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MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

MICHAEL E. SPREADBURY, Plaintiff, vs. KENNETH S. BELL and CITY OF HAMILTON, Defendants.	Cause No. DV 2010-639/60 Department No. 2 **OPINION AND ORDER**

Plaintiff Michael E. Spreadbury ("Plaintiff Spreadbury") is representing himself. Defendants Kenneth S. Bell ("Bell") and City of Hamilton (the "City") (collectively, "Defendants") are represented by William L. Crowley and Natasha Prinzing Jones of Boone Karlberg P.C.

The Court now considers the following motions still pending before the Court:[1]

[1]At the hearing on July 20, 2011, the Court summarily dismissed Plaintiff Spreadbury's *Request for Order* (Doc. # 50) and such request is therefore no longer pending before the Court. Similarly, at that hearing, the Court noted that the *Motion to Accept Admissions Pleading* (Doc. # 14) was inappropriate because, pursuant to local rule, discovery is not filed unless a motion is pending. *See Rules of Practice, 21st Jud. Dist., R.* 10.

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1. *Defendants' Motion for Summary Judgment* (Doc. # 19);

2. *Defendants' Motion to Compel* (Doc. # 35)

3. Plaintiff Spreadbury's *Motion to Stay Order Pending Summary Judgment* (Doc. # 38)

4. *Defendants' Motion in Limine* (Doc. # 39);

5. Plaintiff Spreadbury's *Motion to Set Aside, Stay Defense Motion in Limine* (Doc. # 41);

6. Plaintiff Spreadbury's *Bill of Costs* (Doc. # 51); and

7. *Defendants' Objection to Bill of Costs and Notice of Motion* (Doc. # 53)

The *Defendants' Motion for Summary Judgment* (Doc. # 19) is fully briefed and the Court held a hearing on the motion on July 20, 2011. The time for briefing the other motions under Montana Uniform District Court Rule 2 has now passed. Accordingly, the above motions are ripe for decision.

A. BACKGROUND

On November 16, 2010, Plaintiff Spreadbury sued Defendants for negligence (Count One), a 42 U.S.C. § 1983 claim under Article II, section 6 of the Montana Constitution and under the First Amendment to the United States Constitution (Count Two), a § 1983 claim for violation of Equal Protection as set forth in the Fourteenth Amendment to the United States Constitution and in Article II, section 4 of the Montana Constitution (Count Three), Abuse of Process (Count 4), Misrepresentation (Count 5), Negligent Hiring, Supervision, and Training (Count 6), Custom or Policy-Equal

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Protection under the Fourteenth Amendment to the United States Constitution as to Bell (Count 7), and Punitive Damages (second Count 7). *Pl's. Amend. Compl.* (Doc. # 10). Although not stated as a Count in the *Complaint* or *Amended Complaint*, the Court found that this action also contained a request for declaratory relief. (Doc. # 49).

Defendants timely provided the Court with two documents (the "Reports"), which the Court reviewed. On June 28, 2011, the Court deemed and reformulated Plaintiff Spreadbury's *Motion for Declarative Judgment* (Doc. #16) and *Motion for Summary Judgment* (Doc. # 17) to together request partial summary judgment on the issue of whether and to what extent Plaintiff Spreadbury was entitled to the Reports under Article II, section 9 of the Montana Constitution. (Doc. # 49). The Court granted Plaintiff Spreadbury declaratory relief in part, declaring that Plaintiff Spreadbury was entitled to the Reports as redacted by the Court in accordance with the June 28, 2011 *Opinion and Order*. (Doc. # 49 p.23). Plaintiff Spreadbury's reformulated motion was denied in all other respects. *Id.*

B. DISCUSSION

B.1. *Defendants' Summary Judgment Motion*

A party may move for summary judgment at any time, unless the Court orders otherwise. Mont. R. Civ. P. 56(c)(1)(A). Summary judgment on all or part of a claim

> 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.

