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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

LYLE PHILLIPS, ANNE DEE RENO, TURNER ASKEW, and BEN WHITTEN, Plaintiffs, v. CITY OF WHITEFISH and the BOARD OF COMMISSIONERS OF FLATHEAD COUNTY, Defendants, and CITY OF WHITEFISH, Third Party Plaintiff, v. THE BOARD OF COMMISSIONERS OF FLATHEAD COUNTY, Third Party Defendant, and DAN WEINBERG and ED McGREW, individually and on behalf of LET WHITEFISH VOTE, a ballot committee lawfully organized under the laws of Montana; MARY PERSON and MARILYN R. NELSON, Intervenors.	Cause No. DV-11-1535D Judge David M. Ortley **CITY OF WHITEFISH'S RESPONSE TO PLAINTIFFS' MOTION TO STRIKE**

The City of Whitefish (City) filed its motion for summary judgment and supporting brief with 28 statements of undisputed facts because no material issues of fact precluded summary judgment, and controlling law entitled the City to summary judgment. City's Br., Pp. 2-8.

In response, Plaintiffs filed their Response Brief and this motion to strike portions of the City's brief filed in support of its motion for summary judgment. In particular Plaintiffs seek to strike from City's brief statements of fact numbered 1, 3, 6, 8 and 19, and portions of the affidavit of David Taylor. Plaintiffs' motion, Pp. 3-6. Plaintiffs complain the City's statements should be stricken as inappropriate "characterizations of underlying documents, legal argument and conclusion of law" without supporting evidence in the form of affidavits or exhibits. Plaintiffs' motion, P. 2.

A. Supporting briefs and affidavits are not subject to a motion to strike.

Plaintiffs' motion to strike the above five statements of fact and portions of the affidavit are not appropriate. Rule 12(f) motions are generally viewed with disfavor and apply only to pleadings, not the brief and affidavit of an opposing party:

> (f) Motion to Strike. The court may strike from a **pleading** an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
>
> (1) on its own; or
>
> (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading (emphasis supplied).
>
> Mont.R.Civ.P. 12(f); 2-2 Moore' Federal Practice - Civil § 12.37.

Plaintiffs' motion should be denied because briefs and affidavits filed in support of motions for summary judgment are not a pleading as defined in Mont.R.Civ.P. 7. As a result, only material in a pleading may be subject to a motion to strike:

Only material included in a "pleading" may be the subject of a motion to

> strike, and courts have been unwilling to construe the term broadly .... Motions, briefs or memoranda, objections, or affidavits may not be attacked by the motion to strike.
> 2-12 Moore's Federal Practice - Civil § 12.37.

The Plaintiffs' reliance on *Hefferman v. Missoula City Council,* 2011 MT 91, 360 Mont. 207, 255 P.3d 80, to support its argument that the motion to strike may be used to strike summary judgment evidence is not persuasive to the facts in this case.

Since the City's statements of fact found in its brief and David Taylor's affidavit are not a pleading, the motion to strike should be denied as a matter of law.

B. Plaintiffs' motion to strike is an inappropriate response to City's motion for summary judgment.

The purpose of summary judgment is to encourage judicial economy and dispose of claims for which there remains no genuine issues of material fact which "serves to eliminate the expense and burden associated with unnecessary trials." *Robinson v. Big Horn County Electric Coop.*, 2009 MT 657, ¶ 7 (*Robinson*).

The well-established standard for summary judgment begins with the moving party who must establish both the absence of genuine issues of material fact and entitlement to judgment as a matter of law.

> Summary judgment should be granted if the moving party successfully carries its burden to establish that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. To satisfy its burden of proof, the movant must provide the court with evidence which clearly indicates what the truth is, and which excludes any real doubt as to the existence of a genuine issue of material fact. (Citation omitted.)
> *Thomas v. Hale* (1990), 246 Mont. 64, 802 P.2d 1255, 1256-7 (*Thomas*).

Then, the party opposing the motion must meet its Rule 56(e)(2) obligation to respond "by affidavits or as otherwise provided" in Rule 56 to "set out specific facts showing a genuine issue for trial." Mont.R.Civ.P. 56(e)(2). The shift of the burden of

proof to the party opposing the motion requires "substantial proof":

> Once the movant has discharged this burden of proof, the party opposing the matter must come forward with substantial evidence raiding a genuine issue of material fact. Rule 56(e), M.R.Civ.P. (Citation omitted.) *Thomas,* 802 P.2d at 1257.

