IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 18-0503

KYRA KING,

Appellant,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Seventeenth Judicial District Court, Phillips County
The Honorable Yvonne Laird, Presiding

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Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED FOR REVIEW

Does the insurance exception to the American Rule apply to nontaxable costs?

STATEMENT OF THE CASE

Appellant Kyra King ("Kyra") sued Appellee State Farm Mutual Automobile Insurance Company ("State Farm"), her insurer, for underinsured motorist benefits following an accident in which she was injured. The only settlement offers State Farm has made were less than the applicable policy limits; the highest offer was $20,000.00. A jury rendered a verdict to Kyra in the amount of $410,000.00.

Following entry of the verdict, Kyra filed a Motion for Attorney Fees and Litigation Expenses (the "Motion"). Case Register ("CR"), Doc. 78. Kyra requested attorney fees in the amount provided in the contingency fee agreement with her counsel, and "litigation expenses" in the amount of $12,767.33. State Farm filed a Response to Motion for Attorney Fees and Litigation Expenses (the "Response" or "Resp."), in which it agreed that Kyra was entitled to attorney fees under the "insurance exception" to the American Rule (which generally holds each party responsible for its own attorney fees), as applied in *Mlekush v. Farmers Ins. Exch.*, 2017 MT 256, 389 Mont. 99, 404 P.3d 704. State Farm contested Kyra's request for costs, arguing that her request was untimely with respect to costs allowable under Mont. Code Ann. § 25-10-201, and that she was not entitled to any costs not enumerated in that statute ("nontaxable costs"). CR, Doc. 80. Kyra filed Plaintiff's

Reply Brief in Support of Litigation Expenses (CR, Doc. 83), accompanied by Plaintiff's Renewed Motion for Attorney Fees and Litigation Expenses, in which she requested the same amount of litigation expenses as in the original Motion, $12,767.33 (CR, Doc. 82).

The District Court held a hearing on the Motion on July 24, 2018. Kyra's attorney testified about revisions to her request for expenses, which reduced the request to $11,800.00. Transcript ("Tr."), 3:20 – 8:21. On July 26, 2018, the District Court entered its Order on Attorney Fees and Litigation Expenses (the "Order"), which is the subject of this appeal. CR, Doc. 85. The Order allowed attorney fees in the amount requested, but allowed no litigation expenses of any nature. The District Court found that the insurance exception to the American Rule does not allow a successful litigant to recover costs in excess of those allowed by Mont. Code Ann. § 25-10-201. It also found that Kyra did not file a timely request for costs allowed under the statute. Kyra does not appeal the latter ruling.

STATEMENT OF THE FACTS

The issue on appeal is a question of law. Kyra's attorney testified at the hearing on the Motion, explaining the items that had been deducted from the original request for expenses. State Farm's counsel conducted a short cross-examination, designed to determine which of the requested expenses would be allowable as costs under Mont. Code Ann. § 25-10-20. Tr., 9:10 – 11:15. Otherwise, both counsel

relied on their briefs. Tr., 11:16 – 12:10. The Order focused on whether Kyra was entitled to nontaxable costs as a matter of law, not on the amount requested. Because the District Court did not award any costs, the Order did not determine which costs were and were not taxable. If Kyra prevails on appeal, the District Court should determine the amount of expenses/costs in each category on remand.

STANDARD OF REVIEW

"[A] district court's determination whether legal authority exists for an award of attorney fees is a conclusion of law, which we review for correctness." *Mlekush*, ¶ 13 (citation omitted). Similarly, the question whether a litigant is entitled to costs is a conclusion of law, also reviewed for correctness. *Kuhr v. City of Billings*, 2007 MT 201, ¶ 14, 338 Mont. 402, 168 P.3d 615.

The question whether such expenses are foreclosed by Mont. Code Ann. § 25-10-201 is a matter of statutory interpretation, also subject to *de novo* review. *Hines v. Topher Realty, LLC*, 2018 MT 44, ¶ 12, 390 Mont. 352, 413 P.3d 813 (citation omitted).