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Mont. R. Civ. P. 56(c)(3). Issues of fact are identified by looking at the substantive law governing the proceedings. *Carelli v. Hall*, 279 Mont. 202, 207, 926 P.2d 756, 760 (1996). "A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Mont. R. Civ. P. 56(e)(1). "When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleadings." Mont. R. Civ. P. 56(e)(2). The opposing party's response must, by affidavit or as otherwise specified in Montana Rule of Civil Procedure 56, "set out specific facts showing a genuine issue for trial." Mont. R. Civ. P. 56(e)(2). "If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." *Id.* The Court has discretion to deny summary judgment even when it appears that there is no genuine issue of material fact. *Order*, AF 07-0157, Comm. Notes, Mont. R. Civ. P. 56 (Apr. 26, 2011).[2]

B.1.a. Federal § 1983 Claims

The Court will first address Defendants' request for summary judgment with respect to Plaintiff Spreadbury's federal claims.

[2]While the Court applies the version of Montana Rule of Civil Procedure 56 effective October 1, 2011, the Court notes that it would have reached the same result under the previous version of the rule, which gave the Court less discretion in denying summary judgment motions.

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B.1.a(i) Count Two

Court Two is a 42 U.S.C. § 1983 claim based on the right to petition government under Article II, section 6 of the Montana Constitution and under the First Amendment to the United States Constitution. Plaintiff Spreadbury's *Amended Complaint* also mentions Montana Constitution Art. II, section 9, stating:

> [b]y not providing information guaranteed by common law of the State of Montana, Defendants are violating Plaintiff [sic] right to petition government as fully defined in Amendment 1 U.S. Constitution and Art. II s. 9 Constitution of the State of Montana.

(Doc. # 10 p.4).

Defendants argue that violations of state law are not enforceable under 42 U.S.C. § 1983, that the First Amendment to the United States Constitution's right to petition the government for redress of grievances does not include a right that the petition be acted upon, and that there is no applicable "right to know" in the U.S. Constitution.

With respect to Defendants' first argument, Defendants cite a Sixth Circuit case and a Tenth Circuit case for the proposition that state law violations are not enforceable under 42 U.S.C. § 1983. The Eighth Circuit also appears to follow this rule. *See Booker v. City of St. Louis*, 309 F.3d. 464, 467 (8th Cir. 2002); *Doe v. Gooden*, 214 F.3d. 952, 956 (8th Cir. 2000) citing *Ebmeier v. Stump*, supra.; *Ebmeier v. Stump*, 70 F.3d. 1012, 1013 (8th Cir. 1995); *Kornblum v. St. Louis County, Mo.*, 48 F.3d. 1031 (8th Cir. 1995). The United States Supreme Court implicitly supported this rule in *Baker v. McCollan*, 443 U.S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979). The Court finds this argument persuasive.

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Regarding Defendants' second argument, the Montana Supreme Court held in 1993 that although an individual has a right to petition the government under the First Amendment to the U.S. Constitution, there is no corresponding right that the petition be acted upon. *Gehring v. All Members of the State 1993 Legislature*, 269 Mont. 373, 378, 889 P.2d 1164, 1166 (1995). Thus, assuming *arguendo* that Plaintiff Spreadbury's request for information was a petition for the redress of grievances, the Defendants' failure to respond would not constitute a First Amendment violation. The Court also finds this argument persuasive.

Defendants assert that there is no "right to know" provision of the U.S. Constitution. In response, Plaintiff cited no authority for the proposition that the U.S. Constitution contains a "right to know." The Court's research has not found a case holding that there is a specific "right to know" provision under the U.S. Constitution.

Accordingly, Defendants' motion for summary judgment on Count Two should be granted.

B.1.a(ii) Count Three

Count Three is a § 1983 claim for violation of Equal Protection as set forth in the Fourteenth Amendment to the United States Constitution and in Article II, section 4 of the Montana Constitution.

Defendants argue that (a) the state law violation is not enforceable, (b) even if the state law claim were enforceable, the Human Rights Commission, not this Court, has

jurisdiction over the claim, and (c) Plaintiff Spreadbury has no proof that he was treated differently in support of his Fourteenth Amendment claim.

