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

APPELLANTS NYP HOLDINGS, INC.'S AND ISABEL VINCENT'S COMBINED REPLY BRIEF AND RESPONSE TO CROSS APPEAL

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 4

I. PRIVILEGE SHOULD BE DECIDED AT THE PLEADING STAGE 4

II. NEW YORK LAW CONTROLS THE PRIVILEGE ISSUE 6

A. Montana Law Requires Discrete Analysis of the Privilege Issue 7

B. Plaintiff's Domicile Is Not Determinative 8

C. Section 27-1-804 Does Not Preclude Application of Section 74 9

D. New York Law Allows Application of Section 74 Outside New York 10

III. THE ARTICLE IS A FAIR AND TRUE REPORT 11

A. Every Statement in the Article Is a Substantially Accurate Report 11

B. The Article Did Not Omit Any Material Contextual Facts 13

IV. THE ARTICLE IS ALSO PRIVILEGED UNDER MONTANA LAW 15

RESPONSE TO GOGUEN'S CROSS APPEAL 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Adelson v. Harris,
973 F.Supp.2d 467 (S.D.N.Y. 2013), *aff'd*, 876 F.3d 413 (2d Cir. 2017) 6

Beary v. West Publ'g Co.,
763 F.2d 66 (2d Cir. 1985) 10

Bilinski v. Keith Haring Found., Inc.,
96 F.Supp.3d 35 (S.D.N.Y.) 14

Biro v. Condé Nast,
883 F.Supp.2d 441 (S.D.N.Y. 2012) 11

Blatt v. Pambakian,
No. 20-55084, 2021 U.S. App. LEXIS 29015 (9th Cir. 2021).....12, 18

Buckles v. BH Flowtest, Inc.,
2020 MT 291, 402 Mont. 145, 476 P.3d 422 8

Competitive Enterprise Institute v. Mann,
150 A.3d 1213 (D.C. 2016) 17

Cox Broad. Corp. v. Cohen,
420 U.S. 469 (1975).....6

Cox v. Lee Enters., Inc.,
222 Mont. 527, 723 P.2d 238 (1986).....1, 5, 6

Dalbotten v. C.R. Bard, Inc.,
No. 1:20-cv-00034-SPW, 2022 U.S. Dist LEXIS 131766 (D. Mont. July 22, 2022) 8

Davis v. Costa-Gavras,
580 F. Supp. 1082 (S.D.N.Y. 1984) 7

Edmiston v. Time, Inc.,
257 F. Supp. 22 (S.D.N.Y. 1966) 10

Edward B. Beharry & Co. v. Bedessee Imps., Inc.,
No. 09-CV-0077, 2010 U.S. Dist. LEXIS 27404 (E.D.N.Y. Mar. 23, 2010) 14

Griffin v. Opinion Publ'g Co.,
149 Mont. 502, 512, 138 P.2d 580, 586 (1943).....5

Gubarev v. BuzzFeed, Inc.,
340 F.Supp.3d 1304 (S.D. Fla. 2018).....10

Hale v. City of Billings,
1999 MT 213, 295 Mont. 495, 986 P.2d 413 17

Harte-Hanks Commc'ns, Inc. v. Connaughton,
491 U.S. 657 (1989).....16

Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co.,
399 N.E.2d 1185 (N.Y. 1979).....13

Jonas v. Hagadone Mont. Publ'g,
No. CV-13-30-M-DLC-JCL, 2013 U.S. Dist. LEXIS 201248 (D. Mont. Dec. 6, 2013).....12

Kahl v. Bureau of Nat'l Affairs, Inc.,
856 S.3d 106, 109 (D.C. Cir. 2017).....6

Karedes v. Ackerley Grp., Inc.,
423 F.3d 107, 119 (2d Cir. 2005).....14

Law Firm of Daniel P. Foster v. Turner Broad. Sys., Inc.,
844 F.2d 955 (2nd Cir. 1988) 11

Lence v. Hagadone Inv. Co.,
258 Mont. 433, 853 P.2d 1230 (1993).....*passim*

Lewis v. Reader's Digest Ass'n,
162 Mont. 401, 512 P.2d 702 (1973).....2, 8, 9

Lewis v. Reader's Digest Ass'n,
366 F. Supp. 154 (D. Mont. 1973).....9

Mar-Jac Poultry, Inc. v. Katz,
773 F.Supp.2d 103 (D.D.C. 2011).....10

Masson v. New Yorker Magazine, Inc.,
501 U.S. 496, 111 S.Ct. 2419 (1991).....12

Miller v. Gizmodo Med. Grp., LLC,
No. 18-24227-CIV, 2019 U.S. Dist. LEXIS 69428 (S.D. Fla. Apr. 24, 2019) 10, 11

