

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-039

RANDY LAEDEKE, and,
DARLA PRENN, for
THE ESTATE OF LILA M. LAEDEKE

Plaintiff and Appellant,

v.

BILLINGS CLINIC, and John Doe
Defendants unknown at this time.

Defendant and Appellee.

APPELLANT'S BRIEF

*On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause No. DV-18-0323*

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STATEMENT OF ISSUE

The District Court committed error when it found that the delay in Defendant Billings Clinic providing requested medical records did not toll the statute of limitations when the fact of injury was known, even though the newly disclosed records showed that tests were performed at the hospital indicating Lila Laedeke had experienced a recent heart attack while in Defendant's Hospital and was probably suffering from congestive heart failure, when the hospital staff had previously advised her symptoms were from a cold or flu and that there was no evidence of heart problems.

The District Court relies on *Blackburn v. Blue Mt Women's Clinic*, 286 Mont. 60, 75, 951 P.2d 1, 10 (1997).

STATEMENT OF THE CASE AND FACTS

This is an appeal from the Thirteenth Judicial District Court's Order granting defendant's 12(b) motion to dismiss and dismissing Plaintiff's Complaint against defendants.

This is a medical malpractice case filed by Personal Representatives of the Estate of Lila Laedeke, Randy Laedeke and Darla Prenn, on their behalf and the beneficiaries of The Estate of Lila Laedeke. Lila Laedeke is the mother of Randy

Laedeke and Darla Prenn who was a long time patient at defendant Billings Clinic's medical facilities.

In January 2014 Lila Laedeke stubbed her toe at home and it became neurotic and Randy Laedeke took Lila to Billings Clinic for treatment of the neurotic toe on January 27, 2014. Lila was admitted to Billings Clinic Hospital January 27, 2014 for treatment of her injured toe. After being in Defendant's hospital for approximately a week Lila had become ill with flue like symptoms and complaining of shortness of breath and chest pains. Plaintiff Randy Laedeke and Darla Prenn their sister Sherri Santos stayed with their mother several hours at a time during Lila Laedeke's stay at the Defendant's hospital.

During Lila's stay at Defendant 's hospital Randy, Darla, and Sherrie asked the Defendant's medical staff multiple times what was causing Lila's illness that she acquired while admitted to Defendant's hospital and if there were any tests they could perform to determine why she was having shortness of breath issues and intermittently complaining about chest pain. The hospital staff advised that their mother's symptoms were caused by the flue or cold with lung congestion she acquired while in the hospital and further advised the nurses and doctors in charge of her care didn't think any testing was necessary as it was their opinion her complaints were the result of the cold or flue.

On or about February 13, 2022 it was determined that her toe had healed sufficiently for Lila Laedeke to be discharged home. Lila was discharged home with Randy Laedeke with instructions to give her Robutussin Cold and Flue medication and her diabetic medication.

The next day Lila was complaining about hurting all over and her chest hurting. Randy gave Lila her pain medication and consulted with a nurse at Defendant's hospital regarding Lila's complaints to see what if any course of action should be taken to resolve Lila's complaints. Randy put Lila on speaker phone so she could explain her symptoms to the nurse at Billings Clinic. During this conversation Randy Laedeke asked the Billings Clinic nurse if Lila's complaints about sub sternum chest pain could have something to do with her heart and asked the nurse to look through Lila's chart to see if there was any indication that Lila might have heart issues. After about 30 minutes the **nurse said she looked through Lila's medical chart and did not see anything that indicated she might have a heart issue.** The nurse said she did not know what was causing Lila's symptoms and told to just give Lila her medications and see if she gets better or worse.

Randy Laedeke gave Lila her medications and she fell asleep on the living room couch and seemed to be resting well. Randy went to town to do his banking

business. Upon leaving the bank an old friend he hadn't seen in a long time who insisted Randy listen to some issue he was dealing with.

