IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0512

MICHAEL L. GOGUEN,
Plaintiff, Appellee, and
Cross-Appellant,

v.

NYP HOLDINGS, INC.; ISABEL VINCENT,
Defendants and Appellants,

WILLIAM DIAL,
Defendant and Cross-Appellee

Appeal From Montana Eleventh Judicial District
Flathead County, DV-21-1382(A)
Honorable Amy Eddy

APPELLEE/CROSS-APPELLANT'S COMBINED RESPONSE BRIEF AND BRIEF IN SUPPORT OF CROSS APPEAL

APPEARANCES:

Reid J. Perkins
WORDEN THANE P.C.
321 W. Broadway St., Ste. 300
Missoula, Montana 59802-4142
(406) 721-3400
rperkins@wordenthane.com

Bruce E. Van Dalsem (*pro hac vice*)
Robert M. Schwartz (*pro hac vice*)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 S. Figueroa St., 10th Floor
Los Angeles, California 90017-2543
(213) 443-3000
brucevandalsem@quinnemanuel.com
robertschwartz@quinnemanuel.com

Diane M. Doolittle (*pro hac vice*)
QUINN EMANUEL URQUHART & SULLIVAN, LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, California 94065-2139
dianedoolittle@quinnemanuel.com

Attorneys for Plaintiff/Appellee/Cross-Appellant Michael L. Goguen

Matt J. Kelly
Amy C. McNulty
TARLOW & STONECIPHER, PLLC
1705 West College
Bozeman, Montana 59715-4913
(406) 586-9714
mkelly@lawmt.com
amcnulty@lawmt.com

Laura R. Handman *(pro hac vice)*
Adam L. Rich *(pro hac vice)*
DAVIS WRIGHT TREMAINE LLP
1251 Avenue of the Americas, 21st Floor
New York, New York 10020-1104
(212) 489-8230
laurahandman@dwt.com
adamrich@dwt.com

Attorneys for Defendants/Appellants NYP Holdings, Inc. and Isabel Vincent

Peter Michael Meloy
MELOY LAW FIRM
P.O. Box 1241
Helena, Montana 59624
mike@meloylawfirm.com

Attorneys for Defendant/Cross-Appellee William Dial

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutory Authorities

Rules and Regulations

Treatises

Additional Authorities

COUNTER-STATEMENT OF THE ISSUE ON APPEAL

Did the District Court properly deny the *Post*'s motion to dismiss the Complaint?

STATEMENT OF THE ISSUE ON CROSS-APPEAL

Did the District Court err in granting Defendant Dial's motion to dismiss on the ground that no "defamatory meaning" could be ascribed to statements Dial made about his work as Whitefish's police chief and whether Plaintiff Goguen had engaged in non-consensual sex with women, including those under the age of 18, in which Dial compared Goguen to serial rapists Jeffrey Epstein and Harvey Weinstein, claimed that "a lot of people in this community … [are] afraid of [Goguen]," and warned that Goguen "has to be stopped"?

STATEMENT OF THE CASE

Michael Goguen sued the *New York Post*, its reporter Isabel Vincent (together, "the *Post*"), and William Dial for defamation. The District Court denied the *Post*'s Rule 12(b)(6) motion to dismiss, and that ruling should be affirmed. But it granted Dial's Rule 12(b)(6) motion to dismiss, and that ruling should be reversed.

Goguen is a Montana resident who has attracted scam artists who have used lawsuits to harass him and his family. At every turn, Montana and California courts have rejected the allegations against Goguen through judgments and

injunctions in his favor and even guilty pleas and prison sentences for his accusers. Courts have separated fact from fiction to vindicate Goguen's name.

But those are not the facts that the *Post* and Dial wanted to convey. So they made up their own. Under the guise of "reporting" on judicial proceedings, the *Post* trotted out allegations that had been disproven at trial and in sworn guilty pleas, and spun them to convince readers that the debunked allegations were *true*. The *Post* also lobbed a new bombshell, defamatory accusation by Chief Dial that Goguen was a serial rapist "a la Harvey Weinstein and [Jeffrey] Epstein" and a menace to the community who "has to be stopped."

This appeal asks whether a Montana citizen may proceed beyond the pleading stage on a claim that these unfair, untrue, and malicious statements defamed him. The answer has to be yes. Any "fair report" privilege, which the *Post* invokes, requires the report to be ***fair*** and ***true***. Neither can be established as a matter of law here, where the *Post* mischaracterized years of court proceedings that are outside the Complaint. Those proceedings cannot yet be compared to the Article to measure its fairness or truth. Were they in the record, they would prove the opposite. In any case, to be privileged, Montana law further requires that such reporting be made without malice. That cannot be established at this stage. Rule 9(b) allows malice to "be alleged generally." Goguen's complaint alleged malice both generally and in detail.

Nor does Montana law enable Chief Dial to claim that it was merely his "opinion" that Goguen had forced women to have sex with him, when he compared Goguen to two of the most notorious rapists in American history. Nor did Dial stop there. He said that "a lot of people in this community" are "afraid of" Goguen. Dial also asserted that the conduct is ongoing, claiming that Goguen "has to be stopped." Montana law holds that such "opinions," especially when offered by law enforcement officers, must be reasonably interpreted as implying that the speaker knows and is asserting undisclosed defamatory facts.

The District Court correctly ruled that the *Post*'s privilege defense must be decided under Montana law. Montana choice-of-law principles require applying one state's law to all elements and defenses of a tort. The court was equally correct to rule that questions of fairness, truth, and malice—indispensable elements of the fair-reporting privilege—cannot be decided without a full evidentiary record.

Only by granting Chief Dial a free pass did the court err. Most notably, it failed to recognize that Dial could not be inoculated against liability based on how the *Post* re-packaged his accusations within its story.

This Court should affirm the District Court's ruling as to the *Post*, reverse its ruling as to Dial, and afford Goguen his day in court to defend and restore his reputation against Defendants' noxious smears.

STATEMENT OF FACTS

A. Goguen Survives Years Of Shakedowns and Sham Litigation

Michael Goguen is an engineer, philanthropist, and investor. (Defendants' Supplemental Appendix ("SA") Ex. 1 ¶ 14.) He has lived with his family in Flathead County for nearly 20 years. (*Id*.) He runs local businesses and non-profit organizations dedicated to educational, environmental, public safety, and law enforcement causes. (*Id*.)

Since Goguen's early investing success, he has been beset by extortionists who have blackmailed him, lied to authorities and the media about him, and filed false and defamatory lawsuits against him. (*Id.* ¶¶ 26-31.) The principal sources of the false allegations in the *Post* Article—Amber Baptiste, Bryan Nash, Matthew Marshall, and Bill Dial—are four such bad actors. Each has been discredited and subjected to administrative, civil, or criminal penalties for their efforts to harass Goguen. (*Id.* ¶¶ 26-31, 37.)

Baptiste filed a false complaint against Goguen in 2016 laden with grotesque and defamatory allegations of abuse. (*Id.* ¶ 28.) After trial, the California Superior Court ruled against Baptiste on each of her claims and awarded Goguen more than $14 million on his counterclaims for fraud, extortion, and other torts. (*Id.* ¶ 28; *Post* Op. Br. Appendix ("Order") at 3.) The court's 40-page Statement of Decision found Baptiste had falsified evidence and harassed Goguen and his family. (SA-1

¶ 28; Plaintiff's Supplemental Appendix ("PSA") Ex. 1, internal Ex. B at 29-32, 34.) The judgment included an order restraining Baptiste from repeating the "false and defamatory" accusations she had leveled at Goguen—the same ones the *Post* parroted in the Article. (SA-1 ¶ 28; PSA-1, internal Ex. C.)

