

APPLICATION FOR WORKERS' COMPENSATION JUDGE

A. PERSONAL INFORMATION

1. Full name.
Thomas "Lee" Bruner
2. Birthdate.
[REDACTED]
3. Current home address.
[REDACTED]
4. Email address.
[REDACTED]
5. Preferred phone number.
[REDACTED]
6. Date you became a U.S. citizen, if different than birthdate.
At birth [REDACTED]
7. Date you become a Montana resident.
At birth [REDACTED]

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

Butte Central High School. Graduation May 1980.

Montana College of Mineral Science and Technology. Sept 1980 – May 1982. Courses primarily in physics.

Community College of the Air Force. 1987 – 1989. Associate degree in information systems.

University of Denver, 1987 – 1989. Coursework in Physics.

Montana State University, Bozeman Montana. August 1990 - May 1992. Bachelors degree in physics.

University of Montana School of law. August 1992 – May 1995 Juris Doctorate May 1995.

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

None come to mind.

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

January 2019 – Present. Deputy Clerk of the Montana Supreme Court. 215 N. Sanders St. Helena, MT 59620. I was appointed to the position of Deputy Clerk by the Clerk of Court, Bowen Greenwood. I work here full time.

December 2014 – Present. Doney Crowley PC. 50 S. Last Chance Gulch, Helena, MT 59601. Senior trial counsel. I worked here full time until 1 Jan 2019, primarily handling complicated high value litigation matters. Since 2019, I continue to handle some select long term clients and consult on various litigation.

August 1995 – December 2014. Poore Roth and Robinson P.C. 1341 Harrison Ave. Butte Montana. I began as a new associate fresh out of law school with this excellent firm. I worked there for 19 years as a civil litigation attorney. I left on excellent terms as a full partner.

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

March 2008 United States Supreme Court

March 2008 Ninth Circuit Court of Appeals

September 1995 Federal District Court Montana.

September 1995 State Bar of Montana.

I am an active member in good standing in all these courts and associations.

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., workers' compensation, administrative

law other than workers' compensation, employment law, torts, property, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, alternative dispute resolution, etc).

I primarily focused on medical malpractice defense for the first two decades of my practice. During the last 10 years I continued to handle a few of these, but phased out this area of practice. During the last 10 years my practice is about 20% employment law, 30% torts, 25% environmental law, and 25% advising clients on medical compliance, HIPAA, STARK and various state and federal law relating to the provision of medical services. During the last 4 years most of my work has been business / contracts and environmental, part time only, as I work full time at the Clerk of the Montana Supreme Court office.

I think my legal experience prepares me very well for this position. I spent most of my legal career handling medical negligence cases. These are classic liability and damages matters, with the damages involving physical injury. These are the same issues facing workers compensation practitioners, with the added complication of determining coverage. Each of these cases required studying and learning the medicine, damage analysis of treatment options, risks, recovery timelines and permanent long term impairments. This is great training for a workers compensation judge.

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

I was appointed by Governor Racicot to the Montana Petroleum Tank Releasee Compensation Board (a Board with quasi-judicial function). I was appointed to the Water Pollution Control Advisory Council by Governor Gianforte, and later to the Board of Environmental Review in March of 2023, also a quasi-judicial Board. I currently remain a member of this Board. I taught environmental law at Montana Tech off and on for the last 20 years, and still guest lecture there when requested. I worked as a lobbyist for the Montana Defense Trial Lawyers, working on a number of bills central to the practice of law in Montana. I have worked as a mediator, but not a significant amount.

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

I have handled many cases in state district court during the last 10 years, including at least one trial. I have presented cases to the Montana Public Service Commission on behalf of clients at least three times in the last 10 years, including multi-day hearings. I have handled cases before the Montana Petroleum Tank Release Compensation Board, including live hearings. I represented a client in a significant arbitration case before Dennis Lind, but I think that falls slightly outside the 10 year window.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

Pintar v. State 2008 MT 302N (case brought by Montana Taxi licensees against UBER, originally before Montana Public Service Commission)

Baxter v. Morgan DA 16-0697 (causation hantavirus case, settled before opinion issued).

Simms v. Schabacker 2014 MT 328 (Simms was defrauding workers compensation insurer, Dr. Schabacker reported him, Simms sued Schabacker for violation of patient confidentiality). I represented Dr. Schabacker and obtained verdict / opinion in his favor.

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

Richardson v. State, 2006 MT 43. My client, Clarice Richardson, fell and suffered a serious injury in a State of Montana facility. We were unsuccessful at trial, but later determined the State of Montana had intentionally withheld key evidence. We obtained an unprecedented reversal of the district court decision, entry of default judgment against the State of Montana as a sanction for its actions. This remains one of the leading Montana cases on civil procedure, discovery and sanctions against those who abuse the legal system. See also, The Richardson Case, Montana Lawyer May 2006

Simms v. Schabacker, 2014 MT 328. Investigators for the State Workers Compensation program received evidence that Mr. Simms was defrauding the system, and was malingering regarding his injuries. Dr. Schabacker had previously submitted a letter to the insurer supporting Mr. Simms position. Dr. Schabacker notified them of his changed position after viewing the evidence. Simms sued claiming violation of the physician patient privilege. This is one of the leading Montana cases on the physician patient privilege, who owns the privilege, and under what facts the physician can speak outside that relationship.

Montana Shooting Sports Association v. State of Montana. 10 MT 8. We represented a citizens group seeking to challenge the State of Montana demanding social security numbers to be disclosed to obtain a hunting license. One of our clients had her identity stolen by a clerk who issued her hunting license, resulting in years of problems with her credit and finances. We were unsuccessful and the Court allowed this process to continue. Several subsequent data breaches at Fish Wildlife and Parks have thankfully not resulted in the loss of significant private information, but I believe the risk is still very real. I regret we were unable to obtain a better result in this case, and better protection for the citizens of Montana.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

Encrypted email – A service we owe our clients. 26 Montana Lawyer 32 (June-July 2001) This was way before encrypted email became mainstream, and was fairly cutting edge for 2001, if I do say so myself.

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

Montana College of Mineral Science and Technology, Environmental law. Various times over the last 15 years.

Panel chair for mediation practice in Montana, Montana Defense Trial Lawyers annual meeting, (Nov 2014).

Montana Underground Storage Tank Law, Montana Bar Environmental Law Section annual meeting. (2017)

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

The majority of my pro bono work involves advising non-profit medical providers, primarily ambulance services. This runs the whole spectrum from human resources, privacy, general liability insurance, and many other issues. I also work with public interest nonprofit organizations, and with agricultural producers on a somewhat limited basis. I have also represented a number of clients of very limited means dealing with family law, minor criminal matters, and estates. Exact pro-bono hours for the last 5 years are unfortunately not available. I did not save my submissions, nor did the firm. I contacted the State Bar of Montana, and they stated "As to the pro bono, that is reported to the court and it is anonymized, so no one has a record of your pro bono other than any records you may have kept." Personal correspondence, June 2023. I have exceeded the Supreme Court recommended number of pro-bono hours for every year since reporting began.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

I served as Secretary, Vice President and President of the Montana Defense Trial Lawyers association. I resigned as President when I accepted the position with the Clerk of the Montana Supreme Court.

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

1986 – 1990. United States Air Force, active duty. Honorable discharge.

1990 – 1994 United States Air Force, inactive reserve.

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

I worked for Commissioner of Securities and Insurance, Matt Rosendale, from approximately 2017 – 2019 as an administrative law judge. I handled about a half a dozen cases. It was very interesting work, and I resigned from that when I started with the Court.

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a workers' compensation judge.

I have worked underground mining, construction, driving truck, and agriculture. All dangerous jobs. While working construction back in the mid 1980's I was injured in a construction accident. The employer had no insurance, and told me to get lost, "get the hell out of here", when I reported the injury. I was a young farm kid, did not know any better, healed up and found a new job. The medical bills and the lost wages were a big hit to our young family. If I had known then what I know now, there would have been a different result.

Decades later, one of my hired men was injured working on our ranch. We were, of course, fully insured. It was a great comfort to me to know his medical bills and lost wages were covered. I am a big believer in the Workers Compensation program, and I know it protects both workers and employers.

