Montana
Chamber of Commerce

Judicial Review 2014

INSIDE:

MONTANA SUPREME COURT JUDICIAL REVIEW

Cases from 2012-2013

The Montana Chamber of Commerce is pleased to present the 2014 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 2012 and 2013 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 provides a means of evaluating each individual judge's stance on business-related issues. We understand judges are bound by the rule of law. The federal and state constitutions, judicial construction, and prior case decisions 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, the Montana Chamber sought input from various business leaders from across the state. A strict set of criteria was used to achieve the most objective report possible. Input from affected trade associations and individual businesses allowed the Montana Chamber to independently verify the research conducted in specific categories. Cases selected must have had an impact, either positive or negative, on businesses in the state or affect general liability standards. We tried to exclude decisions with a negative impact on one type of business and a positive effect on other businesses. Many of the case summaries were provided by the descriptions from the "Montana Law Week" publication as well as assistance from various Montana attorneys.

The Montana Supreme Court

Previous Chamber Judicial Reviews have evaluated Montana Supreme Court decisions from 1990 to 2011. The dynamic of the Court has changed considerably in the past few years, which makes it even more important to continually measure the Court's record. This Review provides a greater understanding of the important role that Court decisions play in shaping our economy. Only then can we judge how, and if, the state's business climate is truly improving or suffering as a result of Court decisions.

Cases are divided into 11 categories: Banking, Contracts, Employment, Jurisdiction/Other, Insurance, Land Use/Environment, Medical Malpractice, Taxation, Tort, Unemployment Insurance, and Workers' Compensation. Each case was assigned one category for the purpose of the record even though some cases could obviously be included in multiple categories. In those instances, the Chamber attempted to select the most appropriate category for the case selected.

Scoring

In the review of the Montana Supreme Court, individual justices were evaluated in comparison to the pro-business position. Justices were not scored when they did not participate in a case. When justices concurred in part or dissented in part, the Montana Chamber reviewed the written nature of their concurrence or dissent and made an evaluation of how the justice voted against the overall case. Scores were not weighted. Justices received a 0 to 100 percent Business Score overall for the 2012-2013 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 (2012 to 2013). 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 eight Supreme Court Justices. Justices serve eight-year terms. During the 2012-2013 period, Justice Nelson retired at the end of 2012 after nearly two decades on the Court. Justice Brian Morris was nominated by the Obama Administration to serve on the U.S. District Court for the District of Montana and was subsequently confirmed by the U.S. Senate in December 2013. Justice Laurie McKinnon won her election to the Court over Ed Sheehy of Missoula. Justices Rice and Wheat face reelection in 2014. Justice biographies are available on the Court's web site. The following justices are evaluated in this Judicial Review:

Chief Justice Mike McGrath
Elected in 2008

Justice Jim Nelson
Appointed in 1993, retained by voters in 1994, re-elected in 1996 and 2004, retired in 2012

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

Justice Jim Rice
Appointed in 2001, retained by voters in 2002, reelected in 2006, up for reelection in 2014

Justice Brian Morris
Elected in 2004, appointed and confirmed in December 2013 to serve on the U.S. District Court for the District of Montana

Justice Mike Wheat
Appointed in early 2010 to replace retiring Justice John Warner, retained by voters in 2010, up for reelection in 2014

Justice Beth Baker
Elected in 2010

Justice Laurie McKinnon
Elected in 2012

Justices of the Montana Supreme Court as of 2013 (left to right):
Justice McKinnon, Justice Rice, Chief Justice McGrath, Justice Baker, Justice Morris, Justice Cotter, Justice Wheat

BANKING

***Federal Home Loan Mortgage Corp. v. Petty* – 4/9/2013**
FACTS: The Petty's defaulted on their obligations under a deed of trust. At the trustee's sale, Bank of America Corporation (BAC) Home Loans Servicing purchased the property. BAC then conveyed the property to Freddie Mac. The Petty's remained on the property after the trustee's sale. Freddie Mac initiated this unlawful detainer action after serving the Petty's with both a 30-day Notice to Quit and a three-day notice. The District Court granted Freddie Mac summary judgment.
HOLDING: The Supreme Court affirmed the grant of summary judgment because Freddie Mac was entitled to possession of the property and followed the correct procedure for an unlawful detainer action. (McKinnon, McGrath, Cotter, Wheat, Rice)

***Bell Generations Trust v. Flathead Bank of Bigfork* – 6/5/2013**
FACTS: Bell purchased two lots near Flathead Lake which included an easement across a lakefront parcel of land (Lake Property) owned by the Sunderland's. The Lake Property was encumbered by a deed of trust issued by Flathead Bank. The Sunderland's became delinquent on their loans causing Flathead Bank to foreclose on the property. Flathead Bank purchased the Lake Property at the trustee's sale but did not provide notice to Bell about the sale. Flathead then held a second trustee's sale. Notice was provided to Bell this time. He sued arguing that Flathead should not be allowed to hold the second sale which would extinguish his easement. Flathead Bank held the sale anyway. After both parties moved for summary judgment, the District Court held the first trust sale was invalid because no notice was provided to Bell. However, it then held the second sale was valid and stated that Bell lost all rights to the Lake Property including his easement.
HOLDING: The Supreme Court held that even though the first trust sale was done improperly, Flathead Bank was allowed a second opportunity to sell the property correctly. When the foreclosure sale was done properly, Bell's easement rights to the Lake Property were extinguished. Wheat in his Dissent argued there is an issue of material fact as to Flathead Bank's intention with respect to the first trustee's sale. As such, summary judgment was inappropriate. (Cotter, McGrath, Baker, McKinnon, Morris, Rice) (Wheat Dissented)

***Pilgeram v. Greenpoint Mortgage* – 11/25/2013**
FACTS: In 2006, the Pilgeram's obtained a home loan from Mann Mortgage and executed a deed of trust (DOT) naming Citizen's Title & Escrow the trustee and Mann the lender. Mortgage Electronic Registration Systems (MERS) was identified in the DOT as the beneficiary of the security instrument. The DOT and promissory note were transferred several times. It was at this point that the Pilgeram's defaulted on the note. Then, MERS sold its interest in the DOT to GreenPoint which subsequently held interests in both the DOT and the promissory note. GreenPoint then assigned its servicing rights to Countrywide. Countrywide informed the Pilgeram's that they were in default and in foreclosure. The Pilgeram's sued arguing the lenders lacked the authority to foreclose. The District Court granted summary judgment reasoning that MERS qualified as a beneficiary under Montana's Small Tract Financing Act (STFA).
HOLDING: The issue on appeal is one the Supreme Court had not yet addressed, whether Montana's STFA permits MERS to be the designated beneficiary in a trust indenture. The Court reasoned that the DOT was not given for the benefit of MERS but the for the benefit of the lender. MERS may ultimately obtain some benefit based on its relationship with the lenders but that benefit is not granted by the DOT. The Court concluded that MERS did not meet the STFA's definition of beneficiary. Summary judgment reversed and remanded. Cotter's Dissent argued that even though MERS does not qualify as a beneficiary, it may properly execute the documents in question because it is a special agent of the lender. Rice's Dissent argued that MERS should qualify as a beneficiary. (Wheat, McGrath, McKinnon, Morris) (Cotter Concurred in part, Dissented in part, joined by Baker) (Rice Dissented)

CONTRACTS

***Warren v. Campbell Farming Corp.* – 12/30/11**
FACTS: Campbell Farming is a closely-held Montana corporation, with three shareholders. The majority shareholder used her 51 percent interest to approve a bonus arrangement made to her son in the form of company stock and cash, in exchange for her son not resigning as president. The two other shareholders filed suit in New Mexico federal district court, and the District Court entered judgment in favor of the defendants.
HOLDING: In answering a certified question from the U.S. Court of Appeals for the Tenth Circuit, the Court concluded that even though the bonus arrangement was not a contract, the arrangement still fit the definition of a transaction and could be reviewed under the safe harbor provision in Montana code. The Court also ruled that in a claim based upon a director's conflict of interest, a director could not rely on the business judgment rule as a defense. Finally, the Court ruled that the *Daniel's* test applies only to claims involving breach of fiduciary duty, and not claims involving conflict of interest. (Rice, McGrath, Cotter, Nelson, Baker, Wheat, Morris)

***Krajacich v. Great Falls Clinic* – 4/17/12**
FACTS: A group of psychologists worked as partners in a Great Falls Clinic. Their partnership agreement stated that partners engaging in the practice of medicine within three years after separating from the clinic would forfeit their partnership interest payment. After the psychologists separated from the clinic, they filed an action when the clinic refused to pay

them their full partnership interests. The psychologists argued that the "practice of medicine" is a technical term that does not apply to their practice of psychology, only to licensed physicians.
HOLDING: The Court affirmed the District Court's decision that the term "practice of medicine" was not ambiguous and applied to the psychologists. The Concurrence agreed that the terms of the contract were unambiguous but would not generally include psychology in the practice of medicine. (Rice, Cotter, Morris, Baker) (Nelson Concurred Specially)

Kurtzenacker & Kittleson v. Davis Surveying, Inc. **– 5/15/12**
FACTS: The landowners sued a surveying company (company had completed surveys for previous owners) for negligent misrepresentation and breach of contract, after discovering the true boundaries on the parcel of land they purchased. The District Court found that the landowners were third party beneficiaries to the previous contracts and entered judgment for the landowners.
HOLDING: In reversing the District Court's finding that the landowners were third-party beneficiaries, the Court noted that the landowners were incidental beneficiaries to the survey contracts and had no right of enforcement of the surveying contract, and therefore lacked standing to bring a claim for breach of contract. The Court affirmed the lower court's finding and award of damages for negligent misrepresentation by the surveying company employee, but reversed the findings that the owner of surveying company was personally liable to the landowners. (Rice, McGrath, Wheat, Cotter, Nelson)

Elk Mountain Motor Sports, Inc. v. Montana DLI, UEF **– 11/20/12**
FACTS: The Uninsured Employer's Fund (UEF) accepted a claim from an employee injured while at work and later sought indemnity from the employer, Elk Mountain. UEF and Elk Mountain eventually agreed on an interim payment plan that would remain in place until the parties reached a settlement. This agreement was in place until UEF proposed an alternative payment arrangement and Elk Mountain rejected the new proposal. Because Elk Mountain had previously made four late payments, UEF turned its claim over to a collection agency. Elk Mountain sued UEF for breach of contract, and the District Court granted Elk Mountain's motion for summary judgment. In trial, the jury awarded Elk Mountain $198,749 in damages, finding that UEF's actions had interfered with Elk Mountain's ability to obtain financing and in turn, hurt Elk Mountain's sales. In a motion for post-trial relief, UEF claimed that the District Court had based its findings on the mistake that Elk Mountain would lose its Arctic Cat dealership status. The District Court denied the motion, and UEF appealed.
HOLDING: In affirming the District Court's decision, the Supreme Court found that UEF had breached the contract, because by accepting multiple late payments from Elk Mountain, UEF had waived its right to terminate the contract and refer to collections. The Supreme Court also found that the award of consequential damages had been proper, as the referral to a collection agency substantially interfered with Elk Mountain's ability to obtain financing and inventory. The fact that Elk Mountain did not lose its Arctic Cat dealership was not a mistake, rather a happening that did not occur. In addition, the Supreme Court affirmed the denial of Elk Mountain's claim for future damages, as the loss of profits was not reasonably certain to occur. (Morris, McGrath, Nelson, Cotter, Wheat)

