IN THE SUPREME COURT OF THE STATE OF MONTANA

No.: DA 16-0695

The COMMISSIONER OF POLITICAL PRACTICES FOR THE STATE OF MONTANA, through JONATHAN R. MOTL, acting in his official capacity as The Commissioner of Political Practices,

Appellees,

v.

ARTHUR "ART" WITTICH,

Appellant.

APPELLANT'S BRIEF

On Appeal from the Montana First Judicial District Court, Lewis and Clark County, The Honorable Ray Dayton, Presiding
District Court Case No. DV 2014-251

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STATEMENT OF THE CASE

The Montana Commissioner of Political Practices, Jonathan Motl, ("COPP") instituted the underlying action in April 2014 against Arthur Wittich. The COPP contended that Mr. Wittich violated certain provisions of Montana's Campaign

[1] All reference to §13-1-101(7)(a)(i), MCA herein is to §13-1-101(7)(a)(i) (2009), as it existed in 2010.

Finance and Practices Act ("MCPA") during his 2010 primary campaign for Senate District 35 ("SD 35") by allegedly accepting in-kind corporate contributions and failing to report them. A jury trial occurred from March 28th through April 1st of 2016 in Lewis and Clark County District Court. The jury returned a verdict determining that $19,599.00 of in-kind contributions were accepted and not reported. The District Court thereafter denied Mr. Wittich's motion for new trial and entered an order trebling that verdict amount. This appeal follows.

STATEMENT OF THE FACTS

In early 2010, Mr. Wittich and his law firm represented Western Tradition Partnership ("WTP") in a lawsuit against the Montana Attorney General, and the office of the COPP. That lawsuit followed in the wake of *Citizens United*[2] and sought a declaration that §13-25-227(1), MCA violated WTP's freedom of speech rights under the First Amendment of the United States Constitution. During that time, Mr. Wittich was also a candidate for Montana SD 35 in Gallatin County. (Doc. 5, exhibit 1 at ¶3, and exhibit 2).[3]

In September of 2010, while the WTP case was pending, Debra Bonogofsky, a resident and candidate for House District 77 in Yellowstone County, filed a

[2] *Citizens United v F.E.C.,* 558 US. 310, 130 S.CT 876 (2010).
[3] Citations to ("Doc. ##) refers to the Document Sequence in the Register of Actions for the underlying matter.

complaint with the COPP against her opponent Dan Kennedy. (Doc. 262, exhibit).[4] This Administrative Complaint specifically named Dan Kennedy and only Dan Kennedy: "Person or organization against whom complaint is brought: Dan Kennedy." (Doc. 252, exhibit 1; 11/13/14 Tr. 67:2-24).[5]

In 2011 WTP's lawsuit was heard by the Montana Supreme Court on an appeal from the District Court's Order granting WTP's motion for summary judgment. *Western Tradition Partnership, Inc. v. Attorney General of State,* 2011 MT 328, 363 Mont. 220, 271 P.3d 1. Prior to becoming the current COPP, Jonathan Motl filed an amicus brief in support of the State, and against WTP. The Montana Supreme Court rendered its decision in late 2011, and reversed the District Court's judgment that it entered in favor of WTP. *Id.*

WTP appealed that determination to the United States Supreme Court, which granted certiorari. The U.S. Supreme Court reversed the Montana Supreme Court in June of 2012. *American Tradition Partnership v. Bullock,* 567 U.S. 516, 132 S.CT 2490 (2012). It found that the holding of *Citizens United* applied to Montana state law, and that "Montana's arguments in support of the judgment below either

[4] To avoid confusion with the civil complaint filed by the COPP in District Court, Ms. Bonogofsky's Complaint will be referred to as "The Administrative Complaint".
[5] Transcripts (other than the Trail Transcript) are referred to by the date of the hearing followed by "Tr."). The Trial Transcript is simply cited as ("Tr.") and is not preceded by a date.

were already rejected in *Citizens United,* or fail[ed] to meaningfully distinguish that case." (*Id.* at 2491).

Less than a year later Governor Bullock appointed Jonathan Motl to serve as the Commissioner of Political Practices. Thereafter, three years after Ms. Bonogofsky filed her Administrative Complaint against Dan Kennedy, the newly appointed COPP, Jonathan Motl, "extended" Ms. Bonogofsky's Administrative Complaint to include Mr. Wittich. No citizen, elector, or constituent ever complained.

The COPP did not issue a Notice and Order of Noncompliance under §13-37-121(5), MCA and instead referred his "expanded" Administrative Complaint to the Lewis and Clark County Attorney - rather than the Gallatin County Attorney. (11/13/14 Tr. 67:2-24; Doc. 1 ¶14). The Lewis and Clark County Attorney refused to bring any civil action. (Id.). The COPP issued a Sufficiency Decision on March 31, 2014 (Doc. 1, ¶14 and exhibit 1 thereto) and filed the underlying civil lawsuit against Mr. Wittich the next day in Lewis and Clark County District Court. (Doc. 1).

The unusual procedure used by the COPP to institute the underlying action against Mr. Wittich prompted motions to dismiss the complaint. On May 2, 2014 Mr. Wittich filed a motion to dismiss the complaint for the COPP's failure to refer the case to the Gallatin County Attorney as required by statute. (Doc. 5). That

motion was denied on July 8, 2014. (Doc. 67). He again filed a motion to dismiss on December 29, 2015 arguing that an administrative complaint was never lodged against him with the COPP, and that a Notice and Order of Noncompliance was not provided to him thereby precluding the COPP from filing the underlying action. (Doc. 262). That motion was also denied (Doc. 386), and Mr. Wittich appealed. (Doc. 398). In a split-decision, the Montana Supreme Court dismissed the appeal as premature and remanded the case for trial. (March 18, 2016 Order: *DA 16-0151*).

During the litigation, Mr. Wittich propounded discovery requests to try and determine what information the COPP relied on to render its Sufficiency Decision and file the civil lawsuit. The COPP responded by stating that it relied on approximately 30,000 documents, 5,000 of which it would not disclose to Mr. Wittich, and 25,000 of which it would make available for inspection. (Doc. 151 at 3; 11/13/14 Tr. 12:19 – 13:15).

Mr. Wittich's attorney was sent to the COPP's office to begin the arduous task of reviewing 25,000 documents on December 12, 2014. (Doc. 152 at p.1). After hours of review and analysis, it became apparent that it would be impossible to deduce which specific documents the COPP had relied on to support its Sufficiency Decision against Mr. Wittich. Shortly before trial, the COPP finally identified the documents that it claimed supported its claim: it was less than 100.

The COPP also disclosed two testifying experts before trial: himself (Jonathan Motl), and his friend CB Pearson. (Doc. 201). Mr. Motl's report disclosed that he would express opinions like: the litigation is properly before the District Court (Doc. 300 at exhibit A, p. 4 thereto); coordination existed between Mr. Wittich and corporate entities as a matter of law (Id. at p.9); that Mr. Wittich did not act in conformance with the law because he failed to keep record of contributions, and did not maintain sufficient account records. (Id. at p. 10). C.B. Pearson's report disclosed that he would opine on what the cost of Mr. Wittich's vendor's printing supplies were in 2010.

