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STATE OF MONTANA
Case Number: DA 20-0609

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 20-0609

ARIANE WITTMAN and JEREMY TAYLEN,

Plaintiffs/Appellants,

vs.

CITY OF BILLINGS,

Defendant/Appellee.

REPLY BRIEF OF APPELLANTS

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

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Appearances:

Tucker P. Gannett
Amanda Beckers Sowden
GANNETT SOWDEN LAW, PLLC
100 North 27th Street, Suite 550
Billings, MT 59101
T: (406) 294-2000/F: (406) 294-2010
tucker@gsmtlaw.com
amanda@gsmtlaw.com
Attorneys for Appellants
Ariane Wittman and Jeremy Taylen

Gerry P. Fagan
Afton E. Ball
MOULTON BELLINGHAM PC
27 North 27th Street, Suite 1900
P.O. Box 2559
Billings, MT 59103-2559
T: (406) 248-7731/F: (406) 248-7889
Gerry.Fagan@moultonbellingham.com
Afton.Ball@moultonbellingham.com
Attorneys for Appellee
City of Billings

Raphael Graybill
Graybill Law Firm, P.C.
P.O. Box 3586
Great Falls, MT 59403-3586
T: (406) 452-8566/F: (406) 727-3225
rgraybill@silverstatelaw.net
Attorneys for Amicus MTLA

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INTRODUCTION

Montana's age-old Inverse Condemnation ("IC") jurisprudence squarely addresses the factual circumstances before the Court. Most of the City of Billings' ("City") argument opposing reversal and remand is dedicated to the proposition that, since some other state courts have rejected inverse condemnation claims under similar factual circumstances, this Court should abandon Montana law and do the same. *See* Resp. Br., p. 20. The City's arguments are not persuasive and invite the Court to reinvent its IC jurisprudence.

Notably missing from the City's analysis is any substantial discussion of whether those other states have constitutional IC provisions like Montana's,[1] whether this Court has historically relied on those other state courts or disanalogous constitutional provisions in advancing IC law here, or whether those other states have so faithfully (over the course of more than a century) refused to inject tort elements into their respective IC equations, as Montana clearly has. Without this analysis, comparing Montana IC jurisprudence to that of other states can be like comparing apples and oranges. This may be why the City's response brief – while chock-full of out of state cases – failed to even mention the following Montana IC cases: *Root v. Butte, Anaconda & Pac. Ry. Co.*, 20 Mont. 354, 51 P.

[1] *i.e.*, whether the IC provisions includes the "or damaged" language, which expands the application of the IC provision beyond categorical takings. Only about half of the state constitutions around the country contain this "or damaged" language. *Kafka v. Montana Dep't of Fish, Wildlife & Parks*, 2008 MT 460, fn. 5, 348 Mont. 80, 201 P.3d 8.

155 (1897); *Eby v. City of Lewistown*, 55 Mont. 113, 173 P. 1163 (1918); *Knight v. City of Billings*, 197 Mont. 165, 642 P.2d 141 (1982); *Adams v. Dep't of Highways of State of Mont.*, 230 Mont. 393, 753 P.2d 846 (1988); *Knight v. City of Missoula*, 252 Mont. 232, 241, 827 P.2d 1270 (1992).

Collectively and with other seminal IC cases like *Deschner v. State of Montana, Dep't of Highways*, 2017 MT 37, 386 Mont. 342, 390 P.3d 152 and *Rauser v. Toston Irr. Dist.*, 172 Mont. 530, 565 P.2d 632 (1977), these cases stand for the principal that, in Montana, a compensable consequential damaging of private property for public use occurs if a public improvement directly or indirectly causes uncommon physical damage to property or burdens a cognizable property right resulting in actual pecuniary loss. *Root-Butte*, 20 Mont. at 358-59, 51 P. at 156; *Less v. City of Butte*, 28 Mont. 27, 72 P. 140, 141 (1903)[2]; *Eby v. City of Lewistown*, 55 Mont. 113, 173 P. 1163, 1166 (1918); *Knight-Billings*, 197 Mont. at 174, 642 P.2d at 145-46; *Adams v. Dep't of Highways of State of Mont.*, 230 Mont. at 398, 402, 753 P.2d at 849, 851; *Knight-Missoula*, 252 Mont. at 241, 827 P.2d at 1275; *Rauser*, 172 Mont. at 538, 565 P.2d at 637; *Deschner*, ¶ 17.[3] This Court has limited the reach of the "or damaged" language in Article II, § 29 to "determinable consequential damages resulting from public works projects." *Buhmann v. State*,

[2] The *Less* Court's reasoning was immediately applied to resolve the identical *Hanley*, *Holland* and *O'Donnell* cases – none of which were discussed by the City in its response brief. *See* Opening Brief, p. 13.
[3] The Court in *Evenhus v. City of Great Falls*, 2012 WL 10702891, at *4 (Mont.Dist. Dec. 31, 2012) first synthesized these cases in setting forth this principal of Montana IC law.

2008 MT 465, ¶¶ 68-69, 105, 348 Mont. 205, 201 P.3d 70.

The out-of-state authority relied upon by the City is incongruent with Montana IC law. The state constitutions of four of the eight out-of-state cases cited do not have the "or damaged" language found in Montana's constitution. The remaining four state court decisions are easily distinguished against a backdrop of Montana law, which has remained steadfast for more than 100 years:

> [I]n these days of enormous property aggregation, where the power of eminent domain is pressed to such an extent, and when the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own.

