MONTANA THIRTEENTH JUDICIAL DISTRICT, YELLOWSTONE COUNTY

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GARY McDANIEL, SUSAN McDANIEL, on behalf of themselves and all others similarly situated. Plaintiffs, CITY OF BILLINGS, Defendant.	Cause No. DV 19-1444 **DECISION AND ORDER RE: CITY OF BILLINGS' MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNTS II AND III) PURSUANT TO MONT. R. CIV. P. 56**

On April 3, 2020, Defendant City of Billings ("City") filed City of Billings' Motion for Partial Summary Judgment (Counts II and III) Pursuant to Mont. R. Civ. P. ("Motion). Ct. Doc. 19. On April 3, 2020, the City also filed the City of Billings' Brief in Support of its Motion for Partial Summary Judgment (Counts II and III) Pursuant to Mont. R. Civ. P. 56 ("Brief"). Ct. Doc. 20. On April 27, 2020, Plaintiffs Gary McDaniel and Susan McDaniel ("Plaintiffs") filed Plaintiffs' Response to City's Motion for Partial Summary Judgment (Counts II and III) (Presentment) ("Response"). Ct. Doc. 26. On May 8, 2020, the City filed City of Billings' Reply in Support of its Motion for Partial Summary Judgment (Counts II and III) Pursuant to Mont. R. Civ. P. 56 ("Reply"). Ct. Doc. 31.

On March 30, 2021, the Court held a Scheduling Conference. In its Memorandum issued following the Conference, the Court concluded and counsel agreed that at this time there is no matter to be set for a hearing in this case. Ct. Doc. 74. On March 31, 2021, the City filed a Notice

to Court in which the City stipulated that the present Motion may be submitted on briefs without oral argument. Ct. Doc. 76. Plaintiffs have not requested oral argument. At a Status Hearing held on September 14, 2021, the Court confirmed with counsel that this Motion is submitted on briefs.

The Court also notes that in City of Billings' Response in Opposition to Plaintiffs' Motion for Class Certification, the City suggested to the Court that for the "sake of judicial economy, the Court should decide several important threshold and potentially dispositive or limiting motions before the Court addresses class certification." Ct. Doc. 47, p. 1. This approach has been approved by other courts. *See, Sheehan v. Transit Auth.,* 155 Wn. 2d 790, 807, 123 P.3d 88 (2005) ("...a trial court retains discretion, for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions.") In this case, the Court has not yet addressed Plaintiffs' motion for class certification. The Court points this out because in the related case of *Houser, et al. v. City of Billings,* Montana 13th Judicial Dist. Ct., Cause No. DV 19-0778, the parties agreed that notice should be given to the certified class before the Court decides motions for summary judgment. *Houser* is procedurally distinct from this case because in *Houser* the class was certified. *Houser,* Ct. Doc. 74.

BACKGROUND

On October 9, 2019, Plaintiffs filed a Class Action Complaint (Subdivision Improvement Agreement Properties) ("Complaint"). Ct. Doc. 1. In Count II of their Complaint, Plaintiffs allege that the City and its utility customers entered into individual agreements for water services, sewer services, and garbage disposal services. Plaintiffs allege that the City breached the covenant of good faith and fair dealing by imposing an illegal sales tax on its customers and misrepresenting them as "franchise fees." In Count III of their Complaint, Plaintiffs allege that the City "has wrongfully exacted payments from Plaintiffs and others similarly situated by collecting from them

illegal taxes based upon the City's provision of water, sewer services, and garbage disposal services." *Id.*, ¶ 111. Plaintiffs seek restitution to prevent unjust enrichment to the City.

In 1992, the City's Council adopted Resolution 92-16531 imposing a 4% "franchise fee" on its provisions for water and wastewater services. The City also began applying a 4% "franchise fee" on its provisions for solid waste disposal services. On June 24, 2004, the City Council formally approved the solid waste "franchise fee" when it increased the fee from 4% to 5%.

On May 16, 2018, a group of Billings ratepayers filed a class action suit against the City requesting a declaratory judgment and injunction and damages for breach of contract. *Houser.* This Court certified the matter as a class action, but excluded from the classes City ratepayers whose property is subject to a Subdivision Improvement Agreement ("SIA"), such as Plaintiffs in this case. *Houser,* Or. Granting Pls.'s Mot. for Class Certification (2019). The City appealed to the Montana Supreme Court, which affirmed this Court's Order. *Houser* v. *City of Billings*, 2020 MT 51, 399 Mont. 140, 458 P.3d 1031. However, this Court's decision that the SIA ratepayers were excluded from the class in *Houser* was not raised in the appeal to the Supreme Court.

There is no dispute that since 2004 Plaintiffs have resided in the Ironwood Subdivision in Billings. Their residence has been subject to an SIA during the entire time they have resided in that subdivision. In November 2004, Plaintiff Susan McDaniel established an account with the Billings Public Works Department for water, wastewater, and solid waste disposal services. Ct. Doc. 12, Aff. of Jennifer Duray, ¶ 4. The Public Works Department has no record of an account with Plaintiff Gary McDaniel related to water and wastewater services for Plaintiffs' residence. *Id.*, ¶ 5. The Public Works Department does not have a record of an account with Plaintiff Gary McDaniel related to solid waste service from 2012. *Id.*, ¶¶ 6-7.

Since 2004, Plaintiffs have been paying the "franchise fees" to the City and have never paid the fees under protest. Br., Ex. A, Admis. Nos. 3, 10. The "franchise fees" showed up as separate line items on bills from Public Works to its customers. *Id.,* Admis. No. 5. The recorded SIA covering Plaintiffs' residence explicitly states that fees paid to the Public Utilities Department are subject to "franchise fees." Br., Ex. B, SIA, Ironwood Estates Subdivision, First Filing ¶¶ 3(B)(4)-(5).

Plaintiffs admitted that they did not present a claim or demand for repayment to the City under § 7-6-4301, MCA. Plaintiffs also admitted that they did not file a claim or demand with the Public Works Department before filing the present lawsuit. Ct. Doc. 12, ¶ 8. During the time the "franchise fees" were charged, several citizens complained about the City charging "franchise fees" on water, wastewater, and solid waste disposal services. Despite the complaints, Plaintiffs never presented the City Council with an account or demand related to franchise fee payments. Ct. Doc 13, Aff. of Denise Bohlman, ¶¶ 6-7. The City Council did not receive any refund demand or claims before the City was served with a class action complaint, filed on May 16, 2018, alleging damages for the City's collection of "franchise fees." Class Action Complaint, *Houser,* Ct. Doc. 1.

