IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause 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,

Plaintiff and Appellee,

v.

ARTHUR "ART" WITTICH,

Defendant and Appellant.

APPELLEE'S ANSWER BRIEF

On Appeal from the Montana First Judicial District Court, Lewis and Clark County, Cause No. BDV 2014-251
Honorable Ray J. Dayton

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INTRODUCTION

On April 1, 2014, the Commissioner of Political Practices ("COPP") filed a complaint in District Court, alleging that Arthur "Art" Wittich ("Wittich") had violated Montana's campaign finance laws in the 2010 primary election. The most significant allegation was that Wittich had accepted illegal corporate contributions and failed to report them.

Over the next two years, the Trial Court dealt with 30 pre-trial motions, and this Court dealt with one attempted appeal.

A five day trial started on March 28, 2016. The Trial Court limited each side to nine hours to conduct direct examination, cross-examination, introduce exhibits and voice objections.

In its nine hours, the COPP called 10 witnesses (three by video deposition), introduced more than 70 exhibits and cross-examined five witnesses called by Wittich.

On April 1, 2016, exactly two years after this case was filed, a jury (by a 10-2 vote) returned a verdict, finding in favor of the COPP on all questions posed to them in the verdict form.

With the jury's verdict, Arthur "Art" Wittich became the first Montana politician in 75 years to be adjudicated by a jury as having broken Montana's campaign finance laws. The jury's verdict should be affirmed.

STATEMENT OF ISSUES

The COPP restates the issues on appeal as follows:

I. Did the COPP follow proper procedures prior to filing the Complaint against Wittich in this matter?

II. Was Jury Instruction No. 19 unconstitutionally vague and did Wittich properly preserve the issue for appeal?

III. Did Wittich preserve any objection to Commissioner Motl's testimony?

IV. Did the Trial Court abuse its discretion by permitting COPP expert C.B. Pearson to testify and did Wittich preserve this issue for appeal?

V. Did the Trial Court abuse its discretion by dismissing Juror No. 9, and did Wittich preserve this issue for appeal?

VI. Did the Trial Court properly enhance the penalty imposed on Wittich for (1) accepting illegal corporate contributions and (2) failing to report them, under MCA § 13-37-129?

STATEMENT OF THE CASE

The COPP filed a Complaint against Wittich in District Court on April 1, 2014, alleging that Wittich violated Montana's Campaign Finance Act during his 2010 primary campaign for Montana Senate District 35.

Prior to trial, the District Court granted partial summary judgment in favor of the COPP, finding that Wittich had, as a matter of law, committed three violations of campaign finance laws.

A jury trial on the remaining issues commenced on March 28, 2016. On April 1, 2016, the jury returned a verdict, finding that Wittich had (1) failed to maintain and preserve required records, (2) accepted or received corporate contributions, including coordinated in-kind contributions, in the amount of $19,599 and (3) failed to report contributions, including the coordinated in-kind contributions, in the amount of $19,599.

A disposition hearing was held on June 17, 2016, at which time the Trial Court imposed a total penalty for all violations in the amount of $68,232.58 and awarded $15,919.70 in costs to the COPP.

Judgment was entered on June 27, 2016.

Wittich moved for a new trial. The motion was denied by an Order filed on September 19, 2016.

This appeal followed.

STATEMENT OF THE FACTS

A. Filing of the District Court Action by the COPP.

In 2010, Wittich was a Republican candidate in Montana Senate District 35. (Doc 1, Ex 1, pg. 2)[1]. Wittich prevailed in the June 7, 2010, Republican primary and also won the general election in November. *Id.*

In September of 2010, Debra Bonogofsky, a Republican candidate for House District 77, filed an Administrative Complaint ("AC")[2] with the COPP. (Doc 72, Ex 1, CoppWitt0008-0027). Bonogofsky's AC named her opponent Dan Kennedy and also explicitly referred to other "candidates that are supported by these groups (WTP, Montana Conservative Alliance, Montana Citizens for Right to Work etc) [who] are given the information to use Direct Mail and Communication, which is directly connected to WTP . . .." (Doc 72, Ex 1, CoppWitt0011). Bonogofsky also alleged that Kennedy and the other candidates were aware of the mailings that would be made in their support. *Id.*

The COPP began his investigation into Bonogofsky's AC against Kennedy and these "other candidates." While the investigation into Bonogofsky's AC was ongoing, Wittich's name turned up in a box of National Right to Work Committee

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[1] The COPP will be consistent with Wittich's reference to the documents listed in District Court's Case Register Report as "Doc __."

[2] Again, the COPP will be consistent with the reference used in Wittich's Brief and refer to the Bonogofsky complaint as "Administrative Complaint" or "AC."

("NRTWC") documents stolen out of a car in Colorado. (Tr, pgs. 453, 586, 679).[3] For the first time, the COPP was able to identify at least some of the "other" candidates referred to in Bonogofsky's AC, and caught a glimpse into their illegal campaign activities. Wittich was one of them. (Tr, pg. 587).

The COPP consulted Bonogofsky, who directed that her AC against Kennedy also be filed against Wittich. (Doc 72, Ex 1, CoppWitt0003); *see also* (Doc 1, Ex. 1, pg. 1).

On March 31, 2014, the COPP issued a lengthy Sufficiency Decision (Doc 1, Ex. 1) finding sufficient evidence to show "Candidate Wittich violated Montana's campaign practices laws" and that civil adjudication was warranted. (*Id*, pg. 37). Notice of the Sufficiency Decision was made to the County Attorney of Lewis and Clark County on March 31, 2014. (Doc 7, p. 3). On that same day the Lewis and Clark County Attorney waived his right to bring a legal action on the Sufficiency Decision and returned it to the Commissioner. *Id.* The COPP filed this district court action in Lewis and Clark County on April 1, 2014. (Doc 1).

[3]Consistent with Wittich's practice, the COPP will refer to Trial Transcript as "Tr." References to Transcripts (other than the Trial Transcript) will be by the date of the hearing followed by "Tr".

B. Wittich's Constitutional Right and Instructions to the Jury.

By a motion dated September 21, 2015, (Doc 192) Wittich moved to amend his Answer and add a Ninth Affirmative Defense, alleging that the statutes underlying the COPP's Complaint violated his Constitutional rights. The Trial Court granted his motion, noting "it is a claim that can be handled by briefing prior to the trial." (Doc 204, pg. 8).

Wittich never pursued his Ninth Affirmative Defense prior to trial, but included it as a contention in the Final Pretrial Order. (Doc 456, pg. 10).

At the Final Pretrial Conference, the District Court determined that there would be no evidence presented at trial on the Defense, since it was not a jury question. (3/24/16 Tr, pg. 45, ln 16). The Court then acknowledged that the issue "might be able to be raised on appeal if the jury were to determine he violated the statute." (*Id*, lns 21-23)(emphasis added).

