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 REPLY BRIEF IN FURTHER SUPPORT OF CROSS APPEAL

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PRELIMINARY STATEMENT

Defendant William Dial's arguments for affirming the district court's dismissal of Plaintiff Michael Goguen's defamation claim run away from the lower court's reasoning, which he never quotes, explains, or defends. None of Dial's new arguments cure the errors below or justify keeping from the jury Dial's scathing accusation that Plaintiff is a rich serial rapist, and a menace that the scared Whitefish community must stop.

Dial argues that, because courts have found *some* statements to be non-actionable opinions without the need for discovery or trial, *his* statements are for that reason not actionable. But facts and context make all the difference. Courts have dismissed claims only where reasonable readers could not take the defendant's statement literally. This is not a case where, for example, a journalist called a fastidious country club manager "Vlad the Impaler," ESPN called the aging daredevil Evel Knievel a "pimp," or a columnist compared a former Philadelphia mayor to "Hitler." Those statements do not purport to seriously compare a plaintiff to a known person or archetype.

In contrast, Dial was the recently-retired Chief of Police. And when asked about Plaintiff, a local resident whom Dial had investigated for sexual misconduct, Dial responded that Plaintiff is "a billionaire a la Harvey Weinstein and Epstein," whom "a lot of people in this community" are "afraid of," and who "has to be

stopped." On a motion where every inference must be drawn in Plaintiff's favor, those words cannot be presumed to be understood *only* as hyperbolic opinion rather than provably true or false statements of fact. Montana law affords Plaintiff the right to gather evidence and prove to the jury that a reasonable reader would understand that the ex-Chief of Police meant what he said.

Nor does Dial make up for the District Court's failure to address the prospect that Dial's statements, even if opinion, would be reasonably understood as resting on undisclosed facts. The court ignored how a jury could find for Plaintiff on the ground that Dial had implied that his statements were justified by undisclosed facts likely to be known to him as the ex-Chief of Police, who had spent years investigating Plaintiff. This case is on all fours with *Hale v. City of Billings*, 1999 MT 213, 295 Mont. 495, 986 P.2d 413, which likewise involved statements by law enforcement personnel about the plaintiff that implied facts that the plaintiff was an armed and dangerous fugitive. ¶¶ 27-28.

Finally, Dial argues that the article the *Post* wrote around his attacks exonerates him. It cannot. As Dial even acknowledges, the defamation was complete when he spoke his words to the *Post*'s reporter. And factually, the rest of the article, which supplies supposed details to Dial's statements—all false—makes his comments *more*—not less—actionable. It was reversible error to rule that this aggravating "context" supported dismissing Goguen's claim.

ARGUMENT

I. DIAL HAS FAILED TO ESTABLISH THAT HIS ACCUSATIONS COULD BE DISMISSED AT THE PLEADING STAGE

A. The Jury Could Find Dial To Have Made Accusations Of Fact

1. Dial Misstates The Court's Role In Defamation Cases

Dial mischaracterizes Plaintiff as arguing that "any determination of whether a statement constitutes protected opinion must be submitted to a jury." Dial Br. 12. Plaintiff has never argued that. Nor is any such sweeping rule implicated when deciding whether *these* statements constitute protected opinions, which raises issues of fact.

Dial's citation to *Lee v. Traxler*, 2016 MT 292, 385 Mont. 354, 384 P.3d 82, confirms that a jury question is posed here. In *Lee*, this Court held that Article II, Section 7, of the Montana Constitution "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.'" ¶ 15. Even on summary judgment, this "direction" from the court includes determining, "'as a preliminary finding … whether a communication is capable of bearing a particular meaning; and whether the meaning is defamatory,'" inasmuch as "'the court can presume as a matter of law that they will tend to disgrace and degrade the plaintiff or cause him to be shunned and avoided.'" *Id.* ¶ 20 (quoting *Hale*, ¶ 17 and *Ray v. Connell*, 2016 MT 95, ¶ 11, 383 Mont. 221, 371 P.3d 391).

