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OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

CASSANDRA M. SCHMILL, Petitioner, v. LIBERTY NORTHWEST INSURANCE CORPORATION, Respondent.	WCC No. 2001-0300 **STATE FUND'S ANSWER BRIEF REGARDING RETROACTIVITY, COMMON FUND ENTITLEMENT, COMMON FUND FEES AND GLOBAL LIEN OF SCHMILL'S COUNSEL**

COMES NOW the Respondent, Montana State Fund ("State Fund"), and hereby files its Answer Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien of Schmill's Counsel. For the reasons stated herein and in its Opening Brief, the State Fund asserts that *Schmill v. Liberty Nw Ins. Corp.*, 2003 MT 80, 315 Mont. 51, 67 P.3d 290, applies prospectively only. The State Fund also contends that the application of the common fund doctrine is inappropriate in this case and the failure of Schmill's counsel to plead an entitlement to common fund attorney fees bars her post-remand attempt to collect those fees. Lastly, the State Fund asserts that if the attorney fee lien of Schmill's counsel is effective, it should apply with equal force to all insurers and self-insurers in Montana.

INTRODUCTION

On March 26, 2004, the parties simultaneously exchanged Opening Briefs on four threshold issues. Both briefs were extensive and the parties fully set forth their positions. Upon simultaneous submission of the Answer Briefs, the four threshold issues will be fully briefed and ready for decision. Because the Court will be considering *Stavenjord* and *Schmill* simultaneously, and in an effort to avoid repetitiveness and for the sake of brevity, the State Fund incorporates by reference the responsive arguments it raised in *State Fund's Answer Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund fees and Global Lien of Stavenjord's Counsel.* This Answer Brief only addresses issues which are specific to *Schmill.*

ARGUMENT

A. *SCHMILL* IS NOT ENTITLED TO AUTOMATIC RETROACTIVE APPLICATION.

Unlike *Stavenjord*, the *Schmill* holding may leave § 706 without force or effect. *Cf. Stavenjord v. Mont. State Fund*, 2003 MT 67, ¶ 48, 314 Mont. 466, ¶ 48, 67 P.3d 299, ¶ 48 (concluding that providing greater PPD benefits to a person in Stavenjord's situation under the WCA but limiting her recovery to $10,000 under the ODA violates the Equal Protection Clause; this holding still entitles OD claimants to receive up to $10,000 under § 405 if they have a wage loss but no ratable impairment). Schmill argues the *Schmill* holding requires this Court to conclude that § 706 is void ab initio and therefore the decision must automatically be given retroactive application. Petitioner's Brief Regarding Common Fund and Retroactivity Issues 6-9 (Mar. 26, 2004) [hereinafter "Schmill Br."]. However, as the State Fund has pointed out in its prior briefing, no judicial mandate exists which requires the automatic retroactive application of a judicial decision that finds a statute unconstitutional. In fact, the Montana Supreme Court has applied the *Chevron Oil* test to cases in which statutes were found to be unconstitutional, and so have courts in other jurisdictions. The State Fund refers the Court to its Opening Brief in *Schmill* and to its Answer Brief in *Stavenjord* for a full discussion of these issues.

1. Montana Still Adheres to the *Chevron Oil* Test.

Schmill claims that Montana abandoned the *Chevron Oil* test because four Montana Supreme Court decisions in 1996 addressing retroactivity failed to mention *Chevron Oil. See* Schmill Br. 9. The State Fund has already addressed *Porter, Haugen* and *Kleinhesselink*. However, the State Fund has not discussed the fourth case cited

by Schmill, *Lacock v. 4B's Restaurants, Inc.* (1996), 277 Mont. 17, 22, 919 P.2d 373, 376. Like *Porter, Haugen* and *Kleinhesselink*, *Lacock* contains no in-depth discussion of retroactivity. Instead, citing *Porter*, the Court in *Lacock* ordered a new trial because it determined that its recent decision in *Busta* applied to Lacock's appeal. *See Lacock*, 277 Mont. at 22, 919 P.2d at 376. Clearly, the *Lacock* decision, which was published less than three weeks after *Busta*, came during the short time span in 1996 when the Court was neglecting to apply *Chevron Oil*.

Notably, none of the parties in *Lacock* had a chance to discuss the potential retroactive application of *Busta* because the *Lacock* briefs were fully submitted to the Montana Supreme Court five months before the *Busta* decision in May of 1996.[1] In addition, the *Lacock* holding parallels some criminal cases which hold that judicial decisions that establish new rules of law apply retroactively to all cases pending on review at the time of the decision, but apply prospectively to all other cases. *See e.g. U.S. v. Tayman*, 885 F. Supp. 832, 836 (E.D. Va. 1995) (noting that judicial decisions, unlike legislative enactments, generally apply retroactively to all cases still open on direct review as well as prospectively to all other cases). *See also Porter,* 275 Mont. at 85, 911 P.2d at 1150 (holding that, for purposes of changes in the law, an appellate court must apply the case law in effect at time it renders its judicial decision, but changes in the law resulting from statutory amendments are not necessarily applied to cases pending on appeal at the time of the statutory amendment). Thus, *Lacock* does not establish that Montana abandoned the *Chevron Oil* test in favor of a blanket rule of retroactivity.

