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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

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| CHRISTOPHER SANDRU,<br><br>Petitioner,<br><br>vs.<br><br>ROCHDALE INSURANCE COMPANY,<br><br>Respondent/Insurer. | ) | WCC No. 2003-0908<br><br>**RESPONDENT'S RESPONSE TO PETITIONER'S REPLY BRIEF TO HIS MOTION TO AMEND PETITION AND TO DETERMINE CLASS OF CLAIMANTS** |

COMES NOW the Respondent, and in response to *Petitioner's Reply Brief to His Motion for Leave to Amend Petition and to Determine the Class of Claimants* (*Reply*), states as follows:

ARGUMENT

**I. AS THE ABSENCE OF PREJUDICE TO THE PARTY OPPOSING CLASS ACTION PROCEEDINGS IS NOT AN ELEMENT OF CLASS ACTIONS UNDER Rule 23, Mont. R. Civ. P., RESPONDENT'S FAILURE TO ADDRESS PREJUDICE IS NOT SUFFICIENT REASON TO GRANT PETITIONER'S REQUEST TO PROCEED AS A CLASS ACTION.**

Petitioner argues that he should be permitted to amend the pleadings to re-caption this action as a class action because Respondent failed to document or show that it would be prejudiced by such an amendment. Respondent did not address the issue of prejudice because prejudice is not one of the necessary elements for a class action under Rule 23, Mont. R. Civ. P., relied upon by this court in deciding whether to proceed as a class or quasi-class action. Thus, whether Respondent would be prejudiced by such an amendment is irrelevant. Accordingly, respondent's failure to address prejudice is not sufficient grounds for this Court to permit the amendment proposed by Petitioner.

## II. Rule 15(a), Mont. R. Civ. P. DOES NOT REQUIRE PETITIONER'S MOTION TO AMEND TO BE GRANTED BECAUSE THE RULE IS INAPPLICABLE AND, EVEN IF APPLICABLE, JUSTICE DOES NOT REQUIRE THE PROPSOED AMENDMENT.

Petitioner next argues that he should be granted leave to amend the pleadings to re-caption this action as a class action because Rule 15(a), Mont. R. Civ. P. permits courts to freely grant such leave when justice so requires. Petitioner has neglected to recall the rule of statutory construction.

> "In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it."

§ 1-2-102, MCA. Thus, a rule which more specifically addresses the facts of a case is required over a more general rule. Rule 15(a), Mont. R. Civ. P. applies generally to parties seeking to amend a pleading. However, Rule 23, Mont. R. Civ. P. applies specifically to parties seeking to maintain an action as a class. Therefore, Rule 23, with its requisite elements, is the appropriate rule for parties wishing to amend a pleading to proceed as a class action. Notably, Rule 23 does not permit leave to be freely granted to proceed as a class. Indeed, Rule 23 states that,

> "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all *only* if [the listed elements are satisfied]."

Rule 23(a), Mont. R. Civ. P. (emphasis added). Thus, Rule 15(a)'s requirement that leave to amend pleadings shall be freely given is not applicable in this case because parties wishing to proceed as a class may do so *only* if the elements listed in Rule 23 are satisfied.

Petitioner also argues that his proposed amendment is required by justice and thus appropriate under Rule 15(a). However, even assuming that Rule 15(a) was applicable in this case, Petitioner has not made the slightest showing that justice requires the amendment he proposes. In arguing that injustice will be done if this Court does not permit his proposed amendment, Petitioner makes a broad allegation against the Montana bar and restaurant industry. Specifically, Petitioner claims that the Montana bar and restaurant industry fails to record and report the tip income of its workers and thus causes their workers compensation benefits to be reduced in the event of injury. *Petitioner's Reply Brief to His Motion for Leave to Amend Petition and to Determine the Class of Claimants*, January 26, 2004, p.2. In support of this broad allegation Petitioner offers his own employment history asserting that "for the last ten (10) years...[Petitioner's] pay stubs showed less tips than he actually made or than which were actually known to the employer." *Id.*

