

APPLICATION of
Charles Brentley Brooks
FOR
THIRTEENTH JUDICIAL DISTRICT COURT
JUDGESHIP

A. PERSONAL INFORMATION

1. Full name.

Charles Brentley Brooks

2. Birthdate.

[REDACTED]

3. Current home address.

[REDACTED]

4. Email address.

[REDACTED]

5. Preferred phone number.

[REDACTED]

6. Judicial position you are applying for.

Montana Thirteenth Judicial District Judgeship (Billings, Yellowstone County)

7. Date you became a U.S. citizen, if different than birthdate.

N/A

8. Date you become a Montana resident

August 1969

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.

Billings West High School	Billings, Montana	High School Diploma	1973
Harding University	Searcy, Arkansas	B.A. Social Science	1977
South Texas College of Law	Houston, Texas	J.D.	1980

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

Harding University:

- Phi Alpha Theta National Honorary History Society
- Assistant Concertmaster, Harding Symphony
- NCAA Division II Track Team (sprints)

South Texas
College of Law:

- Civil Trial Advocacy-Best Mock Trial Expert Witness

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.

<u>Employer</u>	<u>Position</u>	<u>Dates</u>
-United States District Court District of Montana	Judicial Law Clerk, Chief Judge James F. Battin	May 1980-June 1983
-Yellowstone County, MT	Deputy County Attorney	Aug. 1983-Oct. 1998

-City of Billings, MT	City Attorney	Oct. 1998-Nov. 2020
-Axilon Law Group	Senior Counsel	December 2020-present

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/Association</u>	<u>Date of Admission</u>
State Bar of Montana	1982
United States District Court, District of Montana	1982
Ninth Circuit Federal Court of Appeals	1988

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).

Axilon Law Group Private Practice (Civil 95%/Criminal 5%):

General civil practice including diverse areas such a business litigation defense, contracts, leases, real property defense litigation, estate litigation, employment litigation-primarily employers; some criminal law limited to advice and assistance to victims of crime.

City of Billings (Civil 60%):

Written memoranda and oral advice to Mayor/City Council/City Administrator/City Department Directors concerning a variety of issues: risk management, contracts, land use, employment/personnel/labor relations and arbitrations, insurance defense/civil litigation, drafting ordinances/resolutions, City Code enforcement, legal research on applicable state and federal statutes and regulations, guidance to City advisory boards/commissions. 2001-2020: Claims Committee Member of Montana Municipal Interlocal Authority (MMIA) (a self - insured risk retention insurance pool of 120 + Montana cities based in Helena, MT)

City of Billings: (Criminal 40%): During employment as City Attorney: supervision of criminal division composed of four misdemeanor prosecution attorneys including a Domestic Violence (DV) Prosecutor and DV Unit. General decisions on charging and sentencing guidelines, assistance to prosecutors on difficult cases. Periodic assumption of brief writing and assistance in trials/evidentiary hearings.

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).

-Testimony and Written Correspondence on behalf of the City of Billings (1998-2020) and Yellowstone County (1987-1998) before numerous legislative session and interim committees on various proposed civil and criminal legislation. Numerous collaborations with legislators, lobbyists and legislative staff on revising and clarifying bill drafts.

-Rocky Mountain Paralegal Certificate Program: (1990-1993): Taught Introduction to Civil and Criminal Law, Criminal Law and Procedure, Legal Research and Writing.

-Local Adult Education Handgun Classes: 2002-2015: Guest Lecturer-Use of Force Statutory and Case Law Presentations. Consistently received high approval ratings for these presentations.

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 participated in several civil case hearings during my tenure as the City Attorney in Billings. Most of the civil cases were handled by Montana Municipal Interlocal Authority (MMIA) defense counsel however there were also cases which were not insured or defended by the MMIA and were handled by City Attorney civil attorney staff. Regardless of who represented the City, I was involved in numerous hearings as well as drafting of legal memoranda-typically motions for summary judgment or to dismiss-and drafting/reviewing discovery and assisting with and preparing for depositions. Two of the writing samples attached to this application are representative of my participation in various cases while City Attorney. I was

not only a full-time supervisor and department head but periodically assumed case responsibility myself in addition to my other Mayor/City Council/City Administrator and civil and criminal duties. This accomplished two important goals: it illustrated my commitment to and collaboration with attorney staff and also re-invigorated me as I engaged in specific case strategy and responsibility and kept me current and informed on the applicable law.

Also during my time as City Attorney I supervised and periodically participated in arbitrations primarily involving personnel issues under collective bargaining agreements. There were also a few arbitrations and mediations concerning contractual disputes.

More recently within the last year in private practice I have participated in or handled civil cases. An example of that work is an appearance along with other counsel in our office on a business LLC dispute which involved a TRO/Preliminary Injunction evidentiary hearing, underlying complaint and related post-hearing legal memoranda.

An example of my recent administrative agency experience concerns defending a small business in a wage claim dispute before the Department of Labor and Industry which is currently pending.

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.

I have not appeared in the past ten years. Prior to that time period I appeared for oral argument and handled additional cases which were submitted on briefs:

Findley v. District Court, (1996), 277 Mont. 242, 921 P.2d 870 (submitted on briefs)

Sanders v. Yellowstone County, et al, (1996), 276 Mont. 116, 915 P.2d 196 (submitted on briefs)

Best, et al v. City of Billings, et al, 2000 MT 97, 299 Mont.247. 999 P.2d 334 (oral argument)

Several appearances before the Montana Supreme Court Sentence Review Division as a follow-up to the criminal cases I prosecuted.

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.

There are several that I have experienced over the years but a few stand out for unique reasons.

1. As the Chief Civil Deputy County Attorney, defending Yellowstone County in 1994 civil litigation challenging the voter approval of \$9.85 million in funding for METRA (the multi-use fairgrounds complex in Billings owned and managed by the County) capital improvements which included the two current large exhibition halls heavily used year round for numerous events. I was assigned as lead counsel for the METRA General Manager, County and Board of County Commissioners who together with many civic groups and the METRA Advisory Board worked so hard to obtain the voter approval of funding to build these essential structures to replace dilapidated buildings from the 1920s. This was a high profile, highly publicized and high stress case extensively reported by local news media. The applicable Montana Supreme Court case law was decades old but nevertheless still applicable and controlling. There were several witnesses required along with approximately 30 unusual exhibits such as election ballots and *Billings Gazette* news articles about the election. After a lengthy and contentious evidentiary hearing and post-hearing briefs, the District Court granted summary judgment to the County. I am proud to visit these buildings several times a year for events and trade shows and quietly reflect upon knowing that I and one other Deputy County Attorney assisting me contributed to their eventual construction and the resulting visitors and tourism these facilities attract to Billings.
2. *State v. Mahoney*, (1994), 264 Mont, 89, 870 P.2d 65 (Attempted Homicide/Sexual Intercourse). Mahoney established new state law on the principle of "abandonment" of criminal activity. This was a horrific crime that I will not describe here. The case was hard fought at the District Court level primarily on the legal issue of whether or not this defendant "abandoned" his crime so as to negate any criminal responsibility for his

actions. The issue of “abandonment” had not been directly considered by either a state District Court or the Montana Supreme Court. The victim and family were understandably upset and highly stressed over the potential for this defendant to evade and escape accountability. The defendant also attempted to withdraw his guilty plea blaming the District Judge for not adequately informing him of his rights and consequences of pleading guilty. Fortunately, both the District Court and the Montana Supreme Court in a rather blunt opinion rejected the defendant’s motion to withdraw his guilty plea and more importantly rejected his abandonment argument based on the facts of the case. This case also established new Montana law on the criteria to be applied for such a legal defense to a crime.

3. *Proposed Non-Discrimination Ordinance (NDO) for the City of Billings-2014.* This was another high profile, highly controversial and time-consuming issue during my time as City Attorney. In the spring and summer of 2014 the Billings Mayor and City Council patiently and methodically reviewed and edited several versions of an NDO during several Council meetings. When this issue was an agenda item at City Council meetings the chambers often overflowed with citizens waiting to offer public comment in support of or opposition to the NDO. During one lengthy meeting there were approximately one hundred fifty persons who testified. The City Administrator and I worked many hours on several revised drafts as directed by the Council and like so many other Municipal issues we approached this task in a non-partisan manner.

