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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

KELLY WILD, Petitioner, vs. MONTANA STATE COMPENSATION INSURANCE FUND, Respondent.	WCC NO. 2001-0286 **STATE FUND'S ANSWER BRIEF IN OPPOSITION TO MOTION FOR APPLICATION OF COMMON FUND DOCTRINE**

COMES NOW Respondent, State Compensation Insurance Fund ("State Fund"), and hereby files its Answer Brief in Opposition to Motion for Application of Common Fund Doctrine. For the reasons stated herein, the State Fund requests this Court to deny Petitioner's motion.

INTRODUCTION

Wild's attorney has asked for common fund fees as a result of the Supreme Court's decision in his client's case, even though he brought an action solely on Wild's behalf and failed to plead entitlement to common fund fees. Procedurally, Wild's motion for application of the common fund doctrine follows a motion to consolidate his case with another case, *Mathews v. Liberty Northwest Ins. Co.*, WCC No. 2001-0294. In separate briefing, the State Fund has opposed the motion to consolidate. However, Wild apparently assumes the Court will consolidate his case with *Mathews* because his motion for common fund fees appears to be a joint motion by the attorneys for *Mathews* and *Wild*. Because the cases have not been consolidated, this brief opposes the request by Wild's attorney for common fund fees.

ARGUMENT

In the opening paragraph of Wild's brief, he states that he is joining in a request with Mathews' attorney for class certification in Mathews' claim against Liberty. *See* Petitioner's Motion for Application of Common Fund 2 [hereinafter "Petr. Br."]. The State Fund is not a party to the *Mathews* case, and Wild has made no attempt to certify a class in this matter. Before addressing the merits of the request by Wild's attorney for common fund fees, the State Fund notes that this Court has recently held that class certifications are improper in workers' compensation cases because the Court follows an informal procedure that accomplishes a similar result:

> My experience in these cases tells me that more is accomplished faster through a cooperative process than through adherence to formal class action rules. Montana workers' compensation insurers are not ordinary defendants: they have a direct duty to pay claimants. §§ 39-71-407(1), -2203, MCA (2001). Disputes between insurers and claimants regarding benefits is within the exclusive jurisdiction of the Workers' Compensation Court, thus insurers appear regularly before the Court. The workers' compensation bar is small and well versed in workers' compensation law and with the practices and procedures of the Workers' Compensation Court. I expect that in future class-action type cases the same spirit of cooperation will prevail that has prevailed in *Broeker*, *Murer* and *Gonzales*. I therefore decline to adopt the class action provisions of the Montana Rules of Civil Procedure. However, where the rules provide helpful guidance, the Court will certainly look to them for assistance in determining a proper course of action. [Footnotes omitted.]

Ruhd v. Liberty Northwest Ins. Corp., 2003 MTWCC 38, ¶ 19 (quoting *Miller v. Liberty Mutual Fire Ins. Co.*, 2003 MTWCC 6, ¶ 4. Therefore, any request for class certification should be denied.

I. WILD'S ATTORNEY IS NOT ENTITLED TO "*MURER*-TYPE" COMMON FUND FEES.

As Wild's brief notes, the Common Fund Doctrine came into workers' compensation prominence with *Murer v. State Comp. Mut. Ins. Fund* (1997) 283 Mont. 210, 221, 942 P.2d 69, 76 ("*Murer III*"). *See* Petr. Br. 2. In *Murer III*, the claimants moved the Workers' Compensation Court to award them attorney's fees pursuant to the common fund doctrine. The Montana Supreme Court held:

> As a result of our decision in *Murer II*, the State Fund became obligated to increase the rate of benefits payment to a substantial number of workers' compensation claimants who were neither parties to, nor directly involved in the *Murer* litigation. . . .
>
> . . . .
>
> Based on these legal principles and authorities, we conclude that when a party, through active litigation, creates a common fund which directly benefits an ascertainable class of non-participating beneficiaries, those non-participating beneficiaries can be required to bear a portion of the litigation costs, including reasonable attorney's fees. Accordingly, the party who creates the common fund is entitled, pursuant to the common fund doctrine, to reimbursement of his or her reasonable attorney fees from that fund.

Murer, 942 P.2d at 75-76. *See also Rausch v. State Comp. Ins. Fund*, 2002 MT 203, 311 Mont. 210, 54 P.3d 25.

