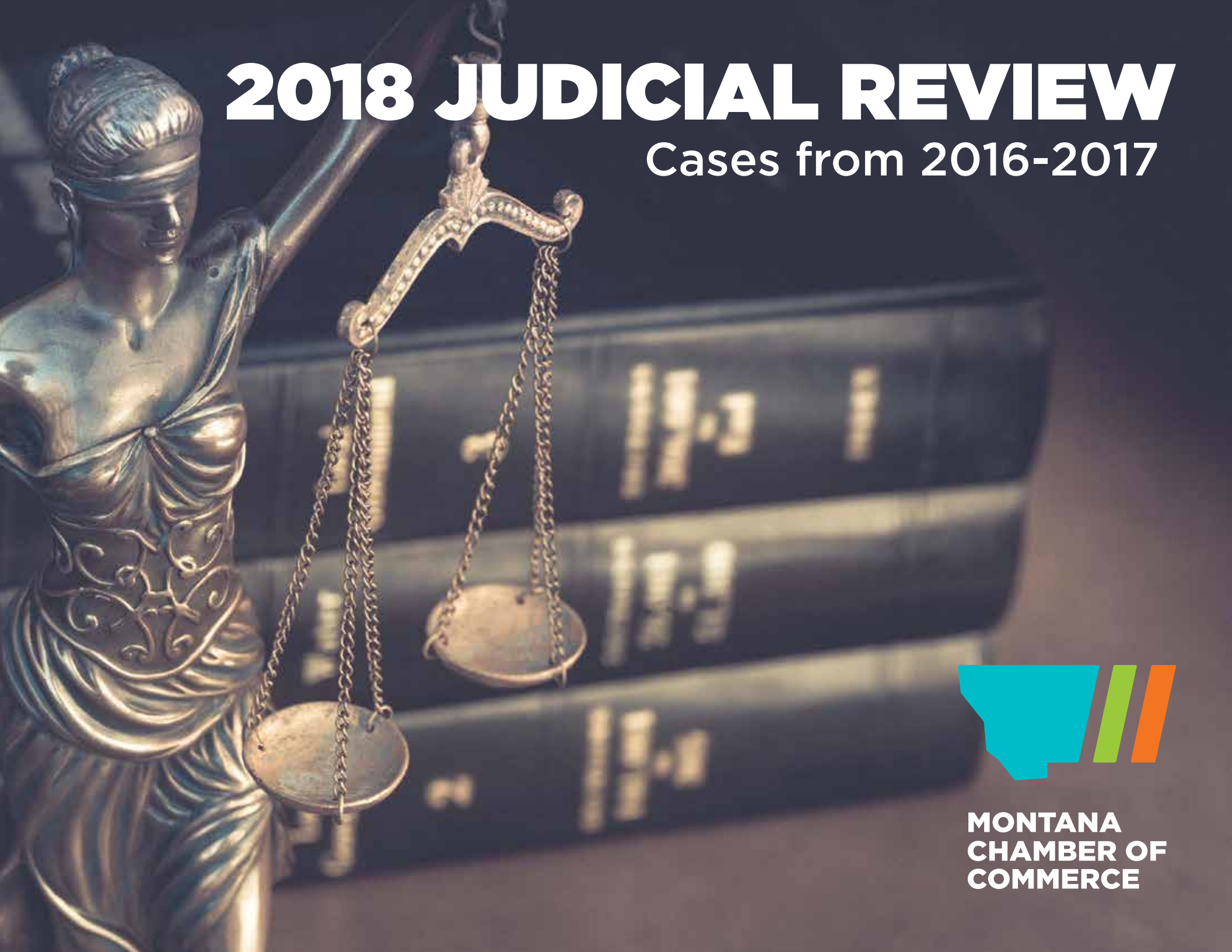

2018 JUDICIAL REVIEW

Cases from 2016-2017

MONTANA CHAMBER OF COMMERCE

Montana Supreme Court Judicial Review

The Montana Chamber of Commerce is pleased to present the 2018 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.

Envision 2026, the 10-year strategic plan of the Montana Chamber, focuses on a stable, predictable judicial system. The Montana Justice Coalition, the legal reform subsidiary of the Montana Chamber of Commerce, engages in the third branch of government (Judicial), just as we engage in the Executive and Legislative branches. We track important cases 24/7/365 so you don't have to. Montana's legal system needs improvement for Montana to succeed. Montana currently ranks No. 27 (No. 1 is best) in the US Chamber's "Legal Environment Index". We're working to move Montana into the Top 10 (and eventually, No. 1) of the country's best legal environments!

Following past practice, this Review encompasses a two-year period of important court decisions from 2016 and 2017 that related to business. Our intent is to assist the business community by tracking trends in judicial rulings that relate 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.

Montana Supreme Court Cases

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

Cases are divided into twelve categories: Banking, Contract, Employment, Insurance, Jurisdiction/Other, Landlord-Tenant, Land Use/Energy/Environment, Medical Malpractice, Taxation, Tort, Unemployment Insurance, and Workers' Compensation. Each case was assigned to a single category for evaluation in this Review, 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 this 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 2016-2017 period. We also included a Judicial Career Score, which includes a score from their entire Supreme Court tenure.

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 (2016 and 2017). 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. Justice biographies are available on the Court's website. Whether we agree or disagree with their rulings in individual cases, we appreciate each justice's service to the state of Montana.

Chief Justice Mike McGrath
Elected in 2008 and retained by voters in 2016

Justice Patricia Cotter
Elected in 2000, re-elected in 2008, retired from Court when term finished in 2016

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

Justice Mike Wheat
Appointed in early 2010, retained later that year, re-elected in 2014 and retired in December 2017

Justice Beth Baker
Elected in 2010

Justice Laurie McKinnon
Elected in 2012

Justice Jim Shea
Appointed in 2014 and retained in 2016

Justice Dirk Sandefur
Elected in 2016 to replace Justice Cotter

Justices of the 2016-2017 Montana Supreme Court (left to right): Justice McKinnon, Justice Shea, Justice Rice, Chief Justice McGrath, Justice Baker, Justice Sandefur, and Justice Wheat.

BANKING CASES

Flathead Bank of Bigfork v. Masonry by Muller and Muller — 10/25/16

FACTS: Masonry by Muller Inc. and Flathead Bank entered into four notes totaling $170,622.88. William Muller signed individually and as president of Masonry and personally guaranteed three notes. Masonry and Muller failed to pay the installments and the bank subsequently issued an IRS Form 1099-C discharge of indebtedness to Muller naming 9/18/13 as the date of the identifiable event. It sued for the balance of the loans, and requested summary judgment. Muller denied owing the amount requested and stated that Masonry was insolvent and non-existent. He also argued that the 1099-C canceled his debt. The bank contended that it is an IRS requirement even where a debt has not been discharged, and that it alone did not cancel the debt. The District Court granted summary judgment for the bank.

HOLDING: The Montana Supreme Court upheld the District Court by adopting the majority position that issuance of a Form 1099-C is not prima facie evidence of intent to discharge a debt, but a means of satisfying IRS reporting requirements and does not prevent a creditor from seeking collection of a debt. Muller offered no other evidence supporting his claim that the bank canceled his debt and did not deny that he failed to pay the installments. (Wheat, McGrath, McKinnon, Shea, Rice)

Anderson v. ReconTrust and Bank of America — 12/19/17

FACTS: The Andersons borrowed from Mountain West Bank and inquired of Bank of America (BA) about a modification when a foreclosure sale was set. BA told them that they preliminarily qualified for a modification. They assert that despite repeated assurances that the preliminary qualification would preempt the foreclosure sale, BA ultimately denied the modification and the property was sold. Andersons then sued BA alleging breach of contract, negligence, fraud, negligent misrepresentation, and unfair or deceptive practices in violation of the Consumer Protection Act (CPA). BA moved to dismiss and Andersons filed a brief in opposition with a supplemental affidavit setting forth additional facts in support of their claims. The District Court ultimately dismissed all claims pursuant to 12(b)(6) without considering their affidavit.

HOLDING: The District Court correctly concluded the Andersons' complaint failed to state sufficient facts entitling them to relief. They did not allege that BA gave them any advice beyond basic information about HAMP and whether they qualified for modification. They did not allege or imply that it advised or induced them to default, but essentially alleged no more than it mistakenly told them they qualified for a modification and then backtracked and told them they did not. (Sandefur, McGrath, Shea, Wheat, Rice)

CONTRACT CASES

Global Client Solutions v. Ossello — 3/2/16

FACTS: The plaintiff sued a debt relief servicer after it allegedly failed to negotiate reduced settlements of her $40,000 debt. The defendant moved to compel arbitration and dismiss the complaint for lack of jurisdiction. The District Court held that the arbitration clause was unconscionable and refused to compel arbitration.

HOLDING: A majority of the Court upheld the District Court's finding that the arbitration clause was unenforceable. It found there was no enforceable delegation clause in the arbitration clause, because the language was ambiguous and confusing, largely due to a typo in the clause. The majority found the clause unconscionable under Montana law because the bank had the right to bring collection matters to court, while the consumer had no similar right. (McGrath, Baker, Cotter, Wheat, Shea) Dissenters noted the majority had manufactured an ambiguity in the agreement because of a likely typo. Regardless of whether the phrase is "termination" or should be "determination," the language remains clear and unmistakable. (Dissenting: McKinnon, Rice)

Friedman v. Lasco — 5/17/16

FACTS: The plaintiffs bought an archery business from the defendants, and the buy-sell incorporated a non-compete covenant that defendants would not offer archery services within a 100-mile radius for a period of five years. Plaintiffs sued because one of the defendants went to work for a sports store with a "new archery department" within a year after the buy-sell. The District Court granted the injunction request and upheld the non-compete covenant because the sale of the business included an exchange of consideration for goodwill and that it was within the exception provided in Montana statute.

HOLDING: The Montana Supreme Court upheld the District Court's issuance of a preliminary injunction. The plaintiffs paid the defendants more than $600,000 for the business, including consideration in exchange for goodwill. (Wheat, Shea, Baker, Cotter, McKinnon)

Junkermier, Clark, Campanella, Stevens v. Alborn, Uithoven, Riekenberg, et al. — 9/6/16

FACTS: Several shareholders in an accounting firm were employed under an agreement with a covenant restricting competition. In 2013, all but one of the Bozeman shareholders started a new accounting firm, taking most of the previous firm's clients. The remaining shareholder sued to enforce the covenant not to compete. This District Court held that the agreement was unenforceable because it was merely an agreement to agree.

HOLDING: The Montana Supreme Court found that the District Court erred in declaring the employment agreement unenforceable. They wrote that it included a "bargained-for exchange in legal positions between the parties" because the departing employees had agreed to provide accounting services on behalf of the accounting firm, and the firm agreed to employ them to provide those services. (Baker, McGrath, Shea, McKinnon, Rice, Cotter, Wheat)

Hill County High School District. v. Dick Anderson Construction and Springer Group Architects — 2/7/17

FACTS: Hill County High School District contracted with Springer Architects to design a new roof for Havre High School, and with Dick Anderson Construction to construct the roof. A final walk-though occurred in January of 1998 in which the parties discussed punch list items. After a heavy snowstorm in 2010, much of the roof collapsed. The District sued in 2011 alleging negligence, breach of express and implied warranty, breach of contract, negligent misrepresentation, deceit, and fraud. The District Court granted summary judgment for Springer and Anderson on the basis of the 10-year §27-2-208 statute of repose because the roof was "completed" in 1998.

HOLDING: The District Court correctly concluded that Springer and Anderson had "completed" the roof in 1998 and therefore the District's claims were barred by the statute of repose. (McGrath, Baker, McKinnon, Shea, Rice)

Zirkelbach Const. v. DOWL — 9/26/17

FACTS: Zirkelbach sued DOWL alleging negligence and breach of contract, claiming that it incurred $1,218,197.93 resolving problems caused by DOWL's design plans. DOWL requested summary judgment that it cannot be liable to Zirkelbach for more than $50,000, a limitation of liability in a contract addendum. Zirkelbach countered that the limitation violates §28-2-702 and is therefore unenforceable. The District Court granted DOWL's motion.