Murray v. Brancato,
48 N.E.2d 257 (N.Y. 1943).....10

Nationwide Tarps, Inc. v. Midwest Canvas Corp.,
228 F.Supp.2d 202 (N.D.N.Y. 2002).....10

Nix v. ESPN, Inc.,
772 F. App'x 807 (11th Cir. 2019) (per curiam).....10, 12

Otto v. Newfield Exploration Co.,
CV-15-66-BLG-SPW, 2016 U.S. Dist. LEXIS 195741 (D. Mont. July 26, 2016) 8

Phillips v. Gen. Motors Corp.,
2000 MT 55, 298 Mont. 438, 995 P.2d 1002 .....7, 8

Pisani v. Staten Island Univ. Hosp.,
440 F.Supp.2d 168 (E.D.N.Y. 2006).....14

Rusk v. Roseen,
2022 MT 21N, 408 Mont. 539, 502 P.3d 176 5

Sagorin v. Sunrise Heating & Cooling, LLC,
2022 MT 58, 408 Mont. 119, 506 P.3d 1028 4

Sible v. Lee Enters.,
224 Mont. 163, 729 P.2d 1271 (1987).....15

Spreadbury v. Bitterroot Pub. Library,
CV-11-64-M-DWM-JCL, 2011 U.S. Dist. LEXIS 114270 (D. Mont. Oct. 4, 2011) 4

Wenz v. Becker,
948 F. Supp. 319 (S.D.N.Y. 1996) 14

Wilkow v. Forbes, Inc.,
2000 U.S. Dist. LEXIS 6587 (N.D. Ill. May 12, 2000).....10

Williams v. Pasma,
202 Mont. 66, 656 P. 2d 212 (1982).....9

Williams v. Williams,
246 N.E.2d 333 (N.Y. 1969).....11

Statutes

§ 27-1-804(4), MCA .....*passim*

N.Y. Civil Rights Law § 74 .....*passim*

Other Authorities

First and Fourteenth Amendments.....6

Mont. Const. Article II, § 7.....5, 6

Mont. Const. Article II, § 9.....1

Montana Rule of Civil Procedure 9(b) 16

Restatement (Second) Conflict of Laws 2, 7, 8, 9

PRELIMINARY STATEMENT

Unless reversed, the District Court's Order will substantially weaken the fair report privilege in Montana. Precluding courts from deciding the privilege as a matter of law, and requiring the media to independently investigate allegations asserted in court filings before reporting on them, will make timely reporting of court filings untenable and substantially impair the public's right to be informed of judicial proceedings.

It would also contravene long-standing precedents of this Court, including, *Lence v. Hagadone Inv. Co.*, 258 Mont. 433, 438, 443, 853 P.2d 1230, 1233, 1237 (1993), which held that the privilege presents a question of law and cannot be overcome by evidence that a newspaper defendant failed to investigate or failed to obtain comment from the target of the reported allegations. *See also Cox v. Lee Enters., Inc.*, 222 Mont. 527, 529-30, 723 P.2d 238, 240 (1986) ("A broad interpretation of the privilege is statutorily supported" by the constitutional "right to inspect public documents" and "be fully informed of their contents") (citing Mont. Const. art. II, § 9). Given the constitutional values at stake, it is no surprise that 15 major news organizations from throughout Montana and the United States filed an *amicus* brief ("Amicus Br."), joining the Post in warning of the dangerous chilling effect that will result unless the District Court's Order is reversed.

No set of facts could entitle Goguen to relief. ***First***, application of the privilege is properly decided at the pleading stage. Goguen contends that this is a jury question, but no reasonable juror could disagree that the Marshall and Baptiste pleadings include

each of the allegations reported by the Post, and Goguen fails to identify any other documents needed to decide this issue. Instead, he baselessly attacks the Post for "improperly" providing the underlying pleadings to the District Court. But Goguen cannot evade dismissal by simply omitting from his Complaint the judicial pleadings he incorporates by reference. Since there can be no genuine dispute as to what allegations are asserted in those underlying pleadings, the privilege question must be decided by the court as a matter of law. Were it otherwise, newspapers would face the unacceptable risk that even a fair and accurate report without malice could subject the publisher to protracted litigation (potentially against a deep-pocketed public figure like Goguen). The absurdity is well illustrated by this case, which, if it proceeds to trial would require a jury to not only decide the privilege question, but also the underlying truth of each allegation in the Marshall and Baptiste lawsuits that was reported by the Post. The fair report privilege was designed to prevent that result.

