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Case Number: DA 23-0279

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Clerk of Supreme Court
State of Montana

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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. **DA 23-0279**

| | | |
|----------------------|---|---------------------------------|
| Miki Adams |) | |
| |) | |
| Appellee-Petitioner, |) | |
| vs. |) | |
| |) | Dirk Adams Appellant |
| Dirk Adams, |) | Brief for Case DA 23- |
| |) | 0279 |
| Appellant-Respondent |) | (Related to Cases DA 22- |
| |) | 0533 and DA 23-0219) |
| |) | |

MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

| | | |
|-------------|---|---------------------|
| Miki Adams |) | Cause No.: DR-20-43 |
| |) | |
| Petitioner, |) | Hon. Judge Y. LAIRD |
| vs. |) | |
| |) | |
| Dirk Adams, |) | |
| |) | |
| Respondent |) | |
| |) | |
| |) | |
| |) | |

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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 23-0219

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| Miki Adams |) | |
| |) | |
| Appellee-Petitioner, |) | |
| vs. |) | |
| |) | Dirk Adams Appellant |
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MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY

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| Miki Adams |) | Cause No.: DR-20-43 |
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Statement of the Issues

There are two issues presented by this appeal.

Issue One:

May a District Court acting in a dissolution case post-judgment find Dirk Adams (Dirk) in civil contempt for two years and issue a ten (10) year Permanent Order of Protection (POP) for failing to send a personal Apple I-Mac computer and its software and digital files to Miki Adams (Miki) when the parties made a mutual mistake as to the identity of the computer which in turn caused the District Court to err and to issue a contradictory order?

Issue Two:

May a District Court issue a post-judgment order denying relief on Dirk's substantive motion to protect his dissolution confidential financial and individual information which Miki repeatedly revealed, the District Court calling the motion meritless and frivolous without making any findings of fact or explaining its conclusions?

Statement of the Case

Dirk's Notice of Appeal is dated April 11, 2023.

This appeal, DA 23-0219, is related to appeals DA 22-5033¹ and DA 23-0279², and like them, arises out of the dissolution of the marriage of Dirk and Miki Adams in Park County numbered DR 20-43.³ The first appeal primarily⁴ concerned the April 18, 2023, post-judgement order of the then-presiding judge, the Hon. J. Oldenburg. The Hon. Judge J. Oldenburg retired at June 30, 2023.

The Hon. Judge Yvonne Laird then was called into the case. Dirk here appeals two of the Hon. Judge Y. Laird's post-judgment orders, one finding Dirk in contempt for two years and issuing a permanent order of protection (POP) against him in favor of Miki for ten years, and the other denying, without explanation, Dirk's request for relief from Miki's repeated violations of the confidentiality requirements of various earlier Court orders. The Hon. Judge Laird's orders were attached to Dirk's Notice of Appeal. The orders are dated March 16, 2023, (Contempt Order) (dkt#481) and March 30, 2023 (Information Order) (dkt#484).

¹The Montana Supreme Court has already denied this appeal.

²DA 23-0279, like DA 23-0217, concerns a post judgment order of the Hon. Judge Laird.

³The case was tried for two days March 31 and April 1, 2021. The District Court issued the Decree on September 27, 2021.

⁴The first appeal also objected to the award of legal fees to Miki in the September 27, 2021, Decree (dkt.#).

The Contempt Order, Dirk contends, respectfully, was not supported by either facts nor law, and was inconsistent with prior relevant orders of the Sixth District Court.

The Information Order summarily denied Dirk relief for Miki's repeated, material breaches of the Sixth District Court's prior orders on the confidentiality of the case record, the most recent violation of which occurred in February 2023.

Statement of Facts Relevant to this Appeal

Procedural Posture of this Case

Miki filed her fourth⁵ Motion for an Order to Show Cause (MOSC) on June 21, 2022, approximately 60 days after her third OTSC motion requesting both a contempt order and a POP, filed on February 2, 2002, was denied on April 18, 2022 (dkt.#391).

The Hon. Judge Oldenburg denied Miki's first application for a petition for a permanent order of protection in the September 27, 2001, Decree, instead ordering a one-year no-contact order. (dkt.#280). Subsequently, on April 18, 2022, Judge Oldenburg extended the no-contact order by five years, but denied a POP on the grounds that Dirk "had been punished enough." (dkt.#) .⁶

⁶The Supreme Court affirmed this extended no-contact order.

Dirk responded to Miki's most recent Order to Show Cause and Petition on July 14, 2022, with a reply on August 25, 2022.

The Hon. Judge Y. Laird commenced a hearing on Miki's fourth MOSC on December 6, 2022, and then concluded it on January 25, 2023. Total hearing time was five (5) hours.

On March 16, 2023, the Hon. Judge Laird issued the Contempt Order (dkt.#481). That Order found Dirk in contempt primarily for allegedly failing to deliver an Apple I-Mac computer and software and digital files to Miki which the Hon. Judge J. Oldenburg purportedly had decreed belonged to Miki.

The Court also found other acts alleged to have been committed by Dirk to warrant her two-year contempt order and the ten (10) year POP.

The Parties' Mutual Mistake about the Number of Apple Computers:

The Divorce Decree awarded one Apple desk top computer known as an I-Mac to Miki as personal property. This one-sentence was the focus of the two hearings held by the Hon. Judge Laird.