Payne v. Berry's Auto, Inc. **– 4/16/2013**
FACTS: Linda Payne bought a used car from Berry's Auto (Berry's). Berry's disclaimed all warranties on the car and sold the vehicle "as is." Payne purchased an extended service contract from the Berry's salesman but the contract was offered through Wynn's Extended Care, Inc. and the purchase price was paid to Wynn's. Payne returned the vehicle to Berry's for minor repairs a few weeks later. A day after she picked up the car, the engine stopped. Berry's informed Payne that it would not be responsible for any repairs and that she should contact Wynn's. Payne sued Berry's. Both the Justice Court and the District Court held that Berry's was not responsible because the car was sold "as is."
HOLDING: The Supreme Court first held that Berry's disclaimer of all warranties was ineffective because the "as is" language conflicted with other language informing Payne that implied warranty rights may be available if she purchased a service contract. Consequently, Berry's failed to disclaim statutory implied warranties. However, even though the disclaimers were ineffective, Payne still failed to prove that the engine stopped working because of a condition impliedly guaranteed by Berry's. The District Court was therefore affirmed. (Rice, McGrath, Wheat, Cotter, Baker)

Kelker v. Geneva-Roth Ventures, Inc. **– 3/12/2013**
FACTS: Tiffany Kelker submitted an online application for a payday loan with Geneva who charged an interest rate of 780 percent APR. The loan agreement contained an arbitration clause. Among other claims, Kelker brought a putative class action in District Court arguing the interest rate was higher than permitted pursuant to § 32-5-301, MCA. Geneva tried to enforce the arbitration clause; the District Court held it unenforceable.
HOLDING: The Court held that the contract was a contract of adhesion because Kelker was given no opportunity to negotiate any terms, especially the binding arbitration provision. Next, the Court held that the contract fell outside of Kelker's reasonable expectations and unreasonably favored Geneva because no one explained it to her, she did not separately sign the arbitration provision, she was suffering from economic duress, and the arbitration provision was ambiguous. The Court held the arbitration provision was unconscionable. The Concurrence agreed with the result but would have deemed the arbitration clause unenforceable on alternate grounds. The Dissent would allow arbitration and allow the arbitrator to determine if the loan agreement's interest rate makes the contract as a whole unconscionable. (Morris, McGrath, Wheat) (Cotter specially Concurred) (Baker Dissented, joined by Rice)

***Castro v. Ernie's Auto, Inc.* – 12/24/2012**
FACTS: Castro purchased a used vehicle from Ernie's Auto (Ernie's) and signed several documents stating that Castro purchased the vehicle "as is." Roughly two miles from Ernie's, the car broke down. Castro returned the car and demanded a refund. Ernie's refused to give a refund, which led to this lawsuit. After a bench trial, the Justice Court granted a motion for a directed verdict in Ernie's favor. The District Court affirmed.
HOLDING: The Court affirmed the lower court's holding concluding that the Justice Court had no choice but to grant the directed verdict motion. Castro put forth no evidence that the 16 year-old car had nonconformity, especially when purchased under an "as is" contract. Because Castro failed to meet her burden of proof on every claim in her complaint, the Justice Court was not in error. The Concurrence believed this decision should not be non-citable. The Dissent believed Castro presented enough evidence to survive a directed verdict and that the majority mistakenly applied warranties law in a revocation of contract case. (Cotter, Nelson, Rice) (Baker specially Concurring) (McGrath Dissented, joined by Wheat and Morris)

EMPLOYMENT

***BNSF Railway Co. v. Feit* – 7/06/12**
FACTS: Feit applied for a job as a conductor trainee with BNSF but was not hired because of the "significant health and safety risks associated with extreme obesity." Feit filed a complaint with the Montana Department of Labor and Industry (DLI), claiming that BNSF had discriminated against him based on a perceived disability, his obesity. The DLI concluded that BSNF was liable, and BNSF appealed to the Montana Human Rights Commission, which affirmed the DLI's decision. BNSF then appealed to the U.S. District Court. The U.S. District Court certified a question to the Supreme Court – is obesity that is not caused by a physiological condition a "physical or mental impairment" in terms of Montana labor standards?
HOLDING: While construing "impairment" for the first time, the Supreme Court answered that yes, under Montana standards, obesity that is not the symptom of a physiological condition may constitute a physical or mental impairment, if the individual's weight is outside the "normal range" and affects "one or more body systems." Relying on the federal ADAAA standards and interpretations, the Supreme Court looked to the EEOC Compliance Manual. The Manual stated that while normal deviations in weight (and which are not the results of a physiological disorder) are not impairments, extreme deviations in weight may be considered impairments. Morris' Dissent stated that he would have answered no, and stated that the majority had correctly relied on federal law for guidance, but had passed over the correct definition of impairment in the Code of Federal Regulations. Rice, in his Dissent, would also have answered no, but he believed the majority relied on federal congressional amendments to the ADA which the Montana legislature had not incorporated into its Human Rights Act. (Baker, Nelson, Wheat, Cotter) (Morris, with McGrath, Dissented) (Rice dissented separately)

***Thompson v. J.C. Billion, Inc.* – 1/29/2013**
FACTS: Thompson worked as a manager of the Pit Stop. The Pit Stop was the automotive services and repair facility within Billion's dealership. During Thompson's time there, he worked almost 820 hours in excess of the 40-hour standard workweek. Upon resigning, Thompson sued, alleging he was owed around $17,000 in overtime pay. Billion countered, stating that Thompson is exempted under overtime payment laws because he is a manager and also a salesperson. Both arguments are defenses which must be timely raised. Both the DLI and the District Court held that he was a salesperson and therefore exempt.
HOLDING: On appeal, Thompson argues that Billion did not timely assert the defense, and thus it was waived. The Court held the defense was actually raised early in the administrative proceeding and not waived. The Court held Thompson was exempted from receiving overtime pay because the plain reading of the statue exempts both sellers and servicers of cars or parts despite contradictory language in the federal rule. (Rice, McGrath, Cotter, Baker, Morris)

***Sullivan v. Continental Construction of Montana, LLC* – 4/23/2013**
FACTS: Sullivan worked for Continental Construction. While Sullivan was on vacation, several employees approached his temporary replacement and threatened to quit if Continental did not immediately fire Sullivan. After conducting individual interviews, Continental terminated Sullivan over the phone. Sullivan sued Continental under the Montana Wrongful Discharge Act arguing Continental lacked good cause. The District Court granted summary judgment in favor of Continental based in part on hearsay statements from the interviews.
HOLDING: Employers have significant discretion in who they hire for managerial positions. Because Sullivan occupied a managerial position, Continental had broad discretion whether to terminate him. The Court held Continental possessed a legitimate business reason for termination. The Court held that employers can use hearsay from interviews to terminate an employee and those statements are admissible for the purpose of establishing employers' grounds for termination. Finally, the Court rejected Sullivan's argument that Continental violated the employee handbook by not giving him two prior written warnings because employee handbook stated that an employee was not guaranteed written warnings. (Morris, McGrath, Wheat, McKinnon, Baker)

***Cartwright v. Scheels All Sports, Inc.* – 6/18/2013**
FACTS: Brandon Cartwright was alleged to be having sexual relations with one assistant manager while dating another while employed at Scheels. The situation made other coworkers

feel uncomfortable. Cartwright and the other employee were called into the manager's office, disputed the sexual relations, and were subsequently fired. Cartwright applied for and received unemployment benefits. Part of that eligibility decision stated that Cartwright had not been fired due to his own misconduct. Cartwright filed suit alleging wrongful discharge from Scheels. Cartwright moved for summary judgment on the issue of liability based on the part of the unemployment benefits eligibility decision stating he was not fired because of misconduct. The District Court denied that motion along with Scheels' cross motion for summary judgment on whether Cartwright was fired for good cause. After a jury trial, the jury found that Scheels did not wrongfully terminate Cartwright.
HOLDING: The Court held that Cartwright's liability argument with regard to unemployment insurance is specifically prohibited by § 39-51-110, MCA. Furthermore, Cartwright's unemployment insurance argument was correctly decided by the District Court because the issue in the administrative hearing is not identical to the issue surrounding good cause. One cannot be substituted for another. Next, Cartwright was not terminated for his off-duty conduct as he alleges, but rather was terminated because of the effect that his off-duty conduct was having on workplace relationships. Also, the District Court did not error when it decided not to sanction Scheels for discovery violations because those violations showed no evidence of bad faith or any attempt to conceal evidence. Rather, it was standard practice to delete former employees' emails. (McKinnon, Wheat, Baker, Rice, Morris)

***Harrell v. Farmers Educational Co-op of America* – 12/10/2013**
FACTS: Thurston Harrell worked for the Farmers Educational Cooperative, commonly known as Montana Farmers Union (MFU), for many years. Alan Merrill was MFU's president. Over the course of his employment, MFU and Harrell had several disputes including wages, vacation time, and Harrell's additional responsibilities. Harrell was eventually demoted to part-time and received less pay while maintaining similar job duties. Harrell filed suit against MFU and Merrill alleging he was owed vacation pay, overtime pay, and as against Merrill only, interference with the employment relationship. He later resigned and added a constructive discharge claim. The District Court denied Harrell's motion for summary judgment. The jury found for Harrell including punitive damages.
HOLDING: The Supreme Court first held that the District Court denying summary judgment to MFU on the overtime pay, vacation pay, and extra duty pay claims was erroneous. The Court determined most of Harrell's wage claims went past the 180-day statute of limitations required by § 39-3-207, MCA. The wage claim that did not fit in that category was the extra duty claim because the extra duty claim is not a wage claim at all; it is an employment contract issue. The Court held that Harrell did not earn pay higher than what he was paid, thus his extra pay claim was without merit. Next, the Court reversed the jury's finding that Merrill be held personally liable. The Court held that Merrill's negative opinions of Harrell's work do not on their own rise to the level of tortuous interference unless there was some indication Merrill had a private financial or personal motive. The Court upheld the jury's verdict that Harrell was constructively discharged. (Baker, McGrath, Cotter, McKinnon, Rice)

***Marsden v. Blue Cross Blue Shield of Montana* – 12/28/2013**
FACTS: Shannon Marsden filed suit alleging wrongful termination from Blue Cross Blue Shield of Montana (BCBSMT) in violation of the Montana Wrongful Discharge from Employment Act (WDEA). Marsden claims she was an employee at-will. BCBSMT argued whether she was at-will or had a term contract should be resolved through arbitration. BCBSMT sought to compel arbitration pursuant to the employment agreement. The District Court enforced the arbitration provision.
HOLDING: The arbitration provision states that parties would submit to arbitration any disputes arising from the employment agreement. Because the dispute about whether Marsden was at-will or had a set-term contract involved a dispute about the employment contract, arbitration is required. The arbitrator's decision will determine whether Marsden can pursue her WDEA claim. (Morris, McGrath, Baker, Wheat, Rice)