Less, 72 P. at 142.

> As I reason, the constitutional test in each case is first, whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause us to conclude that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone.

Knight-Billings, 197 Mont. at 173, 642 P.2d at 145 (internal citations omitted).

> This ["or damaged"] language obviously contemplates a condemnation of property by the State, and the recognition that the appropriation will cause determinable consequential damages to property owners affected thereby.

Buhmann, ¶ 69.

The interference with the Ms. Wittman and Mr. Taylen's property here was direct, peculiar, and of sufficient constitutional magnitude to require the burden imposed to be borne by the public and not by the Appellants alone. The District

Court's Order should be reversed, and this Court should determine as a matter of law that Ms. Wittman and Mr. Taylen's property was damaged for public use without the City first paying just compensation.

ARGUMENT

I. The facts of this case are tailored perfectly for a finding of IC liability under Montana law.

The purpose underlying inverse condemnation jurisprudence is "to prevent the government from forcing a few individuals to bear an economic burden which should be borne by society as a whole." *Kafka v. Montana Dep't of Fish, Wildlife & Parks*, 2008 MT 460, ¶ 78, 348 Mont. 80, 201 P.3d 8. "The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes." *Rauser v. Toston Irr. Dist., 172 Mont. 530*, 539, 565 P.2d 632, 638 (1977). This Court will find a compensable taking when "'justice and fairness' require that property damage caused by a public undertaking 'be compensated by the government, rather than remain disproportionately concentrated on a few persons.'" *Kafka*, ¶ 69.

Article II, § 29 protects against both a "taking" and "damaging" of private property. While the "taking" language appears in the Fifth Amendment to the U.S. Constitution, the "or damaged" language does not. In *Buhmann* this Court was asked to decide whether this "or damaged" language could be read to provide more

expansive rights than the Fifth Amendment, requiring a wholly separate regulatory takings analysis to be performed under the Montana Constitution. *Buhmann*, ¶¶ 60-62. While the present case **is not** a regulatory takings case, the *Buhmann* Court's discussion defining the reach of the "or damaged" language in Montana's IC provision is instructive:

> Under it the courts have uniformly held that there is liability not only for property taken, but also for consequential damages to property arising from the acts of the authorities in constructing public works. It is not necessary that there be a direct injury to the property itself in order to create this liability. **It is sufficient to warrant a recovery if there be "some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally."** And the diminution in value of property resulting from the acts complained of is special and peculiar within the meaning of the rule.

Buhmann, ¶ 73 (citing *King v. Stark Cty.*, 67 N.D. 260, 271 N.W. 771, 773-74 (1937)) (emphasis added). In his dissenting opinion, Justice Nelson summarized the majority's reliance on *King* as follows: "the Court prefers to restrict Article II, Section 29 to only those situations which were not covered by the Fifth Amendment in the late nineteenth century: '**determinable consequential damages' resulting from public works projects**." *Id*. at ¶ 105 (emphasis added).

As far back as 1974 this Court has allowed for the recovery of just compensation for damage caused incident to the installation and operation of

municipal sewer systems. S*ee Butte Country Club v. Metro. Sanitary & Storm Sewer Dist. No. 1*, 164 Mont. 74, 78, 519 P.2d 408, 410 (1974). That damage is compensable under an IC theory of liability if the asserted property interest is one which the law will protect; if it is, the interference must be sufficiently direct, peculiar, and of sufficient magnitude to require the burden imposed to be borne by the public and not by the individuals alone. *Knight-Billings*, 197 Mont. at 173, 642 P.2d at 145.

The interference with the Ms. Wittman and Mr. Taylen's property here has been direct (*i.e.*, raw sewage to a depth of 1.5 inches throughout the entire basement); it is peculiar in the sense that (as the City has argued) Sanitary Sewer Overflow ("SSO") events affect "less than 1/16th of one percent" of Billings homeowners each year;[4] and the interference is of sufficient constitutional magnitude since the proof in this case showed that the cost to remediate the damage caused by the sewage backup was about $80,000.[5] Spread among the City's sewer-using public in general, that would have cost each sewer user an extra 21 cents per month for a year.[6] The facts before the Court here fit perfectly within this Court's definition of "determinable consequential damages caused by public works projects." *Buhmann*, ¶¶ 68-69, 105.

[4] Resp. Br. At pp. 4, 18.
[5] *Dkt. # 18, p. 2*; in *Knight-Billings*, the damage was in the range of $10,000 to $15,000. 197 Mont. at 173, 642 P.2d at 145.
[6] $80,000/32,000 users = $2.50 per user / 12 months = $.21 per user/month.

II. The Court should disregard the City's reliance on out-of-state caselaw that relies on dissimilar constitutional provisions or that import IC principles foreign to Montana.

Instead of analyzing the facts before this court through Montana's IC lens (132 years in the making – and regularly relying on California law), the City relies on "at least eight [other] state courts" which have apparently rejected compensating their citizens for "determinable consequential damages resulting from public works projects." Not surprisingly, the City's out-of-state caselaw is not from California, the state Montana has historically relied upon in shaping its IC jurisprudence. Each of the out-of-state cases relied upon by the City may be disregarded by this Court.

