Larry W. Jones
Law Office of Jones & Garber
An Insurance Company Law Division
700 SW Higgins Avenue, Suite 108
Missoula, MT 59803-1489
(406) 543-2433
(406) 829-3436 (FAX)
Attorney for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

MARK MATHEWS, Petitioner, vs. LIBERTY NORTHWEST INSURANCE CORP., Respondent/Insurer	)	WCC No. 2001-0294 **LIBERTY'S BRIEF REGARDING COMMON FUND ATTORNEY FEES AND RETROACTIVE APPLICATION**

Procedural History

Mathews filed a Petition for Hearing with the Court on February 28, 2001. In his prayer for relief at ¶2 he requested attorney fees pursuant to MCA 39-71-611.

On or about June 14, 2001, Liberty filed its Motion for Summary Judgment. Mathews opposed the motion.

The Court in its SUMMARY JUDGMENT filed February 1, 2002, 2002 MT WCC 6, held Mathews claim was barred by MCA 39-71-401(3)(c) (1999). Mathews timely appealed from this judgment on February 26, 2002.

The Montana Supreme Court in its decision of April 29, 2003, Mathews v. Liberty Northwest, 2003 MT 116, reversed this Court and remanded the case for further proceedings consistent with its opinion.

After remand, Mathews on or about May 7, 2003, filed a pleading captioned Motion for Class Certification and a pleading captioned Class Action Petition for Hearing.

Also after the Supreme Court decision, Mathews served on or about May 7, 2003, a pleading captioned Motion for Common Fund/Class Action Attorney Fee Lien.

On May 13, 2003, Liberty served its Brief and Opposition to Motion for Class Certification and its BRIEF IN OPPOSITION TO MOTION FOR COMMON FUND/CLASS ACTION ATTORNEY FEE LIEN.

Liberty in a letter dated December 16, 2003, sent Mathews's attorney twenty pages of claim file numbers identified by IT personnel in Portland, Oregon, that identified claims, based by the computer code used to identify denials, that had been denied.

COMMON FUND

Jurisdiction-Statutory

The Court does not have jurisdiction to award common fund attorney fees.

> "The jurisdictional parameters of the Workers' Compensation Court are defined by statute as interpreted, from time to time, by the decisions of this Court. Section 39-71-2905, MCA, restricts the jurisdiction of the Workers' Compensation Court to disputes concerning 'any benefits under Chapter 71' of Title 39."

Liberty Northwest Ins. Corp. v. State Compensation Ins. Fund, 1998 MT 169, ¶11.

The statute cited above by the Court provides in pertinent part "The penalties and assessments allowed against an insurer under Chapter 71 are the exclusive penalties and assessments that can be assessed by the workers' compensation Judge against an insurer for disputes arising under Chapter 71."

The Court's statutory grant of jurisdiction to award attorney fees is set forth at MCA §§39-71-611, 612. Those statutes do not authorize this Court to assess attorney fees or penalize an insurer by awarding attorney fees under a common fund attorney fee theory.

While it might be said that the Montana Supreme Court has this jurisdiction to award common fund attorney fees, it did not do so in this case.

To award Mathews common fund attorney fees, the Court would have to violate the most fundamental rule of statutory construction: "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what

has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will effect to all." MCA 1-2-101.

Jurisdiction-Pleadings

The issue as frame acknowledges common fund attorney fees were not plead initially.

> "A district court does not have jurisdiction to grant relief outside of the issues presented by the pleadings unless the parties stipulate that other questions be considered or the pleadings are amended to conform to the proof." *Ryan v. City of Bozeman* (1996), 279 Mont. 507, 511, 928 P.2d 228, 230 (citing *Old Fashion Baptist Church v. Montana Dep't of Revenue* (1983), 206 Mont. 451, 457, 671 P.2d 625, 628).

H-D Irrigating, Inc. v. Kimble Properties, Inc., 301 Mont. 34, 8 P.3d 95, 2000 MT 212, at ¶22.

Because Mathews did not plead common fund in his original petition, his claim for common fund attorney fees is now barred.