Most of my experience outside law is in production agriculture. It's a dangerous business. The US bureau of statistics lists it as more dangerous than police officers, firefighters or emergency responders. See, [Farming: The most dangerous job in the U.S. | MU Extension \(missouri.edu\)](#) Statistically, my son is more likely to be injured or killed while working on our farm than when he is on active duty in the Army. I love Montana, my friends and neighbors run farms, run businesses and work in those farms and businesses. We need a strong Workers Compensation program to protect all of them, keep these business running, keep the employment opportunities available, and protect those families when the worker suffers and injury or death.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

Legion Oasis:

I served on the Board of Directors for Legion Oasis in Butte Montana from about 2009 to 2019 or 2020. This non-profit operates a low income housing property in Butte Montana. There are about 150 units. We were able to operate an excellent, clean, safe facility (primarily through the great work of our property manager and employees) at about ½ the market rate for comparable housing in the Butte market. The waiting list often ran up to 24 months, and we served a number of disabled and elderly population.

Partners United for Lifesaving Education (PULSE).

This non-profit primarily runs 911 emergency response, training and home health services in the southern end of Jefferson County. I was a founding member of the Board, back when we did not even own an ambulance, and had zero employees. I served a term as president, and work with them on a weekly basis. It has grown to several ambulances, a hefty payroll, dozens of providers, and hundreds of lives saved. If I could afford it, I would retire completely and just volunteer there.

Montana Woolgrowers

My wife and I operate a mid sized farm flock of sheep on our ranch. My family has been raising sheep for 5 generations, with my sons being the sixth. I am active in the statewide organization "Montana Woolgrowers", which has been operating since 1883. I was not a founding member, but joined as soon as I could. I participate in the events, donate time, and was selected twice by this Board to travel to Washington DC to present our issues to the congressional delegation and various federal agencies.

Friends of the Butte – Silver Bow Veterans Court.

I am president and a founding member of a group called the Friends of the Butte Silver Bow veterans treatment court. We work in a supporting role providing financing, training and organizational support for the Butte Silver Bow Veterans Treatment Court. The veterans treatment courts are specially targeted judicial treatment programs to provide intensive one on one treatment, judicial involvement and oversight, mentorship and guidance to veterans struggling primarily with addiction issues. I wish I had more time to give to this. It's a big struggle for the veteran participants, and there are failures but the successes make all the time worthwhile.

American Legion, Post 1, Butte Silver Bow.

I have been a member for quite a while, but I am not very active. There are always more opportunities to donate time to great organizations than there is time available.

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

I was appointed as Deputy Clerk of the Montana Supreme Court on January 1, 2019. I still serve in that position.

I was a candidate for Montana Attorney General in 2008. Tim Fox prevailed in the primary, and lost to Steve Bullock in the general.

I have been appointed to various boards, previously described.

E. PROFESSIONAL CONDUCT AND ETHICS

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No.

28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No. I have had some judges pretty angry with me now and then, but, that goes with being a solid advocate for your client sometimes.

29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No.

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

No.

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

We run a multigenerational farming and ranching operation. This is located in the Jefferson Valley, south of Whitehall, with summer pastures on the east slopes of the Highland Mountains. Historically, I have managed this with the help of some hired men, and over the last several years my sons have taken over many of the duties and responsibilities. I fully intend to continue to be active in this business, and continue to turn it over more and more to my sons.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

Yes, with the caveat that we have an extension to file in place for our farm corporation for FY 22, which also delays personal taxes until the farm issues the K1 forms. Extensions are in place for personal taxes FY22 also. All property taxes are current.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a workers' compensation judge.

I think it would be interesting, rewarding work. My background in civil litigation, medicine, and my work experience outside of the legal profession has well prepared me to do a good job here.

36. What three qualities do you believe to be most important in a good workers' compensation judge?

Fairness: Every party in every case must be given unbiased, neutral treatment.

Work ethic: Peoples lives are affected by the decisions in these cases. Decisions need to be made promptly so everyone can move on.

Patience: In my experience key facts are often buried, pro-se litigants (and sometimes attorneys) take winding routes and the factual history takes time to understand. Developing a sufficient understanding of a case takes time. It needs to be done right.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

It is in no way remarkable, and in no way a vindication of textual evolutionism, that taking power from the people and placing it instead with a judicial aristocracy can produce some creditable results that democracy might not achieve. The same can be said of monarchy and totalitarianism. But once a nation has decided that democracy, with all its warts, is the best system of government, the crucial question becomes which theory of textual interpretation is compatible with democracy. Originalism unquestionably is. Nonoriginalism, by contrast, imposes on society statutory prescriptions that were never democratically adopted.

Antonin Scalia, Reading Law: *The Interpretation of Legal Texts*. West Publishing (2012).

I could not say it better.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, not to exceed 20 pages. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.

Please see the attached excerpt from Simms v. Schabacker, 2014 MT 328.

The entire brief may be reviewed at:

<https://searchcourts.mt.gov/PerceptiveJUDSupremeCourt/APP/connector/2/228/url/BF2D9C0F-32C0-5263-C461-39F86379A0FC.pdf>

39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

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Butte, MT 59701

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Mr. James Brown
James Brown Law Office
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CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as Workers' Compensation Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

19 June 23

(Date)



(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Wednesday, July 5, 2023

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

THE SUPREME COURT OF THE STATE OF MONTANA

CAUSE NO. DA 13-0788

RANDALL SIMMS,

Plaintiff and Appellant,

vs.

MICHAEL SCHABACKER, M.D.,

Defendant and Appellee.

ANSWER BRIEF OF APPELLEE MICHAEL SCHABACKER, M.D.

ON APPEAL FROM THE MONTANA THIRTEENTH
JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY
HON. RUSSELL C. FAGG, PRESIDING

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court correctly rule that a physician was authorized to disclose health care information to his patient's workers' compensation insurer?

STATEMENT OF THE CASE

Dr. Schabacker disagrees with Simms' Statement of the Case to the extent it implies that Dr. Schabacker knowingly provided information to a law enforcement agent (rather than Simms' workers' compensation insurer) and that the district court's ruling allows such conduct. Appellant's Opening Brief, p. 1. The district court explicitly ruled that Dr. Schabacker did not knowingly assist a law enforcement agency. Amended Order and Decision, p. 12, attached as Appendix 2 to Appellant's Brief.

Based upon the Stipulation to Simplify Litigation, the district court dismissed all common law claims and the only remaining claim was Simms' statutory claim that Dr. Schabacker violated § 50-16-801, MCA, *et seq.* Simms did not appeal the district court's denial of his Motion for Partial Summary Judgment and has only requested that the district court be reversed due to alleged genuine issues of material fact. Appellant's Opening Brief, p. 27. Additionally, while Simms originally named St. Vincent Healthcare as a Defendant, he has only named Defendant Dr. Schabacker in the appeal.

STATEMENT OF FACTS

Randall Simms was injured on the job on May 3, 1999. Stipulated Facts (“SF,” doc. 57.100), ¶1, Simms’ Appendix (Simms’ App. 3); Amended Order and Decision (“Order,” doc. 80.000), p. 1, Simms’ App. 2. He applied for, received, and continues to receive benefits from the Montana State Fund (MSF), his workers’ compensation insurer. SF, ¶ 2, Simms’ App. 3; Order, p. 1. Simms signed a claim form for workers’ compensation benefits which stated that it authorized the release of health care information to his workers’ compensation insurer. Claim Form, Simms’ App. 4; Order, p. 10.

Dr. Schabacker treated Simms from October 12, 2004, until the fall of 2007. SF, ¶ 6, App. 3; Order, p. 1. In early 2005, Dr. Schabacker gave sworn testimony before the Workers’ Compensation Court on behalf of Simms, offering testimony that Simms had significant disability, continued to suffer serious afflictions, had signs and symptoms consistent with being essentially confined to a wheelchair, and required quite a bit of assistance, even on good days. Transcript, attached to SF as Doc. 36 (“SF Doc.,” doc. 57.100), p:ln 31:9-10; 20:8 to 21:13; 38:8-13; 44:5-10; *see* Order, pp. 5-6. Thomas Martello was counsel for MSF and questioned Dr. Schabacker regarding Simms’ conditions and needs. SF Doc. 36.

In March of 2006, MSF settled Simms’ Workers’ Compensation claim, which included providing Simms with a large lump sum cash settlement in

exchange for resolving Simms' claims for permanent total disability benefits, domiciliary care benefits, and closing claims for handicapped accessible vehicles, home improvements, and durable medical goods. SF Doc. 37; Order, p. 6. The settlement left open medical benefits for Simms, which he continued to receive. SF Doc. 37.