One of the legal issues that arose during the NDO consideration was whether or not the City had the self-governing authority to enact an NDO or was such preempted by state statutory limitations on self-governing entities. Other Montana self-governing cities had previously enacted an NDO but their authority to do so had not arisen as an issue. I researched this issue, consulted with staff attorneys, other larger Montana City Attorney staff and then provided a legal memorandum to the Mayor and Council on the issue. I offered to give the Council a greater comfort level in my analysis by suggesting the City could seek an Attorney General (AG) opinion on the issue. An AG opinion request was submitted with the required analysis at the direction of the Council; however, before the request was acted upon by the AG the Mayor and Council voted against the NDO 6-5. One of the Council

meetings where the NDO was the main agenda item lasted 11 ½ hours. For these and many other reasons, this issue was legally, intellectually, and often physically challenging due to the lengthy and contentious meetings on the issue.

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.

N/A

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.

Ethics Scenarios Panel, Montana League of Cities/Towns (MLCT) City Attorney Ass'n CLE, 10/5/2007

Making Municipal Law/Policy, Montana Municipal Clerks, Treasurers and Finance Officers, 5/5/2008

Understanding Legal Documents, Montana Municipal Clerks Ass'n, 5/2010

State/Local Control of Medical Marijuana, MLCT City Attorney Ass'n CLE, 10/7/2010

Insurance Coverage/Issues for Municipalities, MLCT City Attorney Ass'n CLE, 10/2011

Public Records Laws, Montana Municipal Clerks, et al., 5/2010

Making Municipal Policy 101, Montana Municipal Clerks, et al., 5/2013

Public Records Requests/Laws Montana Municipal Interlocal Authority (MMIA)-Tillotson Service Program for City Attorneys and Contract Attorneys, 5/2016

CI 116/Marsy's Law Issues/Compliance, MMIA Tillotson Service Program, 5/2017

Legal Issues Concerning Homelessness, Public Intoxication, Panhandling and Transiency, MMIA Tillotson Service Program, 5/2019

Bostock and Beyond: Developments in the Law Governing Sexual Orientation, Gender Identity and Expression, Montana Labor and Employment Law Seminar-The Seminar Group. 3/2021

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.

National Ski Patrol (NSP): *Pro Bono* Legal Advisor for Northern Division (Montana, Wyoming, North Dakota) 1996-present and member of NSP National Legal Committee. The focus of this work is on risk management and local/national ski area/ski patrol relations and collaboration. This requires approximately sixty hours annually.

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.

None

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

N/A

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.

None.

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

As a youth and early into my college education years, I worked in several departments at a large and popular discount retailer known as Gibson's Discount Center in Billings. I also worked as a dockhand at Billings Shipping Corporation in Billings unloading freight from railroad boxcars and into semi-truck trailers for local and regional delivery. I also worked part-time as a law clerk to a law firm while attending law school in Houston, Texas.

The application here to a potential Judgeship is that these jobs taught me humility, gratefulness and respect and helped me to mature and appreciate hard work and to strive to achieve a job well done regardless of the task. Those qualities are directly transferable to being a successful and respected District Court Judge.

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.

-Twenty year member and past Board of Directors President, Vice President and Screening Committee member for Alternatives, Inc., a large community pre-release organization based in Billings.

-Billings Caledonian Pipe and Drums since 2017-current Board of Directors President and Bass drummer.

-Twenty nine years with the volunteer Ski Patrol associated with and serving under the direction of Red Lodge Mountain Ski Patrol Director. I was leader of the volunteer group from 2009-2019 and performed various administrative and financial duties and am currently Assistant Volunteer Patrol Representative and a rescue toboggan trainer.

-I have been the *pro bono* legal advisor for the Northern Division of the National Ski Patrol (NSP) and a member of the NSP National Legal Committee since 1996.

-In 2012 I was named Patroller of the Year in the Northern Division of the NSP.

-In 2013, 2014, 2018, 2019 I was voted Volunteer Patroller of the Year at Red Lodge Mountain.

-Recent Court Appointed Special Advocate (CASA) Training Graduate Fall 2020

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.

Applicant for Thirteenth Judicial District Court vacancy in 2017.

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.

No.

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.

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.

N/A

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.

I began my legal career as a law clerk to Chief U.S. District Court Judge James Battin. Judge Battin was generally reserved but very thoughtful and careful with his legal analysis and decisions. He was slow to speak and thoughtful when he did speak in and out of court as he assessed specific cases and legal issues. Judge Battin was always able to decide each case or issue with no bias or inclination, letting the established facts lead him to the applicable law and an accurate, evidenced-based result. His intensely neutral and open approach to his responsibilities had a permanent impact on me as I have progressed through my own career. I often find myself asking how Judge Battin would analyze a difficult issue and reflect upon his methodical and patient approach to each case. He was a Judge's judge, a true mentor and was instrumental in my gradual and continuing professional and personal maturation. Because of this experience I knew that someday I would aspire to a judgeship at some level after obtaining the needed and necessary criminal and civil experience over a period of years.

Unlike many attorneys, I enjoy legal research and writing and have been periodically told by peers that I keep on task/focus on details of an issue and write and communicate well. While at the Yellowstone County Attorney's office, I came to be relied upon for quick, thorough briefs during trials-I once was given a t-shirt from some coworkers that said "Brent Brief" after writing several evidentiary point briefs for some peers trying a homicide case. Although it may seem trivial and likely no one recalls it, I still have that shirt and was/am very proud of that peer appreciation and recognition.

I possess the unbiased and neutral temperament, patience, commitment and enthusiasm along with a balance of experience in a broad array of both criminal and civil law which would enable me to be a successful judge. I try to practice the attributes of a good judge and will bring those qualities to the bench if selected. I am fair, even tempered and methodical in problem/issue analysis and resolution. I am very familiar with the substantial and far-reaching duties of this position since I have conducted approximately twenty-five jury trials in District Court over the years and have gained invaluable experience and professional maturity from those cases. I have known several of the other current District Judges in this District for many years and respect and admire their abilities and am confident that I would assimilate into that group quickly and would be a positive and productive member of the judiciary here in Billings.

I am a longtime Billings resident that understands the community and its future challenges. I have participated in many organizations devoted to enhancing the lives of the City's residents and improving the lives of those who find themselves within the local court system including plaintiffs, defendants, witnesses, relatives of parties and the often-forgotten victims of crime. One of the challenges is maintaining the efficient operation of the criminal and civil justice system as the City and County continues to grow. I have a well-balanced and unique career history in a broad array of civil and criminal law which is essential to the proficient performance this position demands as the caseload inevitably grows with the increase in the City's population.

I also bring a respectful, collegial and courteous personal attitude to this position which I believe is equally important. I do not change employment often. This reflects my commitment and loyalty to the tasks and rigors of the job at hand. I would approach this position with that same commitment combining humility, respect for all, energy and motivation to competently discharge the duties of this position which is arguably one of the most important within our judicial system.

Billings has been my home for fifty-two years and it would be a singular and highest honor to be judge in the City and County I love and care for deeply.

I am prepared and ready to serve

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

There are many attributes that a successful District Judge should possess and continuously practice. It is difficult to limit those to just three however here are my top three:

1. An honest, ethical, humble, calm, patient, kind and respectful standard of conduct and demeanor in all interactions with attorneys, clients, witnesses, crime victims, jurors, bailiffs and Clerk of Court staff, fellow judges and the public.
2. Superior written and verbal communication and listening skills which result in clear direction to attorneys and drafting clear and concise opinions and orders crucial to the efficient and timely disposition of the Judge's docket.
3. A commitment to make well-researched and analyzed legal decisions that are based upon statutes, Administrative Rules and Montana Supreme Court precedent and the closely-related courage to follow the applicable law even if the Judge may personally disagree with the result or the Judge's decision is anticipated to be unpopular.

