

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
First Judicial District**

A. PERSONAL INFORMATION

1. Full Name: **David Charles Morine**
 - a. What name do you commonly go by? **David**
2. Birthdate: [REDACTED] Are you a U.S. citizen? **Yes**
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: **33 S. Last Chance Gulch, Ste. 1A, Helena, MT 59601**
Phone: **406-444-8771**
5. Length of residence in Montana: **6 years**
6. Place of residence for the last five years: **Helena, Montana**

<u>Dates</u>	<u>City</u>	<u>State</u>
September 2014 – Present	Helena	Montana
June 2014 – September 2014	Great Falls	Montana

B. EDUCATIONAL BACKGROUND

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

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
The Blake School	Minneapolis, MN	June 2002	H.S. Diploma
DePauw University	Greencastle, IN	May 2006	B.A.: Philosophy/French
T.E.F.L. Worldwide Prague Certification	Prague, Czech Republic	May 2007	T.E.F.L. (Teacher of English as a Foreign Language)
Université Jean-Moulin Lyon 3	Lyon, France	May 2011	Diploma in E.U. and Int'l Law
University of Minnesota Law School	Minneapolis, MN	May 2012	J.D. (<i>cum laude</i>)

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

- **Honors: *cum laude* (University of Minnesota Law School 2012; The Blake School, 2002)**
- **ABA Negotiation Competition Team member (University of Minnesota Law School 2011-2012)**
- **Jessup International Moot Court Competition Team member ((University of Minnesota Law School 2011-2012)**
- **President: International Negotiation Project (University of Minnesota Law School 2010-2012)**
- **Chubb Bettels Scholarship (The Blake School, 2002)**

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

No. I was a member of the Phillip C. Jessup International Moot Court Competition Team.

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>
State Bar of Minnesota (<i>inactive</i>)	October 2012
State Bar of Montana	April 2015
U.S. District Court for the District of Montana	April 2015

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

Partner- Hattersley Walter, PLLP. My partners are Tom Hattersley and Teri Walter. Jock Anderson and Jeff Hindoiien are of counsel with the firm.

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>
Hattersley Walter, PLLP 33 S. Last Chance Gulch, Ste. 1A Helena, MT 59601	Partner	Jan. 2020 – Present
	Litigation Associate	Feb. 2016 – Dec. 2019
Montana First Judicial District Court 228 Broadway Helena, MT 59601	Law Clerk to Hon. Judge James Reynolds	Oct. 2014 – Feb. 2016
	Judge Pro Tempore for Criminal Matters	May 2015 – Feb. 2016
Montana Supreme Court 215 N Sanders Helena, MT 59601	Law Clerk to Hon. Justice James Shea	Jun. 2014 – Aug. 2014
Randstad Professionals 80 S. 8th St., Suite 1500 Minneapolis, MN 55402	Contract Attorney	Feb. 2013 – May 2014

University of Minnesota Law School 229 19th Avenue South Minneapolis, MN 55455	Communications Associate	Aug. 2012 – Feb. 2013
	Simulation Drafter	Dec. 2011 – Jun. 2012
	Research Assistant Prof. Kevin Reitz	Jun. 2010 – Jan. 2012
Kaplan Test Prep and Admissions 2051 Killebrew Dr. # 110 Bloomington, MN 55425	LSAT Instructor	Jan. 2009 – May 2012
Bonnie M. Fleming, PA 2701 Dean Parkway Minneapolis, MN 55416	Legal Assistant	Jun. 2008 – Aug. 2009
L.T.C. Formation Aix-en-Provence, France	English Teacher	Sep. 2007 – Dec. 2007
Lexis Jazykova Škola Seifertova 327/85 Prague 3, 130 00 Czech Republic	English Teacher	May 2007 – Aug. 2007
Walker Art Center 725 Vineland Place Minneapolis, MN 55403	Security and Operations Manager	Jun. 2006 – Apr. 2007

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

I have been continuously employed since completion of my formal education.

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

My present law practice is focused primarily on tort and insurance defense litigation including personal injury, auto accidents, slip-and-falls, construction defects, contract disputes, and wrongful death claims, among others. My practice also involves some employment litigation defense, wills and estates, and general business advice.

**95% Tort / insurance defense litigation
5% Employment law, wills and estates, general business advice**

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

I have been involved in teaching and public education on the rule of law, trial practice, and the judicial branch of government since I graduated from Law School. I was a coach for the Jessup International Moot Court Competition Team at the University of Minnesota Law School from 2012 to 2014.

Presently, I teach trial practice skills to high school students as a coach for the Helena High School Mock Trial teams. I am one of the founders and program coordinators of the Montana High School Mock Trial Competition. In addition, I have helped prepare students and served as a judge for the crosstown mock trial competition involving Capital and Helena High Schools. I frequently visit various classes at Capital and Helena High Schools to lead discussions on the American justice system, trial practice, and the legal profession.

I have served as a mentor for the Montana Youth in Government program sponsored by the YMCA.

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

Civil Litigation

17. Do you regularly appear in court? **Yes. As a civil litigator, I appear in court consistently with the needs of my cases.**

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

Federal court	5%
State or local courts of record	95%
Administrative bodies	0%
Other	0%

18. During the last five years, what percentage of your practice has been trial practice? **90%**

19. How frequently have you appeared in court? **As needed, 0-1 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, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

No.

23. State the number of jury trials that you have tried to conclusion in the last ten years. **0.**

24. State the number of non-jury trials that you have tried in the last ten years. **0.**

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.

