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 REPLY 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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INTRODUCTION

Lundeen appealed the District Court's erroneous dismissal of her Complaint based upon the statute of limitations. The County filed its answer brief on December 22, 2023. Lundeen now respectfully replies pursuant to M. R. App. P. 12(3).

The District Court's decision should be reversed. Lundeen's claim did not accrue until the federal court granted summary judgment for the Tribes. But even if Lundeen's claim accrued earlier as the District Court concluded, contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run. These are all questions of fact for the jury to decide. Would an objectively reasonable person in Lundeen's position have sued earlier under the circumstances? A reasonable jury could indeed say "no." Barring Lundeen's claim would be unfair. It would enable the County to escape the consequences of its actions.

I. The Court should not address the merits of Lundeen's claim.

The County's first argument is that Lundeen's negligent misrepresentation claim fails on the merits (County Answer Brief, pp. 20-27). But the District Court's dismissal was predicated solely upon the statute of limitations. Lundeen addressed the merits in her opening brief out of an abundance of caution, anticipating the County would argue, or the Court would apply *sua sponte*, the harmless error

doctrine. If the Court entertains the merits, this appeal should still resolve in Lundeen's favor (Lundeen Opening Brief, pp. 31-36).

Although the County raised merits-based arguments in the District Court, they were not addressed in the dismissal order. It is well-established that the appellate court will not address issues on appeal that were either not properly raised in the District Court or "that the [D]istrict [C]ourt does not address in its order." *LHC, Inc. v. Alvarez*, 2007 MT 123, ¶ 20, 290 Mont. 460, 963 P.2d 1279 (1998) (citing *Nason v. Leistiko*, 1998 MT 217, 290 Mont. 460, 963 P.2d 1279; *Marsh v. Overland*, 274 Mont. 21, 29, 905 P.2d 1088, 1093 (1995)); *see also Wilkes v. State*, 2015 MT 243, ¶¶ 15-16, 380 Mont. 388, 355 P.3d 755 ("The District Court has not had the opportunity to address Wilkes's claim according to this standard, and we will not address the claim here…As such, we will not hold that the District Court's failure to adequately address Wilkes's claim was harmless."); *Sacco v. High Country Indep. Press*, 271 Mont. 209, 896 P.2d 411, 428 (1995).

The Court should reverse the erroneous dismissal on statute of limitations grounds only. Upon proper remand, the District Court may rule on the County's alternative merits-based arguments. It would be improper to consider the merits on appeal since those issues were unaddressed in the District Court's dismissal order.

II. Lundeen's Complaint was erroneously dismissed because she can prove the elements of her claims.

Lundeen replies on the merits in case the Court elects to entertain them over her objection. Lundeen's doing so should not be construed as a waiver of Argument I above.

A. Lundeen can prove the first element of negligent misrepresentation.

The County argues its Attorney's statements to Lundeen were "legal opinion" as opposed to those of "material fact." The County's responsive argument is unavailing.

The *Como* exception squarely applies to the facts of this case. The County fails to effectively distinguish *Como Orchard Land Co. v. Markham*, 54 Mont. 438, 171 P.2d 274 (1918), or *Bails v. Wheeler*, 171 Mont. 524, 559 P.2d 1180 (1977). Lundeen's Complaint was sufficiently pleaded to invoke the *Como* exception. The Complaint must be liberally construed in Lundeen's favor, and all facts pleaded therein must be taken as true. M. R. Civ. P. 12(b)(6). The District Court completely ignored this argument in its dismissal order.

The County argues its Attorney did not owe Lundeen a duty because she is not his client. "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 [whom] 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." (County Answer Brief, pp. 24-25).

An attorney's duty of loyalty is not at issue here. The duty of loyalty is arguably the highest duty a lawyer owes to a client, but this case does not involve alleged conflicts of interest, alleged breaches of a client's confidences, or any other issue triggering a duty of loyalty analysis. The County's reliance on *Crane Creek Ranch v. Cresap*, 2004 MT 351, 324 Mont. 366, 103 P.3d 535, is therefore misplaced.

