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PREVIEW; Goguen v. NYP Holdings, Inc.: *Conflicts of Law in Multistate Defamation Cases*

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The Montana Supreme Court will hear oral argument in *Goguen v. NYP Holdings, Inc.* on Friday, September 15, at 9:30 a.m. at the Northern Hotel in Billings, Montana. Matt J. Kelly, Amy McNulty, Laura R. Handman, and Adam I. Rich submitted briefs on behalf of defendant-appellants NYP Holdings, Inc. and Isabel Vincent. Reid Perkins submitted briefs on behalf of plaintiff-appellee-cross-appellant Michael Goguen. Peter Meloy submitted briefs on behalf of defendant-cross-appellee William Dial. Laura R. Handman is expected to appear on behalf of the appellants. Elizabeth L. Griffing and Michael Schwartz are to appear on behalf of the appellee.

I. INTRODUCTION

In *Goguen v. NYP Holdings, Inc.*, the Court will determine whether the Eleventh Judicial District Court erred when it denied NYP Holdings, Inc. and Isabel Vincent's Motion to Dismiss and when it granted William Dial's Motion to Dismiss. The main issues the Court will address are whether Montana or New York law applies in this defamation case and whether the statements are privileged reports of judicial proceedings under the chosen state's law. Compared to New York's fair report privilege laws, Montana's are less developed and wide-reaching. However, Montana's state constitutional mandates afford different protections and responsibilities for news agencies. The nature of online publication adds an additional layer of difficulty in determining where the defamatory conduct or injury occurred and which state has the greatest interest in the litigation. This preview details the factual and procedural background of the case, sets out the arguments of each party, and analyzes several possible outcomes and policy considerations.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Plaintiff, appellee, and cross-appellant Michael Goguen is a businessman and investor who has lived in Flathead County for nearly 20 years.[1] The defendant-appellant, NYP Holdings, Inc., publishes the *New York Post* ("Post").[2] Isabel Vincent is a writer for the *New York Post* and

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[1] Appellee/Cross-Appellant's Combined Response Brief and Brief in Support of Cross-Appeal at 4, *Goguen v. NYP Holdings, Inc.* (Mont. Feb. 2, 2023) (No. DA 22-0512), https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=420088 [hereinafter Goguen's Combined Response and Cross-Appeal Brief].

[2] Opening Brief of Defendants-Appellants NYP Holdings, Inc., and Isabel Vincent at 4, *Goguen v. NYP Holdings, Inc.* (Mont. Feb. 2, 2023) (No. DA 22-0512),

published the article in controversy, titled "Tech billionaire allegedly kept spreadsheets of 5000 women he had sex with." ("Post Article").[3] Defendant and cross-appellee, William Dial, is the former Chief of Police in Whitefish, Montana, who gave a statement in the Post Article.[4]

On May 23, 2014, Goguen entered into a Release and Personal Injury Settlement Agreement ("Release") with an alleged former mistress, Amber Baptise.[5] Baptise signed the Release in exchange for $40,000,000, which required her to keep her prior relationship with Goguen confidential.[6]

On March 8, 2016, Baptise filed a lawsuit in the Superior Court of the State of California for the County of San Mateo, alleging that Goguen had failed to pay the $40,000,000 promised in the Release as Goguen had only provided her with the first payment of $10,000,000.[7] Goguen countersued, and following a bench trial in October 2019 where Baptise failed to appear, the California court dismissed all of Baptise's claims with prejudice. Baptise was also barred from repeating statements which the California court deemed to be false and defamatory.[8]

In 2019, Mathew Marshall, an alleged former associate of Goguen, was indicted for eleven charges in the U.S. District Court for the District of Montana.[9] These charges stem from business relations that Marshall had with Goguen over a five-year period.[10] In September 2021, Marshall filed a civil lawsuit against Goguen in the U.S. District Court for the District of Montana where he alleged that Goguen engaged in a racketeering scheme that involved both sexual and criminal misconduct.[11] Later, in November 2021, Marshall pled guilty to wire fraud, money laundering, and tax evasion.[12] In May 2022, Marshall's civil suit against Goguen was dismissed with prejudice.[13]

On November 20, 2021, the Post published Isabel Vincent's online article titled "Tech billionaire allegedly kept spreadsheets of 5000 women he had sex with." This article reported many of the allegations made in the Baptise and Marshall lawsuits. The article reported that Goguen had control over the local law enforcement in Whitefish, Montana, and had engaged in sexual abuse.[14] In the Post Article, William Dial, the former Chief of Police for Whitefish, Montana, commented that

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https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=413257 [hereinafter Appellants' Opening Brief].

