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Court Defends, Slaps Injured Workers

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By: Gregory S. Munro, Missoula

Two decisions of the Montana Supreme Court issued since the last publication of *Trial Trends* merit particular interest for plaintiffs' trial lawyers; the first, as a measure of progress in obtaining adequate compensation for injured workers and the second, as a stark reminder of the fragility of workers' rights in the compensation system.

Francetich v. State Compensation Mutual Insurance Fund, 49 St. Rep. 0222, decided March 10, 1992.

This salutary decision addresses in part the oppressive and unfair application of Montana's Workers' Compensation Subrogation Statute in situations where the injured worker has not been made whole. The Court declared unconstitutional Section 39-71-414(6)(a), MCA, which granted the insurer full subrogation rights even where the worker's damages exceeded the combined workers' compensation benefits and third party recovery. While Section 39-71-414, MCA, has since 1977 entitled workers' compensation insurers to subrogation against the injured worker's recovery from a third party, the subrogation right has been limited at times by equitable principles adopted by the Montana Supreme Court. In *Skauge v. Mountain States Telephone and Telegraph,* 172 Mont. 521, 565 P. 2d 628 (1977), the Court (in a case not involving workers' compensation), recognized that the insurer, who has collected premiums to cover a loss, should not by subrogation be made whole to the detriment of the injured insured. The *Skauge* Court said:

> ". . . when the insured has sustained a loss in excess of the reimbursement by the insurer, the insured is entitled to be made whole for his entire loss in any costs of recovery, including attorney's fees, before the insurer can assert its right of legal subrogation against the insured or the tortfeasor." *Skauge,* 565 P.2d at 632.

Recognition of the principle that a workers' compensation insurer should not be made whole at the expense of an inadequately compensated injured worker came in *Hall v. State Compensation Insurance Fund,* 218 Mont. 180, 708 P.2d 234 (1985) where the Court held that a work comp insurer could not subrogate until the injured worker had been made whole.

But, the legislature in 1987 abandoned the equity and fairness of *Hall* by amending Sec. 39-71-414 to add subsection (6)(a) which expressly allowed insurers to make themselves whole at the expense of the under-compensated worker:

> (6)(a) The insurer is entitled to full subrogation rights under this section, even though the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. The insurer may subrogate against the entire settlement or award of a third party claim brought by the claimant or his personal representative, without regard to the nature of the damages.

Once again, plaintiff's counsel experienced the frustration of struggling against a third party for minimal compensation for an injured worker only to have it taken from the worker to reimburse a work comp insurance carrier which collected premiums to cover the loss in the first place. Ironically, the

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Sen. Burns: Reform Product Liability

Mr. Joe Bottomly
President
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#1 Last Chance Gulch
Helena, Montana 59601

Dear Joe:

Thank you for your letter regarding S. 640, the Product Liability Fairness Act, introduced by Senator Bob Kasten. I appreciate hearing from you.

I voted for the Kasten amendment primarily because Congress needs to act now to remove some of the barriers to economic growth in this country. I believe Congress should address new issues to get the economy growing again. One of these issues is product liability reform.

The economy has rebounded some on its own, but the need for Congress to take action has not diminished. In fact, the need to reform our product liability system becomes more urgent every day. The current system drives up costs in nearly every sector of our economy, and does very little to improve quality or increase safety.

This is a competitiveness issue and a jobs issue. Currently, the typical American manufacturer faces product liability costs that are 20 to 50 times higher than its foreign competitors. This additional cost makes American companies less competitive; they lose market share to foreign competition, so they raise prices and lay off workers which in the aggregate spells recession. This is not just a big business issue either. It affects small businesses as much, if not more, than large ones. The 1,100 percent rise in the number of federal product liability cases in the 1970s and 1980s has driven up the cost of liability insurance. The burden of this increased cost is proportionally much greater for small business. It can be a "make or break" issue for them.

The Kasten amendment would have reformed the current system to make it more effective. We must protect people from careless manufacturers and defective products—the Kasten bill does not compromise that objective. It just insures that we do so in a fashion that still allows American businesses to compete and grow in the global economy.

Although we seem to disagree on this issue, I'm glad you took the time to voice your concerns to my office. Please feel free to contact me again on this or any other important issue.

