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Significant Montana Cases

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SIGNIFICANT MONTANA CASES

Lauren Amongero, Anne M. Lewis & Forrest Graves*

I. INTRODUCTION

Much like previous volumes, this year's iteration of *Significant Montana Cases* presents several consequential Montana Supreme Court decisions and their likely effects on Montana law. The *Montana Law Review* remains committed to analyzing issues and changes to the legal playing field that are relevant to Montana practitioners. This year, many of the most important—and unprecedented—shifts in Montana's legal system, however, were not captured in case law. On top of a contentious presidential election and the beginning of a nationwide racial reckoning, 2020 brought the first worldwide pandemic in over 100 years.¹ The judiciary responded accordingly.

On March 13, 2020, Chief Justice McGrath directed that courts release “at risk” individuals from jury duty and mandated that courts give parties the option to request a continuance or bench trial.² Later that same week, Justice McGrath asked courts to prioritize criminal matters and delay all civil jury matters.³ On March 27, the Court changed its prior suggestions to mandates, ordering that all criminal and civil jury trials be suspended until April 10 at the earliest.⁴ In line with the nationwide shift to remote interaction, the Court ordered telephonic or video appearances for emergency civil matters and criminal hearings.⁵ These measures were extended through May 4,⁶ but remote appearances, the presence of hand sanitizer and face coverings in courthouses, juror excusal, and physical distancing became long-term mandates.⁷

* *Montana Law Review* Staff Members 2020–21.

1. 100 Years Since the Great Influenza Pandemic: CDC Updates Regulations for a Modern Era, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 17, 2019), <https://perma.cc/843X-H3EM>.

2. Memorandum from Mike McGrath, Chief Justice of the Montana Supreme Court, to Montana District Court Judges and Clerks et al. 2 (Mar. 13, 2020) (copy on file with the Montana Supreme Court).

3. Memorandum from Mike McGrath, Chief Justice of the Montana Supreme Court, to Montana District Court Judges and Clerks et al. 1, 2 (Mar. 17, 2020) (copy on file with the Montana Supreme Court).

4. In The Matter of the Statewide Response by Montana State Courts to the COVID-19 Public Health Emergency 2 (Mar. 27, 2020).

5. *Id.* at 2, 5.

6. Memorandum from Mike McGrath, Chief Justice of the Montana Supreme Court, to Montana District Court Judges and Clerks et al. (Apr. 22, 2020) (copy on file with the Montana Supreme Court).

7. *See generally* Memorandum from Mike McGrath, Chief Justice of the Montana Supreme Court, to Montana District Court Judges and Clerks et al. (Dec. 21, 2020) (copy on file with the Montana Supreme Court).

Perhaps most consequentially for prospective Montana attorneys, the Court denied a petition to be admitted to the bar without taking the bar exam.⁸ Petitioners included current law school students who alleged that the safety measures that were put in place for the bar exam were “insufficient to mitigate the risk” of COVID-19 and further argued that the temporary rules the Court adopted were not comprehensive “to address the risks to all examinees.”⁹ Petitioners sought remedies from the Court that included diploma privilege, permanent waiver of the requirement to pass the bar exam, and, in the alternative, installation of additional safety measures during the bar examination.¹⁰ The Court reasoned the bar exam evaluates competency through a “rigid” and “uniform” standard that requires admission to the profession in the interests of the public.¹¹ The Court held the Montana Board of Bar Examiners undertook sufficient safety precautions to mitigate risks to examinees, including the requirement that all examinees wear masks during the examination.¹² Further, the Court held it could not grant diploma privilege because such a privilege would harm the practice of law since “14 or 15 individuals would be admitted to the practice of law in this State who would otherwise not be admitted.”¹³

In the years to come, and as Montanans slowly transition back to life before the pandemic, we hope that this introduction will help serve as a small reminder of some of the challenges Montana practitioners faced in 2020 and may also evidence lasting changes in the legal profession.

II. *BUCKLES v. BH FLOWTEST, INC.*¹⁴

In *Buckles v. BH Flowtest, Inc.*, the Montana Supreme Court held that Montana law, not North Dakota law, applied in a wrongful death suit, even though the injury occurred in North Dakota, because Montana had the most significant relationship to the litigation.¹⁵

In 2014, Glasgow, Montana resident Zachary Scott Buckles (“Zachary”) died from hydrocarbon vapor exposure while manually gauging oil-production tanks on a well site in North Dakota owned by Continental Resources, Inc. (“Continental”).¹⁶ Continental, an Oklahoma corporation doing business in Montana, had a Master Service Contract with BH

8. Order, In re Rules for Admission to the Bar of Montana (Mont. 2020) (AF 11-0244).

9. *Id.* at 1.

10. *Id.*

11. *Id.* at 3.

12. *Id.* at 4.

13. *Id.*

14. 476 P.3d 422 (Mont. 2020).

15. *Id.* at 423, 428.

16. *Id.* at 423.

Flowtest.¹⁷ BH Flowtest subcontracted with Black Rock, who then subcontracted with Black Gold—all three being Montana business entities—for manual gauging of Continental’s crude oil tanks.¹⁸ Zachary worked for Black Gold Testing (“Black Gold”).¹⁹

In 2015, Zachary’s mother Nicole R. Buckles (“Buckles”) filed a wrongful death action on behalf of Zachary’s estate in Montana’s Seventh Judicial District Court, Richland County, against Continental, BH Flowtest, Black Rock, and Black Gold.²⁰ In district court, Black Rock filed a motion, joined by BH Flowtest, asking the district court to apply North Dakota law to Buckles’s claims.²¹ Buckles argued Montana law applied because the conduct that caused the injury occurred in Montana and the relationship between the parties was centered in Montana.²² Judge Olivia C. Rieger denied the motion holding that Montana law applied.²³ After the denial, Black Rock and BH Flowtest (“Appellants”) filed a consolidated appeal.²⁴

The Montana Supreme Court considered on de novo review whether Montana or North Dakota substantive law governed Buckles’s cause of action.²⁵ Applying the Restatement (Second) of Conflict of Laws, the Court agreed with the district court that Montana law applied.²⁶

Following the Restatement’s two-step analysis, the Court first determined there was no statutory directive with respect to tort claims in Montana.²⁷ Because there was no statutory directive stating which state law applied, the Court turned to the principles in Section 6(2) of the Restatement.²⁸ Before examining the principles in § 6(2), the Court began with the presumption that the appropriate choice of law is that of the state where the injury occurred.²⁹ Even so, the Court noted this presumption is refuted, and the law of the place of injury will not apply, when another state has a “[more] significant relationship” with the issue.³⁰

Noting the Court’s rejection of the traditional rule of *lex loci delicti commissi*—the law of the place where the wrong was committed—the

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 426.

23. *Id.* at 422–23.

24. *Id.* at 424.

25. *Id.*

26. *Id.* at 424, 428.

27. *Id.* at 424–25; RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6(1) (Am. Law Inst. 1971) (“A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.”).

28. *Buckles*, 476 P.3d at 424–25.

29. *Id.* at 425; RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 146–47.

30. *Buckles*, 476 P.3d at 425; RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145(1).

Court first considered the contacts in Section 145(2) to then use when applying the principles in Section 6(2).³¹ Of the four factors to consider, the Court found that only § 145(2)(a), the place where the injury occurred, favored North Dakota.³²

The Court determined that § 145(2)(b), the place where the conduct causing the injury occurred, favored Montana because Buckles had been dispatched from Montana to work in North Dakota at an oil-production site that was controlled from Montana, and that Appellants had failed to provide Buckles with the appropriate equipment and training before sending him to work in North Dakota.³³ The Court found that § 145(2)(c) regarding domicile, residence, and place of incorporation also favored Montana because Buckles was a Montana resident and Appellants are Montana corporations with their principal places of business in-state.³⁴ Last, the Court determined that § 145(2)(d), or the place where the relationship between the parties was centered, again favored Montana because Buckles was hired, contracted, and compensated to work in Montana.³⁵

Having examined the contacts in § 145(2), the Court returned to the seven principles in § 6(2) to be applied when there is no statutory directive on choice of law.³⁶ Section 6(2)(a) considers “the needs of the interstate and international systems.”³⁷ The Court determined this principle weighed towards Montana law because the “harmonious relationship” between Montana and North Dakota would not be furthered if Montana was unable to apply its law in disputes among Montana citizens and entities.³⁸ Thus, Montana has strong policy interests in its ability to resolve these cases.³⁹

Next, the Court considered Sections 6(2)(b) and (c), the policies of the forum and other interested states, as two of the most important factors when a person is injured outside their state of residence.⁴⁰ The Court discussed Montana’s strong policy interest in safeguarding Montanans who perform inherently dangerous activities by holding employers strictly liable.⁴¹ The Court also noted that Montana’s comparative negligence statutes represent Montana’s strong policy interest in distributing liability among those responsible for a resident’s injury. Because the Court found Montana’s policy

31. *Buckles*, 476 P.3d at 425–26 (citing *Phillips v. General Motors Corp.*, 995 P.2d 1002 (Mont. 2000)); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145(2).

