Montana Advance Sheets

A Weekly Compendium of Court Rulings of:

Montana Supreme Court
State Trial Courts
Federal Trial Courts

Friday, April 12, 2024

MONTANA SUPREME COURT

CONTENTS

(Use Bookmarks to navigate between cases)

Montana Supreme Court 2024 MT 75 FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK, Plaintiffs and Appellants, v. THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor, Defendant and Appellee. Decided: April 9, 2024. Case No.: DA 22-0639. APPEAL FROM: District Court of the First Judicial District, In and For the County of Lewis and Clark, Cause No. ADV-2021-611 Honorable Mike Menahan, Presiding Judge

Constitutional Law

In The Supreme Court Of The State Of Montana MONTANANS SECURING REPRODUCTIVE RIGHTS and SAMUEL DICKMAN, M.D., Petitioners, v. AUSTIN MILES KNUDSEN, in his official capacity as MONTANA ATTORNEY GENERAL; and CHRISTI JACOBSEN, in her official Capacity as MONTANA SECRETARY OF STATE, Respondents. No. OP 24-0182.

MONTANA SUPREME COURT NON-CITEABLE

Criminal - PCR Petition: Claims of IAC and IAAC

1. **Montana Supreme Court 2024 MT 79N NICK LENIER WILSON, Petitioner and Appellant, v. STATE OF MONTANA, Respondent and Appellee. Decided: April 9, 2024. Case No.: DA 23-0237.** APPEAL FROM: District Court of the Twenty-First Judicial District, In and For the County of Ravalli, Cause No. DV-22-451 Honorable Jennifer B. Lint, Presiding Judge COUNSEL OF RECORD: For Appellant: Nick Lenier Wilson, Self-Represented, Victor, Montana For Appellee: Austin Knudsen, Montana Attorney General, Brad Fjeldheim, Assistant Attorney General, Helena, Montana William Fulbright, Ravalli County Attorney, Hamilton, Montana Submitted on Briefs: February 21, 2024.
   - [MAS note: Wilson v. State [Baker, aff'd 4/9/2024 [NC] Ravalli Co.] following jury conviction of burglary and theft, D unsuccessfully appealed and now appeals denial of a PCR petition; held, each of D's claims except ineffective assistance of appellate counsel (IAAC) could have been raised on direct appeal, and are barred, 46-21-105(2); D's primary contention in support of his IAAC claim is appellate counsel's refusal to raise trial IAC claims on direct appeal; D has not shown that trial counsel's performance was deficient, his trial counsel attended initial appearance and omnibus hearings, filed a discovery request, moved for a bail reduction, and attended a settlement conference; trial counsel also acted on D's contention regarding witness collusion in a motion in limine; appellate counsel likely would not have succeeded on any record-based IAC claims, appellate counsel need not raise every colorable issue on appeal (Rose v. State, 2013),]
   - Justice Beth Baker delivered the Opinion of the Court.
     - ¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, we decide this case by memorandum opinion. It shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.
     - ¶2 Nick Lenier Wilson appeals the order of the Twenty-First Judicial District Court, Ravalli County, denying his petition for postconviction relief without requiring a hearing or response from the State. We affirm.
     - ¶3 A jury convicted Wilson of burglary and theft. The District Court sentenced him to the Montana State Prison for a term of twenty years with none suspended. Wilson appealed to this Court

on three issues regarding the admission and exclusion of witness testimony; we affirmed. See State v. Wilson, 2022 MT 11, 407 Mont. 225, 502 P.3d 679. Wilson timely filed a pro se postconviction relief petition that raised four claims: (1) procedural error; (2) ineffective assistance of trial counsel; (3) failure of the prosecutor to disclose material evidence; and (4) ineffective assistance of appellate counsel. The District Court determined that the petition, files, and records of the case conclusively showed that Wilson was not entitled to relief, and therefore no responsive pleading by the county attorney or Wilson's former defense counsel was required.

- ¶4 Wilson first claimed procedural error at trial, alleging the State improperly omitted the elements of the burglary offense in the jury instructions. The District Court held that Wilson's allegation of procedural error was barred because his claim was record-based and reasonably could have been raised in his appeal.
- ¶5 Wilson next alleged ineffective assistance of trial counsel, stating that his trial counsel was absent and did not represent him for the first five months of the proceedings. The court also found these claims barred because they were not raised in Wilson's appeal. The court further found that the record contradicted Wilson's allegations, demonstrating that Wilson's trial counsel was present at Wilson's initial appearance, requested discovery, attended a conference with the State on Wilson's behalf, and made bail reduction requests before the assignment of new counsel.
- ¶6 Wilson's third contention was that the State failed to disclose witness collusion. The District Court found that, "[w]hile Petitioner alleges he discovered this information in January 2022, this very issue was the subject of a pretrial Motion in Limine . . . ." Wilson's attorney raised the issue with the District Court, with Wilson present, at pretrial hearings discussing the issue on December 13, 2018, and January 29, 2019. Therefore, the court determined, Wilson had notice of this issue and reasonably could have raised it on appeal.
- ¶7 Wilson's final contention was that his appellate counsel "kept the Petitioner in the dark about what issues would be appealed," failed to provide him a complete case file, and did not raise the issue of ineffective assistance of trial counsel, despite Wilson's wishes. The District Court determined that, "[Wilson] has not been specific enough to identify all facts supporting the grounds for relief and, apart from his own affidavit, has not attached affidavits, records, or other evidence establishing the existence of those facts as required by § 46-21-104(1)(c), MCA."
- ¶8 Wilson argues on appeal that the District Court abused its discretion when it denied his petition without a hearing. The State responds that Wilson's first and third contentions in his petition regarding the burglary instruction and witness collusion are procedurally barred because they could have been raised on appeal. If not procedurally barred, the State argues, Wilson's petition was rightly dismissed because Wilson did not provide facts supporting his allegations—rather, the record refutes Wilson's allegations. Regarding Wilson's ineffective assistance of counsel claims, the State asserts that Wilson failed to show ineffective assistance or prejudice and did not provide the court with anything more than conclusory or self-serving statements.
- ¶9 "A district court may dismiss a petition for postconviction relief as a matter of law, and we review a court's conclusions of law for correctness." Herman v. State, 2006 MT 7, ¶ 13, 330 Mont. 267, 127 P.3d 422 (citation omitted). "We review a court's decision regarding whether to hold an evidentiary hearing in a postconviction proceeding for abuse of discretion." Herman, ¶ 13 (citation omitted).
- ¶10 A petition for postconviction relief must "identify all facts supporting the grounds for relief set forth in the petition

and have attached affidavits, records, or other evidence establishing the existence of those facts." Section 46-21-104(1)(c), MCA. "A court may dismiss a petition for postconviction relief without holding an evidentiary hearing if the procedural threshold set forth in § 46-21-104(1)(c), MCA, is not satisfied." Herman, ¶ 15 (citation omitted). Further, a district court may dismiss a petition for postconviction relief without ordering a response from the State if the petition, files, and records of the case "conclusively show that the petitioner is not entitled to relief." Section 46-21-201(1)(a), MCA. "When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in [a postconviction proceeding]." Section 46-21-105(2), MCA.

- ¶11 To establish an ineffective assistance of counsel (IAC) claim, a defendant must prove both (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense. Whitlow v. State, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). A claimant must prove both elements to obtain relief; thus, if a claimant fails to make a sufficient showing regarding one, we need not address the other. Whitlow, ¶ 11 (citing Strickland, 466 U.S. at 697, 104 S. Ct. at 2069).
- ¶12 We agree with the District Court's denial of Wilson's petition for postconviction relief because each of Wilson's claims except ineffective assistance of appellate counsel (IAAC) could have been raised on direct appeal, and they are therefore barred by § 46-21-105(2), MCA.[1] Wilson's primary contention in support of his IAAC claim is appellate counsel's refusal to raise trial IAC claims on direct appeal. Our review of the record leads us to conclude that Wilson has not shown that trial counsel's performance was deficient or that he was prejudiced by trial counsel's deficient performance. Whitlow, ¶ 11. Wilson's trial counsel attended Wilson's initial appearance and omnibus hearings, filed a discovery request, moved for a bail reduction, and attended a settlement conference with the State. His counsel further acted on Wilson's contention regarding witness collusion in a motion in limine that was briefed and argued before the District Court. Thus, appellate counsel likely would not have succeeded on any record-based IAC claims and did not perform deficiently by failing to raise them. "It is well established . . . that appellate counsel need not raise every colorable issue on appeal." Rose v. State, 2013 MT 161, ¶ 28, 370 Mont. 398, 304 P.3d 387 (citations omitted). Wilson's appellate counsel raised three colorable evidentiary issues on appeal rather than pursue IAC claims. The court appropriately exercised its discretion to deny Wilson an evidentiary hearing or require a response from the State because the petition, files, and records of the case conclusively showed Wilson was not entitled to postconviction relief. Section 46-21-201(1)(a), MCA.
- ¶13 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The judgment of the District Court is affirmed.
- /S/ BETH BAKER
- We Concur:
- /S/ LAURIE McKINNON /S/ JAMES JEREMIAH SHEA /S/ DIRK M. SANDEFUR /S/ INGRID GUSTAFSON
  - [1] Wilson states that the District Court "affirms Wilson's claim of ineffective assistance of counsel by stating the issues [he] raised in [his] petition could have been brought up in the appeal." Wilson misinterprets the court's ruling, which is not an endorsement that Wilson's IAC claims have merit, but a

legal conclusion that he cannot bring the claims now because he did not raise them in his appeal.

Criminal: Sentence Upon Guilty Plea Undermining the Plea Agreement

2. **Montana Supreme Court 2024 MT 78N STATE OF MONTANA, Plaintiff and Appellee, v. LEA ALEX YATES II, Defendant and Appellant. Decided: April 9, 2024. Case No.: DA 21-0256.** APPEAL FROM: District Court of the Thirteenth Judicial District, In and For the County of Yellowstone, Cause No. DC 19-220 Honorable Mary Jane Knisely, Presiding Judge COUNSEL OF RECORD: For Appellant: Chad Wright, Appellate Defender, Jeavon C. Lang, Assistant Appellate Defender, Missoula, Montana For Appellee: Austin Knudsen, Montana Attorney General, Bree Gee, Assistant Attorney General, Helena, Montana Scott D. Twito, Yellowstone County Attorney, Victoria Callender, Deputy County Attorney, Billings, Montana Submitted on Briefs: January 18, 2023.
   - [MAS note: (State v. Yates [Sandefur, rev'd and remanded for resentencing 4/9/2024, [NC]] Yellowstone Co.) D pled guilty to assault on a child that occurred while he was babysitting his girlfriends small children; plea agreement was undermined by prosecutor's emphasis of Yates' criminal history regarding previously dropped/dismissed assault charges and the State's resulting "concern" about that information; by the prosecutor's statement of disbelief that she or her colleague had previously approved such an agreement; by her failure to provide any favorable justification for the plea agreement recommendation; and by her remark that the agreed recommendation would be "a real gift from the court if the court goes along with this." D.Ct's after-the-fact disavowal of reliance on prosecutor's statements was not convincing in light of prosecutor's other disparaging remarks and lack of support for the agreement; her request to the court to honor the recommendation was mere lip service, a material breach of an essential term of the plea agreement; rev'd and remanded for resentencing]
   - Justice Dirk Sandefur delivered the Opinion of the Court.
   - ¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, we decide this case by memorandum opinion, and thus it shall not be cited as precedent. The case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.
   - ¶2 Lea Alex Yates II appeals from the April 2021 judgment of the Montana Thirteenth Judicial District Court, Yellowstone County, sentencing him to a three year suspended term of commitment to the Montana Department of Corrections on the offense of felony assault on a minor. Yates asserts that the State breached the parties' plea agreement by making comments at sentencing that undermined the joint plea agreement sentencing recommendation. We reverse and remand for resentencing.
   - ¶3 On February 19, 2019, Yates was caring for the two young children of his girlfriend while she was at work. When she returned several hours later and asked how the kids behaved in her absence, Yates told her that he had spanked almost three-year-old L.D. after she urinated on herself. When bathing the child later that evening, the mother saw bruising on the child's buttocks. When she asked Yates about it, he did not answer.
   - ¶4 The next day, the maternal grandmother saw the bruising on the child's buttocks while providing daycare and reported it to both the Child and Family Services Division of the Montana Department of Public Health and Human Services, and the Yellowstone County Sheriff's Office. The law enforcement investigation found that the "bruising covered a significant portion of the [child's] buttocks," "appeared to be the result of extreme force," and was thus "inconsistent with a single spanking."

Inter alia, Yates asserted to law enforcement that he only spanked the child once, with his hand.

- ¶5 After the State formally charged Yates with felony assault on a minor, he and the original prosecutor negotiated the terms of a nonbinding plea agreement calling for him to plead guilty in return for the State joining him in recommending a four-year deferred imposition of sentence, a $1,000 fine, and any suitable treatment conditions. However, before the original prosecutor signed the negotiated plea agreement, the case was reassigned to a second prosecutor who later advised defense counsel that she would honor the agreement negotiated by her predecessor. In November 2020, the second prosecutor and Yates signed a nonbinding written plea agreement setting forth the terms previously negotiated with the original prosecutor. Upon an accompanying written acknowledgement and waiver of rights, and a comprehensive supplemental record change of plea colloquy with the court, Yates later pled guilty in accordance with the plea agreement.
- ¶6 At sentencing in March 2021, in advance of making the State's sentencing recommendation, the second prosecutor remarked:
  - As I was getting this calendar ready for today[,] I was looking over this case and I seriously thought, what was I thinking; how could I have agreed to this sentence? But then I realized in going further, that it was not my sentence [but that] I had told [defense counsel] that I certainly would honor [the original prosecutor's] recommendation.
- When the court asked whether the original prosecutor who negotiated the plea agreement was available to explain the reason why the State made the agreement, the second prosecutor advised the court that, after taking-over the case, she assured defense counsel that she "would honor" the agreement negotiated by her predecessor, and then later signed the written plea agreement under which Yates pled guilty. In proceeding with her sentencing recommendation, the second prosecutor noted that Yates had no prior criminal convictions, but that his record manifested "some assaultive behavior that ha[d] not ever gone all the way to a conviction," a fact "that concern[ed] the State." She continued that she did not, however, "have anything in front of [her] to negate the agreement" and was "not going to try and back door" the agreement made by her colleague. The prosecutor ultimately asked the District Court to honor the agreed sentencing recommendation, but stated before doing so that:
  - I just hope that [Yates] takes this as . . . a real gift from the court if the court goes along with this. Because this could have . . . been so much worse, in the State's opinion.
- The second prosecutor ultimately offered no explanation or justification in support of the plea agreement.
- ¶7 After hearing from the defense in support of the plea agreement, the District Court rejected the plea agreement recommendation, and instead imposed a suspended three-year Department of Corrections commitment.[1] The Court reasoned that it was "not comfortable giving [Yates] a deferred sentence" based on the information included in his presentence investigation report, the alleged facts and circumstances of the case, and the court's resulting desire that the conviction remain on Yates' public criminal history record due to the "severe" injury he inflicted upon the child. Defense counsel immediately objected to the sentence on the asserted ground that the prosecutor breached the plea agreement by making comments intended to undermine the agreed sentencing recommendation because "she thought [it] was possibly an inappropriate disposition." The District Court responded that it "didn't consider . . . at all" the "situation between" the different prosecutors, but instead considered the "severe" facts of the case and the "sentencing parameters" within the

possible maximum penalty. The court's subsequent written sentencing rationale further noted, inter alia, the "violent circumstances of the offense" and that two previously charged, but ultimately dropped or dismissed, felony assault charges "illustrate[d] [Yates'] propensity for violence." In response to the defense objection at sentencing, the written judgment asserted that the prosecutor "did not backtrack on [the] agreement" recommendation." Yates timely appeals.

- ¶8 Whether the State breached a plea agreement is a mixed question of law and fact subject to de novo review. See State v. Collins, 2023 MT 78, ¶ 11, 412 Mont. 77, 528 P.3d 1106. We review related district court findings of fact only for clear error. Collins, ¶ 11. Within the framework of § 46-12-211, MCA (plea agreement authorization), plea agreements are contracts generally subject to applicable contract law standards, except as subject to the overlay of fundamental federal and state constitutional rights implicated in a particular case. Collins, ¶ 14. Because a plea agreement induced guilty plea effects a waiver of fundamental state and federal constitutional rights, criminal defendants:
  - have a substantive [constitutional due process] right to be treated fairly throughout the plea-bargaining process. A prosecutor must [thus] meet strict and meticulous standards of both promise and performance relating to plea agreements, because a guilty plea resting on an unfulfilled promise in a plea bargain is involuntary. Prosecutorial violations, even if made inadvertently or in good faith to obtain a just and mutually desired end, are unacceptable.
- Collins, ¶ 14 (internal punctuation and citations omitted). Consequently, prosecutors must present the State's case at sentencing:
  - in a good faith and fair manner that is [neither] clearly intended [n]or likely to undermine the plea agreement, including [any agreed] sentencing recommendation . . . . [The] prosecutor cannot pay mere "lip service" to the agreement by making the agreed sentencing recommendation while presenting the case in a manner intended [or likely] to persuade the court that the sentence recommendation should not be accepted.
- Collins, ¶ 15 (internal punctuation and citations omitted). Because "there are no hard and fast criteria" that distinguish "when a prosecutor has merely paid lip service to a plea agreement as opposed to . . . fairly present[ing] the State's case," each alleged prosecutorial breach of a plea agreement must be assessed under the unique circumstances of each case. Collins, ¶ 15 (citation omitted).
- ¶9 A prosecutor may "undermine" and thus "breach a plea agreement" by, inter alia, "emphasizing negative information about the defendant without fully explaining the justification for the agreed sentencing recommendation." Collins, ¶ 16. Unless barred by the express terms of the plea agreement, a prosecutor may generally note unflattering information relevant to sentencing in a particular case if "within the scope of information required or authorized by statute" for court consideration at sentencing. Collins, ¶ 17. The prosecutor may do so, however, only if "the case is presented in a fair manner not likely to undermine the plea agreement by influencing the court to deviate from the sentence recommendation." Collins, ¶ 17.
- ¶10 Applying those fundamental principles here, the prosecutor's request that the District Court honor the plea agreement recommendation was wholly undermined, if not contradicted, by her unnecessary emphasis of Yates' negative criminal history regarding previously dropped or dismissed assault charges and the State's resulting "concern" about that information; her statement of disbelief that she or her colleague had previously approved such an agreement; her failure to provide any favorable explanation or justification in support of the plea agreement recommendation; and her remark that the agreed recommendation

would be "a *real gift from the court* if the court goes along with this." (Emphasis added.) The record manifests that all necessary relevant sentencing information was independently available to the court as a matter of record in the charging affidavit supporting the Information and the statutory presentence investigation report to the court. Regardless of its disclaimer of reliance on the prosecutor's comments at sentencing, the essence of the District Court's stated sentencing rationale directly corresponded with the prosecutor's disparaging negative comments and concerns, as amplified in the absence of any proffered State explanation or justification in support of the plea agreement. Whether the court may have independently drawn the same conclusions and thus independently deviated from the plea agreement recommendation is impossible to know in light of the prosecutor's disparaging comments and failure to offer any positive explanation in support of the plea agreement. The District Court's after-thefact disavowal of reliance on the prosecutor's statements does not alter that fact. Juxtaposed against her other disparaging remarks and lack of explanation in support of the agreement, the prosecutor's request that the court honor the plea agreement recommendation was mere lip service. We hold that the prosecutor thus materially breached an essential term of the plea agreement.

- ¶11 We decide this case by memorandum opinion pursuant to Section I, Paragraph 3(c), of our Internal Operating Rules. The sentence imposed by the District Court in this matter is hereby reversed, and this matter is thus remanded for resentencing subject to § 3-1-804(12), MCA.
- /S/ DIRK M. SANDEFUR
- We concur:
- /S/ MIKE McGRATH /S/ BETH BAKER /S/ INGRID GUSTAFSON /S/ JIM RICE
  - [1] Unlike the deferred imposition of sentence called for under the joint plea agreement recommendation, the suspended sentence deprived Yates of the statutory opportunity, upon successful completion of probation, to have the court strike the guilty plea and dismiss the case, thus causing the conviction to no longer appear on his public criminal history record. See §§ 46-18-201 and -204, MCA.

DN: DPHHS Reunification Duties, Reciprocal Duties of Parents

3. **Montana Supreme Court 2024 MT 77N IN THE MATTER OF: D.A., L.A., and F.A., Youths in Need of Care. Decided: April 9, 2024. Case No.: _____.** APPEAL FROM: District Court of the Second Judicial District, In and For the County of Butte-Silver Bow, Cause No. DN-19-72, DN-19-73, and DN-19-74 Honorable Robert J. Whelan, Presiding Judge COUNSEL OF RECORD: For Appellant: Laura Reed, Attorney at Law, Missoula, Montana (for Father) Gregory Dee Birdsong, Attorney at Law, Santa Fe, New Mexico (for Mother) For Appellee: Austin Knudsen, Montana Attorney General, Bjorn E. Boyer, Assistant Attorney General, Helena, Montana Eileen Joyce, Butte-Silver Bow County Attorney, Butte, Montana Submitted on Briefs: July 26, 2023.

- [MAS note: (Matter of D.A., L.A., and F.A. [Sandefur, aff'd [NC], 4/9/2024] Butte-Silver Bow Co.) 8/2019 five-year-old D.A., age 5, and L.A., age 3, were found roaming the streets in Butte, unsupervised for over an hour, father asleep and impaired due to marijuana while Mother was at work; a week later, D.A. and L.A. were again found roaming the streets for over an hour, this time mother asleep with the infant 3d child; children removed; held, state must make reasonable efforts toward family preservation & reunification, but 41-3-423 does not require it to make every conceivable or possible effort that might aid parents with treatment plans, in re J.O., 2015; parents have reciprocal duty to make a good faith effort, use DPHHS services, complete plans; health and safety of children is paramount, 41-3-423(1)(b)(i), (vi), and (c); child hearsay here not prejudicial in view of

the weight of other evidence]

- Justice Dirk Sandefur delivered the Opinion of the Court.
  - ¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, we decide this case by memorandum opinion. It shall not be cited and is not precedent. The case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.
  - ¶2 Respondents T.S. (Mother) and A.A. (Father) respectively appeal the November 2022 judgments of the Montana Second Judicial District Court, Butte-Silver Bow County, terminating their respective parental rights to their minor children (D.A., L.A., and F.A.) pursuant to § 41-3-609(1)(f), MCA.[1] We affirm.
  - ¶3 The Child and Family Services Division of the Montana Department of Health and Human Services (Department) most recently became involved with this family in August 2019, when five-year-old D.A. and three-year-old L.A. were found roaming the streets in Butte, Montana, unsupervised for over an hour.[2] Law enforcement later located Father at the family home sleeping in bed with two-month-old F.A. while Mother was at work. Father was apparently impaired due to marijuana use. A week later, D.A. and L.A. were again found roaming the streets alone for over an hour. This time, Mother claimed she put the children down for a nap, she then fell asleep with infant F.A., and that D.A. and L.A. "snuck out" while she was sleeping. In August 2019, the Department removed and placed all three children in a protective kinship placement and petitioned for emergency protective services, adjudication of the children as youths in need of care (YINC), and for temporary legal custody (TLC) under Title 41, chapter 3, MCA. Upon service of the petitions and issuance of preliminary protective and scheduling orders, the parents appeared with their respective court-appointed counsel and stipulated to adjudication of the children as YINC as defined by § 41-3-102(36), MCA, based on the uncontested factual averments in the petitions. The District Court thus: (1) adjudicated the children as YINC as defined by § 41-3-102(36), MCA; (2) granted the Department TLC pursuant to §§ 41-3-438(1), (3)(f)(i), and -442, MCA; and (3) imposed separate reunification-oriented treatment plans on each parent by stipulation pursuant to §§ 41-3-438(1), (3)(g)-(h), and -443, MCA. The court later granted three stipulated six-month TLC extensions to afford each parent additional time to successfully complete all treatment plan requirements.
  - ¶4 As of early January 2022, neither parent had successfully completed all of their respective treatment plan requirements, thus causing the Department to transition to court-ordered guardianships as the new permanency plan for the children instead of parental reunification. In support of the proposed permanency plan change, the Department asserted, inter alia, that the parents had yet to complete their respective treatment plan requirements, had failed to demonstrate significant improvement in their respective abilities to adequately parent, and thus still did not have "adequate parenting abilities to safely parent" the children. Over Mother's objection that it was failing to make reasonable reunification efforts, the Department indefinitely suspended parental visitation with L.A. and F.A. in March 2022 due to the emotional distress they experienced as a result. At the permanency plan hearing, neither parent disputed the Department's assessment of their incomplete treatment plan compliance, nor objected that it had not made reasonable reunification efforts up to that point.
  - ¶5 On March 16, 2022, the Department petitioned for a fourth six-month TLC extension, but later petitioned for termination of parental rights under § 41-3-609(1)(f), MCA (treatment plan non-compliance and failure), on March 30th. The petitions alleged that: (1) termination was statutorily presumed to

be in the best interests of the children because they had been in out-of-home protective placement for 28 months;[3] (2) the parents' reunification-oriented treatment plans had respectively failed to due to their respective failures to successfully complete all treatment plan requirements; (3) each parent thus remained unfit, unable, or unwilling to provide adequate parental care; and (4) each parent's continuing condition of unfitness was unlikely to change within a reasonable time. Following a contested hearing in August and September 2022, the District Court issued findings of fact, conclusions of law, and judgments terminating the parents' respective parental rights pursuant to § 41-3-609(1)(f), MCA. Based on various supporting findings, it made ultimate findings of fact under §§ 41-3-604(1), -609(1)(f), (2), and (3), MCA.

- ¶6 Parents have implied fundamental constitutional rights to the exclusive "care and custody" of their children "which must be protected by fundamentally fair procedures." In re A.T., 2003 MT 154, ¶ 10, 316 Mont. 255, 70 P.3d 1247. District courts have discretion to terminate parental rights due to child abuse or neglect pursuant to § 41-3-609(1)(f), MCA. The procedure and substantive criteria specified by Title 41, chapter 3, part 6, MCA, for termination of parental rights due to child abuse or neglect provide fundamentally fair due process protections of the constitutional rights of parents to the custody and care of their children. See In re B.N.Y., 2003 MT 241, ¶ 21, 317 Mont. 291, 77 P.3d 189; In re D.H., 2001 MT 200, ¶ 14, 306 Mont. 278, 33 P.3d 616. We review parental rights terminations under § 41-3-609(1)(f), MCA, for an abuse of discretion under the statutory criteria at issue in each case. In re D.E., 2018 MT 196, ¶ 21, 392 Mont. 297, 423 P.3d 586; In re K.A., 2016 MT 27, ¶ 19, 382 Mont. 165, 365 P.3d 478; In re D.B., 2007 MT 246, ¶ 16, 339 Mont. 240, 168 P.3d 691. An abuse of discretion occurs if the court terminates parental rights based on a clearly erroneous finding of fact, an erroneous conclusion or application of law, or exercises granted discretion arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. See In re D.E., ¶ 21; In re K.A., ¶ 19. We review lower court factual findings only for clear error, and conclusions and applications of law de novo for correctness. In re L.N., 2014 MT 187, ¶ 12, 375 Mont. 480, 329 P.3d 598. A finding of fact is clearly erroneous only if not supported by substantial evidence or, upon our independent review, the record clearly manifests that the lower court misapprehended the effect of the evidence or was otherwise mistaken. In re N.R.A., 2017 MT 253, ¶ 10, 389 Mont. 83, 403 P.3d 1256; In re D.H., ¶ 14.

- ¶7 Here, on various grounds, both parents assert that the District Court erroneously terminated their respective parental rights based on findings of fact not supported by clear and convincing evidence as required by § 41-3-609, MCA. As a preliminary matter, the District Court made all ultimate findings of fact required under § 41-3-609(1)(f) and (2), MCA. District courts have broad discretion to determine the credibility, veracity, and probative value of evidence, including the relative credibility, veracity, and probative value of any conflicting evidence. In re Marriage of Bliss, 2016 MT 51, ¶¶ 15-21, 382 Mont. 370, 367 P.3d 395. Moreover, partial compliance with treatment plan requirements is insufficient to preclude termination under § 41-3-609(1)(f), MCA. In re D.A., 2008 MT 247, ¶ 22, 344 Mont. 513, 189 P.3d 631. The record manifests that both parents had ample opportunity to comply with all requirements of their respective treatment plans, and thus demonstrate substantially improved knowledge and ability to adequately parent their children, including attendance to their physical and emotional needs, but did not.

- ¶8 Upon our review, the District Court's findings of fact are manifestly supported by substantial record evidence, regardless

of any conflicting evidence. We further find no basis upon which to conclude that the court clearly misapprehended the effect of the evidence or was otherwise mistaken. The parents have thus failed to meet their respective appellate burdens of demonstrating that any material District Court finding of fact was clearly erroneous, or that the supporting evidence upon which they were based was insufficient to constitute clear and convincing evidence. We hold that the District Court correctly terminated the parents' respective parental rights under § 41-3-609(1)(f), MCA.

- ¶9 On various grounds, both parents further assert that the District Court erroneously terminated their respective rights without clear and convincing evidence that the Department made reasonable family preservation and reunification efforts as required by § 41-3-423, MCA. The Department has a duty to make reasonable good faith family preservation and reunification efforts in the exercise of its authority under Title 41, chapter 3, parts 4-5, MCA. Section 41-3-423(1)(a) and (b)(i), MCA. However, § 41-3-423, MCA, does not require it to make every conceivable or possible effort, or to provide every conceivable or available manner of care or service, that might be of beneficial assistance to aid parents in successfully completing their treatment plans or otherwise avoiding termination of parental rights. See In re J.O., 2015 MT 229, ¶¶ 25-28, 380 Mont. 263, 354 P.3d 1242; In re B.J.J., 2019 MT 129, ¶ 24, 396 Mont. 108, 433 P.3d 488. Parents have their own reciprocal responsibilities, moreover, to avail themselves of services and assistance offered by the Department, and to meaningfully engage in good faith, with reasonable concerted effort, to successfully complete reunification-oriented treatment plans in cooperation with the Department. See In re R.J.F., 2019 MT 113, ¶ 38, 395 Mont. 454, 443 P.3d 387. See also § 41-3-423(1)(b)(i), (vi), and (c), MCA ("health and safety" of the child is "of paramount concern" in Department provision of reasonable "preservation or reunification services" and efforts).
- ¶10 The "reasonable efforts" requirement of § 41-3-423, MCA, "is not a separate requirement for termination" of parental rights, but rather "a predicate" consideration, inter alia, regarding the requisite finding of fact under § 41-3-609(1)(f)(ii), MCA ("conduct or condition" rendering a parent unfit, unwilling, or unable to parent "is unlikely to change within a reasonable time"). In re R.J.F., ¶ 26. See similarly In re C.K., 2022 MT 27, ¶ 40, 407 Mont. 329, 503 P.3d 1104; In re D.B., ¶ 25. There is substantial record evidence here that, up until it transitioned to guardianships as the new permanency plan due to the parents' respective failures to successfully complete all treatment plan requirements, the Department was actively involved in the administration and monitoring of their respective treatment plan progress and compliance despite visitation interruptions occasioned by the associated emotional distress of the children. The Department's ultimate cessation of parental contact with the children, over two-and-a-half years post-removal in advance of petitioning for termination, did not undermine its significant reunification efforts up to that point, or any of the other substantial evidence supporting the District Court's ultimate findings of fact under § 41-3-609(1)(f) and (2), MCA. We hold that District Court did not terminate the parents' respective parental rights without clear and convincing evidence that the Department made reasonable family preservation and reunification efforts as required by § 41-3-423, MCA.
- ¶11 Father asserts that the District Court erroneously admitted child hearsay statements through the hearing testimony of therapists Allison Brown and Jolynn Browning. Brown testified, inter alia, that L.A. told her that her sister D.A. "was put in [a] bag" and "left . . . at home." Browning testified, inter alia, that D.A. told her that Father "touched [her] no-no box."[4] Father further asserts that the

District Court "erred in finding that the sexual abuse allegations were proven by clear and convincing evidence."[5] Construing the record in the light most favorable to the judgment in accordance with the presumption of correctness on appeal, the record appears to indicate, albeit unclearly, that the District Court overruled Father's preserved hearsay objections on the ground that those out-of-court statements were admissible not for the truth of the matter asserted, but as definitional non-hearsay under M. R. Evid. 702, 703, and 801(c) for the purpose of explaining the bases of the opinion testimony of the respective child therapists regarding the observed fear and distress experienced by the children in Father's presence. See, e.g., In re G.M., 2024 MT 49, ¶¶ 14-15, 415 Mont. 399, __ P.3d __ (citing inter alia In re C.K., 2017 MT 69, ¶¶ 18-29, 387 Mont. 127, 391 P.3d 735). If so, the District Court correctly recognized that the proffered non-hearsay purpose was relevant to the disputed question of fact under § 41-3-609(1)(f)(ii), (2), and (3), MCA, as to whether the children would feel safe and secure if returned to the custody of their parents.

- ¶12 For two distinct reasons, however, we need not further address Father's preserved assertions of error. First, contrary to Father's allegation here, the District Court made no finding as to the truth or accuracy of the disputed out-of-court statements of the children regarding abuse. It found only that "the children have disclosed inappropriate sexual touching" and that D.A. "reported inappropriate sexual contact" with Father. Second, even if the disputed out-of-court statements to which Father objected were excised from the record as inadmissible hearsay, arguendo, the Court's ultimate and supporting findings of fact under § 41-3-609(1)(f), MCA, would still be independently supported by similar out-of-court statements attributed to the children in prior testimony to which he did not object, observational assessments of the subject children's emotions to which the therapists testified without reference to those statements, and other supporting record evidence. Thus, Father's preserved assertions of hearsay-based error were at most harmless error, if any. See M. R. Evid. 103(a).
- ¶13 We decide this case by memorandum opinion pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules. For the foregoing reasons, we hold that neither parent has demonstrated that the District Court erroneously terminated his or her parental rights under § 41-3-609(1)(f), MCA. Affirmed.
- /S/ DIRK M. SANDEFUR
- We concur:
- /S/ MIKE McGRATH /S/ BETH BAKER /S/ INGRID GUSTAFSON /S/ JIM RICE
  - [1] The separate cases for each child, DA 22-0696, DA 22-0697, and DA 22-0698, are consolidated for appeal.
  - [2] The Department was previously involved with this family in 2016, and frequently thereafter, based on alleged or apparent child abuse or neglect including, inter alia, parental inability to meet the children's basic needs, domestic violence, and four-year-old D.A's hospitalization due to ingestion of the prescription drug Prozac.
  - [3] See § 41-3-604(1), MCA (termination presumed to be "in the best interests of the child" where child has been in State's physical custody "for 15 of the most recent 22 months").
  - [4] For the first time on appeal, Father asserts similar error regarding: (1) Brown's earlier testimony that D.A. told her that Father "touched her pee-pee"; (2) Browning's earlier testimony that L.A. told her that Mother and Father both "touched her ‘no-no box'"; and (3) a Department social worker's testimony regarding a multitude of similar statements purportedly made by one or both of those children. Father further asserts, for the first time on appeal, that the District Court erroneously permitted Department witnesses to "vouch for the credibility of the child hearsay."

