

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 09-0550

NICOLE ALEXANDER, as personal representative of the estate of Michael Alexander, BURT OSTERMILLER, and HELEN ALEXANDER

APPELLANTS,

v.

BOZEMAN MOTORS, INC., d/b/a BOZEMAN FORD, et al., DAVID A. WALLIN, BOB SNEDEKER, ROGER BEVERAGE, AND NORTHERN TOOL AND EQUIPMENT COMPANY, INC.

APPELLEES.

BRIEF OF AMICUS CURIAE
MONTANA CHAMBER OF COMMERCE

On Appeal from a Judgment Entered in the Eighteenth Judicial District Court in Gallatin County in the State of Montana before Honorable John C. Brown

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STATEMENT OF ISSUES

For purposes of this brief, the Montana Chamber of Commerce has limited its arguments to whether Alexander has proven beyond a reasonable doubt that § 39-71-413, MCA, is unconstitutional under the following provisions of the Montana Constitution: (i) Article II, § 4; (ii) Article II, § 31 and Article V, § 12; (iii) Article II, § 17; or (iv) Article II, § 3.

STATEMENT OF INTEREST OF AMICUS

The Montana Chamber of Commerce is a private, not-for-profit 501(c)(6) organization. It represents and promotes the interests of business at the state and national levels. It is dedicated to building Montana's economy, creating a business-friendly environment, and growing the number of good-paying careers in Montana. The Montana Chamber has nearly 1,500 members throughout the state ranging from small main street businesses to larger natural resource-based industries, from multi-generational ranches to high-tech manufacturers. These member companies employ tens of thousands of Montana workers around the state. Affordability of workers' compensation premiums, competitiveness and vitality of Montana's economy, and reliable legal standards for the conduct of business are all very important issues for Montana Chamber members, their employees, and businesses in general.

STANDARD OF REVIEW

This Court's standard of review of a grant or denial of a motion for summary judgment is identical to the standard used for ruling on a motion for summary judgment. This Court determines "whether there is an absence of genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law." *Otteson v. Montana State Fund*, 2005 MT 198, ¶ 8, 328 Mont. 174, ¶ 8, 119 P.3d 1188, ¶ 8.

SUMMARY OF ARGUMENT

Alexander has not met the high burden in proving § 39-71-413, MCA, unconstitutional beyond a reasonable doubt. The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional. *State v. Martel*, 273 Mont. 143, 148, 902 P.2d 14, 17 (1995). The Montana workers' compensation system is based upon the principle of *quid pro quo*, and has always had limited, specific exceptions. In Article II, § 16, the Montana Constitution gives the Legislature the power to decide the exceptions and scope of the workers' compensation exclusive remedy. Alexander's request to throw out § 39-71-413, MCA, would undermine Montana's workers' compensation system and be harmful to Montana's business climate.

ARGUMENT

I. ALEXANDER HAS NOT MET THE HIGH BURDEN IN PROVING § 39-71-413, MCA, UNCONSTITUTIONAL BEYOND A REASONABLE DOUBT.

Alexander is asking the Court to declare §39-71-413, MCA, unconstitutional as passed by the Montana Legislature. The constitutionality of all legislative enactments is presumed, and Alexander must overcome the heavy burden of proving § 39-71-710, MCA unconstitutional beyond a reasonable doubt:

“The constitutionality of a legislative enactment is *prima facie* presumed, and every intendment in its favor will be presumed, unless its unconstitutionality appears beyond a reasonable doubt. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action which will not be declared invalid unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.

Every possible presumption must be indulged in favor of the constitutionality of a legislative act.”

Powell v. SCIF, 2000 MT 321, ¶ 13, 302 Mont. 518, ¶ 13, 15 P.3d 877, 13.

This Court has also stated in cases involving equal protection that “the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose.” *State v. Price*, 2002 MT 229, ¶ 41, 311 Mont. 429, ¶ 41, 57 P.3d 42, ¶ 41. For the reasons set forth below, Alexander has failed to prove the statute unconstitutional beyond a reasonable doubt.

A. THE MONTANA WORKERS' COMPENSATION SYSTEM IS BASED UPON THE PRINCIPLE OF *QUID PRO QUO*, AND HAS ALWAYS HAD LIMITED, SPECIFIC EXCEPTIONS.

