

IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CAUSE NO. DA 19-0533

NATIONAL INDEMNITY COMPANY,

Plaintiff and Appellant,

vs.

STATE OF MONTANA,

Defendant and Appellee,

and

TERRY JELLESED, et al.,

Intervenors.

**UNOPPOSED MOTION FOR LEAVE FOR APPELLANT AND CROSS-
APPELLANT TO FILE OVERLENGTH BRIEFS**

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Holly Brown Presiding

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Appellant National Indemnity Company (“National”) respectfully submits this unopposed motion for leave to file an overlength opening brief of no more than 16,000 words. This request is justified by the extraordinary circumstances of this case, as explained below and in the February 21, 2020 Affidavit of D. Wiley Barker, which is attached as Exhibit A. Counsel for the State has been contacted concerning this motion. Although the State does not agree with a number of National’s representations in support of its motion, the State does not oppose National’s request for additional words based on the understanding the order provides that the word-limit expansion is reciprocal and will allow 16,000 words for the State’s opening brief. Intervenors also have been contacted and do not oppose this motion. A proposed order is included for the Court’s consideration.

Principal appellate briefs are generally limited to 10,000 words. Mont. R. App. P. 11(4)(a). Motions to expand this limitation must provide “extraordinary justification,” pursuant to the Court’s appellate rules. *Id.* 12(10). The Court has granted motions to file overlength briefs where the complexity of a case necessitates additional words. *See Order, State v. Christensen*, DA 18-0268 (July 2, 2019) (granting motion to file overlength brief of 26,931 words where the complexity of the case and issues of first impression, involving both constitutional and statutory interpretation, and the need for substantial research regarding federal

and state law warranted an overlength brief); Order, *Stevens v. Novartis Pharm. Corp.*, DA 10-0029 at 1 (May 25, 2010) (granting motion to file overlength brief in “a complex case . . . [where] it [was] not possible for [appellee/cross-appellant] to comply with the 10,000 word limit set forth in the rules”); Order, *Conway v. Benefis Health System, Inc.*, DA-12-0180 and DA 12-0308 at 2 (Oct. 23, 2012) (granting motion to file overlength brief “[i]n the interests of full consideration of the issues”).

This case is procedurally and substantively complex. It involves several significant questions concerning the State’s coverage under a two-year liability policy (1973-1975) for claims that the State failed to warn Libby residents and mine workers of asbestos exposure. It ultimately resulted in a judgment by the District Court that National is liable to the State for \$97,883,193.39 in defense and settlement costs. *See* Ex. A, Barker Aff., ¶ 4; Dist. Ct. Reg. Doc. No. (“CR”) 430. The appeal involves three separate parties who have maintained different positions throughout the underlying litigation, and a variety of orders issued by the District Court, including two summary judgment orders, an order for clarification, and other orders addressing numerous issues of law and fact. *See* Barker Aff., ¶ 4; National’s Notice of Appeal (citing eight separate orders in addition to the District Court’s Judgment).

These orders comprise several significant rulings based on an extensive record, which National must address in its opening brief. For example, the parties have raised, and the District Court has ruled on, multiple complex issues of insurance law, including contract interpretation, statutory interpretation, common law, and federal and state constitutional rights. *See id.* ¶ 5. These issues have required substantial research to fully and fairly present them to the Court, necessitating expansion of the usual word limit. *Id.* In addition, the record before the Court, which National must address, is extensive. *Id.* ¶ 6. The factual record spans decades, and the documents submitted to the District Court in support of argument comprise thousands of pages. *Id.*

The District Court recognized the complexity of this matter by more than doubling the allowed page limit for opening summary judgment briefs and expanding limitations on response briefs. *Id.* ¶ 7; *see also* Dist. Ct. Reg. Doc. Nos. 106 Order Granting the State’s Motion for Leave to File an Over-Length Brief in Support of Motion for Summary Judgment (June 3, 2015) (expanding page limit from 20 to 45); 118 Order Granting National’s Motion for Leave to File an Over-Length Brief (Sept. 2, 2015) (expanding page limit from 20 to 45); 138 Order Granting Joint Motion of National and the State for Leave to File Over-Length

Response Briefs (Oct. 20, 2015) (expanding page limit from 20 to 30). Each of the parties submitted opening, response, and reply briefing. Barker Aff., ¶ 6.

Therefore, National cannot comply with the usual word limitation and provide the Court the information necessary to fully consider the issues in this appeal. *Id.* ¶ 7. National made extensive efforts to limit the number of words necessary for its opening brief before making this request. *Id.* Accordingly, National respectfully requests the Court expand the word limit to 16,000 each for the respective opening briefs of Appellant and Cross-Appellant.

DATED this 21st day of February, 2020.

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/s/ D. Wiley Barker

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CERTIFICATE OF SERVICE

I, Wiley Barker, hereby certify that I have served true and accurate copies of the foregoing Motion - Unopposed - File Enlarged Brief to the following on 02-21-2020:

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Dated: 02-21-2020