HOLDING: The District Court did not err in granting summary judgment for DOWL on limitation of liability. Private parties generally may contract away liability as long as they have equal bargaining power and public interest is not involved. The statute is not violated when businesses contractually limit liability, but do not eliminate it entirely. (Wheat, McGrath, Rice, Shea, Baker, McKinnon, Sandefur)

Tedesco v. Home Savings Bancorp and Adams — 12/12/17

FACTS: Matthew Tedesco negotiated an agreement with the CEO of Home Savings of America (HSOA), Dirk Adams, in 2008 to move his branches and lending platforms to HSOA. He signed HSOA's employee handbook and an alternative resolution agreement which stated that he agreed to arbitrate any employment disputes. When he was terminated, Tedesco refused to arbitrate. The District Court issued an order compelling arbitration through AAA. The Arbitrator granted summary judgment to Adams and HSBC. Tedesco filed an application to vacate, correct, or modify the award.

HOLDING: Neither the statutes nor the MRAP authorizes immediate appeal from an order compelling arbitration where the case is not dismissed by that order. Interlocutory orders compelling arbitration and staying further proceedings are not immediately appealable. The parties entered into a valid agreement to arbitrate. (Baker, McGrath, Sandefur, Shea, Rice)

EMPLOYMENT CASES

Fenwick v. Dept. of Military Affairs — 4/5/16

FACTS: The plaintiff and the Department of Military Affairs (DMA) executed a severance agreement where DMA agreed to lay her off as opposed to terminating her for cause. She could participate in the job registry for two years and DMA would give neutral employment recommendations along with three-months pay, plus $3,500, healthcare and access to training. She later sued after she didn't get a newly-created job similar to the one she had before and wanted the severance agreement rescinded based on several legal theories. The District Court upheld the severance agreement.

HOLDING: The Court sustained the District Court's holding regarding the lawfulness of the severance agreement. Under §28-2-701, a contract is unlawful if it is: 1) contrary to an express provision of law; 2) contrary to the policy of express law, though not expressly prohibited; or 3) otherwise contrary to good morals. There is nothing in the record to show the severance agreement was in violation of these three categories. (Rice, McGrath, McKinnon, Wheat, Shea)

Ridgeway v. Department of Public Health and Human Services — 6/14/16

FACTS: Ridgeway was hired as a registered nurse and later terminated after receiving a doctor's report as to the nature of her latex allergy. Ridgeway filed a grievance and represented herself at the grievance hearing. In representing herself, she allowed the admission of several documents, which the hearings officer used to deny her grievance. She retained counsel and petitioned for judicial review under the Wrongful Discharge Act. The District Court affirmed the denial of the grievance.

HOLDING: The Montana Supreme Court upheld the District Court's holding. Because she stipulated to the admission of the documents without foundation, she cannot later raise a hearsay objection. (Baker, McGrath, Shea, McKinnon, Rice)

Reinlasoder v. Colstrip — 7/19/16

FACTS: The City of Colstrip fired its police chief, alleging misconduct that violated its employment manual. The conduct included sending obscene and pornographic emails from his office computer, lying about his work history on his application, criminal mischief, insubordination, intimidation and sexual harassment. The police chief sued for wrongful discharge. Colstrip moved for judgment as a matter of law, based on a theory that the police chief's uncontested sexual harassment of a female dispatcher constituted good cause for termination. The District Court denied the motion. The police chief was awarded $300,000 for wrongful discharge at trial, and Colstrip appealed.

HOLDING: The District Court erred in denying the motion for judgment as a matter of law when the police chief failed to contest the sexual harassment claims. Such a motion is only proper when granted in the absence of any evidence that would justify

submitting an issue to the jury. The ample evidence of sexual harassment, coupled with the absence of any denial of such claims from the police chief, show an absence of material fact on the claim. Sexual harassment is unquestionably a "legitimate business reason" or "reasonable job-related grounds for dismissal" that satisfies the good cause standard in the Wrongful Discharge Act. (Rice, McGrath, Cotter, McKinnon, Wheat)

Pearson v. McPhillips and Raulston — 10/11/16

FACTS: Raulston asked O'Brien, McPhillips's son-in-law who helps manage her property, if he could remove scrap metal. O'Brien gave permission to remove the scrap plus junk vehicles for 35% of the proceeds. Raulston chose the days and hours he worked, who worked with him, and the method of removing the metal, and used his own equipment & tools. During the project, Raulston accidentally started a grass fire which burned structures and equipment on neighbor Pearson's property. Pearson sued Raulston and McPhillips alleging that Raulston was "acting as an agent, servant, or employee" of McPhillips. The District Court found for McPhillips, holding that she was not liable for Raulston's actions because they did not enter into a joint venture and he was an independent contractor.

HOLDING: The District Court correctly held that McPhillips and Raulston were not engaged in a joint venture. The majority noted that while profit-sharing may be persuasive evidence of a joint venture, it does not conclusively establish one. McPhillips dictated the areas of her property from which Raulston could collect scrap but had no control over the equipment he used, when he worked, or his methods, and thus did not have an equal voice in controlling the agencies used in his performance. Intent is crucial to determining whether a joint venture exists. (Shea, Wheat, McKinnon, Baker) A dissenting justice argued that the undisputed facts support the conclusion that the parties entered into a joint venture. (Dissenting: Cotter)

Bird v. Cascade Co. — 12/27/16

FACTS: Cascade County employed Stacey Bird as HR Director in 2008. It placed her on administrative leave in 2012 while it investigated allegations that she used public time and resources inappropriately. It subsequently sent her a letter providing details of the investigation, notifying her of additional allegations, and advising of potential discipline. She denied the allegations. She sued alleging wrongful discharge. The District Court granted summary judgment for the County, finding that Bird held a sensitive managerial position, and it had good cause to terminate her.

HOLDING: The Montana Supreme Court upheld the District Court's decision. She was a key player in the management team, entrusted with confidential employee information, and counted on to keep the workplace running smoothly. The County was entitled to greater discretion in terminating her. (Baker, McGrath, Wheat, Rice). The dissenting justice argued that while there is a case to be made that Bird's performance was deficient in some respects, there is at least a legitimate question as to whether her performance warranted termination or some lower level of discipline. (Dissenting: Shea)

Slate v. Bozeman Deaconess Health Services — 2/28/17

FACTS: Slate was employed by Bozeman Deaconess Health Services (BDHS) as a medical physicist and radiation officer from 2009 until termination in 2013. His termination rested in part on an incident where he left a message on a Nuclear Regulatory Commission (NRC) inspector's phone. Witness said he may have used very vulgar language. BDHS had him sign a warning that any future inappropriate behavior would result in immediate termination. It terminated him after its HR department received a complaint from his colleague. Her complaint outlined not only his text messages, but also multiple visits to her office where he informed her of his sexual adventures. BDHS's HR investigation substantiated her allegations and formed the basis of its cause to terminate him. He sued alleging wrongful discharge. A Bozeman jury found 8-4 that BDHS did not discharge him for his refusal to violate public policy or for reporting a violation of public policy or wrongfully discharge him without good cause.

HOLDING: The District Court properly denied Slate's motion for a new trial on the basis that the verdict lacked substantial evidence. The jury heard testimony that he used profanity with NRC regulators, that the HR department cautioned him that further problems would be grounds for dismissal, and that he nevertheless discussed sex with a coworker and texted her referencing his libido and evoking her fear of snakes. This is more than a scintilla of evidence and clearly sufficient to conclude that BDHS had good cause to terminate him. (McKinnon, McGrath, Wheat, Baker, Rice)

Harrington v. Energy West — 6/13/17

FACTS: Energy West (EW) is a Montana corporation and subsidiary of Gas Natural (GN), an Ohio corporation. Jonathan Harrington was hired as controller in 2011. He entered into the agreement in Ohio, he lived and worked primarily in Ohio, he provided services to EW from GN's Ohio office, and EW issued his paychecks in Ohio. He was terminated in 10/12. On remand from the Montana Supreme Court, Harrington sought to file an amended complaint to drop wrongful discharge and NIED and assert deceit, negligent misrepresentation, constructive fraud, unjust enrichment, negligent slander, and punitives. The District Court denied his motion to amend.

HOLDING: The District Court did not act arbitrarily. The Montana Supreme Court did not remand to give Harrington the chance to start over with new theories. The District Court did not abuse its discretion in determining that resolution of Harrington's claims in Ohio would promote the convenience of witnesses and the ends of justice. (Baker, McGrath, McKinnon, Wheat, Shea)

Dundas v. Winter Sports Inc. — 11/7/17

FACTS: Mark Dundas was a seasonal employee at Winter Sports Inc. (WSI) 2003-14. He was hired for the 2014-15 season for a new position of Snow Safety Coordinator, but terminated due to negative comments about his job performance and profanity. He sued alleging wrongful discharge, alleging that WSI lacked good cause, failed to following its written policies, and terminated him for refusing to violate public policy or for reporting violations of public policy. The District Court granted summary judgment for WSI on the basis that he was a probationary employee who could be terminated for any reason.

HOLDING: The Montana Supreme Court upheld the District Court's ruling for WSI. As provided in the Handbook, he was separately hired for each new season and terminated at the end of each season. This is consistent with §39-2-501(1) that an employment "is terminated by the expiration of its appointed term". (McGrath, McKinnon, Baker, Sandefur, Rice)

INSURANCE CASES

Westchester Surplus Lines Ins. v. Keller Transport, et al. — 1/12/16

FACTS: This case was the result of a gasoline tanker that went off the side of the road, spilled 6,380 gallons of gasoline, and contaminated several homeowners' properties. One central issue was how much insurers would cover for the spill and how to

interpret language about "general aggregate" limits. According to the insurer, "general aggregate" is used in policies and means the maximum that applies to all coverages under the entire policy. According to the homeowners, because the term was undefined in the policy, the maximum must apply individually to each of the underlying coverages.
HOLDING: The Montana Supreme Court upheld the District Court's finding that the term "general aggregate" is ambiguous and should be construed to allow for another $4 million in coverage. Westchester's policy with regard to application of the general aggregate is ambiguous because, taken as a whole, it is reasonably susceptible to at least two interpretations. Such an ambiguity must be construed in favor of coverage. (Rice, Baker, McGrath, Cotter, Wheat, Shea) The dissenting justice declined to subscribe to manufacturing an ambiguity when a simple and careful review of the insurance documents does not support coverage beyond the general aggregate amounts of $4 million per occurrence. "General aggregate" clearly refers to Westchester's maximum liability for the whole policy rather than individual sections of the underlying CCIC policy. (Dissenting: McKinnon)

Stonehocker v. Travelers Indemnity — 3/29/16
FACTS: The plaintiff was a camp cook who was injured in a pickup she was using for work while the camp's vehicle was being repaired. She collected uninsured motorist coverage from her pickup's insurance carrier. She sought insurance coverage from the camp's corporate auto policy, but was denied because the pickup was not covered by the policy. The District Court granted summary judgment for the insurer, and the plaintiff appealed.
HOLDING: The Montana Supreme Court reversed the District Court's determination that the camp's corporate policy didn't cover the claim. They rejected the insurer's argument on interpreting the policy language for a "temporary substitute vehicle." Based on a consumer's reasonable interpretation of the policy language, the appropriate analysis for the temporary substitute is whether the substitute is put to the same use to which the covered vehicle would have been put, but for its withdrawal due to repairs. (Cotter, Wheat, McGrath, Rice, Shea, Baker)

Welscott v. Allstate Fire & Casualty — 4/5/16
FACTS: The plaintiff was injured in an auto accident and sought insurance coverage from his carrier, Allstate. It initially made advances for medical care based on his representations in his deposition, but Allstate subsequently asked for the money back when it learned he had not been accurate in his representations. The jury found the insurer had not breached its contract.
HOLDING: The Montana Supreme Court upheld the District Court's use of the special verdict form and rejected the plaintiff's appeal. The record is clear that he specifically agreed to the special verdict form, and failure to object at the lower court is a reason for the Montana Supreme Court to reject consideration of such arguments on appeal. (McGrath, Wheat, Shea, Baker, Rice)

Employers Mutual Casualty v. Fisher Builders and Slack — 4/19/16
FACTS: The Slack family hired Fisher Builders to build a remodeled home. During the project, the deck collapsed, and the Slacks' construction permit was revoked. The Slacks filed a negligence action against Fisher and his company. Fisher had a commercial general liability insurance policy with Employers Mutual Casualty (EMC). EMC filed a declaratory action alleging that there was no coverage because Fisher's actions were intentional and that it had no duty to defend or indemnify any party in the negligence action. The District Court granted summary judgment in favor of EMC.
HOLDING: The Montana Supmreme Court reversed the District Court's ruling that the incident didn't fit within the meaning of "occurrence" under the policy. It held that the District Court erred by concluding that the term "occurrence," defined by the policy as "an accident," categorically precludes coverage for any intentional conduct on the part of the insured with unintended results. Even if Fisher's acts were intentional, he did not intend to cause the harm. (Rice, McGrath, Baker, Wheat, Cotter)

Ibsen v. Caring For Montanans — 5/11/16

FACTS: Ibsen purchased health insurance coverage clinic employees from Blue Cross and Blue Shield of Montana (BCBSMT) through a program known as "Chamber Choices." Ibsen filed a class action citing violations of the Unfair Trade Practices Act (UTPA) by charging Ibsen and other similarly-situated employers excessive premiums and using the excess collections to pay "kickbacks" to the Chamber. The District Court found for defendants.

