



**MONTANA  
CHAMBER OF  
COMMERCE**

# **JUDICIAL REVIEW**

# 2012

MONTANA CHAMBER OF COMMERCE | JUDICIAL REVIEW | 2012

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# MONTANA SUPREME COURT JUDICIAL REVIEW

Cases from 2010-2011

The Montana Chamber of Commerce is pleased to present the 2012 Judicial Review of the Montana Supreme Court. It is a companion piece to the Montana Chamber's biennial Legislative Voting Review, which evaluates the other two branches of state government – the Legislature and the Governor. A Review of the Montana Workers' Compensation Court is also included in this Review.

Following past practice, this Review encompasses a two-year period of important business court decisions from 2010 and 2011. Our intent is to assist the business community in tracking trends in judicial rulings relating to Montana's economy. The report also provides a means of evaluating each individual judge's stance on business-related issues.

We understand judges are bound by the rule of law. The federal and state constitutions, judicial construction, and prior case decisions, rather than anti-business or pro-business positions, may dictate the outcome of a particular case. In these instances, it is difficult to hold a judge philosophically accountable for a particular outcome.

In preparing this analysis, the Montana Chamber sought input from various business leaders from across the state. A strict set of criteria was used to achieve the most objective report possible. Input from affected trade associations and individual businesses allowed the Montana Chamber to independently verify the research conducted in specific categories. Cases selected must have had an impact, either positive or negative, on businesses in the state or affect general liability standards. We tried to exclude decisions with a negative impact on one type of business and a positive effect on other businesses.

Many of the case summaries were provided by the descriptions from the "Montana Law Week" publication.

## The Montana Supreme Court

Previous Chamber Judicial Reviews have evaluated Montana Supreme Court decisions from 1990 to 2009. The dynamic of the Court has changed considerably in the past few years, which makes it even more important to continually measure the Court's record. This Review provides a greater understanding of the important role that Court decisions play in shaping our economy. Only then can we judge how, and if, the state's business climate and image are truly improving or suffering as a result of Court decisions.

Cases are divided into 12 categories: Banking, Construction Lien, Contracts, Employment, Jurisdiction/Other, Insurance, Land Use/Environment, Medical Malpractice, Tort, Tax, Workers' Compensation/FELA, and Unemployment Insurance. Each case was assigned one category for the purpose of the record even though some cases could obviously be included in multiple categories. In those instances, the Chamber attempted to select the most appropriate category for the case selected.

## Scoring

In the review of the Montana Supreme Court, individual justices were evaluated in comparison to the pro-business position. Justices were not scored when they did not participate in a case. When justices concurred in part or dissented in part, the Montana Chamber reviewed the written nature of their concurrence or dissent and made an evaluation of how the justice voted against the overall case. Scores were not weighted. Justices received a 0 to 100 percent Business Score overall for the 2010-2011 period. We also included a Judicial Career Score, which includes a score from their entire Supreme Court tenure. Whether we agree or disagree with their rulings in individual cases, we appreciate each justice's service to the state of Montana.

## Case Participation

The report shows the total number of cases for each category as well as the number of cases participated in by each justice. Higher case participation rates should reflect a higher degree of reliability. The case participation number reflects the number of case scored for a particular justice from the selected cases during the period of the study (2010 to 2011). District judges who filled in for recused justices were not scored in this Review.

## Montana Supreme Court Justices

This report includes a review of the work of 8 Supreme Court Justices. During this period, Associate Justice Bill Leaphart served the final year of his eight-year term and did not run for re-election. Helena attorney Beth Baker won election to the position in 2010 over District Judge Nels Swandal of Wilsall. In addition, Justice John Warner resigned from the Court in 2009, allowing Governor Brian Schweitzer to appoint former state Senator Mike Wheat as his replacement. Justice Wheat was retained in the 2010 election for the remainder of Warner's term. The other five justices stayed the same during this two year period. The following justices are evaluated in this Judicial Review:

**Chief Justice Mike McGrath** - elected in 2008

**Justice Jim Nelson** - appointed in 1993, elected in 1994, re-elected in 1996 and 2004. Retiring in 2012

**Justice William Leaphart** - elected in 1994, re-elected in 2002, retired at the end of 2010

**Justice Patricia Cotter** - elected in 2000, re-elected in 2008

**Justice Jim Rice** - appointed in 2001, elected in 2002, reelected in 2006

**Justice Brian Morris** - elected in 2004

**Justice Mike Wheat** - appointed in early 2010, elected in late 2010 through the end of 2014

**Justice Beth Baker** - elected in 2010



Justices of the Montana Supreme Court as of 2012: (Bottom, left to right) Justice Nelson, Justice Baker, Justice Cotter, Justice Rice, Justice Wheat; (Top, left to right) Chief Justice McGrath, Justice Morris



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## BANKING

### ***Credit Service v. Crasco – 8/30/11***

**FACTS:** Crasco secured three payday loans from three different lenders. After the payor banks returned the checks for insufficient funds, the payday lenders assigned the checks to Credit Service, a collection agency. Credit Service filed an action against Crasco to recover the face value of the checks, a service fee per check, and bad check penalties of \$500 per check. The county justice court concluded (1) Crasco must pay to Credit Service the face amount of each check and the service charge on each check, (2) Credit Service could not collect the bad check penalties, and (3) Crasco could recover damages for Credit Service's illegal pursuit of the bad check penalties. The District Court reversed, determining that Credit Service could collect the bad check penalties.

**HOLDING:** The Supreme Court reversed, holding a collection agency cannot charge bad check penalties for checks assigned to it from payday lenders when the payday lenders themselves are statutorily prohibited from charging such penalties. Remanded to determine whether the justice court incorrectly awarded Crasco damages. (Morris, McGrath, Baker, Cotter, Nelson)

## CONSTRUCTION LIEN

### ***Anderson Const. v. Monroe Property LLC – 6/14/11***

**FACTS:** In 2000, Dick Anderson Construction (DAC) entered into a contract with Monroe Construction to do construction work on Paws Up Ranch, which was owned by Monroe Property. When each phase of the construction was completed, Monroe Construction sold that phase to Monroe Property. When DAC was not paid for the last \$800,000 of its billings, it filed a construction lien to secure its claim. In 2001, DAC sued Monroe Property to foreclose the lien. On remand to the District Court, Monroe Property argued since it was not a party to the construction contract with DAC, it was not a contracting owner against whom the lien could be foreclosed under the construction lien statutes. The District Court granted Monroe Property's motion for summary judgment, and DAC appealed.

**HOLDING:** The Supreme Court reversed, holding the facts of the case demonstrated that Monroe Construction was the actual agent of Monroe Property for the purpose of engaging DAC to complete construction work on the ranch. Therefore, under the statutes, Monroe Property, acting through its agent Monroe Construction, was a contracting owner with regard to the construction contract with DAC. (McGrath, Nelson, Wheat, Baker, Rice)

## CONTRACT

### ***Riehl v. Cambridge Court GF – 2/9/2010***

**FACTS:** After Riehl's mother died in the care of Cambridge Court Memory Care Unit, she alleged negligence and requested a declaratory judgment that the agreement's binding arbitration provision was unenforceable and invalid. The District Court held it was invalid and granted summary judgment to Riehl.

**HOLDING:** The agreement as a whole is ambiguous as to scope and applicability of the arbitration provisions. Neither Riehl nor the administrator of Cambridge knew of the binding arbitration provision, which led the Court to believe neither party intended to agree to arbitrate. There was no mutual intent or meeting of the minds as to the arbitration provision. (Nelson, McGrath, Leaphart, Cotter, Morris)

### ***Wrigg v. Junkermeier, Clark, Campanella, Stevens – 11/22/11***

**FACTS:** JCCS hired Wrigg as a staff accountant in 1987. JCCS promoted Wrigg to a shareholder in 2003. Wrigg signed her first Shareholder Agreement (Agreement) in January 2004, which included a covenant not to compete clause. Wrigg signed new Agreements in 2005 and again in 2007. In 2009, JCCS terminated the Agreement and reminded Wrigg of the covenant not to compete. Wrigg accepted employment at another Helena firm with a significant pay cut. Wrigg conceded she worked for, and solicited business from, JCCS's clients within a year of termination. JCCS sent Wrigg a demand letter that sought compensation under the terms of the JCCS covenant. Wrigg filed an action for declaratory judgment in District Court to determine whether JCCS could enforce the covenant. The District Court applied the Dobbins test to determine that the covenant was reasonable, and therefore, could be enforced. Wrigg appealed.

**HOLDING:** JCCS clearly ended the employment relationship here as evidenced by its May 2009 letter to Wrigg. The letter describes no refusal or failure by Wrigg to comply with JCCS policies or standards and no facts that would give rise to misconduct. JCCS elected to terminate its employment relationship with Wrigg, and, accordingly, cannot enforce its covenant under these circumstances. We reverse and remand with instructions to the District Court to vacate its declaration that JCCS can enforce its covenant and enter judgment in Wrigg's favor. (Morris, McGrath, Cotter, Wheat, Baker)

## EMPLOYMENT

### ***Prescott v. Innovative Resource Group (ASP Healthcare) – 2/16/10***

**FACTS:** Prescott sued ASP Healthcare alleging wrongful discharge. ASP offered Prescott to enter binding arbitration, but said it would pursue attorney's fees pursuant to §39-2-915 if she refused and they were successful at trial. No response was given and ASP prevailed at trial. The District Court awarded \$33,920 in attorney's fees to ASP. Prescott appealed the judgment arguing §39-2-915 violates her right to access the courts, to a jury, and to equal protection.

**HOLDING:** Prescott did not address the issue or make the argument in the District Court. Therefore, the Court declined to address the constitutional argument. (Cotter, McGrath, Leaphart, Wheat, Rice)

### ***Blehm v. St. John's Lutheran Hospital – 12/14/10***

**FACTS:** Blehm accepted a position of HR manager at St. John's and started over a month following acceptance. One of her first acts as HR manager was to amend the probationary period for employees to six months. Within days of almost her reaching the end of the six month probationary period, St. John's terminated her employment. Blehm sued under wrongful discharge, and lost at the District Court level in summary judgment.

**HOLDING:** The District Court correctly granted summary judgment because the probationary period started from the day she started working, not on the date of hire. This conclusion is reached based on either reading of the St. John's employment handbook – both before Blehm amended it and after. §39-2-904 allows employers to define a probationary period and provides a default time period if the employer fails to do so. (McGrath, Rice, Wheat, Cotter, Nelson)

### ***Eldredge v. Asarco and Retirement Benefit Plan for Salaried Employees of Asarco – 4/19/11***

**FACTS:** Eldredge was laid off of his job at Asarco just a few months before he accrued the requisite years of employment for retirement benefits. Eight months earlier, he had rejected a comparable position in the company in Arizona with a 5% pay increase. Following the termination of his employment, he was hired as a "consultant" for Asarco, which he did beyond the time period to be eligible for retirement if he had remained an employee.

**HOLDING:** Asarco's offer eight months before Eldredge's termination was not an offer of comparable employment because the offer must be contemporaneous with the notice of termination. In addition, Eldredge's consulting agreement was more similar to employment, rather than consulting. He was paid under the same arrangements, performed the same duties, and he continued to work for them after the initial contract expired. District Court's ruling reversed in part, affirmed in part. (Morris for full Court)

### ***Brown v. Yellowstone Club – 6/28/11***

**FACTS:** Brown was hired by the Yellowstone Club as director of retail sales and rentals of ski-related goods. Brown and the Club entered an employment agreement that employed Brown for a term of three years. The agreement also provided that the Club (or Brown) could terminate Brown's employment at any time, without cause. After about six months, the Club terminated Brown's employment, without cause. Brown brought an action for damages against the Club under the Wrongful Discharge Act. The District Court granted the Club's motion to dismiss based upon § 39-2-912(2), MCA, which exempts from the Act an employee covered by a "written contract of employment for a specified term."

**HOLDING:** Construing the employment agreement in this case as one for a specific term would remove the discharge from the Act could effectively reinstate at-will employment in Montana, and would leave the discharged employee arguably without remedy. He would not be able to bring an action under the Act, and at the same time would be subject to the employer's contractual right to discharge at will. We reverse and remand. (McGrath for full Court)

### ***Kershaw v. MDT – 7/19/11***

**FACTS:** Kershaw was demoted and later resigned from his employment at MDT and sued for constructive discharge. At the time he resigned he was given a BPA grievance form, which he did not file. The District Court granted summary judgment to MDT because Kershaw did not go through the BPA grievance procedure. He appealed claiming the BPA procedure requirement violates his right to equal protection and a jury trial.

