

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 22-0175

T.M.B. by and through DARCY SAUNDERS, CAPITAL CITY CASE
MANAGEMENT, Guardian and Conservator,

Plaintiff/Petitioner,

vs.

FIRST JUDICIAL DISTRICT COURT, LEWIS
AND CLARK COUNTY, HON. MICHAEL
MENAHAN, Presiding,

Respondent

**WEST MONT, INC.'S RESPONSE TO PETITION FOR WRIT
OF SUPERVISORY CONTROL**

On Petition from the Montana First Judicial District Court, Lewis and Clark County, Cause No.
ADV-2020-1589, the Honorable Mark Menahan Presiding

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I. STATEMENT OF ISSUES

1. Whether the denial of Petitioner's Partial Motion for Summary Judgment was error, as a matter of law, that would allow an emergency, interlocutory appellate review by exercise of supervisory control.

2. Whether the district court, in following this Court's case law in denying Petitioner's motion, created a statutory interpretation or constitutional issue of statewide importance which would create an urgent or emergency need for supervisory control.

II. STATEMENT OF THE CASE AND NECESSARY FACTS

T.M.B. is a developmentally disabled adult, who, at the time this action commenced, resided in a group home which was operated by West Mont, Inc. ("West Mont"), a non-profit corporation, which operates homes and provides services for developmentally disabled individuals. Appendix A ("App."), *Order – Motion for Summary Judgment*, p. 2-3, filed 02-16-22. Darcy Saunders, of Capital City Case Management ("Saunders"), was and is T.M.B.'s guardian.

West Mont has never acted as either a legal custodian or a legal guardian of T.M.B. App. B, ¶2, *Affidavit of Ashleigh Heimbach* filed with *Response to Plaintiff's Motion for Summary Judgment*, filed 08/20/21. West Mont provided services to eligible individuals such as T.M.B. pursuant to a contract with the State

of Montana (“State”). *Affidavit of Lindsey Carter*, ¶¶1, 4, filed with *Defendant State of Montana’s Brief in Opposition to Plaintiff’s Motion for Partial Summary Judgment*. An employee of West Mont, Zane Frisbie, was found by supervisory personnel in what appeared to be a sexual assault upon T.M.B., and Frisbie was prosecuted and sentenced to 60 years incarceration at the Montana State Prison. App. A, p. 3. West Mont was not found to have violated its contract provisions or any other laws in regard to the assault by Frisbie. App. B, ¶¶3,4,5,6,7,8,9,10,11,12,13.

Petitioner filed her motion requesting summary judgment as to West Mont solely, on July 13, 2021. The argued legal basis for the request was founded in the Montana Developmental Disabilities and Facilities Act of 1974, found at §53-20-101, *et seq.*, and its accompanying administrative rules. Petitioner argued that West Mont was strictly liable for the criminal acts of its employees because it had nondelegable duties, passed to it from the State when West Mont contracted to provide services to developmentally disabled persons under the Act, pursuant to *Restatement (Second) of Agency*, §214, ignoring whether or not West Mont had acted within the standard of care when hiring Frisbie and West Mont requested summary judgment be issued *sua sponte*, based upon *Maguire v. State of Montana*, 254 Mont. 178, 183, 835 P.2d 755 (1992). Thereafter, the State moved for

summary judgment against Petitioner, and after oral argument by all counsel on the pending motions, the district court issued its Order. App. A.

Petitioner has made claims against West Mont of negligent hiring, training, and supervision of employees, in addition to the nondelegable claim, and negligent supervision by the State. Remaining negligence claims against West Mont and the State have not been determined by the lower court and are moving forward.

III. APPLICATION AND EXERCISE OF SUPERVISORY CONTROL

Pursuant to Rule 14 (3)(a), M.R.App.P., supervisory control is an extraordinary remedy and is sometimes justified when “urgency or emergency factors exist”, making the “normal appeal process inadequate”, and that involve “purely legal questions of statutory or constitutional interpretation which are of state-wide importance.” This Court may assume supervisory control to control the course of litigation when the case involves purely legal questions, and the district court is proceeding under a mistake of law, and is causing a gross injustice. Mont. Const. Art. VII, § 2(2); Mont.R.App.P. 14(3)(a). *Watchtower Bible & Tract Soc’y of New York, Inc. v. Montana Twentieth Jud. Dist. Ct., Sanders Cty.*, 2021 MT 13, 403 Mont. 57, 479 P.3d 946.

