IN THE SUPREME COURT OF THE STATE OF MONTANA

LORI LUNDEEN, Plaintiff/Appellant, vs. LAKE COUNTY, a political subdivision of the State of Montana, Defendant/Appellee.	No. DA 23-0387

APPELLEE'S ANSWER BRIEF

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

December 22, 2023

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1. Whether the District Court's Order dismissing Ms. Lundeen's Complaint for failure to state a claim should be affirmed because Ms. Lundeen cannot prove the elements of her claims.

2. Whether the District Court's Order dismissing Ms. Lundeen's Complaint for failure to state a claim should be affirmed because the statute of limitations bars her claims.

STATEMENT OF THE CASE[1]

Ms. Lundeen purchased the property on which she would later develop the Wild Horse RV Resort without Lake County's involvement and before any of Lake County's alleged misrepresentations. When she purchased the property, Ms. Lundeen was aware that legal access to the property was an issue. She admits she would not have purchased the property if she thought she did not have legal access to it. She did her own research to confirm she had legal access to the property, including review of the title commitment.

After purchasing the property, Ms. Lundeen sought Lake County's approval to subdivide and develop it into the Wild Horse RV Resort. Ms. Lundeen proposed using roads platted through the Big Arm town site to provide access to her

[1] Because this is an appeal of the District Court's grant of Lake County's Rule 12(b)(6) Motion to Dismiss, this Brief assumes for sake of analysis, without admitting, that the well-pled facts alleged in Ms. Lundeen's Complaint are true. *See, e.g., Cowan v. Cowan*, 2004 MT 97, ¶14, 321 Mont. 13, 89 P.3d 6.

development. Lake County granted conditional approval for the proposed development on or about May 16, 2018. One of the conditions on the approval was that the legality of the proposed access to the subdivision would be investigated by **both** Lake County and by Ms. Lundeen. No later than August 2, 2018, the Confederated Salish and Kootenai Tribes of the Flathead Nation (CSKT) contested the legality of the conditionally approved access route to the proposed development, on the grounds that the access route ran through land over which CSKT asserted it, not Lake County, had ownership and regulatory authority. Ms. Lundeen was aware of CSKT's position and dispute with Lake County. Over the next several months, Lake County, consistent with the condition on approval, analyzed the complex legal issues involved in assessing whether the contested land was properly subject to County authority or CSKT authority. Ms. Lundeen, despite the condition on approval, states she did no analysis regarding the legality of the proposed access.

By on or about January 31, 2019, Lake County opined to Ms. Lundeen that CSKT's legal position was incorrect, the County had legal ownership and regulatory authority over the proposed access route, and Ms. Lundeen could proceed with the development. Lake County issued another conditional approval of the proposed subdivision. This approval also contained a condition that the legality of the proposed access route would continue to be analyzed by Lake County and by Ms. Lundeen. Ms. Lundeen, allegedly relying on Lake County's representations,

committed time and resources to break ground on the development in or around April 2019. On May 13, 2019, Ms. Lundeen went to the development and discovered CSKT had gated off her access and was preventing further work by her contractors. Ms. Lundeen retained her own counsel no later than May 17, 2019. The firm Ms. Lundeen retained represented her continuously since then in both the U.S. District Court action with CSKT and in Ms. Lundeen's claim against Lake County.

On May 24, 2019, CSKT filed a Complaint against Lake County and Ms. Lundeen, seeking to quiet its asserted title to the proposed access route to Ms. Lundeen's development. Per Ms. Lundeen, "[t]he access dispute between the County and the tribes [wa]s inherently complex, involve[d] convoluted immunity issues, date[d] back many decades and require[d] interpretation of historical facts and antiquated treaties." Appendix ("Appendix") 21-22; Opening Brief ("Opening Brief") pp. 24-25.

On April 16, 2020, the U.S. District Court for the District of Montana denied Ms. Lundeen's and Lake County's Joint Motion for Summary Judgment and entered summary judgment in favor of CSKT. Ms. Lundeen concedes that "the second element of her [current] claim (e.g., the County's representation was untrue) would still have been subject to reasonable debate until Judge Christensen ruled." *Id.* Ms. Lundeen was aware of her alleged claims against Lake County during the entirety of the underlying federal lawsuit; she states Lake "County was aware all along that

[Ms.] Lundeen would bring claims against them if [the federal court ruled against Ms. Lundeen and Lake County]." Appendix 19; Opening Brief, p. 30 ("…the County already knew Lundeen would be asserting a claim against it if the federal court litigation was decided in favor of the Tribes.").

On November 1, 2022, Ms. Lundeen filed her instant Complaint. Her Complaint alleges Lake County negligently misrepresented to her that it, and not CSKT, had jurisdiction over the proposed access route to her development, causing her damages from May 13, 2019, the date CSKT gated off access to her property (Count I). The Complaint also asserts Lake County's alleged misrepresentations negligently inflicted emotional distress on Ms. Lundeen (Count II) and that Lake County is vicariously, as well as directly, liable (Count III[2]).

On January 9, 2023, Lake County moved to dismiss Ms. Lundeen's Complaint under Rule 12(b)(6), for failure to state a claim upon which relief can be granted, on two independent bases. The statute of limitations bars Ms. Lundeen's claims. Also, even if Ms. Lundeen's claims were timely, Lake County's legal opinions cannot be the basis of a negligent misrepresentation claim, and Ms. Lundeen therefore cannot prove the elements of either Count I (negligent misrepresentation) or Counts II and III (which derive from the same underlying conduct).

[2] Count III does not allege an additional claim on the merits, but rather an alternative theory of liability as to Count I and Count II. It therefore fails for the same reasons as Counts I and II. In the interest of concision, Count III is not further separately addressed.

On June 12, 2023, the District Court granted Lake County's Motion to Dismiss. The District Court's dismissal of Ms. Lundeen's Complaint was correct.

STATEMENT OF THE FACTS

Ms. Lundeen purchased the real property at issue at some point before May 16, 2018. Appendix 4, ¶¶ 9-13. Ms. Lundeen was aware, before and when she purchased the property, that legal access to the property was a potential issue. Appendix 45, ¶8. Ms. Lundeen performed her own independent research prior to purchasing the property, including reviewing the title commitment, and believed, based upon her independent research, that she would have legal access to the property if she purchased it. *Id.* Ms. Lundeen would not have purchased the property if she did not believe she had legal access to it. *Id.* All these events occurred before and unrelated to any alleged misrepresentation by Lake County. Appendix 4-9, ¶¶ 13-35.

After she purchased the property, Ms. Lundeen filed an application with Lake County for the development of a 60-lot RV resort subdivision, the "Wild Horse RV Resort." Appendix 4, ¶¶ 9-13.

On or about May 16, 2018, Lake County conditionally approved Ms. Lundeen's subdivision application. *Id*, ¶ 13. One of the conditions on the approval was, "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 Subdivision] to be legal." *Id*, ¶ 14 (emphasis added).

