

In late 2016, Gersh became involved in a real estate dispute with Sherry Spencer,

the proposal was rejected, talk of a boycott or protest persisted in the Whitefish community.

When Gersh learned about the possible protests, she tried to warn several of her friends who rented spaced as commercial tenants in Sherry Spencer's building. One of those tenants told Gersh that Sherry Spencer wanted to talk to her, and Gersh reluctantly agreed to consider accepting a call from Sherry Spencer. A few minutes later, Sherry Spencer called Gersh and essentially asked Gersh what she should do. Gersh said that if she were in Sherry Spencer's situation she might sell the building, donate the profits, and make a public statement denouncing her son's views. Sherry Spencer apparently liked that idea at first, and asked Gersh if she would be the realtor and help her sell the property. Sherry Spencer subsequently changed her mind about having Gersh list the property, however, and on December 15, 2016, she published a post on a blog website accusing Gersh of threatening and harassing her into agreeing to sell the property.

The day after Sherry Spencer's blog post, Anglin posted the first in a series of thirty articles related to Gersh on his website, *The Daily Stormer*. The December 16, 2016, article republished Sherry Spencer's allegations against Gersh and was titled "Jews Targeting Richard Spencer's Mother for Harassment and Extortion – TAKE ACTION!" Anglin called for a "troll storm" against Gersh, and included

publicly available

of diversity subject matter jurisdiction under Rule 12(b)(1), for lack of personal jurisdiction based on insufficient service of process under Rule 12(b)(5), and for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

On March 21, 2018, the undersigned entered a Findings and Recommendation recommending that Anglin's motion to dismiss be denied to the extent it seeks dismissal for lack of subject matter and personal jurisdiction, and scheduling oral argument on the Rule 12(b)(6) aspect of his motion. (Doc. 75). That Findings and Recommendation is awaiting review by presiding Judge Dana L. Christensen. In the meantime, the undersigned held oral argument on the Rule 12(b)(6) aspect of Anglin's motion and issues the following Findings and Recommendation.

II. Legal Standards

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

To survive a Rule 12(b)(6) motion, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

privacy, intentional infliction of emotional distress, and violations of Montana's Anti-Intimidation Act.² Anglin makes several arguments in support of his motion to dismiss. First, he argues that the entire Complaint is subject to dismissal because Gersh's claims are premised on speech protected by the First Amendment to the United States Constitution. Second, Anglin argues that even if the speech his online readers engaged in is not protected, he cannot be held liable for their tortious conduct. Even assuming his first two arguments fail, Anglin maintains Gersh has not alleged facts sufficient to support the elements of her claims for invasion of privacy, intentional infliction of emotional distress, and violations of the Montana Anti-Intimidation Act. Anglin also challenges the constitutionality of Montana's Anti-Intimidation Act, both facially and as applied.

A. First Amendment

Anglin first argues the Complaint should be dismissed in its entirety because Gersh's claims are all premised on speech protected by the First Amendment. Because Gersh is seeking to hold Anglin liable in tort for the impact of his speech and that of his readers, Anglin likens her claims to content-based restrictions on

² Gersh also brings a claim for "malice," by which she seeks punitive damages under Mont. Code Ann. § 27-1-221. Because a claim for punitive damages is not an independent cause of action, whether it survives Anglin's motion to dismiss depends on whether Gersh's substantive tort claims survive.

speech. See *United States v. Cassel*, 408 F.3d 622, 626 (9th Cir. 2005) (recognizing that “when the definition of a crime or tort embraces any conduct that causes or might cause a certain harm, and the law is applied to speech whose communicative impact causes the relevant harm, we treat the law as content-based.”)

As a general rule, content-based restrictions on speech are permitted only when confined to a “few historic and traditional categories” of unprotected speech, including incitement, “obscenity, defamation, speech integral to criminal conduct, so-called fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to present.” (internal quotations and citations omitted). *United States v. Alvarez*, 567 U.S. 709, 717 (2012). For speech to be characterized as “fighting words,” there must be “a likelihood that the person addressed would make an immediate violent response.”

1243, 1428 (9th Cir. 1983).

