

APPLICATION FOR
DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full Name: Gregory Lee Bonilla
2. Birthdate: [REDACTED]
3. Current home address: [REDACTED]
4. Email address: [REDACTED]
5. Preferred phone number: [REDACTED]
6. Judicial position you are applying for: District Judge, Ninth Judicial District
7. Date you became a U.S. citizen, if different than birthdate: Same as birthdate
8. Date you become a Montana resident: On my birthdate and then again in August 1996 after being a California resident for two years.

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.

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Shelby High School	Shelby, Montana	May 1984	HS Diploma
University of Montana	Missoula, Montana	May 1991	BA Economics & Political Science
University of California- Berkeley School of Law, Boalt Hall	Berkeley, California	May 1996	Juris Doctor

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

Graduate Assembly Delegate, University of California-Berkeley, 1995-96

Member of the Boalt Hall *La Raza Law Review* from 1994-96 and served as Production Editor for one year and Assistant Editor for another.

Heisey Scholarship Recipient, University of Montana, 1984-85

University of Montana Dean's List several quarters

C. PROFESSIONAL BACKGROUND AND 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.

<u>Entity's Name</u>	<u>Position</u>	<u>Dates</u>
County Litigation Group 2715 Skyway Drive Helena, Montana 59602	Attorney (Managing Counsel from 08/2012 through 12/2022)	May 2009- Present
Bonilla Law Office 1914 Main Street PO Box 546 Fort Benton, Montana 59442	Owner	July 2008-May 2009
Smith, Walsh, Clarke & Gregoire (dissolved)	Intern then Associate	Nov. 2006-July 2008 Nov. 1996-July 2001
Cascade County Attorney's Office 121 4 th Street North, Ste. 2A Great Falls, Montana 59401	Deputy County Attorney (Chief Civil Deputy from 01/2004 through 11/2006)	Aug. 2001-Nov. 2006

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.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
State Bar of Montana	December 1997
Montana Supreme Court	December 1997
United States District Court for the District of Montana	January 1998
United States Court of Appeals for the Ninth Circuit	July 2013

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., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).

In my current practice in which I have been engaged for the last fourteen years, I oversee cases through all phases of litigation including trial. My practice is diverse. I defend member counties and special districts and their elected officials, agents, and employees in the areas of law enforcement liability (25%), labor and employment law (25%), negligence (20%), land use and road disputes (15%), and civil rights matters (15%). Many of these cases are brought under 42 U.S.C. § 1983. On occasion, they are brought administratively which requires knowledge of the Montana Administrative Procedure Act.

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).

My practice does not entail teaching or lobbying duties, although in 2015, I testified before the Montana Senate Judiciary Committee against a bill seeking to impose attorney fees against governmental entities requesting a district court determination on release of documents with a privacy interest attached. My busy practice has not afforded me the time to serve as a mediator. My 2012 appointment as managing defense counsel for the Montana Association of Counties Defense Services included administrative, budgetary, and supervisory responsibilities. I held the managing position until January 2023, which I gave up when I opted to pursue this position.

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.

During the last ten years, I have regularly appeared in state and federal court proceedings. Although the frequency of the appearances varies due to the nature of the roughly fifteen scheduling orders to which I am subject at any given time, I estimate I average two to three appearances per month. In the post-COVID world, these are usually via Zoom or similar platform. Occasionally, my defense of a client in a labor law case is done in an arbitration setting, although it is not frequent. I also occasionally defend clients in administrative hearings (usually the Human Rights Bureau, the Human Rights Commission, or before a Department of Labor Administrative Hearings Officer, but also a few times in front of the the Board of Personnel Appeals). In terms of percentages, I break down my appearances as follows:

Federal court	50%
State or local courts of record	45%
Administrative bodies	4%
Arbitration	1%

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.

