

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Eighteenth Judicial District**

A. PERSONAL INFORMATION

1. Full Name: James Donald McKenna

a. What name do you commonly go by? Jim

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

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

4. Office Address: 109 East Main St., Suite 1, Bozeman, MT 59715

Phone: 406-586-4994

5. Length of residence in Montana: Lifetime

6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
Continuously since 1981	Bozeman	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>
Hamilton High School	Hamilton, MT	June, 1974	Diploma
Carroll College	Helena, MT	May, 1978	Bachelor of Arts
City University of Seville	Seville, Spain	(Junior year)	N/A
University of Montana	Missoula, MT	May, 1981	J.D.

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

During my third year of law school, I was selected to be a Teaching Assistant for an undergraduate class at the University of Montana, Law and Society. I was also selected to be a research assistant for a scholarly article regarding public participation in federal administrative proceedings. The article was published in the Columbia University Law Review.

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.

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 Courts	May, 1981
U.S. District Court, Montana	May, 1981

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

I am employed as an attorney in private practice, as a sole practitioner. The name of my firm is McKenna Law, P.C. Presently, I do not have partners or associates.

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>
Moore, O'Connell & Refling, P.C.	Temporary legal associate	September, 1981 - December, 1981
Gallatin County, Montana	District Court Law Clerk for the Hon. Joseph B. Gary	January, 1982 - December, 1982
Gallatin County, Montana	Deputy County Attorney, serving under Mike Salvagni, County Attorney	January, 1983 - June, 1988
Self, attorney in private practice	Attorney	July, 1988-July, 1990
Lineberger, Walsh & McKenna, P.C.	Partner in law firm	August, 1990 - August, 1992
City of Bozeman	City Court Judge (one-half time)	December, 1990 - December, 1995
Walsh & McKenna, P.C.	Partner in law firm	September, 1992 - December, 2008
McKenna Law, P.C.	Sole practitioner in law firm	January, 2009 - present

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

Except for a period of approximately three months immediately following law school, I have been employed continuously. During that time period, I did extensive backpacking in the Bitterroot mountains.

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

I am a sole practitioner in a busy civil law practice. The major types of law that I practice are family law and construction law. I also regularly serve as a substitute judge in the Bozeman Municipal Court, and as a mediator. Family law constitutes approximately eighty percent of my total practice, with the remainder being made up of construction law, transactional matters, other legal disputes, and mediation.

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

I was the West Yellowstone City Attorney for approximately 24 years, from 1990 through 2014. My former law partners, Peter S. Lineberger and Philip F. Walsh, also performed some of those duties. I have also practiced as a volunteer representing Guardians ad Litem for Gallatin County's CASA/GAL program in child abuse and neglect cases. I have not done this work recently.

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

None.

17. Do you regularly appear in court? Yes.

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

Federal court	<u>5</u>	%
State or local courts of record	<u>90</u>	%
Administrative bodies	<u>5</u>	%
Other	<u>0</u>	%

18. During the last five years, what percentage of your practice has been trial practice? 80%

19. How frequently have you appeared in court? Four times per month on average.

20. How frequently have you appeared at administrative hearings?
0-1 times per month on average.

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

Civil	<u>90</u>	%
Criminal (acting as substitute municipal court judge)	<u>10</u>	%
Other	<u>0</u>	%

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

Yes (not for oral argument).

Conlon, et al. v. Town of West Yellowstone, Case No. DA-12-0207

Opposing counsel: Stephen C. Pohl, 1700 W. Koch, Suite 5, Bozeman, MT 59715; 406-586-3366, and Paul Grigsby, 1700 W. Koch, Suite 4, Bozeman, MT 59715; 406-586-0246

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

Four. Also note that, as Bozeman City and Municipal Judge, I have presided over at least 24 jury trials.

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

Approximately 20.

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

a. *In Re the Guardianship of Jack Y. Ostrovsky*, Montana 18th Judicial District Court, Cause No. DG-15-28B.

