

DA 23-0387

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 120

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LORI LUNDEEN,

Plaintiff and Appellant,

v.

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

Defendant and Appellee.

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APPEAL FROM: District Court of the Twentieth Judicial District,  
In and For the County of Lake, Cause No. DV-22-193  
Honorable John W. Larson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

J.R. Casillas, Datsopoulos, MacDonald & Lind, P.C., Missoula, Montana

For Appellee:

Christopher Di Lorenzo, Eric M. Brooks, Moore, Cockrell, Goicoechea &  
Johnson, P.C., Kalispell, Montana

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Submitted on Briefs: March 20, 2024

Decided: June 4, 2024

Filed:

  
Clerk

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Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Lori Lundeen (Lundeen) appeals from the Order granting Lake County’s M. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim, issued by the Twentieth Judicial District Court, Lake County on June 13, 2023. We reverse and remand for action consistent with this opinion.

¶2 We restate the issue on appeal as follows:

*Did the District Court err in granting Lake County’s motion to dismiss under M. R. Civ. P. 12(b)(6)?*

### **FACTUAL AND PROCEDURAL BACKGROUND**

¶3 Lundeen owned property in Lake County and intended to develop it into a 60-lot subdivision called the Wild Horse RV Resort. Lundeen proposed using roads that went through the Big Arm townsite to access her development. The Board of Lake County Commissioners (the Board) granted Lundeen conditional approval for the development on May 16, 2018. Shortly thereafter, the Confederated Salish and Kootenai Tribes of the Flathead Nation (the Tribes) contested the County’s ownership, regulatory authority, and right to use the access routes that the Board conditionally approved for Lundeen’s use. The Tribes asserted they had ownership and regulatory authority over the proposed access routes.

¶4 Lundeen’s Complaint alleges she relied on Lake County and the Lake County Attorney to research her access issue—who purportedly devoted “more than 1,000 man hours thoroughly researching the factual background and access issues called into question by [the Tribes].” After an eight-month moratorium on Lundeen’s development application,

the Board conditionally approved an amended road layout for the development. Lundeen claims the Lake County Attorney unequivocally represented to her the Tribes' claim was "unfounded and baseless, that Lundeen had access, and that she could proceed with develop[ment]." Additionally, condition number three in the amended conditional approval stated:

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.

However, on January 31, 2019, the Board held a public meeting and amended condition number three to remove the last sentence that provided Lake County would not be held liable in the event Lundeen did not have access rights to her development.

¶5 Based on Lake County's confidence in its position on access, Lundeen broke ground in April 2019. Shortly after, on May 13, 2019, the Tribes gated off Lundeen's access to prevent further development. According to Lundeen, Lake County maintained its position that she had access rights and expressed that it would be willing to litigate with the Tribes over the issue. Such litigation came to be when the Tribes filed a Verified Complaint to Quiet Title and Injunctive Relief in federal court on May 24, 2019. Lundeen was a named party in the suit and claims she relied on the Lake County Attorney's and Planning Staff's research and expertise. On April 16, 2020, the Federal District Court of Montana entered summary judgement in favor of the Tribes and against Lake County and Lundeen.

¶6 On November 1, 2022, Lundeen filed suit against Lake County asserting Count I—negligent misrepresentation, Count II—negligent infliction of emotional distress (NIED), and Count III—*respondeat superior*, or that Lake County is vicariously liable for the conduct at issue in Counts I and II. Lake County argued the statute of limitations barred Lundeen’s complaint and asserted Counts I, II, and III failed to state claims on the merits. Lake County filed a M. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim based on its argument that: (1) Count I fails because Lake County’s representations to Lundeen were legal opinion and, as a matter of law, legal opinion cannot be the basis for negligent misrepresentation; (2) Count II fails because NIED requires a higher standard of proof than negligent misrepresentation, thus because her negligent misrepresentation claim fails, her NIED claim based on the same alleged conduct also fails; and finally (3) Lundeen’s claim for *respondeat superior* does not allege tortious conduct separate from Counts I and II, and therefore fails.

