IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. DA 23-0700

SKYLER WILLARD; LACIE WILLARD, individually and on behalf of; R.C.R.W., R.A.W., and A.L.W., minor children,

Appellees,

vs.

JOSEPH SCHMAUS; TRACI SCHMAUS, and DOES 1-9

Appellants.

ANSWER BRIEF OF APPELLEES

On Appeal from the Montana First Judicial District Court, Lewis and Clark County
Honorable Michael Menahan, Presiding
District Court Cause No. DV-2023-0558

APPEARANCES:

Joseph Schmaus, *pro se*
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STATEMENT OF ISSUES

Whether the District Court erred in denying Defendants/Appellants' Motion for Change of Venue prior to the expiration of the time for Appellants to file a reply brief.

STATEMENT OF THE FACTS

Mr. Willard and Defendant Traci Schmaus struck up a social relationship. That relationship evolved to the point where Mr. Willard and Mrs. Schmaus exchanged private photographs of an intimate nature with each other. *Doc. 5*, ¶ 12. In one such exchange, Mr. Willard sent Mrs. Schmaus a photo of himself in a state of undress (hereinafter referred to as the Photo) that was meant to be seen only by Mrs. Schmaus. The Photo depicts Mr. Willard standing in front of a mirror, nude, with a toothbrush in his mouth. *Doc. 5*, ¶ 13. Mrs. Schmaus is the only person to whom Mr. Willard sent the Photo. *Doc. 5*, ¶ 14. In fact, Mr. Willard deleted the Photo after he sent it to Mrs. Schmaus.

In October, 2022, Appellants' adult child contacted A.W. and alleged that Mr. Willard and Mrs. Schmaus were having an affair. *Doc. 5*, ¶ 15. Soon thereafter, Appellants' other minor child started leaving multiple harassing comments on A.W.'s Instagram and/or other social media. These comments forced A.W. to block Appellants' minor child on those platforms. *Doc. 5*, ¶ 16.

At some unknown point in time, Mr. Schmaus discovered the Photo, which started an unceasing campaign of harassment against Plaintiffs. *Doc. 5*, ¶ 17. On January 13, 2023, Mr. Schmaus sent the Photo to both Mr. Willard and Mrs. Willard, with the accompanying message "Skyler, I just want to talk with you. No threats, no fighting. I may end up shaking your hand and thanking you." *Doc. 5*, ¶ 18. Mr. Willard did not

respond to Mr. Schmaus text message or otherwise engage with him at that time. *Doc. 5*, ¶ 19.

Shortly after receiving the text from Mr. Schmaus, Mr. Willard was notified by a co-worker that Mr. Willard's employer had received approximately four envelopes addressed to various people at Mr. Willard's place of employment. All of the intended recipients were Mr. Willard's superiors. *Doc. 5*, ¶ 20. The envelopes indicated that they were sent from Helena, Montana, and that they were mailed on January 13, 2023, which is the very same day that Mr. Schmaus sent the aforementioned text to Mr. Willard and Mrs. Willard. *Doc. 5*, ¶ 21. The envelopes contained a copy of the Photo, together with a letter that read:

> Dear Sir,
>
> The enclosed are images of Mr. Skyler Willard, Safety Director of Dick Anderson Construction. My wife came to me with these images which were sent from 406-xxx-xxxx, Skyler's company cell phone number. After reviewing them with her, she informed me that Skyler sent her these image [sic] and others after meeting her at her place of employment. She informed me that Skyler was there as a representative of DA Construction and approached her asking for her phone number as a business contact. According to her, in the beginning, their communication was that of a professional nature but quickly turned sexual on Skyler's part with him sending selfies and nude pictures of himself to her and that even though she asked him to stop, he continued to harass her with images and text messages up and until the time she blocked his phone number.
>
> For obvious reasons, I will not disclose my contact information but am hopeful that your office will deal with Mr. Willard's inappropriate behavior appropriately.
>
> Thank you---

Doc. 5, ¶ 22.

Based upon the fact that Mr. Willard only sent the Photo to Mrs. Schmaus, coupled with the fact that the author referenced the recipient of the enclosed Photo as his "wife," it is clear that Mr. Schmus authored and sent these letters in an attempt to interfere with Mr. Willard's employment. *Doc. 5*, ¶ 23.