32. *Buckles*, 476 P.3d at 426.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6(2).

37. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6(2)(a).

38. *Buckles*, 476 P.3d at 426–27.

39. *Id.* at 426–27; RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6(2)(a), cmt. d.

40. *Buckles*, 476 P.3d at 427.

41. *Id.*

objectives to be stronger and more specific, compared to North Dakota's more "general policy objective[s]," it found these factors to favor Montana law.⁴²

The Court determined § 6(2)(d) to be neutral to the case because tort cases do not usually involve protecting the justified expectations of the parties.⁴³ Next, the Court did not find § 6(2)(e), the basic policies underlying the particular field of law, applicable because Montana and North Dakota law differed so greatly in tort liability.⁴⁴

Last, Sections 6(2)(f) and (g) consider the certainty, predictability, and uniformity of the result, and the ease in the law's determination and application.⁴⁵ The Court stated that these factors, too, favored application of Montana law because certainty, predictability, uniformity, and ease of determination and application in result are all furthered when the conduct takes place in Montana and involves Montana individuals and companies.⁴⁶ The Court disagreed with the Appellants' argument, that the § 6(2) factors favor North Dakota law, and found the two cases cited by the Appellants to be distinguishable because those cases did not involve parties whose relationships were centered in Montana by residence or incorporation.⁴⁷

Ultimately, based upon the contacts considered in Section 145(2) and the principles in Section 6(2), the Court affirmed the district court's ruling and held Montana law applied because Montana had the most significant relationship to Buckles's claims.⁴⁸

Justice Laurie McKinnon dissented, joined by Justices Beth Baker and Jim Rice.⁴⁹ Justice McKinnon argued that North Dakota had the "most significant relationship" with Buckles's claims and disagreed with the majority's "conclusory discussion" of the Section 6(2) factors.⁵⁰ She asserted the majority incorrectly held that Montana law applied to the dispute, finding it inconsistent with the "most significant relationship" test and the Court's holding in *Phillips*.⁵¹

Justice McKinnon believed the majority inappropriately focused its analysis on the domiciles of the parties, arguing that choice of law analyses

42. *Id.*

43. *Id.*; RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6(2)(d) (AM. LAW INST. 1971) ("the protection of justified expectations").

44. *Buckles*, 476 P.3d at 427–28.

45. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 6(2)(f)–(g) (AM. LAW INST. 1971).

46. *Buckles*, 476 P.3d at 428.

47. *Id.* (citing *Otto v. Newfield Expl. Co.*, No. CV 15-66-BLG-SPW, 2016 WL 9461791 (D. Mont. July 26, 2016); *Winter v. Pioneer Drilling Serv., Ltd.*, No. CV-14-20-GF-BMM, 2015 WL 9855923 (D. Mont. May 14, 2015)).

48. *Id.*

49. *Id.* at 434.

50. *Id.* at 429–34 (McKinnon, J., with Baker, Rice, JJ., dissenting).

51. *Id.* at 429–30 (citing *Phillips v. General Motors Corp.*, 995 P.2d 1002 (Mont. 2000)).

require a broader focus on the particular issue and the state interests at play.⁵² She argued that all of Buckles's claims—negligence, negligent infliction of emotional distress, and loss of consortium—took place in North Dakota.⁵³ Justice McKinnon summarized Buckles's claims as unsafe well site conditions, and argued it was *that* issue that should be analyzed under the Restatement (Second) of Conflict of Laws.⁵⁴

Following, Justice McKinnon provided her own analysis of the factors in Section 145(2).⁵⁵ Under § 145(2)(a), the injury occurred in North Dakota. Under § 145(2)(b), according to Justice McKinnon, the place where the conduct causing the injury occurred also favored North Dakota because it is most likely that any failure to provide a safe work environment occurred at the well site in North Dakota.⁵⁶ Under the domicile consideration in § 145(2)(c), she noted that although Buckles was a Montana resident, he was living in North Dakota at the time of his death, and that Buckles and the Appellants were both conducting business in North Dakota.⁵⁷ Last, under § 145(2)(d), Justice McKinnon argued that the place where the relationship between the parties centered also favored North Dakota because the parties' connection was "centered" around their "common objective" of working the well site.⁵⁸

Next, turning to § 6(2), Justice McKinnon focused her analysis on the place of the injury because, she asserted, the location was "inextricably tied" to the choice of law factors and supported the presumption that North Dakota law applied.⁵⁹ She argued that North Dakota had a greater policy interest than Montana in the safety of a workplace within North Dakota and in encouraging and promoting oil and gas development in the state.⁶⁰ She cautioned that if a worksite could be subject to any state's laws based on the domicile of any worker "a mess" of unpredictability would result.⁶¹

Justice McKinnon believed that the majority's decision was influenced by its perception that Buckles would receive an "unfair result" if North Dakota law applied and argued the opinion will promote forum shopping.⁶² Justice McKinnon argued that the majority disregarded North Dakota's policy interests, as if none existed, in favor of Montana's policy.⁶³ She argued

52. *Id.*

53. *Id.* at 30.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 431.

61. *Id.*

62. *Id.* at 432.

63. *Id.*

that the majority’s decision would lead to “uncertainty, unpredictability, and a lack of uniformity.”⁶⁴ Accordingly, Justice McKinnon would have held that North Dakota had the “most significant relationship” to Buckles’s claims.⁶⁵

Continental’s petition for a writ of certiorari to the United States Supreme Court was denied.⁶⁶

Montana practitioners should note *Buckles*, as it reveals how the majority weighs factors in choice of law disputes. As evinced here, the Court does not agree on how those factors are analyzed and applied.

—Lauren Amongero

III. *STATE V. THOMAS*⁶⁷

In *State v. Thomas*, the Montana Supreme Court held that Stephen Thomas (“Stephen”) did not automatically lose his legitimate expectation of privacy in his residence when renting from a person on probation.⁶⁸

In 2016, Stephen and his gravely ill wife had been homeless for almost a year.⁶⁹ While Stephen and his wife were renting a room at a hotel they learned that an employee’s sister, Parischere Hughes (“Paris”), had an “outbuilding” in her backyard for rent.⁷⁰ Stephen met with Paris, whom he did not know, and they agreed Stephen and his wife would rent the outbuilding for \$400 per month.⁷¹ Stephen and his wife lived in the outbuilding, moved out, and then returned.⁷² Stephen continued to live in the outbuilding alone after his wife died.⁷³

Paris owned and lived in the trailer on the property.⁷⁴ The outbuilding was detached from the primary trailer residence, but both were located

64. *Id.* at 433.

65. *Id.* at 434.

66. *Continental Res. Inc. v. Buckles ex rel.*, 592 U.S. ____ (2020) (cert. denied). Throughout this appeal, Continental Resources petitioned the United States Supreme Court for a writ of certiorari. Continental sought review under a specific personal jurisdiction theory, mainly, that their contacts in Montana had nothing to do with its case-related contacts in North Dakota. *See generally* Petition for a Writ of Certiorari at 1–3, *Cont’l Resources, Inc. v. Buckles ex rel.*, <https://perma.cc/PHM9-BG66> (U.S. Sept. 18, 2020) (No. 20-324). Moreover, given the Court’s granting certiorari in *Ford Motor Co. v. Mont. Eighth Judicial Dist.*, Continental sought at a minimum, a vacating of the Montana Supreme Court’s judgment and a remand pending the outcome of *Ford*. *Id.* The Montana Supreme Court had been made aware of this development as the case written on above was the third appeal—the prior two appeals were concerned with personal jurisdiction. *See Buckles*, 476 P.3d at 424 n.1.

67. 471 P.3d 733 (Mont. 2020).

68. *Id.* at 734, 739.

69. *Id.* at 734.

70. *Id.* at 734–35.

71. *Id.* at 735.

