

CASE NO. DA 08-0084

IN THE SUPREME COURT OF THE STATE OF MONTANA

D. LISA LOZEAU,

Plaintiff/Appellant,

-VS.-

GEICO INDEMNITY CO. and
ELIZABETH DURGLO, aka LIZ DURGLO,

Defendants/Appellees.

On Appeal from the Montana Twentieth Judicial District,
Missoula County, The Honorable Deborah Kim Christopher Presiding
Lake County District Court Cause No. DV-06-283

APPELLEE ELIZABETH DURGLO'S ANSWER BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the Montana Twentieth Judicial District Court correctly grant Appellee Elizabeth Durglo's Montana Rule of Civil Procedure 12(b)(6) motion for dismissal of Appellant D. Lisa Lozeau's Complaint, which alleged tort claims and was filed in the district court more than three years after the tort claims accrued?

STATEMENT OF THE CASE

On November 21, 2006, Appellant D. Lisa Lozeau (hereinafter "Ms. Lozeau") filed a Complaint and Demand for Jury Trial in the Montana Twentieth Judicial District Court. Compl. & Jury Demand 1 (Nov. 21, 2006). The Complaint named as defendants Appellee Elizabeth Durglo (hereinafter "Ms. Durglo") and her insurer, GEICO Indemnity Co. (hereinafter "GEICO").¹ *Id.*

In response to Ms. Lozeau's district court action, Ms. Durglo appeared and filed a motion to dismiss the Complaint pursuant to the

¹ GEICO was never served with process in Ms. Lozeau's Montana Twentieth Judicial Court action. After Ms. Lozeau filed her February 7, 2008 Notice of Appeal, and apparently realizing that GEICO's continuing status as an unserved Defendant in the district court precluded a final judgment from which this appeal could be taken, Ms. Lozeau filed a voluntary motion dismissing GEICO from the district court action. *See* Pl.'s Voluntary Dismissal Pursuant to Mont. R. Civ. 41(a)(1)(i).

provisions of Montana Rule of Civil Procedure 12(b)(6) and the three-year statute of limitations for tort actions provided by Montana Code Annotated § 27-2-204 (2007). Def.'s Mot. Dismiss 1-2 (Oct. 29, 2007). Ms. Lozeau's sole district court argument to avoid the three-year statute of limitations applicable to tort actions was the so-called doctrine of equitable tolling. Pl. Response Mot. Dismiss 2-3 (Nov. 15, 2007).

Ms. Lozeau's district court Complaint made no reference to any earlier filed action. Instead, Ms. Lozeau opposed Ms. Durglo's Rule 12(b)(6) motion by filing a brief that argued the district court should equitably extend the three-year statute of limitations because she had earlier filed a jurisdictionally flawed complaint in the Confederated Salish and Kootenai Tribal Court. Pl.'s Response Mot. Dismiss 1, 2.

The Montana Twentieth Judicial District Court rejected Ms. Lozeau's argument for equitable tolling, reasoning that Ms. Lozeau could not demonstrate a required element of the doctrine – that Ms. Durglo had not been prejudiced by the more than four years that had passed since the motor vehicle accident between the parties. Memo. & Order Granting Def.'s Mot. Dismiss 7-8 (Jan. 10, 2008). Therefore, because Ms. Lozeau's district court Complaint was filed more than three years after her

claims accrued, Ms. Lozeau's claims against Ms. Durglo are barred by the provisions of Montana Code Annotated § 27-2-204 (2007). *Id.* at 4-5, 8.

This appeal followed the entry of the district court's order granting Ms. Durglo's motion for dismissal of the Complaint filed against her. Notice of Appeal (Feb. 7, 2008).

STATEMENT OF RELEVANT FACTS

On October 5, 2003, Ms. Lozeau and Ms. Durglo were involved in a motor vehicle accident, which occurred at the intersection of Lemery Lane and Watson Road in Lake County, Montana. Compl. & Jury Demand at ¶ II. Ms. Lozeau alleged that Ms. Durglo was negligent in the operation of her motor vehicle and that Ms. Lozeau suffered bodily injuries in the accident. *Id.* at ¶¶ III-IV.