The Estate of Jacob Wayne Fellman v. Cascade County

- **Montana 8th Judicial District Court, Cascade County, Cause No. ADV-14-572**
- **Defend Cascade County in wrongful death action.**
- **Mediation is scheduled for October 2020. Trial to be scheduled if mediation is unsuccessful.**

**Opposing Counsel: James G. Hunt
Patrick T. Fox
HUNT & FOX, PLLP
111 N. Last Chance Gulch, Suite 3A
Helena, MT 59601
406-442-8552**

**Channing Hartelius
HARTELIUS, DUROCHER & WINTER
118 6th St. S.
Great Falls, MT 59401
406-727-4020**

**Presiding Judge: Hon. Robert Olson (9th Judicial District)
406-424-8360**

Johnson-Wilson Constructors, Inc. v. Gary Wilson & Ryan Thiessen

- **Montana 1st Judicial District Court, Lewis & Clark County, Cause No. CDV-2017-922**
- **Defend Johnson-Wilson Constructors on counterclaims of negligence, breach of contract, breach of covenant of good faith and fair dealing, and abuse of process arising out of the buyout and departure of two former officers, directors, and shareholders.**
- **Case resolved before trial.**

Opposing Counsel: Michael L. Rausch
Steve J. Fitzpatrick
BROWNING, KALECZYC, BERRY & HOVEN, PC
Liberty Center, Suite 302
9 Third Street North
Great Falls, MT 59401
406-453-1634

Presiding Judge: Hon. Kathy Seeley
406-447-8209

The Estate of Virginia D. Petroni v. 3745 Harrison Avenue LLC and Cameron Calder

- Montana 2nd Judicial District Court, Silver Bow County, Cause No. DV-18-125
- Defend 3745 Harrison Ave. LLC and managing member Cameron Calder in wrongful death action.
- Case resolved before trial.

Opposing Counsel: William P. Joyce
Michael W. Haynes
JOYCE & MACDONALD, PLLP
100 East Broadway Street, First Floor
Butte, MT 59701
406-723-8700

Presiding Judge: Hon. Kurt Krueger
406-497-6410

Donna and Michael Gardner v. Darius Investments LLC d/b/a Days Inn

- Montana 2nd Judicial District Court, Silver Bow County, Cause No. DV-19-51
- Defend owner of Days Inn hotel in Butte in personal injury slip-and-fall lawsuit.
- Jury trial is scheduled for March 2021.

Opposing Counsel: Lyman H. Bennett, III
P.O. Box 337
Virginia City, MT 59755-0337
406-843-5650

Presiding Judge: Hon. Kurt Krueger
406-497-6410

Melissa Beth Dyekman, individually and as Personal Representative of the Estate of Jeffrey Lane Dyekman v. Big Sky Steel and Salvage, Inc. and Ethan James Anderson

- Montana 13th Judicial District Court, Yellowstone County, Cause No. DV-19-0356
- Defend Ethan Anderson in wrongful death and survival action arising out of auto accident.
- Case resolved before trial.

Opposing Counsel: Ann E. Davey
VINCENT LAW OFFICE
621 E. 4th Avenue North
P.O. Box 1207
Columbus, MT 59019
406-322-8557

John R. Vincent
VINCENT LAW OFFICE
301 E. Adams Avenue
P.O. Box 433
Riverton, WY 82501
307-857-6005

Presiding Judge: Hon. Donald Harris
406-256-2906

Amanda M. Schlieman v. City of Helena; Great Northern Town Center Owners Association

- Montana 1st Judicial District Court, Lewis & Clark County, Cause No. BDV-2017-457
- Defend Great Northern Town Center Owners Association in personal injury slip-and-fall lawsuit.
- Jury trial is scheduled for January 2021.

Opposing Counsel: John C. Doubek
DOUBEK, PYFER & STORRAR, PC
307 N. Jackson
PO Box 236
Helena, MT 59624
406-442-7830

Presiding Judge: Hon. Michael McMahon
406-447-8208

Donovan Lucibello and Charla Lucibello v. Ryan D'Esterre and Details Home Improvement and Repair, LLC.

- Montana 1st Judicial District Court, Lewis & Clark County, Cause No. DDV-2019-1600
- Defend D'Esterre and Details Home Improvement in construction defect lawsuit.
- Case resolved before trial.

Opposing Counsel: David B. Gallik
GALLIK LAW OFFICE, PLLC
1124 Billings Avenue
Helena, MT 59601
406-443-0008

Presiding Judge: Hon. James Reynolds
406-447-8209

Branigan Sherman v. Ryan D'Esterre and Details Home Improvement and Repair, LLC

- Montana 1st Judicial District Court, Lewis & Clark County, Cause No. CDV-2020-850
- Defend D'Esterre and Details Home Improvement in construction defect lawsuit.
- Jury trial demanded, not yet scheduled.

Opposing Counsel: Mark Lancaster
Lucas Hamilton
LUXAN & MURFITT, PLLP
P.O. Box 1144
Helena, MT 59624
406-442-7450

Presiding Judge: Hon. Kathy Seeley
406-447-8209

Brenda K. Belli v. Marie Vainio

- Montana 2nd Judicial District Court, Silver Bow County, Cause No. DV-18-22
- Defend property owner Marie Vainio in personal injury slip-and-fall lawsuit.
- Mediation scheduled for January 2021. Jury trial will be scheduled if mediation is unsuccessful.

