

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 20-0312

LARRY REINLASODER,
Plaintiff /Appellant,

vs.

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

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

APPELLEE CITY OF COLSTRIP'S RESPONSE BRIEF

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I. STATEMENT OF THE ISSUE

As it pertains to the Appellee City of Colstrip, Appellant Larry Reinlasoder (“Reinlasoder”) has correctly stated the issue before the Court.

II. STATEMENT OF THE CASE

Reinlasoder filed a *Third Amended Complaint* in the Montana Thirteenth Judicial District Court, Yellowstone County, naming the City of Colstrip (“Colstrip”), its present Mayor John Williams (“Williams”), and the State of Montana, Judicial Branch, Office of Court Administrator (the “Administrator”) asserting claims of negligence, abuse of process, due process violations, and malice. Reinlasoder’s allegations all relate to the Court’s handling of trial Exhibit 272 in Reinlasoder’s prior wrongful discharge action which was decided in favor of Colstrip by this Court in Reinlasoder v. City of Colstrip, 2016 MT 175, 384 Mont. 143, 376 P.3d 110 (hereafter, “Reinlasoder I”).

In the present action, the District Court granted the Administrator’s Motion to Dismiss on the basis of judicial immunity on April 19, 2019. The District Court also granted Williams’ Motion to Dismiss on May 9, 2019 because the *Third Amended Complaint* lacked sufficient allegations to state an actionable claim against Williams. Finally, on May 18, 2020, the District Court granted Colstrip’s Motion for Summary Judgment on all three claims. Reinlasoder appeals from the final judgment.

III. STATEMENT OF THE FACTS

The facts were succinctly set forth by the District Court in its summary judgment Order of May 18, 2020 (the “SJ Order”). Colstrip will provide a synopsis of the facts by paraphrasing the District Court’s SJ Order and adding some additional background information.

In 2012, Reinlasoder was fired as Colstrip’s Chief of Police. (SJ Order, p. 2 citing *Third Amended Complaint* ¶ 7) He sued the City of Colstrip and its former Mayor which proceeded to a jury trial. (SJ Order, p. 2 citing *Third Amended Complaint* ¶ 8) During the course of its trial defense, Colstrip’s counsel “sought to offer photographic evidence allegedly obtained from a forensic analysis conducted on Reinlasoder’s computer after he was fired.” (SJ Order, p. 2 citing *Third Amended Complaint* ¶¶ 16, 10) Reinlasoder moved to exclude from the jury certain photographs, compiled as Exhibit 272, which consisted of numerous photos attached to emails of nude or scantily clad women. (SJ Order, pp. 2-3 citing *Third Amended Complaint* ¶ 29).

The emails containing the photos were found in messages from Reinlasoder’s work email address and Colstrip demonstrated legitimate reasons for using Ex. 272 at trial in Reinlasoder I. First, Ex. 272 was relevant because it challenged Reinlasoder’s credibility and veracity regarding his statement that he had never sent any pornography from his work owned computer. (Appellee App.

at 1, Appellant's Opening Brief, Reinlasoder I, at pp. 13, 38-40, 46 (without exhibits)) In addition, Ex. 272 was necessary to preserve the record for Mike Lilly to defend himself before the Commission on Practice¹ against Plaintiff's accusations that he violated the Rules of Professional Conduct. In Reinlasoder's Fifth Motion in *Limine*, he had argued that Colstrip's counsel violated various professional ethical rules by attempting to present such evidence to the District Court. (Appellee App. at 2, Plaintiff's Fifth Motion in *Limine*) Colstrip's counsel requested Exhibit 272 be filed under seal to preserve its record on appeal and to preserve counsel's ability to defend himself against accusations of unethical behavior.

The trial court ultimately ruled that the prejudicial effect of Exhibit 272 outweighed its probative value such that it was held inadmissible. The jury never viewed Exhibit 272 and it was filed under seal and made part of the court record. (Summary Judgment Order, p. 3 citing *Third Amended Complaint* ¶¶ 17, 29).

The jury returned a verdict for Reinlasoder and Colstrip appealed. (Summary Judgment Order, p. 3) One of Colstrip's appellate issues included that Exhibit 272 was relevant evidence to the jury issues and that it should have been admitted into evidence by the trial court. (Summary Judgment Order, p. 3) "The

¹ Now known as the Office of Disciplinary Counsel

proposed but rejected exhibit was part of the appeal record transmitted to the Montana Supreme Court from the district court.” (Summary Judgment Order, p. 3).

