IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 24-0717

AUSTIN ROGER CARTER;

Appellant,

v.

MAGRIS TALC USA, INC., LOUISE M. CARTER, and JULIE ANN BITTICK;

Appellees.

APPELLEES' RESPONSE BRIEF

On Appeal from the Montana Eighteenth Judicial Court, Gallatin County,
Cause No.: DV-16-2024-315-WS
Honorable Andrew Breuner

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ISSUES PRESENTED FOR REVIEW

A. Are the district court's orders dismissing Appellees/Defendants Louise M. Carter ("Louise") and Julie Ann Bittick ("Julie") pursuant to a Rule 12(b)(6) motion[1] and denying Appellant/Plaintiff's ("Mr. Carter") motions for default judgment properly before the Court where they concern interlocutory matters that have not been certified for appeal?

B. If the issue is validly before this Court on appeal, did the district court properly dismiss Julie and Louise pursuant to a Rule 12(b)(6) motion under the Wrongful Discharge from Employment Act, Section 39-2-901, MCA, *et. seq.,* where Julie and Louise are employees of Magris Talc USA, Inc. ("Magris") and not Mr. Carter's employer?

C. If the issue is validly before this Court on appeal, did the district court properly deny Mr. Carter's motions for default judgment against Defendants where Magris answered the complaint and Julie and Louise filed a joint Rule 12(b)(6) motion prior to Mr. Carter filing for default judgments?

STATEMENT OF THE CASE

Mr. Carter filed this wrongful discharge action on March 27, 2024. (Dkt. 1.) On April 8, 2024, Scott Bergen Vice President, Commercial and Corporate Affairs, of Magris learned Mr. Carter effectuated service of the complaint and summons on

[1] All references to Rule 12 motions in this brief are references to motions filed pursuant to Montana Rule of Civil Procedure 12.

CT Corporation, the registered agent for Magris. (Dkt. 10, Aff. Scott Bergen ¶ 4.) Mr. Bergen, based out of Toronto, Ontario, is responsible for coordinating legal defenses on behalf of Magris. (*Id.,* ¶ 3.)

That same day, April 8, 2024, counsel for Magris learned from Mr. Bergen that Mr. Carter served the company. (*Id.,* Aff. Mark Feddes and Emily Golz, ¶ 4.) Based upon a mistaken belief that Magris was served on April 8, 2024, counsel for Magris filed Magris's answer on April 25, 2024. (*Id.,* ¶¶ 4, 5.) Counsel for Magris believed the answer to be timely filed pursuant to Rule 12(a)(1)(A), Mont. R. Civ. P. (*Id.,* ¶ 6.) The timing of Magris' answer—27 days after Mr. Carter effectuated service of the complaint—was based on an honest, good faith misunderstanding by counsel of the timing of service on Magris. (*Id.,* Feddes and Golz Aff. ¶¶ 3–10.)

After Magris filed its answer, Mr. Carter filed a motion for default judgment against Magris on April 29, 2024. (Dkt. 9.) On April 30, 2024, Magris responded in opposition to Mr. Carter's motion on the grounds that: (1) Magris did not fail to plead or defend in response to the claims; (2) the minor delay in answering did not unfairly prejudice Mr. Carter; (3) Magris possesses good defenses to Mr. Carter's complaint; (4) Magris would suffer unjust injury if default was entered; and (5) Mr. Carter's alleged damages are not capable of being made a sum certain. (Dkt. 10.) The district court denied Mr. Carter's motion for default against Magris on November 14, 2024, finding Magris did not fail to plea or defend and Mr.

Carter's motion for default was preempted by Magris filing its answer on April 25, 2024, four days before Mr. Carter moved for default. (Dkt. 7; 9.)

