IN THE SUPREME COURT OF THE STATE OF MONTANA

CAUSE No. DA 24-0619

JAMES MARION DEL DUCA

Appellant,

V.

ARIA SKYDANCER (F/K/A Kristin Marie Del Duca),

Defendant and Appellee.

APPELLANT'S REPLY TO APPELLEE'S OPENING BRIEF

APPEARANCES:

James Marion Del Duca
2282 Gallatin Green Blvd. Unit D
Bozeman, MT 59718
Email: delducja@gmail.com
Tel. (406) 599-2463
Pro se

Andrea J. Utick Fox
P.O. Box 9621
Kalispell, MT 59904
Email: afox@mtfoxlaw.com
Tel. (406) 204-0757
Attorney for Appellee

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Rules

III. STATEMENT OF THE ISSUES FOR REVIEW

1. Did the District Court err in concluding that appellant failed to state a claim for which relief can be granted?
2. Did the District Court err in dismissing appellant's case with prejudice?
3. Did the District Court abuse its discretion by denying appellant's request to amend his complaint?
4. Did the District Court err in failing to explain its ruling?

IV. STATEMENT OF THE CASE

Appellee misstates that the case stems from an IIED action based upon a parenting plan conflict. The case stems from deliberate violations of Montana law by Appellee in her actions to intentionally inflict emotional harm and psychological damage upon Appellant (James). Criminal conduct by Appellee is the actual stem of the case.

Appellant filed the underlying action on July 9, 2024 (dckt. 1). Appellee filed her Motion to and Brief to Dismiss; Request for Attorney's Fees on July 24, 2024 (dckt. 3). Appellant then filed Appellant's Motion for Leave to Allow for Amended Complaint and Demand for Jury Trial on August 19, 2024 (dckt. 9). Three days later, Appellant filed Appellant's Response to Defendant's Motion and Brief to Dismiss; Request for Attorney's Fees (dckt. 10). The District Court then

issued an Order of Dismissal and Denying Attorney's Fees on October 1, 2024 (dckt. 12). Appellant timely appealed.

In Appellee's section titled "III. STAEMENT OF FACTS" (pps. 5, 6, 7, 8) Appellee is attempting to bring in information that was not entered into evidence and considered by the District Court when making its decision. This is both improper and unreasonable. James therefore objects to it being considered by this court and moves that the court strike from the record the entirety of Appellee's Section III. STATEMENT OF FACTS.

V. STANDARD OF REVIEW

James recognizes the below standards of review referenced by Appellee as supporting each of his own arguments.

Whether an asserted claim fails to sufficiently state a claim upon which relief may be granted is a question of law reviewed de novo for correctness under the standards of M. R. Civ. P. 12(b)(6). *Sinclair v. BNSF Ry. Co.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 200 P.3d 46 (Mont. 2008).

"A motion to dismiss under Rule 12(b)(6), M.R.Civ.P., has the effect of admitting all well-pleaded allegations in the complaint. In considering the motion, the complaint is construed in the light most favorable to the Appellant, and all

allegations of fact contained therein are taken as true." *Willson v. Taylor*, 194 Mont. 123, 126-27, 634 P.2d 1180, 1182 (Mont. 1981) (citations omitted). We will affirm the District Court's dismissal when we conclude that the Appellant would not be entitled to relief based on any set of facts that could be proven to support the claim. *Grove v. Montana Army Nat. Guard*, 264 Mont. 498, 501, 872 P.2d 791, 793, (Mont. 1994).

M.R. Civ. P. 15(a) of the Montana Rules of Civil Procedure states that leave to amend should be freely given by the district courts. *Upky v. Marshall Mtn., LLC*, 2008 MT 90, ¶ 18, 342 Mont. 273, 180 P.3d 651 (Mont. 2008). While amendments are not permitted in every circumstance, they may be allowed when they would not cause undue prejudice to the opposing party. *Id.* We generally review a district court's decision denying leave to amend for an abuse of discretion. *Deschamps v. Treasure State Trailer Court, Ltd.*, 2010 MT 74, ¶ 18, 356 Mont. 1, 230 P.3d 800 (Mont. 2010). As we recently stated in *Deschamps*, "[a]lthough leave to amend is properly denied when the amendment is futile or legally insufficient to support the requested relief, it is an abuse of discretion to deny leave to amend where it cannot be said that the pleader can develop no set of facts under its proposed amendment that would entitle the pleader to the relief sought." *Id.* The only exception to this abuse of discretion standard of review arises in cases where the district court's decision is rendered pursuant to M.R. Civ. P. 15(c), which addresses the relation

