IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 21-0382

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,

Plaintiffs and Appellees,

v.

CHRISTI JACOBSEN, Montana Secretary of State,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Second Judicial District Court,
Silver Bow County, The Honorable Kurt Krueger, Presiding

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STATEMENT OF THE ISSUE

Whether the district court erred when it denied as untimely Montana Secretary of State Christi Jacobsen's motion to substitute a judge even though the time to substitute for the party served runs from the completion of service in compliance with Rule 4.

STATEMENT OF THE CASE

On May 6, 2021, Plaintiffs-Appellees 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 (collectively, "McDonald") filed a complaint against Montana Secretary of State Christi Jacobsen ("Jacobsen" or "the State") in the Second Judicial District Court, Butte-Silver Bow County, challenging the constitutionality of House Bill 325. Doc. 1. McDonald served the complaint on Jacobsen but did not serve the Attorney General. Several days later, McDonald sent via certified mail a Notice to Attorney General of Constitutional Challenge pursuant to Mont. R. Civ. P. 5.1(a). Doc. 2.

McDonald filed a motion for summary judgment and supporting brief on July 1, 2021. Docs. 3 and 4. The district court issued an order scheduling oral argument on McDonald's summary judgment motion and

ordering Jacobsen to respond to the pending motion and to file an answer. Doc. 5.

On July 8, 2021, Jacobsen appeared in the case for the first time when the parties filed a joint motion to continue the summary judgment hearing "because of a dispute between them regarding whether the Office of the Attorney General of Montana has been properly served." Doc. 8 at 1. In the joint motion, the parties represented that "[r]ather than argue about this, and in the interest of all parties and the Court, the parties have agreed Plaintiffs will circulate an acknowledgment of service and that the Attorney General will promptly execute that acknowledgment. In fact, this was accomplished on July 7." *Id.* Because "[t]he Attorney General takes the position that he now has 42 days from July 7 in which to file a responsive pleading[,] Plaintiffs, to avoid any dispute about service, agree to join in this motion …." *Id.* In filing this joint motion, an attorney from the Montana Attorney General's Office—not from the Secretary of State's Office—appeared on behalf of Defendant. *Id.* at 2.

The court granted the joint motion on July 9, and McDonald filed the Acknowledgment and Waiver of Service of Summons on July 12. Docs. 11 and 12. On July 16, 10 days after service was perfected on the

State, Jacobsen filed a motion to substitute judge. Doc. 12. McDonald objected, Doc. 13, and the district court denied the motion to substitute as untimely. Doc. 18. The district court stated that the Attorney General is not a party in this matter, concluding that service on the Attorney General was not required to effectuate service on the Secretary. Doc. 18. The court reasoned that because McDonald mailed copies to Jacobsen, Jacobson was served, thus Jacobsen's motion was untimely because it was filed more than 30 days after she received the complaint and summons. Doc. 18. Jacobsen appealed.

STATEMENT OF THE FACTS

After filing the Complaint in early May, McDonald failed to serve the Complaint on the Attorney General until counsel for the State notified McDonald's counsel of the lack of proper service. McDonald then sent the State a notice and acknowledgment, which counsel for the State signed. Doc. 15, Ex. 1. To avoid argument, McDonald accepted the Attorney General's acknowledgment of service, dated July 7, 2021, even though McDonald did not agree with the State's position that service had not been effectuated. *Id.*; Doc. 11; Doc. 13 at 3 (stating acknowledgment of service "has now been accomplished").

STANDARD OF REVIEW

A district court's determination whether to substitute a judge is a question of law that this Court reviews for correctness. *Holms v. Bretz*, 2021 MT 200, ¶ 4, 405 Mont. 186, ___ P.3d ___ (internal citation omitted); *Labair v. Carey*, 2017 MT 286, ¶ 11, 389 Mont. 366, 405 P.3d 1284.

SUMMARY OF THE ARGUMENT

The Montana Rules of Civil Procedure require a plaintiff suing a state officer to serve the State by providing service of process on the Attorney General. Rule 4(l). In addition to serving the Attorney General, a plaintiff suing an officer in connection with their duties must also serve the officer. This requirement applies regardless of whether the State of Montana or the Attorney General are named parties in the case. Here, McDonald is suing the Secretary of State in her official capacity. Because Jacobsen is a state officer, McDonald was required to serve both Jacobsen *and* the State via the Attorney General.

