IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA 24-0430

JOSH HENDERSON,

Plaintiff and Appellee,

-vs.-

SILVER BOW PIZZA and TAYLOR BOWMAN,

Defendants and Appellant.

On Appeal from the Montana Second Judicial District,
Butte-Silver Bow County, The Honorable Judge Kurt Krueger Presiding
District Court Cause No. DV-23-106

Appellee's Answer Brief to Appellant's Opening Brief

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I. STATEMENT OF THE ISSUE

1. The 2nd Judicial District Appropriately Rejected Appellant's Attempt to Substitute Two Judges in Contravention of MCA Section 3-1-804.

II. STATEMENT OF THE CASE

This case is about whether, after one defendant has substituted a judge, a second defendant against whom liability arises from the same facts as the first and who has no claims against the first defendant, can subsequently substitute a second judge.

The underlying case arises from a physical altercation between Bowman and Henderson at Silver Bow Pizza, a bar and restaurant, after Silver Bow overserved alcohol to Bowman. Appellee Josh Henderson filed his Complaint in the Second Judicial District on April 10, 2023 against Taylor Bowman and Silver Bow Pizza alleging negligence against Bowman and Silver Bow, Assault and Battery against Bowman, and Violation of Mont. Code Ann. § 27-1-710 colloquially known as Montana's dram shop act against Silver Bow. Compl., Doc 1. First Bowman, then Silver Bow answered, each agreeing that the altercation happened at Silver Bow after Bowman drank alcohol there. Bowman and Silver Bow Answers, Docs. 2; 4. In their Answers, both contended Bowman was not intoxicated, and therefore, not overserved at Silver Bow prior to the altercation. Henderson

contends both Bowman and Silver Bow are liable for his injuries because Bowman's intoxication contributed to the altercation happening. The one discrete event of the altercation at Silver Bow underlies Henderson's entire case, including the dram shop claim, and neither Silver Bow nor Bowman have cross-claimed against each other. Silver Bow and Bowman are not adverse because of the shared facts of Henderson's claims against both underlying all claims.

Now, approximately a year after this case began in earnest, Silver Bow appeals Judge Krueger's Order. Judge Krueger correctly found that Silver Bow was not adverse to Bowman, and, collectively Defendants (via Bowman) had already used their one substitution against Judge Whelan.

Henderson respectfully submits that the Court should affirm Judge Krueger's findings, and, upon the Court's finding of no adversity, and given that Judge Krueger will be retiring soon, remand the case to his successor.

III. STATEMENT OF FACTS

Bowman answered on November 20, 2023. On November 20, 2023, Bowman moved to substitute Judge Whelan. Bowman's Mot. Sub. of Judge, Doc 3. Silver Bow Pizza answered on November 29, 2023. Doc. 4, Silver Bow Answer. Whelan granted Bowman's motion on April 17, 2024. Or. of Sub., Doc. 12. After the substitution of Judge Whelan, Judge Krueger assumed jurisdiction. Silver Bow Pizza moved to substitute Judge Krueger on April 22, 2024. Silver

Bow Pizza's Mot. to Sub, Doc. 13. Judge Krueger denied Silver Bow's Motion on June 21, 2024, Doc.16. Silver Bow now appeals Judge Krueger's order.

IV. STANDARD OF REVIEW

A district court's decisions on his/her substitution by a party pursuant to MCA Section 3-1-804 is a question of law. *Eisenhart v. Puffer,* 2008 MT 58, ¶ 13, 341 Mont. 508, 178 P.3d 139. This Court reviews the lower court's decision for correctness. *Id.*

V. SUMMARY OF ARGUMENT

The issues in this appeal are simple and the caselaw underlying the Court's precedent limited. Two or more parties on the same side of a legal claim or claims, must be adverse to each other, based upon the Complaint, to collectively have more than one substitution. If the parties are not adverse, the substitution is only allowed to the party who moves for it first. Here, the two defendants agree on the same facts of the case in contending that Bowman was not intoxicated when he initiated the altercation with Henderson, and are functionally aligned in opposing the damages Henderson seeks. When Bowman beat Silver Bow to the punch by substituting Judge Whelan, it barred Silver Bow from exercising the same right against Judge Krueger.

VI. ARGUMENT

A. Defendants Silver Bow and Bowman are Not Adverse to Each Other, So When Bowman Exercised Defendants' Substitution Right, it Barred Silver Bow From Exercising the Same Right.