Montana law is clear. Where a third-party like Lundeen asserts a claim for negligent misrepresentation against a lawyer, an accountant, or another professional, the court must instruct the jury according to the elements of a *Restatement (Second) of Torts* § 552 negligent misrepresentation claim. *Western Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶ 66, 359 Mont. 34, 249 P.3d 35.

Watkins Trust v. LaCosta, 321 Mont. 432, 92 P.3d 620 (2004), was a case of first impression where the Court held that Montana attorneys can owe duties to non-clients. In *Rhode v. Adams*, 288 Mont. 278, 280, 957 P.2d 1124, 1126 (1998), the Court noted a duty may exist in non-adversarial proceedings.

Exactly like *Western Sec. Bank*, the County's argument confuses the "near privity" standard from *Thayer v. Hicks*, 243 Mont. 138, 793 P.2d 784 (1990), for the duty of care in third-party professional negligence claims with the § 552 standard

for the duty of care in third-party negligent misrepresentation claims like Lundeen's. *Western Sec. Bank*, ¶¶ 13, 65-66. Lundeen is not required to establish that the County Attorney owed her a duty under the *Thayer* "near privity" approach. *Id.*, ¶ 13.[1] Lundeen's § 552 claim includes the following elements: (1) the County supplied false information in the course of business (e.g., subdivision review); (2) the County failed to exercise reasonable care in obtaining or communicating the information to Lundeen, the applicant; (3) Lundeen's justifiable reliance on the false information caused her financial loss; (4) Lundeen was one of a limited group of persons for whose benefit and guidance the County intended to supply the information or knew that the recipient intended to supply it; and (5) Lundeen relied on the information in a transaction that the County knew the information would influence. *Western Sec. Bank*, ¶ 66 (citations omitted). Lundeen would not have moved forward with her project but for the County's misrepresentations.

The allegations of Lundeen's Complaint make a prima facie showing of negligent misrepresentation. (Doc. 1, ¶¶ 45-60). The subdivision review process was not at all non-adversarial in nature.

[1] Lundeen's claim is nevertheless actionable even under the *Thayer* standard. The County Attorney knew Lundeen intended to rely upon his work regarding access in connection with the subdivision. (Doc. 1, ¶ 17).

B. Lundeen can also prove the third and fifth elements.

The County argues Lundeen "also cannot prove the third and fifth elements of negligent misrepresentation." (County Answer Brief, pp. 25-27).

The County fails to cite any legal authority to support this argument. (*Id.*). "Parties must cite legal authority to support the positions they advance…It is not this Court's job to conduct legal research on a party's behalf or to develop a legal analysis to support the party's position." *Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cty.*, ¶ 24, 396 Mont. 194, 445 P.3d 1195 (quoting *Johansen v. Dep't of Nat. Res. & Conservation*, 1998 MT 51, ¶ 24, 288 Mont. 39, 955 P.2d 653). This argument should be accordingly rejected.

The County's argument fails substantively as well. Lundeen's Complaint alleges, "Regardless of Lake County's actual belief, Lake County made the representations without any reasonable ground for believing them to be true." (Doc. 1, ¶ 55). The District Court ruled under M. R. Civ. P. 12, refusing to convert the County's motion into one for summary judgment under M. R. Civ. P. 56. These allegations of fact are taken as true and construed in the light most favorable to Lundeen. *Doty v. Mont. Comm'r of Political Practices*, 2007 MT 341, 340 Mont. 276, 173 P.3d 700.

Moreover, even at the summary judgment stage, what is "reasonable" in the context of a negligent misrepresentation claim (e.g., whether the County had a

"reasonable" basis for its representations and whether Lundeen "reasonably" and justifiably relied on those representations) is a question of fact. Had the District Court converted the County's motion to one under M. R. Civ. P. 56, Lundeen's Affidavit contains more than sufficient facts to carry the "reasonableness" question forward to the jury.

In *Cechovic v. Hardin & Assocs.*, 273 Mont. 104, 113, 902 P.2d 520, 525-526 (1995), the Court explained, "Generally the level of care and competence the recipient of information is entitled to expect is determined in light of the circumstances and will vary, depending upon many factors. Finally, we stated, 'the question is one for the jury, unless the facts are so clear as to permit only one conclusion.'" (citing *State Bank of Townsend v. Maryann's Inc.*, 204 Mont. 21, 33, 664 P.2d 295, 301 (1983)); *see also Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 136, 345 Mont. 12, 192 P.3d 186 ("Reasonableness is generally a question of fact for the jury to resolve.").