Mr. Wittich filed Motions *in limine* to preclude the COPP and Mr. Pearson from expressing these opinions. (Docs 313 and 315). His motions were denied on March 9, 2016. (Doc. 387 and 388). Both the COPP and Mr. Pearson were eventually permitted to express their opinions at trial.

Before trial commenced, extensive discussions about Mr. Wittich's ninth affirmative defense were held between the District Court and the parties. (3/24/16 Tr. 43:19 – 49:10; Doc. 456 at p.10). Mr. Wittich's ninth affirmative defense contended that the laws, which COPP were proceeding under, were an unconstitutional infringement on First Amendment rights. (Doc. 230). Although the District Court agreed that the defense was preserved, and placed that specific defense

in the Final Pretrial Order, it would not permit the issue to be raised at trial. (3/24/16 Tr. 43:19 – 49:10),

The jury trial commenced on March 28, 2016. The parties conducted *voir dire*, and passed the jury for cause. (Trial Transcript (Tr.) 120:9-10). After the jury was impaneled and the parties gave their opening statements, the District Court dismissed a juror because Mr. Wittich's opening statement persuaded her that the lawsuit against him should probably not have been filed. (Tr. 171:18 – 184:7). The COPP then expressed his opinions on whether Mr. Wittich violated the law; Mr. Pearson expressed his opinions on the value of 2010 printing costs. All the while Mr. Wittich's ninth affirmative defense remained at bay.

At the conclusion of evidence, the jury rendered a verdict finding that Mr. Wittich had failed to report certain in-kind contributions. (Doc. 481; Doc. 515). Neither the jury nor the District Court made a finding on Mr. Wittich's culpability, but the District Court trebled the verdict amount anyway. (Doc. 513).

Mr. Wittich filed a motion for new trial contending that the improper dismissal of the impaneled juror deprived him of a fair trial, and because he was not permitted to assert his ninth affirmative defense. (Doc. 529). His motion was denied. (Doc. 546). The instant appeal followed.

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SUMMARY OF ARGUMENT

The verdict should be vacated and the matter dismissed. Montana Code Ann. §§13-37-111(2), 121(5), and 124(1) are jurisdictional. They set forth statutorily mandated prerequisites to a lawsuit filed by the COPP. The COPP failed to comply with each of these statutes. The District Court, therefore, did not have authority to hear the COPP's lawsuit.

Additionally, §13-1-101(7)(a)(i), MCA unconstitutionally infringes on the First Amendment and was unconstitutionally applied by the COPP to Mr. Wittich. The statute's phrase "or influence an election" has been held unconstitutionally vague because it infringes on protected First Amendment rights. Section 13-1-101(7)(a)(i), MCA is only constitutional if enforced by the COPP in accordance with *Buckley* and its progeny. Here, the COPP enforced and applied the statute without consideration of whether the communications at issue constituted "express advocacy or its functional equivalent." As such, the COPP's application and enforcement of §13-1-101(7)(a)(i), MCA against Mr. Wittich was unconstitutional.

The verdict should be vacated and the matter remanded for a new trial. Mr. Motl's testimony constituted impressible conclusions of law, and applications of law to fact that violated the province of the judge and jury. Mr. Pearson offered the only evidence for the value of in-kind contributions, but he was not qualified to render opinions on print house printing costs in 2010. Additionally, Mr. Wittich was

deprived of a fair trial when the District Court dismissed a juror because she formed an opinion after opening statements. Lastly, the District Court's refusal to permit Mr. Wittich's ninth affirmative defense during trial and after trial was in error.

Finally, the verdict should be vacated and the matter remanded for further proceedings. Montana Code Ann. §13-37-128, MCA is punitive in nature. As such, the assessment of treble fines was required to comport with §27-1-221, MCA's clear and convincing standard. The trial court's imposition of treble fines in the absence of clear and convincing evidence of Mr. Wittich's culpability was, therefore, in error.

STANDARD OF REVIEW

Issue 1: A court's determination as to its jurisdiction is a conclusion of law, which is reviewed de novo. *Bunch v. Lancair Intl., Inc.,* 2009 MT 29, ¶ 15, 349 Mont. 144, 202 P.3d 784; *Stanley v. Lemire*, 2006 MT 304, ¶ 52, 334 Mont. 489, 148 P.3d 643. A court may address the question of its jurisdiction *sua sponte. Id.*, ¶ 32.

Issue 2: The Court's review of constitutional questions is plenary. *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88.

Issue 3: The District Court's admission of the COPP's "expert" opinions on conclusions of law, and the application of law to facts, was contrary to the Montana Rules of Evidence and Montana law, and is reviewed for correctness. "To the extent that the expert testimony ruling is based purely on an interpretation of the evidentiary

rules, however, we will review that interpretation like any other question of law, for correctness." *McClue v. Safeco Ins. Co. of Illinois,* 2015 Mont. 222 ¶14, 380 Mont. 204, 354 P.3d 604, citing, *In re T.W.,* 2006 MT 153, ¶8, 332 Mont. 454, 139 P.3d 810.

The District Court's determination on CB Pearson's qualifications is reviewed as an abuse of discretion. The Supreme Court reviews a district court's determination regarding the qualification and competency of an expert witness for an abuse of discretion. *State v. Jay*, 2013 MT 79, ¶ 15, 369 Mont. 332, 298 P.3d 396; see also *Nesbitt v. City of Butte*, 118 Mont. 84, 93, 163 P.2d 251, 256 (1945).

Issue 4: The Supreme Court "review[s] a district court's decision to deny a motion for a new trial on the grounds enumerated in § 25-11-102, MCA, for an abuse of discretion." *Willing v. Quebedeaux*, 2009 MT 102, P 19, 350 Mont. 119, 204 P.3d 1248; see also *Cooper v. Hanson*, 2010 MT 113, ¶ 28, 356 Mont. 309, 318, 234 P.3d 59, 64-65. "An abuse of discretion can be found if the district court acts arbitrarily without the employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *State v. Sage*, 2010 MT 156, ¶ 21, 357 Mont. 99, 235 P.3d 1284.

Issue 5: The Court's standard of review of a district court's discretionary ruling is whether the district court abused its discretion. *Plath v. Schonrock*, 2003 MT 21, ¶ 13, 314 Mont. 101, 106, 64 P.3d 984, 988

The Supreme Court will review claimed errors where failing to do so may result in a manifest miscarriage of justice, leave the question of fundamental fairness of the proceedings unsettled, or compromise the integrity of the judicial process. The Supreme Court uses its inherent power of common-law plain error review sparingly, on a case-by-case basis, and only in the aforementioned circumstances. *State v. Rovin*, 2009 MT 16, ¶ 29, 349 Mont. 57; 201 P.3d 780; *see also State v. Finley*, 276 Mont. 126,137-38, 915 P.2d 208, 215 (1996), *overruled on other grounds*, *State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817.