Belanus v. Gallagher, 2016 MT 186N, 385 Mont. 539 (unpublished)

Belanus v. Potter, 2017 MT 95, 387 Mont. 298, 394 P.3d 906

Blaine Cnty. v. Stricker, 2017 MT 80, 387 Mont. 202, 394 P.3d 159 (*Stricker I*)

Blaine Cnty. v. Stricker, 2019 MT 280, 398 Mont. 43, 453 P.3d 897 (*Stricker II*)

Blaine Cnty. v. Stricker, DA- 22-0656 (*Stricker III*) (this appeal is currently pending)

Renenger v. State, 2018 MT 228, 392 Mont. 495, 426 P.3d 559

Norbeck v. Flathead County, 2019 MT 84, 395 Mont. 294, 438 P.3d 811

Mitchell v. Glacier County, 2020 MT 173N, 401 Mont., 554, 466 P.3d 936 (unpublished)

Davenport v. Cnty. of Lincoln, 2020 MT 314N, 402 Mont. 429, 478 P.3d 341 (unpublished)

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.

Although I have not practiced much criminal law in the latter half of my career, I have, at various times in my career practiced criminal law, sometimes as prosecutor and sometimes as defense counsel. My criminal law experiences have served me well in later endeavors, particularly since a significant portion of my current practice is devoted to the defense of law enforcement officers civilly sued. Two of the examples I am about to give were challenging for me not so much because they were in the criminal context, but because I have had far more experience advocating on behalf of law enforcement rather than against law enforcement's position. The perspective from which I had to approach these cases required a paradigm shift, and I think it important for a judge to have had experiences from multiple perspectives.

1. *Stricker*, a case referenced in answer to the preceding question which is currently before the Montana Supreme Court for the third, and hopefully final, time, is the longest running case of my career and has presented the most diverse set of legal issues. The case is rooted in the tragic death of an 18-year-old who died of delirium tremens (alcohol withdrawal) while incarcerated in the Hill County Detention Center on charges arising in Blaine County. My client is Hill County. The case was first postured as a discrimination claim and later as a negligence suit. The case has been through: an administrative contested case hearing; two appeals to the Human Rights Commission (HRC); judicial review of the HRC's final decision (said review reversed the HRC upon the grounds that the HRC failed to use the appropriate standard of review); the first appeal to the Montana Supreme Court which affirmed the District Court's reversal of the HRC; a subsequent grant of summary judgment by another District Court holding that Hill County had a

nondelegable duty to ensure inmates are not subjected to medical negligence; the Supreme Court's reversal of that summary judgment order on the second appeal; and, upon remand, another grant of summary judgment by yet another District Court (this time based on the doctrine of collateral estoppel). The latest summary judgment order is the basis for the third appeal.

As I write this, I realize there is no adequate way to summarize a case which began when my son was in second grade and is still ongoing while he is in his junior year of college. Fourteen-year-old cases are hard to summarize. The case has presented a myriad of complicated legal issues and, frustratingly, may not end any time soon. The attempt to impose two enormous shifts in Montana jurisprudence have been thwarted through the defense of this case and a third such attempt is currently pending. While the legal issues are challenging, the case is difficult because it is impossible to forget the terrible tragedy which underlies it.

2. In terms of emotion, my defense of a young (not much past the age of majority) client charged with deliberate homicide was the most difficult. Getting the deliberate homicide charges dismissed upon motion was not a terribly onerous legal challenge (the evidence simply did not support the charge), but the stakes were, obviously, as high the stakes can get given the penalties which could have been imposed upon conviction. In addition, there were other lesser charges which could not be defeated upon motion. Complicating matters was the fact that law enforcement officers were assigned to watch my family residence for several days due to fears that the victim's family would not take kindly to my involvement in the case. As it turns out, the victim's family behaved with nothing but grace during the most difficult of times for them. There was some internal struggle with whether to take the case under the circumstances, but in the end, I am glad I did. Due to a serious health issue in my family, I was unable to remain on the case. I do, however, know that the legal outcome for the client was difficult, but far from the worst of the possible outcomes.
3. The third challenging case was my *pro bono* defense of a family member, who was a minor, charged with DUI. It is not always a good idea to defend family members, partly because of the inordinate amount of pressure from the family which expects a good outcome. However, in this instance, the charge was not a felony, and a vigorous defense was required which my family member would have been unable to afford. The issue in the case was the calibration of the portable breathalyzer and the arresting officer's interpretation of certain portions of the field sobriety tests. In-depth legal research was required in areas of ambiguity in Montana law. The resulting work product, a motion to suppress, was apparently crafted well enough to induce the prosecutor to offer a favorable plea deal for my client before the prosecution's response to the motion to suppress was due. While the outcome was good for my client, the case nevertheless exemplifies one of the problems with our justice system, namely, that not everyone has access to quality legal representation.
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.