On April 1, 2024, Mr. Carter served the complaint and summons on Julie, former Human Resource Director for Magris. (Dkt. 5.) On April 3, 2024, Mr. Carter served the complaint and summons on Louise, Magris's Supply Chain Director and Mr. Carter's supervisor during his employment with Magris. (*Id.*) Julie and Louise jointly filed a combined Rule 12(b)(6) motion to dismiss on April 24, 2024, for failure to state a claim upon which relief can be granted. (Dkt. 6.) Louise separately moved for dismissal pursuant Rule 12(b)(2) for lack of personal jurisdiction. (*Id.*)

Mr. Carter subsequently filed motions for default judgments against Julie and Louise on May 3, 2024. (Dkt. 12, 13.) On May 6, 2024, Julie and Louise jointly responded in opposition to Mr. Carter's motions based upon several defenses: (1) Rule 12(b) required Julie and Louise to raise Rule 12(b) defenses before filing a responsive pleading; (2) Julie and Louise properly preserved their Rule 12(b) defenses by raising them by motion prior to filing a responsive pleading; and (3) Mr. Carter's alleged damages are not capable of being made a sum certain. (Dkt. 14.) The district court denied Mr. Carter's motions for default against Julie and Louise on November 14, 2024, finding Julie and Louise did not fail to plea or defend and Mr. Carter's motion for default was preempted by the

joint motion to dismiss filed on April 24, 2024, nine days before Mr. Carter moved for default. (Dkt. 25.)

On November 19, 2024, the district court granted Julie and Louise's joint motion to dismiss finding Julie and Louise were not Mr. Carter's employer and correctly concluding, "[n]othing in the WDEA suggests that a wrongful discharge claim can be brought against a fellow employee in an individual capacity separate and apart from the actions of the employer." (Dkt. 26.) Because the district court found Julie and Louise's Rule 12(b)(6) argument dispositive, the court declined to consider Louise's separate argument under Rule 12(b)(2).

Mr. Carter now attempts to appeal interlocutory orders denying default judgment against Defendants and dismissing Julie and Louise without seeking or obtaining certification of the matter as a final judgment for purposes of appeal under Montana Rule of Appellate Procedure 6(6).

FACTUAL BACKGROUND

This wrongful discharge action arises from Magris's termination of Mr. Carter on March 27, 2023. (Dkt. 1, ¶¶ 2, 7.) During his employment, Mr. Carter failed to satisfactorily perform in his position, and Magris put Mr. Carter on a Performance Improvement Plan ("PIP") on October 26, 2022. (Dkt. 10, Ex. C.) The PIP informed Mr. Carter that failure to make progress and meet expectations "will result in further disciplinary action, up to and including termination." (*Id.*)

Magris periodically met with Mr. Carter in an effort to help him improve in the areas identified in the PIP. (*Id*.) Magris subsequently terminated Mr. Carter on March 27, 2023 for substandard performance and failing to comply with the PIP. (*Id.*) Mr. Carter alleges Magris wrongfully terminated his employment without good cause, in violation of its written policies, and in retaliation for reporting and/or refusing to engage in a violation of public policy. (Dkt. 1, ¶ 1.)

In the complaint, Mr. Carter individually named Julie and Louise as defendants, alleging the action was brought against "Louise M. Carter, and Julie Ann Bittick pursuant to Montana Code Annotated (hereafter MCA) Section 39 for Wrongful Discharge." (*Id.*) "Specifically, MCA 39-2-904 (1)(a), MCA 39-2-904 (1)(b), and MCA 39-2-904 (1)(c), MCA 39-2-905 (1), and as defined in MCA 39-2-903 (1)(2)(3)(8)." (*Id.*)

By Mr. Carter's judicial admissions, Julie and Louise were not Mr. Carter's employer. (*Id.,* ¶ 2.) During the relevant timeframe, Magris employed Julie as "H.R. Director for Magris." (*Id.*, ¶¶ 2, 3, 7.) Magris employed Louise as "Supply Chain Director" and Mr. Carter's supervisor. (*Id.*, ¶¶ 2, 3, 8.) Mr. Carter alleges his wrongful discharge action is against Julie and Louise in their "official" and "individual" capacities. (*Id.*, ¶¶ 7, 8.)

