BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Larsen v. Bell No. COPP 2018-CFP-014	DISMISSAL OF ALLEGED VIOLATIONS FINDING OF SUFFICIENT FACTS TO SUPPORT A CAMPAIGN PRACTICE ACT VIOLATION

On May 29, 2018, Cliff Larsen of Missoula, MT filed a campaign practices complaint against Matthew Bell of Missoula, MT. The complaint alleges that candidate Bell failed to provide a copy of a mailer sent out within ten days of an election that specifically referenced his opponent, Kimberly Dudik, to her campaign as required by the Clean Campaign Act. The complaint further alleges that the mailer in question, herein the "endorsement mailer," made several false or untruthfulful statements both disparaging candidate Dudik and promoting candidate Bell.

SUBSTANTIVE ISSUES ADDRESSED

The decision examines reference and notification obligations found in Montana's attribution statute, political libel statute, Clean Campaign Act and the Fair Notice provision, and the proper and timely reporting of campaign finance expenditures.

FINDINGS OF FACT

The foundational facts necessary for this Decision are as follows:

Finding of Fact No. 1: Montana's Primary elections will be held on Tuesday, June 5, 2018. (Montana Secretary of State.)

Finding of Fact No. 2: Matthew Bell filed a C-1 Statement of Candidate as a Democratic candidate for House District 91 in Missoula County on June 19, 2017, and later filed an Amended C-1 changing the Office Sought to House District 94 (also in Missoula County) on March 12, 2018. (Commissioner's Records.)

Finding of Fact No. 3: Kimberly Dudik filed a C-1 Statement of Candidate as a Democratic candidate for HD 94 with the COPP on January 16, 2018. (Commissioner's Records.)

Finding of Fact No. 4: State District candidate campaign finance (C-5) reports were due on or before May 7 (beginning of campaign through May 1, 2018) and May 29 (May 2 through May 24, 2018). (Commissioner's Records.)

Finding of Fact No. 5: Candidate Bell timely filed his initial C-5 finance report using the CERS system covering all campaign financial activity from January 1 through May 1, 2018. No expenditures or debts owed by the campaign specifically for the creation or distribution of mail pieces were included in this report, nor was any such activity included on amended versions filed on May 14 and May 21, 2018. (Commissioner's Records.)

Finding of Fact No. 6: Candidate Bell did not file a C-5 campaign finance report on or before May 29, 2018. Candidate Bell did file a C-7 finance report using the CERS system on May 24, 2018, that detailed all contributions received by the campaign between the dates of May 2 and May 24. No expenditure activities were reported by the campaign, as form C-7 is designed to report only contributions of $100.00 or more received by a candidate within certain time windows before the date of an election and does not allow for the reporting of expenditures made. (Commissioner's Records.)

Finding of Fact No. 7: The 10-day Fair Notice period before Montana's primary election runs from May 26 through June 4, 2018. (Commissioner's Records.)

DISCUSSION

The complaint alleges candidate Bell failed to meet the reference and notification requirements found in § 13-37-225, MCA. The Commissioner

examines the legislative history, past COPP rulings, and the application of § 13-37-225, MCA, in light of recent judicial rulings.

Further, the complaint alleges a violation of § 45-8-212, MCA, Criminal Defamation, which is outside the jurisdiction of the Commissioner. The Commissioner does, however, examine Montana's Political Libel statute, |§ 13-37-131, MCA, in the context of the allegations of this complaint.

1. Montana's Attribution Statute, Mont. Code Ann. § 13-35-225

Montana election law requires that campaign materials contain certain attributions indicting party who paid for the materials and party affiliation. Mont. Code Ann. § 13-35-225(1)-(2). In 2003, the 58th Legislature of the State of Montana, enacted House Bill 468 which added subsection 3 to Montana's attribution statute.

> (3) (a) Printed election material described in subsection (1) that includes information about another candidate's voting record must include:
>
> (i) a reference to the particular vote or votes upon which the information is based;
>
> (ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if closely related in time; and
>
> (iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge the statements made about the other candidates voting record are accurate and true.
>
> (b) The statement required under subsection (3)(a) must be signed:
>
> (i) by the candidate, if the election material was prepared for the candidate or the candidate's political committee and includes information about another candidate's voting record; or
>
> (ii) by the person financing the communication or the person's legal agent, if the election material was not prepared for a candidate or a candidate's political committee.