MSF began video recorded monitoring of Simms on August 16, 2002, before he became a patient of Dr. Schabacker, and continued until May 1, 2007. SF Doc. 20. In total, MSF recorded eleven video clips during the five year period. Video Clips attached as Schabacker App. A. (SF Doc. 39); SF Doc. 20.

Simms had advised Dr. Schabacker that he was almost entirely limited to using a wheelchair, and was not capable of moving about normally. Medical Records, SF Docs. 6-13. Dr. Schabacker's notes for Simms' April 30, 2007, visit show that Simms' reported he was at best walking with his four-wheeled walker and was not getting out as much as he wanted to. SF Doc. 15. Dr. Schabacker concluded: "Unfortunately I do not anticipate Mr. Simms will improve markedly through time." SF Doc. 15.

Several months later, on June 20, 2007, MSF sent Dr. Schabacker the video segments of Mr. Simms along with a letter requesting Dr. Schabacker's observations and comments regarding Simms' condition. Order, pp. 3, 10; Schabacker App. A.; Letter, Simms' App. 5 (SF Doc. 20). The letter from MSF

did not mention law enforcement or a criminal investigation. Simms' App. 5. The letter was on MSF letterhead and included a signature block stating:

Sincerely,

A handwritten signature in black ink that reads "Thomas E. Martello". The signature is written in a cursive, slightly slanted style.

Thomas E. Martello
Attorney at Law

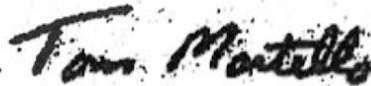
Excerpt of Simms' App. 5. MSF copied Simms' counsel on the letter and thus Simms was provided the letter and video segments at the same time as Dr. Schabacker. Simms' App. 5.

Dr. Schabacker reviewed the video clips and wrote a response letter "center[ed] on health care information relevant to Simms' condition for which he was claiming workers' compensation benefits" and discussing "Schabacker's impressions regarding only Simms' medical condition." Order, p. 10; Letter, Simms' App. 6 (SF Doc. 21). The letter was addressed to "Thomas Martello, Attorney at Law Montana State Fund." Simms' App. 6. This letter from Dr. Schabacker to MSF is the sole basis of Simms' claim; Simms has not challenged any other disclosure by Dr. Schabacker to MSF. Simms' App. 6. Although dated June 28, 2007, MSF did not receive the letter until August 17, 2007. SF, ¶ 18.

After Dr. Schabacker wrote the response letter to MSF's request (Simms' Apps. 6 and 5, respectively), MSF sent Dr. Schabacker a letter dated July 2, 2007.

Letter, Simms' App. 8 (SF Doc. 22 (with attachment)). This letter does not mention a criminal investigation. Simms' App. 8. Rather, it expresses that MSF's concern "is that Mr. Simms continue to receive appropriate medical care," which is consistent with the actions of a workers' compensation insurer, not a law enforcement agency. Simms' App. 8. The letter was written on MSF letterhead and was signed as follows:

Sincerely,

A handwritten signature in dark ink, appearing to read "Tom Martello".

Thomas B. Martello

Legal Counsel

Special Assistant Attorney General

Excerpt of Simms' App. 8. Simms bases his entire argument that Dr. Schabacker knowingly and willingly assisted law enforcement in a criminal investigation on this signature block change that now included "Special Assistant Attorney General" (SAAG).

Simms speculates and assumes that Dr. Schabacker noticed this change in the signature block and then knew or should have known that Martello was asking him to assist a law enforcement agency in a criminal investigation. There are no facts in the record establishing whether Dr. Schabacker noticed the change in the signature block. Dr. Schabacker learned sometime after he wrote the letter that Martello was also a SAAG, but did not associate any implications with that title.

Schabacker Aff. (doc. 76.000) ¶¶ 6-7, Simms' App. 9. There are no facts in the record establishing whether Dr. Schabacker knew Martello was also a SAAG at the time Dr. Schabacker's office sent the letter in August that had been written on June 28. Simms deposed Dr. Schabacker regarding these letters but did not establish any facts regarding the speculations and assumptions he now asserts and asks the Court to make.¹

It is undisputed that Dr. Schabacker "did not intend to communicate with any law enforcement agency or assist in a criminal investigation." Schabacker Aff. ¶ 9, Simms' App. 9. It is undisputed that Dr. Schabacker did not associate any implications with Martello's SAAG title, whenever he did become aware of it. Schabacker Aff. ¶ 7, Simms' App. 9.

Simms' Appellate Brief includes a number of assertions in his Statement of the Facts that are not true, not relevant, and/or are not supported by evidence in the record. As many of these "facts" are not relevant to the appeal, they will not be addressed. However, contrary to Simms' assertion, although not an element of any claim brought by Simms, Dr. Schabacker did not abandon Simms or refuse to communicate or consider his side of the story. Dr. Schabacker wrote letters to Simms and his attorney, some in response to false statements and accusations by Simms' attorney. SF Docs. 31-35. Contrary to Simms' assertion, Dr. Schabacker

¹ The deposition is not a part of the record presented to the district court.

did respond to both Simms and his attorney, welcomed any information that would contradict the video clips, and discussed an anticipated follow-up appointment on October 30, 2007. SF Docs. 32, 34. Dr. Schabacker expressed that his desire and intention was to continue care for his patient and move forward with appropriate treatment. SF Docs. 32, 34. For reasons that do not appear in the record, Simms did not have the October 30, 2007, appointment with Dr. Schabacker. Simms has subsequently admitted misrepresenting his condition to Dr. Schabacker. SF, ¶ 17.

Simms has also sought to blame Dr. Schabacker for subsequent lawsuits against him by other parties. The fact is that Dr. Schabacker's letter did not cause the lawsuits, the video clips obtained by MSF in comparison with Simms' reports to Dr. Schabacker set off the lawsuits. Additionally, Dr. Schabacker only sent the letter to Simms' insurer; he did not authorize release of the letter or videos to anyone else.

Simms' asserted in his opening brief that there was no fraud. Appellant's Opening Brief (Appellant's Br.), p. 9. The district court did not make any such finding in its Amended Order and Decision, nor is the assertion something supported by the record. When Dr. Schabacker first saw Simms on October 12, 2004, Simms was "for the most part, restricted to wheelchair mobility." SF Doc. 2. During the next two years of treatment Dr. Schabacker was given the impression that Simms had very limited physical functioning, including:

- 2/14/05 “unable to stand without a frame” and “not able to do any walking at all” SF Doc. 6
- 3/23/05 was in a powered wheelchair SF Doc. 7
- 4/4/05 “spends all day in his wheelchair,” “does not transfer from the wheelchair to his couch,” and “unable to use a standing frame any longer” SF Doc. 8
- 6/2/05 had “become almost bedridden” SF Doc. 9
- 8/12/05 had “been spending more time in bed due to pain. Physical activity leads to escalation of pain to the degree that he reports it may take several days to recover. He has only perhaps been in a standing frame several times since his last visit in this clinic.” SF Doc. 10
- 11/1/05 was “committed to the wheelchair for most all activities” SF Doc. 11
- 4/12/06 “does some standing occasionally. He is not ambulatory” SF Doc. 12

Then, on October 30, 2006, after two years of seeing Simms in a wheelchair, Dr. Schabacker notes: “Amazingly, Mr. Simms is using the four wheeled walker in lieu of his power mobility device. . . . His distance of ambulation is variable and not yet reliably community distances, although he was able to walk from the drop-off point to the exam room which is a considerable distance.” SF Doc. 13.

Compare the representation of Simms on October 30, 2006, that at best he was able to walk short distances *using a four wheeled walker* with the video from September 27, 2006, depicting a shopping trip. SF Doc. 13; Video, Schabacker App. A. As the Court will see in the provided video segments, Simms is shown

going on a shopping trip for over an hour at Wal-Mart in a town at least a half hour from his home. Schabacker App. A. During the trip Simms can be seen walking around naturally and quickly at times, lifting two shopping carts worth of items into the back of his truck (including what appears to be bags of dog food from the bottom rack of one cart), and driving a truck. Schabacker App. A. Everything Dr. Schabacker had been led to believe about Simms' physical condition was completely wrong. Dr. Schabacker communicated his misunderstanding of Simms' condition to MSF in the letter dated June 28, 2007. Simms' App 6. Unlike all prior communications between Dr. Schabacker and MSF, Simms did not like this communication because it had the potential effect of reducing the sizable benefits he had received over time and continued to receive.

