IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 6

WCC No. 2008-2103

TINA MALCOMSON

Petitioner

vs.

LIBERTY NORTHWEST

Respondent/Insurer.

ORDER VACATED PURSUANT TO 2011 MTWCC 11

ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner moves for summary judgment for reinstatement of her medical benefits which were terminated after she refused to allow Respondent to communicate *ex parte* with her healthcare providers. Petitioner argues that § 39-71-604(3), MCA (2007), and § 50-16-527(5), MCA (2007), unconstitutionally violate her right of privacy under Article II, Section 10, of the Montana Constitution, and her right to due process under Article II, Section 17, of the Montana Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution. Petitioner raises both as applied and facial constitutional challenges. Petitioner further argues that she is entitled to recovery of her attorney fees and costs under the private attorney general doctrine. Respondent responds that the statutes Petitioner challenges are constitutional, and that Petitioner waived her right to pursue a claim for attorney fees and costs.

Held: As applied to the facts of Petitioner's claim, §§ 39-71-604(3), and 50-16-527(5), MCA, are unconstitutional under Article II, Section 10, of the Montana Constitution. Petitioner does not seek to limit Respondent's ability to obtain relevant healthcare information regarding her claim; she seeks only to be advised that the communications with her treating physicians are taking place and to be included in the communications in order to protect her constitutional right of privacy. Petitioner is not entitled to her attorney fees and costs under the private attorney general doctrine. Although she alleges she waived only her right to pursue these claims under § 39-71-611, MCA, the stipulation to which she agreed contains no such limiting language.

¶ 1 Petitioner Tina Malcomson moves for summary judgment in this matter, alleging that no genuine issues of material fact exist and that she is entitled to summary judgment as a matter of law on the grounds that § 39-71-604(3), MCA (2007), and § 50-16-527(5), MCA (2007), violate her right of privacy under Article II, Section 10, of the Montana Constitution, and her right to due process of law under Article II, Section 17, of the Montana Constitution, and under the Fifth and Fourteenth Amendments to the United States Constitution. Malcomson contends that she is entitled to reinstatement of her medical benefits.[1]

¶ 2 Respondent Liberty Northwest (Liberty) opposes Malcomson's motion. Noting that Malcomson has brought both facial and as-applied constitutional challenges, Liberty contends that material facts in dispute preclude summary judgment regarding the as-applied challenge, and that Malcomson is not entitled to summary judgment regarding the facial challenge as a matter of law.[2]

¶ 3 For the reasons discussed below, I conclude that the challenged statutes, as applied to the facts of this case, violate Malcomson's right of privacy under Article II, Section 10, of the Montana Constitution. I therefore confine my analysis to Malcomson's right of privacy challenge and do not reach her due process challenge.

Undisputed Facts[3]

¶ 4 Malcomson filed a workers' compensation claim for injuries she sustained on December 21, 2007, while performing her duties as the manager of Freemo's Pizza in Missoula.

¶ 5 Malcomson initially signed releases which authorized Liberty and its agent, PacBlu NorthWest, to contact her healthcare providers to provide relevant healthcare information without prior notice to Malcomson.

¶ 6 On March 12, 2008, Malcomson, through her counsel, revoked the releases via letter which stated in part that Liberty did not have permission to speak with her medical providers without prior notice to her attorney. In spite of the written revocation, an agent of Liberty telephoned Malcomson's healthcare providers on five occasions from March 13, 2008, through March 27, 2008.

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[1] Petitioner's Motion for Summary Judgment and Brief in Support (Opening Brief), Docket Item No. 29.

[2] Liberty's Brief in Opposition to Motion for Summary Judgment and Request for Hearing (Response Brief), Docket Item No. 39.

[3] Opening Brief at 2-6.

¶ 7 On March 31, 2008, Liberty terminated Malcomson's medical benefits due to her refusal to "allow the insurer *ex parte* communications as permitted by statute. . . ."

