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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 23-0505

IN THE MATTER OF THE ESTATE OF:
KEVIN THIELMANN,

Deceased.

**APPELLEE'S RESPONSE
BRIEF**

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Montana Rules of Civil Procedure

M. R. Civ. P. 61 **10**

STATEMENT OF THE ISSUE

Did the Personal Representative's counsel's judicial admission identifying Honorable Judge Bonilla as the new Presiding Judge render void the Personal Representative's motion to substitute Judge Bonilla filed 76 days later?

STATEMENT OF THE CASE

In a May 10, 2023, deposition the Personal Representative's counsel specifically identified the Honorable Judge Bonilla as the successor Judge to the Honorable Judge Robert Olson and then propounded questions asking the witness the testimony he would provide before "Judge Bonilla" regarding the Personal Representative's parentage. [District Court Docket Number (hereinafter "D.C.") 29 at Exhibit B; authenticated by D.C. 29 at Exhibit C-Affidavit Gary W. Bjelland at ¶ 3].¹ Seventy-six days later, on July 25, 2023, the Personal Representative moved to substitute Judge Bonilla. [D.C. 28]. On July 26, 2023, Scott Theilmann moved to quash the substitution of Judge Bonilla supported by the Affidavit authenticating relevant portions of the May 10, 2023, deposition transcript. [D.C. 29 & 30]. On August 29, 2023, the District Court ordered the Personal Representative's Substitution Motion quashed. [D.C. 38, attached hereto as Exhibit A]. On September 7, 2023, the Personal Representative filed a Notice of Appeal [D.C. 46].

¹ The Deposition Transcript Portion and authenticating Affidavit are attached hereto as Exhibits B and C respectively.

STANDARD OF REVIEW

A district court's denial (quashing) of a motion to substitute a district court judge is a question of law reviewed for correctness. Mattson v. Montana Power Co., 2002 MT 113, ¶ 7, 309 Mont. 506, 48 P.3d 34. All errors and defects are disregarded unless the appellant establishes errors of law that resulted in prejudice affecting a substantial right. Labair v. Carey, 2017 MT 286, ¶¶ 11, 19, 389 Mont. 366, 405 P.3d 1284.

STATEMENT OF THE FACTS

In a deposition transcript dated May 10, 2023, the Personal Representative acknowledged through her counsel that the Honorable Judge Gregory L. Bonilla, was the newly-appointed presiding judge of Ninth Judicial District Court who would be hearing testimony in the probate proceeding. Such binding judicial admissions are contained in the deposition transcript of Scott Thielmann taken on May 10, 2023. [D.C. 29 at Exhibit B; authenticated by D.C. 29 at Exhibit C, ¶3]. Not only did the Personal Representative's counsel expressly name Judge Bonilla as the new presiding Judge, but such counsel even incorporated Judge Bonilla name and presiding status by reference in examination questions as to how the deponent intended to testify in the Probate before "Judge Bonilla" regarding potential parentage issues:

16 Q So if we go to court and you're put on the
17 witness stand -- and we have a new judge.

18 MR. BJELLAND: Yes.

19 MR. P. FLAHERTY: I think Greg Bonilla is
20 our new judge, isn't he?

21 MR. BJELLAND: Yes.

22 MR. P. FLAHERTY: Has Olson had his
23 retirement party yet? I wanted to go to that, if we
24 do.

25 MR. BJELLAND: I don't think so. I don't

1 know. I'm not sure.

2 MR. P. FLAHERTY: But, anyway, thank you.

3 Q (BY MR. P. FLAHERTY) But when we go to
4 trial, and you're put on the stand, and I ask you in
5 front of Judge Bonilla is it your opinion that Ashton
6 is not the daughter of your brother Kevin, your
7 answer is going to be you don't know?

[D.C. 29 at Exhibit B, p. 8-9].

The Personal Representative's counsel's May 10, 2023 judicial admission of personal knowledge in the deposition transcript specifically identifying Judge Bonilla as the judge who would hear testimony in probate proceeding rendered unnecessary and superfluous providing written notice of such information to the Personal Representative. In spite of such judicial admission, 76 days later on July 25, 2023, the Personal Representative moved to substitute Judge Bonilla asserting

the substitution motion was within the thirty-day notice window of Mont. Code Ann. §3-1-804. [D.C. 28]. The District Court granted Scott Thielmann’s Motion to Quash the Personal Representative’s substitution motion filed 76 days after the Personal Representative’s judicial admission of knowledge of Judge Bonilla’s status. [D.C. 38].

