2024 JUDICIAL REVIEW

2022 - 2023 MONTANA SUPREME COURT JUDICIAL DECISIONS

MONTANA CHAMBER OF COMMERCE

MONTANA SUPREME COURT JUDICIAL REVIEW

For the last third of a century, the Montana Chamber of Commerce has conducted a review of decisions from the Montana Supreme Court to assist its members and the public in understanding the work of the state's judicial branch. The Montana Chamber is one of the only state business organizations in the entire country that monitors and reviews the work of all three branches of state government. We hope this important work allows the business community to better understand and have their voice heard in our representative democracy.

Following past practices, the Judicial Review covers a two-year period of Montana Supreme Court decisions (2022-2023) that had an impact on the business community. In conducting regular reviews spanning four decades, it is easier to track trends in judicial rulings that can affect Montana's economy.

Just like with previous Judicial Reviews, each individual justice is evaluated for his or her stance in cases where they participated in a decision. We understand judges are bound by the rule of law where federal and state constitutions or prior precedent may control the outcome in a particular case rather than pro-business or anti-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 preparation of this Judicial Review, a strict set of criteria was used to produce the most objective report possible. Input from affected businesses, trade associations, and attorneys allowed the Montana Chamber to verify the research conducted in specific legal categories.

Cases selected must have had an impact, either positive or negative, on business in the state or affect general liability standards. Business v. business litigation was generally not included in the Judicial Review.

Scoring

Cases in the Judicial Review are divided into categories: Banking, Contract, Employment, Insurance, Jurisdiction, Land Use/ Natural Resource, Medical Malpractice, Taxation, Tort, Workers' Compensation, and Other. Each case was assigned one of the categories for purposes of this Review even though some cases could be included in multiple categories.

Individual justices were evaluated in comparison to the pro-business position the Montana Chamber identified. When justices concurred in part or dissented in part, the Montana Chamber reviewed the written nature of their opinion and made an evaluation of how the justice interpreted the overall case.

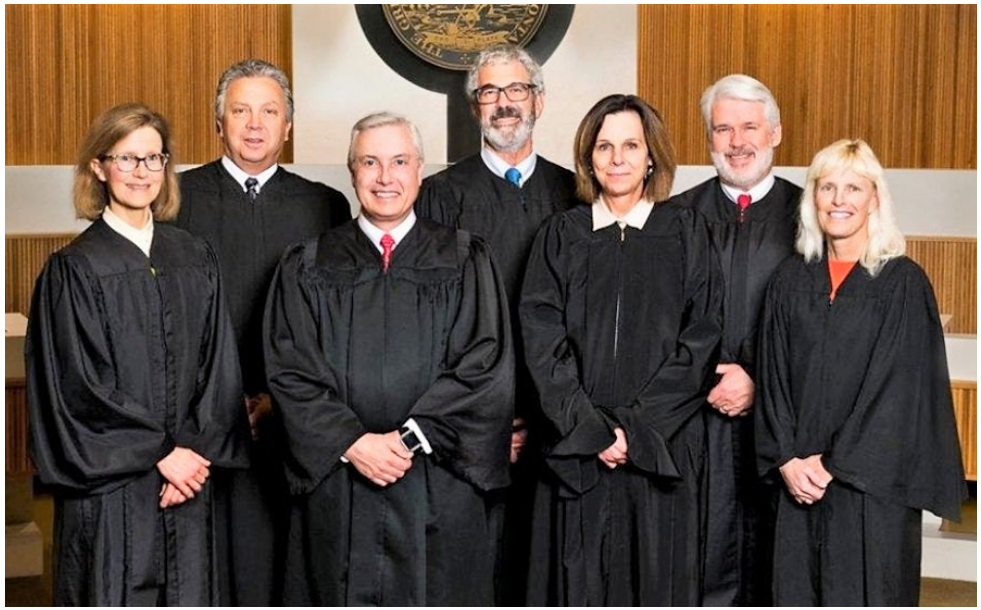
Cases were all weighted the same for purposes of scoring the Review. Justices received a 0 to 100 percent Business Score for the 2022-2023 period, and their lifetime score on the Court was also highlighted. Justices were not scored when they did not participate in a case. The total cases in which a justice participated is reflected in the data. The Business Score is calculated by dividing the total number of cases where a justice agreed with the pro-business position of the Montana Chamber by the total number of cases in which the justice participated.

The Montana Supreme Court

The Montana Supreme Court is the state's highest court, and its only appellate court. Since 1972, terms of the justices were set at eight years with staggered elections each cycle. When Montana's new state constitution was passed, there were five justice position on the Court – a chief justice position and four associate justice positions. The 1979 Legislature added two associate justice positions to the Court to help with workload issues, thereby establishing the Court's current number of seven justices overall.

In races for the Montana Supreme Court, any qualified candidate may run for a position regardless of whether an incumbent justice is running for reelection or it is an open seat. In circumstances when three or more candidates file for a justice position, voters narrow the field down to two candidates in the primary election. When a justice runs for reelection without a challenger, the justice must still received a majority vote by Montanans in a general election to be retained.

Since the first set of cases were evaluated in a Judicial Review in 1990, the Court has changed considerably. This makes these regular Reviews all the more important.



The 1990's and early 2000's saw a Montana Supreme Court that overturned long-standing precedents, adopted minority legal positions that were very anti-business, and generally created more uncertainty for the business community. Court opinions at the time would often come with a justice or two who dissented from the Court's direction. Over the last 10-12 years, we have seen more unanimity in the Court on decisions, more opinions where just five justices participate, and a more regular use of "non-citable" opinions.

This report includes a review of the work of seven Montana Supreme Court Justices. During the two-year period of the Judicial Review, there was no turnover in the Court's composition. Justice biographies are available on the Court's website. Regardless of how the Judicial Review scores an individual justice, we appreciate each person's public service to the state of Montana.

Chief Justice Mike McGrath: Elected in a contested 2008 race and retained in 2016. He is retiring the end of 2024, and a race to elect his successor will be on the 2024 ballot.

Associate Justice Beth Baker: Elected in a contested 2010 race and retained by voters in 2018.