¶ 8 On April 1, 2008, Malcomson, through counsel, wrote to Liberty and stated that Liberty could speak to her healthcare providers, but any communications must include notice to Malcomson's counsel and an opportunity to Malcomson and her counsel to participate. On April 4, 2008, Malcomson executed a new release which authorized Liberty to obtain copies of all relevant medical and billing records, but did not permit Liberty to speak with any of her medical providers without prior notice to her and her counsel. She asked Liberty to reinstate her medical benefits. Liberty refused to reinstate her benefits, but presented Malcomson with another medical release.

¶ 9 On April 7, 2008, Malcomson signed the new release Liberty provided, but wrote on the release that she did not authorize Liberty or its agents to contact her healthcare providers without giving notice to Malcomson or her attorney. She again requested reinstatement of her benefits. Liberty refused.

¶ 10 On April 15, 2008, Malcomson advised Liberty that she had no objection to written correspondence with her medical providers so long as she was copied with the correspondence. Malcomson again requested reinstatement of her benefits.

¶ 11 Between December 31, 2007, and March 27, 2008, medical case manager Annie Young, RN, made 32 *ex parte* telephone calls totaling 8.9 hours to Malcomson's medical providers on behalf of Liberty. On December 31, 2007, Young sent a letter to Malcomson's employer advising that Young would be attending all of Malcomson's future medical appointments at Liberty's request; Young did not copy the letter to Malcomson.

¶ 12 On January 23, 2008, Young e-mailed Malcomson's physical therapist *ex parte* with Young's account of a conversation Young had had with Malcomson. Young opined that Malcomson "spends a great deal of our time/efforts with repetitive information" and noted that Malcomson "[r]ambles on."[4]

Standard of Review

¶ 13 For summary judgment to be granted, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law.[5] Although Liberty asserts in its response brief that "material issues . . .

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[4] Opening Brief at 5. (Emphasis removed.)

[5] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

remain in dispute,"[6] Liberty does not set forth any argument in support of this assertion. Finding no material facts in dispute, I conclude this matter is susceptible to summary disposition.

¶ 14 All legislative enactments are presumed constitutional. The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt.[7]

¶ 15 Malcomson and Liberty disagree on the appropriate level of scrutiny to use in evaluating the constitutionality of the statutes at issue. Regarding her right of privacy challenge, Malcomson argues that because the right of privacy is explicit in the Declaration of Rights of Montana's Constitution, it is a fundamental right. Since it is a fundamental right, any legislation which infringes upon its exercise must be reviewed under strict scrutiny.[8] Liberty argues that rational basis review is the level of scrutiny which applies in constitutional challenges to workers' compensation statutes, regardless of which constitutional provisions may be infringed, because workers' compensation statutes do not involve fundamental rights.[9]

¶ 16 Liberty relies on *Henry v. State Compen. Ins. Fund* in support of its position. In *Henry*, and relying on previous cases challenging the constitutionality of statutes in the Workers' Compensation Act (WCA), the Montana Supreme Court noted that equal protection challenges which do not involve a suspect classification or implicate a fundamental right do not trigger a strict scrutiny analysis. The court further noted:

> This Court has previously held that the workers' compensation statutes neither infringe upon the rights of a suspect class nor involve fundamental rights which would trigger a strict scrutiny analysis. This Court has held that the test to be applied when analyzing workers' compensation statutes is the rational basis test.[10]

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[6] Response Brief at 2.

[7] *Henry v. State Compen. Ins. Fund*, 1999 MT 126, ¶ 11, 294 Mont. 449, 982 P.2d 456. (Citation omitted.)

[8] Petitioner's Reply in Support of her Motion for Summary Judgment (Reply Brief) at 5, Docket Item No. 47, *citing Gryczan v. State*, 283 Mont. 433, 448-49, 942 P.2d 112, 121-22 (1997); *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 989 P.2d 364.

[9] Response Brief at 8, *citing Henry*.

[10] *Henry*, ¶ 29. (Citations omitted.)

