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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN, Petitioner, vs. MONTANA STATE FUND, Respondent/Insurer.	**WCC 2000-0222** **AMICUS BRIEF OF KELLY WILD**

1. INTRODUCTION:

The Court has requested Amicus briefs be filed in this matter. Here follows the Amicus brief of Kelly Wild. The issues the Court has asked to be addressed will be in the context of both *Flynn* and *Wild*.

2. THE FAILURE TO REQUEST COMMON FUND ATTORNEY FEES OR CLASS CERTIFICATION IN PRE-REMAND PROCEEDINGS DOES NOT BAR POST-REMAND REQUESTS FOR COMMON FUND FEES OR CLASS CERTIFICATION:

Although couched in several different forms, the State Fund's core argument against the awarding of common fund attorney fees is based simply on the fact that they were not originally requested in the pre-remand proceedings. This argument should be rejected as a matter of law.

As the primary legal basis for this argument, the State Fund relies upon ARM 24.5.301(3). This section, however, which must be read in conjunction with ARM 24.5.343, §39-71-611, MCA, and §39-71-612, MCA, is totally inapplicable to a claim for common fund

attorney fees. When placed within its proper statutory context, the undersigned believes that ARM 24.5.301(3) is only applicable when the petitioner and his or her attorney seek fees for the unreasonable actions of the insurer. If the undersigned is incorrect in this assumption, then he stands corrected. If not, then this ARM is irrelevant for the issue presented.

ARM 24.5.301(3) only controls when fees are sought directly from an insurer because of the insurer's own conduct. It does not govern the payment of fees from the petitioner's recovery or from a common fund created by the attorney's efforts.

State Fund's argument punishes those attorneys, like the undersigned, that seriously evaluate, before filing, whether there are actual grounds to claim fees for unreasonable behavior. Unlike many other claimant lawyers, the undersigned does not routinely plead for such fees in a boilerplate manner. This Court should not allow any such good faith evaluation to be utilized by the insurer in an attempt to now prevent payments of subsequent fees from a common fund created by the attorney's efforts.

The State Fund's argument also erroneously pre-supposes that whenever an individual case is filed, the petitioner and his or her attorney necessarily anticipate that a legal precedent will be established that would lead to the creation of a common fund for non-participating beneficiaries. This Court, however, has specifically recognized that this is not always the case.

In *Miller v. Liberty Mutual Fire Insurance Company* 2003 MTWCC 6, ¶3, this court commented that in other cases it was only "*...following the establishment of the legal precedents giving rise to the additional entitlements* [that] this Court has overseen proceedings to assure that the claimants entitled to the additional benefits are identified and paid." (Emphasis added.)

In *Broeker v. State Compensation Mutual Insurance Fund*, (1996), 275 Mont. 502, 914 P.2d 967, the original proceeding was brought on behalf of a single individual without any class action or common fund allegations. There was no notice given to non-participating beneficiaries or the insurer concerning common fund issues. The rule of law established in that case, however, ultimately led to the establishment of a common fund for non-participating beneficiaries and payment fees to the attorneys.

Consequently, petitioner is not estopped to claim common fund attorney fees. Furthermore, the claim for such fees is not barred by res judicata or an alleged lack of due process.

With respect to the defense of res judicata, it is well established from the authorities cited by the State Fund that res judicata applies only as a bar to a subsequent action between the same parties or those in privity with them. By its very nature, a common fund case that follows after the establishment of "*legal precedents giving rise to the additional entitlements*" involves non-participating beneficiaries that were not parties originally and are not bound by res judicata.

As discussed above, this Court has previously approved of the creation of a related common fund after the litigation of an individual's case created the precedent favorable to the claims of non-participating beneficiaries. See, *Broeker and Miller, supra.*

Finally, the State Fund claims that it would be denied due process if a common fund is created for non-participating beneficiaries. This argument is not supportable factually or legally. The State Fund and Respondent Amicus clearly had notice of the underlying legal issues that gave rise to petitioner's pre-remand claims and had full opportunity to litigate them. It would be disingenuous to now claim that had it known that a common fund might result from an adverse ruling, the State Fund and Respondent Amicus would have "tried harder" or the Supreme Court would have decided differently.

In addition, the State Fund now has the opportunity to be heard on the issue of whether the establishment of common fund would be appropriate following remand. Those issues have been extensively briefed by the State Fund and are pending a decision. Patently, the State Fund has not been deprived of due process with respect to any factual or legal issue involved in this matter.

3. THE SUPREME COURT DECISION IN FLYNN SHOULD BE APPLIED RETROACTIVELY:

The second issue which the Court has asked amicus briefs to address is whether the Supreme Court decision in Flynn is retroactive. Whether this Court applies *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S.Ct. 2501, 125 L.Ed.2d74 (1993) or *Chevron Oil Co. v. Huson,* 404 U.S. 97, 30 L.Ed.2d 296, 92 St. 349 (1971), the answer is "yes."

