DA 17-0603

IN THE SUPREME COURT OF
THE STATE OF MONTANA

2018 MT 259

JANIE L. ROBINSON,

Plaintiff and Appellant,

v.

STATE COMPENSATION MUTUAL
INSURANCE FUND,

Defendant and Appellee.

APPEAL FROM:
District Court of the First Judicial District,
In and For the County of Lewis and Clark,
Cause No. BDV 05-790
Honorable Michael F. McMahon,
Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Lawrence A. Anderson, Attorney at Law, P.C.,
Great Falls, Montana

For Appellee:

Maxon R. Davis, Davis, Hatley, Haffeman, &
Tigh, P.C. Great Falls, Montana

Submitted on Briefs: September 5, 2018
Decided: October 23, 2018

Filed:

/s/ Ed Smith
Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Plaintiff Janie Robinson (Robinson) appeals from the summary judgment entered by the First Judicial District Court, Lewis and Clark County, in favor of Defendant State Compensation Mutual Insurance Fund (State Fund), on Robinson's claims. We affirm, addressing the following issues:

1. *Did the District Court err by denying Robinson's claims that § 39-71-605, MCA, was unconstitutional because it permits workers' compensation insurers to obtain multiple medical examinations of a claimant?*

2. *Did the District Court err by denying Robinson's constitutional tort claim?*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On July 4, 1996, Robinson suffered a heat stroke-related injury while working on the South Peak Angus Ranch in Judith Basin County, Montana. South Peak was insured for workers' compensation purposes by State Fund, which accepted liability for Robinson's injury and began paying expenses related to her medical

care. Six years later, in September 2002, State Fund referred Robinson for an independent medical examination (IME) by Dr. Bach, for the purposes of determining the effectiveness of the treatment Robinson was receiving, assessing whether she suffered from emotional health problems unrelated to her 1996 injury, and identifying any permanent restrictions causally related to that injury. Dr. Bach reported that, in his view, Robinson's "[c]urrent course of treatment is appropriate, reasonable, and medically necessary."

¶3 In November 2002, State Fund assigned Robinson's case to Claim Examiner Bridget Disburg. Robinson was then receiving primary medical care from Dr. Astle and counseling from Dr. Johnson. Upon her review of Robinson's file, Disburg noticed that Robinson was taking two forms of anti-inflammatory medication that seemed inconsistent with her treatment for a heat stroke injury. Additionally, Disburg found no treatment plans from either of Robinson's physicians. In February 2003, Disburg sent a letter to Dr. Astle and Dr. Johnson inquiring about Robinson's treatment plan, citing a Montana Administrative Rule authorizing submission of such plans, and copying Robinson with her correspondence.

¶4 Because Robinson had not yet recovered and was still receiving treatment for her 1996 injury, in March 2003 Disburg requested a medical records review of Robinson's case by Dr. Stratford. Robinson was informed by letter of this records review. Dr. Stratford opined that a medical panel evaluation would be the most appropriate way to assess the issues involved

with Robinson's care. Disburg contacted Robinson about Dr. Stratford's recommendation for a panel IME, and, according to Disburg's affidavit, Robinson "seemed open to the option." Sam Heigh, Disburg's supervisor, spoke with Robinson over the phone in June 2003, wherein Robinson expressed concern about the second IME, but indicated she was willing to participate. In addition to Dr. Stratford, the panel consisted of a psychiatrist, a neurologist, and a psychologist. The IME was conducted in September 2003.

¶5 Dr. Stratford, authoring the panel's report, stated that, while acknowledging Robinson's need for further treatment of her depression, he would not "endorse" the current course of Robinson's treatment, adding "[b]y no means do I mean to denigrate or be critical of the therapy that has occurred because I believe it has been very helpful. However, it does need to be very much more directed toward solutions. . . ." He concluded with a recommendation to "[c]ontinue to have [Robinson] work with this psychologist as long as it is aimed toward a goal-directed cognitive treatment of depression—perhaps even on a weekly basis up to six months—with some clear indication of value past that point." In December 2003, Disburg forwarded the panel's report to Dr. Astle and renewed her request for submission of a treatment plan.

¶6 Robinson suffered an injury to her lower back while working at South Peak Angus Ranch in March of 2004, which was still insured by State Fund at that time. State Fund accepted liability and began paying for medical care associated with this injury as well.

¶7 In May 2004, addressing Robinson's ongoing psychiatric care related to the 1996 injury, State Fund requested that Robinson's psychiatrist, Dr. Engstrom, provide a treatment plan, including "a timetable for the implementation and duration of the treatment." The letter instructed that a narrative report would need to be submitted at the end of the designated treatment period "prior to initiating any additional services," and that "[p]ayment for any future services will be suspended pending receipt of the treatment plan." In August 2004, Robinson's therapist, Dr. Johnson, advised State Fund that Robinson's treatment would continue for a minimum of twelve months or "into the unforeseeable future."

¶8 In light of a review of Dr. Johnson's progress notes and Dr. Stratford's recommendations, State Fund, in November 2004, suspended payment for further treatment of Robinson by Dr. Johnson, in favor of and regular visits with Dr. Astle and biofeedback treatment, which State Fund had approved. That decision was reversed one month later and State Fund resumed its payment of Robinson's psychiatric services. Dr. Astle later reported that Robinson had "reached maximum psychological stability, maximum healing or maximum medical healing," effective June 2005. In March 2006, State Fund declared Robinson permanently totally disabled based upon the cumulative effect of her injuries for which State Fund had accepted liability.

¶9 Beginning in 2004, Robinson filed successive legal challenges in the Workers' Compensation Court (WCC) to the managed care provisions of the Workers'

Compensation Act, and the medical utilization rules governing workers' compensation claims promulgated by the Department of Labor and Industry, as unconstitutional. Ultimately, these actions were dismissed by the WCC, first, on grounds that Robinson lacked standing, because her claims against State Fund did not arise under the challenged provisions. And secondly, that the WCC lacked jurisdiction over some of Robinson's claims because they did not arise in the context of a dispute regarding benefits.

¶10 Robinson originally filed this proceeding before the Lewis and Clark County District Court in 2005, ultimately filing her Second Amended Complaint in December 2015. Robinson alleged that State Fund's handling of her workers' compensation claims violated her constitutional rights to privacy, substantive due process, and freedom from unreasonable searches, by reason of obtaining a second IME without showing good cause; that State Fund committed a constitutional tort against her; and that she was entitled to attorneys' fees under the private attorney general doctrine because the government "fail[ed] to properly enforce" significant constitutional protections.

¶11 The parties filed cross motions for summary judgment, and the District Court granted State Fund's motion, while denying Robinson's motion and dismissing her complaint with prejudice. Robinson appeals.

STANDARD OF REVIEW

¶12 We review a district court's grant or denial of summary judgment de novo, applying the same criteria used by the district court under M. R. Civ. P. 56. *Pilgeram v. Greenpoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839. "Summary judgment is appropriate only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Town & Country Foods, Inc. v. City of Bozeman*, 2009 MT 72, ¶ 12, 349 Mont. 453, 203 P.3d 1283.

¶13 Our review of constitutional questions is plenary. *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88. "Legislative enactments are presumed to be constitutional, and the party challenging the provision has the burden of proving beyond a reasonable doubt that it is unconstitutional." *Williams*, ¶ 23. "If there is any doubt as to constitutionality, the resolution must be made in favor of the statute." *Walters v. Flathead Concrete Prods.*, 2011 MT 45, ¶ 32, 359 Mont. 346, 249 P.3d 913. A statute's constitutionality is a question of law, which we review for correctness. *Walters*, ¶ 9.

DISCUSSION

¶14 *1. Did the District Court err by denying Robinson's claims that § 39-71-605, MCA, was unconstitutional because it permits workers' compensation insurers to obtain multiple medical examinations of a claimant?*

¶15 Broadly stated, the issue raised here is whether § 39-71-605, MCA, violates the Montana Constitution. Robinson argues the provision permits State Fund to act in contravention to the rights of privacy, substantive due process, and against unreasonable searches embodied in Article II, Sections 3, 10, and 17 of the Montana Constitution.

¶16 Section 39-71-605(1), MCA, provides, in pertinent part:

> (a) Whenever in case of injury the right to compensation under this chapter would exist in favor of any employee, the employee shall, upon the written request of the insurer, submit from time to time to examination by a physician, psychologist, or panel that must be provided and paid for by the insurer and shall likewise submit to examination from time to time by any physician, psychologist, or panel selected by the department or as ordered by the workers' compensation judge.
>
> (b) The request or order for an examination must fix a time and place for the examination, with regard for the employee's convenience, physical condition, and ability to attend at the time and place that is as close to the employee's residence as is practical. An examination that is conducted by a physician, psychologist, or panel licensed in another state is not precluded under this section. The employee is entitled to have a physician present at any examination. If the employee, after written request, fails or refuses to submit to the

> examination or in any way obstructs the examination, the employee's right to compensation must be suspended and is subject to the provisions of 39-71-607. Any physician, psychologist, or panel employed by the insurer or the department who makes or is present at any examination may be required to testify as to the results of the examination.

¶17 Robinson's constitutional claims are premised upon State Fund obtaining a second medical evaluation, thus implicating the portion of § 39-71-605(1), MCA, requiring a claimant who is receiving workers' compensation to, "upon the written request of the insurer, submit from time to time to examination by a physician, psychologist, or panel." Section 39-71-605(1)(a), MCA. Robinson argues, "[t]he Court should hold that § 605 is facially invalid. The doctor shopping, which it promotes, violates constitutional guarantees."[1]

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[1] The District Court concluded that Robinson "brought an as applied, not facial, constitutional challenge to the statute." Robinson challenges this conclusion on appeal, arguing that she challenged the statute in both ways. As the District Court noted, "the distinction is not without significance." As we have stated, "[a]nalysis of a facial challenge to a statute differs from that of an as-applied challenge." To prevail on a facial challenge to a statute's constitutionality, the challenger "must show that 'no set of circumstances exists under which the [challenged sections] would be valid, i.e., that the law is unconstitutional in all of its applications.' " *Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190 (2008)). Although Robinson's complaint expressly asserted the statute was invalid "as applied," other allegations of the complaint were stated more broadly, albeit without being labeled a "facial" challenge. State

a. Right to Privacy

¶18 In a facial argument, Robinson contends that by allowing insurers "to compel attendance at serial IMEs, with no showing of good cause," the statute "unduly abridg[es] privacy rights" of all workers' compensation claimants, in violation of the Montana Constitution. As applied to her, Robinson contends that the second IME obtained by State Fund in her case, as authorized under § 39-71-605(1), MCA, violated her fundamental right to privacy by failing to establish good cause for the panel evaluation.

¶19 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." This Court has long recognized that "the privacy interests concerning a person's medical information implicate Article II, Section 10, of the Montana Constitution." *Malcomson v. Liberty Northwest*, 2014 MT 242, ¶ 23, 376 Mont. 306 (citing *State v. Nelson*, 283 Mont. 231, 241-42, 941 P.2d 441, 447-48 (1997)). Robinson argues strict scrutiny review is applicable here because the challenged statute implicates the fundamental right of privacy. Consistent therewith, State Fund responds by arguing that § 39-71-605(1), MCA, is justified by a compelling state interest and is narrowly tailored to effectuate that interest, thus satisfying strict scrutiny review. As we explained in *Malcomson*,

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Fund responds to Robinson's as-applied and facial arguments, and our analysis likewise incorporates both.

"legislation that infringes the right of privacy must be reviewed under a strict scrutiny analysis. The subject statute must be justified by a compelling state interest and be narrowly tailored to effectuate that purpose." *Malcomson*, ¶ 24.

¶20 In *Malcomson*, we addressed a related statute, § 39-71-604, MCA, which permitted a workers' compensation insurer to engage in *ex parte* communications with healthcare providers about a claimant's medical information, without the claimant's knowledge. *Malcomson*, ¶ 3. While we recognized that a claimant receiving compensation benefits "waives any privilege of confidentiality as to [her] healthcare information which is relevant to the subject matter of her claim," *Malcomson*, ¶ 27 (citing *Linton v. Great Falls*, 230 Mont. 122, 749 P.2d 55 (1988)), we nonetheless reasoned that such a waiver "does not mean the worker loses all privacy interests in how that information is circulated or disseminated." *Malcomson*, ¶ 29. We concluded that § 39-71-604, MCA, was not narrowly tailored to effectuate the State's interest in the orderly administration of the workers' compensation system, and was thus unconstitutional, to the extent it gave authority to insurers beyond what was necessary to pursue their "legitimate interest in engaging in *ex parte* contact with healthcare providers" for administration of the claim handling process. *Malcomson*, ¶¶ 30, 33.

¶21 Robinson argues that, as with the statute at issue in *Malcomson*, § 39-71-605(1), MCA, likewise fails the strict scrutiny test and is unconstitutional.

Acknowledging our holding in *Malcomson* that "the State has a compelling interest in the orderly administration of the workers' compensation process," *Malcomson*, ¶ 25, Robinson concedes § 39-71-605(1), MCA, satisfies the first prong of the strict scrutiny analysis, but contends it is not narrowly tailored because it allows insurers to "compel attendance at serial IMEs, with no showing of good cause," and thus fails under the second prong. In order to remedy the statute's asserted unconstitutional effect, Robinson urges the Court to impose the same good cause requirement applied to IMEs in civil litigation, as set forth in M. R. Civ. P. 35, to IMEs in workers' compensation cases, which would permit IMEs only upon a court order made after a showing of good cause. Robinson argues "[s]uch a rule would provide a more narrowly-tailored means of protecting the State's interest than does § 39-71-605," and cites our orders vacating district court orders requiring an IME in *Simms v. Mont. Eighteenth Judicial Dist. Ct.*, 2003 MT 89, 315 Mont. 135, 68 P.3d 678, and *Lewis v. Mont. Eighth Judicial Dist. Ct.*, 2012 MT 200, 366 Mont. 217, 286 P.3d 577.

¶22 First, the particular constitutional inadequacy of the statute at issue in *Malcomson*—a failure to be narrowly tailored to effectuate only the State's compelling interest in obtaining a claimant's medical information—is not present here. Robinson was kept informed throughout the process and her medical information was not obtained or disseminated without her knowledge. Robinson was privy to the IME process and participated in the examination.

¶23 The provision Robinson challenges is part of the statutory structure of the workers' compensation system, which operates differently than the civil litigation at issue in *Simms* and *Lewis*. The workers' compensation system presumes injury without proof of fault and requires payment of stated medical and other benefits. We discussed M. R. Civ. P. 35, and noted the distinctions between workers' compensation and civil litigation, in *Linton*, 230 Mont. at 132-33, 749 P.2d at 62 ("The Workers' Compensation Act is withdrawn from private controversies because of the unique status of the Act as a humanitarian, quasi-judicial legislative creation of several special provisions applicable only to injured workers covered by the law."). The Legislature intends the workers' compensation system to "be primarily self-administering" and designed it "to minimize reliance upon lawyers and the courts." Section 39-71-105(4), MCA. The challenged provision helps further this mandate by allowing insurers to obtain IMEs without having to petition the court, make a showing of good cause, and obtain an order.