Settlement of instructions was held off the record by agreement of the Trial Court and counsel. (Tr, pg. 1047, lns 16-17). Wittich's proposed Instruction No. 27, incorporating his Ninth Affirmative Defense, was rejected by the District Court. Wittich has not included his proposed Instruction No. 27 in the record on appeal.[4]

[4] "A copy of any challenged jury instruction, whether given or offered but not given, must be made a part of the record on appeal." Rule 8(1), MRAppP (emphasis added).

On April 1, 2016, the Trial Court gave the parties an opportunity to make a record on Instructions. Wittich did not object to the giving of Instruction No. 19, or to the rejection of his Defendant's Proposed Inst. No 27. (Tr, pg. 1048, ln 6-1049, ln 9).

C. Wittich's Motion to Preclude COPP Jonathan Motl from Testifying.

Wittich moved in limine to exclude from trial "any testimony by Jonathan Motl." (Doc 300). Wittich argued that Motl (1) was not a qualified expert, (2) was not an appropriate fact witness, and (3) that his anticipated testimony improperly consisted of improper "declarative legal conclusions." (Doc 315, pg. 7).

The District Court denied Wittich's Motion to Exclude Motl (Doc 388), holding that "Motl is both a proper expert and fact witness for this trial." (Doc 388, pg. 4). The Court did not rule on or even mention the third basis for Wittich's motion, concerning "declarative legal conclusions."

Commissioner Motl did testify at trial as set forth on pages 26-29 of Wittich's Brief. As reflected by the transcript, Wittich's counsel did not object to the questions or to Motl's testimony or opinions.

D. Wittich's Motion to Exclude Expert Witness C.B. Pearson.

Wittich also moved in limine to preclude COPP's expert witness C.B. Pearson from testifying, disputing his qualifications. (Doc 312 & Doc 313, pg. 1).

The Trial court denied Wittich's Motion to Exclude Pearson, holding that "Pearson is a proper expert witness for this trial." (Doc 387, pg. 3). The Trial

Court further noted that "if Wittich has concerns about [Pearson's] qualifications or his methodology, he should raise those issues on cross examination." *Id.*

Pearson testified at trial, consistent with his expert disclosure. (Tr. pgs. 789-807). Wittich did not object to any testimony about his work/campaign history, his qualifications, or his opinions, and did not ask even one question on these matters during cross-examination. (Tr. pgs. 807-815)

E. The Replacement of Juror No. 9

After opening statements, but before any evidence had been introduced, Juror No. 9 approached the clerk (an officer of the court), telling her that Wittich "was being unfairly prosecuted, she's made her mind up, and she doesn't want to continue." (Tr, pg 169, lns 2-4). Juror No. 9 was "almost in tears as she was talking to [the clerk]." (Tr, pg. 170, ln 5).

Juror No. 9 was brought into chambers. All counsel were present. While in Chambers, Juror No. 9 offered inconsistent statements about her ability to proceed with an open mind and wait until all the evidence was in and both sides were fully heard before forming an opinion. (Tr, pg. 172, lns 7-17); (Tr, pg. 173, lns 3-5); (Tr, pg. 174, lns 1-9); (Tr, pg. 176, lns 9-10, 15-19); (Tr, pg. 177, lns 4-8, 10-14).

Juror No. 9 was then escorted out of chambers, and the Court and counsel conferred among themselves. (Tr, pg. 178, lns 17-20).

The Court observed that "[s]he is distraught. She's on the edge of a break-down" and "she's in this caldron of turmoil. (Tr, pg. 179, lns 13-15, 23 (emphasis added). The Court noted that "[i]t's not going to come across on [the court reporter's] stenographic machine there, but the emotion behind what she said does concern me for her. (Tr, pg. 180, lns 13-18). The Court stated: "I'm really worried about her. With all the effort that goes into any case, you know, particularly this one, the magnitude of what is at stake for everybody, she's my new - - I worry about her." (Tr, pg. 181, lns 12-15).

After recounting his concerns about Juror No. 9's inconsistent remarks and her demeanor, the Court conferred with his clerk about the comments Juror No. 9 had made to her, and ultimately concluded that Juror No. 9 must be dismissed. (Tr, pg. 182, lns 9-12).

Wittich did not object to the dismissal of Juror No. 9 or to the Trial Court making Alternate Juror No. 1 a principal juror. (Tr, pg. 183).

F. The Enhancement of the Penalty

The jury found that Wittich had committed three separate violations of campaign practice laws by: (1) failing to maintain and preserve required records; (2) accepting or receiving corporate contributions, including in-kind contributions, in the amount of $19,599; and (3) failing to report contributions, including the coordinated in-kind contributions, in the amount of $19,599. At a disposition hearing

on June 17, 2016, the Trial Court imposed monetary penalties on Wittich for all[5] of his violations. In its Summary of Penalties and Costs (Doc. 513), the Court summarized the penalties imposed for Wittich's acceptance of prohibited corporate contributions and his failure to report the contributions, as follows:

> 5. Accepting or receiving corporate contributions, including coordinated in-kind contributions, in the amount of $19,599.
> 6. Failing to report all contributions, including coordinated in-kind contributions, in the amount of $19,599.
>
> **Penalty for both: $58,797**

(Doc 513, pg. 2)(bold in original).

The penalty of $58,797 for both violations 5 and 6 represents a penalty of 1.5 times the amount of each of the two separate violations—not a trebling of the amount of each violation which would total $117,594.

STANDARD OF REVIEW

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 (citation omitted).

A district court's interpretation of a statute is reviewed for correctness. *Williams*, ¶24 (citations omitted)

[5] Including the three violations determined by summary judgment. (Doc 413).

A discretionary ruling by a district court is reviewed for an abuse of discretion. *Plath v. Schonrock*, 2003 MT 21, ¶ 13, 314 Mont. 101, 64 P.3d 984 (citation omitted).

A district court's determination regarding the qualification and competency of an expert witness is reviewed for an abuse of discretion. *State v. Jay*, 2013 MT 79, ¶ 15, 369 Mont. 332, 298 P.3d 396.

SUMMARY OF ARGUMENT

The district court action against Wittich was proper, based on the AC filed by Debra Bonogofsky. The COPP was required to investigate the allegations of the AC. The investigation showed that Wittich was one of the "other candidates" referenced in the AC. The AC was properly extended to Wittich at Bonogofsky's direction. Since this case began with Bonogofsky's AC, a Notice and Order of Non-compliance was not required.

Referral of this case to the Lewis and Clark County Attorney was appropriate, since Lewis and Clark County is where Wittich's reports were filed and at least some of the violations occurred.

Wittich did not preserve his Constitutional issue for appeal because he did not object to the Instructions that were given or refused on the issue. The language in Instruction No. 19 is not unconstitutionally vague in this context, because it is irrelevant. The "express advocacy" test has not been applied to determine the obli-

gation of a candidate to report coordinated expenditures with a corporation. Review of the Instructions as a whole in this case shows that the jury was fully and fairly informed of the conduct that it could, and could not, rely upon in reaching its verdict. The nature of "attack" pieces sent on Wittich's behalf by NRTWC affiliated groups is irrelevant; it is the coordination of the mailings with Wittich's own campaign that made them illegal.