On or about August 2, 2018, CSKT sent a letter to Lake County "contesting the County's ownership, regulatory authority over, and right to use one of the access routes that had been conditionally approved" for Ms. Lundeen's subdivision. *Id*, ¶15. Ms. Lundeen was aware that CSKT disputed Lake County's legal authority over the proposed access route from the time "the tribes first questioned whether the County could grant access for [her] project," and at any event no later than August 17, 2018. Appendix 44, ¶ 5; Appendix 4-5, ¶¶ 15-19.

Over the next several months, consistent with the May 16, 2018, conditional approval, Lake County researched to confirm its opinion regarding the legality of the proposed access route to Ms. Lundeen's proposed subdivision. Appendix 5, ¶ 16. Ms. Lundeen, despite the requirement in the May 16, 2018, conditional approval, alleges she did no additional research or analysis regarding the legality of her proposed access route. *Id*, ¶ 17.

On or about January 31, 2019, Lake County conditionally approved an amended road layout for the proposed subdivision. *Id*, ¶ 19. Lake County's statement that forms the basis of Ms. Lundeen's negligent misrepresentation claim occurred on January 31, 2019, when Ms. Lundeen alleges Lake County "represented unequivocally to Lundeen that CSKT's position was unfounded and baseless, that

Lundeen had access, and that she could proceed with developing the Resort as applied for and conditionally approved." *Id*, ¶20. Like the May 16, 2018, conditional approval, one of the conditions on the January 31, 2019, approval was, "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." *Id*, ¶ 19 (emphasis added).

Ms. Lundeen "commit[ed] significant time and valuable resources to break ground and move ahead" with construction on the subdivision in or around April 2019. Appendix 7, ¶ 24.

"On or about May 13, 2019, [Ms.] Lundeen went to the Resort and discovered that the CSKT had gated off her access to prevent further work by her contractors. [Ms.] Lundeen called 9-1-1 and reported that she was being held hostage on her own real property and that her contractors were blocked in." *Id*, ¶ 25. Ms. Lundeen's "Resort was effectively shut down by the CSKT and the gate." *Id*, ¶ 28.

Ms. Lundeen sought counsel after CSKT gated off access to her property. Appendix 46, ¶11. No later than May 17, 2019, Ms. Lundeen was represented by Bill VanCanagan, of the firm Datsopoulos, MacDonald & Lind, P.C. Appendix 46, ¶11 (referencing Exhibit B to the same). Ms. Lundeen was represented by this firm throughout, and with respect to, the underlying dispute between Ms. Lundeen, Lake County, and CSKT, and also throughout, and with respect to, Ms. Lundeen's claims

against Lake County. Appendix 46, ¶11; Appendix 47-48, ¶¶ 17-24; Appendix 83; Appendix 86.

On or about May 24, 2019, CSKT filed a Verified Complaint to Quiet Title and Injunctive Relief in the U.S. District Court for the District of Montana. Appendix 8, ¶29; Appendix 61-62. The CSKT Complaint sought, generally, to quiet title in parts of the proposed Big Arm townsite, including an access route for Ms. Lundeen's proposed subdivision, in CSKT, requested the Court enjoin Ms. Lundeen's development and use of the roads at issue, and requested the Court enjoin Lake County from any further acts authorizing construction on the roads within the proposed Big Arm townsite. *Id.* The CSKT Complaint named Ms. Lundeen and Lake County as separate Defendants. *Id.* Ms. Lundeen alleges that "[t]he access dispute between the County and the tribes [wa]s inherently complex, involve[d] convoluted immunity issues, date[d] back many decades and require[d] interpretation of historical facts and antiquated treaties." Appendix 21-22; Opening Brief, pp. 24-25.

Ms. Lundeen alleges she "was forced to come out-of-pocket to fund her defense in the federal litigation. Being unable to move forward with the Resort due to the litigation, Lundeen found herself in a financial bind. She had to fire sale family property just to keep her head above water. Lundeen's emotional distress continued to escalate throughout the federal litigation." Appendix 8, ¶ 31.

Ms. Lundeen alleges she was aware of her ability to assert a claim against Lake County during the entirety of the underlying lawsuit between her, CSKT, and Lake County. She alleges she made Lake County aware that she would assert claims against Lake County if the federal court ruled against her and Lake County. Appendix 19. ("The County was aware all along that Lundeen would bring claims against them if [Judge Christensen disagreed with the County's and Ms. Lundeen's position and the County did not appeal]."); *see also* Opening Brief, p. 30 ("…the County already knew Lundeen would be asserting a claim against it if the federal court litigation was decided in favor of the Tribes.").

On April 16, 2020, the Court in the underlying dispute between CSKT, Ms. Lundeen, and Lake County, issued a thirty-three page Order granting summary judgment in favor of CSKT and denying Ms. Lundeen's and Lake County's Joint Motion for Summary Judgment. Appendix 8, ¶32; Appendix 119. Ms. Lundeen alleges that the truth of Lake County's representations about its legal authority over the proposed access route was "subject to reasonable debate until Judge Christensen ruled." Appendix 22; Opening Brief, p. 25.

On July 14, 2020, Ms. Lundeen, through counsel, sent a letter to Lake County summarizing her alleged claim. Appendix 47, ¶17.

On July 6th and 12th, 2021, Ms. Lundeen and Lake County, respectively, signed a Tolling Agreement. Appendix 124-126. The Tolling Agreement stated that

"any statutes of limitations applicable to any Claim(s) Ms. Lundeen may have against Lake County… [are] tolled from July 1, 2021, to and including December 1, 2021." *Id.*, p. 1. The Tolling Agreement further stated, "This Agreement shall not be construed as an admission by any Party as to any issues or contentions that may exist or arise among or between them incident to the Claim(s). This Agreement will not add or detract from the Claim(s) or from defenses to the Claim(s)… Any defenses available to Lake County as of July 1, 2021, including any defenses existing by virtue of the passage of time, are hereby preserved." *Id.*, p. 1.

From May 13, 2019, to May 13, 2022, is three years. From July 1, 2021, to December 1, 2021, is 153 days. There are 153 days between May 13, 2022, and October 13, 2022.

Ms. Lundeen filed her Complaint in the District Court on November 1, 2022, nineteen (19) days after October 13, 2022.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's grant or denial of a motion to dismiss *de novo*. *Rooney v. City of Cut Bank*, 2012 MT 149, ¶13, 365 Mont. 375, 286 P.3d 241 (citing *Grizzly Sec. Armored Express, Inc. v. Armored Group, LLC*, 2011 MT 128, ¶12, 360 Mont. 517, 255 P.3d 143). A motion to dismiss must be construed in the light most favorable to the plaintiff. Whether a district court properly converted, or did not convert, a motion to dismiss into a motion for summary judgment pursuant

to M.R.Civ.P. 12(d) is a discretionary matter reviewed for an abuse of discretion. *Anderson v. ReconTrustCo., N.A.*, 2017 MT 313, ¶7, 390 Mont. 12, 407 P.3d 692.

