IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 23-0387

LORI LUNDEEN,

Plaintiff/Appellant,

v.

LAKE COUNTY,
a political subdivision of the State of Montana,

Defendant/Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Twentieth Judicial District Court
Lake County, Cause No. DV-2022-193
Honorable John W. Larson

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STATEMENT OF THE ISSUE

I. Whether the District Court erred by granting Lake County's M. R. Civ. P. 12(b)(6) motion to dismiss based upon the statute of limitations rather than denying it or, alternatively, sending the tolling question to the jury as required by Montana caselaw.

STATEMENT OF THE CASE

Lundeen's claim did not accrue until April 16, 2020. Lundeen filed her complaint & jury demand (Doc. 1) on November 1, 2022, well within the applicable three-year statute of limitations.

Regardless, this case otherwise falls within the great majority where the issue of whether a claim is barred by the statute of limitations is a question of fact for a jury. The District Court completely ignored that different conclusions may be drawn from the evidence as to whether the statute of limitations had run. The District Court's decision to dismiss Lundeen's complaint was reversible error.

The County moved to dismiss Lundeen's complaint on January 9, 2023 (Doc. 2). The County argued Lundeen's claim is barred by the statute of limitations and that her negligent misrepresentation claim is not actionable even if not time-barred (Doc. 3). The County was wrong on both points. As such, Lundeen's NIED claim should have survived M. R. Civ. P. 12(b)(6) scrutiny as well.

The Honorable Deborah Kim Christopher recused herself from jurisdiction and the other Lake County District Court Judge, the Honorable Molly Owen, declined to assume jurisdiction (Doc. 4). Missoula County District Court Judge, the Honorable John W. Larson, assumed jurisdiction on January 20, 2023 (Doc. 4) after the County filed its motion to dismiss.

Lundeen filed her opposition brief on February 6, 2023 (Doc. 8), correctly arguing her complaint was timely filed applying the accrual rule, and that material issues of fact nevertheless exist about the discovery of facts necessary to make out her claim, which makes the tolling issue one of fact for a jury. Lundeen also filed a detailed Affidavit (Doc. 9) and asked the District Court to review the County's motion under M. R. Civ. P. 56. Lundeen's Affidavit further explained the material issues of fact a jury should be tasked with resolving, inclusive of multiple exhibits. Without any explanation whatsoever, the District Court arbitrarily refused to review the County's motion under M. R. Civ. P. 56, and disregarded Lundeen's Affidavit.[1]

The District Court filed an opinion and order erroneously granting the County's motion to dismiss (Doc. 13) on June 13, 2023 (*see* Appendix A). The

[1] The District Court refused to convert the County's motion into a motion for summary judgment pursuant to M. R. Civ. P. 12(d), which was an abuse of discretion under the circumstances. *See, e.g.*, *Anderson v. Recon Trust Co., N.A.*, 2017 MT 313, ¶ 7, 390 Mont. 12, 407 P.3d 692 (2017); *Johnston v. Centennial Log Homes & Furnishings, Inc.*, 2013 MT 179, ¶ 7, 370 Mont. 529, 305 P.3d 781 ("Our well-established summary judgment standard dictates that we may not weigh the evidence or choose one disputed fact over another."). The District Court's arbitrary refusal to consider the additional evidence in Lundeen's Affidavit resulted in a substantial injustice as it deprived Lundeen of due process and her day in court. The facts in Lundeen's Affidavit constitute precisely the type of evidence a jury should consider and weigh in deciding the tolling issue involved with the discovery rule and equitable tolling doctrine.

District Court largely ignored many of the well-pleaded allegations in Lundeen's complaint which must be taken as true, and determined incorrectly that Lundeen was on "inquiry notice" of her claim when the Tribes blocked off her access "no later than May 13, 2019." (Doc. 13, p. 8).

Judgment was entered in favor of the County and against Lundeen (Doc. 15) based on the District Court's opinion and order (Doc. 13) (Appendix A). The County filed a request for entry of judgment (Doc. 14). Lundeen timely appealed (Doc. 16) to this Honorable Court on July 20, 2023. *See* M. R. App. P. 4(5)(a)(i). The parties engaged in mandatory dispute resolution with attorney Alice J. Hinshaw acting as the mediator, but the mediation was unsuccessful.

STATEMENT OF THE FACTS

Lundeen applied *pro se* to the County for entitlement to develop a 60-lot, 5-phased subdivision commonly known as the Wild Horse RV Resort (the "Resort") in Big Arm, Montana (Doc. 1, ¶¶ 9-11). Lundeen devoted her entire retirement life savings to the success of the Resort, which created significant stress facing the possibility of losing everything if things did not go as planned. (*Id.*, ¶ 12).

The County granted conditional approval of Lundeen's development application on May 16, 2018. (*Id.*, ¶ 13). There were questions about the validity of access to and from the Resort as conditionally approved by the County, so one of the conditions of approval stated: "Prior to final plat, legality of the proposed access to

the subdivision through the Big Arm Townsite will be investigated by Planning Staff and the applicant to confirm that Lake County considers the access [to the Resort] to be legal." (*Id.*, ¶ 14).

Approximately three (3) months later, on August 2, 2018, the Confederated Salish and Kootenai Tribes of the Flathead Nation ("the Tribes") sent a letter to the County raising a challenge to the County's ownership, regulatory authority, and right to use the conditionally approved accesses. (*Id.*, ¶ 15). Lundeen relied on the County to research these complicated issues. (*Id.*, ¶ 16); (Doc. 9, ¶ 5). The County sent Lundeen a letter dated August 17, 2018, saying it was "working on the legal access question raised by CSKT." (Doc. 9, ¶ 5). The Lake County Attorney repeatedly held himself out as an expert on the access issues. He reported to Lundeen that the County spent more than 1,000 man hours researching the access issues. Based on these representations, Lundeen understood the County Attorney to be an expert in this arena who had access to special information and knowledge. Lundeen was told he had been dealing with similar issues for several years and that the Tribes' analysis was fundamentally flawed. (Doc. 9, ¶ 5); (Doc. 1, ¶ 16). Lake County knew Lundeen was not represented by counsel regarding the access issues and therefore would be relying on it to conduct research and reach the right conclusion (Doc. 1, ¶ 17). Lundeen did not believe she needed separate counsel given the County's purported expertise (Doc. 9, ¶ 7).