Not applicable.

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.

I have presented at continuing legal education seminars as follows:

- April 2018, presented on qualified immunity at a State Bar CLE on governmental immunities;
- 2005-2018 (approximately), taught at the annual Fire Services Training School on governmental issues faced by fire districts and fire service areas.
- April 8, 2022, guest lecturer at an “Ethics and Enterprise” class; lectured on types of coverages available to businesses and the legal reasons for carrying sufficient insurance.

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.

During the last five years, I have had the opportunity to provide *pro bono* services to dozens of individuals in need of legal help. For instance, I was asked by three separate people for assistance in personal injury cases in which the individuals lacked the resources and awareness of the system to find an attorney. One of the cases I brought to a successful conclusion and one remains ongoing. The third case, which was also a complex civil rights case, presented time and resource challenges beyond that which I could provide on a *pro bono* basis. The conditions of my employment prevent me from taking private clients, otherwise I would have taken the case on a contingent fee basis. I was, however, able to find the client an attorney willing to represent her interests and that case just recently concluded with an excellent result, including the righting of a wrong done to the client.

In addition, I represented my church’s interest in a federal court case wherein a member of the church had allegedly used employee retirement funds to, among other things, donate to the church. I also have assisted several individuals with minor employment issues (interpreting personnel policies and responding to disciplinary letters). I also recently helped an individual who needed to respond to a complex civil complaint and corresponding early motions. Once the necessary initial pleadings were filed, I assisted the individual in finding an attorney to represent him. I have also aided an individual involved in a will contest and guided her at the mediation of the matter.

Further, I have defended several individuals in misdemeanor cases including DUI and MIP. I also assisted two people with parenting plan modifications. Currently, I am assisting an individual with a very difficult dissolution and custody issue. Finally, although not technically *pro bono*, I consent to serve on the Montana Medical Legal Panel whenever possible.

For reasons unknown, the State Bar does not have my 2018 or 2019 *pro bono* time. I reported a total of 135 hours of *pro bono* hours in 2017, 2020, and 2021. I estimate my total hours for the last five years is 225 hours.

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.

Not applicable.

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

Not applicable.

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.

Not applicable.

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

My professional life has been devoted to the law, so my other occupational experiences are somewhat limited. However, as a young man I umpired youth baseball games and refereed youth basketball games. Dealing with coaches and parents does require one to develop a certain amount of patience and skill in moving combatants along to something else. These are skills helpful in a courtroom.

My very first job was assisting the custodian of the Toole County Courthouse in emptying trash and sweeping floors every weekday after school for a dollar per week (I was ten years-old and the world was a very different place in 1976). I still remember the sense of awe I felt when collecting the trash from the courtroom itself; my ten-year old mind had difficulty comprehending the magnitude and importance of the matters which must be decided in such hallowed chambers. It never occurred to me at the time that it would be possible for me to be the first minority in Montana appointed to the district court bench. Sometimes, that ten-year-old boy still surfaces in the courtrooms in which I appear. If appointed to the bench, it is my sincere hope that the awe of that ten-year-old boy continues to surface.

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.

- Board of Deacons, Helena First Assembly of God, March 2012 through March 2016 (the Board of Deacons governs the financial and operational affairs of the Church).
- Board of Directors, Splashes of Joy, 2012 - 2013, (this is an organization that provides meals and household services (or whatever else is needed) for the terminally ill and their families).

- Board of Directors, Options Clinic, 2014 (this is an organization that provides alternatives to pregnant women seeking abortion and provides post-decision assistance in the form of formula, diapers, parenting classes, and equipment such as car seats).

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 have never been elected nor appointed to public office. I ran unsuccessfully for Chouteau County Attorney in 2002. In 2020, I applied for appointment to District Court Judge in the First Judicial District. I was granted an interview by the Nominating Commission but did not receive its recommendation to be considered by the Governor.

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.

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.

I am not so engaged.

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.

I have timely filed.

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 district court judge.

I want to be a district court judge because it is the natural progression of my career and, quite frankly, I believe the breadth and depth of my legal and life experiences provide me with the tools necessary to do an excellent job on the bench.