Another source the *Post* Article cited is Nash, a convicted criminal who has harassed Goguen and his family, resulting in a federal indictment on 11 felony counts, including interstate stalking and extortion. (SA-1 ¶¶ 7, 29.) In 2020, Nash pleaded guilty to blackmail and was sentenced. (*Id.*)

Marshall, whose lies the *Post* featured most prominently, is serving a six-year prison sentence after pleading guilty in 2021 to crimes he committed against Goguen, including wire fraud, money laundering, and tax evasion. (*Id.* ¶ 30; Order at 4 n.3.) He owes Goguen more than $2 million in restitution. (Order at 4 n.3.) Marshall filed a RICO lawsuit to extort and discredit Goguen, which he had to replead months before the *Post* ran the Article and which was dismissed for its failure to state a claim. (SA-1 ¶ 31; Order at 4 n.2; *Post* Opening Br. ("Br.") at 5 n.3.) Marshall's guilty plea, which contradicts the key allegations of his complaint, was a matter of public record before the *Post* published the Article.

B. The *Post* Conducts A Defamatory Interview With Chief Dial

Bill Dial was the Whitefish Police Chief until his resignation in August 2021. (SA-1 ¶¶ 1, 9-11.) Dial's departure came just weeks before the Montana

Public Safety Officer Standards and Training Bureau issued formal allegations against him for conspiring with Marshall and providing false information to the City of Whitefish, the Montana Division of Criminal Investigation, and the FBI. (*Id.* ¶ 11.) Those actions followed years of Dial's attempts to pursue Goguen for a non-existent crime that Marshall had fabricated. (*Id.* ¶¶ 9-11.) Dial and Marshall's attempts to coerce a woman into accusing Goguen of assault never succeeded. (*Id.*)

As Dial acknowledged, the *Post* "interviewed [him] in connection with the piece." (PSA-2 at 1.) And it is undisputed that when Dial was discussing his investigations into Goguen he said: "This man has to be stopped…. He's a billionaire a la Harvey Weinstein and Epstein. There's a lot of people in this community who know what he's about and they're afraid of him." (SA-2 at 2.)

C. The *Post* Publishes Its Attack On Goguen

On November 20, 2021, the *Post* published an Article about Goguen titled "Tech billionaire allegedly kept spreadsheet of 5,000 women he had sex with." (SA-1 ¶¶ 1, 32; SA-2-3.) The Article recounted, misleadingly and inaccurately, many of the allegations that Baptiste, Nash, Marshall, and Dial had leveled against Goguen. But it failed to tell readers how judicial proceedings had exposed these allegations as lies. The Article did not mention that there had been a trial in the Baptiste case that found for Goguen on all issues, did not explain that Goguen had

shown Marshall's lawsuit not to state a claim, and did not disclose that Marshall had contradicted many of his allegations when he pleaded guilty to multiple crimes. The Article's selective, distorted recitation of the proceedings it supposedly reports implied that the horrific (and false) allegations against Goguen are true, and that the extortionists behind them have failed only because they were unjustly "taken down"—suggesting additional nefarious conduct by Goguen. (SA-3 at 3.)

The Article also manufactured its own, new allegations, found nowhere even in the discredited pleadings that the *Post* trumpeted. It reported that Goguen had "transformed" Whitefish "into his private fiefdom" and "a dark banana republic"; that members of the Flathead County Sheriff's Department were "on Goguen's payroll"; that multiple women "tried to complain to police about Goguen's alleged sexual assaults"; that one woman "told Whitefish police that Goguen had sexually assaulted her" and "later recanted her story"; and that Goguen was the subject of "a federal indictment." (SA-1 ¶¶ 6, 33.) Not one of these attacks comes from any judicial proceeding. Each is a fictional creation of the *Post*.

The Article concluded by invoking Dial's status as a "local authority"—even though he was then retired, disgraced, and charged with misconduct—to equate Goguen with Harvey Weinstein and Jeffrey Epstein, two reviled sexual abusers. (*Id.* ¶¶ 10-11, 34-35.) The *Post* thus portrayed Dial, who the Article noted had

"investigat[ed]" Goguen while Dial was Chief of Police, as having undisclosed knowledge of Goguen's actions that would lead readers to credit his false statement as fact, not opinion. (*Id.* ¶ 37.)

The *Post* further demonstrated its intentional or reckless disregard for the truth and high probability of injury by flouting journalistic standards and denying Goguen a fair opportunity to comment. Although nothing in the Article was "breaking news" or time-sensitive, and although the *Post* had taken its time in reporting, it was not until one day before the *Post*'s arbitrarily-selected publication "deadline" that the *Post* told Goguen about the story. It did so via a single email seeking comment, sent to a single attorney, who did not receive the message until the next day. (*Id.* ¶¶ 43-50.) Rather than contact Goguen or any other representative, much less hold the story to provide a fair opportunity for comment, the *Post* published its article less than 24 hours later, adorned with the false statement that multiple "requests for comment from Goguen's lawyer were not returned Friday." (*Id.*)

D. The District Court Properly Denies The *Post*'s Motion to Dismiss And Erroneously Grants Chief Dial's

Immediately upon publication, Goguen informed the *Post* of its Article's errors and defamatory statements. He requested a retraction. (*Id.* ¶ 3.) When the

Post refused, Goguen filed a single-count Complaint for defamation under Mont. Code Ann. § 27-1-801.

Dial and the *Post* moved to dismiss. The *Post* argued that its Article was a "fair and true report" under New York law (PSA-3 at 8-22), and that Goguen had failed to plead malice. (*Id.* at 22-25.) Dial argued that his comments were non-actionable opinions. (PSA-2 at 7-24.)

The District Court denied the *Post*'s motion. Applying Montana law "to all aspects of this case," the District Court "agree[d] with Goguen that the 16 identified allegations" recognized as false in the Complaint "are capable of maintaining a defamatory meaning." (Order at 17.) From there, the court asked "whether the statements are nonetheless protected under the fair report privilege," a statutory privilege "[a]nchored in the public's constitutional right to know, right to inspect public documents, including complaints filed in court, and right to the public sittings of courts." (*Id.*)

The court concluded that three of the challenged statements could not be entitled to privilege because, as a matter of law, they did not fairly and truly report on judicial proceedings. (*Id.*) It then ruled that, although the remainder bore some connection to judicial proceedings, dismissal was inappropriate because, although "***preliminarily*** entitled to a qualified privilege," "[t]he *Post* is ***ultimately*** only entitled to protection of that privilege if it was a 'fair and true report without

malice.'" (*Id.* at 17-18.) Applying *Sible v. Lee Enterprises*, 224 Mont. 163, 729 P.2d 1271 (1986), and *Cox v. Lee Enterprises*, 222 Mont. 527, 723 P.2d 238 (1986), the court concluded that "[w]hether the *Post* Article was fair, true and published without malice are questions of fact for the jury to decide," and that the District Court would "make the legal determination as to whether the fair report privilege applies" post-verdict. (*Id.*)

The Order granted Dial's motion. It characterized his comments as "generally opinion statements," and recognized that they could still constitute defamation if they might "'reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct.'" (*Id.* at 18-19 (quoting Restatement (Second) of Torts § 566, cmt. c).) In concluding that they could not be so understood, the court considered three factors: (1) "the broad context in which the statements were published," which exclusively discussed aspects of the *Post*'s Article; (2) "the specific context and contents of the statements," which acknowledged that Dial "was well-known in the community, [and] known to previously be involved in investigations about Goguen and others," and (3) "whether the statements are sufficiently factual to be susceptible to being proven true or false," which the court concluded, without explanation, they were not. (*Id.* at 19.)