¶ 17 The *Henry* language, taken out of context, is misleading. *Henry* relies upon four older cases: *Heisler v. Hines Motor Co.*,[11] *Stratemeyer v. Lincoln County*,[12] *Cottrill v. Cottrill*,[13] and *Zempel v. Uninsured Employers' Fund*.[14] The oldest of these is *Cottrill*, decided in 1987. *Cottrill* raised an equal protection challenge to § 39-71-401(2)(c), MCA (1985). The court noted:

> Both parties agree that the right to receive Workers' Compensation benefits is not a fundamental right which would trigger a strict scrutiny analysis of equal protection. . . . Examples of fundamental rights are the right of privacy, freedom of speech, freedom of religion, right to vote and the right to interstate travel.[15]

¶ 18 *Cottrill* states that the right to receive workers' compensation benefits, in and of itself, is not a fundamental right. *Cottrill* does not state that any constitutional claim involving a fundamental right which sounds in workers' compensation law is somehow stripped of its status as a fundamental right simply because it is found within the WCA.

¶ 19 The Montana Supreme Court later relied upon *Cottrill* in determining the correct level of scrutiny to apply to an equal protection challenge made in *Stratemeyer*. After quoting *Cottrill*, the court noted, "The statute at issue here, because it affects no fundamental right or suspect class, must be analyzed under the rational basis test."[16] The court looked to the specific challenge made and determined whether it implicated a fundamental right or suspect class; it did not end the analysis after merely ascertaining that the statute was part of the WCA.

¶ 20 In *Heisler*, which also presented an equal protection challenge to a statute within the WCA, the Montana Supreme Court quoted *Stratemeyer*, again noting that an equal protection challenge which neither implicates a fundamental right nor a suspect class is scrutinized under a rational basis test.[17]

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[11] *Heisler*, 282 Mont. 270, 279, 937 P.2d 45, 50 (1997).

[12] *Stratemeyer*, 259 Mont. 147, 151, 855 P.2d 506, 509 (1993).

[13] *Cottrill*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987).

[14] *Zempel*, 282 Mont. 424, 430, 938 P.2d 658, 662 (1997).

[15] *Cottrill*, 229 Mont. at 42-43, 744 P.2d at 897.

[16] *Stratemeyer*, 259 Mont. at 151, 855 P.2d at 509.

[17] *Heisler*, 282 Mont. at 279, 937 P.2d at 50.

¶ 21 Finally, in *Zempel*, the Montana Supreme Court noted that legislation subject to an equal protection challenge is reviewed under strict scrutiny if a fundamental right is infringed or a suspect class affected.[18] The court further noted that it applies middle-tier scrutiny in limited situations where constitutionally significant interests are implicated by government classification.[19] Zempel argued that this middle-tier scrutiny should apply to his constitutional challenge, but the court disagreed, noting that the Workers' Compensation Court had applied the rational basis test, and rejecting Zempel's argument that middle-tier scrutiny should apply because, like welfare benefits, workers' compensation benefits are "lodged in" Article XII, Section 3(3), of the Montana Constitution.[20] The court further noted, "Moreover, we consistently have applied the rational basis test to equal protection challenges in workers' compensation cases."[21]

¶ 22 In addition to *Stratemeyer* and *Cottrill*, the Montana Supreme Court cited *Burris v. Employment Relations Div./Dept. of Labor and Indus.*[22] in support of its assertion that the rational basis test is "applied . . . to equal protection challenges in workers' compensation cases." In *Burris*, as in *Cottrill*, *Stratemeyer*, *Heisler*, and *Zempel*, the Montana Supreme Court, faced with an equal protection challenge, first considered whether the challenge involved a fundamental right or suspect class.[23] Concluding that it did not involve either a fundamental right or suspect class, the *Burris* court then considered whether the challenge presented by Burris would appropriately be scrutinized under a middle-tier analysis, as used in cases involving the constitutionally-protected interests of education and welfare, and determined that the challenge was not the kind which would be subject to middle-tier scrutiny.[24] The court therefore analyzed Burris' challenge using the rational basis test.[25]

¶ 23 More to the point, Article II, Section 10, of the Montana Constitution, states: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a ***compelling state interest***."[26] The language of the

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[18] *Zempel*, 282 Mont. at 428-29, 938 P.2d at 661.

