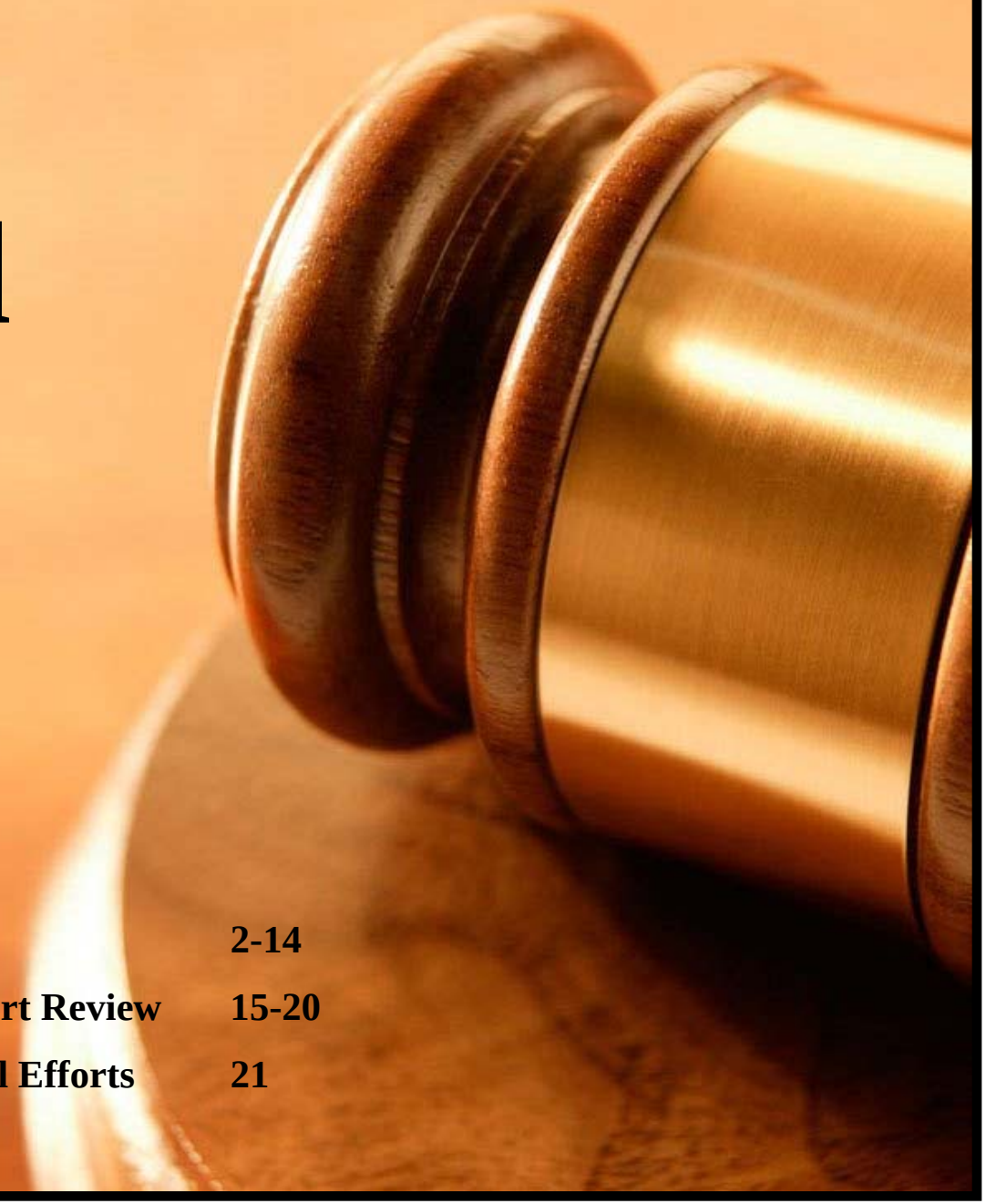
MONTANA CHAMBER OF COMMERCE

Judicial Review 2016



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MONTANA SUPREME COURT JUDICIAL REVIEW

Cases from 2014-2015

The Montana Chamber of Commerce is pleased to present the 2016 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 2014 and 2015 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 2013. The dynamic of the Court has changed considerably in the past decade, which makes it even more important to continually measure the Court's record. This Review provides a greater understanding of the important role that Court decisions play in shaping our economy. Only then can we judge how, and if, the state's business climate is truly improving or suffering as a result of Court decisions.

Cases are divided into eight categories: Banking, Employment, Insurance, Medical Malpractice, Taxation, Tort, Unemployment Insurance, and Workers' Compensation/FELA. Each case was assigned one category for the purpose of the record even though some cases obviously could 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 2014-2015 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 (2014 to 2015). 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. In late 2013, Justice Morris was nominated and confirmed to serve on the U.S. District Court for the District of Montana. He was replaced by Workers' Compensation Court Judge James "Jim" Jeremiah Shea, who was appointed by Governor Steve Bullock in 2014 and confirmed by the Montana Senate in 2015. He will run for retention to serve the remainder of the term (concluding 2020) in the 2016 Election. 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, up for re-election in 2016

Justice Patricia Cotter
Elected in 2000, re-elected in 2008, not running for re-election in 2016

Justice Jim Rice
Appointed in 2001, retained by voters in 2002, reelected in 2006 and 2014

Justice Mike Wheat
Appointed in early 2010 to replace retiring Justice John Warner, retained by voters in 2010, re-elected in 2014

Justice Beth Baker
Elected in 2010

Justice Laurie McKinnon
Elected in 2012

Justice Jim Shea
Appointed in 2014, up for retention in 2016

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

BANKING

Morrow v. Bank of America – 5/7/14
FACTS: Bank of America (BOA) forclosed on the home of plaintiffs after an alleged loan modification. Plaintiffs assert they had been told to skip a payment and make reduced payments after telephone conversations with BOA representatives. The plaintiffs sued alleging breach of oral contract, negligence, negligent misrepresentation, tortious breach of the covenant of good faith and fair dealing, fraud, and violation of the Consumer Protection Act. BOA claimed the Statue of Frauds prevented most of the plaintiffs' claims, while it owed no duty to plaintiffs as to negligence, misrepresentation, and breach of the covenant.
HOLDING: The Supreme Court reversed the District Court's grant of summary judgment to BOA on most claims. A lender does not normally have a duty to renegotiate a defaulted loan, but it may create one when it takes steps to advise a customer on financial matters. The Statute of Frauds does not preclude claims of actual fraud, constructive fraud, and violations of the Consumer Protection Act. The plaintiffs produced sufficient evidence on these claims to overcome summary judgment in favor of BOA. (Majority: McGrath, Wheat, Cotter, Baker, and Judge Pinski sitting for Morris)
The Dissent agreed with the Majority on its holding regarding negligent misrepresentation and violations of the Consumer Protection Act, but the plaintiffs cannot argue their original loan was modified since it was not in writing. The Majority has blurred the line between actual fraud and negligent misrepresentation. (Concurring in part, Dissenting in part: McKinnon, Rice)

EMPLOYMENT

Estate of Welch v. Holcim and HRC – 1/7/14
FACTS: A worker at a cement plant with cardiac problems asserted he was constructively discharged and experienced discrimination as a result of his disability. The company had offered the worker light duties as a part of a return to work program, but the employee resigned when he understood that the only position available to him on a permanent basis was his former job. The worker filed a human rights complaint, and the hearings officer found the employee overstated the severity of his condition, produced conflicting reports from doctors, and had poor communication with his employer.
HOLDING: The Court upheld the District Court's affirmation of the Human Rights Commission. The employee was not constructively discharged because he resigned of his own accord. Nor was his claim of discrimination valid because the company did not regard him as disabled. The cement plant did not have adequate information about his condition due to poor communication. (Majority: Baker, McGrath, Cotter, Wheat, Rice)

Chipman et al v. Northwest Healthcare et al – 1/21/14
FACTS: Northwest Healthcare changed an employee benefit policy in 2002 allowing unused sick leave hours to be paid to departed employees with 25 years of service. The benefit was discontinued six years later for most employees. Employees with under 25 years of service brought a class action alleging breach of contract, breach of the covenant of good faith, and violations of the Montana Wage Act.
HOLDING: The Majority upheld the District Court's granting of summary judgment for Northwest Healthcare because employee handbook was not a standardized group employment contract. Since the employer manuals and handbooks are unilateral statements of company policies and procedures, they are not binding agreements. Personal time does not automatically qualify as "wages" under Montana law. Only those employees that already had 25 years of service had actually accrued a benefit – something the company had already recognized. (Majority: Baker, Cotter, Rice, McKinnon)
The Dissent argued summary judgment was not appropriate because an employee handbook by itself cannot support summary dismissal of the contract claim. (Dissent: Wheat, McGrath)