INSURANCE

***Conway v. Benefis Health System, Inc.* – 3/19/2013**
FACTS: Conway was injured in an auto accident and received medical care at Benefis. Conway's healthcare coverage was through TRICARE and had medical payments coverage through his auto carrier, Kemper. Benefis received payments from both TRICARE and Kemper. Upon receiving Kemper's payment, Benefis reimbursed TRICARE's payment in full. Conway filed an individual and class action complaint stating that he was entitled to the additional money that Benefis received from Kemper over and above the TRICARE reimbursement rate. The District Court granted summary judgment in favor of Conway holding that Benefis breached its agreement with TRICARE by accepting more money for its services than the maximum allowable charge under the TRICARE agreement.
HOLDING: The Court held that summary judgment in favor of Conway was in error because Conway is not entitled to pocket medical expenses paid by insurers after all his medical bills are paid. Medical payments coverage is for the payment of medical expenses only. Additionally, Conway should not be allowed to pocket money because he received no damages from the breach of contract claim he alleges. Further, § 27-1-303, MCA's prohibition on receiving a greater amount in damages for contract breach than the person would have received if he fully performed also prohibits Conway from receiving money. (Cotter, McGrath, Baker, McKinnon, Rice)

***Bailey v. State Farm Mutual Auto Ins. Co.* – 5/2/13**
FACTS: The Baileys moved from Oregon to Montana in 1998, and when transferring their policy, asked the Montana State Farm insurance agent to give them the "same coverage that

they had in Oregon." Oregon state law required uninsured motorist (UM) protection include underinsured motorist (UIM) protection, and classified both as "U" coverage. The Montana insurance agent filled out applications for new policies, neither which included UIM coverage. The Baileys signed the insurance applications, which included a signed acknowledgement that the insured had read and understood the insurance policy. In 2005, Mr. Bailey called a State Farm agent to discuss his policy, requesting changes in other coverage plans. After reviewing his policy, the State Farm agent mentioned that the Bailey's policy did not include UIM coverage. In 2006, a drunk driver hit the Bailey's car in a head-on collision, and the Bailey's incurred over $1 million in medical expenses. The Baileys brought an action against State Farm for negligence in failing to obtain the appropriate insurance coverage. The District Court granted summary judgment for State Farm, finding that the request for "the same insurance" was not a specific request for UIM coverage, and that no fiduciary relationship existed between an insurance agent and a client.
HOLDING: Reversing the District Court's granting of summary judgment, the Court determined that genuine issues of material fact existed as to why the two policies differed in terms of coverage offered. In addition, the Court determined that the Baileys' oral request to the State Farm agent for matching Montana coverage was not barred by the parole evidence rule, and should be considered. The Court declined to address the nature of the duty of an insurance agent to a client. Rice dissented, stating that summary judgment was proper. Baker wrote a separate dissent, agreeing with Rice's view that summary judgment was proper, but expressing her separate concerns that the majority's opinion had in fact imposed a heightened duty on insurance agents. (Cotter, McGrath, Wheat, Morris) (Rice Dissented) (Baker Dissented separately)

***Harris v. St. Vincent Healthcare* – 7/25/2013**
FACTS: Two plaintiffs were injured in separate accidents and taken to receive medical treatment. Both plaintiffs were members of health plans under Blue Cross Blue Shield of Montana (BCBSMT). Both Billings Clinic and St. Vincent agreed to preferred provider agreements (PPA) with BCBSMT. Both health care providers agreed to provide a discounted rate for certain medical services provided to BCBSMT insureds. The plaintiffs' complaints requests compensatory damages equal to the difference between the amounts the third party insurers paid to the health care providers and the reduced reimbursement rates under the PPA's. Both District Courts granted motions for failure to state a claim upon which relief can be granted.
HOLDING: The Supreme Court considered the appeals and upheld the District Courts' interpretation of the term covered services in the PPA. That language obligates a provider to bill on discounted rates only where a plaintiff receives services that are paid for under a BCBSMT health plan. The Supreme Court further upheld the District Courts by concluding that the plaintiffs failed to demonstrate the health care providers breached the PPA by billing the insurers at the usual rate for the medical services instead of the PPA reimbursement rate. The Court summed up the last issue of constructive fraud concluding that the health care providers are under no legal duty to charge insurers at the BCBSMT reduced reimbursement rates. The District Courts were fully upheld. The special Concurrence found additional deficiencies in the breach of contract claims. (Cotter, Wheat, Rice, Morris) (McKinnon specially Concurred)

***Fisher v. State Farm Mutual Auto Ins. Co.* – 7/30/2013**
FACTS: Sharon McCartney (through her conservator Kathleen Fisher) and Leslie McCartney, wife and husband, sought declaratory relief that Leslie's umbrella policy with State Farm provided coverage for injuries sustained by Sharon as a result of Leslie's negligent driving. State Farm argued there was no coverage for Sharon's claim because of the family member exclusion in the umbrella policy. The District Court held via summary judgment the exclusion was unconscionable.
HOLDING: The Court held the plain language of the umbrella policy excluded Sharon's injuries. It further held the policy was not ambiguous, did not violate the insured's reasonable expectations, did not violate public policy, and, in reversing the District Court, was not unconscionable. The family member exclusion at issue is not so one sided as to be unconscionable. (Rice for full Court) (Kim Christopher sitting for Justice Wheat)

***McVey v. USAA Casualty Ins. Co.* – 11/14/13**
FACTS: After sustaining considerable injuries in an automobile accident, McVey's insurer (USAA) determined that she was the majority at fault, and refused to pay out any of McVey's uninsured motorist/under insured motorist (UM/UIM) coverage. McVey brought a separate action against the other driver, who filed a claim with USAA as a third party claimant. During this lawsuit, USAA's expert determined that the other driver had in fact been at fault, and immediately awarded McVey the full policy limit. McVey filed an action against USAA for violation of the Unfair Trade Practices Act (UTPA) and for punitive damages, asserting that the insurer's investigation had not been reasonable as a matter of law. USAA filed two motions for summary judgment: 1) alleging that McVey was not qualified to bring a claim under the UTPA and that USAA had not in fact denied McVey benefits, and 2) requesting dismissal of McVey's damages claims for emotional distress. The District Court granted both of insurer's motions.
HOLDING: Reversed. The Court determined that McVey was qualified to bring an action against USAA. Even though the alleged improper investigation occurred while investigating the other driver's claim, McVey still had standing under the UTPA to challenge USAA's action. In addition, the insurer's original determination of McVey's fault and refusal to pay UIM coverage constituted a denial of coverage, despite the insurer paying the full coverage three years later. The Court also found that there was sufficient evidence of a parasitic emotional distress claim to survive a motion for summary judgment. McKinnon in Dissent stated that the majority's holding contradicted traditional standing and justiciability requirements. (Morris, Wheat, Cotter, Baker) (McKinnon Dissented)

JURISDICTION/OTHER

***Patterson Enterprises v. Johnson* – 2/24/12**

FACTS: Patterson, a general contractor, was hired to construct a mountain road, requiring a significant amount of blasting. Because he had no experience blasting, Patterson hired Archie Johnson Contracting to perform the blasting for the project, while Patterson was in charge of excavating. One of the blasts created a dangerous and steep rock overhang. Despite the two crews not agreeing on a plan how to safely deal with the overhang, the excavating crew started removing the blasted rock. The blasting crew did nothing to warn the excavating crew, as it was assumed that they "already knew it was dangerous." The blasting crew supervisor signaled for the excavator to get out from under the overhang, and almost immediately, an entire section of the rock collapsed, crushing the machinery but not injuring anyone. Patterson sued the blasting subcontractor, claiming negligence. The District Court found that while blasting is an inherently dangerous activity, the blasting subcontractor's liability was not unlimited and should be determined by the jury. The jury found that Patterson had assumed the risk, and Patterson appealed.

HOLDING: The Court found that the District Court was correct in allowing the jury to decide that the blasting subcontractor did not assume all of the risk associated with the blasting, as the excavating crew intentionally began removing blasted rock, and knew of the dangers associated with excavating there. Wheat in his Dissent disagreed that the jury was properly allowed to consider if the excavating crew assumed the risk in the blasting activity.

(Nelson, McGrath, Cotter, Morris, Baker, Rice) (Wheat Dissented).

***Ward v. Johnson* – 5/1/12**

FACTS: Plaintiff was injured while working on employer's property when a gate failed to latch and struck her on the head. Plaintiff filed an action in her county of residence against the gate manufacturer (an out-of-state corporation) for strict products liability and against her employer for negligence. Her employer filed a motion to change venue to his county of residence, where the injury had taken place, and the District Court ruled in the employer's favor.

HOLDING: Reversed, the Court ruled that when an out-of-state corporation was named as a defendant, the plaintiff may file the action in her own county of residence, rather than the county where other Montana defendants reside (the choice of venue if there is no out-of-state defendant). This choice in venue for the plaintiff did not deprive the employer of equal protection of the law, but was a policy choice made by the Montana Legislature. (Baker, Cotter, Nelson, Wheat, Rice)

***O'Connell v. Bolen* – 10/23/12**

FACTS: Homeowners filed a complaint against individual board members of the Glastonbury Landowner's Association, and named the Association as a defendant. The District Court dismissed the action with prejudice for failure to state a claim, and awarded attorneys' fees and costs to Association.

HOLDING: Reversal of the District Court's decision, determining that while the complaint was unclear, the District Court should have ordered a more definite complaint from the pro-se homeowners, rather than dismissing with prejudice. Rice in his Dissent found the District Court was justified in dismissing the action as the complaint was "incomprehensible," but would have dismissed the case without prejudice. (Wheat, McGrath, Morris, Baker) (Rice Dissented)

***Baxter Homeowners' Association, Inc. v. Angel* – 4/2/2013**

FACTS: Geoffrey Angel rented an office in Bozeman on the second floor. The top floors of the building contained residential units. In 2008, the Baxter Homeowners' Association (BHA) restricted access to the elevator by only allowing tenants' access. Angel complained that locking the elevator in such a manner denied persons with disabilities access to his second floor office. The BHA filed a motion for summary judgment arguing Angel lacked standing to bring the complaint because he cannot show that he is associated with disabled persons nor has he been damaged because of the elevator policy. The District Court held there was no discrimination.

HOLDING: The Montana Supreme Court held Angel did not have standing to bring the case because he had not alleged a specific personal and legal interest. He was asserting the rights of third parties and did not come close to establishing standing to assert a third party's claim – which has its own statutory requirements. Because he was not a grieved party, he did not have standing. (Baker, McGrath, Wheat, Morris, Rice)

***Newman v. Scottsdale Ins. Co.* – 5/7/2013**

FACTS: This is the second action arising out of the same set of facts. The first action (Newman I) involved the suicide of a 16 year-old girl (Karlye Newman) at Spring Creek Lodge Academy, a "tough love" academic facility. One defendant, Teen Help, agreed to settle with Newman's family by assigning to her its rights to $3 million in insurance coverage. This lawsuit (Newman II) arose when Newman sued Teen Help's insurers, Scottsdale Insurance Company and National Union Fire Insurance Company (umbrella coverage insurer), to collect on the settlement. The District Court entered judgment against the insurers for $3,000,000 and in addition awarded Newman $1,188,399.45 in attorney's fees. Scottsdale argued that awarding Newman attorney's fees in Newman II for work performed on Newman I, and based on the contingency fee agreement enter in Newman I on fees issue, was in error.

