2020 JUDICIAL REVIEW

CASES FROM 2018-2019

MONTANA CHAMBER OF COMMERCE

Montana Supreme Court Judicial Review

The Montana Chamber of Commerce is pleased to present the 2020 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.

Following past practice, this Review encompasses a two-year period of important court decisions from 2018 and 2019 that related to business. Our intent is to assist the business community in tracking trends in judicial rulings relating to Montana's economy. The report also evaluates 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 may control the outcome of a particular case rather than anti-business or pro-business positions. The hope of the business community is that the justices will follow the rule of law and precedent to foster predictability and certainty in the legal arena.

In preparing this analysis, 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, Justia.com, as well as assistance from various Montana attorneys.

The Montana Supreme Court

Previous Chamber Judicial Reviews have evaluated Montana Supreme Court decisions since 1990. The dynamic of the Court has changed considerably in the past decade, 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 is truly improving or suffering as a result of Court decisions.

Cases are divided into twelve categories: Banking, Contract, Employment, Insurance, Jurisdiction, Land Use/Energy/Environment, Landlord-Tenant, Medical Malpractice, Taxation, Tort, Workers' Compensation, and Other. Each case was assigned one category for the purpose of the record even though some cases obviously could be included in multiple categories.

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 interpreted the overall case. Scores were not weighted. Justices received a 0 to 100 percent Business Score overall for the 2018-2019 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 cases scored for a particular justice from the selected cases during the period of the study (2018 and 2019). 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 seven Supreme Court Justices. Justices serve eight-year terms. Justice biographies are available on the Court's website.

Chief Justice Mike McGrath
Elected in 2008 and re-elected 2016

Justice Beth Baker
Elected in 2010 and retained by voters in 2018

Justice Ingrid Gustafson
Appointed in 2017 and retained in 2018

Justice Laurie McKinnon
Elected in 2012

Justice Jim Rice
Appointed in 2001, retained in 2002 and 2006, and re-elected in 2014

Justice Dirk Sandefur
Elected in 2016

Justice Jim Shea
Appointed in 2014 and retained in 2016

Justices of the Montana Supreme Court (left to right): Justice Baker, Justice Sandefur, Justice Rice, Chief Justice McGrath, Justice McKinnon, Justice Shea, and Justice Gustafson

BANKING

Estate of Robert Severson v. Lynn Severson, Severson Family Mineral Trust, and Stockman Bank of Plentywood – 6/25/2019

FACTS: Robert and Lynn Severson were brothers sharing mineral rights within a mineral trust created in 2011. In 2012 Robert added Lynn as a joint owner with rights of survivorship to his Stockman bank account. A loan was taken out later that year under a request that was purportedly approved by Robert, and those proceeds were deposited to Robert's account. The loan was repaid later that year. Robert died in 2015. In 2017, Robert's estate filed against Lynn for breach of written agreement and fraud and a tort claim for breach of the covenant of good faith and fair dealing against the bank. Both the mineral trust and Stockman filed for summary judgment in 2018, which were granted. The Estate appealed.

HOLDING: The District Court is affirmed. Even if there was a genuine issue of fact as to who signed the promissory note with Stockman, Robert or Lynn, Robert ratified the loan because it was never challenged, and all loan-related mail was sent to his registered address. The other claims are time-barred by statute of limitations. The District Court did not err in awarding sanctions for filing suit against the weight of the evidence that the Estate should have known. (Rice, Shea, Baker, McKinnon, Sandefur)

Graham-Rogers v. Wells Fargo Bank – 9/24/2019

FACTS: Wells Fargo assumed service of a loan obtained by Graham-Rogers, who used a section of her property as collateral. Graham-Rogers failed to remit property taxes on the property that contained the portion serving as collateral, leading Wells Fargo to pay those taxes. Wells Fargo then required Graham-Rogers to repay the taxes, reasoning that the deed of trust was unambiguous in permitting it to pay the taxes in full. Graham-Rogers filed suit and the District Court granted summary judgment to Wells Fargo.

HOLDING: The District Court is affirmed, as Wells Fargo did not breach contract by paying the delinquent taxes and requiring Plaintiff to repay them. Likewise, because Wells Fargo did not breach the deed of trust, it did not violate any duty owed to Plaintiff under that deed, therefore making other claims properly moot. (Rice, McGrath, Sandefur, Baker). Dissenting justices noted that whether it was "necessary" for Wells Fargo to pay the taxes to protect its interest in the collateral property is a fact question that should have gone to a jury. While the taxes had to be paid, no evidence indicated that no other possible solutions existed before Wells Fargo made the unilateral decision to pay the taxes and raise Plaintiff's payments. (Gustafson, McKinnon, Shea)

CONTRACT

Lenz, et al. v. FSC Securities – 4/3/2018

FACTS: Investors purchased securities in Invizeon of Missoula through FSC Securities on the recommendations of Rocky Mountain Financial Advisors (RMF). Invizeon failed, causing Investors to sustain substantial losses. Investors sued, alleging that FSC failed to adequately supervise RMF and that RMF wrongfully induced them to invest in Invizeon. Months into litigation, FSC and RMF moved to compel arbitration. The District Court compelled Investors to submit to arbitration as provided in the customer agreement forms.

HOLDING: The District Court correctly concluded that Investors knowingly assented to the arbitration agreements and waived their Montana constitutional rights to legal redress and jury trial. The assertion that some or all Investors did not recall seeing or reading the customer agreement forms is insufficient to overcome the presumption that they read and understood the consequences of the clear and unambiguous language of the arbitration agreement. (Full Court)

Peeler v. Rocky Mountain Log Homes and White River Contracting – 12/11/2018

FACTS: James Peeler and Rocky Mountain Log Homes executed a contact to produce plans for a home on Peeler's property in Libby. It stated that Rocky Mountain would manufacture and deliver the log package under a separate contract. Peeler executed a separate contract with Rocky Mountain's affiliate, White River Contracting, to construct a "turn-key" home in accordance with Rocky Mountain's plans. The construction contract included an arbitration agreement. Following attempts to resolve his dissatisfaction with progress and quality of construction, Peeler sued White River and Rocky Mountain. White River moved to dismiss and compel arbitration. Peeler responded that arbitration was not mandatory, and that White River had waived it by failing to demand it within 30 days after the dispute arose. The District Court held that arbitration was required. Peeler appealed.

HOLDING: The District Court correctly concluded that the agreement required arbitration of all matters within its scope. The arbitration provision stated that all disputes, claims, and questions regarding the rights and obligations of the parties under the terms of the agreement are subject to arbitration. (Sandefur, Shea, Gustafson, Baker, McKinnon)

Kapor v. RJC Investment – 2/12/2019

FACTS: Kapor entered into a sale contract for purchase of a mobile home in 2009, and RJC was assigned management of that contract and loan. Kapor defaulted several times, and in 2015 the parties entered into an agreement where Kapor released all rights to the mobile home back to RJC, including all money paid on the house until the date of the agreement. RJC sold the mobile home in excess of the principle Kapor owed and did not repay the surplus back to Kapor. Kapor sued under Uniform Commerical Code (UCC) Art. 9. District Court granted judgment for RJC, reasoning that the 2015 agreement terminated the original contract and estops litigation.

HOLDING: The contract between Plaintiff and Defendant releasing "all rights" to RJC did not remove the obligation of RJC to pay Kapor the difference between the debt duty and the actual sale price from RJC's resale of Kapor's mobile home. The freedom to contract between the parties allows each to discharge all responsibilities to each other, but that does not mean the creditor is not obligated to return the excess proceeds to the debtor. The debtor's releasing "all rights" does not automatically amend the original, agreed-upon contract and does not preclude litigation. (Baker, McGrath, Gustafson, Shea). Dissenting justices argued that parties should have the freedom to contract around the provisions of the MCA as they see fit, and restricting parties to only what is under the UCC restricts the freedom to contract. (McKinnon, Sandefur, Rice)

Warrington v. Great Falls Clinic – 5/14/2019

FACTS: Lisa Warrington was offered a job as clinic manager with the Great Falls Clinic (GFC) in October 2014 and accepted the offer the next day. A contract was signed, agreeing to begin work October 27. On October 24, GFC notified Warrington that they would not be hiring her. It was later found that a GFC employee who had worked with Warrington at her previous employment had told GFC that she would not be a good fit at the clinic. Warrington sued GFC for breach of contract, breach of the covenant of good faith & fair dealing, and promissory estoppel. GFC filed for summary judgment against Warrington as her contract fell under "executive contract" not protected under the Wrongful Discharge from Employment Act (WDEA). The District Court granted in part and denied in part on both sides. A jury found $20k in contract damages for the Plaintiff. The Plaintiff appealed, and GFC cross appealed.

HOLDING: The District Court is affirmed. GFC breached the contract for employment by trying to withdraw the offer after the contract had already been signed. Warrington failed to prove unequal bargaining power for a "special relationship" contract for a breach of covenant of good faith & fair dealing. Damages recovered are restricted to expectancy damages under breach of contract and not tort

claims. The trial court did not err admitting evidence relevant to Warrington's expectations. Any recoverable damages are a question for the jury. (Rice, McKinnon, Sandefur, Gustafson, Baker)

Thornton v. Whitefish Credit Union – 6/11/2019

FACTS: Thornton borrowed $3.3 million from Whitefish Credit Union (WCU) to develop property. They never drew up plans, never developed, and did not pay back the loan. Foreclosure began in 2012. The Parties settled in 2016, with WCU paying the Thorntons $150k for the overages paid by the property that backed the loan, and an option that the Thorntons could buy back the property if executed within 18 months. In 2018, Thorntons sued WCU for failure to place mortgage releases, deeds, and transfer certificates in escrow, alleging failure to do so prevented them from exercising their option. WCU filed for summary judgment. The District Court granted the motion. Plaintiffs appealed.

HOLDING: The contract clearly stated that the documents would not be held in escrow until the option was exercised. The District Court correctly disregarded exhibits that were immaterial or inadmissible; the facts clearly showed the Thorntons were in default. (McGrath, McKinnon, Shea, Sandefur, Gustafson)

Strauser v. RJC Investment – 7/23/2019

FACTS: Lisa Strauser purchased a mobile home for which the loan was assigned to RJC Investment. Strauser sued alleging that RJC assessed excessive late fees against her and violated the Montana Retail Installment Sales Act (RISA) by failing to disclose the finance charge. RJC filed a motion to dismiss due to failure to state a claim. The District Court granted the motion to dismiss as the 2009 RISA did not confer a private cause for action. Strauser appealed.

HOLDING: The District Court is affirmed in part and reversed in part. The RISA does not allow a private cause of action, but the District Court erred in dismissing Strauser's declaratory judgment motion to clarify her "rights, status, or other legal relations" under the contract considering the RISA. Reversed and remanded for further proceedings. (McGrath, Sandefur, Gustafson, Shea). The dissenting justices argued that Strauser should pursue administrative remedies through the RISA and not the judicial system. (McKinnon, Baker, Rice). One further noted that there was no actual dispute because RJC has not sued for the outstanding balance. The Court should not issue advisory opinions about potential disputes that the legislature gave to an administrative agency. (McKinnon)

Flathead Management Partners v. Jystad – 12/17/2019

FACTS: A fire destroyed Gary Jystad's home in Rollins in 2016. Jystad entered a contract with Flathead Management Partners (FMP) to restore the property and to oversee the reconstruction of the main residence. Several months into the work, Jystad informed FMP that the contract was void because it did not contain the statutorily required disclosures for a general contract constructing a new residence. FMP filed suit claiming damages for the full contract price, arguing that it was not a general contractor in this instance and was not hired for the purpose of constructing a new residence. The District court granted summary judgment for FMP.

