IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 53

WCC No. 2004-1089

LEE N. THOMPSON, DARIN SHARP, and SCOTT BAILEY

Petitioners

vs.

STATE OF MONTANA

Respondent

LIBERTY NORTHWEST INSURANCE CORPORATION and MONTANA STATE FUND

Intervenors.

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT
Appealed to Supreme Court 05/15/06

Summary: Petitioners filed an action for declaratory judgment seeking to have this Court declare subsection (3) of section 39-71-604, MCA (2003), and subsection (5) of section 50-16-527, MCA (2003), unconstitutional as violative of Mont. Const., Art. II, §§ 10 and 17, and/or the Fifth and Fourteenth Amendments to the United States Constitution. Petitioners subsequently filed motions for summary judgment on these issues.

Held: Summary judgment is granted. Section 39-71-604(3), MCA (2003), and section 50-16-527(5), MCA (2003), violate the petitioners' constitutional right of privacy as guaranteed by Mont. Const., Art. II, § 10, and no compelling state interest exists to justify such violation. Moreover, the Court also finds that sections 39-71-604(3) and 50-16-527(5), MCA (2003), violate the petitioners' constitutional right to due process as guaranteed by Mont. Const., Art. II, § 17, and no rational basis exists to justify such violation.

Topics:

> **Constitutional Law: Privacy.** Mont. Const., Art. II, § 10, prohibits insurers or their representatives from engaging in *ex parte* communications with a claimant's treating health care provider under the auspices of either section 39-71-604(3), MCA (2003), or section 50-16-527(5), MCA (2003).

Constitutional Law: Due Process. Mont. Const., Art. II, § 17, prohibits insurers or their representatives from engaging in *ex parte* communications with a claimant's treating health care provider under the auspices of either section 39-71-604(3), MCA (2003), or section 50-16-527(5), MCA (2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-604(3) and 50-16-527(5), MCA (2003). Sections 39-71-604(3) and 50-16-527(5), MCA (2003), which allow an insurer or its agent to communicate with a physician or other health care provider about an injured employee's health care information by telephone, letter, electronic communication, in person, or by other means and to receive from the physician or health care provider the sought after information 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 are violative of Mont. Const., Art. II, §§ 10 and 17.

Attorney Fees: Private Attorney General Theory. The petitioners are entitled to attorney fees pursuant to the private attorney general theory. Protecting fundamental constitutional rights is of the highest societal importance; the need for private individuals to vindicate these constitutional rights was apparent where the State of Montana was defending the constitutionality of these statutes in the litigation; and, all claimants in the Montana Workers' Compensation system stand to benefit from the petitioners' actions.

¶1 The petitioners have petitioned this Court for a declaratory judgment that subsection (3) of section 39-71-604, MCA (2003), and subsection (5) of section 50-16-527, MCA (2003), are unconstitutional pursuant to Mont. Const., Art. II, §§ 10 and 17, and/or the Fifth and Fourteenth Amendments to the United States Constitution. Although disputing the merits of the petitioners' claims, all parties to this action agree that the issues raised by the petitioners are appropriate for declaratory judgment by this Court. The petitioners then moved for summary judgment on these issues. For the reasons set forth below, the petitioners' motions for summary judgment are granted.[1]

FACTUAL BACKGROUND

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[1] The petitioners' original Petition for Declaratory Judgment sought a ruling that the subject statutes were violative only of Mont. Const., Art. II, § 10. Subsequent to the original filing of their petition and the filing of their first motion for summary judgment, however, the petitioners sought and were granted leave from this Court to allege violations of Mont. Const., Art. II, § 17, and the Fifth and Fourteenth Amendments to the United States Constitution. The petitioners then filed a second motion for summary judgment addressing these additional provisions. This Order will deal with all of the issues raised in both of the petitioners' motions for summary judgment collectively.

¶2 The petitioners are or have been injured employees with claims for workers' compensation benefits under the workers' compensation laws of the State of Montana. During the administration of the petitioners' workers' compensation claims, the workers' compensation insurers for the petitioners, or their agents, have engaged in private communications with the petitioners' physicians or other health care providers or have otherwise asserted the right to engage in such private communications under the auspices of sections 39-71-604(3) or 50-16-527(5), MCA (2003). Both of these sections were passed by the 2003 Legislature and were signed into law in April 2003. No constitutional challenges have previously been made to either statutory section.

DISCUSSION

¶3 The challenged language contained in both of the statutes at issue is substantively identical. In its entirety, section 39-71-604(3), MCA (2003), reads as follows:

> 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.