**HOLDING:** Kershaw has not demonstrated that the two classes he presents – MDT employees and employees with access to the Wrongful Discharge Act – are similarly situated. The remedies available to these classes, whether it's the WDA, a collective-bargaining agreement, or an employment contract, vary in scope and nature of rights. (Rice, McGrath, Cotter, Wheat, Morris)

### ***Williams v. Plum Creek Timber – 11/1/11***

**FACTS:** In the spring of 2006, Plum Creek determined that it could no longer supply enough logs to run its Columbia Falls mill at eight hours production capacity per week. To keep the mill profitable and to avoid layoffs, Plum Creek decided to reassign 25 employees to other mills. The determination as to which employees would be reassigned was based on a written pre-transfer evaluation form. Williams asserts his evaluation form was done in error. Williams was reassigned and placed on a 90-day probationary period. The only position he was eligible for was as a plugger operator. Williams had no experience in this job and,

although he improved over time, he failed to perform at a fast enough pace to satisfy his supervisors. Plum Creek terminated Williams' employment at the end of his probationary period. Williams brought this action under the Wrongful Discharge Act alleging that Plum Creek violated the express provisions of its written employment policies by failing to apply those policies consistently and equally to all employees. Williams further alleged that Plum Creek violated those policies by reassigning him to a new plant based on an erroneous evaluation, wrongfully demoting him to a position in which he had no experience, and, ultimately, terminating his employment. The District Court granted Plum Creek's Motion for summary judgment on the basis that no wrongful discharge took place since Williams was discharged for good cause. Williams appeals the District Court's judgment. **HOLDING:** Viewing the evidence in Williams' favor as the non-moving party, we conclude that conflicting inferences could be drawn from this evidence and that reasonable persons could conclude that the evaluation form was part of Plum Creek's written personnel policy, that Plum Creek violated the express provisions of that policy by failing to apply it consistently and equally to all of its employees, that Plum Creek wrongfully demoted and transferred Williams, and that this demotion and transfer was directly linked to Williams' discharge. We have repeatedly held that summary judgment is an extreme remedy and should never be substituted for a trial if a material factual controversy exists. Reversed and remanded. (Nelson, McGrath, Wheat, Morris, Rice)

## OTHER

### ***Montana Consumer Finance Association and Harrington v. State – 8/17/10***

**FACTS:** Initiative 624 sought to cap interest for certain loans at 36%. The AG's office found factual errors in proponent's ballot statement and redrafted the language. A group challenged the ballot statements and the AG's legal sufficiency determination.

**HOLDING:** The Court rejected petitioner's request to strike language from the ballot measure or refer to District Court. Instead, the Court rewrote the ballot statement as modified by the AG's office and allowed it to go forward. The Dissent felt as though the statement could not be rewritten by the Court, and that the Majority acted as a pseudo-legislature to manipulate clear statutory mandates to achieve some presumed greater good. (Morris, Leaphart, Cotter, Wheat) (Morris and Leaphart specially concurring) (Nelson Dissented) (Rice Dissented)

### ***Grizzly Security Armored Express v. The Armored Group – 6/7/11***

**FACTS:** TAG sells armored vehicles throughout the United States and internationally, but has its principal place of business in Phoenix, Arizona. Grizzly provides security and armored services in Kalispell, Montana. Grizzly purchased new and used armored vehicles from TAG to use in its Montana business. Grizzly alleges that the two vehicles had mechanical problems and body damage. The parties dispute responsibility for the repairs. TAG communicated over the phone and through email with Grizzly in order to facilitate sales and arrange any necessary repairs to Grizzly's vehicles. TAG also spoke with other business owners in Kalispell about repairing vehicles for Grizzly. TAG's website represents that TAG services vehicles in Montana. TAG also offered to rent Grizzly a truck for \$600 a day to replace the damaged 2008 Dodge. TAG indicated that it could ship the rental from Texas to Montana. Grizzly eventually filed suit against TAG in Montana to recover damages from the sale. Grizzly served TAG's corporate counsel in Arizona. TAG failed to file a timely answer and Grizzly moved for entry of default. Grizzly presented TAG filed a motion to dismiss for lack of personal jurisdiction with the District Court in its first appearance. The District Court granted TAG's motion to dismiss.

**HOLDING:** TAG's business contacts with Montana qualify as more substantial than the nonresident defendants in similar cases. TAG's trucks did not end up in Montana as a result of Grizzly's unilateral action. TAG negotiated numerous contracts with Grizzly for armored vehicles that Grizzly used in its Montana business. TAG contracted with several Montana businesses to make repairs to the vehicles that it sold to Grizzly. TAG's business contacts with Montana qualify as substantial. Grizzly's claim arose out of TAG's business activity in Montana. TAG transacted sufficient business in Montana to support the extension of long-arm jurisdiction over TAG under M. R. Civ. P. 4B(1)(a). The Montana court's exercise of personal jurisdiction over TAG does not offend traditional notions of fair play and substantial justice. We reverse the District Court's order and remand to the court for further proceedings consistent with this opinion. (Morris, McGrath, Baker, Wheat, Cotter)

### ***Western Tradition Partnership v. Attorney General – 12/30/11***

**FACTS:** Following the *Citizens United* case at the federal level, several plaintiffs challenged Montana's own state ban on corporate campaign contributions. They argued the state ban was unconstitutional for First Amendment reasons and that the state had no compelling government interest to have its own ban. The Attorney General argued Montana adopted the law over 100 years ago due to a precedent of undue corporate influences in executive, judicial and legislative campaigns.

**HOLDING:** Plaintiffs have not proven the Montana statute unconstitutional beyond a reasonable doubt. There are numerous historical and unique compelling state interests for Montana to have its own ban on corporate contributions. The dissent pointed out that all of the alleged compelling state interests to uphold the ban were already rejected by the U.S. Supreme Court in *Citizens United*. (McGrath, Morris, Wheat, Cotter, Rice) (Baker dissented) (Nelson dissented) Note: This case is being appealed to the U.S. Supreme Court.

## INSURANCE

### ***Monroe v. Cogswell Agency and Safeco Ins. – 6/9/10***

**FACTS:** Monroe sued Safeco and Cogswell Agency after they were unable to collect UIM following a one-vehicle accident involving one of their cars that resulted in the death and injury of its passengers. They allege they should be able to collect UIM from Safeco even though the policy does not apply to any of the insureds' vehicles, and that Cogswell was negligent in failing to obtain sufficient coverage. The District Court granted summary judgment to both defendants, and Monroe appealed.

**HOLDING:** A majority of Court members determined summary judgment was properly given as to claims against Safeco because the "owned vehicle" exclusion for UIM coverage is far from illusory and Monroe would collect liability and UIM under the same policy. This could create an incentive to substitute inexpensive UIM for more expensive liability, contrary to public policy. A majority of Court members determined that an insurance professional acts as a broker while shopping for insurance and determining the carrier with which the insurance should be placed. Once the insurer is chosen, the broker becomes an agent for the insurer. The Court recognized that a broker owes an absolute duty to obtain the insurance coverage that the applicant directs the broker to obtain. It also concluded that a broker does not owe a duty of care to advise clients of their coverage needs. Summary judgment in favor of the broker was overruled based upon a question of fact and the broker's failure to prove that the claimed coverage had not been requested. Various Dissents spelled out objections to . For the decision on Safeco, McGrath, Leaphart, Cotter and Rice made up the Majority. (For the decision to reverse as to Cogswell, McGrath, Leaphart, Wheat and Judge Irigoin sitting in for Nelson made up the Majority. Justice Morris wrote a Dissenting opinion.)

### ***Peterson v. St. Paul Fire & Marine Ins. – 8/24/10***

**FACTS:** Peterson, who was injured in the accident, sued the party he alleged was at fault; the defendant was insured by St. Paul Fire & Marine Insurance Company. Peterson ultimately sued St. Paul for bad faith and violation of the UTPA, arguing that it didn't make sufficient attempts to settle the case when its insured's liability was reasonably clear.

**HOLDING:** The court reviewed case law from around the country and concluded that liability was reasonably clear when a reasonable person, with knowledge of the relevant facts and law, would conclude, for good reason, that the defendant is liable to the plaintiff. This is an "objective test" in which a trier of fact judges the reasonableness of the insurer's conduct under the facts and circumstances as presented. In addition to taking account of the relevant facts, the trier of fact is also to take account of the relevant legal principles to be considered by the insurer when evaluating liability. A finding of liability by a trier of fact under the preponderance of evidence standard in the negligence action does not necessarily imply that liability was "reasonably clear" when the insurer was adjusting the claim. Instead, "reasonably clear" liability is established when it is "clear enough" that reasonable people assessing the claim would agree on the issue of liability, and that the facts, circumstances, and applicable law leave little room for objectively reasonable debate about whether liability exists. The jury, which had reached a verdict in St. Paul's favor, was not properly instructed as to "reasonably clear liability," the court reversed the case and remanded it for a new trial. The Dissent points out that such an instruction has never before been required in Montana. (Cotter, McGrath, Nelson, Wheat) (Wheat and Nelson specially concurring)(Nelson specially concurring)(Morris, Rice, and Judge Dayton sitting for Leaphart Dissented)

### ***State Farm Mutual Auto Ins. v. Freyer - 8/27/10***

**FACTS:** Heath Freyer, his wife, Vail, and their infant daughter, Alicia, were involved in an automobile accident in October 2003 that killed Heath and injured Alicia. Vail was driving when they collided with another vehicle driven by Michelle Manning. Vail lost control of the vehicle, and it rolled, ejecting Heath. Heath's father, Frank Freyer, was appointed personal representative of Heath's estate and conservator of Alicia's estate. Frank filed a claim for benefits under Heath's and Vail's State Farm insurance policy. State Farm paid Heath's estate \$50,000, the policy limit for "Each Person," and paid Alicia's medical expenses separately. Frank, however, insisted that State Farm also pay Alicia wrongful death and survivorship benefits resulting from Heath's death. Frank maintained that those "additional benefits should be paid out of the policy's \$50,000 'Each Person' limit for Alicia," which, —when added to the \$50,000 paid to Heath's estate, exhaust the \$100,000 'Each Accident' policy limit. State Farm refused to make these additional payments and argued it had fulfilled its contractual obligations stemming from Heath's death. The District Court granted State Farm's motion, holding that the policy was unambiguous and that "any claims asserted by Alicia related to the wrongful death or survivorship of her father are restricted by his 'Each Person' policy limit." Frank and Vail appealed.

**HOLDING:** The Court concluded that the complete and plain language of the Limits of Liability Clause must be interpreted to mean that because two people suffered bodily injury, the —Each Accident limit of \$100,000 is available and the 'Each Person' limitation of \$50,000 applies separately to Heath's claim and to Alicia's claim. Thus, because Alicia was injured, she was eligible for up to \$50,000 in direct damages and derivative damages stemming from Heath's death. The Dissent argued the decision conflicted with prior cases regarding derivative claims. (Cotter, McGrath, Nelson, Leaphart, Wheat, Morris) (Rice Dissented)

***Diaz et al v. BCBS et al – 10/13/10***

**FACTS:** Two insureds working for the State sued the State and the administrators of the state health insurance programs in a class action lawsuit following two separate vehicle accidents in which they were injured. The plaintiffs argued that when a state insured is injured by a third party, the state's health care claims handling process violates Montana law by preventing the insured from being "made whole." The District Court denied the plaintiff's class action request because individual adjudication would be more appropriate to determine the extent to which a plaintiff was or was not "made whole."

**HOLDING:** The District Court should have considered whether the "made whole" doctrine applies to third party administrators before making a meaning determination of the certification issues. The Dissent argues the Majority forces the District Court to put "the actual resolution of the merits cart before the motion to dismiss, summary judgment, and trial horse." (Morris, Leaphart, Wheat, Nelson) (Rice Dissented)

***Hop individually and on behalf of all others similarly situated v. Safeco Ins. – 8/30/11***

**FACTS:** Timothy Hop's automobile was damaged in an accident with a Safeco insured. In addition to the costs of repair, Hop sought "residual diminished value" (RDV) for his vehicle. RDV is the difference between the value of a vehicle immediately before an accident and the value of the vehicle after post-accident repairs have been made. When Safeco failed to pay RDV, Hop moved the Eighteenth Judicial District Court to certify a class action against the insurer. Hop sought, on behalf of himself and all proposed class members, injunctive and declaratory relief and monetary damages. The District Court granted the motion for class certification.

**HOLDING:** Hop is seeking money damages that are readily distinguishable from the types of advance damages paid in cases involving medical expenses and lost wages not reasonably in dispute. Where an insured tortfeasor is clearly at fault and the medical bills and lost wages incurred by the claimant are plainly ascertainable, public policy dictates that mandatory liability insurance pay such expenses in a timely fashion. RDV, on the other hand, is not an indisputable out-of-pocket item of damages; the failure to pay it promptly will neither destroy a person's credit nor impose financial stress. Also, one of the requirements of the rule is that the claims of the representative party must be typical of the claims of the class. There cannot be typicality sufficient to satisfy the rule unless the named representative has individual standing to raise the legal claims of the class. Hop has not yet met the requirements of § 33-18-242(6), MCA. He therefore does not have individual standing to raise his claim, nor does he have the requisite typicality to raise a claim on behalf of the class he purports to represent. Reversed and remanded to District Court. (Nelson, Cotter, Rice, Wheat, Baker)

***LaMere and Henderson v. Farmers Ins. Exchange – 11/1/11***

**FACTS:** Lexi LaMere is Virgil Henderson's daughter. In 2001, Lexi was seriously injured in an automobile accident caused by an uninsured motorist. Henderson and members of his household, including Lexi, were insured by two Farmers Insurance Exchange (Farmers or FIE) automobile insurance policies, each providing uninsured motorist protection of \$25,000. In late 2001, in exchange for a full release signed by Lexi, Farmers paid \$25,000 in uninsured motorist coverage under Henderson's policy insuring the vehicle involved in the accident. In April 2006, Lexi and her father sued FIE seeking uninsured motorist benefits under Henderson's second policy. The District Court entered summary judgment in favor of FIE.