SUMMARY OF ARGUMENT

Although this Court has not confronted the issue directly, it implicitly has approved the award of litigation expenses beyond those enumerated in Mont. Code Ann. § 25-10-201 under the insurance exception to the American Rule. The Court's

jurisprudence surrounding the adoption and refinement of the insurance exception supports its explicit extension to nontaxable costs. Mont. Code Ann. § 25-10-201 does not apply to nontaxable costs.

ARGUMENT

The District Court denied Kyra's motion for nontaxable costs because it was "not convinced that the insurance exception to the American Rule allows recovery of costs and expenses not expressly stated" in Mont. Code Ann. § 25-10-201. The Court found that the cases on which Kyra relied for these costs "do not expressly state the insurance exception to the American Rule was an exception to § 25-10-201." The Order stated that this Court "as stated numerous times that [§ 25-10-201] is an exclusive list of costs." Order at 3.

The cases on which the District Court relied, and the cases State Farm cited for the same principle, did not involve actions by an insured against her insurer. The "insurance exception" to the American Rule is deeply embedded in this Court's case law, and has evolved and expanded since its inception. This Court implicitly has recognized that nontaxable costs may be awarded to an insured in Kyra's position. It is a natural step to make this principle explicit.

Mont. Code Ann. § 25-10-201 does not apply to nontaxable costs. A ruling that nontaxable costs are allowed as part of the insurance exception will not disturb any of this Court's precedent under that statute.

1. This Court allowed nontaxable costs in the **Mlekush** *appeals.*

This Court's decision in *Mlekush v. Farmers Ins. Exch.*, 2017 MT 256, 389 Mont. 99, 404 P.3d 704 ("*Mlekush II*"), was the second in the same litigation. Ms. Mlekush commenced a case in 2013, seeking underinsured motorist ("UIM") coverage under her insurance policy with Farmers Insurance Exchange ("Farmers"). After the jury entered a verdict in her favor, she stipulated to judgment in the amount of her UIM policy limit. *Mlekush v. Farmers Ins. Exch.*, 2015 MT 302, ¶¶ 3-6, 381 Mont. 292, 358 P.3d 913 ("*Mlekush I*").

Ms. Mlekush then filed two separate post-trial requests. The first was "a memorandum of costs seeking a total of $1,757.45." Farmers responded with a motion to tax costs under Mont. Code Ann. § 25-10-502, which allows "[a] party dissatisfied with costs claimed" in a bill of costs to "have the same taxed by the court." Farmers argued that certain of the costs Ms. Mlekush had requested "were not allowed under § 25-10-201," the statute on which State Farm relied in this case. *Mlekush I*, ¶ 7.

Her second posttrial request was "a motion for attorney fees and nontaxable costs," in which she "sought attorney fees under the insurance exception to the

American Rule . . . and nontaxable costs totaling $10,439.30 minus the amount of costs deemed recoverable by the District Court" under her first request. The District Court denied this motion. *Mlekush I*, ¶ 7.

On appeal, this Court "reverse[d] the District Court's order denying Mlekush's motion for attorney fees and taxable costs," finding that the District Court interpreted the insurance exception too narrowly, and remanding "for further proceedings to determine whether Farmers forced Mlekush to assume the burden of legal action to obtain the full benefit of her UIM policy, thus entitling her to attorney fees under the insurance exception." *Mlekush I*, ¶ 14.

Although the Court used the term "taxable costs" in paragraph 14 of the opinion, the term appears to be a typographical error. In the first paragraph of the opinion, the Court stated that Ms. Mlekush was appealing the order denying her motion for attorney fees and *nontaxable* costs. In footnote 1 of the opinion, the Court noted that that neither party had appealed the District Court's ruling on FIE's motion to tax costs.

On remand, following the parties' submission of a joint statement of undisputed facts oral argument, the District Court denied the motion again. *Mlekush II*, ¶ 12. This Court reversed, remanding for "further proceedings" with instructions for the District Court to "consider a reasonable amount of fees, costs, and interest to which Mlekush is entitled." *Mlekush II*, ¶ 25.

The *Mlekush II* Court did not modify the term "costs." However, since neither party had appealed the District Court's decision on taxable costs, the only "costs" at issue in both appeals were nontaxable costs. Ms. Mlekush's opening brief in *Mlekush II* stated the issue on appeal as the District Court's denial of Ms. Mlekush's "Motion re Attorney Fees *and Litigation Expenses*." Case No. DA 16-0670, Appellant's Opening Brief, at 1 (emphasis added).

