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' REPLY BRIEF

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

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INTRODUCTION

This Court should reverse the district court's grant of summary judgment on Counts I-II, and IV-VI and Rule 12(b)(6) dismissal on Counts IV-VI.[1] From the moment Christopher Shelton (Christopher) learned of L.S.'s existence, he has been fighting for his parental rights. Despite DPHHS's claims that Christopher, Vicky Costa (Vicky), and Todd Costa (Todd) are attempting to "reverse the stable placement of a now nine-year-old child" and that their claims "[threaten] the stability of this child," Christopher, Vicky, and Todd seek to hold Appellees accountable by the only means available to them. Appellee's Resp. Br. 1, 14 (Oct. 7, 2024). The reversal and finding that Appellees are liable results in a monetary judgment and setting precedent in the hope that this never happens to another family. As much as Christopher, Vicky, and Todd desperately want to have a relationship with L.S., this Court's reversal does not unwind the Utah adoption. Had DPHHS not illegally approved the ICPC and L.S. had stayed in Montana, DPHHS would have likely filed an abuse and neglect petition and Vicky and Todd would have been placement options. Mont. Code Ann. §§ 41-3-301(5)-(6) (2015).

[1] Paul and Aaron assert Christopher, Vicky, and Todd did not appeal from the district court's March 12, 2024, order dismissing the case against them. DC-Doc. 75. Examination of the district court record reveals Paul and Aaron did not file a judgment regarding the March 12, 2024 order as required by Mont. R. Civ. P. 58(a) nor does their March 29, 2024, Notice of Entry of Judgment (DC-Doc. 81) reference the March 12, 2024 order. As a result, the time for filing a notice of appeal has not started to run on the March 29, 2024 order because the district court did not issue a judgment on this order.

Had DPHHS followed through on its representation to return L.S. if Christopher's paternity results confirmed he was L.S.'s natural father, L.S. would not have been in adopted in Utah and would have been returned over seven years ago.

ARGUMENT

I. COUNTS I-II AND IV-VI ARE NOT BARRED BY COLLATERAL ESTOPPEL.

Although DPHHS asserts this isn't about Christopher's fundamental right to parent, that is exactly what this is about. DPHHS as a government agency, is supposed to protect the health and well-being of its citizens. DPHHS's Child and Family Services Division's mission is "Keeping Children Safe and Families Strong." Montana DPHHS, *Child and Family Services* <https://dphhs.mt.gov/CFSD/index> (last accessed October 30, 2024). DPHHS failed to live up to this mission by not complying with the ICPC. DPHHS interfered with Christopher's fundamental right to parent and interfered with Vicky and Todd's right to grandparent, by approving the illegal removal of L.S. from Montana to Utah. DPHHS illustrates this by summarizing the reasons why the Utah district court terminated Christopher's parental rights – reasons that would not have led to termination under Montana law as explained in Section III below.

A. The issues are not identical.

DPHHS, and Paul Henning (Henning) and Aaron Davies (Aaron) attempt to hide behind the Utah Court's judgment by asserting the judgment addressed more

than whether ICPC compliance or non-compliance divested the Utah Courts of jurisdiction. Contrary to their assertion, the Utah Courts made clear their analysis under the ICPC was focused on jurisdiction and not liability. Supp. Appendix I, ¶ 28; Supp. Appendix J, ¶¶ 25, 57-58. This is illustrated by the Utah Supreme Court's discussion that a violation of the ICPC may be punished or subjected to penalty in the sending state in accordance with the state's law. Supp. Appendix J, ¶¶ 25, 57-58. Here, the sending state was Montana and the violator was DPHHS. DPHHS's violations were never addressed in the Utah adoption proceedings because the Utah adoption was never about whether DPHHS violated Montana law. As a result, DPHHS's claims that Christopher, Vicky, and Todd had an opportunity to raise these issues in the Utah adoption proceedings is disingenuous at best. There were two issues in the Utah adoption proceedings: (1) whether Christopher's parental rights should be terminated; and (2) whether Paul and Aaron should be permitted to adopt L.S. Appendix 1, 17; Appendix 2, 3-5. In addressing the second issue, the Utah district court was required to make a finding that the "terms and conditions of the ICPC were complied with." Appendix 2, ¶ 24. The Utah Courts' focus was whether DPHHS approved the ICPC, not whether DPHHS should have approved the ICPC. Additionally, in analyzing whether the ICPC was deficient, the Utah Courts focused on Melissa Surbrugg's (Melissa) conduct. Thus, the issue is not identical because here the claims against DPHHS are about

DPHHS's conduct and no one else's conduct. DPHHS failed Christopher, Vicky, and Todd by legally removing L.S. from Melissa's custody and then failing to file an abuse and neglect petition after its legal removal.[2] DPHHS further failed Christopher, Vicky, and Todd by then approving an ICPC that contained numerous legal errors.