First, four of the eight out-of-state opinions can be disregarded outright. The City cited to *Dunn v. City of Milwaukie*, 355 Or. 339, 328 P.3d 1261 (2014), *Lorman v. City of Rutland*, 2018 VT 64, ¶ 37, 193 A.3d 1174, *Edwards v. Hallsdale-Powell Util. Dist. Knox Cty.*, Tenn., 115 S.W.3d 461, 463 (Tenn. 2003) and *Rolandi v. City of Spartanburg*, 363 S.E.2d 385, 387 (S.C. Ct. App. 1987), despite the fact that Oregon, Vermont, Tennessee, and South Carolina's constitutional IC provisions **do not include the "or damaged" language** that has been subject to more than 120 years of judicial scrutiny here in Montana. *See* Or. Const. art. I, § 18; Vt. Const. CH I, art. II; Tenn. Const. art. I, § 21; S.C. Const. art. I, § 13. It makes sense, then, why these state courts determined that "determinable

consequential damages" resulting from the operation of municipal sewer systems was not compensable under their respective constitutional provisions: because that property was not **categorically taken**. Without the "or damaged" language in those constitutional provisions, this Court would be comparing apples and oranges if it tried applying any of the principals of these four cases to the facts before the Court now.

Turning to the remaining four state-courts relied upon by the City (Nebraska, Missouri, Texas, and Virginia), these too should be disregarded by this Court. First, the case of *Henderson v. City of Columbus*, 285 Neb. 482, is legally distinguishable because the Supreme Court of Nebraska endorsed a position in **direct conflict** with Montana IC law:

> [A] property loss compensable as a taking only results when the government **intends to invade a protected property interest** or the asserted invasion is the 'direct, natural, or probable result of an authorized activity **and not the incidental or consequential injury inflicted by the action**.

Henderson v. City of Columbus, 285 Neb. 482, 493, 827 N.W.2d 486, 495 (2013). In contrast, Montana IC law specifically allows for the recovery of "incidental or consequential" damages:

> [t]his ["or damaged"] language obviously contemplates a condemnation of property by the State, and the recognition that the appropriation will cause **determinable consequential damages** to property owners affected thereby—damages which can be ascertained at the time of the taking.

Buhmann, ¶ 69. This same "or damaged" language allows for recovery of

"unexplained and unplanned for problems," arising out of public works projects. *Rauser*, 172 Mont. at 538, 565 P.2d at 637. "It is enough to show the damages were proximately caused by the undertaking of the project and a reasonable foreseeable consequence of the undertaking." *Rauser*, 172 Mont. at 538, 565 P.2d at 637.

The facts examined in *Henderson* are distinguishable, too. *Henderson* concerned a town of approximately 20,000[7] that experienced **a single sewage overflow event**. *Henderson*, 285 Neb. at 496, 827 N.W.2d at 496. The *Henderson* Court found that there was no evidence that the sewage backup was foreseeable to the City, nor that any actions taken by the City would foreseeably result in damage to private property. *Id.* In contrast, the facts before the District Court here involved a town of approximately 110,000[8] that has experienced 10-15 SSO events every year **for the past 40 years**:

> **Q: And I think you said earlier that overflow events are a regular part of operating a sewer utility?**
>
> A: Well, we'll – again, we see probably ten to 15, on average, a year.
>
> **Q: Have you ever had a year with zero?**
>
> A: I don't think so. I think we've had five, maybe is the lowest that we've ever had. And I've tracked these since they've – well, before me. We've got records that go to 1980 on sanitary sewer events.

[7] https://www.census.gov/quickfacts/fact/table/columbuscitynebraska/SBO010212
[8] https://www.census.gov/quickfacts/fact/table/billingscitymontana/PST120219

Dkt. #18, p. 7

The City also relies on Missouri law through its citation to *Christ v. Metro. St. Louis Sewer Dist.*, 287 S.W.3d 709, 711 (Mo. Ct. App. 2009). This, too, is misplaced. Missouri imports the tort of nuisance directly into its inverse condemnation analysis: "Inverse condemnation is the exclusive remedy when private property is damaged by **a nuisance** operated by an entity having the power of eminent domain." *Christ*, 287 S.W.3d at 711. Missouri law requires prior notice of a possible "taking" or "damaging" for public use, which gives rise to the government's "duty" to correct the problem. *Id*.

In Montana, nuisance is a tort, and a finding of IC liability does not require notice, the finding of a duty, or any other tort elements. S*ee, e.g., Burley v. Burlington N. & Santa Fe Ry. Co.*, 2012 MT 28, ¶ 14, 364 Mont. 77, 273 P.3d 825; *Rauser*, 172 Mont. at 538, 565 P.2d at 637. It is also noteworthy that while the Missouri Court of Appeals in *Christ* rejected the plaintiffs' attempt at finding IC liability based on the facts of that case, the Missouri **Supreme Court** previously found for a group of plaintiffs seeking IC redress against a **sewer district** for the odor emitted from local sewage treatment plant. *See Byrom v. Little Blue Valley Sewer Dist.*, 16 S.W.3d 573, 577 (Mo. 2000) (emphasis added). On a factual basis, the sewage backup at issue in *Christ* was not wholly caused by an inherent risk of stoppage on the main line, but rather caused in part by an "unauthorized **private**

lateral sewer line which was going through the center of the storm sewer." *Christ*, 287 S.W.3d at 713. Like *Henderson*, *Christ* is incongruent with an IC liability analysis under Montana law.

