IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0261

CHRISTOPHER SHELTON, VICKY COSTA, AND TODD COSTA,

Plaintiffs - Appellants,

v.

STATE OF MONTANA, DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES, an agency of the State of Montana, SUSAN RIDGEWAY, AXILON LAW GROUP, PLLC, PAUL S. HENNING, and AARON J. DAVIES,

Defendants - Appellees.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana First Judicial District,
Lewis and Clark County, The Honorable Mike Menahan, Presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Montana Code Annotated

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

(1) Did the district court err by granting the State of Montana, Department of Public Health and Human Services' (DPHHS) motion for summary judgment joined by Paul S. Henning (Paul) and Aaron J. Davies (Aaron), finding Christopher Shelton (Christopher), Vicky Costa (Vicky), and Todd Costa (Todd) were collaterally estopped under the Full Faith and Credit Clause of the United States Constitution from litigating whether DPHHS violated the Interstate Compact for the Placement of Children (ICPC) under Montana law by allowing the minor child, L.S., to be removed from the State of Montana to the State of Utah shortly after birth without the consent of L.S.'s birth father, Christopher, so L.S. could be adopted in the State of Utah?

(2) Did the district court err by granting Susan Ridgeway's (Susan) and Axilon Law Group, PLLC's (Axilon) Rule 12(b)(6) motion to dismiss finding Susan and Axilon did not owe a duty to Christopher, Vicky, and Todd in the direct parental placement adoption of L.S.?

(3) Did the district court err by granting DPHHS's motion for summary judgment on Count VII, finding Christopher, Vicky, and Todd did not satisfy the first element of a negligent misrepresentation claim against DPHHS?

STATEMENT OF THE CASE

On August 8, 2018, Christopher, Vicky, and Todd filed their Verified Complaint and Jury Trial Demand bringing various claims against DPHHS, Susan, Axilon, Paul, and Aaron as a result of Christopher's newborn child, L.S., being removed from the State of Montana without Christopher's consent and placed in the State of Utah so L.S. could be adopted. District Court Docket (DC-Doc.) 1 at 1-2. Count I sought a declaratory judgment from the district court that DPHHS violated the ICPC. DC-Doc. 1 at ¶¶ 40-45. Count II alleged DPHHS violated Chris, Vicky, and Todd's substantive due process rights under the Montana Constitution Article 2, § 17. DC-Doc. 1 at ¶¶ 46-52. Christopher, Vicky, and Todd are not appealing the district court's dismissal of Count III. Count IV alleged negligence by DPHHS, Susan, Axilon, Paul, and Aaron. DC-Doc. 1 at ¶¶ 59-65. Count V alleged gross negligence by DPHHS, Susan, Axilon, Paul, and Aaron. DC-Doc. 1 at ¶¶ 66-74. Count VI alleged gross negligent infliction of emotional distress by DPHHS, Susan, Axilon, Paul, and Aaron. DC-Doc. 1 at ¶¶ 75-79. Count VII alleged negligent misrepresentation by DPHHS. DC-Doc. 1 at ¶¶ 80-87.

On October 5, 2018, Susan and Axilon moved for an order dismissing the claims against them pursuant to Rule 12(b)(6), Mont. R. Civ. P., on the grounds that they owed no duty to Christopher, Vicky, and Todd. DC-Doc. 16 at 2. The district court held oral argument on January 3, 2019. DC-Doc. 26 at 1. On January

30, 2019, the district court granted Susan and Axilon's motion to dismiss with prejudice holding they did not owe a duty to Christopher, Vicky, and Todd. DC-Doc. 31 at 6-7.

On March 17, 2023, Paul and Aaron moved for an order dismissing the claims against them pursuant to Rule 12(b)(6), Mont. R. Civ. P. DC-Doc. 50.

On May 26, 2023, DPHHS moved for summary judgment asserting Counts I, II, and IV-VI were barred by collateral estoppel and under Count VII Christopher, Vicky, and Todd could not establish the elements of negligent misrepresentation. DC-Doc. 57 at 7, 13-15. On May 31, 2023, Paul and Aaron filed a notice of joinder in DPHHS's motion for summary judgment. DC-Doc. 60. The Court heard oral argument on November 20, 2023. DC-Doc. 70.

On February 29, 2024, the Court granted DPHHS's motion for summary judgment on all counts in favor of DPHHS, Aaron, and Paul. DC-Doc. 71.

STATEMENT OF FACTS

I. SUMMARY JUDGMENT FACTS

On January [redacted] 2016, Melissa Surbrugg (Melissa) delivered L.S. at St. Peter's Hospital in Helena, Montana. DC-Doc. 50 at Ex. 1, ¶ 19 attached as Supplemental Appendix D; DC-Doc. 63 at Ex. 1, ¶ 13 attached as Supplemental Appendix E. On January 31, 2016, DPHHS, through Child and Family Services Division's Central Intake (commonly known as the Child Abuse Hotline), received

a report regarding concerns that birthmother, Melissa, had tested positive for methamphetamine and amphetamines. DC-Doc. 64 at ¶ 2, Ex. 1, Ans. to Interrog. No. 4 attached as Supplemental Appendix F. L.S. was born with addictions. DC-Doc. 50 at Ex. 1, ¶ 48 attached as Supplemental Appendix D.

DPHHS did not respond to the January 31, 2016, report until February 3, 2016. DC-Doc. 64 at ¶ 2, Ex. 1, Ans. to Interrog. No. 4 attached as Supplemental Appendix F. On February 3, 2016, DPHHS attempted to locate Melissa at her residence without success. As a result, on February 3, 2016 the Child Family Services (CFSD) worker issued a Notification to Parent of Removal to Melissa for L.S. and her sibling, G.S., by attaching it to Melissa's residence. *Id.*, Ans. to Interrog. No. 3 attached as Supplemental Appendix F.

On or about February 4, 2016, while DPHHS had emergency protective custody of L.S., the CFSD worker contacted DNA Diagnostics to set up a paternity test for L.S. and contacted individuals to determine whether CFSD was set up with DNA Diagnostics for payment. DC-Doc. 64 at ¶ 2, Ex. 1, Ans. to Interrog. No. 1, Response to Admis. No. 1 attached as Supplemental Appendix F. Prior to the adoptive parents, Paul and Aaron, removing L.S. from Montana to Utah, DPHHS did not perform DNA testing on L.S. nor did it verify the true paternity of L.S. *Id.*, Response to Admis. Nos. 2 and 3 attached as Supplemental Appendix F.