Second, Montana's choice of law rules require application of New York's fair report privilege, N.Y. Civil Rights Law § 74 ("Section 74"). Goguen disagrees, urging the Court to forego the required issue-based analysis and contending that the "controlling" case is *Lewis v. Reader's Digest Ass'n*, 162 Mont. 401, 512 P.2d 702 (1973), which dealt with personal jurisdiction, not choice of law, and was decided nearly 30 years before this Court adopted the Restatement (Second) Conflict of Laws (the "Restatement"). Other courts applying the Restatement test have correctly found that the law of a *defendant's* domicile governs the issue of immunity from suit, even if the

law of *plaintiff's* domicile governs the underlying claim. Tellingly, Goguen fails to cite a single case in which a court applied the forum state's fair report privilege to a nonresident publisher. Since New York has the most significant interest in governing the conduct of its publishers, New York's fair report privilege must apply.

Third, the Article is, as a matter of law, a fair and true report. Goguen argues that some of the challenged statements do not appear in the Marshall and Baptiste pleadings, but that is demonstrably untrue. *See* SA-16 (comparison chart). Though some of the challenged statements may not repeat the exact language used in the underlying pleadings, the privilege does not require the media to merely transcribe official proceedings. Literary license is permitted so long as the report remains substantially accurate, which the Post Article is as a matter of law. Goguen also accuses the Post of being unfair because the Article omits facts about Marshall's sentencing and the dismissal of Marshall's Amended Complaint, but that is misleading: The Article reported that Marshall pled guilty but he was sentenced nearly four months after the Article was published, and Marshall's Complaint was not dismissed until six months after the Article was published. Post Br. at 5 n.3. Since no reasonable juror could disagree that the Article is a fair and true report, it is absolutely privileged pursuant to N.Y. Civil Rights Law § 74 ("Section 74").

Fourth, the Article is also privileged under § 27-1-804(4), MCA, because—in addition to being both fair and true—Goguen's allegations of fault cannot as a matter of law give rise to malice. *Lence*, 258 Mont. at 438, 443, 853 P.2d at 1233, 1237 (failure

to investigate and failure to obtain comment do not overcome the privilege afforded by § 27-1-804(4)). Moreover, Goguen admits the Post sought comment but continues to ignore that within hours of Goguen tweeting a response to the Article, the Post published a follow-up story reporting fully on Goguen's tweet.

The District Court erred by not granting the Post's motion to dismiss.

ARGUMENT

I. PRIVILEGE SHOULD BE DECIDED AT THE PLEADING STAGE

Application of the fair report privilege presents a question of law properly decided at the pleading stage. *See, e.g.*, *Spreadbury v. Bitterroot Pub. Library*, CV-11-64-M-DWM-JCL, 2011 U.S. Dist. LEXIS 114270, at *4 (D. Mont. Oct. 4, 2011) (granting motion to dismiss pursuant to § 27-1-804(4)). *See also* Post Br. at 28. The Court need only compare the Article to the Marshall and Baptiste pleadings to find that the Article was a fair and true report without malice. All of the relevant documents were either attached to Goguen's Complaint or—in the case of the Marshall and Baptiste pleadings—incorporated by reference and properly before the District Court.[1] The record is complete on this narrow and determinative issue.

[1] *See* Compl. ¶¶ 7, 28, 31, 33, Exs. C, D, E, F. *See also Sagorin v. Sunrise Heating & Cooling, LLC*, 2022 MT 58, ¶ 10, 408 Mont. 119, 506 P.3d 1028 (on Rule 12(b)(6) motion, court can consider documents incorporated by reference into complaint).

Goguen states erroneously that it is "established" that only a jury can decide if the fair report privilege applies. Opp. at 29 (citing *Cox v. Lee Enters., Inc.*, 222 Mont. 527, 529-30, 723 P.2d 238, 240 (1986)). But the only holding of *Cox* was that reports of civil pleadings fall within the scope of § 27-1-804(4). *See* Post Br. at 28. Indeed, this Court has established that § 27-1-804(4) does *not* require fact finding by a jury and can be decided as a matter of law. *Lence*, 258 Mont. at 443, 853 P.2d at 1237 (affirming summary judgment). Goguen tries to distinguish *Lence*, arguing that there is some (unidentified) "dispute about the content" of the Marshall and Baptiste lawsuits. Opp. at 26. But while Goguen is free to dispute the substantive allegations made against him in those lawsuits, no set of facts could alter the fact that the challenged allegations were in fact made in publicly filed court documents and accurately reported by the Post. *See* SA-16.

