

IN THE SUPREME COURT OF THE STATE OF MONTANA

<p>DAVID MCCAULEY, and individual, LEADERS WITHOUT LIMITS, INC. a Wyoming Corporation, and PERKINS FAMILY HOLDINGS, LLC, a Montana Limited Liability Company,</p> <p style="text-align: center;">Appellants,</p> <p style="text-align: center;">vs.</p> <p>CROWLEY FLECK, PLLP, a Montana Professional Limited Liability Partnership, GRANT S. SNELL, an individual, SCOTT D. HAGEL, an individual, CHASE D. GIACOMO, an individual, and DOES 1-10,</p> <p style="text-align: center;">Appellees.</p>	<p style="text-align: center;">No. DA 21-0207</p>
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**APPELLEES’ ANSWER BRIEF**

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On Appeal from the Montana Eleventh Judicial District Court  
Flathead County District Court Cause No. DV 2019-918  
The Honorable Dan Wilson, Presiding

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November 15<sup>th</sup>, 2021

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## STATEMENT OF ISSUE

Did the District Court err in granting summary judgment to Crowley Fleck on David McCauley, Leaders Without Limits, Inc., and Perkins Family Holding, LLC’s (collectively “McCauley”) First Amended Complaint?

## STATEMENT OF CASE

Facing McCauley’s lawsuit to evict them from their long-time home in the middle of winter, an elderly and infirm couple – Joyce and Sam Perkins (“Perkinses”) – turned for help to Scott Hagel, Grant Snell, and Chase Giacomo of Crowley Fleck (collectively “Crowley Fleck”). Crowley Fleck agreed to represent Perkinses *pro bono*, and on short notice, to defend the eviction action and to assert claims on Perkinses’ behalf. McCauley’s appeal seeks to reverse the District Court’s grant of summary judgment to Crowley Fleck which ended McCauley’s effort to prolong the eviction litigation.

Crowley Fleck represented, *pro bono*, Samuel and Joyce Perkins in a now-settled lawsuit – *Perkins Family Holdings, LLC,<sup>1</sup> Plaintiff and Counterclaim Defendant, vs. Samuel and Joyce Perkins, Defendants and Third-Party Plaintiffs, vs. David McCauley and Caspian Enterprises, Inc., Third-Party Defendants*, DV-18-377(A), Montana Eleventh Judicial District, Flathead County.<sup>2</sup>

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<sup>1</sup> McCauley coopted Perkinses’ name to create an entity in which Perkinses never had any ownership or involvement, as more fully explained in the Statement of Facts, below, at page 9.

<sup>2</sup> On Crowley Fleck’s Motion For Judicial Notice, the District Court took judicial notice of the entire record in the underlying case. Dkt. 15.

Integral to settlement of the underlying action, Perkins Family Holdings, LLC, David McCauley, and Caspian Enterprises, Inc., released claims that they represented were worth more than of \$231,400 plus “a significant amount” and, in addition to releasing claims, paid \$13,000 to Perkinses. In exchange, Perkinses released their defenses and compromised and released their affirmative claims. The underlying Plaintiffs reserved claims against Crowley Fleck.

This action is McCauley’s assertion of claims he contends were reserved in the underlying action.<sup>3</sup> McCauley’s First Amended Complaint against Crowley Fleck included the following claims: Count 1-Defamation; Count 2-Tortious Interference; Count 3-Abuse of Process; Count 4-Malicious Prosecution; Count 5-Intentional Infliction of Emotional Distress; and Count 6-Negligent Infliction of Emotional Distress.

Facing Crowley Fleck’s Motion For Summary Judgment, McCauley abandoned the claims for defamation (Count 1), abuse of process (Count 3), and negligent infliction of emotional distress (Count 6). Dkt. 21, p. 2. Based on McCauley’s abandonment of these claims, the District Court entered summary judgment on Counts 1, 3, and 6 of the First Amended Complaint. Dkt. 47, page 11 of 33. These abandoned claims are not part of this appeal.

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<sup>3</sup> Crowley Fleck argued that claims McCauley alleged in this First Amended Complaint were not reserved and were barred. See, Dkt. 14.2. The District Court did not reach these issues in its Order On Defendants’ Motion For Summary Judgment. Dkt. 47 at 32 of 33.

The District Court's Order on Defendants' Motion For Summary Judgment ("Order," Dkt. 47) granted Crowley Fleck summary judgment on "all of the Plaintiffs' claims in the First Amended Complaint," which included the abandoned claims. Dkt. 47 at page 33 of 33. The District Court's Order is correct.

Appellants' Principal Brief ("Appellants' Brief") argues the District Court erred in granting Crowley Fleck summary judgment on Count 4-malicious prosecution and Count 5-intentional infliction of emotional distress. Appellants' Brief does not include any argument concerning the claim for tortious interference (Count 2). McCauley's failure to address the tortious interference claim results in waiver of appeal concerning this claim. See, *State v. Makarchuk*, 2009 MT 82, ¶19, 349 Mont. 507, 204 P.3d 1213 (The Court "will not address the merits of an issue presented for the first time in a reply brief on appeal.")(quoting *Pengra v. State*, 2000 MT 291, ¶13, 302 Mont. 276, 14 P.3d 499). Accordingly, Crowley Fleck will not address McCauley's tortious interference claim (Count 2).

Setting aside Appellants' abandoned and waived claims, the only claims subject to this appeal are (1) Count 4-malicious prosecution and (2) Count 5-intentional infliction of emotional distress.

## **STATEMENT OF FACTS**

### **I. The Perkinses And Their Home.**

At the time of the events which culminated in efforts to evict Perkinses from

their home, Samuel Perkins was in his mid-80s and required a special reading machine to enable him to read documents. **CF Appendix 6-7 and 12**<sup>4</sup>, Transcript of Deposition of Samuel Perkins, pp. 24:6-25, 25:1-4, 40:13-22, 160:13-15. Joyce Perkins was also in her mid-80s.

Perkinses purchased their home at 260 McMannamy Draw, Kalispell, MT 59901 (hereinafter the “Home”) in 1998. **CF Appendix 10**, p. 70:4-6. In 2012-2013, the Perkinses obtained a reverse mortgage on their Home from One Reverse Mortgage (hereinafter the “Reverse Mortgage”). **CF Appendix 24**, ¶7. One Reverse Mortgage obtained an appraisal valuing the Home at \$500,000.00. **CF Appendix 266**, ¶11.

The Reverse Mortgage allowed the Perkinses to live in their Home until their deaths or until they decided to move, without making any mortgage payments, subject only to their paying taxes and insurance on the property. *Id.*

The Reverse Mortgage contained a “due on sale” provision that allowed the lender to declare the entire sum of the loan due and payable immediately if the Home were sold or transferred to another. **CF Appendix 30**, ¶35; **CF Appendix 11**; **CF Appendix 73-78**; and **CF Appendix 101** at lines 15-18. The Reverse Mortgage also required the Perkinses to inform the lender if and when any such sale or transfer

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<sup>4</sup> References to the Appellees’ Appendix are to a consecutively numbered collection of documents from the District Court record referred to as CF Appendix.

occurred. *Id.*

## II. Perkines' Journey From Home Ownership For Life to Mid-Winter Eviction.

### A. McCauley's Promises.

In 2014 David McCauley sent a mass-mailing to approximately 2,000 landowners in the Kalispell area. **CF Appendix 60-64.** In the mass-mailed letter, McCauley solicited offers to sell from the landowners, as he was allegedly seeking to buy properties. *Id.*

The Perkines contacted McCauley in response to the mass-mailed letter, met with him, and were provided a hand-delivered Letter of Intent to Purchase their Home. **CF Appendix 183-191** and **CF Appendix 25.** Perkines understood from their conversations with McCauley, including multiple in-person meetings, that if they agreed to sell their Home to him, title to their Home would not actually transfer to him until (a) three or more years passed, (b) the entire reverse mortgage was paid off, and (c) he paid them some amount of money for the purchase of their Home. *Id.* Based on these understandings, Perkines consummated a transaction with McCauley.

