

IN THE SUPREME COURT OF THE STATE OF MONTANA  
NO. \_\_\_\_\_

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PAIGE LOZEAU,

Plaintiff,

-vs-

KALISPELL REGIONAL MEDICAL CENTER, INC.  
a Montana Corporation,

Defendant.

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**PETITION FOR WRIT OF SUPERVISORY CONTROL**

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*On Review from the Montana Eleventh Judicial  
District Court, Flathead County, Cause No. DV-2025-1343  
Hon. Paul D. Sullivan*

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APPEARANCES

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## **I. INTRODUCTION AND RELIEF SOUGHT**

COMES NOW Defendant Kalispell Regional Medical Center, Inc. (“KRMC”), through counsel and pursuant to Rule 14, M. R. App. P., and hereby petitions for a writ of supervisory control to review the District Court’s Order Denying Motion to Exclude Audio Recording (“Order”) dated March 10, 2026. **Exhibit A**, Order.

This petition is necessitated by the District Court denying KRMC’s request to exclude Plaintiff’s secret recording of Plaintiff’s medical appointment. Montana is undisputedly an “all-party consent” state for recording private conversations. Mont. Code Ann. §45-8-213. All persons involved in an in-person conversation or phone call need to consent to being recorded in order for the recording to be legal. Mont. Code Ann. §45-8-213(1)(c). A “person commits the offense of violating privacy in communications if the person knowingly or purposely: ... records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation.” *Id.*, emphasis added.

The District Court erroneously found that this Court has already determined that the exclusionary rule does not apply to a recording illegally created by private parties in violation of § 45-8-21 for the private parties’ use and benefit in a civil action. *Id.*, pp 3-4. The District Court also erroneously found that the exclusionary

rule – a judicially created remedy – cannot apply to recordings illegally created by private parties in violation of § 45-8-21, for the private parties’ use and benefit in a civil action, because the remedy is not specifically spelled out in § 45-8-21. *Id.*, pp 4-5.

Here, Plaintiff and/or Plaintiff’s mother, Nicole Brown, recorded Plaintiff’s December 12, 2023, medical appointment with KRMC employee Meghan Duvall, NP, without NP Duvall’s knowledge and without her consent, in violation of § 45-8-21. **Exhibit B**, NP Duvall Affidavit. Plaintiff and her mother secretly and illegally created evidence that would not otherwise exist and now seek to use that illegally created recording to benefit Plaintiff in this litigation.

Parties to civil litigation will be severely and irreparably prejudiced if opposing parties are allowed to use recordings they secretly and illegally create to benefit themselves in litigation. Allowing these clandestine recordings would permit people to design and create their own evidence, recording those who do not know they are being recorded while purposely directing or limiting the interaction and limiting the recording to only those things they want recorded.<sup>1</sup> As discussed further below, several district courts have addressed this exact issue and taken a strong, consistent stance against allowing parties to benefit from these secret recordings.

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<sup>1</sup> If the shoe were on the other foot here, and a medical provider secretly recorded a patient without his or her permission while at the same time directing the discussion and conversation to attempt to obtain one sided discussions that could later be used against the patient, there can be no question that the patient and his/her advocates would loudly and vigorously argue the illegality and impropriety of the medical provider’s conduct.

Urgency and emergency factors necessitate this Petition. The District Court's Order exposes witnesses – both fact witnesses and expert witnesses – in this litigation to an illegal recording they cannot later unhear, making Defendant's remedy through traditional appeal inadequate. These issues can and should be definitively addressed now.

KRMC requests that this Court stay any further proceedings in the District Court pursuant to M. R. App. P. 14(7)(c) until this issue is resolved. The stay is appropriate because the District Court is proceeding under mistakes of law which are causing Defendant gross injustice.

This petition involves purely legal questions. The District Court is proceeding based on mistakes of law, which, if uncorrected, will cause significant injustice for which appeal is an inadequate remedy; the witnesses, both expert and fact, will never be able to unhear the illegally created recording once they listen to it. Requiring an appeal from final judgment would irrevocably taint the witnesses in both this and any future proceedings.

The interest of fairness justifies granting this Petition for Writ of Supervisory Control.

## **II. BACKGROUND**

This case arises from KRMC's alleged misdiagnosis of Lupus in Plaintiff. **Exhibit C**, Complaint and Demand for Jury Trial, pp 7-8. Plaintiff admits she and/or

her mother created an audio recording of Plaintiff's December 12, 2023, medical appointment with NP Duvall (FKA "NP Upham"). **Exhibit D**, P's Responses to Defendant's First Discovery Requests, pp 13-14. Plaintiff plans to rely on this recording to support her negligence claim against KRMC. **Exhibit D**, P's Responses to Defendant's First Discovery Requests, pp 16-17. Plaintiff and her mother surreptitiously recorded their conversation with NP Duvall without notifying NP Duvall and without obtaining NP Duvall's consent. **Exhibit B**, Affidavit of NP Duvall. Plaintiff claims she and her mother asked for and obtained NP Duvall's permission to record; however, notably, Plaintiff does not and cannot point to anywhere in the recording or transcript where she or her mother informed NP Duvall that they were recording.<sup>2</sup> It is apparent from the video associated with the recording that the phone used to record was held under something or covered by something to make the recording less obvious. NP Duvall would not and did not agree to Plaintiff and her mother recording the appointment. *Id.* At no time did NP Duvall become aware Plaintiff and her mother were recording their appointment. *Id.*

Plaintiff undisputedly recorded her appointment with NP Duvall – creating evidence that would not otherwise exist. Plaintiff now states she intends to rely on

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<sup>2</sup> Common sense and fairness require that the burden of proving consent rest with the recording party, not the recorded party. The recording itself, if Plaintiff and her mother were being honest and transparent, would include statements notifying NP Duvall of the recording and statements of affirmative consent from NP Duvall. That is undisputedly not the case here. The district courts that have reviewed this issue have consistently held that the burden of proving consent rests with the recording party and should be a part of the recording itself.

that illegally created recording to support her claims of medical negligence. **Exhibit D**, P's Responses to Defendant's First Discovery Requests, pp 16-17. Plaintiff intends to share this illegally created recording with her experts, so they can rely on it to support their opinions. **Exhibit E**, P's Response BIO to D's Motion to Exclude Audio Recording, pp 3-4, 9-11. Plaintiff also intends to use this illegally created recording as impeachment evidence. **Exhibit E**, P's Response BIO to D's Motion to Exclude Audio Recording, pp 9-11.

Witnesses – both fact witnesses and expert witnesses – will be unable to unhear the illegally created recording once they listen to it; the illegally obtained toothpaste will be out of the tube, so to speak. To allow Plaintiff to use an illegally obtained recording would encourage Plaintiff and others similarly situated to secretly record conversations any time they thought it would benefit themselves; it would create a tenuous and slippery slope leading to the erosion of trust in relationships of every kind, personal and professional. To allow parties to use, for their own benefit in civil actions, recordings they illegally created, would be to undermine the very tenets of our judicial system; the search for truth would be replaced by a search for opportunity to trap witnesses and strategically and secretly create evidence.

Plaintiff's actions and the District Court's Order both severely and irreparably prejudice KRMC and encourage litigants to create their own evidence through clandestine and illegal methods.

### **III. LEGAL STANDARD**

“This Court has supervisory control over all other courts in Montana, and may, on a case-by-case basis, supervise another court through a writ of supervisory control.” *Daenzer v. Mun. Court*, 2020 MT 140, ¶ 4, 400 Mont. 179, 464 P.3d 996. This Court has held that it “will assume supervisory control over a district court, as authorized by Article VII, Section 2(2) of the Montana Constitution and Rule 17(a), M. R. App. P., to control the course of litigation where the district court is proceeding under a mistake of law, and in so doing is causing significant injustice, and where the remedy by appeal is inadequate.” *Sportsmen for I-143 v. Montana Fifteenth Judicial Dist. Court*, 2002 MT 18, ¶ 4, 308 Mont. 189, 40 P.3d 400.

### **IV. LEGAL QUESTIONS RAISED**

- a. Did the District Court err in finding that this Court has already determined that the exclusionary rule does not apply to recordings illegally created by private parties in violation of § 45-8-21 for the private parties' use and benefit in a civil action?
- b. Did the District Court err in finding that the exclusionary rule – a judicially created remedy – cannot apply to recordings illegally created

by private parties in violation of § 45-8-21 for the private parties' use and benefit in a civil action because the remedy is not specifically spelled out in § 45-8-21?

V. **DISCUSSION**

a. **THE QUESTION OF WHETHER TO EXCLUDE RECORDINGS ILLEGALLY MADE BY PRIVATE PARTIES IN VIOLATION OF § 45-8-21 FOR THE PARTIES' USE AND BENEFIT IN A CIVIL ACTION IS ONE OF FIRST IMPRESSION FOR THIS COURT.**

The District Court states that the exclusionary rule does not apply to recordings created in violation of § 45-8-213 for use by the creating party in civil litigation. **Exhibit E**, P's Response BIO to D's Motion to Exclude Audio Recording, p 4. The District Court states that "Montana law on this point is settled," while citing only criminal cases. The District Court is mistaken.

The question of whether to exclude recordings illegally made by private parties in violation of § 45-8-21 for the parties' use and benefit in a civil action is one of first impression for this Court. However, this issue is one that will continue to arise, as the use of cell phones to record activities and conversations has become more prevalent. Numerous Montana district courts over the last 30-plus years have encountered this issue and confirmed that illegally obtained recordings should be excluded. These rulings comport with common sense and public policy.

In *Marriage of Middlesworth*, 1999 ML 221, 1999 Mont. Dist. LEXIS 164, a 1999 case out of Missoula County, Judge Henson held that where the respondent denied knowledge that the conversations at issue were being recorded, only recordings/transcripts in which the recording/transcript itself confirms “that taping of the conversation was transpiring” were admissible. *Marriage of Middlesworth*, 1999 ML 221, 10. In *King v. Nationwide Ins.*, 1992 Mont. Dist. LEXIS 381, a 1992 case out of Lewis and Clark County, Judge Sherlock held that any references to tape recordings made without notice to all parties “should be excluded from the parties’ cases-in-chief.” *King*, Mont. Dist. LEXIS 381, 4-5. He held that the plaintiff “is able to testify as to what was said during the telephone conversations without resorting to the use of the tape.” *King*, Mont. Dist. LEXIS 381, 5. In *McCormick v. Brevig*, 1996 Mont. Dist. LEXIS 557, a 1996 case out of Fergus County, Judge Christensen held that “the proponent of an offered tape has the affirmative burden to prove to the Court that all parties knew of the recording and consented thereto.” *McCormick*, 1996 Mont. Dist. LEXIS 557, 5. Judge Christensen went on to state that “[u]ntil the Court is satisfied that all parties knew and consented to the conversation being recorded, it is the Court’s belief that such clandestine recording of a parties conversation without his knowledge violates Article 2, Section 10 of the Montana Constitution which provides that the right of individual privacy is essential to the well being of a free society and shall not be infringed upon without the showing of

a compelling state interest. It is a violation of a citizens right to privacy to have one citizen record another citizens conversation without their knowledge to be played back and utilized in later litigation between the parties.” *Id.*

In the present case, the District Court cited criminal cases, most dealing with illegal searches, in support of its holding that the exclusionary rule does not apply to recordings illegally created by private parties in violation of § 45-8-21 for the parties’ use and benefit in a civil action. These cited criminal cases are all distinguishable from civil cases involving illegal actions taken by a private party. The private party in a civil action is acting illegally for their own benefit, not the benefit of law enforcement or others. In *State v. Long*, (1985) 216 Mont. 65, 700, P.2d 153, a case relied on by the District Court in its Order, this Court held that, “[w]hen applied to private action, the deterrence argument is inapplicable.” *Long*, 216 Mont. 65, 71. While it is true that the deterrence argument is inapplicable to private action in criminal cases, the deterrence argument is exactly the point here, in a civil action. A civil litigant must be deterred from secretly and illegally creating recordings for their own use and benefit in litigation. To hold otherwise will signal to litigants and potential litigants across the state that they can illegally create recordings – leading and crafting conversations unbeknownst to the other party – and then use those recordings in litigation. Such an outcome degrades all trust in relationships and daily interactions – professional or personal.

This Court has held that the exclusionary rule does not apply to private searches. *State v. Malkuch*, 2007 MT 60, ¶ 13, 336 Mont. 219, 154 P.3d 558. However, the present case does not involve an illegal search; this case involves illegal creation of a recording that would not otherwise exist. Plaintiff now seeks to benefit from her and her mother's illegal actions by using the illegally created recording in litigation. This is in every way distinguishable from this Court's holding regarding illegal searches by private parties in criminal cases.

The District Court states that “[t]he rule’s deterrent rationale has no purchase against a private citizen who has never heard of it and would not modify her behavior based on an evidentiary rule.” Exhibit A, Order, p 6. The District Court goes on to state that “[e]xtending it to private conduct would impose considerable cost, the suppression of relevant evidence, without any corresponding benefit.” *Id.* Respectfully, the District Court is wrong. Private citizens have a responsibility to know the law and abide by it. To hold otherwise is to encourage such illegal activity. To allow a party to benefit from the illegal action, again, encourages such illegal action. The exclusionary rule’s deterrent rationale is exactly why this Court should hold that the exclusionary rule applies to illegally created recordings created by parties in civil actions for use in said civil actions. The benefit to excluding illegally created evidence is immense; the risk posed to the judicial process by not excluding illegally created evidence under these circumstances is equally immense.

This is an issue of first impression for this Court, one that needs addressed, as evidenced by the district courts who have faced exactly this issue for decades. Fairness and common sense require exclusion of illegally created evidence in civil cases.

**b. THE EXCLUSIONARY RULE IS A JUDICIALLY CREATED REMEDY, NOT A STATUTORILY CREATED RULE.**

The District Court states that because § 45-8-213 does not contain a civil exclusionary remedy, the exclusionary rule does not apply. **Exhibit A**, Order, pp 4-5. The District Court states that the statute's "silence is dispositive." **Exhibit A**, Order, p 4. The District Court is again mistaken regarding the nature and origin of the exclusionary rule.

The exclusionary rule is "a judicially created remedy," originally created by the United States Supreme Court, that has evolved over time; it is not a statutorily created rule, as the District Court suggests. *State v. Pipkin*, 1998 MT 143, ¶ 12, 961 P.2d 733; see also *State v. Christensen*, (1990) 244 Mont. 312, 317, 797 P.2d 893. Importantly, this Court has explained that "the rule is really a remedy, the universal application of which is not dictated by the court which created it." *State v. Thorsness*, (1974) 165 Mont. 321, 327, 528 P.2d 692.

A remedy is exactly what is needed now. When a party illegally records conversations, then seeks to use them, for their own benefit, in civil litigation, a

remedy is needed. Montana law is clear that a “person may not take advantage of the person’s own wrong,” as Plaintiff seeks to do here. Mont. Code Ann. 1-3-208 (emphasis added); see also *Payne v. Stratman*, (1987) 229 Mont. 377, 382, 747 P.2d 210 (“We have long held that one cannot benefit from his own wrong”); *Spadaro v. Midland Claims Serv.*, (1987) 227 Mont. 445, 454, 740 P.2d 1105 (“We have long held one cannot take advantage of his own wrong”). “[E]quity is premised on the notion that a wrongdoer may not take advantage of his own wrong.” *Roundup Cattle Feeders v. Horpstad*, (1979) 184 Mont. 480, 485, 603 P.2d 1044 (emphasis added). If there is no remedy in this situation, and parties are allowed to use illegally created recordings in litigation, the outcome will be a degradation of trust in the litigation process and in all levels our daily interactions. If the District Court’s Order stands, there is nothing stopping other parties and their counsel from proactively creating illegal recordings for their own use and benefit in litigation.

**c. REMEDY BY APPEAL WOULD BE INADEQUATE.**

This case presents unique concerns which make the normal appeal process inadequate. KRMC seeks an order excluding the illegally created recording from all use in litigation – including in depositions and disclosure to experts. If the witnesses in this case – both lay witnesses and expert – are allowed to hear the illegally created recording, they will be irreparably tainted by the illegally created recording. Appeal will be an inadequate remedy because witnesses will be unable to unhear the illegally

created recording; the recording will taint this and all future proceedings. The actions of Plaintiff and her mother, along with the District Court's Order, will cause substantial detriment to KRMC and NP Duvall.

Supervisory control should be granted.

## **VI. CONCLUSION**

Supervisory control is the appropriate remedy in response to the District Court's March 10, 2026, Order. Appeal is an inadequate remedy because Defendant KRMC will be irreparably prejudiced by Plaintiff's illegally created recording and the District Court's Order. KRMC respectfully requests that this Court grant its Petition for Writ of Supervisory Control and reverse the District Court's Order.

Further, KRMC requests that this Court issue an order staying further proceedings in this case until this issue is resolved.

## **VII. COPIES OF ORDERS AND OTHER DOCUMENTS RELEVANT TO THE PETITION**

An Appendix of Exhibits, along with the copies of the following documents relevant to this Petition, are being filed contemporaneously herein:

- Exhibit A: Order Denying Motion to Exclude Audio Recording, March 10, 2026.
- Exhibit B: Affidavit of Meghan Duvall, FNP, February 3, 2026.
- Exhibit C: Complaint and Demand for Jury Trial, September 3, 2025.
- Exhibit D: Plaintiff's Responses to Defendant's First Combined Discovery Requests, November 28, 2025.

Exhibit E: Plaintiff's Response in Opposition to Defendant's Motion to Exclude Audio Recording, February 19, 2026.

DATED this 27th day of March, 2026.

MOORE, COCKRELL, GOICOCHEA  
& JOHNSON, P.C.



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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 27, M. R. App. P., I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word, is not more than 4,000 (writ of supervisory control) words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 27th day of March, 2026.

MOORE, COCKRELL, GOICOECHEA  
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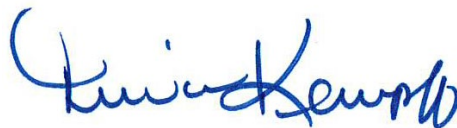
**CERTIFICATE OF SERVICE**

The undersigned does hereby certified that I have filed a true and accurate copy of the foregoing Writ of Supervisory Control with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing Writ of Supervisory Control upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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Tina Kempff

## CERTIFICATE OF SERVICE

I, Katrina L. Feller, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 03-27-2026:

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Electronically signed by Tina Kempff on behalf of Katrina L. Feller  
Dated: 03-27-2026