IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 20-0112

SHARON UHLIG,

Plaintiff/Appellant,

v.

ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY,

Defendant/Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Fourth Judicial District Court
Missoula County, Montana
Cause No. DV-17-1292
Honorable Leslie Halligan

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. STATEMENT OF ISSUES

1. Did the district court err in limiting its award of attorney fees to work performed by Uhlig's counsel prior to January 19, 2018, and in awarding Uhlig only a fraction of her requested fees?

2. Did the district court err in denying Uhlig's motion to strike the affidavit of Marlee Miller? This issue needs to be addressed only if the case is remanded for further proceedings in the district court.

II. STATEMENT OF THE CASE

Uhlig filed this declaratory judgment action against Allied for advance payment of her medical expenses in accordance with *Ridley v. Guaranty Nat. Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997). After the court granted her motion for summary judgment, Uhlig filed a motion to recover her attorney fees pursuant to *Renville v. Farmers Insurance Exchange*, 2004 MT 366, 324 Mont. 50, 105 P.3d 280. The court committed reversible error in awarding less than six percent (6%) of the total amount of fees requested by Uhlig.

III. STATEMENT OF FACTS

On February 1, 2017, Dennis Hildebrand, an insured of Allied, negligently operated his motor vehicle in Missoula, Montana, causing a high-impact collision with a motor vehicle operated by Uhlig. ROA 25, 3:3-5. Uhlig was transported by ambulance to St. Patrick Hospital where she was treated in the emergency room

and released later in the day. She received an ambulance bill of $1,360, and an emergency room bill of $3,470, for a total of $4,830. ROA 25, 3:10-12. Fortunately for Uhlig, she did not require further medical treatment, though it took some time for her injuries to heal.

Uhlig was an innocent victim of the automobile accident. Hildebrand's liability has always been clear, both for the accident and for Uhlig's medical expenses. ROA 25, 2:10-13. In spite of this, Allied refused to make advance payment of Uhlig's medical expenses as required by subsections (6) and (13) of Mont. Code Ann. § 33-18-201 and *Ridley.* In fact, Allied claimed that because Uhlig's medical expenses were covered by her own auto medical payments coverage with Farmers, that Allied owed nothing for Uhlig's medical expenses. ROA 25, 5:9-12. As a result, Uhlig filed this declaratory judgment action to force Allied to make advance payment of her medical expenses as the law requires. ROA 25, 5:12.

After Uhlig filed her Complaint, Allied continued to refuse to make advance payment of Uhlig's medical expenses, and fought the case every step of the way. Uhlig ultimately filed a motion for summary judgment and brief (ROA 14), whereupon Allied filed a cross-motion for summary judgment and brief (ROA 15,16).

After the motions were fully briefed, the court held a hearing. ROA 24. The court subsequently granted summary judgment in favor of Uhlig. ROA 25, 2:4-17. The court correctly found that Montana law required Allied to make advance payment of Uhlig's medical expenses of $4,830 because liability was clear and the medical expenses undisputed. ROA 25, 2:6-10. Allied finally made the required advance payment of $4,830 to Uhlig on January 14, 2019, after the court entered summary judgment for Uhlig. ROA 33, 6: ¶ 22.

Uhlig then moved for an award of her attorney fees under *Renville.* ROA 28. By supporting affidavit, Uhlig's counsel documented 218.2 hours of his time spent working on the case to secure the order granting summary judgment for Uhlig and other orders granting the relief requested in Uhlig's pleadings, at a normal hourly rate of $200/hr. ROA 30. Allied filed a brief opposing the motion. ROA 33. The court granted the motion in part and denied it in part. ROA 39, 2:2-3. The court awarded fees for work performed by Uhlig's counsel prior to January 19, 2018, a total of 12 hours at $200 per hour, and awarded $2,400 in fees. ROA 39, 2:4-11. The court denied fees for all work performed after January 18, 2018, a total of 206 hours.

This appeal involves issues that are highly fact-intensive. Additional facts are discussed below where relevant.