ARGUMENT

THE VERDICT SHOULD BE REVERSED AND THE CASE DISMISSED

ISSUE 1: THE DISTRICT COURT DID NOT HAVE AUTHORITY TO HEAR THE UNDERLYING LAWSUIT BECAUSE THE COPP FAILED TO FOLLOW THE STATUTORILY MANDATED PREREQUISITES TO FILING SUIT.

A court's determination as to its jurisdiction is a conclusion of law, which is reviewed de novo. *Bunch v. Lancair Intl., Inc.,* 2009 MT 29, ¶ 15, 349 Mont. 144, 202 P.3d 784; *Stanley v. Lemire*, 2006 MT 304, ¶ 52, 334 Mont. 489, 148 P.3d 643. A court may address the question of its jurisdiction *sua sponte*. *Id.*, ¶ 32.

"Subject-matter jurisdiction is a court's fundamental authority to hear and adjudicate a particular class of cases or proceedings." *Lorang v. Fortis Ins. Co.,* 2008 MT 252, ¶57, 345 Mont. 12, 193 P.3d 186 (internal citations omitted). Montana Code Annotated §13-37-113 confers jurisdiction on the State's District

Courts to hear alleged violations of the MCPA. *See State v. Matthews,* 183 Mont. 405, 407, 600 P.2d 188 (1979) (indicating that because §13-37-113, MCA requires that all prosecutions under the MCPA be brought in District Court, that section confers jurisdiction on the District Court).

A District Court's authority to hear a case it has jurisdiction over, however, may be regulated by statute. Some statutes require a litigant to exhaust an administrative process before a District Court can hear their matter. See, e.g. *Art v. Montana Department of Labor & Industry,* 2002 MT 327, 313 Mont. 197, 60 P.3d 958. Other statutes also mandate that litigants perform certain acts prior to filing a lawsuit. See e.g., Mont. Code Ann. §2-9-301 (requiring a plaintiff to notify the Department of Administration of their claim before filing a civil lawsuit against the State so that the Department has an opportunity to grant or deny the claim); Mont. Code Ann. §27-6-701 (stating that "[n]o malpractice claim may be filed in any court against a health care provider before an application is made to the [medical legal] panel and its decision is rendered). These types of statutory mandates are commonly referred to as jurisdictional requirements. See, e.g*., Cottonwood Hills, Inc. v. State, Dept. of Labor & Industry., Unemployment Ins. Div.,* 238 Mont. 404, 777 P.2d 1301, 1303 (1989) ("Compliance with procedures is *mandatory* because only after the procedures have been followed is the District Court vested with jurisdiction."). Statutorily mandated prerequisites also apply to governmental plaintiffs. *State ex*

rel. Jones v. Giles, 168 Mont. 130, 132, 541 P.2d 355 (1975) (no subject-matter jurisdiction where county attorney failed to pursue statutory administrative remedy).

The office of the COPP is imbued with the dangers of becoming an arm of a political party. Charged with enforcing Montana's campaign finance laws, the COPP may choose to vigorously prosecute alleged violations against candidates from one political party, while ignoring the alleged violations of candidates from another political party. For this reason, states around the country have commissions to enforce campaign finance laws by committees comprised of multiple people with differing political ideologies. (See e.g. California's five-member Fair Political Practices Commission; Georgia's five-member Government Transparency and Campaign Finance Commission; Minnesota's five-member Campaign Finance and Public Disclosure Board). Montana, however, has placed the trust of enforcing its campaign finance laws in one individual: The Commissioner of Political Practices.

Nevertheless, Montana theoretically has statutory safeguards that frustrate the dangers of a politically motivated lawsuit by the COPP. Prior to filing a civil or criminal lawsuit against a candidate, the legislature requires that a written complaint has been made to the COPP; or that the COPP issue a Notice and Order of Non-Compliance to allow the candidate to submit the necessary information. Mont. Code Ann. §13-37-121(5). The legislature also requires the COPP to first provide the county attorney - where the alleged violations occurred – with the opportunity to

bring the lawsuit instead. Mont. Code Ann. §13-37-124(1). The COPP disregarded each of these statutorily mandated prerequisites in this matter.

A. A Complaint Was Never Submitted to the COPP Against Mr. Wittich and a Notice and Order of Noncompliance was Never Issued to Him[6]

Before the COPP may investigate violations that are unrelated to statements filed with the COPP, a proper written complaint against a candidate must be filed with the COPP. Mont. Code Ann. §13-37-111(2) ("***Upon the submission of a written complaint*** by any individual, the commissioner shall investigate . . .") (emphasis added); see also, Mont. Admin. R. 44.10.307(3); Mont. Code Ann. §13-37-121(5). The COPP's own regulations expound on the "written complaint" requirement referred to in §§13-37-111(2) and 13-37-121(5), MCA:

> A complaint shall ***name the alleged violator***, . . . The complaint shall describe in detail the alleged violation, and cite each statute and/or rule that is alleged to have been violated. . ..

Mont. Admin. R. 44.10.307(2) (emphasis added).

The COPP may investigate statement violations in the absence of the submission of a written complaint. In such instances, however, the Montana Code explicitly requires the COPP to first provide a Notice and Order of Noncompliance

[6] Although a District Court's jurisdiction to hear a matter may be raised at any time, Mr. Wittich's Motion to Dismiss (Doc. 262) first raised this specific issue in December 2015.

prior to filing a lawsuit so that the candidate may "submit the necessary information" and bring their filed statements into compliance. Mont. Code Ann. § 13-37-121(5).

The COPP failed to follow these statutory prerequisites. No administrative complaint was ever made against Mr. Wittich. It is undisputed that Ms. Bonogofsky's complaint named Dan Kennedy, and did not name Mr. Wittich. Instead, the COPP decided to "expand" Ms. Bonogofsky's administrative complaint to include Mr. Wittich, and then filed suit.

Even assuming *arguendo* that the COPP was pursuing a statement violation - and an administrative complaint was not required - the COPP never provided a "Notice and Order of Noncompliance" to Mr. Wittich to allow him to submit the necessary information. Mont. Code Ann. §13-37-121(5). Rather, it filed suit without providing Mr. Wittich with such an opportunity.

Because there was neither a complaint nor Notice and Order of Noncompliance, the COPP never satisfied the "prerequisite to initiation of any administrative or judicial action." Mont. Code Ann. § 13-37-121(5). Allowing the COPP to skirt these statutory requirements provides a Commissioner with unfettered power to use the office for political party gain. Since the COPP did not follow the statutorily mandated prerequisites to filing this suit, the underlying action was not properly before the District Court, and the verdict must be reversed and matter dismissed.