**HOLDING:** LaMere's claim on the second policy (stacking) was precluded by the policy language and the anti-stacking law in effect at the time she signed the release. The Court's 2003 decision in Hardy, was not applicable to cases finalized or settled before that decision. Because LaMere settled her claim with Farmers Insurance before Hardy was decided, Hardy did not apply retroactively to her claim. Additionally, the court ruled that neither LaMere nor Henderson had standing to bring a class action claim for medical coverage as neither policy purchased by Henderson carried medical coverage. Finally, neither LaMere nor Henderson were members of the class they sought to certify for purposes of securing disgorgement of over-paid premiums, because they were not persons entitled to stack coverages at the time LaMere settled her uninsured motorist claim in 2001. District Court is affirmed. (Cotter, McGrath, Baker, Morris, Rice)

***Estate of Richerson v. Cincinnati Ins. – 10/27/11***

**FACTS:** The dispute concerns Richerson's Estate's entitlement to medical payments under a motor vehicle policy issued by Cincinnati for the subject vehicle. Terry L. Richerson (Mr. Richerson) was seriously injured when a concrete truck, owned by United Materials and employed by the other concrete subcontractor, backed over him. Mr. Richerson was caught in the truck's differential or driveshaft, and although the exact distance is disputed, he was transported at least five feet and possibly up to fifty feet by the truck. Mr. Richerson had no physical contact with or other connection to the truck prior to the accident. He later died from his injuries. The Estate requested medical payments under the policy Cincinnati issued to United Materials for the truck involved in the accident. Cincinnati denied the claim. The policy provided coverage for injuries suffered by a claimant while "occupying" a covered auto, and "occupying" is further defined as "in, upon, getting in, on, out or off." The Estate argued to the District Court that because Mr. Richerson was caught in and transported by the concrete truck, he was "upon" it, and therefore he was "occupying" the truck, qualifying him as an insured under the policy. Cincinnati countered that Mr. Richerson was not "upon" the vehicle, did not meet the definition of "insured," and was not entitled to coverage. Both parties filed for summary

judgment, agreeing that no issues of material fact were in dispute. The District Court concluded that Mr. Richerson was not occupying the covered auto as defined in the policy.

**HOLDING:** Mr. Richerson had no contact with or connection to the vehicle other than the accident itself. The concrete truck was not hired by Mr. Richerson and was being used on a separate job. He was not working with the truck in any way and was not entering or exiting the truck. He had no purpose or connection with the truck other than the incidental contact that led to his unfortunate injuries and death. This was insufficient to trigger coverage under the definition of “occupying” in the policy. (Rice, Cotter, Baker, Morris, Wheat)

## LAND USE/ENVIRONMENT

### ***Citizens Awareness Network et al v. BER and Intervenors, DEQ and Thompson River Power – 1/26/2010***

**FACTS:** DEQ issued an air quality permit to Thompson River Co-Gen for a coal and wood waste power plant in 2001 and a modified permit to successor Thompson River Power in 2006. Plaintiffs requested a hearing and claimed the DEQ did not require the best technology pursuant to U.S. law. Three months after the time for filing their affidavit, they sought leave to add a claim that emissions would qualify the facility as a “major stationary source,” subjecting it to additional controls. Their request was denied by a hearings examiner and upheld by the BER. The District Court granted summary judgment for the BER.

**HOLDING:** The claims the plaintiff sought to add arose from the same transaction or occurrence as the claims in the original affidavit, which was DEQ’s decision to issue a modified permit to Thompson River Power. New theories based on the same transaction or occurrence relate back. The Dissent points out that allowing untimely amendments which raise new issues violates the letter & spirit of §75-2-211(1). (Leaphart, Morris, Nelson, Judge John Brown for McGrath) (Cotter Dissented) (Rice Dissented)

### ***Northern Cheyenne Tribe et al v. DEQ and Fidelity Exploration – 5/18/10***

**FACTS:** Plaintiffs challenged DEQ’s issuance of permits to Fidelity in connection with its extraction of coal-bed methane near the Tongue River, alleging violation of the CWA and WQA by failing to include pre-discharge treatment standards, failure to do a non-degradation review, violation of the right to a clean & healthful environment, and failure to comply with MEPA’s requirement of considering alternatives, including no action. The District Court granted summary judgment to DEQ, plaintiffs appealed.

**HOLDING:** Amendments from 1972 to the CWA refocused its purpose to eliminate pollutant discharge through use of pre-discharge treatment standards. The CWA imposes a duty to apply pre-discharge treatment standards when granting a permit. Courts have routinely interpreted the CWA’s pre-discharge treatment standards to apply to states since EPA’s adoption of regulations in 1979. The permits are void. (Morris for full Court with Judge Deschamps sitting for McGrath)

### ***Plains Grains et al v. Cascade Co. Commission – 7/16/10***

**FACTS:** Neighbors to a proposed power plant sued the county commission after the zoning was changed from agriculture to industrial. They argued it was illegal spot zoning that fell outside of the Cascade County growth policy, which the County amended following their success at the District Court level.

**HOLDING:** The neighbors sued the County for spot zoning, not out of the County’s decision to zone in conflict with the growth policy. The Court held the County’s actions were, in fact, spot zoning, based on the fact that the requested heavy industrial use differed significantly from the agricultural uses that dominate the area. The areas to be rezoned is relatively small both in size and terms of landowners affected, which smacks of “special legislation” in that the benefits would accrue to a single landowner to the detriment of the surrounding farmers and ranchers. The District Court’s summary judgment in favor of the County is reversed. The Dissent expresses puzzlement over the Majority’s animus towards the power plant project and feels they have ignored last of appellate procedure the substantive law of judgments, and mootness jurisprudence. (Morris, McGrath, Leaphart, Judge Sherlock sitting for Warner) (Rice and Nelson Dissented) (Cotter joined Dissent in part)

### ***DEQ v. BNSF, Kalispell Pole and Timber, DNRC, et al. – 12/21/2010***

**FACTS:** DEQ filed a lawsuit against seven parties seeking cleanup of the KRY Site near Kalispell. The KRY Site was primarily contaminated from wood-treating, refinery, and railroad operations. DEQ settled with six of the parties and secured a partial summary judgment for the Kalispell Pole and Timber facility against BNSF. In 2008, DEQ and BNSF went to trial on the outstanding issues and DEQ ultimately obtained a judgment against BNSF requiring the company to conduct cleanup at the entire site. The trial court’s decision against BNSF was based on multiple sources of liability under Montana’s CECRA any one of which could have supported a finding of liability. First, the trial court concluded that BNSF was jointly and severally liable for the clean-up as an owner of part of the facility on which the hazardous and deleterious substances were found. Second, the trial court concluded that BNSF’s activities on the facility as an “arranger” had added at least some of these hazardous and deleterious substances to the environment. Third, the trial court concluded that BNSF was jointly and severally liable for the clean-up as an owner of adjacent property from which contamination had migrated and comingled. The trial court’s finding of arranger liability was based on BNSF’s predecessor’s, Northern Pacific’s, action in spotting railcars for the refinery and allowing

the refinery employees to unload the petroleum products into unlined earthen dikes. In concluding that BNSF was liable as an arranger, the trial court relied on a decision issued by the Ninth Circuit. That decision was later reversed by the United States Supreme Court. In 2009, the district court ordered BNSF to abate the imminent and substantial endangerment to public health at the site and to reimburse DEQ for all its remediation costs for the site. However, the court did not require BNSF to comply with DEQ's record of decision, as DEQ requested, because the record of decision is subject to a challenge. In addition, the court dismissed DEQ's nuisance claim. Both BNSF and DEQ appealed the order to the Montana Supreme Court. DEQ contended the district court erred by not requiring cleanup according to the record of decision and by dismissing DEQ's public nuisance claim. BNSF claimed that the district court erred by holding that BNSF is liable for cleanup as a party that arranged for disposal of the hazardous substances because BNSF did not intentionally arrange for disposal of the substances. BNSF's argument on appeal was based, in large part, on the United State Supreme Court's reversal of the Ninth Circuit decision relied upon by the trial court in finding arranger liability. BNSF further argued the court erred by approving DEQ's settlements with other liable parties.

**HOLDING:** The Supreme Court affirmed the district court's decision on these issues. The Court began its review of the trial court decision by noting that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) says that nothing prevents a state from enacting additional liability beyond those imposed by federal law. The Court held that "an entity need not specifically 'intend' to dispose of a hazardous substance for imposition of 'arranger' liability." It was enough that BNSF "possessed or was otherwise responsible for the materials it shipped" and that a "necessary and foreseeable consequence of shipping the material was unloading the material." Because BNSF employees moved full tank cars of crude oil to the site so Reliance employees could dump the crude oil on the ground, "BNSF participated in the unloading process which resulted in the release of the materials it possessed." In holding that the trial court did not err in holding BNSF liable as an "arranger," the Court set a low bar for "arranger" liability under CECRA. (Wheat, McGrath, Rice, Nelson, Morris)

#### ***MATL v. Salois – 6/7/11***

**FACTS:** MATL filed a Verified Complaint for Condemnation against Salois. Salois subsequently moved for summary judgment. On December 12, 2010, the District Court issued an order concluding "MATL does not possess the power of eminent domain, either express or implied, and it has no authority to take the private property of a non-consenting landowner." MATL appeals from that order.

**HOLDING:** Following the passage of HB 198 in the 2011 Legislative Session, MATL does possess the power of eminent domain. The explicit language of HB 198 conflicts with the District Court's order. The District Court concluded that there was no support for MATL's contention that a "private merchant transmission line, without express or implied authority for condemnation, may pursue eminent domain proceedings by virtue of its establishing an enumerated use set forth in 70-30-102, MCA." As MATL correctly points out, HB 198 now expressly provides such authority, and the Legislature made it retroactive to 2008. (McGrath, Wheat, Nelson, Baker, Rice)

#### ***Barhaugh et al v. State – 6/15/11***

**FACTS:** Petitioners requested judgment that the State holds the atmosphere in trust for present & future citizens, and that the trust imposes the duty to protect and preserve the atmosphere including establishing and enforcing limits on greenhouse gases to mitigate human-caused climate change. The AGs office filed a summary response at the request of the MT Supreme Court.

**HOLDING:** Petitioners fail to satisfy MRAP 14(4). The petition for a declaratory judgment requires factual determinations that cannot be part of a request for an original proceeding in the state's highest court. They have not established urgency or emergency factors necessary to forego the normal judicial process. Petition denied. (Morris, Baker, Cotter, McGrath, Rice)

#### ***Montana Trout Unlimited v. Beaverhead Water et al – 6/23/11***

**FACTS:** Montana Trout Unlimited (MTU) appealed from an order of the water court dismissing its objections to water right claims by claimants Beaverhead Water Company, et al. Those claims were contained in the water court's temporary preliminary decree for the Big Hole River Basin. At issue in the appeal was whether the water court erred in holding that only the Department of Fish, Wildlife and Parks may represent the public recreational and conservation interests in water adjudication proceedings, and that only water right claimants may request a hearing on their objections in water adjudication proceedings.

**HOLDING:** The Supreme Court reversed and remanded, holding there is no statutory or regulatory restriction on who is entitled to file an objection to a claim of water right contained in a temporary preliminary decree. In addition, based on the state's ownership of the waters of Montana which it holds in public trust and the undisputed specific interests of the members of MTU in the Big Hole River basin, MTU has a sufficient ownership interest in water or its use to demonstrate good cause to require the water court to hold a hearing on its objections under Mont. Code Ann. 85-2-223. (McGrath, Baker, Wheat, Cotter, Morris) (Nelson concurred in part and Dissented in part)(Rice Dissented)

## MEDICAL MALPRACTICE

### ***Griffin v. Moseley – 6/8/10***

**FACTS:** Griffin had a condition called pseudotumor cerebri (PTC), for which she was referred to Moseley, a neurologist, to place a shunt. Another treatment for the condition is weight loss combined with drugs. Following the shunt surgery, Griffin experienced leg pain as a result of nerve damage. The pain required powerful medication, which ultimately led to her death six years later. She and her husband sued Moseley claimed he did not get her informed consent for the surgery because he did not explain reasonable alternatives. At the District Court, the plaintiffs used neuro-ophthalmologist Houchin as an expert to testify regarding the alternatives. The District Court granted Moseley's motion for summary judgment due to the fact that Griffin supplied an ophthalmologist as an expert in a neurosurgery case, and would not allow the plaintiff's motion to amend. Griffin appealed.

**HOLDING:** The District Court should have granted Griffin's motion to amend, and then addressed the summary judgment motion in the new context. Houchin's testimony would be sufficient as to the issue of informed consent on reasonable alternatives. There is no absolute requirement that a physician must be a neurosurgeon to testify as to informed consent for treatment of the plaintiff's condition. The Dissent noted that PTC patients are not even referred to neurosurgeons until after they have exhausted conservative treatments, so a neuro-ophthalmologist is not qualified to render an expert opinion as to how a neurosurgeon should proceed after the referral. (Cotter, McGrath, Leaphart, Wheat) (Rice Dissented)

### ***Willson v. Addison, Benefis Healthcare, and Peace Hospice – 7/29/11***

**FACTS:** After Madeleine Willson died of metastatic breast cancer and acute aspiration pneumonia, Robert Willson filed a complaint against Benefis Hospitals, Peace Hospice, and Dr. T. Brice Addison for medical malpractice. Robert alleged that the administration of medication expedited Madeleine's death and that Madeleine did not give informed consent to administration of the medications. Benefis filed two motions for summary judgment, the first of which argued that Robert had failed to establish causation through qualified expert testimony. Robert filed a motion for summary judgment seeking default judgment as a sanction for Benefis' alleged spoliation of evidence. The District Court granted summary judgment on the issue of causation in favor of Benefis and Dr. Addison. The court denied Robert's motion, finding Robert failed to prove spoliation.