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

The interpretation and application of these crucial laws should be performed thoughtfully with focused analysis on the literal and plain language of the text as assisted by case law precedent. I have always admired and respected the philosophy of jurists such as deceased United States Supreme Court Justice Antonin Scalia who deeply believed and practiced the interpretation of statutes and the Constitution with the goal of discerning the original meaning of the text as intended by the author(s) as opposed to interpreting such documents as situational, fluid and flexible as influenced or persuaded by contemporary societal changes.

Judges should be mindful of the separation of powers and responsibilities between the executive, legislative and judicial branches of our state and federal government. Judges should not be intent on legislating or re-making/revising statutory or constitutional provisions. Occasionally there is no binding precedent or reasonably helpful case law from the Montana Supreme Court. In those circumstances a Judge can review opinions from other Montana District Judges or review non-binding

case law from nearby states or Federal District or Circuit Courts that may offer assistance on an issue of first impression in Montana. However, Judges should be aware of interpretational guidance from what the Montana legislature long ago codified in two sections of the Montana Code Annotated.

§ 1-2-101, Montana Code Annotated, states:

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.

§ 1-4-101, Montana Code Annotated provides:

In the construction of an instrument, 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.

Ultimately these two statutes simply mandate a common sense approach to written document interpretation that has been codified for over a century. It reflects the legislative intent that should be carefully observed and practiced.

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.

Writing samples are provided as Attachments A, B and C.

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.

Harlan Krogh
Crist, Krogh, Alke and Nord
2708 1st Ave. North
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hkrogh@crislaw.com

Doug James
Moulton Bellingham
27 North 27th Street, Suite 1900
P.O. Box 2559
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(406) 248-7731
Doug.James@moultonbellingham.com

Gina Dahl
City Attorney
210 North 27th Street
P.O. Box 1178
Billings, MT 59103
dahlg@billingsmt.gov

I truly appreciate the opportunity to be considered for the next Thirteenth Judicial District Court Judge.

Brent Brooks

Brent Brooks

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).

OCTOBER 13, 2021

Date

Brent Brooks

Signature of Applicant

Attachments A, B and C

Writing Samples

Attachment A

1 Brent Brooks
2 Billings City Attorney
3 City Attorney's Office
4 P. O. Box 1178
5 Billings, MT 59103-1178
6 (406) 657-8205
7 brooksb@ci.billings.mt.us

8 Doug James
9 Moulton Bellingham PC
10 Attorneys at Law
11 P.O. Box 2559
12 Billings, MT 59103
13 (406) 248-7731
14 Doug.James@moultonbellingham.com
15 Attorneys for Defendant City of Billings

16
17 **IN THE MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,**
18 **YELLOWSTONE COUNTY, MONTANA**

19 JOHN M. GURR, on behalf of himself and Cause No. DV 18-1434
20 all other similarly situated,

Judge Michael Moses

21 Plaintiff,

22 v.

**MOTION TO DISMISS PURSUANT TO
23 RULE 12 (B)(6), MONT. R. CIV.P. OR IN
24 THE ALTERNATIVE, MOTION FOR
25 JUDGMENT ON THE PLEADINGS, RULE
26 12(c), MONT. R. CIV.P.**

27 CITY OF BILLINGS,

28 Defendant.

Comes now the Defendant City of Billings, Montana, through counsel of
record and moves the Court for Dismissal of the complaint in this matter
pursuant to Rule 12(b)(6), M.R.Civ.P. or in the alternative, for Judgment on
the Pleadings pursuant to Rule 12(c), M.R.Civ.P. The legal authority for
these alternative motions is more specifically provided below.

1. The Complaint is prohibited by Mont. Code Ann. § 2-9-103(b) which provides that a
governmental entity cannot be held civilly liable for an ordinance subsequently ruled
invalid.

1 2. The City of Billings has immunity from suit for its legislative acts as provided in Mont.
2 Code Ann. § 2-9-111(2) which prohibits this complaint.

3 3. The City of Billings has immunity from suit based on orders and decisions made by
4 Municipal Court Judge Sheila Kolar in the sentencing of plaintiff as provided in Mont.
Code Ann. § 2-9-112(1).

5 4. The exclusive remedy for an alleged illegal criminal sentence is either through direct
6 appeal of the sentence or through a Petition for Post-Conviction Relief pursuant to
7 Mont. Code Ann. § 46-21-101, *et seq.* A civil action for damages and class certification
8 cannot be used to avoid or circumvent this long established statutory and case law
requirement in criminal cases.

9 5. The recent Montana Supreme Court case of *City of Missoula v. Franklin*, 2018 MT
10 218, 392 Mont. 440, 425 P. 3d 1285 upon which Plaintiff relies cannot be applied
retroactively to recover civil damages.

11 These alternative motions are supported by and discussed within the accompanying
12 legal memorandum.

13 Respectfully submitted this 31st day of October, 2018.

14
15 CITY ATTORNEY'S OFFICE

16
17
18 By: 

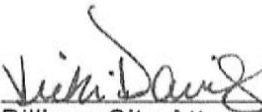
19 Brent Brooks
20 City Attorney
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Motion to Dismiss was e-mailed to the attorney(s) named below at the following addresses on this 31st day of October, 2018:

Jock B. West
Tyler L. West
West Law Firm, P.C.
301 N. 27th St., Ste. 100
Billings, MT 59101

Chase E. Brown
Russell A. Hart
Netzer law Office, P.C.
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Billings City Attorney's Office

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Attorneys for Defendant City of Billings

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

JOHN M. GURR, on behalf of himself and all other similarly situated, Cause No. DV 18-1434

Judge Michael Moses

Plaintiff,

v.

CITY OF BILLINGS,

Defendant.

**BRIEF IN SUPPORT OF MOTION
TO DISMISS, RULE 12 (b)(6)
OR FOR JUDGMENT ON THE
PLEADINGS, RULE 12(c).**

FACTUAL-PROCEDURAL BACKGROUND

On September 11, 2018, the Montana Supreme Court issued its opinion in the case of *City of Missoula vs. Corinne Franklin*, 2018 MT 218, 392 Mont. 440, 425 P.3d. 1285. Franklin was charged in Missoula Municipal Court with the offense of Disorderly Conduct, misdemeanor, in violation of § 45-8-101, Mont. Code Ann. Franklin received a deferred imposition of sentence for a period of 12 months upon her plea of no contest to

the Disorderly Conduct charge, was fined One Hundred dollars (\$100.00) and assessed various Montana Code Annotated statutory surcharges. In addition, Franklin was assessed a Twenty-Five dollar (\$25.00) surcharge pursuant to a Missoula City Council resolution. This additional City of Missoula surcharge was intended to assist in funding the Missoula City Attorney's Office and had been adopted and approved by the Missoula City Council because the current state statutory surcharges did not adequately fund the Missoula City Attorney's Office. The Missoula City Council believed that misdemeanor criminal defendants should contribute an additional amount to the City Attorney's Office as a supplement to the various state statutory surcharges found at § 46-18-236, MCA to help offset prosecution expenses.

At the time of sentencing in Missoula Municipal Court Franklin argued that the Missoula city surcharge of Twenty-Five dollars (\$25.00) should be excluded from her sentencing arguing that it was not authorized by state criminal sentence surcharge statutes and that the Missoula Municipal Court therefore had no authority to assess such a surcharge as part of her sentence on the Disorderly Conduct charge.

The Missoula Municipal Court denied the request to exclude the Missoula city surcharge concluding that the surcharge was an administrative fee and not a sentence.

Franklin appealed the Municipal Court decision on the Missoula city surcharge to District Court which affirmed the Municipal Court's decision and held that as a self-governing entity, Missoula had the authority to impose additional, special assessments as part of an effort to increase the safety of the community by providing additional funds to the Missoula City Attorney's Office.

Franklin appealed the District Court decision to the Montana Supreme Court once

again arguing that the City of Missoula had no statutory authority to impose a local surcharge as part of sentencing for a state law violation of Disorderly Conduct. The Montana Supreme Court held that the City of Missoula did not have the self-governing authority to enact a local surcharge through adoption of a resolution and the surcharge was not authorized by § 46-18-236(1)(a), MCA. *Franklin* ¶¶ 13, 15.