B. The COPP Also Failed to Refer the Matter to the County Attorney Where the Violations Occurred Before it Filed Suit[7]

Prior to filing a civil action under chapter 35 of title 13, the Montana Code Annotated requires that the Commissioner must first notify and arrange to transmit relevant information to the county attorney where the alleged violation occurred. Mont. Code Ann. §13-37-124(1) ("the commissioner ***shall*** notify . . . and ***shall*** arrange to transmit to the county attorney") (emphasis added). This allows the county attorney where the violation occurred to file suit in the matter. Only if that county attorney fails to initiate the appropriate civil action, or waives the right to prosecute the civil action, may the Commissioner initiate a civil action. Mont. Code Ann. §§13-37-124(1) and (2).

The Montana Supreme Court has indicated that this statutory prerequisite is jurisdictional. *State v. Matthew,* 183 Mont. 405, 408, 600 P.2d 188, 190 (1979) (Noting that the candidate was not contesting jurisdiction because the State violated its duty by not offering the prosecution to the county attorney, but instead that the State's failure to recite that it referred the case to the county attorney was a jurisdictional defect.).

[7] Although a District Court's jurisdiction to hear a matter may be raised at any time, Mr. Wittich's Motion to Dismiss (Doc. 05) first raised this specific issue in May, 2014.

Mr. Wittich campaigned for office in SD 35, which is located entirely in Gallatin County. (Doc. 05, exhibit 1 ¶3, and exhibit 2 thereto). All of Mr. Wittich's campaign activities took place in Gallatin County, including all accounting, bookkeeping, receipt of contributions, and administrative tasks related to his campaign. (Doc. 05, exhibit 1 ¶4 thereto). The COPP did not notify the Gallatin County Attorney, or arrange to transmit relevant information to the Gallatin County Attorney to permit the Gallatin County Attorney to prosecute a civil action in Gallatin County. (See, Doc. 1 ¶ 14). The COPP's failure to follow this statutorily mandated prerequisite deprived the District Court of jurisdiction over this matter and the verdict should be reversed and case dismissed.

ISSUE 2: MONT. CODE ANN. §13-1-101(7)(a)(i) (2009) IS AN UNCONSTITUTIONAL INFRINGEMENT ON FIRST AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION

The Montana Supreme Court's review of constitutional questions is plenary. *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88

Montana law prohibits a candidate from receiving "contributions" from corporations. *See* MONT. CODE ANN. §§13-35-227 and 13-1-101. Furthermore, a candidate is required to report "contributions." MONT. CODE ANN. §13-37-225. In 2010, Montana defined "contribution" as:

> The receipt by a candidate of any advance, gift, loan, conveyance, deposit, payment, or distribution of money or

> anything of value ***to influence an election*** and the payment by a person other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate.

MONT. CODE ANN. §13-1-101(7)(a)(i) (emphasis added).[8] The COPP has applied the foregoing definition of contribution to Mr. Wittich in such a way as to impermissibly regulate First Amendment activities. *Montanans for Community Development v. Motl,* ---F.Supp.3d---, 2016 WL 6469886, (Under a vagueness challenge one of the arguments is that statute impermissibly restricts protected activity.), quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 636,(1998).

On November 25, 2015 Mr. Wittich asserted, as his ninth affirmative defense, that, "The laws under which Plaintiff brings the Complaint violate Defendant's right to freedom of speech and association under the First and Fourteenth Amendments to the U.S. Constitution . . .". (Doc. 230 p. 8). At the pretrial conference the District Court stated, "We're not going to be asking the jury anything about Mr. Wittich's First Amendment right or any other parties' First Amendment rights are we?" (Tr. 3/24/16 at 43:19-24). It then stated that "it's not a jury question. . . . Well, it might be able to be raised on appeal if the jury were to determine he violated the statute. 'I appeal that, I was convicted under an unconstitutional statute.'" (Id. at 45:21-24).

[8] This definition has since been amended and the phrase "to influence an election" removed.

Accordingly, Mr. Wittich now appeals the verdict against him that was premised on an unconstitutional application of the MCPA.

The First Amendment only permits the regulation of campaign contributions in limited "express advocacy" circumstances. In 1976, the United States Supreme Court rendered its opinion in *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 4 (1976). To uphold the constitutionality of certain statutes regulating expenditures and contributions to campaigns, the *Buckley* court construed the statutes' definitions "***to apply only to*** expenditures for communications that in express terms ***advocate the election or defeat of a clearly identified candidate*** for federal office." *Montanans for Community Development* 54 F.Supp.3d at 1160, (emphasis added) (internal quotations omitted), quoting *Buckely* at 44, 96 S.Ct. 612. Therefore, under *Buckley,* only express advocacy communication can be regulated, otherwise the regulation would be an unconstitutional infringement on First Amendment rights.

In *Federal Election Comm'n v. Furgatch,* the Ninth Circuit later rejected the requirement of specific "magic words" to find express advocacy under *Buckley. Federal Election Comm'n v. Furgatch,* 807 F.2d 857 (9th Cir.1987). Rather, the Ninth Circuit held that "speech could be express advocacy if, when read as a whole, it was susceptible to no other reasonable interpretation but as an exhortation to ***vote for or against a specific candidate***." *Id.* at 864. (emphasis added). This became known as the "functional equivalent" test.

The United States Supreme Court upheld *Furgatch* in *McConnell v. Federal Election Comm'n,*[9] and later held that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL,* 551 U.S. 449, 469–470, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007). Thus, if a communication is not "express advocacy or its functional equivalent" to vote for or against a specific candidate, it cannot be regulated.

Other courts have addressed the very language that is at issue here – "to influence an election" – and held it to be so unconstitutionally vague so as to infringe on First Amendment rights. See, *Nat'l Org. for Marriage v. McKee,* 649 F.3d 34, 65-67 (1st Cir. 2011); see also, *WRTL-III,* 751 F.3d 804 at 833 ("The 'influence an election' language in both definitions raises the same vagueness and overbreadth concerns that were present in federal law at the time of *Buckley."*). Statutes using the "to influence an election" do not specify what conduct is prohibited, and contravene longstanding federal case law limiting speech regulations to express advocacy or its functional equivalent.

The United States District Court for Montana addressed a vagueness challenge to this language as well. See, *Montanans for Community Development v.*

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[9] *McConnell v. Federal Election Comm'n* 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003)

Motl, 54 F.Supp.3d 1153, 1160 (D. Mont. 2014). In *Montanans for Community Development,* the Federal District Court upheld the constitutionality of the statute, however, only on the grounds that the COPP had interpreted the word "influence" "over the last 18 years using the express advocacy of a candidate or ballot issue standard that arose in *Buckley*." *Id.*

This interpretation and application changed when the COPP brought the underlying action against Mr. Wittich. Mr. Wittich did not receive the benefit of the COPP's "consistent application" of the "functional equivalent of express advocacy" test. In fact, Mr. Wittich offered, and the COPP opposed, an "express advocacy" jury instruction (Def's Proposed Instr. No. 27) during the jury instruction settlement conference. The COPP's proposed jury instructions even lacked any limiting construction or definition that would have been required to accurately state the necessary and constitutional application of the statute. (See, Jury Instruction No. 19). The District Court then refused Mr. Wittich the opportunity to introduce any jury instruction or evidence on his First Amendment defense. (3/24/16 Pretrial Conference 43:5-47:16).