Associate Justice Ingrid Gustafson: Appointed in 2017 to fill the remainder of a term, retained by voters in 2018, and re-elected to a full eight-year term in a contested 2022 race.

Associate Justice Laurie McKinnon: Elected in contested 2012 race and re-elected in a contested 2020 race.

Associate Justice Jim Rice: Appointed in 2001 to fill the remainder of a term, retained by voters in 2002 and 2006, and re-elected in 2014 and 2022 in contested races.

Associate Justice Dirk Sandefur: Elected in a contested 2016 race. He is retiring the end of 2024, and a race to elect a new associate justice will be on the 2024 ballot.

Associate Justice Jim Shea: Appointed in 2014 to fill the remainder of a term and retained by voters in 2016 and 2020.

EMPLOYMENT

McCaul v. *Southwest Montana Community FCU,* DA 21-61, 1/11/22

Daniel McCaul alleged he was wrongfully discharged by Southwest Montana Community federal credit union. The credit union specifically stated it had never discharged McCaul and asked him to return to work as soon as possible. The district court granted summary judgment for the credit union because the undisputed facts showed McCaul had an opportunity to keep his job. The Montana Supreme Court upheld the district court by noting the Wrongful Discharge from Employment Act requires a discharged employee to mitigate his damages by accepting a job offer "absent special circumstances." The record from the district court contains no evidence of "special circumstances" that would prevent McCaul from retaining his job. (Shea, McKinnon, Sandefur, Baker, Rice)

Grigg v. *Cabinet Peaks Medical Center,* DA 21-228, 1/25/22

Peter Grigg was a paramedic who was terminated from his employment at Cabinet Peaks Medical Center. He sued for wrongful discharge more than a year after the grievance process concluded. The district court held his claim was time-barred pursuant to the one-year requirement in the Wrongful Discharge from Employment Act, and the Montana Supreme Court upheld the decision. (McKinnon, McGrath, Shea, Baker, Gustafson)

Carmalt v. *Flathead Co.,* DA 21-341, 4/12/22

Nuggett Carmalt, a fair food booth operator, filed a discrimination claim against her supervisor at Flathead County, and the matter was settled. She resigned as a condition of the settlement, but she filed a complaint against the County alleging it retaliated against her for filing the first complaint. When Carmalt's claim was denied by the Human Rights Commission, she appealed to district court, which ruled the alleged discriminatory acts did not rise to a level that would dissuade a reasonable person from engaging in a protected activity. The Montana Supreme Court upheld this decision, holding that Carmalt could not establish a prima facie case of discrimination. (Shea, McGrath, Baker, Gustafson, Sandefur)

Ku v. *HRB,* DA 21-588, 5/24/22

Jada Ku filed an HRB complaint against Great Falls Public Schools in 2002 alleging that it had discriminated against her due to her race, which was dismissed. The decision was affirmed by the HRC and District Court. Nearly 20 years later, she filed a claim in district court alleging HRB had discriminated against her by dismissing her claim. The Court held that even if a complaint alleges discrimination by the HRB itself, the plaintiff must still follow HRA procedures and file first with the HRB before appealing any dismissal to district court. (McGrath, Shea, McKinnon, Baker, Gustafson)

Peavler v. *Rocky Mountain Supply,* DA 22-216, 1/24/23

Plaintiff sued alleging violation of the Wrongful Discharge from Employment Act, alleging that RMS allowed others to work without a mask when they produced medical notes and that his note was the only one that it refused to consider. He also claimed its stated reason for the termination was pretextual and really tied to the employer's termination of his wife's employment as well. RMS moved to dismiss, arguing that Peavler failed to state a claim for wrongful discharge because his allegations concerned marital discrimination. The district court agreed with RMS and dismissed. The Montana Supreme Court reversed and essentially allowed the plaintiff a do-over in his claim ("there can be facts supporting a claim for discrimination and other facts supporting a claim for wrongful discharge arising from the same case.") (Shea, McGrath, McKinnon, Sandefur). The Dissent objected to the reversal saying the plaintiff's complaint failed to state a WDEA claim independent of his claim of discrimination. (Baker)

indicates a business-positive decision indicates a business-negative decision

EMPLOYMENT (cont.)

Semenza v. *Larson,* DA 22-65, 2/21/23

Craig Semenza sued Hollister Larson dba First & Main Building in 2009 alleging wrongful discharge and unpaid wages. The case went up to the Montana Supreme Court, which dismissed his appeal without prejudice because the summary judgment did not adjudicate all his claims. The plaintiff filed a motion eight years later entitled "Plaintiff's Motion for Time to File a Pleading" in which he asked for an extension to file his brief. The district court dismissed the filings as untimely. The Montana Supreme Court agreed saying the district court judge did not abuse her discretion in dismissing for failure to prosecute after weighing the relevant factors. (Shea, McGrath, Gustafson, Baker, Rice.)

Shepherd v. *Department of Corrections (DOC),* DA 22-562, 5/30/23

A DOC employee was let go when it was discovered she secretly recorded audio of an internal meeting and provided false information to an investigator who was looking into the incident. Shepherd filed a discrimination claim with the HRB alleging that the DOC Director had engaged in sexual harassment of DOC employees and her discharge was retaliatory. HRB dismissed her retaliation claim finding "no reasonable cause" and lack of evidence. Shepherd filed her Complaint for Wrongful Termination, Petition for Judicial Review and Demand for Jury Trial and DOC moved for summary judgment on the basis that it was untimely. After close of discovery, DOC moved for summary judgment, which was granted by the district court. The Montana Supreme Court found that DOC met its initial burden of showing good cause for Shepherd's discharge. (McKinnon, McGrath, Sandefur, Gustafson, Rice)

