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STATE OF MONTANA
Case Number: DA 24-0261

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 24-0261

CHRISTOPHER SHELTON, VICKY COSTA, and TODD COSTA,

Appellants,

vs.

STATE OF MONTANA, DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES, an agency of the State of Montana; SUSAN G. RIDGEWAY; AXILON LAW GROUP, PLLC, PAUL S. HENNING; AARON J. DAVIES, and DOES 1-20,

Defendant - Appellees.

APPELLEE'S RESPONSE BRIEF

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

APPEARANCES:

TARA A. HARRIS
MELISSA BROCH
Harris Law Office PLLC, Ste. 318
Helena, MT 59601
(406) 513-1412
tara@harrislawmt.com
melissa@harrislawmt.com

Attorneys for Plaintiffs-Appellants

PATRICIA KLANKE
Drake Law Firm, P.C.
111 N. Last Chance Gulch, Ste. 3J
Helena, MT 59601
(406) 495-8080
patricia@drakemt.com

Attorneys for Defendant – Appellee State of Montana

DAVID C. DALTHORP
Jackson, Murdo & Grant, P.C.
203 North Ewing
Helena, MT 59601
(406) 513-1120
dalthorp@jmgattorneys.com

Attorneys for Defendants-Appellees Susan Ridgeway and Axilon Law Group, PLLC

DONALD CRAIG ST. PETER
LOGAN ALAN NUTZMAN
St. Peter Law Offices, P.C.
2620 Radio Way
P.O. Box 12255
Missoula, MT 59808
(406) 728-8282
don@stplawoffices.com
logan@stplawoffices.com
Attorneys for Defendants-Appellees Paul S. Henning and Aaron J. Davies

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STATEMENT OF ISSUES

1. Whether Plaintiffs are precluded from relitigating the issue of compliance with the Interstate Compact on the Placement of Children, where the Utah District Court found in a prior proceeding that "All terms and conditions of the Interstate Compact on the Placement of Children ('ICPC') from the state of Montana were complied with."
2. Whether Plaintiffs can establish the elements of negligent misrepresentation based upon a statement of hypothetical future events, rather than a statement of then-existing material fact.

STATEMENT OF THE CASE

This case arises from an adoption that has been final since 2021 and was already the subject of an appeal in Utah. Plaintiffs now ask the Montana courts to enter findings directly contradictory to those underlying the Utah adoption decree, in an effort to reverse the stable placement of a now nine-year-old child.

The Complaint in this matter was filed August 8, 2018, while an appeal from the Utah District Court orders terminating Christopher Shelton's parental rights and finalizing the adoption was pending.

On March 14, 2023, adoptive parents Aaron Davies and Paul Henning filed a motion to dismiss in the Montana First Judicial District Court, providing notice of the final judgment of the Utah court.

On May 26, 2023, the Montana Department of Public Health and Human Services ("DPHHS") moved for summary judgment asserting that the majority of Plaintiffs' claims were barred by issue preclusion arising from the Utah judgment. DPHHS also asserted that Plaintiffs had failed to establish the elements of their remaining claim, negligent misrepresentation. Davies and Henning joined in the motion for summary judgment.

On November 20, 2023, the District Court heard oral argument. On February 29, 2024, the District Court granted the motion for summary judgment on all counts in favor of DPHHS, Davies, and Henning. Plaintiffs appeal from the order granting summary judgment.

Claims against Susan Ridgeway and Axilon Law Group, PLLC, were dismissed January 30, 2019, pursuant to Montana Rule of Civil Procedure 12(b)(6). That order is also included in this appeal, but is not relevant to the claims against DPHHS.

STATEMENT OF FACTS

In January 2016, Melissa Surbrugg gave birth to a baby girl while separated from her then-husband, Christopher Shelton. Complaint, ¶ 13; *P.H. v. C.S. (In re*

Adoption of B.H.), 2020 UT 64, ¶ 2, 474 P.3d 981 (Utah Supreme Ct., September 16, 2020) (App'x 6). Surbrugg planned a private adoption for the baby, selecting Utah residents Aaron Davies and Paul Henning as adoptive parents. Complaint, ¶¶ 14-15. Davies and Henning filed a petition for adoption in Utah's Third District Court upon matching with Surbrugg. App'x 6, ¶¶ 3, 8. They traveled to Helena, where the baby was born, within hours after the birth. App'x 6, ¶ 8; Complaint, ¶ 15.

The baby, known as L.S. in these proceedings, tested positive for amphetamines, methamphetamines, and Suboxone. Complaint, ¶ 13. This resulted in a report to child protective services by hospital staff and issuance of a notice of removal. Complaint, ¶¶ 16, 19. No abuse and neglect petition was ever filed, and L.S. was never actually removed from Surbrugg's care, because she instead remained at the hospital with her adoptive parents. Complaint, ¶¶ 17, 23. The baby was discharged into the care of Henning and Davies, who remained in Helena with L.S. until they were authorized to return home to Utah with her. App'x 6, ¶10; Complaint, ¶ 24.

Because the adoption involved an interstate placement, it was subject to the requirements of the Interstate Compact on the Placement of Children ("ICPC"). The ICPC "provides a uniform legal framework for the placement of children across State lines in foster homes and adoptive homes." App'x 6, ¶ 54 (citation

omitted). The compact establishes interstate cooperation to ensure that children are placed in suitable environments and that "appropriate jurisdictional arrangements" are made. App'x 6, ¶ 54; ICPC Article I (codified in Montana at § 41-4-101, MCA, and in Utah at Utah Code § 62A-4a-701). The "chief function" of the ICPC "is to protect the interests of children and of the States." App'x 6, ¶ 54 (citation omitted).

The ICPC requires that before placing a child across state lines, the person or agency making the placement must give to the appropriate public authorities in the receiving state notice of their intent to place the child in that state. Section 41-4-101, MCA (ICPC Article III, also codified at Utah Code § 62A-4a-701). The notice must include the name, date, and place of birth of the child; the identity and address of the parents or legal guardian; the name and address of the person with whom the child will be placed; and a full statement of the reasons for the proposed action. *Id*. This notice requirement is met by submission of a request packet including ICPC Form 100A, a cover letter, and other documentation to the sending state's Compact Administrator, who then transmits the request to the receiving state's Compact Administrator. App'x 5, ¶ 2 n.2; ICPC Regulation No. 12 (App'x 7 at 40-44), adopted at Admin. R. Mont. 37.50.90.