Mr. Carter claims he reported policy and public policy violations to Louise, and "was terminated as result of his advising his immediate supervisor, Louise M

Carter, Supply Chain Director for Magris, about activity that was occurring in the company as it related to an explosives purchases for the mine and how this was in violation of State and Federal laws, and for his refusing to participate in that fraudulent activity." (*Id*. ¶¶ 2, 3.) "These actions were carried out throughout the Magris Talc USA, Inc. Leadership and is apparently their business practice." (*Id*., ¶ 7.)

Contrary to the assertion in his opening brief, Mr. Carter's complaint fails to state a blacklisting claim. Each statutory provision Mr. Carter relies upon in the complaint falls within the WDEA. While Mr. Carter purports to allege that his complaint sounds in "all the provisions of Title 39 supporting his claim," (Dkt.1, ¶ 1.) Mr. Carter's general reference to the entire labor code does not convert his wrongful discharge claim into unspecified causes of action without limitation, including blacklisting. Mr. Carter failed to allege a single element of blacklisting. (*See generally* Dkt. 1.) The complaint expressly states a wrongful discharge claim against Julie and Louise, not claims for blacklisting, libel, slander, or any other claim. (*Id.*)

STANDARD OF REVIEW

Because there has been no appealable order issued by the district court, Mr. Carter's appeal should be dismissed without substantive review. Should this Court consider the appeal, dismissal of Julie and Louise pursuant to the Rule 12(b)(6)

motion is a question of law and subject to de novo review. *Matter of the Est. of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 465 P.3d 1165. Denial of Mr. Carter's motions for default judgment is reviewed for a manifest abuse of discretion, meaning an abuse of discretion that is obvious, evident, or unmistakable. *Carter v. Badrock Rural Fire Dist.*, 2021 MT 280, ¶ 11, 406 Mont. 174, 512 P.3d 241.

SUMMARY OF THE ARGUMENT

There are several reasons why Mr. Carter's appeal fails as a matter of law. As a threshold issue, Mr. Carter's appeal should be dismissed because the orders Mr. Carter seeks to appeal are interlocutory orders not subject to substantive review, and Mr. Carter has not sought or obtained certification under Montana Rule of Appellate Procedure Rule 6(6). This issue presents an absolute bar to Mr. Carter's appeal.

Second, the district court correctly dismissed Julie and Louise from the action because it is undisputed Julie and Louise were not Mr. Carter's employer. Agents or employees of an employer cannot be held individually liable for wrongful discharge. The WDEA provides an exclusive remedy against the employer.

Finally, the district court correctly denied Mr. Carter's motions for default against Defendants because Defendants did not fail to plead or defend against Mr.

Carter's claims. Magris answered the complaint four days before Mr. Carter moved for default against Magris. Julie and Louise filed a joint motion to dismiss nine days before Mr. Carter moved for default against them.

ARGUMENT

A. THE ORDERS FROM WHICH MR. CARTER SEEKS APPEAL ARE INTERLOCUTORY ORDERS NOT PROPERLY BEFORE THE COURT.

The district court has not issued a final judgment in this matter, and the orders from which Mr. Carter seeks appeal do not fall within any appealable order identified under Rule 6. Cases "involving multiple parties or multiple claims for relief, an order or judgment which adjudicates fewer than all claims as to all parties, and which leaves matters in the litigation undetermined," are not appealable. Mont. R. App. P. 6(5)(a). Unless final judgment is entered as to one or more claims or parties, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action. Mont. R. Civ. P. 54(b)(1). Interlocutory orders, such as those at issue, are not appealable absent special circumstances, none of which exist. Mont. R. App. P. 6(6); Mont. R. Civ. P. 54(b).

Generally, a district court's ruling on a Rule 12(b)(6) motion to dismiss is appealable only after entry of a final judgment upon adjudication of all matters in the litigation. *Vulles v. Thies & Talle Mgmt., Inc.*, 2021 MT 279, ¶ 7, 406 Mont.