HOLDING: The Montana Supreme Court upheld the District Court's determination that Ibsen's claims for violations of the UTPA are precluded. Purely common law causes of action based upon insurer misconduct are not precluded. The Court rejected arguments made by Ibsen and the Montana Trial Lawyers Association that urged the Montana Supreme Court to consider § 27-1-202, MCA, which states "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." (Cotter, McGrath, Baker, Shea, Rice, McKinnon)

Fire Ins. Exchange v. Weitzel and Kevin Groff as PR of Estate of Ronny Groff — 5/17/16

FACTS: Weitzel, a caregiver for an elderly man, was sued by his estate after Groff's passing for elder abuse, including economic loss from stealing personal property, inducing the elderly man to make cash withdrawals, unlawfully transferring vehicle titles, and more. The complaint alleged several torts, including negligence per se based on the Montana Elder and Persons With Developmental Disabilities Abuse Prevention Act. Weitzel's homeowner insurer sought a declaration from the District Court that it had no duty to defend because the complaint did not allege actions covered by the homeowner policy. The District Court agreed with Weitzel.

HOLDING: The Montana Supreme Court overturned the District Court's conclusions. False imprisonment requires a showing of "restraint of an individual against his will and the unlawfulness of such restraint." The complaint fails to list false imprisonment or specifically allege that Weitzel restrained the elderly man against his will. Therefore, the insurer is not required to defend Weitzel from the claims against the estate. (McKinnon, McGrath, Cotter, Wheat, Shea)

In re BCBS of Montana nka Caring for Montanans and Montana Comprehensive Health Association Insurance Litigation — 5/24/16

FACTS: The defendant's health insurance policies excluded health care costs if the insureds received or were entitled to benefits from any auto insurance policy. After the Insurance Commissioner rejected these exclusions, the matter evolved into a class action. In a previous Montana Supreme Court holding, the Court sent the case back to the trial court to allow objectors to the class action settlement to conduct more discovery and how fees were calculated. After further discovery and a second fairness hearing, the District Court approved the settlement.

HOLDING: The Montana Supreme Court upheld the District Court's findings on a number of issues. The Court rejected the claims of several objectors because they lacked standing. It also rejected objector's claims that the District Judge shouldn't have approved the settlement because he somehow lacked sufficient information to determine fairness. (Baker, Cotter, McGrath, McKinnon, Rice)

Parker v. Safeco Ins. — 7/19/16

FACTS: A large boulder caused significant damage to a cabin when it dislodged from a hillside. The insurer denied the plaintiff's claim on the cabin damage because it was excluded by the earth movement exclusion in the policy ("...earthquake, landslide, mudflow, mudslide, sinkhole..."). The plaintiff sued for breach of contract and damages under the Unfair Trade Practices Act (UTPA). The District Court granted summary judgment for the insurer.

HOLDING: The District Court properly granted summary judgment for the insurer because "earth" includes more than just soil. The insurer promptly investigated and informed the plaintiff that it considered the boulder incident a "landslide" under the policy, so both the plaintiff's breach of contract and UTPA claim had no basis. (McGrath, Cotter, Baker, McKinnon, Rice)

West (GAL for Lee) v. USAA — 11/9/16

FACTS: Peter Lee and three others were injured in a single-vehicle accident where Lee sustained catastrophic injuries. The driver, Julian Perez, had a USAA policy with $50,000/$100,000 limits. All passengers were military-covered by TRICARE, which paid medical benefits for the passengers and had a statutory right to recover. It determined that Perez was 100% at fault and informed him that he could be liable for damages exceeding his coverage limits. Lee's attorney demanded $100,000 policy limits, stating that they would seek all their damages from USAA if it did not agree to pay in 20 days. USAA's claims examiner offered to pay the limits if the TRICARE liens were addressed. TRICARE finally agreed to waive its liens and USAA issued a check for $100,000 six weeks later. Lee had sued Perez and continued to sue after receiving the payment. Perez agreed to a $1,464,000 consent judgment and assigned his claims against USAA to Lee. Lee's guardian sued that same month, alleging bad faith by USAA by failing to promptly settle. The District Court granted summary judgment for Lee's guardian, concluding that USAA did not have a reasonable basis in law for conditioning payment on resolution of the TRICARE liens, and it was therefore liable to Lee for the consent judgment.
HOLDING: The District Court correctly recognized that a TRICARE lien arises under the incorrectly-interpreted Medical Care Recovery Act by concluding that USAA's obligation to honor the liens did not depend on the US having already pursued judicial enforcement. USAA had an obligation to reimburse TRICARE given its status as a secondary payer. The District Court also erred in not considering USAA's request for lien waiver before concluding that it did not have a reasonable basis in law to condition payment of the settlement. (Baker, McGrath, McKinnon, Shea and Rice) Dissenters pointed out that USAA consented to Perez filing the consent judgment and had no objection to the amount, which does represent Lee's actual damages. USAA's legal theories are a moving target and the majority erred in supplying legal authority for its defense long after the fact. (Dissenting: Wheat and Cotter)

Byorth and McKean v. USAA Casualty Ins. — 11/22/16

FACTS: Byorth and McKean sued USAA alleging breach of fiduciary duties, breach of contract, and Unfair Trade Practices Act (UTPA) violations, arguing that sending medical claims to AIS was "an improper cost-containment scheme" and moved to certify a class. The District Court certified the class as all Montanans who were insured by USAA for med-pay who submitted a claim for med-pay for an eight year period and had it denied in whole or in part following a "file review" by AIS or because of a "coding error."
HOLDING: The majority held that the District Court abused its discretion in certifying the class under Rule 23(a). The District Court has not established the scope and very little certification-related discovery is in the record. Therefore, we have no evidence of the number of claimants who had their claims denied or evidence as to claims filed or denied in the eight-year period. Therefore, the District Court abused its discretion in finding numerosity satisfied. As to commonality, the mere act of sending claims to an outside contractor is not the type of programmatic conduct that satisfied that needed element. (Cotter, Baker, Shea, McKinnon, Rice) The dissenting justices said the District Court's order demonstrates its clear grasp of the parameters of the case and the need to manage and control the litigation. (Dissenting: Wheat and McGrath)

Mundel v. Farmers Ins. Exchange — 1/10/17

FACTS: Jeannette Mundel was rear-ended by Zona Bauer at a stoplight in Kalispell, but law enforcement was not called. Bauer's insurer Allstate paid its $25,000 bodily injury limit. Mundel made a claim under her $100,000 Farmers underinsured motorist (UIM) policy, but it was denied. Mundel sued Farmers alleging breach of contract. The jury awarded Mundel $19,731.02, not enough to qualify for UIM because Bauer was not underinsured.
HOLDING: The Montana Supreme Court upheld the District Court's holding on attorney's fees. Mundel wrongly assumed that after a party fails to admit what is later proven true, 37(c)(2) requires a judge to order payment of fees incurred in proving the fact. (McGrath, Shea, McKinnon, Baker, Wheat)

Behlmer v. Mountain West Farm Bureau Mutual Ins. — 2/21/17

FACTS: Fitte caused the Corral Fire which burned 1,800 acres of 35 landowners, including Behlmer's 224 acres, and consumed four dwellings. He had two Mountain West policies: a $300,000 homeowner policy and a policy that provided $1 million CGL and $500,000 for commercial vehicles. Behlmer sued for a declaration that the policy provided coverage for the fire damages and enforcement of his judgment. Mountain West counterclaimed for a declaration of no coverage. The District Court granted summary judgment for Behlmer, reasoning that the removal and disposal of trees to prevent damage to Fitte's vehicles caused the Corral Fire.
HOLDING: The Montana Supreme Court reversed the District Court. The Montana Supreme Court said there is no dispute that the incident was an "accident" that caused "property damage" that Fitte was required to pay. However, the real question is whether the damage resulted from the ownership, maintenance or use of Fitte's vehicles. The District Court erred in granting summary judgment for Behlmer. Even if one were to assume that cutting down trees constituted maintenance of a vehicle, the policy would not extend coverage for the fire damages. (Rice, Shea, McKinnon, Baker, Wheat).

Huckins v. USAA — 6/13/17

FACTS: Barry Van Sickle listed his Stevensville home in 2010. Next to the disclosure statement about the "BASEMENT: (Leakage, Flooding, Moisture or evidence of Water, and Fuel Tanks)" he wrote "N/A." Upon entering the home, Huckins found the basement flooded. She sued Van Sickle for failure to disclose the flooding problems, asserting negligent & fraudulent misrepresentation, negligence, fraud & constructive fraud, violations of the CPA, and breach of the covenant of good faith. Van Sickle tendered the complaint to USAA under two homeowner policies and a renter policy on a California home where he had moved. USAA denied the claims. Huckins then sued USAA asserting breach of duty to defend Van Sickle, breach of contract, Unfair Trade Practices Act (UTPA) violations, breach of the covenant of good faith, and punitives. The District Court reasoned USAA had not breached its duty to defend.
HOLDING: The 2014 homeowner policy clearly excludes coverage for failure to disclose information "regarding the sale or transfer of real property." Thus USAA had no duty to defend Van Sickle under the homeowner policy. However, the renter policy did not contain a failure to disclose exclusion. USAA had a duty to defend Van Sickle, at least until a ruling was obtained that there was no coverage under the renter policy. By failing to defend him, it breached its duty. (Rice, McGrath, McKinnon, Shea, Sandefur)

Kilby Butte Colony v. State Farm Mutual Auto Ins. — 10/10/17

FACTS: Mary Ann & Ivan Stahl, members of a Hutterite colony, were injured in a car accident in Saskatchewan while passengers in a vehicle owned by a Canadian Colony. Stahls' colony owns multiple vehicles titled and insured in the Colony's name. All of its auto policies were purchased through State Farm at its Lewistown agency with no individual Colony members named. The Colony submitted

a claim on behalf of Stahls under its 2006 Freightliner Policy that provided $50,000/$100,000 UIM. State Farm declined the claim because Stahls were not occupying the Freightliner and did not meet the definition of "insured."
HOLDING: The Colony maintains that underinsured motor coverage is "personal and portable" and is provided even if the claimant is not occupying an insured vehicle (*Mitchell v. State Farm*, 2003). However, an exception to this rule exists for corporate or business policies that require occupancy of the vehicle as a condition of coverage. (Shea, Wheat, Sandefur, Baker, Rice)

