IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 18-0374

JON KRAKAUER

Petitioner and Appellee,

v.

STATE OF MONTANA, by and
Through its COMMISSIONER OF
Higher education, Clayton T. Christian,

Respondent and Appellant.

John Doe,

Intervenor and Appellant.

REPLY BRIEF OF INTERVENOR, JOHN DOE

On Appeal from Montana First Judicial District Court,
Lewis and Clark County, The Honorable Michael Menahan, Presiding

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APPEARANCES:

David R. Paoli Paoli Law Firm, P.C. 257 West Front Street, Suite A P.O. Box 8131 Missoula, MT 59802 (406) 542-3330 davidpaoli@paoli-law.com Attorney for Intervenor, John Doe	Vivian V. Hammill Helen C. Thigpen Special Assistant Attorneys General Office of the Commissioner of Higher Education Montana University System 560 North Park Ave. Helena, MT 59620-3201 (406) 449-9130 vhammill@montana.edu hthigpen@montana.edu Attorneys for Respondent and Appellant, Commissioner of Higher Education	Peter Michael Meloy Meloy Law Firm P.O. Box 1241 Helena, MT 59624 (406)442-8670 Mike@meloylawfirm.com Attorney for Petitioner and Appellee, Krakauer

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I. INTRODUCTION

Intervenor has taken the necessary steps to protect his enhanced and unique privacy right he has in his student records. Intervenor took the extraordinary measure and intervened in this action to ensure that his privacy rights were protected. At the District Court, Intervenor was denied the legitimate opportunity to seek protective action. He has every right to claim privacy to his records and Krakauer's claim to having a super priority interest in Intervenor's private student records is wrong. Accordingly, it was error for the District Court to conclude that Intervenor has no subjective or actual expectation of privacy.

II. ARGUMENT

Intervenor adopts and incorporates Appellant State of Montana's arguments in its combined Reply and Answer Brief of Appellant.

This Court first notified the parties and Intervenor of the necessity for Intervenor to be given notice and apprised of the attempts to access and gain Intervenor's private student records. *Krakauer v. State* 2016 MT 230 ¶27, 384 Mont. 527, 381 P3d 524 at footnote 6. The requirement for notification is found at 20 USC §12332g(b)(2)(B) and 34 C.F.R §99.31(a)(9)(i). [Pursuant to this FERPA section that the information "is furnished in compliance with judicial order or pursuant to any lawfully issued subpoena,

upon condition that parents and the students are notified of all such orders or subpoenas…"] The Code of Federal Regulations further details the requirement of notice to the parents and student so that "protective action" may be undertaken:

> The federal statute and corresponding regulation both require that such notice would be given to the student or parent in advance of the issuance of any subpoena or court order that might release such documents. Even if, as in this case, the subject student is not a party to the lawsuit, an opportunity is provided for the student (or parents) to be heard before such records are released. "The educational agency or institution my disclose information … only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action…"

34 C.F.R. §99.31(b)(9)(ii). (emphasis added)

This is exactly what Intervenor undertook—made a motion to intervene in this case and attempted to take the necessary steps to seek protective action in pursuit of keeping his private student records confidential.

Although Intervenor was not "notified" of the matter, he moved to intervene on November 17, 2016 (Dkt. #54). Thereafter, in an effort to fully engage in the case, be heard and "seek protective action," Intervenor requested a Status Conference (Dkt. #57). Intervenor's request for a Status Conference was deferred by one judge and then ignored by the District Court. Even still, Intervenor renewed his request for a Status Conference. (Dkt.#63) This request was denied on August 3, 2017 (Dkt.#65) because the District

Court granted Krakauer's request for the Court's *in camera* review prior to holding the Status Conference:

> Doe seeks a status conference prior to the Court undertaking its *in camera* review. Krakauer does not oppose holding a status conference, but asks the Court to review the documents before holding a status conference. A status conference here will ultimately be more fruitful following an *in camera* review of the documents. Thus, Doe's motion for a status conference is denied, with the understanding a status conference shall be scheduled following the Court's receipt of the documents. Following the Court's review, the parties and the Court shall confer to determine the best path forwards.

August 3, 2017 Order (Dkt. #65)

Intervenor's request for a Status Conference was intended to allow Intervenor to undertake all steps necessary to protect his confidential records and be heard on the matter. No status conference was ever convened for the purposes as outlined in Intervenor's request or to determine "the best path forwards."

