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DEPUTY

8 MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

9 WILLIAM K. MILLIGAN and CINDY L.
10 MILLIGAN,

11 Plaintiffs,

12 vs.

13 CITY OF BILLINGS and NANCY
14 MCCULLOUGH, individually and in her
15 official capacity as a CITY OF BILLINGS
16 CODE ENFORCEMENT OFFICER, and
17 DOES 1 and 2,

18 Defendants.

Cause No. DV - 10 - 1604

Judge SUSAN P. WATTERS

COMPLAINT AND DEMAND FOR JURY
TRIAL

18 Plaintiffs, William K. Milligan and Cindy L. Milligan, by and through their attorney,
19 Elizabeth J. Honaker, for their complaint against Defendants state and allege as follows:

20 1. Plaintiffs William K. Milligan and Cindy L. Milligan ("the Milligans") are and at all
21 pertinent times hereto were residents of Billings, Yellowstone County, Montana. Plaintiffs own a
22 second hand business "Good Stuff" in Billings.

23 2. Defendant City of Billings ("City") is and at all times pertinent hereto was a
24 subdivision of the State of Montana, existing under the laws of the State of Montana, with its
25

1 principal office in Billings, Yellowstone County, Montana. The City's official policy required,
2 encouraged, ignored, and/or condoned intimidation, harassment, malicious prosecution, and civil
3 rights violations by its City code enforcement officers. The Milligans were treated pursuant to such
4 City policies and practices.

5 3. Defendant Nancy McCullough ("Officer McCullough") was at all pertinent times
6 hereto employed as a Code Enforcement Officer for the City of Billings, was responsible for
7 enforcement of the Billings Municipal City Code ("BMCC") and the City's policies and practices,
8 and was a resident of Yellowstone County. Officer McCullough is sued in both her official capacity
9 and individually.
10

11 4. The true names of Defendants named in this complaint as Does 1 through 2
12 inclusive are unknown to Plaintiffs at this time. Plaintiffs bring this action against those Defendants
13 by those fictitious names and will amend this complaint to show the true names of those Defendants
14 when they have been determined. Plaintiffs are informed and believe, and based on that information
15 and belief allege, that the Defendants named as Does 1 through 2 are in some way responsible for
16 the damages alleged in this complaint to the same extent as the named defendants, individually and
17 in their official capacities.

18 5. All official activity that is the subject of this complaint occurred within Billings,
19 Yellowstone County, Montana.

20 6. Venue is proper pursuant to Mont. Code Ann. § 25-2-126.

21 7. This is a civil action seeking damages against Defendant City of Billings, as well as
22 Officer McCullough individually, for committing acts under color of state law, which deprived
23 Plaintiffs of rights secured to them under the Fourth and Fourteenth Amendments to the
24 Constitution of the United States and under Article II of the Constitution for the State of Montana.
25

1 and consistent; and as long as the non-conforming use was not enlarged to occupy a greater area
2 of land. Good Stuff at no time ceased their business activity and did not enlarge their business to
3 occupy a greater area of land after 1984.

4 13. During this pertinent time in question, it was the practice of the City of Billings to
5 negligently train and supervise their employee code enforcement officers, by failing to train and
6 supervise them in the proper interpretation and enforcement of the BMCC. The code
7 enforcement officers were more or less allowed to interpret the BMCC and apply it to citizens as
8 they saw fit and in order to serve their specific purpose.

9
10 14. In 1998, Billings Code Enforcement Officer Marion Dozier informed the
11 Milligans that they needed to remove appliances from the alley between their business
12 properties. She made no complaint about the merchandise on display or the inventory stored in
13 all other areas of the Milligan's property.

14 15. On May 15, 2000, Officer Dozier informed the Milligans that to bring their
15 property into "compliance" with the zoning code dealing with the "storage of merchandise," they
16 would need to remove the open storage in the clear vision triangle on the North East corner of
17 their property and Dozier requested that all open storage on the East Side of the property be
18 behind their wooden fences, although not required. Officer Dozier made no complaint of the
19 open display of merchandise anywhere else, which was maintained in the same manner since
20 1975, or the storage of inventory behind the fences.

21
22 16. On July 31, 2001, the Milligans had cleared all appliances, whether or not the
23 items were public drop-offs, from the alley between their properties.