Mont. Code Ann. § 13-35-225(3) (2003).

This new provision of the statute went unchallenged until the fall of 2011 and unchanged until the early spring of 2012. On February 24, 2012, Judge Lovell of the United States District Court enjoined enforcement of section (3)(a) as unconstitutionally vague. In particular, Judge Lovell ruled that the words "closely related in time" and "the same issue" failed to put a person on notice of what was prohibited by or required by the statute. *Lair v. Murray*, 846 F. Supp. 2d 1116, 1121-1123 (D. Mont. 2012). For defending the constitutionality of this statute, and two others also at issue in that suit, in November 2012 the Court ordered the people of the State of Montana pay plaintiff $68,978.60 in attorney fees and costs.

In 2013, the 63rd Legislature, enacted House Bill 129 amending the requirements as shown by the underlining below:

> (3) (a) Printed election material described in subsection (1) that includes information about another candidate's voting record must include the following:
>
> (i) a reference to the particular vote or votes upon which the information is based;
>
> (ii) a disclosure of contrasting votes known to have been made by the candidate on the same issue if ~~closely related in time~~ the contrasting votes were made in any of the previous 6 years; and
>
> (iii) a statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge the statements made about the other candidates voting record are accurate and true.

Mont. Code Ann. § 13-35-225(3)(a) (2013).

After the close of the 63rd Legislature and when the statute became operative in October of 2013, the Commissioner of Political Practices was sued again, this time challenging the underlined passage above as being unconstitutionally vague. Even though the State conceded that the challenged

language was unconstitutional within 17 days after the lawsuit was filed, the people of Montana paid the plaintiff $37,500 in attorney fees and costs for the challenge to Mont. Code Ann. § 13-35-225(3)(a). *Monforton v. Motl, Fox and Gallagher*, Cause No 14-2-H-DLC (D. Mont. 2014).

Not to be deterred, the 65th Legislature again changed the language to require an attribution to include the following:

> (3)(a) Printed election material described in subsection (1) that includes information about another candidate's voting record must include the following:
>
> (i) a reference to the particular vote or votes upon which the information is based;
>
> (ii) a disclosure of all votes made by the candidate on the same legislative bill or enactment; and
>
> (iii) statement, signed as provided in subsection (3)(b), that to the best of the signer's knowledge, the statements made about the other candidate's voting record are accurate and true.

Mont. Code Ann. § 13-37-225(3)(a) (2015).

Unsurprisingly, the Commissioner of Political Practices was sued once again, this time by an entity National Association for Gun Rights, Inc. and an individual, J.C. Kantorowicz, and the people of Montana paid plaintiffs $18,900 in attorney fees and costs for stipulating to the unconstitutionality Mont. Code Ann. § 13-35-225(3)(a) in January 2018.[1] This portion of the statute is permanently enjoined by the Court's order from enforcement as violative of the First Amendment as of December 18, 2017.

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[1] Thus bringing the total amount money the State has paid to in attorney fees and costs to $125,378.60 for unconstitutional legislative enactments attempting to regulate speech in this manner during political campaigns.

Thus, to the extent the Complaint in this matter raises the issue of failing to disclose a vote or contrasting votes up on which Mr. Bell relied on in making his statements about Rep. Dudick's voting record, the Commissioner is enjoined from enforcing the statutory provisions at issue, and the allegations are dismissed.

2. Montana's Political Libel Statute, Mont. Code Ann. § 13-37-131

In 1995, the 54th Montana Legislature enacted a Political Civil Libel statute which provided:

> (1) It is unlawful for a person to willfully or negligently make or publish a false statement about a candidate's public voting record or to make or publish a false statement that reflects unfavorably upon a candidate's character or morality.
>
> (2) It is unlawful for a person to willfully or negligently provide false information to a candidate concerning another candidate's public voting record when the person knows or should know that the information will be made public during the course of a campaign.
>
> (3) For the purposes of this section, the public voting record of a candidate who was previously a member of the legislature includes a vote of that candidate recorded in committee minutes or in journals of the senate or the house of representatives. Failure of a person to verify a public voting record is evidence of the person's willful or negligent conduct if the statement made by the person or the information provided to the candidate is false.
>
> (4) A person violating subsection (1) or (2) is liable in a civil action brought by the commissioner or county attorney pursuant to 13-37-124 for an amount up to $1,000. An action pursuant to this section is subject to the provisions of 13-37-129 and 13-37-130.