Unfortunately, the hearings revealed a mutual mistake; both parties having misunderstood which computer was awarded to Miki by the Hon. Judge Oldenburg's Divorce Decree. And the District Court's contempt order, perhaps understandably, is confused

about the computers as well and leaves the issue of the decreed computer in flux as explained below.

Miki's descriptions of "her computer" to the District Court in connection with the trial were vague and contained no identifying information or specifications, using instead the possible location of the I-Mac computer in the ranch house.

As it turned out, Miki's description of the I-Mac was so ambiguous that both she and Dirk erred in attempting to comply with the Decree. Dirk thought there were only two I-Macs in the ranch house, an older one and the 2015 27" rectangular display slim profile I-Mac he used primarily. It was located in his office.

Miki was so confused by her own description of the I-Mac, that when she broke into Dirk's house three different times over two days without Court permission on October 25-26, 2021, she removed his 2015 slender profile I-Mac⁷ and stole it from Dirk's house because it was sitting on the kitchen desk.

Nor did Miki and her counsel in their June 21, 2022, Motion for OTSC and POP and their August 4, 2022, Reply and in Miki's affidavit of June 21, 2022, and in all of Miki's exhibits at the

⁷Apple changed the profile of the I-Mac in 2015, sliming it down significantly.

hearings provide meaningful, distinctive identifying information about the I-Mac she sought.

In fact there were at least two I-Mac computers,⁸ one of which was not in the ranch house, which met the description provided by Miki: (1) a 2011 27" rectangular display I-Mac⁹ and (2) a 2007 24" square display I-Mac.¹⁰ Obviously, at the time of the January 25, 2023, hearing, the 2007 I-Mac was 16 years old.

Miki testified late under cross at the December 2022 hearing that the computer she sought weighed less than the 2011 I-Mac Dirk produced on April 4, 2022,¹¹ offered fewer ports, and had a display that was squarer than the later manufactured rectangular

⁸Besides the 2015 slim profile I-Mac of which Dirk was the exclusive user.

⁹In the December hearing, Dirk described the 2011 I-Mac based upon his analysis of the then available information and research on the Apple website as the 2014 I-Mac. Later both Dirk and Miki worked out that this was in fact the 2011 I-Mac.

¹⁰Miki referred to the 2007 I-Mac as the 2008 I-Mac. In fact it was manufactured in 2007, which Dirk discovered by researching the serial number. This statement about the two computers is clear now in this brief, but certainly the testimony was confused after the December 6, 2022 hearing. Dirk believes it was clear at the end of the January 24, 2023, hearing. For example in the December 2022 hearing Miki originally testified that there were three relevant I-Macs. This stunned Dirk and led the Court to comment on his obvious distress at this testimony. (12/6/2022 Hearing Transcript at pg.126) By the end of the second hearing, Dirk believes both parties were stating there were the two computers at issue—the 2011 and the 2007.

¹¹This delivery was thirty-days late because the subject computer was in Montana and Dirk was in Cambridge, Massachusetts.

display 2011 model which had been shipped to her on April 4, 2022. Nor had she ever produced a photograph of the computer she actually sought until the January 2023 hearing (see Miki's 1/24/2023 Hearing Transcript Exhibit 4).

In good faith Dirk originally delivered the 2011 manufactured computer. The only other I-Mac in the house was one from 2015 which Dirk had purchased and continued to use at the time of the Divorce Decree. Because of his belief, he caused the software and files, which either by law did not belong to Miki or which she had not claimed, to be removed consistent from the 2011 I-Mac with Apple's directions on how to do so.

It was after Miki's description of the square display for the first time at the December 6, 2022, hearing, that Dirk (and Miki) realized, one and half years after trial, that there might be two I-Macs that met her earlier, vague description. This realization was based upon the fact that the 2011 computer had a rectangular display. That possibility sent him promptly on the search for a second computer with a square display located outside of the ranch house because he knew it was not in the ranch house. He found that computer on the second floor of a barn adjacent to the ranch house.

There is no evidence in this hearing record that Dirk knew before the December 6, 2022, hearing that there was a second I-

Mac that might have been confused with the 2011 rectangular display I-Mac.

Dirk testified that he had not removed any software of digital documents from the 16-year old computer. There was no opportunity to evaluate the software and files on the 2007 I-Mac afforded by the Court to Miki.

Other Facts Allegedly Supporting the Contempt Order

Miki made a number of factual allegations supporting her request for the Contempt Order. Those factual allegations either already had been resolved at the February 16, 2022, hearing and rejected or the factual allegations were either false or otherwise not reliable (Exhibit F to Dirk Response to Fourth MOTSC).

Facts Relevant to Dirk's MOTSC for Repeated Violations of the District Court Order Sealing Certain Confidential Personal and Financial Information

Miki Adams (Miki), with the aid of both her legal counsel, repeatedly has disclosed confidential personal and financial information developed during this dissolution to third parties and real estate service vendors. Those facts are not in dispute.¹²

¹²Those facts are set out in Dirk's MOTSC.

On March 2, 2023, Dirk moved the Court for an OSC to Miki for failing to comply with Judge Oldenburg's seal and confidentiality orders. The Court promptly denied that motion without even asking for a response from Miki, finding that his motion was meritless. No explanation for the basis of that finding was provided.