SUMMARY OF ARGUMENT

By May 10, 2023, the Personal Representative had actual knowledge that the newly-appointed Honorable Judge Gregory L. Bonilla was the Presiding Judge of the Ninth Judicial District Court in Pondera County, Montana. Binding admissions are contained in the deposition transcript of Scott Thielmann taken on May 10, 2023. [D.C. 29 at Exhibit B and C]. The Personal Representative’s counsel expressly names Judge Bonilla as the new district judge and even incorporated Judge Bonilla by name and presiding status by reference in examination questions as to how the deponent intended to testify in the Probate “before Judge Bonilla” regarding potential parentage issues. [D.C. 29 at Exhibit B, at p. 9, lines 3-7]. Such statements are judicial admissions showing actual knowledge that Judge Bonilla “ha[d] accepted jurisdiction” and rendered the written notice requirements under Mont. Code Ann. §3-1-804(7) a superfluous and idle act. *See* Mont. Code Ann. § 1-3-223. Further, the Personal Representative suffered no prejudice affecting a substantial right as Personal Representative’s July 25, 2023, Motion for Substitution was untimely (76 days) and thus void as outside the 30-day filing

prerequisite. See Labair v. Carey, 2017 MT 286, ¶¶ 11, 19, 389 Mont. 366, 405 P.3d 1284. In fact the Personal Representative's assertion that written notice pursuant to Mont. Code Ann. §3-1-804(7) was required under all circumstance despite her judicially admitted knowledge as to the identity of the presiding judge is the exact argument rejected by this Court in Labair, 2017 MT at ¶¶ 11, 19. The requisite written notice by the Clerk of Court was waived by the Personal Representative's counsel's May 10, 2023, deposition transcript admission of actual knowledge that Judge Bonilla was the new presiding judge. *Id.* Like all litigants, the Personal Representative was afforded 30 days to file for substitution running from counsel's admission of actual knowledge of Judge Bonilla's status as presiding judge. The Personal Representative's substitution motion was properly ordered quashed as such was *void ab initio* having been filed 76 days after the May 10th deposition (i.e. 46 days late) pursuant to Mont. Code Ann. § 3-1-804 (4). [D.C. 38].

ARGUMENT

I. THE PERSONAL REPRESENTATIVE HAD ACTUAL NOTICE THAT JUDGE BONILLA WAS THE PRESIDING JUDGE BY MAY 10, 2023.

Black letter Montana law dictates that when a party's attorney has notice the party has notice. See e.g. Credit Counsellors, Inc. v. Alcorn, 173 Mont. 72, 76, 566 P.2d 77, 79 (1977); Davenport v. Davenport, 69 Mont. 405, 222 P. 422, 424 (1924) ("Notice to her attorney was notice to her."). The principles of estoppel and

judicial admissions dictates that a client is bound by their counsel's statements during litigation proceedings. See Rasmussen v. Heebs Food Ctr., 270 Mont. 492, 496–97, 893 P.2d 337, 339–40 (1995). Judicial admissions may occur at any point in the litigation process including discovery. See Kohne v. Yost, 250 Mont. 109, 112–13, 818 P.2d 360, 362 (1991).

The Personal Representative's counsel made clear in the deposition record of having personal knowledge of the identify of Judge Bonilla as the Judge who would hear testimony in the probate proceeding:

1 know. I'm not sure.

2 MR. P. FLAHERTY: But, anyway, thank you.

3 Q (BY MR. P. FLAHERTY) But when we go to
4 trial, and you're put on the stand, and I ask you in
5 front of Judge Bonilla is it your opinion that Ashton
6 is not the daughter of your brother Kevin, your
7 answer is going to be you don't know?

[D.C. 29 at Exhibit B, p. 9].

This statement shows the Personal Representative had actual knowledge that Judge Bonilla had assumed jurisdiction over the probate proceedings by the May 10, 2023. The Personal Representative's counsel referenced Judge Bonilla by name in questioning Scott Thielmann about how he would testify "in front of Judge Bonilla" about his opinion as to whether the Personal Representative was the

decedent's issue. Most noticeably, the Personal Representative has never offered an explanation as to the deponent testifying in front of Judge Bonilla regarding the Personal Representative's parentage in any other action than the probate. Such testimony could only be relevant to the probate action as the original petition was filed intestate and parentage is unquestionably relevant under Mont. Code. Ann. §§ 72-2-111, 112, and 113. [D.C. 1-4].

Moreover, the Personal Representative has never disputed that such deposition transcript containing such admission was relevant to this action. Instead, the Personal Representative has only argued that the District Court's failed to serve official notice on the Personal Representative under § 3-1-804(7).²

² Before the District Court the Personal Representative did not argue she did not have actual knowledge by May 10, 2023 of Judge Bonilla's status as presiding judge in the probate action. Rather, the Personal Representative's argument raised before the District Court was that the 30-day time period for substitution could not begin to run unless and until the Clerk of Court served written notice of Judge Bonilla's status as provided by § 3-1-804(7). Having relied solely on her argument for strict compliance with § 3-1-804(7) before the District Court, the Personal Representative cannot now on appeal raise new argument contesting her actual knowledge of Judge Bonilla's status as presiding judge in the probate proceeding:

Neither of these contentions were raised before the District Court. "The general rule in Montana is that this Court will not address either an issue raised for the first time on appeal or a party's change in legal theory." Unified Indus., Inc. v. Easley, 1998 MT 145, ¶ 15, 289 Mont. 255, 961 P.2d 100 (citing Day v. Payne, 280 Mont. 273, 276, 929 P.2d 864, 866 (1996)). We generally follow this rule because it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Gateway Hosp. Grp. Inc. v. Phila. Indem. Ins. Co., 2020 MT 125, ¶ 15, 400 Mont. 80, 464 P.3d 44. We therefore decline to address whether under the circumstances of this case

....