[3] *Id.*

[4] *Id.*

[5] Order Re: Motions to Dismiss at 2, *Goguen v. NYP Holdings, Inc.* (Mont. 11th Jud. Dist. Ct. Jul. 26, 2022) (DV-21-1382(A)), available as Exhibit B to Notice of Appeal at https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=402838) [hereinafter District Court Order].

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 4.

[10] *Id.*

[11] Appellants' Opening Brief, *supra* note 2, at 5.

[12] *Id.* at 4.

[13] *Id.*

[14] *Id.* at 5.

Goguen is a "billionaire à la Harvey Weinstein and Jeffery Epstein" and that he "has to be stopped."[15]

B. Procedural Posture

On November 26, 2021, Goguen filed a complaint in Montana's Eleventh Judicial District Court, Flathead County, against NYP Holdings, Inc., Isabel Vincent, and William Dial, alleging defamation stemming from the Post Article.

On December 23, 2021, Dial filed a Motion to Dismiss arguing that his comments in the Post Article were not actionable statements of fact.[16] On January 10, 2022, NYP Holdings, Inc. and Vincent filed a Motion to Dismiss arguing that under either Montana law or New York law, the comments made in the Post Article were absolutely privileged under the fair report doctrine.[17] On July 26, 2022, the District Court found that Montana law applied and that Goguen sufficiently alleged the elements of defamation to withstand a motion to dismiss. The District Court dismissed Dial from the suit after finding that Dial's comments were not actionable.[18]

C. District Court's Reasoning

A claim is subject to dismissal only if it either "fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim."[19]

Under Montana law, "defamation is effected by . . . libel . . . ."[20] Libel is a "false and unprivileged publication by writing . . . that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a tendency to injure a person in the person's occupation."[21] A privileged publication is a publication that is "a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof."[22] Combining these statutes, the district court uses a three-part test to establish defamation:

(1) The publication must be false;
(2) The publication must not be privileged; and
(3) The publication must be defamatory, in that it exposes the person to "hatred, contempt, ridicule, or obloquy," or causes "a person to be shunned or avoided," or has a tendency to injure the person in his or her occupation.[23]

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[15] Goguen's Combined Response and Cross-Appeal Brief, *supra* note 1, at 6.
[16] Order Entering Partial Final Judgment and Granting Certification Pursuant to Mont. R. Civ. P. 54(b), *Goguen v. NYP Holdings, Inc.* (Mont. 11th Jud. Dist. Ct. Aug. 30, 2022) (DV-21-1382(A)) available as Exhibit A to Notice of Appeal at https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=413257.
[17] District Court Order, *supra* note 5, at 1.
[18] *Id.* at 18–19.
[19] *Id.* (quoting MONT. R. CIV. P. 12(6)(b)).
[20] MONT CODE ANN. § 27-1-801 (2023).
[21] MONT. CODE ANN. §27-1-802.
[22] MONT. CODE ANN. § 27-1-804.
[23] District Court Order, *supra* note 5, at 15 (quoting Lee v. Traxler, 384 P.3d 82, 86 (Mont. 2016)).

This test is interpreted in light of Article II, Section 7 of the Montana Constitution, which requires that "[i]n all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts."[24]

The district court found that the allegations made within the Post Article were potentially defamatory and turned to the issue of whether the statements were privileged. A publication is privileged if it is "a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof."[25] The court found that the Baptise and Marshall lawsuits were reports of judicial proceedings and determined that the majority, but not all, of the allegedly defamatory statements were based on these two lawsuits.[26] However, for the Post Article statements to be protected, they must also be a "fair and true report, without malice."[27]

Under Montana law, a defendant acts with actual malice if:

(1) "the defendant has knowledge of facts or intentionally disregards the facts that create a high probability of injury to the plaintiff; and
(2) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
(3) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff."[28]

The district court relied upon *Sible v. Lee Enterprises, Inc.*,[29] where the Montana Supreme Court found that a newspaper has a duty to investigate facts that are highly suspect before publishing them.[30] Accordingly, the district court found that whether the Post Article was fair, true, and published without malice was a question of fact for the jury to decide because the source of the statements in the Post Article were suspicious.[31]

In determining whether Dial's comments were capable of a defamatory meaning, the district court considered the broad context and the specific context in which his statements were published and whether the statements were sufficiently factual to be susceptible to being proven true or false.[32] The district court concluded that, although Dial's comments were hyperbolic, they were "not sufficiently factual to imply there are underlying undisclosed facts beyond those contained in the Post's Article."[33] Therefore, Dial's motion to dismiss was granted.[34]

