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TRIBUTE

A TRIBUTE TO JUSTICE WHEAT ON THE OCCASION OF HIS RETIREMENT FROM THE MONTANA SUPREME COURT

Nick Kirby Brooke*

Justice Mike Wheat retired from the Montana Supreme Court at the end of 2017, after serving seven years on the bench. Wheat was appointed by Governor Brian Schweitzer in 2010 to replace the retiring Justice John Warner.¹ In 2014, the people of Montana re-elected Justice Wheat with 59.1% of the vote after a contentious campaign which, at the time, was the most expensive judicial race in state history.²

Justice Wheat was born in Spokane, Washington in 1947 and raised in California. He served in the U.S. Marine Corps from 1968-1969 and was awarded a Purple Heart for his service in Vietnam. He married Debby Craig, a Helena native in 1973, and has three sons, Matt, Christer, and Craig, and a daughter, Stacey.

Justice Wheat received his undergraduate degree in political science from the University of Montana in 1975, and three years later, obtained his law degree at the University of Montana School of Law. After graduation, he worked as a Deputy County Attorney in Butte, Montana.

In 1981, Wheat moved to Bozeman, Montana to start the civil practice of Cok & Wheat with his law school classmate, Mike Cok. The firm started out taking any business it could find, but eventually specialized in repre-

* Nick Kirby Brooke clerked for Justice Wheat from 2013-2014.

1. Charles S. Johnson, *Bozeman's Mike Wheat Appointed to Montana Supreme Court*, MISSOULIAN, Dec. 23, 2009, <https://perma.cc/N8Y3-G8D8>.

2. Mike Dennison, *At Least \$1.5M Spent on Montana's Wheat-VanDyke Supreme Court Race*, HELENA INDEPENDENT RECORD, Nov. 26, 2014, <https://perma.cc/MS9F-Y9YM>.

senting plaintiffs against doctors, banks, and insurers. After 29 years of practice together, Cok describes Wheat in no uncertain terms: “There is no better person to have your back in the whole world. Mike is fearless.”³

Mike was elected to the Montana State Senate in 2002 and served in the 2003 and 2005 Montana Legislatures. During that time, he served on the Judiciary Committee, which he chaired in 2005, as well as the Veterans Affairs, Local Government, and Natural Resources Committees. He also served on the Environmental Quality Council. During his time in the Montana Senate, he was significantly involved in legislation creating the Office of Public Defender in 2005. Wheat also sponsored legislation to reorganize the Board of Veterans Affairs and received the Meritorious & Distinguished Service Award from the Veterans of Foreign Wars (2003) and the Guardian of the Guard Award from the Montana National Guard (2007).

Mike was a common sight at the Montana Supreme Court before ascending to the bench. Wheat appeared as counsel of record in more than a dozen cases before the Court, and obtained reversals for his clients in a number of cases, including a plaintiff suing an out-of-state law firm for violation of the Unfair Trade Practices Act,⁴ a plaintiff facing summary judgment dismissal for failure to locate an expert,⁵ and a contractor whose bid to provide services was rejected as untimely.⁶ As a legislator, Mike joined with then-State Senator John Tester to challenge the treatment of “holdover” legislators whose districts were altered by redistricting.⁷

As a Justice, Wheat focused on making precedent accessible and understandable to the practitioner. Mike demanded that opinions be clear, concise, and easy for the practicing attorney to understand and follow. Former Justice Jim Nelson elaborates:

Mike was usually the voice of common sense and pragmatism. When the discussion got too far into the ivory tower, it was always Mike Wheat that would pull us back into the real world—his focus was always how our decision was going to affect the real people involved. Reflecting his legislative experience, Mike was always ready to work for compromise and to get his colleagues on the same page. ‘That’s not a hill I need to die on’ was one of his favorite phrases. The Court will miss Mike—he was a good justice, committed to making the law work for people. And, he was always quick with a ‘Butte’ joke or story. Mike Wheat served Montana and Montanans well. We all will miss his presence on the Court.⁸

3. Interview with Mike Cok (December 4, 2017).

4. *Jackson v. Kroll, Pomerantz & Cameron*, 724 P.2d 717, 718, 721 (Mont. 1986).

5. *Halse v. Murphy*, 774 P.2d 418, 421, 423 (Mont. 1989).

6. *ISC Distribs., Inc. v. Trevor*, 903 P.2d 170, 171, 178–79 (Mont. 1995).

7. *Wheat v. Brown*, 85 P.3d 765, 766–67, 771–72 (Mont. 2004).

8. Email from Jim Nelson, former Justice of the Montana Supreme Court, to Nick Kirby Brooke (December 7 2017) (copy on file with Nick Kirby Brooke).