¶4 In its entirety, section 50-16-527(5), MCA (2003), reads as follows:

> 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.

¶5 These sections were enacted pursuant to Senate Bill 450 (SB 450), passed by the 2003 Legislature. Nothing in the legislative history, however, offers any particularly helpful insight as to the purpose of this bill as it pertains to these specific sections. The only insight presented to this Court as to the Legislature's motivation is a Fiscal Note, submitted by the petitioners, which pertains to the financial impact of other, unrelated provisions of SB 450. At paragraphs

4 and 5 of this Fiscal Note is an apparent reference to the statutory amendments at issue in this case. The entire sum and substance of these references, however, is an acknowledgment that SB 450 will allow private "communication of relevant medical information between the insurer, or agent thereof, and the health care provider." As to the justification for this expanded access, the Fiscal Note says only: "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."

¶6 Save for this brief reference, the Court is left with virtually no background against which to assess whether a compelling state interest exists to allow a workers' compensation insurer or its agent the essentially unfettered access to an injured workers' physician or health care provider as prescribed by these sections.

A. Montana Constitution, Article II, Section 10. Right of Individual Privacy.

¶7 Article II, Section 10 of the Montana Constitution provides:

> 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.

¶8 The Montana Supreme Court has long recognized that the privacy interests attendant an individual's medical information implicate Article II, Section 10 of the Montana Constitution. Specifically, the Court has most recently held: "Medical records are private and deserve the utmost constitutional protection. Article II, Section 10, of the Montana Constitution guarantees informational privacy in the sanctity of one's medical records."[2] That being the case, the very language of Article II, Section 10 mandates that a compelling state interest be shown in order for the statutory sections at issue in the present case to survive a constitutional challenge. Additionally, since the right of individual privacy is among those rights guaranteed by the Montana Constitution's Declaration of Rights, it is deemed a fundamental right.[3] Any statute which implicates a fundamental right must be strictly scrutinized and can only survive scrutiny if a compelling state interest is established and its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the state's objective.[4, 5]

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[2] *Henricksen v. State*, 2004 MT 20, 319 Mont. 307, 84 P.3d 38, ¶ 36 (internal quotations and citations omitted).

[3] *Montana Envtl. Info. Cent. v. Department of Envtl. Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236, ¶ 63.

[4] *Id.*

[5] This Court is mindful that the Montana Supreme Court has previously applied a rational basis test in analyzing the constitutionality of workers' compensation statutes. However, those cases in which a rational basis test was applied involved equal

¶9 This Court recognizes, however, that this fundamental right of individual privacy is not inviolate. When a claim for workers' compensation is filed, the claimant appropriately relinquishes his or her privacy rights to all medical records and information which are relevant to the claim. The respondent and intervenors have argued that sections 39-71-604(3) and 50-16-527(5), MCA (2003), pass constitutional muster because these statutory sections only allow the insurer or its representative to privately discuss relevant health care information with a health care provider. The principal problem with this argument, however, lies in the broad scope of what constitutes relevant health care information as that term is defined in the preceding subsection of both statutes. Specifically, the identical definition found in both statutes reads as follows:

> 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.[6]

¶10 In light of this broad definition, an insurer might inquire of the health care provider into areas wholly unrelated to the injury for which a claim has been made under the rubric of "conditions that may affect recovery," conditions "similar" to that presented in the claim, or "conditions related to the same body part."

¶11 By way of example, it is not inconceivable that an insurer may inquire into a claimant's history of mental illness, no matter how remote or irrelevant to the claimed injury, since a claimant's mental health "may" affect his or her recovery. Similarly, the breadth of this statute would allow an insurer to inquire into a claimant's medical history of conditions which are in no way related to the claimed injury simply because they involve the same body part. Finally, as to conditions "similar" to that presented in the claim, the degree of similarity is essentially left to the discretion of the insurer as the inquiring party. This is not to impute ill intent to the representatives of those insurers who would privately inquire of a claimant's treating health care provider. However, in situations such as these, what is or is not relevant is often in the eye of the beholder.

¶12 Intervenor Montana State Fund (State Fund) further argues that "[t]he right of privacy in the information and any privilege to the information is shed when the claimant files a claim for

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protection challenges which neither infringed upon the rights of a suspect class nor involved fundamental rights which would have triggered a strict scrutiny analysis. *Henry v. State Comp. Ins. Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456, ¶ 29. Conversely, the present case involves a fundamental right which *does*, therefore, trigger a strict scrutiny analysis.