STATEMENT OF THE STANDARD OF REVIEW AS TO EACH ISSUE

The Supreme Court's review of a district court's grant of summary judgment is de novo and the Court applies the criteria set forth in Mont. R. Civ. P. 56. *Estate of Donald ex rel. Donald v. Kalispell Regional Medical Center*, 2011 MT 166, ¶ 16, 361 Mont. 179, 258 P.3d 395 (citation omitted).

Summary judgment "should be rendered if 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 has the burden of demonstrating no genuine issues of material fact exist. *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090 (citations omitted). "Once this has been accomplished, the burden then shifts to the non-moving party to prove by more than mere denial and speculation that a genuine issue of material fact does exist." *Williams*, ¶ 14 (citations omitted). "A 'material' fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact." *Williams*, ¶ 14 (quotation omitted). "In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences must be drawn in favor of the party opposing summary judgment." *Williams*, ¶ 15.

Mont. R. Civ. P. 56(e)(2) provides that “[w]hen 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. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.”

This Court has further explained that “the non-moving party must provide ‘material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact.’” *Hiebert v. Cascade County*, 2002 MT 233, ¶ 21, 311 Mont. 471, 56 P.3d 848 (quoting *Stuart v. First Sec. Bank*, 2000 MT 309, ¶ 16, 302 Mont. 431, 15 P.3d 1998). “The non-moving party must set forth *specific facts* and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements.” *Hiebert*, ¶ 21 (quoting *Thomas v. Hale*, 246 Mont. 64, 67, 802 P.2d 1255, 1257 (1990)) (emphasis in original). “Speculation is insufficient to avoid summary judgment.” *Hiebert*, ¶ 45.

In regard to claims and arguments raised for the first time on appeal, this Court has explained that “[w]e have repeatedly held that we consider issues presented for the first time on appeal to be untimely and will not consider them.” *State v. LaFreniere*, 2008 MT 99, ¶ 11, 342 Mont. 309, 180 P.3d 1161 (citing *State v. Ferguson*, 2005 MT 343, ¶ 38, 330 Mont. 103, 126 P.3d 463); *Kurtzenacker v.*

Davis Surveying, Inc., 2012 MT 105, ¶ 17, 365 Mont. 71, 278 P.3d 1002; *Lockhead v. Lockhead*, 2013 MT 368, ¶ 15, 373 Mont. 120, 314 P.3d 915. “This includes new arguments and changes in legal theory.” *LaFreniere*, ¶ 11 (citation omitted); *State v. Adgerson*, 2003 MT 284, ¶ 12, 318 Mont. 22, 78 P.3d 850; *Stanton v. Wells Fargo Bank Montana, N.A.*, 2007 MT 22, ¶ 35, 335 Mont. 384, 152 P.3d 115. The Court has “reasoned that ‘it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider.’” *LaFreniere*, ¶ 11 (quoting *Adgerson*, ¶ 12); *Lockhead*, ¶ 15, *see Kurtzenacker*, ¶ 17. When the district court record does not reflect a claim, this Court will limit its review only to issues raised before the district court. *Adgerson*, ¶ 12.

This Court “will not reverse a district court when it reaches the right result, even if it reached that result for the wrong reason.” *Wells Fargo Bank v. Talmage*, 2007 MT 45, ¶ 23, 336 Mont. 125, 152 P.3d 1275.

A district court’s interpretation and application of a statute is a conclusion of law and the Court reviews a district court’s conclusion of law to determine whether those conclusions are correct. *Estate of Donald*, ¶ 17 (citation omitted).

SUMMARY OF ARGUMENTS

Dr. Schabacker communicated with Simms' workers' compensation insurer regarding Simms' condition as allowed by law. The district court correctly applied the law, and correctly rejected Simms' argument that Dr. Schabacker willingly assisted a law enforcement agency.

The issues on appeal are narrow. Simms' chose not to appeal the district court's determination that if Dr. Schabacker was not knowingly or willingly communicating with a law enforcement agency then his disclosure was authorized under § 50-16-805(1), MCA. Rather, Simms has only appealed two main issues: first, whether Dr. Schabacker violated § 50-805(2), MCA, and second, whether the district court erred in rejecting Simms' argument that Dr. Schabacker knowingly or willingly assisted a law enforcement agency in a criminal investigation. Simms' entire argument is based on trying to change Dr. Schabacker's letter from a communication with Simms' workers' compensation insurer regarding Simms' condition into a communication with law enforcement to aid in a criminal investigation.

This Court should not consider the first issue Simms raises as he did not argue a violation of § 50-16-805(2), MCA, to the district court, and cannot raise the issue for the first time on appeal. Even if the Court considers Simms' untimely

claim, Dr. Schabacker did not violate § 50-16-805(2), MCA, and his disclosure was authorized by § 50-16-805(1), MCA.

The district court ruled correctly that Dr. Schabacker did not willingly assist a law enforcement agency in a criminal investigation. Simms did not meet his burden at summary judgment to present material and substantial evidence to show a genuine issue of material fact. Instead, Simms attempted to rely on speculation, assumptions, and conclusory arguments that are unsupported by the record.

The district court's decision was also correctly supported by other factors. Additionally, other statutes and factors establish that Dr. Schabacker's disclosure was lawful and can be the basis for affirming the district court.

The district court correctly addressed the issues before it and granted Dr. Schabacker's Motion For Summary Judgment. After a review of the narrow issues raised on appeal, this Court should affirm the district court.

ARGUMENT

I. Simms' arguments regarding § 50-16-805(2), MCA, should not be addressed because they were not raised before the district court, and even if addressed, that subsection does not affect Dr. Schabacker's authorized disclosure under § 50-16-805(1), MCA.

a. Simms' assertion that this case does not involve communication between a health care provider and an insurer or its agent is false and contrary to Simms' prior assertions

As an initial matter, due to false statements in Simms' brief, it is important to clarify that Dr. Schabacker was communicating with Simms' workers' compensation insurer. This case involves a communication to a workers' compensation insurer who unbeknownst to Dr. Schabacker also had a law enforcement role. On appeal, Simms repeatedly makes the completely false assertion that "this case *does not involve* communication between a health care provider and an insurer or its agent." Appellant's Br., p. 15 (emphasis added); Appellant's Br., p. 11 ("Simms' claim does not concern disclosure of health care information to an insurer." (emphasis in original)), p. 20 ("was not shared with an insurance company" (emphasis in original)). Simms can attempt to argue that the letter was to an insurer who also has a law enforcement role, but to assert that the case does not involve a letter to an insurer, was not shared with an insurer, or does not concern disclosure of health care information to an insurer is preposterous.

The parties stipulated that the "State Compensation Insurance Fund was, and still is, the carrier" for Simms' workers' compensation claim. SF, ¶ 2, Simms'

App. 3. Section 50-16-805(1), MCA, provides that “workers’ compensation insurer” is defined by § 39-71-116, MCA. In turn, § 39-71-116(17) provides the following definition: “‘Insurer’ means . . . the state fund under compensation plan No. 3.” MSF meets the definition of “insurer.”

Simms’ own Amended Complaint repeatedly states that Dr. Schabacker’s letter was written to the State Workers’ Compensation Insurance Fund, Simms’ insurer. Amended Complaint and Demand for Jury Trial (Amended Complaint), ¶¶ 7, 8, 9, and 22, Schabacker App. B. In contrast, the Amended Complaint did not once assert that Dr. Schabacker communicated with law enforcement. Schabacker App. B. As discussed in further detail below in section II of this Brief, Dr. Schabacker did not intend to communicate with a law enforcement agency for a criminal investigation and did not know Martello was potentially associated with a law enforcement agency. To the contrary, Dr. Schabacker’s letter was to MSF, Simms’ insurer. Indeed, Dr. Schabacker’s letter was addressed to “Thomas Martello, Attorney at Law, Montana State Fund.” Simms’ App. 6.

There can be no reasonable dispute that this case involves a communication (letter) from a health care provider (Dr. Schabacker) to a workers’ compensation insurer (MSF). Simms may argue that the insurer also has roles as a law enforcement agency, but he cannot in good faith deny that the letter was to Simms’ insurer.