Arlington v. Miller's Trucking – 3/3/15
FACTS: A log truck driver sued the trucking company arguing he had received an oral guarantee of more than $60,000 per year in wages and also had unpaid overtime. The trucking company provided ample evidence to show the claimed overtime was grossly inflated and there was insufficient evidence of an oral contract.
HOLDING: The Supreme Court upheld the District Court's finding for the trucking company, citing its conclusions were supported by the evidence in the lower court. However, it did reverse the District Court in its determination that it was not the employee's fault for failing to keep good time records. The Fair Labor Stand-

ards Act makes clear that employers, not employees, bear the ultimate responsibility for ensuring employees keep good time records. (Majority: McKinnon, McGrath, Shea, Baker, Rice)

McDonald v. Ponderosa Enterprises and RTK Const. – 6/16/15
FACTS: An independent contractor sued two companies involved in a construction project after a wall fell on him. He sued under the Montana Occupational Safety and Health Act and a general negligence theory.
HOLDING: The Supreme Court sided with the District Court's analysis that the Montana Occupational Safety and Health Act does not create a duty of safety running from employer to an independent contractor. In addition, the District Court correctly prohibited testimony at trial related to "rules" at a construction site. There was a Dissent on this case, but it related to the question of attorney fees, not the pertinent business issues of the case. (Majority: Wheat, Rice, Cotter, Baker) (Dissent: McKinnon)

Lay v. Dept. of Military Affairs et al – 6/10/15
FACTS: A woman filed a sex discrimination complaint through the Human Rights Bureau, and then failed to appeal to District Court when she failed to sue after the 90-day limit. She sued almost five months later alleging conspiracy to violate constitutional rights, state constitutional rights deprivation, and wrongful discharge.
HOLDING: The Supreme Court upheld the District Court's grant of summary judgment to defendants. Because she alleges she was terminated in retaliation for objecting to sexual favoritism, the District Court correctly held that her claims were subject to the Human Rights Act procedures and, as a result, were time-barred. (Majority: Rice, Shea, Baker, Cotter, McKinnon)

Morrow et al v. Monfric – 7/7/15
FACTS: Allegedly due to a failure to pay prevailing wages, a group of laborers filed a wage and hour action and requested certification of a class of all laborers, skilled tradesman, and craftsmen who worked for an employer and its subcontractors. The defendants opposed inclusion of some laborers, insisting they were not laborers.
HOLDING: The Supreme Court upheld the District Court's determination that the group was sufficiently small enough to have individual workers named as parties. The necessity of determining the type of labor performed by each individual, hours worked, the prevailing wage for that type of labor, and the actual wage paid would outweigh efficiency benefits of a class action. (Majority: McKinnon, Baker, Rice; Specially Concurring: Cotter, McGrath, Shea)
The Dissent stated that in close calls, the equitable balance ought to tip in favor of the injured party. (Dissent: Wheat)

Davis v. Dept. of Public Health and Human Services – 9/8/15
FACTS: A DPHHS attorney sued for wrongful discharge after she failed to report to work. Her superiors had also received complaints or observed that she was rude to co-workers, her work was inadequate/incorrect, she did not follow instructions, and she violated policies. She claimed she was fired after she filed a grievance against her supervisor.
HOLDING: The Supreme Court upheld the District Court's finding of good cause for the termination. She failed to report to work after the confrontation with her supervisor, failed to show up to meetings intended to resolve the confrontation, and disrupted business by these occurrences. (Majority: Cotter, McGrath, McKinnon, Baker, Rice)

INSURANCE

Van Ordon v. USAA – 2/19/14
FACTS: The plaintiff was injured in a car accident and received payment from two different insurers for property damage sustained in the accident. One insurer sought subrogation for the property damage payments, but the plaintiff sued alleging the insurer was violating Montana law. The case was removed to federal court and the federal district judge certified the subrogation question to the Montana Supreme Court.
HOLDING: The plaintiff was made whole for the element of damage (property) for which he purchased the insurance. Montana law specifically states than an insurer may prevent duplicative payments for the same element of loss. Even if the plaintiff has not fully recovered for his personal injury losses, he fails to present authority

for the proposition that a sum from a separate property liability policy may be received as compensation for his personal injury damages. (Majority: Baker, McGrath, Cotter, Rice, McKinnon, and Judge Salvagni sitting in for Morris)
The Dissent believes this holding is an incremental shift away from state law where the insured's interests are the primary concern and injured parties will not be made whole. (Dissent: Wheat)

Schaefer v. Safeco Ins. – 3/18/14
FACTS: Plaintiff brought a class action lawsuit against Safeco, the insurer of her personal vehicles, after she was injured in an accident while driving a vehicle owned by her employer and insured by Mountain West Farm Bureau. Safeco had refused to pay any underinsured motorist (UIM) coverage until the Mountain West UIM coverage was exhausted. The plaintiff claimed that by requiring other med-pay and UIM to be exhausted before triggering Safeco's duty to pay, the insurer had engaged in unlawful subrogation.
HOLDING: The Supreme Court upheld the District Court's determination that the "other insurance" clauses in the Safeco policy were valid and enforceable, and that they do not constitute subrogation clauses. Safeco had not engaged in any subrogation, but has paid med-pay and assumed a back-up position to Mountain West UIM. The plaintiff has not produced evidence she has yet to be made whole. (Majority: Cotter, McGrath, McKinnon, Wheat, Rice)

Dulaney v. State Farm Fire & Casualty Ins. and Ori – 5/13/14
FACTS: A floral shop owner sued State Farm and her insurance agent following a fire that destroyed her business. State Farm paid the maximum under her policy, but she claimed her damages far exceeded what was paid and alleged the defendants did not adequately advise her of what an appropriate amount of coverage would be. In District Court, the defendants produced several experts to provide evidence regarding the standard of care of an insurance agent, but the plaintiff only disclosed lay witnesses.
HOLDING: The Supreme Court upheld the District Court's summary judgment for the defendants. The question of duty of an insurance agent requires an expert to establish the factors an agent should consider when procuring coverage. As the Insurance Commissioner noted in rejecting a complaint from plaintiff, it is the "responsibility of the insured to determine the appropriate amount of coverage they need." The only way for a jury to resolve whether an agent had the legal duty to perform these tasks would be to receive expert testimony on the duties of an agent, but the plaintiff produced no such experts. (Majority: McKinnon, Cotter, Wheat, Baker, Rice)

Winter v. State Farm Mutual Auto Ins. – 7/1/14
FACTS: A man injured while working on his truck sued his insurance company for failure to pay his medical bills and alleging unfair trade practices. The plaintiff's health insurer paid nearly all of his expenses. The insurer argued that the plaintiff had not incurred expenses because his health insurance had covered nearly all of the cost.
HOLDING: The Supreme Court disagreed with the District Court's decision to grant summary judgment to the defense and reversed with orders to grant summary judgment for the plaintiff. The Court's reasoning revolved around the meaning of the word "incurred" in the insurance contract, and how a consumer would interpret the meaning. The policy contained no double recovery exclusion or limitation, and a reasonable consumer would expect that expenses would occur at the time of delivery of medical services. (Majority: Rice, McGrath, Cotter, Baker, Wheat)

Truck Ins. Exchange v. O'Mailia and Diamond P&H – 2/17/15
FACTS: The installer of a water heater at a Missoula restaurant was sued as a third-party defendant when the restaurant experienced a fire. He was covered by a commercial general liability policy through Truck Insurance Exchange at the time of installation, but later canceled the policy before the fire. He argued that the condition that contributed to the fire occurred at the time he was covered. Truck Insurance Exchange denied coverage and the plaintiff counterclaimed arguing unfair claim settlement practices, breach of the insurance contract, breach of the covenant of good faith, common law insurance bad faith, negligent infliction of emotional distress, and negligence and sought punitive damages.
HOLDING: The Supreme Court upheld the District Court's ruling in favor of Truck Insurance Exchange because no property damage occurred during the policy period. None of the experts concluded or even suggested that harmful exposure to high temperatures occurred when O'Mailia was covered. His counterclaims were also appropriately dismissed. (Majority: McKinnon, McGrath, Shea, Baker, Rice)