Opposing Counsel: James G. Hunt
Patrick T. Fox
HUNT & FOX, PLLP
111 N. Last Chance Gulch, Suite 3A
Helena, MT 59601
406-442-8552

**Presiding Judge: Hon. Robert Whelan
406-497-6420**

Naomi Johnson v. Carroll College; Helena Symphony Society

- **Montana 1st Judicial District Court, Lewis & Clark County, Cause No. ADV-2017-533**
- **Defend Carroll College in personal injury slip-and-fall lawsuit.**
- **Case resolved before trial.**

**Opposing Counsel: Andrea J. Utick Fox
UTICK LAW FIRM
1424 National Avenue
Helena, MT 59601
406-443-7250**

**Presiding Judge: Hon. Michael Menahan
406-447-8205**

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

None.

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.
- **Author of “Trial Run at Trials: High school mock trial program taking off in Helena”
Montana Lawyer, Oct. 2017.**
 - **Contributed significant research to *The Oxford Handbook of Sentencing and Corrections*, Joan Petersilia and Kevin R. Reitz, eds., Oxford University Press, 2012.**
 - **Drafted numerous negotiations simulations for use by the University of Minnesota Law School Negotiation and Lawyering Skills classes, 2011-2012.**
 - **I have spent dozens of hours lecturing on trial practice topics at both Capital and Helena High Schools, 2014-Present.**

D. PROFESSIONAL AND PUBLIC SERVICE

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

**State Bar of Minnesota (*inactive*) – 2012 to Present
State Bar of Montana – 2015 to Present**

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

- **Montana High School Mock Trial Competition – Co-Founder and Program Coordinator**
From October to March I coach mock trial teams at Helena High School for approximately 8 hours per week. In 2019, I successfully coordinated with the State Bar of Montana to host Montana’s first statewide high school mock trial program. I worked with both the State Bar of Montana and the Idaho State Bar to plan and coordinate the inaugural competition in which approximately 100 students from across the state competed and approximately 50 lawyers, judges, supreme court justices, and members of the Bar helped judge.

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

No.

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

Public involvement and community service are critical to both community and personal health. A community is strongest when its members contribute according to their individual strengths and resources. Some people have money to contribute, some people have things, some people have ideas, and some people have time. Each is important, and in conjunction these modes of selfless giving improve a community and raise others into a position where they, too, can give back to the community.

One of my strengths is teaching the public about the rule of law and the judicial system. The bulk of my community service time the past six years has been spent coaching and mentoring high school students on the mock trial competition teams at Helena High Schools. I teach students the basics of how the U.S. and Montana legal systems function, why we do things the way we do, and important milestones in American legal history. For example, in the 2019-2020 competition year the case involved an election which presented an opportunity to teach and celebrate the 100th anniversary of the 19th Amendment. One of the main benefits of this type of volunteer work is helping young people understand the importance of the rule of law and how it is maintained in Montana.

From a selfish point of view, it is comforting and encouraging to see young people take interest in the law and to know that Montana has a fresh generation of talented and intelligent women and men who will soon be prepared to lead and govern the state and the nation.

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.

While I was neither arrested nor convicted, in 2003 I was cited for trespassing while exploring a train bridge over the Mississippi River in Minneapolis, MN. I received a continuance without a plea and after one year, the charge was dismissed. I paid approximately \$200 in court fees.

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.

For approximately five months after I was admitted to practice in Minnesota (October 2012 – February 2013) I worked as a Communications Associate at the University of Minnesota Law School. In that position I designed, implemented, and managed a mentoring program that connects law students with alumni.

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

I am a partner in the law firm Hattersley Walter, PLLP. As a partner, in addition to practicing law I have a shared responsibility for managing the firm, including billing and managing IT vendors. I will resign from the partnership immediately if appointed as a district court judge.

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.

None.

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

No.

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

Yes.

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

If not, please explain. **N/A.**

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

If yes, please explain. **N/A.**

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.

Much of my work over the past five years has involved researching legal issues and drafting briefs. I was the only associate at Hattersley Walter from the time I started with the firm to the time I became a partner. As such, much of my time was spent researching legal issues and drafting memoranda and briefs. Since becoming a partner, our firm has not hired any associates and I continue to do all my own research and brief 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.

Legal writing is integral to all aspects of the litigation process. In addition to briefs, I regularly draft pleadings, motions, proposed orders, discovery requests and responses, mediation and settlement brochures, communications to clients and opposing counsel, comprehensive reports to insurers, and internal legal memoranda.

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

Please see the attached writing sample, a portion of a brief in support of a motion for summary judgment filed in *Johnson-Wilson Constructors, Inc. v. Gary Wilson & Ryan Thiessen*, Montana 1st Judicial District Court, Lewis & Clark County, Cause No. CDV-2017-922

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

Approximately 50-60 %

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

Yes, I am competent in both.

H. MISCELLANEOUS

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

I have an 8-month-old son with whom I spend most of my free time. In addition to watching my son discover the world, I enjoy traveling, hiking with my wife and our two dogs, reading, and board games. I am also very involved with high school mock trial, serving as a coach for the Helena High School competition teams for the past six years and as the co-founder and a program administrator for the Montana High School Mock Trial Competition.

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

As set forth in my answer to question 12, I have held a wide variety of jobs around the country and around the world. I have taught English in France and the Czech Republic. I worked as a chief security guard and operations manager at the Walker Art Center in Minneapolis. I produced promotional videos for DePauw University and served as Executive Producer of the campus television station while I was a student. I have experience in the food service industry, including as a head cook at a summer camp, cashier, barista, fast-food cook, and delivery driver.