Wittich failed to preserve any objection to COPP Jonathan Motl's testimony.

The District Court properly allowed COPP expert witness C.B. Pearson to testify. The decision to allow expert testimony is within the discretion of the Trial Court. Further, Wittich failed to preserve his right to challenge the Trial Court's decisions by failing to object at trial.

The Trial Court's dismissal of Juror No. 9 because of her emotional state was within the Trial Court's discretion.

The penalty imposed by the Trial Court by reason of Wittich's receipt of illegal corporate contributions and his failure to report all contributions was within the discretion of the Trial Court.

ARGUMENT

I. THE PRESENT MATTER WAS PROPERLY FILED BY THE COPP.

A. Introduction.

Wittich phrases his first issue on appeal as a jurisdictional one. It is not. His argument, first raised by a motion (Doc 6) filed May 2, 2014, is that the COPP did not comply with statutory requirements prior to filing the Complaint against him.[6] However, this does not implicate the Court's jurisdiction, i.e. its power to hear the case. *COPP v. Wittich*, DA-16-0151, March 18, 2016.[7] In truth, this issue is really a question of statutory interpretation.

B. A Written Complaint was Received by the COPP.

The COPP received a written AC from Bonogofsky, alleging illegal coordination by "Dan Kennedy and also the other (WTP) supported candidates." (Doc 72, Ex 1, CoppWitt0011). Citing Rule 44.10.307(2), ARM, Wittich argues (Wittich Brf, pg. 14) that the AC was not a "proper written complaint" as to him, because it did not expressly name him, and the COPP therefore could not investigate him. (Wittich Brf, pg. 15).

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[6] On pg. 13 of his Brief, Wittich suggests that the COPP may exercise its powers in a biased way. Yet, he provides no evidence of uneven enforcement. As to the NRTWC entities, the record shows that they did not work with any Democrats. (Tr, pg. 208).

[7] The COPP respectfully requests that this Court take judicial notice of the filings in Supreme Court Case No. DA 16-0151 pursuant to Rule 201, MREv.

Rule 44.10.307(2), ARM (2009)[8] provides, in relevant part, that "[a written] complaint shall name the alleged violator, ..." Wittich does not dispute that Bonogofsky met that requirement in the allegations of her AC, wherein she named Kennedy as an alleged violator. He also does not dispute that she alleged illegal conduct by "other candidates" in 2010 who benefitted from coordinated expenditures by WTP and various other organizations. Based on the AC, the COPP had an express statutory obligation to investigate not only Kennedy, but also the "other alleged violations" of Montana campaign finance laws set forth in the AC. Section 13-37-111(2)(a), MCA.

In 2011, while the AC was pending, three boxes of NRTWC documents, stolen from a car in Colorado, were received by the COPP. (Tr, pgs. 453, 911). Documents from these boxes (e.g. Doc 72, Ex. 1, CoppWitt0005) expressly identified Wittich as one of the "other (WTP) supported candidates" in 2010, referred to in the AC. (Tr, pg. 587). Armed with this information, the COPP contacted Bonogofsky, who directed him to expand her Administrative Complaint to include Wittich. (Doc 72, Ex. 1, CoppWitt0003). The COPP did just that, and provided Wittich with a written Notice of Complaint dated January 24, 2014, that gave Wittich an opportunity to respond. (*Id*, CoppWitt0004).

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[8]Rule 44.10.307, ARM (2009) was transferred and amended to Rule 44.11.106, ARM on January 9, 2016.

From that point on, the COPP's investigation and subsequent prosecution were conducted pursuant to a written complaint, expanded at Bonogofsky's direction to expressly name Wittich as a violator, meeting the requirements of Rule 44.10.307(2), ARM.

The Trial Court correctly interpreted Section 13-37-111(2)(a), MCA along with its associated Administrative Rule when it denied Wittich's Motion to Dismiss on this ground. (Doc 386, pg. 5).

C. Notice and Order of Noncompliance—an Issue First Raised on Appeal.

Wittich also argues that the COPP never provided him with a Notice and Order of Noncompliance pursuant to Section 13-37-121, MCA. (Wittich Brf, pgs 14-15). This argument was never raised in the District Court and was not in the Final Pretrial Order (Doc 456), so the record is devoid of any evidence or argument. He tried to raise it in his appeal (Case No. DA 16-0151) from the District Court's March 9, 2016, jurisdictional ruling (Doc 386). However, Wittich failed to create or preserve the issue in the District Court record after this Court dismissed the appeal and reminded him that any future appeal would need to be made "with the benefit of a full record of the District Court proceedings." (Order, March 18, 2016, DA 16-0151, pg. 4)

This Court considers "issues presented for the first time [on appeal] to be untimely and [we] will not consider them." *Molnar v. Mont. PSC*, 2008 MT 49, ¶ 11,

341 Mont. 420, 177 P.3d 1048 (citations omitted). This includes new arguments. *Id.* This Court will not fault a trial court for failing to rule on an issue that was never presented. *Id.*

In any event, Section 13-37-121(5), MCA provides,

> After a complaint is filed with the commissioner pursuant to 13-37-111, the procedure described in this section regarding the provision of notice and issuance of orders of noncompliance is not a prerequisite to initiation of any other . . . judicial action authorized under chapter 35 of this title or this chapter. (emphasis added).

As discussed above, Wittich's prosecution flowed from an AC that was filed with the COPP pursuant to Section 13-37-111(2)(a), MCA, and after investigation, was properly expanded to include Wittich.

As expressly provided by Section 13-37-121(5), issuing a Notice and Order of Noncompliance was not a prerequisite to the filing of this case. In addition, Wittich's failure to raise this issue before the Trial Court precludes him from raising any claim of error on appeal.

D. Referral to the Lewis and Clark County Attorney was Proper.

After a sufficiency decision is rendered, the commissioner "shall notify the county attorney of the county in which the alleged violation occurred and shall arrange to transmit to the county attorney all information relevant to the alleged violation." § 13-37-124(1), MCA.

Wittich argues that all of his campaign activities occurred in Gallatin County. (Wittich Brf, pg. 17) (emphasis added). He concludes that the COPP was required to notify the Gallatin County Attorney of the alleged violations and give that office the opportunity to prosecute this civil action. *Id.* He argues that failure to do so deprived the District Court of jurisdiction over this matter and the verdict should be reversed and the case dismissed." *Id.*[9]

The plain language of Section 13-37-124(1) dictates that it is the county attorney of the county "in which the alleged violation occurred"—not the county where the campaign activities occurred—who is to be notified. Wittich's alleged violations, including failure to report his campaign contributions and expenditures, (Doc 1, ¶¶ 31, 32, 41, and 42) occurred at least in part in Lewis and Clark County, where his reports were received by the COPP. District Judge Sherlock was right—"it makes no sense to conclude that one can make an improper report if the act of reporting [to the COPP] has not yet occurred." (Doc 67, pg. 4). As District Judge Sherlock further observed,

> If the alleged violation [of failure to report] ripened upon mere completion of the report, candidates [like Wittich] could not only easily shop for the most favorable venue in Montana including counties where neither the election nor the Commissioner's office are located,

[9] This Court has held that this is not a jurisdictional issue. The District Court clearly has jurisdiction over this case. The question is whether the language of Section 13-37-124(1), MCA permits referral to the Lewis and Clark County Attorney as was done in this case.

