident on February 19, 1999.[74] At the time of Virgil's death National Casualty Company issued business auto insurance to Wallace providing underinsured motorist coverage for relatives residing with the named insured.[75] After Virgil's death, Wallace's girlfriend added Wallace to her AMCO insurance policy providing underinsured motorist coverage for residents of the named insured's household.[76] The conclusion of the district court that Virgil was not a resident of Wallace's household at the time of his death likely precludes coverage under these policies.

The court considered the following facts in light of the statutory guidelines in making its decision that Virgil was not a resident of Wallace's household. Wallace and Virgil's mother lived

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the minor customarily resides is the residence of the unmarried minor. In case of a controversy, the district court may declare which parental residence is the residence of an unmarried minor.

(5) The residence of an unmarried minor who has a parent living cannot be changed by either the minor's own act or that of a minor's guardian.

(6) The residence can be changed only by the union of act and intent.

69. *Id.* ¶ 30

70. *Id.*¶ 25 (applying Lima School Dist. No.12 v. Simonsen, 210 Mont. 100, 110-11, 683 P.2d 471, 476 (1984)).

71. *Id.* ¶ 8, 29

72. Farmers Union Mut. Ins. Co. v. Blair, 250 Mont. 52, 817 P.2d 1156 (1991)

73. *Umland* ¶ 27

74. *Id.* ¶ 11

75. *Id.* ¶ 16

76. *Id.* ¶ 14

in Nevada for ten years prior to divorcing in August 1994.[77] The divorce decree awarded physical custody to Virgil's mother and visitation rights to Wallace.[78] Wallace moved to Montana in 1996 and began defaulting on his financial child support obligations shortly thereafter. Since the 1994 divorce, Virgil had lived with his mother in Nevada as a resident of her household.[79] Plaintiff exercised his visitation rights for only three to four months over the four years he resided in Montana.[80] Plaintiff did not support Virgil.[81] Virgil's contacts, schooling, and athletic involvement all occurred in Nevada through the financial and emotional support of his mother.[82]

Additionally, the court refused to consider testimony offered by Wallace that Virgil intended to visit him in Montana for a substantial period had he survived because the intent was not probative as to whether Virgil resided in Wallace's household "at the time of his death."[83]

This decision clarifies the statutory analysis in Montana for determination of dependent minor residency under circumstances of dual households, likely precluding coverage under insurance policy coverage for the determined non-resident parent.

J. Bowman Neely

4. *STATE V. HERD*[84]

In *State v. Herd*, the Montana Supreme Court addressed the appropriate standard of review for criminal sentences that are statutorily unreviewable by the Sentence Review Division.

Defendant Michelle Lee Herd was charged with four counts of negligent homicide following a December 28, 2000, head-on automobile collision near Bonner, Montana.[85] On December 27, 2000 at about 9:30 p.m., Herd, then living near Seattle, Wash-

77. *Id.* ¶ 5

78. *Id.* ¶ 6. Visitation rights granted Plaintiff specify: "at all reasonable times and places, including alternate weekends, holidays, and 6 continuous weeks during school summer vacation." *Id.* ¶ 7

79. *Id.* ¶ 26

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* ¶ 36

84. 2004 MT 85, 320 Mont. 490, 87 P.3d 1017.

85. *Id.* ¶¶ 4-7.

ington, learned that her mother, a Great Falls, Montana resident, had suffered a stroke and would not likely live more than forty-eight hours.[86] With her sister, Herd set off on the all-night drive to Great Falls on Interstate 90, sleeping for approximately two and one-half hours along the way.[87] At about 9:00 a.m. on December 28, she exited I-90 onto Highway 200 at Bonner, Montana, proceeding eastbound.[88] Shortly thereafter, Herd moved to the westbound lane to pass another eastbound vehicle; however, rather than returning to her lane following the pass, she continued eastbound in the westbound lane.[89] She subsequently collided head-on with a westbound Volkswagen Beetle, killing all four of its occupants.[90] Following the collision, Herd stated that, having just exited a four-lane highway, she became confused and failed to appreciate her location in the oncoming lane of travel.[91]

Herd was charged with four counts of negligent homicide pursuant to Section 45-5-104 of the Montana Code Annotated.[92] She ultimately pled guilty after reaching a Plea Agreement with the Missoula County Attorney's Office, through which the State agreed to recommend a twenty-year suspended sentence and a five-year driving ban.[93] At the sentencing hearing, however, the district court sentenced Herd to concurrent twenty-year sentences on Counts I and II and concurrent twenty-year sentences on Counts III and IV, all suspended, with the two sets of concurrent sentences to run consecutively.[94] Among the conditions imposed, the district court banned Herd from driving for the entire forty-year term of the sentences.[95] Herd appealed only the driving restriction imposed by the district court.[96]

At the outset, the court addressed the issue of whether, under its holding in *State v. Montoya*[97], the Montana Supreme Court was authorized to review the reasonableness of sentences

