

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Case No.: DA 20-0312

LARRY REINLASODER,

Appellant and Plaintiff,

vs.

CITY OF COLSTRIP, Mayor John Williams,
STATE OF MONTANA, Judicial Branch,
Court Administrator, Does I - V.

Appellees and Defendants.

APPELLANT'S OPENING BRIEF

On Appeal from the Thirteenth Judicial District Court
of the State of Montana in and for the County of Yellowstone
Before the Honorable Donald L. Harris
Case No: DV 2016-566

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STATEMENT OF ISSUES FOR REVIEW

I. ISSUES

1. Whether the district court erred by granting the Court Administrator's motion to dismiss.
2. Whether the district court erred by granting summary judgment to the City of Colstrip.

STATEMENT OF THE CASE

Larry Reinlasoder's right to a fair appeal was compromised when Exhibit 272 was viewed by the Montana Supreme Court. Exhibit 272 consists of a series of photographs that were highly prejudicial to Reinlasoder's right to a fair trial. Colstrip tried time and again to introduce Exhibit 272 at trial, only for the district court to reject it. Still, Colstrip wrongfully convinced, and over Reinlasoder's vehement objection, the district court to admit Exhibit 272 as part of the district court file. The district court did so but only on the condition Exhibit 272 was sealed, remain sealed, and not viewed by anyone. Ultimately, Exhibit 272 was viewed by many, including those at the Montana Supreme Court, to Reinlasoder's prejudice. Under these circumstances, Reinlasoder filed his complaint in which he named as defendants the City of Colstrip, Mayor Williams, and the Court Administrator. The district court dismissed all parties, allowing Reinlasoder to move forward with this appeal.

STATEMENT OF FACTS

This matter began on February 28, 2014, when Reinlasoder filed a Complaint in the Thirteenth Judicial District Court against Colstrip for a wrongful discharge. On October 29, 2014, the district court denied Colstrip's motion for summary judgment on Reinlasoder's wrongful discharge claim. (Brief in Opposition to Colstrip's Summary Judgment, Appendix, pp. 136-137).

The district court set the trial for May 5, 2015. On the eve of the trial, with the time for filing motions in limine expired, Colstrip included Exhibit 272 as one of its exhibits, spurring the following email exchange between counsel.

William A. D'Alton <bill@daltonlawpc.com>
To: Mike J Lilly <mikelilly@berglawfirm.com>
Cc: Suzanne Damjanovich <suzie@daltonlawpc.com>

Sun, May 3, 2015 at 8:35 PM

Mike, I do object because I do not believe the documents should be filed at all.

William A. D'Alton
bill@daltonlawpc.com
P.O. Box 702
Billings, Montana 59103
406.245.6643

On May 2, 2015, at 8:54 AM, Mike J Lilly <mikelilly@berglawfirm.com> wrote:

Before you file a complaint with the Commission on Practice, you should get your facts straight:

- 1) Our exhibits were not sent to the Court. They are sitting in Bridget's office. If there is a cover letter indicating they were sent to the Court, it is in error.
- 2) Bridget was in Billings all day Wednesday and Thursday. I was in Billings and Colstrip all day Wednesday and in Colstrip all day Thursday. We had instructed our staff to get color photos of the pictures that were attached to the US Forensics report and put them in the exhibit notebooks. Somehow they got the all the photo you and I are now viewing. I won't know how they got them until Monday.
- 3) Bridget and I did not see the photos until we saw your brief and then looked at the notebooks.
- 4) Bridget, our staff person, Fisher Court reporting, our computer consultant and me are the only ones who have seen or even know these photos exist. I have not shared the discovery of these photos with the Mayor, Gary Ryder or Cory Hert.
- 5) Cory Hert is not my client. He is an employee of my client.

I will remove these photos from the exhibit books. I will leave the photos that were attached to the report in the books. I will move the court to file the disputed photos under seal. I assume you will not oppose that motion. I will then prepare and file my response to your brief. The court can then decide if the photos are relevant in light of your client's testimony in his federal court affidavit in which he states "I never sent or transmitted pornographic material" and federal court deposition where he states "I never looked at pornography on my computer."

I take my ethical obligations very seriously. I do not believe I have or am about to violate them. I have an obligation to vigorously represent my client's interests. I cannot and will not allow accusations of professional misconduct deter me from doing my duty.

William A. D'Alton <bill@daltonlawpc.com>
To: Mike J Lilly <mikelilly@berglawfirm.com>
Cc: Suzanne Damjanovich <suzie@daltonlawpc.com>

Mon, May 4, 2015 at 1:21 PM

Well, if we get into this at trial, I want to voir dire your expert before the judge and outside of the jury. There could be five emails containing these pictures and that is it. I also want to ask him if he examined Mr. Hert's computers for response email, and if not, why not.

William A. D'Alton
bill@daltonlawpc.com
P.O. Box 702
Billings, Montana 59103
406.245.6643

On May 4, 2015, at 1:18 PM, Mike J Lilly <mikelilly@berglawfirm.com> wrote:

Bill:

I had a chance to talk to my staff and expert and now understand how these events unfolded. We sent you a disc on October 13, 2013 (COL 2716) We kept a copy. I asked my staff last week to print a copy of the pictures on it for our attachment to the Requests for Admission, thinking all that was on it were 2009 photos. All the photos the expert had recovered were on the disc. None of our computers could read the disc, so my staff asked our expert for a new copy. He sent an electronic one. My staff printed the photos from the electronic file and put them in the exhibit books. They sent a book to you, but not the court or our client. I didn't know what pictures were printed until I looked in the Exhibit Book after seeing your brief late Friday afternoon.