The limited research Lundeen did on her own seemed to confirm the Tribes' position on access was unfounded. For example, one of the covered risks on the owner's policy of title insurance obtained by Lundeen when she bought the land insures against loss or damage sustained or incurred by Lundeen by reason of "[n]o right of access to and from the [l]and." (Doc. 9, ¶ 8). Lundeen would not have bought the land without legal access to the Resort. (*Id.*). The policy of title insurance furthered Lundeen's belief that the County's representations about access were true and, in turn, made her reliance thereon even more objectively reasonable under the circumstances. (*Id*.).

On January 31, 2019, the County conditionally approved an amended road layout for the Resort, with condition of approval no. 3 stating: "Prior to final plat, legality of the proposed access to the subdivision through the Big Arm Townsite will continue to be investigated by County staff and the applicant to confirm that Lake County considers the access to be legal. Lake County shall be held harmless in the event that the primary and secondary access roads are found not to provide legal access to the Wild Horse RV Subdivision." (Doc. 1, ¶ 19).

However, the County had represented unequivocally to Lundeen by January 31, 2019, that the Tribes' position was baseless, that Lundeen had valid access as conditionally approved, and that she could proceed with development. (*Id.*, ¶ 20). The County held a public meeting on January 31, 2019, at which time condition of

approval no. 3 was amended to remove the last sentence – e.g., the hold harmless clause. (*Id.*, ¶ 21). The amendment evidenced the County's extreme confidence in the truth of its representations about access. (*Id.*). It also heightened Lundeen's confidence that she received true and accurate information from the County. (Doc. 9, ¶ 9). Lundeen was stuck in the middle of a dispute and did not believe the County would lead her astray. (*Id.*). Lundeen never would have moved forward and broke ground if the County did not remove the hold harmless clause. (Doc. 1, ¶¶ 21, 24).

On February 21, 2019, Lundeen's planning consultant emailed Lake County asking it to confirm the amendment to condition no. 3. (Doc. 1, ¶ 22). The County responded the same day, "My impression is that both the Commissioners and [the County Attorney] are confident in the County's ownership of the platted roadways in the Big Arm Townsite. Based on that I would consider that condition no. 3 is satisfied. I hope this helps clarify." (*Id.*, ¶ 23). Thereafter, Lundeen devoted significant time and financial resources to break ground and move forward with developing the Resort. (*Id.*, ¶ 24).

On May 13, 2019, Lundeen discovered the Tribes had gated off her access to the Resort, which temporarily prevented further construction and development work on the underlying land. (Doc. 1, ¶ 25).

Even then, the County doubled down on its prior representations about access. (Doc. 1, ¶ 26); (Doc. 9, ¶ 10). The County even made statements to the media about

having sufficient information from their attorney to render it resolute in its position on access. (Doc. 1, ¶ 26). In a May 15, 2019 article in the *Missoulian*, the County said the access issues involve "a complex thicket of laws, administrative actions and court rulings dating back to the reservation's 1855 establishment." (Doc. 9, ¶ 10, Exhibit A). The article also discussed the County's decision to remove the hold harmless clause. The County said it "had enough information from [the County Attorney] where [it was] comfortable in [its] position that [it] had jurisdiction over the roads and [it] didn't (need to) have that hold harmless agreement put into the subdivision agreements." (*Id.*).

Being untrained in the law, these and similar statements by the County after the Tribes gated off Lundeen's access continued to instill confidence in her that its representations were true and she would ultimately have nothing to worry about. (*Id.*). The County gave Lundeen no reason to question the veracity of their representations even after May 13, 2019. In fact, the County told Lundeen it was willing to litigate with the Tribes to resolve the access question. (Doc. 1, ¶ 28). In a letter dated May 17, 2019, the County again advised Lundeen that the Tribes' position was flawed and that the County was gearing up for litigation. (Doc. 9, ¶ 11, Exhibit B). The County said, "[The Tribes'] information ignores all of the items provided herein. We expect to be served with your client May 15 or 16, and this should help us be ready for the TRO arguments." (*Id.*). The County gave Lundeen

no indication she needed to be concerned about her access rights even when litigation with the Tribes became imminent. (*Id.*).

On May 24, 2019, the Tribes filed a verified complaint to quiet title and for injunctive relief in federal court. The County continued to assure Lundeen its representations about access were true. (Doc. 1, ¶ 29). The lawsuit named Lundeen as a defendant and sought to enjoin the County from asserting regulatory authority over the use of Indian trust land, including the accesses granted to Lundeen, and future trespass. (Doc. 1, ¶ 30); (Doc. 9, ¶ 12, Exhibit C).

The County maintained its representations were true throughout the entire course of the federal court litigation. (Doc. 1, ¶ 30); (Doc. 9, ¶ 13, Exhibits D and E). Lundeen was forced to fire sale property to fund her defense and ride the County's coattails in litigation. Her severe emotional distress continued to escalate during this time. (*Id.*). Some of the property she sold had sentimental value and family ties. (Doc. 9, ¶ 15). Lundeen continued relying on the County's research, expertise, and representations. She remained optimistic the litigation would be resolved in defendants' favor. (Doc 1, ¶ 30).

It was not until April 16, 2020, when Lundeen realized for the very first time that the County's representations about access were untrue. (Doc. 1, ¶¶ 33-36); (Doc. 9, ¶ 16). She did not understand the complex issues involved, so she deferred to the County and its attorneys up to that point in time. (*Id.*). On that date, the federal court

filed an order on the parties' cross-motions for summary judgment, quieting the Tribes' interest to the real property, including the streets, alleys, and public reserves in the Big Arm Townsite, including Lundeen's conditionally approved accesses. (Doc. 1, ¶ 32) (Doc. 9, ¶ 14, Exhibit F). This was very surprising and disappointing for Lundeen, especially considering the County's repeated representations about the validity of access between May 13, 2019 and April 16, 2020. (Doc. 9, ¶ 14). The County chose not to appeal to the Ninth Circuit. Lundeen could not afford to do so as she was already in serious financial trouble as a result of being thrown in the middle of the County's access dispute with the Tribes. (Doc. 1, ¶ 38); (Doc. 9, ¶ 15). The federal court ruling informed Lundeen for the first time that she needed to make a claim against the County. (Doc. 9, ¶ 16).

