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OFFICE OF
WORKER'S COMPENSATION JUDGE
HELENA, MONTANA

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Liberty Northwest adopted, implemented and enforced an operating policy to not pay totally permanently impaired workers' impairment awards. Jeremy Ruhd opposed this practice. Jeremy Ruhd sought within the time permitted for amendment of his Petition for Hearing to amend to enforce the rights of all other similarly situated Liberty Northwest' insured workers. Jeremy Ruhd is believed to be the only Liberty Northwest' insured which sought to enforce this right, and the rights of all similarly situated claimants, to be paid an impairment award in addition to the payment of permanent total disability benefits by Liberty Northwest. Liberty Northwest opposed Jeremy Ruhd's petition and motion to amend. This Court denied Jeremy Ruhd's claim and did not rule on the motion to amend. Jeremy Ruhd timely filed his appeal.

Jeremy Ruhd mailed and filed his Appellant's Brief with the Montana Supreme Court. On or near the same day the Montana Supreme Court filed its decision in *Rausch*.

The Montana Supreme Court ordered that counsel for *Rausch, Fisch and Frost* were to share equally in the reasonable attorney fees paid from the common fund for all non-participating ascertainable beneficiaries of impairment awards paid by the State Fund. *Rausch v. State Compensation Insurance Fund*, 2002 Mont. 203, 311 Mont. 210, ___ P.3d ___.

Claimants' 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*

Rausch, 2002 Mont. 203, ¶ 44, 311 Mont. 210, ¶ 44 (*emphasis added*). The common fund was the collective fund of all impairment awards withheld by the State Fund prior to the *Rausch* decision. The clearly ascertainable non-participating beneficiaries were all permanently totally disabled claimants who were denied immediate impairment awards *by the State Fund*. *Rausch, Fisch and Frost* lack standing to, through active litigation, enforce the obligation to pay impairment awards against an insurer other than the State Fund.

The issues remaining here are 1) whether a class action to enforce the decision in *Rausch* and *Ruhd* ordering the payment of impairment awards can be maintained against Liberty Northwest and 2) whether the ascertainable beneficiaries (State Fund claimants) are entitled to reimbursement of their counsel's reasonable fees as against Liberty Northwest' insureds and specifically Jeremy Ruhd?

This Court should allow Jeremy Ruhd to amend his petition to enforce the rights of all similarly situated Liberty Northwest insured workers and should grant the request to reimburse Jeremy Ruhd the costs, and reasonable attorney fees, incurred in creating the common fund of impairment awards set aside by Liberty Northwest.

Montana adopted and continues to follow the American rule which requires each party to bear their burden of attorney fees without contribution or indemnification absent a specific contractual or statutory provision to the contrary. *See Mountain West Farm Bureau Mut. Ins. Co. v. Hall*, 308 Mont. 29, 38 P.3d 825 (2001); *Smith v. Fergus County* 98 Mont. 377, 39 P.2d 193 (1934). Montana also recognized equitable exceptions to the American rule which allow for the spread of attorney fees among the parties or other non-participating beneficiaries. *Id citing Foy v. Anderson*, 176 Mont. 507, 580 P.2d 114 (1978)(affirming award of attorney fees on equitable grounds when party is "forced into frivolous lawsuit"). One of the recognized equitable exceptions to the American rule is the "common fund" doctrine which spreads attorney fees among non-participating beneficiaries of an ascertainable common fund. *Mountain West, supra*.

The "common fund" doctrine is based upon the essential premise that when a party through active litigation creates, reserves or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorney fees. *Mountain West*, 2000 Mont 314, ¶ 14, 38 P.2d at 828. The purpose of the "common fund" doctrine is to assign responsibility for reasonable attorney fees among all those who benefit from an ascertainable common fund. *Flynn v. State Compensation Insurance Fund*, 2002 Mont. 279, 312 Mont. 410, ___ P.3d ___.

The Montana Supreme Court expressly adopted the “common fund” doctrine in *Means* explaining the principles underpinning the doctrine:

The “common fund” concept provides that when a party through active litigation creates, reserves or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorney fees. The doctrine is employed to spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and the “stranger” (i.e., passive) beneficiaries do not receive their benefits at no cost to themselves.