- b. Simms has only appealed a portion of the district court's ruling and has not appealed the district court's ruling that § 50-16-805(1), MCA, authorized Dr. Schabacker's disclosure if he was not knowingly assisting a law enforcement agency

Next, it is important to note that Simms has only appealed the district court's Amended Order and Decision in terms of an alleged communication to law enforcement. The main issue argued by the parties to the district court was whether subsection (1) of § 50-16-805, MCA, authorized Dr. Schabacker's disclosure. Simms has not appealed this issue. The district court ruled that 1. Dr. Schabacker's disclosure was lawful pursuant to § 50-16-805(1), and 2. that Dr. Schabacker did not willingly assist a law enforcement agency. Order, pp. 10-12. Simms has only appealed the second ruling. Simms' only argument in regard to the first ruling is premised entirely on his disagreement with the district court in regard to the second ruling. Thus, if this Court agrees with the district court that Dr. Schabacker did not willingly assist law enforcement, then Simms' appeal fails. As Simms has not appealed the district court's ruling in regard to § 50-16-805(1), MCA, outside the context of an alleged knowing assistance to law enforcement, this Brief will not discuss why the district court correctly ruled that § 50-16-805(1), MCA, authorized the disclosure.

- c. The Court should not consider Simms' claim alleging a violation of § 50-16-805(2), MCA, as it was not argued before the district court and is being raised for the first time on appeal

On appeal, Simms has completely changed his “claim.” His claim before the district court was addressed by Dr. Schabacker in summary judgment briefing and the district court in its Amended Order and Decision. Dr. Schabacker and the district court simply did not have an opportunity to address the arguments Simms has presented on appeal, because they were not presented to the district court.

This Court has repeatedly held that it will not consider issues raised for the first time on appeal because they are considered untimely. *LaFreniere*, ¶ 11 (citing *Ferguson*, ¶ 38); *Kurtzenacker*, ¶ 17; *Lockhead*, ¶ 15. “This includes new arguments and changes in legal theory.” *LaFreniere*, ¶ 11 (citation omitted) (emphasis added); *Adgerson*, ¶ 12; *Stanton*, ¶ 35. The Court has “reasoned that ‘it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider.’” *LaFreniere*, ¶ 11 (quoting *Adgerson*, ¶ 12); *Lockhead*, ¶ 15, *see Kurtzenacker*, ¶ 17. When the district court record does not reflect a claim, this Court will limit its review only to issues raised before the district court. *Adgerson*, ¶ 12.

Simms would like this Court to believe that he has had the same “claim” since the inception of this case. However, a review of the record reveals that he has not previously made the “claim” he is now making on appeal. In his appellate

brief, Simms states: “Simms’ claim is straightforward. Schabacker violated Section 50-16-805(2), MCA . . .” Appellant’s Br., p. 11 (emphasis added). Simms makes this claim repeatedly through his appellate brief:

- Pages 11-12: “Simms’ claim . . . is about Schabacker’s violation of § 50-16-805(2), MCA . . .”
- Page 12: “Simms’ claim against Schabacker asserts that Schabacker violated § 50-16-805(2), MCA.”
- Page 15: “Simms’ claim is based on Section 50-16-805(2) . . .”
- Page 15: “in violation of §50-15[SIC]-805(2)”
- Pages 18-19: “Section 50-16-805(2), MCA applies to him and claimed ignorance of the implications of a Special Assistant Attorney General title is no excuse for his violation of that statute.”
- Page 27: “[Dr. Schabacker] violated that statute [§ 50-16-805(2), MCA] . . .”

(Emphasis added.)

Contrary to Simms’ assertions on appeal, his “claim” before the district court was not based on a “violation” of § 50-16-805(2), MCA. Indeed, § 50-16-805(2), MCA, is not found in Simms’ Amended Complaint (Schabacker App. B). Although Simms cites to Simms’ Brief in Support of Motion for Partial Summary Judgment (“Simms’ SJ Br.,” doc. 64.00) for the proposition that “Schabacker violated Section 50-16-805(2), MCA . . .” three of the four pages he cites to do not cite or discuss subsection (2). Appellant’s Br., p. 12 (citing to “pgs. 1, 3, 5, & 15” of Simms’ SJ Br.). The fourth page Simms cites to contains his entire citation to

and discussion of § 50-16-805(2), MCA, presented to the district court. Simms' SJ Br., p. 15. Simms quotes a portion of the statute and then states:

In the present matter, this statute did not permit Dr. Schabacker to author and send the letter because there was no warrant, no subpoena, or court order requiring Dr. Schabacker to author and disclose health care information (The Letter). In fact, in June of 2007, Simms was not a party to a legal proceeding with the State Fund. (See SF 10). There certainly was no authorization or consent by Simms to such disclosure to law enforcement.

Simms' SJ Br., p. 15 (emphasis added). Note that Simms did not assert a "violation" of the statute, he merely asserted that it did not "permit" Dr. Schabacker to disclose the information. Dr. Schabacker does not assert that subsection (2) permits the disclosure, rather subsection (1) of § 50-16-805, MCA, permits the disclosure.

The block quote above and his quotation of the statute with it is the *entirety* of Simms' citation to or discussion of subsection (2) of § 50-16-805, MCA, before the district court. Simms did not cite to or discuss subsection (2) in Simms' Reply to Defendant's Motion for Summary Judgment ("Simms' SJ Reply Br.," doc. 66.000) or in oral argument to the district court.

In fact, in Dr. Schabacker's Motion for Summary Judgment with Brief Incorporated ("Schabacker SJ Br.," doc. 65.000), Dr. Schabacker extensively argued to the district court that Simms failed to allege a violation of a specific section in Part 8 of Chapter 16, Title 50. Schabacker SJ Br., pp. 7-10. In Simms'

SJ Reply Brief, Simms did not respond by asserting that Dr. Schabacker violated § 50-16-805(2), MCA. Instead, Simms argued that his claim did not depend on any specific provision of Part 8. Simms' SJ Reply Br., p. 10. Simms also responded: "The question is not whether Part 8 expressly *prohibits* what Dr. Schabacker did, but whether Part 8 – and all that is contained and impliedly contained within it – allows it in the first place." Simms' SJ Reply Br., p. 11 (emphasis in original). The district court directly responded to that question and correctly ruled that § 50-16-805(1), MCA, does authorize the disclosure. Now, Simms wants the Supreme Court to believe that a "violation" of § 50-16-805(2), MCA, has been his "claim" all along, despite his explicit denial to the district court that his claim was based on any specific statutory provision.

Simms is even so bold as to repeatedly fault the district court for not addressing § 50-16-805(2), MCA, in its Amended Order and Decision. Appellant's Br., p. 12 ("the Court failed to acknowledge the governing statute (§ 50-16-805(2) MCA)"), p. 13 ("The district court ignored this statute, which is the basis for Simms' claim."), and p. 15 ("The Court's only finding that conceivably touched on the issue of disclosure to a law enforcement agency in violation of § 50-15[SIC]-805(2) was . . .").

The district court did not address § 50-16-805(2), MCA, because it was not the basis of Simms' claim, nor did Simms argue it to the district court in any

significant way. The *entirety* of Simms' argument to the Court regarding subsection (2) is quoted above. Thus it would be fundamentally unfair to fault the district court for not addressing a claim it was never given the opportunity to consider. *Adgerson*, ¶ 12.

Contrary to Simms' assertions on appeal, the district court did address the claim that Simms presented. Before the district court, Simms' claim was that Dr. Schabacker allegedly "knowingly and willingly assisted a law enforcement agency which was conducting a criminal investigation of his patient Simms." Simms' SJ Br., p. 5. Simms made the same or similar allegation throughout his summary judgment brief to the district court. Simms' SJ Br., pp. 1, 3, 5, 9, 10, 12, 13, 14, and 15.

The district court used the wording that it did in its Amended Order and Decision because it was responding directly to Simms' arguments. The district court considered Simms' arguments and ruled that "the Court also does not agree with Simms' argument Schabacker willingly assisted a law enforcement agency," "Schabacker had no knowledge he was assisting a law enforcement agency when he wrote the letter," and "Schabacker did not knowingly assist in the prosecution of Simms when he sent the letter." Order, pp. 11-12.

In *Stanton v. Wells Fargo Bank Montana, N.A.*, 2007 MT 22, ¶ 35, the Court declined to address an issue raised on appeal because a party changed its claim

from constructive fraud before the district court to actual fraud on appeal. Simms' is attempting to do something more egregious here. He is attempting to change from denying that his claim was based on a specific statutory provision before the district court to claiming an alleged violation of § 50-16-805(2), MCA, on appeal.

After the district court properly rejected Simms' arguments, Simms has sought to completely change his "claim" on appeal. The district court was never given the opportunity to consider an alleged violation of § 50-16-805(2), MCA. This Court should refuse to consider the claim and argument Simms raised for the first time on appeal and affirm the district court.