Smith v. *Charter Communications,* DA OP-23, 5/23/23

Smith was terminated from Charter Communications for failure to meet the travel requirement for his management area. When he sued for wrongful discharge in federal court, he urged the court to take a narrow reading of the reasons he was fired as stated in his termination letter to prevent Charter from providing a full defense of their action. Charter pointed out the Montana Legislature had amended state law to allow an employer to provide all reasons for a termination regardless of what was contained in the letter. The federal district judge granted summary judgement for Charter, and Smith appealed. The 9th Circuit certified the legal question of whether the Montana Legislature had in fact made changes that would allow Charter to state all reasons for the termination, and not be bound by the stated reasons in the termination letter. The Montana Supreme Court said no, the rule in these cases are predicated on the Montana Rules of Evidence rather than any statutory guidance. A judge can still prohibit an employer from raising reasons for the termination outside those in a termination letter if the judge considers the evidence irrelevant. (Shea, McGrath, Rice, Baker, McKinnon, Sandefur, Gustafson)

Dupuis v. *UID,* DA 23-135, 10/24/23

The Unemployment Insurance Division determined that Isaac Dupuis was overpaid $12,418 of benefits during the COVID pandemic because he was "not available for work due to child care circumstances." After losing at the hearings examiner level and the Unemployment Insurance Appeals Board, Dupuis petitioned for judicial review but failed to serve the petition within 30 days as required by §39-51-2410(2). The Montana Supreme Court found Dupuis was well past any subsequent deadline to refile when he filed his complaint more than 6 months after dismissal. (McGrath, Gustafson, Baker, Sandefur, Rice)

Edwards v. *Turley Dental Care,* DA 23-12, 11/14/23

Alma Edwards was a dental employee of Turley Dental who was discharged from employment when she tested positive for marijuana following a random drug test. Turley Dental had a valid drug and alcohol policy in place. Edwards filed a lawsuit claiming discrimination based on age, disability, and a wrongful discharge claim. The district court held Turley Dental was within its rights to terminate Edwards' employment, and the Montana Supreme Court upheld the district court. (Rice, McGrath, Shea, Sandefur)

EMPLOYMENT (cont.)

Fuson v. *CHS,* DA 23-94, 11/28/23

A driver for CHS filed a sex and disability discrimination claim after she was placed on work comp, had surgery, and was hospitalized at Warm Springs. During this time, she was unable to renew her CDL due to a lack of medical certification. Her formal complaint to the Human Right Bureau came more than 180 days after her last day of work and any alleged discriminatory incidents. The district court granted summary judgment to CHS because the position required a CDL under federal law and therefore CHS could not have discriminated against the plaintiff due to a disability. On the sex discrimination claims, the plaintiff acknowledged that all alleged incidents occurred outside of the 180-day window required by state law to file with the HRB. The Montana Supreme Court upheld the district court's ruling that her complaint was time-barred and did not amount to a claim of discrimination. (McGrath, Shea, Rice, Baker, Sandefur)

INSURANCE

RS and DS v. *USAA,* DA 21-273, 4/5/22

Shawn Conrad was convicted of several crimes including hiding video cameras and spying on underage nude victims. Two victims sued Conrad and secured a $500,000 consent judgment, which he was unable to pay. Conrad lacked assets to satisfy the whole judgment. He asked USAA, with which he had a homeowners policy, to defend the civil case. USAA declined because Conrad's crimes did not meet the policy's definitions of an "accident" that led to "bodily injury." The Court found no ambiguity as to whether the policy excluded coverage of Conrad's conduct. Since the plain meaning of the exclusion was clear, Conrad's claims were beyond the scope of coverage in the policy and USAA did not have a duty to defend him. (McGrath, Shea, Baker, Sandefur, Rice.)

Daniels v. *Gallatin Co. and Atlantic Specialty Ins.,* DA 21-321, 7/12/22

Sarah Daniels was injured when her car was struck by a county snow plow that had run a stop sign. The vehicle was insured by Atlantic Specialty Insurance Company and had $1.5 million auto coverage and $5 million excess coverage. State statute limited recovery from a county government at an amount of $750,000, and Atlantic had policy language which limited its own liability to whatever the insured was required to pay. The Court majority held Atlantic could not rely on the county limit because state statute also stated a party waives the cap if it "specifically agree[s] by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section." The Court found Atlantic had done so in this case by stating the $1.5 million and $5 million coverage figures. (McGrath, Shea, Baker, Sandefur, McKinnon). The Dissent argued that when read as a whole, the statute requires a written endorsement indicating a specific intent to waive the cap, which is not present in the current case. (Rice)

Loendorf and Stevens v. *Employers Mutual Casualty,* DA 21-449, 7/19/22

Two couples who purchased homes from the same builder sued after seeing increasing damage to their homes caused by settling. The builder had commercial general liability policies through Employers Mutual Casualty, but those policies contained broad exclusions for "earth movement." EMC argued that the exclusion unambiguously barred coverage because the settling of the soil was alleged to have caused the damages. Homeowners argued that it was ambiguous because it did not differentiate between natural and human-made earth movement causes. The Court majority held here was no ambiguity and the plain language excluded such claims as a responsibility of the insurer. (Rice, Baker, McKinnon, Sandefur). The Dissent found the exclusion ambiguous and said it cannot absolve EMC for damages caused by the homebuilder's negligence. (Shea, McGrath, Gustafson).

indicates a business-positive decision indicates a business-negative decision

INSURANCE (cont.)

Humes v. *Farmers Ins. Exchange and Mid-Century Ins.,* DA 21-422, 7/26/22

After Connie Humes was injured in an auto accident, she sought coverage under her own insurer and that of the at-fault party. The insurers had different names, but were owned by the same company, making this a "dual-insured" loss. Her claims were ultimately settled for $320,000, but she sued alleging violations of the Unfair Trade Practices Agreement (UTPA). Before trial, the district court excluded certain evidence from going to the jury about the underlying settlement agreement. A jury found the insurer had not violated the UTPA, and Humes appealed. The Court found that while Humes was given broad leeway to present evidence in support of her allegations of improper claims handling, the jury received all of this evidence and found the insurer had acted reasonably. The jury's decision was upheld. (Rice, Shea, Baker, Gustafson, Sandefur)

21st Century North American Ins. and Farmers Ins Exchange v. *Frost,* DA 22-73, 9/6/22