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[24] *Id.* (quoting MONT. CONST. art. II, § 7).
[25] MONT. CODE ANN. § 27-1-804.
[26] District Court Order, *supra* note 5, at 17.
[27] *Id.*
[28] MONT. CODE ANN. §27-1-221(2).
[29] 729 P.2d 1271 (Mont. 1986).
[30] District Court Order, *supra* note 5, at 18 (quoting *Sible*, 729 P.2d, at 1274).
[31] *Id.*
[32] *Id.* at 19.
[33] *Id.*
[34] *Id.*

III. SUMMARY OF THE ARGUMENTS

A. NYP Holdings, Inc. and Isabel Vincent's Arguments

The defendant-appellants NYP Holdings, Inc. and Isabel Vincent ("Appellants") raise three main questions on appeal: (1) does Montana's fair report privilege of judicial proceedings apply rather than New York's privilege law; (2) if New York's fair report privilege does apply, are the statements set forth in the Post Article absolutely privileged as a matter of law; and (3) if Montana's fair report privilege applies, did the district court err by finding that it could not determine, as a matter of law, whether the allegations in the Post Article are privileged.[35]

1. Choice of Law

Appellants argue that when there is an actual conflict between interested states, Montana's choice of law rules require an analysis of the competing policy interest. Although there is an initial presumption favoring the law of the state where the plaintiff is injured, that presumption can be overcome if a different state has a more significant relationship.[36]

First, Appellants argue that an actual conflict exists between the fair report privileges of Montana and New York law.[37] New York's fair report privilege is an absolute privilege and cannot be defeated by bad faith or malice, while Montana's fair report privilege applies only if the reports are published without malice.[38] When an actual conflict exists between state laws, Montana will apply the Restatement (Second) Conflicts of Law to determine which law to apply.[39] The Restatement compares the competing policies and interests of the underlying issue when determining which law to apply.[40]

Montana courts consider the following Restatement factors when determining which state has the most significant interest in a particular issue:

> (1) The place where the injury occurred;
> (2) The place where the conduct causing the injury occurred;
> (3) The domicile, residence, nationality, place of incorporation, and place of business of the parties; and
> (4) The place where the relationship, if any, between the parties is centered.[41]

The Appellants argue that when considering these factors, New York has a greater interest in this case than Montana. Additionally, Appellants argue that because New York has such a significant interest in the regulation and conduct of its publishers, outside courts routinely apply New York law when a non-New York plaintiff sues a New York publisher.

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[35] Appellants' Opening Brief, *supra* note 2, at 1.
[36] *Id.* at 13.
[37] *Id.* at 14.
[38] *Id.*
[39] *Id.*
[40] *Id.* (quoting Phillips v. Gen. Motors Corp., 995 P.2d 1002, 1007 (Mont. 2000)).
[41] *Id.* at 16 (quoting *Phillips*, 995 P.2d at 1008 (citing Restatement (Second) § 145(2))).

The Appellants cite numerous cases, such as *Kinsey v. N.Y. Times Co.*[42] and *Wilkow v. Forbes, Inc.*,[43] where the courts chose to apply New York's privilege, and argue that Montana should follow this trend.[44]

Appellants also argue that the Court should apply New York law to the privilege issue regardless of which state's law governs the underlying defamation claim.[45] This concept of deciding the applicable law by legal issue rather than by case is called *depecage* and has been recognized by various courts.[46]

2. Absolute Privilege Under New York Law

If the Court is to apply New York law, the applicability of New York Civil Rights Law § 74 is a question of law, not fact.[47] Appellants argue that as a matter of law, every statement in the Post Article is absolutely privileged because they are accurate reports of the Marshall and Baptise lawsuits.[48] Goguen argues that the statements made within the Post Article are false because the claims Marshall and Baptise made in their respective lawsuits are false. Appellants argue that it does not matter whether the allegations are true; all that matters is whether it is an accurate description of the judicial proceedings.[49] Appellants argue that the district court erred when it found that some of the challenged statements were not based on the Baptise and Marshall lawsuits. Although not all of the challenged statements in the Post Article are direct quotes from the Baptise or Marshall lawsuits, they are based on the allegations made in those lawsuits and the Post should be accorded some liberty when reporting on judicial proceedings.[50]

3. Privilege Under Montana Law

a. Question for the Jury

Appellants argue that even if Montana law applies, the statements made in the Post Article are still privileged.[51] Appellants argue the district court erred when it found that only a jury can determine the fairness, truth, and malice of the statements because when there is no dispute about the content of the judicial proceedings, whether the publication is privileged is a question of law.[52] Appellants rely on *Lence v. Hagadone*,[53] in which the Daily Inter Lake published an article reporting that the Montana Supreme Court's Commission on Practice was investigating attorney John Lence after a former client and contractor of his, Craig Semenza, filed a complaint against him.[54] In that case, the Montana Supreme Court held