Due process

Mathews's failure to plead to common fund attorney fees in his petition and the Pretrial Order denied LNW due process.

> Article II, Section 17 of the Montana Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law." Due process requires both notice of a proposed action and the opportunity to be heard. *Pickens v. Shelton-Thomas*, 2000 MT 131, ¶ 13, 300 Mont. 16, ¶ 13, 3 P.3d 603, ¶ 13. Montana Media is required to demonstrate that it: (1) has a property interest; and (2) the procedures in place provide an inadequate protection of that property interest.

Montana Media, Inc. v. Flathead Co., 314 Mont. 121, 63 P.3d 1129, 2003 MT 23, at ¶65.

Notice and the opportunity to be heard is not just an academic exercise in this case. Had LNW been aware claimant was seeking common fund attorney fees, LNW would have had the option of trying to settle this case, presumably on a disputed liability basis, and thereby avoid the legal and administrative entanglements that are inherent in common fund claims. Also it would have had the opportunity to raise the defense of this Court's lack of jurisdiction to award common fund attorney fees and, all other things being equal, have had it ruled on initially rather than having to have yet another judicial proceeding and the administrative entanglements necessitated in common fund cases.

RES JUDICATA

Liberty is mindful that the Court has not been receptive to LNW's res judicata arguments in the past. But LNW must preserve its record for appeal. This Court's discussion of res judicata in Cheetham v. Liberty Northwest, 2001 MTWCC 65, Decision and Judgment, at ¶27-28 succinctly sets forth the law of res judicata.

No one seriously can contend Mathews could not have raised the common fund attorney fee issue, assuming the Court rejects LNW's initial jurisdictional argument, given the Montana Supreme Court decision in Murer v. State Compensation Mut. Ins. Fund, 283 Mont. 210, 942 P.2d 69 (1997) establishing the common fund doctrine.

This Court's discussion at ¶29 of Cheetham concisely explains the unique nature of Workers' Compensation Court proceedings: "The difficulty in applying the 'opportunity to litigate' doctrine to the present case arises from the practice of this Court. In cases where an insurer has denied liability, the Court typically considers only the issue of liability. In denied liability cases, the amount of benefits due is typically an arithmetical computation not requiring judicial intervention. . . ."

It is not as though Mathews was unfairly caught unaware of the possibility of claiming common fund attorney fees. If he prevailed, he had to know that he would get more money, and, if the case were applied retroactively, there would be a common fund created just as occurred in Murer. Therefore the rational in Cheetham does not apply in the instant case. Liberty respectfully requests the Court to follow its rationale in Cheetham while at the same time recognizing the implied exception to the general non-application of the rule of res judicata in the Montana Workers' Compensation Court, i.e., a benefit dispute based on statutory interpretation which could result in increased benefits to a claimant and, and if retroactively applied, to all those similarly situated.

Equitable estoppel

The doctrine of equitable estoppel is concisely set forth in Selley v. Liberty Northwest Ins. Corp.:

> ¶9. As a general matter, estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse. Smith v. Krutar (1969), 153 Mont. 325, 332, 457 P.2d 459, 463. The doctrine of equitable estoppel is grounded in both statute and case law. By statute, the following presumption is deemed conclusive:
>
> the 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 [or she] 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(1), MCA.
>
> ¶10. Furthermore, we have held that six elements are necessary in order to establish an equitable estoppel claim: (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse. See Dagel v. City of Great Falls (1991), 250 Mont. 224, 234-35, 819 P.2d 186, 192-93; Elk Park Ranch, Inc. v. Park County (1997), 282 Mont. 154, 165, 935 P.2d 1131, 1137-38. A party must establish all six elements before the doctrine can be invoked. Billings Post No. 1634 v. Montana Dep't of Revenue (1997), 284 Mont. 84, 90, 943 P.2d 517, 520. Equitable estoppel must be established by clear and convincing evidence. Beery v. Grace Drilling (1993), 260 Mont. 157, 163, 859 P.2d 429, 433.
>
> ¶11. The doctrine of equitable estoppel is designed to prevent one party from unconscionably taking advantage of a wrong while asserting a strict legal

right, and will be invoked where "justice, honesty, and fair dealing" are promoted. In re Marriage of K.E.V. (1994), 267 Mont. 323, 331, 883 P.2d 1246, 1251. At this point, it is necessary to address Liberty's view that the doctrine of equitable estoppel has no application to the facts of this case because it engaged in no "wrongful conduct." The WCC took a similar position:

The doctrine of equitable estoppel precludes a party from profiting from its wrong . . . . Even without consideration of the specific elements of the doctrine, [Selley] has failed to demonstrate any wrong by Liberty. At best she has demonstrated that Liberty belatedly learned that Dr. Nelson did not have admitting privileges and therefor [sic] did not satisfy the definition of a treating physician.

¶12. Classically, the function of the doctrine of equitable estoppel is the prevention of fraud, actual or constructive. See 28 Am.Jur.2d Estoppel and Waiver § 28, at 630 (1966); 2 Joseph Story, Commentaries on Equity Jurisprudence § 1543, at 780 (Jairus W. Perry ed., rev.12th ed. 1984). However, this does not imply that the party sought to be estopped must have possessed an actual intent to deceive, defraud or mislead the other party at the inception of the transaction. Indeed, "[t]he fraud may, and frequently does, consist in the subsequent attempt to controvert the representation and to get rid of its effects, and thus to injure the one who has relied on it." 28 Am.Jur.2d Estoppel and Waiver § 43, at 651 (1966).

¶13. Under modern usage, the meaning of "fraud" upon which an equitable estoppel action is premised is that it would be unconscionable or inequitable to allow the party sought to be estopped to repudiate or set up claims inconsistent with its prior conduct and, thus, to commit "a fraud upon the rights of the person benefited by the estoppel." 3 John Norton Pomeroy, A Treatise on Equity Jurisprudence § 803, at 185-86 (Spencer W. Symons ed., 5th ed. 1941). To do so would permit a fraudulent "purpose" or "result" to occur which would be repugnant to equity. See 28 Am.Jur.2d Estoppel and Waiver § 43, at 651 (1966). Therefore, when comparing the many permutations of equitable estoppel, it has been said that the doctrine rests upon the following general principle: When one of two innocent persons--that is, persons each guiltless of an intentional, moral wrong--must suffer a loss, it must be borne by that one of them who by his [or her] conduct--acts or omissions--has rendered the injury possible.

3 Pomeroy, Equity Jurisprudence § 803, at 187.

> ¶14. Today, we apply the doctrine of equitable estoppel to prevent an inequitable result. We conclude, as analyzed below, that Selley has established an equitable estoppel claim and, therefore, that Liberty is estopped from asserting § 39-71-116(30), MCA (1993), as a defense to reimbursing Dr. Nelson. We address each of the six elements in turn.

Selley v. Liberty Northwest Ins. Corp., 2000 MT 76, ¶9-14.

Liberty relied to its detriment on Mathews's representation in his pleadings that he was proceeding only on his own behalf. The detriment is that had he plead common fund attorney fees, LNW could have made the decision to settle, presumably on a disputed liability basis, for possibly less than the full amount and certainly without the current legal and administrative entanglements associated with common fund claims.

The remaining five elements of the doctrine are established as follows:

(1) Mathews was silent about his intent to claim common fund attorney fees.

(2) This fact must necessarily be imputed to him.

(3) Liberty can rely only on the pleadings, such as the Pretrial Order, which supercede all other pleadings and framed the issues for the Court.

(4) It was both natural and probable that Liberty would act on the representation that he was seeking only fees for himself, as the issue was framed.

(5) Liberty relied on Mathews's representation that he was seeking only attorney fees for himself.

(6) This element is discussed immediately above.

Also see Rasmussen v. Heebs Food Center, 270 Mont. 492, 893 P.2d 337, 339-340 (1995)(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.)

In its original decision, Mathews v. Liberty Northwest, Decision and Judgment, 2001 MTWCC 36, in its judgment the Court denied Mathews's request for attorney fees. That issue was not raised on appeal. Mathews v. Liberty Northwest, 2003 MT 80. Therefore, Mathews's request for common fund attorney fees properly falls under Heisler v. State Fund, 198 MTWCC 25, ¶31 (Petitioner had fair and full opportunity to pursue claim for attorney fees and chose not to do so and on appeal did not raise the issue resulting in the law of the case.)