HOLDING: The District Court erred and abused its discretion when it based its award of attorney fees from the contingency agreement of the first, and separate, tort action. The fee arrangement for Newman I does not transfer. The Court reversed and remanded the case for recalculation of fees based on what Newman, as an assignee of Teen Help, would have

been able to recover for her attorney's time and expenses incurred in pursuing insurance coverage from the other defendants. The Dissent concurred in all respects except to attorney's fees; he would have affirmed the District Court's ruling on how it calculated attorney's fees. (Cotter, McGrath, Rice, Baker, Morris) (Wheat Concurred in part, Dissented in part)

Johnston v. Centennial Log Homes & Furnishings, Inc. **– 7/8/2013**
FACTS: By grant deed, the Johnstons were granted 36 percent interest in a log home built by Centennial. Quickly, the majority owners (the Leonards) found defects in the house. In 2003, the Leonards signed a general release in favor of Centennial which included future damages associated with the Leonards' casualty, but the Johnstons were not a party to the lawsuit. Over the next six years, other defects that were too numerous to count arose. Engineers ultimately decided dismantling and rebuilding the home was the only option because fixing all structural defects was impossible. In 2009, the Johnstons filed a complaint against Centennial alleging, among other claims, negligent construction and breach of statutory and implied warranties. Centennial filed a motion for summary judgment arguing a statute of limitations defense as well as stating that the Johnstons' claims were waived by the Leonards' release. The District Court granted summary judgment on both grounds.
HOLDING: The Supreme Court agreed with the Johnstons stating that conflicting evidence exists as to whether the problems discovered in 2002 and the repairs made in 2004 and 2005 reasonably put the Leonards on notice of the serious nature of the problems in the home. When the claims should have been discovered is a question for the jury. Furthermore, the release is only binding on those who signed it. Because the Johnstons were not a party to that release, it is not binding on them. McKinnon in her Dissent believed the statute of limitations began to run when the first repairs were made because the Johnstons were put on notice. (Baker, McGrath, Morris, Cotter, Rice, Wheat) (McKinnon Dissented)

Diaz v. State of Montana **– 8/6/2013**
FACTS: This is the second time the Supreme Court has dealt with this case. Here, Plaintiffs requested class certification against the state after the insurance companies were dismissed. Disputes arose as to who was to be included in the class; the State wanted only those who filed timely claims to be included. The District Court agreed and the Plaintiffs appealed.
HOLDING: The District Court did not abuse its discretion in the class limitation because opening the class to members who never filed a claim would explode the number of claims under this suit to an unreasonable amount. The Supreme Court affirmed the District Court's decision that only those members who timely filed claims will be in the class. Wheat dissented, arguing that the Supreme Court affirmed different class definition standards in another case, and should have applied those standards to this case. (Baker, McGrath, McKinnon, Cotter, Rice, Morris) (Wheat Dissented)

Jacobsen v. Allstate Ins. Co. **– 8/29/2013**
FACTS: This case comes to the Montana Supreme Court for the second time. The first case, Jacobsen I, involved an injured motorist settling with Allstate. For the settlement, Allstate used its Claim Core Process Redesign (CCPR), which is a system Allstate used to fast track settlements and reduce the amount paid out on claims. On appeal in Jacobsen I, Jacobsen argued that Allstate did not hand over certain documents (McKinsey documents) in discovery that it should have. The Court ordered Allstate to hand over the McKinsey documents in discovery and remanded for a new trial. On remand, armed with the McKinsey documents, Jacobsen filed leave to add class action claims concerning Allstate's CCPR program. Specifically, Jacobsen argues that Allstate's CCPR program misrepresents how much unrepresented "fast track" claimants receive as opposed to represented claimants. This representation unfairly influences claimants into not obtaining counsel. The District Court certified the class.
HOLDING: The Supreme Court upheld the District's certification of the class action lawsuit. The Supreme Court held that commonality of all class members exists because they all dealt with the CCPR program which may be in violation of the UTPA. Furthermore, even if every individual trial cannot be satisfied in this lawsuit, resolving whether the CCPR violates the UTPA would set the stage for individual trials, establish a commonality for each individual, and drive the resolution of the case. The Supreme Court upheld most of the District Court's decision; however, the Supreme Court did reverse the District Court on class-wide punitive damages. The Court held that punitive damages should not be tried now; instead, Allstate should be afforded the opportunity to establish defenses to individual claims. To not do so would potentially allow claimants who were not actually damaged by the adjustment of their claim because of the CCPR to receive punitive damages anyway. Finally, the Court also upheld the District Court's evidentiary review even though it may not have been admissible at trial because of the preliminary nature of the class certification process and the broad discretion afforded to District Court judges. The Supreme Court remanded the case for a determination on whether the CCPR violated the UTPA, and if so, should the court require Allstate to notify all class members of their right to reopen and readjust their claims. The case was also remanded to determine if use of the CCPR involved actual fraud or actual malice. Baker's Dissent argued that the Court's attempt to preserve the class certification is in error because it still left in place a class claim that cannot meet the requirements of Montana Rule of Civil Procedure 23(b)(2). McKinnon's Dissent argued the Court wrongly turned the case from one of declaratory action, into one of damages under the UTPA. Furthermore, she believed the requirements under Rule 23(a) were not met. (Wheat, McGrath, Cotter, Morris) (Baker Dissented joined by Rice) (McKinnon Dissented)

Schuster v. Northwestern Energy Co. **– 12/3/2013**
FACTS: Larry Schuster was an electric service customer of Northwestern Energy (NWE). In 2009, NWE disconnected Schuster's service for failure to pay a $16 bill. Schuster alleges the termination of service cause his furnace to fail, which caused significant damage to his home. Schuster filed a negligence action against NWE in District Court. NWE filed a motion to dismiss, which was granted, arguing that Schuster failed to exhaust his administrative remedies before the Public Service Commission (PSC).

HOLDING: The Supreme Court held that the PSC has no authority to decide whether Schuster is entitled to damages from NWE. The essential nature of this claim is one of negligence, not energy rules promulgated by the PSC. Furthermore, exhaustion of administrative remedies is not required when they would be futile. No remedy the PSC is statutorily authorized to do could satisfy Schuster. As such, the District Court was the appropriate place for Schuster to bring his claim. The District Court was reversed. (Rice, McGrath, Cotter, Baker, Wheat)

LAND USE/ENVIRONMENT

Montana Wildlife Federation v. Montana Board of Oil & Gas **– 6/19/12**

FACTS: After completing environmental assessments for each application, the Montana Board of Oil and Gas Conservation (MBOGC) issued 23 gas well permits to Fidelity Exploration and Production Company (Fidelity) for wells in the area of Cedar Creek Anticline. The Montana Wildlife Federation challenged the granting of the permits, claiming that the environmental assessments for each of the permit applications were virtually identical and did not adequately assess the potential impacts on the habitat of the sage grouse, which is currently under consideration for endangered species status. The District Court granted summary judgment for MBOGC and the Wildlife Federation appealed.

HOLDING: Affirmed the District Court's decision that MBOGC, recognizing that the Montana Environmental Protection Act (MEPA) requires the authoritative agency to "review projects, programs, ... and other major actions of state government significantly affecting the quality of the human environment in order to make informed decisions." Under this standard, MBOGC fulfilled its obligations in completing the environmental assessments by properly "tiering" the reviews, and did not ignore the cumulative impact on all 23 applications, citing that the individual environmental assessments gave different responses where situations differed. Wheat in his Dissent would have reversed because the clear legislative purpose behind MEPA was to ensure that the public is informed of the anticipated impacts in Montana from potential state actions, and because the public was left largely in the dark with the institutional procedure of the environmental assessments. (Baker, McGrath, Cotter, Rice, James B. Wheelis sitting for Justice Nelson) (Wheat Dissented)

Clark Fork Coalition v. Montana DEQ and Revett Silver Co. **– 10/29/12**

FACTS: Revett Silver Company applied for a Montana Department of Environmental Quality (DEQ) general permit for storm water discharge from construction activity for a proposed mine site in the Rock Creek area. Clark Fork Coalition sued DEQ to prevent the agency from issuing the permit, claiming that the proposed run-off was an area of "unique ecological significance." Rock Creek houses a significant population of bull trout, a threatened species, and the habitat conditions were already on edge because of past sediment buildup in the creek system. The District Court granted summary judgment to the Clark Fork Coalition, and issued an injunction against the DEQ from issuing the permit. Revett appealed.

HOLDING: The Court affirmed the District Court, agreeing that the Rock Creek area was indeed a unique ecological resource, citing the DEQ's own environmental impact statement that described Rock Creek's bull trout population as "an essential stock for conservation purposes." The Court also rejected Revett's argument that the potential sediment buildup could be eliminated at the end of the project, as the damage to the trout's habitat would already have been done by the end of the proposed five-year construction plan. Rice in his Dissent claimed that the majority had applied an incorrect standard of review, and that both the majority and the District Court had failed to consider vast portions of the DEQ's evidence. (Wheat, McGrath, Nelson, Morris) (Rice Dissented, joined by Cotter).

Helena Sand & Gravel v. Lewis and Clark County Planning & Zoning Commission **– 11/30/12**

FACTS: Helena Sand and Gravel (HSG) applied for a permit from the DEQ to mine gravel on 110 acres of property. Before HSG obtained the permit, a group of neighboring citizens proposed a petition seeking to create a special zoning district that would encompass HSG's land and that would prohibit industrial and mining activity in the area. HSG filed a complaint against the County, and the District Court awarded summary judgment against HSG.

HOLDING: The Court affirmed the District Court, finding that the proposed special zoning district is a creation expressly contemplated by the local Growth Policy, a policy which did not place mining as a priority for the growth and expansion of the Helena valley. HSG argued and the County conceded that the private citizens' petitioned zoning district had been designed with the specific intent of preventing HSG from mining on their property, but the Court found that the County Commissioner's decision was not based on this same motivation. The Court also rejected HSG's argument that the Commissioners' zoning decision had singled out HSG for different, less favorable treatment (or "spot zoning") because HSG was the only landowner in the area that would be adversely affected by the decision. The Court determined that the proposed zoning change fit in with the "rural residential" use of the surrounding area. The Court remanded the case to the District Court level for briefing on the takings clause issue. Nelson's Concurrence agreed with the decision to remand for takings proceedings, but dissented in the affirmation of the Commissioners' decision because this decision was the perfect example of illegal spot zoning against Helena Sand and Gravel. Rice's Dissent expressed his particular concern about the takings/compensation issue. (Baker, Cotter, Wheat, Morris) (Nelson concurred in part, Rice concurred in part and dissented in part, joined by Nelson)