Victory Ins. v. Montana State Fund, Liberty Northwest Ins., Payne Financial Group, Western States Ins. Agency – 3/17/15
FACTS: A Miles City-based work comp insurer sued other insurers and their agents for a "barrage of falsehoods" that allegedly resulted in lower than expected growth. It claimed the defendants made derogatory remarks to prospective customers about the company, its leadership and financial condition. It sought actual, economic, special, compensatory, and punitive damages.
HOLDING: The Supreme Court found the District Court correctly granted summary judgment to all defendants. Each defendant presented details of transactions with customers at issue. The record fully supports the District Court's conclusion that Victory failed to advance any evidence of actual financial loss resulting from a lost contract or business opportunity. (Majority: Cotter, Wheat, McKinnon, Shea, Rice)

Meek v. Oldenburg – 5/13/15
FACTS: A woman fell over a threshold, broke her ankle and later died as a result of an infection she sustained from the surgery. Her estate sued the premises for wrongful death. Her total medical bills were close to $200,000, but her Medicare coverage with supplemental health insurance paid $70,771.26. The judge determined the plaintiff had no exposure or obligation to pay any charges beyond those actually paid. Defendants moved to limit the plaintiff's medical expense recovery to amounts paid, not amounts billed.
HOLDING: The Supreme Court found the District Court erred in concluding the amount billed is irrelevant and admitting only evidence of amounts insurers paid. If the plaintiff introduces evidence of medical bills, the defendants can contest their reasonableness as a measure of damages. No evidence can come in to the jury that plaintiff was covered by Medicare or other insurance. (Majority: McGrath, Wheat, Cotter, Baker, Shea, Rice)
The Dissent pointed out that the Majority was inconsistent with several statutes and prior Court rulings. It allows a tort victim to recover more than the actual amount paid. (Dissent: McKinnon)

Gazelka v. St. Peter's Hospital – 5/12/15
FACTS: An uninsured woman who did not pay her hospital bill sued the hospital alleging it violated Montana anti-trust laws and Article II, Section 4 by discriminating on the basis of her uninsured status. She sought class certification. She says the fact that a payment amount is dependent on whether a person has insurance and with what insurers, this constitutes discrimination based on social origin or condition.
HOLDING: The Supreme Court found that the plaintiff had standing due to the fact that she may have suffered a financial injury when the hospital charged a non-discounted amount and referred her to collections. It also reversed the District Court's granting of summary judgment for the hospital, because it did not address her argument that she was treated differently from similarly situated individuals, whether the insurer pricing contracts satisfies rational basis review, or whether the hospital's conduct violated MCA 30-14-205. (Majority: Baker, Shea, Cotter, Rice)
The Dissent challenged the Majority's findings on standing, saying the plaintiff did not raise or brief those arguments. The judiciary is not the forum to highlight the problems of our health care system. (Dissent: McKinnon)

Estate of Gleason v. Central United Life Ins. Co. – 5/20/15
FACTS: The estate of a woman who died of cancer sued the insurer to pay for claims that went back beyond the notice period. The insurer admitted it had not been prejudiced by the late notice. At trial, the judge submitted a special verdict form which directed the jury to determine whether the insurer violated the Unfair Trade Practices Act (UTPA) and, if so, the amount of damages, and if the jury awarded damages, to consider whether the insurer had acted with malice. A jury found it had violated the UTPA, but it had not damaged the plaintiff.
HOLDING: The Supreme Court adopted the notice-prejudice rule for the first time in a case of first party insurance claims. The notice-prejudice rule allows an insurer to deny coverage based on a failure to comply with a policy notice provision only if the insurer can demonstrate that it was prejudiced by the late notice. The District Court erred in instructing the jury that it must first find UTPA damages beyond damages for failure to pay benefits before considering malice and punitives. The plaintiff is also entitled to attorney fees under the "insurance exception" to the American rule. (Majority: Wheat, McGrath, Shea, Cotter, Baker)
The Dissent was uncomfortable when the Court sets forth a new rule without adequate guidance or rationale for insureds and insurers. (Dissent: McKinnon, Rice)

Atlantic Casualty Ins. v. Greytak and GTL – 5/29/15
FACTS: The 9th Circuit certified a question to the Montana Supreme Court of whether under Montana law, in a case involving a claim of damages by a third party, an

insurer who does not receive timely notice according to the terms of a policy must demonstrate prejudice from the lack of notice to avoid defense and indemnification of the insured.
HOLDING: The Supreme Court answered the certified question by stating the notice-prejudice rule applies to insurers in third-party damages claims. (Majority: McGrath, Shea, Wheat, Baker, Cotter) (Specially concurring: McKinnon, Rice)

American States Ins. v. Flathead Janitorial & Rug Services and Noland – 8/11/15
FACTS: A woman attending college in Utah was injured in a bike accident in that state. Her parents owned a business in Kalispell, which included a fleet of vehicles where the woman was listed as a driver. She received the full policy limits for the truck that struck her and from two vehicles for which she was the insured. Her parents sought underinsured motorist coverage and med-pay under their company fleet, and were denied. The insurer sought a declaration that the woman was not covered under the company policies.
HOLDING: The Supreme Court agreed with the District Court decision to grant summary judgment for the insurance company. Although the plaintiffs argue there is ambiguity in the policy that should be construed in their favor, the Court concluded the language required the woman to be occupying one of the covered vehicles at the time of the accident before she could be covered. (Majority: McKinnon, Shea, Cotter, Rice)
The Dissent believed that the parents, as sole shareholders of the business, are insured under the entire policy and their daughter would be covered as a family member under the med-pay and underinsured motorist coverage. (Dissent: Wheat)

Finn v. Dakota Fire Ins. – 8/26/15
FACTS: The plaintiff in this case was involved in a vehicle accident that resulted in the total loss of his truck. Prior to the accident, the insurance company cancelled his policy for nonpayment and issued notice the policy was cancelled. The plaintiff sued, arguing that conditioning renewal of a policy on receiving payment prior to the expiration date violates MCA 33-23-214(1). He believed this statute requires insurers to make their renewal decision at least 45 days before expiration.
HOLDING: The Supreme Court upheld the District Court's determination to grant summary judgment to the insurance company. The plain language of the notice requirement and the statute defeat the plaintiff's arguments. The insurer was entitled to cancel the policy because the plaintiff failed to discharge his obligations in connection with the payment of premiums. (Majority: Rice, McKinnon, Baker, Cotter, Wheat, Shea)

MEDICAL MALPRACTICE

Pickett v. Cortese – 6/27/14
FACTS: A patient filed a claim with the Medical Legal Panel (Panel) against her medical provider for perforating her intestine during an ERCP, failing to timely diagnosis the perforation, and failing to disclose all material facts and the nature of significant risks. Following the Panel's confidential decision, the patient sued the medical provider with additional arguments not presented at the Panel. The defendant moved to dismiss some of the claims, asserting the District Court lacked subject matter jurisdiction on claims not made before the Panel.
HOLDING: The Supreme Court upheld the District Court's denial of the defendant's motion to dismiss. The Panel's proceeding results in no record or decision for review and is not binding. A claimant before the Panel is required to provide only "reasonable detail," so there is no requirement to present each legal theory that may come to fruition following discovery. The defendant was on reasonable notice of the plaintiff's claims. (Majority: Baker, McGrath, McKinnon, Wheat, Rice)

Hastie v. Alpine Orthopedics & Sports Medicine – 12/22/2015
FACTS: The plaintiff was a man who had surgery on his foot to repair several fractures. The defendant doctor treated him by placing screws in his foot and placing an orthotic boot on him. The plaintiff did not pay his bill and claimed the doctor refused to see him for follow-up visits unless he paid, which the defendant denied. The plaintiff sued under medical malpractice and consumer protection violations. A jury unanimously found for the defendant, but the plaintiff appealed on the District Court's refusal to let a podiatrist testify and dismissing the consumer protection claims.
HOLDING: A podiatrist is not a medical doctor, so he is therefore not able to testify as an expert witness with respect to issues of negligence or standards of care and practice concerning the treatment of a medical doctor. In addition, the consumer protection allegations were properly dismissed because the claims were premised on allegations of professional negligence, which are exempt from the consumer protection code. (Majority: Cotter, McKinnon, Shea, Wheat, Rice)