Gersh's tort claims are based on Anglin's own speech in the articles he posted online, as well as on the speech of readers as expressed in the hundreds of troll storm messages they sent to Gersh and her family. In his opening brief, Anglin anticipates that Gersh might attempt to characterize these articles and messages as fighting words, true threats, or incitement. Anglin contends that even taking the allegations in the Complaint as true, however, none of the speech at issue falls within any of these historically recognized categories and the First Amendment thus bars Gersh's claims as a matter of law.

Gersh does not do as Anglin anticipates, however, and does not take the position that the speech giving rise to her claims constitutes fighting words, true threats, or incitement. According to Gersh, it does not matter whether Anglin's articles and his readers' messages fall squarely within any of the historically recognized categories of speech. What matters, Gersh contended at oral argument, is whether after balancing the competing interests at stake and considering the record as a whole, the speech at issue is entitled to First Amendment protection. Gersh is correct.

Anglin's argument to the contrary is based on the mistaken premise that unless speech falls squarely within a recognized category of unprotected speech,

the First Amendment necessarily operates as a complete bar to tort liability. The Ninth Circuit has rejected this approach, finding instead that the “court has an obligation to make an independent examination of the whole record” to determine whether speech is protected or whether it “may be lawfully restricted under the First Amendment.” *Shoemaker v. Taylor*, 730 F.3d 778, 788 (9th Cir. 2013).

Certainly, the First Amendment “can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress.” *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). See also *Hustler Magazine, Inc. v. Falwell*, 481 h6(.)6[S(alsre)7.2(2).

based tort claims. He argued the allegations in the Complaint establish that Gersh became a limited purpose public figure by voluntarily injecting herself into the public controversy between Sherry Spencer and the Whitefish community activists who were planning a boycott or protest at her property. Anglin maintained that taking the allegations in the Complaint as true, Gersh voluntarily injected herself into this controversy by joining the Love Lives Here anti-hate group, and contacting Sherry Spencer to suggest that she sell her building, donate the profits, and make a public statement denouncing her son.

But

for a troll storm against Gersh and her family.

Accepting the allegations in the Complaint as true, Gersh has alleged facts upon which it could be found that she was a private individual who was dragged into any public controversy that might be found to exist, and did not voluntarily inject herself into a public controversy simply by accepting a call from Sherry Spencer and having a private conversation with her. The fact that those allegations are disputed by Anglin serves only to illustrate that

sanctuary in their homes, free from unwanted speech, is just as – if not more – vital today, where intrusions via the mail, the telephone and, now, email and the internet are ubiquitous.” *National Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783, 795 (7th Cir. 2006) (Williams, J., concurring). Relying on this expansive view of home and Montana’s traditional and time honored respect for residential privacy, Gersh argues the troll storm messages invaded her privacy interests in an essentially intolerable manner.

According to Anglin, however,

accounts. Anglin takes the position that Gersh was not a captive audience to the

alleged facts upon which he can be held liable under Montana law for the conduct of his readers. Second, he argues that to hold him liable for his readers' speech would violate his First Amendment rights.

Anglin premises his first argument on Montana agency law, which holds that “[a] principal is not responsible for other wrongs committed by the principal’s agent... unless the principal has authorized or ratified the acts, even though they are committed while he agent is engaged in the principal’s service.” Mont. Code Ann. § 28-10-602(2). An actual agent is statutorily defined as a person who is “really employed by the principal.” *Butler v. Domin*, 15 P.3d 1189, 1194 (Mont. 2010). Because the Complaint does not allege that Anglin employed any of his readers, Anglin contends Gersh has not stated a basis for holding him liable as a principal for the actions of his readers.

Gersh does not rely on agency law, however, and instead claims that Anglin may be held liable for his readers' conduct on a “substantial assistance” theory. Under Montana law, an individual defendant can be held liable for the tortious conduct of another individual if the former “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.” *Sloan v. Faque*, 784 P.2d 895, 896 (Mont. 1989) (quoting Restatement (Second) of Torts § 876).