As has been revealed by discovery Petitioner has not been employed in positions offering tip income for anything close to ten years. Since April of 1999, Petitioner has worked for four different employers for a total of twenty two months in positions offering tip income. *Petitioner's Responses to Respondent's First Discovery Requests*, November 24, 2003, *Response to Interrogatory No. 3*. Thus, even assuming that Petitioner's pay stubs from those employers showed less tip income than he actually made, Petitioner's personal employment history is a woefully inadequate sample to create an inference that the Montana bar and restaurant industry commonly reports less tips on pay stubs than its workers actually make. Indeed, even as to his own individual employment history, Petitioner's employment records do not indicate that his

previous employers consistently under-reported his tip income. Petitioner worked for the Bridge Bistro in Missoula, Montana from April to July, 2000. *Id.* His pay record from that employer includes a column entitled *Reported Tips*, in which his tip income is recorded. *Payroll Printout, Sandru, Christopher*, April 30 – August 31, 2000. The amount of tip income recorded in that column is quite significant in comparison to Petitioner's hourly wages thus indicating that the amount recorded is far more than a nominal amount or a routinely imputed percentage of wages. *Id.* Furthermore, Petitioner's W-2 from The Bridge for that year clearly indicates that his tip income has been added to his hourly wage to arrive at the figure in box 17 entitled *State wages, tips, etc. 2000 W-2, Christopher F. Sandru.* In fact, the figure in box 17 is slightly higher than Petitioner's combined wages and tip income. *Id.* Thus, The Bridge appears to have slightly over-reported Petitioner's income. Clearly, Petitioner's own employment history reveals that under-reporting of tip income by the Montana bar and restaurant industry is not the common practice he claims.

Furthermore, notably absent from Petitioner's argument is any documentation of his tip income earned during his twenty two months of employment in positions offering such income. Thus, petitioner offers nothing more than his own testimony to prove that his employers refused to report his tip income and, by extension, his allegation that the Montana bar and restaurant industry commonly refuses to report the same.

Petitioner also asserts that the industry wide practice of employers failing to record tip income is an injustice that cries out to be dealt with in terms of justice and law. However, Petitioner offers no evidence, and does not even assert, that faced with such an injustice, he ever advised any of his employers that his pay stubs did not accurately reflect his actual tips earned. Indeed, with respect to his time of injury employer, Hellgate Elks Lodge (The Lodge), Petitioner has affirmatively stated that he never advised The Lodge that his pay stubs did not accurately reflect his tips earned. *Deposition Christopher Sandru*, January 16, 2003, 25:25; 26:1-3; 27:10-22. Thus, Petitioner never objected to the very practice that he now claims victimizes him and every other bar and restaurant worker in Montana.

Obviously, if Montana bars and restaurants are failing to properly record the tip income of their workers, such workers benefit in that they are taxed on lesser income than actually earned. Thus, even assuming the practice is common in the Montana bar and restaurant industry it would benefit bar and restaurant workers. Accordingly, this practice is hardly the grave injustice decried by Petitioner but ignored by him until it impacted his workers compensation benefits. Indeed, if there is injustice, it would appear to be perpetrated against the non-tip income wage earner who has no opportunity to hide income and thus, effectively, subsidizes the tax burden of the tip earner. In addition, if any individual worker wishes to pay taxes on his tip income and thereby maximize any future workers compensation benefits, the solution is simple. Simply comply with the law and document tip income to the employer for tax purposes as required by § 39-71-123(3), MCA.

Rule 15(a) does not apply to this case because it is inconsistent with the more specific Rule 23 regarding class actions. Thus, Petitioner's request to amend the pleadings under Rule 15(a) is without merit. In addition, even if Rule 15(a) were applicable, Petitioner has failed to show that justice requires this Court to permit his amendment to re-caption this action as a class action. Accordingly, this Court should deny Petitioner's motion to amend the pleadings.

## III. THE PROHIBITION OF COMMON FUND ATTORNEYS FEES, FOUND IN § 39-71-611(3), MCA (2003), IS NOT UNCONSTITUTIONAL BECAUSE THE LEGISLATURE MAY PROHIBIT OR CONDITION AWARDS OF ATTORNEYS FEES

Petitioner next argues that § 39-71-611(3), MCA (2003) violates Article II, Section 16 of the Montana Constitution because it denies access to the courts to persons unable to afford such access without attorneys fees paid for from a common fund.

Article II, Section 16 of the Montana Constitution states as follows:

> "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state. Right and justice shall be administered without sale, denial, or delay."

Article II, Section 16, Montana Constitution

§ 39-71-611(3), MCA (2003), alleged by Petitioner to violate the above, states that,

> "[a]ttorney fees may...not be awarded under the common fund doctrine or any other action or doctrine in law or equity."