Surbrugg and Shelton had been separated for some time when she learned of her pregnancy, and therefore she did not believe Shelton to be the baby's father. App'x 6, ¶ 2. On the ICPC Form 100A, she identified another man, Donnell Gleed,

as the likely father. App'x 3. Surbrugg and Gleed both executed relinquishments of their parental rights, which were submitted with the request packet. App'x 6, ¶ 9. Attorney Susan Ridgeway also submitted a cover letter with the packet, which stated:

> Only yesterday did the birth mother, Melissa, inform us that she was actually still married, although they have been separated for some time. We learned that her husband Christopher Dennis Shelton was released from prison one week ago but is currently in jail on a probation violation. He is likely going back to prison. 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. The adoptive parents have executed a Legal Risk Statement and understand the risks involved.

App'x 3.

On February 8, 2016, the Montana Compact Administrator approved the ICPC request and transmitted it to the state of Utah. Complaint, ¶ 26. Utah's Compact Administrator approved the ICPC request on February 9, 2016, and Davies and Henning returned home to Utah with L.S. the following day. Complaint, ¶ 27. On February 10, 2016, Davies and Henning moved for temporary custody of L.S. in the Utah Third Judicial District Court, where they had already filed their petition for adoption. P.H. v. C.S. (In re B.H.), 2019 UT App 103, ¶ 3, 447 P.3d 110 (Utah Ct. App., June 13, 2019) (App'x 5). They noted in the motion

that they had recently learned Surbrugg was married, and were "working on determining paternity and/or providing notice to address any legal interests" of Shelton. *Id*.

A Notice of Adoption Proceedings dated February 17, 2016, was sent to Shelton at the Yellowstone County Jail, App'x 4, following which he retained counsel and intervened in the adoption proceeding, App'x 1 at 1. A termination hearing was held on July 31 and August 21, 2017. *Id*. Shelton was represented by counsel and both he and his mother, Vicky Costa, testified. *Id*. at 1, 8-10.

In an Order dated September 15, 2017, the Utah District Court terminated Shelton's parental rights after concluding that Shelton's "addictions are his priority, not his children." *Id*. at 13. The Court took note of Shelton's recent sentencing in the Montana Eighth Judicial District, Cascade County, which reported that Shelton had a criminal history of two felonies and 19 misdemeanors, with five DUI convictions. *Id*. at 2. The Court also took notice of a newspaper report stating that Shelton had been charged with a seventh DUI on or about March 30, 2016. *Id*.

The Court heard testimony regarding Shelton's parenting of his other child with Surbrugg, G.S., and concluded that Shelton was not an involved parent. *Id*. at 13. The Court concluded that during times when the family had lived with Vicky Costa, it was she, not Shelton, who had done what Shelton should have done as a

parent. *Id*. The Court also heard testimony that, if successful in challenging the adoption arranged by Surbrugg, Shelton intended to relinquish his parental rights and allow Vicky and her husband, Todd Costa, to adopt the baby. *Id*. at 8. The Court noted that the Costas had already filed a petition for adoption, *id*., and that Shelton had appointed Vicky Costa as his attorney-in-fact, *id*. at 2.

The Court found that Shelton had a severe drinking problem, drove after drinking substantial amounts of alcohol, used marijuana heavily, used pain pills, and sold and used methamphetamine. *Id*. at 14. Despite a significant record substantiating these findings, including five to seven DUI convictions, Vicky Costa testified that her son did not get drunk or use drugs, and that she had never seen him drunk. *Id*. at 8-9. The Court found this testimony non-credible. *Id*. at 15. The Court also observed that restraining orders had been issued against Todd and Vicky Costa in favor of the adoptive parents, and that there may have been pending charges against Todd Costa for violating the order. *Id*. at 8.

The Court found credible Surbrugg's testimony that in June 2015, during Surbrugg's pregnancy, "Shelton called Surbrugg because he was using meth with a friend, and the friend's baby drank some liquid meth and was having seizures and rolling around on the floor." *Id*. at 14. Shelton and his friend did not take the baby to the hospital because they did not want to get caught using meth. *Id*. The Court also found credible testimony that Shelton had been a member of the Cossacks

motorcycle gang and was trying to teach G.S., who was eight years old at the time of the hearing, to be an "outlaw biker," including by using soda or juice to teach him how to take shots. *Id*. Based upon these and other findings, the District Court terminated Shelton's parental rights *Id*. at 15-17. The District Court later finalized the adoption. App'x 6, ¶ 16.

While the adoption was pending in Utah, Shelton and the Costas were also pursuing efforts in Montana to have L.S. returned to the state. App'x 8. Vicky Costa asserts that in May 2017, she was party to a phone call with DPHHS attorney Frank Clinch, in which Clinch "stated that if my son was determined to be L.S.'s biological father, DPHHS would take the necessary steps to have L.S. return to the State of Montana." App'x 8, ¶ 2; Complaint, ¶ 33.

Shelton filed for dissolution of his marriage to Surbrugg in the Montana First Judicial District and moved that Court to order paternity testing of L.S., alleging her to be a child of the marriage. App'x 8, ¶ 5. The motion was granted, and results obtained in August 2017 showed that Shelton was the biological father of L.S. Complaint, ¶ 35; App'x 8, ¶ 7. The results of the paternity test were also considered by the Utah District Court in its September 15, 2017 order terminating Shelton's parental rights. App'x 1 at 1.

Shelton appealed from the orders terminating his rights and finalizing the adoption. App'x 5; App'x 6. First, he argued that the district court did not have

jurisdiction to terminate his parental rights under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). App'x 5, ¶ 8. Secondly, he argued "that the district court erred in finalizing the adoption, because the ICPC was not complied with." *Id*., ¶ 9. Shelton argued that the ICPC request was defective because Surbrugg had listed Gleed as the child's father. *Id*., ¶ 25.

The Court of Appeals found that the district court did have jurisdiction, because the UCCJEA did not apply to adoption proceedings. *Id*., ¶ 24. In addressing the ICPC issue, the Court of Appeals first noted that the District Court's findings of fact and conclusions of law had failed to state whether the ICPC had been complied with. *Id*., ¶ 26. The Court of Appeals therefore set aside the adoption decree and remanded for further findings as to ICPC compliance. *Id*., ¶ 29. The Court also noted that while the Form 100A itself "was defective in that it listed Purported Father, rather than Father, as Child's parent," *Id*., ¶ 28, that did not preclude a finding of ICPC compliance on remand:

> Compliance with the ICPC requires that written notice, containing specific information, be submitted to ICPC administrators . . . not necessarily that all the specific information be set forth on the ICPC request form 100A. Adoptive Parents, in their brief, indicate that the complete ICPC packet submitted to Montana's ICPC administrator contained information not included on the ICPC request form, including a cover letter identifying Father as Mother's husband. Accordingly, on remand, it may be necessary to add the complete ICPC packet to the record in order to find that the ICPC was complied with in this case. And given that noncompliance with the ICPC would not divest the court of jurisdiction, in the event that the current record and ICPC packet still do not comply with the ICPC, Adoptive Parents can

> still undertake steps to comply with the ICPC prior to reinstating the adoption decree.

