

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. OP 22-0175

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

Petitioner,

v.

THE FIRST JUDICIAL DISTRICT COURT,
HON. MICHAEL MENAHAN, Presiding

Respondent.

From the Montana First Judicial District Court, Lewis and Clark County
Cause No. ADV 2020-1599
The Honorable Michael Menahan Presiding

STATE OF MONTANA'S RESPONSE TO PETITION FOR WRIT OF
SUPERVISORY CONTROL

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I. STATEMENT OF ISSUES

Whether denial by the Montana First Judicial District Court, Honorable Mike Menahan, of Petitioner’s Partial Motion for Summary Judgment creates urgent factors making the normal appellate process inadequate and warrants this Court exercising supervisory control?

Whether constitutional issues of statewide importance exist in various courts’ treatment of *Restatement (Second) of Agency*, §214, requiring this Court to exercise supervisory control?

Whether the Montana First Judicial District Court proceeded under a mistake of law in refusing to apply *Restatement (Second) of Agency*, §214 in a situation where it is not applicable because a contractor-independent contractor relationship existed?

II. STATEMENT OF THE CASE

T.M.B. is a 57-year-old, developmentally disabled Montanan who, at the time of filing the first complaint, resided at the Hillside Group Home in Helena, Montana, run by West Mont. App. To Resp. Opp’n T.M.B. Pet. Writ. Superv. Cont., May 4th, 2022 (“App.”), App. H at 2. West Mont is a nonprofit organization operating group homes for individuals with developmental disabilities. App. F at 3; App. C at 2-3. It contracts with the State of Montana, by and through DPHHS (“State”), as a “Qualified Provider” to provide services to Montanans under the statutorily created

Developmental Disabilities Program (“DDP”). App. C at 2-3. The statute gives the State discretion to contract with nonprofit organizations to provide developmental disabilities services. App. C at 2.

The written contract between West Mont and the State runs on a year-to-year basis, provides federal funding to West Mont, and requires West Mont to comply with applicable state and federal laws and the policies and procedures of the DDP, among other things. App. C at 3. The State does not play a role in the hiring, firing, or other management of Qualified Provider employees, but it does audit Qualified Providers for compliance with state and federal laws, procedures, and standards. App. C at 3; App. E at 4-5. T.M.B.’s permanent medical guardian executed a Freedom of Choice form selecting services from West Mont in 2018-2019. App. A at Ex. 1.

T.M.B. was assaulted on the evening of July 12, 2019, by Zane Frisbie, an employee of West Mont. App. G at 7-9. Mr. Frisbie was charged with Aggravated Sexual Intercourse without Consent and was sentenced to 60 years in the Montana State Prison. App. C at 3-4.

T.M.B. amended her complaint to include claims of negligence and negligent supervision against West Mont and the State. App. G at 7-9. She moved for summary judgment against the State on the sexual assault claims in September 2021, arguing Montana adopted *Restatement (Second) of Agency*, §214 (“§214”) without any

limitation and regardless of other exceptions to the *respondeat superior* doctrine. App. D at 6-9. She asserted the State held nondelegable duties under the DDP’s statutory scheme, including the statutes establishing its purpose. App. D at 9-11; App. E at 20-21. T.M.B. also asserted the State held an agency relationship with West Mont through express contract. App. D at 12. The State cross-moved for summary judgment on the same claims. App. C.

Thereafter, T.M.B. filed her Second Amended Complaint, bringing claims of negligence against West Mont and the State and negligent supervision only against the State for the sexual assault of T.M.B. and for the improper administration of medicine to T.M.B. in August 2021. (Dkt. 1) Pet. Writ. Sup. Control at Exhibit A, 2d Am. Compl., April 11, 2022 (“Writ”).

Petitioner’s Partial Motion for Summary Judgment was denied in February 2022. Writ at Ex. B, Order. Crucially, such was not a final judgment in the case. Plaintiff ignores the appropriate remedy of raising the denial on appeal and attempts to circumvent normal appellate procedures—contrary to Mont. R. App. P. 14(3)—by bringing the instant Petition.