Texas law is also unavailing. The City relies on *City of Dallas v. Jennings*, 142 S.W.3d 310, for the proposition that a "governmental entity must know that either a specific act is causing the identifiable harm or knows the specific property damage is substantially certain to result" from the governmental action for IC liability to be found. *See* Resp. Br. At p. 25 (citing *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004)). While this recitation of Texas law directly contradicts *Rauser* and its progeny,[9] it is not even an accurate statement of what is required for a finding of IC liability in Texas.

Less than a year after its issuance, the Court of Appeals of Texas relied on *Jennings* in *Karnes City v. Kendall*, 172 S.W.3d 624, to proclaim that, to find IC liability under Texas law, the proponents must demonstrate "non-negligent" governmental action, *i.e.*, "'beyond negligence', **as in gross negligence or an intentional act**." *Karnes City v. Kendall*, 172 S.W.3d 624, 628 (Tex. App. 2005) (emphasis added). Moreover, *Jennings* found that for a governmental taking to occur, the risk of damage must be so obvious that "its incurrence amounts to the

[9] "Where, as here, the damages are known or knowable and are an inevitable result of the intentional undertaking of the project, there is no need to show negligent design, construction or operation. It is enough to show the damages were proximately caused by the undertaking of the project and a reasonable foreseeable consequence of the undertaking." *Rauser*, 172 Mont. at 538, 565 P.2d at 637.

deliberate infliction of harm." *Jennings* 142 SW3d at 314, quoting *Electro–Jet Tool Mfg. Co. v. City of Albuquerque,* 114 N.M. 676, 845 P.2d 770, 777 (1992). In Montana, IC proponents do not have to demonstrate even general, garden-variety negligence to prevail on an IC claim. In Texas, IC proponents must establish that harm was intentionally inflicted. Texas law should not be considered here.

Finally, the City's reliance on *AGCS Marine Ins. Co. v. Arlington Cty.*, 293 Va. 469, is similarly misplaced. Virginia law imports concepts of contract law into its IC jurisprudence. *AGCS Marine Ins. Co. v. Arlington Cty.*, 293 Va. 469, 478, 800 S.E.2d 159, 164 (2017). Even so, it should be noted that the *AGCS* Court ruled **in favor** of the party seeking to impose IC liability, stating that the sewage overflows at issue "constituted a public use [and] the personal property that was damaged as a result was recoverable." *Johnson v. City of Suffolk*, 299 Va. 364, 851 S.E.2d 478, 484 (2020) (citing *AGCS*, 293 Va. At 486-96, 800S.E.2d at 159).

All eight of the out-of-state cases relied upon by the City are readily distinguishable from Montana's IC jurisprudence. Montana's IC jurisprudence has historically relied heavily on California's IC jurisprudence whose constitution contains the same "or damaged" language as Montana's constitution. The City has offered no reason to depart from the Montana Supreme Court's use of on-point California precedent.

III. Citation to *Oroville* is not a new argument, and its application is in accord with over 120 years of Montana IC law.

Generally, this Court will only consider issues that are properly preserved for review. *Gateway Hosp. Grp. Inc. v. Philadelphia Indem. Ins. Co.*, 2020 MT 125, ¶ 15, 400 Mont. 80, 464 P.3d 44, cert. denied, 141 S. Ct. 1060 (2021). This general prohibition is based on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. *Day v. Payne*, 280 Mont. 273, 276–77, 929 P.2d 864, 866 (1996). This rule only controls, however, when the "overall theory" of the case has changed. *Becker v. Rosebud Operating Servs., Inc.*, 2008 MT 285, ¶ 18, 345 Mont. 368, 191 P.3d 435. This Court routinely permits parties to "bolster their preserved issues with additional legal authority or make further arguments within the scope of the legal theory articulated to the trial court." *Wicklund v. Sundheim*, 2016 MT 62, ¶ 26, 383 Mont. 1, 367 P.3d 403. A change in "emphasis" is perfectly permissible – just not an overall change of legal theory. *Whitehorn v. Whitehorn Farms, Inc.*, 2008 MT 361, ¶ 23, 346 Mont. 394, 400, 195 P.3d 836, 841.

In District Court briefing, Ms. Wittman and Mr. Taylen cited to *Rauser* and *Deschner* for the well-settled principal that, in Montana, where damages caused by a public undertaking are the "reasonable foreseeable consequence of the undertaking," there is no need to show negligence to establish IC liability. *Rauser*,

172 Mont. at 538, 565 P.2d at 637; *Deschner*, ¶ 17.152 (*Dkt. # 18, p. 6*). "Occurring at least five times every year for the past 40 years, the City cannot reasonably expect this Court to conclude that damages related to a sewage overflow event are not a "known or knowable" result of the City's intentional undertaking." *Dkt. # 18, p. 6*.

In the Opening Brief of this appeal, Ms. Wittman and Mr. Taylen cited to *City of Oroville* for the nearly identical proposition that, where private property damage is "substantially caused by an inherent risk" of the public undertaking, IC liability attaches. *See* Op. Br., p. 19. "To satisfy the 'inherent risk' element of the *Oroville* test, then, the injury to private property must be an 'inescapable or unavoidable consequence' of the public improvement." *Id*. at p. 20 (internal citations omitted).