On September 11, 2006, more than two years and eleven months after the motor vehicle accident, Ms. Lozeau filed an Amended Complaint against Ms. Durglo and her insurer, GEICO, in the Confederated Salish and Kootenai Tribal Court. Appellant's Br. at 4 (Apr. 16, 2008). It is undisputed that Ms. Lozeau is not a member of the Confederated Salish and Kootenai Tribe. *Id.* Ms. Lozeau and Ms. Durglo are both residents of Lake County, Montana. Compl. & Jury Demand at ¶ I. Lake County is

the location of the Montana Twentieth Judicial District Court. *Id.* at 1.

The Montana Twentieth Judicial District Court exercises undisputed subject matter and personal jurisdiction over Ms. Lozeau's claims. *See* Mont. Const. art. VII, § 4(1); *see also* Mont. Code Ann. § 3-5-302 (2007).

On May 21, 2007, the tribal court dismissed Ms. Lozeau's cause of action against Ms. Durglo and GEICO, concluding that it lacked jurisdiction in the matter because Ms. Lozeau had failed to properly establish tribal court jurisdiction over her claims as required by Confederated Salish and Kootenai Tribal law. Def. Durglo's Reply Br. Supporting Mot. Dismiss at Ex. A. p.[3] (Nov. 30, 2007).

During the pendency of the tribal court's consideration of its jurisdiction over Ms. Lozeau's claims, Ms. Lozeau recognized that the tribal court forum was legally unsound. Appellant's Br. at 5. Upon realizing the error of her selected forum, Ms. Lozeau filed a Complaint in the Montana Twentieth Judicial District Court. *Id.*; Compl. & Jury Demand at 1. Ms. Lozeau's November 21, 2006 filing of her district court Complaint occurred more than three years after the October 5, 2003 motor vehicle accident. *Id.* at 1; Appellant's Br. at 3, 5. It is undisputed that Ms. Lozeau did not serve the district court Complaint on Ms. Durglo until

October 7, 2007, more than four years after Ms. Lozeau's claims accrued.
(Appellant's Br. At 5.)

STANDARD OF REVIEW

A trial court's determination that a complaint fails to state a claim is a conclusion of law so that the Montana Supreme Court's review on appeal is de novo. *Snyder v. Love*, 2006 MT 317, ¶ 7, 335 Mont. 49, ¶ 7, 153 P.3d 571, ¶ 7 (citing *Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d 1352, 1354 (1997)). A plaintiff's "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citing *Willson v. Taylor*, 194 Mont. 123, 126, 634 P.2d 1180, 1182 (1981)). A motion to dismiss under Montana Rule of Civil Procedure 12(b)(6) has the effect of admitting all well-pleaded allegations in the complaint. *Id.* "In considering the motion, the complaint is construed in the light most favorable to the plaintiff, and all allegations of fact contained therein are taken as true." *Id.* The Montana Supreme Court will affirm a trial court's dismissal for failure to state a claim only if it is determined that the plaintiff is not entitled to relief under

any set of facts which could be proven in support of the plaintiff's claim. *Id.*

SUMMARY OF ARGUMENT

The district court correctly dismissed Ms. Lozeau's untimely filed Complaint against Ms. Durglo because, on its face, it was filed more than three years after Ms. Lozeau's tort claims accrued. Ms. Lozeau's district court Complaint made no reference to any earlier timely-filed action that would serve to equitably toll the three-year statute of limitations imposed on tort claims by Montana Code Annotated § 27-2-204. Moreover, the district court correctly rejected Ms. Lozeau's sole argument for equitable tolling of the statute of limitations because Ms. Lozeau could not demonstrate a lack of prejudice to Ms. Durglo under any set of facts applicable to the argument.

Ms. Lozeau's sole argument on appeal asserts the trial court erred when it concluded that Ms. Lozeau had failed to demonstrate that Ms. Durglo would suffer no prejudice if the three-year statute of limitations was equitably tolled. The district court correctly concluded that such prejudice was unavoidable given the undisputed fact that more than four years had passed since the accrual of Ms. Lozeau's claims and the service of her district court Complaint. Moreover, even if Ms. Lozeau could

demonstrate a lack of prejudice to Ms. Durglo, which she cannot do, the earlier filing of Ms. Lozeau's claims in a court without proper jurisdiction to adjudicate the claims was not a reasonable pursuit of a legal remedy required to apply the doctrine of equitable tolling. Finally, Ms. Lozeau's attempt to raise new arguments on appeal that were not raised below should be summarily rejected as required by long-standing Montana jurisprudence.