[19] *Zempel*, 282 Mont. at 429, 938 P.2d at 661. (Citation omitted.)

[20] *Zempel,* 282 Mont. at 429, 938 P.2d at 661.

[21] *Zempel,* 282 Mont. at 430, 938 P.2d at 662.

[22] *Burris*, 252 Mont. 376, 380, 829 P.2d 639, 641 (1992).

[23] *Burris*, 252 Mont. at 379, 829 P.2d at 641.

[24] *Burris*, 252 Mont. at 380, 829 P.2d at 641.

[25] *Id.*

[26] (Emphasis added.)

privacy clause itself requires that any infringement on the right of individual privacy be for a compelling state interest – in other words, able to withstand a strict scrutiny review.[27] To review Malcomson's constitutional challenge under a rational basis review, as Liberty suggests, would require the Court to amend the privacy clause so that it reads: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a ***rational basis***." I am fairly certain such an amendment would exceed the Court's jurisdiction.

Analysis and Decision

¶ 24 The challenged language contained in both of the statutes at issue is substantially identical. In its entirety, § 39-71-604(3), MCA, states:

> A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (2), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (2) without prior notice to the injured employee, to the employee's authorized representative or agent, or in the case of death, to the employee's personal representative or any person with a right or claim to compensation for the injury or death.

¶ 25 In its entirety, § 50-16-527(5), MCA, states:

> A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (4), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (4) without prior notice to the injured employee, to the employee's authorized representative or agent, or in the case of death, to the employee's personal representative or any person with a right or claim to compensation for the injury or death.

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[27] *See, e.g., Oberson v. U.S. Dep't of Agric.*, 2007 MT 293, ¶ 36, 339 Mont. 519, 171 P.3d 715.

¶ 26 Both statutes share the same definition of "relevant health care information," found in §§ 39-71-604(2) and 50-16-527(4), MCA:

> Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery.[28]

¶ 27 Malcomson challenges the constitutionality of §§ 39-71-604(3) and 50-16-527(5), MCA. She alleges that *ex parte* communications with her medical providers violate her right of privacy under Article II, Section 10, of the Montana Constitution. Malcomson contends that the statutes are unconstitutional as applied to the facts of her case because she is willing to allow Liberty to communicate with her healthcare providers regarding relevant healthcare information so long as her counsel is informed of any communications and given the opportunity for inclusion.[29]

¶ 28 To withstand a strict-scrutiny analysis, legislation must be justified by a compelling state interest and must be narrowly tailored to effectuate only that compelling interest.[30] Article II, Section 10, of the Montana Constitution, protects an individual's right of privacy to matters which can reasonably be considered private.[31] Although Montana's constitutional right of privacy cannot protect something that is not a private matter,[32] the Montana Supreme Court has long recognized that the privacy interests concerning a person's medical information implicate Article II, Section 10, of the Montana Constitution.[33]

¶ 29 Montanans' fundamental right of individual privacy is not inviolate. When an injured worker files a workers' compensation claim, he or she relinquishes privacy rights to all medical records and information which are relevant to the claim.[34] Malcomson acknowledges that the State has a compelling interest in the orderly administration of its workers' compensation laws and that as part of such administration, insurers have the

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[28] §§ 39-71-604(2) and 50-16-527(4), MCA.

[29] Opening Brief at 2, 7.

[30] *Gryczan*, 283 Mont. at 449, 942 P.2d at 122. (Citations omitted.)

[31] *Hastetter v. Behan*, 196 Mont. 280, 283, 639 P.2d 510, 513 (1982).

[32] *Hastetter*, 196 Mont. at 282, 639 P.2d at 512.

[33] *See, e.g., State v. Nelson*, 283 Mont. 231, 241, 941 P.2d 441, 447-48 (1997).