I asked the expert why some were dated and others were not. He said many emails contained more than one photo. The first text sets out the date and then all the emails attached to it follow and a new date is not shown until a new email is identified.

I hope this explains the situation to your satisfaction.

In response to the unexpected disclosure, Reinlasoder filed a motion *in limine* in which he pointed out that Exhibit 272 was generated by Colstrip's forensic company, US Forensic, about a year and a half after Colstrip wrongfully terminated

Reinlasoder. The documents were not considered by Colstrip as its reason to discharge Reinlasoder. Therefore, Exhibit 272, had no relevance and its only purpose was to create prejudice. Moreover, according to the US Forensic report, the emails and attachments were from 2005, or about seven years prior to Reinlasoder's termination, making the documents too remote in time. (Brief in Opposition to Colstrip's Summary Judgment, Appendix, pp. 137-138).

Due to foundation problems, Colstrip could not introduce Exhibit 272 at trial. Nonetheless, while prevented from submitting Exhibit 272 to the jury, Colstrip's counsel submitted a motion to file the documents under seal under the premise that Colstrip's counsel was preparing his defense to a possible professional misconduct complaint. The logic as to why Exhibit 272 needed filing in the docket to ward off a complaint is inexplicable. The following details what happened on the morning of the first day of trial regarding Exhibit 272:

Court: So you want them as part of the record in case this case goes to the Montana Supreme Court, just to be able to have the full picture? Are you thinking that the jury would look at – would they be an exhibit that would go to the jury?

M.Lilly. No (sic) necessarily. I had not planned on offering them, but then the motion was filed, and the Court was advised that these photos were there and that they were going to impugn Mr. Hert and that he was sending some of them, and those are not true statements and I want to be able to have a record in place so that that doesn't stand alone, because it sounds like, from the motion, I'm going to be taken before the Commission on Practice, and so I would like to have the Court review them.

B. D'Alton He's not going to be taken before the Commission on Practice. This is the chronology: I get their exhibits Friday, last Friday, a bunch of exhibits. I look at them and I find a bundle of photos. Some are of nude women, and I then am wondering what's going on with this exhibit. And I recently have reviewed a disciplinary case where things were filed to embarrass, to put pressure on another side, and that attorney was sanctioned for that. I could see absolutely no relevance for these photos in this case. Absolutely none - I made that call. There was just no relevance. So what is the purpose of filing these photos? As far as I could see, the closest date on any of these documents was 2005. And so I then said, well, there may be an issue with Professional Conduct 4.2 or 4.4, where an attorney files things. Mike was gone; he was interviewing in Colstrip. I quickly filed the motion to raise the issue, why are we doing this? Why are we filing things like this? **Then Mike sent me an email explaining, well, his assistant, his secretary or legal assistants had done that - he didn't know about it.** (Emphasis Added). I believe him. I believe him that he didn't know about it but I'm still wondering why wasn't there some supervision over those exhibits before they went out. Well, they're out of the office, I understand, I'm busy too, as an attorney. So he did explain that to me, but **then I'm still wondering why are these being made part of the record. They don't need to be made part of the record.** (Emphasis Added) I suppose if we get into issues going back to 2005, although I am flabbergasted how we would get there, that they could come and say, well, we've got these photos. But my question to Mike was, how are you going to get them in? Where's - these are an expert forensic computer guy. Where is he? You've got to put him on the stand. There's no foundation for these photos and then I get an email well the pictures were part of a greater email. There might have been, I don't know, five pictures, ten pictures. We don't even know how many emails are here. There might be five; there might be ten. And so, I told Mike, if the Court is going to consider this, then I get to voir dire your expert. What is going on here - what is going on. So I want him on the stand. I told Mike, I want you to have your expert here before the Judge to allow me to voir dire outside the jury so the Judge

can hear this. That's been my position.

...

B. D'Alton: To lay the foundation, where did these come from; did you review his computer; why are they this way; why aren't dates on most of these; all sort of questions on foundation.

M. Lilly: I think we should point out, Bill's had these photos since December of 2013, and he did not depose my expert.

B. D'Alton That still doesn't allow it admissible at trial.

M. Lilly: I don't suggest that it does, but it's not –

COURT: Well, obviously, the foundation, if Mr. Lilly decides they're going to be an exhibit, the foundation is going to have to be laid, and if you don't think the foundation is laid, of course, you're going to have a chance to voir dire the expert. I'm not going to promise you you'll do it outside the presence of the jury, because that's an unusual practice, but you know, maybe in this case it would be appropriate. We'll deal with that when and if we get there.

B.D'Alton: All right, thank you, Judge.

COURT: ALL RIGHT –

M. LILLY: I could bring a written order for that if that would –

COURT: Sure. So Lora, just to be clear, the Exhibits are filed under seal and these are the exhibits. They're not going to go to the jury; it's must more of a – I guess you'd call it a Court Exhibit.

CLERK: Is it just these, or all of the exhibits?

COURT: Just those. So that would be under seal, and I'll sign the order.