Sometime after midnight on February 15, 2014 Randy returned home and found Lila laying on the couch dead. Subsequently Randy hired pathologist Thomas Bennet to perform an autopsy. Tom Bennett completed his autopsy draft report on or about February 25, 2014 and forwarded it to Randy Laedeke. To Randy's surprise the autopsy findings were that Lila had died from coronary artery disease resulting in congestive heart failure. Randy ordered and obtained Lila's medical records from Billings Clinic which did not include any indication that Lila was suffering from coronary artery disease or congestive heart failure as the nurse he spoke to February 14 had indicated. See Exhibit A, [REPORT OF POSTMORTEM EXAMINATION] which contains a statement of facts and Dr. Bennett's opinion of cause of death being Hypertensive and atherosclerotic cardiovascular disease, resulting in Congestive Heart Failure.

February 16, 2017 PR Randy Laedeke fax filed a medical negligence claim against Defendant Billings for failure to diagnose and treat Lila's coronary heart disease and congestive heart failure. As many attorneys in Montana do, Randy Laedeke used the Medical Legal Panel process as a factfinding process to determine exactly what Defendant Billings Clinic knew about Lila Laedeke's coronary artery disease and congestive heart failure.

During the Medical Legal Panel Process Billings Clinic produced nearly 1800 pages of Lila Laedeke's medical records, which to Randy's surprise, included records of test performed by Billings Clinic medical staff that showed Lila Laedeke was probably suffering from congestive hart failure. [See Exhibit B, Chest Xray and Echocardiogram]

Even though Randy, Darla, and Sherrie on multiple occasions during Lila's last stay in Billings Clinic Hospital asked if Lila's complaints about chest pain and shortness of breath could be caused by a heart or blood circulation issue, the Billings Clinic medical staff never disclosed that these tests were performed or what they showed. The Billings Clinic medical staff assured them that Lila's complaints and symptoms were related to a cold or flu she contracted while in the hospital. On at least one occasion while Lila's children were present in her hospital room along with Billings Clinic medical staff, Lila stated that she had a heart attack. Randy, Darla, and Sherri asked the medical staff if there was any evidence that Lila had suffered a heart attack and the medical staff stated that there was no medical evidence that Lila had suffered a heart attack and Lila was imagining the heart attack. The fact of the matter is that the medical records produced during the Medical Legal Panel proceedings indicated that testing performed January 27, 2014, at the beginning of Lila's last hospital stay indicated probable recent Myocardial Infarction [heart attack].

Thirty days after the Medical Legal Panel issued its opinion and served it on Randy Laedeke, Randy Laedeke and Darla Prenn, as Personal Representative of the Estate of Lila Laedeke, filed the medical malpractice lawsuit at issue in this case on March 5, 2018, in the Montana Thirteenth Judicial Court which is at issue in this appeal.

Defendant Billings Clinic filed a Rule 12(b)(6) Motion to Dismiss on March 31, 2021, alleging among other things that Plaintiffs Complaint was time barred as a result of new shorter time limits in medical malpractice claims. Plaintiff Randy Laedeke filed an affidavit correcting in-accurate factual statements in Defendant's motion and Plaintiffs file their Response in Opposition on April 30, 2021.

Plaintiff's Response in Opposition to Defendants Motion to dismiss is reproduced below setting forth the relevant facts and issues addressed in this appeal.

COMES NOW Plaintiff Randy Laedeke and respectfully submits his response and brief, in addition to his affidavit filed April 30, 2021, in opposition to Defendant BILLINGS CLINIC'S motion to dismiss as follows:

Contrary to Defendant's allegations in its motion to dismiss, Plaintiff's claims are not barred by the applicable statute of limitations. Plaintiff's complaint was timely filed with the Montana Medical Legal Panel; Plaintiff's Complaint was timely filed in the Yellowstone County District Court; and, Plaintiff's complaint was timely served on Defendant pursuant to Rule 4, Montana Rules of Civil Procedure.

THE NEW TWOYEAR STATUTE OF LIMITATION

DOES NOT APPLY IN THIS CASE.