The day after DPHHS had removed L.S. from Melissa, on February 4, 2016, Melissa signed Form ICPC 100A as the "sending agency or parent" and represented the current legal status of child was "Other" and handwrote in "Temporary Guardianship." Melissa also listed Donnel Gleed (Donnel) as the father. DC-Doc. 63 at Ex. 1, Ex. 2-B attached as Supplemental Appendix E.

On February 6, 2016, Susan sent a letter to DPHHS again listing Donnel as the father of L.S. However, in this letter, she did inform DPHHS that Melissa was still married to Christopher but stated Christopher was not the biological father. *Id.*, Ex. 2-A attached as Supplemental Appendix E. In this letter Susan stated,

> Under Utah law, where this adoption will be finalized, **a husband** is entitled to notice of the adoption proceedings, **although since it can be shown that he is not the father of this baby, he would not be able to block or stop this adoption from being finalized**. We plan to serve him with the statutory notice of the Utah adoption proceeding after it has been commenced in Utah. **Because he is not the biological father and has no basis to block the adoption**, we ask that the ICPC application be approved permitting the adoptive parents to return to Utah with this child.

Id., Ex. 2-A at 2 attached as Supplemental Appendix E (emphasis added). Susan did not offer any proof to DPHHS to support her statements that Christopher was not the biological father or that Donnel was the biological father. *Id.*, Ex. 2-A attached as Supplemental Appendix E. Christopher later proved through DNA testing that he was L.S.'s father and the statements made by Susan were false. DC-Doc. 50 at Ex. 1, ¶ 3 attached as Supplemental Appendix D. DPHHS also knew

Christopher was L.S.'s presumptive father before Paul and Aaron removed L.S. from Montana. DC-Doc. 64 at ¶ 2, Ex. 1, Response to Admis. No. 4 attached as Supplemental Appendix F.

Christopher did not relinquish his rights to L.S. nor did he consent to the adoption by Paul and Aaron. As a result, when DPHHS approved the ICPC it did so knowing: (1) Christopher was the presumptive father under Montana law; and (2) DPHHS did not have Christopher's consent. *Id.*; DC-Doc. 63 at Ex. 1, ¶¶ 26, 32 attached as Supplemental Appendix E.

On February 10, 2016, L.S. was placed in Utah. DC-Doc. 63 at Ex. 1, Ex. 3 attached as Supplemental Appendix E. On February 11, 2016, Susan submitted Form 100B to the State of Utah representing to Utah that Donnel was L.S.'s biological father. *Id.*

In approximately May of 2017, DPHHS' chief legal counsel at the time, Frank Clinch (Frank), represented to Vicky and others that if Christopher was determined to be L.S.'s biological father, DPHHS would take the necessary steps to have L.S. returned to the State of Montana. DC-Doc. 65 at ¶ 4 attached as Supplemental Appendix G. Frank contacted Paul and Aaron's Utah attorney, Jessica Couser, regarding the logistics of the DNA testing and worked with the Montana Department of Corrections to effectuate the testing. DC-Doc. 64 at ¶ 2, Ex. 1, Ans. to Interrog. No. 1, Response to Req. for Production No. 5, Bate No.

DPHHS 00856 attached as Supplemental Appendix F. Christopher relied upon that representation and filed a motion in his pending dissolution proceeding in BDR-2016-149 asking the district court to order genetic testing for L.S. DC-Doc. 65 at ¶ 5 attached as Supplemental Appendix G. By order filed on July 17, 2017, the district court ordered genetic testing of L.S. (referred to as Baby L.). DC-Doc. 64 at ¶ 2, Ex. 1, Response to Req. for Production No. 5, Bate No. DPHHS 01182 attached as Supplemental Appendix F.

In August 2017, the DNA testing confirmed Christopher was the biological father of L.S. These results were provided to Frank. DC-Doc. 65 at ¶ 7 attached as Supplemental Appendix G. Despite Frank's earlier representation, he refused to return L.S. to the State of Montana. *Id.*, ¶ 8 attached as Supplemental Appendix G.

II. UTAH ADOPTION PROCEEDINGS

Paul and Aaron filed the adoption in Utah and later provided Christopher with notice. Christopher received the Notice of Adoption Proceedings occurring in Utah regarding L.S. (referred to as Baby H.) that was dated February 17, 2016, notifying him of his right to contest the adoption within 30 days of being served with the notice by filing a motion to intervene or he would waive his rights to L.S. and to further notice in connection with the adoption. DC-Doc. 63 at Ex. 2 attached as Supplemental Appendix H. It stated,

> **YOU ARE HEREBY INFORMED THAT IF YOU CONTEST THIS ADOPTION, PURSUANT TO UTAH LAW, YOUR RESPONSE MUST BE IN THE FORM OF A MOTION TO INTERVENE THAT SHALL SET FORTH SPECIFIC RELIEF SOUGHT AND BE ACCOMPANIED BY A MEMORANDUM SPECIFYING THE FACTUAL AND LEGAL GROUNDS UPON WHICH THE MOTION IS BASED, AND MUST BE FILED WITHIN 30 DAYS OF SERVICE OF THIS NOTICE UPON YOU.**
>
> **FAILURE TO FULLY AND STRICTLY COMPLY WITH ALL ITEMS LISTED ABOVE WITHIN 30 DAYS OF SERVICE OF THIS NOTICE WILL RESULT IN WAIVER OF YOUR RIGHTS TO FURTHER NOTICE IN CONNECTION WITH THIS ADOPTION, FORFEITURE OF ALL RIGHTS YOU MAY POSSESS IN RELATION TO THE ADOPTEE, AND A PERMANENT BAR AGAINST YOU ASSERTING ANY INTEREST IN THE ADOPTEE THEREAFTER.**

Id. (emphasis in original).