The Supreme Court reversed the jury verdict and remanded the case for entry of judgment in favor of Colstrip. (Summary Judgment Order, p. 3 citing Reinlasoder I at ¶ 1) Exhibit 272 was never referenced in the Supreme Court’s decision. (Summary Judgment Order, p. 3 citing Reinlasoder I at ¶ 2) The decision was based, instead, upon the Supreme Court finding “uncontested evidence showed Reinlasoder [the chief of police] sexually harassed [a Colstrip dispatcher].” (Summary Judgment Order, p. 3 citing Reinlasoder I at ¶ 18)

After the Court’s decision in Reinlasoder I, the present action was brought in District Court in which “Reinlasoder alleged that the envelope containing the sealed Exhibit 272 was opened so many times at the Montana Supreme Court that “the envelope was ripped and tattered.” (Summary Judgment Order, pp. 3-4 citing *Third Amended Complaint* ¶¶ 21-23) Reinlasoder asserted that Colstrip wrongfully presented Exhibit 272 to the Supreme Court on appeal and “that viewing the sealed exhibit on appeal in the prior case prejudiced his right to a fair process.” (Summary Judgment Order, p. 4 citing *Resp. Brf.*, p. 9) In other words, Reinlasoder believes that the Montana Supreme Court, justices and/or staff, improperly opened and viewed the contents of sealed document Exhibit 272 and by doing so, wrongfully reversed the underlying jury verdict in Reinlasoder I.

IV. STANDARD OF REVIEW

With respect to the summary judgment Order issued in favor of Colstrip by the District Court, the Supreme Court reviews *de novo* a district court's grant or denial of summary judgment, applying the same criteria of M. R. Civ. P. 56 as a District Court. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839 (citation omitted). A District Court's conclusions of law are reviewed to determine whether they are correct and its findings of fact to determine whether they are clearly erroneous. *Id.*, ¶ 9 (citation omitted).

V. SUMMARY OF ARGUMENT

Appellant's overall theory under each of his liability claims against all of the appellees is premised on the flawed belief that the Montana Supreme Court cannot review documents within the district court record that are filed under seal. The Supreme Court has often demonstrated its authority to access and review documents sealed by district courts. Since Reinlasoder's misguided understanding of the law and the Supreme Court's inherent power on appeals is incorrect, it follows that his arguments against each of the Defendants/Appellees also fail to conform with Montana law.

The District Court correctly determined that Colstrip was entitled to summary judgment on all of Reinlasoder's claims pled. As to the negligence claim, the District Court correctly determined that Reinlasoder could not prove

causation. There is absolutely no evidence in the record that the Supreme Court relied upon Exhibit 272. The decision does not reference the exhibit at all. In addition, Reinlasoder cannot show that Colstrip owed Reinlasoder a legal duty as to what trial exhibits it would present in defense at trial. A party in litigation does not owe a duty to his adversary regarding the evidence presented at trial. On the abuse of process claim, the District Court correctly determined that Reinlasoder could not prove either of the two essential elements of the claim – the receipt by Reinlasoder of an unfavorable appellate decision in Reinlasoder I could not be the basis for an abuse of process claim. Lastly, on malice, the District Court correctly determined that his cause of action was actually for punitive damages for which Colstrip is immune by statute. Furthermore, there was absolutely no evidence of malice in the record.

Reinlasoder's present action is, in essence, an attempt to re-litigate Reinlasoder I and to sue those parties he believes were to blame for his unsuccessful appeal. The District Court realized this and correctly granted summary judgment in favor of Colstrip.

VI. LEGAL ARGUMENT

A. Reinlasoder Presents No Substantive Arguments Opposing the Summary Judgment Order in Favor of Colstrip.

Reinlasoder basically argues only one issue on appeal: judicial immunity. His sole contention is that he should be entitled to conduct discovery against the

Administrator to identify what individuals at the Supreme Court may have opened the sealed envelope containing Exhibit 272. Aside from this issue, his entire brief is devoid of any analysis of the issues in the Summary Judgment Order relating to Colstrip. For this reason alone, the Court should reject Reinlasoder's appeal because the rules of this Court require Reinlasoder's brief to "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and pages of the record relied on...." *See* Rule 12(1)(g), M.R.App.P. "It is not this Court's obligation to guess a party's precise position or to develop legal analysis that may support that position." *Harland v. Anderson Ranch Co.*, 2004 MT 132, ¶ 33, 321 Mont. 338, 92 P.3d 1160. When an appellant fails to present a cogent argument on an appeal, the Court should "decline to address the merits of this argument on appeal." *Id.*