86. *Id.* ¶ 3.
87. *Id.* ¶ 4.
88. *Id.* ¶¶ 4-5.
89. *Id.* ¶ 5.
90. *Herd,* ¶ 5.
91. *Id.* ¶ 6.
92. *Id.* ¶ 7.
93. *Id.* ¶¶ 7-8.
94. *Id.* ¶ 9.
95. *Id.*
96. *Herd,* ¶ 9.
97. 1999 MT 180, 295 Mont. 288, 983 P.2d 937.

like Herd's.[98] Prior to the creation of the Sentence Review Division (SRD) and the Montana Supreme Court's holding in *Montoya*, the court used a two-tiered standard of review, reviewing sentences for both legality and abuse of discretion.[99] In *Montoya*, the court held that, since the creation of the SRD, the reasonableness of a sentence was a question for the SRD, and that the Montana Supreme Court was confined to reviewing sentences for legality only.[100] However, in *State ex rel Holt v. District Court*[101], the court noted that the SRD possessed statutory jurisdiction only to review sentences that involved a year or more of actual incarceration.[102] The court in *Herd* reasoned that "[n]othing in *Montoya* suggests that it was our intent . . . to leave those with unreasonable sentencing conditions but no term of incarceration without remedy."[103] Accordingly, in cases like Herd's, which evade SRD review, the court will use the pre-SRD two-tiered approach.[104]

The court then applied the two-tiered approach to Herd's sentencing condition. First, the court found the sentence imposed to be legal; the district court was statutorily vested with the authority to impose a sentence subjecting Herd to court oversight for forty years, and Herd lodged no objection to a forty-year probationary term.[105] Turning to the second tier of its analysis, however, the court concluded a forty-year driving ban, "under the facts of the case and in light of the district court's findings", amounted to an abuse of discretion.[106] The court reasoned the forty-year ban "simply irreconcilable" with the tragic circumstances underlying the accident and with Herd's prospects for rehabilitation and for leading a law-abiding life.[107] Furthermore, the absolute prohibition against driving compromised Herd's ability to earn a living, serve family needs and satisfy her restitution obligations, all of which, the court concluded, impaired the rehabilitation process.[108] Lastly, the court identified

98. *Herd*, ¶ 11.
99. *Id.*
100. *Montoya*, ¶ 15.
101. 2000 MT 142, 300 Mont. 35, 3 P.3d 608.
102. *Id.* ¶ 8, *Herd*, ¶ 21.
103. *Herd*, ¶ 22.
104. *Id.*
105. *Id.* ¶ 24.
106. *Id.* ¶ 25.
107. *Id.*
108. *Id.*

nothing of record suggesting the necessity of the driving ban to protect the victims or society.[109] The district court therefore abused its discretion in leveling such a long driving ban.[110]

Chief Justice Karla M. Gray "strenuously" dissented from the majority opinion, arguing the sentence at issue satisfied both the legality and abuse of discretion standards.[111] As a preliminary matter, Justice Gray noted one could "readily sympathize" with any individual receiving tragic information concerning a fellow family member's health.[112] Tragedy aside, however, Justice Gray focused heavily upon the end result of Herd's errant judgment – the deaths of four other individuals – and Herd's guilty plea to four counts of negligent homicide – for which Herd could have been sentenced to a maximum of eighty years in prison.[113] Considering the eighty years to which Herd could have been sentenced, Justice Gray reasoned the driving ban "a gift . . . inherently reasonable and entirely legal."[114] She concluded, "[t]he tradeoff of not driving for 40 years as opposed to incarceration for 80 years, for a person whose driving has killed four people, seems an easy and very reasonable one to me."[115]

To be sure, the court's decision in *Herd* provides a necessary safeguard against unfair sentences falling outside the purview of the SRD. Not even Justice Gray's dissent objected to, much less addressed, resurrection of the two-tier legality and abuse of discretion analysis. Yet, while *Herd* provides the framework by which sentence conditions falling outside the purview of the SRD must be measured, it undermines the discretion of judges and prosecutors by injecting uncertainty into the sentencing process as to the types and ranges of sentences that will be tolerated under the abuse of discretion standard. Perhaps additional decisions reviewing sentences under the abuse of discretion standard will do more to clarify the true bounds of a judge's discretion.

Malin J. Stearns

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109. *Herd*, ¶ 25.
110. *Id.*
111. *Id.* ¶ 29.
112. *Id.* ¶ 30.
113. *Id.* ¶¶ 30-32.
114. *Id.* ¶ 36.
115. *Herd*, ¶ 36.