¶24 The statutory scheme balances this procedure by providing protections to claimants. Section 39-71-605(1)(b), MCA, requires IMEs to be scheduled "with regard for the employee's convenience, physical condition, and ability to attend at the time and place that is as close to the employee's residence as practical," and provides that a claimant "is entitled to have a physician present at any examination." Further, while an objecting claimant who refuses to attend an examination may be subject to suspension of her benefits, that

suspension is a "termination of compensation benefits" subject to an order by the Department granting interim benefits to the claimant pending further review of the dispute by the Workers' Compensation Court. Section 39-71-607, -610, MCA. Thus, a claimant who believes an insurer is abusing the IME process can seek this relief. These provisions help to narrowly tailor the statute to guard against an insurer's abusive use of IMEs in the workers' compensation context. Ultimately, a claimant also has remedies against an abusive insurer under the common law of bad faith. *White v. State*, 2013 MT 187, ¶ 24, 371 Mont. 1, 305 P.3d 795 (citations omitted).

¶25 Thus, the challenged provision does not undermine a claimant's rights in her medical information, as in *Malcomson*, and an IME is obtained pursuant to a claimant's waiver of confidentiality for purposes of the administration of her claim. The statutory framework includes protections for a claimant to prevent an insurer from seeking IMEs abusively. We conclude that the provisions of § 39-71-605(1), MCA, challenged by Robinson are justified by the State's compelling interest in the orderly administration of the workers' compensation process, and sufficiently narrowly tailored to effectuate only that interest. Robinson has not established there is "no set of circumstances . . . under which the [challenged sections] would be valid, i.e., that the law is unconstitutional in all of its applications," and therefore, they do not facially violate the right of privacy. *Cannabis Indus. Ass'n*, ¶ 14. As applied to Robinson, we first note she did not challenge the second IME

by pursuing relief from the Workers' Compensation Court, as provided by statute. Then, the record indicates State Fund's second IME occurred seven years after Robinson's injury, that Robinson was still receiving treatment from multiple medical providers, and it had not been made clear to State Fund that Robinson's providers were treating her pursuant to a treatment plan. Under these undisputed circumstances, the record does not support Robinson's as-applied constitutional challenge to the statute's authorization of a subsequent IME as a violation of her right to privacy.

b. Substantive Due Process

¶26 Robinson argues that the authorization given by § 39-71-605, MCA, for State Fund to order an additional IME was an unreasonable government action that violated the right of substantive due process under the Montana Constitution, which provides: "No person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art. II, § 17. "In order to satisfy substantive due process guarantees, a statute enacted under a state's police power must be reasonably related to a permissible legislative objective." *Walters*, ¶ 18 (citations omitted). We analyze a substantive due process challenge to a statute in two steps, considering: "(1) whether the legislation in question is related to a legitimate governmental concern, and (2) that the means chosen by the Legislature to accomplish its objective are reasonably related to the result sought to be attained." *Plumb v. Fourth Judicial*

Dist. Ct., 279 Mont. 363, 372, 927 P.2d 1011, 1016 (1996).

¶27 In our above discussion of the first issue herein, and in previous cases, we have acknowledged the government's legitimate concern in an "orderly" workers' compensation process, *Malcomson*, ¶ 14, that "promote[s] the continued economic welfare of employers who pay into the State Fund and the welfare of employees who receive compensation benefits." *Walters*, ¶ 28 (citations omitted). Addressing a previous substantive due process challenge to the Workers' Compensation Act, we identified "improving the financial viability of the system, controlling costs of the system, and providing benefits" as legitimate governmental objectives of the Act. *Walters*, ¶ 28 (citations and internal quotations omitted).

¶28 The challenged statute and the broader Workers' Compensation Act, as we recognized above, provide parameters on the IME process, including a mechanism for a claimant to challenge an abusive IME. The IME process is clearly related to the government's concern for effectively administering the workers' compensation process, permitting an insurer to request an IME without first petitioning the court, proving good cause, and obtaining an order, and is reasonably related to the legitimate government objective of promoting efficiency and self-reliance in the workers' compensation process. Therefore, we conclude the challenged provisions of § 39-71-605, MCA, do not violate the right of substantive due process, either facially or as applied to Robinson.

c. Unreasonable Searches

¶29 Robinson argues that "repetitive IMEs is a means of gathering evidence," and thus, constitutes an unreasonable government search in violation of Article II, Section 11 of the Montana Constitution and the Fourth Amendment of the United States Constitution. The Montana Constitution provides: "The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures." Mont. Const. art. II, § 11. We have long considered a warrantless search to be "*per se* unreasonable." *State v. Hamilton*, 2003 MT 71, ¶ 34, 314 Mont. 507, 67 P.3d 871.

¶30 However, Robinson offers no authority to support the proposition that an IME—a medical examination ordered in the course of the administration of her workers' compensation claim—is a "search" for purposes of Article II, Section 11 of the Montana Constitution. As we noted above, the context here is a civil matter in which the claimant has waived confidentiality to her healthcare information for purposes relevant to her claim with State Fund. Under this framework, Robinson agreed to submit to medical examinations appropriate to the handling of her claim. As discussed above, the statute places parameters on the IME process, which are reasonably related to fulfilling the Legislature's goal of administering the workers' compensation process in an orderly fashion, and which provide a remedy for a claimant to contest an abusive IME.

¶31 Robinson has failed to prove beyond a reasonable doubt that § 39-71-605, MCA, is facially unconstitutional. *Williams*, ¶ 23. Furthermore, Robinson has failed to establish that any action taken by State Fund pursuant to the statute in her case deprived her of any constitutional protections. Therefore, we conclude that § 39-71-605, MCA, is neither facially unconstitutional nor unconstitutional as applied in Robinson's case, and the District Court properly dismissed the claims.

¶32 *2. Did the District Court err by denying Robinson's constitutional tort claim?*

¶33 In her Second Amended Complaint, Robinson argued broadly that State Fund, acting under authority granted it by state law,[2] violated her constitutional rights to dignity, privacy, health, due process, and freedom from unreasonable searches, and, in so doing committed a constitutional tort against her, citing *Dorwart v. Caraway*, 2002 MT 240, 312 Mont. 1, 58 P.3d 128. In *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079, we explained "the absence of any other remedy [had] supported the establishment of a constitutional tort" in *Dorwart*, but that a constitutional tort will not lie where "adequate remedies exist under the statutory or common law." *Sunburst*, ¶ 64.

¶34 Government entities are liable for torts committed by their officers, employees, and agents. Section

[2] On appeal, Robinson does not contest the District Court's determination that State Fund is a government agency for purposes of this issue.

2-9-101, MCA. With regard to enforcement of a statute that is subsequently declared to be unconstitutional, a government officer, employee or agent is entitled to immunity in a civil action if they acted to enforce the statute "in good faith, without malice or corruption, and under the authority of law." Section 2-9-103(1), MCA.

¶35 However, we need not address the existence of alternate remedies or good faith immunity, as we have already determined that no constitutional violation occurred here. The constitutional challenges brought by Robinson failed to establish that the challenged provisions of § 39-71-605, MCA, violated a provision of the Montana Constitution, and, consequently, Robinson's constitutional rights were not violated by State Fund's action in seeking a second IME. Therefore, there is no basis to claim a constitutional tort and the District Court correctly dismissed the claim. Having affirmed the dismissal of all of Robinson's claims, there is no basis for her request for attorney fees.

¶36 Affirmed.

/S/ JIM RICE

We concur:

/S/ DIRK M. SANDEFUR
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

JANIE L. ROBINSON, Plaintiff, v. MONTANA DEPARTMENT OF LABOR AND INDUSTRY and STATE COMPENSATION MUTUAL INSURANCE FUND, Defendant.	Cause No. BDV-2005-790 **ORDER ON VARIOUS MOTIONS** (Filed Jun. 23, 2017)

Before the Court are the following motions: (1) Defendant State Compensation Mutual Insurance Fund's (State Fund) motion for partial summary judgment on Counts 2, 4, and 5; (2) Plaintiff Janie L. Robinson's (Robinson) motion to reconsider the Court's prior summary judgment order; and (3) Robinson's motion for summary judgment on constitutional grounds. The motions are fully briefed. The State Fund untimely requested oral argument and a status conference on the pending motions.

BACKGROUND

In the summer of 1996, Robinson was found unresponsive and drenched in sweat in the closed cabin of a tractor she was operating for a business insured by State Fund. Robinson was treated for heat exhaustion and dehydration then released. Robinson has had

extensive medical treatment for her injury since the incident.

In September 2002, State Fund requested an independent medical examination with neuropsychologist Paul J. Bach because Robinson's symptoms had failed to improve. Bach recommended continued psychotherapy with Johnson and medication for "anxiety/depression." In October 2003, State Fund scheduled a second independent medical examination with neuropsychologist William D. Stratford, two neurologists, and a physiologist. Stratford's report suggested referral to a psychopharmacologist and continued psychotherapy.

In March of 2004, Robinson suffered a back injury and was declared to have a permanent and total disability in March of 2006.

In November of 2005, Robinson filed, but did not serve, this lawsuit. Robinson amended the complaint in December 2007 and served it in January 2008. The amended complaint made three claims: declaratory judgment that the medical utilization statutes and rules are unconstitutional, declaratory judgment over whether the District Court or Workers' Compensation Court had jurisdiction, and constitutional tort.

In November 2010, Robinson sought summary judgment on the whether the medical utilization rules violated her constitutional right to privacy. The Court denied Robinson's motion in September 2011 because she failed to prove she had an actual expectation of privacy, the first prong in determining privacy under *Gryczan v. State*, 283 Mont. 433, 447, 942 P.2d 112, 121

(1997); see *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516 (1967).

In March 2012, Robinson signed an affidavit detailing extensively her privacy expectations regarding medical care, and filed a second motion for summary judgment on privacy. The Court granted Robinson's motion, because State Fund failed to respond, but the Court subsequently vacated that order because Robinson's counsel had consented to an extension to the response. In April 2013, the Court issued an order on this renewed motion. Although Robinson established her actual expectation of privacy, the Court concluded that summary judgment was not warranted because "there has been no authority presented to this Court that would show, at this stage in the proceeding, that Robinson's expectation of privacy would be considered reasonable by society."

In 2014, the Montana Supreme Court issued *Malcomson v. Liberty Nw.*, 2014 MT 242, 376 Mont. 306, 339 P.3d 1235. There, a claimant challenged the constitutionality of Mont. Code Ann. § 39-71-604(3), which provided that a claim for benefits authorizes the insurer to communicate with healthcare providers "without prior notice to the injured employee." The Montana Supreme Court concluded that the statute "violated Malcomson's constitutional right of privacy because it allowed [insurer] Liberty to discuss wide-ranging healthcare information with Malcomson's doctors, nurses, and therapists – some of which may not be relevant to Malcomson's workers' compensation claim – without giving Malcomson or her attorney notice and

the opportunity to participate in the communication." *Malcomson*, ¶ 9.

In December 2015, Robinson filed a second amended complaint alleging five counts: (1) violation of the separation of powers by former Defendant Department of Labor and Industry, (2) violation of Robinson's constitutional right to privacy, (3) declaratory judgment over which court should have jurisdiction, (4) constitutional tort, and (5) fees and costs under the private attorney general doctrine.

In January 2017, the parties stipulated to dismiss the separation of powers claim and the Department of Labor and Industry as a party. The declaratory judgment question about jurisdiction was ruled on by this Court in its April 26, 2013 Order. Therefore, only the constitutional challenge, constitutional tort, and private attorney general claims remain.

STANDARD

Summary judgment should never be a substitute for trial when there is an issue of material fact. *McDonald v. Anderson*, 261 Mont. 268, 272, 862 P.2d 402, 404 (1993). It is "an extreme remedy and should never be substituted for a trial if a material fact controversy exists." *Clark v. Eagle Sys.*, 279 Mont. 279, 283, 927 P.2d 995, 997 (1996). All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment. *Heiat v. Eastern Mont. College*, 275 Mont. 322, 327, 912 P.2d 787, 791 (1996). Summary judgment is not to be

utilized to deny the parties an opportunity to try their cases before a jury. *Brohman v. State*, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v. Swingley*, 206 Mont. 306, 670 P.2d 1386 (1983); *Cheyenne W. Bank v. Young*, 179 Mont. 492, 587 P.2d 401 (1978); *Kober v. Stewart*, 148 Mont. 117, 122, 417 P.2d 476, 479 (1966).

Summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). It is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish the absence of any genuine issue of material fact and the party is entitled to judgment as a matter of law. *Tin Cup County Water &/or Sewer Dist. v. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60. Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)).

Disputed issues of fact are considered material if they concern the elements of the claim or the defenses to such claim to an extent that requires resolution by the jury. *State Medical Oxygen & Supply v. American*

Medical Oxygen Co., 267 Mont. 340, 344, 883 P.2d 1241, 1243 (1994) (citation omitted). If the trial court determines that no genuine issue of material fact exists, it then must determine whether the moving party is entitled to judgment as a matter of law. *Willden v. Neumann*, 2008 MT 236, ¶ 13, 344 Mont. 407, 189 P.3d 610. It is universally recognized that "[t]he purpose of summary judgment is to encourage judicial economy through the elimination of any unnecessary trial." *Payne Realty & Hous. v. First Sec. Bank*, 256 Mont. 19, 24, 844 P.2d 90, 93 (1992).

ANALYSIS

State Fund seeks summary judgment on all three remaining counts in the second amended complaint: constitutional challenge, constitutional tort, and fees under the private attorney general doctrine.

Robinson seeks summary judgment on the constitutional tort claim and seeks favorable reconsideration of the Court's prior orders denying her summary judgment on the constitutional privacy claim.

1. State Fund's Motion for Partial Summary Judgment

State Fund seeks summary judgment on Counts 2 (declaratory judgment on constitutionality), 4 (constitutional tort), and 5 (private attorney general) of the complaint.

1.1 Declaratory Judgment on Constitutionality (Count 2)

Count 2 of the second amended complaint alleges:

> The provisions of A.R.M. § 24.29.1519, and § 39-71-605, MCA, as applied here, violate the Petitioner's right to individual dignity as guaranteed by Article II, Section 3 of Montana's Constitution, the right to pursue health by all lawful ways as guaranteed by Article II, Section 3 of Montana's Constitution, the right to privacy as guaranteed by Article II, Section 10 of Montana Constitution, the right against unreasonable searches and seizures as guaranteed by Article II, Section 11 of the Montana Constitution; and the Fourth Amendment to the United States Constitution, the warrant requirement of Article II, Section 11 of the Montana Constitution and the Fourth Amendment of the United States Constitution, and the right to substantive due process as guaranteed by Article II, Section 17 of Montana's Constitution.

As a preliminary matter, the agency that promulgated rules subject to an action challenging the rule's validity "must be made a party to the action." Mont. Code Ann. § 2-4-506(4). The Department of Labor and Industry, which promulgated Mont. Admin. R. 24.29.1501 *et seq*, has been dismissed as a party, therefore Robinson's challenges to the administrative rules must fail as a matter of law.

Additionally, in the various briefs Robinson repeatedly argues the facial unconstitutionality of the

statute despite the clear language of her complaint. (Second Amended Complaint, ¶ 33 ("[t]he provisions of A.R.M. § 24.29.1519, and § 39-71-605, MCA, *as applied here*, violate the Petitioner's right . . . ") (emphasis added).) This distinction is not without significance. Indeed, "[a]nalysis of a facial challenge to a statute differs from that of an as-applied challenge." *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131. "[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190 (2008), quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987). Robinson has unequivocally brought an as applied, not facial, constitutional challenge to the statute.

1.1.1 Search, Seizure, & Warrant

Robinson alleges Mont. Code Ann. § 39-71-605 violates the search, seizure, and warrant provisions of the United States Constitution and the Montana Constitution. State Fund counters that those provisions do not apply to independent medical examinations consented to by the examinee and not concerning criminal conduct.