Then, on June 20, 2023, Mr. Willard's employer was, yet again, notified of another incident involving the Photo. *Doc. 5*, ¶ 24. On that date, one of Mr. Willard's co-workers was alerted by an employee of a Town Pump store in Helena, Montana, that someone had posted a flyer in the men's restroom which contained the Photo. *Doc. 5*, ¶ 25. The flyer also contained another photograph of Mr. Willard that was taken from his employer's website, his name, company title, and contact information for his company, including Mr. Willard's personal cell phone number. *Doc. 5*, ¶ 26. The heading on the flyer stated "CREAP [sic] ALERT Please Photograph and Share," and contained the following "Watch out for this PATHETIC LOSSER [sic]! Even though he is married, he CREAPS [sic] married women with naked pictures of himself." *Doc. 5*, ¶ 27.

Upon learning of the existence of the flyer, Mr. Willard went to another Town Pump location near where the flyer was discovered. There, he observed and removed another flyer. It is unknown how many flyers were posted around Helena. *Doc. 5*, ¶ 28. Surveillance footage from the security cameras at both Town Pump locations confirmed that Defendant Joseph Schmaus frequented both Town Pump locations within close proximity and shortly before the flyers were discovered. *Doc. 5*, ¶ 29.

For instance, at 12:45 p.m. on June 20, 2023, Mr. Schmaus is observed entering the Town Pump location at 3161 N. Sanders Street and walking directly to the men's

restroom. Mr. Schmaus is then observed exiting the men's restroom at 12:50 p.m. and immediately exiting the building without making any other purchase. *Doc. 5*, ¶ 30. Then, at 12:57 p.m. on June 20, 2023, Mr. Schmaus is observed entering the Town Pump location at 1822 E. Custer Avenue, in Helena, Montana, and he walks immediately to the men's restroom. Mr. Schmaus is then observed exiting the men's restroom at 1:02 p.m., and, again, immediately exits the building without making any purchase. *Doc. 5*, ¶ 31. The surveillance video also shows a Town Pump employee exiting the men's restroom around 1:30 p.m. with what appears to be the flyer in their hands. *Doc. 5*, ¶ 32.

Multiple unknown individuals enter and exit the men's restrooms at both Town Pump locations between the time when Defendant Joseph exits the men's restrooms and when the flyers are removed, meaning multiple people likely saw these flyers. *Doc. 5*, ¶ 33. Furthermore, no other individuals observed on the surveillance video frequented both locations during this time. *Doc. 5*, ¶ 34.

Based upon the surveillance footage and other information obtained, on August 23, 2023, Mr. Willard filed suit against Mr. Schmaus alleging negligence, negligent and intentional infliction of emotional distress, and invasion of privacy by false light. *Doc. 1*. Mr. Willard also sought injunctive relief in the form of an order prohibiting Mr. Schmaus from any further dissemination of the Photo in perpetuity. *Id.*

Then, on August 30, 2023, Mrs. Willard had just dropped R.W. off at school and was traveling to work. *Doc. 5*, ¶ 35. Mrs. Willard was stopped at a stop light just to the west of the Custer Avenue overpass, when she noticed that the person in the vehicle next to her was gesturing to her. *Doc. 5*, ¶ 36. Mrs. Willard initially thought that the person in

the vehicle next to her was waving, but quickly realized that the person was flipping her off. *Doc. 5*, ¶ 37. Mrs. Willard instantly recognized this person as Mrs. Schmaus. *Doc. 5*, ¶ 38.

Mrs. Willard followed Mrs. Schmaus into the parking lot of the Town Pump located at 3161 N. Sanders Street, and confronted Mrs. Schmaus by asking whether Mrs. Schmaus had something to say to her. *Doc. 5*, ¶ 39. During this interaction Mrs. Schmaus made reference to this lawsuit that Mr. Willard had initiated against Mr. Schmaus, and mocked Mr. Willard as being suicidal. *Doc. 5*, ¶ 40. Mrs. Schmaus also stated that she had gone to Mrs. Willard's place of work in an attempt to "tell everyone you work with how childish you are," but that they were closed. *Doc. 5*, ¶ 41.

Mrs. Schmaus threatened to call Mrs. Willard's place of work to schedule an appointment, which Mrs. Willard understood to be an intended threat to interfere in Mrs. Willard's employment and harass her. *Doc. 5*, ¶ 42. Mrs. Schmaus also threatened that if Mr. Willard went forward with the lawsuit, everything would go public. Again, Mrs. Willard interpreted this remark as a threat that Appellants would continue to release the Photo and make these matters public. *Doc. 5*, ¶ 43.

STATEMENT OF THE CASE

As previously stated, Mr. Willard filed suit against Mr. Schmaus in the Montana First Judicial District Court for Lewis and Clark County on August 23, 2023. *Doc. 1.* In that Complaint, Mr. Willard asserted claims of negligence, negligent infliction of emotional distress, intentional infliction of emotional distress, and invasion of privacy by

false light, all of which are torts. *Id.* Mr. Willard filed suit in Lewis and Clark County due to the fact that the tortious conduct complained of occurred within said county.