Opposing counsel: Todd R. Hillier, 3825 Valley Commons Dr., Suite 5, Bozeman, MT 59718.

Telephone: 406-586-1643. Date of trial: August 2, 2016. Presiding Judge: Hon. Mike Salvagni

b. *In Re the Marriage of Voris*, Montana 18th Judicial District Court, Cause No. DR-13-112C.

Opposing counsel: Jessica Wilkerson, 616 Helena Ave., Suite 100, Helena, MT 59601.

Telephone: 406-442-9830. Date of trial: July 27, 2016. Presiding Judge: Standing Master Magdalena Bowen, 406-582-2156.

c. *In Re the Marriage of Elliott*, Montana 18th Judicial District Court, Cause No. DR-07-280C.

Opposing counsel: Daniel J. Roth, 2417 W. Main, Suite 2A, Bozeman, MT 59718. Telephone: 406-586-8615. Date of trial: February 3, 2016. Presiding Judge: Standing Master Magdalena Bowen, 406-582-2156.

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

I have had several telephonic hearings involving child support disputes, presiding over by administrative law judges, and involving the Montana Child Support Enforcement Division. The most extensive adversary proceeding before an administrative board or commission, that I have appeared in, involved an application for a Montana Intrastate Certificate of Public Convenience and Necessity, filed by Mr. Paul LeGros, d/b/a A-Cab Taxi. This matter involved a contested hearing lasting one full day, on November 28, 2012. The presiding officer was Public Service Commissioner W. A. (Bill) Gallagher. The applicant presented nine witnesses, and the opposing parties presented four witnesses. On May 21, 2013, the Montana Public Service Commission issued its order denying the application. The Public Service Commission Docket Number is T-12.5.PCN, and the order number is 7270a.

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.

None.

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.

- a. Montana State Bar Association, 1981-present.
- b. Gallatin County Bar Association, 1982-present.
- c. Montana Judges Association, Courts of Limited Jurisdiction, 1990-1995.

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.

Hope Lutheran Church, Bozeman, Montana, 1986-present.

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

Yes. In the fall of 1991, I ran for the office of Bozeman City Judge. I was not opposed, and was elected to a term of four years.

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

Attorneys and judges have the benefit of an extensive formal education. I believe that with that benefit comes the responsibility to serve one's community with volunteer work. Several years ago, I served on the board of the Gallatin Community Clinic (now Community Health Partners), a low-income health clinic in Bozeman. When I first joined the board, the clinic operated in a two-room facility on Saturday mornings. I was on that board for several years, including a time as chairman. When I left the board, the clinic had expanded into a full-service, standalone clinic operating six days per week. The clinic has since partnered with Community Health Partners of Livingston, Montana, and operates clinics in Bozeman, Livingston, Belgrade, and West Yellowstone.

More recently, I have volunteered to represent Guardians ad Litem as part of the Gallatin County CASA/GLA program, in child abuse and neglect cases filed in the District Court here in Gallatin County. I also serve as a substitute Municipal Court judge in Bozeman, approximately 15-20 days per year. Although I am paid for this work, I receive less than one-third my normal hourly rate, so I consider that to be a form of public service. Presently, I am scheduled to serve as Municipal Court judge on September 26-29.

I should also note that in June of 1995, I received the Montana State Bar Association Pro Bono Service Award.

E. PROFESSIONAL CONDUCT AND ETHICS

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

No.

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

No.

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

No.

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

No.

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

No.

F. BUSINESS AND FINANCIAL INFORMATION

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

No.

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

N/A

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.

N/A

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 No

If not, please explain.

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

If yes, please explain.

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 have researched and drafted a number of briefs and proposed Findings of Fact and Conclusions of Law, in preparation for bench trials, in the last five years. This involves both statutory and case law

research. Up until the end of 2014, I did have the assistance of an associate, but I was primarily responsible for my own research and writing.

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

I have drafted approximately 20 contracts and simple wills in the last five years, including a somewhat complex contract for a multi-million-dollar construction project in West Yellowstone. I also regularly write letters to other attorneys. Some of these letters are multi-page position statements or settlement proposals.