Mont. Code Ann. § 13-37-131 (1995) (emphasis added).

In December of 1996, following a sufficiency finding by former Commissioner Ed Argenbright in *Somerville v. Dowell*, Peter Parisot[2] sued the

[2] Mr. Parisot was an employee of the Montana Democratic Party.

Commissioner of Political Practices for holding that he was negligent in providing information to candidate Dowell about candidate Somerville's voting record in violation of the above statute.

When the case came before the Montana First Judicial District Court, Judge Honzel held:

> Section 13-37-131, MCA, is inconsistent with the First Amendment to the United States Constitution and Article II, Section 7, of the Montana Constitution because it subjects a person, who negligently makes or publishes a false statement about a candidate's voting record, to civil liability. In doing so, the statute dampens the vigor and limits the variety of public debate by deterring would-be critics from voicing their criticism. By not requiring a plaintiff to prove that a false campaign statement was knowingly or recklessly made, the statute casts a substantial chill on the expression of protected speech and is unconstitutionally overbroad on its face.

Parisot v. Argenbright, 1997 Mont. Dist. LEXIS 307, 12 (June 2, 1997), limited to "negligent conduct" by *Parisot v. Argenbright*, 1997 Mont. Dist. LEXIS 128 (Aug. 6, 1997).

Further, in February of 1998, United States District Court Judge Shanstrom also found the negligence provisions in Mont. Code Ann. § 13-37-131(1) and (2), unconstitutional as it "offends the First and Fourteenth Amendments to the United States Constitution because it will inevitably lead to self-censorship[.]" *Montana Right to Life Ass'n v. Eddleman*, 999 F. Supp 1380, 1383–85 (D. Mont. 1998).

In 1999 the 56th Legislature enacted Senate Bill 292 which removed the negligence standard by amending subsections (1) and (2) of the political civil libel statute to read:

> (1) It is unlawful for a person to misrepresent a candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.
>
> (2) It is unlawful for a person to misrepresent to a candidate another candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.

Mont. Code Ann. § 13-37-131 (1999).

Following the February 2012 decision in *Lair v. Murray*,[3] the 63rd Legislature also included in 2013 House Bill 126 an amendment to the 1999 version of the political libel statute deleting "or any other matter that is relevant to the issues of the campaign" in subsections (1) and (2). Thus, the political libel statute now reads:

> (1) It is unlawful for a person to misrepresent a candidate's public voting record with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.
>
> (2) It is unlawful for a person to misrepresent to a candidate another candidate's public voting record with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.
>
> (3) For the purposes of this section, the public voting record of a candidate who was previously a member of the legislature includes a vote of that candidate recorded in committee minutes or in journals of the senate or the house of representatives. Failure of a person to verify a public voting record is evidence of the person's reckless disregard if the statement made by the person or the information provided to the candidate is false.
>
> (4) A person violating subsection (1) or (2) is liable in a civil action brought by the commissioner or county attorney pursuant to 13-37-

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[3] "Since there is no way to know what constitutes a matter 'relevant to the issues of the campaign,['] Section 13-37-131 'fails to clearly mark the boundary between permissible and impermissible speech...' As such it is unconstitutionally vague." *Lair*, 846 F. Supp. 2d at 1123-24 (citing *Buckley v. Valeo*, 424 U.S. 1, 41 (1976)).

> 124 for an amount up to $1,000. An action pursuant to this section is subject to the provisions of 13-37-129 and 13-37-130.

Mont. Code Ann. § 13-37-131 (2017).

Over the past twenty-three years and several lawsuits, the Legislature has narrowed the application of Mont. Code Ann. § 13-37-131 from negligent political libel to an actual malice standard regarding misrepresentation of an elected official's voting record. The allegations in this Complaint involve potential misrepresentation of Rep. Dudick's voting record in the legislature.

The Commissioner is required to interpret the statute narrowly, so as to avoid unconstitutionally regulating speech. An elected official's vote is a matter of public concern which is, in the instant case, being discussed publicly during a contested primary campaign when free speech rights are at their zenith.

"The First Amendment is the pillar 'of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Montana Right to Life Ass'n*, 999 F. Supp. at 1384 (citing *New York Times v. Sullivan*, 376, U.S. 254, 270(1964)). "Even when considering some instances of defamation or fraud, the Court has instructed that falsity alone may not suffice to bring the speech outside of the First Amendment; the statement must be a knowing and reckless falsehood[.]" *United States v. Alvarez*, 567 U.S. 709, 709 (2012) (plurality) (citing *New York Times*, 376 U.S. at 280).