The Perkines executed the documents McCauley put in front of them without reading them, in trust and reliance on McCauley's representations of their meaning and effect. **CF Appendix 8-9.**

**B. Broken Promises.**

The transaction involved a series of documents, including but not limited to a Buy-Sell Agreement (CF Appendix 192-200); five separate addenda to the Buy-Sell Agreement (CF Appendix 201-223); a rent-back agreement contemplated by the Buy-Sell Agreement and addenda (CF Appendix 224-231); and a three-part promissory note and deed of trust (CF Appendix 232-243). McCauley prepared all of these documents himself. CF Appendix 65-67, 70, 72.

McCauley also drafted powers of attorney and had the Perkinses sign them. The powers of attorney authorized McCauley to act in the Perkinses' stead entirely with respect to any matter involving the Home. CF Appendix 244-247. The signed powers of attorney would allow McCauley nearly unfettered ability to act in his own self-interest and to the detriment of Perkinses. By way of example only, he could unilaterally cancel any of his monetary obligations to Perkinses at any time. *Id.*

The McCauley-drafted transaction documents, on close examination, and to the extent they made sense, violated Perkinses' understanding of the deal and McCauley's pre-transaction representations. Based on the transaction documents, the Perkinses were agreeing to sell their home to Mr. McCauley, for a "sale price" of \$400,000. CF Appendix 192. This "\$400,000" was to be paid as follows:

i. \$12,000 payment due to Perkinses at closing. *Id.* The agreements required, however, that the Perkinses pay costs at closing, including their first year's rent

under the rent-back agreement. These amounts were deducted from the \$12,000 “payment.” The settlement statement shows the Perkinses receiving only \$5,095.07 at closing. **CF Appendix 248.**

ii. \$74,255.24 payment due January 20, 2025, approximately 10 years after the initial closing, when the Perkinses would be 91 (Sam) and 95 (Joyce), should they live that long. **CF Appendix 233.**

iii. \$313,744.76 payment due January 20, 2025, plus monthly payments of \$1,368.22 (the amount of monthly accrued interest on the Reverse Mortgage) beginning February 20, 2018, all paid to One Reverse Mortgage. **CF Appendix 232-233.**

Further, in violation of the Perkinses most foundational understanding of the agreement, ownership of their Home would pass to McCauley upon closing in January 2015, not years later when all the payments to Perkinses had been made. *See generally* **CF Appendix 192-223.**

Provided One Reverse Mortgage did not discover it, McCauley’s transaction with the Perkinses effectively gave McCauley control over the Home for a due-at-closing cost of, at most, \$5,095 plus annual taxes and insurance, despite the nominal purchase price of \$400,000. **CF Appendix 192-223, 232-243.** Over the first three years, the Perkinses’ rent to McCauley would effectively pay the insurance and taxes. **CF Appendix 68.**

Per the Rental Agreement, the Perkinses were ostensibly required to “occupy the Premises for a minimum of “**THIRTY SIX MONTHS** or longer...” (emphasis in original), and to pay rent of \$425 per month. **CF Appendix 224**. After the first three years (January 2015 through January 2018), McCauley purportedly had the right to evict the Perkinses and/or increase the rent dramatically. **CF Appendix 224-230**. After the initial 36 months, McCauley increased the rent to \$1,425.00 per month, nearly quadrupling it. When Perkinses did not pay the increased rent, McCauley sought to evict them.

**C. McCauley’s Efforts To Hide The Truth.**

In violation of the Perkinses’ agreement with One Reverse Mortgage, the transaction documents required Perkinses and McCauley to agree not to inform One Reverse Mortgage about their transaction. **CF Appendix 203, ¶11**. In furtherance of the effort to deceive One Reverse Mortgage, though McCauley would own the property beginning in January 2015, insurance on the property was to remain in the Perkinses’ name. *Id.*, ¶10.

McCauley created a Montana LLC – Perkins Family Holdings, a Plaintiff in the underlying case and here – to hold title to the Perkinses’ Home. The sole member of Perkins Family Holdings, LLC is Caspian Enterprises, Inc., a Wyoming corporation. **CF Appendix 59**. The sole shareholder of Caspian Enterprises, Inc. is Lariat Cattle Company, Inc., a Nevada corporation. *Id.* The sole shareholder of

Lariat Cattle Company, Inc. is Mr. McCauley. *Id.* In addition, the president and incorporator of Leaders Without Limits, Inc., a Wyoming corporation, is McCauley. *Id.*

Despite the name, the Perkinses have never had any legal interest in Perkins Family Holdings LLC. **CF Appendix 27, ¶15.** McCauley included “Perkins Family” in the name of the entity in part because he was aware of the due-on-sale clause in the Perkinses’ Reverse Mortgage. **CF Appendix 76-78.**

Naming the entity “Perkins Family Holdings,” and the mandate that neither McCauley nor the Perkinses would inform One Reverse Mortgage of the transaction, were intended to prevent One Reverse Mortgage from learning of the sale and exercising its contractual right to accelerate its priority mortgage on the Home. **CF Appendix 76-80.**

**D. McCauley Benefits From Broken Promises.**

McCauley’s own experts in the underlying case stated the property was worth between \$450,000 and \$475,000, with a fair monthly rental value of between \$2,800 and \$3,000. **CF Appendix 249-258.**

For at most \$5,095 in 2015, plus annual taxes and insurance (covered for the first three years by Perkinses’ rent payments), McCauley was able to complete the purchase of the property at substantially below market value, with the primary payments not due for approximately 10 years. **CF Appendix 192-243.**

Alternatively, Mr. McCauley obtained the ability to rent the property to others for approximately \$30,000 per year before paying the vast majority of the purchase price, unless and until One Reverse Mortgage discovered title to the property had transferred to him and accelerated its priority loan. *Id.*

After closing, the Perkinses continued to live in the property. They paid to Mr. McCauley \$425 per month. This continued until February, 2018. **CF Appendix 69** at lines 6-12.

On February 16, 2018, Reverse Mortgage Solutions, Inc., sent a Home Equity Conversion Mortgage Due and Payable Notice to Perkins Family Holdings, LLC. **CF Appendix 30, ¶35; CF Appendix 13-14; and CF Appendix 73-78.** The notice stated Reverse Mortgage Solutions had discovered that title to the Home had been transferred to Perkins Family Holdings, LLC, and that the “due on sale” clause had been triggered. *Id.*

On February 28, 2018, McCauley used Perkins Family Holdings, LLC to send a Thirty-Day Notice to Terminate Tenancy to the real Perkins family. **CF Appendix 259.** On March 7, 2018, Perkins Family Holdings, LLC served Perkinses with a Three-Day Notice to Pay Rent. **CF Appendix 260.**

By Complaint dated March 12, 2018, Perkins Family Holdings, LLC filed suit in Justice Court for Flathead County, Montana, seeking eviction of the Perkinses from their Home and an award of damages, costs, and fees. **CF Appendix 261-263.**

**E. Crowley Fleck's Representation of Perkins, For No Fee.**

On March 8, 2018, while Perkins were facing eviction from their Home and imminent deadlines to act, Crowley Fleck agreed to represent the Perkins *pro bono*. **CF Appendix 276, ¶34.**

On Perkins' behalf Crowley Fleck filed an Answer, with Counterclaims and Third-Party Complaint, to the eviction complaint. **CF Appendix 277-301.** Among other actions, Crowley Fleck reviewed the transaction documents, met with and interviewed the Perkins and others, and extensively researched the possible counterclaims and third-party claims prior to filing them. **CF Appendix 50, ¶¶16-17; CF Appendix 264-276.**

On April 2, 2018, Crowley Fleck filed a First Amended Verified Answer, with Counterclaims and Third-Party Complaint, on behalf of the Perkins. **CF Appendix 18-45.** The underlying case was removed to District Court on the Perkins' motion, over McCauley's objection. **CF Appendix 302-303; see also DV-18-377A, Doc. 1.**

**F. The District Court In The Underlying Action Determined Perkins and Crowley Fleck Pursued Perkins' Claims By Permissible Means.**

The underlying action was actively and extensively litigated. The validity of Perkins' claims and litigation activity was subject to motions and District Court rulings. Among these, McCauley moved for sanctions under Rule 11, M.R.Civ.P.