Also meritless is Goguen's contention that Montana's Constitution precludes courts from deciding libel claims at the pleading stage. Opp. at 29 (citing Mont. Const. Art. II, § 7). This Court has made clear that "the function of the court and jury is not greatly different in the trial of libel from what it is in other cases," and "it is for the court and not the jury to pass upon demurrers to the complaint." *Griffin v. Opinion Publ'g Co.*, 149 Mont. 502, 512, 138 P.2d 580, 586 (1943). *See* Post Br. at 27; *Rusk v. Roseen*, 2022 MT 21N, 408 Mont. 539, 502 P.3d 176 (affirming dismissal of defamation claim pursuant to R. 12(b)(6)).

Early adjudication of meritless libel suits is not just *permitted* under Montana law, it has also been recognized as *necessary* to preserve the freedom of speech guaranteed by the First Amendment and Article II, Section 7 of the Montana Constitution. *See, e.g.*, *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 S.3d 106, 109 (D.C. Cir. 2017) (Kavanaugh, J.) ("[T]he Supreme Court had directed courts to expeditiously weed out unmeritorious defamation suits"); *Adelson v. Harris*, 973 F.Supp.2d 467, 481 (S.D.N.Y. 2013) ("Because a defamation suit 'may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself,' courts should, where possible, resolve defamation actions at the pleading stage.") (citation marks omitted), *aff'd*, 876 F.3d 413 (2d Cir. 2017).

This is particularly true in the fair report privilege context. "[T]he First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Cox Broad. Corp. v. Cohen*, 420 U.S. 469, 496 (1975). *See also Cox*, 222 Mont. at 529-30, 723 P.2d at 240 ("[Although] pleadings are one-sided and may contain, by design, highly defamatory statements, we believe the information found in such pleadings is of sufficient value as to warrant the encouragement of its publication."). The constitutional values at stake in this case compel prompt dismissal of the Complaint.

II. NEW YORK LAW CONTROLS THE PRIVILEGE ISSUE

A true conflict exists between the absolute privilege afforded under Section 74, and the privilege provided by § 27-1-804(4), MCA, which is qualified and can be

defeated by evidence of malice. The Post Article is privileged under both statutes, but since New York has the most significant interest in regulating the conduct of its own publishers, Montana's choice of law rules require application of the New York privilege. Post Br. 13-20. Other factors like "certainty, predictability and uniformity of result," Restatement § 6(2)(f), also favor application of New York law. *See Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1092 (S.D.N.Y. 1984) ("[Publishers'] justified expectation that their conduct will be judged by the rules of jurisdictions in which they carry on their activities merits protection.").

Goguen tries to avoid this result by ignoring the required Restatement analysis and relying on easily distinguishable caselaw. These arguments fail.

A. Montana Law Requires Discrete Analysis of the Privilege Issue

The heart of the Restatement approach adopted by this Court compares the competing "policies and interests underlying the *particular issue* before the court." *Phillips v. Gen. Motors Corp.*, 2000 MT 55, ¶ 22, 298 Mont. 438, 995 P.2d 1002 (emphasis added) (citation omitted). The particular issue raised here is the fair report privilege. Both the purpose of the privilege and the competing policy interests at stake strongly favor application of New York law. Post Br. at 16-20.

Goguen's completely ignores the competing interests relevant to the privilege issue and even contends that "*Phillips* did not analyze the choice-of-law applicable to each issue separately." Opp. at 14. To the contrary, the Court in *Phillips* explicitly endorsed the issue-oriented approach, ¶ 22, and separately analyzed the competing state

interests and policy considerations relevant to each issue before the Court. *Phillips*, ¶¶ 40, 43-45. The exact same approach was followed in *Buckles v. BH Flowtest, Inc.*, 2020 MT 291, ¶ 11, 402 Mont. 145, 476 P.3d 422. While it is true that in *Phillips* and *Buckles* the Court ultimately found that Montana had the most significant interest as to each issue and applied Montana law, no Montana court has ever prohibited applying different states' laws to different elements (*i.e.*, depecage) if warranted by the Restatement analysis. *See, e.g.*, Restatement § 145 cmt. d. (courts "are not bound to decide all issues under the local law of a single state"); Post Br. at 14-15. Moreover, at least one federal court in Montana has applied depecage, *Dalbotten v. C.R. Bard, Inc.*, No. 1:20-cv-00034-SPW, 2022 U.S. Dist LEXIS 131766, at *9 (D. Mont. July 22, 2022) (applying Arizona law to resolve collateral estoppel issue even though failure to warn claim controlled by Montana law), and another described depecage as a "'widely approved process' when there are issues to which the different laws applied are separable." *Otto v. Newfield Exploration Co.*, CV-15-66-BLG-SPW, 2016 U.S. Dist. LEXIS 195741, at *17 (D. Mont. July 26, 2016) (citation omitted). Montana's choice of law rules permit application of different states' laws to different issues in a case.