However, Father waived those new assertions of error by failing to contemporaneously object below, and has not demonstrated plain error.

- [5] Mother asserts all of the same errors asserted by Father but, by merely incorporating his briefing by reference, has failed to perfect them for review on appeal. See M. R. App. P. 12(1)(g); State v. Ferguson, 2005 MT 343, ¶¶ 40-43, 330 Mont. 103, 126 P.3d 463. We thus limit our review to Father's preserved assertions of error.

MONTANA SUPREME COURT CITEABLE

Criminal: Homicide Reversed: Brady Violations And Other Errors

4. **Montana Supreme Court 2024 MT 76 STATE OF MONTANA, Plaintiff and Appellee, v. KYLE LEE SEVERSON, Defendant and Appellant. Decided: April 9, 2024. Case No.: DA 21-0290.** APPEAL FROM: District Court of the Seventh Judicial District, In and For the County of Richland, Cause No. DC-19-55 Honorable Olivia Rieger, Presiding Judge COUNSEL OF RECORD: For Appellant: Chad Wright, Appellate Defender, Michael Marchesini, Assistant Appellate Defender, Helena, Montana For Appellee: Austin Knudsen, Montana Attorney General, Christine Hutchison, Assistant Attorney General, Helena, Montana Charity McLarty, Richland County Attorney, Sidney, Montana Submitted on Briefs: February 14, 2024.

- [MAS note: (State v. Severson [Baker, rev'd and remanded for new trial 4/9/2024] Richland Co.) shooting, homicide jury conviction, D claimed self defense; clear Brady violation in repeatedly withholding evidence tending to impeach state's key witness, as well as prosecutorial violation of order in limine about D's drug use; had jury been presented with the Brady material, had the witness story been impeached, and had the prosecutor not referred to D's drug activity, D's claim of justifiable use of force would have been stronger; the errors do not warrant reversal individually, but their combined effect calls into question the fairness of D's trial]
- Justice Beth Baker delivered the Opinion of the Court.
  - ¶1 Kyle Severson appeals a jury conviction for mitigated deliberate homicide after he shot Tyler Hayden on the evening of July 2, 2019. We address the following issues on appeal:
- 1. Did the District Court err when it denied Severson's motion to dismiss based on the State's failure to disclose favorable evidence?
- 2. Did the cumulative effect of errors in the District Court deny Severson a fair trial?
  - ¶2 We conclude that the cumulative effect of errors in the proceedings denied Severson his constitutional rights to a fair trial and due process. We reverse and remand for a new trial.
- FACTUAL AND PROCEDURAL BACKGROUND
  - ¶3 On July 2, 2019, Severson, his girlfriend Karina Orozco, her sister Jessica Orozco, and Severson's and Karina's three-year-old daughter drove to the Loaf 'N Jug convenience store in Sidney. Severson was sitting in the rear passenger seat of the vehicle. Karina and Jessica entered the store; Severson and his daughter stayed in the car. Six minutes later, Hayden and Dalton Watson arrived at the store and parked next to Karina's vehicle. Both Watson and Hayden entered the store. After a few minutes, Watson returned to his vehicle. Karina and Jessica exited the store roughly forty-five seconds later. Twenty seconds after that, Hayden exited and returned to the passenger side of Watson's vehicle. After briefly confirming with Watson that Severson was in the back seat of Karina's car, Hayden turned and approached Severson's open window. Karina, who was driving the vehicle, stopped the car as Hayden approached.

Karina testified at trial that as he approached, Hayden said something "[l]ike aggressive, taunting." Watson testified that "[Hayden] said 'hey buddy, it's been a long time. How you been doin' in a friendly way." As Hayden approached, Severson raised a .38 caliber handgun, shot Hayden at close range, and killed him.

- ¶4 Immediately after the shooting, Watson exited his vehicle to assist Hayden, who had fallen to the ground. Security camera footage of the shooting shows Watson running to assist Hayden, tripping on the curb, retrieving an object from the ground near Hayden, running back to his vehicle, and then returning to help Hayden. It was later determined that the object Watson picked up was a .22-caliber handgun. Watson claimed that he, not Hayden, had been the one carrying the handgun and that it had flown out of his pants when he tripped on the curb. As Watson assisted Hayden, Karina quickly drove away. Severson immediately told Karina to drive him to the police station. Once there, Severson waived his Miranda rights, admitted to the shooting, and claimed that he was scared that Hayden was going to harm him or his daughter. Severson also recounted to law enforcement a history of confrontations between himself and Hayden. Roughly a year before the shooting, in April 2018, Hayden and another man followed Severson and Severson's brother-in-law into the parking lot of an IGA. Hayden exited his vehicle and immediately began assaulting Severson's brother-in-law, attempting to drag him from the passenger side of the vehicle Severson was driving. Additionally, although he did not tell law enforcement during his initial interview on the night of the shooting, Severson later recounted a March 2018 incident in which Hayden robbed Severson at gunpoint.
- ¶5 Severson was charged by information with deliberate homicide in violation of § 45-5-102, MCA.[1] On October 2, 2020, a jury found Severson guilty of mitigated deliberate homicide. The District Court sentenced him to forty years in prison. We discuss additional pertinent facts below.

- STANDARDS OF REVIEW
  - ¶6 We review the grant or denial of a motion to dismiss de novo to determine whether the district court's conclusions of law are correct. State v. Seiffert, 2010 MT 169, ¶ 10, 357 Mont. 188, 237 P.3d 669. We exercise plenary review of constitutional questions, including alleged violations of a criminal defendant's due process rights. State v. Jackson, 2009 MT 427, ¶ 50, 354 Mont. 63, 221 P.3d 1213 (citing State v. West, 2008 MT 338, ¶ 13, 346 Mont. 244, 194 P.3d 683).
- DISCUSSION
- ¶7 1. Did the District Court err when it denied Severson's motion to dismiss based on the State's failure to disclose favorable evidence?
  - ¶8 Severson claims that the State violated his right to due process by failing to disclose favorable evidence as required under Brady v. Maryland, 373 U.S 83, 87, 83 S. Ct. 1194, 1196-97 (1963), and Montana law. At issue are law enforcement investigative reports of a burglary of Severson's home and the contents of Watson's cell phone.
  - ¶9 On the night of the shooting, after taking Severson to the police station and providing a statement, Karina returned to the home she and Severson shared and discovered it had been burglarized that evening. In the ensuing investigation, police identified Keaston Johns, Logan Krauser, and Immanuel Brown as the primary suspects. Johns was Hayden's girlfriend at the time of the shooting. Karina testified that she believed the assailants stole several electronics, a guitar, a shotgun, and roughly $2,000 cash from the home. On August 6, 2019, in an unrelated search of Watson's apartment, police discovered Karina's medical marijuana card in a safe in Watson's room. In an interview with officers following the search of his residence, Watson stated that following the shooting, while in a parking lot

adjacent to the Loaf 'N Jug, he received $300 from the two men suspected in the burglary of Severson's home.[2

- ¶10] On October 30, 2019, Severson sought to compel the disclosure of any "information and reports" of law enforcement regarding the burglary. The State objected, arguing the reports were irrelevant to Severson's defense. Finding he had failed to demonstrate a need for the report evidence, the District Court denied Severson's motion on January 7, 2020. On September 4, 2020, roughly three weeks before his trial, Severson again moved to compel disclosure of the evidence.[3] The District Court, reasoning that Severson could receive the investigative information as the victim of the burglary, ordered that the reports be disclosed.
- ¶11 Upon reviewing the reports and learning of the potential connections between the burglary, Watson, and Hayden, Severson moved the District Court to compel disclosure of the contents of Watson's cell phone, which had been in the State's possession since the night of the shooting. The Defense asserted that Watson and Hayden may have intercepted Severson at the Loaf 'N Jug as part of a conspiracy to burglarize Severson's home. On September 28, 2020, the first day of Severson's trial, the State notified the court that it had never attempted to unlock the phone or to view its contents because, in the words of the prosecutor, the State "[didn't] have any indication that [it was] relevant." The court ordered Watson to appear the following day to unlock the phone for the court to examine. That evening, upon being notified by the prosecutor that the court would order him to unlock his phone, Watson asked "if he had to." During the hearing the next morning, Watson testified that he could no longer recall the phone's passcode.[4] Recognizing the significant time and effort needed for investigators to pursue entry of the phone, the court asked Severson if he wished to continue the trial until the phone could be unlocked. Concerned that Severson already had been in custody for fifteen months, Severson's attorney rejected the court's offer of a continuance.
- ¶12 Unable to access the potentially exculpatory cell phone information, Severson made two motions based on alleged violations of his rights to due process and a fair trial. First, following Watson's inability to access the phone, Severson moved orally to exclude Watson from testifying. Severson then moved to dismiss the case. The District Court denied both motions because, due to the State's failure to access the information on the phone and Watson's inability to unlock it, Severson had not shown that any evidence on the phone was favorable to him. See State v. Williams, 2018 MT 194, ¶ 21, 392 Mont. 285, 423 P.3d 596.
- ¶13 Trial proceeded as scheduled. Severson was found guilty and sentenced to forty years in the Montana State Prison.
- ¶14 Five months after trial, law enforcement was able to access the contents of Watson's phone. On June 29, 2021, the District Court ordered that the contents of the phone be filed under seal and made available to the parties. A review of the phone revealed that, although the phone belonged to Watson, Hayden had used it in the days leading up to the shooting. Included in the data retrieved from the phone were Facebook messages between Hayden and a person named Shammar Brown, indicating that on the day before the shooting Hayden had pulled a gun on Brown during an argument.
- ¶15 Suppression by the government of favorable evidence that is material to either the guilt or punishment of an accused violates due process irrespective of the innocent or malign intentions of the prosecution. Brady, 373 U.S at 87, 83 S. Ct. at 1196-97. The rule recognized by Brady and its progeny advances society's interest in conducting "criminal trials [that] are fair," 373 U.S. at 87, 83 S. Ct. at 1197, ensures the accused is not deprived of life, liberty, or property

without due process of law, U.S. Const. amend. XIV, § 1, and protects against miscarriages of justice, United States v. Bagley, 473 U.S. 667, 675, 105 S. Ct. 3375, 3380 (1985). The Montana Legislature has imposed a separate duty on all prosecutors to "make available to the defendant for examination and reproduction . . . all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence." Section 46-15-322(1)(e), MCA. This statutory duty persists, requiring disclosure of any new information that would have been subject to § 46-15-322, MCA, had it been known at the time of initial disclosure. Section 46-15-327, MCA.

- ¶16 To succeed on a Brady claim, a party must show that (1) the State possessed evidence favorable to the defense, (2) the State suppressed the evidence, and (3) had the State disclosed the evidence, there is a reasonable probability that the result would have been different. State v. Reinert, 2018 MT 111, ¶ 17, 391 Mont. 263, 419 P.3d 662.[5]
- ¶17 The State first argues that Severson waived any potential Brady claim by failing to request a continuance to investigate the contents of the phone when the State disclosed the reports of the burglary. The State points to no authority binding on this Court for the proposition that a failure to request a continuance waives a Brady claim.[6] We decline to adopt such a rule here. Accordingly, we will address the merits of Severson's claim.

- a. Favorability of the evidence

- ¶18 Evidence is favorable, and therefore subject to the duties imposed by Brady and § 46-15-322, MCA, if it has the potential to lead directly to the discovery of admissible evidence. State v. Stutzman, 2017 MT 169, ¶ 28, 388 Mont. 133, 398 P.3d 265 (quoting State v. Weisbarth, 2016 MT 214, ¶ 24, 384 Mont. 424, 378 P.3d 1195). Brady evidence need not itself be admissible to trigger due process protections; it need have only the "potential to lead directly to admissible exculpatory evidence." State v. Mathis, 2022 MT 156, ¶ 34, 409 Mont. 348, 515 P.3d 758 (internal quotations omitted). Evidence tending to undermine or impeach a key state witness is of particular favorability to the defense for purposes of a Brady analysis. Weisbarth, ¶ 26 (citing United States v. Price, 566 F.3d 900, 914 (9th Cir. 2009)).
- ¶19 The favorability of the investigative reports should have been obvious to the State as early as August 7, 2019. On that date, Watson admitted to receiving items stolen from Karina. The information contained in the reports connected the burglary directly to Watson and Hayden. Watson received proceeds from the burglary—from Hayden's girlfriend— on the night of the shooting. The information connecting the burglary to the shooting had the potential to lead directly to the discovery of other exculpatory evidence, namely the contents of Watson's cell phone. Mathis, ¶ 34.
- ¶20 The evidence ultimately found on Watson's cell phone also is favorable under Brady. Severson's defense rested primarily on his claim that he was afraid for his and his family's safety when he shot Hayden. Key to that claim was Severson's state of mind when he shot Hayden and whether the jury found his testimony credible. At a minimum, had the Defense been aware of an altercation between Hayden and Brown just a day earlier, Severson would have had the opportunity to interview Brown about the incident, about the type of gun Hayden brandished, and about Hayden's reputation for violence.
- ¶21 The State's case rested in large part on the testimony of Watson. Evidence tending to suggest that Hayden had been in possession of a firearm the day before the shooting calls into question Watson's story that he was the one with the firearm found at the scene— a story Watson first recounted in September 2019, months after the shooting. As Severson points out, the very existence of Hayden's

Facebook conversations on Watson's cell phone may suggest that Watson was aware of instances of Hayden brandishing a firearm and would have allowed Severson more effectively to cross-examine Watson about his knowledge of Hayden's propensity to carry a firearm. Information that calls into question the credibility of a witness lies squarely at the heart of a prosecutor's duty to disclose evidence favorable to the defense. See Weisbarth, ¶¶ 22-25.

- ¶22 The State argues that Severson's claim cannot succeed on this evidence because it is a specific instance of a victim's prior bad acts, which is admissible only if the defendant was aware of the specific bad acts when he killed the victim. See M. R. Evid. 405(b); State v. Montgomery, 2005 MT 120, ¶¶ 18-19, 327 Mont. 138, 112 P.3d 1014. The State's argument, however, misapprehends two important factors. First, the cell phone evidence may have been admissible for purposes other than demonstrating Hayden's propensity for violence, such as undercutting Watson's credibility. Second, even evidence that is inadmissible can support a Brady claim. Mathis, ¶ 34. The message records found on Watson's cell phone could have supported the credibility of Severson's own fears of Hayden and called into question Watson's testimony that he was the person carrying a firearm on the evening of the shooting and that Hayden was "friendly" when he approached Karina's vehicle.
- ¶23 The favorability of the cell phone evidence is not confined to its impact on witness credibility. As Severson points out, none of the individuals connected to or suspected of playing a part in the burglary of Severson's home were ever charged for the crime. Although Watson was charged with criminal possession of dangerous drugs in the months after the shooting, he was offered a deferred prosecution by the State. The District Court noted the optics of the State's treatment of its own witnesses when it told the State, "especially for crimes that occurred after the homicide, when you knew that [Watson] was going to be a witness . . . it was a bad idea to do a deferred prosecution." Had Severson known the contents of the phone at trial, he could have more effectively questioned the State's decision to not access it and better called into question the "thoroughness and even the good faith" of the State's handling of the investigation. See Kyles v. Whitley, 514 U.S. 419, 445, 115 S. Ct. 1555, 1571 (1995).
- ¶24 When he made his motions to dismiss and to exclude Watson, Severson could not and did not show that the cell phone contained any information favorable to the defense. That is no longer the case. Severson has shown that information on the phone "has the potential to lead directly to admissible exculpatory evidence." State v. Ilk, 2018 MT 186, ¶ 31, 392 Mont. 201, 422 P.3d 1219 (quotations omitted). The favorable nature of the evidence is apparent. See State v. Fisher, 2021 MT 255, ¶ 30, 405 Mont. 498, 496 P.3d 561 (citations omitted).

● b. Suppression of the evidence

- ¶25 It is not enough that a criminal defendant show that the state possessed favorable evidence, he must also show the government suppressed the evidence. Rienert, ¶ 17. Although the state is under no affirmative obligation to "take initiative or even assist the defendant with procuring exculpatory evidence," State v. Wagner, 2013 MT 47, ¶ 26, 369 Mont. 139, 296 P.3d 1142, neither may the state impede the defense's gathering of relevant evidence through the employment of rules and regulations. See State v. Swanson, 222 Mont. 357, 361-62, 722 P.2d 1155, 1158 (1986).
- ¶26 The State argues that Severson's rights were not violated because he possessed the Facebook records well before trial. The State points to the following exchange that took place shortly after Watson was unable to access the phone to argue the Defense had the cell phone evidence:

- THE STATE: Okay. Your Honor, we did get the Facebook and, I think, Snapchat records. Just Facebook. The Facebook Messenger records, which we got those regarding Dalton, okay.
- [DEFENSE COUNSEL]: Regarding who?
- THE STATE: The Messenger records regarding Dalton, Dalton's Messenger records.
- [DEFENSE COUNSEL]: We don't have those.
- THE STATE: We don't have those?
- [DEFENSE COUNSEL]: No, we don't have anything from Dalton Watson.
- THE STATE: Never mind, okay. I'm confusing Tyler and okay.

- The State also points to its proposed exhibit list in which it listed "DISC 36: DVD containing Facebook records (Tyler Hayden)." This proposed exhibit and the above-mentioned exchange, the State asserts, show that Severson was in possession of Hayden's Facebook messages long before trial. In response, Severson argues that the in-court exchange and the exhibit list are insufficient to show what messages actually were disclosed.
- ¶27 After reviewing the record in this case, it is unclear what, if any, Facebook messages were included in "Disc 36" or what the prosecutor was referencing in the above-quoted exchange. No record evidence substantiates the claim that Severson was in possession of the messages between Hayden and Brown or that those messages were a part of "Disc 36." Although the State has failed to show that it in fact disclosed the evidence at issue in this case, neither does Severson present evidence that he did not possess the Facebook messages. In support of his appeal, Severson points merely to the fact that the State has not proven it disclosed the information.
- ¶28 The record demonstrates that the State consistently resisted Severson's efforts to access the requested information. Both times Severson sought to compel the burglary reports, the State objected, claiming that no information in the reports was relevant to the shooting. As noted above, the State was in possession of information sufficient to establish a connection between the parties to the burglary and the shooting as early as August 2019. But even if the connection initially had gone unnoticed by the prosecution, in January 2020 police sent a request for prosecution of Johns and Krauser, putting the prosecution on notice of the relevance of the reports. Despite this knowledge, the State took no action to disclose the reports or investigate the contents of the phone in the months leading up to trial. When Severson moved to compel discovery of the reports for a second time in September 2020, the State again claimed they contained no relevant information. Following trial, the State argued that it had no probable cause to search the phone and that allowing Severson to access the contents of the phone would constitute a "treacherous" invasion of Watson's privacy. Granted, Severson was never denied access to the phone. But it also is clear that, whether by design or by oversight, the State's failure to investigate the phone, dubious claims of irrelevance, and employment of procedural excuses amounted to suppression of favorable evidence in violation of the State's duties under Brady. See Ilk, ¶ 34 ("Prosecutors have a duty to learn of any favorable evidence known to the others acting on the government's behalf . . ." and this duty is "ongoing") (quotations and citations omitted); Fisher, ¶ 30 ("the State cannot frustrate the defense's evidence-gathering efforts through either affirmative acts or their rules and regulations") (quotations omitted).

- c. Probability of a different result
  - ¶29 The third prong of a Brady claim requires a claimant to show that the suppression of favorable evidence "undermines confidence in the outcome of the trial." Ilk, ¶ 37 (quoting Kyles, 514 U.S. at 434, 115 S. Ct. at 1566). In considering whether a trial sufficiently protected the rights of the accused, we

review the excluded evidence collectively, not in a piecemeal fashion. Weisbarth, ¶ 26 (citing McGarvey, ¶ 17).

- ¶30 Severson argues that the case ultimately boils down to a credibility battle between his version of events and Watson's. Any evidence tending to undermine Watson's credibility or supporting Severson's fear of Hayden, he maintains, had a reasonable probability of changing the result. As evidenced by their willingness to find Severson guilty only of the lesser included offense of mitigated deliberate homicide, Severson argues that the suppressed evidence easily could have tipped the jury in his favor. The State responds that Severson has failed to demonstrate the reasonable probability of a different outcome because none of the evidence on the phone was admissible to show Hayden had a propensity to violence and because evidence admitted at trial was sufficient to show that Severson's belief that he needed to shoot Hayden was not reasonable.
- ¶31 In Ilk, we had the opportunity to address the prejudice prong of Brady. Ilk, ¶¶ 37-39. Ilk was accused of attempted deliberate homicide for his altercation with two other individuals at a construction site, during which Ilk fired a handgun several times at the two individuals. Ilk, ¶ 4. During the ensuing investigation, a police detective took three sets of photographs of the crime scene. The first set, which was disclosed during discovery, was taken on the evening of the shooting when it already was dark out. Ilk, ¶ 8. The third set, also disclosed, was taken during the daytime, several weeks after the shooting when construction at the site had significantly changed the area. Ilk, ¶ 8. Then, during trial, the detective testified that he may have taken a second set of photographs during the daytime "within a day or two after the shooting." Ilk, ¶ 9. Ilk moved for dismissal based on the State's failure to produce the second set of photos during discovery. Ilk, ¶ 9. We determined that Ilk had not shown a reasonable probability of a different result because the additional photos would not have served to "put the whole case in a different light." Ilk,
- ¶ 39 (quoting Kyles, 514 U.S. at 435, 115 S. Ct. at 1566). Because other photographs of the scene were available, the defense had the opportunity to vigorously attack the State's case even in the absence of the additional evidence, and the record otherwise provided strong support for the jury verdict, we concluded that Ilk had not met his burden under Brady. Ilk, ¶ 39 (internal quotations omitted).
- ¶32 Severson's case is stronger. Here, the material he sought was not duplicative of evidence that was available during trial. Although Severson was able to present evidence of Hayden's past violent interactions with him, the conversation between Hayden and Brown is singular in showing Hayden's similar behavior toward someone else just the day before the shooting—though it is not clear that Brown would have been available to testify or that his testimony would have been favorable to the Defense. Knowing that Hayden's girlfriend was involved in a burglary taking place at Karina's home at about the same time Hayden encountered her and Severson at the Loaf 'N Jug likely would have weighed heavily in the jury's mind. Additional evidence of Watson's connection to the burglary could have cast his credibility and willingness to participate with the State in a different light.
- ¶33 The District Court denied Severson's Brady motion because Severson could not show that the evidence on the cell phone was favorable to him. At the time the District Court made that ruling based on the record before it, it was correct. Accordingly, we cannot conclude that the District Court erred as a matter of law. Severson recognizes this flaw in his appeal and asks this Court to find that the State acted in bad faith. Severson argues that under our holdings in Villanueva and Fisher, the State's deceptive actions and animosity towards

him are the reason he was unable to show that the evidence on Watson's cell phone was favorable to him. Accordingly, Severson argues, we should hold that the District Court erred as a matter of law when it found that Severson did not satisfy the Brady test in full. The District Court, however, did not find that the State had acted in bad faith, and the record does not compel a contrary conclusion.

- ¶34 The State's failure to disclose evidence is troubling and was wrong; it should have produced the favorable evidence. For the reasons discussed below, however, our decision does not turn on Severson's Brady claim alone. When taken in the context of the entire trial, the Brady concerns contribute to our conclusion that Severson is entitled to a new trial. We need not determine whether, standing alone, the State's failure to disclose the information "undermines confidence in the outcome of the trial." Ilk, ¶ 37 (citing Kyles, 514 U.S. at 434, 115 S. Ct. at 1566).

- ¶35 2. Did the cumulative effect of errors in the District Court deny Severson a fair trial?
  - ¶36 Severson alleges several other trial errors that he argues, taken together, deprived him of a fair trial. We address each in turn.
- a. Prosecutorial misconduct
  - ¶37 Severson claims that the prosecutor violated his right to a fair trial by repeatedly referencing Severson's drug use in violation of the District Court's pretrial order in limine and by impermissibly blaming Severson for failing to discover the contents of Watson's cell phone.
  - ¶38 Prior to trial, the Defense moved the court to preclude any evidence of a 2018 informant drug buy in which Severson allegedly sold marijuana to a police source. Following briefing and argument, the District Court ordered that "the State is prohibited from introducing evidence of the Defendant's alleged drug dealing or drug activity in its case in chief." The court's order left open the possibility, however, that such questions would be allowed during cross-examination if the Defense opened the door to them. During cross-examination of Karina, the prosecutor raised the issue of the burglary. She asked Karina, "Isn't it true that people also know that you would have had cash, guns, and drugs in your house?" Severson's attorney immediately objected, and the court sustained. The prosecutor further initiated the following exchange with Karina:
    - Q. Okay. And I believe you testified that about $2000 in cash was also taken from your residence, correct?
    - A. Yes.
    - Q. Where did that money come from?
  - Severson's attorney again objected, the court again sustained. After the District Court already had sustained objections to her questions, the prosecutor asked Karina, "[i]sn't it true that Kyle posted pictures on social media, various forms, of cash and drugs?" Defense counsel immediately called for a sidebar conference outside the presence of the jury.
  - ¶39 During direct examination of Mark Kraft, an officer involved in the investigation of the shooting, the prosecutor initiated the following exchange:
    - Q. Okay. In this case, did defense counsel ever [] request to inspect the physical evidence that you had in your property?
    - A. Yes.
    - . . .
    - Q. Okay. Have, has there ever been a request from the defense to access that phone and download it?
  - Defense counsel objected and requested a sidebar conference to discuss the issue with the court. During that conversation the District Court stated, "I do think that now you're shifting the burden to the Defendant and I'm not going to allow you to do that anymore."
  - ¶40 Severson argues that the prosecutor's violation of the court's order in limine and her impermissible burden-shifting amount to prosecutorial misconduct,

warranting reversal. In response, the State argues that Severson has failed to show that Severson's substantial rights were prejudiced by the questioning. See State v. Lehrkamp, 2017 MT 203, ¶ 15, 388 Mont. 295, 400 P.3d 697 (citing State v. Otto, 2014 MT 20, ¶ 15, 373 Mont. 385, 317 P.3d 810; State v. Dobrowski, 2016 MT 261, ¶ 28, 385 Mont. 179, 382 P.3d 490).

- ¶41 The prosecution's questioning of Karina was clearly a violation of the court's order in limine. The District Court, however, sustained each of Severson's immediate objections, issued a curative instruction to the jury, and allowed testimony explaining that Severson was a licensed medical marijuana provider. Similarly, Severson's attorney immediately objected to the State's questioning regarding the Defense's efforts to access the cell phone. Though it is unlikely, standing alone, that the prosecutor's improper questions tainted the jury to such an extent as to violate Severson's right to a fair trial, the misconduct again contributes to the Court's consideration of cumulative error.

- b. Ineffective assistance of counsel

- ¶42 Following the State's violation of the trial court's order in limine, a lengthy discussion was held in which the District Court asked defense counsel what sanction he would seek in response to the State's behavior. After conferring with Severson, counsel chose not to seek a mistrial but reserved the right to do so. The court agreed that Severson would retain the right to seek a mistrial and notified the parties that it would hold a hearing to determine whether to hold the State in contempt of court for its actions. Counsel never moved for a mistrial. Severson argues that counsel's failure to seek a mistrial constitutes ineffective assistance of counsel.

- ¶43 We utilize the two-part test first articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), to determine whether a criminal defendant's trial counsel was unconstitutionally ineffective. Lehrkamp, ¶ 25. Under that test, a defendant must show "(1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant." Lehrkamp, ¶ 25 (quoting McGarvey, ¶ 24). An attorney's performance is deficient if it "[falls] below an objective standard of reasonableness considering prevailing professional norms, and in the context of all circumstances." McGarvey, ¶ 25 (citing Whitlow v. State, 2008 MT 140, ¶ 16, 343 Mont. 90, 183 P.3d 861). A defendant must overcome a strong "presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689, 140 S. Ct. at 2065 (internal quotations omitted).

- ¶44 Severson cannot show that his counsel's decision to not move for a mistrial fell below an "objective standard of reasonableness." McGarvey, ¶ 25. The record indicates that counsel fully considered the option of moving for a mistrial and made the tactical decision not to do so. By the time of trial, Severson had been in detention for over a year. Had the District Court granted a mistrial motion, Severson likely would have remained in jail while he awaited a new trial. This concern was raised on the record several times. Further, the record indicates that, just prior to deciding not to move for a mistrial, the court recessed to allow counsel time to discuss the implications of moving for a mistrial with Severson. Severson argues that because it was likely the State was attempting to goad a mistrial, double jeopardy would have barred a retrial. See Oregon v. Kennedy, 456 U.S. 667, 673-74, 102 S. Ct. 2083, 2088 (1982). Whether the District Court would have reached such a conclusion is not at all certain. The merits of Severson's double jeopardy argument aside, the record clearly indicates that Defense counsel considered a mistrial motion and, in consultation with Severson, chose not to pursue it. Severson has, therefore, failed to show that Defense counsel's trial performance was unconstitutionally deficient.

- 3. Cumulative error
  - ¶45 The cumulative error doctrine applies in the rare case in which several errors occur, the cumulative effect of which is to deny the defendant the right to a fair trial. State v. Novak, 2005 MT 294, ¶ 35, 329 Mont. 309, 124 P.3d 182. Under the doctrine, the defendant is required to prove that the aggregate effect of the errors denied him a fair trial— mere allegations and speculation that prejudice occurred are insufficient. Novak, ¶ 35. If prejudice is shown, however, reversal is required. State v. Enright, 2000 MT 372, ¶ 34, 303 Mont. 457, 16 P.3d 366 (citation omitted).
  - ¶46 When considering the cumulative effect of several claimed errors, courts consider:
    - each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the district court dealt with the errors as they arose . . . ; and the strength of the government's case.
  - State v. Lawrence, 2016 MT 346, ¶ 30, 386 Mont. 86, 385 P.3d 968 (Baker, J., concurring; quoting United States v. Sepulveda, 15 F.3d 1161, 1196 (1st Cir. 1993)).
  - ¶47 The issues in this case, including Severson's claim of self-defense, hinge primarily on the credibility of the witnesses. The errors that occurred during Severson's trial had direct bearing on the credibility of Severson, Karina, and Watson—the three most important witnesses. The burglary reports supported the Defense's theory that Watson and Hayden purposefully intercepted Severson to give the burglars more time and undercut Watson's version of events. The cell phone evidence could have undermined Watson's claim that it was him and not Hayden carrying a pistol during the shooting. The Brady material in this case also tends to show that Severson's claimed fear of Hayden was reasonable, supporting his claim that he was afraid for himself and his family when Hayden approached his vehicle. The prosecutor's misconduct likewise goes directly to the credibility of the witnesses at trial. Her improper questioning of Karina in violation of the District Court's order in limine appears to have been a clear attempt to diminish the credibility of Karina and Severson in the eyes of the jury. Additionally, when Watson testified falsely that he had received only $300 from the burglary, the prosecutor took no steps to correct his testimony in the presence of the jury. She ultimately did notify the court of Watson's untruthful statements regarding the amount of money he received from the burglary. She did not, however, attempt to correct his testimony in the moment, despite knowing of its falsity.
  - ¶48 The District Court described this trial as "a disaster." Given the string of missteps and errors in the case, namely the prosecutor's implicit suggestion to the jury through improper questioning that Severson and Karina were drug dealers and the State's failure to disclose the burglary information—all going to the essential issue of witness credibility— we conclude this is "the rare case in which the cumulative effect of the errors" has prejudiced the defendant's right to a fair trial. See Lawrence, ¶ 27 (Baker, J., concurring).
  - ¶49 As demonstrated by the jury's decision to convict Severson on the lesser offense of mitigated deliberate homicide, the problems explained above undermine confidence in its verdict. Had the jury been presented with the Brady material, had Watson's story been impeached, and had the prosecutor not referred to Severson's and Karina's drug activity, Severson's claim of justifiable use of force would have been stronger. Although the above-stated errors do not warrant reversal individually, we determine their combined effect calls into question the fairness of Severson's trial. See State v. Cunningham, 2018 MT 56, ¶ 33, 390 Mont. 408, 414 P.3d 289.
- CONCLUSION

- ¶50 The cumulative effect of the errors in this case leaves us convinced that Severson is entitled to a new trial. Accordingly, we reverse Severson's conviction and remand to the District Court for further proceedings consistent with this Opinion.
- /S/ BETH BAKER
- We Concur:
- /S/ JAMES JEREMIAH SHEA /S/ LAURIE McKINNON /S/ INGRID GUSTAFSON /S/ JIM RICE
  - [1] Severson later was charged with evidence or witness tampering. Severson pleaded guilty to the tampering charge and was sentenced to eight years in the Montana State Prison. The tampering charge is not addressed in this appeal.
  - [2] Watson initially told law enforcement that he had received $300 from Krauser and Immanuel Brown. During a trial preparation interview with prosecutors, Watson recounted that he had received $700 from the burglary. Then, during trial, Watson again changed his story, claiming that it had been only $300 but that Johns had been the person who gave him the money. It is unclear from the record whether Watson knew the provenance of the money when he received it.
  - [3] At this point, Severson was unaware that the parties suspected to be involved in the burglary were associated with Watson and Hayden. When arguing for disclosure of the reports, Severson's attorney said he had only "rumors" about the identities of the burglary suspects. The State, however, knew the identities of the parties by at least August 2019.
  - [4] The District Court also requested that Watson attempt to open the phone through fingerprint recognition. Because the phone had been powered off, it could not be opened by fingerprint recognition.
  - [5] Prior to 2014, this Court required a fourth Brady element requiring a claimant to show that "the petitioner did not possess the evidence nor could he have obtained it with reasonable diligence." McGarvey v. State, 2014 MT 189, ¶ 16, 375 Mont. 495, 329 P.3d 576 (quoting Gollehon v. State, 1999 MT 210, ¶ 15, 296 Mont. 6, 986 P.2d 395); see also Seiffert, ¶¶ 14, 15. In 2014, the Ninth Circuit Court of Appeals determined that a due diligence requirement improperly shifts the obligations imposed under Brady from the prosecution to the defense, is "contrary to federal law as clearly established by the Supreme Court," and is "unsound" as a public policy matter. Amado v. Gonzales, 758 F.3d 1119, 1136 (9th Cir. 2014). In 2018, this Court adopted the Ninth Circuit's rationale. Reinert, ¶ 17 n.1.
  - [6] The State draws the Court's attention to four cases it contends support its argument. Madsen v. Doremire, 137 F.3d 602 (8th Cir. 1998), and United States v. Higgins, 75 F.3d 332 (7th Cir. 1996), the State argues, stand for the proposition that the "failure to request a continuance when evidence is disclosed before or during trial constitutes a waiver of any Brady violation." The State fails to recognize, however, that both cases qualify this statement by requiring the evidence still be disclosed in time for the defendant to make beneficial use of it. Madsen, 137 F.3d at 605 ("there is no due process violation under Brady as long as ultimate disclosure is made before it is too late for the defendant to make use of any benefits of the evidence") (internal quotation omitted); Higgins, 75 F.3d at 335 ("[d]isclosure even in mid-trial suffices if time remains for the defendant to make effective use of the exculpatory material") (citation omitted). The State does not explain how its production of the burglary reports two weeks before trial allowed Severson sufficient time to utilize the evidence on Watson's cell phone—which took five months to access. The only other authority offered by the State is from intermediate appellate state courts.