As the Court is likely aware, Judge Krueger announced his retirement on December 1, 2023 and the election is underway for his successor.[1] Consequently, Henderson must first address the issue of why Judge Krueger's impending retirement does not moot Silver Bow's appeal and the Court should uphold the merits of Judge Krueger's Order that Silver Bow challenges.

"If the issue presented at the outset of the action has ceased to exist or is no longer 'live,' or if the court is unable due to an intervening event or change in circumstances to grant effective relief or to restore the parties to their original position, then the issue before the court is moot." *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶¶ 16, 396, 276 P.3d 867, 871. Here, unless the Court makes a determination as to adversity between Silver Bow and Bowman, Silver Bow's appeal, predicated as it is on its own right to substitution, will not be resolved should Silver Bow later take issue with the newly elected judge. As such, the Court must reach the merits of Silver Bow's arguments.

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[1] https://mtstandard.com/news/local/crime-courts/judge-kurt-krueger-not-seeking-a-fifth-term-in-butte/article_b23332ce-9075-11ee-bc75-9357d698fd26.html

As to adversity, Silver Bow and Bowman are not adverse to each other because this case arises from the same set of agreed facts: Bowman drank at Silver Bow before starting an altercation with Henderson. MCA Section 3-1-804 requires that, for a party subsequently appearing in a case to be entitled to a substitution after the original party seeking substitution has already been granted it, the subsequent party must demonstrate that it is adverse to the first movant. *Goldman Sachs Grp., Inc. v. Mont. Second Judicial Dist. Court,* 2002 MT 83, ¶ 14, 46 P.3d 606. The timing and manner of entry into the litigation of a party seeking to substitute is irrelevant if there is no adversity between parties on the same side of a case. *Eisenhart*, at ¶ 16. The determination of adversity is based on the allegations in the Complaint. *Id.* at ¶ 17. "Adversity does not necessarily mean "hostility." *Id.* at ¶ 16. The parties need not be joined at the hip in their defense to lack adversity, i.e. they need not share an insurer or defense counsel, need not share the same defense strategy, and the causes of action need not be the same against both defendants. Rather adversity is determined by whether there are different facts, giving rise to the different evidence that may be at issue, underlying different claims as between the parties. The Montana Supreme Court's holding in *Goldman* has been affirmed several times in the years since the 2002 decision. *See e.g. Eisenhart; Ratliff v. Pearson,* 2011 MT 241, ¶ 28, 261 P.3d 1037, 1041; *Pallister v.*

Blue Cross & Blue Shield of Mont., Inc., 2013 MT 149, ¶ 16, 341, 302 P.3d 106, 110.

A look first at the core cases defining what is *not* adversity is instructive. First, in *Goldman Sachs,* the complaint at issue alleged that each of the defendants were knowledgeable of and involved in a scheme to transfer the same corporate assets of Montana Power Company without shareholder approval. The complaint originally listed John Does and subsequently replaced the Does with Goldman. The Plaintiffs alleged that Goldman held a fiduciary duty to the shareholders equal to that of the Montana Power Company directors, and, essentially, conspired with the directors to defraud shareholders. Thus, the Court held, if found liable, based on the claims asserted, Goldman would share culpability for the shareholders' damages alongside the other defendants. *Goldman Sachs*, at ¶ 18. Similarly, in *Eisenhart,* the dispute between the parties involved enforcement of an arbitration judgment based on a construction dispute between contractor Eisenhart and homeowners, the Puffers. The Puffers were bonded by F & D, a surety, so Eisenhart also sought to enforce against F&D. F & D, after entering the case, sought to substitute the judge, after the Puffers had already done so. The Court upheld the district court's denial of substitution because F&D's participation in the case arose from the same set of facts, enforcement of the judgment against the

Puffers. The Court held that the only difference between the parties was that F & D was also potentially responsible for Eisenhart's damages.

In contrast to *Goldman Sachs* and *Eisenhart*, a detailed look at this Court's holding in *Ratliff v. Pearson* is necessary to get to the crux of where adversity may be found. 2011 MT 241, ¶ 24, 362 Mont. 163, 168, 261 P.3d 1037, 1041. In *Ratliff,* the issue before the Court was a farm property deal gone bad whereby Ratliff sought specific performance of the farm sale and monetary damages from the original defendant, Pearson. Through two judge substitutions, and one judge's recusal, the case ended up before the fourth judge. In the midst of the multiple substitutions, the subsequently added party, attorney Schwanke then sought to substitute the fourth judge, who denied the motion.