While DPHHS's explanation of *Thoring v. La Counte*, 225 Mont. 77, 733 P.2d 340 (1986) and *Fadness v. Cody*, 287 Mont. 89, 951 P.2 584 (1997) are correct, its analysis is not. In analyzing *Thoring* and *Fadness*, DPHHS clings onto the surface of the Utah district court's finding that the ICPC was complied with and wants this Court to ignore the Utah Appeal Courts' own analysis of the ICPC issue. However, when this Court dives into the Utah Appeal Courts' analysis, it will discover similar to the North Dakota court in *Thoring*, here the Utah Courts did not address liability under Montana law by a Montana actor. This Court will also discover that similar to the claims in *Fadness*, here, whether the ICPC was complied with for purposes of the Utah adoption is not identical to the issue of whether DPHHS violated the ICPC and is therefore, liable. As a result, *Thoring* and *Fadness* support reversal of the district court's grant of summary judgment.

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[2] DPHHS appears to argue that although it issued a Notification to Parent of Removal of L.S. to Melissa on February 3, 2016, because it didn't file a petition for legal custody or take L.S. into its physical custody, that somehow negates the fact DPHHS had emergency custody of L.S. from February 3, 2016 through February 10, 2016. However, DPHHS did not need to take physical custody of L.S. as she was in a safe placement at the hospital being treated for testing positive for drugs at birth.

Because the issues are not identical, the Court should reverse and need go no further.

B. Vicky and Todd were not parties in the Utah adoption proceedings nor in privity with Christopher.

Although DPHHS, and Paul and Aaron cite to *Denturist Assn. of Mont. v. State,* 2016 MT 119, 383 Mont. 391, 372 P.3d 466 as authority establishing when privity exists, there is no analysis of the facts of the case which are distinguishable. The Denturist Association of Montana (Association) sued the Board of Dentistry (Board) on behalf of Carl Brisendine (Brisendine) claiming a rule the Board promulgated was invalid. *Id.*, ¶ 3. There was a lengthy history of litigation between the Association and the Board over the same rule. *Id*. Prior to *Denturist*, in *Wiser I* the Association made a similar challenge to the rule on behalf of every denturist in the state and in *Wiser II* made the same challenge on behalf of a smaller group of denturists. *Id.*, ¶ 4. The lower court determined *res judicata* barred Brisendine's claims finding "privity exist[ed] between the litigants in *Wiser I* and *Wiser II* and Brisendine." *Id.*, ¶ 15.

Vicky and Todd's position had DPHHS not wrongfully permitted Paul and Aaron to remove L.S. from Montana would have been different from Christopher's in important respects. The record reflects Christopher was in jail when L.S. was born and would not have been able to immediately parent her. Similar to Melissa, Christopher had serious chemical dependency issues. By contrast, Vicky and Todd

would have been a preferred placement for L.S. once DPHHS removed L.S. from Melissa, and Christopher was unavailable to parent. Mont. Code Ann. § 41-3-301(5) (2015).

DPHHS claims Christopher only acted to preserve his parental rights so Vicky and Todd could adopt L.S. citing to two scant findings from the Utah district court. Appellee's Resp. Br., 26-27. The facts do not support DPHHS's theory. "Ex. 7 is an agreement appointing Vicky Costa, the mother of Christopher Shelton as his attorney-in-fact." Appendix 1, ¶ 12. Appendix 1, ¶¶ 5-9 detail Christopher's criminal history including that he was incarcerated at times. No power of attorney executed by Christopher is in evidence so the date or any limitations on the agreement referred to above are unknown. Nor is there any evidence to support Todd was named in the power of attorney. As a result, this Court doesn't have a basis to conclude whether the power of attorney creates privity between Vicky and/or Todd and Christopher for purposes of this case.