B. Plaintiff's Domicile Is Not Determinative

Goguen tries to short circuit the required Restatement analysis by asserting that the state of his domicile (Montana) is determinative of the choice of law inquiry. Opp. at 18-21. That approach, known as the "*lex loci* rule" was explicitly *rejected* by this Court in favor of the Restatement. *Phillips*, ¶ 22. As stated above, Goguen relies

primarily on *Lewis*, Opp. at 18, 21, but that case was decided nearly 30 years before Montana adopted the Restatement, and it simply answered a certified question regarding personal jurisdiction (which is uncontested here). *Lewis* did not consider the fair report privilege—or any other privilege or immunity—and it did not address the issue of applying separate choice of law analyses to discrete issues raised by a claim. Goguen describes *Lewis* as "controlling" on the issue of choice of law, but there does not appear to be a single Montana case from the last 50 years that cites *Lewis* as an authority on either choice of law or personal jurisdiction. The Restatement—not *Lewis*—reflects Montana's choice of law rules. And while Restatement § 150(2) acknowledges the presumption in multistate defamation cases that the law of plaintiff's domicile will apply, that presumption is overcome where, as here, another "state has a greater interest in the determination of the particular issue." *Id.* cmt. b.

C. Section 27-1-804 Does Not Preclude Application of Section 74

Next, Goguen contends—without citation—that Montana's libel statute precludes application of another state's privilege law. Opp. at 20. But Section 27-1-801 does not limit privilege to the examples provided in Section 27-1-804. For example, Montana courts recognize that liability is also limited by common law privileges. *See*, *e.g.*, *Williams v. Pasma*, 202 Mont. 66, 76-77, 656 P. 2d 212, 217 (1982) (recognizing privileges of "belief in truth" and "fair comment"); *Lewis v. Reader's Digest Ass'n*, 366 F. Supp. 154, 154-56 (D. Mont. 1973) (statement protected by privilege protecting statements on matters of public concern).

D. New York Law Allows Application of Section 74 Outside New York

Goguen is also incorrect that New York courts have precluded application of Section 74 outside New York. Goguen primarily relies here on *Murray v. Brancato*, 48 N.E.2d 257 (N.Y. 1943), but *Murray* dealt with the immunity of *judges* with respect to publication of decisions in unofficial reports. To the extent that *Murray* might be construed to limit the reach of Section 74, that holding has been "disavowed" and "is not the current law in New York." *Nationwide Tarps, Inc. v. Midwest Canvas Corp.*, 228 F.Supp.2d 202, 211 (N.D.N.Y. 2002) (citing *Beary v. West Publ'g Co.*, 763 F.2d 66 (2d Cir. 1985)). Section 74 protects a New York publisher from a claim "wherever it may be deemed to have arisen," *Edmiston v. Time, Inc.*, 257 F. Supp. 22, 24 (S.D.N.Y. 1966), and courts outside New York routinely apply Section 74 in libel cases arising from online publications, even when the plaintiff is domiciled outside of New York.[2]

Also meritless is Goguen's contention that Section 74 only applies to reports of

[2] Goguen cites cases in which he says courts declined to apply New York law to defamation claims asserted by plaintiffs outside of New York, but each is distinguishable because *none* of them implicated the fair report privilege. *See* Opp. at 19 (collecting cases). In fact, courts routinely apply Section 74 in cases brought by plaintiffs domiciled outside New York. *See*, *e.g.*, *Nix v. ESPN, Inc.*, 772 F. App'x 807 (11th Cir. 2019) (per curiam) (Florida plaintiffs); *Wilkow v. Forbes, Inc.*, 2000 U.S. Dist. LEXIS 6587 (N.D. Ill. May 12, 2000) (Illinois plaintiff); *Gubarev v. BuzzFeed, Inc.*, 340 F.Supp.3d 1304, 1313-20 (S.D. Fla. 2018) (plaintiff from Cyprus); *Miller v. Gizmodo Med. Grp., LLC*, No. 18-24227-CIV, 2019 U.S. Dist. LEXIS 69428 (S.D. Fla. Apr. 24, 2019) (Virginia plaintiff). *See also Mar-Jac Poultry, Inc. v. Katz*, 773 F.Supp.2d 103, 117 n.8 (D.D.C. 2011) (applying defamation law of plaintiff's domicile (Georgia) but noting that media defendant also raised "very serious defenses" under the D.C. fair report privilege).