HOLDING: The District Court's ruling is upheld, as it did not err when it determined that the contract was enforceable, and that it did not abuse its discretion in the award of damages. (Baker, McKinnon, Gustafson, Sandefur, Shea)

EMPLOYMENT

Borges v. Missoula Co. Sheriff's Office – 1/30/2018

FACTS: Missoula Co. juvenile detention officer Michael Borges received good performance reviews and was promoted. He was later diagnosed with autism which caused painful sensitivity to fragrances. In response to his complaints, the County adopted a policy banning perfumes and colognes. Borges expressed concern that the policy was inadequate. Staff encouraged him to excuse himself when he encountered offensive scents. He filed a complaint with the Human Rights Bureau (HRB) claiming that the County discriminated against him by failing to provide a reasonable accommodation, subjected him to a hostile environment, and retaliated by denying him a promotion. Due to increasing severity of his sensitivity, the County placed him on paid leave. HRB found no reasonable cause to believe that the County had discriminated against him. He resigned and sued the County. The District Court granted summary judgment to the County.

HOLDING: The District Court correctly ruled for the County because it engaged in a good faith effort to develop a reasonable accommodation for Borges, it accommodated his needs when he encountered offensive fragrances, and no reasonable fragrance policy could have fully shielded him from offensive fragrances in the workplace. (Baker, McGrath, McKinnon, Shea, Rice)

Blodgett v. State – 10/2/2018

FACTS: Jeffrey Blodgett began work as a probation officer, subject to a one-year probationary period. Blodgett reported what he believed to be ethical and public policy violations by the Chief Juvenile Probation Officer. The Chief Officer informed him by letter of her decision to terminate him that day for his disruptive conduct. She further informed him that as a probationary employee he had no grievance rights. Blodgett sued, alleging retaliation for whistleblowing. The District Court granted summary judgment for the State.

HOLDING: The Wrongful Discharge Act provides the exclusive remedy for wrongful discharge and specifically provides that employment may be terminated for any reason or no reason during a probationary period. The question was whether a whistleblower can be terminated in the probationary period. The Court previously held there are no exceptions in the law allowing for a lawsuit during the probationary period. (Gustafson, Shea, Sandefur, Baker, Rice)

Alexander v. MDC – 11/13/2018

FACTS: Montana Developmental Center (MDC) employee Christopher Alexander reported incidents when he was attacked or injured. After one incident he underwent shoulder surgery and returned to work but was restricted from physical contact with clients. MDC and DPHHS discussed possible accommodations that would allow him to restrain clients, but his doctor concluded that it would provide no significant protection from reinjury. Alexander proposed having two direct support professionals with him, but MDC found it unworkable due to staffing issues. Because MDC and Alexander could not identify an accommodation that would allow him to restrain clients and because he did not work with MDC to identify a vacancy for which he was qualified, MDC terminated him. He sued alleging disability discrimination. The District Court granted summary judgment for MDC.

HOLDING: The District Court correctly ruled for MDC, as it met its obligations to involve Alexander in an interactive process. Even if there were positions for which he may have qualified, MDC could not determine whether he was interested without his input. Alexander hampered the process and prevented MDC from accommodating him. (McKinnon, Baker, Gustafson, Sandefur, Rice)

Schulz v. JTL Group dba Knife-River – 11/27/2018

FACTS: Tye Schulz worked for Knife-River as a project superintendent. He was terminated in 2016 for not following orders from his supervisor and because he had refused to perform his duty to secure equipment. Schulz sued Knife-River alleging that it lacked good

cause to terminate him. The District Court granted summary judgment for Knife-River, concluding that Schulz's behavior violated Knife-River's Employee Policy Handbook – "failure to carry out an order of a supervisor", and its Safety Manual – "disobedience by an employee gives cause for immediate termination."

HOLDING: The District Court properly granted summary judgment for Knife-River. Schulz acknowledged in depositions that it was reasonable for his supervisors to expect that he would follow instructions, just as it was reasonable for him to expect that his supervisors would follow his instructions. Employers are still constrained by the reasonableness of their directives, which must be job-related. However, Knife-River's actions were reasonable under the circumstances. (Shea, McGrath, McKinnon, Sandefur, Rice)

Hirsch v. Choteau – 1/8/2019

FACTS: Choteau Public Works Director Kelly Hirsch was fired by the mayor. An offer to resolve Hirsch's claims was reached, but then rescinded by Hirsch. He sued for wrongful discharge. The District Court found for the city.

HOLDING: Hirsch argued that his initial acceptance was not an unconditional acceptance and that the agreement did not express sufficiently clear terms to constitute a settlement and with which he could agree. However, the essential terms of a settlement are the amount of the settlement and the release of all claims. The District Court is upheld. (Rice, McGrath, Gustafson, Shea, Sandefur)

Bollinger v. Billings Clinic – 2/12/2019

FACTS: Ronis Bollinger, an RN with Billings Clinic, was terminated for several confidentiality violations against hospital policy and dishonesty. She filed two Human Rights Bureau (HRB) complaints alleging disability discrimination and retaliation. Her complaints were dismissed in the HRB and in District Court.

HOLDING: The District Court did not err in concluding that Bollinger was properly terminated for dishonesty. She lied about removing a document containing confidential, sensitive, and protected health information. The privacy breach placed potential liability on the Clinic, interfering with its ability to determine the magnitude of the breach and what action it needed to take regarding patient notification. It prolonged the investigation, required additional Clinic time and resources, and raised the possibility that another person could get blamed for the privacy breach. (Full Court)

Jergens v. Marias Medical Center, Toole Co. Commissioners, and Frydenlund – 5/7/2019

FACTS: Jeanette Jergens worked at Marias Medical Center (MMC) for over 20 years. In 2015, she was placed on administrative leave after being accused of bullying and abusive behavior, pending investigation by an outside investigator. After being contacted by the investigator, Jergens' former supervisor Mary Frydenlund sent the investigator a letter detailing complaints about Jergens. After the investigation concluded, Jergens was fired. Jergens sued for invasion of privacy and defamation against Frydenlund, and wrongful discharge against MMC. The District Court dismissed the first two claims, and a jury found for Jergens on wrongful discharge. Jergens appealed the first two claims and MMC appealed the last.

HOLDING: The District Court is affirmed on all counts. Defamation and invasion of privacy must reach the bar of MCA 39-2-905 WDEA. This claim fails on both the publication and publicity requirements. A former supervisor accusing a subordinate of padding time sheets is not "publicity," even when accusations are made to an outside party, as it is not an invasion of privacy "to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons." The District Court did not err in submitting wrongful discharge to a jury, where a decision was affirmed in favor of Jergens. A new trial is not warranted as the evidence

admitted did not display a substantial prejudice to the Defendants. (Gustafson, McGrath, Sandefur, Shea, Rice)

Bucy v. Edward Jones – 7/30/2019

FACTS: Bucy, a financial advisor employed by Edward Jones, was terminated after an internal review. Bucy filed a complaint against Edward Jones for statutory blacklisting, statutory defamation, and interference with a prospective business relationship. Edward Jones moved to dismiss on the basis that Bucy's claims were subject to arbitration. The District Court denied arbitration of post-employment claims, concluding that the claims were not arbitrable within the scope of the agreements.

HOLDING: The District Court is reversed. The arbitration agreements were in fact enforceable and Bucy's claims were within the scope of those agreements, therefore making them mandatorily arbitrable. (Full Court)

Wage Claim of Mays and Sagebrush Sam's – 9/17/2019

FACTS: Sagebrush Sam's hired Elizabeth Mays pursuant to an Independent Contractor Agreement executed in 2013. Mays worked brief periods, pursued concurrent opportunities, and often declined work with Sam's. Sam's later terminated the relationship. She filed a wage claim in 2016 alleging that she was misclassified, worked under a single employment period, and was owed wages for hours worked. The Wage & Hour Unit determined that she was employed for several periods, but due to the 180-day limitation for filing claims she was only eligible for a portion of the wages. The District Court concurred. Mays appealed.

HOLDING: The District Court's ruling is consistent with this Court's holding in *Dundas* (Mont. 2017) in that a seasonal employee was not continuously employed for purposes of claiming wrongful termination. The wage hearing examiner noted that "Mays' on-and-off schedule was representative of an independent contractor relationship." This Court also concurs with the examiner's additional finding in that "each time Mays either left employment with Sam's when continued work was available or refused work that was offered, she voluntarily separated from her employment with Sam's." (Rice, McGrath, Gustafson, Sandefur, McKinnon)

Watters et al. v. Billings – 10/29/2019

FACTS: Billings Police Union members sued in 2009 claiming the City of Billings had incorrectly calculated longevity pay under their collective bargaining agreements (CBAs) and the Montana Wage Protection Act. The City asserted that it paid the benefit as provided in the CBA and that changes in successive CBAs introduced ambiguities which ultimately resulted in overpayment. In a prior appeal, the Montana Supreme Court remanded for a determination of whether the City owed the Officers unpaid longevity and other wages, penalties, costs and attorney fees. The District Court granted summary judgment to the City, determining that it did not owe unpaid longevity or other unpaid wages.

HOLDING: The District Court correctly granted summary judgment to the City on the Officers' claim for unpaid longevity. However, the District Court erred in dismissing the Officers' claims for unpaid straight-time and overtime on annual bonus pay as they were not dependent on the longevity claim. (Baker, McGrath, Shea, McKinnon, Rice)

INSURANCE

Marshall v. Safeco Ins. and Mid-Century Ins. – 3/13/2018

FACTS: Marcia Marshall was a passenger in a vehicle accident. She settled with the driver's insurer and the car owner's insurer. She

then brought claims seeking declaratory judgment and alleged Unfair Trade Practices Act (UTPA) violations by the insurers for improperly relying on the collateral source statutes to justify taking a $15,000 reduction against her settlement. The District Court granted the insurers' Rule 12(b)(6) motion to dismiss. Marshall appealed, contending that there had not been a "tort award," nor evidentiary hearing.

HOLDING: The District Court erred in holding that there was no justiciable controversy. Once the insurers settled, they became subject to the UTPA, under which insurers must adhere to their settlement practices. It also erred in dismissing pursuant to 12(b)(6). Marshall sufficiently pled a claim under the UTPA for which relief may be granted. It failed to consider the plain language of the collateral source statute and whether it was applicable in Marshall's case. (Gustafson, McGrath, Shea, Sandefur, McKinnon)

Gazelka v. St. Peter's Hospital – 6/19/2018

FACTS: Jessica Gazelka received treatment from St. Peter's Hospital (SPH) for motor vehicle injuries. SPH billed her directly because she had no health insurance, but almost all her costs were covered by another party's insurance or discounted by SPH's 50% financial need discount. She sued alleging that the Preferred Provider Agreements Act (PPAA) for insured patients discriminates against uninsured patients. The District Court granted summary judgment for SPH, ruling that while the PPAA creates similarly situated classes, it did not violate Gazelka's rights.

HOLDING: Because the parties did not brief the issue and because the question is not appropriately before the Court, it declines to determine whether SPH entering into PPAs with insurers pursuant to the PPAA constitutes state action. The District Court incorrectly determined that Gazelka properly alleged similarly situated classes because patients without the most favorable PPA pay more for the same treatment. SPH did not unconstitutionally discriminate against Gazelka based on her social condition as an uninsured. Whether one has health insurance is not a social condition for equal protection analysis. (Full Court)

Cramer v. Farmers Ins. Exchange – 8/14/2018

FACTS: Jamie Cramer was one of five passengers in a vehicle hit by an at-fault vehicle. She stipulated that her damages were $75,686.81. She was apportioned $27,000 of the tortfeasor's liability limits for her bodily injury claims, as other passengers also sustained injuries, so she was under insured. GEICO, which insured the vehicle she was in, paid its limit of $25,000. Farmers, another insurer of hers, paid $21,186.81 med-pay, offsetting some of its payment due to GEICO's overpayment. Overall she received $73,186.81 – $2,500 less than her damages. The District Court found that Cramer was not entitled to recover more than her stipulated damages and granted summary judgment to Farmers and ordered it to pay $2,500 under insured motorist coverage (UIM) to Cramer.

