

**APPLICATION FOR**

**DISTRICT COURT JUDGESHIP  
Eighth Judicial District**

**A. PERSONAL INFORMATION**

1. Full Name: Michele Reinhart Levine
  - a. What name do you commonly go by? Michele
2. Birthdate: [REDACTED] Are you a U.S. citizen? Yes
3. Home Address: [REDACTED]  
Phone: [REDACTED]
4. Office Address: PO Box 2629/ 120 First Avenue North, Great Falls, Montana 59401  
Office Phone: 406-453-4500
5. Length of residence in Montana: 35 years
6. Place of residence for the last five years: Great Falls, Montana, from October 2012 to present.

<u>Dates</u>	<u>City</u>	<u>State</u>
October 2012 to present	Great Falls	Montana

## 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>
Park High School	Livingston, MT	1998	H.S. Diploma
College of St. Benedict	St. Joseph, MN	Transferred to Carroll College	
Carroll College	Helena, MT	2002	B.A.
University of Montana	Missoula, MT	2006	M.S.
Alexander Blewett III School of Law	Missoula, MT	2012	J.D.

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

#### Alexander Blewett III School of Law, University of Montana

- Recipient of American Bar Association Janet Steiger Anti-Trust/Consumer Protection Fellowship (2010)
- Marge Hunter Brown Research Assistantship (2010-2011)
- Robert D. Corette Law School Scholarship (leadership and public service) (2011)
- Justice William E. Hunt, Sr. and Mary V. Hunt Scholarship (leadership and public service)(2011)
- Graduated with Honors
- Member of ABA Negotiations Competition Team coached by Klaus Sitte
- Natural Resource Conflict Resolution Certificate

#### University of Montana (M.S.)

- Graduated with Honors

#### Carroll College:

- Graduated with Honors
- Member of Award-winning Speech and Debate team in Extemporaneous Speaking, Parliamentary Debate, and Prose, coached by Brent Northup

#### Park High School

- National Honor Society
- All State Country (set school record for the women's 3 mile race); All State Band; All State Extemporaneous Speaker; and All State Policy Debate

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.**

No. I was not a member of the 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>
Montana State Bar	2012
U.S. District Courts, District of Montana	2012
Montana Workers' Compensation Court	2012
Chippewa Cree Tribal Court	2015

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

I am a shareholder of Linnell, Newhall, Martin, and Schulke, P.C., in Great Falls, Montana. I work with my fellow partners, J. Kim Schulke, Stacy Tempel-St. John, former partner and current attorney Richard Martin, and our associate attorney Megan Miller. Wayne Linnell is of-counsel at our firm. Norman L. Newhall is a former partner who retired in 2017.

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>
<i>Law Firm:</i>		
Linnell, Newhall, Martin, & Schulke, P.C.	Partner	2018 - Present
Linnell, Newhall, Martin & Schulke, P.C.	Associate Attorney	2012 - 2017
<i>During Law School:</i>		
Missoula County Attorney's Office	Student Prosecutor	2011-2012
Montana Dept. of Natural Resources and Conservation	Law Clinic Intern	2011
Montana Department of Justice	Summer Intern	2010
<i>Government Agencies (Pre-law school, non-legal):</i>		
Missoula Office of Planning and Grants	Land Use Planner	2006 - 2009
Montana House Representatives (HD 97)	State Representative	2007 - 2012
Yellowstone National Park, North Entrance	Visitor Use Assistant	1999
Yellowstone Youth Conservation Corps, NPS	Crew Leader	2000
Yellowstone National Park, Tower Ranger Station	Visitor Use Assistant	2002, 2005

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

Not applicable.

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.**

My practice includes complex civil litigation. The bulk of my case load (approximately 90%) includes workers' compensation and personal injury cases on behalf of injured persons. These cases range from products liability, disputed medical causation matters including toxic chemical exposure, back injuries, brain injuries, farm and ranch hand injuries, and paraplegia. These cases involve substantial amounts of summary judgment briefing and numerous motions in limine. I have analyzed thousands of pages of medical records and discovery materials as part of my practice. I represent a wide range of people, including pre-release people doing back-breaking manual labor, certified nursing assistants, electricians, fire fighters, office workers, and widows and their children. Approximately 10% of my current case load is pro bono work, including a disputed parenting plan and a guardian ad litem matter.

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

**Missoula County Attorney's Office, Missoula, MT, May 2011 – May 2012**

*Legal Intern*

I handled all aspects of misdemeanor criminal cases for Missoula County. I processed and completed discovery and filed witness and exhibit lists. I negotiated plea agreements with defense attorneys; conducted legal research; wrote motions and briefs; represented the State at trials and hearings in Justice Court; and prosecuted a felony DUI jury trial under the supervision of a Deputy Attorney. I researched prospective jurors. I kept crime victims informed regarding the status of proceedings.

**Department of Natural Resources and Conservation, Missoula, MT, Summer 2011**

*Legal Clinic Student*

I researched and wrote legal memos on environmental laws, open meeting laws, and workers' compensation for volunteer firefighters. I gained knowledge and experience with school trust laws and management, road easements across State land, and forest fire suppression laws.

**Montana State Representative, Missoula, MT, Jan. 2007 – 2012**

*Three-Term State Representative, House District 97*

I researched, drafted, introduced, and passed many pieces of legislation on wide ranging topics. The majority party appointed me to be minority vice-chair of the Local Government Committee. I participated in lengthy hearings and scrutinized high volumes of legislation and public comments. I cross-examined witnesses; delivered speeches at legislative hearings and floor sessions; and was actively involved with legislation in numerous areas including insurance, labor, banking, land use planning, local government, natural resources, criminal statutes, and constitutional law. This experience fueled my passion for public service. I enjoyed teaching citizens about the legislative process and working with all kinds of people to solve all kinds of policy problems.

**Montana Department of Justice, Helena, MT, Summer 2010**

*American Bar Association Janet Steiger Anti-Trust and Consumer Protection Fellow*

I researched and wrote legal memos on anti-trust law, consumer protection, and ballot access. I wrote an appellate brief on a criminal case regarding stalking. I also researched and wrote a legal memo regarding a fraudulent telemarketer's compliance with a consent decree.