¶7 The District Court granted Lake County’s motion to dismiss. The court reasoned that Lundeen was on inquiry notice of the negligent misrepresentation on May 13, 2019, when she became aware the Tribes had blocked off her property. The court also determined the discovery and accrual rules for the statute of limitations were satisfied no later than May 13, 2019. Based on the applicable three-year statute of limitations, the court found Lundeen’s claims filed on November 1, 2022, were time-barred. Lundeen appeals.

#### **STANDARD OF REVIEW**

¶8 This Court reviews a district court’s ruling on a M. R. Civ. P. 12(b)(6) motion to dismiss de novo. *Marshall v. Safeco Ins. Co.*, 2018 MT 45, ¶ 6, 390 Mont. 358, 413 P.3d

828. When reviewing an order dismissing a complaint under M. R. Civ. P. 12(b)(6), we construe the complaint in the light most favorable to the plaintiff. *Marshall*, ¶ 6. The district court must not dismiss a complaint for failure to state a claim, “unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Marshall*, ¶ 6. The district court’s ruling that a complaint failed to state a claim is a conclusion of law that we review for correctness. *Marshall*, ¶ 6.

¶9 “A motion to dismiss under M. R. Civ. P. 12(b)(6) has the effect of admitting all well-pleaded allegations in the complaint.” *Puryer v. HSBC Bank USA, N.A.*, 2018 MT 124, ¶ 10, 391 Mont. 361, 419 P.3d 105. When considering the motion, “all allegations of fact contained therein are taken as true.” *Puryer*, ¶ 10. “Dismissal is proper under M. R. Civ. P. 12(b)(6) if the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim.” *Puryer*, ¶ 10 (citation omitted).

## DISCUSSION

¶10 *Did the District Court err in granting Lake County’s motion to dismiss under M. R. Civ. P. 12(b)(6)?*

¶11 A claim is subject to dismissal if it is insufficient as it is pled to state a cognizable claim that entitles the claimant to relief. M. R. Civ. P. 12(b)(6). “A claim is subject to dismissal only if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim.” *Puryer*, ¶ 12. M. R. Civ. P. 8(a) and 12(b)(6) have liberal pleading requirements, but they do not excuse the omission of material and necessary facts that entitle relief. *Puryer*, ¶ 12. The complaint must state more than facts

that “would breed only a suspicion” that the claimant is entitled to relief. *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247. For the reasons stated below, we find that, although Lundeen’s claims may face greater hurdles at the trial or summary judgment stage, she has set forth sufficient facts that, if accepted as true, allow her to proceed beyond the Rule 12(b)(6) stage.

### **A. Statute of Limitations**

¶12 We find it necessary to first address the statute of limitations issue. The statute of limitations for a negligent misrepresentation claim is three years. Section 27-2-204(1), MCA; *Norbeck v. Flathead Cty.*, 2019 MT 84, ¶ 17, 395 Mont. 294, 438 P.3d 811. A claim accrues and the limitations period begins to run “when all elements of the claim or cause exist.” Section 27-2-102(1)(a), MCA. “The fact a party does not know he or she has a claim, either because he or she is unaware of the facts or unaware of his or her legal rights is insufficient to delay the commencement of the limitations period.” *Norbeck*, ¶ 18. If a claim is filed outside of the applicable statute of limitations, it is generally barred. *Norbeck*, ¶ 18. One exception to this general rule is the discovery rule. Under the discovery rule, the limitations period does not start to run until the plaintiff discovers the facts constituting the claim, or in the “exercise of due diligence, should have discovered the facts constituting the claim if the facts constituting the claim are by their nature concealed or self-concealing or a defendant has taken action preventing plaintiff from discovering the facts.” *Norbeck*, ¶ 19; section 27-2-102(3), MCA.