Williams v. Board of County Commissioners of Missoula County **– 8/28/2013**

FACTS: A few landowners filed suit under the protest provision of § 76-2-205(6), MCA, to stop the Commissioners from establishing a zoning district north of Lolo. In a separate suit, Williams challenged the constitutionality of § 76-2-205(6), MCA, by suing the Commissioners in Missoula. The landowners intervened in the lawsuit. The District Court granted sum-

mary judgment to the Commissioners holding the protest provision at issue in § 76-2-205(6), MCA, unconstitutional.
HOLDING: The Court first held the landowners were necessary parties because their interests in use of their property would be directly affected. The Supreme Court next agreed with the District Court that the protest provision within § 76-2-205(6), MCA, is unconstitutional as it allows a minority of landowners to strike down a zoning provision without any justification. Finally, the Court concluded that the unconstitutional provision is severable from the rest of the statute because the remaining portions are complete and capable of fulfilling the legislative intent. Rice's Dissent argued the landowners have a constitutional right to property and to protect their property rights from infringement, while Missoula County has no constitutional right to zone. McKinnon's Dissent argued the majority fails to distinguish between a zoning regulation and a statue that enables zoning to take place in the first instance. Only the former might implicate an unconstitutional delegation of legislative authority. (Cotter, McGrath, Wheat, Baker, Morris) (Rice Dissented) (McKinnon Dissented)

MEDICAL MALPRACTICE

***Estate of Wirtz v. 15th Judicial District, Hon. McKinnon* – 4/18/12**
FACTS: After a car accident, the victim was admitted to the ER and died several hours later under the care of the ER physician. Family members brought suit against the hospital for negligent hiring practices. The hospital contracted with an outside entity to make a report on the circumstances surrounding the victim's death, and subsequently terminated the physician based on the contents of that report. The victim's family demanded a copy of the report, and the hospital refused. The District Court ruled that the report met the definition of "data" and was exempt from disclosure.
HOLDING: Reversed, the majority ruled that if the report compiled by the outside agency was used in termination negotiations, the report was not considered "data" under the peer-review statutes and was therefore discoverable. In addition, the report qualified as an "incident report" made in response to the victim's death, and was not privileged. The Dissent argued that the majority overlooked §50-16-203, MCA, which establishes that a record or report from the hospital's committee would be confidential and privileged. In addition, the Dissent claimed the majority placed too much emphasis on the plaintiff's claim that the report had been used in termination negotiations, as this claim was unsubstantiated.
(McGrath, Wheat, Nelson, Morris) (Baker and Rice Dissented)

TAXATION

***Montana Department of Revenue v. Heidecker* – 7/2/2013**
FACTS: Heidecker purchased a 240-acre parcel of land. Heidecker continuously rented out most of the land for grain and hay production. The land was classified as agricultural for property tax purposes. Heidecker subdivided the property and created covenants requiring the land to be used only for residential purposes. However, Heidecker continued to use the land for agricultural purposes and the existing lot owners did not object. Upon consultation with the Montana Department of Revenue (DOR), Heidecker learned sale of the lots would trigger a reclassification from agricultural to residential. However, although Heidecker had not sold the lots at issue, the DOR reclassified the land as residential in 2009. Heidecker appealed. At the State Tax Appeal Board (STAB) hearing, STAB determined the land satisfied the requirements for agricultural classification and ordered the DOR to reclassify the land. The DOR petitioned for judicial review, claiming the land must be classified as residential because the covenants "effectively prohibit" agricultural use as stated in § 15-7-202(5), MCA. The District Court held the covenants failed to accomplish any prohibition on the agricultural use of the land.
HOLDING: The Court affirmed the District Court and held Heidecker's use of the land for agricultural purposes without an objecting lot owner negates any claim that the covenants "effectively prohibit" agricultural use. (Morris, Baker, McKinnon, Wheat, Rice)

***Covenant Investments v. Montana Department of Revenue* – 8/6/2013**
FACTS: Covenant owns property in a residential subdivision outside Bozeman. Covenant challenged the constitutionality of the six-year reappraisal cycle mandated by § 15-7-111, MCA, as a violation of its equal protection rights. Covenant argued that they were required to pay an unfair amount of taxes by assessing its tax liability based on a revised 2008 value. The District Court held the tax cycle violated Covenant's rights.
HOLDING: The Supreme Court held that this case was unlike previous cases in that Covenant did not begin the six-year tax cycle with an inequitable valuation of its property. Whereas beginning a tax cycle with an inequitable valuation is a violation of due process, courts have uniformly upheld cyclical revaluations between valuations against equal protection claims so long as no intentional, systematic, arbitrary, or fraudulent discrimination was present. The Montana Constitution only requires periodic attainment of equality in tax treatment. Covenant's constitutional rights were not violated. (Morris, Cotter, Baker, Wheat, McKinnon)

***Gold Creek Cellular v. Montana Department of Revenue* – 9/24/2013**
FACTS: Gold Creek and AT&T brought suit for declaratory action seeking to invalidate various Administrative Rules of Montana adopted by the DOR because those rules conflicted with other statutes. The District Court, upon receiving cross motions for summary judgment, granted summary judgment to Gold Creek and AT&T because the rules imposed additional and contradictory requirements of state law.

HOLDING: The Court held that the rule's definition of goodwill as that which can be valued using the purchase price accounting method narrows the definition too much by not allowing other fair valuation methods, thus restricting § 15-6-218, MCA, too much. In a similar manner, the regulation defining "intangible personal property" is invalid as it conflicts with the statute as well. Administrative Rules of Montana 42.22.101(10) and 42.22.101(12) are invalid as they conflict with § 15-6-218. (Wheat, Rice, McKinnon, Cotter)

***Bresnan Communications, LLC v. Montana Department of Revenue* – 12/2/2013**
FACTS: Bresnan upgraded its network beginning in 2003 to provide voice and internet services to its customers in addition to cable television services. Despite these upgrades, the vast majority of Bresnan's channels remained devoted to one-way cable programming, while a smaller portion were devoted to voice and internet services. Bresnan apportioned these assets among tax classifications as had other companies in Montana. It reported 90 percent of its assets as locally assessed cable and internet assets, subject to a three percent tax rate. It reported the remaining 10 percent of its assets as centrally assessed telecommunications property, subject to a six percent tax rate. The DOR audited Bresnan in 2009 and determined Bresnan was a telecommunications services company and therefore all of its property should be centrally assessed and subject to the six percent tax rate. This increased Bresnan's property tax liability by more than 300 percent from 2009 to 2010. In addition, the DOR revised Bresnan's assessments for 2007 through 2009 to reflect its determination, claiming the property was erroneously assessed. Bresnan sought a declaratory judgment regarding the assessments. The District Court held Bresnan owned property subject to the three percent rate, and the DOR could not issue retroactive assessments.
HOLDING: The Court reversed the District Court and held an analysis of the use and productivity of Bresnan's entire network allowed the DOR to classify all of Bresnan's property as a telecommunications service subject to the higher tax rate. It also held the DOR was authorized to make retroactive assessments because of inaccuracies in Bresnan's classifications of its property. The Dissent argued only a small fraction of Bresnan's property facilitated telecommunications and criticized the opinion for failing to analyze the evidence in the record. It pointed out Montana tax statutes allowed different classifications of different property. Therefore, only property that met the statutory definition of telecommunications services should be so classified. (Morris, McGrath, Cotter, Wheat, Baker) (Rice Dissented, joined by McKinnon)

TORT

***Steichen v. Talcott Properties, LLC* – 1/8/2013**
FACTS: Talcott owned a building in Great Falls and leased it to Bresnan Communications. Steichen worked as an independent contractor for Bresnan providing cleaning services. He had no contractual relationship with Talcott. In 2005, Steichen slipped on water during his cleaning duties in Talcott's building and was injured. Talcott won summary judgment in District Court because Steichen was an independent contractor.
HOLDING: Reverse and remand. The Court held that Talcott, as property owner, owed a duty of care to Steichen. The status of the injured party does not affect a property owner's general duty of care which is the exercise of ordinary care in the circumstances by the landowner. Talcott may attempt to prove on remand that Steichen should have anticipated the harm despite such knowledge or obviousness. Summary judgment was inappropriate. Rice in his Dissent argued it is poor policy to require a landlord to protect independent contractors from dangers inherent in the very job they were hired to perform. (McGrath, Wheat, Cotter, Baker) (Rice Dissented)

***Weaver v. Tri-Country Implement, Inc.* – 10/22/2013**
FACTS: C.R. Weaver and Michael Smith were named as managers or members of Mikart Transport, LLC. Smith was named as Mikart's registered agent. Smith, as Mikart's agent, requested that Tri-Country perform work on a truck of Mikart's. Roughly half the balance of the work was unpaid. A separate unpaid bill led to a lawsuit between Weaver, Mikart, Tri-Country, and Smith. The District Court entered judgment against Mikart, Weaver, and Smith holding them jointly and severally liable. Weaver appealed the imposition of personal liability against him.
HOLDING: The Court held that Weaver should not be held personally liable. Personal liability is allowed when the agent would be liable if acting in an individual capacity. Here, Weaver would not be assessed personal liability because he was not a party in any of the contracts. There is no basis to hold Weaver individually liable for the contractual obligations of Mikart. (Rice, McGrath, Baker, Cotter, Morris)

UNEMPLOYMENT INSURANCE

***Sheila Callahan & Friends, Inc. v. State of Montana, DLI* – 6/26/12**
FACTS: The employee was working under a one-year contract with SC&F (a radio station), and shortly before the expiration of that contract, declined in an email the station's offer for the next year. On her exit interview, the employee signed on a form that she had "quit." After a brief employment with another radio station, the employee was laid off and filed for unemployment benefits. The DLI determined that the employee was employed by SC&F on a contract basis during her base period of employment, and that SC&F's account was chargeable for a pro rata portion of benefits. SC&F appealed, and both a departmental redetermination and the Board of Labor Appeals affirmed the decision. On appeal, the District Court reversed, finding that the employee voluntarily left her employment due to a family illness, and the DLI appealed.

HOLDING: The Court affirmed the District Court's reversal. The District Court, in reviewing the Board of Labor Appeals, was correct in finding that an employee of limited duration is entitled to unemployment benefits when the employer does not offer the opportunity to continue the same work at the expiration of employment. But in this case, the employee voluntarily left her employment when she refused all offers from SC&F and was not entitled to benefits from SC&F. (Rice, McGrath, Nelson, Cotter) (Baker concurring)

***Gary & Leo's Fresh Foods v. State of Montana, DLI* – 10/09/12**
FACTS: A Havre grocery store terminated one of its deli clerks after receiving multiple complaints from customers about the clerk's inappropriate language and poor service. When the clerk applied for unemployment benefits, the DLI determined that the clerk was eligible for benefits. The grocery employer appealed, and the District Court reversed the Board of Labor Appeal's decision, finding that the employee was ineligible for benefits as she had been discharged due to misconduct. DLI appealed, claiming that the District Court improperly considered customer reports that could not have been admitted as evidence.
HOLDING: The Court affirmed the District Court's reversal of the Board's determination. The District Court was correct in using the Board's finding of facts (which mentioned the customer reports) to determine whether or not the employee's conduct constituted carelessness or negligence in disregard of the employer's interest. (Rice, Cotter, Nelson, Wheat, Baker)