Thus, for workers' compensation claimants, the Montana Legislature has prohibited awards of attorney fees under the common fund doctrine.

In arguing that § 39-71-611(3), MCA (2003) is unconstitutional, Petitioner relies upon *Murer v. State Compensation Ins. Fund* (1997), 283 Mont. 210, 942 P.2d 69, which held that attorneys fees could be awarded from a common fund because the participating claimants had created such a fund by creating a vested right in non-participating claimants to back payments for benefits previously and improperly withheld. Petitioner quotes at great length that portion of the *Murer* decision in which the Montana Supreme Court expresses its approval of the common fund doctrine. Petitioner also states that the rationale behind the common fund doctrine, as expressed in *Murer*, is as sound today as in 1997 when *Murer* was decided. Quite simply, the rationale for the common fund doctrine, as expressed in *Murer*, is not as sound today as it was 1997 because in 1997 there was no statute prohibiting awards of attorney's fees under the doctrine.

§ 39-71-611(3), MCA (2003), became effective on April 1, 2003. Prior to that date, there was no statute barring awards of attorneys fees to workers' compensation claimants under the common fund doctrine. Thus, regardless how enthusiastically the Montana Supreme Court relied upon the common fund doctrine in *Murer*, it could not have addressed the statutory authority of the Legislature to prohibit awards of attorneys fees under the common fund doctrine. Accordingly, the explanation of, and rationale for, the common fund doctrine, as stated in *Murer* is irrelevant to the issue of whether the legislature violated Article II, Section 16 of the Montana Constitution by its enactment of § 39-71-611(3), MCA (2003).

Petitioner also quotes from the *Appellant's Brief* filed by attorney James Goertz in *Murer*. The crux of Mr. Goertz's argument, adopted by Petitioner in this action, is that without access to common fund attorneys fees claimants are denied access to the courts when their damages are not large enough to justify the expense of litigating their individual cases. Thus, Petitioner concludes that,

> "[w]ithout benefit of attorney fees paid from a common fund that may be generated in this case, then it is impossible to proceed with a class action, because Mr. Sandru cannot personally bear the entire costs in such litigation, and access to the courts for Mr. Sandru and other similarly situated class members, is effectively and unconstitutionally denied."

*Petitioner's Reply Brief to His Motion for Leave to Amend Petition and to Determine the Class of Claimants*, January 26, 2004, p.6.

Petitioner's argument fails because attorneys fees are a statutory right and not a constitutional right. *Gaustad v. City of Columbus* (1995), 272 Mont. 486, 488, 901 P.2d 565, 567 (finding that "Montana's Constitution does not provide a right to attorney fees" and holding that "generally there can be no recovery for attorney fees unless authorized by statute or contract"). Thus, attorney's fees may be provided for, denied or conditioned as the Legislature chooses. Indeed, specifically with respect to Article II, Section 16, the Montana Supreme Court has held that

> "...Article II, Section 16, of the Montana Constitution does not create a fundamental right to recover attorney fees."

*Schuff v. A.T. Klemens & Sons*, 303 Mont. 274, ¶ 101, 2000 MT 357, ¶ 101, 16 P.3d 1002, ¶ 101. Therefore, in enacting § 39-71-611(3), MCA (2003), the Legislature did nothing more than exercise its prerogative, as recognized by the Montana Supreme Court, to deny awards of attorneys fees under the common fund doctrine. Accordingly, § 39-71-611(3), MCA (2003), is not unconstitutional.

## IV. PETITIONER'S ARGUMENT THAT THE ELEMENTS OF A CLASS ACTION ARE SATISFIED IN THIS CASE IS WITHOUT MERIT BECAUSE HE PROVIDES NOTHING MORE THAN HIS OWN ASSERTIONS THAT EACH ELEMENT IS SATISFIED.

Petitioner inventories the elements necessary to maintain a class-action under Rule 23 and then addresses each individual element and concludes they are all satisfied. However, Petitioner's conclusions are based on nothing more than his own opinions.