[42] 991 F.3d 171, 178 (2d Cir. 2021).
[43] No. 99 C 3477, 2000 U.S. Dist. LEXIS 6587 (N.D. Ill. May 15, 2000), aff'd, 241 F. 3d 552 (7th Cir. 2001).
[44] Appellants' Opening Brief, *supra* note 2, at 13–14.
[45] *Id.* at 14.
[46] *Id.* at 15.
[47] *Id.* at 20.
[48] *Id.*
[49] *Id.* at 2.
[50] Appellants' Opening Brief, *supra* note 2, at 22.
[51] *Id.* at 26 (citing MONT. CODE ANN. § 27-1-804(4)).
[52] *Id.* (quoting Lence v. Hagadone Inv. Co., 853 P.2d 1230, 1237 (Mont. 1993)).
[53] 853 P.2d 1230 (Mont. 1993).
[54] *Id.* at 1233.

that when parties do not dispute the content of a judicial proceeding, whether the publication is privileged is a question of law.[55]

Appellants also argue that Goguen's interpretation of Article II, Section 7 of the Montana Constitution is incorrect.[56] Article II states that "[i]n all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts."[57] Appellants argue that the cases the district court relied on when it found that truth, fairness, and malice were questions for the jury are misplaced.[58] First, the district court relied on *Sible v. Lee Enterprises.* However, *Sible* did not involve the fair report privilege.[59] Second, the district court also relies on *Cox v. Lee Enterprises*, but *Cox* only certified a question about whether statutory privilege applied to civil complaints and only mentioned the jury when determining damages.[60]

b. Fair and True Reports and Malice

The Appellants argue that the allegations made in the Post Article are fair and true reports of judicial proceedings because it does not matter whether the underlying allegation is true, but only whether the report of the judicial proceedings is "substantially accurate."[61] Additionally, Appellants argue that no set of facts Goguen could prove would establish malice under any standard.[62] Constitutional malice is defined as "knowledge of falsity or reckless disregard for the truth," and Goguen's complaint does not sufficiently allege malice.[63] Additionally, the Post did not specifically adopt any of the allegations as being true, but merely reported on them.[64]

B. Goguen's Arguments

1. Choice of Law

Goguen argues that Montana law applies because Montana has the most significant relationship to the dispute. Goguen is a Montana resident, who brought a defamation claim under a Montana statute, for an injury he suffered in Montana based on the Post Article chronicling conduct in Montana. Therefore, Montana has the most significant relationship to the dispute.[65]

Additionally, Goguen argues that Appellants' effort to apply the principle of *depecage*, which would split the defamation and privilege

[55] *Id.* at 1237.
[56] Appellants' Opening Brief, *supra* note 2, at 27.
[57] MONT. CONST. art. II, § 7.
[58] Appellants' Opening Brief, *supra* note 2, at 27–28.
[59] *Id.* (quoting *Sible*, 729 P.2d at 1274).
[60] *Id.* at 28.
[61] *Id.* at 29.
[62] *Id.* at 36.
[63] *Id.* at 36.
[64] *Id.*
[65] Goguen's Combined Response and Cross-Appeal Brief, *supra* note 1, at 11.

issues, should be rejected.[66] The Montana Supreme Court has never applied *depecage*, and they should not begin to do so here.[67]

Even if the Court did apply *depecage*, Montana's privileges would still govern. In *Lewis v. Reader's Digest Association, Inc.*,[68] a New York-based publisher published an article about a Montana resident who later filed a defamation claim.[69] The Montana Supreme Court reasoned that because in multistate libel cases, the most harm to a person's reputation is in their home state, it is preferrable to apply the law of the plaintiff's domicile.[70] The application of Montana law to cases of multistate defamation prevents publishing companies from choosing a place of business in a state with favorable libel laws.[71]

2. Question for the Jury

Goguen argues that under both Montana and New York law, it is a question for the jury to decide whether the Post Article was fair, true, and published without malice. Under Montana law, Appellants rely on *Lence v. Hagadone*, where the court found that when there is no dispute about the content of the judicial proceedings, whether the report is privileged is a question of law.[72] Goguen argues that this case is not similar to *Lence* because there is a dispute about the content of the judicial proceedings reported in the Post Article.[73] Appellants claim the Post Article accurately reported on the lawsuits involving Goguen, but Goguen argues that because the underlying judicial proceedings are not in the record, the district court could not have determined whether the Post Article reports on the judicial proceedings were fair.[74] Additionally, despite claiming to fairly summarize the cases, the Post Article disparaged Goguen by making allegations against Goguen with no basis in any judicial pleading.[75] Therefore, under Montana law, it is the jury's province to determine whether the Post Article was fair, true, and published without malice.