- d. Alternatively, § 50-16-805(2), MCA, is not applicable to this case and does not vitiate the authorization pursuant to § 50-16-805(1), MCA

Even if the Court considers Simms' arguments regarding § 50-16-805(2), MCA, that have been raised for the first time on appeal, subsection (2) is not applicable to this case. Section 50-16-805, MCA, provides in part:

(2) A health care provider *may* disclose health care information about an individual *for law enforcement purposes* if the disclosure is to:

- (a) federal, state, or local law enforcement authorities to the extent required by law; or
- (b) a law enforcement officer about the general physical condition of a patient being treated in a health care facility if the patient was injured by the possible criminal act of another.

(Emphasis added.) This Court has not previously interpreted or applied this statute. “In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.” Section 1-2-101, MCA; *see State v. Madsen*, 2013 MT 281, ¶ 8, 372 Mont. 102, 317 P.3d 806. “A court’s function is to determine legislative intent, and where that can be determined from the plain meaning of the words used, the plain meaning controls and a court need not go further or apply other means of interpretation.” *Madsen*, ¶ 8 (citations omitted).

Implicit in the statute is the requirement that the health care provider know the identity and purpose of who they are dealing with. The plain language of the statute addresses when a health care provider is releasing information to a law enforcement agent “*for law enforcement purposes.*” Section 50-16-805(2), MCA (emphasis added). Typically, to whom the disclosure is made and the purpose for disclosure are obvious. Federal law (HIPAA), provides that health care information cannot be disclosed to just anyone; thus health care providers generally know to whom and for what purpose they are disclosing information. However, what happens when the disclosure is to someone who has an unknown additional role or an unknown additional purpose?

For example, consider a hypothetical factual scenario. An undercover FBI agent is also employed by a workers' compensation insurer. In his role as an agent of the workers' compensation insurer he properly requests and receives health care information pursuant to a lawful authorization for workers' compensation purposes, as described in § 50-16-805(1), MCA. Although the request and receipt was made in his role as the agent of a workers' compensation insurer, the agent intends to use it for law enforcement purposes. The health care provider had no knowledge that the workers' compensation insurer was an undercover FBI agent or that he intended to use the information for law enforcement purposes. Does the health care provider's lawful disclosure suddenly become unlawful because of the agent's unknown dual role and purpose? Of course not! Certainly questions may arise about the propriety of the FBI agent's actions, but that has nothing to do with the health care provider who provided the information under a statutory authorization.

Similarly, for the sake of argument, although this is not the facts of this case, even if the health care provider did know that the agent of the workers' compensation insurer was also an FBI agent, the statute requires that the health care provider know that the disclosure be "for law enforcement purposes" in order for § 50-16-805(2), MCA, to be relevant. Nothing in subsection (2) vitiates the

authorization in subsection (1) to provide information to a patient's workers' compensation insurer. Section 50-16-805, MCA.

This case is unique because Dr. Schabacker was authorized to release information to Simms' workers' compensation insurer by § 50-16-805(1), MCA. This is the ruling of the district court, and Simms has not challenged that aspect of the district court's order. Rather, Simms has asserted that the disclosure was a violation of subsection (2), because in addition to being an agent of Simms' workers' compensation insurer, Thomas Martello also had a role as a special assistant attorney general. There is nothing in subsection (2) that prohibits a proper disclosure to a workers' compensation insurer under subsection (1) if the workers' compensation recipient is also a special assistant attorney general.

Therefore, even if the Court considers Simms' untimely argument in regard to § 50-16-805(2), MCA, the statute was not "violated," nor did it prohibit the proper disclosure pursuant to § 50-16-805(1), MCA. Additionally, as discussed below, there is no evidence that Dr. Schabacker knew of any law enforcement purpose.

II. The district court correctly ruled that Dr. Schabacker did not willingly assist a law enforcement agency in a criminal investigation and no genuine issue of material fact exists.

Simms argues that the district court erred in finding that “Schabacker had no knowledge he was assisting a law enforcement agency when he wrote the letter” because “it ignored genuine issues of material fact.” Appellant’s Br., p. 16.

As an initial matter, Simms’ alleged issue of fact is not material. His argument that Dr. Schabacker knowingly and willingly assisted a law enforcement agency was not tied to any statutory provision at the time it was argued to the district court. Now, for the first time on appeal, Simms has attempted to connect the allegation with a statute, but such a connection was not before the district court. Thus it was a factual allegation in a legal void – it was not connected to a specific statutory prohibition, and Simms’ *only* claim in this case is a statutory, not common law, claim. “A ‘material’ fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact.” *Williams*, ¶ 14. Simms’ stated cause of action is that the disclosure was made in violation of Part 8. Complaint, ¶ 20, Schabacker App. B. Dr. Schabacker argued and the district court agreed that the disclosure was authorized under subsection (1) of § 50-16-805, MCA. Simms’ alleged issue of fact is not material, because it was not tied to any statutory provision that made Simms’ allegation relevant to a determination by the district court as to whether the

disclosure was authorized by § 50-16-805(1), MCA, the statute that was actually argued before the district court.

Even if Simms' allegation is considered material to the issues presented before the district court, the district court correctly ruled that Dr. Schabacker did not willingly assist a law enforcement agency and no genuine issue of material fact exists in regard to this determination. The district court correctly laid out the summary judgment standard on pages 5-6 of its Amended Order and Decision.

This Court has explained that "the non-moving party must provide material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact." *Hiebert*, 2002 MT 233, ¶ 21 (quotation omitted) (emphasis added). "The non-moving party must set forth *specific facts* and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements." *Hiebert*, ¶ 2 (quotation omitted) (emphasis in original). "Speculation is insufficient to avoid summary judgment." *Hiebert*, ¶ 45.

The district court made its determination "[b]ased on the record and Dr. Schabacker's Affidavit." Order, p. 12. The record showed that Dr. Schabacker had repeated contacts with Thomas Martello as an attorney for his patient's insurer, MSF. Order, p. 12. The district court noted that the letters from Martello were on

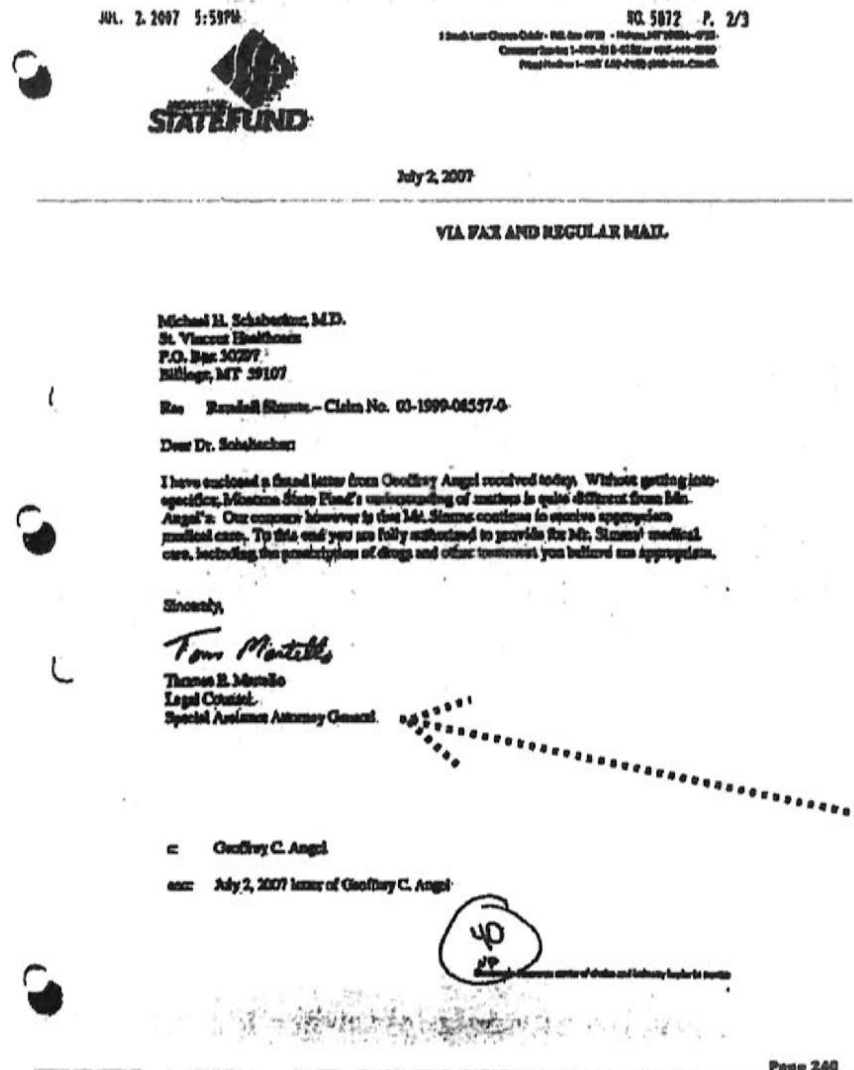
MSF letterhead. Order, pp. 11-12.² Dr. Schabacker had previously been deposed by Martello regarding Simms' condition and had testified in Simms' favor. Order, pp. 2-3. The district court also noted that the MSF's actions are not at issue in this case. Order, pp. 10, 11.

