



## B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
<u>Poplar High School</u>	<u>Poplar, MT</u>	<u>1986</u>	<u>Diploma</u>
<u>Gonzaga University</u>	<u>Spokane, WA</u>	<u>1990</u>	<u>B.A. Poli. Sci.</u>
<u>University of Montana</u>	<u>Missoula, MT</u>	<u>1993</u>	<u>J.D.</u>
<u>U.S. Army Ordinance Center</u>	<u>APG, MD</u>	<u>1994</u>	<u>OBC</u>
<u>National Advocacy Center</u>	<u>Columbia, SC</u>	<u>2000, 2005</u>	<u></u>
<u></u>	<u></u>	<u></u>	<u></u>

8. List any scholarships, awards, honors and citations that you have received:

U.S. Army ROTC Four-year Scholarship

Commissioned 2<sup>nd</sup> Lieutenant United States Army Reserve 1990;

Distinguished Graduate U.S. Army Ordinance Center 1994

Rotary International Paul Harris Fellow

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

I was not a member of Law Review.

**C. PROFESSIONAL BACKGROUND AND EXPERIENCE**

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
<u>Montana Courts</u>	<u>1993</u>
<u>United States District Court, District of Montana</u>	<u>1998</u>
<u>_____</u>	<u>_____</u>
<u>_____</u>	<u>_____</u>
<u>_____</u>	<u>_____</u>

11. Indicate your present employment. (List professional partners or associates, if any).

I am a partner in the firm of Cole, Amestoy & O'Brien, P.L.L.P. My partner is Edward A. Amestoy. I am the Deputy Phillips County Attorney. Edward Amestoy is the County Attorney.

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12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
<u>Cole &amp; Amestoy Law Firm</u>	<u>Attorney</u>	<u>1994-1997</u>
<u>Cole, Amestoy &amp; O'Brien, P.L.L.P.</u>	<u>Partner</u>	<u>1997- present</u>
<u>Phillips County</u>	<u>Deputy County Atty.</u>	<u>1994 -present</u>
<u>Valley County</u>	<u>Interim County Atty.</u>	<u>March-July2016</u>
<u>_____</u>	<u>_____</u>	<u>_____</u>
<u>_____</u>	<u>_____</u>	<u>_____</u>

13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

I have been continuously employed.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

I have a general law practice and I am a deputy county attorney. About sixty percent of my work week is spent on my duties as deputy county attorney and forty percent is spent on my private practice. I prosecute felony and misdemeanor cases, child abuse and neglect cases, and involuntary commitments. My private practice involves all types of family law (30%), probate law and estate planning (20%), contracts and contract litigation (10%), real estate transactions and litigation (10%), and farm and ranch matters (10%). I also represent local municipalities (10%) on government, zoning, employment and criminal prosecution. The remainder (10%) of my practice involves employment law, oil and gas leases, banking, foreclosures, personal injury, and insurance defense, water law, and collections.

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

I have some experience with bankruptcy law based on my representation of local banks and and a single, but lengthy case, involving a tort claim caught up in a national company's bankruptcy.

16. If you specialize in any field of law, what is your specialty?

I do not specialize in any field of law.

17. Do you regularly appear in court? Yes.

What percentage of your appearance in the last five years was in:

Federal court	<u>0</u>	%
State or local courts of record	<u>49</u>	%
Administrative bodies	<u>1</u>	%
Other -Justice and City Courts	<u>50</u>	%

18. During the last five years, what percentage of your practice has been trial practice? 85%

19. How frequently have you appeared in court? 5-8 times per month on average.

20. How frequently have you appeared at administrative hearings?

0 times per month on average.

21. What percentage of your practice involving litigation has been:

Civil	<u>15</u>	%
Criminal	<u>85</u>	%
Other	<u>          </u>	%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

I have not appeared before the Montana Supreme Court in the last five years.

