

ORIGINAL

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08/09/2021

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 21-0395

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OP 21-0395

L. B., individually and on
behalf of D.B., a minor,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA;
BUREAU OF INDIAN AFFAIRS;
DANA BULLCOMING, agent of
the Bureau of Indian Affairs
sued in his individual
capacity,
Defendants-Appellees.

No. 20-35514

D.C. No.
1:18-cv-00074-SPW

ORDER CERTIFYING
QUESTION TO THE
SUPREME COURT
OF MONTANA

FILED

AUG 09 2021

Bowen Greenwood
Clerk of Supreme Court
State of Montana

Filed August 6, 2021

Before: Danny J. Boggs,* Marsha S. Berzon, and
Mary H. Murguia, Circuit Judges.

Order

* The Honorable Danny J. Boggs, United States Circuit Judge for
the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY**

Montana Law

The panel certified to the Montana Supreme Court the following question:

Under Montana law, do law-enforcement officers act within the course and scope of their employment when they use their authority as on-duty officers to sexually assault members of the public?

ORDER

We are asked to determine whether law-enforcement officers act within the scope of their employment under Montana law when they use their authority as on-duty officers to sexually assault members of the public. This central question of state law is determinative of the instant case, and there is no controlling precedent in the Montana Supreme Court's decisions. Mont. R. App. P. 15(3). Therefore, we respectfully certify this question of law to the Montana Supreme Court pursuant to Montana Rule of Appellate Procedure 15.

I. Factual Background

Plaintiff-Appellant L.B., a Northern Cheyenne tribal member, lived within the Northern Cheyenne Reservation in

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Lame Deer, Montana. On October 30, 2015, L.B. and her mother went to a bar outside the Reservation and had a few alcoholic drinks. After they returned home, L.B.'s mother took the truck keys and said she was going for a drive. L.B. called the police and reported that her mother was driving while intoxicated.

Bureau of Indian Affairs ("BIA") Officer Dana Bullcoming responded to L.B.'s call. Officer Bullcoming determined that L.B.'s mother was safe and then went to L.B.'s residence. After entering the residence, Officer Bullcoming asked L.B. whether she was there alone; L.B. responded that her children were asleep in the other room. L.B. told Officer Bullcoming that she had consumed a couple of drinks that evening, including half of a beer at her residence. Officer Bullcoming then threatened to call social services and arrest L.B. for child endangerment because she was intoxicated while in the presence of her children. *See* Northern Cheyenne Criminal Code § 7-9-6 (1998) (prohibiting intoxication within the exterior boundaries of the Northern Cheyenne Reservation). L.B. pleaded with Officer Bullcoming not to arrest her because if he did, she would lose her job as a school bus driver.

Officer Bullcoming took L.B. outside to his patrol car to take a breathalyzer test, which L.B. recounts reporting a .132 or .136 blood alcohol content. Officer Bullcoming repeatedly told L.B. that "something had to be done." L.B. got the impression that Officer Bullcoming did not want to arrest her, so she inquired if by "something needs to be done" he meant "sex." Officer Bullcoming replied affirmatively. L.B. believed that her choices were to go to jail or have sex with Officer Bullcoming. L.B. and Officer Bullcoming had unprotected sexual intercourse in her home and then he left

the residence. L.B. became pregnant as a result of the encounter and gave birth to D.B.

In April 2018, L.B. brought this Federal Tort Claims Act (“FTCA”) suit against the United States, seeking to hold the United States liable for Officer Bullcoming’s misconduct.¹ L.B. and the government filed cross-motions for summary judgment. The government asserted that Officer Bullcoming was not acting within the scope of his employment with the BIA when he sexually assaulted L.B; therefore, Officer Bullcoming’s actions fell outside the scope of the FTCA’s limited waiver of sovereign immunity and grant of jurisdiction. The district court agreed with the government, granted the government’s motion for summary judgment, and denied L.B.’s cross-motion. The district court reasoned that under Montana’s respondeat superior case law, the scope of employment includes only an employee’s actions made “in furtherance of his employer’s interest.” Relying on *Maguire v. State*, 835 P.2d 755 (Mont. 1992)—a non-law-enforcement respondeat superior case—the district court concluded that Officer Bullcoming was not acting in furtherance of his employer’s interest, and therefore was acting outside the scope of his employment, when he sexually assaulted L.B. Because the FTCA requires that the challenged conduct be within the scope of the actor’s employment, the district court concluded that L.B.’s FTCA claim necessarily failed.

L.B. appealed, raising a single issue: whether, under Montana law, Officer Bullcoming’s sexual assault of L.B. was within the scope of his employment as a law-

¹ L.B. also named Officer Bullcoming as a defendant. He failed to answer the complaint and a default judgment was entered against him.

enforcement officer. L.B. alternatively moved this court to certify this question to the Montana Supreme Court.

II. Explanation of Certification

Because this case comes to us under the Federal Tort Claims Act, we apply the law of the state “where the act or omission occurred.” 28 U.S.C. § 1346(b)(1); *see Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir. 1996). The alleged tortious acts in this case occurred in Montana; therefore, Montana law applies.