IV. STANDARDS OF REVIEW

This Court reviews for correctness a district court's decision as to whether legal authority exists to award attorney fees. *Hughs v. Ahlgren,* 2011 MT 189, ¶ 10, 361 Mont. 319, 258 P.3d 439. If such authority exists, a district court's order to grant or deny fees is reviewed for abuse of discretion. *Id.* Abuse of discretion is also the standard used to review the district court's ruling on an evidentiary matter, or a discovery matter. *McClue v. Safeco Ins. Co. of Ill.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604; *McKamey v. State,* 268 Mont. 137, 145, 885 P.2d 515, 520 (1994). A district court abuses its discretion if its fee award is based on an inaccurate view of the law or a finding of fact that is clearly erroneous, *Osterman v. Sears Roebuck & Co.*, 2003 MT 327, ¶ 37, or if the district court otherwise acts arbitrarily, without conscientious judgment, or in excess of the bounds of reason in its determination of fees, resulting in substantial injustice. *Wagner v. Woodward*, 2012 MT 19, ¶18.

V. SUMMARY OF THE ARGUMENT

The district court abused its discretion by arbitrarily limiting its award of fees to work performed by Uhlig's counsel prior to January 19, 2018. The amount of fees requested by Uhlig is reasonable, and there is no evidence in the record to the contrary. For these reasons the district court should be reversed, and the case

remanded with instructions to enter judgment in Uhlig's favor for the full amount of the fees requested.

VI. ARGUMENT

1. Bases For Award Of Fees To Uhlig

Montana follows the general American Rule that a litigant in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision. *United Nat. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2009 MT 269, ¶ 37, 352 Mont. 105, 214 P.3d 1260. Uhlig based her motion for attorney fees on statutory grounds, specifically, the supplemental relief provisions of Mont. Code Ann. § 27-8-313.

In *Trustees of Indiana University v Buxbaum,* 2003 MT 97, 315 Mont. 210, 69 P.3d 663, this Court held that the district court erred when it concluded that it lacked authority to award attorney fees under § 27-8-313 *Id*., ¶ 46. The Court held that § 27-8-313 provides a statutory basis for awarding supplemental relief in the form of attorney fees in declaratory judgment actions if the award is "necessary and proper." *Id*., ¶ 42. The Court remanded the case to the district court to determine whether fees were necessary and proper, and if so, the amount of the fees. *Id*., ¶ 46.

The following year, in *Renville v. Farmers Insurance Exchange*, 2004 MT 366, 324 Mont. 50, 105 P.3d 280, the Court adopted the "tangible parameters" test

to determine whether attorney fees granted under § 27-8-313 are "necessary and proper." In *Renville*, which like the present case was a declaratory judgment action for advance payment of an injured party's medical expenses, the Court held that fees are necessary and proper under the tangible parameters test when: 1) an insurance company possesses what the plaintiff sought in the declaratory judgment action; 2) it is necessary to seek a declaration showing that the plaintiff is entitled to the relief sought; and, 3) the declaratory relief sought was necessary in order to change the status quo. *Id*., ¶ 27.

Five years later, in *United Nat. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2009 MT 269, 352 Mont. 105, 214 P.3d 1260, a declaratory judgment action to resolve a contractual dispute between two insurance companies, the Court further clarified that attorney fees are appropriate under § 27-8-313 only if equitable considerations support the award, a determination the district court must make before applying the criteria of the tangible parameters test. *Id*., ¶ 38. The Court held that an award of fees under § 27-8-313 was not warranted by the equitable considerations since the case involved "… two similarly situated parties disputing the interpretation of a contract." *Id*., ¶ 39. The Court contrasted these facts with *Renville,* a case in which the equities did support an award of attorney fees "… where an injured party expended more on the cost of litigation than it received as a

result of the litigation, thus potentially rendering the declaratory relief meaningless." *United Nat. Ins. Co.*, ¶ *39.*

Most recently, in *Whitefish Congregation of Jehovah's Witnesses, Inc. v. Caltabiano*, 2019 MT 228, ¶ 45, 397 Mont. 284, 449 P.3d 812, a case involving an access easement dispute, the Court affirmed the district court's denial of attorney fees. The Court held that the equities did not support an award of attorney fees because "[b]oth parties were similarly situated in this case and were genuinely disputing their rights." *Id*., ¶ 45.

Based on these authorities, the threshold question in this appeal is whether the equities support an award of attorney fees to Uhlig. The district court decided that for the most part the equity threshold had not been met, and that as a result there was no need to engage in an analysis of the tangible parameters test. ROA 39, 10:5-9. This decision is incorrect.