STANDARD OF REVIEW

Abuse of Discretion Generally: An abuse of discretion occurs if a court exercises discretion based on a clearly erroneous finding of material fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. (citations omitted). Van Buskirk v. Gehlen, 2021 MT 87, ¶ 13, 404 Mont. 33, 484 P.3d 924, 933.

Contempt Finding in Dissolution Proceeding:

"Our standard for review of contempt orders, pursuant to our granting a writ of certiorari, is first to determine whether the court which found contempt acted within its jurisdiction and, second, to determine whether there is substantial evidence to support the findings of the court. *Kauffman v. Twenty-First Judicial Dist. Court*, 1998 MT 239, ¶ 16, 291 Mont. 122, ¶ 16, 966 P.2d 715, ¶ 16." Lee v. Lee, 2000 MT 67, ¶ 19, 299 Mont. 78, 996 P.2d 389, 394

Our standard of review of a district court's findings is whether substantial evidence supports those findings. *In re Marriage of Nevin* (1997), 284 Mont. 468; 472, 945 P.2d 58, 61 (citation omitted). Substantial evidence is the amount of relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Nevin*, 284 Mont. at 472, 945 P.2d at 61 (citation omitted). Lee v. Lee, 2000 MT 67, ¶ 20, 299 Mont. 78, 996 P.2d 389, 394-95

Permanent Order of Protection (POP): "This Court will not overturn a district court's decision to continue, amend, or make permanent an order of protection absent an abuse of discretion. *Boushie v. Windsor*, 2014 MT 153, ¶ 8, 375 Mont. 301, 328 P.3d 631; *Keller v. Trull*, 2007 MT 108, ¶ 7, 337 Mont. 188, 158 P.3d 429; see also *In re Marriage of Coogler*, 2004 MT 122, ¶¶ 14, 24, 321 Mont. 243, 90 P.3d 414 (citing § 40-15-202, MCA). A district court abuses its discretion when it acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Boushie*, This Court will not overturn a district court's decision to continue, amend, or make permanent an order of protection absent an abuse of discretion. *Boushie v. Windsor*, 2014 MT 153, ¶ 8, 375 Mont. 301, 328 P.3d 631; *Keller v. Trull*, 2007 MT 108, ¶ 7, 337 Mont. 188, 158 P.3d 429; see also *In re Marriage of Coogler*, 2004 MT 122, ¶¶ 14, 24, 321 Mont. 243, 90 P.3d 414 (citing § 40-15-202, MCA). A district court abuses its discretion when it acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice." *Boushie*, 8; *Lockhead v. Lockhead*, 2013 MT 368, ¶ 12, 373 Mont. 120, 314 P.3d 915.

Review of Motion Denial: "In this case, the District Court summarily denied the Feeses' motion to set aside the entry of default without explanation. Although we can assume from this order that the District Court did not find good cause to set aside the entry of default, we cannot ascertain why the District Court found good cause lacking. Thus, we are compelled to reverse the District Court's order because we have no meaningful way to assess whether the District Court committed a slight abuse of discretion in refusing to set aside the entry of default." *Robinson v. Feese*, 2015 MT 290N, ¶ 8, 382 Mont. 407, 363 P.3d 1145

"Findings must be sufficient, however, to permit review without speculation into a district court's reasoning. *In re Bartsch*, ¶ 33." *In re Marriage of Crowley*, 2014 MT 42, ¶ 26, 374 Mont. 48, 53, 318 P.3d 1031, 1037

SUMMARY OF THE LEGAL ARGUMENT

The District Court Contempt Order finding that Dirk violated the Decree on an Apple I-Mac computer is an abuse of discretion based upon erroneous factual conclusions, erroneous conclusions of law unsupported by any legal analysis, and punishes Dirk severely for actions with regard to the computer which were taken in good faith and based upon a mutual mistake of the parties. Moreover, the District Court Order here was contradictory and required Dirk to perform tasks which the District Court in that same Contempt Order had found did not need to be performed.

To the extent the contempt and POP findings also relied upon other of Dirk's acts, those acts mostly occurred before Miki testified on February 22, 2022, that Dirk had not contacted nor attempted to contact her. The District Court's conclusions were an abuse of discretion and also were barred by res judicata and issue preclusion.

The District Court's denial of Dirk's MOTSC is not explained so it is not possible to determine upon what basis the District Court issued it.

LEGAL ARGUMENT

Mutual Mistake About the Identity of the Decreed Computer

Miki's June 22, 2023, MOTSC sought to hold Dirk in contempt, for failing to deliver an I-Mac computer which she had been awarded in the Divorce Decree (Decreed Computer). This was Miki's fourth motion to hold Dirk in contempt. (dkt. ## 25, 56, 340) The District Court denied all three prior motions. Her most recent MOTSC, before the current one, was filed four months previously and was denied on April 18, 2022, by the Hon. Judge Oldenburg. This Supreme Court affirmed Judge Oldenburg's order.

Neither party disputes that originally Dirk had purchased an I-Mac for his personal and business use and that there continued to be on this I-Mac software and files he owned. At some time subsequent after Dirk purchased a new Apple I-Mac, Dirk permitted Miki and other household members, in addition to himself, to use the Apple computer by removing it from his office and placing it in common space in the kitchen (the "kitchen desk") because he had purchased a more current version of the I-Mac with a slim profile and a 27" rectangular display.