DV-18-377A, Doc. 26. The District Court, Judge Eddy presiding, denied McCauley's motion. DV-18-377A, Doc. 35.

On June 22, 2018, Perkins Family Holdings, LLC, moved to dismiss on the basis that it failed to state a claim, Perkinses' claim seeking rescission of the Home transaction. DV-18-377A, Doc. 19. Perkinses, through Crowley Fleck, opposed this motion. DV-18-377A, Doc. 23. Judge Eddy converted the motion to a motion for summary judgment, denied it, and specifically found the rescission claim did state a claim upon which relief may be granted. DV-18-377A, Doc. 53.

On September 21, 2018, McCauley moved for summary judgment on Counts II, III, IV, V, VI, VII, IX, and X of the Perkinses' Counterclaim and Third-Party Complaint on the basis the statute of limitations barred those claims. They moved for summary judgment on Count X (Violation of the Montana Mortgage Act) on the additional basis that that Act does not create a private right of action. DV-18-377A, Doc. 37. Perkinses, through Crowley Fleck, opposed this motion. DV-18-377A, Doc. 44. Judge Eddy denied the motion as to the statute of limitations argument. DV-18-377A, Doc. 59. Judge Eddy granted the motion as to the nonexistence of an implied private right of action under the Montana Mortgage Act, but specifically found that the relevant statutory provision, M.C.A. §32-9-123(4)(a) was "ambiguous." *Id.*, p. 5.

On October 5, 2018, McCauley moved for judgment on the pleadings on the

Perkineses' Count XI (Piercing the Corporate Veil), on the grounds it failed to state a claim upon which relief can be granted. DV-18-377A, Doc. 43. The Perkineses, through Crowley Fleck, opposed this motion. DV-18-377A, Doc. 46. Judge Eddy denied McCauley's motion and found the claim did state a claim upon which relief could be granted. DV-18-377A, Doc. 61.

On October 24, 2018, the Perkineses moved to compel responses to discovery requests. DV-18-377A, Doc. 47. McCauley opposed the Perkineses' motion. DV-18-377A, Doc. 51. Judge Eddy granted the Perkineses' motion. DV-18-377A, Doc. 62.<sup>5</sup>

**G. The Underlying Action Was Compromised And Settled.**

On May 16, 2019, after a settlement conference, a full and final settlement was reached among the parties with the underlying Plaintiff parties and the Perkineses settling their respective claims against each other. **CF Appendix 304-307**, Stipulation and Settlement Agreement; **CF Appendix 308-312**, Mutual General Release. The underlying Plaintiff parties, with David McCauley signing for all of them, released all claims against the Perkineses, and Perkineses released their defenses and affirmative claims, including third-party claims. *Id.*

Perkins Family Holdings, LLC originally asserted claims for possession of the

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<sup>5</sup> Judge Eddy resolved the substantive discovery disputes in Perkineses' favor. She rejected all McCauley's objections except for limiting the number of interrogatories to fifty.

Home, money damages, and costs and attorney fees, while denying the Perkinses were entitled to any relief. *See generally* **CF Appendix 261-263**; DV-18-377A, Doc. 20. The following table summarizes the relief to which the underlying Plaintiffs asserted entitlement in the underlying case; how each assertion was resolved in settlement; and, accepting *arguendo* their allegations as true, the total alleged net damages underlying Plaintiffs released to the Perkinses:

<b>Plaintiffs' Claim</b>	<b>Settlement Resolution</b>	<b>Total Alleged Damages Released to Perkinses</b>
Plaintiffs asserted they were entitled to possession of the property (CV-18-0385, Complaint, p. 2), immediately ( <i>See, generally</i> , DV-18-377A, Doc. 17).	Perkinses vacated the property and ceased contesting possession. <b>CF Appendix 304-312.</b>	Plaintiffs received possession after roughly a 15-month delay. Doc. 10, ¶22.
Plaintiffs asserted they were entitled to \$1,425 past due rent, plus \$1,425 per month until they obtained possession. CV-18-0385, Doc. 2, Complaint, p. 3.	Plaintiffs received nothing. <b>CF Appendix 304-312.</b>	Plaintiffs surrendered a claim allegedly worth about (\$1,425 overdue, plus \$1,425 per month for 15 months, equals) \$22,800.  Total alleged net damages released: \$22,800
Plaintiffs asserted they were entitled to damages equal to treble rent due and owing. CV-18-0385, Doc. 2, p. 3.	Plaintiffs received nothing. <b>CF Appendix 304-312.</b>	Plaintiffs surrendered a claim allegedly worth about \$45,600, in addition to base rent.  Total alleged net damages released: (\$22,800 times 3 equals) \$68,400.
Plaintiffs asserted they were entitled to payment for damage to the property. CV-18-0385, Doc. 2, p.3.	Plaintiffs received nothing. <b>CF Appendix 304-312.</b>	Plaintiff surrendered a claim allegedly worth a “significant” amount. Doc. 10, ¶23.  Total alleged net damages released: \$68,400 plus a

		“significant” amount
Plaintiffs asserted they were entitled to attorney’s fees and costs. CV-18-0385, Doc. 2, p.3.	Plaintiffs received nothing. <b>CF Appendix 304-312.</b> The parties agreed in settlement: (“Each party shall be responsible for his/her/its own attorney fees and costs incurred in this matter.”).	Plaintiffs surrendered a claim allegedly worth “in excess of” \$150,000. Doc. 10, ¶21.  Total alleged net damages released: “In excess of” \$218,400 plus a “significant” amount.
Plaintiffs asserted they owed the Perkinses nothing at the present. DV-18-377A, Doc. 20, ¶5.	Plaintiffs paid the Perkinses \$13,000 at the present. Doc. 21, p.6.	Plaintiffs paid the Perkinses money to which they asserted the Perkinses had no right. DV-18-377A, Doc. 20, ¶5; Doc. 21, p.6.  Total alleged net damages released: “In excess of” \$231,400 plus a “significant” amount.
Plaintiffs assert they would have paid the Perkinses the amount stated in the Promissory Note. <i>See</i> , <b>CF Appendix 213-223</b> ; Doc. 21, p.6.	Perkinses released the debt, which they calculate was then worth about \$84,000, with payment not otherwise due for roughly 6 years. <b>CF Appendix 304-307</b> ; Doc. 21, p. 6.	Plaintiffs obtained release of about \$84,000 of debt they allege they would have paid. Doc. 21, p.6.; <b>CF Appendix 213-223 and 304-307.</b>  Total alleged net damages released: “In excess of” \$147,400 plus a “significant” amount.