Goguen and the *Post* separately moved to certify portions of the Order as final pursuant to Rule 54(b). The District Court granted both motions and this Court accepted the matter for review.

STANDARD OF REVIEW

This Court reviews a ruling on a motion to dismiss *de novo*. *Turner v. City of Dillon*, 2020 MT 83, ¶ 7, 399 Mont. 481, 461 P.3d 122. It "construe[s] the complaint in the light most favorable to the plaintiff." *Marshall v. Safeco Ins. Co. of Ill.*, 2018 MT 45, ¶ 6, 390 Mont. 358, 413 P.3d 828. Dismissal for failure to state a claim is inappropriate "unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id.*

APPEAL ARGUMENT

Summary of Argument

The District Court correctly concluded that Montana law applies to this defamation claim, brought by a Montana citizen, in a Montana court, under a Montana statute, for an injury he suffered in Montana from an article concerning his role in his Montana community and judicial proceedings in California and Montana. Case law from this Court and New York's high court, basic choice-of-law principles, and Mont. Code Ann. § 27-1-801 *et seq.* foreclose the *Post*'s bid to project into Montana the laws of New York, where the *Post* has chosen to place its

headquarters. Contrary to the *Post*'s premise, New York cannot license the *Post* to defame citizens in other states.

The District Court was also correct that there are triable issues. The *Post* fails to connect many of its defamatory statements to any court proceeding. And under both Montana and New York law, whether any of the rest of the *Post*'s editorializing about disproven pleadings constitutes a "fair and true report" poses a question for the jury.

A jury trial is also required to decide whether the *Post* published its hit piece with malice. The defamation pleading standard does not "require the additional pleading of the supportive fact" beyond a general allegation of malice. *Gallagher v. Johnson*, 188 Mont. 117, 126, 611 P.2d 613, 618 (1980); *see also* Mont. R. Civ. P. 9(b). The *Post* misplaces reliance solely on this Court's analysis of a *negligence* action, as distinct from a defamation action and the law governing it.

The *Post* should also face liability for republishing Chief Dial's defamatory accusations. The dismissal of these comments is discussed in the cross-appeal but implicates the *Post*, which republished the attack and does not contend it is privileged. If the ruling as to these statements is reversed (as it should be), then the *Post* remains a defendant for that reason alone.

I. THE DISTRICT COURT PROPERLY DENIED THE *POST*'S MOTION TO DISMISS

A. Montana Law Applies To All Aspects Of This Case

Montana applies "the 'most significant relationship' approach to determine the applicable substantive law for issues of tort." *Phillips v. Gen. Motors Corp.*, 2000 MT 55, ¶ 23, 298 Mont. 438, 995 P.2d 1002. There is no dispute that Montana law presumptively applies. (*See* Br. at 13 (acknowledging "presumption in favor of the law of the state where the plaintiff is injured").) The *Post* has never even argued that whether the Article is capable of defamatory meaning should be decided under New York law. (*See id.* at 14 n.9.)

The *Post* nonetheless asks this Court to reverse the choice-of-law ruling below, claiming incorrectly that the District Court reached that conclusion "without any analysis." (Br. at 2.) In fact, the District Court "adopt[ed] Goguen's analysis such that Montana law applies to all aspects of this case" (Order at 14), invoking Goguen's extensive briefing below.[1] The District Court was correct.

[1] The *Post* faults the District Court (Br. at 2) for referencing the *Post*'s position at oral argument that, while "we've spent a lot of time – both sides – on this interesting choice of law question … the Court need not even reach that." (PSA-4 at 39:11-16.) As the District Court made clear in its Order, however, it did not rely on this position to resolve any issue. Instead, "[t]o the extent the choice of law question need[ed] to be addressed, the Court adopt[ed] Goguen's analysis such that Montana law applies to all aspects of this case." (Order at 14.)

1. Montana Choice-Of-Law Rules Call For The Application Of One State's Law To All Issues Of A Single Tort

The Court should reject the *Post*'s effort to split the overlapping issues of defamatory conduct and privilege, a principle known as *depecage*. This Court has never applied *depecage*. Instead, it has consistently applied just one state's tort law for all purposes. In this case, that state must be Montana.

Phillips illustrates the folly of the *Post*'s argument. There, this Court considered which state's law applied to claims brought by the representative of a Montana family against the Michigan company that manufactured the car the family had bought in North Carolina and accused of causing their deadly wreck in Kansas. *Phillips*, ¶¶ 7-10. That case presented myriad issues, including whether negligence or strict liability was the relevant test, whether regulatory compliance was a defense, whether a plaintiff's comparative negligence diminished his damages, whether any caps for noneconomic loss applied, and what punitive damages were available. *See id.* ¶¶ 39-66. But *Phillips* did not analyze the choice-of-law applicable to each issue separately. It conducted a single analysis, comparing the application of Montana law wholesale to Kansas law wholesale, and held that Montana choice of law requires "applying Montana product liability, defenses, damages, and wrongful death statutes to the facts of this case." *Id.* ¶ 73.

The *Post*'s reliance on *Phillips* is thus fatal to its request for *depecage*. *Phillips* recognized that states' interests in different legal "issues" may vary. Products liability policies reflect an interest in regulating conduct at the site of manufacture, comparative negligence policies reflect an interest in regulating conduct at the site of the accident, and caps on damages reflect an interest in insurance markets. *See id.* ¶¶ 39-66. But *Phillips* did not, for example, apply Michigan law to defective design claims, Kansas law to comparative negligence provisions, and Montana law to punitive damages. Rather, this Court held "that issues such as the tortious character of conduct, available defenses, contributory fault, and damages are all to be determined by applying the most significant relationship rule of § 145," and then conducted a single analysis to conclude, as to all issues in the case, that "the laws [plural] of Montana apply." *Id.* ¶¶ 30, 76.

Similarly, in *Buckles v. BH Flowtest, Inc.*, 2020 MT 291, ¶ 34, 402 Mont. 145, 476 P.3d 422, this Court again applied a unitary analysis to hold that one state's substantive law governed all questions of tort liability, defenses, and damages. Tort law is not divisible in the way the *Post* claims.

The *Post*'s brief does not identify any decision by any Montana court applying *depecage*. The closest it comes is *Otto v. Newfield Exploration Co.*, No. CV 15-66-BLG-SPW, 2016 WL 9461791 (D. Mont. July 26, 2016), an unpublished federal case that expressly ***declined*** to decide "if Montana law permits

depecage" because doing so would "create 'a smorgasbord approach which inures only to the benefit of the party picking and choosing.'" *Id.* at *7 (quoting *Johnson v. Cont'l Airlines Corp.*, 964 F.2d 1059, 1064 (10th Cir. 1992)). This Court's choice-of-law precedent avoids that chaos.