These varied jobs in multiple locations exposed me to many different people and cultures and taught me critical lessons in patience and how to quickly adapt to a new environment.

In addition to the positions listed in my answer to question 12, which covers my employment from the time I graduated from undergrad through the present, I have also held the following jobs:

- **Video Production Associate: DePauw University (Greencastle, IN)**
- **Delivery Driver: Marvin's Restaurant (Greencastle, IN)**
- **Valet Parking Attendant: Classic Parking Services (Plymouth, MN)**
- **Barista: Caribou Coffee (Minnetonka, MN)**
- **Head Cook: Camp Ajawah (Wyoming, MN)**
- **Cashier and kitchen worker: Schlotzky's Deli (Minnetonka, MN)**
- **Retail paint store clerk and delivery person: Hirshfields and Iowa Paint (Minneapolis, MN)**

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

I have performed a variety of pro bono work during the past five years.

I have offered free legal advice at limited scope advice clinics in Helena through the Montana Legal Services Association. These clinics involve multiple clients seeking advice in family law matters including parenting plans and dissolution of marriage.

Recently, my pro bono work has focused on civic education. As part of coaching mock trial competition teams at Helena High School, I teach students about U.S. and Montana law and how the judicial branch of government functions. That education often extends to parents of team

members who learn through their child or approach me directly with specific questions. I also have guest-taught numerous classes at both Helena and Capital High Schools on topics ranging from trial practice to ethical issues surrounding expert witnesses.

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

Professor Mary Alton, who became my mentor and friend while I was in law school, had a profound influence on the way I view our system of justice. I first met Mary, as she preferred to be called, as a student in her negotiation and lawyering skills class. Mary was also the coach for the ABA Negotiation Competition team of which I was a member. Through the class and the team, she and I bonded.

Before becoming a professor, Mary’s legal practice focused on mediation and alternative dispute resolution. She helped me understand that our justice system is a mechanism to resolve disputes. For it to function properly, participants must take an active role: participants must “do justice.”

To “do justice” and take an active role in the justice system means taking affirmative steps to ensure that justice is done. That implies a responsibility for an individual lawyer to be just and fair in her practice, and a responsibility to hold other members of the profession to the same standard and demand that they, too, comport themselves justly and fairly.

Perhaps most importantly, Mary helped me understand that the justice system is a mechanism for resolving disputes between *people*. Respecting the people involved and understanding that emotion is an inherently human trait that cannot be ignored, particularly when resolving disputes, is critical for everyone involved in the judicial system. Relationships matter, whether it is the relationship between opposing counsel or the relationship between the judge and the litigants. Respect and professionalism are necessary components of justice.

It is important to recognize that the justice system is made up of significantly more than just lawyers and judges. Law enforcement, court-appointed special advocates, guardians at litem, clerks, and social workers are just some of the people that make the justice system run. To “do justice” means to recognize, appreciate, and utilize the role those people play in the system.

For a judge, to “do justice” means to honor the process. That means being a respectful and professional leader, a patient listener, an impartial referee, and an advocate for the judicial system. It means ensuring everyone’s right to be heard is honored. It means spending the time and effort to understand the law and the legal issues presented, but also understanding that there are individual people involved and respecting their humanity.

Mary died a few years ago but I still think of her and the lessons she taught me frequently. The specific negotiation tactics and legal writing skills she taught me have served me well in my career, but I think the most powerful influence she had was in helping shape my view of our system of justice.

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

A good judge must be independent, fair, and impartial. The judicial office is a public trust that plays a central role in preserving the principles of justice and the rule of law. So much is described in the Preamble to the Montana Code of Judicial Conduct.

A good district court judge upholds this standard by embodying these important qualities: respect, compassion, decisiveness, and efficiency.

A good judge must be respectful. A critical component of our system of justice is the right to be heard. A good judge respects that right by being patient and receptive to what is said in the courtroom. Being heard is broader than being allowed to speak. A judge must be receptive to the arguments presented in court, understanding not only the legal arguments, but also the facts and the people involved in those arguments. A good judge must respect the parties and lawyers appearing in court, understanding that a person is much more than the issue on the docket for a particular day.

A good judge must be compassionate. This means, for example, recognizing and respecting the emotions of parents and children in a family law matter, or understanding the humanity of both victims and defendants in a criminal matter. The person selected for the 1st Judicial District Judge position will likely be involved in the drug treatment courts, which requires a high level of compassion and caring. A good judge should understand the medical, emotional, and human aspects of addiction to lead and fulfill the purposes of the treatment courts and help participants free themselves from the cycle of crime and addition.

A good judge must be decisive. Court is a problem-solving mechanism that requires decisiveness and finality. While a judge must be open and receptive, allowing everyone to be heard, a judge must also appreciate the need for expediency and finality in the administration of justice. Matters are presented to the court because the parties cannot otherwise reach a resolution, and a judge must objectively and impartially make decisions to steer the matter to resolution in an expedient manner.

A good judge must be efficient. It is no secret that judges have an enormous workload, and a good judge must be able to organize and address the work in an efficient manner. Efficiency serves to decrease or eliminate backlog and it allows a judge to be more expedient and decisive. The people relying on the courts to resolve their disputes deserve efficient administration of justice.

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.