I also performed some citizen legislative lobbying (training citizens on the legislative process, testifying, and talking to legislators) on behalf of conservation and family agriculture organizations prior to law school and being an attorney.

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

My specialties include complex civil litigation, workers' compensation, personal injury (primarily motor vehicle crashes), family law, domestic violence, orders of protection, land use planning, and environmental law. I also have prior experience with handling misdemeanor assaults and traffic violations (including DUIs).

**17. Do you regularly appear in court?**

I do not regularly appear in court but my courtroom experience includes bench trials and hearings in personal injury cases, family matters, orders of protection, and guardian ad litem cases. The bulk of my bench and jury trial experience was for the Missoula County Attorney's office as discussed above.

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

Federal court	<u>5%</u>
State or local courts of record	<u>10%</u>
Administrative bodies	<u>84%</u>
Legislature	<u>1%</u>

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

Approximately ninety percent of my practice has been dedicated to civil litigation matters either in State District Court, U.S. District Court, or the Workers' Compensation Court. I have also appeared in the Chippewa Cree Tribal Court.

**19. How frequently have you appeared in court?**

The frequency of my court appearances varies. I have court hearings at least a few times per year, if not more, either related to workers' compensation matters, pro bono family law cases, or civil matters in State and Federal District Courts.

**20. How frequently have you appeared at administrative hearings?**

I appear several times per month at Workers' Compensation Dispute Mediations, pursuant to ARM 24.28.106. I file multiple petitions for trial in the Workers' Compensation Court each year. I have also participated in hearings before the Workers' Compensation Court, typically on an annual basis. Many of the matters settle prior to trial.

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

Civil	100%
Criminal	0%
Other	0%

**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.**

No.

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

One felony DUI trial (Missoula County Student Prosecutor, with supervision from a Deputy Attorney)

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

- One bench trial in Workers' Compensation Court
- Multiple bench trials in Justice Court (as a student prosecutor)
- Several disputed District Court hearings regarding family law cases

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.

Opposing Counsel	Caption	Dates of Trial	Judge
Stephanie Oblander 104 – 2 <sup>nd</sup> Street South, Suite 400 Great Falls, Montana 59401 (406)453-8144 Counsel for Allstate	<i>Kristi Kleinschmidt v. Allstate</i> , CDV 20-0392	Not yet known	Judge John Kutzman (406)454-6897
Patricia Klanke Drake Law Firm, P.C. 111 North Last Chance Gulch Suite 3J, Arcade Building Helena, MT 59601 (406)495-8080 Counsel for Darian Higbee	<i>Deanna Morsette v. Darian Higbee</i> , Cause No. BVD-19-0714	March 2021	Judge James Manley (406)883-7250
Marshal Mickelson Robert M. Carlson Corette, Black, Carlson & Mickelson 129 West Park Street PO Box 509 Butte, MT 59703 (406)782-5800 Counsel for Bradbury	<i>Diego Ramirez v. Ashlyn Bradbury</i> Cause No. DV-20-104C	Not yet known	Judge John Brown (406)582-2150
Lance Shurtleff/Christine Stickley, Gordon, Rees, Scully, Mansukhani, LLP 555 – 17 <sup>th</sup> St., Suite 3400 Denver, CO 80202 (303)534-5160 Counsel for Killpack Trucking, Inc.	<i>Kayla Lemmings v. Killpack Trucking Inc.</i> (pro hac vice), Case No. 18-CV-210-J (Consolidated with Case No. 18-CV-209-J)	October 2020	Judge Johnson (U.S. District Court, Wyoming) (307)433-2170

<p>Joe Maynard, Crowley Fleck PLLP PO Box 2529 Billings, MT (406)252-3441 Counsel for Albertsons</p> <p>Kelly Wills Wills Law Firm PO Box 1510 Missoula, MT 59806 (406)541-8560 Counsel for Amtrust Ins. Co. of Kansas</p>	<p><i>Cassie Smith v. Albertsons and Amtrust Ins. Co. of Kansas, WCC No. 2020-5130</i></p>	<p>Likely January 2021</p>	<p>Judge David Sandler (406)444-7794</p>
<p>Bradley J. Jones Bulman Jones &amp; Cook PLLC PO Box 8202 Missoula, MT 59807-8202</p> <p>Quinlan O'Connor Haley Nelson Special Assistant Attorneys General Montana Department of Labor &amp; Industry PO Box 1728 Helena, MT 59624-1728 (406)444-1689</p>	<p><i>John Rice v. Mary Jo Johnston and Uninsured Employers' Fund, WCC No. 2020-5082</i></p>	<p>Likely the week of March 8, 2021</p>	<p>Judge David Sandler (406)444-7794</p>
<p>Kelly Wills Wills Law Firm PO Box 1510 Missoula, MT 59806 (406)541-8560 Counsel for MCCF</p>	<p><i>Jeffrey Herman, Jr. v. Montana Contractor Compensation Fund, WCC No. 2018-4426</i></p>	<p>Summary Judgment Motions are pending</p>	<p>Judge David Sandler (406)444-7794</p>
<p>Charles Adams Montana State Fund PO Box 4759 Helena, MT 59604 406-495-5314</p>	<p><i>Vince Burns v. Montana State Fund, WCC No. 2020-2972</i></p>	<p>Resolved prior to trial</p>	<p>Judge David Sandler (406)444-7794</p>



