

APPLICATION FOR

**DISTRICT COURT JUDGESHIP  
Eleventh Judicial District**

**A. PERSONAL INFORMATION**

1. Full Name: James Henry Cossitt

a. What name do you commonly go by? Jim

2. Birthdate: [REDACTED] Are you a U.S. citizen? yes

3. Home Address: [REDACTED] Cell: [REDACTED]

4. Office Address: PO Box 1889, Kalispell MT 59903-1889

Phone: 406-752-5616

5. Length of residence in Montana: 09/1998, 17 years

6. List your place of residence for the last five years: see item #3 above, lived there since 4/2000

Dates

City

State

_____	_____	_____
_____	_____	_____
_____	_____	_____

## 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>
Roosevelt High School	Des Moines, IA	6/1976	High School
Iowa State University	Ames, IA	5/1982	BA with distinction
Iowa State University	Ames, IA	NA	Course work towards MPA
University of Iowa College of Law	Iowa City, IA	5/1986	JD

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

Iowa Governors Volunteer Award, 1992; Deans list multiple times during undergrad school from 1978-1982; BA with distinction (top 10% of the 1982 class).

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

No.

### 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>
Iowa State Courts, bar # 8918	6/13/1986
US District Courts, Southern and Northern Districts of Iowa	1986
Michigan State Courts, bar # P52918	6/6/1995
US District Court, Western District of Michigan	11/8/1995
Montana State Courts, bar # 4773	6/25/1998
US District Court, District of Montana	8/27/1998
Colorado State courts, bar # 30510	4/16/99

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

Solo private practice, Kalispell MT

12. State the name, dates and addresses of all law firms with which you have been associated in practice, all 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>
Estes Law Firm, Fort Dodge, IA	Associate	06/86 to 04/87
FDIC, Des Moines Consolidated office	Bankruptcy attorney	05/87 to 05/88
Payer, Hunziker, Cossitt & Oeth Ames, IA	Associate / partner	05/88 to 05/95
Solo practice, Muskegon MI	Owner	02/96 to 09/98
Solo practice, Kalispell MT	Owner	02/99 to present

13. If you have not been employed continuously since the completion of your formal education, describe what you were doing.
- 06/95 to 02/96: Moved to Muskegon for spouse residency training, took some time off and recharged my batteries
- 09/98 to 02/99 Moved to Missoula, managed the Birchwood Youth Hostel, moved to Kalispell and started practice
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.
- Bankruptcy & debtor creditor: about 70-80%
- Business and commercial litigation: about 20-30%
15. List other areas of law in which you have practiced, including teaching, lobbying, etc.
- Bankruptcy, workouts, debtor / creditor, personal and real property foreclosure; UCC (articles 3, 4 & 9); consumer finance & protection (both state consumer protection act and federal statutes (FDCPA, FCRA, TILA and other related); professional responsibility & ethics (representation of multiple Montana lawyers in ODC inquiries and proceedings; landlord tenant law; real estate law; water law; some construction and lien law; many years ago, some domestic relations
16. If you specialize in any field of law, what is your specialty?
- Bankruptcy & debtor / creditor law; ethics and professional responsibility
- Certifications** Board certified, Consumer Bankruptcy Law, American Board of Certification, certified on 12/20/95
- Board Certified, Business Bankruptcy Law, American Board of Certification, certified on 03/07/05
- Editorial** West's Bankruptcy Exemption Manual, Montana Editor, 2000 – present
- American Bankruptcy Institute Journal, Coordinating Editor of the “Straight & Narrow” Ethics column, 2012 - present

17. Do you regularly appear in court?\_Yes

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

Federal court	80%
State or local courts of record	20%
Administrative bodies	0%
Other	0%

18. During the last five years, what percentage of your practice has been trial practice? 20-40 %

19. How frequently have you appeared in court? 1-3 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	100%
Criminal	0%
Other	0%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, please 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.

LARSON LUMBER COMPANY, INC., Plaintiff and Appellee, v. BILT RITE CONSTRUCTION AND LANDSCAPING LLC; YAAK RIVER CONTRACTING, INC.; ANITA BARTZ, and CASEY RANKIN, Defendants and Appellants.  
DA 13-0457, SUPREME COURT OF MONTANA, 2014 MT 61; 2014 Mont. LEXIS 73

Counsel:

David Tennant, 22 Second Avenue West, Suite 4000, Kalispell, MT 59901 Phone (406) 755-5700

Amy N. Guth, 408 Main Ave, Libby, MT 59923 Phone:(406) 293-2322

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DA 12-0149, IN THE SUPREME COURT OF THE STATE OF MONTANA  
2012 MT 230N, IN RE THE MARRIAGE OF, ROBIN J. CINI, Petitioner and Appellee,  
And NIGEL CINI, Respondent and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,

In and For the County of Flathead, Cause No. DR 08-483(A)

Counsel: Nigel J. Cini (Self-Represented)

23. State the number of jury trials that you have tried to conclusion in the last ten years. 0
24. State the number of non-jury trials that you have tried in the last ten years. About 30-40, contested hearings and trials over the last 10 years. About 80% or more in the bankruptcy court system
25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Please include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, give the same information regarding opposing counsel and the nature of the matter.

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In re McConkey, chapter 12 case # 12-60092, US Bankruptcy Court, District of Montana.

Hearing date: 5/7/15

Judge name and phone: Ralph B. Kirscher, 406-497-1240

Adversary counsel

Dean A. Stensland, 201 West Main Street, Suite 300, Missoula, MT 59802; Mailing Address: Boone Karlberg P.C., P.O. Box 9199, Missoula, MT 59807-9199. Telephone: (406) 543-6646

Jon Binney, 1001 SW Higgins Ave #104 Missoula, MT 59803. Tel. (406) 541-8020

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Cossitt v. McMichael, case # DV-13-1218, Montana District Court, 11<sup>th</sup> Judicial District, Flathead County

No hearings but 2 settlement conferences with Michael Viscomi in October and November 2014

Judge name and phone: David M. Ortley, 406-758-5906

Adversary counsel

Randall J. Colbert, Garlington, Lohn & Robinson, PLLP, 350 Ryman Street, Missoula, MT 59802

Phone: 406-523-2500

Paul M. Tranel, 283 West Front St., Suite 201 Missoula, MT Tel. 406.532.7800

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Nelcon, Inc. v. Lookout Ridge Investors, LLC, et al, case # DV-10-1620(B), Montana District Court, 11<sup>th</sup> Judicial District, Flathead County