Mlekush v. Farmers Ins. Exchange — 10/24/17
FACTS: Tanya Mlekush was injured in a motor vehicle accident and sought an UnderInsured Motorist (UIM) claim through her own insurer. She sued for "all sums due and owing," stating that Farmers questioned causation on a clear medical record and denied payment of surgery. They exchanged offers for several years. At trial, the jury found 8-4 that $450,000 is the total amount which will compensate Mlekush for her injuries. Mlekush moved for attorney fees under the insurance exception to the American Rule. The District Court denied her motion, finding that she initiated the action prematurely and therefore was not "forced to assume the burden of legal action."
HOLDING: When a 1st-party insured is compelled to pursue litigation and a jury returns a verdict in excess of the last offer to settle a UIM claim, the insurer must pay the insured's reasonable fees. Obtaining a verdict in excess of the last offer constitutes prima facie proof that the insured was forced to assume the burden of legal action to obtain the full benefit of the policy, obviating the need to inquire whether the insurance exception applies. Mlekush was compelled to sue and the jury returned a verdict higher than Farmers' last offer to settle her UIM claim. (Wheat, McGrath, Baker, Shea, McKinnon, Rice, Sandefur)

Teeter v. Mid-Century Ins. — 11/28/17
FACTS: Jennifer Teeter was rear-ended in Missoula and was diagnosed with whiplash and shoulder strain. Immediately after the accident, she retained counsel, demanding advance pay of medicals from Mid-Century, which paid $53,347.97, and asked her to undergo an IME to determine if the ongoing medicals were related to the accident. She refused the request. Teeter filed a declaratory action seeking payment of medicals and lost wages. Teeter moved for summary judgment, arguing that there was no dispute of material facts that Colberg's liability was reasonably clear. The District Court ordered Mid-Century to pay Teeter's unpaid medicals, lost wages, medical mileage, attorney fees, and costs.
HOLDING: The District Court erred in granting summary judgment for Teeter. A Ridley declaratory action is inappropriate for resolving disputed issues of material fact as to causation. After balancing Teeter's affidavits against the IME affidavits, there remains a clear disputed issue of material fact as to causation and damages. (Wheat, McGrath, Baker, McKinnon, Sandefur, Rice)

JURISDICTION/OTHER CASES

Interstate Explorations v. Morgen Farm & Ranch — 1/26/16
FACTS: Interstate Explorations placed a well on Morgen Farm & Ranch property pursuant to an oil and gas lease. Interstate later sued, alleging Morgen refused to execute an easement for Montana-Dakota Utilities to enter the property, and Morgen counterclaimed for property damage, trespass, unjust enrichment and wrongful occupation. Interstate moved to dismiss Morgen's claims for lack of subject matter jurisdiction under the theory that Morgen is required to exhaust administrative remedies.
HOLDING: The Court upheld the District Court's conclusion that Morgen did not have to exhaust administrative remedies before counterclaiming in the present case. The relevant precedent states that "the remedies provided by this part do not preclude any person from seeking other remedies allowed by law." (Rice, Wheat, McGrath, McKinnon, Shea)

Tyrrell v. BNSF & Nelson v. BNSF — 5/31/16

FACTS: The two plaintiffs sued Burlington Northern Santa Fe (BNSF) Railroad for injuries allegedly sustained while working for BNSF. Neither plaintiff alleged they ever worked or lived in Montana, and BNSF is a Delaware corporation with its principal place of business in Texas. In the two separate cases, the railroad moved to dismiss for lack of personal jurisdiction. One of the District Court judges held there was no personal jurisdiction, while the other held there was none. The two cases were appealed to the Montana Supreme Court.

HOLDING: The Montana Supreme Court held that Montana courts have personal jurisdiction over BNSF under the Federal Employers Liability Act (FELA). BNSF owns and operates lines in Montana, is licensed to do business in the state, has agents and office in the state, and is therefore properly sued in Montana. BNSF is "found within" the state under Rule 4(b)(1). If Montana courts have personal jurisdiction over BNSF for FELA cases brought by Montana residents, they necessarily must have personal jurisdiction over BNSF for FELA cases brought by nonresidents. (Shea, McGrath, Cotter, Baker, Wheat, Rice) The dissenting justice argued the United States Supreme Court has made it clear that a state court may assert general jurisdiction over a foreign corporation under the Due Process Clause "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render it essentially at home in the forum State.'" (Dissenting: McKinnon)

Thomas v. Liberty Northwest Ins. — 3/21/17

FACTS: Susan Thomas sued Liberty Northwest, alleging that it failed to pay certain work comp benefits. She alleged breach of the covenant of good faith and fair dealing, negligent and intentional infliction of emotional distress, punitive damages, and violation of the Unfair Trade Practices Act (UTPA). Thomas did not attempt service through the Insurance Commissioner as required in §33-1-602. The District Court granted Thomas' motion of entry of default judgment and issued an Order on Judgment for $1,504,000. Liberty moved to vacate the default judgment, but was denied.

HOLDING: The Montana Supreme Court held that the District Court's denial of Liberty's motion to vacate was an abuse of discretion. §33-1-602 provides that, as a foreign insurer, service on Liberty "may be made only by service of process upon the commissioner or upon a deputy or other person in charge of the commissioner's office during the commissioner's absence." Liberty was never properly served and the District Court never obtained personal jurisdiction. (Shea, McGrath, Wheat, Sandefur, Rice)

Southern Montana Telephone and Lincoln Telephone v. PSC — 5/30/17

FACTS: The Public Service Commission (PSC) started requiring "eligible telecommunications carriers" to disclose in their annual reports, the names and compensation of executives & managers earning more than $100,000/yr. Southern Montana Telephone and Lincoln Telephone agreed to provide the information to the PSC but argued that salaries constituted trade secret information and disclosure would violate employees' privacy. The PSC denied their motions for protective orders, concluding that the information was not a trade secret and the employees' right to privacy did not clearly outweigh the public's right to know. The District Court affirmed.

HOLDING: The District Court incorrectly upheld the PSC. The PSC did not give notice of its intent to adopt this rule or provide an opportunity for comment. It is invalid for failure to comply with Montana Administrative Procedure Act. (Baker, Shea, McGrath, Sandefur, Wheat)

Buckles v. Continental Resources — 9/21/17

FACTS: Zachary Buckles died in 2014 of exposure to hydrocarbon vapors while gauging oil tanks on Continental Resource's well site in North Dakota. He was dispatched by Black Gold Testing pursuant to Continental's contract with BH Flowtest, which subcontracted with several companies that are Montana entities. Continental is an Oklahoma corporation. It owns and operates several wells in Montana, and has vehicles registered with the state. Zachary's personal representative filed suit in Richland County against all businesses

involved. Continental moved to dismiss for lack of personal jurisdiction, which the District Court granted.
HOLDING: Taking all of Buckles' allegations as true, it does not appear beyond doubt that she has failed to establish the Montana Court's specific personal jurisdiction over Continental. Remanded with instructions to conduct an evidentiary hearing to determine whether Continental is subject to Montana-specific personal jurisdiction. (Shea, McGrath, Wheat, Baker, Sandefur, Rice) The dissenting justice stated Buckles has not demonstrated that Continental's suit-related conduct arose from its transaction of business in Montana. (Dissenting: McKinnon)

LANDLORD-TENANT CASES

Hershberger v. Marquart — 7/11/17
FACTS: Curtis Hershberger (Landlord) purchased a residence in Denton in 2015 which Michael Marquart (Tenant) had been renting. Landlord mailed a certified letter to Tenant 10/2/15 outlining a new rental agreement. Tenant refused to pick it up, leading Landlord to post it on the front door. A series of events occurred where Landlord made reasonable efforts to get Tenant to comply. Following a hearing, the justice court judge ruled that no rental agreement existed and that Landlord had acted reasonably. It awarded Landlord $592.20 for the water bill and $100 in court costs and ordered Tenant to vacate.
HOLDING: The lower courts correctly concluded that there was no rental agreement. If a landlord or tenant fails to sign and deliver a rental agreement, a written rental agreement does not exist. (Wheat, Sandefur, McKinnon, Baker, Rice)

LAND USE/ENERGY/ENVIRONMENT CASES

Montana Environmental Information Center (MEIC) v. Department of Environmental Quality (DEQ) and Golden Sunlight Mines — 1/12/16
FACTS: MEIC sued DEQ's approval of an expansion of a gold mine. It argued the reclamation plan to reclaim the pit violated Art. IX §2 and the Metal Mine Reclamation Act. These were nearly identical arguments MEIC made in litigation in connection with a plan for a different pit. MEIC had lost that case, and DEQ and the mine argued MEIC should be collaterally estopped from relitigating the same issue.
HOLDING: The Montana Supreme Court agreed with the District Court's ruling that MEIC was collaterally estopped from relitigating the issue. In the previous case, MEIC had insisted that the District Court decide the constitutional standard by which legislative actions are measured under Art. IX §2. MEIC's arguments in that case were rejected, and they did not appeal the District Court's decision. Because that issue was specifically raised, litigated and decided in the previous litigation, MEIC is barred by issue preclusion from raising it again. (McKinnon, Rice, Baker, McGrath, Cotter)

Bitterrooters v. DEQ; Intervenors Wanderer and Filcher — 9/5/17
FACTS: The Department of Environmental Quality (DEQ) received an application from CT Consultants for a groundwater pollution control system on the site of a "big box" store near Hamilton. The certification and signature sections listed local real estate broker Lee Foss as applicant. DEQ ultimately granted the permit. Bitterrooters petitioned for judicial review. The District Court granted summary judgment that DEQ violated the Montana Water Quality Act.
HOLDING: The District Court erred in concluding that DEQ violated the Montana Environmental Policy Act (MEPA) by failing to consider secondary environmental impacts other than water quality and construction of the wastewater system. MEPA requires a reasonably close causal relationship between the state action and the environmental effect. (Sandefur, McGrath, Rice, McKinnon, Baker, Wheat, Shea)

Clark Fork Coalition, et al v. DNRC — 9/13/16

FACTS: MCA §85-2-306(3)(a)(iii) of the Water Use Act created an exemption from permitting groundwater appropriations under 35 gallons/minute and 10 acre-feet/yr. It also provided an exception to the exemption when a "combined appropriation" from the same source by two or more wells or developed springs exceeds 10 acre-feet/yr. regardless of flow rate. The 2013 Legislature reduced the permissible flow in stream depletion zones, left the permissible flow rate unaltered outside stream depletion zones, and again retained "combined appropriation." The District Court invalidated the combined appropriation definition and directed DNRC to formulate a new rule.

HOLDING: The Montana Supreme Court upheld the District Court by holding that it did not err by invalidating the definition. Based on the plain language of §85-2-101(4) and the stated purpose of the Act to "protect existing uses," "combined appropriation" refers to the maximum quantity of water that may be appropriated without a permit, not to the manner in which wells or developed springs may be physically connected. There is no language in the Act which suggests that wells or developed springs must be physically manifold or connected to be deemed a "combined appropriation." (McKinnon, McGrath, Cotter, Baker, Wheat, Shea) The dissenting justice argued that the majority sweeps away the messy business of analyzing the legislative record and history, preferring to employ a canon of statutory construction whereby it is absolutely clear on its face because "we say so." (Dissenting: Rice)

Northwestern Energy v. Public Service Commission — 9/27/16

FACTS: Northwestern Energy (NWE) requested a $1.4 million rate increase for supply costs, due to an outage at Gates Generating Station. The Public Service Commission (PSC) denied the request and rejected their expert's conclusion that the "free ridership" and "spillover" values of its demand-side management programs were perfectly offsetting, adopting instead the draft calculations.