23. State the number of jury trials that you have tried to conclusion in the last ten years. 3

24. State the number of non-jury trials that you have tried in the last ten years. 30

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

- A. Peter Helland, [phelland@hellandlawfirm.com](mailto:phelland@hellandlawfirm.com), P.O. Box 512, Glasgow, MT 59230, 228-9331, *Field v Field*, Valley County, DR-15-1, Hearing February 17, 2016, Judge McKeon, 654-1062;
- B. Joshua Campbell, [jcampbell@jardinelaw.com](mailto:jcampbell@jardinelaw.com), P.O. Box 2269, Great Falls, MT 59403, 727-5000, *Carney v. Malmend*, Phillips County, DV-13-14, no trial, Judge McKeon, 654-1062;
- C. Lindsay Lorang, [llorang@loranglaw.com](mailto:llorang@loranglaw.com), 410 3<sup>rd</sup> Ave. Havre, MT 59501, 265-1510, *State v. Vanhoesen*, Phillips County, DC-14-1, Judge Hayworth, 874-3335, no trial;
- D. Jeremy Yellin, [yellinlaw@qwest.office.net](mailto:yellinlaw@qwest.office.net), P.O. Box 564, Havre, MT 59501, 265-3303, *Hilton v. State of Montana*, Phillips County, DV-15-24, Hearing May 9, 2016, Judge McKeon, 654-1062;
- E. Craig Wahl, [craig@wahllawfirmpllc.com](mailto:craig@wahllawfirmpllc.com), 2722 3<sup>rd</sup> Ave North, Ste. 400, 294-0575, *Rappold v. Rappold*, DR-10-1, Hearing June 28, 2016, Judge McKeon, 654-1062;

F. The following attorneys also regularly appeared on behalf of defendants in felony and misdemeanor cases or opposite me in civil matters in the last two years:

Terrance Toavs, [ttoavs@nemont.net](mailto:ttoavs@nemont.net), 429 2nd Ave South, Wolf Point, MT 59201, 653-1624;

Bradley Finn, [duifinn@qwestoffice.net](mailto:duifinn@qwestoffice.net), 2812 1st Ave North, Suite 300, Billings, MT 59101, 272-2853;

Casey Moore, [CMoore2@mt.gov](mailto:CMoore2@mt.gov), 334 West Court Street, Suite 3, Glasgow, MT 59230; 228-2101

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I have not appeared before any commissions or boards.

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27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

I have not published any articles or lectured at any continuing legal education seminars.

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**D. PROFESSIONAL AND PUBLIC SERVICE**

28. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

State Bar of Montana, 1993 to present

Seventeenth Judicial District Bar Association, 1994 to present; President 2002-present

Montana County Attorney's Association, 1994 to present; deputies cannot hold any office

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29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

Rotary International, Rotary Club of Malta; Club President 1998-2000; Treasurer 2016

Milk River Bambino Baseball League; President 2007-2013

Malta Swim Team, 2005 to present

Malta Chamber of Commerce, 1997 to present; Director 2003-2009

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30. Have you ever run for or held public office? If so, provide the details.

I have not run for public office.

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31. Explain your philosophy of public involvement and practice of giving your time to community service.

I believe everyone should volunteer their time to make their communities better. I know that giving just a little bit of your time pays huge dividends in a small community. I believe lawyers should be members of service organizations. I served on the Malta Chamber of Commerce Board of Directors. I participate in community service projects with my Rotary Club. I believe I have made a difference in our community and would like to continue to make a difference as district judge.

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**E. PROFESSIONAL CONDUCT AND ETHICS**

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No. \_\_\_\_\_  
\_\_\_\_\_

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

36. Is there any circumstance or event in your personal or professional life that would, if brought to the attention of the Commission, Governor or Montana Supreme Court, affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No. \_\_\_\_\_  
\_\_\_\_\_

**F. BUSINESS AND FINANCIAL INFORMATION**

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

No.  
\_\_\_\_\_  
\_\_\_\_\_

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

I am a partner in Cole, Amestoy & O'Brien, P.L.L.P. and the sole shareholder of Dan  
O'Brien, P.C. I will resign those positions if appointed.  
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39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

I have not received fees or compensation other than from legal service.  
\_\_\_\_\_  
\_\_\_\_\_

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.

No.  
\_\_\_\_\_  
\_\_\_\_\_

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes.  
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42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities?  Yes  No

If not, please explain.

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43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?  
 Yes  No

If yes, please explain.

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44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No.