Id., ¶ 27 n.7.

Shelton appealed to the Utah Supreme Court. The Utah Supreme Court affirmed the Court of Appeals as to both issues. App'x 6, ¶ 65. The Utah Supreme Court held that "Father is correct that Mother was required to comply with the ICPC before sending the child to Utah with Adoptive Parents." Id., ¶ 56, and agreed with the Court of Appeals that the District Court was required to "state in the adoption decree that the ICPC was complied with," but had failed to enter the necessary findings. *Id*., ¶ 63. The Utah Supreme Court noted that the Court of Appeals "had also observed that Mother might have complied with the ICPC through a cover letter that identified Father as her husband," but did not consider the letter in its analysis, as it had not yet been made part of the record. *Id*., ¶ 52 n.13.

On remand, additional evidence of ICPC compliance, including both Form 100A and the cover letter from Ridgeway, was made part of the record. App'x 2 at 1-2. In an order dated January 27, 2021, the District Court made the following findings:

> 3. All terms and conditions of the Interstate Compact on the Placement of Children ("ICPC") from the state of Montana were complied with.
> 4. The Court noted that the ICPC 100A Form listed Donald [sic] Gleed as the name of the father. However, the Court also finds that a cover letter dated February 6, 2016 re ICPC approval to Montana

> DPHHS indicated that the birthmother was married to a Christopher Shelton at the time of the child's birth, and identified him as a legal father.
> 5. Adoptive Father, Paul Henning, testified that he hand-delivered the entire packet including cover letter, and 15 attachments including a home study, legal risk affidavits, and more.
> 6. Compliance with ICPC is evidenced in this matter by the DPHHS-CFS-019C ICPC 100A Form signed by the Sending State (Montana) Compact Administrator on February 8, 2016, and by the Receiving State Compact Administrator on February 9, 2016. The Court notes that ICPC approval was granted by both states' Administrators subsequent to the delivery of the ICPC form and cover letter identifying both alleged fathers.

Id. at 2.

The Utah District Court repeated in its conclusions of law that "All terms and conditions of the Interstate Compact on the Placement of Children ('ICPC') from the state of Montana were complied with prior to the commencement of this case." *Id*. at 4. The Utah Rules of Civil Procedure state that a notice of appeal must be filed within 30 days of the date of entry of the judgment or order appealed from. Utah R. App. P. 4. The Utah District Court's January 27, 2021 order determining that all terms and conditions of the ICPC were complied with became final on or about February 26, 2021, when no appeal was filed.

While the Utah appeal was progressing, on August 8, 2018, Shelton and the Costas filed this action in the Montana First Judicial District Court. Complaint,¶ 1, 2; Or. on State's Mot. for Summ. J. at 5. The Complaint alleged that DPHHS "violated the ICPC by allowing L.S. to be sent to the state of Utah without first notifying and/or obtaining the consent of [Shelton,] L.S.'s presumed natural

father." Complaint, ¶ 45. The Complaint alleged that Shelton "and his parents, Vicky and Todd [Costa], have spent a considerable amount of time and resources contesting [Davies and Henning]'s adoption of L.S. in the State of Utah through the Utah Court system." Complaint, ¶ 38. The Complaint also included claims against Davies, Henning, Ridgeway, and Axilon Law Group. Complaint, ¶ 1, 2; Or. on State's Br. Supp. Mot. for Summ. J. at 5.

On March 14, 2023, counsel for adoptive parents Henning and Davies filed a motion to dismiss in the Montana case, attaching as exhibits the Utah order terminating Shelton's parental rights, the order on remand regarding ICPC compliance, and the decree of adoption on remand. Henning and Davies argued that the issues raised in the present litigation had been determined by the Utah court, and that those findings "should be given full faith and credit before this court as a judicial record of a sister state . . . ." Mot. To Dismiss and Br. In Supp. at 8. Henning and Davies asked that the Complaint against them be dismissed on the grounds that it was "barred by the Full Faith and Credit Clause of the U.S. Constitution." Mot. To Dismiss and Br. in Supp. at 9.

On May 26, 2023, DPHHS moved for summary judgment on the same basis, asserting that the Complaint was based upon alleged non-compliance with the ICPC, and that the Utah court had determined the ICPC was complied with. Henning and Davies joined in the motion for summary judgment. Oral argument

was heard on November 20, 2023. Or. on State's Mot. for Summ. J. at 5. On February 29, 2024, the District Court granted summary judgment in favor of DPHHS, Henning, and Davies. This appeal followed.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo, applying the standards of M. R. Civ. P. 56. *Martin v. SAIF Corp.*, 2007 MT 234, ¶ 9, 339 Mont. 167, 167 P.3d 916. Summary judgment is appropriate where the moving party establishes that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Id*.; M. R. Civ. P. 56. Whether the judgment of another state is entitled to full faith and credit in Montana raises questions of law, which are reviewed for correctness. *Martin*, ¶ 9; *Aetna Life Ins. Co. v. McElvain*, 221 Mont. 138, 144-45, 717 P.2d 1081, 1085 (1986).

SUMMARY OF THE ARGUMENT

Plaintiffs' arguments disputing the adoption of L.S. in Utah were already litigated in Utah courts. Their attempt to have those issues relitigated in Montana is a collateral attack on the finalized adoption of a nine-year-old child who has been in the care of her adoptive parents since birth. The entry of any judgment in Montana finding that the ICPC was not complied with would directly contradict the Utah court's finding, necessary to the adoption decree, that the ICPC was complied with. Regardless of how Plaintiffs have sought to characterize their

claims, this action is an attack on a final judgment and decree of the Utah court and inherently threatens the stability of this child.

Plaintiffs are precluded from relitigating the issue of whether the ICPC was complied with, because the Utah District Court expressly found that all terms and conditions of the ICPC were complied with. Plaintiffs cannot avoid this determination by attempting to restate the issue or by introducing arguments and allegations that could have been introduced in the Utah proceeding. Vicky and Todd Costa were in privity with Christopher Shelton during the Utah proceeding, and had a full and fair opportunity to litigate the issues they now attempt to relitigate in this action.

