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IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. 22-0182

BROADWATER COUNTY, MONTANA,

Plaintiff and Appellee,

vs.

PERSONS WITH AN INTEREST IN THE RELEASE OF CONFIDENTIAL
CRIMINAL JUSTICE INFORMATION PERTAINING TO THE
INVESTIGATION AND PROSECUTION OF JASON ELLSWORTH: (JASON
ELLSWORTH, HELENA INDEPENDENT RECORD), ET AL.,

Defendants and Appellants.

**JASON ELLSWORTH'S RESPONSE IN OPPOSITION TO MOTION FOR
LEAVE TO PARTICIPATE AND REALIGN PARTIES**

COMES NOW, Jason Ellsworth ("Ellsworth"), through his counsel of
record, David M. McLean of the law firm McLean & Associates, PLLC, and

hereby submits this Response in Opposition to Helena Independent Record's ("IR") Motion for Leave to Participate and to Realign Parties.

BACKGROUND

The underlying case in this matter was initiated by Broadwater County on January 19, 2022. The basis of bringing the action was due to the IR requesting access to the investigative file of Ellsworth. (Doc. 2, p. 1). Despite not being personally served with the Complaint for Declaratory Relief, Ellsworth was mailed a copy of the Motion for Leave to Deposit Investigative File Under Seal with the Court. (Doc. 2). Ellsworth filed his Brief in Opposition, indicating his position was the matter was not yet ripe and requesting additional briefing for the District Court to analyze the issue pursuant to Montana Code Annotated § 44-5-303. (Doc. 4). On March 17, 2022, without the additional briefing and without service of the Complaint for Declaratory Service, the District Court issued its Order Following in Camera Review. (Doc. 6). On April 18, 2022, Ellsworth timely appealed the District Court Order, on the basis the District Court failed to provide due process and failed to appropriately restrict the release of the CCJI in its Order.

ARGUMENT

On May 5, 2022, the IR filed a Motion for Leave to Participate and to Realign Parties on the basis of "procedural anomalies." In its Motion, the IR does not provide any citation to a Montana Rule of Appellate Procedure that would

allow it the leave it requests. Instead, it relies on *State ex rel. Greely v. Water Court of State of Mont.*, 214 Mont. 143, 691 P.2d 833 (Mont. 1985). However, in *Greely*, the Confederated Salish and Kootenai Tribes requested leave to intervene as amicus curiae. *Greely*, 214 Mont. at 145, 691 P.2d at 835. No parties which were named defendants in the underlying case sought leave to participate. Instead, several of the tribes argued that the Attorney General and the Water Court are not adverse parties and that as a result a live controversy did not exist. *Greely*, 214 Mont. at 156, 691 P.2d at 840. The Montana Supreme Court recognized the need for a realignment of parties so that opposing views on the substantive issues may be properly presented. *Id.* Contrary to the IR's implication, *Greely* does not support granting their Motion to Participate.

The IR further argues it should be permitted leave to participate because it did not receive a summons and there was no proof of Rule 4 service. While the IR was not personally served, no other parties were served either. However, just like the IR, Ellsworth was aware of the proceedings. Unlike Ellsworth, the IR took no action. Specifically, on January 18, 2022, pursuant to Rule 5, the IR received the County's Motion for Leave to Deposit Investigative File Under Seal with the Court ("County Motion"). (Doc. 2). The certificate of service included in this motion provides:

Certificate of Service

The foregoing was sent by U.S. Mail to:

Jason Ellsworth
1073 Golf Course Road
Hamilton, MT 59840

David McCumber
25 West Granite Street
Butte, MT 59701
Montana Standard

Dave McLean
McLean & Associates, PLLC
3301 Great Northern Ave., Suite 203
Missoula, MT 59808
Counsel for Jason Ellsworth

Holly Michels
2222 Washington Street
Helena, MT 59602
Helena Independent Record

(Doc. 2, p. 2). Additionally, the County’s Motion explicitly provided “Helena Independent Record has not yet retained Counsel for this matter. It reserves its position on this motion.” (Doc. 2, p. 2).

As shown above, Ellsworth received notice of the County’s Motion in the same manner as the IR. The IR, in their Motion for Leave and to Realign Parties, admits that Ellsworth filed a brief in opposition of the County’s Motion. On February 8, 2022, Ellsworth appeared, through counsel, and specifically requested briefing on the issue, although he was not properly served. Unlike Ellsworth, the IR slept on its rights when it should have appeared. The IR could have, and should have, filed a notice of appearance with the District Court if it wanted to participate in the proceedings. Instead, it advised Broadwater County it had not yet retained counsel and wanted to reserve its position. (Doc. 2, p. 2). Apparently, rather than actively participate, the IR wanted to sit back and wait to see what happened in the

District Court. The IR was aware of this issue, spoke with the attorney for the County, and waited until now to interject themselves into the case. Appearing now would be untimely and improper, simply because the IR sat back and monitored the litigation and now does not like what transpired below in the District Court. Part of the appeal is the procedural anomaly in this case, which includes the District Court acting before the Complaint was served and before the parties were served. The IR seeks to cure the procedural anomaly on appeal, which should not occur. Any issues the IR wishes to address should be addressed in the District Court, should the case be remanded.

The District Court stayed the release of Ellsworth's CCJI pending this appeal. (Doc. 14). The status quo of this case should be maintained pending appeal. Further, Ellsworth believes his appeal will be successful, and the matter will be remanded to the District Court for appropriate briefing and, if the CCJI is released, for appropriate procedural safeguards like those the District Court addressed in *Jefferson County v. Montana Standard*, 2003 MT 304, 318 Mont. 173, 79 P.3d 805. On remand, the IR can appear and set forth its position, which it wanted to reserve in January 2022. Allowing them to appear now is both improper and untimely.

Accordingly, for the reasons set forth herein, the IR's Motion for Leave to Participate and to Realign Parties should be denied.

DATED this 16th day of May, 2022.

McLEAN & ASSOCIATES, PLLC

By /s/ David M. McLean

David M. McLean

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3), Mont.R.App.P., I certify that the foregoing Response Brief is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 980 words.

/s/ *David M. McLean*

McLEAN & ASSOCIATES, PLLC

CERTIFICATE OF SERVICE

I, David Matthew McLean, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 05-16-2022:

Kyle W. Nelson (Attorney)
PO Box 6580
Bozeman MT 59771
Representing: Helena Independent Record
Service Method: eService

Jeffrey J. Tierney (Attorney)
35 N. Grand
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Bozeman MT 59715
Representing: Helena Independent Record
Service Method: eService

Jania Briana Hatfield (Attorney)
515 Broadwater St.
Townsend MT 59644
Representing: Broadwater County, Montana
Service Method: E-mail Delivery

Electronically signed by Cecelia Hamilton on behalf of David Matthew McLean
Dated: 05-16-2022