Lundeen promptly placed the County on notice of her substantive claim against it after the federal court ruling informed her of the facts constituting it (e.g., that the County's representations about access were untrue). On July 14, 2020, Lundeen sent the County a letter summarizing her claim and inquiring about its interest in resolving it without court action. (Doc. 9, ¶ 17). Lundeen asked the County to tender her claim to MACo and advised she was willing to mediate if the County so desired. (*Id*.). Lundeen presented a demand directly to MACo on May 4, 2021. (Doc. 9, ¶ 18). Ten (10) days later MACo's attorney advised there was "no indemnity

protection of Lake County since the claim presented involved subdivision and road access ownership issues." (Doc. 9, ¶ 19, Exhibit G).

Out of abundance of caution, and despite her reasonable belief that her claim had accrued in connection with the federal court's ruling, Lundeen wrote the County regarding the statute of limitations issue on June 21, 2021. (Doc. 9, ¶ 20, Exhibit H). Lundeen's letter states in relevant part:

> …the purpose of this correspondence is to provide the County with notice of Ms. Lundeen's position on the statute of limitations applicable to her claim(s) against the County…Judge Christensen filed the Summary Judgment Order on April 16, 2020. Judgment was entered the same day. However, Ms. Lundeen's position is that her claim(s) or cause of action did not accrue until the timeline ran out for an appeal to the 9th Circuit Court of Appeals, or May 15, 2020. As such, Ms. Lundeen may timely file her claim(s) or cause of action anytime on or before May 15, 2023. In our view, any claim filed prior to the timeline running out for appeal would have been subject to dismissal for lack of ripeness. This despite the fact that the Tribes had blocked Ms. Lundeen's access off with a gate long before then. Please review Ms. Lundeen's foregoing position and respond hereto *in writing* to advise whether the County agrees with the applicable SOL. If the County disagrees, please kindly explain why within the body of the County's response.

(emphasis in original) (*Id.*).

The County never stated any disagreement with Lundeen's statute of limitations analysis, instead entering into a five (5) month tolling agreement with Lundeen from July 1, 2021 to December 1, 2021. (Doc. 1, ¶ 44); (Doc. 9, ¶¶ 21, 26, Exhibit I). The terms of the tolling agreement evidenced the parties' ongoing efforts to resolve Lundeen's claim without the necessity of her suing the County.

> The purpose and effect of this Agreement is simply to toll any applicable statute of limitations pertaining to the Claim(s) (e.g., "any and all civil claims that may be maintainable on the Effective Date by Ms. Lundeen against Lake County") from July 1, 2021 until December 1, 2021. The parties are interested in exploring potential avenues by which Ms. Lundeen may obtain reasonable access to her development, Wild Horse RV Resort Subdivision, without the case having to be filed with the District Court having jurisdiction.

(*Id*.).

Lundeen reasonably believed she was well within the applicable statute of limitations as of July 2021, but nevertheless signed the tolling agreement to buy herself even more time to try to find alternative access and otherwise resolve her claim against the County amicably. (Doc. 9, ¶ 23). She believed the County's interest in a finding pre-litigation resolution was genuine, so she held off filing suit to allow negotiations to run their course. Lundeen's counsel retained an expert C.P.A. to opine on the amount of her economic loss. (Doc. 9, ¶ 28).

Thereafter, Lundeen mitigated her damages by purchasing additional land from a neighbor to provide alternate primary access. (Doc. 1, ¶ 39). Had Lundeen not been able to consummate this purchase, she would not have been able to move forward with developing the Resort. (Doc. 9, ¶ 27). But she still needed the County to approve a variance giving her relief from the mandatory requirement to also provide secondary access. (*Id.*, Exhibit J).

The variance was approved at a public meeting on September 8, 2021, but not before the County engaged in misconduct designed to prevent Lundeen from filing

her claim sooner. During a meeting with the Lake County Attorney, he overtly threatened to revoke her conditional approval and shut down her project altogether if she took legal action against the County. (Doc. 1, ¶ 43) (Doc. 9, ¶ 28). Lundeen was understandably afraid if she sued before the variance was approved that the County would act on its threat and stop her project dead in its tracks. (*Id.*).

After the variance was approved, Lundeen sent the County a revised settlement demand. (Doc. 9, ¶ 24); (Doc. 1, ¶ 41). Lundeen's damages were established by her expert and provided to the County. (*Id.*). The County suddenly shifted course on September 30, 2022, advising Lundeen in a letter from outside counsel that the County was no longer "interested in a prelitigation settlement conference" and flatly denied any legal liability. (Doc. 9, ¶ 25).

The facts giving rise to Lundeen's parasitic emotional distress and NIED claim are detailed in her District Court filings. (Doc. 9, ¶¶ 29-30); (Doc. 1, ¶ 60). Lundeen filed her complaint in District Court on November 1, 2022. (Doc. 1). The District Court dismissed her complaint on June 13, 2023. (Doc. 13) (Appendix A).

STANDARD OF REVIEW

The Court reviews a District Court's ruling on a motion to dismiss for failure to state a claim pursuant to M. R. Civ. P. 12(b)(6) *de novo*. *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 7, 390 Mont. 12, 407 P.3d 692. The Court construes a complaint in the light most favorable to the plaintiff when reviewing an order

dismissing a complaint under M. R. Civ. P. 12(b)(6). *McKinnon v. Western Sugar Coop. Corp.*, 2010 MT 24, ¶ 12, 355 Mont. 120, 225 P.3d 1221 (citing *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 15, 337 Mont. 1, 155 P.3d 1247)).

SUMMARY OF ARGUMENT

Application of the accrual rule renders the filing of Lundeen's complaint timely. Regardless, the District Court should have tolled the running of the statute of limitations until April 16, 2020, by applying either the discovery rule or the equitable tolling doctrine. There are disputed material facts regarding when Lundeen knew or should have known the facts of her injury. These issues are best left to the province of a jury. Different conclusions may be drawn from the evidence. The jury should decide if a reasonable person in Lundeen's shoes would have filed suit earlier considering all the facts and circumstances. Lundeen's negligent misrepresentation claim is actionable on the merits under a long-standing exception adopted and applied in Montana. Thus, her NIED should not have been dismissed by the District Court either. The District Court's decision to dismiss Lundeen's claim was reversible error.

ARGUMENT

I. The District Court erred by granting Lake County's M. R. Civ. P. 12(b)(6) motion to dismiss based upon the statute of limitations.