III. STATEMENT OF FACTS AND UNDERLYING LAW

A. Petitioner ignores crucial Montana law underlying §214 nondelegable duties.

Plaintiff ignores relevant Montana law other than *Paull v. Park County*, 2009 MT 321, 352 Mont. 465, 218 P.3d 1198, and uses *federal* case law to argue §214

applies “without limitation.” App. F at 7-8; *See generally*, App. D, App. B. The context of Montana case law regarding §214 and other *respondeat superior* exceptions shows differently. This section provides the background of *respondeat superior*’s applicable exceptions depending on the type of principal/agent relationship.

Respondeat superior imposes vicarious liability on an employer for the tortious acts of employees committed within the course and scope of employment. *Brenden v. City of Billings*, 2020 MT 72, ¶ 13, 399 Mont. 352, 470 P.3d 168. However, without an applicable exception, employers/contractors are generally not liable for the torts of independent contractors, and employers are not liable for torts committed outside the course and scope of employment. *Beckman v. Butte-Silver Bow County*, 2000 MT 112, ¶ 12, 299 Mont. 389, 1 P.3d 348 (2000); *Maguire v. State of Montana*, 254 Mont. 178, 183, 835 P.2d 755, 758 (1992).

The type of relationship between the employer and tortfeasor drives the applicable exception. *See e.g.*, *Stricker v. Blaine County*, 2019 MT 280, 398 Mont. 43, 453 P.3d 897 (referring to the *Beckman* exceptions); *Paull*, 2009 MT 321; *but see Brenden*, 2020 MT 72; App. A at 3-11. Three exceptions impose a duty on the contractor in a contractor/independent contractor relationship: (1) where a contractual nondelegable duty exists; (2) for inherently dangerous activities; and (3) when a general contractor is negligent in its control over a subcontractor’s work.

Beckman, ¶ 12. A contractor-independent contractor relationship *must* exist to apply these exceptions. *Paull*, ¶¶ 19-22; App. A at 3-11.

Separately, this Court has applied the nondelegable duty exception under §214 where no express relationship exists, but an agency relationship exists based on elements of consent and control (in essence, implied agency). *Paull*, ¶¶ 31-39; *Stricker*, ¶¶ 16-17; App. A at 10-11. The exception was specifically applied where (1) the State provided actual and apparent authority to transport a prisoner without expressly contracting with the transportation company, and there was a (2) statutory duty of responsibility for the prisoner and (3) continuing relationship between the State and the prisoner. *Paull*, ¶¶ 31-39.

Importantly, in a case strikingly similar to this case, this Court found rape to fall outside the course and scope of employment and declined to extend the non-delegable duty exception to a care facility. *Maguire*, 254 Mont. at 182-85, 835 P.2d at 758-59 (where a State employee at the Montana Developmental Center sexually assaulted a resident); *Brenden*, ¶ 16 n. 4; App. A at 10. The Court “declin[ed] to extend [the §214] non-delegable duty doctrine to make [an] institutional caretaker entity vicariously liable for crime committed against an incapacitated ward by the caretaker’s employee.” *Brenden*, ¶ 16 n. 4 (recognizing *Maguire* as good law 27 years later and *after Paull’s* application of §214).

With this background of *respondeat superior* exceptions, the District Court correctly declined to apply a §214 nondelegable duty on the State and denied Petitioners' Partial Motion for Summary Judgment.

B. Petitioner relies on one line of Paull, rather than its entire context, to insist §214 establishes a ubiquitous standard for nondelegable duties.

The crux of Petitioner's argument is this Court's adoption of §214 as "an appropriate statement of the law in Montana" in *Paull* means §214 applies "without limitation." *Paull*, ¶ 37; App. F at 7-8. Petitioner asserts such language overruled *Maguire* and essentially creates strict liability for the State based on the statutory scheme creating the DDP. App. B at 3; App. F at 9-12; App. E at 13-16.