SUMMARY OF ARGUMENT

The District Court correctly dismissed Ms. Lundeen's claims for failure to state a claim upon which relief can be granted. The Court correctly determined the statute of limitations bars Ms. Lundeen's claims. Even if they were not time-barred, Ms. Lundeen's allegations fail to state claims on the merits. And the District Court did not abuse its discretion in failing to convert the Motion to Dismiss to a Motion for Summary Judgment.

Accepting Ms. Lundeen's well-pled allegations[3] as true, her claims are based upon legal opinions from Lake County. This is sufficient to defeat her claims. Lake County was never Ms. Lundeen's attorney, and a legal opinion cannot at any event be the basis of a negligent misrepresentation claim. Moreover, Ms. Lundeen admits Lake County's legal opinions were "subject to reasonable debate until Judge Christensen ruled," and regarded issues that were "inherently complex, involve[d] convoluted immunity issues, date[d] back many decades and require[d] interpretation of historical facts and antiquated treaties." And though she alleges she relied solely on Lake County's opinions, Ms. Lundeen retained her own counsel no

[3] Looking beyond the Complaint to Ms. Lundeen's Affidavit, as she requests, only provides additional evidence that her claims fail. The District Court did not err in declining to convert the Motion to a Motion for Summary Judgment, because considering the Affidavit does not alter the outcome of the Motion to Dismiss.

later than May 17, 2019, and, through counsel, asserted the same legal positions as Lake County in the U.S. District Court action. Ms. Lundeen's admission that Lake County's statements were "subject to reasonable debate" is further fatal to her claims – negligent misrepresentation requires the defendant "made the representations without any reasonable ground for believing it to be true."

Ms. Lundeen was also repeatedly told in writing that she, in addition to Lake County, was obligated to review the disputed issues and reach her own opinions. Ms. Lundeen alleges that despite her obligations, she did no research of her own. Ms. Lundeen cannot establish justified reliance upon Lake County's representations. Ms. Lundeen's negligent misrepresentation claim fails because she cannot establish the first, third, or fifth elements of it, and her NIED claim failed because it derives from the same alleged conduct.

Further, all elements of Ms. Lundeen's claims accrued on or before May 13, 2019. Ms. Lundeen alleges Lake County made the disputed representations before May 13, 2019; that she relied on the disputed representations to "commit[] significant time and valuable resources to break ground and move ahead" with construction on the subdivision before May 13, 2019; and that she suffered damages as a result of CSKT gating off her property beginning on May 13, 2019, and continuing thereafter. Ms. Lundeen was also on inquiry (or actual) notice that Lake County's legal opinion about authority over the disputed access route might be

incorrect as early as August 2018, when she became aware CSKT disputed Lake County's legal position. The accrual and discovery rules were both satisfied no later than May 13, 2019. After accounting for the period excluded by the Tolling Agreement, the statute of limitations ran on Ms. Lundeen's claims no later than October 13, 2022.

Ms. Lundeen's arguments to the contrary are unavailing. That the federal court did not rule against Ms. Lundeen's and Lake County's legal position until April 16, 2020, did not make Ms. Lundeen unable, before then, to prove the truth or falsity of Lake County's representations regarding its authority over the disputed access. Nor did it make Ms. Lundeen unable to prove her alleged damages. The U.S. District Court action did not toll the statute of limitations.

The "continuing relationship" doctrine also does not delay the accrual of Ms. Lundeen's claim. The "continuing relationship" doctrine requires a professional-client relationship. Lake County was not Ms. Lundeen's attorney, and Ms. Lundeen was not Lake County's client.[4] Moreover, Lake County informed Ms. Lundeen of her obligation to review and assess the legality of the proposed access route.

Ms. Lundeen's arguments regarding the discovery rule fail for similar reasons. Unlike in the cases Ms. Lundeen cites, there was no attorney-client or other

[4] This Court has rejected the application of the "continuing relationship" doctrine in the context of legal malpractice claims. *Schneider v. Leaphart*, (1987) 228 Mont. 483, 488, 743 P.2d 613, 616-617.

professional-client relationship between Lake County and Ms. Lundeen. Ms. Lundeen had other counsel – the same firm that represents her in this lawsuit and has continuously represented her since at least May 17, 2019. Moreover, Lake County's and CSKT's differing legal opinions about jurisdiction over the proposed access were open and obvious, not concealed. Based on CSKT's communications – not to mention the subsequent lawsuit – Ms. Lundeen was on at least inquiry notice that Lake County's legal opinion might be incorrect before she even broke ground on her project. Equitable tolling does not apply for substantially the same reasons: there was no concealment of the alleged basis for Ms. Lundeen's claims.

Fundamentally, this case presents a straightforward application of well-established Montana law regarding the statute of limitations and the elements of negligent misrepresentation. The District Court's Order of Dismissal should be affirmed.

ARGUMENT

I. Ms. Lundeen's Complaint Was Correctly Dismissed Because She Cannot Prove The Elements Of Her Claims.

A. Ms. Lundeen cannot prove the elements of negligent misrepresentation.

The elements of negligent misrepresentation are:

a) the defendant made a representation as to a *past* or *existing* material fact;

b) the representation must have been untrue;

> c) regardless of its actual belief, the defendant must have made the representations without any reasonable ground for believing it to be true;
>
> d) the representation must have been made with the intent to induce the plaintiff to rely on it;
>
> e) the plaintiff must have been unaware of the falsity of the representation; it must have acted in reliance upon the truth of the representation and it must have been justified in relying upon the representation;
>
> f) the plaintiff, as a result of its reliance, must sustain damage.

Morrow v. Bank of America, N.A., 2014 MT 117, ¶45, 375 Mont. 38, 324 P.3d 1167 (emphasis in original)(internal citation omitted).

1. Ms. Lundeen cannot prove the first element of negligent misrepresentation because a legal opinion is not a statement of fact.

For purposes of the first element of negligent misrepresentation, a legal opinion is not a statement of fact. *See, e.g., Yellowstone II Dev. Group, Inc. v. First Am. Title Ins. Co.*, 2001 MT 41, ¶79, 304 Mont. 223, 20 P.3d 755; *Elk Park Ranch, Inc. v. Park County*, (1997) 282 Mont. 154, 166, 935 P.2d 1131, 1138 (same); *City of Whitefish v. Troy Town Pump, Inc.*, 2001 MT 58, ¶7, ¶¶17-19, 304 Mont. 346, 21 P.3d 1026 (same).

The statements Ms. Lundeen alleges were misrepresentations were statements of legal opinion, not statements of "past or existing material fact." Ms. Lundeen's own Complaint reflects this. She describes the statements as regarding the "legality

of the proposed access to the subdivision through the Big Arm Townsite" (Appendix 4-5, ¶14), and the dispute between Lake County and CSKT as CSKT "contesting the County's ownership, regulatory authority over, and right to use one of the access routes…" (*Id.*, ¶15). She repeatedly alleges she was not represented by legal counsel during the events before May 17, 2019, which would only matter if the statements in dispute were legal opinions. *Id.*, ¶¶10, 16, 17. She notes Lake County, on January 31, 2019, after researching the legality of the disputed access route, specifically conditioned development approval as follows: "Prior to the 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." *Id.*, ¶19 (emphasis added).