2. The District Court Misapplied The Equities Analysis

The district court found that "… Uhlig has not satisfied the threshold element of demonstrating the equities support of grant of fees." ROA 39, 10:5-7. The court concluded that, on balance, the equitable considerations weighed against an award of fees, "… with a small exception." ROA 39, 9:6-7. The court determined that several factors weighed against an award of fees. First, the court concluded that Allied's refusal to advance pay caused no financial distress to Uhlig

because the medical bills had at some point been paid by Uhlig's medical payments coverage with Farmers. ROA 39, 9:11. The court also reasoned that the question of whether *Ridley* requires advance payment in Uhlig's case is unsettled "[b]ecause the reason for the rule was absent here …." ROA 39, 9:14-15. The court further concluded that "… this suit became a lot less necessary" after January 19, 2018, the date that Allied claims adjuster Marlee Miller offered to pay for Uhlig's medical expenses if she would agree to dismiss the suit. ROA 39, 10:1-2.

Despite reaching these conclusions, the court also decided that the equities of the case weighed in favor of an award of fees to Uhlig, but only for the work performed by her counsel before January 19, 2018. This amounts to 12 hours of counsel's time, little more than 5% of the 218 hours sought. With little analysis the court determined that the work performed by Uhlig's counsel before January 19, 2018 satisfied both the equities threshold for an award of fees and the three-pronged tangible parameters test set forth in *Renville.* ROA 39, 10:10-13.

The court's analysis is flawed in several respects, beginning with its conclusion that the reason for the *Ridley* rule is not present here. In *Ridley*, this Court held that insurance companies have a duty to advance-pay an injured third party's medical expenses when an insured's tort liability for those expenses is reasonably clear. *Id.,* 286 Mont. at 334, 951 P.2d at 992. The rule is based upon this Court's interpretation of two statutory provisions found in the Unfair Trade

Practices section of the Montana Insurance Code, subsections (6) and (13) of Mont. Code Ann. § 33-18-201.

Under subsection (6), it is an unfair trade practice for an insurance company to "neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." Subsection (13) makes it an unfair trade practice for an insurance company to 'fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage." These statutory provisions were enacted to further the public policy behind Montana's mandatory automobile liability statutes, which is "... to protect members of the general public who are innocent victims of automobile accidents" by curbing abuses practiced by insurance companies. *Id.,* 286 Mont. at 335, 951 P.2d at 993.

This Court stated in *Ridley* that the purpose of § 33-18-201 "… is to assure prompt payment of damages for which an insurer is clearly obligated." *Id.*, 286 Mont. at 335, 951 P.2d at 993. The Court noted that its interpretation of subsection (6) is consistent with this purpose. *Id.* The Court noted that the purpose of subsection (13) is to prevent "… the leveraging of undisputed claims in order to settle disputed claims…." *Id*., 286 Mont. at 336, 951 P.2d at 993.

The *Ridley* Court noted that automobile accident victims who cannot afford to pay their medical expenses are in special need of the protections of these statutory provisions. *Id.*, 286 Mont. at 335, 951 P.2d at 993. However, the Court did not hold or suggest that the protections of subsections (6) and (13) are unnecessary or unavailable if the injured third party has her own insurance or is otherwise able to afford to pay her medical expenses.

If it is true, as the district court apparently believed, that *Ridley* was intended to protect only those innocent victims of automobile accidents who cannot afford to pay their medical expenses, this Court could have easily said so. The Court could have created an exception excluding from the rule those who have their own auto med-pay coverage, or those who are wealthy and can afford to pay their own medical bills without insurance.[1] In short, the Court could have required proof of the injured party's inability to pay the medical expense as a pre-condition to the advance-payment rule. But the Court did not do these things, and the district court's decision in the present case erodes the precedent set forth in *Ridley*.

Subsequent decisions expound on *Ridley*. In *Dubray v. Farmers Insurance Exchange*, 2001 MT 251, ¶ 13, 307 Mont. 134, 36 P.3d 897, the Court stated that "… to construe *Ridley* as applying only to medical expenses … is to construe our

[1] In this vein, the Court could have found exceptions when personal health insurance or workers' compensation is available as well.

holding too narrowly and ignore the principle for which it stands…." The Court concluded that "[n]othing in *Ridley* suggests that its scope should be categorically limited to medical expenses. Rather, medical expenses are just one of the obligations incurred by victims that mandatory liability insurance laws were designed to alleviate." *Id*. ¶ 15.

