IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 20-0556

DEANNA H. McATEE,

Plaintiff and Appellant,

vs.

MORRISON AND FRAMPTON, PLLP,

Defendant and Appellee.

On Appeal from the Montana Eleventh Judicial District Court, Flathead County,
Cause No. DV-14-1017(D)
Honorable Dan Wilson, District Court Judge

APPELLANT'S BRIEF

APPEARANCES:

Mark M. Kovacich
Ben A. Snipes
ODEGAARD KOVACICH SNIPES, P.C.
P.O. Box 2325
Great Falls, MT 59403
(406) 222-2222
(406) 259-3232 - fax
mark@mtlawyers.com
ben@mtlawyers.com

Michael J. McKeon, Jr.
McKEON LAW, PLLC
P.O. Box 3329
Butte, MT 59701
(406) 494-8890
(406) 494-7066 - fax
michael@themckeonlaw.com

Attorneys for Plaintiff and Appellant

Fred Simpson, Esq.
JENKS & SIMPSON, P.C.
1821 S. Avenue W., Suite 400
Missoula, MT 59803
(406) 549-2322
(406) 549-2707
fsimpson@cjs.legal

Attorney for Defendant and Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

RULES

STATUTES

OTHER AUTHORITY

STATEMENT OF ISSUES

1. Did the District Court err in granting summary judgment, dismissing McAtee's claims for malicious prosecution, based on its determination that McAtee's claims were barred by judicial estoppel?

2. Did the District Court err by applying the safe-harbor provision of the Annunzio–Wylie Anti–Money Laundering Act, 31 U.S.C. § 5318(g)(3), to preclude Morrison and Frampton from liability for inciting McAtee's federal Indictment?

3. Did the District Court err in granting summary judgment in favor of Morrison and Frampton by determining as a matter of law that Morrison and Frampton had probable cause to commence and continue the underlying civil fraud action against McAtee?

STATEMENT OF THE CASE

From 2007 through 2011, Deanna McAtee contracted with Whitefish Credit Union ("WCU") to broker construction loans. WCU, through its legal counsel Morrison and Frampton ("MF"), filed a lawsuit in 2011 after the borrowers on one of the loans McAtee brokered for WCU defaulted. Besides asserting contractual rights against McAtee's mortgage brokerage business, WCU and MF sued McAtee personally, accusing her of fraud in connection with the transaction. App. 4. Around the same time, MF provided information concerning its fraud allegations against McAtee to the United States Secret Service, ultimately resulting in a criminal bank fraud Indictment. App. 109-133, 135-141. The fraud allegations and criminal charges destroyed McAtee's reputation, caused her unbearable

distress, and forced her into bankruptcy. App. 5, 41-42, 45, 56.

In 2012, Doug Johnson, the representative of WCU who worked directly with McAtee on the loan brokerage arrangement, testified that McAtee followed his directions in connection with the defaulted loan, and did not commit fraud in any way. App. 12-13. Aaron Archer, WCU's Rule 30(b)(6) designee, also confirmed that the fraud allegations against McAtee were false. App. 23-25. Eventually, both WCU's fraud claim and the criminal charges against McAtee were dismissed in her favor. App. 167, 173-176.

McAtee filed this action in 2014. MF eventually was made to file its Answer on December 26, 2017. MF then moved for summary judgment on January 18, 2018. MF based its request for summary judgment in part on the safe-harbor provision of the Annunzio–Wylie Anti–Money Laundering Act ("Annunzio Act"), 31 U.S.C. § 5318(g)(3). The Annunzio Act exempts financial institutions from liability for providing law enforcement with information on a "possible violation of law or regulation."

Over McAtee's opposition, the District Court granted MF partial summary judgment. In its May 15, 2018 Order, the District Court held the Annunzio Act immunized MF from malicious prosecution liability for inciting McAtee's criminal Indictment. App. 70-73.

McAtee's remaining malicious prosecution claim, based on MF/WCU's efforts to commence and continue the civil fraud action against McAtee, continued in litigation. On December 7, 2018, MF moved for summary judgment on McAtee's remaining malicious prosecution claim, asserting it had the requisite probable cause to initiate and continue its civil fraud claims. Over McAtee's opposition, the District Court granted summary judgment to MF and dismissed McAtee's malicious prosecution action with prejudice as against MF on January 31, 2019. App. 81-89. After settling with WCU, McAtee filed her Notice of Appeal.

On May 9, 2019, McAtee appealed the summary judgment orders relieving MF of liability for McAtee's criminal and civil malicious prosecution claims. MF cross-appealed the District Court's order denying summary judgment to MF based on judicial estoppel. Subsequently, the Montana Supreme Court decided *Kucera v. City of Billings*, 2020 MT 34, and remanded that issue back to the District Court for review in light of the intervening *Kucera* decision. On October 23, 2020, the District Court granted summary judgement in favor of MF on the issue of judicial estoppel, dismissing McAtee's malicious prosecution claim with prejudice. App. 223-230. McAtee again appealed on November 19, 2020.

STATEMENT OF FACTS

In 2007, Doug Johnson, a representative of WCU, approached McAtee and requested that she enter into a business relationship whereby WCU would provide construction financing to various borrowers, using McAtee's corporation, The Mortgage Source, as a middle man. McAtee agreed to broker the loans as directed by Johnson, and WCU financed several construction projects under the arrangement. The Mortgage Source held a trust indenture on the properties and assigned its interest in the trust indenture to WCU. App. 28.

Before 2008, when McAtee brokered construction loans on behalf of WCU, she understood that in the event of a default, WCU would record its assignment of the trust indenture securing the loan and foreclose on the property subject to the loan. App. 30-31. In 2008, Kevin and Heidi Korsa defaulted on a loan they had arranged through McAtee and WCU. After the default, Johnson, on behalf of WCU, chose not to record the assignment and foreclose. Instead, Johnson instructed McAtee to foreclose on the property. App. 11, 29, 34. Johnson advised McAtee that she was personally responsible for the debt, under a personal guarantee, and that she would be required to finish construction on the Korsa property, sell the property, and satisfy the debt. App. 11, 29, 33, 35. McAtee reluctantly followed Johnson's instructions and commenced a foreclosure on the

Korsa property in the name of The Mortgage Source. App. 29-30. Johnson understood that when McAtee foreclosed in the name of The Mortgage Source, title to the property would transfer to The Mortgage Source. App. 11. As stated in her July 10, 2009 letter to Johnson, McAtee had retained attorney Rich DeJana to commence the foreclosure by issuing a notice of default, with the intent that McAtee acquire and then "finish the house and sell" the property. App. 14, 90-92.

