IN THE SUPREME COURT OF THE STATE OF MONTANA

SUPREME COURT CAUSE NO. DA 24-0203

JOEY ZAHARA,

Plaintiff/Appellant

v.

ADVANCED NEUROLOGY SPECIALISTS,

Defendant/Appellee.

ZAHARA'S RESPONSE TO MOTION TO STRIKE AND DISMISS CONSTITUTIONAL CHALLENGE

On appeal from the Eighth Judicial District of the State of Montana, in and for Cascade County, Cause No. CDV-14-093; The Honorable John Kutzman

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Appearances for Plaintiff/Appellant Joey Zahara

Daniel Flaherty
Paul Gallardo
FLAHERTY GALLARDO LAW
P.O. Box 1968
Great Falls, MT 59403
(406) 727-8537
daniel@greatfallsfirm.com
paul@greatfallsfirm.com

Martha Sheehy
SHEEHY LAW FIRM
P.O. Box 584
Billings, MT 59103
(406) 252-2004
Msheehy@sheehylawfirm.com

Having fully complied with Rule 27's notice requirements, Appellant Joey Zahara opposes Advanced Neurology Specialists' ("ANS") Motion to Strike and Dismiss Zahara's Constitutional Challenge.

I. ZAHARA COMPLIED WITH RULE 27.

Rule 27, Mont. R.App.P. provides "a party who challenges the constitutionality of any act of the Montana legislature . . . must give notice to the supreme court and to the Montana attorney general of the existence of the constitutional issue" when the State is not a party. "This notice must be in writing, specify the section of the Montana Code Annotated or chapter of the session law to be construed, and must be given no later than 11 days from the date" of filing the notice of appeal.

Zahara fully and unequivocally complied with Rule 27.

First, Rule 27 required Zahara to give notice to this Court of the existence of the constitutional challenge. Zahara included the required information in the Notice of Appeal filed in this Court on April 2, 2024, stating that Zahara "appeals to the Supreme Court of the State of Montana from the Order on Constitutionality of Medical Malpractice Damage Cap." In the Notice, Zahara confirmed "that notice of this constitutional challenge has been provided to the Attorney General of the State of Montana." (Notice, ¶ 5).

Second, Rule 27 required Zahara to provide notice to the AG within eleven days of filing of the Notice. Zahara notified the AG contemporaneously by mailing a letter on April 2, 2024, which stated: "Notice is hereby given to the Montana Attorney General that Appellant Joey Zahara challenges the constitutionality of § 25-9-411, the statutory cap for non-economic damages in medical malpractice claims, as set forth in the attached Notice of Appeal filed on this date." (Mead Aff., Ex. 3). Counsel for Zahara drafted the letter, addressed the envelope, and personally mailed the letter on April 2, 2024. (Sheehy Aff. ¶¶ 5, 6).

Relying entirely on an affidavit from the AG disputing receipt of the April letter, ANS asserts the legally unsupportable proposition that "the Notice of Appeal was not served on the [AG], nor was the [AG] otherwise provided with the requisite notice." (Motion, p. 6). ANS utterly fails to provide this Court with the relevant law for what constitutes "service," not citing to a single rule, statute, or case. ANS's omission is concerning because the law is both abundant and crystal clear: In mailing the notice on April 2, 2024, Zahara served the AG, *even if the AG later disputes receipt*.

Rule 10(3), M.R.App.P., provides that "service may be made personally or by mail" and that "service by mail is complete upon mailing." Zahara's service obligation was complete upon Sheehy's mailing of the notice on April 2.

Moreover, mailing the letter on April 2 gave rise to a presumption that the AG received the letter. § 26–1–602(20), (24), MCA. Based on § 26-1-602(24), this Court presumes – and so must ANS – that "a letter duly directed and mailed was received in the regular course of the mail." *City of Billings v. Lindell* (1989), 236 Mont. 519, 522, 771 P.2d 134, 136. Further, [a]bsent additional evidence, an addressee's testimony of non-receipt is not enough to overcome the statutory presumption" that a mailed letter has been received. *Kenyon-Noble Lumber Company v. Dependant Foundations, Inc*., 2018 MT 308, ¶ 17, 393 Mont. 518, 432 P.3d 133; *Baldwin v. Board of Chiropractors*, 2003 MT 306, ¶ 15, 318 Mont. 188, 79 P.3d 810; *General Mills, Inc. v. Zerbe Bros., Inc*. (1983), 207 Mont. 19, 22, 672 P.2d 1109, 1111. Mead's affidavit testimony is insufficient to rebut the presumption as a matter of law.

Zahara fully complied with Rule 27's notice requirements by notifying this Court of the constitutional challenge in the Notice of Appeal and by contemporaneously serving the AG by mail with a separate notice which enclosed the Notice of Appeal.