In a concurring and dissenting opinion in *Shilhanek v. D-2 Trucking, Inc.*, 2003 MT 122, ¶ 45*,* 315 Mont. 519, 70 P.3d 721, Justice Trieweiler added the following insight: "The question then, following *Ridley*, is whether §§ 33-18-201 (6) or (13), MCA, by themselves provide any basis for limiting the insurer's obligation to a specific type of claim…. The simple answer is that there is no such language in the statute. Insurers have tried to add that language on a case-by-case basis."[2]

Not once in the more than two decades since *Ridley* has this Court modified or created a single exception to its core holding. Very recently the Court observed that *Ridley* is alive and well today: "As we have recognized since our 1997 decision in *Ridley*, and have consistently reaffirmed in the years since, insurers have a duty to advance-pay an injured third party's medical expenses when

[2] Allied would have this Court add the requirement of proof by the claimant of financial inability to pay the medical expense as a condition-precedent to the requirement of advance payment. However the role of this Court in the construction of § 33-18-201 or any other statute "… is simply to declare what is stated by the plain terms of the statute and not to insert what has been omitted." *Ridley v. Guaranty Nat. Ins. Co.*, 286 Mont. 325, 330, 951 P.2d 987, 990 (1997), citing Mont. Code Ann. § 1-2-101.

liability is reasonably clear." *High Country Paving, Inc. v. United Fire & Casualty Co.*, 2019 MT 297, ¶ *17*.

The district court's analysis in our case does not square with the language of §§ 33-18-201(6) or (13) or with this Court's case law as discussed above. Based on its inaccurate view of the law, the district court concluded that the need for advance payment did not exist in our case because Uhlig faced no financial distress. But that is not the proper inquiry or analysis under *Ridley* and its progeny. This well-settled body of law makes it clear that insurance companies must promptly pay damages which they are clearly obligated to pay. In this case those damages are Uhlig's undisputed medical expenses.

The question of whether an injured claimant has the ability to pay their own medical expenses is not a proper consideration under this established body of law. Placing the burden on injured victims to demonstrate financial need for advance payment is contrary to the purpose of Montana's mandatory insurance liability laws, which is to protect members of the general public who are innocent victims of automobile accidents. It also frustrates the purpose of § 33-18-201(6), which is to assure prompt payment of damages for which an insurer is clearly obligated, and the purpose of § 33-18-201(13), which is to prevent the leveraging of undisputed claims in order to settle disputed claims. Finally, it shifts the burden of payment to

victim and its own insurer, which defeats the obligations set forth by the legislature.

The automobile accident that caused Uhlig's personal injuries and medical expenses occurred on February 1, 2017. Allied did not pay for Uhlig's medical expenses until January 14, 2019, almost two years later, and only after the district granted summary judgment in favor of Uhlig. Because Allied refused to pay the medical expenses during that entire time, the settlement of Uhlig's personal injury claim was similarly delayed for nearly two years. The reason for the *Ridley* rule is clearly and plainly present in this case. The district court abused its discretion in failing to take this into consideration in its ruling on Uhlig's motion to recover her attorney fees.

The court's conclusion that this suit somehow became a lot less necessary after January 19, 2018 is likewise based on an inaccurate view of the law. The court's view is completely arbitrary and in excess of the bounds of reason. The court explained that the reason it chose to limit Uhlig's recovery of fees to work performed by her counsel prior to January 19, 2018 is because on that date Allied claims adjuster Marlee Miller offered to pay for Uhlig's medical expenses *if* she would agree to dismiss this suit.

An insurer does not satisfy the requirements of §§ 33-18-201(6) and (13) by offering to pay a sum that it is clearly obligated to pay. These statutes require the

insurer to pay the sum that is owed, and that is why it is referred to as advance payment. That is the whole point of the statutes. Allied's offer to pay an amount that it clearly owed in exchange for dismissal of this lawsuit is but another form of prohibited leveraging under § 33-18-201(13). Limiting fees to amounts incurred up and until Allied offered to pay what it was obligated to pay not only defeats the purpose of the obligations set on insurers, but encourages insurers to force claimants to retain attorneys and file lawsuits simply to obtain benefits owed by law. The court clearly abused its discretion in so limiting Uhlig's recovery of her attorney fees.