HOLDING: The District Court erred in applying a complete dollar-for-dollar offset instead of the 2/3 pro rata offset provided by Cramer's policy. The UIM provision in Cramer's policy provides that Farmers "will pay all sums which an insured is legally entitled to recover as damages" from the tortfeasor. Farmers is not entitled to a dollar-for-dollar offset of the excess portion of the GEICO UIM payment and must pay its contractual 2/3 of Cramer's damages. There are no provisions that credit its UIM obligations for an overpayment by another insurer. The District Court correctly determined to offset Farmers' UIM obligation to Cramer by its med-pay payments to her. Farmers is therefore obligated to pay her $11,271.06 under her UIM coverage. Because she was forced to sue to obtain the full benefit of her policy, she is entitled to recover reasonable fees. (Rice, McGrath, Baker, McKinnon, Gustafson, Sandefur)

Cross, Brady, Redfield v. Robert & Sherle Warren, Grass Chopper, Taylor Warren, and Progressive Ins. – 3/5/2019

FACTS: Taylor Warren crossed the centerline and crashed his parents' vehicle into a vehicle carrying Cross, Brady, and Redfield. Taylor

was an insured driver and the truck was an insured vehicle under a Progressive policy which covered all four members of the Warren family and included separate liability for each of their four vehicles. Each vehicle's coverage provided bodily injury liability limits of $100,000/$300,000, although the premiums were different. Progressive paid $100,000 to each Plaintiff under one vehicle's coverage, a Sierra. Plaintiffs claimed that they were entitled to stacked limits on all four vehicles. Progressive declined to stack. The District Court granted summary judgment for Defendants.

HOLDING: The District Court correctly granted summary judgment for Defendants. Progressive's declarations page lists 3rd-party limits and prohibits stacking "unless the policy contract or endorsements indicate otherwise," and this prohibition was reinforced by specific terms within the policy itself. Premiums for Warrens' policy represent consideration for separate liability for each vehicle based on their separate use. (Rice, McGrath, Baker, Shea, McKinnon). Dissenting justices argued that §33-23-203(1)(c) requires that an insurer file premiums which "actuarially reflect the limiting" of coverages separately to specific covered vehicles. It does not require insurers to file any statement or proof showing the actuarial correlation. An issue remains as to whether Progressive's rates "actuarially reflect the limiting of those coverages separately to specific covered vehicles." (Sandefur, Gustafson)

Shortly after her appointment to the Montana Supreme Court, Justice Ingrid Gustafson delivered the keynote address at the Montana Chamber's 2018 Business and the Law Conference

US Specialty Ins. v. Estate of Ward and Estate of Melotz – 3/26/2019

FACTS: Darrell Ward passed away in an airplane crash. His estate filed a claim to the insurance company of the pilot, seeking stacked claims under the insurance coverage by USSIC for three separate aircraft owned by the pilot, each policy with a $100k per-passenger "per occurrence" limit for death or bodily injury.

HOLDING: The policy language was unambiguous and allows for each policy coverage to apply only to each distinct occurrence with each distinct aircraft. Limiting liability claims to one per person applies, policies limiting stacking does not render the policy illusory or deceptive, and no reasonable expectation of stacked coverage exists. The clear language of the insurance policy in this case specifically limits the policy to the named aircraft, which has been correctly identified as a 3rd-party policy. (Full Court)

King v. State Farm Mutual Auto Insurance – 9/3/2019

FACTS: Kyra King was a passenger in a vehicle that was hit by a drunk driver near Malta in 2014. King sued the drunk driver and State Farm, which insured the vehicle in which she was riding. King and State Farm did not agree on the value of her claim and went to trial. The jury found that King suffered $410,000 damages. She later moved for attorney fees, expenses and costs. State Farm argued that she was not entitled to her costs because they were not timely filed and exceeded those allowed by statute. The District Court entered judgment against State Farm in the amount of the policy limit of $50,000, awarded King $20,000 in attorney fees, but denied her claimed litigation expenses and costs.

HOLDING: King was not entitled to her taxable costs because they were found to not be timely filed. However, this Court reverses the

District Court's conclusion that King was not entitled to her nontaxable costs because those costs are part of the insurance exception to the American Rule. (Gustafson, McGrath, Rice, Baker, Sandefur)

JURISDICTION

DeLeon, Kingery, and Beck v. BNSF – 9/11/2018

FACTS: DeLeon, Kingery, and Beck sued BNSF in Yellowstone County for injuries allegedly sustained in Texas and Missouri. BNSF moved to dismiss the case for lack of personal jurisdiction. The Plaintiffs argued that BNSF consented to general personal jurisdiction in Montana when it registered to do business and subsequently conducted business in Montana. In 2017, the US Supreme Court held in another jurisdiction case involving BNSF that mere "in-state business" is not enough "to permit the assertion of general jurisdiction," and that BNSF's contacts in Montana were insufficient to subject it to general jurisdiction.

HOLDING: Consent jurisdiction is jurisdiction "that parties have agreed to, either by accord, by contract, or by general appearance." Because it is based on the parties' approval and agreement, the scope of the consent must be defined and limited accordingly. The Court rejects Plaintiffs' argument that BNSF's activities in Montana are enough to confer general personal jurisdiction. (McKinnon, McGrath, Rice, Shea, Gustafson)

Ford Motor v. Best – 5/21/2019

FACTS: Markkaya Gullett died in a car crash in Montana due to tire failure in her 1996 Ford Explorer, which was assembled in Kentucky and originally sold at a dealer in Washington. Her PR sued Ford in Montana for several tort claims including negligence. Ford moved to dismiss for lack of personal jurisdiction, which the District Court denied. Ford appealed for supervisory control.

HOLDING: Personal jurisdiction was properly granted. Montana's long arm statute gives personal jurisdiction over non-residents for tort claims that occur within the state. Ford produced the vehicle that allegedly caused the tortious injury. Ford purposefully availed itself to Montana's laws when engaging in business within the state. Ford serves the market in Montana and could reasonably foresee being brought to court within the state of Montana under the stream of commerce plus theory. The fact that the specific vehicle in question was not manufactured or originally sold in Montana does not matter when many other vehicles made by Ford are purposefully sold in Montana. (Full Court)

Lucero as PR for Gullett v. Ford Motor, Goodyear Tire & Rubber, Kelly-Springfield Tire, Lloyd's Tire Service, and Tires Plus – 7/2/2019

FACTS: Following *Ford Motor v. Best*, Gullett's PR Charles Lucero sued Ford and tire entities in Cascade County alleging strict liability for design defects, failure to warn and negligence. Ford moved to dismiss for lack of personal jurisdiction or for change of venue to Mineral County or Missoula County. Tires Plus filed for change of venue to Mineral or Sanders County. The District Court denied all motions. Defendants appealed on grounds of venue.

HOLDING: Venue is appropriate in the district in which a Plaintiff resides, or, if the Plaintiff is deceased and the suit is being brought by a representative, in the district where the representative resides. (Gustafson, McGrath, Sandefur, Shea, Baker). Dissenting justices note that in the case of a deceased plaintiff, venue should be appropriate in the district where the deceased resided prior to their death. Doing otherwise bestows the representative with more rights than the deceased would have were they not dead. (McKinnon, Rice)

LAND USE/ENERGY/ENVIRONMENT

ARCO v. Bidegaray – 12/29/2017

FACTS: The Anaconda Smelter processed copper ore from Butte for nearly 100 years before shutting down in 1980. CERCLA was enacted in 1980 to foster cleanup of sites contaminated by hazardous waste. EPA designated the area impacted by the smelter as a Superfund site in 1983, and in 1984 ordered ARCO to begin a remedial investigation. Property Owners sued ARCO in 2008 claiming common law trespass, nuisance, and strict liability and seeking restoration damages. ARCO requested summary judgment in 2013 on the basis that CERCLA barred the claims. The District Court denied ARCO's motions. ARCO petitioned for supervisory control to vacate the orders denying summary judgment.

HOLDING: Property Owners' claim for restoration damages arises solely under Montana common law and does not implicate federal law or cleanup standards. They are not seeking to compel EPA to do or refrain from any action. ARCO's argument that EPA has sole authority to select remedies ignores CERCLA's savings clauses which contemplate state law remedies. Property Owners' claim does not prevent EPA from accomplishing its goals. (Shea, Judge Manley sitting for McGrath, Judge Kutzman sitting for Rice, Wheat, Sandefur, Baker) The dissenting justice argued that Property Owners' restoration claim does conflict with the ongoing EPA investigation and CERCLA cleanup. (McKinnon)

MEIC and Sierra Club v. DEQ and Western Energy – 9/10/2019

FACTS: DEQ issued Western Energy a permit in 2012 renewing its 1999 Pollutant Discharge Elimination System Permit to discharge pollutants from its Rosebud Coal Mine into waters tributary to the Yellowstone River, with an exemption for "ephemeral" rain and snow water. MEIC and Sierra Club sued alleging that the renewal violated the Montana Water Quality Act and the federal Clean Water Act. DEQ modified the permit in 2014. The District Court granted summary judgment to MEIC and Sierra Club, invalidating the modified permit. Defendants appealed.

HOLDING: This Court defers to DEQ's interpretation when it comes to exempting waters with ephemeral characteristics from the legal standards. DEQ's interpretation is therefore lawful, and the District Court is reversed. (Full Court)

Mines Management Inc., Newhi Inc., and Montanore Minerals Corp. v. Estate of Bakie and Optima – 11/26/2019

FACTS: Concerning Mines Management Inc.'s (MMI) right to access its patented claims on the Montanore Project in Libby, MMI filed a complaint against the defendants seeking clarification that the mining claims owned by the defendants were invalid. Defendants counter sued, alleging that MMI's use of the audit and underground tunnel on the property constituted a trespass. The District Court granted summary judgment to Defendants, holding that MMI was liable for trespass because it ruled that Bakie's claims were valid.

HOLDING: The District Court is reversed, as it erred in granting summary judgment to Bakie because there was no evidence of valuable mineral deposits on the claims at issue, a requirement in a case like this. Therefore, the District Court also erred in determining that MMI committed trespass. Summary judgment granted to MMI. (McGrath, Shea, Baker, Gustafson, Rice)

LANDLORD-TENANT

Hines v. Topher Realty – 3/13/2018

FACTS: Elizabeth Hines provided Topher Realty notice of intent to vacate her apartment in 11/15. Topher sent a parcel informing her that the property was to be cleaned and ready to re-rent by the 12/2 move-out date. Upon inspection, Hines would be given 24 hours

or until her move-out date to complete cleaning. The documents stated that if the cleaning was not done or was unsatisfactory, a cleaning service would be hired, and costs deducted from the deposit. A final walk through was agreed upon by both parties during which Hines advised that she was not finished with cleaning. Hines moved out and admitted to having left some cleaning unfinished. Topher hired a cleaner and used the cleaning deposit. Hines claimed before Justice Court that the cleaning deposit was wrongly withheld, arguing that the landlord was required to conduct a second inspection with the tenant to inform of any additional cleaning. Topher appealed to District Court after Justice Court found for Hines. The District Court reversed, noting that §70-25-201(3) does not require the inspection to occur after the tenant has cleaned or vacated the property. Hines appealed.

HOLDING: The District Court is affirmed. Topher complied with Montana law on the treatment of cleaning deposits. Failure to clean before the inspection does not place an additional burden on the landlord to perform additional inspections. Hines was provided clear notice of the required cleaning expected of her before vacating. Topher provided cleaning checklists, an inspection, and a list of items that still needed cleaned after 12/2. This Court notes that in interpreting a statute, its function is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted"; and "It is not our prerogative to read into a statute what is not there." (McGrath, Shea, Rice, Baker, McKinnon)

Federal National Mortgage Association v. Stafford – 5/14/2019

FACTS: Gail Stafford leased a house in 2010 with a landlord-tenant agreement for one year of leasing followed by a month-month option. After several years, the landlord died and the mortgage defaulted. The property was auctioned in 2012, and even though Stafford was the only bidder, the auctioneer abruptly ended the auction saying Stafford's bid was too low. According to the records, Fannie Mae purchased the property at auction, and later served Stafford notice that her tenancy was expiring in 2013. Stafford refused to vacate. Mae sued for unlawful detainer. Stafford counterclaimed that Mae's ownership was unlawful as she did not have a representative at the public auction and filed for quiet title as a 1-year leasehold. Stafford filed for summary judgment in 2014, to which Mae responded with an affidavit from the auctioneer that Fannie Mae was the only bidder at auction. In 2018, Mae quitclaimed the title to a 3rd party, and filed a motion to dismiss because Mae no longer owned the property. Stafford filed to add several defendants, including the 3rd party, and quiet title for ownership. The District Court granted the motion to dismiss. Stafford appealed.