A. Lundeen's claim did not accrue until April 16, 2020.

Lundeen's claims are grounded in negligence. Lundeen and the County agree the applicable statute of limitations is three years. § 27-2-204, M.C.A.; *Strom v. Logan*, 2001 MT 30, ¶¶ 15-20, 304 Mont. 176, 18 P.3d 1024 (applying three-year statute at § 27-2-204, M.C.A., to a claim for negligent misrepresentation); *Estate of Woody v. Big Horn Cnty.*, 2016 MT 180, ¶ 9, 384 Mont. 185, 376 P.3d 127 ("The statute of limitations for claims of negligence,…and negligent infliction of emotional distress is three years…").

The accrual rule provides that a cause of action accrues when all elements of the claim exist or have occurred. *Draggin' Y Cattle Co. v. Addink*, 2013 MT 319, ¶ 20, 372 Mont. 334, 312 P.3d 451 (citing § 27-2-102(1)(a), M.C.A.). Generally, "all elements" include a plaintiff's damages. *Draggin' Y Cattle Co.*, ¶ 20 (citing *Uhler v. Doak*, 268 Mont. 191, 199-200, 885 P.2d 1297, 1302-03 (1994)). Specifically, in negligence-based actions, the earliest date a cause of action can accrue is when a person suffers damages from the alleged negligent conduct. *Cechovic v. Hardin & Assocs.*, 273 Mont. 104, 119, 902 P.2d 520, 529 (1995) (citing *Uhler v. Doak*, 268 Mont. 191, 885 P.2d 1297 (1994)); *see also Barrett v. Holland & Hart*, 256 Mont. 101, 107, 845 P.2d 714, 717-18 (explaining that damages represent an essential

element to a negligent misrepresentation claim). Failure to satisfy all elements of a claim causes the claim to fail as a matter of law. *Estate of Schwabe v. Custer's Inn*, 2000 MT 325, ¶ 27, 303 Mont. 15, 15 P.3d 903.

A claim for negligent misrepresentation requires proof that: (1) defendant made a representation as to a past or existing material fact; (2) the representation must have been untrue; (3) regardless of actual belief, defendant must have had made the representation without any reasonable ground for believing it to be true; (4) the representation must have been made with the intent to induce plaintiff to rely on it; (5) plaintiff must have been unaware of the falsity of the representation and he must have been justified in relying upon the representation; and (6) plaintiff, as a result of his reliance, must sustain damage. *Barrett*, 845 P.2d at 717-18 (citing *Kitchen Krafters, Inc. v. Eastside Bank of Montana*, 242 Mont. 155, 165, 789 P.2d 567, 573 (1990)). The claim requires a showing of the failure to exercise the care or competence of a reasonable person in obtaining or communicating information. *Cechovic*, 273 Mont. at 113.

The accrual rule is based on the rationale that, "it is inherently illogical and unfair to require a plaintiff to file an action prior to the accrual of the cause of action because if a plaintiff filed suit when no actual damages had been sustained, the suit would properly be dismissed." *Ehrman v. Kaufman*, 2010 MT 284, ¶ 20, 358 Mont. 519, 246 P.3d 1048.

Further, actual damages, not the mere threat of future damages, are required to begin the running of the statute of limitations under the accrual rule. *Id.* In similar cases involving alleged misrepresentations and other alleged malpractice by attorneys, courts require "objective proof that would support the existence of some actual damage." *Stanley L. & Carolyn M. Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 51, 321 Mont. 432, 92 P.3d 620 (citing *Chicoine v. Bignall* (Idaho 1992), 122 Idaho 482, 835 P.2d 1293, 1298). The cases look for some damage caused by an activity adverse to the damaged party. *Id.* (citing *Elliot v. Parsons* (Idaho 1996), 128 Idaho 723, 918 P.2d 592 (damages occurred not when faulty legal documents drafted and implemented for sales transactions, but rather four years later when clients incurred legal fees to resolve resulting disputes with the I.R.S.); *Bonz v. Sudweeks* (Idaho 1991), 119 Idaho 539, 808 P.2d 876 (no damages when faulty legal work was done by filing a release of *lis pendens* in the wrong county; rather, damages occurred later when the mistake resulted in the loss of a potential financier); *Marshall v. Fenton, Fenton, Smith, Reneau & Moon* (Okla. 1995), 1995 OK 66, 899 P.2d 621 (where client is involved in litigation through attorney's negligence, client suffers no damages until the litigation begins)).

In *Ehrman*, the Court determined Ehrman's damages did not accrue until the District Court declared the Agreement at issue null and void, enjoined Ehrman from

using the dock, and quieted title in favor of Myers and the other property owners. *Ehrman*, ¶ 21. The Court explained this determination,

> If, as the District Court concluded, Ehreman's damages had accrued in July 2004, he would have had to sue for malpractice when he still had possession of and was using the dock rights – before he sustained any damages arising from Ramlow's interpretation of the Contract for Deed. Because the matter in dispute was related to the interpretation of a contract, and because Ehrman was not deprived of the possession or use of the dock rights until August 2007, we conclude his claim against KVHR did not accrue until that point.

Id.

Similarly, in *Spolar v. Datsopoulos*, 2003 MT 54, ¶¶ 5-7, 16, 314 Mont. 364, 66 P.3d 284, the Court determined that although the plaintiff client had been voicing his objections for over one year to the valuation method his attorney used in preparing proposed findings of fact and conclusions of law for the division of the client's marital estate, his claim did not accrue until the district court issued its order dividing the marital estate.

All elements of Lundeen's claim did not exist when the Tribes gated off her access to the Resort on May 13, 2019. Despite this action by the Tribes and the access challenge they brought against the County, the County remained adamant that its position on access was correct and, therefore, its representations to Lundeen were true and accurate.

Had Lundeen sued the County before the federal court resolved the access question in favor of the Tribes, the County undoubtedly would have moved to

dismiss Lundeen's complaint as premature and for lack of proof of element (2) above (e.g., the County's representations about access were untrue). *See, e.g.*, *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 19, 333 Mont. 331, 142 P.3d 864 ("The basic rationale behind the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]."); *Batten v. Watts Cycle & Marine*, 240 Mont. 113, 117-18, 783 P.2d 378, 381-82 (1989) (negligent misrepresentation claim dismissed for failure to prove a prima facie case of all elements).