In *Maguire v. State*, the Montana Supreme Court suggested that sexual assault falls outside the scope of ordinary employment. *See* 835 P.2d at 758–59. But the Montana Supreme Court has not yet decided how the scope of a law-enforcement officer’s employment is viewed, in light of the power and authority law-enforcement officers maintain over citizens. Other states have considered factual situations similar to the one presented here and have concluded that the scope of a law-enforcement officer’s employment may include on-duty sexual assault—even when the scope of other areas of employment may not—because of the significant authority law-enforcement officers possess over others. *See Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1349–50 (Cal. 1991) (distinguishing the scope of a police officer’s employment from other types of employment because of “the considerable power and authority that police officers possess”); *Applewhite v. City of Baton Rouge*, 380 So. 2d 119, 121 (La. 1979) (“A police officer is a public servant given considerable public trust and authority. . . . [W]here excesses are committed by such officers, their employers are held to be responsible for their actions even though those actions may be somewhat removed from their usual duties. This is unquestionably the case because of the position of

such officers in our society.”). The Montana Supreme Court has not been presented with an opportunity to decide this question.

In *Brenden v. City of Billings*, the Montana Supreme Court explained that, “[e]ven if not authorized by the employer, and itself not motivated by any intent or purpose to serve the employer,” an employee’s tortious conduct may still fall within the scope of employment so long as it is “incidental to” or “closely intermingled” with authorized conduct. 470 P.3d 168, 178 (Mont. 2020) (quoting *Keller v. Safeway Stores*, 108 P.2d 605, 612 (Mont. 1940)). But *Brenden* did not answer the question presented in this case—whether sexual assault can come within the scope of employment in the context of law enforcement, where officers are permitted to detain, arrest, and when necessary, use force against members of the public.

Additionally, Montana’s post-*Maguire* endorsement of the non-delegable-duty doctrine, see *Paull v. Park County*, 218 P.3d 1198 (Mont. 2009), complicates the issue presented here. The non-delegable-duty doctrine holds employers who have a duty to protect others from harm liable for harm caused by their agents. See *id.* at 1205. Before *Paull*, the Montana Supreme Court applied the non-delegable-duty exception to the respondeat-superior doctrine only to “instances of safety where the subject matter is inherently dangerous.” *Maguire*, 835 P.2d at 759. *Paull*, however, “adopt[ed] Restatement (Second) Agency, § 214”—which sets forth the non-delegable-duty doctrine—“as an appropriate statement of the law in Montana,” without any express limitation to inherently dangerous activity. *Paull*, 218 P.3d at 1205.

Liability under the non-delegable-duty doctrine ostensibly covers conduct that falls outside the scope of

employment. *See Maguire*, 835 P.2d at 758–60 (discussing Restatement § 214, the non-delegable-duty exception, as a rule that covers tortious acts of employees acting outside the scope of employment). Because the FTCA waives sovereign immunity in this context only for actions taken within the scope of a law-enforcement officer’s employment, victims of sexual assault by federal officers do not have the benefit of the non-delegable-duty doctrine. As a result, a Montana citizen who is a victim of sexual assault by a state, county, or municipal law-enforcement officer has a potential remedy in tort against the employer, while a Montana citizen who is a victim of rape by a BIA police officer does not, simply because the BIA officer is a federal employee. This dichotomy likely has a disproportionate effect on Montana’s indigenous population, who are more likely to interact with federal, rather than state or local, law-enforcement officers. And the Montana Supreme Court may not otherwise be presented with this dichotomy, as claims concerning federal officers are typically tried in federal court. This reality further supports our decision to invoke the certification process.

Because the unanswered question regarding the scope of a law-enforcement officer’s employment in Montana presents important public-policy ramifications, we find, after careful consideration, that it is appropriate to exercise our discretion to certify this question to the Montana Supreme Court. *See Kremen v. Cohen*, 325 F.3d 1035, 1037–38 (9th Cir. 2003) (listing the factors considered when determining whether certification is appropriate).

III. Certified Question

We respectfully certify the following question to the Montana Supreme Court:

Under Montana law, do law-enforcement officers act within the course and scope of their employment when they use their authority as on-duty officers to sexually assault members of the public?

We acknowledge that, as the receiving court, the Montana Supreme Court may reformulate the certified question. Mont. R. App. P. 15(6)(a)(iii).

IV. Counsel Information

The names and addresses of counsel or the parties, as required by Mont. R. App. P. 15(6)(a)(iv), are as follows:

Timothy M. Bechtold, Bechtold Law Firm PLLC, PO Box 7051, Missoula, MT 59807; and John Heenan, Heenan & Cook, 1631 Zimmerman Trail, Billings, MT 59102, for Plaintiff-Appellant L.B.

Timothy A. Tatarka, Assistant U.S. Attorney, District of Montana, U.S. Courthouse, 2601 Second Avenue North, Box 3200, Billings, MT 59101, for Defendant-Appellee United States of America.

V. Conclusion

The Clerk shall forward a certified copy of this certification order, under official seal, to the Montana Supreme Court. The Clerk is also ordered to transmit a copy of the Excerpts of Record filed in this appeal to the Montana Supreme Court and, if requested by the Montana Supreme Court, provide all or part of the district court record not included in the Excerpts of Record. Mont. R. App. P. 15(5).

Submission of this appeal for decision is vacated and deferred pending the Montana Supreme Court's final response to this certification order. The Clerk is directed to administratively close this docket, pending further order. The parties shall notify the Clerk of this court within fourteen days of the Montana Supreme Court's acceptance or rejection of certification, and again, if certification is accepted, within fourteen days of the Montana Supreme Court's issuance of a decision.

**QUESTION CERTIFIED; PROCEEDINGS
STAYED.**