If New York law applies, the question of whether the Post Article is a fair and true report is still a question for the jury. Appellants argue that New York Civil Rights Law Section 74 is satisfied if the Post Article is a "substantially accurate" reflection of judicial proceedings, but Section 74 protections do not apply if the statements suggest more serious conduct than that which is suggested in the judicial proceedings.[76] Goguen relies upon *Karedes v. Ackerley Group., Inc.*,[77] where the Second Circuit reversed a dismissal because "a reasonable jury could conclude that the article suggested more serious conduct than that actually suggested in the

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[66] *Id.* at 14.
[67] *Id.*
[68] 512 P.2d 702 (Mont. 1973).
[69] *Id.* at 703.
[70] *Id.* at 705.
[71] *Id.*
[72] *Lence*, 853 P.2d at 1237.
[73] Goguen's Combined Response and Cross-Appeal Brief, *supra* note 1, at 26.
[74] *Id.* at 26–27.
[75] *Id.* at 27–28.
[76] *Id.* at 31 (quoting Karedes v. Ackerley Grp., Inc., 423 F.3d 107, 119 (2d Cir. 2005)).
[77] 423 F.3d 107 (2d Cir. 2005).

official proceeding."[78] The Post Article suggests to a common reader that Goguen committed more serious acts than the allegations contained in the judicial proceedings alone.[79]

3. The Complaint Adequately Alleges Malice

Goguen argues that the complaint sufficiently alleges that the Post Article was published with actual malice.[80] Goguen's complaint expressly alleges that the Post published their article with actual malice and that the Post had actual knowledge of falsity or a reckless disregard for the truth or falsity when it published its article.[81] Goguen argues that in *Gallagher v. Johnson*,[82] the Montana Supreme Court clarified that all a defamation complaint needs to do to adequately allege malice is plead that that the opposing party knew the words were untrue and acted with specific malice.[83]

4. Dial's Dismissal

Goguen argues that the district court erred by granting Dial immunity from defamation.[84] The district court ruled that all of Dial's statements in the Post Article were opinions.[85] Goguen argues instead that Dial's claims are susceptible to being proven true or false and are therefore not legally protected as pure opinion.[86]

The district court also considered the context of the Post Article in its decision to dismiss Dial, but this was in error. Goguen argues that under Montana law, a statement's defamatory nature is determined at the time the statement was made, and later evidence is not admissible.[87] A defamation claim is complete once the initial publication occurs, and here, Dial made his statement to the Post before the article was published.[88] Once the initial publication occurred, Dial's tort was complete.[89] Therefore, the district court should not have considered the context of the Post Article when determining whether Dial's statements were defamatory.

Goguen argues that Dial's statements cannot only be seen as an unactionable opinion.[90] Under Montana law, if a statement is not based on disclosed facts and creates a reasonable inference that the opinion is based on undisclosed defamatory facts, it is not afforded constitutional protection.[91] Because protection of Dial's statements relies on what

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[78] *Id.* at 119.
[79] Goguen's Combined Response and Cross-Appeal Brief, *supra* note 1, at 31.
[80] *Id.* at 32.
[81] *Id.*
[82] 611 P.2d 613 (Mont. 1980).
[83] Goguen's Combined Response and Cross-Appeal Brief, *supra* note 1, at 32 (quoting *Gallagher*, 611 P.2d at 618).
[84] *Id.* at 36.
[85] Notice of Appeal Ex. B, *supra* note 5, at 19.
[86] Goguen's Combined Response and Cross-Appeal Brief, *supra* note 1, at 37 (quoting Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990)).
[87] *Id.* at 38 (quoting Lussy v. Davidson, 683 P.2d 915, 916 (Mont. 1984)).
[88] *Id.*
[89] *Id.*
[90] *Id.* at 39.
[91] Hale v. City of Billings, Police Dept., 986 P.2d 413, 419 (Mont. 1999).

"reasonable inference" can be drawn from them, it is a question for the jury.[92]

C. Dial's Argument

Dial argues that statements of opinion are not actionable as defamation.[93] There are two types of opinion statements: those stemming from assumed or stated facts and those based on implied, undisclosed facts.[94] Opinions based on disclosed facts can only be punished if the disclosed facts are false and demeaning.[95] Here, Dial's statement did not express false or demeaning facts. Rather, his statement was an opinion expressing his dislike of Goguen.[96]

An implication from a statement may become the basis for a defamation claim, but only if a speaker's opinion would cause a reasonable listener "to understand that the opinion is based on the speaker's knowledge of undisclosed facts."[97] Dial asserts that his statement is hyperbolic language that leaves the impression that his statement is not an assertion of fact.[98]

IV. ANALYSIS

This appeal raises three major issues: (1) whether Montana or New York law applies, (2) whether the Post Article is privileged under Montana or New York law, (3) and whether Dial should be dismissed from the suit.