The COPP actively pursued Mr. Wittich for contributions that were protected by the First Amendment. The COPP did not differentiate between express advocacy letters and other letters when it filed its complaint against Mr. Wittich, or at trial. The COPP also did not differentiate between Mr. Wittich's campaign and other 2010

Republican candidates, presumably supported by third-party groups, as all third-party letters introduced at trial concerned other districts and races. None involved SD 35. (See, e.g. Trial Exhibits 28-33, 35, and 37). Indeed, the "attack" letters introduced from other races did not advocate for or against a candidate. (See, e.g. Trial Exhibits 28-33, 35, and 37). These letters discuss various issues and reports of groups' issue-based candidate surveys. Without any specimens, Mr. Motl estimated that 10,400 of these letters were mailed out in SD 35. (Tr. 624:15 – 625:2). Mr. Pearson was asked to place a value on these supposed SD 35 letters, and he valued them at over $7,000.00. (Tr. 804:10-16). Mr. Pearson's total estimate for the value of alleged corporate in-kind contributions thereafter was $22,174. (Tr. 806:13-19). There was no evidence that the alleged contributions were more than that. The jury returned a verdict determining that $19,599 was received in alleged in-kind corporate contributions. The verdict, therefore, contained the value of the protected letters.

The constitutionality of §13-1-101(7)(a)(i), MCA has specifically been premised on whether the COPP's application of the statute was consistent with *Buckley.* In this instance, however, the COPP actively sought to prevent such an application and actually enforced the statute on contrary to *Buckley* and its progeny. It also sought and obtained a verdict based on a definition of "influencing an election" that has been found unconstitutionally vague. The COPP's failure to apply

the MCPA in light of *Buckley* and its progeny was unconstitutional. Mr. Wittich, therefore, requests that the verdict be reversed and the matter dismissed.

THE VERDICT SHOULD BE REVERSED AND THE MATTER REMANDED FOR A NEW TRIAL

ISSUE 3: THE DISTRICT COURT'S ADMISSION OF IMPROPER EXPERT TESTIMONY WAS REVERSIBLE ERROR

A. The District Court Erred When It Denied Mr. Wittich's Motion *in Limine* to Preclude the Opinions of the COPP and Permitted Them to Be Expressed During Trial.

"To the extent that the expert testimony ruling is based purely on an interpretation of the evidentiary rules . . . we will review that interpretation like any other question of law, for correctness." *McClue 2015* Mont. 222 ¶14. Here, the District Court's admission of Mr. Motl's testimony was contrary to Montana Rule of Evidence 704.

In Montana, it's axiomatic that a witness, including an expert witness, cannot render a legal conclusion or apply the law to the facts. *Cartwright v. Scheels All Sports, Inc,* 2013 MT 158, citing *Perdue v. Gagnon Farms, Inc.,* 2003 MT 47, ¶28, 314 Mont. 303, 65 P.3d 570. Indeed, in *Kizer v. Semitool, Inc.*, the Montana Supreme Court emphasized "the distinction under Rule 704, M.R.Evid., between testimony on the ultimate ***factual*** issue, which is allowable, and testimony on the ultimate ***legal*** issue, which is not allowable." *Kizer v. Semitool, Inc.,* 251 Mont. 199, 824 P.2d 229, (1991) (emphasis added). The *Kizer* court noted that Rule 704 states

that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Id.* at 206. It, however, reiterated that the Commission Comments to Rule 704 state that "the Commission intends this rule to follow the existing Montana practice of ***not allowing the witness to give a legal conclusion or to apply the law to the facts*** in his answer." *Id.* (emphasis added).

> Such testimony 'amounts to no more than an expression of the witness' general belief as to how the case should be decided.' The admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to decide the case. It is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum.

Kizer 251 Mont. 199, 206, quoting *Hart-Anderson v. Hauck* (1988), 230 Mont. 63, 748 P.2d 937, 958. (internal citations omitted).

Two months before trial, on January 15, 2016, the COPP disclosed Motl's Second Amended Expert Witness Disclosure, and attached Mr. Motl's expert report. That report was wrought with statements that he would express legal conclusions and apply the law to the facts in his testimony. (Doc. 300, ex. A thereto). A few examples contained in his report are as follows:

- "I will testify that the litigation in the Matter is properly and duly placed before the District Court." (Id. at p. 4).
- "As opinions, I will testify: . . . that as a matter of fact cooperation or coordination existed between Candidate

> Wittich and the corporate entities such that the value of the campaign activity involved in the 'works' became a contribution to the Wittich campaign; that Montana's campaign practice standards do not allow Candidate Wittich to accept corporate contributions in any amount; and, that Montana's campaign practice standards require Candidate Wittich to report and disclose all contributions received by his campaign and that, as a matter of fact, he failed to do so." (Id. at p. 9).

- "I will further testify that Candidate Wittich did not act in conformance with campaign practice standards which he failed to keep record of cash contributions to his candidacy." (Id. at 10).

- "I will testify that Montana campaign practice standards . . . require that Candidate Wittich maintain sufficient account records so support campaign expenditures and that, as a matter of fact, Candidate Wittich did not meet these standards." (Id.)

- "It will be my testimony that Candidate Wittich failed to timely list the names of up to 16 people who contributed cash to Candidate Wittich fundraisers. It will be further testimony that Candidate Wittich failed to list the names of (and the amounts of contribution) the contributors who supplied the value of the "works" electoral support Candidate Wittich received in his 2010 SD 35 Republican primary election. I will finally testify that Candidate Wittich did not file as a candidate in the time set by Montana campaign practices . . .". (Id.).

As such, Mr. Wittich filed a motion *in limine* to preclude Mr. Motl from testifying because he was expressing legal conclusions, applying law to facts, and improperly invading the province of the judge and jury. (Doc. 300) ("Motl repeatedly asserts that he will testify about what 'Montana's campaign practices

standards, as applied by the COPP . . . require.' . . . In other words, [Mr.] Motl's 'field of expertise' encompasses the meaning of the laws that he is tasked with enforcing."). (Id. at p.4). After citing *Perdue v. Gagnon Farms, Inc.* 2003 MT 47, 314 Mont. 303, 65 P.3d 570, and *Heltborg v. Modern Mach.,* 244 Mont. 24, 795 P.2d 954, (1990) for the proposition that legal conclusions and application of law to fact by a witness is improper, Mr. Wittich pointed out that "[Mr.] Motl's 'expert' testimony amounts to nothing more than his beliefs about how the case against Rep. Wittich should be decided, point-by-point. Accordingly, the testimony is improper and the Court should exclude it." (Id. at p. 5).