Constitutional Law - Legislature: Private Atty-General Fees Clarified

5. **In The Supreme Court of The State of Montana DA 22-0639 FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK, Plaintiffs and Appellants, ORDER v. THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor, Defendant and Appellee.**

- [MAS note: (Forward Montana, et al., Original Proceeding, 4/9/2024): MSC's obligation is to examine whether a statute complies with the Constitution. Mont. Const. art. III, § 1, art. VII, § 1; MSC will not declare a statute invalid for legislative failure to observe its own rules; nor does the attorney fee ruling in this case invite or permit a cause of action to challenge legislation for violating internal legislative rules or open the floodgates by "incentivizing" litigants to bring every bill into court. Attorney fee awards under the private attorney general doctrine are very limited by caselaw]
- Order
  - On March 1, 2024, Appellee State of Montana (State) filed a petition for rehearing in the above-titled matter. On March 4, 2024, legislators who hold leadership positions in the Montana Legislature (legislators) filed an amicus brief in support of the State's petition for rehearing. On March 18, 2024, Forward Montana filed their objection to the petition for rehearing.
  - This Court generally will grant rehearing on appeal only if our initial decision overlooked some fact material to the decision, overlooked a question presented by counsel that would have proven decisive to the case, or if the decision conflicts with a statute or controlling decision not addressed by the Court. M. R. App. P. 20(1)(a)(i)-(iii).
  - The State first argues that we formulated arguments not raised by the parties. Generally, we decline to address issues on appeal not raised before the district court: See Pinnow v. Mont. State Fund, 2007 MT 332, ¶ 15, 340 Mont. 217, 172 P.3d 1273. Here, however, Appellants raised the bad faith acts of the Legislature from its complaint in District Court through to briefing before this Court. See, e.g., Complaint, pp. 12-15, 22; Opening Brief, pp. 1-15 (detailing the constitutional limits the Montana Legislature must follow when enacting legislation, and arguing they are entitled to attorney fees when elected officials "pass and enforce unconstitutional legislation" by abdicating their obligation and "plainly violat[ing]" the Montana Constitution); see also, e.g., Opening Brief, p. 1 (citing the Montana Constitution's right to know provision as implicated by Article V, Section 11, of the Montana Constitution). Clearly the issues were raised below and do not provide grounds for rehearing.
  - The State and legislators also argue that the Court improperly intruded on internal legislative rules by interpreting or enforcing them. Petitioners misinterpret and misstate the Court's decision. There is nothing inherently wrong with legislative "sausage-making" and the Legislature is free to interpret and implement its own internal rules, including the timing of its meetings, the amendment of Bills, --and other issues the legislators raise as examples of how our Opinion limits their work—as long as no constitutional provision is violated. Petitioners ignore that the crux of our decision to award attorney fees rested on the bad faith of the Legislature in willfully enacting unconstitutional laws. See, e.g., Forward Montana v. State, 2024 MT 19, IN 20, 24-28, 415 Mont. 101, ___ P.3d ___.
  - Petitioners do not argue—and the State did not appeal—the District Court's finding that the Legislature ignored its constitutional limitations by placing multiple subjects in SB 319 and by amending it beyond its original purpose as prohibited by Article V, Section 11, of the Montana Constitution. The clear

violations of these constitutional provisions forms the basis of our award of attorney fees. Our citation to legislative rules merely reinforced that the Legislature knowingly disregarded its constitutional limits.

- Legislators here assert that intrusion into internal rules will have disastrous consequences for the legislative process. They cite to multiple other instances where the Legislature deviated from its rules in the last decade. Petitioners' examples actively demonstrate that courts "'will not inquire into whether the legislature complied with its own rules in enacting the statute, as long as no constitutional provision is violated.'" Petition at 3 (quoting State ex rel. Grendell v. Davidson, 716 N.E.2d 704, 708 (Ohio 1999)) (emphasis added). Indeed, we will not declare a statute invalid for legislative failure to observe its own rules. See Davidson, 716 N.E.2d at 708; see also State ex reL Woodward v. Moulton, 57 Mont. 414, 426, 189 P. 59, 64 (1920). When a case is properly before us, our obligation is to examine whether a statute complies with the mandates of our Constitution. Mont. Const. art. III, § 1, art. VII, § 1. "Constitutional mandates must be followed by the legislature and the journals may be examined to show compliance." O'Bannon v. Gustafson, 130 Mont. 402, 407, 303 P.2d 938, 941 (1956).
- Moreover, our decision does not invite or permit a cause of action to challenge legislation for merely violating internal legislative rules or open the floodgates by "incentivizing" litigants to bring every bill into court. An award of attorney fees under the private attorney general doctrine is very limited by caselaw. See generally Forward Montana, ¶ 16.
- However, as the Opinion notes, we may award attorney fees to a prevailing party when equities dictate. Here, the bad faith of the Legislature in enacting unconstitutional legislation, as shown by the process through which the unconstitutional additions came to be—whether or not the process actually violated internal legislative rules—warranted attorney fees. The District Court found: that SB 319 passed the Senate and House with minor changes that needed to be reconciled; that the Legislature disregarded those minor changes when it appointed a free conference commiftee that considered amendments outside the scope of the original bill; that the committee had a short meeting with no public participation, testimony, or notice; and that two of the amendments during this meeting disregarded constitutional limits on legislative power. Legislators dispute some of these factual findings. But those arguments are not properly before us on a petition for rehearing. Instead, the parties should have presented evidence and arguments at the District Court or brought them before this Court in an appeal of the court's order. They did not file an appeal; thus, the facts found by the District Court have become law of the case. See Jonas v. Jonas, 2013 MT 202, ¶ 21, 371 Mont 113, 308 P.3d 33.
- As shown by petitioners' examples, the Legislature sometimes deviates from its normal processes to enact legislation. But when it knowingly disregards its constitutional limits and enacts blatantly unconstitutional legislation, the State may be subject to attorney fees when private parties are forced to vindicate constitutional interests. The equities in this case supported an award of fees for plaintiffs under the private attorney general doctrine.
- Petitioners contend that our decision raises speech or debate immunity issues from Article V, Section 8, of the Montana Constitution. These arguments were not raised in the State's briefs and thus are not appropriate matters for a petition for rehearing. See M. R. App. P. 20. Nevertheless, we note that speech or debate immunity immunizes legislators from suit "to support the rights of the people." Cooper v. Glaser, 2010 MT 55, ¶ 11, 355 Mont. 342, 228 P.3d 443 (internal quotation omitted). No

legislators are liable for their unconstitutional enactment of SB 319, nor were they burdened by defending themselves in a lawsuit. Accord Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503, 95 S. Ct. 1813, 1821 (1975). Our decision does not delay or disrupt the legislative function. Eastland, 421 U.S. at 503, 95 S. Ct. at 1821. The Legislature must abide by constitutional limits in enacting legislation. To protect the rights of the people, the private attorney general doctrine allows an award of attorney fees against the State when private parties are forced to vindicate constitutional interests.

- Finally, the State contends we overlooked several arguments made, including the plaintiffs' litigation burden below, using caution in awarding fees against the State, and the attorney general's merits defense of SB 319. Upon review, the Court did not overlook arguments made by the State. In briefing before us on the three Montrust factors, the State focused on whether the constitutional interests vindicated met the first factor and whether private enforcement was necessary—it did not dispute the burden plaintiffs faced, as the District Court similarly concluded. See Response Brief, pp. 19-26; M. R. App. P. 12. We also did not overlook the State's arguments that we should use caution in awarding fees against the State. See Forward Montana, ¶¶ 19-20, 25-34. Legislators' brief further misreads our Opinion by contending we "navigated around" statutory immunity by criticizing the legislative conduct at issue as administrative rather than legislative. Our actual holding was that § 2-9-111, MCA, grants immunity from torts committed by legislative acts or omissions, which has nothing to do with whether the State is immune from an equitable award of attorney fees. Forward Montana, ¶ 23.
- Nevertheless, it is apparent that some of the wording in our Opinion has created some confusion. As such, to the extent that our Opinion suggested binding legal interpretations of internal legislative rules, the petition is granted and an amended Opinion will be filed with this Order.
- Therefore, having considered the petition and response from Appellee,
- IT IS ORDERED that the petition for rehearing is GRANTED, the Opinion is WITHDRAWN, and a new Opinion will be issued.
- The Clerk is directed to provide a copy of this Order to all counsel of record.
- DATED this 9th of April, 2024.
- /S/ Mike McGrath, Chief Justice, Lorie McKinnon, Beth Baker, James Jeremiah Shea, Justices
- While we disagree with much of what is stated within the Order, and with the Court's denial of rehearing on the merits of its reversal of the District Court's denial of attorney fees in this matter, we nonetheless concur in granting rehearing on the basis cited by the Court.
- /S/ Dirk M. Sandefur, Jim Rice, Justices

-- Private AG Fees Clarified: Substitute Opinion Issued

6. Montana Supreme Court 2024 MT 75 FORWARD MONTANA; LEO GALLAGHER; MONTANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; GARY ZADICK, Plaintiffs and Appellants, v. THE STATE OF MONTANA, by and through GREG GIANFORTE, Governor, Defendant and Appellee. Decided: April 9, 2024. Case No.: DA 22-0639. APPEAL FROM: District Court of the First Judicial District, In and For the County of Lewis and Clark, Cause No. ADV-2021-611 Honorable Mike Menahan, Presiding Judge COUNSEL OF RECORD: For Appellants: Raph Graybill, Graybill Law Firm, PC, Great Falls, Montana Rylee Sommers-Flanagan, Constance Van Kley, Upper Seven Law, Helena, Montana For Appellee: Austin Knudsen, Montana Attorney General, Brent Mead, Deputy Solicitor General, Helena, Montana Emily Jones, Special Assistant Attorney General, Jones Law Firm, PLLC, Billings, Montana Submitted on Briefs: November 29, 2023.

- [MAS note: (Forward Montana et al. v. State, [McGrath C.J., 4/9/2024], Lewis and Clark County)[on rehearing: 1/31/2024 opinion clarified in this substitute opinion per explanation in separate 4/9/2024 rehearing order] In a 17-minute meeting at the end of the 2021 session, the Montana Legislature amended a campaign finance bill to add two provisions, one prohibiting campaign activities in university facilities and the other requiring judicial recusal in certain cases; the additions violated the single-subject rule (Mont. Const. art. V, § 11) and the D.Ct separately found them unconstitutional; D.Ct denied private attorney general fees in this "garden variety" constitutional violation in which the D.Ct stated the AG did not act in bad faith; held, D.Ct abused discretion in denying private attorney general fees where the Legislature was well aware that what they were doing was unconstitutional and in bad faith; "if the Doctrine was eliminated where the Legislature has willfully disregarded its constitutional duties and purposefully passed unconstitutional laws, vindicating important constitutional rights through litigation would not be feasible"; dissent by Justice Rice, joined by Justice Sandefur]
- Chief Justice Mike McGrath delivered the Opinion of the Court.
  - ¶1 Forward Montana, Leo Gallagher, Montana Association of Criminal Defense Lawyers, and Gary Zadick (Appellants) appeal from a September 16, 2022 order of the First Judicial District Court denying attorney fees under the private attorney general doctrine ("Private AG Doctrine" or "the Doctrine") and under the Uniform Declaratory Judgments Act (UDJA), § 27-8-313, MCA. We reverse and remand to the District Court for calculation of attorney fees.
  - ¶2 We restate the issue on appeal as follows:
- Was it an abuse of discretion for the District Court to deny Appellants' attorney fees under the private attorney general doctrine?
- FACTUAL AND PROCEDURAL BACKGROUND
  - ¶3 The Montana Legislature passed Senate Bill 319 (SB 319) during the 2021 legislative session. The Bill—originally a regulation of joint political fundraising committees—proceeded normally through the legislative process (introduced in Senate, passed through the Senate Committee on State Administration, passed on the Senate floor, passed as amended through the House Committee on State Administration, passed as amended on the House floor). Each of these steps included a public process, and citizen testimony was provided in both committees. The House passed and transmitted a slightly amended version back to the Senate. The Bill's sponsor recommended the Senate not concur with the amendments so a committee could "review those amendments."
  - ¶4 A free conference committee consisting of members of both houses was appointed. The committee did not discuss the House amendments at all. Instead, on April 27, 2021— 3 two days before the Legislature adjourned—the free conference committee used the opportunity to include four new sections to the Bill during a 17-minute meeting, closed to public comment. Several of these last-minute amendments came almost verbatim from a Bill that had recently failed to pass in the legislative session. See S.B. 318, § 4(1)(E)(v), (F), 67th Leg., Reg. Sess. (Mont. 2021) (rejected on House floor April 15, 2021); compare S.B. 319.5, § 22, 67th Leg., Reg. Sess. (Mont. 2021) (adopted during last-minute, closed-door session April 27, 2021). The Bill as amended then passed both houses in the last 24 hours of the 2021 legislative session.
  - ¶5 On June 1, 2021, Appellants challenged two of these amendments based on Article V, Section 11(6), of the Montana Constitution, which allows a person to challenge a statute "on the ground of noncompliance with [Section 11] only within two years after its effective date." Among other allegations

of unconstitutionality, Appellants challenged Sections 21[1] and 22[2] of SB 319 as violative of two sections of the Montana Constitution: Article V, Sections 11(1) and (3). Article V, Section 11(1), requires that "[a] law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose." (Rule on Amendments.) Article V, Section 11(3), requires that "[e]ach bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title." (Single Subject Rule.) 4

- ¶6 On June 4, 2021, Appellants filed a Verified Amended Complaint and an Application for Preliminary Injunction to preserve the status quo while the merits of the case were heard, as the laws were set to go into effect on July 1, 2021. The Attorney General responded to Appellants' motion for preliminary injunction on June 21, arguing Appellants did not have legal standing to challenge the law, and that they had not satisfied the legal standard for obtaining a preliminary injunction. The District Court held a show-cause hearing on June 28 and granted Appellants' motion on July 1, preliminarily enjoining the enforcement of SB 319, Sections 21 and 22. On August 4, the Attorney General filed a motion to dismiss, arguing again that Appellants did not have standing to challenge the laws and that they had failed to state a claim upon which relief could be granted under M. R. Civ. P. 12(b)(6).
- ¶7 On August 18, Appellants filed a Motion for Summary Judgment on their claims under Article V, Section 11. Appellants argued there were no genuine disputes of material fact, and they were entitled to judgment as a matter of law. The State filed a motion to stay the decision on Appellants' motion for summary judgment until its motion to dismiss was resolved and until it could conduct discovery into Appellants' claims regarding standing.
- ¶8 The District Court ruled that Appellants had standing to bring the lawsuit and denied the State's motion to dismiss on October 6. The court further found that additional discovery was unnecessary on the two constitutional claims in Appellants' summary judgment motion and stayed discovery until resolution of that motion. Thereafter, the State responded to Appellants' motion for summary judgment. The State again argued that Appellants lacked standing and that the sections at issue were not unconstitutional. The 5 court held oral argument on the motion for summary judgment on January 25, 2022, and issued its order on February 3.
- ¶9 The court found that SB 319 contained two subjects unrelated to campaign finance (the original subject of SB 319) because Section 21 banned select campaign activities[3] and had no effect on campaign contributions, spending, or disclosures, and because Section 22 3 Section 21 reads: 6 regulated judicial recusal[4] rather than limiting campaign contributions or reporting requirements. It was thus in violation of Article V, Section 11(3), of the Montana Constitution. The court further found that Sections 21 and 22 amended SB 319 to the extent that its original purpose was changed in violation of Article V, Section 11(1), of the Montana Constitution. The court permanently enjoined enforcement of Sections 21 and 22 as violative of Article V, Sections 11(1) and (3), of the Montana Constitution. It then certified its prior judgment as a final judgment subject to immediate appeal.
- ¶10 In a tacit acknowledgment that the Bill was unconstitutional, the State filed a notice that it was waiving appeal of the District Court's order.[5] The order thus became law. See Jonas v. Jonas, 2013 MT 202, ¶ 21, 371 Mont. 113, 308 P.3d 33 ("[A] legal decision made at one stage of litigation which is not appealed when the opportunity to do so exists, 7 becomes the law of the case for the future course of that litigation." (internal quotation omitted)). Section 13-35-242,

MCA (2021), and § 3-1-609, MCA (2021), repealed 2023 Mont. Laws ch. 433, § 2, are thus unconstitutional and void.

- ¶11 Thereafter, Appellants moved for attorney fees under the Private AG Doctrine; § 25-10-711, MCA; and under the UDJA, § 27-8-313, MCA. The District Court declined to award attorney fees. Under the Private AG Doctrine, the court found that Appellants had satisfied all three factors required for attorney fees under Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, ¶¶ 66–67, 296 Mont. 402, 989 P.2d 800 (Montrust). Nevertheless, the court considered equity and immunity principles and found that this case was a "garden-variety" constitutional challenge undeserving of attorney fees under the Doctrine. The court also denied fees under § 25-10-711, MCA, finding the Attorney General did not act frivolously or in bad faith in defending the Bill, and under the UDJA, finding this case did not present circumstances making fees equitable. Appellants appealed the court's decision under the Private AG Doctrine and the UDJA but did not appeal the court's decision regarding § 25-10-711, MCA.

- STANDARD OF REVIEW
  - ¶12 We review de novo a district court's conclusion on whether legal authority exists to support an award of attorney fees. City of Helena v. Svee, 2014 MT 311, ¶ 7, 377 Mont. 158, 339 P.3d 32. If legal authority exists, we review for an abuse of discretion the court's order granting or denying fees. Svee, ¶ 7. An abuse of discretion exists if the district court 8 acted arbitrarily, without the employment of conscientious judgment, or exceeded the bounds of reason resulting in substantial injustice. Montrust, ¶ 68.
- DISCUSSION
- ¶13 Was it an abuse of discretion for the District Court to deny Appellants' attorney fees under the private attorney general doctrine?
  - ¶14 When it comes to attorney fees, Montana follows the American rule—absent specific statutory or contractual provisions, prevailing parties are generally not entitled to recovery of their attorney fees in prosecuting or defending an action. W. Tradition P'ship v. Att'y Gen., 2012 MT 271, ¶ 9, 367 Mont. 112, 291 P.3d 545. We recognize several equitable exceptions to the American rule, but we construe them narrowly so the exceptions do not swallow the rule. W. Tradition P'ship, ¶ 9.
  - ¶15 One of these narrow equitable exceptions to the American rule is the Private AG Doctrine, which we adopted from Serrano v. Priest, 569 P.2d 1303 (Cal. 1977). Montrust, ¶ 67. The party seeking attorney fees must show three basic equitable considerations under the Doctrine: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision." Montrust, ¶ 66 (quoting Serrano, 569 P.2d at 1314). The District Court found that Appellants met all three factors under Montrust. However, the court concluded the case was a "'garden-variety' declaratory judgment action," which was not deserving of attorney fees. 9
  - ¶16 Generally, attorney fees under the first factor of the Doctrine have been applied in cases vindicating constitutional interests so that courts will not be in the role of assessing public policies better left to the Legislature. Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 2011 MT 51, ¶ 22, 359 Mont. 393, 251 P.3d 131; see also Serrano, 569 P.2d at 1314. However, this factor does not require a litigant to bring a direct constitutional challenge. See Burns v. Cty. of Musselshell, 2019 MT 291, ¶¶ 14–16, 398 Mont. 140, 454 P.3d 685; see also Clark Fork Coal. v. Tubbs, 2017 MT 184, ¶¶ 17–22, 388 Mont. 205, 399 P.3d 295 (comparing cases).
  - ¶17 As discussed below, this factor is satisfied here. Appellants challenged

Sections 21 and 22 purely on constitutional grounds and won summary judgment on their claims under Article V, Section 11, of the Montana Constitution. See Burns, ¶ 21 ("It is the vindication of constitutional interests that demonstrates the societal importance of the litigation."). This case falls squarely within the courts' important role in enforcing constitutional checks on the legislative power.

- ¶18 The Dissent suggests that even though significant constitutional interests were vindicated in Western Tradition Partnership, we held these were not enough under the first factor. See Dissent, ¶ 53. However, our holding in Western Tradition Partnership recognized that "even though ATP vindicated principles of constitutional magnitude, the State's defense *also was grounded in constitutional principles* and in an effort to enforce interests the executive deemed *equally significant* to its citizens." W. Tradition P'ship, ¶ 20 (emphasis added). The important constitutional interests at stake in Western Tradition Partnership are not in dispute. Our holding shows that both sides had important 10 constitutional interests they were trying to vindicate. Here, however, Appellants alone were vindicating important constitutional interests. The Legislature disregarded its constitutional limitations, and the Attorney General offered no substantive or constitutional interests in defense of these actions.
- ¶19 We have discussed that the separation of powers cautions us to avoid interfering with other branches under the first factor. W. Tradition P'ship, ¶ 16. For example, in determining if fees under the Doctrine were appropriate in Western Tradition Partnership, we held that awarding attorney fees against the Attorney General was improper in a "garden variety" constitutional challenge that the Attorney General had chosen to defend because his arguments were not frivolous or in bad faith. W. Tradition P'ship, ¶¶ 17–18, 20. Indeed, because of our reluctance to invade the province of another coequal branch of government, we looked closely at whether the Attorney General defended the law in bad faith. We held that the Attorney General's defense was far from frivolous because five members of this Court were convinced of the argument's merit in a prior decision; both the plaintiff's and the State's arguments were grounded in equally significant constitutional principles; the statute the Attorney General was defending had century-old roots in Montana history; the statute had been enacted by initiative of the people to combat corruption which had entangled state judges and a U.S. senator from Montana; and the challenge had been brought in a time of shifting legal landscapes given recent U.S. Supreme Court cases. W. Tradition P'ship, ¶ 20.
- ¶20 Here, we do not hold attorney fees are proper because of the Attorney General's defense of the law, which included a challenge to Appellants' standing at different stages 11 of the litigation as well as defenses on the merits of the Bill. Rather, we conclude that attorney fees are proper in this case because of the process through which the unconstitutional sections of this Bill came to be: an obviously unlawful Bill adopted through willful disregard of constitutional obligations.
- ¶21 Initially, however, we address the State's argument that statutory immunity requires the denial of fees in this case. This argument stems from Finke v. State ex rel. McGrath, 2003 MT 48, ¶¶ 33–34, 314 Mont. 314, 65 P.3d 576, where we held attorney fees were improper against the defendant counties and State:
  - Defendant Yellowstone County advances several arguments against the award of attorneys' fees in this case, but the one we find most persuasive is that *it would be unjust to force the Counties to pay for the unconstitutional actions of the Legislature.* The award of attorneys' fees, when not statutorily mandated, is within the discreet and inherent equitable powers of the judiciary. While under the private attorney

general doctrine, it may be considered equitable to award attorneys' fees to Finke, we conclude that the inequity of imposing those fees against the Defendant Counties who neither fashioned nor passed the unconstitutional law is overriding.

- The only entity remaining against whom fees could be assessed is the State of Montana. The claim against the State in the case at bar is for injunctive relief against enforcement of SB 242. *The Plaintiffs did not specifically seek attorneys' fees from the State*, and the claim for injunctive relief simply does not provide a basis for the imposition of attorneys' fees against the State. In fact, the only potential liability of the State for fees would lie for the actions of the Legislature in enacting an unconstitutional bill, as it is the enactment of SB 242 that prompted the filing of this action. However, § 2-9-111, MCA, provides that the Legislature, as a governmental entity, is immune from suit for any legislative act or omission by its legislative body. There is, therefore, no avenue whereby attorneys' fees could be imposed against the State in this matter.

- (Internal citations omitted and emphasis added.) The State thus argues that we cannot impose attorney fees when our only finding is that the Legislature enacted an unconstitutional Bill. This is incorrect for several reasons. First, the holding of Finke as 12 it applied to attorney fees against the State was that plaintiffs had not sought fees against the State and thus could not recover fees from it—everything else was dicta. See In re Marriage of Pfeifer, 1998 MT 228, ¶ 24, 291 Mont. 23, 965 P.2d 895 ("[B]ecause we had resolved the issues before us prior to that [relied upon statement], it is clear that the statement was not necessary to the decision and was, instead, obiter dictum. Consequently, it was not a principle or rule of law necessary to our decision so as to implicate the law of the case.").

- ¶22 Second, a reading of the statute (§ 2-9-111, MCA) mentioned in Finke does not lead to the conclusion that it prohibits attorney fees against the State. Section 2-9-111(2), MCA, provides that governmental entities (including the State) are "immune from suit" for legislative acts or omissions. If taken literally, a suit seeking a declaration that a law is unconstitutional or to enjoin its enforcement would be prohibited. This clearly is not the case. See, e.g., Mont. Const. art. V, § 11(6); § 27-8-202, MCA (allowing suits concerning the validity of statutes).

- ¶23 Rather, we have held that § 2-9-111, MCA, immunizes governmental entities from torts committed by legislative acts or omissions. See, e.g., Knight v. Missoula, 252 Mont. 232, 245, 827 P.2d 1270, 1278 (1992); Massee v. Thompson, 2004 MT 121, ¶¶ 77–78, 321 Mont. 210, 90 P.3d 394 (Nelson, J., specially concurring) (collecting cases); Denke v. Shoemaker, 2008 MT 418, ¶ 54, 347 Mont. 322, 198 P.3d 284 (explaining that § 2-9-111, MCA, is a narrow exception to Article II, Section 18, of the Montana Constitution, which provides that governmental entities have no immunity from suit for injury to person or property unless specifically provided by law by a two-thirds vote of the Legislature). This 13 reading is consistent with the plain meaning of the statute and the rest of Title 2, chapter 9, part 1, of the Montana Code. See § 2-9-111(5), MCA (specifically exempting some torts from immunity); § 2-9-101(1), MCA (defining "claim" to include suits for money damages for personal injury or property damage arising from "negligent or wrongful act[s] or omission[s]"). Thus, although § 2-9-111, MCA, provides immunity to the State for damages arising in tort caused by legislative acts or omissions, it does not provide immunity against a declaratory judgment action that a law is unconstitutional—or from an equitable grant of attorney fees in that action arising from unconstitutional actions of the Legislature that plaintiffs

are forced to litigate.

- ¶24 We have awarded attorney fees against the State in prior cases. See generally, e.g., Montrust, Burns. The purpose of the Doctrine is to "provide[] an incentive for parties to bring public interest related litigation that might otherwise be too costly to bring." Sunburst Sch. Dist. No. 2 v. Texaco, Inc., 2007 MT 183, ¶ 91, 338 Mont. 259, 165 P.3d 1079. If the Doctrine was eliminated where the Legislature has willfully disregarded its constitutional duties and purposefully passed unconstitutional laws, vindicating these important constitutional rights through litigation would not be feasible.
- ¶25 Nevertheless, as we noted in Western Tradition Partnership, courts must use caution in awarding fees against the State in "garden variety" constitutional challenges so as not to improperly infringe on the separation of powers. W. Tradition P'ship, ¶¶ 16–17. That case discussed attorney fees in relation to the Attorney General's defense of the law and our hesitation to interfere with the executive function of the State. W. Tradition P'ship, ¶ 16. 14 We thus looked at whether the Attorney General had defended the law frivolously or in bad faith as a guidepost. W. Tradition P'ship, ¶ 18.
- ¶26 The Legislature must abide by the Constitution when enacting legislation to ensure transparency and public participation. Mont. Const. art. V, § 11. The Single Subject Rule is substantially unchanged from Article V, Section 23, of the 1889 Montana Constitution. We stated that the purposes of this section:
  - are to restrict the legislature to the enactment of laws the subjects of which are made known to the lawmakers and to the public, to the end that anyone interested may follow intelligently the course of pending bills; to prevent the legislators and the people generally being misled by false or deceptive titles, and to guard against the fraud which might result from incorporating in the body of a bill provisions foreign to its general purpose and concerning which no information is given by the title.
  - State ex rel. Foot v. Burr, 73 Mont. 586, 588, 238 P. 585, 585 (1925). Similar policies lie behind the Rule on Amendments, which has remained substantially unchanged from Article V, Section 19, of the 1889 Montana Constitution. Undoubtedly, the Legislature is aware of these constitutional duties and limitations, especially given these provisions' long history. Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation, 2021 MT 44, ¶ 60, 403 Mont. 225, 481 P.3d 198. We have held that if "it is apparent that two or more independent and incongruous subjects are embraced in its provisions, the Act will be held to transgress [Article V, Section 11(3)], and to be void by reason thereof." Evers v. Hudson, 36 Mont. 135, 146, 92 P. 462, 466 (1907).
- ¶27 The District Court found, and the State does not dispute, that SB 319 was clearly in contravention of the Single Subject Rule. Mont. Const. art. V, § 11(3). Prior to the free conference committee, SB 319 contained only one subject—campaign finance. After the 15 committee meeting, SB 319 contained two additional subjects within Sections 21 and 22— political activities in university facilities and judicial recusal.
- ¶28 In addition, the District Court found that these sections were in violation of the Rule on Amendments, which requires Bills to not be so altered or amended during the legislative process so as to change their original purpose. Mont. Const. art. V, § 11(1). Prior to the free conference committee meeting, the Bill's entire purpose was to revise campaign finance laws regarding the establishment and regulation of joint fundraising committees. After the meeting, the original purpose was changed to include regulations on political activities on college campuses and judicial recusal. The violation is manifestly apparent by examining SB 319's title before and after the committee meeting:

- AN ACT GENERALLY REVISING CAMPAIGN FINANCE LAWS; CREATING JOINT FUNDRAISING COMMITTEES; PROVIDING FOR CERTAIN REPORTING; ESTABLISHING THAT IF STUDENT ORGANIZATIONS THAT ARE REQUIRED TO REGISTER AS POLITICAL COMMITTEES ARE FUNDED THROUGH ADDITIONAL OPTIONAL STUDENT FEES, THOSE FEES MUST BE OPT-IN; PROHIBITING CERTAIN POLITICAL ACTIVITIES IN CERTAIN PLACES OPERATED BY A PUBLIC POSTSECONDARY INSTITUTION; PROVIDING FOR JUDICIAL RECUSALS UNDER CERTAIN CIRCUMSTANCES; PROVIDING PENALTIES; ~~AND~~ AMENDING SECTIONS [enumerated]; AND PROVIDING AN EFFECTIVE DATE.

- S.B. 319.5, 67th Leg., Reg. Sess. (Mont. 2021) (underlines and strikethrough in original). The nonunderlined portions of the title above show SB 319 prior to the free conference committee. SB 319 had 22 sections prior to the committee meeting yet had a relatively short title because it was a comprehensive Bill covering a single subject. By adding four 16 amendments (only two of which are at issue in this case), the committee more than doubled the length of the original title with completely unrelated matters.
- ¶29 The State did not appeal these conclusions.
- ¶30 Again, legislative acts are at issue, and we use caution so as not to interfere with the proper functioning of the legislative branch. We therefore find it a helpful guidepost to look to the bad faith of the Legislature in enacting unconstitutional laws when deciding whether attorney fees are proper under the Doctrine. See W. Tradition P'ship, ¶ 18. This consideration is only an equitable guidepost rather than a requirement. As Serrano notes, the concept of the Private AG Doctrine "seeks to encourage suits effectuating a strong congressional or national policy by awarding substantial attorney's fees, regardless of defendants' conduct, to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens." Serrano, 569 P.2d at 1312. Further, this is only a guidepost because if bad faith were a requirement under the equitable Doctrine, it would be swallowed up by § 25-10-711, MCA. Cf. Montrust, ¶¶ 60–62. Nevertheless, it can be helpful to discuss bad faith in fee requests against the State in order to not unnecessarily interfere with other branches' policy choices. W. Tradition P'ship, ¶ 16; Serrano, 569 P.2d at 1313.
- ¶31 Bad faith can be seen through the process the Legislature used in passing these obviously unconstitutional amendments. When the House and Senate pass different versions of the same Bill and do not accept the other chamber's amendments, the leadership may appoint a conference committee to resolve the differences—confined to accepting, rejecting, or amending only the disputed amendments. See Rules of the Montana 17 Legislature, 67th Leg., 30-30(1)–(2) (Mont. April 2021) (available at https://perma.cc/74EA-TAQG) [hereinafter Legislature's Rules]. However, leaders can appoint a free conference committee which is able to "discuss and propose amendments to a bill in its entirety and is not confined to a particular amendment. *However, a free conference committee is limited to consideration of amendments that are within the scope of the title of the introduced bill."* Legislature's Rules, 30-30(3)(a) (emphasis added); accord Mont. Const. art. V, § 11(1).
- ¶32 Here, a free conference committee was appointed. During the 17-minute meeting, the committee adopted amendments that were, as noted above, clearly outside the scope of the title of the introduced Bill.
- ¶33 The committee—consisting of legislators with more than 42 years of Montana state legislative experience between them—undoubtedly were aware that there would be no public participation, testimony, or public notice

of the intended changes. Significantly, some amendments consisted of provisions that had already been defeated in other Bills during the legislative session—one of them having failed mere days before the free conference committee meeting. Such practice is generally discouraged. Cf. Legislature's Rules, 40-70(1) ("A bill may not be introduced or received in a house after that house, during that session, has finally rejected a bill designed to accomplish the same purpose . . . ."); see also Legislature's Rules, 40-90 (same as Mont. Const. art. V, § 11(1)); Legislature's Rules, 60-05 (precedent of legislative rules).

