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ATTORNEYS FOR PLAINTIFFS

**MONTANA SECOND JUDICIAL DISTRICT COURT
BUTTE-SILVER BOW COUNTY**

<p>SISTER MARY JO MCDONALD; LORI MALONEY; FRITZ DAILY; BOB BROWN; DOROTHY BRADLEY; VERNON FINLEY; MAE NAN ELLINGSON; and the LEAGUE OF WOMEN VOTERS OF MONTANA,</p> <p>Plaintiffs,</p> <p>v.</p> <p>CHRISTI JACOBSEN, Montana Secretary of State,</p> <p>Defendant.</p>	<p>Cause No. DV-21-120 Hon. Kurt Krueger</p> <p>Plaintiffs' Objection to Defendant's Motion to Substitute Judge</p>
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This objection addresses the defendant's motion to substitute Judge Krueger, filed July 16, 2021.

FILED
(by e-mail)
July 19, 2021
Tom Powers, Clerk
By: 
Clerk

I. THE MOTION FOR SUBSTITUTION MUST BE DENIED BECAUSE UNTIMELY

The Montana Substitution statute is clear: “Any motion for substitution that is not timely filed is void.” § 3-1-804(4). M.C.A. The defendant, Christi Jacobsen, was served with the summons and complaint on May 13, 2021¹. The substitution statute provides: “a motion for substitution by the party served must be filed within 30 calendar days after service has been completed in compliance with M.R. Civ. P. (4) § 3-1-804(1)(a).

Defendant Jacobsen’s motion to substitute, filed on July 16, 2021, was not filed within 30 days of when she was served. Therefore, it is not timely filed and is “void”. *Id* (4)

The substitution statute provides: “The District Judge for whom substitution is sought has the jurisdiction to determine time limits, and if the motion for substitution is untimely, shall enter an order denying the motion.” §3-1-804 (4) (Emphasis added). Thus, Judge Krueger has jurisdiction to decide the present motion.

II. THE ATTORNEY GENERAL, A NON-PARTY, MAY NOT INVOKE THE SUBSTITUTION STATUTE ON THE PRETENSE THAT HE WAS NOT PROPERLY SERVED

Christi Jacobsen, the sole defendant in this case, was served on May 13, 2021. On the same day, plaintiffs served the Montana Attorney General with a notice of constitutional challenge². This was accomplished by certified mail pursuant to Rule 5.1 (a) M.R. Civ. P., which provides “such notice may be served on the Attorney General by certified or registered mail or by sending it to an electronic address designated by the Attorney General for such purpose”.

¹ See Exhibit 1 “Return of Service”, attached to plaintiffs’ motion for summary judgement dated July 1, 2021.

² See Exhibit 2 “Plaintiffs’ Summary Judgment Motion” dated July 1, 2021.

Plaintiffs filed their motion and supporting brief for summary judgment on July 1, 2021. Plaintiffs noted that, though due, no responsive pleading had yet been filed. Plaintiffs' counsel was then contacted by office of Attorney General, which claimed that they had not been properly served in accordance with Rule 4 M.R. Civ. P. Although plaintiffs disagree with this position of the Attorney General, rather than argue about it and waste the Court's time, plaintiffs agreed to mail a copy of the summons and complaint so that the Attorney General could go through the process of "acknowledgment" of service. That has now been accomplished³.

It appears now that the Attorney General is trying to take advantage of its argument that he was not properly served, to revive the defendant's right of substitution.⁴ But the Attorney General is not a party to this suit. He has no separate right of substitution and the sole defendant (Jacobsen) was, beyond argument, served on May 13, 2021 and, beyond argument, did not exercise her right of substitution within 30 days. It is clear under Montana's Substitution Law that a substitution may be only made by a "party". *Pallister v. Blue Cross and Blue Shield of Montana, Inc.* 2013 MT 149, 370 Mont. 335, 302 P.3d 106. (Pallister, although a member of the represented class, was determined not to be a "party" for purposes of the substitution law). So, the question of whether the Attorney General was properly served makes no difference here.⁵

³ Judge Krueger had previously set a hearing date on plaintiffs' motion for summary judgment for August 3, 2021. Because of the wrangle over whether the Attorney General was properly served, plaintiffs agreed to a joint motion to vacate the August 3 hearing date. That hearing has now been rescheduled by Judge Krueger for September 1, 2021.