3. The District Court Overlooked The Relevant Equitable Considerations

Uhlig based her motion to recover attorney fees on this Court's decision in *Renville v. Farmers Insurance Exchange*, 2004 MT 366, 324 Mont. 50, 105 P.3d 280. In ruling on the motion, the district court made no effort to compare or contrast our case to *Renville*. Nor did the court engage in an analysis of the three-pronged tangible parameters test adopted in *Renville*. We submit that the facts here are analogous to those in *Renville*, and that *Renville* is therefore controlling.

As noted in the previous section, attorney fees are appropriate under § 27-8-313 only if equitable considerations support the award, a determination that must be made before the Court applies the criteria of the tangible parameters test.

United Nat. Ins. Co. v. St. Paul Fire & Marine Ins. Co., 2009 MT 269, ¶ 38, 352 Mont. 105, 214 P.3d 1260. Because that case involved a genuine and legitimate dispute between similarly situated parties, two insurance companies, the Court held that equitable considerations did not support an award of fees. *Id*., ¶ 39. On the other hand the Court noted that the equities in *Renville* did support an award of attorney fees because the plaintiff in that case, an innocent tort victim who had been injured in an automobile accident, had expended more on the cost of litigating his *Ridley* advance-payment claim against the insurance company than he received as a result of prevailing in the litigation. *Id.* These facts are virtually indistinguishable from the facts in our case.

Like the plaintiff in *Renville*, Uhlig is an innocent tort victim who was injured in an automobile accident. Like the plaintiff in *Renville*, Uhlig filed suit against the responsible insurance company to enforce her right to advance-payment under *Ridley*. Like the plaintiff in *Renville*, Uhlig prevailed in her suit. Like the plaintiff in *Renville*, Uhlig expended far more on the cost of litigating her advance-payment claim against Allied than she received as a result of prevailing in the litigation.

The precise amount of advance-payment that the plaintiff sought in *Renville* is unstated. It appears that the amount was around $5,000, perhaps a little more. The plaintiff, having prevailed on her claim for advance payment under *Ridley*,

was awarded the sum of $27,750 in attorney fees. This Court affirmed the award. *Renville*, ¶ 32.

In our case Uhlig sought advance payment of a similar sum, $4,830. She ultimately prevailed on her *Ridley* claim. However, she expended far more than the amount in controversy litigating her claim, thus potentially rendering the declaratory relief meaningless, as in *Renville*. The affidavit of Uhlig's counsel establishes that he expended 218.2 hours of time to recover the sums which Uhlig was ultimately awarded. At counsel's usual hourly rate of $200 per hour, the total amounts to $43,640.

This is not a case involving similarly situated parties who genuinely dispute their rights, as in *United Nat. Ins. Co.* or *Caltabiano.* Unlike those cases, our case is between an innocent Montana citizen who sustained injury in an automobile accident and a liability insurance company whose insured caused the injury by negligently operating a motor vehicle. It is a case where liability was never disputed, either for the accident or the amount of special damages caused thereby, yet this undisputed claim was not settled as required by subsections (6) and (13) of § 33-18-201.

The court overlooked these equitable considerations in ruling on Uhlig's motion for attorney fees. The court allowed Allied to leverage its position by forcing Uhlig to file suit in order to obtain amounts clearly due and owing. This is

another way in which the court abused its discretion by misapprehending and misapplying applicable law in reaching the conclusion that the equities generally do not support an award of fees to Uhlig. The district court's ruling in this regard must be reversed.

4. The Tangible Parameters Test Supports An Award Of Fees To Uhlig

The tangible parameters test is used to determine whether attorney fees granted under § 27-8-313 are "necessary and proper." *Renville*, ¶ 27. Under the tangible parameters test attorney fees are necessary and proper when: 1) an insurance company possesses what the plaintiff sought in the declaratory judgment action; 2) it is necessary to seek a declaration showing that the plaintiff is entitled to the relief sought; and, 3) the declaratory relief sought was necessary in order to change the status quo. *Id*.

Allied possessed what Uhlig sought in this declaratory judgment action, the sum of $4,830 which was clearly owed to Uhlig as discussed in the preceding section. It became necessary for Uhlig to seek a declaration showing that Allied was obligated to pay her this sum because Allied denied this clear obligation imposed by Montana law.