II. NO AUTHORITY SUPPORTS DISMISSAL WHEN AMPLE NOTICE HAS BEEN PROVIDED TO THE AG.

ANS incorrectly relies upon cases holding that a party's failure to provide notice to the AG precludes the Court from addressing a constitutional challenge. (ANS Motion, p. 4). Those cases are inapposite because Zahara repeatedly and timely notified the AG. The purpose of Rule 27 is "to allow the Attorney General to intervene in a case where a party challenges the constitutionality of a statute." *McKinnon v. Western Sugar Co-Op Corp.*, 2010 MT 24, ¶ 28, 355 Mont. 120, 224 P.3d 1221 (interpreting Rule 5.1, M.R.Civ.P). Zahara not only met the technical requirements of Rule 27, but also fulfilled the purpose of the Rule.

When the AG did not respond to the initial appellate notice on April 2, Zahara continued to provide the AG with notices. On May 20, 2024, Zahara informed the AG of the constitutional challenge *and* the stipulation of the parties extending all appellate deadlines until June 17, 2024. (Mead Ex. 1). With all deadlines extended, even Zahara's May 20 notice to the AG was timely. The AG admits receiving this letter and the stipulated extension of all deadlines on May 22. (Mead Aff., ¶ 7). Yet the AG did not respond within 20 days as required by Rule 27. A month later, Zahara provided a copy of the opening brief to the AG, again citing to its prior notices in April and May. The AG acknowledges receipt of this third letter and the brief on June 24, 2024. (Mead Aff., ¶ 8).

This Court refuses to formulaically construe compliance with the AG notice rules when, as here, the party supplies the AG with opportunity to appear. *U.S. Mfgr. & Distributing v. City of Great Falls*, 169 Mont. 298, 302, 546 P.2d 522, 524 (1976) ("spirit of the rule appears satisfied when such opportunity to prepare for the constitutional challenge is given [to the AG]."). In *McKinnon*, this Court refused to apply the notice requirements as a "condition precedent" to jurisdiction even when (unlike here) notice was not timely, stating that the rules "place the spirit of the law above strict compliance with the letter of the law." *Id.* ¶ 30*, quoting State Medical Oxygen & Supply v. American Medical Oxygen Co.*, 230 Mont. 456, 462, 750 P.2d 1085, 1089 (1988). "This Court has refused to abide by such a strict, formalistic approach to statutory interpretation and ha[s] readily applied the maxim 'the law respects form less than substance.'" *Id.*, ¶ 28, *quoting McKirdy v. Vielleux*, 2000 MT 264, ¶ 35, (quoting § 1–3–219, MCA). The AG admittedly received notice on May 22 and June 24, 2024, both well within the extended deadline (commencing on June 17) for the AG to respond to the notice.

ANS's opportunistic motion to dismiss Zahara's constitutional challenge – filed without adequate inquiry into the facts or the applicable law – tells a cautionary tale. A jury awarded Zahara $6 million in damages caused by ANS's medical malpractice. The trial court reduced that award to $250,000 based on

§ 25-9-411, MCA. Zahara challenged the constitutionality of that statute, and notified the AG of the challenge in the district court and three times on appeal. The AG never responded to any of the notices. Instead, the AG belatedly contacted ANS and supplied an affidavit of non-receipt. (Mead Aff.). Now, just weeks before a long-scheduled mediation, ANS cynically seeks dismissal of the constitutional challenge not on the merits, but by adopting the AG's incorrect legal position regarding what constitutes service. Notwithstanding this gamesmanship, the record and law establish that Zahara has preserved and is entitled to his appeal.

CONCLUSION

Zahara respectfully requests that ANS's motion to dismiss be denied.

DATED this 22nd day of July, 2024.

FLAHERTY & GALLARDO LAWYERS

SHEEHY LAW FIRM
P.O. Box 584
Billings MT 59103
Msheehy@sheehylawfirm.com

/s/ Martha Sheehy
Martha Sheehy

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 16, I certify that this Response is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by WordPerfect 10, is 1,245 words, excluding captions, signatures and certificates.

/s/ Martha Sheehy
Martha Sheehy

CERTIFICATE OF SERVICE

I, Martha Sheehy, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to Dismiss to the following on 07-22-2024:

Elijah Laurel Inabnit (Attorney)
Garlington, Lohn & Robinson PLLP
P.O. Box 7909
Missoula MT 59807
Representing: Advanced Neurology Associates
Service Method: eService

Peter J. Stokstad (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: Advanced Neurology Associates
Service Method: eService

Paul Gallardo (Attorney)
1026 1st Avenue South
Great Falls MT 59401
Representing: Joey Zahara
Service Method: eService

Daniel J. Flaherty (Attorney)
PO Box 1968
Great Falls MT 59403
Representing: Joey Zahara
Service Method: eService

Justin K. Cole (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: American Medical Association, Montana Medical Association
Service Method: eService

Brent A. Mead (Govt Attorney)
215 North Sanders
Helena MT 59601

Service Method: eService
E-mail Address: brent.mead2@mt.gov

Electronically Signed By: Martha Sheehy
Dated: 07-22-2024