Complaints and objections about the "franchise fees" being illegal sales taxes were also made by City Council members and City employees. Ct. Doc. 1, ¶¶ 32-36, 39-49. In 2017, a group of utility customers, including customers residing in subdivisions subject to an SIA, consulted with an attorney regarding the "franchise fees." Plaintiffs' co-counsel, Matthew Monforton, wrote a letter dated August 3, 2017 to City Attorney Bret Brooks. Br., Ex. A. In the letter, Mr. Monforton wrote that he was writing on behalf of Billings resident Terry Houser expressing concerns about the "franchise fees" imposed upon the City's customers for water and

wastewater services. Mr. Monforton mentioned that the City has the statutory discretion to establish rates and charges for these services, which must be "reasonable and just" under § 69-7-101, MCA. Mr. Monforton also stated, "My client would like to know how the imposition of the City's 4% franchise fee directly upon customers can be reasonable and just under § 69-7-101, MCA, if imposing it upon customers indirectly via a non-municipal utility would constitute an unlawful tax." Mr. Monforton requested a response to his inquiry.

By letter dated October 11, 2017, Jessica Fehr, an attorney with Moulton Bellingham PC, responded on behalf of the City addressing the "franchise fees" paid by all utility customers under their "contractual relationship" with the City. Br., Ex. B. On November 17, 2017, Plaintiffs' co-counsel, Kristen Juras, responded to Ms. Fehr in a letter in which Ms. Juras advised that she would be assisting Mr. Monforton in a class action lawsuit they intended to file on behalf of the water and garbage customers who were paying a 4% "franchise fee" on water and sewer services and a 5% "franchise fee" on the solid waste disposal services provided by the City.[1] *Id.*, Ex. C. In her letter, Ms. Juras responded to the points made by Ms. Fehr in her letter to Ms. Juras and further raised and discussed three factors about the legality of the "franchise fees" with particular reference to *Montana-Dakota Utils. Co. v. City of Billings*. *Montana-Dakota Utils. Co. v. City of Billings*, 2003 MT 332, 318 Mont. 407, 80 P.3d 1247. Ms. Juras also attached an exhibit to her letter showing the annual "franchise fees" collected by the City.

Thereafter, Ms. Juras and Mr. Monforton met with Ms. Fehr. Following the meeting, Ms. Juras wrote a letter dated December 18, 2017 to Ms. Fehr confirming the discussions that were held during the meeting. Br., Ex. D. Ms. Juras's letter explains that the meeting focused on the position of her clients on the legality of the "franchise fees." According to the letter, the parties

[1] By Order filed on March 9, 2021, Ms. Juras was granted leave to withdraw as co-counsel in this case. Ct. Doc. 57.

agreed to provide a specified period of time within which to engage in settlement negotiations to reach an agreement to avoid the costs in time and resources that a class action lawsuit would entail. Conditions for postponement of the filing of a class action lawsuit challenging the legality of the franchise fees were established. The letter states that Ms. Juras's client would not enter into any settlement agreement unless the City agreed to cease collection of the "franchise fees" no later than July 1, 2018. The letter also states that during the settlement negotiations discussions would be had about the amount of damages payable by the City, including costs and attorney fees. *Id.* In January 2018, a Tolling Agreement was entered into between Plaintiffs and the City. *Id.*, Ex. E. The Tolling Agreement contained a termination date of April 30, 2018.

On December 8, 2021, the Court issued an Order allowing Plaintiffs' counsel to file settlement documents. Ct. Doc. 96. The Court allowed the documents to be filed because Plaintiffs did not seek to offer settlement offers for the purpose of proving liability for its claims against the City. The Court agreed that Plaintiffs sought to offer the settlement offers to rebut the City's argument that Plaintiffs failed to give timely notice of its claims to the City Council as required by § 7-6-4301, MCA. The Court concluded that this reason was a proper purpose under Rule 408, M.R.Evid. On or before December 15, 2021, Plaintiffs' counsel filed the applicable settlement documents with the Clerk of the District Court under seal. On December 17, 2021, the Court received the documents from the Clerk of the District Court by way of postal service and has reviewed the documents.

In this case, Plaintiffs proposed classes include "persons owning property subject to an [SIA] who have at any time since February 2, 2014 paid 'franchise fees' for water..." and "who have at any time since February 2, 2010 paid 'franchise fees' for wastewater services..." and 'who

have at any time since July 1, 2012 paid 'franchise fees' for solid waste disposal services..." Compl., Ct. Doc. 1, ¶ 71.

Plaintiffs filed this lawsuit on October 9, 2019. Plaintiffs seek a refund of "franchise fees" paid by themselves and other City residents who paid "franchise fees" pursuant to an SIA. The City stopped charging the "franchise fees" at issue in this case on June 30, 2018. On November 12, 2019, the City formally adopted a resolution repealing Resolution 92-16531, the resolution that originally added a "franchise fee" to the cost of water and wastewater services beginning in 1992.

LEGAL STANDARD

Summary judgment is appropriate "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." *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, ¶ 16, 369 Mont. 444, 299 P.3d 338 (citing M. R. Civ. P. 56(c)(3)). Summary judgment may be entered for either all or part of the claim. Mont. R. Civ. P. 56(a). Once the moving party demonstrates the absence of any genuine issue of material fact, the burden of proof shifts and the non-movant "must establish with substantial evidence, as opposed to mere denial, speculation, or conclusory assertions, that a genuine issue of material fact does exist or that the moving party is not entitled to prevail under the applicable law." *Semenza v. Kniss*, 2008 MT 238, ¶ 18, 344 Mont. 427, 189 P.3d 1188 (citation omitted). Disputed facts "are material if they involve elements of the cause of action" and the trier of fact must resolve the dispute. *Pospisil v. First Natl. Bank of Lewistown,* 2001 MT 286, ¶ 12, 307 Mont. 392, 37 P.3d 704 (citation omitted).

DISCUSSION

The City seeks partial summary judgment on Count II (Breach of Contract) and Count III (Restitution) barring Plaintiffs' claims and the claims of any class members who failed to bring

their demands against the City before the Billings City Council as required by § 7-6-4301(1), MCA. The City also seeks judgment that the one-year period to bring claims under the statute has passed for Plaintiffs to bring these claims.

Section 7-6-4301(1), MCA, provides:

> All accounts and demands against a city or town must be presented to the council in an itemized format. These claims must be presented with all necessary and proper vouchers within 1 year from the date the claims accrued. An action may not be maintained against the city or town for or on account of any demand or claim against the city or town until the demand or claim has first been presented to the council.

The City argues that because Plaintiffs did not present their claims under Counts II and III of their Complaint to the City Council within one year before filing this suit Plaintiffs' claims should be dismissed.

