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By *[Signature]* Deputy Clerk

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ATTORNEYS FOR PETITIONER BOARD OF REGENTS OF HIGHER EDUCATION OF THE STATE OF MONTANA

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

BOARD OF REGENTS OF HIGHER
EDUCATION OF THE STATE OF
MONTANA,

Petitioner,

v.

THE STATE OF MONTANA, by and
through Austin Knudsen, Attorney General
of the State of Montana in his official
capacity,

Respondent.

) No. BVD 2021-598 *(email)*

) Judge Michael McMahon

) **PETITIONER BOARD OF REGENTS'**
) **RESPONSE TO STATE'S RULE 60**
) **MOTION**

The State of Montana has moved this Court pursuant to Rule 60(a), M.R.Civ.P., to correct what it calls “mistakes arising from oversight” in this Court’s Order Denying Intervention dated July 16, 2021 (“the Order”). The State objects to the purported identification of the Legislature as a party to this action and characterization of the Board of Regents of Higher Education (“the Board”) as an “equal governmental branch.” The Board disputes the State’s characterization of the Order and opposes the State’s motion as groundless.¹

ARGUMENT

The State seeks to revise the Order based upon Rule 60(a), which provides in full:

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the supreme court and while it is pending, such a mistake may be corrected only with the supreme court’s leave.

The Montana Supreme Court advises that Rule 60(a) provides remedy only for “errors which misrepresent the court’s original intention.” *In re Marriage of Schoenthal*, 2005 MT 24, ¶ 19, 326 Mont. 15, 106 P.3d 1162. “It is not the purpose of Rule 60(a) to set aside a judgment actually rendered nor change what was originally intended.” *Id.*, citing *State v. Owens* (1988), 230 Mont. 135, 138, 748 P.2d 473, 474, citing *Dahlman v. Dist. Court, Seventeenth Jud. Dist.* (1985), 215 Mont. 470, 473, 698 P.2d 423, 425. The alleged “errors” identified by the State are neither errors nor misrepresentations of the Court’s intention. As such, Rule 60(a) does not apply here.

¹The State has withdrawn its motion for relief, under Rule 60(b), from the Court’s scheduling order and instead requested a modified briefing schedule. The Board does not oppose the proposed schedule.

A. The Order Accurately Identifies the Parties and Properly Includes the Legislature in Describing the State.

The State asserts that “the Order incorrectly identifies the Legislature as a party,” (Br., p. 1), and then provides a proposed redline of the Order changing “Legislature” to “State” in three instances. No change is necessary, and no change is allowed under the auspices of Rule 60(a). The State concedes that “the Legislature’s power is at issue in this case.” (Br., p. 1). The State, in this case, *is* the Legislature. The state actions at issue are the Legislature’s actions in enacting HB102.

Lawsuits challenging the scope of the Legislature’s power are often brought against the State, of which the Legislature is a part. *See American Cancer Society v. State*, 2004 MT 376, 325 Mont. 70, 103 P.3d 1085. Here, the Board properly brought this action challenging the power of the Legislature against the State, by and through the Attorney General. By constitutional mandate, “[t]he attorney general is the legal officer of the state and shall have the duties and powers provided by law.” Mont. Const. art. III, § 1. “Among those duties is the duty to defend all causes in which the State is a party.” *Seven Montana Legislators v. Montana First Judicial District Court*, OP 12-0171, p. 7, *citing* § 2-15-501(1), (6), MCA. The Attorney General is defending the Legislature’s enactment of HB102.

The Court’s three references to the Legislature in its Order did not misrepresent the Court’s intention, and were not incorrect. The Legislature’s power – or lack thereof – to enact HB102 is the sole issue in this case, and the State, through the Attorney General, is charged with defending the legislative action.

B. The Order Correctly Characterizes the Executive Branch as Acting Via the Board.

The State disputes the Court's characterization of the lawsuit as concerning "the delineation of power between two equal governmental branches." (Order, p. 9; Br., p. 3). The State does not attempt to argue, as it cannot, that this delineation misrepresents the Court's intention. Rule 60(a), therefore, does not apply.

Additionally, the Court's characterization is not in error, but is precisely correct. By constitutional mandate, "the power of the government of this state is divided into three distinct branches – legislative, executive, and judicial. No persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. art. III, § 1. The Board does not claim to be a fourth branch of government. Rather, "the Board of Regents and its members, as well as the entire MUS [Montana University System], is an independent board within the executive branch," with constitutionally-mandated powers. *Sheehy v. Commissioner of Political Practices*, 2020 MT 37, fn 1, 399 Mont. 26, 458 P.3d 309 (J. McKinnon, concurring).

The Order correctly states that the dispute in this case involves two of the branches of government identified in the Constitution: the legislative branch and the executive branch. The Order also correctly notes numerous times that in this case, the executive branch is acting "via the Board of Regents." The Order accurately reflects the Court's intention and correctly states Montana law. The Board of Regents is an independent board within the executive branch, and the executive branch acts through the Board in matters affecting the MUS. No alteration to the Order is necessary, and no alteration is allowed under Rule 60(a).

CONCLUSION

Rule 60(a) allows correction of errors which misrepresent the court’s original intention. The State has not established an error within the Order, and the State has not established that the Order misrepresents the Court’s intention. The State’s motion is groundless. Accordingly, the Board respectfully requests that the motion be denied.

Dated this 7th day of September, 2021.

/s/ Martha Sheehy

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was mailed to the following persons by United States mail, postage prepaid on the date herein.

<p>David Dewhirst Kathleen Smithgall Montana Attorney General Justice Building, Third Floor 315 N. Sanders Helena, MT 59601 <i>Email: David.dewhirst@mt.gov kathleen.smithgall@mt.gov</i></p>	<p><input type="checkbox"/> U. S. Mail, postage prepaid <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile Transmission <input type="checkbox"/> Personal Delivery</p>
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Dated this 7th day of September, 2021.

/s/ Kyle A. Gray

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