Nevertheless, the District Court denied Mr. Wittich's motion *in limine* (Doc. 388) ruling that Mr. Motl was qualified to testify as an expert simply because he is the COPP. The District Court somehow ignored the argument that the opinions offered by the COPP were legal conclusions and were applying law to fact. The District Court then permitted the opinions at trial.[10]

> Q: Based on your review and comparison of the documents here identified, have you reached an opinion as to whether or not as a matter of fact Mr. Wittich has produced documents, records, and accounts for his 2010 Senate District 35 Republican Primary Election Campaign

[10] "We hold that a motion *in limine* may relieve a party of the obligation to contemporaneously object at trial providing that the motion is specific and articulates the grounds for the objection. *State v. Ankeny*, 2010 MT 224, ¶ 39, 358 Mont. 32, 40, 243 P.3d 391, 398.

that Montana campaign practice standards expects him to keep and produce?

A: Yes, I have reached an opinion.

Q: What is your opinions?

A: My opinion is that, as a matter of fact, Mr. Wittich has failed to produce to the Commissioner the campaign documents, and records, and accounts that he is required to keep by Montana campaign practice standards.

(Tr. 600:8-21).

[M]y opinion is that, as a matter of fact, this record production fails the public trust obligation that is inherent in every candidate for office in the State of Montana, that it properly understood is a reporting not to the Commissioner, not to Jon Motl in his capacity as Commissioner, but to the people of Montana because that is what is required, that is what is required for public office.

(Tr. 602:3-10).

Q: Mr. Motl, what is your opinion – is your opinion also based upon what he disclosed in there, your opinion that he failed to meet the standards?

A: My opinion is that – that the lack of records failed to meet the requirement that a candidate keep a detailed account and records justifying his campaign contributions and expenditures. There were no such records in Mr. Wittich's campaign production. And the jury is not going to see them to this day. They're not produced to this day.

(Tr. 650:22-606:6).

Q: Mr. Motl, given the amount of personal services, web services, copy writing, consulting, and so on, are the records kept by Mr. Wittich deficient or sufficient for

meeting the accounts and records production requirements?

A: Mr. Jarussi, I intend to include all of the elements of Mr. Wittich's expenditures and contributions in my opinion that the record production was deficient. That includes all of the paid personal services that the Right to Work umbrella group or corporations might have provided him. Any materials that were provided him, there should have been documentation for that. They were not produced.

(Tr.607:19-608:6).

Q: Have you developed an opinion on the fact of coordination?

A: I have developed an opinion on the fact of coordination.

Q: What is that opinion?

A: My opinion is that Mr. Wittich coordinated with the umbrella group of National Right to Work corporations. And by the umbrella group of National Right to Work incorporations, I include all of the eight corporations that we listed earlier, that includes the Right to Work print shop known as Direct Mail.

(Tr. 614:6-16).

Q: Was there a failure to report and disclose in this matter?

A: There was a failure to report and disclose.

Q: What was that?

A: The failure to report and disclose was by the entities that made in-kind contributions to Mr. Wittich's campaign, and it was by Mr. Wittich's campaign as to the value of the in-kind contributions as well.

(Tr. 619:21 – 620:4).

The Court's admission of Mr. Motl's opinions was contrary to the Montana Rules of Evidence and constituted reversible error. As such, Mr. Wittich respectfully requests that the verdict be reversed and the matter remanded.

B. The Court Erred When It Denied Mr. Wittich's Motion *in Limine* to Preclude Mr. Pearson From Testifying About the Fair Market Value of Labor and Products in the 2010 Printing Industry.

Montana Rule of Evidence 702 permits "a witness qualified as an expert by knowledge, skill, experience, training, or education" to testify "in the form of an opinion or otherwise" if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." A field of expertise is defined as "an area, category, or division within a particular activity or pursuit is carried out." *McClue v. Safeco Ins. Co.,* 2015 MT 222, ¶29, 380 Mont. 205, 354 P.3d 604 (internal citations omitted). "To establish a witness's qualifications as an expert, Rule 702 implicitly requires a foundation showing that the expert has special training or education and adequate knowledge on which to base an opinion." *State v. Crawford*, 2003 MT 118, ¶ 24, 315 Mont. 480, 487, 68 P.3d 848, 853.

On November 20, 2015, the COPP disclosed Mr. Pearson's Amended Expert Report. (Doc 301, exhibit B thereto). In that report, Mr. Pearson sets forth his qualifications stating that he has:

> written a number of newspaper opinions; run (and won) several campaigns on public policy issues . . . conducted hundreds of trainings for nonprofit organizations . . . on the key steps to winning public policy issues. As part of my work I regularly use or cause to be used a variety of campaigning tools, including the ***use*** of direct mail campaigning.

(Id.) (emphasis added).

Mr. Pearson's CV and report are void of any education or experience in third-party print-shops or the printing industry. (Id.). Nevertheless, in section 3 of his report he proceeds to express opinions on what the cost a third-party print shop (like Direct Mail) would incur to produce the letters at issue in Mr. Wittich's 2010 campaign. "I value the cost of producing these documents using the 'identified cost' of the paper, ink and postage involved . . ." How, or what, Mr. Pearson's 'identified cost' was not known or disclosed. He then attempts to opine on what it would have cost a print shop to produce "attack letters" and "attack slicks" back in 2010.

Even assuming *arguendo* that Mr. Pearson was qualified to testify on the labor and services involved in a candidate's campaign, he was not qualified to testify about the costs that a print shop would have incurred back in 2010 to produce the letters and slicks. As such, Mr. Wittich filed a motion arguing that "most of the labor and material Motl claims were provided were that of Direct Mail – a printing house. It was not the labor and material of a campaign office." (Doc. 301 p. 6). In fact, Mr. Wittich pointed out in his motion *in limine,* that Mr. Pearson had never worked on a

candidate's campaign, and had never sent the type of letters and slicks out that were in issue in this case:

> Q: Have you ever served as a campaign manager for a Montana Senate Race?
>
> A: I have not.
>
> Q: Have you served on a state-wide campaign?
>
> A: I don't do candidate work. I only do ballot initiative work.

(Doc. 301 p. 6).

> Q: And would there be any things that you point to as differences between those two campaigns?
>
> A: Yes. . . The attack slicks that were done, the survey letters that were done, the attack letters that were done. As part of our ballot work we generally don't end up doing attack things . . .

(Doc. 301 p. 6).

Notwithstanding his lack of education and experience in print shops or the printing industry, the Court permitted him to testify on the cost of producing third-party attack mailers printed in 2010 simply because "Pearson has over 30 years' experience in Montana political campaigns." (Doc. 387 p.2). Mr. Pearson thereafter testified at trial about the printing and mailing costs of Direct Mail to send the "attack letters" "attack slicks" and "survey letters". (Tr. 804:10 – 805-15). This was the only testimony provided to the jury about the value of alleged in-kind corporate

contributions pertaining to the "attack letters," "attack slicks" and "survey letters" and accounted for over two-thirds of the final verdict amount.

The Court's denial of Mr. Wittich's motion *in limine* to preclude Mr. Pearson's opinions was an abuse of discretion that constituted reversible error when those opinions were expressed during trial to quantify the amount of in-kind contributions that Mr. Wittich allegedly received for printing and mailing the "attack letters," "attack slicks" and "survey letters". As such, Mr. Wittich requests that the Court reverse the verdict and remand the matter.