Kevin Frost assaulted, restrained, and kidnapped Sherri as they were going through a divorce. He pled guilty to aggravated kidnap and partner or family member assault (PFMA). Sherri sued him alleging intentional torts and negligence and seeking punitive damages. Frost requested that his auto and umbrella insurers defend him. They sought a declaratory judgment that they had neither a duty to defend nor a duty to indemnify him. They moved for summary judgment, arguing the incident was not an "accident" or an "occurrence." The Court held that because the incident does not qualify as an "accident" under the auto policy, it also does not qualify as an "occurrence" under the umbrella policy. Further, the FIE policy clearly precludes coverage for damages payable to a named insured. Frost's FIE policy named both Frost and Sherri. (Baker, Shea, McKinnon, Gustafson, Rice)

Reisbeck v. *Farmers Ins. Exchange,* DA 21-594, 11/1/22

Kirk Reisbeck was rear-ended in Helena in 2009. After a trial, Reisbeck settled with the person who caused the auto accident and sued his own insurer for under-insured motorist (UIM) and violation of the UTPA. After another jury trial, the jury found 8-4 that Reisbeck was not injured in the auto accident, and he did not prevail on his UIM or UTPA claim. Reisbeck appealed on a number of issues, including the district judge's refusal to admit the claims file and refusal to disqualify a juror. The Court concluded that any error in exclusion of the claims file or refusal to excuse the juror was not prejudicial to Reisbeck's case. (Baker, McKinnon, Shea, Gustafson, Sandefur)

Vogel v. *Salsbery,* DA 22-554, 7/18/23

In a lawsuit involving a motor vehicle accident, the district judge directed the parties not to bring up insurance issues or ability to pay at trial. Plaintiff's counsel made mention of "other payors" in his closing statement, and Defendants moved for a mistrial. The Plaintiff ended up appealing the judge's ruling that the Defendant was entitled to a new trial based on the violations of the judge's directives. The Montana Supreme Court reversed, finding the mention in the closing statement at worst was an ambiguous reference to the general topic of insurance. (Baker, McGrath, Shea, Gustafson, Sandefur). The Dissent disagreed, stating Plaintiff's counsel used words that were well placed to reach the prohibited topic of who would be responsible to pay. (Rice, McKinnon)

Farmers Ins. Exchange and Truck Ins. Exchange v. *Salsbery,* DA 22-482, 7/18/23

A defendant sought defense and indemnity from Farmers Ins. Exchange and Truck Ins. Exchange under homeowner's and CGL policies for a lawsuit regarding the 2012 development of a golf course. The Insurers sought a declaratory judgment that they were not obligated to defend and indemnify the defendant and successfully moved for summary judgment at the district court. attaching copies of the policies. The Montana Supreme Court held the Farmers CGL policy did not exist until 2014 and the judicial proceedings on which the malicious prosecution claim is based was commenced prior to the policy period. It found the district court correctly held that the insurers had no duty to defend against this claim. (Gustafson, Shea, Baker, McKinnon, Sandefur)

LANDLORD-TENANT

Snyders v. *Professional Property Management,* DA 22-70, 10/4/22

David Snyders entered into a Residential Lease-Rental Agreement with Clark Fork Realty in 2017. In 2018, Professional Property Management (PPM) took over management of the building. After Snyders moved out in 2021, PPM conducted an inspection and reported numerous issues and withheld all but $84.99 of his security deposit. Snyders claimed in justice court that his security deposit should not have been withheld because the residence was already in disrepair by the time he moved in. PPM presented testimony and a report documenting the condition of the residence after Snyders moved out as "filthy." Justice Court and District Court found for PPM, and Snyders appealed. The Court held the record supports the conclusion that PPM met its burden to show that the damage occurred during his tenancy and was caused by him or his guests. (McGrath, McKinnon, Baker, Sandefur, Rice)

Westview Mobile Home Park v. *Lockharts; Greener Montana Property Management* v. *Cunningham;* DA 22-358, 10/31/23

Two separate mobile home tenants had their month-to-month lease terminated – in one case for parking violations and failure to maintain the lot while the other was with a simple 30-day notice of intent not to renew. They would not vacate, so the landlords sued for possession. A majority of Justices on the Montana Supreme Court found for the tenants by concluding the "Montana Residential Mobile Home Lot Rental Act" bans no-cause terminations of mobile home lot rental agreements. (Gustafson, McGrath, Baker, McKinnon, Shea) The Dissent disagreed and pointed out that hundreds and perhaps thousands of Montana landlords and tenants will wake up tomorrow with the loss of the contractual right to have a true month-to-month lease that can be terminated for any reason with 30-day notice. (Rice, Sandefur)

LAND USE/NATURAL RESOURCES

Belk v. *DEQ and Glacier Stone Supply,* DA 21-117, 2/2/22

Glacier Stone Supply operates a stone quarry and applied for a DEQ permit to expand their operation. A husband and wife neighbor opposed the expansion, raising the concerns of deteriorating view and loss of peace and quiet. The district court found for the defendants, and the Belks appealed. The Montana Supreme Court found DEQ's environmental assessment adequate because the Belks were conflating regulatory impacts on private property rights with environmental impacts. The Belks perceive the significance of the quarry differently and take issue with DEQ's outcome, but its assessment process was procedurally sound and comported with MEPA's "hard-look" directive. (McGrath, Shea, McKinnon, Sandefur, Rice)

In re Hurd, DA 2-661, 6/21/22

The landowners prior to Robert & Carol Hurd filed a "Declaration of Vested Groundwater Rights" for stockwater and individual use. In 2006 Hurds filed a Form 627 — "Notice of Water Right" — with DNRC, but that did not relieve them of the responsibility of establishing the existence of a water right. The 2017 Legislature established a 6/30/19 deadline for exempt rights holders to file a statement of claim and provided that "the department may not accept any statements of claim submitted or postmarked after June 30, 2019." In 2021 the Hurds filed a motion in the Water Court to amend a statement of claim. The Water Court denied the motion, concluding that it had no jurisdiction to modify a statement of claim for Hurds because they had not properly filed a claim to amend. The Supreme Court agreed because the Hurds have invoked the Water Court's jurisdiction to amend something the Hurds do not have. (McGrath, McKinnon, Baker, Gustafson, Sandefur)

indicates a business-positive decision indicates a business-negative decision

LAND USE/NATURAL RESOURCES

Montana Rivers, Gallatin Wildlife Association, and Cottonwood Environmental Law Center v. *DEQ* DA 21-613, 7/5/22