As discussed above, § 1983 claims based on violations of state laws are unenforceable. Therefore, the Court proceeds to consider Plaintiff Spreadbury's § 1983 claim pursuant to the Fourteenth Amendment to U.S. Constitution.

Defendants argue that they are entitled to summary judgment on this issue because Plaintiff Spreadbury cannot provide evidence that he was treated differently.

In response, Plaintiff stated:

> As Defendant Bell gives information to the public, Steffancucci, and not Spreadbury, example of procedural due process deprivation as supported by state statute *Mendez v. INS* 563 F.2d 956 (9th Cir. 1977) [for federal statute].

(Doc. # 22, p. 3-4; *Pl. Objection Defense Summary Judm. Request; Mtn. Find Pl.*) The record in this cause contains no affidavit or other evidence showing that someone named "Steffancucci" or otherwise was treated differently from Plaintiff Spreadbury.

Moreover, *Mendez* is inapposite here. In *Mendez*, an immigration case, the Ninth Circuit stated that "departure" of an alien from the United States must be done "legally" in the sense that the alien's counsel must be served. The *Mendez* Court specifically relied on administrative law instead of the Fourteenth Amendment.

Therefore, Defendants should be granted summary judgment on Count Three.

B.1.a(iii) Count Seven

Count Seven is a claim that Defendant Bell had a custom or policy of violating the equal protection clause of the Fourteenth Amendment to the United States

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Constitution. The *Amended Complaint* describes the policy thus: "By rejecting Plaintiff's requests for public information, Bell made [sic] new policy regarding public information."

There is no evidence in the record that Bell even rejected Plaintiff's requests for public information; indeed, Plaintiff Spreadbury's requests included non-public information.[3] Plaintiff Spreadbury's Count Seven focuses on Defendant Bell and does not mention Defendant City, except by incorporation of the previous paragraphs.

In support of their motion, Defendants argue that Plaintiff Spreadbury has no evidence of widespread practices or evidence of repeated constitutional violations or of deliberate indifference to a constitutional right.[4]

Plaintiff, instead of responding with evidence of other practices, relies upon *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) for the proposition that civil liability may attach under § 1983 for a single decision by a municipal policy maker who possesses final authority to establish municipal policy.[5]

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[3] The Court notes that even if Count Seven is construed to include a claim that the policy or custom was a failure to train, a 2011 U.S. Supreme Court decision, *Connick v. Thompson*, __ U.S. __ 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) is on point. That case rejected a custom or policy argument involving failure-to-train-attorneys based on one incident because, given the regime of legal training that lawyers receive, violations of constitutional issues for failure to train are non-obvious. *Connick*, __ U.S. at __, 131 S. Ct. at 1363, 179 L. Ed. 2d at 430.

[4]Defendants also state that Defendant Bell is not the City's final policy maker concerning the release of confidential information.

[5]Plaintiff Spreadbury's brief states:

> Defendant Bell, as official policymaker for the City of

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The underlying claim in *Pembaur* was a violation of the Fourth Amendment as applied to the states through the Fourteenth Amendment. *Pembaur*, 475 U.S. at 474-475, 106 S. Ct. at 1295-1296, L. Ed. 2d at 459-460 (1986). The Court therefore finds *Pembaur* inapposite here - in the equal protection context in which Plaintiff Spreadbury has failed to provide evidence that Defendants treated him differently even one time.

Moreover, Defendants, although mis-citing the correct MCA section, appear to argue that under § 7-4-4604, MCA, Bell did not, as a matter of law, have final policymaking authority. Section 7-4-4604, MCA states:

> **7-4-4604. Duties.** The city attorney shall:
>
> (1) appear before the city court and other courts and prosecute on behalf of the city;
>
> (2) serve upon the attorney general within 10 days of the filing or receipt a copy of any notice of appeal that the city attorney files or receives in a criminal proceeding;
>
> (3) when required, draft for the city council contracts and ordinances for the government of the city;
>
> (4) when required, give to the mayor or city council written opinions on questions pertaining to the duties and the rights, liabilities, and powers of the city; and
>
> (5) perform other duties that pertain to the functions of the city council or that the city council prescribes by resolution.