A joint stipulation to dismiss the entire action, including all claims, counterclaims, and third-party claims, with prejudice, was an essential term of the settlement. **CF Appendix 308-312, ¶6.** In accordance with this agreement, the parties signed a stipulation for dismissal, all parties agreeing to dismissal of the action with prejudice. **CF Appendix 313-316.** In accordance with the parties’ stipulation, the District Court entered an Order of Dismissal With Prejudice. **CF Appendix 317-319.**

On September 20, 2019, and February 19, 2020, McCauley filed, respectively, the original and First Amended Complaint in this action. Out of the six separate claims alleged in the First Amended Complaint, McCauley's only claims subject to this appeal are malicious prosecution (Count 4) and intentional infliction of emotional distress (Count 5).

### **STANDARD OF REVIEW**

This Court reviews a district court's grant or denial of a summary judgment motion de novo. *Crane Creek Ranch, Inc. v. Cresap*, 2004 MT 351, ¶8, 324 Mont. 366, 103 P.3d 535. A district court's legal conclusions are reviewed for correctness. *Id.*

Because Appellants contend the District Court mis-applied the standards for summary judgment, applicable summary judgment standards are briefly outlined.

Only genuine issues of material fact preclude summary judgment:

A “**material**” fact is a fact that “involve[s] the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact.” *Mt. W. Bank, N.A. v. Mine & Mill Hydraulics, Inc.*, 2003 MT 35, ¶ 28, 314 Mont. 248, ¶ 28, 64 P.3d 1048, ¶ 28 (citing *State Med. Oxygen v. American Med. Oxygen* (1994), 267 Mont. 340, 344, 883 P.2d 1241, 1243).

*Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, ¶¶ 14-15, 323 Mont. 295, 100 P.3d 137 (emphasis added).

“Important in the determination [of material fact disputes] is whether the material facts are actually disputed by the parties or whether the parties simply

interpret the facts differently.” *Sprunk v. First Bank System*, (1992) 252 Mont. 463, 466, 830 P.2d 103, 105. “[M]ere disagreement about the interpretation of a fact or facts does not amount to genuine issues of material fact.” *Id.* Mischaracterization of facts and selective quotation of testimony does not establish genuine issues of material fact. *Id.*, 252 Mont. at 467, 830 P.2d at 106.

Equivocal and non-specific evidence is insufficient to meet the opposing party’s burden of presenting material and substantial evidence to defeat summary judgment. *Young v. Hammer, Hewitt, Jacobs & Floch, PLLC*, 2021 MT 180, ¶¶ 24, 28, 405 Mont. 65, 491 P.3d 725, citing, *Sullivan v. Continental Const. of Montana, LLC*, 2013 MT 106, ¶14, 370 Mont. 8, 299 P.3d 832.

### **SUMMARY OF ARGUMENT**

McCauley’s and Perkinses’ compromise settlement, with the integral negotiated dismissal of the underlying action, cannot satisfy the favorable termination element of McCauley’s malicious prosecution claim. Public and legal policies favoring settlement and finality of litigation foreclose McCauley’s argument that compromise settlements and negotiated dismissals should be parsed and weighed in litigation-extending malicious prosecution claims to determine which party “won” the settlement.

McCauley’s reliance on a non-existent “presumption” that all lawsuit terminations favor the party dismissed should fail. This Court has never employed

McCauley's argued-for "presumption." It has instead, under circumstances not present here, employed a "reasonable inference" that certain lawsuit terminations favor malicious prosecution plaintiffs.

The "reasonable inference" that select lawsuit terminations favor the dismissed party arises only when no consideration is given for the dismissal. On the undisputed record here, McCauley paid money, released affirmative claims, and agreed to dismissal of all claims as essential elements of a negotiated settlement. The "reasonable inference" of favorable termination cannot arise. Instead, no reasonable juror could find for McCauley on the favorable termination element of his malicious prosecution claim.

The District Court correctly concluded that the favorable termination element of McCauley's malicious prosecution claim failed as a matter of law. For this independently sufficient reason, the District Court's Order (Dkt. 47) should be affirmed.

McCauley's only argument to overturn the District Court's determination that Crowley Fleck had probable cause to initiate and pursue Perkins' claims is based on his interpretation of Perkins' deposition testimony. The District Court rejected McCauley's self-serving focus on purported testimonial conflicts related to verification of Perkins' Complaint and instead correctly evaluated whether probable cause existed on the undisputed record under the totality of the

circumstances. Applying the controlling totality of the circumstances standard, the District Court specifically identified the undisputed facts supporting probable cause and correctly concluded no reasonable juror could find an absence of probable cause. Dkt. 47 at 28.

Contrary to McCauley's accusations that the District Court weighed evidence and found facts when evaluating the probable cause issue, the District Court's thorough and painstaking examination of the record revealed no genuine issues of material fact. Dkt. 47 at 19-28. McCauley's reliance on his factual characterizations and out-of-context quotations did not provide material and substantial evidence. The District Court's ruling that McCauley's malicious prosecution claim fails because Crowley Fleck had probable cause to bring and pursue Perkinses' claims should be affirmed.

McCauley's argument to save his intentional infliction of emotional distress ("IIED") claim—that a jury should determine whether Crowley Fleck pursued Perkinses' claims in a "permissible way"—is waived because it was not raised or decided in the District Court. Further, McCauley's IIED claim fails because the District Court's determinations that the underlying action did not terminate favorably for McCauley and that Crowley Fleck had probable cause for its initiation and pursuit of Perkinses' claims defeats the essential requirement that McCauley's emotional distress be the result of an actionable wrong. Finally, on the undisputed

record, Crowley Fleck initiated and pursued Perkinses' claims in permissible ways.

The District Court's Order (Dkt. 47) should be affirmed.

## ARGUMENT

### **I. McCauley's Malicious Prosecution Claim Fails Because He Failed To Establish Genuine Issues of Material Fact On The Favorable Termination Element Of This Claim.**

#### **A. Malicious Prosecution Is A Disfavored Claim And The Favorable Termination Element Should Be Enforced To Preserve and Promote Important Social and Legal Policies.**

Because malicious prosecution claims run counter to important legal and social policies, they are “not favored by the law and the burden on the plaintiff is heavy.” *Reece v. Pierce Flooring*, (1981) 194 Mont. 91, 100, 634 P.2d 640, 645-646. See, also, *Orser v. State*, (1978) 178 Mont. 126, 135, 582 P.2d 1227, 1232; *Corpus Juris Secundum*, Malicious Prosecution or Wrongful Litigation, §95, (“...malicious prosecution actions are disfavored in the law. The basis for this disfavor stems from an individual's right to seek redress or to enforce rights through the legal process free from fear that an adverse judgment will result in one's liability for civil damages...”). The “heavy burden” to which this Court referred in *Reece* certainly includes plaintiff's burden to prove each required element of malicious prosecution by *prima facie* evidence. See, *Hughes v. Lynch*, 2007 MT 177, ¶12, 338 Mont. 214, 164 P.3d 913. If the plaintiff cannot prove each of the required elements by *prima facie* evidence, “judgment as a matter of law may be entered for the

defendant.” *White v. State ex rel. Montana State Fund*, 2013 MT 187, ¶32, 371 Mont.1, 305 P.3d 795, (citing *Plouffe v. Montana Dept of Public Health and Human Services*, 2002 MT 64, 309 Mont. 184, 45 P.3d 10, at ¶16).

The “heavy burden” should also include interpretation and application of the law consistent with Montana’s public and legal policies. Foremost among the public policies running counter to malicious prosecution claims is Montana law’s strong preference for settlement, especially the finality of settlement, instead of prolonged litigation. *See, e.g., Augustine v. Simonson*, (1997) 283 Mont. 259, 266, 940 P.2d 116, 120 (It is “the declared public policy of this State to encourage settlement and avoid unnecessary litigation”)(citing *Holmberg v. Strong*, (1995) 272 Mont. 101, 899 P.2d 1097, 1100); *see also Reisbeck v. Farmers Insurance Exchange*, 2020 MT 171, ¶21, 400 Mont. 345, 467 P.3d 557 (Same); *Kruzich v. Old Republic Ins. Co.*, 2008 MT 205, 344 Mont. 126, 188 P.3d 983 (Same); *Miller v. State Farm Mut. Auto. Ins. Co.*, 2007 MT 85, 337 Mont. 67, 155 P.3d 1278 (Same).