As instructed by Johnson, The Mortgage Source, via DeJana, foreclosed on the Korsa property on February 10, 2006. App. 46. After The Mortgage Source acquired title to the Korsa property, McAtee discovered that substantial work would be required to sell the property. McAtee did not have the financial means to complete the construction, and WCU had declined to loan any additional proceeds on the property. App. 32, 35-36. Thus, McAtee borrowed funds from John Thor to complete the construction, consistent with Johnson's direction and her July 10, 2009 letter. App. 36, 91-92. The Mortgage Source granted a trust indenture on the property to Thor, to secure the construction loan along with other private loans that he provided to McAtee. McAtee eventually finished the construction, at substantial additional expense, and attempted to sell the property to satisfy the debts owed to WCU and Thor. App. 37-38.

However, while McAtee attempted to sell the Korsa property, WCU filed a

Lis Pendens on the property thwarting any possibility of a sale. App. 38, 94-95. Shortly thereafter, MF, on behalf of WCU, inexplicably sued McAtee for fraud, alleging:

> Knowing that she had assigned The Mortgage Source, Inc.'s interest in the Trust Indenture away to WCU, and intending that WCU would rely upon the assignment, McAtee arranged for an attorney to conduct a trustee's sale on behalf of The Mortgage Source, Inc.
>
> Using the trustee's sale, McAtee obtained title to the property for The Mortgage Source, Inc. despite having pledged the property as collateral for its loan to WCU by assigning the Trust Indenture to it.
>
> By foreclosing on a Trust Indenture in which neither she nor The Mortgage Source, Inc. had any interest, McAtee perpetrated a fraud upon the trustee and WCU.

App. 103-104.

In his deposition, Johnson confirmed that the fraud allegations against McAtee were false. App. 12-13. Although the loan transaction involving the Korsa property turned out poorly for all of the parties, Johnson confirmed that McAtee had been following his instructions and did not engage in any fraudulent conduct:

> Q. Okay. This says without notice to Whitefish Credit Union, The Mortgage Source foreclosed on the property. That's not true; is it?
> A. No. No.
> Q. This allegation, Paragraph 14, is false; right?
> A. Well, the extent that I -- my conversation with Deanna was to instruct her to go ahead and foreclose.

* * * * *

Q. In this paragraph Whitefish Credit Union alleges that Deanna McAtee individually and on behalf of the Mortgage Source obtained the loan from Whitefish Credit Union under false pretenses. Do you think that's true?

* * * * *

A. I do not.
Q. Okay. You think that's a false statement?
A. I think it's a false statement, yes.

App. 12-13. WCU's corporate designee, Archer, has also admitted the allegations against McAtee were false. App. 17-25. Archer and Johnson each testified that McAtee made no false representations to anyone at WCU. App. 13, 25.

Overwhelmed by an unmarketable home and the defense of MF's lawsuit against her, McAtee filed for bankruptcy on July 29, 2011. Her petition included twenty-five (25) sheets of required schedules. Mentioned in her schedules were the WCU loans, her disputed lawsuit with MF, and the attorney fees she incurred in defending MF's lawsuit. Through these schedules, the trustee was made aware of MF's lawsuit against McAtee (DV-11-326B). For McAtee this forced bankruptcy was "no great gift." App. 41-42. Instead it was "embarrassing and it was life destroying." App. 42. McAtee's discharge was entered by the bankruptcy court on November 9, 2011. App. 231-233.

On November 8, 2011, one day prior to her discharge, WCU filed a civil Adversary Proceeding in the bankruptcy court against McAtee alleging false

pretenses, false representations and actual fraud arising out of the Korsa property transaction, in an attempt to preclude McAtee's discharge of WCU's creditor claim. App. 238-240, 55-56. WCU brought fraud allegations to preclude the discharge of the debt related to the Korsa transaction. App. 238-240. McAtee answered WCU's bankruptcy court Complaint on February 6, 2012, denying all allegations of fraud alleged by WCU. App. 242-248.

Around the same time MF filed false fraud allegations against McAtee, it also began communicating with the United States Secret Service. MF's records confirm twenty communications between the law firm and the Secret Service between November 4, 2010, and September 24, 2012. App. 109-133. On May 2, 2012, the U.S. Attorney filed criminal charges against McAtee for fraud. The language of the Indictment reads almost identical to the groundless civil fraud claim filed against McAtee by MF. App. 135-141.

After interviewing Johnson, at which time he admitted the fraud allegations against McAtee were false, Thor's counsel, David Sandler, sent a letter to MF, and copied the Assistant U.S. Attorney prosecuting McAtee. Sandler explained the groundless nature of the fraud allegations against McAtee, and requested that MF drop its fraud allegations. App. 143-144.

On May 16, 2012, MF responded to Sandler by referencing him to the

federal Indictment (App. 135-141) as "grounds for WCU to argue the foreclosure was a fraud upon it." App. 146. MF rejected Sandler's demand that it dismiss its fraud claims against McAtee, instead insisting to continue those claims despite the facts revealed in Sandler's letter (and later affirmed by Johnson in his deposition). App. 14, 146.

After Doug Johnson's deposition confirming McAtee committed no fraud and made no false statements, McAtee's counsel, James Manley, similarly demanded that MF/WCU dismiss their civil fraud allegations. App. 148.

Despite confirmation that McAtee made no false statements to WCU, MF amended its Complaint for Foreclosure and continued the civil fraud claim against McAtee. App. 150-165. On September 24, 2012, the U.S. Attorney's office voluntarily dismissed McAtee's criminal Indictment. App. 167. On April 10, 2013, WCU filed a stipulation to dismiss its claims, including actual fraud, in the bankruptcy adversary proceeding against McAtee. App. 250-251. The adversary proceeding was dismissed with prejudice on April 11, 2013, with a final decree of discharge entered on May 20, 2013. App. 250-252, 255.

Unlike the federal Indictment and MF's fraud-based adversary proceeding, MF's civil fraud claims against McAtee persisted. Eventually, MF/WCU abandoned their fraud claim against McAtee by clandestinely leaving it out of a

proposed Pretrial Order. During the pretrial conference hearing on March 27, 2013, it was brought to the Court's attention that MF had omitted the fraud allegations against McAtee when preparing the proposed Pretrial Order. In response to the Court's inquiry for clarification, MF represented to the Court and opposing counsel that it was no longer pursuing its fraud claims against McAtee. App. 169-171. On January 29, 2014, based on MF's agreement to drop the claim, the District Court dismissed MF/WCU's fraud claim. App. 173-176.