The Court further explained that a self-governing municipality in Montana may enact local ordinances defining criminal offenses and related local resolutions or ordinances to defray the expense of the City Attorney's Office so long as those ordinances are not expressly preempted or in conflict with state law. *Franklin* ¶ 21. However, sentencing courts, including municipal courts, must have statutory authority to impose a sentence for a state law violation. The Court determined that the Missoula surcharge imposed a greater burden on Franklin than what was allowed under Montana statutes for a state law criminal offense of Disorderly Conduct. The Court therefore concluded that the city of Missoula and Municipal Court exceeded the authority to impose the local surcharge. *Franklin* ¶ 15. The remedy the Montana Supreme Court determined was appropriate was to remand the case back to the District Court with instructions to in turn remand the case back to Missoula Municipal Court with instructions to "strike the \$25 surcharge imposed under Missoula Resolution 7784." *Franklin* ¶ 17. It should be noted that the cities of Billings and Helena have similar surcharges which supplement the state statutory surcharges allowed in § 46-18-236(1)(a), MCA.

Within a few days after the Montana Supreme Court decision in *Franklin*, the Plaintiff in this case filed his complaint and request for class certification and then later filed an amended complaint and request for class certification on September 28, 2018.

As alleged in Plaintiff's complaint, in 2017 in Docket Number CR-2017-516 he was charged in Billings Municipal Court with two counts of Violation of an Order of Protection as prohibited by § 45-5-626, MCA. The Plaintiff eventually entered a no contest plea and was given the following sentence: 6 months in jail all suspended, 25 hours of Aggression Control Education ("ACE"), Mental Health Evaluation ("MHE"), follow any recommendations, provide proof to the Court every 30 days of MHE compliance, GPS Monitoring, no possession of weapons, and no contact with the two victims D.S., J.S. or their minor children. As part of Plaintiff's sentence he was assessed a surcharge of Ninety-Five dollars (\$95.00). Ten dollars (\$10.00) of that amount was based upon and required by Billings City Code (BMCC) § 10-402 enacted in 2005 which is an administrative processing fee for any citation or complaint in the Municipal Court which is in addition to any regular fines, surcharges and fees. The purpose of this Ten dollar (\$10.00) surcharge as explained in §10-401, BMCC is intended to offset the cost of Municipal Court administrative and processing work including allowing defendants to go into a time payment contract status for their fines. Unlike Franklin, Gurr did not object to the surcharges at the time of his sentencing and he did not appeal his sentence to the District Court.

Premised upon the *Franklin* case, Plaintiff here alleges that since 2005 the City of Billings, through its Municipal Court, has been "illegally collecting administrative surcharges and processing fees". Complaint page 3, L. 5-7. Plaintiff alleges four counts in his complaint: count one: constitutional tort, count two: conversion, count three: unjust enrichment, and count four: class certification. As to class certification, Plaintiff maintains that any individual who has been convicted of or pled guilty to a misdemeanor offense in

Municipal Court and paid the Ten dollar (\$10.00) surcharge in § 10-402, BMCC should be a member of the class he is hopeful to create. Further, the Plaintiff requests reimbursement of each class member for the Ten dollars (\$10.00) but also goes further and asks that each class member be awarded damages for the imposition of that Ten dollar (\$10.00) surcharge and also asks that as a potential class representative that he be paid an incentive award.

STANDARD OF REVIEW

A Rule 12(b)(6), M. R. Civ. P. Motion to Dismiss presumes and admits that the facts are accurate in the plaintiff's complaint and his complaint is construed most favorable to him. *Pederson v. Rocky Mountain Bank*, 2012 MT 48, ¶¶8, 364 Mont. 258, 272 P.3d 663 citing *Spencer v. Beck*, 2010 MT 256, ¶¶7, 358 Mont. 295, 245 P. 3d 21. Therefore, the Court's focus here is an examination of the complaint to determine if it presents any legal basis for relief and if the complaint fails to do so the Motion to Dismiss must be granted for failing this test. *Pederson* ¶ 8; *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶¶13-14, 337 Mont. 339, 160 P. 3d 552.

The alternative Rule 12(c), M.R. Civ. P. Motion for Judgment on the Pleadings submitted here requires the Defendant City, as moving party, to establish that there are no issues of fact and only questions of law remaining to be decided by the Court. *Montana Interventional and Diagnostic Radiology Specialists, et al v. St Peter's Hospital*, 2015 MT 258, ¶¶11, 381 Mont. 25, 355 P. 3d 777 citing *Conway v. Benefis Health Sys.*, 2013 MT 73, ¶ 20, 369 Mont. 309, 297 P. 3d 1200.

**THERE ARE MULTIPLE STATUTES REQUIRING DISMISSAL OF THE COMPLAINT
OR JUDGMENT ON THE PLEADINGS**

As stated in the accompanying Motion to Dismiss or for Judgment on the Pleadings, this case must be dismissed for the following reasons:

1. The Complaint is prohibited by Mont. Code Ann. § 2-9-103(b) which provides that a governmental entity cannot be held civilly liable for an ordinance subsequently ruled invalid.
2. The City of Billings has immunity from suit for its legislative acts as provided in Mont. Code Ann. § 2-9-111(2) which prohibits this complaint.
3. The City of Billings has immunity from suit based on orders and decisions made by Municipal Court Judge Sheila Kolar in the sentencing of Plaintiff as provided in Mont. Code Ann. § 2-9-112(1).
4. The exclusive remedy for an alleged illegal criminal sentence is either through direct appeal of the sentence or through a Petition for Post-Conviction Relief pursuant to Mont. Code Ann. § 46-21-101, *et seq.* A civil action for damages and class certification cannot be used to avoid or circumvent this long established statutory and case law requirement in criminal cases.
5. The recent Montana Supreme Court case of *City of Missoula v. Franklin*, 2018 MT 218, 392 Mont. 440, 425 P. 3d 1285 upon which Plaintiff relies was a criminal case which cannot be applied retroactively to recover civil damages. Rather, the remedy is to appeal and have the incorrect portion of a criminal sentence removed from the sentencing order as Franklin herself did. Plaintiff failed to pursue this mandatory and exclusive remedy.

1. The Complaint Is Prohibited By Mont. Code Ann § 2-9-103(b)

This statute provides that a governmental entity cannot be held civilly liable for an ordinance subsequently ruled invalid. Therefore, the city is immune from liability pursuant to this statute. § 2-9-103(2) provides:

(2) If an officer, agent, or employee of a governmental entity acts in good faith, without malice or corruption, and under the authority of a duly promulgated rule or ordinance and that rule or ordinance is subsequently declared invalid, that officer, agent, or employee, any other officer, agent, or employee of the represented governmental entity, or the governmental

entity is not civilly liable in any action in which liability would not attach if the rule or ordinance had been valid.

The City is therefore immune from liability unless it did not act in good faith and without malice or corruption through the Mayor and City Council whom enacted the ordinance at issue here. There has been no allegation of such and the complaint does not mention or acknowledge this statute.

In interpreting this statute, the Montana Supreme Court has previously held the following:

"However, § 2-9-103(1), MCA, by its terms, clearly applies to *any action* brought against a governmental entity or its officers, agents and employees.

...

We conclude that the immunity from liability contained in § 2-9-103(1), MCA, is not limited to claims brought pursuant to the [Montana Human Rights] Act, but applies in any action brought against a governmental entity and its officers, agents and employees."

Ross v. City of Great Falls, 1998 MT 276, 291 Mont. 377, 967 P.2d 1103, ¶ 33.

In *Ross*, a 37 year-old requested an application for a police officer position with the City of Great Falls. *Id.*, ¶ 5. At the time of the request, a statute required that all new police officer applicants had to be between the ages of 18 and 35. *Id.* As a result, the applicant filed an age discrimination claim against the City arguing the subject statute was unconstitutional.