Robinson quotes *State v. Hardaway*, 2001 MT 252, 307 Mont. 139, 36 P.3d 900, which defines a search as "the use of some means of gathering evidence which

infringes upon a person's reasonable expectation of privacy." *Hardaway*, ¶ 16. Robinson also quotes *State v. Goetz*, 2008 MT 296, 345 Mont. 421, 431, 191 P.3d 489, 497, which states that "[a] search occurs when the government *infringes upon an individual's expectation of privacy* that society considers objectively reasonable." *Goetz,* ¶ 25 (Robinson's emphasis). Finally, Robinson quotes language from a recent United States Supreme Court requoting language from the seminal search case *Katz v. United States*: "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *City of L.A. v. Patel*, 135 S. Ct. 2443, 2452 (2015) quoting *Katz*, 389 U.S. 347 (1967).

However, one thread ties together and undermines the applicability of Robinson's authority; she consented to the independent medical examination. "A search to which an individual consents meets Fourth Amendment requirements. . . ." *Katz v. United States*, 389 U.S. 347, 358 n.22, 88 S. Ct. 507, 515 (1967). "Where no objectively reasonable expectation of privacy exists, a 'search' does not occur." *Goetz*, ¶ 25. Robinson can hardly claim she has an expectation of privacy regarding a consented-to search. Indeed, the problem in Hardaway was that the police search [sic] Hardaway "[w]ithout his *consent* or a warrant." *Hardaway,* 18 (emphasis added).

Robinson argues that the freedom to not consent to the examination "is illusory, and should be disregarded" because "injured workers depend upon compensation

payments for their livelihood." This is insufficient argument and authority for the Court to find a violation under the unconstitutional conditions doctrine.

Accordingly, since Robinson consented to the examination, no wrongful search occurred.

1.1.2. Privacy, Dignity, & Pursuit of Health

As a preliminary matter, Robinson's consent to the examination constitutes a waiver of any privacy expectation she may have had concerning the examination, as concluded in section 1.1.1 above. Similarly, "a claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim." *Bowen v. Super Valu Stores*, 229 Mont. 84, 745 P.2d 330 (1987); accord *Linton v. Great Falls*, 230 Mont. 122, 749 P.2d 55 (1988).

Malcolmson v. Liberty Northwest

Robinson relies primarily upon the argument that *Malcomson* stands for the proposition that "Robinson has an expectation of health care information privacy that society would deem reasonable in the context of the administration of the workers' compensation program." State Fund counters that although *Malcolmson* protects the privacy of claimants by prohibiting ex parte distribution of a claimant's medical information, it does not limit the collection of information relevant to the injury.

The *Malcolmson* Court in no way limited release to the insurer of relevant medical information, but simply required the insurer to give notice to the claimant of any communication with healthcare providers: "That *a worker consents to release of relevant medical information* does not mean the worker loses all privacy interests in how that information is circulated or disseminated. The right to control circulation of private information would be lost if the individual does not know what healthcare information is being circulated or to whom." *Malcomson*, ¶ 29 (emphasis added).

Robinson states that "[a]ccording to SF [State Fund], *Malcolmson* does not upend the fundamental principle that injured workers must give up relevant information regarding their claim." The Court agrees with State Fund. Robinson's own quote from *Malcolmson* exposes the error in her analysis. In *Malcolmson*, the Court stated that the insurer's "attempt to sweep away all expectation of privacy ignores the distinction made in the revised statute between the right of access to medical information and the method whereby that access is accomplished." *Malcomson,* ¶ 22. Robison [sic] makes the same error in analyzing *Malcolmson, failing* to distinguish between that case's limitation on ex parte distribution of information (*i.e. method* of access) and the broader right to access to that information. Nothing in *Makolmson* [sic] stands for the proposition that an injured worker need not give up relevant information regarding their claim.

Indeed, *Malcomson* states "[s]ection 39-71-604(2), MCA, provides that by making a claim for workers'

compensation benefits, a claimant authorizes her physician or other healthcare provider to disclose or release information relevant to the claimant's condition to the workers' compensation insurer." *Malcomson*, ¶ 25. This provision was not challenged in *Malcomson*, let alone overturned.

Malcolmson concerned *ex parte* distribution of medical information. This case is about whether and how relevant medical information can be collected in the first place. *Malcolmson* is inapplicable.

As for *ex parte* communication, Robinson has identified only one: a February 7, 2003 letter from State Farm [sic] claim adjuster Bridget Scevers to Dr. Astle. Had Robinson examined the verso, she would have found "cc: Janie Robinson." Scever's affidavit[1] states that she "followed Montana State Fund's general practice and copied Ms. Robinson" when communicating with providers. There is no evidence of *ex parte* communication in contravention of *Malcolmson* and no allegation that the examinations were irrelevant to Robinson's injuries.

Armstrong v. State

The other major authority upon which Robinson relies is *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, which struck down a statute prohibiting certified physician assistants from performing

[1] Ms. Scevers was formerly Ms. Disburg, and that is the name she used in her affidavit.

abortions, citing the privacy, dignity, and pursuit of health, religion and speech, and due process clauses of the Montana Constitution.

This Court has already rejected *Armstrong* as inapplicable, stating "the State is not denying Robinson any medical procedure, treatment, or provider as was the case in *Armstrong*. She is free to obtain any such procedure, treatment, or provider. The only question is whether the State Fund should be required to pay for her choice." Order, pages 16-17 (April 26, 2017).

Neither *Malcolmson* nor *Armstrong* support Robinson's claim that Mont. Code Ann. § 39-71-605 is unconstitutional.

1.1.3. Substantive Due Process

No party has made more than a cursory mention of Robinson's claim that Mont. Code Ann. § 39-71-605 violates her right to substantive due process. With no argument or authority on this claim, the Court will not consider or decide if summary judgment is warranted.

All constitutional challenges to the administrative rules must fail because the promulgating agency is no longer a party. No search of [sic] seizure provisions of either constitution were violated by the independent medical examination to which Robinson consented. The Court has been presented with no legal authority which supports Robinson's constitutional challenges. Privacy is a fundamental right, Mont. Const. Art II, Section 10, and that privacy right includes medical

information, *Malcolmson*. However, that privacy right is waived by a worker's compensation claimant as to information relevant to their injury. *Id.* This insurer right of access is counterbalanced with claimants' privacy interests by prohibiting substantive, non-administrative communications between the insurer and provider without the claimant's knowledge.

There are no material facts in dispute on these issues, and State Fund is entitled to judgment as a matter of law. As indicated earlier, however, insufficient authority and argument was presented for the Court to grant summary judgment on the substantive due process claim.

1.2. Constitutional Tort (Count 4)

State Fund seeks dismissal of Robinson's constitutional tort claim, arguing it is entitled to statutory immunity under Mont. Code Ann. § 2-9-103(1). Robinson counters that statutory immunity does not apply because State Fund is not a governmental entity.

> If an officer, agent, or employee of a governmental entity acts in good faith, without malice or corruption, and under the authority of law and that law is subsequently declared invalid as in conflict with the constitution of Montana or the constitution of the United States, that officer, agent, or employee, any other officer, agent, or employee of the represented governmental entity, or the governmental entity is not civilly liable in any action in which the individuals or governmental

> entity would not have been liable if the law had been valid.

Mont. Code Ann. § 2-9-103(1).

Robinson argues that State Fund's assertion that it is a governmental entity "has no merit" because it performs the functions of a private insurer and is governed by appointees from private enterprises. The Court disagrees. Although not legally dispositive, Robinson could at a minimum acknowledge that it is the *State* Fund being sued, and defended by an attorney from the Risk Management & Tort Defense Division of *the State.* More substantive is the Montana Supreme Court's unambiguous statement: "The State Fund, *as a state agency*, is insured by the state comprehensive insurance plan." *Birkenbuel v. Mont. State Comp. Ins. Fund*, 212 Mont. 139, 147, 687 P.2d 700, 704 (1984). This language is all the more determinative coming as it does from a case interpreting a different statute within the same statutory scheme limiting liability or conferring immunity on various governmental actors and acts. Mont. Code Ann. Tit. 2, Ch. 9, Pt. 1.

Finally, Robinson argues that there are genuine issues of material fact as to whether State Fund acted in good faith. This is, conveniently, the first mention of bad faith by Robinson. No allegation of bad faith is made in the second amended complaint. No affidavit has been offered to show, or even allege, bad faith. Instead, Robinson offers several hypotheticals in which a jury *could* find bad faith, but Robinson does not even

argue, let alone support with facts, that these actually do constitute bad faith.

"When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." Mont. R. Civ. P. 56(e)(2). Here, Robinson has not even relied on the pleadings (which are bereft of bad faith allegations) or even directly argued bad faith occurred, but merely implied bad faith by oblique reference to what a jury could theoretically find. This is insufficient to overcome summary judgment.

State Fund is a government entity and Robinson's unsupported and late allegations of bad faith fail to undermine State Fund's immunity under Mont. Code Ann. § 2-9-103(1).

1.3. Private Attorney General (Count 5)

State Fund seeks dismissal of Robinson's private attorney general claim because the only defendant named in that count has been dismissed and because Robinson is bringing an as applied challenge. Robinson counters that State Fund's authority is inapplicable.

"There are three basic factors to be considered in awarding fees on this [private attorney general] theory. These are in general: (1) the strength or societal importance of the public policy vindicated by the

litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶ 66, 296 Mont. 402, 989 P.2d 800, quoting *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977). The first factor has since been limited to "awarding private attorney general fees only in litigation vindicating constitutional interests." *Am. Cancer Soc'y v. State*, 2004 MT 376, ¶ 21, 325 Mont. 70, 103 P.3d 1085.

Even if Robinson were to prevail on Count 2, the number of people standing to benefit from the decision is minimal. Although Robinson alternates between referring to Count 2 as a facial or as applied challenge, this Court has already found that she has brought as applied, not facial, challenge to Mont. Code Ann. § 39-71-605. Accordingly, since any remedy under Count 2 would only apply to Robinson, her as applied claim is not eligible for fees under the private attorney general doctrine.

Finally, on January 17, 2017, the parties filed a stipulation to dismiss the Department of Labor and Industry. Robinson's Count 5 claims that "[t]he State of Montana, through the Montana Department of Labor and Industry, as [sic] implemented unconstitutional administrative regulations as set forth herein, and the Montana Department of Labor and Industry has failed to recognize the unconstitutional nature of these regulations." No defendant other than the already-dismissed Department of Labor and Industry is

named in Robinson's private attorney general claim. With no remaining defendant named, Count 5 must fail for lack of standing, specifically no case or controversy.

The private attorney general doctrine does not allow Robinson to recoup fees for her as applied challenge, particularly where the defendant named in that count has been dismissed as a party.

2. Robinson's Motion to Reconsider

Robinson requests the Court "reconsider its summary judgment decisions that no authority exists that would recognize that Plaintiff has an expectation of privacy that society would recognize in this context." State Fund counters that Robinson's legal authority is inapplicable to this case. Based on the Court's conclusions above in section 1 above, Robinson's motion to reconsider is moot.

3. Robinson's Motion for Summary Judgment

Robinson requests the Court to conclude that State Fund's application of Mont. Code Ann. § 39-71-605 and Mont. Admin. R. 24.29.1519 to Robinson violates the warrant requirements of the Fourth Amendment of the United States Constitution and Article II, Section 11 of the Montana Constitution. Based on the Court's conclusions above granting summary judgment to State Fund (section 1 above), Robinson's motion for summary judgment is moot.

⁂ ⁂ ⁂

What remains of the Robinson's complaint [sic] the claim for unconstitutional violation of her right to substantive due process, but only as that claim relate [sic] to Mont. Code Ann. § 39-71-605 and not as it relates to Mont. Admin. R. 24.29.1501 et seq.

ORDER

1. State Compensation Mutual Insurance Fund's motion for partial summary judgment is **PARTIALLY GRANTED**; Counts 4 and 5 of the second amended complaint are **DISMISSED WITH PREJUDICE**, Count 2 is **PARTIALLY DISMISSED** except that the substantive due process claim remains but only as to Mont. Code Ann. § 39-71-605.

2. Janie L. Robinson's motion to reconsider is **DENIED**.

3. Janie L. Robinson's motion for summary judgment is **DENIED**.

4. Pursuant to this Order, the State Fund's untimely request for oral argument and status conference is moot.

DATED this 28th day of June, 2017.

/s/ Michael F. McMahon
MICHAEL F. McMAHON
District Court Judge

C: Lawrence A. Anderson, Esq., PO Box 2608, Great Falls, MT 59403-2608
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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

JANIE L. ROBINSON, Plaintiff, v. MONTANA DEPARTMENT OF LABOR AND INDUSTRY and STATE COMPENSATION INSURANCE FUND, Defendant.	Cause No. BDV-2005-790 **ORDER ON VARIOUS CROSS-MOTIONS FOR SUMMARY JUDGMENT** (Filed Jun. 23, 2017)

Before the Court are cross-motions for summary judgment on the only remaining claim in this case – declaratory judgment as to whether Montana Code Annotated § 39-71-605 violates Plaintiff Janie L. Robinson's substantive due process rights under the Montana Constitution. The issue is fully briefed. No party requested oral argument.

BACKGROUND

In December 2015, Robinson filed a second amended complaint alleging five counts: (1) violation of the separation of powers by former Defendant Department of Labor and Industry; (2) violation of Robinson's constitutional right to privacy; (3) declaratory judgment over which court should have jurisdiction; (4) constitutional tort; and (5) fees and costs under the private attorney general doctrine.

In January 2017, the parties stipulated to dismiss the separation of powers claim and the Department of Labor and Industry as a party. The declaratory judgment question about jurisdiction was ruled on by this Court in its April 26, 2013 Order. On June 28, 2017, the Court ruled on Robinson's motion to reconsider and cross-motions for summary judgment, denying reconsideration and granting partial summary judgment to State Fund on all claims except for the substantive due process claims under the Montana Constitution in Count 2 of the amended complaint.

Based on that Order, Robinson requested the Court either enter final judgment against her, certify the question as final under Montana Rule of Civil Procedure 54(b), or order a briefing schedule for final resolution of the case through summary judgment. The Court ordered each party to submit a brief on the substantive due process claim, and each party did so requesting summary judgment in their favor. Accordingly, even though neither party has submitted a formal motion, the Court will consider this as cross-motions for summary judgment.

STANDARD

Summary judgment should never be a substitute for trial when there is an issue of material fact. *McDonald v. Anderson*, 261 Mont. 268, 272, 862 P.2d 402, 404 (1993). It is "an extreme remedy and should never be substituted for a trial if a material fact controversy exists." *Clark v. Eagle Sys.*, 279 Mont. 279, 283, 927 P.2d

995, 997 (1996). All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment. *Heiat v. E. Mont. College*, 275 Mont. 322, 327, 912 P.2d 787, 791 (1996). Summary judgment is not to be utilized to deny the parties an opportunity to try their cases before a jury. *Brohman v. State*, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v. Swingley*, 206 Mont. 306, 312, 670 P.2d 1386, 1389 (1983); *Cheyenne W. Bank v. Young*, 179 Mont. 492, 496, 587 P.2d 401, 404 (1978); *Kober v. Stewart*, 148 Mont. 117, 122, 417 P.2d 476, 479 (1966).

Summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). It is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish the absence of any genuine issue of material fact and the party is entitled to judgment as a matter of law. *Tin Cup County Water &/or Sewer Dist. v. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60. Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts which raise a genuine issue as to one or more elements

of its case. *Id.*, ¶ 54 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)).