While the City bemoans the citation of a case consistent with Montana law but inconvenient for its defense, it also completely fails to demonstrate how this citation changes the legal theory upon which Ms. Wittman and Mr. Taylen rely. The City does not endeavor to distinguish between the terms "known," "knowable," and "foreseeable" in *Rauser* from "inherent," "inescapable," and "unavoidable" as found in *Oroville*. Further, to the extent that citation to a single new case on appeal automatically changes a party's legal theory, the City's "Eight State Courts" argument should similarly be disregarded. The City cited to *Lorman*

v. City of Rutland, 2018 VT 64, ¶ 37, 193 A.3d 1174 and *Edwards v. Hallsdale-Powell Util. Dist. Knox Cty.*, Tenn., 115 S.W.3d 461, 463 (Tenn. 2003) for the first time on appeal. The City also relied on *Robinson v. City of Ashdown*, 301 Ark. 226, 783 S.W.2d 53 (1990) at the District Court level, and completely removed any mention of the same case from its briefing on appeal. It is obvious to the undersigned that these changes were simply meant to change the emphasis of the City's argument and not the fundamental nature. The same is true for Ms. Wittman and Mr. Taylen's reliance on the *Oroville* case on appeal.

Turning to the applicability of *Oroville* to the facts of this case, the City argues that it is the "linchpin" of Ms. Wittman and Mr. Taylen's argument on appeal, and that *Oroville* and *Deschner* are at odds with one another. But the City simply does not explain how *Oroville* and *Deschner* are at odds, other than to blithely suggest that this Court does not need the California Supreme Court looking "over its shoulder," without any regard to the 120+ years of relying on California IC jurisprudence.

Employing some literary sleight of hand, the City attempts to blend apples (*i.e.*, the notion of "foreseeability" and "inherent risk" coursing through Montana and California IC jurisprudence) and oranges (*i.e.*, requiring an "intent to damage" before finding IC liability) with the following arguments, supposedly employing the *Oroville* test:

> Appellants would have to show their damage was "substantially caused" by "an **inherent risk**[10] presented by the deliberate design, construction, or maintenance" of the City's sewer system. Appellants must therefore show pursuant to *Oroville* that a **deliberate decision**[11] or choice made by the City in designing, constructing, or maintaining the sewer system "substantially caused" their damage.

Resp. Br., p. 40 (emphasis added). The City goes on to state that, under this unreconcilable IC liability test, Appellants' claim fails because the "evidence in the record shows the backup was caused by third parties injecting grease into the system and doing so illegally." *Id*. at 41. Notwithstanding the City's misstatement of the holding in *Oroville*, this assertion fails for several reasons.

First, the City stated at least seven times throughout its Response Brief that the stoppage on the sewer main at issue was the result of "illegal" grease discharge into the City's sewer system. *Id*. at 2, 3, 6, 17, 18, and 41(x2). What is missing from these many assertions is **any** discussion regarding the fact that **no ordinance** restricting residential grease discharge exists. As stated in Appellants' opening brief, the ordinance cited by the City at the District Court for the same proposition undeniably applies to **industrial users only**. *Dkt. #17, p. 6* (citing City Code Billings, Montana, § 26-604(9)); City Code Billings, Montana § 26-602 (defining "industrial" and "industrial user"). This notion of "illegal discharge," then, is nothing more than a strawman argument.

[10] Apples.
[11] Oranges.

Second, even assuming *arguendo* that residential grease discharge was captured under the industrial use ordinance, the City's own expert admitted that he could not prove that the grease-clog at issue was **caused by** illegal discharge:

Q: And then after we get through the ordinance here, John, on this same page, the last sentence says, the backups at issue appear to have been caused by local residents -- a local resident or residents illegally discharging grease into the sewer.

A. Yeah. I'm sure that's what it says as I'm trying to get pages apart. Yes.

Q. So I read that correctly?

A. You did.

Q. And can you tell me what you base this opinion on?

A. The video.

Q. When you saw the grease clog?

A. Yeah. Yes.

Q. Okay. And do you know, as you sit here today, which residents illegally discharged grease or oil in excess of this municipal code on the previous page?

A. No, I do not.

Q. Do you know how many residents in this particular section of sewer, how many residents are attached to that sewer line?

A. I didn't count the amount of wyes, sewer wyes, and that's the entrance into the main. I did not count those.

Q. Okay. Do you know how often folks in this neighborhood who are attached to this sewer line discharge grease or oil?

A. No.

Q. In your opinion here, you say that it's an illegal discharge, which tells me that it's in excess of a hundred milligrams per liter. Is that what you're trying to convey?

A. Yes.

Q. So how many legal discharges are homes allowed per day?

A. I don't know.

Q. And so when it says a hundred milligrams per liter, is that, you know, from one dishwashing session? Is that from one day? If I turn the sink off and turn it back on again, do I start over? Just trying to understand how I comply with that.

A. No. I can't answer that.

Q. Okay. So you don't know if this grease buildup was a result of discharge in excess of the code or if it was discharge in accordance with the code?

A. I don't.

Deposition of John Alston, 63:8-65:7 (June 29, 2020), Tab 11.

Q. Do you know, John, as you sit here, if you've ever discharged oil, fat, or grease in excess of a hundred milligrams per liter?

A. I'm sure I have.

Q. Is that also something that is inherent in a city sewer system, discharge of grease?

A. Sure it is.

Id. at 62:19-25.

Grease discharge and accumulation is an inherent, known, unavoidable, foreseeable, and inescapable consequence of operating a municipal sewer system. Asked about this, the City's Superintendent of Distribution and Collection stated that grease is "going to collect **no matter what type of pipe it is**. It collects on the pipe walls, and it just keeps collecting until it eventually **chokes off the pipe**, the flow." Op. Br., p. 4 (emphasis added). John Alston stated something similar in his expert witness disclosure:

> This [grease] problem is **nationwide** and occurs when homeowners don't scrape their dishes, put food down the disposal or pour excess grease down the drain.