Nearly 11 months after MF/WCU abandoned the fraud claim against McAtee, WCU's corporate designee, Archer, confirmed that no false statements were made by Deanna McAtee to any WCU representative. App. 31. Thus, while MF attempts to justify its actions, the record clearly establishes that after three years, MF abandoned the fraud claim, resulting in its dismissal in McAtee's favor, because the fraud allegations were baseless from their inception and continued after they were confirmed false. App. 173-176.

When WCU sued McAtee in 2011, she asserted several counter-claims, including claims for abuse of process and constructive fraud. At the time, McAtee's malicious prosecution claims were not yet ripe, because the groundless fraud claim and criminal charges against her had not yet been resolved in her favor. The action in which WCU sued McAtee drug on for years, finally settling

shortly before trial in 2016. In 2014, McAtee sought leave to amend her pleading to include, in part, her malicious prosecution causes. The District Court denied leave, requiring McAtee to assert her claims in a separate action. App. 178-181.

McAtee filed a separate action in 2014 (Cause No. DV-14-1017D), including malicious prosecution claims against WCU and MF. McAtee based her claims upon their efforts to both independently bring, and incite federal authorities to pursue, false fraud claims against McAtee. App. 2-8.

Shortly after McAtee served her Amended Complaint on MF and WCU, both Defendants filed Rule 12, M.R.Civ.P., motions to dismiss. On December 20, 2016, the District Court granted the Rule 12(b)(6) motions to dismiss. App. 183-185.

McAtee appealed. On November 7, 2017, the Montana Supreme Court (Cause No. DA 17-0037) held that the District Court incorrectly dismissed McAtee's Amended Complaint. The Court reversed and remanded the District Court's decision. This Court issued Remittitur on November 24, 2017.

By unopposed motion, the District Court granted WCU and MF until December 29, 2017, to file their Answers to McAtee's Amended Complaint and Jury Demand. WCU filed its Answer on December 29, 2017. Five (5) working days later, on January 8, 2018, WCU moved for summary judgment. MF filed its

Answer on December 26, 2017, and likewise moved for summary judgment independently and by incorporating WCU's arguments on January 18, 2018. MF based its request for summary judgment in part on the safe-harbor provision of the Annunzio Act, 31 U.S.C. § 5318(g)(3). The Annunzio Act exempts financial institutions from liability for providing law enforcement with information on a "possible violation of law or regulation."

Over McAtee's opposition, based on the inapplicability of the Annunzio Act's immunity to circumstances where law enforcement is fed false and baseless information, the Court granted MF partial summary judgment. In its May 15, 2018 Order, the Court held the Annunzio Act immunized MF from liability for inciting McAtee's criminal Indictment. App. 67-80.

McAtee's remaining malicious prosecution claim, based on WCU/MF's initiation and continuation of the civil fraud action against McAtee, continued in litigation. On December 7, 2018, MF moved for summary judgment on the remaining component of McAtee's malicious prosecution action, asserting it had the requisite probable cause to initiate the civil fraud claim based on the information provided in WCU's loan file. Over McAtee's opposition, the District Court granted MF summary judgment. The District Court dismissed McAtee's malicious prosecution claim as against MF on January 31, 2019. App. 82-89.

McAtee's civil malicious prosecution claim against WCU remained. On March 20, 2019, McAtee and WCU settled. The District Court finally dismissed on April 12, 2019. On May 9, 2019, McAtee appealed the summary judgment orders relieving MF of liability for McAtee's criminal and civil malicious prosecution claims. MF cross-appealed the District Court's order denying summary judgment to MF based on judicial estoppel. While the appeals were pending, the Montana Supreme Court issued its Opinion in *Kucera v. City of Billings*, 2020 MT 34, addressing the circumstances when a plaintiff may be judicially estopped from pursuing claims not disclosed in bankruptcy. In light of the *Kucera* Opinion, the Montana Supreme Court remanded this matter back to the District Court. On October 23, 2020, the District Court granted summary judgement in favor of MF, dismissing McAtee's malicious prosecution claim with prejudice. App. 224-230. McAtee again appeals.

STANDARD OF REVIEW

This Court conducts de novo review of summary-judgment orders, performing the same analysis as the District Court pursuant to Rule 56 of the Montana Rules of Civil Procedure. See *LaTray v. City of Havre*, 2000 MT 119, ¶ 14, 299 Mont. 449, 999 P.2d 1010. Under M. R. Civ. P. 56(c), judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there remains no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200 (citing *Corporate Air v. Edwards Jet Ctr*., 2008 MT 283, ¶ 24, 345 Mont. 336, 190 P.3d 1111).

Summary judgment may be granted only when there lacks a complete absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c); *LaTray*, ¶ 14. A material fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact. *Roe*, ¶ 14 (citing *Corporate Air*, ¶ 24). The party seeking summary judgment bears the initial burden of establishing a complete absence of genuine issues of material fact. *LaTray*, ¶ 14. To satisfy this burden, the moving party must "exclude any real doubt as to the existence of any genuine issue of material fact" by making a "clear showing as to what the truth is." *Toombs v. Getter Trucking, Inc*., 256 Mont. 282, 284, 846 P.2d 265, 266 (1993). In doing so, the moving party must contend with Montana's rules which favor the party opposing summary judgment. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 37, 345 Mont. 12, 21, 192 P.3d 186, 195.

In determining whether genuine issues of material fact exist, this Court

must view all evidence in the light most favorable to the non-moving party. *LaTray*, ¶ 15. Therefore, all reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment. *LaTray*, ¶ 15. If there is any doubt as to whether a genuine issue of material fact exists, that doubt must be resolved in favor of the party opposing summary judgment. *Lorang*, ¶ 38 (collecting cases).

SUMMARY OF ARGUMENT

The District Court incorrectly granted summary judgement to MF by applying judicial estoppel to preclude McAtee's malicious prosecution claims, which had not accrued and were not sufficiently rooted in her pre-bankruptcy past such that they were required to be scheduled as an asset to her bankruptcy estate. Application of judicial estoppel under such circumstances is entirely inequitable.

The District Court incorrectly applied the Annunzio Act's immunity provision to MF's communications with federal authorities, despite no "possible" violation of the law. MF filed false civil fraud allegations without having confirmed the veracity of that information with WCU's managing agent, Johnson. App. 12-13. MF then provided those allegations to federal authorities along with other suspicions and curiosities. App. 109-133. MF cannot provide suspicions, curiosities, and false pleadings, to federal authorities then claim immunity under

the Annunzio Act. While MF communicated with the government and instigated the charges against McAtee, WCU's Johnson was aware McAtee had made no false statements and could not possibly be guilty of banking fraud. Where all reasonable inferences must be drawn in McAtee's favor, MF's disclosures could not have implicated a "possible" illegality as required for Annunzio Act immunity.