> but could also immunize themselves by simply signing their reports on a quick day trip to Williston, North Dakota, or better yet, Lethbridge, Alberta.

(*Id*, pgs. 4, 5).

The Trial Court correctly interpreted the language of Section 13-37-124(1), MCA when it ruled that the COPP had the right to file this matter in Lewis and Clark County because at least some of the violations occurred there and there is no express requirement to refer to multiple county attorneys. (*Id*, pg. 5).

II. WITTICH'S CONSITUTIONAL RIGHTS WERE NOT VIOLATED AND THE ISSUE WAS NOT PRESERVED.

A. Introduction

Wittich argues the Constitutional issue raised by his Ninth Affirmative Defense in two different sections of his Appellant's Brief. First, on pgs. 17-23, he argues that Section 13-1-101(7)(a)(i), MCA is an unconstitutional infringement on his First Amendment rights. Then, on pgs. 35-38, he argues that the Court improperly precluded him from asserting his Ninth Affirmative Defense, asserting that same Constitutional issue. These two arguments are inextricably intertwined, and the COPP will therefore address them both at the same time.

Wittich amended his Answer to include a Ninth Affirmative Defense on November 25, 2015, alleging that the statutes underlying this case violated his Constitutional rights to free speech and association. (Doc. 230, pg.8) As the case has

progressed, the scope of this affirmative defense has been refined to focus on only one statute: Section 13-1-101(7)(a)(i), MCA.

Specifically, § 13-1-101(7)(a)(i) defined the phrase "contribution" as being something of value received by a candidate to "influence an election." According to Wittich, the phrase to "influence an election" has been found to be unconstitutionally vague. As such, he contends that Instruction No. 19 (Doc 482), incorporating this language, was unconstitutionally vague, and he is now entitled to dismissal of the case or remand for a new trial.

B. Wittich failed to preserve the Constitutional issue raised by his Ninth Affirmative Defense for appeal to this Court

Wittich amended his Answer to include his Ninth Affirmative Defense, by leave of the Court's Order (Doc 204) dated October 22, 2015. The Court specifically stated that "it is a claim that can be handled by briefing prior to the trial." (*Id*, pg. 8). Yet, for some unknown reason, Wittich never attempted to do so.

Despite his inaction during the pretrial phase of the case, Wittich asserted the Defense as a contention in the Final Pretrial Order (Doc 456, pg. 10), preserving it as an issue at trial.

Wittich finally addressed the Defense in his Defendant's Proposed Inst. No. 27. (Wittich Brf, pg. 37), which was refused by the Court. Instead, the Court gave Jury Instruction No. 19, which was based on the language of Section 13-1-101(7)(a)(i), MCA.

The settlement of instructions occurred off the record, by agreement of the Court and the parties. (TR, pg. 1047, lns 16-17). The next day, on the morning of April 1, 2016, the Trial Court gave the parties an opportunity to make a record. Wittich did not object to the giving of Jury Inst. No. 19 and did not object to the Court's refusal of Defendant's Proposed Inst. No. 27. (TR, pg. 1048, ln 6- pg. 1049 ln 9).[10]

A party may only assign error to an instruction actually given if the party properly objected to the giving of the instruction; and may only assign error to the failure to give an instruction if the party also properly objected.[11] Rule 51(d)(1)(A) & (B), MRCivP. Thus, as a matter of straightforward application of the Rules of Civil Procedure, Wittich's failure to object to the instructions as refused and given means that he can no longer assign error and challenge the Trial Court decisions in that regard. *Turk v. Turk*, 2008 MT 45, ¶16, 341 Mont. 386, 177 P.3d 1013 (Failure to object to an instruction results in a waiver of the right to challenge it on appeal. Further, an instruction given without objection becomes the law of the case.) Wittich cannot now be heard to complain on the basis of any instructional error on the issue.

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[10] See footnote 4, supra.

[11] Wittich did not argue in his Motion for New Trial or in his Appellant's Brief that there was plain error associated with the instructional process, in an attempt to excuse his failure to object under Rule 51(d)(2), MRCivP.

Simply stated, Instruction No. 19 became the law of the case when Wittich failed to object, and his proposed Instruction No. 27 can't be considered because he didn't object to its refusal and it is not even in the record on appeal.

Finding that Wittich had not preserved this issue, the District Court properly denied his Motion for New Trial on this ground. (Doc 546, pgs. 3, 4).

C. § 13-1-101(7)(a)(i), MCA is not Unconstitutional as Applied in this Case.

The essence of the claims against Wittich was that he, a candidate for the Montana Legislature in 2010, accepted or received and failed to report as in-kind contributions various coordinated corporate expenditures made by the NRTWC and affiliated corporations. The law at the time (2010) essentially defined the term "contribution" as something of value received by a candidate to "influence an election." Section, 13-1-101(7)(a)(i), MCA. Wittich contends that this language, "influence an election," is unconstitutionally vague because it does not distinguish between permitted issue advocacy and regulated express advocacy, under longstanding federal law pertaining to freedom of speech. (Wittich Brf, pgs. 18-20). Wittich argues that the absence of "express advocacy" language in Instruction No. 19 rendered the instruction unconstitutionally vague, because it allowed the jury to hold him liable based on communications that were permissible and unregulated speech, under the First Amendment. (Wittich Brf, pgs. 22, 37).

It is true that Courts have made a distinction between "express advocacy,"

which "[advocates] the election or defeat of a clearly identified candidate," and "issue advocacy," which is intended to educate the public on broader issues.[12] Campaign expenditures amounting to express advocacy may be regulated, under the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 704 (1976).

However, this distinction has only come into play when evaluating the free speech right to make an independent expenditure during the election process. Every single case cited by Wittich involves a PAC or other entity or person challenging limitations on the right to make independent expenditures on claimed issue advocacy, under the First Amendment. See e.g. *Buckley*, 424 U.S. 1, 96 S. Ct. 612 (1976); *Montanans for Community Development v. Motl*, 54 F. Supp. 3d 1153, 1160 (D. Mont. 2014); *Federal Election Comm'n v. Furgatch*, 807 F. 2d 857 (9th Cir. 1987); *Federal Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 65-67 (1st Cir. 2011).