But some hills are worth dying on. Former law clerks recall Justice Wheat's constant concern for the rights of the average Montanan when threatened by larger forces. Former Justice Pat Cotter notes, "[w]hen Mike passionately believes in an issue or outcome, he won't quit."⁹

Justice Wheat's opinions at the Montana Supreme Court reflect his passion for protection of the environment. Wheat wrote for the majority in *Clark Fork Coalition v. Department of Environmental Quality*,¹⁰ invalidating a permit for a copper and silver mine near an important bull trout habitat. When the Court considered the issuance of oil and gas wells near sage grouse breeding areas, Wheat dissented vigorously that Montanans had been "left in the dark."¹¹

Wheat's fervent defense of the environment included protection of public access to Montana's public lands and waters. In *Public Lands Access Association v. Board of County Commissioners of Madison County*,¹² a private landowner argued that the Montana Stream Access law was an unconstitutional taking. The dispute concerned public access of the Ruby River from a public bridge and the banks near the bridge. Writing for the majority, Wheat carefully explained why the takings argument did not "hold water," and upheld the Stream Access Law. Wheat further clarified that, on remand, a court could consider the public's history of recreational use to determine the nature and width of the public easement.¹³

A plaintiff's lawyer himself, Justice Wheat was a champion for the rights of plaintiffs. In *Jacobsen v. Allstate Insurance Co.*,¹⁴ plaintiffs sought to litigate a class action suit against Allstate for the company's strategy of discouraging claimants from hiring an attorney, thus cheapening their settlements. Wheat wrote for a narrow majority affirming class certification, a decision that this law review warned "portend[s] stormy seas for class opponents"¹⁵ In *Tidyman's Management Services, Inc. v. Davis*,¹⁶ an insurer wrongfully refused to defend its policy holder. The policy holder then settled the claim for \$29 million and an assignment of rights, and when the insurer then accepted coverage, it attempted to avoid the settlement. Wheat wrote for the majority in holding that the insurer had breached their

9. Interview with Patricia Cotter, former Justice of the Montana Supreme Court (December 7, 2017).

10. 288 P.3d 183, 185, 190 (Mont. 2012).

11. *Montana Wildlife Fed'n v. Montana Bd. of Oil & Gas Conservation*, 280 P.3d 877, 894–95 (Mont. 2012) (Wheat, J., dissenting).

12. 321 P.3d 38, 50 (Mont. 2014).

13. *Id.* at 46.

14. 310 P.3d 452, 456 (Mont. 2013).

15. Lucas Hamilton, Note, *The Breaking of a Wave: Jacobsen v. Allstate Ins. Co. and Class Certification*, 76 MONT. L. REV. 157, 183 (2015).

16. 330 P.3d 1139 (Mont. 2014).

duty to defend, and thus, was estopped from denying coverage or avoiding the settlement.¹⁷

Wheat was also deeply concerned for the rights of criminal defendants. In *Beach v. State*,¹⁸ the Court considered the sentence of Barry Beach, who was sentenced to 100 years without parole as a 17 year-old. The U.S. Supreme Court declared life sentences for juveniles to be unconstitutional in *Miller v. Alabama*,¹⁹ and Beach challenged his sentence in a petition to the Montana Supreme Court.²⁰ In a plurality opinion, the Montana Supreme Court held that Miller's bar on juvenile life sentences did not apply retroactively.²¹ Justice Wheat dissented in a comprehensive discussion of finality and fairness, concluding that *Miller* was retroactive, and that Beach's sentence was unconstitutional.²²

Eight months later, the U.S. Supreme Court ruled that *Miller* was retroactive.²³ Derrick Steilman, who was sentenced to 110 years without parole at the age of 17, then petitioned the Montana Supreme Court to overturn his sentence.²⁴ In a 4-3 decision, the Montana Supreme Court found that Steilman's sentence was not unconstitutional because he qualified for "good time" credit while in prison.²⁵ Justice Wheat dissented again: "although Steilman's sentence may be subject to day-to-day credit, it should not negate the fact that the sentencing judge sentenced Steilman to the practical equivalent of life without parole: 110 years without the possibility of parole."²⁶ As counsel for Derrick Steilman, I may be biased, but I find his dissent persuasive.

At the time of drafting this tribute, Justice Wheat wrote for the majority in 410 opinions, including 42 reversals and 29 affirmed in part. Wheat dissented 29 times.²⁷ After retirement from the Court, he is not walking away from the law, only taking a step back: Mike will continue to maintain active status with the Bar. Nevertheless, Mike's presence at the Montana Supreme Court will be sorely missed. As an attorney, he worked diligently for his clients' interests. As a legislator, he worked to enact major changes enhance the treatment of veterans, the environment, and the indigent accused. As a justice, he brought a pragmatic and practical viewpoint while

17. *Id.* at 1152.

18. 348 P.3d 629, 631 (Mont. 2015).

19. 567 U.S. 460 (2012).

20. *Beach*, 348 P.3d at 631.

21. *Id.* at 631.

22. *Id.* at 643-51 (Wheat, J., dissenting).

23. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016).

24. *Steilman v. Michael*, 407 P.3d 313, 315.

25. *Id.*

26. *Id.* at 321 (Wheat, J., dissenting).

27. Email from Rex Renk, Deputy Clerk of Montana Supreme Court, to Nick Kirby Brooke (December 7, 2017) (copy on file with Nick Kirby Brooke).

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consistently standing up for the rights of his fellow Montanans. Mike Wheat spent a lifetime in public service to his nation and his state, and the people of Montana were truly fortunate to have him represent us.