Dkt. # 17, p. 6 (emphasis added).

The result is the same if this Court applies *Oroville*, *Rauser*, *Knight-Billings*, *Knight-Missoula*, *Eby*, *Less*, or *Root-Butte*. Montana IC jurisprudence allows for recovery of determinable consequential damage caused by public works projects. Application of *Oroville* would simply allow this Court to remove any reference to terms synonymous with tort theories (*i.e.*, proximate cause and foreseeability), further refining its prodigious history of IC law in Montana.

CONCLUSION

Ms. Wittman and Mr. Taylen's home and personal property was severely damaged by the realization of an inherent risk of operating municipal sewer systems nationwide: grease discharge and accumulation. The District Court

imported an "intent to damage" element into the Montana IC liability equation, forsaking over 120 years of "consequential damage" awards. The District Court's Order should be reversed, and this Court should determine as a matter of law that Ms. Wittman and Mr. Taylen's property was damaged for public use without the City first paying just compensation. With this, the Court may then remand the case back to the District Court for jury trial on the issues of causation and damages.

DATED this 12th day of August, 2021.

GANNETT SOWDEN LAW, PLLC

By /s/ Tucker P. Gannett

TUCKER P. GANNETT
100 North 27th Street, Suite 550
Billings, MT 59101
Attorneys for Appellants

CERTIFICATE OF SERVICE

I Tucker P. Gannett, hereby certify that I have served true and accurate copies of the foregoing Reply Brief of Appellants to the following on August 12, 2021:

Gerry P. Fagan
Afton Ball
Moulton Bellingham PC
P.O. Box 2559
Billings, MT 59103-2559

Raphael Graybill
Graybill Law Firm, P.C.
P.O. Box 3586
Great Falls, MT 59403

By /s/ Tucker P. Gannett

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Reply Brief of Appellants is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count is 4,898 words, excluding Certificate of Service and Certificate of Compliance.

DATED this 12th day of August, 2021.

By /s/ Tucker P. Gannett

INDEX TO APPENDIX

Tab 11

Ariane Wittman and Jeremy Taylen v
City of Billings

John Alston
June 29, 2020

Charles Fisher Court Reporting
442 East Mendenhall
Bozeman, MT 59715
(406) 587-9016
maindesk@fishercourtreporting.com

Min-U-Script® with Word Index

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

ARIANE WITTMAN and JEREMY TAYLEN,

PLAINTIFFS,
CAUSE NO. DV 19-1124

vs.

CITY OF BILLINGS,

DEFENDANT.

DAVID and HEIDI CHRISTENSEN,
PLAINTIFFS,
CAUSE NO. DV 19-1151

vs.

CITY OF BILLINGS,
DEFENDANT.

DEPOSITION UPON ORAL EXAMINATION OF JOHN ALSTON

BE IT REMEMBERED, that the deposition upon oral examination of JOHN ALSTON, appearing at the instance of the Plaintiffs, was taken at the offices of Moulton Bellingham, 27 N. 27th St., Suite 1900, Billings, Montana, on Monday, June 29, 2020, beginning at the hour of 1:27 p.m., pursuant to the Montana Rules of Civil Procedure, before Sharon L. Gaughan, RDR, CRR, CRC, and Notary Public.

APPEARANCES

ATTORNEY APPEARING ON BEHALF OF THE PLAINTIFFS, ARIANE WITTMAN and JEREMY TAYLEN and DAVID and HEIDI CHRISTENSEN:

TUCKER P. GANNETT
Gannett Sowden Law, PLLC
3936 Avenue B
Suite A
Billings, Montana 59102
tucker@hgvlawfirm.com

ATTORNEYS APPEARING ON BEHALF OF THE DEFENDANT, CITY OF BILLINGS:

GERRY P. FAGAN
AFTON E. BALL
Moulton Bellingham PC
27 N. 27th St., Suite 1900
P.O. Box 2559
Billings, Montana 59103-2559
Gerry.Fagan@moultonbellingham.com
Afton.Ball@moultonbellingham.com

INDEX

EXHIBITS

MONDAY, JUNE 29, 2020

Thereupon,

JOHN ALSTON,

a witness of lawful age, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified upon his oath as follows:

EXAMINATION

BY MR. GANNETT:

Q. Sir, could you please state your name and professional address for the record.

A. John Alston, 814 North Bozeman Avenue, Bozeman, Montana, 59715.

Q. Is it okay if I call you John?

A. Yes.

Q. John, my name is Tucker Gannett. We met just a minute ago, right?

A. Yes.

Q. We've not met before today?

A. No.

Q. John, I represent two sets of Plaintiffs in the lawsuits filed against the City of Billings for sanitary sewer overflow. Is that a term of art or is that just a Billings term?

A. No, that's a national term, SSO.

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A. Because I wanted to show that the City of Billings does have a code that prohibits that discharge. And, obviously, it was very plain in the video that that has been violated in that neighborhood.

Q. Does Bozeman have a code section like this?

A. Pretty much.

Q. Okay. Do you know if it's the same hundred milligrams per liter?

A. I'm not sure. I don't want to say. I would have to go back and look.

Q. Sure. So I'm a homeowner here. And ignorance of the law is not a defense of the law, but can you tell me how a user is supposed to measure the amount of grease or oil in the water that they're discharging to make sure that they're not in violation of this ordinance?