Plaintiffs cannot state a claim for negligent misrepresentation based on the statement of DPHHS attorney Frank Clinch that he "would take action to have L.S. returned to the State of Montana," as this was not a statement of then-existing material fact. It was a statement regarding a potential future event, which cannot give rise to a claim of negligent misrepresentation.

ARGUMENT

The issue in this case is whether the Interstate Compact on the Placement of Children was complied with in the adoption of L.S. The Utah District Court found, in a final judgment issued January 27, 2021, that all terms and conditions of the

ICPC were complied with. Plaintiffs are precluded from relitigating this issue to obtain a contrary result.

This case is in no way about Christopher Shelton's fundamental right to parent. Shelton was provided a full hearing prior to the termination of his parental rights. Moreover, Shelton never intended to parent. He planned to relinquish his parental rights and consent to adoption of the child.

It is also not about the ICPC, as the arguments raised by Plaintiffs regarding ICPC compliance are meritless and based on non-existent requirements. The District Court in Utah determined that the ICPC was complied with, and Shelton and the Costas had every opportunity to challenge ICPC compliance in that proceeding.

Plaintiffs' inflammatory and illusory arguments are intended to distract from Plaintiffs' real goal of overturning the final judgment of a sister state, which has already conclusively determined that the interstate placement and adoption in this case fully complied with the law and should remain final.

I The Issue Of Whether The Adoption Placement Complied With The ICPC Has Already Been Conclusively Determined By The Utah Court.

Collateral estoppel, also referred to as issue preclusion, "bars the reopening of an issue that has been litigated and determined in a prior suit." *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267 (citing *Holtman v. 4-G's Plumbing and Heating*, 264 Mont. 432, 439, 872 P.2d 318, 322). The doctrine

precludes relitigating of issues already "'determined in a prior suit regardless of whether it was based on the same cause of action as the second suit.'" *Martelli v. Anaconda-Deer Lodge Cnty.*, 258 Mont. 166, 168, 852 P.2d 579, 580 (1993) (quoting *Lawlor v. National Screen Service*, 349 U.S. 322, 326, 75 S.Ct. 865, 867 (1955)).

There are four requirements that must be met for the litigation of an issue to be precluded by a prior judgment:

1. The issue must be identical to the issue decided in the prior adjudication.
2. A final judgment on the merits must have issued in the prior adjudication.
3. The party against whom preclusion is asserted must have been a party to or in privity with a party to the prior adjudication.
4. The party against whom preclusion is asserted must have had opportunity for a full and fair adjudication of the issue in the prior adjudication.

Baltrusch, ¶ 18; *Brishka v. State*, 2021 MT 129, ¶ 11, 404 Mont. 228, 487 P.3d 771. It is not disputed that the second element, a final judgment on the merits, is met here. *See* Pl.'s Br. at 16, 18.

a. <u>The Issue Decided In The Utah Case Is Identical To The Issue Raised Here.</u>

The issue decided in the previous case must be "substantively identical" to the issue raised in the present case. *Brishka*, ¶ 12. Preclusion applies "to all questions essential to the judgment and actively determined by a prior valid

judgment," *Id*. (quoting *Baltrusch*, ¶ 25), and acts as a bar where the "issues are so intertwined that to decide the issue before it, the district court would have to rehear the precise issue previously decided." *Baltrusch*, ¶ 25 (quoting *Martelli*, 258 Mont. at 169, 852 P.2d at 581). A party cannot avoid preclusion by reframing the same issues or raising new arguments, and a new argument is not necessarily a new issue. *Brishka*, ¶ 21. If the issue raised in the present case "is simply a new legal theory for the same issue litigated and adjudicated" in the prior case, then the parties are precluded from litigating it again. *Brishka*, ¶ 21. Similarly, if a new legal theory or factual assertion is so related to the issues previously adjudicated that it could have been raised in that proceeding, the prior judgment is conclusive. *McDaniel v. State*, 2009 MT 159, ¶ 33, 350 Mont. 422, 208 P.3d 817 (citing *Haines Pipeline Constr., Inc. v. Mont. Power Co.*, 265 Mont. 282, 288-89, 876 P.2d 632, 636-37 (1994)).

Here, Plaintiff raises new theories and factual assertions to address the identical issue already decided in the prior adjudication. The issue is whether the ICPC was complied with in the adoption of L.S. The Utah District Court, on remand, addressed this identical issue and found that "All terms and conditions of the Interstate Compact on the Placement of Children ("ICPC") from the state of Montana were complied with." In this appeal, Plaintiffs allege that the ICPC was *not* complied with because (1) Surbrugg did not have authority to place L.S. for

adoption at the time the ICPC request was submitted; (2) Shelton did not consent to the adoption prior to approval of the ICPC request; and (3) Henning and Davies should not have been designated as "temporary guardians" on the ICPC Form 100A. None of these allegations raises a new issue. Each is merely a new argument or factual assertion addressing the identical legal issue: whether there was compliance with the terms and conditions of the ICPC. Each of these arguments is "so intertwined" with the issue of whether the ICPC was complied with that, in order to hear these issues, the Montana court would have to rehear the issues already submitted to and decided by the Utah court.

First, Plaintiffs assert that in determining that Surbrugg was the sending agency for purposes of ICPC compliance, the Utah District Court did not consider whether Surbrugg was authorized under Montana law to place L.S. for adoption. They assert that because DPHHS had issued a notice of removal, Surbrugg no longer had legal custody of L.S., even though DPHHS never filed a petition for legal custody or took L.S. into its physical care. Therefore, Plaintiffs assert, the Montana Compact Administrator should never have transmitted the ICPC request to Utah.

Surbrugg signed the ICPC Form 100A as the "sending agency or person" and identified herself as the "agency or person responsible for planning for the child." App'x 3. The Utah District Court considered the ICPC Form 100A in

making its determination that all terms and conditions of the ICPC were complied with. Plaintiffs' argument that Surbrugg did not have authority to act as the "sending agency" was relevant and closely intertwined with that determination. *See Brishka*, ¶ 21. Plaintiffs had the opportunity, and indeed the obligation, to raise that issue during the Utah proceedings. They did not, and they are precluded from doing so here.

Plaintiffs next assert that the Compact Administrator should not have transmitted the ICPC request to Utah because it did not include a consent to adoption or relinquishment of parental rights executed by Shelton. The issue of Shelton's consent or relinquishment was plainly addressed by the Utah District Court as part of the termination of his parental rights. Any arguments regarding whether Shelton's objection to the adoption rendered the ICPC process inadequate were, again, so intimately connected to the matters addressed in the Utah proceeding that they could, and should, have been raised. *Id*.