Wittich has not cited a single case (and the COPP knows of no such case) that supports an "express advocacy" test upon the obligation of a candidate to report coordinated expenditures by a corporation, which are considered under Montana law to be in-kind contributions to the campaign. *Buckley v. Valeo*, 424 U.S. 1,

[12] The COPP does not waive any argument that the coordinated materials involved in the present case were express advocacy.

47, 96 S.Ct. 612, 704 (1976);[13] *See also* Instr. No. 24 (Doc 482) and Rule 44.10.323(4), ARM. The corporate expenditures made on behalf of Wittich by NRTWC and its affiliated corporations were tried as, and found by the jury to be, coordinated expenditures that were an in-kind contribution to his campaign. In fact, there was no evidence of anything BUT coordinated expenditures. While the content of some or all of the expenditures qualified as express advocacy, the measure of content (that is, either express or issue) did not matter because Wittich had an obligation to avoid any corporate contributions and to report all expenditures coordinated with his campaign.

Wittich's attempt to parlay cases fleshing out the free speech rights of corporations, unions, PACs and the like to make unlimited "issue advocacy" expenditures during elections, into some kind of constitutional limitation on his obligation to report those expenditures when illegal coordination has occurred, is a disingenuous misapplication of the law.

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[13] In *Buckley* the Supreme Court discussed the value of coordinated contributions provided to a candidate versus independent expenditures, noting "The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." 424 U.S. at 47.

D. Review of the Instructions as a whole shows that the jury was fully and fairly informed of the conduct that it could, and could not, rely upon to hold Wittich liable.

The factual heart of the COPP's case against Wittich was that the NRTWC, through NRTWC employee and Wittich campaign consultant Christian LeFer, his wife, Allison LeFer, and NRTWC financed print shop, Direct Mail and Communications, provided a multitude of campaign services to Wittich under the auspices of the NRTWC's Smart Simple Campaign program (Ex. 13).

The evidence showed that Wittich wanted and received "the works" (Ex. 52, pg. 3) and that he worked with NRTWC paid staff to accomplish the basics of his campaign, including a website (Ex. 6, pg. 1), targeted walk list (Ex. 9), a direct mail program (Exs 40-51), opposition research (Tr, pg. 214 ln 20-22), and other services, including a "wife letter" (Tr. pg. 217, ln 15-17).

Because Wittich correctly completed surveys sent out by corporations associated with the NRTWC, letters from these corporations associated with the NRTWC were sent to voters in Wittich's district. (Tr, pg. 211, ln 20-pg. 212, ln19)(Tr, pg. 290, ln 23-pg. 295, ln13)(Tr, pg. 307, lns 2-12). These letters came from the National Gun Owners Association (Ex 28; Tr, pg. 330, ln 4-23), National Pro Life Alliance (Ex. 30), National League of Taxpayers (Tr, pg. 307, ln 2-12), Montana Citizens for Right to Work (Ex 29; Tr, pg. 333, ln 11-pg. 334, ln 24) and other NRTWC-related corporations and were predictably triggered by Wittich's

favorable and required responses (Tr, pg. 212, lns 10-14) to surveys sent earlier. They were precisely timed, through LeFer and NRTWC, to go out in coordination with the Wittich campaign letters (Ex. 40-45) sent by Direct Mail on Wittich's behalf. (Tr, pg. 614, ln 11- pg. 618, ln 15).

The crux of the case was the coordination of all these corporate expenditures with Wittich's campaign, and Wittich's failure to report the expenditures as in-kind contributions as required by Montana law.

The Instructions given by the Court, taken as a whole and to which Wittich did not object, accurately reflected the claims in the case and correctly apprised the jury of the applicable law.

Specifically, the jury was informed that:

-The term "contribution" includes various things received by a candidate to influence an election. Instruction No. 19 (Doc 482)

-The term "contribution" also includes "the payment by a person other than a candidate or political committee of compensation for the personal services of another that are rendered to a candidate." Instruction No. 19 (Doc 482)

-The term "expenditure" includes another list of various things of value. Instruction No. 20 (Doc 482)

-A candidate may not receive a corporate contribution. Instruction No. 21 (Doc 482)

-Corporate expenditures that are "coordinated" (as defined in the Instructions) with a candidate must be reported as an "in-kind" contribution. Instruction No. 24 (Doc 482)

-The opposite of a "coordinated expenditure" is an "independent expenditure." Express advocacy not made in coordination (as defined by the instructions) with a candidate is an "independent expenditure." Instruction No. 24 (Doc 482)

-Corporations are permitted to spend "unlimited amounts of money on issue-related advertising, provided that advertising is not coordinated with a candidate. These "independent expenditures" are not required to be reported by a candidate. Instruction No. 27 (Doc 482)

Thus, while the phrase "influence an election" was not defined, subsequent instructions amply clarified the types of expenditures that must be reported and those that need not be reported. As such, there was no error in the giving of the instructions simply because one of the instructions may have had an irrelevant deficit. *Peterson v. St. Paul Fire and Marine Ins. Co.*, 2010 MT 187, ¶22, 357 Mont. 293, 239 P.3d 904 (jury instructions are reviewed in the entirety in order to determine whether they fully and fairly instruct the jury on the applicable law*); see also, Federated Mut. Ins. C. v. Anderson*, 1999 MT 288, ¶ 44, 297 Mont. 33, 991 P.2d 915 (When this Court reviews whether a particular jury instruction was properly refused, "we must consider the instruction in its entirety, as well as in connection with the other instructions given and … ."). Unlike given Instruction No. 19, Wit-

tich's refused Instruction No. 27 can't be considered in connection with the other instructions because it is not in the record on appeal.

Even in cases where the free speech rights of an organization are at issue and the "issue vs. express advocacy" distinction is relevant, the language of §13-1-101(7)(a)(i), MCA has been upheld in *Montanans for Community Development v. Motl*, 54 F.Supp. 3d 1153, 1160 (D. Mont. 2014) (the statute was not unconstitutional as applied to independent expenditures because the COPP specifically employed concepts of "express advocacy" in the application of the statutes).

Similarly, in this case neither the statute nor the application of the statute were unconstitutionally vague because the phrase "influence an election" had no particular significance to the issues in this case, involving the obligation of a candidate to report coordinated contributions to his campaign, and not the obligation of a person making an independent expenditure to disclose. The Court's use of the statutory language was not constitutionally defective here.

For all of these reasons, Wittich is not entitled to a new trial or dismissal based upon either the merits of his Ninth Affirmative Defense or instructions to the jury.[14] The District Court correctly denied Wittich's Motion for a New Trial based

[14] Wittich appears to challenge the evidentiary basis for the jury's verdict, on pages 21-22 of his brief. However he did not raise an evidentiary issue as a ground for appeal. In addition, as recognized by the District Court in its Order Denying Wittich's Motion for a New Trial (Doc 546) evidence that Wittich received contribu-

on these grounds. (Doc 546, pg. 4)

III. WITTICH FAILED TO PRESERVE HIS OBJECTION TO COMMISSIONER MOTL'S TESTIMONY.

Wittich claims that the District Court erred when it denied his motion in limine to preclude the opinions of Commissioner Motl and permitted them to be expressed during trial. (Wittich Brf, pg. 23).