The question is not whether a defamatory meaning is the best or only reading, but whether a statement is *capable* of being understood as tending to cause the plaintiff to be disgraced, shunned, or avoided. If so, the jury must decide. *See* Restatement (Second) of Torts § 614(2) ("The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.").

Montana protects the jury's role in balancing a speaker's right to speak against a citizen's right not be defamed. *See* Mont. Const. Art. II, § 7 ("Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty."). Where there is a dispute over whether statements could be understood as protected "opinions," this Court requires that a jury decide how the statements were understood. *See, e.g.*, *Hale*, ¶ 32. Dial cites an academic treatise on federal procedure to suggest that defamation is a "disfavored cause of action" more readily dismissed than other claims. Dial Br. 13. But Montana law is to the contrary and holds that even on summary judgment, "due to the unique nature of cases involving libel, a district court should take particular care when evaluating such motions." *Lee*, ¶ 15.

2. Dial Fails To Address His Factual Statements About The Whitefish Community Or His Call For It To "Stop" Goguen

Dial's statement that "There's a lot of people in this community who know what [Plaintiff]'s about and they're afraid of him" asserts a fact: Either there are a lot of people in Whitefish afraid of Plaintiff or there are not. Because the statement "is sufficiently factual to be susceptible of being proved true or false," it cannot be protected opinion. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990).

Dial runs from this, asking the Court to not consider "whether the statement is provable"—it is—but instead "whether it is even defamatory." Dial Br. 27. But he argues solely that it is not defamatory *per se*, Dial Br. 27-31, which would be relevant only if Goguen sought to hold Dial liable without proving specific damages. Here, Goguen has pleaded such damages. Defendants' Supplement Appendix ("SA") Ex. 1 ¶¶ 2, 13, 63-65 & Prayer for Relief. The claim thus proceeds even if "the language is susceptible of two meanings, one defamatory and the other not." *Manley v. Harer*, 73 Mont. 253, 257, 235 P.2d 757, 758 (1925). Even if the *per se* standard applied here, it is met by the accusation that a large percentage of the population "know[s] what he's about" and fears him. *See, e.g.*, *Tindall v. Konitz Contracting, Inc.*, 240 Mont. 345, 355, 783 P.2d 1376 (1989)

(accusation of having "conducted dishonest activities" and "defaulted on contracts … [is] libelous *per se*").

Dial fails to mention his further statement: "This man has to be stopped." *See* Dial Br. 10-37. That too is actionable because it "tend[s] to … cause [Goguen] to be shunned and avoided." *Lee*, ¶ 20. Dial called for the community to rise up against Goguen to prevent further criminal activity. Few things could more likely cause someone to be shunned than such a declaration from the ex-Chief of Police.

3. Dial's Invocation Of Notorious Serial Rapists To Attack Goguen Can Be Understood To Accuse Goguen Of A Crime

Dial focuses most of his defense on only one statement: When telling the *Post*'s reporter about his investigation seeking to charge Plaintiff with multiple sexual assaults, including of a minor, Dial called Plaintiff "a billionaire a la Harvey Weinstein and Epstein"—two of the most reviled sexual offenders in American history. Dial's statement is unquestionably capable of disgracing Plaintiff. He conveyed to the audience that, just like those infamous rapists, Plaintiff had committed multiple sexual assaults.

Dial attempts to exonerate himself at the pleading stage by comparing his statement to the statements at issue in *McConkey v. Flathead Electric Cooperative*, 2005 MT 334, 330 Mont. 48, 125 P.3d 112 (*see* Dial Br. 21-22), and *Roots v.*

Montana Human Rights Network, 275 Mont. 408, 913 P.2d 638 (1996) (*see* Dial Br. 21-22, 29-31). Neither case supports a dismissal of Plaintiff's claim.