ARGUMENT

I. The District Court Correctly Dismissed Ms. Lozeau's Complaint Because The Complaint Was Filed More Than Three Years After Her Tort Claims Accrued.

A. Ms. Lozeau's District Court Complaint Is Inherently Deficient.

The district court properly considered the sufficiency of Ms. Lozeau's Complaint when it concluded the action against Ms. Durglo was filed in violation of Montana Code Annotated 27-2-204. When considering a party's Rule 12(b)(6) motion to dismiss, the contents of the plaintiff's complaint will determine the adequacy of the plaintiff's claims. *Meagher v. Butte-Silver Bow City-County*, 2007 MT 129, ¶ 15, 337 Mont. 339, ¶ 15 160 P.3d 552, ¶ 15. It is undisputed that Ms. Lozeau's district

court Complaint made no reference to any earlier court action and clearly indicated that the motor vehicle accident between the parties occurred on October 5, 2003, more than three years prior to the district court filing. *See* Compl. & Jury Demand 1-2.

Montana law specifies that a plaintiff's claim or cause of action accrues "when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action." Mont. Code Ann. § 27-2-102(1)(a) (2007). Ms. Lozeau's cause of action accrued on October 5, 2003 when the motor vehicle accident with Ms. Durglo occurred, a fact that Ms. Lozeau has not disputed. *See* Appellant's Br. at 3 (asserting that Ms. Lozeau's alleged personal injuries occurred on October 5, 2003).² Having this knowledge, Ms. Lozeau filed her untimely complaint and made no effort to include in her allegations any factual basis that would support an equitable tolling of the three-year statute of limitations. Absent such facts, the district court should not be expected to exercise judicial clairvoyance to divine an effective legal theory to avoid

² Inexplicably, Ms. Lozeau's appellate brief later erroneously states the motor vehicle accident between the parties occurred on September 25, 2003. *See* Appellate's Br. at 7.

dismissal of a plaintiff's patently defective complaint. Therefore, the district court should be affirmed.

B. The District Court Exercised Proper Discretion In Dismissing Ms. Lozeau's Complaint.

In considering Ms. Durglo's motion to dismiss, the district court had discretion to consider the sufficiency of the Complaint. *See Meagher*, ¶ 16. Because Ms. Lozeau's district court Complaint was filed on November 21, 2006, and considering that Ms. Lozeau's Complaint clearly established the date when her claims and cause of action accrued, the district court correctly, and wholly within its discretion, concluded that the Complaint should be dismissed pursuant to the three-year statute of limitations imposed by Montana Code Annotated § 27-2-204.

The record demonstrates that the district court expressly outlined the proper standard for review of a Rule 12(b)(6) motion to dismiss and went on to assume the truth and accuracy of all well-pleaded allegations contained in Ms. Lozeau's Complaint. *See Memo. & Order Granting Def.'s Mot. Dismiss* at 3, 5. In fact, Ms. Lozeau's opening brief asserts no error in the district court's exercise of discretion when considering the sufficiency of her Complaint. Instead, Ms. Lozeau's only assertion of

error is the district court's conclusion that she failed to demonstrate a lack of prejudice to avail herself to an equitable tolling of the three-year statute of limitations. For this reason, the only issue on appeal is whether the district court properly rejected Ms. Lozeau's argument for equitable tolling when the court granted Ms. Durglo's Rule 12(b)(6) motion for dismissal.

II. The District Court Correctly Rejected The Doctrine Of Equitable Tolling When It Granted Ms. Durglo's Motion To Dismiss.

A. Ms. Lozeau Failed To Demonstrate A Lack Of Prejudice Necessary To The Doctrine Of Equitable Tolling.

The district court properly rejected Ms. Lozeau's equitable tolling argument when it determined that Ms. Lozeau could not demonstrate a lack of prejudice to Ms. Durglo. Montana courts have determined that the purpose of statutes of limitations is to protect defendants from having to litigate claims where their ability to defend has been lessened due to the passage of time. *Ereth v. Cascade County*, 2003 MT 328, ¶ 16, 318 Mont. 355, ¶ 16, 81 P.3d 463, ¶ 16. Relying on *Ereth v. Cascade County*, the district court correctly reasoned that the passage of more than four years between the accrual of Ms. Lozeau's claims and the service of her district

court Complaint inevitably created a prejudicial effect to Ms. Durglo.