A malicious prosecution claim is, by definition, collateral litigation concerning a previously resolved matter; the elements a claimant must prove include (1) a prior judicial proceeding (2) which terminated favorably for the malicious prosecution plaintiff. *See, Hughes v. Lynch* at ¶12. Because they prolong litigation of previously terminated matters, malicious prosecution claims must be proven, and correct burdens of proof must be employed.

McCauley’s arguments seek to reformulate malicious prosecution claims and elevate such claims from disfavored to most favored in two ways. First, McCauley’s formulation of the favorable termination element of malicious prosecution is premised on a non-existent legal “presumption” that all dismissals of underlying litigation favor the party against whom the dismissed claims were asserted. Unspoken in McCauley’s reformulation of the favorable termination element is an inversion of the burden of proving favorable termination. In McCauley’s formulation, the malicious prosecution plaintiff’s burden of proof is shifted to the malicious prosecution defendant. As we explain, McCauley’s reformulation is contrary to this Court’s controlling authorities, none of which either created the “presumption” upon which he relies or suggest the burdens of proving favorable termination should be inverted.

Second, applying McCauley’s reformulation of the favorable termination element would erode the certainty and finality of settlements. Parties would be well advised to choose the risk of an adjudicated resolution over a settlement that could lead to yet another round of expensive litigation in a subsequent malicious prosecution action to determine who “won” the settlement. The better approach would reaffirm this Court’s holdings that a compromise settlement cannot satisfy the favorable termination element of malicious prosecution, thereby promoting settlements and finality in litigation.

**B. McCauley Reformulates The Favorable Termination Element, Contrary to Montana Law.**

Overreading language in *Plouffe*, 2002 MT 64, ¶ 34<sup>6</sup>, McCauley contends Montana law contains and employs a “presumption.” McCauley’s version of this “presumption” holds that any dismissal of affirmative claims against a party are favorable to that party and the favorable termination element of malicious prosecution is thereby satisfied, unless the malicious prosecution defendant produces “persuasive evidence of ‘the converse.’” Appellants’ Brief at 22. McCauley then builds on this incorrect premise by further inverting Montana law with the remarkable and confusing statement: “If the evidence to the converse suggests a reasonable juror could conclude that the voluntary dismissal of an underlying action does not reflect unfavorably on its merits, the question is not properly one to be determined on summary judgment but should be submitted to the jury for ultimate resolution.” *Id.* Removing any doubt of McCauley’s reformulation of the favorable termination element, and his inversion of the burden of proof, he states: “Ultimately, Crowley Fleck bears the burden of coming forward with ‘converse’ evidence to overcome the ‘presumption’ that ‘voluntary dismissal’ of the Third-Party Complaint ‘reflected favorably’ on McCauley.” Appellants’ Brief 31.

Summarized, McCauley’s incorrect reasoning goes like this: Because there

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<sup>6</sup> Appellants also rely on decisions from Arizona. As the District explained (Doc. 47 at 16) the Arizona cases fail to support Appellants’ argument.

is a “presumption” that lawsuit terminations are favorable to the party against whom claims were asserted in the underlying litigation, and because the “presumption” places the burden of proof on the party who pursued the affirmative claims to prove the termination was “unfavorable,” a jury must resolve the favorable termination issue. McCauley’s reformulation of the favorable termination element underlies all McCauley’s arguments on this element of his claim.

McCauley’s reformulation of the favorable termination element is incorrect in three important respects: First, it invokes a nonexistent “presumption.” Second, it employs the nonexistent “presumption” to invert the burden of proof—shifting to the malicious prosecution defendant the obligation to “dis-prove” favorable termination. And third, it requires negotiated compromise settlements to be parsed and weighed in every case to determine who “won” the settlement.

**C. McCauley’s version of the “presumption” does not exist, and this Court’s employment of a “reasonable inference” does not apply on this record.**

The “presumption” McCauley purports to extract from *Plouffe* does not exist in the form he articulates. McCauley’s version of the “presumption” both inverts the burdens of proof and effectively renders every termination by settlement a jury question on the favorable termination element. Properly understood, the “presumption” mentioned in *Plouffe*, is, at most, a recognition of the “natural assumption that one does not simply abandon a meritorious action once instituted.”

*Plouffe* ¶¶ 34-35. This “presumption” is the articulation of what the *Plouffe* Court understood to be a commonsense inference, and nothing more.

In *Seipel v. Olympic Coast Investments*, 2008 MT 237, ¶14, 344 Mont. 415, 188 P.3d 1027, this Court did not interpret *Plouffe* to establish a “presumption” as McCauley contends, but instead described its analysis in *Plouffe* as follows: “On appeal [in *Plouffe*], we stated the voluntary dismissal of the underlying action could lead to a reasonable inference that the plaintiff in that case had achieved its goals outside the lawsuit; alternatively, it also could lead to a reasonable inference that the plaintiff simply abandoned the action as meritless.” *Id.* Confirming the *Seipel* Court’s interpretation of the “presumption” language in *Plouffe*, no other post-*Plouffe* case from this Court employs the “presumption” language as McCauley contends. Correctly applying this Court’s decisions, at most, McCauley’s argued-for “presumption” is, in appropriate cases not including this one, a “reasonable inference.” *Seipel*, ¶14.

More to the point on the record here, the “reasonable inference” discussed in *Seipel* cannot arise from a termination of litigation if there is *any evidence* the underlying action involved a compromise settlement between the parties. See, *Plouffe*, ¶ 34. This Court in *Plouffe* cited to *O’Fallon v. Farmers Ins. Exchange*, (1993) 260 Mont. 233, 241, 859 P.2d 1008, 1013, and included this parenthetical: (favorable termination is issue for jury when action dismissed **without evidence of**

**settlement by defendant).**” *Id.* (emphasis added.), see, also, *Vehrs v. Piquette*, (1984) 210 Mont. 386, 392, 684 P.2d 476, 479 (compromise settlements lead to indecisive lawsuit terminations that cannot be favorable terminations). The correct rule is: Any evidence of compromise settlement prevents an “inference” of favorable termination because a stipulation for dismissal that arises from a compromise settlement is not “favorable” to either party; it is, instead, the final jointly-agreed-upon procedural step ending the parties’ compromised and settled litigation.

Further, the factual circumstances in *Plouffe* reveal that this Court’s decision does not support McCauley’s expansively imagined “presumption.” In *Plouffe* there was no “evidence of settlement by the defendant” in that case: “[T]he State filed a motion for voluntary dismissal of the First Amended Complaint. Plouffe objected on the grounds that he wanted to disprove the allegations in Court. The District Court dismissed the State’s action without prejudice on September 17, 1997.” *Plouffe* ¶ 9.

Even if *Plouffe* supported McCauley’s “presumption” argument, which it does not, the “presumption” would not apply because the facts here are opposite those in *Plouffe*. McCauley and Perkinses agreed to a multifaceted settlement agreement which resolved McCauley’s affirmative claims and defenses, Perkinses’ affirmative claims and defenses, and related issues concerning the real property, including issues

concerning title and occupancy of the Home. An integral element of the parties' negotiated settlement agreement required a stipulation to dismiss all parties' claims, crossclaims, and third-party complaints. **CF Appendix 308-312**. In accordance with the parties' Stipulation (**CF Appendix 313-316**), the District Court entered its Order dismissing all the parties' claims with prejudice. **CF Appendix 317-319**.