Christopher filed a motion to intervene and contested the Utah adoption proceedings. On September 15, 2017, the Utah district court terminated Christopher's parental rights. DC-Doc. 50 at Ex. 1 at 1, 17 attached as Supplemental Appendix D. Christopher appealed to the Utah Court of Appeals and later to the Utah Supreme Court. *P.H. v. C.S. (In re B.H.)*, 2019 UT App. 103, 447 P.3d 110, 116 attached as Supplemental Appendix I; *P.H. v. C.S. (In re the Adoption of B.H.)*, 2020 UT 64, ¶ 51, 474 P.3d 981, 991 attached as Supplemental Appendix J. The issue decided by the Utah Courts regarding the ICPC is not as clear cut as the district court found. The issue decided by the Utah Courts regarding the ICPC centered around whether the Utah Courts had jurisdiction for

the adoption of L.S., not whether DPHHS violated the ICPC under Montana law. Although the Utah district court judge on remand found "All terms and conditions of the [ICPC] from the state of Montana were complied with," prior to the remand, the Utah Court of Appeals determined the ICPC submitted by Melissa was materially defective. *In the Matter of the Adoption of Baby H.*, Findings of Fact and Conclusions of Law on Remand 2, ¶ 3 (Utah Third D. Ct. Judge Robert Faust Jan. 27, 2021) (FoF, CoL on Remand) attached as Supplemental Appendix K; *In re B.H.*, ¶ 28 attached as Supplemental Appendix I. The Utah Court of Appeals explained:

> **We acknowledge that the ICPC form in this case was defective** in that it listed Purported Father, rather than Father, as Child's parent. This defect does not, however, deprive Utah courts of jurisdiction. To be sure, under the ICPC, a party could be subject to criminal penalties for knowingly violating the ICPC, *see* Utah Code Ann. § 62A-4a-711 (LexisNexis 2018),[8] **but such a violation does not amount to non-compliance with the ICPC sufficient to divest the district court of jurisdiction or unwind the adoption**, *id.* § 62A-4a-701 art. IV ("[A]ny violation [of the ICPC] shall constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency . . . ."); *see also In re Adoption No. 10087*, 324 Md. 394, 597 A.2d 456, 465 (Md. 1991) ("The fact that the ICPC had been violated in this case does not mandate dismissal; rather it indicates the need for a prompt determination of the best interest of this child.").

Id. (emphasis added) (footnote omitted). The issue of whether the ICPC request was defective was not appealed to the Utah Supreme Court and thus is still the law

of the case. *In re the Adoption of B.H.*, ¶ 51 attached as Supplemental Appendix J. The Utah Supreme Court explained,

> Father also asserted that the adoption was invalid because Mother failed to comply with the ICPC when she did not list him as the child's father on the request form. The court of appeals agreed that this was a material deficiency, but it concluded it was not a jurisdictional defect. *In re Adoption of B.H.*, 2019 UT App 103, ¶ 28, 447 P.3d 110.

Id., ¶ 20 attached as Supplemental Appendix J. On appeal, Christopher argued the ICPC deficiency deprived the Utah Courts of jurisdiction and that the Utah Court of Appeals erred in remanding to the district court for additional fact finding and to permit the adoptive parents to cure the ICPC deficiency, if necessary. *Id.*, ¶¶ 51-52 attached as Supplemental Appendix J.

> We now address Father's argument that the court of appeals erred in remanding the case to the district court for supplemental factfinding regarding compliance with the ICPC. The court of appeals concluded that Mother's ICPC request form was defective because she listed D.G. instead of Father as the child's father. *In re Adoption of B.H.*, 2019 UT App 103, ¶ 28, 447 P.3d 110. But the court held that this defect did not deprive the district court of jurisdiction or otherwise require dismissal of the adoption petition. *Id.* However, because the district court did not include a conclusion that the ICPC "ha[d] been complied with" in the adoption decree—as required by the Adoption Act, UTAH CODE § 78B-6-107(1)(a)—the court of appeals set aside the decree. *In re Adoption of B.H.*, 2019 UT App 103, ¶ 30, 447 P.3d 110. It then remanded to the district court for additional factfinding, and if necessary to give Adoptive Parents an opportunity to cure the ICPC deficiency before moving for reinstatement of the decree. *Id.* ¶ 27 n.7. **Neither party has contested the court of appeals' determination that the ICPC request was materially defective, so that issue is not before us.**

> Father contends it was error for the court of appeals to remand to the district court for additional factfinding and to permit the Adoptive Parents to cure the ICPC deficiency if necessary. He asserts that the ICPC must be complied with before filing an adoption petition and that the failure to do so constitutes an irreparable jurisdictional defect. He contends that because the ICPC notice was defective, Mother's attempt to invoke the jurisdiction of Utah courts is invalid and the deficiency can no longer be cured.[13] Father asserts that this means Montana has jurisdiction over the child and that any new ICPC request must be filed in Montana.

Id. attached as Supplemental Appendix J (footnote omitted) (emphasis added). The Utah Supreme Court disagreed with Christopher's argument and in doing so declined to adopt the Montana Supreme Court's interpretation of jurisdiction under the ICPC as addressed in *In re Adoption of T.M.M.*, 186 Mont. 460, 608 P.2 130 (1980). *In re the Adoption of B.H.*, ¶ 59 N16 attached as Supplemental Appendix J. Instead, the Utah Supreme Court explained the remedy provided by the ICPC is not loss of jurisdiction by the receiving state, but is punishment of the alleged violator. *Id.*, ¶ 25 attached as Supplemental Appendix J.

> The ICPC addresses the consequences of a failure to comply with its terms, and none of them involve transferring jurisdiction over the child from the receiving state to the sending state or reversing a child placement. **The ICPC provides that a violation of its provisions constitutes a violation of "the laws respecting the placement of children" of both the sending state and the receiving state**. *Id.* § 62A-4a-701 art. IV. And such a violation "may be punished or subjected to penalty **in either jurisdiction in accordance with its laws**." *Id.*

Id., ¶ 57 attached as Supplemental Appendix J (emphasis added).

On remand, the Utah district court found, "All terms and conditions of the [ICPC] from the state of Montana were complied with" and relied on the following facts to support this finding: (1) that although Melissa listed Donnel as the father on Form ICPC 100A, the subsequent cover letter from Susan identified Christopher as the legal father; (2) Paul hand-delivered the entire packet; and (3) the sending state (Montana) signed Form ICPC 100A on February 8, 2016 and the receiving state (Utah) signed Form ICPC 100A on February 9, 2016, thus granting ICPC approval by both states after delivery of both Form ICPC 100A and the cover letter identifying both alleged fathers. FoF, CoL on Remand, ¶¶ 3-6 attached as Supplemental Appendix K. Nowhere in the Utah district court's findings does it determine that DPHHS did not violate Montana law in approving the ICPC. *Id.*, 1-5 attached as Supplemental Appendix K. Additionally, the Utah Court of Appeals had already found the ICPC was materially deficient.