HOLDING: The Montana Supreme Court affirmed the PSC's decision. It did not err in finding that NWE failed to appropriately plan for and operate Gates. Its decision to disallow the outage costs when Gates went offline was well within its authority to determine whether those costs were "prudently incurred." §69-8-210(1). PSC's adoption of the calculated values for free ridership and spillover is affirmed. As an administrative agency, its "experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence." It had substantial evidence and appropriately used its expertise to evaluate that evidence. (Rice, McGrath, Shea, Cotter, Wheat)

CCRC and NPRC v. BOGC — 9/27/16

FACTS: Carbon County Resource Council and Northern Plains Resource Council argued they were denied a meaningful opportunity to oppose fracking at Energy Corp's Hunt Creek exploratory well in Carbon County. The District Court held that their concerns were

speculative, as fracking had not occurred and therefore were not ripe for judgment.
HOLDING: The Montana Supreme Court held that the District Court erred in concluding that the environmental groups' claim was unripe. The groups' right to participate did not hinge on whether Energy Corp. engaged in fracking, but whether the groups had the opportunity to participate in the permitting process. It filed a sundry notice pursuant to ARM 36.22.608, which the Board approved. Therefore, whether the Plaintiffs had the opportunity to participate was not a "hypothetical, speculative, or illusory dispute." However, the Board did not violate their right to participate. They did participate in the decision to approve the drilling permit, which included consideration of the potential for fracking. (Baker, McGrath, Wheat, Shea, Rice)

Korman — 12/16/16
FACTS: The Kormans objected to their own water claims, asserting that they own "vested" rights, not just "existing" rights, and that priority dates should reflect a uniform 12/31/1893, based on their contention that their stockwater rights should date to the earliest use of open range by their ancestral free grazers. The Water Court Judge affirmed the Water Master's Report that the Kormans failed to show a connection between use by the free grazers sufficient to make them successors to any rights that those people had perfected.
HOLDING: The Montana Constitution states that all "existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed." This expressly confirms all pre-73 rights as a matter of constitutional law, and confirms Kormans' existing rights. No other category of pre-73 rights is provided. (McGrath, Shea, Baker, McKinnon, Wheat)

MEDICAL MALPRACTICE CASES

Smith v. Anderson and Heaton — 8/9/16 (Non-cite Memorandum)
FACTS: The plaintiff brought this medical negligence case against the defendant doctors, who treated him at Community Medical Center in Missoula. In response to a deadline set by the District Court, Plaintiff identified forensic psychiatrist Dr. William Stratford as his medical expert. Defendant doctors moved for summary judgment when they learned that Dr. Stratford had not evaluated Smith's claims and had not agreed to appear as an expert. They also contended that Stratford was not an expert in the medical specialties that they practice. The District Court determined that expert medical testimony by a practitioner in the appropriate medical field was necessary to support Smith's case.
HOLDING: The Montana Supreme Court upheld the District Court. Montana law requires that the elements of a medical negligence claim be supported by experts. Based upon the disposition of the case, the District Court properly granted the protective order sought by the defendant doctors and properly denied Smith's motion for appointment of counsel. (McGrath, Shea, McKinnon, Baker, Rice)

Evans v. Scanson and Peters — 6/27/17
FACTS: Kerrie Evans' child was born in 2010 with cystic fibrosis (CF). She sued the prenatal care and counseling professionals because, she alleged, she would have aborted had she been timely provided with the CF diagnosis. The nurse practitioner's notes indicate that the fetus was at risk for Down's syndrome due to Evans's age, Evans wanted the fetus tested, and she would abort for an abnormality. Evans alleged that she also asked for CF testing. She asserted claims in equity, negligence, negligence misrepresentation, and NIED. The Bozeman jury found 12-0 that her providers did not depart from accepted standards of healthcare in their care and treatment of Evans.
HOLDING: The Montana Supreme Court upheld the jury's conclusions and the rulings of the District Court. Evans argued that defense counsel made inflammatory statements in closing that were sufficiently prejudicial to constitute reversible error. Although

a judge has an obligation to ensure a fair trial, a fair trial is not necessarily an error-free trial. (McKinnon, McGrath, Shea, Baker, Sandefur)

TAXATION CASES

Mountain Water v. DOR — 5/16/17

FACTS: The City of Missoula brought an action to condemn Mountain Water (MW) in 2014. A preliminary order of condemnation was issued, which the Supreme Court affirmed. MW asked the Montana Department of Revenue (DOR) to agree that it was no longer responsible for taxes and that the City be deemed responsible. The City objected, stating that responsibility for taxes would shift after a judgment awarding possession. The District Court granted summary judgment for MW, ordering a refund and assessment of taxes against the City.

HOLDING: The Montana Supreme Court reversed the District Court because, "[it] is the general rule that a taking does not occur until: (1) legal title vests in the condemnor, (2) the condemnor enters into actual possession, or (3) the condemnor takes constructive possession either by causing damage to property or by depriving the owner of full beneficial use of his land." (Rice, McGrath, Baker, Wheat, Shea, McKinnon, Sandefur)

Richland Aviation v. DOR — 5/23/17

FACTS: Richland Aviation, based in Sidney, has six twin-piston engine aircraft, that it provides on demand. DOR determined that since it "performs regularly-scheduled flights for United Parcel Service (UPS)," it is subject to centrally assessed taxes. Richland objected and filed this action to determine whether it was subject to the aircraft registration statutes or central tax assessment. The District Court concluded that Richland was not a scheduled airline because it "does not hold out to the public that it operates between certain places at certain times."

HELD: The Montana Supreme Court upheld the District Court, but with different reasoning. Richland does not engage in "regularly-scheduled flights" required for central assessment. It does not publish or otherwise predefine a schedule of flights that it offers to the public. It does not fly "according to timetables and locations predefined by the carrier." It flies on a schedule that is arranged by the customer. UPS sets the dates, times, and pickup locations. This conclusion corresponds with Montana's aircraft registration statutes. "Aircraft required to be registered in Montana are subject to a fee. The registration fee is in lieu of property tax." (Rice, Wheat, Sandefur, Shea, McKinnon, Baker)

TORT CASES

Missoula v. Mountain Water, et al — 8/2/16

FACTS: The City of Missoula and its residents sued Mountain Water to condemn it as the city water provider. Following a three-week trial, the District Court issued a preliminary condemnation order allowing the condemnation to proceed. Defendants appealed, claiming violations of procedural due process, abuse of discretion, collateral estoppel, and other issues. The District Court appointed three commissioners, who decided market value to be $88.6 million. Mountain Water, Carlyle and the employees did not appeal the valuation.

HOLDING: The Montana Supreme Court affirmed the District Court's findings and conclusions on all fronts. The majority held that the District Court did not deny defendants' procedural due process. The District Court did not abuse its discretion in limiting defendants' valuation evidence in the necessity phase. The Legislature clearly intended valuation to be determined by unbiased

fact-finders after the necessity determination. The District Court correctly determined that a municipality may condemn a water system even if the owner does not have a franchise agreement or contract to provide water pursuant to §§ 7-13-4403 & 4404. The District Court did not err in finding that public ownership of the system is more necessary than private ownership. (Cotter, McGrath, Shea, Baker, and Wheat) Justice Rice dissented, arguing that the District Court permitted and participated in deprivations of Mountain Water's right to due process. He believed the District Court was "hell-bent" on condemnation, adopting an unconstitutional presumption in favor of condemnation by essentially presuming that municipal ownership of a water system is always a "more necessary public use," and relieved the City of its burden of proving the "public use" element of eminent domain. Justice McKinnon also dissented, but for some different reasons. She stated it was error to apply the "more necessary" requirement of §70-30-111(1)(c) in a condemnation proceeding where the public use for public or private ownership is the same. (Dissenting: Rice & McKinnon)

Talbot v. WMK-Davis and Cudd Pressure Control — 10/4/16

FACTS: An Oklahoma man employed by Cudd Pressure Control (Cudd) was working for the company in Montana when he was struck by a vehicle and sustained extensive brain damage. Talbot had a pending workers' compensation claim in Oklahoma, but sued the driver and WMK-Davis in Montana. His employer, Cudd, filed a comp subrogation lien against his tort recovery in Montana, which is allowed under Oklahoma law. The District Judge held in summary judgment that Montana law precluded Cudd from attaching the lien to Talbot's potential tort recovery prior to Talbot being made whole.

HOLDING: The majority upheld the District Court's conclusion, because the Montana constitution (Article II, Section 16) has immortalized a strong public policy interest in preventing subrogation of tort awards prior to a worker being made whole. Montana courts will not entertain comp subrogation prior to a worker's full recovery. There's no dispute that Talbot hasn't been made whole. (Cotter, McGrath, Baker, Shea, Rice, Wheat) The dissenting justice argued that it protested the Majority's failure to provide a well-reasoned analytical framework for determining the choice of law here between Montana and Oklahoma. (Dissenting: McKinnon)

Boyce & Sayer v. Carpet Plus, Curtis Bowler, and Marty Johnson — 10/11/16

FACTS: Boyce and Sayer sued in 2010, seeking property damages arising from Defendants' 2008 installation of flooring and carpeting in the house they occupied in Missoula and also sought personal injury damages for "toxic poisoning" caused by the finishing materials. The District Court determined that they lacked standing to prosecute the property damage claims because they did not own the property at the time the claims arose. It determined that Plaintiffs specifically alleged that the individual Defendants were acting within the course & scope of their employment and that this provided a shield from personal liability.

HOLDING: The Montana Supreme Court agreed with the conclusions of the District Court. This case presents questions controlled by settled law, which the District Court properly applied. (McGrath, Cotter, Baker, Shea, Rice)

Suzor v. International Paper, et al — 12/27/16

FACTS: Charlotte Suzor injured her knees in 1982 while working for Champion International. She settled her comp claim, medical reserved. International Paper bought Champion and contracted with Sedgwick to handle claims. In the spring of 2009, Suzor fell and fractured her hip while getting into her pickup. Under terms of her comp settlement, she was entitled to medicals for the hip as a consequence of her job injury. After a series of denials by Sedgwick, Suzor sued, alleging breach of fiduciary duty and bad faith, claiming that denial of her medicals resulted in months of pain & suffering. The District Court dismissed her fiduciary duty theory, concluding that no authority supported the proposition that employers owe fiduciary duties to their employees in the context of comp insurance.

HOLDING: The District Court correctly held that the defendants did not owe Suzor a fiduciary duty. Terms of an insurance policy may create fiduciary duties that insurers owe to their insureds. Those duties arise from the contractual nature of the insurer-insured relationship. A third-party claimant does not have a contractual relationship with an insurer and therefore the fiduciary duties running from the insurer to the insured do not flow to the third-party claimant. (Cotter, McGrath, Wheat, McKinnon, Rice)

Swanson v. Consumer Direct — 3/14/17

FACTS: Maria Atkins-Swanson qualified in 2009 for the Self Directed Personal Assistance Services Program and selected Consumer Direct (CD) as her provider and Taylor Lang as her personal assistant. She later died from a buspirone overdose. Her husband sued CD, alleging wrongful death/survivorship and breach of contract. CD moved for summary judgment on the basis of §53-6-145(5), which states that medical and related liability for personal-care services rests with the person directing the services, arguing that Atkins-Swanson was the person directing the services. The District Court granted summary judgment for CD.
HOLDING: The District Court correctly held that Swanson's claims were foreclosed under §53-6-145 as a matter of law. Swanson argues that CD was Lang's "common law employer" and therefore responsible. In this state, there is no common law in any case where the law is declared by statute. (Rice, McGrath, Baker, Wheat, Shea)

Fishman v. GRBR — 10/5/17

FACTS: Neill Fishman was injured while riding a horse at GRBR. Fishman sued, alleging that GRBR never physically touched or inspected Neill's saddle after it was placed upon his horse, nor after it noticed it was off-center and told Neill to recenter, and at no time before or after Neill mounted his horse. The District Court granted summary judgment for GRBR, reasoning there are risks inherent to equine activities.
HOLDING: The District Court properly granted summary judgment for GRBR. That the cinch loosened during the ride underscores that this is an inherent danger or condition of equine activity, about which he was expressly advised. (Rice, McKinnon, Baker, Sandefur) The dissenting justice argued the majority interprets the Act too narrowly, depriving an injured person of the right to have the facts decided by a jury, rather than by a judge's expansive interpretation of an immunity statute. (Dissenting: Wheat)

Stokes v. First American Title and US Bank Trust — 11/7/17

FACTS: While another matter was pending, First American Title and US Bank Trust requested an order declaring John Stokes a vexatious litigant and requiring that anything he files be pre-approved by the district court or certified by a lawyer as meritorious under Rule 11.
HOLDING: Stokes's history of litigation is significant and has entailed vexatious, harassing, or duplicative suits. He has been before the Montana Supreme Court ten times. He was represented in several cases and there was no assertion that those appeals had been taken unreasonably. However, his pro se appeals have repeatedly been found insufficiently presented. (Rice, Shea, Sandefur, McKinnon, Baker)

Watson v. Burlington Northern Santa Fe (BNSF) — 11/4/17

FACTS: Kelly Watson alleged he was exposed to vermiculite dust while employed by BNSF, which transported vermiculite for W.R. Grace and its predecessors from Libby. Grace had filed Chapter 11 Bankruptcy in 2001. The District Court granted summary judgment for BNSF that his claim was barred because it accrued in 2007 and he should have filed his Federal Employers Liability Act claims by 2010.
HOLDING: The Montana Supreme Court reversed the District Court and allowed Watson's claims to move forward. Watson's claim

accrued in 10/07. Watson was barred from commencing his ARD action against BNSF until the injunction was lifted on 2/3/14. He amended his complaint to include BNSF within 16 months of his claim accruing, well within the three-year statute. (Shea, McGrath, Sandefur, Baker, Rice)

UNEMPLOYMENT INSURANCE CASES

Crouse v. Madison Co. — 10/17/17

FACTS: Joyce Crouse was hired as Madison County Sanitarian, but contractors complained about her work. The Madison County Commissioners sent her a warning that she could expect disciplinary action if she failed to change as to missed appointments, scheduling problems, and lack of communication. Before the decision to terminate her employment was finalized, she handed in her resignation, which stated that she had no choice but to quit because of retaliation for performing her duties, harassment, and inability to work in a hostile environment. She filed an unemployment comp claim. Following a telephonic hearing, it was concluded that she had quit without good cause and denied her claim.