RETROACTIVE APPLICATION

The leading case on retroactive application of a Supreme Court decision is Ereth v. Cascade County, 2003 MT 328, ¶29.

> In *Riley v. Warm Springs State Hosp.* (1987), 229 Mont. 518, 748 P.2d 455, we set forth the three factors to be considered in determining whether or not to apply a judicial decision retroactively. If nonretroactive application is sought, "[f]irst, the ruling to be applied nonretroactively must establish a new principle of law either by overruling precedent or by deciding an issue of first impression whose result was not clearly foreshadowed. Next, the new rule must be examined to determine whether retroactive application will further or retard its operation. Third, the equity of retroactive application must be considered." *Riley*, 229 Mont. at 521, 748 P.2d at 457. All three of these factors weigh in favor of nonretroactive application of this new rule in our jurisprudence.

Clearly Foreshadowed

The issue in the instant case was a matter of first impression for the Supreme Court (in that this case and Wilde v. State Fund were combined for oral argument). It was not a case of first impression for this Court. Bouldin v. UEF, WCC No. 9704-7742, Decision and Judgment (October 22, 1997) accord American Seamless Rain Gutters v. Independent Contractor Central Unit, 2001 MT WCC 4, ¶12.

In the face of clear Workers' Compensation Court precedent Mathews brought his case. How can the decision in Mathews have been clearly foreshadowed when this Court had ruled twice that the DOLI exemption barred a claimant from benefits?

Furthering rule's operation

Retroactive application of Mathews will not further the rule's application. The Supreme Court in Mathews created a new insurer liability that this Court had not anticipated. Insurers are now on notice that they can not deny claims based on the DOLI exemption. Prospective application of the rule will not weaken the rule or retard its operation.

Substantial inequity

The benefits to which a claimant is entitled are determined by the statutes in effect on the date of injury. Buckman v. Montana Deaconess Hosp., 224 Mont. 318, 730 P.2d 380 (1986). Therefore, the Buckman rule, which has not been overruled, would have to be

abandoned in all statutory interpretation cases which increase insurer liability. The Montana Supreme Court has never so held.

The Buckman rule is intended to provide stability and certainty in the Montana Workers' Compensation system and it would be unfair to disrupt both by increasing insurer liability retroactively when LNW had every right to rely on the Buckman rule in this case and all cases that predate Mathews.

CONTRACT

"The basis for workers' compensation is a contract of hire either express or implied." Buckman v. Montana Deaconess Hospital, 224 Mont. 318, 325-326 (1996). Contracts for hire may be oral or written. The retro-application of Mathews raises the question of how far back in time it could be applied. That is, Liberty's contractual obligations to a claimant, under which work comp benefits are paid, could not exceed the contract period of the obligation.

Liberty's contractual obligations under an oral contract for hire is three years and for a written contract of hire is eight years. MCA 27-2-202.

Therefore, if Mathews is applied retroactively, every claimant and the time of injury employer would have to be located to determine if the claimant was working under an oral or written contract of hire. If the contract of hire is oral, then only those claimants with dates of injury three years prior to this Court's decision may benefit from it. There is an eight year period for those with a written contract of hire.

If the Court were simply to ignore this contract principal and apply Mathews retroactively uniformly and irrespective of the type of contract of hire, the Court's ruling would impermissibly impair Liberty's contract rights. Synek v. State Compensation Insurance Fund, 272 Mont. 246, 252-253 (1995).

If the Court were to require Liberty to undertake this identification of claimant's employers, it would be both inequitable and unduly burdensome because of the resources it would take to locate the parties, if they could be located.

If the Court were to apply the Mathews decision retroactively there are additional issues relating to the types of cases that would fall under the retroactive application and how far back the Mathews decision could be applied retroactively.

The categories of cases that theoretically could be involved in this proceeding are claims that have settled and claims that have not settled.