As a starting point, district court judges are bound by the Constitution and statutes of the State of Montana, as well as the interpretations thereof by the Montana Supreme Court. That anchors one side of the scale in balancing precedent against flexibility. A district court judge may not (and should not) ignore a statute she disagrees with, impose a harsher sentence than the law allows, or

rely on a different understanding of an issue the Montana Supreme Court has already clearly addressed.

At the same time, statutes are often written in broad terms to encompass a variety of situations. Every case that comes before the court presents a unique set of facts, and there is necessary flexibility in fitting (or not fitting) the facts of an individual case into the structure created by a broad statute.

Likewise, because Montana does not have an intermediate appellate court, all appeals are heard by the Montana Supreme Court. This can lead to a broadly applicable precedent arising from a narrow set of facts. For a district court, flexibility is found in analogizing and extrapolating from the facts before the Montana Supreme Court when it established the precedent to fairly apply that precedent to the case at hand.

Fairness, impartiality, and respect for the process are the tools a judge must use to find the balance between precedent and flexibility. Better resolution results from a focus on the process, rather than a specific outcome. By applying processes specified by statute or by the Montana Supreme Court in a fair and impartial way yet tailored to the individual facts and issues of a particular case, a judge appropriately exercises the necessary flexibility while following the established precedent.

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

I want to be a judge because I want to make a positive difference in my community. A judge is equipped to help families find stability and businesses resolve disputes. A judge can help people suffering from addiction or mental illness find the help they need. A judge can protect the community he calls home and in which he chooses to raise his own children by ensuring community members who would do harm to other are appropriately punished and, if necessary, removed from the community. A judge protects the most vulnerable people in our communities—children and the elderly—from abuse in many forms.

I want to be a judge in the First Judicial District because of my experience clerking with Judge Reynolds. I understand the specific demands placed on a judge in the First Judicial District, and I know many of the people who regularly work in the district. In particular, I want to continue and build on the success Judge Reynolds has had with the treatment courts to help those in the community suffering from addiction.

To make a positive difference, a judge must have the right temperament and the ability to be fair and impartial even in exceedingly emotional situations. I have the right temperament, emotional intelligence, and experience to serve Lewis & Clark and Broadwater Counties fairly.

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

I am most proud of my role in the creation and development of the Montana High School Mock Trial Program. Years ago, my wife and I were recruited to coach a mock trial team at Helena High School, along with faculty coach Kacey Askin. There was no Montana competition at the

time, so we traveled to Idaho to compete. The three of us worked over the years to put together a proposal for a high school mock trial competition, which the State Bar agreed to sponsor in 2019. We held the first Montana High School Mock Trial Competition in March 2020 at the State Capitol in Helena. Approximately 100 students participated along with dozens of lawyers, judges, teachers, parents, and other volunteers.

I am proud of the mock trial program for many reasons. The students I coach at Helena High take mock trial very seriously—some have said mock trial was the best experience they had in high school. I am proud to help provide them an opportunity to compete against their peers in Montana. I am proud and encouraged to see high school students take an interest in the law, and I am delighted to think that I may be one of the people who sparked an interest in future Montana lawyers. I am proud to share my knowledge of the law and trial practice with the students.

I am also proud because the benefits of the mock trial program are not limited to the students themselves. The students share what they learn with their parent and siblings who, in turn, gain a better understanding of the rule of law and how our justice system operates. One of my fondest memories is arguing a hearsay question with a parent who, while not a lawyer, had clearly been well-taught on the subject by his daughter.

The mock trial program is beneficial for the legal profession in Montana. The program connects lawyers and judges with the non-legal community by providing a forum to interact in a non-adversarial context and share their profession with young people and the public.

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

Nothing additional to add.

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?

Most of my legal career has been spent in the First Judicial District. In addition to clerking for Justice Shea at the Montana Supreme Court, I was Judge Reynolds's law clerk for a year and a half. As a law clerk, I was appointed as a Judge Pro Tempore for criminal matters to handle first appearances in Lewis & Clark County. I believe I am uniquely positioned to understand the details of a judge's position in the First Judicial District and, in particular, the details of Judge Reynolds's seat and its involvement with the treatment courts.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 1st 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.

8/26/2020

(Date)

Lois Menzies

(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 Thursday, August 27, 2020.

Mail the signed original to:

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

Send the electronic copy to: mtsupremecourt@mt.gov

Writing Sample

David C. Morine

The attached writing sample is a portion of a brief I wrote in support of a motion for summary judgment on all counterclaims on behalf of Johnson-Wilson Constructors, Inc. (“JWCI”) in *Johnson-Wilson Constructors, Inc. v. Gary Wilson and Ryan Thiessen*, Montana First Judicial District Court, Lewis and Clark County, Cause No. CDV-2017-922. To comply with the ten-page limit, portions of the brief are omitted. Included are the background and undisputed facts sections, the argument section on the counterclaim for breach of the implied covenant of good faith and fair dealing, and the argument section on the counterclaim for abuse of process.

BACKGROUND

This case involves a business dispute arising out of the buyout of two officers and shareholders of JWCI. JWCI was founded by third-party defendant Dean Johnson and defendant/counterclaim plaintiff Gary Wilson as a heavy civil construction firm engaged in the business of constructing dams, dikes, spillways, and other large projects. Prior to December 2016, Wilson was the President and Treasurer of the company, Johnson was the Vice-President and Secretary, and Thiessen was a Vice-President and project manager. All three were shareholders in the company.