The phrasing in Montana law, "with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false[,]" is an

actual malice standard, *id.* In other words, the standard requires a subjective test from the perspective of candidate Bell, rather than an objective test from the perspective of Rep. Dudik or her supporters.

The U.S. Supreme Court has held that evidence of actual malice requires a showing that "only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Further the evidence presented requires proof by "clear and convincing evidence." *Vanesco v. Schwartz*, 401 F. Supp. 87, 99 (E.D.N.Y. 1975), *aff'd* 423 U.S. 1041 (1978).

Having reviewed the facts from the investigation and candidate Bell's response, the Commissioner determines there is insufficient "clear and convincing evidence" that candidate Bell acted with "actual malice" in publishing his election communication, and therefore declines to find a violation of Mont. Code Ann. § 13-37-131.

3. Failure to follow the 'Fair Notice' provision of the Clean Campaign Act

Montana's Clean Campaign Act includes a notification requirement to opposing candidates for certain election communications "intended for public distribution in the 10 days prior to an election day[.]" Mont. Code Ann. § 13-35-402(1).

Finding of Fact No. 8: During a phone conversation held with the COPP on May 31, 2018, an employee of The Directory in Missoula

stated that candidate Bell's mailer was mailed on May 25, 2018. (Commissioner's Records.)

To determine if candidate Bell's material fell within the 10-day period, the Commissioner examines Admin. R. Mont. 44.11.607(2):

> For the purpose of that section, the date used to determine the date "intended for public distribution" for material distributed by:
>
> (a) print media is the date of the postmark.
>
> (i) If no postmark is provided on the mailing, the date the mailing is mailed or "dropped," as reported by the mail distributor, is the equivalent of the postmark date.

Therefore, the 10-day Fair Notice Period for Montana's 2018 primary election is May 26 to June 4, 2018 (FOF No. 7). The material in question was mailed on May 25, 2018 (FOF No. 8), outside the Fair Notice Period and thus was not required to be noticed to the opposing candidate. This allegation is hereby dismissed.

4. Failure to file required campaign finance reports

Once a complaint is filed, the Commissioner "shall investigate any other alleged violation ...." Mont. Code Ann. § 13-37-111(2)(a). This investigative authority includes authority to investigate "all statements" and examine "each statement or report" filed with the COPP. Mont. Code Ann. §§ 13-37-111, 123. The Commissioner is afforded discretion in exercising this authority. *Powell v. Motl,* OP-07111, Supreme Court of Montana, November 6, 2014 Order.

In reviewing candidate Bell's campaign finance reports for the 2018 election cycle, the Commissioner notes candidate Bell failed to file his campaign finance report due on May 29, 2018, which covered the period from May 2 through May 24, 2018 (FOF No. 4).

Finding of Fact No. 9: An invoice in the amount of $256.18, dated May 10, for the printing of the mailer and an invoice in the amount of $583.41, dated May 24, for the mailing of the material was provided to COPP by candidate Bell on May 31, 2018. (Commissioner's Records.)

Candidate Bell stated during COPP's investigation that he had designed the "endorsement mailer" himself and then, on or about May 21, 2018, uploaded it to Vista Prints for printing. Candidate Bell stated he subsequently picked the printed mailers up to hand deliver to The Directory for mass mailing between May 21 and May 24, 2018. In response to the complaint, candidate Bell submitted an invoice from Vista Prints dated May 10, 2018 in the amount of $256.18 for postcards and an invoice from The Directory dated May 24, 2018 in the amount of $583.41 for postage and handling (FOF No. 9).

As a campaign finance report was due on May 29, 2018 for the reporting period May 2-24, 2018, candidate Bell would have been required to report both the printing of the "endorsement mailer," as well as the postage and handling to distribute it, as either a debt or an expenditure. "An obligation to pay for a campaign expenditure is incurred on the date *the obligation* is *made* and shall be reported as a debt of the campaign until the campaign pays the obligation by making an expenditure." Admin. R. Mont. 44.11.502(2) (emphasis supplied). Further, "An expenditure is made on the date payment is made, or in the case of an in-kind expenditure, on the date the consideration is given." Admin. R. Mont. 44.11.502(3). "The date of each expenditure shall be reported in the reporting period during which it is made." Admin. R. Mont. 44.11.503(4).

