



ORIGINAL

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By: *Angie Sparks* Deputy Clerk

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MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY

FORWARD MONTANA; LEO  
GALLAGHER; MONTANA  
ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS; GARY ZADICK,

Plaintiffs,

vs.

THE STATE OF MONTANA, by and  
through GREG GIANFORTE, Governor,

Defendant.

Cause No. ADV-2021-611

Hon. Mike Menahan

**STATE'S REPLY IN SUPPORT  
OF MOTION TO STRIKE AMARA  
REESE-HANSELL AFFIDAVIT  
OR, ALTERNATIVELY,  
TO VACATE HEARING  
AND PROCEED WITH  
DISCOVERY**

There is nothing novel or confusing about the requirement that affidavits supporting a motion be filed with the motion itself. *See* Mont. R. Civ. P. 6(c)(2). Plaintiffs may, in general, offer supplemental affidavits

setting forth factual matters after the complaint. What they may not do is submit new factual allegations in a reply affidavit because it denies the opposing party opportunity to respond to those new allegations. See *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996); *Worledge v. Riverstone Residential Grp. LLC*, 2015 MT 142, ¶ 17, 379 Mont. 265, 272, 350 P.3d 39, 44–45. In other words, this is a due process issue. The prohibition against new factual allegations on reply formed the basis for the State’s Motion to Strike. See generally, (Doc. 88). The Court should take Plaintiffs up on their offer to “disregard[] the Reese-Hansell affidavit” and strike that affidavit as being improperly filed. (Doc. 89 at 6).

The Reese-Hansell affidavit falls under Rule 6 because it goes to establishing an essential element of Plaintiffs’ case, standing. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (Standing is “not [a] mere pleading requirement[] but rather an indispensable part of the plaintiff’s case,” and must be supported the same as any other element of the plaintiff’s case.). As the State previously argued, the issue of standing remains open throughout litigation. See (Doc. 88 at 5) citing *Lujan*, 504 U.S. at 561; *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249, 255 (1994); *Stanley v. Lemire*, 2006 MT 304, ¶ 31, 334 Mont. 489, 500, 148 P.3d 643, 651.

Plaintiffs that the Reese-Hansell affidavit “properly goes to establishing standing.” (Doc. 89 at 4). Plaintiffs carry an affirmative obligation to set forth sufficient facts establishing standing in support of their motion at the time of the motion.<sup>1</sup> Because Plaintiffs improperly filed the Reese-Hansell affidavit on reply in violation of Rule 6, this Court should strike the affidavit.

Plaintiffs recycle their same argument that the State’s motion to strike constitutes an improper motion to reconsider. *See* (Doc. 89 at 5–6). Sometimes a motion to strike is just a motion to strike. *See* (Doc. 88 at 3) (“A straightforward reading of Rule 6(c)(2) required Plaintiffs to file any supporting affidavits, including affidavits supporting Plaintiffs’ standing, with the motion on August 18, 2021.”). “Because Amara Reese-Hassell’s affidavit was filed 138 days late and Plaintiffs fail to offer any

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<sup>1</sup> As previously noted, Plaintiffs filed their motion for summary judgment at the same time they filed their response to the State’s Motion to Dismiss. (Doc. 88 at 3). To the extent the Reese-Hansell serves to shore up standing deficiencies, it should have been filed in response to the motion to dismiss or in support of the motion for summary judgment. *See Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 38, 46, 360 Mont. 207, 255 P.3d 80 (The court considered affidavits submitted in response to a motion to dismiss). In either case, the proper time for filing would have been on August 18, 2021. Instead, Plaintiffs offer these new allegations without any opportunity for examination or rebuttal by the State.

justification for the delay, this Court should strike the affidavit as untimely.” *Id.*

Plaintiffs, ultimately, distort the State’s argument through the lens of their own procedural missteps. *See* (Doc. 89 at 4). Plaintiffs opine that the Reese-Hansell affidavit “responds to the only factual claims the State has ever made about standing.” (Doc. 89 at 6). Not so. Plaintiffs seem to acknowledge the Mead Affidavit created a factual dispute that can only be resolved via the Reese-Hansell affidavit. *Id.* This factual dispute renders summary judgment inappropriate at this stage. *See* Mont. R. Civ. P. 56(c)(3). This is why the State seeks to vacate the summary judgment hearing and proceed to discovery. (Doc. 88 at 4). Moreover, if Plaintiffs allowed *any* discovery into their claims, including standing, this issue could have been addressed without the need for additional motions in this Court through the ordinary course of discovery.

The State only asks the Court to strike the Reese-Hansell affidavit and restore normal order to these proceedings by allowing some investigation into Plaintiffs’ claims.

For the reasons stated, the Court should grant the State's Motion to Strike the Reese-Hansell Affidavit or Alternatively Vacate the Hearing.

DATED this 24th day of January, 2022.

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**CERTIFICATE OF SERVICE**

I hereby certify that I served a true and correct copy of the foregoing document by email to the following addresses:

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