In the early 20th century, Montana joined with other states in enacting a statutory framework to help provide compensation for workers who were injured on the job, regardless of fault. In exchange for this compensation, employers were shielded from lawsuits based on work-related injuries, even if their actions or policies were the cause of those injuries. This provided injured workers with a reliable, workable framework to receive lost wages compensation and medical care, and employers with a reliable, consistent framework with which to operate their business, employ workers with sustainable jobs, and compete with businesses in other states and countries. This statutory framework was upheld in the case of *Shea v. North Butte Min. Co.*, 55 Mont. 522, 179 P.499 (1919).

For decades there were no statutory or common law exceptions to the exclusive remedy in Montana. In 1969, the Montana Legislature maintained the exclusive remedy in cases against employers, and passed a bill amending the code to allow causes of action against co-workers. This change essentially codified the Court's ruling in the case *McGew v. Consolidated Freightways, Inc.*, where an employee sued his co-worker for an assault at

work. 141 Mont. 324, 377 P.2d 350 (1963). This change did not, however, apply to employers, thereby leaving the exclusive remedy totally intact.

In 1971, in *Enberg v. Anaconda Co.*, 158 Mont. 135, 489 P.2d 1036 (1971), the Court broadened the rule as outlined in the *McGew* case and created a very narrow intentional act exception for employers that included a “specific intent to injure” standard used up until the *Sherner v. Conoco, Inc.* case in 2000. 2000 MT 50, 298 Mont. 401, 995 P.2d 990. The many cases after *Enberg* and preceding *Sherner* required proof beyond negligence that showed an employer acted with specific intent to injure. See *Great Western Sugar Company v. District Court*, 188 Mont. 1, 610 P.2d 717 (1980); *Sitzman v. Schmaker*, 221 Mont. 304, 718 P.2d 657 (1986); *Dvorak v. Matador Serv. Inc.*, 223 Mont. 98, 727 P.2d 1306 (1986); *Adsem v. Roske*, 224 Mont. 269, 728 P.2d 1352 (1986); *Vaino v. Brookshire*, 258 Mont. 273, 852 P.2d 596 (1990); *Blythe v. Radiometer America., Inc.*, 262 Mont. 464, 866 P.2d 218 (1993); *Lockwood v. W.R. Grace & Co.*, 272 Mont. 202, 900 P.2d 314 (1995); *Calcaterra v. Mont. Resources*, 1998 MT 187, 289 Mont. 424, 962 P.2d 590.

In 2000, the Court departed from its previous interpretations of §39-71-413 in the *Sherner* case and severely crippled the *quid pro quo* in workers’ compensation. Instead of being required to show a specific intent

to injure an employee, the injured employee could sue if the employer disregarded facts showing a high probability that an employee might be injured. *Shermer* ¶¶37-39. This reversal was based in large part to a new and different interpretation of the statute’s language regarding “malice.”

The 2001 Legislature addressed the *Shermer* decision in amendments that were thoroughly debated in committees and on the floors of the state House and Senate. The amendments to §39-71-413 restored the pre-*Shermer* standards that required a showing “specific intent to injure” with “actual knowledge injury” is “certain to occur.” This language restored the *quid pro quo* of workers’ compensation by limiting the exceptions to the exclusive remedy to very specific circumstances involving actions of employers or co-workers that are intended to deliberately harm the employee.

Appellants do not dispute the pre-*Shermer* rulings, nor do they dispute the Legislature’s intent in 2001 when the pre-*Shermer* exceptions to the exclusive remedy were specifically codified.

B. THE MONTANA CONSTITUTION GIVES THE LEGISLATURE THE POWER TO DECIDE THE EXCEPTIONS AND SCOPE OF THE WORKERS’ COMPENSATION EXCLUSIVE REMEDY.

Citing numerous provisions in the Montana Constitution, Alexander argues that §39-71-413 unconstitutionally deprives injured workers of equal

protection of the law, creates special privileges and classes for employers and co-workers, and deprives injured workers of the right to enjoy and defend life and liberties, a clean and healthful environment, and the right to seek safety, health, and happiness. Alexander's entire brief, however, is based on a limited and unsupported reading of the Montana Constitution.