Typically, a motion which denies summary judgment, or which grant partial summary judgments to a party may not be appealed as those orders are not final

judgments and therefore no appeal may lie. Mont.R.App.P. 4(1)(a); Mont.R.Civ.P., Rules, 55, 56 & 58. An interlocutory appeal is one where no final judgment has been obtained, and such appeal is generally limited to certified judgments which can satisfy the demands of Rule 54(b)(1), M.R.Civ.P. under Mont.R.App.P. 6(6).

According to this Court, the exercise of supervisory control is by discretion under the extraordinary circumstances which include a lower court proceeding under a mistake of law, which, if left uncorrected before final judgment, will result in significant injustice for which ordinary appeal will not be an adequate remedy.

Montana State Univ. - Bozeman v. Montana First Jud. Dist. Ct., 2019 MT 220, 392 Mont. 458, 426 P.2d 541.

In the case of *Stokes v. Montana Thirteenth Jud. Dist. Ct.*, 2011 MT 182, 361 Mont. 279, 259 P.3d 754, this Court accepted a purely legal question of first impression, which was one of statutory interpretation since making the determination would allow the speedy resolution of the answer and thereby prevent substantial injustice in terms of time and resources to both the parties and the courts. However, the granting of such writs are rare and should not work to dismantle regular appeal processes under the Montana Appellate Rules. *State ex rel Ward v. Schmall*, 190 Mont. 1, 4, 617 P.2d 140, 141 (1980).

For instance, in *Belgrade School Dist. No. 1 v. Montana Fourth Jud. Dist.*

Ct., OP 22-0125 (04-05-2022), a request for a writ of supervisory control was denied, stating:

Exercise of supervisory control pursuant to M.R.App.P. 14(3)(a) and *Stokes*, ¶¶6-8 is proper only in our discretion upon a showing that the lower court is proceeding under manifest mistake of law for which ordinary appeal is inadequate and which will thus result in gross injustice absent supervisory control. However, . . . we find and conclude that the School District has failed to clearly demonstrate that the District Court is proceeding under a manifest mistake of law, not dependent on outstanding factual issues, and under circumstances rendering ordinary appeal inadequate.

Id. at p. 2. In the case of *Boy Scouts of America, and Mt. Council v. Montana Eighth Jud. Dist. Ct.*, 2017 WL 10110270, this Court provided an example of when the facts of a particular case do not provide a pure legal issue to decide on an interlocutory basis, by explaining:

Montana Rule of Appellate Procedure 14(3) sets forth three elements which must be established before it is appropriate for this Court to exercise the “extraordinary remedy” of supervisory control. The relief “is sometimes justified” when (1) “urgency or emergency factors exist making the normal appeal process inadequate,” (2) the “case involves purely legal questions,” and (3) the “other court is proceeding under a mistake of law and is causing a gross injustice[.]” The District Court's Order denying Defendants' affirmative defense was based on its review of the record and the facts contained in that record. The District Court concluded that, based on the substantial factual record that was compiled, no reasonable person could conclude that Leninger's criminal acts were not foreseeable by the Defendants. Whether the District Court was correct in making such a factual finding and removing the issue from determination by a jury does not constitute a purely legal question; indeed, the decision was driven entirely by the District Court's consideration of the facts. The propriety of the District

Court's actions must await development of the record on appeal. Here, the District Court entered judgment on an affirmative defense based on a factual determination. We conclude the issue is not purely a legal question and that the normal appeal process is adequate. *2

Here, there is no specific statute to be interpreted, nor are there any constitutional issues. The granting of a partial summary judgment involving one legal issue regarding agency will not end the remainder of the tort claims against West Mont and the State in the case presently before this Court. No emergency exists, no legal mis-steps have occurred by the district court, it has merely followed this Court's *stare decisis*, and the present appeal attempt is interlocutory in nature, has not been certified, and should be disallowed as there is an adequate final appeal.

IV. SUMMARY OF ARGUMENT

There is no basis for the granting of supervisory control in this case as there is no mis-interpretation of a statute, no constitutional question, and no emergency or urgency as to the issue. The issue is not one where this Court has not already spoken, nor is a purely legal issue, as the facts of the contract between the parties, and the personal factual situation, i.e., custody and control of T.M.B., are integral to the decision. Whether or not the lower court should apply §214 of the *Restatement* is a decision which this Court has already made in almost this exact context, in *Maguire*. The Petitioner asks this Court to make create new case law,

and reverse its long standing determination as to the employer - employee relationship when an employee commits an intentional crime which the employer has no reason to foresee.