[34] *Thompson v. State*, 2005 MTWCC 53, ¶ 9.

right of access to a claimant's relevant medical information.[35] However, Malcomson argues that the State does not have a compelling interest in allowing private insurers or their agents to engage in private communications with a claimant's healthcare providers without prior notice to the injured worker or her representative.[36] She contends:

> The fact that private insurers would like such access in the interest of efficiency and administrative convenience does not establish a compelling state interest. Unfettered private communications with a claimant's healthcare providers invade an individual's privacy solely in the interest of the private insurer and without any of the safeguards associated with traditional methods for discovery of private information such as notice and opportunity to object, *in camera* review, protective orders, etc. As such, [§§ 39-71-604(3) and 50-16-527(5), MCA,] are not narrowly tailored to accommodate the state's interest in permitting insurers' access to relevant medical information and exceed the right of privacy guaranteed to Montana citizens under Article II, § 10 of the Montana Constitution.[37]

¶ 30 Sections 39-71-604(3) and 50-16-527(5), MCA, were enacted under Senate Bill 450 and passed by the 2003 Legislature. As I previously noted in *Thompson v. State*, the legislative history does not offer much insight regarding the bill's purpose as it pertains to these specific sections.[38] In *Thompson*, the petitioners submitted a Fiscal Note which Malcomson also submits in support of her present motion. Malcomson points out that the Fiscal Note contains a "passing reference" to the bill allowing for private communication of medical information between the insurer and the healthcare provider and justifies the method of access by asserting that "the proposal will make the process more efficient, and thereby reduce costs. The more quickly the insurer can receive information on the status of the Claimant, the more quickly they can authorize certain procedures to hasten the process."[39] Malcomson argues that no evidence supports the notion that *ex parte* communications are more efficient, but in any event,

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[35] Opening Brief at 6.

[36] *Id.*

[37] Opening Brief at 12-13.

[38] *Thompson,* 2005 MTWCC 53, ¶ 5.

[39] Opening Brief at 12; *see* Ex. 27 to Opening Brief.

the standard is whether the statute is narrowly tailored to provide the least restrictive means of access[40] – not whether it is the fastest means of access.[41]

¶ 31 Prior to the 2003 amendments, private communications between insurers and healthcare providers were prohibited. The Montana Supreme Court has previously held that, even if the physician-patient privilege has been waived, the rules of discovery do not permit private interviews between counsel for one party and possible adversarial witnesses.[42] In *Jaap v. District Court*, the court noted that, if a party were allowed to privately interview an adverse witness, "the sanctions and protections which are available under the Montana Rules of Civil Procedure for ordinary methods of discovery become unavailable . . . ."[43]

¶ 32 Later, citing *Jaap*, the Montana Supreme Court held in *Linton v. City of Great Falls* that in a workers' compensation claim, no physician-patient privilege exists and an insurer is entitled to relevant healthcare information. However, the court held that the WCA did not contemplate private interviews without the knowledge or opportunity of the claimant to be present; a personal interview between an insurer and the claimant's treating physician must be done openly to allay any suspicion that something is available to one party and not to the other.[44]

¶ 33 Malcomson argues that in considering her constitutional challenge, this Court must distinguish an insurer's ***right*** of access to relevant medical information from the ***method*** of access. Malcomson alleges that the statutes at issue do not set forth a method of access for which a compelling state interest exists.[45] Malcomson argues:

> [N]othing in the legislative history explains why approximately 90 years after enactment of the WCA, during which workers' compensation insurers have had reasonable access to relevant healthcare information, it suddenly became necessary to expressly authorize private communications between the insurers and the claimant's physicians without notice to the claimant. Nor does legislative history reflect any finding by the legislature that in the absence of permitting such private

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[40] Opening Brief at 12.

[41] Reply Brief at 6.

[42] *Jaap v. District Court*, 191 Mont. 319, 322, 623 P.2d 1389, 1391 (1981).

[43] *Jaap*, 191 Mont. at 323, 623 P.2d at 1392.

[44] *Linton v. City of Great Falls*, 230 Mont. 122, 133-34, 749 P.2d 55, 62-63 (1988).