It is the jury's role to apply the facts to the instructions. Interpreting Lundeen's Complaint in a light most favorable to her, the third and fifth elements of negligent misrepresentation were established. It is not the Court's job to weigh evidence that the District Court ignored altogether. *See, e.g.*, *Lyndes v. Green*, 2014 MT 110, ¶ 25, 374 Mont. 510, 325 P.3d 1225.

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

Lundeen stands on the argument in her Opening Brief. Lundeen previously distinguished *Ray v. Connell*, 2016 MT 95, 383 Mont. 221, 371 P.3d 391, which is inapposite to the case *sub judice* because Lundeen's negligent misrepresentation claim is actionable and should not have been dismissed.

The County also cites *Judd v. Burlington Northern & Santa Fe Ry.*, 2008 MT 181, 343 Mont. 416, 186 P.3d 214. *Judd* is similarly distinguishable. Judd argued he had an actionable IIED claim based on BNSF's intentional act of prosecuting an indemnification claim against him. *Id.*, ¶ 30. The Court rejected Judd's argument, finding BNSF had a right to file suit to insist upon its legal rights. *Id.*

Lundeen's NIED claim is not based upon the County suing or taking other legal action against her. Lundeen's Complaint and Affidavit speak for themselves. Unlike the privileged filing of a lawsuit in *Judd*, the County did not have a legal right to make negligent misrepresentations to Lundeen upon which she reasonably relied to her detriment. Further, her NIED claim is also not based only upon the same alleged conduct as that claim. Lundeen's filings in District Court confirm this.

III. Lundeen's claim did not accrue on May 13, 2019.

The County relies on *Ereth v. Cascade County*, 2003 MT 328, 318 Mont. 355, 81 P.3d 463, to support its position that Lundeen's claim accrued before the federal

court's ruling. (County Answer Brief, pp. 36-38).[2] The County goes so far as to contend "*Ereth* is dispositive of Ms. Lundeen's claim." (*Id.*, p. 38). The County is incorrect.

Ereth involved a legal malpractice claim arising from the allegedly negligent representation of a criminal defendant. The specific question before the Court was whether postconviction relief is required as a prerequisite to maintaining a legal malpractice action in a criminal case. *Id.*, ¶ 19. The Court noted a split of authority and discussed the "one-track" and "two-track" approaches, neither of which fit the facts here. *Id.*

Lundeen did not sue for malpractice based on representation she received in a criminal case. She did not sue for malpractice at all. She sued for third-party negligent misrepresentation. Thus, Lundeen's claim did not accrue until all elements existed or had 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.). *Ehret* placed parties convicted in criminal proceedings on notice that any alleged act of attorney error or omission discovered on or after the date of the Opinion triggers the running of the statute of limitations for the filing of any legal malpractice claim. *Ehret*, ¶ 31. The rule from *Ehret* does not apply in the absence of underlying criminal proceedings.

[2] *Ereth* was abrogated in part by *Labair v. Carey*, 2012 MT 312, 367 Mont. 453, 291 P.3d 1160.

The County argues Lundeen could have filed suit earlier "and then she or Lake County, if necessary, could have sought a stay pending resolution of the federal suit." (County Answer Brief, p. 38). This conveniently ignores the County's threat to revoke her conditional approval and shut down her project altogether if she took earlier legal action. (Doc. 1, ¶ 43) (Doc. 9, ¶ 28). She still needed the County's cooperation to obtain a variance. Without a variance, Lundeen could not have advanced her development project.

Moreover, the basis for a stay would have been that if the federal court ruled in the County's favor, Lundeen's claim would not be viable. She would have been unable to prove the County's representations were untrue in that alternative situation. The federal court first needed to answer the access question.