72. *Id.*

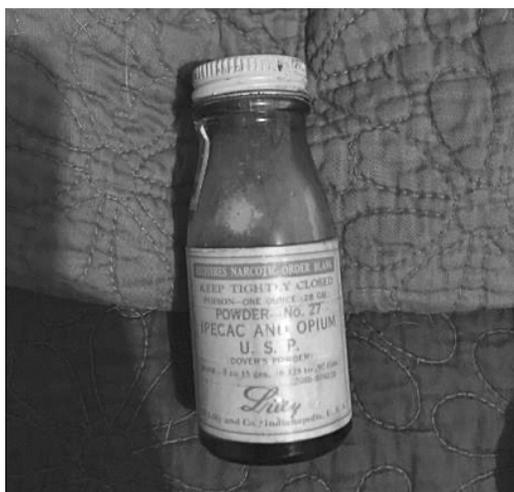
73. *Id.*

74. *Id.*

within a fenced yard.⁷⁵ Stephen's residence was modest, fitting a bed, desk, and end tables.⁷⁶ There was electricity, but the outbuilding did not have a bathroom, kitchen, running water, or plumbing.⁷⁷ Stephen spent most of his time in the outbuilding and kept all of his and his wife's possessions there.⁷⁸ Stephen would go into Paris's trailer to use the toilet, shower, and sometimes use the kitchen.⁷⁹ He kept his residence locked with a padlock that Paris had no access to.⁸⁰ Paris did not use the outbuilding for any purpose.⁸¹

Paris was on misdemeanor probation.⁸² Her sentencing order provided that her residence and all places she had access to, including private rooms of other persons, were subject to search at any time.⁸³ Before Stephen and his wife moved into the outbuilding, Paris's probation officer, Gen Stasiak ("Stasiak"), performed background checks and approved the rental.⁸⁴

FIGURE 1



After Paris missed two drug and alcohol testing appointments, Stasiak and law enforcement officers conducted a probation search at her resi-

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

dence.⁸⁵ At the time, Stephen was in his outbuilding but came outside when he heard dogs barking.⁸⁶ When he walked outside, he met an officer who directed him to open the front door to Paris's trailer.⁸⁷ Stephen followed the order.⁸⁸ He did not lock his outbuilding.⁸⁹ After searching Paris's home, Stasiak decided to search Stephen's outbuilding as well.⁹⁰ Stasiak did not ask for Stephen's permission to search the outbuilding and Stephen did not consent to the search.⁹¹ Inside Stephen's home the officers found an old bottle of "Ipecac and opium powder" (*see* Figure 1), marijuana, and marijuana paraphernalia.⁹²

Stephen testified that the bottle came from a pharmacy his wife's family had owned and was "sort of a family relic."⁹³ Stephen was later charged with felony criminal possession of dangerous drugs for the opium bottle.⁹⁴

The Eighteenth Judicial District Court for Gallatin County, Judge John C. Brown, denied Stephen's motion to suppress the evidence, holding that the search was justified because Paris and Stephen were roommates, Paris's probation authorized the search of his room, and the room was unlocked and accessible.⁹⁵ Stephen appealed Judge Brown's order.⁹⁶

The Montana Supreme Court reviews district court findings of fact in denials of suppression motions for clear error and interpretation and application of the law for correctness.⁹⁷

On appeal, Stephen argued the outbuilding was his separate residence and he had not lost his legitimate expectation of privacy when he did not lock the outbuilding.⁹⁸ The State countered that Stephen's room was subject to search because it was not a separate residence and, because no lock was on the door at the time of the search, it was reasonable to believe Paris had access to the room.⁹⁹

The Court began its analysis of the search with the constitutional guarantees of protection from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article II, Section

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 735.

93. *Id.*

94. *Id.* at 736.

95. *Id.* at 734, 736.

96. *Id.* at 736.

97. *Id.*

98. *Id.*

99. *Id.* at 736–37.

11 of the Montana Constitution.¹⁰⁰ The Court also cited Montanans' explicit right to privacy in Article II, Section 10 as narrowing the searches permissible without a warrant.¹⁰¹ The Court reiterated that it has "emphasized again and again that the entrance to the home is where the federal and Montana constitution draw a firm line" and that warrantless searches of the home are per se unreasonable, absent a valid warrant exception.¹⁰²

The Court first considered whether Stephen had a legitimate expectation of privacy in the outbuilding that he rented.¹⁰³ The Court held the district court's finding that Stephen and Paris were roommates was clearly erroneous because the undisputed evidence showed that Stephen and Paris had entered into an "arms-length" rental agreement that gave Stephen exclusive control of the outbuilding.¹⁰⁴ The Court noted that although Stephen was welcome to use Paris's residence for necessities that the outbuilding lacked, Paris did not similarly use or have access to the outbuilding.¹⁰⁵

Next, the Court rejected the argument that Stephen's legitimate expectation of privacy was diminished because of Paris's probation conditions.¹⁰⁶ The Court agreed with Stephen that the search of his residence exceeded the scope of the probationary search and noted that an individual's privacy rights are not lost "merely because he or she rents the residence from a person on probation."¹⁰⁷

Last, the Court disagreed with the district court's "excessively broad interpretation" of *State v. Finley*.¹⁰⁸ Likening the facts here to those in *Finley*, the district court held that Stephen lost his legitimate expectation of privacy when he did not lock the outbuilding after walking outside to see why the dogs were barking and meeting the officer.¹⁰⁹ In *Finley*, Finley's wife was on probation when a probationary search revealed contraband in an unlocked, open safe in their shared bedroom.¹¹⁰ Finley argued the probationary search exceeded its scope because the contents of the safe were his alone, and his wife had no access to the safe.¹¹¹ The Court disagreed, concluding there were no facts to indicate that Finley's wife did not have access to the safe.¹¹²

100. *Id.* at 737.

101. *Id.*

102. *Id.* (quoting *State v. Therriault*, 14 P.3d 444, 453 (Mont. 2000)).

103. *Id.*

104. *Id.* at 737–38.

105. *Id.* at 737.

106. *Id.* at 738.

107. *Id.*

108. *Id.* (citing *State v. Finley*, 260 P.3d 175 (Mont. 2011)).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

Here, Stasiak concluded that Paris had access to the outbuilding because it was unlocked at the time of the search.¹¹³ Unlike in *Finley*, the Court pointed to the fact that Stephen and Paris had entered into a rental agreement that gave Stephen sole dominion of the detached outbuilding.¹¹⁴ The Court also noted Stephen and Paris were not in any sort of relationship and did not share the outbuilding space.¹¹⁵ The Court held that Stephen did not have to lock his residence to have a legitimate expectation of privacy in it.¹¹⁶ Ultimately, the Court held that the district court erred in denying Stephen's suppression motion and thus reversed his conviction for criminal possession of dangerous drugs and remanded the case to be dismissed with prejudice.¹¹⁷

Thomas is noteworthy for Montana practitioners working in criminal law. This decision makes clear that the scope of probationary searches is fact specific and that an individual's legitimate expectation of privacy in their home is not diminished simply because the home is rented from a person on probation.

—Lauren Amongero*

IV. *FARMERS INSURANCE EXCHANGE V. WESSEL*¹¹⁸

In *Farmers Insurance Exchange v. Wessel*, the Montana Supreme Court held in part that when an insurance company does not have a duty to defend under an insurance policy, it does not have a duty to indemnify.¹¹⁹ In doing so, the Court reversed the trial court's determination that the duty to indemnify issue was not judicially ripe.¹²⁰

Kate Wessel and John Mehan ("Insureds") purchased property in Lewis and Clark County in 2008.¹²¹ At that time, two neighboring landowners ("Neighbors") used a road running through the Insureds' property to access their own properties.¹²² The road was the only way to access Neighbors' properties.¹²³ That same year, Insureds asked one of the Neighbors if

113. *Id.*

114. *Id.* at 739.

115. *Id.*

116. *Id.*

117. *Id.*

* The author discloses that the views expressed here do not reflect those of the Montana State Office of the Appellate Defender.

118. 477 P.3d 1101 (Mont. 2020).

119. *Id.* at 1107.

120. *Id.*

121. *Id.* at 1103.