- ¶34 We are not intruding on the Legislature or enforcing its own internal rules as the Dissent suggests. See Dissent, ¶ 56. Rather, we use these examples to amplify the fact that 18 the Legislature was well aware that what they were doing was unconstitutional, which serves as a strong showing of bad faith, a factor we consider as a guidepost in determining that fees are proper here.
- ¶35 The first factor of Montrust is clearly met. The constitutional policies vindicated here—to restrict legislative enactments to those made known to lawmakers and the public, to prevent legislators and the people from being misled, and to guard against obfuscation by the Legislature—are sufficiently weighty to justify fees. See Foot, 73 Mont. at 588, 238 P. at 585. Appellants vindicated important constitutional rights, and our typical judicial restraint from interference with the proper functioning of other branches of government was overcome by the willful disregard of constitutional standards in adopting these Sections.
- ¶36 However, even when important interests are vindicated by the litigation, we still look at the necessity for private enforcement and the magnitude of the burden on the plaintiff under the second factor. Montrust, ¶ 66. As such, we consider whether invoking the Doctrine provides an incentive for parties to bring public interest litigation that might otherwise be too costly to bring. Sunburst, ¶ 91. Thus, when litigants are motivated primarily by their own interests and only coincidentally protect the public interest, attorney fees are inappropriate—such as where the litigation results in a monetary judgment for plaintiffs. Sunburst, ¶ 91.
- ¶37 The Doctrine is applicable where private litigants must litigate because "the government, for some reason, fails to properly enforce interests which are significant to its citizens." Bitterroot, ¶ 27 (internal quotation omitted); Burns, ¶ 13. Thus, we generally 19 do not apply the Doctrine when a government agency represents a public interest and complies with its duties. In re Dearborn Drainage Area, 240 Mont. 39, 43, 782 P.2d 898, 900 (1989). However, we awarded attorney fees in Bitterroot where, although a government agency was involved in the litigation, the agency did not appeal an adverse decision and—against its objection—was joined as an involuntary party to other parts of the litigation. Bitterroot, ¶ 32. Because the agency's involvement "was hardly the usual effort" of an agency seeking to enforce the law, private parties were forced to bear the brunt of the litigation burden and full relief would not have been granted without their effort. Bitterroot, ¶ 32.
- ¶38 The State does not dispute that Appellants bore a large burden in litigating the constitutionality of Sections 21 and 22.[6] Instead, it argues that Lewis and Clark County is one of the Appellants, and therefore a government agency is litigating this matter. The State's argument is that since Leo Gallagher (one of the Appellants in this case) was Lewis 20 and Clark County Attorney, the Court should conclude his participation is on behalf of Lewis and Clark County and therefore there was no need for private enforcement.
- ¶39 This argument misconstrues Gallagher's role in the case. Gallagher sued as a private citizen who will be negatively affected by the recusal requirements of Section 22 in both his

public and private work (now or in the future). If the State's argument was correct, our caption would read "Lewis and Clark County, by and through its County Attorney," rather than "Leo Gallagher." See, e.g., Crites v. Lewis & Clark Cty., 2019 MT 161, 396 Mont. 336, 444 P.3d 1025. Gallagher verified the complaint personally and not on behalf of the County. If he had participated on behalf of the County, he would have had to state as such. See § 25-4-203, MCA. The verification stated "I, *Leo Gallagher*, being first duly sworn, upon oath depose and say: 1. *I* am Plaintiff in the action set forth above," and it was signed by him personally, not on behalf of the County or in his role as county attorney. (Emphasis added.) Although Section 22 would affect Gallagher in the cases he litigates on behalf of the County, it would equally impact him, and other Appellants, in any cases they litigate in private practice. Thus, Section 22 will affect Gallagher no matter what job he holds, and he personally sued to prevent that.

- ¶40 Additionally, the complaint shows that Gallagher, in his personal capacity, has contributed to judicial races in the past six years "[c]onsistent with *his* First Amendment rights and commitment to civic life in Montana." (Emphasis added.) Clearly Gallagher was suing on behalf of his own constitutional rights. It would be illegal for Lewis and Clark County to contribute to a candidate. Section 13-35-227(1), MCA. The District Court did not abuse its discretion. 21
- ¶41 Since the only governmental entity involved in this case was defending the statute, private enforcement was necessary. "Although there are within the executive branch of the government offices and institutions (exemplified by the Attorney General) whose function it is to represent the general public in such matters and to ensure proper enforcement, for various reasons the burden of enforcement is not always adequately carried by those offices and institutions, rendering some sort of private action imperative." Serrano, 569 P.2d at 1313. The second factor of Montrust is met.
- ¶42 Finally, although we have not set a threshold number of people benefiting from the decision to support attorney fees under the Doctrine, clearly issues of statewide importance are sufficient to pass muster under the third factor. Bitterroot, ¶ 34; see also Burns, ¶ 23 (concluding an issue that would benefit all Musselshell County voters was sufficient to meet the third factor). The State conceded this factor was met at the District Court because the litigation involves a challenge enforcing important constitutional restraints affecting all Montanans.
- ¶43 We note that Appellants seek compensation for 335.78 hours worked on the case, totaling $105,119. We make no comment on the number of hours or the hourly rate that is appropriate for the District Court to award on remand.

- CONCLUSION
  - ¶44 We affirm that all three of the Montrust factors support an award of attorney fees in this case under the private attorney general doctrine. However, for the reasons stated herein we conclude that the District Court's finding that this case presented equitable considerations which did not warrant attorney fees under the Doctrine was unreasonable 22 under these facts and as such was an abuse of discretion. Because we conclude fees are warranted under the Doctrine, we do not reach the parties' arguments under the UDJA.
  - ¶45 We decline to award attorney fees on appeal.
  - ¶46 Reversed and remanded to the District Court for consideration of attorney fees.
  - /S/ MIKE McGRATH
  - We Concur:
  - /S/ LAURIE McKINNON /S/ BETH BAKER /S/ JAMES JEREMIAH SHEA /S/ INGRID GUSTAFSON
- Justice Jim Rice, dissenting.
  - ¶47 In my view, the Court's reasoning regarding application of the private attorney general doctrine (Doctrine) lacks

merit under our precedent. I would conclude the District Court did not abuse its discretion by denying fees under the Doctrine, which is to be "invoked sparingly," Western Tradition P'ship v. AG of Mont., 2012 MT 271, ¶ 13, 367 Mont. 112, 291 P.3d 545 (Western Tradition II), and affirm.

- ¶48 The Court reasons that Appellants "bore a large burden in litigating the constitutionality" of SB 319. Opinion, ¶ 39. The burden of litigation borne here versus the burden borne by the Plaintiffs in Western Tradition, which challenged § 13-35-227(1), MCA, part of the original Corrupt Practices Act (Act), counsels otherwise. Here, the Plaintiffs filed suit on June 1, 2021, filed application for a preliminary injunction on June 4, and moved for summary judgment by August 18, 2021, six weeks later. The Attorney 23 General, acting to defend the bill, limited his defense to the issue of standing. When the District Court entered summary judgment in favor of Plaintiffs, the Attorney General "folded his hand" and gave notice he would not appeal from the judgment, conceding the matter. The Attorney General thus acted prudently, in a manner that fulfilled his duty to defend the challenged bill but which also did not unreasonably prolong the matter by engaging in protracted litigation. The case was over.
- ¶49 In contrast, in Western Tradition, after likewise receiving an adverse summary judgment ruling, in which the District Court, quoting Minnesota Chamber of Commerce v. Gaertner, 710 F. Supp. 2d 868 (D. Minn. 2010), described the governing precedent from the U.S. Supreme Court, as "unequivocal,"[1] the Attorney General rejected this "unequivocal" determination and extended the litigation by appealing to this Court. While the nature of the interest at issue and the public import are discussed below, Western Tradition involved free speech under the First Amendment, an issue which attracted much public interest that necessarily complicated advocacy in the case. Leave to file amicus briefs was sought and briefs were filed by The ACLU of Montana Foundation, The Montana Trial Lawyers Association, Former Montana Supreme Court Justices William Hunt, William Leaphart, James Regnier, Terry Trieweiler, and John Warner, Montana Public Interest Research Group, The Peoples Power League, Montana Conservation Voters, Montanans for Corporate Accountability, Montana League of Rural Voters, Free 24 Speech for People, Novak Inc., d/b/a Mike's Thriftway, The American Independent Business Alliance, The American Sustainable Business Council, Domini Social Investments, LLC, Trillium Asset Management Corporation, Newground Social Investment, Interfaith Center on Corporate Responsibility, Harrington Investments, Inc., Loring, Wolcott & Coolidge Sustainability Group, Calvert Asset Management Company, Inc., The Christopher Reynolds Foundation, Inc., Walden Asset Management, and the Center for Competitive Politics. Pro hac vice and student practice motions were granted. In contrast, there was no amici or outside involvement in Forward Montana.
- ¶50 During the appeal, the Western Tradition Plaintiffs were required to litigate appellate procedural issues before this Court, including the Attorney General's motion to strike its reply brief. Following receipt of the party and amicus briefs, this Court set the case for oral argument, in which counsel for Plaintiffs appeared and argued. Several months later, this Court issued the decision, its collective opinions totaling 80 pages, including vigorous dissents to the Court's divided holding. The Dissenters would be proven to be entirely correct that the Court's decision was clearly and predicably wrong. See Western Tradition I, ¶¶ 49, 50 (Baker, J., dissenting) ("Citizens United holds unequivocally that '[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.'"); ("In my view, the State of Montana made

no more compelling a case than that painstakingly presented in the 90-page dissenting opinion of Justice Stevens and emphatically rejected by the majority in Citizens United. Though I believe Citizens United requires us to affirm the District Court, we must in any event anticipate the consequences should the Court's holding today be reversed."); 25 see also Western Tradition I, ¶¶ 62, 73 (Nelson, J., dissenting) ("The [U.S.] Supreme Court could not have been more clear in Citizens United . . . . This Court is simply wrong in its refusal to affirm the District Court. Like it or not, Citizens United is the law of the land as regards corporate political speech.").

- ¶51 This Court's erroneous decision in Western Tradition I, in which the undersigned concurred, forced the Plaintiffs to continue the litigation yet further by preparing and filing a petition for certiorari seeking review by the U.S. Supreme Court. Plaintiffs moved for a stay of this Court's decision pending appeal, and briefed the issue, but this Court denied the request. Plaintiffs were then required to seek a stay of this Court's decision from the U.S. Supreme Court, which granted the stay. Regarding the Attorney General's position in defense of the Act, the Supreme Court declared "there can no serious doubt" that Citizens United applied and invalidated the Act, reversing this Court's decision. Am. Tradition P'ship, Inc. v. Bullock, 567 U.S. 516, 516, 132 S. Ct. 2490, 2491.[2]
- ¶52 There is no need to say more—that is a heavy litigation burden. With all due respect to the fine lawyering on behalf of the Plaintiffs here in Forward Montana, this case was a cakewalk compared to Western Tradition, and the Court's reliance on the heavy burden here provides no shelter from the precedent of Western Tradition's denial of fees in a much more difficult case. This consideration should weigh in favor of the District Court's denial of fees. In retrospect, our inference in Western Tradition II that the case was "garden variety" litigation should be considered as suspect as our merits decision in Western 26 Tradition I. Regardless, at a minimum, it is irrefutable that Western Tradition's burden of litigation, including before the U.S. Supreme Court, far exceeded Forward Montana's summary judgment litigation here. See Western Tradition II, ¶ 37 (Nelson, J., dissenting) (". . . the undisputed result was that ATP had to incur the burden of litigating its rights—not only in the District Court, but also in appeals to this Court and the Supreme Court— against arguments that 'either were already rejected in Citizens United, or fail to meaningfully distinguish that case.' Am. Tradition, 132 S. Ct. at 2491. In my view, given these facts, the magnitude of the burden [of litigation] was great.").
- ¶53 Next, the Court engages in a perfunctory analysis of the Doctrine's constitutional vindication factor and concludes that because the Plaintiffs here sought relief "purely on constitutional grounds," the factor is easily satisfied. Opinion, ¶ 17. This simplistic assessment will weigh in favor of fees for virtually any constitutionally related challenge, and thereby undermine the intended narrowness of the Doctrine's exception to the American Rule. This factor is supposed to assess "the strength or societal importance of the public policy vindicated by the litigation." Montanans for the Responsible Use of the Sch. Tr. v. State ex rel. Bd. of Land Comm'rs (Montrust), 1999 MT 263, ¶ 66, 296 Mont. 402, 989 P.2d 800. Thus, the broader nature of the litigation is important and requires assessment of societal impact, although courts are to do so without approval or disapproval of the public policies advanced by the litigation, to guard against violating separation of powers. See Western Tradition II, ¶ 16. The list of amici in Western Tradition, provided above, also serves to demonstrate the advanced public interest and importance of the constitutional right that was at issue—free speech. As the District Court in Western 27 Tradition reasoned on the fee issue, "the issues

here are very important and are grounded in the United States Constitution." Although the Citizens United and Western Tradition cases are often pigeon-holed as "corporate speech" cases, they affected a broader set of rights, going back to cases decided long before Citizens United:

- Citizens United was not just about the rights of *corporations* and *associations* to speak. More importantly, it was about the rights of citizens to hear and obtain information about candidates from diverse sources without governmental censorship. Indeed, the Citizens United decision rested on two propositions: first, that expenditures (by a person or an organization) on political communication are a form of 'speech'; and second, that 'citizens [have the right] to inquire, to hear, to speak, and to use information to reach consensus.' Citizens United, 130 S. Ct. at 898 (emphasis added). These propositions were not created in Citizens United. Rather, they can be traced to Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam), and First Natl. Bank v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

- Western Tradition II, ¶ 42 (Nelson, J., dissenting) (emphasis in original). "As a matter of federal constitutional law, *all* Montana citizens—at least, every voter in Montana— benefitted from the District Court's decision in favor of ATP under Citizens United." Western Tradition II, ¶ 45 (Nelson, J., dissenting) (emphasis in original); see also Western Tradition II, ¶ 16 ("The constitutional principles underlying this litigation cannot be doubted."). The Court concludes that, despite our determination in Western Tradition II, the significant constitutional vindication at work there did not tip the scales in favor of fees, the factor is nonetheless easily met here. In my view, this conclusion is an incorrect application of the factor and irreconcilable with Western Tradition II. The constitutional interests vindicated in Western Tradition served a far greater societal purpose than the issue 28 here, evidenced both by public interest and an analysis of the constitutional history of the rights vindicated in Western Tradition. This factor should also weigh against fees.[3]

- ¶54 Perhaps because support here is weak under our precedent, the Court utilizes new standards to justify fees: that fees should be awarded because SB 319 is "obviously" unconstitutional, and that fees under the Doctrine should be awarded for the punitive purpose of punishing the Legislature for legislating in "bad faith" and in violation of legislative rules. Opinion, ¶¶ 31-32, 34. Beyond the fact that our precedent provides no support for such considerations in application of the Doctrine, I disagree with the use of these standards for several other reasons.

- ¶55 First, the law provides no gradations of unconstitutionality, nor should we create them. A law is either constitutional or not. The Court's holding here encourages future parties to argue that the law they challenge is "really" unconstitutional, and for that reason alone, such vague considerations should not be employed. However, if it is fair to colloquially refer to a law as "clearly" or "obviously" unconstitutional, then such could clearly be said about the Corrupt Practices Act after Citizens United was decided. Although, for our Court, that point was only clear in hindsight, a retrospective demonstrates the Act's unconstitutionality was never in doubt after Citizens United. In striking down the statute, the District Court correctly described Citizens United as "unequivocal," as did the Dissenters in Western Tradition I. The U.S. Supreme Court upheld these perspectives 29 by summarily reversing this Court's decision, without even requiring briefing on the merits of the issue. See Western Tradition II, ¶ 37 (Nelson, J., dissenting) (". . . despite the clarity and breadth of the Citizens United decision, the Attorney General took the position that Montana's ban on independent expenditures is constitutional and enforceable."). By any

measure, this turn of events demonstrated "obvious" unconstitutionality of the Act. Yet, this Court, despite having the benefit of this hindsight at the time we decided Western Tradition II, did not consider this "obvious" unconstitutionality of the Act to weigh in favor of fees under the Doctrine, despite the Dissent making that very point. To be consistent, nor should we here.

- ¶56 Secondly, the Court is using the Doctrine as a sword to punish the Legislature, to deter it from wrongdoing, based in part on what I view as the Court's revulsion at legislative "sausage-making." This is an inappropriate judicial consideration. The judiciary has no business intruding into the internal operation of another branch of government, except as the Constitution expressly permits it. The District Court properly stayed within constitutional contours in its summary judgment ruling. See Order on Motion for Summary Judgment, ADV-2021-611, p. 9 ("[T]he Court concludes SB 319 contains two subjects not related to campaign finance, in violation of the single subject rule embodied in the Montana Constitution, Article V, § 11(3). The Court further concludes SB 319 was amended in passage through the legislature to an extent the bill's original purpose was changed, in violation of the Montana Constitution, Article V, § 11(1)."). However, in contrast, the Court veers off the constitutional pathway, indicting the Legislature's procedural use of a free conference committee as a violation of legislative 30 rules, the timing of legislative amendments ("two days before the Legislature adjourned"), the use of prior bills as source material for the challenged amendments ("[s]ignificantly, some amendments consisted of provisions that had already been defeated in other Bills during the legislative session—one of them having failed mere days before the free conference committee meeting"), the length of a committee meeting (a "17-minute committee meeting"), engaging in actions "generally discouraged" by legislative rules or in violation of cited rules, and that such behavior was from "legislators with more than 42 years of Montana state legislative experience between them." While such aspects of the legislative process may be mortifying to some, I find nothing unusual here. More to the point, none of these are constitutional violations. What violates the Constitution is the Court's use of these things in its reasoning. The Legislature is free to violate its own internal rules all day long, and it is none of this Court's concern unless a constitutional provision has been violated. There are no constitutional prohibitions on legislators making decisions at the last minute, and I completely disagree that it is legally "significant" that prior bills were used as sources for amendments—even bills that failed "mere days" before. There is no prohibition against legislators engaging in behaviors that they have enough experience to avoid, or against conducting a 17-minute meeting. Indeed, it could just as well have been a five-minute meeting. As we have explained, where the shoe was on the other foot, and we resisted the Legislature's effort to control the judiciary's internal operations:
  - The totality of the effect of [the challenged statute] is to interfere with the internal operations of the judiciary *in the same manner as if the judiciary would impose limitations on the legislature as to its internal operations*, such 31 as the number of committees, the time within which a committee must act, the time each legislator must attend the sessions, limiting the time of discussion, limiting the time one bill must pass from one house to the other and the like. All of these legislative functions are internal with the legislature and the constitution authorizing the legislature to govern its affairs without interference from the other constitutional branches of government.
- Coate v. Omholt, 203 Mont. 488, 498, 662 P.2d 591, 596-597 (1983) (emphasis

added). In my view, the use of "legislative norm" violations, including the Court's repeated citation to internal legislative rules, Opinion, ¶¶ 28-29, to establish wrongdoing, is an inappropriate intrusion into another branch and sets a troubling precedent. It is only the requirements of the Constitution we are to be concerned about. More broadly, the Court's use of the Doctrine as a measure to punish the Legislature is a drastic departure from the purpose of the Doctrine as established in our precedent.

- ¶57 The Court does not fault the Attorney General for defending SB 319. I agree and find the Attorney General's action here to be measured and reasonable, including waiving the right to appeal and bringing the litigation to a close after the District Court's adverse ruling. Attorney fees are not warranted under § 25-10-711(1), MCA, which, while not dispositive, we have explained "serves as a guidepost in analyzing a claim for fees under the private attorney general doctrine." Western Tradition II, ¶ 18.
- ¶58 The equitable nature of the Doctrine makes it critical that courts ensure it is not applied through a lens of judicial endorsement of the litigation, that is, granting fees where a court favors a plaintiff's constitutional objectives, while rejecting fees where a court disfavors a plaintiff's constitutional objectives. Justice demands that all parties receive equal treatment under the Doctrine. In my view, application of the Doctrine's factors, as 32 discussed herein, clearly demonstrates that Western Tradition presented a far more appropriate case for an award of fees than the case made here, and that this case is the more "garden variety" constitutional litigation that does not satisfy our precedent for an award of fees. Given that precedent, and the need for fairness, I would conclude the District Court did not abuse its discretion by denying them here.
- /S/ JIM RICE
- Justice Dirk Sandefur joins in the dissenting Opinion of Justice Rice.
- /S/ DIRK M. SANDEFUR
  - [1] Section 13-35-242, MCA (2021 Mont. Laws ch. 494, § 21).
  - [2] Section 3-1-609, MCA (2021 Mont. Laws ch. 494, § 22).
  - [Political] activity in public postsecondary institution residence hall, dining facility, or athletic facility -- prohibition -- exceptions -- penalty.
    - (1) A political committee may not direct, coordinate, manage, or conduct any voter identification efforts, voter registration drives, signature collection efforts, ballot collection efforts, or voter turnout efforts for a federal, state, local, or school election inside a residence hall, dining facility, or athletic facility operated by a public postsecondary institution.
    - (2) Nothing in this section may be construed as prohibiting any communications made through mail, telephone, text messages, or electronic mail inside a residence hall, dining facility, or athletic facility or any political advertising made through radio, television, satellite, or internet service. Nothing in this section may be construed as prohibiting an individual from undertaking or participating in any activity for a federal, state, local, or school election if the activity is undertaken at the individual's exclusive initiative.
    - (3) A person who resides in a residence hall operated by a public postsecondary institution or who regularly uses a dining hall operated by public postsecondary institution, a candidate for office in a federal, state, local, or school election, or a political committee engaged in a federal, state, local, or school election may institute an action in any court of competent jurisdiction to prevent, restrain, or enjoin a violation of this section.
    - (4) A political committee that violates this section is subject to a civil penalty of $1,000 for each

violation. Each day of a continuing violation constitutes a separate offense.
- (5) For the purposes of this section, "public postsecondary institution" means:
- (a) a unit of the Montana university system as described in 20-25-201; or
- (b) a Montana community college defined and organized as provided in 20-15-101.

- Section 13-35-242, MCA (2021).
- [4] Section 22 reads: Judicial conflict of interest -- recusal -- definition. (1) A judicial officer shall disqualify the judicial officer in a proceeding if: (a) the judicial officer has received one or more combined contributions totaling at least one-half of the maximum amount allowable amount under 13-37-216 from a lawyer or party to the proceeding in an election within the previous 6 years; or (b) a lawyer or party to the proceeding has made one or more contributions directly or indirectly to a political committee or other entity that engaged in independent expenditures that supported the judicial officer or opposed the judicial officer's opponent in an election within the previous 6 years if the total combined amount of the contributions exceed at least one-half of the maximum amount that would otherwise be allowed under 13-37-216 if the contributions had been made directly to the judicial candidate. (2) For the purposes of this section: (a) "contribution" has the meaning provided in 13-1-101; and (b) "judicial officer" has the meaning provided in 1-1-202. Section 3-1-609, MCA (2021).
- [5] By doing so, the fee ultimately awarded in this Opinion will be decreased.
- [6] The Dissent also compares Western Tradition Partnership, which admittedly was a much more difficult and drawn-out case than here, for its argument that Appellants have not hit a threshold burden requirement to get fees under the second factor. See Dissent, ¶¶ 48–52. Appellees did not make any of these arguments to the District Court below or in briefing to us. The District Court said "[t]he State does not argue Plaintiffs did not bear the financial burden of litigating this constitutional issue," and we reiterate in our holding that the State does not dispute this part of the second factor under the Doctrine. Instead, the State argues that private enforcement was not necessary because of the participation of a prior public official in the case. "It has long been the rule of this Court that on appeal we will not put a District Court in error for a ruling or procedure in which the appellant acquiesced, participated, or to which appellant made no objection." State v. Gardner, 2003 MT 338, ¶ 44, 318 Mont. 436, 80 P.3d 1262 (internal quotation omitted); see also State v. Kearney, 2005 MT 171, ¶ 16, 327 Mont. 485, 115 P.3d 214 ("This Court will not consider unsupported arguments, locate authorities or formulate arguments for a party in support of positions taken on appeal." (internal quotation omitted)).
- [1] See Western Tradition P'ship v. AG, 2011 MT 328, ¶ 8, 363 Mont. 220, 271 P.3d 1 (Western Tradition I), quoting the District Court ("Citizens United is unequivocal: the government may not prohibit independent and indirect corporate expenditures on political speech.").
- [2] During the course of the litigation, Western Tradition Partnership changed its name to American Tradition Partnership. See Western Tradition I, ¶ 9.
- [3] The broad societal impact of the Western Tradition litigation thus also provided support for the Doctrine's factor of "the number of people standing to benefit from the decision," Montrust, ¶ 66, but we did not conclude that factor tipped the balance in favor of fees.

Constitutional Law: Elections:

Supplemental Relief Mooted: Dismissed Without Prejudice

7. **In The Supreme Court Of The State Of Montana MONTANANS SECURING REPRODUCTIVE RIGHTS and SAMUEL DICKMAN, M.D., Petitioners, v. AUSTIN MILES KNUDSEN, in his official capacity as MONTANA ATTORNEY GENERAL; and CHRISTI JACOBSEN, in her official Capacity as MONTANA SECRETARY OF STATE, Respondents. No. OP 24-0182.**

- [MAS note: (Montanans Securing Reproductive Rights et al. v. Knudsen et al. Original Proceeding 4/8/2024): Respondents' compliance with this court's order renders Petitioners' requested supplemental relief at this time unnecessary; dismissed without prejudice]
  - ORDER
  - On April 3, 2024, Petitioners Montanans Securing Reproductive Rights and Samuel Dickman, M.D. (MSRR), moved this Court for "supplemental relief" in this case. MSRR alleged that Montana Secretary of State Christi Jacobsen had failed to immediately provide a finalized petition forrn for its ballot initiative after this Court certified a ballot statement to Jacobsen.
  - MSRR requested three forms of relief: (1) this Court directs the Secretary to immediately provide to MSRR a finalized petition form that substantially complies with the format provided in § 13-27-241, MCA, with the language concerning interim committee review stricken as inapplicable to CI-14; (2) this Court declare that § 13-27- 228, MCA, does not apply to CI-14, may not delay the collection of signatures, and may not be used to question the collection of otherwise-valid signatures for CI-14; and (3) this Court retain jurisdiction over this matter through the signature collection process, including sanctions and contempt powers.
  - In our April 3, 2024 Order, we denied the first form of relief MSRR requested, ruling that the relief requested would, in substance, be a writ of mandamus. We explained that if MSRR wanted this Court to consider issuance of a writ of mandamus, it must follow the procedure for obtaining such writ.
  - On April 4, 2024, MSRR petitioned for writ of mandate. See Montanans Securing Reproductive Rights v. Jacobsen, No. OP 24-0214. This Court allowed the writ, and on April 5, 2024, Jacobsen provided MSRR with the finalized petition form MSRR sought.
  - Because MSRR has received the ultimate relief it requested—as we allowed the writ and the Secretary of State provided notice of satisfaction of the writ—we have considered whether supplemental relief is required in this Original Proceeding or if subsequent actions have mooted MSRR's request. We conclude that, at this juncture, Jacobsen's compliance with the writ relieved any further delay in collection of signatures. The supplemental relief prospectively requested by MSRR is speculative as there are no facts developed regarding signature collection, the signature collection process, or any interference therewith aside from the delay in obtaining the finalized petition form which has since been resolved.
  - IT IS THEREFORE ORDERED that MSRR's request for supplemental relief is DENIED WITHOUT PREJUDICE.
  - IT IS FURTHER ORDERED that this Court's Order requiring Respondents to prepare, file, and serve a response(s) to MSRR's requests for relief as set forth in (2) and (3) above, is VACATED.
  - The Clerk is directed to provide immediate notice of this Order to counsel for all parties.
  - DATED this 8th day of April, 2024.
  - /S/ Mike McGrath, Chief Justice
  - /S/ Ingrid Gustafson, James Jeremiah Shea, Laurie McKinnon, Justices

Montana Advance Sheets

A Weekly Compendium of Court Rulings of:

Montana Supreme Court
State Trial Courts
Federal Trial Courts

Friday, April 12, 2024

STATE TRIAL COURTS

CONTENTS

(Use Bookmarks to navigate between cases)

Natural Resources
Preliminary Injunction

8. Montana Seventeenth Judicial District Court Phillips County MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY Plaintiff, v. LUKE PLOYHAR, BLUE ARC, LLC., OWEN VOIGT, AND LEGACY MINING, LLC, Defendants. Case No. DV-2023-10.

- [MAS note: MDEQ v. Ployhar, et al. (Laird, Phillips Co. 8/18/2024)] DEQ sued Ds in 4/2023 for violating the Metal Mine Reclamation Act, §§ 82-4-301, et seq, by creating eight mining related disturbances on properties owned by Ployhar and another located in the area of the Little Rockies which was mined decades before by Pegasus Gold; with the suit DEQ halted Ds' mining activity and reclaimed the disturbed land; DEQ's request for preliminary injunction is granted based on a finding that DEQ is likely to succeed on the merits, irreparable harm will occur without injunctive relief because of the damage to the land and the increased cost of reclamation if land disturbance continues, the balance of the equities favors DEQ as does the public interest]
- Order On DEQ's Request For Preliminary Injunction
- Hon. Yvonne Laird, District Court Judge
  - Plaintiff Montana Department of Enviorunental Quality ("DEQ") filed a Complaint for penalties and injunctive relief against Defendants Luke Ployhar, Blue Arc, LLC, Owen Voigt, and Legacy Mining, LLC, on April 21, 2023, for alleged violations of the Metal Mine Reclamation Act ("MMRA"), §§ 82-4-301, MCA, et seq, by creating eight mining related disturbances on properties owned by Ployhar/Blue Arc. Doc. 1. DEQ thereafter filed a Motion for Preliminary Injunction and Request for Order to Show Cause on July 7, 2023, Doc. 19, accompanied by a brief in support, Doc. 20. DEQ asks for a preliminary injunction under§ 27-19-201 (1), MCA, restraining Ployhar from interfering with its statutory right under § 82-4-371, MCA, to reclaim six of the eight disturbances.
  - DEQ asserts that it is entitled to preliminary injunctive relief because it meets the four factors under§ 27-19-201(1), MCA. First, DEQ asserts it is likely to succeed on the merits under § 82-4-371(2), MCA, because (a) the land on which the disturbances exist have been adversely affected by past mining practices at the Zortman mining complex; (b) it is in the public interest to reclaim the disturbances and abate the risk of harm to the water catchment and water treatment facilities in order to ensure excess water cannot infiltrate into the deeper bedrock and pollute the groundwater with acid mine drainage that serves the Town of Zortman; and (3) Ployhar, the landowner, will not give DEQ permission to enter the properties to reclaim the disturbances. Id. at 10-12. DEQ asserts, further, that irreparable injury to water resources is likely to occur if the disturbances are not reclaimed at this juncture; that balancing of the equities weighs in favor of DEQ due to the risk of environmental harm; and that it is in the public interest to immediately reclaim the disturbances. Id. at 12-15.
  - Ployhar filed a response to DEQ's request for preliminary relief on July 19, 2023 (Doc. 27), asserting that a preliminary injunction should not issue because (1) permitting reclamation at this juncture would constitute spoliation of evidence, interfering with Ployhar's ability to mount an adequate defense to the unlawful mining and exploration claims asserted by DEQ, id at 2-5, and (2) that DEQ has not met its burden to demonstrate that irreparable injury is likely to occur absent preliminary relief, id. at 5-7.
  - The Court held a show cause hearing on August 4, 2023, to determine whether DEQ's request for injunction should be granted. DEQ was in attendance through counsel Jessica Wilkerson and Samuel King. Also in attendance was Wayne Jepson, a reclamation specialist and

hydrogeologist in DEQ's hard rock mining program. Defendants Luke Ployhar and Blue Arc, LLC, were present at the hearing, as was his counsel, Kaden Keto. DEQ called Jepson as its sole witness to provide testimony. From the evidence presented, the Court makes the following findings of fact and conclusions of law.

- FINDINGS OF FACT
  - 1. Jepson testified on behalf of DEQ. Jepson testified $hat he is a hydrogeologist and permitting and reclamation specialist with DEQ's hard rock mining program, a position he has occupied for the past 31 years. Additionally, Jepson was designated the Zortman Project Officer by DEQ in 1999 and continues to serve in this capacity to engage in day-to-day oversight of all contracted activities at the Zortman and Landusky mines, and coordinate activities at the sites with other DEQ programs, the Bureau of Land Management ("BLM"), the Fort Belknap Indian Reservation, and other state and federal agencies.
  - 2. Jepson·testified that the Zortman Mine Site was·operated by Pegasus Gold Corporation ("Pegasus") and its subsidiary, Zortman Mining, Inc. ("Zortman") as an open pit mine subject to heap leach mining techniques from approximately 1979-1998.
  - 3. Open pit mining during this time, as well as prior underground mining, allowed the flow of water and oxygen into bedrock deep, beneath the mine pits, causing this rock to oxidize. This process caused iron sulfide minerals contained in the rock to decompose, forming sulfuric acid. The sulfuric acid then leached toxic metals from rock it encountered. The acid water, known as acid mine drainage, then flowed via gravity from the land surface ·through fractures in the bedrock, primarily through excavated mining tunnels, into the surrounding groundwater and surface water.
  - 4. Jepson testified that this acid mine drainage contaminated the water supply that supports the Town of Zortman, as well as tne nearby Fort Belknap Indian Community.
  - 5. In 1999, Pegasus declared bankruptcy, resulting in abandonment of its Zortman (and Landusky) mines.
  - 6. DEQ, together with BLM, assumed responsibility for required water treatment at the Zortman and Landusky Mines, as well as completion of mine reclamation in accordance with the Supplemental Environmental Impact Statement prepared during 2001.
  - 7. Reclamation was completed in 2005. DEQ and BLM, however, continue to monitor the Zortman site to ensure the water treatment systems are working properly and are not compromised. The costs of DEQ's and BLM's·reclamation and water treatment efforts cost approximately $86 million to date between both sites, including Pegasus' bond amount. An additional $24 million was invested into a trust fund for future costs.
  - 8. Jepson also provided extensive testimony as to how the water treatment system at the Zortman site works .. As part of DEQ's reclamation and water treatment at Zortman, its objective, through much trial and error, was to establish a water catchment system that included a free draining system of surface and ground water, whereby contact of water with sources of contamination is minimized and any water contaminated on the entire site could be captured and treated.
  - 9. To achieve this objective, DEQ oversaw the recontouring of waste rock to eliminate surface depressions on the landscape to minimize the potential for stormwater to pool and infiltrate the subsurface. Additionally, several tens of feet of rock fill were added to the area and topsoil was placed over the fill to support vegetation. Portals of historic adits were also reopened to construct water collection sumps to convey contaminated water flowing through the adits into pipelines, which then convey water into a lined collection basin in Ruby Gulch. Water is then pumped to the Zortman water treatment plant. The water

infrastructure installed, together with the backfilling, topsoiling, and revegetation, works collectively to minimize uncertainty from excess water and ensure any water that infiltrates into the groundwater or flows off site is first captured and then treated to avoid acid mine drainage contaminating the groundwater supply and downstream surface water.