Miki characterized Dirk's placement of the old I-Mac as well as his purchase of a new I-Mac as a "gift" of the old I-Mac to her. The Dissolution Decree granted this I-Mac to Miki. The challenge as it turned out was determining which I-Mac that was.

Almost all five hours of the hearings were taken up with identifying the correct I-Mac computer. Dirk had delivered the I-Mac computer he thought was the correct one to Miki's counsel

Ellington on April 4, 2022, thirty days later than the District Court had ordered. The delivery was late because Dirk was residing in Cambridge, Massachusetts, and the computer commenced its journey at his ranch in Wilsall. It then went to Dallas, Texas where a third-party service removed from it the software and digital files Dirk owned.

Miki received the computer from her counsel and reviewed it approximately 60 days thereafter. Miki believed that the I-Mac Dirk delivered was not the one she had been awarded, largely because her files, digital photographs, and software were missing from the computer. She also was concerned that the computer had E-Bay (the digital auction house) labeling which appeared on the display screen when turned on.

There is no dispute now that the I-Mac delivered was manufactured in 2011¹³ and that its operating system worked. Nor is there any evidence after five (5) hours of testimony that there was more than one I-Mac computer which could have matched the Decreed Computer in the ranch house at the time of delivery of it on April 4, 2022.

Unfortunately, the hearings revealed a case of mutual mistake; both parties having misunderstood which computer was awarded to Miki by the Hon. Judge Oldenburg's Divorce Decree.

¹³Dirk originally thought it was a 2014 I-Mac.

And the District Court's contempt order, surprisingly, is confused about the computers as well and leaves the issue of the Decreed Computer unresolved as explained below.

Miki's descriptions of "her computer" to the District Court in connection with the trial were vague and contained no standard identifying information or specifications. For example, in Miki's Amended Declaration of Personal Property prepared by counsel Ellington dated March 26, 2021, (pg. 11: "Apple computer in kitchen (gifted from respondent to petitioner)";¹⁴ or in Miki's Attachment to Updated Final Disclosure dated March 1, 2021, (dkt.## 177,1870: "I-Mac computer in kitchen;" and in Miki's Proposed Findings of Fact, Conclusions of Law, and Decree dated August 20, 2021, (Exhibit MM, dkt.#269): "Apple computer in kitchen gifted by Dirk."

With regard to the I-Mac computer Miki claimed, the District Court in Conclusion of Law para.72 awarded to Miki the: "**Apple computer in kitchen gifted by Dirk.**" (bolded and underlined for ease of reference) granting her request in a single sentence, adopting her description in the Decree.

¹⁴Dirk did not believe he had ever gifted a computer to Miki; he believed its ostensible location on the kitchen desk, the presence of his software and work on the computer, and Miki's ownership of a recently manufactured Mac laptop, meant the I-Mac was intended for the use of both parties.

Nor did Miki and her counsel in their June 21, 2022, Motion for OTSC and their August 4, 2022, Reply and in Miki's affidavit of June 21, 2022, and in all of Miki's initial exhibits for the hearings provide any more meaningful, distinctive identifying information about the I-Mac she sought.

Miki use of location to define the computer she claimed was problematic. She had not used the I-Mac that was purportedly in the kitchen since January 2019 as she had not lived in Montana since she left at that time three years ago. Moreover, except for her late October 2021 ranch house break-in, she had not been in the ranch house since May 2020. As a result, she did not have any information as to what I-Mac, if any, stood on the kitchen desk.

As it turned out, Miki's description of the I-Mac was so ambiguous that both she and Dirk erred in attempting to comply with the Decree. Dirk thought there were only one eligible I-Mac in the ranch house. The 2015 slim profile display I-Mac which Dirk used exclusively could not possibly have been the Decreed Computer because only Dirk used it.

In fact, Miki's description of the I-Mac as one that sat on the ranch house kitchen desk was so misleading that when she broke into Dirk's house without Court permission on October 25-

26, 2021, she stole his 2015 slender profile I-Mac¹⁵ which had been moved to the kitchen by Dirk. She returned it subsequently.

In an order on November 17, 2022, the Hon. Judge Laird earlier had provided guidance on how she thought a lay person should be able to identify a computer.¹⁶

Actually it was not until late in the hearing on December 6, 2022, responding to Dirk's cross-examination that Miki finally made an attempt to meet Judge Laird's order on identifying a computer, she testified about the identifying numbers, marks and other distinct features, including a description of the display, of the Apple I-Mac computer she believed she sought.

Miki testified at the December 6, 2022, hearing that she thought the computer she sought weighed less than the 2011 I-Mac Dirk delivered, offered fewer ports, and had a square display, rather than the later manufactured rectangular display of the 2011 model which had been shipped to her on April 4, 2022.

¹⁵Apple changed the profile of the I-Mac in 2015, sliming it down significantly.

¹⁶"The identification of one's computer is a common endeavor in which lay persons routinely engage at work, during school, and at home. This is often done without the aid of experts by observing **identifying numbers, marks, and other distinct features on the exterior of the device** and by recognizing the **display, settings, files and programs saved in the computer's software.**"(emphasis added).

In other words, it was nine (9) months after Dirk delivered the 2011 I-Mac that he learned at the hearing enough information to discern there might be a second computer because of her description of the display shape.