B. D'Alton What Exhibit number is that?

M. Lilly: 272 I think – I don't have my book, I'm sorry. I have to tell you when we get out there. (Brief in Opposition to Colstrip's Summary Judgment, Appendix, pp. 138-141).

The district court rejected Exhibit 272's admission at trial. The district court found Exhibit 272 "marginally relevant" and its "minimal probative value" was outweighed by "unfair prejudice." Even though the district court rejected Exhibit

272, it was part of the record that eventually went to the Montana Supreme Court, albeit under the guarantee to Reinlasoder it was to remain sealed. (Brief in Opposition to Colstrip's Motion for Summary Judgment, Appendix, p. 141).

From May 5, 2015, to May 8, 2015, the parties tried the wrongful discharge action. After overwhelming evidence against Colstrip, the Jury rendered a verdict (11-1) to Larry. The Jury awarded Larry \$300,000.00 (11-1). On May 14, 2015, (Brief in Opposition to Colstrip's Summary Judgment, App. p.).

Clearly, Colstrip was "shocked" that Exhibit 272 did not make it to the jury. Exhibit 272 was its defense. (Brief in Opposition to Colstrip's Summary Judgment, Appendix, p. 141). Ms. Shantz, one of Colstrip's attorneys, wrote the following thirteen days before Colstrip filed its appellate brief. (Brief in Opposition to Colstrip's Summary Judgment, Appendix, p. 142).

From: Hanna Schantz [<mailto:hannaschantzlaw@gmail.com>]
Sent: Friday, January 08, 2016 4:45 PM
To: Gary Ryder <gryder@rangeweb.net>
Subject: Comments on the Brief

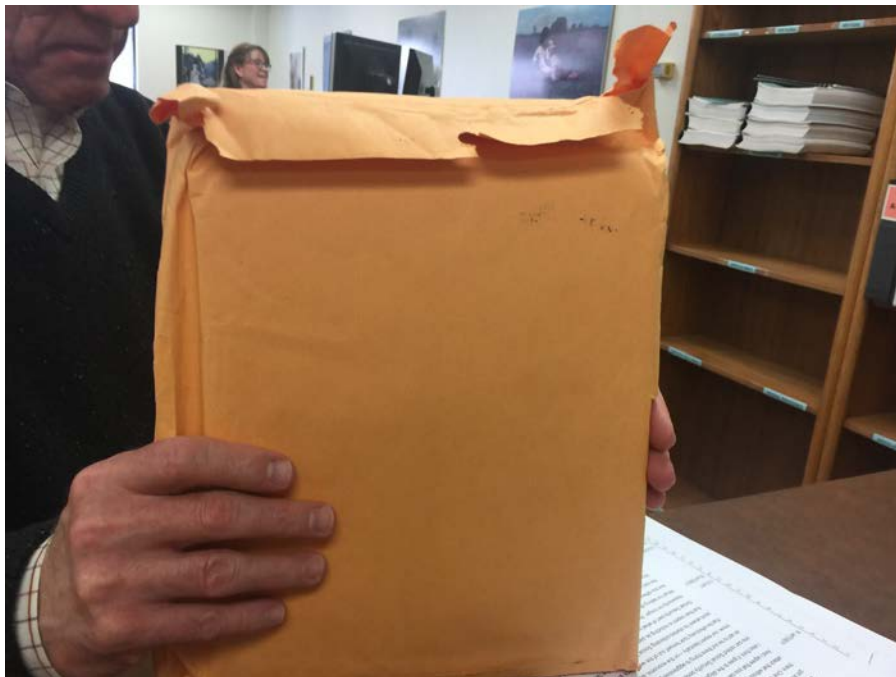
Hey Gary,

I thought the Brief was very good. I really liked getting to read about the trial and see a nice, step by step timeline of all the problems Colstrip had with Reinlasoder. I'm particularly in shock over that Judge Fagg allowed the punitive damages instruction and the special verdict form, but disallowing the computer porn pictures and Sather report. Completely baffles me!

One thing I noticed is that the Statement of Facts does not mention Reinlasoder's untruthfulness on his initial job application regarding his employment in Billings, nor does the fact statement mention anything about how he left the Billings job. - but maybe that's intentionally left out because that was not why Mayor Hanser terminated him, not sure. Just thought I'd mention it.

After Colstrip filed its notice of appeal, the district court clerk sent the entire file to the Montana Supreme Court Clerk, including Exhibit 272, which should have remained sealed. Pictures were taken of Exhibit 272 while in the possession of the Montana Supreme Court and after the Court issued its opinion in *Reinlasoder v. City of Colstrip*, 2016 MT 175, 384 Mont. 143, 376 P.3d 110. Abundantly clear from the pictures of Exhibit 272 taken while the Exhibit was in the Clerk of Montana Supreme Court's possession, the pictures were viewed so many times that the envelope was ripped and tattered. (Affidavit in Support of Reinlasoder's Brief in Opposition to Colstrip's Motion for Summary Judgment, Appendix, pp. 73-103).

Here is the "sealed" Exhibit 272 in the possession of the Montana Supreme Court:



(Affidavit in Support of Reinlasoder's Brief in Opposition to Colstrip's Motion for Summary Judgment, Appendix p. 78).