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.

See attached.

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

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

Yes - Westlaw. No - Lexis. I am also competent in the use of Fastcase.

H. MISCELLANEOUS

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

My hobbies are skiing, both alpine and Nordic, golf, hiking and backpacking, and cooking. I am also somewhat active in the congregation of Hope Lutheran Church, where I work in the audio-visual recording booth most Sundays.

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

I worked as a lifeguard and swimming instructor at the Hamilton city pool for summers following my junior and senior years in high school, and part of the summer following my freshman year in college. During my freshman, sophomore, and senior years at Carroll College, I held work-study positions at the Helena Junior High School library and in the kitchen of the Carroll College food service. For the summers of 1975-1979, I worked as a firefighter for the U.S. Forest Service in Montana, Idaho, Washington, and Arizona. In the summer of 1980, I worked as an intern for the Flathead County Public Defender's Office.

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

I worked as a volunteer attorney representing Guardians ad Litem in the Gallatin County CASA/GAL program involving child abuse and neglect cases in the District Court. I have not done that work in the last couple of years, but worked approximately five hours per month prior to that. I have also served as a substitute Bozeman Municipal Court judge during the last five years. I serve in that position 15-20 days per year.

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

I was strongly influenced by my father, D.W. McKenna, who operated a law office in Hamilton from 1948 until 1996. He taught me that every person, even people who have committed serious crimes, should be treated with dignity and respect. I was also influenced by Professor Carl Tobias, my academic advisor in law school, and by Mr. Klaus Sitte, the director of the Missoula, Montana, Legal Services office. Both of these attorneys influenced me to believe that lawyers should be involved in community activities. I was also influenced by Judge Mike Salvagni, who was my boss in the Gallatin County Attorney's office for five and one-half years. He taught me about hard work, attention to detail, and professional ethics in difficult criminal cases, including prosecutions for rape and homicide. Finally, I was influenced by Judge Thomas A. Olson, who became a Gallatin County District Judge the same day I started work in the County Attorney's office. He held me accountable for my actions, successes, and mistakes in his courtroom and greatly assisted me in developing my trial skills.

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

A judge's job is not to be perfect, but to make decisions. This includes difficult decisions in close cases. To do this, a judge must be attentive, respectful, and diligent in his or her work. A judge must have the academic and intellectual ability to understand and analyze complex legal problems in a timely manner. A judge should also have the life experience and open-mindedness to evaluate witnesses and advocates appearing in court. A judge should also have the work habits and discipline necessary to operate effectively and get things done, especially in an extremely busy judicial district like Gallatin County.

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.

District court judges are not policy makers, and they are rarely faced with legal questions that have not been addressed by other courts, especially appellate courts. A judge's primary objective should be to develop a thorough understanding of the ways in which various legal issues have been addressed or resolved by other courts. That being said, a judge must recognize that legal disputes involve individual persons, and that all people are unique. In proper cases, a judge must be able to adjust legal principles

and rules to provide the best outcome for the individuals involved. This is particularly true for cases involving parenting issues for minor children. As a parent who has helped raise two children to adulthood, I believe I recognize the need to balance consistency with flexibility in addressing individual problems and circumstances.

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

I have been extremely fortunate in my personal and professional lives. I grew up in a very stable household, with two brothers and two sisters. I was given great opportunities to work for outstanding supervisors, before, during and after law school. I have lived in Bozeman for 35 years and have greatly enjoyed and benefited from this magnificent part of our state. I believe that my life experience has prepared me well to be a District Court judge, and see that office as an opportunity for me to contribute back to the community and to the state of Montana. I look forward to working hard to perform the duties of a judge, and maintaining the high level of professional excellence and respect that has already been established by Judge Salvagni and the other judges in Gallatin County.