II. THE MAY 10, 2023, ADMISSIONS OF ACTUAL KNOWLEDGE RENDERED WRITTEN NOTICE UNDER § 3-1-804(7) AN IDLE ACT.

After the May 10, 2023 deposition, any notice to the Personal Representative under § 3-1-804(7) would have been superfluous and without purpose as the Personal Representative had actual knowledge of Judge Bonilla’s status as presiding judge in the probate action. Such judicial admissions of actual knowledge rendered the requirement to provide notice under Mont. Code Ann. §3-1-804(7) an unnecessary, idle act. Mont. Code Ann. § 1-3-223 (“The law neither does nor requires idle acts.”). The Personal Representative suffered no prejudice affecting a substantial right as her July 26, 2023, Motion for Substitution was untimely and void as outside the 30-day filing prerequisite. Labair, at ¶¶ 11, 19.

III. THE PERSONAL REPRESENTATIVE’S ASSIGNMENT OF ERROR WAS REJECTED IN LABAIR V. CAREY.

The Personal Representative struggles to distinguish Labair because of the commonality of facts found in both Labair and this matter. Namely, that both the substituting party in Labair and the Personal Representative had “actual knowledge” of the identity of the respective presiding judge more than 30 days before filing their respective motions for substitution. Labairs presented this Court the same argument made by the Personal Representative:

Tai Tam, LLC v. Missoula County, 2022 MT 229, ¶ 21, 410 Mont. 465, 520 P.3d 312 (footnotes omitted).

We consider the Labairs' arguments that . . . [t]he time never started running on their deadline for substitution because the Clerk of District Court did not give statutorily-required notice of Judge McLean's assumption of jurisdiction; . . .

Labair, at ¶ 1. In rejecting the propriety of substitution motion, in Labair this Court explained:

The Labairs argue that the Clerk's failure to give written notice of the June 1, 2015 Order also violated their due process rights. "We have said that the hallmarks of due process are notice and opportunity to be heard." As discussed above, the Labairs had actual notice of Judge McLean's assumption of jurisdiction over their case. **The court's failure to serve official notice on them under § 3-1-804(7), MCA, did not "adversely affect their legally protected interests" where they had actual knowledge of the judge presiding in their case.** Steab v. Luna, 2010 MT 125, ¶ 22, 356 Mont. 372, 233 P.3d 251. Their claim of a due process violation fails.

Labair, at ¶ 20 (emphasis added). As did the District Court below, this Court found that actual knowledge alleviated any claim of unfair process:

The court's failure to serve official notice on them under § 3-1-804(7), MCA, did not "adversely affect their legally protected interests" where they had actual knowledge of the judge presiding in their case. Their claim of a due process violation fails.

Labair, at ¶ 20 (emphasis added) (internal citations omitted). Like the District Court which ordered that the Personal Representative's actual knowledge cured any failure of compliance with § 3-1-804(7), this Court found the failure to provide § 3-1-804(7) notice of no consequence in Labair as the substituting party already had actual knowledge as to the new presiding judge:

The purpose of the notice rule in § 3-1-804(7), MCA, is to ensure that parties are informed when a new judge assumes jurisdiction. Here, the

District Court's failure to comply with § 3-1-804(7), MCA, did not prejudice the Labairs, because the Labairs had actual notice when Judge McLean assumed jurisdiction in the case. Absent prejudice, we will not disturb the District Court's denial of the Labairs' motion for substitution. *See* M. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

Labair, at ¶ 19.

CONCLUSION

For the above state reasons, the Court should affirm the District Court's Order quashing the Personal Representative's Motion to Substitute Judge Bonilla.

Dated December 13, 2023.

JARDINE, STEPHENSON, BLEWETT &
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word, and is 1836 words excluding table of contents, table of citations, certificate of service, and certificate of compliance.

Dated December 13, 2023.

JARDINE, STEPHENSON, BLEWETT & WEAVER, P.C.

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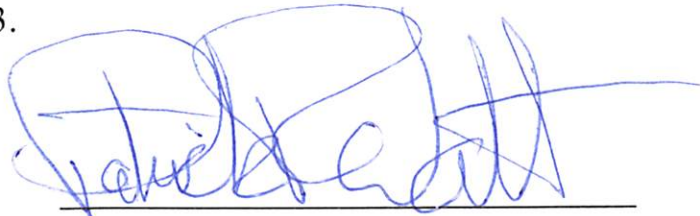
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served this date upon the following counsel by me by delivering a copy thereof, or by me causing a copy thereof to be delivered, to:

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A handwritten signature in blue ink, appearing to read "Patrick F. Flaherty", is written over a horizontal line.

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