[6] §§ 39-71-604(2) and 50-16-527(4), MCA (2003).

workers compensation benefits."[7] State Fund notes that, in signing a claim form, the worker acknowledges, in pertinent part:

> This is my claim for workers' compensation benefits due to the on-the-job injury, occupational disease or death of the above named worker. **I understand** that signing this claim for compensation authorizes the release of rehabilitation records, Social Security records and health care information (medical records pursuant to HIPAA, Public Law 104-191, 42 U.S.C. 1301 et seq. and Section 50-16-527(4)&(5), MCA and Section 39-71-604(2)&(3), MCA – refer to the back of this form) relevant to this claim to the workers' compensation insurer and the insurer's agents. . . . [8]

¶13 The circuitous logic employed seems to be that the petitioners have no constitutional right to privacy in this matter because the very statutes which are now being challenged as unconstitutional require a claimant to waive this privacy right. Employing the same logic, however, a finding that these statutes are violative of a claimant's constitutional right to privacy would render the above-quoted waiver null and void, *ab initio*, to the extent it relies upon the challenged language.

¶14 Moreover, if the Court were to uphold these statutes and, by extension, the waiver cited above by the State Fund, Montana workers who sustain injury on the job would be faced with the Hobbesian choice of either signing a form, the result of which is an unchecked abrogation of their constitutional right of privacy, or otherwise forfeiting their constitutional right to pursue life's basic necessities in the form of wage supplement as well as their right to seek safety, health, and happiness by way of the workers' compensation medical benefits.[9] This Court is not persuaded that, when drafting the Declaration of Rights to Montana's Constitution, the

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[7] (Response of Intervenor Montana State Fund to Petitioners' Motion for Summary Judgment at 2.)

[8] *Id*.

[9] Section 39-71-105(1), MCA (2003), states that it is an "objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease." In *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996), the Montana Supreme Court held that the right to pursue employment necessarily implicated the right to pursue life's basic necessities because "[a]s a practical matter, employment serves not only to provide *income for the most basic of life's necessities*, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other *essentials of modern life, including health and medical insurance*, retirement, and day care." (Emphasis added.)

delegates to the 1972 Constitutional Convention contemplated that *any* of the rights guaranteed by this Declaration should be mutually exclusive of one another.

¶15 Finally, this waiver fails to address the fundamental concern, raised above, that the definition of relevance in the subject statutes is so broad and sweeping as to conceivably allow inquiry into areas wholly *irrelevant* to the claimant's claim with the determination of relevance being essentially left to the sole discretion of the insurer. None of the parties have advanced the theory that the filing of a workers' compensation claim could properly result in the waiver of privacy regarding irrelevant medical information. Indeed, the respondent itself has cited this Court to the Supreme Court's pronouncement in *Henricksen* that a party "is *not* entitled to unnecessarily invade [a claimant's] privacy by exploring totally unrelated or irrelevant matters."[10] This is precisely the practical result of these statutes, however, and by incorporating them into the waiver language set forth above, the waiver likewise incorporates their constitutional infirmity.

¶16 The Court next turns to whether the respondent or the intervenors have demonstrated a compelling state interest and that this action is closely tailored to effectuate that interest to achieve the State's objective. The Montana Supreme Court has previously held that "to demonstrate that its interest justifying infringement of a fundamental constitutional right is 'compelling' the state must show, at a minimum, some interest 'of the highest order and . . . not otherwise served,' or 'the gravest abuse . . . endangering [a] paramount [government] interest . . . .'"[11]

¶17 In the present case, the only argument advanced in this regard is that the amendments to these statutes were designed to enhance communication between the health care providers and the insurers to facilitate the process. This Court would be hard pressed to find that administrative expediency of a workers' compensation claim is an interest "of the highest order" justifying the infringement of a fundamental constitutional right. This is particularly so when there are other, less intrusive means available.

B. <u>Petitioners' Rights to Due Process of Law Pursuant to Article II, Section 17 of the Montana Constitution and the Fifth and Fourteenth Amendments to the United States Constitution</u>.

¶18 Having found sections 39-71-604(3) and 50-16-527(5), MCA (2003), unconstitutional pursuant to Article II, Section 10, the Court need not address the due process challenges raised in Petitioners' Second Motion for Summary Judgment. For the record, however, and for many of the same reasons set forth above, the Court finds this challenge also to be well taken.

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[10] *Henricksen, supra*, ¶ 41 (emphasis added).

[11] *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, ¶ 41, n. 6.

¶19 Since the petitioners' due process challenge implicates a fundamental right enumerated in the Montana Constitution's Declaration of Rights, it may properly be held to a strict scrutiny standard.[12] This Court finds, however, that these statutes do not pass due process muster even applying a rational basis test. Since it is axiomatic that a statute that cannot survive a rational basis challenge, obviously, cannot survive either of the higher constitutional standards, the Court will apply the lowest standard for purposes of its analysis.