Unlike the common funds created in *Murer* and *Rausch*, the alleged "common fund" claimed by Wild's attorney is nothing more than Wild's workers' compensation award as a result of his fact-specific employment relationship with Fregien Construction. Wild's attorney has not created a pool of money from which other claimants will benefit. Instead, *Wild* only changed the procedure to follow when determining whether a claimant is an independent contractor or an employee. Because no specific common fund exists, the claim for common fund fees by Wild's attorney should be denied.

In addition to the lack of a specific common fund, this case has no ascertainable

class of non-participating beneficiaries. In *Murer III*, the State Fund could determine, with certainty, the number of absent claimants involved or the amount of money each was entitled to receive. *Murer III*, 942 P.2d at 77. Such is not the case here. Although Wild's attorney claims the class includes independent contractors who had an exemption but were denied benefits, such a class is unascertainable. *See* Petr. Br. 2. The State Fund cannot determine, with certainty, the number of absent claimants or their benefits, especially since the amount of benefits available might be contested in some cases. If *Wild* applied retroactively, the State Fund would have to undergo a fact-specific analysis to determine if an independent contractor exemption was inapplicable. Lacking an ascertainable class of non-participating beneficiaries, the claim for common fund fees by Wild's attorney should be denied.

The attempted application of the common fund doctrine to this case is an example of how the original intent and concept of the common fund doctrine is in danger of getting swept aside. In *Murer III*, the court noted that the doctrine is appropriate in situations where the damage to a particular claimant is insufficient from an economic viewpoint to justify the legal expense necessary to challenge that wrong. *Murer III*, 942 P.2d at 76. Such is not the case here. The stakes were high in Wild's case and an economic justification existed for challenging the conclusive presumption attached to an independent contractor exemption. If common fund fees are appropriate in this case, then every decision that gives some direction or interprets a statute will become a common fund case. Although the common fund doctrine is supposed to be an exception to the American rule regarding attorney fees, Wild's attorney is trying to make it become the rule. To prevent the exception from becoming the rule, this Court should deny the claim for common fund fees by Wild's attorney.

II. WILD'S ATTORNEY IS ESTOPPED FROM ASSERTING AN ENTITLEMENT TO COMMON FUND FEES.

Administrative Rules of Montana 24.5.301(3) states that:

> Any claim for attorney fees and/or penalty with respect to the benefits or other relief sought by the Petitioner shall be joined and pleaded in the petition. Failure to join and plead a claim for attorney fees and/or penalty with respect to the benefits or other relief sought in the petition shall constitute a waiver and shall bar any future claim with respect to such attorney fee and/or penalty.

Wild's attorney failed to property plead a claim for common fund fees, as set forth in the rules of this Court and in *Murer*. *Murer* began as a group of claimants that sought, but were denied, class certification. From the onset, the insurer was put on notice that the litigation was not confined to a single claimant, but involved multiple parties. Although denied class certification, claimant's attorneys proceeded with the litigation, asserting a lien on all increased benefits due to the *Murer* litigation pursuant to the Common Fund Doctrine. *Murer III*, 942 P.2d at 75. Without question, the *Murer* litigation was instituted on behalf of the named claimants and as representatives of non-participating beneficiaries because claimants initiated the litigation "as representatives of a class of injured claimants similarly situated." *Murer III*, 942 P.2d at 72. *Rausch* carried forward the notice provisions of *Murer* by specifying that the action was being brought on behalf of other similarly situated. *See Rausch*, 54 P.3d at 34 ("Claimant's attorneys contend they are entitled to attorney fees pursuant to the common fund doctrine for all similarly situated permanently totally disabled claimants who have been denied immediate impairment awards by the State Fund . . . .").

Other than usage of the verbiage "common fund," *Wild* carries none of the earmarks of a class action or an action on behalf of others similarly situated. From the onset, Wild's allegations and claim for attorney fees were confined solely to his case. Wild's attorney never put the State Fund on notice that he was seeking common fund fees or that he was instituting an action on behalf of all other similarly situated claimants. Instead, a claim for attorney fees was only asserted against one beneficiary, the State Fund. No claim for attorney fees from "all ascertainable absent workers' compensation claimants" was made by Wild's attorney at any point in the pre-remand proceedings. In fact, the Montana Supreme Court decision makes no mention of common fund fees because it had not been an issue until after the Supreme Court remanded the matter. The failure by Wild's attorney to properly raise the common fund claim bars his attempt to do so now. *See, e.g. Heisler v. State Compensation Insurance Fund*, 1998 MTWCC 25, ¶ 31.

