NO. 20-1708

IN THE

United States Court of Appeals
For the Eighth Circuit

DANIEL A. **RASSIER**; RITA RASSIER,

Plaintiffs - Appellants

v.

JOHN **SANNER**; PAM JENSEN; STEARNS COUNTY, MINNESOTA,

Defendants – Appellees.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA – ST. PAUL

BRIEF OF APPELLEES

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SUMMARY OF THE CASE

Dan Rassier and his mother Rita waited nearly seven years before filing this lawsuit on March 29, 2017, alleging nine causes of action stemming from events that occurred in 2010. Following Appellees' early Motion to Dismiss, the district court dismissed three causes of action and allowed four to advance to the extent they were based upon former Stearns County Sheriff John Sanner's decision to label Dan Rassier a "person of interest" in the Jacob Wetterling investigation. The district court determined the remaining claims were untimely but found Appellants adequately pleaded that the statute of limitations was equitably tolled. At the close of discovery, which was delayed by Appellants' frequent yet unsuccessful attempts to conduct irrelevant discovery, Appellees moved for dismissal or summary judgment on the remaining claims. The district court concluded, now with the benefit of discovery, that equitable tolling did not apply and dismissed the remaining claims. The district court rejected Appellants' request for reconsideration and reaffirmed its judgment. Thereafter, Appellants filed this appeal. Oral argument should be heard to answer any questions the Court may have once this matter is fully briefed. Appellees request 15 minutes of oral argument.

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STATEMENT OF THE CASE

On October 22, 1989, Jacob Wetterling was abducted near the end of Robert and Rita Rassier's driveway in St. Joseph, Minnesota. Appellants' App. 96-97.[1] Robert and Rita's 34-year-old son, Dan Rassier ("Rassier"), was at their home alone that night and witnessed a car turning around in his driveway near the time of the abduction. *Id*. Rassier immediately spoke to investigators, but his property was not thoroughly searched. *Id*.; Appellants' App. 160 at 165:24-166:1. The decision not to search Rassier's property during the early phase of the investigation left lingering questions about his potential involvement in the crime. Appellants' App. 105-106, 111-114. But it would be many years before those questions could be definitively answered.

The day Wetterling went missing the FBI was called in to assist with the investigation. Appellants' App. 174-176. The FBI, as a national police investigative unit, handles investigations differently than local law enforcement. *Id*. Where local investigators start with a local focus and

[1] All references to Appellants' Appendix are to the page numbers provided therein; however, it should be noted pages 336-355 are missing, and the page following Appellants' Appendix 556 is missing.

gradually move out, the FBI casts a wide net before focusing inward. *Id*. In the first week of the investigation, a lead was run in California and by the second week leads were run in Iowa, Vermont, and North Dakota. *Id*. Then-Stearns County Sheriff Charlie Grafft essentially lost control of his own investigation in the first few weeks. *Id*.

The FBI's national focus as opposed to a local focus, led the investigation off the rails early on, and squandered the time and manpower available for solving the case. *Id*. The question of what happened to Jacob Wetterling would remain unanswered for over 26 years until September 6, 2016, when Danny Heinrich confessed to kidnapping, molesting, and murdering Jacob. Appellants' App. 178-180.

On November 5, 2002, the citizens of Stearns County elected John Sanner to serve as their Sheriff, and he assumed office in January 2003. Appellants' App. 121 at 11:5-11:7; 238. Solving the Wetterling crime was a high priority for Sanner because it was a matter of great importance to the community. Appellants' App. 129-130 at 44:24-45:7. While the case had been unsolved for over thirteen years, Sanner wanted to make sure no leads were forgotten and all reasonable theories were looked at and investigated thoroughly. *Id*. at 45:22-46:1. Although he oversaw the entire Stearns

County Sheriff's Department, Sanner did not oversee the day-to-day operations of the Wetterling investigation. Appellants' App. 122 at 13:24-14:3, 14:14-14:19. This task was delegated to his subordinates including Captain Pam Jensen. *Id*.

Jensen became a detective in the Stearns County Sheriff's Office in 2000 and was assigned to the Wetterling investigation by then-Stearns County Sheriff Jim Kostreba. Appellants' App. 242 at 10:6-10:7, 12:6-12:7. Jensen continued to work on the file as the lead County investigator even after she was promoted to Captain in 2004. Appellants' App. 242 at 9:15-9:16; 247 at 31:19-31:21; 249 at 38:7-38:14. Along with County detectives, Jensen worked hand in hand with other investigators, including BCA Agent Ken McDonald. *Id*.

On February 23, 2004, Rassier spoke at length with Fox 9 television reporter Trish Van Pilsum about his involvement in the Jacob Wetterling investigation, and an interview he recently participated in with Jensen and McDonald. Appellants' App. 189 at 18:9-19:21; 201 at 68:14-70:15; 204 at 78:17-79:11; 373-376. Rassier labeled himself a suspect in the investigation, which was especially curious given it was "pretty obvious" the subsequent news story was about him. *Id*. Rassier also criticized investigators' failure

to conduct a thorough search of his family's farm. *Id*. This criticism was nothing new, as Rassier had lodged the same complaints in his conversation with Jensen and McDonald a few weeks before. Appellants' App. 159 at 161:4-162:3; 163-164 at 180:11-181:3; 265 at 103:13-103:16. Sanner was aware of Rassier's criticism, and felt it was "absolutely accurate." *Id*. A thorough search of the Rassier farm was something that had not been done early on, and it was something investigators would have to remedy. Appellants' App. 160 at 165:24-166:1.

In the years following the events of 2004, investigators continued looking at all possibilities for what happened to Jacob but ran into roadblocks when they attempted to interview potential suspects and witnesses. Appellants' App. 245, 248-9, 263, 292-293, 320-321. In 2009, Jacob Wetterling's mother, Patty, approached investigators with a proposal. Appellants' App. 388 at 41:21-42:11. Patty wanted to set up an encounter with Rassier during which she would wear a wire and ask questions about what happened to Jacob. *Id*. Investigators cooperated with Patty and set the covert operation in motion. *Id*. While Sanner was aware this would be occurring, he was not involved in the operation's planning or execution.

Appellants' App. 158 at 159:5-159:10; 160 at 167:1-167:3; Appellees' App. 72 at ¶10.

On October 20, 2009, Patty was wearing a body recording device and being monitored by law enforcement and met with Dan Rassier as he was coming out of a health club in St. Cloud. Appellants' App. 413-437. Rassier expressed fear to Patty that Jacob's body was buried on his property because it would be very easy for someone to come on the property and bury a body without anyone noticing. *Id*. at 425. Rassier also questioned Patty about what details the boys with Jacob had provided to law enforcement about the abductor. *Id*. at 432-432. Investigators found these aspects of the covert conversation to be potentially relevant to the investigation. Appellants' App. 266 at 105:22-106:1; Appellees' App. 74-75 at ¶¶ 3-8. Rassier made other, irrelevant statements, including criticizing the current investigators. Appellees' App. 75 at ¶¶ 8-9. Rassier told Patty the investigators are "big bullies," "idiots," and liars who "completely screw[ed] up" the investigation. Appellants' App. 413-414, 420, 428. Rassier further stated he did not "have any confidence in the police solving the crime." Appellants' App. 428. Speaking about Sanner specifically, Rassier stated "Sheriff Sanner saying we are closer than ever to solving this case.