On the undisputed facts, there can be no "inference" that the resolution of the underlying action was favorable to McCauley. This necessary premise of McCauley's argument fails.

**D. Even if McCauley's version of the "presumption" existed, it does not invert the burdens of proof.**

The importance to McCauley of his "presumption" is that it provides the predicate, in the context of his erroneous analysis, to invert the burden of proof on the favorable termination element of malicious prosecution. Longstanding Montana law forbids McCauley's effort.

For more than one hundred years, this Court's decisions uniformly confirm McCauley is wrong. See, e.g., *Plouffe* ¶ 16. In *Plouffe* this Court traced back to 1914 both the elements of malicious prosecution and a plaintiff's burden to prove each and every element. *Id.*; see, also, *Hughes v. Lynch*, 2007 MT 177, ¶12. Never has this Court held that its recognition of the "natural assumption that one does not simply abandon a meritorious action once instituted," *Plouffe* ¶¶ 34-35, inverts the burdens of proof and relieves a malicious prosecution plaintiff of the burden to prove

each and every element of his claim. McCauley's inversion of the burden of proof, while essential to his analysis, has no support; this necessary element of McCauley's analysis fails.

Without support for his analysis, McCauley next incompletely addresses the undisputed record and mistakenly concludes the District Court erred when it did not surrender the favorable termination element to a jury. We explain below why McCauley's incomplete analysis of the factual record through the prism of his incorrect legal analysis leads him to the wrong conclusion.

**E. The District Court Correctly Concluded The Underlying Action Did Not Terminate Favorably For McCauley.**

**1. McCauley misreads and misapplies this Court's decisions.**

McCauley contends that because the parties dispute the relative value of the claims abandoned and consideration given by each party in the underlying case to reach the parties' compromise settlement, the District Court erred in granting summary judgment. Neither the controlling law nor the factual record support McCauley's conclusion. Because McCauley compromised all McCauley's claims in settlement, and paid settlement money to Perkinses, McCauley cannot prove the underlying action terminated favorably.

McCauley's contention that a compromise settlement can be parsed and weighed to determine whether the settlement resulted in a "favorable termination" finds no support in Montana law. In a case involving a compromise settlement,

distinct from the cases on which McCauley relies, this Court stated: “A proceeding that terminates indecisively because of a settlement or plea negotiation agreement does not meet the requirements of a cause of action for malicious prosecution.” *Vehrs* 210 Mont. 386, 392. The holding in *Vehrs*, applied to the record in this matter, means that the negotiated stipulation for dismissal of the underlying action was not a favorable termination. Instead, the stipulated dismissal was the last agreed-upon procedural step in terminating the compromised and settled action. This type of termination is an indecisive termination as a matter of law and cannot meet the favorable termination element of malicious prosecution. See, also, *O’Fallon*, 260 Mont. 233, 239-40 (by implication, any evidence of compromise of the underlying claim would defeat the favorable termination element).

McCauley mistakenly claims support for his position in four of this Court’s decisions – *Sacco*, *Plouffe*, *O’Fallon* and *Seipel*.<sup>7</sup> These cases do not support McCauley’s argument because in each case the underlying claims were resolved without any form of consideration given by the malicious prosecution plaintiff(s) for the dismissals. In *Plouffe*, the underlying plaintiff unilaterally and voluntarily dismissed its claims, without consideration from the underlying defendants, and over their objection. *Plouffe*, 2002 MT 64, ¶9. No compromise settlement was involved.

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<sup>7</sup>*Sacco v. High Country Independent Press, Inc.*, (1995) 271 Mont. 209, 896 P.2d 411, 432; *Plouffe v. Montana Dept of Public Health and Human Services*, 2002 MT 64, ¶9, 309 Mont. 184, 45 P.3d 10; *O’Fallon v. Farmers Ins. Exchange*, 260 Mont. 233, 239-40, 859 P.2d 1008, 1012 (1993); *Seipel v. Olympic Coast Investments*, 2008 MT 237, ¶17, 344 Mont. 415, 188 P.3d 1027

In *Sacco*, after the prosecutor amended the charge at issue and admitted he did so because of an inability to prove the originally charged offense, the amended charge was dismissed based on statute of limitations. See, *Sacco*, 271 Mont. 209, 244. No compromise settlement was involved.

In *O'Fallon*, the favorable termination element of malicious prosecution was before this Court on a Rule 12(b)(6), M.R.Civ.P., motion to dismiss. 260 Mont. at 237-238, 859 P.2d at 1010-1011.<sup>8</sup> Unlike the District Court's determination in this case, employing Rule 56, M.R.Civ.P., a Rule 12 (b)(6) motion to dismiss presents the issue whether the Complaint stated a claim for relief. For this reason alone, *O'Fallon* is distinguishable. Additionally, this Court's decision in *O'Fallon* is premised on the conclusion the factual record at the motion to dismiss stage was undeveloped and insufficient to support dismissal. This Court rejected the *O'Fallon* District Court's speculation, unsupported by sufficient factual record at the motion to dismiss stage, that "the [malicious prosecution plaintiffs'] claims must have been dismissed as part of the overall settlement in the underlying personal injury action." 260 Mont. at 239-240, 859 P.2d at 1012. Far from concluding that the issue of favorable termination presented a jury question, and because the factual record was incomplete, this Court reversed the District Court's dismissal under Rule 12(b)(6)

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<sup>8</sup> This Court noted the parties' litigation over the scope of review. Ultimately, on the record before this Court in *O'Fallon*, the District Court's ruling granting a Rule 12 (b)(6) motion to dismiss was reversed. 260 Mont. at 237-238, 859 P.2d at 1010-1011.

stating: “Therefore, we reverse the District Court’s judgment dismissing plaintiffs’ complaint for malicious prosecution and remand to the District Court for the resolution of the factual issue.” 260 Mont. at 241, 859 P.2d at 1013. This Court’s remand order does not direct that the favorable determination issue be resolved by jury. Instead, it left the District Court all available procedures for resolution of the favorable termination issue, including Rule 56 summary judgment. Further, a fair reading of *O’Fallon* supports the conclusion that if the developed record contained evidence of a compromise settlement, the favorable termination element of plaintiffs’ malicious prosecution claim would fail. *Id.*

In *Seipel*, the Court in the underlying matter dismissed the underlying plaintiff’s claims without prejudice but stated it would have been justified in dismissing them with prejudice. *Seipel*, 2008 MT 237, ¶17. No settlement was involved.

These cases do not support McCauley’s argument that an underlying claim settled in exchange for consideration and dismissed by stipulation as an integral element of a negotiated settlement, presents a jury issue on favorable termination. Further, none of this Court’s malicious prosecution decisions support a jury’s parsing and weighing of settlement terms to ascertain “favorable termination” by deciding who “won” the settlement.

Applying the lessons of these decisions correctly, whether McCauley or

Perkines negotiated the better bargain in the negotiations resulting in dismissal of the underlying action is immaterial. What matters is that, as the undisputed record shows, a compromise was reached and as a part of that compromise, the parties agreed to dismissal of all claims with prejudice. As the District Court correctly concluded, the underlying litigation was not favorably terminated for McCauley.

**F. McCauley Compromised Claims and Paid Perkines Money In Exchange for Dismissal of the Claims Against Him. The Underlying Claims Did Not, as a Matter of Law, Terminate in McCauley's Favor.**

The undisputed evidence confirms McCauley cannot satisfy the favorable termination element of his malicious prosecution claim. The compromise settlement consisted of several elements: First, McCauley released and abandoned claims against the Perkines in exchange for dismissal of the Perkines' claims against McCauley. *See, CF Appendix 308-312.* These undisputed facts alone prove there can be no "favorable termination." The analysis can end here.

