

Adam Warren
Keturah Shaules
MOULTON BELLINGHAM PC
27 North 27th Street, Suite 1900
P.O. Box 2559
Billings, Montana 59103-2559
Telephone: (406) 248-7731
Adam.Warren@moultonbellingham.com
Keturah.Shaules@moultonbellingham.com

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

BNSF RAILWAY COMPANY,

Plaintiff,

-vs-

CITY OF GLENDIVE,

Defendant.

Cause No. CV 24-81-BLG-SPW-TJC

**DEFENDANT'S
PRELIMINARY PRETRIAL
STATEMENT**

Defendant City of Glendive (“City”), by and through its undersigned counsel, hereby respectfully submits the following Preliminary Pretrial Statement prior to the Preliminary Pretrial Conference to be held in this case on September 17, 2024, in accordance with Fed. R. Civ. P. 26(a)(1) and L.R. 16.2(b)(1).

A. BRIEF FACTUAL OUTLINE OF THE CASE

In 2020, BNSF Railway Company (“BNSF”) shut down and decommissioned its licensed wastewater pretreatment plant located in the City. BNSF previously had a discharge permit granted in 1980. In late 2023, BNSF made a proposal to the City to add a pre-treatment facility to the City’s sewer system. Due to concerns with the ecological balance, potential risks to treatment process, water quality, regulatory compliance, and historical issues with BNSF, the City determined that it would deny BNSF’s permit request in early 2024.

Subsequently, during a routine inspection of manholes near the BNSF Work Equipment Building, the City viewed what appeared to be an oily discharge and diesel fuel in the manhole nearest the Building. The manhole was located on East Valentine Street. The City took immediate action to stop the spread of contamination and capped the pipe entering the manhole. Subsequently, the City discovered the cap had been removed. The City then placed a concrete plug in the pipe. The City’s actions were done to stop the flow of contaminated sewage. In blocking the spread of contamination, the City also terminated BNSF’s sewer discharge from restrooms in the Building, as BNSF’s sewer discharge flowed through the same manhole.

Within days of the City’s actions, BNSF requested the City restore its services. The City noted that it may be able to restore services if BNSF could confirm that

there was a sanitary line free of groundwater inputs. While BNSF replaced the sewer piping and cleaned the entire line from the Building, BNSF failed to provide a sanitary line. The City visited BNSF's railyard and the Building and conducted an inspection. During the inspection, it was noted that there were issues with the plumbing, sewer line contamination, inadequate communication by BNSF, and non-compliance with proper procedures by BNSF. On April 18, 2024, the City provided notice to BNSF that it would not allow BNSF to reconnect to the City's sewer system. However, BNSF continued to request that the City allow BNSF to reconnect to the City's sewer system.

In May 2024, the City was replacing a water main at the intersection of Valentine Street and Sargent Avenue, which are the streets directly in front of BNSF's Building. During the replacement, the City once again determined there was what appeared to be contamination coming from the BNSF Building. The City collected samples from the manholes in the vicinity of the BNSF Building and sent the samples to TENORM Measurement Solutions for testing. The test results demonstrated that the samples contained hydrocarbons at extremely high percents over DEQ limitations. The test results supported the City's decision to take all necessary action to stop the contamination discharge into the City's sewer system by BNSF. BNSF filed suit shortly thereafter.

B. BASIS FOR FEDERAL JURISDICTION AND VENUE

Plaintiff's base jurisdiction is upon 28 U.S.C. § 1332 because the alleged damages claimed exceeds \$75,000.00 and the case is between citizens of different states. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events and omissions giving rise to the actions occurred in Dawson County, Montana.

C./D. FACTUAL AND LEGAL BASIS OF EACH CLAIM OR DEFENSE

1. Subject to discovery and in order not to waive the defense, Defendant alleges Plaintiff failed to state a claim upon which relief can be granted. Further factual and legal bases are expected to be provided as discovery progresses. The legal authority for this defense is Fed. R. Civ. P. 12(b)(6).

2. The City is not liable for damages caused by independent, intervening acts. *Est. of Strever v. Cline*, 278 Mont. 165, 179, 924 P.2d 666, 674 (1996). The City asserts that some or all of the claimed damages claimed by Plaintiff were proximately caused by other acts, conduct, or events unrelated to the incident giving rise to this litigation. The factual basis for this defense will be further developed as discovery progresses.

3. The City complied with its obligations under the City Code. There were emergency circumstances which required the City to take immediate action. The

legal basis for the City's compliance is found in the Glendive City Code. The factual basis for this defense will be further developed as discovery progresses.

4. In order to preserve this defense, and in the event that discovery further justifies this defense, Plaintiff failed to mitigate its damages, if any. The factual basis for this defense will be developed in discovery. The legal authority for this defense is *Spackman v. Ralph M. Parsons Co.*, 414 P.2d 918, 921 (Mont. 1966).