A. Does Montana Law or New York Law Apply?

Since *Phillips v. General Motors Corporation*,[99] the Montana Supreme Court has applied the Restatement's "most significant relationship" approach when determining the applicable law for tort claims.[100] In *Phillips*, the owner of a Chevrolet Pickup truck and his family were in a fatal car accident in Kansas.[101] At the time of the accident, the family was domiciled in Montana. The only surviving family member of the crash was Samuel Bryd. His legal guardian, Alvin Phillips, filed a lawsuit against General Motors claiming negligence and strict liability. The Montana Supreme Court applied the Restatement's most significant relationship test. Under this test, the local law of the place of injury applies unless another state has a more significant relationship.[102] To determine what state other than the state of injury has the most significant relationship, the contacts under Section 145(2)[103] must be determined in

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[92] Goguen's Combined Response and Cross-Appeal Brief, *supra* note 1, at 40.
[93] Dial Cross-Appellee's Response Brief at 10, *Goguen v. NYP Holdings* (Mont. Feb. 2, 2023) (No. DA 22-0512) available at https://juddocumentservice.mt.gov/getDocByCTrackId?DocId=424020.
[94] *Id.* (quoting Herring Networks, Inc. v. Maddow, 8 F.4th 1148, 1159 (9th Cir. 2021)).
[95] *Id.*
[96] *Id.* at 10.
[97] *Id.*
[98] *Id.* at 11.
[99] 995 P.2d 1002 (Mont. 2000).
[100] *Id.* at 1007.
[101] *Id.* at 1005.
[102] *Id.* at 1014.
[103] RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(2):
(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,

relation to the principles in Section 6(2).[104] Additionally, the Montana Supreme Court determined that the public policies of all interested states must be considered when determining what state has the most significant relationship.[105] In *Phillips*, after applying these principles, the Montana Supreme Court held that Montana law applied.

Montana courts have routinely applied this analysis when determining which state has the most significant relationship when there is a conflict between state laws. For instance, in *Buckles v. BH Flowtest, Inc.*,[106] a Montana Resident, Zachary Buckles, died while working in North Dakota for his employer, Black Gold Testing.[107] Buckles' employer asked the court to apply North Dakota law, but the Montana Supreme Court disagreed, finding that Montana had the most significant relationship to the lawsuit and therefore, Montana law applied.[108]

In the current case, Appellants argue that New York has the most significant interest in governing the conduct of its publishers and therefore, New York's privilege should apply.[109] The Restatement factors apply to the relevant contacts in this case. The first factor, where the injury occurred, is contested because the Post published the article online, meaning the place of injury is not straightforward. In *Miller v. Gizmodo*,[110] the defendants published an article online describing allegations from court documents about the plaintiff.[111] When discussing where the injury occurred, the United States District Court for the Southern District of Florida found that the plaintiff was not injured within Florida because the article in controversy was published online and accessible worldwide. The Court relied on the Restatement Section 145 comment E, which states that "there may be little reason in logic or persuasiveness to say that one state rather than another is the place of injury, or when, such as in the case of multistate defamation, injury has occurred in two or more states."[112] In this case, the Post Article was posted online and could have caused injury in multiple states, as Goguen claims.[113] If the Montana Supreme Court is to follow the Restatement Section 145 comment E, neither Montana nor New York was the place of injury.

(c) the domicile, residence, nationality, place of incorporation, and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

[104] RESTATEMENT (SECOND) CONFLICT OF LAWS § 6(2):
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of a particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability, and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

[105] *Phillips*, 995 P.2d at 1014.
[106] 476 P.3d 422 (Mont. 2020).
[107] *Id.* at 423.
[108] *Id.* at 428.
[109] Appellants' Opening Brief, *supra* note 2, at 16.
[110] Miller v. Gizmodo Media Grp., No. 18-24227-CIV (S.D. Fla. Apr. 24, 2019), 2019 U.S. Dist. LEXIS 69428.
[111] *Id.* at *6–7.
[112] *Id.* at *14.
[113] Appellants' Opening Brief, *supra* note 2, at 16–17.

The second factor is the place where the conduct causing the injury occurred. Here, the place where the conduct that caused the injury is New York. The Post Article was written and published primarily in New York.