III. PAUL AND AARON'S MONTANA LAWSUIT AGAINST DPHHS, SUSAN, AND AXILON

Christopher, Vicky, and Todd are not the only parties in this action that have asserted DPHHS violated the ICPC under Montana law. On January 14, 2019, Paul and Aaron filed an action against DPHHS as well as Susan and those associated with her. DC-Doc. 63 at Ex. 1 attached as Supplemental Appendix E. In their Complaint, specific to DPHHS, they alleged DPHHS was negligent in that it owed a duty to them to comply with the ICPC, that it breached that duty by "wrongfully

approving [the] ICPC request packet which was incomplete, did not comply with each and every requirement of the Montana [ICPC] and contained misrepresentations and errors." *Id.*, ¶¶ 51-52 attached as Supplemental Appendix E. Their Complaint asserted DPHHS violated the ICPC by accepting "temporary guardian" as a legal status, which was in violation of Regulation 10 of the ICPC and that DPHHS violated Montana law and its own rules and regulations including Regulation 12, ¶ 6(a)(3) by approving Form ICPC 100A without obtaining Christopher's consent or relinquishment. *Id.*, ¶¶ 53-54 attached as Supplemental Appendix E.

IV. FACTS FROM COMPLAINT ONLY

Christopher was married to Melissa on August 8, 2008 in Jefferson County, Montana. Christopher and Melissa had two children together, G.S. and L.S. Both children were born while Christopher and Melissa were married. DC-Doc. 1 at ¶ 12. Without the knowledge of Christopher, Melissa had prearranged a private adoption for L.S. with the assistance of Missoula attorney, Susan of Axilon. DC-Doc. 1 at ¶ 14. In early 2016, Melissa delivered L.S. at St. Peter's Hospital in Helena, Montana. DC-Doc. 1 at ¶ 13. On February 4, 2016, Melissa completed relinquishment counseling through Catholic Social Services of Montana and with the assistance of Susan, executed an Affidavit relinquishing her parental rights to L.S. DC-Doc. 1 at ¶ 20.

On February 4, 2016, with the assistance of Susan, Melissa signed ICPC Form 100A requesting L.S. be placed with adoptive parents Paul and Aaron in the State of Utah. On Form 100A, Melissa listed L.S.'s father as Donnel. DC-Doc. 1. at ¶ 21. On February 4, 2016, Melissa did not have the legal authority to request L.S. be removed from the State of Montana and placed with the adoptive parents because L.S. was in the temporary legal custody of DPHHS beginning on February 3, 2016, the date the Child Protection Specialist executed the Notification of Removal to Parent for L.S. DC-Doc. 1 at ¶ 22.

At least as of February 5, 2016, Susan was aware that Christopher was married to Melissa and, as such, under Montana law was the presumptive father of L.S. until proven otherwise. DC-Doc. 1 at ¶ 23. Despite this knowledge, on February 5, 2016, L.S. was discharged into the care of the adoptive parents. DC-Doc. 1 at ¶ 24. Susan notified DPHHS that Melissa was legally married to Christopher and that the plan was to serve him (as the putative father) with notice after the Utah adoption proceedings had commenced. DC-Doc. 1 at ¶ 25.

On February 9, 2016, the State of Utah approved Montana DPHHS's ICPC request and the adoptive parents removed L.S. from Montana to Utah. DC-Doc. 1 at ¶ 27. Christopher did not learn that L.S. existed until February 8, 2016, when Susan attempted to get Christopher to sign an Affidavit relinquishing his rights to L.S. DC-Doc. 1 at ¶ 30. Christopher later received a Notice of Adoption

Proceedings occurring in the State of Utah regarding L.S. that was dated February 17, 2016, notifying him of his right to contest the adoption within 30 days of being served with the notice. DC-Doc. 1 at ¶ 31.

On July 14, 2017 the district court in Lewis and Clark County, State of Montana ordered paternity testing for Christopher and L.S. DC-Doc. 1 at ¶ 34. The DNA testing proved Christopher was L.S.'s natural father. DC-Doc. 1 at ¶ 35.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*, applying the same criteria as Mont. R. Civ. P. 56. *Fadness v. Cody*, 287 Mont. 89, 96, 951 P.2 584, 588 (1997) . Summary judgment is proper if there are no material factual issues, and the prevailing party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3)

This Court reviews a district court's ruling on a Mont. R. Civ. P. 12(b)(6) motion *de novo*. *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316. "A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true." *Id.* (internal citation omitted). A district court should only grant a Rule 12(b)(6) motion if it determines "the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the

claim." *Id.* (internal citation omitted). The district court is limited to reviewing only the complaint. *Id.*, ¶ 13. As explained by this Court, "The effect of such a motion is admitting to all the well pleaded allegations in the complaint and it should not be dismissed 'unless it appears *beyond a reasonable doubt* that the plaintiff can prove no set of facts which would entitle him to relief.'" *Id.* (internal citation omitted) (emphasis added).

SUMMARY OF THE ARGUMENT

Christopher has a fundamental right to parent his child, which was taken away by the wrongful removal of L.S. from the State of Montana. Both DPHHS and Susan knew before L.S. left the State of Montana that Christopher was the presumed father of L.S. DPHHS also knew Melissa did not have legal authority to place L.S. with Paul and Aaron when she signed the ICPC form since DPHHS had already issued a Notice of Removal of L.S. from Melissa's custody. DPHHS should not be allowed to infringe on this fundamental right by violating the law and procedures put in place to protect a parent's fundamental right to parent. Christopher, Vicky, and Todd should not be collaterally estopped from a Montana court determining liability under Montana law because: (1) the Utah Courts did not decide whether DPHHS violated the ICPC; (2) Vicky and Todd were not parties nor in privity with Christopher in the Utah adoption; (3) they did not have a full opportunity to litigate the ICPC violations. The only way for them to hold DPHHS

accountable is for this Court to reverse the district court's decision and allow their lawsuit in Montana to proceed.

Susan's duty of care in a direct parental placement adoption should extend beyond the traditional attorney-client relationship because representing a natural parent in a direct parental placement adoption is not adversarial. Therefore, this Court should reverse the district court and find a duty of care exists to non-client third parties in direct-parental placement adoptions.

Christopher, Vicky, and Todd satisfy the first element of a negligent misrepresentation claim because DPHHS's chief legal counsel represented to Vicky that L.S. would be returned to Montana once Christopher's paternity was confirmed by DNA testing. They acted in reliance upon Frank's representation to them to their detriment, resulting in the Utah Courts continuing to assert jurisdiction over L.S. and the termination of Christopher's parental rights under Utah law. As a result, this Court should reverse the district court's dismissal of Count VII.

ARGUMENT

I. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF DPHHS, PAUL, AND AARON FINDING MOST OF THE CLAIMS WERE BARRED BY COLLATERAL ESTOPPEL.