The Complaint is replete with allegations that Anglin encouraged his readers to take action against Gersh, and caused them to inundate her and her family with

her factual allegations and this theory of liability. She alleges that Anglin “gave his followers instruction and encouragement to harass [her] by exhorting them to contact [her] and by repeating false stories about [her] and Jews generally to stoke his followers’ emotions.” (Doc. 1, ¶ 215). Gersh’s invasion of privacy claim further alleges that “Anglin gave his followers substantial assistance in harassing [her] by continually posting stories about, and posting contact information for, [her], her family members, and her colleagues.” (Doc. 1, ¶ 214). Whether the facts as alleged will ultimately provide a basis for holding Anglin liable once the record is fully developed remains to be seen. But for present purposes, Gersh has sufficiently alleged facts in support of a cognizable legal theory by which Anglin could be held liable for the allegedly tortious conduct of his readers.

Turning again to his constitutional defense, Anglin next argues that to

association alone it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.” *Claiborne*, 458 U.S. at 920. Anglin maintains Gersh has not alleged facts showing that he belonged to a group with unlawful goals and that he specifically intended to further those goals, which means the First Amendment protects him from being found liable in tort merely by reason of his association with his readers.

As Gersh makes clear in response, however, she is pursuing a different theory of liability against Anglin. *Claiborne* identified three theories by which an individual may be held liable in tort for the unlawful conduct of others without running afoul of the First Amendment: (1) the individual “authorized, directed, or

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assistance theory recognized under Montana law, and many of the allegations discussed above that support Gersh's state law theory of liability also support her claim that Anglin authorized, directed, or ratified his readers' conduct. For example, the fact that Anglin published the Twitter handle of Gersh's son and wrote that "[y]ou can hit him up, tell them what you think of his whore mother's vicious attack on the community of Whitefish" can be construed in Gersh's favor as evidence that Anglin directed his readers to do just that.

In addition, Gersh has alleged facts supporting her theory that Anglin ratified his readers' conduct in the many articles he published on his website between December 2016 and February 2017. Gersh claims that "since launching the troll storm," Anglin "stoked the fire continuously by publishing new articles on the *Daily Stormer*," most of which "urge[d] his readers to continue their harassment of Ms. Gersh and her family and associates." (Doc. 1, ¶ 27). By way of example, Gersh cites the following excerpt from Anglin's second article: "There's only one place this road ends. Keep Up the Pressure. Keep calling these people. Keep emailing them. Make it known to them that the jig is officially up. We aren't t]TJ -0.00C("

playing this game anymore. The entire list of contact information is in my last post. Go do it.” (Doc. 1, ¶ 128). As further alleged in the Complaint, Anglin published similar statements in subsequent articles, telling his readers: “So please, if you haven’t contacted these people to let them know what you think of their deranged actions, do so” (doc. 1, ¶ 130) and

Amendment grounds, Anglin argues Gersh has otherwise failed to state a claim under Montana law for invasion of privacy, intentional infliction of emotional distress, or violations of the Anti-Intimidation Act.

1. Invasion of Privacy

Count I of the Complaint alleges a common law claim against Anglin for invasion of privacy based on intrusion upon seclusion. Under Montana law, the common law cause of action for invasion of privacy “is defined as a wrongful intrusion into one’s private activities in such a manner as to [cause] outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.” *State Board of Dentistry v. Kandarian*, 886 P.2d 954, 957 (Mont. 1994).

Anglin argues Gersh has not stated a claim for invasion of privacy because the only conduct he stands accused of was republishing publicly available contact information for Gersh and her family. Anglin argues Gersh had no reasonable expectation of privacy in such information, and so she cannot state a claim against him for invading her privacy.

As Gersh points out in response, however, her invasion of privacy claim is not based on the publication of her publicly available contact information. Rather, she alleges invasion of privacy based on Anglin’s conduct in assisting and encouraging his followers to use that information to harass and torment her.

Gersh's invasion of privacy claim alleges that Anglin's conduct "and the conduct of his followers who acted at his urging amounts to a course of hounding" that became a "substantial burden" to her existence. Gersh claims that Anglin "acted in an extreme and outrageous manner by calling for a troll storm" against her, and that his conduct was a substantial factor in bringing about the harm that she experienced. (Doc. 1, ¶¶ 208-217). These allegations are sufficient to state a claim for invasion of privacy based on intrusion upon seclusion under Montana law.