The declaratory relief that Uhlig sought was necessary in order to change the status quo because Allied refused to pay this sum to Uhlig. Allied continued to deny its clear obligation even after Uhlig filed this suit, and Allied made the

conscious decision to fight the suit rather than comply with Montana law. This status quo did not change until the court granted summary judgment in favor of Uhlig, at which time Allied finally paid the sum it clearly owed to Uhlig.

Filing of the action was necessary to change the status quo of Allied's continued denial of its statutory obligations. It is clear that Allied's January 19, 2018 offer to pay Uhlig's medical expenses in exchange for dismissal of Uhlig's suit did not change the status quo, and further sends a chilling message that encourages insurers in Montana to withhold payment up and until a lawsuit is filed. Allied continued to possess what Uhlig sought in this declaratory judgment action until it was forced to pay the sum it owed to Uhlig by the court's Order granting Uhlig's motion for summary judgment.

5. Uhlig's Fees Are Reasonable

An award of attorney fees must be reasonable in amount. This Court has identified seven specific factors that district courts must consider in determining reasonableness of fees: (1) the amount and character of the services rendered; (2) the labor, time and trouble involved; (3) the character and importance of the litigation; (4) the amount of money or the value of the property to be affected; (5) the professional skill and experience called for; (6) the attorney's' character and standing in the profession; and, (7) the results secured by the services of the

attorney. *Plath v. Schonrock*, 2003 MT 21, ¶ 36, 314 Mont. 101, 64 P.3d 984, 991. These guidelines are not exclusive, and other factors may be considered. *Id.*

Ordinarily, an evidentiary hearing is required to determine the amount of reasonable attorney fees to be awarded. *Rossi v. Pawiroredjo*, 2004 MT 239, ¶ 29, 320 Mont. 63, 85 P.3d 776. However, this requirement may be waived. *Stipe v. First Interstate Bank of Polson*, 2005 MT 295, ¶ 26, 329 Mont. 320, 125 P.3d 591 (finding waiver based on filing of stipulation withdrawing party's objection to fees and agreeing to vacate hearing); *JTL Group v. New Outlook*, 2010 MT 1, ¶¶ 14, 52, 355 Mont. 1, 223 P.3d 912 (finding waiver based on party's failure to request hearing within time set by court).

In addition, Mont. R. Civ. P. 54(d)(2)(D) provides that by local rule district courts "… may establish special procedures to resolve fee-related issues without extensive evidentiary hearings." The district court correctly noted that although parties must be given an opportunity for an evidentiary hearing, the hearing may also be waived. ROA 39, 10:18-20. The court impliedly invoked Rule 54(d)(2)(D) by announcing a "presumptive award" of $2,400, which the court stated would become final if neither party requested a hearing within 30 days. ROA 39, 11:3-4. When neither party requested a hearing, the court issued a follow-up Order confirming its final attorney fee award of $2,400. ROA 43, 3:8-11.

Uhlig did not request an evidentiary hearing because it would have served no purpose. The court had already decided to severely limit an award of fees to Uhlig. No amount of additional evidence would change this, since the court's decision was not based on the evidence but on an inaccurate view of the law, as discussed in previous sections of this brief.

Uhlig had already presented all of her evidence supporting her claim for fees before the court made its presumptive award. That evidence included her own affidavit and the affidavit of her counsel, together with a contemporaneously maintained Excel spreadsheet of the time counsel spent working on the case, with detailed chronological descriptions of the work performed.[3] The evidence also included an opening brief and a reply brief in support of the motion. Though Allied filed a brief opposing the motion, it did not request a hearing within the time set by the court, and it did not submit any sworn testimony to refute the reasonableness of the work performed by Uhlig's counsel.

The right to an evidentiary hearing was waived by both parties, since neither asked for a hearing before the deadline set by the court. Accordingly, we submit

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[3] There is a strong presumption that an affidavit itemizing an attorney's hourly fee and describing the work performed and hours expended in performing the work, representing the lodestar fee, is a reasonable fee. *Laudert v. Richland County Sheriff's Dept.*, 2001 MT 287, ¶ 17, 307 Mont. 403, 38 P.3d 790, 793. To Uhlig's knowledge the Court has never authorized or rejected the use of the lodestar method in determining the reasonableness of fees under § 27-8-313.

that this appeal may be properly decided on the basis of the written submissions of the parties, both in this Court and in the district court, without remand for an evidentiary hearing.