The case has additional claims left to litigate, and to allow this additional appeal will create the opposite of what supervisory control is designed to prevent: a piecemeal approach to the litigation and the time and cost to the parties and the judicial system. The district court was not mistaken in the application of this Court's prior pronouncements, and properly analyzed the factors necessary as the basis for his decision. No gross injustice has occurred.

V. ARGUMENT

1. The Denial of Petitioner's Partial Motion for Summary Judgment was Not Error Which Would Allow A Writ to Issue.

A denial, or an issuance of a partial summary judgment which does not enter judgment on all parties and all issues between them is not appealable as a final appeal. Rules 54, (b)(1), & 58, M.R.C.P.; M.R.App.P. 4(1)(a). Not all claims by Petitioner against the two defendants herein have been disposed of by the entry of the *Order* by the lower court. App. A. The issue is not a purely legal issue as it has to consider the fact that the guardian of T.M.B. had the fiduciary duty to make the ultimate decisions about whether or not to accept services from a developmental disability services provider, and from what provider the services

should be accessed.

The district court's consideration of the operative facts, and the case law from this Court were correctly analyzed in the resulting *Order*. App. A. For instance, the lower court had to determine if West Mont, as the employer of Frisbie, was factually a joint venturer of the State, an independent contractor of the State, or an agent of the State. That analysis provides part of the factual basis for how the resulting legal issue that West Mont owed a nondelegable duty for the criminal acts of Frisbie is analyzed.

As can be seen from that *Order*, the lower court acknowledged this Court's previous decisions about independent contractors, after determining that under the contract between West Mont and the State, West Mont is an independent contractor. App. A p. 4. The district court then applied this Court's holdings in *Beckman v. Butte-Silver Bow County*, 2000 MT 112, ¶12, 299 Mont. 389, 1 P.3d 348, *Maguire*, supra, and *Paull v. Park County*, 2009 MT 321, 254 Mont. 178, 18 P.3d 1198.

Essentially, the Petitioner argues what she has argued below, which is that the *Maguire* case has been overturned by the *Paull* case, and that other lower courts and federal district courts have the correct interpretation of who should be strictly liable for their employees' criminal acts. The District Court was correct in

applying this Court's case law and other state trial courts and federal courts interpretations of certain factual situation, which differ from the one in this case, are not authority. Based upon their facts, the citations to other state district court and federal district court cases are not persuasive because of their stark factual differences and procedural postures.

The analysis by the lower court of the *Paull* case is correct in that *Paull* involves a prisoner being transported between states for a probation violation, not by the State, but by a third party who contracted with a county. This Court held that transporting prisoners is inherently dangerous, and therefore, vicarious liability is applicable to the State because a prisoner is in the sole custody and control of the State. However, the third party contractor's actions are subject to ordinary negligent standards. The *Paull* case does not support liability for West Mont and did not overturn *Maguire*, supra. West Mont does not engage in inherently dangerous activities, nor is there any allegation that it does. West Mont never had "custody and control" over T.M.B. West Mont is merely the independent contractor, whose negligence must be judged by the ordinary negligence standard and as an employer, by *respondeat superior*. *Maguire*, supra.

Petitioner cites *Smith v. Ripley*, 446 F.Supp 3d. 683 (2020), as applicable authority, but it has nothing in common with this case. The *Smith* case is a §1983

case, alleging that the State violated the plaintiff's 14th Amendment rights, as well a negligence on the part of the State for its employee's actions while overseeing a Dependant Neglect/Youth in Need of Care case. The federal trial court determined the State of Montana was vicariously liable because its employee assaulted the plaintiff when the State of Montana was in control of the plaintiff and she was in a similar position to the prisoner in the *Paull* case.

The trial court noted that in Montana, generally,

Whether an employee acts within the scope of employment is generally a question of fact; “[i]t becomes one of law, however, when it appears that the given deviation was made for the purpose of doing something which had no connection with the servant's duty.” *Hoffman v. Roehl*, 61 Mont. 290, 203 P. 349, 350 (1921).

Id. at p. 687. The federal district court also noted that the plaintiff Smith, agreed *Maguire* was still good law.