122. *Id.*

123. *Id.*

they could recreate on their property.¹²⁴ The Neighbors denied this request because a conservation easement on the land prohibited motorized use.¹²⁵

In response, Insureds refused to allow Neighbors to continue to use the road through Insureds' property.¹²⁶ This prevented Neighbors from accessing their own property, so they bought an access easement from a different property owner next to the Insureds and built a new driveway.¹²⁷ Insureds' allegedly retaliatory conduct continued, ranging from the construction of physical barriers on Neighbors' new driveway to alleged violent threats.¹²⁸ One of the Neighbors claimed that Insureds' conduct forced the neighbor to leave their home and prevented them from finding a buyer for the property.¹²⁹

In 2011, one of the Neighbors disappeared.¹³⁰ His dismembered remains were later found near McDonald Pass.¹³¹ John Mehan, one of the Insureds, was arrested for felony assault with a weapon and felony evidence tampering in relation to the law enforcement investigation into the death.¹³² The Neighbors sued Insureds for assault, trespass, civil conspiracy, and, in the case of the deceased neighbor's estate, intentional infliction of emotional distress.¹³³ All claims alleged intentional and purposeful action on the part of the insureds.¹³⁴

Insureds' homeowners insurance provider, Farmers Insurance Exchange ("Farmers"), declined coverage over the claims because of the alleged intentional nature of the conduct.¹³⁵ The First Judicial District Court for Lewis and Clark County, Judge Michael McMahon, agreed and found that Farmers owed no duty to defend Insureds under the policy.¹³⁶ The district court granted Farmers' summary judgment motion, but declined to dismiss the claim entirely, holding that the duty to indemnify issue was not yet ripe and therefore not justiciable.¹³⁷ Insureds appealed Judge McMahon's decision to deny their discovery requests and the finding that Farmers did not owe a duty to defend them under the insurance policy.¹³⁸ Farmers cross-

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 1103–04.

133. *Id.* at 1104.

134. *Id.*

135. *Id.* at 1102.

136. *Id.* at 1103.

137. *Id.*

138. *Id.*

appealed, requesting a declaration on “[w]hether there can be a duty to indemnify in the absence of a duty to defend[.]”¹³⁹ The Montana Supreme Court quickly dispensed with the insureds’ discovery claim, finding that the district court had not abused its discretion in denying the discovery requests, because the insureds had not followed Rule 56(f) of the Montana Rules of Civil Procedure.¹⁴⁰

An insurer in Montana has a duty to defend an insured party when the allegations in a complaint, if proven, would result in coverage for the insured party under the insurance policy.¹⁴¹ The initial burden lies on the insured party to prove that the claim lies within the policy’s coverage.¹⁴² The Court analyzed the language of Insureds’ homeowners policy based on the complaints brought by Neighbors.¹⁴³ Because the policy only covered “occurrences” that were accidental, if the claimed occurrences were not accidental, but intentional, then they would not be covered by the policy.¹⁴⁴ The Court affirmed the district court’s analysis that Neighbors’ claims all alleged intentional—not accidental—conduct on the part of the insureds because the insureds allegedly acted “both intentional[ly] and . . . purposefully . . . to cause injury and damages to the [Neighbors].”¹⁴⁵ Because the claims alleged intentional conduct, the Court affirmed that they did not constitute accidental “occurrences” under the insurance policy and therefore did not give rise to a duty for Farmers to defend the insureds.¹⁴⁶

The duty to defend and the duty to indemnify are separate legal obligations.¹⁴⁷ Because the duty to indemnify is only established once facts are actually “proven, stipulated, or otherwise established” that give rise to the insured’s liability,¹⁴⁸ the duty to indemnify is narrower than the duty to defend.¹⁴⁹ The Court agreed with the district court that if the duty to defend question remains unresolved, then whether there is a duty to indemnify is not yet justiciable.¹⁵⁰ The Court then noted that here, as already determined, there is no duty to defend and the insurance policy does not cover the insureds, so there was no duty to indemnify either.¹⁵¹ The Court definitively

139. *Id.*

140. *Id.* at 1106.

141. *Id.* at 1105 (citing *Fire Ins. Exch. v. Weitzel*, 371 P.3d 457, 461 (Mont. 2016)).

142. *Id.*

143. *Id.* at 1105.

144. *Id.*

145. *Id.* at 1106.

146. *Id.*

147. *Id.* (referencing *Skinner v. Allstate Ins. Co.*, 127 P.3d 359 (Mont. 2005)).

148. *Wessel*, 477 P.3d at 1106 (citing *State Farm Mut. Auto. Ins. Co. v. Freyer*, 312 P.3d 403, 410–11 (2013)).

149. *Id.*

150. *Id.* at 1107.

151. *Id.*

held that “a conclusion that there is no duty to defend compels the conclusion that there is no duty to indemnify.”¹⁵²

Before *Wessel*, the Court in *Skinner v. Allstate Insurance Co.*¹⁵³ noted that the analysis of whether there is a duty to defend or a duty to indemnify are separate inquiries that might end in different conclusions.¹⁵⁴ For example, even if a court finds that the insurance policy covers the claims, thus establishing a duty to defend, a finder of fact may later determine that no duty to indemnify exists.¹⁵⁵ The *Skinner* court, however, did not answer whether the duty to indemnify could exist without a duty to defend. The *Wessel* court answered that question definitively in the negative.¹⁵⁶

While perhaps not making any enormous leaps in determining the duties of insurance companies in Montana, *Wessel* conclusively establishes the scope of the duty to indemnify as it falls within the duty to defend in insurance policies: if there is no duty to defend because the claims are not covered by the insurance policy, then there is no duty to indemnify either. Moving forward, Montana practitioners should look to *Wessel* when determining duties under an insurance policy.

—Forrest Graves

V. *MURRAY V. BEJ MINERALS, LLC*¹⁵⁷

The Montana Supreme Court held that fossilized dinosaur bones were not “minerals” as contemplated by the ordinary meaning of “mineral” in a transfer deed.¹⁵⁸ In so holding, the Court established that fossils should generally be considered a part of the surface estate rather than the mineral estate if the contractual language in the deed does not say otherwise.¹⁵⁹ The Court’s majority established the ordinary meaning of “mineral” through conventional methods of statutory interpretation, relying primarily on dictionaries, statutory definitions, and regulatory guidance.¹⁶⁰ Importantly for Montana lawyers, however, Justice Laurie McKinnon penned a separate concurrence in which she introduced and advocated for the use of corpus linguistics as a new tool of statutory interpretation. Because of the novelty of her suggestions, this essay summarizes the majority and dissent but

152. *Id.*

153. 127 P.3d 359 (Mont. 2005).

154. *Id.* at 363.

155. *Id.*

156. *Wessel*, 477 P.3d at 1106.

157. 464 P.3d 80 (Mont. 2020).

158. *Id.* at 93.

159. *Id.*

160. *See generally Id.* at 87–90.

mainly focuses on corpus linguistics and Justice McKinnon's related analysis.

In 2013, BEJ Minerals, LLC ("BEJ") asserted ownership over fossils found on the Murrays' property.¹⁶¹ At the time, the Murrays owned all surface rights to the property where the bones were located but shared the mineral rights with BEJ.¹⁶² The fossils in question included a rare formation depicting "two dinosaurs locked in combat," a triceratops skull, and "one of only a dozen intact *Tyrannosaurus rex* skeletons of its quality ever found," the lot of which was worth millions of dollars.¹⁶³ BEJ claimed the fossils were minerals and should therefore belong in part to BEJ as holder of one-third of the mineral estate.¹⁶⁴

Upon removal to the United States District Court for the District of Montana, Judge Susan P. Watters granted the Murrays' motion for summary judgment, holding that fossils were "not included in the natural and ordinary meaning of 'mineral,'" so the mineral estate in question did not include rights to the fossils.¹⁶⁵ On appeal, a Ninth Circuit Court of Appeals panel reversed.¹⁶⁶ BEJ then petitioned for rehearing and rehearing en banc.¹⁶⁷ Sitting en banc, the Ninth Circuit certified this question to the Montana Supreme Court: "[w]hether, under Montana law, dinosaur fossils constitute 'minerals' for the purpose of a mineral reservation."¹⁶⁸

The Montana Supreme Court majority used a test established in prior caselaw for what qualifies as a "mineral," and grounded its opinion in an interpretation of the contractual language in the deed in question.¹⁶⁹ "Courts [in Montana] interpret contracts according to their plain and ordinary meaning," and the Court restricted its analysis to the meaning of the words in the deed itself.¹⁷⁰ In determining whether the ordinary meaning of "mineral" as used in the deed included fossils, the Court brushed aside the federal courts' focus on individual dictionary definitions of the word "mineral," opting instead to find the meaning of the word by looking at the context in which it was used.¹⁷¹ The Court also looked to various statutory and regulatory definitions of "mineral" and "fossil."¹⁷² Because none of the "mineral" defini-

161. *Id.* at 82.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 83 (quoting *Murray v. Billings Garfield Land Co.*, 187 F. Supp. 3d 1203, 1204 (D. Mont. 2016)).

166. *Murray v. BEJ Minerals, LLC*, 908 F.3d 437 (9th Cir. 2018).

167. *Murray*, 464 P.3d at 83.

168. *Id.* at 83.