Memo. & Order Granting Def.'s Mot. Dismiss at 7. Given such prejudice, the court correctly determined that the doctrine of equitable tolling could not be applied to extend the three-year statute of limitations. *Id.* at 7-8.

Ms. Lozeau attempts to persuade this Court that the inevitable prejudice Ms. Durglo suffered as a direct result of unreasonable forum selection was Ms. Durglo's fault because she failed to propound discovery in the tribal court. Appellant's Br. at 5, 6-7. While it is ludicrous to assert that defendants should conduct discovery in a court lacking jurisdiction to adjudicate the plaintiff's claims, the fact that Ms. Lozeau presents such an argument should not escape this Court's review. In doing so, Ms. Lozeau acknowledges the very prejudice that she also asserts the district court should not have found when it considered Ms. Durglo's Rule 12(b)(6) motion.

As she did below, Ms. Lozeau relies principally on this Court's decisions in the cases of *Chance v. Harrison*, (272 Mont. 52, 55, 899 P.2d 537, 539 (1995)) and *Erickson v. Croft*, (233 Mont. 146, 151, 760 P.2d 706, 708 (1988)) in support of her argument for application of the doctrine of equitable tolling. Appellant's Br. at 8-10.

In *Erickson*, as here, the plaintiff's claims were untimely and the defendant was barred from proceeding with his claims. 252 Mont. 149, 760 P.2d 707. Like Ms. Lozeau, the *Erickson* plaintiff admitted that his complaint was not timely filed, but argued that the applicable statute of limitations should be equitably tolled. *Id.* at 150, 760 P.2d 708.

This Court determined that all three of the required elements of the doctrine of equitable tolling could not be satisfied in *Erickson*, so the plaintiff was not entitled to equitable relief. *Id.* at 151-152, 760 P.2d at 709. In stark contrast to Ms. Lozeau's reliance on the case, *Erickson* stands for the proposition that statutes of limitation should **not** be equitably tolled unless the plaintiff can clearly demonstrate all three elements of the doctrine. *Id.* at 153, 760 P.2d at 710.

Here, following the guidance provided by *Erickson*, the district court properly considered all the required elements of the doctrine of equitable tolling and concluded that Ms. Lozeau could not demonstrate an absence of prejudice. Memo. & Order Granting Def.'s Mot. Dismiss at 7. Therefore, the court correctly concluded that Ms. Lozeau was not entitled to equitable relief from the three-year statute of limitations. *Id.* at 7-8.

Ms. Lozeau's reliance on *Chance* is equally misplaced. In *Chance*, this Court applied the doctrine of equitable tolling to toll a Plaintiff's sexual harassment claims filed beyond the 180-day statute of limitations, which began to run when the plaintiff was discharged from employment. 272 Mont. at 53, 899 P.2d at 537-38. More specifically, this Court stated that the doctrine of equitable tolling may be applied:

[W]hen a party reasonably and in good faith pursues one of several possible legal remedies **and** the claimant meets three criteria:

- (1) timely notice to the defendant within the applicable statute of limitations in filing the first claim;
- (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and
- (3) good faith and reasonable conduct by the plaintiff in filing the second claim.

Id. at 55, 899 P.2d at 539 (citation omitted) (emphasis added).

The *Chance* case presented significantly different factual circumstances than those presented here. In *Chance*, the plaintiff's filing of her claims in the district court was contravened by the provisions of a statute that required exhaustion of sexual harassment claims before the Montana Human Rights Commission prior to filing claims in district court. *Id.*, 899 P.2d at 537 (citing Mont. Code Ann. § 49-2-509 (1987)).

The jurisdictional discrepancy that existed at the time the *Chance* plaintiff filed her action supported the application of equitable tolling. *Id.* at 56, 899 P.2d at 539. Moreover, this Court concluded that the unique circumstances of *Chance* satisfied all three elements necessary to the doctrine of equitable tolling. *Id.* at 57, 899 P.2d at 540.