There is no evidence in this hearing record that Dirk knew before the December 6, 2022, hearing that there was a second I-Mac that might have been confused with the 2011 computer. He could not have known that there was a 2007 I-Mac on April 4, 2022, when he sent the 2011 Computer to counsel Ellington because at that time Miki had not provided any identifying characteristics. And Miki did not grasp that there were two I-Mac computers and that Dirk had sent the later-dated one.

If she had known those specific, identifying details around the date she picked up the April 4, 2022, delivery, she surely would have mentioned that in her affidavit accompanying the June 2022 motion that commenced this proceeding.

There is no evidence in this hearing record that Dirk knew before the December 6, 2022, hearing that there was a second I-Mac that might have been confused with the 2011 computer he provided to Miki. The District Court conclusion that the timestamp on a picture of the second I-Mac taken after the December 6, 2022, hearing adjourned does not prove he was aware

of the second computer before April 4, 2022. That timestamp proves rather that Dirk was diligent in pursuing a second computer after the conclusion of the December 6, 2022 hearing around 1:15 pm. Nor was it rational, if Dirk knew of the 16-year old computer at the time the 2011 was delivered to Miki, for Dirk to spend the money and effort to clean up the 2011 I-Mac and to ship it instead of a 16-year old computer no longer even serviced by Apple. No other evidence of Dirk's alleged pre-hearing knowledge was recited by the District Court.

After the December 6, 2022, hearing Dirk immediately contacted his ranch tenant to look for a second I-Mac outside of the ranch house. Dirk's ranch tenant found and removed the 2007 I-Mac from the log barn next to the ranch house, turned it on, and connected it to the internet. Remotely, Dirk then began to run tests on it. He completed a number of tests on the I-Mac and determined from research on the Apple website that the I-Mac was manufactured in 2007, possessed the square 24" screen, and was lighter in weight than the 2011 model Dirk originally had shipped to Miki's counsel. Dirk research was unable to confirm Miki's testimony about the I-Mac with the 24" square screen having fewer ports than the 2011 I-Mac. Once he had completed as much research as was possible Dirk delivered it to the Park County District Court room on January 25, 2023.

Dirk testified that the 2007 I-Mac with the 24" square screen likely was the computer described inadequately in Miki's original request for an I-Mac computer. Dirk's testimony was uncontradicted by any other testimony during the hearing.

The Montana Supreme Court has recognized that a mutual mistake of fact means that no contract can be formed.

"A mutual mistake occurs when, at the time the contract is made, the parties share a common misconception about a vital fact upon which they based their bargain. *Carey v. Wallner* (Mont.1986), 725 P.2d 557, 43 St.Rep. 1706. Such a mistake is a proper ground for rescission. Section 28-2-1711, MCA; *Wallner*, 725 P.2d at 561." *Mitchell v. Boyer*, 237 Mont. 434, 437, 774 P.2d 384, 386 (1989), see also *Kruzich v. Old Republic Ins. Co.*, 2008 MT 205, ¶ 25, 344 Mont. 126, 131, 188 P.3d 983, 987.

A mutual mistake causes the parties to start again once the mutual error is discovered, which is exactly what Dirk did. Dirk did deliver the 2007 Decreed Computer.

The District Court Order is Confusing and Contradictory on the Number of Computers and Their Identity

Just as importantly, even the District Court could not sort out the computers in its Contempt Order. The District Court in its Contempt Order labels the Apple I-Mac computer delivered to the Court at that second hearing as the *Discovered Computer*. Having just named it and distinguished

it, the District Court says nothing further about the Discovered Computer.

Instead it orders Dirk to send the *Awarded Computer*, defined as the computer the Divorce Decree awarded to Miki, to Miki's counsel. There is no explanation by the Court of the identification or characteristics of the *Awarded Computer*.

But, there is also the suggestion in the Court's.

language that the *Discovered Computer* might be the *Awarded Computer* as the Order contains this language, "...based on this and other evidence presented at hearing, the Court finds that the *Awarded Computer* was not lost as Dirk asserts, and that rather than shipping the *Awarded Computer* as ordered, Dirk hid it in a barn and mailed the *Shipped Computer* in its place in violation of the Interim Order. The Court makes no findings as to the present condition of the *Awarded Computer*." The Court had earlier recited that the *Discovered Computer*, (just like the *Awarded Computer*) had been found in Dirk's barn. It is not clear if the Court regards the *Discovered Computer* and the *Awarded Computer* as two distinct computers or as the same computer. Therefore it is not clear if the Court thinks there are two computers (*Shipped, Discovered/Awarded*) or three computers (*Shipped, Discovered, Awarded*) involved in the hearings.

The Court heard Dirk's extensive, uncontradicted testimony about the *Discovered Computer* on the second hearing date. Apparently though, the District Court thought there were two I-Macs hidden in the log barn even though there is no testimony or evidence to support such a conclusion. Also the Court's Contempt Order mistakenly states that with regard to the *Shipped Computer* (as set out below, to avoid any confusion, Dirk would label this the 2011 I-Mac), that Miki testified it had a squarer screen than the *Awarded Computer*. Actually, Miki's testimony on January 24, 2023, was not that. Miki's testimony was that it was the *Awarded Computer* that had the square screen.