Reinlasoder's brief focuses on judicial immunity but that is not the basis for the Summary Judgment Order. Rather, the Summary Judgment Order determined that Reinlasoder could not prevail because: a) he could not prove causation on his negligence claim; b) he provided only speculative evidence on his abuse of process claim; and, c) Colstrip was immune from punitive damages. (SJ Order at pp. 6-12) Reinlasoder fails to discuss any of these issues directly on appeal. Instead, he focuses solely on judicial immunity and his frustration in attempting to conduct discovery against the Administrator regarding Exhibit 272. These arguments do not

pertain to Colstrip but solely to the Administrator. As for the issues involving Colstrip, Reinlasoder only obliquely references them and provides no legal authority setting forth his position that the District Court erred in its decision.

Neither Colstrip nor the Court is obligated to develop the legal analysis for Reinlasoder on the negligence, abuse of process, or punitive damages issues.

McCulley v. American Land Title Co., 2013 MT 89, ¶ 20, 369 Mont. 433, 300 P.3d 679 (citations omitted); *see also* Snow v. Snow, 2002 MT 143, 310 Mont. 260, 49 P.3d 610 (Court refused to consider appeal where appellant listed six issues in his brief on appeal, but only argued one which was unintelligible and created a disadvantage for appellee by not setting forth a clear statement of what appellant was attempting to argue and what appellee needed to address in her response brief). Since Reinlasoder failed to sufficiently address the appropriate issues in his opening brief, the SJ Order should be affirmed.

B. The District Court Correctly Determined That Colstrip Was Entitled to Summary Judgment.

Even though Reinlasoder has not complied with Rule 12(1)(g), M.R.App.P., Colstrip will address each of the issues raised on summary judgment in ensure that the District Court reached the correct decision.

1. **Appellant's fundamental basis supporting his claims is contrary to the law.**

The true nature of this present litigation is to serve Reinlasoder's desire to relitigate the prior case of Reinlasoder vs. City of Colstrip, 2016 MT 175, 384 Mont. 143, 376 P.3d 100 (Reinlasoder I), in hopes of obtaining a different result before this Court. The core arguments advanced by Reinlasoder are directed at the Montana Supreme Court but unfortunately include Colstrip since Colstrip was the named party in the previous litigation. One of Appellant's fundamental problems is his irrational belief that a document filed under seal by the district court is not among the records contained within the court's record. Appellant is so zealous in his belief that he believes Judge Fagg "guaranteed" him that it would not be seen by anyone. A sealed document is sealed from the public's view yet Appellant chooses to disregard this common understanding. In fact, Appellant goes so far as to argue that once a document is sealed, no one, including the trial judge, their staff or even the Montana supreme court can view the document. This strained view of the effect of a sealed document unfortunately is not the law.

Appellant's flawed belief that the Montana Supreme Court cannot review a document which was filed under seal forms the basis of each of his legal claims. Appellant's faulty premise is rebutted by an abundance of legal authority to the contrary. The District Court correctly rejected Appellant's confused and mistaken beliefs as to the outcome of a sealed document within the Court's record. There are

several examples where the Supreme Court has shown its authority to review sealed documents. See State v. Weisbarth, 2016 MT 214, ¶ 32, 384 Mont. 424, 378 P.3d 1195 (the Court accessed documents sealed by the trial court and discussed the contents of those documents at length); State v. Stutzman, 2017 MT 169, ¶ 30, 388 Mont. 133, 398 P.3d 265 (the Court conducted a complete review of the documents that were sealed by the lower court); State ex rel. Great Falls Tribune Co. Inc. v. Mont. Eighth Judicial Dist. Ct., 238 Mont. 310, 777 P.2d 345 (1984).

2. Reinlasoder Could Not Prove the Essential Elements of Negligence.

a. Reinlasoder Could Not Prove that Colstrip Caused His Damages.

Summary judgment is appropriate in negligence cases where the plaintiff fails to establish any of the four necessary elements: duty, breach, causation, and damages. See generally Dulaney v. State Farm Fire and Cas. Ins. Co., 2014 MT 127, 324 P.3d 1211, 375 Mont. 117 (duty); Dubiel v. Montana Dept. of Transp., 2012 MT 35, 364 Mont. 175, 272 P.3d 66 (duty and breach); Estate of Willson v. Addison, 2011 MT 179, 361 Mont. 269, 258 P.3d 410 (causation). As to causation, Reinlasoder provided only speculative conjecture to the District Court that Colstrip caused his alleged damages. Where plaintiff cannot prove causation, plaintiff cannot prevail under negligence. Estate of Willson, ¶ 21.