Following the August 30 incident involving Mrs. Schmaus, the Complaint was amended to include Mrs. Willard and the Willards' minor children as plaintiffs, and Mrs. Schmaus as a defendant. Mrs. Willard asserted claims for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. *Doc. 5.* The Willards also sought injunctive relief.

On September 7, 2023, the Willards filed a Motion for Temporary Restraining Order and Application for Preliminary Injunction. *Doc. 7.* On September 11, 2023, the District Court issued a Temporary Restraining Order and set a show cause hearing for September 25, 2023. *Doc. 10.* The District Court convened a show cause hearing on September 25, 2023, which was attended by the Willards and their counsel. Neither Appellant appeared at the show cause hearing. *Doc. 18.* On September 26, 2023, the District Court granted the Willards' application and issued a Preliminary Injunction in favor of the Willards. *Doc. 19.*

On October 31, 2023, Appellants filed a Motion for Change of Venue on the basis that Jefferson County, where Appellants reside, was the proper venue pursuant to Mont. Code Ann. § 25-2-118. *Doc. 26.* The Willards opposed Appellants' motion for change of venue on the basis that venue was proper in Lewis and Clark County pursuant to Mont. Code Ann. § 25-2-122 since the Willards alleged that torts were committed in Lewis and Clark County. *Doc. 28.* On November 7, 2023, the District Court denied Appellants' Motion for Change of Venue. *Doc. 32.* In so doing, the District Court found that the

Willards had filed their claims in the proper venue because Mont. Code Ann. § 25-2-122 proscribed the county in which the torts occurred as the proper venue, and that it was precluded from granting a change of venue pursuant to Mont. Code Ann. § 25-1-115. *Id.* Appellants appeal this order.

STANDARD OF REVIEW

Whether a county is a proper place for trial presents a question of law involving the application of the relevant venue statutes to the pleaded facts. *Allen v. Atlantic Richfield Co*., 2005 MT 281, ¶ 6, 329 Mont. 230, 124 P.3d 132, 133 (citing *Wentz v. Montana Power Company* (1996), 280 Mont. 14, 17, 928 P.2d 237, 238 (citation omitted)). Thus, this Court's review of the District Court's denial of the motion for change of venue is plenary; this Court simply determines whether the district court's ruling was legally correct. *Id.*

SUMMARY OF THE WILLARDS' ARGUMENT

There is absolutely no merit to Appellants' appeal. Their sole argument is that the district court judge did not allow them to file a reply brief in support of their motion. However, Montana law is abundantly clear that a reply brief is optional, meaning that a district court judge is under no obligation to consider such a brief.

To the extent that this Court could assign any error to the district court's actions with respect to Appellants' Motion for Change of Venue, such error is harmless considering that Montana statutory and case law interpreting the venue statutes—which the Willards cited in their response to Appellants' Motion for Change of Venue—make it explicitly clear that venue was proper in Lewis and Clark County. This Court has already

settled the exact issue of this appeal in *Allen v. Atlantic Richfield Co*., 2005 MT 281, 329 Mont. 230, 124 P.3d 132. As such, any error assignable to the district court is harmless because there is nothing that Appellants could have submitted that would have altered the calculus in this matter.

ARGUMENT

A. The District Court Did Not Err by Ruling on Appellants' Motion for Change of Venue Prior to Appellants Filing a Reply Brief.

The only argument advanced by Appellants is that, pursuant to U.D.C.R. 2(b), they should have been allow ten days in which to file a reply brief in support of their motion for change of venue before the district court ruled on their motion. Appellants claim that the district court's issuance of an order prior to them being allowed to file a reply brief was erroneous. However, Appellants' argument is not supported by law.

U.D.C.R. 2(b) provides, in part, that "[w]ithin fourteen days after service of the opposing party's answer brief, the movant **may** file a reply brief or other appropriate responsive documents." *Id.* (emphasis added). U.D.C.R. 2(c) goes on to state that "[r]eply briefs by movant are optional, and failure to file will not subject a motion to summary ruling." *Id.* Based upon the clear language of U.D.C.R. 2, reply briefs are optional, and not mandatory. This conclusion is further reinforced by the use of permissive "may" within U.D.C.R. 2(b), as opposed to a mandatory "shall." Given the optional nature of reply briefs, a district court is not bound to wait for the filing of a reply brief before deciding a motion because such briefs are not required in order for a motion to be considered fully-briefed.