back of amendments; in such cases, we review the legal question presented de novo. *Deschamps*, ¶ 19 (discussing *Citizens Awareness Network v. Mont. Bd. of Envtl. Rev.*, 2010 MT 10, 355 Mont. 60, 227 P.3d 583). *Griffin v. Mosely* 234 P.3d 869, 2010 MT 132, 356 Mont. 393 (Mont. 2010).

The standard of review for the sufficiency of the judge's decision for a judge sitting without a jury, pursuant to Mont. R. Civ. P. Rule 52(a) is that the court's findings shall not be set aside unless clearly erroneous. Thus, when the District Court's findings are based on substantial credible evidence, they are not clearly erroneous. Parker, supra. *Downing v. Grover*, 237 Mont. 172, 772 P.2d 850 (Mont. 1989).

VI. SUMMARY OF ARGUMENT

The District Court improperly dismissed Appellant's case pursuant to Mont. R. Civ. P. 12(b)(6). Appellant did in fact state a claim for which relief could be granted and he did meet the basic legal threshold for negligent or intentional infliction of emotional distress, which Appellant rightfully claimed stemmed from his ongoing co-parenting relationship with Appellee. The underlying case was improperly dismissed with prejudice, and Appellant's Motion for Leave to Amend Complaint was improperly denied as it was not futile and within the court's discretion to do so. The court's reasoning for the dismissal and denial was clearly

erroneous. Furthermore, by dismissing with prejudice the court effectively gave Appellant civil immunity for further willful and criminal emotional abuse of James, as future civil action to seek redress for present and future abuse would not be allowed. This is not reasonable. Based upon the foregoing, the Appellant's appeal should be granted.

VII. ARGUMENT

1. Did the District Court err in concluding that appellant failed to state a claim for which relief can be granted?

Montana Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint if the plaintiff "fail[s] to state a claim upon which relief can be granted." The plaintiff carries the burden to plead adequately a cause of action. See *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247 (Mont. 2007). A plaintiff fails to meet this burden "if [the plaintiff] either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under the claim." *In re Estate of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 465 P.3d 1165 (Mont. 2020). James did plead his cause of action adequately and stated a cognizable legal theory for relief. He did state sufficient facts that, if true, would entitle him to relief under the claim.

The "complaint must state something more than facts which, at the most, would breed only a suspicion that the plaintiffs have a right to relief." *Maney v. Louisiana Pacific Corp.*, 2000 MT 366, ¶ 28, 303 Mont. 398, 15 P.3d 962 (Mont. 2000). The complaint must, in other words "state a cognizable claim for relief," which "generally consists of a recognized legal right or duty; infringement or breach of that right or duty; resulting injury or harm; and, upon proof of requisite facts, an available remedy at law or in equity." *Larson v. State*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241 (Mont. 2019). "Whether a complaint states a cognizable claim for relief is a question of substantive law on the merits rather than a threshold jurisdictional issue." *Id.* James' complaint did state in particularity more than facts arousing suspicion. James' complaint clearly stated in particularity both the offending actions of Appellee and that they had caused him injury and harm, and that there does exist an available remedy in law or in equity.

Additionally, James agrees that a court has no obligation to take as true legal conclusions that have no factual basis. See *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6 (Mont. 2004). But a court does have an affirmative obligation to "avoid an unconstitutional [statutory] interpretation, if possible," and to resolve any doubt about the constitutionality of a statute in favor of the statute. See *Brown v. Gianforte*, 2021 MT 149, ¶ 32, 404 Mont. 269, 488 P.3d 548 (Mont.

2021); *State v. Davison*, 2003 MT 64, ¶ 8, 314 Mont. 427, 67 P.3d 203 (Mont. 2003) ("Every possible presumption must be indulged in favor of the constitutionality of a legislative act."); *GBN, Inc. v. Mont. Dep't of Revenue*, 249 Mont. 261, 265, 815 P.2d 595, 597 (Mont. 1991). ("If a doubt exists, it is to be resolved in favor of the legislation"). The legislation in this case regards Appellee's actions as criminal and which are detailed in James' complaint, and James' case is based entirely upon factual actions by Appellee.