The third factor is the domicile or place of incorporation of the parties. Here, Goguen is domiciled and resides in Montana while the defendant's place of incorporation is Delaware with its principal place of business in New York. Because Goguen is domiciled in Montana, this factor weighs heavily in his favor. The Montana Supreme Court has routinely applied Montana law when the plaintiff is a Montana resident.[114] For instance, in *Phillips*, *Buckles*, and *Mitchell*, the plaintiffs were Montana residents and the Montana Supreme Court applied Montana law.

The fourth factor is the place where the relationship between the parties is centered. Here, there is no definitive place where the parties have a relationship because the New York Post and Goguen did not interact prior to the Post Article's publication. However, much of the content within the Post Article arises from lawsuits based on events that occurred in Montana.

The majority of the Restatement Section 6(2) factors require analyzing the relevant policies of the interested forums. The Montana Supreme Court has determined that the underlying purpose of its libel laws is to "furnish a means of redress for defamation" and that "[i]n a libel action the interest protected is that of reputation."[115] Montana courts must balance this interest with that of the Montana Constitution, which states that "[e]very person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty."[116]

The purpose of New York's fair report privilege is to ensure the press receives "broad protection."[117] Additionally, the Second Circuit has previously determined that New York has "strong policy interests in regulating the conduct of its citizens and its media."[118]

When analyzing the respective interests and policies of Montana and New York regarding defamation and fair report privilege in conjunction with the contacts between the parties, Montana has the most significant interest. Because of the Montana Supreme Court's trend of determining that Montana has the most significant interest when the plaintiff is a Montana resident, it is likely that the Court will apply Montana law.

Additionally, Section 150 of the Restatement discusses multistate defamation torts: "When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the

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[114] See *Phillips*, 995 P.2d at 1015; *Buckles*, 476 P.3d at 428; Mitchell v. State Farm Ins. Co., 68 P.3d 703, 709 (Mont. 2003).
[115] *Lewis*, 512 P.2d at 705.
[116] MONT. CONST. art. II, § 7.
[117] Cummings v. City of N.Y., No. 19-cv-7723 (CM)(OTW) (S.D.N.Y. Feb. 24, 2020), 2020 U.S. Dist. LEXIS 31572 (quoting Idema v. Wager, 120 F. Supp. 2d 361, 365 (S.D.N.Y. 2000)).
[118] Kinsey v. New York Times Co., 991 F.3d 171, 177 (2nd Cir. 2021).

matter complained of was published in that state."[119] The Montana Supreme Court has clarified that "[e]very sale or delivery of [a] defamatory article is a distinct publication."[120] Accordingly, it is clear that the Post Article has been published in Montana as it has been delivered to Montana readers through the internet. Therefore, Section 150 furthers the argument that Montana has the most significant relationship to the controversy.

1. Is the Post Article Privileged Under Montana Law?

Article II, Section 7 of the Montana Constitution states that "[i]n all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts."[121] However, under Montana law, when there is no dispute about the content of the proceedings reported in the publication, the Court determines privilege as a matter of law.[122] Additionally, the Supreme Court of Montana has affirmed lower courts that have granted 12(b)(6) motions to dismiss as a matter of law in defamation cases.[123]

In this case, if there is no dispute about the content of the proceedings on which the Post Article is based, then the court can rule on its privilege as a matter of law. And, if the Post Article is privileged, then Goguen cannot prevail on his claim for defamation.[124] Pursuant to Montana Code Annotated Section 27-1-804(4), a "fair and true report without malice of a judicial" proceeding is privileged. Although at times hyperbolic, the Post Article did accurately report on the allegations in the Baptise and Marshall lawsuits against Goguen. Additionally, the Post Article was likely not written with malice. The district court determined that because Appellants did not investigate the statements in the Post Article, Goguen sufficiently alleged that the Post acted with malice.[125] Although not explicitly stated, the district court likely reasoned that because the Post did not investigate the statements in the Post Article, they acted with a disregard of the probability of injury to Goguen.[126] However, the Montana Supreme Court has not supported such a conclusion. In *Lence*, the author of the article in controversy admitted that she did not investigate the statements about the civil suit upon which she based her report.[127] The Court did not find that the reporter had a duty to investigate statements in a judicial proceeding.[128] The statements in this case are more demeaning and consequential than the statements made within *Lence*, and this may persuade the Supreme Court to conclude that news agencies have a duty to investigate judicial proceedings that are extraordinarily damaging or outlandish. However, such a policy would go against the

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[119] RESTATEMENT (SECOND) ON CONFLICT OF LAWS, § 150(2).
[120] *Lewis*, 512 P.2d at 705.
[121] MONT. CONST. art. II, § 7.
[122] *Lence*, 853 P.2d at 1237; *see also Hale*, 986 P.2d at 421.
[123] *See* Cherewick v. Gildehaus, 2014 WL 861712, *2 (Mar. 4, 2014) (where the Montana Supreme Court affirmed a district court granting a 12(b)(6) Motion to Dismiss in a defamation claim); *see also* Smith v. Roope, 469 P.3d 166 (Table) (Mont. 2020).
[124] *See* McLeod v. State, 206 P.3d 956, 962 (Mont. 2009).
[125] District Court Order, *supra* note 5, at 17–18.
[126] *Id.*
[127] *Lence*, 853 P.2d at 1233.
[128] *Id.* at 1238.

policy interest of informing the public on judicial proceedings, which most jurisdictions have supported. Ultimately, the district court likely erred in determining that the Post Article was published with malice, and the Post Article is likely privileged under Montana law.