In this case the applicable statute of limitations was three years at the time the malpractice was committed and discovered after the subsequent death of Lila Laedeke as the result of Defendant's malpractice pursuant to §27-2-205, MCA. The Montana Supreme Court held in Fleming v. International Paper Co, 2008 MT 327, 346 Mont. 141, 194 P.3d 77, that the statute of limitations, other applicable statutes, and procedural rules in effect at the time of the injury or discovery of the injury apply. The Montana Supreme Court stated in 2008 that this has been the rule for the past 75 years and they were not inclined to change it now, and to Plaintiff's knowledge has not changed this rule since it's ruling in Fleming.

To apply the subsequent change in the time period would be to impose an ex post facto law to this case and the three year statute in place at the time the tort was committed and subsequently discovered must be applied.

Lila Laedeke was treated at the Billings Clinic for a number of years prior to her death on or about February 15, 2014, and died within two days of her discharge from the Billings Clinic Hospital. Plaintiff Lila Laedeke and her son were advised by the medical staff that she was suffering from a cold or flue and instructed to treat the condition with cold and flue medicine. It was later discovered after her death and the autopsy report received sometime after February 25, 2017, that Lila Laedeke was suffering from and died from coronary artery disease resulting in congestive heart failure as opposed to a cold or flue.

The complaint in this case was filed with the MEDICAL LEGAL PANEL on February 16, 2014, which is well within the applicable three year statute of limitations. According to

Plaintiff's records Plaintiff's medical negligence claim was filed with the MEDICAL LEGAL PANEL by fax at 406-443-4042 with a cover letter from Randy Laedeke dated February 16, 2017 along with 1) Original Application, 2) Statement of Facts and claim by Randy Laedeke, 3) Pathology Report by Dr. Thomas Bennett; and, 4) Narrative to Thomas Bennett by Randy Laedeke. [See Plaintiff's Affidavit filed April 29, 2021.]

The discovery doctrine is a principal of law that tolls the running of the statute of limitations until the injury or cause of injury is discovered, which is recognized through out the united states including Montana's State and Federal Courts is codified in §27-2-205, MCA, which was the statute controlling medical negligence claims at the time of injury in 2014. At least as far back as Monroe v. Harper (1974), 164 Mont. 23, 518 P.2d 788, the Montana Supreme Court has tolled the statute of limitations pursuant to the discovery doctrine where the plaintiff was unable to discover his injury until his cast was removed, thereby delaying the running of the statute of limitations by fifty-seven days. In this case, Plaintiff's case was filed within two days after the death of Lila Laedeke and well before the three years ran from the time the cause of death was known when the preliminary autopsy report was written by Dr. Bennett on February 25, 2014. Plaintiff's claim was additionally tolled by Defendant's failure to disclose relevant facts. [Note that the discovery doctrine is now codified in the relevant statute of limitations statutes]

Likewise, the Montana Federal District Court in Billings applied the discovery doctrine in a products liability action to toll the statute of limitations until the plaintiff discovered that his cataracts may have been caused by the drug MER/29. Hornung v. Richardson Merrill, Inc.(D.Mont.1970), 317 F.Supp. 183.

As to Defendant's claim that the original filing was not complete, the original filing was sufficient to notify the Defendant what Plaintiff's claim is and Montana is a Notice Filing State. The claim or complaint only needs to be specific enough to put the defendant on notice there is being a claim made and what that claim is.

Again, the statute in effect at the time this action accrued controlling the applicable statute of limitations, 27-2-205, MCA, Actions for medical malpractice, provided that an action in tort for injury of death against a medical provider based upon alleged professional negligence must be commenced within 3 years after the date of injury or within 3 years after the plaintiff discovers the injury, whichever occurs last. However, **this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant or through reasonable diligence subsequent to the act, error, or to the defendant's omission would have been.** In this case defendant failed to disclose the facts alleged in Plaintiff's complaint at paragraph 9, until after defendant was required to provide medical records to the Montana Medical Legal Panel after the complaint filed with the Montana Medical Legal Panel was transmitted to defendant Billings Clinic on April 5, 2017, and said medical records were later forwarded to Plaintiffs disclosing Defendant's negligent acts or omissions recited in paragraph 9 of Plaintiff's complaint.