The District Court correctly concluded that there is absolutely no evidence in the record that the contents of trial Exhibit 272 had any impact on the Supreme Court's decision in Reinlasoder I. The District Court correctly noted, "The decision issued by the Supreme Court does not reference either the photographs or the exhibit itself." (Appellee App. at 7, Summary Judgment Order, p. 8). The District Court properly noted that ". . . the Court found the district court erred when it failed to grant judgment as a matter of law because the evidence at trial showed that Reinlasoder. . . sexually harassed a dispatcher." (Page 8 Order granting Summary Judgment). The District Court in granting Colstrip summary judgment found:

Taken further, even making the extreme conclusory and speculative leap that the Court viewed Exhibit 272, was offended by its contents, and as a direct result, chose to find a different, more neutral reason to rule against Reinlasoder in the appeal, these "facts" can never be proven. The speculation about its consideration is just that. Speculation. And importantly, it does not change the outcome of the dispositive decision it rendered on an entirely different legal basis. (Id.)

The District Court's conclusion was correct. The Supreme Court's opinion in Reinlasoder I reversing District Judge Russell Fagg and entering judgment in favor of Colstrip was completely devoid of any mention of Exhibit 272 or its contents. Instead, the Supreme Court's opinion clearly describes the examples of Reinlasoder's conduct in the record that supported his termination from employment and the reversal of the jury verdict:

- A December 2007 email, with a picture of Santa Claus that said, “[y]ou ain’t getting s—for Christmas! I’ve just examined your computer and it’s full of porn, you f---- pervert;”
- A September 2009 email with “pornographic pictures of men and women in various stages of sexual intercourse;”
- Lying about his work history in his job application;
- An accusation of criminal mischief by the Rosebud County Sheriff’s office;
- Insubordinate conduct;
- Intimidating a female dispatcher to the point that she “no longer [felt] comfortable in dispatch without someone else being present; and
- Sexual harassment of a female dispatcher.

Reinlasoder I, ¶¶ 3-4. This Court also found that Reinlasoder himself presented evidence that he approached a Colstrip dispatcher and stated “[d]o you want to come see porn in my office?” and “[Y]ou look like a freaky kind of girl that would like porn.” *Id.* at ¶ 5. Perplexingly, Reinlasoder introduced additional evidence at trial corroborating these statements. *Id.* at ¶¶ 6-7.

Reinlasoder has always failed to acknowledge the above described evidence was the basis of the Supreme Court’s decision. Instead, he chooses to believe his own unsupported and contrived theory, involving speculation and conjecture as to why his wrongful discharge appeal turned out the way it did. The undisputed facts, however, do not support his suspicious, absurd claims and there is simply no

credible evidence that Exhibit 272 had any influence on the Supreme Court's decision. As such, the District Court was correct in determining that Reinlasoder failed to raise a genuine issue on the matter of causation. Without causation, Reinlasoder's negligence claim fails as a matter of law.

b. The City of Colstrip Owed No Duty to Reinlasoder.

Although the District Court did not need to address the issue of duty because it found the analysis of the causation element determinative, it is important nonetheless to discuss this element on appeal since the Supreme Court can affirm the District Court for a reason other than those set forth in the Summary Judgment Order. Montana Democratic Party v. State by and through Stapleton, 2020 MT 244, ¶ 6, ___ P.3d ___, 2020 WL 5651613 (citation omitted).

“[T]he existence of a legal duty can be determined as a matter of law.” Eklund v. Trost, 2006 MT 333, ¶19, 335 Mont. 112, 151 P.3d 870 (citation omitted); Lopez v. Great Falls Pre-Release Servs., 1999 MT 199, ¶ 31, 295 Mont. 416, 986 P.2d 1081. It is a question for the court rather than the jury. Slack v. The Landmark Co., 2011 MT 292, ¶ 17, 362 Mont. 514, 267 P.3d 6 (citations omitted). “If there is no duty, there is no negligence.” *Id.*; Sikorski v. Johnson, 2006 MT 228, ¶ 13, 333 Mont. 434, 143 P.3d 161 (“Absent a duty, breach of duty cannot be established and the negligence action cannot be maintained”).