SETTLED CASES.

This category is the easiest one to deal with because of the abundance of case law. In the leading case, Kienas v. Peterson, (1981), 191 Mont. 325, 328, 624 P.2d 1, the Montana Supreme Court held: "The full and final compromise settlement entered into by the parties is a contract. The law of contracts applies in construing and determining the validity and **enforceability** of the settlement agreement." (Emphasis added.)

In determining whether a workers' compensation settlement can be reopened, the Court, without hesitation, looked to contract law. Citing § 28-2-401, MCA, the Court in Kienas held that a mutual mistake of material fact can be the basis. Id. at 329. Citing § 28-2-410, MCA, the Court in Brown v. Richard A. Murphy, Inc., (1993), 261 Mont. 275, 280-281, 862 P.2d held that a mutual mistake of law can be the basis for re-opening a workers' compensation settlement.

In the same way that it looked to contract law to determine the grounds for reopening work comp settlements, the Court applied the two year statute of limitation for setting aside work comp settlements. Rath v. St. Labre Indian School, (1991), 249 Mont. 433, 439-440, 816 P.2d 1061. Specifically, the Court in Rath held that "the statute of limitations begins to run when the facts are such that the party bringing the action would have discovered the mistake had he or she exercised ordinary diligence." *Id.*

UNSETTLED CASES.

In this category of cases the Court has given clear guidance regarding the body of law to look to in evaluating the instant case. In the seminal decision Buckman v. Montana Deaconess Hosp., (1996), 224 Mont. 318, 321, the Court held: "Workers' compensation benefits are determined by the statutes in effect as of the date of injury."

The dispute in Buckman was over a lump sum conversion under an amended statute and whether the amended statute could be applied retroactively. Buckman, 224 Mont. at 320. In resolving the constitutional challenge, the Court characterized the issue before it as follows:

> We now turn our attention to the contract clause challenge before us. In the past we have generally interpreted the contract clauses found in Art. II, § 31, 1972 Mont. Const. and Art. I, § 10(1), United States Constitution as interchangeable guarantees against legislation impairing the obligation of contracts. *Neel v. Federal Savings and*

Loan Assoc. (Mont.1984), 675 P.2d 96, 103. Consistent with our intention to initially examine state grounds in an effort to resolve the issue, **we turn to prior Montana contract clause case law for independent interpretation of our own prohibition of impairment of contract**. Federal cases cited are relied on for their analytical persuasiveness but in no way mandate our decision.

The Montana Constitution states, "No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature." Art. II, § 31, 1972 Mont. Const. We have construed the two contract clauses interchangeably, and have cited United States Supreme Court opinions to test the validity of Montana legislation under both contract clauses. *Neel*, 675 P.2d at 103.

The basis for Workers' Compensation is a contract of hire either express or implied. Section 39-71-117, MCA; § 39-71-118, MCA; 1C Larson Workmen's Compensation Law § 47.10 (1986). **This Court, as well as courts of other states have held that Workers' Compensation is based on contract theory.** *Estate of Baker* (1977), 222 Kan. 127, 563 P.2d 431; *Harris v. National Truck Service* (1975), 56 Ala.App. 350, 321 So.2d 690; *Spengler v. Employers Commercial Union and Insurance Co.* (1974), 131 Ga.App. 443, 206 S.E.2d 693; *Gaston v. San Ore Construction Co.* (1970), 206 Kan. 254, 477 P.2d 956; *Nadeau v. Power Plant Engineering Co.* (1959), 216 Or. 12, 337 P.2d 313; *Morgan v. Industrial Accident Board* (1956), 130 Mont. 272, 300 P.2d 954.

This Court has assumed for a number of years that the Workers' Compensation statutes in effect on the date of injury **set the contractual rights between the parties**. *Trusty*, 681 P.2d at 1085. This is consistent with the provisions of the Workers' Compensation Act that the term employee or worker means "each person in this state ... who is in the service of an employer ... under an appointment or contract of hire, express or implied, oral or written." Section 39-71-118, MCA.

. . . .