169. *Id.* at 83–88.

170. *Id.* at 85.

171. *Id.*

172. *Id.* at 87–89.

tions included fossils and the only “fossil” definitions were used in the natural history and paleontology contexts, the Court found that “minerals” were not generally understood to include “fossils.”¹⁷³

The Court also looked to the statutory interpretation maxim *expressio unius est exclusion alterius*, or “the expression of one thing is the exclusion of another.”¹⁷⁴ The Court found it telling that the word “fossil” was not included in the grant of the mineral interest in the deed, which included “oil, gas, and hydrocarbons.”¹⁷⁵ Given that the grant excluded fossils, the Court found that the parties to the mineral deed shared an understanding that fossils would not be included in the mineral interest.¹⁷⁶

Justice Ingrid Gustafson dissented, joined by Justices Beth Baker and Judge Olivia Reiger of the Seventh Judicial District for Dawson County.¹⁷⁷ Justice Gustafson noted that the ordinary meaning analysis should be fact-specific in this instance, questioning not whether fossils generally should be considered minerals but whether the actual fossils at issue should be considered minerals under the deed in question.¹⁷⁸ Using the same caselaw and statutory definitions as the majority, Justice Gustafson asserted that because fossils are “scientifically” made up of minerals and are “rare and valuable,” they should be considered minerals for the purposes of the mineral deed between the parties.¹⁷⁹

A. *The Concurrence and Corpus Linguistics*

Justice McKinnon’s discussion of corpus linguistics remains the first substantive mention of the interpretive tool in a published opinion in both Montana and the Ninth Circuit.¹⁸⁰ Her suggestions are part of a burgeoning body of support for the tool in the legal context.

Corpus linguistics describes the relatively new practice of compiling written language into databases, forming a body or “corpus” of language that can then be searched and analyzed.¹⁸¹ Practically speaking, these modern linguistic corpora are created by consolidating documents into a software program that allows a user to search the body of materials for a

173. *Id.* at 87–88.

174. *Id.* at 86–87. The Court has used *expressio unius* as a tool for statutory interpretation beginning in at least 1881. See *King v. Nat’l Mining & Exploring Co.*, 1 P. 727 (Mont. 1881).

175. *Murray*, 464 P.3d at 87.

176. *Id.*

177. *Id.* at 96.

178. *Id.* at 96–97.

179. *Id.* at 99–100.

180. Confirmed by a search of “corpus linguistics” in Westlaw Edge and Lexis+ conducted on April 9, 2021.

181. See Tommy Gales & Lawrence M. Solan, *Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer?*, 36 GA. ST. U. L. REV. 491, 496–97 (2020).

keyword, much like a simple Google search.¹⁸² Features within the corpus search mechanism allow the user to measure the frequency of the words surrounding the search word.¹⁸³ This allows the user to consider the ordinary meaning of the word based on the contexts in which it most frequently occurs in written and spoken language, rather than from a decontextualized dictionary definition.¹⁸⁴

There are several corpora of linguistics data available online.¹⁸⁵ One has been consistently referenced by courts: the Corpus of Contemporary American English (“COCA”).¹⁸⁶ Because linguistic corpora vary in their linguistic contents, the choice of corpus should be tailored to the statutory language at issue, especially if the language is specialized or tied to a particular time period.¹⁸⁷ COCA, for example, contains “over one billion words of text . . . from eight genres,” including newspapers, magazines, fiction, television, and movies dating from 1990–2019.¹⁸⁸ In comparison, the News on the Web (“NOW”) corpus contains 12.3 billion words accumulated from internet news sources beginning in 2010 and updated monthly.¹⁸⁹

There are now dozens of scholarly articles referencing corpus linguistics and statutory interpretation, most of which side with Justice McKinnon in espousing the positive influence the tool could have on statutory interpretation. Some scholars emphasize the benefits of corpus linguistics’ empirical and quantifiable nature,¹⁹⁰ lending additional support for Justice McKinnon’s concerns about the potential misuse of dictionary definitions. By applying corpus linguistics to past United States Supreme Court opinions, legal scholars have shown that the new tool may lead to different ordinary meaning outcomes at the highest judicial levels.¹⁹¹

In his 2019 article *Against Corpus Linguistics*, John Ehrett noted the danger of eliminating the hierarchy of the sources from which words are

182. See for example Corpus of Contemporary American English, <https://perma.cc/L2JD-KYGT> (last visited May 2, 2021).

183. *Murray*, 464 P.3d at 95.

184. *Id.*

185. Gales & Solan, *supra* note 181, at 501.

186. COCA is available at <https://perma.cc/L2JD-KYGT>. Other available corpora include (without limitation): The Corpus of Historical American English (COHA), available at <https://perma.cc/MX6N-6YHK>; Google Books Ngram Viewer, available at <https://perma.cc/33CW-LF5G>; and the NOW Corpus, available at <https://perma.cc/R9BZ-52QK>.

187. Gales & Solan, *supra* note 181.

188. Corpus of Contemporary American English, *supra* note 182.

189. NOW Corpus (News on the Web), <https://perma.cc/R9BZ-52QK> (last visited May 2, 2021).

190. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 *YALE L.J.* 788, 829 (2018).

191. See *id.* (applying a corpus linguistics to *Muscarello v. United States* to determine the ordinary meaning of “carry” with reference to a firearm and coming to a different conclusion than the Court).

pulled.¹⁹² Because corpus databases compile language samples from a myriad of sources into one searchable space, searchers cannot assess or validate the credibility or importance of individual language sources.¹⁹³ This could limit judges' ability to make fine-grained distinctions between the relative strength or import of one source's use of a word over another's use.¹⁹⁴

Ehrett also notes that users of corpus linguistic search databases do not know what sources the creators of the database chose to include or exclude.¹⁹⁵ This could lead to materials from some classes, races, or other groups being disproportionately represented in the corpus, leading to biased search results.¹⁹⁶ Ehrett also describes the burden on judges to correctly execute searches in linguistic databases that can be difficult to interpret.¹⁹⁷

Although corpus linguistics has been widely discussed in law journals and scholarly treatises in recent years, its application by courts remains limited in scope. The Utah Supreme Court,¹⁹⁸ the Michigan Supreme Court,¹⁹⁹ and the United States Court of Appeals for the Sixth Circuit²⁰⁰ have all addressed the new tool in some capacity in reported opinions. In an April 2021 concurrence, United States Supreme Court Justice Samuel Alito raised the possibility of using corpus linguistics in concert with another canon of statutory interpretation.²⁰¹

Justice McKinnon began her concurrence by underscoring the previous two *Murray* decisions in which the federal district court and the Ninth Circuit panel used the same dictionary and statutory definitions of 'mineral' but came to opposite conclusions.²⁰² Justice McKinnon noted that this "demonstrate[d] dependency on such authority may be less reliable than convention holds."²⁰³ She suggested that a corpus linguistics analysis would have eliminated the initial dictionary conflict between courts and would have led the *Murray* majority to the same conclusion it reached through its conventional analysis.²⁰⁴

192. John S. Ehrett, *Against Corpus Linguistics*, 108 GEO. L. J. ONLINE 50, 61(2019).

193. *Id.*

194. *Id.*

195. *Id.* at 65–69.

196. *Id.*

197. *Id.* at 68–70.

198. *State v. Rasabout*, 356 P.3d 1258, 1264 (2015) (Lee, J., concurring). (suggesting that the Google News corpus be used to determine the meaning of "discharge" in relation to a firearm).

199. *People v. Harris*, 885 N.W.2d 832, 839 (Mich. 2016) (using COCA search results to find common usages of the term "information").

200. *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 439, 441 (6th Cir. 2019) (Thapar, J., concurring) (suggesting corpus linguistics as a tool for statutory interpretation).

201. *Facebook, Inc. v. Duguid*, ___ S. Ct. ___, 2021 WL 1215717 (Apr. 1, 2021) (Alito, J., concurring).

202. *Murray*, 464 P.3d at 93.

203. *Id.* at 94.

204. *Id.* at 95–96.