Reinlasoder's *Third Amended Complaint* asserts that Colstrip was negligent in presenting Exhibit 272 for trial. (Appellee App. at 3, *Third Amended Complaint*, ¶¶ 35-36) Yet, from the undisputed facts of the case presented to the District Court, Reinlasoder asserted that any wrongful conduct that occurred in opening the envelope containing Exhibit 272 occurred at the Supreme Court and not at the hands of Colstrip. For this reason alone, he failed to show any duty owed by Colstrip.

Reinlasoder also completely failed to provide any statutory or case law authority to the District Court that would recognize a legal duty on the part of Colstrip. In other words, there is no duty of law running from Colstrip to an adverse party, like Reinlasoder, with respect to how Colstrip must present its trial exhibits in defending itself against accusations of wrongful discharge. To the extent any duties existed in the trial court arena, they did not run in favor of Reinlasoder. Certainly, Colstrip's trial attorney owed his client a duty of loyalty and a duty to be a devoted advocate within the ethical and professional rules of conduct. Colstrip's trial counsel was an officer of the Court. He also had specific duties in the administration of justice (to be candid, forthcoming and honest in his arguments and in the presentation of evidence). These ethical duties, however, do not create an independent basis for legal action. Lucas v. Stevenson, 2013 MT 15, ¶ 23, 368 Mont. 269, 294 P.3d 377 (citation omitted); Byers v. Cummings, 2004

MT 69, ¶ 31, 320 Mont. 339, 87 P.3d 465 (citations omitted). Beyond the general duties owed to the Court, neither Colstrip nor its trial counsel had any legal duty to limit the use of any evidence available to defend against the accusations of wrongful discharge.

Reinlasoder's *Third Amended Complaint* against Colstrip arising from a previous lawsuit presents even a broader concern. The concept that one party attempts to sue a former opponent or an opponent's attorney for what occurred at trial has been rejected by the courts; activities that occur within the parameters of prior litigation cannot be the basis for subsequent litigation. *See generally*, Spreadbury v. Bitterroot Public Library, 2011 WL 4499030 (D.Mont. 2011) (collecting cases); Taylor v. McNichols, 243 P.3d 642 (Idaho 2010) (collecting cases). This rule is sometimes referred to as the "litigation privilege" or the "judicial proceedings privilege." Although sometimes limited by the jurisdiction, the "judicial proceedings privilege is typically applied to counsel, parties and witnesses." Landry's, Inc. v. Animal Legal Defense Fund, 566 S.W.3d 41, 57-58 (Tex.App.Ct. 2018) (citations omitted). These privileges are designed to immunize a party "in a judicial proceeding and is fundamental to the courts' truth-finding mission." O'Brien & Gere Engineers, Inc. v. City of Salisbury, 135 A.3d 473, 476 (Md. 2016). The Court in O'Brien looked at the history of the litigation privilege, specifically, and noted that:

The litigation privilege dates back 500 years to the English Court of Queen's Bench. *See Beauchamps v. Croft*, 73 Eng. Rep. 639 (Q.B. 1497) (“[N]o punishment was ever appointed for a suit in law, however it be false and for vexation. And in the case above, it is indifferent to say that it is false or true[.]”). The privilege rests on the vital public policy of the “free and unfettered administration of justice.”

O'Brien at 482 (citation omitted). The O'Brien Court also noted that the “litigation privilege” is applicable to cases sounding in both tort and contract. *Id.* at 484-485 (collecting cases). And courts “have extended it to “any tort action” based on conduct or statements made in connection with litigation.” Coultas v. Liberty Mutual Fire Insurance Company, 2016 WL 2637802*4 (D.Or. 2016) (citation omitted). “The courts have articulated only one exception to the litigation privilege: it does not protect conduct that constitutes wrongful initiation of civil proceedings.” *Id.* (citation omitted). Otherwise, the “privilege is “granted to good and bad alike,” and it “promotes the unfettered expression that is critical to the administration of justice; [s]uch freedom would be defeated if participants in the process feared later tort liability.” Allia v. Target Corp., 2008 WL 1732964*8 (D.N.J. 2008) (citations omitted).

The rationale for this privilege directly applies here because this Court has been clear that “[t]here must be some point at which litigation ends and the respective rights between the parties are forever established.” In re the Marriage of Weber, 2004 MT 211, ¶ 26, 322 Mont. 341, 96 P.3d 716. Since there is a public policy underlying the finality of judgments, “courts look with a jealous eye upon

suits which have for their object setting aside a judgment at law” In re Marriage of Hopper, 1999 MT 310, ¶ 29, 991 P.2d at 968 (citation omitted).