Smith does not dispute that Maguire stands for the general rule that, in Montana, rape falls outside the scope of employment. (See Docs. 5 at 6; 8 at 11.) Instead, she relies on *Kornec* to argue that Ripley's “conduct was incidental to and so connected with the task he was performing for the State” that the Court should treat it as “one indivisible tort” within the scope of employment. (Doc. 8 at 11.) Essentially, Smith posits that, but for Ripley's employment with the State, he never would have been in her home and in a position to rape her. (*Id.*) However, she improperly conflates the “but-for” test for causation, see *Busta v. Columbus Hospital Corp.*, 276 Mont. 342, 916 P.2d 122, 140 (1996), with Montana's respondeat superior analysis—jurisprudence developed under the umbrella of agency law. *Maguire*, 835 P.2d at 758. And, in any event, Kornec is both consistent with the principles set out in Maguire and readily

distinguishable from the facts here.

Id. (Emp. Add.) While West Mont does not agree with the analysis of the federal district court, that court found vicarious liability because the plaintiff there was under the control of the employee through a court action and could demand entry into the woman's home, holding the re-unification of her family over her head. There was no court action which placed T.M.B. under any service providers control or custody, let alone West Mont.

The additional cases cited by Petitioner involve an assault on a train, which involves a common carrier, and which was decided by a federal district court, not this Court, and a determination regarding a law enforcement officer, again made by a federal court, and since certified to this court. Neither involve the same exact factual situation, which is involved in the *Maguire* case.

West Mont is not the State of Montana, they are separate parties. West Mont is an independent non-profit contractor with specific terms and conditions to its contracts with the State. There was no evidence of any contract breach before the district court in this case, which is West Mont's obligation, to act under its contract, and provide sufficient hiring and background checks. It has not breached those terms and conditions.

Petitioner basically argues "trickle down" nondelegable duty for West Mont,

because if it has a contract with the State, it must be treated as the State, as the nondelegable duty comes with the contract. There is no support for that in the law as every contract has its own terms. Citing to vague statutory verbage that West Mont “must ensure” “basic life and health care needs are met” and “must assist” the person to “reside, work and play in safe, healthy, integrated environment” does not mandate strict liability for West Mont when an employee commits a criminal act which is unanticipated and not foreseen. While West Mont can train employees to be mandatory reporters and to act within the confines of their duties to forward a vision, West Mont cannot prevent any and all criminal actions which are not only unforeseeable, but also unimaginable. The district court was correct in following this Court’s case law and determining that there is no basis to veer from the *Maguire* case in making its decision.

2. The District Court, Following this Court’s Prior Holdings, did Not Create a Statutory Interpretation or Constitutional Issue of Statewide Importance.

The application for a writ by Petitioner does not point out what statute was incorrectly interpreted which would mandate West Mont has a nondelegable duty for its employees’ intentional criminal acts which are not furthering West Mont’s aims. The application for the writ does not provide any constitutional question or any error in the decision rendered by the lower court. It merely seeks an additional

appeal in an request to reverse this Court's prior decisions. There is no mistake of law which would allow for a writ to issue.

West Mont is accused of having not exercised its obligations respecting T.M.B.'s dignity and personal integrity, citing to §53-20-101(1), MCA. However, there is no citation to any fact that West Mont did not do everything to ensure that it's hiring and training practices were the best that could be put in place, or that they did not meet some standard set by the State contract, or the law as to the operation of its facility. There is no basis for the argument by Petitioner that a writ should issue based upon these arguments of error by the lower court. Here, Petitioner seeks to impose strict liability for all employers whose employees commit intentional criminal acts that are not in furtherance of the employers' legitimate goals. The district court was correct in its analysis of the cases from this Court and the facts that exist in this case. There is no reason under the facts or the law for this court to exercise emergency jurisdiction and issue a writ of supervisory control over the lower court in this case.

DATED the 4th day of May, 2022.

By: /s/ Antonia P. Marra
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CERTIFICATE OF COMPLIANCE

I, Antonia P. Marra, attorney for Defendants/Respondents, hereby certifies that:

(1) Said DEFENDANTS/RESPONDENTS' RESPONSE BRIEF filed herewith has a line spacing of 2.0, except for footnotes and quoted, indented material, which have a line spacing of 1.0;

(2) Said DEFENDANTS/RESPONDENTS' RESPONSE BRIEF is proportionately spaced and uses a 14 point Times New Roman typeface; and

(3) Said DEFENDANTS/RESPONDENTS' RESPONSE BRIEF has a word count of 3,159 as counted by WordPerfect X4 for Windows, not including the Table of Contents, Table of Authorities and Certificate of Mailing.

DATED the 4th day of May, 2022.

By: /s/ Antonia P. Marra
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CERTIFICATE OF SERVICE

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Dated: 05-04-2022