***Jacky v. Avitus Group* – 10/10/2013**
FACTS: Jacky worked as a bus driver in Great Falls. After leaving her job, she filed for unemployment benefits to the DLI. The DLI determined she did not qualify. The hearing officer and Board of Labor Appeals affirmed the decision, leaving Jacky the only option to file a complaint in District Court. Jacky did not serve the DLI with notice of her petition. The District Court denied her petition because no supporting brief was filed.
HOLDING: On appeal, the Supreme Court held the District Court erred when it denied her petition because no supporting brief was filed. Not only is a petition not a motion as stated in Rule 2 of the Montana Rules of Civil Procedure, but per § 39-51-2410, MCA, such a briefing is not even mandated. Furthermore, although Jacky did not serve the DLI notice nor did she provide a discernible objection to the Board's findings, the procedural rules are to be construed liberally to best achieve justice allowing parties to have their day in court. Reversed and remanded for the District Court to fully review the administrative record. The Dissent believed there are no legal issues for the District Court to consider on remand. (Cotter, McGrath, Baker, Wheat, Morris) (Rice Dissented, joined by McKinnon)

WORKERS' COMPENSATION

***American Zurich Ins. Co. v. Todd* – 3/13/12**
FACTS: In a workers' compensation claim, a third party insurance adjustor voluntarily disclosed an attorney's communication with its client insurer to the non-client employer. When the employee later filed an action for unfair settlement practices, the employee requested the letter and the insurer claimed attorney-client privilege. The District Court ordered the insurer to produce the letter, and the insurer requested supervisory control.
HOLDING: The Supreme Court denied the petition for supervisory control. Despite sharing general common legal interests, the employer and insurer do not share a common legal interest in the adjustment of an employee's claim for compensation when the insurer is exclusively liable. The employer was not a party to the action and was not protected by insurer's privilege with its counsel. The insurance adjustor effectively waived the attorney-client privilege by disclosing the letter. Rice in his Dissent would have concluded that the employer fit into the community of interest where information could be shared without the loss of privilege. (Baker, McGrath, Nelson, Cotter, Wheat, Morris) (Rice Dissented)

***Alexander v. Bozeman Motors* – 12/20/2012**
FACTS: Mike Alexander was one of two former employees of Bozeman Motors who filed suite against Bozeman Motors and its president and managers alleging negligence, battery, and negligent or intentional infliction of emotional distress. The Plaintiffs claimed long-term physical and emotional injuries resulting from exposure to carbon monoxide and propane. Bozeman Motors moved for summary judgment on the basis that the claims against it were barred by the exclusive remedy provision of Montana's Workers' Compensation Act. The District Court granted Bozeman Motors' motion, holding that the conduct of the Defendants did not rise to the level of deliberate intent to cause specific harm, and that § 39-71-413, MCA, which provides an exception to the exclusive remedy provision of the Act, was constitutional.
HOLDING: The Supreme Court reversed and remanded with respect to Alexander's claims. On remand, the jury returned a verdict for the Defendants on all claims. The Supreme Court affirmed, holding: 1) § 39-71-413(2), MCA, does not create an impermissible class of employees in violation of equal protection; 2) the District Court did not err in instructing the jury; and 3) the District Court did not err in denying Plaintiffs' motion to exclude Alexander's cause of death. (Cotter, Wheat, Morris, Baker, Rice)

***Big Sky Colony v. Montana Department of Labor and Industry* – 12/31/2012**
FACTS: The DLI sought to enforce a law requiring employers to provide workers' compensation coverage against the Big Sky Colony (Colony), a Hutterite religious group. The District Court held the requirement violated the Colony's First Amendment and equal protection rights.

HOLDING: The Supreme Court reversed the District Court, holding the Colony's constitutional rights were not violated. The Court held the DLI's actions do not unfairly target the Colony because it simply adds to the scope of "employers" those that engage in commercial activities with nonmembers for remuneration. Nelson's Dissent believed the law targets the Colony and prevented them from being able to practice important parts of its religion. Rice's Dissent suggested the Colony's free exercise of religion was violated. (Morris, McGrath, Wheat, Baker) (Nelson Dissented) (Rice Dissented, joined by Cotter and Nelson)

***Harris v. State of Montana, Department of Corrections* – 1/29/2013**

FACTS: David Harris was employed by the Montana Department of Corrections (DOC) for roughly 13 years as a corrections officer and special response team (SRT) member for the Montana State Prison (MSP). In 2005, MSP decided to buy tasers. All members of the SRT were required to undergo training which included five-second taser exposure. As a result of his taser exposure, Harris claims injuries for which he received workers' compensation benefits. He also filed an action against the DOC, State of Montana, and others for intentional infliction of personal injury by his fellow employee. Defendants moved for summary judgment arguing the suit was barred by the exclusive remedy provision of the Workers' Compensation Act (WCA). The District Court granted the motion.

HOLDING: Harris argues that because his fellow employees intentionally injured him, it falls into an exception to the WCA. The Court upheld the District Court stating that a chance of injury is not the same as an employer's deliberate act to injure an employee. Harris' supervisors were upfront about the risks, underwent the tasing themselves, and had no actual knowledge of how the tasing would affect Harris. The exception does not apply and Harris' exclusive remedy is the WCA. The Concurrence would have affirmed the District Court more simply by holding that Harris did not satisfy the definition of "intentional injury." (Wheat, McGrath, Baker, Cotter) (Rice specially Concurring)

***Dvorak v. Montana State Fund* – 7/30/2013**

FACTS: Dianne Dvorak contracted an occupational disease arising from her employment with Wheat Montana. She first sought treatment in 2006 and then periodically after until 2011, when her doctor recommended she leave her job because it worsened her condition. Montana State Fund (MSF) denied her workers' compensation claim as untimely. The Workers' Compensation Court (WCC) granted summary judgment in favor of MSF.

HOLDING: The Supreme Court held there was an issue of material fact as to when Dvorak knew or should have known she was suffering from an occupational disease, thus the WCC's granting of summary judgment based on the statute of limitations was in error. Although Dvorak experienced work related pain starting in 2006, it might not have been until 2010 that she learned it was an occupational disease. The Dissent believes the Court remade the case into something neither party raised. (Cotter, McGrath, Baker, Wheat, Morris) (Rice Dissented, joined by McKinnon)

MONTANA SUPREME COURT REVIEW – Cases from 2012-2013

	COURT	Baker	Cotter	McGrath	McKinnon	Morris	Nelson	Rice	Wheat
Banking									
Federal Home Loan Mortgage Corp. v. Petty	✔		✔	✔	✔			✔	✔
Bell Generations Trust v. Flathead Bank of Bigfork	✔	✔	✔	✔	✔	✔		✔	✕
Pilgeram v. Greenpoint Mortgage	✕	✔	✔	✕	✕	✕		✔	✕
Contract									
Warren v. Campbell Farming Corp.	✔	✔	✔	✔		✔	✔	✔	✔
Krajacich v. Great Falls Clinic	✔	✔	✔			✔	✔	✔	
Kurtznacher & Kittelson v. Davis Surveying, Inc.	✔		✔	✔			✔	✔	✔
Elk Mountain Motor Sports, Inc. v. Montana DLI, UEF	✔		✔	✔		✔	✔		✔
Payne v. Berry's Auto, Inc.	✔	✔	✔	✔				✔	✔
Kelker v. Geneva-Roth Ventures, Inc.	✕	✔	✕	✕		✕		✔	✕
Castro v. Ernie's Auto, Inc.	✔	✔	✔	✕		✕	✔	✔	✕
Employment									
BNSF Railway Co. v. Feit	✕	✕	✕	✔		✔	✕	✔	✕
Thompson v. J.C. Billion, Inc.	✔	✔	✔	✔		✔		✔	
Sullivan v. Continental Construction of Montana, LLC	✔	✔		✔	✔	✔			✔
Cartwright v. Scheels All Sports, Inc.	✔	✔			✔	✔		✔	✔
Harrell v. Farmers Educational Co-op of America	✔	✔	✔		✔			✔	✔
Marsden v. Blue Cross Blue Shield of Montana	✔	✔		✔		✔		✔	✔
Insurance									
Conway v. Benefis Health System, Inc.	✔	✔	✔	✔	✔			✔	
Bailey v. State Farm Mutual Auto Ins. Co.	✕	✔	✕	✕		✕		✔	✕
Harris v. St. Vincent Healthcare	✔		✔		✔	✔		✔	✔
Fisher v. State Farm Mutual Auto Ins. Co.	✔	✔	✔	✔	✔	✔	✔	✔	
McVey v. USAA Casualty Ins. Co.	✕	✕	✕		✔	✕			✕
Jurisdiction/Other									
Patterson Enterprises v. Johnson	✔	✔	✔	✔		✔	✔	✔	✕
Ward v. Johnson	✔	✔	✔				✔	✔	✔
O'Connell v. Bolen	✕	✕		✕		✕		✔	✕
Baxter Homeowners' Association, Inc. v. Angel	✔	✔		✔		✔		✔	✔
Newman v. Scottsdale Ins. Co.	✔	✔	✔	✔		✔		✔	✕
Johnston v. Centennial Log Homes & Furnishings, Inc.	✕	✕	✕	✕	✔	✕		✕	✕
Diaz v. State of Montana	✔	✔	✔	✔	✔	✔		✔	✕
Jacobsen v. Allstate Insurance Co.	✕	✔	✕	✕	✔	✕		✔	✕
Schuster v. Northwestern Energy Co.	✕	✕	✕	✕				✕	✕

MONTANA SUPREME COURT REVIEW – Cases from 2012-2013

	COURT	Baker	Cotter	McGrath	McKinnon	Morris	Nelson	Rice	Wheat
Land Use/Environment									
Montana Wildlife Federation v. Montana Board of Oil & Gas	✔	✔	✔	✔				✔	✕
Clark Fork Coalition v. Montana DEQ and Revett Silver Co.	✕		✔	✕		✕	✕	✔	✕
Helena Sand & Gravel v. Lewis & Clark County	✕	✕	✕			✕	✔	✔	✕
Williams v. Missoula County Board of Commissioners	✕	✕	✕	✕	✔	✕		✔	✕
Medical Malpractice									
Estate of Wirtz v. 15th Judicial District, Hon. McKinnon	✕	✔		✕		✕	✕	✔	✕
Taxation									
Montana DOR v. Heidecker	✔	✔			✔	✔		✔	✔
Covenant Investments v. Montana DOR	✕	✕	✕		✕	✕			✕
Gold Creek Cellular v. Montana DOR	✔		✔		✔			✔	✔
Bresnan Communications, LLC v. Montana DOR	✕	✕	✕	✕	✔	✕		✔	✕
Tort									
Steichen v. Talcott Properties, LLC	✕	✕	✕	✕				✔	✕
Weaver v. Tri-Country Implement, Inc.	✔	✔	✔	✔		✔		✔	
Unemployment Insurance									
Sheila Callahan & Friends, Inc. v. State of Montana, DLI	✔	✔	✔	✔			✔	✔	
Gary & Leo's Fresh Foods v. Montana DLI	✔	✔	✔				✔	✔	✔
Jacky v. Avitus Group	✕	✕	✕	✕	✔		✕	✔	✕
Workers' Compensation									
American Zurich Ins. Co. v. Todd	✕	✕	✕	✕		✕	✕	✔	✕
Alexander v. Bozeman Motors	✔	✔	✔			✔		✔	✔
Big Sky Colony v. Montana DLI	✔	✔	✕	✔		✔	✕	✕	✔
Harris v. State of Montana, DOC	✔	✔	✔	✔				✔	✔
Dvorak v. Montana State Fund	✕	✕	✕	✕	✔	✕		✔	✕
Participation:	49	43	42	37	20	35	17	45	43
Total Business Score 2012-2013:	63%	70%	62%	57%	90%	54%	65%	93%	42%
Judicial Career Business Score:		60%	38%	52%	90%	51%	39%	80%	42%

Montana Workers' Compensation Court Judicial Review
Cases from 2012-2013

The Montana Workers' Compensation Court (WCC) was created in 1975 to address workers' compensation 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 25 percent to eighth highest nationally. 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 made the decision in 2007 to review the decisions of the WCC. This is the fourth cycle the Chamber has reviewed its work, and it covers cases from 2012 and 2013.