Justice McKinnon used COCA to show how common collocates of the word “mineral” could be used to establish the word’s ordinary meaning.²⁰⁵ Collocates are “words that are statistically most likely to appear in the same context as” the keyword.²⁰⁶ Analyzing a word’s collocates entails investigating the relationship “between two or more words [that] have a tendency to occur within a few words of each other.”²⁰⁷ The process follows the premise that the meaning of words is shaped by its surrounding words.²⁰⁸

Through COCA, Justice McKinnon found that the most frequent collocated nouns for “mineral” were “resource,” “oil,” “right,” and “deposit,” all of which occurred within four words of the word “mineral” at least 200 times in the corpus materials.²⁰⁹ By contrast, the word “fossil” occurred within 4 words of “mineral” only 69 times.²¹⁰ The most common relevant verbs collocated with “mineral” were “extract” and “mine.”²¹¹ Justice McKinnon noted that the written materials in the corpus referring to “mineral” and its most common collocates “overwhelmingly” referred to economic contexts and resource extraction and exploitation.²¹² Her corpus linguistics analysis supported the district court’s original holding that the common understanding of the word “mineral” relates to mining or resource extraction for “economic exploitation.”²¹³ This meaning also supported the majority’s holding here. Because of the insights provided by a close analysis of the collocates of “mineral,” Justice McKinnon suggested using corpus linguistics as a tool for statutory interpretation in the future.²¹⁴ Justice McKinnon explicitly noted, however, that “Montana courts use, and will continue to use, dictionary definitions” to help determine the ordinary meaning of contract terms.²¹⁵

Corpus linguistics is still in its early stages of development in the legal field. Given its novelty, some scholars have valid concerns about over-relying on corpus linguistics as a tool for statutory interpretation. Most available resources, however, tout corpus linguistics’ usefulness as a modern tool for establishing the ordinary meaning of ambiguous statutory and contractual language. Any ordinary meaning analysis in Montana should continue

205. *Id.*

206. Lee & Mouritsen, *supra* note 190, at 837.

207. Neal Goldfarb, *A Lawyer’s Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. REV. 1359, 1368–69 (2018) (quoting MICHAEL STUBBS, *WORDS AND PHRASES: CORPUS STUDIES OF LEXICAL SEMANTICS* 24 (2001)).

208. Lee & Mouritsen, *supra* note 190, at 832.

209. *Murray*, 464 P.3d at 96.

210. *Id.* at 95.

211. *Id.*

212. *Id.* at 96.

213. *Id.*

214. *Id.* at 93.

215. *Id.* at 96.

to reference dictionary definitions as needed. Given the growing support for corpus linguistics in the legal community, however, when dictionaries come up in an ordinary meaning argument it may be persuasive to supplement the tried-and-true dictionary belt with a corpus linguistics set of suspenders.

VI. *REAVIS v. PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY*²¹⁶

In *Reavis v. Pennsylvania Higher Education Assistance Agency*, the Montana Supreme Court held that a student loan borrower's state law claims against the Pennsylvania Higher Education Assistance Agency (PHEAA) did not constitute improper disclosure claims that would be expressly or implicitly preempted by the Higher Education Act (HEA), and the borrower's claims were not subject to conflict preemption by the HEA.²¹⁷ The Court reversed and remanded the case for further proceedings because the borrower's claims survived dismissal.²¹⁸

This case involves the federal student loan system established by the HEA and the administration of such loans by a private loan servicer.²¹⁹ Congress established the HEA in 1965 "to strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education."²²⁰ Since 2010, the Department of Education ("DoEd") has exclusively loaned funds to student borrowers directly.²²¹ The DoEd also contracts with private entities to service loans to student borrowers.²²² Student borrowers typically communicate with their federal loan servicer opposed to the actual holder of their debt.²²³ Student loan servicers assume several responsibilities, including receiving and applying payments to a borrower's account and maintaining account records.²²⁴ Student loan servicers interact with borrowers "to help prevent default in obligations arising from post-secondary education loans conducted to facilitate repayment."²²⁵

Congress created the Public Service Loan Forgiveness program ("PSLF") in 2007.²²⁶ PSLF was established to encourage students to enter

216. 467 P.3d 588 (Mont. 2020).

217. *Id.* at 590, 595.

218. *Id.* at 595; M. R. Civ. P. 12(b)(6).

219. *Reavis*, 467 P.3d at 590.

220. *Id.* (citing *Leveski v. ITT Educ. Servs. Inc.*, 719 F.3d 818, 819 (7th Cir. 2013) (quoting Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1219 (1965))).

221. *Id.* at 590.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* (quoting 12 C.F.R. § 1090.106).

226. *Id.* at 590.

public service careers promising student loan forgiveness.²²⁷ It requires a borrower who has direct loans through the DoEd to make 120 on-time monthly payments under a qualifying repayment program while working for a qualifying public service employer.²²⁸ PSLF retains an exclusive contract with PHEAA to administer loans for which borrowers seek forgiveness under the PSLF.²²⁹

From 2007 to 2010, James Reavis attended the University of Montana School of Law and obtained a juris doctor.²³⁰ Reavis continued to study at the Monterey Institute of International Studies for two more years where he obtained a master's degree in Public Administration in 2012.²³¹ In the summers of 2010 and 2011, Reavis attended language courses.²³² Reavis funded all of these graduate courses with student loans.²³³

In 2012, Reavis consolidated his student loans into federal direct loans to guarantee his loans would qualify for forgiveness under the PSLF.²³⁴ He began working for the Montana Office of the Public Defender ("OPD"), which remains a qualifying public service employer under the PSLF.²³⁵ Reavis made all payments on time and in the amounts designated under the PSLF.²³⁶ However, Reavis alleged PHEAA has failed to correctly account for his payments.²³⁷ PHEAA broke Reavis's loans into a series of loan sequences.²³⁸ Reavis claims that he had made 65 qualifying payments between June 2012 and the filing of his complaint, but PHEAA reported to Reavis that he has made between 34 and 54 qualifying payments on the different loan sequences.²³⁹

Reavis also claimed the PHEAA furnished him conflicting information about the amount due during each pay period and his income-based repayment plan.²⁴⁰ The income-based repayment plan required Reavis to regularly update information related to his employment.²⁴¹ Reavis alleged he accurately reported to PHEAA his employment information between 2012 to 2017.²⁴² PHEAA changed the qualifying review period to last until Octo-

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 591.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

ber 2017, rather than May 2018 as Reavis expected.²⁴³ PHEAA did not notify Reavis that his plan only qualified through October 2017.²⁴⁴ Reavis changed his income-based repayment plan to Revised Pay As You Earn (“REPAYE”) upon PHEAA’s recommendation.²⁴⁵ Additionally, PHEAA’s online system neglected to accept payments made on a Saturday until the following Monday.²⁴⁶

Reavis sued PHEAA in Lewis and Clark County District Court and made several state law claims: (1) PHEAA violated the Consumer Protection Act; (2) PHEAA negligently accounted Reavis’s payments; (3) PHEAA engaged in deceit, negligent misrepresentation, or constructive fraud; and (4) PHEAA breached the implied covenant of good faith and fair dealing.²⁴⁷ Reavis sought declaratory relief regarding the number of qualifying payments he has made under the PSLF.²⁴⁸ PHEAA moved to dismiss Reavis’s claims, arguing that the HEA preempted all of Reavis’s claims.²⁴⁹

Judge Michael F. McMahon granted PHEAA’s motion to dismiss and held that the HEA expressly preempted Reavis’s claims.²⁵⁰ The district court construed 20 U.S.C. § 1098g as grounds for dismissing Reavis’s claims.²⁵¹ This statute preempts any state law disclosure requirements on federal loan servicers.²⁵² The district court held that Reavis’s claims arose from and related to PHEAA’s disclosures or non-disclosures to Reavis.²⁵³ The district court determined that state law claims that a servicer misrepresented a business practice remain expressly preempted by federal statute because the claims are contrary to a state law requirement to make alternate disclosures.²⁵⁴

The Montana Supreme Court dispensed with the district court’s interpretation of Reavis’s claims as disclosures based on the theory of express preemption.²⁵⁵ Express preemption applies when Congress clearly states its intention to preempt state law through explicit statutory language.²⁵⁶ The Court started its analysis at the Supremacy Clause: “the historic police powers of the States are not to be superseded by Federal Act unless that is the

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*; M. R. Civ. P. 12(b)(6).

250. *Reavis*, 467 P.3d at 591.

251. *Id.* at 592.

252. *Id.* (citing 20 U.S.C. § 1098g).

253. *Reavis*, 467 P.3d at 592.

254. *Id.*

255. *Id.* at 593.

256. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

clear and manifest purpose of Congress.”²⁵⁷ The Court analyzed the purpose of Congress by looking at the “text and structure of the statute at issue” because Congress’s intent to preempt state law may be stated expressly or implied in the statute’s structure and purpose.²⁵⁸ The Court determined the HEA does not define “disclosure requirements” and interpreted its definition within the context of 20 U.S.C. § 1083.²⁵⁹ Section 1083 refers to HEA’s disclosure requirements that certain information be communicated to borrowers during the various stages of the loan.²⁶⁰ The Court held the “domain” of § 1098g preempts the type of disclosures to borrowers that § 1083 requires.²⁶¹ The Court therefore held that Reavis challenged actions made by PHEAA rather than improper disclosures made by PHEAA.²⁶²

The Court disagreed with the district court’s special deference to the DoEd’s 2018 informal guide.²⁶³ The DoEd expressed its opinion that the HEA preempts all state regulations that impact federal loan servicing.²⁶⁴ The Court sided with federal court decisions that the DoEd’s guidance “has little persuasive value and should be given little weight.”²⁶⁵ The Court therefore held that the HEA does not expressly preempt Reavis’s claims as pleaded.²⁶⁶

The Court continued its analysis of Reavis’s claims within the context of conflict preemption, unlike the district court.²⁶⁷ Conflict preemption applies when an actual conflict between state and federal law exists and thus it is impossible to obey both laws or when state law interferes to fully accomplishing Congress’s objectives.²⁶⁸ PHEAA argued that subjecting PHEAA to the “disparate laws of fifty states” would thwart Congress’s objective of uniformity in the federal student loan system.²⁶⁹ The Court decided that the HEA’s structure does not support PHEAA’s argument under a theory of

257. *Reavis*, 467 P.3d at 592 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)).

258. *Id.* (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) and citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

259. *Id.* at 593; 20 U.S.C. § 1098g (providing that “loans made, insured, or guaranteed pursuant to a program authorized by Title IV of the Higher Education Act of 1965 shall not be subject to any disclosure requirements of any State law”).

260. *Reavis*, 467 P.3d at 592 (citing *Lawson-Ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908, 917 (11th Cir. 2020); 20 U.S.C. § 1083(a)-(b)).

261. *Id.* at 593.

262. *Id.* (noting that PHEAA failing to accurately account for Reavis’s payments constitutes an action, not a disclosure).

263. *Id.* at 594; The guide is entitled “Federal Preemption and State Regulation of the Department of Education’s Federal Student Loan Programs and Federal Student Loan Servers.”

264. *Id.*

265. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

266. *Id.*

267. *Id.*

268. *Id.* (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

269. *Reavis*, 467 P.3d at 594.

conflict preemption because the express preemption provisions in the HEA demonstrate that Congress considered preemption issues when drafting the statutory language.²⁷⁰ The Court determined that it must enforce the express preemption provisions rather than adding to them.²⁷¹ The Court also held that state law prohibitions against the types of claims Reavis made, such as unfair, deceptive, or negligent conduct, will not harm the HEA's uniform requirements for federal student loan programs.²⁷² The Court ultimately held that conflict preemption does not apply to Reavis's claims.²⁷³

In consideration of the Court's decision in Reavis, Montana practitioners must recognize that Montana law claims made by a borrower of federal student loans against a private loan servicer will survive a motion to dismiss on the grounds of express and conflict preemption because the HEA does not preempt state law claims. The express preemption analysis largely depends on whether the private loan servicer failed to disclose information to the borrower or whether the servicer failed to act on behalf of the borrower. Practitioners should understand that state law claims will also survive a challenge of conflict preemption because the Montana Supreme Court held that Congress need not achieve an objective of uniformity within the federal student loan system.

—Anne M. Lewis

VII. *STATE V. RUNNING WOLF*²⁷⁴

In *State v. Running Wolf*, the Montana Supreme Court held that the 2015 version of a Persistent Felony Offender (“PFO”) statute applied at the defendant’s 2017 sentencing hearing.²⁷⁵ However, the majority held that the defendant cannot be designated as a PFO because the defendant had never been convicted of a felony offense before his sentencing for his Driving Under the Influence (“DUI”) felony offenses.²⁷⁶ The Court affirmed the district court’s judgment in part, reversed in part, and remanded with instructions to strike the defendant’s designation as a PFO.²⁷⁷ This decision overruled *State v. Williamson*,²⁷⁸ *State v. Hamm*,²⁷⁹ and *State v. Anderson*.²⁸⁰

270. *Id.* (listing several express preemption provisions).

271. *Reavis*, 467 P.3d at 594.

272. *Id.*

273. *Id.* at 595.

274. 457 P.3d 218 (Mont. 2020).

275. *Id.* at 226; MONT. CODE ANN. § 46-18-501 (2015).

276. *Running Wolf*, 457 P.3d at 226.

277. *Id.*

278. 707 P.2d 530 (Mont. 1985).

279. 818 P.2d 830 (Mont. 1991).

280. 203 P.3d 764 (Mont. 2009).

The purpose of PFO designation and the corresponding enhanced sentences is meant to impose punishment for recidivists who continuously fail to reform their criminal behavior.²⁸¹ The Court identified the “fundamental purpose” of enhanced sentencing statutes as a way to identify defendants who fail to correct their behavior after prior convictions and to incarcerate such defendants for a longer time period to protect the community and deter similar behavior in society.²⁸² Enhanced penalty statutes therefore provide defendants fair warnings if they continue to commit criminal acts after gaining the opportunity to reform their criminal acts.²⁸³

This case addresses a PFO designation under Montana Code Annotated § 46-18-501 and incorporation of a new definition of a PFO under a 2017 statute.²⁸⁴ Section 46-18-501 defined a “persistent felony offender” as “an offender who has *previously been convicted* of a felony and who is presently being sentenced for a second felony if less than five years have elapsed between the commission of the present offense and either: (a) the previous felony conviction; or (b) the offender’s release on parole or otherwise from prison or other commitment imposed as a result of the previous felony conviction.”²⁸⁵ The statutory language of “previously been convicted” required that a second felony be committed on a different occasion than the first and within five years.²⁸⁶ The Legislature enacted House Bill 133 (“HB 133”), which expressly preserved the application of the 2015 PFO statute to offenses committed before July 1, 2017.²⁸⁷ The 2017 statute provides that a PFO means “an offender who has previously been convicted of two separate felonies and who is presently being sentenced for a third felony committed on a different occasion than either of the first two felonies.”²⁸⁸ An offender is considered to have “previously been convicted” of two separate felonies “if less than five years have elapsed between the commission of the present offense and the most recent of the two felony convictions.”²⁸⁹ Section 46-1-202(18) requires that one of the three felonies must be a sexual offense or a violent offense.²⁹⁰

The facts here started on January 28, 2015 when law enforcement arrested the defendant, Running Wolf.²⁹¹ The State charged Running Wolf

281. *Running Wolf*, 457 P.3d at 225.

282. *Id.* at 226.

283. *Id.*

284. MONT. CODE ANN. § 46-1-202(18) (2017).

285. § 46-18-501 (emphasis added).

286. *Running Wolf*, 457 P.3d at 226 (citing *Williamson*, 707 P.2d at 532–33).

287. *Id.* at 221.

288. § 46-1-202(18).

289. *Id.*

290. *Id.*

291. *Running Wolf*, 457 P.3d at 220.

with his fourth DUI offense.²⁹² Law enforcement arrested Running Wolf again, and he was charged with his fifth DUI offense and separate misdemeanor offense on May 1, 2015 while the fourth DUI charge was still pending.²⁹³ Running Wolf had three prior misdemeanor DUI convictions from 2005, 2009 and 2011.²⁹⁴ The State charged Running Wolf's January and May 2015 DUI offenses as felonies because a fourth or subsequent DUI constitutes a felony under Montana law at the time. Before Running Wolf was convicted of either felony following the May 2015 charges, the State gave notice that it intended to seek PFO designation.²⁹⁵

On July 14, 2017 Running Wolf pleaded guilty to both felony DUIs, approximately two weeks after the 2017 PFO statute took effect.²⁹⁶ The district court conducted Running Wolf's sentencing hearing on October 30, 2017 and concluded that the 2015 PFO statute applied because the 2015 statute was in effect during the time Running Wolf "committed his underlying offenses."²⁹⁷ The district court sentenced Running Wolf for two felony DUI offenses from his fourth DUI offense on January 28, 2015 and his fifth DUI offense from May 1, 2015.²⁹⁸ The district court used Running Wolf's fourth DUI offense from January as the predicate offense to enhance Running Wolf's punishment for the May DUI offense under § 46-18-501.²⁹⁹ As a result, Running Wolf received a straight ten-year sentence without ever having the opportunity to participate in a sobriety program or receive other alcohol abuse treatment to help reform his criminal behavior.³⁰⁰

Running Wolf appealed his conviction, arguing that the district court lacked authority to designate him as a PFO under the 2015 statute because the 2017 version applied on the date of his sentencing.³⁰¹ Running Wolf also contended, even if the 2015 statute applied, that the district court erred because "the PFO statute requires an offender to have a felony conviction before committing the offense for which the PFO designation is sought."³⁰² Running Wolf asserted that he had no "previous felony conviction" upon which the district court could base his PFO designation because the district court entered judgment on his fourth and fifth DUI offenses during the same sentencing hearing.³⁰³ Running Wolf asked the Montana Supreme

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* (citing Mont. Laws ch. 321, § 40, at 1013 (HB 133)).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 220–221.