In *McConkey*, the defendant published letters and ads in newspapers claiming that the plaintiff and others who sat on a Montana utility board had created "one hell of a mess" through "mismanagement." ¶ 40. After discovery, this Court affirmed *summary judgment* for defendant on factual grounds that distinguish that case from this one, including that the comments "were merely critical of the performance of FEC" and were not "aimed specifically at the person claiming injury," were supported by "no evidence that they disgraced or degraded [plaintiff], or caused him to be shunned or avoided," and could constitute the defendant's opinion only that the board should have adopted different plans. *Id.* ¶¶ 45-49. Unlike Dial's statements, a developed factual record established why those opinions could not be understood as conveying undisclosed facts. In particular, the statement contained "publicly disclosed facts concerning FEC's financial problems and rate increases" that formed the basis for the opinion, and the plaintiff "failed to suggest what inferred facts are undisclosed." *Id.* ¶ 50.

In *Roots*, this Court *reversed* a grant of summary judgment to a defamation defendant, an organization that had published a booklet calling the plaintiff, a right-wing columnist and politician, a "Ku Klux Klan organizer." 275 Mont. at 410-12, 913 P.2d at 639-41. Although discovery had established that the plaintiff

had "shared viewpoints with the KKK," "supported people who are openly members of the KKK," and attended militia meetings, *id.*, a jury would have to determine whether calling him a KKK "organizer" was protected or actionable, true or untrue.

McConkey and *Roots* illustrate how the "totality of the circumstances" must be considered to determine "whether a statement can reasonably be interpreted as a factual assertion" versus opinion. *Knievel v. ESPN*, 393 F.3d 1068, 1074-75 (9th Cir. 2005). Considerations include: (1) "the broad context," such as "the general tenor of the entire work, the subject of the statements, the setting, and the format of the work," (2) "the specific context and content of the statements," such as "the extent of figurative or hyperbolic language used and the reasonable expectations of the audience," and (3) "whether the statement itself is sufficiently factual to be susceptible of being proved true or false." *Id.* Each factor points to a jury question here.

First, the "broad context" of Dial's statement rendered it more factual than the statements in *McConkey* and *Roots*. In those cases, politically-engaged speakers made statements in widely-distributed publications about their adversaries' positions on matters of contested public policy. Public audiences expect heated rhetoric on policy questions, particularly in open letters, newspaper ads, and political booklets. *Gilbrook v. City of Westminster*, 177 F.3d 839, 862-63

(9th Cir. 1999) (collecting cases). But that principle does not insulate a speaker from liability where his language fails to "negate the impression that [he] was seriously maintaining" that the speaker's subject committed an unlawful act. *Rodriguez v. Panayiotou*, 314 F.3d 979, 987 (9th Cir. 2002).

Nor does any such principle apply to one-on-one statements about a single, named citizen's supposed criminal conduct, particularly coming from a law enforcement speaker. Unlike the terminated employee in *McConkey* and the activist group in *Roots*, Chief Dial had investigated the person he denounced in a deadly-serious effort to charge him with rape. SA-1 ¶¶ 10, 37, 59; SA-2 at 2. Numerous decisions have recognized that "a statement is more likely to be viewed as one of fact, as opposed to opinion, when the speaker might reasonably be perceived as an expert or authority on the topic of the statement." *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. 17-CV-02824-JST, 2019 WL 281370, at *6 (N.D. Cal. Jan. 22, 2019) (collecting cases); *see also, e.g.*, *Open Source Sec., Inc. v. Perens*, 803 F. App'x 73, 76 (9th Cir. 2020) ("the speaker's knowledge and experience, as well as the audience's reliance on the speaker's experience, are [] part of th[e] inquiry" into whether a statement can be understood as factual); *Weiner v. San Diego Cty.*, 210 F.3d 1025, 1031-32 (9th Cir. 2000) (same).

Second, the "specific context" of Dial's statements shows why a triable issue exists here. The letters and ads in *McConkey* employed colorful attacks on a public

board, including rhetorical questions and the allegation of "one hell of a mess." ¶ 40. There is nothing comparable in Dial's calls for Plaintiff to be "stopped" or in Dial's comparison of Plaintiff to known, reviled rapists. Even Dial admits that his comparison of Plaintiff to Weinstein and Epstein was direct, not merely figurative. *See* Dial Br. 9, 23, 34.