That motion would likely have been granted. The County and the Tribes continued to quibble about access throughout the duration of the federal court litigation, long after the Tribes gated off Lundeen's access. The County continued to tell Lundeen its representations were true and that it fully expected to prevail in litigation. The County's correspondence to Lundeen after May 13, 2019 affirmed the same. Any disagreement Lundeen had with the County about access was merely "abstract" until the federal court resolved the access question. Element (2) above did not exist and Lundeen's right to maintain an action was not yet complete until the ruling came down on April 16, 2020. § 27-2-101, M.C.A. Lundeen is required to prove the County "[failed] to exercise the care or competence of a reasonable person in obtaining or communicating information" to her about access. *Cechovic*, 273

Mont. at 113. She could not have met her burden of proof before Judge Christensen ruled for the Tribes.

Moreover, regarding damages, like *Ehrman* and *Spolar*, Lundeen's claim did not accrue until the federal court issued its summary judgment order quieting title in favor of the Tribes. The Tribes gating off Lundeen's access would have only temporarily halted development had the County's representations turned out to be true. Until the summary judgment ruling nobody could determine if or when Lundeen would be able to complete her project as conditionally approved. Until then, there was still the possibility Lundeen would be able to carry out her development plans as originally submitted. Ergo, Lundeen's damages did not accrue or actually develop until April 16, 2020, at which time it was conclusively established she did not have valid access as represented by the County.

Like *Watkins Trust*, Lundeen's damages occurred not when the Tribes gated off her access and it was still possible for her to proceed with development as conditionally approved, but rather nearly a full year later when the federal court ruling foreclosed that possibility. It is inherently illogical and unfair to require Lundeen to file her action before the accrual of her cause of action. As discussed above, if she sued when no actual damages had been sustained or developed, her suit would properly be dismissed. *Ehrman*, ¶ 20 (citing *Watkins Trust*, ¶ 49). Because the matter in dispute is related to the County's flawed interpretation of the complex

access issues and historical record, including old tribal treaties and land instruments, and because Lundeen was not truly deprived of her right to develop the Resort as conditionally approved until April 16, 2020, her claim against the County did not accrue until that point.

The case *sub judice* involves facts akin to cases where the Court has applied the continuing relationship doctrine which prevents professionals, including attorneys like Lake County's, from providing assurances to plaintiffs, whether fraudulently or in good faith, that problems can be fixed or that another party is responsible while the statute of limitations runs. *Northern Mont. Hosp. v. Knight*, 248 Mont. 310, 317, 811 P.2d 1276, (1991).

The Court should apply the continuing relationship doctrine here even though Lundeen was not technically the County's "client" because the facts fit squarely with those giving rise to the use of this theory. The County Attorney, a professional, acted in the course and scope of his employment with Lake County. He made representations to Lundeen about access that were "of a highly technical or specialized nature," far outside the knowledge of Lundeen or any other layperson. *Northern Mont. Hosp.*, 248 Mont. at 317. As the County stated to the *Missoulian*, the access issues involve "a complex thicket of laws, administrative actions and court rulings dating back to the reservation's 1855 establishment." (Doc. 9, ¶ 10, Exhibit A). Lundeen had the right to place her confidence and trust in the County –

the local governmental body responsible for properly handling her land use application – and depend on its representations if problems arose during the course of the land use process and relationship. *Id.* The County Attorney held himself out as an expert with specialized knowledge in the access arena. Lundeen should not be forced to have to consult with another lawyer to ensure she was receiving competent information about access. *Id.* (citing *County of Broome v. Vincent J. Smith, Inc.*, 78 Misc. 2d 889, 358 N.Y.S. 2d 998, 1001-03 (N.Y. Sup. Ct. 1974)). There were "clear indicia of an ongoing, continuous, developing, and dependent relationship" between Lundeen and the County long after the Tribes gated off her access. *Northern Mont. Hosp.*, 248 Mont. at 316. Though Lundeen had to retain her own counsel for the federal court litigation, she merely went along for the ride, relying on the County and its outside counsel from New Mexico to litigate the access issues against the Tribes. The County was litigating not only on its own behalf, but also with the goal of affirming the validity of the conditional approval it gave to Lundeen. The relationship was ongoing, and their interests remained aligned until April 16, 2020.

The doctrine suspends the accrual of the cause of action in order to give the professional an "opportunity to remedy, avoid or establish that there was no error or attempt to mitigate damages." *Id.* (citing *Pittman v. McDowell, Rice & Smith, Chartered*, 12 Kan. App. 2d 603, 752 P.2d 711, 716 (Kan. Ct. App. 1988) (quoting *Mallen and Levit, Legal Malpractice* § 391, at 460-61 (2d ed. 1981)). That is exactly

what happened here. The County used the federal litigation to try to show its representations were true so there was no error and thus Lundeen had no actionable claim against it. The County blamed the Tribes for baselessly challenging the County's ownership of the access roads. Until April 16, 2020, the County assured Lundeen it was correct about access and the Tribes were responsible for unlawfully blocking off her access to the Resort. *Northern Mont. Hosp.*, 248 Mont. at 317. The County should not be able to take advantage of Lundeen's justifiable reliance on its purported expert representations by claiming the statute of limitations bars her cause of action because of the County's repeated assurances throughout the federal court litigation that the access issues would ultimately be decided in defendants' favor. *Id.* Lundeen continued to seek and rely upon the County's expertise and advice until the federal court conclusively established the County was wrong all along.

As applied to this case, the continuing relationship doctrine should relieve the harshness rendered by a strict application of the limitations period. Under the continuing relationship theory, the statute of limitations, which the District Court ruled started to run upon the Tribes gating off Lundeen's access on May 13, 2019, should be suspended until April 16, 2020, when her relationship with and reliance upon the County's purported expertise ended. Lundeen filed her complaint on November 1, 2022, well within the three-year limitations period, even setting aside the parties' tolling agreement which added another five (5) months. Adding the time

under the tolling agreement, Lundeen had until September 16, 2023 to timely file suit.

B. The District Court erred in not applying the discovery rule.

The discovery rule provides an exception to the general rule that a claim not filed within the applicable statute of limitations is generally barred. Under the discovery rule, the period of limitation does not begin to run until the injured party discovers facts constituting the claim if they are concealed or self-concealing or a defendant has taken action preventing plaintiff from discovering the facts. § 27-2-102(3), M.C.A.; *Draggin' Y Cattle Co*. The discovery statute "protects plaintiffs against the harsh results of having their claims barred before they even know they exist." *Draggin' Y Cattle Co.*, ¶ 22.