¶13 Here, Lundeen maintains the statute of limitations began to run on April 16, 2020—when the federal court issued its order resolving the access issue. Lundeen argues that all

of the elements of her claim did not exist when the Tribes gated off her access on May 13, 2019. She asserts had she tried to bring suit prior to the federal court resolving the access issue, the County would have requested dismissal of her case as premature for lack of proof of all the elements—specifically that Lake County’s representations about access were untrue. Lake County counters that, as per the discovery rule, Lundeen’s claims accrued, and she discovered them, no later than May 13, 2019, when the Tribes gated off her access and caused her damages.

¶14 Based on both parties’ allegations, there are disputed allegations as to when the statute of limitations began to run—whether it was when the Tribes blocked Lundeen’s access or when the federal court decision was issued. There are also disputed allegations about whether Lake County did anything to prevent Lundeen from discovering the claims, such as withdrawing its hold harmless provision from its conditional approval and leading Lundeen to believe its position on access was correct. As such, we find this issue improper for dismissal under Rule 12(b)(6) standards and believe it better suited for resolution at the summary judgment or jury trial stage.

### **B. Negligent Misrepresentation**

¶15 A claim for negligent misrepresentation requires the plaintiff to prove six elements:

(1) the defendant made a representation as to a past or existing material fact; (2) the representation was untrue; (3) regardless of actual belief, the defendant made the representation without any reasonable ground for believing it to be true; (4) the representation was made with the intent to induce the plaintiff to rely on it; (5) the plaintiff was unaware of the falsity of the representation and justified in relying upon the representation; (6) the plaintiff, as a result of reliance, sustained damage.

*TCF Enters., Inc. v. Rames, Inc.*, 2024 MT 38, ¶ 28, 415 Mont. 306, 544 P.3d 206 (citation omitted). Additionally, negligent misrepresentation “requires a showing of the failure to exercise the care or competence of a reasonable person in obtaining or communicating information.” *Cechovic v. Hardin & Assocs.*, 273 Mont. 104, 113, 902 P.2d 520, 525, (1995). As with other negligence claims, what constitutes reasonable depends on the circumstances.

¶16 Here, Lundeen’s complaint alleged sufficient facts, that if taken as true, could establish a claim for negligent misrepresentation. First, Lundeen alleged Lake County and the Lake County Attorney represented to her the material fact that she had access rights and the Tribes did not. Second, Lundeen’s complaint alleges that the representation was untrue because of the federal court’s April 16, 2020 Order that granted exclusive access rights to the Tribes. Third, Lundeen alleges that “[r]egardless of Lake County’s actual belief, Lake County made the representations without any reasonable ground for believing them to be true.” Fourth, Lundeen asserts the representation was made with the intent to induce her to rely on it by moving forward with the development. Fifth, Lundeen claims she was wholly unaware of the falsity of the representation because she relied on Lake County’s alleged 1,000-man hours of research and expertise throughout the permitting process and throughout the federal court proceedings. Finally, Lundeen claims she suffered damages that include emotional distress, losses and delays in the development of her project, and changes in the required access roads.

¶17 Lake County argues Lundeen cannot prove all the elements of negligent misrepresentation. First, Lake County asserts the representations Lundeen challenges were

statements of inadmissible legal opinion, not statements of past or existing material fact. Because Lake County was not Lundeen’s attorney, the statements of legal opinion were not statements of fact for purposes of negligent misrepresentation.

¶18 Lake County’s arguments fail because, under Rule 12(b)(6), Lundeen does not have to prove her claims—she is only required to demonstrate sufficient facts exist to establish the elements of the claim. When considering Lake County’s Rule 12(b)(6) motion, we must view the facts alleged by Lundeen in the light most favorable to her. Thus, if the facts asserted by Lundeen are accepted as true, then Lundeen’s allegations minimally meet the Rule 12(b)(6) requirements that there be sufficient facts to establish all the elements of a negligent misrepresentation claim. As such, we find this issue improper for dismissal under Rule 12(b)(6) standards and believe it better suited for resolution at the summary judgment or jury trial stage.