The district court incorrectly nullified that requirement in this case, instead focusing only on whether Jacobsen was properly served. The district court's decision ignores the plain language of the relevant rules, as well as the purpose behind those rules.

Because service is "deemed complete on the date" the acknowledgement is signed, Jacobsen had 30 days from the signing of the acknowledgment on July 7 to file a motion to substitute. Rule 4(d)(3)(E); Mont. Code Ann. § 3-1-804(1)(a). Jacobsen filed the motion to substitute four days after the acknowledgment was signed. Therefore, her motion was timely, and this Court should reverse the order denying the motion to substitute.

ARGUMENT

I. The district court erred when it denied as untimely Jacobsen's motion to substitute a judge even though the time to substitute for the party served runs from the completion of service in compliance with Rule 4.

Under Montana Code Annotated § 3-1-804, "[e]ach adverse party is entitled to one substitution of a district judge." If timely filed, that substitution "is granted as a matter of course with no briefing or argument necessary." *Holms*, ¶ 12. The party served has 30 days to file a motion to substitute, and this 30-day deadline is triggered upon service being completed in compliance with Rule 4. Mont. Code Ann. § 3-1-804(1)(a); *Holms*, ¶ 13.

A. Rule 4(l) requires service of the summons and complaint on the Attorney General to effectuate service on a state officer.

Lawsuits against state officials in their official capacities are suits against the State. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (stating "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office … [which] is no different from a suit against the State itself") (internal quotations omitted). Montana Rule 4(l) of Civil Procedure acknowledges and protects the unique role of the Attorney General in all litigation against the State. Rule 4(l) (requiring a plaintiff to serve the state by delivering a copy of the summons and complaint to the attorney general and any other party prescribed by statute.) A plaintiff who is suing a state officer or employee in an individual capacity must "serve the state and *also* serve the officer or employee." *Id*. (emphasis added).

The requirement to personally serve an individual capacity defendant, as well as the State through the Attorney General, is an *additional* requirement. Thus, contrary to the district court's decision,

whether an official is sued in an official or individual capacity, the Attorney General *must* be served.[1]

This interpretation furthers the purpose of Rule 4(l), namely ensuring the Attorney General is properly notified of, and able to defend as needed, *all* suits against the State and state officers in whatever capacity. *See State ex rel. Olsen v. Mont. Public Serv. Comm'n*, 129 Mont. 106, 115, 283 P.2d 594, 599 (1955) ("Obviously there can be no dispute as to the right of an attorney general to represent the state in all litigation of a public character.") (internal citation omitted). Rule 4(l) promotes efficient disposition of actions involving the State. *Kozaczek v. N.Y. Higher Educ. Servs. Corp.*, No. 1:10-CV-107, 2011 U.S. Dist. LEXIS 12761, at **3–4 (D. Vt. Feb. 9, 2011) (stating "the purpose of requiring service upon the Attorney General's office … is to insure the prompt notification of the Attorney General's office of all legal actions against the state… for the subsequent coordination and supervision of the [State's] defense.") (internal quotation omitted); *Boyd v. State*, 960 So. 2d 722, 724

[1] Even if Rule 4(l) were limited to individual capacity defendants, McDonald did not specify in the Complaint whether Christi Jacobsen was sued in her official or individual capacity or in both capacities. *See* Doc. 1, ¶ 10.

(Ala. 2006) (stating "[t]he purpose of [the statute requiring service on the attorney general] is to give notice of the filing of the [complaint], and protect the state and its citizens should the parties be indifferent to the outcome of the litigation") (internal quotation omitted). To not require service on the Attorney General when a plaintiff chooses to name a state officer in their official capacity would create an obvious loophole and undercut the purpose of insuring "the prompt notification of the Attorney General's office of all legal actions against the state." *Kozaczek*, *4. Rule 4(l)'s additional requirement for serving the Attorney General in individual capacity suits "occurring in connection with duties performed on the state's behalf" also ensures that plaintiffs cannot bypass the Attorney General's authority by only naming state officials in their individual capacity.