Apparently recognizing this infirmity in her claim, Ms. Lundeen alleges that "[a]ny opinions Lake County gave to Lundeen regarding access were so blended with facts that they too amounted to statements of facts."[5] Appendix 12, ¶53. There 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. This is for good reason: Almost all legal opinions are a matter

[5] This is a legal conclusion, which the Court need not accept for purposes of Rule 12(b)(6).

of applying the facts to the law. This is the essence of what an attorney does. *See, e.g., Montana Supreme Court Comm'n on the Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, 334 Mont. 311, 147 P.3d 200; *Ostrovsky v. Monroe (In re Ellingson)*, (1999) 230 B.R. 426 (D.Mont.); Rule 702, M.R. Evid.; *In re Potts*, 2007 MT 81, 336 Mont. 517, 158 P.3d 418 (re: the inadmissibility of expert legal opinions: opinions "that state a legal conclusion or apply the law to the facts are inadmissible").

Ms. Lundeen's citation to the "*Como*" exception does not support her contention that a legal opinion can be a statement of fact for purposes of negligent misrepresentation. *Como Orchard Land Co. v. Markham*, (1918) 54 Mont. 438, 443, 171 P.2d 274, 275. The statements in *Como* were dealer's talk or trade talk regarding the value and characteristics of the fruit orchard land the defendants were selling to plaintiff – not legal opinions. *Como* at 275. The *Como* counterclaim defendant was puffing up the value of its land for sale by opining how profitable it could be. There were no legal opinions whatsoever at issue in *Como*.

The same is true of *Bails v. Wheeler*, the only other case in which, to undersigned counsel's knowledge, this Court has applied the *Como* exception. *Bails v Wheeler*, (1977) 171 Mont. 524, 559 P.2d 1180; *but see Dunlap v. Nelson*, (1974) 165 Mont. 291, 296, 529 P.2d 1394 (referencing existence of the *Como* exception); *Ray v. Divers*, (1925) 72 Mont. 513, 517, 234 P. 246 (same). In *Bails*, this Court

held that depending on determination of issues of fact, real estate brokers' opinions that a ranch could produce $80,000 to $100,000 in income, when the cash flow estimate prepared for that year indicated a much lower income, could be actionable under a fraudulent representation cause of action. *Bails*, at 527. There were no legal opinions at issue in *Bails*.

Ms. Lundeen's proposed "blended with fact" exception would swallow the rule that a legal opinion cannot be the basis for a negligent misrepresentation claim, is unsupported in Montana law, and should be rejected.

While a person may have a cause of action against an attorney for an incorrect legal opinion, that cause of action is legal malpractice—which requires the existence of an attorney-client relationship except under very limited circumstances not present here—and not negligent misrepresentation, which does not require the existence of an attorney-client relationship. Ms. Lundeen attempts to work around this defect in her claims by citing Texas cases for the proposition that "an attorney may be liable for negligent misrepresentation" for a legal opinion provided to a non-client "based on the professional [attorney's] manifest awareness of the non-client's reliance on the misrepresentation…" Ms. Lundeen's reliance on Texas law is misplaced. Under Montana law, except for under specific circumstances not present here, "an attorney's duty of loyalty runs to his client, not to third parties with him he has no agency relationship," and an attorney cannot be liable for negligent

misrepresentation within the context of his actions as an attorney to non-clients. *Crane Creek Ranch v. Cresap*, 2004 MT 351, ¶6, ¶¶10-11, 324 Mont. 366, 103 P.3d 535 (citing *Rhode v. Adams*, 1998 MT 73, 288 Mont. 278, 957 P.2d 1124).

Lake County's representations were statements of legal opinion, and Lake County was not Ms. Lundeen's attorney. Statements of legal opinion are not a statement of fact for purposes of negligent misrepresentation. Ms. Lundeen cannot prove her claim for negligent misrepresentation.

2. Ms. Lundeen also cannot prove the third and fifth elements of negligent misrepresentation.

In addition to the matters set forth in the pleadings, Ms. Lundeen's Brief in Opposition to Motion to Dismiss, including her supporting Affidavit, demonstrate she cannot prove the third element (lack of a reasonable basis) or the fifth element (justified reliance) of negligent misrepresentation. Her request to convert the Motion to Dismiss to a Motion for Summary Judgment was futile, and the District Court properly declined to do so.

Ms. Lundeen admits that the underlying "access dispute between the County and the tribes [wa]s inherently complex, involve[d] convoluted immunity issues, date[d] back many decades and require[d] interpretation of historical facts and antiquated treaties." Appendix 21-22; Opening Brief, pp. 24-25. She further admits that "the second element of her claim (e.g., the County's representation was untrue) would still have been subject to reasonable debate until Judge Christensen ruled."

Appendix 19; Opening Brief, p. 25. In a failed effort to justify her untimely filing of the instant Complaint, Ms. Lundeen admits too much: The positions Lake County – **and** Ms. Lundeen, through her own independent counsel – took on the complex underlying legal issues were not unreasonable, even though the underlying Court ultimately concluded they were incorrect. By Ms. Lundeen's own admission, Lake County had a reasonable basis for its representations regarding legal access.

Ms. Lundeen also cannot show justified reliance on Lake County's representations. As noted, the representations were statements of legal opinion and Lake County was not Ms. Lundeen's attorney. Ms. Lundeen was informed, repeatedly and in writing, of her obligations to research and form her own legal opinions regarding the underlying access dispute. Appendix 4-5, ¶¶ 14, 19. Ms. Lundeen apparently disregarded her own obligations, and elected not to retain her own counsel until shortly after CSKT gated off access to her project[6]. *Id*, ¶17; Appendix 46, ¶11. After retaining her own counsel, Ms. Lundeen alleges that she continued to rely on Lake County's legal opinions, despite being represented by her own counsel and despite joining, through her counsel, in the legal positions adopted by Lake County. Appendix 8, ¶30; Appendix 119. Moreover, Ms. Lundeen alleges she continued to rely on Lake County's legal opinions during the underlying

[6] The U.S. District Court also emphasized that Ms. Lundeen "did not even seek permission from the United States or the Tribes" for her requested access despite being aware of CSKT's position on access. Appendix, p. 109.

litigation while simultaneously alleging she ensured "[t]he County was aware all along that [she] would bring claims against them if [the Court ruled against the County and Ms. Lundeen]." Appendix 19; Opening Brief, p. 30 ("…the County already knew Lundeen would be asserting a claim against it if the federal court litigation was decided in favor of the Tribes.").

In short, Ms. Lundeen alleges she relied on the legal opinions of Lake County (1) when Lake County was not her attorney, (2) when she was informed she needed to obtain her own legal opinions, and failed to do so, (3) when she was subsequently represented by her own counsel, and willingly joined the legal positions advance by Lake County, and (4) when Ms. Lundeen was threatening litigation against Lake County. Accepting these allegations as true, permits only one conclusion: Ms. Lundeen cannot have justifiably relied on Lake County's representations.