[45] Opening Brief at 6.

communications, the insurers would somehow be denied reasonable access to relevant healthcare information.[46]

¶ 34 Malcomson contends that, as the Montana Supreme Court recognized in *Linton*, she cannot protect her right of privacy if she is excluded from communications between Liberty and her healthcare providers. She argues that no safeguards ensure protection of her right of privacy to information other than relevant healthcare information without an opportunity for her or her agent to be present during communications between the insurer and her healthcare provider. Malcomson argues that if she is excluded, it would be solely up to Liberty to decide what constitutes relevant healthcare information. Malcomson would not know what information was shared and would be unable to object if the parties exchanged information beyond the relevant healthcare information allowed by statute.[47]

¶ 35 Malcomson notes that in her case, Liberty contracted with Young to serve as Malcomson's medical case manager, and Young then made 32 telephone calls totaling 8.9 hours and made additional personal visits to Malcomson's medical providers without Malcomson's knowledge or opportunity to participate. Malcomson asserts that, since she was not present for these conversations, she has no way of knowing what was discussed, and no way to know whether the information shared was healthcare information relevant to her claim or not. Malcomson contends that while she does not know what Young may have orally communicated to Malcomson's healthcare providers, she knows that in e-mail communications with Malcomson's physical therapist, Young characterized Malcomson as taking up Young's and the physical therapist's time with repetitive information and "rambl[ings]."[48] Malcomson argues that Young's attempts to cast her in a negative light with one of her medical providers can only be viewed as an attempt to negatively influence the treating provider – a situation which would not occur if Malcomson or her agent were included in communications between the insurer and the provider. Malcomson further alleges that it is inaccurate to characterize Young's activities regarding her claim as simply "expedited record gathering" since Young's notes indicate that she advocated for Liberty's position and directed Malcomson's treating physician regarding Malcomson's work restrictions.[49]

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[46] Opening Brief at 16.

[47] Reply Brief at 7. In *Thompson*, ¶ 23, I noted that these statutes contain no procedural safeguards regarding how much, if any, of these *ex parte* communications are documented.

[48] Opening Brief at 9-10.

[49] Opening Brief at 17.

¶ 36 Malcomson further argues that "relevant healthcare information" is defined in a way which does not provide any objective standard or guidelines by which legal relevance can be determined, leaving relevancy to the subjective determination of the claims adjuster and the claimant's medical provider.[50] Malcomson notes that "relevance" is not a medical term, but rather is a legal concept. She argues that healthcare providers cannot be expected to make a legal determination as to what medical information falls within the legal definition of relevancy.[51] Malcomson argues that private insurers' desire for *ex parte* access to a claimant's healthcare providers "in the stated interest of efficiency and administrative convenience" does not establish a compelling state interest. Malcomson contends that these private communications invade a claimant's privacy solely in the insurer's interest and without any discovery safeguards.[52]

¶ 37 Liberty alleges that it is more efficient for an insurer to communicate *ex parte* with a claimant's healthcare providers. Liberty admits, however, that Malcomson's treating physician opined, "it's a lot more efficient and easy on everybody if we're all in the same room at the same time."[53] Malcomson replies that Liberty does not contend that allowing it to engage in *ex parte* communications with her healthcare providers is the least restrictive means to provide relevant healthcare to the insurer; it only argues that it is the fastest means.[54] Malcomson argues that her treating physician's testimony demonstrates that, "allowing everyone to participate in the discussions is actually the most efficient and least problematic way to discuss relevant healthcare information."[55]

¶ 38 Liberty further responds that relevant healthcare information is "a very broad concept that is best left to the expert medical judgment of the health care provider who is providing the information."[56] Liberty argues that §§ 39-71-604(3), and 50-16-527(5), MCA, pass constitutional muster because the statutes allow the insurer or its representative to discuss only relevant healthcare information *ex parte* with a healthcare provider. Liberty contends, "The statutes only apply to relevant health care information.

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[50] *Id*.

[51] Reply Brief at 7.

[52] Reply Brief at 9.

