

IN THE SUPREME COURT OF THE STATE OF MONTANA  
CASE NO. DA-12-0484

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LARRY COLEMAN

Plaintiff/Appellant,

v.

THE STATE OF MONTANA, acting by and  
through THE MONTANA DEPARTMENT  
OF TRANSPORTATION

Defendant/Appellee.

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**FILED**

DEC 18 2012

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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**APPELLEE'S MOTION TO STRIKE**

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ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT,  
LEWIS AND CLARK COUNTY  
THE HONORABLE KATHY SEELEY, PRESIDING

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APPEARANCES:

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Filed: \_\_\_\_\_, 2012

\_\_\_\_\_, Clerk

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Motion to Strike - 1  
Coleman vs. MDT

Pursuant to Rule 16 of the Montana Rules of Appellate Procedure, the Montana Department of Transportation (MDT), hereby files its Motion to Strike facts claimed in Mr. Coleman's Reply Brief that are extra-record material. Mr. Coleman's attorney has been contacted and he objects to the present motion, as, contrary to MDT's recollection and Mr. Coleman's discovery responses, his client recalls stating these additional facts at the hearing before agency legal services.

#### Facts

1. Interrogatory No. 8 of MDT's First Discovery Requests requested the following information: "[p]lease state each and every basis for your contention that the International Harvester driven by Mr. Coleman on November 14, 2008 is an 'off-highway vehicle/equipment' as defined in Administrative Rule of Montana 18.10.110."

2. The Answer provided by Mr. Coleman to Interrogatory No. 8 was as follows: "[a]s previously noted, the International Harvester bore the characteristics of a vehicle not intended for primary use on the highway. It was fitted with a feedbox, hoist and tailgate and was not primarily designed to carry property or persons on the highway."

3. Mr. Coleman's Reply Brief then adds facts inconsistent with its earlier discovery response in footnote number 1 on the bottom of Page 4 of Appellant's Reply Brief as follows: "Mr. Coleman testified to the significant cost and extensive modifications to this vehicle including box, tailgate, *transmission, tandem locking axels*, and changes designed to make the vehicle operate efficiently in fields but simultaneously making it unfit for general highway use." (emphasis added).

#### Argument

After years of MDT, Agency Legal Services, the State Tax Appeal Board, and the

District Court relying on Mr. Coleman's discovery responses, Mr. Coleman cannot now change the facts before the Supreme Court. The Court should strike the extra record information contained in Mr. Coleman's Appellant's reply brief.

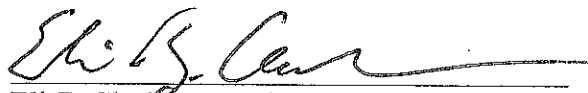
A court reviewing an agencies action is limited in what it can review. Judicial review is "confined to the record." Montana Code Annotated § 2-4-704(1). Both the District Court and the Supreme Court of Montana apply this same procedure. *Grenz v. Montana Dept. of Natural Resources*, 2011 MT 17, ¶ 15, 359 Mont. 154, 248 P.3d 785 (Supreme Court Review of Department of Natural Resources administrative decision concerning dispute over valuation of property between a current and former lessee of state lease).

As the review of MDT's decision in this case is limited by Montana law, the extra-record information sought to be included by Mr. Coleman in his Reply Brief should be stricken. It is improper to review MDT's decision with different facts than presented to MDT.

#### Conclusion

For the forgoing reasons, MDT respectfully requests that the extra-record information provided in Mr. Coleman's Reply Brief be stricken from the record.

Dated this 18<sup>th</sup> day of December, 2012.

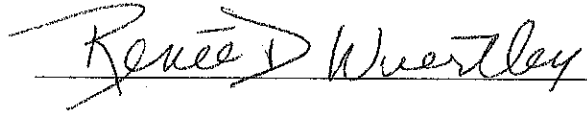


Eli Z. Clarkson, Staff Attorney  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> day of December, 2012, I mailed a true and accurate copy of Appellee's Motion to Strike, postage prepaid, by U.S. mail, to the following:

Richard A. Reep, Esq.  
REEP, BELL & LAIRD, P.C.  
2955 Stockyard Road  
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A handwritten signature in cursive script, reading "Renee D. Wiertel", written over a horizontal line.