In addition to being estopped from asserting entitlement to common fund fees, the acts and tacit judicial admissions by Wild's attorney precludes his claim for common fund fees. In analyzing estoppel and the binding effect of judicial admissions, the Montana Supreme Court has stated:

> We have previously held that a party may not benefit from asserting one position during pre-trial discovery and later assert a contrary position to the detriment of its opponent at trial or on appeal. *Plouffe v. Burlington Northern, Inc.* (1986) 730 P.2d 1148, 1153. In *Plouffe* we relied on § 26-1-

601, MCA, for the following conclusive presumption:

> [T]he truth of a declaration, act, or omission of a party, as against that party in any litigation arising out of such declaration, act, or omission, whenever he has, by such declaration, act, or omission, intentionally led another to believe a particular thing true and to act upon such belief.

Section 26-1-601, MCA; *Plouffe*, 730 P.2d at 1153.

. . .

> The State Fund led Rasmussen to believe that it was not asserting fraud as a defense. It repeatedly skirted the court's questions on this issue and, on at least one occasion, stated that it was not asserting fraud. Therefore, counsel conceded for purposes of trial that fraud was not an issue. Rasmussen should not have to spend the time and assume the expense of a trial on the assumption that the State Fund's position is as represented by its attorney, only to find out after the result that the whole proceeding must be repeated based on a different theory.

Rasmussen v. Heebs Food Center (1995), 270 Mont. 492, 497, 893 P.2d 337, 339-40.

As in the case at bar, the State Fund should be entitled to rely upon the representations made by Wild's attorney that his attorney fee claim was limited to the State Fund and was not brought on behalf of all others similarly situated. Wild's attorney should not be able to change his position and assert a new theory during post-remand proceedings, and his attempt to assert entitlement to common fund fees should be denied.

III. THE ATTEMPT BY WILD'S ATTORNEY TO CLAIM COMMON FUND FEES IS BARRED BY THE DOCTRINE OF RES JUDICATA.

An excellent discussion of the doctrine of res judicata and its applicability to the present matter is contained in *Cheetham v. Liberty Northwest Insurance Corporation*, 201 MTWCC 65, ¶¶ 27-28:

> Liberty argues that the claimant could and should have raised his entitlement to domiciliary benefits in his first petition to this court. It cites decisions of both the Supreme Court and this Court holding that where a party could have raised a claim in a prior proceeding, but failed to do so, the

party is barred from raising it in a subsequent proceeding. Liberty's argument is not easily dismissed.

See also Michael Miller v. State Compensation Insurance Fund, 2000 MTWCC 72, ¶ 9. Additional case law provides further guidance:

> "[R]es judicata is a final judgment which, when rendered on the merits, is an absolute bar to a subsequent action between the same parties or those in privity with them, upon the same claim or demand." *Scott v. Scott* (1997), 283 Mont. 169, 175, 939 P.2d 998, 1001 (citing *Fiscus v. Beartooth Electric Cooperative, Inc.* (1979), 180 Mont. 434, 436, 591 P.2d 196, 197). The doctrine bars a party from re-litigating a matter that the party has already litigated **and from re-litigating a matter that the party had the opportunity to litigate in a prior case**. *City of Bozeman v. AIU Ins. Co.* (1995), 272 Mont. 349, 354, 900 P.2d 929, 932 (quoting *State ex rel. Harlem Irrigation District v. Montana Seventeenth Judicial District Court* (1995), 271 Mont. 129, 894 P.2d 943, 946). Res judicata is based on the policy that there must be some end to litigation. *Glickman v. Whitefish Credit Union Ass'n*, 1998 MT 8, ¶ 20, 287 Mont. 161, ¶ 20, 951 P.2d 1388, ¶ 20. A claim is res judicata if: (1) the parties or their privies are the same; (2) the subject matter of the claim is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and issues. *Glickman*, ¶ 20 (citing *Loney v. Milodragovich, Dale & Dye, P.C.* (1995), 273 Mont. 506, 510, 905 Pl.2d 158, 161).

In re Raymond W. George Trust, 1999 MT 223, ¶ 47, 296 Mont. 56, ¶ 47, 986 P.2d 427, ¶ 47 (1999) (emphasis added).