TAXATION

Cloud Peak Energy v. Dept. of Revenue – 1/13/15
FACTS: After an audit of Cloud Peak Energy Resources coal tax payments for 2005-2007, the Department of Revenue (DOR) levied a deficiency assessment for additional taxes owing from sales involving non-arm's length (NAL) agreements. Cloud Peak filed a complaint alleging that the DOR's methodology for determining market value was illegal and that it had also illegally assessed taxes on coal additives for the years 2005-2007.
HOLDING: The Supreme Court affirmed the District Court in part and reversed in part, holding that the District Court correctly found that market value is properly based upon similarly negotiated contracts, but the additional language included in the order was inappropriate. In addition, it did not err in holding that coal additives used from 2005-2007 are subject to Montana Coal Taxes. (Majority: Rice, Cotter, McKinnon, McGrath, Baker, Wheat, Shea)

Lucas Ranch, Montana Farm Bureau Federation, Montana Taxpayers' Association v. Dept. of Revenue – 4/28/2015
FACTS: DOR reappraised Lucas Ranch in 2009 and concluded that it had non-market changes due to reclassification of land and thus required a new Value Before Reappraisal (VBR). Lucas, Montana Farm Bureau and the Montana Taxpayers' Association requested class certification, which was denied.
HOLDING: The Supreme Court stated the DOR and the District Court correctly interpreted MCA 15-7-111. DOR concluded that 3.45 acres of Lucas Ranch had changed from grazing to tillable land, thereby implicating (2). If individual landowners dispute the DOR's findings, they can raise the issue with the local or state tax appeal boards. (Majority: McGrath, Cotter, Rice, Wheat)
The Dissent stated DOR's calculated VBR and phase-in method for "new, remodeled or reclassified property" is not supported by MCA 15-7-111. (Dissent: McKinnon)

Dept. of Revenue v. Priceline.com et al – 8/12/2015
FACTS: DOR sued several online travel companies claimed they were not collecting and remitting the 4% Lodging Facility Use Tax, the 3% Lodging Facility Sales Tax, and the 4% Rental Vehicle Sales Tax. The companies claimed they had no obligation to collect the taxes based on statutory definitions. The Montana Chamber filed an amicus brief in the case.
HOLDING: The Supreme Court reversed the District Court in part by holding that the online travel companies as "sellers" of travel services were required to collect and remit the Facility Sales Tax and the Rental Vehicle Sales Tax. They are not, however, required to collect and remit the Facility Use Tax because the online travel companies do not fit the definition of "owner or operator" given the plain meaning of those words. (Majority: Shea, McGrath, Wheat, Cotter, Baker)
The Dissent would not have required the online companies to collect any of the taxes based on the definitions within the code. (Dissent: McKinnon, Rice)

TORT

Burnett et al v. PPL Montana, Western Energy, Rosebud Operating Services, and Westmoreland Resources – *12/3/2013*
FACTS: A group of former PPL Montana employees sued their former employer and several other employees claiming their was a conspiracy to prevent them from obtaining work. The plaintiffs claimed there was a campaign of boycotting their businesses as a means to punish them for another lawsuit they had brought and settled with PPL Montana. They requested compensatory and punitive damages, injunctive relief, declaratory relief, attorney fees, and costs.
HOLDING: The Supreme Court upheld the District Court's summary judgment ruling in favor of defendants, stating the plaintiffs failed to produce evidence of unlawful or wrongful acts. Based on an absence of evidence, the issues were purely legal and controlled by settled law. (Majority: Cotter, McGrath, Baker, McKinnon, Rice)

Bracken v. McDonnell Enterprises – 6/24/14
FACTS: An auto repair shop failed to fix a car damaged in an accident after several attempts. The at-fault car's insurance agreed the car was a loss and paid the difference between the car's value before the accident and the car's salvage value, and the car owner took the payment. The car owner sued the body shop seeking to recover the value of the car, cost of replacement transportation, cost of getting repairs done right, and treble damages under the Consumer Protection Act. The repair shop

claimed the plaintiff suffered no loss following the insurance company's payment on behalf of the at-fault driver.
HOLDING: The Supreme Court reversed the District Court's grant of summary judgment to the repair shop, arguing there were material fact issues regarding the pre-accident value of the car. There is a genuine issue as to the nature and extent of damages and the plaintiff is entitled to prove his claims. (Majority: McGrath, Wheat, McKinnon, Baker, Rice)

Simms v. Schabacker – 12/16/14
FACTS: The plaintiff had claimed a work-related injury that eventually led Montana State Fund (MSF) to conduct an investigation on whether the worker had committed work comp fraud. During the investigation, the plaintiff's doctor provided a letter to MSF after watching video of the plaintiff's lifting, carrying, walking, and driving abilities, which led the doctor to believe the plaintiff was capable of working. The doctor's letter was circulated by the insurer to others that had provided treatment or insurance to the plaintiff. The plaintiff sued his doctor alleging he had unlawfully disseminated his private medical information to a law enforcement officer.
HOLDING: The Supreme Court upheld the District Court's finding that the doctor did not knowingly assist law enforcement and that Montana law authorized his letter to MSF addressing the plaintiff's medical condition. Even if a fact question remained as to what the doctor knew, summary judgment was still appropriate in light of the Notice of Privacy Policy that the medical facility of the doctor "may disclose any information we collect [that] may include disclosures related to fraud investigations." (Majority: Cotter, McGrath, Baker, McKinnon)
The Dissent argued a material fact remained as whether the disclosure was made for a law enforcement purpose or knowingly to a law enforcement agent. Therefore, summary judgment was not appropriate. (Dissent: Wheat)

Eisner v. Northwest Autobody & Towing – 2/24/15
FACTS: Plaintiff fell in front a truck that was used by an auto body company to transport people with a broken down vehicle. She claimed the fall was the fault of the auto body company because there were no handles or running boards.
HOLDING: The Supreme Court upheld the District Court grant of summary judgment to the auto body shop. There was no duty of the company to install handles or running boards, even if it would have prevented her fall. The plaintiff's failure to look was the main cause of the fall. (Majority: Wheat, Rice, Baker, Cotter, Shea)

Lopez v. Butte-Silver Bow County – 4/7/15
FACTS: A woman was hit by a car while jaywalking after leaving the bus depot. There was a pedestrian crosswalk 100 feet away that she did not use. She sued the driver that hit her and the County for negligence, but eventually dismissed the driver. The plaintiff claimed the County had a duty to warn of the dangers crossing the busy street and that it breached this duty.
HOLDING: The Supreme Court upheld the District Court's finding for the defense on summary judgment. As a general rule, there is no duty to protect others against harm from third parties. The danger of jaywalking across a 4-lane road after dark is not obscured – it is apparent. (Majority: Baker, McGrath, McKinnon, Cotter, Rice)

Stokes v. Golden Triangle – 7/14/15
FACTS: An employee was injured when ice fell off the building where he worked and struck his head. The business where he worked was Golden Triangle, which operated under the name of First National Pawn. He received work comp, which was under a policy with First National Pawn as the named insured. The employee sued Golden Triangle for failing to maintain the premises and claimed Golden Triangle was an uninsured employer because there was no work comp policy with that particular business name.
HOLDING: The Supreme Court upheld the District Court's ruling that Golden Triangle was an insured employer and was entitled to tort immunity. An insurance policy must be given interpretation that is reasonable and is consonant with the manifest object and intent of the parties. The evidence shows that although the insurer inadvertently failed to identify Golden Triangle, it intended Golden Triangle to be a covered insured and the insurer paid out work comp benefits accordingly.
(Majority: Rice, McGrath, Cotter, Baker, Shea)

George v. Bowler – 7/28/15
FACTS: An employee was injured in the construction of a warehouse, a venture "owned" individually by a couple who also operated a separate carpet business. Although the employee received a settlement through the carpet business' insurance, he sued the couple as "owners" alleging they negligently supervised and controlled

assembly of the carpet racks that contributed to his fall. The couple argued the case should be dismissed due to work comp exclusivity.
HOLDING: The Supreme Court affirmed the District Court's grant of summary judgment for the defendants. The racks were indisputably for use by the carpet business, which rents the warehouse from the couple. The couple was the injured party's supervisor in the carpet business, which is where the plaintiff received work comp benefits. Although the property owners are separate legal entities from the carpet business, the separate legal entities are not third parties when acting within their employment as co-employees of the plaintiff at the time the plaintiff alleges they were negligent. (Majority: Baker, McKinnon, Wheat, Shea, Rice)