More important, although it is imperfect, I believe in our system of justice. I am committed to public service and being a district court judge is an honorable and meaningful way to serve. A judge's decisions can impact not only the litigants, but the whole community. It is my fervent hope that, if appointed, my impact on the justice system and the people affected by it would be as positive as is humanly possible.

A district court judge sees a myriad of problems faced by members of the public. Many people who appear in court have been damaged, whether as a crime victim, a tort victim, or in some other capacity. Oftentimes that damage cannot be entirely undone.

What can be done, however, is affording litigants, whether *pro se* or represented, and victims a fair and timely process through which they can have the opportunity to rectify, to the greatest extent possible under the law, the wrongs done to them. What should not be forgotten is that not all defendants, whether in the civil or criminal arena, have done what they have been accused of doing. They, too, must be afforded all the protections available to them under the law during the pendency of their case.

Of particular interest to me is safeguarding the rights of those who cannot speak for themselves, namely minors and others who may be incompetent to protect their own interests. Safeguarding the rights of all who appear in court is safeguarding the entirety of the public. I want to provide these services for the people of the Ninth Judicial District and give back to the community that gave me my start in life.

36. What three qualities do you believe to be most important in a good district court judge?

Of all the questions in this application, this is easily the most difficult to answer. A good district court judge must possess many important qualities. Several such qualities such as courage, intelligence, ability to communicate, and decisiveness will by necessity not make the short list.

First, a good district court judge must have a passion for the law and for the rule of law. Without that, there is probably no point in being a judge in the first place. I do not think it an overstatement to say that the commitment to the rule of law must be unwavering or the system fails. Such adherence to the rule of law requires impartiality. We all have our points of view, but to the greatest extent possible, a judge must leave biases at home and objectively apply the facts to the law or else there is no rule of law.

Second, a good district court judge must be empathetic. A judge must be many different things to many different people. No two cases are alike and, therefore, the needs of each case are different. How a judge conducts a dissolution litigated by *pro se* parties should be different than how a judge conducts a complex contract or homicide case wherein the parties are represented by competent, experienced counsel. What the parties need from the judge in the first example will be far different than what the parties need from the judge in the second example. However trivial the case might appear on its surface, the case is nevertheless important to the litigants. Thus, a good district court judge must be able to empathize with all who participate in the judicial system, whether as litigant, attorney, juror, or court personnel. There is no way to dispense justice without that ability.

Third, a good district court judge must be discerning in order to balance the competing interests which will present in nearly all proceedings. Many of the objectives of the judicial system can be at odds with other of its objectives. For instance, public safety concerns can be at odds with the rights of the accused or the public's right to know can collide with a person's individual privacy rights. Systemically, litigants are entitled to be heard regardless of how the court ultimately rules on an issue. Further, a district court judge must be able to explain the court's decisions to the attorneys, the litigants, and to the public. Well-written and well-reasoned decisions are not only valuable to the attorneys and parties, but they make the Supreme Court's work easier in the event the case is appealed. Such thoroughness requires time, however, and the parties as well as the entire judicial system require cases to move forward expeditiously so the docket does not become clogged. Failure to move the docket along results in back log, and a back log serves no one's interests. Achieving and balancing two sometimes-competing objectives is both art and science, but the ability to do so is a must for a district court judge.

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

At its root, my philosophy is that the district court is not the forum in which new law is, or should be, created. Attempts to do so can result in catastrophic results for the parties in terms of wasted time and resources. New law should usually be created at the Montana Legislature, or on rare occasions when a shift in the common law may be necessary, by the Montana Supreme Court. It is the role of the district court to apply existing law, whether statutory, Constitutional, or common law, to the facts of a given case. The district court should bring as much certainty to the process as possible, thereby affording the litigants and their attorneys the predictability necessary to choose the appropriate course of action. This philosophy begins with asking what the plain meaning of the statute or Constitutional provision at issue

is. Barring a plain meaning, the question then becomes, can the intent of the drafters be discerned? If the question is one of application of common law, the principle of *stare decisis* controls. In any given case, it is not for the district court to interpose what it believes the law ought to be, but rather it is incumbent upon the district court to impartially interpret existing law and apply it to the facts of the case.