The "opportunity to litigate" rule is discussed in state ex. rel. *Harlem Irrigation District v. Dist. Ct.* 1995, 271 Mont. 129, 894 P.2d 943. The discussion is quoted in the subsequent case of *City of Bozeman v. AIU Insurance Co.* (1995), 272 Mont. 349, 354, 900 P.2d 929, 932. That discussion is as follows:

> However, the doctrine of res judicata bars not only issues that were actually litigated, but also those that could have been litigated in a prior proceeding. *Mills v. Lincoln County* (1993), 262 Mont. 283, 864 P.2d 1265, 1267. A party should not be able to litigate a matter that the party already had the opportunity to litigate; public policy dictates that there must

> be some end to litigation. [Citations omitted.] Once a party has had an opportunity to present a claim, the judgment in a previous case is final as to the issues that were raised, as well as those that could have been raised. *See Burgess v. Montana* (1989), 237 Mont. 364, 366, 772 P.2d 1272, 1273. This notion arises from public policy designed to prevent endless piecemeal attacks on previous judgments. *Wellman v. Wellman* (1982), 198 Mont. 42, 46, 643 P.2d 573, 575. We conclude that the theories of recovery alleged in this cause of action could have been litigated in the prior proceeding.

As set forth in the above quoted language, the "opportunity to litigate" rule is tied to the specific issues raised in the prior litigation. *Rafanelli v. Dale*, 1998 MT 331, ¶ 12, 292 Mont. 277, ¶ 12, 971 P.2d 371, ¶ 12. The doctrine prohibits a party in subsequent litigation from raising a new legal theory or ground with respect to the issues raised in the prior case. As applied here, the doctrine prohibits Wild's attorney from raising a new legal theory regarding attorney fees because he could have raised that issue in this Court or in the Supreme Court. His untimely attempt to assert the common fund doctrine in post-remand proceedings fails.

IV. ALLOWING A CLAIM FOR COMMON FUND FEES IS AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS.

A corporation is entitled to due process of the law. *Browning-Ferris Indus. v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, 285, 109 S. Ct. 2909, 2925, 106 L. Ed. 2d 219. Essential elements of due process are notice and an opportunity to be heard. *Byrd v. Columbia Falls Lion Club* (1979), 183 Mont. 330, 332, 599 P.2d 366, 367; *In re Marriage of Huotahi* (1997), 284 Mont. 285, 291, 943 P.2d 1295, 1299. Although the issue of a state agency's entitlement to "due process" is subject to judicial debate, it is clear that the State Fund is more analogous to an insurance corporation than a state agency. The State Fund derives its operating income from policyholders and not taxpayers of the state. In recognition of the "autonomy" of the State Fund and the requirement to conduct business similar to a public corporation, the legislature passed Senate Bill 360.

Due process is a fundamental right of the defendant to be made aware of the claims made against it. Allowing Wild's attorney to maintain his claim for common fund fees denies the State Fund due process of the law because his attorney waited until after the Supreme Court issued its decision to make a claim for common fund fees. There was no notice nor opportunity to be heard on the claim of common fund fees. The State Fund relied on the arguments set forth in Wild's prior pleadings and briefs. Courts should not

go beyond the matters before it and should limit Wild's attorney to the attorney fee arguments he has previously raised and pled. *See Gallatin Trust & Sav. Bank v. Darrah* (1968), 152 Mont. 256, 262-63, 448 P.2d 734; *Lurie v. Gallatin County Sheriff* (1997), 284 Mont. 207, 215, 944 P.2d 205. Therefore, this Court should deny Wild's attorney's post-remand attempt to claim an entitlement to common fund fees.

CONCLUSION

Common fund fees have no application to this case, especially since there is no specific common fund or ascertainable class of non-participating beneficiaries. Even if any entitlement potentially existed, Wild's attorney is estopped from asserting a claim for common fund fees for the first time on post-remand proceedings. Further, his untimely attempt to claim entitlement to common fund fees is barred by the doctrine of res judicata and would unconstitutionally deny the State Fund due process of law. Therefore, his motion for application of the common fund doctrine should be denied.

RESPECTFULLY SUBMITTED this 13 day of June, 2003.

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CERTIFICATE OF MAILING

The undersigned, an employee of the Montana State Fund, Attorneys for the Respondent, hereby certifies that on this 13 day of June, 2003, a true copy of the foregoing *State Fund's Answer Brief in Opposition to Motion for Application of Common Fund Doctrine*, was mailed, postage prepaid, to the following:

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