Even the *Post*'s out-of-state cases (Br. at 13-14, 17-20) scarcely reference or apply *depecage*. *Kinsey v. N.Y. Times Co.*, 991 F.3d 171, 178 (2d Cir. 2021), *Nix v. ESPN, Inc.*, 772 F. App'x 807, 812 (11th Cir. 2019) (per curiam), *Jacob v. Lorenz*, No. 21 CIV. 6807, 2022 WL 4096701, at *7 (S.D.N.Y. Sept. 7, 2022), *Miller v. Gizmodo Media Grp., LLC*, No. 18-24227-CIV, 2019 WL 1790248, at *6 (S.D. Fla. Apr. 24, 2019), *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1093 (S.D.N.Y. 1984), and *Edmiston v. Time, Inc.*, 257 F. Supp. 22, 24 (S.D.N.Y. 1966), each conducted a single choice-of-law analysis and applied *one* state's substantive defamation law *alongside* the privilege issue. The Seventh Circuit took a similar approach in *Wilkow v. Forbes, Inc.*, 241 F.3d 552, 555 (7th Cir. 2001), resolving the appeal based on the state's substantive law defining defamation, without reaching any privilege or choice-of-law issues. *ACT I, LLC v. Davis*, 60 P.3d 145, 149 (Wyo. 2002), is even further afield, as it was about contracts and did not raise a conflict between two states' laws. None of these foreign-jurisdiction decisions applied one state's law of defamation while applying a different state's law of privilege.

2. Goguen's Defamation Claim Is Controlled By Montana Law, And The *Post* Has Waived Any Contrary Argument

To affirm the ruling below that "Montana law applies to all aspects of this case," this Court need go no further than ruling that *depecage* is not appropriate here. (Order at 14.) On appeal, "[t]he *Post* takes no position on which state's law controls the underlying defamation claim." (Br. at 14 n.9.) It thus waives any ability to address the choice-of-law question presented. *See Richardson v. Indem. Ins. Co. of N. Am.*, 2019 MT 160, ¶ 23 n.2, 396 Mont. 325, 444 P.3d 1019 ("[W]e will not address an argument raised for the first time in a reply brief.") (citing M. R. App. P. 12(3)).

If further analysis were necessary, the Restatement (Second) of Conflict of Laws leaves no doubt that Montana law controls. The "most significant relationship" test for "Multistate Defamation" is Section 150(2): "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 matter complained of was published in that state." Goguen is domiciled in Montana and the *Post*'s Article was published and directed here. (SA-1 ¶¶ 20, 24-25.) The *Post*'s brief does not cite, much less distinguish, this test.

The more general principles of Section 145(2) of the Restatement likewise compel Montana law. "The place where the injury occurred" is Montana, where Goguen lives and works. (*Id.* ¶¶ 14, 20, 64.) "The place where the conduct causing the injury occurred" is primarily Montana, where the *Post* conducted research and publicized its attack; the Complaint does not allege any conduct that occurred in New York. (*Id.* ¶¶ 2-3, 24-25.) Goguen's "domicile" and "residence" is Montana, while the *Post*'s "place of incorporation" is Delaware and its principal "place of business" is New York. (*Id.* ¶¶ 14-16.) The relationship between the parties arises solely out of this tort that accrued in Montana. (*Id.* ¶¶ 2, 20-25, 37, 64.) Each factor favors Montana law or is neutral; none favors New York.

Restatement Section 6(2) similarly points to Montana law. Its factors emphasize the policy interests of each interested state and of the area of law. All point to applying Montana law to defamation claims brought by Montana residents in Montana for injuries suffered in Montana because "the underlying purpose of libel laws is to furnish a means of redress for defamation." *Lewis v. Reader's Digest Ass'n, Inc.*, 162 Mont. 401, 406, 512 P.2d 702, 705 (1973). The *Post* asserts that its interests as a tortfeasor outweigh its victims' interest (Br. at 17-18), but that ignores Montana policy and the policy of defamation law: "In a libel action the interest protected is that of reputation." *Lewis*, 162 Mont. at 406, 512 P.2d at 705.

Numerous decisions have rejected media companies' attempts to apply New York law to defamation claims by victims in other states, even where those plaintiffs sued in New York. *See, e.g.*, *Machleder v. Diaz*, 801 F.2d 46, 52 (2d Cir. 1986) (applying New Jersey law, even though "the subject broadcast emanated in Manhattan, and the day-to-day professional activities of CBS are conducted in New York"); *Condit v. Dunne*, 317 F. Supp. 2d 344, 354 (S.D.N.Y. 2004) (applying California law, even though "most of the statements emanated in New York"); *La Luna Enters., Inc. v. CBS Corp.*, 74 F. Supp. 2d 384, 389 (S.D.N.Y. 1999) (applying Florida law, even though "New York has an interest in protecting the free speech rights of publishers within its borders"); *Woods Servs., Inc. v. Disability Advocates, Inc.*, No. CV 18-296, 2018 WL 2134016, at *5 (E.D. Pa. May 9, 2018) (applying Pennsylvania law because "defamation laws are undergirded by the state's interest in protecting the individual reputations of its citizens").

Under this Court's precedent, the choice-of-law question is singular: Which state's law controls all of the liability, privilege, and damage determinations in this defamation case? There is no doubt that the District Court was right to rule "that Montana law applies to all aspects of this case." (Order at 14.) Because the *Post* does not even address that bottom-line question, much less provide a persuasive basis to swap New York law for Montana's, this Court should affirm.

3. Montana's Defamation Statute Prohibits Applying A New York Privilege Statute To A Montana Defamation Claim

The text and structure of Mont. Code Ann. § 27-1-801 *et seq.*, further confirm the ruling below. The Montana legislature created a unified statutory scheme regarding defamation and privileges. Section 27-1-802 defines libel as "a false ***and unprivileged*** publication … 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." (Emphasis added). Section 27-1-804 goes on to define, as its title explains, "What communications are privileged." "In construing a statute the whole Act must be read together." *Corwin v. Bieswanger*, 126 Mont. 337, 339, 251 P.2d 252, 253 (1952). Here, the Legislature did not out-source the definition of "privilege" to other states. Instead, it defined defamation as being "unprivileged" in one section and defined what it means to be "privileged" in another. The *Post* has failed to identify any Montana decision defining whether a publication is "unprivileged" by reference to any statute outside Section 27-1-804.

4. Even If *Depecage* Were A Part Of Montana's Choice-Of-Law Analysis, Montana Law Governs Any Privilege Here

This Court has rejected arguments like the one the *Post* now makes (Br. at 16-20), which seek to elevate tortfeasors' interests in "certainty" over their victims' interest in redress.

Lewis is controlling. It concerned which state's law applies to a defamation claim stemming from an article that a New York-based publisher wrote about a Montana resident. *Lewis*, 162 Mont. at 402-03, 512 P.2d at 703. In selecting a "multi state publication rule," under which Montana law controlled, rather than a "single state publication rule" that called for New York law, *Lewis* reasoned that, because "the underlying purpose of libel laws is to furnish a means of redress for defamation" and because "generally in cases of multi-state libel, the greatest harm to a person's reputation will occur in the state of domicile," the "better rule" was "to apply the law of the plaintiff's domicile." *Id.* at 406-07, 512 P.2d at 704-05.