- 10. Jepson also testified to the harmful effects of acid mine drainage, if water is not first treated, may negatively impact human health; bioaccumulate through the food chain; cause mortality and compromise life support systems for aquatic organisms; corrode infrastructure; contaminate drinking water; and generally disrupt ecosystems. Jepson stated that remediation of water contaminated by acid mine drainage is both difficult and expensive.
- 11. Jepson testified that Defendant Luke Ployhar purchased properties from a bankruptcy trustee of Pegasus in 2001 that are in the former Zortman Mining District and within the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") boundary established by BLM. Ex. 2 August 4, 2023 Hearing. Jepson said that these properties were subject to reclamation foilowing Pegasus' bankruptcy.
- 12. Jepson testified that on March 18, 2022, he was reviewing the conditions of the reclaimed Zortman Site on satellite imagery when he discovered seven, and possibly eight excavated trenches on Ployhar's properties. By reviewing historical satellite imagery, Jepson testified that he was able to determine that the disturbances were created in approximately August 2021. Jepson testified that Ployhar had not received an exploration license or final operating permit from DEQ, nor had a performance bond been posted with the agency. [JPG here] Ex. 3 August 4,.2023: aerial map of seven excavated 'disturbances in relation to water treatment facilities, prepared by DEQ.
- 13. Jepson testified that the largest of these excavations, Disturbance 1, is located north of the Zortman mine water treatment plant and approximately 0.42 acres in size and 23 feet deep. Ex. 4 August 4, 2023. The excavation at Disturbance 1 coincides with the locations of entry points to a historic mining portal to underground tunnels, known as the Ruby Adit and Alabama Adit. These adits have water collections systems within the portals and buried pipelines that lead from the portals to the lined water collection basin, installed as part of the Zortman reclamation.
- 14. Jepson testified that Disturbance 2 is a smaller trench excavated by Ployhar approximately 100 feet to the east of Disturbance 1. Ex. 5 August 4, 2023. This trench crosses the drainage swale leading east from Disturbance l.
- 15. Jepson testified that Disturbances 3-6 are also trenches located to the north of Disturbances 1 and 2, located near the northern perimeter of the Zortman "Ross Pit," an area where ore was excavated during past mining operations and placed onto the leach pad. Exs. 6-9 August 4, 2023.
- 16. Jepson testified that he conducted a site inspection of the disturbances in April and again in June 2022, and confirmed the existence of the eight disturbances. Jepson testified that DEQ sent Ployhar/Blue Arc and Owen Voigt/Legacy each·notice of violation letters in Apri1 1 2022 for Disturbances 1, 7, and again in June 2022 for Disturbance 8. Jepson said that he has been back to the site to inspect the disturbances on multiple occasions since then, most recently in June 2023. Jepson testified that the disturbances have not been reclaimed. Jepson also testified that Ployhar has been present at the site on multiple occasions where he has done inspections, including in June 2023.
- 17. Jepson testified that he is very concerned about the disturbances remaining unreclaimed. Jepson stated that each piece of the water treatment system's technical components, including land reclamation, are strategically placed to

direct and capture infiltrating surface water for treatment. Jepson testified that the disturbances create substantial uncertainty about efficacy of the water collection and treatment system that could result in irreparable harm to the state if left un-reclaimed.

- 18. Specifically, Jepson testified that the disturbances now permit substantially increased surface water infiltration into the ground in areas where infiltration was previously minimized because of capping and other preventative measures. Accordingly, Jepson testified that, by disrupting the free draining system, water can more eas~ly infiltrate into the deeper bedrock. Jepson testified that water may still be captured by the water treatment facilities, but that it is now much more probable that water may bypass these, water treatm~nt facilities, which may result in contamination to the groundwater supply through· acid mine drainage. Jepson, additionally, testified that, even if water is captured by the wat~r treatment facilities, in the event of a major precipitation event, the water treatment facilities may exceed their operational capacity such that not all water captured is necessarily treated.
- 19. Jepson also testified that with respect to Disturbances 3-6, there is more concern with the distance of these disturbances in proximation to the water catchment system. The further the disturbances are from the treatment plants, the more opportunity there is for contaminated water to be directed away from treatment.
- 20. Finally, with respect to Disturbance 1, the largest of the disturbances, Jepson testified this disturbance is immediately adjacent to the Ruby and Alabama adits, where the collection systems and buried pipelines are located. If any furtl1er excavation into· this area occurs, Jepson testified there is a substantial likelihood of this infrastructure being damaged.
- 21. Jepson testified that his scientific conclusions were based on a reasonable degree of scientific certainty, given his education, experience, and technical knowledge of the site.
- 22. Jepson testified that the most effective and easiest way to avoid the risk of environmental harm to the groundwater and surface water would be to reclaim the disturbances. Jepson testified that this reclamation may take only one to two days and would require backfilling of the waste rock into the six trenches, followed by the placement of 18" of topsoil and revegetation.
- 23. The contamination of the drinking water of the Town of Zortman and the Fort Belknap Indian Community by acid mine drainage is an ongoing concern with an undisputed risk · of harm to the members of the public utilizing the drinking water.
- 24. Maintenance of the water catchment and water treatment facilities is necessary to preclude infiltration of excess water deeper into the bedrock resulting in pollution of the ground water.
- 25. The disturbance of the water catchment and water treatment facilities has created a situation where the failure of the water catchment and water treatment facilities is inevitable. Although the precise time of such failure is not predictable due to uncontrolled variable such as the weather, failure will happen if excess rainfall is experienced. Additionally, the disturbances to the water catchment facilities have resulted in increased surface water infiltration into the ground in areas where infiltration was previously minimized, more infiltration into the deeper bedrock, and a higher probability of water bypassing the water treatment facitilities.

- CONCLUSIONS OF LAW
- I. Legal Standards
- A. Preliminary Injunction Standard
  - 1. As amended through 2023 Senate Bill 191, a preliminary injunction may be granted when, as set forth in§ 27-19-201(1), MCA, the applicant establishes four conjunctive factors:
    - (a) That they are likely to succeed on the merits ofits claim;
    - (b) That the applicant is likely to suffer irreparable harm in the absence

of preliminary relief;
- (c) That the balance of the equities tips in the applicant's favor; and
- (d) The order is in the public interest. Section 27-19-201(1), MCA; Winter v. NRDC, Inc., 555 U.S. 7, 20, 129 S. Ct. 365,374 (2008).

- 2. In amending the preliminary injunction standard in Montana, the requirements of § 27-19-201(1), MCA, are intended to "mirror the federal preliminary injunction standard" and the interpretation and application of this provision is to "closely follow United States supreme court law." Section 27-19-201 (3), MCA.
- 3. A preliminary injunction is "an extraordinary remedy never awarded as of right." Winter, 555 U.S. at 24.
- 4. The applicant bears the burden of demonstrating the factors in § 2 7-19-201 (1), MCA, for a preliminary injunction to issue. Id.
- 5. A preliminary injunction is proper for the limited purpose of preserving the status quo and minimizing harm to all parties. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834 (1981).
- 6. The "status quo" is the "last peaceable, noncontested condition which preceded the pending controversy." Sandrock v. DeTienne, 2010 MT 237, ¶ 16, 358 Mont. 175, 243 P.3d 1123 (citations omitted). Thus, the purpose of a preliminary injunction is to prevent "further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits." City of Billings v. County Water Dist, 281 Mont. 219, 226, 935 P.2d 246, 250 (1997).
- 7. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." Trump v. Int'l Refugee Assistance Project, 582 U.S. 571, 579, 137 S. Ct. 2080,2087 (2017).

- B. MMRA
- 8. The Metal Mine Reclamation Act ("MMRA"), §§ 82-4-301, MCA, et seq., provides the applicable statutory requirements for hard rock (i.e., nonsulfide rock products) mining in Montana.
- 9. The Montana Legislature enacted the MMRA in furtherance of its constitutional obligations under Article II, Section 3 (inalienable right to a clean and healthful environment), and Article IX (recognizing availability of adequate remedies fot: the protection ofthe environmental life support system and to prevent unreasonable depletion and degradation of natural resources). See §§ 82-4-301(2)(a)(i), -371(2)(c), MCA. Adequate remedies under these underlying constitutional provisions include equitable relief necessary to "avert harms that would have otherwise arisen." Park Cnty. Envtl. Council v. Mont. Dep 't of Envtl. Quality, 2020 MT 303, ¶ 64, 402 Mont. 168, 477 P.3d 288 (recognizing Montana Environmental Policy Act's role in fulfilling this constitutional mandate) (citing Montana Constitutional Convention, Verbatim Transcript: March 1, 1972, Vol. V 1230).
- 10. Consistent with its underlying constitutional purpose, the MMRA provides DEQ with broad authority to "abate, control, or prevent" adverse harm from past mining practices on property. Specifically, § 82-4-371, MCA, provides, in pertinent part:
  - (1) Agents, employees, or contractors of the department may enter upon property for the purpose of conducting studies or exploratory work to determine whether the property has been mined and not reclaimed and rehabilitated in accordance with the requirements of this part and to determine the feasibility of restoration or reclamation of the property or abatement, control, or prevention of the adverse effects :of past mining practices. The department may bring an injunctive action to restrain interference with the exercise of the right to enter and inspect granted in this subsection.
  - (2) (a) The department may enter upon property pursuant to subsection (2)(b) if it makes a finding that:

- (i) Land or water resources on the property have been adverse!y affected by past mining practices;
- (ii) The adverse effects are at a stage that, in the public interest, action to restore or reclaim the property or to abate, control, or prevent the adverse effects should be taken; and
- (iii) The owners of the land or water resources where entry must be made to restore or reclaim the property or to abate, control, or prevent the adverse effects of past mining practices are not known or readily available or the owners will not give permission for the department or its agents, employees, or contractors to enter upon the property to restore or reclaim the property or to abate, control, or prevent the adverse effects of past mining practices.

- (b) If the department has made findings pursuant to subsection (2)(a), agents, employees, or contractors of the department _may enter upon property adversely affected by past mining practices and other property necessary for access to the adversely affected property to do all things necessary or expedient to restore or reclaim the property or to abate, control, or prevent the adverse effects of past mining practices after:
  - (i) giving notice by mail to the owner, if known, and a purchaser under contract for deed, if known; or
  - (ii) if neither is known, posting notice upon the property and advertising in a newsP,aper of general circulation in the county in which the property lies.
- (c) Entry upon property pursuant to this section is not an act of condemnation of property or oftrespass but rather an exercise ofthe power granted by Article IX, sections 1 and 2, of the Montana constitution.

- Section 82-4-371(1), (2), MCA!

- II. 'Analysis
- A. Preliminary Injunction Factors
- (1) Likelihood of Success on the Merits.

- 11. An applicant seeking a preliminary injunction must establish he or she is likely to succeed on the merits of an underlying claim. Winter, 555 U.S. at 20, 129 S. Ct. at 374; § 27-19- 201(1), MCA. Thus, as the applicant, DEQ has the burden ofmaking out a "prima facie case" but "need not show a certainty of winning." 11 A Charles Alan Wright et al., Federal' Practice & Procedure § 2948.3 (3d ed. 2014); Planned Parenthood of Mont. v. State, 2022 MT 157, ~ 35, 409 Mont. 378, 515 P.3d 301.
- 12. DEQ asserts that it is likely to succeed on the merits ofits claim under§ 82-4- 371(2), MCA ofthe MMRA. The Court agrees.
- 13. Section 82-4-3 71 (2)(b), MCA, provides that "If [DEQ] has made findings pursuant to subsection(2)(a), agents, employees, or contractors of[DEQ] may enter upon property adversely affected by past mining practices and other property necessary for access to the adversely affected property to do all things necessary or expedient to restore or reclaim the property or to abate, control, or prevent the adverse effects of past mining practices after:
  - (i) Giving notice by mail to the owner, if known, and a purchaser under contract for deed, if known; or
  - (ii) If neither is known, posting notice upon the property and advertising in a newspaper of general circulation in the county in which the property 'lies:
- Section 82-4-371(2)(b), MCA (emphasi~ added).
- 14. Thus, to demonstrate a likelihood of success on the merits whereby DEQ could exercise its statutory authority and reclaim the disturbances, it would need to make out a prima facie case that it has satisfied the notice requirements under subsection (2)(b), as well as met the requirements of subsection (2)(a). Under§ 82-4-371(2)(a), MCA, DEQ must make a prima facie showing that:
  - (i); Land or water resources on the property have been adversely affected by past mining practices;

- (ii) The adverse effects are at a stage that, in the public interest, action to restore or reclaim the property or to abate, control, or prevent the adverse effects should be taken; and
- (iii) The owners of the land or water resources where entry must be made to restore or reclaim the property or to abate, control, or prevent the adverse effects of past mining practices are not known or readily available or the owners will not give permission for [DEQ] ·or its agents, employees, or contractors to enter upon the property to restore or reclaim the property or to abate, control, or prevent the adverse effects, of past mining practices.

- 15. DEQ has met its prima facie burden to demonstrate that all elements under§ 82- 4-371(2), MCA, have been met.
- 16. First, DEQ made a prima facie showing that the properties upon which the disturbances exist have been adversely affected by past mining practices. Testimony of Wayne Jepson demonstrated that the properties owned by Ployhar where the disturbances exist were subject to prior reclamation following the conclusion of mining operations at Zortman. Jepson testified that the mining techniques employed by Pegasus resulted in acid mine drainage, which subsequently contaminated the groundwater supply of the town of Zortman and upon which the Fort Belknap Indian Community relies. Jepson also testified that reclamation was completed in 2005, but that ongoing inspection by DEQ and other state and federal agencies remains necessary to address any environmental concerns.
- 17. As part of the reclamation, Jepson testified that prior mining disturbances were backfilled with waste rock, and then approximately 18" of topsoil was placed over the reclaimed areas. and subsequently revegetated. Jepson testified that these reclamation efforts served to essentially seal the deeper bedrock from excess surface water infiltration to avoid acidic groundwater further contaminating the groundwater supply and downstream surface water. Ad4itionally, Jepson testified that an intricate water catchment system was installed in historic adits to capture any water infiltrating into the subsurface, which, through the use of leach pad liners and drainage systems, funnels captured groundwater to the Zortman water treatment plant before it is released. Jepson testified that the total cost for reclamation and water treatment of the Zortman Mine exceeded $80 million and· that water treatment costs are expected to continue in perpetuity.
- 18. Jepson testified that through the creation of Disturbances 1-6, additional surface water can now infiltrate into the deeper bedrock. Jepson testified that the disturbances can now allow for increased surface water to either place additional demands on the water treatment systems, which result in additional costs to Montana taxpayers for treatment. But Jepson also testified that infiltrating water can now more easily bypass the water treatment facilities as well, which cause an increased risk of the formation of acid mine drainage reaching the water supplies of Zortman and the Fort Belknap Indian Community. Likewise, Jepson testified that major precipitation events can result in excess surface water infiltrating into the ground and risks exceeding the capacity of the water treatment facilities, such that not all captured groundwater will be treated.
- 19. Because ofthe concerns of additional acid mine·drainage exacerbated and aggravated by the six disturbances, DEQ is likely to succeed on the merits that these adverse effects are at a stage, in the public interest, that action to reclaim the property and abate, control, or prevent the adverse effects should be taken, without which the surrounding communities, and the state of Montana, more generally, is subject to needless risk offurther groundwater contamination.
- 20. Finally, it is undisputed that Ployhar received notice from DEQ by letter, dated June 2, 2023, that if he was unwilling to reclaim the disturbances, DEQ may do so. And Ployhar responded on June 9, 2023,

that he would not permit DEQ to reclaim the disturbances.

- 21. Without expressing or anticipating the ultimate outcome of the issues on the merits at this stage of the litigation, Yockey v. Kearns Props., LLC, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185, the Court finds that DEQ has made out a prima facie case it is likely to succeed on the merits of its request for permanent injunctive relief under § 82-4-371(2), MCA.

- (2) Irreparable Harm
  - 22. An applicant must also demonstrate irreparable injury is likely for preliminary injunctive relief to issue. Winter, 555 U.S. at 21-23; § 27-19-201(1)(b), MCA.
  - 23. Again, as supported by the testimony of Jepson, the disturbances permit increased water infiltration into the groundwater. Because of these disturbances, increased groundwater demands are placed on the water treatment system in the most favorable circumstances; however, Jepson testified that because the surface disturbances now provide new entry points for water entry into the subsurface, groundwater can now more easily ·bypass these water treatment facilities and/or exceed the treatment capacity for these systems, resulting in contaminated acid rock drainage infiltrating the groundwater and surface water downstream.
  - 24. Ployhar argues that this risk of harm is speculative and, to the extent it does occur, is not irreparable. Doc. 27 at 6. Ployhar's argument is unpersuasive and ignores the standard for irreparable injury.
  - 25. To demonstrate irreparable injury is likely, it must be more than a mere possibility that the harm will come to pass. Winter, 555 U.S. at 21-23. Thus, harm cannot be "speculative," i.e., an "unfounded fear on the part of the applicant." Daniels lfealth Scis., LLC v. Vascular Health Scis., LLC, 10 F.3d 579, 585 (5th Cir. 2013). But the injury need not be occurring nor certain to occur before a court may grant re.lief. United States v. W.T. Grant Co.,.345 U.S. 629, 633,73 S. Ct .. 894, 897 (1953). So long as there is an existing "actual threat" of irreparable injury, the imminence of the harm is satisfied. 11A Charls Alan Wright et al., Federal Practice & Procedure § 2948.1 at 154-55 (2d ed. 1995); Acierno v. New Castle Cnty., 40 F.3d 645, 655 (3d Cir. 1994) (to establish irreparable harm there must be a "clear showing of immediate irreparable injury" or a "presently existing actual threat."). Here, the immediate threat of irreparable harm undoubtedly exists. For over 15 years, the Zortman site had been reclaimed, with both DEQ and federal and state agencies understanding how infiltrating surface water into the ground may be directed to the water treatment facilities to avoid the most damaging effects of the past mining practices by Pegasus. The disturbances disrupt the efficacy of this system. That, because of the disturbances, it is not "certain" that the groundwater will not be subject to water treatment is not dispositive; the very real threat of it bypassing or overloading these treatment systems is sufficient.
  - 26. Likewise, harm to the water resources is irreparable. Irreparable harm is that for which there is no adequate remedy at law, such as an award of money damages. Winter, 555 U.S. at 20. Environmental injury, by its nature, is often irreparable because it "can seldom be adequately remedied by money damages and is often permanent or at least of long duration." Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545 (1987). Here, in the event preliminary relief is not granted and ground and surface water are further contaminated by acid mine drainage, money damages, plainly, will not compensate all the potentially injured parties because the extent of that harm is simply not quantifiable; there is no adequate remedy at law. To borrow Ployhar's characterization, resultant environmental injury to the water supply from these disturbances is "self-evident".
  - 27. Additionally, it should be noted that irreparable harm .. should be determined by reference to the purpose ofthe statute

being enforced." Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 886 F.3d 803 (9th Cir. 20 18) (holding it was not legal or an abuse of discretion to base injunction on lesser magnitude of harm because the ESA's central purpose is to conserve species such that impaired breeding and sheltering ofa listed species, rather than an extension level-threat to listed species, was sufficient). The underlying purpose of the MMRA, more broadly, and the statute upon which DEQ relies, § 82-4-371, MCA, more specifically, is to provide adequate remedies to "prevent unreasonable depletion imd degradation of natural resources" and "protect[] .. . human health and the environment," in furtherance of Article II, Section 3, and Article IX, Sections 1 and 2, of the Montana Constitution. Sections 82-4-301(2)(a)(i), -371(2)(c), MCA (permitting DEQ to "enter upon the property to restore or reclaim the property or to abate, control, or prevent the adverse effects of past mining practices") (emphasis added). Thus, the entire purpose of the authority granted to DEQ under § 82-4-371 is not only remedial, but preventative, ensuring Montanans "have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place." Park Cnty., ¶ 62 (interpreting MEPA's intent and availability of injunctive relief in light of Article IX of the Montana Constitution). For this Court to require a showing that some environmental harm is already occurring to the ground and surface water before a preliminary injunction may issue to restrain an uncooperative landowner would do violence to the preventative nature of § 82-4-371, MCA. That this harm very likely could occur without the necessary preventative abatement of the risk through reclamation of the disturbances is sufficient grounds to find the irreparable injury prong is satisfied.

- 28. DEQ has met its burden to demonstrate a substantial risk of irreparable injury if preliminary relief is not granted.

- (3) Balance of the Equities

- 29. An applicant must also demonstrate that the balance of the equities tips in his or her favor. Section 27-19-201(1)(c), MCA; Winter, 555 U.S. at 20. Thus, the Court must "balance competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Winter, 555 U.S. at 24.
- 30. The Court finds that the balance of the equities factor tips sharply in favor of granting DEQ's request for preliminary relief. As stated, DEQ has met its burden that irreparable injury is sufficiently likely in the absence of preliminary relief; as such, the balance of the harms generally tips in favor of an injunction to protect the environment. Amoco, 480 U.S. at 545. Ployhar, of course, has private property interests. But these interests are not subject to a complete absence of regulation. Indeed,§ 82-4-371(2)(c), MCA, acknowledges that "[e]ntry upon property pursuant to this section is ·not an act of condemnation of property or of trespass but rather an exercise of the power granted by Article IX, sections 1 and 2, of the Montana constitution." As such, reclaiming the disturbances and abating the risk of water contamination in furtherance of the public health, saf~ty, and welfare, is a wholly reasonable burden on these private property interests. Knight v. Missoula, 252 Mont. 232, 242, 827 P.2d 1270, 1276 (1992).
- 31. Ployhar, however, also alleges that pennitting reclamation at this juncture would constitute "spoliation of evidence" and "devastate [Ployhar's] defenses against DEQ's mining. and exploration claims" such that a preliminary injunction should not issue. Doc. 27 at 4 (citing Spotted Horse v. BNSF Ry. Co., 2015 MT 148, ¶ 29, 379 Mol)t. 314, 350 P.3d 350. The Court finds Ployhar's arguments unpersuasive.
- 32. To be sure, as Ployhar asserts, the disturbances themselves are certainly relevant to the underlying claims and

defenses in this action. But Ployhar's argument that he would be prejudiced by the reclamation of these disturbances at this juncture is not availing. Primarily, Ployhar alleges that he has "had no time or opportunity to obtain [his own] expert analysis of the disturbances with respect to [the] analysis of the disturbances themselves, let alone the sufficiency of DEQ's claims in relation to them." Doc. 27 at 3. But as Jepson testified at the hearing, the disturbances were created nearly two years ago. And Ployhar owns the properties upon which the disturbances exist and can access these properties whenever he desires-a markedly different scenario than a typical spoliation claim in which a party to a case has possession of documents or other tangible things the other party does not, and the party in possession either negligently or intentionally destroys evidence upon which the other party will rely in furtherance of their claims or defenses. See, e.g., Spotted Horse, ¶ 39 (finding discovery sanctions appropriate against BNSF for knowingly disposing video footage in their possession of an accident scene). And even presuming Ployhar's assertion that he has "not had time" to secure evidence on his own property for disturbances he created had merit, DEQ is not intentionally or negligently destroying evidence to undermine Ployhar's defenses; it is seeking to ,reclaim the disturbances to avoid the substantial risk of environmental harm.

- 33. Moreover, Ployhar's claims that he did not have sufficient time is belied by the facts. On several occasions that Jepson has· visited the site, Ployhar has been present, including most recently in June 2023. Furthermore, DEQ issued its notice of violations under the MMRA over a year ago, filed its Complaint over three months ago, and filed its motion for a preliminary injunction almost a month ago. Ployhar's assertions that he has not had time to obtain any necessary evidence he believes he will need to mount an adequate defense are simply uncredible. Ployhar, additionally, previously offered to reclaim the disturbances himself, which further undercuts his position that reclamation cannot now be completed.
- 34. Finally, to accept Ployhar's argument as grounds to deny DEQ's statutory right to reclaim land would defeat the very purpose § 82-4-371 was designed for. Mwphy v. State, 229 Mont. 342, 346, 748 P.2d 907, 909 (1987) (noting a court will not interpret a statute so as to defeat its obvious purpose). Section 82-4-371(2)(a) and (o), MCA recognizes that when land or water resources have been adversely affected by past mining practices, are at a stage in the public interest that require reclamation or prevention, and the landowner will not give permission to enter and do all that is necessary to abate, reclaim, or prevent the adverse effects, DEQ can enter the property and do so after providing sufficient notice if the landowner does not consent. It is reasonable to expect that liability may attach to the party that engaged in the mining practices - that resulted in the adverse effects, whether that be the landowner or another party. But the Legislature did not create some contingency in the statute whereby DEQ is prohibited from doing its job if the potentially liable party has not yet had an opportunity to collect necessary evidence to defend itself against a potential claim. Even so, the Court finds equity demands Defendants be allowed to gather evidence and cbmplete their oym analysis prior to the commencement of a preliminary injunction.
- 35. The Court thus finds, in balancing the equities between the parties, that this factor tips sharply in favor of granting preliminary relief.

● (4) Public Interest

- 36. Finally, an applicant for a preliminary injunction must demonstrate that issuing preliminary relief is in the public interest. Section 27-19-201(1)(d), MCA; Winter, 555 U.S. at 20. When analyzing this element, "court of equity should pay particular regard for the public consequences in employing the

extraordinary remedy of injunction." Weinberger v. Romero-Barcelo, 456 U.S. 3 05, 312, 102 S. Ct. 1798, 1803 (1982); see also Cal. Pharmacists Ass'n v. Preiminary Injunction Order 21 Maxwell-Jolly, 596 F.3d 1098, 1114-15-(9th Cir. 2010) (noting that "[t]he public interest analysis for the issuance of a preliminary injunction requires us to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief.") (internal quotations omitted).

- 37. The public interest will not be injured, but rather, benefitted, by the granting of preliminary relief. By restraining Ployhar, DEQ can reclaim the disturbances and avoid unwanted environmental harm, in furtherance of its statutory obligations under the MMRA, see §§ 82-4-30l(l(a), (e), (g) (purpose of the MMRA to fulfill responsibilities and exercise powers delegated by Article IX, section 1(3) and 2(2) of the Montana constitution, provide reclamation, and mitigate or prevent undesirable offsite environmental impacts), -321 (charging DEQ "with the responsibility of administering [the MMRA]") -the execution of which is certainly in the interest of the public. Avoiding unnecessary environmental damage through preliminary injunctive reliefis likewise in the public interest. See Lands Council v. McNair, 537 F.3d 981, 1005 (9th Cir. 2008) (recognizing well-established "public interest in preserving nature and avoiding irreparable environmental injury.").
- 38. The public interest factor, therefore, weighs in favor of granting preliminary injunctive relief.

- B. Status Quo
  - 39. It must also be reiterated that a preliminary injunction is for the limited purpose of preserving the status quo-the last peaceable, noncontested condition preceding the pending controversy-and minimizing harm to all parties. Camenisch, 451 U.S. at 395. "Preserving the status quo," however, is often misunderstood. As federal courts aptly recognize, the "status quo" as referenced in the context of a preliminary injunction is really a "status quo ante." See Holt v. Cont'l Grp., Inc., 708 F.2d 87, 90 (2d Cir. 1982) (referring to reinstatement of benefits as "restoration of the status quo ante"); accord 0 Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 1013 (1Oth Cir. 2004) (en banc) (per curiam) ("requir[ing] a party who has recently disturbed the status quo to reverse its actions ... restores, rather than disturbs, the status quo ante, and is thus not an exception "to the ordinary standard for preliminary injunctions"). This formulation of the status quo in the realm of equities precludes defendants seeking shelter under a current "status quo" precipitated by their wrongdoing. N.Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 883 F.3d 32,37 n. 5 (2d. Cir. 2018).
  - 40. Moreover, "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance ofthe legal issues it presents." Trump v. Int'l Refugee Assistance Project, 582 U.S. 571, 579, 137 S. Ct. 2080, 2087 (2017). Thus, when considering the status quo, the Court necessarily needs consider to what effect further injury or irreparable harm may be prevented. City of Billings v. Cnty. Water Dist, 281 Mont. 219,226,935 P.2d 246,250 (1997). The operative question, therefore, is whether a preliminary injunction can prevent further injury. Mustang Holdings, LLC v. Zaveta, 2006 MT 234, ¶ 15, 333 Mont. 471, 143 P.3d 456.
  - 41. Here, the last peaceable, noncontested condition preceding the pending controversy was that there was no present threat to contamination of the groundwater and surface water from acid mine drainage. Restraining Ployhar from interfering with DEQ's statutory right of entry such that the disturbances can be reclaimed and the risk of environmental harm abated does not alter the status quo; it restores the parties to the status quo

ante and minimizes the risk of future harm to all parties. That DEQ necessarily is going to take some affirmative action does not change this analysis. See, e.g., Mastrio v. Sebelius, 768 F.3d 116, 120-21 (2d. Cir. 2014) (preserving the status quo may require the parties to affirmatively act). The Court therefore finds that, because DEQ has est~blished that it is entitled to preliminary injunctive relief under§ 27- 19-201(1), MCA, and preliminary relief returns the parties to the status quo and minimizes the harm to all parties, injunctive relief is proper.

- NOW, THEREFORE, IT IS HEREBY ORDERED:
  - 1. Plaintiff DEQ'·s request for a preliminary injunction is GRANTED.
  - 2. Defendants Luke Ployhar and Blue Arc, LLC, shall have until September 17, 2023, at 11:59 p.m., to obtain their own expert analysis of the disturbances with respect to analysis of the disturbances themselves and the sufficiency of DEQ's claims in relation to them.
  - 3. Beginning at 12:00 a.m. on September 18, 2023 and continuing for the duration of this action, Defendants Luke Ployhar and Blue Arc, LLC are prohibited from interfering with or obstructing DEQ's statutory right to enter the Ployhar/Blue Arc properties under § 82-4-371(1)-(3), MCA, including any of its employees, agents, or contractors, and doing all that is reasonable and necessary to reclaim Disturbances 1-6 and prevent any additional infiltration of groundwater into the water treatment system and previously reclaimed areas, including backfilling waste rock into the disturbances, covering the disturbances with topsoil, and revegetating the disturbed areas.
  - 4. Before entering the properties for the purposes set herein, DEQ shall provide Ployhar no less than 48 hours advance notice, including disclosing any agents, employees, or contractors who may be entering the properties.
  - 5. DEQ is exempt from providing a written undertaking under § 25-1-402, MCA, as referenced in § 27-19-306, MCA.
  - 6. This Order shall continue in full force and effect until amended, modified, or revoked by a subsequent Order of this Court.
  - DATED this 18th day of August 2023.
  - Yvonne Laird, District Court Judge
  - Cc: Samuel King / Jessica Wilkerson
  - Kaden Keto / Betsy Story
  - Affidavit of Service
  - DV-2023-10
  - I hereby certify that on, August 18, 2023, I served a true and correct copy of the foregoing by maii or email: Order on DEQ'S Request for Preliminary Injunction (x) Emailed: Daniel Belcourt John Bloomquist Abigal Brown Robert Coulter Amanda Galvan Kaden Keto Jessica Wilkerson Samuel King Betsy Story

-- Ruling on R.12(b)(6) Motion

9. **Montana Seventeenth Judicial District Court Phillips County MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY Plaintiff, v. LUKE PLOYHAR, BLUE ARC, LLC., OWEN VOIGT, AND LEGACY MINING, LLC, Defendants. Case No. DV-2023-10.**

- [MAS note: (MDEQ v. Ployhar, et al., Laird, 9/19/2023) Phillips County: Ds seek 12(b)(6) dismissal: 1) the disturbances do not constitute "mining"; 2) DEQ has not shown the disturbances were created "in anticipation of" mining, 3) MMRA uses the term "in anticipation of", not "intent", so DEQ cannot allege intent to mine; 4) DEQ failed to show the soil disturbances were created to determine mineralization; 5) DEQ cannot charge failure to file bonding permits when proof of mining and exploration is lacking; 6) penalties should not be assessed because Ds did not violate the MMRA; 7) complaint fails to establish co-defendants Voigt or Legacy caused the alleged disturbances, Ployhar told DEQ that neither Voigt nor Legacy helped create the disturbances; 8) exhibits and statements against interest are derived or constituted from settlement discussions and should be stricken; (all asserted bases for dismissal are rejected or deferred for

later proceedings)]

- Order On Defendants' Rule 12(b)(6) Motion To Dismiss and Alternative Motion To Strike
- Hon. Yvonne Laird, District Court Judge
  - Before the Court is Defendants Luke Ployhar (Ployhar), Blue Arc, LLC (Blue Arc), Owen Voigt (Voigt), and Legacy Mining LLC's (Legacy) (collectively "Defendants") joint Rule 12(b)(6) Motion to Dismiss and Alternative Motion to Strike DEQ 's Allegations Containing Protected M R. Evid. 408 Settlement Discussions filed on June 2, 2023. Plaintiff Montana Department of Environmental Quality (DEQ) filed their response on June 16, 2023. Defendants filed their reply on June 30, 2023.
- Factual Background
  - On April 21, 2023, DEQ filed a complaint against Ployhar, Blue Arc, Voigt, and Legacy alleging four counts of violations of the Metal Mine Reclamation Act (MMRA) regarding excavations on Ployhar's property which is located within the former Zortman mine site. The counts are for violating the MMRA by (I) conducting mining activities without an operating permit, (II) exploration without an exploration license, (III) failure to post performance bond, and (IV) a request for injunctive relief. Defendants have now filed a Motion to Dismiss under Rule 12(b)(6) on all counts for failure to state a claim and to dismiss Voigt and Legacy from the case entirely. Defendants set forth eight arguments in their original motion.
  - The first argument is the disturbances do not constitute "mining" under the MMRA because the MMRA defines "mining" as commencing when the operator first mines ores or minerals in commercial quantities for sale, beneficiation, refining, or other processing or disposition and DEQ has not alleged Defendants mined in commercial quantities, that the quantities were for sale, beneficiation, refining, or other processing or disposition, or that the Defendants removed bulk samples in excess of the aggregate of 10,000 short tons. In their response, DEQ argues the disturbances were a violation of §82-4-335(1), MCA because they were made in anticipation of mining, rather than a violation of§ 82-4-303(17), MCA.
  - The Defendant's second argument is DEQ has not shown the disturbances were created "in anticipation of" mining because DEQ has not alleged any facts connecting the disturbances to mining, ore processing, or reprocessing of tailings or waste material. DEQ's response reiterates that the disturbances themselves are the alleged violations.
  - The Defendants also argue the MMRA has no intent element because the statute uses the term "in anticipation of". DEQ's complaint listed "intent to mine" and Defendants argue because the statute does not specifically use the word "intent" DEQ cannot allege Defendants created the disturbances with intent to mine. Defendants assert that DEQ's use of "intent" instead of "in anticipation of" means the claimed violation of the MMRA cannot be substantiated or proven. DEQ's response points out the similarities between "in anticipation of" and "intent" and that Defendants cannot create the disturbances "in anticipation of" mining activities without the intent to create said disturbances.
  - The Defendants further argue the alleged disturbances do not constitute exploration because there is no "anticipation" element of the exploration portion of the MMRA and DEQ must show the disturbances were created to determine mineralization of the land at that time. DEQ notes in their response that they did allege the Defendants created the disturbances for exploration and do not need to provide more specific pleadings under M. R. Civ. P. Rule 8.
  - The fifth argument made by Defendants is if Counts I and II are dismissed, so must be Counts III and IV. Defendants claim that Counts III and IV are contingent upon Counts I and II, respectively and because DEQ failed to state a claim on mining and exploration Defendants cannot be held liable for

failure to file bonding permits for mining and exploration and should not be injuncted from continuing to disturb the land. DEQ's response to this claim states the Defendants have not met the burden under Rule 12(b)(6) and as such, they are not entitled to dismissal of Counts I-IV.