Notably, Appellants have cited to no authority to support their argument. Perhaps this is because the case law on this issue states the exact opposition proposition. In other contexts, this Court has found no abuse of discretion when a district court has decided a motion prior to a party filing a reply brief. *See e.g. Cascade Cty. v. Montana Petroleum Comp. Bd*., 2022 MT 202, ¶ 13, 410 Mont. 325, 518 P. 3d 1280, 1282 ("the District Court did not abuse its discretion when it denied the County's request for a briefing schedule and to amend its petition before the County submitted its reply brief because allowing the County to file additional briefing would have been futile...."). The holding establishes that a district court does not abuse its discretion when it decides a matter without first allowing the moving party to file a reply brief, particular when additional briefing would be futile. As such, the district court, in this case, did not abuse its discretion when it rendered a decision on Appellants' Motion for Change of Venue.

Similarly, Appellants' argument that they were deprived of the opportunity to present "other appropriate responsive documents" should be rejected by this Court because Montana law makes it clear that a party cannot present new evidence in a reply brief. In *Worledge v. Riverstone Residential Group*, 2015 MT 142, 379 Mont. 265, 350 P.3d 39, this Court held that "[c]ourts that strike new evidence offered for the first time in a . . . reply brief are typically driven by fairness to the parties, reasoning that admitting such evidence 'deprives a defendant of an opportunity to meaningfully respond.'" *Worledge*, ¶ 17 (citing *Bennett v. Sprint Nextel Corp*., No. 09-2122-EFM, 2013 WL 1197124, at *2, 2013 U.S. Dist. LEXIS 41161, at *6-7 (D.Kan. Mar. 25, 2013)); *see also Tovar v. U.S. Postal Serv*., 3 F.3d 1271, 1273 n. 3 (9th Cir. 1993) (striking new evidence

presented in a reply brief after the defendant argued that "the new information was outside the record and that including it in a reply brief deprived the [defendant] of an opportunity to respond"). Under this case law, Appellants cannot claim prejudice due to an inability to submit documents in their reply brief that could not have been considered by the district court. If this documentation was so vital to Appellants' argument, they should have presented it in their initial motion as opposed to trying to unfairly surprise the Willards with it in a reply brief. As such, Appellants cannot claim that they suffered prejudice by not being able to submit documents that could not, by law, be considered in the first place.

The foregoing establishes that Appellants have advanced no argument to demonstrate that the district court abused its discretion by not allowing them time to submit a reply brief, and the district court's order on their venue motion should be affirmed.

B. Even if the District Court Erred in Ruling on Appellants' Motion Before They Filed Their Reply Brief, Such Error Was Harmless.

To the extent that any error can be assigned to the district court's decision to rule on Appellants' Motion for Change of Venue prior to allowing Appellants to file a reply brief, such error was harmless because there was no argument that Appellants could have advanced that could have altered the calculus of whether venue was proper in Lewis and Clark County. As articulated in the Willards' Amended Complaint, the Willards asserted tort claims arising in Lewis and Clark County. Therefore, Lewis and Clark County presented a proper venue for the Willards' claims. Montana law makes it abundantly

clear that the district court cannot consider a motion for change of venue when a claim is filed in a proper county. As such, there was nothing that Appellants could have presented that could have changed the district court's decision in this matter, thereby making any error by the district court harmless.

"It is well established . . . that 'no civil case shall be reversed by reason of error which would have no significant impact upon the result; if there is no showing of substantial injustice, the error is harmless.'" *In re AN*, 2000 MT 35, ¶ 39, 995 P.2d 427, 435 (citing *Newbauer v. Hinebauch*, 288 Mont. 482, ¶ 20, 1998 MT 115, ¶ 20, 958 P.2d 705, ¶ 20).

"Venue may be proper in more than one county." *Allen*, supra, ¶ 8 (citing Mont. Code Ann. § 25-2-115). "No motion may be granted to change the place of a trial brought in a proper county." *Id.* If a party brings an action in a county that is not designated as a proper venue, however, a defendant may move for a change of venue to any proper county. *Id.* The county in which the defendant resides generally provides the proper venue for civil actions. *Allen*, ¶ 8 (citing Mont. Code Ann. § 25-2-118; *Berlin v. Boedecker* (1989), 235 Mont. 443, 444, 767 P.2d 349, 350).