The Court should reverse the district court's order granting summary judgment on Counts I-II, and IV-VI, finding Christopher, Vicky, and Todd's

claims that DPHHS violated the ICPC by allowing a Montana child to be removed from Montana and sent to Utah is not collaterally estopped due to a finding in the Utah Adoption. This Court has repeatedly held that a parent has a fundamental liberty interest in parenting his child. *A.W.S. v. A.W.*, 2014 MT 322, ¶¶ 15-16, 25, 377 Mont. 234, 339 P.3d 414.

Under Montana law, DPHHS, Paul, and Aaron had the burden to establish **all** of the following four elements of collateral estoppel were met: (1) the issue decided in the prior case is identical to the issue in the present case; (2) there was a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior case; and (4) the party against whom collateral estoppel is asserted "was afforded a full and fair opportunity to litigate the issue." *McDaniel v. State*, 2009 MT 159, ¶ 28, 350 Mont. 422, 208 P.3d 817. Although the district court erred in concluding the first, third, and fourth elements were met, this Court need only find one of these elements has not been met to reverse the district court's order.

Under the first element, the district court erred by finding the issue decided by the Utah Courts was identical to the issue in this litigation. This Court has consistently held the "[i]dentity of issues is the most crucial element of collateral estoppel" and the "identical issue or 'precise question' must have been litigated in the prior action." *Fadness*, 287 Mont. at 96, 951 P.2 at 588-589 . To determine

whether the issues are identical, the Court should compare the pleadings, evidence, and circumstances of the two cases. *Id.*, 287 Mont. at 96, 951 P.2 at 589.

In *Fadness*, the Court reversed the district court's order granting summary judgment based on collateral estoppel, finding the issues presented in the two different lawsuits were not identical. *Fadness*, 287 Mont. at 91, 97, 951 P.2 at 586, 589. Although both lawsuits arose from the same real estate transaction, the first lawsuit involved an intentional wrongful act by the buyers and the second lawsuit involved the negligence of the real estate agent and closing agent. *Id.*, 287 Mont. at 91-92, 96, 951 P.2 at 586, 589. This Court explained, "The fact that each action arises from the same transaction does not mean that each involved the same issues." *Id.*, 287 Mont. at 97, 951 P.2 at 589. Since the duties owed by the real estate agent and closing agent were not considered in the first lawsuit, collateral estoppel did not bar the second lawsuit. *Id.*

Although analyzed under res judicata rather than collateral estoppel, this Court did not bar plaintiffs from litigating whether liability existed under Montana law in a Montana lawsuit, even though plaintiffs had litigated the same issues in North Dakota regarding the application of North Dakota law. *Thoring v. La Counte*, 225 Mont. 77, 81, 733 P.2d 340, 342-43 (1986). In *Thoring*, plaintiffs filed suit in Montana and North Dakota for wrongful death arising out of a motor vehicle accident under the laws of both states. *Id.*, 225 Mont. at 79-80, 733 P.2d at

341-42. The North Dakota Supreme Court held a bar located in Montana could not be held liable under the North Dakota Dram Shop Act, but did not rule on liability under Montana law. *Id.*, 225 Mont. at 81, 733 P.2d at 342-43. As a result, the Montana Supreme Court only applied the full faith and credit clause to liability under the North Dakota Dram Shop Act. *Id.*

Similar to this Court's holding in *Fadness*, the issues here are not identical. A close reading of the Utah Courts' opinions shows the Utah Courts focused on whether Melissa violated the ICPC for purposes of the adoption and whether Utah had jurisdiction over L.S. First, similar the North Dakota Court in *Thoring*, here the Utah Supreme Court made it clear they were addressing only jurisdiction and not liability under Montana law. The Utah Supreme Court explained a violation of the ICPC may be punished in either jurisdiction according to that jurisdiction's laws. *In re the Adoption of B.H.*, ¶ 57 attached as Supplemental Appendix J. Second, the Utah Supreme Court also failed to adopt this Court's interpretation of the ICPC regarding jurisdiction in *In re Adoption of T.M.M.*, 186 Mont. 460, 608 P.2 130. *In re the Adoption of B.H.*, 2020 UT 64 at ¶ 59, 474 P.3d at 986.

In *In re Adoption of T.M.M.*, this Court held the prospective adoptive parents' violation of the ICPC constituted an illegal placement of the child and ordered the district court to dismiss the adoption proceeding and place the child back with the natural mother. *In re Adoption of T.M.M.*, 186 Mont. at 466-67, 608

P.2 at 134. While the natural mother resided with the child in the State of Mississippi, she executed a notarized "parent's consent" in Mississippi releasing her parental rights and consenting to the adoption by the prospective adoptive parents. After the "parent's consent" was executed, the prospective adoptive parents traveled with the child to the State of Montana and filed an adoption petition in Montana. *Id.*, 186 Mont. at 461-62, 608 P.2 at 131-32. The prospective adoptive parents did not notify the Montana Department of Social and Rehabilitation Services (SRS), the agency who administered the ICPC at the time, until after they brought the child to Montana. *Id.*, 186 Mont. at 464-65, 608 P.2 at 133. After the district court terminated the natural mother's parental rights based upon her "parent's consent," the natural mother later moved the district court to withdraw her consent. *Id.*, 186 Mont. at 462, 608 P.2 at 131-32. The district court granted the prospective adoptive parents' motion to dismiss the natural mother from the adoption proceeding. *Id.*, 186 Mont. at 462, 608 P.2 at 132. On appeal, the natural mother asserted the prospective adoptive parents failed to comply with the ICPC "resulting in the illegal placement of the child in Montana." *Id.*, 186 Mont. at 463, 608 P.2 at 132. Although the prospective adoptive parents asserted they didn't need to comply with the ICPC, the Court disagreed finding they clearly violated the ICPC because according to Article III(4) of the ICPC, they "could not legally bring the child into Montana until the SRS had notified them, in writing, that the

proposed placement did not appear to be contrary to the interests of the child." *Id.*, 186 Mont. at 465, 608 P.2 at 133.

Here, similar to the North Dakota Court in *Thoring*, the Utah Courts did not address DPHHS's liability under Montana law and the multiple ways in which DPHHS violated the ICPC. First, at the time Melissa signed the ICPC representing she was the sending agency or person, she did not have custody of L.S. Pursuant to Montana statute that existed at the time of DPHHS's removal of L.S., DPHHS had the legal authority to remove L.S. from Melissa's custody. Upon removal, DPHHS was required to notify Melissa.