> Hamilton as department head is liable for every decision with respect to the City as making official policy: "Municipal liability may be imposed for a single decision by municipal policymakers"...citing *Pembaur v. City of Cincinnati* 475 US 469 (1986).

(Doc. # 22 p. 3).

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Section 7-4-4604, MCA requires Defendant Bell to give written opinions to the mayor or city council but does not give Defendant Bell any authority to implement the opinion given. This section implies that the mayor could decide policy differently. Given that city attorneys hold office for two years unless suspended or removed for neglect, violation or disregard for duties, the it is not unlikely that a mayor might seek a second opinion. *See* 7-4-4602-4603, MCA.[6]

Plaintiff Spreadbury has presented no other evidence of Defendant Bell's authority to make policy. One letter from Defendant Bell to Spreadbury states that Bell had been instructed by the County Attorney's Office not to disseminate confidential criminal justice information to defendants that office was prosecuting.

Therefore, Defendants should be granted summary judgment on Count Seven.

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[6] Plaintiff Spreadbury's brief also states:

> The US Supreme Court held that "Government officials performing discretionary functions are shielded from liability for civil damages only where their conduct does not violate clearly established statutory of [sic] constitutional rights Harlow v. Fitzgerald 457 US 800 (1982).

(Doc. # 22 p. 4). In *Harlow*, the issue was the scope of immunity of high level advisors to the President of the United States in a suit for damages for their official acts based upon the First Amendment and federal statutory rights. The Court fails to see *Harlow*'s relevance to a prima facie claim of municipal liability under the Fourteenth Amendment's equal protection clause for a single municipal decision. Indeed, Defendants have not argued that they are immune from federal suit.

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B.1.a(iv) Second Count Seven (Punitive Damages)

Second Count Seven, punitive damages, contains both federal § 1983 and state law aspects. As discussed above, Defendants are entitled to summary judgment on the substantive § 1983 claims; therefore, Defendants should be granted summary judgment on the punitive damages claims based on those federal claims..

B.1.b. State Law Claims

The Court proceeds to Plaintiff Spreadbury's state law claims. In relation to those claims, the Court first discusses the immunity issues relating to Defendant Bell.

B.1.b(i). Defendant Bell

The Court notes initially that Plaintiff Spreadbury made no allegations against Defendant Bell in Count Six, negligent hiring and supervision.

Defendants argue that Plaintiff Spreadbury's state law claims should be dismissed with respect to Defendant Bell because Defendant Bell is entitled to immunity from any damage award under § 2-9-305, MCA. This argument has merit.

Section 2-9-305, MCA states in pertinent part:

> **2-9-305. Immunization, defense, and indemnification of employees.** (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.
>
> . . .
>
> (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

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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).

(6) In a noncriminal action in which a governmental entity employee is a party defendant, the employee may not be defended or indemnified by the employer for any money judgments or legal expenses, including attorney fees, to which the employee may be subject as a result of the suit ***if a judicial determination is made that:***

(a) the conduct upon which the claim is based ***constitutes oppression, fraud, or malice*** or for any other reason does not arise out of the course and scope of the employee's employment;

(b) the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through 7;

(c) the employee compromised or settled the claim without the consent of the government entity employer; or

(d) the employee failed or refused to cooperate reasonably in the defense of the case.

(7) If a judicial determination has not been made applying the exclusions provided in subsection (6), the governmental entity employer may determine whether those exclusions apply[.]

(Emphasis added).

The Montana Supreme Court has interpreted the second sentence of § 2-9-305(5), MCA to warrant the dismissal of state law claims against a government employee where the action was brought against a governmental entity based on actionable conduct by an employee and the entity acknowledged that the conduct arose out of the course and scope of the employee's official duties. *Kenyon v. Stillwater County*, 254 Mont. 142, 146, 835 P.2d. 742, 745 (1992), *overruled on other grounds*, 275 Mont. 322, 331, 912 P.2d 787, 793 (1996); *Germann v. Stephens*, 2006 MT 130, ¶¶ 41-44 , 332 Mont. 303, 137 P.3d 545.