As to the element of numerosity Petitioner only asserts that it "is satisfied, because those injured employees not receiving proper wage benefits are likely substantial in number." *Petitioner's Reply Brief to His Motion for Leave to Amend Petition and to Determine the Class of Claimants*, January 26, 2004, p.6. Indeed, Petitioner concedes that he has no idea of the number of class members his class might contain when he states "the actual number of the class can be determined only as the case progresses." *Petitioner's Reply Brief to His Motion for Leave to Amend Petition and to Determine the Class of Claimants*, January 26, 2004, p.7. Thus, Petitioner has failed to establish the existence of the element of numerosity.

Similarly, Petitioner insists the element of commonality is satisfied "because insurers generally don't include tip income for purposes of computing injured workers' wage benefits" because bar and restaurant employers do not record or report such income. *Petitioner's Reply Brief to His Motion for Leave to Amend Petition and to Determine the Class of Claimants*, January 26, 2004, p.7. As evidence of this tip exclusion Petitioner states that his time of injury employer did not report his actual tips on his W-2. *Id.* However, Petitioner fails to provide any evidence of the $300.00 per week he claims was his actual tip income. Thus, once again, Petitioner offers nothing more than his own testimony in support of his argument that the element of commonality is satisfied "because insurers generally don't include tip income." Indeed, as shown above, documents provided during discovery indicate that Petitioner's previous employer, The Bridge, documented substantial amounts of tip income on both his pay records and his W-2. Therefore, Petitioner's argument that insurers generally don't include tip income because employers don't report such income is disproved by his own employment history.

Regarding the element of typicality, Petitioner assures the Court that it is satisfied because "the insurer's practice of excluding most of the employee's tip income, is likely a common practice and the insurer's are likely to defend on similarly... ." *Petitioner's Reply Brief to His Motion for Leave to Amend Petition and to Determine the Class of Claimants*, January 26, 2004, p.7. Clearly, Petitioner's estimate of the likelihood of practices and defenses falls far short of establishing that the claims or defenses presented in the instant case would be typical of the claims and defenses asserted in other actions brought by class members.

As to the element of adequacy of representation Petitioner argues that he and his attorney are competent to represent the class he proposes. Respondent does not dispute such argument but states that because the other elements of a class action are not met there is no class for Petitioner and his attorney to represent.

With regard to the element of commonality of class members, petitioner has raised no new law or facts not addressed in *Respondents' Answer in Opposition to Petitioner's Motion for Leave to Amend and to Determine the Class of Claimants*. Accordingly, Respondent refers the Court to the arguments presented therein.

Finally, as to the final element, that a class action is superior to other methods of adjudication, Petitioner asserts that it is satisfied because individual class members could not be identified without proceeding as a class. Petitioner's argument fails because he has chosen to define his class by assuming an answer to the very question of fact that is central to this action. Specifically, the question of fact central to this action is whether Petitioner documented his tip income to his employer for taxes purposes as required by § 39-71-123(c). By defining his proposed class as consisting of members who so documented their tip income, Petitioner forces a conclusion upon this Court that Petitioner, and his proposed class members, have indeed documented such income in the manner prescribed by § 39-71-123(c). Thus, Petitioner seeks to avoid the vital question of fact in this case. However, whether this case proceeds as a class action or not, that question must be resolved. Were this Court to permit Petitioner to proceed as a class, litigation would be required for each individual member to resolve the question of whether they documented their tip income and were thus members of Petitioner's class. Clearly, such questions of fact could only be resolved by reference to the specific facts and evidence of each individual's case. Accordingly, a class action in this case is inferior to individual actions because the central question of fact can only be determined by reference to facts and evidence unique to individual claimants.

Petitioner has failed to establish all elements of a class action as required by Rule 23, and relied upon by this Court, because he has offered nothing more than his own assertions and opinions that such elements exist. Thus, this Court should deny Petitioner's motion to amend the pleadings to re-caption this action as a class action.

## CONCLUSION

As shown above, Respondent's failure to show that it would be prejudiced by a class action is insufficient reason to permit Petitioner to proceed as a class. In addition, Rule 15(a) relied upon by Petitioner as authority for the amendment he seeks, is inapplicable in this action and thus insufficient grounds to permit Petitioner to proceed as a class. Furthermore, as petitioner has failed to establish the elements required for a class action this Court should not permit him to proceed as a class. Finally, as shown above, § 39-71-611(3), MCA (2003), and its prohibition of common fund attorneys fees, is not an unconstitutional denial of access to the courts. Accordingly, Petitioner's *Motion for Leave to Amend and to Determine the Class of Claimants* should be denied.

Dated this 4th day of February, 2004.

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