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

I am proud of the work I did in the Gallatin County Attorney's office. When I started there, it was with a completely new staff and we were frankly somewhat overwhelmed by the job. It was not uncommon for me to come to the office on a Saturday morning, and find the County Attorney, Mike Salvagni, and other deputies already there. We all learned to do our jobs and provide good service to the citizens of Gallatin County.

I am also proud of the work I did with the Gallatin Community Clinic, as described in Section 31, above. Finally, I am proud to have been married to the same woman for 29 years and to have raised two children to be what I feel are constructive, responsible members of society.

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

I believe that I am well-known to most of the members of the Gallatin County Bar. Since I was the West Yellowstone City Attorney for more than twenty years, I am known by law enforcement and also by court personnel throughout this county. I believe these are valuable qualities for a judge.

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?

The fact that I was the Bozeman City Judge (approximately one-half time) for five years and continue to act as a substitute Municipal Court judge, gives me experience and insight that other applicants may not have. I have presided over at least twenty jury trials and numerous other contested hearings. I believe that I would be fully prepared to begin working as a District Court judge on January 2, 2017.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 18th 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.

19 Sep. '16
(Date)

James D. McDonald
(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Wednesday, September 21, 2016.

Mail the signed original to:

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

Send the electronic copy to: mtsupremecourt@mt.gov

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Attorneys for Defendant Edwin R. Meece

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

SHIRLEY EWAN, for herself and on)	Cause No. CV-09-72-BLG-RFC
behalf of all those similarly situated,)	
)	
Plaintiff,)	
)	BRIEF OF DEFENDANT EDWIN
vs.)	R. MEECE IN SUPPORT OF
)	MOTION FOR COMPLETE
CITY OF LIVINGSTON, EDWIN R.)	SUMMARY JUDGMENT
MEECE, individually and as an agent)	
of the City of Livingston, and the)	
MONTANA MUNICIPAL)	
INSURANCE AUTHORITY,)	
)	
Defendants.)	
_____)	

I. INTRODUCTION

Defendant Edwin R. Meece (“Meece”) has filed a motion for complete summary judgment, and this brief is submitted in support of that motion. The Plaintiff, Shirley Ewan (“Ewan”), filed a complaint against the City of Livingston, Montana (“City”) and Meece, as an individual, setting forth several claims for relief. (It may be noted that the complaint also made claims against the Montana Municipal Insurance [sic] Authority, but those claims have been dismissed.) The Plaintiff’s claims

with respect to Meece consist of alleged civil rights violations under 42 U.S.C. § 1983, and more specifically violations of Ewan's substantive and procedural due-process rights.

II. FACTS

Shirley Ewan was employed for several years by the City, most recently as its finance director. Statement of Uncontroverted Facts, ¶ 1. In 2006, Meece became the city manager and, consequently, Ewan's supervisor. Statement of Uncontroverted Facts, ¶ 2. The City was and remains a commission-manager form of local government, and Meece therefore had statutory authority to discipline and discharge Ewan. Affidavit of Steve Caldwell, ¶ 3; § 7-3-304(13), MCA.

On October 31, 2008, in his capacity as city manager, Meece discharged Ewan from her employment. Statement of Uncontroverted Facts, ¶ 4. All of the claims in this litigation arise from that discharge.

III. ARGUMENT

A. Basic Standard for Summary Judgment.

Rule 56(c)(2), Fed.R.Civ.P., sets forth the standard for summary judgment: "The [summary] judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." The party seeking summary judgment bears an initial burden of informing the court of the basis for the motion, and of identifying those portions of the pleadings, affidavits, and other papers on file, which demonstrate the absence of any genuine issue of material fact. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). Once this burden has been met, the opposing party cannot rely simply upon allegations or denials; rather, he or she must set forth specific facts establishing a genuine issue of fact, for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the nonmoving party fails to raise a genuine factual issue, then "the

moving party is entitled to judgment as a matter of law.” *Celotex*, 477 U.S. at 323.