That should tell you almost right there, they are, t—they're just, they're lost." *Id*. at 422.

The conversation ended after Rassier's brother, Rick, approached the pair and notified them someone appeared to be eavesdropping on their conversation. *Id*. at 434-436.

Following the operation, Sanner did not listen to the covert audio, Appellees' App. 72 at ¶ 10, and he never viewed a copy of the transcript. Appellants' App. 158-160 at 160:18-161:5, 166:17-167:9. Instead, he relied on Jensen to report what action was taken and what was the result. *Id*. Jensen provided Sanner with a verbal report and gave him details about the matters relevant to the investigation, which did not include Rassier's irrelevant criticism. Appellees' App. 73-75 at ¶¶ 2, 8-9.

In the summer of 2010, investigators sought to rectify one of the previous investigators' mistakes by thoroughly searching the Rassier property and farmhouse. Appellants' App. 160 at 165:18-161:1. Between June 28 and July 1, 2010, BCA Agent McDonald applied for four warrants to search the Rassier property for evidence related to the Wetterling crime. Appellants' App. 438-544. Each application was approved, *id*., and on June

30, 2010, investigators from the FBI, BCA, and Stearns County began executing the warrants McDonald had obtained. Appellants' App. 545-557.

The Wetterling crime and investigation was a matter of great importance, not just to the Stearns County community, but the entire State of Minnesota. Appellants' App. 129-130 at 44:24-45:7; 140 at 88:5-88:7; 146 at 111:4-111:6; 159 at 163:25-165:8; 163 at 178:10-178:13. Anything involving the Wetterling investigation drew massive media attention, and the search of the Rassier property was no exception. *Id*. Several media outlets covered the search, *id*. 163 at 178:10-178:15, and Stearns County made every effort to keep the Rassier name out of the coverage. Appellees' App. 72 at ¶ 8. Many stories published in the early days of the search contained statements from then-Stearns County Sheriff Chief Deputy Bruce Bechtold, declining to provide details about the search, or implicate anyone in the investigative activity. Appellants' App. 545-557.

Not every media outlet, however, refrained from jumping to conclusions or indulging in speculation. A few articles suggested the search was related to Rassier, without directly stating as much. For example, a Fox 9 article published on June 30, 2010, read: "Patty Wetterling told FOX 9's Maury Glover the Rassiers are 'wonderful people.' She said Wednesday's

activities at the Rassier home may be related to a family member who was investigated early on, but said she thinks Robert and Rita were in Europe at the time of Jacob's disappearance." Appellants' App. 545-547. Dan Rassier was the only member of his family at home the night of the abduction, Appellants' App. 159 at 163:25-164:3, and he felt this article implicated him in the search. Appellants' App. 202 at 72:15-72:21. Although the article left the final inference to the reader, other stories provided all the information needed to conclude Rassier was a suspect. An MPR News article published the same day as the Fox 9 story, stated: "The Stearns County website lists the property's owners as Robert and Rita Rassier. . . . Another family member, Daniel Rassier, is listed at the same address." Appellants' App. 548-553. This article was not definitive in implying who the target of the search was, but other articles approached the topic with even less tact. Appellants' App. 203 at 75:1-75:8. A June 30, 2010, article from the Pioneer Press contained the following information:

> A man who lives at the farm where law enforcement with earth-moving equipment converged Wednesday gave a DNA sample to investigators several years ago as part of the Jacob Wetterling abduction case, according to the man's brother.

> Wednesday was the third time authorities searched the farm, said Daniel A. Rassier's brother, who wouldn't give his own name.
>
> . . .
>
> The property is owned by Robert and Rita Rassier. Rita Rassier hung up when contacted by the Pioneer Press on Wednesday afternoon. Robert Rassier is 85 and Rita Rassier is 81.
>
> Daniel A. Rassier, 54, is the couple's son and lives with his parents, who are retired farmers, said Anna Reischl, the St. Joseph Township clerk. Daniel Rassier, a band teacher, is the St. Joseph Township treasurer, she said.
>
> The man who identified himself as a brother of Daniel Rassier and lives nearby said Daniel Rassier "went through everything, from hypnosis to lie detector tests to DNA." He said Daniel Rassier had given a DNA sample about eight years ago.
>
> . . .
>
> A 2008 profile of Daniel Rassier in the St. Joseph Newsleaders newspaper, after he had run a marathon, said he'd lived in St. Joseph for all but two years in college. The article, which described him as "arguably one of the best trumpet players in central Minnesota," said he'd been a Cold Spring, Minn., elementary band instructor for 30 years.

Appellants' App. 554-557. After laying out all this information about Rassier, the article then quoted Jacob Wetterling's father, Jerry, as saying, "I really don't want to get into any particular suspects or people, because I really don't know what's going on over there." *Id*. at 556.

Rassier agreed this article portrayed him as a suspect in the Wetterling investigation. Appellants' App. 203 at 76:8-77:23. Unfortunately, the media accomplished this task despite the County's best efforts to stop that from happening. Appellees' App. 72 at ¶ 8.

Given the media portrayed him as a suspect, it is not surprising Rassier decided to share his side of the story, but the way he went about it was surprising. Appellants' App. 164 at 181:25-182:11. On July 2, 2010, Rassier spoke with St. Cloud Times reporter Kari Petrie and expressed his support for the search of his family's property and stated he would do what he could to help authorities. Appellants' App. 558-563. Rassier made a point to note how the media's portrayal of him as a suspect was affecting his personal life:

> Rassier said media attention has focused on him and put him in a negative light. He has received death threats and threatening e-mails, which he has reported to authorities, he said.
>
> . . .
>
> Rassier is concerned mainly with how the attention is affecting his family.
>
> "For over 20 years, we have experienced our own never-ending nightmare," he said.

Appellants' App. 560. Rassier also told Petrie investigators interviewed him "'numerous times'" about Jacob's disappearance, and he "submitted to a

lie-detector test, hypnosis and DNA sampling." *Id*. Notably, Rassier also gave Petrie permission to identify him by name, although he later claimed otherwise. Appellants' App. 208-209 at 94:9-94:19, 95:13-98:14; 566.

Following her conversation with Rassier, Petrie called Sanner and told him she had spoken to Rassier, and he had outlined "all of his involvement over a number of years with the investigation." Appellants' App. 163 at 177:18-179:23. Petrie asked Sanner to confirm what Rassier had told her, but Sanner declined to give her any specifics. *Id*. In follow-up questioning Petrie asked Sanner, "'[w]ith everything that Dan Rassier just told us, would you consider him a suspect?'" *Id*. Sanner thought for a second and told Petrie "'No. That's not what I would consider him.'" *Id*.

Internally, Rassier was in fact a suspect, even before Sanner assumed office. Appellants' App. 105-106, 111-114, 164 at 183:21-184:1; 255 at 61:14-61:19; 259-260 at 80:13-81:19; 293-294 at 32:17-32:19, 36:7-36:15; 296 at 44:11-44:12; 328 at 51:15-51:22; 385 at 32:10-32:11. Sanner did not want to mislead Petrie because law enforcement needs community support to be successful and building effective relationships with the news media is crucial to this goal and because effective media relations build positive community relations, which translates into public support for the agency. Appellees'

App. 71-72 at ¶¶ 7-8. But he also did not want to publicly use the word "suspect" to describe Rassier. *Id*.; Appellants' App. 145 at 105:16-105:22; 164 at 183:17-184:1.