For the purpose of clarity in this brief, there are only two computers, a 2007 24" square display I-Mac computer which is the *Awarded Computer*, as it turned out, and a 2011 27" rectangular display I- Mac which is the *Shipped Computer*.

Dirk introduced Exhibits NN (2007 I-Mac) and OO (2014 I-Mac) at trial¹⁷ providing the technical specifications of the two computers. (The 2007 Computer model has been discontinued and is no longer supported by Apple because it is 16 years old).

¹⁷Both were admitted into evidence.

In short, the District Court's conclusions about the Awarded Computer, the Discovered Computer and the Shipped Computer are confusing and contradictory.

But the Court compounds its error by then ordering Dirk to send the *Awarded Computer* and its *Restored Data* to Miki's legal counsel within 14 days. Unfortunately, Dirk could not send the *Awarded Computer* because whatever computer to which the Court is referring is in the possession of the Park County Clerk. In fact both the 2007 I-Mac (the real *Awarded Computer*) and the 2011 I-Mac reside with the Park County District Court Clerk. While the District Court apparently thinks there are three computers, actually there are only two.¹⁸

¹⁸In fairness to the District Court, it may be that the District Court thinks there are three computers at issue because Miki testified at the December 6, 2022, hearing that there were three. Dirk was stunned by this testimony and the District Court acknowledged during the hearing that Dirk obviously was distressed about the disclosure of more than one I-Mac. (12/6/2022 Transcript at pg. 126). Subsequently at the January 24, 2023, Hearing Miki dropped the reference to three computers and instead discussed only two computers—the one Dirk shipped her and the one Dirk introduced into evidence on January 24, 2023, the 2007 24" square display I-Mac. The District Court also may have been confused by the testimony about the 2015 slim profile 27" display I-Mac belonging to Dirk which Miki stole. All of this, of course, is speculation.

Of course, Dirk promptly advised the District Court that he could not comply with the Court's order. He stated in his Status Report:

"Compliance Status

"1. Dirk has not restored any removed data to the *Awarded Computer* because the *Awarded Computer* is not in his possession, Dirk having delivered the *Awarded Computer* to Miki at the hearing on January 24, 2023. Dirk believes the *Discovered Computer* is the same as the *Awarded Computer*. Other than Dirk's 2015 27-inch I-Mac 27 (slim screen; see Exhibit B3) which Miki stole on October 25, 2021, when she burgled Dirk's house with an armed thug, there are only two computers in *Marriage of Adams*: (1) the 2007 version of the I-Mac which is the *Discovered Computer* and which was delivered intact to the Court at the second hearing. The second computer is the 2011 I-Mac 27 inch display computer. The 2007 I-Mac 24" display is the *Awarded Computer*.

2. Dirk shipped the *Restored Data* on an UGreen hard drive, to counsel Ellington at her office on Monday March 27, 2023. Since the *Restored (Preserved) Data* is from a 2011 I-Mac that even Miki has testified does not belong to her (Miki June 21, 2022, Affidavit at para. 4), Dirk cautions that attempting to install files from the 2011 I-Mac from the external hard drive on to the 2007 I-Mac (*Awarded Computer*) may create operating challenges for the 2007 I-Mac. Dirk provides this external hard drive to counsel Ellington only out of an excess of caution."

Neither the District Court nor Miki have responded to this March 2023 Status Report. Dirk assumed after the second hearing that the District Court would want the parties to file memoranda of law arguing the facts and law since so much new information was elicited at the second hearing.

Instead the District Court ordered the parties not to file any other papers in connection with the hearings until

it had issued an order. Not only did this deprive the District Court of clarifying briefs, which based on the Order, appears would have been helpful, but it did not seek Miki's review of the 2007 24' square display computer delivered to the Court. The Court acknowledges this when it says it does not know the status of the *Awarded Computer*.

In short, Miki had the burden of proof here that Dirk deliberately did not provide her with the *Awarded Computer*. Her testimony was confusing and opaque and did not provide the requisite identifying information about the *Awarded Computer* until Dirk's cross-examination. And she has not proven that the 2007 I-Mac (the *Discovered Computer* in the Contempt Order) which was produced to her on January 24, 2023, was not the *Awarded Computer*.

The District Court Order on Software and Digital Files
Ignores the Law and Prior District Court Rulings

Miki's primary argument and the District Court's primary basis for issuing a two-year contempt order is that there were no software nor digital files on the 2011 I-Mac computer with the 27" display. Dirk has stated that the software, other than the Apple operating system, and the digital files were removed at his direction because the District Court's Decree only awarded the computing machine and operating system.

The Contempt Order finds that this one Decree sentence also transferred the software and digital files along with the computer because such transfers "were implicant" in the Hon. Judge Oldenburg's Decree transferring an I-Mac computer. In so interpreting that Decree's one sentence, which is silent on the issue, the District Court offered no factual or legal analysis. As a consequence it is difficult to evaluate or to respond to the District Court's conclusion.