While the District Court granted the City summary judgment on other grounds, it also determined the City would have been immune under § 2-9-103 even if the statute was unconstitutional. *Id.*, ¶ 30. On appeal, the Montana Supreme Court agreed. The Court began its analysis by accepting the plain language of the statute which provided the City would "be immune from liability for acting in reliance on a statute later declared

constitutionally invalid unless it did not act in good faith and without malice or corruption.” *Id.*, ¶ 31. Since Ross failed to establish, or even allege, bad faith, malice or corruption, the Montana Supreme Court applied § 2-9-103 to shield the City from liability. *Id.*, ¶¶ 32, 38.

The same result is appropriate here. The City imposed a \$10.00 fee pursuant to Billings City Code (BMCC) § 10-402, a “duly promulgated...ordinance.” § 2-9-103(1), MCA. Plaintiff does not allege the City acted in bad faith or with malice. Therefore, even if BMCC § 10-402 was invalid, the City cannot be “civilly liable in any action in which liability would not attach if the rule or ordinance had been valid.” *Id.* Assuming this ordinance was valid, as required by § 2-9-103(1), MCA, there is no remaining basis for Plaintiff’s claims.

As shown by the Montana Supreme Court’s discussion in *Ross*, clearly the Montana legislature intended this statute to apply to situations like the present complaint so as to avoid continuous litigation whenever a definitive Montana Supreme Court ruling held either a state statute or local ordinance invalid. This immunity statute is an independent, separate and inescapable law that compels and requires dismissal of all counts of the complaint here.

2. The Complaint Is Prohibited By Mont. Code Ann. § 2-9-111(2)

Legislative immunity is another, independent statutory law compelling dismissal of this complaint. Section 2-9-111 (1) and (2) provide in applicable part as follows:

(1) As used in this section:

(a) the term “governmental entity” means only the state, counties, municipalities, school districts, and any other local government entity or local political subdivision vested with legislative power by statute;

(b) the term "legislative body" means only the legislature vested with legislative power by Article V of The Constitution of the State of Montana and that branch or portion of any other local governmental entity or local political subdivision empowered by law to consider and enact statutes, charters, ordinances, orders, rules, policies, resolutions, or resolves;

(c)(i) the term "legislative act" means:

(A) actions by a legislative body that result in creation of law or declaration of public policy;

(B) other actions of the legislature authorized by Article V of The Constitution of the State of Montana; or

(C) actions by a school board that result in adoption of school board policies pursuant to 20-3-323(1);

(2) A governmental entity is immune from suit for a legislative act or omission by its legislative body, or any member or staff of the legislative body, engaged in legislative acts.

The authority and power to make laws and rules through ordinances and resolutions is a core legislative function of a local municipal governing body such as the Billings City Council. *Denke v. Shoemaker*, 2008 MT 418, ¶¶ 55, 347 Mont. 322 198 P.3d 284, *Koch v. Yellowstone County*, 243 Mont. 447, 451, 795 P.2d.454.457 (1990).

Like the majority of states, Montana "afford[s] a qualified immunity to government units for damages caused by discretionary decisions." See § 27:13. Discretionary function: entity immunity from state claims, 4 Local Government Law § 27:13. Under Mont. Code Ann. § 2-9-111, a "governmental entity is immune from suit for a legislative act or omission by its legislative body." Mont. Code Ann. § 2-9-111; *Knight v. City of Missoula*, 252 Mont. 232, 245, 827 P.2d 1270, 1278-79 (1992).

As defined above, a "governmental entity" means only the state, counties, *municipalities*, school districts, and any other local government entity or local political subdivision vested with legislative power by statute. Mont. Code Ann. § 2-9-111(1)(a)

(emphasis added). The term "legislative body" means "only the legislature vested with legislative power by Article V of The Constitution of the State of Montana and that branch or portion of any other local governmental entity or local political subdivision empowered by law to consider and enact statutes, charters, *ordinances*, orders, rules, policies, *resolutions*, or resolves." Mont. Code Ann. § 2-9-111(b) (emphasis added).

The Montana Supreme Court has routinely held that a municipality's city council is a governmental entity within the meaning of Section 2-9-111. See *e.g. Woods v. City of Billings*, 248 Mont. 254, 256, 811 P.2d 534, 535 (1991). The City Council of the City of Billings, therefore, is a legislative body as that term is defined in Section 2-9-111(b). *Id.*

A legislative act is an action by a legislative body which results in creation of law or declaration of public policy. *Kiely Const., L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶¶ 84, 312 Mont. 52, 57 P.3d 836; *Denke v. Shoemaker*, 2008 MT 418, ¶¶ 55, 347 Mont. 322, 198 P.3d 284. "When a municipal governing body has latitude within its discretion in adopting the specific provisions of an ordinance, its enactment is legislative." *Redelsperger v. City of Avondale*, 87 P.3d 843, 847 (Ariz. App. 1st Div. 2004) (internal quotations omitted).

It cannot be seriously debated that the ordinance imposing a City surcharge is not a legislative act. There has been no factual allegation in the complaint here that the exceptions in § 2-9-111(1) (c)(ii) (administrative acts) or in 2-9-111(5) (torts resulting in personal injury or property damage) apply. Therefore, the City is immune from suit for the later invalidation of this ordinance without limitation or exceptions and dismissal is required.

3. The Complaint Is Prohibited By Mont. Code Ann. § 2-9-112(1)

A third, independent basis upon which this complaint must be dismissed is from another well-known statute. § 2-9-112(1) provides:

The state and other governmental units are immune from suit for acts or omissions of the judiciary.

In interpreting the statute, the Montana Supreme Court has indicated that judicial immunity arises “whenever the judicial power of the state is put to use in a judicial action.” *Knutson v. State*, 211 Mont. 126, 129, 683 P.2d 488, 490 (1984). This immunity applies to judicial acts with no stated limitation. *Knutson v. State, supra*, 211 Mont. at 128-129, 683 P.2d at 490. The imposition of the Ten-Dollar (\$10.00) surcharge when the Plaintiff here was sentenced for a violation of an order of protection is clearly a judicial act as part of a criminal misdemeanor sentence proceeding even if a part of that sentence is later held improper or invalid. The City of Billings is immune from the judicial acts of Municipal Court and this is an additional, separate basis upon which the complaint in its entirety must be dismissed.

4. Plaintiff Has Failed To Avail Himself Of The Exclusive Alternative Remedies Of Appeal Or Post-Conviction Relief

Plaintiff is seeking to avoid the well-established and exclusive statutory post-conviction procedures in favor of an unauthorized civil claim for damages stemming from the terms of a criminal sentence. The very case Plaintiff relies upon for his civil claims, *Franklin*, though, stems from a municipal court sentencing that was challenged in municipal court, appealed to the district court, and ultimately appealed again to the Montana Supreme Court. Plaintiff is not pursuing that procedure. Instead, Plaintiff seeks to create a new radical civil procedure to obtain relief from a criminal sentence. Since this

is not authorized under Montana law, his Complaint should be dismissed.

The Plaintiff could and should have availed himself of alternative procedural remedies that are time sensitive. If the Plaintiff believed his sentence was unlawful to the extent that he believed the ten dollar (\$10.00) surcharge from § 10-402, BMCC, was improperly imposed pursuant to City Council enactment, he could have appealed directly to the District Court for review of the Ten dollar (\$10.00) surcharge and argued errors of law pursuant to Mont. Code Ann. § 3-6-110 ("A party may appeal to district court from a municipal court judgment or order".)

Secondly, the Plaintiff could have pursued post-conviction challenge to this part of his sentence pursuant to § 46-21-101 *et seq*, MCA. However, this remedy would not be available to the Plaintiff here unless he had exhausted all appeal remedies prior to pursuing a Post-Conviction Petition. § 46-21-101 provides in its entirety:

(1) A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was imposed in violation of the constitution or the laws of this state or the constitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of *coram nobis*, or other common law or statutory remedy may petition the court that imposed the sentence to vacate, set aside, or correct the sentence or revocation order.