But Petitioner fails to delve into the context of *Paull* and this Court's application of §214 and other *respondeat superior* exceptions. *See generally*, App. F, App. D, App. B. As demonstrated above, this Court applied §214 as another *respondeat superior* exception where no express agency relationship existed. *See also* App. A at 3-11. It did so when specifically discussing the State's duty toward a prisoner being transported from Florida to Montana. *Paull*, ¶¶ 31-39.

Importantly, this Court discussed the duty of the County and the State *separately* because the County held a contractual relationship with the transportation company, but the State did not. *Id.*, ¶¶ 19-30, 31-39. The relationship each defendant held with the transportation company drove the analysis of the applicable duty and exceptions. *Id.*

Because the County held a contractor-independent contractor relationship with the transportation company, the *Beckman* exceptions importing liability to a contractor for the torts of independent contractors applied. *Id.*, ¶¶ 18-23. For the State, despite there being “[n]o contractor-independent contractor relationship,” the consent and control the State held over the transportation company created an agency relationship. *Id.*, ¶ 36. That agency relationship, the statutory responsibilities the State held over the prisoner, and the continuing relationship between the State and the prisoner and his liberties led this Court to impute liability pursuant to the nondelegable duty exception under §214. *Id.*, ¶¶ 32-39.

As demonstrated by the separation in the analyses between the County and the State, this Court did not adopt §214 with the expectation it would become the sole basis to impute liability. *Id.*, ¶¶ 19-30, 31-39. Subsequent Montana case law has continued to apply different analyses in different relationships. *See Stricker*, 2019 MT 280. Thus, §214 is not ubiquitous; it applies in distinct contexts where an (implied) agency relationship exists, where a statutory duty exists, and where a continuing relationship exists between the principal and third party. There can be no mistake of law if law is correctly not applied where it is not applicable.

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C. Contrary to Petitioner’s assertions, the DDP statutory scheme does not create a duty of care and federal case law applying §214 is distinguishable.

Not only does Petitioner attempt to apply §214 in a vacuum, but the law Petitioner cites in support is disparate. The statute Petitioner relies upon to assert the State holds a statutory duty, Mont. Code Ann. §53-20-101, establishes the *purpose* of the DDP statutory scheme. Writ. at 8, 14. The purpose and goal of the Montana Developmental Disabilities and Facilities Act of 1974 includes securing skillful, humane, and respectful treatment and habilitation for Montanans with developmental disabilities. §53-20-101(1). Section 53-20-101(1) lacks obligatory language, such as “must” or “shall,” in establishing its purpose. App. E at 20-22.

Equally, Petitioner cites a *discretionary* statute to argue “Montana imposes the ultimate responsibility” on the State. Writ at 8. To the contrary, §53-20-205 (1) & (2)(a) provides the State with *options* in establishing developmental disabilities services. App. E at 20-22; §53-20-205 (1) & (2)(a). The “responsibilities” of the State are outlined in §50-20-203 and do not include the “duties” Petitioner argues. §53-20-203; Writ at 8, 14.

Also contrary to Petitioner’s argument, federal case law is not binding authority for this Court, and its application of §214 is distinguishable. *See generally*, Writ. The most recent case, *L.B. v. United States*, addressed whether a sexual assault perpetrated *specifically* by a law-enforcement officer fell within the course and

scope of the officer's employment. 8 F.4th 868, 870 (9th. Cir. 2021) (certified question, oral argument held on April 15, 2022). The Ninth Circuit noted *Paull* adopted §214 "without any express limitation to inherently dangerous activity." *Id.* at 871.

In *Shepherd v. Amtrak*, §214 arose in the context of the course and scope of employment for employees of a common carrier with a heightened duty of care. No. CV-17-40-GF-BMM-JTJ, 2018 WL 5309825 at *1-2, (D. Mont. Aug. 15, 2018) (where a woman was sexually assaulted in a sleeper car of a train passing through Montana). Amtrak was liable under the heightened duty of care for common carriers outlined in Montana statute and common law. *Id.* at *3 (quoting *Taillon v. Mears*, 29 Mont. 161, 74 P. 421, 423 (1903)); §69-11-107(1). The *Shepherd* Court also imposed liability under Comment (e) to §214, which contains an example of a train employee assaulting a passenger. *Shepherd*, 2018 WL 5309825 at *4.