Finally, the District Court incorrectly granted summary judgment to MF on McAtee's civil malicious prosecution claim when it found that McAtee could not demonstrate MF lacked probable cause for filing the civil fraud claim at the time MF filed the underlying fraud complaint. Genuine issues of material fact exist and the jury must hear the differing evaluations regarding the reasonableness of MF's investigation and amendment of its civil fraud action.

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT TO MF BASED ON ITS DETERMINATION THAT McATEE'S CLAIMS WERE BARRED BY JUDICIAL ESTOPPEL.

a. Without Accrual, McAtee's Malicious Prosecution Claims Were Not An Asset to Her Bankruptcy Estate.

McAtee's malicious prosecution claims had not accrued and were not sufficiently rooted in her pre-bankruptcy past such that they were required to be scheduled as an asset to her bankruptcy estate. Application of judicial estoppel

under such circumstances is entirely inequitable.

The bankruptcy code sets out what property comprises a bankruptcy estate in 11 U.S.C. § 541. Under § 541(a), the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the estate." Legal causes of action are included within the broad scope of § 541. *Goldstein v. Stahl (In re Goldstein)*, 526 B.R. 13, 21 (Bankr. App. 9th Cir. 2015) (citation omitted). Assets of the bankruptcy estate properly include pre-petition causes of action. *Id.*

Under § 541(a), a temporal line of demarcation defines which claims are in and which are outside of the estate. If a cause of action accrued prior to the debtor's petition date, it is an asset that must be scheduled. *Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001). An accrued cause of action is property of the bankruptcy estate even if the debtor was unaware of the claim when he or she filed for bankruptcy protection. *Boland v. Crum (In re Brown)*, 363 B. R. 591, 605 (Bankr. D. Mont. 2007). "[I]t is often necessary to look to state law on the statute of limitations to determine when a cause of action accrues because accrual rarely is discussed apart from the issue of the running of the statute of limitations." *In re Swift*, 129 F.3d 792, 796 fn. 18 (5th Cir. 1997).

In re Brown, 363 B. R. 591 (Bankr. D.Mont. 2007), the Court concluded that, for purposes of determining whether a claim is an asset of the bankruptcy

estate under Montana law and federal bankruptcy law, a claim accrues when an action can be brought. *In re Brown*, 363 B. R. at 605-06. Section 27-2-102(1)(a), MCA provides, "a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action ..." To bring a claim for malicious prosecution, a plaintiff must be able to show a 'favorable termination' in the underlying proceeding. *Hughes v. Lynch*, 2007 MT 177, ¶ 12, 338 Mont. 214, 218, 164 P.3d 913, 917.

The parties do not dispute that the pertinent date for determining whether McAtee's eventual malicious prosecution cause of action is property of the estate is July 29, 2011, when McAtee's bankruptcy was commenced. Therefore, unless the malicious prosecution action was "sufficiently rooted in the pre-bankruptcy past" as of this date, it is not property of the bankruptcy estate. *Johnson v. Mitchell*, 2011 WL 1586069, *6 (E.D. Cal. 2011).

As of the commencement of her bankruptcy estate on July 29, 2011, McAtee knew she was being accused of fraud she did not commit. This knowledge, without a favorable termination, is insufficient to require McAtee to schedule a potential malicious prosecution claim as if it were an accrued cause of action. On the date that McAtee filed her bankruptcy petition, the federal criminal

case did not exist and there had been no termination of any kind in DV-11-326B. Therefore, a malicious prosecution claim based on the federal criminal case and/or the fraud allegations in DV-11-326B could not have been brought at the time McAtee's bankruptcy petition was filed. See *Hughes*, ¶ 12. Because the malicious prosecution claim had not accrued, McAtee was not required to schedule it as a current or contingent asset of her bankruptcy estate. See *Cusano* at 947 ("generally, a debtor has no duty to schedule a cause of action that did not accrue prior to bankruptcy."); see also *In re Bobroff*, 766 F.2d 797, 803 (3d Cir.1985).

In like circumstances, the federal magistrate judge in *Johnson v. Mitchell*, 2011 WL 1586069 (E.D. Cal. 2011), considered whether a malicious prosecution claim was "sufficiently rooted" in the pre-bankruptcy past to bring it within the bankruptcy estate. In *Johnson*, a real estate developer brought a malicious prosecution action against lot owners, alleging that he was forced to file bankruptcy due to allegedly false criminal complaints made against him by the lot owners. *Johnson*, at *1-2. The developer's malicious prosecution action was brought nearly two years after his Chapter 11 bankruptcy was converted to Chapter 7. *Johnson*, at *1. While the developer's Chapter 7 bankruptcy was pending, the criminal cases terminated in his favor. *Johnson*, at *8. The

developer did not disclose the malicious prosecution claim in the bankruptcy. *Johnson*, at *2. The bankruptcy Trustee moved to intervene in the malicious prosecution action and to dismiss the claim, asserting that the claim was the property of the bankruptcy estate. *Johnson*, at *2 and *5. The court observed that (like Montana law) the element of termination in the plaintiff's favor is of paramount importance to a malicious prosecution claim and without a favorable termination, such a claim does not exist. *Johnson*, at *8. This requirement distinguishes a malicious prosecution claim from other claims. *Johnson*, at *8. The court determined absent a favorable termination in the underlying proceeding occurring prior to or on the date of the bankruptcy filing, a cause of action based on malicious prosecution is not sufficiently rooted in the pre-bankruptcy past. *Johnson*, at *8. The court concluded that, because the orders terminating the criminal cases in the developer's favor post-dated conversion of the bankruptcy to Chapter 7, the developer's malicious prosecution claim was not part of the bankruptcy estate. *Johnson*, at *9. The magistrate's findings were adopted by the U.S. District Court. See *Johnson v. Mitchell*, 2011 WL 2259408 (E.D. Cal. 2011).

Exclusion of unaccrued malicious prosecution causes from bankruptcy estates is further supported by the following cases: *In re Atanasov*, 221 B.R. 113 (D.N.J.1998)(favorable termination for malicious prosecution arose when the

indictment was dismissed, post-petition, despite much of the activity leading toward the malicious prosecution claim occurring pre-petition.); and *Carroll v. Henry County, Georgia*, 336 B.R. 578 (N.D.Ga.2006)(the malicious prosecution claim did not accrue until debtor was found not guilty at trial, notwithstanding that the claim was based on pre-petition conduct.).