In all 47 pages of Alexander's brief, not one mention is made of Article II, §16 of the Montana Constitution, which reads:

Section 16. The administration of justice. Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. **No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state.** Right and justice shall be administered without sale, denial, or delay.

(Emphasis added).

How does Alexander expect to have a comprehensive analysis of the rights and privileges of Montana employees and employers in work-related injury cases without fully outlining the relevant constitutional provisions?

Article II, §16 is not listed in Alexander's Table of Authorities, nor anywhere else in the body of the brief.

The Montana Legislature, though its plenary power, has the sole authority to create, amend or reject any and all exceptions to Article II, §16.

Based on the plain meaning of Section 16, the Legislature could actually refuse to create any exceptions at all. As cited numerous times by the Court, “the people, though the legislature, have plenary power, except in so far as inhibited by the Constitution, and the person who denies the authority in any given instance must be able to point out distinctly the particular provision of the Constitution which limits or prohibits the power exercised.” *Meech v. Hillhaven*, 238 Mont. 21, 776 P.2d 488 (1989).

In 2001, the people, through the Legislature, enacted a new law relating to an exception in the exclusive remedy provision in Article II, §16. The new language expressly limited the scope of lawsuits that an employee could pursue against an employer or co-worker outside of the workers’ compensation system. The opposing views to such changes, which Alexander has repeated, were heard and rejected by the Legislature.

By not even addressing the issue of Article II, §16 and how it relates to other provisions in the Constitution and §39-71-413, Alexander has failed to prove the statute unconstitutional beyond a reasonable doubt. Amicus respectfully ask the Court to uphold the statute and reject Alexander’s constitutional arguments.

II. ALEXANDER’S ANALYSIS REGARDING AN ALLEGED DISPARATE TREATMENT FOR EMPLOYEES OF DIFFERENT BUSINESSES AND EMPLOYERS IS NOT BASED ON FACTS.

Alexander argues that § 39-71-413, MCA creates two similarly situated classes of employees that receive disparate treatment, which violates equal protection as guaranteed by the Montana Constitution. To make this point, Alexander grossly oversimplifies and sometimes mischaracterizes the nature and structure of Montana businesses and other employers.

At the heart of Alexander’s argument is the notion that small businesses have an “identifiable person or persons who are employers,” but corporations are too complex and saddled with levels of managers and agents to allow an injured worker to pursue a cause of action outside of the workers’ compensation system. These arguments are grounded on a fundamental lack of understanding of Montana businesses.

First, Alexander’s arguments oversimplify the nature of sole proprietors, partnerships and corporations. A sole proprietorship or partnership can be a business made up of hundreds of employees, dozens of managers and agents, and have an owner or operator that has little to no relationship with the company’s employees. A corporation in Montana can also be a small family business, a family farm or ranch, made up of

relatively few employees who have daily and frequent interaction with the employer or manager.

Alexander tries to lump corporations into a different category with generalizations and assumptions. Those arguments are not based on any facts, statistics or clear examples, but solely on stereotypical characterizations that paint corporations as faceless, monstrous entities. These generalizations made throughout section two of Alexander's brief, should be rejected as baseless rhetoric.

Second, § 39-71-413, MCA makes no distinction between a person who works in a corporation versus a sole proprietorship or partnership. Instead, it allows an injured worker to pursue a cause of action against any individual in the workplace who intentionally injured him or her:

39-71-413. Liability of employer or fellow employee for intentional and deliberate acts -- additional cause of action -- intentional injury defined. (1) If an employee is intentionally injured by an intentional and deliberate act of the employee's employer or by the intentional and deliberate act of a fellow employee while performing the duties of employment, the employee or in case of death the employee's heirs or personal representatives, in addition to the right to receive compensation under the Workers' Compensation Act, have a cause of action for damages against the person whose intentional and deliberate act caused the intentional injury.

(2) An employer is not vicariously liable under this section for the intentional and deliberate acts of an employee.

(3) As used in this section, "intentional injury" means an injury caused by an intentional and deliberate act that is specifically and actually intended to cause injury to the employee injured and there is actual knowledge that an injury is certain to occur.

§ 39-71-413, MCA.