The *Post*'s invocation of "certainty and predictability," and its purported desire to avoid "a patchwork quilt of different standards" (Br. at 17-18), is upside-down. ***Goguen's*** interest in predictable redress for harm to his standing in this community is paramount. After all, the *Post* has every opportunity to choose what stories to publish and can prepare itself to navigate any "patchwork" of laws to which it thereby subjects itself. Although victims of defamation can choose where they live, they have no ability to control from whence unfair, unfounded attacks may spring.

Lewis's policy rationale refutes the *Post*'s argument for invoking New York law. *Lewis* rejected the very same purported "'chilling effect' upon the First Amendment's freedom of the press" that the *Post* now echoes. *Lewis*, 162 Mont.

at 408, 512 P.2d at 706; (*See, e.g.*, Br. at 17-18.). *Lewis* saw no evidence that applying Montana law would "inhibit the zeal with which national periodicals disseminate their ideas," and recognized the need to balance "any protection given the press … against a citizen's right to protect his reputation and good name in the community in which he resides." 162 Mont. at 408, 512 P.2d at 706. It also noted that applying Montana law "would prevent the publishing company from choosing as a place of printing a state with favorable libel laws." *Id.* at 407, 512 P.2d at 705. The *Post* should not be allowed to drape itself in purported immunity from its defamation victims in Montana (or elsewhere) merely by choosing New York for its headquarters.

Phillips carried forward *Lewis*'s rejection of subjecting defendants only to their chosen state's rules. In *Phillips*, a products liability case, the Court held that it is "inherently unfair" to allow "the manufacturing state [to] enjoy the benefits associated with liability laws which favored manufacturers in order to attract and retain manufacturing firms and encourage business within its borders while placing the costs of its legislative decision, in the form of less tort compensation, on the shoulders of nonresidents injured by its manufacturers' products." ¶ 51; *see also id.* (allowing defendants' home states to govern liability "tend[s] to leave victims under compensated"). It would be equally "unfair" to allow media companies to

locate in New York and invoke that state's immunity to deprive defamed Montana residents of their day in a Montana court.

It is not just unfair but illogical to apply another state's fair-report privilege to this Article. New York's highest court has held that "the reason upon which the claim of [a fair and true report] privilege … must rest" is to inform the community of judicial activity: "The public generally may not attend the sittings of the courts, but they may be kept informed by the press of what goes on in the courts." *Williams v. Williams*, 23 N.Y.2d 592, 597 (1969). The Montana public, not the New York public, has the most significant stake in Montana court proceedings.

5. New York Law Similarly Prohibits Applying New York's Fair Report Privilege Outside Of New York

New York law refutes the *Post*'s notion that N.Y. Civ. Rights Law § 74 somehow extends to a Montana case. In *Murray v. Brancato*, 290 N.Y. 52, 59 (1943), New York's highest court considered Section 74's predecessor and held: "In no event could the statute confer immunity for publication outside of the state." It did so for the same reasons applicable here: Sister states should decide for themselves whether a finding of malice forfeits any privilege, even if New York's Legislature has decided otherwise for purposes of New York law. *See id.*

The *Post* does not cite any New York state court applying New York's fair-reporting privilege to materials published in another state. Although some federal

courts have done so anomalously (and incorrectly), "*Murray* … remains the state law on the books." *Zappin v. Cooper*, No. 16 CIV. 5985, 2018 WL 708369, at *14 (S.D.N.Y. Feb. 2, 2018), *aff'd*, 768 F. App'x 51 (2d Cir. 2019). That binding statement of New York law prohibits applying Section 74 here.

B. Under Either State's Law, The *Post*'s Assertion Of A Privilege Cannot Be Decided On The Pleadings

The District Court also correctly ruled that, in light of the Complaint's allegations, "whether the *Post* Article was fair, true and published without malice are questions of fact for the jury to decide." (Order at 18.) This is true under both Montana and New York law. The *Post* lacks any good argument for why this fact-intensive question should have been resolved in its favor at the pleading stage.

1. The *Post*'s Article Contains Statements That Do Not Report On Judicial Proceedings

Although the *Post* faults the District Court for dividing the Article into statements that are and are not based on underlying litigation, the *Post* urged that approach below. (PSA-3 at 15-22.) In fact, this Court has instructed that "[t]he words used may not be segregated and construed alone. The entire printed statements must be viewed by the court as a stranger might look at it." *Wainman v. Bowler*, 176 Mont. 91, 95, 576 P.2d 268, 270 (1978). It follows that *all* of the Article should go to the jury, just as the District Court ruled. (Order at 17-18.)

Even if each statement were considered in isolation, however, if anything the District Court *over*-counted the number of attacks that might arguably qualify as a report of underlying litigation. The *Post* largely rests its arguments upon a "chart" attached to its brief. Tellingly, the *Post* therein admits that no judicial document alleges that Goguen "transformed [Whitefish] into his private fiefdom: a dark banana republic where he allegedly controls local law enforcement." (SA-16 at 2.) The same absence of any judicial document is apparent for the *Post*'s allegations that multiple women attempted to report Goguen to the police; that members of the Flathead County Sherriff's Department "were on Goguen's payroll"; and that Goguen was the subject of "a federal indictment." (*Id.* at 10-11, 16.) Each statement is "capable of maintaining a defamatory meaning, such that the Court may 'presume as a matter of law that they will tend to disgrace and degrade [the plaintiff] or cause him to be shunned and avoided.'" (Order at 17 (quoting *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶ 45, 330 Mont. 48, 125 P.3d 1121).)

2. Under Montana Law, The Jury Decides Whether The *Post*'s Article Is Fair And True

The *Post* fails to identify any sound legal basis (Br. at 26-30) for the District Court to resolve factual disputes without the benefit of any discovery, testimony, or evidence. Because the *Post* confined its arguments below to why certain

statements were purportedly "fair and true reports" under New York law, it waived any argument under Montana law. (*See* PSA-3 at 13-22 (exclusively making arguments "pursuant to Section 74").); *see also Kellogg v. Dearborn Info. Servs., LLC*, 2005 MT 188, ¶ 15, 328 Mont. 83, 119 P.3d 20 ("A party may not raise new arguments or change his legal theory on appeal because it is unfair to fault the trial court on an issue that it was never given an opportunity to consider."). Regardless, Montana law precludes the *Post*'s arguments.

Given that the *Post* summarized only parts of the record in the cases it purported to characterize, this is ***not*** a case "where there is no dispute about the content of the proceedings on which the publication is based." *Lence v. Hagadone Inv. Co.*, 258 Mont. 433, 443, 853 P.2d 1230, 1237 (1993). Instead, the Article here purports to report on years of litigation in California that culminated in a trial and judgment for Goguen, years of criminal charges brought in Montana for crimes victimizing Goguen, and civil pleadings in Montana that were dismissed as a matter of law. (SA-1 ¶¶ 5, 7, 26-31.) The Article purports to report on *all* of these judicial proceedings: the "three-year legal battle" with Baptiste; when "federal authorities indicted Bryan Nash"; the "federal charges against Marshall"; and Marshall's "civil suit filed against Goguen in February and amended in September." (SA-3 at 2-3, 5-13.)

But the underlying judicial proceedings are not in the record. They are not part of the pleading, which attached only the final orders from the Baptiste litigation and a transcript of Marshall's guilty plea. (SA-5; PSA-5-7); *see Plouffe v. State*, 2003 MT 62, ¶ 13, 314 Mont. 413, 66 P.3d 316 (on a motion to dismiss, "the District Court's examination is limited to the content of the complaint"). Nor are the materials included even in the *Post*'s improper attempts to supplement the pleadings. (SA-7-8.) The District Court could not have decided whether the *Post* fairly summarized judicial proceedings without the records from those proceedings.