The City relies on a California case which analyzed a similar California statute noting, "failure to timely present a claim for money or damages to a public entity bars a plaintiff from filing a lawsuit against that entity." *State of California v. Super. Ct.*, 90 P.3d 116, 119, 32 Cal. 4th 1234, 13 Cal. Rptr. 3d 534 (Cal. 2004) The California statute provided, in part, "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented...until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board..." *Id.*

In its Brief, the City presents a detailed and historical analysis of the validity and application of § 7-6-4301, MCA. Br., pp. 8-13. The City notes that Plaintiffs had notice of the "franchise fees" charged by the City and did not act on their claims until filing the present lawsuit. It is undisputed that Plaintiffs never presented an itemized claim or demand to the City Council. Therefore, the City argues because Plaintiffs did not make a proper claim or demand against the

City the claims for breach of contract and restitution are improperly before this Court. The City also argues that even if the Plaintiffs were aware that some residents were opposed to the franchise fee, this awareness did not relieve Plaintiffs from their obligation to present a claim or demand to the City Council.

The City points out that even if the City had actual knowledge of the circumstances surrounding a claim and numerous citizens expressed objections to the "franchise fees" at City Council meetings that there is no exception or alternative means of compliance to the presentment of a claim or demand under the statute. See, *City of Stockholm v. Super. Ct.*, 171 P.3d 20, 25, 42 Cal. 4th 730, 68 Cal. Rptr. 3d 295 (Cal. 2007). The City also cites *Burnett v. Tacoma City Light,* in which the court held that a failure to properly file a notice of claim precluded the subsequent lawsuit, even if the City had actual knowledge of the claim. *Burnett v. Tacoma City Light,* 124 Wn. App. 550, 559, 104 P.3d 677, 683 (Wash. App. Div. 2 2004).

The City argues that the claim presentation requirement is in addition to, and exclusive of, any applicable statute of limitations. *Sweitzer v. Dean,* 118 Idaho 568, 798 P.2d 27, 30 (Idaho 1990). In *Sweitzer*, the Idaho Court confronted the issue of the interaction of an Idaho statute requiring a claim presentation with a statute of limitations. The Idaho statute required all claims against a political subdivision to be presented by the claimant within 120 "days from the date the claim arose or reasonably should have been discovered, whichever is later." *Id. Sweitzer* involved a claim of wrongful discharge. In *Sweitzer*, the plaintiff filed a notice of claim against the City more than ten months after his resignation, which was beyond the time required by the Idaho statute.

In *Sweitzer,* the trial court barred plaintiff's claims for his failure to comply with the 120 days' notice requirement. The Idaho Supreme Court agreed and held plaintiff was precluded from

asserting his claims against the City for failure to provide timely notice as required by the statute. In *Sweitzer,* the trial court relied on an earlier Idaho case wherein the Idaho Supreme Court affirmed a trial court's dismissal of claims against the City of Burley for breach of contract and breach of the duty of good faith and fair dealing because the plaintiff failed to provide timely notice pursuant to an Idaho statute. See, *Harkness v. City of Burley*, 110 Idaho 353, 715 P.2d 1283 (1986).

In *Harkness*, the plaintiff filed his notice seven months after his claim arose as opposed to the 60 days specified by the applicable Idaho statute. The trial court dismissed plaintiff's claims. The plaintiff appealed, asserting that the four-year statute of limitations for bringing an action on an oral contract controlled over the 60-day notice period in the Idaho statute. The Idaho Supreme Court disagreed and affirmed the trial court's decision, holding that the 60-day requirement was not a statute of limitations and held that the requirement of 60-day notice of claim was applicable in addition to the specified statute of limitations. *Harkness*, 110 Idaho at 358-359, 715 P.2d at 1289-1290.

The City contends that for the breach of contract claim the latest date for any breach to have accrued was June 30, 2018, the last date in which the City charged "franchise fees." The City also contends that Plaintiffs' restitution claim is based on the City collecting the "franchise fees" and that the latest date for the restitution claim is also June 30, 2018. The City argues that Plaintiffs had one year from June 30, 2018 within which to present claims to the City under § 7-6-4301(1), MCA. In applying the statute, the City maintains that Plaintiffs had until July 1, 2019 to present a claim or demand, which Plaintiffs failed to do.

As the City points out, the Montana Supreme Court has had few occasions to interpret the meaning of § 7-6-4301, MCA, which has been the law in Montana since 1895. In an early case, the Supreme Court recognized that the purpose of the statute is to allow a city to audit a party's

demands for payment and direct the payment of claims. *Dawes v. City of Great Falls,* 31 Mont. 9, 13, 77 P. 309, 310 (1904). The Supreme Court held that the statute did not apply to torts but that it applies "to accounts and demands upon contracts." *Id.*, 31 Mont. at 14-15. Therefore, § 7-6-4301, MCA, applies to this case because Plaintiffs' claims under Counts II and III arise out of a contract. Nowhere in their Response do Plaintiffs dispute that as a matter of law Count II or Count III are not contract claims. Plaintiffs do not discuss the theory of unjust enrichment as alleged in Count III. In fact, Plaintiffs admit that they and the City entered into written contracts for providing water, wastewater and solid waste services to Plaintiffs. See, Pls.' Resp. to City's Mot. for Partial Summary Judm. Re Good Faith and Fair Dealing (Count II), p. 3. Ct. Doc. 25.

Although the City further discussed the doctrine of "sovereign immunity" and whether the statute is impacted by that doctrine, from the Court's review of the authorities cited by the City, the Court concludes there is no question that § 7-6-4301, MCA is constitutional and valid. The pertinent issue raised by the City is whether the statute was followed.

The Montana Supreme Court also held that a complaint must state that a claim or demand was presented to the City Council and disallowed before a party can sue in the District Court. *Leggat v. City of Butte,* 54 Mont. 137, 140, 168 P. 38, 39 (1917). In *Leggat,* a contractor paved the streets with brick in a special improvement district. The city then gave notice of its intention to pass a resolution levying a special assessment to defray the cost of the improvement. The plaintiffs, who owned property in the special improvement district, appeared before the city council and protested against the adoption of the resolution. *Id.* The protest was overruled and the resolution was passed; and plaintiff's property was assessed. Plaintiffs paid the whole amount of the assessment under protest. Plaintiffs then sued the city to have the resolution and the assessment declared invalid, and to recover the amount paid with interest. Plaintiffs' complaint

was dismissed for a procedural reason. However, the Montana Supreme Court agreed that the dismissal was correct and held:

> The moneys paid under protest were or they were not for a "tax, license or other demand for public revenue." If they were, suit to recover was barred sixty days after November 30, 1912, or on January 29, 1913. (Chapter 135, Laws 1909, sec. 1.) If they were not, then such payment--if it could form the basis of an action at all--would stand as a mere demand against the city, not suable until after presentation to and disallowance by the city council (Rev. Codes, sec. 3288; *Dawes v. City of Great Falls*, 31 Mont. 9, 77 P. 309), which presentation and disallowance must appear upon the face of the complaint. (emphasis supplied).