Third, the "statement itself" in this case is far more "susceptible of being proved true or false" than was the challenged language in *McConkey*. Whether a public utility board is in "one hell of a mess" or suffered from "mismanagement" are matters of classic opinion. In contrast, whether Plaintiff scares "a lot of people in this community who know what he's about" and is so similar to Harvey Weinstein and Jeffrey Epstein that the former Police Chief can tell a newspaper that "he has to be stopped" is *not*. Taking all three factors together, the "totality of the circumstances" establish that this case presents a jury question.

Dial asks the Court to treat his statement as if it contained a mere exaggeration. *See* Dial Br. 16-19, 24-25 (suggesting Dial's language was "colorful, rhetorical, and figurative"). He relies on inapposite federal cases such as *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), and *Fasi v. Gannett Co.*, 114 F.3d 1194 (Table) (9th Cir. 1997), which arose from statements analogizing a developer's "public and wholly legal negotiating proposals" to "blackmail" because the developer sought concessions in exchange for

cooperation. *Greenbelt*, 398 U.S. at 14. In both cases, "even the most careless reader must have perceived that the [challenged statement] was no more than rhetorical hyperbole," *id.*, because "[n]o reasonable mind, in the context of the entire editorial, could have taken the article to accuse [the developer] of the literal crimes of extortion and blackmail." *Fasi*, 114 F.3d 1194, at *1. *CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008) and *Knievel* likewise turned on clear analogies: labeling harsh civilian interrogators "hired killers" without any accusation that any prisoner died "make[s] clear to all reasonable listeners that they are offered not as facts." *CACI*, 536 F.3d at 301. Similarly, no reader could believe that ESPN was accusing Evel Knievel of representing prostitutes when it captioned a photo of him flanked by female fans as proof that one is "never too old to be a pimp." *Knievel*, 393 F.3d at 1070.

Here, Dial uttered no bombastic analogy that a reader would undoubtedly understand as mere rhetoric. Dial is not an op-ed columnist. He did not compare Mr. Goguen to comic book characters or obviously inapt historical figures. Dial is the ex-Whitefish Chief of Police and he said that Plaintiff, a local businessman whom Dial had investigated for alleged violent sexual assaults, was "a billionaire a la Harvey Weinstein and Epstein" who scares "a lot of people in this community" and who "has to be stopped." Statements that charge despicable crimes and are attended by concrete comparisons to notorious criminals who committed the same

offenses cannot be mistaken for fanciful or comical caricatures. *See Milkovich*, 497 U.S. at 21 (editorial assertion that plaintiff "lied at the hearing after having given his solemn oath to tell the truth" was not entitled to "constitutional privilege for 'opinion'" because "a reasonable factfinder could conclude that the statements … imply an assertion that [he] perjured himself").

For similar reasons, no categorical rule emerges from cases that Dial cites for the proposition that "rhetorical comparison to a public figure constitutes hyperbolic opinion, not actionable as defamation." Dial Br. 26. Just as no reader would believe that a land developer's hard bargain is literally blackmail, *see Greenbelt*, 398 U.S. at 14, no reader would believe that a rules-obsessed country club manager who was compared to Vlad the Impaler had gruesomely murdered unruly golfers,[1] that a fringe Korean religious group compared to Nazis had preached Aryan racial supremacy or genocide,[2] that a firefighter compared to

[1] *Clark v. Time Inc.*, 242 F. Supp. 3d 1194, 1222-23 (D. Kan. 2017) ("Considering the context and surrounding circumstances, no reader of the article would believe that plaintiff committed acts similar to the atrocities committed by the 15th century's Vlad.").

[2] *Holy Spirit Ass'n for Unification of World Christianity v. Harper & Row, Publishers*, 420 N.Y.S.2d 56, 59 (N.Y. Sup. Ct. 1979) ("the author does not label plaintiffs as Nazis, but merely compares organizational structure and procedure").