In 2015, Wilson and Thiessen decided to leave the company and began negotiating a buyout of their company stock along with additional consideration. An agreement was reduced to writing in the Stock Purchase and Settlement Agreement (“Stock Purchase Agreement”), which was signed by Wilson, Thiessen, and JWCI on December 31, 2016. After making the agreement, JWCI discovered through its new accountants that there were significant bookkeeping errors and omissions that resulted in material overstatement of the value of the company.

JWCI approached Wilson and Thiessen to adjust the Stock Purchase Agreement because of the significant mistakes, but Wilson and Thiessen refused. JWCI filed this lawsuit seeking to reform or rescind the Stock Purchase Agreement on the basis of mistake, or to recover damages for constructive fraud, actual fraud, breach of the covenant of good faith and fair dealing, and punitive damages. Facts revealed in discovery have led to additional claims alleged in a proposed third amended complaint that is pending leave of the Court to file.

Wilson and Thiessen counterclaimed against JWCI (and brought several identical third-party claims against Dean Johnson individually) for negligence, breach of contract, breach of the

implied covenant of good faith and fair dealing, abuse of process, and punitive damages. The parties stipulated to dismissal of the reciprocal punitive damages claims.

STATEMENT OF UNDISPUTED FACTS

- On December 30, 2016, Gary Wilson, Ryan Thiessen, and JWCI entered into the Stock Purchase Agreement. Second Amended Complaint, ¶ 32; Exhibit 6 to Second Amended Complaint; Wilson and Thiessen Answer to Second Amended Complaint, ¶ 32; Affidavit of Dean Johnson, ¶ 4 (attached as Exhibit 1 with exhibits 1-A through 1-F, incorporated here by this reference).
- Up to that day, Wilson was the President and Treasurer of JWCI and Thiessen was Vice President and a shareholder. Affidavit of Dean Johnson, ¶ 3 (attached as Exhibit 1 to this brief with exhibits 1-A through 1-G, incorporated here by this reference).
- Gary Wilson managed the finances of JWCI and knew more about the finances of the company than anyone else. Deposition of Gary Wilson, 25:9-21, 264:22-265:1 (Attached as Exhibit 1-A to Johnson Aff.).
- In discharging his duties as a director and officer of JWCI, Dean Johnson relied on the financial information Wilson provided to him (Deposition of Dean Johnson 19:1-9 (Attached as Exhibit 1-D to Johnson Aff.)) and the financial statements and information provided by Wipfli, a certified public accounting firm. Johnson Depo., 211:14-19 (Ex. 1-D). Such reliance was reasonable. Deposition of Ryan Thiessen, 66:2-11 (Attached as Exhibit 1-B to Johnson Aff.).
- Wilson provided the financial information necessary for Wipfli to create the reviewed financial statement in 2015 and accepted responsibility to know and represented to Wipfli that the information was accurate and complete. Wilson Depo., 102:16-104:19 (Ex. 1-A).

- After the Stock Purchase Agreement, JWCI discovered numerous errors with the company books:
 - JWCI’s retainage receivable account was overstated by approximately \$250,000;
 - Wilson failed to include a liability of approximately \$177,500 on the books; and
 - That source of that liability, an improper payment to a previously departed shareholder (Vern Karnath) for his ESOP shares, subjected JWCI to an IRS audit, a fine of \$15,000, and legal and accounting fees. Johnson Aff., ¶¶ 5-8 (Ex. 1).
- These errors, which total more than a quarter million dollars representing approximately 10% of the value of JWCI at the time, were material. Deposition of Nicholas Shull, 109:5-24 (Attached as Exhibit 1-C to Johnson Aff.).
- JWCI has not done anything to prevent Wilson and Thiessen from competing with JWCI. Thiessen Depo., 87:21-88:11 (Ex 1-B); Wilson Depo., 291:19-292:25 (Ex. 1-A).

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the pleadings, 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. M. R. Civ. P. 56(c)(3).

As the moving party, JWCI “bears the initial burden of establishing that no genuine issue of material fact exists.” *Knapton ex rel. E.K. v. Monk*, 2015 MT 111, ¶ 10, 379 Mont. 1, 4, 347 P.3d 1257, 1259 (citations omitted”). Once that burden has been met, the “burden then shifts to the non-moving party to present substantial evidence that raises a genuine issue of material fact.” *Id. citing Olsen v. Johnston*, 2013 MT 25, ¶ 9, 368 Mont. 347, 301 P.3d 791. Substantial evidence involves specific facts and a party cannot merely rely upon “speculative or conclusory statements.” *Simms v. Schabacker*, 2014 MT 328, ¶ 13, 377 Mont. 278, 339 P.3d 832.

Further, the damages Wilson and Thiessen seek are not recoverable in a contract action. Wilson and Thiessen seek attorney's fees and emotional distress damages, neither of which are recoverable under Montana law. Wilson Depo., 276:15 (Ex. 1-A); Thiessen Depo., 83:15-19 (Ex. 1-B); Answer to Int. No. 6 (Ex. 1-E).

Omitted

Montana law does not permit recovery of damages for emotional distress in an action for breach of contract absent some physical injury. Section 27-1-310, MCA. There is no evidence or allegation that Gary Wilson or Ryan Thiessen suffered any physical injury and, therefore, emotional distress damages are not recoverable.

Montana law likewise does not permit recovery of attorneys' fees as an element of damages absent a specific contractual provision permitting such recovery. *Foy*, 176 Mont. at 511, 580 P.2d at 116. There is no contractual provision here that provides for an award of attorney's fees and, therefore, attorneys' fees are not recoverable.