Contrary to what Alexander argues, the statute makes no distinction between an injured worker in a corporation, sole proprietorship or partnership. An employer or co-worker in a corporation who injures an employee is just as liable for intentional acts intended to cause harm to the employer or co-worker in a sole proprietorship or partnership. Alexander does not even quote the statute to show this alleged disparate treatment.

III. ALEXANDER'S REQUEST TO THROW OUT § 39-71-413, MCA, WOULD UNDERMINE MONTANA'S WORKERS' COMPENSATION SYSTEM AND BE HARMFUL TO MONTANA'S BUSINESS CLIMATE.

The workers' compensation system is a benefit for Montana employers and their employees. It creates certainty, predictability and reasonable benefits for both sides of the employment relationship. The *quid pro quo* is fundamental to the framework of the workers' compensation, and any decision that allows fault to creep into the analysis of workplace injuries would be damaging to Montana employers and employees.

As stated earlier, the element of fault was taken out of the analysis when workers' compensation was passed in the early 20th century. This means that an injured worker can receive indemnity and medical benefits regardless of who or what caused the injury as long as it falls within the

course and scope of the worker's employment. Not only are employers and co-workers shielded for an injury they may have caused through negligence, bad policy, or a disregard of good policy or safety measures, but the injured worker is also not prevented from collecting benefits if the injury was caused by his or her own negligence or disregard of good policy or safety measures. It is not a perfect system, but it is a system that has been authorized by the framers of our state constitution, set up by the Legislature with limited and specific exceptions, and upheld by this Court for decades.

The narrow exceptions to the exclusive remedy provisions in Montana are very similar to other states— all of which Montana businesses compete with everyday. *See Johnson v. Mountaire Farms of Delmarva, Inc.*, 503 A.2d 708 (Md. 1986); *Kaess v. Armstrong Cork Co.*, 403 N.W.2d 643 (Minn. 1987); *Kearney v. Denker*, 760 P.2d 1171 (Idaho 1988); *Grillo v. National Bank of Washington*, 540 A.2d 743 (D.C. 1988); *Lantz v. National Semiconductor Corp.*, 775 P.2d 937 (Utah Ct. App. 1989); *Peay v. U.S. Silica Co.*, 437 S.E.2d 64 (S.C. 1993); *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271 (Ind. 1994); *Bercaw v. Domino's Pizza, Inc.*, 630 N.E.2d 166 (Ill. App. Ct. 1994); *Zimmerman v Valdak Corp.*, 570 N.W.2d 204 (N.D. 1997); *Gourley v. Crossett Public Schools*, 968 S.W.2d 56 (Ark.

1998); *Blailock v. O'Bannon*, 795 So.2d 533 (Miss. 2001); *Fenner v. Municipality of Anchorage*, 53 P.3d 573 (Alaska 2002);

Throwing out the law contained in §39-71-413 would not only put Montana businesses at a competitive disadvantage, but it would limit Montana's ability to attract new businesses and industries. Montana employers would be subjected to a barrage of frivolous workplace injury lawsuits while other states enjoy the predictability and consistency of a sound workers' compensation system. Such an outcome would have a chilling effect on the creation and sustainability of jobs for Montanans.

Amicus respectfully ask the Court to uphold the statute and reject Alexander's constitutional arguments.

CONCLUSION

Alexander has not met the high burden in proving § 39-71-413, MCA, unconstitutional beyond a reasonable doubt. The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional. The statute should be upheld because (1) the Montana workers' compensation system is based upon the principle of *quid pro quo*, and has always had limited, specific exceptions; and (2) in Article II, § 16, the Montana Constitution gives the Legislature the power to decide the exceptions and scope of the workers' compensation exclusive remedy.

Alexander's request to throw out § 39-71-413, MCA, would undermine Montana's workers' compensation system and be harmful to Montana's business climate. Amicus respectfully ask the Court to uphold the statute and reject Alexander's constitutional arguments.

CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing brief was prepared in compliance with this Court's amendments to Rule 11 of the Montana Rules of Appellate Procedure. The brief is proportionally spaced using 14 point Times New Roman font and contains 3,654 words per Microsoft Word 2003, excluding the Certificate of Service and Certificate of Compliance.

So certified this 16th day of February, 2010.

BY: _____
Jon W. Bennion, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2010, I mailed a true and accurate copy of the foregoing, postage pre-paid, to the following:

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