Plaintiffs argue that the Utah court also did not consider whether the ICPC Form 100A improperly designated the adoptive parents as "legal guardians." The Utah District Court found, "Compliance with ICPC is evidenced in this matter by the DPHHS-CFS-109C ICPC 100A Form signed by the Sending State (Montana) Compact Administrator on February 8, 2016, and by the Receiving State Compact Administrator on February 9, 2016." App'x 2, ¶ 6. The Utah court considered the

ICPC Form 100A and conclusively determined the issue of ICPC compliance, finding that the requirements of the ICPC were met. Plaintiffs could have raised the specific issue of whether it was improper to deem Davies and Hennings "legal guardians" on the ICPC 100A Form, but they did not.

Plaintiffs also assert that the Utah findings should not preclude relitigation of whether the ICPC was complied with because the Utah courts focused only on whether the alleged non-compliance deprived Utah of jurisdiction, not on whether there was actual compliance with the ICPC. This was true of the Court of Appeals and Supreme Court proceedings, but not the District Court proceedings on remand. The Utah District Court was required to make factual findings regarding whether all the requirements of the ICPC were met, and those findings were not limited to the question of jurisdiction. The Utah District Court expressly found, "All terms and conditions of the Interstate Compact on the Placement of Children ('ICPC') from the state of Montana were complied with. App'x 2, ¶3.

While trying to avoid application of the Utah courts' final judgment, Plaintiffs simultaneously rely on statements in the Court of Appeals and Utah Supreme Court discussing the effect of any potential ICPC non-compliance as the "law of the case." Appellants' Br. at 9-10. The Court of Appeals "acknowledge[d] that the ICPC form in this case was defective in that it listed Purported Father, rather than Father, as Child's parent." App'x 5, ¶ 28. Plaintiffs ignore, however,

the footnote to the preceding paragraph, in which the Court of Appeals explains that although the ICPC *form* (Form 100A) was deficient, there appeared to be the possibility that the cover letter submitted with the form had cured that deficiency. The Court of Appeals did not make findings of fact regarding the issue of ICPC compliance, because it is not a fact-finding court. Instead, it observed that the District Court had failed to enter findings regarding ICPC compliance, and remanded for entry of those findings. The Utah Supreme Court further noted that any ICPC defects found on remand could be cured to allow reinstatement of the adoption decree. On remand, the District Court found that there were no defects, and the ICPC had been complied with.

Each of the cases cited by Plaintiffs are also clearly distinguishable. In *Thoring v. LaCounte*, 225 Mont. 77, 81, 733 P.2d 340, 342-43, a Montana tavern had served alcoholic beverages to a driver who later caused a fatal accident in North Dakota. *Thoring v. LaCounte*, 225 Mont. 77, 79, 733 P.2d 340, 341; *Nehring v. LaCounte*, 219 Mont. 462, 464, 712 P.2d 1329 (1986). Thoring, the father of a woman killed in the accident, filed suits in both Montana and North Dakota. In both suits, he had alleged violations of the North Dakota Dram Shop Act by the Montana bar owners, LaCountes. *Thoring*, 225 Mont. at 79-81. The North Dakota Supreme Court "narrowly [held] that a Montana bar could not be liable under the North Dakota Dram Shop Act," and that claim was dismissed. *Thoring*, 225 Mont.

at 81. The Montana District Court granted summary judgment on the count of Thoring's Montana complaint alleging violations of the North Dakota Dram Shop Act, but "allowed Thoring's claims as to the alleged negligence of LaCountes under Montana law to go forward." *Id*. at 82. The Montana Supreme Court affirmed this result. *Id*.

In *Thoring*, both the North Dakota and Montana proceedings raised the issue of violations of the North Dakota Dram Shop Act. The North Dakota court held that the Act could not be applied to a Montana bar, and the Montana court applied this holding to grant summary judgment as to the same claims brought in Montana. Similarly, in this case, both the Utah and Montana proceedings raised the issue of ICPC compliance. The Utah court held that the ICPC was complied with, and it was therefore proper for the Montana court to apply this holding and grant summary judgment as to the same claims brought in Montana.

In *Thoring*, the Montana court alleged a separate negligence-based claim to move forward. Similarly, here, the Montana court did not grant summary judgment on the separate negligent misrepresentation claim on the basis of issue preclusion. Instead, Plaintiffs simply failed to demonstrate the existence of necessary elements of that claim. In *Thoring*, the North Dakota Dram Shop Act claims and the Montana common-law negligence claim were not based on the same provisions of law. Here, both the Utah case and the Montana case are based on the ICPC, an

interstate compact adopted by both jurisdictions. Application of *Thoring* supports affirming the District Court's grant of summary judgment to DPHHS because the issue in both the Utah and Montana proceedings, whether the ICPC was complied with, was the same.

Plaintiffs also compare this case to *Fadness v. Cody*, 287 Mont. 89, 951 P.2d 584 (1997). In *Fadness*, the plaintiffs had previously sued the buyer, alleging that "a promissory note was missing and . . . the mortgage was altered, before it was returned for recording." *Id*., 287 Mont. at 93. Fadnesses won title to the property and punitive damages for actual fraud. *Id*. Fadnesses then sued the closing agent and real estate agent, alleging negligence and breach of fiduciary duty "to the extent that the real estate transaction documents were 'lost, altered, or forged.'" *Id*., 287 Mont. at 94. The Montana Supreme Court held that the claims against the two agents were not precluded by the prior suit against the buyers. *Id*., 287 Mont. at 97. The first suit, alleging intentional wrongdoing by the buyers, did not consider the issue of negligence by the agents. *Id*.

Here, the Utah proceeding very expressly considered the issue of whether the ICPC was complied with, affirmatively and definitively holding that all terms and conditions of the ICPC were complied with. Plaintiffs cannot now seek a different finding regarding ICPC compliance from Montana courts. Notably, the judgment sought in the second *Fadness* suit could easily have co-existed with the

first one: whether the buyers committed fraud was not necessarily determinative of whether the agents had a duty, or breached that duty, to prevent or detect that fraud. It is both legally and factually possible for the buyers to have committed fraud and yet for the agents to not have been negligent. That is not true here. Either the ICPC was complied with, or it was not, and any potential finding of non-compliance in Montana necessary conflicts with and calls into question the finality of the Utah judgment and adoption decree.