This objective, of course, cannot always be neatly achieved. There are ambiguities in the law and new developments in society and technology which result in close calls or cases of first impression. Neither the Legislature nor the Supreme Court are prescient, and they cannot foresee all possible fact patterns or occurrences. Likewise, the drafters of the Montana Constitution could not foresee all possibilities. Thus, there will be instances in which the statutes, the Constitution, and common law provide no clear answer. At that point, the district court must employ all its knowledge of jurisprudence and the best of its reasoning powers to determine what it believes to be just while being mindful of what it thinks the Supreme Court and, ultimately, the Legislature, will have to say on the matter.

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 find attached the Supreme Court brief I drafted in *Renenger v. State*. I was the sole author of this brief and my client, Jefferson County, prevailed on appeal.

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.

Justice Jim Rice
Montana Supreme Ct.
PO Box 203001
Helena, MT 59620
(406) 444-5573

Hon. Robert Whelan
Judge, Second Jud. Dist.
155 W. Granite St.
Butte, MT 59701
(406) 497-6420

Justice Dirk Sandefur
Montana Supreme Ct.
PO Box 203001
Helena, MT 59620
(406) 444-5573

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 District Court 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).

02/07/2023

(Date)

Gregory L. Bouille

(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 Monday, February 13, 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

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 17-0387

GERALD and PATRICIA RENENGER, Individually and
On behalf of their minor son, A.R.,

Plaintiffs-Appellants,

v.

STATE OF MONTANA; STEVEN SHAPIRO; and
JEFFERSON COUNTY, MONTANA,

Defendants-Appellees.

APPELLEE JEFFERSON COUNTY'S RESPONSE BRIEF

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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<i>Monroe v. Cogsell Agency</i> , 2010 MT 134, ¶ 62, 356 Mont. 417, 234 P.3d 79 (quoting <i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 322 (1986)).....	3
<i>Nelson v. Driscoll</i> , 1999 MT 193, ¶ 21, 295 Mont. 363, 983 P.2d 972	5, 9
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<i>Prosser v. Kennedy Enters. Inc.</i> , 2008 MT 87, ¶ 18, 342 Mont. 209, 179 P.3d 1178	7
<i>Rosenthal v. Cnty. of Madison</i> , 2007 MT 277, ¶ 22, 339 Mont. 419, 170 P.3d 493; Mont. R. Civ. P. 56(e)	3, 10
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I. ISSUES PRESENTED

1. Whether the doctrine of absolute prosecutorial immunity applies to the facts of this case.
2. Whether the public duty doctrine applies to the facts of this case.

II. STATEMENT OF THE CASE

The County concurs with Renengers' Statement of the Case with two additions. First, the District Court held in its Order Granting Summary Judgment that, to the extent Renengers sought to hold the County liable for Shapiro's actions, absolute prosecutorial immunity extended to the County. (Renenger App. 2 at 4.) Second, while Renengers state that the District Court did not address their argument that the public duty doctrine does not apply to "affirmative acts," the District Court did not have to reach that question because the only action taken by the County was turning its file over to the prosecutor. Shapiro was not obligated to file criminal charges upon receipt of the file, but he chose to do so in his discretion.

III. STATEMENT OF FACTS

On October 6, 2012, the Jefferson County Sheriff's Office (JCSO) received a report from the father of J.S., age 11, that J.S. had told his father that A.R. had performed oral sex on J.S. without consent. (Renenger App. 2 at 3.) The case was assigned to Deputy Tom Grimsrud who filed an incident report containing the

narrative of the interview with the father of J.S., which stated there was an ongoing investigation and there would be follow-up interviews. (Renenger App. 2 at 3.)

The JCSO forwarded its file to the Jefferson County Attorney's Office (JCAO). (Renenger App. 2 at 3.) Steve Shapiro was appointed Special Deputy County Attorney to handle the case. (Renenger App. 2 at 3.) Shapiro, without having any further investigation conducted, filed a petition in youth court for leave to file an information against A.R. for sexual intercourse without consent. (Renenger App. 2 at 3.)

The District Court found probable cause and granted leave for the State to file the petition. (Renenger App. 2 at 3.) After the petition was filed, Shapiro arranged for a forensic interview of J.S. (Renenger App. 2 at 3.) On December 26, 2013, A.R. completed a psychosexual evaluation which concluded that A.R. was low risk and, therefore, did not recommend A.R. be placed on restrictions, receive formal treatment, or register as a sex offender. On March 19, 2014, the court dismissed the action against A.R. after receiving a stipulation to dismiss. (Renenger App. 2 at 3.)