Means v. Montana Power Co., 191 Mont. 395, 403, 625 P.2d 32, 37 (1981). The “common fund” doctrine is an equitable remedy to spread the cost, including reasonable fees, among all beneficiaries of a common fund from which the costs and reasonable fees are taken, however, this equitable remedy is not without limits. *Id.*

In the *Flynn* dissent Justice Rice articulated the limitations placed upon the applicability of the “common fund” doctrine by the express elements of the doctrine itself. Justice Rice explained that the **fund** must be **common** as between the active beneficiary, the non-participating beneficiaries and the defendant and the fee splitting must be based upon a common interest. The fund must be clearly identifiable with identifiable beneficiaries.

The underlying principle in all the cases where one has been allowed compensation out of a common fund belonging to others for expenses incurred and services rendered on behalf of the common interest **is the principle of representation or agency** . . . *The fact that one may be benefitting by an action brought by another is not by itself sufficient to justify a court in assessing costs against the one who also profits by said action.* Some contractual relation or some equitable reason sufficient to support an allowance of costs must be shown to exist to justify a court of equity in making such assessment.

Flynn, 2002 Mont. 279, ¶ 31 citing *Neal v. Stanislaus County*, 141 Cal.App.3d 534, 190 Cal.Rptr. 324 (1983)(emphasis added). The “common fund” doctrine requires a **fund common** to all those participating in the payment of fees for the purpose of a **common interest**. Justice Rice relied on the elements of the doctrine itself and clearly stated that the fact a party benefits from an action alone is not enough to impose the obligation to pay attorney fees for a beneficial decision on non-participants.

In a special concurring and dissenting opinion in *Murer* Justice Gray reached a more significant limitation applying the common fund doctrine to fees under the Workers’ Compensation Act. Justice Gray analogized this case to *Fleishemann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), and concluded as did Chief Justice Johnson in his dissent in *Hardware*, 116 Mont. 73, 148 P.2d 563 (1944), that the text of the Act should control the payment of reasonable attorney fees without deference to equity or the doctrine. The United States Supreme Court held in *Fleischmann* that equity could not expand the recovery or obligation to pay attorney fees which are expressly provided by statute. Justice Gray and past Chief Justice Johnson agreed.

The Act’s express limitations should further restrict application of the common fund.

The “common fund” doctrine equitably distributes the burden of costs, including reasonable attorney fees, among the parties and non-participating beneficiaries alike if and only if three essential elements are present. Those elements require an active beneficiary to incur disproportionate costs and reasonable fees to create, reserve or increase a fund in common with passive beneficiaries. *See Means supra*.

The United States Supreme Court first created the common fund doctrine in *Trustees v. Greenough*, 105 U.S. 527 (1881). That Court applied the common fund doctrine subsequently in several cases as an equitable remedy to require non-participating beneficiaries to pay out of the common fund costs including reasonable attorney fees. *See Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967); *Boeing Co. v. VanGemert*, 444 U.S. 472 (1980). These cases provide that when a party incurs legal fees to establish, preserve, increase or collect a common fund then the active party is entitled to reimbursement of costs, including reasonable attorney fees from the proceeds of the fund itself. *Id.*

The term “common fund” as it relates to the apportionment of attorney fees appears in the Montana Reports seventeen (17) times¹. *Means* is cited as the sentinel case which set forth the three essential elements which may justify the equitable assessment of attorney fees on non-participating ascertainable beneficiaries of a clearly identifiable common fund:

1. A party (active beneficiary) must create, reserve, or increase a common fund.
2. The active beneficiary must incur legal fees in establishing the common fund.
3. The fund must benefit ascertainable, non-participating (passive²) beneficiaries.

See Mountain West, supra citing Means, supra. *Means* reasoned that the doctrine is “rooted in the equitable concepts of quasi-contract, restitution and recapture of unjust enrichment” from the non-participating beneficiaries who will share in the common fund and as such a deduction from their share is justified. *Means*, 191 Mont. at 403, 625 P.2d at 37.