**HOLDING:** On appeal, the Supreme Court affirmed, holding the District Court did not err in granting summary judgment to Benefis and Dr. Addison, and although the District Court denied Robert's motion for summary judgment for the wrong reason, it did not abuse its discretion in denying the motion where sanctions were not appropriate. (Wheat, Morris, Baker, Cotter, Nelson)

## TAX

### ***PPL Montana v. State – 3/30/10***

**FACTS:** PPL Montana, an owner of hydroelectric dams in Montana, was being sued for rental payments for its use of state-owned riverbeds. A District Court judge concluded that riverbeds are school trust lands, and therefore, the state has constitutional duty to seek full market value for their use. It held PPL was liable for \$40,956,180 in rent payments.

**HOLDING:** Summary judgment was proper because the rivers were navigable at the time of statehood, which gave Montana title to the riverbeds. The riverbeds are public trust lands, and PPL Montana's rights of water use do not include incidental rights to free use of those lands. The Court upheld the District Court's calculation of damages. The Dissent opined the Majority erred in its analysis of the law governing title navigability and failed to properly apply summary judgment tenets by disregarding material factual disputes. This case is currently being appealed to the U.S. Supreme Court. (Cotter, Judge Krueger sitting for McGrath, Leaphart, Nelson, Judge McLean sitting for Warner) (Rice and Judge Salvagni sitting for Morris Dissented) Note: This case was reversed and remanded by the U.S. Supreme Court in 2012.

### ***Puget Sound Energy v. DOR – 6/21/11***

**FACTS:** Montana Department of Revenue (Department) appeals the judgment of the Thirteenth Judicial District Court, Yellowstone County that concluded that the State Tax Appeal Board (STAB) could not assess Puget Sound Energy's (Puget) market value in excess of the Department's original assessment.

**HOLDING:** STAB possesses authority to assess a taxpayer's market value at 100% market value, even if the assessment exceeds the Department's original assessment. To conclude otherwise would hamstring STAB's authority to conduct a contested case under MAPA and to reach an independent assessment. The statutory mandate that all property "must be assessed at 100% of its market value" applies equally to the Department and to STAB. No exception exists for STAB to assess a centrally assessed taxpayer's property at less than 100% market value simply when the Department may have botched its initial assessment. (Morris for full Court)

***Rohlf v. Stumble Inn – 3/23/10***

**FACTS:** Warren collided with Rohlf's vehicle after drinking at Stumble Inn and brought a dram shop action against Stumble Inn. Stumble moved to dismiss based on the fact that it was past the 180-day notice requirement in §27-1-710(6). Rohlf contended the statute is unconstitutional special legislation and violates his right to equal protection. The District Court dismissed and the Supreme Court affirmed. Rohlf petitioned for a rehearing.

**HOLDING:** The petition for a rehearing is denied. Three Dissenting justices would have reheard the case. (McGrath, Morris, Rice) (Nelson, Cotter, Leaphart Dissented)

***Penn v. Dayton – 6/29/10***

**FACTS:** A Tucker Transportation bus carrying MSP employees collided with a deer and overturned. Passenger Penn requested supervisory control reversal of the District Court's denial of his motion that would have precluded Tucker from asserting superseding, intervening cause.

**HOLDING:** The Majority was not convinced that urgency or emergency factors made the normal appeal process inadequate. Supervisory control denied. Three members of the Court Dissented, arguing that since Tucker admits to negligence per se and that it was a cause in fact of the injuries, it should not be able to assert intervening cause to sever its legal responsibility to compensate passengers. One Dissenter went as far as to say proximate cause and superseding intervening causes should be eliminated in favor of modified analysis on duty. (McGrath, Leaphart, Rice, Morris) (Leaphart specially concurring)(Wheat and Cotter Dissenting)(Nelson Dissenting)

***Chriske v. State – 7/13/10***

**FACTS:** Chriske sued the State alleging she was supplied cigarettes for good behavior while being incarcerated at Mountain View School, and that she developed smoking-related illness after becoming addicted. She continued to smoke despite training as an addiction counselor and following a diagnosis of respiratory illnesses. The state argued her claims were barred by the 3-year statute of limitations since she had learned of disease in the 90's, knew of the dangers of smoking, and did not file suit earlier. The District Court granted summary judgment for the State and

**HOLDING:** The District Court correctly concluded Chriske's claim was time-barred. Her providers confirmed that her smoking was causing her lung problems, and she knew it caused lung disease as early as 1980s. (Wheat, Leaphart, Rice, Cotter, Nelson)

***Miller v. Great Falls Athletic Club – 8/9/10***

**FACTS:** Miller was receiving work comp benefits while also regularly exercising in ways that exceeded what he claimed he could physically do for work. A PI got the permission of the Great Falls Athletic Club to use Club videotape, which was used against him in his work comp case. Miller sued the Club alleging it violated his privacy and that it resulted in his work comp settlement being reduced. The District Court granted summary judgment for the Club.

**HOLDING:** The privacy section of the state constitution contemplated privacy invasion by state action only, and when a reasonable person has a subjective or actual expectation of privacy which society is willing to recognize as reasonable. Since the Club is private and not part of the State, and he has not adequately shown his actions constituted a private activity, Miller's claim must fail. (McGrath, Leaphart, Wheat, Morris) (Nelson specially concurring)

***Hulstine et al v. Lennox Industries – 8/17/10***

**FACTS:** : A group of 18 Job Corps student workers were injured as a result of a heating system won a \$7.5 million judgment against Lennox, who was deemed 70% responsible for the accident. The other 30% was apportioned to the heating system installer, who settled out of court for \$2 million. The District Court reduced the award of \$7.5 million by 30% according to §27-1-703(6). Plaintiffs appealed, claiming the statute should not be applied.

**HOLDING:** The District Court erred in reducing the award amount because the Legislature rejected including product liability claims in §27-1-703. Since the jury awarded the damages in whole or in part under a product liability theory, it cannot be applied. Nevertheless, a pro tanto reduction is appropriate, which provides for a single satisfaction for a single injury. Lennox and the installer cause one single indivisible injury, for which they are jointly & severally liable. The case is remanded to District Court for a reduction of the verdict by \$2 million. (Wheat, McGrath, Leaphart, Rice, Morris)

***Goles v. Neumann – 2/4/11***

**FACTS:** Neumann built an addition to his barn on his property, but the new roof blew off two years later and cut a power line on the Goles' property which sparked a fire causing real and personal property damage. Goles sued for negligent construction of the roof, alleging that he should have used "storm collars" to secure the roof in high winds. At trial, the Goles' expert testified that he always used storm collars in windy areas and believed that the lack of collars was not reasonable and prudent, rendering the roof insufficient. Neumann's expert testified that while storm collars are commonly used in windy areas, the fact that 550 nails had

been used to secure the roof was significant. However, on cross-examination he conceded that “you can make it better” if metal strapping is added to a roof. The trial judge gave the following instruction to the jury: “Negligence is not proven merely because someone later demonstrates that there would have been a better way. Reasonable care does not require prescience nor is it measured with the benefit of hindsight.” Goles objected to the instruction but was overruled. The jury returned a defense verdict.. HOLDING: Jurors could have reasonably inferred from the instruction that the testimony of both experts regarding storm collars make better roofs should be disregarded. The gist of the jury instruction was fair game for argument, but not for a jury instruction. Jurors following this instruction could have concluded that they were obligated to disregard much of the evidence, instead of using their own sense of which evidence to accept and which to reject. (Cotter, McGrath, Nelson, Wheat, Morris) (Baker & Rice Dissented)

#### ***Patch v. Hillerich & Bradsby – 7/21/11***

FACTS: While pitching in a baseball game, Brandon Patch was struck in the head by a batted ball that was hit using a Hillerich & Bradsby Company (H&B) aluminum bat. Brandon died from his injuries. Brandon's parents sued H&B in strict products liability for survivorship and wrongful death damages, asserting manufacturing and design defect and failure to warn claims. The District Court granted H&B's motion for summary judgment on Patches' manufacturing defect claim but denied summary judgment on their design defect and failure to warn claim. The court granted Patches' motion in limine, excluding H&B's assumption of the risk defense. The jury concluded that the bat was in a defective condition due to failure to warn of the enhanced risks associated with its use and awarded Patches an \$850,000 verdict on their failure to warn claim.

HOLDING: On review, the Supreme Court affirmed, holding the District Court properly denied H&B summary judgment, denied H&B's motion for judgment as a matter of law, granted Patches' motion in limine regarding H&B's assumption of the risk defense, and instructed the jury on failure to warn. (Wheat, McGrath, Nelson, Cotter, Baker, Morris) (Rice specially concurring)

#### ***Stokes v. Fagg – 8/1/11***

FACTS: After Peter Carter was killed in a car accident, Plaintiff filed a wrongful death and survival action against the vehicle manufacturer, the auto rental company, and the other driver in the accident. Plaintiff asserted claims against the auto companies for negligence and strict liability, arguing that the seatbelt system in Carter's vehicle was defective. The District Court ruled that Mont. Code Ann. 61-13-106 prohibited evidence of seatbelt use or nonuse in negligence claims but not in products liability claims. The court concluded it would be too confusing for the jury to admit the evidence on the products liability claims but exclude it on the negligence claims and informed Stokes if he planned on using evidence of seatbelt use or nonuse he must drop his negligence claims.

HOLDING: The Court granted Stokes's petition for supervisory control, holding when the plaintiff's injuries are alleged to result from a defect in the vehicle's occupant restraint system, whether the claim sounds in negligence or strict liability, the statute does not preclude evidence of seatbelt use or nonuse; and where the plaintiff's claim is combined with a claim against the driver of another vehicle involved in the crash, limiting instructions must be given. (Baker for full Court - Reynolds sitting for Wheat)

#### ***United Tool Rental and Paulsen v. Riverside Contracting, Highway Technologies, MDT – 8/30/11***

FACTS: Following an automobile crash for which United Tool Rental (UTR) and DeLyle Paulsen admitted negligence, UTR and Paulsen sought contribution from the state DOT and several construction entities, alleging their negligent design, construction, and maintenance of the highway contributed to the crash. After a jury trial, the District Court determined UTR and Paulsen were entirely at fault for the crash and rejected their contribution claim.

HOLDING: The District Court did not abuse its discretion in excluding evidence the DOT erected a "no left turn" sign after the crash and a post-crash memorandum prepared by the highway patrol; (2) the District Court did not deprive UTR and Paulsen a fair trial by allowing the construction parties' counsel to inquire what caused Paulsen to drive inattentively; and (3) the jury's verdict was not defective. (Wheat, McGrath, Baker, Morris, Rice)

#### ***Lampi v. Speed – 9/14/11***

FACTS: Rohnn Lampi's neighbor admitted liability for negligently dumping ashes that caused a wildfire that burned the trees and vegetation on Lampi's property. After the parties failed to agree on a settlement amount, Lampi brought an action in District Court against his neighbor and sought a jury trial to determine damages. The jury awarded him \$250,000. On appeal, Lampi contended that the District Court wrongly denied his motions to establish restoration damages as the appropriate measure of damages.

HOLDING: The Supreme Court reversed, holding that the District Court erred by not concluding that restoration damages constituted the appropriate measure of damages in this case. Remanded for a new trial to allow the jury to determine what reasonable amount of damages would restore Lampi's property to its pre-fire condition. (Morris for the full Court)

## WORKERS' COMPENSATION/FELA

### ***McKinnon v. Western Sugar Cooperative – 2/5/10***

**FACTS:** McKinnon's legs were amputated by a railcar while working at Western Sugar. He received work comp, but also sued Western Sugar for failure to provide a safe workplace. He claimed the exception to work comp exclusivity was unconstitutional. The District Court dismissed all counts, finding that the claims did not fit within the exclusivity exception.

**HOLDING:** The Court reversed the lower court concluding it could not say beyond a reasonable doubt that he can prove no facts in support of his claim that would entitle him to relief. At a minimum, McKinnon should have been afforded the opportunity to develop the record through discovery to attempt to show intentional and deliberate action by Western Sugar. The Dissent felt the plaintiffs complaint fell incredibly short of the necessary evidence to prove intentional conduct that is specifically and actually intended to cause injury to the employee injured. (Morris, Leaphart, Cotter, Nelson) (Rice Dissenting)

### ***Boyd v. Zurich American Ins. – 3/16/10***

**FACTS:** Zurich moved for summary judgment in the Workers' Compensation Court on the grounds that Boyd failed to petition the Court within two years of Zurich's denial of workers' compensation benefits. Boyd argued an earlier decision by Zurich to deny benefits did not create a dispute over liability. The WCC granted Zurich's motion and Boyd appealed.