169, 172, 512 P.3d 248. Here, Mr. Carter improperly attempts to appeal such an order. Although Julie and Louise were dismissed from the action, Mr. Carter's claims against Magris remain undetermined in the pending litigation, and a final judgment has not yet been entered. Mont. R. App. P. 6(5)(a). Certification of the matter as a final judgment for purposes of appeal has not been sought or obtained under Rule 6(6), Mont. R. App. P., and Rule 54(b)(1), Mont. R. Civ. P.

Similarly, "entry of default is merely an interlocutory order that in itself determines no rights or remedies, whereas a default judgment is a final judgment that terminates the litigation and decides the dispute." *Essex Ins. v. Jaycie, Inc.,* 2004 MT 278, ¶ 10, 323 Mont. 231, 99 P.3d 651. Entry of default is an interlocutory order that does not determine rights or remedies. *Hoff v. Lake Cnty. Abstract & Title Co.*, 2011 MT 118, ¶ 20, 360 Mont. 461, 255 P.3d 137 (citing *Essex,* ¶ 10). The district court correctly denied Mr. Carter's motions for default because Defendants did not fail to plead or defend. Irrespective of the correctness of the district court's orders denying default, such orders are interlocutory because they do not determine the parties' ultimate rights and remedies, and certification of the matter as a final judgment for purposes of appeal has not been sought or obtained under Rule 6(6), Mont. R. App. P., and Rule 54(b)(2), Mont. R. Civ. P.

Because the orders from which Mr. Carter seeks appeal are interlocutory in nature, they are not subject to substantive review on appeal. Consequently, this Court should dismiss Mr. Carter's appeal without further analysis.

B. THE DISTRICT COURT CORRECTLY DISMISSED JULIE AND LOUISE PURSUANT TO THEIR RULE 12(B)(6) MOTION BECAUSE THE WDEA PROVIDES THE EXCLUSIVE REMEDY FOR ALLEGED WRONGFUL DISCHARGE AGAINST AN EMPLOYER, NOT INDIVIDUAL EMPLOYEES.

The district court correctly applied the WDEA to find the WDEA precludes individual liability against Julie and Louise as employees of Magris. The WDEA's statutory framework provides an exclusive remedy against the employer. The district court correctly interpreted and applied the plain text of the WDEA to conclude the WDEA precludes recovery against Julie and Louise for alleged wrongful discharge.

Mr. Carter attempts to frame the issue as a constitutional question. (Notice of Constitutional Challenges, p. 1-3) The facts and law present no cognizable constitutional question. The issue is a straightforward question of statutory interpretation and application to the facts as plead.

The Montana Legislature enacted the WDEA to provide the exclusive remedy for a wrongful discharge from employment. *Buckley v. W. Montana Cmty. Mental Health Ctr.*, 2021 MT 82, ¶ 14, 403 Mont. 524, 485 P.3d 1211. "If an *employer* has committed a wrongful discharge, the employee may be awarded lost

wages and benefits . . . ." Mont. Code Ann. 39-2-905(1) (emphasis added); *Blehm v. St. John's Lutheran Hosp.*, 2010 MT 258, ¶ 18, 358 Mont. 300, 246 P.3d 1024 ("The Wrongful Discharge from Employment Act provides a cause of action against an employer in favor of an employee who has been wrongfully discharged.") The WDEA "provides the exclusive remedy for wrongful discharge from employment . . . and preempts common-law remedies." *Blehm*, ¶ 19; Mont. Code Ann. § 39-2-913 (expressly preempting all common law remedies and providing that no claim for discharge may arise from tort or express or implied contract). "There is no right under any legal theory to damages for wrongful discharge under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages . . . ." Mont. Code Ann. § 39-2-905.