Stearns County Sheriff's Department policy prohibited employees from providing any law enforcement information to the media without the permission of the Sheriff, and designated the Sheriff as the individual responsible for answering inquiries and disseminating information to the media, in part to ensure no information is released, which would jeopardize affected persons' safety. Appellees' App. 70-72 at ¶¶ 3-8; Appellants' App. 567-587. Sanner reasoned referring to Rassier as a suspect would indicate law enforcement suspected Rassier perpetrated the crime, because a suspect is thought to be guilty of a crime. Appellants' App. 164 at 183:17-184:1. This could potentially jeopardize Rassier's safety, *id*. 143 at 98:16-98:20, which Rassier confirmed was already happening based on the media's portrayal. Appellants' App. 558-563.

While Sanner declined to reveal that Rassier was a suspect, Petrie again followed up and asked Sanner, "'[t]hen what would you consider him?'" Appellants' App. 163 at 177:18-179:23. Sanner responded by telling Petrie that Rassier was a "person of interest." *Id*. Sanner felt the label

"person of interest" was a truthful characterization, which also minimized Rassier's involvement in the investigation as it was a step back from referring to Rassier as a suspect like the media was doing in the days before. *Id*.; Appellees' App. 72 at ¶ 9. Sanner reasoned, unlike the term "suspect," which carried an association of guilt, the term "person of interest" could be somebody investigators are looking at, but not necessarily as a perpetrator, because it could be as a witness. Appellants' App. 164 at 183:17-184:1.

Three days after the person of interest story appeared in the St. Cloud Times on July 3, 2010, Appellants' App. 558-563, Rassier met face to face with Sanner in his office. Appellants' App. 565. The two talked for more than an hour and "had a really good discussion." *Id*. They discussed the search, the media, and Rassier's recent family troubles. *Id*. Rassier also used the opportunity to let Sanner know about a theory he developed just five days before. *Id*.

On July 1, 2010, the second day of the search, Rassier approached Sanner while he was standing under a tree at the Rassier property. Appellants' App. 159 at 162:6-163:3; 193 at 33:10-34:8; 196 at 46:17-47:12. Rassier expressed his opinion the search was "really bad" and alleges that in response, Sanner said: "This is what happens when you talk." *Id*. Rassier

claims he asked Sanner what he meant, but Sanner "got a convenient phone call and walked away." *Id*. In the moment, Rassier "was certain" law enforcement was retaliating against him for the statements he had made to Patty Wetterling. *Id*. While this was "very crystal clear" to Rassier on July 1, 2010, he became "more certain" as time went on, and it "became even more clear" when Rassier ran this theory by Sanner on July 6, 2010. *Id*.

Sanner could not tell Rassier why the search happened, but "it seemed obvious to" Rassier it was all because of what he told Patty Wetterling in October 2009. Appellants' App. 565. Rassier left his meeting with Sanner thinking "Sanner was as nice as can be" and "seemed very objective!" *Id*. But the meeting also "resolved" Rassier's "thinking....[sic]yes it was because I told Patti[sic] the things I did and she went to the police." *Id*.

Following the meeting, Rassier had another interaction with reporter Kari Petrie. Rassier made a contemporaneous record of the interaction in his personal journal:

> The reporter from the Times...Kari Petrie twitters me and I blocked her immediately. She called later and pretended not to know I blocked her. I talked about the hallway work and so forth so she had to call on another line. She asked how they did and I

> said we can't do business anymore. I said I talked to Sanner and he said that [sic]must have somehow given her permission to use my name. I asked her about this and she said she asked right out if she may use my name . .[sic] and I said yes. I said I don't remember that…..[sic] She seemed to insist I did. I said like channel 9, it would be your word against mine. Then she said that it wasn't her that put the Rassier into the headline.

Appellants' App. 566.

Rassier expounded on the theory he presented to Sanner many times in the following years. On June 9, 2011, he called the Stearns County Attorney's Office and spoke with Matt Flynn. Appellants' App. 589. During this conversation Rassier made a point about how investigators were treating him the way they were out of "retaliation over what [he] told Patty Wetterling" and how he knew the conversation "was a complete set up." *Id*. Rassier also asked about suing investigators and what the statute of limitations was "for sueing[sic] the police on this," even though he knew Flynn "represents the police" and was not "going to comment." *Id*. Rassier explained later he did not believe he could initiate a lawsuit because he "had really nothing except what [he] thought. And what [he] thought meant nothing." Appellants' App. 208 at 95:20-95:24. According to Rassier,

the only action the County Attorney's office took in response to his complaints "was to report everything I said to the Stearns County Sheriff Department within the hour." Appellants' App. 594. Indeed, Jensen called Rassier the same day and he "brought up that whole thing last Summer was sort of retailiation[sic] against me and she denied that." Appellants' App. 591.

Rassier was so confident he had been retaliated against he outlined his claim in a letter he sent to various state officials and agencies. Appellants' App. 193 at 34:10-34:17. Rassier's letter claimed law enforcement "violated my family's civil rights as well as mine. . . . out of retaliation . . . for being critical of their dishonest actions and statements." Appellants' App. 594. Rassier asserted it was "100% clear that my family and I were being retaliated against for me being honest with Patty Wetterling and informing her how "STUPID" law enforcement has been." Appellants' App. 595. Not only did Rassier claim to know he was being retaliated against for what he told Patty, he claimed to know the meeting was recorded:

> Fast forward to the Fall of 2009 when Patty Wetterling and law enforcement set up a meeting with me. . . . **what does she do?** She participates in

> a set-up with law enforcement designed to obtain sound bits that can be spliced and diced to suit law enforcement wishes! The set-up was discovered because law enforcement was clumsy and just too predictable.

Appellants' App. 597.

Rassier did not pursue his complaints against Sanner, Jensen, or Stearns County in 2010, 2011, or 2014. Appellants' App. 193 at 33:8-34:10; 196 at 46:17-47:12. Rather he waited more than six years after it was "very crystal clear" he had suffered retaliation, of which he "was certain," before filing the current action on March 29, 2017. *Id*.

SUMMARY OF THE ARGUMENT

Appellees were entitled to judgment as a matter of law because Appellants' claims accrued outside the limitations period. The claims accrued when the retaliatory action and conduct complained of occurred, and the parties agree the retaliatory action occurred in July 2010. The district court did not improperly weigh the evidence, draw inferences, or make credibility determinations, because there were no material factual disputes for the district court to resolve. Rassier's retaliation claim accrued when the retaliatory action occurred and Rassier suffered an injury.

Appellants do not truly contend Rassier was unaware of his injury in 2010. Rather, their argument is focused on Rassier's impressions of the evidence. But to the extent Rassier's subjective beliefs are relevant, they are relevant only to determine when he should have become aware he suffered an injury. There is no dispute Rassier was aware he was injured in July 2010. Rassier's subjective impressions of the evidence do not determine the accrual date. Nor does the accrual date depend on when Rassier felt he could put forward a persuasive case. A plaintiff can file suit and obtain relief when a justiciable controversy exists. A justiciable controversy exists when a plaintiff has suffered a compensable injury. It is undisputed Rassier suffered his alleged injury in 2010. Appellants fail to demonstrate material factual disputes exist with regard to the accrual issue. Rassier could have filed suit and the district court could have granted relief in 2010. Therefore, the district court correctly concluded Appellants' claims accrued in 2010.