- The Defendants also argue penalties should not be assessed against Defendants for Counts I, II, and III because they have not violated the MMRA and therefore should not have to pay penalties for the alleged violations. DEQ's response is the same as for the dismissal of all counts. DEQ claims Defendants have not met the burden for dismissal and therefore are not entitled to dismissal of penalties.
- The Defendants next claim DEQ's complaint fails to establish Voigt or Legacy caused the alleged disturbances. Defendants state Ployhar told DEQ that neither Voigt nor Legacy helped create the disturbances and that Voigt helped with some of the applications and paperwork for permits. Defendants argue that the license applications submitted with Voigt and Legacy that included some of the disturbances in DEQ's complaint does not implicate Voigt and Legacy in creating the disturbances. DEQ's response states Voigt was a representative for Ployhar, as DEQ stated in the Complaint, and as such the Defendants collectively caused the disturbances and engaged in mining and exploration. DEQ also notes the Defendants' dispute of factual matters in this part of the motion and reiterates a previous statement that on a motion to dismiss the allegations in the Complaint are taken to be the truth and not subject to factual dispute based on the decision in Anderson v. ReconTrust Co. 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692.
- Finally, the Defendants submitted an alternative Motion to Strike DEQ's allegations containing protected settlement discussions. Citing Rule 12(f) of the Montana Rules of Civil Procedure and Rule 408 of the Montana Rules of Evidence, the Defendants claim the statements derived or constituted from settlement discussions between the parties are not admissible and requests the Court strike Paragraphs 62-70 and Exhibits G-R of the complaint. DEQ's response asserts Defendants fail to meet the Rule 12(f) burden because the Rule requires the material to be redundant, immaterial, impertinent, or scandalous. To meet the burden, the requested relief must be unavailable, and the material must be prejudicial. DEQ argues the material at bar does not meet the requirements, the requested relief is available, and Defendants have failed to show the material is prejudicial.
- Notably, DEQ's response underlines the notice pleading standard and contends they have met the requirements for pleading on all counts, Defendants are asking for a higher specificity in the pleading than required, and Defendants have not met the burden to entitle them to dismissal.

- Standard of Review
  - A complaint should not be dismissed under Rule 12(b)(6) unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of a claim" entitling the plaintiff to relief. Snetsinger v. Mont. Univ. Sys., 2004 MT 390, ¶ 10, 325 Mont. 148, 152, 104 P.3d 445, 449. In considering a motion to dismiss for failure to state a claim, the complaint is "construed in the light most favorable to the plaintiff" and all allegations of fact in the complaint are "taken as true." Id.
  - As for the MMRA, §82-4-303(17) defines "mining" as commencing "when the operator first mines ores or minerals in commercial quantities for sale, beneficiation, refining, or other processing or disposition or first takes bulk samples for metallurgical testing in excess of the aggregate of 10,000 short tons." §82-4-335 states a person may not engage in mining activities or "disturb the land in anticipation of" mining activities without first obtaining an operating permit. §82-4-303(12)(a) defines "exploration" as "all activities that are conducted on or beneath the surface of lands and that

result in material disturbance of the surface for the purpose of determining the presence, location, extent, depth, grade, aud economic viability of mineralization in those lands, if any, other than mining for production aud economic exploitation." § 82-4-331 requires a person engaging in exploration to first obtain a license from DEQ aud § 82-4-332 requires a $100 fee, a reclamation agreement, a reclamation and revegetation bond, and an application including a map or sketch of the area to be explored and a description of the exploration activities to be conducted.

- Rule 8 of the Montana Rules of Civil Procedure requires a claim for relief to include a "short and plain statement of the claim showing the pleader is entitled to relief" and a demand for relief.
- Rule 12(f) of the Montana Rules of Civil Procedure concerns pleadings and states "(t)he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The Court can act on its own or on motion by a party before a response to the pleading. M. R. Civ. P. 12(f)(1), (2).
- Finally, Rule 408 of the Montana Rules of Evidence addresses compromise and offers to compromise. It states that evidence of offering, promising, or actually furnishing or offering, promising, or actually accepting a compromise or attempting to compromise a disputed claim is inadmissible to prove liability for the claim. Conduct and statements made during compromise negotiations are also inadmissible to prove liability.·

- Discussion
  - Here, the Court should not dismiss the counts unless DEQ cannot prove any set of facts supporting their claims that would entitle them to the relief requested.
  - Regarding Count I, the first question is the relevancy of the definition of "mining" under the MMRA. DEQ is not alleging mining, DEQ is alleging an intent to mine, as stated in their original complaint and response to the motion. Because of this, the definition of mining is not as relevant to the 12(b)(6) motion as the part of the statute DEQ is alleging injuries under. DEQ is alleging injuries under the section of the MMRA that includes disturbing the land "in anticipation of" mining under the activities requiring a permit.
  - The second issue regarding Count I is whether DEQ properly connected the disturbances to mining activities. DEQ is held to the standard in Rule 8 which requires a plain statement explaining the injury and the relief requested. DEQ does not, at pleading, have to argue specifics. DEQ's allegations are that the disturbances were created with the intent to conduct mining activities. Based on all the documents filed thus far, these disturbances are all close to former mining adits. Disturbing the land to uncover mining adits is connected to mining activities because of the existing history of the site.
  - The third issue regarding Count I is the difference between DEQ's use of the word "intent" and the statute's use of the phrase "in anticipation of". This is a semantic argument that does not raise the question of whether DEQ properly claimed injuries that can be relieved by the Court. DEQ alleges the Defendants had the intent to mine without a permit, as prohibited by the MMRA.
  - Regarding Count II, Defendants argue there is no "anticipation" portion of the exploration section of the MMRA, so they cannot be held liable for the intent to explore. DEQ is not alleging an intent to explore, DEQ is alleging exploration in itself by creating the disturbances. Whether the disturbances were created for the purposes of determining the "presence, location, extent, depth, grade, and economic viability of mineralization", as required by the statute, is a question of fact, which is not before the Court.
  - Regarding the argument that DEQ failed to plead Counts I and II properly, so Counts III and IV must also be dismissed, the Court does not find Counts I and II were improperly pled. The following argument that penalties requested for Counts I, II, and III should

be dismissed because DEQ failed to properly state the related claims is similar because DEQ has stated the claims necessary for Counts I- IV and so the penalties need not be dismissed.

- The final argument in the motion to dismiss is that Voigt and Legacy should not be included in the claims because DEQ has failed to show their involvement with the allegations. DEQ's complaint alleges the actions against all the Defendants collectively and states that Voigt has acted as an agent for Ployhar by communicating with DEQ on projects on Ployhar's land, by assisting Ployhar with applications and documents for DEQ, and Voigt's company, Legacy, was involved in the creation of the disturbances, whether or not Voigt and Legacy were involved to the extent DEQ has alleged is a question of fact.
- Regarding the Alternative Motion to Strike paragraphs 62-70 and exhibits G-R, Paragraph 67 and Exhibit 0 were already admitted as evidence at the August 4, 2023 hearing and as such are moot. Regarding Paragraphs 62-66 and 68-70 and Exhibits G-N and P-R, while Defendants argue the evidence aligns with the Rule, their reasoning is because it violates Rule 408. These rules govern different issues, where Rule 12(f) concerns materials at pleading, Rule 408 concerns evidence presented at a trial. A Rule 408 violation is not before the Court at this time, so the Defendants must show the materials should be stricken because they are "redundant, immaterial, impertinent, or scandalous". M.R.Civ.P. Rule 12(f). Defendants argue that because the evidence violates Rule 408, it is impertinent and scandalous. That is not an issue that Rule 12(£) can remedy, as it is an evidentiary issue.
- IT IS HEREBY ORDERED that:
- 1. Defendant's motion to dismiss is DENIED.
- 2. Defendant's motion to strike is DENIED.
- 3. The Clerk shall send a copy of this Order to counsel of record.
- DATED this 19th day of September, 2023.
- CERTIFICATE OF SERVICE
- DV2023-10
- I hereby certify that on September 19, 2023, I served a true and correct copy of the foregoing: Order on Defendants' Rule 12(b)(6) Motion to Dismiss and Alternative Motion to Strike to:
- E- Mailed:
- Daniel Belcourt
- John Bloomquist
- Abigail Brown
- Robert Coulter
- Amanda Galvin
- Kaden Keto
- Samuel King
- Betsy Story
- Jessica Wilkerson
- Tami R Christofferson, Clerk of District Court
- Toni Smith, Deputy Clerk of District Court

-- New Plaintiffs: Intervention Granted, Denied

10. **Montana Seventeenth Judicial District Court Phillips County MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY Plaintiff, v. LUKE PLOYHAR, BLUE ARC, LLC., OWEN VOIGT, AND LEGACY MINING, LLC, Defendants. FORT BELKNAP INDIAN COMMUNITY, MONTANA ENVIRONMENTAL INFORMATION CENTER, EARTHWORKS, AND MONTANA TROUT UNLIMITED, Intervenors. Case No. DV-2023-10.**

- [MAS note: (MDEQ v. Ployhar, et al., Laird, Phillips County, 9/29/2023) the tribes established a legal interest because of their rights in waters from the Little Rocky Mountains and because of their cultural, spiritual, and historical ties, while the conservation groups do not have such an interest; they have failed to show that advocating for a cause is a legally protectable interest that would allow for intervention under either the MMRA or Rule 24(a); intervention is a discretionary judicial efficiency rule used to avoid delay, circuity, and multiplicity

of suits, Grenfell v. DuffY (1982); allowing the conservation groups to intervene would be adverse to judicial economy]

- Order on Motion to Intervene
- Hon. Yvonne Laird, District Court Judge

  - Before the Court is Fort Belknap Indian Community (FBIC or the 'Tribes"), Montana Environmental Information Center (MEIC), Earthworks, and Montana Trout Unlimited's (MTU) (together, "Conservation Groups) (together, proposed Intervenors) Motion to Intervene filed on June 21,2023. The Tribes and Conservation Groups filed a brief in support of the motion, a proposed complaint, and a corporate disclosure statement on the same day. The Montana Department of Environmental Quality (DEQ) filed a response in support of the motion to intervene on July 3, 2023. The Defendants filed a response in opposition to the motion to intervene on July 6, 2023. The proposed Intervenors filed a reply brief in support of the motion to intervene on July 21,2023.
- Factual Background
  - On April 21, 2023, DEQ filed a complaint against Ployhar, Blue Arc, Voigt, and Legacy alleging four counts of violations of the Metal Mine Reclamation Act (MMRA) regarding excavations on Ployhar's property which is located within the former Zortman mine site. The counts are for violating the MMRA by (I) conducting mining activities without an operating permit, (II) exploration without an exploration license, (III) failure to post performance bond, and (IV) a request for injunctive relief.
  - The motion to intervene was brought pursuant to Montana Rule of Civil Procedure 24(a) and MCA § 82-4-354(3)(b). The proposed Intervenors argue first that their motion is timely. The Defendants do not object to the motion's timeliness.
  - The proposed Intervenors then assert that they have substantial interests in the matter as required by the MMRA and Rule 24(a)(2). The Tribes argue that they have "substantial and legally protected sovereign, cultural, spiritual, environmental, recreational, and aesthetic interests" because of the Little Rocky Mountains' significance to the Tribes. The Little Rocky Mountains have been traditionally used for cultural, spiritual, hunting, and fishing activities, and are the headwaters of the Reservation's water sources. Importantly, the Tribes have rights to the waters in the Little Rocky Mountains. The Tribes note the environmental impacts the past mining activities had on the Reservation's water sources.
  - The Conservation Groups argue they have substantial interests because they all have been involved in advocating for reclamation of the site through litigation, stakeholder meetings, and other efforts according to their individual interests. The proposed Intervenors assert that the alleged activity threatens to harm their interests in reclamation of the mining site.
  - The proposed Intervenors also claim they do not need to prove DEQ's inadequacy in representing the intervening parties' interests because the MMRA allows for intervention without this standard. MCA § 82-4-354. Further, the proposed Intervenors assert that DEQ represents the broader public interest and cannot adequately represent the Tribes or Conservation Groups' interests because of the Tribes and Conservation Groups' specific interests. DEQ stated in their response that DEQ agrees that they cannot adequately represent the proposed Intervenors' interests.
  - The Defendants object to intervention, claiming the proposed Intervenors' interest is adequately represented by DEQ because the Tribes and Conservation Groups are asking for the same relief as DEQ, that DEQ is already arguing everything the proposed Intervenors would, and that the interests" of the proposed Intervenors are not sufficiently related to the action because they have no right to the use or enjoyment of the property and have not shown that their interests may be adversely affected.

Defendants point to the proposed Intervenors' use of case law where public land was at issue and note that this is privately owned land. In their reply brief, the proposed Intervenors reiterate their interests in clean water and reclamation, that the MMRA does not require intervenors to demonstrate inadequacy of representation, that DEQ represents broader interests, and that they may not make all the same arguments as DEQ.

- The proposed complaint describes the effects of the Zortman-Landusky mines on the Reservation's water sources and the Tribes and Conservation Groups' advocacy for reclamation over the last 30 years. The complaint continues to describe the disturbances DEQ found on the site and realleges the counts brought by DEQ.

- Standard of Review
  - Montana Rule of Civil Procedure 24(a) requires the Court to allow anyone to intervene who has the "unconditional right to intervene" according to statute or who "claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest." The Montana Supreme Court notes that Rule 24(a) is "almost identical" to the Federal Rule 24(a), which states that applications to intervene as a matter of right must "(1) be timely; (2) show an interest in the subject matter of the action; (3) show the protection of the interest may be impaired ... ; and (4) show that the interest is not adequately represented by an existing party", and that all four criteria must be satisfied to intervene. Estate of Schwenke v. Becktold (1992), 252 Mont. 127, 131, 827 P.2d 808, 811. To show an interest, movants must make a "prima facie showing of a direct, substantial, legally protectable interest in the proceedings" to support a claim for intervention. Loftis v. Loftis, 2010 MT 49, ~ 13, 355 Mont. 316, ~ 13, 227 P.3d 1030,, 13.Aniballi v. Anibal/i (1992), 255 Mont. 384,387,842 P.2d 342,344.
  - The MMRA, states, "A person having an interest that is or may be adversely affected may intervene as a matter of right in the civil action" when the department has already brought a civil action to enforce the MMRA. MCA § 82-4-354(3)(b).
- Discussion
  - To support a claim for intervention, the Tribes and Conservation Groups must make a "prima facie showing of a direct, substantial, legally protectable interest in the proceedings." Upon review, the Court does not find the Conservation Groups have such an interest. The Conservation Groups have failed to show a legal interest because they have failed to show that advocating for a cause is a legally protectable interest that would give them the statutory right to intervene under either the MMRA or Rule 24(a). Further, the Montana Supreme Court has stated "the intervention rule is a discretionary judicial efficiency rule used to avoid delay, circuity, and multiplicity of suits." Grenfell v. DuffY (1982), 198 Mont. 90, 95,643 P.2d 1184, 1187. Allowing the Conservation Groups to intervene in this case would be adverse to judicial economy. However, the Tribes have established such an interest because of their right to the waters from the Little Rocky Mountains and because of their cultural, spiritual, and historical ties to the site.
  - While the MMRA does allow for intervention without mentioning the requirement to show an inadequacy in representation by existing parties, the Rules of Civil Procedure still apply and must be met. Here, the Tribes' request must be timely, show an interest, show their interest would be harmed without intervention, and show that DEQ cannot adequately represent their interest. The request is timely, and the Defendants do not argue otherwise, so the first requirement is met. The Tribes have shown an interest, as discussed previously, so the second requirement is

met. The Tribes assert that their interest would be harmed if the Defendants continue the alleged conduct because they have already been harmed by past mining activity and the reclamation of the sites is important to the mitigation of the past pollution and the prevention of future water pollution. This meets the third requirement of Rule 24(a). Finally, the Tribes must show that DEQ cannot represent their interest adequately. DEQ has said they cannot, and the Tribes have asserted that because their interest is related to their own sovereignty and ability to enjoy their water rights, DEQ cannot adequately represent their interests while representing the broader public interest in enforcing the MMRA. It should be noted that DEQ is a state regulatory agency, and the Tribes are a federally sovereign nation. As a state agency, DEQ cannot adequately serve the interests of the Tribes because DEQ does not serve the Tribes or their interests. Because of this, the fourth requirement of Rule 24(a) is met.

- IT IS HEREBY ORDERED that:
- 1. The Tribes' motion to intervene is GRANTED.
- 2. The Conservation Groups' motion to intervene is DENIED.
- 3. The Clerk shall send. a copy of this Order to counsel of record.
- DATED this 19th day of September 2023.
- /S/ Yvonne Laird, District Judge

-- Motion for Stay Denied

11. **Montana Seventeenth Judicial District Court Phillips County MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY Plaintiff, v. LUKE PLOYHAR, BLUE ARC, LLC., OWEN VOIGT, AND LEGACY MINING, LLC, Defendants, FORT BELKNAP INDIAN COMMUNITY, Intervenors. Case No. DV-2023-10.**

- [MAS note: (MDEQ v. Ployhar, et al.; Laird, Phillips County, 1/17/2024) Ds move for a stay pending appeal, arguing they did not have enough time to complete discovery before DEQ began reclamation, which causes Ds irreparable harm and is a hardship; Ds had a month to gather necessary evidence and waited to file this motion for a stay until a few days before DEQ was allowed to begin reclamation; DEQ has been on the property multiple times since, so even if reclamation did impede Ds' ability to gather evidence, the disturbances have been reclaimed; stay is denied]
- Order On Defendants' Motion To Stay Proceedings
- Hon. Yvonne Laird, District Court Judge
  - Before the Court is Defendants', Luke Ployhar and Blue Arc, LLC (collectively "Ployhar"), Motion to Stay Proceedings filed on September 15, 2023. Plaintiff Montana Department of Environmental Quality ("DEQ") filed their response in opposition on September 29, 2023. Thereafter, Ployhar filed their reply on October 16, 2023. This motion has been fully briefed and is ready for ruling.
- Factual Background
  - On April 21, 2023, DEQ filed a complaint against Ployhar, Blue Arc, Voigt, and Legacy alleging four counts of violations of the Metal Mine Reclamation Act (MMRA) regarding excavations on Ployhar's property which is located within the former Zortman mine site. The counts allege the MMRA was violated by (I) conducting mining activities without an operating permit, (II) exploration without an exploration license, and (III) failure to post performance bond. DEQ also advanced a request for injunctive relief in Count IV.
  - This Court granted a Preliminary Injunction on August 18, 2023. The injunction allows DEQ to enter the properties involved and reclaim the disturbances. Thereafter, Ployhar filed an appeal of the preliminary injunction with the Supreme Court on September 15, 2023. On the same day, Ployhar brought the Motion to Stay currently before the Court.
  - Ployhar asserts the preliminary injunction will impede their ability to collect primary evidence. Ployhar argues the

inability to collect evidence will create an irreparable injury to Ployhar. In response, DEQ claims the issue is moot because DEQ has already started reclaiming the disturbances. The motion was filed the Friday before the Monday DEQ was to be on the property and, as of this order, the sites have been reclaimed. Ployhar also argues they are incapable of supporting their request to stay the injunction because they do not have a copy of the transcript from the August 4, 2023 hearing.

- Ployhar would like to assert a claim the Court relied on unsubstantiated facts to grant the injunction but argues they cannot because they lack the transcript. These alleged unsubstantiated facts include statements on water infiltration and the failure of the water catchment and water treatment facilities. However, Ployhar offered no support for this argument, and instead attached an exhibit showing their attempts to obtain a copy of the transcript.
- Finally, Ployhar concedes that DEQ has already reclaimed the disturbances but claims the issue is not moot because DEQ is allowed to continue their presence on the property and will expect Ployhar to pay the costs of reclamation. Ployhar believes paying for the reclamation constitutes a hardship, but gives no context, statute, or case law to support this claim.

- Standard of Review
  - Rule 22 of the Montana Rules of Appellate Procedure governs stays. The Rule states, "A party shall file a motion in district court" "to stay a judgment or order of the district court pending appeal", "for approval of a supersedeas bond," or "for an order suspending, modifying, restoring, or granting an injunction pending appeal." Mont. R. App. P. 22(a). There is no requirement to show good cause in the district court, but the standard for a motion filed in the supreme court must show good cause. Mont. R. App. P. 22(2). The district court must enter a written order including in the "findings of fact and conclusions of law, or in a supporting rationale, the relevant facts and legal authority" on which the order is based. Mont. R. App. P. 22(1)(d).
- Discussion
  - Ployhar does not need to show good cause in this Court, however because Ployhar argued they have good cause, this Court will consider the arguments. Good cause is defined as a legally sufficient reason and the burden is on the litigant to demonstrate why the request should be granted. Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC No. DA 22- 0064(Aug. 9, 2022), 2022 Mont. LEXIS 735, at *5. This means Ployhar has the burden of showing why the Court should grant their request.
  - Ployhar's argument is they did not have enough time to complete discovery before DEQ began reclamation and DEQ's ability to enter the property and charge Ployhar for the reclamation expenses throughout the proceedings causes irreparable harm and is a hardship. Ployhar had a month to gather necessary evidence to support their argument. Because Ployhar waited to file this Motion until a few days before DEQ was to be allowed to reclaim the disturbances, DEQ has already begun reclamation. DEQ has been on the property multiple times since. At this point, even if the reclamation did impede Ployhar's ability to gather evidence, the disturbances have been reclaimed. Further, this issue was discussed at the hearing on August 4, 2023 and was already considered by the Court when issuing the order on the preliminary injunction.
  - Ployhar conceded DEQ has already reclaimed the disturbances but argues DEQ's continued presence on the properties causes harm because DEQ will expect Ployhar to pay for the reclamation once the proceedings have ended. Whether Ployhar will have to pay those expenses is not an issue before the Court at this time. Further, minimizing Ployhar's expenses is not a legally sufficient reason to grant a stay, as there is no case law or statute citing minimizing expenses that

are required by statute as good cause for granting a stay.

- Finally, Ployhar argues they are incapable of supporting an argument that the Court relied on insufficient support in granting the injunction because they have been unable to obtain a copy of the official transcript. The Court cannot rule on an assertion that has not been substantiated. However, given the nature of the assertion, the Court reviewed the transcript from the August 4 hearing and can confirm water infiltration and the failure of the water treatment facility and the water catchment were addressed throughout the August 4, 2023 hearing.
- Considering that DEQ has already entered the site and reclaimed the disturbances and given the lack of statutory or case law support for Ployhar's argument of good cause, and good cause appearing,
- IT IS HEREBY ORDERED that:
- 1. Defendant's motion to stay the preliminary injunction is DENIED.
- 2. The Clerk shall send a copy of this Order to counsel of record.
- DATED this 17th day of January 2024.
- /S/ Yvonne Laird, District Judge
- Affidavit of Service
- DV-2023-10
- I hereby certify that on, January 17, 2024, I served a true and correct copy of the foregoing by mail or email Order on Defendants' Motion to Stay Proceedings (x) Emailed:
- Amanda Galvan
- Kaden Keto
- Samuel King
- Betsy Story
- Jessica Wilkerson
- Robert Coulter
- Abigail Brown
- John E. Bloomquist
- Daniel Belcourt
- Tami R. Christofferson, Clerk of District Court

Montana Advance Sheets

A Weekly Compendium of Court Rulings of:

Montana Supreme Court
State Trial Courts
Federal Trial Courts

Friday, April 12, 2024

FEDERAL TRIAL COURTS

CONTENTS

(Use Bookmarks to navigate between cases)

Tortious DPHHS License Revocation Marijuana Provider

12. **In The United States District Court for The District of Montana Billings Division STEVEN PALMER d/b/a MONTANA ORGANIC MEDICAL SUPPLY, Plaintiff, vs. MONTANA DEPARTMENT OF HEALTH AND HUMAN SERVICES; DARCI WIEBE in her individual and official capacity; JAMIN GRANTHAM, in his individual and official capacity; CITY OF BILLINGS; STEVE HALLAM in his individual and official capacity; and JOHN DOES 1-10, Defendants. CV 21-38-BLG-SPW-TJC Consolidated with Member Case: No. CV 22-25-BLG-SPW-TJC.**

- [MAS note: (Steven Palmer dba Montana Organic Medical Supply v. Montana DPHHS (Cavan 2/5/2024)): challenge to Yellowstone County District Court judicial review of administrative revocation of marijuana provider license;

in this federal case P alleges negligence, negligent misrepresentation, tortious interference, defamation, conspiracy and Dorwart claims; collateral estoppel is addressed: were issues adequately deliberated and firm and not avowedly tentative conclusions reached, was the decision set out in a reasoned opinion, was appeal available, and was there a full and fair opportunity to litigate; the court rules that the state court did not establish finality or afford a sufficient process (no discovery, no clear final judgment from the court) to D; on cross motions for summary judgment, the court denies summary judgment to P on his negligence and negligent misrepresentation issues (Count II) and Dorwart v Caraway (2002) remedy availability issue (Count VI); and grants D's summary judgment as to defamation and conspiracy and partially grants summary judgment as to negligence and the Dorwart issue]

- Findings and Recommendation of U.S. Magistrate Judge
- Hon. Timothy J. Cavan, United States Magistrate Judge
  - This action arises out of the revocation of Plaintiff Steven Palmer d/b/a Montana Organic Medical Supply's medical marijuana provider license. Presently before the Court are Plaintiff's Motion for Collateral Estoppel (Doc. 74), Plaintiff's Motion for Partial Summary Judgment on Count II and VI (Doc. 79), and the State's Motion for Summary Judgment (Doc. 80). 1 The motions are fully briefed and ripe for the Court's review. 1 Plaintiff's Motion for Collateral Estoppel and Motion for Partial Summary Judgment on Count II and VI were also filed in Member Case CV -22-25-BLGSPW- TJC at Docs. 33 and 38. The motions in the Member Case are identical to
  - Having considered the parties' submissions, the Court RECOMMENDS Plaintiffs Motion for Collateral Estoppel be DENIED~ Plaintiffs Motion for Partial Summary Judgment be DENIED, and the State's Motion for Summary Judgment be GRANTED in part and DENIED in part.
- I. BACKGROUND2
  - Plaintiff became a licensed medical marijuana provider in 2011, and he renewed his license in May 2018. (Doc. 82-2 at ,-r 1, 82-26 & 27.) Under his 2018 license, Plaintiff was authorized to cultivate marijuana and operate a marijuana dispensary. Plaintiffs cultivation property was located at 2896 US Highway 89 S, Unit A, Emigrant, Montana. (Doc. 82-27.) His dispensary was located in Billings Montana. (Doc. 82-26.)
  - On June 13, 2018, the Montana Department of Health and Human Services (DPHHS) inspected the cultivation facility, and it inspected the dispensary on June 15, 2018. (Doc. 89 at ,-r 7.) Both inspections were conducted by DPHHS inspectors Jamin Grantham and Kim Speckman. (/d. at ,-r 8.)
  - On June 18, 2018, Grantham wrote a memo to Medical Marijuana Bureau Chief Darci Wiebe, summarizing the inspections, and recommending "that Steven the motions in this Lead Case. Therefore, this Findings and Recommendations addresses all pending motions in the consolidated actions. 2 The background facts set forth here are relevant to the Court's determination of the pending motions and are taken from the parties' submissions and are undisputed except where indicated. Palmer's provider and dispensary license be revoked immediately." (Doc. 78-5 at 5.)
  - Prior to any action on the recommendation, Plaintiff sent an email to DPHHS and others on July 19, 2018, advising of his intention to relinquish his provider's license. Plaintiff stated that he intended to merge with another provider, Lionheart Caregivers, by July 25, 2018, and "[e]ffective on that date, I choose to relinquish my status as an independent Provider .... " (Doc. 82-31.)
  - DPHHS issued a Registered Premise Inspection Report on July 25, 2018, which Plaintiff received on or about August 7, 2018. (Doc. 78-4~ Doc. 82-2 at~ 21.) The Inspection Report identified

seven areas of concern, five statutory violations and five administrative violations. (Doc. 78-4 at 6-8.) The "Corrective Action Items" section of the Report stated "[p]lease provide proof by no later than 9.18.18 that all violations have been rectified." (Id. at 8.)

- On August 13, 2018, however, Wiebe issued an Order Revoking Provider License and Notice for Judicial Review ("Revocation Order"), that immediately revoked Plaintiffs license. (Doc. 75-3.) The Revocation Order was based on the same code violations that were noted in the Inspection Report. (!d.~ Doc. 78-4.)
- Upon receipt of the revocation order, Plaintiff again emailed Darci Wiebe and expressed his surprise in receiving the order, "particularly because [on] July 19, 2018, I sent the Department formal notification that I was relinquishing my license, effective July 25." (Doc. 82-31.) Plaintiff advised that the merger with Lionheart was incomplete, but he stated: "I don't consider myself a licensed Provider at this time or since the end of last month." (!d.)
- Nevertheless, Plaintiff subsequently filed a petition for judicial review in Montana's Thirteenth Judicial District Court, Yellowstone County on September 12,2018. (Doc. 75 at 13-16.) On September 14, 2018, District Court Judge Harris granted a temporary restraining order, pursuant to Mont. Code Ann. § 2-4-702(3), staying revocation of Plaintiffs license pending a hearing on the matter. (Doc. 75- 2.) Judge Harris further found that Plaintiffs motion "satisfies the requirements of Mont. Code Ann.§ 27-19-315 and can be issued without notice to [DPHHS]." (!d.) Judge Harris set a hearing on the matter for September 19, 2018. (!d.)
- At the hearing, both Plaintiff and DPHHS appeared with counsel. (Doc. 7 5- 4.) Plaintiff, Wiebe and Grantham provided testimony, and counsel presented oral argument. (!d.) Following the hearing, Judge Harris gave the parties additional time to submit further briefing. (!d. at 119-120~ Doc. 75-3.)
- On October 1, 2018, Judge Harris issued Findings of Fact and Conclusions of Law and Order. (Doc. 75-5.) Judge Harris made several factual and legal findings, and stated "the Revocation Order is unlawful and should be reversed." (!d. at 1 0.) Judge Harris noted, however, that it was unclear what remedy Plaintiff sought. (!d.) Thus, Judge Harris stated that "[b]efore issuing a final judgment, the Court requires additional information from the parties." (!d.) Judge Harris also continued the stay of enforcement of the August 13, 2018 Revocation Order "[u]ntil further Order of the Court." (!d.)
- Prior to the issuance of any further order, however, the parties agreed to dismiss the petition, and District Court Judge Davies dismissed the matter without prejudice on March 8, 2019.3 (Doc. 75-6.) In the order, Judge Davies noted that "the parties agree that this Petition for Judicial Review is not the proper mechanism to afford Petitioner full redress for the harm caused by the revocation[.]" (Id. at 3.) She further stated that the "Court's prior rulings set forth in the Findings ofFact, Conclusions of Law, and Order dated October 1, 2018 are incorporated herein." (Id. at 3-4.)
- On April 6, 2021, Plaintiff initiated this action. (Doc. 1.) Plaintiffs pending claims against the State include negligence/negligent misrepresentation (Count II), tortious interference (Counts III-IV), defamation (Count V), Dorwart claims (Count VI), and conspiracy (Count VII).

- II. COLLATERAL ESTOPPEL
  - Plaintiff moves for collateral estoppel in conjunction with his motion for partial summary judgment. Plaintiff argues Judge Harris' October 1, 2018 Order 3 Judge Davies took over the case after she became a judge in the 13th Judicial District Court, Yellowstone County. resolved many of the issues now before the Court, and therefore, the State should be collaterally estopped from relitigating or disputing certain findings and conclusions of law found within Judge Harris' Order. The State counters that

collateral estoppel does not apply.
- Federal courts must give the same collateral estoppel and res judicata effects to the judgment of state courts, as the state itself would. 28 U.S.C. § 1738~ Engquistv. Or. Dep'tofAgric., 478 F.3d 985,1007 (9thCir. 2007). Therefore, the relevant test here "is whether the state court decision 'meets the state's own criteria necessary to require a court of that state to give preclusive effect' to the decision." Id. (quotingDias v. Elique, 436 F.3d 1125, 1128 (9th Cir. 2006)).
- Collateral estoppel (issue preclusion) and res judicata (claim preclusion) "are doctrines that embody a judicial policy that favors a definite end to litigation." Baltrusch v. Baltrusch, 130 P.3d 1267, 1273 (Mont. 2006). Plaintiff asserts the application of collateral estoppel, which "bars the reopening of an issue that has been litigated and resolved in a prior suit." Adams v. Two Rivers Apartments, LILP, 444 P. 3d 415, 419 (Mont. 20 19). In Montana, collateral estoppel applies when the following are met: (1) the identical issue raised was previously decided in a prior adjudication~ (2) a final judgment on the merits was issued in the prior adjudication~ (3) the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication~ and (4) the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred. Id. at 1274. Each of these elements will be discussed below.