Mr. Carter concedes Julie and Louise were, respectively, the Human Resource Director and Director of Supply Chain for Magris. (Dkt. 1, ¶¶ 2, 3, 7.) Mr. Carter specifically alleges his claim was brought against "Louise M. Carter, and Julie Ann Bittick pursuant to Montana Code Annotated (hereafter MCA) Section 39 for Wrongful Discharge." (*Id.*, ¶ 1). The complaint further alleges that Julie and Louise violated "Section 39 for Wrongful Discharge" and specifies that those violations are pursuant to "MCA 39-2-905 (1)(a), MCA 39-2-904 (1)(b), and MCA 39-2-904 (1)(c), MCA 39-2-905 (1), and as defined in MCA 39-2-903

(1)(2)(3)(8)." (*Id.*) The plain language of the complaint makes clear that Mr. Carter alleged wrongful discharge claims against fellow employees of Magris.

The district court correctly read the express allegations and gravamen of the complaint to find, "[a]s plead by Carter, Louise and Julie were acting within the scope of their employment with Magris so that their conduct could be attributed to Magris . . . ." (Dkt. 26, p. 3.) "Agents are not liable to others for acts performed within the scope of their agency unless the agent, with the consent of the principal, receives credit for a transaction; enters into a contract in the name of the principal without a good faith believe that he has the authority to do so; or the agent's acts are wrongful in nature." (*Id.* (citing *Crane Creek Ranch v. Cresap*, 2004 MT 351, ¶ 12.))

The district court correctly found nothing in the WDEA suggests that a wrongful discharge claim can be brought against a fellow employee in an individual capacity separate and apart from the actions of the employer. (*Id.*) "The Court finds that the WDEA is addressed to the wrongful actions of 'employers' as manifested by the actions of their employees within the scope of their employment." (*Id.*) Because Mr. Carter alleged the wrongful discharge by Magris was consummated through Julie and Louise in their capacity as employees of the company, the district court correctly determined the complaint failed to state a viable claim against Julie and Louise. (*Id.*, p. 3-4.)

Harrell v. *Farmers Educational Coop. Union of Am., Mont. Div.,* 2013 MT 367, 373 Mont. 92, 314 P.3d 920, provides an analogous case. There, the plaintiff filed suit against both his employer, the Montana Farmers Union ("MFU"), and Alan Merrill, MFU's president, alleging wrongful discharge. *Harrell,* ¶¶ 1, 15. "Prior to and during trial, Merrill moved to dismiss the claims against him, arguing that as an employee and officer of MFU he could not be held individually liable for his actions under the facts of th[e] case." *Id.,* ¶ 45. In finding the claims against Merrill should have been dismissed as a matter of law, the *Harrell* Court observed, "the WDEA provides an exclusive remedy" against MFU. *Id.,* ¶ 49. The Court concluded that "Merrill is not personally liable under the legal standards that govern this case" and accordingly "is shielded from personal liability." *Id.* at 50-51. (*See also* Dkt. 6, Ex. A, *Krasowski* v. *Billings District Council of the Society of St. Vincent de Paul,* DV 21-0007 (Mont. 13th Jud. Dist. Ct.) (May 5, 2021) ("The WDEA does not allow for relief brought against the corporate agents of the employer – the express language of the statute only contemplates the actions of the employer . . . ."); (*Id.,* Ex. B, *Yelenich v. Mission Senior Living, et. al.* DV 23-161 (Mont. 2nd Jud. Dist. Ct.) (December 28, 2023) (The WDEA does not allow for relief brought against the corporate agents of the employer . . . .").)

Accordingly, the district court's order should be affirmed because Mr. Carter has not identified any material errors, irregularities, or omissions in the

Court's findings or conclusions to warrant reversal. Instead, Mr. Carter advances two unsupported arguments.