Thereafter, Intervenor took all necessary and fundamental steps to be heard and seek protective action as detailed in Intervenor's opening brief at page 8. These efforts were not unnecessary exercises, but, rather, were intended and necessary to attempt to fulfill the "protective action" necessary to secure the ongoing confidential status of Intervenor's private student records. Because the District Court ignored, failed to rule on Intervenor's motions and attempts to "seek protective action", the District Court abused its discretion and Intervenor respectfully requests the Court to reverse the District Court

and remand the case for further proceedings including the measures Intervenor has legitimately requested to secure protective action and retain inviolate the current confidential status of his private student records.

Intervenor has professed his subjective and actual expectation of privacy. Given this claim by Intervenor, it was error for the District Court to conclude Intervenor had no expectation of privacy, utilizing an objective standard. It was under this erroneous finding of no expectation of privacy that the District Court engaged in the required balancing test. This process was doomed from the start.

It is unfortunate that this case is driven by unverified news stories that Krakauer uses to justify his conduct or his improper use of Intervenor's name. Although Intervenor relies on news reports to show Krakauer's lack of good faith and unclean hands, for the most part these are quotes or transcripts of his recorded interviews. It is disconcerting when a Supreme Court brief seeking to obtain a student's private records from a state university relies upon introductory clauses such as "according to the news report" and then fails to provide any authority [Additionally, Krakauer invokes Twitter as part of his factual basis: "the Missoulian posted live, minute-by-minute coverage of the entire trial on twitter."] for the statements or quotes claimed to be in the article. Krakauer brief at Pg.10.

Throughout the long, winding trail of this case, Intervenor has taken every possible step to protect his private student records. Along these steps, Intervenor was availing himself of his rights whether it be before Judge Christensen in Federal Court or filing a legitimate and necessary lawsuit before the applicable statute of limitations had run to redress the violation and abuse of his rights and his treatment through the "University process." Intervenor should not be condemned for asserting his constitutional and state rights for accessing the courts, even though one judge disclosed heavily redacted documentation following the conclusion of that case. Krakauer claims that Intervenor "had full opportunity to participate in the matters considered by the District Court…" Krakauer brief at 15. However, the many motions that Intervenor filed that were either ignored and/or not ruled on shows that Intervenor did not have a "full opportunity to participate" at all. Being allowed to file motions without a hearing or decision can never be considered a full opportunity to participate and it must be concluded to be a denial of the right to seek protective action.

Krakauer then chooses to cast aspersions and refer to Intervenor's motions as "spurious." Even though Krakauer should have welcomed the opportunity to sit for a deposition and defend the dramatic and outrageous statements he made in the press in order to sell his book, he chose to file a motion to quash the deposition notice. The deposition was never taken, the District Court just moved on.

Krakauer claims he has abided by the law and has properly brought suit to enforce his rights. However, Krakauer's own statements out in the public marketplace, tell a different story.

> I didn't just interview a lot of people I tried to interview the rapist I interviewed victims I interviewed cops off the record I got a lot of records that I wasn't supposed to have. Montana has a very good Press Shield Law so I couldn't do that legally.

> Instead, he chased written records and audio recordings, and he got them. The information, he said, is a lot more valuable than the mayor and police chief saying, "Trust us, we're on this."
>
> "I got a lot of documents that I'm not supposed to have," Krakauer said.

> I, for the most part, did not have cooperation of any law enforcement. I relied on records that I'm not supposed to have. I relied on documents.
>
> But I had thousands and thousands of pages of trial transcripts, hearing transcripts. I had recordings.

> I have all these audio recordings of university investigations and police interviews. I'm not supposed to have this stuff, and I can't say how I got it, and its so much more valuable.

"University investigations" are highly confidential and Krakauer possesses "all these recordings of university investigations" and he "can't say how [he] got it."

Krakauer proudly claims that the "only sworn testimony before this Court is that Krakauer does not possess improperly or illegally obtained records pertaining to Johnson…" Appellees Brief at 29-30. Krakauer's Affidavit is a clear dodge. He doesn't address "all these audio recordings of university interviews." Or the "documents he's not supposed to have." What about the improperly or illegally obtained records from other students? What about Krakauer's admission that he has illegally obtained records that he proclaims in the press: "I'm not supposed to have this stuff, and I can't say how I got it, and it's so much more valuable." His Affidavit shows how necessary the deposition Intervenor noticed really is. Krakauer's lack of clean hands here is obvious and is proven by his own affidavit. Unclean hands are shown here by Krakaeur's actions against Intervenor and against all the students whose records he shouldn't have. It does not matter if the victims of Krakauer's unclean hands are third parties, and not intervenor. See *Murphy v. Redland*, 178 Mont. 296, 209, 583P2d 1049, 1056 (1978). Again, Intervenor requested the opportunity to depose Krakauer to get to the bottom of this issue of his illegally held and obtained documentation and records. Krakauer should have been required to sit for his deposition.