In its underlying briefing MF's cites to *Cole v. Pulley*, 468 N.E.2d 652 (Mass. App. Ct. 1984), *In re Motors Liquidation Company*, 576 B.R. 761 (Bankr. S.D.N.Y. 2017) and *Stone v. Kmart Corp*., 2007 WL 1034959, to support the proposition that a malicious prosecution could be sufficiently rooted in the pre-bankruptcy past, despite the post-petition occurrence of a favorable termination. In doing so, MF asks this court to stretch the reasonable contemplation test to reach where it cannot. The *Johnson* Court addressed this very proposition in holding that "the element of termination in plaintiff's favor is of paramount importance to a malicious prosecution claim, and the claim would not exist without this primary predicate." *Johnson* at *8.

Here, favorable termination was not foreseen at the commencement of McAtee's bankruptcy. Instead, as of July 29, 2011, the false fraud allegations against McAtee seemed to be gaining steam. It wasn't until Doug Johnson's July 30, 2012 deposition (more than a year after McAtee's bankruptcy commencement)

that the wind left those sails. Not even MF foresaw McAtee's favorable termination, as MF's fraud allegations against McAtee persisted until January 29, 2014, when they were dismissed. Given this dynamic, neither McAtee nor her bankruptcy counsel reasonably contemplated a malicious prosecution action when petitioning for bankruptcy relief. App. 254-257. To take MF's approach is to hinge the judicial estoppel evaluation to speculation on what a debtor might contemplate happening on future events largely out of their hands. This lends all the more reason to adopt the *Johnson*, *Atanasov* and *Carroll* Courts' bright line approach- without termination of the underlying action in plaintiff's favor occurring prior to the bankruptcy petition, the malicious prosecution is not sufficiently rooted in the pre-bankruptcy past. See *Johnson* at *9.

This Court's analysis in *Kucera v. City of Billings*, 2020 MT 34, is not aimed at determining whether property is appropriately rooted pre- or post-bankruptcy. *Kucera* involved a claim for property damage due to a water line leak that occurred on July 21, 2011. *Kucera* at ¶ 3. Kucera believed he had a claim against the City of Billings and presented that claim on August 15, 2011. *Id.* Nearly 10 months after Kucera filed a claim with the City, he petitioned for bankruptcy relief. *Kucera* at ¶ 4. Kucera did not disclose his claims against the City in his bankruptcy petition or schedule. *Id.* On September 3, 2013, over two

years after the City denied his claim, Kucera filed a complaint against the City alleging the City was liable for damages caused by the water leak. *Kucera* at ¶ 5. Judicial estoppel was applied and later affirmed by the Montana Supreme Court due to Kucera's failure to disclose his potential claim at the time of filing or during his pending bankruptcy. *Kucera* at ¶ 13.

Kucera does not involve a malicious prosecution claim or, for that matter, any analogous pre/post bankruptcy accrual analysis. *Kucera* involved the omission of ripe pre-bankruptcy claims. Here, the element of favorable termination is of paramount importance to McAtee's malicious prosecution claim, as her claim would not exist without this primary predicate. Therefore, *Kucera* and like cases not involving then ripe malicious prosecution claims fall short of providing comparable analysis to the present matter.

Without the termination of the underlying action in McAtee's favor occurring prior to the bankruptcy measuring date, her malicious prosecution action is not sufficiently rooted in the pre-bankruptcy past. It is undisputed that as of the date of filing of McAtee's bankruptcy petition, there was no "termination" of any kind, favorable or otherwise, in either DV-11-326B or the federal criminal case. Therefore, as in *Johnson*, McAtee's malicious prosecution claims against MF were not sufficiently rooted in her pre-bankruptcy past to bring it within her bankruptcy

estate.

The bankruptcy rules do not require scheduling of pre-petition claims that are both incapable of prosecution during the bankruptcy proceedings and are contingent on extrinsic events. See 11 U.S.C. § 101(5)(A); *Cusano*, at 947. Without accrual by favorable termination, McAtee's malicious prosecution claims were not sufficiently rooted in the pre-bankruptcy past to constitute an asset of her bankruptcy estate. Under such circumstances, judicial estoppel does not bar McAtee's malicious prosecution claims.

b. McAtee's Malicious Prosecution Claims Were Not Fraudulently Omitted From Her Bankruptcy Estate.

After confirming the omission of pre-bankruptcy assets, *Kucera* turned to the threshold consideration of whether Kucera's omission sought to intentionally manipulate the court or was based on inadvertence or mistake. *Kucera* at ¶¶ 9, 11-13. Ultimately, the Court determined that judicial estoppel applied, noting "Kucera's omission can hardly be interpreted as a result of mistake or inadvertence." *Kucera* at ¶ 13.

Unlike the findings in *Kucera*, McAtee made no intentional misrepresentations in her bankruptcy proceedings that would bar her malicious prosecution claims under the equitable doctrine of judicial estoppel. Assuming arguendo that McAtee's yet ripe malicious prosecution claims were sufficiently

rooted in her pre-bankruptcy past to be considered pre-petition property, MF is unable to establish that they were intentionally omitted from her bankruptcy schedules. Any unsupported assertions that her malicious prosecution claims were deliberately withheld from the bankruptcy schedules is contradicted by the affidavit and analysis of her experienced bankruptcy counsel, Edward Nolde. App. 254-257. Particularly, Nolde confirms that McAtee's malicious prosecution claims had not accrued and/or were unknown at the time of McAtee's bankruptcy petition, making them post-petition property not "part of the bankruptcy estate." See App. 254-257.

MF cannot satisfy the threshold burden of showing McAtee intentionally misled the bankruptcy court and trustee on her assets. Judicial estoppel seeks to prevent the deliberate manipulation of the courts, and therefore should not apply when a party's prior position was based on inadvertence or mistake. *Dovey v. BNSF Ry. Co.,* 2008 MT 350, ¶ 16, 346 Mont. 305, 309, 195 P.3d 1223, 1225 (internal quotations omitted). If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply. *Id*. Given the sworn affidavit of McAtee's bankruptcy counsel, MF cannot establish by undisputed fact that McAtee (and her counsel) deliberately misrepresented her assets, as required for judicial estoppel to apply. As noted

herein, McAtee's malicious prosecution claims were not sufficiently ripe to be part of her pre-petition bankruptcy estate and their omission from McAtee's bankruptcy schedules were not intentionally misleading.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY APPLYING THE ANNUNZIO ACT'S IMMUNITY TO MF's COMMUNICATIONS WITH FEDERAL AUTHORITIES DESPITE NO "POSSIBLE" VIOLATION OF LAW.