Although *Flynn* should be applied retroactively even if the three part *Chevron* test is used, Wild believes the U.S. Supreme Court's rationale in *Harper* should be adopted. Quoting from previous U.S. Supreme Court cases, *Harper* noted that "[N]othing in the constitution alters the fundamental rule of 'retrospective operation' that has governed 'judicial decisions ... for near a thousand years." 509 U.S. at 94, 113 S.Ct. at 25-6, 125 L.Ed at 84. *Harper* then recognized that the U.S. Supreme Court had not followed this fundamental rule in previous cases:

> In *Linkletter v. Walker*, [cite omitted], we developed a doctrine under which we could deny retroactive effect to a newly announced rule of criminal law. Under *Linkletter*, a decision to confine a new rule of prospective application rested on the purpose of the new rule, the reliance placed upon the previous view of the law, and the "effect on the administration of justice of a retrospective application." [cite omitted]. In the civil law context, we similarly permitted the denial of a retroactive effect to "a new principle of law" if such limitation would avoid "injustice or hardship" without unduly undermining the "purpose and effect" of the new rule. *Chevron Oil Co. v. Huson*, [cite omitted].

509 U.S. at 94-5, 113 S.Ct. at 25-6, 125 L.Ed at 84-5.

In *James B. Beam Distilling v. Georgia*, 501 U.S. 529, 115 L.Ed.2d 481, 111 S.Ct. 2439 (1991), the Court seemed to reject the notion that all case decisions should not be applied retroactively. The *Harper* Court observed that:

> After the case announcing any rule of federal law has "applied that rule with respect to litigants" before the court, no court may "refuse to apply [that] rule ... retroactively." ... JUSTICE WHITE likewise concluded a decision "extending the

> benefit of the judgment" to the winning party "is to be applied to other litigants whose cases were not final at the time of the [first] decision. ... Three other Justices agreed that "our judicial responsibility ... requir[es] retroactive application of each ... rule we announce.

509 U.S. at 96, 113 S.Ct. at 26-7, 125 L.Ed at 86.

> The *Harper* Court then specifically adopted the majority opinion in *Beam*:
>
> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases and still open on direct review as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends to *Griffith's* ban against "selective application of new rules." ... Mindful of the "basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, ... we now prohibit erection of selective temporal barriers to the application of federal law in non-criminal cases. In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particularly equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of a new rule. ... Our approach to retroactivity heeds the admonition that "the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similar situated litigants differently.

509 U.S. at 97, 113 S.Ct. at 26-7, 125 L.Ed at 86.

Petitioner urges this Court to adopt the U.S. Supreme Court's rationale in *Harper* that all cases are retroactive. This rationale is persuasive. Courts are not legislative bodies. They are judicial bodies and as such, should not selectively apply laws that would affect individuals differently based upon a date the Court selects. Therefore, this Court should hold that all of the common fund cases currently before it, including *Flynn* and *Wild*, should apply retroactively "to all cases still open."

Even if the Court applies the *Chevron* test, it should find that all of these common fund cases, including *Flynn*, apply retroactively "to all cases still open." The *Chevron* test was articulated in *Riley v. Warm Springs State Hospital,* 229 Mont. 518, 748 P.2d 455 (1987). In its brief addressing this issue, the State Fund cites two Montana Supreme Court cases and one Federal District Court which applied the *Chevron* or *Riley* test, *Benson v. Heritage Inn, Inc.*, 1998 MT 330, 292 Mont. 268, 971 P.2d 1227 (1998); *Seubert v. Seubert*, 2000 MT 241A, 301 Mont. 399, 13 P.3d 365 (2000); and *Burton v. Mountain West Farm Bureau Mutual Insurance Co.*, (D. Mont., March 31, 2003). In these cases, only *Seubert* did not apply retroactively and then only for already decided cases.

In *Benson,* Plaintiff slipped and fell at the Heritage Inn in Great Falls. The District Court gave a jury instruction that was rejected two weeks later by a Montana Supreme Court case that "made it clear that to give such an instruction on the law would be reversible error." Benson at ¶11. The District Court then determined a new trial was necessary because the Supreme Court decision two weeks prior applied retroactively. The defendant appealed, and the Supreme Court,

applying the three part Riley test, held that the law change should be applied retroactively because none of the factors was satisfied even after a final jury verdict.

> *Richardson* does not establish a new principle of law, but represents a clarification of the law whose result was foreshadowed by recent decisions that discuss premises liability. Indeed, in *Richardson*, we pointed out that the standard of care adopted therein was "consistent with the body and trend of Montana's premises liability law as that has developed over the years" and "compatible with the general statutory standards of care articulated by the legislature." *Richardson*, 286 Mont. at 321, 950 P.2d at 756. Additionally, as the District Court indicated, the rule of law and principles of equity discussed in *Richardson* would not be furthered by prospective application of that case only. As we noted in *Richardson*, "the interests of both the possessors of premises and those persons foreseeably on the premises are better served by our adoption of" the standard of care we set out in the case. *Richardson*, 286 Mont. at 320, 950 P.2d at 755. Therefore, all of the *Riley* factors for nonretroactive application of *Richardson* are lacking.