No hearings but settlement conference with William Wagner of Garlington firm

Judge name and phone: Katherine R. Curtis, retired

Adversary counsel:

James C. Bartlett, P.O. Box 2819, Kalispell, MT 59903-2819 Tel. 406-756-1266

Noah Bodman, PO Box 1038, Kalispell MT 59901 Tel. 406-755-4212

Sean Frampton, 341 Central Ave., Whitefish, MT 59937-1090 Tel. 406-862-9600

Stephanie Oblander, PO Box 2685, Great Falls, MT 59405 Tel. 406-453-8144

Ken A. Kalvig, P.O. Box 1678, Kalispell, MT 59903-1678 Tel. 406-257-6001

Stephanie / Justin Breck, PO Box 2071, Columbia Falls, MT 59912 Tel. 406-892-4446

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Whitefish Credit Union v. Loft 54, LLC et al, case # DV-13-852, Montana District Court, 11<sup>th</sup> Judicial District, Flathead County

No hearings but settlement conference

Judge name and phone: David M. Ortley, 406-758-5906

Adversary counsel

Sean Frampton, 341 Central Ave., Whitefish, MT 59937-1090 Tel. 406-862-9600

Randall S. Ogle, PO Box 899, Kalispell MT 59903-0899 Tel. 406-752-7550

Kent P. Saxby, PO Box 3038, Kalispell MT 59903-3038 Tel. 406-755-5535

Ken A. Kalvig, P.O. Box 1678, Kalispell, MT 59903-1678 Tel. 406-257-6001

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Larson Lumber Company v. Bilt Rite Construction, et al., consolidated case # DV-10-316 & DV-09-166, Montana District Court for Lincoln County

Trial date: 2/12-13/2013, 2 day non-jury trial  
Judge name and phone: James B. Wheelis, 406-293-8120

Adversary counsel

David Tennant, 22 Second Avenue West, Suite 4000, Kalispell, MT 59901 Phone (406) 755-5700

Amy N. Guth, 408 Main Ave, Libby, MT 59923 Phone:(406) 293-2322

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In re Cini, chapter 11 case # 10-62715-11, Adversary Proceeding # 11-07, US Bankruptcy Court, District of Montana.

Trial date: March 14 & 15, 2013, 2 day non-jury trial  
Judge name and phone: Ralph B. Kirscher, 406-497-1240

Adversary counsel:

Peter Carroll, 715 S Main St, Kalispell, MT 59901 Phone:(406) 755-6330

Michael Viscomi, 121 Wisconsin Ave, Whitefish, MT 59937 Phone:(406) 862-7800

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

I represented a lawyer in case # 13-113 with the Montana Office of Disciplinary Counsel resulting in dismissal of the complaint.

In previous years, I have represented other lawyers in ODC matters.

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

Publications

**“American Bankruptcy Institute Presidential Task Force on Uniform Ethics Standards for Bankruptcy Practice”,** 2011 to 2013. Served as consumer committee chair and task force member of group that drafted the **“National Ethics Task Force Report”**. As chair of the consumer committee, I had significant and material involvement in drafting the sections on competency and limited scope of representation for debtor counsel.

In 2011, the ABI's National Ethics Task Force was established to address a problem familiar to all bankruptcy professionals and judges: state ethics rules do not always "fit" with the realities of bankruptcy practice. The Task Force was charged with answering the question of whether there is a need for national ethics rules, standards, and general practice guidance in the bankruptcy context.

The final report is located at:

[https://abi-org-corp.s3.amazonaws.com/materials/Final\\_Report\\_ABI\\_Ethics\\_Task\\_Force.pdf](https://abi-org-corp.s3.amazonaws.com/materials/Final_Report_ABI_Ethics_Task_Force.pdf)

**"Cracking the Means Test"**, The King Bankruptcy Practice Series, Morgan King Company. Contributing Editor to this book along with my colleagues on the Best Practices Working Paper, Cathy Vance and Marc Stern. Morgan D. King and Catherine E. Vance are the primary authors of this work.

The book can be purchased at: <http://www.bankruptcybooks.com/budget.html>

**"ABA Task Force on Attorney Discipline Best Practices Working Group,, Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Process."** Chair of Working Group, which prepared a working paper on Best Practices for Debtors' Attorneys that was published in the November 2008 edition of The Business Lawyer, Vol. 64, No. 1, p. 79.

The report is also located at:

[http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=cl&url=/buslaw/mo/premium-cl/tbl/2008\\_064\\_01/0004/0004.pdf](http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=cl&url=/buslaw/mo/premium-cl/tbl/2008_064_01/0004/0004.pdf)

**"ABA Task Force on Attorney Discipline, Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Process."** Served as a member of the task force, which addressed a number of topics that arose as a result of the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The task force prepared a comprehensive report on lawyer liability under § 707(b) of the BAPCPA that was published in the February 2006 edition of The Business Lawyer, Vol. 61, No.2, p. 697. April 2005 to the present.

The report is also located at:

[http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=cl&url=/buslaw/mo/premium-cl/tbl/2006\\_061\\_02/0011/0011.pdf](http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=cl&url=/buslaw/mo/premium-cl/tbl/2006_061_02/0011/0011.pdf)

Speaking & Consulting Engagements

**"Dealing with Zombie mortgages, tools in the bankruptcy toolkit"**, July 9-10, 2015, National Consumer Law Center's Summer Mortgage Conference, July 9-10, 2015, Foreclosure Echo: Addressing the Ongoing Consequences of the Foreclosure Crisis, Crystal Gateway Marriott, Arlington, VA

**"Unbundling the Sticks: Can Debtor Counsel Limit Scope of Representation?"**, ABI Annual Paskay Meeting, March 5-7, 2015 Tampa, FL. Debated with the Atlanta Regional US Trustee on the propriety of limited scope of representation.

**"Social Media: What you don't know can hurt you"**, ABI Annual Spring Meeting, April 24 to 27, 2014, Washington DC, MD. Moderated a panel on traps for the unwary.

**“Bankruptcy for Formerly Important People, or How the Mighty Have Fallen (Issues Involving High Income Debtors and Those Who Used To Have High Incomes)”**, National Association of Consumer Bankruptcy Attorneys Annual Meeting, April 11 to 13, 2014, New York, New York.