(2) If the sentence was imposed by a justice's, municipal, or city court, the petition may not be filed unless the petitioner has exhausted all appeal remedies provided by law. The petition must be filed with the district court in the county where the lower court is located.

If this Plaintiff had adequately preserved his appellate remedies and his challenge to this surcharge were denied on appeal, then he certainly could have filed the Petition for Post-Conviction Relief challenging this portion of his Municipal Court sentence at any

time within one year of the date that the conviction and sentence became final. § 46-21-102(1). By way of example, the Plaintiff could have pursued this appropriate appeal and post-conviction path as briefly described in the case of *State v. Carson*, 2002 MT 234, ¶ 14 311 Mont. 485, 56 P.3d 844.

It is a well-known and strictly followed principal that a defendant who was convicted of or pleads guilty to one or more criminal offenses, whether misdemeanor or felony, and who believes that some or all of that resulting sentence imposed by the Court is illegal or improper, must avail himself of the appropriate appellate remedies. The Plaintiff here did not follow these required sequential remedies, rather, he did nothing until the Montana Supreme Court's recent ruling in the *Franklin* case and based upon that case he now seeks money damages rather than a correction of his original municipal court sentence imposing the Ten dollar (\$10.00) The Montana Supreme Court noted that same exclusive remedy in its concluding comments in *Franklin* by observing that:

"When the illegal portion of the sentence does not affect the entire sentence, the remedy typically is remand with instructions to strike the offending portion. See *Stephenson*, ¶ 34 (applying this reasoning to a suspended sentence). Because the illegal portion of Franklin's sentence, the twenty-five-dollar surcharge, is only a small portion of all the surcharges imposed, striking the local resolution surcharge does not affect the entire sentence. Accordingly, we reverse the District Court's order affirming the local surcharge. The District Court shall remand this matter to the Municipal Court with instructions to strike the twenty-five-dollar surcharge *1289 imposed under Missoula Resolution 7784."

Franklin, ¶ 14.

Plaintiff's complaint here comingles basic criminal law with a civil action for money damages. § 46-21-101 *et seq* and the numerous Montana Supreme Court cases applying and interpreting these statutes make it clear that the *exclusive* remedy for a defendant to appeal a sentence he believes improper is through direct appeal of that

sentence and if the appeal is not available or unsuccessful, then he may petition for post-conviction relief if supported by the facts and if all other procedural requirements governing the proper presentation of post-conviction petitions and claims are followed.

It should be noted that by suggesting criminal post-conviction relief remedies are the Plaintiff's exclusive means for redress, the City in no way waives defenses available to any city or state prosecution agency in any collateral relief proceeding. The City, on behalf of itself and any other prosecuting agency, further specifically reserves the right to all post-conviction defenses, which may include, but are not limited to, the non-retroactivity rule, the post-conviction statute of limitations, procedural default, and *res judicata*.

In summary, Plaintiff cannot circumvent this exclusive, required statutory process and now seek money damages and recruit other members of such a class who were imposed the Ten Dollar (\$10.00) surcharge.

5. *City of Missoula v. Franklin* is Not Retroactive

Plaintiff relies solely upon *Franklin* as authority to pursue civil damages and class certification. This presumes *Franklin* expressly provides such authority. Obviously the cities of Billings, Missoula and Helena have ended the assessment of the surcharges approved by their governing bodies. However, *Franklin* is silent on any form of retroactive application either from a criminal or civil viewpoint. The Court simply overruled local legislation by three cities and remanded *Franklin's* sentencing to District Court for the removal of the Twenty-Five (\$25.00) Dollar surcharge from the sentencing order by Missoula Municipal Court. Nothing further was authorized by that decision. This makes sense in that the Montana Supreme Court is certainly aware of the immunity statutes discussed earlier as well as the exclusive remedies available from a misdemeanor sentencing which Plaintiff failed to utilize.

CLASS CERTIFICATION

Each person that is proposed as a member of the class Plaintiff seeks to create must also comply with the exclusive remedies of direct appeal of their sentence and subsequent post-conviction relief. These are the exclusive remedies available to individuals similarly situated to the Plaintiff here. *State v. Boucher*, 2002 MT 114, ¶¶ 15-17, 309 Mont. 514, 48 P.2d 21. Therefore, it is not possible to create a class of damage-seeking misdemeanor defendants who have been imposed the Ten Dollar (\$10.00) Municipal Court surcharge. The proposed attempt at class certification cannot circumvent or ignore the appeal and post-conviction statutory requirements nor does it supersede the statutory immunities discussed earlier.


CONCLUSION

Each of the four statutory grounds previously discussed provide independent authority for the Court to dismiss the complaint. Any one of which compels dismissal. There are no factual disputes and the complaint is accepted as true for purposes of the alternative motions. The plaintiff has failed to follow appropriate criminal appellate procedure in challenging the imposition of a Ten Dollar (\$10.00) surcharge. He should have followed the procedure which Corinne Franklin followed when she appealed her sentence from a similar Missoula ordinance. *Franklin, supra*. The plaintiff did not do so and accordingly he has waived and forfeited any legal basis to now complain. He cannot avoid that exclusive remedy and instead seek money and class certification. Moreover, the immunity statutes discussed above are clear, succinct and not subject to nuanced

interpretation. This case should be dismissed and/or Judgment on the Pleading granted to the Defendant.

Respectfully submitted this 31st day of October, 2018.

CITY ATTORNEY'S OFFICE


By: 
Brent Brooks
City Attorney

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief In Support of the Motion to Dismiss was e-mailed to the attorney(s) named below at the following addresses on this 31st day of October, 2018:

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Attachment B

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8 **MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,**
9 **YELLOWSTONE COUNTY**

10 CITY OF BILLINGS,)
11) CAUSE NO: DC 17-0134
12 Plaintiff/Appellee,)
13) JUDGE GREGORY R. TODD
14 vs.)
15) **CITY'S RESPONSE BRIEF**
16 JAMES EDWARD MEURET II,)
17)
18 Defendant/Appellant.)

19 COMES NOW, Charles B. Brooks, attorney for Plaintiff/Appellee, the City of Billings,
20 (hereinafter "City") and hereby responds to the Defendant/Appellant's, (hereinafter "Meuret")
21 Opening Brief on Restitution.

22 **INTRODUCTION**

23 Meuret has appealed a portion of the Billings Municipal Court sentence ordering him to
24 pay restitution to his next door neighbors Taylor and Sheila Glantz. The Municipal Court record
now before this Court reflects that Meuret was charged with and convicted of misdemeanor
assault committed on Mr. Glantz after a jury trial in Billings Municipal Court in late 2016. The
assault involved Meuret striking Mr. Glantz on the head with his fist. On the assault conviction
Meuret was sentenced by Municipal Court as follows:

1 Assault (Municipal Court Docket TK-16-2471)
2 Six Months suspended sentence with Probation Supervision upon the below conditions:

3 Anger Management
4 Parenting Class
5 \$500.00 Fine and Surcharge
6 \$250 Public Defender Fee
7 Jury Costs
8 Restitution of \$1845.59

9 The Municipal Court held a restitution hearing in this case on January 5, 2017, and a
10 certified copy of that transcript is attached to this memorandum as Exhibit 3. References will be
11 made periodically to this transcript. As a result of this hearing, Meuret was ordered to pay
12 restitution to the Glantzes including the cost of a video surveillance camera system which Mr.
13 Glantz purchased two days after the assault and installed it himself a short time thereafter.

14 BACKGROUND FACTS

15 The facts in this case are not complicated but are important for the purposes of restitution
16 as ordered by the Municipal Court. The record before this Court on appeal indicate that Meuret
17 had a history of harassing his next door neighbors, the Glantzes. The harassment involved such
18 periodic and continuing behavior as Meuret temporarily parking his vehicle in their driveway,
19 cursing at them and verbally threatening them among other conduct. The following chronology
20 of events leading to Meuret's criminal charges here are important concerning his argument that
21 he should not be required to pay restitution for an upgrade to a preexisting video surveillance
22 system purchased by the Glantzes two days after Meuret assaulted Mr. Glantz.