HOLDING: The District Court is affirmed. Stafford's final claims in 2018 should have been filed years before; her 1-year leasehold request may not have been formally accepted, but Stafford did in fact continue to live on the property for another year after filing, and so had already received the requested relief. This renders the later counterclaim for full ownership moot. Mae cannot seek to evict a person off a property they no longer own. The conduct leading to Stafford's presence on the property cannot re-occur, as Mae no longer owns the property, and the court correctly dismissed for mootness. The District Court acted within its discretion when denying Stafford's request to amend. Her amended claims and motions were known for several years, and Stafford did not file until after Mae filed a motion to dismiss. (McKinnon, Sandefur, Shea, Rice, Gustafson)

Pummill, Robertson, and Black Gold Enterprises v. Patterson – 11/5/2019

FACTS: Black Gold Enterprises LLC (BGE) rented out a commercial property in Missoula with primary tenants Patterson, Pummill, and Robertson; Patterson owned the tenant entities. No formal rental agreement ever existed, as Patterson paid amounts he deemed reasonable based on what the tenants could afford and BGE's needs. The tenants later voted to allow BGE to retain counsel to execute rental agreements to ensure timely payments from all tenants. Patterson's entities then owed substantial past-due rent. Patterson ignored the resolution, refused to pay the past-due rent, and refused to enter into agreements to establish terms for future rent. BGE struggled to pay its mortgage. Pummill and Robertson filed derivative claims against Patterson in 11/18, asserting that he

and his entities' actions were harming BGE. They later moved for a preliminary injunction and appointment of a receiver. After the District Court granted these motions, Patterson appealed.

HOLDING: It was within the District Court's discretion to appoint a receiver. It was presented with substantial evidence that Patterson's conduct threatened BGE's property and that a receiver was necessary to stabilize the business, preserve its assets, and keep it operating. (Shea, McGrath, McKinnon, Gustafson, Sandefur)

Attendees at the Montana Chamber's 2020 Business Days at the Capitol heard from the candidates for Attorney General (photo credit: Jonathan Ambarian, KXLH-Helena)

MEDICAL MALPRACTICE

Richards v. KRMC – 1/16/2018

FACTS: Harry Richards accussed Lincoln Co. Dep. Steve Short of falsely alleging that Richards and Short's wife Raylee – an employee of a branch of KRMC – had sex in an exam room and that another KRMC employee refused to provide a written statement refuting the allegations. He sued KRMC alleging that it failed to properly treat him, inappropriately discharged him, and failed to provide a statement refuting Short's allegations. During discovery, Richards did not disclose any standard-of-care expert. The District Court granted summary judgment for KRMC.

HOLDING: The District Court correctly granted summary judgment because Richards failed to disclose an expert to support his medical malpractice allegations. KRMC had no legal duty to provide a statement refuting Short's allegations as a result. Richards failed to set forth any authority that KRMC is responsible for Short's actions. (McKinnon, Sandefur, Shea, Baker, Rice)

Estate of Bushong et al v. Huebner and Great Falls Clinic – 7/17/2018

FACTS: David Bushong visited podiatrist David Huebner for a soft-tissue mass on the bottom of his foot. Huebner treated it as a ganglion cyst with no biopsy. It was later diagnosed by another podiatrist as a rare and aggressive cancer. Bushong died from it in 3/09. His family sued Huebner and Great Falls Clinic alleging that he was negligent in failing to diagnose his cancer. The Great Falls jury found 9-3 that Huebner and the Clinic were not negligent in Bushong's treatment.

HOLDING: The jury did not need to reach the issue of causation in light of its finding. The District Court did not abuse its discretion in denying a new trial. Nor did it abuse its discretion in determining that the Plaintiffs' rights to a fair trial were impeded. The comments here all related to credibility of experts, which a jury properly weighs. (Baker, McGrath, McKinnon, Rice)

Melton v. Speth – 9/4/2018

FACTS: Steven Speth performed a lower spine fusion on John Melton, but it was not properly fused. Speth conducted follow-up surgery three years later. Melton sued alleging malpractice over the first surgery. He disclosed Steven Graboff as his standard of care expert, who explained in his deposition that he had performed his last surgery in 2004 and that he had never used the new surgical method because it was introduced in 2009. Speth moved for summary judgment, arguing that Graboff was not qualified because he

had not performed surgery since 2004. The District Court agreed and granted summary judgment. Melton appealed.

HOLDING: The District Court correctly held that Graboff was not qualified under §26-2-601(1)(a) which requires that a medical malpractice expert (1) "routinely treats or has routinely treated within the previous five years the diagnosis or condition" that is "the subject matter of the malpractice claim," (2) currently "provides the type of treatment that is the subject matter of the malpractice claim," or (3) "is or was within the previous five years an instructor of students in an accredited health professional school or accredited residency or clinical research program relating to the diagnosis or condition or the type of treatment that is the subject matter of the malpractice claim." (Rice, McGrath, McKinnon, Baker, Sandefur)

Griffin v. Lewis and Nichols – 4/16/2019

FACTS: Dr. Griffin was evaluated by the two Defendants — Nichols, a surgeon, and Lewis, an OB-GYN — for abdominal pressure, with neither diagnosing cancer. After several more evaluations by doctors in Helena, Griffin traveled to Michigan for surgery and was diagnosed with stage 4 uterine cancer. Griffin sued for negligence, asserting that had the first two doctors performed a colonoscopy or a pelvic exam, the cancer would have been discovered while it was still stage 1. Griffin brought in Dr. Beck as an expert witness. Beck testified that she does not routinely perform colonoscopies or pelvic exams. Lewis and Nichols moved for summary judgment in light of this testimony. The District Court granted the motion.

HOLDING: The District Court is affirmed. Dr. Beck did not rise to the expert qualifications as required by law, as she did not regularly perform similar diagnostic examinations as the Defendants. (Baker, Gustafson, Shea, Sandefur, Rice)

DeMoney v. Kaufman – 8/13/2019

FACTS: Dr. Raymond Kaufman performed a sinus surgery and tonsillectomy on Andrew DeMoney in 2013. He successfully completed the sinus procedure, but complications ensued during the tonsillectomy. DeMoney sued Kaufman for malpractice. Kaufman presented expert testimony on meeting the standard of care. The District Court ruled that fact issues existed and denied DeMoney's motion.

HOLDING: The District Court holding is affirmed. "A district court should grant judgment as a matter of law only where there is a complete lack of any evidence which would justify submitting an issue to the jury, considering all evidence and any legitimate inferences that might be drawn from it in a light most favorable to the opposing party." *Wagner* (Mont. 2016). Because DeMoney did not present expert testimony regarding the standard for informed consent, the District Court correctly granted Kaufman's motion. (Gustafson, McGrath, McKinnon, Sandefur, Rice)

Howard v. Replogle – 10/15/2019

FACTS: Howard sued her surgeon, Dr. Robert Replogle, and Spineology, a company that invented technology that Replogle used as part of the procedure. She claimed that Replogle did not obtain her informed consent for surgery because he did not disclose a financial interest that he holds in Spineology. A jury found that Replogle was not negligent on both the matters of informed consent and the way in which he performed the surgery. The District Court denied Howard's motions for a retrial.

HOLDING: The District Court is affirmed. Replogle was not required to disclose the financial interest as part of informed consent prior to surgery, and a new trial was not warranted as a result. (Gustafson, Shea, McKinnon, Baker, Rice)

TAXATION

Hiland Crude v. Department of Revenue – 7/3/2018

FACTS: Prior to 2013, the Montana Department of Revenue (DOR) assessed Hiland Crude's oil gathering systems locally as Class 8 property, taxed at 1.5-3% of market value. In 2013 it began centrally assessing them as Class 9, taxed at 12%. Hiland paid under protest and filed a declaratory action, arguing that they should be Class 8 because the gathering systems are "flow lines and gathering lines." The District Court granted summary judgment for Hiland. DOR appealed.

HOLDING: The District Court correctly held for Hiland. DOR argued that "pipeline carrier" definitions do not distinguish between gathering and transmission lines; rather, the term applies to all pipelines that carry oil for compression, which is Class 9. It is plain from the statutes defining Class 9 and Class 8 that the Legislature intended to differentiate larger transmission lines from pipelines that gather and transport oil or gas "from an oil or gas well to an interconnection." §15-6-138(2)(c). (Baker, McGrath, Shea, Rice, Gustafson)

Exxon Mobil v. Department of Revenue – 7/9/2019

FACTS: Exxon made a "water's edge" election effective tax years 2008-10 which allowed it to exclude foreign subsidiaries from its combined group return. It owned several domestic subsidiaries that had 20% or less of their payroll and property outside the US (80/20 corporations). Pursuant to Montana law, it excluded its foreign subsidiaries and its 80/20 corporations from its water's edge combined group return. Exxon claimed an 80% income exclusion for its 80/20 corporations' after-tax net income, but also a 100% exclusion for the dividends it received by applying an IRC 243 deduction. DOR determined that Exxon was only entitled to an 80% exclusion for dividends it received from its 80/20 corporations and that it needed to apportion and pay taxes on remaining 20% of the dividends. As a result, DOR assessed an additional tax of over $4 million. Exxon challenged the adjustment. The District Court entered judgment for DOR in that the dividends were apportionable as income and that Exxon was not entitled to a 100% exclusion.

HOLDING: The decision is reversed, as DOR erred by determining that Exxon was entitled to only an 80% exclusion for the dividends at issue. Unless the Legislature expressly provides otherwise, a corporation is entitled to federal deductions for computing its Montana tax liability. Therefore, multinational corporations filing under the water's-edge provisions may exclude actual dividends they receive from 80/20 corporations under IRC 243. (McKinnon, Rice, Baker, Sandefur). The dissenting justice argued that 80% of dividends must be excluded from income. It stands to reason that if 80% are excluded, then 20% of the received dividends must be included. Thus IRC 243 does not apply. (McGrath)

Vision Net v. Department of Revenue – 8/27/2019

FACTS: Vision Net, a Montana communications technology company, has equipment in 32 counties connected by fiber optic cables and achieves a statewide network by leasing access to unused fiber from other phone companies. Historically, its properties have been locally assessed by the counties in which the property is located and were classified by DOR as Class 4 commercial and Class 8 business equipment. In 2015, DOR reclassified it as a centrally assessed company, which increased its tax liability by over 300%. Vision Net challenged the reclassification. The District Court granted summary judgment to DOR. Vision Net appealed.

HOLDING: DOR properly assessed Vision Net's property. Vision Net argued that it does not operate a single and continuous inter-county property as required by §15-23-101(2), but the District Court and DOR deemed that it operates as a "functionally integrated property" that broadly provides internet services across the state. Vision Net contended that this amounts to "use" of the cables,

not "operation" as required by 101(2). Ownership of the property is considered in determining central assessment, but the operative phrase is "a single and continuous property operated in more than one county." Its overall network is "functionally integrated over a wide area," allowing it to "enjoy a unity of use and management," and is operated as a single and continuous property. (Rice, McGrath, McKinnon, Gustafson, Shea)

TORT

Daley v. BNSF – 8/14/2018

FACTS: Kenneth Daley worked for BNSF's predecessor from 1967 to 1986, and alleged injury from exposure to asbestos. A Kalispell jury found after a 7-day trial in 7/17 that BNSF did not violate the standard of care under the Federal Employers Liability Act (FELA). Daley then moved to enter default judgment against BNSF for litigation conduct, which was denied.

HOLDING: The District Court did not err in excluding several items at trial. Nor did it abuse its discretion by holding that an exception to a fee award had not been established in a discovery issue dispute. Daley's significant delay required the parties to engage on a discovery issue shortly before trial that should have been long resolved. (Rice, McKinnon, Baker, Gustafson). The Dissent objected to the District Court's discretionary award of fees to BNSF. (Sandefur)

Norbeck v. Flathead Co., DEQ, and Birk Engineering – 4/9/2019

FACTS: Birk Engineering was hired in 2005 by the developer of a subdivision in Kalispell for engineering services. The DEQ filed a Certificate of Subdivision Approval in April 2008, stating that the water systems needed to be completed within 3 years, which would allow purchasers to start buying lots before the sites were complete. Norbeck purchased a partially developed home and lot in the subdivision in 2008. The house was completed in 2010 with prior knowledge that the house still had no water. Another contractor then spent several weeks repairing various problems with the water. Although Norbeck didn't respond to several opportunities to engage in the proper legal channels, they later sued Defendants collectively in 2014. All defendants individually moved for summary judgment on statute of limitations, no duty of care, etc. The District Court ruled for the Defendants in all cases. Norbeck appealed.