In *McCormick v. Brevig*, 1999 MT 86, 294 Mont. 144, 980 P.2d 603, the Court held that an accountant's withholding of information from a client rendered a potential malpractice claim self-concealing. The injured party did not know he was injured until he learned that his accountant withheld information from him. *Id.*, ¶ 101. Like *McCormick*, at what point Lundeen discovered or should have discovered through due diligence the negligence of the County is a question of fact that must be submitted to a jury for determination.

In *Watkins Trust*, the Court held that the plaintiff's failure to discover the attorney's purported negligence could be excused due to the "complexity of the legal

transaction involved." The Court reasoned that an attorney may not impose upon a client a duty to understand defects in a technical instrument to defeat a malpractice claim. *Id.*, ¶ 42. To require a layperson to recognize professional negligence on a complex issue the moment of its incidence would require the client to seek a second professional opinion to observe the work first, an expensive and impractical duplication. *Id. Wakins Trust* involved facts similar to those in the present case. The County Attorney held himself out as an expert. The County acknowledges the access issues involve "a complex thicket of laws, administrative actions and court rulings dating back to the reservation's 1855 establishment." (Doc. 9, ¶ 10). Lundeen's failure to discover the County's negligent misrepresentation is excused because of the complexity of the access issues and the land use transaction involved. The access issues are far beyond the understanding of a layperson. This case involves the type of factual questions appropriate for resolution by a jury. *Watkins Trust*, ¶ 47 (citing *Young v. Datsopoulos*, 249 Mont. 466, 473, 817 P.2d 225, 229 (1991)).

In *Draggin' Y Cattle Co.*, the discovery rule applied to tort claims arising from an accountant's alleged professional negligence in a tax matter, the facts of which were concealed by the complexity of the transaction. Thus, the claims were timely under § 27-2-102(3) and § 27-2-204(1), M.C.A., even if the cause of action accrued earlier under § 27-2-102(1)(a), M.C.A. This reasoning applies with equal force here. The access dispute between the County and the Tribes is inherently complex,

involves convoluted immunity issues, dates back many decades, and requires interpretation of historical facts and antiquated treaties. The County Attorney claimed to be an expert in this arena. (Doc. 1, ¶ 16). Lundeen is not a lawyer.

As the Court reasoned in *Watkins Trust*, for Lundeen to know she had a claim when the Tribes gated off her access would have required her to retain multiple professionals, duplicating the County's research and adding expense. Even then, the second element of her claim (e.g., the County's representations about access were untrue) would still have been subject to reasonable debate until Judge Christensen ruled. Lundeen's injury was concealing in nature by the complexity of the access issues.

Assuming the damages to Lundeen accrued on May 13, 2019, the limitations period nonetheless did not begin to run until the discovery rule was also satisfied on April 16, 2020. The discovery rule tolls the running of the statute of limitations until the facts constituting Lundeen's claim were discovered.

The County also threatened to stop Lundeen's project if she sued them and led her to reasonably believe they were interested in a pre-litigation settlement. Lundeen was afraid if she sued before her variance was approved, the County would retaliate against her. The County's conduct was calculated to prevent Lundeen from discovering the facts to support her claim.

The answer to the statute of limitations question is fact intensive and should be decided by a jury. It was not the District Court's job to sort through the disputed facts and interpret them one way or the other – that is the jury's responsibility. *See, e.g.*, *Hill v. Squibb & Sons, E.R.*, 181 Mont. 199, 592 P.2d 1383 (1979) ("Whether an action is barred by the statute of limitation is for the jury when there is conflicting evidence as to when the cause of action accrued."); *Johnston*, ¶ 28 ("[W]hen there is conflicting evidence as to when a cause of action accrued, the question of whether the action is barred by the statute of limitations is for the jury to decide."). When Lundeen should have discovered she had a viable claim against the County is "inconsistent and unclear" under the facts of the present case. *Thompson v. Nebraska Mobile Homes Corp.*, 198 Mont. 461, 469, 647 P.2d 334, 338 (1982). The District Court erred by not letting a jury resolve the statute of limitations question.

C. The District Court erred in not applying equitable tolling.

Consistent with its inherent equitable powers, courts can preclude defendants from asserting a statute of limitations defense where the defendant's own misconduct prevented the plaintiff from timely filing suit. This equitable doctrine, known as equitable estoppel or, "equitable tolling" – is consistent with the principle that a wrongdoer should not be able to benefit from his own wrong, and is sometimes raised by plaintiffs in response to a statute of limitations defense. *See* § 1-3-208, M.C.A.

The Court has applied the equitable tolling doctrine to statutes of limitations. *Weidow v. Uninsured Employers' Fund*, 2010 MT 292, ¶ 25, 359 Mont. 77, 246 P.3d 704 (citing *Harrison v. Chance*, 244 Mont. 215, 228, 797 P.2d 200, 208 (1990)); *Lozeau v. GEICO Indem. Co.*, 2009 MT 136, ¶ 14, 350 Mont. 320, 207 P.3d 316. The Court rejects any one-size-fits-all approach that would serve no policy purpose. *Weidow*, ¶ 28 (citing *Burnett v. N.Y.C. RR. Co.*, 380 U.S. 424, 433-34, 85 S. Ct. 1050, 1057-58, 13 L. Ed. 2d 941 (1965)). As the Court stated in *Lozeau*, "[e]quitable tolling allows in limited circumstances for an action to be pursued despite the failure to comply with relevant statutory filing deadlines." *Lozeau*, ¶ 14. The policy behind the doctrine is to avoid forfeitures and allow good faith litigants like Lundeen their day in court. *Schoof v. Nesbit*, 2014 MT 6, ¶ 34, 373 Mont. 226, 316 P.3d 831.

The Court has previously considered adoption of aspects of federal equitable tolling rules. *Id.*, ¶ 35 (citations omitted). "The Second Circuit Court of Appeals has held that equitable tolling may extend a statute of limitations in "rare and exceptional circumstances." *Id.* (quoting *Valverde v. Stinson*, 224 F.3d 129, 133 (2nd Cir. 2000)). Equitable tolling does not require that the defendant's conduct rise to the level of fraud, or even be intentional, but only that the nature of the defendant's actions has concealed from the plaintiff the existence of the claim. *Schoof*, ¶ 35 (citing *Veltri v. Bldg. Serv. 32-b-J Pension Fund*, 393 F.3d 318, 322 (2nd Cir. 2004)).