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Here, Defendants cited *Kenyon* and *Germann* for the proposition that "Bell is immune from Plaintiff's state law claims" in their *Defendants' Answer to Complaint* and *Defendants Answer to Amended Complaint*. *Def's. Ans. Compl.* ¶ 22; *Def's Ans. Amend Compl.* ¶ 22. Furthermore, Defendants' brief in support of *Defendants' Motion for Summary Judgment* states:

> The City of Hamilton is a Defendant in this action. Further, the alleged acts or omissions of Defendant Bell occurred within the course and scope of his employment with the City.

Def.'s Br. Opposition Pl.'s Mtn. Summary Judm. Declaratory Judm. Def.'s Br. Support Mtn. Summary Judm. p. 16. This is an admission that Bell was acting in the course and scope of his employment. Therefore, under § 2-9-305, MCA, Defendant Bell is immune from the state law claims against him and Defendant Bell should be granted summary judgment on all remaining state law claims.

B.1.b(ii). Defendant City

The Court proceeds to consider the state law claims against Defendant City.

B.1.b(ii)(A) Count One

Count One alleges negligence. Plaintiff Spreadbury has not provided any evidence of damages, a required element in a negligence claim. Accordingly, Defendant City is entitled to summary judgment on Count One.

B.1.b(ii)(B) Count Four

Count Four alleges abuse of process. Defendants argue that Plaintiff Spreadbury has not pointed to any evidence that any City representative, including Defendant Bell,

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used process for a purpose not proper in the regular conduct of proceedings. Defendants cite *Seipel v. Olympic Coast Investments*, 2008 Mont. 237, ¶ 10, 344 Mont. 415, 188 P.3d. 1027, which relied upon a line of cases originating in *Brault v. Smith*, 209 Mont. 21, 679 P.2d 236 (1984). In *Brault*, the Montana Supreme Court, relying on Prosser, *Law of Torts*, 4th Edition, for the first time acknowledged that:

> 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.

Brault, 209 Mont. at 28, 679 P.2d at 240.

Plaintiff has not pointed to any evidence of the use of any process, let alone process for a malicious purpose. Therefore, Defendant City should be granted summary judgment on Count Four.

B.1.b(ii)(C) Count Five

Count Five alleges misrepresentation. Defendants argue that Plaintiff Spreadbury has pointed to no admissible evidence of negligent misrepresentation or fraud.

According to the *Amended Complaint*, Plaintiff Spreadbury alleged Defendant Bell advised him in writing that he would not talk to him and he should speak with Defendant Bell's attorney because Defendant Bell was a defendant in another action Plaintiff Spreadbury had brought. Plaintiff Spreadbury's *Amended Complaint* alleges that "Bell had full ability to provide public information to Plaintiff."

In Montana, the prima facie elements of a claim for negligent misrepresentation are:

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a. the defendant made a representation as to a past or existing material fact;
b. the representation must have been untrue;
c. regardless of its actual belief, the defendant must have made the representation without any reasonable ground for believing it to be true;
d. the representation must have been made with the intent to induce the plaintiff to rely on it;
e. the plaintiff must have been unaware of the falsity of the representation; it must have acted in reliance upon the truth of the representation and it must have been justified in relying upon the representation;
f. the plaintiff, as a result of its reliance, must sustain damage.

May v. Era Landmark Real Estate of Bozeman, 2000 MT 299, ¶ 60, 302 Mont. 326, 15 P.3d 1179.

The Montana Supreme Court has also approved the definition of negligent misrepresentation as set forth in the Restatement (Second) of Torts § 552, which provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

May, ¶ 31.

With respect to a claim for fraud, a plaintiff must establish a prima facie case by providing evidence of:

1. a representation;
2. its falsity;
3. its materiality;
4. the speaker's knowledge of its falsity or ignorance of its truth;

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5. the speaker's intent that it should be acted upon by the person and in the manner reasonably contemplated;
6. the hearer's ignorance of its falsity;
7. the hearer's reliance upon its truth;
8. the right of the hearer to rely upon it; and
9. the hearer's consequent and proximate injury or damage.

May, ¶ 21.