Those acts disclosed by the subsequent disclosure of medical records recited in paragraph 9 of Plaintiff's complaint are as follows:

9. **Unknown to Lila Laedeke or her son Randy Laedeke or daughters Darla Prenn and Sherri Santos, who were at the hospital monitoring Lila's treatment for most of her hospital stay, various tests indicated that Lila Laedeke may have been experiencing cardio complications such as suspected heart failure** associated with hypoxia and pulmonary edema. As an example the date Lila came to the Billings Clinic on January 27, 2014 an EKG was performed

that showed a probable recent **Myocardial Infarction** [Heart attack], which was not disclosed to Lila or her son Randy Laedeke who was present at the medical facility. It was dismissed by the admitting Hospitalist as a computer error. On 2/5/14 an **ECOCARDIOGRAPHY** was done for **Pulmonary Edema**, the primary cause of which is **CONGESTIVE HEART FAILURE**. On 2/7/2014 a chest xray was performed to determine the cause of **hypoxia** and crackles. This report indicates “**may be due to congestive heart failure**. Underlying pneumonia or combination of both also possible.” This was also not disclosed to the patient or her son who had medical power of attorney or her daughters. There is also no record of a consultation or request for evaluation by a cardiologist or any other kind of heart doctor, which should be regular protocol when a serious heart condition is suspected such as congestive heart failure.

Therefore, based upon the plain language of §27-2-205, MCA, the statute of limitations was tolled until after the above disclosure was made by the production of medical records after April 5, 2017, when they were supplied to the Medical Lega Panel and then to Plaintiffs. Therefore, the above entitled claim was timely filed with the Medical Legal Panel from February 16, 2017 through April 3, 2017 when the complaint file was deemed complete by the Montana Medical Legal Panel and then transmitted to Defendant Billings Clinic.

PLAINTIFF’S COMPLAINT WAS TIMELY FILED IN THE YELLOWSTONE COUNTY DISTRICT COURT WITHIN 30 DAYS AFTER PLAINTIFF WERE SERVED WITH THE MEDICAL LEGAL PANEL’S DECISION.

Plaintiffs were served with the Medical Legal Panel’s decision on February 1, 2018. 30 days from February 1, 2018 is Saturday March 3, 2018. The Montana Rules of Civil Procedure provide that if the last day of filing falls on a weekend or legal holliday the party has until the next business day to make their filing. The next business day the courthouse was open was Monday March 5, 2018, which is the date Plaintiff’s Complaint.

was filed in the Yellowstone County District Court.

SERVICE OF PROCESS OF PLAINTIFF'S COMPLAINT WAS TIMELY PURSUANT TO RULE 4, MONTANA RULES OF CIVIL PROCEDURE.

Defendant concedes that Defendant was served with Plaintiff's Complaint within three years of filing the Complaint. Rule 4, Montana Rules of Civil Procedure provides that the Plaintiff has three years to serve the complaint on Defendant, and Defendant concedes that Defendant was served with Plaintiff's Complaint and return of service was filed with the Clerk of Court's Office within that three year period.

Defendant however contends that the new special service of process statute enacted in 2015 applies. Again, this new statute does not apply to this case because of the holding in in Fleming v. International Paper Co, 2008 MT 327, 346 Mont. 141, 194 P.3d 77, that the statute of limitations, other applicable statutes, and procedural rules in effect at the time of the injury or discovery of the injury apply. §25-3-106, MCA, which is the new new statute shortening the time for service of process in medical negligence cases did not exist at the time of injury and therefore does not apply in this case.

CONCLUSION

Based on the foregoing, and Plaintiff Randy Laedeke's Affidavit, Defendant's motion to dismiss should be denied.

Dated this 30th day of April, 2021.

On May 19, 2021, the District Court issued it's Order and Opinion granting Defendant's motion and dismissing Plaintiff's complaint in the above entitled case.