New York judicial proceedings. Opp. at 11-12. *See, e.g.*, *Miller*, 2019 U.S. Dist. LEXIS 69428 (applying Section 74 to reporting on court proceeding in Florida); *Biro v. Condé Nast*, 883 F.Supp.2d 441, 479 (S.D.N.Y. 2012) (applying Section 74 to coverage of court proceedings in Canada).

The purpose of Section 74 would be defeated if journalists in New York risked triggering a libel suit outside of New York every time they posted an online article accurately reporting judicial proceedings. *See Williams v. Williams*, 246 N.E.2d 333, 336 (N.Y. 1969) (Section 74 was enacted "to afford the news media a greater freedom to publish news of public interest without fear of suit.").

III. THE ARTICLE IS A FAIR AND TRUE REPORT

Under both New York and Montana's fair report privileges, "true" means a "substantially accurate" report of an official proceeding. *Lence*, 258 Mont. at 446, 853 P.2d at 1239 (citing *Law Firm of Daniel P. Foster v. Turner Broad. Sys., Inc.*, 844 F.2d 955 (2nd Cir. 1988)). As a matter of law, the Article is fair and true because it is a substantially accurate report of the Marshall and Baptiste pleadings. *See* Post Br. 21-25.

A. Every Statement in the Article Is a Substantially Accurate Report

First, Goguen argues that the Post "manufactured its own, new allegations, found nowhere" in the pleadings. Opp. at 7. To the contrary, a side-by-side comparison between the Article and the Marshall and Baptiste pleadings, *see* SA-16, shows that *every* challenged statement is a substantially accurate report of those allegations, which

is all that is required.[3] *See* SA-16. Even on a motion to dismiss, the Court need not accept Goguen's conclusory characterizations of judicial pleadings in the record. *See Nix*, 772 F. App'x at 812 ("When the parties submit allegedly defamatory information to a court, that court may determine as a matter of law whether allegedly defamatory publications are 'fair and true' reports of official proceedings.") (internal citation and quotation marks omitted).

Most of the statements Goguen challenges as being "manufactured" by the Post are simply colorful descriptions of specific allegations in the Marshall Complaint (*e.g.*, Goguen "transformed" Whitefish "into his private fiefdom" and "a dark banana republic," and law enforcement was "on Goguen's payroll"). *See* Opp. at 7. Each is a substantially accurate report, *see* SA-16, and thus "'fall[s] within the literary license' of the fair-and-true-report privilege." *Blatt v. Pambakian*, No. 20-55084, 2021 U.S. App.

[3] Though a quickly corrected photo caption in the Post Article initially stated that the challenged allegations were made against Goguen in an "indictment" (instead of Marshall's civil complaint), that does not cause the Article to lose protection of the privilege. A reasonable reader would have likely presumed that this was a reference to one of the two indictments actually described in the Article (against Goguen's accusers Marshall and Nash). No reasonable reader could have thought the allegations were contained in a criminal indictment against Goguen because the Article stated explicitly that Goguen was not subject to criminal charges, it noted five separate times that the allegations were made in a "civil" suit, and the headline attributed the allegations to a "civil complaint." "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified." *Jonas v. Hagadone Mont. Publ'g*, No. CV-13-30-M-DLC-JCL, 2013 U.S. Dist. LEXIS 201248, at *10 (D. Mont. Dec. 6, 2013) (citing *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)). *See* Post Br. at 24-25.

LEXIS 29015 (9th Cir. 2021) (citation omitted). *See also Holy Spirit Ass'n for Unification of World Christianity v. N.Y. Times Co.*, 399 N.E.2d 1185, 1187 (N.Y. 1979) (defendant's language need not be "dissected and analyzed with a lexicographer's precision."). All of the challenged statements are substantially accurate reports of the allegations in the Marshall and Baptiste pleadings. *See* Post Br. at 21-26; SA-16.

B. The Article Did Not Omit Any Material Contextual Facts

Goguen complains that the Post Article is not fair because it omits facts that undermine the credibility of his accusers. Opp. at 1-2, 4-7. To the contrary, the Article includes each of these facts, including that Baptiste's allegations were "unproven" and "unsubstantiated," that Goguen prevailed in his countersuit against Baptiste, that Marshall pleaded guilty to multiple charges including "conning Goguen out of millions of dollars," and that Bryan Nash (another accuser cited in Marshall's pleading) "pleaded guilty to blackmailing Goguen." Compl. Ex. B.