The Montana Supreme Court has applied the common fund doctrine to obligate payment of costs, including reasonable attorney fees, out of a common fund at the expense of non-participating beneficiaries in seven (7) of the fifteen (15) cases which considered the common fund doctrine. *See Flynn supra* note 1 (ordered payment of fees out of common fund created for benefit of non-participating State Fund); *Rausch supra* note 1 (ordered payment of fees out of common fund created for benefit of non-participating State Fund insured claimants); *Murer*

¹ 1. *Ruhd v. Liberty Northwest*, 2002 Mont. 290; 2. *Flynn v. State Compensation Insurance Fund*, 2002 Mont. 279, 312 Mont. 410; 3. *Rausch v. State Compensation Insurance Fund*, 2002 Mont. 203, 311 Mont. 210; 4. *Mountain West Farm Bureau Mut. Ins. Co. v. Hall*, 2001 Mont. 314, 308 Mont. 2938 P.3d 825; 5. *Montanans for the Responsible Use of the School Trust v. Board of Land Comm.*, 199 Mont. 263, 296 Mont. 402, 989 P.2d 800; 6. *Moore v. Imperial Hotels Corp.*, 285 Mont. 188, 948 P.2d 211 (1997); 7. *Murer v. State Compensation Insurance Fund*, 283 Mont. 210, 942 P.2d 69 (1997); 8. *Helena Elementary School District No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (1989); 9. *Butte-Silver Bow Local Government v. State*, 235 Mont. 398, 768 P.2d 327 (1989); 10. *Estate of S. Counts*, 217 Mont. 350, 704 P.2d 1052 (1985); 11. *Missoula High School Legal Defense Fund v. Superintendent of Public Instruction*, 196 Mont. 106, 637 P.2d 1188 (1981); 12. *Means v. Montana Power Co.*, 191 Mont. 395, 625 P.2d 32 (1981); 13. *Tuttle v. Morrison-Knudsen Co., Inc.*, 177 Mont. 166, 580 P.2d 1379 (1978); 14. *Murch v. Fellows*, 118 Mont. 461, 167 P.2d 842 (1946); 15. *Hardware Mut. Casualty Co. v. Butler*, 116 Mont. 73, 148 P.2d 563 (1944); 16. *In re Hamilton's Estate*, 96 Mont. 551, 33 P.2d 258 (1934); 17. *In re Baxter's Estate*, 94 Mont. 257, 22 P.2d 182 (1933).

² *Means* referred to the non-participating beneficiaries as inactive or passive beneficiaries and defined them as those who fail to retain counsel, or those who retain counsel who fails to participate in the labors creating the common fund. *Means*, 191 Mont. at 404, 625 P.2d at 37.

supra note 1 (ordered payment of fees out of common fund created for benefit of non-participating State Fund insured claimants); *Missoula supra* note 1 (ordered payment of fees out of common fund preserved); *Means supra* note 1 (ordered payment of fees for appointed lead counsel from non-participating Department from fund created for its benefit); *Tuttle supra* note 1 (ordered payment of proportionate fees from workers' compensation carrier share of common fund created); *Hardware supra* note 1 (ordered payment of fees from common fund deposited in Court for benefit of party and non-participating beneficiaries).

The common fund doctrine should be applied in this case to spread the cost of reasonable attorney fees among the active beneficiary, Jeremy Ruhd, and the non-participating passive beneficiaries, Liberty Northwest insureds, who will share in the common fund of impairment awards consistent with the payment of attorney fees under the Workers' Compensation Act.

The Workers' Compensation Act does not expressly provide for a party to maintain a claim on behalf of all similarly situated claimants as a class action, however, the Workers' Compensation Court has referred to Rule 23, Montana Rules of Civil Procedure, to determine if a class action is appropriate. *Murer v. Montana State Compensation Mut. Ins. Fund*, 257 Mont. 434, 849 P.2d 1036 (1993). The Montana Supreme Court approved of the Workers' Compensation Court seeking guidance from the Montana Rules of Civil Procedure where they were not inconsistent with the Act. *Murer, supra* citing *Moen v. Peter Kiewit & Sons, Co.*, 201 Mont. 425, 434, 655 P.2d 482, 486 (1982).

Jeremy Ruhd should be allowed to amend his petition to enforce the rights of all similarly situated Liberty Northwest insured workers. This Court's Order Resetting Scheduling Order was filed April 29, 2002 and required the parties to file all motions to amend pleadings on or before August 5, 2002. On June 17, 2002 Jeremy Ruhd filed a motion to amend and brief in support with an Amended Petition for Hearing setting forth the Rule 23 elements of his proposed class action. The motion to amend was timely filed and the request to amend should be granted.