23 On May 2, 2016, Meuret physically struck Mr. Glantz on the left side of his head after
24 the two argued over Meuret parking in the Glantzes driveway which is where the assault
occurred. Law enforcement were called to the location by a neighbor who witnessed the assault.
Meuret denied physically striking Mr. Glantz which was refuted by the witness/neighbor. Meuret
was arrested and later released on his own recognizance by Municipal Court.

On May 3, 2016, the Glantzes each applied for and were granted a Temporary
Restraining Order (TRO) prohibiting Meuret from being within 1500 of the Glantzes home and
other specific locations as more fully detailed in these Orders that are part of the transmitted

1 Municipal court record (CV-2016-189-OP and CV-2016-190-OP) attached here as Exhibits I
2 and 2.

3 On May 5, 2016, Meuret requested and was granted an amendment to the TRO which
4 allowed him to temporarily live again next door to the Glantz family.

5 On May 6, 2016, the Glantzes moved Municipal Court to reinstate the original TRO
6 including the 1500 foot restrictions, based on Meuret's violation of the amended TRO as he was
7 allowed by the Municipal Court to live again next door to the Glantz family.

8 On May 24, 2016, the Municipal Court held the permanent order of protection hearing
9 wherein the Municipal Court granted.

10 During this same time period in early May, 2016, Mr. Glantz purchased a video
11 surveillance system with video cameras on May 4, 2016, two days after the assault upon him by
12 Meuret. This system was purchased online from Costco. Restitution Hearing Transcript of
13 January 5, 2017, (hereafter "Tr."), page 11, L. 39-40 and page 12, L.1-7. Mr. Glantz indicated at
14 the January 5, 2017, restitution hearing that he purchased this system because of the assault,
15 broken vehicle windows, his vehicle being scratched or "keyed" and because the investigating
16 Billings Police Officers suggested he obtain such video surveillance system. Tr. Page 12, L.
17 1-13.

18 Of particular importance is Mr. Glantz's testimony about the previous harassment by
19 Meuret and the reason for the purchase of the video camera system two days after the assault by
20 Meuret. Mr. Glantz testified that the assault was the reason for the purchase of the video
21 surveillance system. Tr. Page 17, L.29-30. Mr. Glantz also testified that such a purchase was an
22 investment made because of "him"- referring to Meuret. Mr. Glantz also stated that the purchase
23 arose from the history of living next door to Meuret, dealing with his threats, problems and then
24 finally escalating his behavior by committing the physical assault on Mr. Glantz. Tr. Page 16,
L.35-41, Page 17, L.1-3. Much of this transcript details the attempts made by the Glantz family
to cope with Meuret's unstable yet predictably unacceptable behaviors.

After considering the testimony and argument from the respective counsel during the
restitution hearing, the Municipal Court ultimately found that restitution for this upgrade to the
preexisting video surveillance system in this case was proper based upon Section 46-18-243,
Montana Code Annotated, and *State v. Good*, 2004 MT 296, 323 Mont. 378, 100 P.3d.

1 **THE MUNICIPAL COIURT PROPERLY ASSESSED RESTITUTION FOR THE**
2 **VIDEO SURVEILLANCE CAMERA SYSTEM**

3 It is axiomatic that restitution in criminal cases may include pecuniary and "out of
4 pocket" expenses incurred by a victim related to the offense. 46-18-243 (1)(a) and (d), MCA. Of
5 specific application here is 46-18-243(1)(d) which provides that pecuniary loss of a crime victim
6 includes "(d) reasonable out-of-pocket expenses incurred by the victim in filing charges or in
7 cooperating in the investigation and prosecution of the offense."

8 Section 46-18-243(1)(d) was previously interpreted and applied in a remarkably similar
9 case before the Montana Supreme Court, *State v. Good*, 2004 MT 296, 323 Mont. 378, 100 P.3d
10 644 (2004). In *State v. Good, supra*, the factual circumstances involved restitution to a victim of
11 an assault as a result of an ongoing dispute between neighbors in which the Montana Supreme
12 Court described Good's behavior as "abominable". *State v. Good, supra*, 2004 MT 296 ¶ 15. We
13 will not repeat the entire factual account in that case however, some of the facts are notable to
14 emphasize as the Court considers this appeal.

15 Good often verbally accosted his nearby victims as they would enter or exit their next
16 door home, would challenge the husband to fight, ran the victims off the road in one incident,
17 threatened to sexually assault the victims' daughter and as his behaviors escalated, the Defendant
18 attempted to physically strike the victim. Near in time to the pending assault and other criminal
19 charges against Good, the victim rented and installed a video surveillance system at the urging of
20 local law enforcement. The victims also moved to a different location.

21 Good eventually pled guilty to assault, disorderly conduct and tampering with public
22 records and was given various deferred or suspended sentences as well as assessed restitution to
23 the victims. The restitution included assessment for five months of the victims' mortgage
24 payments for the house they vacated since they could not find tenants and restitution for the
surveillance equipment costs expended by the victims. Similar to the argument here by Meuret,
Good argued that both the five months of mortgage payments and the video surveillance system
were not a proper restitution under 46-18-243(1)(a). The Montana Supreme Court determined
that the mortgage payments were special damages appropriately imposed under
46-18-243(1)(a) *State v. Good, supra*, 2004 MT 296 at ¶ 15-17 and the outdoor video
surveillance system costs were appropriate restitution under 46-18-243(1)(d) *State v. Good,*
supra, 2004 MT 296 ¶18.

1 more evidence against Good. Therefore, Huseby was "cooperating in the investigation
2 and prosecution of the offense." Section 46-18-243(1)(d), MCA."

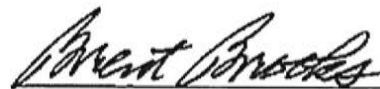
3 *State v. Good, supra*, 2004 MT 296 at ¶ 18.

4 In the case here, the Glantz family purchased additional cameras to add to an existing
5 video security system two days after Meuret was arrested for assault and as in *Good*, the
6 Glantzes certainly had no idea or knowledge of or when Meuret would either plead guilty or be
7 found guilty. In fact, Meuret exercised his right and contested his assault charge and a jury found
8 him guilty. The Glantz family also sought and obtained TROs further attempting to further
9 protect themselves and therefore, identical to *Good*, the Glantzes were cooperating with the
10 Billings Police Department's ongoing investigation in multiple efforts.

11 CONCLUSION

12 Meuret continuously engaged in classic, old fashioned bullying behaviors directed at his
13 next door neighbors that made life miserable for them. He now is attempting to dilute and
14 mitigate the financial consequences of his free will behaviors that landed him before a Municipal
15 Court jury and now this Court. Determining the appropriate amount of restitution is a matter of
16 law. *State v. Good, supra*, 2004 MT 296 at ¶ citing *State v. Mikesell*, 2004 MT 146 ¶ 321 Mont.
17 462, 91 P.3d 1273. However, the facts here are crucial. Municipal Court Judge Kolar carefully
18 listened to testimony at a lengthy restitution hearing, considered the argument of defense counsel
19 concerning the application of *State v. Good, supra*, and properly assessed restitution. We
20 respectfully submit that Meuret should not be rewarded for a creative attempt at avoiding
21 responsibility through a partial rebate of the carefully considered restitution order of Municipal
22 Court and that he be held fully accountable for restitution to the Glantz family in the same
23 manner as in *State v. Good, supra*.

24 Respectfully Submitted this 2ND day of June, 2017.



Charles B. Brooks
Billings City Attorney

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2 **CERTIFICATE OF SERVICE**

3 The undersigned certifies that on the 2nd day of June, 2017, a true and correct copy of
4 the enclosed and foregoing was delivered by email to:

5 J. Gregory Tomicich
6 Assistant Public Defender
7 State Office of Public Defenders
8 Attorney for Defendant

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By Thomas L. Richardson

Attachment C

MEMORANDUM

**TO: Honorable Mayor and City Council Members
Kristoff Bauer, City Administrator
Tina Volek, Assistant City Administrator
Dave Mumford, Public Works Director**

FROM: Brent Brooks, City Attorney

DATE: May 9, 2005

FACTUAL – PROCEDURAL BACKGROUND

During your last regular meeting on April 25, 2005, you reconsidered your decision to award a contract on the South Billings Boulevard Project, SID 1373, W.O. # 04-11. You instructed Chief Construction Specialties and JTL Group, the only two bidders on this project, to submit their respective positions to City staff so that staff could review the materials and advise the Council in the premises.