[53] Response Brief at 15, quoting deposition of Michael Woods, M.D., at 31.

[54] Reply Brief at 6.

[55] Reply Brief at 8.

[56] Response Brief at 12.

What can be narrower than that?"[57] The difficulty with Liberty's position is that – as Liberty itself admits – the statutory definition of what constitutes relevant healthcare information is very broad.

¶ 39 In *Thompson*, I hypothesized that under this broad definition of relevancy, an insurer could inquire into a claimant's history of mental illness, no matter how remote, since a claimant's mental health might affect his or her recovery. It would also allow an insurer to inquire into a claimant's medical history of unrelated conditions simply because those conditions involve the same body part.[58] I further speculated that the definition of relevant healthcare information leaves it to the insurer's sole discretion to determine what healthcare information is "similar" enough to be discoverable.[59] Since issuing my ruling in *Thompson*, it has become apparent that these concerns are more than hypothetical.

¶ 40 In *Dewey v. Montana Contractor Compensation Fund*, the claimant (Dewey) sought treatment for wrist pain following two industrial accidents in 2007. Virtually Dewey's entire medical history was then obtained and reviewed because the claims adjuster considered it to be relevant to his wrist claim.[60] The claims adjuster denied Dewey's request for authorization for carpal tunnel surgery and arranged for Dewey to undergo an independent medical examination (IME) for his wrist complaints. The IME physician was provided with Dewey's medical records dating back to the 1970s.[61] Among other items, these medical records included a treatment note for a bout of pneumonia Dewey suffered in 1970 and a sore throat in 1974.[62] The IME physician testified that it was his opinion that carpal tunnel syndrome is never caused by work-related activities except in cases of extreme repetitive motion with vibration, which Dewey's job activities did not entail. Nevertheless, the IME physician found it appropriate and important to include in his report such details as: Dewey was "born illegitimately"; Dewey felt suicidal after his grandfather's death several years before the onset of his wrist problems; and Dewey's father was a drug user.[63] The IME physician testified that he believed these details were relevant to Dewey's carpal tunnel syndrome claim because they spoke to a certain "social chaos" in Dewey's life. When asked

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[57] Response Brief at 11.

[58] *Thompson*, ¶ 11.

[59] *Id.*

[60] 2009 MTWCC 17.

[61] *Dewey*, ¶¶ 24-25.

[62] *Dewey*, ¶ 27.

[63] *Dewey*, ¶ 28.

whether the social chaos related to Dewey's veracity, the IME physician testified, "Yeah, I guess so."[64]

¶ 41 Certainly, *Dewey* represents one of the more egregious misuses of irrelevant healthcare information; and it bears noting, as I did in *Thompson*, that I do not impute ill intent to every claims adjustor, most of whom are simply trying to obtain ***relevant*** healthcare information to adjust the claim. *Dewey* illustrates, however, the peril in allowing unfettered access to a claimant's healthcare providers with no check to ensure that the information communicated is relevant. Under the challenged statutes, not only is a claimant unable to object to the sharing of arguably irrelevant information, he or she may never learn what information has been shared. In the case before me that is all Malcomson sought – an opportunity to be apprised of the communications with her treating physician and to object, if necessary, to the sharing of irrelevant information. As written, these statutes are not narrowly tailored to effectuate only that compelling interest the State has in the orderly administration of the workers' compensation process. Rather, they sacrifice a claimant's ability to protect his or her constitutional right of privacy in exchange for an arguably more efficient exchange of information between the insurer and the claimant's healthcare providers. I therefore conclude that, as applied to Malcomson's case, the statutes at issue unconstitutionally violate her right of privacy under Article II, Section 10, of the Montana Constitution.