The Annunzio Act offers financial institutions and their agents broad exculpation from civil liability in exchange for disclosing "any possible violation of law." Such immunity is not afforded to communications with law enforcement that disclose information that cannot be a "possible" legal violation. Alternatively stated, the Annunzio Act does not provide immunity unless the violation of law is "possible." Where MF's communications with federal law enforcement involved circumstances that could not possibly be a violation of law, the Annunzio Act's immunity cannot apply.

Through summary judgment, the District Court granted MF refuge under the safe-harbor provision of the Annunzio Act, 31 U.S.C. § 5318(g)(3). Specifically, the District Court granted MF immunity from McAtee's malicious prosecution claim arising from the false disclosures and deceptive information MF provided to federal authorities. The statute granting immunity reads:

> Any financial institution that makes a voluntary disclosure of any

> possible violation of law or regulation to a government agency . . . shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure . . . .

31 U.S.C. § 5318(g)(3).

The Annunzio Act does not provide unfettered, blanket immunity. Instead, a financial institution is entitled to immunity only if its disclosure falls within one of the three safe harbors set forth in § 5318(g)(3). *Lopez v. First Union Nat. Bank of Fla.,* 129 F.3d 1186, 1192 (11th Cir. 1997)(emphasis added). Section 5318(g)(3) immunity is limited to three specific types of disclosures:

> (i.) A disclosure of any possible violation of law or regulation,
> (ii.) A disclosure pursuant to § 5318(g) itself, or
> (iii.) A disclosure pursuant to any other authority.

31 U.S.C. § 5318(g)(3).

MF sought immunity under the first safe harbor, by posturing its communications with federal authorities as related to a "possible violation of law or regulation." App. 194. Importantly, the Annunzio Act requires there to be a "possible" violation of law—"possible" being the operative word—before the protection of the statute applies. Here, viewing the evidence in a light most favorable to McAtee, no "possible" violation existed.

The District Court misinterpreted McAtee's argument, assuming that she

was advocating that immunity can be granted only if MF's disclosures were made in "good faith." App. 71. While the Eleventh Circuit in *Lopez* reached that conclusion, McAtee's argument centered upon MF's inability to objectively identify a "possible violation" at the time it communicated with federal authorities. McAtee made no mention that the "good faith" standard in *Lopez* should apply. Instead, McAtee argued that MF failed to meet the threshold showing that it was reporting a "possible violation of law." Drawing all inferences in McAtee's favor, MF cannot be immunized from providing false, factually unfounded information to federal agents.

Relying on the holding in *Stoutt v. Banco Popular de Puerto Rico,* 320 F.3d 26 (1st Cir. 2003), rejecting the "good faith" standard, MF argued that disclosures to federal law enforcement could be "unfounded, incomplete, careless and even malicious" and still be entitled immunity. App. 192. However, the First Circuit's decision in *Stoutt* to reject the "good faith" standard does not affect the threshold immunity evaluation. McAtee's arguments are not based on the "good faith" standard recognized in *Lopez*, but rather MF's inability to objectively identify a "possible violation," when it was communicating with federal authorities.

While the federal circuit courts are split on imposing a "good faith" requirement, it cannot be disputed that there still must exist a "possible" violation

of law before a financial institution or its agents can benefit from the Annunzio Act's safe-harbor. *Lopez* at 1192. This is true even if the disclosure is requested by federal authorities. To find otherwise is to conclude Congress intended to provide financial institutions with blanket immunity for willful criminal and civil violations of law. Having consciously included the language mandating a "possible" violation, Congress sought to ensure the Annunzio Act's immunity was not limitless.

Stoutt deals specifically with the objective standard for evaluating a "possible violation." Therein, a financial institution reported an apparent crime to the FBI and the U.S. Attorney "in an abundance of caution." *Stoutt* at 30. Upon the discovery of new information that made it clear that no crime had occurred, the U.S. Attorney dismissed the charges. *Stoutt* at 30. In immunizing the bank, the *Stoutt* Court applied the objective reasonableness standard. *Stoutt* at 29-30.

Unlike the bank in *Stoutt*, which was determined to have "by any objective test identif[ied] a 'possible violation'," MF filed false civil fraud allegations without having confirmed the veracity of that information with WCU's managing agent, Johnson. *Stoutt* at 30; App. 97-107. MF then provided those allegations to federal authorities along with other suspicions and curiosities. App. 109-133. MF's records confirm twenty communications between MF and the Secret Service

between November 4, 2010, and September 24, 2012. App. 109-133. On May 2, 2012, the U.S. Attorney filed criminal charges against McAtee for banking fraud. After Johnson confirmed that WCU/MF's fraud allegations were false, MF continued to tout the "strength of the evidence" to federal authorities right up until the federal charges were dismissed. App. 132-133.

Fortuity did not lead to the Indictment's dismissal, but rather the truth revealed. That truth– McAtee made no misrepresentations that could "possibly" constitute criminal bank fraud. This truth is confirmed by the binding testimony of WCU's agents, Johnson and Archer, who testified that McAtee made no false representations to anyone at WCU. App. 12-13, 25. Unlike the financial institution in *Stoutt*, MF engaged in a continuous course of conduct inciting and urging McAtee's prosecution by supplying admittedly false information to federal authorities without concern for the "possibility" of criminal activity. App. 25. When asked about McAtee's possible crimes, MF's Sean Frampton stated, "I don't have any opinion on her crimes. It's not my concern." App. 50. Quite simply, the present matter is easily distinguished from *Stoutt* as lacking objective identification of a "possible violation" of law.

The "possible" illegality on which MF relies in seeking Annunzio Act immunity is bank fraud. Based on the MF's numerous communications with

federal law enforcement, McAtee was charged with bank fraud in violation of 18 U.S.C. § 1344(2). Proof of a misrepresentation is a material element of bank fraud under § 1344(2). See e.g., *United States v. Ragosta*, 970 F.2d 1085, 1089 (2d Cir.) (collecting cases), cert. denied, 506 U.S. 1002, 113 S.Ct. 608, 121 L.Ed.2d 543 (1992). WCU's representatives Archer and Johnson both testified that McAtee made no false representations to anyone at WCU. App. 12-13, 25. Absent the material element of a misrepresentation, § 1344(2) banking fraud is not "possible." MF cannot seek shelter behind the Annunzio Act without first establishing the threshold showing of a "possible" illegality. Where binding testimony confirms McAtee made no misrepresentations, § 1344(2) banking fraud is impossible and the Annunzio Act's safe-harbor is inapplicable.