**HOLDING:** The WCC correctly granted summary judgment for Zurich. The record firmly established Zurich's denial of benefits more than two years before he petitioned the WCC for relief. (Cotter, McGrath, Wheat, Morris, Rice)

### ***Vincent v. BNSF – 3/23/10***

**FACTS:** Vincent injured her elbow on duty on a locomotive. She worked light duty until her doctor released her to full duty. Her employment later ended, but not before she turned down a job as an inspection officer. She sued for her injury under FELA, and a trial was held on damages only. Vincent was unsuccessful at keeping out information about the other position that was offered and mitigation. The Billings jury returned an award of \$184,856, and Vincent moved for a new trial based on the lack of evidence supporting the mitigation defense and on a jury instruction. The motion was denied and Vincent appealed.

**HOLDING:** The District Court correctly concluded there was sufficient evidence to instruct on mitigation. She even declined BNSF's offers to participate in voc-rehab. The District Court's ruling is upheld. (Wheat, McGrath, Cotter, Rice, Morris)

### ***Alexander v. Bozeman Motors – 6/9/10***

**FACTS:** Two employees alleged they were injured by carbon monoxide from a propane stove at work. Both received work comp benefits and then sued their employer alleging negligence, intentional battery, NIED, and requested punitives. The District Court granted summary judgment to Bozeman Motors concluding that Plaintiffs failed to show deliberate and intentional cause for specific harm as required under the narrow exception to work comp exclusivity. Plaintiffs appealed and challenged the constitutionality of the narrow exception in §39-71-413.

**HOLDING:** The District Court correctly granted summary judgment on the first employee's injury, but incorrectly granted it on the second employees injury. When the employer sent the second employee to work in the office, he had actual knowledge of the first employee's injury. The allegations of the plaintiff are sufficient enough to allow a jury to determine whether the acts of the employer were deliberate & intentional conduct and meant to cause harm to the employee. Plaintiff failed to demonstrate beyond a reasonable doubt that the statute is unconstitutional. The Dissent argued both summary judgments were proper because the alleged conduct at most established aggravated negligence, which is insufficient to remove this case from work comp exclusivity. (Cotter, McGrath, Morris) (Leaphart specially concurred) (Rice concurred in part, Dissented in part)

### ***Keller v. Liberty Northwest – 12/28/10***

**FACTS:** Keller petitioned the Court for reinstatement of her medical benefits. She argues that a mutual mistake of fact occurred in this case and that the parties failed to account for the onset of nerve damage and/or chronic nerve inflammation and winging of her right scapula as the major injury and cause of her pain at the time they entered into two settlement agreements. The Workers' Compensation Court refused to set aside the settlement, and Keller appealed.

**HOLDING:** The Workers' Compensation Court applied an incorrect burden of proof. The rule distilled from our work comp cases is that if parties are mutually mistaken as to a material fact as to the nature and extent of the injury, the settlement may be set aside. A mutual mistake may still exist when parties know about a theory of injury, if that theory is disregarded, forgotten or not considered even though raised as a possibility. Since the judge did not reach whether the mistake constituted a material fact or consider whether it is time-barred, the case is remanded to the Work Comp Court. (Leaphart, McGrath, Rice, Cotter, Nelson)

### ***Walters v. Flathead Concrete Products – 3/16/11***

**FACTS:** Walters, an unmarried man with no children, was fatally crushed by a forklift while working for Flathead Concrete Products (FCP). He lived with his mother but did not support her as a dependent pursuant to 26 USC §152. Burial costs were paid at the statutory rate of \$4,000, and \$3,000 was given to his mother as a non-dependent parent. She sued FCP asserting

wrongful death/survivorship based on intentional & negligent acts and omissions under the theory that the statutory payments are so low, they lack quid pro quo. District Court granted summary judgment to FCP.

**HOLDING:** The work comp Act's statutes relating to minimal payments to a non-dependent are rationally related to its recognized legitimate government objectives. Out of available resources, the Legislature logically directed wage loss benefits to those who depended on them and paid a small amount to those who did not. (Rice, McGrath, Morris, Judge Langton) (Cotter specially concurring) (Wheat Dissented) (Nelson Dissented)

***Hopkins v. UEF v. Kilpatrick – 3/22/11***

**FACTS:** Hopkins contended that he was employed by Kilpatrick at "Great Bear Adventures," a privately owned bear park. Customers observed the bears from their cars while driving through the park. Hopkins testified that Kilpatrick paid Hopkins and other employees in cash, and that his duties consisted of general maintenance, and the feeding of various bears. In 2007, Hopkins sustained severe injuries when he was attacked by one of the grizzly bears during a feeding session. He sought workers' compensation benefits, contending that his injuries arose out of and in the course of his employment. Kilpatrick countered that the bear park had no employees, that no employment relationship existed between Hopkins and Kilpatrick, and that Hopkins' services had been provided on a volunteer basis only. Kilpatrick also contended that the major contributing cause of Hopkins' injuries was Hopkins' marijuana use on the morning of the incident.

**HOLDING:** The Supreme Court upheld the Workers' Compensation Court's findings of facts and conclusions of law, including the fact that Hopkins was an employee of Kilpatrick, Hopkins was within the course and scope of his employment during the attack, non-prescription drug use was not the major contributing cause of the accident, and that Hopkins' services were not only in exchange for aid or sustenance. (McGrath, Wheat, Cotter, Baker, Rice)

***Wright v. ACE American Ins., - 3/15/11***

**FACTS:** Wright suffered an industrial injury to his left shoulder. After surgery, his shoulder pain worsened and he also experienced cervical symptoms. Although he saw several doctors, none offered viable treatment options besides pain management. He eventually sought medical treatment on his own with a Wyoming doctor (whose Montana license lapsed) who recommended a second shoulder surgery. ACE denied Petitioner's request for that surgery and request for TTD benefits. ACE alleges that Wright's treating actual physician signed job analyses and has released him to return to work, thereby rendering him ineligible for TTD benefits. The Worker's Compensation Court found ACE liable for the surgery and granted TTD benefits.

**HOLDING:** Wright's failure to obtain the ACE's authorization for the surgery does not absolve the insurer of liability for treatment by unauthorized physicians. The judge must consider the actual diagnosis to determine whether recommended treatment is appropriate. (Baker, Nelson, Cotter, Morris, Rice)

***Matter of RPC et al v. McCarther, Sherlock, and Seeley – 11/1/11***

**FACTS:** A group of Montana work comp attorneys and five claimants requested declaratory and injunctive relief regarding confidential criminal justice information about work comp claimants. Petitioners claim they are obligated to report violations of the MRPC, which some lawyers have allegedly done.

**HOLDING:** Petitioners failed to name the allegedly unethical lawyers as respondent, but more fundamentally, the petition and original proceedings are not appropriate forums for allegations of lawyer misconduct. Claims of MRPC violations should be made to the ODC. Petitioners constitutional and statutory claims as to alleged illegal or unethical practices do not have the urgency or emergency factors that make the normal appeal process inadequate, justifying emergency control. Interveners arguments demonstrate the need to resolve factual disputes in District Court. (McGrath, Morris, Baker, Cotter, Rice) (Nelson and Wheat concurred in part and dissented in part)

## UNEMPLOYMENT INSURANCE

***Johnson v. Western Transport and BLA – 2/8/11***

**FACTS:** Johnson was by Western Transport in April 2009 drive a truck and deliver wood chips for a round-trip of 580 miles a day. He was paid by the load. DOT regulations allow drivers to work 14 hours in one day, driving 11 of those hours. Johnson told his supervisor he couldn't do the route within those parameters. His supervisor said he could park his truck, which Johnson did and never returned to work. He filed for UI and filed a complaint with the DOT against Western. UID denied his claim and said it could be appealed before a certain deadline. He appealed ten days after the deadline, and his appeal was dismissed because he quit without good cause and didn't give Western a reasonable opportunity to address the problems he raised.

**HOLDING:** The District Court erred in substituting its findings for the Board of Labor Appeals. It also erred in concluding that Johnson quit for good cause. The only alternative was to make 1.5 hauls per day, which would result in a 25% reduction in income for Johnson. It is not by itself good cause. (Wheat, McGrath, Nelson, Cotter, Rice)

## MONTANA SUPREME COURT REVIEW - Cases from 2010-2011

	COURT	NELSON	LEAPHART	COTTER	RICE	WHEAT	MORRIS	McGRATH	BAKER
<b>Banking</b>									
<i>Credit Service v. Crasco</i>	×	×		×			×	×	×
<b>Construction Lien</b>									
<i>Anderson Const. v. Monroe Property LLC</i>	✓	✓			✓	✓		✓	✓
<b>Contract</b>									
<i>Riehl v. Cambridge Court GF</i>	×	×	×	×			×	×	
<i>Wrigg v. Junkermeier, Clark, Campanella, Stevens</i>	×			×		×	×	×	×
<b>Employment</b>									
<i>Prescott v. Innovative Resource Group</i>	✓		✓	✓	✓	✓		✓	
<i>Blehm v. St. John's Lutheran Hospital</i>	✓	✓		✓	✓	✓		✓	
<i>Eldredge v. Asarco and Retirement Benefit Plan</i>	×	×		×	×	×	×	×	×
<i>Brown v. Yellowstone Club</i>	×	×		×	×	×	×	×	×
<i>Kershaw v. MDT</i>	✓			✓	✓	✓	✓	✓	
<i>Williams v. Plum Creek Timber</i>	×	×			×	×	×	×	
<b>Other</b>									
<i>Montana Consumer Finance Association v. State</i>	×	✓	×	×	✓	×	×		
<i>Grizzly Security Armored Express v. The Armored Group</i>	✓					✓	✓	✓	✓
<i>Western Tradition Partnership v. Attorney General</i>	×			×	×	×	×	×	
<b>Insurance</b>									
<i>Monroe v. Cogswell Agency and Safeco Ins.</i>	×		×	✓	✓	×	×	×	
<i>Peterson v. St. Paul Fire &amp; Marine Ins.</i>	×	×		×	✓	×	✓	×	
<i>State Farm Mutual Auto Ins. v. Freyer</i>	×	×	×	×	✓	×	×	×	
<i>Diaz et al v. BCBS et al</i>	×	×	×		✓	×	×		
<i>Hop v. Safeco Ins.</i>	✓	✓		✓	✓	✓			✓
<i>LaMere and Henderson v. Farmers Ins. Exchange</i>	✓			✓	✓		✓	✓	✓
<i>Estate of Richerson v. Cincinnati Ins.</i>	✓			✓	✓	✓	✓		✓
<b>Land Use/Environment</b>									
<i>Citizens Awareness Network et al v. BER</i>	×	×	×	✓	✓		×		
<i>Northern Cheyenne Tribe et al v. DEQ</i>	×	×	×	×	×	×	×		
<i>Plains Grains et al v. Cascade Co. Commission</i>	×	✓	×	✓	✓		×	×	
<i>DEQ v. BNSF, Kalispell Pole and Timber</i>	×	×			×	×	×	×	
<i>MATL v. Salois</i>	✓	✓			✓	✓	✓	✓	
<i>Barhaugh et al v. State</i>	✓			✓	✓	✓	✓		✓
<i>Montana Trout Unlimited v. Beaverhead Water et al</i>	×	×		×	✓	×	×	×	×

	COURT	NELSON	LEAPHART	COTTER	RICE	WHEAT	MORRIS	McGRATH	BAKER
<b>Medical Malpractice</b>									
<i>Griffin v. Moseley</i>	×		×	×	✓	×		×	
<i>Willson v. Addison, Benefis Healthcare, &amp; Peace Hospice</i>	✓	✓		✓		✓	✓		✓
<b>Tax</b>									
<i>PPL Montana v. State</i>	×	×	×	×	✓				
<i>Puget Sound Energy v. DOR</i>	×	×		×	×	×	×	×	×
<b>Tort</b>									
<i>Rohlf s v. Stumble Inn</i>	✓	×	×	×	✓		✓	✓	
<i>Penn v. Dayton</i>	✓	×		×	✓	×	✓	✓	
<i>Chriske v. State</i>	✓	✓	✓	✓	✓	✓			
<i>Miller v. Great Falls Athletic Club</i>	✓	✓	✓			✓	✓	✓	
<i>Hulstine et al v. Lennox Industries</i>	×		×		×	×	×	×	
<i>Goles v. Neumann</i>	×	×		×	✓	×	×	×	✓
<i>Patch v. Hillerich &amp; Bradsby</i>	×	×		×	×	×	×	×	×
<i>Stokes v. Fagg</i>	×	×		×	×		×	×	×
<i>United Tool Rental v. Riverside Contracting</i>	✓				✓	✓	✓	✓	✓
<i>Lampi v. Speed</i>	×	×		×	×	×	×	×	×
<b>Workers' Compensation/FELA</b>									
<i>McKinnon v. Western Sugar Cooperative</i>	×	×	×	×	✓		×		
<i>Boyd v. Zurich American Ins.</i>	✓			✓	✓	✓	✓	✓	
<i>Vincent v. BNSF</i>	✓			✓	✓	✓	✓	✓	
<i>Alexander v. Bozeman Motors</i>	×		×	×	✓		×	×	
<i>Keller v. Liberty Northwest</i>	×	×	×	×	×			×	
<i>Walters v. Flathead Concrete Products</i>	✓	×			✓	×	✓	✓	
<i>Hopkins v. UEF v. Kilpatrick</i>	×			×	×	×		×	×
<i>Wright v. ACE American Ins.,</i>	×	×		×	×		×		×
<i>Matter of RPC v. McCarther, Sherlock, and Seeley</i>	✓	×		✓	✓	×	✓	✓	✓
<b>Unemployment Insurance</b>									
<i>Johnson v. Western Transport and BLA</i>	✓	✓		✓	✓	✓		✓	
<b>Participation:</b>	51	35	19	42	45	38	41	40	22
<b>Total Business Score 2010-2011:</b>	<b>41%</b>	<b>28%</b>	<b>21%</b>	<b>40%</b>	<b>69%</b>	<b>42%</b>	<b>39%</b>	<b>40%</b>	<b>50%</b>
<b>Judicial Career Business Score:</b>		<b>38%</b>	<b>37%</b>	<b>31%</b>	<b>78%</b>	<b>42%</b>	<b>41%</b>	<b>45%</b>	<b>50%</b>

# Montana Workers' Compensation Court Judicial Review

## Cases from 2010-2011

The Montana Workers' Compensation Court was created in 1975 to address workers' compensation cases – a significant development for the business community. Over the past decade, Montana businesses have seen their work comp premiums skyrocket to almost unaffordable levels. Since the courts are a key player in interpreting work comp law, making findings of fact as to work-related injuries, and setting precedent, the Montana Chamber made the decision in 2007 to review the decisions of the Workers' Compensation Court (WCC). This is the third cycle the Chamber has reviewed the work of the WCC, and it covers cases from 2008 through 2009.