Courts may look only within the four corners of the complaint when reviewing a Rule 12(b)(6) motion. See *Stufft v. Stufft*, 276 Mont. 310, 313, 916 P.2d 104, 106 (Mont. 1996). In other words, "the court is limited to an examination of the contents of the complaint in making its determination [under a motion to dismiss]." *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 15, 337 Mont. 339, 160 P.3d 552 (Mont. 2007). James' complaint was factually detailed, supported by evidence, and well founded.

In this case, the Appellant has taken parental emotional abuse and intentional interference with parental rights, which is governed by Montana criminal statutes, and recognized that these acts constitute intentional infliction of emotional distress (hereinafter referred to as "IIED") and negligent infliction of emotional distress (hereinafter referred to as "NIED") case. The law around

IIED/NIED has evolved over time and through case law, rather congruously. The evolution of IIED/NIED law was explored extensively in *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (Mont. 1995), which resulted in the following test for an IIED claim:

> . . . an independent cause of action for intentional infliction of emotional distress will arise under circumstances where **serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's intentional act or omission.** Again, the requirement that the emotional distress suffered be serious or severe, as we have already defined those terms, alleviates any concern over a floodgate of claims, particularly fraudulent claims. Also, the requirement that **a claim of intentional infliction of emotional distress will arise only under circumstances where plaintiff's serious or severe emotional distress was the reasonably foreseeable consequence of the defendant's intentional act or omission** alleviates the concern that defendants will be exposed to unlimited liability. *Id* at 428. (Emphasis Added)

The court had previously utilized the Second Restatement of Torts to define "serious" and "severe" as such:

> The Restatement (Second) of Torts, § 46, comment j at 77-78 defines "serious" emotional distress as:
>
> Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable person] could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved....

> The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor had knowledge. *Id* at 426.

A similar standard is in place for NIED, namely:

> We hold that an independent cause of action for negligent infliction of emotional distress will arise under circumstances where **serious or severe emotional distress to the Appellant was the reasonably foreseeable consequence of the defendant's negligent act or omission**, and, as indicated above, we will employ the definition of severe or serious emotional distress from the Restatement (Second) of Torts, § 46, comment j at 77-78. *Id.* at 234. (Emphasis Added)

James, in his complaint, made only factual allegations, for which he was prepared to present supporting evidence at trial. Presenting the entirety of evidence as part of the complaint is not a legal requirement in the state of Montana.

It is the rare co-parent who violates criminal law in their pathological and compulsive abuse of the other co-parent. In this case Appellee has done exactly that. That Appellee has not yet been arrested or charged with criminal conduct by Montana authorities is not evidence of her innocence. Her being resident in Colorado, beyond the reach of Montana law enforcement, is one obvious reason.

In considering violations of criminal law, and their resulting harm, "Violation still constitutes negligence per se." *Azure v. Billings,* 182 Mont. 234 (Mont. 1979) 596 P.2d 460 is the authority. Appellee is liable both for intentional

and negligent harm inflicted upon James. The District Court did err in concluding that appellant failed to state a claim for which relief can be granted.

2. Did the District Court err in dismissing appellant's case with prejudice?

Dismissing an action with prejudice accords the dismissal the "*res judicata* effect." This means, essentially, that a matter cannot be relitigated if it has already been decided by a Court. Mont. R. Civ. P. 41(b) states, in pertinent part:

> (b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule -- except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 -- ***operates as an adjudication on the merits***. (Emphasis Added)

In this situation, this means that Appellant's case was erroneously dismissed with prejudice due to the fact that the merits of the case were not heard by the court. If the court had properly dismissed Appellant's claim without prejudice, it would be properly allowing Appellant to cure defects in the original complaint and relitigate the matter accordingly.

In Appellee's Motion to Dismiss, dismissal with prejudice was requested. Rule 41(a)(2), M.R.Civ.P., which states in part:

> (2) By order of court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.... Unless otherwise specified in the order a dismissal under this paragraph is without prejudice.