24 17. During this time, Officer Dozier acknowledged to the Milligans that their display
25 of appliances on the Broadwater side of the property could legally be stored in the open because

1 the area is zoned community commercial. Regardless, on August 10, 2001, she issued Bill
2 Milligan a citation charging him with storage of salvage. On December 24, 2001, Deputy City
3 Attorney Craig Hensel sent an email to Marion Dozier, acknowledging the vagueness of the
4 ordinance and finding that the Milligan's business would be "grandfathered" in under the prior
5 law. On December 27, 2001, the citation was dismissed.

6
7 18. On March 19, 2002, Officer Dozier told Bill Milligan: "If I can't get you one way,
8 I'll get you another." On May 8, 2002, she sent the Milligans a letter indicating that they had 14
9 days to remove the appliances from the alley. Bill Milligan responded by asking if the City
10 would permit him to erect a six-foot metal fence around his business, including the storage areas,
11 even though it was not necessary per the BMCC.

12 19. Ramona Mattix with the City and Bill Milligan discussed the fence permit but
13 then Jeff Bolman, the Senior Planner/Zoning Coordinator for the City, informed Bill Milligan
14 that he could not build a metal fence as it is not commonly used material and that he would not
15 recommend approval under a special review or a variance. At the time, BMCC 26-604 stated
16 that all fences shall be constructed from materials which are commonly used for fencing and
17 shall not be constructed from railroad ties, tires, or salvaged materials. Regardless, the City
18 would not budge.

19 20. On November 7, 2002, the Milligans received new citations for storage of salvage
20 regarding the lots on Custer Avenue but not Broadwater Avenue.

21 21. Bill Milligan went to trial and was convicted of storage of salvage. The
22 Municipal Court Judgment provided that his sentence was suspended on the condition that the
23 property in the alley and on the Custer lots are "in compliance with City Code." This Order also
24 advised him that Bill shall not use or take for sale any property illegally dumped in the alley at
25

1 any time. "Defendant shall contact the City of Billings Solid Waste Department within 48 hours
2 for removal of discarded property which is not a part of his operation." The City Municipal
3 Court strongly encouraged the City to provide assistance in the cleanup.

4 22. Afterwards, in order to settle the matter, the City and the Milligans came to terms,
5 and on that basis the Milligans did not appeal the Municipal Court Judgment to District Court.
6 Defendant Nancy McCullough, the new code enforcement officer for the City, was now involved
7 with the Milligan's business. On May 27, 2003, she documented the settlement in writing: the
8 City agreed that all "dumped" appliances that are left in the Milligan's alley would be hauled
9 away by the City Solid Waste and Street Department. Second, the City would provide Bill
10 Milligan up to \$500 in Community Development Block Grant funds. Third, the City would
11 provide "No Dumping" signs to be posted in the alley.
12

13 23. By December 23, 2003, the Milligans were in total compliance with the
14 Municipal Court Judgment and the agreement with the City. The City entirely failed to fulfill its
15 part of the agreement as they never provided the Milligans with the "No Dumping" signs and
16 they never to date provided the Milligans with the \$500 block grant fund. After hundreds of
17 phone calls and hours spent just trying to get the City to pick up the drop-offs per the Court
18 order, the Milligans finally gave up. In March 2005, Officer McCullough told Bill Milligan that
19 the City is not responsible for picking up the drop offs any longer, and Ken Behling, with the
20 City, informed Bill Milligan that he does not have to follow a court order as his employer is
21 Dave Mumford.
22

23 24. On March 21, 2005, after having had open display of the same kind of used
24 merchandise on the Broadwater side of their business for thirty years, Officer McCullough came
25 to Milligan's business and said the alley looked good but "what about the front?"

1 25. On or about May 23, 2006, Bill Milligan was again issued citations, sixteen in
2 total, for the storage of junk at his business, citing him for the Broadwater property as well as the
3 rest. On July 3, 2006, all of these citations were dismissed. Then on July 7, 2006, a City police
4 officer came up the alley with five new citations, with no previous notice as required under the
5 BMCC.