HOLDING: Crouse did not have a compelling reason to quit because she feared termination. Nor did the tension with her co-workers give her a compelling reason. The District Court was correct in determining that allegations of hostile conditions did not give her good cause to quit. (McGrath, Shea, Baker, Wheat, Sandefur)

WORKERS' COMPENSATION CASES

Asurion Services v. MIGA — 6/13/17

FACTS: Christy Harris filed claims for incidents in 2002 while employed by what is now Asurion. Lumbermens adjusted until it was declared insolvent and MIGA assumed the claims. MIGA notified Asurion that it was seeking recovery of benefits. Asurion requested declaratory relief, which the District Court granted on the basis that the Workers' Compensation Act (WCA) provides an exclusive remedy that frees the employer from liability claims by employees: "It would be illogical to conclude that an employer, protected from liability and removed from the benefits distribution process by law, is suddenly liable for all the payments made by MIGA because the insurer became insolvent."

HOLDING: The District Court correctly granted summary judgment for Asurion. The exclusive remedy doctrine insulates employers like Asurion from what are essentially third-party indemnity claims by MIGA, while the insurer's duty to pay claims under a Plan 2 arrangement is non-delegable. To deprive it of the exclusive remedy by requiring it to reimburse MIGA for benefits paid to Harris would strike at one of the very foundations of the comp system. (Shea, Rice, McGrath, Wheat) (Dissenting: Sandefur)

MONTANA SUPREME COURT REVIEW - Cases from 2016-2017

	Court	Baker	Cotter	McGrath	McKinnon	Rice	Sandefur	Shea	Wheat
BANKING									
Flathead Bank of Big Fork v. Masonry	✓			✓	✓	✓		✓	✓
Anderson v. ReconTrust and BA	✓			✓		✓	✓	✓	✓
CONTRACT									
Global Client v. Ossello	X	X	X	X	✓	✓		X	X
Friedman v. Lasco	✓	✓	✓		✓			✓	✓
Junkemier v. Alborn	✓	✓	✓	✓	✓	✓		✓	✓
Hill Co. High v. Dick Anderson	✓	✓		✓	✓	✓		✓	
Zirkelbach Const. v. DOWL	✓	✓		✓	✓	✓	✓	✓	✓
Tedesco v. Home Savings Bancorp	✓	✓		✓		✓	✓	✓	
EMPLOYMENT									
Fenwick v. Dept. Military Affairs	✓			✓	✓	✓		✓	✓
Ridgeway v. DPHHS	✓	✓		✓	✓	✓		✓	
Reinlasoder v. Colstrip	✓		✓	✓	✓	✓			✓
Pearson v. McPhillips and Raulston	✓	✓	X		✓			✓	✓
Bird v. Cascade Co.	✓	✓		✓		✓		X	✓
Slate v. Bozeman Deaconess	✓	✓		✓	✓	✓			✓
Harrington v. Energy West	✓	✓		✓	✓			✓	✓
Dundas v. Winter Sports	✓	✓		✓	✓	✓	✓		
INSURANCE									
Westchester v. Keller Transport	X	X	X	X	✓	X		X	X
Stonehocker v. Travelers	X	X	X	X		X		X	X
Welscott v. Allstate Fire & Casualty	✓	✓		✓		✓		✓	✓
Employers Mutual v. Fisher	X	X	X	X		X			X
Ibsen v. Caring for Montanans	✓	✓	✓	✓	✓	✓		✓	
Fire Ins. Exchange v. Weitzel	✓		✓	✓	✓			✓	✓
In Re BCBS	✓	✓	✓	✓	✓	✓		✓	
Parker v. Safeco Ins.	✓	✓	✓	✓	✓	✓			

MONTANA SUPREME COURT REVIEW - Cases from 2016-2017

	Court	Baker	Cotter	McGrath	McKinnon	Rice	Sandefur	Shea	Wheat
INSURANCE (CONT.)									
West v. USAA	✓	✓	X	✓	✓	✓		✓	X
Byorth and McKeen v. USAA	✓	✓	✓	X	✓	✓			X
Mundel v. Farmers Ins.	✓	✓		✓	✓			✓	✓
Behlmer v. MT West	✓	✓			✓	✓		✓	✓
Huckins v. USAA	X			X	X	X	X	X	
Kilby Butte Colony v. State Farm	✓	✓				✓	✓	✓	✓
Mlekush v. Farmers Ins.	X	X		X	X	X	X	X	X
Teeter v. Mid-Century Ins.	✓	✓		✓	✓	✓	✓		✓
JURISDICTION/OTHER									
Interstate Explorations v. Morgen	X			X	X	X		X	X
Tyrrell v. BNSF	X	X	X	X	✓	X		X	X
Thomas v. Liberty Northwest	✓			✓		✓	✓	✓	✓
Southern MT Telephone v. PSC	✓	✓		✓			✓	✓	✓
Buckles v. Continental Resources	X	X		X	✓	X	X	X	X
LANDLORD-TENANT									
Hershberger v. Marquart	✓	✓			✓	✓	✓		✓
LAND USE/ENERGY/ENVIRONMENT									
MEIC v. DEQ and Golden Sunlight	✓	✓	✓	✓	✓	✓			
Bitterrooters v. DEQ	✓	✓		✓	✓	✓	✓	✓	✓
Clark Fork Coalition v. DNRC	X	X	X	X	X	✓		X	X
Northwestern Energy v. PSC	X		X	X		X		X	X
CCRC & NPRC v. BOGC	X	X		X		X		X	X
Korman	✓	✓		✓	✓			✓	✓
MEDICAL MALPRACTICE									
Smith v. Anderson and Heaton	✓	✓		✓	✓	✓		✓	
Evans v. Scanson and Peters	✓	✓		✓	✓		✓	✓	

MONTANA SUPREME COURT REVIEW - Cases from 2016-2017

	Court	Baker	Cotter	McGrath	McKinnon	Rice	Sandefur	Shea	Wheat
TAXATION									
Mountain Water v. DOR	X	X		X	X	X	X	X	X
Richland Aviation v. DOR	✓	✓			✓	✓	✓	✓	✓
TORT									
Missoula v. Mountain Water	X	X	X	X	✓	✓		X	X
Talbot v. WMK-Davis	X	X	X	X	✓	X		X	X
Boyce & Sager v. Carpet Plus	✓	✓	✓	✓		✓		✓	
Suzor v. International Paper	✓		✓	✓	✓	✓			✓
Swanson v. Consumer Direct	✓	✓		✓		✓		✓	✓
Fishman v. GRBR	✓	✓			✓	✓	✓		X
Stokes v. First American Title	✓	✓			✓	✓	✓	✓	
Watson v. BNSF	X	X		X		X	X	X	
UNEMPLOYMENT INSURANCE									
Crouse v. Madison Co.	✓	✓		✓			✓	✓	✓
WORKERS' COMPENSATION									
Asurion v. Montana Ins.	✓			✓		✓	X	✓	✓
2016-2017 Judical Score	**72% (42/58)**	**72% (34/47)**	**50% (11/22)**	**66% (33/50)**	**88% (37/42)**	**73% (36/49)**	**71% (15/21)**	**66% (31/47)**	**61% (27/44)**
Career Judicial Score		**64%**	**41%**	**55%**	**89%**	**78%**	**71%**	**63%**	**48%**

Montana Workers' Compensation Court Judicial Review

The Montana Workers' Compensation Court (WCC) was created in 1975 to address work comp cases – a significant development for the business community. Before the Montana Chamber successfully enacted systematic reforms 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 WCC. This is the sixth cycle the Chamber has reviewed its work, and it covers cases from 2016 and 2017.

Montana Chamber's Efforts 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, it has continued to pursue legislative opportunities to protect businesses from inflationary pressure on premiums. In the 2015 Legislature, the Montana Chamber supported legislation – SB 288 – to authorize subrogation, which allows work comp insurers to collect funds from at-fault third parties for claims for injuries or occupational diseases. SB 288 made it through the Legislature but was vetoed by Governor Bullock. The Chamber also supported successful legislation – HB 538 – to exempt Montana employers from having to pay work comp in Montana for their employees that work full-time and are covered by work comp in North Dakota. In the 2017 Legislature, the Montana Chamber successfully opposed an attempt to unwind one of the key reforms in HB 334, in addition to supporting the passage of SJ 27, an Interim study of Montana's workers' compensation system.

The Montana Chamber provides a representative (Bill Dahlgren of Sun Mountain Sports) on the Labor-Management Workers' Compensation Advisory Council (LMAC), which was recently reauthorized by Governor Bullock. This installment of the LMAC is looking at key work comp issues such as subrogation, administering a drug formulary, and the role of the Montana State Fund in our state's workers' compensation system. The Montana Chamber also created and utilizes a Work Comp Coalition.

Scoring

In this review, the WCC judge was evaluated in comparison to the pro-business position. 26 cases were chosen for this review during the period from 2016-2017. This report includes a review of judgments made by Judge David Sandler, who was appointed by Governor Steve Bullock in 2014 and confirmed by the Montana Senate in 2015.

Judge Sandler was born and raised in Billings. He received his Juris Doctor degree from the University of Montana School of Law in Missoula in 1998. He clerked for the Honorable James C. Nelson at the Montana Supreme Court from 1998-99, and practiced law at several prominent Montana law firms throughout his career. Judge Sandler's law practice included insurance defense of work comp claims from 1999 to 2006 and from 2007 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 from Court documents, as well as case summaries compiled by the Montana Law Week and the Workers' Compensation Court staff (wcc.dli.mt.gov/cases.asp).

Warburton v. Liberty Northwest Inc. – 1/7/16

FACTS: The petitioner claimed she injured her head, right shoulder and side while moving merchandise from a stock room. This worker had a history of filing workers' compensation claims. She sought treatment for the alleged injury more than a month and a half after the incident. Co-workers testified that while she did fall, she did not hit anything on her way down.
HOLDING: The medical evidence demonstrates that she has problems with her head, neck and shoulders, but she has not proven a causal connection with the fall at work. Her long history of similar complaints led the Court to believe she was not credible. Her claims were rejected.

Estate of Greer v. Liberty Northwest – 2/3/16

FACTS: A worker died in a single car accident as he traveled from his home in Bozeman to a job site in Ekalaka. His employer did not pay for time traveling from Bozeman, but it paid a per diem at $60 for each full day which was an incentive to get employees from their homes to the sites. His estate argued his death arose out of and within the course and scope of his employment because the employer paid per diem for his travel expenses and his travel was necessary. The insurer claimed per diem was not "travel pay" and that travel was not a part of his work duties.
HOLDING: The Court held that the facts of the case were in line with the travel allowance exception to the going and coming rule in § 39-71-407(3)(a)(i). His death occurred within the course and scope of his employment.