The same jurisdictional discrepancy exemplified by *Chance* simply does not exist in Ms. Lozeau's case. In this case, only the Montana Twentieth Judicial District Court possessed undisputed jurisdiction to adjudicate Ms. Lozeau's claims. *See* Mont. Const. art. VII, § 4(1); *see also* Mont. Code Ann. § 3-5-302. At any time within the three-year period following the October 5, 2003 motor vehicle accident with Ms. Durglo, Ms. Lozeau could have filed her claims in the Montana Twentieth Judicial District Court and no reasonable jurisdictional dispute would have ensued. Ms. Lozeau's decision to file an action in a court having questionable jurisdiction at a time perilously close to the expiration of the three-year statute of limitations clearly distinguishes this case from *Chance*. Furthermore, these same facts demonstrate that the district court was correct in concluding that Ms. Lozeau could not demonstrate all three

elements necessary to equitable tolling because Ms. Lozeau could not demonstrate a lack of prejudice to Ms. Durglo.

B. Ms. Lozeau's Filing Of Her Tribal Court Complaint Did Not Constitute A Reasonable Legal Remedy For Her Claims.

In Montana, equitable tolling of statutes of limitation can only occur where the plaintiff has several legal remedies at her disposal and, reasonably and in good faith, pursues one. *Hash v. U.S. West Commun. Serv.*, 268 Mont. 326, 332, 886 P.2d 442, 446 (1994). Only after meeting this preliminary threshold can a court then consider the three necessary elements to an application of the doctrine to arrest the running of statutes of limitation while the plaintiff in good faith pursues one of several possible legal remedies. *Id.* at 332, 886 P.2d at 446; *Sorenson v. Massey-Ferguson, Inc.*, 279 Mont. 527, 529, 927 P.2d 1030, 1032 (1996). Where a plaintiff has but one legal remedy at her disposal and fails to pursue that remedy by filing her complaint in a timely manner, the plaintiff cannot assert the doctrine of equitable tolling to escape statutes of limitation. *Hash*, 286 Mont. at 332-33, 886 P.2d at 446.

As noted above, Ms. Lozeau could have filed her claims in the district court at any time within three years after her claims accrued and

no reasonable jurisdictional dispute would have ensued. Rather than follow this reasonable and prudent course of legal action, Ms. Lozeau elected to *unreasonably* file a complaint in a court where a jurisdictional dispute was virtually certain to erupt. Moreover, Ms. Lozeau embarked on this precarious legal course less than a month before the three-year statute of limitations was set to expire. When the inevitable jurisdictional challenge ensued, Ms. Lozeau found herself caught in a legal morass of her own design that cannot be attributed to anyone other than herself.

Furthermore, the folly of Ms. Lozeau's legal miscalculations serves to establish that the fundamental equitable tolling requirement of *Chance* – that Ms. Lozeau *reasonably* pursued one of several possible legal remedies – cannot be demonstrated. *See Chance*, 272 Mont at 55, 899 P.2d at 539. It is inescapable that Ms. Lozeau's selection of the tribal court forum was not a reasonable legal alternative when Ms. Lozeau could not even demonstrate the essential jurisdictional criteria necessary to the forum. *See* Def. Durglo's Reply Br. Supporting Mot. Dismiss at Ex. A. [3].

Because Ms. Lozeau unreasonably pursued her claims in the tribal court, Ms. Lozeau's circumstances are more analogous to the case of *Hash*

v. U. S. West Commun. Serv.. In *Hash*, this Court refused to apply the doctrine of equitable tolling because the *Hash* plaintiff possessed only one reasonable legal remedy, which she had failed to pursue in a timely manner. 286 Mont. at 332-33, 886 P.2d at 446. Like the *Hash* plaintiff, Ms. Lozeau had only one reasonable legal remedy, which she failed to pursue in a timely manner. For this reason, the district court should be affirmed.

III. Ms. Lozeau's Argument For Application Of Montana Code Annotated § 27-2-407 Was Not Raised In The District Court And Is Barred On Appeal.

Ms. Lozeau's argument for application of Montana Code Annotated § 27-2-407 was not raised in the district court and should not be considered on appeal under the long-standing jurisprudence of this Court. It is well-settled that this Court will not consider legal theories or arguments that are raised for the first time on appeal. *See Saari v. Winter Sports, Inc.*, 2003 MT 31, ¶ 26, 314 Mont. 212, ¶ 26, 64 P.3d 1038, ¶ 26. This is because it is fundamentally unfair to consider changes to a party's legal theory or new arguments that the district court had no opportunity to consider. *Schlemmer v. N. Central Life Ins. Co.*, 2001 MT 256, ¶ 22, 307 Mont. 203, ¶ 22, 37 P.3d 63, ¶ 22.