Finally, Plaintiffs allege that the Utah court failed to apply Montana law when it did not find that the alleged ICPC defect deprived the Utah court of jurisdiction. Plaintiffs cite *In re Adoption of T.M.M.*, in which adoptive parents had brought the child from Mississippi to Montana with no ICPC notice whatsoever. *In re Adoption of T.M.M.*, 186 Mont. 460, 464-65, 608 P.2d 130, 133 (1980). The child was returned to the birth mother after she revoked her consent to the adoption. *Id*., 186 Mont. at 466-67.

In *T.M.M.*, it was undisputed that the ICPC was not complied with. The adoptive parents instead argued that the compact did not apply. *Id*., 186 Mont. at 465. Here, there has been a definitive holding that the ICPC was complied with. The holding of *T.M.M.* does not apply to this case. In *T.M.M.*, the child was returned to the birth mother not because the Montana court did not have jurisdiction, or even directly because of non-compliance with the ICPC. Instead,

the child was returned to the birth mother because violation of the ICPC gave the birth mother, as the "sending agency," grounds to revoke her consent to the adoption. *Id*., 186 Mont. at 467. Here, there was no ICPC violation, Surbrugg did not revoke her consent, and Shelton's parental rights were involuntarily terminated after a full hearing. Plaintiffs' invocation of *T.M.M.* does nothing more than illustrate that their ultimate intent is to disrupt the adoptive placement of L.S. with her parents of nearly nine years. This is exactly the kind of result that issue preclusion and the full faith and credit clause must prevent. See *In re Parentage of E.A.*, 518 P.3d 419, 427-28 (Kan. App. 2022).

Shelton, and through him, the Costas, could have brought, in the Utah state proceeding, each of the arguments raised now regarding the alleged ICPC deficiencies. They failed to do so, and cannot use this proceeding to collaterally attack the final judgment entered in Utah. The Utah District Court conclusively determined that the ICPC was complied with. Given that the issue in this case is identical – whether the ICPC was complied with – the first element of issue preclusion is met.

b. <u>Shelton Was A Party To The Utah Case, And The Costas Were In Privity With Shelton.</u>

Privity exists where "two parties are so closely aligned in interest that one is the virtual representative of the other." *Denturist Ass'n of Mont. v. State*, 2016 MT 119, ¶ 14, 383 Mont. 391, 372 P.3d 466 (quoting *Nordhorn v. Ladish Co.*, 9 F.3d

1402, 1405 (9th Cir. 1993)). A non-party may be bound by a prior judgment if he or she was adequately represented by someone with the same interests who as a party to the suit. *Denturist Ass'n*, ¶ 14 (citing *Taylor v. Sturgell*, 553 U.S. 880, 894, 128 S. Ct. 2161 (2008)).

Undisputedly, Shelton was a party to the Utah proceeding. The interests of Vicky and Todd Costa as grandparents stem entirely from Shelton's parental interest. Grandparents have no rights to contact if the child has been adopted by a person other than a stepparent or grandparent. Section 40-9-102, MCA. After a final decree of adoption is entered, "the kindred of the natural parents of the adopted child" have no rights over that child. Section 40-8-125, MCA; see also *Kanvick v. Reilly*, 233 Mont. 324, 326, 760 P.2d 742 (1988). The Costas' interests derive solely from Shelton's relationship to the child. Todd and Vicky Costa therefore had the same interest as Shelton in the termination proceeding. If Shelton's interest was terminated, then so was the Costas'.

Shelton and the Costas are so closely aligned in interest that not only was one the virtual representative of the other, but the Utah court received in evidence a document showing that Vicky Costa was the *actual* representative, as the appointed attorney-in-fact, of Shelton. App'x 1 at 2. Vicky Costa appeared and gave testimony in the Utah proceeding. She was also in frequent communication with Shelton's Utah attorney. App'x 8, ¶ 2. The Utah court found, based upon the

testimony presented during the termination hearing, that Christopher Shelton did not intend to exercise his parental rights, but in fact intended to relinquish those rights in favor of adoption by Vicky and Todd Costa. App'x 1 at 8. Shelton was not acting to preserve his parental rights on his own behalf, but on behalf of the Costas. There can be no closer example of privity than where one party defends their interest for the sole purpose of handing that identical interest over to another.

Plaintiffs point to a Kansas case, *In re Parentage of E.A.*, 518 P.3d 419, 427-28 (Kan. App. 2022), for the proposition that issue preclusion does not apply to grandparents who were not party to a prior adoption proceeding. In *E.A.*, the Kansas Court of Appeals held, "a collateral attack upon an adoption proceeding should not be permitted in order to avoid inconsistent judgments of parentage from two courts." 518 P.3d at 422. This holding could not be more relevant here. Further, in *E.A.*, the grandfather's interests did not derive from or align with the interests of the child's father, as they do here. The grandfather in that case was attempting to establish an independent parental interest in his own right, based on the fact that the child had lived with him for six years before being adopted by the maternal grandparents.

The Costas have no basis for their interest independent of Shelton's parental rights. They were therefore in privity with Shelton during the proceeding terminating those rights. The second element of issue preclusion is met.

c. Plaintiffs Were Afforded A Full And Fair Opportunity To Litigate The Issue.

Issue preclusion applies only where the party against whom preclusion is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *McDaniel*, ¶ 28 (citing *Baltrusch*, ¶ 18). Consistent with the principle that arguments or factual assertions that could have been raised are precluded in addition to those that actually were raised, "the fact that a party did not raise certain defenses in the prior adjudication does not necessarily mean that the party has been denied a full and fair 'opportunity' to litigate the issue to be barred." *McDaniel*, ¶ 45 (citing *Baltrusch*, ¶ 18). If an issue was litigated, but the party failed or strategically elected not to raise certain arguments regarding that issue, that "does not mean it did not have the *opportunity*" to fully and fairly litigate the issue. *Id*. (emphasis in original).

Plaintiffs claim they were not given a full and fair opportunity to litigate the narrowly-drawn issue of whether DPHHS violated the ICPC under Montana law. This is a red herring. That issue, as stated by Plaintiffs on appeal, does not exist. The ICPC is an interstate compact, and its provisions are not different "under Montana law" than under Utah law. The issue in both cases is whether the ICPC was complied with. It either was or it was not – it was not complied with in one state but not in another.

To the extent that the Utah court did not specifically address whether DPHHS complied with the ICPC, that is because the ICPC itself is not addressed to the sending state in the case of private adoptions. The ICPC imposes its requirements on the "receiving state," in this case Utah, and the "sending agency," which in this case was Surbrugg. *See* § 41-4-101, MCA. The Utah court did, nevertheless, address DPHHS's role, finding:

> Compliance with ICPC is evidenced in this matter by the . . . ICPC 100A Form signed by the Sending State (Montana) Compact Administrator on February 8, 2016, and by the Receiving State Compact Administrator on February 9, 2016. The Court notes that ICPC approval was granted by both states' Administrators subsequent to the delivery of the ICPC Form and cover letter identifying both alleged fathers.