### **C. Negligent Infliction of Emotional Distress**

¶19 To establish a claim for NIED, the plaintiff must show she “suffered ‘serious’ or ‘severe’ emotional distress as the reasonably foreseeable consequence of the defendant’s act or omission.” *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, ¶ 34, 369 Mont. 444, 299 P.3d 338. Montana case law has elaborated that to be serious or severe, “the emotional distress must be ‘so severe no reasonable person could be expected to endure it.’” *Feller*, ¶ 34 (quoting *Sacco v. High Country Indep. Press*, 271 Mont. 209, 234, 896 P.2d 411, 426 (1995)). We have further explained that when there is a physical manifestation of bodily harm that results from the emotional distress, the bodily harm is

sufficient, but not required, to show the emotional distress was genuinely severe. *Henricksen v. State*, 2004 MT 20, ¶ 79, 319 Mont. 307, 84 P.3d 38.

¶20 Further, “[i]t is for the court to determine whether on the evidence severe [serious] emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.” *Sacco*, 896 P.2d at 425 (quoting Restatement (Second) of Torts, § 46, comment j at 78). It is for the fact finder to decide whether the emotional distress claimed to have been sustained is genuinely serious or severe. *Sacco*, at 425. Thus, under Rule 12(b)(6) standards, it is not the job of this Court to determine whether the emotional distress Lundeen claims to have sustained was genuinely serious or severe, but whether they were properly pled to survive dismissal.

¶21 Here, Lundeen’s complaint alleges she suffered serious or severe emotional distress by relying on Lake County’s repeated assertions and affirmations that she had access rights. Throughout the entire approval process and up to the federal court’s decision, Lundeen avers she relied on Lake County’s assertions that she had proper access. She asserts she would not have broken ground if she knew that she did not have access rights. Lundeen alleges she incurred expenses for her defense of the federal litigation, and to meet these expenses she had to sell some of her family property. This, she asserts caused her emotional distress to escalate throughout the approval process and federal litigation. She also alleges she suffered further emotional distress when the Lake County Attorney commented, or rather threatened, that Lake County could stop her project altogether if she chose to take legal action against them.

¶22 From the allegations contained in her complaint, taken as true and viewed in the light most favorable to her, there are sufficient facts alleged to survive the County’s Rule 12(b)(6) motion. Resolution of this issue is better suited for the summary judgment or jury trial stage.

**D. *Respondeat Superior***

¶23 “[T]he common law doctrine of *respondeat superior* imposes vicarious liability on employers for the tortious conduct of employees committed while acting within the scope of their employment.” *Brenden v. City of Billings*, 2020 MT 72, ¶ 13, 399 Mont. 352, 470 P.3d 168; *see also* § 28-10-602, MCA (“a principal is responsible to third persons for the negligence of the principal’s agent in the transaction of the business of the agency, including wrongful acts committed by the agent.”).

¶24 Lundeen asserts that if Lake County is not directly liable for negligent misrepresentation and NIED, then “Lake County is responsible under the law of agency, vicarious liability, and *respondeat superior* for all wrongful, negligent or other improper conduct of the Planning Staff, the [Board], the Lake County Attorney, and all other officers, agents, and employees of Lake County.” Lake County argues that both of Lundeen’s claims for negligent misrepresentation and NIED fail, thus, as an alternate theory of liability, so too should the *respondeat superior* claim.

¶25 As noted above, we concluded Lundeen has asserted sufficient facts for her claims of negligent misrepresentation and NIED to withstand dismissal at the Rule 12(b)(6) stage. As such, because her claim for *respondeat superior* is based on the same factual circumstances, we find it withstands dismissal at the Rule 12(b)(6) stage as well.

## CONCLUSION

¶26 We narrowly review this appeal under the M. R. Civ. P. 12(b)(6) requirements. Under Rule 12(b)(6), we find Lundeen has sufficiently asserted facts that, if accepted as true and viewed in the light most favorable to her, establish a basis for the claims asserted in her Complaint. As such, we find the District Court erred by granting Lake County's M. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim.

¶27 Reversed and remanded.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH  
/S/ JAMES JEREMIAH SHEA  
/S/ LAURIE McKINNON  
/S/ BETH BAKER  
/S/ DIRK M. SANDEFUR  
/S/ JIM RICE