As stated in *Cantrell v. Henderson*:

> From the wording of the rule, it is clear that **a district court has authority to condition a dismissal upon such terms and conditions as it deems proper, and that the court also has the power to dismiss with prejudice or without prejudice, subject to the provision that the dismissal is without prejudice unless otherwise stated.** It was appropriate for Cardinal Drilling to file its motion in response to plaintiffs' motion to dismiss, and for it to request a dismissal with prejudice. Plaintiffs have not proven facts requiring a limitation upon the discretion granted to the District Court with regard to dismissal. We conclude that the District Court acted within its discretion when it entered an order of dismissal. We will discuss further the prejudice aspect of the dismissal. *Cantrell v. Henderson*, 221 Mont. 201, 718 P.2d 318 (Mont. 1986). (Emphasis Added)

As noted, the district court has authority to condition a dismissal upon terms and conditions as it deems proper. James was never allowed the opportunity to prove the facts of his complaint requiring a limitation upon the discretion granted to the Court, and was thus improperly deprived of his right to due process. The Court was free to act within its discretion in whether to dismiss with or without prejudice, and the Court improperly chose to dismiss with prejudice. And, in doing so has rendered a decision not based upon the merits of the case. Appellee misconstrues

the doctrine of *res judicata* to mean that the court not properly considering the merits of a case, or not even allowing the merits to be presented, is allowable. It is not. Dismissing the case with prejudice without properly considering the merits was an error by the district court.

Further, if the doctrine of *res judicata* is accepted in this case, Appellee will not only be made unaccountable in civil litigation for her past criminal actions, but also be effectively given judicial civil immunity for present and future criminal actions if evidence comes to light. Future standing for violations once they accrue will be rejected due to improper application of *res judicata*. This is clearly unreasonable. The District Court did err in dismissing appellant's case with prejudice.

3. Did the District Court abuse its discretion by denying appellant's request to amend his complaint?

Mont. R. Civ. P. 15 states:

> Rule 15. Amended and Supplemental Pleadings.
>
> (a) Amendments before Trial.
>
> (1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:
>
> (A) 21 days after serving it; or
>
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

> (2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

In this situation, Appellant's motion was filed after the 23 days set forth in Mont. R. Civ P. 15(a)(1)(b). Therefore, it was up to the court to decide the issue of amendment. As directed by the rule, the court should freely give leave when justice so requires. In this case, the amended complaint was substantially similar to the initial complaint, with an additional defendant named (Appellee's spouse), and some additional, but similar, facts listed.

> This court has held the following:
>
> Rule 15(a), M.R.Civ.P., allows parties to amend pleadings by obtaining leave of the district court and requires the court to grant leave "when justice so requires." Although the rule has been liberally interpreted, a district court is justified in refusing amendment because of undue prejudice to the opposing party, undue delay, and dilatory tactics by the moving party. *Lindey's v. Professional Consultants* (1990), 244 Mont. 238, 242, 797 P.2d 920, 923. The prejudice sufficient to support a court's denial of a motion to amend can be of precisely the kind faced by the State here--added time, energy and money in resolving the case due to additional discovery and time to determine the sufficiency of the claims alleged in the amended complaint. See Lindey's, 797 P.2d at 923. *Smith on Behalf of Smith v. Butte-Silver Bow County*, 266 Mont. 1, 878 P.2d 870, Mont. 1994. (Abrogated on a different issue)

In this case, allowing the Appellant to amend his complaint, when the Court had not already found that the original complaint failed to state a claim upon which relief would be granted would have been proper to serve justice. Being less than one week late would not have added significant or undue time, energy and money

to resolve the case. That James is acting *pro se* should also have been considered and the court would have acted properly by affording him leniency.

Additionally, this Court has stated the following standard:

> Generally, it is an abuse of discretion to refuse amendments to pleadings offered at a reasonable time and which would further justice; on the other hand, amendments which would result in undue delay or undue prejudice to the opposing party or amendments which would be futile need not be permitted. See Loomis, ¶ 41 (citations omitted). *Reier Broad. Co. v. Mt. State Univ.-Bozeman*, 328 Mont. 471, 2005 MT 240, 121 P.3d 549, Mont. 2005.

