IN THE SUPREME COURT OF THE STATE OF MONTANA
No. _____

JAY SPILLERS,

Petitioner,

v.

MONTANA THIRD JUDICIAL DISTRICT COURT, ANACONDA-DEER LODGE COUNTY, THE HONORABLE RAY J. DAYTON, PRESIDING JUDGE,

Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL and MOTION FOR STAY OF PROCEEDINGS

Original proceeding arising from Spillers v. Montana Department of Public Health and Human Services, Cause No. DV-17-74, Montana Third Judicial District, Anaconda-Deer Lodge County, Hon. Ray J. Dayton, District Court Judge

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INTRODUCTION

Over four years after the Montana Department of Public Health and Human Services (DPHHS) filed its *Answer* to Jay Spillers' Complaint, and over three years and ten months after the deadline to amend pleadings had passed, DPHHS moved to amend its answer to now plead a "failure to mitigate" affirmative defense. Despite DPHHS providing no reasonable justification for its delay, and the corresponding prejudice to Spillers, the District Court granted DPHHS's motion. This decision is procedurally incorrect as a matter of law, and renders Montana Rule of Civil Procedure 8(c) a nullity.

This Court should grant a writ of supervisory control. The pertinent procedural facts are undisputed and the error is undeniable. Failure to grant the writ will waste resources of the parties and the courts and will result in a gross injustice to Spillers. Granting this petition will ensure that the parties, and the District Court, are not required to participate in multiple trials in this matter, and will properly focus the scope of trial preparation, presentation, and settlement negotiations.

STATEMENT OF FACTS

On August 11, 2017, Jay Spillers (Spillers) filed a Complaint in the Montana Third Judicial District Court alleging that DPHHS discriminated against him on the basis of his disability and sex when it refused to interview or hire him for an open

Administrative Assistant position. (Ex. A, Complaint and Demand for Jury Trial, ¶¶ 16-19).

Spillers alleges that he was the most qualified applicant for the open Administrative Assistant position, but that despite his qualifications, DPHHS refused to interview or hire him for the position because of his disability and/or sex. (Ex. A, ¶¶ 17-19). Spillers alleges that DPHHS's acts violate the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act (Title VII), the Montana Human Rights Act, and the Governmental Code of Fair Practices. (Ex. A, ¶¶ 20-21).

On November 28, 2017, DPHHS was served with Spillers' *Complaint and Demand for Jury Trial* and the *Summons*. (Ex. B, Certificate of Costs and Return of Service). On January 9, 2018, DPHHS filed its *Answer*. (Ex. C, *Answer to Complaint*). Nowhere within DPHHS's *Answer to Complaint* is the affirmative defense of "failure to mitigate" pled. (*Id*).

On January 29, 2018, the District Court entered its *Scheduling Order*, setting a March 9, 2018 deadline for the parties to amend their pleadings. (Ex. D, *Scheduling Order*). March 9, 2018 passed without DPHHS moving to amend its *Answer to Complaint*. (Ex. E, *Case Register Report for Case No. DV-17-74*).

The case was set for trial to commence on February 25, 2019. (Ex. D). DPHHS did not move to amend its *Answer to Complaint* before the February 25,

2019 scheduled trial date. (Ex. E). Instead, on February 5, 2019, the parties jointly filed a *Proposed Pretrial Order*. (Ex. F, *Proposed Pretrial Order*).

Nowhere within DPHHS's "Contentions" section of the Proposed Pretrial Order does it argue that Spillers failed to mitigated his damages or otherwise raise a "failure to mitigate" affirmative defense. (*Id*, pg. 5-9). Failure to mitigate" is not raised anywhere within the "Issues of Fact" section. (*Id*, pg. 11). In fact, nowhere within the Proposed Pretrial Order signed and jointly filed by the parties is a "failure to mitigate" affirmative defense raised. (*Id*).