App'x 2 at 2. It is clear that the Utah court considered the full ICPC process, including the role of the DPHHS Compact Administrator. Shelton, and through him the Costas, who were intimately connected with the Utah proceedings, Complaint, ¶ 38, had a full and fair opportunity to litigate this issue in the Utah courts.

Plaintiffs allege they did not have the opportunity to litigate DPHHS's compliance "because DPHHS was not a party" to the Utah proceeding. This did not prevent the Utah District Court from entering findings regarding DPHHS's role in processing the ICPC placement request. Further, the failure to join a third party does not allow a party to escape the application of preclusion in subsequent lawsuits. The Montana Supreme Court considered a similar argument in *Brishka v.*

State. In that case, the Brishkas' private pond had overflowed during a large storm event, damaging neighboring properties. *Brishka*, ¶ 3. Brishkas sued the Montana Department of Transportation ("MDT"), alleging that a nearby road construction project had increased runoff to their pond and caused it to overflow. *Id*., ¶ 4. Brishkas' neighbors, the Coveys, had also sued Brishkas for damage to their property. *Id*., ¶ 5. MDT was not a party to the action by Coveys. *Id*. In *Covey v. Brishka*, 2019 MT 164, ¶ 32, 396 Mont. 362, 445 P.3d 785, the Montana Supreme Court had held that Brishkas were "strictly liable for any damage their pond might cause." The Court later held that this finding of strict liability precluded the Brishkas' claim for damages against the State, even though MDT had not been a party to *Covey*. *Brishka*, ¶ 15. The prior holding in *Covey* directly addressed the element of causation necessary to sustain Brishkas' subsequent suit, and therefore, the subsequent suit was precluded. *Id.*at 16.

Similarly, the question of ICPC compliance raised here is the same question addressed by the Utah proceedings, despite the fact that DPHHS was not a party. The essential facts have already been determined. That determination is binding and precludes the present suit.

d. Plaintiffs' New Arguments On The Issue Of ICPC Compliance Are Also Without Merit.

Although this case can, and should, be decided on the basis of preclusion alone, it is also clear that not only are the Utah District Court's findings binding, they are correct, and Plaintiffs' challenges to those findings are without merit.

Plaintiffs allege that because DPHHS had issued a notice of removal in response to reports of Surbrugg's drug use during pregnancy, Surbrugg no longer had legal custody of L.S., and therefore did not have authority to place her for adoption. There is no statutory basis for this argument. Section 41-3-301, MCA, refers to "emergency protective services," and makes no reference to "legal custody." In order to obtain legal custody, the Department must file an abuse and neglect petition. Section 41-3-422(1)(a)(ii); 41-3-422, MCA. Emergency protective services may be contested by a person having legal custody of the child – a provision which would be senseless if a notice of removal placing the child in emergency protective services had the effect of automatically vesting legal custody in the Department. Section 41-3-427, MCA. The emergency removal statute also specifically contemplates that parents may make arrangements for the care of the child after issuance of a notice of removal, in which case the Department need not file a petition. Section 41-3-301(6), MCA. That is exactly what happened here. Surbrugg retained the authority to make alternate arrangements for her child, and she did so.

Plaintiffs argue that "the Utah Courts also didn't address that under Montana law DPHHS should never have approved the ICPC without [Shelton]'s consent or relinquishment." The ICPC does not require the consent or relinquishment of all parents prior to placement. ICPC Regulation No. 12, cited by Plaintiffs, requires the ICPC request packet to include consent or relinquishment "signed by the parents in accordance with the law of the sending state." App'x 7 at 42. In a direct parental placement adoption, Montana requires a placing parent to "execute a voluntary relinquishment and consent to adopt" and "identify and provide information on the location of any other legal parent or guardian of the child and any other person required to receive notice . . . including . . . any current spouse." Section 42-4-102, MCA. Under the law of the sending state, Surbrugg, as the placing parent, was required to execute a relinquishment and provide the identity of her current spouse. She did so. Montana law does not contemplate that relinquishment by both parents is required before a child may be directly placed for adoption. Instead, within 30 days after relinquishment by the placing parent, the prospective adoptive parent must act to resolve the other parent's legal rights. Section 42-4-110, MCA.

Consistent with this process, the ICPC requires the request packet to "contain a statement detailing how the rights of all parents shall be legally addressed." App'x 7 at 42. If the ICPC required a consent or relinquishment by all

parents prior to placement, a statement of how to address parental rights in the future would plainly not be necessary. The ICPC request packet did contain a statement of how Shelton's rights would be addressed, because Ridgeway's cover letter explained that he would be given notice of the Utah adoption proceeding and a petition to terminate his rights would be filed in that venue. App'x 3 at 2.

The ICPC allows for "legal risk placements," defined as a placement "where the prospective adoptive parents acknowledge in writing that a child can be ordered returned to the sending state . . . and a final decree of adoption shall not be entered in any jurisdiction until all required consents or termination of parental rights are obtained or are dispensed with in accordance with applicable law." App'x 7 at 40. Again, this contemplates that a child can be placed with prospective adoptive parents in another state pending consent or termination of parental rights. The ICPC did not require Shelton's consent prior to the placement.

Finally, Plaintiffs argue that "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." This is another misstatement of the requirements of the ICPC. The provision cited by Plaintiffs, ICPC Regulation 10.2, provides an exemption for non-agency guardians who do not need to go through the ICPC process prior to taking a child across state lines. App'x 7 at 35. Adoptive parents

are not considered non-agency guardians, therefore, they do have to go through the ICPC process. *Id*. The adoptive parents here did comply with the ICPC process. They never sought an exemption as non-agency guardians under Regulation 10.2. Surbrugg's identification of Henning and Davies as guardians on Form 100A is immaterial to the issue of whether they complied with the ICPC.

II. Plaintiffs Cannot State A Claim For Negligent Misrepresentation Based On A Statement Of Hypothetical Future Events.

In order for negligent misrepresentation to be actionable, all elements of the tort must be present. *WLW Realty Partners, LLC v. Cont'l Partners VIII, LLC*, 2015 MT 312, ¶ 29, 381 Mont. 333, 342, 360 P.3d 1112. Negligent misrepresentation requires the plaintiff to establish that:

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 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 a result of its reliance, must sustain damage.