Leggat, 54 Mont. at 140, 168 P. at 39.

The City references a Montana Attorney General letter of advice, not for any precedential value, but for its instructive value due to the similarity with the issue in this case and the application of § 7-6-4301, MCA. *Time Bar as to Claim Against Municipality,* Mont. Att'y Gen. Letter of Advice (May 31, 2013).[2] The Attorney General was asked whether a claim to the City of Forsyth for a refund due to overpayment for water and sewer services for the period of June 2004 to December 2012 because of an incorrect meter size was subject to the one-year statute of limitations in § 7-6-4301, MCA. The letter quotes the requirements of § 7-6-4301, MCA. The letter also cites § 27-2-102(1)(a), MCA which provides that "a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action." The Attorney General letter concluded that the claimant's claim "accrued each time he received a bill based on the incorrect meter size, because at that time all elements of the claim existed." *Id.* However, the Attorney General letter concluded that the lack of actual knowledge on the part of

[2] https://dojmt.gov/wp-content/uploads/05-31-13-Begley-ltr.pdf

the claimant did not toll the applicable statute of limitations. *Id.*, citing *Sampson v. Montana,* 285 Mont. 310, 319, 948 P.2d 232, 237-238 (1997).

The City argues that this case is similar because Plaintiffs had notice of the "franchise fees" when they purchased their home in 2004 and they did not act on their claims until filing this lawsuit. In addition, Plaintiffs did not allege in their Complaint that their claims were presented to the City Council and disallowed. The City contends that Plaintiffs could not make these allegations because Plaintiffs never presented an itemized claim or demand to the Billings City Council. The City maintains that Plaintiffs cannot rely on the fact that other citizens may have objected to the "franchise fees" during City Council meetings to satisfy their obligation under § 7-6-4301, MCA.

In this regard, the City argues that the plain language of § 7-6-4301, MCA requires that a demand or claim be first presented to the City Council and that there is no exception in the statute. To support their argument, the City relies on a decision by the California Supreme Court wherein that Court said, "It is well-settled that claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim." *City of Stockton v. Super. Ct.*, 42 Cal. 4th 730, 738, 68 Cal. Rptr. 3d 295, 302, 171 P.3d 20, 25 (2007). The City further cites *Burnett* wherein the Court of Appeals of Washington stated, "[E]ven assuming that the City had actual knowledge of the Category II plaintiffs' claims by virtue of their filing with the City Attorney and the Department, their failure to file with the Clerk's Office, as the ordinance directs, precludes their subsequent lawsuit against the City." *Burnett,* 124 Wash. App. at 559, 104 P.3d at 682-83.

Plaintiffs argue that certain utility customers repeatedly notified the City of their objections to the "franchise fees." Plaintiffs point out that in 2017 the City received demands challenging the

legality of the franchise fees. According to Plaintiffs, these demands led to months of negotiations between the City and its utility customers in an attempt to resolve the challenges without the necessity of litigation and now the City is attempting to avoid any responsibility for its alleged illegal conduct by contending that no claim was presented to the City as required by § 7-6-4301, MCA.

Plaintiffs argue that the City has waived its right to assert the one-year bar set forth in § 7-6-4301, MCA because the City did not plead the one-year bar as an affirmative defense in its Answer. Plaintiffs contend that Rule 8(c), Mont. R. Civ. P. required the City to "affirmatively state any avoidance or affirmative defense." Plaintiffs also assert that the City cannot assert an affirmative defense for the first time in a motion for summary judgment. *Meadow Lake Estates Homeowners Ass'n v. Shoemaker,* 2008 MT 41, ¶ 26-31, 341 Mont. 345, 178 P.3d 81.

Plaintiffs cite cases from other jurisdictions to buttress its argument that waiver is appropriate in cases where a municipality not only fails to identify a notice-of-claim defense in its initial pleadings, but then litigates for nearly two years before raising it. See, e.g. *Hill v. Bd. of Education*, 183 N.J. Super. 36, 443 A.2d 225 (Super. Ct. App. Div. 1982). A closer review of *Hill* demonstrates that *Hill* is not particularly supportive of Plaintiffs' position. *Hill* involved the parents of a student, the student, and guardian ad litem, who filed a personal injury action against the board of education for injuries the student suffered playing basketball at school. *Hill,* 183 N.J. Super. at 38, 443 A.2d at 226.

In New Jersey, the Tort Claims Act required a "claimant to file a claim notice in prescribed form with the public entity within 90 days after the accrual of the claim. *N.J.S.A.* 59:8-8(a). However, the time within which a child must give notice was tolled until after he reached majority. A parent had the same period of time as his injured child in which to file a notice of

claim for consequential damages." *Hill*, 183 N.J. Super. at 39, 443 A.2d at 227, citing *Rost v. Fair Lawn Bd. of Ed.*, 137 *N.J. Super.* 76, 79 (App.Div.1975); *Vedutis v. Tesi*, 135 *N.J. Super.* 337, 340-341, 346 (Law Div.1975), aff'd o.b. 142 *N.J. Super.* 492 (App.Div.1976). According to the New Jersey statute, "the 90-day notice period could be extended in the discretion of the Superior Court to a maximum of one year following the accrual of the claim." *N.J.S.A.* 59:8-9. The New Jersey Court emphasized "that judicial discretion to extend the time for filing of the requisite notice does not survive the passage of one year following the accrual date of the claim." Citing *Speer v. Armstrong*, 168 *N.J. Super.* 251, 255, 402 A.2d 963, 965 (App.Div.1979).

In *Hill,* the Court found that the defense of failure to file notice under the New Jersey Tort Claims Act is an affirmative defense that must be pleaded in order to avoid surprise, and a defendant may be found to have waived its protection by failing to plead it as a defense. *Hill*, 183 N.J. Super. at 40, 443 A.2d at 228, citing *Anske v. Palisades Park, supra*, 139 *N.J. Super.* at 350; *McShain v. Evesham Tp.*, 163 *N.J. Super.* 522, 529 (Law Div.1978). In *Hill,* the Court noted that the defendant did not specifically plead that plaintiffs failed to comply with the notice provisions of the Tort Claims Act, nor did they cite the applicable section of the statute. *Id.*

After finding that defendant did not plead the notice requirements, the New Jersey Court then observed that defendant waited until over 2 1/2 years after the complaint was filed before bringing its motion for summary judgment and that during that time plaintiffs conducted discovery. *Hill,* 183 N.J. Super. at 41, 443 A.2d at 228. The Court stated," [d]efendant's conduct created the objective impression that it was waiving the notice requirements, especially in view of its failure to properly plead this defense." *Id.*

However, in this case Plaintiffs' waiver argument does not have the same force as it did in *Hill.* In this case, the City raised the issue of the lack of notice requirement early in the litigation.