Smith v. Ripley applied a §214 nondelegable duty to the State where a State-employed Child Protection Specialist raped a mother while at her home to collect paperwork. 446 F.Supp.3d 683, 685-86 (D. Mont. 2020) (the mother's children were in the State's legal custody). The Court did so based on (1) a Montana statute imposing a duty on the State and (2) the continuing relationship between the woman and the State. *Id.* at 690-91; App. E at 13-15.

Comparing these federal cases to the application of §214 under Montana law demonstrates the distinguishability of federal case law. For *L.B., Paull* mentioned “inherently dangerous activities” in its discussion of contractor-independent contractor liability and not its discussion of §214.

For *Shepherd*, this Court has not applied §214 in the context of Comment (e), but Comment (e) is not at odds with this Court’s established law governing *respondeat superior*. In *Maguire*, the nondelegable duty of a common carrier was discussed; but, this Court noted, aside from elevators, Montana had not adopted a common carrier exception to the *respondeat superior* doctrine. 254 Mont. at 184, 835 P.2d at 759. Feasibly, based on Comment (e) to §214, §214 could apply in certain employer/employee contexts as well; though, this Court has not applied §214 in such a context.

The *Smith* Court only focused on two of the three factors in applying §214, erroneously asserting the relationship between the principal and the agent is not relevant. *Id.* at 689. To the contrary, based on *Paull*, *Stricker*, and *Beckman*, the inquiry into the principal/agent relationship is of the utmost importance in determining applicable exceptions.

Thus, federal case law applying §214 is distinguishable from this Court’s application of §214 in *Paull*. Further, the differences in application of §214 between state and federal courts is *not* a constitutional issue. At most, federal courts have

mistakenly not applied all the factors considered in *Paull* in applying the §214 nondelegable duty exception.

IV. LEGAL STANDARD

The Montana Constitution vests this Court with “general supervisory control over all other courts.” Mont. Const. Art. VII, § 2(2). Supervisory control may only be exercised where (1) the case involves wholly legal questions; (2) urgent factors exist rendering normal appellate procedures inadequate; *and*, (3) as pertinent here, either the case involves “[c]onstitutional issues of state-wide importance” or “[t]he other court is proceeding under a mistake of law and is causing a gross injustice” or both. Mont. R. App. P. 14(3). As “[s]upervisory control is an extraordinary remedy, reserved for extraordinary circumstances,” it is “*sometimes* justified” where these factors are satisfied. *Stokes v. Mont. Thirteenth Judicial Dist. Court*, 2011 MT 182, ¶ 5, 361 Mont. 279, 259 P.3d 754; Mont. R. App. P. 14(3) (emphasis added).

Orders denying motions for summary judgment or granting partial motions for summary judgment cannot be immediately appealed. Mont. R. Civ. P. 6(5)(b). Such orders may be reviewed on appeal after a final judgment is entered. Mont. R. Civ. P. 6(1).

Supervisory control is not appropriate where the petitioner has an adequate remedy on appeal. *Yearous v. Mont. Fifth Judicial Dist. Ct.*, 404 Mont. 551, 2021 WL 1390376 at *1 (Apr. 13, 2021) (citing e.g., *Buckles v. Seventh Judicial Dist.*,

No. OP 16-0517, 386 Mont. 393, 386 P.3d 545 (table) (Oct. 18, 2016)). “[A] writ of supervisory control is not to be used as a means to circumvent the appeal process. Only in the most extenuating circumstances will such a writ be granted.” *State ex rel Ward v. Schmall*, 190 Mont. 1, 4, 617 P.2d 140, 141 (1980). Mont. R. App. P. 14(3). Additionally, supervisory control is not appropriate for the sole purpose of conserving resources. *Gideon Knox, LLC v. Mont. Seventh Judicial Dist. Ct., Richland Cty*, No. OP 22-0053, 2022 WL 387599 at *1 (Feb. 8, 2022).