Therefore, on May 18, 2018, Reinlasoder filed his Third Amended Complaint. In the Third Amended Complaint Reinlasoder named the City of Colstrip, Mayor John Williams, and the State of Montana Judicial Branch, Office of Court Administrator as defendants. Reinlasoder filed negligence and due process claims against the Court Administrator, Mayor John Williams, the City of Colstrip and an abuse of process claim against Mayor John Williams and the City of Colstrip. (Third Amended Complaint, Appendix, pp. 154-160).

On April 19, 2019, the district court dismissed the State of Montana Judicial Branch, Office of Court Administrator as a party. The district court held the Montana Supreme Court enjoyed immunity. (April 19, 2019, Order, Appendix, pp. 24-29). The district court, on May 9, 2019, dismissed John Williams as a party. On May 20, 2020, the district court dismissed the City of Colstrip. (May 20, 2020, Order Granting Colstrip's Motion for Summary Judgment, Appendix, pp. 11-23).

STANDARD OF REVIEW

A. Standard of Review for Motion to Dismiss

A district court's rulings on a motion to dismiss under Rule 12(b)(1) or (6), M.R.Civ.P., are reviewed *de novo*.¹ The rulings are granted as conclusions of law and therefore reviewed *de novo* for correctness. *Stowe v. Big Sky Vacation Rentals*,

¹ The Court Administrator did not identify which subpart of 12(b) the Court Administrator's motion was made. Instead, the Court Administrator's position was the Motion to Dismiss was made under the judicial immunity doctrine.

Inc., 2019 MT 288, ¶ 12, 398 Mont. 91, 454 P.3d 655 (2019).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true. Pursuant to this standard of review, the Montana Supreme Court will affirm a district court's dismissal only if it is "determine[d] that plaintiff is not entitled to relief under any set of facts which could be proven in support of the claim." *Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d 1352, 1354-1355 (1997)

B. Standard of Review for Summary Judgment

A district court's summary judgment ruling is reviewed *de novo*. This Court applies the same Rule 56, M.R.Civ.P. criteria as the district court. The Montana Supreme Court determines whether the moving party has established both the absence of any genuine issues of material fact and the party is entitled to judgment as a matter of law. The Court reviews a district court's conclusions of law for correctness. *The Estate of Willson v. Addison*, 2011 MT 179, ¶ 11, 361 Mont. 269, 258 P.3d 410.

SUMMARY OF ARGUMENT

- 1. The district court erred when it granted the Court Administrator's motion to dismiss as well as Colstrip's motion for summary judgment on the grounds of judicial immunity.**

The Montana Supreme Court did not have the jurisdiction to review documents which were not part of the record on appeal. By reviewing and considering sealed documents, these acts denied Reinlasoder a right to a fair appeal.

ARGUMENT

The district court granted the Court Administrator's motion to dismiss and Colstrip's motion for summary judgment for three reasons.

1. The Montana Supreme Court was protected by judicial immunity.
2. With judicial immunity protecting the Montana Supreme Court, Reinlasoder could never not discover the issues in the case
3. The opinion in *Reinlasoder v. City of Colstrip*, 2016 MT 175, 384 Mont. 143, 376 P.3d 110 stands alone, regardless that the Court reviewed Exhibit 272.

A. The issue of judicial immunity.

When the district court granted judicial immunity to the Court Administrator, Reinlasoder was effectively prevented from moving forward with discovery. Therefore, Reinlasoder requests this Court reverse the district court order on judicial immunity, allowing Reinlasoder to move forward with discovery in this matter.

For the purposes of reviewing a motion to dismiss, the following allegations in the Third Amended Complaint were admitted:

7. In May 2012, Colstrip terminated Larry's employment.
8. Larry filed suit in Federal Court and then filed suit in State Court.
9. Just prior to the trial, Colstrip submitted photographs that were

part of an expert report.

10. Colstrip commissioned the forensic analysis after Larry was terminated.
11. The forensic company, US Forensics, issued its report in December 2013.
12. On the eve of trial, Colstrip submitted the photos as Exhibit 272.
13. Colstrip did not list anyone from US Forensics as an expert to be called at the trial.
14. Colstrip did not call anyone from US Forensics to lay the proper foundation for the Exhibit 272.
15. Still, Colstrip was insistent that Exhibit 272 be made part of the record.
16. On numerous occasions Colstrip tried to get the photos into evidence although the Rules of Evidence clearly prohibited the evidence.
17. The Court refused to allow Exhibit 272 into evidence. The Court also ordered Exhibit 272 sealed.
18. After Colstrip appealed the jury's verdict, the file was sent up to the Montana Supreme Court.
19. The district court never issued an order to unseal Exhibit 272 or allow it to be admitted into evidence.
20. The envelope containing 272 was not opened by anyone at the district court level.
21. The envelope containing the photos (Exhibit 272) was opened many times at the Montana Supreme Court.
22. The envelope that had Exhibit 272 in it was opened so many times that the envelope was ripped and tattered.
23. When reviewed and photographed at the Montana Supreme Court the envelope containing Exhibit 272 was not even sealed.
24. Once the boxes go upstairs to the Justices' office, the Montana Supreme Court Clerk's office no longer has control over the files.

25. In violation of the May 5, 2015, Court Order, court personnel opened the sealed envelope which contained Exhibit 272 and reviewed its contents.
26. It is believed that personnel at the Montana Supreme Court, including clerks and Justices, considered Exhibit 272 as evidence.
27. Colstrip circumvented the district court's ruling and got the photos into evidence at the Montana Supreme Court.
28. This was also highly prejudicial to Larry at the appellate level.
29. Colstrip got its expert report and the prejudicial photos into the evidence even though the report was inadmissible before the jury and not considered by the jury.
30. Larry has incurred damages by the Defendants' wrongful acts. (Third Amended Complaint and Demand for Jury, Appendix, pp. 156-157).