- A. Identical Issues/Parties
  - The parties do not contest that the issues decided in Judge Harris' Order are the same as the issues raised in the present case. There is also no dispute that the State was a party to the previous litigation. The first and third elements are therefore satisfied.
- B. Final Judgment on the Merits in the Prior Adjudication
  - Plaintiff asserts Judge Harris' Order, which was incorporated into Judge Davies' dismissal order, constitutes a final judgment for purposes of collateral estoppel. The State counters that Judge Harris' Order cannot be considered a final judgment.
  - Judge Davies' order, voluntarily dismissing the state court matter without prejudice, is not a final judgment. Farmers Union Mut. Ins. Co. v. Bodell, 197 P.3d 913, 916 (Mont. 2008) ("[A]n order dismissing or striking a complaint without prejudice is not a final judgment."). Therefore, the fact Judge Harris' Order was incorporated into Judge Davies' dismissal order did not convert it into a final judgment on the merits.
  - Nevertheless, in Baltrusch, the Montana Supreme Court adopted a "relaxed requirement of finality for purposes of applying collateral estoppel." !d. at 1275. The Court held the following factors should be considered in deciding whether to give preclusive effect to issues resolved in an order that has not been entered as final:
    - (1) whether the prior decision was adequately deliberated and firm and not avowedly tentative;
    - (2) whether the parties were fully heard;
    - (3) whether the court supported its decision with a reasoned opinion; and
    - (4) whether the court's prior decision was subject to appeal or was in fact reviewed on appeal.
  - Id. at 1276.
  - Baltrusch, 130 P.3d at 1275-76. The Court will, therefore, look to the Baltrusch factors to determine whether the findings and conclusions in Judge Harris' October 1, 2018 Order are sufficiently final to be given preclusive effect.
- 1. Adequately Deliberated and Firm and Not Avowedly Tentative
  - In light of the statutory framework under which the October 1, 2018 Order was litigated, the best understanding of Judge Harris' Order is that it was a preliminary injunction. The original stay was issued without notice to the State pursuant to Mont. Code Ann. § 27-19-315, which allows temporary restraining orders

without notice to the adverse party in certain situations. (Doc. 75-2.)

- Judge Harris held a hearing on the matter 5 days later, which he characterized as a "hearing on the temporary restraining order." (Id. at 2.) This complied with Mont. Code Ann. § 27-19-318 (2017), which provided that "[w]henever a temporary restraining order is granted without notice, the application for an injunction must be set for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character At the hearing the party who obtained the temporary restraining order shall proceed with the application for an injunction .... "
- Following the hearing, Judge Harris issued the October 1, 2018 Findings of Fact and Conclusions of Law and Order, staying enforcement of the State's Revocation Order until further order. (Doc. 75-5 at 11.) The procedure conformed to Mont. Code Ann. § 27-19-303, which permits the issuance of a preliminary injunction after hearing.
- Hence, Judge Harris' Order was issued in accordance with the requirements and procedures for consideration of an application for a temporary restraining order and preliminary injunction. The Order issued after the hearing was tantamount to a preliminary injunction, even if it was not expressly titled as such.
- A preliminary injunction is, by definition, not a final determination on the merits of a controversy. The limited function of a preliminary injunction is "to preserve the status quo and to minimize the harm to all parties pending final resolution on the merits." Driscoll v. Stapleton, 472 P.3d 386, 391 (Mont. 2020). Thus, "a party need establish only a prima facie violation of its rights to be entitled to a preliminary injunction - even if such evidence ultimately may not be sufficient to prevail at trial." !d. at 392. See also Weems v. State, 440 P.3d 4, 10 (Mont. 2019) ("An applicant need only establish a prima facie case, not entitlement to final judgment. The court does not determine the underlying merits of the case in resolving a request for preliminary injunction"). Thus, the nature of a preliminary injunction is inherently tentative.
- Further, although Judge Harris stated some of his findings in fairly definitive terms, the Order acknowledged that issues remained to be determined. For example, the Order stated that "[b]efore issuing a final judgment, the Court requires additional information from the parties." (Doc. 75-5 at 10.) Judge Harris also stated the stay of enforcement of the Revocation Order would remain in effect "[u]ntil further Order of this Court," indicating his Order was not the final word on the issues before the court. (!d. at 11). The Court, therefore, finds the October 1, 2018 Order lacks sufficient definiteness to be considered "firm and not avowedly tentative." Baltrusch, 130 P.3d at 1276.

- 2. Whether the Parties Were Fully Heard
  - On September 19, 2018, Judge Harris held a lengthy hearing. The parties appeared with counsel, multiple witnesses testified, the parties presented oral argument, and were invited to file supplemental briefing. (Doc. 75-4.) Yet, it appears there was some uncertainty regarding the purpose and procedural posture of the hearing. Before the first witness was called to testify, Plaintiff's counsel sought clarification, asking "we're just addressing the procedural aspect at this time~ correct?" (!d. at 24.) The court responded:
    - Well, here's the issue. I issued a temporary restraining order at your request. ... And the issue is where do we go from here? One possibility is a preliminary injunction. But for a preliminary injunction, I've got to have evidence. The other possibility is to reverse on procedural grounds. But I'm not entirely comfortable doing that at the present time .... So I'm going to basically cover both bases here in this hearing, and I want to hear evidence.
  - (Id. at 24.)

- Therefore, although the parties fully participated in the hearing, it is not apparent that there was clear understanding of the issues to be determined, and whether it was intended to be a full hearing on the merits.

- 3. Decision Supported with a Reasoned Opinion
  - Judge Harris' decision was supported by a thoughtful, reasoned opinion. The October 1, 2018 Order was 11 pages long, and contained 12 findings of fact, and 12 conclusions of law.
- 4. Whether Prior Decision was Appealed or Subject to Appeal
  - In general, preliminary injunctions are subject to appeal under Montana law. Mont. R. App. P. 6(3)(e). Here, however, the October 1, 2018 Order was not appealed, and it is not clear that the Order was, in fact, appealable in the circumstances of this case.
  - Under Montana law, "[a] party aggrieved may appeal in the cases prescribed in the Rules of Appellate Procedure." Mont. Code Ann. § 25-12-102. Montana Rule of Appellate Procedure 6 provides, in pertinent part:
    - (3) Orders appealable in civil cases.
      - In civil cases, an aggrieved party may appeal from the following, provided that the order is the court's final decision on the referenced matter:
      - ...
    - (e) From an order granting or dissolving, or refusing to grant or dissolve, an injunction or an attachment.
  - Mont. R. App. P. 6(3) (emphasis added).
  - Based on the concluding language in the October 1, 2018 Order, it is evident that the Order was not Judge Harris' "final decision on the referenced matter." Mont. R. App. P. 6(3). Rather, Judge Harris required the parties to provide additional information and continued the stay of enforcement of the Revocation Order pending further order of the court. (Doc. 7 5-5 at 10-11.) Thus, even if the State had wished to appeal Judge Harris' ruling, it does not appear that the October 1, 2018 Order was the final decision on the matter, from which an appeal could lie under Rule 6(3).
  - On balance, the Court finds the Baltrusch factors do not support treating the October 1, 2018 Order as sufficiently final to for purposes of collateral estoppel.
- C. Full and Fair Opportunity to Litigate Issues
  - Plaintiff contends the State was afforded a full and fair opportunity to litigate the issues in the prior action. Plaintiff points out that the State was represented by counsel, submitted written briefs, and participated in a hearing where the State called witnesses. The State counters that it did not have the benefit of a full opportunity to litigate the merits of the matter before the State court.
  - The application of collateral estoppel requires that the party against whom preclusion is sought had "a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time." Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313,333 (1971). But "ifthere is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation," redetermination of issues is warranted. Montana v. United States, 440 U.S. 147, 164 n.11 (1979).
  - Procedurally, the State was given a fair opportunity to litigate the issue of the preliminary injunction before Judge Harris. The State appeared at the hearing with counsel, had the ability to call and cross-examine witnesses, was permitted to file written briefs, and received a written order following the hearing. But substantively, it is not clear that the State had a full and fair opportunity to litigate the merits. As the State points out, neither party was afforded an opportunity for discovery, or notice that the hearing would lead directly to a ruling on the merits. Even Judge Harris equivocated when Plaintiffs counsel sought clarification about scope of issues to be decided at the hearing. (Doc. 78-6 at 24.) As previously noted, Judge Harris also

characterized the hearing as a "hearing on the temporary restraining order" in his October 1, 2018 Order. (Doc. 75-5 at 2.) Thus, it does not appear that the hearing was intended as a full hearing on the merits. Accordingly, it is questionable whether the State had a full and fair opportunity to litigate the merits of the controversy between the parties.

- In sum, only two of the four elements for collateral estoppel have been satisfied in this case. The Court, therefore, recommends that Plaintiffs Motion for Collateral Estoppel be denied.

- III. SUMMARY JUDGMENT
  - Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp. , 475 U.S. 574, 586 (1986). When making this determination, the Court must view all inferences drawn from the nnderlying facts in the light most favorable to the non-moving party. See Matsushita, 475 U.S. at 587
- A. Plaintiffs Motion for Partial Summary Judgment
  - Plaintiff moves for partial summary judgment with respect to liability only on his claims for negligent misrepresentation (Count II) and Due Process Dorwart claims (Count VI).
- 1. Count II- Negligence/Negligent Misrepresentation
  - Plaintiff seeks summary judgment on his allegation that the State engaged in negligent misrepresentation "by representing to MOMS that they had nntil September 18, 2018, to cure any alleged statutory or administrative violations fonnd at MOMS' dispensary or cultivation site." (Doc. 3 at ,-r 80.) To establish a claim for negligent misrepresentation, Plaintiff must establish:
    - a) the defendant made a representation as to a past or existing material fact;
    - b) the representation must have been untrue;
    - c) regardless of its actual belief, the defendant must have made the representation without any reasonable gronnd for believing it to be true;
    - d) the representation must have been made with the intent to induce the plaintiff to rely on it;
    - e) the plaintiff must have been unaware of the falsity of the representation; it must have acted in reliance upon the truth of the representation and it must have been justified in relying upon the representation;
    - f) the plaintiff, as a result of its reliance, must sustain damage. Jackson v. State, 956 P.2d 35,43 (Mont. 1998). The Court finds there are disputed issues of material fact with regard to this claim.
  - As to the first element, the parties offer differing interpretations of the statement in the Inspection Report: "Please provide proof by no later than 9.18.18 that all violations have been rectified." (Doc. 78-4 at 8.) Plaintiff contends this statement was a representation as to past or existing fact. Specifically, that Plaintiff was being given the present opportunity to remedy any violations in the Inspection Report by September 18, 2018. Or, alternatively, that Plaintiff was not presently at risk of losing his license. The State, on the other hand, contends the statement was not a representation of fact, but was rather a request or directive to Plaintiff to provide proof that the violations were remedied. The State argues the statement did not directly say the State would not revoke Plaintiffs license prior to September 18.
  - Both constructions of the statement are plausible. Weighing the parties' competing interpretations of the evidence is a task

for the jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]"). Thus, whether the statement in the Inspection Report was a representation of a past or existing fact is a question for the jury.

- Additionally, with regard to materiality, Plaintiff contends the statement in the Inspection Report was material because it ostensibly gave him an opportunity to take corrective action before being at risk of losing his provider license. The State challenges Plaintiffs materiality argument on grounds that Plaintiff did not believe he possessed a provider license at the time he received the Inspection Report. The State cites Plaintiffs email to DPHHS on July 19, 2018, approximately a week before the Inspection Report was issued, in which he indicated that he was relinquishing his provider license effective July 25, 2018. (Doc. 82-31.) Then on August 13, 2018, after he received the Revocation Order, Plaintiff stated in an email to Wiebe that he was surprised by the revocation because he had sent the Department "formal notification" that he was relinquishing his license, effective July 25, 2018. (I d.) Plaintiff also advised DPHHS that "I don't consider myself a licensed Provider at this time or since the end of last month." (I d.)
- In response, Plaintiff argues that regardless of his statements in the emails, the State did not accept his relinquishment, as evidenced by the fact that the State took action to issue the Inspection Report and Revocation Order. Plaintiff contends that the State's actions would have been unnecessary if he did not, in fact, have a provider license.
- Again, both parties' interpretations of the events and communications surrounding the revocation of Plaintiff's license are plausible. In light of the conflicting inferences about the status of Plaintiff's license, the Court finds there are disputed issues of material fact with regard to the materiality of the statement in the Inspection Report.
- Additionally, regarding the fifth element, there is a material dispute of fact regarding reliance. Plaintiff asserts he acted in reliance on the statement in the Inspection Report by continuing to operate the dispensary and cultivation facility. Plaintiff indicates that he also continued in his efforts to merge with Lionheart Caregiving. The State counters that continued operation, without any change to the status quo, is not reliance, and there are no facts to indicate Plaintiff changed his position or did anything differently based on the alleged representation. The Court finds that whether Plaintiff justifiably relied on the statement in the Inspection Report presents a jury question.
- Finally, as to the sixth element, Plaintiff asserts he sustained damage by relying on the State's representation that the business would not be shut down until September, when in fact, his license was revoked on August 13, 2018. Plaintiff argues he lost his license because he was not given the time to remedy the violations or to merge with Lionheart. But as noted above with regard to materiality, the State has pointed to evidence suggesting Plaintiff did not believe he had a provider license at the time. Thus, because there are disputed issues of fact as to the status of Plaintiff's license, the Court finds there are likewise disputed issues regarding damages.
- Therefore, because the Court finds there are disputed issues of fact regarding Plaintiff's Negligent Misrepresentation claim, the Court recommends that Plaintiff's Motion for Partial Summary Judgment on Count II be denied.

- 2. Count VI -Due Process Dorwart Claims
  - Plaintiff alleges the State violated his state constitutional rights by revoking his provider license without adequate procedural due process. Under Montana law, a cause of action for money damages is available for a violation of Article II,

Section 17 of the Montana Constitution. Dorwart v. Caraway, 58 P.3d 128, 137 (Mont. 2002). Article II, Section 17 provides that "no person shall be deprived of life, liberty, or property without due process of law." "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Small v. McRae, 651 P.2d 982, 987 (Mont. 1982) quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

- Procedural due process "generally requires notice of a proposed action which could result in depriving a person of a property interest and the opportunity to be heard regarding that action." Pickens v. Shelton-Thompson, 3 P.3d 603, 606 (Mont. 2000). To succeed on a claim for violation of procedural due process, it must be shown that (1) a property interest exists~ and (2) the procedures in place provided an inadequate protection of that property interest. Mont. Media, Inc. v. Flathead Cty., 63 P.3d 1129, 1141 (Mont. 2003).

- a. Property Interest

- Plaintiff asserts he had a property interest in his provider license. The State counters that Plaintiff had no property interest in the license because at the time of revocation, he did not believe he possessed a license. Additionally, the State argues that a marijuana provider license is a privilege and not a right.
- Mont. Code Ann. § 50-46-312(1) articulates the unremarkable principle that there is no right to obtain a marijuana provider license in Montana. Specifically, it states a provider license "is a privilege that the state may grant to an applicant and is not a right to which an applicant is entitled." Mont. Code Ann.§ 50-46-312(1) (2017). Generally speaking, a license "is a grant by a government authority or agency of the right to engage in conduct that would be improper without such a grant. The conferment of a license ... is merely a privilege .... " Wallace v. Montana Dep 't ofFish, Wildlife & Parks, 889 P.2d 817, 820 (Mont. 1995).
- But once issued, a license generally confers on the recipient a property interest that is entitled to due process protections under Montana's Constitution. See e.g. Kafka v. Montana Dep't ofFish, Wildlife & Parks, 201 P.3d 8, 19-20 (Mont. 2008) (noting that "licenses may contain property interests that go beyond their status as a "mere privilege."). State v. Pyette, 159 P.3d 232, 235 (Mont. 2007) (driver's license becomes a property interest once issued); Crismore v. Mont. Ed. of Outfitters, Ill P.3d 681 (Mont. 2005) (recognizing protected property interest in outfitter license); Barry v. Barchi, 443 U.S. 55 (1979) (recognizing property interest in horse trainer license).
- The Montana Supreme Court's discussion of property interests in Wilson v. Dept of Pub. Serv. Reg., 858 P.2d 368 (Mont. 1993) is instructive on this issue. The plaintiffs in Wilson operated a waste disposal business and held a Class D Motor Carrier Certificate of Public Convenience and Necessity, which authorized them to transport garbage and other materials. !d. at 369. The Public Service Commission (PSC), which issued the Certificate, initiated an action against the plaintiffs to revoke their Certificate. The Montana Supreme Court noted that "[t]he right to carry on a lawful business is a property right[.]" !d. at 371. The court explained that "[i]nasmuch as the [plaintiffs] may not carry on their business except under the authority of a certificate of public convenience and necessity issued by the PSC, it follows that if that agency intends to take action which might result in the [plaintiffs'] loss of their certificate, and hence their right to do business," the plaintiffs would be entitled to procedural due process. !d.
- Likewise, a marijuana provider license permits the holder to lawfully conduct business under Montana law. Thus, the State's grant of a provider license confers upon the licensee the right to carry on a lawful business. As in Wilson, if DPHHS intends to take action that may result in the loss of a marijuana provider's license and right to do business, the licensee has

a property interest in their license that is entitled to due process protection.

- As noted above, however, there are factual disputes in this case whether Plaintiff had, or believed he had, a valid provider license at the time of the revocation. The Court, therefore, cannot find as a matter of law that Plaintiff, in fact, had a property interest.

- b. Process
  - Plaintiff also contends the post-deprivation due process he received was inadequate. Plaintiff asserts he should have received pre-deprivation process, and the State lacked adequate justification to provide only post-deprivation process. The State counters that even assuming Plaintiff had a property interest in his provider license, he committed numerous violations that allowed the State to immediately revoke the license without a pre-deprivation hearing.
  - "The process due in any given case varies according to the factual circumstances of the case, the nature of the interests at stake and the risk of making an erroneous decision." Pyette, 159 P.3d at 235. Process can either be in the form of pre-deprivation process or post-deprivation process. Generally, in situations where the State can feasibly provide a pre-deprivation hearing before taking property, it must do so. Zinerman v. Burch, 494 U.S. 113, 132 (1990). "Only under exigent circumstances, where the government's interest requires immediate action, may a post-deprivation rather than a pre-deprivation hearing satisfy due process." Mont. Media, Inc., 63 P.3d at 1141. See also Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 240 (1988) ("An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation.").
  - At the time Plaintiffs provider license was revoked, DPHHS was governed by the Montana Marijuana Act, Mont. Code Ann.§ 50-46-301, et seq., the Montana Administrative Procedure Act ("MAP A"), § 2-4-101, et seq., and the Administrative Rules of Montana ("ARM") 37.107.101, et seq. Under Administrative Rule 3 7.107 .130(1), DPHHS was required to provide written notice to a licensee before their license could be revoked. ARM 37.107.130(1) also specified several potential grounds for the revocation of a license.
  - The Montana Administrative Procedure Act provides that when the revocation of a license is required by law to be preceded by notice and opportunity for hearing, the MAP A contested case provisions apply. Mont. Code Ann. § 2-4-631 (1). The contested case provisions require that "all parties must be afforded an opportunity for hearing after reasonable notice," that includes (1) notice of the time, place and nature of the hearing~ (2) a statement of the legal authority and jurisdiction under which hearing is to be held~ (3) reference to the particular statutes and rules involved ~ (4) a short and plain statement of the matters asserted~ and (5) a statement that formal proceeding may be waived. See Mont. Code Ann. § 2-4-601. Only where "the agency finds that public health, safety, or welfare imperatively requires emergency action and incorporates a finding to that effect in its order," is the summary suspension of a license allowed. Mont. Code Ann. § 2- 4-631(3).
  - Here, it is undisputed that Plaintiff was not provided pre-deprivation process. The State argues, however, that it had authority to summarily revoke Plaintiffs license. The State argues that it complied with ARM 37.1 07.130(1) by providing written notice of the revocation via the Inspection Report on August 7, 2018 and the Revocation Order on August 13, 2018. The State further contends Plaintiff committed numerous violations of the Montana Medical Marijuana Act that warranted immediate action, including violation of§ 50-46-330 (allowing others to be in possession of marijuana plants, seedlings, usable marijuana and infused products)~§50-46-312(1) (making false

statements or misrepresentations in his license application)~ § 50-46-308(1)(a)(vi) (manufacturing infused products and dispensing marijuana from a non-registered premises)~ § 50-46-308(6)(b) (cultivation location impermissibly shared with another provider)~ and § 50-46-312(4)(b) (dispensary location ineligible for license because prohibited by city ordinance).

- Plaintiff counters that if the State believed the alleged violations justified immediate revocation, and only post-deprivation notice, then the State would not have given Plaintiff the opportunity to remedy the violations in the Inspection Report and allowed the continued operation of the business for almost two months.
- Thus, the parties dispute whether exigent circumstances existed at the time of the revocation, and there are facts in the record to support their respective positions. Accordingly, the Court cannot find as a matter of law that postdeprivation process was insufficient in the circumstances of this case. Whether exigent circumstances existed is a question for the jury.
- Accordingly, the Court recommends that Plaintiff's Motion for Partial Summary Judgment on Count VI (Due Process Dorwart claims) be denied.

- B. The State's Motion for Summary Judgment
  - The State moves for summary judgment on all of Plaintiff's state law claims. Plaintiff concedes his claims for defamation (Count V), Dorwart claims based on the right to privacy and employment (Count VI), and conspiracy (Count VII). It is thus recommended that the State's motion for summary judgment as to those claims be granted.
  - Therefore, the only claims remaining at issue in the State's motion are Plaintiff's claims for negligence/negligent misrepresentation (Count II), tortious interference (Counts III-IV), and Due Process Dorwart claims (Count VI).
- 1. Damages
  - At the outset, the State argues Plaintiff's claims fail as a matter law because he cannot demonstrate an entitlement to damages. The State argues Plaintiff is only entitled to claim damages incurred by "Steven Palmer d/b/a Montana Organic Medical Supply," and not on behalf of his brother Shawn Palmer or A&S Palmer Enterprises, Inc., a corporation owned jointly by Shawn and Steve Palmer. The State acknowledges, however, that Steven Palmer reported individual income to the IRS from marijuana infused cookies he produced in the amount of $3,353 to $16,040 between 2014 and 2018. Thus, there is a basis from which Plaintiff can claim damages.
  - The State further argues that even if Plaintiff were entitled to recover all damages alleged from the loss of revenue from the dispensary, no damages were actually incurred because the business had no value. In response, Plaintiff points to the opinion of his expert that cannabis businesses may sell for millions, even if they do not produce a profit, and that Plaintiff's license alone had a value approximately of $250,000. (Doc. 91 at 39-40, ~~ 9-12.) As such, there are material disputes of fact as to damages.
  - Additionally, the State argues that even assuming the revocation of Plaintiff's provider license did not comport with due process, the revocation was justified because Plaintiff was operating illegally, and therefore Plaintiff is entitled to no more than nominal damages. But the denial of procedural due process is actionable for nominal damages, even if substantive injury cannot be proven. Weinberg v. Whatcom Cty., 241 F.3d 746, 752 (9th Cir. 2001) (citing Carey v. Piphus, 435 U.S. 247, 266 (1978)).
  - Ultimately, the question of whether, or in what amount, Plaintiff can establish damages is a question of fact for a jury. Dahlin v. Rice Truck Lines, 352 P.2d 801, 804 (Mont. 1960) ("The rule has been established in this state that the amount of damages is committed first to the discretion of the jury, and next to the discretion of the trial judge, who, in passing upon the motion for new trial,

may set it aside if it is not just.").

- 2. Count II- Negligent Misrepresentation/Negligence
  - Plaintiff alleges two bases for his claim of negligent misrepresentation. First, Plaintiff asserts DPHHS negligently misrepresented that Plaintiff would have until September 18, 2018 to cure any alleged statutory or administrative violations found at Plaintiff's dispensary or cultivation site. (Doc. 3 at~ 80.) The Court has determined that there are disputed issues of material fact with regard to this aspect of Plaintiffs negligent misrepresentation claim. Summary judgment is, therefore, not appropriate.
  - Second, Plaintiff alleges the State engaged in negligent misrepresentation when DPHHS emailed the Billings Police Department, and gave them false information that the District Court had approved the license revocation and that Plaintiff was illegally selling marijuana and marijuana infused products. The State argues this aspect of the claim fails because the representations were admittedly true. Plaintiff does not present any argument in opposition to this portion of the State's motion.
  - Negligent misrepresentation requires proof that the defendant made a representation as to a past or existing material fact that was untrue. Jackson, 956 P.2d at 43. Here, the representations were made to the Billings Police Department on March 12, 2019. (Doc. 91 at ,-r 106.) Plaintiff does not dispute that he admitted in his deposition that the representations were true, and that he did not have a valid license to sell marijuana in March 2019. (!d. at ,-r 102.) Accordingly, the State is entitled to summary judgment on this aspect of Plaintiffs negligent misrepresentation claim.
  - The Court will therefore recommend that the State's Motion for Summary Judgment on Count II be granted in part, and denied in part.
- 3. Counts III-IV - Tortious Interference
  - Plaintiff alleges the State's revocation of his license tortiously interfered with his business relations in two ways. First, Plaintiff asserts the State interfered with his relationship with cardholders who purchased marijuana from his dispensary by advising the cardholders Plaintiffs provider license was being revoked. Second, Plaintiff alleges the revocation interfered with the prospective merger with Lionheart. The State argues both claims fail because the alleged interference was justified, and did not result in actual damage or loss.
  - "An action for tortious interference with business relations entails four elements: that the defendant's acts: (1) are intentional and willful; (2) calculated to cause damage to the plaintiffs business; (3) done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and (4) result in actual damages and loss." State Med. Oxygen & Supply, Inc. v. Am. Med. Oxygen Co., 883 P.2d 1241, 1243 (1994).
  - The State contends its alleged interference with the cardholders was justified because Plaintiff was in violation of multiple regulations that were intended to protect the safety of consumers. In response, Plaintiff argues the State cited him for violating at least one law that was no longer in effect. (Doc. 91 at ,-r 84.) Further, Plaintiff contends the remaining violations did not create exigent circumstances warranting immediate revocation and notice to the cardholders because the Inspection Report gave him until September 18, 2018 to remedy the violations. Both parties' positions are supported by evidence in the record. Accordingly, the Court finds there are disputed issues of material fact regarding whether the State acted without right or justifiable cause.
  - The State further contends the alleged interference in the prospective merger with Lionheart did not result in actual damage or loss because Plaintiff had already relinquished his license in preparation for the merger. But, as the Court has already noted, there are disputed issues of fact with regard to the

relinquishment of Plaintiffs license. As a result, there are likewise disputed issues regarding actual damage or loss.
- The Court, therefore, recommends that the State's Motion for Summary Judgment on Counts III and IV be denied.

- 4. Count VI -Due Process Dorwart Claim
  - As noted above, Plaintiff does not oppose summary judgment as to his Dorwart claims based on right to privacy and employment. The State argues Plaintiffs Dow art due process claim also fails because he was provided adequate post-deprivation due process. As discussed above, the Court has determined that there are disputed issues of material fact with regard to Plaintiffs state due process claim regarding post-deprivation due process. The State's motion for summary judgment as to this aspect of Plaintiff's claim in Count VI should, therefore, be denied.
- IV. CONCLUSION
  - Based on the foregoing, IT IS HEREBY RECOMMENDED that:
  - 1. Plaintiff's Motion for Collateral Estoppel (Doc. 7 4) be DENIED;
  - 2. Plaintiff's Motion for Partial Summary Judgment (Doc. 79) be DENIED;
  - 3. State Defendants' Motion for Summary Judgment (Doc. 80) be GRANTED as to Counts V and VII, GRANTED in part as to Counts II and VI and DENIED as to all remaining claims.
  - NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendations of United States Magistrate Judge upon the parties. The parties are advised that pursuant to 28 U.S.C. § 636, any objections to the :findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.
  - IT IS ORDERED.
  - DATED this 5th day of February 2024.
  - /S/ Timothy J. Cavan
  - United States Magistrate Judge

-- Recommendations Adopted On Summary Judgment

13. **In The United States District Court for The District of Montana Billings Division STEVEN PALMER d/b/a MONTANA ORGANIC MEDICAL SUPPLY, Plaintiff, vs. MONTANA DEPARTMENT OF HEALTH AND HUMAN SERVICES; DARCI WIEBE in her individual and official capacity; JAMIN GRANTHAM, in his individual and official capacity; CITY OF BILLINGS; STEVE HALLAM in his individual and official capacity; and JOHN DOES 1-10, Defendants. CV 21-38-BLG-SPW-TJC Consolidated with Member Case: No. CV 22-25-BLG-SPW-TJC.**

- [MAS note: Steven Palmer dba Montana Organic Medical Supply v. Montana DPHHS (Watters, 3/27/2024): magistrate's rulings on P's Dorwart claims and on negligence, damages, and tortious interference are adopted; the court disagrees w/ magistrate's finding that P relied on the regulator's statements made after P advised he was going to relinquish his license, which P now claims influenced him to retain it; the court grants the state's summary judgment motion on negligent misrepresentation, retaining certain remaining theories of recovery per Judge Cavan's recommendations]
- Order
- Hon. Susan P. Watters, United States District Judge
  - Before the Court is United States Magistrate Judge Timothy Cavan's Findings and Recommendations on Plaintiff Steven Palmer d/b/a Montana Organic Medical Supply's Motion for Collateral Estoppel (Doc. 74), Plaintiffs Motion for Partial Summary Judgment on Counts II and VI (Doc. 79), and Defendant Montana Department of Heath and Human Services' ("DPHHS" or "the State") Motion for Summary Judgment (Doc. 80).[1] (Doc. 99). Judge Cavan recommended the Court 1 Plaintiff's Motion for Collateral Estoppel and Motion for Partial Summary Judgment on Counts II and VI were also filed in Member Case CV 22-25-BLG-SPW. The motions in the Member Case are identical

to the motions in the lead case, and the Findings and Recommendations address all deny Plaintiffs Motion for Collateral Estoppel and Motion for Partial Summary Judgment, and grant in part and deny in part the State's Motion for Summary Judgment. (Id. at 2).

- Both parties filed objections and corresponding responses. (Docs. 100, 101, 104, 105).
- For the following reasons the Court adopts in part and rejects in part Judge Cavan's Findings and Recommendations.

- I. Legal Standard
  - The parties are entitled to a de novo review of those findings to which they have "properly objected." Fed. R. Civ. P. 72(b)(3); see also 28 U.S.C. § 636(b)(1). The portions of the findings and recommendations not properly objected to are reviewed for clear error. See McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981); Thomas v. Arn, 474 U.S. 140, 149 (1985).
  - An objection is proper if it "identif[ies] the parts of the magistrate's disposition that the party finds objectionable and present[s] legal argument and supporting authority, such that the district court is able to identify the issues and the reasons supporting a contrary result." Mont. Shooting Sports Ass 'n v. Holder, No. CV 09-147-M, 2010 WL 4102940, at *2 (D. Mont. Oct. 18, 2010). "It is not pending motions in the consolidated actions. This Court's order will address all the motions, as well. sufficient for the objecting party to merely restate arguments made before the magistrate or to incorporate those arguments by reference." Id.
- II. Background
  - Neither party objects to Judge Cavan's recitation of the facts of the case. Thus, the Court will adopt Judge Cavan's background section in full and only reiterate the facts necessary to the analysis below. 2
  - In short, this case challenges the authority of the State to revoke Plaintiff's medical marijuana provider's license and the methods by which they revoked it. DPHHS inspected Plaintiffs marijuana dispensary in Billings, Montana ("M.O.M.S.") on June 13, 2018. DPHHS finalized the inspection report on July 25, 2018, and noted various statutory and regulatory violations. (Doc. 82-33, hereinafter "Inspection Report"). Plaintiff received the Inspection Report on August 7, 2018. (Doc. 91 at 28). At the end of the Inspection Report under the Corrective Action Items section, the inspector wrote, "Please provide proof by no later than 9.18.18 that all violations have been rectified." (Doc. 82-33 at 8). On August 13, 2018, Plaintiff was served with an order revoking his provider license for the violations noted in the Inspection Report. (Doc. 78-8, hereinafter "Revocation Order"). 2 The Court also notes that it provided a thorough recitation of the facts in its order adopting Judge Cavan's Findings and Recommendations on the parties' motions to dismiss. (Doc. 39).
  - Pursuant to the governing Administrative Rule, ARM 3 7.107 .130, Plaintiff filed a petition for judicial review in the Thirteenth Judicial District Court in Yellowstone County, Montana on September 12, 2018. (Doc. 82-34). He also sought a temporary restraining order, which the district court granted on September 14, 2018. (Id. at 1 0). After a hearing, the district court found the Revocation Order was unlawful because it violated Montana's constitutional due process protections and the Montana Administration Procedure Act, Montana Code Annotated § 2-4- 631(3). (Id. at 4-5). However, because Plaintiffs damages were unclear, the district court requested more information from the parties before issuing a final order. (Id. at 3). Before the district court issued any final order, the parties agreed to dismiss the case. (Doc. 78-12).
  - Plaintiff filed this suit on April 6, 2021, against the State, Darci Wiebe (the Bureau Chief of the Montana Medical Marijuana Program with DPHHS) in her individual and official capacity, Jamin Grantham (an inspector for DPHHS'

Medical Marijuana Program) in his individual and official capacity, the City of Billings, and Billings Police Department Detective Steve Hallam. (Doc. 1). Plaintiff asserted a 42 U.S.C. § 1983 claim against DPHHS, Wiebe, and Grantham (collectively, "State Defendants"); a § 1983 claim against the City of Billings and Detective Hallam; a negligence/negligent misrepresentation claim against the State Defendants; two tortious interference claims against DPHHS; a defamation claim against the State Defendants; a Dorwart constitutional claim against DPlffiS; a Dorwart constitutional claim against the City of Billings; a conspiracy claim against the State Defendants; a trespass claim against Detective Hallam; a conversion claim against Detective Hallam; a claim for punitive damages against Wiebe and Grantham; and a claim for punitive damages against Detective Hallam. (Id.).