Plaintiff Spreadbury has presented no admissible evidence that Bell's representation was untrue, that Bell had no reasonable grounds to believe the representation, that Plaintiff Spreadbury relied upon the representation, or that Plaintiff Spreadbury sustained damage or pecuniary loss.

Accordingly, Defendants should be granted summary judgment on Count Five.

B.1.b(ii)(D) Count Six

Count Six alleges negligent hiring, supervision, and training of Defendant Bell. The City argues that it had no duty to Plaintiff Spreadbury with respect to negligent hiring and that Plaintiff has not otherwise pointed to a legal duty that a City representative breached which caused Plaintiff Spreadbury damage or injury.

As discussed above, Plaintiff Spreadbury has provided no admissible evidence of damages, a required element in a negligence claim. *See Nelson v. Nelson*, 2005 MT 263, ¶ 18, 329 Mont. 85, 122 P.3d 1196.

Accordingly, Defendants should be granted summary judgment on Count Six.

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B.1.b(ii)(E) Second Count Seven

With respect to Plaintiff Spreadbury's punitive damages claim based upon state law, Defendants argue that the City is immune under state law pursuant to § 2-9-105, MCA. Section 2–9-105, MCA states:

> **2-9-105. State or other governmental entity immune from exemplary and punitive damages.** The state and other governmental entities are immune from exemplary and punitive damages.

The City meets the definition of "other governmental entity" in § 2-9-101, MCA because it is a "political subdivision" under § 2-9-101(5), MCA. The Montana Supreme Court has held that § 2-9-105, MCA is not unconstitutional because it satisfies the rational basis test. *White v. St.*, 203 Mont. 363, 661 P.2d 1272 (1983), *overruled on other grounds, Meech v. Hillhaven W.*, 238 Mont. 21 (1989).

Accordingly, Defendants are also entitled to summary judgment with respect to their state law claims in Second Count Seven.

B.2. *Defendants' Motion to Compel* (Doc. # 35)

Defendants sought to compel Plaintiff Spreadbury to provide certain discovery related to (1) Plaintiff's alleged "actual damages" and (2) possible witnesses.

Because the Court has granted Defendants' motion for summary judgment on all the remaining claims in this action, Defendants' motion should be denied as moot.

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B.3. Plaintiff Spreadbury's *Motion to Stay Order Pending Summary Judgment* (Doc. # 38)

Plaintiff Spreadbury requested a stay of Defendants' *Motion to Compel* pending the Court's summary judgment decision in this case. Plaintiff's motion was not accompanied by a brief in support. Because the Court has now decided all pending summary judgment motions in this case, the motion should be denied as moot.

B.4. *Defendants' Motion in Limine* (Doc. # 39)

Defendants moved the Court to exclude any evidence, testimony, or reference concerning (1) Plaintiff Spreadbury's actual damages and (2) whether the reports in this matter are confidential criminal justice information.

Because all claims have been resolved in this matter, Defendants' motion should be denied as moot.

B.5. Plaintiff Spreadbury's *Motion to Set Aside, Stay Defense Motion in Limine* (Doc. # 41)

Plaintiff moved the Court "to set aside, stay" Defendants' *Motion in Limine*. Because *Defendants' Motion in Limine* has been denied as moot and all claims in this matter have been resolved in advance of trial, Plaintiff Spreadbury's motion should be denied as moot.

B.6. Plaintiff Spreadbury's *Bill of Costs* (Doc. # 51) and *Defendants' Objection to Bill of Costs and Notice of Motion* (Doc. # 53)

On July 5, 2011, Plaintiff Spreadbury submitted his *Bill of Costs* in the amount of $ 98.82 on the theory that he was entitled to costs as the "prevailing party for partial

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summary judgment" pursuant to § 25-10-501, MCA and Montana Rule of Civil Procedure 54(d). On July 7, 2011, Defendants filed *Defendants' Objection to Bill of Costs and Notice of Motion*, arguing that (1) the Court did not accept Plaintiff Spreadbury's arguments in support of his motion for declaratory judgment, (2) other claims in this action remain outstanding, and (3) Plaintiff Spreadbury's motions have not been sustained.