301. *Id.* at 221.

302. *Id.* at 222.

303. *Id.*

Court to overrule its decisions in *Williamson*, *Hamm*, and *Anderson* because *Williamson* and its progeny prove inconsistent with the majority of other jurisdictions that have held that the basis for a PFO designation for a felony conviction “must precede commission of the principal offense.”³⁰⁴ Running Wolf contended that the plain language of the 2015 statute demonstrates the Legislature’s intent to assign a PFO designation only when the defendant has a felony conviction that existed before commission of the offense that provides basis for the PFO designation.³⁰⁵ In contrast, the State directed the Court to *Williamson* because in *Williamson* the Court held that the statutory language “previously been convicted” requires a second felony to be committed on a different occasion than the first and within five years of the first felony.³⁰⁶ The State emphasized that the Court affirmed the *Williamson* decision twice, in *Hamm* and *Anderson*.³⁰⁷

The Supreme Court resolved the first issue regarding whether the 2015 PFO statute applied to Running Wolf’s sentencing in 2017 by a recent decision in *State v. Thomas*.³⁰⁸ In *Thomas*, the State charged Thomas with a felony DUI arising from an incident that allegedly occurred on July 23, 2016.³⁰⁹ The State sought PFO designation for Thomas based on a prior felony escape conviction.³¹⁰ The district court sentenced Thomas as a PFO under the 2015 statute, although the jury convicted Thomas of a DUI felony in January 2017.³¹¹ Thomas received a ten-year prison sentence.³¹² Thomas appealed, and the Supreme Court held that the plain language of HB 133 explicitly expressed the Legislature’s intent to refrain from applying the revisions enacted by HB 133 to offenses committed before July 1, 2017.³¹³ The Court in *Running Wolf* held that *Running Wolf* presented the same issue and arguments raised in *Thomas*, therefore compelling the Court to make the same conclusion as the district court that the 2015 PFO statute correctly applied at Running Wolf’s October 30, 2017 sentencing hearing.³¹⁴

The Court further addressed the issue on whether the PFO statute required the predicate felony conviction upon which the PFO status is based to precede the commission of the principal offense.³¹⁵ The majority used a plain language analysis to interpret the express language of § 46-18-501 to

304. *Id.*

305. *Id.*

306. *Id.* (citing *State v. Williamson*, 707 P.2d 530 (Mont. 1985)).

307. *Id.* (citing *State v. Hamm*, 818 P.2d 830 (1991); *State v. Anderson*, 203 P.3d 764 (2009)).

308. *Running Wolf*, 457 P.3d at 221; 445 P.3d 777 (Mont. 2019).

309. *Thomas*, 445 P.3d at 778.

310. *Id.*

311. *Id.*; § 46-18-501.

312. *Thomas*, 445 P.3d at 778.

313. *Id.*

314. *Running Wolf*, 457 P.3d at 221.

315. *Id.*

determine the intent of the Legislature.³¹⁶ The Court stated that it cannot “go further and apply any other means of interpretation” if it can determine the plain meaning of the words used in a statute.³¹⁷ The Court held that the plain language of the 2015 PFO statute expressly requires the existence of a felony conviction before the commission of the principle offense upon the basis of a valid PFO designation.³¹⁸

The majority held that *Williamson* directly contradicts the express requirements of § 46-18-501.³¹⁹ In *Williamson*, the defendant argued he could not be designated as a PFO because he committed his two felony offenses at approximately the same time, and he entered his pleas at the same time.³²⁰ The majority of the Court critiqued its rationale in *Williamson* because the *Williamson* decision disregarded the plain, clear, and unambiguous statutory language.³²¹ The Court in *Williamson* grounded its disregard for the plain meaning of the statute based in fear that “to hold otherwise would provide criminals unfettered license to commit all manner of felonies without adequate consequence” between the commission of a first felony and the subsequent conviction on that felony.³²² In *Running Wolf*, the Court decided that its role is not to insert what has been omitted in statutory language but to interpret the statute “in accordance with its plain meaning.”³²³ The Court overruled *Williamson* and its progeny because *Williamson* created a “falsely exaggerated scenario” that the legislature did not intend to address in the statute.³²⁴

Justice Baker concurred and dissented, arguing that the majority should have followed the decisions in *Williamson*, *Hamm*, and *Anderson* under the theory of stare decisis.³²⁵ Justice Baker noted that the Court in *Williamson* rejected a plain language interpretation of “previously been convicted” because the statute would have given an offender “a sort of ‘window of opportunity’ to commit additional crimes before being sentenced on his first felony and be immune from [PFO] designation because the [five-year] clock does not start running until after the first conviction.”³²⁶ Justice Baker emphasized that the Legislature did not intend to provide such an “open season” for criminals to run free.³²⁷ Justice Baker

316. *Id.* at 222.

317. *Id.* (citing *State v. Gatts*, 928 P.2d 114, 117 (Mont. 1996)).

318. *Id.* at 223.

319. *Id.* at 223.

320. *State v. Williamson*, 707 P.2d 530, 532 (Mont. 1985).

321. *Running Wolf*, 457 P.3d at 223.

322. *Id.* (referencing *Williamson*, 707 P.2d at 532–33).

323. *Id.*

324. *Id.*

325. *Id.* at 227.

326. *Id.* (quoting *State v. Williamson*, 707 P.2d 530, 532–33 (Mont. 1985)).

327. *Id.* (quoting *Williamson*, 707 P.2d at 533).

contended that the Legislature has the responsibility to cure the Court's mistakes if the Legislature determines the Court misconstrued the PFO statutes in *Williamson*, *Hamm*, and *Anderson*.³²⁸

Justice Rice joined in Justice Baker's concurrence and dissent, arguing that the majority rejected 30 years' worth of deliberations by the Court.³²⁹ Justice Rice reiterated the application of stare decisis, which he asserted teaches the Court that it must use its ability to overrule precedent sparingly.³³⁰ Justice Rice stated that the Court can overturn incorrect precedent only "where departure therefore can be made without unduly affecting contract rights or other interests calling for consideration."³³¹ Justice Rice noted that in *Running Wolf*, charges had been assessed and filed and criminal proceedings had been undertaken "pursuant to our precedential interpretation of the PFO statutes."³³² Justice Rice stated that the

Legislature expressly chose not to revise the Court's 35-year interpretation of PFO statutes and qualifying offenses, and as such, the Court's decisions since 1985 have "repeatedly and fairly warned everyone, including *Running Wolf*" that committing multiple felonies may result in enhanced penalty.³³³

Justice Shea joined in Justice Baker's and Justice Rice's concurrences and dissents, articulating that the "manifestly wrong" standard raises the bar substantially and stating that the majority's interpretation of § 46-18-501 does not rise to the level of "manifestly wrong."³³⁴ Justice Shea noted that the Court's precedents have allowed the previous felony conviction to be committed "mere seconds before the sentence imposed for the second felony, irrespective of whether the previous felony conviction occurred before the commission of the second felony."³³⁵ Justice Shea determined that the interpretation of "persistent felony offender," which hinges on whether an offender has been considered to have been "previously convicted of a felony," does not prove to be "manifestly wrong."³³⁶

In conclusion, Montana legal practitioners can expect the Court to follow a plain language analysis regarding PFO statutes.³³⁷ The Court determined that it cannot draw any inference from the Legislature's silence that remains inconsistent with the plain language of the statute and cannot serve

328. *Id.* at 228.

329. *Id.* at 229.

330. *Id.* at 230 (citing *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 465 (2015)).

331. *Id.*

332. *Id.*

333. *Id.* at 231 (referring to *State v. Williamson*, 707 P.2d 530 (Mont. 1985)).

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 225.

as “a justification to perpetuate a manifestly wrong interpretation of § 46-18-501.”³³⁸ As a result of the *Running Wolf* decision, Montana lawyers must know that *Williamson*, *Hamm*, and *Anderson* no longer remain good law, and that Montana law now requires that a felony conviction must occur before the commission of the principal offense before designating an offender as a PFO with an attached sentencing enhancement.³³⁹

—Anne M. Lewis

338. *Id.*

339. *Id.* at 226.