The City filed its Answer containing Affirmative Defenses on November 14, 2019. Ct. Doc. 7. The City's Motion was filed five months later on April 3, 2020. Ct. Doc. 19. When the City filed its Answer, this case had not been significantly litigated. As the City points out, the City's relief under § 7-6-4301, MCA would not have prevented this lawsuit. Plaintiffs have asserted five causes of action. Reply, p. 12. Three of the causes of action (Count 1 – Declaratory Relief; Count IV – Federal Due Process, and Count V – State Due Process) do not fall within the scope of § 7-6-4031, MCA. As the City observes, the substantial amount of litigation in this case would have and has occurred regardless of the timing of the City's Motion. These facts distinguish this case from the facts in *Hill.*

Furthermore, in its Answer, the City pleaded the affirmative defense that "Plaintiffs failed to exercise and exhaust their administrative remedies prior to initiating this legal action." Answer, Ct. Doc., 7, p. 14, ¶ 20. The City also pleaded that it "raises each and every defense (at law, in equity, or otherwise) available under all federal and state statutes, laws, rules, regulations, and other creations, including common law." Answer, Ct. Doc. 7, p. 17, ¶ 38. In addition, the City pleaded immunity as a defense. Answer, Ct. Doc. 7, p. 15, ¶¶ 25-28. "If a statute provides for administrative relief, an aggrieved party must seek that relief from the administrative body and exhaust the statutory remedy before seeking judicial relief." *Mont. Trout Unlimited v. Mont. Dep't of Nat. Res. & Conservation*, 2006 MT 72, ¶ 20, 331 Mont. 483, 133 P.3d 224, *citing Wiser v. State Dept. of Commerce*, 2006 MT 20, ¶ 30, 331 Mont. 28, 129 P.3d 133. "The archaic rules of code pleading have been replaced by our new rules of civil procedure, which place the spirit of the law above strict compliance with the letter of the law. The liberal rules of pleading in Montana's courts are found in Rule 8, M.R.Civ.P." *Morse v. Espeland*, 215 Mont. 148, 151, 696 P.2d 428, 430 (1985). The Court concludes that the City stated its affirmative defense requiring Plaintiffs

to give notice to the City in compliance with § 7-6-4301, MCA before filing this lawsuit by alleging that Plaintiffs did not exercise their administrative relief.

As they do with the opinion of the New Jersey Court in *Hill*, Plaintiffs rely on what the Arizona Supreme Court has said on the issue presented by Plaintiffs:

> Any defense a public entity may have as to the sufficiency of a notice of claim is apparent on the face of the notice. This is a matter that courts can quickly and easily adjudicate early in the litigation. See *Pritchard,* 163 Ariz. at 432-33, 788 P.2d at 1183-84 (noting that issue can be raised through motion for summary judgment to which notice is appended). Given that a government entity may entirely avoid litigating the merits of a claim with a successful notice of claim statute defense, waiver of that defense should be found when the defendant "has taken substantial action to litigate the merits of the claim that would not have been necessary had the entity promptly raised the defense." *Jones*, 218 Ariz. at 380 P 26, 187 P.3d at 105. 4

City of Phoenix. v. Fields, 219 Ariz. 568, 575, 201 P.3d 529, 536 (2009).

Plaintiffs claim that the City could have pressed its purported notice-of-claim defense in May 2018 when the *Houser* Plaintiffs (which at the time included the Plaintiffs in this case) filed their original complaint. Plaintiffs point out that in *Houser* significant discovery was conducted following the filing of the *Houser* Complaint:

> This included nearly a dozen depositions, productions of documents approaching 100,000 pages, multiple dispositive motions involving thousands of pages of briefing and exhibits, multiple non--dispositive motions, an interlocutory appeal in the Montana Supreme Court, multiple informal mediation conferences between the City and the Class Representatives, and preparations (and expenses) associated with a formal mediation scheduled for May 13.

Response, p. 8. Plaintiffs argue that the City's two-year delay in raising its notice-of-claim defense constitutes a waiver. However, in this case, the City's defense was raised in its Answer filed one month after Plaintiffs' Complaint was filed and further asserted in its Motion filed five

months after Plaintiffs' Complaint was filed. This is not a case in which the defense was raised more than two years after the Complaint was filed.

Plaintiffs argue that the 2017 claims were presented on behalf of all of the City's utility customers, including Plaintiffs and other utility customers residing on property subject to an SIA. Response, p. 17. Plaintiffs acknowledge that Plaintiffs did not personally sign the presentment of their claims. *Id.*, fn. 9. Plaintiffs contend that the claims were signed by Plaintiffs' attorneys on behalf of all utility customers. *Id.* The City maintains that these claims, the execution of a Tolling Agreement in January 2018 prior to the filing of the *Houser* lawsuit, a settlement offer made to the City in March 2018, the subsequent settlement negotiations held after the filing of the *Houser* lawsuit, offers made by both parties, including a January 2019 settlement offer presented to the City on behalf of all utility customers, a counter-offer presented by the City in March 2019, and several settlement discussions and exchanges in August and September 2019 before the filing of this lawsuit satisfy the claim requirements of § 7-6-4301, MCA. *Id.*, p. 10.

Although Plaintiffs maintain that they presented claims to the City in satisfaction of § 7-6-4301, MCA, they also assert they were not required to do so. *Id.*, p. 11. Plaintiffs argue that *Dawes* and *Wynne* do not support the City's position that § 7-6-4301, MCA applies to Plaintiffs in this case. See, *Wynne v. Butte*, 45 Mont. 417, 123 P. 531 (1912). However, the City cited *Dawes* and *Wynne* for the proposition that the predecessor to § 7-6-4301, MCA did not apply to torts but to contracts. Plaintiffs focus on the language of the Supreme Court that "It would be difficult to present a demand arising out of tort under the provisions of these two sections." *Dawes,* 31 Mont. at 13; Resp., p. 11. Plaintiffs argue that *Dawes* and *Wynne* support their proposition that § 7-6-4301, MCA "excludes claims that either are not capable of audit before a lawsuit is filed or that the City does not need any additional information to audit." Resp., p. 12.

As discussed above, the City explains that reasoning in *Dawes* and *Wynne* support their argument that § 7-6-4301, MCA applies to claims based on contract and are illustrative to clarify the scope and limitation of the statute. Reply, p. 3. In their Response, Plaintiffs present a rundown of the procedures and methods by which the City charged its customers with the utility rates and "franchise fees." Resp., p. 12. Relying on *Dawes* and *Wynne,* Plaintiffs reason that when the City controls all of the documentation about charging its customers it makes no sense to require a utility customer to present a claim to the City for "audit to determine the amounts the City itself established, calculated, charged to and collected from its utility customers." *Id.* The City argues that these cases do not support a conclusion that § 7-6-4301, MCA can be waived when a municipality has records related to a plaintiff's claims. Reply, p. 3.