Additionally, Rassier failed to establish his untimely claims should be equitably tolled. It remains Appellants' burden to establish an entitlement to equitable tolling, and Rassier failed to establish he pursued his rights diligently, but extraordinary circumstances made it impossible to file a timely claim. Rassier did not display reasonable diligence by

attempting to obtain the warrant documents, because they were not vital to his claims, and Rassier needed to be reasonably diligent in pursuing his claims, not the evidence he hoped to use to prove them. Likewise, Rassier's ignorance of the warrant documents' contents does not present an extraordinary circumstance. Rassier knew a claim existed in his favor, and it is his own fault the limitations period expired because he waited to file until he gathered more evidence. Rassier's lack of evidence to prove his claims was not an extraordinary circumstance preventing timely filing. In fact, it is the same predicament most plaintiffs encounter when advancing a First Amendment retaliation claim. The district court's decision not to toll the statute of limitations was sound, and the court did not abuse its discretion. To the extent the district court resolved any factual disputes in regard to this issue, it was well within its authority to do so. Appellants cannot raise the fraudulent concealment argument for the first time on appeal, nevertheless Appellees did not conceal Rassier's cause of action.

Appellants fail to establish any basis to reverse the district court's decision, and therefore this Court should affirm the judgment below.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a "district court's grant of summary judgment *de novo*." *Wright v. United States*, 892 F.3d 963, 966 (8th Cir. 2018) (quotation omitted), *cert. denied*, 139 S. Ct. 1177, 203 L. Ed. 2d 200 (2019). It "will affirm the district court if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id*.

To withstand the motion for summary judgment, the non-moving party "must substantiate his allegations with sufficient probative evidence that would permit a finding in his favor, without resort to "speculation, conjecture, or fantasy." *Reed v. City of St. Charles, Missouri*, 561 F.3d 788, 790-791 (8th Cir. 2009) (quotations omitted). Although the Court must view "the facts in the light most favorable to the non-moving party, it is not required to accept unreasonable inferences or sheer speculation as fact." *Id.* at 791 (quotation omitted). The nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." *Krenik v. County of LeSueur*, 47 F.3d 953, 957 (8th Cir. 1995).

A "fact is material if its resolution affects the outcome of the case." *Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149, 1157 (8th Cir. 2016). The "substantive law will identify which facts are material" and only factual disputes affecting the outcome "under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

"This court may affirm summary judgment on any grounds supported by the record." *Food Mkt. Merch., Inc. v. Scottsdale Indem. Co.*, 857 F.3d 783, 786 (8th Cir. 2017) (quotation omitted).

II. THE DISTRICT COURT CORRECTLY DETERMINED THE CLAIMS ACCRUED IN JULY 2010.

Appellees were entitled to judgment as a matter of law because Appellants' claims accrued outside the limitations period. Appellants claim otherwise, arguing the district court decided the accrual issue by improperly weighing evidence, drawing inferences, and making credibility determinations. But the facts material to the accrual issue remain undisputed.

Where an issue's outcome is dependent on undisputed facts, a material factual dispute cannot exist. As noted above, only facts capable of affecting an issue's outcome, as determined by the governing law, are material. *Anderson v. Liberty Lobby*, 477 U.S. at 248. Thus, when an issue depends upon an undisputed fact, logically there can be no material factual disputes. This standard "provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.* at 247–48. Resolving the accrual issue depends on undisputed facts.

A. The District Court Did Not Need to Resolve Any Factual Disputes to Decide When the Retaliation Claim Accrued.

There is no dispute when the retaliatory action occurred in this case. It is undisputed Sanner labeled Rassier a person of interest in July 2010.[2]

[2] Appellant asserts this occurred on July 3, 2010. Appellants' Br. at 11. The article published in the St. Cloud Times on Saturday, July 3, 2010, however, makes clear Rassier spoke to Kari Petrie on "Friday," July 2, 2010, and Sanner made the person of interest statement "on the same day." Appellants' Appendix at 559. Whether the retaliatory action occurred on July 2nd or July 3rd is immaterial because the initial Complaint was not filed until March 29, 2017, more than six years after both dates. Appellants' App. at 4.

Appellants' Brief, at 11, July 2, 2020. When this event occurred is the only fact material to determining when Rassier's claims accrued.

Resolution of the accrual issue is dependent on when the retaliatory action occurred. "[T]he time at which a § 1983 claim accrues is a question of federal law, conforming in general to common-law tort principles." *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019). "An accrual analysis begins with identifying the specific constitutional right alleged to have been infringed." *Id.* (quotation omitted). Here Rassier claims Appellees infringed upon his First Amendment rights to free speech by retaliating against him for criticizing the Wetterling investigation. *See* Appellants' App. 22 at ¶ 21; 38 at ¶ 180; 47-48 at ¶¶ 226-228; 61 at ¶¶ 340-341; *see also*, Appellees' App. 12-19, ns.10 and 11. Once the specific constitutional right is identified, courts decide "accrual questions by referring to the common-law principles governing analogous torts."[3] *McDonough*, 139 S. Ct. at 2156. Here there is

[3] These principles, however, "are meant to guide rather than to control the definition of § 1983 claims, such that the common law serves more as a source of inspired examples than of prefabricated components." *McDonough*, 139 S. Ct. at 2156 (quotation omitted).

no analogous common law tort,[4] but the Court need not conduct this analysis to determine when a retaliation action accrues. "[T]he cause of action accrues—in retaliation actions, when the retaliatory action occurs." *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 419 (2005); *accord*. *Charleston v. McCarthy*, 926 F.3d 982, 989–90 (8th Cir. 2019) (holding First Amendment retaliation and discrimination claims

[4] When § 1983 was enacted in 1871, there was no common law tort for retaliation based on protected speech. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019). The difficulty in identifying a comparable common law claim lies in the fact that a plaintiff not only needs to show a defendant acted intentionally, but must also show the defendant was specifically motivated by "retaliatory animus." *See Nieves*, 139 S. Ct. at 1722. Nevertheless, the Supreme Court has found comparable common law claims when the claimed retaliation is a criminal charge or a retaliatory arrest. *See id*.; *and*, *Hartman v. Moore*, 547 U.S. 250, 258 (2006). In each of these scenarios, however, the retaliation claim and the common law analog both involved the initiation of legal process, and the "retaliatory animus" could be inferred from the absence of probable cause to support the legal process. *Id*. Here, however, Rassier was neither prosecuted nor arrested, and probable cause was not required to label him a "person of interest." Under these circumstances, the retaliatory action makes Rassier's claim more analogous to a dignitary tort like defamation or publication of private facts. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233 (Minn. 1998). These torts, however, only require a showing of intent or motivation in certain circumstances. *Stepnes v. Ritschel*, 663 F.3d 952, 963–64 (8th Cir. 2011). Nevertheless, these torts accrue at the time of publication and not when the statement is discovered. *Wild v. Rarig*, 302 Minn. 419, 449 & n. 21, 234 N.W.2d 775, 794 & n. 21 (1975) (per curiam), *appeal dismissed*, 424 U.S. 902 (1976); *see also* Restatement (Second) of Torts § 652D, comment a. (1977).

accrued when adverse action occurred, and because suspension occurred outside the limitations period, claim was untimely). Thus, the only material fact is when the retaliatory action occurred.