However, "Montana law provides additional venue statutes that allow for exceptions to the general venue rules of § 25-2-118, MCA, for certain types of actions." *Allen*, ¶ 9 (citing *Liang v. Lai*, 2004 MT 188, ¶ 17, 322 Mont. 199, ¶ 17, 94 P.3d 759, ¶ 17). "For tort actions, § 25-2-122(1), MCA, provides that, among other proper venues, the proper place for a tort action is (a) the county in which the defendants or any of them reside at the commencement of the action; or (b) the county in which the tort was

committed." *Allen*, ¶ 9. Questions regarding proper venue are determined based on the allegations contained in the complaint. *Petersen v. Tucker* (1987), 228 Mont. 393, 395, 742 P.2d 483, 484; *Johnson v. Clark* (1957), 131 Mont. 454, 461, 311 P.2d 772, 776.

Based upon the above venue statutes, any error committed by the district court by not allowing Appellants to file a reply brief is harmless because there is nothing that Appellants could have presented to show that venue was proper in another county. The Willards' Amended Complaint clearly alleges that the Appellants committed torts in Lewis and Clark County. The letters containing the Photo that were mailed to Mr. Willard's employer were both mailed from and received in the 59601 zip code, which is Lewis and Clark County. Further, the two flyers containing the Photo were posted in two Town Pump convenience store bathrooms in Lewis and Clark County. Finally, the incident between Mrs. Schmaus and Mrs. Willard occurred in Lewis and Clark County.

Since the Willards alleged tort claims against Appellants, they had the option, pursuant to Mont. Code Ann. § 22-2-122, to bring their claims either in Lewis and Clark County, where the torts occurred, or Jefferson County, where Appellants reside. The Willards chose the former. Montana law clearly provides that when the venue statutes designate multiple counties as proper venues for bringing a claim, and the party brings their claims within one of the proper counties, the district court cannot grant a motion for change of venue. *See* Mont. Code Ann. § 22-2-115. Due to the fact that, by law, the district court lacked the authority to grant Appellants' request for a venue change, there is nothing that Appellants could have presented that would have given the district court such authority. Therefore, the District Court's order should be affirmed by this Court.

The exact question presented in this appeal has already been decided by this Court in *Allen v. Atlantic Richfield Co*., supra. In *Allen*, the plaintiff filed his complaint in Cascade County against the defendant, a Flathead County resident, based upon tort claims that occurred within Cascade County. *Allen*, ¶ 5. The defendant therein, just as Appellants in this case, moved to change venue to Flathead County arguing that the proper venue is where a defendant resides under Mont. Code Ann. § 25-2-118. *Id*. The district court denied the defendant's motion, and the defendant appealed. *Id.*

This Court affirmed the district court's denial of the defendant's motion for change of venue. While acknowledging the general rule that "[t]he county in which the defendant resides generally provides the proper venue for civil actions," this Court went on to state that the exceptions to the general rule, particularly in cases involving tort claims, allow for those claims to be brought in the county where the torts occurred. *Allen*, ¶ 13. After reviewing the allegations contained in the plaintiff's complaint, this Court ultimately held that the district court did not err in denying the motion because the complaint alleged that the "tortious and illegal conduct occurred within Cascade County and proximately caused [the plaintiff's] injuries." *Allen*, ¶ 13. As such, this Court found that Cascade County was a proper venue based upon the tort claims asserted by the plaintiff therein.

Here, the same logic and rationale applied by this Court in *Allen* applies to this matter. As established above, the Willards alleged that Appellants committed torts in Lewis and Clark County. As such, the Willards had the option to file their complaint either in Lewis and Clark County or Jefferson County. The Willards opted to file their

claims in Lewis and Clark County. Since the Willards filed their claims in a proper venue for tort claims pursuant to Mont. Code Ann. § 25-2-115, the district court was precluded from transferring this matter to another venue. Therefore, the district court properly denied Appellants' motion for change of venue.

Simply put, Appellants filed a meritless motion for change of venue and have refused to acknowledge either Mont. Code Ann. § 25-2-115 or this Court's holding in *Allen*. Despite the clear analysis articulated by the district court, in its order denying Appellants' motion for change of venue, Appellants have lodged this frivolous appeal, which should be denied accordingly as it is not supported by law or facts.

CONCLUSION

Based on the foregoing, the Willards respectfully request that this honorable Court affirm the district court's ruling on Appellants' Motion for Change of Venue and dismiss Appellants' appeal. The Willards respectfully request that this matter be decided promptly and immediately remanded back to district court.

RESPECTFULLY SUMBMITTED this 9th day of February, 2024.

/s/ Jeffrey M. Doud
JEFFREY M. DOUD
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I hereby certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 13 points; is doubled-spaced except for quoted and indented material; and the word count calculated by Microsoft Word is 4,017 excluding the Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and any Appendices.

By: */s/ Jeffrey M. Doud*
JEFFREY M. DOUD
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CERTIFICATE OF SERVICE

I, Jeffrey Michael Doud, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-09-2024:

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