Jimmy Hoffa in a public debate had robbed union pension funds,[3] or that a Philadelphia mayor compared to Hitler had invaded neighboring towns.[4] That *those* comparisons were non-actionable does not license Dial to equate a successful local businessman falsely accused of rape with two wealthy businessmen who had used their power to avoid imprisonment for their serial sex crimes.[5]

Multiple cases establish that comparisons like these are actionable. Dial never addresses *Competitive Enterprise Institute v. Mann*, 150 A.3d 1213 (D.C. 2016). The *Post* suggests that the defendants' comparison to Jerry Sandusky was not, by itself, actionable. *See Post* Br. 17-18.[6] But *Mann* held that "comparisons to specific individuals from which defamatory factual allegations can be inferred" *are* actionable. 150 A.3d at 1248; *see also id.* at 1243 (ruling that a jury could find accusations of "academic and scientific misconduct" and, separately, "noxious

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[3] *Gilbrook*, 177 F.3d at 862-63 ("Viewed in that specific context, Schweisinger's reference to 'Jimmy Hoffa' was a loose, figurative expression of his strong disagreement with the union's activities and his support for the budget cuts.").

[4] *Rizzo v. Welcomat, Inc.*, 14 Phila. Co. Rptr. 557, 562 (1986) (passages in story about former Philadelphia mayor "are not, merely because of a reference to Hitler, accusing him of condoning or practicing genocide or other atrocities").

[5] Dial also cites an unpublished Third Circuit opinion, *Montefusco v. ESPN Inc.*, 47 F. App'x 124 (3d Cir. 2002), in his string cite. Dial Br. 25. But that case did not rule that a comparison was non-actionable, and instead held merely that the challenged broadcast was "factually accurate." *Montefusco*, 47 F. App'x at 125.

[6] Plaintiff responds here to the portion of the *Post*'s brief titled "Response to Goguen's Cross-Appeal," Dkt. 29 at 17-19.

comparisons" to a rapist each to be defamatory). Dial's comparison here is far closer and less rhetorical than the comparison in *Mann*, where the defendant called plaintiff the "Jerry Sandusky of climate science, except for instead of molesting children, he has molested and tortured data," *id.* at 1244, thus making clear that the alleged wrongdoing was not the rape of a minor. Dial's statement asserts the opposite—warning of Goguen's alleged sex offenses with pointed reference to known sex offenders.

Dial fails to distinguish *Hadley v. Doe*, 12 N.E.3d 75 (Ill. Ct. App. 2014), where the Illinois Appellate Court affirmed that calling someone "a Sandusky waiting to be exposed" is actionable defamation not protected as opinion. *See* Dial Br. 22-24. Dial quotes *Hadley*'s reference to "name calling" to argue that the comparison to a sex offender was not itself actionable, but the opinion holds the opposite: "Although … the statement at issue uses figurative language akin to name calling, the question is whether a reader could reasonably take the allegation as an assertion of fact." 12 N.E.3d at 90. Dial notes the presence of the "innocent construction" rule in Illinois, which makes it *easier* to dismiss defamation claims, *see id.* at 83-86, but its absence from Montana precedent makes the case even worse for Dial. He claims further that *Hadley*'s comparison to Jerry Sandusky would not have been actionable without the additional statement that the plaintiff was "waiting to be exposed." That is incorrect. What mattered was that there was

"no natural, nondefamatory association between Hadley and Sandusky." *Id.* at 92. The same is true here: There is no association between Goguen and either of Weinstein or Epstein that does not defame Goguen. And to prevail at this stage, Goguen need only show that the comparison is *capable* of defaming him.

Throughout his brief, Dial asks the Court improperly to construe facts in his favor. He relies on the unpleaded assertion that "At the time of Dial's comment, the Weinstein and Epstein scandals were no longer dominating the national news." Dial Br. 23. But the jury gets to decide how the audience would understand Dial's invocation of those scandals. *See* Mont. Const. Art. II, § 7. Dial asks this Court to accept his description of Weinstein and Epstein as merely being "*accused* of various instances of sexual misconduct" and merely "facing '*allegations*' of sexual misconduct." Dial Br. 23, 26 (emphasis added). A jury could, and likely would, understand Dial to be referring to the fact that those men had *committed* serial rape. SA-1 ¶¶ 9, 34-35. Dial can argue otherwise to the jury. But he cannot prevail on it at the pleading stage.