⁴ Rule 4(l) M.R. Civ. P. Requires formal service on the Attorney General only when "an officer or employee of the State is sued in an **"individual" capacity...**" That is not the case here. Defendant Jacobsen is sued in her official capacity as Montana Secretary of State.

⁵ There is, by the way, a mechanism by which the Attorney General may, in certain circumstances, become a party—intervention. Indeed, Rule 5.2 explicitly accords the Attorney General 60 days in which to intervene in a case challenging the constitutionality of a Montana law. But, here, the

Even if the Attorney General should intervene as a party, he would have no separate right to substitute a judge. In *Mattson v. Montana Power Co.* 2002 MT 113, 309 Mont. 506, 48 P.3d 34, the Court summarized the statute as follows:

When construed in its entirety, §3-1-804(1)(c), M.C.A., clearly provides that **parties originally named in a summons** have thirty days, following service within which to file a motion for substitution, but after the time has expired for the original parties to do so, no parties who were not originally named in a summons may move to substitute.

¶13 (Emphasis added).

Accordingly, §3-1-804(1)(c), M.C.A., effectively affords an **original party** thirty days from the service of summons, to move for a substitution of the District judge. Once the time expires for the original parties to move for a substitution, subsequently joined parties may not do so.

¶14 (Emphasis added).

The only potential exception to that rule is that if a third-party defendant is joined later, such party may have a right of substitution, depending on whether the party is adverse to the others previously named. That is not the situation here. But there is no adversity between defendant Jacobsen and the Montana Attorney General. See *Eisenhart v. Puffer* 2008 MT 58, 341 Mont. 508, 178 P.3d 139; See also *Goldman Sachs v. Montana Second Judicial District Court* 2002 MT 83, 309 Mont. 289, 46 P.3d 606.

Finally, the plain fact is that the Attorney General has been on notice since May 13, 2021, when it was served with the Rule 5.1 notice. See *Eisenhart* where the Court said, under the facts of that case, including that the same attorney represented both the served and unserved parties,

Attorney General has not moved to intervene.

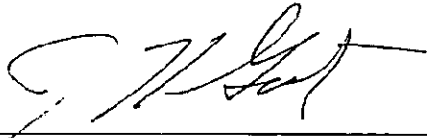
that the unserved party was, or “should have” been on “notice” of the proceedings. *Id.* In other words, the party, though not technically served was on notice. ¶19

III. CONCLUSION

The motion to substitute is not timely. Accordingly, it is void §3-1-804(4).

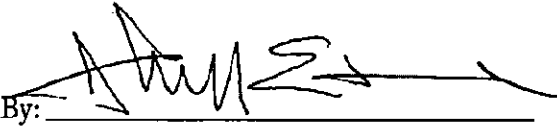
Respectfully submitted this 19th day of July, 2021.

GOETZ, BALDWIN & GEDDES, P.C.

By: 
James H. Goetz

and

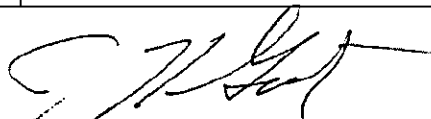
EDWARDS & CULVER

By: 
A. Clifford Edwards

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following counsel of record, by the means designated below, this 19th day of July, 2021.

<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Via fax: <input type="checkbox"/> E-mail	Christi Jacobsen Montana Secretary of State Montana Capitol Building, Rm 260 P.O. Box 202801 Helena, MT 59620
<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Via fax: <input type="checkbox"/> E-mail	Austin Knudsen Montana Attorney General Justice Building, Third Floor 215 North Sanders P.O. Box 201401 Helena, MT 59620
<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Via fax: <input checked="" type="checkbox"/> E-mail: David.dewhirst@mt.gov	David M.S. Dewhirst Solicitor General Justice Building, Third Floor 215 North Sanders P.O. Box 201401 Helena, MT 59620
<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Hand-Delivery <input type="checkbox"/> Via fax: <input checked="" type="checkbox"/> E-mail: Hannah.tokerud@mt.gov	Hannah E. Tokerud Assistant Attorney General Justice Building, Third Floor 215 North Sanders P.O. Box 201401 Helena, MT 59620
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