V. SUMMARY OF THE ARGUMENT

Supervisory control is not appropriate as no urgent factors render Petitioner’s appeal of her Partial Motion for Summary Judgment inadequate.

The application of §214 by various courts and a citizen’s ability to pursue a claim under §214 do not create *constitutional* issues of statewide importance providing a basis to exercise supervisory control.

Judge Menahan did not “proceed under a mistake of law” and did not “caus[e] a gross injustice.” Judge Menahan did not limit this Court’s adoption of §214; instead, he analyzed the appropriate exceptions creating a duty upon the State for the torts of its independent contractor.

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VI. ARGUMENT

A. No urgent factors exist in this case to permit exercising supervisory control.

Petitioner has not established any urgent factors making the normal appellate process inadequate under Mont. R. App. P. 14(3). At most, Petitioner suggests resolution of a conflict between Montana federal and state court in the interpretation of §214 “is urgent.” Writ at 5. Petitioner provides no further explanation of why such conflict creates urgent factors in this case so that normal appellate procedure are inadequate. *Id.* Instead, Petitioner argues this Court must follow federal interpretation of Montana law, regardless of its correctness, to avoid “creating a dichotomy between Montana’s state and federal courts.” Writ at 4-6.

To the contrary, no urgent factors are present, and Petitioner has a proper remedy on appeal under Mont. R. App. P. 6(1). Denial of summary judgment is reviewable on appeal after a final judgment, and these questions of law do not have an instant effect on Petitioner or her liberties. Mont. R. App. P. 6(1); *see also e.g., Hill v. Mont. Fifth Judicial Dist. Ct.*, No. OP 21-0352, 2021 WL 3879383 (Mont. Aug. 21, 2021). Further, this Court is not bound by federal law.

The Petitioner is also incorrect that citizens of Montana would be inhibited from pursuing nondelegable duty claims due to this conflict. Writ at 5. In fact, whether the §214 nondelegable duty exception will apply in each case depends on whether a statutory duty exists and on the principal’s relationships with the agent

and the third party. *See* App. A at 3-11. As such, Petitioner's writ is not appropriate for supervisory control.

B. The treatment of §214 by state and federal courts is not a constitutional issue of statewide importance.

Supervisory control is precluded as the Petitioner does not present any constitutional issue of statewide importance. *See* Mont. R. App. P. 14(3) (b). Issues of statewide importance are those having profound and far-reaching effects on Montana citizens and companies. *See e.g., Mont. Power Co. v. Public Serv. Comm'n of State of Mont.*, 214 Mont. 76, 77, 768 P.2d 842, 843 (1985). Constitutional issues can include challenging a statute's constitutionality or addressing parameters of constitutional rights. *State v. Spady*, 2015 MT 218, ¶ 12, 380 Mont. 179, 354 P.3d 590; *see also, e.g., Donaldson v. State*, 2012 MT 228, ¶ 10, 367 Mont. 228, 292 P.3d 364.

Imposing what would amount to strict liability on the State for the torts of its independent contractor's employees for the State's funding of community-based welfare programs would have a major effect across the state. Doing so violates Montana public policy. App. E at 12-13 (citing §2-9-305(6)(b)); App. E at 12-13; App. C at 8-10, 13-14. Such an expansion of §214 would ignore precedent set in *Maguire* and constitute a sea change in Montana law. *Id.*; *see also Maguire*, 254 Mont. at 184-85, 835 P.2d at 759-60.

However, the application of §214, and its treatment by Montana state and federal courts, is not a constitutional issue. It does not challenge a statute's constitutionality nor address the constitutional rights of any individual. Petitioner made no showing of a constitutional issue. Without a constitutional issue, this case is not suitable for supervisory control, and supervisory control is barred.

C. Judge Menahan did not limit this Court's application of §214 and properly found the State did not owe Petitioner a duty under §214 due to the existence of a contractor-independent contractor relationship between the State and West Mont.

Judge Menahan did not proceed under a mistake of law nor cause a gross injustice in refusing to apply the nondelegable duty exception under §214 to the State. *See* Mont. R. App. P. 14(3) (a). To the contrary, §214 is not applicable here due to the existence of a contractor-independent contractor relationship between the State and West Mont. *See Paull*, ¶¶ 19-30, 31-39; *Stricker*, ¶¶ 11-18; App. A at 3-7.