Under *Plath*, reasonableness of fees is determined by careful consideration of the facts and circumstances of each case. Most of Uhlig's opening brief in the district court focused on application of the *Plath* factors to the facts and circumstances of our case. ROA 28, pp. 5-17. The court gave short shrift to the *Plath* factors. The court simply concluded "… it appears to the Court that an award of $200 per hour x 12 hours would be reasonable under the factors identified in *Plath* …." ROA 39, 10:20-23. Because the court brushed aside consideration of these factors in reaching its decision, we focus attention on them here.

The *Plath* factors are discussed below in sequential order, with one exception. The second *Plath* factor, the labor, time and trouble involved, is reserved for last because it explains more than any other factor how and why this case got to be so expensive. It also dovetails with the issue of whether the district court erred in denying Uhlig's motion to strike Marlee Miller's affidavit.

The first *Plath* factor requires consideration of the amount and character of the services rendered. The spreadsheet maintained by Uhlig's counsel reveals the amount and character of the services rendered. ROA 30. It shows that Uhlig's counsel began providing services in this case on December 19, 2017, when Marlee

Miller responded to Uhlig's settlement demand with her email denying that Allied had any obligation to pay Uhlig's medical expenses. Counsel's services were completed on August 22, 2019. During this 20-month period, counsel expended a total of 218.2 hours of time working on the case. Not included in these hours is the time spent by Uhlig's counsel on the motion to recover attorney fees, or the time spent on the motion to strike Marlee Miller's affidavit.

The third *Plath* factor is the character and importance of the litigation. This case has state-wide importance. Allied refused to make payment of a liability claim that the law plainly and clearly required it to make. It unlawfully withheld payment of medical expenses it owed under *Ridley,* and unlawfully claimed it did not owe Uhlig anything for her medical expenses since they were also covered under her med-pay coverage with Farmers. Uhlig filed this declaratory action in order to vindicate her rights under Montana law, to uphold well-established Montana law, and to require Allied and other insurers to follow that law in future similar cases.

The fourth *Plath* factor is the amount of money to be affected. Cases like this one are ripe for abuse by insurance companies for the very reason that the amount in controversy is relatively small. Lawyers are expensive, and innocent accident victims who have not been seriously injured are especially vulnerable to the type of unfair practices that Allied engaged in here. Although the sum in

controversy here is small, the Court's ruling will serve to warn all insurers of the significant consequences they will pay for engaging in the type of conduct involved in this case. On the other hand, if lawyers are not paid for their work they will not take on these kinds of cases. This would give the green light to liability insurance companies to treat other injured claimants the way Allied treated Uhlig in this case.

The fifth *Plath* factor focuses on the professional skill and experience required by the case. Montana has unique and complex insurance laws (which of course does not excuse Allied's failure to follow them). While it should not have been a complicated matter, Allied's unprincipled actions forced Uhlig's counsel to file a declaratory judgment action on a specialized issue of insurance law and litigate it to summary judgment. This has been a long and arduous case. To achieve the desired result for his client, Uhlig's counsel relied on the many lessons learned over his 35 years of practicing insurance and personal injury law in Montana.

The sixth *Plath* factor requires consideration of the attorney's character and standing in the profession. As stated in his affidavit, the undersigned has always been in good standing in the profession and has never been disciplined in all of his years practicing law, the vast majority of which has been spent advising and representing insurance companies and their insureds. The undersigned's character

has never been called into question in any matter before the State Bar of Montana, the Montana Supreme Court, any district court or any disciplinary authority.

The seventh *Plath* factor takes into account the results secured for the benefit of the client by the attorney's services. The district court granted all of the declaratory relief that Uhlig requested in her Second Amended Complaint.

This brings us to consideration of the second *Plath* factor. As this discussion shows, Allied did everything it could to increase and multiply the labor, time and trouble involved for Uhlig to pursue this case to resolution.

The case began as a garden-variety automobile injury claim involving clear liability, undisputed medical expenses, and straightforward general damages. Allied could have and should have settled Uhlig's personal injury claims within a few months after the accident of February 1, 2017. Had it done so, there would have been no need for Uhlig to retain an attorney or file this *Ridley* declaratory judgment action.