ISSUE 4: THE DISTRICT COURT'S DENIAL OF MR. WITTICH'S MOTION FOR NEW TRIAL WAS IN ERROR

A denial of a party's request for new trial is reviewed for abuse of discretion, and overturned if the district court acts arbitrarily or exceeds the bounds of reason resulting in substantial injustice. *Quebedeaux*, 2009 MT 102; *Sage* MT 156 ¶21. The denial of Mr. Wittich's Motion for New Trial was both arbitrary and exceeded the bounds of reason.

A. Mr. Wittich's Persuasive Opening Statement Did Not Provide Grounds for Disqualification of Juror #9, Who He Was Entitled to Have on the Jury.

During *voir dire*, the jury (including Juror 9) was asked if anyone felt "like either [The COPP] or Mr. Wittich kind of start off on a, you know, not a level playing field?" (Tr. 52:7-15). Juror 9 did not indicate that she favored one party over the other. Juror 9 also stated that she would follow the law as the judge instructs. (Tr.

57:21-59:7). The parties passed the jury for cause and the court took a recess. (Tr. 120:9-10).

The parties then made their peremptory strikes and Juror 9 was selected for jury duty and sworn in. (Tr. 126:24-127:3). The District Court took a recess and following that recess the parties gave their opening statements. (Tr. 131:8 – 139:21). After the opening statements were presented to the jury, the District Court took another recess and Juror 9 approached the clerk indicating that she had made her decision that Mr. Wittich was being unfairly prosecuted because Mr. Wittich's attorney "did an excellent job of presenting his side." (Tr. 171:21-23).

The clerk was instructed to bring Juror 9 back to meet with the attorneys and the judge. (Tr. 171:4-16). During the questioning of Juror 9, Juror 9 stated that the views she took away from the opening statements would not prevent her from listening to the witnesses testify. (Tr. 175:7-12). She also stated that she could look at the evidence that the witnesses talked about and would be able to reserve her judgment until the end. (Tr. 175:13-19). She further stated that she could proceed on the jury and give her "honest and . . . best". (Tr. 177:10-14; 178:6-10). After she was removed from the presence of the judge and attorneys, the judge acknowledged to counsel that it appeared that Juror 9 had a stated willingness to continue with the trial. (Tr. 180:17-18). Then, the judge inexplicably stated "[Juror 9] didn't say it to

us, but she said it to Megan. She said she had an opinion about the case. I don't think I can ignore that. . ." and he excused Juror 9. (Tr. 182:1-21).[11]

Juror 9 was excused because Mr. Wittich's opening statement was persuasive. Juror 9 represented that she did not favor one party over the other during *voir dire*. The court then went into recess, and Juror 9 did not approach the clerk with any preconceived opinions about the case. It was only after opening statements that she formed opinions and approached the clerk. She even stated that she held these opinions because "[Mr. Wittich's attorney] did an excellent job of presenting his side." (Tr. 171:21-22). Notwithstanding these opinions, she informed the judge and counsel that she could continue with jury service, listen to the evidence, and reserve judgment until the end of the trial, but she was still dismissed by the District Court.

Mr. Wittich filed a motion for new trial because Mr. Wittich had a vested right to have Juror 9 hear and decide his case. Mont. R. Civ. P. 47(c) provides that an impaneled juror may be dismissed only if she "is unable or disqualified to perform their duties." Montana Code Annotated § 25-7-304 permits a court to dismiss a juror for illness. However, Montana does not identify any other basis for disqualification of a juror after the jury has been impaneled. *Compare* MONT. CODE ANN. § 25-7-

[11] Mr. Wittich's counsel stated on the record that he maintained that the Juror was not disqualified for cause. (Tr. 181:21-25).

225 (setting forth seven explicit grounds to challenge a juror for cause before the jury is impaneled).

The District Court's denial of Mr. Wittich's motion for new trial was arbitrary and exceeded the bounds of reason. The Order denying Mr. Wittich's motion for new trial states that the District Court dismissed the juror because he "deemed it probable that the juror's emotional state would render her unable to deal with the stresses of the trial given the emotional state she exhibited . . ." (Doc. 546 p. 4). It's clear from the trial transcript, however, that the District Court dismissed Juror 9 because she formed an opinion after opening statements, not because of her emotional state. Moreover, Juror 9 expressly stated that she could continue with jury-duty and would do her "honest and best."

It's clear Juror 9 was dismissed for forming an initial opinion after opening statements. The District Court's denial of Mr. Wittich's motion for a new trial for improper dismissal of an impaneled juror was arbitrary, and beyond the bounds of reason that resulted in substantial injustice to Mr. Wittich and deprived him of a fair trial. Mr. Wittich respectfully requests that the verdict be reversed and the matter be remanded for a new trial.

B. Mr. Wittich Should Have Been Permitted to Assert His Ninth Affirmative Defense.

Six months before trial Mr. Wittich was granted leave to assert his ninth affirmative defense on the unconstitutional application of the MCPA. Mr. Wittich

raised the issue again in advance of the pretrial conference, and during the pretrial conference. (3/24/16 Pretrial Conference 44:5-47:16). At the pretrial conference the District Court prohibited any evidence on the subject from being presented during trial, but acknowledged that the issue was preserved for appeal and for post-trial motion practice. (Id. at 45:21-24). The District Court reminded COPP's counsel that they signed the pretrial order containing the First Amendment issue, and the District Court included the ninth affirmative defense in its final pretrial order. (Id. at 48:1-6; Doc. 456 p.10).

After the last witness was called, counsel for COPP moved to strike defendant's ninth affirmative defense. (Tr. 1035:23 – 1036:13). The District Court stated:

> Well, the First Amendment matters, those types of constitutional claims, I think, from an evidentiary standpoint, were restricted by the Court at the pretrial conference. I didn't expect to hear any testimony about the First Amendment because it's not – it doesn't raise the type of claims that are appropriate for submission to the jury . . . Whether there's waiver, those kinds of things, whether I'll have any other post-trial motions, everybody's position as it exists now is preserved. Waiver hasn't been waived. If it hasn't been waived, you can raise something in this Court.

(Id. at 1036:24 – 1037:21).

After trial, Mr. Wittich raised the issue in his Motion for New Trial. (Doc 526 p.9). The judge denied that motion because it believed that the issue was not

preserved, and that jury instruction 19's definition of contribution did not violate Mr. Wittich's constitutional rights. (Doc. 546:4). Mr. Wittich contends that the District Court's denial of his motion for new trial was an abuse of discretion because it was an error of law to determine that the issue was not preserved, and that it denied Mr. Wittich a fair trial by permitting jury instruction 19 while prohibiting Mr. Wittich's ninth affirmative defense at trial.