**“Selected Ethics issues in Chapters 7 & 13 cases: (LSR)Limited Scope of Representation & Competency”**, Iowa Chapter of the Federal Bar Association, 32<sup>nd</sup> Annual Bankruptcy Conference, October 24, 2013. Renaissance Savery Hotel, Des Moines, IA

**“National Ethics Task Force Report”**, ABI Annual Spring Meeting, April 29 to May 2, 2013, National Harbor, MD. Panelist on 2 panels, presentation of the National Ethics Report and on the Professional Compensation Committee Panel.

**“Ethics Update: A Review of the Basics and the August 2012 Amendments to the ABA Model Rules”** Iowa Chapter of the Federal Bar Association, 31<sup>st</sup> Annual Bankruptcy Conference, November 1, 2012. Renaissance Savery Hotel, Des Moines, IA

**“ABI Consumer Fee Study”**, ABI Winter Leadership Conference, December 1-3, 2011, La Quinta, CA. Panel presented and discussed the results of the nationwide study.

**“Commercial Chapter 7 Case Issues: A Review Of The Basics”** Iowa Chapter of the Federal Bar Association, 30<sup>th</sup> Annual Bankruptcy Conference, October 27, 2011. Renaissance Savery Hotel, Des Moines, IA

**“Ethical and Compensation Issues in Consumer Bankruptcy Cases”**, ABI Annual Spring Meeting, April 29 to May 2, 2010, National Harbor, MD. Panelist on Professional Compensation Committee Panel.

**“ABI Consumer Fee Study”**, ABI Winter Leadership Conference, December 3-5, 2009, LaQuinta, CA. Panel presented and discussed the results of the pilot study.

**“Best Practices in Representing Debtors: From Preparing Papers to Reaffirmation Agreements”**, ABI Detroit 2009 Consumer Bankruptcy Conference, November 11, 2009, Hyatt Regency, Detroit MI. Panelist and presenter on best practices issues.

**“Bankruptcy Boot Camp”**, ABA General Practice and Solo Division, Teleseminars held on 12/4/08 (Part 1, Means Test) and 1/15/09 (Part 2, Schedule Preparation Best Practices ).

**“Best Practices in Schedule Preparation”**, State Bar of Montana CLE Institute, Annual Bankruptcy seminar, October 25-26, 2007, Butte, MT. Presented and discussed draft of ABA paper on Best Practices for Schedule Preparation.

**“Panel Discussion: Post BAPCPA, How Far Have we come and Where Are We Going ?”**, State Bar of Montana CLE Institute, Annual Bankruptcy seminar, October 26 & 27, 2006, Missoula, MT. Researched, prepared & participated in a panel discussion on issues under the BAPCPA of 2005.

**“Assisted Person” Status and §526(a)(4)’s Limits on Complete & Competent Legal Representation”**, published in ABI Consumer Bankruptcy Committee E newsletter, Volume 4, Number 5, September 2006.

**“Preference Defenses & Homestead Issues under BAPCPA”**, State Bar of Montana CLE Institute, Annual Bankruptcy seminar, September 29-30, 2005, Great Falls, MT. Researched, prepared & presented a paper on preference and homestead issues under the BAPCPA of 2005.

**“Chapter 13—Aggressive Strategies for Debtors and Creditors”**, American Bankruptcy Institute Annual Meeting, April 10-13, 2003, Washington, DC. Researched, prepared & presented a paper entitled “Chapter 13 Attorney Fee Survey”, which was cited by Justice Scalia in his dissent in *Till v. SCS Credit Corp.*, 541 U.S. 465, 503; 124 S. Ct. 1951, 1975; 158 L. Ed. 2d 787, 815; 2004 U.S. LEXIS 3385 (2004).

**"Dischargeability: What's New under § 523 ?"**, American Bankruptcy Institute Annual Meeting, April 18-21, 2002, Washington, DC. Researched, prepared & presented materials on the dischargeability of marital debts.

**"Montana's Revised Article 9 of the UCC"**, sponsored by Lorman Educational Services, in Billings, MT on December 11, 2001 & December 8, 2000.

**"Collection Law in Montana"**, sponsored by Lorman Educational Services, in Helena, MT on October 16, 2001, October 20, 2000, April 3, 2003

**"Advanced Consumer Bankruptcy Issues in Montana"**, sponsored by National Business Institute, Inc., in Missoula, MT on August 24, 2000.

**"Ethics in Collections"** and **"Collecting the Judgment"** presented at the *Successful Judgment Collections in Montana* seminar, sponsored by National Business Institute, Inc., in Missoula, MT on September 15, 1999.

**"Is Foreclosure Your Best and Only Option ?"** and **"Bankruptcy and the Secured Creditor"** presented at the *Michigan Foreclosure and Repossession* seminar, sponsored by National Business Institute, Inc., in Grand Rapids, Michigan on February 4, 1998 and January 21, 1997.

**"Preventative Collection"** and **"Bankruptcy and Debt Collection"**, presented at the *Collection of Delinquent Debts in Iowa* seminar, sponsored by National Business Institute, Inc., in Des Moines, Iowa on July 25, 1995.

**"Russian Bankruptcy School"**, presented by the Iowa State University Center for International Agricultural Finance to governmental officials from the Russian Federation of the CIS. Served as invited lecturer in bankruptcy law during the School in Ames, Iowa from July 17-28, 1995.

**"Slovak Republic Task Force on Bankruptcy and Debt Resolution"**, presented by the Iowa State University Center for International Agricultural Finance (sponsored by US Agency for International Development) to government ministries, Parliament and research institutes. Served as task force member/consultant/lecturer regarding agricultural bankruptcy topics while in Bratislava, Slovakia from October 4-8, 1993.

**"Bankruptcy Local Rules: Why is Highway 30 so important?"**, presented at the Bridge the Gap seminar of the Iowa State Bar Association, Des Moines, Iowa on April 23, 1992.

**"Basic Bankruptcy for Lenders: A Primer on Chapters 7, 11 and 13"**, presented at the Iowa Financial Services Association Annual Convention, Lake Okoboji, Iowa on July 18, 1989.

**"David v. Goliath: Representing the Distressed Debtor in Negotiations and Litigation with the FDIC"**, presented at the Iowa State Bar Association Annual Meeting, Des Moines, Iowa on June 29, 1989.