Environmental groups sued DEQ alleging that it violated MEPA by failing to enact a rule to classify a section of the Gallatin River as new "outstanding resource waters." The Board of Environmental Review had declined to proceed with rulemaking. Judge Ohman granted summary judgment to DEQ, holding that Plaintiffs had no viable MEPA case since there was no longer any proposed state action. The Court agreed stating there is no Montana law creating a cause of action to challenge an agency's discretionary decision not to issue a contemplated rule. (The Full Court)

MEIC and Sierra Club v. *Westmoreland Rosebud Mining et al and DEQ,* DA 22-64, 8/9/22

Westmoreland Rosebud Mining operates a coal mine that supplies coal for the Colstrip electric generating units. A district judge reversed the approval of an amendment to Westmoreland's permit, stated that the mine could not continue to mine under the permit, and refused to stay her decision pending an appeal. Westmoreland appealed the stay decision to the Montana Supreme Court. The Court stated that the likelihood of an impact on energy supplies and costs for consumers against the unquantified impact on the environment, there was sufficient cause to grant Westmoreland and DEQ's request to pause the district court's order. (The Full Court)

Tai Tam LLC v. *Missoula Co. Commissioners,* DA 21-664, 11/15/22

Westmoreland Rosebud Mining operates a coal mine that supplies coal for the Colstrip electric generating units. A district judge reversed the approval of an amendment to Westmoreland's permit, stated that the mine could not continue to mine under the permit, and refused to stay her decision pending an appeal. Westmoreland appealed the stay decision to the Montana Supreme Court. The Court stated that the likelihood of an impact on energy supplies and costs for consumers against the unquantified impact on the environment, there was sufficient cause to grant Westmoreland and DEQ's request to pause the district court's order. (The Full Court)

Cahill, Gayner, Reed, and Erickson v. *Columbia Falls, Columbia Falls Board of Adjustment, and CNS Property Development,* DA 22-395, 5/2/23

A property development company sought a variance in the Columbia Falls zoning to reconstruct apartment units that were destroyed by fire. The variance was granted by the Board of Adjustment, but a group of local property owners sued saying the variance was not properly granted. The district court held for the property development company saying the variance is in the public interest inasmuch as it would help provide housing for young families and members of the community's workforce. The local property owners appealed. The Montana Supreme Court agreed with the district judge's findings on the public interest, unnecessary hardship for the property development company, and that the spirit of the city ordinance was still observed. (McGrath, McKinnon, Shea, Sandefur, Rice)

Water for Flathead's Future v. *DEQ and Montana Artesian Water,* DA 22-112, 5/16/23

An organization called "Water for Flathead's Future" sued to overturn a DEQ wastewater discharge permit for Montana Artesian Water as part of the application process for a water use permit requested by Montana Artesian Water. The district court granted the plaintiff's motion for summary judgment, holding that DEQ's responses to comments from EPA and FS were inadequate as to impacts to bull trout and it failed to consider the cumulative impact of Artesian's discharge level upon completion of its full-scale facility. The Montana Supreme Court reversed, holding that while DEQ's responses could have been more complete, these potential deficiencies do not overcome the deference owed to DEQ. The agency did not act arbitrarily, capriciously, or unlawfully, and the district court improperly substituted its judgment for DEQ's. (Rice, McGrath, McKinnon, Shea, Sandefur)

indicates a business-positive decision

indicates a business-negative decision

LAND USE/NATURAL RESOURCES

350 Montana et al v. *Montana, NorthWestern Energy, and PSC,* DA 22-319, 5/16/23

A climate advocacy group and three ratepayers challenged a statute requiring NWE to apply to the PSC for pre-approval of electricity supply resources such as a power plant or battery storage facility. Pre-approval allows NWE to acquire an electricity supply resource with assurance that it will be able to include that resource's purchase and initial operating costs when calculating electricity bills. The district court struck down the statute saying it was special legislation that only applied to one company. The Montana Supreme Court reversed saying plaintiffs lacked standing to assert the claims of non-party utilities and their alleged consumer injury claims were not ripe. (Baker, McGrath, Gustafson, Sandefur, Rice)

MEIC and Sierra Club v. *Westmoreland Rosebud Mining et al,* DA 22-64, 11/22/23

Environmental groups sued Westmoreland and DEQ after an approval of permit to expand coal mining at the Rosebud mine. After the Board of Environmental Review (BER) upheld DEQ's determination, a district judge reversed the decision, vacated the permit, and granted attorney's fees and costs to the environmental groups close to $1 million. The Montana Supreme Court agreed with the district court and remanded portions back to the BER. It upheld the district court's decision to award fees, but remanded for an adjustment and declined to award fees for the appeal. (McGrath, Rice, Sandefur, Baker, Shea, Gustafson, McKinnon)

MEDICAL MALPRACTICE

Laedeke v. *Billings Clinic,* DA 21-390, 8/30/22

Lila Laedeke had a partial toe amputation at Billings Clinic, was discharged a week after her surgery, and died 2 days later. Her son faxed a request for Medical-Legal Panel review three years later. The Panel issued its decision a year later. Her son and daughter filed their complaint the next month, and the complaint was served three years later. Billings Clinic moved to dismiss the complaint as time-barred. The Court held the son's filing was too late and his subsequent court filing following the MLP decision in 2018 was barred by the statute. (Gustafson, McGrath, Shea, Baker, Sandefur)