A. I can't.

Q. There's no standard tool that a homeowner could buy or might be required to buy in order to not run afoul of this?

A. Not that I'm aware of.

Q. Do you know if there's any sort of education program in Billings educating new

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homeowners as to how much water and oil is okay to put down and how much is not okay?

A. I don't have firsthand information, but I do believe Billings, like Bozeman, has reached out to their residents. We do concentrate in Bozeman more on food establishments, but I know that disposals, not scraping dishes, pouring grease down with either Dawn or hot water, that creates fog issues. And I know there's cities, including Raleigh, North Carolina, that has prohibited disposals, period.

Q. Like grease disposals?

A. Food disposals.

Q. Oh, wow. So you can't even have --

A. Yeah, you can't even have a disposal in your sink.

Q. Wow. How do they enforce that?

A. Good question.

Q. Do you know, John, as you sit here, if you've ever discharged oil, fat, or grease in excess of a hundred milligrams per liter?

A. I'm sure I have.

Q. Is that also something that is inherent in a city sewer system, discharge of grease?

A. Sure it is. I will tell you that I took

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out my garbage today and I had three frozen cans of grease right at the top. So I do really look at disposing that, leading by example.

Q. Absolutely. I learned just by watching my parents do it. I had no idea why they did it, but I did it, you know, when I moved out on my own.

And then after we get through the ordinance here, John, on this same page, the last sentence says, The backups at issue appear to have been caused by local residents -- a local resident or residents illegally discharging grease into the sewer.

A. Yeah. I'm sure that's what it says as I'm trying to get pages apart. Yes.

Q. So I read that correctly?

A. You did.

Q. And can you tell me what you base this opinion on?

A. The video.

Q. When you saw the grease clog?

A. Yeah. Yes.

Q. Okay. And do you know, as you sit here today, which residents illegally discharged grease or oil in excess of this municipal code on the

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previous page?

A. No, I do not.

Q. Do you know how many residents in this particular section of sewer, how many residents are attached to that sewer line?

A. I didn't count the amount of wyes, sewer wyes, and that's the entrance into the main. I did not count those.

Q. Okay. Do you know how often folks in this neighborhood who are attached to this sewer line discharge grease or oil?

A. No.

Q. In your opinion here, you say that it's an illegal discharge, which tells me that it's in excess of a hundred milligrams per liter. Is that what you're trying to convey?

A. Yes.

Q. So how many legal discharges are homes allowed per day?

A. I don't know.

Q. And so when it says a hundred milligrams per liter, is that, you know, from one dishwashing session? Is that from one day? If I turn the sink off and turn it back on again, do I start over? Just trying to understand how I comply with

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that.
A. No. I can't answer that.
Q. Okay. So you don't know if this grease buildup was a result of discharge in excess of the code or if it was discharge in accordance with the code?
A. I don't. I don't think that's a big quantity, though, of grease.
Q. Yeah. I don't know. I don't know how many milligrams of grease are generally in a liter.
A. It's not a lot.
Q. Okay. And what do you base that on, John?
A. Just my own common sense. Sorry.
Q. Sure. No. You've been doing this for a long time. So I guess what I'm wondering is there's no -- you didn't employ some type of calculation saying, With this many users on this section of line, people must have discharged grease in excess of the code, to arrive at this opinion?
A. Correct. But I will tell you that's one of the most greasiest sewers that I've ever seen in my 30 years of working in the water department.

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And I worked exclusively on the sewer TV truck for almost three years.
Q. It was a big buildup?
A. It's a huge buildup.
Q. Okay. The next paragraph, John, starts with, I also do not believe these backups occurred as a planned part of the City's sewer system. Do you see that sentence?
A. Yes.
Q. And did I read it correctly?
A. Yes.
Q. Can you tell me what that opinion is based on?
A. That, basically, that the City does not plan to have citizens discharge anything other than fecal matter, toilet paper, and urine into its system. And it was designed correctly, but we cannot predict what our residents are putting into their sewer. We, in the City of Bozeman, have several neighborhoods that we're struggling with and working with and reaching out to about fats, oils, and grease.
Q. So you don't know what people are going to discharge, but you understand that people are going to discharge things other than, I think you

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said, pee, poop, and paper?
A. Right.
Q. I mean, that's a part of the sewer business, right?
A. Unfortunately.
Q. And so when it says it's not a planned part of the City sewer system, you mean that the City isn't intentionally telling people to discharge items that are banned, right?
A. Right.
Q. But certainly, somebody operating a municipal sewer understands that not everyone is going to follow the rules?
A. Unfortunately, yes.
Q. The next sentence says, The City is entitled to expect that its residents will abide by the law.
Again, can you tell me what your basis is for this opinion?
A. Basically, that we're hoping that they would abide by the law and if they did, that this wouldn't -- this would not have occurred.
Q. If everyone abided by the rules imposed by each city, that is, just pee, poop, and paper --

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A. Right.
Q. -- would there be any need for annual maintenance?
A. I still believe there would be.
Q. Why is that?
A. Well, we have -- the older parts of our town still have vitreous clay mains. So that's not going to eliminate tree growth, especially when we see in drought years very aggressive tree root growth. I mean, it's great eats. I mean, that's raw fertilizer. It's nothing more than just fertilizer and moisture, and so they're going to get aggressive. So, yeah, you would have to maintain those.
I still think you would want to flush a PVC main X amount of times just to make sure that something hasn't occurred in the sewer where a crack or something is now holding up toilet paper and solids.
Q. And so even without the, you know, what you have characterized as the illegal discharge of excess grease, oil, fat, rags, the number of items you listed earlier, even without those discharges, there would still be the need to maintain the system?