Denying leave to amend is within the court's discretion when amendment would be futile. In the instant case, the amended complaint was substantially similar to the original, with only the addition of one defendant, and some facts similar to the initial facts presented. No additional causes of action were pleaded. The initial complaint did meet the legal threshold, and the amended complaint would still state a claim upon which relief could be granted, and as such the amendment would be proper. Based upon the foregoing it is clear that the Court did abuse its discretion in denying Appellant's Motion for Leave to Amend Complaint.

4. Did the District Court err in failing to explain its ruling?

James will maintain that the Court did abuse its discretion in the method by which it rendered its ruling. "The standard of review for a judge sitting without a jury, pursuant to Mont. R. Civ. P. Rule 52(a), is that the court's findings shall not

be set aside unless clearly erroneous. Thus, when the District Court's findings are based on substantial credible evidence, they are not clearly erroneous. *Parker, supra.*" *Downing v. Grover*. 772 P.2d 850, 237 Mont. 172 (Mont. 1989).

In the instant case, the Court's decision was based upon Appellee's Motion to Dismiss and was not based upon the required substantial credible evidence. James' substantial and credible evidence set forth in his complaint was not disproven. Appellee's evidence was neither substantial or credible. The court erroneously believed the case was ripe for dismissal under Mont. R. Civ. P. 12(b)(6).

VIII. CONCLUSION

It was clear based upon the four corners of the complaint that James did in fact state a claim for which relief could be granted. The district Court was not justified in its decision to dismiss with prejudice. The District Court would have properly allowed James to amend his complaint. Explanation of the ruling was required of the District Court but not provided. The District Court did abuse its discretion in its decision and acted in error.

In Appellee's section titled "III. SATAEMENT OF FACTS" (pps. 5, 6, 7, 8) Appellee is attempting to bring in information that was not entered into evidence

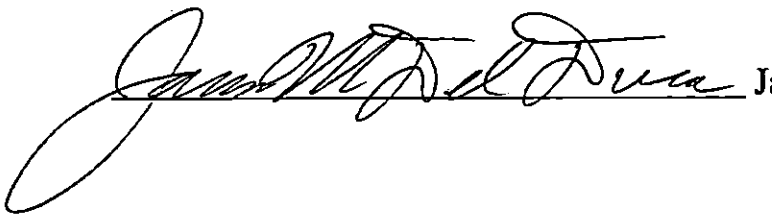
and was not considered by the District Court when making its decision. This is both improper and unreasonable. James therefore objects to it being considered by this court and moves that the court strike from the record the entirety of Appellee's Section III. STATEMENT OF FACTS.

James therefore requests that this Court reverse and remand to the District Court with instructions to grant leave to amend, and/or state its rationale for granting the Defendants' motion to dismiss with prejudice.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this APPELLANT'S REPLY TO APPELLEE'S OPENING BRIEF is printed proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count as calculated by Microsoft Word is 3,743 (not more than 10,000) words, excluding the Table of Contents, Table of Authorities, Signature Block, Certificate of Service, and Certificate of Compliance.

DATED this 23rd day of March 2025.



James M. Del Duca

CERTIFICATE OF SERVICE

I do hereby certify that on this 24th day of March 2025, I mailed a true and correct copy of the foregoing APPELLANT'S REPLY TO APPELLEE'S OPENING BRIEF upon the individuals listed below by the following means:

MONTANA SUPREME COURT

215 North Sanders, Room 323

Helena, MT 59620-3003

by Express Mail

Andrea J. Utick Fox

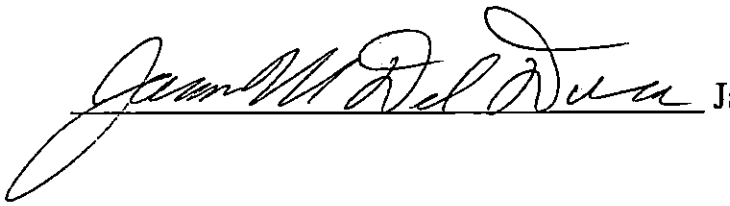
P.O. Box 9621

Kalispell, MT 59904

Email: afox@mtfoxlaw.com

Attorney for Appellee

by email (with consent)



James M. Del Duca