¶20 Article II, Section 17 of the Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." As pointed out by the petitioners, and undisputed by the respondent and the intervenors, administration of the Workers' Compensation Act is a physician-driven system. Many benefits available under the Act may be either reduced or denied outright based solely upon the opinion of the treating physician.

¶21 Intervenor Liberty Northwest Insurance Corporation (Liberty) argues that a claimant's due process rights are not violated by allowing the insurer to privately communicate with treating health care providers because the claimant ultimately has the right to petition this Court to seek redress for a denial of benefits after the insurer has denied or terminated benefits. The focus of Liberty's due process argument is essentially a "timing" argument. Specifically, Liberty argues that due process does not require notice and an opportunity to be heard before the insurer's termination of benefits. Liberty's argument is misplaced.

¶22 The due process implications in the present case are not so much whether a claimant is afforded the opportunity to be heard before or after the insurer makes the decision to terminate benefits. Rather, the due process implications arise when, in a physician-driven system such as workers' compensation, the claimant is not afforded the opportunity to be present *at all* when the insurer meets with, and may solicit determinative opinions from, the claimant's treating physician.

¶23 The fact that the claimant may subsequently petition this Court after the treating physician has rendered his or her opinion does not cure the due process deficiency. By the time the matter would be brought before this Court, the insurer or its representative may have met privately with the treating physician and a determinative opinion may have been solicited from the physician. Additionally, there are no procedural safeguards in place as to how much or what of the conversation's content is documented. In effect, the proverbial horse will have long since left the barn by the time this Court hears the matter.

¶24 In the case of *Linton v. City of Great Falls*,[13] the Montana Supreme Court specifically disallowed the very practice which is at issue in the present case, i.e., private communications

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[12] *Montana Envtl. Info. Cent. v. Department of Envtl. Quality*, *supra*., ¶ 63.

[13] 230 Mont. 122, 749 P.2d 55 (1988).

between treating health care providers and insurers or employers. In so doing, the Court in *Linton* implicitly acknowledged the same due process concerns raised in the present case. Specifically, the *Linton* Court held that the Workers' Compensation Act "does not contemplate . . . private interviews between the employer or insurer [and treating health care providers] without the knowledge or opportunity of the claimant to be present."[14] In fact, the workers' compensation statutes in place at the time *Linton* was decided neither expressly authorized nor prohibited such a practice. Nevertheless, the Court found that such private communications were not allowed because "a personal interview between defendant insurance company and claimant's treating physician must be done openly to allay any suspicion that there is something available to one party and not to the other."[15]

¶25 The extent of due process to which a claimant is entitled is determined by balancing three elements:

(1) the private interests at stake;

(2) the government's interest; and

(3) the risk that the procedures used will lead to erroneous decisions.[16]

¶26 In the present case, the private interest at stake is an individual's claim for workers' compensation benefits. As noted above at footnote 9, section 39-71-105, MCA (2003), identifies an objective of the Montana Workers' Compensation Act to provide wage supplement and medical benefits to Montana workers injured on the job. The Supreme Court in *Wadsworth v. State*[17] held that employment provides "income for the most basic of life's necessities, such as food, clothing, and shelter for the worker and the worker's family . . . ."[18] Accordingly, the Court in *Wadsworth* held that the deprivation of income was, in effect, a deprivation of the right to pursue life's basic necessities as guaranteed by Article II, Section 3 of the Montana Constitution. Since workers' compensation benefits are designed to act as a substitute for the income lost as a result of an on-the-job injury, the deprivation of these benefits must similarly implicate the fundamental rights found at Article II, Section 3. To hold otherwise would be *non sequitur.*

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[14] *Id.* at 133, 749 P.2d at 62.

[15] *Id.* at 134, 749 P.2d at 63.

[16] *Matter of T.C.*, 240 Mont. 308, 314, 784 P.2d 392, 395 (1989).

[17] 275 Mont. 287, 911 P.2d 1165 (1996).

[18] *Id*. at 299, 911 P.2d at 1172.

¶27 This private fundamental right must then be balanced against the governmental interest at stake. In the present case, the only governmental interest that has been advanced is a theoretically more efficient administration of the workers' compensation system.