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7-16-2020

CHRISTINE MELAND
Notary Public
for the State of Montana
Residing at:
Bozeman, Montana
My Commission Expires:
February 14, 2024

the average home is over $400,000. I'm the only one of the staff -- and I'm down seven out of 26 right now -- that owns property in the city of Bozeman. Most everybody lives in a 10-mile radius in the city of Belgrade.

Q. I've been told that they call it the mountain tax?

A. Call it the Bozeman 15. Everything housing-wise is at least 15 percent. So that's a problem. Believe me, if I could do more frequency, I would do it. That's my goal. But I also have the growth issue. And in a city that is growing close to 5 percent every year and far more than Billings is right now, I have certain things that I have to do in subdivision acceptance, and that includes TVing the new mains before we can --

THE REPORTER: I'm sorry? TVing?

THE WITNESS: TVing. Anyway, there's just -- and I tell this to the commissioners on down, it's proactive versus reactive. And every day we're having to make calls of how we -- what do we really have to do versus what can we maybe put off a little bit more. And so I wish I could flush sewers every year like Scott does. I would.

Q. (BY MR. GANNETT) Yeah. I'm surprised

it's only growing 5 percent. I would have put it at a higher clip than that in Bozeman. John, if you give me just a couple of minutes to go over my notes, I think I'm done with you. I'm going to hit the rest room, but just a few minutes and we'll get back on and get you out of here.

(Whereupon, a recess was taken.)

MR. GANNETT: John, I appreciate you coming down. Travel safe back home. Gerry and Afton have the opportunity to ask you some questions, if they'd like. But unless they raise something that I haven't brought up, then I think I'm done with you and I appreciate it.

MR. FAGAN: We have no questions.

(Whereupon, the deposition duly ended at 3:05 p.m. Witness excused; signature reserved.)

DEPONENT'S CERTIFICATE

I, JOHN ALSTON, the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing - 82 - pages of typewritten material and that the same is, with any changes thereon made in ink on the corrections sheet, and signed by me, a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

JOHN ALSTON, Deponent.

Subscribed and sworn to before me this 13th day of July, 2020.

PRINT NAME: CHRISTINE MELAND
Notary Public, State of Montana
Residing at: Bozeman, Montana
My commission expires: February 14, 2024

SG - Wittman/Taylen et al v City of Billings

CERTIFICATE

STATE OF MONTANA)
: ss
COUNTY OF YELLOWSTONE)

I, Sharon L. Gaughan, RDR, CRR, CRC and Notary Public for the State of Montana, residing in Billings, do hereby certify:

That I was duly authorized to and did swear in the witness and report the deposition of JOHN ALSTON in the above-entitled cause; that the foregoing pages of this deposition constitute a true and accurate transcription of my stenotype notes of the testimony of said witness, all done to the best of my skill and ability; that the reading and signing of the deposition by the witness have been expressly reserved.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal on this, the 7th day of July, 2020.

RECEIVED
7-16-2020

Correction Sheet

Please make all changes or corrections on this sheet showing page, line and correction for Court Reporter's insertion into the Original Deposition. Sign this sheet and sign the Deponent's Certificate Page before a Notary, then return to the Court Reporter for filing. If there are no corrections, please write "No Corrections" across this sheet and sign at the bottom of the page.

Page	Line	Now Reads	Should Read	Reason
28	24	in backFow	and backflow	wrong word
45	3	residence	residences	needed a S
52	3	PCV	PVC	misspell
73	5	annual monthly	annual fee	delete annual

State of Montana

County of Gallatin

John Alston
Deponent Signature

This instrument was signed and sworn to before me on 07/13/2020

by John Alston
Print name of signer(s)

Christine Meland
Notary Signature

Affix seal/stamp as close to signature as possible.

[Montana notaries must complete the following, if not part of stamp.]

CHRISTINE MELAND
Notary Public
for the State of Montana
Residing at:
Bozeman, Montana
My Commission Expires:
February 14, 2024

CHRISTINE MELAND
Printed Name

Notary Public for the state of MONTANA

Residing at Bozeman, Montana

My Commission expires: February 14, 2024

CERTIFICATE OF SERVICE

I, Tucker Patrick Gannett, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 08-12-2021:

Afton Eva Ball (Attorney)
Moulton Bellingham PC
P O Box 2559
27 North 27th Street, Suite 1900
Billings MT 59103
Representing: Billings, City of
Service Method: eService

Gerry P. Fagan (Attorney)
27 North 27th Street, Suite 1900
P O Box 2559
Billings MT 59103-2559
Representing: Billings, City of
Service Method: eService

Raphael Jeffrey Carlisle Graybill (Attorney)
300 4th Street North
PO Box 3586
Great Falls MT 59403
Representing: Montana Trial Lawyers Association
Service Method: eService

Amanda Beckers Sowden (Attorney)
100 North 27th Street
Suite #550
Billings MT 59101
Representing: Jeremy Taylen, Ariane Wittman
Service Method: Conventional

Electronically Signed By: Tucker Patrick Gannett
Dated: 08-12-2021