B. Meece Was Acting Within the Course and Scope of His Employment.

When Meece terminated Ewan, he was performing his duties as city manager, and was acting within the course and scope of his employment. As noted above, Livingston was and is a commission-manager local government. This form of government is authorized and described by §§ 7-3-301, et seq., MCA. Section 7-3-304, MCA, sets forth the duties of the city manager:

7-3-304. Duties of manager. The manager shall: ... (4) direct, supervise, and administer all departments, agencies and offices of the local government unit except as otherwise provided by law or ordinance; ... (13) appoint, suspend, and remove all employees of the local government except as otherwise provided by law or ordinance....

The propriety of Meece’s actions is affirmed by the Affidavit of Steve Caldwell, attached to Meece’s Statement of Uncontroverted Facts, as Exhibit B.

C. Meece Is Immune from Individual Liability.

The Montana Legislature has made it clear that state governmental entities are liable for their wrongful actions, in appropriate cases: “Every governmental entity is subject to liability for its torts and those of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function....” § 2-9-102, MCA. However, the legislature has also made it clear that individual government employees are to be immunized for their non-criminal behavior, when performing the duties of their employment. Section 2-9-305, MCA, provides in part as follows:

(1) It is the purpose of this section to provide for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment.

(2) In any noncriminal action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission, including alleged violations of civil rights pursuant to 42 U.S.C. 1983, or other actionable conduct of the employee committed while acting within the course and scope of the employee’s office or employment, the governmental entity employer,

except as provided in subsection (6), shall defend the action on behalf of the employee and indemnify the employee.

* * *

(5) Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter constitutes a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, omission, or other actionable conduct gave rise to the claim. In an action against a governmental entity, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment, unless the claim constitutes an exclusion provided in subsections (6)(b) through (6)(d).¹

One of the public policy considerations behind the statute quoted above is the prevention of a double recovery by a claimant. In *Kiely Construction, LLC v. City of Red Lodge*, 2002 MT 241, 312 Mont. 52, 57 P.3d 836 (2002), a construction company brought claims against the City of Red Lodge and individual members of the city council, arising from a real estate development project. The claims consisted essentially of abuse of discretion and § 1983 claims. Prior to trial, the District Court granted summary judgment to individually named members of the city council. That ruling was based on § 2-9-305, MCA. On appeal, the Montana Supreme Court upheld that decision, with the following comments:

All the counts alleged in Kiely's complaint and amended complaint turn on actions performed by the individually named defendants, while serving as members of the city council. The council members' actions served as the factual basis for Kiely's claims and damages under § 76-3-625(1), MCA, and [42 U.S.C.] § 1983.... The recovery sought by Kiely against both Red Lodge and the city council members arose out of the same subject matter, and because the intent behind § 2-9-305(5), MCA, is to prevent a plaintiff from recovering from both the governmental entity and the individuals acting on behalf of that entity for the same conduct, we conclude Kiely is barred from recovering awards against the individual council members, separate and in addition to the awards it recovers from Red Lodge.

¹ Subsection (6) of the statute sets forth exceptions to the immunity and indemnification of the individual employee. Those exceptions involve cases of criminal conduct, interference with the defense of the claim, or behavior constituting oppression, fraud, or malice. The complaint in this case alleges none of these things, with the sole and minor exception that at ¶ 16, the complaint claims that the Defendants acted with the intent to injure the Plaintiff, and with malice and reckless disregard of the Plaintiff's rights. No evidence of any kind has been adduced to support such a claim.

2002 MT 241, ¶ 88, 312 Mont. 52, 57 P.3d 836. This reasoning applies to the case now before this Court, since Ewan's claims against Meece arise from the same subject matter as do her claims against the City.

D. The City Has Acknowledged That Meece's Conduct Occurred Within the Course and Scope of His Employment.

The City of Livingston has acknowledged that when Ewan was discharged, Meece was acting within the course and scope of his employment. Affidavit of Steve Caldwell, attached to Meece's Statement of Uncontroverted Facts, ¶ 3. In *Kenyon v. Stillwater County*, 242 Mont. 142, 835 P.2d 742 (1992), the Montana Supreme Court noted the significance of such an acknowledgment, and used it as a basis for upholding the dismissal of an individual county employee from a lawsuit. In that case, the plaintiff was discharged from her employment as a secretary in the county attorney's office. She brought a wrongful-discharge and age-discrimination case against the county and the county attorney as an individual. The District Court granted summary judgment for the county attorney and the plaintiff appealed.