It is undisputed that Ms. Lozeau did not argue for the application of Montana Code Annotated § 27-2-407 in the district court. In fact, she readily acknowledges this bare fact in her opening brief. Appellant's Br. at 12. Ms. Lozeau further acknowledges this Court's holdings that prohibit appellants from seeking reversal of district court decisions by arguing matters not presented to the district court. *Id.* at 13 (citation omitted).

After admitting that her arguments should not be considered, Ms. Lozeau then boldly asserts that the statute not raised below should be applied to negate the district court's finding of prejudice against Ms. Durglo "as a matter of law." *Id.* at 12. Because this novel argument was not raised below, it should not be considered on appeal and the district court's dismissal of Ms. Durglo should be affirmed.

However, even if the argument is considered, it must fail. If Ms. Lozeau's assertion is correct, then the element of lack of prejudice necessary to the doctrine of equitable tolling would never be considered in cases appropriately involving the doctrine of equitable tolling. The lack of prejudice element exists within the doctrine for the very reason that statutes of limitation exist – to protect defendants from having to litigate

claims where their ability to defend has been lessened due to the passage of time. *See Ereth*, ¶ 16.

Ms. Lozeau also asserts that it is Ms. Durglo's burden to demonstrate prejudice in order to prevent equitable tolling. Again, Ms. Lozeau misapprehends the law. Under the doctrine of equitable tolling, the burden of demonstrating the elements necessary to the doctrine is on the party seeking the relief. *See Chance*, 272 Mont. at 55, 899 P.2d at 539 (establishing the elements of the doctrine and stating that the *claimant* must establish elements); *See also Erickson*, 233 Mont. at 153, 760 P.2d at 710.

Ms. Lozeau also again grasps at the fleeting notion that defendants in a court lacking jurisdiction should immediately engage in discovery to assuage prejudice caused by a plaintiff's misguided legal reasoning in selecting an improper forum. Ms. Lozeau's newly-raised argument on this point is not only prohibited by this Court's jurisprudence, it also demonstrates the continuing legal miscalculations that led to Ms. Lozeau's breach of the statute of limitations in the first place. Such legal miscalculations and misjudgments should result in only one conclusion –

the decision of the Montana Twentieth Judicial District Court should be affirmed.

CONCLUSION

The Montana Twentieth Judicial District Court correctly granted Ms. Durglo's motion for dismissal of Ms. Lozeau's Complaint under Montana Rule of Civil Procedure 12(b)(6) and the provisions of Montana Code Annotated 27-2-204. On its face, Ms. Lozeau's district court Complaint was deficient because it demonstrated the three-year statute of limitations imposed on Ms. Lozeau's tort claims was breached by the untimely filing of her district court action and made no reference to any earlier timely-filed action that would support equitable tolling. In considering Ms. Lozeau's opposition to dismissal of her Complaint, the district court properly exercised its discretion and gave proper deference to the elements of the doctrine of equitable tolling, concluding that Ms. Lozeau could not demonstrate that a lack of prejudice existed under the undisputed facts of the case. Moreover, the preliminary threshold for equitable tolling – Ms. Lozeau's reasonable pursuit of more than one available legal remedy – does not exist because she failed to file her action in the only court having undisputed jurisdiction over her claims.

Finally, Ms. Lozeau's appellate arguments that were not raised in the district court should not be considered.

For these reasons, the January 10, 2008 Montana Twentieth Judicial Court Memorandum and Order Granting Defendant's Motion to Dismiss should be affirmed in its entirety.

DATED this 14th day of June, 2008.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman typeface of 14 points, is double spaced; and the word count calculated by Corel WordPerfect 8.0 for Windows is not more than 10,000 words (5,000 for reply), not averaging more than 280 words per page, excluding Certificate of Service and Certificate of Compliance.

DATED this 14th day of June, 2008.

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CERTIFICATE OF MAILING

I, J. Wayne Capp, one of the attorneys for Defendant/Appellant Elizabeth Durglo in the above-entitled action, hereby certify that on the 14th day of June, 2008, I served the within *Appellee Elizabeth Durglo's Answer Brief* upon the attorneys of record by mailing a true copy thereof in an envelope, securely sealed, postage prepaid and addressed as follows:

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