2. Intentional Infliction of Emotional Distress

Count II of the Complaint alleges a claim against Anglin for intentional infliction of emotional distress under Montana common law. Montana recognizes that "[a]n independent cause of action for 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 negligent or intentional act or omission." *Sacco v. High Country Independent Press*, 896 P.2d 411, 429

for him to foresee that the messages he called on his readers to send would have caused her any emotional distress. (Doc. 32, at 36-37).

Anglin's defensive argument notwithstanding, Gersh has alleged sufficient facts to support a finding of foreseeability. As discussed above, Gersh alleges that Anglin assisted, encouraged, and ratified, a vicious campaign of anti-Semitic harassment against her and her family. Regardless of Gersh's views on the propriety of collective action to express political views, she has adequately alleged that her emotional distress was a reasonably foreseeable consequence of Anglin's conduct.

3. Montana's Anti-Intimidation Act

Count III of the Complaint alleges a claim against Anglin under the following provision of the Montana Anti-Intimidation Act:

An individual or organization who is attempting to exercise a legally protected right and who is injured, harassed, or aggrieved by a threat or intimidation has a civil cause of action against the person engaging in the threatening or intimidating behavior.

Mont. Code Ann. § 27-1-503(2).

Gersh alleges she "was attempting to exercise her legally protected rights, including her free speech rights," and was "injured, harassed, and aggrieved by the troll storm Mr. Anglin orchestrated against her." (Doc. 1, ¶¶ 226-27). Gersh asserts that "[m]any of the harassing communications constituted threats or intimidation

Anglin's constitutional arguments raise a threshold procedural issue. At the time of oral argument on April 3, 2018, Anglin had not complied with Federal Rule of Civil Procedure 5.1, which requires a party who raises an argument challenging the constitutionality of a state statute to provide notice to the state attorney general. Fed. R. Civ. P. 5.1(a). By the end of the day on April 3, 2018, Anglin had filed the requisite Notice of Constitutional Question in compliance with Rule 5.1. A party's failure to comply with Rule 5.1 may provide a basis for dismissing a claim challenging the constitutionality of a state statute. See *Skogen v. Kosola* 2017 WL 4516672 *5 (D. Mont. Oct. 10, 2017).

Here, however, Anglin has raised the constitutionality of Montana's Anti-Intimidation statute as a defense to Gersh's claim under the statute. Rule 5.1(d) states that "[a] party's failure to file and serve the notice...does not forfeit a constitutional...defense that is otherwise timely asserted. Anglin did not forfeit his constitutional defense by asserting it prior to having filed and served his Notice on the Montana Attorney General.

Under Rule 5.1(b), the Montana Attorney General has 60 days from the date the Notice was filed to intervene if he chooses to. Because that period has yet to run, and the record is not yet fully developed, it would be premature for the Court to address the constitutionality of Montana's Anti-Intimidation statute on Anglin's

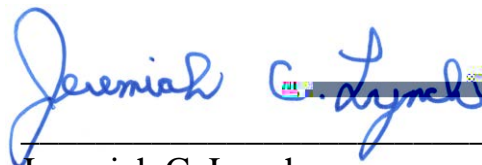
motion to dismiss.

IV. Conclusion

In sum, the Court concludes: (1) it is not clear based on the allegations in the Complaint that Gersh's claims are barred as a matter of law by the First Amendment; (2) Gersh has alleged sufficient facts to support a cognizable legal theory by which Anglin could be held liable for the conduct of his readers; and (3) Gersh has adequately stated claims under Montana law for invasion of privacy, intentional infliction of emotional distress, and violations of the Anti-Intimidation Act.

Accordingly, IT IS RECOMMENDED that Anglin's Motion to Dismiss be DENIED to the extent it seeks dismissal pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

DATED this 3rd day of May, 2018.



Jeremiah C. Lynch
United States Magistrate Judge