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. For the 2013 Legislature, the Montana Chamber top priority was House Bill 232 to strengthen the "exclusive remedy" doctrine in the intentional tort exception to Montana's work comp statute. The intentional tort exception allows an injured worker to sue for punitive damages in addition to wage and medical benefits if a court determines that an employer intentionally injures a worker. Courts were deciding large judgments against employers in addition to work comp benefits, thereby undermining the quid pro quo of the "exclusive remedy" doctrine. The Legislature passed and Governor Steve Bullock signed HB 232 to establish a "clear and convincing" evidentiary standard to prove that an employer intentionally injured a worker.

Additionally, the Montana Chamber is participating in the deliberations of the Labor-Management Workers' Compensation Advisory Council (LMAC) ordered by Pam Bucy, Director of the Montana Department of Labor and Industry. This is the second installment of the LMAC, which developed the HB 334 reforms enacted by the 2011 Legislature. The current LMAC is tasked with reviewing the HB 334 reforms while also addressing current cost factors influencing premiums in Montana, in particular Montana's lackluster workplace safety record.

Montana Workers' Compensation Court
Judge James "Jim" Jeremiah Shea

Scoring

In this review, the WCC judge was evaluated in comparison to the pro-business position. A total of 19 cases were chosen for this review during the period from 2012-2013. This report includes a review of judgments made by Judge James "Jim" Jeremiah Shea, who was appointed by Governor Brian Schweitzer as the state's sole workers' compensation judge in 2005, and reappointed in 2011. In early 2014, Judge Shea was nominated by Governor Bullock to finish the term of Supreme Court Justice Brian Morris, who was confirmed by the U.S. Senate to sit on the U.S. District Court for the District of Montana. Shea was subsequently approved by the Montana Supreme Court Nominating Committee and is currently serving.

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

***Pearson v. Montana Insurance Guarantee Association*, 2012 MTWCC 1**
FACTS: The Petitioner suffered an industrial injury, including a traumatic brain injury, in 1995. In 1997, he settled his claim. The Petitioner contended that his settlement agreement with the Respondent was void, invalid, or unenforceable and that the Court should order his claim reopened. The Petitioner further argued that the insurer unreasonably adjusted his claim and that he should be entitled to reasonable attorney fees and a penalty. The Respondent contended that: the Petitioner's claim was barred by a statute of limitations; no grounds existed to order reopening of the Petitioner's settlement; and, statutorily, it cannot be held liable for attorney fees or a penalty.
HOLDING: The Petitioner was not competent to enter into the settlement agreement and it was therefore void. The Respondent was not an insurer within the meaning of that term under the Workers' Compensation Act. Therefore, the Respondent cannot be subjected to attorney fees or a penalty under §§ 39-71-611, -2907, MCA.

***Delong v. Montana State Fund*, 2012 MTWCC 3**
FACTS: The Petitioner contended that he injured his back while lifting a motor at work. Although the Petitioner's employer had no formal policy for reporting work-related injuries, the Petitioner informed him that he had injured his back, that his pain was not resolving, and that he intended to seek medical treatment. The Petitioner did not file a workers' compensation claim until more than 30 days after the incident. The employer denied any knowledge of the Petitioner's industrial injury until getting a call about the report from the Respondent. The Respondent denied the Petitioner's claim for failure to give timely notice to his employer, pursuant to § 39-71-603, MCA.
HOLDING: The Petitioner and two former coworkers testified that everyone at the business, including the employer, knew about the Petitioner's industrial accident shortly after its occurrence. The employer's deposition testimony to the contrary was not credible. The Court concluded that the employer had actual notice of the Petitioner's industrial injury within 30 days of its occurrence.

***McCollom v. Montana State Fund*, 2012 MTWCC 6**
FACTS: The Petitioner suffered severe injuries from an explosion in his camping trailer, where he stayed while working on a jobsite. The Petitioner alleged that he was an on-call employee and that he was camping in part because his employer expected him to arrive at the jobsite quickly if he were recalled after hours. The Petitioner's employer denied that Petitioner was on call and alleged that Petitioner was not one of the employees that would have been recalled to the jobsite. The Respondent contended that Petitioner's injuries did not occur within the course and scope of his employment.
HOLDING: The Petitioner was not an on-call employee and his employer received no benefit from his decision to camp near the jobsite. The Petitioner's injury did not occur within the course and scope of his employment and it was therefore not compensable.

***Schellinger f/k/a Uffalussy v. St. Patrick Hospital and Health Sciences Center*, 2012 MTWCC 10**
FACTS: The Respondent moved for summary judgment regarding the Petitioner's request for medical benefits, arguing that because the Petitioner had not "used" her benefits for 60 consecutive months, such benefits terminated pursuant to § 39-71-704(1)(e), MCA. The Petitioner objected to the Respondent's motion and cross-motioned for summary judgment, arguing that the Respondent was on notice that medical bills existed for which the Petitioner believed the Respondent was liable.
HOLDING: The statute of repose did not expire in this matter, and the Petitioner's claims for unpaid medical bills are not barred by § 39-71-704(1)(e), MCA.

***Morse v. Liberty Northwest Ins. Corp.*, 2012 MTWCC 16**
FACTS: In 2009, the Petitioner sought medical treatment for hip pain and learned that his condition was likely attributable to two industrial accidents which occurred in the fall or winter of 2006. Although no one has located a contemporaneous incident report, the Petitioner contends that he reported both accidents to his employer's safety officer. The safety officer testified that he recalled filling out an incident report for the Petitioner's first accident and recalled the Petitioner reporting the second accident. The Respondent denied the Petitioner's claims on the grounds that he did not timely report his injury to his employer within 30 days, as required by § 39-71-603, MCA, and that he failed to comply with the claims filing time limitations found in § 39-71-601, MCA.
HOLDING: The Petitioner reported his industrial accidents to his employer, and the employer later mislaid the paperwork for one injury and failed to prepare a report for the second. The employer's actions can be imputed to the Respondent, and the Petitioner is entitled to an additional 24 months in which to file his claim under § 39-71-601, MCA. The Petitioner's second industrial accident fell within the additional time limit and was therefore compensable.

***Gunderman v. Montana State Fund,* 2012 MTWCC 18**
FACTS: The Petitioner suffered an injury as a seasonal farm worker. He contended that, since he did not work for four pay periods, his average weekly wage should be based on his hourly rate of pay times the number of hours in a week for which he was hired to work under § 39-71-123(3)(a), MCA. The Respondent calculated the Petitioner's average weekly wage based on the Petitioner's four prior pay periods going back more than one year from the date of injury, given the Petitioner's long history of seasonal employment with the same employer. The parties requested the Court to identify the proper method of calculating the Petitioner's average weekly wage.
HOLDING: As a seasonal farm worker with a long history working for the same employer and the reasonable relationship requirement of § 39-71-105(1), MCA, Petitioner's average

weekly wage should be calculated pursuant to § 39-71-123(3)(b), MCA, by compiling his wages earned while working for his time-of-injury employer for a period of one year prior to the date of injury. For purposes of this calculation, the Petitioner's wages would include the value of his room and board as well as the value of a truck that his employer gave him as compensation for his labor. The Petitioner's wages should then be divided by the number of weeks in the year prior to his injury that the Petitioner worked for his time-of-injury employer and periods of idleness during that year. Excluded from the calculation were periods during which the Petitioner worked for another employer since those periods do not constitute "periods of idleness."

***McCone County v. State of Montana, WC Regulation Bureau, Independent Contractor Central Unit,* 2012 MTWCC 19**

FACTS: The Petitioner moved for summary judgment on its appeal of an Independent Contractor Central Unit Decision, finding its contract worker was an employee rather than an independent contractor for the purposes of her unemployment insurance claim. The Respondent opposed the motion and, as there were no material issues of fact, requested summary judgment in its favor as a matter of law.

HOLDING: There was no material issues of fact remaining as to the status of a worker who contracted with the Petitioner, so the Court granted summary judgment to the non-moving party as a matter of law. Solely for the purposes of § 39-51, MCA, and the contract worker's unemployment insurance claim, the Petitioner's contract worker did not meet the definition of an independent contractor and was therefore an employee, as she had no workers' compensation insurance on herself and no independent contractor exemption certificate. As pertains to any issues beyond § 39-51, MCA, any determination regarding the worker's status would have been an advisory ruling, from which Judge Shea was jurisdictionally constrained.

***Dauenhauer v. Montana State Fund*, 2012 MTWCC 22**

FACTS: Within the 60-consecutive month period under the statute of repose, § 39-71-704(1)(e), MCA, the Petitioner's wife contacted the Respondent for authorization for her husband to see his surgeon for a follow-up visit. The Respondent's claims examiner denied authorization, believing the request was based solely on the Petitioner's desire to keep his medical benefits open. Without the Respondent's authorization to see a physician, the Petitioner had difficulty setting a medical appointment. The Petitioner's family physician eventually faxed a request to the Respondent to have the Petitioner seen by a neurosurgeon, two days after the statute of repose had run. The Respondent continued to deny further medical care on the basis that the Petitioner had failed to use his medical benefits for over 60 consecutive months.

HOLDING: Seeking authorization for legitimate, reasonably necessary medical treatment causally related to an accepted injury claim within 60 consecutive months of the last treatment constituted "use" under § 39-71-704(1)(e), MCA. Because the Respondent's claims examiner believed the sole reason the Petitioner was requesting authorization for treatment was to extend the 60-month deadline, the Respondent acted reasonably in denying and maintaining the denial of medical benefits.

***Clapham v. Twin City Fire Ins. Co.,* 2012 MTWCC 27**

FACTS: The Petitioner moved for summary judgment, arguing that the Respondent violated the provisions of § 39-71-608, MCA, when it agreed to pay his claim under a reservation of rights and then refused to pay medical expenses and failed to accept or deny his claim, or request authorization to continue paying his claim under the statute, after the 90-day time period had expired. The Petitioner contended he was entitled to acceptance of his claim, attorneys fees, and a penalty. The Respondent admitted it did not pay the Petitioner's medical expenses and that it did not accept or deny his claim within 90 days as required by the statute. However, the Respondent argued that it was not obligated to pay any benefits under § 39-71-608, MCA, and that the only consequence it may face for failing to comply with the 90-day deadline is attorney fees and a penalty if the claim is later adjudged compensable.

HOLDING: The Petitioner was not entitled to acceptance of his claim for the Respondent's failure to obtain written consent to make compensation payments for more than 90 days under reservation of rights. However, the Petitioner is entitled to a penalty if his claim is found to be compensable. The Respondent is obligated to pay certain medical expenses incurred during the time period it placed the Petitioner's claim under § 39-71-608, MCA.