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## G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

I do my own legal research and write my own briefs. I research legal questions daily. I frequently write briefs in response to motions to suppress evidence or confessions in criminal cases. I have researched and prepared motions and briefs for civil cases on several issues. I have written and filed briefs in state and federal courts. I have researched and prepared written opinions for the Phillips County Commissioners, the City Council of Malta, and the Town Council of Saco.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

I have prepared numerous contracts, deeds, leases, and business entity documents. I have written numerous resolutions and ordinances for my municipal clients.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

I have attached a ten-page portion of my Plaintiff's response brief opposing summary judgment filed in *Link v. USA*, CV-08-54-GF-SEH.

48. What percentage of your practice for the last five years has involved research and legal writing?

40 %

49. Are you competent in the use of Westlaw and/or Lexis?

Yes. I use Westlaw.

**H. MISCELLANEOUS**

50. Briefly describe your hobbies and other interests and activities.

I am an avid golfer. I participate in my local golf league. I enjoy bird hunting in the fall and skiing in the winter. It's a great way to spend time with my family. I like playing guitar. I am self-taught and I love the challenge of becoming a better player.

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51. Describe the jobs that you have held during your lifetime.

During college and law school, I worked on my parents' farm and ranch. I worked one summer as bartender. I spent one summer as a legal intern at the Tort Defense Division in Helena.

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52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I regularly provided free legal advice to clients over the phone and in my office. I prepared wills, powers of attorney, deeds, contracts and parenting plans for those who couldn't afford the regular fee. I represented a client in court on a contested family law matter.

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53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

One of my first trials gave me faith in the jury process. The case involved a dog, a dog catcher, a .44 magnum, a two-way radio and an attempt at vigilante justice. After a dog bit a child, the dog catcher was contacted and the dog was taken to the pound. A friend of the dog's owner thought this was wrong and tried to single handedly resolve the issue. He went to the pound with a .44 magnum, and having watched too much TV, tried to shoot the lock off the dog's cage. Unsuccessful, he looked around for a plan B; he located a radio in the building and used it to call the dog catcher to arrange a trade - the radio for the dog. I ultimately charged him with burglary and theft. The case was tried twice to juries. The first jury hung and after a second trial, the jury found him guilty of theft but not burglary. His wife later revealed the facts of the crime in more detail than we had previously known. The jury's theory about what had happened - based on post jury interviews - matched the wife's explanation.

In talking with jurors, I have learned how seriously they protect rights guaranteed by our Constitutions. They hold the State to its burden of proof while balancing community safety. They value the need to protect the innocent and the higher hurdle the State has to meet to obtain a conviction. They work hard to try and figure out what happened; they try to determine the truth. Juries get it right when the evidence is fairly and properly presented. I respect the jury process and the role it plays in keeping our communities functioning properly.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

A good judge must be a professional. The judge sets the example for the lawyers, staff and parties that appear before the Court. A judge should show up on time and start on time. The judge should be prepared for court. A good judge holds everyone to the same standard of conduct.

A good judge knows the law of the case before it is heard and before material decisions are made.

A judge should be considerate of the witnesses and parties. The process is stressful and a judge should be understanding of this stress. People need to be heard and a judge should provide people this opportunity. The judge should try to treat witnesses and attorneys with a calm demeanor. Being polite and considerate also means that a judge requires the same behavior from those appearing in the court system. Judge McKeon is always calm and nice, but no one doubts he is in charge in the courtroom.

A good judge must be able to decide. A good judge should consider the facts presented and apply the law without undue delay. A judge cannot hold off deciding simply out of fear of making the wrong choice.

A good judge must have common sense. Judges decide the case on the facts that are presented to them. Most times, the parties do not give the judge the full picture. Common sense helps a judge figure out what happened.

A good judge must have courage. The correct decision is not always popular. A judge must have the courage to make the right decision even if doing so will cost the judge popularity or retention as a judge.





57. What items or events in your career have distinguished you or of which you are most proud?

I am proud that I practice law in rural Montana and that I feel like I belong to my community. Rural law practice is unique in that you cannot escape the results of your work. It would be easy to withdraw from community events and try to avoid contact with those in the court system. I chose to practice and live as a member of the community and not withdraw. So, I practice law in a way that allows me to represent my clients effectively while still allowing me to retain the respect of people that are on the opposite side. I try to treat the opponent with respect while still representing the interests of my client. I practice as my older peers practiced. When I started in 1994, my old partner Don Cole told me these things and at that time, I didn't realize the good advice and mentoring I was getting from him. He taught me how to practice in this community while making it my and my family's home.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

The judicial district encompasses the Fort Belknap Indian Reservation and part of the Fort Peck Indian Reservation. I have handled cases in the Fort Belknap Tribal Court. I am familiar with tribal sovereignty and jurisdictional issues that arise occasionally in criminal, abuse and neglect, and family law cases.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

My practice has allowed me to interact with and learn from the best lawyers that live and practice in all three of the district's counties. I think my experience makes me the best applicant for district judge.