Goguen completely ignores this language in the Article. Instead, he takes issue with the indisputably true statement that each of his accusers were "taken down" themselves, which he contends somehow implies "nefarious conduct" on his part. Opp. at 7. This new allegation (made the first time on appeal) fails to salvage his claim. Goguen alleges in his Complaint that "[t]hese charlatans have been discredited and punished in civil and criminal proceedings," Compl. ¶ 26, and, similarly, the Article states explicitly that in each case Goguen's accusers were discredited by adverse court

decisions (not Goguen). The Article portrays Goguen's accusers the same way they are portrayed in Goguen's Complaint.

Goguen next contends that the Article gives readers a worse impression than they would have had if they read the actual documents in the Marshall and Baptiste lawsuits. Opp. at 31. But Goguen fails to identify anything in those documents that was actually omitted, and that would have portrayed him more fairly. He claims that the Article omitted that Marshall "is serving a six-year prison sentence" and that Goguen had "shown Marshall's lawsuit not to state a claim," Opp. at 5-7, but this is misleading: Marshall's sentencing and the dismissal of Marshall's Amended Complaint both occurred months *after* the Post Article was published. *See* Post Br. at 5 n.3.

Since the Article includes facts that discredit Goguen's accusers. Post Br. at 12, and omits nothing from the judicial documents that would alter the Article's effect on a reader, the cases Goguen cites on this issue are readily distinguishable.[4] The Article is

[4] *See* Opp. at 31 (citing *Karedes v. Ackerley Grp., Inc.*, 423 F.3d 107, 119 (2d Cir. 2005) (defendant omitted that challenged statement "expressly disclaimed" by the speaker); *Bilinski v. Keith Haring Found., Inc.*, 96 F.Supp.3d 35 (S.D.N.Y.) (statement that parties agreed to remove "fake" artwork misleading because it omitted that galley did not admit the removed works were inauthentic); *Edward B. Beharry & Co. v. Bedessee Imps., Inc.*, No. 09-CV-0077, 2010 U.S. Dist. LEXIS 27404, at *18-19 (E.D.N.Y. Mar. 23, 2010) (statement that plaintiff's curry powder and "other products" posed health risk not protected where FDA seized only a single shipment of plaintiff's curry powder); *Pisani v. Staten Island Univ. Hosp.*, 440 F.Supp.2d 168 (E.D.N.Y. 2006) (hospital's statement about settlement of fraud charges misleading because it "admitted" that its executive—the plaintiff—committed misconduct, even though official complaint contained only allegations); *Wenz v. Becker,* 948 F. Supp. 319 (S.D.N.Y. 1996) (challenged statements not related to a judicial proceeding)).

fair and substantially accurate as a matter of law and, thus, ***absolutely privileged*** under Section 74.

IV. THE ARTICLE IS ALSO PRIVILEGED UNDER MONTANA LAW

Even if New York's fair report privilege were not applicable in this case, Goguen's claim would be barred as a matter of law by § 27-1-804(4), MCA. That is because the Article is not only fair and true, *see supra* § III; Post Br. 20-29, but also because there is no set of facts that could support Goguen's malice claim.[5]

In his response brief, the two allegations Goguen cites to show that he pleaded malice are the Post's alleged failure to independently investigate the reported allegations and the Post's failure to obtain comment from him. Opp. at 33-34. But this Court has already held that such evidence cannot defeat the privilege afforded by § 27-1-804(4), MCA. *Lence*, 258 Mont. at 443, 853 P.2d at 1237.[6] Once again, Goguen misconstrues a controlling case by stating incorrectly that this holding in *Lence* related to a negligence claim, Opp. at 34; to the contrary, it was the basis for granting summary judgment for the newspaper defendant pursuant to Section 27-1-804(4). *See* Post Br. at 30-31. Goguen also fails to address or distinguish the myriad cases in which courts in Montana

[5] Goguen's suggestion that the Post somehow waived this argument is meritless. The Post has consistently argued that the Article is fair and true under both New York and Montana law. *See* Post Br. at 26; PSA Ex. 3 at 3.