As such, this case differs categorically from *Lence*, which arose on summary judgment, after discovery, and concerned articles about a professional standards complaint and a building-code violation. *Lence*, 258 Mont. at 437-38, 853 P.2d at 1232-34. The *only* errors alleged were misidentifying the tribunal in which the complaint was filed and the entity that owned the building. *Id.* at 442, 853 P.2d at 1236. In such a case, the court could properly determine on summary judgment whether descriptions of two discrete complaints were accurate. But it does not follow that, in a case like this, the Court could dismiss based on a defendant's self-serving characterizations of judicial proceedings that are not in the record.

Further, the content of the *Post*'s Article makes its claim of a fair and true report dubious, at best. While purporting to summarize a series of cases that

vindicated Goguen at every turn, the *Post* nonetheless painted Goguen as having "transformed [Whitefish] into his private fiefdom: a dark banana republic where he allegedly controls local law enforcement." (SA-3 at 2.) While the *Post* argues (Br. at 10) that its claim that Goguen's accusers have been "taken down" should be read as undermining their credibility, a reasonable jury could easily conclude that the *Post* was suggesting further misconduct by Goguen and a reason to believe those accuser's stories. *See, e.g.*, Lia Eustachewich, *Man's Nearly $1 Million Super Bowl Scam Took Down His Own Mom*, NEW YORK POST (February 1, 2019), https://nypost.com/2019/02/01/man-vanishes-amid-claims-he-swindled-nearly-1m-in-super-bowl-scam. Atop that, the *Post* embroidered further, referencing police reports against Goguen and a "payroll" of Sheriff's Department employees that the *Post* did not trace to any pleading. And the *Post* omitted context that would make clear why the accusations against Goguen should not be credited.

Notably, the *Post*'s one-sided account was not written, as many articles are, at the start of a dispute and without the benefit of context that emerges only later. *Cf. Cox*, 222 Mont. at 530, 723 P.2d at 240 (applying fair and true report privilege to article about complaint before litigation ensued). Instead, the Article came years after the Baptiste litigation had concluded with the rejection of her claims and an order prohibiting her from repeating the accusations the *Post* republished. (SA-1 ¶ 28.) It came after federal indictments and guilty pleas that directly contradicted

lies the *Post* credited. (*Id.* ¶¶ 29-30.) And it came after Marshall had filed one frivolous complaint against Goguen and then responded to its inadequacies with another churning through hundreds of pages of ludicrous, contradictory allegations that were dismissed for failing to state a claim. (*Id.* ¶¶ 29-31.) The *Post* will be hard pressed to defend its choice to pluck out and amplify the most vile allegations against Goguen as "fairly" and "truly" reporting on proceedings that conclusively refute those charges. For present purposes, however, the *Post* cannot claim, as a matter of law, that its Article reflects a "fair and true report without malice of a judicial … proceeding," just from the face of the Complaint. Mont. Code Ann. § 27-1-804(4).

This Court has established that a jury should decide whether a challenged statement fairly and truly reports on the underlying proceeding. In *Cox*, this Court held that the privilege ***could*** apply to reports of initial complaints, but ***could not*** be decided as a matter of law, because liability "will be decided by a jury in federal court. Fairness, truth and malice will be at the controversy's core." 222 Mont. at 530, 723 P.2d at 240. The *Post* suggests (Br. at 28) that this holding—one sentence saying the case was for the jury, and the next defining what that jury would decide—should not be read together, and that perhaps the Court meant to take "fairness, truth and malice" away from the jury. But *Cox*'s plain text refutes that reading. So does Article II, Section 7 of the Montana Constitution, which

"places the heart of any determination regarding defamatory libel directly within the province of the jury, subject only to determinations envisioned by the phrase 'under the direction of the court.'" *Lee v. Traxler*, 2016 MT 292, ¶ 15, 385 Mont. 354, 384 P.3d 82.

Contrary to the *Post*'s assertion, the District Court did not rule that ***no*** libel case can ever be decided on the pleadings. For that reason, the unpublished decisions that the Post cites (Br. at 28) as doing so (mostly on grounds other than fair and true report privilege) have no bearing. What matters is that ***this*** Complaint adequately alleges that the attacks in ***this*** Article "leav[e] readers with an unfair and inaccurate impression of the proceedings that is the opposite of the truth," because "the *Post* knowingly ignored publicly-available court judgments, orders, guilty pleas, and contrary sworn testimony that rebutted every material assertion in the *Post*'s article." (SA-1 ¶¶ 32, 5.) Just as in *Cox*, whether the Article is defamatory "will be decided by a jury." 222 Mont. at 530, 723 P.2d at 240.

3. Even Under New York Law, Whether The *Post's* Article Is A "Fair And True Report" Poses A Jury Question

Although inapplicable, New York law on the fair report privilege would similarly preclude dismissal. Although the *Post* claims (Br. at 21) that N.Y. Civ. Rights Law § 74 is satisfied if its Article is a "substantially accurate" reflection of judicial proceedings, it omits the key caveat: A "report cannot be said to be

'substantially accurate,' … if it would have a 'different effect' on the mind of the recipient than the 'actual truth.' In other words, Section 74 does not afford protection if the specific statements at issue, considered in their context, suggest more serious conduct than that actually suggested in the official proceeding." *Karedes v. Ackerley Grp., Inc.*, 423 F.3d 107, 119 (2d Cir. 2005). For the reasons discussed in the preceding section, that exception applies here: The Article suggests, at a minimum, a far greater likelihood that Goguen actually committed heinous acts than any reader would take away from "the official proceedings," which have always vindicated Goguen and undercut the accusations the *Post* credited.

Contrary to the *Post*'s suggestion that simply invoking Section 74 eliminates liability at the pleading stage, courts applying that statute recognize that cases like this must proceed through discovery and trial. In *Karedes*, for example, the Second Circuit reversed dismissal on the pleadings because "a reasonable jury could conclude that the article suggested more serious conduct than that actually suggested in the official proceeding." *Id.* Other cases have similarly denied motions to dismiss. *See, e.g.*, *Bilinski v. Keith Haring Found., Inc.*, 96 F. Supp. 3d 35, 49 (S.D.N.Y. 2015); *Edward B. Beharry & Co. v. Bedessee Imports Inc.*, No. 09-CV-0077 DLI JMA, 2010 WL 1223590, at *7 (E.D.N.Y. Mar. 23, 2010); *Pisani v. Staten Island Univ. Hosp.*, 440 F. Supp. 2d 168, 178 (E.D.N.Y. 2006);

Wenz v. Becker, 948 F. Supp. 319, 324 (S.D.N.Y. 1996) (whether "omitting certain facts … which were included in [the] answer and counterclaims" from a report "renders [the] statement an unfair or untrue report" is a "material issue of fact").

These decisions recognize, as the District Court did here, that where the contents of the proceedings and the impression left by the challenged statement are contested, whether an account "was fair [and] true … are questions of fact for the jury to decide." (Order at 18.) Even under New York law, the *Post*'s motion was properly denied.