Reis v. Luckett – 12/2/15
FACTS: The plaintiff was in an auto-accident caused by the defendant. He sued alleging back, neck, and hand injuries and seeking damages for economic losses, pain and suffering, and emotional distress. The defendant admitted liability was disputed, the extent to which the accident was the result of the plaintiff's injuries. A jury found for the defendant on causation, and therefore did not reach the damages questions. Plaintiff moved for a new trial, which was granted by the District Judge.
HOLDING: The District Court did not err in granting a new trial because the plaintiff's primary doctor unequivocally attributed the hand fracture to the accident. There was no evidence offered to counter the plaintiff's testimony that his hand was broken when his airbag inflated during the accident. A jury is not free to disregard uncontradicted, credible, non-opinion evidence. (Majority: Cotter, Shea, Baker, Rice)
The Dissent argued the Majority displaced the jury's function. The doctor gave conflicting testimony, which was reason alone for the jury to reach a verdict of no causation for the hand injury. (Dissent: McKinnon)

Not Afraid v. State, Yellowstone County, and Billings – 12/1/15
FACTS: An intoxicated driver with several passengers in his car drove the vehicle off a steep hillside. A passenger who was paralyzed sued the State, Yellowstone County, and the City of Billings claiming that they improperly installed ineffective barriers along the roadway. The defendant's expert determined the car was traveling more than 40 mph over the speed limit, so the construction of the barriers was of little relevance in the crash.
HOLDING: The Supreme Court upheld the District Court's ruling on summary judgment in favor of the defendants. The plaintiff did not produce expert testimony to establish the standard of care. He failed to establish the degree of prudence, attention, and caution that the defendants must have exercised in placing and installing the barriers 30 years ago. (Majority: Baker, McGrath, McKinnon, Shea, Rice)

UNEMPLOYMENT INSURANCE

Sayler v. Dept. of Labor and Industry – 9/23/14
FACTS: The plaintiff owned 51% of his bike business, but stopped taking a salary and applied for unemployment benefits during a downturn. He continued to work 50 hours a week, but reported he worked 0 hours. When the business was audited, the Department of Labor and Industry (DLI) determined he wrongfully received more than $28,000 in benefits and ordered repayment of benefits with penalties.
HOLDING: The Supreme Court upheld the District Court's finding for DLI. As a corporate officer performing service under an implied contract, the plaintiff was performing "work in employment." By continuing to work without a salary, he increased his business' worth with the expectation that it would benefit him. To be totally unemployed, one must perform no work and receive no wages. (Majority: Baker, Shea, Wheat, Cotter, Rice)

Huset v. BLA and Butte Military Entrance Processing Station – 10/7/14
FACTS: A testing clerk at the Army's Military Entrance Process Station resigned after a number of his grievances went unresolved. Unemployment benefits were denied based on the finding that his separation was without good cause and that there was sufficient evidence that his employer had taken his concerns seriously.
HOLDING: The Supreme Court upheld the District Court's decision to sustain the denial of unemployment benefits. "Compelling reasons" to leave employment include undue risk of injury, illness, or physical impairment; unreasonable actions by the employer as to hours, wages, terms of employment, or work conditions; and unreasonable rules or discipline so severe as to constitute harassment. The plaintiff's stated reasons for leaving do not meet this standard. (Majority: McKinnon, McGrath, Shea, Wheat, Rice)

Cruson v. Missoula Electric Co-op – 10/27/15
FACTS: An electrician filed for unemployment benefits after he quit his job. He testified that he quit partly due to stress from knowing that employees were being directed or allowed to work beyond their electrical capabilities, which jeopardized his license. The employer testified he had addressed the employee's concerns.
HOLDING: The Supreme Court affirmed the District Court's finding for the employer. The determination of whether an employer had a "reasonable opportunity" to correct an issue is left to the fact-finder. In this case, the DLI had concluded that the employee's reasons for leaving were personal. There was substantial evidence that the employer did not act unreasonably and had corrected or was working to correct problems. (Majority: Baker, McGrath, McKinnon, Shea, Rice)

WORKERS' COMPENSATION/FELA

Goble and Gerber v. Montana State Fund – 4/15/14
FACTS: Two plaintiffs alleged MSF improperly withheld their permanent partial disability (PPD) payment because they were incarcerated for more than 30 days. They asserted the time limit on benefits refers to the statute of limitations, not PPD to which they would otherwise be entitled but for their incarceration. MSF argued its actions were in accordance with MCA 39-71-444.
HOLDING: The Supreme Court upheld the Workers' Compensation Court's ruling in favor of MSF and sustaining MCA 39-71-444, allowing for the denial of PPD payments to inmates incarcerated for more than 30 days. These restrictions are rationally related to legitimate interests of the Workers' Compensation Act and do not violate equal protection or due process rights of the plaintiffs. (Majority: McKinnon, McGrath, Baker, Rice)
The Dissent made arguments that MCA 39-71-444 violates the plaintiffs' substantive due process rights because it adds an additional punishment beyond those levied by the criminal justice system. (Dissent: Cotter, Wheat)

Malcomson v. Liberty Northwest – 9/10/14
FACTS: An injured worker sued Liberty Northwest and alleged two Montana statutes were unconstitutional because they allowed the insurance company to discuss wide-ranging health information with her medical providers without notice and opportunity to participate. The plaintiff had hurt her back at work, and Liberty Northwest terminated her work comp payments because her employer had terminated her employment for disciplinary reasons. She asked for reinstatement of the benefits pending resolution of the job dispute, but also revoked her releases and authorizations as she asserted Liberty could no longer speak to her providers.
HOLDING: The Supreme Court upheld the Workers' Compensation Court's ruling that MCA 39-71-604 was unconstitutional because it violates worker privacy. The plaintiff did not dispute that an insurer is entitled to access medical information relevant to the claim, but objects to permitting an agent of the insurer to communicate with her providers without prior notice or opportunity to participate. The Court stated insurers have a legitimate interest in ex parte contact for the sole purpose of facilitating administrative aspects of claim handling, and that a release authorizing this type of limited contact would not violate the right of privacy. (Majority: Cotter, McGrath, McKinnon, Rice, Wheat, Baker, and Judge Dayton sitting for the position vacated by Morris)

BNSF v. Macek – 1/21/15
FACTS: The plaintiff settled a Federal Employers Liability Act (FELA) claim in 2010. He later sued BNSF seeking to rescind the release, claiming the settlement provided that he would receive a disability annuity from the Railroad Retirement Board, which he in fact was later awarded. BNSF moved for summary judgment claiming his claims were time barred by the release. The District Court granted summary judgment to the plaintiff on a theory of mutual mistake, despite testimony from BNSF that it had no ability to affect whether the disability annuity would be granted. BNSF sought supervisory control.
HOLDING: BNSF has not shown the extraordinary circumstances necessary for supervisory control. The issues the company raises can be reviewed on regular appeal. (Majority: Rice, Shea, Wheat, Baker, Cotter)

Spotted Horse v. BNSF – 5/29/15
FACTS: A railroad worker sued BNSF for a workplace injury and requested a directed verdict when the company did not produce videos of the accident scene. BNSF management testified that the video in question did not capture the area where the plaintiff was working or the alleged injury. The judge prohibited BNSF from referencing any testimony or evidence about the video unless the plaintiff first introduced it. Plaintiff raised the issue, and the trial court permitted both parties to offer testi-

mony about whether the video would have shown the incident. The trial court also instructed the jury that if it believed the video would have shown the injury, it should assume the video would have helped the plaintiff.
HOLDING: The Supreme Court held the District Court should have imposed a more severe sanction on the company. Because the company has been accused of misconduct in other cases, the judge should have fashioned a sanction more commensurate with the act of intentional or negligent spoliation of evidence, not one where the company gets to take advantage of the lack of video evidence. The Court noted that even before litigation is initiated, as a "sophisticated corporate litigant" BNSF should have retained not only video that did not show the incident but also video from cameras in other areas of the complex that could have captured the plaintiff both before and after the incident. (Majority: Cotter, McGrath, Shea, Baker, Rice)
The Dissent points out that the Majority sanctions BNSF on its alleged bad acts in unrelated past litigation and that the District Judge did not abuse her discretion in the sanctions decision. (Dissent: McKinnon)

Martin v. BNSF – 6/23/15
FACTS: A railroad worker sued BNSF after he slipped and fell off a locomotive while on duty. At trial, the jury found for BNSF on the claims of negligence and strict liability.
HOLDING: The District Court erred by excluding evidence of a heated platform as a subsequent remedial measure. The judge also abused his discretion by admitting specific amounts that the plaintiff earned from his concurrent non-railroad employment. The Court held that evidence plaintiff was working at another job and had additional income was prejudicial, and could not be admitted to suggest plaintiff had a motive for not returning to work at the railroad. (Majority: Shea, McGrath, Cotter, Baker).
The Dissent noted that the Supreme Court's ruling was contrary to the standard of review. Evidentiary rulings are reviewed for abuse of discretion, which is "not whether this Court would have reached the same decision, but whether the District Court 'acted arbitrarily, without employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice.'" The Dissent stated the jury needed to place the plaintiff's claimed wage loss in context of the compensation for time billed, which arguably demonstrates that he was not available to work full-time for the railroad as he claimed. (Dissent: McKinnon)