5. Any award of damages for negligent conduct is subject to comparative negligence law. Mont. Code Ann. § 27-1-702. All claims against the City should be barred or comparatively reduced by Plaintiff's own negligent conduct. The information presently available to the City demonstrates that Plaintiff had previously contaminated land in and around the City. To the extent any judgment is rendered against the City, it is the City's assertion that Plaintiff may have contributed to its own damages. Accordingly, any judgment rendered against the City must consider and be limited by the fault attributed to Plaintiff. The factual basis for this defense will be developed as discovery progresses.

6. Out of an abundance of caution, the City asserts that Plaintiff's claim for an "immediate hearing" is not appropriate in this case due to the allegations raised by Plaintiff. The claims related to violation of city code, negligence, declaratory judgment, and violation of due process do not legally support the need

for an immediate hearing, and Plaintiff has provided no statutory authority for the same. *See* Mont. Code Ann. § 27-1-701, and § 27-8-101, *et. seq.*

7. Subject to discovery and in order to not waive the defense, the City alleges that Plaintiff's damages must be reasonable, provable, and not speculative, and that Plaintiff is not entitled to damages to the extent they were caused by events or conditions other than those alleged in Plaintiff's Complaint. The legal basis for this defense is contained within both federal and Montana statutory and common law. *See e.g. Allen v. United Food & Commercial Workers Int'l Union, AFL-CIO, CLC*, 43 F.3d 424, 427 (9th Cir. 1994) ("An action cannot be successfully maintained if, at the time the plaintiff becomes aware of the wrong, the plaintiff's damages are not certain to occur or too speculative to be proven."); Mont. Code Ann. § 27-1-302 (stating in part that "[d]amages must in all cases be reasonable"); *Walton v. City of Bozeman*, 588 P.2d 518, 522 (Mont. 1978) (stating speculative damages cannot be recovered); and *Ehly v. Cady*, 687 P.2d 687, 695 (Mont. 1984) (requiring damages to "be ascertainable in their nature and origin."). The factual basis for this defense is anticipated to be provided during discovery.

8. Subject to discovery and in order not to waive the defense, the City alleges Plaintiff did not sustain and is not entitled to recovery of the amount of damages alleged in its Complaint. Plaintiff has provided no proof of damages claimed. The factual basis for this defense is anticipated to be further provided

during discovery. The legal authority for this defense, in part, is Mont. Code Ann. § 27-1-201, *et seq.*

9. Subject to discovery and in order not to waive the defense, the City alleges Plaintiff is precluded by law from recovery of attorneys' fees for the claims in the Complaint. In Montana, each party in a civil action is not entitled to attorneys' fees absent a specific contractual or statutory provision. *Martin v. SAIF Corp.*, 167 P.3d 916, 920 (Mont. 2007). Additionally, in order for attorneys' fees to be awarded in a declaratory judgment action, such award must be "necessary and proper." *Id.* The factual basis for showing that such an award would not be "necessary and proper" will be provided during discovery.

10. Plaintiff did not have a legally cognizable interest relating to the City's procedural enforcement of and compliance with the City Code of Glendive. Even if Plaintiff were to establish Plaintiff did have such an interest, it cannot establish that Plaintiff's due process rights were violated. Plaintiff's interest in the City's enforcement of and compliance with the City Code of Glendive is not a constitutionally protected property interest. "A property interest exists if discretion is limited by the procedures in question, that is, whether the procedures, if followed, require a particular outcome. . . . [W]here the governing body retains discretion, and the outcome of the proceeding is not determined by the particular procedure at issue, no property interest is implicated." *Snell v. City of Hamilton*, 2007 Mont. Dist.

LEXIS 132, *10. The factual basis for this defense will be developed as discovery progresses.

11. Out of an abundance of caution, the City asserts that Plaintiff failed to exhaust Plaintiff's administrative remedies. "The doctrine [of exhaustion of administrative remedies] provides 'that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Woodford v. Ngo*, 548 U.S. 81, 88-89, 126 S.Ct. 2378, 2385, 165 L. Ed. 2d 368 (2006) (citations omitted); *see also Flowers v. Bd. of Pers. Appeals, Montana Dep't of Fish, Wildlife & Parks*, 465 P.3d 210, 213 (Mont. 2020); Mont. Code Ann. § 2-4-702(1)(a). The factual and legal bases for this defense are expected to be provided as discovery progresses.

12. The City of Glendive did not owe Plaintiff a duty of care as the City Code of Glendive Section 10-2-2, as alleged in Plaintiff's Complaint, does not require the City to provide access to a sanitary sewer for Plaintiff's building. The legal authority for this defense is Section 10-2-2 of the City Code of Glendive. In fact, Section 10-2-2 of the City Code of Glendive states that it is "unlawful to discharge to any natural outlet within the City, or in area under the jurisdiction of the City, any sanitary sewage, industrial wastes, or other polluted waters, except where suitable treatment has been provided" in accordance with the Code. Further, Plaintiff cannot establish the City of Glendive owed a duty to Plaintiff. In the event

that a duty exists, the City was not negligent, and its actions conformed with the standard of care applicable in this case. Establishing this defense will require expert testimony, which will be provided with the deadlines set by the Court. The complete factual basis for this defense will be developed as discovery progresses.