Taken as true, Lundeen's allegations qualify for application of these equitable tolling principles. Assuming, *arguendo,* Lundeen's claim accrued on May 13, 2019, she gave timely notice of her claim to the County long before May 13, 2022. On July 14, 2020, approximately three (3) months after the federal court ruling, Lundeen sent the County a letter summarizing her claim and inquiring about the County's interest in resolving it short of litigation. (Doc. 9, ¶ 17). Lundeen sent another settlement demand to the County on May 4, 2021. (*Id.*, ¶ 18). On June 21, 2021, Lundeen sent the County a letter regarding the statute of limitations issue, which culminated in the parties' execution of the tolling agreement. (*Id.*, ¶¶ 20-21).

The County was well aware of Lundeen's claim within the applicable statute of limitations erroneously determined by the District Court. The County cannot show any prejudice to it in gathering evidence to defend against Lundeen's claim. After the Tribes gated off Lundeen's access, the County continued to tell her its representations about access were true, and that it and she would ultimately prevail in the federal court litigation, thereby affirming the validity of Lundeen's conditional approval and allowing her to move ahead with her project. Lundeen reasonably and in good faith waited to sue the County until the federal litigation concluded in the Tribes' favor. Prevailing in the federal litigation was one of two legal remedies possessed by Lundeen, which she chose to pursue based on the County's assurances about the strength of its position. She trusted the County and relied on its

representations about access. That turned out to be a mistake. But Lundeen did not learn, and could not reasonably have learned, that the County's representations about access were untrue until Judge Christensen made his ruling.

The nature of the County's conduct deterred Lundeen from suing sooner. The County not only led her to believe it was genuinely interested in resolving her claim out-of-court, but also directly threatened to stop her project dead in its tracks by revoking her conditional approval if she took legal action. Lundeen's fear of retaliation was reasonable under the circumstances. After the Tribes gated off her access, she had to mitigate her damages by purchasing additional land to provide for alternate primary access to the Resort. At the time the County threatened Lundeen, she still needed to obtain a variance that would exempt her from also having to provide secondary access, which she was unable to do because the Tribes refused to grant her a permit or to work with her in any way. Lundeen was afraid to sue before obtaining the variance. After the variance was approved negotiations continued. Then the County suddenly shifted course and advised Lundeen on September 30, 2022 it was no longer interested in amicably resolving her claim. Lundeen promptly filed suit about one (1) month later.

Lundeen should not be deprived of her claims "when such an approach would serve no policy purpose." *Weidow*, ¶ 28. The primary purpose of statutes of limitations is the suppression of stale claims which, with the attendant passage of

time, inhibits a party's ability to mount an effective defense. *E.W. v. D.C.H.*, 231 Mont. 481, 484, 754 P.2d 817 (1988). The policy underlying the bar imposed by statutes of limitations is, at its roots, one of basic fairness. *Id.* "[L]imitation periods are designed to ensure justice by preventing surprise, but no surprise exists when defendants are already on notice of the substantive claim being brought against them." *Weidow*, ¶ 28 (quoting *Stevens v. Norvartis Pharms. Corp.*, 2010 MT 282, ¶ 34, 358 Mont. 474, 247 P.3d 244).

There was no unfair surprise to prevent because the County already knew Lundeen would be asserting a claim against it if the federal court litigation was decided in favor of the Tribes. The tolling agreement and settlement negotiations throughout 2021 and into 2022 clearly establish this. Applying the equitable tolling doctrine is appropriate because Lundeen was substantially prejudice by the County's concealment of her claim and its misconduct in threatening the overall viability of her project, which she has her entire life savings tied up in. Lundeen made a reasonable effort to pursue her legal rights by riding out the federal litigation with the County before suing. Lundeen should get relief from the filing deadline.

"[T]he application of the tolling doctrine in this case is a question appropriately reserved for a jury determination." *Guobadia v. Irowa*, 103 F. Supp. 3d 325, 341 (E.D.N.Y. 2015). The County will have the opportunity to present its statute of limitations defense at trial when the evidence the parties will present about

the County's involvement in Lundeen's injuries will likely overlap with the evidence in support of its statute of limitations defense. The District Court erred in taking the tolling question away from a jury.

D. Lundeen's NIED claim should have survived M. R. Civ. P. 12(b)(6) scrutiny.

The District Court erred in dismissing Lundeen's NIED claim and determining, "[a]s Plaintiff's NIED claim is based upon the same alleged conduct as her negligent misrepresentation claim, such claim similarly fails." (Doc. 13, p. 8). The County's argument, which the District Court erroneously adopted, rose and fell with the fact that Lundeen's negligent misrepresentation claim is actionable. (Doc. 3, pp. 12-13).

The County cited *Ray v. Connell*, 2016 MT 95, ¶ 21, 383 Mont. 221, 371 P.3d 391, where the Court concluded "that (the plaintiff's) additional claims rely on the same underlying conduct that we have already concluded is not actionable." The County's reliance on *Ray* is misplaced because, as discussed below, Lundeen's negligent misrepresentation claim is actionable and should not have been dismissed.

E. The District Court's error in dismissing Lundeen's complaint was not harmless.

The Court's harmless error doctrine requires that, "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 35,

371 Mont. 356, 308 P.3d 88 (citing M. R. Civ. P. 61). The District Court's dismissal order clearly affected Lundeen's substantial rights, including her due process rights and her right to a jury trial. As a result of the order, Lundeen was deprived of her day in court altogether – clearly not a harmless error.

The County may argue the order was harmless because Lundeen's claim is not actionable even if it were not time-barred. The County's motion to dismiss asserted Lundeen's negligent misrepresentation claim "also fails because Lake County's alleged representations were statements of legal opinion." (Doc. 3, pp. 7-12).

The District Court failed to address this argument, relying only on the statute of limitations in dismissing Lundeen's complaint. (Doc. 13). But the County's argument is nevertheless unavailing. Its contention that, "[t]here is no Montana case law, at all, supporting the idea that a legal opinion can become 'blended with facts' such that it is a statement of fact for purposes of negligent misrepresentation," is simply incorrect. (Doc. 3, p. 11).