B. The Jury Could Find The Former Chief Of Police To Have Had Undisclosed Facts Supporting His Accusation

Dial offers no defense of the district court's failure to apply this Court's holding in *Hale* that, "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." ¶ 27. Because that rule leaves Dial liable even if the jury interprets his statement as opinion, Dial challenges this Court's statement of the rule, accusing the Court of having "departed somewhat from *Milkovich* in *Hale*." Dial Br. 20. Dial is doubly wrong: This Court's *Hale* precedent is in harmony with that of the U.S. Supreme Court and it should be binding and dispositive here.

Hale is strikingly on point. This Court held that a law-enforcement agency's labeling someone as 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." *Id.* ¶ 28. The Court reversed summary judgment for the police authority, holding that even statements couched in the language of an opinion can be defamatory if they "create[] the reasonable inference that the opinion is based on undisclosed defamatory facts." *Id.* ¶ 27.

That rule applies here, where a recently-retired Police Chief, who says a local business man "has to be stopped," without further explanation, implies a knowledge of facts that may have reasonably led his audience to conclude that Goguen *was* an active threat. When that same officer says that the same citizen scares "a lot of people in this community who know what he's about," again

without further explanation, he implies that he knows facts from which his audience could reasonably conclude that Plaintiff *does* terrify those in Whitefish who know defamatory "truths" about him. And when the same authority says that the same Plaintiff is "a billionaire a la Harvey Weinstein and Epstein," once again without further explanation, his audience can readily understand him to possess facts that would make valid his comparison to America's two most infamous rapists. A jury could reasonably conclude that all of these statements convey the same actionable meaning as those in *Hale*: "to warn that the person in question, above all other ordinary wanted persons, is the focus of intense scrutiny by law enforcement personnel" and "has allegedly committed a crime, has eluded capture, and is now fleeing justice." *Id.* ¶¶ 30-31.

The defamation in this case is even worse than in *Hale*. There, the reference to being "most wanted" was only in the title of the program, the description of "fugitives" was applied to multiple still photos, only one of which was the plaintiff's, and the police claimed that these people alone "may be" armed and dangerous. *Id.* ¶ 7. In contrast, Dial's statement was directed at a single, named person, whom the speaker had investigated, and it contained no qualification such as "may be." SA-1 ¶¶ 9-10, 34, 37, 59; SA-2 at 2. Though Dial omits the "may be" language from his discussion of *Hale*, *see* Dial Br. 35, it follows *a fortiori* that

Dial's unequivocal denouncement and warning against Goguen is actionable. *Hale*, ¶ 32.

II. THE *POST*'S LATER-ADDED "CONTEXT" CANNOT INOCULATE DIAL'S DEFAMATORY STATEMENTS

Dial and the *Post* fail to justify the district court's error in considering the content of the *Post*'s article, as though it can transform the defamatory nature of Dial's statement. All agree that Dial's statement was made to a reporter before the article was written. *See* Dial Br. 11-12, 25, 33-36, *Post* Br. 18. The defamatory character of a statement is assessed in light of "all the circumstances under which it is made so far as they were known to the recipient"—here, the *Post*'s reporter. Restatement (Second) of Torts § 563, cmt. e (1977). It is "[t]he extrinsic circumstances at the time of the publication" of the defamatory statement itself, not at a subsequent time, that matter. *Id*. It was thus reversible error to rule that the content of the article exonerated Dial.