Disputed issues of fact are considered material if they concern the elements of the claim or the defenses to such claim to an extent that requires resolution by the jury. *State Med. Oxygen & Supply v. Am. Med. Oxygen Co.*, 267 Mont. 340, 344, 883 P.2d 1241, 1243 (1994). If the trial court determines that no genuine issue of material fact exists, it then must determine whether the moving party is entitled to judgment as a matter of law. *Willden v. Neumann*, 2008 MT 236, ¶ 13, 344 Mont. 407, 189 P.3d 610. It is universally recognized that "[t]he purpose of summary judgment is to encourage judicial economy through the elimination of any unnecessary trial." *Payne Realty & Hous. v. First Sec. Bank*, 256 Mont. 19, 24, 844 P.2d 90, 93 (1992).

ANALYSIS

Robinson seeks summary judgment on the sole remaining claim: "§39-71-605, Montana Code Annotated §, as applied here violate the Petitioner's right to . . . substantive due process as guaranteed by Article II, Section 17 of Montana's Constitution."

As a preliminary issue, Robinson's briefing also argues the constitutionality of Montana Code Annotated § 39-71-604 and -607. Since these statutes are not mentioned in Count 2 of the amended complaint, they will not be considered. Likewise, Robinson argues that Montana Code Annotated § 39-71-605 "expressly violates Article II, Section 11 of the Montana Constitution

and the Fourth Amendment of the United States Constitution." Robinson also raises arguments concerning procedural due process; the Fourth Amendment of the United States Constitution; and Article II, section 10, of the Montana Constitution. None of these constitutional provisions are mentioned in Count 2 of the amended complaint and will therefore not be considered.

Similarly, Robinson criticizes State Fund for ignoring the authority she cited in support of the remaining claim, specifically *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694 (1972); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968); and *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332 (1958). This Court will also ignore Robinson's *federal* authority interpreting *federal* constitutional law in support of a claim under the *Montana* Constitution. "Statutes are presumed to be constitutional. That presumption can only be overcome after careful consideration of the purpose and effect of the statute, employing the proper level of scrutiny." *Donaldson v. State*, 2012 MT 288, ¶ 10, 367 Mont. 228, 292 P.3d 364.

> 'Substantive due process primarily examines underlying substantive rights and remedies to determine whether restrictions are unreasonable or arbitrary when balanced against the purpose of a government body in enacting a statute, ordinance or regulation.' '[I]n essence, substantive due process analysis requires that we decide (1) whether the legislation in question is related to a legitimate governmental concern, and (2) that the means

> chosen by the Legislature to accomplish its objective are reasonably related to the result sought to be attained.'

Walters v. Flathead Concrete Prods., 2011 MT 45, ¶ 18, 359 Mont. 346, 249 P.3d 913 (citations omitted).

Robinson makes no effort to analyze whether State Fund's efficiency or solvency are legitimate government concerns. Likewise, Robinson fails to analyze whether the statute is reasonably related to those legitimate concerns. Instead, Robinson rehashes already dismissed claims and raises new claims not made in her amended complaint.

Given the presumption of constitutionality and Robinson's total failure to engage in the analysis required for a substantive due process claim, summary judgment in her favor is not warranted.

The Court agrees with State Fund that Montana Code Annotated § 39-71-605 is reasonably related to a legitimate government concern. The State has a legitimate interest in ensuring that the workers' compensation system is solvent and functions efficiently, specifically preventing improper payment or overpayment. The statute is reasonably related and tailored to this legitimate interest. The statute does not mandate the examination, and contains safeguards about who can perform an examination and how a claimant must be accommodated. Furthermore, there are statutory recourses for seeking interim benefits pending determination of reasonableness of the refusal to submit to

an examination. See Mont. Code Ann. § 39-71-607, -610.

The reasonableness of this system is manifest from the very nature of the compromise which created the workers' compensation system. Robinson argues that "[implicit] in [State Fund's] argument is the proposition that giving up constitutional rights is part of the quid pro quo of the workers' compensation system. The quid pro quo of the workers' compensation system simply gives workers compensation benefits in exchange for relinquishing tort claims against employers." Robinson ignores the fact that the very constitutional provision which bestows Montanans' right to access the courts specifically precludes that right from injured employees covered by workers' compensation. Said another way, the workers' compensation scheme is premised on a reasonable diminution of injured workers' constitutional rights to access courts in exchange for guaranteed compensation. A civil claimant must prove negligence, but also is afforded judicial review of a request for an independent medical examination. Conversely, a workers' compensation claimant is entitled to benefits regardless of negligence, but the covering insurer is likewise entitled to independent medical examination. The workers' compensation system, from the Montana Constitution to the statute in question, is fundamentally premised on a reasonable diminution of constitutional rights of both claimants, employers and insurers. Montana Code Annotated § 39-71-605 is reasonably related and tailored to effectuate the legitimate government interest in maintaining the efficiency and

solvency of the workers' compensation system by reviewing the appropriateness of claims and benefits. Accordingly, since there are no material factual disputes, State Fund is entitled to judgment as a matter of law.

ORDER

1. State Fund's motion for summary judgment is GRANTED.

2. Robinson's motion for summary judgment is DENIED.

3. Robinson's amended complaint is DISMISSED with prejudice.

DATED this 22nd day of September 2017.

/s/ Michael F. McMahon
MICHAEL F. McMAHON
District Court Judge

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IN THE SUPREME COURT OF
THE STATE OF MONTANA

DA 17-0603

JANIE L. ROBINSON,

Plaintiff and Appellant,

v.

STATE COMPENSATION MUTUAL INSURANCE FUND,

Defendant and Appellee.

ORDER

(Filed Nov. 27, 2018)

Appellant Janie L. Robinson (Robinson) has filed a petition for rehearing following issuance of the Court's opinion in this matter on October 23, 2018. Appellee State Compensation Mutual Insurance Fund (State Fund) has filed objections thereto.

Robinson contends the Court's decision was rendered by a five-justice panel in violation of the Court's Internal Operating Rules, which provide the Court shall hear cases *en banc* involving the constitutionality of a statute "and such cases as shall be determined by two or more justices to require a hearing *en banc*." Section IV(1), Internal Operating Rules. Robinson argues the panel decision constitutes structural error and requires rehearing. However, as State Fund notes, the Internal Operating Rules, which provide for the efficient and orderly conduct of the Court's internal operations, "may be suspended or waived by order of the Court." Section VII(5), Internal Operating Rules. On

September 5, 2018, the Court issued an Order classifying the case to the Court sitting *en banc*, but noting the recusal of two justices. The Court determined that calling in judges to sit for the recused justices was not required for this case.

Robinson argues that dispositive questions were overlooked and that the Court reached issues *sua sponte*. However, all issues reached were argued by Robinson and her petition proceeds to acknowledge that the Court provided a "brief analysis" of her claims. These grounds do not provide a basis for rehearing under the Rule. M. R .App. P. 20(1)(A).

The Court having carefully considered the contentions raised in the petition

IT IS HEREBY ORDERED that the petition is DENIED.

The Clerk is directed to mail copies hereof to counsel of record for the respective parties.

DATED this 27th day of November, 2018.

/s/ Jim Rice

/s/ Laurie McKinnon

/s/ Ingrid Gustafson

/s/ Dirk M. Sandefur

/s/ Beth Baker

Justices

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCA 39-71-605

39-71-605. Examination of employee by physician – effect of refusal to submit to examination-report and testimony of physician – cost

(1)(a) Whenever in case of injury the right to compensation under this chapter would exist in favor of any employee, the employee shall, upon the written request of the insurer, submit from time to time to examination by a physician, psychologist, or panel that must be provided and paid for by the insurer and shall likewise submit to examination from time to time by any physician, psychologist, or panel selected by the department or as ordered by the workers' compensation judge.

(b) The request or order for an examination must fix a time and place for the examination, with regard for the employee's convenience, physical condition, and ability to attend at the time and place that is as close to the employee's residence as is practical. An examination that is conducted by a physician, psychologist, or panel licensed in another state is not precluded under this section. The employee is entitled to have a physician present at any examination. If the employee, after written request, fails or refuses to submit to the examination or in any way obstructs the examination, the employee's right to compensation must be suspended and is subject to the provisions of 39-71-607. Any physician, psychologist, or panel employed by the insurer or the department who makes or is present at any examination may be required to testify as to the results of the examination.

(2) In the event of a dispute concerning the physical condition of a claimant or the cause or causes of the injury or disability, if any, the department or the workers' compensation judge, at the request of the claimant or insurer, as the case may be, shall require the claimant to submit to an examination as it considers desirable by a physician, psychologist, or panel within the state or elsewhere that has had adequate and substantial experience in the particular field of medicine concerned with the matters presented by the dispute. The physician, psychologist, or panel making the examination shall file a written report of findings with the claimant and insurer for their use in the determination of the controversy involved. The requesting party shall pay the physician, psychologist, or panel for the examination.

(3) As used in this section, a panel includes a practitioner having substantial experience in the field of medicine concerned with the matters presented by the dispute and whose licensure would qualify the practitioner to act as a treating physician, as defined in 39-71-116, and may include a psychologist.

(4) A claimant is required, upon a written request of an insurer, to submit to a functional capacities evaluation conducted by a licensed physical or occupational therapist.

Credits

(1) Enacted by Laws 1915, ch. 96, § 13; reenacted Revised Code of Montana 1921, § 2906; reenacted Revised

Code of Montana 1935, § 2906. Amended by Laws 1975, ch. 23, § 16; Revised Code of Montana 1947, § 92-609. (2) Enacted by Laws 1957, ch. 234, § 10; amended by Laws 1975, ch. 23, § 27; Revised Code of Montana 1947, § 92-814.1; Revised Code of Montana 1947, 92-609, 92-814.1; amended by Laws 1985, ch. 422, § 1; amended by Laws 1987, ch. 464, § 15; amended by Laws 1989, ch. 613, § 64; amended by Laws 1991, ch. 558, § 5; amended by Laws 1993, ch. 619, § 3; amended by Laws 1997, ch. 276, § 10; amended by Laws 1999, ch. 218, § 1; amended by Laws 1999, ch. 377, § 12; amended by Laws 2005, ch. 141, § 1.

Notes of Decisions (18)

MCA 39-71-605, MT ST 39-71-605

Current through chapters effective, Oct. 1, 2017 session. Statutory changes are subject to classification and revision by the Code Commissioner. Court Rules in the Code are current with amendments received through May 1, 2017.

IN THE SUPREME COURT
OF THE STATE OF MONTANA
Supreme Court Cause No. DA 17-0603

Janie L. Robinson,

Plaintiff and Appellant,

-vs-

State Compensation Mutual Insurance Fund,

Defendant and Appellee.

On Appeal for the First Judicial District Court,
Lewis and Clark County
Cause No. BDV 2005-790
Honorable Michael F. McMahon

APPELLANT'S OPENING BRIEF

(Filed Apr. 16, 2018)

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[1] **STATEMENT OF ISSUES**

I. Insurers "doctor shop" by compelling Workers Compensation claimants to submit to repetitive independent medical examinations (IMEs) without showing good cause, pursuant to

§ 39-71-605, MCA. Does this practice violate constitutional guarantees of privacy, substantive due process, and freedom from unreasonable search?

II. Did the District Court err in granting summary judgment dismissing Plaintiff's constitutional tort claim?

III. Did the District Court err in granting summary judgment dismissing Plaintiff's claim for attorney's fees under the private attorney general doctrine?

STATEMENT OF THE CASE

This case involves practices in Montana's Workers Compensation system. Plaintiff challenges "doctor shopping" by insurers who compel multiple independent medical examinations (IMEs), then choose the IME report most beneficial to them. Plaintiff claims that this practice violates constitutional guarantees of privacy, of due process, and against unreasonable search.

The case has been in progress for thirteen years. It was originally filed in the [2] Workers Compensation Court (WCC). After benefits issues were resolved, the WCC dismissed the issues raised here on jurisdictional grounds.

Plaintiff sued the Montana Department of Labor and Industry and the State Fund (the State Comprehensive Mutual Insurance Fund). She sought a declaratory judgment that various statutes and

administrative rules are unconstitutional. She also claimed a constitutional tort. (Doc. 2)

Plaintiff brought three motions for summary judgment before the Hon. Jeffrey Sherlock, in 2010, 2012, and 2013. (Docs. 10, 48, 67) Judge Sherlock found Plaintiff's arguments "cogent," but ultimately denied the motions. (Docs. 35 and 88, p. 19)

Judge Sherlock then granted Plaintiff permission to file a Second Amended Complaint. (Doc. 100) Plaintiff broadened her claims for declaratory judgment and for constitutional tort. She also added a claim to exercise private attorney general status. (Doc. 101)

In 2016-17, all the parties moved for summary judgment. (Docs. 113, 114, 116, 118, 139) While motions were pending, the Department of Labor and Industry was dismissed by stipulation. (Doc. [sic] 130, 132) The summary judgment motions of the Plaintiff and of the State Fund then were heard by the Hon. Michael McMahon.

Judge McMahon granted the State Fund summary judgment on all Plaintiff's claims except her claim of a due process violation. (Doc. 151) After further [3] briefing, he issued an additional order, which dismissed that claim as well. (Doc. 160) Plaintiff timely brought this appeal. (Doc. 164)

STATEMENT OF FACTS

The Industrial Accident

In July 1996, Plaintiff Janie Robinson was doing ranch work in the midsummer heat. She was found in the enclosed cab of a tractor, drenched with sweat and barely responsive. She was rushed to a hospital and treated for heat exhaustion and dehydration. (Doc. 11, Ex. 3)

Six days later, a follow-up examination recorded fatigue and chills, although the temperature was above 85 degrees. The treating physician noted balance problems, nausea and diminished concentration. (*Id.*, Ex. 4)

One month later, a neurologist found that Robinson had post-traumatic syndrome. He noted that "she feels like 'I am in high altitude,'" with diffuse weakness, loss of memory, clumsiness and nervousness. (*Id.*, Ex. 5)

The IME with Dr. Bach

The State Fund covered Robinson's employer. When her symptoms did not abate, the State Fund referred her in September 2002 for an IME by a neuropsychologist, Dr. Paul Bach. (*Id.*, Ex. 6)

Using an extensive neuropsychological test battery, Dr. Bach diagnosed a traumatic brain injury from the heat event six years before. He found numerous [4] sequelae, including (1) memory problems related to heat stroke; (2) serious memory deficits; (3) serious impaired ability to learn new information; and

(4) significant depression, anxiety, psychological discomfort and suicidality. (*Id.*, Ex. 6, pp. 2-3)

Dr. Bach stated that he was unaware of any preexisting conditions contributing to Robinson's disorder. He recommended continuing psychotherapy and psychiatric medication. He stated that therapy "has been very useful for her, and has been masterfully performed by her current therapist." (*Id.*, Ex. 6, p. 3)

The Second IME with Dr. Stratford

The State Fund was not satisfied with Dr. Bach's findings. It consulted a psychiatrist, Dr. William Stratford. Dr. Stratford is retained by workers' compensation insurers on a constant basis. *See New Hampshire Ins. Co. v. Matejovsky*, 2016 MTWCC 8, ¶¶ 11-14, 18, 30 (Dr. Stratford performs 60-70 IMEs a year, charging $4,200 to $11,500; these facts "can be used to show bias at trial").