B. Is the Post Article Privileged Under New York Law?

If the Montana Supreme Court were to apply New York's fair report privilege, the Post Article would also be privileged. New York courts have determined that application of New York Civil Rights Law Section 74 is a question of law.[129] New York Civil Rights Law Section 74 states that a "civil action cannot be maintained against any person, firm, or corporation, for the publication of a fair and true report of any judicial proceeding."[130] The Second Circuit has ruled on this law and determined that it is an absolute privilege; allegations of malice cannot defeat the privilege.[131] However, this privilege does not apply if the publication makes it impossible for the ordinary reader to determine if the report comes from a judicial proceeding.[132] Furthermore, New York courts have clarified that for this privilege to apply, the statement must be an accurate description of the claims made within the judicial proceedings.[133] Here, the Post Article did publish a fair and true report on the Baptise and Marshall lawsuits. Goguen can argue that the Post Article did not verbatim quote the Marshall and Baptise complaints, but under New York law, a publisher's statement is accorded "some degree of liberality."[134] Therefore, under New York law, the Post Article would likely be privileged.

C. Did the District Court Err When it Granted Dial's Motion to Dismiss?

Under Montana law, when determining whether a publication is defamatory, the court must decide whether the statements are capable of having a defamatory meaning, even if the statements are false.[135] In *McConkey v. Flathead Electric Co-op.*,[136] the Montana Supreme Court determined that, for defamatory statements to be actionable, the court can presume as a matter of law that they will "disgrace and degrade [the plaintiff], or cause him to be shunned and avoided."[137] In *Milkovich v. Lorain Journal Co.*,[138] the United States Supreme Court held that the First Amendment protects statements that cannot "reasonably [be] interpreted as stating actual facts about an individual."[139] The Montana Supreme Court has further interpreted this ruling: "if an opinion is not based on

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[129] Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co., 49 N.Y.2d 63, 65–68 (1979).
[130] N.Y. CIV. RIGHTS LAW § 74.
[131] Kinsey v. New York Times Co., 991 F.3d 171, 176 (2d Cir. 2021).
[132] *Id.*
[133] Mulder v. Donaldson, Lufkin & Jenrette, 161 Misc. 2d 698, 705 (N.Y. Sup. Ct. 1994), aff'd, 208 A.D.2d 301 (N.Y. App. Div. 1995).
[134] *Holy Spirit Ass'n*, 49 N.Y.2d at 68.
[135] Chapman v. Maxwell, 322 P.3d 1029, 1033 (Mont. 2014).
[136] 125 P.3d 1121, 1130 (Mont. 2005) (quoting Wainman v. Bowler, 576 P.2d 268, 271 (Mont. 1978)).
[137] *Id.*
[138] 497 U.S. 1, 20 (1990) (quoting Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988)).
[139] *Id.*

disclosed facts, and as a result creates the reasonable inference that the opinion is based on undisclosed defamatory facts, such an opinion is not afforded constitutional protection."[140]

Taking into consideration the context in which Dial's comments appear, as well as the statements themselves, his statement in the Post Article would likely not lead a reasonable reader to believe that his statement is based on undisclosed facts. In the Post Article, there are numerous allegations of sexual misconduct, Goguen's wealth, and being in control of law enforcement; however, many of these allegations arise from the prior judicial proceedings. Furthermore, the article clarifies that Dial is the "retired Whitefish police chief" demonstrating that his comments may not be entirely accurate as he no longer has a close relationship with Whitefish's police force and Goguen. Because his statement does not express false or demeaning facts, but rather, Dial's own opinion and ostensibly does not cause a reasonable reader to believe the opinion is based on knowledge of undisclosed facts, Dial's statement is likely a protected opinion.

V. CONCLUSION

The issue of which law to apply in multistate defamation cases stemming from an article that was published online is a new issue for this Court. In an increasingly online world, determining what law applies to torts arising out of online activity is a crucial procedural issue of incredible importance for Montana courts.

[140] *Hale*, 986 P.2d at 419.