¶28 The final element of this balancing test is the risk that this procedure will lead to erroneous decisions. As discussed at length above, the procedures allowed by these sections grant an insurer's representative the right to privately discuss with a treating physician the medical condition of a claimant. The substance of these conversations may well be undocumented and the claimant is neither present nor, perhaps, even aware that the conversation is taking place. There are absolutely no safeguards to guarantee that completely extraneous, irrelevant, and prejudicial information may not be imparted to the physician which may well color his or her opinion of the claimant. Once the physician's opinion is rendered as a result of this private, undocumented conversation, a termination or reduction of benefits may result from that opinion. Although the claimant will retain the right to petition this Court for relief, this Court can render its decision only on the evidence that is put before it. If some of the most critical evidence presented to the Court is tainted at its inception, the relief available from this Court may well carry the same taint.

¶29 An application of this balancing test clearly preponderates in favor of a finding that a claimant's due process rights are not satisfied by the procedures allowed pursuant to sections 39-71-604(3) and 50-16-527(5), MCA (2003).

C. Attorney Fees.

¶30 The petitioners have sought attorney fees in this matter pursuant to the private attorney general doctrine as set forth by the Montana Supreme Court in the case of *Montanans for Responsible Use of School Trust (MonTrust) v. State*.[19] This doctrine provides that attorney fees may be awarded if three factors are met: (1) the societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement; and (3) the number of people standing to benefit.

¶31 Liberty contends that attorney fees are not allowed because, at least as this matter pertains to the petitioners Thompson and Bailey, their injuries occurred after the 2003 amendments to sections 39-71-611(3) and -612(4), MCA (2003).[20] Liberty contends that these statutes prohibit an award of attorney fees in this case. The Court disagrees.

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[19] 1999 MT 263, 296 Mont. 402, 989 P.2d 800.

[20] Liberty acknowledges that petitioner Sharp's injuries occurred prior to the passage of sections 39-71-604(3) and 50-16-527(5), MCA (2003). Therefore, even if these statutes applied to the present action, an award of attorney fees would be appropriate at least as this matter pertains to Mr. Sharp.

¶32 Both of the statutes cited by Liberty involve situations in which a claim is brought before the Workers' Compensation Court because an insurer either denies liability for a claim, terminates compensation benefits, or disputes the compensation due a claimant. In such cases, if the claimant prevails and the Court finds that the insurer acted unreasonably, attorney fees may be awarded. As Liberty correctly points out, these statutes specifically proscribe an award of attorney fees under the common fund doctrine or any other action or doctrine in law or equity. The triggering event to these statutes, however, is the bringing of a claim in the Workers' Compensation Court because of a denial of liability, termination of benefits, or dispute as to the compensation due. This is not the situation in the case at bar. None of the petitioners have alleged that the insurer denied liability, terminated benefits, or disputed the compensation due them. Rather, petitioners sought declaratory judgment regarding the constitutionality of two statutes, one of which is not even found within the workers' compensation statutes. Since the procedural predicate which triggers the application of these two statutes is not present, the statutory prohibitions found at subsections -611(3) and -612(4) do not apply.

¶33 Applying the factors set forth in *MonTrust*, the Court finds that an award of attorney fees is appropriate. The public policy vindicated by this litigation is the protection of two fundamental rights specifically guaranteed by the Montana Constitution's Declaration of Rights. There are few, if any, matters of greater societal importance than the protection of the citizenry's fundamental constitutional rights. The necessity for private enforcement of these rights is self-evident by the fact that the Montana Attorney General has appeared in support of these two challenged statutes. Finally, the number of people standing to benefit from the petitioners' actions is both significant and ongoing. Every Montana worker who files a claim for workers' compensation benefits has and, but for the petitioners' actions, would continue to suffer the compromise of their rights to privacy and due process.

JUDGMENT

¶34 For the foregoing reasons, the Court finds that sections 39-71-604(3) and 50-16-527(5), MCA (2003), are violative of Article II, Sections 10 and 17 of the Montana Constitution. Having so found, the Court need not address the constitutional challenge raised by the petitioners pursuant to the Fifth and Fourteenth Amendments to the United States Constitution. Accordingly, both of the petitioners' first and second motions for summary judgment are **granted**.

¶35 With respect to the petitioners' request for attorney fees, the Court finds this request to be well taken. The petitioners shall have 20 days to submit to this Court their time expended in bringing this action. The respondent and intervenors shall then have 20 days to file written objections.

¶36 This Order is certified as final for purposes of appeal.

DATED in Helena, Montana, this 18th day of October, 2005.

(SEAL)

/s/ James Jeremiah Shea
JUDGE

c: Mr. Norman L. Newhall
Mr. Mike McGrath
Mr. Anthony Johnstone
Mr. Larry W. Jones
Mr. David A. Hawkins
Submitted: June 24, 2005