The *Mlekush* decisions may not have addressed the issue explicitly, but this Court certainly was aware that the costs Ms. Mlekush sought in both appeals were nontaxable costs, as opposed to costs of the kind enumerated in Mont. Code Ann. § 25-10-201.

The Mlekush cases do not represent an isolated occurrence. Kyra also drew the District Court's attention to other cases where insureds had recovered nontaxable costs.

In *Home Ins. Co. v. Pinski Bros.*, this Court found that a counterclaim plaintiff was entitled to the fees and expenses he incurred in defending an insurance company's action against him and in pursuing his counterclaim. This Court specifically found that the insurer's conduct in that case rendered it "liable for damages by way of attorney fees, expenses, and court costs occasioned thereby." 160 Mont. 219, 227-28, 500 P.2d 945, 950 (1972). The Court used the terms "expenses" and "court costs," evidently recognizing a distinction between the two.

A later case recognized that "the insurance exception [was] instituted in *Pinski*. *Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 20, 315 Mont. 231, 69 P.3d 652, 656. Even before *Pinski*, this Court found an insurer liable for "attorneys fees and expenses incurred" by its insured because of its wrongful refusal to defend." *Lindsay Drilling & Contracting v. U.S. Fid. & Guar. Co.*, 208 Mont. 91, 97, 676 P.2d 203, 206 (1984).

An award of nontaxable costs certainly is not unprecedented in Montana courts. In this appeal, Kyra requests this Court to rule explicitly that nontaxable costs, in a reasonable amount determined by the trial court, are included in the insurance exception to the American Rule.

2. Allowance of nontaxable costs is consistent with the history and purpose of the insurance exception.

Mlekush II is a recent addition to a long line of cases, beginning with *Pinski*, in which this Court has extended the insurance exception to new sets of facts. This Court examined this evolution in *Mlekush II*, citing cases in which the insurer had breached its duty to defend and discussing further expansion of the exception to an insurer's breach of its duty to indemnify the insured, in *Brewer*. *Mlekush II*, ¶¶ 14-17. In *Brewer*, this Court held that the exception applies "when the insurer forces the insured to assume the burden of legal action to obtain the full benefit of the insurance contract." *Brewer*, ¶ 36. Emphasizing this point, the *Mlekush II* Court

expanded the exception to the situation, like Kyra's, where an insured "is compelled to pursue litigation [for coverage under her own policy] and a jury returns a verdict in excess of the insurer's last offer to settle an underinsured motorist claim." *Mlekush II*, ¶¶ 17, 23. The Court found persuasive the insured's "reasonable expectation that [she] will be treated fairly and will not have to resort to expensive, time-consuming litigation in order to recover what they are rightfully entitled to under the terms of their insurance policy." *Mlekush II*, ¶ 20.

Farmers had argued that "a legitimate dispute about value of a UIM claim should not penalize the insurer with threat of attorney fees." This Court explained that the insurance exception "is not a bad faith concept; it simply recognizes that the insured should not bear the expense when she has to resort to litigation in order to recover the benefits for which the insured has contracted and paid premiums. The Court found that "[f]orcing a first-party insured to bear the burden of attorney fees, when the insured seeks only the full benefit of her insurance claim, defeats the purpose of having an insurance exception." *Mlekush II*, ¶ 21.

It is unrealistic to expect that an insured who has to sue to recover benefits she has paid for will incur only attorney's fees, or only the costs taxable under Mont. Code Ann. § 25-10-201, in the course of litigation. The enumerated costs do not include high-ticket items like the fees of expert witnesses, whose testimony often is

required in auto accident cases to establish such matters as the cause, nature, and extent of physical injuries, the plaintiff's lost earnings, and the like.