Greene v. *McDowell,* DA 22-250, 3/21/23

Plaintiff sued a medical provider following a back surgery where she claimed to have difficulty swallowing and hoarseness that was long-lasting. The medical provider had discussed potential side effects before the plaintiff had given informed consent for the surgery. At trial, plaintiff's expert explicitly stated a discussion about difficulty swallowing and hoarseness does not need to mention whether it could be long-lasting. The Defendant moved for a directed verdict following the Plaintiff's case, which was granted by the district judge. The Montana Supreme Court agreed, stating there was unrefuted testimony offered that the standard of care does not require a physician to advise of the potential of long-term dysphonia or dysphagia as a result of ACDF surgery. (Shea, McKinnon, Baker, Gustafson, Sandefur).

indicates a business-positive decision indicates a business-negative decision

OTHER

Monforton v. *McMahon,* OP 22-21, 1/18/22

A Helena judge issued a temporary restraining order blocking signature gathering that would have limited residential property tax collections and shifted them to businesses and agriculture. Matthew Monforton sought supervisory control in the Montana Supreme Court, asking the justices to direct the Helena judge to vacate the TRO. The Court said supervisory control is inappropriate because the briefing schedule alone would delay the process longer than the district court's timeline to determine whether a preliminary injunction is warranted. The petition for supervisory control was denied. (McGrath, McKinnon, Shea, Baker, Rice.)

Cottonwood Environmental Law Center v. *AG,* OP 22-76, 3/15/22

An environmental group had their ballot initiative to restrict development along parts of the Madison and Gallatin Rivers declared "legally deficient" by the Attorney General, and it petitioned for review by the Montana Supreme Court. The AG found the initiative was an unconstitutional regulatory taking of private property. The Court disagreed and said the remedy for a taking is "just compensation," not nullification of the statute or ballot initiative. It declared I-24 petition legally sufficient and allowed it to proceed to the signature gathering phase. (The Full Court).

Meyer v. *SOS Jacobsen and Gallatin Co. Election Administrator,* DA 21-378, 5/17/22

John Meyer intended to run as an Independent in the 2020 election for Attorney General. He submitted five petitions to the county election office containing only electronic signatures, and claimed he couldn't get in person signatures because of the Governor's COVID stay-at-home order. He sued the county when it rejected the signature as invalid under state law. The Court held state law is plain that no acceptance of electronic signatures is allowed. (Baker, McGrath, Shea, Sandefur, Rice) The dissent would not have ruled on whether the electronic signatures are valid because it believed the controversy was moot. (McKinnon and Gustafson)

Monforton v. *AG Knudsen and SOS Jacobsen,* OP 22-331, 9/26/23

In an original proceeding, the Montana Supreme Court rejected a proposed constitutional amendment to establish a draconian acquisition-based system of taxation for real property. The Court found it would have violated the state constitution's separate vote section. (McGrath, Rice, Baker, Shea, McKinnon, Gustafson, Sandefur)

Butler v. *Swanson,* DA 22-630, 8/8/23

In a lawsuit involving a motor vehicle accident between two parties, the district court dismissed the case for the Plaintiff's abuses and lack of compliance with discovery requests. On appeal, the Plaintiff argued the dismissal was too harsh a sanction. The Montana Supreme Court disagreed and upheld the dismissal saying, "when litigants use willful delay, respond evasively, or disregard court directions as part and parcel of their trial strategy, they must suffer the consequences." (Shea, McGrath, Baker, Sandefur, Rice)

indicates a business-positive decision

indicates a business-negative decision

TORT

Kostelecky v. *Peas in a Pod, Allen, and Williams,* DA 21-217, 10/11/22

A young infant was diagnosed with bilateral subdural hemotomas "of unknown etiology," and was successfully treated. The treating physician said the most likely cause of the hematomas as some type of force or trauma, but other causes were possible. The parents sued the daycare where the baby had been staying. After two years of discovery and depositions that produced no evidence the daycare had caused the hemotomas, the district court granted summary judgment for the daycare. The Montana Supreme Court upheld the decision, stating the missing link remained the lack of a non-speculative evidentiary basis on which the finder of fact could reasonably conclude that the baby was harmed by the daycare's negligence. (Sandefur, McGrath, McKinnon, Gustafson, Rice)

WORKERS' COMPENSATION

Barnhart v. *Montana State Fund,* DA 22-0114, 12/27/22

Barnart was injured at Youth Dynamics when she was also concurrently employed at Dairy Queen. She was able to return to Youth Dynamics after maximum medical healing, but her permanent impairment left her unable to return to Dairy Queen. The Workers' Compensation Court held that Montana State Fund incorrectly calculated Barnhart's indemnity benefit rate because it failed to include her Youth Dynamics wages. The Montana Supreme Court held the lower court's interpretation leads to Barnhart's indemnity benefits award exceeding her actual wage loss and reversed the lower decision. (Shea, McGrath, McKinnon, Gustafson, Rice, Sandefur)

Allum v. *Montana State Fund,* DA 22-625, 6/20/23

Allum alleged a workplace injury that involved a benefit dispute and constitutional claims. His benefits claims were resolved, but the Workers' Compensation Court rejected his constitutional claim since it is a court of limited jurisdiction that lacks jurisdiction to address constitutional questions outside the context of a dispute over benefits. The Montana Supreme Court agreed saying the WCC has authority to rule on constitutional challenges to the WCA or WCC "only in the context of a dispute concerning benefits under the Workers' Compensation Act and only as to the applicability of any statutory provision, rule, or order of the agency to that dispute." (Gustafson, Baker, Shea, Sandefur, Rice)