> **The question becomes whether the statute at issue in this case constitutes an impairment of the obligation of contract.**

Buckman, 224 at 325-326 (emphasis added).

As in Buckman, the Court has consistently held that rights between the parties in the workers' compensation arena are contractual rights.

> This Court has assumed for a number of years that the Workers' Compensation statutes in effect on the date of injury set the **contractual rights between the parties.**" *Buckman v. Montana Deaconess Hosp.* (Mont.1986), 730 P.2d 380, 384, 43 St.Rep. 2216, 2222 (citing *Trusty v. Consolidated Freightways* (1984), 210 Mont. 148, 681 P.2d 1085, 1087, 41 St.Rep. 973, 975). Both the United States and Montana Constitutions prohibit state laws impairing the obligation of a contract. Art. I, Sec. 10, U.S. Const; and Art. II, Sec. 31, Mont. Const.

Carmichael v. Workers' Compensation Court, (1988), 234. Mont. 410, 413, 763 P.2d 1122 (emphasis added). The dispute in *Carmichael* involved the retroactive application of the newly enacted statutes governing workers' compensation mediation.

> On appeal, Carmichael argued that retroactive application of the mediation requirement unconstitutionally impaired his contractual rights by significantly delaying his right to petition the Workers' Compensation Court. We observed that Carmichael's contractual workers' compensation rights vested on the date of his injury and entitled him, as of that date, to directly petition the Workers' Compensation Court. *Carmichael*, 763 P.2d at 1124. The mediation statute subsequently enacted by the legislature required exhaustion of the mediation procedure prior to filing a petition in the Workers' Compensation Court, a delay of up to 100 days. Accordingly, **we held that retroactive application of the mediation statute to Carmichael's work- related injury substantially and impermissibly impaired his vested contractual rights**. *Carmichael*, 763 P.2d at 1126.

Synek v. State Compensation Ins. Fund, (1995), 272 Mont. 246, 252-253 (emphasis added).

Retroactive application of Mathews to unsettled claims invokes the contract provisions of the Montana Code Annotated, which include statutes of limitations, under the above case law.

STATUTES OF LIMITATION.

The following statutes govern the commencement of actions based on contract and for relief on the grounds of mistake. Section 27-2-102(2), MCA, provides:

> Unless otherwise provided by statute, the period of limitation begins when the claim or cause of action accrues. Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation.

Section 27-2-202, MCA, further provides in relevant part:

> (1) The period prescribed for the commencement of an action upon any contract, obligation, or liability founded upon an instrument in writing is within 8 years.
>
> . . . .
>
> (3) The period prescribed for the commencement of an action upon an obligation or liability, other than a contract, account, or promise, not founded upon an instrument in writing is within 3 years.

With regard to actions for relief on the ground of mistake, § 27-2-203, MCA, provides:

> The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Section 27-2-211, MCA, further provides:

> (1) Within 2 years is the period prescribed for the commencement of an action upon:
>
> . . .
>
> (c) **a liability created by statute** other than:
> (i) a penalty or forfeiture; or

(ii) a statutory debt created by the payment of public assistance.

(Emphasis added.)

The statute of limitation set forth at § 27-2-203, MCA, was addressed by the Court in D'Agostino v. Swanson, (1990), 240 Mont. 435, 443:

> . . . [T]he statute of limitations for actions based on mutual mistake does not depend on actual discovery of the alleged mistake before it begins to run. Rather, the limitations period begins to run when the facts are such that the party bringing the action would have discovered the mistake had he exercised ordinary diligence. *Gregory v. City of Forsyth* (1980), 187 Mont. 132, 136, 609 P.2d 248, 251. Therefore, when it ruled upon the statute of limitations issue, the District Court was **not required to determine at what point the D'Agostinos obtained actual knowledge of the encroachment.**

(Emphasis added.)