***Clapham v. Twin City Fire Ins. Co.,* 2012 MTWCC 34**

FACTS: The Petitioner suffered a work-related back injury in 2002. In 2010, he changed jobs. He later filed an occupational disease claim against his new employer. The Respondent denied the Petitioner's claim on the grounds that his employment did not cause his back condition. The Petitioner contends that he developed a compensable occupational disease while working for the Respondent's insured.

HOLDING: The Petitioner did not prove that he developed an occupational disease while working for the Respondent's insured. He was therefore not entitled to the benefits he sought.

***Gary v. Montana State Fund*, 2012 MTWCC 38**

FACTS: The Petitioner suffered from low-back pain due to an L4-5 herniated disk. The Petitioner claimed his condition was a result of his 2005 industrial injury and wanted the Respondent to pay for surgery and, related, unpaid medical expenses. The Respondent denied liability for the Petitioner's current condition and maintained that the Petitioner's herniated disk was a result of a naturally-occurring degeneration unrelated to his industrial injury.

HOLDING: The Petitioner had the burden of proving a causal connection between his current herniated disk and his industrial accident. Without proof of medical causation on a

more-probable-than-not basis that his current condition is causally related to his industrial injury, the Petitioner failed to meet the burden of proof.

***Drivdahl v. Zurich American Ins. Co. et al.*, 2012 MTWCC 43**
FACTS: The employee contended that he was permanently totally disabled due to his industrial injury. The insurer contended that employee was not entitled to permanent total disability benefits because his treating physician had approved several job analyses.
HOLDING: The weight of the evidence supported the employee's entitlement to permanent total disability benefits.

***Hardie v. Montana State Fund*, 2012 MTWCC 44**
FACTS: The Petitioner fell in her employer's parking lot, landing on her backside, causing immediate low-back pain. Her pain improved over time and she sought no medical attention until months later, but failed to relate the onset of pain to the fall at work for over ten months. The Respondent denied the Petitioner's claim on the basis of a lack of objective medical evidence.
HOLDING: The Petitioner had shown by a preponderance of the evidence that her fall at work caused the objective medical findings of a bulging disk and annular tear in her lumbar spine revealed in an MRI some ten months post-injury. She was entitled to past and future medical and indemnity benefits related to her low-back condition.

***Trevino v. Montana State Fund,* 2013 MTWCC 1**
FACTS: The Respondent moved for summary judgment on the Petitioner's claim of entitlement to permanent partial disability and vocational rehabilitation benefits, arguing that the Petitioner was at maximum medical improvement and released to return to her time-of-injury employment and that the Petitioner believed she was capable of performing her time-of-injury job. The Petitioner objected to the Respondent's motion, arguing that a question of fact existed as to whether she could perform her time-of-injury job.
HOLDING: The undisputed facts support a conclusion that the Petitioner is capable of performing her time-of-injury job. Thus, she was not entitled to additional permanent partial disability benefits nor vocational rehabilitation benefits and the Respondent was entitled to summary judgment in its favor.

***Gaudette v. Montana* State Fund, 2013 MTWCC 7**
FACTS: The employee contended that she suffered either from Multiple Chemical Sensitivity or somatoform disorder since reacting to odors during renovations at her workplace. Although MSF accepted liability for her respiratory condition, the employee contended that MSF unreasonably refused to accept liability for her continuing condition. MSF contended that the employee suffered only a temporary aggravation of an underlying respiratory condition, that she reached maximum medical improvement for that aggravation, and that her present complaints were not causally related to her industrial injury.
HOLDING: The employee had not met her burden of proving that her present condition was causally related to her industrial injury. She reached maximum medical improvement for a temporary aggravation of an underlying condition and was not entitled to further indemnity or medical benefits.

***Goble v. Montana State Fund*, 2013 MTWCC 8**
FACTS: The Petitioner moved for summary judgment, alleging that since the Respondent accepted liability for his injury, he was entitled to additional benefits under § 39-71-703, MCA, notwithstanding his incarceration for more than 30 days. The Petitioner further alleged that the Respondent's interpretation of § 39-71-744, MCA, in denying him additional permanent partial disability benefits was in error. If it was not, then the statute is unconstitutional for violating his equal protection and due process rights. The Respondent's Cross-Motion for Summary Judgment countered that § 39-71-744, MCA, was plain and unambiguous and was intended to deny disability benefits to an injured worker who is incarcerated for more than 30 days, and that the statute had been previously found to be rationally related to a legitimate governmental purpose.
HOLDING: Section 39-71-744, MCA, is plain and unambiguous and is clearly intended to deny disability benefits, including permanent partial disability benefits, to an injured worker during the period of the worker's incarceration of more than 30 days. The Court found previously in *Wimberley* and *McCuin* that § 39-71-744, MCA, was constitutional, and the statute is also rationally related to the legislated objectives of the Workers' Compensation Act.

***Johnson v. Liberty NW Ins. Corp.*, 2013 MTWCC 18**
FACTS: Upon order of the Court, the parties simultaneously moved for summary judgment on the issue of whether the 5th or 6th Edition of the AMA Guides applied for purposes of calculating the Petitioner's impairment rating.
HOLDING: The 1999 version of the Workers' Compensation Act applied to the Petitioner's claim because that was the version in effect on the Petitioner's last day of work. Under the 1999 statutes, the correct edition of the AMA Guides to apply was that which was current on the date the injured worker reached MMI. Since the Petitioner reached MMI on April 16, 2001, the 5th Edition applied for his impairment rating. Summary judgment on this issue was granted in favor of the Petitioner.

***Malcomson v. Liberty Northwest*, 2013 MTWCC 21**

FACTS: The employee withdrew her consent allowing the insurer to have ex parte communications with her medical providers. She then signed a release allowing the insurer to obtain relevant medical information, but required the insurer to give her the opportunity to participate in any communications. The insurer terminated the employee's benefits, arguing that it was entitled to pursue ex parte communications with an injured worker's medical providers pursuant to §§ 39-71-604(3) and 50-16-527(5), MCA. The employee petitioned the Court, arguing that these statutes unconstitutionally violate her right of privacy under Article II, Section 10, of the Montana Constitution, and her right to due process under Article II, Section 17, of the Montana Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution.

HOLDING: As applied to the facts of employee's claim, § 39-71-604(3), MCA, is unconstitutional under Article II, Section 10, of the Montana Constitution. The employee did not seek to limit the insurer's ability to obtain relevant healthcare information regarding her claim; she sought only to be advised that the communications with her treating physicians were taking place and to be included in the communications in order to protect her constitutional right of privacy. Although its provisions are identical to the language of § 39-71-604(3), MCA, the Court lacked the jurisdiction to rule on the constitutionality of § 50-16-527(5), MCA, since it is not part of the Workers' Compensation Act.

Torgerson v. Transportation Ins. Co. 2013 MTWCC 24

FACTS: The Respondent moved for summary judgment, arguing that it is not liable for payment of an impairment award to a claimant who died from unrelated causes after reaching MMI but prior to a physician issuing an impairment rating for his occupational disease. The Petitioner filed a cross-motion for summary judgment, arguing that the claimant's right to this benefit accrued at the time he reached MMI and that it was therefore payable to his estate.

HOLDING: Under the applicable case law, a claimant's right to an impairment award accrues at the time the claimant reached MMI, even though a physician must subsequently issue an impairment rating in order to determine the precise value of the entitlement. In this case, the claimant's right to an impairment award accrued when he reached MMI, even though the claimant died prior to the issuance of an impairment rating. Therefore, his estate is entitled to receive payment of the impairment award from the Respondent.

MONTANA WORKERS' COMPENSATION COURT REVIEW – Cases from 2012-2013

	JUDGE SHEA
Pearson v. Montana Insurance Guarantee Association	✔
Delong v. Montana State Fund	✔
McCollom v. Montana State Fund	✔
Schellinger f/k/a Uffalussy v. St. Patrick Hospital and Health Sciences Center	✘
Morse v. Liberty Northwest Ins. Corp.	✔
Gunderman v. Montana State Fund	✔
McCone County v. State of Montana, WC Regulation Bureau, Independent Central Unit	✔
Dauenhauer v. Montana State Fund	✘
Clapham v. Twin City Fire Ins. Co. (2012 MTWCC 27)	✘
Clapham v. Twin City Fire Ins. Co. (2012 MTWCC 34)	✔
Gary v. Montana State Fund	✔
Drivdahl v. Zurich American In. Co. et al.	✘
Hardie v. Montana State Fund	✘
Trevino v. Montana State Fund	✘
Gaudette v. Montana State Fund	✔
Goble v. Montana State Fund	✔
Johnson v. Liberty Northwest Ins. Corp.	✘
Malcomson v. Liberty Northwest Ins. Corp.	✘
Torgerson v. Transportation Ins. Co.	✔
Total Business Score 2012-2013:	**58%**
Judicial Career Business Score:	**62%**

Montana Chamber's Legal Efforts
2012-2013

The Montana Chamber has continued to commit time and resources to improving Montana's legal climate, which is ranked as one of the worst in the nation by the U.S. Chamber Institute for Legal Reform. Following are some of the Montana Chamber's 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.

Biennial Business and the Law Conference
For the past six 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. For the March 2014 conference in Billings, we partnered with the U.S. Chamber Institute for Legal Reform, the American Tort Reform Association (ATRA), and a dozen business groups and organizations to cover topics such as subrogation in our workers' compensation system; legal reforms considered during the 2013 Legislature; potential legal reforms for the tax appeal process; and sue and settle tactics utilized by environmental groups to stop development. We were joined by Harold Kim with the Institute for Legal Reform, who delivered a presentation on *The New Lawsuit Ecosystem*. Lauren Sheets Jarrell with ATRA outlined how other states are tackling trespass and landowner liability. Montana Attorney General Tim Fox delivered the luncheon keynote. The conference was approved by the Montana Bar for 6.5 CLE credits.

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 2013, the Montana Chamber successfully passed a number of new, common sense legal reforms, including strengthening the "exclusive remedy" doctrine in our workers' compensation statute; $50 million appeal bond cap; lowering judgment interest in civil cases; and reducing lost wages and benefits awards in the Wrongful Discharge Act. Governor Steve Bullock signed the exclusive remedy and appeal bond cap legislation, but vetoed the other two. The Montana Chamber will continue to pursue critical legal reforms in the 2015 Legislature.

U.S. Chamber of Commerce's Institute for Legal Reform
Although the U.S. Chamber is a completely separate organization from the Montana Chamber, we still look to them as a national leader in the area of legal and tort reform. The Institute for Legal Reform publishes the State Liability Systems Ranking Survey to identify how reasonable and balanced a state's tort liability systems is perceived to be by in-house general counsel, senior litigators or attorneys, and other senior executives who indicated they are knowledgeable about litigation matters at companies with at least $100 million in annual revenues. The survey aims to quantify how corporate attorneys view the state systems. Montana consistently ranks low in the study, including placing 39th in 2006, 40th in 2007, 38th in 2008, 42nd in 2010, and 45th in 2012.

Americans for Tort Reform
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. We worked closely with ATRA on the appeal bond cap and judgment interest legislation in the 2013 Legislature. ATRA started in 1986 and is the only national organization exclusively dedicated to reforming the nation's civil justice system.

Montana
Chamber of Commerce

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