**CERTIFICATE OF APPLICANT**

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 17th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

August 26, 2016

(Date)

Don O'Brien

(Signature of Applicant)

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A signed original **and** an electronic copy of your application and writing sample must be submitted by ***5:00 p.m. on September 1, 2016.***

**Mail the signed original to:**

**Office of Court Administrator  
c/o Lois Menzies  
P.O. Box 203005  
Helena, MT 59620-3005**

**Send the electronic copy to: [mtsupremecourt@mt.gov](mailto:mtsupremecourt@mt.gov)**

Application for District Judgeship  
Seventeenth Judicial District  
Writing Sample of Dan O'Brien

(SOGI ¶1). Montana does not use the term regulations but instead they are called administrative rules. In Montana, the violation of an administrative rule is evidence of negligence but is not negligence per se. *Stepanek v. Kober Const.*, 191 Mont. 430, 625 P.2d 51 (1981).

The Plaintiff was working inside the post office building. She was in the foreseeable zone of risk created by negligent acts inside the building. Therefore, USPS employee Carol Smith owed the Plaintiff a duty to use ordinary care and follow USPS regulations.

**B. USPS employee Carol Smith acted negligently when she failed to immediately remove the defective BMC from service.**

Carol Smith violated USPS safety rules when she failed to immediately remove the BMC from service when she could not move it. USPS safety rules require defective equipment to be immediately removed from service. (SOGI ¶35). This regulation is intended to prevent injuries. (SOGI ¶36).

The BMC was defective equipment. In working condition, Carol Smith could have easily moved it. (SOGI ¶16). If the BMC had a “frozen wheel” then it would be defective. (SOGI ¶40). Something was wrong with BMC that made it defective. It should have been immediately removed from service.

Carol Smith did not immediately remove it from service. Carol Smith kept it in service and planned to refill it with outgoing mail. (SOGI ¶14). The Plaintiff

was struck by the defective BMC as Carol Smith and John Cummings moved it to the front of the building to be loaded with outgoing mail. (SOGI ¶18-28). If Carol Smith had immediately removed the BMC from service, it would not have hit the Plaintiff. Her negligence is the actual cause of the Plaintiff's injury.

**C. The Plaintiff's claim is not barred by the independent contractor exception to the FTCA because USPS employee Carol Smith exercised direct control over John Cummings's actions when the accident happened.**

USPS employee Carol Smith had the duty, responsibility and authority to exercise direct control over the actions of John Cummings in moving the BMC. USA argues that John Cummings is the employee of an independent contractor and that it is not responsible for his negligence.

The Plaintiff agrees that under federal law, highway route contractors like Gail Cummings and the Plaintiff are independent contractors. The Plaintiff agrees that John Cummings, as Gail Cummings's employee, would normally be covered by the independent contractor exception to the Federal Tort Claims Act. However, the exception does not apply because John Cummings was acting under the direct supervision and control of USPS employee Carol Smith while he was pushing the BMC.

This case is distinguishable from the cases cited by the USA. In those cases, the alleged negligence arose out of actions or omissions of independent contractors

or contractors' employees in the performance of their actual contractual obligations. While the Plaintiff believes that John Cummings negligently moved the BMC, the negligence claim in this case arises out of the failure of the USPS employee's failure to follow regulations. This case is further distinguishable because a USPS employee exercised direct control over John Cummings's efforts.

The USPS maintained direct and complete control over the actions of John Cummings in moving the BMC. As acting supervisor, Carol Smith had the responsibility to immediately remove the defective BMC from service. (SOGI ¶3). She was not relieved of her responsibility simply because the employee of an independent contractor came to her assistance. If anything, her responsibility and level control grew because she still had to make sure that her bad decision did not make things worse. She was obligated to make sure that this defective piece of equipment was properly moved to a location out of service.