Dial and the *Post* claim that Plaintiff did not raise this below. Plaintiff did. The Complaint makes clear that Plaintiff seeks relief for "the defamatory statement of former (and disgraced) Whitefish Police Chief Bill Dial" both from Dial himself (for originally defaming Goguen) and from the *Post* (for subsequently "republishing" that defamation). SA-1 ¶ 9. The Complaint notes that Dial's defamation was complete when he spoke to the reporter and that a separate tort

accrued when the *Post* republished it. *See, e.g.*, *id.* ¶ 36 ("[Dial] is liable for making the statements about Plaintiff, and the *Post* Defendants are liable for republishing them."); *id.* ¶ 59 ("Defendant Dial conveyed that he was in possession of undisclosed false and defamatory facts proving Plaintiff to be guilty of the accusations Defendant Dial made against him and that the *Post* Defendants republished.").

Furthermore, Plaintiff addressed the independent wrongfulness of Dial's statements below, in a separate brief from the one that addressed the *Post*'s article. *See* D.C. Doc. 31 (opposition to Dial motion); D.C. Doc. 32 (opposition to *Post* motion). Plaintiff briefed this question of context in the district court. Mr. Dial asserted that his "statement must be read in conjunction with the article in which it was reported" by the *Post*. D.C. Doc. 9 at 17. Plaintiff's Opposition explained that any context provided by "surrounding statements only make[s] it more reasonable for a factfinder to conclude that Mr. Dial was" asserting facts (not opinion) about Plaintiff. D.C. Doc. 31 at 13. There was no waiver.

On the merits, there can be no denying that the defamatory nature of Dial's statements must be assessed solely on the circumstances when they were made. *See* Restatement § 563; *Lussy v. Davidson*, 210 Mont. 353, 355, 683 P.2d 915, 916 (1984) ("The truth of the defamatory statement must be determined at the time the

statement was made," and thus evidence of subsequent developments "was not admissible.").

Dial even concedes that "Goguen may have a slander (not libel) claim against Dial arising from his initial interview with [the reporter]." Dial Br. 33. That is what Goguen has sued Dial for: defamation (which covers both slander and libel, *see* Mont. Code Ann. § 27-1-801) over his statement to the *Post*'s reporter.

Even if it would have been appropriate to consider the rest of the *Post*'s article to determine whether Dial had defamed Goguen during his interview before the article was written, it was error for the district court to interpret that "context" as favoring dismissal. "Under Rule 12(b)(6), the court must take all well-pled factual assertions as true and view them in the light most favorable to the claimant, drawing all reasonable inferences in favor of the claim." *Puryer v. HSBC Bank USA*, 2018 MT 124, ¶ 12, 391 Mont. 361, 419 P.3d 105; *see id.* ¶¶ 20, 26, 36 (reversing dismissal of claims supported by sufficient factual inferences in complaint). The district court did the opposite.

The inferences from the article make it *more* likely that a reader would understand ex-Police Chief Dial's attack to be stating facts about Goguen, or that Dial knew undisclosed facts supporting his condemnation. For example, the article states that Goguen "transformed [Whitefish] into a fiefdom where he allegedly controls law enforcement—and a 'harem' of women," that multiple "women …

tried to complain to police about Goguen's alleged sexual assaults," that another woman was subjected to "constant sexual abuse" and "countless hours of forced sodomy," that Goguen arranged "hush-money payoffs," and even that Goguen sought "to kill" a former friend. SA-2 at 1-2. All of these are lies. But a jury could easily conclude that a reader processing these statements while learning "one local authority has had enough of Goguen" (Dial), would therefore understand this "authority" knew something from his "investigation" corroborating the preceding criminal accusations. The jury could naturally conclude that the same reader would credit the *Post*'s allegations upon learning that this former Chief of Police had gone on record to proclaim "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."

CONCLUSION

The Court should reverse the grant of Dial's motion and remand this case for discovery and trial.

Dated: April 19, 2023

WORDEN THANE, P.C.

/s/ Reid J. Perkins
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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 5,000 words, as calculated by Microsoft Word.

Dated: April 19, 2023

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CERTIFICATE OF SERVICE

I, Reid J. Perkins, hereby certify that I have served true and accurate copies of the foregoing Brief - Cross Appellant Reply to the following on 04-19-2023:

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