## D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member and give 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 and NW Montana Bar Assoc., 1998 - present  
Iowa State and American Bar Associations, 1986-present

National Association of Bankruptcy Trustees, 1989-present  
American Bankruptcy Institute, 1991-present (life member)

Story County Legal Aid Society, director 1989-1994; President 1991-1993

Recipient, Iowa Governor's Volunteer Award, April 1992

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

Glacier Mountaineering Society, Inc. Served as Director from 2006-2012 (2 terms, 3 years each) and as Secretary for 3 years. Responsible for development of online calendar and sign up system and online voting for BOD matters. Kept all records and minutes of meetings of GMS.

Flathead Nordic Ski Patrol (nka Flathead Backcountry Ski Patrol). Served as Director from 2002/3 ? - 2010 ? and as Secretary for ?? years. Responsible all records and minutes of meetings of group.

Impact Fee Advisory Committee, City of Kalispell. Served as member of committee from 2006 to 2010 and again from 2014 to the present.

30. Have you ever run for or held public office? If so, please give the details. No

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

My view is that as part of the social contract and being able to enjoy the benefits of civilized society we all have an obligation to give back and make it a better place. Those of us who have had the privilege to do well have an enhanced obligation to give back.

Consistent with that view, I participated in extensive comment and revisions to the Ethics Policy of the City of Kalispell that was considered and adopted by the City Council in the spring of 2013. I spent a fair amount of time commenting on, drafting and editing the provisions of the policy and appeared at 2-4 meetings to assist the Council.

**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, give the particulars.

On 10/1/92 a complaint was filed with the Iowa disciplinary authorities by opposing counsel and assigned # 9293-82. On 10/19/95, I received a public reprimand for failing to withdraw as counsel when I should have been a witness. I had created the documents for the transaction that was the subject of the litigation and acted as trial counsel to uphold the validity of the matter.

See: <https://www.iacourtcommissions.org/icc/ViewLawyer.do?id=2411>

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

No.

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

<u>Date filed</u>	<u>Court &amp; number</u>	<u>Description</u>	<u>Disposition &amp; date</u>
1/10/01	Flathead Justice Court Case # 57-085 District Court # DC-01-064(B)	Assault w/ weapon 2 counts, felony. Plead self-defense & reasonable use of force.	Transferred from Justice Court to District Court Dismissed 2/25/02 with prejudice.

6/08

Kalispell Municipal Court  
Case # CR-2008-90

Charged with  
disorderly conduct  
after being assaulted  
by a motorist while  
riding bike to work

Plead to disturbing the  
peace, Kal City Code  
§ 19-10, 2/12/10, fine  
\$205

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, please give details.

No.

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

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, please give details, including dates.

No.

38. If you are an officer, director, or otherwise engaged in the management of any business, please state 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 own and manage Glacier Mountaineering Guides, LLC, which owns the rental unit in my duplex and conducts no other business. I do not intend to resign if appointed, but could if need be.

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, please identify the source and the approximate percentage of your total income it constituted over the last five years.

None other than clients in the private practice of law.

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

No.

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

If not, please explain.

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

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

No.

## G. WRITING SKILLS

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

I do hire contract counsel to research and draft on some matters and review it extensively before my name goes on it. In recent years, I do rely on contract counsel a bit more often.

In the past 5 years, I have done 70% or more of my own brief research and writing.

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

Supervised the writing and publication of: **“ABA Task Force on Attorney Discipline Best Practices Working Group,, Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Process.”** Chair of Working Group, which prepared a working paper on Best Practices for Debtors’ Attorneys that was published in the November 2008 edition of The Business Lawyer, Vol. 64, No. 1, p. 79.

The report is also located at:

[http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=cl&url=/buslaw/mo/premium-cl/tbl/2008\\_064\\_01/0004/0004.pdf](http://www.abanet.org/abanet/common/login/securedarea.cfm?areaType=premium&role=cl&url=/buslaw/mo/premium-cl/tbl/2008_064_01/0004/0004.pdf)

Material and substantial participation in the writing and revision of the consumer portions of the Final Report of the **“American Bankruptcy Institute Presidential Task Force on Uniform Ethics Standards for Bankruptcy Practice”**, 2011 to 2013. The Final Report included 2 key consumer sections: competency and limited scope of representation best practices and I served as consumer committee chair.

In 2011, the ABI’s National Ethics Task Force was established to address a problem familiar to all bankruptcy professionals and judges: state ethics rules do not always “fit” with the realities of bankruptcy practice. The Task Force was charged with answering the question of whether there is a need for national ethics rules, standards, and general practice guidance in the bankruptcy context.

The final report is located at:

[https://abi-org-corp.s3.amazonaws.com/materials/Final\\_Report\\_ABI\\_Ethics\\_Task\\_Force.pdf](https://abi-org-corp.s3.amazonaws.com/materials/Final_Report_ABI_Ethics_Task_Force.pdf)

Numerous CLE presentations as outlined in the response to # 27 above.

### Editorial Positions

West’s Bankruptcy Exemption Manual, Montana Editor, 2000 – present

American Bankruptcy Institute Journal, Coordinating Editor of the “Straight & Narrow” Ethics column, 2012 - present

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

Attached

47. What percentage of your practice for the last five years has involved research and legal writing?  
30-40 %

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

Yes, had a Lexis account from 2011 to 2015. Not used Westlaw for years.

## H. MISCELLANEOUS

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

Hiking, backpacking, alpine climbing, ice climbing, front (resort) and back country skiing.

Cycling. Theatre occasionally. Travel and visiting relatives / family.

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

1960's, late: Newspaper delivery

1970's, early: Various restaurant jobs, deliver newspapers and rough frame carpenter

1974-1982: Gas station attendant (pump gas, light repairs, towing and service work), various full service Standard stations in the Des Moines, IA metro area (intermittent between college and other matters)

1977 (spring & summer): Custom combine worker, Pasco WA (worked in Texas, OK, Kansas)

1977-1978: Screw machine operator, Delevan Manufacturing, West Des Moines, IA.

1982-83: Bicycle shop sales and mechanic; Teaching Assistant at Iowa State University, Ames, IA

1985: Officer candidate, USMC, Quantico, VA

1985/86: Hearing Officer, Residence Department, University of Iowa

Research Assistant, Institute of Public Affairs, University of Iowa

1986 to present: Legal profession, see #12 above

51. Please identify the nature and extent of any pro bono work that you have personally performed during the last five years.

2012, Powell Chapter 7 case, direct services, market value \$3,233.

2015, Alex debtor / creditor matter, direct services to client, market value \$1,600

2010-2015: Other pro / low bono. I either performed services at vastly discounted rates or charged off fees billed to clients that could not pay. Market value = \$ thousands, way too much. In 2011 or 2012 we began setting up these clients as per normal to track the pro bono time and value.