In upholding the District Court's decision, the Supreme Court considered the language of § 2-9-305, MCA, and the fact that the county commissioners agreed that the county attorney was acting within the scope of his official duties when he discharged the plaintiff. The court reached its conclusion with the following observations:

The county was named as a defendant on the basis of its liability for [the county attorney's] conduct within the scope of his duties.... Given the acknowledgment by the commissioners that the conduct on which the action is based arose out of the course and scope of [the county attorney's] official duties, it is clear that [the county attorney] himself is immune from liability under § 2-9-305(5), MCA (1987).

254 Mont. at 147, 835 P.2d at 745.

IV. CONCLUSION

When Edwin Meece discharged Shirley Ewan from her employment with the City of Livingston, he was doing his job as required by Montana statutes and the Livingston City Commission. While the City may or may not be liable for these actions, Meece is immune under well-established law. His motion for summary judgment should be granted.

DATED this 8th day of October, 2010.

/s/ James D. McKenna
JAMES D. McKENNA
McKENNA LAW, P.C.
Attorney for Defendant Edwin R. Meece

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2010, a true and correct copy of the foregoing document was served on the following persons by the following means:

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THE MUNICIPAL COURT OF THE CITY OF BOZEMAN
COUNTY OF GALLATIN, STATE OF MONTANA

STATE OF MONTANA,)
)
 Plaintiff,)
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 vs.)
)
 ANDREW CLAYTON KEMP,)
)
 Defendant.)
 _____)

Case No. TK-12-5560

ORDER AND MEMORANDUM

The Defendant in this case has filed a Motion to Suppress Evidence, asking the Court to suppress evidence gathered by the Bozeman Police Department in connection with the Defendant’s arrest for Driving While Under the Influence of Alcohol, in violation of § 61-8-401, MCA. The Plaintiff opposes the motion. Both the Plaintiff and the Defendant have filed briefs in support of their respective positions, and a hearing in this matter was held on May 1, 2013. In consideration of the evidence presented at the hearing, together with applicable law, and for the reasons set forth below;

IT IS HEREBY ORDERED that the Defendant’s motion is DENIED.

MEMORANDUM

1. Facts. Bozeman Police Officer Matthew Slayton (“Slayton”) was on patrol in Bozeman at approximately 2:00 a.m. on November 15, 2012. He was in a police vehicle in the general area of 7th Avenue and Main Street.

At approximately 2:05 a.m., Slayton received a transmission from law enforcement dispatch, consisting of an “attempt to locate” call. The transmission indicated that a suspected “hit and run”

1 vehicle, a red pickup truck, was traveling east on Story Street and then North on South 9th Avenue.
2 The dispatch further stated that the pickup had or might have some physical damage to the driver's
3 side of the vehicle. Shortly thereafter, Officer Slayton, eastbound on Main Street between 7th and
4 8th Avenues, saw a red pickup, apparently stopped at a stop sign, at the intersection of 7th and Main,
5 pointed to the north. The officer made a right-hand turn onto South 7th and then did a U-turn to get
6 behind the red pickup. As shown on a video recording introduced in evidence at the hearing in this
7 case, the officer had a good view of the left side of the red pickup, and noticed a dent near the front
8 fender. The officer then pulled behind the truck and activated his overhead flashing lights. The
9 officer then made contact with the driver of the truck, Defendant Andrew Kemp. That contact
10 eventually developed into an arrest of Mr. Kemp and the charges now pending in this case.

11 The Defendant claims that Officer Slayton's "stop"¹ of the Defendant was illegal. The Court
12 concludes that the "stop" occurred when the officer activated his overhead flashing lights, from a
13 position immediately behind the Defendant. This action unmistakably notified the Defendant that
14 he was not free to leave the area. Therefore, the legality of the officer's action depends upon the
15 facts and circumstances existing immediately prior to the activation of the flashing lights.