Carol Smith was doing her job when she attempted to move the BMC. John Cummings helped her do her employee duties. It's not his job or obligation. John Cummings cannot be as an independent contractor if he is doing Carol Smith's employee duties.

Carol Smith, not John Cummings, made the decision to keep the BMC in service. Carol Smith accepted John Cummings's offer to help. (SOGI ¶19). By

accepting his help, she also made the decision to allow John Cummings to move it to the front of the building. Carol Smith had the authority, and responsibility, to tell John Cummings to move it to a location out of service. John Cummings was only doing what Carol Smith gave him permission to do. He was being treated like an employee or servant. He was not an independent contractor when he pushed the BMC.

Carol never stopped exercising control over the BMC. Carol Smith was helping John Cummings push the BMC. (SOGI ¶23). While he was pushing, she continued to try to see why the BMC was not working. (SOGI ¶27). These facts show direct control of the movement of the BMC by an employee of the USPS while John Cummings was pushing the BMC.

The lack of any contractual obligation to move the BMC weighs against the independent contractor exception. John Cummings's pushing of the BMC was not part of the contractual duties as a highway route contractor's employee. (SOGI ¶20). John Cummings had no duty to help Carol Smith move the BMC. John Cummings's job was to transport and deliver mail **outside** of the post office. John Cummings, as an employee of an independent contractor, had no contract of his own with the USPS. The USPS's contract with Gail Cummings did not pass any liability onto the contractor for a USPS employee's failure to follow postal

regulations.

The independent contractor exception to the Federal Tort Claim Act does not apply because Carol Smith has direct control, supervision and responsibility over the movement of the BMC by John Cummings. The Ninth Circuit has held that the critical test for distinguishing an agent from a contractor is the existence of federal authority to control and supervise the detailed physical performance and day to day operations' of the contractor. *Carrillo v. United States*, 5 F.3d 1302, 1304 (9th Cir.1993). This case is special because John Cummings's actions were outside his contract duties and responsibilities. When he helped Carol Smith do her job in moving the BMC, he did it under her authority. He did it subject to her responsibility to remove defective equipment from service. She had the power and responsibility to control every last detail of the movement of that defective BMC. If she had declined his offer of help, he could not have moved the BMC. He was acting as her agent and her servant. She is the master. The independent contractor exception does not apply under these facts.

**D. Even if the Independent Contractor exception were to apply, the USA is still liable for the negligence of its employee.**

The USA is not relieved of a duty of care just because an independent contractor is involved. *Hines v. United States*. 60 F.3d 1442, 1449 (9<sup>th</sup> Cir. 1995). In *Hines*, the Ninth Circuit found that the Postal Service could be sued for

negligence of its employee for allegedly violating its regulations for screening driver applications even though it was the drunk driving of an independent contractor who injured the plaintiff in that case. *Id.* at 1448. Like in *Hines*, the Plaintiff filed her action based upon the negligence of the United States employees. (SOGI ¶47). It doesn't matter if John Cummings is an independent contractor so long as a USPS employee owed a duty of care to the Plaintiff and violated that duty. As argued above, the USPS employee owed a duty of care to the Plaintiff.

**E. Carol Smith failed to use ordinary care in moving the BMC.**

The USPS handbooks direct employees and contractors to push containers from the front and side (SOGI ¶44). This is done so that they can see ahead of the container as it is moving. The handbook established the standard of care for moving the BMC. John Cummings and Carol Smith were behind the BMC and looking down while it moved. (SOGI ¶22, 27 and ¶33). If Carol Smith had followed the handbook rules, she would have been able to see the Plaintiff and stop the BMC before it hit the Plaintiff.

**F. The Negligence of the USA was the proximate cause of the Plaintiff's injuries.**

**1. The negligence of Carol Smith is the direct cause of the Plaintiff's injuries.**

The actions and failures of Carol Smith caused the Plaintiff's injuries. A defendant's negligence is the direct cause of the plaintiff's injury if there is an uninterrupted chain of events from the negligent act to the plaintiff's injury.