### Montana Chamber's Effort in Workers' Compensation

Over the past few years, the Montana Chamber has made workers' compensation reform its top priority. On average, Montana businesses are paying some of the highest workers' compensation premiums in the country. That puts our businesses at a competitive disadvantage with other states and hurts their ability to provide higher wages and better benefits to workers.

Our efforts in workers' compensation include legal action in a few Montana Supreme Court cases. Most recently, the Montana Chamber filed an *amicus* brief in *Alexander v. Bozeman Motors*, where two plaintiffs asked the Montana Supreme Court to essentially throw out the Legislature's 2001 amendments to the workers' compensation exclusive remedy rule.

Our efforts to reform workers' compensation also were central to the 2011 Legislative Sessions. The Legislature passed and the Governor signed HB 334 (Reichner – Bigfork), which reformed many of the cost drivers in the system through increased claim closure & settlements, implementation of utilization and treatment guidelines, changes to the PPD structure, reforms to course and scope of employment law, and modifications to choice of physician. Following passage of this bill, workers' compensation insurers responded by dropping premiums by an average of 20%. Future reductions are likely as more components of the bill become quantifiable and insurers are able to evaluate its impacts.

We will continue to make workers' compensation a top issue in our future legislative effort in order to make premiums more affordable for employers.

### Scoring

In this review, the worker's compensation court judge was evaluated in comparison to the pro-business position. A total of twenty-two cases were chosen for this review during the period from 2010-2011. This report includes a review of judgments made by Judge James "Jim" Jeremiah Shea, who was appointed by Governor Brian Schweitzer as the state's sole workers' compensation judge in 2005, and reappointed in 2011. Whether we agree or disagree with his rulings in individual cases, we appreciate his service to the state of Montana.

Many of the case summaries were taken directly from the issue and holding sections of the cases. Some have been condensed and edited to give the reader a more concise summary of the case.



Judge James Jeremiah Shea

## BENEFITS

### ***MACO Worker's Compensation Trust v. Klinkam, 2011 MTWCC 26***

**FACTS:** MACO claims it is entitled to an offset pursuant to § 39-71-701(5), MCA, which provides that an insurer is entitled to an offset if the claimant collects social security disability payments "because of the injury" for which the claimant also receives workers' compensation benefits.

**HOLDING:** Klinkam receives social security disability benefits for a multitude of reasons in addition to the knee injury for which she receives workers' compensation benefits. Klinkam's knee injury was only one of eleven conditions considered severe by the Social Security Administration's Administrative Law Judge in his determination that Klinkam was entitled to benefits. MACO is not entitled to an offset.

### ***Drake v. Montana State Fund; and Hilbert v. Montana State Fund, 2011 MTWCC 2***

**FACTS:** Petitioners suffered industrial injuries while the 5th Edition of the AMA Guides was in effect but reached MMI after the 6th Edition came into effect. They challenge Respondent's decision to award them impairment ratings as determined under the 6th Edition. Petitioners argue that impairment ratings should be calculated under the Guides in effect on the date of their industrial injury. Respondent argues that impairment ratings should be calculated under the Guides in effect on the date an injured worker reaches MMI.

**HOLDING:** Section 39-71-703, MCA, provides that an injured worker's impairment rating is to be determined by the "latest" edition of the Guides. Section 39-71-711, MCA, provides that an impairment rating is a purely medical determination which must be determined by an impairment evaluator after a claimant has reached maximum healing and must be based on the "current" edition of the Guides. The "latest" or "current" edition of the Guides is the most recent edition in existence on the date an injured worker reaches MMI. In Petitioners' cases, the 6th Edition existed on the date they each reached MMI. Petitioners' motions for summary judgment are denied and Respondent's cross-motions for summary judgment are granted.

### ***Poindexter v. Montana State Fund, 2010 MTWCC 31***

**FACTS:** Poindexter was off work after an industrial accident. MSF informed Poindexter that his treating physician was releasing him to return to work with restrictions and that his employer had a modified job available. Poindexter alleges that he called his employer and was informed that no work was available. Poindexter's employer claims that he instructed Poindexter to report to work, but Poindexter did not report for work at the agreed-upon time. Poindexter alleges that Respondent incorrectly and unreasonably terminated his TTD benefits.

**HOLDING:** Poindexter has not proven his entitlement to TTD benefits for the time period of September 2009, through February 2010. MSF did not unreasonably terminate Poindexter's TTD benefits. He is not entitled to his costs, attorney fees, or a penalty.

### ***Chapman v. Twin City Fire Ins. Co., 2010 MTWCC 30***

**FACTS:** Chapman alleges she suffered an industrial injury to her low back when her employer required her to move her belongings from one workstation to another. Twin City Fire denied liability because it did not believe Chapman suffered an industrial injury.

**HOLDING:** The facts demonstrate that Chapman suffered a compensable industrial injury. However, the facts further demonstrate that Chapman's injuries are not as severe as she claims, nor did Chapman prove that the subsequent termination of her employment was related to her industrial injury. Chapman has proven entitlement to certain medical benefits, but neither to wage-loss benefits nor a penalty.

### ***Stewart v. Liberty Northwest Ins. Corp., 2010 MTWCC 14***

**FACTS:** After this Court determined that Stewart was not entitled to an increased impairment rating because Stewart failed to establish a causal relationship between her industrial injury and chronic pain, Liberty discontinued payment for Stewart's pain patches. Stewart petitioned the Court for an order directing Liberty to resume coverage and payment for this prescription and any other necessary pain medications. Liberty moved for summary judgment, arguing that Stewart is collaterally estopped from bringing this second cause of action because the issue of causation was resolved in the trial concerning Stewart's impairment rating.

**HOLDING:** Liberty's motion is denied. In *Lund v. State Compensation Mut. Ins. Fund*, the Montana Supreme Court held that a second action in a workers' compensation claim which seeks a different type of benefit based on different statutory criteria than the benefit sought in the first action does not satisfy the identical issue element of collateral estoppel. In Stewart's first action, she sought an increased impairment rating. Section 39-71-711, MCA, sets forth the statutory criteria for impairment ratings. Stewart's current action seeks to establish Liberty's liability for payment of certain medical benefits. Section 39-71-704, MCA, sets forth the statutory criteria for medical benefits. Since the issue in the present action differs from the issue raised and decided in the prior action, collateral estoppel does not apply.

***Wright v. ACE American Ins. Co., 2010 MTWCC 11***

FACTS: Wright suffered an industrial injury to his left shoulder. After surgery, his shoulder pain worsened and he also experienced cervical symptoms. Although Wright subsequently saw several doctors, none offered viable treatment options except pain management. Wright sought medical treatment on his own with a former Billings doctor, now practicing in Wyoming, who recommended a second shoulder surgery. ACE has denied Wright's request for that surgery. Wright further alleges that he is unable to work and should receive TTD benefits. ACE alleges that Wright's treating physician signed job analyses and has released him to return to work, thereby rendering him ineligible for TTD benefits.

HOLDING: Wright is entitled to additional medical benefits. Although Wright's treating physician, a pain management specialist, does not recommend further surgical treatment, the Court finds the opinion of an orthopedic surgeon, who believes Wright is likely to improve with additional surgery, more persuasive. Since additional medical treatment is reasonably expected to improve Wright's condition, he is not at MMI. Since he also has not been released to return to his time-of-injury employment, he is entitled to TTD benefits.

***Hart v. Hartford Ins. Co. of the Midwest, 2010 MTWCC 8***

FACTS: Hart petitioned the Court for certain periods and amounts of temporary total, temporary partial, and back-owing medical benefits. Hart injured his low back in the course and scope of his employment. Hart's employer provided him with light-duty employment, but Hart missed several days of work. Hart's relationship with his initial treating physician was terminated due to Hart's drug seeking behavior. A new physician examined Hart at Hartford's request. This physician concluded that Hart was at MMI and assigned him a 0% impairment rating.

HOLDING: Hart is not entitled to any retroactive temporary total disability benefits because his employer offered him job duties within his restrictions and no physician removed him from work entirely. Hart is not entitled to past medical benefits because his personal conduct leave little room for a determination that the treatment bills at issue were for necessary treatment.

***Murphy v. Montana State Fund, 2010 MTWCC 6***

FACTS: Petitioner sought a lump-sum conversion of his permanent total disability benefits.

HOLDING: In a bench ruling, the Court concluded that Petitioner is entitled to a lump-sum conversion of his permanent total disability benefits as he planned to use the funds to purchase a feedlot. Petitioner came to trial fully prepared, having sought financing and with a reasonable business plan. His self-employment venture would not pay more than his bi-weekly benefits and would provide him a saleable asset upon retirement. The provisions of ARM 24.29.1202 were thus satisfied.

***Carey v. American Home Assurance Co., 2010 MTWCC 3***

FACTS: Petitioner broke her left wrist while working as the front end manager at Sam's Club. Shortly after she returned to work, Petitioner's job position was eliminated at Sam's Club stores nationwide as part of a restructuring plan. Petitioner opted not to apply for other management positions at Sam's Club. Petitioner declined the position and accepted a severance package. She later filed this petition, arguing that she was terminated due to her industrial injury and that she is entitled to TTD and PPD benefits, as well as her costs, attorney fees, and a penalty.

HOLDING: Petitioner lost her job at Sam's Club due to the elimination of her time-of-injury job position and due to the unavailability of any other position which Petitioner desired and for which she was qualified. Petitioner is not entitled to TTD or additional PPD benefits. Because Petitioner is not the prevailing party, she is not entitled to her costs, attorney fees, or a penalty.

***Pugh v. Charter Oak Fire Ins. Co., 2010 MTWCC 1***

FACTS: Petitioner asked for a determination of temporary total disability (TTD) benefits due to her. Petitioner argues that she was constructively discharged from her time-of-injury employment and is entitled to TTD benefits pursuant to § 39-71-701(4), MCA. Petitioner contends she is also entitled to TTD benefits for a period of time following her cubital tunnel release surgery.

HOLDING: Petitioner voluntarily resigned her employment and was not constructively discharged. Petitioner failed to meet her burden of proof that she suffered a total loss of wages as a result of her injury after her voluntary resignation.

## **BURDEN OF PROOF**

***Ingle v. Montana State Fund, 2011 MTWCC 3***

FACTS: Petitioner alleges that she has suffered medical problems caused by carbon monoxide exposure at her workplace. Respondent denied liability for Petitioner's injuries, alleging that she has not proven that her medical conditions occurred as a result of carbon monoxide poisoning.

HOLDING: Although the Court finds that Petitioner was exposed to a small amount of carbon monoxide at her workplace, the Court concludes Petitioner did not meet her burden of proof regarding the relationship of that exposure to the symptoms she has exhibited.

## CAUSATION

### ***Ford v. Sentry Casualty Company, 2011 MTWCC 19***

**FACTS:** Petitioner suffered a work-related injury to his neck for which Respondent accepted liability. Petitioner argues that Respondent should be liable for his cervical disk condition, which Respondent denies is related to the industrial accident. Petitioner further argues that Respondent should be liable for ongoing TTD benefits, and that it unreasonably adjusted his claim. Respondent contends Petitioner is at MMI and has been released to return to work without restrictions, and that it has reasonably adjusted Petitioner's claim.

**HOLDING:** Although Petitioner suffers from ongoing headaches, neck pain, and tingling sensations in his fingers as a result of his industrial accident, Petitioner has not proven that his cervical disk condition was caused or aggravated by his industrial accident. Petitioner's subjective complaints associated with his industrial injury do not correlate with the objective medical findings for which he seeks surgery. Petitioner has not proven that he is entitled to TTD benefits because no doctor has disputed that he is able to return to work without restrictions. Since Petitioner is not the prevailing party, he is not entitled to his costs, attorney fees, or a penalty.