Under these allegations, Reinlasoder alleged the Montana Supreme Court's actions were negligent and violated Reinlasoder's right to a fair appeal. (CR, Doc. 12, Third Amended Complaint, Appendix, 154-157). The Court Administrator did not contest that the Montana Supreme Court reviewed Exhibit 272. The Court Administrator's position is the Montana Supreme Court is protected by judicial immunity. The district court agreed and granted the Court Administrator's motion to dismiss and, about a year later, Colstrip's Motion for Summary Judgment.

Reinlasoder submits the district court should have rejected the judicial immunity doctrine under the particular allegations in this case. Reinlasoder alleged personnel at the Montana Supreme Court reviewed sealed documents, which the jury

did not consider, and weighed and considered the documents as part of the appellate process. Judicial immunity does provide protection for such wrongful acts.

Montana statutory law is clear that every person must exercise ordinary care for the safety of others, and anyone who doesn't, including persons acting as the agent for others, is individually liable for the damages caused by his or her personal conduct.

Section 28-1-201, MCA provides:

Every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon any of another person's rights.

Section 27-1-701, MCA provides that:

Except as otherwise provided by law, each person is responsible not only for the results of the person's willful acts, but also for an injury occasioned to another by the person's want of ordinary care or skill in the management of the person's property or person except so far as the person has willfully or by want of ordinary care brought the injury upon the person.

Finally, §28-10- 702(3), MCA makes clear that:

A person who assumes to act as an agent is responsible to third persons as a principal for acts in the course of the agency in any of the following cases and in no other:

3) When the agent's acts are wrongful in their nature.

Needless to say, acts or omissions which are prohibited by law, such as negligence, are wrongful in nature. As stated by the Montana Supreme Court, "Montana's public policy, already set forth in our statutes and in force for decades,

clearly and unequivocally imposes on each citizen the legal duty to, in all matters, act prudently, with a view to the nature and probable consequences of his conduct, and to abstain from injuring other persons or their property or infringing on their rights." *Estate of Strever v. Cline*, 278 Mont. 165, 180, 924 P.2d 666, 674-75 (1996). Summing up these propositions, there is always a remedy for a wrong, except here, after the district court applied judicial immunity.

Judicial immunity protects judicial independence. *Forrester v. White*, 484 U.S. 219, 226-227 (1988). Therefore, judicial immunity is not for the protection of judges, but for the protection of the public. *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

Stump v. Sparkman, 435 U.S. 349, 362 (1978) is the seminal case on judicial immunity. The critical holding in *Stump* is:

A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." *Id.* at pp. 356-357.

Judges, in Montana, enjoy immunity when acting within their official authority. Section 2-9-112, MCA (2015) states:

- (1) The state and other governmental units are immune from suit for acts or omissions of the judiciary.
- (2) A member, officer, or agent of the judiciary is immune from suit for damages arising from the lawful discharge of an official duty associated with judicial actions of the court.

- (3) The judiciary includes those courts established in accordance with Article VII of The Constitution of the State of Montana.

Justice Wheat, relying upon § 2-9-112(2) and *Stump v. Sparkman*, outlined when judicial applies and when it does not:

Section 2–9–112(2), MCA, provides that a member of the judiciary is immune from suit for damages arising from official judicial actions of the court. We recognize that the Legislature has complied with Article II, Section 18 in the enactment of § 2–9–112(2), MCA. *Silvestrone v. Park Co.*, 2007 MT 261, ¶ 15, 339 Mont. 299, 170 P.3d 950.

Judges are not entitled to judicial immunity when their act (1) is not normally a function performed by a judge, and (2) the judge acts in the “clear absence of all jurisdiction.” *Stump v. Sparkman*, 435 U.S. 349, 356–62, 98 S.Ct. 1099, 1105–08, 55 L.Ed.2d 331 (1978). If a judge has subject-matter jurisdiction over the act in question, he is entitled to immunity. *Stump*, 435 U.S. at 362, 98 S.Ct. at 1108. The immunity statute applies to judicial acts without limitation. *Silvestrone*, ¶ 14. This is true even if the action taken was in error or in excess of his authority. *Mireles v. Waco*, 502 U.S. 9, 13, 112 S.Ct. 286, 288–89, 116 L.Ed.2d 9 (1991).

Therefore, whether an act by a judge is “judicial” relates to the nature of the act itself. The *Stump* Court held that a judicial act is a function normally performed by the judge, and to the expectations of the parties. *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). Therefore, *Stump v. Sparkman* is a two-factor test. *Stump v. Sparkman*, 435 U.S. 349, 361-362 (1978).

The issue presented for this Court’s consideration is whether the Montana

Supreme Court normally reviews documents that are not part of the record, and, second, whether a litigant would expect the justices of the Montana Supreme Court to review documents not part of the record and not considered by the district court or jury for any purpose.

Contrary to the State's position, Reinlasoder submits under the following law, the Montana Supreme Court does not have jurisdiction to review documents not part of the trial record and not considered by the district court or jury. If it does, it acts outside of its jurisdiction, and therefore it is not afforded immunity.