An exception to the rule that expressions of opinion are not actionable for negligent misrepresentation applies when the party making the false representation of opinion has superior knowledge or special information. *Anschutz Corp. v. Merrill Lynch and Co. Inc.*, 785 F. Supp. 2d 799 (N.D. Cal. 2011).

The Court first adopted and applied this exception in Montana in *Como Orchard Land Co. v. Markham*, 54 Mont. 438, 443, 171 P. 274, 275 (1918), where it said "the following rule is sustained by reason and the authorities: If the party expressing the opinion possesses superior knowledge, such as would reasonably justify the conclusion that his opinion carries with it the implied assertion that he knows the facts which justify it, his statement is actionable if he knows that he does not honestly entertain the opinion because it is contrary to the facts. So, likewise, an opinion may be so blended with facts that it amounts to a statement of facts." *Id.* (citing *Edward Barron Estate Co. v. Woodruff*, 163 Cal. 561, 42 L.R.A. (n.s.) 125, 126 P. 351; *Sheer v. Hoyt*, Cal. App. 662, 110 P. 477).

The Montana Supreme Court again applied this exception several years later in *Bails v. Wheeler*, 171 Mont. 524, 559 P.2d 1180 (1977). Bails purchased a ranch in reliance on a representation by his realtor that it would produce an income of at least $80,000 per year. *Id.*, 171 Mont. at 525, 559 P.2d at 1181. As to the "past or existing material fact" element, defendants argued the representation about the ranch producing $80,000 was an opinion and therefore not actionable. *Id.*, 171 Mont. at 526, 559 P.2d at 1181. Applying the *Como* exception, the Court disagreed, explaining "the income representation may be actionable within either of [the rules from *Como*] depending on determination of issues of fact." The Court explained that real estate brokers had superior knowledge of ranching and one of them had superior

knowledge of the ranch in question. *Id.*, 171 Mont. at 526-27, 559 P.2d at 1181. The District Court's summary judgment was vacated, and the cause remanded for further proceedings on the misrepresentation claim. *Id.*

Como has been followed both by Montana courts and courts in other jurisdictions. *See, e.g., Glacier General Assurance Co. v. Casualty Indem. Exchange*, 435 F. Supp. 855, 860 (D. Mont. 1977) ("If the [insurance loss] figures so published are determined arbitrarily and with the intent to deceive and are in fact false, then the publisher is guilty of fraud regardless of whether his expression be one of fact or one of opinion."); *Dunlap v. Nelson*, 165 Mont. 291, 296, 529 P.2d 1394 (1974) ("Generally the representations must relate to a fact, as distinguished from the expression of an opinion, though an exception to that rule is illustrated in *Como*…"); *Horton v. Reynolds*, 65 F.2d 430 (8th Cir. 1933); *Berman v. Thomas*, 41 Ariz. 457, 19 P.2d 685 (Ariz. 1933); *Palladine v. Imperial Valley Farm Land Asso.*, 65 Cal.App. 727, 225 P. 291 (Cal. 1924).

The *Como* exception applies to attorneys and other professionals. At common law, the rule of privity limits an attorney's liability to those in privity with the attorney. An attorney in Montana therefore is not generally liable to non-client third parties. However, the common law rule does not apply to all causes of action against an attorney. If an independent duty to the non-client exists, "based on the professional [attorney's] manifest awareness of the non-client's reliance on the

misrepresentation and the professional's intention that the non-client so rely," then an attorney may be liable for negligent misrepresentation or fraudulent misrepresentation. *See, e.g.*, *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. 2005) (citing *McCamish, Martin, Brown & Loeffler v. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999) (allowing a cause of action for negligent misrepresentation by a non-client under the *Restatement (Second) of Torts* § 552)); *Western Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶ 66, 359 Mont. 34, 249 P.3d 35 (reversing District Court's dismissal of negligent misrepresentation claim, explaining that, "[w]here a third party asserts a claim for negligent misrepresentation against an accountant, the court must instruct the jury according to the elements of a § 552 negligent misrepresentation claim."); *Thayer v. Hicks*, 243 Mont. 138, 793 P.2d 784 (1990) (applying the rule that a professional owes a duty of care to third parties if the professional actually knows that a specific third party intends to rely upon his work and if the reliance is in connection with a particular transaction or transactions which the professional is aware when he prepares the work product).

The representations the County made to Lundeen are actionable. Special or one-sided knowledge establishes that a statement is one of fact, not opinion. The Lake County Attorney "represented that he had superior knowledge or special information." (Doc. 1, ¶ 47). The County spent eight (8) months and over 1,000 man hours "thoroughly researching the factual background and access issues." (*Id.*, ¶ 16).

The County represented they were "confident in the County's ownership of the platted roadways in the Big Arm Townsite." (*Id.*, ¶ 23). The County knew Lundeen did not have counsel and was relying on their expert research and representations. (*Id.*, ¶ 17). The County Attorney overtly "held himself out as an expert on the access issues." (*Id.*, ¶ 16). Lundeen reasonably concluded the County's representations and opinions blended with facts carried an implied assertion of truth. (*Id.*, ¶ 51). The County was so confident in its representations that it removed the condition of approval requiring Lundeen to hold them harmless if the roads were found not to provide valid access for Lundeen's Resort. (*Id.*, ¶ 19).

The County had superior knowledge to Lundeen with respect to all historical facts, treaties, access issues, and other long-standing disputes with the Tribes. Construing Lundeen's complaint in the light most favorable to her, and taking all allegations of fact therein as true, her allegations easily satisfy, for pleading purposes, the *Como* exception to the rule that opinions are normally not actionable.

CONCLUSION

For the foregoing reasons, the District Court's decision to dismiss Lundeen's complaint should be reversed. The Court should remand this case back to the District Court for further proceedings on Lundeen's claim and instructions to issue a scheduling order pursuant to M. R. Civ. P. 16.

DATED this 23rd day of October, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, except for quoted and indented material; and, the word count calculated by Microsoft Word for Windows is 9,144 words, excluding Table of Contents, Certificate of Service and Certificate of Compliance.

DATED this 23rd day of October, 2023.

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I, the undersigned, an employee of Datsopoulos, MacDonald & Lind, P.C., hereby certify that I have filed a true and accurate copy of the foregoing with the Clerk of the Montana Supreme Court, and that true and accurate copies of the foregoing were served upon each attorney of record, as follows:

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