Both bidders have recently provided materials late last week which have been reviewed. Chief has cited two cases which it contends either permit or require the Council to award the contract to Chief. For the reasons stated below, it remains the recommendation of the Office of the City Attorney that the contract be awarded to JTL Group.

THE MASSACHUSETTS CASELAW

Both of the cases cited by Chief are factually very similar to the matter now under consideration. A bidder made an error in the unit price on their bid. The governing body was aware that the error was a mistake. Just as in the present contract, the bid documents provided that if there was a discrepancy in the unit price and the total sum of all the items, the unit prices shall govern. If the unit price had been calculated out or “extended” in that case, the sum of all the items would have been \$96,000 instead of \$960, and the mistaken bid would have been very high and not low.

The City chose to reject all bids on that item and awarded the balance of the contract to the bidder who had made the error, since they were the low bidder on the rest of the work. The bidder who did not make the mistake sued for an injunction, saying that (1) the obvious clerical error should not have been corrected or disregarded since the bid documents say that a unit price error shall be calculated out to correct the total, that (2) if that item had not been disregarded, they would have made them the low bidder, which (3)

would have required the City to award them the contract, since the City had no choice but to award the contract to the low numerical bidder.

The Massachusetts Appellate Court said that the City was authorized to correct the bid, or throw out that item since it was an obvious and insubstantial error and they were then permitted to award the contract to the bidder who made the error. They weren't obligated, therefore, with the higher bid. They had authority to go either way. It was okay for the City to make the correction of this error. Chief argues that based on this authority we can award the contract to them and are not required to award it to JTL.

THE NEW JERSEY CASELAW

The New Jersey case cited by Chief involved a unit price error also. The bidding instructions provided that if there was a discrepancy between the unit prices quoted and the extended totals, the unit prices shall prevail. There, however, the City refused to correct the obvious error and recalculated the extended totals for that item. If they had not done this, the bidder who made the mistake would have been the low bidder, and the City would have been required under New Jersey law to give them the contract. When the City recalculated the totals by the erroneous unit price, another bidder became the low bidder and the mistaken bidder lost the contract.

The mistaken bidder sued, saying that the City had to correct the obvious mistake, and the City had to give them the contract since they were the numerically low bidder. The Court agreed, saying that the City's failure to waive a clear error was arbitrary where the true intent of the bidder was apparent. They then ordered the contract awarded to the mistaken bidder since they were they were the low numerical bidder after the correction was made.

So there is a Massachusetts case that says you may award the contract to a bidder who makes a mistake in Massachusetts if the mistake is obvious, and a New Jersey case that says you must correct the mistake by a bidder in New Jersey and you must give them the contract, if they are the low bidder after the correction is made. In both of these states, the municipality is absolutely required to award the contract to the low numerical bidder.

MONTANA CASELAW

Montana law is different from Massachusetts and New Jersey. Montana statutes require the contract be awarded to "the lowest responsible bidder". The controlling case in Montana is *Debcen, Inc. v. City of Glasgow* (2001) 28 P.3d 478, 305 Mont. 391. The low numerical bidder sued because they were not given the contract.

In that case, the Montana Supreme Court held that law that the phrase "lowest responsible bidder" does not merely mean the lowest bidder whose pecuniary ability to perform the contract is deemed the best, but the bidder who is "most likely in regard to skill, ability and integrity to do faithful, conscientious work, and promptly fulfill the contract according to its letter and spirit." The Court indicated that the City Council has

discretion to decide who gets the contract, and “such determination cannot be set aside unless the action of the tribunal is arbitrary, oppressive or fraudulent.”

Reinforcing this decision is another fairly recent Montana Supreme Court case of *Heritage Commercial Cont. v. City of Helena* (1995) 899 P.2d 1076, 272 Mont. 90. The Court provided a clear articulation of the test to be applied:

[W]e have held that the discretion of the agency to award public work contracts to the lowest bidder is not subject to judicial review under normal circumstances. (citations omitted). We will not make a contract for the parties. Nor is this Court prepared to venture that Baker would have been awarded the contract if Edsall was not the successful bidder. In the absence of any showing of bad faith, fraud, or corruption of the Department, the exercise of discretion will not be disturbed. *Baker v. State* (1985), 218 Mont. 235 at 240, 707 P.2d 20 at 24.

Regardless of bidding or no bidding, the only way this Court will review an agency's discretionary rulings--which would involve the decision in this case--is whether the action taken by the governmental agency was conducted in bad faith, with fraud, or under the influence of corruption. *Baker*, 218 Mont. at 240, 707 P.2d at 24. Heritage has not introduced a shred of evidence that would taint the City's decision.

For decades Montana Courts have declined to review contract awards unless the bidding “was conducted in bad faith, with fraud, or under the influence of corruption.” There is no hint of bad faith, fraud or corruption in this case. Although under the *Debcon* case the Mayor and Council would have discretion to award the bid to either company or reject all bids and begin anew with the process, we do not recommend that based upon the additional fact that this would be inconsistent with the Council’s past practice in dealing with errors in the bidding instructions as well as inconsistent with the generally accepted industry practice in Montana as affirmed by recent written correspondence from the Montana Contractors Association, as summarized immediately below.

BILLINGS CITY COUNCIL PRECEDENT

In 2002, Western Municipal Construction submitted the numerical low bid for some City work but they failed to submit an acknowledgment of liquidated damages form with their bid as the bid instructions required. The contract was awarded to COP Construction, the second low bidder, and Western Municipal sued. The District Court granted summary judgment to the City, dismissing Western Municipal’s complaint.

In that case the City contended and the Court agreed that errors in the bid were a rational basis for rejecting a bid. By awarding the contract to the second low bidder in that case, the Council set the precedent that mistakes in bids are the responsibility of the bidder and they are to bear the burden they have created for themselves. It is unfortunate that this

will sometimes cause the City to award a contract to other than the lowest priced bidder, but it is important to maintain the integrity of the bidding process and honor the requirements set forth in the bidding instructions. Interestingly, Western Municipal Construction has submitted the attached letter supporting an award of this contract to JTL.

MONTANA CONTRACTOR'S ASSOCIATION

Finally, I note that the Montana Contractors Association (MCA) has urged the City to safeguard the integrity of the bidding process by rejecting the mistaken bid and accepting the bid that contains no mistakes. Otherwise, the opening of the bids will become the beginning of a long and contentious process, competing parties will be able to quibble about their figures or the figures submitted by their competitors, construction will be delayed following the bid opening until all such discussions are completed, and no one will really know what the rules are because there are none. The MCA correspondence is attached hereto.

CONCLUSION

We recommend that you award this contract to JTL, Inc. because they did not make mistakes in their bid, and once the mistakes in the Chief bid are corrected, as the bidding documents say they will be corrected, JTL is the low bidder. It is Montana law, not the law of Massachusetts or New Jersey that controls the outcome here.

If we adopt a policy of correcting the mistakes of bidders who make them, we enter a legal quagmire in which we become responsible for changing information submitted by others. We have to determine what others meant by the information they provided, whether they said that or not. We encourage, rather than discourage, errors in bids, because a prospective bidder knows that they will get another opportunity. This will inevitably lead to uncertainty as to the outcome of a bidding process, causing delays in the start of construction projects. We may find ourselves doing business with organizations that are more likely to make mistakes. And the Council will spend more time considering more extraneous procedural issues, deciding who should get which contract when that should be decided by the parties themselves when they prepare and submit their bids. The Montana Contractors Association concurs and has submitted a brief letter supporting the award to JTL and the supporting past practice in unit price mistakes.

cc: Kelly Addy, Deputy City Attorney