Charles Adams Montana State Fund Helena, MT 59604 PO Box 4759 406-495-5314	<i>Janie Carter v. Montana State Fund, WCC No. 2019-4703</i>	Resolved prior to trial	Judge David Sandler (406)444-7794
Leo Ward Browning, Kaleczyc, Berry & Hove, P.C. PO Box 1697 Helena, MT 59624 (406)443-6820	<i>Todd Jankord v. Liberty Mutual Ins. Co., WCC 2017-4135</i>	The matter has currently been placed in abeyance.	Judge David Sandler (406)444-7794
Mark Bauer, 506 1 <sup>st</sup> Avenue North P.O. Box 1423 Great Falls, MT 59403 (406)727-0800 Counsel for McLaughlin	<i>Monty McLaughlin v Jessica Stewart, BDR-19-521, ADR-19-522(b) (dueling Orders of Protection)</i>	Hearing held on 12/11/19 regarding Orders of Protection	Judge Elizabeth Best (406)771-3950
Christopher R Betchie Hull, Swingley & Betchie PC. P.O. Box 534 Helena, MT 59624 (406)-204-5710 <a href="mailto:christopher@hullmtlaw.com">christopher@hullmtlaw.com</a> Attorney for Ian Manor	<i>In Re the Parenting of BTS, Jessica Stewart v. Ian Manor, Cause No. ADR-2011-407</i>	The parties are trying to resolve disputes regarding an Amended Parenting Plan through mediation at this time.	Standing Master Dave Grubich (406)454-6705
Jeffrey S. Ferguson 410 Central Ave., Suite 515 PO Box 109 Great Falls, MT 59403 (406)453-3275	<i>In Re the Marriage of Cyrus Watson &amp; Sharon Watson, DDR 18-0577</i>	That matter resolved via a mediated agreement.	Judge John Parker (406)771-6566
Trevor Carlson Carlson Law, PLLC PO Box 3703 600 Central Ave., Ste 412 Great Falls, MT 59403 (406)750-0250 Attorney for Katherine Walker  James Gardner Big Sky Justice	<i>In Re the Marriage of Katherine Walker &amp; Max Walker, ADR 19-028</i>  (Guardian Ad Litem Matter regarding a parenting plan dispute)	Temporary Order of Protection Hearing, September 16, 2020	Standing Master Dave Grubich (406)454-6705

417 Central Ave., Suite 2B PO Box 1963 Great Falls, MT 59403 (406)761-1212 Attorney for Max Walker			
Victoria Francis Assistant U.S. Attorney U.S. Attorney's Office 2601 2 <sup>nd</sup> Ave. N., Suite 3200 Billings, MT 59101 (406)247-4633  Melissa Hornbein Former U.S. Attorney Currently available at: 103 Reeder's Alley Helena, MT 59601 (406)708-3058	<i>Alene Ciaverelli v. United States of America,</i> CV18-1-GF-BMM (co-counsel with J. Kim Schulke)	The matter resolved prior to trial.	Judge Brian Morris, U.S. District Court of Montana (406)454-7800
Jim Lippert PO Box 1636 Big Timber, MT 59011 (406)932-5410  Vuko Voyich Anderson & Voyich PO Box 1409 Livingston, MT 59047 (406)222-9626	<i>Helen Biddulph and John Biddulph, v. Massey Services, Inc. and Checkerboard Cattle Co.,</i> DV-16-19	The matter resolved prior to trial.	Judge E. Wayne Phillips & Judge Randal Spaulding (406)323-1701
Leonora Coles, Esq. Formerly with Montana State Fund Currently at Odegaard, Kovacich, Snipes 845 Great Northern Blvd. Helena, MT 59601 (406)204-7439	<i>Darlene Lee v. Montana State Fund,</i> WCC 2019-4729	The matter resolved prior to trial.	Judge Dan Wilson (406)758-5906

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

I regularly advocate on behalf of injured workers in workers' compensation disputes before the Department of Labor and Industry in mediation proceedings. While I have filed several Petitions for Trial in

Workers' Compensation Court every year, very few of the cases proceed to trial. I have appeared at hearings in the Worker's Compensation Court a few times over the past five years. I have successfully negotiated settlements with adjusters and opposing counsel for hundreds of clients over the years.

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.**

On April 24, 2020, I presented on the best practices and ethical duties for managing client contacts from the initial intake meeting through completion of the case, for the Montana Trial Lawyers. In April 2018, I helped organize the Montana Trial Lawyers CLE in Great Falls, Montana, and facilitated some of the panel discussions. I have also authored the following articles:

MTLA Trial Trends	Summer 2015	Workers' Compensation Section Legislative Update
MTLA Trial Trends	Summer 2018	Workers' Compensation Section Independent Medical Examinations

#### **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.**

- Cascade County Bar Association, *Member*, 2012 to present
- Montana Bar Association, *Member*, 2012 to present
- National Trial Lawyers Top Lawyers Under 40, *Member*, 2020
- Workers Injury Law & Advocacy Group (WILG), *Member*, 2012 to present
- Montana Trial Lawyers Association, *Member*, 2012 to present

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.**

- Kairos Youth Homes, *former Board Chair/current member*, 2012 to present
- Junior League of Great Falls, *Past President, Membership Chair, Nominating Chair*, 2012 to 2019
- Carols' List, *Former Board Member*, 2012 to August 2020
- Cascade County Zoning Board of Adjustments, *Vice Chair/Member*, 2018 to present
- Montana Board of Environmental Review, *Member*, 2015 to 2017

For Junior League of Great Falls, I chaired meetings, organized volunteer and membership events, edited organizational documents and policies, attended leadership conferences, assisted with placement of new board members, participated in fundraising activities, and volunteered at the Children's Museum of Montana, Toby's House, and the Science, Technology, Engineering, Math (STEAM) Expo for the students of Great Falls Public Schools.

I currently serve as a board member (and former board chair) of a local non-profit youth home organization, Kairos Youth Services. We serve young people that have been placed by the Montana Child and Family Services Division, or by juvenile probation officers. We also serve youths have severe emotional needs at our therapeutic group home. Through the Chafee Foster Care Independence Program, we offer assistance with life skills to prepare foster care young people for their transition into adulthood. These services have helped struggling students learn the tools needed to secure housing, jobs, and college opportunities. My activities include reviewing the financial information, the organization's status, human resource challenges, and the status of regulatory compliance. We make decisions to benefit the organization and follow its mission.

I also serve as the Vice Chair of the Cascade County Zoning Board of Adjustments. I was appointed by the Cascade County Commissioners. In this position, I apply the zoning regulations and zoning laws to special use permit applications, with the assistance of staff, public and agency comments, and insight from the Cascade County Attorney's office. I chair hearings, and direct citizens to keep comments relevant and within the Board's jurisdiction. After reviewing hundreds of pages of project materials and public comments, I have proposed mitigation measures for complicated development projects.