Schmill astutely notes that "[w]hen the Montana Supreme Court overrules a prior decision, it does so cautiously and with a full explanation" because the principles of stare decisis mandate the need for predictability and stability in the law. Schmill Br. 9. This is precisely the point the State Fund made in *Stavenjord*, when it recited the history behind the *Chevron Oil* test in Montana and explained that the Montana Supreme Court could not have intended to abandon *Chevron Oil* and overrule eighteen years worth of decisional law without a full explanation of why it was doing so. Because the 1996 cases fail to explain the significant departure from the prior precedent, it is reasonable to presume that the Montana Supreme Court did not intend to significantly alter its retroactivity jurisprudence in those decisions. Therefore, the 1996 cases are anomalies

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1 *See* Brief of Plaintiff-Appellant (filed on Nov. 20, 1995), Respondent's Brief (filed on Dec. 20, 1995), Reply Brief of Plaintiff-Appellant (filed on Jan. 8, 1996), *Lacock v. 4B's Restaurants, Inc.*, Mont. Sup. Ct. No. 95-431.

and Montana still adheres to *Chevron Oil*, as verified by the Montana Supreme Court's post-1996 opinions.[2]

a. <u>The *Chevron Oil* test requires a conclusion that *Schmill* applies prospectively only</u>.

The State Fund has already explained why the first and second factors of *Chevron Oil* militate in favor of prospective application. Schmill raises no new arguments under those two factors, so the State Fund respectfully refers this Court to its prior briefing of those factors. Most of Schmill's arguments concerning the hardship factor – including the inapplicability of *Murer* and the misunderstanding of dividend payments and surplus information – have also been previously addressed.[3] However, a few points unique to *Schmill* require additional discussion.

Schmill claims that retroactively implementing *Schmill* creates no inequities because it only requires the State Fund "to do a quick mathematical calculation." Schmill Br. 11. Implementing *Schmill* would not be as easy as Schmill suggests. Schmill ignores the significant administrative difficulties the State Fund would experience in locating, retrieving and reviewing older files to see if they fit the *Schmill* criteria. After completing that process, the State Fund would then have to adjust each file and determine what apportionment was taken and how the apportioned amount was calculated. Therefore, contrary to Schmill's suggestion, retroactively implementing *Schmill* requires the State Fund to do much more than just punch a few numbers into a calculator.

Schmill also claims that *Murer* required a review of 60,000 claims[4] and the State Fund was able to implement that decision, so it should be able to retroactively implement the estimated 3,500 claims subject to *Schmill*. *See* Schmill Br. 11. However,

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2 *See Benson*, *Seubert* and *Ereth*. Notably, Schmill's brief makes no mention of *Ereth*, the most recent civil decision discussing retroactivity and the *Chevron Oil* test.

3 The State Fund notes that its Opening Brief indicated that the Legislature had transferred $26 million from the State Fund to the General Fund. Although the enabling legislation allows for a transfer of $26 million, the Legislature has transferred $22 million to date.

4 This number does not appear anywhere in the factual stipulation.

Murer involved the payment of benefits to about 3,200 people and involved claims covering a four-year time frame. By comparison, *Schmill* covers a fourteen-year time frame. If Schmill's unscientific 60,000 figure serves as a baseline number for the amount of OD claims occurring in a four-year period, a retroactive implementation of *Schmill* would require the State Fund to review 210,000 claims. Even under Schmill's own scenario, retroactivity is improper. Regardless, Schmill's attempted extrapolation of the *Murer* information is a flawed attempt to distort facts which are not part of the record and should be disregarded.

As a fundamental matter, Schmill fails to appreciate and consider the cumulative administrative and financial effects that all of these common fund cases are having on the State Fund.[5] In analyzing the hardship prong in these common fund cases, the State Fund urges this Court to consider the collective administrative and financial impact of *Rausch*, *Flynn*, *Schmill*, *Stavenjord*, *Wild* and the other common fund cases. If this is done, the substantial hardships associated with retroactive application become obvious. Thus, for the reasons stated above and in its other briefing, the State Fund asserts that the third factor of the *Chevron Oil* test necessitates a conclusion that *Schmill* operates prospectively only.

B. THE FAILURE OF SCHMILL'S COUNSEL TO PLEAD AB INITIO AN ENTITLEMENT TO COMMON FUND FEES OR CLASS CERTIFICATION BARS HER POST-REMAND REQUEST FOR COMMON FUND FEES.