Resolving the accrual issue depends on undisputed facts. When the retaliatory action occurred is the only fact material to the accrual issue, and the parties do not dispute the retaliatory action occurred in July 2010. Appellants' Br. at 11. As such, the accrual issue did not depend on resolving any material factual disputes.

The district court correctly concluded Appellant's claims accrued in 2010. The district court noted "Rassier's retaliation claim accrued in 2010 when Sanner named Rassier a person of interest." Appellants' App. at 689 (citing *Gekas v. Vasiliades*, 814 F.3d 890, 894 (7th Cir. 2016) ("Generally, the statute of limitations clock begins to run on First Amendment retaliation claims immediately after the retaliatory act occurred.")). It is undisputed Sanner labeled Rassier a person of interest in 2010 and the district court did not need to resolve any material factual disputes before rightfully concluding "Rassier's claims, which all relate to him being named a person of interest, accrued when Rassier was so named in 2010." Appellants' App.

at 689. The district court did not err in concluding Appellants' claims accrued in July 2010, and this Court should affirm the decision below.

B. Appellants Fail to Demonstrate Material Factual Disputes Exist on the Accrual Issue.

Rassier's retaliation claim accrued when the retaliatory action occurred and Rassier suffered an injury. While the foregoing establishes the district court correctly resolved the accrual question, Appellants claim the district court improperly weighed evidence to reach this conclusion. Appellants' Br. at 21-24. Appellants assert, Rassier's "knowledge or discovery of a complete or present cause of action, or the right to sue and obtain relief is pivotal on the determination of accrual and on the limitations period." *Id*. at 24. Appellants, however, do not contend Rassier was unaware he had a complete and present cause of action in 2010.

Traditionally, in federal-question cases, this Court has "applied the discovery rule as the default statute-of-limitations rule in the absence of a contrary directive from Congress." *McDonough v. Anoka Cty.*, 799 F.3d 931, 940 (8th Cir. 2015). According to this rule, "a plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, ***the injury that is the basis of the litigation***." *Union Pac. R. Co. v. Beckham*,

138 F.3d 325, 330 (8th Cir. 1998)(emphasis added). While recent Supreme Court decisions cast some doubt as to the default application of this rule, *see McDonough v. Anoka Cty.*, 799 F.3d at 940–42, applying it in this case does not change the outcome.

Rassier was aware he was injured in July 2010. Rassier knew Sanner labeled him a person of interest in July 2010, see Appellants' App. 216 at 126:13-15; and 566, and Appellants did not dispute this fact in the court below. *See generally* Appellees' App. 76-105. Indeed, Appellants do not dispute this fact now.

Appellants do not truly contend Rassier was unaware of his injury in 2010. Rather, they contend Rassier doubted Sanner's motivation for labeling him a person of interest. See Appellants' Br. at 24 (stating there "are material questions of facts as to *when Rassier knew he was being retaliated against in violation of his First Amendment Rights*.") (emphasis added). When Rassier's claims accrued, however, depends on when he suffered an injury, not when he believed this injury resulted from retaliation. Yet, even if Rassier's subjective beliefs about why Sanner labeled him a person of interest were relevant, Appellants have not shown Rassier's beliefs on this issue changed.

Appellants' argument is focused on Rassier's impressions of the evidence, not the knowledge of his injury or Sanner's motivation. Appellants note Rassier "[n]ever knew for sure" why he was labeled a person of interest, but when he saw the affidavits of probable cause and associated warrants, he realized the investigators "had nothing" to support their suspicions. Appellants' Br. at 23. Even so, Appellants acknowledge the information in the affidavits and warrants did not change Rassier's belief about Sanner's motivation. *See* Appellants' Br. at 24 ("I thought I knew it could have. Was I sure? Could I go out and sue somebody? No. I had really nothing except what I thought. And what I thought was nothing."). Nor did it change the fact Rassier already knew he was injured. Even after filing this suit and seeing the warrant documents, Rassier admits he still does not know "for sure" what Sanner's motivation was. *See* Appellants' Br. at 24 ("Never – I never know – I didn't know – ever to this day."). While the warrant documents did not change Rassier's knowledge of his injury it was "the first time that [Rassier] had proof" he could "use to prove [his] case." *Id*.

To the extent Rassier's subjective beliefs are relevant, they are relevant only to determine when he should have become aware he suffered

an injury. Appellants focus on when Rassier obtained evidence purportedly revealing Sanner's motivation in an effort to shift focus away from the undisputed fact Rassier knew Sanner labeled him a person of interest in July 2010.[5] But when Rassier discovered this evidence is irrelevant under the discovery rule because his claim accrued when he "should have discovered, the injury that is the basis of the litigation." *Union Pac. R. Co.*, 138 F.3d at 330. Whether Rassier had evidence to prove Sanner's motivation in 2010 does not change the date he became aware of his injury. Indeed, in a similar context, this Court held a cause of action accrues when the adverse action is taken, and the limitations periods begin to run even if the plaintiff is not aware of the motivation for taking the adverse action. *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1032 (8th Cir. 2005). Proof of a wrongful motive "may be elusive or nonexistent," *Kilpatrick v. King*, 499 F.3d 759, 769 (8th Cir. 2007), but a party seeking relief cannot delay accrual until he

[5] In addition to the warrant documents, Appellants claim "Don Gudmundson's press conference finally made it clear" Rassier was the target of retaliation. Appellants' Br. at 23. It would be strange to conclude, as Appellants apparently do, that Rassier was unaware of his injury until this press conference, because the press conference occurred on September 20, 2018, Appellants' App. at 173, more than a year and a half **after** Appellants finally brought their untimely claims. Appellants' App. at 4.

believes the time is right. *See Wallace v. Kato*, 549 U.S. 384, 391 (2007) ("[T]he tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known or predictable. Were it otherwise, the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the sole hands of the party seeking relief.") (quotations omitted).

Rassier's subjective impressions of the evidence do not determine the accrual date. In the same vein as their previous argument, Appellants contend Rassier's retaliation claim could not have accrued "until the evidence of Heinrich became public." Appellants' Br. at 25. Unlike the previous argument, Appellants do not contend Rassier's knowledge of this evidence is relevant. Instead they argue it was not possible to obtain relief until this evidence became public. *Id*. Appellants' argument depends upon a misinterpretation of the governing law.

Determining when Rassier's causes of action accrued does not depend on when he could file suit and obtain relief, at least not as Appellants use those terms. "[I]t is 'the standard rule that [accrual occurs]

when the plaintiff has a complete and present cause of action,' that is, when 'the plaintiff can file suit and obtain relief.'" *Wallace*, 549 U.S. at 388 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of California*, 522 U.S. 192, 201 (1997)). Appellants believe the accrual rule stated in *Wallace v. Kato* relates to a plaintiff's ability to successfully prove their claims, rather than the plaintiff's ability to maintain them. They focus on the words "obtain relief" to argue:

> Rassier did not and could not have obtained relief on his claims until 2016 when substantive evidence of Heinrich became public or when Heinrich confessed and detailed his crimes. Without that information for Rassier to obtain relief against Sanner and SCSO, he would have had to have proven his innocence, or provide substantive evidence of another perpetrator.