6 26. On October 11, 2006, Bill Milligan went to Billings Municipal Court on five
7 counts of storage of salvage, and was convicted on all counts. Bill Milligan was sentenced to six
8 months jail per count for a total of two and one-half years of jail time, all suspended, on the
9 conditions that he pay a fine in the amount of \$500.00 on each count, and that he remove and
10 abate "any and all salvage and rubbish" stored on his property, within ninety days from the date
11 of sentencing. The Court also ordered that the sentences imposed run consecutively; that
12 Milligan pay \$566 for jury costs; and if Code Enforcement determines he has failed to
13 adequately remove or abate the "salvage" and "rubbish," his suspended sentence would be
14 revoked, "at which point the issue of the City's abatement of the property will be addressed as
15 necessary." (Judgment, 11/1/2006.)

16 27. Bill Milligan appealed the conviction and sentence in the district court and the
17 Montana Supreme Court. At the conclusion of the appeal, the Municipal Court issued a Notice
18 to Appear for Bill Milligan to appear in the Municipal Court of Billings on June 16, 2008 at 3:00
19 p.m., for resentencing, which states that "[i]f you do not appear, a warrant for your arrest may be
20 issued." (Notice to Appear, 3/14/1008.) Defendant's counsel appeared at the Billings Municipal
21 Court on June 16, at 3:00 p.m. on behalf of the Plaintiff as Bill Milligan's mother had just passed
22 away. No one from the City of Billings was present, and a clerk of Municipal Court advised
23 counsel herein that there was no Judge present that day. On June 24, 2008, the City of Billings
24 filed a *Petition to Revoke Suspended/Deferred Sentence and Warrant for Arrest* apparently on
25

1 the mistaken presumption that Bill Milligan had not made an appearance on the Notice to
2 Appear, while it was the Court and the prosecutor who had failed to appear. For eight days, the
3 Milligans were under constant fear and stress that Bill would be arrested and jailed on the
4 warrant at any time. Upon Milligan's motion, but eight days after the warrant was issued and the
5 motion was filed, the Municipal Court quashed the arrest warrant.

6 28. Bill Milligan then filed a petition for postconviction relief with the District Court,
7 and the District Court ruled in his favor, overturning his convictions in Municipal Court and
8 vacating the sentence. The Municipal Court subsequently dismissed the case against him with
9 prejudice.

10 29. A dismissal with prejudice failed to stop the continual harassment of the Milligans
11 by the City of Billings. On June 30, 2009, Officer McCullough sent the Milligans a notice that
12 "a recent inspection" found a violation under BMCC 27-604(h), concerning a fence permit. The
13 Milligans responded by pointing out that they had indeed obtained a City of Billings and
14 Yellowstone County Zoning Jurisdiction Fence Permit, No. 01-137 for the fence that shows the
15 perimeter of the fence, which had never changed.

16 30. The Notice also informed the Milligans that they had violated BMCC 27-604(e) by
17 the type of fencing material they were using. BMCC 27-604(e) states that fences shall be
18 constructed of commonly used fence materials, which include wood, brick, stone, split railing, etc.
19 The Milligan's fence was entirely made of wood and not constructed from railroad ties, wood
20 pallets, tires, rubble or salvaged material, as prohibited. The Milligans responded by informing the
21 City that the yard of SOS Robert Signs on Sixth Avenue North was fenced with wood just as the
22 Milligans and the City had approved it at the time the City made SOS tear out his nice metal fence
23 with was "illegal" for him but "legal" for Daniel Kenney to erect a metal fence on his City property
24 in 2005 and that Mr. Kenney was a Board of Adjustments officer at the time Mr. Milligan's metal
25 fence was rejected in 2002. The Milligans put the City on notice at that time that they considered

1 their continual unfounded complaints nothing more than harassment, which had been inflicted on
2 them by the City for over a decade. The City did not respond and did not issue a citation.

3 31. On or about February 11, 2009, City of Billings Code Enforcement issued a
4 Notice to Appear and Complaint, citing Bill Milligan with violation of BMCC 27-601(a)(7), for
5 allegedly having a trailer used for living or sleeping purposes for longer than five consecutive
6 days on the Milligan's business property, which has a valid City-issued trailer court license
7 continually since the 1980's and was zoned neighborhood commercial.

8 32. Fourteen months later, in April 2010, Bill Milligan was checking on his business
9 in the middle of the night as an alarm had gone off, and at that time was detained by the City
10 police solely for purposes of serving him with a fifteen-month old notice to appear and
11 complaint. The Milligans filed a motion to dismiss the complaint on the basis that BMCC 27-
12 601(a)(7) applies only to residential areas and the pertinent property at issue where the trailer
13 was located is zoned neighborhood commercial, and that Plaintiffs had a valid trailer court
14 license in effect. After paying legal fees and enduring the stress of yet another City complaint
15 inflicted upon them, the Municipal Court again dismissed this complaint.