Re-arguing evidentiary issues and making accusations regarding the handling of exhibits in the prior trial and appeal are inappropriate uses of the judicial system. Reinlasoder cannot continue to re-try his underlying wrongful discharge appeal until he gets the outcome he desires. Colstrip was entitled to summary judgment on this issue.

c. Colstrip Did Not Breach Any Duty to Reinlasoder.

Even setting aside the fact that no legal duty exists in this context, Reinlasoder failed to provide any genuine issue that Colstrip breached any recognized duty. This is a situation where Reinlasoder was required to present expert testimony, yet he failed to disclose any expert witness.

The Supreme Court has determined in many situations that expert testimony is required to show breach of the standard of care when the duties of a party “are not obvious to a layperson.” Dulaney v. State Farm Fire and Cas. Ins. Co., 2014 MT 127 ¶ 15, 375 Mont. 117, 324 P.3d 1211 *citing* Dayberry v. City of E. Helena, 2003 MT 321, ¶ 21, 318 Mont. 301, 80 P.3d 1218 (in a suit against a swimming pool operator, whether the depth of a swimming pool was unreasonably dangerous for the diving board length required expert testimony); Romans v. Lusin, 2000 MT 84 ¶ 18, 299 Mont. 182, 997 P.2d 114 (expert testimony was required to establish

standard of care applicable to physical therapist's administration of functional capacities evaluation (FCE) on patient); Carlson v. Morton, 229 Mont. 234, 241, 745 P.2d 1133, 1138 (1987) (whether a lawyer breached the applicable standard of care in a legal malpractice suit required expert testimony); Mont. Deaconess Hosp. v. Gratton, 169 Mont. 185, 189–90, 545 P.2d 670, 672–73 (1976) (whether doctors breached the applicable standard of care in a medical malpractice suit required expert testimony); Doble v. Lincoln Co. Title Co., 215 Mont. 1, 5, 692 P.2d 1267, 1270 (1985) (whether a title insurance company breached a standard of care required expert testimony); May v. ERA Landmark Real Estate, 2000 MT 299, ¶ 70, 302 Mont. 326, 15 P.3d 1179 (plaintiff's claim for professional negligence required the submission of expert testimony to prove the standard of care of a real estate broker).

The present case is not a situation where a layperson would know and understand the very technical rules of evidence and procedure that are used in a courtroom. Therefore, expert testimony was required to show that there was a breach of the standard of care. Yet, Reinlasoder has no expert testimony to show that any breach of the applicable standard of care occurred and his negligence claim must fail.

Reinlasoder's own briefing shows that no breach occurred on the part of Colstrip because he blames the Supreme Court, and not Colstrip, for opening the

sealed envelope containing Exhibit 272. Without any evidence of a breach of a cognizable duty in this context, Reinlasoder cannot prevail on his negligence theory. *See e.g. Dubiel v. Montana Dept. of Transp.*, 2012 MT 35, 364 Mont. 175, 272 P.3d 66 (duty and breach); Therefore, Colstrip was entitled to summary judgment on this issue as well.

3. Reinlasoder Could Not Prove His Abuse of Process Claim.

The District Court correctly found that Reinlasoder failed to present any evidence to satisfy the two essential elements necessary for an abuse of process claim. Further, Reinlasoder failed to provide any credible evidence to raise a genuine issue regarding his abuse of process claim.

To prevail on abuse of process claim, Reinlasoder must show: “(1) an ulterior purpose and (2) a willful act in the use of process not proper in the regular conduct of the proceeding.” *Seipel v. Olympic Coast Investments*, 2008 MT 237, ¶ 20, 344 Mont. 415, 188 P.3d 1027. “A plaintiff resisting a motion for summary judgment must raise a genuine issue of material fact on each element of abuse of process, because the elements are written in the conjunctive.” *Id.*

Reinlasoder was required to prove to the District Court that the legal process used by Colstrip was “perverted beyond its intended purpose.” *Salminen v. Morrison & Frampton, PLLP*, 2014 MT 323, ¶ 29, 377 Mont 244, 339 P.3d 602 (internal quotation marks omitted); *see also Brault v. Smith*, 209 Mont. 21, 29, 679

P.2d 236, 240 (1984) (“Pressing valid legal claims to their regular conclusion, even with an ulterior motive, does not by itself constitute abuse of process.”). “[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” Hughes v. Lynch, 2007 MT 177, ¶ 21, 338 Mont. 214, 164 P.3d 913 (citation omitted). “The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, but the use of the process as a threat or a club.” *Id.* (citation omitted). “There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.” *Id.* (citation omitted).