Appellants' Br. at 25. Appellants focus on the words "obtain relief" is misguided. "[G]eneral language in judicial opinions" refers "in context to circumstances similar to the circumstances then before the Court" but does not refer "to quite different circumstances that the Court was not then considering." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004). When a plaintiff can file suit and obtain relief has nothing to do with their ability to put forth a persuasive case.

A plaintiff can file suit and obtain relief when a justiciable controversy exists. Before appearing in *Wallace v. Kato*, the Supreme Court outlined the standard accrual rule in its decision in *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of California*, 522 U.S. 192. There, the Court overturned the Ninth Circuit Court of Appeals' holding that the limitations period for an action under the Multiemployer Pension Plan Amendments Act of 1980, begins to run from the date of complete withdrawal. *Id.* at 199–200. The Court noted the Ninth Circuit focused on the wrong event: "The date of withdrawal cannot start the statute of limitations clock, because the MPPAA affords a plan no basis to obtain relief against an employer on that date." *Id.* at 201–02. Under the MPPAA, Congress imposed a mandatory payment scheme, which a party was required to go through before a justiciable cause of action arose. *Id*. Withdrawal set in motion this routine process, but it did not create a cause of action to "sue to undo the withdrawal, for an employer does not violate the MPPAA simply by exiting the plan." *Id*. Thus, the Court held,"[a]ny pension plan suit to collect the employer's withdrawal liability, commenced on the date of withdrawal, would be ***premature***" because a "plan's interest in receiving withdrawal liability ***does not ripen*** into a cause of action

triggering the limitations period until" the statutorily required prerequisites transpire. *Id*. (emphasis added).

A justiciable controversy exists when a plaintiff has suffered a compensable injury. The Supreme Court's decision in *Bay Area Laundry*, focused on justiciability. The Court acknowledged this focus when it reiterated the rule in *Wallace v. Kato,* 549 U.S. at 391 ("Under the traditional rule of accrual the tort cause of action accrues, and the statute of limitations commences to run, when the wrongful act or omission results in damages."). Thus, a plaintiff has a complete and present cause of action when the plaintiff has suffered an injury-in-fact and the injury presents a justiciable controversary, which is neither premature nor moot, such that the court has the ability to grant relief.

Rassier could have filed suit and the district court could have granted relief in 2010. A cause of action accrues when a plaintiff suffers a redressable injury, not when a plaintiff decides he has amassed enough evidence to successfully maintain a claim. While Appellants contend that "to obtain relief against Sanner and SCSO, [Rassier] would have had to have proven his innocence, or provide substantive evidence of another perpetrator," Rassier's burden to prove his claims did not prevent him from

filing them. Appellants' Br. at 25. Nor did it affect the district court's ability to grant relief. Any injury Rassier suffered was accomplished and existed in July 2010 when Sanner labeled him a person of interest. Thereafter Rassier had a complete and present cause of action, and his decision to wait to file suit until the limitations period had run bars his claims. The district court did not err when it decided this issue upon the undisputed material facts. Therefore, this Court should affirm the district court's decision.

C. The District Court Correctly Concluded Appellants' State Law Claims Accrued in 2010.

It is unclear whether Appellants are appealing the district court's decision their Minnesota state law claims accrued in July 2010, or whether they are only appealing the decision as it relates to the retaliation claim. While Appellants assert "Rassier's §1983, IIED and defamation claims did not accrue until September 6, 2016," Appellants' Br. at 25, each of their arguments are limited to the retaliation claim.[6] Nonetheless, had

[6] *See* Appellants' Br. at 23 (arguing "the district court repeatedly relied upon Rassier's testimony that it was clear to him on July 1, 2010 that Sanner and SCSO were ***retaliating*** against him[.] . . . The district court ignored Rassier's testimony that all of this ***retaliation*** was 'cumulative[.]' . . . It ignored the testimony that the ***retaliation*** continued[.]")(emphasis added); *and*, 24 (arguing "the district court discounted and gave less weight to Rassier's testimony as to ***when he became a target of retaliation***[.] . . . As is evident

Appellants advanced any arguments with regard to the accrual date of their state law claims, such arguments would be similarly unavailing. Rassier's defamation claim accrued on the date of publication in 2010, *Wild v. Rarig*, 302 Minn. 419, 448–49, 234 N.W.2d 775, 794 (1975) (citations omitted), and Rassier's IIED claim accrued on the date of the allegedly tortious act in 2010, *see Krause v. Farber*, 379 N.W.2d 93, 97 (Minn. Ct. App. 1985). Thus, Appellants' state law claims are similarly untimely.

III. THE DISTRICT COURT DID NOT ERR BY DECLINING TO TOLL THE STATUTE OF LIMITATIONS ON APPELLANTS' UNTIMELY CLAIMS.

Rassier failed to establish his untimely claims should be equitably tolled. Minnesota law supplies the rules for tolling limitations periods for each of Rassier's claims. *See Wallace*, 549 U.S. at 394. Equitable determinations, such as the decision to equitably toll the statute of limitations, are reviewed for an abuse of discretion. *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 23 (Minn. 2011); *Gen. Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 316 (8th Cir. 2009). Under an abuse of discretion standard, this

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from the above, the [sic] are material questions of facts as to *when Rassier knew he was being* ***retaliated*** *against in violation of his First Amendment Rights.*")(emphasis added).

Court will not substitute its own weighing of the evidence for that of the district court, but will uphold the decision if the Court could have reached a similar decision. *See Equal Employment Opportunity Comm'n v. CRST Van Expedited, Inc.*, 944 F.3d 750, 755 (8th Cir. 2019) ("This court will not disturb a district court's discretionary decision if it remains within the range of choices available, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a clear error of judgment.") (quotation omitted). "An abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Id*. (quotation omitted).

Appellants retain the burden of establishing an entitlement to equitable tolling. *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45, 51 (Minn. 1982). A party may be entitled to equitable tolling "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Fla.*, 560 U.S. 631, 649 (2010) (quotation omitted); *see also Sanchez v. State*, 816 N.W.2d 550, 561 (Minn. 2012). This doctrine focuses on an individual's "ignorance of a ***claim*** . . . and tolls the limitations period when the plaintiff, despite all due diligence, is unable to obtain **vital information bearing on**

the existence of *his claim*." *Henderson*, 403 F.3d at 1033 (emphasis added, quotation omitted). "Equitable tolling is proper only when extraordinary circumstances . . . beyond a [plaintiff's] control make it impossible to file . . . on time." *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000). The district court correctly rejected Appellants' tolling argument.

Rassier failed to establish he pursued his rights diligently, but extraordinary circumstances made it impossible to file a timely claim. For both prongs Appellants focus on the search warrants, Rassier's attempts to access the search warrants, and the information contained within the corresponding affidavits of probable cause. Appellants' Br. at 28-29. Again, they argue the district court improperly weighed the evidence when it declined to toll the statute of limitations. *Id*. at 26. This argument fails for many reasons.