The District Court did correctly find that the new shorter time requirements enacted after the death of Lila Laedeke did not apply to this case. However, the District Court found that although the February 16, 2017, application for review filed with the Montana Medical Legal Panel was filed within three years of discovering Lila Laedeke died of congestive heart failure from the autopsy but did not toll the three year statute of limitations because Plaintiff's had not officially been appointed Personal Representatives yet. In addition, the District Court erroneously ruled that the Defendant Billings Clinic's failure to produce medical records of testing disclosing that its medical staff had indeed conducted testing that showed Lila Laedeke was suffering from congestive heart failure as opposed to cold and flu symptoms medical staff advised Plaintiffs while Lila Laedeke was in Defendant's hospital prior to her death. The District Court erroneously found that the tolling provision in §27-2-205, MCA, did not apply to Defendant's failure to disclose the fact that testing performed at its hospital showed that Lila Laedeke was probably suffering from congestive heart failure and its failure to provide or delay in providing medical records including the testing documents does not toll the statute of limitations when the fact of injury is known pursuant to §27-6-702, MCA, as per Blackburn v. Blue Mt. Women's Clinic, 286 Mont. 60, 75, 951 P.2d 1, 10 (1997).

The remainder of facts are contained in the body of Defendant/Appellant's Argument below and the autopsy report, and not reproduced here to avoid duplication.

STANDARD OF REVIEW

THE SUPREME COURT REVIEWS DE NOVO A DISTRICT COURT'S RULING ON A MOTION TO DISMISS UNDER Mont. R. Civ. Procedure 12(b)(6). IN REVIEWING A MOTION TO DISMISS THE COURT CONSTRUES THE COMPLAINT IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF AND TAKES THE ALLEGATIONS OF THE COMPLAINT AS TRUE.

ARGUMENT

The District Court committed error when it found that the delay in Defendant Billings Clinic providing requested medical records did not toll the statute of limitations when the fact of injury was known, even though the newly disclosed records showed that tests were performed at the hospital indicating Lila Laedeke had experienced a recent heart attack while in Defendant's Hospital and was probably suffering from congestive heart failure, when the hospital staff had previously advised her symptoms were from a cold or flu and that there was no evidence of heart problems.

The tolling provision of Montana Case Law are provided with the medical malpractice statute of limitations found in §27-2-205(1), Montana Code Annotated.

27-2-205. Actions for medical malpractice. (1) Action in tort or contract for injury or death against a physician or surgeon, dentist, registered nurse, nursing home or hospital administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, a licensed hospital or long-term care facility, or licensed medical professional

corporation, based upon alleged professional negligence or for rendering professional services without consent or for an act, error, or omission, must, except as provided in subsection (2), be commenced within 3 years **after the date of injury or within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last**, but in no case may an action be commenced after 5 years from the date of injury. **However, this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant or through the use of reasonable diligence subsequent to the act, error, or omission upon which an action is based and that is known to the defendant or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant.**

History: En. Sec. 1, Ch. 328, L. 1971; amd. Sec. 1, Ch. 191, L. 1973; R.C.M. 1947, 93-2624; amd. Sec. 1, Ch. 499, L. 1987; amd. Sec. 38, Ch. 83, L. 1989; amd. Sec. 1, Ch. 16, L. 1995.

It is Plaintiff's position that the statute of limitations is tolled under the first discovery rule in 27-2-205, until Plaintiff discovered the injury or cause of death and that the injury was caused by Defendant as this Court found in Wilson v. Brandt, 406 P.3d 452 (2017), 398 Mont.. 387.

In this case Plaintiff was not made aware that Defendant's Hospital staff conducted tests until they were produced during the course of the Medical Legal Panel Proceedings, which showed Plaintiffs' mother had recently had a heart attack and was probably suffering from Congestive Heart Failure while in Defendants hospital from January 27 to February 13, 2014. Defendants hospital staff are negligent and caused the subsequent death of Lila Laedeke because they failed to advise the patient's children of her heart condition and failed to treat Lila Laedeke for the heart condition revealed by the tests.

This Court in Wilson v. Brandt, 406 P.3d 452 (2017), 398 Mont.. 387, found that the Plaintiff Wilson's statute of limitations did not begin to run until she seen another doctor 4 year later who discovered that the Defendant doctor had injured Plaintiff's knee when her performed knee surgery 4 years earlier.

In Wilson This Court explained that the statute of limitations does not begin to run until the injured party discovers 1) the injury; and 2) that the injury may have been caused by the defendant medical provider.