Ms. Lundeen's Affidavit, even had the District Court considered it, and her Brief in Opposition only show she cannot prove the third and fifth elements of negligent misrepresentation, in addition to her claims failing on other bases. Converting the Motion to Dismiss to a Motion for Summary Judgment would have been futile, and the District Court did not abuse its discretion in declining to do so.

B. Ms. Lundeen's NIED Claim (Count II) fails because it is based upon the same alleged conduct as her negligent misrepresentation claim.

A lawful action cannot form the basis for a claim of infliction of emotional

distress, whether intentional or negligent. *Judd v. Burlington Northern & Santa Fe Ry.*, 2008 MT 181, ¶¶ 28-31, 343 Mont. 416, 186 P.3d 214. A statement is not unlawful merely because it is incorrect. As addressed above, the alleged statements at issue, which form the basis of Ms. Lundeen's NIED claim as well as her negligent misrepresentation claim, do not meet the elements of negligent misrepresentation. Therefore, because her negligent misrepresentation claim fails, her NIED claim must also fail.

This Court addressed an analogous issue in *Ray v. Connell*, 2016 MT 95, 383 Mont. 221, 371 P.3d 391. In that case, the plaintiff alleged claims for defamation, tortious interference, and for general damages for mental pain and suffering. *Id.*, ¶¶7-8. The plaintiff's claims arose out of statements he asserted the defendant had made about him. *Id.* The plaintiff asserted that by making these statements the defendant defamed him, tortiously interfered with his business interests, and caused him general damages. *Id.* This Court first addressed the defamation claim and found neither publication at issue met the elements of defamation. *Id.* at ¶10-19. This Court affirmed the District Court's grant of summary judgment on the defamation claim. *Id.* This Court then addressed whether the District Court's grant of summary judgment on the remaining claims was appropriate:

> The District Court concluded [Defendant] was entitled to summary judgment on these additional claims because it had already granted summary judgment on [Plaintiff's] defamation claims and the additional claims failed to allege 'any additional

> conduct of [Defendant] upon which to impose liability under Montana law.' **We conclude, likewise, that [Plaintiff's] additional claims rely on the same underlying conduct that we have already concluded is not actionable**. Therefore, no genuine issue of material fact existed and the District Court properly concluded [Defendant] was entitled to judgment as a matter of law.

Id. at ¶21 (emphasis added); *see, also, Hughes v. Lynch*, 2007 MT 177, ¶¶ 25-29, 338 Mont. 214, 164 P.3d 913 (where underlying malicious prosecution and abuse of process claims failed, tortious interference claim predicated on same bases also failed).

Ms. Lundeen's NIED claim is based upon the same alleged conduct as her negligent misrepresentation claim. As in *Ray*, where Ms. Lundeen's "additional claim[] rel[ies] on the same underlying conduct we have already concluded is not actionable," this claim also fails. To hold otherwise would allow plaintiffs, through artful pleading, to relieve themselves of the burden of proving the elements of negligent misrepresentation, effectively obviating that tort because almost any negligent misrepresentation claim can be recharacterized as an NIED claim. When the gravamen of the claim sounds in negligent misrepresentation, the elements of negligent misrepresentation, not another species of negligence, must be met. *Western Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶¶ 21-26, 359 Mont. 34, 249 P.3d 35 (where party asserted claim for "professional negligence," but gravamen of the claim was negligent misrepresentation, party was required to prove elements of

negligent misrepresentation notwithstanding its characterization of the claim).

Ms. Lundeen does not challenge that her NIED claim fails if her negligent misrepresentation claim fails. She only asserts her NIED claim survives because (according to her) the District Court incorrectly dismissed her negligent misrepresentation claim. But, as already addressed, Ms. Lundeen cannot prove the elements of negligent misrepresentation. Her claim for negligent misrepresentation claim was properly dismissed for failure to state a claim and, therefore, so was her claim for NIED.

II. Ms. Lundeen's Complaint Was Properly Dismissed Because The Statute Of Limitations Bars Her Claims.

Ms. Lundeen's claims are subject to a three-year statute of limitations. *Pederson v. Rocky Mountain Bank*, 2012 MT 48, ¶10, 364 Mont. 258, 272 P.3d 663 (M.C.A. § 27-2-204(1) three-year statute of limitations applies to claims for negligence, including negligent misrepresentation) (citing *Cechovic v. Hardin & Assocs.*, (1995) 273 Mont. 104, 119, 902 P.2d 520, 529. The statute of limitations generally begins to run when all elements of the claim, including damages, have accrued; this is commonly referred to as the "accrual rule". *Id.*, ¶11 (citing M.C.A. § 27-2-102(1)(a)). Section 27-2-102(3), MCA, provides an exception to the accrual rule that, when the facts constituting the claim are concealed or self-concealing, or when the defendant has prevented the plaintiff from discovering the injury or its cause, the statute of limitations begins to run when the plaintiff should, in the

exercise of due diligence, have discovered the facts constituting the claim. *Id.* (citing M.C.A. § 27-2-102(3)). This exception to the accrual rule is commonly known as the "discovery rule."

An objective standard of reasonable diligence applies to "discovery" of a claim. This Court has stated:

> It is the knowledge of facts, rather than discovery of legal theory, that is the test. The test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation.

Peschel v. Jones (1988) 232 Mont. 516, 760 P.2d 51, 56, (internal citation omitted); *see also Osterman v. Sears*, 2003 MT 327, 318 Mont. 342, 80 P.3d 435 (same); *Guest v. McLaverty*, 2006 MT 150, ¶5, 332 Mont. 421, 138 P.3d 812 (discovery "requires knowledge of the facts essential to the legal malpractice claim, rather than the discovery of legal theories. . . [T]he court determines whether the plaintiff had the opportunity to obtain knowledge from sources open to his or her investigation at the time or shortly thereafter.").

Thus, when the discovery rule applies, the operative event commencing the limitation period is the plaintiff being on inquiry notice, actual or constructive, of the allegedly negligent act or omission, not the culmination of the act or omission. *Rouane v. Lynaugh*, (1993) 259 Mont. 171, 172, 855 P.2d 114 (discovery rule satisfied when attorney missed statute of limitations in clients' case against airline,

not when court later granted summary judgment for airline). Actual knowledge of the underlying facts is not required; constructive knowledge is sufficient. *Schweitzer v. Estate of Halko*, (1988) 231 Mont. 283, 287, 751 P.2d 1064, 1067.

A. Ms. Lundeen's claims accrued, and she discovered them, no later than May 13, 2019, when CSKT gated off access to her development, causing her damages.