HOLDING: Norbeck allowed the statute of limitations to run out and incorrectly applied Montana law. They waived their right to dispute their claims accrued later than May 1, 2010 because they did not appeal on those grounds. The District Court is affirmed. (Gustafson, McGrath, McKinnon, Baker, Sandefur)

WORKERS' COMPENSATION

Moreau v. Transportation Ins. – 1/2/2018

FACTS: A former W.R. Grace mine worker, Edwin Moreau, died of asbestos-related lung cancer in 2009. His widow filed an occupational disease claim with Transportation, which denied it. She then filed a petition seeking determination of liability for Edwin's medical care. Transportation accepted liability in 2013 and reimbursed Medicaid, other providers, and Moreau individually for medicals they had paid. Libby Medical Plan, established by W.R. Grace, paid $95,846 in medicals. The Plan and Grace refused any reimbursement from Transportation. Moreau then demanded the $95,846 from Transportation because he had not been made whole for all losses and damages. The lower court judge determined that all of Edwin's medicals had been paid, he had no liability to any health provider, and he had no right to claim any further payment from Transportation.

HOLDING: The "made whole" concept in the context of work comp does not apply to the recovery of comp by the injured worker or his estate, but can be applicable when a worker recovers damages from a 3rd party tortfeasor on a claim for personal injury outside of the comp system, in which case the comp insurer may not subrogate against the tort damages until the worker has been made whole. This is not one of those subrogation cases. There has been no 3rd-party tort recovery. Moreau and his Estate were entitled only to the medical benefits provided by the WCA, primarily §704, and there is no dispute that those benefits were provided. (McGrath, Sandefur, Baker, McKinnon, Rice)

State v. Ailer – 2/6/2018

FACTS: Matthew Ailer was in a motor vehicle accident while driving his employer's van. He filed a claim with Montana State Fund (MSF) for an arm injury. He asserted that his symptoms worsened after treatment and was eventually released to full duty. Ailer filed a 2nd claim reporting that his arm went numb as he was lifting the burnisher and it fell on him. A co-worker later claimed the accident was staged, saying Ailer asked him to put the burnisher on top of him after they finished cleaning a store and reluctantly agreed after Ailer promised to pay him $20,000 from settlement of his claim. Ailer was charged with felony theft and convicted by a jury.

HOLDING: This Court upholds the conviction. (McGrath, McKinnon, Shea, Baker, Sandefur)

Murphy v. WestRock – 3/20/2018

FACTS: Carl Murphy hurt himself in 1991 at Smurfit-Stone and it accepted liability. Murphy reached maximum medical improvement in 1993. He began treating again in 1998 with chiropractor Jim Helmer when his symptoms worsened after pushing a car. Helmer opined that his symptoms were "a direct result of his 1991 injury." He recommended continued chiropractic with lifting restrictions. Murphy presented claims to Smurfit's successor WestRock, which denied on the ground that they were premised on the determination of a chiropractor rather than a physician as required by the 1991 WCA. Westrock obtained an independent medical examiner (IME) from an orthopedic surgeon who opined that his restrictions were unrelated to his 1991 injury. WestRock moved for summary judgment, arguing that the 1991 WCA requires a "physician" to determine medical restrictions, and doesn't include chiropractors. The Workers' Compensation Court (WCC) granted summary judgment for WestRock.

HOLDING: A previous ruling that the Montana Supreme Court had "made no exception" to the general rule applying comp statutes in effect on the date of injury was incorrect. Its reasoning should have been limited to the narrow issue of which statute of limitations applied. The definition of physician to be applied to Murphy's claim is the one provided in "the statutes in effect at the time of trial." Sandler correctly followed our most recent holding, but reversal is required because the over-broad analysis in *Fleming* (2008) was in error. WestRock's argument is not preserved for appeal. (Rice, McGrath, McKinnon, Sandefur, Gustafson)

Ramsbacher v. Jim Palmer Trucking – 5/8/2018

FACTS: David Ramsbacher was referred by Payroll Plus Corp (PPC) to Jim Palmer Trucking (JPT). He was injured in late 2013 while working on a truck that he had been driving. PPC's comp insurer paid benefits. He then sued JPT alleging failure to provide a safe workplace. JPT responded that his claim was barred by comp exclusivity. The District Court granted summary judgment for JPT. Ramsbacher appealed, contending that §39-8-207(8)(b)(i) – which extends comp exclusivity from a professional employer organization (PEO) to its client – violates Art. II §16 right of full legal redress.

HOLDING: The District Court was correct. Ramsbacher argued that PPC was his immediate employer and contends that Art. II §16 permits only one immediate employer. This Court saw nothing in Art. II §16 that precludes a worker having more than one immediate

employer. PPC handled administrative duties while JPT controlled day-to-day duties of the employees assigned to it pursuant to their contract. Therefore, JPT was his employer-in-law under the PEO Act. Ramsbacher further argued that JPT was not entitled to comp exclusivity because it did not provide his comp as required by Art. II §16. However, its cost was factored into the PEO agreement and was based on JPT as the employer. Although PPC may have directly paid the insurer, JPT paid PPC for obtaining and maintaining comp. Therefore, JPT is an immediate employer of Ramsbacher and is thus entitled to the benefit of comp exclusivity. (Full Court)

Neisinger v. New Hampshire Ins. – 10/9/2018

FACTS: The WCC ruled that New Hampshire Ins. (NHI) did not have good cause to have Michael Neisinger attend an IME with a psychiatrist because it had not first authorized him to see a treating psychiatrist as recommended by one of his doctors. NHI requested for the Montana Supreme Court to stay the order.

HOLDING: NHI may ask Neisinger's treating physicians why they think the injury caused a psychological condition for which Neisinger needs treatment. If NHI is not satisfied with the treating physician's answers, it may then have good cause for an IME with a psychologist or a psychiatrist. But NHI has not shown good cause for a stay on the lower court's ruling. (Baker, Gustafson, McKinnon, Shea, Rice)

Robinson v. MSF - 10/23/2018

FACTS: Janie Robinson suffered a brain injury due to a heat stroke while working in 1996 and from a back injury in 2003. In 2004, Robinson filed challenges in the WCC to the managed care provisions of the WCA and the Department of Labor and Industry's (DLI) medical utilization rules. These actions were dismissed because her claims did not arise under the challenged provisions. She alleged that MSF's handling of her claims violated her rights to privacy, substantive due process, and freedom from reasonable searches by obtaining a 2nd IME without good cause. The District Court granted summary judgment for MSF. Robinson appealed.

HOLDING: The District Court did not err by denying Robinson's claims. Robinson contended that "doctor shopping violates constitutional guarantees" and allowing insurers to compel serial IMEs "unduly abridges privacy rights" of comp claimants. However, the comp system presumes injury without proof of fault and requires payment of benefits. The Legislature intends the system to be "primarily self-administering" and "minimize reliance upon lawyers and the courts." The challenged provision allows insurers to obtain IMEs without having to petition the Court. This is balanced by requiring IMEs to be scheduled "with regard for the employee's convenience, physical condition, and ability to attend at the time/place that is as close to the employee's residence as practical" and that a claimant "is entitled to have a physician present at any examination." The provisions of §605(a) are justified by the State's compelling interest in the orderly administration of the comp process. (Rice, Sandefur, Baker, Gustafson, McKinnon)

Richardson v. INA – 7/16/2019

FACTS: In 2006, Brian Richardson and other security guards at Billings Clinic were involved in an altercation with a psychiatric patient, which was noted in the Daily Activity Report (DAR), including a description of the injuries sustained by Richardson. One that was not filed in the DAR was an injury to Richardson's nose, which he reported to his manager, who told him he didn't need to file paperwork unless he was going to seek treatment. In 2008, Richardson was diagnosed with a nasal fracture, and the ENT attributed the symptoms to the 2006 injury. Richardson had surgery and later attempted to file a comp claim after learning his personal insurance would not cover the costs. The WCC and District Court denied for failure to timely file. Richardson appealed.

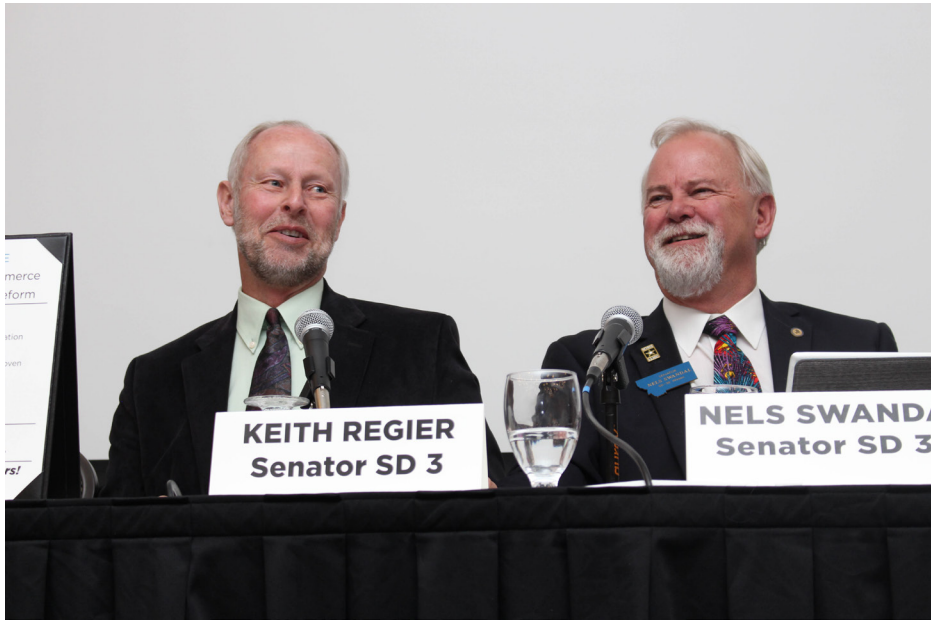
HOLDING: The District Court is affirmed. Informal reporting through the DAR is insufficient to constitute notice to the employer, especially as it did not include any documentation of the injury to the nose. Under MCA 39-71-601, lack of knowledge of the injury can

extend the statute of limitations for filing at most 24 months following the accident. (Baker, McGrath, Rice, Gustafson, McKinnon)

OTHER

Ascencio v. Orion International – 5/15/2018

FACTS: Orion International was a Montana business that performed background checks on prospective employees. Ascencio applied to Missoula Bone & Joint (MBJ), which retained Orion to perform a background check. The check provided prohibited, obsolete information. Orion later issued a corrected background check. MBJ terminated Ascencio at the conclusion of her 6-month probation, noting concerns with her background check as well as requests for time off, leaving early, and personality conflicts with a co-worker. She sued Orion, asserting claims in her individual capacity and for class action. The District Court denied Ascencio's motion to certify the class, determining that she failed to establish predominance and superiority as required by Rule 23(b)(3).



Two-time Senate Judiciary Committee chairman Keith Regier (Flathead) shares a laugh with former district judge and state senator Nels Swandal (Wilsall) at the Montana Chamber's 2018 Business and the Law Conference

HOLDING: The District Court did not abuse its discretion by denying class certification. Ascencio failed to support her allegations with evidence to demonstrate why prosecuting as a class action was superior to individual actions. Ascencio also failed to articulate why it would be difficult for individuals to pursue their claims separately. (Shea, Gustafson, Sandefur, Rice). The Dissent stated that Ascencio satisfied both the superiority and predominance prongs of Rule 23(b)(3). The parties agreed that Orion provided prohibited obsolete information in consumer reports; that is the predominant issue. (McGrath)

BNSF and Ahern v. Bidegaray – 3/12/2019

FACTS: Dannels won a FELA claim against ex-employer BNSF in 2014, and then proceeded to sue on a bad-faith claim under common law and the MCA. Discovery disputes ensued regarding the previous 15 years of employee liability claims and outcomes. BNSF declined Dannels demand for closed and current FELA claims, arguing that reporting such disputes over many departments across the country would result in hundreds of hours of work to compile, and additionally that much of the work related to those claims and outcomes is protected work-product. Bidegaray (District Court) granted a motion to compel and issued sanctions against BNSF and a default judgment on the trial. BNSF appealed, seeking supervisory control over the District Court, arguing that FELA preempts Dannels' underlying state-law claim.