Anderson v. BNSF – 8/12/15
FACTS: A railroad worker sued BNSF for cumulative injuries sustained through work the company negligently assigned to him. BNSF argued the claim was time barred, but the judge allowed the question to go to the jury, finding a dispute regarding when the employee knew or should have known that he had a work-related injury. The jury found the cumulative trauma claim was time-barred and that BNSF was not liable for other injuries.
HOLDING: The Supreme Court reversed the District Court on most issues in favor of the plaintiff. The judge erred in approving several jury instructions on timeliness of the claims and aggravation, seemingly overruling its own precedent from a 2013 case on which the District Court based its instructions. The judge also should have granted a new trial due to comments made by the defense attorneys in argument suggesting plaintiff may have been motivated by the possibility of recovering a large sum of money. This argument was deemed prejudicial. (Majority: Shea, McGrath, Wheat, Baker, Cotter, Rice) (Specially Concurring: Wheat)
The Dissent disagreed that the plaintiff's proposed jury instructions correctly state the law and noted that "[t]he Court has reached today to reconstruct Anderson's arguments." Regarding alleged improper arguments the District Court considered plaintiff's allegations in the context of the trial as a whole and was in a better position than the Supreme Court to determine what prejudice, if any, occurred. (Dissent: McKinnon)

MONTANA SUPREME COURT REVIEW – Cases from 2014-2015

	COURT	Baker	Cotter	McGrath	McKinnon	Rice	Shea	Wheat
BANKING								
Morrow v. Bank of America	X	X	X	X	✔	✔		X
EMPLOYMENT								
Estate of Welch v. Holcim and HRC	✔	✔	✔	✔		✔		✔
Chipman et al v. Northwest Healthcare	✔	✔	✔	X	✔	✔		X
Arlington v. Miller's Trucking	X	X		X	X	X	X	
McDonald v. Ponderosa Enterprises	✔	✔	✔		✔	✔		✔
Lay v. Dept. of Military Affairs et al	✔	✔	✔		✔	✔	✔	
Morrow v. Monfric	✔	✔	✔	✔	✔	✔	✔	X
Davis v. DPHHS	✔	✔	✔	✔	✔	✔		
INSURANCE								
Van Ordon v. USAA	✔	✔	✔	✔	✔	✔		X
Schaefer v. Safeco Ins.	✔		✔	✔	✔	✔		✔
Dulaney v. State Farm Fire & Causalty Ins.	✔	✔	✔		✔	✔		✔
Winter v. State Farm Mutual Auto Ins.	X	X	X	X		X		X
Truck Ins. Exchange v. O'Mailia	✔	✔		✔	✔	✔	✔	
Victory Ins. v. Montana State Fund	✔		✔		✔	✔	✔	✔
Meek v. Oldenburg	X	X	X	X	✔	X	X	X
Gazelka v. St. Peter's Hospital	X	X	X		✔	X	X	
Estate of Gleason v. Central United Life Ins.	X	X	X	X	✔	✔	X	X
Atlantic Casualty Ins. v. Greytak and GTL	X	X	X	X	X	X	X	X
American States Ins. v. Flathead Janitorial	✔		✔		✔	✔	✔	X
Finn v. Dakota Fire Ins.	✔	✔	✔		✔	✔	✔	✔
MEDICAL MALPRATICE								
Pickett v. Cortese	X	X		X	X	X		X
Hastie v. Alpine Orthopedics	✔		✔		✔	✔	✔	✔

MONTANA SUPREME COURT REVIEW – Cases from 2014-2015

	COURT	Baker	Cotter	McGrath	McKinnon	Rice	Shea	Wheat
TAXATION								
Cloud Peak Energy v. Dept. of Revenue	✔	✔	✔	✔	✔	✔	✔	✔
Lucas Ranch v. Dept. of Revenue	X		X	X	✔	X		X
Dept. of Revenue v. Priceline.com	X	X	X	X	✔	✔	X	X
TORT								
Burnett et al v. PPL Montana	✔	✔	✔	✔	✔	✔		
Bracken v. McDonnell Enterprises	X		X	X		X		X
Simms v. Schabacker	✔	✔	✔	✔	✔			X
Eisner v. Northwest Autobody & Towing	✔	✔	✔			✔	✔	✔
Lopez v. Butte-Silver Bow County	✔	✔	✔	✔	✔	✔		
Stokes v. Golden Triangle	✔	✔	✔	✔		✔	✔	
George v. Bowler	✔	✔			✔	✔	✔	✔
Reis v. Luckett	X	X	X		✔	X	X	
Not Afraid v. State	✔	✔		✔	✔	✔	✔	
UNEMPLOYMENT INSURANCE								
Sayler v. Dept. of Labor and Industry	✔	✔	✔			✔	✔	✔
Huset v. BLA	✔			✔	✔	✔	✔	✔
Cruson v. Missoula Electric Co-op	✔	✔		✔	✔	✔	✔	
WORKERS' COMPENSATION/FELA								
Goble and Gerber v. Montana State Fund	✔	✔	X	✔	✔	✔		X
Malcomson v. Liberty Northwest	X	X	X	X	X	X		X
BNSF v. Macek	X	X	X			X	X	X
Spotted Horse v. BNSF	X	X	X	X	✔	X	X	
Martin v. BNSF	X	X	X	X	✔		X	
Anderson v. BNSF	X	X	X	X	✔	X	X	X
2014-2015 Business Score	60% (26/43)	58% (21/36)	56% (20/36)	50% (15/30)	89% (32/36)	71% (29/41)	58% (15/26)	40% (12/30)
Career Business Score	49%	59%	41%	52%	90%	79%	58%	41%

Montana Workers' Compensation Court Judicial Review
Cases from 2014-2015

The Montana Workers' Compensation Court (WCC) was created in 1975 to address work comp cases – a significant development for the business community. Before systematic reforms were enacted in the 2011 Legislature, Montana businesses experienced skyrocketing work comp premiums that became the highest in the nation. Since implementation of the 2011 reforms, Montana's rates have gone down over 30 percent to 11th 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 fifth cycle the Chamber has reviewed its work, and it covers cases from 2014 and 2015.

Montana Chamber's Effort in Workers' Compensation

After the Montana Chamber and other business groups successfully spearheaded the enactment of work comp reform with House Bill 334 in the 2011 Legislature, we have continued to pursue legislative opportunities to protect businesses from inflationary pressure on premiums. In the 2015 Legislature, the Montana Chamber supported legislation – SB 288 – to authorize subrogation, which allows work comp insurers to collect funds from at-fault third parties for claims for injuries or occupational diseases. SB 288 made it through the Legislature but was vetoed by Governor Bullock. SB 288 would have provided that work comp carriers have subrogation rights against an at-fault third party for medical claims regardless of whether the damage awards exceed a combination of work comp benefits and third-party settlements. The Chamber also supported successful legislation – HB 538 – to exempt Montana employers from having to pay work comp in Montana for their employees that work full-time and are covered by work comp in North Dakota.

Since 2015 Session adjourned, the Montana Chamber has participated in the deliberations of the Labor-Management Workers' Compensation Advisory Council (LMAC), which has been reauthorized by Governor Bullock for 2016-2017. This third installment of the LMAC is looking at key work comp issues such as subrogation and creating a drug formulary.

Scoring

In this review, the WCC judges were evaluated in comparison to the pro-business position. 26 cases were chosen for this review during the period from 2014-2015. This report includes a review of judgments made by two judges: Judge James "Jim" Jeremiah Shea, who served as the state's work comp judge from 2005 through 2014, and Judge David Sandler, who was appointed by Governor Steve Bullock in 2014 and confirmed by the Montana Senate in 2015.