Counsel for *Rausch*, *Fisch* and *Frost* now seek a 20% attorney fee from Jeremy Ruhd's impairment award and a 20% attorney fee from the impairment award of all other workers insured by Liberty Northwest, and every other insurer in Montana, if the worker may benefit or may successfully recover the impairment award in reliance on the Montana Supreme Court's decision in *Rausch*. In essence, counsel for *Rausch*, *Fisch* and *Frost* argue in favor of the type of defendant class certification denied in *Murer*.

Even if we were to assume that these nine individuals can represent a "class" they **can only represent a class of which they are a member**, i.e. claimants who have claims against the same insurer as the representative. The Court has found no authority and petitioners cite none which would permit an unknown number of class members, yet to be identified to blindly sue an unknown number of defendants.

Murer v. Montana State Compensation Mut. Ins. Fund, 257 Mont. 434, 849 P.2d 1036 (1993). Counsel for *Rausch*, *Fisch* and *Frost* do not seek to certify and enforce the rights of a class against a class of defendants but instead seek to recover fees as if they represented all permanently totally disabled claimants against all insurers in Montana. And so it has come to pass as predicted by Justice Angstman in *In re Hamilton's Estate*, 96 Mont. 551, 33 P.2d 258

(1934):

As well might it be contended that the attorney who obtains the enunciation of a new doctrine of the law should have compensation from all who are thereafter, in virtue of that doctrine, victorious in the courts.

In re Hamilton's Estate, 96 Mont. at 33 P.2d at citing *O'Doherty & Yonts v. Bickel*, 166 Ky. 708, ___, 179 S.W. 848, 850. The Supreme Court in *In re Hamilton's Estate* denied common fund fees as imprudent just as the Workers' Compensation Court and the Supreme Court denied certification of a class against defendant insurers who were not insurers for the named claimants in *Murer*. *Rusch*, *Fisch* and *Frost* are all insured by the State Fund, they can only enforce the payment of impairment awards against the State Fund, and they are entitled to reimbursement of costs, including reasonable attorney fees, from the common fund of all impairment awards paid by the State Fund including amounts paid to non-participating passive beneficiaries.

Pursuant to *Murer* we conclude that claimants' attorneys in this case are entitled to common fund attorney fees. . . . The attorneys incurred legal costs and fees in the preservation of that right, and the common fund will benefit an ascertainable class of workers who were denied immediate payment of an impairment award **by the State Fund** which they were legally entitled to receive.

Rausch, 2002 Mont. 203, ¶ 48, 311 Mont. 210, ¶ 48 (*emphasis added*).

Jeremy Ruhd timely filed a motion to amend his petition to enforce the rights of all similarly situated workers denied an impairment award by Liberty Northwest and that motion should be granted. Jeremy Ruhd will then be in a position to enforce through active litigation the payment of all impairment awards consistent with the entitlement to receive these benefits under the Act. Jeremy Ruhd should also be entitled to recover his costs, including reasonable attorney fees, from the common fund of impairment awards paid by Liberty Northwest.

The circumstances to be considered in determining compensation to be recovered are the amount and the character of the services rendered, the labor, time and trouble involved, the character and importance of the litigation in which services are rendered, the amount of money or the value of property to be affected, the professional skill and experience called for, the character and standing in their profession of the attorneys . . . The result secured by the services of the attorneys may be considered as an important element in determining their value.

Means, *supra* note 1 citing *First Security Bank v. Tholkes*, 169 Mont. 422, 429-430, 547 P.2d 1328, 1332 (1976).

Jeremy Ruhd matched the collective efforts of Ruasch, Fisch and Frost through the Workers' Compensation Court and on appeal through the Montana Supreme Court. *Rausch*, *Fisch* and *Frost* now seek to enforce the right to collect impairment awards on behalf of all similarly situated workers insured by the State Fund and to be paid reasonable attorney fees from that common fund. Jeremy Ruhd seeks to enforce this same right on behalf of all similarly situated workers and should also be entitled to recover reasonable attorney fees from that common fund. The motion to amend and motion for reimbursement should be granted.

DATED this 21st day of January 2003.

ANGEL LAW FIRM


Geoffrey C. Angel

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 21st day of January 2003 a true and correct copy of the foregoing was hereby served, by depositing the same, in an envelope in the United States mail, first-class, postage pre-paid, addressed to:

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