IV. STANDARD OF REVIEW

This Court reviews a district court's ruling on a motion for summary judgment *de novo* and uses the same criteria from Rule 56 of the Montana Rules of Civil Procedure used by the District Court. *Chapman v. Maxwell*, 2014 MT 35, ¶ 7,

374 Mont. 12, 322 P.3d 1029. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3); *Tvedt v. Farmers Ins. Group of Companies*, 2004 MT 125, ¶ 18, 321 Mont. 263, 91 P.3d 1. The purpose of summary judgment is to eliminate the burden and expense of unnecessary trials. A motion for summary judgment is proper if the moving party has met its burden of showing that no genuine issues of material fact exist. *Rosenthal v. Cnty. of Madison*, 2007 MT 277, ¶ 22, 339 Mont. 419, 170 P.3d 493; Mont. R. Civ. P. 56(e). Once the movant has presented their supporting evidence, the opposing party must establish a substantial issue of material fact that is neither fanciful, frivolous, or conjectural. *Id.* ¶ 22. The evidence, as well as all justifiable inferences drawn from it, must be viewed in a light most favorable to the non-moving party. *Svaldi v. Anaconda-Deer Lodge Cnty.*, 2005 MT 17, ¶ 12, 325 Mont. 365, 106 P.3d 548. Summary judgment shall be entered “against a party who fails to make a showing sufficient to establish the existence of an element to that party’s case, and on which that party will bear the burden of proof at trial.” *Monroe v. Cogsell Agency*, 2010 MT 134, ¶ 62, 356 Mont. 417, 234 P.3d 79 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

V. SUMMARY OF ARGUMENT

Renengers' attempt to render the public duty doctrine inapplicable in this case by characterizing the JSCO's act of sending its case file to the JCAO as an "affirmative act" is fruitless. The County's "affirmative act" was simply providing the prosecutor with its investigation. This is not an act which negates the public duty doctrine. Moreover, the act which Renengers allege caused them damages was the actual filing of criminal charges by the State. (Jefferson Cnty.'s App. 1, Interrog. Nos. 1-3.) The prosecutor (Shapiro) was not, upon receipt of the JCSO's file, obligated to file criminal charges. Thus, the County did not take an affirmative act against Renengers which renders the public duty doctrine inapplicable.

Further, Shapiro exercised prosecutorial discretion in filing criminal charges. Shapiro was correctly afforded absolute prosecutorial immunity by the District Court. This immunity was properly extended to both the County and the State.

VI. ARGUMENT

A. The District Court Was Correct and the Public Duty Doctrine Bars Plaintiffs' Claims.

Common law negligence is the failure to use the degree of care that a reasonable person would use under same or similar circumstances. *Massee v. Thompson*, 2004 MT 121, ¶ 30, 321 Mont. 210, 90 P.3d 394. In order to prove negligence, Renengers had to be able to show that the County owed them a legal duty and that it breached that duty. *Peterson v. Eichhorn*, 2008 MT 250, ¶ 23, 344

Mont. 540, 189 P.3d 615. A negligence claim against a public entity requires a consideration of the public duty doctrine, which provides that a government entity cannot be held liable for an individual plaintiff's injury resulting from a police officer's breach of a duty owed to the public. *Massee*, ¶ 41.

The public duty doctrine holds that where a governmental agent owes a duty to the general public, then that duty is not owed to any particular individual. *Nelson v. Driscoll*, 1999 MT 193, ¶ 21, 295 Mont. 363, 983 P.2d 972. Absent duty, there can be no negligence. The public duty doctrine originates from the practical desire to protect the exercise of discretion and prevent governmental agents from being sued for every discretionary action. *Id.*

There is an exception to the public duty doctrine. An individual may establish that the governmental entity owes the individual a duty that arises out of a "special relationship" between the entity and the individual. *Nelson*, ¶ 22. A special relationship may be established if: (1) a particular statute was intended to protect a specific class of persons (of which the individual is a member) from a particular type of harm; (2) an agent of the governmental entity undertook specific action to protect the individual or the individual's property from harm; (3) the individual was reasonably induced to rely on a governmental action; or (4) a third-party in the custody of the government caused harm to the individual. *Id.* The question of whether a special relationship exists is a question of law. *Id.* ¶ 19.