Because the release does not bar the filing of this lawsuit and because Wilson and Thiessen have not alleged any recoverable damages, JWCI is entitled to judgment as a matter of law of the breach of contract counterclaim. *Knucklehead Land Co.*, ¶¶28-31.

3. The Court should dismiss the counterclaim for breach of the covenant of good faith and fair dealing.

JWCI is entitled to judgment as a matter of law on Wilson and Thiessen's counterclaim for breach of the implied covenant of good faith and fair dealing because there is no allegation or evidence that JWCI acted dishonestly and there is no evidence that JWCI deviated from reasonable commercial conduct.

“[E]very contract, regardless of type, contains an implied covenant of good faith and fair dealing. A breach of the covenant is a breach of the contract.” *Story v. Bozeman*, 242 Mont. 436, 450, 791 P.2d 767, 775 (1990). “For every contract not covered by a more specific

statutory provision, the standard of compliance is that contained in § 28-1-211, MCA.” *Id.*

“Accordingly, in ordinary contract cases, only contract damages are recoverable. *Warrington*, ¶ 14.

“The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”

Section 28-1-211, MCA.

“Where a party seeks to prove commercially unreasonable conduct, this Court has held that, in the absence of statutorily defined standards of conduct, expert testimony is required.” *Grizzly Sec. Armored Express, Inc. v. Bancard Servs.*, 2016 MT 287, ¶ 39, 385 Mont. 307, 384 P.3d 68.

Wilson and Thiessen allege that JWCI breached the covenant by filing this lawsuit despite the release provision in the Stock Purchase Agreement, by failing to act like a reasonable and prudent person, and by failing to conduct an appropriate level of due diligence. Answer to Int. No. 11 (Ex. 1-E).

There is no evidence or allegation that JWCI acted dishonestly, the first of two requirements of the implied covenant of good faith and fair dealing. It is therefore undisputed that JWCI acted with honesty in fact.

Reasonable commercial standards for a director and officer of a company are provided by statute. See §§ 35-1-418 and -413, MCA; *Story*, 242 Mont. at 450, 791 P.2d 775. There is no evidence that JWCI did anything other than rely on the competency and expertise of Gary Wilson, the President and Treasurer of the company and the person who knew more about the finances of the company than anyone else, and on the reports provided by Wipfli, a certified public accounting firm. Reliance on both is expressly authorized by statute.

To the extent Wilson and Thiessen suggest JWCI was required to follow some standard of conduct other than what is prescribed by statute, they have failed to disclose any expert witness who could provide testimony on such a standard and therefore cannot prove it. See *Grizzly Sec. Armored Express, Inc.*, ¶ 39.

The allegations that are the basis of the counterclaim for breach of the covenant of good faith and fair dealing are duplicative of the allegations in the breach of contract claim. JWCI has a valid legal basis to bring this lawsuit and the release provision is not a bar to it. Moreover, in the context of the covenant of good faith and fair dealing, JWCI's officers and directors have an obligation to act in the best interests of the company. See §§ 35-1-418(1)(c) and -443(1)(c), MCA. When JWCI determined there was a mistake in the financial data that formed the basis of the payments to Wilson and Thiessen as departing shareholders, JWCI had a duty to attempt to modify those payments to reflect the actual financial state of the company, up to and including filing a lawsuit to modify the agreement. The overstatement in the retainage receivables account and the bookkeeping errors surrounding the payment to Vern Karnath—errors that undisputedly existed—resulted in reported assets that were significantly greater than the company actually had.

As with the claim for breach of contract, JWCI is also entitled to judgment as a matter of law here because the damages Wilson and Thiessen seek are not recoverable. Wilson testified that the damages he claims are the same for all four counts. Wilson Depo., 280:21-281:2 (Ex. 1-A). Those damages are attorneys' fees and emotional distress. Wilson Depo., 276:15 (Ex. 1-A); Answer to Int. No. 6 (Ex. 1-E). Thiessen testified that the only damages claimed for breach of the covenant of good faith and fair dealing are attorneys' fees and emotional distress damages. Thiessen Depo., 87:3-20 (Ex. 1-B). As explained above, attorneys' fees and emotional distress

are not recoverable on these contract-based claims, and therefore JWCI is entitled to judgment as a matter of law.

4. The Court should dismiss the counterclaim for abuse of process.

JWCI is entitled to judgment as a matter of law on Wilson and Thiessen's counterclaim for abuse of process because JWCI has a valid legal basis for filing this lawsuit and there is no evidence that JWCI has an ulterior purpose or is otherwise using this lawsuit for an improper purpose.

“Essential to proof of abuse of process is (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.” *Hughes v. Lynch*, 2007 MT 177, ¶ 21, 338 Mont. 214, 164 P.3d 913 (citing *Brault v. Smith*, 209 Mont. 21, 28, 679 P.2d 236, 240 (1984); Prosser, *The Law of Torts* § 121, at 857 (4th ed., West 1971); *Seltzer v. Morton*, 2007 MT 62, ¶ 57, 336 Mont. 225, 154 P.3d 561). “Some definite act or threat not authorized by the process, or aimed at an object not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” *Id.*, quoting Prosser, *The Law of Torts* § 121, at 857).

“In the context of the abuse of process tort, process may refer to summons, subpoenas, attachments, garnishments, replevin or claim and delivery writs, arrest under a warrant, injunctive orders, and other orders directly affecting obligations of persons or rights in property... However, merely filing a complaint in court does not institute any process.” *Hughes*, ¶ 23 (quotations and citations omitted).