Secondly, it is also Plaintiff's position that the second tolling provision in §27-2-205, MCA, as argued in Plainff's Response Brief [reproduced above] in Opposition to Defendant's Motion to Dismiss also tolls the statute of limitations, because Defendants concealed the fact that they knew Lila Laedeke suffered from the condition she died from while she was in Defendant's hospital. However, Defendant did not disclose the fact that they knew of Lila Laedeke's heart condition while in Defendant's Hospital but failed to treat the condition. As a result Lila Laedeke died of the condition within two days of being discharged from Defendants Hospital claiming that Lila Laedeke was suffering from a cold or the flu. In Blackburn, this court explained that the concealment did not have to be intentional but merely failure to disclose.

Blackburn v. Blue Mt Women's Clinic, 286 Mont. 60, 75, 951 P.2d 1, 10 (1997), stated the following in interpreting the tolling provision in §27-2-205(1), Montana Code Annotated.

In the absence of specific statutory language to the contrary, a statute of repose such as the one codified in § 27-2-205(1), MCA, is not subject to tolling. See First United Methodist Church of Hyattsville v. United States Gypsum Co. (4th Cir. 1989), 882 F.2d 862, 866, cert. denied (1990), 493 U.S. 1070, 110 S.Ct. 1113, 107 L.Ed.2d 1020. We conclude that Montana's medical malpractice statute contains just such as statutory tolling provision. Specifically, the second sentence of § 27-2-205, MCA, directly follows the language which establishes the five-year statute of repose and reads:

However, this time limitation is tolled for any period during which there has been a failure to disclose any act, error, or omission upon which an action is based and that is known to the defendant, or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant.

This Court will construe a statute in accordance with the plain meaning of its terms. State v. Martel (1995), 273 Mont. 143, 150, 902 P.2d 14, 17 (citing State v. Lilburn(1994), 265 Mont. 258, 266, 875 P.2d 1036, 1041, cert. denied (1995), 513 U.S. 1078, 115 S.Ct. 726, 130 L.Ed.2d 630). The first sentence of § 27-2-205(1), MCA, ends with the provision that "in no case may an action be commenced after 5 years from the date of injury," thereby creating a five-year statute of repose for medical malpractice actions. Basic statutory construction and a plain reading of the statute compel the conclusion that the subsequent phrase "this time limitation," refers to and modifies the immediately preceding five-year time limitation.

Further, to interpret the second sentence of § 27-2-205, MCA, as anything other than a tolling provision applicable to the statute of repose immediately preceding it would be to effectively permit a health care provider who learns of a prior negligent act, error, or omission to conceal that information from a patient and obtain eventual immunity from suit. Accordingly, we hold that, pursuant to the specific terms of § 27-2-205(1), MCA, a plaintiff must commence an action for medical malpractice no later than five years after the date of injury except where a health care provider fails "to disclose any act, error, or omission upon which an action is based and that is known to the defendant, or through the use of reasonable diligence subsequent to the act, error, or omission would have been known to the defendant."

.....


CONCLUSION

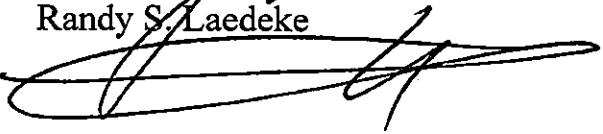
As evidenced by the arguments and authorities advanced above; The district court in this case erred in granting Defendant's 12(b)(6) Motion to Dismiss.

Therefore, the trial court's rulings outlined above should be reversed.

26th
Respectfully submitted this ~~2~~²⁶th day of April, 2022.

Randy S. Laedeke
Appellant
1148 Patriot Street,
Billings, MT 59105

By 

Randy S. Laedeke


CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Opening Brief of Appellant to be delivered by U.S. First Class Mail, postage prepaid, to: Counsel for Defendants and Appellee

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DATED: 26th ^{First by mail} day of April, 2022
29th

By Randy S. Laedeke
Randy S. Laedeke

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is not more than 5,000 words, excluding certificate of service and certificate of compliance.

By Randy S. Laedeke
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