### ***McLeish v. Rochdale Insurance Co., 2011 MTWCC 18***

**FACTS:** Respondent moves this Court for summary judgment. Respondent argues that Petitioner's injury does not arise out of his employment as required by § 39-71-407(1), MCA, because it resulted from an idiopathic fall onto a level surface. Petitioner argues that his injury is compensable because the event resulting in the injury occurred at work.

**HOLDING:** Respondent's motion is granted. Section 39-71-407(1), MCA, requires that a claimant's injury "arise out of" his employment in order to be compensable. An injury which results from an idiopathic fall onto a level surface does not arise out of one's employment.

### ***Grande v. Montana State Fund, 2011 MTWCC 15***

**FACTS:** Petitioner left his job as a truck driver due to arthritic conditions in his hands and filed an occupational disease claim. Respondent denied Petitioner's claim, arguing that the conditions were not caused by Petitioner's employment and that aggravations of non-work-related conditions are not compensable as occupational diseases.

**HOLDING:** Petitioner has proven that his job duties are the major contributing cause of his condition and he is therefore suffering from a compensable occupational disease. He has further proven that his occupational disease currently precludes him from returning to his time-of-injury employment. Petitioner is entitled to TTD benefits, reasonable medical benefits, and his costs.

### ***Mullaney v. Montana State Fund, 2010 MTWCC 27***

**FACTS:** Petitioner filed an occupational disease claim for injuries to her neck, shoulders, and low back which she alleges were caused by poor ergonomic conditions in her workspace. Respondent denied Petitioner's claim, alleging that her complaints are not causally related to her employment. Petitioner then filed this claim for workers' compensation benefits.

**HOLDING:** Petitioner's treating physician opined that her conditions were caused by her exposure to a nonergonomic workspace while she was employed at Respondent's insured. Since the opinion of the treating physician is entitled to greater weight, the Court concludes that Respondent is liable for Petitioner's occupational disease claim.

### ***Petritz v. Montana State Fund, 2010 MTWCC 17***

**FACTS:** Petitioner suffered a myocardial infarction while at work on July 6, 2009. Petitioner alleges that his work activities were unusually strenuous and caused the myocardial infarction. Respondent argues that Petitioner has failed to prove under § 39-71-119(5)(a), MCA (2009), that his work activities were the primary cause of his condition.

**HOLDING:** Petitioner has not proven that it is more probable than not that his work activities were the primary cause of his myocardial infarction. Petitioner's treating physician testified that he could not say with a reasonable degree of medical certainty that Petitioner's exertion at work caused the injury. The only medical opinion that Petitioner's work exertion was the primary cause of his condition came from a non-treating physician who specialized in neurology.

### ***Fleming v. Montana Schools Group Insurance Authority, 2010 MTWCC 13***

**FACTS:** Petitioner sustained an injury in 2007. Respondent initially accepted liability. Respondent denied further liability after receiving an unsolicited opinion from an IME physician who opined that Petitioner's condition was a temporary aggravation of a preexisting condition. Petitioner contends that Respondent unreasonably denied further liability.

**HOLDING:** Petitioner suffered a permanent aggravation of her preexisting condition. Respondent is liable for payment of further benefits associated with Petitioner's permanent aggravation. The IME physician's written opinion that Petitioner did not suffer a permanent aggravation of her preexisting condition is inconsistent with his deposition testimony. Respondent's denial was not unreasonable because it attempted to obtain Petitioner's treating physicians' opinions about the IME report prior to denying liability.

## CONSTITUTIONAL LAW

### ***Flynn and Miller v. Montana State Fund and Liberty Northwest Ins. Corp., 2010 MTWCC 21***

**FACTS:** Common Fund Insurers moved this Court to dismiss the common fund claims asserted against them on five grounds: (1) Because Common Fund Insurers were not parties to *Flynn I*, enforcement of the *Flynn* common fund violates their right to due process; (2) Petitioners lack standing to pursue common fund claims against Common Fund Insurers; (3) Petitioners failed to mediate the common fund claims against Common Fund Insurers; (4) requiring Common Fund Insurers to identify potential *Flynn* beneficiaries impermissibly reverses the burden of proof; and (5) Petitioners' counsel's attorney fees are limited to the actual amount incurred by the active litigants.

**HOLDING:** Common Fund Insurers' motion to dismiss is denied. Common Fund Insurers' due process and standing arguments were rejected by the Montana Supreme Court in *Schmill v. Liberty Northwest Ins. Corp.* Mandatory mediation does not apply to *Flynn* common fund benefits because *Flynn I* resolved the dispute concerning the entitlement to these benefits. Requiring Common Fund Insurers to identify *Flynn* beneficiaries does not shift the burden of proof to Common Fund Insurers. The insurers' burden in this case is to identify claimants whose right to increased benefits has already been established as a matter of law pursuant to *Flynn I*. This Court has previously rejected Common Fund Insurers' fee calculation argument in *Rausch v. Montana State Fund*. In *Rausch*, this Court held that Common Fund Insurers' argument was based upon a fundamental misinterpretation of the common fund doctrine.

## COURSE AND SCOPE

### ***Charlson v. Mont. State Fund, 2011 MTWCC 7***

**FACTS:** Petitioner worked on two different job sites for his employer. Petitioner was injured in an automobile accident while traveling to one job site to start his shift. Petitioner moves for summary judgment, arguing that his injury should be compensable as a work-related injury under the exception to the "going and coming" rule found at §39-71-407(3)(a)(ii), MCA. Respondent opposes Petitioner's motion, arguing that Petitioner was simply driving to work to report for his regular shift and his injury is not compensable under the "going and coming" rule.

**HOLDING:** Petitioner's automobile accident which occurred on his way to work is not compensable under § 39-71-407(3)(a)(ii), MCA. Simply traveling to the workplace prior to the start of a work shift does not make travel part of an employee's job duties. Respondent's cross-motion for summary judgment is granted.

### ***Peck v. International Paper Co., 2010 MTWCC 35***

**FACTS:** Respondent moved for summary judgment, arguing that Petitioner brought this claim against the wrong insurer as he has not correctly identified which entity was his employer at the time he left his employment. Petitioner filed a cross-motion for summary judgment, alleging that Respondent is correctly identified as the party liable for his occupational disease claim.

**HOLDING:** Under the control test, Petitioner was an employee of the company for which Respondent is the successor-in-interest. Therefore, Respondent is properly identified as Petitioner's employer for the purposes of Petitioner's occupational disease claim.

### ***Hopkins v. UEF v. Kilpatrick, 2010 MTWCC 9***

**FACTS:** Petitioner was injured in a grizzly bear attack at a private bear park in West Glacier, Montana. Petitioner petitioned the Court for a determination that he was an employee of the alleged employer, Russell Kilpatrick, at the time of the attack. Petitioner contended that he was performing duties in the course and scope of his employment. Kilpatrick responded that Petitioner worked as a volunteer at the bear park. Kilpatrick and the Uninsured Employers' Fund contended that Petitioner was not acting in the course and scope of his employment. Kilpatrick and the UEF further argued that Petitioner's use of marijuana was the major contributing cause of the accident.

**HOLDING:** Kilpatrick employed Petitioner at the bear park. Kilpatrick controlled the details of Petitioner's work and paid him cash daily for the services he performed. Petitioner acted in the course and scope of his employment when he was attacked as he entered the bear pen to feed the bears. Petitioner fed the bears at Kilpatrick's request and Kilpatrick benefitted from services Petitioner performed at the bear park. Petitioner's marijuana use was not the major contributing cause of the accident. Although Petitioner admitted to smoking marijuana before arriving at work on the morning of the attack, it is difficult for the Court to conclude that the *major* contributing cause of the grizzly bear attack was anything other than the grizzly.

## CREDIBILITY

### ***Martin v. Montana State Fund, 2011 MTWCC 25***

**FACTS:** Petitioner alleges that he injured his low back while preparing metal siding for installation on a job site. Respondent denied Petitioner's claim, alleging that its investigation led it to conclude that Petitioner was not injured in the course and scope of his employment. In separate motions, Petitioner moves this Court to exclude evidence regarding an alleged probation violation, moves to compel Respondent to produce an investigative report, and moves to supplement the record with a 2007 W-2 form to refute the employer's testimony that Petitioner first worked for him in March 2008.

**HOLDING:** Petitioner has not proven that he was injured as a result of an industrial accident. Petitioner's motion to exclude evidence of an alleged probation violation is granted because the evidence is not relevant to the issue in this case. Petitioner's motion to compel production of an investigative report is denied because the report is protected work product. Petitioner's motion is denied because it is irrelevant as to whether Petitioner's first day of employment with the employer occurred in 2007 or 2008.

### ***Sherwood v. Watkins & Shepard Trucking and Great West Casualty Co., 2010 MTWCC 19***

**FACTS:** Petitioner suffered numerous industrial injuries over several years of working as a commercial truck driver. Petitioner's employer terminated him after he was missing for several hours with his truck. Although he was unable to account for his disappearance at the time, Petitioner later alleged that he fell and lost consciousness the day before his disappearance, which caused him to become confused the following day. Petitioner alleges that the sum of his industrial injuries and the medications he takes have rendered him totally disabled and that either of two previous employers should be liable for his condition.

**HOLDING:** The Court does not believe that Petitioner's alleged fall and loss of consciousness occurred. The Court does not find Petitioner's report of another alleged industrial accident to be credible. Therefore, the employer at the time of Petitioner's previous, undisputed industrial injuries is liable for his present condition. Petitioner has presented no evidence that he is at MMI and therefore he is not entitled to permanent total disability benefits. Based on the evidence presented, the Court concludes Petitioner is entitled to temporary total disability benefits as of September 28, 2009.

## EVIDENCE

### ***Montana State Fund v. Simms, 2010 MTWCC 41***

**FACTS:** Respondent moves to exclude an opinion letter of his treating physician which was elicited by Petitioner. Respondent argues that the letter was based on surveillance videos which were confidential criminal justice information which Petitioner disclosed in violation of the Criminal Justice Information Act. Respondent also moves to preclude the use or further publication or dissemination of the surveillance videos in these proceedings because of Petitioner's alleged violations of the Criminal Justice Information Act. Petitioner argues that the surveillance was properly disclosed. Although Petitioner concedes the surveillance is now confidential criminal justice information, Petitioner argues it did not become confidential criminal justice information until after Respondent's treating physician reviewed the surveillance.

**HOLDING:** The surveillance constituted confidential criminal justice information before it was disclosed to Respondent's treating physician and was disseminated in violation of the Criminal Justice Information Act. The opinions elicited from Respondent's treating physician and any other physicians to whom the surveillance was improperly disseminated are excluded. Respondent's motion to prospectively preclude the use of the surveillance "for all time" and "for any purpose," even if the surveillance is disseminated in compliance with the Criminal Justice Information Act, is overbroad and is denied.

## INDEPENDENT MEDICAL EXAMINATIONS

### ***Dodge v. Montana Insurance Guaranty Association, 2011 MTWCC 20***

**FACTS:** Respondent moved for an order compelling Petitioner to attend an IME with Dr. John R. Harrison in Missoula pursuant to §39-71-605, MCA. Respondent claims that Petitioner's condition has changed since his last IME necessitating an additional examination. Specifically, Respondent argues that it only learned of Petitioner's subjective complaints of memory loss since Petitioner underwent the last IME. Petitioner objects to the additional IME on the grounds that his condition has not changed since undergoing two separate IMEs in the past year.

**HOLDING:** Respondent's motion to compel a third IME is denied. An insurer is entitled to additional IMEs where there is an indication that claimant's medical condition has changed or there is some other sound reason. Respondent has not shown a sound reason nor a change in Petitioner's condition to warrant an additional IME. Respondent has been aware of Petitioner's subjective complaints of memory loss since at least 2006, long before the most recent IMEs.

***Perlinski v. Montana Schools Group Insurance Authority, 2011 MTWCC 16***

FACTS: Respondent moved for an order compelling Petitioner to attend an IME with Dr. Emil Bardana in Portland, Oregon. Respondent contends that an out-of-state IME is justified because there are no Montana physicians with the same level of experience as the doctor. Petitioner moved for a protective order holding that she not be required to attend the out-of-state IME.

HOLDING: Respondent's motion to compel the IME in Portland is denied. Petitioner's motion for a protective order is granted. Out-of-state IMEs should be viewed with disfavor when an adequate examination can be conducted in Montana. Section 39-71-605, MCA, requires that an IME shall be conducted at a place that is as close to the employee's residence as is practical by a physician with "adequate and substantial experience in the particular field of medicine concerned with the matters presented by the dispute." Respondent has failed to demonstrate that an adequate IME cannot be conducted in Montana.

***Svensden v. Montana State Fund, 2011 MTWCC 14***

FACTS: Respondent moved this Court to compel Petitioner to attend an IME. Petitioner concedes Respondent is entitled to an IME but objects to the IME being performed by Dr. Schumpert. Petitioner argues that Dr. Schumpert has a conflict of interest because the industrial hygienist who conducted an on-site evaluation of Petitioner's workplace was employed by the same entity that employs Dr. Schumpert.

HOLDING: Respondent's motion to compel an IME with Dr. Schumpert is granted. Petitioner cites no precedent in support of his argument that Dr. Schumpert's previous working relationship with the industrial hygienist precludes him from performing the IME. Any conflict of interest, real or perceived, may go to the weight the Court assigns to Dr. Schumpert's opinion. It does not provide a basis to preclude Dr. Schumpert from performing the IME.