“For a defendant to claim abuse of process, there must be an attempt by the plaintiff to use process to coerce the defendant to do some collateral thing which he could not be legally and

regularly compelled to do.” *Brault v. Smith*, 209 Mont. 21, 29, 679 P.2d 236, 240 (1984) (citing *Crease v. Pleasant Grove City* (1974), 30 Utah 2d 451, 519 P.2d 888; *Batten v. Abrams* (1981), 28 Wash.App. 737, 626 P.2d 984.

Section 28-2-1611, MCA permits the reformation of contract “[w]hen, through fraud or a mutual mistake of the parties...a written contract does not truly express the intention of the parties, it may be revised....” Section 28-2-1711, MCA permits rescission of a contract if the consent of the rescinding party was based on a mistake or obtained through fraud. “There must be real and free consent by the parties to the terms of a contract. Consent is not real or free if it is obtained through fraud or mistake.” M.P.I. 2d 13.10 (citing §§ 28-2-401 &-411, MCA)

Wilson and Thiessen allege JWCI committed abuse of process by filing this lawsuit without a legal or factual basis, by filing the lawsuit despite the release in the Stock Purchase Agreement, and for filing the lawsuit with the ulterior purpose of revenge. Counterclaim ¶ 24; Answer to Int. No. 17 (Ex. 1-F).

Critically, the only act Wilson and Thiessen allege as a basis for abuse of process is the filing of this lawsuit. Filing a complaint is not “process” in the context of an abuse of process claim. *Hughes*, ¶ 23 (citing *Dobbs, The Law of Torts* § 438 at 1235). Wilson and Thiessen have not alleged that JWCI used any process, other than filing a complaint, for an ulterior purpose or in an otherwise improper manner. Because filing a complaint is not “process,” JWCI is entitled to judgment as a matter of law on Wilson and Thiessen’s counterclaim for abuse of process.

Moreover, the undisputed facts show there is both a legal and factual basis for JWCI’s lawsuit. There is no dispute there was a large, material overstatement of approximately a quarter-million dollars, which represents approximately 10% of the value of JWCI, in the retainage receivables account in the financial data managed by Gary Wilson and provided by him

to Wipfli, who created the 2015 reviewed financial statements based on that data. Section 28-2-1611, MCA, allows for the reformation of a contract based on mistake. Wilson and Thiessen's allegation that there is no legal and factual basis for this lawsuit is incorrect as a matter of law. Montana statute provides a legal basis and the undisputed facts provide a factual basis.

Wilson and Thiessen further allege "this action was brought for the ulterior purpose of extracting revenge following the decision of Gary Wilson and Ryan Thiessen to start a competing business...." Answer to Int. No. 17 (Ex. 1-F). There is no evidence of this and, in fact, both Thiessen and Wilson testified that JWCI has done nothing to prevent them from competing.

Q: Okay. On your abuse of process claim, you claim that Johnson-Wilson is unfairly using the system or using the legal system for an ulterior purpose of seeking revenge. What evidence do you have of that allegation?

A: Just the fact that we're being sued.

Q: Okay. You also allege that Johnson-Wilson is trying to stop you from competing work. What facts do you have to support that allegation?

A: I don't have any facts.

Q: And, in fact, you did pursue competing work and got the job, right?

A: Correct.

Q: Okay. Have there been any projects that you were precluded from bidding because of Johnson-Wilson's Complaint?

A: No.

Thiessen Depo., 87:21-88:11 (Ex. 1-B).

Q: Has it stopped your company from competing with Johnson-Wilson Constructors, Inc.? Has the filing of this lawsuit stopped your company?

A: No, on one job.

Q: What do you mean, "No, on one job"?

A: It didn't stop us from competing with them on one job.

Q: Yeah. So you haven't been stopped with competing with them. You've got a company that's doing the same kind of work, and you're trying as hard as you can to get work, right?

A: Correct.

Wilson Depo., 291:19-292:18 (Ex. 1-A).

Even if the Montana Supreme Court's clear precedent that filing a complaint is not process is not applicable here, Wilson and Thiessen have produced no evidence that JWCI is using this lawsuit to force Wilson and/or Thiessen to do anything they could not otherwise be compelled to do. See *Brault*, 209 Mont. at 29, 679 P.2d at 240. In *Brault*, the Court cited the federal district court case *Hopper v. Drysdale* (D.Mont.1981), 524 F.Supp. 1039, as an example of using process to compel a person to do something he otherwise couldn't legally be compelled to do. There, the defendant noticed and took the plaintiff's deposition in Gallatin County so that he would be arrested on an outstanding warrant in an unrelated case. The district court found those facts, if proven, would constitute an ulterior motive and an abuse of process because "the process was put to a use perverted beyond its intended purpose." *Brault*, 209 Mont. at 29, 679 P.2d at 240.

Here, Wilson and Thiessen allege that JWCI is using this lawsuit to set aside the Stock Purchase Agreement, something that JWCI has a legal and factual basis to do. Wilson and Thiessen have failed to provide any evidence JWCI is acting with an ulterior purpose and have neither alleged nor produced any evidence of JWCI improperly using any process to compel Wilson and Thiessen to do anything they could not otherwise be compelled to do. JWCI is therefore entitled to judgment as a matter of law on Wilson and Thiessen's counterclaim for abuse of process.