As discussed above, there is no evidence to dispute that Dr. Schabacker was communicating with MSF, Simms' workers' compensation insurer. There is no evidence to dispute that Dr. Schabacker was not aware Thomas Martello had any other role than working for Simms' insurer at the time he wrote the letter. Schabacker Aff. ¶¶ 6, 8, Simms' App. 9. There is no evidence to dispute that even after learning that Martello was also a special assistant attorney general, Dr. Schabacker did not associate any implications with that title. Schabacker Aff. ¶ 7, Simms' App. 9. Most importantly, there is no evidence to dispute that Dr. Schabacker "did not intend to communicate with any law enforcement agency or assist in a criminal investigation." Schabacker Aff. ¶ 9, Simms' App. 9.

The only thing Simms points to in an attempt to contradict the above is that Thomas Martello included a line stating "Special Assistant Attorney General" in the signature block of a letter that was sent to Dr. Schabacker *after* he wrote the June 28, 2007, letter. Simms' App. 8. As discussed above, Simms' argument to

² The District Court stated that MSF provided the video and letter to Dr. Schabacker *ex parte*. Order, p. 10. MSF did not communicate with Dr. Schabacker *ex parte*, but copied Simms' attorney on the communication, as acknowledged by Simms in his Appellate Brief, p. 5. Additionally, Simms has not raised any claim regarding *ex parte* communication on appeal.

the district court was that Dr. Schabacker "knowingly and willingly assisted a law enforcement agency which was conducting a criminal investigation of his patient Simms." Simms bases his *entire* support for this position on the signature line of this letter, which is denoted by a dashed arrow in the image pasted below.



(Simms' App. 8, with dashed arrow added.) This letter was sent to Dr. Schabacker after he had written his response to the MSF letter that was accompanied by the

video clips. This letter is on MSF letterhead, does not mention the State Fund's Special Investigative Unit, and does not mention anything about a criminal investigation. Simms' App. 8. The letter states that MSF's concern is that Simms continue to receive appropriate care, which is consistent with it being a letter by Simms' insurer. Simms' App. 8.

Simms speculates that Dr. Schabacker noticed the change in the signature block before his office faxed the June 28, 2007, letter in August 2007, but can point to no facts in support. Dr. Schabacker's affidavit does not specify when he learned Martello was a special assistant attorney general other than it was after he wrote the letter. Schabacker Aff. ¶ 7, Simms' App. 9. Simms speculates that the inclusion of the SAAG title in the signature block should have tipped Dr. Schabacker off that Tom Martello was involved in a *criminal* investigation of Simms, but Dr. Schabacker explicitly stated he did not associate any implication with that title.³ Schabacker Aff. ¶ 7, Simms' App. 9. In a conclusory fashion, Simms asserts that after receiving the July 2, 2007, letter from Martello, Dr. Schabacker should have gone back and ensured that the letter he previously drafted was not sent because now he should have known that the *previous* letter from MSF

³ On appeal, Simms argues that Dr. Schabacker's *should have* known what a special assistant attorney general is and the implications of that title and that ignorance of the implications of such title is no defense. Appellant's Brief, pp. 17-18. However, this is not what Simms argued at the District Court; there he argued that Dr. Schabacker "knowingly and willingly assisted a law enforcement agency which was conducting a criminal investigation of his patient Simms." Simms' SJ Brief, p. 5. Thus there was no reason for the district court to address what Dr. Schabacker should have known, and this Court should not address it either.

was for law enforcement purposes. Frankly, the argument is preposterous. Simms failed to meet his burden under Rule 56 to “set forth *specific facts*” and instead relies “upon speculative, fanciful, or conclusory statements.” *Hiebert*, ¶ 21 (emphasis in original). Most importantly, the argument completely ignores the uncontroverted affidavit of Dr. Schabacker which establishes that he “did not intend to communicate with any law enforcement agency or assist in a criminal investigation.” Schabacker Aff. ¶ 9, Simms’ App. 9.

The Court can draw reasonable inferences in favor of the party opposing summary judgment, but Simms’ speculations and unsupported claims do not give rise to a reasonable inference that Dr. Schabacker “knowingly and willingly assisted a law enforcement agency which was conducting a criminal investigation of his patient Simms.” Simms’ SJ Br., p. 5. Simms did not meet his burden to raise a genuine issue of material fact and the district court correctly rejected Simms’ unsupported, speculative assertions based on the record and Dr. Schabacker’s affidavit. *Hiebert*, ¶ 21, 45.

III. The district court correctly considered other factors in supporting its decision.

In addition to ruling that “the letter at issue falls under an authorized communication pursuant to Mont. Code Ann. §§ 50-16-805(1), 50-16-527, and 39-71-704,” the district court noted that “[t]here are other factors supporting the Court’s decision.” Order, pp. 10-11. On appeal, this Court does not need to reach

these other factors and can simply make the holdings discussed above and affirm the district court. However, the other factors raised by the district court do provide further support for Dr. Schabacker's position.

The district court explained that the letter was not sent in a vacuum, rather it was consistent with an established course of conduct between MSF and Dr. Schabacker. Order, p. 11. The district court stated: "There had been multiple exchanges between Schabacker and Montana State Fund whereby Montana State Fund would inquire about the prescriptions Simms was prescribed, his current medical condition, prognosis, and status updates in which Schabacker would respond and provide the relevant medical information sought." Order, p. 11. The Court noted that in response to the letter containing the videos, "Schabacker only discusses how his medical diagnosis of Simms has changed and what he believes is Simms' current medical condition."⁴ Order, p. 12.

The district court also noted that "Simms was fully aware these communications had been ongoing. Letters and communications between MSF and Schabacker had been forwarded to Simms' attorney and Simms." Order, p. 11.

⁴ In his appeal brief, Simms' repeatedly states that Dr. Schabacker's letter included "expert" opinions. The district court stated that Dr. Schabacker's letter included his professional opinion of Simms' medical condition. Of course, any time a doctor discloses medical records pursuant to § 50-16-805(1), MCA, it must be relevant to the patient's condition. Section 50-16-527(4), MCA. Any opinions contained therein will obviously be "professional opinions," or "expert" in the sense that they are based on expertise. However, Dr. Schabacker's letter was in no way an "expert opinion" as lawyers think of the term. His letter was a discussion of his understanding of Simms' condition, just like his prior letters to MSF regarding Simms. SF Docs. 18 (necessary medications), 19 (patient may not work for indefinite period of time).

Indeed, Simms' prior attorney had communicated to Dr. Schabacker that MSF should communicate with him regarding Simms' condition. During Dr. Schabacker's deposition testimony before the Workers' Compensation Court in early 2005, Simms' attorney at the time asked Dr. Schabacker a number of questions regarding his communications with MSF. Simms' attorney asked Dr. Schabacker if MSF has contacted him regarding Simms' condition and needs. Stip. Facts Doc. 36, pp. 38-40, 43-46, 53, 55-57. After a discussion of whether Simms needed domiciliary care, Mr. Angel stated to the court in response to an objection: "Nobody has asked [Dr. Schabacker]. *And the State Fund should have done that . . .*" Stip. Facts Doc. 36, p. 45 (emphasis added). Thus, prior to Dr. Schabacker writing his letter in response to a request from MSF, Dr. Schabacker had heard Simms' attorney, in front of the Workers' Compensation Court Judge, chastise MSF for not communicating requests to Dr. Schabacker.

Finally, the district court noted that Simms signed a Notice of Privacy Policy "which placed Simms' [sic] on notice Schabacker could share information with Montana State Fund regarding his medical condition." Order, p. 11.

Simms' disagreement with the district court's use of these factors as support for its decision are based on Simms' argument that Dr. Schabacker was knowingly or willingly communicating with a law enforcement agency.

The Court need not reach the additional factors that the district court relied upon in supporting its Amended Order and Decision, but the Court can use these factors as further or independent reasons to affirm the district court.