The district court did not improperly weigh the evidence in declining to toll the statute of limitations. "[T]he court rather than the jury is to resolve the factual questions surrounding a plaintiff's mental state as relevant to the equitable tolling of a statute of limitations." *Montin v. Estate of Johnson*, 636 F.3d 409, 415 (8th Cir. 2011). This is "a natural consequence of the fact that tolling, as an equitable consideration, is a court-issued

remedy." *Id*. To the extent the district court resolved any material factual disputes relating to the issue of equitable tolling, the district court was within its authority to do so. Nevertheless, the district court did not need to resolve any material factual disputes because Appellants failed to demonstrate Rassier was diligently trying to pursue relief on his claim during the limitations period, but extraordinary circumstances prevented him from doing so.

A party cannot "benefit from equitable tolling" when "he was not reasonably diligent in pursuing ***his claims***." *Chachanko v. United States*, 935 F.3d 627, 630 (8th Cir. 2019) (emphasis added). Appellants contend, by attempting to access the search warrant documents,[7] Rassier displayed

[7] Appellants also contend Rassier diligently pursued his rights by asking an assistant county attorney for legal advice about suing the County. Appellants' Br. at 28-29. No reasonable person would expect to get legal advice from an attorney who represents the party threatened to be sued. Not even Rassier himself expected a different outcome. Appellants' App. at 589 ("I asked about sueing [sic] the police and I needed the box for that.... he didn't know what to say .... but he represents the police .... and isn't going to comment."). Additionally, Appellants claim Rassier asked "for the return of evidence that would assist him." Appellants' Br. at 29. But, Appellants have provided no reason to believe "a family heirloom chest" and multiple "truckloads of top soil" would have revealed to Rassier that he had claims against the Appellees. Appellants' App. 50-51 at ¶¶ 254-256.

reasonable diligence in pursuing his claims. Appellants' Br. 28-29. But, the district court reasoned "[t]he central issue here is whether Rassier was labeled a person of interest in retaliation for making comments critical of the investigation," and found "[t]his issue did not hinge on the information in the search warrants or the identity of the true perpetrator." Appellants' App. at 692.

Rassier was not reasonably diligent in pursuing his claims. Rassier provides no reason to believe the district court reached an erroneous conclusion, because there is no basis to suggest the search warrant documents contained "vital information bearing on the existence of his claim." *Henderson*, 403 F.3d at 1033. In fact, when he was asked directly about the documents' significance, Rassier could not identify any vital information bearing on the existence of his claim contained in the documents. Appellants' App. 212-213 at 112:18-114:22. Rather, he explained these documents made him "realize these are the worst people in the world to trust. They're just – and I'm not exaggerating. They're blankety blank, blank, blank liars." *Id*. But Rassier already believed he could not trust the investigators at the time he inquired about the search warrant documents. Appellants' App. at 589 (stating his belief the handling of the warrant

documents was all part of the "trickery and lies on [sic] part of the police."). He also "made a point about it is about the police doing this as a retalition [sic] over what I told Patty Wetterling...and I know in hindsight that was a complete set up." *Id*. In other words, Rassier himself confirmed nothing in the warrant documents was vital to learning he had claims against Appellees. Rassier was not reasonably diligent in pursuing his claims, and even if he had been, nothing prevented him from timely filing.

Equitable tolling is not appropriate unless "extraordinary circumstances" beyond a party's control "make it impossible to file . . . on time." *Kreutzer*, 231 F.3d at 463. The extraordinary circumstances, which allegedly made it impossible for Rassier to timely file his claim, were not a "paramount authority," but Rassier himself and his own doubts about the viability of his claims. *Sanchez*, 816 N.W.2d at 562. Appellants claim Rassier "never knew for sure" that he had been labeled a person of interest in retaliation for his speech. But when he "saw the search warrant in 2016 . . . it became clear in [his] mind right there that [he] was never a suspect" and "this [was] the first time that [he] had proof that [he] could use to prove [his] case." Appellants' Br. at 29. Rassier's subjective belief that the warrant documents were important is irrelevant, because equitable tolling is

assessed under an "objective knew or should have known standard." *Sanchez*, 816 N.W.2d at 558 (quotation omitted). But even if his subjective beliefs mattered, Rassier "was certain" law enforcement was retaliating against him in July 2010 for the statements he had made to Patty Wetterling. Appellants' App. 193 at 33:10-34:8; 196 at 46:17-47:12. While this was "very crystal clear" to Rassier on July 1, 2010, he became "more certain" as time went on, and it "became even more clear" when Rassier ran this theory by Sanner on July 6, 2010. *Id*.

Extraordinary circumstances did not prevent Rassier from timely filing his claims. While Rassier was "certain" he was being retaliated against in 2010, *id*., "[c]ertainty is not the standard." *Henderson,* 403 F.3d at 1033. "If a plaintiff were entitled to have all the time [he] needed to be certain [his] rights had been violated, the statute of limitations would never run—for even after judgment, there is no certainty." *Id*. (quotation omitted). Whether Rassier was certain or not, he had knowledge of facts sufficient to apprise him of the purported retaliation, and a reasonable person in Rassier's position would have been aware a claim existed. *See id.* at 1033. Rassier's doubts about the viability of his claims did not prevent him from timely filing this action, and they do not constitute extraordinary

circumstances. Nor does the fact that he did not know the details of the evidence by which he would attempt to establish his claims.

Rassier's lack of evidence to prove his claims does not result in an extraordinary circumstance preventing timely filing. Under Minnesota law, it does not matter that a party did not "'know the details of the evidence by which to establish his cause of action.'" *Wild*, 302 Minn. at 451, 234 N.W.2d at 795 (quoting 54 C.J.S. Limitations of Actions §206e). "[I]t is enough that he knows that a cause of action exists in his favor, and when he has this knowledge it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim." *Id*.

While Rassier did not believe he had evidence to prove his claim until 2016, there is nothing "extraordinary" about this situation. Rassier faced the same predicament most plaintiffs encounter when advancing a First Amendment retaliation claim. *See Kilpatrick*, 499 F.3d at 769 ("We are not unsympathetic to the plight of plaintiffs who bring retaliation claims that require proof of a wrongful motive, the evidence of which may be elusive or nonexistent."). Nevertheless, Rassier was not prevented from timely filing his claims. He chose not to bring his claims sooner because he did not have supporting evidence. Nevertheless, it is Rassier's burden to prove

more than mere evidence was concealed from him. *Wild*, 234 N.W.2d at 795; *see also*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (observing equitable relief is sparingly extended in situations "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."). Rassier failed to meet his burden, and the district court wisely declined to toll the statute of limitations. The district court's conclusion was not clearly erroneous, and this Court should affirm the dismissal.

IV. APPELLANTS CANNOT RAISE ARGUMENTS FOR THE FIRST TIME ON APPEAL.

This Court has often explained it will not consider arguments raised for the first time on appeal. *Glover v. McDonnell Douglas Corp.*, 150 F.3d 908, 909 (8th Cir. 1998). Before the district court, Appellees argued "'Minnesota law recognizes only one general equitable tolling exception,' which arises when 'the defendant engaged in fraudulent concealment.'" Appellees' App. 42 (quoting *Lamere v. St. Jude Med., Inc.*, 827 N.W.2d 782, 788 (Minn. Ct. App. 2013)). Appellants, however, argued the test articulated in *Holland v. Florida* applied to the equitable tolling determination. Appellees' App. 95-97. The district court did not fully develop a record on the issue of

fraudulent concealment, because it determined "Rassier is unable to demonstrate that tolling applies even under the less demanding *Holland* test." Appellants' App. at 690 n.10. Appellants now argue for the first time[8] that fraudulent concealment should be considered on appeal as basis for reversal. Appellants' Br. at 28-30. Even if the Court were inclined to abandon the general rule that it will "not ordinarily consider arguments raised for the first time on appeal," *Smoky Hills Wind Project II, LLC v. City of Indep., Missouri*, 889 F.3d 461, 471 (8th Cir. 2018), Appellants have not demonstrated fraudulent concealment.