Kitchen Krafters v. Eastside Bank, 242 Mont. 155, 165, 789 P.2d 567, 573 (1990) (emphasis in original). The representation must relate to a fact already in existence. *Id*. In *Kitchen Krafters*, it was alleged that Eastside Bank represented to Kitchen

Krafters that it would apply Kitchen Krafters' payments to a trust indenture held by a third party. When the payment was actually made, Eastside Bank misapplied the payment, and distributed it to the third party rather than applying it to his trust indenture. The Court held that Kitchen Krafters failed to establish the first element of negligent misrepresentation, because it could not show that the Bank had made a false representation as to a fact then in existence. The Bank's representation about what it would do with the payment "only became in possible error" after the Bank actually received and misapplied the payment. *Id*.

Similarly, in *WLW Realty Partners*, a developer represented to a buyer that the home it was constructing would have ski-out access. *WLW Realty Partners*, ¶ 23. The ski-out access was ultimately never constructed. *Id.*, ¶ 28., however, the representation was as to a future event, and "[n]ot until after the representation was made could the parties determine its accuracy." *Id*., ¶ 27.

Here, Plaintiffs allege that DPHHS attorney Frank Clinch made the representation that "he would take action to have L.S. returned to the State of Montana following confirmation of [Shelton's] paternity of L.S. through DNA testing." Complaint, ¶ 81. Even assuming that Clinch made the statement as alleged, it was an alleged representation as to a future event. As in *Kitchen Krafters* and *WLW Realty Partners*, the statement did not pertain to a fact then in existence, and therefore could become potentially in error only after Shelton's

paternity was actually confirmed. Plaintiffs failed to establish the first necessary element of their claim of negligent misrepresentation: a representation as to a *past* or *existing* material fact. Plaintiffs attempt to avoid this requirement by arguing that Clinch's representation related to "fact – not a legal opinion," and that his statement was that L.S. "would" be returned to Montana, not that she "should" be returned to Montana. The distinction made by *Kitchen Krafters* and *WLW Realty*, however, is not one between fact and opinion. The distinction is between a representation regarding a fact that exists and can be objectively demonstrated to be true or false at the time the statement is made; and a representation regarding a fact that does not yet exist and might turn out to be true or false in the future. Clinch's statement about what he would do in the future is a statement of future events, not then-existing fact.

Plaintiffs also failed to demonstrate that they relied on Clinch's alleged representation or suffered any damages as a result of the representation. Plaintiffs allege that, based on Clinch's representation, Shelton obtained DNA testing proving that he was L.S.'s biological father. Even assuming that Shelton would not otherwise have pursued a DNA test, an assumption which seems unlikely, the test results were ultimately a benefit, not a detriment, to Shelton and thereby the Costas. Rather than relying on DPHHS to return L.S. to Montana, Shelton and the Costas continued to vigorously pursue L.S.'s return in the Utah courts on their

own. There was no detrimental reliance, and there were no damages as a result. The District Court correctly held that Plaintiffs could not establish the elements of negligent misrepresentation, and DPHHS was entitled to summary judgment as a result.

CONCLUSION

Plaintiffs are precluded from relitigating the issue of compliance with the ICPC, because the identical issue was already fully and fairly litigated in the Utah courts.

Plaintiffs have failed to demonstrate the elements of negligent misrepresentation, where the representation in question pertains to future events, rather than a then-existing material fact.

The District Court did not err when it granted summary judgment in favor of Defendant DPHHS. The District Court correctly recognized that the issue of ICPC compliance was a finding necessary to the final judgment of the Utah District Court, and that any relitigation of that issue here would impermissibly call into question the finality of the final decree of adoption issued by that court. The judgment of the District Court granting summary judgment in favor of DPHHS should be affirmed.

RESPECTFULLY SUBMITTED this 7th day of October, 2024.

By: */s/ Patricia Klanke*

Patricia Klanke
Drake Law Firm
Attorney for Appellee State of Montana Department of Public Health and Human Services

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Word for Microsoft 365, is 9,274 words, excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

Dated October 7, 2024.

BY: */s/ Patricia Klanke*
Attorney for Appellee

APPENDIX

1. Memorandum Decision and Order Terminating Parental Rights, Utah Third District Court, September 15, 2017. Filed as Exhibit 1 to Defendants Henning and Davies' Motion to Dismiss and Brief in Support.

2. Findings of Fact and Conclusions of Law on Remand, Utah Third District Court, January 27, 2021. Filed as Exhibit 2 to Defendants Henning and Davies' Motion to Dismiss and Brief in Support.

3. Cover Letter and ICPC Forms 100A and 100B. Filed as part of Exhibit 1 to Plaintiffs' Response Brief to DPHHS' Motion for Summary Judgment.

4. Notice of Adoption Proceedings, Utah Third District Court, February 17, 2016. Filed as Exhibit 2 to Plaintiffs' Response Brief to DPHHS' Motion for Summary Judgment.

5. *P.H. v. C.S. (In re B.H.)*, 2019 UT App 103, 447 P.3d 110 (Utah Ct. App., June 13, 2019).

6. *P.H. v. C.S. (In re Adoption of B.H.)*, 2020 UT 64, 474 P.3d 981 (Utah Supreme Ct., September 16, 2020).

7. ICPC Regulations. Association of Administrators of the Interstate Compact on the Placement of Children. Available at aphsa.org/icpc-resources/.

8. Affidavit of Vicky Costa, June 23, 2023.

CERTIFICATE OF SERVICE

I, Patricia Hope Klanke, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-07-2024:

David C. Dalthorp (Attorney)
203 North Ewing Street
Helena MT 59601
Representing: Axilon Law Group, PLLC, Susan G. Ridgeway
Service Method: eService

Tara A. Harris (Attorney)
Harris Law Office PLLC
825 Great Northern Blvd.
Ste. 318
Helena MT 59601
Representing: Todd Costa, Vicky Costa, Christopher Shelton
Service Method: eService

Melissa Broch (Attorney)
Harris Law Office PLLC
825 Great Northern Blvd.
Ste. 318
Helena MT 59601
Representing: Todd Costa, Vicky Costa, Christopher Shelton
Service Method: eService

Logan Alan Nutzman (Attorney)
2620 Radio Way
Missoula MT 59808
Representing: Aaron J. Davies, Paul S. Henning
Service Method: eService

Donald Craig St. Peter (Attorney)
2620 Radio Way
P.O. Box 17255
Missoula MT 59808
Representing: Aaron J. Davies, Paul S. Henning
Service Method: eService

Electronically signed by Regina Reynolds on behalf of Patricia Hope Klanke
Dated: 10-07-2024