In 2003, the State Fund sent Robinson to an IME with Dr. Stratford and three of his colleagues in Missoula. Dr. Stratford issued a lengthy report. (Doc. 11, Ex. 7) In contrast to Dr. Bach, he stated that he did not believe that Robinson "has suffered from any organic brain difficulty." (*Id.*, Ex. 7, pp. 15-16)

Also in contrast to Dr. Bach, Dr. Stratford found that elements of [5] Robinson's disorder were preexisting. He acknowledged that her symptoms were severe – "severe major depression," "a major anxiety disorder,"

"a panic disorder with agoraphobia." (*Id.*, Ex. 7, p. 15-16)

Dr. Stratford stated that Robinson's psychological counseling is probably related to the work incident. However, he stated that "it is not something that I would endorse or would suggest should continue." (*Id*., Ex. 7, p. 17) He asserted that with medication, effective psychotherapy and biofeedback, substantial improvement should be made in six months or less. (*Id*.)

The Impact of the Second IME

Robinson was traumatized by the second IME. Days afterward (and long before the present lawsuit was filed), she stated:

> One doctor in perticuler was very hard on me, demanding answers, or questioning repeated about many things that were sexual. I was asked if my husband satisfied me sexualy and about my husbands injury their were many on that line and I feel violated. I wanted to say many times its none of your business yet I was told if I did not cooperate the doctor could call it off and I was very scared to stop it I felt trapped & powerless. I have nightmares of this man just hounding me. Friday on the way home from Doctors appt. something happened to me, I started cring and I jump out of the pickup at different times James stop'd we came home and I just wanted to lay on the ground, be alone. Every noise I heard it sound'd like everyone was yelling at me

> everything was so loud, I felt sick from Meds of headache I guess, vomiting-unsteady balance I just wanted to lay on ground I spent most of Saturday in & out and I did lay in my yard until people my husband, sister in law, my friend kept comming out so I sent and laid in back of pickup until I was found. I came in went to bed, didn't fall asleep for a long time tossd and turned up & down-thirsty the next thing I know Im in a truck on a 2 lane highway-I was very scared and [6] did not know how to get home . . .

(Doc. 49, Ex. 1 (emphasis added))

Robinson wrote the foregoing statement after a dissociative episode (defined by her psychiatrist as "behavior that a patient is unaware of what they are doing at the time . . . no conscious awareness of where she was going, why she was going, what she wanted to achieve"). (Doc. 65, Ex. 3, p. 8, lines 18-22) In this episode, Robinson "drove off from Geyser and her family found her in Big Timber." (*Id.*, lines 14-15)

The psychiatrist, Dr. Engstrom, testified with regard to that episode as follows:

> Q. And do you know what provoked that reaction; did you investigate that?
>
> A. Yes, She was very upset by her evaluation by Dr. Stratford.
>
> * * *
>
> Q. Did the State Fund's termination of care for psychotherapy, did it make your and Dr.

> Johnson's treatment and care of the post-traumatic stress syndrome and depression more difficult or less difficult?
>
> A. More difficult.
>
> * * *
>
> Q. And what issue did you take with Miss Scevers [the State Fund's adjuster] requiring Miss Robinson to be reevaluated by Dr. Stratford?
>
> A. Well, that after the previous evaluation, she, Miss Robinson, was overwhelmingly stressed by that, and was so distressed that she had the dissociative reaction and was contemplating suicide.

[7] (*Id.*, Ex. 3, pp. 8-9, 21, 31)

Robinson's other treating physicians gave similar statements. Dr. English, her neuropsychologist, stated:

> With the assistance of Drs. Stuart Hall, Stratford, Wilson, and Capps, the insurance adjuster questioned the need for psychological counseling, determined, inappropriately, that Janie did not suffer a brain injury, terminated her psychological counseling, and interfered with her ability to secure needed medication for her migraine headaches. In essence it appears that the insurance adjuster interfered in Janie Robinson's care. This provoked an emotional response in Janie Robinson that she was ill equipped to accommodate because of her compromised ability to manage her emotions.

(*Id.*, Ex. 4, p. 10 (emphasis added))

Dr. Paul Bach, who performed the first IME for the State Fund, stated:

> [G]iven the difficulty she had – the emotional difficulty she had in the interview of [sic] with Dr. Stratford for the workman's comp adjustor to say, Well, we must do this because Dr. Stratford said so, I would expect a catastrophic reaction.
>
> It was a difficult interview for her. She reacted to it profoundly, with emotional and cognitive disruption.
>
> * * *
>
> Q. And, Doctor, if a person with the deficits, the emotional and cognitive deficits that Janie has, how would you expect her to react to an arbitrary decision by the Insurance adjustor to terminate the care and treatment provided by her long-time psychotherapist Dr. Rennae Johnson?
>
> Mr. Davis: Same objections. It's an undisclosed expert opinion, and foundation.
>
> A. A stable therapeutic relationship provided for an anxious, [8] depressed patient, if interrupted without adequate time and explanation, you would expect a significant pathological, emotion reaction.

(Doc. 65, Ex. 2, pp. 40, 41 (emphasis added))

The Adjuster's Use of the Second IME

The State Fund's adjuster assigned to Robinson's case was Bridget Scevers (now Bridget Disburg). She aggressively intervened in Robinson's case based on the second IME. She disputed with Robinson's treating physicians – Dr. Astle, a neurologist; Dr. English, a neuropsychologist; Dr. Engstrom, a psychiatrist; and Dr. Johnson, a psychologist. Among other matters:

- Scevers required that the treating physicians provide a "treatment plan encompassing all the recommendations [in the second IME] reports within the next 30 days." (Doc. 11, Ex. 8)
- After further correspondence, Scevers required the physicians to submit a treatment plan including a specific diagnosis, specific types of treatment, procedures, modalities, and a timetable setting the duration of the treatment. (*Id*., Ex. 12)
- Scevers objected to Robinson being treated both by a psychiatrist and by a psychologist. (*Id*., Ex. 13) Dr. Astle and Dr. Engstrom responded that she needed both – one to manage medication and one for psychotherapy. (*Id.*, Exs. 14, 16)
- [9] Scevers repeatedly demanded that Dr. Johnson offer plans and timelines to terminate Robinson's psychological treatment. (Exs. 15, 17, 20) Dr. Johnson explained that the treatment was needed to treat post-traumatic stress disorder, depression and anxiety, and that it would continue into the unforeseeable future. (*Id.*, Exs. 18, 19)

- Finally, Scevers notified Dr. Johnson that the State Fund no longer would pay for the psychotherapy. (*Id.*, Ex. 21)

The treating physicians objected vigorously to this termination of treatment. Dr. English, the neuropsychologist, stated that the adjuster and the second IME panel had made Robinson's condition worse. (*See* Dr. English's letter of 11/30/12, filed under seal with Doc. 63) Dr. Engstrom, the psychiatrist, stated:

> [I]t is my strong opinion that she requires the type of ongoing psychotherapy she is receiving from Dr. Johnson. In fact, I maintain that her psychotherapy with Dr. Johnson is the cornerstone of her treatment. . . . [I]t seems irresponsible to me that [the adjuster] would base her decision on a one-time psychiatric evaluation by Dr. Stratford. . . . I believe that Dr. Stratford is in error when he says that prompt substantial improvement should be achieved in six months or less. It is my opinion that Ms. Robinson will require ongoing psychotherapy with Dr. Johnson and medication management by me for at least the next 12 months and probably significantly beyond that time.

(Doc. 11, Ex. 22 (emphasis added))

Scevers then reversed the decision to terminate psychotherapy payments. However, she continued aggressively seeking the management of Robinson's care. [10] She repeatedly questioned the medications and the dosing that the doctors were prescribing. (*Id.*, Exs. 24, 25) She insisted that Dr. Engstrom, the psychiatrist,

get approval from Dr. Astle, the neurologist, for psychotherapy and biofeedback. (*Id*., Ex. 26)

Finally, Scevers instructed Robinson's pharmacists not to fill her prescriptions without the adjuster's approval. Robinson had to make a 120-mile round trip from her remote ranch for these prescriptions. On numerous occasions, she tried unsuccessfully to get prior approval, drove to Great Falls, and was told by pharmacists that they could not reach the adjuster and could not fill the prescriptions. (Doc. 49, Ex. 1 – Robinson Aff., ¶ 12)

The Present Litigation

Robinson initially challenged the State Fund's use of IMEs and its case management practices in the Workers' Compensation Court. That Court declined jurisdiction, since Robinson did not raise a benefits dispute. (Doc. 11, Ex. 1 – WCC Order of Dec. 31, 2008)

Thereafter, Robinson pursued this litigation. She sought declaratory judgment that ordering repetitive IMEs without a showing of good cause is unconstitutional. She challenged the State Fund's overall management of her case, and she claimed a constitutional tort. (Docs. 2, 101)

These claims were based upon the rights of privacy, dignity, pursuit of [11] health, and substantive due process guaranteed by the Montana Constitution. (Doc. 101, ¶ 33) They also were based upon the guarantee against unreasonable searches of the U.S.

Constitution's Fourth Amendment and of the Montana Constitution. (*Id*.)

The litigation has been in process for more than a decade. Robinson brought three motions for partial summary judgment, in 2010, 2012 and 2013. (Docs. 10, 48, 67) Judge Sherlock ultimately denied them[1], holding that there were issues of law and fact for trial. (Docs. 35, 88)

In 2016, Robinson moved for summary judgment once again. (Docs. 114, 116, 118) She cited this Court's decision in *Malcomson v. Liberty Northwest*, 2014 MT 242, 376 Mont. 306, 339 P.3d 1235, which established that workers' compensation claimants have constitutional privacy rights. The State Fund also sought summary judgment. (Doc. 139)

Judge McMahon then issued his Order on Various Motions. (Doc. 151) He dismissed all Robinson's claims except her substantive due process claim (on which he found the briefing to be inadequate). (*Id*., p. 11) He rejected the claims on these grounds:

> [12] (1) Robinson's challenge to the IME statute (§ 39-71-605, MCA) had been pled as an as-applied claim, and would not be considered as a facial challenge. (*Id.*, pp. 6-7)

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[1] Judge Sherlock initially granted Plaintiff's second motion for partial summary judgment because the State Fund failed to respond. (Doc. 66) Thereafter, however, he granted the State Fund's motion to vacate the order and reserved the issues for trial. (Doc. 88)

(2) Robinson's constitutional claims against the serial IMEs were waived because she consented to the IMEs. (*Id*., pp. 7-8)

(3) *Malcomson* "in no way limited release to the insurer of relevant medical information," and does not bar serial IMEs. (*Id.*, pp. 8-9)

(4) Even if Robinson's claims were viable, the State Fund would be immune to her tort claim because she has made no showing of bad faith. (*Id.*, pp. 11-13)

(5) Robinson cannot act as a private attorney general, because "the number of people standing to benefit from the decision is minimal." (*Id.*, pp. 1314)

After further briefing, Judge McMahon dismissed Robinson's substantive due process claims. In his Order on Cross-Motions for Summary Judgment (Doc. 160), he ruled as follows:

(1) The Court would not consider Robinson's references to the Fourth Amendment of the U.S. Constitution, to the parallel provision of the Montana Constitution (Art. II, § 11), or to procedural due process, because they were not pled in her Complaint. (*Id*., pp. 4-5)

[13] (2) "This Court will also ignore Robinson's *federal* authority interpreting *federal* constitutional law in support of a claim under the *Montana* Constitution." (*Id*., p. 5 (italics by the Court)) Judge

McMahon expressly refused to consider *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968); and *Speiser v. Randall*, 357 U.S. 513 (1958). (*Id.*)

(3) "Robinson makes no effort to analyze whether State Fund's efficiency or solvency are legitimate government concerns. Likewise, Robinson fails to analyze whether the statute is reasonably related to these legitimate concerns. . . . Given the presumption of constitutionality and Robinson's total failure to engage in the analysis required for a substantive due process claim, summary judgment in her favor is not warranted." (*Id*., pp. 5-6)

(4) The statute authorizing serial IMEs (§ 39-71-605, MCA) "is reasonably related to a legitimate government concern . . . and tailored to a legitimate interest." (*Id*., p. 6)

(5) "[T]he workers' compensation scheme is premised on a reasonable diminution of injured workers' constitutional rights to access courts in exchange for guaranteed compensation." (*Id*., pp. 6-7)

Plaintiff respectfully contends that this analysis is mistaken. The vital [14] constitutional issues raised by this litigation are addressed below.

STANDARDS OF REVIEW

I. Unconstitutionality of § 39-71-605, MCA. The constitutionality of a statute is a question of law. *City of Billings v. Albert*, 2009 MT 63, 349 Mont. 400, 203 P.3d 828, ¶ 11. The Supreme Court reviews the district court's application of the Constitution to determine if it is correct. *Id.* The Supreme Court's review of constitutional questions is plenary. *Id.*

II. Summary judgment as to the constitutional tort claims. The Supreme Court reviews de novo a district court's grant or denial of summary judgment, applying the same criteria of M.R.Civ.P. 56 as a district court. *Grizzly Security Armored Express, Inc. v. Bancard Services, Inc.*, 2017 MT 184, 385 Mont. 307, 399 P.3d 295, ¶ 13. The party moving for summary judgment has the initial burden of establishing both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Id.* The Supreme Court's de novo standard of review allows it to review the record and make its own determinations regarding the existence of disputed issues of fact and entitlement to judgment as a matter of law. *Id*.

III. Summary judgment as to attorney's fees under the private attorney general doctrine. A district court's determination whether legal authority exists for an award of attorney fees is a conclusion of law, which the Supreme Court [15] reviews for correctness. *Clark Fork Coalition v. Tubbs*, 2016 MT 287, 388 Mont. 205, 384 P.3d 68, ¶ 9. The Supreme Court reviews de novo a district court's grant or denial of

summary judgment, applying the same criteria of M.R.Civ.P. 56 as a district court. *Grizzly Security Armored Express*, ¶ 13.

SUMMARY OF ARGUMENT

This case poses the question whether "doctor-shopping" by workers' compensation insurers violates constitutional guarantees. Plaintiff marshals several lines of authority to show that the practice is unconstitutional.

Insurers doctor-shop under § 39-71-605, MCA. That statute authorizes repetitive IMEs without any showing of good cause. Plaintiff argues that the statute is facially unconstitutional, or at the least is unconstitutional under the facts shown here.

Montana's constitution guarantees a fundamental right to privacy, including the right to choose one's doctor. Restrictions on that right must be narrowly tailored to serve a compelling state interest. Narrow tailoring should require insurers to show good cause for repetitive IMEs.

Privacy analysis is supported by unreasonable-search analysis. Warrantless searches are per se unreasonable. Showing good cause as a prerequisite to repetitive IMEs serves the constitutional warrant requirement.

Claimants do not waive these rights by consenting to repetitive IMEs. The [16] workers' compensation laws terminate benefits if claimants refuse IMEs. This

is demonstrably coercive, and a coerced consent waives no rights.

Even if there were a waiver, moreover, doctor-shopping would be unreasonable. Arbitrary government conduct is barred by the doctrine of substantive due process. That doctrine provides an additional ground to bar the practice in issue here.

This Court should grant declaratory judgment holding doctor-shopping unconstitutional. The Court should order § 39-71-605 revised to require a good-cause showing by insurers to justify repetitive IMEs. The good-cause requirement should follow the well-established practice under Rule 35, M.R.Civ.P.

This Court should also reinstate Plaintiff's claim of a constitutional tort. The District Court improperly held that Plaintiff failed to plead bad faith by the State Fund. The State Fund had the burden to plead good faith as an affirmative defense.

The record establishes genuine issues of material fact with regard to the tort and with regard to bad faith. Out-of-state cases have expressly recognized tort claims for doctor-shopping by workers' compensation insurers.