"[T]he statute of limitations on a cause of action is tolled when, but for the fraudulent concealment of the cause of action by the defendant, the

[8] Appellants also appear to suggest the "continuing violations" doctrine serves as basis for reversal. Appellants' Br. at 26; *Zotos v. Lindbergh Sch. Dist.*, 121 F.3d 356, 362 (8th Cir. 1997). But Appellants never raised this argument before the district court, *see generally* Appellees' App. 76-105, nor do they sufficiently raise this argument before this Court. *See generally* Appellants' Br. at 26. Nonetheless, had Appellants raised this argument it would fail because Rassier's claims are all based on the allegation John Sanner "falsely accus[ed] him of being a 'person of interest'" in retaliation for criticism Rassier had verbalized to Patty Wetterling. Appellees' App. 12-19, ns.10 and 11; Appellants' App. 22 at ¶ 21; 38 at ¶ 180; 47-48 at ¶¶ 226-228; 61 at ¶¶ 340-341; 193 at 34:24-35:9, 36:6-36:13; 196 at 46:17-47:17. This court has never applied the continuing violations doctrine to a discrete act, such as Sanner's decision to label Rassier a person of interest. *Stolzenburg v. Ford Motor Co.*, 143 F.3d 402, 405 (8th Cir. 1998).

diligent plaintiff would have known that she had a cause of action." *Sanchez*, 816 N.W.2d at 561. In those cases in which Minnesota courts have applied tolling due to fraud, they "have been clear that the plaintiff's lack of knowledge of the cause of action is irrelevant unless the defendant has actively concealed its existence." *Id*.

Appellees did not conceal Rassier's cause of action. As noted, Rassier knew Sanner labeled him a person of interest in July 2010 even though Rassier did not know about the evidence through which he would attempt to prove his claims. To support this new argument, Appellants claim Pam Jensen concealed Rassier's cause of action when Rassier talked to Jensen on the phone and "brought up that whole thing last Summer was sort of retailiation[sic] against me and she denied that." Appellants' Br. at 29 (citing Appellants' App. 591); Appellants' App. 591. To establish fraudulent concealment, Appellants must establish Jensen's response was false, i.e. they must establish Rassier was being retaliated against. *Haberle v. Buchwald*, 480 N.W.2d 351, 357 (Minn. Ct. App. 1992). For the reasons outlined in Appellees' Memorandum of Law in support of their dispositive motions, Appellants cannot establish this statement was false. See Appellees' App. 45-56. Appellants also claim Rassier's cause of action was

concealed when he did not receive a response to requests for clarification and legal advice. Appellants' Br. 29-30. But for "fraudulent concealment to toll a limitations period, there must be something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action. Silence does not suffice unless accompanied by a duty to speak." *DeCoursey v. Am. Gen. Life Ins. Co.*, 822 F.3d 469, 475 (8th Cir. 2016)(quotation omitted); *accord*. *Minnesota Laborers Health & Welfare Fund v. Granite Re, Inc.*, 844 N.W.2d 509, 514 (Minn. 2014). John Sanner had no duty to ignore the call he was receiving when Rassier asked his question, Appellants' Br. at 12, and an Assistant County Attorney has no duty to provide legal advice to a member of the public threatening to sue the County. Appellants' App. at 589.

Appellants fail to establish any basis to reverse the district court's decision. Appellants cannot raise new arguments for the first time on appeal, but even if they could, Appellees did not conceal Rassier's cause of action.

CONCLUSION

This Court should affirm the judgment of the court below. The district court correctly determined Appellants' claims accrued in July 2010, and

because Appellants did not file suit until March 2017, Appellants' claims are untimely. No material factual disputes exist to prevent judgment in Appellees' favor. From the beginning, Rassier based his claims on John Sanner labeling him a person of interest in alleged retaliation for criticism he verbalized to Patty Wetterling. The parties agree the alleged retaliatory action occurred in July 2010 and there is no dispute Rassier knew about the complained of conduct in July 2010. Appellants focus on the evidence they sought to use to prove their claims to distract from the reality there are no material facts in dispute. Appellants' subjective impressions of the evidence do not determine the accrual date. Nor does the accrual date depend on when they felt they had enough evidence to succeed at trial. Appellants argue they could not obtain relief on any claims until the Wetterling case was solved but provide no reason why. Even if there was a reason—which there is not—it would not matter because Appellants' argument is based on a misinterpretation of the governing law. A plaintiff can file suit and obtain relief when a justiciable controversy exists. A justiciable controversy exists when a plaintiff has suffered a compensable injury. It is undisputed Rassier suffered his alleged injury in 2010.

Therefore, the district court correctly concluded Appellants' claims accrued in 2010, and therefore they were untimely.

The district court did not err by declining to toll the statute of limitations on these untimely claims. It was, and is still, Appellants' burden to prove an entitlement to equitable tolling. Appellants did not establish Rassier pursued his rights diligently, but extraordinary circumstances made it impossible to file a timely claim. The district court concluded as much and Appellants supply no reason to second-guess the district court's conclusion. Appellants' attempts to obtain evidence for use in this case, and their ignorance of the evidence do not show reasonable diligence or extraordinary circumstances because the evidence was not vital to discovering the existence of the claims. Even if it was, there is no dispute Appellants had knowledge of facts sufficient to apprise them of the claims. Appellants did not need to know what evidence they would use to try to put forward a persuasive case; it is enough that a reasonable person would have been aware a claim existed. Even so, the record is replete with evidence Rassier did in fact know a claim existed and it is his own fault he did not timely prosecute or preserve his claims. Any findings the district court reached were within its discretion, as equitable tolling is a judicial

remedy and the district court was in the best position to determine whether Appellants were entitled to relief. Appellants do not establish any basis to reverse the district court's decision. The district court did not improperly apply the law or clearly err in declining to equitably toll the statute of limitations.

The district court's judgment should not be disturbed. Instead, this Court should affirm the conclusion of the court below.

Respectfully submitted,

Dated: August 3, 2020 By: 

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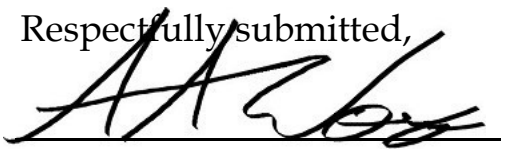
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because the textual portion of the foregoing brief (exclusive of the tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 10,810 words as determined by the word counting feature of Microsoft Word. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Book Antiqua font.

I also hereby certify, pursuant to Circuit Rule 28A(h), that electronic files of this Brief have been submitted to the Clerk via the Court's CM/ECF system in Portable Document Format. The files have been scanned for viruses and are virus-free.

Respectfully submitted,

Dated: August 3, 2020 By: 

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