***Salazar v. Montana State Fund, 2011 MTWCC 10***

FACTS: Petitioner moved for a protective order to prevent Respondent from obtaining an IME, arguing that Respondent does not have an absolute right to a "Rule 35 Examination," and that Respondent could have Petitioner's treating physician address Respondent's questions instead. Respondent argues that it is entitled to an IME under§ 39-71-605, MCA, because Petitioner's condition has changed since it obtained a previous I ME.

HOLDING: Respondent is entitled to an IME under§ 39-71-605, MCA. Salazar does not deny that his condition has changed, nor has he explained why he believes the Court should look to the Rules of Civil Procedure to the apparent exclusion of§ 39-71-605(1)(a), MCA, in determining State Fund's entitlement to an I ME.

## LAST INJURIOUS EXPOSURE

***Banco v. Liberty Northwest Insurance Corp., 2011 MTWCC 13***

FACTS: Petitioner worked part-time as a food server for Respondent's insured and concurrently worked full-time as a cook for an employer insured under the federal workers' compensation system. Petitioner left her employment at Respondent's insured while continuing to work at her other job. Petitioner filed a workers' compensation claim, alleging that she developed an occupational disease in her right shoulder. Respondent denied liability.

HOLDING: Under the "last injurious exposure" rule as set forth in *In re Mitchell*, the employer who is liable for an occupational disease is the employer at which the claimant was last exposed to the working conditions of the same type and kind which gave rise to the occupational disease. In this case, Petitioner continued to be exposed to those working conditions at her other employment after she quit her job at Respondent's insured. Therefore, Respondent is not liable for Petitioner's occupational disease.

## MAXIMUM MEDICAL IMPROVEMENT

***Newman v. Montana State Fund, 2011 MTWCC 12***

FACTS: Petitioner moves for partial summary judgment on the issue of whether Respondent properly terminated her indemnity and medical benefits. Petitioner seeks judgment, as a matter of law that Respondent acted without medical or legal basis when it terminated her medical benefits and refused to reinstate her indemnity and medical benefits. Respondent argues that factual disputes exist concerning whether Petitioner had reached maximum medical improvement before it terminated her benefits and whether any continuing treatment is causally related to Petitioner's industrial injury.

HOLDING: Material factual disputes regarding Petitioner's MMI status preclude summary ruling. Petitioner's motion is therefore denied.

***Wilson v. UEF v. Elk Mountain Motor Sports, Inc., 2010 MTWCC 33***

FACTS: Petitioner suffered an industrial injury on January 8, 2004, while working for Third-Party Respondent. Third-Party Respondent was not enrolled in a workers' compensation insurance program at the time. Respondent/Third-Party Petitioner accepted the claim. Petitioner alleges he is permanently totally disabled and entitled to a penalty and attorney fees. Respondent/Third-Party Petitioner and Third-Party Respondent contend that Petitioner has not reached maximum medical healing and, therefore, is not permanently totally disabled. Petitioner, Respondent/Third-Party Petitioner and Third-Party Respondent ask this Court to determine: 1) whether Petitioner has reached maximum medical healing; 2) whether Petitioner is permanently totally disabled; 3) whether a preponderance of the objective medical findings supports entitlement to permanent total disability; 4) if Petitioner is not permanently totally disabled, whether he is temporarily totally disabled, permanently partially disabled, or otherwise disabled; 5) whether Third-Party Respondent is obligated to indemnify Respondent/Third-Party Petitioner for all benefits paid or payable; 6) whether Petitioner is entitled to a penalty and attorney fees; and 7) whether Third-Party Respondent's contentions are improper in light of this Court's ruling granting Respondent/Third-Party Petitioner's motion for partial summary judgment.

HOLDING: Petitioner has reached maximum medical healing within the meaning of §39-71- 116{18}, MCA. Petitioner is permanently totally disabled within the meaning of §39-71- 116{24}, MCA. A preponderance of objective medical findings supports Petitioner's entitlement to permanent total disability. Issue 4 is moot, and Issues 5 and 7 were resolved by this Court's Order Granting Respondent/Third-Party Petitioner's motion for partial summary judgment. Petitioner is not entitled to a penalty or attorney fees.

***Hale v. Liberty Mutual Middle Market, 2010 MTWCC 28***

FACTS: Petitioner suffered an injury to his left leg in 2006. He is currently off work and receiving temporary total disability benefits. Petitioner alleges that he is permanently totally disabled. He argues that his benefits should be converted to permanent total disability benefits and that it is in his best interest to receive those benefits in a lump sum. Petitioner further alleges that Respondent has unreasonably refused to convert his benefits and that he is entitled to his costs, attorney fees, and a penalty.

HOLDING: Petitioner is not at maximum healing. Under § 39-71-116{25}, MCA, a worker cannot be declared permanently totally disabled until after he reaches maximum healing. Therefore, Petitioner is not permanently totally disabled. Since this issue is dispositive of Petitioner's case, the Court does not reach the other issues presented.

## SETTLEMENTS

***Keller v. Liberty Northwest Ins. Corp., 2010 MTWCC 4***

FACTS: Petitioner petitioned the Court for reinstatement of her medical benefits. Petitioner argues that a mutual mistake of fact occurred in this case. Petitioner contends that the parties failed to account for the onset of nerve damage and/or chronic nerve inflammation and winging of her right scapula as the major injury and cause of Petitioner's pain at the time they entered into two settlement agreements.

HOLDING: No mutual mistake of fact occurred in this case. Even if Petitioner was unaware that her condition at the time she entered into the settlement agreements included scapular winging and long thoracic nerve damage, she failed to establish that Respondent entered into the settlement agreements under the same mistaken belief. Therefore, the settlement agreements will not be set aside.

## STATUTE OF LIMITATIONS

***Johnson v. Montana State Fund, 2011 MTWCC 22***

FACTS: Respondent moved for summary judgment, arguing that Petitioner's petition was untimely pursuant to § 39-71-2905{2}, MCA. Petitioner opposed Respondent's motion, arguing that Respondent is equitably estopped from claiming it denied Petitioner's claim and that Respondent could not have effectively denied Petitioner's claim prior to investigation. Alternatively, Petitioner argues that Respondent's subsequent denial letter "reset" the statute of limitations.

HOLDING: Under § 39-71-2905{2}, MCA, a claimant must file his petition for hearing within two years after benefits are denied. Petitioner did not do so, and Respondent's motion for summary judgment is granted.

## VOC-REHAB

### **Caldwell v. MaCo Workers' Comp. Trust, 2010 MTWCC 24**

**FACTS:** Pursuant to § 39-71-710, MCA, the insurer's liability for payment of permanent partial disability benefits, permanent total disability benefits, and rehabilitation benefits terminates when a claimant is considered retired. Petitioner argues that, as it relates to vocational rehabilitation benefits, § 39-71-710, MCA (2005), violates his right to equal protection as guaranteed by Article II, Section 4, of the Montana Constitution.

**HOLDING:** Section 39-71-105(3), MCA, sets forth the public policy for rehabilitation benefits. It provides that an objective of the workers' compensation system is to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease. Before an injured worker can qualify for rehabilitation benefits, § 39-71-1006, MCA, requires that a rehabilitation provider certify that the worker has reasonable vocational goals and reasonable reemployment opportunity. Since the statute already considers the worker's age, the Court sees no rational basis for automatically terminating rehabilitation benefits upon an injured worker's eligibility for retirement. Therefore, the Court concludes that as it relates to rehabilitation benefits, § 39-71-710, MCA, violates Petitioner's right to equal protection.

<b>MONTANA WORKERS' COMPENSATION COURT REVIEW</b>	
<b>Cases from 2010-2011</b>	
<b>JUDGE SHEA</b>	
<i>MACO Worker's Compensation Trust v. Klinkam</i>	✗
<i>Drake v. Montana State Fund; and Hilbert v. Montana State Fund</i>	✓
<i>Poindexter v. Montana State Fund</i>	✓
<i>Chapman v. Twin City Fire Ins. Co.</i>	✓
<i>Stewart v. Liberty Northwest Ins. Corp.</i>	✗
<i>Wright v. ACE American Ins. Co.</i>	✗
<i>Hart v. Hartford Ins. Co. of the Midwest</i>	✓
<i>Murphy v. Montana State Fund</i>	✗
<i>Carey v. American Home Assurance Co.</i>	✓
<i>Pugh v. Charter Oak Fire Ins. Co.</i>	✓
<i>Ingle v. Montana State Fund</i>	✓
<i>Ford v. Sentry Casualty Company</i>	✓
<i>McLeish v. Rochdale Insurance Co.</i>	✓
<i>Grande v. Montana State Fund</i>	✗
<i>Mullaney v. Montana State Fund</i>	✗
<i>Petritz v. Montana State Fund</i>	✓
<i>Fleming v. Montana Schools Group Insurance Authority</i>	✗
<i>Flynn and Miller v. Montana State Fund and Liberty Northwest Ins. Corp.</i>	✗
<i>Charlson v. Mont. State Fund</i>	✓
<i>Peck v. International Paper Co.</i>	✗
<i>Hopkins v. UEF v. Kilpatrick</i>	✗
<i>Martin v. Montana State Fund</i>	✓
<i>Sherwood v. Watkins &amp; Shepard Trucking and Great West Casualty Co.</i>	✓
<i>Montana State Fund v. Simms</i>	✗
<i>Dodge v. Montana Insurance Guaranty Association</i>	✗
<i>Perlinski v. Montana Schools Group Insurance Authority</i>	✗
<i>Svendsen v. Montana State Fund</i>	✓
<i>Salazar v. Montana State Fund</i>	✓
<i>Banco v. Liberty Northwest Insurance Corp.</i>	✗
<i>Newman v. Montana State Fund</i>	✓
<i>Wilson v. UEF v. Elk Mountain Motor Sports, Inc.</i>	✗
<i>Hale v. Liberty Mutual Middle Market</i>	✓
<i>Keller v. Liberty Northwest Ins. Corp.</i>	✓
<i>Johnson v. Montana State Fund</i>	✓
<i>Caldwell v. MaCo Workers' Comp. Trust</i>	✗
<b>Total Business Score 2010-2011</b>	<b>54%</b>
<b>Judicial Career Business Score</b>	<b>61%</b>

# Montana Chamber's Legal Efforts

## 2010-2011

Over the past few years, the Montana Chamber has stepped up its legal efforts in order to provide a private sector, free enterprise perspective in important cases before the Montana Supreme Court. In addition, we are the leading advocate in the state for legal and tort reforms to limit the number of frivolous lawsuits filed against businesses.

### **The Montana Supreme Court**

Our efforts have included filing an *amicus* brief in the *Alexander v. Bozeman Motors* case, where two plaintiffs asked the Montana Supreme Court to essentially throw out the Legislature's 2001 amendments to the workers' compensation exclusive remedy rule. If decided in the plaintiffs' favor, Montana employers would see a flood of new frivolous workplace injury lawsuits outside of the workers' compensation system. The Montana Supreme Court upheld the constitutionality of the limited exception to the exclusive remedy rule, but the decision also opened the door to drawn-out legal battles over whether employers are intending to cause deliberate and actual harm to their employees.

### **The Montana Legislature**

Over the past two decades, many of the legal reforms passed in general liability, workers' compensation, medical malpractice and other areas was a direct result of the Montana Chamber's lobbying efforts. Attempts have been made to undo some of those reforms, but they largely remain intact insofar as the Montana Supreme Court upholds those legal protections.

In 2011, the Montana Chamber was successful in the Legislature in passing a number of new, common sense legal reforms. Unfortunately, all of those bills were vetoed by Governor Brian Schweitzer. The reforms included caps on appeal bonds, revisions on pre/post-judgment interest in tort claims, a defensive medicine bill, a sunshine bill for situations when the state attorney general hires outside counsel, and others. We will reintroduce all of those bills in 2013, and possibly others when there will be a new Governor.

### **The Montana Justice Coalition**

Formerly known as the Montana Liability Coalition, the Montana Justice Coalition is a collection of business leaders, attorneys and association directors tasked with keeping track of the liability climate in the state, monitoring important cases that come out, and developing new legal reform measures that should be enacted into law. The Montana Chamber oversees this Coalition and brings its members together as needed.

### **The U.S. Chamber of Commerce's Institute for Legal Reform**

Although the U.S. Chamber is a completely separate organization from the Montana Chamber, we still look to them as a national leader in the area of legal and tort reform.

The Institute for Legal Reform publishes a "State Liability Systems Ranking Study" to explore how reasonable and balanced the states' tort liability systems are perceived to be by U.S. business. Participants in the survey were comprised of a sample of 1,482 in-house general counsel, senior litigators or attorneys, and other senior executives who indicated they are knowledgeable about litigation matters at companies with at least \$100 million in annual revenues. The State Liability Systems Ranking Study aims to quantify how corporate attorneys view the state systems. Montana consistently ranks low in the study, including placing 39<sup>th</sup> in 2006, 40<sup>th</sup> in 2007, 38<sup>th</sup> in 2008, and 42<sup>rd</sup> in 2010. The 2012 study is due soon. To get more information on the U.S. Chamber's Institute for Legal Reform, visit their website at: [www.instituteforlegalreform.com](http://www.instituteforlegalreform.com).