As to the first element, Reinlasoder provided no proof to the District Court that Colstrip had an “ulterior motive” for any of its actions. Seipel at ¶ 20. The intended purpose or motive of Exhibit 268 (which was later labeled as 272) was to challenge Reinlasoder’s veracity and credibility. Reinlasoder previously testified that he never used his computer or email to view or send pornography. Former Mayor Hanser’s termination letter, however, referred to Reinlasoder’s previous discipline in 2009 for sending pornography. (Appellee App. at 4). Reinlasoder disputed Mayor Hanser’s testimony and described the emails as inappropriate jokes, not pornography. (Appellee App. at 5).

As set forth in Appellant's Opening Brief in Reinlasoder I, Trial Exhibits 268 and 272 were relevant on this issue because they had a tendency to make facts of consequence relating to Reinlasoder's termination of employment more probable. (Appellee App. at 1, Appellant's Opening Brief, Reinlasoder I, at pp. 13, 38-40, 46 (without exhibits)) Reinlasoder denied Mayor Hanser's previous discipline of him was related to pornography. (Appellee App. at 6, Transcr. p. 194). The pornographic photos attached to emails made Mayor Hanser's testimony more probable. Further, Reinlasoder testified at trial "I don't have any porn on my computer". (Appellee App. at 5; Transcr. 247:13-17) (Appellee App. at 8, Reinlasoder's affidavit). Exhibits 268 and 272 would directly rebut his testimony at trial. Evidence which tends to affect a witness' credibility and veracity is admissible cross examination at trial. Exhibits 268 and 272 would directly impact Reinlasoder's testimony.

Next, the pornographic images contained in Exhibits 268 and 272 also were relevant to corroborate Colstrip Dispatcher Mercedes Kroll's testimony, the same testimony that this Court relied upon in reaching its decision in Reinlasoder I.

Finally, there was another important reason for including Exhibit 272 into the record. Michael Lilly, trial attorney for Colstrip, also presented Exhibit 272 to be filed under seal so that he could preserve a record to address opposing counsel's accusations that "[T]he tactic of defense counsel has crossed into the Rules of

Professional Conduct.” (Appellee App. at 2, Plaintiff’s Fifth Motion *in Limine*). Reinlasoder asserted serious accusations of professional misconduct against Lilly, and Lilly requested the District Court view the materials in ruling on Reinlasoder’s Fifth Motion *in Limine*. For these reasons alone, the District Court correctly granted Colstrip summary judgment on the abuse of process claim.

“For a defendant to claim abuse of process there must be an attempt by the plaintiff to use process to coerce the defendant to do some collateral thing which he could not be legally and regularly compelled to do.” Brault at 209 Mont. at 29, 679 P.2d at 240 (citations omitted). For example, noticing “plaintiff’s deposition with the ulterior motive of having him present in Gallatin County so he could be served and arrested on an outstanding contempt order issued in an unrelated proceeding.” *Id. citing Hopper v. Drysdale* (D.Mont 1981), 524 F.Supp. 1039. The District Court correctly found that “Reinlasoder has put forth no evidence that Colstrip coerced Reinlasoder into doing any collateral thing which he was not legally or regularly bound to do.” (Appellee’s App. at 7, Pg. 11 Order of Summary Judgment). Reinlasoder failed to present any evidence of such ulterior motive in the instant case and, therefore, the first necessary element of abuse of process was not met.

Reinlasoder also failed to meet the second element of the claim. Reinlasoder failed to provide any legal authority which held that a party’s counsel attempting to

list trial exhibits amounts to an abuse of process. “The abuse of process tort involves the misuse of legal process primarily to accomplish a purpose for which it was not designed, usually to compel the victim to yield on some matter not involved in the suit, or to harass litigation opponents by clearly wrongful conduct.” Meyer v. Big Sky Resort, 2019 WL 4451239*2 (D. Mont. 2019) (citation and internal quotation marks omitted). Reinlasoder provided no evidence that proved that Colstrip misused the legal process or “perverted [it] beyond its intended purpose” to satisfy the second essential element. Reinlasoder’s real contention boils down to advocacy at trial; he disapproved of Colstrip’s attempt to challenge his credibility by questioning his past testimony. Yet, challenging prior testimony or statements of a party is proper and allowable at any trial.