This Court also should reinstate Plaintiff's claim for attorney's fees under the private attorney general doctrine. The District Court erred in holding that Plaintiff's claim would not benefit other claimants. Her facial challenge to the statute would certainly do

so, and her as-applied challenge would set a strong [17] precedent for future cases.

Doctor-shopping clearly is unreasonable. Adjusters can use the practice oppressively, as shown by the record here. This Court should reverse the District Court and should curtail the practice of doctor-shopping.

ARGUMENT

I. THE STATE FUND'S USE OF REPETITIVE INDEPENDENT MEDICAL EXAMINATIONS IS UNCONSTITUTIONAL.

Section 39-71-605, MCA, allows Workers Compensation insurers to impose repetitive independent medical examinations (IMEs) on their claimants. Plaintiff argued in District Court that this measure is unconstitutional, both facially and as applied to her particular case. (*See, e.g.*, Doc. 140, pp. 10-13)

The District Court denied this claim. It rejected the facial challenge on grounds that Plaintiff "has unequivocally brought an as applied, not facial, constitutional challenge to the statute." (Doc. 151, pp. 6-7) It rejected the as-applied challenge on grounds, inter alia, that Plaintiff "consented to the independent medical examination," and thereby waived her claim. (*Id*., p. 7)

The District Court erred on both these points. As will be shown below, Plaintiff properly raised and did

not waive her claim. Section 605 clearly is unconstitutional, facially and as applied.

[18] **A. The Facial Claim and the As-Applied Claim**

The District Court denied the facial challenge to the statute based upon a single sentence in the Second Amended Complaint. That sentence states: "The provisions of A.R.M. § 24.29.1519, and § 39-71-605, MCA, *as applied here*, violate the Petitioner's right . . . " (Doc. 101, ¶ 33; Doc. 151, p. 6 (italics by the Court))

Other paragraphs of the Second Amended Complaint, however, raise a general challenge. In ¶ 31, Plaintiff asserts that § 605 "authorize[s] the insurer to obtain 'second options' without limitation." In ¶ 32, she alleges that "the insurer has doctor-shopped" under the authority conferred by that statute. In her Prayer for Relief, she seeks a general declaration that "the medical utilization rules of the Workers' Compensation system described herein" violate her constitutional rights.

These allegations state a facial challenge to § 605 under well-settled principles of Montana law. This Court long has held:

> Under our statute pleadings must be liberally construed with a view to substantial justice between the parties. [citation omitted] And in construing a pleading liberally whatever is necessarily implied by, or is reasonable to be

> inferred from, an allegation must be taken as directly averred.

Hage v. Orton, 119 Mont. 419, 422, 175 P.2d 174, 176 (1946) (emphasis added). Accord, *Sikorski v. Johnson*, 333 Mont. 434, 143 P.3d 161, 2006 MT 228, ¶ 23 ("We liberally construe pleadings," inquiring whether a cause of action is [19] "explicitly or implicitly stated in [the] complaint").

This Court repeatedly has reversed dismissals of claims where pleadings were too narrowly read. *See, e.g.*, *Kunst v. Pass*, 1998 MT 71, 288 Mont. 264, 957 P.2d 1, ¶¶ 34-37 ("although the Plaintiffs did not specifically request attorney's fees . . . [t]his Court liberally construes pleadings"); *Fode v. Farmers Ins. Exchange*, 221 Mont. 282, 719 P.2d 414, 416 (1986) ("Pleadings should be construed in the manner consistent with the spirit of modern rules of civil procedure"); *Morse v. Espeland*, 215 Mont. 148, 696 P.2d 428, 430 (1985) ("We find the essence of a claim has been pleaded, though not artfully described"). A similar holding is warranted here.

A recent U.S. Supreme Court holding directly supports consideration of Plaintiff's facial federal constitutional claim. It is powerfully persuasive as to her facial state constitutional claims as well. In *Citizens United v. Federal Election Commission*, 558 U.S. 310, 331 (2010), the Court stated:

> [T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always

> control the pleadings and disposition in every case involving a constitutional challenge. The distinction . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint."

(emphasis added)

This holding directly governs here. The Court should hold that Plaintiff properly has raised both a facial and an as-applied claim. Those claims, moreover, [20] are well taken on the merits, as shown below.

B. The Right to Privacy

The Montana Constitution establishes a fundamental right to privacy. Art. II, § 10 of the 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." This clause "broadly guarantees each individual the right to make medical judgments with a chosen health care provider free from the interference of the government." *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, ¶ 75 (emphasis added).

This right to privacy is exceptionally broad. Montana guarantees "one of the most stringent protections of its citizens' right to privacy in the United States – exceeding even that provided by the federal constitution." *Id*., ¶ 34.

Restrictions on the privacy right are subject to strict scrutiny. Thus, they "must be justified by a compelling

state interest and must be narrowly tailored to effectuate only that compelling interest." *Id.*

In *Malcomson v. Liberty Northwest*, 2014 MT 242, 376 Mont. 306, 339 P.3d 1235, this Court held that the fundamental right of privacy applies in the workers' compensation context. Insurers have a right of access to medical information, but employees have a privacy right in "the method whereby that access is accomplished." *Id.*, ¶ 22 (emphasis added).

[21] *Malcomson* held that the method at issue in that case was unconstitutional. The Court acknowledged that "the State has a compelling interest in the orderly administration of the workers' compensation process." *Id.*, ¶ 25. Statutes, however, must be "narrowly tailored to effectuate that interest" – and the statute in question was not narrowly tailored. *Id.*

A similar holding is warranted here. Section 39-71-605, MCA, allows insurers to compel attendance at serial IMEs, with no showing of good cause. This statute is *not* narrowly tailored to promote the State's interest without unduly abridging privacy rights.

A more narrowly tailored alternative is obvious. It would require insurers to justify repeated IMEs by showing good cause to a judge. This alternative would follow the standards prescribed for general civil litigation by M. R. Civ. P. 35.

C. Rule 35 Jurisprudence

M. R. Civ. P. 35 governs IMEs in discovery in civil litigation. It provides:

> When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licenced or certified examiner . . . The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.
>
> * * *

(emphasis added)

[22] Under Rule 35, thus, IMEs only are available by judicial order after a showing of good cause. The reason for this is that "privacy concerns . . . are recognized in the rule, and it is well accepted that a party does not possess an absolute right to obtain an independent medical examination." *Simms v. Montana Eighteenth Judicial Dist. Court*, 2003 MT 89, 315 Mont. 135, 68 P.3d 678, ¶ 28.

In *Simms*, this Court forbade an IME, exercising a writ of supervisory control. As in the present case, "a comprehensive independent exam ha[d] already been done at the request of the State Compensation Insurance Fund." *Id*., ¶ 38. The proposed examination site

was distant, and the examiner was known as a "hired gun." *Id*., ¶ 10.

Simms stressed the constitutional basis of Montana's privacy right. *See id.*, ¶ 32. It then stated, in part:

> When a proposed examination risks unnecessary, painful or harmful procedures the scale must favor protecting the individual's rights.
>
> * * *
>
> A court must scrutinize a request for a proposed examination on a case-by-case basis. The time, place, manner, conditions and scope of an examination must be balanced with the plaintiff's inalienable rights. . . . Rule 35, M.R.Civ.P., does not empower a defendant to seek out and employ the most favorable "hired gun" available no matter the inconvenience to the plaintiff and without regard to the plaintiff's rights.

Id., ¶¶ 32, 33 (emphasis added).

In *Lewis v. Montana Eighth Judicial District Court*, 2012 MT 200, 366 [23] Mont. 217, 286 P.3d 577, the Court again forbade an IME through supervisory control. As in the present case, the plaintiff had suffered many years of health problems, and one IME has been performed. *Id*., ¶¶ 2, 3. *Lewis* held that the insurer had not met the "high standard" required by Rule 35:

> We have expressly approved and applied a high standard for the "in controversy" and

> "good cause" requirements of Rule 35. . . . [T]he "in controversy" and "good cause" requirements of Rule 35 "'require an affirmative showing by the movant that each condition as to which examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. . . .'"

Id., ¶ 7 (emphasis added).

The analysis in *Simms* and *Lewis* supports a rule requiring good-cause showings to justify repetitive IMEs in workers' compensation cases. As in *Simms* and *Lewis*, a court should scrutinize insurers' claims of necessity and balance those claims against workers' privacy rights.

Such a rule would provide a more narrowly-tailored means of protecting the State's interest than does § 39-71-605. The rule would be workable, as shown by its routine use in civil litigation. This Court should adopt it to prevent arbitrary doctor-shopping by workers' compensation insurers.

D. "Unreasonable Search" Jurisprudence

The foregoing arguments, drawn from Montana's right to privacy, amply demonstrate that the statute at issue is unconstitutional. A separate but related line of authority emphatically supports this. That line applies the "unreasonable [24] search" provisions of the federal and state constitutions.

The two provisions are nearly identical in substance. The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search [sic], and the persons or things to be seized.

(emphasis added) Art. II, Sec. 11, of the Montana Constitution states:

> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

(emphasis added)

A "search," for these purposes, is "the use of some means of gathering evidence which infringes upon a person's reasonable expectation of privacy." *State v. Hardaway*, 2001 MT 252, 307 Mont. 139, 36 P.3d 900, ¶ 16 (emphasis added). "A search occurs when the government infringes upon an individual's expectation of privacy that society considers objectively reasonable." *State v. Goetz*, 2008 MT 296, 345 Mont. 421, 191 P.3d 489, ¶ 25.

The matters at issue in the present case clearly fit these definitions. The State Fund's doctor-shopping through repetitive IMEs is a "means of gathering evidence." Society surely considers it reasonable that people should not be [25] compelled to submit arbitrarily to serial examinations.

Warrantless searches are per se unreasonable. *See State v. Crawford*, 2016 MT 96, 383 Mont. 229, 371 P.3d 381, ¶ 18. The U.S. Supreme Court recently reiterated that "'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge] are per se unreasonable . . . subject to a few specifically established and well-delineated exceptions.'" *City of Los Angeles v. Patal,* ___ U.S. ___, 135 S.Ct. 2443, 2452 (2016) (emphasis added).

The U.S. Supreme Court and the Montana Supreme Court both have discussed the warrant requirement in terms that are directly pertinent here. *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 532-33 (1967) observes:

> Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing whether the inspector himself is acting under proper authorization. . . . The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by

> a requirement that a disinterested party warrant the need to search.

(emphasis added) *See also Skinner v. Railroad Labor Executives' Association*, 489 U.S. 602, 621-22 (1989) ("The essential purpose of the warrant requirement is to . . . assur[e] citizens subject to a search . . . that such intrusions are not the random or arbitrary acts of government agents"); *State v. Goetz*, ¶ 40 ("the Fourth [26] Amendment . . . has interposed a magistrate . . . so that an objective mind might weigh the need to invade that privacy in order to enforce the law").

In the present case, the statute fails to meet these constitutional standards. No "disinterested party warrant[s] the need to search." The statute allows insurers arbitrary discretion to force claimants through repetitive IMEs, and that is plainly unconstitutional.

The District Court held, however, that Plaintiff had waived her constitutional rights. It observed:

> [O]ne thread ties together and undermines the applicability of Robinson's authority; she consented to the independent medical examination. "A search to which an individual consents meets Fourth Amendment requirements. . . ." *Katz v. United States*, 389 U.S. 347, 358 n. 22, 88 S. Ct. 507, 515 (1967). "Where no objectively reasonable expectation of privacy exists, a 'search' does not occur. *Goetz*, ¶ 25. Robinson can hardly claim she has an expectation of privacy regarding a consented-to search.

(Doc. 151, pp. 7-8 (emphasis added, italics by the court))

This Court should reverse the District Court. The statute coerces claimants' "consent" to submit to repetitive IMEs, and a coerced consent does not waive rights.

The statute is mandatory. It states that a claimant "shall . . . submit" from "time to time" to examinations paid for by the insurer. § 39-71-605, MCA. If she "fails or refuses to submit" to IMEs, her "right to compensation must be suspended." *Id.*

[27] Manifestly, this is coercive. By definition, claimants for workers compensation have lost their livelihood. Mandatory suspension of benefits effectively compels acceptance of an IME.

The U.S. Supreme Court has held that coerced consent is *not* consent, and does not waive rights against an unreasonable search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 223-34 (1973) ("if under all the circumstances it has appeared that the consent was not given voluntarily – that it was coerced by threats or force, or granted only in submission to a claim of lawful authority – then we have found the consent invalid and the search unreasonable"); *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) ("The situation is instinct with coercion – albeit colorably lawful coercion. Where there is coercion there cannot be consent").

The Montana Supreme Court has held the same. *See State v. Munson*, 2007 MT 222, 339 Mont. 68, 169 P.3d 364, ¶ 50 (the State must prove that consent to a warrantless search was "uncontaminated by any express or implied duress or coercion").

Plaintiff cited those cases to the District Court. (Doc. 82, p. 4) This Court should find them controlling. It should hold that, as in *Bumper*, "[t]he situation is instinct with coercion . . . [w]here there is coercion there cannot be consent."

For these reasons, the Court should hold that the statute violates the Fourth [28] Amendment and the Montana Constitution. It authorizes unreasonable searches. The Court should require that § 39-71-605 be revised to require a good-cause finding by a judge to authorize repetitive IMEs.

E. Substantive Due Process

The foregoing arguments find additional support in the doctrine of substantive due process. That doctrine is grounded in Article II, Section 17 of the Montana Constitution. Plaintiff pled the doctrine in challenging §39-71-605. (Doc. 101, ¶ 33)

This Court discussed substantive due process in *Walters v. Flathead Concrete Products, Inc.*, 2011 MT 45, 359 Mont. 346, 249 P.3d 913. It stated:

> The essence of substantive due process is that the State cannot use its police power to take unreasonable, arbitrary or capricious action against an individual. In order to satisfy substantive due process guarantees, a statute enacted under a state's police power must be reasonably related to a permissible legislative objective.

* * *

> [S]ubstantive due process bars arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on oppressive governmental actions. . . . Consistent with this description, we have noted that "[e]ven though a plaintiff may have no property or liberty interest grounded in state law which is protected from arbitrary government action, such action may be subject to review under the substantive due process clause.

Id., ¶¶ 18, 21 (emphasis added).

Walters rebuts the District Court's holding in this matter. The District Court [29] held that the workers' compensation system entails a grand bargain in which workers sacrifice their liberty interest. (*See* Doc. 160, pp. 6-7) That rationale cannot justify arbitrary government action such as the doctor-shopping in issue here.

A line of U.S. Supreme Court cases is persuasive on this point. The Court has held that due process bars attempts to condition government benefits on waivers of constitutional rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) held:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . For if

> the government could deny a benefit to a person because of his constitutionally protected [fundamental rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." [citation omitted] Such interference with constitutional rights is impermissible.

(emphasis added) *See also Pickering v. Board of Ed. of Township High School Dist. 205, Will City*, 391 U.S. 563, 568 (1968) (government cannot condition employment as a public school teacher on surrender of First Amendment rights); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (government cannot condition a tax exemption on surrender of First Amendment rights).