HOLDING: Supervisory control is denied. The District Court was in the best position to determine discovery rights and limitations as it was most intimately involved in this case. After the case is over, the normal appeals process is enough to correct any inequity in judgment stemming from discovery missteps. (McGrath, Shea, Gustafson, Baker, Rice). The dissenting justice reasoned that this case should not have proceeded in the first place, as damages were awarded under FELA, which preempts state-law claims under previous precedent. There is ample federal authority to demonstrate that FELA is the exclusive remedy for injured railroad workers. (McKinnon)

MONTANA SUPREME COURT REVIEW - Cases from 2018-2019

	COURT	Baker	Gustafson	McGrath	McKinnon	Rice	Sandefur	Shea
BANKING								
Severson v. Severson, Mineral Trust, Stockman Bank	✓	✓			✓	✓	✓	✓
Graham-Rodgers v. Wells Fargo Bank	✓	✓	✗	✓	✗	✓	✓	✗
CONTRACT								
Lenz, et al. v. FSC Securities	✓	✓	✓	✓	✓	✓	✓	✓
Peeler v. Rocky Mountain and White River	✓	✓	✓		✓		✓	✓
Kapor v. RJC Investment	✗	✗	✗	✗	✓	✓	✓	✗
Warrington v. Great Falls Clinic	✗	✗	✗		✗	✗	✗	
Thornton v. Whitefish Credit Union	✓		✓	✓	✓		✓	✓
Strauser v. RJC Investment	✗	✓	✗	✗	✓	✓	✗	✗
Flathead Management Partners v. Jystad	✓	✓	✓		✓		✓	✓
EMPLOYMENT								
Borges v. Missoula Co. Sheriff's Office	✓	✓		✓	✓	✓		✓
Blodgett v. State	✓	✓	✓			✓	✓	✓
Alexander v. MDC	✓	✓	✓		✓	✓	✓	
Schulz v. JTL Group dba Knife-River	✓			✓	✓	✓	✓	✓
Hirsch v. Choteau	✓		✓	✓		✓	✓	✓
Bollinger v. Billings Clinic	✓	✓	✓	✓	✓	✓	✓	✓
Jergens v. Marias Medical Center, et al.	✗		✗	✗		✗	✗	✗
Bucy v. Edward Jones	✓	✓	✓	✓	✓	✓	✓	✓
Wage Claim of Mays and Sagebrush Sam's	✓		✓	✓	✓	✓	✓	
Watters et al. v. Billings	✓	✓		✓	✓	✓		✓
INSURANCE								
Marshall v. Safeco Ins. and Mid-Century Ins.	✗		✗	✗	✗		✗	✗
Gazelka v. St. Peter's Hospital	✓	✓	✓	✓	✓	✓	✓	✓
Cramer v. Farmers Ins. Exchange	✗	✗	✗	✗	✗	✗	✗	

MONTANA SUPREME COURT REVIEW - Cases from 2018-2019

	COURT	Baker	Gustafson	McGrath	McKinnon	Rice	Sandefur	Shea
INSURANCE *(continued)*								
Cross, et al. v. Warren, Progressive Ins., et al.	✓	✓	✗	✓	✓	✓	✗	✓
US Specialty Ins. v. Estates Ward and Melotz	✓	✓	✓	✓	✓	✓	✓	✓
King v. State Farm Mutual Auto Ins.	✗	✗	✗	✗		✗	✗	
JURISDICTION								
DeLeon, Kingery, and Beck v. BNSF	✓		✓	✓	✓	✓		✓
Ford Motor v. Best	✗	✗	✗	✗	✗	✗	✗	✗
PR for Gullett v. Ford Motor, et al.	✗	✗	✗	✗	✓	✓	✗	✗
LAND USE/ENERGY/ENVIORNMENT								
ARCO v. Bidegaray	✗	✗			✓		✗	✗
MEIC and Sierra Club v. DEQ and Western Energy	✓	✓	✓	✓	✓	✓	✓	✓
Mines Management Inc., et al. v. Estate of Bakie, et al.	✓	✓	✓	✓		✓		✓
LANDLORD-TENANT								
Hines v. Topher Realty	✓	✓		✓	✓	✓		✓
Federal National Mortgage Association v. Stafford	✓		✓		✓	✓	✓	✓
Pummill, Black Gold Enterprises, et al. v. Patterson	✓		✓	✓	✓		✓	✓
MEDICAL MALPRACTICE								
Richards v. KRMC	✓	✓			✓	✓	✓	✓
Estate of Bushong, et al. v. Huebner and Great Falls Clinic	✓	✓		✓	✓	✓		
Melton v. Speth	✓	✓		✓	✓	✓	✓	
Griffin v. Lewis and Nichols	✓	✓	✓			✓	✓	✓
DeMoney v. Kaufman	✓		✓	✓	✓	✓	✓	
Howard v. Replogle	✓	✓	✓		✓	✓		✓

MONTANA SUPREME COURT REVIEW - Cases from 2018-2019

	COURT	Baker	Gustafson	McGrath	McKinnon	Rice	Sandefur	Shea
TAXATION								
Hiland Crude v. DOR	✓	✓	✓	✓		✓		✓
Exxon Mobil v. DOR	✓	✓		✗	✓	✓	✓	
Vision Net v. DOR	✗		✗	✗	✗	✗		✗
TORT								
Daley v. BNSF	✓	✓	✓		✓	✓	✗	
Norbeck v. Flathead Co., DEQ, and Birk Engineering	✓	✓	✓	✓	✓		✓	
WORKERS' COMPENSATION								
Moreau v. Transportation Ins.	✓	✓		✓	✓	✓	✓	
State v. Ailer	✓	✓		✓	✓		✓	✓
Murphy v. WestRock	✗		✗	✗	✗	✗	✗	
Ramsbacher v. Jim Palmer Trucking	✓	✓	✓	✓	✓	✓	✓	✓
Neisinger v. New Hampshire Ins.	✗	✗	✗		✗	✗		✗
Robinson v. MSF	✓	✓	✓		✓	✓	✓	
Richardson v. INA	✓	✓	✓	✓	✓	✓		
OTHER								
Ascencio v. Orion International	✓		✓	✗		✓	✓	✓
BNSF and Ahern v. Bidegaray	✗	✗	✗	✗	✓	✗		✗
2018-2019 Judicial Score	**74% (40/54)**	**78% (32/41)**	**64% (27/42)**	**68% (27/40)**	**83% (38/46)**	**80% (37/46)**	**71% (30/42)**	**72% (28/39)**
Career Judicial Score		**67% (127/189)**	**64% (27/42)**	**57% (122/213)**	**87% (124/143)**	**78% (271/346)**	**71% (45/63)**	**67% (74/111)**

Montana Worker's Compensation Court Review

The Montana Workers' Compensation Court (WCC) was created in 1975 to address work comp cases – a significant development for the business community. Before systematic reforms were enacted in the 2011 Legislature, Montana businesses experienced skyrocketing work comp premiums that became the highest in the nation. Since implementation of the 2011 reforms, Montana's rates have gone down over 30 percent. However, our relatively high premiums still place Montana businesses at a competitive disadvantage with other states and hurt their ability to provide higher wages and better benefits to workers. Because the courts are a key player in interpreting work comp law, the Montana Chamber began reviewing the decisions of the WCC starting in 2007. This is the seventh cycle the Chamber has reviewed its work, and it covers cases from 2018 and 2019.

Montana Chamber's Effort in Workers' Compensation

After the Montana Chamber and other business groups successfully spearheaded the enactment of work comp reform with House Bill 334 in the 2011 Legislature, we have continued to pursue legislative opportunities to protect businesses from inflationary pressure on premiums. In the 2015 Legislature, the Montana Chamber supported legislation – SB 288 – to authorize subrogation, which allows work comp insurers to collect funds from at-fault third parties for claims for injuries or occupational diseases. SB 288 made it through the Legislature but was vetoed by Governor Bullock. The Chamber also supported successful legislation – HB 538 – to exempt Montana employers from having to pay work comp in Montana for their employees that work full-time and are covered by work comp in North Dakota. In the 2017 and 2019 Legislatures, the Montana Chamber successfully opposed attempts to unwind key 2011 reforms.

The Montana Chamber participates in the deliberations of the Governor-appointed Labor-Management Workers' Compensation Advisory Council (LMAC). This installment of the LMAC is looking at key work comp issues such as joint petitions for 5-year reopening, the Montana Safety Culture Act, cost drivers in the system, and stay at work/return to work.

Scoring

In this review, the WCC judge was evaluated in comparison to the pro-business position. 26 cases were chosen for this review during the period from 2018-2019. This report includes a review of judgments made by Judge David Sandler, who was appointed by Governor Steve Bullock in 2014 and confirmed by the Montana Senate in 2015.

Judge Sandler was born and raised in Billings. He received his Juris Doctor degree from the University of Montana School of Law in Missoula in 1998. He clerked for the Honorable James C. Nelson at the Montana Supreme Court from 1998-99, and practiced law at several prominent Montana law firms throughout his career. Judge Sandler's law practice included insurance defense of work comp claims from 1999 to 2006 and from 2007 until his appointment to the Court in August 2014. A portion of his practice represented work comp claimants.

The case descriptions were taken directly from official case summaries compiled by the Montana Law Week and the Workers' Compensation Court staff (wcc.dli.mt.gov/cases.asp).

TG v. MSGIA – 1/25/2018

FACTS: Helena Public Schools aide TG – who had preexisting fibromyalgia, anxiety, panic attacks, depression, and pseudo-seizures – reported that a special needs student hit her in the face in 2015. She reported several injuries and bruising. She reported later that the student hit her with an open hand and then hit her at various body parts and filed sperate reporting for those injuries. MSGIA denied liability for both claims on the basis that she did not seek treatment and requested summary judgment because TG did not suffer a compensable physical injury and that her preexisting conditions and pseudo-seizures are mental-physical conditions, which are not compensable under the Workers' Compensation Act (WCA).

HOLDING: TG did not present enough objective medical findings to establish that the physical harm was a compensable physical "injury" under the WCA. She sought no treatment for her bruising, did not contend that any was necessary, and none of the providers she saw in the months after the attacks witnessed her bruising, diagnosed bruising as an injury based on their observations, stated that she needed any treatment for the bruising, or imposed any restrictions due to the bruising. Summary judgment for MSGIA.

Kunz v. Electric Ins. – 2/9/2018

FACTS: Kunz hurt his neck while working for a Kalispell sign company. Montana State Fund (MSF) accepted liability. He settled this claim with medicals open. He began seeing Greg Vanichkachorn for an arthritic neck ache and pain. Kunz was later hired by Granite Manpower as a turbine mechanic at power plants throughout the US, working 4-6 months/year. He sometimes returned to his home in Montana for a few days between jobs and always returned when his work for the year was done. He hurt his neck and back while working in Texas. Vanichkachorn opined that the accident materially worsened his preexisting cervical condition. Electric Insurance notified Kunz that it was denying the claim because it was not an injury that arose out of Montana employment. Granite fired Kunz in 4/16 on the basis that he had not provided any medical documentation that he could work as a turbine mechanic.

HOLDING: Kunz was a person in Montana in the service of an employer and therefore an "employee" under §39-71-118(1)(a). Thus his employment with Granite was Montana employment, thereby satisfying 402(1)(a). He also satisfied the other requirements. He temporarily left Montana when he worked for Granite. He did not move to any of the states where he worked and establish residency, but traveled from Montana to Granite's jobs and stayed in motels. Depending on Granite's schedule, he returned to Montana for a short stay between jobs and then traveled to the next job. At the time he was injured, he had left Montana incidental to his employment. Kunz has a compensable claim and is entitled to his costs but not to attorney fees and penalty.