The people of Montana conferred jurisdiction upon the Montana Supreme Court pursuant to Montana's Constitution, Article 7, Section 2:

Section 2. Supreme Court jurisdiction

(1) The supreme court has appellate jurisdiction and may issue, hear, and determine writs appropriate thereto. It has original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as may be provided by law.

(2) It has general supervisory control over all other courts.

(3) It may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.

(4) Supreme court process shall extend to all parts of the state.

The scope of the appellate review is limited to matters contained within the trial record. Rule 9(a), M.R.App.P. The Montana Supreme Court has long held to

the rule that an appellate court in reaching its decision will only consider material ascertainable from the record. *State v. Ellison*, 2012 MT 50, ¶ 10, 272 P.3d 646, 364 Mont. 276; *State v. Hatfield*, 256 Mont. 340, 344, 846 P.2d 1025, 1028 (1993); *State v. Mix*, 239 Mont. 351, 361, 781 P.2d 751, 757 (1989).

In *State v. Graham*, Justice Baker pointed out that the Court's role is not to add facts to the record:

The Dissent faults the Court for concluding there was no particularized suspicion for the stop of Graham and Strauser. The Dissent seems to implicitly recognize that its contentions are not supported by the actual facts of this case when it states that “virtually any fact which *may have been added* to the situation here would have supported, not just particularized suspicion, but probable cause that a sex crime was being committed.” However, **it is not our role to add facts to the record.** (Emphasis Added). *State v. Graham*, 2007 MT 366 ¶ 21, 340 Mont. 366, 175 P. 3d 885.

Chief Justice Gray, *In re Guardianship of Saylor*, reminded the majority the Montana Supreme Court should not become a trial court and if it took on the role as a trial court this potentially could infringe upon the due process rights of litigants. *In re Guardianship of Saylor*, 2005 MT 236, ¶¶ 48-49, 121 P.3d 532, 328 Mont. 415.

Reinlasoder's claims reflect Justice Gray's concerns. Applying the *Stump* factors, the Montana Supreme Court cannot review documents that are not admitted into the trial record. Second, Reinlasoder would not expect the justices of the Montana Supreme Court would review documents that are not part of the record.

The Montana Supreme Court acted outside of its jurisdiction and therefore it did not enjoy judicial immunity.

The district court found judicial immunity for Montana Supreme Court on the grounds that “[i]t is axiomatic that the Montana Supreme Court's appellate jurisdiction extends to resolving evidentiary issues raised in the trial court, including review of disputed exhibits.” (Order Granting State’s Motion to Dismiss, Appendix, p. 28). While the Montana Supreme Court has the jurisdiction to review evidentiary issues, those issues are raised by argument in the record, which is made by the court reporter, and sent to the court on appeal. If the trial exhibit has been rejected by the district court, the exhibit itself is not reviewed at the appellate level at part of the trial record. This is exactly what happened when the district court rejected Exhibit 272. The district court, rejected Exhibit 272, finding Exhibit 272 was “marginally relevant” and its “minimal probative value” was outweighed by “unfair prejudice.” (District Court, July 14, 2015, Order, Appendix, p. 117). Therefore, if reviewed on appeal, the only issue would have been whether the district court properly rejected the exhibit based upon its wide discretion to do so.

The district court also has to handle the order sealing Exhibit 272 in order to make judicial immunity square with its legal conclusion. The district court does this by stating the Montana Supreme Court has the authority to review sealed exhibits.

According to the district court, once the documents are sealed and submitted to the Montana Supreme Court, the Montana Supreme Court has jurisdiction to review the documents. The district court cited *State v. Weisbarth*, 2016 MT 214, ¶32, 384 Mont. 424, 378 P.3d 1195; *State v. Stutzman*, 2017 MT 169, ¶30, 388 Mont. 133, 398 P.3d 265; and *State ex rel. Great Falls Tribune Co., Inc. v. Mont. Eighth Judicial Dist. Ct.*, 238 Mont. 310, 315, 777 P.2d 345, 348 (1989). (Order Granting Colstrip’s Motion for Summary Judgment, Appendix, p. 15). These cases are not controlling. Unlike the facts here, the parties in those cases consented to the Montana Supreme Court’s review of the sealed documents.

In *Weisbarth*, the defendant raised the issue that the State had the victim’s medical records and failed to disclose those medical records to defense counsel, thereby violating the defendant’s right to a fair trial. The *Weisbarth* Court agreed. *Id.* at ¶¶20-21. Unlike the facts here, the parties in *Weisbarth* agreed to make the medical records part of the record for review by the Montana Supreme Court. The medical records were sealed from the public, not the Court. *Id.* at ¶31.

The facts in *State v. Stutzman*, 2017 MT 169, 388 Mont. 133, 398 P.3d 265, are also distinguishable. Like *Weisbarth*, the *Stutzman* case is a criminal case where the parties agreed the district court should review the medical records of the State’s key witnesses to resolve a discovery issue. The district court conducted a *in*

camera inspection of the documents and found the medical records contained no exculpatory evidence. *Id.* at ¶8.

The defendant in *Stutzman* raised a due process claim which required the Montana Supreme Court to review the records. The parties agreed the district court and the Montana Supreme Court should review the records. *Id.* at ¶¶30-33.