Plaintiff cited these cases to the District Court. (Doc. 154, pp. 7-8) The [30] Court flatly refused to consider them. It stated: "This Court will . . . ignore Robinson's *federal* authority interpreting *federal* constitutional law in support of a claim under the *Montana* Constitution." (Doc. 160, p. 5 (italics by the court))

The District Court's refusal to consider federal cases was improper. This Court repeatedly has held that federal cases are persuasive when construing the Montana Constitution. *See, e.g.*, *Wilson v. State*, 2010 MT 278, 358 Mont. 438, 249 P.3d 28, ¶ 29 ("We have found it proper to rely on federal jurisprudence as persuasive authority for interpreting a provision of the Montana Constitution that is similar to a provision of the federal constitution"); *Plan Helena, Inc. v. Helena Regional Airport Authority Board*, 2010 MT 26, 355

Mont. 142, 226 P.3d 567, ¶ 6 ("federal precedents interpreting the Article III requirements for justiciability are persuasive authority for interpreting the justiciability requirements of Article VII, Section 4(1) [of the Montana Constitution]").

This Court should hold that compelling repetitive IMEs without showing good cause is unreasonable governmental action. It violates substantive due process. The State Fund should not be heard to justify this violation by invoking waiver or consent.

For all the foregoing reasons, this Court should reverse the entry of summary judgment. The Court should hold that § 605 is facially invalid. The doctor-shopping, which it promotes, violates constitutional guarantees.

[31] **F. <u>As-Applied Analysis</u>**

The foregoing arguments all show that § 39-71-605, MCA, is unconstitutional on its face. Were that not so, however, the statute demonstrably is unconstitutional as applied to this case.

Plaintiff filed an affidavit detailing infringements on her privacy. Among other matters, it states:

- Plaintiff has spent her whole life on a remote ranch. This seclusion, in a family that "keep[s] to ourselves," influences her expectations of privacy. (Doc. 47, Ex. 1 – Robinson Aff., ¶¶ 2-3)

- Plaintiff's understanding of privacy includes the right to choose her own doctor to help her determine appropriate courses of care. (*Id.*, ¶ 4) She understands the State Fund's right to review her medical records. But she does not understand how that inquiry is served by having multiple doctors examine her without any limitation and without a showing of need. (*Id.*, ¶¶ 6-8)

- By requiring multiple examinations without showing need, the State Fund invaded Plaintiff's expectations of privacy and deprived her of her dignity. (*Id*., ¶¶ 8-10)

- The serial IMEs were obtained by intimidation. Plaintiff is dependent on her workers' compensation benefits for the necessities of life. She had [32] no choice but to submit to the repeated examinations. (*Id*., ¶ 11)

- Dr. Stratford's IME was like an interrogation. She felt "trapped & powerless" and compelled to submit to repeated questions on "many things that were sexual." (*Id*., ¶ 12 and Ex. 1) That serial IME with Dr. Stratford caused her an intense reaction involving vomiting, nightmares, and dissociative behavior. (*Id.*)

As shown above, Plaintiff's treating physicians emphatically supported her account. They stated that the second IME produced a "catastrophic reaction," left Plaintiff "overwhelmingly stressed" and suicidal, and "provoked an emotional response . . . that she was ill equipped to accommodate because of her compromised

ability to manage her emotions." (*See* Doc. 65, Exs. 2-4 – statements of Drs. Bach, Engstrom and English)

The record shows that Dr. Bach's initial IME was comprehensive. He diagnosed a traumatic brain injury with serious memory deficits, depression, anxiety, PTSD, and no apparent preexisting condition. (*See* Doc. 11, Ex. 6, pp. 2-3) The State Fund showed no justification for rejecting his analysis and ordering a second IME.

The unrebutted evidence thus shows, as a matter of law, that the State Fund violated Plaintiff's right to privacy and performed an unreasonable search. This Court, accordingly, should order summary judgment finding an as-applied [33] constitutional violation. At the very least, it should find a genuine issue of fact on this point, and should reverse the summary judgment for the State Fund.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM FOR A CONSTITUTIONAL TORT.

In Plaintiff's Second Amended Complaint, she alleges a constitutional tort. Plaintiff claims that the State Fund, "acting under authority granted it by state law . . . violat[ed] Plaintiff's right to dignity, the right to pursue health, the right to privacy, right against unreasonable searches and seizures, and right to due process under Montana's Constitution." (Doc. 101, ¶ 42)

The District Court summarily dismissed this claim. It held that Plaintiff failed to allege "bad faith" and to demonstrate a fact issue as to bad faith:

> No allegation is made in the second amended complaint. No affidavit has been offered to show, or even allege, bad faith. Instead, Robinson offers several hypotheticals in which a jury *could* find bad faith, but Robinson does not even argue, let alone support with facts, that these actually do constitute bad faith.
>
> * * *
>
> Here, Robinson has not even relied on the pleadings (which are bereft of bad faith allegations) or even directly argued bad faith occurred, but merely implied bad faith by oblique reference to what a jury could theoretically find. This is insufficient to overcome summary judgment.

(Doc. 151, pp. 12-13 (emphasis added; italics by the court))

The District Court plainly erred on these points. "Bad faith" is not an [34] element of the Plaintiff's claim. The State Fund has the burden to demonstrate "good faith" to establish its immunity defense.

Plaintiff, therefore, had no obligation to plead "bad faith." She did, however, show abundant proof of bad faith in opposing summary judgment. (Doc. 141, pp. 18-19, *see also* pp. 13-15) The District Court's holding that Plaintiff "has not even . . . directly argued bad faith" is plain error.

Those points will be addressed below. Fact issues clearly exist with regard to both the constitutional tort and the immunity defense. Thus, summary judgment was improper.

A. Constitutional Tort Analysis

In *Dorwart v. Caraway*, 2002 MT 240, 312 Mont. 1, 58 P.3d 128 ("*Dorwart II*"), this Court established a right of action for violations of the state Constitution. In *Dorwart*, as here, the plaintiffs claimed violations of their rights to privacy and their rights against unreasonable search. This Court held: "[A] cause of action for money damages is available for violation of those rights guaranteed by Article II, Sections 10 and 11 of the Montana Constitution." *Id*., ¶ 48.

Governmental entities[2] can claim immunity to constitutional tort claims. *See id.*, ¶¶ 50-52. Section 2-9-103(1), MCA, provides:

> If an officer, agent, or employee of a government entity acts in good faith, without malice or corruption, and under the authority of law and that law is subsequently declared invalid as in conflict with the constitution of Montana or the constitution of the United States, that officer, agent, or employee, any other officer, agent, or employee of the represented governmental entity, or the governmental entity is

[2] The District Court held that the State Fund is a governmental entity. (Doc. 151, p. 12) Plaintiff does not contest that point on appeal.

> not civilly liable in any action in which the individuals or governmental entity would not have been liable if the law had been valid.

(emphasis added)

Immunity under this clause is an affirmative defense. For that reason, defendants have the burden to plead and to prove it. *See Orr v. State*, 2004 MT 354, 324 Mont. 391, 106 P.3d 100, ¶ 55 ("Immunity is a matter of avoidance, an affirmative defense"); *Wicklund v. Sundheim*, 2016 MT 62, 338 Mont. 1, 367 P.3d 403, ¶ 40 ("the party asserting the [affirmative] defense bears the burden of proof").

In the present case, the District Court clearly erred in holding that Plaintiff had those burdens. This Court reversed a similar holding in *Brown v. Ehlert*, 255 Mont. 140, 841 P.2d 510 (1992):

> [The district court's holding] would radically alter our modern rules of civil practice and procedure. Plaintiffs bringing common law negligence actions could no longer make "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a), M.R.Civ.P. . . . Presumably, it also would be incumbent on such plaintiffs to allege the inapplicability of all other immunities and bars to their action. In the event of a general denial by the defendant, one assumes the plaintiff would be put to her or his proof on all such matters. Such a result is not only contrary to our procedural rules, it is also contrary to our most fundamental notions of the

> pleading and proof burdens of the respective parties to a lawsuit.

[36] *Id.*, 841 P.2d at 513-14 (emphasis added).

This Court should similarly reverse the District Court's holding. Defendant had the burdens of pleading and proof. Moreover, the record shows genuine issues of material fact on bad faith.

B. Genuine Issues of Bad Faith

As Plaintiff showed the District Court, the record is replete with proof of bad faith. This is true with regard to the doctor-shopping and to other conduct of the State Fund. Relevant evidence includes the following:

- The State Fund initially referred Plaintiff for an IME with Dr. Bach. Dr. Bach found physical impairment (organic brain injury), and he supported ongoing psychotherapy and medication. (Doc. 11, Ex. 6) The State Fund then consulted Dr. Stratford and insisted on another IME.
- Strong grounds exist to infer that the State Fund chose Dr. Stratford because it believed that his opinions would favor an insurer. *See, e.g.*, *New Hampshire Ins. Co. v. Matejovsky*, 2016 MTWCC 8, ¶¶ 11-14, 18, 30 (Dr. Stratford performs 60-70 IMEs a year, charging $4,200 to $11,500; these facts "can be used to show bias at trial").
- Dr. Stratford concluded that Plaintiff has no organic brain injury. He did not endorse

psychological counseling, and he recommended that counseling not continue for more than six months. (Doc. 11, Ex. 7, pp. [37] 16-18) Those findings contradicted the opinions not just of Dr. Bach, but of all Plaintiff's treating physicians.

- Dr. Hall, a neuropsychologist on Dr. Stratford's own panel, disagreed with him. Dr. Hall's tests yielded even more severe results than Dr. Bach's. He concluded that "treatment may take a long time" and that "it is critical that she receive this treatment." (*Id*., Ex. 7, p. 41) Dr. Hall's opinion thus reinforces the very strong inference that Dr. Stratford is a biased examiner.

- The adjuster, citing Dr. Stratford's opinion, aggressively challenged Plaintiff's treating physicians. She demanded to know the duration of treatments, questioned the use of medications, challenged dosages, and objected to Plaintiff being treated by both a psychologist and a psychiatrist. (*Id*., Exs. 12-25)

- The adjuster, disregarding the opinions of treating physicians, and disregarding Dr. Hall's opinion, peremptorily terminated Plaintiff's psychotherapy. (*Id.*, Ex. 21; *see* Exs. 14, 16, 18, 19) Later, she reversed herself after a vigorous protest by the treating physicians. (*See* Dr. English's letter of 11/30/12, filed under seal with Doc. 63) Plaintiff's psychiatrist called the conduct of the adjuster "irresponsible." (Doc. 11, Ex. 22, p. 4)

[38] • The adjuster refused to allow the Plaintiff to refill prescriptions without her approval. Plaintiff repeatedly made fruitless 120-mile trips, because pharmacists could not successfully contact the adjuster. (Doc. 49, Ex. 1 – Robinson Aff., ¶ 12)

A jury could find bad faith based upon the foregoing facts. Several out-of-state courts have found jury issues of bad faith in similar cases, where plaintiffs claimed doctor-shopping by workers' compensation carriers.

In *Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 213 P.3d 288 (2009), the plaintiff was injured at work. Her physician scheduled surgery, but her self-insured employer refused to pay and required multiple IMEs. The Arizona appellate court upheld her bad-faith claim and also authorized a claim for punitive damages:

> Here, the record contains sufficient reasonable evidence to allow Mendoza to pursue punitive damages from McDonald's. . . . Although by May 1998 McDonald's had been advised Mendoza's carpal tunnel condition was causally related to the accident, it scheduled another independent medical examination with a different doctor. It did this, according to its claim file, to "support our denial." From this evidence, a jury could conclude McDonald's had engaged in impermissible "doctor shopping" in conscious disregard of the likely deterioration in Mendoza's medical condition.

Id., 213 P.3d at 307-308 (emphasis added). *See also*, *e.g.*, *Demetrulias v. Wal-Mart Stores Inc.*, 917 F. Supp. 2d

993, 1007 (D. Ariz. 2013) (summary judgment denied to insurer, where a reasonable jury could find that it scheduled an IME [39] "without reasonable or fairly debatable grounds"); *Jones v. Colorado Cas. Ins. Co.*, 2015 WL 1806726 * 6 (D. Ariz. April 21, 2015) ("Plaintiff . . . presented evidence that Defendant was 'doctor shopping' and making Plaintiff jump through procedural hoops rather than investigating a debatable claim").

A similar holding is warranted here. A jury reasonably could find that the State Fund acted in bad faith, including improper doctor-shopping. This Court, accordingly, should reverse the summary judgment and reinstate Plaintiff's claim for a constitutional tort.

III. PLAINTIFF IS ENTITLED TO ATTORNEY'S FEES UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE.

The private attorney general doctrine allows an award of attorneys' fees in litigation "vindicating constitutional interests." *Clark Fork Coalition v. Tubbs,* ("*Clark Fork II*") 2017 MT 184, 388 Mont. 205, 399 P.3d 295, ¶ 15. The doctrine applies when the government, "for some reason, fails to properly enforce interests which are significant to its citizens." *Id.*, ¶ 14.

Clark Fork II reviewed case law applying the private attorney general doctrine. It showed that fees have been awarded where "constitutional concerns were integrated into the rationale underlying the decision." *Id.*, ¶¶ 18, 23, quoting *Bitterroot River Protective*

Ass'n v. Bitterroot Conservation Dist., 2011 MT 51, 359 Mont. 393, 251 P.3d 131, ¶ 25. Fees have been denied where lawsuits do not [40] vindicate a constitutional interest, but turn on statutory interpretation. *Clark Fork II*, ¶¶ 19-23.

The present case clearly would vindicate constitutional interests. It does not turn on the language of the statute. Fees therefore may be awarded under the private attorney general doctrine.

The "*Montrust* factors" govern fee awards. This Court recently stated:

> When determining whether to award fees under the private attorney general doctrine, we consider: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision."

Clark Fork II, ¶ 15, citing *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 199 MT 263, 296 Mont. 402, 989 P.2d 800, ¶ 66 ("*Montrust*").

In the present case, Plaintiff clearly satisfies the *Montrust* factors. The strength of the public policy vindicated by the litigation is incontestable. *See Armstrong*, ¶ 34 (Montana's privacy right is "one of the most stringent protections . . . in the United States"). The State Fund conceded this factor below.

The second factor is proven by the sheer complexity of this lawsuit, which has extended for thirteen years. The constitutional issues never have been tested before because the burden on a litigant is so great. (A challenge could not be funded by workers' compensation fee awards, because no benefits are at issue.)

[41] Finally, large numbers of people stand to benefit from the Plaintiff's challenge. *See, e.g.*, *New Hampshire Ins. Co. v. Matejovsky*, 2016 MTWCC 8, ¶¶ 11-14, 18, 30 (finding that Dr. Stratford performs 60-70 IMEs a year). A rule against "doctor-shopping" by workers' compensation insurers will guard the privacy rights and the rights against unreasonable search of all future claimants.

The District Court summarily dismissed the private attorney general claim. It held that

> the number of people standing to benefit from the decision is minimal . . . this Court has already found that she has brought as applied [sic], not facial, challenge to Mont. Code Ann. § 39-71-605. Accordingly, since any remedy under Count 2 would only apply to Robinson, her as applied claim is not eligible for fees under the private attorney general doctrine.

(Doc. 151, p. 14 (emphasis added).

This holding is error. As shown above, Plaintiff raised a facial challenge. *See Citizens United*, 558 U.S. at 331. Even if the challenge were only as-applied, moreover, a holding for the Plaintiff would set a strong precedent for other claimants.

The District Court also held that Plaintiff lacks standing to claim attorney's fees. It reasoned that Plaintiff had pled her claim against the Department of Labor and Industry, which later was dismissed from the case. (Doc. 151, p. 14) ("With no remaining defendant named, Count 5 must fail for lack of standing").