**30. Have you ever run for or held public office or sought a judicial appointment? If so, provide the details.**

This is my first time seeking a judicial appointment. From 2007 to 2012 I served three terms as a legislator in the Montana House of Representatives, for House District 97, in Missoula. I am very familiar with the elements of campaigning for office: raising money, knocking doors, organizing fundraisers, and making phone calls to constituents and community leaders.

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

My passions include using my time and talent to be of service to others and to make a difference in my community. My empathy runs deep for fellow humans and I am committed to treating others with compassion. Sometimes, clients call me and say "I just don't know how much longer I can take it." I take pride in helping these individuals in their time of crisis whether it be chronic pain, anxiety, depression, poverty, or other challenges. One of the best gifts that we can give to each other is a sense of hope. I tell my clients that we can help them get through this temporary situation. My clients are often people who find themselves entwined in the judicial system due to poverty, substance abuse, or mental illness. As attorneys we are called to continually find ways to better serve people. I also practice my public involvement philosophy by volunteering on several community boards as well.

### **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.**

I have sold Isagenix products over the years to family and friends from 2016 to present.

- 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.**

Upon appointment, I would resign as a shareholder of Linnell, Newhall, Martin, & Schulke, P.C.

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 sold Isagenix products over the years. The amount is less than 1% of my income.

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

42. **Have you filed appropriate tax returns as required by federal, state, local and other government authorities?**

Yes

**If not, please explain.**

Not applicable

43. **Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?**

No

**If yes, please explain.**

Not applicable

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

## **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 handle my own legal research and brief writing. I conduct legal research and writing on a weekly basis, primarily for workers' compensation and personal injury cases. My writings include summary judgment motions and briefs; motions in limine, parenting plans; orders of protection; disputes over expert witnesses or independent medical examinations; and discovery disputes.

- 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.**

My writing frequently includes drafting letters requesting wage loss benefits and medical benefits from insurers on behalf of injured persons. I have also drafted proposed orders, proposed findings of fact and conclusions of law, settlement brochures, settlement documents, discovery requests and responses, and frequent letters to 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. The writing sample should be as recent as possible.**

Attached is my most recent writing sample. It was a Motion in Limine response, filed on July 17, 2020, pro hac vice in the U.S. District Court of Wyoming. I represent a Montana resident along with co-counsel, Richard Martin and Laurence Stinson. Our client was injured in a motor vehicle crash in Wyoming. I opposed the Defendant's Motion in Limine, arguing that the evidence of multiple cell phones in the truck driver's vehicle was admissible. The Court agreed and denied Defendant's Motion in Limine.

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

At least fifty percent of my practice involves legal research and writing.

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

Yes

## **H. MISCELLANEOUS**

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

Being of service to others is very important to me. Serving on community boards helps me meet that need. I also have been active in recruiting women to seek elected and appointed roles because it is important to me to see diversity in gender and perspective within various branches of Government.

When not working or volunteering my time in the community, I enjoy spending time with my family. On summer weekends my family and I enjoy camping in the great outdoors. We love splashing in the creek, checking out bugs and worms, fishing and looking for fish, and of course, roasting marshmallows. I also strive to be a better person and learn new things, such as via TED Talks, podcasts, personal growth resources. Finally, I occasionally participate in sprint triathlons. Long distance running and triathlons have taught me self-discipline, time-management, and mental grit to schedule and complete the training exercise programs necessary to adequately prepare for endurance competitions.

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

Growing up in a blue collar family, as the daughter of a landscaping business owner and a social worker, I was taught the values of hard work, accountability, and empathy. One of my first paid jobs in high school was doing yard maintenance and fence painting. A friend and I had a small yard maintenance business. I also worked as a housekeeper at a local hotel. In the afternoons, I worked at fast food front counters, including Hardee's one summer and McDonald's the next. After graduating from high school, I was a summer camp counselor at Saint Thomas Church Camp, between Neihart and Monarch.

In summers between college semesters, I worked in Yellowstone National Park. At age 19, I was a Visitor Use Assistant at the North Entrance in Gardner, Montana. Visitors entering the park received the daily speech from me about the fee, safety rules, a map, a newspaper, and a warning handout about the dangers of bison. At age 20, I served as a Yellowstone Youth Conservation Corps Crew Leader, leading high school students on front country and back country maintenance projects from painting amphitheaters, to trail clearing fallen trees using a chain saw. For two separate summers, I was a Visitor Use Assistant at Tower Ranger Station in Yellowstone, alerting people to the dangers of the backcountry, prior to issuing backcountry permits. I also drove the ambulance on occasion and helped manage traffic jams caused by bears near the road. I also served as a family liaison regarding search and rescue operations for a missing person.

While at Carroll College, I interned with the Montana Environmental Information Center (MEIC) where I did a project on the status of subdivision growth in Montana and served as a legislative intern at the 2001 Legislative Session.

After college, I worked for Northern Plains Resource Council, a conservation and family agriculture organization. I was a community organizer and a legislative lobbyist. My projects included working with citizens on the Good Neighbor Agreement with the Stillwater Mine. Thanks in part to the agreement, the Mine went beyond minimal environmental standards to manage its waste and protect the water. It became an award-winning environmental leader. I also helped pass a local coal bed methane reclamation ordinance in Rosebud County, working with local farmers, ranchers, and members of the Northern Cheyenne Tribe. Surface owner protection legislation for property owners in split estate situations was also one of my legislative projects.

After leaving Northern Plains, and after obtaining a Master's of Science in Environmental Studies, I became a land use planner. I handled subdivision and zoning projects for the Missoula City-County



Office of Planning and Grants (as it was known at that time). I advised local governing bodies, developers, and citizens about project proposals. I worked with the local County Attorney's Office, the County Commissioners, the City Attorney, and City Council members. I helped resolve conflicts through mitigation of negative impacts, to improve project design, and to address concerns from agencies and citizens. This work led to a desire to help local governments make good, legally defensible, land use decisions as a lawyer someday. Thus, I went to law school.

During my time as a land use planner, and subsequently as a law student, I ran and served three terms as a Montana State House Representative as discussed above. I worked on topics including land use planning, energy, workers' compensation insurance, and licensure disputes. I sharpened my conflict resolution skills by working with a wide range of people on a variety of topics.