Renengers produced no evidence, nor did they argue below, that a special exception to the public duty doctrine exists in this case. Thus, the District Court concluded that no special relationship existed between the County and Renengers. (Renenger App. 2 at 5.) Absent a special relationship, the public duty doctrine applies and Renengers cannot prove duty or breach. (Renenger App. 2 at 5.) Summary judgment is appropriate “if plaintiff fails to offer proof of any one of the elements of a negligence claim.” *Dubiel v. Mont. Dept. of Transp.*, 2012 MT 35, ¶ 12, 364 Mont. 175, 272 P.3d 66 (citations omitted). The District Court, therefore, properly granted the County summary judgment.

On appeal, Renengers assert that, merely because they have alleged the County, through the JCSO, committed an affirmative act, an independent duty is triggered which negates the public duty doctrine. (Pl. Op. Br. at 20.) The affirmative act which Renengers complain of is the simple act of the JCSO giving its investigative file to Shapiro. (Pl. Op. Br. At 20.)

In making this argument, Renengers rely on *Kent v. City of Columbia Falls*, 2015 MT 139, 379 Mont. 190, 350 P.3d 9. However, in *Kent*, this Court was not addressing whether law enforcement owes private individuals rather than the general public a duty to “completely” investigate a case. Instead, *Kent* was a case wherein the City of Columbia Falls constructed a paved path on which a skateboarding accident occurred. In *Kent*, this Court cited with approval several

cases standing for the proposition that the public duty doctrine applies to law enforcement agencies:

The public duty doctrine provides that a governmental entity cannot be held liable for an individual plaintiff's injury resulting from a governmental officer's breach of a duty owed to the general public rather than to the individual plaintiff.' [*Gatlin-Johnson v. City of Miles City*, 2012 MT 302, ¶ 14, 367 Mont. 414, 291 P.3d 1129]. Under the doctrine, 'where a municipality owes a duty to the general public, that duty is not owed to any particular individual.' *Prosser v. Kennedy Enters. Inc.*, 2008 MT 87, ¶ 18, 342 Mont. 209, 179 P.3d 1178. Such duties to the general public include law enforcement services and fire protection. '[A] law enforcement officer has no duty to protect a particular person absent a special relationship because the officer's duty to protect and preserve the peace is owed to the public at large and not to individual members of the public.' *Gonzales v. City of Bozeman*, 2009 MT 277, ¶ 20, 352 Mont. 145, 217 P.3d 487. See also *Coty v. Washoe Cty.*, 108 Nev. 757, 839 P.2d 97 (1992) ('[T]he duty to fight fires "runs to all citizens and is to protect the safety and well-being of the public at large."' Therefore, the duty of fire and police departments "is one owed to the public, but not to individuals."

Kent, ¶ 23.

In finding the public duty doctrine inapplicable in that case, the majority in *Kent* did state that, "the City did not merely approve the walkway; it took an active role in monitoring, determining, and approving the engineering aspects of the trail system." *Kent*, ¶ 49. However, at no point did the *Kent* Court ever hold that any sort of "affirmative acts" test applied to law enforcement when investigating reports of possible crimes. The holding in *Kent* is a far cry from holding that the public duty doctrine is inapplicable any time a law enforcement agency gives a prosecutor its investigation file. If Renengers have their way, any time an

individual involved in an investigation does not like the outcome of the investigation, even if the outcome is determined by a prosecutor or a court, the investigating agency will be subject to suit. This is currently not the law and the County suggests this would be poor public policy.

In any event, at the crux of Renengers' complaint is the fact that the investigation file did not contain a forensic interview. (Pl. Op. Br. At 20.) The County acknowledges that the JCSO does not do them. However, the JCSO does not do forensic interviews because it does not have the opportunity to do them with sufficient frequency to be proficient. Therefore, the State is relied upon to conduct those interviews. (Jefferson Cnty.'s App. 2 at 11:13-18:7.) That Shapiro chose to proceed with a motion for leave to file an information without having the forensic interview cannot be imputed to the County.