Section 25-10-501, MCA provides in pertinent part:

> The party in whose favor judgment is rendered and who claims the party's costs shall deliver to the clerk and serve upon the adverse party, within 5 days after the verdict or notice of decision of the court . . . a memorandum of the items of the party's costs and necessary disbursements in the action or proceeding.

Section 25-10-502, MCA provides:

> A party dissatisfied with the costs claimed may, within five days after notice of filing of the bill of costs, file and serve a notice of a motion to have the same taxed by the court in which the judgment was rendered or by the judge thereof at chambers.

As used in the Montana Rules of Civil Procedure, a judgment "includes a decree and any order from which an appeal lies." M. R. Civ. P. 54(a). Unless the Court directs entry of a final judgment on a claim, "any order or other decision, however designated, that adjudicates fewer than all the claims . . . does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims . . ." M. R. Civ. P. 54(b).

Because the Court did not direct entry of a final judgment with respect to Plaintiff Spreadbury's request for declaratory relief in accordance with Montana Rule of Civil

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Procedure 54(b), the decision in the Court's June 28, 2011 *Opinion and Order* was not a "judgment."

Nonetheless, the Montana Supreme Court has ruled, in the context of a bench trial, that a bill of cost is timely even when it was filed prematurely. *See Poeppel v. Fisher*, 175 Mont. 136, 572 P.2d 912 (1977) (In a case involving a jury trial, the statute requires a party to file a memorandum of costs within five business days after the jury returns its verdict. *Doyle v. Clark*, 2011 MT 117, ¶¶ 40-41, 360 Mont. 450, 254 P.3d 570).

The Court therefore deems it useful to a speedy and just resolution of this matter to address this issue now. With respect to Plaintiff Spreadbury's claim that he is entitled to costs under § 25-10-202, MCA for his *Motion for Declarative Judgment* (Doc. # 16) and *Motion for Summary Judgment* (Doc. # 17), the Court notes initially that the Court deemed and reformulated these two motions "to together request partial summary judgment" on the issue of "whether and to what extent Plaintiff Spreadbury is entitled to the Reports under Article II, section 9 of the Montana Constitution." (Doc #49: *Op. Or.* p. 4). Therefore, the Court construed the documents as a single motion. With respect to that reformulated motion, the Court granted it in part and denied it in part. *Id.* at 23. Therefore, the Court concludes that no party was "the losing party" under § 25-10-202, MCA and no party will be required to pay another party's costs pursuant to such section.

With respect to costs pursuant to 25-10-502, MCA, consistent with this *Opinion and Order* and the Court's previous *Opinion and Order* (Doc. # 49) resolving all of the claims in the case at bar on motions for summary judgment, there is no party in whose

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favor summary judgment was entirely rendered pursuant to Montana Rule of Civil Procedure 56. After considering the record in this case, the Court determines that each party should bear his or its own costs.

ORDER

IT IS THEREFORE ORDERED:

1. *Defendants' Motion for Summary Judgment* (Doc. # 19) is hereby **GRANTED**; summary judgment on all remaining claims in this action is therefore granted in favor of the Defendants.

2. *Defendants' Motion to Compel* (Doc. # 35) is **DENIED** as moot;

3. Plaintiff Spreadbury's *Motion to Stay Order Pending Summary Judgment* (Doc. # 38) is **DENIED** as moot;

4. Defendants' *Motion in Limine* (Doc. # 39) is **DENIED** as moot;

5. Plaintiff Spreadbury's *Motion to Set Aside, Stay Defense Motion in Limine* (Doc. # 41) is **DENIED** as moot;

6. Each party shall bear his or its own costs; and

7. Plaintiff Spreadbury's *Bill of Costs* (Doc. # 51) and *Defendants' Objection to Bill of Costs and Notice of Motion* (Doc. # 53) are **DENIED** to the extent they are inconsistent with this *Opinion and Order*.

DATED this 23rd day of November, 2011.

HON. JAMES A. HAYNES, District Judge

AR 11-23-11

cc: counsel of record
Michael E. Spreadbury, *pro se*

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