5. *Crawford v. Washington*[116]

On March 8, 2004, a unanimous U.S. Supreme Court decided *Crawford v. Washington*, and in doing so, handed down a decision that has been termed the most "defense-friendly" opinion in recent memory.[117] In deciding *Crawford*, the Court overruled *Ohio v. Roberts*[118] and held that the Sixth Amendment Confrontation Clause does not allow the admission of out-of-court testimony when the witness is absent from trial and the defendant has had no opportunity for cross-examination.[119] Roberts had previously established the admissibility of an unavailable witness's statements against a criminal defendant if it could by shown that the statements bore adequate "indicia of reliability" by falling within a "firmly rooted hearsay exception" or exhibited other "particularized guarantees of trustworthiness."[120]

Although the impact of *Crawford* will be felt whenever a criminal prosecutor attempts to rely on a statement made by an unavailable witness, it is likely that the greatest effect of the decision will be in two principle areas of criminal law: (1) Prosecution of domestic violence cases where the victim is reluctant (or refuses) to testify; and (2) Prosecution of child abuse cases where testimony of the victim was previously admitted under the *Roberts* criteria or statutory exceptions to hearsay prohibitions.[121]

In *Crawford*, the defendant was prosecuted for stabbing a man who had allegedly tried to rape his wife.[122] The defendant and his wife had gone together to the victim's apartment where a fight ensued and the victim was stabbed.[123] After the stabbing the police apprehended the defendant and his wife, both provided tape-recorded statements to the police.[124] The defendant asserted that he had acted in self-defense.[125] The defendant's

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116. 124 S.Ct. 1354 (2004).

117. Robin Franzen, *Ruling on Hearsay Evidence Guts Cases*, THE OREGONIAN, Mar. 3, 2004, *available at* 2004 WL 58859205.

118. 448 U.S. 56 (1980).

119. *Crawford*, 124 S.Ct. at 1374.

120. *Roberts*, 448 U.S. at 66.

121. For example, Montana has created express hearsay exceptions for the out-of-court statements of a child who is an alleged victim of, or witness to, a sexual offense or other crime of violence, including partner or family member assault, and is unavailable as a witness. MONT. CODE ANN. § 46-6-220(1)(a)-(c) (2003).

122. *Crawford*, 124 S. Ct. at 1356.

123. *Id.*

124. *Id.* at 1357.

125. *Id.*

wife did not testify at his trial because of the Washington laws on marital privilege, which generally barred a spouse from testifying without the other spouse's consent.[126] However, in the State of Washington, spousal privilege does not extend to out-of-court statements that would be admissible under a hearsay exception, so prosecutors sought to introduce the wife's tape-recorded statement to rebut the defendant's self-defense claims.[127] Applying the *Roberts* tests, the trial court admitted the wife's out-of-court statements and the defendant was convicted.[128] The conviction was reversed on appeal, with the Washington Court of Appeals concluding that the wife's out-of-court statements were not trustworthy.[129] The State's appeal to the Washington Supreme Court resulted in reinstatement of the conviction, which the defendant then appealed to the U.S. Supreme Court.[130]

Justice Scalia wrote for the Court and couched the opinion in an historical analysis of the origins of the Confrontation Clause in the minds of the Framers, which, according to the Court, did not necessarily include the admission of out-of-court statements dependent "upon 'the law of Evidence for the time being.'"[131] More precisely, the Court stated, "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."[132]

In adopting a historical perspective, the Court emphasized the "testimonial" nature of statements made to modern a police officers during the course of an investigation and likened such statements to those made justices of the peace in pre-Colonial England.[133] The Court then offered categories of modern "testimonial" statement to include:

> *[E]x parte* in-court testimony or its functional equivalent . . . affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . .

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126. *Id.*

127. *Id.* at 1358, citing *Washington v. Burden*, 841 P.2d 758 (Wash. 1992).

128. *Crawford*, 124 S. Ct. at 1358.

129. *Id.*

130. *Id.* at 1359.

131. *Id.* at 1364, citing 3 Wigmore § 1397, at 101; *accord* Dutton v. Evans, 400 U.S. 74, 94 (1970).

132. *Crawford*, 124 Sup. Ct. at 1364.

133. *Id.*

> extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions . . . [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[134]

Although the Court specifically held that admission of out-of-court "testimonial" statements in a criminal trial was a violation of the Sixth Amendment, the Court refused to provide further guidance on what an exact definition of "testimonial" would be. On this point, the Court stated: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[135]

The Court's refusal to be more specific was met with disapproval by Chief Justice Rehnquist, who, along with Justice O'Conner, concurred in the judgment but dissented as to overruling *Roberts*.[136] As Chief Justice Rehnquist wrote:

> [T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of 'testimony' the Court lists . . . [t]hey need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner."[137]

Chief Justice Rehnquist's admonition appears to be ringing true as lower courts have already begun wrestling with the issue of what will be deemed "testimonial" in light of *Crawford*. For example, one lower court recently ruled that an emergency 911 call to a police dispatcher during a domestic violence assault should not be deemed a "testimonial" communication to the police so as to prohibit admission of the victim's out-of-court statements at a defendant's trial.[138] It seems likely that similar interpretive decisions in the lower courts will continue in light of the Court's reluctance to provide a comprehensive definition of what constitutes inadmissible "testimonial" out-of-court statements.

J. Wayne Capp

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134. *Id.*
135. *Id.* at 1374.
136. *Id.*
137. *Id.*
138. *City of New York v. Moscat*, 2004 WL 615113.