Wittich moved in limine (Doc 300) to exclude Commissioner Motl from testifying at trial. Wittich's supporting brief (Doc 315) raised three issues: (1) should Motl be precluded from testifying because he allegedly did not qualify as an expert?; (2) should Motl be precluded from testifying because he allegedly was not an appropriate fact witness?; and (3) should Motl be precluded from testifying because his anticipated testimony consisted of legal conclusions that invaded the province of the jury? (Doc 315, pg. 5).

The District Court denied Wittich's motion in limine, ruling "Motl is both a proper expert and fact witness for this trial." (Doc. 388, pg. 4). The District Court did not rule on Wittich's third issue, as Wittich candidly acknowledges. (Wittich Brf, pg. 26) ("The District Court somehow ignored the argument that the opinions offered by the COPP were legal conclusions and were applying law to fact.")

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tions in the form of campaign management, copywriting of letters, a website, a walk list, attack letters, attack flyers and survey letters supported the jury's verdict. (Doc 546, pg. 2).

Motl testified at trial, consistent with his expert disclosure. The questions were asked and answered without any objection by Wittich.

Relying on *State v. Ankeny*, 2010 MT 224, ¶ 39, 358 Mont. 32, 243 P.3d 391, Wittich apparently contends that his motion in limine to exclude Motl from testifying relieved him from the obligation to contemporaneously object to the questions and/or answers at trial. But this is not so, and his failure to object precludes him from now raising this issue on appeal.

The general rule is that a party may not seek appellate review when the party fails to make a contemporaneous objection to an alleged error in the trial court. *Guertin v. Moody's Mkt.*, 265 Mont. 61, 67, 874 P. 2d 710, 714 (1994)("Under Rule 103(a)(1), MREv., the failure to object [to testimony] in a timely and specific manner waives the objection"). In some instances, a motion in limine can preserve an issue for appeal even though an objection is not made at trial. *Ankeny*, 2010 MT 224, ¶ 34, 358 Mont. 32, 243 P.3d 391. Specifically, "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." *Ankeny*, ¶ 39.

However, in *State v. Favel*, 2015 MT 336, 381 Mont. 472, 362 P.3d 1126, this Court noted that "in each of our prior cases in which we have permitted a motion in limine to preserve an issue on appeal, the district court provided a definitive ruling." *Favel*, ¶ 19. In each case "the district court was directly faced with the

question and ruled against the defendant, thereby preserving for appeal any evidentiary issue that was specifically addressed in the motion." *Favel*, ¶ 19 (quoting *State v. Vukasin*, 2003 MT 230, ¶ 34 317 Mont. 204, 75 P.3d 1284). But this Court further noted, "we have never allowed a party to preserve an issue based on a motion in limine without the party having obtained a definitive ruling from the district court on the issue." *Favel*, ¶ 19 (emphasis added).

After reviewing case law from other jurisdictions and recognizing that a trial court may "justifiably wish to delay ruling on admissibility of evidence until after the trial has begun," this Court held that "in order for a motion in limine to sufficiently preserve an issue on appeal without an objection at trial, the party must obtain a definitive ruling on the issue from the district court." *Favel*, ¶ 21. Wittich admits that he did not obtain a definitive ruling on the issue of whether Motl should have excluded as a witness because his anticipated testimony, in Wittich's view, was improper. (Wittich Brf, pg. 26).

Wittich's motion in limine did not excuse his failure to object during Motl's testimony at trial, and he is not entitled to relief on this ground.

IV. THE TRIAL COURT'S DECISION TO PERMIT COPP'S EXPERT C.B. PEARSON TO TESTIFY WAS WITHIN ITS DISCRETION, AND WITTICH FAILED TO PRESERVE THE ISSUE FOR APPEAL

A. No abuse of discretion has been shown

Wittich moved "to exclude [COPP expert] C.B. Pearson from testifying at trial." (Doc 312). In his supporting brief (Doc 313), Wittich argued that Pearson "is not a qualified expert in the field about which he seeks to offer testimony. Therefore, he should be precluded from testifying at trial." (Doc 313, pg. 1). After considering and analyzing Wittich's arguments and the COPP's response (Doc 317), the District Court issued its Order Denying Wittich's Motion to Exclude Pearson, holding that "Pearson is a proper expert witness for this trial." (Doc 387, pg. 3). The Trial Court further noted that "if Wittich has concerns about his qualifications or his methodology, he should raise those issues on cross examination." *Id.*

Wittich contends that the District Court erred when it denied his motion in limine. (Wittich Brf, pgs. 29-32). A trial court possesses broad discretion in ruling on the admissibility of expert testimony. *Sunburst Sch. Dist. N. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 68, 338 Mont. 259, 165 P.3d 1079. The grant or denial of a motion in limine is reviewed for an abuse of discretion. *Henricksen v. State*, 2004 MT 20, ¶ 46, 319 Mont. 307, 84 P.3d 38 (citation omitted). "The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice."

Jarvenpaa v.Glacier Electric Co-op, 1998 MT 306, ¶ 13, 292 Mont. 118, 970 P.2d 84 (citation omitted).

Nowhere in his brief does Wittich assert, let alone establish, that either of these tests is met in this case. The Trial Court's decision to permit Pearson to testify was within its discretion.

B. Wittich did not preserve this issue for review

Wittich has also failed to preserve as error any of Pearson's testimony or opinions. He did not object to Pearson's testimony on the value of certain campaign activities, or his methodology in arriving at his testimony. (Tr. pgs 789-807). By not objecting, Wittich waived any issue arising out of that testimony. Again, a party waives an objection and may not seek appellate review when the party fails to make a contemporaneous objection to an alleged error in the trial court. *Guertin v. Moody's Mkt.*, 265 Mont. 61, 67, 874 P. 2d 710, 714 (1994)("Under Rule 103(a)(1), M.R.Evid., the failure to object [to testimony] in a timely and specific manner waives the objection").

Wittich's claim that the Trial Court abused its discretion when it permitted Pearson to testify is without merit. In addition, Wittich failure to object to Pearson's opinions precludes him from raising any claim of error.

V. THE DISMISSAL OF JUROR NO. 9 WAS WITHIN THE TRIAL COURT'S DISCRETION.

A. Wittich failed to preserve this issue for review

Wittich did not object to the dismissal of the Juror No. 9 and the seating of the alternate. (Tr., pg. 183). Having failed to object, Wittich is not now entitled to claim that the Trial Court erred in dismissing Juror No. 9 and that he is entitled to a new trial. As the Montana Supreme Court noted in *In re D.H.*, 2001 MT 200, ¶ 41, 306 Mont. 278, 33 P.3d 316, it is "fundamentally unfair to fault the [lower court] for failing to rule correctly on an issue it was never given the opportunity to consider."