Second, McCauley admitted the settlement and resulting dismissal was a compromise of disputed claims. The parties' settlement agreement states:

**No Admission of Liability**

It is understood that the above-mentioned sum is accepted as the sole consideration **for full satisfaction and accord to compromise a disputed claim**, and that neither the payment of the sum by the Releasees nor the negotiations for settlement shall be considered as an admission of liability.

**CF Appendix 309** (emphasis added). In the same settlement agreement, the

parties agreed to stipulate to the dismissal of the entire action. **CF Appendix 310.**

Third, analysis of the parties' claims, counterclaims, and third-party claims in light of the compromise settlement yields only one reasonable conclusion: The underlying action was not terminated favorably for McCauley. The summary chart at pages 14-15 of this Brief provides a detailed description of the claims McCauley made, and released, as part of the give-and-take that yields a compromise settlement. Addressing only the monetary element, McCauley gave up the net amount of \$147,400 plus "a significant amount" as consideration for Perkins release of their claims against McCauley. No reasonable juror could conclude this undisputed record satisfies the "favorable termination" element.

McCauley's effort to separate David McCauley's settlement from Perkins Family Holdings, LLC's, settlement cannot save his malicious prosecution claim. The settlement documents confirm that the settlement was a compromise of all claims of all parties, without any language or support for allocation to individual parties. **CF Appendix 304-312.** The settlement was a single global resolution, with a mutual release, of two opposing litigant groups: Group 1 – David McCauley, Perkins Family Holdings, LLC, and Caspian Enterprises, Inc.; and Group 2 – Sam and Joyce Perkins. Each litigant group had a one lawyer/law firm representative. And, in the case of Group 1, a single controlling representative – David McCauley. *See, CF Appendix 307.* The Perkinses received consideration for the release of their

claims against all members of Group 1, not just for the release of their claims against Perkins Family Holdings, LLC. *Id.* David McCauley signed on behalf of Perkins Family Holdings, LLC and Caspian Enterprises, Inc., in addition to himself, in settlement. *Id.* Further, the undisputed evidence shows David McCauley effectively was Perkins Family Holdings, LLC, in all ways relevant to the settlement. He had complete control of Perkins Family Holdings, LLC. *See*, Doc. 14.2, Brief in Support of Motion for Summary Judgment, Statement of Undisputed Facts, ¶18.

More important, David McCauley directly compromised claims personal to him in settlement in exchange for release of claims against him. **CF Appendix 306, 308-312.** He gave up all claims he had against the Perkinses. *Id.* This includes, but is not limited to, his claim for negligent infliction of emotional distress arising out of the underlying case which, having been released against the Perkinses, he concedes fails against Crowley Fleck. *Flagstone Development, LLC v. Joyner*, 2010 WL 4286341, 2 (D.Mont. 2010)(citing *Crane Creek Ranch*, 2004 MT 351, ¶12)(Principal, and not agent, is liable for agent's allegedly negligent acts committed in course of agency); *see also*, Doc. 14.2, Brief in Support of Motion for Summary Judgment, p. 25. McCauley, having conceded he compromised claims to obtain release of the claims against him, and that he compromised claims he believed were valid, cannot effectively assert the underlying case was terminated favorable to him. *Vehrs*, 210 Mont. at 392; *O'Fallon*, 260 Mont. at 239-40.

Juries properly resolve factual disputes. There are no such factual disputes on this record. No jury should be allowed to compare and interpret the relative meaning of the various elements constituting the parties' compromise settlement. Surrendering to the jury what amounts to a determination of who "won" the settlement would serve only to undermine the public policies favoring settlement and the finality of litigation.

The District Court should be affirmed.

**II. McCauley's Malicious Prosecution Claim Fails Because Crowley Fleck Had Probable Cause To Initiate And Pursue Perkins' Claims.**

The totality of the evidence, not the self-serving, incomplete, and out-of-context analysis of immaterial evidence, determines the existence of probable cause. *See, e.g., McAtee v. Morrison and Frampton, PLLP*, 2021 MT 227, ¶23, 405 Mont. 269, --- P.3d ---; *Seltzer v. Morton*, 2007 MT 62, ¶72, 336 Mont. 225, 154 P.3d 561 (A determination of probable cause "...turns on the facts known to the suing party at the time the lawsuit was filed... a determination of probable cause must take into account the totality of the circumstances.") (citing *Plouffe, supra*, 2002 MT 64, ¶¶18-19). Probable cause in a civil case exists when the totality of the evidence possessed at the time of filing, applied to the law, provided a reasonable basis to believe each of the underlying claims could be established to the satisfaction of a court and jury. *See, Spoja v. White*, 2014 MT 9, ¶13, 373 Mont. 269, 317 P.3d 153; *see also, Restatement (Second) of Torts*, §675, Comment (d).

McCauley’s argument regarding probable cause begins with quotations from, and citations to, this Court’s decisions addressing the District Court’s role in determining summary judgment motions. Appellants’ Brief 34-37. McCauley then concludes the District Court (1) impermissibly engaged in fact finding when it allegedly “reconcile[d] Joyce Perkins’ conflicting testimony” (Appellants’ Brief 38-41); and (2) required McCauley to “establish facts” in order to defeat summary judgment, rather than requiring McCauley to raise genuine issues of material fact. Appellants’ Brief 42-48. McCauley reaches these conclusions based solely on his contention that “McCauley produced evidence that Crowley Fleck filed verified pleadings without reviewing them with the Perkinses before the Perkinses signed them” (Appellants’ Brief 43), which evidence would allow a jury to “reasonably conclude that Crowley Fleck ‘lacked a trustworthy factual basis to support the reasonable suspicions of a contentious and careful person’ when it filed this falsely verified pleading.” Appellants’ Brief at 45.

This argument is McCauley’s only argument to defeat summary judgment on probable cause. McCauley identifies no other purported genuine issues of material fact. He concedes by his silence the District Court’s compilation of the totality of the evidence of probable cause (Dkt. 47 at 27-28), with the sole exception of the purported testimonial conflicts. McCauley’s argument is: a single disputed fact (according to him)—whether Perkinses reviewed the verified Complaint before

signing it—overwhelms all other undisputed facts and necessarily renders the probable cause issue a factual question for the jury. The District Court correctly concluded otherwise.

**A. McCauley failed to present genuine issues of material fact.**

Properly applying Rule 56, the District Court carefully examined whether the purported testimonial conflicts arising from the Perkinses’ depositions presented genuine issues of material fact. Dkt. 47 at 19-28. The District Court’s analysis correctly explained why the purported testimonial conflicts either do not exist or do not present genuine issues and are, instead, non-issues or insufficient to present genuine issues. *Id.*

The District Court determined that McCauley’s claimed testimonial conflicts, when considered in context, failed to present admissible evidence sufficient to defeat summary judgment. Dkt. 47 at 22, 24, 26-27. In reaching these correct conclusions, the District Court directly confronted and examined McCauley’s incomplete and out-of-context references to the record. *Id.* Examining the record in this way conforms with this Court’s admonition that “the determination [of material fact disputes turns on] whether the material facts are actually disputed by the parties [not] whether the parties simply interpret the facts differently.” *Sprunk* 252 Mont. 463, 466. The District Court did the hard work and correctly concluded McCauley’s self-serving characterization of facts and selective quotation of testimony did not

establish genuine issues of material fact. *Id.*, 252 Mont. at 467, 830 P.2d at 106.