Benson at ¶25.

In *Seubert,* the Montana Supreme Court held unconstitutional the practice of the Child Enforcement Support Division modifying child support orders from District Courts. The Court was then asked by CSED whether the decision was retroactive. The Supreme Court held it was not retroactive with respect to "final" orders but was to be applied to all pending and future cases. The Court expressed concern that retroactive application would have a negative emotional impact on families whose "final" orders are undone. *Seubert,* 301 Mont at 400.

In *Burton,* Judge Donald Molloy applied the *Chevron/Riley* factors and held that automobile medical payments coverage should be stacked. Citing a Montana Supreme Court case, Judge Molloy observed that "[a] person seeking a determination of prospective application must prove by a preponderance of evidence that retroactive application will have 'substantial inequitable results.' *LaRoque v. State of Montana,* 178 Mont. 315, 320, 583 P.2d 1059, 1062 (1978)." Thus, here, the burden of proof is on the State Fund and other respondents to show that retroactive application will be inequitable. As the Montana Supreme Court found in *Benson* and Judge Molloy found in *LaRoque,* when applying the three factors from *Chevron/Riley*, this Court should find that the respondents cannot meet this burden.

When applying these three factors, Amicus Wild believes it will be most effective in the context of the case he best understands, *Wild v. Fregein and the State Fund*. Applying the first factor, *Wild* did not overrule precedent. The Supreme Court had never addressed the independent contractor issue and therefore there was no precedent.

Although the Workers' Compensation Court had addressed the issue previously in *Bouldin* and *Seamless Raingutter*, a lower Court does not have authority to set precedence for the Montana Supreme Court. See e.g., *State v. Whitehorn,* 2002 MT 54, ¶14, 433 P.2d 922 ("Under the principles of binding authority, the District Court could not overrule our holding in Nichols, only this Court could do so. *See* Black's Law Dictionary 1195 (7th ed., 1999) ("a lower court is bound by an applicable holding of a higher court in the same jurisdiction"). For this reason, we

conclude under the common law doctrine of plain error, that Whitehorn is not procedurally barred from raising retroactivity arguments on appeal.") Obviously, the same rule should be applied to *Flynn*.

As with *Benson, supra*, the *Wild* decision was foreshadowed. Although the A/B test has not existed in Montana for a "thousand years" as the U.S. Supreme Court observed retroactive application of case law has existed, it has been the rule of law for at least a quarter of a century. See e.g., *Sharp v. Hoerner Waldorf Corp.*, 178 Mont. 419, 425, 584 P.2d 1298 (1978). As noted by the Supreme Court in *Wild*, Section 39-71-120 and 401(3)c) must be read together and a good faith inquiry done to determine whether the A/B test is met before hiring an individual as an independent contractor. In Wild, as in most cases when the A/B test is at issue, it if walks like a duck, quacks like a duck, it must be a duck even if it is holding a piece of paper that says it is a chicken. *Wild* at ¶31. This decision was clearly foreshadowed because to do otherwise would have put the entire workers' compensation system in jeopardy by making the Act "worthless" if employers are able to opt out by a "transparent sham." *Wild* at ¶42.

The second part of the *Chevron/Riley* test, whether retroactive application will further or retard the rule's operation, is met. The *Wild* Court observed that the Workers' Compensation Act "was designed to provide benefits to injured workers." *Wild* at ¶42. In order to further this rule, the Wild decision must be applied retroactively.

The third part of the *Chevron/Riley* test, whether retroactive application will result in substantial inequity, is met. As observed by the Supreme Court, if employers are allowed to avoid their responsibilities under the Act, then "this practice puts to a severe economic and competitive disadvantage those employers who, in compliance with the Act, assume their legitimate obligations under the law by hiring and paying workers according to whether they are *in fact* (and not simply in name) ICs or employees." *Wild* at ¶42. [Emphasis supplied]. Further, the Court believed its holding "would ensure that employers and ICs alike following through with the intent of the statute, i.e., that once an exemption is presented to the employer, the employer will actually treat the worker as an IC and not, as in the case at bar, an employee. *Wild* at ¶26.

4. CONCLUSION:

The State Fund's arguments must fail with respect to these two issues. Significantly, the basis of its argument on the first issue must fail because the ARM on which it relies is irrelevant to the issue at hand. With respect to issue number two, whether *Harper* or *Chevron/Riley* is followed, the Court should apply all the common fund cases retroactively to "all cases still open."

DATED this 11 day of July, 2003.

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BY: _____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of July, 2003, a true and correct copy of the foregoing **AMICUS BRIEF OF KELLY WILD** was mailed, postage prepaid, to the following:

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