Montana courts strive to promote judicial economy. *See, e.g., Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 25, 331 Mont. 281, 130 P.3d 1267. Forcing Lundeen to sue the County before the federal court ruling would further deplete the already limited resources of the legal system. Lundeen's Complaint and Affidavit establish the County was well aware of Lundeen's claim and was even entertaining the possibility of settling it without the necessity of a lawsuit before it was filed. Therefore, finding Lundeen's claim time-barred serves no policy purpose. *Weidow v. Uninsured Employers' Fund*, 2010 MT 292, ¶ 28, 359 Mont. 77, 246 P.3d 704 (quoting *Stevens v. Norvartis Pharms. Corp.*, 2010 MT 282, ¶ 34, 358 Mont. 474,

247 P.3d 244) ("[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.").

IV. The Court should apply the continuing relationship doctrine.

In her Opening Brief, Lundeen urged the Court to apply the continuing relationship doctrine. This doctrine applies where there is continuing trust and confidence in the relationship between the parties. Though the County Attorney was not Lundeen's attorney, there was a clear indicium of an ongoing, continuous, developing, and dependent relationship between the parties. Lundeen relied on the County Attorney's purported expertise in investigating the access question and concluding the Tribes' position was incorrect. Hence why the County agreed to remove the hold harmless clause from the conditions of approval. The County Attorney held himself out as the ultimate authority on the subject matter. Lundeen trusted and relied on his conclusions and representations in breaking ground.

The County cites *Schneider v. Leaphart*, 228 Mont. 483, 488, 743 P.2d 613, 616-617 (1987), arguing against the application of the continuing relationship doctrine. *Schneider* held that, "Montana does not recognize the doctrine of continuous representation in legal malpractice actions." *Id.*, 228 Mont. at 488, 743 P.2d at 616. *Schneider* is not controlling because Lundeen did not bring a legal malpractice claim. She brought a third-party negligent misrepresentation claim. The

Court should extend the doctrine to the unique facts of this case despite the absence of a "professional" relationship between the parties.

V. The discovery doctrine tolls the statute of limitations.

As demonstrated in Lundeen's Opening Brief, the discovery rule delays the accrual of a cause of action until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he or she has a basis for an actionable claim. No reasonable inquiry or exercise of any degree of diligence on Lundeen's part would have allowed her to confirm her injuries or damages absent a ruling from the federal court. Short of that ruling, the County would have persisted in claiming its representations and position on access were true and accurate.

The County cites no new authority beyond that contained in Lundeen's Opening Brief in arguing the discovery doctrine does not apply. The County's attempt to distinguish the cases cited by Lundeen is futile.

VI. The Court should apply equitable tolling.

Consistent with its inherent equitable powers, a court can preclude a defendant like the County from asserting a statute of limitations defense where the defendant's own intentional misconduct prevented the plaintiff from timely filing suit. This equitable tolling doctrine is consistent with the principle that a wrongdoer should

not be able to benefit from his or her own wrong. *Rolan v. New West Health Servs.*, 2022 MT 1, ¶ 20, 407 Mont. 34, 504 P.3d 464.

The County overtly threatened to revoke Lundeen's conditional subdivision approval if she took earlier legal action. The County also repeatedly assured her throughout the federal court litigation that its representations about access were true. Lundeen did not want to sue the County if she did not have to. She should not have been thrown out of court for waiting to see if the federal court action would eliminate the necessity of her bringing a separate legal action against the County. It was the very "nature of [the County's] actions" that caused Lundeen not to sue earlier. *Schoof v. Nesbit*, 2014 MT 6, ¶ 35, 373 Mont. 226, 316 P.3d 831. The County's conduct caused Lundeen to delay in bringing suit until after she obtained a variance and the County abruptly terminated what had been ongoing settlement discussions. The District Court erred in not applying equitable tolling.

CONCLUSION

Lundeen's claim did not accrue when the County and the District Court say it did. It accrued when the federal court ruled on summary judgment. Regardless, to mitigate the harsh practical application of statutes of limitation in cases like this one, Montana courts have developed a number of common law and legislative doctrines that work to create categories of special circumstances which soften the impact of strict application of statutes of limitations.

Here, these special circumstances allow Lundeen to extend or toll the statute of limitations because the required conditions are met. The jury should hear the evidence and decide if Lundeen's claim is time-barred. The jury should also decide the facts relevant to the merits of her claim.

DATED this 19th day of January, 2024.

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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 3,077 words, excluding Table of Contents, Certificate of Service and Certificate of Compliance.

DATED this 19th day of January, 2024.

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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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