

IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO.: DA 20-0609

Ariane Wittman and Jeremy Taylen,

Plaintiffs/Appellants,

-vs-

City of Billings,

Defendant/Appellee.

**MONTANA TRIAL LAWYERS ASSOCIATION'S
MOTION TO APPEAR AS *AMICUS***

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause No. DV 19-1124, Hon. Michael G. Moses

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The Montana Trial Lawyers Association (MTLA) respectfully requests the Court to grant it leave to submit an *amicus curiae* brief in this matter. In support of its motion, MTLA states as follows:

1. MTLA's Interest

MTLA is a member organization of over 500 Montana attorneys who represent litigants to secure a just result for the injured, the accused and those whose rights are jeopardized. Its members represent claimants in tort actions in which they seek damages which provide for full and just compensation.

MTLA periodically appears in the Montana Supreme Court as *amicus* on various matters involving tort issues, insurance issues, civil procedure issues, workers compensation issues, and constitutional issues. On these various issues, the Montana Supreme Court occasionally invites the MTLA to participate as *amicus*.

MTLA is interested in this matter. The resolution of the issues upon which MTLA seeks to participate affect the continuing development of Montana's inverse condemnation jurisprudence under Article II, Section 29 of Montana's Constitution.

2. The Issues on Which MTLA Wishes to Submit an *Amicus* Brief.

The issues on which MTLA wishes to file an *amicus* brief are:

1. Whether the inverse condemnation provisions of Article II, Section 29 of Montana's Constitution require intent to damage property before a property owner can recover under the "damages" clause of Article II, Section 29.

2. In multi-factor causation inverse condemnation cases, should Montana continue to follow California's case law on inverse condemnation and adopt its "substantially caused by an inherent risk" standard?

3. The Reason an *Amicus* Brief is Desirable.

Inverse condemnation in Montana does not depend on a negligence standard. And yet, the use of negligence-like terms in Montana's inverse condemnation cases has at times led to confusion and caused district courts, such as the one in this case, to graft negligence principles onto inverse condemnation analysis. The seminal case, *Rauser v. Toston Irr. Dist.*, supra, represents a good example. *Rauser* involved an irrigation system that raised the water table on adjacent property owners land. *Rauser's* use of terms like "reasonably foreseeable," "proximate result," and "deliberately planned and built" tend to import the negligence duty and causation analysis into the inverse condemnation paradigm. While *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 916 P.2d 122 (1996) and *Fisher v. Swift Transp. Co., Inc.*, 2008 MT 105 342 Mont. 335, 181 P.3d 601, cleared up these terms' confusion in the context of tort cases, confusion in the inverse condemnation paradigm persists.

California law, which Montana law has long tracked in the context of inverse condemnation, confronted and resolved the same problems through recent refinements of the standard require in inverse condemnation cases. In inverse condemnation cases, in the context of the causation element, it is enough that a property owner prove that the inherent risk of the public utility as designed, built and maintained, was the cause of the private property damage. As *Rauser* said “[i]t is enough to show the damages were proximately caused by the undertaking of the project and a reasonable foreseeable consequence of the undertaking.” *Rauser v. Toston Irr. Dist.*, 172 Mont. 530, 538-539, 565 P.2d 632, 637-638 (1977) (emphasis added), *see Deschner v. State of Montana, Dep't of Highways*, 2017 MT 37, ¶ 17, 386 Mont. 342, 390 P.3d 152, *Knight v. Missoula*, 252 Mont. 232, 243, 827 P.2d 1270, 1276 (1992).

But the District Court’s decision in the instant *Wittman/Taylen* case illustrates the problem created when tort duty and causation concepts are used for inverse condemnation cases. That confusion improperly imposes a requirement that a property owner whose property has been damaged by a public works project to prove the governmental entity intentionally damaged her property.

4. Identity of the Party Whose Position MTLA Supports.

MTLA supports the position of the Plaintiffs and Appellants, Ariane Wittman and Jeremy Taylen, in this matter.

5. The Parties' Position Regarding MTLA's Participation as *Amicus*

The parties have been contacted regarding MTLA's participation as *amicus*. Plaintiffs/Appellants agree to MTLA's participation. The Defendant/Appellee has not responded to MTLA's request to participate as *amicus*.

6. The Date on Which MTLA's *Amicus Curiae* Brief Can Be Filed.

MTLA's *Amicus* Brief accompanies this motion and will be filed upon approval of this motion.

Respectfully submitted this 17th day of May 2021.

/s/ Raphael Graybill
Raphael Graybill

CERTIFICATE OF SERVICE

I, Raphael Jeffrey Carlisle Graybill, hereby certify that I have served true and accurate copies of the foregoing Motion - Amicus to the following on 05-17-2021:

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