But Judge Oldenburg's language in another paragraph in the Divorce Decree makes clear that he did not regard the one-sentence language on the I-Mac transfer as conclusive on the title to software and digital files. Judge Oldenburg ruled at paragraph 67 of the Conclusions of Law as follows:

"The Court finds that the customer/work data and documents in Dirk's possession that do not belong to Dirk shall be returned to Miki immediately. Likewise, any documents, papers or records belonging to Dirk taken by Miki from the Ranch house shall be returned to him immediately. These transfers shall be accomplished no later than 30 days after this Order, or alternatively, the party in possession shall certify under penalty of perjury that they have destroyed all such data and/or documents, no longer possess them or were never in possession of the same."
(emphasis added)

Finally, Judge Oldenburg ruled in paragraph 70 of the Conclusions of Law that "Dirk shall be awarded all other personal property not specifically listed herein or as specified

in the Distribution Chart attached hereto Exhibit B." (emphasis added)

Miki cited no statute or case law in support of her position that the transfer of a machine, a computer, also transferred whatever digital software and files were located on the computer. This part of Miki's MOTSC takes the position, in effect, that a one-sentence order in a state court divorce action, impliedly overrules the Copyright Laws, as amended, 17 U.S.C. chapters 1-8 and 10-12 (2022) (exclusive rights in copyrighted items), as well as the developed law, mostly in the federal courts (e.g., *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 429 (2d Cir. 2012)). Miki seeks to disregard copyright and software licensing black letter law which undergirds the technology boom of the last fifty (50) years without even one citation. If the change of title to a computer also transfers title to all the software and digital files, then the software licenses relied upon by America's digital economy to protect intellectual property are a fruitless exercise.

Moreover, in taking this position, Miki raises a very serious question about whether a state divorce decree should be interpreted by *implication* to preempt applicable federal law. Such an interpretation is contrary to good interpretative

practice and ignores language to the contrary in the same Decree.

Miki's motion, in effect, holds that a software license agreement, for example, which runs to more than 20 pages prepared by the second largest technology company in the world (Microsoft), can be ignored (see 12/6/2022 Hearing Transcript Exhibit S, para. 1.a. "This service/software is licensed not sold." Exhibit S was admitted into evidence). If such wild, unsubstantiated assertions are to be found credible, at the least, Miki should be tasked with citing some case law and making some tightly reasoned argument from the license contract language.

As well, Miki advanced no legal argument that a Montana divorce court distributing property pursuant to MCA 40-4-202, has the authority to distribute digital documents without the necessary findings required by that statutory section's requirement that the property "**belonging** to either or both, however and whenever acquired and whether the **title** to the property and assets is in the name of the husband or wife or both..." (emphasis added) "Belonging" is defined by Merriam-Webster as "to be owned by." (Merriam-Webster.com as accessed on January 27, 2023). It simply is not credible to contend that Miki possessed ownership in software appearing on the computer

because she admits that the 2007 computer was a "hand-me-down." Rather the 2011 computer had software placed upon it, which was governed by contracts which granted written permission to use the software, permission which was not transferable. Those contracts were with Dirk.

Just as importantly, with regard to the digital files and software, on the computer, Miki has provided no description of any software, digital file nor digital photograph to which she makes a claim, nor has she made any effort to prove nor even to allege that she owned the property which she claims. For example, is she claiming that photographs Dirk took of his son Harry in 2008 on the 2007 I-Mac now belong to her? That cannot be Judge Oldenburg's intention. But if it was, then surely more than a few words were required to do so.

In response to Dirk's questions of Miki on cross-examination on how Dirk would identify software or digital files, including photographs, she claimed she owned so he could provide them to her; she responded that she did not know why she had to identify the pictures. (1/24/2023 Hearing Transcript pg. 50)

By comparison if one approaches the issue of interpreting the Decree's one sentence pursuant to the principle of Occam's Razor, one could read the sentence as simply transferring a

machine. That approach does not require this Court to find that the Hon. Judge Oldenburg, by implication, in one sentence overruled fifty (50) years of U.S. copyright law.

Here again, though, the District Court's Contempt Order contradicts its own conclusion that title to a computer also transfers title to all the software and digital files on the computer. The District Court ignores its own rule by ordering Dirk to transfer the Restored Files to Miki.

If software and digital files belong to the owner of the computer, then Dirk, by the logic of the District Court, must own the Restored Files.

There was no testimony nor opportunity to evaluate the software and files on the 2007 I-Mac afforded by the Court.

Instead the Court took the MOTSC under advisement and ordered the parties not to file briefs or further motions.

The District Court's Information Order, Provides No Information about Why Dirk's Motion Was Denied as Meritless.

Dirk filed a MOTSC to enforce the District Court's various seal orders on March 2, 2023. Without hearing from Miki, the District Court on March 30, 2022, denied the motion,¹⁹ calling it

¹⁹ The details of Miki's violations are provided in Dirk's Motion.

meritless. The Court provided no other insight into the basis of its order. Therefore Dirk is unable to respond to it.

For example, the Park County District Court Clerk decided to treat the Decree as confidential. And this Supreme Court has treated the Decree as confidential on it's docket website.

Miki, of course, violated that restriction. Reminding both parties seemed just. The Supreme Court has stated that if an order on a substantive motion provides no explanation, the decision must be remanded to the District Court for an explanation. Robinson v. Feese, 2015 MT 290N, ¶ 8, 382 Mont. 407, 363 P.3d 1145; In re Marriage of Crowley, 2014 MT 42, ¶ 26, 374 Mont. 48, 53, 318 P.3d 1031, 1037.

CONCLUSION

The Supreme Court should reverse the Order in full and remand the Order to the District Court for a hearing to make a decision which reflects the actual facts of the computer ownership issue as well as the ownership of the software and digital files consistent with the facts, prior District Court orders, and applicable federal and state law.