Montana Supreme Court Case Review

CASE SUMMARY	Court	Baker	Gustafson	McGrath	McKinnon	Rice	Sandefur	Shea
2022-2023 Cases (Pro-Justice/Total Participation)	33/40	27/33	21/28	25/33	22/29	28/31	29/35	26/34
2022-2023 Judicial Score	83%	82%	75%	76%	76%	90%	83%	74%
Career Cases (Pro-Justice/Total Participation)		179/258	63/101	169/282	173/206	324/413	92/133	118/178
Career Judicial Score		69%	62%	60%	84%	78%	69%	66%

indicates a business-positive decision indicates a business-negative decision

Montana Supreme Court Case Review

	Court	Baker	Gustafson	McGrath	McKinnon	Rice	Sandefur	Shea
EMPLOYMENT								
McCaul v. *Southwest Montana Community FCU*	☑	☑			☑	☑	☑	☑
Grigg v. *Cabinet Peaks Medical Center*	☑	☑	☑	☑	☑			☑
Carmalt v. *Flathead Co.*	☑	☑	☑	☑			☑	☑
Ku v. *HRB*	☑	☑	☑	☑	☑			☑
Peavler v. *Rocky Mountain Supply*	☒	☑		☒	☒		☒	☒
Semenza v. *Larson*	☑	☑	☑	☑		☑		☑
Shepherd v. *Department of Corrections*	☑		☑	☑	☑	☑	☑	
Smith v. *Charter Communications*	☒	☒	☒	☒	☒	☒	☒	☒
Dupuis v. *UID*	☑	☑	☑	☑		☑	☑	
Edwards v. *Turley Dental Care*	☑			☑		☑	☑	☑
Fuson v. *CHS*	☑	☑		☑		☑	☑	☑
INSURANCE								
RS and DS v. USAA	☑	☑		☑		☑	☑	☑
Daniels v. *Gallatin Co. and Atlantic Specialty Ins.*	☒	☒		☒	☒	☑	☒	☒
Loendorf and Stevens v. *Employers Mutual Casualty*	☑	☑	☒	☒	☑	☑	☑	☒
Humes v. *Farmers Ins. Exchange and Mid-Century Ins.*	☑	☑	☑			☑	☑	☑
21st Century North American Ins. and Farmers Ins Exchange v. *Frost*	☑	☑	☑		☑	☑		☑
Reisbeck v. *Farmers Ins. Exchange*	☑	☑	☑		☑		☑	☑
Vogel v. *Salsbery*	☒	☒	☒	☒	☑	☑	☒	☒
Farmers Ins. Exchange and Truck Ins. Exchange v. *Salsbery*	☑	☑	☑		☑		☑	☑
LANDLORD-TENANT								
Snyders v. *Professional Property Management*	☑	☑		☑	☑	☑	☑	
Westview Mobile Home Park v. *Lockharts; Greener Montana Property Management* v. *Cunningham*	☒	☒	☒	☒	☒	☑	☑	☒

☑ indicates a business-positive decision ☒ indicates a business-negative decision

	Court	Baker	Gustafson	McGrath	McKinnon	Rice	Sandefur	Shea
LAND USE/NATURAL RESOURCES								
Belk v. *DEQ and Glacier Stone Supply*	☑			☑	☑	☑	☑	☑
In re Hurd	☑	☑	☑	☑	☑		☑	
Montana Rivers, Gallatin Wildlife Association, and Cottonwood Environmental Law Center v. *DEQ*	☑	☑	☑	☑	☑	☑	☑	☑
MEIC and Sierra Club v. *Westmoreland Rosebud Mining et al and DEQ*	☑	☑	☑	☑	☑	☑	☑	☑
Tai Tam LLC v. *Missoula Co. Commissioners*	☑	☑	☑	☑	☑	☑	☑	☑
Cahill, Gayner, Reed, and Erickson v. *Columbia Falls, Columbia Falls Board of Adjustment, and CNS Property Development*	☑			☑	☑	☑	☑	☑
Water for Flathead's Future v. DEQ and Montana Artesian Water	☑			☑	☑	☑	☑	☑
350 Montana et al v. *Montana, NWE, and PSC*	☑	☑	☑	☑		☑	☑	
MEIC and Sierra Club v. *Westmoreland Rosebud Mining et al*	☒	☒	☒	☒	☒	☒	☒	☒
MEDICAL MALPRACTICE								
Laedeke v. *Billings Clinic*	☑	☑	☑	☑			☑	☑
Greene v. *McDowell*	☑	☑	☑		☑		☑	☑
OTHER								
Monforton v. *McMahon*	☑	☑		☑	☑	☑		☑
Cottonwood Environmental Law Center v. *AG*	☒	☒	☒	☒	☒	☒	☒	☒
Meyer v. *SOS Jacobsen and Gallatin Co. Election Administrator*	☑	☑	☒	☑	☒	☑	☑	☑
Monforton v. *AG Knudsen and SOS Jacobsen*	☑	☑	☑	☑	☑	☑	☑	☑
Butler v. *Swanson*	☑	☑		☑		☑	☑	☑
TORT								
Kostelecky v. *Peas in a Pod, Allen, and Williams*	☑		☑	☑	☑	☑	☑	
WORKERS' COMPENSATION								
Barnhart v. *Montana State Fund*	☑		☑	☑	☑	☑	☑	☑
Allum v. *Montana State Fund*	☑	☑	☑			☑	☑	☑

☑ indicates a business-positive decision ☒ indicates a business-negative decision

THE MONTANA WORKERS' COMPENSATION COURT JUDICIAL REVIEW

The Montana's Workers' Compensation Court (WCC) was created in 1975 solely to address cases involving workplace injuries in the workers' compensation system. This was a significant development for the business community as the cost and efficacy of the system can have big economic consequences for the state.

In 2007, the Montana Chamber of Commerce added a review of judicial decisions coming out of this court to its biennial Judicial Review. This was at a time when businesses saw the cost of workers' compensation premiums skyrocket, eventually leading to Montana having the most expensive workers' compensation premiums in the country. This resulted in the Montana Chamber leading the charge during the 2011 Montana Legislature to pass comprehensive reforms that lowered costs and helped get injured workers back into the workplace. Since that time, premiums have dramatically dropped and fewer businesses describe work comp premiums as a hindrance to growth.

Scoring the Montana Work Comp Judicial Review

This is the ninth two-year cycle the Montana Chamber has review the Workers' Compensation Court. Since the Court consists of a single judge who serves in six-year terms and is appointed by the Governor and confirmed by the Montana State Senate, it is the review of just a single person's decision-making. During the last 15+ years of reviews, only two judges have served in the roll of Montana Workers' Compensation Court judge.

For this review, it was entirely Judge David Sandler, who was originally appointed for the remainder of a term held by a judge who was elevated to the Montana Supreme Court. He was appointed by Governor Steve Bullock in 2014 and confirmed by the Montana State Senate in the 2015 Session. When the remainder of the term expired, he was re-appointed in 2017 and confirmed once again for a full six-year term, which expired in 2023.