In upholding the district court's denial of substitution, the Court looked to whether the non-substituting party (plaintiff Ratliff), brought at least some unique claims against each defendant *predicated on different facts and potential evidence*. The claims at issue in *Ratliff* were breach of contract, breach of the covenant of good faith and fair dealing, actual fraud, constructive fraud, negligent misrepresentation, and punitive damages.

Against Pearson, Ratliff alleged breach of contract and breach of the covenant of good faith and fair dealing for not following through with the sale of the land. Against Schwanke, Ratliff alleged that he had made tortious misrepresentations on

behalf of Pearson and himself. Particularly important to the Court's holding was that Pearson and Schwanke could be adverse to each other in alleging and defending, respectively, a legal malpractice claim. The Court's holding is worth quoting at length to demonstrate the sorts of facts and evidence that were different as between Ratliff's claims against Pearson versus his claims against Schwanke, and, more importantly, Schwanke versus Pearson:

> Ratliff's amended complaint alleges that Schwanke made tortious misrepresentations to Ratliff on his own, and on behalf of Pearson. Ratliff alleges that Dean Pearson told him that he could treat the Property as his own before [****13] the closing. Ratliff alleges that Schwanke told him to take over farming the property pending the closing. Ratliff [**170] further alleges that Schwanke affirmed the validity of the contract when he contacted Ratliff to ask him how he wanted the property titled. Ratliff contends that Schwanke's material misrepresentations of fact induced Ratliff to spend time and money improving the Property. The complaint alleges that Schwanke knowingly made these false statements to Ratliff on Pearson's behalf.
>
> [*P30] **The differing factual allegations against the parties will establish whether the parties individually, or collectively, committed fraud, constructive fraud, or negligent misrepresentation. Pearson could contest the validity of the representations allegedly made to Ratliff by Schwanke on Pearson's behalf. It further appears on the face of the complaint as though Schwanke and Pearson have reasons to dispute factual statements that either party allegedly made to the other. Schwanke may be able to establish that he, like Ratliff, genuinely believed that Pearson intended to sell the property to Ratliff. Moreover, any duties that Pearson may owe to Ratliff likely differ from any duties that Schwanke may owe to Ratliff.** The amended complaint acknowledges that Pearson and Schwanke owe different duties to Ratliff.
>
> .....
>
> [*P31] **Pearson may assert a separate malpractice claim against Schwanke. Schwanke may claim that he acted on misinformation provided by Pearson**. The defendants' interests do not necessarily align. Schwanke and Pearson qualify as adverse parties under these circumstances.

Ratliff at ¶¶ 29-31.

The *Ratliff* Court contrasted the issues raised in the complaint before it to those issues at play in *Eisenhart* and *Goldman Sachs* for the basis of its holding that adversity arises from different underlying facts:

> The parties in both *Eisenhart* and *Goldman Sachs* **failed to show that any unique claims existed among the original defendants and the subsequently joined defendant. The plaintiffs in Eisenhart could have collected damages from either defendant based on the same factual allegations.** Eisenhart, ¶ 17. The complaint in Goldman Sachs combined all defendants for purposes of establishing culpability. Goldman Sachs, ¶ 18. The same counsel represented all the [***1042] defendants in Eisenhart. Eisenhart, ¶ 9. The defendants in Goldman Sachs likewise had engaged in a coordinated defense against the claims. Goldman Sachs, ¶ 20.

Ratliff at ¶ 28.

The guidance on adversity to be gleaned from comparing *Eisenhart*, *Goldman Sachs*, and *Ratliff* is that a party will *not* be adverse to another if: 1) the defense is based on the same basic facts/evidence; and 2) if the non-substituting party can obtain relief against either substituting party based on these facts; in other words if the question is allocation of liability, not fundamentally different claims. Following the precedent set by these three cases, as originally spelled out in the *Goldman Sachs* holding, Judge Krueger's order succinctly dealt with the issue of Silver Bow's timing and adversity.

Here, Defendant Taylor Bowman moved for substitution of then-presiding Judge Whelan on November 20, 2023 and Judge Whelan granted the motion on April 17, 2024. Nothing in the Complaint indicates Silver

Bow Pizza and Bowman are adverse. Instead, Henderson makes separate claims against each for liability arising from a common incident. The Motion is both untimely and not allowed as a matter of right.

Order Denying Sub., Doc. 16.

Silver Bow contests Judge Krueger's findings in arguing that its motion was timely, and that is adverse to Bowman because: 1) each party has "separate defense strategies" (App. Brief, p. 8); 2) each has "differing legal duties" (App. Brief, p. 12); and 3) "most importantly, Silver Bow Pizza will attempt to attribute all liability to Mr. Bowman for his criminal actions." (App. Brief, p. 8).