16 2. Legal Standard. There is little disagreement between the parties as to the legal
17 standard for the permissibility of a traffic stop. Both parties agree that a traffic stop must be based
18 on particularized suspicion. The Montana Supreme Court has made it clear that "particularized
19 suspicion" requires the following: (1) objective data from which an experienced police officer can
20 make relevant inferences; (2) a resulting "particularized suspicion" that an occupant of the vehicle
21 in question is or has been engaged in wrongdoing. *Sate v. Gopher*, 193 Mont. 189, 631 P.2d 293
22 (1981). *See also* § 46-5-401(1), MCA. As correctly noted by the State in its response to the
23 Defendant's motion, in any given case the analysis is driven by the particular facts and circumstances
24 present. *State v. Gopher, supra*.

25 In this case, the traffic stop occurred about five or six blocks from the reported first location

27 ¹ It is interesting that the Defendant's vehicle was not moving at the time the officer activated his flashing lights. This was therefore more
28 of a "detention" than a stop, and begs the question of whether a detention is less invasive, and therefore requires less factual and legal justification,
than does a traffic stop of a moving vehicle. *See State v. Reiner, infra*, ¶ 19. The Court finds, however, that resolution of this case does not require
the Court to count the number of angels dancing on the head of that particular pin.

1 of the suspicious truck. Also, the stop occurred north and east of that reported location, consistent
2 with the direction of travel indicated by the dispatcher. The color of the truck was similar or the
3 same as that indicated by the dispatcher. The stop occurred less than thirty minutes after the officer
4 first received the dispatch. Under these circumstances, the officer had a particularized suspicion,
5 although not necessarily knowledge or certainty, that the vehicle he stopped was involved in a “hit
6 and run” incident. The State has met the legal standard for justification of the traffic stop.

7 In his reply brief, the Defendant cites *State v. Reiner*, 2003 MT 243, 77 P.3d 210, and *State*
8 *v. Lee*, 282 Mont. 391, 938 P.2d 637 (1997). Both of these cases are distinguishable from the present
9 case. In *Reiner*, the offense under investigation was Driving While Under the Influence, and the
10 initial report to law enforcement did not provide any reasons for why the caller believed the driver
11 was intoxicated. *Reiner*, ¶ 3. In reversing the District Court’s approval of the investigative stop, the
12 Supreme Court noted that for a citizen’s report of wrongdoing to be considered reliable by a peace
13 officer, it must contain detail to provide a basis for the citizen’s belief that a criminal act was taking
14 place. The court concluded that the informant’s belief was not supported by either the reasons for
15 that belief or by the officer’s personal observations, and therefore did not form a particularized
16 suspicion for the traffic stop. *Id.*, ¶ 17. The *Lee* decision is very similar. An anonymous caller
17 stated that she “believed” Lee was driving while under the influence, and gave a description of the
18 suspect vehicle. The caller did not explain the reasons for her belief, and the investigating officer
19 acknowledged that the suspect vehicle was not speeding, weaving, or swerving on the road. This
20 lack of information, either from the anonymous caller or the investigating officer, caused the
21 Supreme Court to conclude that the officer did not have the required particularized suspicion to make
22 the traffic stop. In the present case, on the other hand, the offense under investigation was Leaving
23 the Scene of an Accident, or “hit and run.” When Officer Slayton saw damage to the suspect vehicle,
24 that information, combined with the other factors mentioned above, provided the requisite
25 particularized suspicion for the officer’s subsequent investigation.

26 CONCLUSION

27 For the reasons stated above, the Defendant’s Motion to Suppress Evidence is denied.

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DATED this 4th day of June, 2013.

/s/
JAMES D. McKENNA
Acting Municipal Court Judge

cc: Susan Wordal, City Attorney's Office (via email: swordal@bozeman.net)
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