The holding *State ex rel. Great Falls Tribune Co., Inc. v. Mont. Eighth Judicial Dist. Ct.*, 238 Mont. 310, 777 P.2d 345, 348 (1989) is not controlling. The case concerned a Great Falls Tribune reporter entering a closed revocation hearing. When the reporter entered the courtroom the judge told the reporter the hearing was closed. *Great Falls Tribune*, 238 Mont. at 320-321. The reporter then left the hearing. The reporter called her editor who told her to reenter the courtroom. The reporter reappeared with another person and interrupted the judicial proceeding. Ultimately, the district court held the reporter in contempt. In response, the Great Falls Tribune applied for a Writ of Review of the District Court's Order of Contempt. *Id.* at 312.

The Montana Attorney General filed a motion for an *in camera* review of the hearing transcript. The Attorney General asked that the transcript remain sealed. The Great Falls Tribune objected because it did not have access to the sealed transcript. *Id.* at 315-316. The Montana Supreme Court received a copy of the transcript of the probation revocation hearing filed under seal. Instead of granting

the Great Falls Tribune's motion to unseal the transcript of record the Court directed the parties to brief issues in the case by assuming a premise under facts which were given by the Court to the parties. *Id.* at 317.

The facts of the *Great Falls Tribune* case are very different from the facts in this matter. Here, the Montana Supreme Court received an exhibit with close to 200 photos, which were very prejudicial to Reinlasoder's case and not relevant to the issues in the case. The district court rejected Exhibit 272 based on the arguments of the party.

Although the district court rejected Exhibit 272, which was the key to Colstrip winning the case, the Exhibit was still made part of the district court file, albeit filed under seal. Reinlasoder's counsel, at the time Colstrip proposed entering Exhibit 272 into the court file, vehemently objected:

B. D'Alton He's not going to be taken before the Commission on Practice. This is the chronology: I get their exhibits Friday, last Friday, a bunch of exhibits. I look at them and I find a bundle of photos. Some are of nude women, and I then am wondering what's going on with this exhibit. And I recently have reviewed a disciplinary case where things were filed to embarrass, to put pressure on another side, and that attorney was sanctioned for that. I could see absolutely no relevance for these photos in this case. Absolutely none - I made that call. There was just no relevance. So what is the purpose of filing these photos? As far as I could see, the closest date on any of these documents was 2005. And so I then said, well, there may be an issue with Professional Conduct 4.2 or 4.4, where an attorney files things. Mike was gone; he was interviewing in Colstrip. I quickly filed the motion to raise the issue,

why are we doing this? Why are we filing things like this? **Then Mike sent me an email explaining, well, his assistant, his secretary or legal assistants had done that - he didn't know about it.** (Emphasis Added). I believe him. I believe him that he didn't know about it but I'm still wondering why wasn't there some supervision over those exhibits before they went out. Well, they're out of the office, I understand, I'm busy too, as an attorney. So he did explain that to me, but **then I'm still wondering why are these being made part of the record. They don't need to be made part of the record.** (Emphasis Added) I suppose if we get into issues going back to 2005, although I am flabbergasted how we would get there, that they could come and say, well, we've got these photos. But my question to Mike was, how are you going to get them in? Where's - these are an expert forensic computer guy. Where is he? You've got to put him on the stand. There's no foundation for these photos and then I get an email well the pictures were part of a greater email. There might have been, I don't know, five pictures, ten pictures. We don't even know how many emails are here. There might be five; there might be ten. And so, I told Mike, if the Court is going to consider this, then I get to voir dire your expert. What is going on here - what is going on. So I want him on the stand. I told Mike, I want you to have your expert here before the Judge to allow me to voir dire outside the jury so the Judge can hear this. That's been my position.

...

B. D'Alton: To lay the foundation, where did these come from; did you review his computer; why are they this way; why aren't dates on most of these; all sort of questions on foundation.

M. Lilly: I think we should point out, Bill's had these photos since December of 2013, and he did not depose my expert.

B. D'Alton: That still doesn't allow it admissible at trial.

M. Lilly: I don't suggest that it does, but it's not -

COURT: Well, obviously, the foundation, if Mr. Lilly decides they're going to be an exhibit, the foundation is going to have to be laid, and if you don't think the foundation is

laid, of course, you're going to have a chance to voir dire the expert. I'm not going to promise you you'll do it outside the presence of the jury, because that's an unusual practice, but you know, maybe in this case it would be appropriate. We'll deal with that when and if we get there. (Brief in Opposition to Colstrip's Summary Judgment, Appendix, pp. 138-141).

From the record, Reinlasoder never consented and did not expect the Montana Supreme Court to review Exhibit 272. When the district court sealed Exhibit 272, the district court acknowledged Reinlasoder's objection to the Montana Supreme Court reviewing Exhibit 272. Still, that sealed Exhibit was opened many times, thereby violating the district court's order, and also Reinlasoder's right to a fair appellate process.

The district court also held Reinlasoder's negligence claim could not be proven because he would never know what happened at the Montana Supreme Court regarding viewing Exhibit 272 and therefore Reinlasoder could not prove causation. (Order Granting City of Colstrip's Motion for Summary Judgment, Appendix, pp. 17-19). That may be the case but it wasn't for Reinlasoder trying to discover who, what, when and why a sealed exhibit that was not part of the trial and sent to the Montana Supreme Court nevertheless was viewed. There is no dispute that the envelope was repeatedly opened in violation the district court's order. (Reinlasoder's Brief in Opposition to Court Administrator's Motion for Protective Order, Affidavit in Support, Appendix, pp. 73-91).