This case did not proceed to trial on February 25, 2019 as originally scheduled, as Spillers filed a *Petition for Writ of Supervisory Control* with this Court on February 20, 2019 regarding the District Court's striking of Spiller's jury trial demand and ordering the case to proceed to a bench trial. On February 21, 2019, this Court took supervisory control of the case to consider Spillers' *Petition*, and on January 21, 2020 this Court issued its *Opinion* that the District Court erred in denying Spillers a jury trial on his federal discrimination claims, reversing the District Court's order and remanding the case to the District Court. *Spillers v. Mont. Third Judicial Dist. Court*, 2020 MT 8, ¶ 20, 398 Mont. 323, 456 P.3d 560.

Since being remanded back to the District Court, this case has been set for trial five separate times, and has had each of these five trial dates vacated and continued – two upon motion of DPHHS, and three upon order of the District

Court due to COVID-19. (Ex. G, District Court orders resetting trial dates). Most recently, the jury trial set for January 31, 2022 was vacated and reset to May 31, 2022. (Ex. G, January 24, 2022 *Order Vacating and Resetting Trial Date*).

Not until January 25, 2022 – six days after the District Court orally vacated and continued the January 31, 2022 trial date – did DPHHS move to amend its *Answer* to include an affirmative defense of "failure to mitigate." This motion was filed **three years, ten months and sixteen days** after the deadline set for motions to amend pleadings, and **two years and eleven months** after the initial trial date in this matter. Furthermore, this motion was filed within approximately four months of the new May 31, 2022 jury trial setting.

On March 3, 2022, the District Court issued its *Order on Motion to Amend* (Ex. H), granting DPHHS's *Motion* and allowing it to amend its Answer to include a "failure to mitigate" affirmative defense. Thereafter, on March 4, 2022 – 4 years, 1 month and 23 days after DPHHS filed its *Answer*, and 3 years, 11 months and 23 days after the deadline set in the District Court's Scheduling Order for amending pleadings –DPHHS filed its *Amended Answer to Complaint*, including for the first time in its answer a "failure to mitigate" affirmative defense.

ISSUE PRESENTED

Did the District Court make a mistake of law that will cause a gross injustice to Spillers by allowing DPHHS to amend its answer to include the previously unpled "failure to mitigate" affirmative defense?

ARGUMENT

I. In allowing DPHHS to amend its answer to raise an unpled affirmative defense nearly four years after the deadline for amendments to pleadings and less than three months before trial, the District Court erred as a matter of law.

In the present case, DPHHS waited nearly four years after the deadline set to amend pleadings to move to amend its answer to include a "failure to mitigate" affirmative defense. During the time DPHHS delayed, this case was set to be tried six separate times. In fact, it was only after the most recent setting for jury trial had been vacated due to COVID-19 concerns that DPHHS filed a motion to amend to plead a "failure to mitigate" affirmative defense.

DPHHS failed to provide any reasonable justification for its failure and delay in moving to amend its answer to raise a "failure to mitigate" affirmative defense. Despite DPHHS's failures, the District Court abused its discretion and erred as a matter of law, granting DPHHS's *Motion*, allowing DPHHS to amend its Answer 3 years, 11 months and 23 days after the deadline set for amending

pleadings and two months and twenty-eight days before the jury trial now set for May 31, 2022.

The Montana Rules of Civil Procedure govern all civil suits in Montana district courts. *Meadow Lake Estates Homeowners Ass'n v. Shoemaker*, 2008 MT 41, ¶ 28, 341 Mont. 345, 178 P.3d 81. Montana Rule of Civil Procedure 8(c) requires a party to plead any affirmative defense in its answer. Montana Rule of Civil Procedure 8(c) requirement that an affirmative defense be pled in the answer serves the same principles of fairness and notice that require a plaintiff to set forth the basis of a claim in a complaint. *Meadow Lake*, ¶ 28 (citation omitted).

"Failure to mitigate" is an affirmative defense that must be raised in an answer to be preserved. M.R.Civ.P. 8(c); *Martinell v. Montana Power Co.*, 268 Mont. 292, 322-323, 886 P.2d 421 (1994); *Severy v. Kalispell Regional Hosp.*, 1999 Mont. Dist. LEXIS 1037 *13-16 (Mont. 11th Judicial Dist. 1999); *E.C.A. Envtl. Mgmt. Services, Inc. v. Toenyes* (1984), 208 Mont. 336, 349, 679 P.2d 213, 220; *Dollar v. Smithway Motor Xpress, Inc*., 701 F.3d 798, 807-808 (8th Cir. 2013); *EEOC v. Serv. Temps Inc.*, 679 F.3d 323, note 30 (5th Cir. 2012). By moving to amend its answer to include "failure to mitigate" as an affirmative defense, DPHHS implicitly acknowledges the same.

A party waives an affirmative defense not raised in its answer. Mont. R. Civ. P. 8(c); *Meadow Lake* ¶ 29, 341 Mont. 345, 178 P.3d 81 (citations omitted).

"Failure to mitigate" is no different and also waived if not raised in an answer. *Severy*, *15-16; *E.C.A. Envtl. Mgmt. Services, Inc.*, 208 Mont. at 350; *Dollar*, 701 F.3d at 807-808; *Serv. Temps Inc.*, 679 F.3d at note 30. Montana Rule of Civil Procedure 8(c)'s waiver of affirmative defenses not pled is not absolute; as a district court retains discretion to allow a defendant to amend its answer to include an affirmative defense pursuant Montana Rule of Civil Procedure 15. *Rolan v. New West Health Servs.*, 2017 MT 270, ¶14, 389 Mont. 228, 406 P.3d 65.

Although Montana Rule of Civil Procedure 15(a) states that a court should freely give leave to amend when justice so requires, this Rule "does not mean that a court must automatically grant a motion to amend." *Rolan*, ¶15 (quoting *Kershaw v. Mont. Dept. of Transp*., 2011 MT 170, ¶11, 361 Mont. 215, 257 P.3d 358). Determining whether a district court abused its discretion in granting or denying a motion to amend is a question of law subject to de novo review. *Mont. State Univ. – Bozeman v. Mont. First Judicial Dist. Court*, 2018 MT 220, ¶ 15, 392 Mont. 458, 426 P.3d 541.

Denial of a motion to amend is appropriate when the denial is "for an apparent reason such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by allowance of the amendment …" *Rolan*, at ¶15 (quoting *Bitterroot Int'l Sys. v. Western Star Trucks, Inc.*, 2007 MT 48, ¶50,

336 Mont. 145, 153 P.3d 627). "In determining whether an amendment would cause undue prejudice, a [district] court should balance the prejudice suffered by the opposing party "**against the sufficiency of the moving party's justification of the delay**." *Rolan*, at ¶16 (quoting *Farmers Coop. Ass'n v. Amsden, LLC*, 2007 MT 286, ¶14, 339 Mont. 445, 171 P.3d 690) (emphasis added).

In the present case, denial of DPHHS's motion is mandated by the facts, and the District Court's failure to do the same constitutes an abuse of discretion as a matter of law. First, DPHHS's proposed amendment comes after significant period of undue delay. This motion to amend was filed **three years, ten months and sixteen days** after the deadline set to file motions to amend pleadings, and nearly three years after the initial trial date in this matter.

Furthermore, this case has been proceeding for over four years and set for trial on six separate dates. Only after the sixth trial setting was continued did DPHHS move to amend its *Answer* to include a "failure to mitigate" affirmative defense. This is despite the fact that DPHHS's acknowledged in the first paragraph of its *Brief in Support of Motion to Amend* that it was aware of and intended to use this affirmative defense since the inception of its defense of Spiller's claims. (Ex. I).

Given DPHHS's admitted knowledge since the beginning of its defense, no reason exists for it to have failed to move to amend and plead this affirmative

defense until **three years, ten months and sixteen days** after the deadline set the parties to file motions to amend pleadings, and **over four years** after it filed its *Answer*. DPHHS does not provide any justification for its failure to previously plead the "failure to mitigate" affirmative defense. DPHHS's delay in moving to amend is by definition undue delay.

Second, Spillers is unduly prejudiced by DPHHS's failure to plead its "failure to mitigate" affirmative defense in its *Answer*. Because the affirmative defense was not raised in the four years of litigation, Spillers' discovery requests did not include any interrogatories, requests for admission, or requests for production concerning a "failure to mitigate" affirmative defense. (Ex. J, *Plaintiff's First Combined Discovery Requests to Defendant* (included as an exhibit to *Plaintiff's Brief in Response and Opposition to Defendant's Motion to Amend*)). Furthermore, Spillers would be required to incur additional costs attendant to additional discovery.

Discovery in this case closed well before DPHHS moved to amend its answer to include the "failure to mitigate" affirmative defense. Although the District Court did grant leave for additional discovery on March 3, 2022 (Ex. H), such an allowance does not alleviate the undue prejudice caused by the untimely amendment. The two months and twenty-eight days the District Court allowed Spillers to conduct discovery on the "failure to mitigate" affirmative defense is

significantly less than the nearly nine months allowed for discovery under the initial Scheduling Order, and includes time that necessarily must be spent on trial preparation rather than conducting discovery.

The undue prejudice caused by allowing this untimely pled affirmative defense to be raised and argued only becomes more evident in light of the fact that this previously unpled affirmative defense constitutes a significant portion of DPHHS's defense in this matter, and nearly the entirety of the exhibits it now seeks to introduce concern its "failure to mitigate" affirmative defense. This is demonstrated by DPHHS's *Brief in Support of Motion to Amend* (Ex. I, pg. 6). It is further demonstrated by comparing proposed pretrial order exhibit lists attached to previously filed proposed pretrial orders. In the Proposed Pretrial Order filed by the parties in February 2019 before the first trial setting, DPHHS did not discuss "failure to mitigate" anywhere in its contentions, nor did it seek introduction of exhibits which would be utilized to demonstrate an alleged "failure to mitigate." (Ex. F, pg. 5-9, and Defendant's Exhibit List). In contrast, and as acknowledged by DPHHS, 32 of the 39 exhibits DPHHS identified on its most recent exhibit list were being offered by DPHHS to support a "failure to mitigate" defense. (Ex. K).

Not surprisingly, this Court has previously recognized that a plaintiff suffers undue prejudice in nearly identical circumstances. In *Bitterroot International Systems v. Western Star Trucks, Inc.*, this Court upheld a district court's denial of a

motion to amend to assert an unpled affirmative defense, reasoning that allowing such an amendment after the close of discovery and three months before trial could unduly prejudice the plaintiff. *Bitterroot International Systems*, 2007 MT 48, ¶¶ 51-54, 336 Mont. 145, 153 P.3d 627.

In light of the undue delay by DPHHS in attempting to amend its answer to raise a "failure to mitigate" affirmative defense, together with the undue prejudice to Spillers as a result of allowing the amendment of DPHHS's answer, the District Court abused its discretion when it granted DPHHS's *Motion to Amend*. The District Court's abuse of discretion is all the more evident given that it failed to engage in the analysis required prior to allowing the amendment.

As stated previously, in ruling on a motion to amend to add a previously unpled affirmative defense, a district court is required to analyze several factors including whether the moving party engaged in undue delay, bad faith or had a dilatory motive, as well as whether the party opposing the motion will suffer undue prejudice by allowance of the amendment. *Rolan*, at ¶15. In completing this required analysis, the district court should also weigh prejudice suffered by the non-moving party against the sufficiency of the moving party's justification for its delay in requesting to amend. *Rolan*, at ¶16.

The District Court failed to undertake this required analysis. The District Court's order makes no mention of undue delay on the part of DPHHS. Similarly,

it fails to discuss or mention DPHHS's justification for its delay in requesting to amend to add the "failure to mitigate" affirmative defense, or weigh any potential justification against the prejudice suffered by Spillers. This Court has previously held that a district court's granting of a motion to amend while failing to engage in this required analysis – particularly when combined with the presence of undue delay on the part of the movant, absence of any reasonable justification for the delay, and prejudice on the part of the non-moving party – constitutes an abuse of discretion. *Rolan*, at ¶¶ 16 – 24.

Instead of analyzing any alleged justification for DPHHS's delay in moving to amend its answer, the District Court simply states "Defendant argues it is in the interest of justice to amend the answer and does not prejudice the Plaintiff." (Ex. H). Like the district court in *Rolan*, the District Court here apparently allowed the amendment simply because the defense would apply. 2017 MT at ¶17. However, as recognized in *Rolan*, the fact that an affirmative defense would apply does not, by itself, provide sufficient grounds to allow an amendment to raise a previously unpled affirmative defense. 2017 MT at ¶18. Allowing an amendment any time an affirmative defense applied would effectively eliminate Montana Rule of Civil Procedure 8(c). *Id.*

Had the District Court engaged in the required analysis, denial of DPHHS's *Motion to Amend* would have been the only conclusion it could have reasonably

come to, as DPHHS provided no reasonable justification for its delay of nearly four years in moving to amend. DPHHS admitted that it was aware of this affirmative defense throughout this litigation, yet failed to explain how it escaped its attention that this affirmative defense should be plead in its Answer. Instead of providing justification, DPHHS attempted to minimize its failure by arguing that all parties were on notice of this defense, and that the duty to mitigate has been an issue throughout.

This argument previously failed in *Bitterroot International Systems v. Western Star Trucks, Inc.*, where the defendant attempted to utilize oversight by the defendant's attorney as sole justification for its failure to raise the affirmative defense of "statute of frauds." 2007 MT at ¶53. The defendant attempted to minimize its "oversight" by arguing that its statute of frauds was no surprise to the plaintiff because the existence or non-existence of a written contract was "always a central issue in [the] case." *Id*. In disregarding this argument, the Court stated that the defense counsel failed "to explain adequately, however, how such an obvious defense escaped its attention for nearly five years." *Id*. Similarly, DPHHS failed to explain how "such an obvious defense has escaped its attention" for the past four years, nor has it provided any reasonable justification for its failure to plead the defense.

In granting DPHHS's *Motion to Amend* – despite the ample evidence of undue delay by DPHHS, the prejudice Spillers will suffer as a result, DPHHS's failure to provide any reasonable justification, and the District Court's failure to conduct the required inquiry – the District Court abused its discretion as a matter of law, acting arbitrarily without conscientious judgment and exceeding the bounds of reason resulting in substantial injustice to Spillers. *Harrington v. Energy West, Inc.*, 2017 MT 141, ¶ 10, 387 Mont. 497, 396 P.3d 114; *Rolan*, at ¶¶ 16 – 24. The District Court's order allowing DPHHS to amend its answer rendered Montana Rule of Civil Procedure 8(c) a nullity. Therefore, this Court should grant this Petition for Writ of Supervisory Control and reverse the District Court's *Order on Motion to Amend*.

II. This case is appropriate for supervisory control.

Although an extraordinary remedy, supervisory control is appropriate and necessary when a district court is proceeding under a mistake of procedural law which if left uncorrected prior to final judgment will result in gross injustice for which an ordinary appeal will not be an adequate remedy. M.R. App. P. 14(3) *Mont. State Univ. – Bozeman*, at ¶ 14, (citing M.R. App. P. 14(3); *Park v. Mont. Sixth Judicial Dist. Court*, 1998 MT 164, ¶ 13, 289 Mont. 367, 961 P.2d 1267). Furthermore, this Court has recognized that "judicial economy and avoidance of 'inevitable procedural entanglements' are 'appropriate reasons' for exercise of

supervisory control." *Id* (citing *Truman v. Mont. Eleventh Judicial Dist. Court*, 2003 MT 91, ¶ 15, 315 Mont. 165, 68 P.3d 654).

Supervisory control is appropriate in this case. Whether a district court abused its discretion in granting or denying a motion to amend is a question of law subject to de novo review. *Id* at ¶ 15. As discussed previously, the District Court committed a mistake of procedural law when it allowed DPHHS to amend its answer to raise a "failure to mitigate" affirmative defense, despite DPHHS presenting no reasonable justification for its delay of over four years and despite the undue prejudice the amendment will cause Spillers.

If supervisory control is not exercised, Spillers will suffer a gross injustice. First, any verdict reached by the jury will be in error, as DPHHS will incorrectly be allowed to present argument and evidence concerning whether Spillers failed to mitigate his damages, thereby sullying any award of damages made by the jury. Furthermore, given the amount of evidence DPHHS seeks to introduce concerning this previously unpled affirmative defense, there is a significant risk that presentation of this evidence could prejudice the jury towards Spillers, creating a situation where the jury's negative feelings towards Spillers concerning his alleged "failure to mitigate" cloud its decision on liability.

Failure to exercise supervisory control herein would create a situation where this case would be required to try this case again, before a different jury, and only

after the time and costs of appeal. Requiring this case to proceed through trial and appeal, only to have to hold another trial, wastes the valuable resources of both the parties and the courts, and is not in the interests of judicial economy.

This Court has also previously found exercise of supervisory control necessary "where the ruling at issue dramatically affects the costs and scope of trial preparation and presentation and also significantly alters the dynamic of settlement negotiations." *Id* at ¶ 18, (citing *Stokes v. Mont. Thirteenth Judicial Dist. Court (Stokes I)*, 2011 MT 182, ¶¶ 6-8, 361 Mont. 279, 259 P.3d 754; *Truman v. Mont. Eleventh Judicial Dist. Court*, 2003 MT 91, ¶ 15, 315 Mont. 165, 68 P.3d 654; *Plumb v. Mont. Fourth Judicial Dist. Court*, 279 Mont. 363, 370, 927 P.2d 1011, 1015-16 (1996) (superseded on other grounds)). Such a situation exists in this matter.

The District Court's order allowing DPHHS to amend its answer 4 years, 1 month and 23 days after it filed its *Answer to Complaint*, and 3 years, 11 months and 23 days after the deadline set in the District Court's *Scheduling Order* for amending pleadings greatly increases the scope of trial preparation and presentation – as demonstrated by the 32 exhibits DPHHS seeks to introduce solely concerning its "failure to mitigate" affirmative defense. Furthermore, it greatly alters the dynamic of settlement negotiations, as the presence or absence a "failure

to mitigate" affirmative defense drastically affects the range of recoverable lost wage and fringe benefit damages.

By issuing a writ of supervisory control and reversing the District Court's *Order on Motion to Amend*, this Court will reverse a mistake of procedural law, vindicating and giving appropriate power to Montana Rule of Civil Procedure 8(c), and preventing a gross injustice to Spillers. Furthermore, it will preserve the resources of both the District Court and the parties, properly focusing the scope of trial preparation, presentation and settlement negotiations.

CONCLUSION

For the reasons set forth above, it is necessary and proper for this Court to issue a writ of supervisory control in this matter. Therefore, Spillers respectfully requests this Court issue a writ of supervisory control and, pursuant to Montana Rule of Appellate Procedure 14 (7)(c), stay the District Court proceedings, including the jury trial set to commence on May 31, 2022, and reverse the District Court's *Order on Motion to Amend*.

Respectfully submitted this 12th day of May, 2022.

TIPP COBURN & ASSOCIATES PC

/s/ Torrance L. Coburn
Torrance L. Coburn
Attorney for Petitioner Jay Spillers

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11 and 14, I certify that this Petition for Writ of Supervisory Control is printed with a proportionately spaced Times New Roman text typeface of 14 point; is double spaced; and the word count of the text of the Petition is not more than 4,000 words, being 3,996 words.

Dated this 12th day of May, 2022.

TIPP COBURN & ASSOCIATES PC

/s/ Torrance L. Coburn
Torrance L. Coburn
Attorney for Petitioner Jay Spillers

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and correct copy of the foregoing Petition for Writ of Supervisory Control with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the Petition for Writ of Supervisory Control upon each attorney of record and each party not represented by an attorney in the above referenced action by depositing said copies into the U.S. Mail, first-class postage prepaid, addressed as follows:

The Honorable Ray J. Dayton
Montana Third Judicial District
800 South Main St.
Anaconda, MT 59711

Aislinn W. Brown
Deputy Bureau Chief
Agency Legal Services Bureau
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Helena, MT 59620-1440

Dated this 12th day of May, 2022.

TIPP COBURN & ASSOCIATES PC

/s/ Torrance L. Coburn
Torrance L. Coburn
Attorney for Petitioner Jay Spillers

CERTIFICATE OF SERVICE

I, Torrance Lee Coburn, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 05-12-2022:

Aislinn W. Brown (Govt Attorney)
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Service Method: eService

Ray Dayton (Respondent)
Montana Third Judicial District Court
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Representing: Self-Represented
Service Method: Conventional

Electronically Signed By: Torrance Lee Coburn
Dated: 05-12-2022