C. The Complaint More Than Adequately Alleges Malice

Even if the fairness and truth of the *Post*'s Article could be assessed on a motion to dismiss, affirmance is still required because Montana excludes statements made with "malice" from the privilege. Mont. Code Ann. § 27-1-804(4). The *Post* is incorrect to challenge the District Court's ruling that Goguen adequately and "specifically alleged the Defendants acted with 'malicious intent.'" (Order at 18.) The Complaint does that expressly, alleging that "Defendants published their False and Defamatory Statements … with actual malice, that is, with actual knowledge of falsity or a reckless disregard for truth or falsity." (SA-1 ¶ 56.)

Nothing more is required. Montana Rule of Civil Procedure 9(b) states that malice "may be alleged generally." This standard applies to defamation claims,

and satisfies both Montana law and constitutional requirements. As this Court held in *Gallagher*, all that a defamation complaint need allege is that the defendant "knew that said words were untrue and … acted with specific malice." 188 Mont. at 126, 611 P.2d at 618. This is "sufficient to state the actual malice standard required by [Montana law and] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)," neither of which "require[s] the additional pleading of the supportive fact." *Id.* Paragraphs 40, 50, and 56 of the Complaint fully support the District Court's ruling.

The *Post* ignores *Gallagher*. As to Rule 9(b), the *Post* offers only a sentence that fails to address the provision's terms. (*See* Br. at 37.) The *Post* argues as though the Complaint needed to plead all further facts showing malice. But the District Court was correct that the facts proving or disproving malice will properly emerge through discovery and trial.

Regardless, the Complaint goes beyond what is required. It specifically alleges how the *Post* acted with actual knowledge of falsity or a reckless disregard for truth or falsity and with conscious or intentional disregard or indifference to the high probability its Article would injure Goguen. The Complaint alleges that (at best) the *Post* neglected to undertake a reasonable investigation before parroting the debunked statements of convicted blackmailers, felons, and fabulists. (*See, e.g.*, SA-1 ¶¶ 40-51.) That constitutes malice: Where "a newspaper has facts that

indicate material is highly suspect … it does[] have a duty to investigate before publishing," and otherwise cannot invoke a privilege that requires an absence of malice. *Sible*, 224 Mont. at 168, 729 P.2d at 1274. Given that the *Post* was reporting on years-old allegations, it had a duty to investigate and reflect whether and how they had been resolved. The Complaint also alleges that the *Post* acted maliciously by failing to afford Goguen any real opportunity to comment. (SA-1 ¶¶ 40-50.)

The *Post* argues that *Sible*'s holding was overruled in *Lence* (Br. at 27-28), but that is wrong: The cited portion of *Lence* holds only that a newspaper does not owe a duty to perform such investigations that, if breached, gives rise to a negligence claim. 258 Mont. at 446, 853 P.2d at 1238 (evaluating "Lence's negligence claim … independently of his libel claim"). It leaves undisturbed *Sible*'s holding that failing to investigate in the face of facts raising suspicions disables any privilege that requires acting "without malice," per Montana law dating back more than a century. *See Kelly v. Ind. Publ'g Co.*, 45 Mont. 127, 138-39, 122 P. 735, 739 (1912) (imposing liability for repeating law enforcement accusations where "the least investigation by the reporter would have disclosed to him" that those accusations were "wholly untrue"); *see also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) ("In a case … involving the reporting of a third party's allegations, recklessness may be found

where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.").

Contrary to the *Post*'s suggestion (Br. at 30), the District Court did not hold that Montana law *always* "requires the media to independently investigate allegations made in a judicial proceeding before reporting on them." It merely acknowledged the well-settled rule that not reasonably investigating in the face of "facts that indicate material is highly suspect" (Order at 18 (quoting *Sible*, 24 Mont. at 167-168, 729 P.2d at 1274)) can amount to purposeful avoidance of the truth and constitute malice. Even if Goguen were required to allege malice in detail, the Complaint does so.

D. The *Post* Is Liable For Republishing Dial's Defamatory Statements

As set forth below in the cross-appeal, Dial's statements were defamatory. Assuming this Court agrees, the *Post* is equally liable for republishing them. *Kelly*, 45 Mont. at 138-39, 122 P. at 739; *see also Lence*, 258 Mont. at 449, 853 P.2d at 1240 (Trieweiler, J., concurring in part) ("[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.") (quoting Restatement (Second) of Torts § 578).

"Every repetition of the defamation is a publication in itself, even though the repeater states the source, or resorts to the customary newspaper evasion 'it is

alleged.'" W. Keeton et al., Prosser and Keeton on the Law of Torts § 113, at 799 (5th ed. 1984). "Liability for repetition of a libel may not be avoided by the mere expedient of adding the truthful caveat that one heard the statement from somebody else." *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (quoting 1 R. Smolla, Law of Defamation § 4:87, at 4–136.3 to –136.4 (2d ed. 2001)).

Because Dial's statements were defamatory, so, too, is the *Post*'s republication of them.

CROSS-APPEAL ARGUMENT

Summary of Argument

The District Court erred by granting retired Police Chief Bill Dial wholesale immunity for defaming Goguen. Montana law does not grant law enforcement officials impunity to proclaim, without factual basis, that Goguen "***has to be stopped***," because "***he's a billionaire a la Harvey Weinstein and Epstein. There's a lot of people in this community who know what he's about and they're afraid of him***." Those statements are suffused with factual content, and they are defamatory. To the extent Dial might try to characterize them as pure opinion, they at the very least present triable issues because a reasonable reader would understand a law enforcement officer, who had investigated Goguen, to know undisclosed facts underlying his pointed attacks.

In reaching a contrary conclusion and taking this issue from the jury, the District Court ignored most of Chief Dial's statement, credited him with "context" that did not exist when he spoke and cannot be considered in evaluating his liability, and erroneously failed to heed this Court's decision in *Hale v. City of Billings*, 1999 MT 213, 295 Mont. 495, 986 P.2d 413.

II. THE DISTRICT COURT ERRED IN GRANTING DIAL'S MOTION TO DISMISS

A. Some Of Dial's Statements Are Not Opinions

The District Court first erred by ruling that all of Dial's comments "are generally opinion statements." (Order at 18.) Starting at the end, the last sentence of Dial's statement expressly asserts facts. Whether "[t]here's a lot of people in this community who know what he's about and they're afraid of him," as Dial claimed, "is sufficiently factual to be susceptible of being proved true or false," and therefore cannot be legally protected as pure opinion. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). There either are or are not "a lot of people" in Whitefish who are afraid of Goguen, so a "determination of whether [Dial] lied in this instance can be made on a core of objective evidence." *Id.* The District Court erred by lumping this lie in with other statements that Dial tried to characterize as opinions.

B. The District Court Erred By Considering "Tone" From An Article Published After Dial's Defamation Was Complete

The District Court also erred by considering the context of the *Post*'s Article to decide whether Dial's statement was capable of a defamatory meaning. Under Montana law, whether a statement is defamatory "must be determined at the time the statement was made," and later evidence is "not admissible." *Lussy v. Davidson*, 210 Mont. 353, 355, 683 P.2d 915, 916 (1984). By any reading of the Complaint, Dial made his statement *before* the Article *re*published it. A defamation claim is complete, and accrues, once initial publication occurs. *Montana Supreme Ct. Comm'n on Unauthorized Prac. of L. v. O'Neil*, 2006 MT 284, ¶ 21, 334 Mont. 311, 147 P.3d 200. "Publication" does not necessarily mean printing: It means simply that "the defamation must have been communicated to someone other than the person defamed." *Lewis*, 162 Mont. at 406, 512 P.2d at 705. When Dial made his comments to the *Post*'s reporter, Dial's tort was complete, and it could not be rendered any less tortious by how the *Post* thereafter packaged his words. *See, e.g.*, *Flowers*, 310 F.3d at 1126 ("[A] cause of action for defamation accrues immediately upon the occurrence of the tortious act.").