¶ 42 Liberty further argues that, if this Court concludes these statutory provisions are unconstitutional, "then the only remedy is nondisclosure of relevant health care information" which will "shut down the entire workers' compensation system."[65] Liberty, as an intervenor, raised this same argument when it moved for reconsideration in *Thompson*. In the Order denying Liberty's motion, I held:

> Remedies aside from "nondisclosure" are included in the annotations to Mont. Const., Art. II, § 10 . . . . Moreover, contrary to [Liberty's] apocalyptic scenario that the only possible remedy is nondisclosure and the resulting "shut-down of the workers' compensation system in Montana," the Court notes that the statutory subsections at issue in this case were enacted in 2003, prior to which the workers' compensation system in Montana did not shut down just as it has not shut down in the months since the Court issued its original Order.[66]

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[64] *Dewey*, ¶ 29. (Emphasis omitted.)

[65] Response Brief at 6.

[66] *Thompson v. State*, 2006 MTWCC 19, ¶ 24. (Emphasis removed.)

¶ 43 Notably, the workers' compensation system likewise did not shut down from the time I issued *Thompson* until it was reversed on procedural grounds. It also bears reiterating that in the present case, Malcomson is not seeking the nondisclosure of relevant healthcare information. To the contrary, Malcomson is seeking only a means to ensure that the healthcare information disclosed is, in fact, relevant.

Due Process

¶ 44 Malcomson further argues that §§ 39-71-604(3) and 50-16-527(5), MCA, unconstitutionally violate her right to due process under Article II, Section 17, of the Montana Constitution, and under the Fifth and Fourteenth Amendments to the United States Constitution. Since I have concluded that these statutes violate her right of privacy under Article II, Section 10, of the Montana Constitution, I need not reach these additional constitutional arguments.

Attorney Fees and Costs

¶ 45 Malcomson argues that she is entitled to her attorney fees and costs under the private attorney general doctrine. Malcomson asserts that the doctrine, as set forth in *Montanans for Responsible Use of School Trust v. State ex rel. Board of Land Commissioners*,[67] applies in the present case.[68]

¶ 46 Liberty responds that Malcomson waived her claim for attorney fees under a previously filed stipulation for dismissal.[69] Malcomson replies that she waived her right to pursue attorney fees and costs against Liberty, but alleges that in doing so, she did not waive her right to pursue recovery of fees under the private attorney general doctrine.[70]

¶ 47 The parties filed with the Court a Stipulation for Judgment and Dismissal with Prejudice, in which the parties stipulated:

> Petitioner waives her claim for attorney fees or a penalty with regards [to] the medical benefit dispute. However, Petitioner's attorney hereby asserts

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[67] *Montanans for Responsible Use of School Trust*, 1999 MT 263, 296 Mont. 402, 989 P.2d 800.

[68] Opening Brief at 19-20.

[69] Response Brief at 19.

[70] Reply Brief at 14.

a *Lockhart* lien on any and all medical benefits that may be paid as a result of this Court's decision.[71]

¶ 48 The Court issued an Order in accordance with the parties' stipulation. The Order states that the parties are "settling on a disputed liability basis the issues of attorneys[']fees and penalty, exclusive of *Lockhart* fees" and further provides, "Each party is responsible for payment of its own attorney fees."[72]

¶ 49 Neither the stipulation nor the Order specifies that Malcomson intended to waive only her entitlement to pursue attorney fees under §§ 39-71-611, -612, MCA. Rather, these filings state that Malcomson waived her right to pursue a claim for attorney fees against Liberty. Malcomson did not reserve the right to pursue a claim for attorney fees under one avenue while closing another. I therefore conclude that in entering this stipulation, Malcomson waived her right to pursue attorney fees against Liberty in this matter.

ORDER

¶ 50 Sections 39-71-604(3) and 50-16-527(5), MCA, unconstitutionally violate Petitioner's right of privacy as applied to the facts of this case.

¶ 51 Petitioner's motion for summary judgment is **GRANTED**.

¶ 52 Petitioner is not entitled to her attorney fees.

¶ 53 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 25th day of February, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Stacy Tempel-St. John
Larry W. Jones
Submitted: March 17, 2010

[71] Stipulation for Judgment and Dismissal with Prejudice at 2, Docket Item No. 17.

[72] Order, Judgment and Dismissal with Prejudice, Docket Item No. 18.