Renengers' argument completely ignores the fact that the criminal charges were filed by the State through Shapiro. Shapiro was not obligated to file criminal charges upon receipt of the investigation. That he decided to do so is entirely within his discretion for which he has been afforded prosecutorial immunity. Further, there is no question that the Renegers would not have suffered their alleged damages but for Shapiro filing the criminal charges. (Jefferson Cnty.'s App. 1, Interrog. Nos. 1-3)

After a prosecutor initiates a prosecution, a plaintiff seeking to sue non-prosecutorial officials alleged to be responsible for the prosecution post-complaint must show the absence of probable cause to prevail. *Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008). There exists a rebuttable presumption that a prosecutor who files a criminal complaint exercises independent judgment in determining probable cause existed and thereby immunizing investigating officers from liability after the criminal complaint was filed. *Id.* at 862 (citations omitted). This presumption may be rebutted only if a plaintiff is able to show that the prosecutor's independence has been compromised. *Id.* (citations omitted). In addition, defendants are not liable for "instigating" criminal proceedings when they are acting within their statutory duties as JCSO personnel was doing here. *White v. State*, 2013 MT 187, ¶ 34, 371 Mont. 1, 305 P.3d 795.

Renengers put no evidence in the record which indicates that Shapiro lacked independence or the ability to have further investigation conducted. The decision to proceed with criminal charges cannot be imputed to the County absent evidence that Shapiro's independence was compromised. *Beck*, at 862. Therefore, Renengers cannot show duty or breach and the County is immune from liability here. *Id.*

Simply put, the JCSO's duty to investigate criminal complaints is a duty owed to the public, not to an individual. Further, none of the special relationship exceptions articulated in *Nelson* apply here. Therefore, the public duty doctrine

applies and Renengers cannot satisfy the duty and breach elements of a negligence claim. Therefore, the County was entitled to summary judgment on Renengers' claims and the District Court should be affirmed.

B. The Doctrine of Prosecutorial Immunity Is Applicable.

Renengers also appeal the District Court's dismissal of the State and of Shapiro from this lawsuit based upon prosecutorial immunity. The State and Shapiro opposed this in their Answer Brief and, in the interests of the Court's time, the County will simply adopt and incorporate the State's arguments herein and urge the Court to reject Renengers' arguments.

The County simply notes that the State and Shapiro were dismissed from this lawsuit because absolute prosecutorial immunity remains a common-law immunity in Montana. (Renenger App. 1 at 5-6); See *Rosenthal, supra*, ¶ 25. The Montana Supreme Court has extended prosecutorial immunity to include county governments employing prosecutors who are defendants in tort actions such as the one here. *Ronek v. Gallatin Cnty.*, 227 Mont. 514, 517, 740 P.2d 1115, 1117 (1987). Thus, the County cannot be held vicariously liable to Renengers because of prosecutorial immunity.

The County also notes that Shapiro was acting on behalf of the State of Montana in prosecuting A.R., not the County. No party disputes this. A claim of vicarious liability is based on the theory of *respondeat superior*, where "the

employer's liability is a derivative from the negligent acts of the employee acting within the scope of employment." *Maguire v. State*, 254 Mont. 178, 182-83, 835 P.2d 755, 758 (1992) (citation omitted). Here, the claims against Shapiro stem from his actions on behalf of the State, not the County. Thus, under no circumstances can the County be held vicariously liable for Shapiro's actions.

VII. CONCLUSION

The District Court correctly applied the public duty doctrine in granting summary judgment to the County. The "affirmative act" argument set forth by Renengers is simply a red herring on the context of the facts of this case. The County, through the JCSO, did nothing more than send its file to the State's prosecutor, Shapiro. Shapiro did not have to file criminal charges upon receipt of the file, but he did. The District Court even found probable cause to proceed. It is unfathomable how the County could be held liable for performing its public function of investigating reported crimes when the prosecutor and the District Court both found probable cause to proceed with a criminal case. Further, Shapiro was correctly afforded absolute immunity.

DATED this 17th day of January 2018.

MACo Defense Services

/s/ Gregory L. Bonilla
Gregory L. Bonilla

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is 2,690 words, excluding certificate of service and certificate of compliance.

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CERTIFICATE OF SERVICE

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