Accepting the alleged facts in her Complaint as true, Ms. Lundeen's claims accrued no later than May 13, 2019, when CSKT gated off access to her development and caused work on the development to cease. She specifically alleges her initiation of the construction, and its subsequent delay due to the gating-off, caused her damages. *See, e.g.,* Appendix 7-10, ¶24 ("Lundeen reasonably relied on Lake County's representations by committing significant time and valuable resources to break ground and move ahead with the Resort in or around April of 2019"), ¶25 (alleging CSKT gated off her access on May 13, 2019, preventing further work and holding Ms. Lundeen "hostage"), ¶28 (Ms. Lundeen's "Resort was effectively shut down by the CSKT and the gate"), ¶31 (Ms. Lundeen was "forced to come out-of-pocket to fund her defense in the federal litigation" and her "emotional distress continued to escalate throughout the federal litigation"), ¶41 (Ms. Lundeen "sustain[ed] significant losses and damages as a result of the delays and the changes in the required access roads"); *see also* Appendix 49, ¶27 ("After the tribes gated off my access, I mitigated by damages by purchasing adjacent property…"). Ms.

Lundeen's claims accrued no later than May 13, 2019.

Likewise, accepting the well-pled allegations in her Complaint as true, Ms. Lundeen was on, at the very least, inquiry notice of her claims no later than May 13, 2019. Ms. Lundeen knew why CSKT gated off the construction project on May 13, 2019 – she was fully aware, well before then, of the legal dispute between Lake County and CSKT regarding ownership and regulatory authority over the proposed access road. CSKT sent Lake County a letter, addressing the disputed issues, on August 2, 2018, which Ms. Lundeen was aware of, and Ms. Lundeen's project was put on hold for several months as a result. Appendix 4-6, ¶¶15-21. Well before May 13, 2019, Ms. Lundeen not only knew there was reason to question whether Lake County's representations were correct, she knew CSKT was disputing Lake County's legal position and the basis on which CSKT was disputing it. *Id.*; *see also* Appendix 19 (Ms. Lundeen contending that Lake County was aware "all along" during the underlying litigation that she would bring claims against Lake County if the federal court disagreed with their joint legal position). Ms. Lundeen was at the very least on inquiry notice, if not actual notice, of her alleged claims against Lake County, no later than May 13, 2019.

1. The U.S. District Court litigation does not delay the accrual or discovery dates of Ms. Lundeen's claims, nor does it toll the statute of limitations.

Ms. Lundeen's argument that her claims did not accrue, and that she should

not have discovered them, until April 16, 2020, when the federal court dismissed her and Lake County's Joint Motion for Summary Judgment, incorrectly analyzes both accrual and discovery.

As to accrual, Ms. Lundeen's admission that Lake County's legal position was within the realm of reasonable dispute until the federal court's ruling, though fatal to her ability to prove the elements of negligent misrepresentation, does not alter when the elements of her alleged claim accrued. That the federal court did not rule against Ms. Lundeen's and Lake County's legal positions until April 16, 2020, did not make Ms. Lundeen unable, before then, to prove the truth or falsity of Lake County's representations regarding its authority over the disputed access. Nor did it make Ms. Lundeen unable to prove her alleged damages. By definition, a statement is true or false when it is made. A court's later determination that a statement was correct or incorrect may, depending on the circumstances, have preclusive effective in subsequent litigation, but it does not alter whether the statement was, in fact, true or false. Similarly, Ms. Lundeen specifically contends her damages began when CSKT gated offer her access, and that her damages also include attorney fees and costs related to the underlying litigation. No subsequent ruling by the federal court could "un-accrue" her alleged damages.

Ms. Lundeen's comparison of her case to *Ehrman v. Kaufman*, 2010 MT 284, 358 Mont. 519, 246 P.3d 1048, and to *Spolar v. Datsopoulous*, 2003 MT 54, 314

Mont. 364, 66 P.3d 284, fails because, unlike the plaintiffs in those cases, Ms. Lundeen alleges damages that date to before the operative Order in the underlying litigation.

The claims in *Ehrman* arose from a dispute over legal rights to the possession and use of a dock. *Ehrman*, ¶¶ 3-9, 21. The plaintiff, Ehrman, had the possession and use of the dock until August 2007, when the underlying court ruled that other persons, and not Ehrman, held the legal rights to possession and use of the dock. *Id.* Even though the allegedly-negligent legal advice was given before August 2007, because Ehrman did not lose the possession and use of the dock until August 2007, his damages, and therefore his claims, did not accrue until August 2007. *Id.*

The claims in *Spolar* arose from the valuation method the plaintiff's (Spolar's) former attorney used in preparing proposed findings of fact and conclusions of law for the division of the client's marital estate. *Ehrman*, ¶ 20; *Spolar*, ¶ 6, 9, 10, 13-16. Spolar's claims therefore accrued when the underlying court issued its Findings of Fact and Conclusions of law. Even if Spolar's attorney's proposed findings of fact and conclusions of law were deficient, they were of no legal effect and could not possibly have caused damages until the underlying court ruled. *Id.*

Ms. Lundeen, unlike Ehrman or Spolar, specifically alleges her damages began before the April 16, 2020, Order from the underlying federal court. As addressed above, she alleges her damages date to when CSKT gated off her access,

which was May 13, 2019, and she was unable to continue her development and sell lots. She also alleges damages from the underlying federal litigation itself, in the form of attorney fees, being forced to sell property to pay for attorney fees, and emotional distress that "continued to escalate **throughout** the federal litigation." Appendix 8, ¶31 (emphasis added). *Ehrman* and *Spolar* are inapposite. Ms. Lundeen's damages accrued no later than May 13, 2019, and it is undisputed the other elements of her claims accrued on or before that date.

Nor did Ms. Lundeen have to wait for the federal action to conclude to assert her present claims. Rather, as this Court has determined is appropriate in analogous circumstances, Ms. Lundeen could have timely filed her civil Complaint against Lake County, and then she or Lake County could have sought a stay pending the outcome of the litigation between CSKT, Ms. Lundeen, and Lake County. *See Ereth v. Cascade County,* 2003 MT 328, 318 Mont. 355, 81 P.3d 463.

Ereth involved a civil claim for legal malpractice arising out of an underlying criminal prosecution. *Id.*, ¶¶ 3-10. The plaintiff, Ereth, then represented by Scott Albers, entered an *Alford* plea in the criminal case on April 12, 1996. *Id.*, ¶ 5. On July 26, 1996, Ereth, through new counsel, while attempting to withdraw her *Alford* plea, filed a pleading expressly alleging Albers pressured and unduly influenced her to enter the plea. *Id.*, ¶ 6. After several years of litigation, the criminal case was dismissed by motion filed September 21, 1999. *Id.*, ¶ 14. On August 11, 2000, Ereth

filed a Complaint against Cascade County (Mr. Albers' employer), alleging legal malpractice.