In this matter, the City has met its burden to show there is no genuine issue as to any material fact through affidavits, other sworn testimony, and public record documents. The City has also established it should be entitled to its requested relief as a matter of law. The referendum is valid and constitutional and should be given its stated effect, the repeal of the 2010 IA and reinstatement of the parties' earlier agreement, the 2005 IA.

In response, the Plaintiffs have argued the 2010 IA is a lawsuit settlement, administrative, and not subject to referendum. The 2010 IA was property terminated so the County should have jurisdiction in the ETA. Plaintiffs' arguments in support of their motion for summary judgment and in opposing City's motion fail because Plaintiffs have not met their burden of proof as the movant for summary judgment or as the opposing party to City's motion.

By their motion Plaintiffs attempt to strike the City's underlying establishment of facts supported by affidavit testimony, verified pleadings and discovery responses, and the public record. Plaintiffs challenge the factual statements made in City's brief numbered 1, 3, 6, 8 and 19, based only upon the Plaintiffs' unsworn arguments, mere denials, speculation, and conclusory statements, all insufficient under long-standing Montana case law. *Ternes v. State Farm Inc.,* 2011 MT 156, ¶ 18, 311 Mont. 129, 257 P.3d 352; ; *Robinson v. Twenty-Second Judicial District Court, Big Horn County,* 2009 MT 657, ¶ 7; *Leichtfuss v. Malone,* 2003 MT 1182, ¶ 6, *Magone v. Aul* (1994) 269 Mont.

281, 887 P.2d 1235, 1236-7; *Thomas, Bradley v. General Mills, Inc.*, 2000 MT 3517, ¶ 4; *Cerek v. Albertson's, Inc.*, (1981) 195 Mont. 409, 411, 637 P.2d 509, 511. The party opposing the motion must respond by affidavits, or other sworn testimony, not the party's "pleadings, mere denial, speculation, nor conclusory statements". *UMLIC VP, LLC v. AMC Sullivan Photo, Inc.*, 2001 MT 3051, ¶ 7 (*UMLIC*). "The opposing party's facts must be material and of a substantial nature, not fanciful, gauzy nor merely suspicions". *Robinson*, 2009 MT at ¶ 8.

Furthermore, the Plaintiffs' motion to strike with its arguments, denials, speculation and conclusory statements and attached documents provided in support of their motion, fail to meet the Plaintiffs' obligation to "come forward with substantial evidence" disputing the City's statement of facts or raising a genuine issue of material fact to preclude the City's motion for summary judgment. *Thomas*, 802 P.2d at 1257; *Bradley*, 2000 MT 3517 ¶ 4; *UMLIC*, 2001 MT 3051, at ¶ 8.

1. Plaintiffs' motion to strike is insufficient to meet their Rule 56(e)(2) obligation to necessary to respond to City's summary judgment motion.

Rather than filing a motion to strike, the proper response to the City's brief and affidavit in support of its motion for summary judgment is a properly supported response by substantial evidence to dispute the City's characterization of facts. Rule 56(e); 11-56 Moore's Federal Practice - Civil, § 56.81.

Mont.R.Civ.P. 56(e)(2) provides the opposing party's obligations to respond to the movant's summary judgment "by affidavits or as otherwise provided in this rule". Rather than relying on their denials, speculation and conclusory statements, Plaintiffs must establish facts to the contrary – by affidavits made on personal knowledge with admissible evidence made by competent affiants or as allowed by Rule 56(e):

> (e) Affidavits; Further Testimony.
>
> (1) *In General.* A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.
>
> (2) *Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.
>
> Mont.R.Civ.P. 56(e).

Rather than making their response with the required showing of substantial evidence to dispute the City's statements, Plaintiffs chose instead to argue their political differences with the City.

2. Plaintiffs' objections to City's brief and affidavit are not supported by the evidence.

Consider Plaintiffs' objection to the City's first factual statement. The Plaintiffs argue the City has presented "no evidence to support its claims" that it is a fast growing community, concerned about maintaining its unique character due to its concern about protecting its economic base and should be stricken as having no relevance.

The City disputes Plaintiffs' bold assertion that it has presented no evidence to support the first factual statement or that the statement is not relevant to the underlying community issues and concerns which resulted in the referendum repeal. The City's first statement is supported by the affidavits of David Taylor and Richard Hildner, the City's responses to Plaintiffs' discovery, and the public record.