Reinlasoder made attempts to discover who violated the district court's order by opening and viewing Exhibit 272 at the Montana Supreme Court, but the Court Administrator contested any attempt by Reinlasoder to discover these issues. On May 16, 2017, when Reinlasoder filed his administrative complaint with the Court Administrator, the Court Administrator responded that the office could not assist him with his complaint and that she suggested that he work through his attorney on the legal issues. (Brief in Opposition to Colstrip's Motion for Summary Judgment, Affidavit in Support, Exhibits 18 and 19, Appendix, pp. 104-107).

Shortly after the Court Administrator appeared on the Third Amended Complaint, Reinlasoder served his first set of discovery upon the Court Administrator. The Court Administrator responded by filing a motion for a protective order. (CR, Docs. 31, 32). After the district court dismissed the Court Administrator as a party, Reinlasoder served a subpoena *duces tecum* upon the Court Administrator seeking information regarding Exhibit 272. The Court Administrator responded by filing an objection to Reinlasoder's subpoena. (CR Docs. 49, 54, 58).

Finally, the district court concluded the opinion in *Reinlasoder v. City of Colstrip*, 2016 MT 175, 384 Mont. 143, 376 P.3d 110 is final, and that contesting the outcome is useless because the opinion rests on an entirely different legal basis. (Order Granting City of Colstrip's Motion for Summary Judgment, Appendix 17-18).

The opinion in *Reinlasoder v. City of Colstrip*, 2016 MT 175, 384 Mont. 143, 376 P.3d 110 found the district court should have granted Colstrip's motion for summary judgment on the grounds that Reinlasoder testified he "did not recall" making certain statement to Colstrip's key witness against Reinlasoder. Because, Reinlasoder equivocated in his answer, according to the majority opinion, he must have sexually harassed Mercedes Kroll. *Reinlasoder*, 2016 MT at ¶ 16.

Judge Russell Fagg, who oversaw the trial, perplexed by the opinion, which made no sense to him, penned his opinion against it, which was published in Billings Gazette. In part, Judge Fagg wrote:

The Court, and The Gazette, laid out the evidence why the firing was justified. Neither laid out the contrary evidence why the firing may not have been justified. For instance, one witness testified the Mayor (who I thought otherwise did an excellent job as major) told her at a grocery store they were going to get rid of Reinlasoder, or the favorable job reviews Reinlasoder had received, or Reinlasoder's side of the story. The jury heard all this evidence, and more, during the several day trial. (Reinlasoder's Brief in Opposition to Court Administrator's Motion for Protective Order, Affidavit in Support, Appendix, p. 72).

Reinlasoder also raised issues about the legal soundness of the decision. Reinlasoder filed a motion to reconsider raising the point that the majority opinion never set forth a definition of sexual harassment. If the opinion set a standard before making its factual finding, the outcome would have been different. The motion was summarily denied. (See Petitioner for Rehearing, Filed July 26, 2016, and Order Denying Motion to Reconsider, August 9, 2016).

Exhibit 272 was so prejudicial, according to the district court, if considered it would have diverted anyone away from the relevant issues in the case. Therefore, the district court rejected it.

The majority opinion in *Reinlasoder v. City of Colstrip*, right out of the gate, concentrates on the issue of pornography and Reinlasoder's computer, raising suspicions that Exhibit 272 was reviewed by persons at the Montana Supreme Court.

Justice Rice wrote:

“You ain’t getting s--- for Christmas! I’ve just examined your computer and it’s full of porn, you f----- pervert,” read a captioned picture of Santa Claus attached to a December 2007 office email from Reinlasoder, one of many instances of misconduct cited by Colstrip when it discharged Reinlasoder from his position as Colstrip’s Chief of Police on May 22, 2012. Colstrip alleged numerous instances of misconduct by Reinlasoder that violated Colstrip’s employment policy manual, including the December 2007 email, a September 2009 email which contained “pornographic pictures of men and women in various stages of sexual intercourse. . .” *Id.* at ¶ 3.

The context of the majority opinion raises issues persons at the Montana Supreme Court reviewed and considered Exhibit 272 to the prejudice of Reinlasoder’s right to a fair appellate process.

CONCLUSION

The judgment in favor of Defendants should be reversed and the case remanded to the District Court which will allow Reinlasoder to commence discovery in Exhibit 272 and ultimately proceed to trial.

Dated this 16th day of October, 2020.

By: /s/ William A. D'Alton
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word for Windows 2013, is not more than 10,000 words (7,000), excluding table of contents, table of citations, certificate of service and certificate of compliance, or any appendix containing statutes, rules, and regulations.

Dated this 16th day of October, 2020.

/s/ William A. D'Alton

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CERTIFICATE OF SERVICE

I, William A. D'Alton, being over the age of 18 and not a party to this action, hereby certifies under penalty of perjury that on October 16, 2020, electronically filed a true and correction copy of the APPELLANT'S OPENING BRIEF, with the Clerk of the Court for the Montana Supreme Court of Appeals using the CM/ECF System.

I certify that service will be accomplished to the following persons and parties on the appellate CM/ECF service list:

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Dated this 16th day of October, 2020.

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APPENDIX
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I, William A. D'Alton, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-16-2020:

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