Schmill claims that common fund attorney fees can be awarded in post-remand proceedings even if no claim was made for them in the pre-remand proceedings. *See* Schmill Br. 4. In support of her position, she cites to *Flynn*, *Estate of Lande* and *Brewer*. However, the cases cited by Schmill either contain a catchall prayer for relief which encompasses a general claim for attorney fees, or the award of attorney fees is authorized by a governing statute. Here, Schmill's Petition for Hearing contained a request for statutory attorney fees, not for the judicially-created common fund fees. Further, Schmill quotes a portion of *Murer* which states that a party is entitled to reimbursement of his or her reasonable attorney fees if the party incurs legal fees to establish the fund.[6] *See* Schmill Br. 6. Somehow, the "party" has turned into the

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[5] The same can be said of Stavenjord.

[6] Specifically, Schmill quotes the following sentence: "[W]hen a party has an interest in a fund in common with others and incurs legal fees in order to establish,

"party's counsel" because Schmill's counsel – not Schmill herself – is receiving reimbursement from all other non-participating beneficiaries. Therefore, the State Fund reiterates its position that the failure of Schmill's counsel to plead ab initio an entitlement to common fund fees bars her post-remand request for the payment of those fees.

C. THE COMMON FUND DOCTRINE IS INAPPLICABLE TO *SCHMILL*.

Like Stavenjord, Schmill relies on *Murer* to support her contention that the *Schmill* decision created a common fund. *See* Schmill Br. 12-13. However, because the economic stakes to the claims set forth in Schmill's Petition for Hearing served as justification for litigating those issues, and for the other reasons stated in its briefs, the State Fund asserts that the common fund doctrine is inapplicable to *Schmill*.

D. THE IMMINENT APPELLATE DECISION IN *RUHD* WILL DETERMINE WHETHER SCHMILL'S GLOBAL ATTORNEY FEE LIEN APPLIES TO ALL INSURERS AND SELF-INSURERS IN THE STATE OF MONTANA.

Much like Stavenjord, Schmill spends a significant amount of time addressing the global attorney lien issue. As explained in the other briefs, the appellate decision in *Ruhd* will determine whether the global lien of Schmill's counsel applies exclusively to Liberty or whether it applies to all insurers and self-insurers in the State of Montana. Until *Ruhd* is decided, the State Fund continues to maintain its position that the common fund global attorney fee lien of Schmill's counsel should apply with equal force to all insurers and self-insurers.

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preserve, increase, or collect that fund, then that party is entitled to reimbursement of his or her reasonable attorney fees from the proceeds of the fund itself." Schmill Br. 6 (citing *Murer*, 283 Mont. at 222, 942 P.2d at 76). A fair reading of that quotation indicates that Schmill should be entitled to collect reimbursement of the fees she paid to her attorney. However, the common fund doctrine has been expanded, perhaps mistakenly, to allow Schmill's counsel to reap the monetary benefits of the decision from other non-participating beneficiaries, while Schmill herself is limited to the benefits awarded in the precedent-setting case.

CONCLUSION

Nothing in Schmill's Opening Brief changes the arguments and analysis set forth by the State Fund in its Opening Brief. Even if *Schmill* struck down § 706 as unconstitutional, no judicial mandate exists which requires *Schmill* to automatically receive retroactive application. Instead, the *Chevron Oil* test is used in Montana to determine if *Schmill* applies retroactively. Although only one of the three factors of the *Chevron Oil* test needs to be satisfied in order to prevent retroactive application, all three factors are met in this case. Therefore, retroactive application of *Schmill* is improper.

Even if *Schmill* applies retroactively, the common fund doctrine is inapplicable. The doctrine was meant to apply to situations where a claimant has minimal benefits at issue but still pursues a claim. Such is not the case here. Further, the failure of Schmill's counsel to plead an entitlement to common fund attorney fees or class certification prior to the appellate decision bars her post-remand request for common fund attorney fees. For the reasons stated herein, in its Opening Brief and in its *Stavenjord* briefs, the State Fund requests this Court to hold that *Schmill* applies prospectively only and that common fund fees are inappropriate in this case.

DATED this 13th day of April, 2004.

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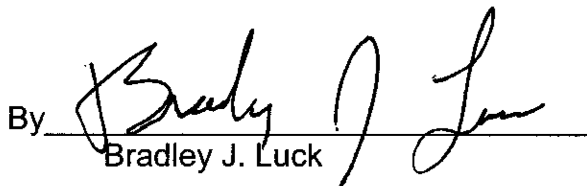

By ______________________
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CERTIFICATE OF MAILING

The undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Intervenors, hereby certifies that on this 13 day of April, 2004, she mailed a copy of the foregoing *State Fund's Answer Brief Regarding Retroactivity, Common Fund Entitlement, Common Fund Fees and Global Lien of Schmill's Counsel*, postage prepaid, to the following persons:

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