[6] Also unpersuasive is Goguen's reliance on this Court's decision in *Sible v. Lee Enters., Inc.*, 224 Mont. 163, 729 P.2d 1271 (1986), which did not involve § 27-1-804(4). *See* Post Br. at 27-28, 31-32; Amicus Br. at 4, 11-13.

and other jurisdictions have held that an alleged failure to investigate cannot overcome a qualified fair report privilege. *See* Post Br. at 32-33; Amicus Br. at 8-13.

Next, Goguen's claim that the Post "flouted journalistic standards" is baseless and false, but even if it were true, it would not defeat the privilege. Even an "extreme departure from professional standards" is insufficient, on its own, to prove malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989). In any event, the record negates any possible inference of malice here. *See* Post Br. at 34-35. There is no dispute that after Goguen sent out a tweet attacking the Post Article, the Post—within hours—published a second story detailing Goguen's response. Post Br. at 8, SA-10. Goguen also admits in his Complaint that when his lawyers finally responded to the Post (three days after the Post's prepublication request for comment), the Post promptly made certain corrections and clarifications, Compl. ¶ 33, even though those points were already clear from the context of the story (*e.g.*, that the allegations against Goguen were made in a civil suit, and that Goguen both prevailed in his countersuit against Baptiste and that Baptiste's allegations were found to be "false and defamatory"). *See* Post Br. at 8-9.

Finally, the fact that Montana Rule of Civil Procedure 9(b) permits malice to be alleged "generally" does not save Goguen's claim. *See* Post Br. 37. Goguen cites no case applying Rule 9(b) in the context of § 27-1-804(3) or (4), and, to the contrary, Montana courts have granted motions to dismiss pursuant to § 27-1-804(3) and (4),

citing the insufficiency of the plaintiff's allegations of malice. Post Br. at 28 (collecting cases)..

As a matter of law, the Article is a fair and true report without malice of the Marshall and Baptiste pleadings. It is therefore privileged under both New York and Montana law.

RESPONSE TO GOGUEN'S CROSS APPEAL

The District Court correctly dismissed Dial's comments from the case. Order at 18-19. The Post joins in Dial's opposition to Goguen's cross-appeal but writes separately to briefly address three points.

First, Dial's comments are pure opinion. In his brief, Goguen claims that Dial called him a "serial rapist" and "menace to the community," Opp. at 2, but those words appear nowhere in the Article. The words Dial *did* use were unspecific and not capable of being proven or disproved, unlike the statements in *Hale v. City of Billings*, 1999 MT 213, ¶¶ 29, 31, 295 Mont. 495, 986 P.2d 413, which were found to imply assertions of verifiable fact (*i.e.*, police statement that Hale may be "armed," when in fact there was no suspicion that he was, or that Hale was a "fugitive," though police knew where he was and made no effort to apprehend him). *Id*.

Second, stating that Goguen is "a la" reviled figures like Weinstein and Epstein is nonactionable. *See* Dial Br. at 25-26 (collecting cases). Goguen relies on *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213, 1243-44 (D.C. 2016), but in that case, the defendant not only called plaintiff "the [Jerry] Sandusky of climate science," but

separately accused him of "academic and scientific misconduct" and "data manipulation." By contrast, Dial's plain disapproval of Goguen is devoid of any express or implied reference to additional facts.

Third, the District Court correctly considered the context in which the Post published Dial's comment. Goguen now argues (for the first time) that the only relevant context to be considered is the context of Dial's original statement to the Post's reporter. Opp. at 38. That makes no sense. Insofar as Goguen seeks to hold the Post liable for republishing Dial's comment, the only relevant context is the one in which the Post *published* the statement. As a matter of law, the comment is nonactionable because it appears at the end of the Article, after a litany of allegations made in civil suits, including that Goguen—like Weinstein and Epstein—is a wealthy man, accused of having sex with young girls, using nondisclosure agreements to silence his accusers, and being a "pedophile." The comparisons to Weinstein and Epstein are self-evident, and the "average person [reading] the [Article] in its entirety would reasonably understand that [Dial] was referring" to the allegations discussed in the Article and filed in the public record. *Blatt*, 2021 U.S. App. LEXIS 29015, at *2 (applying California law). Dial's comments convey the exact "same gist or sting" as the allegations in the Marshall Complaint, and thus cannot give rise to liability. *Id.* at *3.

CONCLUSION

For the foregoing reasons, the District Court's Order denying the Post's motion to dismiss should be REVERSED, and the District Court's Order granting Dial's motion to dismiss should be AFFIRMED.

DATED this 16th day of March, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count calculated by Microsoft Word for Office 365 is 4,978, excluding the cover page, table of contents, table of authorities and certificate of compliance.

Dated March 16, 2023.

/s/ Amy McNulty

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