> Any child protective social worker of the department, a peace officer, or the county attorney who has reason to believe any child is in immediate or apparent danger of harm may immediately remove the child and place the child in a protective facility. . . . The person or agency placing the child shall notify the parents, parent, guardian, or other person having physical or legal custody of the child of the placement at the time the placement is made or as soon after placement as possible. . . .

Mont. Code Ann. § 41-3-301(1) (2015). DPHHS then had two working days from the date of the emergency removal to submit an affidavit to the County Attorney's Office and the County Attorney's Office had three additional days to file an abuse and neglect petition. Mont. Code Ann. § 41-3-301(5) (2015). The issue before the Utah Courts centered around Melissa's actions related to the ICPC, determining she was the "sending agency" under the ICPC. What is clear from the orders of the Utah Courts, is they focused on whether Melissa's violation divested Utah of

jurisdiction - they did not address whether Melissa had legal custody of L.S. at the time she filled out Form ICPC 100A. The findings of the Utah district court on remand establish that the district court was not deciding the specific issue of whether DPHHS violated the ICPC. The district court's findings revolved around Melissa's actions, Paul's delivery of the ICPC packet to DPHHS, and the signatures from the ICPC Administrator of the sending state, Montana, and the ICPC Administrator of the receiving state, Utah. Here, on February 3, 2016, DPHHS removed L.S. from Melissa's care by issuing a Notification to Parent of Removal. This Notification to Parent gives DPHHS emergency custody of L.S. for two to five working days. Therefore, DPHHS had custody of L.S. through February 10, 2016. Melissa signed Form ICPC 100A on February 4, 2016.

Second, the Utah Courts also didn't address that under Montana law DPHHS should never have approved the ICPC without Christopher's consent or relinquishment. In administering the ICPC, DPHHS has adopted the regulations by the Association of Administrators of the ICPC as amended through May 6, 2012. Admin. R. Mont. 37.50.901 (2023). Regulation No. 12 governs private/independent adoptions and requires the sending agency or party to provide supporting documentation with Form ICPC 100A including, in part,

> **Consent or relinquishment: signed by the parents in accordance with the law of the sending state**, and, if requested by the receiving state, in accordance with the laws of the receiving state. If a parent is permitted and elects to follow the laws of a state other than his or her

> state of residence, then he or she should specifically waive, in writing, the laws of his or her state of residence and acknowledge that he or she has a right to sign a consent under the law of his or her state of residence. The packet shall contain a statement detailing how the rights of all parents shall be legally addressed;

American Public Human Services Association, *ICPC Regulations, Regulation No. 12 6.(a)(3)* <https://aphsa.org/OE/AAICPC/ICPC_Regulations.aspx> (last accessed July 31, 2024) (emphasis added). Pursuant to Montana law, there is no dispute that Christopher was presumed to be the natural father at the time of the ICPC because he was married to Melissa at the time L.S. was born. Mont. Code Ann. § 40-6-105(1)(a) (2015). Contrary to Montana law, the Utah district court found Donnel was presumed to be the natural father until DNA proved otherwise. DC-Doc. 50 at Ex. 1, ¶ 10 attached as Supplemental Appendix D. There is also no dispute that DPHHS did not have Christopher's consent or relinquishment when it approved the ICPC.

Third, the Utah Courts also didn't consider that under Montana law DPHHS should never have approved the ICPC because Paul and Aaron could not have qualified as guardians under the ICPC since they were the prospective adoptive parents. Therefore, Form ICPC 100A marked Other: Temporary Guardianship violated the ICPC. Regulation No. 10 of the ICPC states,

> 2. Prospective Adoptive Parents Not Guardians.
>
> An individual with whom a child is placed as a preliminary to a possible adoption cannot be considered a non-agency guardian of the

> child, for the purpose of determining applicability of ICPC to the placement, unless the individual would qualify as a lawful recipient of a placement of the child without having to comply with ICPC as provided in Article VIII (a) thereof.

American Public Human Services Association, *ICPC Regulations, Regulation No. 10 2.* <https://aphsa.org/OE/AAICPC/ICPC_Regulations.aspx> (last accessed July 31, 2024). There is no dispute that Paul and Aaron do not qualify as "lawful recipients" of L.S. without having to comply with the ICPC.

Next, the third element is not met because while Christopher was a party in the Utah adoption proceeding, Vicky and Todd were not parties and were not in privity with Christopher. In a similar case, which is persuasive but not controlling authority, the Kansas Court of Appeals questioned whether collateral estoppel could apply since the grandfather in that case was not a party in interest in the adoption case. *In re Parentage of E.A.*, 518 P.3d 419, 427-28 (Kan. App. 2022). In doing so, the Court determined that collateral estoppel did not seem to apply. *Id.*, 518 P.3d at 428.

Although only persuasive authority, as the Kansas Court determined in *In re Parentage of E.A.*, here this Court should find since Vicky and Todd, as grandparents, were not parties to the Utah adoption proceedings, the third element of collateral estoppel is not met.

Finally, the fourth element was not met because Christopher, Vicky, and Todd did not have a full and fair opportunity to litigate whether DPHHS violated

the ICPC under Montana law. This is especially true given that DPHHS wasn't a party in the Utah Adoption proceedings. Here, the fourth element is closely linked to the first element. Since the issues were not identical, Christopher, Vicky, and Todd did not have a full and fair opportunity to litigate the ways in which DPHHS violated the ICPC, which were discussed above. Instead, the Utah Supreme Court, in deciding Utah had jurisdiction, not only refused to adopt Montana's interpretation of the ICPC, but also explained that a violation of the ICPC may be punished or subjected to penalty in either the sending or receiving state in accordance with that state's laws. What was litigated by Christopher, not Vicky and Todd, in Utah was whether Utah had jurisdiction and whether Christopher's parental rights should be terminated under Utah law. Neither Christopher nor Vicky and Todd had a full and fair opportunity to litigate the issue of whether DPHHS violated the ICPC under Montana law. Therefore, the fourth element is not satisfied.

Because all four elements of collateral estoppel are not met, this Court should reverse the district court's order granting summary judgment.

II. THE DISTRICT COURT ERRED IN GRANTING SUSAN AND AXILON'S 12(B)(6) MOTION TO DISMISS BECAUSE THIS COURT SHOULD EXTEND A DUTY OWED BY AN ATTORNEY TO NON-CLIENT THIRD PARTIES IN DIRECT PARENTAL PLACEMENT ADOPTIONS.