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

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

Peterson v. Liberty Northwest – 12/31/13
FACTS: Plaintiff was a former employee of Stimson Lumber and was diagnosed with an asbestos-related disease, reflecting an injury date of February 1976. He first signed reports in 2010 alleging lung disease. Liberty denied the claim in July 2010 and again in September 2012.
HOLDING: The plaintiff's claim is time-barred by MCA 39-72-403 because he knew or should have known he was suffering from an occupational disease when he was diagnosed in 2005. Peterson was aware of his exposure to vermiculite at work and failed to file a claim within one year of being diagnosed with asbestos-related disease. (Shea) ✓

Engle v. Hartford Underwriters – 12/31/13
FACTS: A woman who had injured her ulna and elbow as a child experienced elbow and wrist pain while working as a waitress 23 years later. She had surgery on both arms and worked sporadically as a waitress. In 2011, she went to the hospital complaining of elbow pain following a fall. She informed the work comp insurer that she required an elbow replacement sooner than expected. The insurer denied the claim.
HOLDING: Hartford has not been relieved of liability due to any subsequent injuries pursuant to MCA 39-71-407(5). Doctors may not agree on all of the relevant facts, but they do agree that the fall did not permanently aggravate her elbow condition. Hartford is responsible for plaintiff's attorney fees and assessed a penalty due to the absence of any evidence demonstrating that Engle suffered a permanent aggravation of her underlying elbow condition. (Shea) X

Nelson v. Montana School Group Ins. Authority – 1/9/14
FACTS: A teacher/volleyball coach fell on the job and dislocated her ankle. The insurer sought summary judgment that she failed to timely file her request for medical and travel expenses, and that she is not entitled to temporary partial disability payments because she makes more with her current employer.
HOLDING: The claim was not untimely as the time for filing the petition commenced when Montana Schools Group Insurance Authority (MSGIA) denied the claim, not when it denied her request to discontinue treatment with a specific doctor. She is not entitled to temporary partial disability payments because the total remuneration for her current job is greater now than at the time of injury. (Shea) ✓

Gray v. Montana State Fund – 1/30/14
FACTS: A worker started to receive Social Security Retirement at 62, and was injured at work four months later when he was 63. He believed he was eligible for permanent total disability (PTD) payments because he had not reached the age of "full retirement" and could not be "retired" since he was still working.
HOLDING: Regardless of whether the Social Security he receives is "partial" or "early," the injured worker is receiving Social Security. A claimant is deemed retired under Montana law when he either receives Social Security Retirement benefits or is eligible to receive full Social Security benefits. He is "retired" under the statute and not entitled to PTD. (Shea) ✓

Monroe v. MACWCT – 3/17/14
FACTS: A widow of a man who died from asbestos-related disease sued Lincoln County claiming his work on the road crew was a significant factor in the development of the disease. The decedent had also worked for W.R. Grace for a number of years and settled his claims with that company. The decedent's wife sought widow's benefits and a claim on behalf of his estate.
HOLDING: Medical experts disputed whether the decedent's work on the county road crew was a significant factor in the development of the disease, but the Court gave more weight to the plaintiff's expert. The Court concluded the road crew work constituted an injurious exposure to his disease and awarded widow's benefits. The Court rejected plaintiff's arguments that since he died from his disease, she should be entitled to a 100% impairment award. (Shea) X

Starkey v. ACE American Ins. – 3/17/15
FACTS: A woman claimed she hurt her foot on the slanted leg of a table while taking a smoke break. The insurer contended she hurt it the day before.
HOLDING: The Court held the injury happened in the course and scope of her employment after finding the claimant to be a credible witness. She did not stop working due to her injury, however. She quit her job after breaking up with her boyfriend and moved to Wyoming, so she is not entitled to wage-loss benefits. The insurer was not unreasonable in its denial of benefits, therefore it is not liable for fees or penalties. (Shea) X

Boland v. Montana State Fund – 3/21/14
FACTS: The plaintiff alleged a back occupation disease from his janitorial work at a parish. MSF argued his claim was untimely. He last injuriously exposed himself to the conditions that caused his back problems at a subsequent employer, and a non-work-related fall severed liability.
HOLDING: The Plaintiff did not prove that his janitorial parish work was the major contributing cause of his condition. An occupational disease must be established by objective medical findings. (Shea) ✓

Newlon v. Teck American – 5/8/14
FACTS: A mine employee experienced several knee injuries over three decades and had several knee surgeries. In 1996, the employer proposed settling all claims, which they did for $25,000 and future care for his knees and back. The employee went without any treatment for a considerable time. When he sought treatment for his knees in 2012, the company invoked the 60-month limit for non-use of medicals in MCA 39-71-704(1)(d) (1991).
HOLDING: The agreement made between the company and the employee made no mention of the 60-month rule in statute and represented from the outset that it was offering lifetime treatment. An employer may contract around the statute or promise more than what is required by law. Teck must provide the medical treatment as promised. (Shea) X

Nelson v. Montana Schools Group Ins. Authority– 5/28/14
FACTS: A worker that had reached maximum medical improvement and been told by the insurer that all further treatment had to be authorized went to California to see an ankle specialist. The insurer refused to pay because she failed to obtain authorization or timely submit travel expenses.
HOLDING: The plaintiff is not entitled to payment for the visit or reimbursement for travel. She failed to seek preauthorization and failed to timely submit travel receipts. (Shea) ✓

Baeth v. Liberty Northwest – 5/5/2014
FACTS: A woman alleged that her work at a plywood plant caused her asbestos-related lung disease. The plant was owned and operated initially by Champion International Co., then was taken over by Stimson Lumber Co. in November 1993. Liberty denied she suffers from an occupational disease and claims that her respiratory problems are instead related either to chronic obstructive pulmonary disease or emphysema caused by a long history of smoking.
HOLDING: Plaintiff's two treating physicians both opined that she has asbestos-related disease and that her employment at the plywood plant substantially contributed to it. Her work for Stimson was of the type and kind that could have caused her asbestos-related disease. (Shea) X

Dvorak v. Montana State Fund – 5/5/2014
FACTS: In 2006, the plaintiff sought medical treatment for neck and shoulder pain which she attributed to her job duties. Her symptoms were managed with the use of a prescription pain reliever until they worsened in late 2010. In 2011, her treating physician referred her to a specialist and she subsequently filed an occupational disease claim. MSF argues the claim was untimely filed under MCA 39-71-601(3), and that petitioner should have known in 2006 that she suffered from an occupational disease.
HOLDING: The Court held that the facts of the case indicate that neither the plaintiff nor her treating physician gave any consideration to her symptoms beyond refilling her prescription for several years after she first complained of these symptoms. The Court concluded she either knew or should have known that she suffered from an occupational disease until 2011 on the day that her treating physician first took her off work and referred her to a specialist for further evaluation. (Shea) X

Rushford v. MCCF – 5/30/14
FACTS: A worker claimed to have reactive airways dysfunction syndrome (RADS) after inhaling point and diesel exhaust while working as a carpenter. He sought PTD, retroactive TTD, and medical treatment. MCCF disputes the worker suffered from RADS.
HOLDING: The plaintiff's reports of disability are wholly lacking in credibility. The Court cannot reconcile the reports from plaintiff and his doctors with plaintiff's activities captured in MCCF's surveillance video. He is not entitled to PTD, TTD, medical treatment, fees, costs or penalties. (Shea) ✓

Davidson v. Benefis – 5/30/14
FACTS: The claimant slipped and fell in the employer's parking lot. The claimant was not able to return to her time of injury job due to a prior permanent impairment and due to the effects of her injuries. The insurer disputed payment of PPD benefits premised in part on the fact that the claimant's permanent impairment was not due to the injury.
HOLDING: The Court found that the pre-2011 version of the law did not require the permanent impairment to be due to the injury and awarded PPD benefits because the claimant had an actual wage loss due to the injury. (Shea) **X**

Myles v. Sparta Ins. – 5/30/14
FACTS: The plaintiff claimed he hurt his right hip when he stepped up onto a semi-truck. The insurer believes he failed to prove that it was more probable than not that he suffered a hip injury at work.
HOLDING: The plaintiff's treating physician was more credible and persuasive than the defense's expert. The defense expert overlooked the medical records that related to the onset of symptoms when he stepped onto the truck. (Shea) **X**

NEW JUDGE – David Sandler

Spencer v. Zurich American Ins. – 10/21/14
FACTS: A hotel worker was injured while lifting a box at work and the insurer accepted liability. The worker returned to his jobs with modified duties and lifting restrictions. He was terminated from his job for "performance issues because he was not a 'fit for culture, property, department.'" The insurer then refused to pay TTD because his inability to work was for HR issues, not work injury issues.
HOLDING: The court disregarded the insurer's argument about the plaintiff's termination from employment making him ineligible for TTD because there was no evidence of misconduct. Furthermore, since a worker with a TTD is "no longer eligible" for TTD when he begins working in a modified position, he must have been "eligible" for such benefits before then, regardless of the termination. The plaintiff is entitled to TTD. (Sandler) **X**