DPHHS similarly mischaracterizes Christopher's desire to have Vicky and Todd adopt L.S. "[Vicky and Todd] have also filed a petition to adopt [L.S.] and [Christopher] is alleged to be willing to consent to the adoption of his child." Appendix 1, ¶ 60. For Vicky and Todd to adopt L.S., Christopher's parental rights would have to be terminated. As a parent with full parental rights, Christopher has the right to choose who should parent his children. Christopher refused to

relinquish his parental rights to Paul and Aaron, but if a court was going to terminate his rights regardless, his desire to have his child adopted by his parents rather than strangers does not mean his sole interest in fighting the termination was to allow his parents to adopt L.S.

DPHHS's reliance on *In re Parentage of E.A.*, 518 P.3d 419, 427-28 (Kan. App. 2022) is misplaced. DPHHS claims "the grandfather's interests did not derive from or align with the interests of the child's father, as they do here." Appellee's Resp. Br., 27. When E.A. was seven months old, paternal grandfather took custody of E.A. with the consent of the biological parents. *In re Parentage of E.A.*, 518 P.3d at 423. E.A.'s father later executed a "Consent to Adoption of Minor Child" giving paternal rights to grandfather and agreeing to grandfather's adoption of E.A., although grandfather took no steps at that time to adopt E.A. *Id*.

Maternal grandmother, S.P., and her husband, D.P., petitioned to adopt E.A. Grandfather tried unsuccessfully to intervene and filed a separate parentage case. *Id*. The lower court granted summary judgment in favor of S.P. and D.P. on theories of collateral estoppel and *res judicata*. *Id*., 518 P.3d at 424. The Kansas Court of Appeals determined collateral estoppel probably did not apply because grandfather was not a party to the adoption case. *Id*., 518 P.3d at 431-432.

Grandfather's interests did align with C.A.'s interests as both individuals sought the same goal: for grandfather to raise E.A. as his own child. Grandfather in

In re E.A. collaterally attacked E.A.'s adoption seeking to have himself declared E.A.'s father in the parentage proceeding. In contrast, Christopher, Vicky, and Todd are not seeking to set aside L.S.'s adoption. They are seeking to hold DPHHS, Paul and Aaron, and Susan and Axilon accountable in the only way possible to them – monetary damages.

C. Christopher, Vicky, and Todd were not given a full and fair opportunity to litigate DPHHS's liability.

DPHHS incorrectly asserts the issue on appeal does not exist and is a "red herring." In doing so, DPHHS ignores the Utah adoption proceedings regarding the ICPC focused on jurisdiction, not liability. It also ignores the Utah Supreme Court's failure to adopt Montana's interpretation of the ICPC regarding jurisdiction in *In re Adoption of T.M.M.*, 186 Mont. 460, 608 P.2 130 (1980).

DPHHS also improperly relies on *Brishka v. State*, 2021 MT 129, 404 Mont. 228, 487 P.3d 771. First, in *Brishka*, this Court's holding only addressed the first element of collateral estoppel, it did not address the fourth element. *Brishka*, ¶ 12. "Brishkas' appeal is self-limited to a challenge only of the first element, issue identity, contending it has not been satisfied. Accordingly, we need only address whether Brishkas raise an identical issue in this matter that was previously raised and decided." *Id.* Contrary to DPHHS's assertion, the issue raised by Christopher, Vicky, and Todd that DPHHS was not a party in the Utah proceedings is not similar to an argument considered by this Court in *Brishka*. Brishkas did not assert

collateral estoppel should not apply because MDT was not a party in the first lawsuit. MDT not being a party in the first lawsuit is only discussed in dicta of the opinion.

Second, if this Court agrees with DPHHS's reliance on *Brishka*, it is factually distinguishable. In *Brishka*, allegations regarding the impact of MDT's actions were central to Brishkas' defense in the first lawsuit, even though neither party sought to join MDT in the first lawsuit. *Id.*, ¶ 5. The district court in the first lawsuit ruled Brishkas were "strictly liable" for maintaining their pond. *Id.*, ¶ 15. As a result, Brishkas were collaterally estopped from bringing claims in a second lawsuit against MDT for their pond. *Brishka*, ¶¶ 16-17. Here, as discussed in Section I. A. above, the Utah Courts' did not address liability of DPHHS, but did explain that a sending state could be criminally and civilly liable for violating the ICPC. Supp. Appendix J, ¶¶ 25, 57-58. This is a far cry from the district court's finding in *Brishka*, that Brishkas were strictly liable.