The District Court ruled that Ereth's claims accrued when she entered her *Alford* plea on April 12, 1996, that she discovered them no later than July 26, 1996, and that her claims were therefore time-barred. *Id.*, ¶ 13. This Court affirmed the District Court's conclusion (although it declined to apply its ruling retroactively and, on that limited basis, reversed the District Court's grant of summary judgment to Cascade County). *Id.*, ¶ 32. Ereth, in attempting to avoid application of the statute of limitations, made arguments substantively identical to Ms. Lundeen's:

> Ereth argues that the statute of limitations did not begin to run until she obtained relief from her conviction on September 21, 1999, the day the Cascade County prosecutor filed a motion to dismiss the case. Ereth claims that she could not have filed against Albers prior to that date because the elements of her cause of action had not accrued. Ereth also maintains that if she had filed before then, her claim would have been dismissed for failure to state a claim. To that end, Ereth asserts that until the charges against her were dropped, she could not have presented a *prima facie* case that "but for" Albers' negligence she would not have been convicted. Moreover, she posits that her damages, an element of her cause of action, had not accrued until she obtained relief from the charges against her.

Id., ¶ 14. The District Court, and this Court, rejected Ereth's argument. *Id.*, ¶¶ 16-27. The fact that Ereth might have obtained (and subsequently did obtain) relief from her alleged damages in the criminal action, from a dismissal on September 21, 1999, did not alter the fact that her damages accrued on April 12, 1996. *Id.* The fact

that subsequent litigation in the criminal action might have preclusive effect in a related civil malpractice action did not toll the statute on Ereth's claim. *Id.*, ¶ 26. While "[i]ssue preclusion and collateral estoppel should be utilized in the appropriate case… the availability of these devices should not lead to a subversion of the statute of limitations…" *Id.*, ¶ 23 (quoting *Gebhardt v. O'Rourke*, (1994) 444 Mich. 535, 510 N.W.2d 900, 906-07 (Mich.). The appropriate course of action was for Ereth to timely file her claim within three years of accrual and discovery; with her claim timely filed, a stay in the civil suit pending the outcome of the related litigation could be sought. *Id.*, ¶ 26.

Ereth is dispositive of Ms. Lundeen's claims. The fact that Ms. Lundeen might have obtained relief from her alleged damages from the underlying federal court does not alter the fact that her claims accrued before the court's April 16, 2020, Order. The fact that the then-pending federal litigation might have had preclusive effect on an element of her alleged claims against Lake County did not toll the statute on those claims and Ms. Lundeen cites no authority to the contrary. Ms. Lundeen could have timely filed her Complaint against Lake County during the underlying federal litigation, and then she or Lake County, if necessary, could have sought a stay pending resolution of the federal suit. She did not do so, and her claims are time-barred.

2. The "continuing relationship" doctrine does not delay the accrual or discovery dates of Ms. Lundeen's claims, nor does it toll the statute of limitations.

The "continuing relationship" doctrine also does not delay the accrual of Ms. Lundeen's claim. The "continuing relationship" doctrine requires a professional-client relationship. *Northern Mont. Hosp. v. Knight*, (1991) 248 Mont. 310, 316, 811 P.2d 1276 ("The continuing relationship doctrine may be used… **during the course of an ongoing relationship between a professional and his client**…") (emphasis added). There was no professional-client relationship between Lake County and Ms. Lundeen. Lake County was not Ms. Lundeen's attorney, and Ms. Lundeen was not Lake County's client[7]. Moreover, this Court has rejected the application of the "continuing relationship" doctrine in the context of legal malpractice claims. *Schneider*, 228 Mont. At 288. Even if Lake County had been Ms. Lundeen's attorney, which it was not, the continuing relationship doctrine would not apply. In addition, Lake County informed Ms. Lundeen of her obligation to review and assess the legality of the proposed access route. The only continuing relationship present is between Ms. Lundeen and her counsel, whose firm has represented Ms. Lundeen continuously since no later than May 17, 2019.

3. The discovery doctrine does not toll the statute of limitations for Ms. Lundeen's claims.

[7] Ms. Lundeen cites no authority for a defendant in a negligent misrepresentation claim refusing to admit liability, or refusing to admit its alleged misrepresentation was incorrect, tolls the statute of limitations. Defendants are permitted to defend themselves without tolling the statute of limitations.

Ms. Lundeen's other arguments regarding discovery are also unavailing. She incorrectly characterizes the level of knowledge that constitutes "discovery" of a claim for purposes of the statute of limitations. As addressed above, "[the test is whether the plaintiff has information of circumstances sufficient to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation." *Osterman*, 2003 MT 327, ¶27. This test was met no later than when Ms. Lundeen learned CSKT disputed Lake County's ownership of and regulatory authority over the access road at issue, if not sooner. Ms. Lundeen's assertion that she did not discover Lake County's legal position was incorrect, for purposes of the statute of limitations, until the federal court's ruling on summary judgment, is wrong. The discovery rule was triggered when Ms. Lundeen, reasonably, was on inquiry notice that Lake County's position could have been incorrect. *See, Rouane*, 259 Mont. At 172, (discovery rule satisfied when attorney missed statute of limitations in clients' case against airline, not when court later granted summary judgment for airline).

Stanley L. & Carolyn M. Watkins Trust v. Lacosta, 2004 MT 144, 321 Mont. 432, 92 P.3d 620 does not alter the discovery analysis; *see also Estate of Watkins v. Hedman, Hileman & Lacosta*, 2004 MT 143, 321 Mont. 419, 91 P.3d 1264. *Watkins Trust* involved an extremely complex trust and estate plan that was defective, where the attorney who represented the clients in making the plan allegedly covered up the

defects by lying to her clients. *Id.*, ¶¶6-13. The trust in *Watkins Trust* was supposed to be a revocable trust and was, in fact, titled as a "Revocable Trust Agreement." *Estate of Watkins*, ¶30; *Watkins Trust*, ¶7. But, because of negligence by the drafting attorney, the trust agreement was irrevocable, instead of revocable. *Id.* However, the trust was so complex that this defect was extremely difficult to discern and, when the client, who was concerned, asked the drafting attorney about it, the attorney allegedly lied and told the client the trust was revocable. *Watkins Trust*, ¶¶6-13. This Court held, given the complexity of the documents involved and the alleged fraud by the drafting attorney against her own client, that a jury could conclude the statute of limitations had not yet run. This Court specifically observed that "a drafting attorney may not impose upon **her client** a duty to understand defects in a technical instrument in order to defeat a malpractice claim." *Id.*, ¶42 (emphasis added).

Lake County did not represent Ms. Lundeen and did not draft the complex legal authorities governing the relationship at issue between CSKT and the County upon which Lake County opined. Unlike *Watkins Trust*, no action by Lake County prevented Ms. Lundeen from being put on notice that Lake County's legal opinion may be incorrect. To the contrary, Ms. Lundeen knew no later than August 2018 that CSKT contended the County's legal opinion was incorrect. Further unlike *Watkins Trust*, no later than May 17, 2019, Ms. Lundeen was represented by her own counsel in relation to this legal dispute. The differences between this case and *Watkins Trust*

only illustrate that Ms. Lundeen was on inquiry notice, and her claim accrued, no later than May 13, 2019.