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

My undergraduate academic adviser and Political Science Professor Donald E. Boles who provided my first real introduction to the law in undergraduate courses at Iowa State in 1980-81. His demanding and exacting teaching style combined with his commitments to equality and fairness had a profound impact on my outlook on and introduction to the justice system.

In the 1990's, another former Iowa State professor, Neil Harl, invited me to participate in various consulting activities associated with the International Center for Agricultural Finance at Iowa State.

Those activities allowed me to understand our justice system but to put it in context with other systems that were arising after the fall of the iron curtain. Those activities included:

**"Russian Bankruptcy School"**, presented by the Iowa State University Center for International Agricultural Finance to governmental officials from the Russian Federation of the CIS. Served as invited lecturer in bankruptcy law during the School in Ames, Iowa from July 17-28, 1995.

**"Slovak Republic Task Force on Bankruptcy and Debt Resolution"**, presented by the Iowa State University Center for International Agricultural Finance (sponsored by US Agency for International Development) to government ministries, Parliament and research institutes. Served as task force member/consultant/lecturer regarding agricultural bankruptcy topics while in Bratislava, Slovakia from October 4-8, 1993.

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

Commitment to the office and duties of the office, including:

Commitment to equal justice under law, fairness and equality

Commitment to treating all participants in the process with dignity, fairness, respect and courtesy.

Commitment to deciding cases on their merits – finding or ascertaining the facts, identifying the correct legal principles and attempting to fairly and reasonably apply the law to the facts to obtain a just decision or outcome.

Commitment to being unbiased and impartial: not just a conflict of interest standard, but the appearance of conflict of propriety standard, and not allowing the identity, status, stature or reputation of a party influence the outcome. This includes treating all litigants equally (no special treatment for anyone based on occupation, courthouse connections, etc.)

Commitment to getting cases and matters decided with reasonable promptness.

Commitment to providing practical as well as legally correct decisions or outcomes.

54. 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.

Long standing case law and legal principles from those cases serve to set expectations and rules that govern society and guide parties in their business and personal affairs. Typically, those principles and rules have been developed gradually in the judicial decisions over decades, if not longer.

But life, social order and the law are not static - times, values and outlooks change. Established bodies of precedent must be reexamined by courts and legislative bodies at times to ascertain the ongoing validity, utility and relevance of the principles. When these cases come before judicial officers, the courts rely on counsel to provide new looks, new legal and policy arguments in cases and to reexamine existing precedent.

When presented with sound, fair and reasonable justifications, courts must be willing to consider modification or abandonment of existing precedent, but cannot and should not do so lightly or in the absence of sound reasons or justifications. Courts must also be vigilant to not overstep into the responsibility of the legislature, which should be the first step of change in the law.

Accordingly, in reaching the balance between established precedent and necessary flexibility, Courts should keep an open mind, be willing to reexamine and reconsider established precedent.

However, courts should actually alter existing precedent only if warranted by substantial and sound policy, social, legal or other justifications.

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

After 29 years of government service, private practice and related legal experience, I have the requisite experience, depth, common sense and wisdom necessary to serve as an effective judge. While private practice has been enjoyable, lucrative and challenging for the last 29 years, I am seeking new challenges and opportunities for the final 1/3 or so of my career. With 3 decades of legal practice experience in a judicial position will allow me to bring that experience to bear on resolving the disputes that litigants present.

In addition, at this stage of my career, I'm not concerned about the next job, next client, next referral. I am concerned about the quality and timeliness of justice in Flathead County and will use my background, depth and experience to ensure that the citizens receive fair, impartial and reasonably prompt justice. Flathead County has had some horribly slow rulings and justice delayed is justice denied: trial courts must do the best they can with the resources available, but their primary job is to make decisions. If selected for this position, I will be fair, impartial and render decisions in a timely manner.

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

Participation in the American Bankruptcy Institute Ethics Task Force and completion of the final report.

The completion of the Best Practices White Paper and publication of it in The Business Lawyer.

My participation in the programs with the Iowa State Institute for International Agricultural Finance, both in Slovakia and at the Russian programs in Ames, IA.

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

None.

58. 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 candidate?

Extensive government and private practice experience of almost 30 years.

Strong national reputation & background in bankruptcy, debtor / creditor and commercial law matters.  
See endorsements at:

[https://www.linkedin.com/profile/view?id=AAIAAAJOtHABTyPoO8XyAQ6CP5x24\\_8oWigKST4&trk=nav\\_r esponsive\\_tab\\_profile](https://www.linkedin.com/profile/view?id=AAIAAAJOtHABTyPoO8XyAQ6CP5x24_8oWigKST4&trk=nav_r esponsive_tab_profile)

Which include the following:



[David Leibowitz](#) Click to drag this recommendation

**Managing Member at Lakelaw and General Counsel and Chief of Litigation at UpRight Law**

Jim is among the most highly regarded consumer bankruptcy attorneys in the United States. His work in the preparation of the best practices for consumer bankruptcy cases was exceptional. Moreover, Jim is a complete bankruptcy attorney as his service market in Montana demands expertise across a wide range of disciplines within the bankruptcy field.

September 21, 2009, David was with another company when working with James H. (Jim) at JAMES H COSSITT PC



[O. Max Gardner III](#) Click to drag this recommendation

**President, Max Gardner Law, PLLC**

James Cossitt is one of the leading consumer bankruptcy lawyers in America. He has been deeply involved with the ABI and the ABA during his years of practice and was one the Members of the Committee that published the "Best Practices for Consumer Debtor Lawyers." He has also been involved in many complex and novel bankruptcy cases, He is one of the best of the best.

September 16, 2009, O. Max was with another company when working with James H. (Jim) at JAMES H COSSITT PC



[Hank Hildebrand](#) Click to drag this recommendation  
Trustee at Chapter 13 Trustee

Mr. Cossitt has demonstrated a keen understanding of the nuances of consumer insolvency and has advocated energetically for his clients to achieve an outcome that is in their best interests. He has a national reputation as an effective advocate.

September 16, 2009, Hank was with another company when working with James H. (Jim) at JAMES H COSSITT PC

Demonstrated and sustained commitment to legal education, improvement of the bar and ethical standards via long record of CLE speaking, published ABA articles and the ABI Ethics Task Force Report.

Strong and consistently demonstrated commitment to professional responsibility and ethics, including publication of the 2013 ABI Ethics Task Force Report.

### CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 11th 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.

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(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 Wednesday, August 12, 2015.***

**Mail the signed original to:**

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

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

Application form approved 7/10/93  
Revised 9/15/2009

## **II. LANDLORDS HAVE DUTIES UNDER A VARIETY OF LEGAL STANDARDS TO ENSURE THAT TENANTS RESPECT THE PEACEFUL AND QUIET ENJOYMENT OF ADJACENT LANDOWNERS**

The McMichaels have asserted that they “have no duty to enforce Plaintiff’s right to the peaceful and quiet enjoyment of his real property”. In addition to being repugnant to good social order, good neighbors and reasonable people, this argument fails for multiple reasons.

### **A. The general common law or statutory duties of reasonable care towards others, including to prevent nuisance, injury to others and disturbances of the peace.**

The mere existence of the nuisance statute, trespass law, intentional infliction of emotional distress and negligence are all a reflection of the general duty of care that reasonable members of a civilized society owe to each other. To the extent that the McMichaels assert that those doctrines, statutes or theories do not apply to them or real estate they own, they are rejecting the basic glue that holds civilized society together. Their position defies common sense, any acknowledgement of a reasonable duty of care in business affairs and indicates their intent to remove themselves from the responsibilities of the social contract.<sup>2</sup>

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<sup>2</sup> The social contract is described as: “ In [moral](#) and [political philosophy](#), the **social contract** or **political contract** is a theory or model, originating during the [Age of Enlightenment](#), that typically addresses the questions of the origin of society and the legitimacy of the authority of the [state](#) over the [individual](#).<sup>[1]</sup> Social contract arguments typically posit that individuals have consented, either explicitly or tacitly, to surrender some of their freedoms and submit to the authority of the ruler or magistrate (or to the decision of a majority), in exchange for protection of their remaining [rights](#). The question of the relation between [natural and legal rights](#), therefore, is often an aspect of social contract theory. *The Social Contract* (*Du contrat social ou Principes du droit politique*) is also the title of a 1762 book by [Jean-Jacques Rousseau](#) on this topic. . . . . The starting point for most social contract theories is a [heuristic](#) examination of the human condition absent from any political order that [Thomas Hobbes](#) termed the “[state of nature](#)”.<sup>[2]</sup> In this condition, individuals' actions are bound only by their personal [power](#) and [conscience](#). From this shared starting point, social contract theorists seek to demonstrate, in different

McMichaels position is apparently that they wish to enjoy the benefit of the legal protections the laws provide to the landlord tenant relationship, but reject those portions of the law that impose duties or obligations on them as landlords. Same position they take on the covenants: pick and choose, take the benefits, but none of the responsibilities.

Unless and until the McMichaels acknowledge the basic duties of care as members of a civilized society apply to them and their real estate, they should be prohibited from enjoying the benefits of an of organized society and enjoined from continuing to rent the premises at 1233 or 1235 6<sup>th</sup> Street West.

**B. The covenants impose duties on McMichaels that govern and limit the use of the real estate in question and require them to use the property free of conduct that is offensive, annoying, a nuisance or a breach of the covenant of quiet enjoyment.**

On 10/15/1980, a Declaration of Covenants, Conditions and Restrictions of Sixth Street West Townhouses (hereafter “the Covenants”) were recorded in Book 702, page 726-733 (reception # 14717) with the Clerk and Recorder of Flathead County. The covenants are binding on the owners of 1229, 1231, 1233 and 1235 6<sup>th</sup> Street West. The covenants prohibit conduct that is an annoyance, nuisance of a breach of the covenant of quiet enjoyment:

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ways, why a rational individual would voluntarily consent to give up his or her natural freedom to obtain the benefits of political order.”

[http://en.wikipedia.org/wiki/Social\\_contract](http://en.wikipedia.org/wiki/Social_contract)

ARTICLE IX

USE RESTRICTIONS

In addition to all other covenants contained herein, the use of the lots and each building or improvement thereon is subject to the following:

Section 3. Noxious or Offensive Activities. No noxious or offensive activity shall be carried on upon any part of the properties nor shall anything be done thereon which may be, or may become, an

BOOK 702 PAGE 732

annoyance or nuisance to the neighborhood, or which shall in any way interfere with the quiet enjoyment of each of the owners of his respective residence, or which shall in any way increase the rate of insurance.

The McMichaels deny the covenants impose any duty on them? Apparently the McMichaels position is that the covenants are no longer enforceable, but for the reasons outlined in Plaintiff's Memorandum of Law in Support of the 1<sup>st</sup> Motion for Summary Judgment (pp. 6-8) this argument fails.

Until such time as the covenants are declared judicially invalid, they are binding on and impose duties on the owners of the real estate at issue. McMichaels have simply engaged in self-help repudiation of the covenants.

**C. The Montana Residential Landlord and Tenant Act of 1977 and the lease between the Gills and McMichaels impose duties on McMichaels.**

THE LEASE: On or about 2/9/13, the McMichaels and Gills entered into a Rental Agreement and at least 2 addendums (hereafter "the lease"). At ¶ 10, the rental agreement incorporated the terms of MCA 70-24-321 and included the following at ¶ 10(a):

- vi. **Conduct themselves and require other persons on the premises with their consent to conduct themselves in a manner that will not disturb their neighbors' peaceful enjoyment of the premises.**

At ¶ 10(I), the rental agreement included the following:

- I. **Tenant shall not violate any law, nor commit or permit any waste or nuisance on or about the premises, nor in any way annoy any other Tenant of the premises or neighbors, nor do or keep anything in or about the premises that will obstruct the public spaces available to other Tenants.**

At ¶ 11, the rental agreement included the following Rules and Regulations:

- j. **No automobiles, trailers, boats, motorcycles or campers shall be stored or repaired on the premises without the written permission of Landlord. A person with more than one (1) vehicle shall park the extra vehicle in the street if second car does not have permitted space.**
- k. **Tenants are required to get renters insurance to protect your personal property.**
- l. **Tenant, family and guests shall not interfere with the health, safety or peaceful enjoyment of the premises or other tenants. Musical instruments, radios, television sets, stereos, etc. shall be played reasonable and not any time a volume that disturbs others. Peaceful enjoyment hours are 10:00pm to 8:00 am.**

At ¶ 13, the rental agreement included the following Pet Rules at ¶ 13(F):

- c. **Tenants agree that they will not allow their pet to disturb or annoy neighbors in any way, whether the pet is inside the dwelling or outside.**
- d. **Tenant will keep control over the pet at all times, whether inside the dwelling or outside.**

If the McMichaels have no legal duty under Montana law to require their tenants conduct to conform to reasonable standards expected in a civilized society, then one wonders why they went to such great lengths to include provisions to accomplish just that in the lease ? If the conduct described in the 17 page affidavit was directed at the McMichaels, would their position be the same ?