Plaintiffs argue that § 7-6-4301, MCA does not apply when the City had actual knowledge of the claim. Plaintiffs cite Article II, Section 16 of the Montana Constitution which provides that "courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." Resp., p. 13. Plaintiffs also cite Article II, Section 18 of the Montana Constitution which abolishes "immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature." *Id.* Plaintiffs emphasize that the Montana Supreme Court has held in view of these constitutional rights, it is the duty of the courts "to strictly construe any attempted governmental immunity." *B.M. v. State,* 200 Mont. 58, 62, 649 P.2d 425, 427 (1982); *Denke v. Shoemaker*, 2008 MT 418, ¶ 55, 347 Mont. 322, 198 P.3d 284 ("we must strictly construe the grants of immunity in §§ 2-9-111 and -114, MCA).

Plaintiffs cite what they contend to be a sample of several Montana cases in which Plaintiffs claim that the courts have exercised jurisdiction over claims against local governments

and have awarded damages arising from a local government's breach of contract. Resp., pp. 13-14. The cases cited by Plaintiffs include *Conner v. City of Dillon*, 2012 MT 21, 364 Mont. 8, 270 P.3d 75 (water customer may proceed on its breach of contract claim against City); *Kuhr v. City of Billings*, 2007 MT 201, 338 Mont. 402, 168 P.3d 615 (upholding breach of contract award against the City in the amount of $3,075,590.30); *Linn v. City County Health Dep't*, 1999 MT 235, 296 Mont. 145, 988 P.2d 302 (remanded for hearing on breach of contract claim); *Gray v. Billings*, 213 Mont. 6, 689 P.2d 268 (1984) (plaintiffs entitled to jury trial on breach of contract claim against the City); *State ex rel. Helena Hous. Auth. v. City Council of Helena*, 125 Mont. 592, 242 P.2d 250 (1952) (municipalities must abide by their contracts). Plaintiffs then assert "None of the rulings in these cases state that the plaintiff was required to first present a claim for breach of contract under Mont Code Ann. § 7-6-4301." Resp., p. 14. From its review of these cases, the Court did not find any issue concerning the application of § 7-6-4301, MCA, or any ruling by the Montana Supreme Court that did not require a plaintiff to first present a claim to a city council before filing a lawsuit for breach of contract. By negative implication, Plaintiffs suggest that these cases stand for the proposition that a claim is not necessarily required to be presented to the City Council. This proposition lacks foundation and legal support in the authorities discussed herein. Further, as discussed earlier herein, this Court notes that Plaintiffs' arguments do not distinguish between contracts and torts. Clearly, despite the allegations of unjust enrichment made by Plaintiffs in Count III, Plaintiffs do not dispute that their claims are based on contract law.

The City argues that Plaintiffs' contention that correspondence addressed to the City Attorney from a utility customer and correspondence from Plaintiffs' counsel to the City Attorney is comparable to an itemized claim presented to the City Council which satisfies the requirement

of § 7-6-4301, MCA is flawed. On the other hand, Plaintiffs argue that in view of Montana's policy "to strictly construe any attempted governmental immunity," *Denke*, ¶ 55, this Court should determine that the requirements of § 7-6-4301, MCA were satisfied because from the interactions between counsel, the City had "actual knowledge of the claim and was the only entity in possession of the records and information required to calculate its potential liability with accuracy." Resp., p. 14. Plaintiffs suggest that to require a written notice of a claim or demand in this case would be senseless. Thus, the decisive issue is whether actual knowledge or notice of a claim that has not been made according to the provisions of § 7-6-4301, MCA fulfill the statutory requirement.

Plaintiffs argue that other jurisdictions have ruled that the requirement to present a claim to a city prior to filing a lawsuit has been met if the city had actual notice of the potential claim. See, e.g. *Kelly v. City of Rochester*, 304 Minn. 328, 231 N.W.2d 275 (1975); Resp., p. 14. In *Kelly,* plaintiff sued the City of Rochester for damages for injuries sustained by plaintiff's son in a diving accident at a pool owned and operated by Rochester. The trial court granted the defendant city's motion for summary judgment because of plaintiff's failure to comply with the provisions of Minn. St. 1971, § 466.05, subd. 1, requiring notice of claims against municipalities to be given within 30 days of the accident from which the claim arises. *Kelly,* 304 Minn. at 329, 231 N.W.2d at 275-76. The Minnesota Supreme Court reversed.

Although a claim for damages was not presented to the city within the statutorily required 30-day period, one of the lifeguards present at the time of the incident, who was employed by the city, prepared a report of the incident and filed it with the head of the recreation department. The injured claimant asserted that the actual notice of the incident acquired by the municipal employees satisfied the statutory notice requirement. In reversing the trial court, the Minnesota Supreme

Court agreed with that assertion and held that actual notice of a possible claim was sufficient to meet the requirements of the statutory notice provision. The Minnesota Supreme Court said:

> While this notice of the injury is not proof that Brian or his father was making a claim, it nevertheless indicates that the city was alerted to make whatever investigation it needed to in order to defend itself in a possible suit, which is supposed to be the reason for requiring adherence to the notice requirement in the first place.
>
> * * * *
>
> . . . we hold that in the absence of a showing of prejudice, actual notice on the part of the municipality or its responsible officials of sufficient facts to reasonably put the governing body of the municipality on notice of a possible claim will be in compliance with the notice requirements of Minn. St.1971, § 466.05, subd. 1. Our holding today does no more than follow the trend of our recent opinions in recognizing the arbitrariness of the notice provision and in an attempt to remedy this injustice, we declare that substantial compliance is accomplished by actual notice on the part of the municipality even if such knowledge is acquired through its own procedures or personnel.

Kelly, 304 Minn. at 332-33, 231 N.W.2d at 277-78.

Although Plaintiffs do not make this distinction, the Court points out that *Kelly* involved a tort. It has been established that § 7-6-4301, MCA, does not apply to torts. Despite that distinction, it is important to further explore the implications of the holding in the *Kelly* case and whether the Minnesota's rationale could be fittingly applied to this contract case. Thus, further analysis is required.

After *Kelly* was decided, the North Dakota Supreme Court had the occasion to consider a similar issue as the one involved in *Kelly*. *Besette v. Enderline Sch. Dist.*, 288 NW.2d. 67 (N.D.). For the sake of transparency, this Court notes that *Besette* also involved a claim for a tort. However, addressing *Besette* is critical to demonstrate that the holding in *Kelly*, relied upon by Plaintiffs, is not the majority rule, even if the Court were inclined to apply Plaintiffs' theory and the *Kelly* decision to this contract case.