The district court paid lipservice to the importance of ensuring the Attorney General is properly notified of all suits against the State and state officers but summarily dismissed that interest here, stating "the Attorney General is *not* presently a party." Doc. 18 at 2 (emphasis in original); *see also id*. at 1–2 ("The Attorney General did not allege the Defendant was improperly served"). But that is not what the rule

requires. Rule 4(l) recognizes that as the constitutional Chief Legal Officer of the State the Attorney General is necessarily a party to all lawsuits against the state "as well as any state board or agency." That's why there is no exception to Rule 4(l) for cases in which the Attorney General is not a named party. In a situation like this—where the Secretary of State is the only named defendant—the Attorney General must be served and he must be served properly before service is effectuated on any party.

But because McDonald initially failed to provide service of process on the Attorney General, she failed to properly serve either the State or the Secretary of State. Rule 4(d) provides only two means to effectuate service of process: (1) serving the summons and complaint together in person, *see* Rule 4(d)(2); or (2) serving the summons and complaint together by mail along with "two copies of a notice and acknowledgment conforming substantially to form 18-A," Rule 4(d)(3). McDonald's service of a Rule 5.1 notice of constitutional challenge on the Attorney General did not meet these requirements and thus did not complete service. *See, e.g., Cascade Dev., Inc. v. City of Bozeman*, 2012 MT 79, ¶¶ 19–20, 364 Mont. 442, 276 P.3d 862 (finding service on the city of Bozeman

through a deputy county attorney was inadequate when the rule explicitly required service through "a commissioner, trustee, board member, mayor or head of the legislative department."); *see also Mt. W. Bank v. Glacier Kitchens*, 2012 MT 132, ¶ 16, 365 Mont. 276, 281 P.3d 600 ("[K]nowledge of the action is not a substitute for valid service.").

This Court has clearly stated "[r]ules for service of process are mandatory and must be strictly followed." *Cascade Dev., Inc.*, ¶ 14; *see also id*. ¶ 14 ("Our task, when called upon to decide a case involving the Rules of Civil Procedure is to simply apply them as written, not to conform the Rules to what may be a prevailing practice actually at odds with what the Rules clearly and unambiguously require.") (citation omitted); *Holms*, ¶ 9 (stating the same for interpreting Mont. Code Ann. § 3-1-804(1)(a)). Regardless of whether the Attorney General or the State are named parties or whether the Office of the Attorney General is defending the named defendant state officer, service on the Attorney General is mandatory under Rule 4(l).

The district court's order ignores these plain requirements by imagining service of the Attorney General as distinct from the Defendant. *See* Doc. 18 at 2. Independent of what these rules require, the Attorney

General is functionally representing the State in this lawsuit. Indeed, the only attorneys that have made an appearance in this case for Defendant are from the Attorney General's Office. *See, e.g.,* Docs. 8, 12, 14, and 15. The district court's position that the Attorney General and Jacobson occupy separate roles in this litigation is belied by the procedural posture of this case.

Thus, this Court should overturn the district court's finding that service for the Attorney General and Jacobson started on different dates. *See Holms*, ¶ 13 ("We agree with Bretz that the thirty-day deadline for a plaintiff to file its motion to substitute is triggered only once."). Instead, this Court should find that service was effectuated against the Defendant on July 7, 2021, and that the motion to substitute was timely.

B. In any case, under Rule 4(d)(3)(E) service is complete on the date the State signed the acknowledgment.

After counsel for the State notified McDonald's counsel of the lack of proper service on the Attorney General, McDonald sent the State a notice and acknowledgment, which counsel for Secretary of State signed and returned. Doc. 15, Ex. 1. McDonald accepted the Attorney General's acknowledgment of service, dated July 7, 2021, even though McDonald

did not agree with the State's position that service had not been effectuated. *Id*.; Doc. 11; Doc. 13 at 3 (stating acknowledgment of service "has now been accomplished").

Under Rule 4(d)(3)(E), service is "deemed complete on the date" the acknowledgment is signed. Because the time to substitute a judge runs from the completion of service "in compliance with" Rule 4, Mont. Code Ann. § 3-1-804(1)(a), the State had 30 days from the signing of the acknowledgment, or until August 6, 2021, to file a motion to substitute. The State filed the motion to substitute on July 16, 2021, well within the thirty-day timeline.

The State, furthermore, could not have filed a motion to substitute prior to July 7, 2021. Under Mont. Code Ann. § 3-1-804, a party may only file a motion to substitute within 30 days of either service of summons or when an adverse party appears. *See Holms*, ¶ 13. Because neither of these events had occurred prior to July 7, 2021, the State would have been precluded from filing a motion to substitute. *See In re Estate of Greene*, 2013 MT 174, ¶¶ 7, 14, 370 Mont. 490, 305 P.3d 52 (holding that the district court properly rejected a premature substitution motion because "[a] motion for substitution that is not timely is void"). By

proposing that the State should have filed a notice of substitution within 30 days of May 13, 2021, *see* Doc. 18 at 1–2, the district court proposes a counterfactual that is prohibited by the rules.