This Court should reverse the district court's order dismissing Counts IV-VI

finding an attorney owes a duty to non-client third parties in direct parental placement adoptions. Although the issue whether an attorney owes a duty to a non-client in an adoption proceeding is an issue of first impression, this Court has held an attorney owes a duty to non-client third parties in guardianship proceedings and estate planning. *See Redies v. ALPS*, 2007 MT 9, ¶ 42, 52, 335 Mont. 223, 150 P.3d 930; *Watkins Trust v. Lacosta*, 2004 MT 144, ¶¶ 21-23, 321 Mont. 432, 92 P.3d 620.

In 1998, this Court addressed for the first time whether an attorney owes a duty of care to a third party in the performance of services for the attorney's client. *Rhode v. Adams*, 1998 MT 73, ¶ 12, 288 Mont. 278, 957 P.2d 1124. In *Rhode*, the underlying matter involved a custody dispute between adversarial parents, who had three children and had been married and divorced twice. *Id.*, ¶¶ 3, 22-23. After their second divorce in Tennessee, the father moved to Montana with their children. *Id.*, ¶ 3. The mother hired an attorney, who obtained an order from a Montana district court judge awarding her sole custody of the children. The father did not become aware of this order until after the mother had removed the children from the State of Montana. *Id.*, ¶ 4. The father brought suit against the mother's attorney for violating the father's procedural due process rights and breaching her duty to comply with Montana law. *Id.*, ¶¶ 1, 6. The father moved the district court

to amend his complaint to add the parties' children as plaintiffs and allege a claim of negligence against the mother's attorney on behalf of the children. *Id.*, ¶ 7. In affirming the lower court's denial of the father's motion to amend his complaint to add the children, this Court held "because the interest of a parent and those of a child in a child custody case may not be identical, the attorney's duty runs solely to his or her client, except as otherwise specified in this opinion." *Id.*, ¶ 23. In so holding, this Court discussed at great length the adversarial nature of the proceedings and that to place a duty upon an attorney to a non-client would compromise the attorney's duty to represent his or her client. *Id.*, ¶¶ 17-22. However, this Court left the door open as to whether an attorney may owe a duty to non-client third parties in other proceedings.

> [W]hen the professional relationship between an attorney and a client is placed within an adversarial context in which the attorney functions as the advocate for the client, the attorney has a different relationship to non-clients than do members of other professions. This distinction is what differentiates this type of case from one involving non-client relationships with doctors, probate and estate planning attorneys, accountants, realtors, architects, and other similarly situated professionals.

Id., ¶ 22.

In another case of first impression, this Court held the decedent's drafting attorney owed a duty to a non-client beneficiary of the estate. *Watkins Trust*, ¶¶ 21-22. In doing so, this Court held whether the trust and personal representative had standing to bring the legal malpractice action against decedent's drafting attorney

was a factual issue for the trier of fact to decide, which precluded summary judgment. *Id.*, ¶ 23. In *Watkins Trust*, the trust and personal representative of the estate of the decedent brought a legal malpractice claim against the attorney who drafted the trust and the decedent's will. *Id.*, ¶ 1. In finding a duty was owed, this Court cited to *Mallen*, Vol. 4, § 32.4, "Despite statements that strict privity is the prevailing or majority rule, just the opposite is true of actions brought by beneficiaries of wills. *A duty to a third party is implied because that is the mutual intent of the attorney and client*." *Id.*, ¶ 21.

Here, the adoption contemplated by Melissa did not constitute an adversarial proceeding. In holding that a stepfather was not entitled to notice of the adoption of his stepchildren, this Court explained that an examination of the adoption statutes did not contemplate any adversarial proceeding. *State ex rel. Sheedy v. District Court*, 66 Mont. 427, 433, 213 P. 802, 804 (1923). "They require only the consent of the parents, if living." *Id.* Similar to the adoption statues that existed in *Sheedy*, the adoptions statues that apply to the facts here also require the consent of living parents. Under Montana law,

> (2) A child may be placed for adoption only by:
>
> > (a) the department or another agency to which the child has been relinquished for purposes of adoption;
> >
> > (b) the department or another agency expressly authorized to place the child for adoption by a court order terminating the

> relationship between the child and the child's parent or guardian;
>
> (c) *the child's parents; or*
>
> (d) a guardian expressly authorized by the court to place the child for adoption.

Mont. Code Ann. § 42-1-107 (2015) (emphasized added). The only relevant section at the time Susan was assisting Melissa with L.S.'s adoption was section (2)(c), "A child may be placed for adoption only by: . . . (c) the child's parents." Mont. Code Ann. § 42-1-107(2)(c) (2015). Unless parental rights have been terminated, written consent of the child's birth mother and "the husband of the birth mother if the husband is the presumed father of the child under 40-6-105" is required for a child to be adopted. Mont. Code Ann. § 42-2-301(1)-(2) (2015). Under Montana law, "A person is presumed to be the natural father of a child if the person and the child's natural mother are or have been married to each other and the child is born during the marriage." Mont. Code Ann. § 40-6-105(1)(a) (2015). Because Melissa and Christopher were married at the time of L.S.'s birth, Christopher was presumed under Montana law to be the natural father of L.S. Therefore, both Melissa and Christopher had to consent in writing to L.S. being placed for adoption.

Similar to a mutual intent existing between the client and attorney in *Watkins Trust*, here a mutual intent existed between Melissa and Susan – that

intent was to have L.S. legally adopted. The only legal way to do that under Montana law was for Susan to obtain consent from Melissa and Christopher. Susan initially attempted to obtain Christopher's consent by attempting to have him sign an affidavit relinquishing his parental rights to L.S. However, when Christopher refused to consent instead of Susan informing her client that L.S. could not be adopted, Susan circumvented Montana law by allowing L.S. to be removed from the State of Montana to the State of Utah.

Susan's duty in a direct parental placement adoption should extend beyond the traditional attorney-client relationship. Unlike the adversarial dissolution and custody proceeding in *Rhode*, here, Susan's role as Melissa's attorney in the adoption was not an adversarial role to Christopher. Susan's role was to advise Melissa on whether L.S. could be placed by her for adoption and to advise Melissa on her parental rights and whether she wanted to relinquish them. Susan's role was not to terminate Christopher's parental rights through a contested proceeding. This differs substantially from Susan representing Melissa in a custody proceeding of L.S. against Christopher. In a custody proceeding, Susan would be representing Melissa's interests and those interests would be adverse to Christopher's interests (i.e. which parent should have custody of L.S.). However, in an adoption proceeding Melissa and Christopher are not fighting each other as to who should have custody of L.S. Instead, both parties should be agreeing to relinquish their

parental rights and consent to L.S.'s adoption. Here, only Melissa relinquished her parental rights and consented to L.S.'s adoption.