IV. The district court correctly recognized the importance of the physician-patient relationship and that the Montana Legislature has established authorized disclosures that encompass Dr. Schabacker's letter.

The district court recognized the importance of the physician-patient privilege. Order, pp. 6-7. The district court also properly recognized that "the privilege is subject to certain exceptions whereby a treating physician can disclose health care information to a workers' compensation insurer," and that "[t]he physician-patient privilege is not without limits in the context of workers' compensation claimants." Order, p. 7.

Simms "argument" in this section of his brief is apparently that the physician-patient relationship and privilege is important. However, its ending shows that it is simply the same argument as his first; he claims Dr. Schabacker violated § 50-16-805(2), MCA. Appellant's Br., p. 27. As discussed above, this argument was made for the first time on appeal, and Simms previously denied that any specific section was violated.

Dr. Schabacker agrees with the district court, the legislature, and Simms that the physician-patient relationship is very important. The legislature has taken into account the importance of the physician-patient relationship and privilege and

chose to explicitly authorize communications to workers' compensation insurers, as Dr. Schabacker did here. Section 50-16-801, MCA; § 50-16-805(1), MCA.

If there was any breach of the physician-patient relationship, it was Simms' gross and repeated misrepresentations to Dr. Schabacker regarding the status of his condition. Schabacker App. A; SF Docs. 6-13. Simms has admitted that he misrepresented his condition to Dr. Schabacker. SF, ¶ 17, Simms' App. 3. However, that is not at issue in this case. Nor are MSF's actions at issue in this case, as the district court noted. Order, pp. 10, 11. What the district court correctly ruled is that Dr. Schabacker's disclosure to MSF regarding Simms' condition was authorized. Therefore, the district court should be affirmed.

V. Other statutes and factors establish that Dr. Schabacker's disclosure was lawful and can be the basis for affirming the district court.

The district court correctly ruled that Dr. Schabacker's disclosure was authorized by § 50-16-805(1), MCA. For the sake of argument, there are other reasons to affirm the district court. These other reasons further establish that there are limitations on the physician-patient relationship and privilege. This Court "will not reverse a district court when it reaches the right result, even if it reached that result for the wrong reason." *Wells Fargo Bank v. Talmage*, 2007 MT 45, ¶ 23, 336 Mont. 125, 152 P.3d 1275. Dr. Schabacker asserts that the district court reached the right result for the right reason, but the following provide additional reasons to support the district court. The district court did not address the

following arguments, raised by Dr. Schabacker in his Motion for Summary Judgment with Brief Incorporated.

a. Simms did not state a claim under Part 8

In his Amended Complaint, Simms had alleged that Dr. Schabacker “violated . . . (MCA 50-16-801, *et seq.*),” and had even stated that his claim was not based upon any specific provision of Part 8 in his summary judgment briefing. Schabacker App. B; Simms SJ Reply Br., p.10, 11. Part 8 defers to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. 1320d, *et seq.* The purpose of Part 8 is to recognize that Federal law, not State law, “provide[s] significant privacy protection for health care information with respect to health care providers subject to HIPAA.” Section 50-16-801(2), MCA. Another purpose of Part 8 is to provide certain requirements with respect to the use or release of health care information by health care providers that are different than HIPAA. Section 50-16-801(4), MCA. Part 8 fits with HIPAA’s authorization for states to allow disclosure in regard to workers’ compensation benefits. 45 CFR § 164.512(l) (“A covered entity may use or disclose protected health information without the written authorization of the individual . . . in the situations covered by this section . . . (l) . . . [a] covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers’ compensation . . .”). Part 8 *does not* adopt HIPAA as Montana law or create a state cause of

action for an alleged violation of HIPAA. Therefore, a claim based on Part 8 must be premised on violating a specific provision of Part 8.

Section 50-16-817, MCA, provides liability only for “a violation of this part.” It does not create liability for a claimed violation of HIPAA or any other statutory, common law, or ethical code. Additionally, Simms is not claiming negligence based on a violation of HIPAA (his prior negligence claim was dismissed by stipulation); rather, he has only made a statutory claim under Part 8.

b. The Workers’ Compensation Act provides that there is no liability for Dr. Schabacker’s disclosure for reporting a violation of the Workers’ Compensation Act

Dr. Schabacker’s purpose in writing the letter was not to report fraud. Schabacker Aff., ¶¶ 2, 12, Simms’ App. 9; Order, pp. 10, 12. However, if Simms is asserting that Dr. Schabacker was communicating with law enforcement, then § 39-71-106, MCA, must be considered. It provides that a person may not be held liable for civil damages as a result of reporting information that proves a violation of the Workers’ Compensation Act. Section 39-71-106, MCA.

c. Dr. Schabacker cannot be liable for correcting his unknowing participation in Simms’ misrepresentations

Similarly, although Dr. Schabacker’s purpose was to communicate with Simms’ insurer regarding Simms’ condition (Order, pp. 10, 12), he had an obligation to correct his prior incorrect statements regarding Simms’ condition.

Simms represented to Dr. Schabacker that his physical condition was far worse than the video segments would later reveal. Dr. Schabacker believed his patient, and testified to the Workers' Compensation Court and communicated to MSF that Simms needed certain care and benefits. Order, pp. 2-3. Due to Schabacker's prior testimony, and especially his continued assistance in helping Simms obtain benefits, he faced potential criminal, professional, and ethical consequences if he did not correct his prior representations regarding Simms' condition.

For example, § 39-71-316, MCA, establishes that a person, including a "medical service provider," who assists another person in obtaining benefits to which the other person is not entitled to is guilty of theft and may be prosecuted under the criminal statutes. Dr. Schabacker could have been investigated, charged, and sentenced up to 10 years in prison or fined \$50,000, and required to pay an additional \$50,000 to the Department of Labor and Industry. Section 45-6-301, MCA; § 39-71-316(3)(a), MCA. Simms misrepresented his condition to Dr. Schabacker which consequently exposed Dr. Schabacker to criminal liability. Dr. Schabacker should not be exposed to civil liability for correcting his exposure to criminal liability by Simms' actions. Simms' actions bring to mind a Montana Maxim of Jurisprudence: "A person may not take advantage of the person's own wrong." Section 1-3-208, MCA.

Additionally, Dr. Schabacker could have lost his license to practice medicine. Section 39-71-316(4), MCA, provides that “[a] person licensed under the provisions of Title 37 is subject to suspension, revocation, or denial of a license if the person knowingly claims or assists in the claiming of benefits in violation of the provisions of this chapter.”

Finally, Dr. Schabacker is bound by a common sense ethical obligation to not misrepresent his patients’ conditions to anyone, including MSF and the legal system. When Dr. Schabacker discovered that his prior representations were false, he was ethically bound to correct those representations.

Dr. Schabacker’s disclosure was authorized pursuant to § 50-16-805(1), MCA. However, the statutes and reasons discussed above provide additional support for why Dr. Schabacker cannot be civilly liable to Simms for the disclosure.

CONCLUSION


The district court correctly ruled that Dr. Schabacker’s disclosure was authorized by § 50-16-805(1), MCA. Simms has raised a new argument for the first time on appeal, and it should not be addressed by the Court. This Court cannot fault the district court for not addressing a claim that Simms did not previously present. The district court did address and correctly rejected Simms’ unsupported assertion that Dr. Schabacker knowingly and willingly aided a law

enforcement agency in a criminal investigation. Simms failed to meet his burden of showing any genuine issue of material fact and summary judgment in favor of Dr. Schabacker was appropriate as a matter of law.

This case is not about MSF's actions, and it is not even about Simms' misrepresentations, it is about a doctor providing information to a workers' compensation insurer regarding his patient's condition as explicitly allowed by statute.

RESPECTFULLY SUBMITTED this 24th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 9,331 words, not averaging more than 280 words per page, excluding the Certificate of Service and Certificate of Compliance.

DATED this 24th day of June, 2014.

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CERTIFICATE OF SERVICE BY MAILING

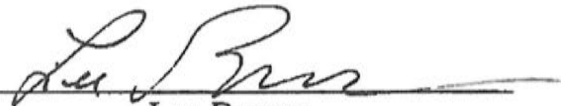
This is to certify that on the 24th day of June, 2014, the foregoing attached ANSWER BRIEF OF APPELLEE MICHAEL SCHABACKER, M.D. was duly served upon the following attorneys of record by depositing a true copy thereof in the United States mails, postpaid, addressed as follows, to-wit:

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