First, as to timing, Silver Bow misapprehends the issue here as one of the timing of its motion to substitute. A motion for substitution must be filed within 30 days of the first summons being served on a party who seeks substitution or an adverse party has first appeared . MCA § 3-1-804. Judge Krueger correctly found that Silver Bow's substitution was untimely in that it was brought more than four (4) months after Silver Bow answered. Judge Krueger's holding is that Silver Bow's motion was untimely not only because Silver Bow was late in seeking substitution temporally, but, perhaps more importantly, that adversity never existed in the first place between Bowman and Silver Bow.

As to adversity, in his Complaint, Henderson alleged negligence, assault and battery against Bowman, and alleged negligence and violation of Montana's dram shop act against Silver Bow for overserving Bowman, all predicated upon the

February 17, 2023 altercation (Compl.¶ 5, Doc. 1). The essential elements of Henderson's Complaint are: Bowman was drinking at Silver Bow prior to the altercation and visibly intoxicated (*Id.* at ¶ 3,); 2) Bowman was "so intoxicated that wait/bar staff discussed either among themselves or with other patrons that Bowman should be 'cut off' from the bar selling him alcohol just before the altercation." (*Id.*); 3) Bowman's intoxication led, at least in part, to the altercation (*Id.* at ¶ 10); and 4). Silver Bow knew or should have known that Bowman was not to be served, and therefore the altercation was foreseeable to Silver Bow (*Id.* at ¶¶ 14; 17-19).

The essential elements of Bowman's Answer are: 1) Bowman admits being present at Silver Bow and drinking at the Silver Bow bar immediately before the altercation (Bowman Answer, Doc. 2 at ¶ 3); Bowman denies that he consumed an excessive amount of alcohol from excessive service at Silver Bow or otherwise (*Id.* at ¶ 10); Bowman denies that alcohol played a role in the altercation, effectively supporting Silver Bow's claim that Bowman drinking on premises did not play a role. (*Id.* at ¶ 17).

The essential elements of Silver Bow's Answer are: 1) Silver Bow admits that Bowman was drinking at Silver Bow prior to the altercation (Silver Bow Answer, Doc. 4 at ¶ 2); 2); Silver Bow admits that the altercation happened at its restaurant (*Id.* at ¶ 4); 3); Silver Bow denies that Bowman was visibly intoxicated and denies

that it overserved Bowman (*Id.* at ¶¶ 9;11). Silver Bow takes no particular position against Bowman except to deny that it had any fault as to overserving Bowman. Silver Bow agrees with Bowman on far more than it disagrees with him, if it disagrees with him at all. Nonetheless, Silver Bow relies on its affirmative defenses to show that it is adverse because it *may*, in the future, blame Bowman entirely or ask a jury for a contributory finding of liability with Bowman. (App. Brief, p. 12).

Looking to the Complaint, Henderson plead negligence against both Silver Bow and Bowman. Henderson's Complaint against Silver Bow alleged negligence in that it failed to maintain a safe premise for other patrons when overserving Bowman. Montana's dram shop act is a derivative of and also may be plead side-by-side with various theories of negligence. The same conduct, Bowman drinking and starting an altercation, was negligence all around and may have contributed to the same elements underlying Henderson's assault and battery, i.e. Bowman's harmful/offensive touching of Henderson. The fact that Silver Bow also has a duty as a bar, that Bowman, as an individual does not, to abstain from serving visibly intoxicated customers, and to maintain a safe premise does not change *the underlying facts* of Henderson's claims. Unlike defendants Schwanke and Pearson in *Ratliff*, Bowman has no potential malpractice claim against Silver Bow, and neither has brought forth allegations against the other of fraud, misrepresentation,

breach of contract, or punitive damages. There are no issues of who said what, who had a fiduciary duty to whom, the truth or falsity of statements made, who had intent to defraud or induce reliance upon whom, or anything of the like as between Bowman and Silver Bow. Rather, like the defendants in *Goldman Sachs* and *Eisenhart*, Silver Bow and Bowman are effectively joined because Henderson can equally seek damages against Silver Bow if he shows that Bowman's conduct was caused by or exacerbated by being overserved. As in *Goldman*, Henderson has "lumped" Bowman and Silver Bow "together for purposes of culpability." *Goldman Sachs* at ¶ 18; *Ratliff* at ¶ 28. The fact that Silver Bow may claim contribution somehow from Bowman, or seek to have fault allocated on a jury verdict, is irrelevant.