Moreover, MF's communications to federal authorities went far beyond disclosure of financial information of a "possible" illegality. MF incited McAtee's federal prosecution by communicating to federal authorities about non-financial matters including:

> - McAtee residing in Bigfork, Montana, noting the house was 15,000 square feet and was for sale for $10.9M, claiming "there is no understanding why Deanna would be using a Bigfork address on her checks." App. 121-122.
>
> - information about the 513 Remington property, noting "[s]ometimes, I'm too curious for my own good..." App. 121-122.
>
> - offering WCU's Complaint for Foreclosure and Lis Pendens under the

premise it "thought [Secret Service Agent Tad Downs] might want to know about this." App. 123.

- after Doug Johnson's deposition testimony was revealed to the federal prosecutors, MF's Sean Frampton offered to discuss with Assistant U.S. Attorney, Tim Racicot, his personal "impressions of the deposition or the strength of the evidence." App. 138. (this communication occurred three (3) days before the Indictment was dismissed by Assistant U.S. Attorney Racicot). App. 132.

Such conjecture and insinuation are beyond the Annunzio Act's disclosure exemptions for reporting a "possible violation" of law.

In sum, MF cannot provide suspicions, curiosities, and false pleadings, to federal authorities and then claim immunity under the Annunzio Act. While MF communicated with the government and instigated the charges against McAtee, WCU's Johnson was aware (and it was later confirmed by WCU's corporate designee, Archer) McAtee had made no false statements to WCU, making the crime of bank fraud impossible. Where all reasonable inferences must be drawn in McAtee's favor, MF's disclosures could not have implicated a "possible" illegality in the manner required for Annunzio Act immunity. It was not Congress' intent to shield malicious behavior premised upon sharing false information and conjecture. Certainly, Congress did not intend to shield financial institutions and their agents who pursue a continuing course of false and malicious communications to federal authorities for purposes other than supporting criminal justice. Stretching the

threshold of "any possible violation" to fit the facts at bar would lead to an absurd result contrary to the legislative intent. Read in the light most favorable to McAtee, the District Court committed error in applying the Annunzio Act safe-harbor to MF's communications with federal authorities.

III. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT TO MF ON THE BASIS THAT MF POSSESSED PROBABLE CAUSE TO FILE THE CIVIL FRAUD CLAIM.

To prevail on her malicious prosecution claim, McAtee must prove the following elements: 1) a judicial proceeding was commenced and prosecuted against her; 2) the defendant was responsible for instigating, prosecuting, or continuing such proceeding; 3) the defendant lacked probable cause for its acts; 4) the defendant acted with malice; 5) the underlying judicial proceeding terminated favorably for her; and 6) she suffered damage. *Plouffe v. Mont. Dept. of Public Health and Human Servs.*, 2002 MT 64, ¶ 16, 309 Mont. 184, 45 P.3d 10.

The District Court granted summary judgment to MF on McAtee's civil malicious prosecution claim when it found that McAtee could not demonstrate MF lacked probable cause at the time MF filed its civil fraud action. The District Court incorrectly determined as a matter of law that MF possessed probable cause to file its underlying fraud claim. App. 82-89.

Lack of probable cause is the gist of a malicious prosecution action.

Plouffe, ¶ 20. Because probable cause is determined under an objective standard on the basis of the facts known to the party initiating the legal action, we have held the issue must be submitted to the jury for resolution when direct and circumstantial evidence related to the defendant's knowledge is susceptible to different conclusions by reasonable persons. *Plouffe*, ¶ 18. Only where the material facts are not in dispute, or when only reasonable inferences can be drawn from the evidence, does the existence of probable cause become an issue of law for the court to resolve. *Reece v. Pierce Flooring*, 194 Mont. 91, 96, 634 P.2d 640, 643 (1981) (citations omitted).

Probable cause stems from a reasonable belief in the existence of the facts upon which the claim is based, where the party making the claim either:

> (a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or
>
> (b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

Restatement (Second) of Torts, § 675 (1977).

Determining whether a party had probable cause for instigating the underlying lawsuit turns "on the facts known to the suing party at the time the lawsuit was filed." *Seltzer v. Morton*, 2007 MT 62, ¶ 72, 336 Mont. 225, 154 P.3d 561. However, in making this determination a jury may consider whether

defendant could or should have made further inquiry or investigation as an ordinarily prudent person would have made in the same circumstances before initiating such a lawsuit. *Seltzer*, ¶ 72 (emphasis added). The determination of probable cause must take into account the totality of the circumstances including consideration of the suing party's investigation before filing the suit. *Seltzer,* ¶ 72.

In *Seltzer*, Steve Seltzer, an art authenticator, brought a malicious prosecution action against the defendants relating to an underlying lawsuit that defendants filed against Seltzer. Defendants filed the suit after Seltzer refused the defendants' demand that he recant his opinion about the true artist of a painting. *Seltzer*, ¶ 13. Seltzer opined that the painting was a work of Seltzer's grandfather, O. C. Seltzer, not Charles M. Russell, who appeared to have signed the painting. *Seltzer*, ¶ 14. Seltzer presented evidence to demonstrate that the defendants did not conduct a reasonable investigation regarding the painting's authenticity, and had they done a reasonable investigation, they would have discovered readily available information supporting Seltzer's opinion. *Seltzer*, ¶ 73.

The defendants challenged affidavits that Seltzer presented to the jury from respected art experts also opining that the painting was not an authentic Russell. The Court determined that even if the defendants were not aware of the information in the affidavits, Seltzer remained entitled to present the affidavits as

part of the evidence regarding the adequacy of defendants' investigation before filing suit. *Seltzer*, ¶ 79.

The Court further determined, as evidence of information that was readily available, these affidavits were relevant to the issue of whether defendants conducted a reasonable investigation before filing suit. *Seltzer*, ¶ 79 (relying on *Rickman v. Safeway Stores*, 124 Mont. 451, 458-59, 227 P.2d 607, 611 (1951) (the failure of a person... to make such further inquiry or investigation as an ordinarily prudent man would have made in the same circumstances, before instigating a proceeding, renders him liable for the proceeding without probable cause). The affidavits "simply showed... what specific information the defendants could have obtained with minimal investigative effort prior to filing suit against Seltzer." *Seltzer*, ¶ 79.

Similar to *Seltzer*, McAtee must be allowed to present to the jury the totality of the circumstances surrounding MF's investigation or lack thereof to demonstrate MF's lack of probable cause before filing the underlying fraud action. MF did not speak to the one WCU employee, Johnson, that had dealings with McAtee regarding the allegedly fraudulent conduct. App. 12.