The Montana Supreme Court and this Court have given additional guidance regarding when a statute of limitations begins to run and what role ignorance of the facts and/or the law plays. In Bennett v. Dow Chemical Company, (1986), 220 Mont. 117, 120-121, the Supreme Court stated:

> This Court follows the general rule that the fact that a party with a cause of action has no knowledge of his rights, or even the facts out of which the cause arises, does not delay the running of the statute of limitations until he discovers the facts **or learns of his rights under those facts.**

(Emphasis added.) In Wiard v. Liberty Northwest Ins. Corp., 2001 MTWCC 31, ¶ 13, this Court concluded as follows:

> Whether or not the claimant was "intimately familiar with the laws and regulations which comprise Montana's Workers' Compensation Act" (Brief in Opposition to Respondent's Motion for Partial Summary Judgment and in Support of Petitioner's Motion for Partial Summary Judgment at 4), **his ignorance of the law was no excuse.** *Donovan v. Graff,* 248 Mont. 21, 25, 808 P.2d 491, 494 (1991); *Rieckhoff v. Woodhull*, 106 Mont. 22, 30, 75 P.2d 56, 58 (1937). **If ignorance of the law were an excuse, laws would be applied willy-**

> **nilly depending upon the individual's legal knowledge; the result would be legal chaos and there would be no rule of law at all.**

(Emphasis added.)

If the award of common fund attorney fees are allowed retroactively and not barred by the doctrine of laches, as set forth below, then these statute of limitations should limit retroactive application. Specifically, under MCA § 27-2-211, the holding should not be applied more than two years retroactively. Alternatively if a settled case would have to be re-opened to award common fund attorney fees, then the Court's holding should not be applied more than two years retroactively under MCA § 27-2-203.

Alternatively, if the contract for hire was oral, which requires a factual determination, it should not be applied more than three years retroactively and if it were a written contract for hire then the Court's holding should not be applied more than eight years retroactively under MCA § 27-2-202.

THE DOCTRINE OF LACHES.

The doctrine of laches was summarized in Marriage of Hahn and Cladouhos (1994), 263 Mont. 315, 318, as follows:

> Section 1-3-218, MCA, provides that "[t]he law protects the vigilant before those who sleep on their rights." Laches is a concept of equity that can apply when a person is negligent in asserting a right, and can apply where there has been an unexplained delay of such duration or character as to render the enforcement of the asserted rights inequitable. *Fillner v. Richland* (1991), 247 Mont. 285, 290, 806 P.2d 537, 540. Each case must be determined on its own unique facts. *Fillner*, 806 P.2d at 540.

Claimants other than Mathews could have made the argument that he made, but chose to sleep on their rights. Under the governing case law, any claimant that would benefit by the retroactive application of the holding in Mathews needs to explain why he or she did not make the same claim Mathews did.

SUMMARY

For the reasons stated above, the decision should not be applied retroactively.

Alternatively, if it is applied retroactively, then the decision should not apply to those claims that are barred by the applicable statutes of limitation.

Alternatively, those claimants could have made the same challenge that Mathews did but declined to do so. They slept on their rights and are barred by laches.

For the reasons stated above, LNW requests that the holding in this case held to be enforceable only from the date of the Montana Supreme Court decision in this case.

DATED this 14 day of May, 2004.

Larry W. Jones
Attorney for Respondent Insurer

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2004, I served the original of the foregoing LIBERTY'S BRIEF REGARDING COMMON FUND ATTORNEY FEES AND RETROACTIVE APPLICATION first-class mail, postage prepaid, on the following:

Ms. Patricia J. Kessner — Via Fax to (406) 444-7798 and U.S. Mail
Clerk of Court
Workers' Compensation Court
P. O. Box 537
Helena, MT 59624-0537

and a copy of the same to the following:

Geoffrey C. Angel — Via Fax to (406) 585-7654 and U.S. Mail
Angel, Coil & Bartlett
125 West Mendenhall
Bozeman, MT 59715

Bradley J. Luck
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula, MT 59807-7909

Greg E. Overturf
Legal Counsel
State Compensation Insurance Fund
P. O. Box 4759
Helena, MT 59604-4759

James G. Hunt
Hunt Law Firm
P.O. Box 1711
Helena, MT 59624

Lucas J. Foust
Foust Buckley Attorneys At Law
2040 N. 22nd, Suite 2
Bozeman, MT 59718

Annie Puhrmann