In 2023, Governor Greg Gianforte nominated Thomas "Lee" Bruner to fill the vacancy for the court's lone judge position. He took office in September of 2023. Judge Bruner issued no decisions prior to the close of 2023, which is why this review is entirely a look at the now-retired Judge Sandler's collection of decisions.

The decisions were evaluated in comparison to the pro-business position. Nine cases were chosen for this Review during the period from 2022-2023.

This report uses the following acronyms:

MSF: Montana State Fund
PPD: Permanent Partial Disability
PTD: Permanent Total Disability
TTD: Temporary Total Disability

WORKER'S COMPENSATION COURT CASES

☑ *Fite* v. *Montana State Fund,* 2021-5416, 1/12/22

Roberta Fite worked as a school bus driver in the school year and groundskeeper during the summer. She was injured during the summer and claimed that her contract work in the school year as a paraprofessional and aide should be included in her workers' compensation award. MSF denied because her contract stated she was not actually employed as an aide during the summer. The WCC denied Fite's argument pursuant to §123(4)(a) and the contract language.

☒ *Barnhart* v. *Montana State Fund,* 2019-4816, 1/11/22

Tamara Barnhart, who worked fulltime at Youth Dynamics and part-time at Dairy Queen, injured her back in the course of her employment at Youth Dynamics. She was able to return to Youth Dynamics, but not to Dairy Queen, and MSF calculated her PPD benefits based only on what she earned at Dairy Queen. The WCC found MSF improperly calculated for concurrent employment and that Barnhardt was entitled to additional PPD.

☑ *Ray* v. *Ohio Security Ins.,* 2020-5195, 1/31/22

Michael Ray was in a motor vehicle accident while driving his employer's truck and was treated for neck and chest pain. He left his job a few months later, subsequently experienced a slip and fall, and had a brief job hauling wood chips. When he saw multiple physicians, Ray pointed to the vehicle accident as the start of pain in his shoulder and back, for which he sought benefits. The WCC was not convinced and found Ray and his wife's testimony unpersuasive. Ohio Security was found not liable for Ray's injuries.

☒ *Thomas* v. *Montana State Fund,* 2020-5321, 2/16/22

Catherine Thomas was a bus driver who slipped and fell in the workplace parking lot. She argued MSF should look beyond the last 4 pay periods to determine her award because her co-workers were retaliating against her by reducing her hours after she asked for a transfer. MSF argued that since Thomas' arguments did not amount to a situation of constructive discharge, it could use only what the law required. The WCC found good cause to use additional earnings from before the last 4 pay periods because Thomas' co-worker's affair and retribution from the transfer request created intolerable conditions that drove her to transfer positions and start a part-time schedule.

☑ *Ruff* v. *Benefis Health System,* 2020-5051, 4/27/22

Lisa Ruff developed pain in her shoulder while working as a CNA at Benefis Health System. She was eventually diagnosed with "chronic right shoulder pain with impingement syndrome and subacromial bursitis." She was later terminated by Benefis, which continued to pay $244.27 a week for PTD . She asked her PTD award to be converted into a lump sum, and Benefis denied. The WCC was not convinced Ruff met the burden under §741 to convert her remaining PTD into a lump sum.

☒ *Victory Ins.* v. *Andell,* 2022-6029, 6/27/22

David Andell injured his spine on the job and Victory accepted liability along with TTD payments. As he was undergoing treatment and recovery, Victory scheduled a medical appointment, which Andell refused to attend. When Victory notified him of its intent to terminate TTD benefits due to failure to attend the appointment, Andell petitioned the Department of Labor. Victory appealed the Department's determination maintaining TTD benefits. The WCC upheld the decision saying the Department correctly determined that Andell tendered sufficient evidence that establishes that his refusal to attend the appointment was reasonable.

☑ indicates a business-positive decision ☒ indicates a business-negative decision

☒ ***Sentry Ins.* v. *Godat,* 2022-6084, 8/16/22**

Burt Godat broke his leg at work, Sentry Insurance accepted liability, and paid TTD for times he had a total wage loss. Godat recovered and then switched employers where his job required him to go up stairs. Godat said this work caused back pain and blamed his leg for the back pain. He sought to reinstate TTD benefits and got an opinion from a doctor tying his back pain to the previous leg injury. Sentry opposed interim TTD benefits and claimed his back pain was a new injury based on the new job. The WCC held Godat only had to tender substantial evidence which, if believed, would entitle him to TTD benefits.

☑ ***Christoffersen* v. *Montana State Fund,* 2023-6352, 8/29/23**

Christoffersen claimed that she suffered a left-wrist condition from overuse at her bus-driving job, resulting in adverse impacts to her right elbow and heart. The Workers' Compensation Court found for Montana State Fund when the plaintiff couldn't meet the burden to establish she had an occupational disease.

☒ ***Russell* v. *Victory Ins.,* 2023-6351, 8/22/23**

Victory Ins. asserts that Phyllis Russell did not attend an appointment with its designated treating physician and then terminated Russell's benefits for unreasonably refusing to cooperate with her treating physician. The Court held Victory did not have grounds to terminate Russell's benefits because it had not accepted liability at the time it attempted to designate the doctor as her treating physician nor at the time of the appointment that she refused to attend.

Work Comp Case Review

Fite v. *MSF*	☑
Barnhart v. *MSF*	☒
Ray v. *Ohio Security Ins.*	☑
Thomas v. *MSF*	☒
Ruff v. *Benefis Health System*	☑
Victory Ins. v. *Andell*	☒
Sentry Ins. v. *Godat*	☒
Christoffersen v. *MSF*	☑
Russell v. *Victory Ins.*	☒
2022-2023 Cases (Pro-Justice/Total Cases)	**4/9**
2022-2023 Judicial Score	**44.4%**
Career Cases (Pro-Justice/Total Cases)	**62/96**
Career Judicial Score	**64.6%**

☑ indicates a business-positive decision ☒ indicates a business-negative decision

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