McCrary v. Liberty Mutual Fire Ins. – 3/2/2018

FACTS: McCrary hurt his low back in 1977 and hurt his knee in 1983. He returned to work, but his employer went out of business in 1996. He has not worked since. From 1997-2009 he asserted that the combination of his back and knee injuries rendered him eligible for permanent total disability (PTD) and demanded PTD under his 1973 and 1983 claims. Liberty argued that McCrary is estopped from claiming and waived his asserted right to PTD for his 1977 claim.

HOLDING: The party asserting waiver must establish that the other party knew of the existing right and acted inconsistently with it. McCrary made six arguments in support of his position that he did not waive his right to PTD under his 1977 claim. The Court is not persuaded. He cites a §39-71-409: "No agreement by an employee to waive any rights under this act for any injury to be received shall be valid." However, held that this language by its plain terms prohibits "a waiver before the injury is received." It is inapplicable to actions post-injury. Under §1-3-204, "any person may waive the advantage of a law intended solely for that person's benefits" – personal rights to benefits under the WCA are capable of being waived.

Heichel v. Liberty Mutual Ins. – 3/12/2018

FACTS: Heichel, a grocery store baker, claimed that she hurt her neck and shoulder while lifting a 50-lb bucket of corn syrup. Liberty denied liability, asserting that she was not injured and/or did not timely notify the store of her alleged injury.

HOLDING: Heichel did not give timely notice because she notified her employer more than a month after the required timeframe to report an injury. She argued that her reporting was timely and the store should have investigated whether it was a job injury. The §39-71-603(1) notice requirement "is mandatory, and compliance with the notice requirement is indispensable to maintaining a claim for compensation." Since Heichel did not give notice within 30 days, her claim is not compensable.

Robinson v. Montana State Fund – 4/6/2018

FACTS: Robinson suffered a brain injury due to heat stroke while working for South Peak Angus Ranch, and was treated for cognitive difficulties. She hurt her low back eight years later. MSF accepted liability for both injuries and began paying PTD. She applied for Social Security in 2012 and it was granted effective 2010. MSF learned of this and notified her that it was entitled to offset her PTD as well as recoup for the overpayment from 2010. She asserted that MSF was not entitled to the offset under §39-71-702(4), emphasizing that the Social Security Disability (SSD) offset does not apply when a claimant has two injuries.

HOLDING: The Court agrees with MSF that Robinson's reading of §702(4) is too narrow. While §704(4) allows an insurer to take the offset only if the claimant's entitlement to SSD is "because of the injury," it also applies when the entitlement is because of two comp injuries. The Court also agrees with MSF that Robinson's reading is contrary to legislative intent. Since Robinson's entitlement to PTD and SSD are because of the injuries for which MSF is liable, it can take the offset from her PTD under §702(4) and continue to recoup the overpayment under §702(7).

Morrish v. Amtrust Ins. – 5/23/2018

FACTS: Morrish had a history of low-back pain which caused him to miss work. In 2012, chiropractor Gary Litle determined that Morrish's work as an auto mechanic was causing his back pain and diagnosed him with Degenerative Disc Disease (DDD). He suffered acute low-back pain later and has been unable to work since. He filed an occupational disease (OD) claim after a medical consultation with another professional, which Amtrust denied. Amtrust contended that he did not have a compensable OD or that his claim was untimely because he filed it more than a year after Litle diagnosed DDD.

HOLDING: Whether Morrish had a compensable OD is moot because he failed to timely file pursuant to the 1-year statute at §39-71-601(3). He knew that his DDD was caused by his work because Litle told him in 2012 that it was causing his back problems, he missed work for those problems, and x-rays revealed DDD. He nevertheless filed his claim in 8/16, outside the 1-year statute.

Griffin v. Associated Loggers Exchange – 7/27/2018

FACTS: After returning to work at Sun-up Ventures after a job injury, Dennis Griffin was in a fight with a co-worker. He was fired pursuant to employee handbook policy. He disputed that he instigated the fight and contended that he was entitled to temporary total disability (TTD) benefits retroactive to the date of termination.

HOLDING: The evidence established that Griffin was not only argumentative with co-workers, but instigated the fight, which violated employee handbook policies that an employee who engaged in fighting was subject to immediate termination. Griffin is not entitled to TTD from the date of his termination.

Simpson v. MMIA – 7/30/2018

FACTS: MMIA moved for summary judgment, arguing that Billings Police Officer Christopher Simpson's claim for medical benefits was barred under the 2-year statute and they terminated because he did not use them for 60 months. Simpson argued that his claim was timely and that there was not a 60-month period in which he did not use his medical benefits.

HOLDING: Simpson's claim is barred under §2905(2). MMIA's denial letter from 2009 firmly established a denial of further liability for medical benefits for his right knee. Simpson did not petition to decide the dispute until 2017. He also argued that WCA policy was to provide medical benefits to injured workers and that they can be closed only by: 1) not using them for 60 consecutive months, 2) by a subsequent non-work-related injury to the same part after the claimant reached MMI, or 3) by a settlement agreement. However, they are also effectively closed when a claim is barred by the statute of limitations. Summary judgment for MMIA.

Mellinger v. Montana State Fund – 8/8/2018

FACTS: Todd Mellinger suffered a severe right foot injury while working for Montana Merchandising. MSF accepted liability, paid medical and indemnity, and advised that "medical benefits terminate when they are not used for a period of sixty (60) months." MSF advised him in 2012 that his claim had been become inactive because he was not receiving medical or wage loss benefits.

HOLDING: Mellinger argued that because MSF authorized the surgery while his medical benefits were open, it was contractually obligated to pay for it. However, MSF did not contractually agree to keep his benefits open indefinitely or that its authorization was indefinite. Summary judgment for MSF.

Richardson v. INA – 9/21/2018

FACTS: Brian Richardson, a security officer at Billings Clinic, helped detain a violent patient who hit him multiple times. The next day he told his manager, who said he "did not have to fill out any more paperwork unless he was seeking treatment." Richardson did not complete any additional paperwork. He saw several providers, and none of them mentioned any issues with Richardson's nose. In 2008, he was diagnosed with several nasal medical issues and underwent corrective surgery. He submitted the bills to his health insurer, which denied liability. He stopped working due to his nose injury. Richardson asserted that the report detailing the assault on the day of the incident constitutes his written and timely claim because he lacked knowledge of his disability.

HOLDING: The company's incident report did not contain enough information to constitute Richardson's claim because it did not indicate his injury. His assertion that it shows "the time and place of the accident/injury and the nature of the injury" is unsupported by the evidence. INA is correct that this Court need not decide whether Richardson is entitled to the waiver of the time limit.

Atchley v. Louisiana Pacific – 9/26/2018

FACTS: Edward Atchley was exposed to asbestos in a Navy ship, and then to the background Libby asbestos where he lived and worked most of the rest of his life. He worked as a security guard at the LP lumber mill from 1985 to 1997. He did not obtain other employment. In 2001, a screening revealed he had Acute Respiratory Disease (ARD). He was also diagnosed with obstructive disease, likely for smoking two packs of cigarettes a day for 50 years. The question raised was whether Atchley's employment at Louisiana Pacific contributed to his ARD.

HOLDING: The Court found that Atchley was consistently exposed to Libby asbestos in amounts greater than the Libby background while employed, and that it significantly contributed to his ARD.

Clark v. Arch Ins. – 10/18/2018

FACTS: Tim Clark sustained a head injury when he rolled a semi during his work with Riverside Contracting. He was diagnosed with mild traumatic brain injury and taken off work. After clearing Clark for some lighter duty work, his doctor wrote that Clark was not released to "out of town work" and could only work "local" jobs and "no heavy machinery." When asked for the medically objective rationale behind the out-of-town restriction, Johnson wrote that the patient objected to out of town work. Because he didn't take the lighter duty job, his benefits were closed off. Clark petitioned DLI for an order awarding interim benefits. DLI granted his request. Arch appealed.

HOLDING: Arch argued that Clark had not made a strong case for reinstatement of disability status because his doctor had released him to a modified position, that he was able to perform with the same employer, and refused to accept it. It maintained that there was no objective medical reason why Clark couldn't return to work at either job offered by Riverside and that his refusal was based solely on his lack of desire to work. Clark argued that Johnson's restrictions prohibited him from completing work requirements because he couldn't work out of town. The Court agrees because there were too many inconsistencies and ambiguities in Johnson's restrictions. The Court does not condone a worker refusing to return to work, but there must be enough evidence that a worker was in fact rejecting employment to which his doctor had released him. Thus DLI's award of interim benefits was correct.

York v. MACoWCT – 1/15/2019

FACTS: LPN Jenny York suffered a compensable right shoulder injury while lifting a fallen patient. Six years later, an orthopedic surgeon diagnosed a torn rotator cuff and labrum in her left shoulder and opined that it was an overuse syndrome caused by inability to fully use her right shoulder for many years. MACo denied liability for the left shoulder condition, citing its own physician who said her left shoulder condition was related to degeneration and not to overuse.

HOLDING: MACo is liable for York's left shoulder condition because it is an overuse syndrome caused by inability to use her right shoulder after her compensable injury. The Court gives greater weight to York's doctor because he is an orthopedic surgeon who frequently treats shoulder injuries. MACo is also liable for medical benefits. It is not currently liable for TTD because York has not suffered a total wage loss as a result of her injury and because she was released to work but has refused to return.

Amundsen v. Albertsons – 1/28/2019

FACTS: Jan Amundsen was a baker for Albertsons. He slipped and fell during a break, injuring his ankle in the parking lot. Albertsons denied his claim, arguing that he was not in course and scope of employment.

HOLDING: Although Amundsen was on a break and not performing any specific task for Albertsons when he fell, the location where he fell was part of its worksite, and therefore his injury arose out of and in the course of his employment under §39-71-407(2)(a). Albertsons is liable for comp benefits.

Heath v. Montana State Fund – 3/14/2019

FACTS: Heath's initial claim against MSF in 2014 was settled via stipulated judgment. In 2014, a doctor recommended surgery to improve shoulder and wrist condition attributed to the same injury. Heath petitioned to re-open the claim, alleging that doctors told both himself and MSF that a surgical repair was not indicated for his condition, and so damages were incorrectly awarded. Heath sought TTD benefits following the surgery, medical benefits associated with the original injuries, and fees. MSF argued on the grounds of statute of limitation expiration.

HOLDING: Rule 60 of Montana Rules of Civil Procedure bar claims more than one year after judgment. Summary judgment for MSF.

Rosling as PR of McMillan v. Associated Loggers Exchange – 3/21/2019

FACTS: McMillan developed ARD, due to life-long exposure to Libby asbestos, nearly seven years prior to employment with ALE. While employed with ALE, McMillan often worked near a vermiculite mine in 2008. This worsened his ARD, forcing him to quit. He filed an OD claim in 2013 prior to his death in 2015, claiming that ALE injured him by exposure. ALE asserted the claim was not filed in a timely fashion and that the OD was not caused by his employment with them.

HOLDING: The McMillan's claim was filed in a timely fashion, his employment with ALE accelerated the condition, and is so entitled to medical benefits and an impairment award. ALE's denial of liability is not unreasonable as McMillan told a coworker in 2009 that he had ARD and had difficulty breathing, and he knew the forest around Libby was contaminated by the vermiculite mine. ALE's defense on statute of limitations is reasonable.

Hagberg v. Ace American – 4/15/2019

FACTS: Hagberg injured his back on the job in 2006. Ace accepted liability. After surgery and settlement, subsequent x-rays showed progressive spinal damage. in 2016, an IME for Ace concluded that Hagberg's spinal damage at one junction was caused by the accident but the continuing pain was related to pre-existing spinal issues. Hagberg's doctor disagreed, stating that the pain resulted from the injury. Ace argued that even if the ongoing pain is attributed to the job accident, Hagberg is at maximum medical improvement (MMI) and ongoing treatment paid by Ace should be denied. Hagberg argued that medications improve his quality of life and going off the medication would move him back to pre-MMI status.