Krakauer's unclean hands as well as the futility of redactions should preclude his efforts to obtain Intervenor's records. Krakauer's disrespect for the privacy rights of students other than Intervenor has even been noted by legal commentators:

> Krakauer himself seems almost tactical in the way he gratuitously violates a victim's privacy by revealing in several pages very personal details about her past involvement in therapy after she was bullied in junior high school. A responsible writer sincerely concerned about revictimization would not have revealed such sensitive information, even though it came out, unjustly, in a public trial. Although Krakauer used pseudonyms, many people know the identities of the victims in *Missoula*. Thus, Krakauer should have known better than to include details about the mental health treatment of a young woman who has obviously suffered a great deal of trauma in her young life.
> …
> Because Krakauer writes about the victim's therapeutic counseling only one page later, he had to know that the victim's emotional problems, caused by bullying she experienced in school, were also protected by FERPA, not to mention the Constitution.

Wendy Murphy, *Krakauer's Missoula: Where Subversive Meets Verisimilitude*, 42 J.C. & U.L. 479, 503–504 (2016).

Krakauer is exposed in this article to have already violated FERPA and to have violated other student's rights or abused other private confidential information. This does not reflect the efforts of an investigative reporter seeking to inform the public so much as a widely published author intent upon the commercial success of his books; following the law or respecting his "subjects" (victims) rights be damned. This Court's observation of Krakauer echoes in these pages: "…there is more of machination than cooperation in Krakauer's offer, repeated at oral argument, to accept redacted records in response to his request." *Krakauer* at ¶38

Not only should Krakauer have been required to sit for a deposition, he should have been compelled to disgorge the documents and recordings he admits he wrongfully obtained in order to ascertain the extent of his admitted wrongdoing. Simply put:

> whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.

Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244-45 (1933). Here, Krakauer has publicly bragged about his disregard for privacy rights and been called out by legal commentators for that disregard. These are exactly the kinds of circumstances for which the doctrine of unclean hands was created.

Krakauer's other argument against unclean hands, that equitable defenses are not available in suits at law, is based on arcane arguments over a now-meaningless distinction. Equitable doctrines such as unclean hands have not been limited to cases sounding in equity for many decades now. Although the issue has not been explicitly addressed in Montana, the modern trend among jurisdictions has been to allow application of the doctrine of unclean hands in suits at law. *See* T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 Ky. L.J. 63, 73 (2011) (collecting cases); *see also* Zechariah Chafee, Jr., *Coming into Equity with Clean*

Hands, 47 Mich. L. Rev. 877, 878 (1949) ("[T]he clean hands doctrine . . . ought not to be called a maxim of equity because it is by no means confined to equity.").

While this Court has not addressed the issue directly, it has regularly applied—or approved of the District Court's application of—equitable doctrines, including unclean hands, in actions at law in Montana. *See, e.g., Cowan v. Cowan*, 2004 MT 97, 321 Mont. 13, 89 P.3d 6 (affirming district court's application of equitable doctrines of judicial estoppel and unclean hands in dissolution proceeding brought pursuant to § 40-4-104, MCA, and subsequent declaratory judgement action brought pursuant to § 27-8-201); *Cole v. State ex rel. Brown*, 2002 MT 32, ¶ 42, 308 Mont. 265, 42 P.3d 760 (original proceeding applying equitable doctrine of laches to claims premised on Article XIV, Section 11 and Article V, Section 11 of the Montana Constitution).

While equitable doctrines developed in courts of equity, since the dissolution of the division between courts of law and courts of equity (*see* Article VIII, Section 11 of the 1889 Montana Constitution; Bannack Statutes, p. 43, § 1), equitable doctrines have become incorporated into cases at law. *See* William Haywood Moreland, *Equitable Defenses*, 1 Wash. & Lee L. Rev. 153 (1940) (noting—77 years ago—that, "These defenses, though equitable, have a way of 'passing over' to the law side and becoming true legal defenses, a process which has been going on for a long time and on an irregular front."). For example, equitable defenses are regularly applied in suits for breach of

contract, which are suits in law. *See De Mers v. O'Leary*, 126 Mont. 528, 534, 254 P.2d 1080, 1083 (1953) (action based on contract is an action at law, not in equity).

It is also highly counterproductive to assert that an equitable defense cannot be raised in a proceeding at law, because this would require the party asserting the equitable doctrine to initiate a separate suit in equity to assert the claim—as was the practice when courts of law and equity were separate. *See* Moreland, *Equitable Defenses*, 1 Wash. & Lee L. Rev. at 153 ("It [the term 'equitable defense'] signifies a defense or set of facts which, if asserted and proved in a proceeding in equity, will prevent judgment from being rendered in an action at law, or will cause the enforcement of a judgment, if rendered, to be prevented."). Thus, if Krakauer is correct that unclean hands cannot be asserted in this proceeding, it would not preclude assertion of the doctrine, but would require Intervenor to assert it in a separate suit in equity after the conclusion of this proceeding. Rather than require litigants to initiate duplicative proceedings based on an ancient, largely forgotten, and now barely understood distinction, it seems preferable to adopt the modern trend (that is, the trend of the past hundred years) and address equitable defenses within suits at law. Unless Montana is prepared to buck the modern trend and begin restricting laches, equitable estoppel, unconscionability, waiver, undue influence, judicial estoppel, and every other equitable doctrine to cases in equity, Krakauer's argument fails.

CONCLUSION

Intervenor absolutely maintains and defends his clear unique and enhanced privacy interest in his records. He did not relinquish his privacy rights by appearing in federal court to assert his due process rights. He did not relinquish his privacy rights by requiring those who abused his rights to take responsibility for what they did to him. Intervenor never did and should never have to, choose between asserting insistence on his rights to due process thereby sacrificing the confidentiality of his private student records. And, most importantly, Intervenor did not relinquish his privacy rights when a book-seller decided to write a book about a nation-wide nightmare; one that sadly exists throughout the country.

Moreover, Intervenor had a basic due process right to notice and opportunity to be heard: "The educational agency or institution my disclose information … only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action…" 34 C.F.R. §99.31(b)(9)(ii). Intervenor was not able to "seek protective action" because the District Court did not rule on his substantive motions. At a minimum, Intervenor was entitled to a decision on them.

Intervenor has diligently persevered in asserting his unique and enhanced privacy interest in his school records. This heightened privacy outweighs Krakauer's commercial

right to know. As detailed in these briefs and in Professor Murphy's article, Krakauer is the last person to whom we want to sacrifice our cherished right to privacy in exchange for him to monetize our very important right to know.

Intervenor respectfully requests the Court to reverse the District Court. There are no circumstances under which Intervenor's unique and enhanced privacy interests can be preserved other than by nondisclosure.

Respectfully submitted this 28th day of December, 2018

BY /s/ David R. Paoli
David R. Paoli
Attorney for Intervenor & Appellant

Certificate of Compliance

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Dated this 28th day of December, 2018.

PAOLI LAW FIRM, P.C.

By: /s /David R. Paoli

CERTIFICATE OF SERVICE

I certify that I have filed a true and correct copy of the foregoing with the Clerk of the Montana Supreme Court and that I have served true and accurate copies upon the Clerk of the District Court, each attorney of record, each court reporter from whom a transcript was ordered, and each party not represented by the following means:

Peter Michael Meloy	[x]	U.S. Mail
Meloy Law Firm	[ ]	Express Mail
P.O. Box 1241	[ ]	Hand-Delivery
Helena, MT 59624	[ ]	Fax
	[ ]	Federal Express
	[ ]	E-Mail

Vivian V. Hammill	[x]	U.S. Mail
Jessica M. Brubaker	[ ]	Express Mail
Office of the Commissioner of Higher	[ ]	Hand-Delivery
Education	[ ]	Fax
2500 Broadway	[ ]	Federal Express
Helena, MT 59601	[ ]	E-Mail

Dated this 28th day of December, 2018

_/s/David R. Paoli
By Paoli Law Firm, P.C.

CERTIFICATE OF SERVICE

I, David Robert Paoli, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 12-28-2018:

Peter M. Meloy (Attorney)
2601 E. Broadway
2601 E. Broadway, P.O. Box 1241
Helena MT 59624
Representing: Jon Krakauer
Service Method: eService

Vivian V Hammill (Attorney)
560 North Park Ave., 4th Floor
Helena MT 59601
Representing: Higher Education, Office of the Commissioner of
Service Method: E-mail Delivery

Helen Clair Thigpen (Attorney)
560 North Park Ave.
P.O. Box 203201
Helena MT 59601
Representing: Higher Education, Office of the Commissioner of
Service Method: E-mail Delivery

Electronically signed by Rebecca Murphy on behalf of David Robert Paoli
Dated: 12-28-2018