Therefore, the District Court erred by using the context of the *Post*'s Article to dismiss Dial as a defendant. Setting aside that legal error, however, the factual context of the Article makes Dial's statement more, not less, defamatory. As the

Order recognized, the Article "is formatted more as a news article than an opinion piece," and "discloses numerous facts that [if true] would support Dial's assertion." (Order at 19.) This makes it ***more*** likely that a reader would understand Dial's statements as conveying factual assertions about Goguen. Likewise, that these "statements were made by the longtime Chief of Police who was well-known in the community, [and] known to previously be involved in investigations about Goguen and others" (*id.*), makes it even ***more*** likely that a reader would understand Dial's strident warnings to have an undisclosed basis in fact, quite different from the musings of some casual, sideline observer. *See Hale*, ¶ 28.

C. A Reasonable Factfinder Could Conclude That Dial's Statements Imply A Falsifiable Assertion Of Undisclosed Facts

The District Court erred also by ruling, as a matter of law, that Dial's statements could ***only*** be understood as non-actionable opinion. In Montana, "if an opinion is not based on 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." *Hale*, ¶ 27. Similarly, if a statement can "reasonably be interpreted as stating actual facts about an individual," it loses any protection as "opinion." *Roots v. Montana Human Rights Network*, 275 Mont. 408, 412, 913 P.2d 638, 640 (1996) (citing *Milkovich*, 497 U.S. at 18-20). In other words, the protection claimed by Dial turns on what

"reasonable inference" can be drawn from his statement and how it can "reasonably be interpreted"—classic jury questions. "Where the language is susceptible of two meanings, one defamatory and the other not, it is for the jury to determine in what sense it was used." *Manley v. Harer*, 73 Mont. 253, 257, 235 P. 757, 759 (1925).

Hale illustrates why Dial's statements cannot be dismissed on the pleadings, before Goguen has taken any discovery into exactly when, how, and why they were made. In *Hale*, this Court reversed summary judgment for a defamation defendant where the lower court erroneously held that statements made by law enforcement about a citizen "were constitutionally protected opinion." ¶ 22. The Court held that "it is error for a court to create an 'artificial dichotomy' by distinguishing statements of opinion from statements of fact, and thereby granting unqualified immunity to the former." *Id.* ¶ 27. Even statements couched in the language of an opinion can still "create[] the reasonable inference that the opinion is based on undisclosed defamatory facts," and thus be actionable. *Id.*

Comparing the two cases underscores why Dial's statements cannot be dismissed on the pleadings. In *Hale*, this Court held that a law enforcement agency's labeling someone a "most-wanted" "fugitive" who "may be armed and dangerous," without further explanation, "implied a knowledge of facts far beyond those disclosed which may have reasonably led viewers to conclude that Hale *was*

most wanted, *was* a fugitive, and *was* possibly armed and dangerous." ¶ 28. The same holds here. A top law enforcement officer implicitly relies on undisclosed facts when he proclaims publicly that someone he investigated is "a billionaire a la Harvey Weinstein and Epstein" who scares "a lot of people in this community" and who "has to be stopped;" reasonable listeners may predictably understand from Dial's warnings that Goguen *is* a wealthy serial rapist who *does* pose a danger to his community *until* he is "stopped." Indeed, unless listeners reflexively dismiss accusations by a former Police Chief as baseless ravings divorced from any factual investigation, Dial's statements about Goguen ***necessarily*** imply that Dial knows facts justifying them. "Such statements of opinion can cause damage, pursuant to § 27–1–802, MCA, and are actionable, under *Roots*," not least because they "can reasonably be interpreted as stating actual facts about an individual." *Hale*, ¶ 28.

To equate someone to a reviled criminal is actionable defamation. Calling a politician "a Sandusky waiting to be exposed" is defamatory because the comparison to Jerry Sandusky uses "a figurative term for a child molester" and the phrase "'waiting to be exposed,' implies the existence of undisclosed facts." *Hadley v. Doe*, 12 N.E.3d 75, 91 (Ill. Ct. App. 2014). Even more obliquely, calling a professor the "Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data" is defamatory because "a jury could find" that the statement "implied that [the professor's] manipulation of data was

seriously deviant for a scientist," and thus "demean [the professor's] scientific reputation and lower his standing." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1243 (D.C. 2016). It is no less true here than it was in *Mann* that "comparisons to specific individuals from which defamatory factual allegations can be inferred" are actionable. *Id.* at 1248.

The District Court's single paragraph of analysis on this point was untethered to the facts or to Montana law on defamatory opinion. Moreover, to the extent the District Court drew inferences from contested facts, it erred procedurally, as such inferences cannot be drawn against the plaintiff at the pleading stage. The parties very much dispute how a reasonable audience would weigh the fact that Dial's accusations "were made by the longtime Chief of Police who was well-known in the community, known to previously be involved in investigations about Goguen and others … and known to be retired under murky circumstances." (Order at 19.) Had the District Court "construe[d] the complaint in a light most favorable to the plaintiff," as it must at this stage, it would have recognized that the relevant circumstances could lead Dial's audience to infer that he was stating facts about Goguen. Because "[t]his Court will affirm the dismissal only if it finds that the plaintiff is not entitled to relief under any set of facts that could be proven in support of the claims," *Giese v. Blixrud*, 2012 MT 170, ¶ 10,

365 Mont. 548, 285 P.3d 458, it should reverse and permit Goguen to develop facts illuminating exactly how Dial's statements should be interpreted.

CONCLUSION

The Court should affirm the denial of the *Post*'s motion, reverse the grant of Dial's motion, and remand this case for discovery and trial.

Dated: February 14, 2023

WORDEN THANE, P.C.

By */s/ Reid J. Perkins*
Reid J. Perkins
Attorneys for Plaintiff/Appellee/Cross-Appellant Michael Goguen

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, M.R.App.P., I certify that this brief is double-spaced in 14 point Times New Roman, a proportionally-spaced font. The word count, excluding the table of contents, table of authorities, the certificate of service, and this certificate of compliance is 9,996 words, as calculated by Microsoft Word.

Dated: February 14, 2023 By */s/ Reid J. Perkins*
Reid J. Perkins

CERTIFICATE OF SERVICE

I, Reid J. Perkins, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee and Cross to the following on 02-14-2023:

Peter M. Meloy (Attorney)
2601 E. Broadway
2601 E. Broadway, P.O. Box 1241
Helena MT 59624
Representing: William Dial
Service Method: eService

Matt J. Kelly (Attorney)
1705 West College
Bozeman MT 59715
Representing: NYP Holdings, Inc., Isabel Vincent
Service Method: eService

Amy Claire McNulty (Attorney)
1705 West College Street
Bozeman MT 59715
Representing: NYP Holdings, Inc., Isabel Vincent
Service Method: eService

Elizabeth L. Griffing (Attorney)
PO Box 157
Helena MT 59624
Representing: Michael L. Goguen, Reporters Committee for Freedom of the Press
Service Method: eService

Electronically signed by Christina DiMuro on behalf of Reid J. Perkins
Dated: 02-14-2023