B. The trial court did not abuse its discretion in replacing Juror No. 9

The dismissal of Juror No. 9 was proper under the applicable law. So, even if Wittich had objected, the Court's decision to dismiss Juror No. 9 by reason of her rambling responses to questions and her erratic emotional state (Doc 546, pg. 5) was within the Trial Court's discretion.

Without any citation to authority, Wittich claims that he "had a vested right to have Juror No. 9 hear and decide his case." (Wittich Brf, pg. 34). However, the right to have a trial heard and decided by a particular set of jurors is a limited right that, in some instances, must be "subordinated to the public's interest in fair trials designed to end in judgments." *United States v. Gay*, 967 F.2d 322, 324 (10th Cir.

2001) (quotation omitted). There is no right to a juror likely to think or vote in a particular way. *United States v. Devin*, 918 F.2d 280, 291 (1st Cir. 1990).

As the Trial Court was dealing with the juror, it candidly recognized the effort that goes into any case, but "particularly this one, the magnitude of what is at stake for everybody." (Tr, pg. 181, lns 14-15). The public had a strong interest in this case because the integrity of Montana's campaign system was at issue as well as the integrity of the electoral process. Any "vested right" Wittich may claim in Juror No. 9 was subordinated to society's right to a fair trial designed to end in a judgment—not a mistrial.

Rule 47(c)(1), MRCivP, provides for alternate jurors to replace jurors who "become unable or disqualified to perform their duties." Citing §25-7-304, MCA, Wittich infers that after a jury has been empaneled a principal juror can be replaced only if he/she becomes ill. (Wittich Brf, pg. 34). However, there are a number of Montana criminal cases in which this Court has upheld the replacement of a principal juror by an alternate juror for various reasons. *See e.g., State v. Price*, 2009 MT 129, ¶¶ 34-38, 350 Mont. 272, 207 P.3d 298 (juror dismissed who recognized a prospective witness and stated she would be less likely to believe witness' testimony based on personal knowledge); *State v. Kennedy*, 2004 MT 53, ¶ 34, 320 Mont. 161, 85 P.3d 1279 (juror dismissed who spoke with prospective witness); *State v. Close*, 267 Mont.44, 48, 881 P.2d 1312, 1315 (1994) (juror who fainted af-

ter seeing autopsy photographs dismissed). In these cases, the juror was dismissed by the court pursuant to Section 46-16-307[15], a criminal statute that provides, much like Rule 47, MRCivP, for the replacement of principal jurors who become "unavailable or disqualified to perform their duties."

The plain meaning of both the criminal statute and the rule of civil procedure is that an alternate juror may be substituted for an original juror who becomes disqualified or unable to perform his duties at any time prior to reaching a verdict. *See, State v. Pease*, 222 Mont. 455, 470, 724 P.2d 153, 162 (1986). As this Court noted in Pease, the federal circuits dealing with this issue consistently hold "the trial court has the discretion to remove a juror and seat an alternate whenever the facts show the juror's ability to perform his duties is impaired. The circuits also consistently hold that the reviewing court will not disturb the ruling unless the defendant shows bias or prejudice. " *Id*, pg. 163. "[P]rejudice would include discharge of a juror for want of any factual support, or for a legally irrelevant reason. There must be some 'sound' basis upon which the trial judge exercised his discretion." *Id.* (quoting *U.S. v. Rodriguez*, 573 F.2d 330, 332 (5th Cir. 1978).

Here, the Trial Court had a sound basis to dismiss Juror No. 9 by reason of the obvious emotional distress she exhibited, along with her disjointed, rambling responses to straightforward questions. When allegations of juror misconduct are

[15] Section 46-16-307, MCA has been redesignated as Section 46-16-118, MCA.

raised, this Court has recognized that the trial court is given wide latitude when ruling on such issues because it is in the "best position to observe the jurors." *Stebner v. Associated Materials, Inc.*, 2010 MT 138 ¶ 11, 356 Mont. 520, 234 P.3d 94 (citations omitted). As in *Stebner*, the Trial Court in the present case was in the best position to observe Juror No. 9. The Trial Court did not abuse his discretion when he concluded that she was unable to perform her duties and replaced her with a fully qualified alternate as allowed by Rule 47(c), MRCivP. (Doc 546, pgs. 4, 5).

Further, there was no prejudice to Wittich. An alternate juror is not inferior in any manner to a principal juror. They "shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the principal jurors." Rule 47(c)(4), MRCivP.

The entire evidentiary portion of the trial, along with closing arguments and instructions to the jury, was presented to and decided by 12 qualified jurors. Wittich participated in the selection of all jurors, including the alternates. Wittich has not shown that the District Court abused its discretion or that he was in any way prejudiced by the replacement of emotionally distraught Juror No. 9 with an alternate juror.

VI. IT WAS WITHIN THE TRIAL COURT'S DISCRETION TO ENHANCE THE PENALTY IMPOSED ON WITTICH FOR (1) ACCEPTING OR RECEIVING CONTRBUTIONS AND (2) FAILING TO REPORT THEM.

A. The statutes are not punitive in nature

Section 13-37-128, MCA creates a cause of action by which a person who violates certain provisions of Montana's campaign finance laws may be found liable for an amount up to $500 or three times the amount of the violation, whichever is greater. Section 13-37-129, MCA provides, in relevant part, "[i]n 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." (emphasis added).

Wittich argues (Wittich Brf, pgs. 38-40) that trebling the amount of the violations under §13-37-128 by applying the standards of § 13-37-129 constitutes punitive damages and that the Trial Court's "imposition of treble damages in the absence of clear and convincing evidence of Mr. Wittich (sic) culpability was an abuse of discretion and warrants reversal." (Wittich Brf, pg. 40).

These arguments are based on Wittich's analysis of §30-14-133, MCA (remedy for matters that fall within the Consumer Protection Act ("CPA")) and §30-13-335, MCA (remedy for trademark disputes). His argument that any enhanced penalty under Section 13-37-129, MCA must be established by "clear and convincing

evidence" is based on a claim that the standard of proof found in Section 27-1-221, MCA is applicable. (Wittich Brf, pg. 40).

Before responding to Wittich's arguments, it is important to note that the Trial Court did not treble the amount of any of Wittich's six violations in determining the penalty ultimately imposed. The Court's Summary (Doc 513) lists all six of Wittich's violations. The penalty imposed for violations #1, #2, and #3 was exactly the amount of the violation. (Id, pgs. 1-2). Because there was no dollar amount determined for violation #4, the Trial Court imposed a penalty of $500 as provided by Section 13-37-128, MCA. (Id, pg. 2). Only violations #5 and #6 were enhanced; but as noted, they were not trebled. The penalty of $58,797 for both of these violations represents a penalty of 1.5 times the amount of each of the two separate violations.

The COPP now turns to Wittich's analysis.