- After Plaintiff amended his Complaint (Doc. 3), the State Defendants collectively moved to dismiss the § 1983 and punitive damages claims against them. (Doc. 39 at 7). The City of Billings and Detective Hallam also moved to dismiss Plaintiffs § 1983 claim against them. (Id.). Judge Cavan issued Findings and Recommendations on December 14, 2021, recommending the Court grant the State's and the City of Billing's motions. (Id. at 13). He further recommended the Court deny Detective Hallam's motion. (Id.). On February 15, 2022, the Court adopted his Findings and Recommendations in full. (Id.).
- On August 31, 2023, Plaintiff moved to dismiss all claims against Detective Hallam and the City of Billings. (Doc. 85). The Court granted the motion. (Doc. 86).
- On July 26, 2023, Plaintiff moved for collateral estopped and for partial summary judgment on his Dorwart and negligent misrepresentation claims against the State Defendants. (Docs. 74, 79). The same day, the State moved for summary judgment on Plaintiffs remaining claims. (Doc. 80).
- Judge Cavan recommended denying Plaintiffs motions; granting the State's motion as to Plaintiffs defamation claim, conspiracy claim, negligent misrepresentation claim concerning an email DPHHS sent to the Billings Police Department, and his Dorwart claims concerning his right to privacy and employment; and denying the State's motion as to all remaining claims. (Doc. 99).

- III. Collateral Estoppel
  - Judge Cavan recommended the Court deny Plaintiffs Motion for Collateral Estoppel on the grounds that the order dismissing the matter without prejudice after the parties agreed to dismiss the case was not a final judgment on the merits, and that it was not clear whether the parties had a full and fair opportunity to the litigate the issues. (Doc. 99 at 7-14). Neither party objects to Judge Cavan's Findings and Recommendations on the motion. Reviewing for clear error, the Court finds none and adopts in full Judge Cavan's Findings and Recommendations on the motion.
- IV. Summary Judgment Motions
- A. Lega/Standard
  - Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex, 4 77 U.S. at 323. If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually exists. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). When making this determination, the Court must view all inferences drawn from the underlying facts in the light most favorable to the non-moving party. See id. at 587.

- B. Objections
  - Plaintiff lodges the following objections to Judge Cavan's Findings and Recommendations on Plaintiffs Dorwart claim as to the allegedly insufficient due process afforded by DPHHS:
    - (1)Judge Cavan erred in concluding that material disputes exist as to whether Plaintiff "had, or believed that he had, a valid provider license at the time of the revocation." (Doc. 101 at 4 (quoting Doc. 99 at 22)); and
    - (2)Judge Cavan erred in concluding that material disputed facts existed as to whether pre-deprivation process was required. (Id.).
  - The State lodges the following objections to Judge Cavan's Findings and Recommendations on its Motion for Summary Judgment:
    - (1)Judge Cavan erred in denying summary judgment on the amount and type of damages that Plaintiff can legally claim and recover because he did not address whether Plaintiff can recover for damages to A&S Palmer Enterprises, Inc., which is a separate and distinct corporate entity that is not a party to this litigation;
    - (2)Judge Cavan erred in denying summary judgment on Plaintiff's negligent misrepresentation claim as to the statement in the Inspection Report about the violations because the statement was not a representation about a past or existing fact, and Plaintiff did not rely to his detriment on the statement;
    - (3)Judge Cavan erred in denying summary judgment on the tortious interference claim because the State's interference was justified and did not cause Plaintiff's damages;
    - (4)Judge Cavan erred in denying summary judgment on Plaintiff's Dorwart claim because Plaintiff did not have a property interest and received adequate post-deprivation process; and
    - (5)Judge Cavan erred by not addressing the State's motion on Plaintiff's negligence claim.
  - (Doc. 100 at 2).
  - The State's objections on tortious interference are improper because they merely restate the same arguments made in front of Judge Cavan. The Court will review Judge Cavan's findings on the tortious interference claim for clear error. The rest of the parties' objections are proper, and the Court will review Judge Cavan's rulings on the issues they raise de novo. Additionally, the Court will address the parties' objections on the Dorwart claims together, since their arguments address the same disputed elements.
- C. Dorwart Claims
  - Both parties object to Judge Cavan's denial of the motions as to Plaintiff's Dorwart claim concerning Plaintiff's due process rights.
  - Article II, § 17 of the Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." A cause of action for money damages is available for a violation of Article II,§ 17. Dorwart v. Caraway, 58 P.3d 128, 137 (Mont. 2002).
  - Procedural due process "generally requires notice of a proposed action which could result in depriving a person of a property interest and the opportunity to be heard regarding that action." Pickens v. Shelton-Thompson, 3 P.3d 603, 606 (Mont. 2000) (internal citation and quotation marks omitted). To succeed on a claim for violation of procedural due process, it must be shown: (1) a property interest exists; and (2) the procedures in place provided an inadequate protection of that property interest. Mont. Media, Inc. v. Flathead County, 63 P.3d 1129, 1141 (Mont. 2003).
  - In front of Judge Cavan, the parties disagreed on whether Plaintiff satisfied both elements. Plaintiff asserts he had a property interest. in his provider license, and that the post-deprivation due process he received was inadequate. (Doc. 99 at 20, 22). Specifically with respect to the necessary process, Plaintiff maintained that the State could not prove exigent circumstances existed to justify immediate

revocation without pre-deprivation process. (Id. at 25). If exigent cir~umstances existed, the State would not have initially given Plaintiff the opportunity to remedy the violations in the Inspection Report and allowed the continued operation of the business for almost two months. (Id.).

- In response, the State argued Plaintiff did not have a property interest because, at the time of the revocation, he did not believe he possessed a license. (Doc. 88 at 11). The State also maintained that a marijuana provider license is a privilege and not a right. (Id.; see also Doc. 81 at 18). As to the process afforded if Plaintiff is found to have a property interest, the State countered that Plaintiffs numerous violations of law permitted the State to immediately revoke the license without a pre-deprivation hearing. (Doc. 88 at 12).
- Judge Cavan found disputed facts existed as to both elements. As an initial matter, Judge Cavan found that once the State grants a provider license, the licensee has a property interest in the license that is entitled to due process. (Doc. 99 at 21-22 (citing Wilson v. Dep't of Pub. Serv. Reg., 858 P.2d 368 (Mont. 1993))). Judge Cavan next found that factual disputes existed as to whether Plaintiffhad or believed he had a valid provider license at the time of the revocation. (Id. at 22).
- As to the process afforded, Judge Cavan first found that because the Administrative Rules governing revocation of marijuana licenses at the time required pre-deprivation notice, the provisions of the Montana Administrative Procedure Act ("MAP A") governed. (Id. at 23). MAP A, § 2-4-631 requires a finding of exigent circumstances for the State to not afford a licensee a predeprivation hearing. (See id at 23). Judge Cavan found disputed facts existed as to whether exigent circumstances existed, so he recommended the Court deny summary judgment. (Id. at 25).
- The State's objections to Judge Cavan's findings on the property interest question mirror its arguments in front of Judge Cavan: Plaintiff cannot have a property interest in a marijuana license because a marijuana license is a privilege, not a right; and even if a protected property interest, the record demonstrates that Plaintiff had voluntarily relinquished, and therefore did not have, a license. (Doc. 100 at 10-11). As to the process afforded, the State maintains that the MAPA provisions do not apply because the application Administrative Rules only required pre-deprivation notice, which was given, not an opportunity for a pre-deprivation hearing. (Id. at 12). Even if the MAPA provisions applied, the State maintains that Plaintiff's illegal actions-which it lists in response to Plaintiff's objection" created a serious threat to public health and safety that justified, and even necessitated, the State's actions." (Doc. 1 04 at 6).
- Plaintiff also objected to Judge Cavan's findings on both elements. Plaintiff recited 13 facts he asserts demonstrate that Plaintiff undisputedly had a provider license at the time of revocation. (Doc. 10 1 at S-6). The facts generally indicate that Plaintiff tried to relinquish his license in an email to DPHHS, DPHHS did not respond and therefore did not accept his relinquishment, and that DPHHS subsequently served on Plaintiff the Inspection Report and Revocation Order. (Id.). Collectively, Plaintiff argues these facts demonstrate that despite trying to relinquish his license, he retained it. (Id. at 6).
- As to the post-deprivation process, Plaintiff argues DPlffiS 's initial grant of time for Plaintiff to remedy the violations, its failure to immediately revoke the license following the inspection, and the lack of any findings of exigent circumstances in the Inspection Report demonstrate the absence of exigent circumstances. (Id. at 8-10). Last, Plaintiff contends that Judge Cavan erred in not addressing Plaintiffs arguments that, even if pre-deprivation process was not necessary, Plaintiffs post-deprivation process was insufficient. (Id. at 1 0-11).
- First, the Court agrees with Judge Cavan that once the State grants a provider

license, a licensee has a protected property interest in that license and that the State must comply with due process if it seeks to revoke that right. See Wilson, 858 P .2d 368. Judge Cavan's reading of Wilson correctly reflects the Montana Supreme Court's holding that once the state grants a business permission to operate via a certificate, or in Plaintiffs case a license, "it follows that if that agency intends to take action which might result in the loss of" the certificate or license, "and hence their right to do business, fundamental fairness and due process require that they at a minimum be given notice of the alleged bases for the possible revocation." Id. at 371.

- Second, the Court agrees with Judge Cavan that disputed facts exist as to whether Plaintiff had a valid provider's license, and therefore property interest, at the time it was revoked. On the one hand, as Plaintiff recounts, the State operated as if Plaintiff had an existing license. Plainly, how could the State revoke a license that Plaintiff no longer held? On the other hand, ambiguities exist as to whether the State accepted Plaintiffs voluntarily relinquishment. In fact, it is not clear if the State needed to accept Plaintiffs relinquishment for it to be valid, or if Plaintiff could unilaterally do so, because neither party cited, nor could the Court find, DPHHS's procedure for relinquishment. Accordingly, Judge Cavan properly concluded that disputed facts exist as to whether Plaintiff held a valid license, and therefore a property interest, at the time of revocation.
- Third, the Court disagrees with Judge Cavan's conclusion that the MAPA provisions applied. MAP A, § 2-4-631, applies when the revocation of a license "is required by law to be preceded by notice and opportunity for hearing[.]" Mont. Code Ann. § 2-4-631 (emphasis added). At the time of the revocation, Montana Administrative Rule 36.107.130 (20 17) governed revocations of medical marijuana provider licenses. It allowed the department to deny or revoke an application for 13 reasons "after written notice to ... the licensee." Mont. Admin. R. 37.107.130. The rule does not require the opportunity for a hearing before the revocation, and so the MAPA provision does not apply.
- The question remains whether constitutional due process required predeprivation process, specifically a contested case hearing. Procedural due process "requires that some form of hearing be available that provides a meaningful and timely opportunity to be heard before property is taken." Mont. Media, Inc., 63 P.3d at 1141. Though procedural due process "does not prescribe what procedural safeguards must be in place ... the procedure should reflect the nature of the private and governmental interests involved." Id. "Only under exigent circumstances, where the government's interest requires immediate action, may a post-deprivation rather than pre-deprivation hearing satisfy due process." Id.
- Thus, the Court's analysis of whether constitutional due process permitted the State to revoke Plaintiffs license without pre-deprivation notice and a hearing depends on whether exigent circumstances existed for the revocation. Judge Cavan assessed whether exigent circumstances existed, so even though his discussion was in the context of MAP A, his analysis is transferrable to a constitutional due process context. Thus, the Court will review his conclusions on whether exigent circumstances permitted the State to revoke Plaintiffs permit without predeprivation due process under a de novo standard of review.
- The Court agrees with Judge Cavan that whether exigent circumstances existed is disputed. Like Plaintiff, the Court finds the State's actions are reasonably interpreted as contradicting its claim that revocation was necessary to safeguard public safety, health, and welfare. For instance, despite the inspector sending a memorandum to DPHHS three days after the inspection requesting permission to immediately revoke Plaintiffs license,

DPPHS did not act on the request. (Doc. 89 at 3-4). DPHHS then issued the Inspection Report on July 25, 2018-more than a month later-and stated Plaintiff had almost two more months to remedy the violations. (Doc. 78-4). These. facts could indicate DPHHS did not believe immediate revocation was warranted.

- At the same time, Wiebe testified that DPHHS gave Plaintiff three months to resolve the problem initially because DPIDIS generally tries to work with providers to bring them into compliance before revoking their license. (Doc. 78-1 at 51). However, Wiebe described the Palmers as not "interested in being compliant," and thus the concerns for public safety justified revocation. (Id.). Further, the inspector who signed the report, Kim Speckman, testified that the report took a month to finalize and sign because DPHHS had many other inspections to complete, which all took preparation, travel, collaboration with other inspectors, and a review process. (Doc. 78-2 at 32-33). With that context, she said, a month "actually is not that long[.]" (Id. at 33). Speckman also testified that the revocation process was new to DPHHS, and there was ongoing discussion "over what might merit a revocation." (Id.). Thus, a reasonable juror could find DPHHS did not delay in acting.
- Regarding the State's argument that Plaintiff's illegal actions created a serious threat to public health and safety, the Court cannot grant summary judgment on this basis for two reasons. First, four of the six alleged violations of law the State lists were not in the Inspection Report or the Revocation Notice and therefore are posthoc rationalizations for DPHHS' s conduct that the Court cannot consider in evaluating DPHHS's conduct. See Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) (holding that an agency "must defend its actions based on the reasons it gave when it acted" and not on post hoc rationalizations). Specifically, neither the Inspection Report nor the Revocation Notice conclude that Plaintiff "allowed employees of Lionheart Caregiving and A&S Palmer Enterprises to be in possession of his marijuana plants, seedlings, usable marijuana, and infused products"; that Plaintiff "falsely represented that Shawn did not have a financial interest in the business, when the buy/sell agreement was a sham executed solely for the purpose of the license application"; that the "business was operated under the auspices of A&S Palmer Enterprises, which was not a licensed provider and was ineligible for licensure due to Shawn Palmer's ownership and prior drug conviction"; and that the dispensary location in Billings was ineligible for a license under a city ordinance. (Doc. 100 at 9).
- The State's remaining two reasons for revocation-that Plaintiff admitted he manufactured marijuana-infused products at another's premises in violation of Montana Code Annotated § 50-46-308(6)(a) and that the warehouse leased by M.O.M.S. was shared with another provider in violation of Montana Code Annotated § 50-46-308(6)(b)-were listed as violations in the Inspection Report and Revocation Report, and thus are proper for the Court to consider. However, the Court has no basis to conclude that these actions created exigent circumstances other than the statements made by counsel. Accordingly, it cannot not rule, as a matter of law, that these violations constituted exigent circumstances justifying revocation without pre-deprivation process.
- Plaintiff last argues that Judge Cavan erroneously failed to address whether the post-deprivation process provided was adequate. (Doc. 101 at 1 0). Specifically, Plaintiff asserts he was not given a meaningful notice or opportunity to be heard because he did not receive prior notice of DPilliS' s intent to revoke, only a notice to remedy his alleged violations. (Id.).
- The Court agrees that Judge Cavan failed to address this issue and that the State failed to provide prior written notice to

Plaintiff of the revocation, as required by Administrative Rule ofMontana 37.107.130 (2017). See Mont. Media, Inc., 63 P .3d at 1140 ("Due process requires both notice of a proposed action and the opportunity to be heard.") (emphasis added). However, summary judgment is not proper because exigent circumstances could have justified revocation without notice, and disputed facts exist as to whether exigent circumstances existed here.

- For these reasons, the Court sustains the State's objection to Judge Cavan's application of MAP A and overrules the State's other objections. The Court sustains Plaintiffs objection that Judge Cavan failed to address Plaintiffs post-deprivation argument and overrules Plaintiffs remaining objections. The Court rejects Judge Cavan's findings as to the applicability of MAP A and adopts his findings on all other Issues.

- D. Negligent Misrepresentation
  - The State next objects to Judge Cavan's denial of summary judgment on Plaintiffs negligent misrepresentation claim concerning the statement in the Inspection Report.
  - Both parties moved for summary judgment on Plaintiffs negligent misrepresentation claim regarding the statement in the Inspection Report, "Please provide proof by no later than 9.18.18 that all violations have been rectified." Negligent misrepresentation requires Plaintiff to show:
    - a) the defendant made a representation as to a past or existing material fact;
    - b) the representation must have been untrue;
    - c) regardless of its actual belief, the defendant must have made the representation without any reasonable ground for believing it to be true;
    - d) the representation must have been made with the intent to induce the plaintiff to rely on it;
    - e) the plaintiff must have been unaware of the falsity of the representation; it must have acted in reliance upon the truth of the representation and it must have been justified in relying upon the representation; and
    - f) the plaintiff, as a result of its reliance, must sustain damage. Jackson v. Montana, 956 P.2d 35, 43 (Mont. 1998).
  - Judge Cavan recommended denying both parties' motions, concluding that disputed facts existed as to the first, fifth, and sixth elements.

- 1. Representation as to Past or Existing Material Fact
  - With respect to the first element, Judge Cavan found that a dispute existed as to whether the statement was a representation as to a past or existing fact and whether it was material. (Doc. 99 at 16). First, as to whether it was a representation about a past or existing fact, Plaintiff contended that the statement indicated that "Plaintiff was being given the present opportunity to remedy any violations in the Inspection Report by September 18, 20 18[,]" or "that Plaintiff was not presently at risk of losing his license." (Id.). The State contended the statement was not a representation of fact but rather a request or directive for Plaintiff to provide proof that the violations were remedied. (Id.). Judge Cavan found both interpretations plausible and concluded that the weighing of the parties' competing interpretations of evidence is a task for the jury. (Id.).
  - The State objects to this finding, maintaining that "no interpretation of the statement ... include[s] a representation as to future events." (Doc. 100 at 6). Specifically, the State asserts the statement "does not represent a 'present' opportunity." (Id.). Rather, "[i]t represents an opportunity that will continue in the future, and which will end in the future." (Id.). As to Plaintiffs construction of the statement to mean that he was not presently at risk of losing his license, the State argued that the Court must also read the "risk" language as necessarily implicating a future .event (a revocation). (Id.).
  - Plaintiff responds that Judge Cavan

correctly found both interpretations reasonable. (Doc. 105 at 7). Plaintiff further argues that the State's construction of the statement as pertaining to a future fact is "absurd and would lead to most negligent misrepresentation claims being denied." (Id.).

- The Court agrees with Judge Cavan that whether the statement was a representation as to a past or existing material fact is ambiguous. Both parties' constructions of the statement are reasonable, and thus a jury must resolve which interpretation is correct." See United States v. Perry, 431 F.2d 1020, 1022 (9th Cir. 1970) ("Summary judgment should not be granted where contradictory inferences may be drawn from undisputed evidentiary facts."). The Court overrules the State's objection and adopts Judge Cavan's findings in full.
- As to the materiality of the statement, Judge Cavan also found factual disputes precluded summary judgment. (Doc. 99 at 17). Plaintiff argued that the statement was material because it gave him an opportunity to remedy the violations before being at risk of losing his provider license. (Id.). The State retorted that the statement is not material because Plaintiff did not believe he had a provider license when he received the Inspection Report. (Id.). Plaintiff responded that regardless of Plaintiffs attempt to relinquish his license, he still retained it because the State did not accept his relinquishment. (Id. at 17-18). Judge Cavan held disputed facts existed as to the status of Plaintiff's license and precluded summary judgment. (Id.).
- The State did not object to the materiality element, and so the Court reviews Judge Cavan's findings on it for clear error.3 The Court finds none and adopts his findings on the matter in full.
- Accordingly, disputed facts exist as to whether the statement in the Inspection Report was a representation made about a past or existing material fact. 3 It is odd to the Court that Plaintiff objected to Judge Cavan's conclusion in his discussion of the Dorwart claim that Plaintiff did not show he had a property interest in the license because disputed facts existed as to whether Plaintiff had or believed he had the provider license, but that Plaintiff did not object to Judge Cavan's denial of the parties' motion on the negligent misrepresentation claim, in part, because a dispute of material fact existed as to whether Plaintiff had or believed he had a provider's license and therefore whether the statement was material. Because the Court agrees with Judge Cavan that summary judgment should be denied on both claims, the discrepancy does not impact the Court's analysis.

- 2. Reliance
  - Judge Cavan next found a material dispute of fact existed regarding whether Plaintiff acted in reliance on the statement. (Id. at 18). While Plaintiff asserted he acted in reliance by continuing to operate the dispensary and to discuss the merger with Lionheart Caregiving, the State countered that Plaintiff only continued operations without a change to the status quo, which cannot constitute reliance. (Id.). Judge Cavan found the parties' competing narrative of events presented a jury question. (Id.).
  - The State objects to Judge Cavan's finding on the grounds that Plaintiff's continued operation of the dispensary and negotiations with Lionheart Caregiving "were not induced" by the statement in the Inspection Report, as required under Montana law. (Doc. 100 at 6-7). The State continues, "Reliance requires some showing that but for the alleged misrepresentation, Plaintiff would have cured the violations and avoided revocation of their license." (Id. at 7 (citing Anderson v. ReconTrust Co., N.A., 407 P.3d 692, 699 (Mont. 2017))). For instance, if Plaintiff was about to institute a new seed-to-sale tracking system but decided to put off the cost a few weeks based on the statement's indication he had longer to remedy the violations, the State argues reliance may be proven. (Id.). "No such circumstance is

alleged here." (Id.).

- Plaintiff responds that he refrained from acting, which can satisfy detrimental reliance, by not shutting down his business. (Doc. 1 05 at 8). "Had [Plaintiff] known that the cure date was illusory, he could have completed his merger or stopped selling marijuana products." (Id.).
- The Court disagrees with Judge Cavan that disputed facts exist as to Plaintiff's reliance on the statement. As the State maintains, the record is devoid of any evidence-in particular a declaration by Plaintiff--that he relied on the statement in deciding to continue operating his business and merger negotiations and to delay implementing corrective actions. In fact, Plaintiff's own statement of undisputed facts does not even state as much. Rather, Plaintiff only states DPHHS "admitted that Steven Palmer was entitled to rely on the inspection report[.]" (Doc. 78 at 5) (emphasis added) (See also id. at 4 ("DPHHS intended that Steven Palmer could rely on the representation that he had until September to remedy the violations.")). Without any evidence that the statement in the Inspection Report caused Plaintiff to refrain from acting, not just evidence that he did not act, the Court cannot find Plaintiff met his burden to rebut summary judgment by showing disputed facts exist. Accordingly, the Court sustains the State's objection to Judge Cavan's finding that disputed facts exist as to the reliance element and rejects Judge Cavan's Findings and Recommendations on the matter. The State therefore is entitled to summary judgment on Plaintiff's negligent misrepresentation claim.

- E. Damages
  - The State next objects to Judge Cavan's conclusion on the damages to which Plaintiff is entitled. (Doc. 100 at 3). The State contends that Judge Cavan failed to address "the central thrust of the State's motion" on the damages claim: "whether Steven Palmer, as an individual plaintiff, can recover for damages to a business operated under a separate and distinct corporate entity not a party to this litigation, namely, A&S Palmer Enterprises, Inc." (Id.).
  - In briefing in front of Judge Cavan, the State argued generally that Plaintiff cannot demonstrate entitlement to damages. (Doc. 81 at 9-1 0). First, the State asserted Plaintiff is only entitled to claim damages incurred by "Steven Palmer d/b/a/ Montana Organic Medical Supply." (Id. at 10-12). The State contended the undisputed facts show no such entity exists, and that M.O.M.S. was operated either as a subsidiary or unregistered assumed business name of A&S Palmer Enterprises or by Shawn Palmer individually. (Id. at 11). Accordingly, Plaintiff cannot recover damages for the M.O.M.S. entity, according to the State. (Id.). The only damages Plaintiff can prove he personally incurred was the loss income for marijuana-infused cookies that he produced and provided to M.O.M.S. dispensary, with gross sales ranging between $3,353 to $16,040 between 2014 and 2018. (Id. at 11-12).
  - The State next argues that even if Plaintiff could recover for damages incurred by M.O.M.S., no damages were actually incurred because the business had no value generally or assigned during the merger. (Id. at 12).
  - Judge Cavan recommended the Court deny summary judgment on the issue of whether Plaintiff could recover damages. (Doc. 99 at 26). First, Judge Cavan concluded that the State admitted that Plaintiff had demonstrated a basis for damages-the individual income for the marijuana-infused cookies between 2014 and 2018. (Id. at 26). Second, Judge Cavan concluded that material disputes of fact existed as to whether the business had any value. (Id. at 26--27). Last, Judge Cavan concluded that procedural due process claims are actionable for nominal damages. (Id. at 27).
  - The State objects to Judge Cavan's Findings and Recommendations primarily on the grounds that he did not resolve the question of whether Plaintiff can recover

for damages incurred by M.O.M.S. because, according to the State, M.O.M.S. was operated by a nonparty to the lawsuit (A&S Palmer Enterprises) and Plaintiff cannot recover damages incurred by a distinct legal entity. (Doc. 100 at 3-4). The State contends its showing that M.O.M.S. in fact belonged to A&S Palmer Enterprises, not Plaintiff, established the requirements for an order pursuant to Federal Rule of Civil Procedure 56(g) limiting the damages to. those incurred by Plaintiff personally. (Id. at 5).

- The State also objects to Judge Cavan's conclusion that disputed facts existed as to whether M.O.M.S. incurred damages because the singular Plaintiff in this action cannot recover for such damages. (Id. at 4). The State last objects to Judge Cavan's finding that Plaintiffs license had a value of about $250,000 because, according to the State, medical marijuana licenses cannot be legally transferred or sold and therefore have a value of zero. (Id. (citing Admin. R. Mont. 3 7.107 .115(6) (2018)).
- Plaintiff responds first that the State failed to timely raise what amounts to a real party in interest defense and therefore waives it. (Doc. 105 at 3). Accordingly, damages can properly be awarded to a shareholder in the corporation (here, Plaintiff). (Id.). Plaintiff next argues that Plaintiff can recover for damages to M.O.M.S. caused by its shutdown because the facts demonstrate that, until this litigation, Plaintiff was the owner ofM.O.M.S. and was treated as such by the State. (Id. at 3-4). Notably, M.O.M.S. was transferred to Plaintiff in May 2018. (Id. at 3). When Plaintiff applied for his dispensary provider license, he identified his business name as "Steven Ray Palmer" with a registered dispensary at 2918 Grand Avenue, Billings, Montana, 59102. (Id. at 4). The state-issued certificate explicitly stated: "Business Name: Steven Ray Palmer." (Id.). Further, the Inspection Report identified "Steve Palmer DBA M.O.M.S." as the entity allegedly committing certain violations of law." (Id.). Plaintiff goes on to list other facts to demonstrate that, even in this litigation, the State has treated Plaintiff as the owner of M.O.M.S. and M.O.M.S. as a distinct e~tity. (Jd.).
- Plaintiff further argues that the State's invocation ofRule 56(g) is an improper objection because it was never raised in front of Judge Cavan and is effectively a new motion improperly filed after the motions deadline. (I d. at 5-6).
- Last, as to the State's objection regarding the value of the license, Plaintiff retorts that the State has provided no expert explaining why Plaintiff's license is not worth $250,000 and must be transferrable to have value. (I d. at 6). Plaintiff contends he was serving 841 patients at the time of his revocation, so the license could be tied to the value of the patients moving to a new provider. (Jd.).
- As an initial matter, the State does not object to Judge Cavan's finding that Plaintiff is entitled to the damages related to him selling the marijuana-infused cookies and nominal damages for the alleged due process violations. The Court reviews Judge Cavan's fmdings on those damages for clear error. Finding none, the Court adopts his findings as to those categories of damages in full and denies summary judgment.
- Next, the Court agrees with Plaintiff that the State's invocation of Rule 56(g) for the first time is an improper objection and, in effect, an improper motion after the motions deadline. Nowhere in the State's briefing in front of Judge Cavan does the State explain or even imply that it is entitled to a Rule 56(g) order, despite its insistence in its objection that one is proper. Accordingly, the Court overrules this objection as improper.
- Moving to the substance of the State's objection, the Court fmds that disputed facts exist as to whether M.O.M.S. was actually operated by a nonparty, thus precluding damages to Plaintiff. The circwnstantial evidence the State sets forth in briefing in front of Judge Cavan is compelling but not conclusive. (Doc.

81 at 11- 12). Further, Plaintiff has put forth ample facts to put in dispute whether Plaintiff was the legal operator of M.O.M.S. Accordingly, even though Judge Cavan did not address this issue, the Court cannot conclude that, as a matter of law, Plaintiff is not entitled to damages incurred by M.O.M.S.

- As to the State's claim that the license was valueless, the Court also fmds summary judgment is improper on the grounds that the State has provided no evidence that the license is devoid of all value because it was non-transferable.
- For these reasons, the Court agrees with Judge Cavan that denial of the State's motion as to Plaintiffs entitlement to damages is proper.

- F. Tortious Interference
  - The State next objects to Judge Cavan's denial of summary judgment on Plaintiff's tortious interference claims. "An action for tortious interference with business relations entails four elements: that the defendant's acts: (1) are intentional and willful; (2) calculated to cause damage to the plaintiff's business; (3) done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and (4) result in actual damages and loss." State Med Oxygen & Supply, Inc. v. Am. Med. Oxygen Co., 883 P.2d 1241, 1243 (Mont. 1994).
  - Plaintiff asserted two bases for his tortious interference claim. First, Plaintiff alleged the State interfered with his relationship with cardholders who purchased marijuana from his dispensary by advising the cardholders Plaintiff's provider license was being revoked. (Doc. 3). Second, Plaintiff alleged the revocation interfered with the prospective merger with Lionheart Caregiving. (Id.).
  - The State argued in front of Judge Cavan that both claims fail because the alleged interferences were justified by Plaintiffs violation of laws intended to protect to the public and did not result in actual damage or loss. (Doc. 81 at 23). As to the interference with the cardholders, Plaintiff responded that one of the laws the State cited him for was not in effect at the time of the revocation, and that the remaining violations did not create exigent circumstances warranting immediate revocation and notification to the cardholders. (Doc. 90 at 29).
  - Judge Cavan recommended the Court deny summary judgment because disputed facts existed with both claims. (Doc. 99 at 29-30). As to the cardholder claim, Judge Cavan found the record supported both parties' positions on exigent circumstances. (Id.). As to the merger, whether the State's interference caused actual damage or loss depends on whether Plaintiff had maintained or relinquished his provider license. (Id. at 30). Since disputed facts existed as to the status of his provider license, Judge Cavan recommended the Court deny summary judgment on the matter. (Id.).
  - The State's objections merely repeat the arguments it made in front of Judge Cavan concerning both alleged forms of interference. (Compare Doc. 81 at 23 and Doc. 94 at 14 with Doc. 100 at 8-10). The State's additional detail on which statutes Plaintiff allegedly violated merely emphasizes its previous position that the interference was justified by Plaintiff's violation of state law.
  - Reviewing his findings for clear error, the Court finds none and adopts Judge Cavan's Findings and Recommendations on the issue in full. Denial of the State's motion for summary judgment as to the tortious interference claim is proper.

- G. Negligence
  - The State last objects to Judge Cavan's failure to address its motion on Plaintiffs negligence claim. (Doc. 100 at 13).
  - Somewhat confusingly, Plaintiff groups his negligence and negligent misrepresentation claim. The Complaint alleges in a single count:
    - • The DPHHS, Wiebe and Grantham had a duty to avoid taking unreasonable acts that would cause MOMS's injury.
    - • Defendants also had a duty to reasonably follow the law and reasonably act within the bound of the

law. Defendants breached this duty when it [sic] exceeded the scope of statutory and administrative rules in conducting their obligations and did so without any reasonable justification.
  - • DPHHS, Wiebe and Grantham violated these duties by taking actions (or by their agents taking actions) that exceeded their authority and jurisdiction and taking those actions without any reasonable basis believing the actions were necessary or allowed.
  - • Defendants further violated these duties by representing to MOMS that they had until September 18, 20 18, to cure any alleged statutory or administrative violations found at MOMS's dispensary or the cultivation cite. Indeed, Defendants made this statement in writing.
  - • Defendants further violated their duties by emailing the Billings Police Department and giving them false information that that the District Court had approved the license revocation and that MOMS was illegally selling marijuana and marijuana infused products. (Doc. 3 at 11-12).
- Judge Cavan addressed the second allegation of a violation of the State's duties (bullet four), as discussed in the negligent misrepresentation section of this order. He also resolved the third allegation (bullet five), which the Court will address in the subsequent section. However, the State is correct that Judge Cavan failed to address the parties' negligence arguments. (See Doc. 81 at 27; Doc. 90 at 30; Doc. 94 at 15).
- The State argues summary judgment on Plaintiff's negligence claim is proper because it is undisputed that the State did not cause Plaintiff to lose his medical marijuana business. (Doc. 100 at 13). Rather, Plaintiff's own violations of law caused him to lose his business. (Id. (citing Doc. 82 at 23-24)).
- Plaintiff disagrees, arguing that he lost his business because DPID-IS failed to operate according to its own requirements and its representation that it would not revoke Plaintiffs license until September. (Doc. 105 at 16).
- The Court agrees with Plaintiff that summary judgment is improper because disputed facts exist as to whether DPHHS followed its own rules regarding revocation procedures and whether DPHHS was justified in revoking Plaintiffs license prior to the date listed in the Inspection Report, as discussed above. The reasonableness of these actions is a question for the jury, and therefore summary judgment is improper.

- H. Remaining Summary Judgment Issues Not Objected To
  - Plaintiff does not object to Judge Cavan's recommendation that the Court deny Plaintiffs motion for summary judgment and grant the State's motion for summary judgment as to his Dorwart claims based on the right to privacy and employment, negligent representation claim concerning DPHHS' s email to the Billings Police Department, conspiracy claim, and defamation claim. The Court reviews Judge Cavan's Findings and Recommendations on these claims for clear error. It fmds none and adopts his Findings and Recommendations on these claims in full.
- V. Conclusion
  - IT IS SO ORDERED:
  - (1)Judge Cavan's Findings and Recommendations (Doc. 99) are REJECTED as to his finding ~hat MAP A govemed the due process procedures, his finding that disputed facts exist as to whether Plaintiff relied on the statement in the Inspection Report, and his recommendation the Court deny summary judgment on Plaintiff's negligent misrepresentation claim. His Findings and Recommendations are ADOPTED as to all other issues.
  - (2)Plaintiff's Motion for Collateral Estoppel (Doc. 74) is DENIED.
  - (3)Plaintiff's Motion for Partial Summary Judgment on Count II and VI (Doc. 79) is DENIED.
  - (4)The State's Motion for Summary Judgment (Doc. 80) is GRANTED as to Counts II, V, and VII; GRANTED IN PART as to Count VI (employment and

privacy rights); and DENIED as to all remaining claims.

- DATED this 27th day of March, 2024.
- /S/ Susan P. Watters
- United States District Judge