*Fisher v. Swift Transportation Co., Inc.*, 324 Mont. 335, 344, 181 P.3d 601, 609, 2008 MT 105, ¶36. A party's act is the cause in fact of an event if the event would not have occurred but for that conduct. *Id.*

Here, the Plaintiff would not have been hit by the BMC but for Carol Smith's failure to remove the BMC from service and her failure to use the required technique for moving the BMC. But for Carol Smith's failure to use ordinary care in moving the BMC with John Cummings, the Plaintiff would not have been hit. The negligence of the USPS's employee was the actual and direct cause of the Plaintiff's injuries.

**2. The actions of John Cummings were not an unforeseeable intervening act.**

It was entirely foreseeable that someone would attempt to help Carol Smith in her efforts to move the BMC. The USA contends that John Cummings's actions were an unforeseeable intervening act. An intervening cause is one in which the facts indicate that a force came into motion after the time of the defendant's

negligent act and combined with the negligent act to cause the injury to the plaintiff. *Cusenbary v. Mortenson*, 296 Mont. 25, 32, 987 P.2d 351, 356, 1999 MT 221, ¶26. However, foreseeable acts are not independent and do not break the chain of causation. *Id.* at 296 Mont. 25, 32, 987 P.2d 351, 355, 1999 MT 221, ¶25. The question is whether a defendant could have reasonably foreseen that his conduct could have resulted in an injury to the plaintiff. *Fisher v. Swift Transportation Co., Inc.*, 324 Mont. 335, 341, 181 P.3d 601, 607, 2008 MT 105, ¶21. A plaintiff is foreseeable if she is within the zone of risk created by the defendant's negligent act. *Id.*

Here, Carol Smith knew that John Cummings was going to move the BMC. He asked if she need help and she gave her approval. (SOGI ¶18 and ¶19). John Cummings had moved them before. (SOGI ¶49). So, it was entirely foreseeable that he would help Carol Smith. Further, the whole episode from start to finish lasted only a couple of minutes. (SOGI ¶46). There is no break in time from Carol Smith's failure to immediately remove the BMC from service to the time it hits the Plaintiff.

In *Cusenbary*, the Montana Supreme Court held a tavern liable for injuries caused by a drunk patron who left the bar and then drove through the wall of the bar. The Court said it was a foreseeable intervening cause. *Cusenbary v.*

*Mortenson*, 296 Mont. 25, 36, 987 P.2d 351, 358, 1999 MT 221, ¶36. In *Fisher*, a truck driver left his semi-truck on the side of the road. After he left, a highway patrolman was injured when the parked truck slid while it was being towed. The Court held that it could not rule as a matter of law that the towing of the truck was an unforeseeable intervening cause breaking causation. *Fisher v. Swift Transportation Co., Inc.*, 324 Mont. 335, 346, 181 P.3d 601, 611, 2008 MT 105, ¶48. The breaks in time and space in *Cusenbary* and in *Fisher* were much greater than what occurred here. In the Plaintiff's case, it is only a matter of minutes from the time Carol Smith identifies that the BMC is broken and the time that the Plaintiff is struck.

It was foreseeable that the actions of John Cummings would endanger someone. The USA contends that it was unforeseeable that a slow-moving cart would hit the Plaintiff. However, John Cummings did several things wrong. He knew that BMC was defective, but he didn't know why. What precautions did he take? None.

It was entirely foreseeable that someone could be injured by the BMC while he was helping to move it. The BMC is big and heavy. (SOGI ¶7 and ¶8). He couldn't see where he was pushing it. (SOGI ¶26). He was pushing it hard. (SOGI ¶ 22). He was pushing the BMC from behind instead of from the side and

front. (SOGI ¶44). He was pushing it 10 to 15 feet across a room. (SOGI ¶45). He was pushing it with enough momentum to hit a grown woman and kept it moving to hit her a second time. (SOGI ¶32).

The defective condition of the BMC is what caused it to hit the Plaintiff. The USA contends that the BMC's condition itself did not cause the BMC to hit the Plaintiff. This argument ignores the actual conduct of Carol Smith and John Cummings. They were pushing it from behind because it wouldn't move easily. Because they were behind it, they couldn't see the Plaintiff. If the BMC wasn't defective, either person could have pushed it from the side and seen the Plaintiff in its path.

### CONCLUSION

Based upon the authority above, the Defendant USA's Motion for Summary Judgment should be denied.

Dated this 30<sup>th</sup> day of November 2009.

/s/ Dan O'Brien  
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