II. DPHHS'S ARGUMENTS REGARDING THE MERITS OF THE ICPC CLAIMS ARE IMPROPER AND SHOULD NOT BE CONSIDERED BY THIS COURT.

DPHHS raises new arguments in its response brief which should not be considered by this Court. This Court will customarily not accept a change in legal theory on appeal upon which the district court did not rule because it is "fundamentally unfair to fault the trial court for failing to rule correctly on an issue

it was never give the opportunity to consider." *Watson v. Mont. Dept. of Fish, Wildlife and Parks*, 2023 MT 239, ¶ 17, 414 Mont. 217, 539 P.3d 1126 (internal citations omitted). Parties may only "bolster their preserved issues with additional legal authority or . . . make further arguments within the scope of the legal theory articulated to the trial court." *Hubbell v. Gull SCUBA Ctr., LLC*, 2024 MT 247, ¶ 13, 2024 Mont. LEXIS 1183 (internal citations omitted). Otherwise, the Court "accepts plain error review." *Id*. DPHHS did not file a cross appeal nor request this Court to conduct plain error. Grounds do not exist for plain error review. *Paulson v. Flathead Conservation Dist.*, 2004 MT 136, ¶ 40, 321 Mont. 364, 91 P.3d 569.

Regarding the ICPC, DPHHS only moved for summary judgment on Counts I-II, and IV-VI based upon the argument those Counts were barred by collateral estoppel. DC-Doc. 57 at 1-2, 6-11, 16. DPHHS did not move for summary judgment based upon the merits of Counts I-II, and IV-VI. *Id.* Despite this, DPHHS now improperly raises arguments in its response brief that it only briefly raised below in its Reply Brief in Support of Summary Judgment and were never considered by the district court in its ruling. DC-Doc. 66 at 7-9; Appendix B. A review of the District Court Case Register establishes that discovery has not been completed and no depositions have occurred.

DPHHS's arguments highlight exactly why this Court should not consider arguments the district court did not address. For example, in alleging that Melissa

"retained the authority to make alternate arrangements for her child", DPHHS inserts facts that are nowhere in the record. Specifically, DPHHS asserts since Montana Code Annotated § 41-3-301(6) (2015) allows **parents** to make arrangements for the child **that are acceptable to DPHHS** after the Notification of Removal is given and before an abuse and neglect petition is filed, Melissa somehow retained authority to make alternative arrangements for L.S. (i.e. an out-of-state option with Paul and Aaron). First, the only evidence in the record is that: (1) on February 3, 2016 DPHHS issued a Notification to Parent of Removal to Melissa for L.S. and her sibling, G.S., by attaching it to Melissa's residence; and (2) 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. There is no evidence in the record that DPHHS prior to February 4, 2016, the day Melissa signed Form ICPC 100A, approved Melissa's arrangements for L.S. to be adopted by Paul and Aaron. Second, the statute states parents, plural, not parent, singular. Here, L.S. had two living parents – Melissa and Christopher. It is undisputed that Christopher never consented to L.S. being placed with Paul and Aaron.

Procedurally, the proper result is for the Court to remand Count I-II, and IV-VI to the district court to allow for discovery to be completed and the merits of the

claims addressed. Since this Court should not consider the merits, the remaining arguments will not be addressed. However, in no way should this be taken as Christopher, Vicky, and Todd conceding their claims are meritless.

III. SUSAN AND AXILON MISAPPREHEND THE ISSUE BEFORE THIS COURT REGARDING DUTY.

Susan and Axilon maintain the issue of whether the attorney for one biological parent owes a duty of care to the other biological parent in an uncontested direct parental placement adoption (DPPA) is not before this Court. Appellees Susan and Axilon's Resp. Br. 6 (Oct. 7, 2024). That is precisely the issue before the Court because Montana law does not contemplate a **contested** DPPA **between parents**. Written consent of both parents is required for a child to be adopted, unless parental rights have been terminated. Mont. Code Ann. § 42-2-301(1)-(2) (2015). Although in a DPPA one parent may place a child with a prospective adoptive parent, the prospective adoptive parents **not** the placing parent must petition a district court to terminate the other parent's rights. Mont. Code Ann. §§ 42-4-101, 42-4-110(1)(a) (2015).

This Court's precedent recognizing a duty of care should be extended to non-clients supports extending a duty of care here. Contrary to Susan and Axilon's assertion, the facts here are analogous to a trust situation where the attorney establishes the trust to benefit a third party (*Watkins Trust v. Lacosta*, 2004 MT 144, ¶¶ 21-23, 321 Mont. 432, 92 P.3d 620) or a guardianship where the

guardianship benefits a third party (*Redies v. ALPS*, 2007 MT 9, ¶¶ 42, 52, 335 Mont. 223, 150 P.3d 930).