First, Mr. Carter argues the complaint states blacklisting claims and the district court ignored Mr. Carter's blacklisting claims when dismissing Julie and Louise. (App. Br., p. 5-8.) The district court allowed that the WDEA's exclusive remedy for wrongful discharge would not necessarily bar actions against individuals for other wrongful conduct or intentional torts. (Dkt. 26, p. 3.) The Court correctly recognized, however, "Carter does not plead that Louise and Julie committed intentional torts or other wrongful conduct in their individual capacity . . . ." (*Id.*, 4.) Each statutory provision Mr. Carter relies upon in the complaint falls within the WDEA. Mr. Carter specifically alleges Julie and Louise were conducting "constructive discharge" of Mr. Carter. (Dkt. 1, ¶ 1.) Mr. Carter does not cite any particular provision of the backlisting statute and failed to allege blacklisting elements. (*See generally* Dkt. 1.) Accordingly, the Court correctly dismissed Julie and Louise based on the exclusivity of the WDEA's remedy in wrongful discharge actions and their actions taken within the scope of their employment.

Second, Mr. Carter asserts the district court erroneously "converted" and applied the Workers Compensation Act ("WCA"). (App. Br., p. 7-8, 25.) A plain reading of the district court's order vitiates the argument. The district court

analogized the exclusivity of the WDEA to the exclusive remedy provided under the WCA for workplace injuries, while allowing for potential claims based on independent wrongful conduct: "Just as Montana's Worker's Compensation Act provides an exclusive remedy for employees of covered employers for on-the-job injury but does not bar actions against fellow employees for intentional injury (see MCA §§ 39-71-411; and 39-71-413), the WDEA provides an exclusive remedy for 'wrongful discharge' but would not necessarily bar actions against fellow employees for other kinds of wrongful conduct or intentional torts (e.g., battery)." (Dkt. 26, p. 3.) The district court made no further reference to the WCA.

Accordingly, the district court correctly dismissed Julie and Louise under Rule 12(b)(6).

C. THE DISTRICT COURT CORRECTLY DENIED MR. CARTER'S MOTIONS FOR DEFAULT AGAINST DEFENDANTS BECAUSE DEFENDANTS ANSWERED OR DEFENDED, AND MR. CARTER'S MOTIONS WERE PREEMPTED BY MAGRIS'S ANSWER AND JULIE AND LOUISE'S JOINT MOTION TO DISMISS.

The district court correctly denied Mr. Carter's motions for default against Defendants because Magris answered the complaint on April 25, 2024, four days before Mr. Carter moved for default against Magris. (Dkt. 7; 9.) Julie and Louise jointly moved to dismiss on April 24, 2024, nine days before Mr. Carter moved for default against Julie and Louise. (Dkt. 6; 12; 13.) The district court subsequently

granted Julie's and Louie's motion. (Dkt. 26.) Defendants did not fail to plea or defend. Accordingly, the district court correctly denied Mr. Carter's motions.

Mr. Carter again attempts to frame the issue as a constitutional question. (Notice of Constitutional Challenges, p. 4-7.) The facts and law present no cognizable constitutional question. The district court correctly denied Mr. Carter's motions for default based on Magris's answer and Julie and Louise's joint motion to dismiss predating Mr. Carter's motions.

CONCLUSION

Based on the foregoing, Mr. Carter's appeal should be dismissed because the orders from which Mr. Carter seeks appeal are interlocutory orders and Mr. Carter has not sought or obtained certification under Montana Rule of Appellate Procedure Rule 6(6). Alternatively, Court should affirm the district court's orders because the district court correctly dismissed Julie and Louise as employees of Magris and Defendants did not fail to plead or defend against Mr. Carter's claims.

DATED this 17th day of March, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) 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 Microsoft Word is not more than 3685 words, excluding certificate of service and certificate of compliance.

CROWLEY FLECK, PLLP

By: /s/ Mark R. Feddes

CERTIFICATE OF SERVICE

I, Mark Feddes one of the attorneys for the law firm of Crowley Fleck PLLP, hereby certify that on the 17th day of March, 2025, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

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/s/ Mark R. Feddes

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I, Mark Feddes, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-17-2025:

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