In *Besette*, on April 20, 1976, a six-year-old child fell off a slide while playing on the school grounds at Alice, North Dakota during recess and sustained injuries. *Id.* A teacher's aide employed by the school district was supervising the playground at the time of this incident, and she saw the child fall off the slide. *Id.* The aide assisted the child into the school building and together, with two other teachers, placed a towel sling on the arm and contacted the child's mother. *Id.* An employee of the school district then took the child to the doctor. *Id.*

The principal contacted the child's mother by telephone about the status of the child's injury while the child was an inpatient at the hospital. *Id.* During their conversation, the principal advised the mother that the school district would be paying part of the cost of the hospital and doctor bills. *Id.* Within 90 days of the incident, the plaintiffs presented medical bills incurred as a result of the child's injury to the principal, including a diagnosis signed by a medical doctor, for submission to the school district's group accident and health insurance carrier. *Id.*

The superintendent of the School District was also informed within 90 days of the injury that a student had fallen from a slide and had possibly suffered a broken arm. *Id.* The plaintiff filed an action for damages against the school district on October 12, 1977, and on that same day also gave notice of claim to the school district. *Id.* The school district moved for summary judgment on the ground that the plaintiff had failed to file a claim within 90 days as required by the North Dakota statute. *Id.* Subsections 1 and 2 of Section 4, Chapter 295, 1975 North Dakota Session Laws provide in part as follows:

> Except as otherwise provided, any claim against a political subdivision for injuries alleged to have arisen under the provisions of this Act shall be filed, within ninety days after the alleged occurrence of such injury, in the office of the county auditor. Such claim shall be signed and verified by the claimant and shall describe the time, place, cause, and extent of the damage or injury, shall contain an abstract of the facts upon which the claim is based, and shall specify the amount of damages claimed therefor.

Besette, 288 N.W.2d at 69.

The North Dakota Supreme Court observed that with regard to the issue of filing a claim as required by the applicable statute, "the overwhelming majority view is that actual notice of an incident does not satisfy a statutory requirement for presenting a written notice or claim to a governmental body and that the failure to present the required written notice or claim precludes the right to commence an action against the governmental body involved." (citations omitted). *Besette*, 288 N.W.2d at 70. "The courts have generally followed one or both of the following two rationales in support of the majority position: (1) that the right to sue a political subdivision is solely a statutory right which requires strict compliance with any legislative prerequisites; and (2) that the express statutory requirement of a 'written' notice or claim is not satisfied by anything less than presentment of such written notice or claim." *Id.*

The North Dakota Supreme Court also noted that "only two jurisdictions, Minnesota and New York, have held that actual notice of an incident may satisfy a statutory requirement for presenting a written notice or claim to a governmental body." Citing *Kossak v. Stalling*, 277 N.W.2d 30 (Minn. 1979); *Kelly v. City of Rochester*, 304 Minn. 328, 231 N.W.2d 275 (1975); *Matey v. Bethlehem Central School Dist., Delmar*, 89 Misc. 2d 390, 391 N.Y.S.2d 357 (Sup. Ct. 1977). *Besette*, 288 N.W.2d at 69.

The North Dakota Supreme Court found that the New York decisions were not relevant because "the New York statute allowed the court, in its discretion, to extend the time for serving a notice of claim under certain circumstances including those in which the public body 'acquired actual knowledge of the essential facts constituting the claim . . . .'" (citation omitted). *Besette*, 288 N.W.2d at 70. The North Dakota Supreme Court rejected the reasoning of the Minnesota Supreme Court and held:

> In view of the express language of Subsection 1, requiring that "any claim . . . shall be filed, within 90 days after the alleged occurrence . . . . Such claim shall be signed and verified by the claimant . . ." we must reject the reasoning of the Minnesota Supreme Court and adopt the majority position that actual notice of an incident is insufficient to satisfy the requirement of a written notice or claim.

Besette., 288 N.W.2d at 71.

Of particular interest to this Court is the fact that in 1991 Minnesota amended its law, which existed when *Kelly* was decided, to allow a longer time period for making a claim and to provide for an expressed "actual notice" provision:

> ...every person, whether plaintiff, defendant or third party plaintiff or defendant, who claims damages from any municipality or municipal employee acting within the scope of employment for or on account of any loss or injury within the scope of section 466.02 shall cause to be presented to the governing body of the municipality within 180 days after the alleged loss or injury is discovered a notice stating the time, place and circumstances thereof, the names of the municipal employees known to be involved, and the amount of compensation or other relief demanded. Actual notice of sufficient facts to reasonably put the governing body of the municipality or its insurer on notice of a possible claim shall be construed to comply with the notice requirements of this section. Failure to state the amount of compensation or other relief demanded does not invalidate the notice; but in such case, the claimant shall furnish full information regarding the nature and extent of the injuries and damages within 15 days after demand by the municipality. The time for giving such notice does not include the time, during which the person injured is incapacitated by the injury from giving the notice.

1991 Minn. ALS 199 | 1991 Minn. Chapter Law 199 | 1991 Minn. S.F. No. 1053.

The City argues that the language of § 7-6-4301, MCA is clear. When interpreting the meaning of a statute, the Montana Supreme Court has set forth the following guidelines:

> We interpret statutes consistently with the Legislature's intent as crystallized in the statute's plain language. *In re Marriage of Rudolf*, 2007 MT 178, ¶ 41, 338 Mont. 226, 164 P.3d 907. Specifically, in interpreting a statute, we are "simply to ascertain and declare what is in the terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-2-

> 101, MCA. It is not our prerogative to read into a statute what is not there. *Rudolf*, ¶ 41.

Bates v. Neva, 2014 MT 336, ¶ 13, 377 Mont. 350, 339 P.3d 1265 (2014).

The language of § 7-6-4301, MCA is clear. Plaintiffs had to present itemized claims to the Billings City Council prior to bringing this lawsuit. Montana's claim presentation statute is not satisfied by actual knowledge, and it does not provide alternative means of compliance. The letters provided by Plaintiffs do not contain an itemized claim and were never presented to the Billings City Council. There is no fact that any demand or claim was presented to the City Council. The settlement documents that were provided to the Court under seal do not contain an itemized claim presented by Plaintiffs to the City Council as required by § 7-6-4301, MCA. Even if the Court agreed with Plaintiffs that all of the communications among the various lawyers constituted making a demand or claim required by § 7-6-4301, MCA, the Court would need to ignore the words of the statute.

As discussed above, Montana Courts view immunity statutes narrowly. As noted in *Denke*, the Courts limit governmental immunity to the acts clearly expressed based on "the plain wording of the immunity statute." *Denke*, ¶ 55. In construing § 7-6-4301, MCA, it is the court's function to ascertain and declare what in terms or in substance is contained in the statute and not insert what has been omitted. *Bates, supra.* Adding an actual knowledge requirement to diminish the statutory requirements would contravene the Legislature and insert omitted language into the statute. *Russette v. Chippewa Cree Hous. Auth.*, 265 Mont. 90, 94, 874 P.2d 1217, 1219 (1994). If the Legislature intended actual notice to satisfy the statute, the Legislature could have written an actual notice or knowledge qualifier into the statute in the same manner as the Minnesota Legislature did.