In response, Susan and Axilon also assert that imposing a duty of care on an attorney for one parent in a DPPA would result in a conflict of interest in violation of Montana Rule of Professional Conduct 1.7. Appellees Susan and Axilon Resp. Br. 5, 8. As previously noted, either the biological parents are aligned in their goal of having their child adopted or the adoptive parents initiate termination proceedings to which the placing parent is not a party. Imposing a duty of care upon an attorney representing one biological parent towards the other biological parent would not create a conflict of interest as the parties' goals are the same.

Despite Susan and Axilon's argument that public policy weighs heavily against recognition of a duty here, even the Montana Rules of Professional Conduct support recognition of a duty. As set forth in the Preamble, "A lawyer shall always pursue the truth." Mont. R. Prof. Conduct 1.7, Preamble (1). Once Christopher, L.S.'s presumptive father, refused to relinquish his parental rights, Susan and Axilon forged ahead, playing fast and loose with the truth and the law. In a cover letter dated February 6, 2016, submitted with the ICPC Susan states repeatedly Christopher is not the biological father of L.S. implying there was supporting evidence to that effect. Appendix 3, 2. Subsequent DNA testing proved this claim was untrue. Susan misstates the law by claiming that as Melissa's

husband, Christopher, was entitled to notice of the adoption proceedings in Utah when in fact under Montana law - where the child was located when the letter was written - Christopher was the presumed father of the child who could only be adopted upon either the relinquishment or termination of Christopher's parental rights. *Id.* Susan maintains "we" plan to serve Christopher after the Utah proceedings are commenced. *Id.* Susan has asserted throughout this litigation she only represented Melissa, not the adoptive parents. As a result, once Melissa relinquished her rights to L.S., there would be no reason for Susan to be involved in the matter. Finally, Susan notes the adoptive parents "under[stood] the risks involved." *Id.*

Susan and Axilon's inclusion in their brief of the grounds for the Utah district court's termination of Christopher's parental rights sets forth the ways in which Utah's laws regarding termination of parental rights differ from those in Montana. In terminating Christopher's parental rights, the Utah district court somehow found that Christopher had abandoned L.S. and was unfit to parent L.S. Appendix 1, 17. This finding seems contrary to what Montana law requires to be shown before terminating a parent's fundamental right to parent under abandonment and unfitness. Under Montana law, in a DPPA, the Court may terminate a parent's rights if the Court determines the parent is unfit. Mont. Code Ann. § 42-2-608(1) (2015). There are a variety of ways to determine unfitness -

one of those is abandonment. The other way relevant to the Utah district court's decision is failure to contribute to the support of the child. To terminate under abandonment, the Court has to find "the parent has **willfully** abandoned the child, as defined in 41-3-102 . . ." Mont. Code Ann. § 42-2-608(1)(b) (2015) (emphasis added). There are four ways in which the Court can determine a parent has abandoned his child, only one of which could apply here: "(1)(a) "Abandon", "abandoned", and "abandonment" mean: (i) leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future; . . ." Mont. Code Ann. § 42-3-102(1)(a)(i) (2015). If Montana law had been applied, the facts, as alleged in the Complaint, do not support that Christopher abandoned L.S. Christopher took steps to assert his legal rights to contest the adoption shortly after he learned of L.S.'s existence. He did not leave L.S. under circumstances that make reasonable the belief that he did not intend to resume care of L.S.

Additionally, the Utah district court states under abandonment that Christopher has "never paid child support nor made any financial efforts to maintain his child nor has he had anyone on his behalf attempt to do so." Appendix 1, 15. A Montana court could not have terminated Christopher's parental rights based on these facts. Under Montana law, the Court may find a parent is unfit for not contributing financially to the child if:

> (c) it is proven to the satisfaction of the court that the parent, if able, has not contributed to the support of the child **for an aggregate period of 1 year before the filing of a petition for adoption**;
>
> (d) it is proven to the satisfaction of the court that **the parent is in violation of a court order to support** either the child that is the subject of the adoption proceedings or other children with the same birth mother;

Mont. Code Ann. § 42-2-608(1)(c)-(d) (2015) (emphasis added). Here, Christopher received notice of the adoption proceeding in Utah on February 17, 2016, less than 3 weeks after L.S. was born. Cmplt., ¶¶ 13, 31. Therefore, it isn't possible Christopher didn't contribute support to L.S. for an "aggregate period of 1 year before the filing of a petition for adoption." Additionally, there is no evidence to support Christopher was in violation of a court order to support L.S. or G.S., the other child Christopher shared with Melissa.