Holtz v. INA – 4/6/16

FACTS: A flight attendant on a one-day layover was injured in a motorcycle accident and sought workers' compensation coverage. INA denied liability on a theory that her injury did not arise out of or within the course of her employment. She admits that she was on a paid break, but states the Legislature only exempted shorter, 15-minute breaks. She also claims she was performing work simply by remaining in the city as desired by her employer, and that since the airline she worked for chose the city of the layover, being in the city alone constituted the employer's worksite.
HOLDING: The Court rejected the plaintiff's arguments that her injury was within the course and scope of her employment as a flight attendant. In §39-71-407(2)(a), the three factors that show an employee is not working for the employer include: 1) employee is on a paid or unpaid break; 2) the employee is not at a worksite of the employer; and 3) the employee is not performing any specific tasks for the employer during the break.

McNamara v. MHAWCR – 5/25/16

FACTS: The plaintiff complained that a 2013 workplace injury aggravated her preexisting knee condition, which necessitated a need for a knee replacement. In the alternative, she claimed the need for a knee replacement was caused by an occupational disease (OD) from years of work. The insurer denied liability.

HOLDING: The Court held the Plaintiff's need for knee surgery is not a direct result of her 2013 injury. The physician testified that her injury made her knee condition only a little worse and that there was no treatment directly necessary for it. She also did not meet the "leading cause" OD test.

Kirk v. MCCF – 6/15/16
FACTS: The insurer moved for summary judgment that Kirk did not present sufficient evidence that he suffered a lumbar sprain/strain while working as a concrete finisher for Knife River Concrete. Kirk argued there were material fact issues and that the insurer is not applying the correct causation standard.
HOLDING: Drawing reasonable inferences in Kirk's favor, he has presented sufficient evidence to create a material fact issue as to whether he suffered a lumbar sprain/strain. Medical records infer a cause-and-effect relationship between his work and his injury.

Rutecki v. First Liberty Insurance Corporation – 6/16/16
FACTS: The plaintiff argued she was entitled to Permanent Partial Disability (PPD) and vocational rehabilitation benefits because she suffered a wage loss as a result of her industrial injury to her lower back. First Liberty argued she had not proven that she suffered an actual wage loss and, consequently, that she was not entitled to PPD or vocational rehabilitation benefits.
HOLDING: The plaintiff has not proven she suffered an actual wage loss as a result of her industrial injury. Her medical providers approved alternative jobs which pay as much or more than her time-of-injury position. She is therefore not entitled to PPD or vocational rehabilitation benefits.

Guymon v. Montana State Fund – 6/25/16
FACTS: Guymon claimed he was injured when his brother, co-owner of AGC, a Kalispell construction company, assaulted him as he was operating a jumping jack soil compactor. Montana State Fund contends that he did not suffer a compensable injury at work.
HOLDING: The evidence demonstrated that Guymon had adhesive capsulitis of the left shoulder, but he did not prove that it was caused by an "accident" within the meaning of §39-71-119(2). His accounts of his brother assaulting him were inconsistent. His brother credibly testified that he never made physical contact with Guymon and that the altercation was strictly verbal, and his multiple accounts have remained constant. Guymon also failed to prove causation.

New Hampshire Ins. v. Matejovsky – 6/29/16
FACTS: The plaintiff hurt her ankle and her doctor suggested that she may have some form of Complex Regional Pain Syndrome (CRPS). The insurer scheduled an independent medical exam (IME) with a psychiatrist. The plaintiff did not attend because New Hampshire refused to let her video it, and it suspended her TTD under §39-71-607. The Department of Labor and Industry (DLI) issued an order granting interim TTD because there was a "legitimate dispute" as to whether she could video the exam and because the insurer's notice that Stratford would not allow the exam to be videoed was untimely.
HOLDING: DLI's order allowing the plaintiff to video the IME is not in excess of its statutory authority. §39-71-605(2) authorizing DLI to order a claimant to attend an IME "it considers desirable" is broad enough for it to place conditions and protective measures on an IME should the claimant submit sufficient evidence to warrant such measures.

Brickman v. Montana State Fund – 7/25/16
FACTS: The plaintiff was injured on the job and Montana State Fund (MSF) accepted liability and began paying temporary total disability (TTD) at $698/wk. After several weeks, MSF informed him that it would terminate his TTD in 14 days and convert to

permanent partial disability (PPD) because he was deemed employable. He petitioned for interim TTD under §39-71-610, but the Department of Labor and Industry denied his application on the basis that MSF did not terminate his biweekly benefits, but converted TTD to PPD.
HOLDING: The plaintiff did not demonstrate that previous cases interpreting §39-71-610 are wrong. MSF is correct that §610 does not say that interim benefits are available when an insurer terminates a biweekly benefit. It states that DLI may order interim benefits only when the "insurer terminates biweekly compensation benefits."

MacGillivray v. Montana State Fund – 8/17/16
FACTS: Jill MacGillivray claimed a respiratory reaction to glue used to lay flooring and carpeting. She underwent an independent medical exam (IME) with Dr. Hewitt. He said that her exposure temporarily aggravated her pre-existing vocal cord dysfunction. A MSF claim examiner sent the report to her treating physician, who ultimately disagreed with portions of Dr. Hewitt's conclusions after initially agreeing with them. Montana State Fund (MSF) tried to get MacGillivray in with a psychologist but her lawyer responded that MSF was not entitled to a second IME and she would not attend. DLI ultimately issued an order directing MacGillivray to attend the exam with Davis "for a diagnostic update."
HOLDING: MSF is not entitled to a second IME, as it initially explained, "to confirm whether Ms. MacGillivray's ongoing complaints and treatment is causally related to her claimed exposure of 02/11/2015." Hewitt had already opined that her condition was more "psychogenically-mediated" than a "true allergic type of reaction," and MSF was denied liability based on Hewitt's opinion that the condition amounted to only "a temporary aggravation."

Barnhart v. Liberty Northwest Ins. – 9/4/15
FACTS: The plaintiff, who had a history of neck injuries, claimed a neck injury during his employment as a bus driver. Dr. Vanichkachorn conducted an independent medical exam (IME) and opined that the accident had exacerbated the plaintiff's multilevel cervical anterolisthesis, and that these symptoms were more probably than not related to the job injury. The plaintiff settled for $40,031 in 3/13, reserving medicals. Liberty ceased paying medicals in 11/13 based on another doctor's conclusion that, although the plaintiff had multi-level cervical with spondylosis, these conditions were all pre-existing and not aggravated by the 11/11 accident. Liberty advised the plaintiff that no further medical treatment would be approved based on Dr. Vallin's opinion.
HOLDING: The Court has no grounds to reject the general rule entitling the treating physician's opinion to greater weight. Liberty had obtained an IME from the plaintiff's treating physician before he became the plaintiff's treating physician, and it relied on his IME opinions in adjusting the claim. The Court is unpersuaded by Liberty's expert and finds for plaintiff.

Handy v. Montana State Fund – 10/10/16
FACTS: Micah Handy alleged that he suffered frostbite while working on an oil rig an hour's drive north of Plentywood. Once Montana State Fund (MSF) reviewed his medical records, it concluded that the evidence did not establish a job injury and denied the claim on the basis that the injury appeared to have occurred outside the course & scope of his employment. Handy later called MSF and asked for the paperwork to petition for mediation. MSF offered during that conversation to settle for $4,000 on a disputed initial compensability basis and explained how that type of settlement works. Handy did not read the petition in its entirety, but he signed the settlement petition and DLI approved it. Within two months he called MSF and asked if he was "getting any more money." He was told he would not receive additional benefits because he had settled. At this point, he petitioned the Court to rescind.
HOLDING: Handy is not entitled to rescind. He argues that he did not read the petition in its entirely and thus did not understand that he was fully and finally settling. However, "one who executes a written contract is presumed to know the contents of the contract and to assent to those specified terms."

Hegg v. Montana State Fund – 10/10/16

FACTS: Thomas Hegg was a part-time employee of Oak Creations at the time of his death from an occupational disease 1/3/15, but had worked full-time 13 of his 15 years. His widow submitted a beneficiary's claim with Montana State Fund (MSF). Pursuant to §39-71-123(3)(a), MSF initially calculated the death benefit rate using the average actual earnings for the four pay periods immediately preceding his death, which resulted in an average weekly wage (AWW) of $53.52. However, due to the sporadic nature of his work in 2014, MSF determined that those periods did not accurately reflect his wages, and calculated earnings over the entire year preceding his death pursuant to 123(3)(b), resulting in an AWW of $79.71. Julia argued she is entitled to the "minimum" which is $354 or to his actual wages, $79.71.
HOLDING: The intent of the statute is clear from its plain language. It states that the "minimum" rate applies when 66-2/3% of the wage is less than 50% of the state's AWW unless the decedent's actual wages were less than 50% of the AWW in which case the rate is the actual wages. It is evident that the Legislature did not intend for the rate to be greater than actual wages.

Stephens v. MACo – 11/2/16

FACTS: The plaintiff was an EMT with Big Horn County Ambulance (BHCA) and got injured while running an obstacle course at a health fair or block party organized by BHCA paramedics to celebrate EMS Week. Although BHCA did not pay her to attend, she contended that it required or requested her attendance and that her supervisor directed her to compete on the course. MACo argued that she was participating in a recreational or social activity not within the course of her employment.
HOLDING: BHCA did not require the plaintiff to attend the health fair. The communications made it clear that employees were only asked to volunteer. Although it asked her to assume duties for the activity so that her presence was not wholly voluntary, it did not "request" her presence as defined in §39-71-407(2)(b) because her injury did not occur in performance of the duties it asked her to assume (blowing up balloons or working at the food booth).

Jimenez v. Liberty Northwest Ins. – 12/22/16

FACTS: Jose Jimenez alleges that although Liberty accepted his claim of injury, they have had several disputes over the years. In 2015, he demanded that Liberty pay permanent total disability (PTD), medical, and domiciliary benefits in a lump sum pursuant to §39-71-741 (2003) because Liberty harmed him by treating him arbitrarily and unfairly. Liberty denied his demand for a lump sum. He sought a total of approximately $3.5 million.
HOLDING: Under the plain language of the statute, Liberty is correct that a claimant cannot obtain a lump sum of every type of comp on demand. The statute from 2003 specified only four such circumstances: where the insurer disputes initial compensability and the parties settle, where the claimant is entitled to permanent partial disability (PPD), where the claimant is entitled to PTD and can prove

financial need under terms of the statute, and when the parties dispute benefits and enter into a compromise settlement or otherwise agree to a lump sum.

Seymour v. UEF and Murnion – 1/17/17

FACTS: James Seymour fell from a roof on which he claims to have been working for Barry Murnion, owner of Crown Construction. The Uninsured Employer's Fund (UEF) denied that Seymour was an employee or in course of his employment, but if the Court determines otherwise, it seeks indemnification from Murnion. Murnion denied employing Seymour, but if the Court determines otherwise, he contends that Seymour fell because of alcohol or drugs.

HOLDING: Murnion employed Seymour at the time of his injury. Murnion argues that he did not personally hire Seymour or give his wife's brother Jeff Seymour or anyone else authority to do so. However, the evidence shows that Jeff was Murnion's agent and that Jeff hired James to work on the roofing job. In addition, Murnion failed to prove that Seymour was intoxicated or that alcohol or drugs played any role in the accident. He is therefore entitled to benefits pursuant to §39-71-407(1) for which UEF is liable under §39-71-503. Because Murnion was an uninsured employer, UEF is entitled to collect from him all benefits it pays as a result of Seymour's claim.

Murphy v. WestRock – 2/22/17

FACTS: Carl Murphy hurt his back in 1991 while working at the Smurfit-Stone Container mill. Stone accepted liability and its successor WestRock is now liable. Douglas Wooley, MD, placed Murphy at maximum medical improvement (MMI) in 1993. Murphy would have continued working at the mill, but it closed in 2010. In 2016, Murphy's lawyer wrote Helmer asking about his ongoing treatment. Helmer replied that the symptoms for which he was treating Murphy were "consistent these past 18 years" and "a direct result of his 1991 injury and its sequelae." He recommended lifting restrictions. Murphy then petitioned for permanent partial disability (PPD) and an order stating that "Petitioner's physical limitations established by his doctor satisfy the statutory criteria for vocational rehabilitation benefits." Later in 2016, a different doctor, Emily Heid, opined that Murphy did not have a medically determined restriction as of 1993, there were no jobs in which his ability to work in some capacity was impaired, and he had no physical restrictions as a result of his injury. Westrock requested summary judgment on the basis that Dr. Heid opined that Murphy has no medically determined restrictions and that his chiropractor, under the 1991 statute, cannot provide the "medically determined" restriction or "physician's" certification.

