

LARIMER COUNTY DISTRICT COURT
201 LAPORTE AVENUE, SUITE 100
FORT COLLINS, COLORADO 80521

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CASE NUMBER: 2019CV30889

Defendant-Appellant:

ADAM WIEMOLD

v.

Plaintiff-Appellee:

CITY OF FORT COLLINS

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Appellate Case No.
19CV30889

Municipal Court Case No.
2018-240752-MD

Div. 5A

Courtroom:

RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

The City of Fort Collins, by and through its attorneys, John R. Duval, Esq. of the Fort Collins City Attorney's Office and Andrew D. Ringel, Esq., of Hall & Evans, L.L.C. hereby respectfully submits this Response to Notice of Supplemental Authority, as follows:

1. Defendant-Appellant Adam Wiemold provided the decision of United States Magistrate Judge Mark D. Clarke of the United States District Court the District of Oregon in *Blake v. City of Grants Pass*, Case No. 1:18-cv-01823-CL, 2020 U.S. Dist. LEXIS 129494 (D. Or. July 22, 2020), as supplemental authority on July 29, 2020. Plaintiff-Appellee the City of Fort Collins respectfully submits this Response.

2. First, *Blake* was decided by the United States District Court for the District of Oregon which as a court in the United States Court of Appeals for the Ninth Circuit is bound by the Ninth Circuit's decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). In contrast, this Court is not in the Ninth Circuit and the City has presented this Court with detailed arguments concerning how this Court need not follow *Martin* and how *Martin* was wrongly decided. [See Appellee's Response Brief, at 12-28].

3. Second, Mr. Wiemold asserts *Blake* addresses the City's purported argument Mr. Wiemold could comply with the City's Ordinance by leaving the City. [See Notice, at 2]. Initially, Mr. Wiemold's mischaracterizes the City's actual argument. In reality, the City argued in detail about how the factual record before the lower court did not support Mr. Wiemold's assertion he had no indoor shelter available to him. Mr. Wiemold's two references to the City's Response Brief, taken in their actual context make this clear. In the first reference cited by Mr. Wiemold, the City actually argued as follows:

Appellant's version of the "issues presented" is problematic at best, insincere at worst. It suggests facts were elicited simply not presented at the hearing. First, Appellant suggests Mr. Wiemold had "no other indoor shelter . . . available to him . . ." (OB, at 1). This is simply not true. Mr. Wiemold did not attempt to secure shelter even though he had the economic means to do so. (Tr. 46:13-14). Moreover, Mr. Wiemold also never tried to access any shelter that night. (Tr. 29:13-15; 30:2-4). Further, Mr. Wiemold's working vehicle provided him access to shelters in nearby cities, or to park outside the City limits to camp in his

car. (Tr. 46:15-16). Finally, Mr. Wiemold has the economic means, through the income from his employment, to purchase shelter, but affirmatively chose not to do so because he wanted to use his income for other purposes. (Tr. 44:2-3; 44:22-45:3).

[See Appellee's Responsive Brief, at 11]. In the second reference cited by Mr. Wiemold, the City again actually argued as follows:

Mr. Wiemold was employed full time with a working vehicle and was camping to get out of debt in his own words. That is not a necessity of life. Further, Mr. Wiemold chose employment by an employer who prohibits him from utilizing shelter space. Appellant states he had no choice, yet he had many choices. He could prioritize housing over his decision to pay-off his self-incurred debt. He could drive to Loveland and stay in one of the many shelters there. Or he could drive a mere mile or two outside the City, and legally camp.

This case is not an instance of a person having no other options, but rather a perfect example of making choices in knowing violation of the law. The ordinance here punishes conduct, not status. And the ordinance here is not punishing Mr. Wiemold's status either, it is simply punishing him for making choices violative of the City's no-camping ordinance.

[See Appellee's Responsive Brief at 28-29]. The entire distinction made in *Martin* was the alleged involuntariness of the need for persons experiencing homelessness to sleep and how that meant the City of Boise's no-camping ordinance violated the Eighth Amendment. A central thrust of the City's argument here is Mr. Wiemold's decision to camp in his vehicle was not involuntary and therefore does not fall within *Martin's* ambit even if this Court were to choose to follow the Ninth Circuit's flawed decision.

4. Third, Mr. Wiemold argues *Blake* did not inquire into whether any individual plaintiff had the means to purchase shelter. [See Notice, at 2]. Notably, *Blake* does not address the argument one way or another. However, in its conclusion, *Blake*, citing *Martin*, strongly suggests an inquiry into the economic means of a person experiencing homelessness is in fact relevant to the analysis. In its conclusion, the District Court in *Blake* reasons as follows:

The holding in this case does not say that Grants Pass must allow homeless camps to be set up at all times in public parks. Just like in *Martin*, this holding in no way dictates to local government that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the street at any time and at any place. See *Martin*, 920 F.3d 584, 617. Nor does this holding “cover individuals who do not have access to adequate temporary shelter, whether they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it.” *Id.* at n. 8. . . .

Blake, 2020 U.S. Dist. LEXIS 129494 at *48. Thus, under both *Blake* and *Martin*, Mr. Wiemold’s economic circumstances are clearly relevant and because he had the economic means to purchase shelter and chose not to do so. Based on this undisputed fact, there is simply no violation of the Eighth Amendment here even under *Martin*. The City made this point in its Responsive Brief. [See Appellee’s Responsive Brief, at 11-12].

WHEREFORE, the City of Fort Collins respectfully submits this Response to Notice of Supplemental Authority.

Dated this 11th day of August, 2020.

Respectfully submitted,

s/ Andrew D. Ringel
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of HALL & EVANS, L.L.C.
**ATTORNEY FOR CITY OF
FORT COLLINS**

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of August, 2020, a true and correct copy of the foregoing was filed with the Court and served same via Colorado Courts E-Filing System to the following:

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s/ Nicole Marion _____
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