Since the McMichaels voluntarily undertook duties to 3<sup>rd</sup> parties by including those provisions in the lease, they are now obligated to enforce them in good faith.<sup>3</sup> In

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<sup>3</sup> Indeed, an easy solution for the Court here is that any injunction entered by the Court incorporate the same terms as the Gills and McMichaels voluntarily agreed to in the lease – the same conduct restrictions that Gill and McMichael agreed to in writing long before the Gill harassment campaign and McMichael head in the sand

fact, Teri McMichael admitted as much in ¶ 20 of her affidavit of 6/5/2014, when she stated:

20. The lease signed by the Gills as tenants of the McMichaels conveys the requirements and obligations for residing on the property, and thus the Gills were on notice as to terms and conditions of the Covenants.

If the Gills were on notice as to the terms and conditions of the covenants, then the lease between the McMichaels and Gills put both of them on notice as to the duties it created to 3<sup>rd</sup> parties. Cossitt, as a third party beneficiary (TPB) is entitled to the protections of those contractual provisions that were included in the lease.

THE LANDLORD TENANT ACT: The lease, the legal relationships of all 3 parties (Cossitt, Gill and McMichael) are governed by the “The Montana Residential Landlord and Tenant Act of 1977”, codified at Title 70, Chapter 24, MCA (hereafter “the Landlord / Tenant Act). The duties imposed on a landlord by the Montana Residential Landlord and Tenant Act extend to third persons and the fact that a third person does not enjoy a contractual relationship with the landlord has no impact. *Kunst v. Pass*, 1998 MT 71, 288 Mont. 264, 957 P.2d 1,1998 Mont. LEXIS 101 (1998).

The Landlord Tenant Act is also applicable to protect 3<sup>rd</sup> parties (those outside of the landlord / tenant relationship), as follows, including but not limited to:

- a. **70-24-109. Obligation of good faith.** Every duty under this chapter and every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performance or enforcement.

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campaign started. If the conduct restrictions are good enough for Gills and McMichael, and intended to protect 3<sup>rd</sup> parties, why would not they be enforceable by the very 3<sup>rd</sup> parties they are intended to protect ?

b. **70-24-303.** (1) A landlord: (b) may not knowingly allow any tenant or other person to engage in any activity on the premises that creates a reasonable potential that the premises may be damaged or destroyed or that neighboring tenants may be injured;

c. **70-24-321. Tenant to maintain dwelling unit.** (1) A tenant shall: (f) conduct oneself and require other persons on the premises with the tenant's consent to conduct themselves in a manner, that will not disturb the tenant's neighbors' peaceful enjoyment of the premises; and

The Tenant Landlord Act is a remedial statute and various provisions of it confirm it is intended to be applied broadly:

- a. It is intended to be to be construed liberally, as noted in § **70-24-102**. Purposes -- liberal construction to promote;
- b. Adjacent landowners are not excluded from applicability of the statute: **70-24-104. Exclusions from application of chapter.**

The general rule of statutory construction is that an entire statute must be read to give meaning to the whole and that if the plain language of the statute is clear, the inquiry ends. Here, § **70-24-321** (1) (f) is clear: a duty is created that a tenant shall not disturb neighbors and § 70-24-303(1)(b) extends that duty to landlords. For the reasons stated above, McMichaels have a statutory duty and have breached it. Unlike the covenants, they cannot and do not claim that the statute is invalid.

**D. McMichaels, as landlords, are liable for their tenants conduct under the holding in Larson-Murphy v. Steiner, 2000 MT 334 (Mont. 2000).**

In Larson-Murphy v. Steiner, the Montana Supreme Court held that a landlord is liable for offsite injuries or nuisances caused by onsite activities, provided that the landlord consented to, knew of, or should have known of the activities when executing

the lease or at the time of renewal. *See Steiner* at ¶ 104 (citing Restatement (Second) of Torts §§ 379A, 837 (1965)):

Two relevant exceptions to the foregoing general rule, to which Larson-Murphy's argument alludes, are expressed under two, related sections of the Restatement (Second) of Torts §§ 379A and 837, which we conclude are persuasive authority in this instance. Section 379A provides that a lessor of land is subject to liability for physical harm to persons outside of the land caused by activities of the lessee or others on the land after the lessor transfers possession if, but only if:

(a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and

(b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary to safety would not be taken.

Restatement (Second) of Torts, § 379A (1965). Similarly, § 837 provides that a lessor of land is subject to liability for a nuisance caused by an activity carried upon the land while the lease continues and the lessor continues as owner, if the lessor would be liable if he had carried on the activity himself; and

(a) at the time of the lease the lessor consents to the activity or knows or has reason to know that it will be carried on, and

(b) he then knows or should know that it will necessarily involve or is already causing the nuisance.

Restatement (Second) of Torts § 837 (1979). See also Restatement (Second) of Property, Landlord & Tenant § 18.4 (1977) (providing substantially the same rule as § 379A). These Restatement sections and interpretive case law suggest that where, for example, a land owner abutting a public highway leases the property knowing it will be used for a potentially hazardous purpose, and as a result a traveler on the highway is injured, the owner may be subject to liability. See Restatement (Second) of Torts § 379A, comment c; *Park v. Hoffard* (Or. 1993), 315 Ore. 624, 847 P.2d 852, 855-56 (holding that landlord may be liable for damage caused by tenant's dog); *Klimkowski v. De La Torre* (Ariz.Ct.App. 1993), 175 Ariz. 340, 857 P.2d 392, 395 (**holding that if landlord has knowledge of nuisance, and has opportunity to reenter and abate the nuisance, [\*\*\*1227] he may be held liable if a third party suffers damage as a result of the nuisance**); *Easson v. Wagner* (S.D. 1993), 501 N.W.2d 348, 351 (stating that a landlord may be held liable for damage to adjoining property occasioned by a tenant's use of the property that was sanctioned by the landlord, pursuant to negligent leasing theory); *Walker v. Everist, [\*\*130] Inc.* (N.M.Ct.App. 1985), 102 N.M. 783, 701 P.2d 382, 387 (providing rule that if the potential harm is sufficiently substantial and predictable, it is the duty of the lessor to abate the nuisance created by his lessee).