Ms. Lundeen's reliance on *Draggin' Y Cattle Co. v. Addink* is misplaced for similar reasons. 2013 MT 319, 372 Mont. 334, 312 P.3d 451. Like in *Watkins Trust*, *Draggin' Y* was a professional malpractice claim, this time against an accountant, involving a complex transaction about which the accountant allegedly made misrepresentations *to his clients* and withheld information *from his clients*. Again, Lake County did not represent Ms. Lundeen or have any kind of fiduciary relationship with her and did not draft the complex documents/authorities regarding which it opined. And unlike the plaintiffs in *Watkins Trust* and *Draggin' Y*, Ms. Lundeen (1) was aware no later than August 2018 that another party, CSKT, contended Lake County's legal position was incorrect; (2) had a condition on approval to independently investigate the legality of access herself; (3) was aware on May 13, 2019, the date her damages accrued, that CSKT blocked offer her access because it disputed Lake County's legal position; and (4) was represented by her own independent counsel no later than May 17, 2019.

4. Equitable tolling, which is only applied in rare and exceptional circumstances, does not apply to Ms. Lundeen's claims.

Finally, equitable tolling does not save Ms. Lundeen's claims from the statute of limitations. Montana law has never applied equitable tolling under circumstances

like those alleged in this case, even viewing the facts in the light most favorable to Ms. Lundeen.

Montana has applied equitable tolling to permit filing an otherwise time-barred claim where the plaintiff previously filed substantially the same claim against the same defendant in another forum, the previous filing was timely, and the second filing was made in good faith and with reasonable conduct. *See, e.g., Weidow v. Uninsured Employers' Fund*, 2010 MT 292, 359 Mont. 77, 246 P.3d 704 (timely petition to Dept. of Labor for mediation, and ambiguity of deadline to file petition with WCC after mediation, excused filing WCC petition 9 days after 60-day deadline); *Lozeau v. Geico Indem. Co.*, 2009 MT 136, 350 Mont. 320, 207 P.3d 316 (timely complaint in Tribal Court, and ambiguity as to whether Tribal Court or District Court had jurisdiction, excused filing District Court complaint six weeks after three-year statute of limitations had otherwise run).

Montana has also applied equitable tolling to permit filing an otherwise time-barred claim when "the nature of the defendant's actions has concealed from the plaintiff the existence of the claim... [and] the plaintiff is actually prevented from filing on time despite exercising 'that level of diligence which could reasonably be expected in the circumstances.'" *Schoof v. Nesbit*, 2014 MT 6, ¶35, 373 Mont. 226, 316 P.3d 831 (Where County Commissioners concealed existence of meeting that was basis for claim for four years, and plaintiff filed claim within 30 days of learning

of meeting, equitable tolling excused filing after 30-day deadline) (quoting *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 323, (2d Cir. 2004).

The above are the circumstances under which Montana has applied equitable tolling. *Id.*; *see also Miesmer v. Smith*, (2020) No. CV 20-41-H-DLC(D. Mont. Oct. 15, 2020), 2020 U.S. Dist. LEXIS 191306, *8 (summarizing circumstances under which Montana has applied equitable tolling). None of these circumstances are present in this case.

It is undisputed Ms. Lundeen did not timely file the same claim against Lake County in another forum. Ms. Lundeen argues that Lake County was aware of her intent to file claims against it throughout the federal litigation, but this is categorically insufficient to invoke equitable tolling. There must be a prior claim timely *filed*, not mere discussion of one. *See Weidow* & *Lozeau*, *supra*. To permit putting a party on extra-judicial notice of a claim to toll the statute of limitations would substitute a mere notice requirement for the filing requirement and render the statute meaningless. It is likewise clear, as already addressed, that Ms. Lundeen's claims accrued, and she was on inquiry (and actual) notice of them no later than May 13, 2019. Despite Ms. Lundeen's arguments to the contrary, this is not a case, like *Schoof*, where the basis for the claims was concealed.

Ms. Lundeen's Affidavit (Appendix 43-52), even if it had been considered, does not change this analysis. As with her inability to prove the elements of her

claims, Ms. Lundeen's Affidavit and its attachments only further demonstrate her claims are time-barred. Her Affidavit does not change any of the operative facts for purposes of the statute of limitations, i.e., when her claims (specifically, her alleged damages) accrued, and when she was on inquiry notice of her alleged claims. Instead, her Affidavit further undercuts her arguments regarding discovery and equitable tolling because it makes clear Ms. Lundeen has been represented by her own counsel continuously since no later than May 17, 2019. As set forth in her Affidavit, on December 29, 2021, counsel for Lake County requested additional information in response to her request for a mediation and informed her counsel that "Lake County is certainly open to considering a pre-litigation mediation in this matter, but cannot reasonably determine whether a pre-litigation mediation is appropriate without this additional information." Appendix 48. Ms. Lundeen did not respond until September 8, 2022. *Id*. Based, in part, on the limited information provided by Ms. Lundeen, on September 30, 2022, Lake County's attorneys informed Ms. Lundeen's counsel that it was not interested in prelitigation mediation. Appendix 49. Ms. Lundeen further cites no authority for the proposition that pre-litigation negotiations toll the statute of limitations. The District Court did not err in declining to convert the Motion to Dismiss to a Motion for Summary Judgment, because doing so would have been futile.

Ms. Lundeen's claims accrued, and the discovery rule was satisfied, no later

than May 13, 2019. From May 13, 2019, to May 13, 2022, is three years. From July 1, 2021, to December 1, 2021, is 153 days (the time excluded by the Tolling Agreement). 153 days after May 13, 2022, is October 13, 2022. Ms. Lundeen filed her Complaint in the District Court on November 1, 2022, nineteen (19) days after October 13, 2022, the date the statute of limitations ran.

The District Court correctly determined the statute of limitations bars Ms. Lundeen's claims, and equitable tolling does not save her claims. Ms. Lundeen's attempts to transfer responsibility for her failings to Lake County and Lake County's attorneys are unavailing. Ms. Lundeen failed to properly research access before purchasing her property; Ms. Lundeen chose her proposed access to her development site; Ms. Lundeen failed to research legal access pursuant to the conditional approval despite being aware CSKT challenged access; Ms. Lundeen failed to seek permission from the United States or CSKT to build her requested access; Ms. Lundeen missed the statute of limitations, despite Lake County entering into a Tolling Agreement with Ms. Lundeen, through counsel, as Lake County provided her variances (which it was not required to do) to obtain alternative access to her development.

CONCLUSION

The District Court's Order of Dismissal was correct and should be affirmed. The statute of limitations bars Ms. Lundeen's claims, and equitable tolling does not

save them. On the face of her pleadings, she cannot prove the elements of her claims. And the District Court did not err in declining to convert the Motion to Dismiss to a Motion for Summary Judgment. The matters outside the pleadings Ms. Lundeen asked the District Court to consider only confirm Ms. Lundeen's claims are time-barred, equitable tolling does not apply, and she cannot prove the elements of her claims.

DATED this 22nd day of December, 2023

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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 9,967, excluding the caption, the certificate of service, the certificate of compliance, the table of contents and the table of authorities.

DATED this 22nd day of December, 2023.

/s/ Eric Brooks
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CERTIFICATE OF SERVICE

I, Eric M. Brooks, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 12-22-2023:

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