MF instead claims ignorance, arguing its failure to learn the facts ultimately disclosed in Johnson's deposition cannot establish a lack of probable cause. MF's

argument ignores the fact that MF made no effort to contact Johnson. App. 20-24. Further, MF billed a total of 4.8 hours to WCU before filing the underlying fraud claim. Attorney Ryan Purdy, MF's primary liaison with WCU, testified:

> Q And the billing records indicate that – and I did the math; if you want to check it for me, it would be great – the total hours billed was 4.8 hours as of the date the complaint was signed. Do you have any reason to dispute that?
>
> * * * * *
>
> A: I have no specific reason to dispute that. I agree that that seems quick, but pat on the back, we're efficient.

App. 54-55.

If MF performed a superficial investigation, including not talking to Johnson or learning his understanding of the facts surrounding the transaction, it had no basis to accuse McAtee of anything, fraudulent or otherwise. MF's failure to speak with Johnson and the 4.8 hour review of the loan file, highlight material factual disputes regarding the adequacy of MF's investigation before filing the civil fraud claim. MF's Frampton affirmed MF's lack of investigation to verify its fraud claim in the following testimony:

> Q: Did you make any efforts to speak with Doug Johnson prior to commencing a lawsuit against Deanna McAtee for fraud?
> A: I did not.
> Q: Do you know if anyone from your law firm made any efforts to contact Doug Johnson before filing this lawsuit to verify the veracity of this lawsuit?
> A: Doug Johnson was not working at the credit union, so we did not make that contact.

Q: Okay. Were any efforts made to explain to Doug Johnson what fraud was and then have him evaluate this lawsuit in that context before it was filed?
A: Doug Johnson was not working at the credit union at the time that lawsuit was drafted and filed.
Q: Is there anything that would prevent you or anyone in your firm from talking with Doug Johnson before commencing the lawsuit?
A: Not that I'm aware.

App. 49. Ultimately, based on a fabricated account of the transaction, MF sued McAtee for fraud, and had her criminally prosecuted, for doing exactly what WCU's representative, Johnson, instructed her to do. App. 11-13. MF relied heavily on *Spoja v. White*, 2014 MT 9, 373 Mont. 269, 317 P.3d 153, in its brief for summary judgment. App. 212-214.

In *Spoja,* Duste White believed that he was incarcerated for fourteen months longer than his actual sentence required and brought a civil action against his attorney, Robert Spoja. This suit was later dismissed. Spoja then sued White and his attorney's (collectively "defendants") for malicious prosecution. The Court determined that the facts known to the defendants "caused many reasonably prudent legal minds" to conclude that White had been wrongfully incarcerated when the defendants brought the civil action against Spoja. *Spoja*, ¶ 15. As a result, Spoja, in his malicious prosecution claim, presented no evidence that would cast probable cause into dispute. *Spoja*, ¶ 15. Here, the record reveals substantial information that casts doubt on probable cause, meriting resolution by the jury.

Further, after Johnson's deposition on July 30, 2012, MF moved the Court for leave to amend the underlying complaint on October 19, 2012. App. 150-165. MF continued to maintain an action for fraud against McAtee even after Johnson's testimony. MF continued its baseless fraud claim until March 27, 2013, where it clandestinely omitted its fraud claim from a proposed Pretrial Order and abandoned it altogether when confronted at the pretrial conference. App. 169-171. The District Court dismissed MF's fraud claim on January 29, 2014. App. 173-176.

The District Court, in granting MF summary judgment, focused solely on MF's abbreviated review of the loan file as the basis for probable cause to bring the underlying fraud claim. However, a reasonable person could conclude that MF failed to reasonably investigate the fraud claim before filing the underlying suit and further, MF then amended and continued the underlying fraud claim long after Johnson confirmed that McAtee never committed fraud. Genuine issues of material fact exist and the jury must hear the differing evaluations regarding the reasonableness of MF's investigation. The Honorable David Sandler was involved in the underlying litigation as Thor's attorney. The Honorable Jim Manley was involved as McAtee's attorney. Both attorneys wrote letters to MF regarding the reasonableness of MF's investigation before filing the underlying

fraud claim. App. 143-144, 148.

The District Court committed reversible error in determining that probable cause existed to bring the underlying fraud claim based solely on MF's abbreviated review of WCU's loan file. The District Court further erred when finding it was immaterial that MF learned at a later time that Johnson had authorized McAtee to foreclose the lien interest. Finally, the District Court completely overlooked whether MF had probable cause to amend and continue the fraud allegation after Johnson testified that McAtee did not commit fraud.

The determination of whether probable cause existed to file the underlying fraud claim and whether MF had probable cause to amend the complaint to maintain its allegation of fraud are questions of fact. Such questions of fact must be determined by the jury based on the totality of the circumstances including the reasonableness of the investigation before filing the suit. *Plouffe*, ¶ 18. The Court must reverse the District Court's determination that MF had probable cause to file the underlying fraud claim. The jury must be left to determine the reasonableness of MF's actions or inactions.

CONCLUSION

For the reasons set forth herein, McAtee respectfully requests that this Court reverse the District Court's decisions, and remand this matter back to the District

Court for a trial. Genuine issues of material fact exist in a manner necessitating resolution of McAtee's malicious prosecution claims by the trier of fact.

DATED this 19th day of February, 2021.

ODEGAARD KOVACICH SNIPES, P.C.
and
McKEON LAW, PLLP

By: */s/ Ben A. Snipes*
Ben A. Snipes
P.O. Box 2325
Great Falls, MT 59403
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count, calculated by WordPerfect X3, is not more than 10,000 words, excluding table of contents, table of authorities, certificate of service, certificate of compliance, and any appendix containing statutes, rules, regulations, and other pertinent matters.

DATED this 19th day of February, 2021.

ODEGAARD KOVACICH SNIPES, P.C.
and
McKEON LAW, PLLP

By: /s/ *Ben A. Snipes*
Ben A. Snipes
P.O. Box 2325
Great Falls, MT 59403
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Ben A. Snipes, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-19-2021:

Mark M. Kovacich (Attorney)
Odegaard Kovacich Snipes, PC
P.O. Box 2325
Great Falls MT 59403
Representing: Deanna McAtee
Service Method: eService

J. Fred Simpson (Attorney)
1821 South Avenue W
Suite 400
Missoula MT 59801
Representing: Morrison & Frampton, PLLP
Service Method: eService

Michael John McKeon (Attorney)
600 Dewey Blvd., Suite C
P.O. Box 3329
Butte MT 59702
Representing: Deanna McAtee
Service Method: E-mail Delivery

Electronically signed by Monique Wagner on behalf of Ben A. Snipes
Dated: 02-19-2021