Similarly, the facts the Utah district court used to determine Christopher was unfit under Utah law would not have satisfied unfitness under Montana law. The Utah district court relied on Christopher's criminal history, none of which are crimes listed under Montana law that deem a parent unfit. Mont. Code Ann. § 42-2-608(1)(e) (2015). Montana law also deems a parent unfit if a crime of violence is involved and certain factors are satisfied. Mont. Code Ann. § 42-2-608(1)(g) (2015). Here, the Utah district court did not cite to any crimes listed above under subsection (e) nor did it cite to any crimes of violence. The crimes listed by the Utah district court include felony DUI, various drug charges, endangering the

welfare of children, theft, obstruction of police, and resisting arrest. Appendix 1, 16.

The public policy issue is whether Susan and Axilon should be held accountable for their conduct in riding roughshod over Christopher's rights by misrepresenting to DPHHS during the ICPC approval process that he was not the biological father, contributing to L.S. being removed from Montana to Utah where Christopher faced a foreign jurisdiction with less protection of his parental rights.

IV. THE FIRST ELEMENT OF THE NEGLIGENT MISREPRESENTATION CLAIM SURVIVES SUMMARY JUDGMENT.

DPHHS incorrectly relies on *Kitchen Krafters v. Eastside Bank*, 242 Mont. 155, 789 P.2d 567 (1990) and *WLW Realty Partners, LLC v. Cont'l. Partners VIII, LLC,* 2015 MT 312, 381 Mont. 333, 360 P.3d 1112. Both are distinguishable. First, in *Kitchen Krafters*, the Court held a mistake rather than a misstatement was made. The principals of Kitchen Krafters contracted with Robert Schell (Schell) to purchase a piece of commercial property in Great Falls for $40,000. *Kitchen Krafters*, 242 Mont. at 158, 789 P.2d at 569. Separately and unbeknownst to Kitchen Krafters, Schell and Eastside Bank (Eastside) entered into an agreement whereby Eastside loaned Schell $30,000 secured by a trust indenture on the property. *Id*. The escrow agreement between Kitchen Krafters and Eastside specified that all payments, including a specially negotiated additional $5,000

payment, would be applied first to Schell's trust indenture with the balance paid to Schell. *Id*., 242 Mont. at 159, 789 P.2d at 569. When Kitchen Krafters learned several years later that Eastside erroneously paid the $5,000 directly to Schell without applying any to the trust indenture, it sued Eastside for, among other things, negligent representation of the manner in which Kitchen Krafters' payments would be made. *Id*., 242 Mont. at 165, 789 P.2d at 573. On appeal, this Court reversed the jury's finding of negligent misrepresentation noting Eastside's statement about the way the payments would be applied "only became in possible error (sic) when the Bank later allegedly failed to properly apply the $5,000 prepayment." *Id*., 242 Mont. at 165, 789 P.2d at 573. Eastside made a mistake in applying the $5,000 prepayment rather than a misstatement of fact. *Id*.

Second, in *WLW Realty Partners, LLC*, the misrepresentation was by a third party. 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*, ¶ 1. Continental constructed the homes and sold one ski home to a Weidner, 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 and the case to proceeded to a bench trial where Continental argued any misrepresentation was made by the Yellowstone Club. *Id.*, ¶ 3. The Montana Supreme Court found the trial court erroneously permitted the negligent misrepresentation claim to go to trial. *Id*., ¶ 24.

Here, Christopher was the presumed father of L.S. as he was married to Melissa when L.S. was born - a fact of which DPHHS was aware. As a result, the DNA results would only have confirmed a known fact.

CONCLUSION

This Court should reverse the district court's Orders granting summary judgment to DPHHS, and Paul and Aaron and dismissing Susan and Axilon under Rule 12(b)(6), and remand to the district court for further proceedings.

RESPECTFULLY SUBMITTED this 4th day of November, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Reply Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Mac is 4,948 words, excluding the table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 4th day of November, 2024.

/s/ Tara A. Harris
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CERTIFICATE OF SERVICE

I, Tara A. Harris, hereby certify that I have served true and accurate copies of the foregoing Brief – Appellants' Reply Brief on the following on 11-04-24 via the efiling system and due to receiving error messages from the efiling system, I served again on 11-06-24 by emailing:

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