Montana law requires "each candidate ... to file with the commissioner periodic reports of contributions and expenditures made by or on behalf of the candidate[.]" Mont. Code Ann. § 13-37-225. Further, candidates shall file campaign finance reports including contribution and expenditure disclosure information as required by Mont. Code Ann. § 13-37-226(3).

> Sufficiency Finding No. 1: Candidate Bell failed to disclose all contribution, expenditure, and debt records from May 2 to May 24, 2018 by neglecting to file his campaign finance report due on May 29, 2018. (FOF Nos. 6, 9.)

The Commissioner finds candidate Bell has violated Montana's campaign finance and practices law by failing to disclose and report campaign finance activity.

CONCLUSION

The cure for disinformation is not the silencing of speech, it is corrective speech. "'Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 232, 344 (1974)). As recently the Federal District Court recently held, "Montana's elected officials may take cold comfort in the notion that even a false statement may be deemed to make a valuable contribution to public debate as it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *Tschida v. Mangan*, 2017 U.S.Dist. LEXIS 206732, *12 (Dec. 18, 2017), *citing New York Times*, 376 U.S. at 279 n. 19 (quoting John Stuart Mill, *On Liberty* 15 (Oxford: Blackwell 1947)).

The Fair Notice Period, enacted by the Legislature in 2007, provides all candidates for office with an opportunity to respond and correct speech made against them during their campaigns. Mont. Code Ann. § 13-35-402. While the election communication here fell just outside of the fair notice period, corrective action and speech by both candidates has taken place, and the voters of House District 94 can take the collective information that resulted with them to the polls on election day.

The recitation of legislative history provided above is to shed light to the many attempts of former legislators to regulate speech of their opponents during a campaign. While it might appear to be objectively reasonable to ask our candidates and elected officials to be truthful in their assertions during a campaign, as Montana's experiment has shown, it is exceedingly difficult to legislate the contours of political speech without running afoul of our Constitutions.

We do know Montanan's take their election process very seriously. The voter is, ultimately, in the best position to judge the veracity of political speech and make those individual determinations on who and what to believe.

DECISION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner "shall investigate" any alleged violation of campaign practices law. Mont. Code Ann. § 13-37-111(2)(a). The mandate to investigate is followed by a mandate to take action. The law requires that where there is "sufficient evidence" of a violation

the Commissioner must ("shall notify," *see id.*, at § 13-37-124) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence to show that candidate Bell violated Montana's campaign practice laws, including, but not limited to the laws set out in the Decision. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The failure to fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. *See Matters of Vincent*, Nos. COPP-2013-CFP-006, 009 (discussing excusable neglect principles). Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. *See Matters of Vincent*, Nos. COPP-2013-CFP-006, 009 (discussing *de minimis* principles).

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a "sufficient evidence" Finding and Decision justifying a civil fine or civil prosecution of candidate Bell. Because of the

nature of the violations (the failure to report and disclose occurred in Lewis and Clark County), this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. *Id.*, at § 13-37-124(1). Should the County Attorney waive the right to prosecute (*id.*, at § 13-37-124(2)) or fail to prosecute within 30 days (*id.*, at § 13-37-124(1)) this Matter returns to this Commissioner for possible prosecution.

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that the Matter is waived back, this Finding and Decision does not necessarily lead to civil prosecution as the Commissioner has discretion ("may then initiate" *see id.*, at § 13-37-124(1)) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In setting that fine the Commissioner will consider matters affecting mitigation, including the cooperation in correcting the reports at issue when the matter was raised in the Complaint.

While it is expected that a fine amount can be negotiated and paid, in the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of campaign practice law, including those of Mont. Code Ann. § 13-37-226. *See id.*, at

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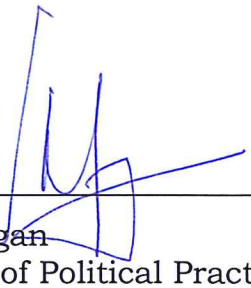
§ 13-37-128. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

DATED this 1st day of June 2018.



Jeffrey A. Mangan
Commissioner of Political Practices
Of the State of Montana
P. O. Box 202401
1209 8th Avenue
Helena, MT 59620
Phone: (406)-444-3919