Beyond McDonald and the district court casting aside the relevant rules discussed above, this Court should not countenance a party reneging on their prior representations as to when service is complete. As a benefit of its stipulation with McDonald, the State should be afforded all the ordinary litigation tools available to a party—like the opportunity to substitute a judge—after the parties agreed that service was completed on July 7, 2021. *See Holms*, ¶ 12 (if timely filed, "[a] party is *entitled* to only one substitution") (emphasis added); *Entitle*, Black's Law Dictionary (11th ed. 2019) ("To grant a legal right to or qualify for.").

The only event that prevented the State from doing so—as conceived by the district court—is McDonald's own failure to serve the Attorney General around the same time as Jacobson. *See* Doc. 18 at 2 ("the Attorney General is not presently a party in this matter" and "Defendant allowed sixty-four (64) days to pass since being served with a complaint and summons ….). The State says "around the same time" as a courtesy; McDonald apparently never would have served the Attorney

General (and thus perfected service) absent the Attorney General reaching out to notify her counsel of this oversight. McDonald's failure to abide by Rule 4's plain language and perfect service cannot deprive the State of the opportunity to file a motion the law entitles it to file. Accordingly, McDonald should be held to her representations and the district court's order should be overturned under both procedural and fairness grounds.

In sum, the Attorney General was properly served on July 7, 2021, and the motion to substitute was timely filed. The district court erred in denying the motion as untimely, and this Court should reverse on that basis.

II. Notice of a constitutional challenge under Rule 5.1 is not a substitute for valid service of process.

Under Rule 5.1, "[a] party … challenging the constitutionality of a state statute must promptly file a notice of constitutional question stating the question and identifying the paper that raises it." The party must "serve the notice and paper on the state attorney general either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose." *Id*. As noted above, however, Rule 4 service of process is effectuated by delivering a copy of

the complaint *and* the summons "in person" or "by mail," which requires a notice and acknowledgment conforming with Form 18-A. Mont. R. Civ. P. 4(d)(2)–(3). The purpose of Rule 5.1 is to provide notice to the Attorney General in the event he wishes to intervene in actions—even between nongovernmental parties—that implicate the constitutionality of a state statute. *See* Rule 5.1(b). It is not a substitute for the requirements of Rule 4.

McDonald did not even attempt to follow the Rule 4 requirement to serve the Attorney General until defense counsel offered to "quickly sign a notice and acknowledgment to facilitate service." Doc 15, Ex. 1; *compare with Eisenhart v. Puffer*, 2008 MT 58, 341 Mont. 508, 178 P.3d 139 (affirming denial of substitution motion where defense counsel refused to accept service, despite repeated efforts by the plaintiff). Importantly, "[s]ervice is flawed if the mandates of M. R. Civ. P. 4 … are not *strictly* followed, *even where* a defendant has actual notice of the summons and complaint; knowledge of the action *is not a substitute for valid service*." *Mt. W. Bank*, ¶ 16 (internal quotation and quotation marks omitted) (emphasis added).

McDonald cannot rely on a notice filed under Rule 5.1 to escape the strict mandates of Rule 4. The clock did not begin ticking on a motion to substitute until service was "completed in compliance with M. R. Civ. P. 4," regardless of whether the Attorney General (or Jacobsen) had notice of the action. Mont. Code Ann. § 3-1-804(1)(a).

CONCLUSION

Though she named the Secretary of State as the lone defendant, McDonald failed to properly effectuate service on the State under Rule 4. The clock for Jacobsen's motion to substitute did not begin running until the acknowledgment was signed on July 7, 2021. Because Jacobsen's motion to substitute was filed on July 16—well within 30 days of July 7—the motion was timely. This district court's denial of the motion to substitute was incorrect, and this Court should reverse it.

Respectfully submitted this 10th day of September, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,233 words, excluding certificate of service and certificate of compliance.

/s/ Christian B. Corrigan
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CERTIFICATE OF SERVICE

I, Christian Brian Corrigan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-10-2021:

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