B. Silver Bow's Appeal Highlights the Dangers of Justice Delayed in Allowing Multiple Defendants who are Not Adverse to Successive Substitutions

Montana Code Annotated § 3-1-804 has its roots deep in Montana political and legal history. When first passed, the statute allowing judge substitution was labeled a "fair trial" law, or "Clancy's law", a reference to corrupted Judge William Clancy of Butte, who rose to unseemly prominence in days of the Copper King wars because of his blatant favoritism shown in lawsuits brought by Augustus Heinze over other mining business rivals. W. William Leaphart,

Comment: First Right of Recusal, 72 Mont. L. Rev. 287, 288 Summer, 2011; Anthony Johnstone, A Past and Future of Judicial Elections: The Case of Montana, 16 J. App. Prac. & Process 47 (Vol 16, Issue 1, 2015). The remedy for aggrieved litigants to remove Judge Clancy by appeal was so delayed, the Legislature felt the need to extend to every civil litigant in Montana the right to remove a judge of their choosing to avoid another, similar situation. The heart of Section 3-1-804 is to give litigants a chance at removing a particular judge the litigant sees as not conducive to giving the litigant an appropriate or fair hearing on his/her case.

While judicial corruption is not an issue in this case, Silver Bow's appeal raises the troubling question, as a matter of policy, of where the substitution of judges must end. Looking holistically at the reasons behind the statute, this Court in *Mattson v. Montana Power*, 2002 MT 113, 309 Mont. 506, 48 P.3d 34, referenced the history of Section 3-1-804(1)(c) (the statute was written differently at the time as to subparts) as a balancing act between fairness to litigants and the need to move cases along, and ensure continuity of the presiding judge:

> Given all of the foregoing considerations, *it was necessary for this Court to fashion a rule to conserve resources and expedite the litigation process,* while simultaneously preserving a potential litigant's interest in removing a judge without cause. *Fashioning such a rule while balancing all potential interests is not an easy task, and while § 3-1-804(1)(c), MCA, may from time to time be less than perfect in its application,* we conclude that it is not arbitrary or capricious and is "reasonably related to a permissible [judicial] objective." Accordingly, we conclude that the District Court did not err when it denied PPL's motion to substitute without cause.

Mattson v. Mont. Power Co., 2002 MT 113, ¶ 25, 309 Mont. 506, 513, 48 P.3d 34, 39, 2002.

The prospect of having a case delayed by months, or even years, by a multiplicity of substitution motions is particularly concerning in the case of complex litigation of the sort that easily occur in, for example products liability, medical malpractice or construction defect cases, as but a few examples. This is exactly the sort of deep reservations about delay and improper judge shopping that the Montana Supreme Court expressed in *Goldman Sachs*:

> we are equally if not more concerned at the prospect of having 4 or 14 or more defendants each exercising substitution rights without demonstrating adversity. We do not construe § 3-1-804, MCA, to permit an endless string of substitutions.
>
> *Goldman Sachs at ¶ 15*

Henderson respectfully submits that the Court should share the same concerns expressed in *Goldman* and *Mattson* regarding litigants who are not adverse seeking multiple substitutions and the delayed effect this will have on justice for the non-movant litigants. The right of substitution is a well-regarded and reasonable one in Montana, long rooted in our State's history, but this Court has rightfully placed limits on how many times that right may be exercised to prevent undue delay.

In this case, Silver Bow was not a subsequently joined party; it was originally named along with Bowman in Henderson's Complaint, long aware of the Complaint and answered soon after Bowman. With its appeal, Silver Bow is

improperly judge shopping, confirming the fears previously expressed in *Goldman Sachs*. In upholding Judge Krueger's Order, Henderson respectfully submits that the Court should strictly affirm the need to show adversity, to prevent the sort of delay Silver Bow's appeal demonstrates.

VII. CONCLUSION

Silver Bow and Bowman are not adverse because Defendants' claims arise from the same facts, share the same basic defense that Bowman was not intoxicated, and both oppose Henderson as to his claim for damages, with no other evidentiary issues or cross-claims as between them. Henderson asks that the Court uphold Judge Krueger's Order and rule that Defendants may not further seek disqualification of the Judge's successor, should Silver Bow also disfavor the winner of the election.

DATED: November 4, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) and (d), M. R. App. P., I certify that this brief:

1. is proportionately spaced Times New Roman text typeface of 14 points, except for footnotes and tables which are size 12 font;
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DATED this 4th day of November, 2024.

DOUBEK, PYFER & STORRAR

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