Further, the District Court did not hold McCauley to a heightened standard of evidence to show genuine issues of material fact. Instead, the District Court employed the long-recognized principle that equivocal and non-specific evidence is insufficient to meet the opposing party's burden of presenting material and substantial evidence to defeat summary judgment. See, e.g., *Young* 2021 MT 180, ¶¶24, citing, *Sullivan* 2013 MT 106, ¶14.

McCauley's accusations that the District Court weighed the evidence, determined credibility, and found facts are simply incorrect. Instead, the District Court found McCauley's purported genuine issues of material fact to be nothing of the kind. Dkt. 47 at 19-28.

**B. McCauley failed to address the totality of the evidence.**

McCauley's probable cause argument is based on the incorrect, but unspoken, premise that what he asserts are conflicts in Perkinses' deposition testimony, standing alone, are sufficient to defeat summary judgment. McCauley's narrow focus leads him to the wrong conclusion.

The District Court's analysis—considering the totality of the evidence--conforms with this Court's decisions regarding the determination of probable cause. See, e.g., *Seltzer v. Morton*, 2007 MT 62, ¶72. Declining McCauley's invitation to focus solely on immaterial and illusory factual inconsistencies in the Perkinses'

deposition testimony, the District Court correctly considered the totality of the evidence in the record to determine whether Crowley Fleck had probable cause to pursue, on Perkinses' behalf, the claims asserted in the underlying action. Dkt. 47 at 19-28. The District Court's summary of this evidence succinctly outlines the undisputed evidence carrying Crowley Fleck's burden under Rule 56 M.R.Civ.P.:

On the record now before the Court, it is undisputed that, at the time of filing of the Perkinses' counterclaims/third-party claims: (1) the Defendants had met with the Perkinses several times and, through their discussions, had learned of the Perkinses' interactions with McCauley and the Perkinses' understanding of their transaction with McCauley/PFH; (2) the Defendants had learned the Perkinses received notice that the holder of the Reverse Mortgage was initiating foreclosure proceedings pursuant to the "due on sale" provision of the Reverse Mortgage; (3) the Defendants had, in their possession, the transaction documents between McCauley/PFH and the Perkinses, including the Power of Attorney naming McCauley as the Perkinses' agent; PFH's notice to the Perkinses terminating their tenancy and three-day notice to pay rent; and the eviction complaint from the Justice Court proceeding; (4) the Defendants had made a preliminary investigation of McCauley; (5) the Defendants had conducted a thorough review and analysis of the documents in their possession; (6) the Defendants had spent substantial time researching possible counterclaims against McCauley; and (7) the Defendants had obtained the Perkinses' sworn verification of the contents of the Verified Counterclaims. The totality of the evidence on which the Defendants rely in their Motion for Summary Judgment admits to only one conclusion: the information and evidence possessed by the Defendants at the time of their filing of the Perkinses' First Amended Verified Answer and Counterclaims (Verified Counterclaims) in DV-18-377, provided a reasonable basis for the Defendants to believe that each of the asserted counterclaims could be proven to the satisfaction of a court or jury. As a matter of law, the Defendants acted with probable cause to bring the Perkinses' counterclaims in DV-18-377.

Doc. 47 at 27-28.

The District Court’s analysis in this case can be distinguished from this Court’s decision in *McAtee v. Morrison and Frampton, PLLP*, 2021 MT 227. This Court’s Opinion in *McAtee* reversed the summary judgment on probable cause because there was a viable theory contending that the malicious prosecution defendants’ investigation “based solely on review of the [client] file” was inadequate. *Id.* at ¶24. No such viable theory, supported by admissible evidence, exists on this record. Instead, McCauley relies solely on his characterization of deposition testimony which, when presented in light of the totality of undisputed evidence, is insufficient to defeat summary judgment. Unlike *McAtee*, the undisputed totality of the evidence here, articulated in the District Court’s Opinion, Dkt. 47 at 19-28, established probable cause as a matter of law.

Crowley Fleck was entitled to summary judgment on McCauley’s malicious prosecution claim (Count 4). The District Court should be affirmed.

**III. The District Court Correctly Granted Summary Judgment on McCauley’s Intentional Infliction of Emotional Distress Claim.**

Proffering an argument not articulated in, or decided by, the District Court, McCauley contends the District Court erred in granting summary judgment on his intentional infliction of emotional distress (“IIED”) claim because it failed to properly examine whether Crowley Fleck pursued the underlying litigation in a “permissible way.” Appellants’ Brief 48-54. McCauley’s new argument is based on

this Court’s language in *Judd v. Burlington Northern & Santa Fe Ry Co.*, 2008 MT 181, ¶¶ 29-31, 343 Mont. 416, 186 P.3d 214 – that the litigation privilege applies when legal rights are pursued in a “permissible way.”

Plaintiffs’ Answer Brief In Opposition To Defendants’ Motion For Summary Judgment, Dkt. 21 at 23-24, contains McCauley’s IIED arguments, but does not include any argument concerning whether Crowley Fleck pursued Perkinses’ claims in a “permissible way.” McCauley’s new argument is waived and should not be considered on appeal. See, *Peters v. Hubbard*, 2020 MT 282, ¶11, 402 Mont. 71, 475 P.3d 730 (Supreme Court will not address an issue raised for the first time on appeal or a party’s change in legal theory).

Additionally, the record confirms the District Court correctly analyzed the law and the evidence supporting McCauley’s IIED claim and for at least two independently sufficient reasons correctly granted summary judgment on this claim. First, the District Court correctly applied this Court’s decision in *Judd*, to conclude that since McCauley’s malicious prosecution claim failed, and he could not show Crowley Fleck’s conduct was outside the litigation privilege, his IIED claim also failed. Dkt. 47 at 32.

Second, the District Court found the evidence McCauley relied on to support his IIED claim (Appellants’ Brief at 48-50)—the same evidence McCauley relied on to support his probable cause argument—did not create genuine issues of material

fact. Dkt. 47 at 19-28.

Finally, should this Court reach McCauley's argument made for the first time on appeal—that jury questions exist concerning whether Crowley Fleck pursued Perkinses' legal rights in a “permissible way”—this argument fails on the record. At a minimum, permissible pursuit of legal rights must include pursuit of those rights with probable cause. Thus, the District Court's correct conclusion on the probable cause element of McCauley's malicious prosecution claim defeats his IIED claim. Additionally, pursuit of legal rights in conformance with the Montana Rules of Civil Procedure and Montana substantive law must be permissible. The undisputed record in the underlying matter confirms Crowley Fleck pursued Perkinses' rights in conformance with these requirements. Specifically, the District Court in the underlying matter denied McCauley's Motion for Rule 11 Sanctions and denied his multiple motions to dismiss and for summary judgment. DV-18-337A Dkt. 35, 53, 59, 61, 62. With these rulings, the underlying District Judge determined that Crowley Fleck permissibly pursued Perkinses' legal rights. On the record, there is no ability for a reasonable jury to conclude otherwise.

The District Court's summary judgment on McCauley's IIED claim should be affirmed.

## CONCLUSION

The District Court correctly concluded McCauley could not prove the favorable termination element of his malicious prosecution claim, and that he could not prove Crowley Fleck lacked probable cause for its initiation and pursuit of Perkins' claims. Additionally, the District Court correctly found no basis for McCauley's IIED claim.

Appellees respectfully request that this Court affirm the District Court's Summary Judgment Order (Dkt. 47).

DATED this 15<sup>th</sup> day of November, 2021.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Answer Brief 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 for Windows, is 9669, excluding the caption, the certificate of service, the certificate of compliance, the table of contents and the table of authorities.

DATED this 15<sup>th</sup> day of November, 2021.

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## **CERTIFICATE OF SERVICE**

I, Mikel L. Moore, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-15-2021:

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Dated: 11-15-2021