With best wishes,

Sincerely,
Conrad Burns
United States Senator

Supreme Court

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new section appeared to be in direct conflict with Article II, Section 16, of the Montana Constitution, as amended in 1972, which provides in part:

> No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state.

In analyzing the conflict between the Constitution and the offending statute, the Court in *Francetich* made two points worth noting in the struggle to obtain legal redress for injured persons in Montana. First, the majority confirmed that in *White v. State,* 203 Mont. 363, 661 P.2d 1272 (1983), it had held that Article II, Section 16, created a fundamental right of full legal redress for all injuries. Second, the Court cited *Corrigan v. Janney,* Mont. , 626 P.2d 838 (1981), saying:

> "this Court held that it is 'patently unconstitutional' for the legislature to pass a statute which denies a certain class of Montana citizens their cause of action for personal injury and wrongful death. We affirm and refine our holding in *Corrigan v. Janney,* supra; we hold that the Montana Constitution guarantees that all persons have a speedy remedy for every injury. The language 'every injury' embraces all recognized compensable components of injury, including the right to be compensated for physical pain and mental anguish and the loss of enjoyment of living."

The Court concluded that Sec. 39-71-414(6)(a) restricts an injured worker's right to obtain a full legal redress against third-party tortfeasors and declared it unconstitutional. Plaintiff's counsel should note, however, that *Francetich,* like *Hall,* involved a worker who had settled with a third party for policy limits. The case appears to turn once again on the fallacious premise that it is only in cases where the worker has settled for limits that he can complain that he has not received adequate compensation. Perhaps in another case a victim's advocate will advance the proposition that the beleaguered plaintiff who settles for less than limits in the face of overwhelming forces arrayed against him has often received inadequate compensation, so that the insurer's subrogation could be inequitable even where the injured settled for less than policy limits.

MTLA stalwart, Patricia Cotter, presented the amicus curiae position on behalf of the MTLA in brief and oral argument.

Burris v. Department of Labor and Industry, 49 St. Rep. 326. Decided April 15, 1992.

This case is, in the words of Justice Trieweiler's ringing dissent, a reflection of "a concerted effort by the Department of Labor and the Division of Workers' Compensation to place the burden of that Division's mismanagement on injured workers—those members of society who are least able to bear that burden." *Burris,* at 330.

In *Burris* the majority upheld the constitutionality of Section 39-71-613, MCA, which allows the Department of Labor to regulate attorney fees of lawyers representing parties to workers' compensation claims. It is this statute under which the Department of Labor unblushingly limits attorney fees that may be spent representing injured workers while allowing the insurers to spend any amount they choose in defense of the claims. The Court held that the practice of the Department of Labor restricting the ability of attorneys for injured workers to contract with those workers, while allowing the insurers and corporations unfettered right to contract in any way and for any amount the market will bear, does not deny equal protection. *Burris,* at 327.

"a concerted effort by . . . the Division of Workers' Compensation to place the burden of . . . mismanagement on injured workers"

The Court rejected strict scrutiny and "middle tier" analysis and tested the statute by the least stringent "rational relation to a legitimate government interest," characterized by Justice Trieweiler in his dissent as the "almost anything goes" test. *Burris,* at 328. The Court, after quoting *Meech v. Hillhaven West, Inc.,* 238 Mont. 21, 776 P.2d 488 (1989), for the twin government interests of assisting the worker "at a reasonable cost to the employer" and returning the worker to work as soon as possible, simply held "that Section 39-71-613, MCA, and the Department's application of the statute to a claimant's attorney's fee is rationally related to the government's legitimate interest in protecting the claimant's net benefits in workers' compensation cases." *Burris,* at 328. Curiously, the Court ended by saying that application of the statute was constitutional "regardless of any interpretation or implementation by the Department of the words 'or any party.'" (referring to the irony that, while the language of the statute allows regulation of attorney fees of "any party," the Department only applies it to claimants' attorney fees).

In dissent, Justice Trieweiler, with the concurrence of Justice Hunt, pronounced the application of the statute to be a clear violation of the Equal Protection Clause of Article II, Section 4, of the Montana Constitution. Justice Trieweiler related a detailed history of the Department of Labor's hypocritical attempts to interfere with injured workers' rights to contract for legal services while claiming the interference is intended for the good of the injured worker. ■

Gregory Munro is a professor at the University of Montana School of Law and is Secretary/Treasurer of the Montana Trial Lawyers Association.

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