In the context of direct parental placement adoptions, the Court should hold that an attorney's duty extends to non-client third parties affected by the adoption. Here, the duty should be extended to Christopher, whose consent was required to place L.S. for adoption and remove L.S. to the State of Utah, and to L.S.'s grandparents, Vicky and Todd, who have been deprived of establishing a relationship with their grandchild due to Susan's actions. Additionally, because of Susan's actions what should have been a non-adversarial adoption with consent of both parents turned into a contested adoption proceeding between Christopher and the adoptive parents.

Consistent with this Court's holdings in *Watkins Trust* and discussion in *Redies*, this Court should reverse and extend a duty to non-client third parties in direct-parental placement adoptions. Here, that duty should be extended to Christopher, Vicky, and Todd.

III. THE DISTRICT COURT ERRED IN GRANTING DPHHS'S MOTION FOR SUMMARY JUDGMENT REGARDING THE FIRST ELEMENT OF A NEGLIGENT MISREPRESENTATION CLAIM.

This Court should reverse the district court's order granting summary judgment to DPHHS on Count VII finding that Christopher, Vicky, and Todd relied on DPHHS's statements made by its former chief legal counsel, Frank, to

their detriment. DPHHS did not present any evidence to the district court disputing that Frank informed Vicky and Christopher's Utah attorney that if genetic testing established Christopher's paternity of L.S., DPHHS would secure the return of L.S. to Montana. DC-Doc. 57 at 13-15; DC-Doc. 66 at 15-16. Instead, DPHHS argued that Frank's representations involved a future event. *Id.* The Complaint alleges Frank made the representation without reasonable grounds to believe it was true at the time it was made and with the intent to induce Christopher, Vicky, and Todd to rely on the statement. DC-Doc. 1 at ¶¶ 80-87. The district court erroneously concluded DPHHS's counsel's statement was a "representation of a future event." DC-Doc. 71 at 13 attached as Appendix B.

> The elements for negligent misrepresentation are:
>
> a) the defendant made a representation as to a *past* or *existing* material fact;
> b) the representation must have been untrue;
> c) regardless of its actual belief, the defendant must have made the representations without any reasonable ground for believing it to be true;
> d) the representation must have been made with the intent to induce the plaintiff to rely on it;
> e) the plaintiff must have been unaware of the falsity of the representation; it must have acted in reliance upon the truth of the representation and it must have been justified in relying upon the representation;
> f) the plaintiff, as result of its reliance, must sustain damage.

Kitchen Krafters v. Eastside Bank, 242 Mont. 155, 165, 789 P.2d 567, 573 (1990), *overruled, in part, on other grounds by Busta v. Columbus Hosp.*

Corp., 276 Mont. 342, 370, 916 P.2d 122, 139 (1996).

The district court found the first element of the negligent misrepresentation claim was not met and, as a result, did not analyze the remaining elements. In so holding, the district court relied on *WLW Realty Partners, LLC v. Cont'l. Partners VIII, LLC,* 2015 MT 312, 381 Mont. 333, 360 P.3d 1112. However, this case is distinguishable in that the misrepresentation made in *WLW Realty Partners, LLC* was due to a reliance on a third party's action. In *WLW Realty Partners, LLC*, Continental Partners VIII, LLC (Continental) purchased a two homesite lot from Yellowstone Development, LLC pursuant to a sales agreement including a provision that the Yellowstone Club would build ski-in and gravity ski-out access to the lot. *WLW Realty Partners, LLC,* ¶ 1. Continental constructed the homes and sold one ski home to Weidner, a managing member of WLW Realty Partners (WLW). *Id.* Ultimately, the Yellowstone Club declared bankruptcy before the ski-out access to Weidner's home was completed, so Weidner constructed a less efficient tow rope access. *Id*., ¶ 2. WLW then sued Continental, including a claim of negligent misrepresentation for Yellowstone Club's failure to construct the ski-out access as originally promised. *Id.* The district court denied Continental's motion for summary judgment on the negligent misrepresentation claim and the case proceeded to a bench trial where Continental argued any misrepresentation was made by the Yellowstone Club. *Id.*, ¶ 3. This Court found the trial court

erroneously permitted the negligent misrepresentation claim to go to trial. The Court explained,

> While the District Court found that "Continental made a representation as to a material fact . . . [and] [t]he representation was untrue," the language from our holding in *Cechovic* reads: "a claim for negligent misrepresentation requires proof of the following elements: (1) the defendant made a representation as to a *past or existing* material fact; (2) the representation must have been untrue . . . ." We have emphasized regarding the first element that "the false representation must relate to a fact already in existence."

Id., ¶ 24 (citations omitted).

Frank represented to Vicky and others as fact – not a legal opinion – that L.S. would be returned to Montana once Christopher's paternity was confirmed by DNA testing. Frank did not render a legal opinion that L.S. *should* be returned nor did he represent DPHHS would rely on a third party to complete the action to which he committed DPHHS.

Christopher, Vicky, and Todd certainly acted in reliance upon Frank's representation to them. Christopher subsequently filed a motion in his dissolution proceeding to have genetic testing of L.S. performed and obtained an order compelling DNA. This action wasn't filed until after DPHHS refused to take any action to return L.S. to Montana. DPHHS argued before the district court that because Christopher continued to contest termination of his parental rights in Utah, he cannot establish his reliance on Frank's statement. DPHHS would penalize Christopher, Vicky, and Todd for pursuing every option for regaining custody of

their daughter and granddaughter and for failing to rely solely on the state agency whose conduct towards their family egregiously violated state law and policy. Christopher's reliance on Frank's false statement resulted in the Utah Courts continuing to assert jurisdiction of L.S. and the termination of his parental rights under Utah law.

CONCLUSION

Christopher, Vicky, and Todd respectfully request this Court to reverse the district court's orders: (1) granting summary judgment to DPHHS, Aaron, and Paul; and (2) dismissing their claims against Susan and Axilon under Rule 12(b)(6). Christopher, Vicky, and Todd further request this Court remand the matter to the district court for further proceedings.

RESPECTFULLY SUBMITTED this 31st day of July, 2024.

HARRIS LAW OFFICE PLLC

By: /s/ Tara A. Harris
TARA A. HARRIS
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and idented material; and the work count calculated by Microsoft Word for Mac is 9,111 words, excluding the table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 31st day of July, 2024.

/s/ Tara A. Harris
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TABLE OF CONTENTS

APPENDIX **Tab**

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