The Supreme Court should reverse the District Court Order finding Dirk in contempt and subjecting him to a 10 year POP.

The Supreme Court should remand the District Court's order on confidentiality for an explanation of its rationale or reconsideration.

Dated: September 8, 2023

Respectfully Submitted,

/s/ Dirk S. Adams

Dirk S. Adams

Certificate of Compliance

This brief uses a monospaced font, Courier New 12 pt. with not more than 10.5 characters per inch.

The brief does not exceed the appellate brief limits in words counting only those words which Rule 12 permits.

Dated: September 29, 2023

Respectfully Submitted

A handwritten signature in black ink, appearing to read 'D. S. Adams', followed by a long horizontal line extending to the right.

Dirk S. Adams

Certificate of Service

I declare under penalty of perjury that on September 8, 2023, I have filed a true and accurate copy of the foregoing Appellate Brief and accompanying papers with the Clerk of the Montana Supreme Court by hand; and that I have served true and accurate copies of this Brief and accompanying papers by first class U.S. mail to each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

| | |
|---------------|-----------------|
| <u> X </u> | Hand Delivery |
| <u> </u> | Federal Express |
| <u> </u> | Fax |
| <u> X </u> | Mail |

1. Clerk of the Supreme Court
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P.O. Box 203003
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2. Adrienne Ellington Adrienne Ellington
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3. Jami Rebsom at jamirebsom@gmail.com
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P.O. Box 670
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Respectfully Submitted

A handwritten signature in black ink, appearing to be 'D.S. Adams', with a long, sweeping horizontal line extending to the right.

Dirk S. Adams

Appendix A

Trial Exhibit 39

From: Miki Adams migsell@mac.com @
 Subject: Legal Fees as of 3.19.21
 Date: March 19, 2021 at 1:15 PM
 To: Jamil Rebsom jamirebsom@gmail.com, Adrienne Ellington adrienne@ellingtonlegal.com

| SUMMARY OF FEES PAID as of 3/20/21 | | |
|------------------------------------|-----------|-------------------|
| Rebsom | \$ | 22,330.62 |
| Ellington | \$ | 18,519.81 |
| McKonkie | \$ | 18,209.35 |
| Johnson | \$ | 5,000.00 |
| Swain | \$ | 82,580.50 |
| TOTAL: | \$ | 146,631.28 |

| Jamil Rebsom | | |
|--------------------|--------------|---------------------|
| DR-34-2020-0000043 | | |
| Invoice # | Invoice Date | Amount |
| 9000 | 2-21-21 | \$ 4,248.82 |
| 9000 | 2-21-21 | \$ 5,660.95 |
| 3272 | | \$ 2,599.25 |
| 3225 | 12-20-20 | \$ 2,725.50 |
| 3157 | 12-3-20 | \$ 1,759.90 |
| 3087 | 11-8-20 | \$ 2,566.20 |
| 3014 | 10-3-20 | \$ 575.75 |
| 2959 | 9-8-20 | \$ 2,194.25 |
| | | \$ 22,330.62 |

| Adrienne Ellington | | |
|--------------------|--------------|---------------------|
| DR-34-2020-0000043 | | |
| Invoice # | Invoice Date | Amount |
| 1298 | 2-21-21 | \$ 1,230.25 |
| | 2-11-21 | \$ 2,542.18 |
| 1193 | 12-3-20 | \$ 1,892.90 |
| 1192 | 11-6-20 | \$ 2,867.50 |
| 1128 | 9-18-20 | \$ 314.50 |
| 138 | 6-8-20 | \$ 5,665.00 |
| 01298 | | \$ 1,280.55 |
| 01334 | | \$ 2,768.01 |
| | | \$ 18,519.81 |

| Tim Swain | | |
|-----------------------------------|--------------|---------------------|
| 120 cv-11366 & DR, AC 2020-P-1237 | | |
| Invoice # | Invoice Date | Amount |
| 2020663 | 3-12-21 | \$ 4,425.00 |
| 2020664 | 12-Jan | \$ 11,315.00 |
| 2018041 | 2-17-21 | \$ 10,365.53 |
| 2013019 | 1-27-21 | \$ 17,987.66 |
| 2006417 | 12-4-20 | \$ 24,257.31 |
| 2003320 | 11-11-20 | \$ 13,730.00 |
| | | \$ 82,580.50 |

| Greg Johnson | | |
|--------------------------------|--------------|--------------------|
| Cambridge D.C. No. 2003 CR-622 | | |
| Account # | Invoice Date | Amount |
| | 10/22/20 | \$ 5,000.00 |
| | | \$ 5,000.00 |

| Bryant McKonkie | | |
|--------------------------|--------------|---------------------|
| 200003796 & 720-279-0025 | | |
| Account # | Invoice Date | Amount |
| 391-00M | 3-19-21 | \$ 1,816.35 |
| 391-00M | 1-27-21 | \$ 1,000.00 |
| 391-00M | 12-4-20 | \$ 2,062.00 |
| 391-00M | 11-2-20 | \$ 500.00 |
| 391-00M | 10-1-20 | \$ 4,331.00 |
| 391-00M | 7-29-20 | \$ 3,500.00 |
| | | \$ 14,209.35 |

PETITIONER'S
 EXHIBIT 39