HOLDING: The 1991 law defined "physician" to include "'surgeon' and in either case means one authorized by law to practice his profession in this state." A chiropractor is not a "physician" under the 1991 definition. WestRock is correct that under the 1991 WCA a chiropractor is not a "physician" and may not make a medical determination of restrictions or ability to work. As Helmer is not a "physician" under the 1991 WCA, Heid's opinion that Murphy has no restrictions as a result of his injury is uncontroverted.

Floyd v. Zurich American Ins. – 4/12/17

FACTS: Danial Floyd smoked for 35 years and had osteoporosis, making him more prone to fractures. He began working for Hiland Partners of Oklahoma in 2014 as a gauger. While jerking to get a lug nut loose, he twisted wrong, and he felt pops in his back and severe pain throughout his body and collapsed. Zurich accepted liability. He was treated at Sidney Health Center ER and Ortho Montana Spine Clinic in Billings, before returning to Texas where orthopedic spine surgeon Shawn Henry took over. Zurich's adjuster Penny Hart terminated TTD/medical based on an IME report by Bernie McCaskill. According to Henry, Floyd has back pain because his muscles are overworked as a result of his compression fracture.

HOLDING: Zurich has not established that its expert has greater credentials than Henry or better evidence on which to base his opinions. It is unreasonable for the insurer to disregard uncontroverted medical evidence and take an inconsistent opinion. Floyd is entitled to costs and attorney fees, as well as a 20% penalty on benefits due during the period of Zurich's refusal to pay.

Ferrel v. Montana State Fund – 5/3/17

FACTS: Trooper "Scout" Ferrel was seriously injured while making an arrest following a high-speed pursuit in 2000. She began receiving disability retirement from the Highway Patrol Officers' Retirement System (HPORS) in 2003. Montana State Fund (MSF) paid temporary total disability (TTD) and then permanent total disability (PTD) in 2007 without any offset. HPORS converted her benefits to regular retirement when she turned 50 in 2003. MSF determined that she would be "retired" when she started receiving HPORS retirement, which it considered an alternative to Social Security retirement. When she turned 60, HPORS converted her benefits from disability to regular retirement and terminated her PTD. The parties request summary judgment as to whether she was she receiving benefits "from a system that is an alternative to social security retirement" within the meaning of §39-71-710(1).

HOLDING: MSF did not cite any history that contradicts its General Counsel 1995 testimony before the Senate Labor Committee that SB 375 provided for termination of PTD if a worker was on retirement benefits taken in lieu of Social Security. Under the definition of "alternative" and the facts of this case, HPORS is not an alternative system to SS retirement. For Ferrel, it is complementary to SS retirement. Therefore, MSF incorrectly determined that she was "retired," and is liable for PTD from the time of termination in 2013.

Moreau v. Transportation Ins. – 5/12/17

FACTS: A former W.R. Grace mine worker, Edwin Moreau, died of asbestos-related lung cancer in 2009. His widow filed an occupational disease claim with Transportation, which denied it. She then filed a petition seeking a determination of liability for Edwin's medical care. Transportation accepted liability in 2013, and reimbursed Medicaid, other providers, and Moreau individually for medicals they had paid. Libby Medical Plan, established by W.R. Grace, paid $95,846 in medicals. The Plan and Grace refused any reimbursement from Transportation. Moreau then demanded that the $95,846 be paid to the estate or a charity selected by it pursuant to the doctrine of cy pres.

HOLDING: §39-71-704 requires the insurer to furnish reasonable medical services. Although Moreau argues that this Court should order Transportation to pay the amount of Edwin's medicals to her since neither Grace nor the LMP has sought reimbursement, it is required only to furnish reasonable medical services, and paying Moreau the value of medical services already paid by another entity is not furnishing medical services.

Devers v. Montana State Fund – 9/11/17

FACTS: Kenneth Devers was hired as Park Manager at Sunset Village Mobile Home Park (SVMHP). SVMHP member Emery Yuhas asked Devers to live in one of the units rent-free so he could be readily available for emergencies. He agreed to follow rules which prohibited alcohol before 5 p.m. He moved into a unit which was close to the office. There were holes in the floors throughout including

inside the front door, which he covered with scrap wood, moving them around as he moved through the unit. He was found 7/24/15 lying on the ground outside his trailer, bleeding from the head. He claims that he tripped in the hole inside his door and fell off his porch while leaving to go to the office to work.
HOLDING: The Court found that Devers's drinking was the major contributing cause of his accident and his employers attempted to stop it. Therefore, he is not eligible for comp under §§ 407(5) & (7).

Smith v. Montana State Fund – 9/19/17
FACTS: Debbra Smith fell and Montana State Fund (MSF) accepted liability for her left shoulder. Larry Stayner found her at Maximum Medical Improvement (MMI) with no restrictions and released her to her job. She resigned a short time later, stating that she could no longer perform her job. Later she emailed which said that medical benefits remained open. It denied liability for disability benefits because her employer had committed to providing accommodations and her job had been approved by her doctor. It notified her that she could petition Department of Labor & Industry for a mediation conference. MSF advised in April 2013 that it was placing her claim on "inactive status" because it was not paying medical or wage-loss benefits. In May 2016 her attorney demanded that she be placed on total disability retroactive to 2011.
HOLDING: Smith's claim is time-barred because she failed to file her petition within two years of denial of benefits pursuant to §39-71-2905(2).

Larson v. Liberty Northwest Ins. – 9/25/17
FACTS: Galen Larson fractured his ankle. His time-of-injury job was typically in excess of 40 hours/wk and paid $12/hr. Justin Jacobson took him off work. Liberty paid TTD. Jacobson performed surgery but it was unsuccessful. He recommended a fusion but required Larson to be tobacco-free for a month. Larson was unsuccessful in tobacco cessation. In August of 2017, Jacobson released him to modified duty, expressing hope that he could achieve tobacco cessation so a surgeon could fuse his ankle. Larson's employer offered a temporary janitorial job, 40 hrs/wk at $8.25/hr, within his restrictions. Larson declined, his lawyer stating that the duties were in excess of restrictions and "furthermore, this position comes with a drastic cut in pay."
HOLDING: Since Larson declined the temporary assignment without attempting it, he is not entitled to reinstatement of benefits. He did not tender a strong prima facie case for reinstatement, so the Department of Labor and Industry's order denying interim benefits is affirmed.

Sikkema v. Liberty Northwest Ins. – 9/26/17
FACTS: Diane Sikkema filed a claim in 2008 for an injury to her left knee and foot. Liberty accepted it and paid benefits. She settled indemnity for $28,000 in 2014. Martin Gelbke in 3/17 recommended total knee arthroplasty but declined to offer a causation opinion and Liberty denied authorization. Alexander LeGrand, who had previously treated her, opined in 5/17 that an arthroplasty was related to her job injury. She petitioned 6/2/17 to hold Liberty liable for the arthroplasty and for her attorney fees and costs and a 20% penalty. Liberty authorized the arthroplasty 6/19.
HOLDING: Liberty is correct that this Court cannot award Sikkema fees on her medical benefits. The Court can award fees only if it adjudges a claim for compensation. It can award fees only when it adjudicates a controversy over compensation. Pursuant to this plain language, held that a claimant cannot recover fees if the insurer accepts liability before this Court adjudicates the dispute.

Suzor v. International Paper – 9/27/17

FACTS: Charlotte Suzor injured her knees in 1982 and International Paper (IP) accepted liability. As a result of her 1982 injuries, she has instability in her knees resulting in falls. She broke her hip in 2009 as a result of a fall, and IP accepted liability for a hip replacement. She fell and broke her right wrist in 2016. IP denied liability for the wrist injury. In January 2016, Suzor's doctor received a message stating that Suzor had called and indicated that her medical record was incorrect -- that she had actually fallen inside her home and not on ice. Bond spoke to Westenfelder, who did not recall anything about the cause of Suzor's fall and to Woods who told her to make a chart note of what Suzor had said. She denied ever telling anyone at MBJ that she slipped and fell on ice.
HOLDING: There are too many inconsistencies to find it likely that Suzor fell inside her home because her knee gave way. The statement that she fell "on ice" cannot be harmonized with Suzor's testimony that she fell in the hall of her home. Suzor's testimony was insufficient to convince the Court that she fell as a result of her knee giving way. IP is not liable for medical benefits for her wrist fracture.

Crabtree v. UEF – 11/3/17

FACTS: The Uninsured Employers' Fund (UEF) notified Bart Crabtree of Lodestar Builders that it had information that he was not covering his employees and that he could be assessed a penalty. He did not comply with a subpoena duces tecum. He was assessed a penalty of $28,259.82 based on an estimated $81,688.01 payroll and that if he disagreed, he would need to comply with the audit.
HOLDING: The discovery sanctions were justified by his dilatory and deficient responses. Nor did the Court find error in the penalty calculation. The penalty judgment is affirmed.

MONTANA WORKER'S COMPENSATION COURT REVIEW - Cases from 2016-2017

	Judge Sandler
Warburton v. Liberty Northwest Inc.	✓
Estate of Greer v. Liberty Northwest	X
Holtz v. INA	✓
McNamara v. MHAWCR	✓
Kirk v. MCCF	X
Rutecki v. First Liberty Insurance Corporation	✓
Guymon v. Montana State Fund	✓
New Hampshire Ins. v. Matejovsky	X
Brickman v. Montana State Fund	✓
MacGilivray v. Montana State Fund	X
Barnhart v. Liberty Northwest Ins.	X
Handy v. Montana State Fund	✓
Hegg v. Montana State Fund	✓
Stephens v. MACo	✓
Jimenez v. Liberty Northwest Ins.	✓
Seymour v. UEF and Murnion	✓
Murphy v. WestRock	✓
Floyd v. Zurich American Ins.	X
Ferrel v. Montana State Fund	X
Moreau v. Transportation Ins.	✓
Devers v. Montana State Fund	✓
Smith v. Montana State Fund	✓
Larson v. Libery Northwest Ins.	✓
Sikkema v. Liberty Northwest Insurance	✓
Suzor v. International Paper	✓
Crabtree v. UEF	✓
2016-2017 Judicial Score	**73% (19/26)**
Career Judicial Score	**68%**

Montana Chamber's Legal Efforts

The Montana Chamber is committed to improving Montana's legal climate, which had ranked in the bottom half 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. The Montana Chamber appreciates the leadership of Ed Bartlett (attorney) and David Bell, ALPS during the time of this Review.

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 2018 conference in Helena will provide Continuing Legal Education (CLE) credits from the Montana State Bar and will feature presentations on Montana's legal climate, improving the legal climate, emerging issues in immigration, legal reforms in the 2017 Legislature, the groundbreaking BNSF v. Tyrrell case, and the legal status of seatbelt admissibility.

Montana Legislature

Over the past two decades, many of the legal reforms passed in general liability, workers' compensation, medical malpractice, and other areas were a direct result of the Montana Chamber's lobbying efforts. In 2017, the Montana Chamber supported legislation to revise judgment interest (SB 293), seatbelt admissibility in court (SB 259), revise punitive damages caps (HB 165), legal protections in the hiring process (SB 325), add district court judges (HB 44), provide funding for civil legal aid (HB 46), and to define liability in agritourism (HB 342).

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 by in-house general counsel, senior litigators or attorneys, and other senior executives at companies with at least $100 million in annual revenues who are knowledgeable about litigation matters. The survey aims to quantify how corporate attorneys view the state systems. For a time, Montana consistently ranked low in the study, including placing 39th in 2006, 40th in 2007, 38th in 2008, 42nd in 2010, and 45th in 2012. But our state has improved in recent years, placing 34th in 2015 and 27th in 2017.

Americans for Tort Reform

The Montana Chamber is a state affiliate of the American Tort Reform Association (ATRA) and works closely with its Washington, DC, staff and its 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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