Mr. Wittich offered, and the COPP opposed, an "express advocacy" jury instruction (Def's Proposed Instr. No. 27) during the jury instruction settlement conference. In fact, Mr. Motl's proposed jury instructions lacked any limiting construction or definition that would have been required to accurately state the necessary and constitutional application of the statute. (See, Jury Instruction No. 19). The District Court subsequently refused to permit any jury instruction, argument or evidence on Mr. Wittich's First Amendment defense during trial.

The jury reached its verdict based on a definition of "contribution" that has been found to be unconstitutionally vague. The jury's verdict (and the amount of liability) was, therefore, erroneously premised on the value of letters that did not constitute "express advocacy or its functional equivalent." Because the jury erroneously considered the letters in determining liability, and included them in its verdict amount, Mr. Wittich is entitled to a new trial because he was not permitted

to present or argue his ninth affirmative defense. He, therefore, requests that the verdict be vacated and matter be remanded for a new trial.

THE VERDICT SHOULD BE REVERSED AND THE MATTER REMANDED FOR FURTHER PROCEEDINGS

ISSUE 5: **SECTION 13-37-128, MCA IS PUNITIVE AND THE DISTRICT COURT ABUSED ITS DISCRETION BY TREBLING DAMAGES IN THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE PERTAINING TO MR. WITTICH'S CULPABILITY.**

The explicit language of §13-37-129, MCA illustrates that the amount assessed under §13-37-128, MCA is a fine, and is therefore punitive. The title of §13-37-129, MCA, which directs how the amount imposed under §13-37-128, MCA should be assessed and disbursed, is "Liability and Disposition of ***Fines***". Awards, which are punitive, are "a type of private ***fine*** or civil penalty inflicted to deter similar conduct." *Finstad v. W.R. Grace & Co.*, 2000 MT 228, ¶ 21, 301 Mont. 240, 245, 8 P.3d 778, 782. (emphasis added).

Additionally, the purpose of §§13-37-128 and 129, MCA is to punish, not to compensate or remedy a damage that was incurred. Under Montana law, punitive awards serve two purposes: "(1) to set an example, and (2) to punish the wrongdoer." *Id.* On the other hand, treble damages that are not punitive in nature are intended to be compensatory and remedial. *Plath v. Schonrock*, 2003 MT 21, ¶ 27, 314 Mont. 101, 109, 64 P.3d 984, 990. (Holding that the treble of damages under the Montana Consumer Protection Act is compensatory in nature).

Section 13-37-128, MCA is not compensatory or remedial. The award is based on the amount of an unlawful contribution – it does not provide compensation to anyone. In fact, §13-39-129, MCA directs that payment of the fine shall be paid to state general fund, or the County – not to an injured party like §30-13-335, MCA of the Montana Consumer Protection Act directs. *Plath v. Schonrock*, 2003 MT 21, ¶ 27, 314 Mont. 101, 109, 64 P.3d 984, 990 (holding that §30-13-335, MCA is compensatory not punitive).

Like §30-13-335, MCA – the Montana trademark infringement remedy statute, which has been deemed punitive in nature – the amount fined under §13-37-128, MCA may be premised on the culpability of the litigant. See, MONT. CODE ANN. §13-37-129, MCA ("In determining the amount of liability under 13-37-128, the court may take into account the seriousness of a violation and the degree of culpability of the defendant") *Compare,* MONT. CODE ANN. §30-13-335 ("The court, in its discretion, may enter judgment for an amount not to exceed three times the profits and damages . . . in cases in which the court finds that the other party committed the wrongful act with knowledge, in bad faith, or otherwise as according to the circumstances of the case."). Increasing an award because of a litigant's culpability is punitive, not remedial.

Since §13-37-128, MCA is punitive in nature it must meet §27-1-221, MCA's requirements to the extent that those requirements are not inconsistent with §13-37-

129, MCA. Section 13-37-129, MCA addresses the culpability standards that would justify trebling the damages – "the seriousness of a violation and the degree of culpability". Therefore, the "actual fraud" or "actual malice" requirement of §27-1-221, MCA is likely not applicable here.

However, §27-1-221, MCA sets forth a standard of proof of which §13-37-129, MCA is silent. Section 27-1-221, MCA's clear and convincing standard, therefore, is applicable:

> All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

MONT. CODE ANN. §27-1-221.

Here, the evidence of Mr. Wittich's culpability was not established by clear and convincing evidence. In fact, neither the judge, nor the jury, ever made a determination on Mr. Wittich's culpability. (See, Doc. 482 and Tr. 6/16/16) (neither the jury instructions, or verdict form contained such a directive or determination; nor did the District Court make such determination at the Dispositional Hearing). The District Court's imposition of treble damages in the absence of clear and convincing evidence of Mr. Wittich culpability was an abuse of discretion that warrants reversal.

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CONCLUSION

Overly adamant about convicting Mr. Wittich in the courts of law and public opinion, the COPP disregarded multiple jurisdictional laws. It filed a lawsuit against a candidate that didn't have a complaint made against him with the COPP, and then failed to provide a Notice and Order of Noncompliance to that candidate. The COPP then kept any prosecutorial discretion and trial out of Gallatin County by tendering his Sufficiency Decision to the Lewis and Clark County Attorney instead of the Gallatin County Attorney. The jurisdictional statutes at issue in this case help prevent the COPP from using the office as an arm of a political party. The COPP ignored them.

Mr. Wittich was then deprived of a fair trial. The District Court improperly dismissed a juror after opening statements because the juror was convinced by Mr. Wittich's opening statement. It permitted the COPP to apply the MCPA in such a way that it infringed on Mr. Wittich's constitutionally protected speech and association rights. The District Court then allowed Mr. Motl to improperly express conclusions of law and apply law to fact during the trial that were contrary to the Rules of Evidence and Montana law. It also allowed unqualified expert testimony on the imputed costs of printing services for implied "attack letters," "attack slicks" and "survey letters" from other campaigns.

After trial, the District Court failed to remedy these errors. It denied Mr. Wittich's motion for new trial, improperly claiming that the juror was excused for emotional reasons, and that Mr. Wittich waived his ninth affirmative defense, when in fact the District Court had explicitly stated that he preserved it.

Finally, the District Court trebled the verdict amount without clear and convincing evidence of Mr. Wittich's culpability.

Mr. Wittich respectfully requests that the verdict be vacated and the matter reversed because the COPP blatantly ignored jurisdictional statutes and applied the MCPA in violation of the First Amendment.

Alternatively, Mr. Wittich respectfully requests that the Court reverse the verdict and order a new trial because the District Court permitted improper opinion evidence, improperly dismissed a juror, and permitted a verdict in violation of the U.S. Constitution while it deprived Mr. Wittich of his defense that the statute was unconstitutional.

Failing a full reversal or remand, Mr. Wittich requests that the District Court's order trebling the verdict amount be reversed and that the matter be remanded for further proceedings.

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RESPECTFULLY SUBMITTED this 19th day of April, 2017.

THE RABB LAW FIRM, PLLC

By: *__/s/ Michael Rabb__*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this opening brief is printed with a proportionally spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count, as calculated by Microsoft Word, does not exceed more than 10,000 words, excluding the certificates of service and compliance.

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