Plaintiffs cannot satisfy § 7-6-4301, MCA by asserting "actual notice" or "actual knowledge" into the statute, and this Court would be remiss in its duty to interpret the statute according to its plain meaning.

The Court also concludes that the City has not waived its right to assert that this Court lacks jurisdiction over Plaintiffs' claims. The Montana Legislature has previously rejected the Court's attempt to write in a waiver of sovereign immunity statutes. As the City argues, Plaintiffs' waiver argument is contrary to the letter and spirit of the Montana Constitution, as well as § 7-6-4301, MCA. Neither the Constitution nor § 7-6-4301, MCA provides for a waiver of sovereign immunity through litigation, and the Court will not write in a waiver to the statute here. Section 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.")

The doctrine of sovereign immunity was generally abrogated with the enactment of the 1972 Montana Constitution. However, the Constitution, as amended, specifically provides for immunity in the situation presented here. The claim presentation statute was adopted and repeatedly amended by more than a 2/3rds vote of each house of the Legislature. Accordingly, the Legislature preserved sovereign immunity for municipalities in contract matters, unless the claimant presents a claim to the City Council, as provided in § 7-6-4301, MCA. Sovereign immunity is waived by legislation, not the conduct of a party during litigation.

The Montana Legislature previously rejected the court's similar attempt to insert an implied waiver of sovereign immunity into an immunity statute. In *Crowell v. School Dist. No. 7,* the Court analyzed § 2-9-111, MCA to determine whether a School District waived its immunity by purchasing liability insurance. *Crowell v. School Dist. No. 7,* 247 Mont. 38, 805

P.2d 522 (1991). At the time, § 2-9-111, MCA did not contain any language related to waiver. Although the Supreme Court noted that "the Montana Legislature has not provided that the presence of insurance waives immunity," it held that the School District waived its statutory immunity to the extent of its available insurance proceeds. *Id.*, 247 Mont. at 58, 805 P.2d at 534. The Legislature rejected the Supreme Court's decision to write a waiver into the statute. The Legislature made clear that it did not intend for a waiver to be included in the statute. The Legislature subsequently overruled *Crowell* by amending the statute to expressly provide that "the acquisition of insurance coverage . . . by a governmental entity does not waive the immunity provided by this section." Section 2-9-111(4), MCA; *Hyde v. Evergreen Volunteer Rural Fire Dept.*, 252 Mont. 299, 304, 828 P.2d 1377, 1380 (1992).

The same logic applies to § 7-6-4301, MCA. The plain language of the statute contains no reference to waiver by any means. This Court will not write a waiver into the statute that was not included by the Legislature. The City has not waived the right to assert that § 7-6-4301, MCA applies to the present case.

However, Plaintiffs urge the Court to find a waiver and rely on *City of Phoenix v. Fields* and *Hill v. Bd. of Education* to argue that the City's litigation conduct excuses Plaintiffs' failure to comply with § 7-6-4301, MCA. *City of Phoenix v. Fields* and *Hill v. Bd. of Education* do not apply to the present case. As noted above, the Montana Legislature has rejected the Court's attempt to write in a waiver to a similar immunity statute.

DECISION

There is no genuine issue as to any material fact and the City is entitled to partial summary judgment as a matter of law.

Plaintiffs had notice of the "franchise fees" when they purchased their home in 2004 and they did not act on their claims until filing this lawsuit. Although Plaintiffs claim that they were potential members of the proposed class in *Houser* filed in this Court, there are no documents showing that a claim was presented by Plaintiffs to the City Council before the *Houser* lawsuit was filed. Plaintiffs cannot bring a breach of contract claim under Count II or a restitution claim under Count III of their Complaint against the City because Plaintiffs never filed claims for breach of contract and restitution with the Billings City Council within one year of their accrual as required by § 7-6-4301, MCA. In addition, Plaintiffs did not allege in their Complaint that their claims were presented to the City Council and disallowed. Section 7-6-4301(2), MCA. Plaintiffs cannot rely on the fact that other citizens may have objected to the "franchise fees" during City Council meetings to satisfy Plaintiffs' obligation under § 7-6-4301, MCA. Correspondence with the City Attorney or outside counsel is not an itemized claim presented to the Billings City Council.

In Montana, governmental immunity is limited and strictly construed. However, it has not been entirely eliminated. Section 7-6-4301, MCA is a constitutional exercise of the City's immunity and the statute does not contain any reference to waiver, actual notice, actual knowledge, or substantial compliance. Plaintiffs did not follow the required procedure before bringing their claims under Counts II and III of their Complaint before this Court, and the City is entitled to partial summary judgment on those Counts. The Court also rejects Plaintiffs' argument that the City did not adequately raise the affirmative defense of non-compliance with the procedure to present its administrative claim to the City Council.

ORDER

IT IS HEREBY ORDERED:

1. The City of Billings' Motion for Partial Summary Judgment (Counts II and III) Pursuant to Mont. R. Civ. P. is **GRANTED.** For the reasons stated in this Decision and Order, Counts II and III of Plaintiffs' Complaint are **DISMISSED** by means of a Partial Summary Judgment.

2. On or before January 18, 2022, the City's counsel shall prepare a Proposed Partial Summary Judgment on Counts II and III of Plaintiffs' Complaint consistent with this Decision and Order and the relief requested by the City and submit it to the Court in Word format directly to the Court at its personal email for the Court's consideration for issuance by the Court. Counsel shall file the original Proposed Partial Summary Judgment with the Clerk of the District Court and provide a copy to Plaintiffs' counsel.

Dated January 5, 2022.

Mike Salvagni

Hon. Mike Salvagni
Presiding Judge

cc: Matthew G Monforton
Doug James
Bryce Burke

MONTANA, THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

Gary McDaniel, et al.	)	Case No. DV 19-1444
Plaintiffs,	)	
	)	Judge Michael Salvagni
Vs.	)	
City of Billings,	)	CERTIFICATE OF SERVICE
Defendant.	)	

On this 5th day of January 2022, the Clerk of District Court certifies that a true and correct copy of the Decision and Order Re: City of Billings' Motion for Partial Summary Judgment (Count II and III) Pursuant to Mont.R.Civ.P56 under seal was mailed, first class, postage paid, to the following parties:

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THIRTEENTH JUDICIAL DISTRICT COURT · YELLOWSTONE COUNTY · MONTANA · SEAL

TERRY HALPIN

By: