

MONTANA SUPREME COURT

INSURANCE: Personal jurisdiction over ND insurer in \$600,000 UIM stacking case ... stay properly denied where insurer sought to invoke "first to file" rule to gain advantage in ND ... Montana law applied to UIM issues ... "reasonable expectations" raised first time on appeal, not considered ... full faith & credit not applied to ND declaratory judgments on choice of law and stacking obtained by insurer taking advantage of Estate allowing extensions to respond to demands ... collateral estoppel not applied to contemporaneous suits ... Montana not required by comity to defer to ND rulings ... H. Brown affirmed.

North Dakotans Alan & Sharon Wamsley were in their minivan on I-90 near Bozeman in 8/02 when Lester Stanton of Butte crossed the median and hit them, causing them to collide with a motor home. Wamsleys and Stanton died. Wamsleys were insured with Nodak Mutual of Fargo. 2 of their 6 children were appointed PRs. The Estate obtained Montana counsel, Anne Biby. It received \$50,000 policy limits from Stanton's insurer Progressive Specialty of Idaho, then sought payments from Nodak under 3 UIM policies which provided \$100,000 per insured for each vehicle covered. They owned 2 vehicles besides the minivan. In 12/02 Biby notified Nodak of the Estate's intent to stack all 3 UIM policies. She notified Kirk Holmes of the pending Hardy (Mont. 2003) and stated her belief that we would likely find § 33-23-203 unconstitutional. She offered to accept \$400,000 in exchange for dropping claims for the full \$600,000. On 4/7/03 Nodak paid \$200,000 UIM on the minivan, but continued to dispute its obligation to stack the other policies. On 4/18/03 Hardy overturned § 33-23-203, holding that UIM stacking was allowed as a matter of public policy. The Estate restated its demand for \$400,000 under the remaining policies, setting a deadline of 4/28/04. Holmes requested more time to study the matter, which the Estate graciously granted. On 5/20 he informed Biby that he was still investigating and requested further time. In truth, Nodak was preparing to seek a declaratory judgment in ND on the Estate's UIM claims. On 6/4/03 it initiated an action in ND, seeking a declaration that Wamsleys' UIM policies could not be stacked under ND law. Their children were named as defendants. Biby received a "courtesy" notice of this suit 6/6/03. On 6/23 the Estate sued Nodak in Gallatin Co. seeking to stack the policies and seeking punitive for UTPA violations. On 7/23 Nodak filed a "Limited Appearance to Contest Personal Jurisdiction" pursuant to Rule 12. On 8/13 the Estate moved for summary judgment on its stacking claims. On 8/14 Nodak moved to stay the Estate's motion pending the outcome of its ND action. On 10/7 the ND court ruled that ND law would be applied. Nodak brought this ruling to Judge Holly Brown's attention. On 11/5 she held oral argument on Nodak's stay motion and subsequently denied it. On 11/11 Nodak moved for summary judgment in Brown's Court, arguing for the first time that she lacked personal jurisdiction and that ND law should apply. It also argued that Montana was required to grant the ND ruling full faith & credit, and that collateral estoppel barred the Estate from litigating its UIM claims in Montana. On 11/14 Brown heard oral argument on the Estate's previous summary judgment motion on stacking, and that same day ruled that she had personal jurisdiction over Nodak and that the Estate was allowed to stack the UIM as a matter of law. On 11/19 the ND court granted summary judgment to Nodak that it was not obligated to stack the policies. The next day Brown denied Nodak's summary judgment motion, ruling that ND law did not apply to the stacking claims in Montana and they were not barred by collateral estoppel. On 9/13/04, Nodak (ND 2004), over Justice Maring's dissent, upheld the ND declaratory judgment, finding that ND law applied to the UIM claims and did not allow stacking. On 9/30/04 Brown rendered judgment against Stanton's Estate in the amount of \$700,000 pursuant to an agreement that it would confess judgment in return for a covenant by the Wamsley Estate not to execute against it. On 12/2 the Wamsley Estate moved for summary judgment in the amount of \$400,000 for its UIM claims. Nodak again urged that Nodak be given full faith & credit. Its motions were again denied. On 9/2/05 the Estate and Nodak entered into a stipulation regarding final judgment, and Brown entered judgment against Nodak for \$400,000. Nodak appeals.

Brown correctly concluded that she had personal jurisdiction over Nodak. She concluded that it submitted to Montana jurisdiction by its appearance at the 11/5/03 hearing and failing to properly argue the merits as required by Rule 12 and UDCR 2(a). Nodak argues that it is not "found" in Montana pursuant to Rule 413(1), Montana's "long arm" statute, subjecting it to personal jurisdiction offends due process, and its "limited appearance" preserved the defense of lack of personal jurisdiction. However, Brown correctly noted that Rule 12 has effectively abolished the distinction between "general" and "special" appearances. Semenza (Mont. 2005). Under UDCR 2(a) & (b), failure to file a brief or argue its motion within 5 days subjects the party to the risk that its motion will be deemed without merit. Nodak did not argue the merits of lack of personal jurisdiction or even raise it until 3 1/2 months after its initial appearance, and in the interim presented other arguments. Brown also correctly determined that its participation constituted a voluntary appearance under 4B(2), thus waiving the defense of lack of personal jurisdiction.

Any act which recognizes the case as in court constitutes a general appearance, and even in the face of a declared contrary intention, a general appearance may arise by implication from the defendant seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself and detrimental to the plaintiff, other than one contesting only the jurisdiction of the court. Spencer (Mont. 1991).

Nodak could have argued lack of personal jurisdiction without subjecting itself to the District Court, but instead sought affirmative relief on the basis of comity. By filing motions seeking relief "on other, non-jurisdictional grounds [it] admitted the authority and jurisdiction of the court ..." Foster (Mont. 1981).

Brown did not abuse her discretion by denying Nodak's motion to stay the Montana proceedings until the ND declaratory action was decided. Nodak contends that comity required a stay because its litigation was "first-filed" in ND. However, while Nodak stated ND's interest in governing the relationship between an ND insured and ND insurer, Montana also has important interests. It has a well-established practice of applying Montana law to auto accidents within its borders, and an injured party may sue the tortfeasor and insurer in one action when UIM is sought. Brown was simply trying to prevent needless "piecemeal litigation," and Nodak fails to provide any evidence that substantial injustice resulted from denial of the motion. Moreover, there is an exception to the "first to file" rule where a party's "first filing" is simply forum shopping. Alltrade (9th Cir. 1991). Nodak's rush to ND courts is a paradigmatic example of such conduct. It apparently believed it would get a more favorable result in ND, and therefore sought to lull a delay in commencement of the Montana case to secure an advantage there. Thus its invocation of "comity" rings hollow.

Brown correctly held that Montana law should apply to the stacking & coverage issues. Nodak, citing Restatement of Conflict of Laws §§ 188 & 193, argues that the UIM claims concern a ND insurance transaction to which only ND law should apply and that Montana's relationship is limited solely to the fact that the MVA occurred here. However, absent language to the contrary, the place of performance of an insurance contract is "where an insured is entitled to receive benefits, has incurred accident related expenses, or is entitled to judgment." Mitchell (Mont. 2003). The factor-based analysis described in the Restatement comes into play only after it has been determined that the contract does not designate a place of performance. Montana is the place of performance of Nodak's contracts. The UIM policies contain boilerplate nearly identical to the policies in Mitchell. Both specify the area of coverage to include "the United States of America, its territories and possessions; Puerto Rico; or Canada." Absent any limitations of coverage in the UIM endorsement, nothing in the policies indicates the UIM territory to be other than "the United States of America, its territories and possessions; Puerto Rico; or Canada." Montana is where the accident occurred and damages arose, and is the site of the Estate's PI action and the forum in which a judgment against the Montana tortfeasor has been rendered. Moreover, Nodak has already paid the Estate \$200,000 in UIM claims submitted by the Estate's Montana counsel.

Nodak argues that Hardy required the Estate to prove that Wamsleys had a reasonable expectation that they would be able to seek UIM under all 3 policies although they paid a separate premium for each, that they were charged premiums for stacked UIM, and that they paid a premium for coverage they did not receive. However, it raises this issue for the first time on appeal and we will therefore not consider it.

Brown did not err in declining to accord full faith & credit to the competing ND rulings. Nodak argues that they were res judicata to issues raised by the Estate in Montana, noting that the ND district court ruled on choice of law several weeks before Brown's ruling applying Montana law. The Estate responds that Wamsleys' children, who appeared in the ND action, were not in privity with the Estate, and that the ND rulings would impermissibly interfere with the Montana litigation and its important interests. However, we agree with Nodak that the privity requirement of res judicata is satisfied. The children and Estate had the same interest in advancing their arguments against applying ND law because of the potential benefit if they were allowed to stack the UIM. That a conflict might develop later between the children and Estate is not significant here because in either event more money would be available to either the Estate or the children if the UIM could be stacked. Further, the same attorney appeared in ND and Montana, arguing the same basic position in both forums. The Estate argues that the ND rulings should not be granted full faith & credit because they greatly offend Montana policy in favor of stacking. However, as a general rule a judgment must be afforded full faith & credit regardless of how greatly it offends the public policy of Montana. Carr (Mont. 1998). However, we do find compelling the Estate's argument that the rulings impermissibly interfere with the Montana litigation. These cases proceeded simultaneously in 2 state courts with competing rulings sought and obtained within weeks and sometimes days of each other. Unlike the classic situation involving entry of judgment by one court prior to commencement of a case in another, we are faced with an anomalous state of affairs. Nodak has cited no precedent addressing how and even whether full faith & credit is due under such circumstances. The ND declaratory action was begun in an attempt to apply ND law "through the back door" in Montana and avoid a potentially adverse result here. Nodak took advantage of the Estate's good graces by obtaining extensions to respond to its demands while buying time to file a preemptive action in ND. We agree with Maring that the ND rulings were simply an "advisory opinion" on choice of law and stacking. Montana was not bound by them. Nodak can point to no cases where full faith & credit has given one state the power to issue declaratory judgments aimed at exerting interlocutory control over ongoing litigation in a forum state. Permitting ND's declaratory judgments to have preclusive effect over Montana courts in this case "would mean in effect that the courts of [ND] can control what goes on in the courts of [Montana]." Baker (US 1998).

Nodak contends that collateral estoppel barred the Estate from pursuing its UIM claims in Montana once the ND court had ruled on choice of law and UIM. However, "collateral estoppel, or issue preclusion, bars the reopening of an issue that has been litigated and determined in a prior suit." Baltrusch (Mont. 2006). The suits here were contemporaneous, with Montana and ND ruling on various aspects at parallel times.

Comity does not require Montana to defer to the ND rulings. To paraphrase Brown, comity should extend in all directions: east to west, as well as west to east.

Cotter, Nelson, Morris.

Rice, Gray, and Judge Phillips, sitting for Leaphart, specially concurred: Nodak has offered substantive arguments which are compelling but which, because of procedural or postural issues, we are not able to adopt. We concur that Brown did not abuse her discretion by denying Nodak's comity request for a stay under the circumstances of its litigation tactics, although we do not necessarily agree that Montana has or should have a "practice of applying Montana law to automobile accidents occurring within its borders" which would render careful application of the statutes and Restatement factors unnecessary or secondary. The "anomalous" circumstances place this case within a very narrow exception to the general rule that we give full faith & credit to the ND judgment. Although we are sympathetic with some of Justice Warner's thoughts as to Hardy, we nonetheless must concur with majority that the merits of this issue cannot be reached because it was raised for the first time on appeal. We concur as to the merits of the choice of law issues, although not necessarily with the entirety of the analysis. Since Casarotto (Mont. 1994) adopted the Restatement's formulation for choice of law, the Court has used inconsistent approaches which need to be resolved or clarified. We should be wary of creating a bright-line rule that the parties always intended the place of injury to also be the place of performance. That does not give effect to the original intent of the parties, which is the primary concern of the Restatement, and may, where a Montanan is in an accident outside the state, dictate that we apply the law of the other state.

Warner specially concurred and dissented: I concur as to personal jurisdiction, full faith & credit, collateral estoppel, denial of a stay based on "first to file," and stacking under Hardy, although Hardy unduly restricts the right to contract and denies the Legislature its rightful role in policy decisions. Mitchell compounded the problems in Hardy by misconstruing § 28-3-102 and essentially ignored the conflict of law principles adopted in Casarotto. The Majority errs again by refusing to let ND courts decide questions arising between ND citizens concerning a ND contract. I would hold that Brown erred in concluding that Montana law applies to the Estate's stacking claims; alternatively, I would dismiss and defer to ND. The Majority errs in holding that Montana must apply every time a contract made elsewhere has some effect in Montana. That an auto policy provides coverage throughout the US is not sufficient to show that it is only performed where an accident happens. Other courts have concluded that the law of the state where a policy was made should generally apply, rather than the law of the state where an accident happened to occur. They recognize that the state where the parties entered the contract has a greater interest in having its own law applied than a state that is only connected to the parties by happenstance. This Court should grant comity to ND in this case. We have the right and duty to correctly interpret Montana law for the benefit of Montana citizens. Still, Montana is a part of the US and the judgments of our sister states are important – especially to the citizens of those other states. The only Montanan affected by this decision are the local lawyers. The refusal to grant comity where only ND policy is directly affected impinges unnecessarily on the harmonious interstate relations which are part & parcel of the spirit of cooperative federalism. There are now diametrically opposed judgments. It remains to be seen if Montana's judgment aids the Estate's pursuit of an insurance payment which Wamsleys did not bargain for, or only necessitates further litigation between ND citizens.

Estate of Wamsley v. Nodak Mutual Ins., DA 06-194, submitted 2/14/07, decided 2/19/08.

Anne Biby (Hash & O'Brien), Kalispell, for the Estate; Jared Dahle (Nelson & Dahle), Billings, for Nodak.