16 33. For over a dozen years and to the current time, Defendants have sent baseless
17 notices and filed baseless complaints, taken hundreds of photographs, inventoried the Milligan's
18 property and harassed Plaintiffs on a regular basis.

19 34. After running a valuable service to the Billings community for thirty-six years,
20 every day that the Milligans are at their place of business, they remain vigilant and distressed
21 that at any moment the City will appear with yet another baseless complaint to serve upon them.
22

23 **COUNT ONE**

24 **MALICIOUS PROSECUTION**

25 [City of Billings Code Enforcement Office]

1 35. Plaintiffs restate and reallege Paragraphs 1 to 34 of the complaint as if fully set
2 forth herein.

3 36. The City of Billings issued numerous citations and commenced judicial
4 proceedings against Bill Milligan.

5 37. The City of Billings Code Enforcement Office and Officer McCullough were
6 responsible for instigating and continuing proceedings against Bill Milligan.

7 38. The City of Billings lacked probable cause for its actions, as there was no
8 reasonable ground for suspicion that would warrant a reasonably prudent and cautious code
9 enforcement officer to believe that the accused Milligan was guilty of the offenses for which he
10 was charged. In fact, a deputy city attorney had admitted and informed the code enforcement
11 office that the City lacked probable cause to charge the Milligans as they would be grandfathered
12 in but City code enforcement issued citations against Bill Milligan nonetheless.

13 39. The City of Billings code enforcement office and Defendant McCullough were
14 actuated by malice in charging Bill Milligan as they did not like the business known as "Good
15 Stuff" and decided to take whatever action was necessary to require the Milligans to either close
16 their business or no longer store and display their merchandise and inventory as they had been
17 legally doing for decades.

18 40. The judicial proceedings concerning Bill Milligan were terminated in his favor
19 when the District Court in a postconviction proceeding overturned the convictions and vacated
20 the sentence, and the City Municipal Court dismissed the case with prejudice.

21 41. As a direct and proximate result of Defendants' conduct as described above,
22 Plaintiffs have been caused to suffer damages, including but not limited to, loss of business
23 sources and contacts, serious emotional distress, injury to dignity and reputation, mental anguish
24
25

1 and suffering, humiliation and public ridicule, and reasonable and proper expenditures to defend
2 against the malicious prosecution by the City of Billings Code Enforcement Office.

3
4 **COUNT TWO**

5 **CLAIM UNDER 42 U.S.C. § 1983**

6 42. Plaintiffs adopt and reallege Paragraphs 1 through 41 of this complaint as if fully set
7 forth herein.

8 43. This count is brought under Section § 1983 of Title 42 of the United States Code.
9 The Milligans seek damages as a result of being deprived of their constitutional right to not be
10 deprived of property without due process of law, and right to equal protection and treatment under
11 the laws, in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

12 44. Defendants' interference with their rights to due process and equal protection under
13 the law was intentional.

14 45. Defendants acted maliciously and with improper purpose in denying the Milligans
15 due process and equal protection of the law by failing to provide proper notice to the Milligans prior
16 to filing criminal citations and by allowing other business enterprises within the Billings city limits
17 to conduct business in a manner in which the City would not allow the Milligans.

18 46. In doing the acts alleged in this Complaint, Defendants were acting under the color
19 and pretense of the law, statutes, regulation, customs, and usages of the State of Montana and the
20 City of Billings, and under the authority of their respective offices in the City of Billings.

21 47. Defendants failed to act in an objectively reasonable manner and violated clearly
22 established constitutional rights.

23 48. The custom and practice of the City of Billings, and its employees, of denying
24 certain citizens their right to due process and equal protection under the law, was promulgated and
25 practiced under the authority of officials of the City of Billings, who failed to properly train and
supervise their employees, amounting to deliberate indifference to the obvious need for training and
supervision.

1 circumstances which reasonably tended to produce a fear that the threats would be carried out
2 and they would be jailed. Officer McCullough facilitated the issuance of a warrant to have Bill
3 Milligan arrested even after his attorney appeared at the time and place of a scheduled hearing
4 but the prosecutor and Judge failed to show up.