[Larson-Murphy v. Steiner, 2000 MT 334 \(Mont. 2000\)](#). Consequently, under at least 2 contracts (the covenants and the lease), the Landlord Tenant Act (an explicit statutory provision) and the common law of Montana, the McMichaels have duties to adjacent landowners and are liable for damages resulting from breach of those duties.

The McMichaels have known of the problems since at least the meeting between Josh McMichael and Cossitt on Saturday, May 4, 2013, in Cossitt's garage, while the Kalispell Police officers were still onsite, conducting an investigation into the throwing of rocks and other projectiles by the Gills against the side of Cossitt's house. In fact, Josh provided a written statement to KPD on 4/4/2013, indicating that the tenant misbehavior has been known to the McMichaels since at least that date. See Exhibit B.

This lawsuit was filed on 12/5/2013 along with an affidavit; Wayne McMichael was served with the Summons, Complaint and affidavit on 1/7/2014. The lease terminated on 2/9/2014 and has apparently been renewed on a month to month basis. At the time of each monthly renewal, McMichaels knew of, were aware of and chose to not take any action with respect to the tenant misconduct.

### **III. WHILE SPEECH IS PROTECTED BY BOTH THE FEDERAL AND MONTANA CONSTITUTIONS, SPEECH INTENDED TO EMBARRASS, HARASSING AND ANNOY ENJOYS NO SUCH PROTECTION**

In 2008 the Montana Supreme Court held that speech that is intended to harass, annoy and intimidate enjoys no 1<sup>st</sup> Amendment protection. [St. James Healthcare v. Cole, 2008 MT 44 \(Mont. 2008\)](#).<sup>4</sup> At issue in the Cole case was an injunction that provided:

That Jesse A. Cole, M.D., is enjoined from engaging in any of the following:

(a) Calling, writing, or coming into contact of any kind, with Dr. Chacko, her supervisors, or any member of Boston University, either directly or indirectly;

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<sup>4</sup> It is curious why the Cole case was not cited in the McMichaels Response. Montana Rule of Professional Conduct 3.3(a) (1) and (2) require lawyers to provide citations to cases or law that may be adverse.

(b) Threatening any type of professional or physical harm to Dr. Chacko, her supervisors, or any member of Boston University, either directly or indirectly;

(c) Coming within 250 feet of Dr. Chacko;

(d) Indicating to patients, potential patients or physicians, that Dr. Chacko, or the radiology services offered by St. James, are in any manner inadequate or unprofessional, either directly or indirectly;

(e) Calling, writing, or have contact of any kind, with any potential candidate for the radiology department at St. James, that would discourage or intimidate such candidate from negotiating or contracting with St. James, either directly or indirectly; and

(f) Threatening any employee or agent of St. James verbally or physically, either directly or indirectly.

**St. James Healthcare v. Cole, 2008 MT 44 (Mont. 2008).** The court made short shrift of the 1<sup>st</sup> Amendment protection argument and stated:

It is important to bear in mind that neither the First Amendment nor Article II, Section 7 provide unlimited protection for all forms of speech. Some forms of speech and conduct are not considered constitutionally protected. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous, and the **insulting or 'fighting' words**--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas." Furthermore, "free speech does not include the right to cause substantial emotional distress by harassment or intimidation." **Activities which are intended to embarrass, annoy or harass . . .** are not protected by the First Amendment. Nye, 283 Mont. at 512, 943 P.2d at 101 (quoting State v. Cooney, 271 Mont. 42, 48, 894 P.2d 303, 307 (1995) (other citations omitted)).

**St. James Healthcare v. Cole, 2008 MT 44, (Mont. 2008).** Consistent with the holding in Cole, this Court can make short shrift of the argument advanced by McMichaels.<sup>5</sup>

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<sup>5</sup> The McMichaels take the same extreme positions with respect to both 1<sup>st</sup> Amendment protection of abusive speech and their duty to 3<sup>rd</sup> parties with respect to abusive conduct by their tenants. For the reasons set forth in this brief, neither position is legally sound. However, their willingness to assert this position in this litigation, and to repudiate or disclaim all reasonable restrictions on speech or conduct, is indicative of their reckless, cavalier and flippant attitude towards their obligations as landlords, neighbors and reasonable people. All the more reason for the Court to enter the requested injunction and remind the McMichaels they are expected to behave and conduct their rental operations as reasonable members of a civilized society.

Turning to the specific injunction at issue in Cole, the Court provided guidance to the lower Courts in drafting injunctions that allow prior restraint where those injunctions:

Lastly, because paragraphs (b), (c), and (f) target only speech and conduct that is intended to embarrass, annoy, harass or threaten, such conduct may be enjoined and does not amount to an [\*\*381] unconstitutional prior restraint on free speech. See Balboa Island Village, 156 P.3d at 347 (speech determined to be not constitutionally protected may be enjoined); Ansonia Associates Ltd. Partnership v. Ansonia Tenants' Coalition, Inc., 253 A.D.2d 706, 677 N.Y.S.2d 575, 576 (N.Y. App. Div. 1 1998) (**holding that defendants may be enjoined from approaching, accosting, initiating communications with, or disturbing visitors to an apartment complex because such conduct is not constitutionally protected**); See also Bihari v. Gross, 119 F. Supp. 2d 309, 327 (S.D.N.Y. 2000) (citing similar examples). Based on the "needs of the case," these paragraphs are all pin-pointed precisely toward forms of speech and conduct which are not constitutionally protected; thus, these paragraphs may stand.

[St. James Healthcare v. Cole, 2008 MT 44 \(Mont. 2008\)](#). Applied here, the Court should have little hesitation to enjoin the defendants from such conduct and the assertion that such speech is protected has about as much merit and is entitled to the same amount of judicial deference as the notion that a landlord has no duty to 3<sup>rd</sup> parties to control tenants or ensure they behave in a civilized manner.

## CONCLUSION

For the reasons discussed above, Cossitt requests that the Court grant his Motion and enter Preliminary Injunction against all Defendants that terminates the Gill lease and prohibits McMichael from renting 1233 6<sup>th</sup> Street West to any other party until this matter can proceed to final judgment.

In the event the Court is not inclined to go that broadly on a temporary basis, then entry of an injunction against all Defendants, their family members, any friends, visitors, future tenants of McMichael, agents or others acting on their behalf are