This Court took guidance from other jurisdictions in expanding the exception in *Brewer*. These included the Kansas Supreme Court, which upheld an award of fees the insured incurred in defending a declaratory judgment action, finding that "the availability of *expenses and attorney fees* in such a situation is necessarily dependent on the existence of coverage," but where the suit determines that coverage exists, "one may conclude that the insured was compelled to expend his or her own funds in litigation expenses to obtain the benefit of his or her bargain with the insurer." The Kansas Court continued: "If these expenses are not reimbursed to the insured, the insured fails to obtain a substantial benefit already paid for under the policy: the defense of the claim." *Brewer*, ¶ 30, *quoting Farm Bureau Mut. Ins. Co. v. Kurtenbach*, 265 Kan. 465, 961 P.2d 53, 64 (1998) (emphasis added) (internal quotation marks omitted). The Brewer Court also favorably quoted the Washington Supreme Court, which found that the insurance exception "remedies the inequity" that results when an insurer puts its own interests ahead of the insured's, "by requiring that the insured be made whole." *Brewer*, ¶ 34, *quoting McGreevy v. Oregon Mut. Ins. Co.* 128 Wash.2d 26, 904 P.2d 731,738 (1995) (internal quotation marks omitted).

The *Brewer* Court observed that "the American Rule and its corresponding exceptions derive from the common law," that "the common law is susceptible of growth and adaptation to new circumstances and situations, and that the *courts* have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule." *Brewer*, ¶ 21 (emphasis in original) (citations and some internal quotation marks omitted). Kyra submits that it is appropriate for this Court to take the next step in the evolution of the insurance exception. She urges this Court to make explicit a principle that it has accepted, implicitly, and which effectuates the stated policy of making whole an insured who takes on an insurance company, by reimbursing the expenses she actually incurred in doing so.

3. Mont. Code Ann. § 25-10-201, does not apply to this case.

State Farm objected to the allowance of any expenses outside the ambit of Mont. Code Ann. § 25-10-201, citing the general principle that "[o]nly those costs delineated in [the statute] may be charged to the opposing party unless the item of expense is taken out of [its operation] by a more specialized statute, by stipulation of the parties or by rule of court." *Springer v. Becker*, 284 Mont. 267, 949 P.2d 641, 645–46 (1997) (citation and internal quotation marks omitted); Resp. at 2-3. The District Court agreed.

Springer involved a dispute over an abandoned vehicle. Neither *Springer*, nor any of the cases on which the District Court relied, relate to insurance or the

insurance exception to the American Rule. *See Order at 3, citing In re Estate of Lande, 1999 MT 179, 295 Mont. 277, 983 P.2d 316 (claim for costs of a personal representative)*; *Schillinger v. Brewer*, 215 Mont. 333, 697 P.2d 919 (1985) (costs incurred in foreclosure of a mechanic's lien); *Cook v. Harrington*, 203 Mont. 479, 661 P.2d 1287 (1983) (agreement to purchase real estate).

Mont. Code Ann. § 25-10-201 simply has no application to this issue. Here, as in *Mlekush I*, the Court's ruling on taxable costs is not on appeal. As *Springer* acknowledges, the statute is the exclusive vehicle for recovery of costs "unless the item of expense is taken out of [its operation] by a more specialized statute, by stipulation of the parties or by rule of court." There is such a "rule of court" here, in the insurance exception to the American Rule.

CONCLUSION

Kyra requests that this Court reverse the District Court's ruling that the insurance exception does not allow "recovery of costs and expenses not expressly stated in Mont. Code Ann. § 25-10-201." Evolution of the exception to encompass reasonable costs, as determined by the trial court, is consistent with this Court's past practice in cases like *Mlekush* and *Pinski*, and furthers the purpose of the insurance exception. Kyra also asks that the Court remand this matter to the District Court, solely for the purpose of determining the reasonable expenses to which she is entitled under the exception.

Respectfully submitted,

Terryl T. Matt
Attorney for the Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this document is proportionately spaced, using a Times New Roman typeface of 14 points, and does not exceed 10,000 words as determined by the word count of the word processing system used to prepare the brief.

Terryl T. Matt
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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Montana Supreme Court and that I have served true and accurate copies of the foregoing **APPELLANT'S OPENING BRIEF** upon the Clerk of the District Court, each attorney of record, each court reporter from whom a transcript has been ordered, and each party not represented by an attorney in the above-referenced District Court action, as follows: (list name and address of Clerk of the District Court, each court reporter, and each attorney or party served).

DATED this 5th day of March 2019.

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Table of Contents

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