HOLDING: The Court agrees with Hagberg's long-term pain management specialist and not the insurance company's doctor. Under MCA 39-71-407, a preexisting condition that is aggravated by a work injury is covered under worker's comp. Since Hagberg has not returned to his same health and comfort as 2006, Ace remains liable for continued medical benefits. Hagberg awarded costs.

Carlson v. Montana State Fund – 6/20/2019

FACTS: Collin Carlson fell in 2018 and began experiencing lower extremity weakness and diminished sensation. MSF petitioned the Court to force Carlson to attend an IME with a neurologist or psychiatrist to identify a possible conversion disorder in the future.

HOLDING: Denied. Under MCA 39-71-605, the Court can only force an exam at a specific time and place. MSF had not scheduled the exam nor the examiner. MSF had also missed the deadline for disclosing an expert witness.

Hideaway Builders v. Rasmussen – 8/6/2019

FACTS: Hideaway Builders petitioned for a hearing, challenging the Uninsured Employers Fund's (UEF) determination that Erik Rasmussen was an employee at the time of his injury. Hideaway contended that he was an independent contractor and that it was not liable to reimburse UEF for benefits paid on his claim. Rasmussen moved to dismiss the petition on the ground that it missed the 60-day statute at §39-71-520(2)(b) & (c), and that UEF's determination is now final. Hideaway asserted that pursuant to Montana rules, the Court should add three days for mailing to the statute, making its petition timely.

HOLDING: The day Hideaway mailed its petition was irrelevant because this Court "deems filing complete upon receipt by the court."

ARM 24.5.303(2)(c). Moreover, this Court allows for filing by fax and email and the Legislature has a set a firm deadline for filing a petition if the parties fail to settle through mediation. Summary judgment for Rasmussen and UEF.

David Bell, President and CEO of the ALPS Corporation in Missoula, is Chairman of the Montana Justice Coalition

Leys v. Liberty Mutual Insurance – 8/7/2019

FACTS: Teresa Leys was rear-ended while driving her employer's company car in 2008. Liberty accepted liability and started paying benefits. Over the next 8+ years Leys received various care. She claimed that she suffered CT and post-concussive syndromes as a result of the accident. Liberty paid TTD until 6/15 when it denied that she had post-concussive syndrome as a result of the accident. Her CTS recurred in late 2015, but Liberty refused to reinstate TTD. She argued that it remained liable for her CTS because her accident-related conditions had rendered her unable to work.

HOLDING: The treating physician did not have enough evidence to rule out the possibility that Ley's current symptoms are caused by depression, which had impacted Leys since before the vehicle accident. The physician relied on the fact that Leys first experienced cognitive dysfunction after the 2008 crash. However, a temporal relationship alone is insufficient to establish causation. Secondly, Leys claimed that just before the accident she had both hands on the wheel, but it is now known that she was holding her phone with her right hand. Liberty is relieved of its initial acceptance of liability due to a mutual mistake of fact.

Hensley v. Montana State Fund – 8/22/2019

FACTS: Susan Hensley returned to work after an injury without an actual wage loss. She received a Class 1 impairment rating under AMA Guides 6th Ed. MSF did not pay an impairment award because §39-71-703(2) (2011) does not provide for payment if an impairment is rated Class 1 and the worker has no actual wage loss, unlike a claimant with a Class 2, 3, or 4 impairment. Hensley asserted that §703(2) violates her right to equal protection under Art. II §4 and her right to due process under Art. II §17. MSF responded that its action was constitutional under the framework of the 2011 WCA.

HOLDING: The classes are not similarly situated, so therefore there is a rational basis to treat them differently. The differences in severity and duration of symptoms and loss of function on a claimant's ability to work justify treating claimants with no actual wage loss and a Class 1 impairment differently than those with no actual wage loss and a Class 2, 3, or 4 impairment. MSF is not liable for an impairment award or for Hensley's attorney fees and costs.

Neisinger v. New Hampshire Insurance – 9/6/2019

FACTS: Michael Neisinger appealed a DLI order to attend a two-day §605 exam with psychiatrist William Stratford. He asserted that it should be limited to one day and Stratford should be required to disclose all raw data and testing materials. He argued that since New Hampshire (NHI) previously scheduled him to attend several 1-day IMEs with Stratford, he can reasonably obtain all the information he needs in one day. NHI argued that a two-day IME is appropriate because Neisinger had presented no medical evidence that he was limited to one day and that one day was not enough time for Stratford to administer the tests and conduct an evaluation based on the test responses. NHI further argued that Stratford was willing to produce all raw data and testing materials but due to licensing

agreements with the test organizations/publishers he couldn't do so without a court order.

HOLDING: The DLI order directing Neisinger to attend a 2-day IME is affirmed but modified to require Stratford to disclose all raw data and testing materials when he issues his report. NHI presented evidence that he requires two days to accommodate Neisinger's demand for 15-minute hourly breaks and complete the testing, interview, and evaluation. DLI should have addressed his request for the raw data and testing materials. Both parties need the raw data and testing materials to properly consider Stratford's opinions.

Schieber v. Liberty Northwest Insurance – 9/20/2019

FACTS: David Schieber suffered compensable injuries in 2012 while working as a truck driver in Harlowton. An examiner later declared him at MMI, set restrictions, and approved a less demanding job analysis. Schieber returned to work elsewhere but left after a few months due to pain. Liberty reinstated TTD until 1/15 after a consulting orthopedic surgeon determined that he needed no further surgery. Schieber visited additional surgeons, several of whom offered conditional recommendations for surgery. In turn, Schieber argued to the Court that he was entitled to past due and ongoing TTD or PTD and ongoing medical.

HOLDING: Scheiber is not entitled to TTD, given that he reached MMI and has remained there since. But he is entitled to PTD and ongoing medical from 1/15. He proved that he neither had nor has a reasonable prospect of performing regular employment given his age, modest education, narrow work history, limited transferrable skills, and multiple physical conditions.

Stevens v. Montana State Fund – 10/23/2019

FACTS: Emma Stevens, an employee of Yellowstone Tractor Company (YTC), suffered a concussion after a fall in the shared parking lot that is leased by YTC and other businesses in the same strip mall. Stevens filed a claim with MSF, but it denied liability claiming that Stevens was outside the course of her employment and that the injury occurred in a public, non-designated parking lot while she was walking into work.

HOLDING: Stevens is not entitled to a penalty. MSF made a fair distinction between this and other Montana cases applying the premises rule. This case involves an employer which leased the parking lot, shared it with other businesses, and did not maintain it; other cases involved employer-owned property. The matter on leased lots has not been settled in Montana law or in the courts. MSF also conducted an adequate investigation, taking statements from Stevens and her colleagues and discovered a dispute as to where and when Stevens fell.

Brower v. Valor Ins./MIGA – 10/25/2019

FACTS: Peggy Brower filed a claim for shoulder pain caused by her work at First Interstate Bank. After being diagnosed with a herniated disk, she settled the wage part of her claim in 2006 with Valor Insurance. She then claimed cervical problems for which MIGA denied liability. Brower asserted that at the time she settled she thought that Valor "would provide future medical treatment for my neck injury, and I relied on that fact when I agreed to settle my claim with medical coverage for my neck open." MIGA responded that she had not proven that her current problems were the same condition for which Valor accepted liability in 2006 and denied any reason to believe that Valor agreed to cover unrelated injuries for Brower in the future.

HOLDING: Brower is not entitled to summary judgment because there are fact issues as to whether her current cervical problems are the same condition for which Valor accepted liability or a natural progression of that specific condition, which was arguably limited

to a herniated disk. Neither Valor nor MIGA represented that Valor had accepted liability for every problem in Brower's cervical spine or that she had coverage for every problem she would develop in her cervical spine.

McKinley v. Pressure Washing Systems and UEF – 11/5/2019

FACTS: Pressure Washing Systems was a West Virginia LLC that closed in 5/18. The owners then entered into an agreement with Donald McKinley, a WV resident, to use Pressure Washing's remaining trucks to haul RVs for an unrelated company in exchange for submitting monthly payments on the truck loans. McKinley was injured in a motor vehicle accident near Billings in 1/19 while driving a Pressure Washing truck and hauling an RV. He filed a claim asserting that was an employee of Pressure Washing. Pressure Washing did not have work comp insurance in Montana, so the claim was transferred to UEF. UEF denied liability, claiming that Pressure Washing was not a Montana employer and that McKinley was not a Montana employee under Montana law.

HOLDING: Pressure Washing was not McKinley's employer under §39-71-117(1)(a) because it did not have him in service under a contract of hire. A business does not become an employer merely by selling equipment to a person via an installment sales contract or by leasing equipment to that person. Pressure Washing did not arrange for McKinley to haul RVs, take a percentage or fee for his hauls, pay him, or make a profit from his hauls. Further, because Pressure Washing and McKinley did not have an employment relationship under Montana law, it had no legal duty to provide Montana comp and therefore UEF is not liable for any benefits. Summary judgment to Pressure Washing and UEF.

MONTANA WORKER'S COMPENSATION COURT REVIEW - Cases from 2018-2019

WORKERS' COMPENSATION	Sandler
TG v. MSGIA	✓
Kunz v. Electric Ins.	✗
McCrary v. Liberty Mutual Fire Ins.	✓
Heichel v. Liberty Mutual Ins.	✓
Robinson v. Montana State Fund	✓
Morrish v. Amtrust Ins.	✓
Griffin v. Associated Loggers Exchange	✓
Simpson v. MMIA	✓
Mellinger v. Montana State Fund	✓
Richardson v. INA	✓
Atchley v. Louisiana Pacific	✗
Clark v. Arch Ins.	✗
York v. MACoWCT	✗
Amundsen v. Albertsons	✗
Heath v. Montana State Fund	✓
Rosling as PR of McMillan v. Associated Loggers Exchange	✗
Hagberg v. Ace American	✗
Carlson v. Montana State Fund	✗
Hideaway Builders v. Rasmussen	✗
Leys v. Liberty Mutual Insurance	✓
Hensley v. Montana State Fund	✓
Neisinger v. New Hampshire Insurance	✓
Schieber v. Liberty Northwest Insurance	✗
Stevens v. Montana State Fund	✓
Brower v. Valor Ins./MIGA	✓
McKinley v. Pressure Washing Systems and UEF	✓
2018-2019 Judicial Score	**62% (16/26)**
Career Judicial Score	**66% (42/64)**

Montana Chamber's Legal Efforts

The Montana Chamber commits time and resources to improving Montana's legal climate. Following are some of its programs aimed at legal reform:

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.

Business and the Law Conference

For the past several years, the Montana Chamber's Justice Coalition has developed and hosted a day-long conference to discuss hot-button legal topics in Montana and legal trends around the United States. The March 2018 conference in Helena received CLE credits from the Montana State Bar and featured presentations on Montana's legal climate, improving the legal climate, emerging issues in immigration, enacted reforms in the legislature, the groundbreaking *BNSF v. Tyrrell* case, and the legal status of seatbelt admissibility.

Montana Legislature

Over the past two decades, many of the legal reforms passed in general liability, workers' compensation, medical malpractice, and other areas were a direct result of the Montana Chamber's lobbying efforts. In 2017, the Montana Chamber supported legislation to revise judgment interest (SB 293), seatbelt admissibility in court (SB 259), revise punitive damages caps (HB 165), legal protections in the hiring process (SB 325), add district court judges (HB 44), provide funding for civil legal aid (HB 46), and to define liability in agritourism (HB 342). While the 2019 Legislature yielded a more challenging political climate for legal reform, the Montana Chamber helped pass legislation that allows insurers to rescind contracts in the event of fraud (SB 240).

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

This U.S. Chamber subsidiary, while a completely separate organization from the Montana Chamber, is national leader in the area of legal and tort reform. The Institute for Legal Reform publishes the State Liability Systems Ranking Survey with an aim to quantify how corporate attorneys and senior executives at major companies perceive state legal climates. Montana was consistently ranked among the bottom 20 states in earliy studies until it was ranked 27th in 2017. The 2019 iteration named Montana the 7th best legal system.

American Tort Reform Association (ATRA)

The Montana Chamber is a state affiliate of ATRA and works closely with their Washington, DC, staff and their Montana representatives to identify and tackle important tort reform issues. ATRA started in 1986 and is the only national organization dedicated exclusively to reforming the nation's civil justice system.

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