Kramlich v. MMIA – 12/17/14
FACTS: A city worker responsible for street maintenance equipment filed a claim alleging an OD caused his pulmonary hypertension, hypoxemia, obesity, hypertension, left ventricular hypertrophy, and congestive heart failure.
HOLDING: Although it is indisputable that the plaintiffs suffers from serious medical conditions, his medical records do not offer sufficient evidence that his employment was the major contributing cause of his conditions. His doctors appear to believe his apnea is to blame for his hypoxia and heart failure. The Court does not believe he is suffering from a compensable OD. (Sandler) ✓

Larson v. Montana State Fund – 1/16/15
FACTS: The plaintiff originally asked the Court to order MSF to accept liability for his alleged acute respiratory distress, but later asked the Court to dismiss under a theory that it lacked subject matter jurisdiction. MSF objected and argued the Court should make a determination or critical evidence could be lost.
HOLDING: Montana statute unequivocally states the Court has exclusive jurisdiction to make determinations concerning liability and benefits in work comp. Plaintiff's motion to dismiss without prejudice or to place in "administrative closure" is denied. (Sandler) ✓

Olson v. Montana State Fund – 2/3/15
FACTS: A worker was heading to a worksite in his own car and was in a single-car accident. He was not being paid at the time of his accident, but he did receive $61.50 a day in subsistence in lieu of a travel allowance according to the collective bargaining agreement. MSF denied his claim because it was outside the course and scope of his employment.
HOLDING: Since the collective bargaining agreement singled out subsistence pay in lieu of travel and the Supreme Court has found subsistence pay to be travel pay, the $61.50 a day subsistence pay was for travel and the worker was within the course and scope of employment. (Sandler) **X**

Cole v. Montana State Fund – 3/18/15
FACTS: Plaintiff requested summary judgment for a torn rotator cuff based on the opinions of her treating physician. MSF denied the claim, and plaintiff said the denial was unreasonable because they had no contrary medical opinion.
HOLDING: There are still material fact questions on whether the plaintiff injured her shoulder at work. A treating physician's opinion is not conclusive, especially when there is evidence indicating that the injury didn't happen at work or that the doctor relied on false information from the claimant. (Sandler) ✓

Emanuel v. Montana State Fund v. UEF and Little Roofing & Construction – 4/27/15
FACTS: A roofer with an Independent Contractor Exemption was injured while working for Little Roofing & Construction. Little Roofing had no insurance. The roofing was being done for Nistler Homes, which was insured through MSF. The Uninsured Employers Fund denied liability. The DLI retroactively revoked the plaintiffs Independent Contractor Exemption, but MSF denied liability based on the fact that a retroactive revocation could not establish liability. Plaintiff sued MSF, which joined Little Roofing and the Uninsured Employers Fund.
HOLDING: The plaintiff's claim is not time-barred according to the 90-day limit for appeals of Uninsured Employer Fund claim denials. If plaintiff is successful, it is MSF that will be liable, not the Uninsured Employer Fund. (Sandler) x

Haines v. MUSSFWCP – 6/9/15
FACTS: A worker alleged that peripheral neuropathy in his legs was caused by exposure to chlorine he mixed for the MSU swimming pool, and other injuries. The insurer accepted liability on the other injuries, but denied on the neuropathy.
HOLDING: The plaintiff has not proven that his exposure to chlorine caused the neuropathy. The doctor that testified to this end was unreliable and unpersuasive. (Sandler) ✓

Spencer v. MSGIA – 6/10/15
FACTS: An insurer amended its pleadings to add a statute of limitations defense, but the plaintiff objected under the belief the amendment was untimely. The plaintiff said it would be unduly prejudicial to let MSGIA amend so close to trial.
HOLDING: The Court is not aware of any case holding that a motion to amend a pleading within the scheduling order deadline could be deemed untimely. The fact that the plaintiff incurred costs by hiring experts is not persuasive in denying MSGIA's ability to amend. That is the risk he took filing beyond the deadline. (Sandler) ✓

Young v. New Hampshire Ins. – 6/18/15
FACTS: A plaintiff filed a petition for a hearing in the Workers' Compensation Court before the conclusion of mediation. He argues the Court should find jurisdiction despite his failure to complete the mediation because that process is a "complete waste of time."
HOLDING: Substantial compliance with the mediation process is not sufficient to petition the Court. It would defeat the purpose of the mediation statutes to let parties proceed to this Court without completing that process by simply stating that there is no possibility of settlement. (Sandler) ✓

Kellegher v. MACoWCT – 8/12/15
FACTS: A sheriff's deputy sustained a head injury while falling out of a truck during a pursuit. MACo accepted liability, but later determined the plaintiff could perform alternative employment and concluded he should receive PPD, not PTD.
HOLDING: The plaintiff is permanently and totally disabled. The objective medical evidence indicates the plaintiff suffered significant injuries and has ongoing limitations. Most of the alternative jobs for which the insurer prepared analyses would also exceed his pre-existing limitations, including hearing impairment. (Sandler) x

TB v. Montana State Fund – 9/29/15
FACTS: The plaintiff was a former MSF claims examiner who claimed occupational disease and/or injuries arising from her work. She sought voc-rehab and PTD benefits. Her Facebook page had many comments and photos that made MSF question her claim, and it moved to compel production of those posts. The plaintiff objected to the request as overly broad, burdensome, and invasive.
HOLDING: There is no "social media privilege" and the plaintiff must produce photos or postings that relate in "any fashion to the use of [plaintiff's] hands whether

it be driving or any other activity." Making Facebook posting "private" through the setting no more shields a party in a case than people who only share letters with his or her most personal friends. The use of Facebook may also undermine her claim regarding her ability to type and use a computer. ✓

Vonfeldt v. Costco – 11/16/15
FACTS: A worker in the Costco bakery claimed occupational disease from "over use" at the bakery. Costco believes the condition preexisted and that her work temporarily aggravated those injuries stemming from an auto accident in 2001 and fall at home in 2005.
HOLDING: Plaintiff is entitled to OD benefits for her myofascial pain syndrome in her upper back, shoulders, neck, and arms. The Court believed her work in the bakery was the leading cause of the onset. (Sandler) X

MONTANA WORKERS' COMPENSATION COURT REVIEW – Cases from 2014-2015

	JUDGE SHEA
Peterson v. Liberty Northwest	✔
Engle v. Hartford Underwriters	✘
Nelson v. Montana Schools Group Ins. Authority	✔
Gray v. Montana State Fund	✔
Monroe v. MACWCT	✘
Starkey v. ACE American Ins.	✘
Boland v. Montana State Fund	✔
Newlon v. Teck American	✘
Nelson v. Montana Schools Group Ins. Authority	✔
Baeth v. Liberty Northwest	✘
Dvorak v. Montana State Fund	✘
Rushford v. MCCF	✔
Davidson v. Benefis	✘
Myles v. Sparta Ins.	✘
	JUDGE SANDLER
Spencer v. Zurich American Ins.	✘
Kramlich v. MMIA	✔
Larson v. Montana State Fund	✔
Olson v. Montana State Fund	✘
Cole v. Montana State Fund	✔
Emanuel v. Montana State Fund v. UEF and Little Roofing & Construction	✘
Haines v. MUSSFWCP	✔
Spencer v. MSGIA	✔
Young v. New Hampshire Ins.	✔
Kellegher v. MACoWCT	✘
TB v. Montana State Fund	✔
Vonfeldt v. Costco	✘

Montana Chamber's Legal Efforts
2014-2015

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 eight years, the Montana Chamber's Justice Coalition has developed and hosted a day-long conference to discuss hot-button legal topics in Montana and legal trends around the United States. The March 2016 conference in Helena received 6 CLE credits from the Montana State Bar and will feature presentations on Montana's legal climate, improving the legal climate, emerging issues in employment law, legal reforms in the 2015 Legislature, legal issues surrounding the Clean Power Plan, and the legal status of exempt water well rights.

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 2015, the Montana Chamber supported legislation to deter defensive medicine, allow subrogation in work comp, discourage bad faith patent assertions, allow liability waiver for recreation providers, revise definitions related to the risks of skiing, and revise liability for forest range fires.

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 system 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, 45th in 2012, and 34th in 2015.

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. ATRA started in 1986 and is the only national organization exclusively dedicated to reforming the nation's civil justice system.

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