Section 30-14-133(1), MCA provides that a consumer who has suffered a loss by reason of a defendant's violation of the CPA may bring an action to recover the greater of his actual damages or $500. "The court may, in its discretion, award up to three times the actual damages sustained . . . " *Id.*

In *Plath v. Schonrock*, 2003 MT 21, ¶27, 314 Mont. 101, 64 P.3d 984 the Supreme Court held that Legislature's intent in drafting the CPA "without including specific conduct that would trigger imposition of the treble damage award was

to provide for a discretionary award of treble damages which is not punitive in nature and which does not require specific intentional conduct on the part of the defendant." (emphasis added). This Court held that the district court in *Plath* had erred when it ruled that an award of treble damages was precluded because "the evidence did not support a finding generally associated with punitive damages." *Id*, ¶ 28. In summary, treble damage awards under the CPA are discretionary and are to be determined on a case-by-case basis. *Id.*

Section 30-13-335(1), MCA, on the other hand, provides that the owner of a trademark may seek to recover all profits lost and damages suffered by reason of the defendant's infringement. In addition, the court may enter judgment in an amount up to three times the lost profits and damages and attorney fees "in cases in which the court finds that the other party committed the wrongful acts with knowledge, in bad faith, or otherwise as according to the circumstances of the case." *Id.* (emphasis added).

In *Circle S Seeds of Montana, Inc. v. Montana Merchandising, Inc*, 2006 MT 311, ¶ 15, 335 Mont. 16, 157 P.3d 671 the Court, based on its analysis in *Plath*, suggested that §30-13-335 was "punitive in nature" because it imposed treble damages upon the court's "finding of specific intent or knowledge of the trademark infringement." (emphasis added).

Section 13-37-129, MCA is more akin to § 30-14-133, MCA because it does not require a finding of specific intent or knowledge on the part of the defendant. The decision to treble is solely within the district court's discretion, although it does provide that the trial court "may take into account the seriousness of the violation and the degree of culpability of the defendant." Section 13-37-129, MCA.

The trebling provision is not punitive in nature, under the cases discussed above. It provides guidance to the District Court but does not require any particular finding. Wittich's argument to the contrary (Wittich Brf, pgs. 38-39) should be rejected.

B. A clear and convincing standard of proof does not apply

Before the Trial Court, Wittich argued that the Court should not enhance the violation "unless it finds by clear and convincing evidence that Mr. Wittich acted with actual malice or committed actual fraud" as set out in Section 27-1-221(5), MCA. (Doc 508, pg. 12).

The Trial Court did not address this argument in its Summary of Penalties (Doc 513) thus impliedly rejecting it.

On appeal, Wittich's argument has shifted. He now argues that a violation can be trebled under Section 13-37-129, MCA only if culpability is established by "clear and convincing evidence" as provided by Section 27-1-221(5), MCA. (Wit-

tich Brf, pg. 40)[16]. According to Wittich, Section 13-37-129 is silent as to a burden of proof so Section 27-1-221, MCA's clear and convincing standard is applicable. (Wittich Brf, pg. 40). Wittich cites no authority for his argument.

Wittich's logic, both before the Trial Court and on appeal, is defective. First, under Section 13-37-129, there is no requirement that culpability be found under any standard of proof. Second, Wittich's argument violates one of the basic rules of statutory construction. When interpreting a statute a court "is simply to ascertain and declare what is in terms or in substance [contained in the statute], not to insert what has been omitted or to omit what has been inserted." Section 1-2-101, MCA; *City of Missoula v. Mt. Water Co.*, 2016 MT 183, ¶ 54, 384 Mont. 193, 378 P.3d 113. Here there is simply no basis upon which one can conclude that in enacting Section 13-37-129, MCA the Legislature intended to incorporate the clear and convincing standard found in Section 27-1-221(5), MCA.

The Trial Court correctly interpreted Section 13-37-129, MCA.

C. Wittich's arguments are contrary to the purposes of Montana's campaign finance laws.

This Court has stated that in making a decision whether or not to award up to three times the damages under the Consumer Protection Act, the trial court "should be guided by the overall purpose of the Act itself, which is to protect the public

[16] Wittich has backed away from the claim that a showing of actual fraud or actual malice is required. (Wittich Brf, pg. 40).

from unfair or deceptive practices engaged in by trade or commerce." *Plath*, ¶ 28. Similarly, the COPP suggests that a trial court, in determining the penalty to impose on a campaign finance violator like Wittich, should consider the overall purpose of the campaign finance laws, which is to encourage people to run for office by upholding the public trust expressed by statute and case law.

Section 2-2-103(1), MCA provides in relevant part: "The holding of public office ... is a public trust, created by the confidence that the electorate reposes in the integrity of ... legislators." As this Court in *Molnar v. Fox*, 2013 MT 132, ¶18, 370 Mont. 238, 301 P.3d 824, explained, "[t]he Code recognizes that public confidence in the integrity of state officials, legislators and state employees is paramount to the overall effectiveness and legitimacy of the government." Stated another way:

> Not only... is the Corrupt Practices Act intended to guarantee the purity of elections and to assure a free exercise of the franchise by the voter uninfluenced by any appeals to its prejudice or cupidity, but it is also designed to protect candidates for public office; and by limiting expenditures and forbidding certain practices, afford an equity of opportunity to the candidates and protect them from the pressure applied by salesmen and others whose purpose it is to increase their sales, or to secure personal benefit at the expense of the candidate.

Kommers et al. v. Palagi, 111 Mont. 293, 297, 108 P.2d 208, 210 (1940)(emphasis added).

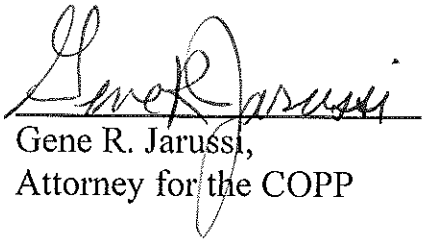
The policy behind the campaign finance laws supports allowing the District Court to use its discretion when imposing a penalty on an adjudicated lawbreaker like Wittich.

Based on the foregoing, the trebling provision at issue is not punitive in nature; enhancement does not require clear and convincing proof, and in any event, the Trial Court did not impose a penalty equal to three times any of Wittich's violations. The Trial Court was well within its discretion in imposing the penalties that are reflected in its Summary of Penalties and Costs (Doc 513) and the Judgment (Doc 515) entered in this case.

CONCLUSION

For the foregoing reasons, this case should be affirmed in its entirety.

DATED this 12th day of May, 2017.



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CERTIFICATE OF COMPLIANCE

Pursuant to rule 11 of the Montana rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman text type-face of 14 points; is double spaced (except for footnotes and quoted and indented material which are single spaced); with left, right, top and bottom margins of one inch; and the word count as calculated by Microsoft Word does not exceed 10,000 words, excluding the Table of Contents, Table of Citations, and Certificate of Compiance.

DATED this 12th day of May, 2017.

Gene R. Jarussi,
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CERTIFICATE OF SERVICE

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