Plaintiffs also seek to strike portions of David Taylor's affidavit. Plaintiffs' motion, Pp. 6-7, because it "is designed to make Whitefish look good and Flathead

County look bad". Plaintiffs' motion, P. 6. As explained earlier, Plaintiffs' failed to meet their burden to establish their factual objection to Taylor's affidavit testimony by more than mere denial and speculation. Also, Plaintiffs have failed to meet their affirmative duty to respond by affidavits or other sworn testimony because conclusory or speculative statements will not suffice. *Robinson,* 2009 MT 657 at ¶ 8.

Rather than attempting to dispute the City's establishment of the first statement by meeting the opposing party's obligation to respond "by affidavits or as otherwise provided" by Rule 56, Plaintiffs argue inferences made from three pages in the City's Fiscal Year 2013 budget (Plaintiffs' motion, P. 3, Exhibit FF), the affidavit of David Taylor, the City's director of planning and building, a newspaper article from 2009 about a developer's decision to locate in Missoula and not Whitefish (Plaintiffs' motion, P. 4, Exhibit GG) and suggests the Plaintiffs' "could offer" expert affidavits, but conceding such testimony would not be relevant to the summary judgment motions (Plaintiffs' motion, P. 4).

Plaintiffs' argument fails to disprove City's first statement of fact and do not support striking portions of the affidavit.

Next, the Plaintiffs claim the third statement is "half true and half false." (Plaintiffs' motion, P. 4).

> The County has attempted to unilaterally withdraw from the 2005 IA and "take back" the ETA on two occasions, but both efforts have met with strong resistance from the City.

The City relies on the Court record.

The Plaintiffs argue statement 3 is not correct, but fails to provide substantial factual basis for their opinion. Instead, Plaintiffs admit as true that the County unilaterally withdrew from the 2005 IA but their offered explanation, "because it

considered the 2005 IA to be illegal", is irrelevant. Plaintiffs' motion, P. 4.

Apparently the Plaintiffs take no issue with the balance of the statement that the County attempted *to take back the doughnut* on two occasions, but both efforts have met with strong resistance from the City.

The Plaintiffs' objections to statement 3 lack merit.

Next, Plaintiffs object to the statements 6 and 8 which characterize the 2010 IA as the "third amendment" with the explanation that the first and second amendments were added to the 2010 IA as well as the third amendment, which is why the 2010 IA was called the *Restatement of Cooperation Interlocal Agreement.* Plaintiffs motion, Pp. 5-6.

In response to these objections, the City directs the Plaintiffs' attention to the four corners of the respective documents, which speak for themselves. The 2010 IA provided the underlying terms of the 2005 IA, the first and second amendments and the third amendments, into one agreement, hence its name "Restatement". 2010 IA, ¶¶ G, H, I; City's Response Br., Pp. 12-13; City's Reply Br., P. 5. The recitals to the 2010 IA explain that the first and second amendments to the 2005 IA were separate agreements but have been incorporated into the 2010 IA in paragraphs 4 and 6. 2010 IA, ¶¶G and H. The 2010 IA represents itself as the third amendment to the 2005 IA: "the parties enter into this Agreement to amend the Interlocal Agreement a third time". Plaintiffs' complaint that statement 8 casts the 2010 IA as the "'third amendment' limited to the addition of a term and duration clause" should fail for the same reason.

Plaintiffs' objections to statements 6 and 8 lack merit.

Plaintiffs also object to City's statement 19:

> The referendum repealed the City's approval of the 2010 IA, and restored the parties to the time before the Council's approval of R 10-46.

This statement appears to be a mixture of fact and conclusion of law, which the Court in its discretion may give the weight it deserves.

The City believes there can be no question of fact that the voters approved Resolution No. 1 as certified by the County Elections Department. The plain meaning of the purpose for the referendum was apparent on the petition for the referendum and on the ballot measure: the repeal of R 10-46, the City Council's approval of the 2010 IA, to reinstate the mutual withdrawal requirement of the 2005 IA. *See,* Aff. Hildner, ¶¶ 10-13, Exhibit E. The referendum's stated purpose should be given effect having been approved by the voters. The referendum's passage repeals the City Council's actions to approve 2010 IA, for the return to "a mutual withdrawal requirement between the City and County in the previous Interlocal Agreement." *See,* Aff. Hildner, Exhibit E.

None of the Plaintiffs' argument establishes their required obligation to respond as provided in Rule 56(e)(e). The Plaintiffs' motion to strike should be denied and the City's motion for summary judgment should be granted as a matter of law.

Therefore, the City respectfully requests that the Plaintiffs' motion be denied.

DATED this 24th day of January, 2013.

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CERTIFICATE OF MAILING

I certify that on this 24th day of January, 2013, a copy of the foregoing document was mailed, first class, postage prepaid, and addressed as follows:

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