E. COMPUTATION OF DAMAGES

The City is not at this time seeking damages in this action but reserves its right to recover costs and attorneys' fees to the extent allowed by law. Additionally, the City reserves the right to recover any damages caused by Plaintiff's contamination of the City's sewer system and may amend its pleadings as necessary. Further, the City denies it is liable for any damages claimed by Plaintiff and contests Plaintiff's allegations regarding the nature and extent of Plaintiff's damages, if any.

F. PENDENCY OR DISPOSITION OF ANY RELATED STATE OR FEDERAL LITIGATION

None

G. PROPOSED ADDITIONAL STIPULATIONS OF FACT AND LAW

None

H. PROPOSED DEADLINES RELATING TO JOINDER OR AMENDMENT

The parties have conferred, prepared, and submitted a Joint Discovery Plan which addresses these topics.

I. IDENTIFICATION OF CONTROLLING ISSUES OF LAW SUITABLE FOR PRETRIAL DISPOSITION

The City realizes that Plaintiff's claim for negligence is likely fact sensitive and not suitable for pretrial disposition. However, Plaintiff's claims based upon violations of the City Code, Declaratory Judgment, and Due Process Violations may be suitable for pretrial disposition following discovery in this matter. The controlling issues of law are whether the City violated City Code, whether the City is required to allow BNSF to connect to the City's sewer system, and whether the City deprived BNSF of its due process rights.

J. NAMES AND ADDRESSES OF WITNESSES AND SUMMARY OF INFORMATION.

1. Frank Ceane
Director of Public Works
City of Glendive
c/o Moulton Bellingham PC
(406) 248-7731

Frank Ceane is the Director of Public Works for the City of Glendive and has been actively involved in discussion with BNSF regarding their proposal to connect to the City's sewer system.

2. Jason Stuart
Executive Director
Dawson County Economic Development Council
Glendive City Council, Ward 2
c/o Moulton Bellingham PC
(406) 248-7731

Jason Stewert is a member of the City Council and is on the Street Committee.

3. Rhett Coon
GPS Facilities Director
Glendive, Montana
c/o Moulton Bellingham PC
(406) 248-7731

Rhett Coon is a member of the Glendive City Council and is on the Street Committee.

4. Tanner Dey
Public Utilities Department
City of Glendive
c/o Moulton Bellingham PC
(406) 248-7731

Tanner Dey is a member of the City of Glendive Public Utilities Department and was part of the team that conducted inspections of the BNSF sewer line and system.

5. Pete Leath
Public Utilities Department
City of Glendive
c/o Moulton Bellingham PC
(406) 248-7731

Pete Leath is a member of the City of Glendive Public Utilities Department and was part of the team that conducted inspections of the BNSF sewer line and system.

6. Ryan Russett
Public Utilities Department
City of Glendive
c/o Moulton Bellingham PC
(406) 248-7731

Ryan Russett is a member of the City of Glendive Public Utilities Department and was part of the team that conducted inspections of the BNSF sewer line and system.

7. Matthew Jones
Executive Director
Public Affairs
BNSF Railway Company
c/o Knight Nicastro Mackay
Anthony M. Nicastro
406-5545-2031

Matthew Jones has been BNSF's contact with the City of Glendive.

8. Pinnacle Engineering
c/o Knight Nicastro Mackay
Anthony M. Nicastro
406-5545-2031

Pinnacle Engineering is the Engineering firm utilized by BNSF.

9. Deb Dion
Mayor
City of Glendive
c/o Moulton Bellingham PC
(406) 248-7731

Ms. Dion is the Mayor of the City of Glendive and has been privy to the communications between BNSF and the City of Glendive.

10. Karissa Miller
Baranko Environmental
c/o Moulton Bellingham PC
(406) 248-7731

Ms. Miller works for Baranko Environmental and is believed to have knowledge concerning the testing the City of Glendive did on the samples associated with BNSF's sewer lines.

11. Robert Autrey
Laboratory Supervisor
TENORM Measurement Solutions
c/o Moulton Bellingham PC
(406) 248-7731

Mr. Autrey is the Laboratory Supervisor of the lab where the testing of samples occurred and is believed to have knowledge regarding the test results.

K. SUBSTANCE OF ANY INSURANCE AGREEMENT THAT MAY COVER ANY RESULTING JUDGMENT.

The City of Glendive is a member of the Montana Municipal Interlocal Authority (MMIA) and is being provided a defense by MMIA. A copy of the Memorandum of Liability Coverage issued by MMIA will be produced to Plaintiff for inspection and copying upon request.

L. STATUS OF SETTLEMENT DISCUSSIONS AND PROSPECTS FOR COMPROMISE

The City is willing to engage in discussions for a compromise or settlement.

M. SUITABILITY OF SPECIAL PROCEDURES

The City does not believe that an special procedures are appropriate at this time.

DATED this 10th day of September, 2024.

MOULTON BELLINGHAM PC

By /s/ Adam Warren
ADAM WARREN
KETURAH SHAULES
27 North 27th Street, Suite 1900
P.O. Box 2559
Billings, Montana 59103-2559

ATTORNEYS FOR DEFENDANT