5 61. Plaintiffs were attempting to exercise a legally protected right to run a second
6 hand store in the City of Billings according to the law that applied to them but were continually
7 harassed and aggrieved by the City's and Officer McCullough's acts of intimidation and threats
8 that they could not do what was legally within their right.

9
10 62. Plaintiffs were aggrieved and injured as set forth in Paragraph 50 above.

11 **COUNT FIVE**

12 **NEGLIGENT HIRING, SUPERVISION AND TRAINING OF EMPLOYEES**

13 [Defendant City of Billings]

14 63. Plaintiffs adopt and reallege Paragraphs 1 through 62 of this complaint as if fully set
15 forth herein.

16 64. The City of Billings had a duty of care with respect to the hiring, training and
17 supervision of its employees entrusted with the duty and authority to interpret and enforce the
18 Billings Municipal City Code. The failure to do so resulted in continual harm to the Milligans over
19 a period of twelve years.

20 65. The City of Billings failed, refused and neglected to properly and adequately train
21 Defendant McCullough, its other code enforcement officers, and its supervisory personnel in the
22 proper and legal manner of interpreting and enforcing the BMCC and in the treatment of its
23 citizens.

24
25 66. The City of Billings then failed to properly and adequately supervise and monitor
Officer McCullough and its other code enforcement officers, allowing them to enforce the

1 BMCC through intimidation, harassment, malicious prosecution and violation of constitutional
2 rights.

3 67. The City of Billings was on actual and constructive notice of the violations of
4 Plaintiffs' civil rights and of the other malicious acts by its employees and officials.

5 68. By failing to properly and adequately train and supervise its employees, the City
6 of Billings breached its duty of care to Plaintiffs as well as to other members of the public.

7 69. As a direct and proximate result of the City of Billings' negligence, the Milligans
8 were damaged as outlined in Paragraph 50 above.

9 10 **COUNT SIX**

11 **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

12 70. Plaintiffs restate and reallege Paragraphs 1 through 69 of the complaint, as if fully
13 set forth herein.

14 71. Defendants' acts of malicious prosecution, harassment and intimidation toward
15 the Milligans were specifically directed toward them. Over the past twelve years, Defendants
16 relentlessly photographed, inventoried, complained and harassed the Milligans.

17 72. Defendants' conduct was extreme and outrageous.

18 73. Defendants' intentional or reckless conduct caused severe emotional distress to
19 the Milligans, resulting in bodily harm.

20 74. The Milligan's emotional distress was extreme and severe.

21 75. As a direct and proximate result of Defendants' conduct, the Milligans sustained
22 and suffered, and continue to suffer emotional distress and mental suffering, embarrassment,
23 humiliation, harm to their reputation and harm to their dignity.

24 76. The Milligans seek damages for Defendants' intentional acts.

25 **COUNT SEVEN**

BREACH OF CONTRACT

1
2 [Defendant City of Billings]

3 77. Plaintiffs restate and reallege Paragraphs 1 through 76 of the complaint, as if fully
4 set forth herein.

5 78. The City of Billings code enforcement office entered into an agreement with the
6 Milligans documented in writing by Officer McCullough, where the City agreed to perform certain
7 acts and in exchange the Milligans did not appeal Bill Milligan's convictions and they cleaned up
8 their properties according to the City's specifications.

9 79. The City of Billings breached the agreement by failing to fulfill any of its terms.

10 80. The Milligans are entitled to damages for the City's breach of contract.

11 **COUNT EIGHT**

12 **PUNITIVE DAMAGES**

13 [Defendant Nancy McCullough]

14 81. Plaintiffs restate and reallege Paragraphs 1 through 80 of the complaint, as if fully
15 set forth herein.

16 82. By her calculated acts of intimidation, malicious prosecution, harassment,
17 violation of civil rights, and intentional infliction of emotional harm, Officer McCullough
18 intended to harm the Milligans and is guilty of actual malice.

19 83. The Milligans are entitled to punitive damages against Officer McCullough,
20 according to proof.

21 **COUNT NINE**

22 **ATTORNEY FEES**

23 [Defendant City of Billings]

24 84. Plaintiffs restate and reallege Paragraphs 1 through 83 of the complaint, as if fully
25 set forth herein.