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

On behalf of the Cascade County Law Clinic and Montana Legal Services Association, I have handled a variety of pro bono matters. I represented a parent in a contentious parenting plan dispute for about two years. I have helped victims of domestic violence obtain temporary and permanent orders of protection and have assisted with a dissolution of marriage involving domestic violence. In addition, I served as the guardian ad litem in a parenting plan dispute involving jurisdictional questions and the Indian Child Welfare Act. I currently am the guardian ad litem in a contentious parenting plan matter involving allegations of sexual assault. The case involves intensive interviewing of medical providers, mental health providers, law enforcement, social workers, and friends and family members of the parties.

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

Article II, Section 16, of the Montana Constitution provides that “Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character.” The Justice System is a critical place for people to bring their legal conflicts, as well as for victims and defendants to have their day in Court. However, the Courts are not easily accessible to all. My views about the importance of access to justice have been shaped by my pro bono clients and by those who have led the charge to close the justice gap.

In the winter of 2019, an elderly woman with a walker limped into a volunteer law clinic being operated by the Cascade County Law Clinic at a local college. The woman was in pain on several levels. She needed immediate help getting a divorce. She had limited income. She felt overwhelmed by the situation. She was in tears. Her husband had already consulted with the Cascade County Law Clinic. I was able to help her on a pro bono basis through the Montana Legal Services Association. She had difficulty advocating for herself and her needs. Years of verbal abuse had taken a toll on her self-worth. I helped her complete the dissolution process, and safely get her belongings back. She was able to make a fresh start. This further helped me appreciate the critical importance of pro bono work and the services provided by the Cascade County Law Clinic and Montana Legal Services for people who are unable to successfully navigate the legal system on their own.

Chief Justice of the Montana Supreme Court, Karla Gray also shaped my views on access to justice. As a young legislator, in January 2007, I heard her deliver the State of the Judiciary Address at the State Capitol. She called for help in “meeting our constituents needs for – and constitutional guarantees to – quality and reasonably timely justice.” Her leadership and vision helped create a Self-Help Law Program to provide all Montanans with user-friendly information to assist with Court access, especially for pro se litigants. Chief Justice Gray helped create the national Self-Represented Litigants Network and she helped write the national book for judges on Self-Represented Litigants. She helped create the statewide self-help law program. The program has helped thousands of Montanans.<sup>1</sup> Through Gray’s efforts, the self-help law forms on the Supreme Court’s website have helped pro se litigants and pro bono attorneys (like me) navigate family law matters. While good work on this front has been done to date, more work is needed. Approximately 167,000 low income Montanans need assistance with legal problems each year.<sup>2</sup> Justice Patricia Cotter stated that:

All of society suffers when basic legal needs are not met. Research shows that unmet legal needs affect especially vulnerable populations: victims of domestic violence, people affected by mental illness or physical disability, Native Americans, persons with limited English proficiency, the elderly and veterans.<sup>3</sup>

Justice Cotter’s words are still true today. We must continue to find ways to assist those needing help accessing the justice system, especially pro bono and pro se litigants.

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<sup>1</sup> See Justice Beth Baker, A **Tribute** to Chief Justice **Karla M. Gray**, 78 **Mont. L. Rev** (2017).

<sup>2</sup> Access to Justice Commission Report (Apr. 8, 2015).

<sup>3</sup> Guest Opinion, Great Falls Tribune (Nov. 13, 2015).

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

Curiosity – There is not enough time in the day to know it all or do it all. Thus, new judges must have curiosity to quickly learn the areas that they do not yet know. They must rely on others for mentorship, training, and how to do the job. Luckily there are many wonderful trainings and very kind and generous District Court Judges both locally and across Montana, who are willing to help teach new Judges the ropes. A curious mind also helps keep the job interesting and entertaining. Curiosity helps a person stay alert in court hearings and ask thoughtful questions of the parties.

Efficiency – Given the crushing workload of youth in need of care cases, criminal cases, and civil cases, there is a need to move the Court’s business along in a reasonably timely fashion by running efficient hearings. Efficiency is also required for issuing orders that correctly apply the law in a timely manner. Parties deserve receiving timely decisions one way or another for closure or appeal purposes. Justice delayed can be justice denied.

Dedication – An energetic person with a strong work ethic is needed to tackle the heavy dockets. Judges must sometimes be willing to show up early and stay late to get orders out in a reasonably timely manner.

Civility – Judges see the good, the bad, and the ugly. Sometimes parties lose their tempers whether it be in person or in writing. Lately, with frequent online hearings there are sometimes glitches and delays. It takes patience to handle these situations while remaining calm. Decorum and civility from the judge can set the tone for the parties. It is still possible for people to disagree without being disagreeable.

Incisiveness—Judges need to intelligently analyze the facts, decide what is relevant, apply the applicable law, and reach a reasoned conclusion. Judges must make tough calls, including how to sentence duly convicted defendants. Judges also need good judgment to do what is right and just, even when the decision is difficult or unpopular.

**55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.**

Stare decisis is the “preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827-828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). The U.S. Supreme Court has held that “special justification—over and above the belief that the precedent was wrongly decided” is required to overturn precedent. *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 455-456, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463, 472, (2015). In Montana, “[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” *ALPS Prop. & Cas. Ins. Co. v. McLean & McLean, PLLP*, 2018 MT 190, ¶30, 392 Mont. 236, 247, 425 P.3d 651, 659, (2018) citing Section 1-2-101, MCA. The Montana Supreme Court has held that “*stare decisis* does not require us to perpetuate incorrectly-decided precedent.” *Id.*

The Court stated that it is “*obligated* to overrule precedent where it appears the ‘construction manifestly is wrong.’” *Id.* citing *State ex rel. Perry v. Dist. Ct.*, 145 Mont. 287, 310, 400 P.2d 648, 660 (1965). The Montana Supreme Court held that violations of the “fundamental canons of statutory construction” may result in overturning prior decisions. *Id.*

“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U. S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). “[R]eliance upon a square, unabandoned holding of the Supreme Court is always justifiable reliance.” *Quill Corp v. North Dakota*, 504 U.S. 298, 321, (1998) (Scalia, J., concurring in part and dissenting in part.)

For the aforementioned reasons, I will follow the directly controlling precedents as set forth by the U.S. Supreme Court and the Montana Supreme Court. It is not a Judge’s place to make law. A Judge must also not insert or omit language in a statute. It is also not a District Court Judge’s job to overrule prior cases. That role belongs to the higher courts. For cases where the facts are distinguishable from directly controlling precedent, I will follow the canons of statutory construction, related case law on point, and the U.S. and Montana Constitutions.

**56. In the space provided, state the reasons why you are seeking office as a district court judge.**

I seek this position because I deeply miss public service and the exposure to diverse areas of law, people, and problems. The District Court offers these opportunities to serve crime victims, defendants, families, and civil litigants in a wide variety of contexts. Fundamentally, I want to make a difference in the world by being of service to people. This includes those who have fallen on hard times, whether due to substance abuse, mental illness, or other challenges. When, as a society, we can find more meaningful ways to obtain justice, serve victims, and rehabilitate offenders, while making our communities safer, we all benefit. Furthermore, because of the statutory priority that criminal cases and youth in need of care cases require, the civil cases have sometimes been neglected. By having a background in complex civil litigation, it is my hope to assist with catching up the civil backlog to more timely provide decisions to civil parties.

From the State Capitol, to the Cascade County Zoning Board of Adjustments, I am no stranger to working with people from all walks of life to problem solve creative approaches to controversies. I have developed the skills to balance giving people time to speak within limits to keep business moving along in an orderly fashion. I can bring an energetic and positive presence to the District Court. For each person that comes into the court house, his or her case is the most important case to them and each person deserves a thoughtful, curious, dedicated Judge to take each matter seriously. I want to be that person for the people of Cascade County.

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

The cases that have left the deepest impact on me are the cases that have involved death and the grief that comes with it. I lost my little brother when I was young. One of the most meaningful acts of service for me is to help the grieving and broken hearted. It is hard enough, when a loved one has died, to deal with the avalanche of paperwork that must be dealt with, including bank accounts, titles, and insurance. It is much harder when there is also a lawsuit or insurance dispute related to the death. It means a lot to me to help reduce the heavy load from the already overburdened shoulders of the widow that lost her spouse or the child that lost a parent. Serving the survivors has been a rewarding honor. Sometimes, the act of service is not legal, but human. It can be listening. It can be crying together. At other times, it has been doing battle with the insurance company on their behalf, so that they do not have to handle that struggle on top of everything else. At the end of the day, these cases have helped me remember how short and precious life can be. We never know when it is our time to go. These situations may be part of the reason why I hug my spouse and my kids a little tighter each night. Each day is a gift to cherish.

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

Some may see my prior political involvement as either a weakness or a strength. Yet, many Judges have successfully transitioned from the legislative branch to the judicial branch, including U.S. Supreme Court Justice Sandra Day O'Connor, Montana Supreme Court Justice Mike Wheat, Montana Supreme Court Justice Jim Rice, District Court Judge John Parker, and District Court Judge Mike Menahan. The legislature can serve as a meaningful and rewarding opportunity to learn how to work with others, compromise, and problem solve. These skills can translate to the judicial branch in a positive way. There are those that may fear that I may be too partisan, too biased, or too much of an advocate. However, by being passionate about public service, I care about others, no matter who they are. Many of my dear friends and family members have differing perspectives from my own. I greatly respect learning from them and appreciating their point of view.

**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?**

I have strong skills in mediation, negotiation, and dispute resolution. I participated in mediations, such as landlord tenant disputes through the Community Dispute Resolution Center of Missoula County. As a member of the ABA Negotiation Team in law school, I regularly competed in mock negotiations. As a legislator, I assisted stakeholders with drafting compromise language in a variety of legislative controversies. On behalf of my clients, I have successfully negotiated hundreds of settlement agreements. I am well positioned to explore additional mediation opportunities for interested parties through the judicial system. As a team player, it is my nature to bring together diverse stakeholders to find solutions to existing challenges. I am willing to work with people from all backgrounds to help our Courts better serve our people.

## CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 8th 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 20, 2020  
(Date)

Michelle R. Levine  
(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 Friday, August 21, 2020.***

**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)**

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*Admitted Pro Hac Vice*  
*Attorneys for Plaintiff Kayla Lemmings*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

BRIAN J. SILVERTHORN,	)	
Plaintiff,	)	
	)	Civil Action No. 18-CV-209-J
vs.	)	
	)	
KILLPACK TRUCKING, INC., and	)	
JAYSEN THOMPSON,	)	
Defendants.	)	
	)	
<hr/>		
KAYLA LEMMINGS,	)	
Plaintiff,	)	Civil Action No. 18-CV-210-J
	)	
vs.	)	
	)	
KILLPACK TRUCKING, INC.,	)	
Defendants.	)	
	)	
<hr/>		

PLAINTIFF KAYLA LEMMINGS' RESPONSE IN OPPOSITION TO  
DEFENDANT KILLPACK'S MOTION IN LIMINE  
REGARDING CELL PHONES

**COMES NOW**, Plaintiff Kayla Lemmings by and through her counsel of record, Stinson Law Group, P.C., and Linnell, Newhall, Martin & Schulke, P.C., and Plaintiff Bryan Silverthorn, by and through his counsel, Karpan & White, P.C., and Brain Injury Law of Seattle, and hereby responds in opposition to Defendants' motion in limine regarding Jaysen Thompson's multiple cell phones. Defendants filed a motion on July 17, 2020, seeking to exclude from the jury the relevant and admissible evidence of Thompson's multiple cell phones.

**APPLICABLE LAW**

A motion in limine should not be used to resolve factual disputes or weigh evidence. *See C & E Servs., Inc. v. Ashland, Inc.*, 539 F. Supp. 2d 316, 323 (D.D.C. 2008). Generally, relevant evidence is admissible in a trial and irrelevant evidence is not admissible. *F.R.E. 402*. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *F.R.E. 401*. Relevant evidence may be precluded, however, where "its probative worth is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..." *F.R.E. 403*. "Evidence is not unfairly prejudicial merely because it damages a party's case." See *Walton v. N.M. State Land Office*, 259 F. Supp. 3d 1242, 1266, (10<sup>th</sup> Cir. 2016) citing *United States v. Caraway*, 534 F.3d 1290, 1301 (10<sup>th</sup> Cir. 2008); *United States v. Curtis*, 344 F.3d 1057, 1067 (10<sup>th</sup> Cir. 2003); *United States v. Martinez*, 938 F.2d 1078, 1082 (10<sup>th</sup> Cir. 1991). Rather, "[t]o



be unfairly prejudicial, the evidence must have 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *United States v. Caraway*, 534 F.3d at 1301 (quoting Fed. R. Evid. 403 advisory committee's note). Defendants have not met their burden of establishing an improper or prejudicial basis to exclude law enforcement's discovery of Thompson's possession of three or four cell phones in his commercial vehicle.

### DISCUSSION

**1. Evidence Regarding Thompson's multiple cell phones is relevant regarding Thompson's credibility.**

Pursuant to *F.R.E. 611*, a witness's credibility is part of the scope of examining witnesses and presenting evidence. "The credibility of the witness is always relevant in the search for truth. Evidence is not unfairly prejudicial simply because it is damaging to an opponent's case." *Slavin v. Garrison Prop. & Cas. Ins. Co.*, 805 Fed. Appx. 561, 562, (10<sup>th</sup> Cir. 2020).

Unfavorable facts are insufficient to establish prejudice or confusion. Merely because the information is damaging to their case, Defendants wish to hide relevant and admissible law enforcement investigation details from the jury that Thompson traveled with three or four cell phones in the cab of his commercial motor vehicle. Thompson admitted that he had three or four cell phones in his vehicle, in a shoe box. He alleged they were broken and that he did not recall the phone numbers. *Thompson Deposition.*, pp. 89-93. These are relevant credibility issues. Since the Defendants chose not to preserve the cell phones (a potential spoliation issue), Plaintiffs and Defendants are unable to independently verify the veracity of Thompson's statements

that the phones were broken and unusable. When Defendants withhold relevant evidence, an adverse inference jury instruction is appropriate that the evidence withheld by Defendants was unfavorable to Defendants.

It is for the jury to determine the credibility of Thompson's statements about his possession and use of his three or four phones. Plaintiffs and the jury have a right to know what Thompson was doing with his three or four phones both on the day of the crash, as well as his habits of conduct on the days and months leading up to the crash. See *F.R.E.* 406 regarding evidence of habits and routines. The jury needs to be able to hear his testimony on these topics, observe his body language, and determine his truthfulness. It is a fundamental question for the jury whether his many phones played a role in his distraction and whether Thompsons' statements are truthful regarding his conduct. It is also fair game to ask Thompson why he was traveling with several phones in his truck, when he could have stored the allegedly broken phones at his home in Idaho, with his wife.

Thompson's deposition testimony about his phones and phone use also conflicts with his statements to law enforcement. These are critical credibility matters. On May 17, 2018, Wyoming Highway Patrol Trooper Robert King, stated in a sworn affidavit as follows.

I made contact with the driver of the Freightliner, Mr. Jaysen Thompson, who informed me that he was traveling at a speed of 65 miles per hour and that he had **looked down to check his cell phone to check a text** and when he looked back up he was unable to avoid the Chevrolet Blazer.

See Trooper Robert King's Aff., ¶ 5 (App. 1). See also the notes from Trooper

Tyler Matheney, who would testify at trial that:

During a search of Vehicle #1 the only items of interest which were discovered inside the vehicle were several cell phones which were resting on the floor between the front driver and passenger seats. **These items were not seized but they are of importance because the Driver of Vehicle #1 (Thompson) stated on scene he was looking at a cell phone just before the crash took place.**

See App. 2. (Trooper Matheney's Supplemental Notes, Lemmings 0014, emphasis added). Just prior to the crash, was Thompson checking text messages and using data on three to four phones? If yes, his level of distraction could be multiplied by each phone demanding his attention. Thompson indicated he has Bluetooth, so he does not handle or touch the phone. See Thompson Depo. 43: 1-16. If he is using multiple phones, does Bluetooth technology through the vehicle attach to multiple phones, or is it just linked to one phone? It is relevant to why Thompson may be needing to touch phone screens if he is using multiple phones without hands free technology. In contrast to what Thompson said to Trooper King, he said in his deposition something different:

I was thinking of what time it was, and I normally wouldn't -- just reach over and press the button on the back of the phone to illuminate it so I could glance down and see what time it is to keep my hands on the wheel and watch the road so I stay aware.

...

And when I reached down for the phone to tap the power button, it wasn't there. And when I saw the traffic ahead of me, a semitruck was moving left, and in my mind, I was thinking my following distance opened up that much more. So I glanced down, shouldn't hurt, and as I was, -- as this was going on, and I was reaching down, the phone wasn't there, so I glanced down at the pocket under the stereo in the cup holder; it wasn't there.

See Thompson Depo. 72: 1-25. This statement differs from what Thompson conveyed to Trooper King about trying to check a text message, which gets at his

credibility and truthfulness. He later said that, after the crash, he found his phone on the floor. *Id.*, 73:17-18. Was the phone perhaps one of the four phones in the shoe box on the floor that he was trying to reach when he slammed into the Chevy Blazer? The presence of multiple phones and their use by Thompson is a credibility issue for the jury to decide.

**2. Evidence Regarding Thompson's multiple cell phones is relevant and admissible regarding foreseeability.**

The conduct and characteristics of the driver leading up to the crash are mandatory for the jury to consider. The skill, or conversely, lack of skill and distraction of the driver, are also part of the circumstances surrounding this crash. *Cervelli v. Graves*, 661 P. 2d 1032, 1036-1037 (Wyo. 1983). "The issue of proximate cause is generally one to be decided by the jury, and resolution of that issue depends on the foreseeability of the risk presented by the actor's conduct." *Endresen v. Allen*, 574 P.2d 1219, 1222, ¶ 9 (Wyo. 1978) ("[W]hat is reasonably to be foreseen is generally a question for the jury.") According to one respected commentator:

The central goal of the proximate cause requirement is to limit the defendant's liability to the kinds of harms he risked by his negligent conduct. Judicial decisions about proximate cause rules thus attempt to discern whether, in the particular case before the court, the harm that resulted from the defendant's negligence is so clearly outside the risks he created that it would be unjust or at least impractical to impose liability....The most general and pervasive approach to proximate cause holds that **a negligent defendant is liable for all the general kinds of harms he foreseeably risked by his negligent conduct and to the class of persons he put at risk by that conduct.** Conversely, he is not a proximate cause of, and not liable for injuries that were unforeseeable. This does not mean that the defendant must be the sole proximate cause of the plaintiff's injury. On the contrary, several wrongdoers are frequently proximate causes of harm.

Dan B. Dobbs, *The Law of Torts* § 180, at 443–44 (2000) (emphasis added, footnote omitted). “The ultimate test of proximate cause is foreseeability.” *Killian v. Caza Drilling, Inc.*, 2006 WY 42, ¶ 20, 131 P.3d 975, 985 (Wyo. 2006); *Wood v. CRST Expedited, Inc.*, 2018 WY 62, ¶ 19, 419 P.3d 503, 511–12 (Wyo. 2018).

Plaintiffs must prove that Defendants had a duty to protect the safety of other vehicles on the highway. A key piece of the duty element of negligence is establishing that the foreseeability of Defendants’ actions could lead to harm to those within the zone of danger. See *Palsgraf v. Long Island Railroad Co.*, 248 N. Y. 339, 162 N.E. 99 (1928). The foreseeability “zone of risk” here includes the possession and potential use of multiple phones while driving a commercial vehicle.

The primacy of foreseeability in determining whether a duty exists has been echoed by numerous courts and commentators. For example, in *Beugler v. Burlington Northern & Santa Fe Ry.*, 490 F.3d 1224 (10th Cir. 2007), the Tenth Circuit Court of Appeals stated that Many factors inform the duty analysis, but the most important consideration is foreseeability. Generally a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks which make the conduct unreasonably dangerous. **Foreseeability establishes a 'zone of risk,' which is to say that it forms a basis for assessing whether the conduct creates a generalized and foreseeable risk of harming others.**

*Wood v. CRST Expedited, Inc.*, 2018 WY 62, P11, 419 P.3d 503, 508 (emphasis added).

As part of the element of foreseeability, jurors are entitled to hear evidence regarding the nature and risk of Thompson’s distracted driving conduct. Due to the deadly nature of distracted driving caused by cell phone use at the wheel, federal law prohibits use of hand held mobile telephones while operating a commercial motor vehicle and no motor carrier shall allow or require a driver to use mobile phones while

driving. See 49 CFR 392.82. Killpack Trucking Inc. (herein “Killpack”) had a similar policy against cell phone use while driving. Thompson’s possession (and potential use) of many cell phones relates to his compliance (or lack thereof) with federal law and Killpack’s policy. Thompson had an addiction to cell phone use and he had multiple phones within his reach to feed that addiction.

Thompson’s call detail record for the one phone for which he actually provided the phone number, showed persistent user activities (calls, texts, and data use by Thompson) for the time frame of December 13, 2016, through December 14, 2016, (the date of the crash) with few breaks in activity. See the report of Charles Faulk, Doc. 64-4, p. 1, ¶ 3. Thompson had 117 calls, texts, and data events between December 13, 2016, at 00:15 and December 14, 2016, at 13:05. [Doc. 64-4, p. 1, ¶5]. This phone activity is consistent with the statement that Thompson made to Trooper King about checking a text message right before the crash, versus his later deposition testimony about looking at the time on his phone (when there were several other display clocks available to see to check the time).

During the time frame of December 1-15, 2016, there were only 11 periods of inactivity were in excess of 4 hours. [Doc. 64-4, p. 2, ¶ 8]. None of the periods of inactivity were in excess of 5 hours. In other words, Thompson was using at least one of his phones (if not more) for 19 to 20 hours per day on average. [Doc. 64-4, p. 2, ¶ 8]. On December 14, 2016, the date of the crash, phone activity was reported while Thompson’s commercial tractor was in motion as reported in the GPS record. [Doc. 64-4, p. 3, ¶11]. This is relevant evidence relating to foreseeability and the zone of risk.

Since the Defendants shockingly claim that they are unaware of the whereabouts of the multiple cell phones, there is no way to verify which cell phones were working and how or what each phone was being used for by Thompson. Thompson has asserted that he only had one operational cell phone. Defendants also have not produced any concrete evidence to prove the other phones were broken and useless. If Defendants had produced any evidence regarding the other phones, such as the phones themselves, the other phone numbers, and/or the call data for the other phones, Thompson's phone addiction could have been proven to be much worse than has already been demonstrated. Here, the probative and relevant value of Thompson's potential use of multiple cell phones while driving outweighs any potential prejudice. The Plaintiffs' case will be unduly prejudiced if this information is wrongfully withheld from the jury.

Foreseeability of the risk involves providing to the jury the admissible evidence of the reasons why and how Thompson was driving in a distracted manner. As part of their investigation, the Troopers found that multiple cell phones had a likely role to play in Thompson's distracted driving. Within the foreseeability zone of risk of the crash is the analysis by the jury of Thompson's distraction from the ringing, text message pings, or data use, from several cell phones while operating his tractor trailer on the highways, endangering other motorists.

The jury must also be able to assess the self-serving statement of Thompson that only one phone was working, when Defendants have chosen to withhold information on the location of any of the cell phones, the phone numbers of the other cell phones, the carriers of the other cell phones, or the make and model of the other cell phones.

Defendants must not be rewarded for their withholding of likely damaging evidence. The jury is entitled to hear this evidence regarding credibility and foreseeability. Therefore, pursuant to *F.R.E. 401, 402, 403, 406, and 611*, any comments, statements or arguments about Thompson's multiple cell phones must be allowed to be presented to the jury.

### CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that Defendants' motion in limine be denied regarding the existence of Thompson's multiple cell phones.

Dated this 30th day of July 2020.

Attorney for Plaintiff Lemmings:

/s/ Michele R. Levine

Linnell, Newhall, Martin & Schulke, P.C.

#### Appendices

1. Trooper Robert King's Affidavit
2. Trooper Tyler Matheney Report
3. Thompson Deposition Excerpts