The District Court keenly recognized that Reinlasoder’s claim was a veiled attempt to reargue evidentiary issues in a previous litigation. (Pg. 12 Order of Summary Judgment). Re-arguing trial decisions runs complete contrary to this Court’s stated position that “[there must be some point at which litigation ends and the respective rights between the parties are forever established.” In re the Marriage of Weber, 2004 MT 211 ¶ 26, 332 Mont. 341, 96 P.3d 716. The District Court properly rejected Reinlasoder’s attempt to re-litigate his previous wrongful discharge case.

The standard for abuse of process is high. Brault at 209 Mont. at 29, 679 P.2d at 240; *see also* Salminen at ¶ 29 (“the legal process must be ‘put to a use perverted beyond its intended purpose’”). Reinlasoder did not meet that standard before the District Court because nothing that Colstrip did, either with respect to Exhibit 272 or otherwise, was shown to be “a willful act in the use of process not proper in the regular conduct of the proceeding.” Seipel at ¶ 20. The District Court properly granted summary judgment on this claim.

4. Montana law prohibits punitive damages against a municipality.

Reinlasoder pled a claim for “malice” against Colstrip. (Appellee App. at 3, Third Amended Complaint, ¶¶ 55-60) Yet, he failed to raise any genuine issue regarding this claim in response to the City’s summary judgment motion. The District Court correctly determined that Reinlasoder could not prevail on this claim, as a matter of law, since the Montana Legislature has granted immunity for municipal entities against any such an award. In that regard, Montana Code Annotated Section 2–9–105 provides that “[t]he state and other governmental entities are immune from exemplary and punitive damages.” Governmental entities are defined as “the state and political subdivisions”. *See* Section 2-9-101(3) MCA. A political subdivision includes “any county, city, [and] municipal corporation . . . “Section 2-9-101(5) MCA. Applying the plain language of the statutes, a city is immune from punitive damages. Segal v. City of Bozeman, 2013

WL 12344339*6 (D.Mont. 2013); Hovland v. Gardella, 2008 WL 11347935**10-11 (D.Mont. 2008).

The District Court also correctly determined that Reinlasoder could not prevail because there is no separate cause of action for “malice” under Montana law. Rather, Reinlasoder was parroting the language from the statute regarding punitive damages. *See* Section 27-1-221(2), MCA. Even so, there is no separate cause of action for “punitive damages” under Montana law. *See* Hackley v. Hackley, 2018 WL 6985182*11 (Mont.Dist.Ct. 2018) (citations omitted) *aff’d* 2019 MT 95N, 396 Mont. 546, 439 P.3d 387; Wagner v. MSE Technology Applications, Inc., 2014 WL 12809518*2 (Mont.Dist.Ct. 2014); Jimenez v. Liberty Northwest Ins. Corp., 2007 WL 1378407*8 (D.Mont. 2007). Instead, punitive damages is a remedy, and an extraordinary one at that. Dees v. American Nat. Fire Ins. Co., 260 Mont. 431, 448, 861 P.2d 141, 151 (1993) (citation omitted); *see also* Seltzer v. Morton, 2007 MT 62, ¶ 161, 336 Mont. 225, 154 P.3d 561 (discussing differences between compensatory damages and punitive damages as a remedy). Since there is no separate claim for “malice” under Montana law, and no separate claim for punitive damages as well, the District Court correctly determined this claim should be dismissed.

Even if there were a separate claim for malice or punitive damages, *arguendo*, Reinlasoder failed to establish facts to support it. His sole allegation in

this regard is that Colstrip attempted to introduce Exhibit 272 into evidence. (Appellee App. at 3, Third Amended Complaint, ¶ 57). As a matter of law, offering a trial exhibit to be admitted into evidence in a prior case cannot form the basis for a claim of malice, especially when Colstrip was unsuccessful in doing so. District Court Judge Russell Fagg denied the admissibility of Exhibit 272 (as well as 268), instead filed it under seal, and it was never seen or considered by the jury. Thus, Reinlasoder was awarded his remedy in the prior court proceeding.

VII. CONCLUSION

For all the foregoing reasons, the District Court's decision should be affirmed.

DATED this 16th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionally spaced Times New Roman text typeface of 14 points; is double spaced (except for footnotes and quoted and indented material which are single spaced); with left, right, top and bottom margins at one inch; and the word count as calculated by Microsoft Word does not exceed 10,000 words, excluding the Table of Contents, Table of Authorities and Certificate of Compliance.

DATED this 16th day of November, 2020.

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CERTIFICATE OF SERVICE

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