The District Court, however, stressed elsewhere that the remaining [42] Defendant, the State Fund, is "*a state agency*," "defended by an attorney . . . of *the State.*" *Id.*, p. 12 (italics by the Court). Count 5 of Plaintiff's Complaint (the private attorney general count) re-alleges all Plaintiff's claims against the State Fund. (Doc. 101, ¶ 43)

This Court should apply the rule of liberal construction. *See Sikorski*, ¶ 23 (courts must inquire whether a claim is "explicitly or implicitly stated"). The Court should hold that Plaintiff has stated a viable claim for attorney's fees under the private attorney general doctrine. Thus, it should reinstate the claim.

CONCLUSION

This Court should hold that §39-71-605's authorization of the practice of "doctor shopping" through repetitive IMEs with no showing of good cause is unconstitutional. The Court should order that § 39-71-605, MCA, be revised to require a good cause showing to justify repetitive IMEs.

The Court should find genuine issues of material fact supporting Plaintiff's constitutional tort claim

and her claim for attorney's fees. Therefore, the Court should reverse the summary judgment and remand the case for trial.

Respectfully submitted this 16th day of April 2019 [sic].

/s/Lawrence A. Anderson
Lawrence A. Anderson

[Certificate Of Compliance Omitted]

[Certificate Of Service Omitted]

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 17-0603

Janie L. Robinson,

Plaintiff and Appellant,

-vs-

State Compensation Mutual Insurance Fund,

Defendant and Appellee.

On Appeal for the First Judicial District Court,
Lewis and Clark County
Cause No. BDV 2005-790
Honorable Michael F. McMahon

APPELLANT'S PETITION FOR REHEARING

(Filed Nov. 7, 2018)

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[1] INTRODUCTION

Petitioner recognizes the heavy burden required to demonstrate grounds for a rehearing. She respectfully submits that those grounds exist in the present case.

First, the case is "a bona fide challenge . . . to the constitutionality of a statute." Such cases are to be heard by a "seven member" panel, under this Court's

Internal Operating Rules. This case, however, was determined by a panel of five members.

The panel's composition is a "structural error." Well-settled principles of jurisprudence require that the case be reheard by a seven-member panel, as required by the rules.

The Court's decision, moreover, "overlooked . . . questions presented by counsel that would have proven decisive to the case." It conflicts with U.S. Supreme Court decisions cited by counsel but not mentioned by the Court. These are grounds for a rehearing on the merits under Mont. R. App. P. 20(1)(a).

ARGUMENT

I. DECISION OF THIS APPEAL BY A FIVE-MEMBER PANEL IS A STRUCTURAL ERROR THAT REQUIRES A REHEARING.

This Court's Internal Operating Rules require that constitutional cases be heard by seven members. Section IV of the Rules provide, in pertinent part:

> [2] The Supreme Court en banc shall consist of seven members. The Court en banc shall hear all cases in which . . . a bona fide challenge is made to the constitutionality of a statute.

In the present case, two justices recused themselves. The Court's practice is to appoint two District Court justices in such cases, in order to satisfy the seven-member panel requirement. Apparently,

through inadvertence, the two vacant seats on the panel were not filled here.

Well-settled jurisprudence holds that such defects in panel composition are "structural errors" that mandate a rehearing. Structural defects in the framework of proceedings are reversible error and "not amenable to harmless error review." *See State v. LaMere*, 2000 MT 45, 298 Mont. 358, 2 P.3d 204, ¶ 42; *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

A leading case on structural defects in appellate panels is *Nguyen v. United States*, 539 U.S. 69 (2003). In *Nguyen*, the U.S. Court of Appeals for the Ninth Circuit affirmed criminal convictions. The Ninth Circuit's panel included two Article III judges and a non-life-tenured territorial judge of the District Court for the Northern Mariana Islands.

The appellants in *Nguyen* had not challenged the composition of the panel. The Supreme Court, however, held that territorial judges are not authorized to serve on such panels, and vacated the judgment. The Court remanded the case "for fresh consideration of petitioners' appeals by a properly constituted panel." *Id.* at [3] 83.

Other U.S. Supreme Court cases likewise have vacated judgments on grounds of improper composition of appellate panels. *See*, *e.g.*, *United States v. American Foreign S.S. Corp.*, 363 U.S. 685, 690-91 (1960) (vacating judgment of an en banc Court of Appeals because participation by a Senior Circuit Judge was not authorized by statute); *American Constr. Co. v. Jacksonville,*

T. & K.W.R. Co., 148 U.S. 372, 387 (1893) (vacating judgment because one member of the appellate panel had been prohibited by statute from taking part). A similar holding is warranted here.

This Court should confirm that its rules require an en banc panel "of seven members" to weigh constitutional challenges to statutes. The Court, accordingly, should vacate its judgment in the present case. Two District Court judges should be appointed to complete a seven-member panel for fresh consideration of Petitioner's appeal.

II. THE COURT'S DECISION OVERLOOKS DISPOSITIVE QUESTIONS AND CONTROLLING CASE LAW.

The structural error, taken alone, should lead this Court to grant a rehearing. Petitioner respectfully submits that, in addition, rehearing is warranted on the merits.

Petitioner challenged § 39-71-605(1), MCA. That statute allows Workers [4] Compensation insurers to require repetitive independent medical examiners (IMEs) without making any showing of good cause. Petitioner argued that this enables insurers to "doctor shop," arbitrarily compelling insureds to visit multiple doctors and then choosing the report that best serves the insurer's financial interest.

Petitioner challenged the statute on several alternative constitutional grounds. This Court rejected her

Right to Privacy argument under the Montana Constitution. *See Robinson v. State Compensation Mutual Insurance Fund*, 2018 MT 259, ¶¶ 18-25. The Court found the statute "sufficiently narrowly tailored" to serve the State's compelling interest in an orderly workers compensation process. *Id.*, ¶ 25.

The Court gave only brief analysis to Plaintiff's alternative claims under the federal Constitution. It did not mention the U.S. Supreme Court decisions on which Petitioner relied. A rehearing should be granted on those claims, as will be demonstrated below.

A. Unreasonable Search

Petitioner argued that repetitive IMEs are a "search" for purposes of the federal Constitution's Fourth Amendment. (App. Br., pp. 23-28) She argued that warrantless searches are per se unreasonable and unconstitutional under that provision, with exceptions not pertinent here. *See City of Los Angeles v. Patal*, ___ U.S. ___, 135 S.Ct. 2443, 2452 (2016) and *Camara v. Municipal Court of City and* [5] *County of San Francisco*, 387 U.S. 523, 532-33 (1967) (cited in App. Br., p. 25).

This Court did not mention *Patal* or *Camara*. It held that repetitive IMEs are not a "search" for purposes of the State Constitution. It stated that "the context here is a civil matter" and that "Robinson offers no authority to support the proposition that an IME – a medical examination ordered in the course of the administration of her workers' compensation claim – is a

"search" for purposes of Article II, Section 11 of the Montana Constitution." *Robinson v. State Comp. Mut. Ins. Fund*, at ¶ 30.

But Robinson did offer such authority for Fourth Amendment purposes. She cited *Skinner v. Railroad Labor Executives' Association*, 489 U.S. 602, 621-22 (1989). (App. Br., p. 25) *Skinner* held that medical assessments (blood, breath, and urine samples) conducted by private parties in a civil context under authority of law are "searches" under the Fourth Amendment. *See id*. at 617.

The warrantless searches at issue in *Skinner* were held to be reasonable, on grounds which do not apply to the present case. *See id*. at 622 ("there are virtually no facts for a neutral magistrate to evaluate" before samples are taken); 623 (samples "must be obtained as soon as possible"); and 628 (railroad workers impaired by drugs have "duties fraught with . . . risks of injury to others").

This Court's opinion in the present case did not cite *Skinner*. It implies – contrary to *Skinner* – that medical examinations in civil matters are not Fourth [6] Amendment "searches." Moreover, the Court applies a too-stringent burden of proof for Fourth Amendment issues.

The Court states that "Robinson has failed to prove beyond a reasonable doubt that § 39-71-605, MCA, is facially unconstitutional." *Robinson*, at ¶ 31, citing *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88 (emphasis

added). Montana case law applies this standard, though members of the Court have found it "incongruous." *See Oberson v. U.S. Dept. of Agric., Forest Service*, 2007 MT 293, ¶¶ 33-37, 339 Mont. 519, 171 P.3d 715 (Leaphart, J., joined by Nelson and Cotter, JJ., concurring) (proposing alternative tests).

The doctrine of proof "beyond a reasonable doubt" arose in historical cases of Montana Constitutional challenges to statutes that involved the legislative power to tax and assess fees. The issues in those cases involved arguments over whether the fees and taxes were assessed for public purposes. *See*, *e.g.*, *State ex rel. Mills v. Dixon*, 66 Mont. 76, 213 P. 227, 229 (1923); *Northwestern Mut. Life Ins. Co. v. Lewis & Clark Co.*, 28 Mont. 484, 72 P. 982, 987 (1903). Different standards apply to statutes challenged under the federal Constitution involving fundamental rights.

In *Harris v. McRae*, 448 U.S. 297, 312 (1980), the Court held that "if a law 'impinges upon a fundamental right explicitly or implicitly secured by the [7] Constitution [it] is presumptively unconstitutional." That presumption should be applied here.

The Court should reconsider its holding. It should hold that repetitive IMEs are a "search" for Fourth Amendment purposes. This conclusion finds direct support in *Skinner* and in other cases arising in the civil context. *See*, *e.g.*, *Camara*, 387 U.S. at 530; *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

Under the Fourth Amendment, this Court should hold that a warrantless search is per se unreasonable and unconstitutional, as shown in Appellant's Brief. *See Patal* and *Camara* (App. Br., p. 25). The Court should hold that the warrant requirement should be met as Petitioner proposed, by requiring a good-cause showing prior to repetitive IMEs. (*See* App. Br., pp. 21-23, 27-28)

This Court also should reverse the District Court's holding that "Robinson consented" to the second IME and that "[a] search to which an individual consents meets Fourth Amendment requirements." (Doc. 151, pp. 7-8; *see* App. Br., p. 26) Petitioner cited U.S. Supreme Court cases holding that coerced consent does not validate a search. (App. Br., pp. 26-27)

The cases in question clearly are relevant here. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 223-34 (1973) (consent "granted only in submission to a claim of lawful authority" is invalid and renders a search unreasonable); *Bumper* [8] *v. North Carolina*, 391 U.S. 543, 550 (1968) (consent held invalid where "[t]he situation is instinct with coercion – albeit colorably lawful coercion"). This Court did not mention *Schneckloth* or *Bumper*, and it should do so now, on reconsideration.

The Court should hold that the statute at issue here is "instinct with coercion." It mandates suspension of benefits if claimants fail to comply with an IME. This has a coercive impact, promoting "submission to a claim of lawful authority," as was the case in *Schneckloth* and in *Bumper.*

Petitioner argued that, at minimum, the record presents a fact issue with regard to coercion. The State Fund's own affidavit admits that Robinson "expressed concern" about the second IME, and then "decided to cooperate." Robinson states that she was told "either you submit to the examination, or we will terminate your workers compensation benefits." (*See* Appee. Br., p. 26; Appt. Reply Br., pp. 9-10) This Court did not address that contention.

The Court should hold that Petitioner has raised a valid Fourth Amendment claim. The U.S. Supreme Court case law cited by Petitioner supports that claim, and the evidence supports it. This case warrants reconsideration.

B. Sua Sponte Consideration Raises Due Process Issues

Paragraph 30 of this Court's Opinion sua sponte frames this question – whether a medical examination ordered in the course of the administration of her [9] workers' compensation claim is a "search." This Court decided this issue; without the benefit of either briefing or a District Court decision of the issue. Fundamental elements of due process would call for procedural norms of notice and an opportunity to be heard where issues have not been briefed, and those issues involve serious jurisprudential matters of first impression. As Judge Easterbrook said:

> Legal rules committing decisions to judicial discretion suppose that the court will have,

> and give, sound reasons for proceeding one way rather than the other. "We must not invite the exercise of judicial impressionism. Discretion there may be, but 'methodized by analogy, disciplined by system.' Discretion without a criterion for its exercise is authorization of arbitrariness." *Brown v. Allen*, 344 U.S. 443, 496, 73 S. CT. 397, 97 L. ED. 469 (1953) (FRANKFURTER, J.).

York Center Park Dist. v. Krilich, 40 F.3d 205, 209 (7th Cir. 1994); *Stanley v. Illinois*, 405 U.S. 645, 656, 92 S. Ct. 1208, 31 L. Ed 2d. 551(1972) ("The Constitution recognizes higher values than speed and efficiency." – . . . the Due Process Clause.)

C. Conditioning Benefits on Waivers of Constitutional Rights

The State Fund has argued throughout these proceedings that Petitioner waived her constitutional rights. It argues that this waiver occurred, in the first instance, through the grand bargain of Workers' Compensation (workers exchange rights of litigation for guaranteed benefits). And it argues that Petitioner waived her rights specifically by giving consent to the second IME.

[10] Petitioner challenged these arguments, first in the District Court and later in this Court, by citing U.S. Supreme Court cases. Those cases hold that governments cannot condition benefits upon a waiver of constitutional rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("government . . . may not deny a

benefit to a person on a basis that infringes his constitutionally protected interests"); *Pickering v. Board of Ed. of Township High School Dist. 205, Will City*, 391 U.S. 563, 568 (1968) (government cannot condition employment as a public school teacher on surrender of First Amendment rights); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (government cannot condition a tax exemption on surrender of First Amendment rights). (App. Br., p. 29)

The District Court declared that it would "ignore" those cases, because the due process claim invoked the Montana Constitution, rather than the federal Constitution. (Doc. 160, p. 5; *see* App. Br., p. 30) Petitioner argued that this disregard of federal law was improper. As her Appellant's Brief showed, this Court has held repeatedly that federal cases are persuasive when construing the Montana Constitution. (Appt. Br., p. 30)

This Court's opinion did not mention *Perry*, *Pickering*, or *Speiser*. It did not mention the District Court's deliberate ignoring of those cases. The Court should speak directly to those matters on reconsideration.

The principle at issue is a weighty one. The U.S. Supreme Court stresses the [11] insidious potential of conditioning benefits on waivers of rights. *See Perry*, at 597 (warning that government insidiously may "produce a result which [it] could not command directly").

This issue, and the U.S. Supreme Court case law, should be addressed expressly in applying Montana's

Due Process Clause. This Court should hold that government benefits cannot be conditioned on a waiver of constitutional rights.

That principle forcefully applies to Fourth Amendment rights surrendered for repetitive IMEs. At minimum, the record shows a fact issue as to whether Petitioner's benefits were based on a coerced surrender of Fourth Amendment rights.

CONCLUSION

The structural error in the en banc panel's composition clearly warrants vacating the judgment. Two District Court judges should be appointed to fill the panel of "seven members" required by the Internal Operating Rules.

This case also warrants reconsideration on its merits. Petitioner's Fourth Amendment arguments were not addressed in the Court's decision, and the U.S. Supreme Court cases cited by Petitioner (*Skinner*, *Patal*, *Camara*, *Schneckloth*, *Bumper*, *Perry*, *Pickering*, *Speiser*) were not mentioned.

Petitioner's constitutional challenge to § 39-71-605(1), MCA, is firmly grounded in that U.S. Supreme Court case law. The challenge is carefully [12] measured, attacking the statute only insofar as it enables insidious "doctor-shopping" through repetitive IMEs. Petitioner respectfully asks that the case be reconsidered, with oral argument.

Respectfully submitted this 7th day of November 2018.

/s/Lawrence A. Anderson
Lawrence A. Anderson

[Certificate Of Compliance Omitted]

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