Judge Menahan's decision to not apply §214 to the present case was properly based on (1) the existence of a contractor-independent contractor relationship between the State and West Mont and (2) the lack of (a) an agency relationship between the State and Mr. Frisbie, (b) a statutory duty on the State; and (c) a close, continuing relationship between T.M.B. and the State. Writ. at Ex. B, 4-6. The decision is not, as Petitioner asserts, a limitation of the application of §214 in *Paull*. Writ at 7, 10.

First, because the Petitioner admits an express contract exists between the State and West Mont, §214 is not the appropriate exception. App. A at 11. Instead, like the County in *Paull*, the State, as a contractor with West Mont, can only be liable if one of three exceptions apply: (1) nondelegable duty based on contract; (2) inherently dangerous activities; or (3) a general contractor negligently reserving control over a subcontractor's work. *Paull*, ¶¶ 8-23; App. C at 10-12; App. A at 12-14.

Addressing each exception in turn, presently there is no nondelegable duty based on contract; in fact, the contract specifically requires West Mont to indemnify the State for any liability caused by West Mont's employees. App. A at Ex. 2. Medical care has been found to not be an inherently dangerous activity. *See Stricker*, ¶¶ 15. And, the State did not reserve control over the day-to-day care of T.M.B. App. A at 14. The State's contract with West Mont, required the State to provide funding and ensure compliance with laws and procedures. *Id.* It maintained its duties under those obligations. *Id.* As there was no applicable exception, the District Court correctly found the State did not owe a duty.

Secondly, relating to Mr. Frisbie, the State holds no control over the hiring, training, management, or firing of independent contractor employees, including Mr. Frisbie. App. E at 21, 25. The State is not liable for the torts of the employees of its independent contractors, nor, as explained above, does the purpose of the Montana

Developmental Disabilities and Facilities Act of 1974 create a statutory duty for the State. Further, the District Court found the relationship between T.M.B. and the State was not of the same nature as the continuing relationship between the State and the prisoner in *Paull*. Writ. at Ex. B, 5.

Petitioner misstates the District Court's Order in asserting the District Court revised §214 and added an "assumption of the risk" element. Writ at 10-12. The District Court correctly distinguished the relationship between a prisoner and the State, whose fundamental right to freedom was involuntarily restricted, and T.M.B. and the State. Writ at Ex. B, 5. Unlike the prisoner, T.M.B. is a voluntary participant in a state-run program, and chose her provider through her permanent medical guardian. App. E at 4; App. A at Ex. 1.

The imposition of §214 is precluded two-fold, and the District Court correctly declined to apply it. The Petitioner incorrectly asserts the District Court limited §214. Writ at 3. The application of §214 in *Paull* does not mean it applies in all circumstances regardless of other applicable case law. To the contrary, §214 was applied in conjunction with existing law, in the context of agency relationships *lacking* an express contract. *Paull*, ¶¶ 30-38.

There cannot be a gross injustice where the law was correctly applied, as here. Because the District Court was not proceeding under a mistake of law, supervisory control is not justified and must be denied.

VII. CONCLUSION

For the foregoing reasons, this case does not satisfy the parameters necessary to exercise supervisory control and overturn Judge Manahan's Order denying Petitioner's Partial Motion for Summary Judgment. The request for supervisory control should be denied. If the Court is inclined to accept the request to exercise supervisory control, the State requests the Court accept full briefing on what would be a sea change in Montana law and a drastic expansion of liability for the State.

Dated this 4th day of May, 2022.

/s/ Susan Moriarity Miltko

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) of the Montana Rules of Appellate Procedure, I certify that this Response Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced, and consists of 3998 words as calculated by Microsoft Word 2016, excluding the Certificate of Service and Certificate of Compliance.

/s/ Susan Moriarity Miltko

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CERTIFICATE OF SERVICE

I, Susan Moriarity Miltko, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 05-05-2022:

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