On December 8, 2017, Uhlig's counsel wrote to Allied and demanded settlement of Uhlig's injury claims. In case Allied should refuse the settlement demand, the letter reminded Allied of its duty under *Ridley* to make advance payment of Uhlig's undisputed medical expenses of $4,830. ROA 6, 4: ¶14; ROA 7, 4: ¶14.

In response to the letter, Marlee Miller emailed Uhlig's counsel on December 19, 2017. The email advised that Allied did not owe for Uhlig's medical expenses, and that only general damages would be considered in any settlement. ROA 6, 4: ¶15; ROA 7, 4: ¶15. This response by Allied triggered the filing of this declaratory judgment action.

It was our hope that the filing of the Complaint would trigger a call from Allied's counsel advising that a check was in the mail for Uhlig's medical expenses. But instead, as already discussed, Allied tried to leverage payment of Uhlig's medical expenses in exchange for dismissal of the suit, another violation of § 33-18-201(13).

Next Allied filed an Answer in which it denied the material, indisputable facts that Uhlig needed to prove to establish her case. Allied refused to admit that Uhlig was injured, that Uhlig incurred medical expenses[4], or the amount of such expenses. It denied its obligation to make advance-payment of Uhlig's medical expenses. Uhlig's counsel wrote to Allied's counsel on February 19, 2018, asking that Allied's Answer be amended to fairly respond to the factual allegations in the Complaint. Alternatively, the letter requested that Marlee Miller be made available

[4] Allied's denial that Uhlig "incurred" medical expenses is a position rejected by this Court in *Winter v. State Farm Mut. Auto. Ins. Co*., 2014 MT 168, ¶¶ 15-16, 375 Mont. 351, 328 P.3d 665, 670.

for deposition to establish the truth of the undisputed facts as alleged in Uhlig's Complaint. ROA 19, Ex. B.

Allied refused both requests. In an email dated February 21, 2018, Allied's counsel asserted he was "hard pressed to see any reason why there would be a legal basis to take [Miller's] deposition." ROA 19, Ex. D. Accordingly, Uhlig instead whittled away at the unreasonable denials in Allied's Answer by twice amending her Complaint, once in March, 2018 (ROA 6), and again in June, 2018. ROA 12.

This strategy worked. Allied's Answer to Uhlig's Second Amended Complaint, filed on June 28, 2018, gave Uhlig the admissions she needed to form the basis of her summary judgment motion. Once Allied answered her written discovery requests on July 2, 2018 (ROA 19, Ex. A), Uhlig had all the evidence she needed to proceed with the filing of her motion for summary judgment.

Two of Allied's discovery responses are relevant to the second *Plath* factor. These are Allied's Answer to Uhlig's Request For Admission No. 3 and its Answer to Uhlig's Interrogatory No. 7. Allied's responses to these discovery requests played a significant role in increasing the labor, time and trouble for Uhlig to vindicate her rights in this litigation. Request For Admission No. 3 asked Allied

to "[a]dmit that prior to the filing of this lawsuit, Defendant never offered to pay Plaintiff's medical expenses of $4,830."[5] Allied provided the following response:

> Denied. On June 20, 2017, Allied Property & Casualty Insurance Company, through its employee Marlee Miller, sent Plaintiff correspondence offering to pay all reasonable expenses for necessary medical services related to this accident incurred within one day [February 1, 2017] following the date of the accident, not to exceed a total of $8,000. A copy of said correspondence is attached hereto. ROA 37, p. 2.

Allied's Response to Request For Admission No. 3 fortified Uhlig's *Ridley* claim. The "correspondence" that Allied referenced in its Response to Request For Admission 3 and attached to its discovery responses (ROA 37), is actually a comprehensive release from liability form. The release offers to pay Uhlig's accident-related medical expenses incurred within one day following the date of the accident (up to a limit of $8,000), coupled with an offer to settle Uhlig's general damages claim for an additional sum of $2,000, in exchange for her full and final release of all claims against both Hildebrand and Allied.

At the time that Allied sent this release to Uhlig, it knew that its insured's liability for the accident was clear. Under these circumstances, simply offering to pay Uhlig's accident-related medical expenses, rather than actually paying them, is a violation of § 33-18-201(6). Worse yet, the release leverages Uhlig's undisputed

[5] This request for admission was designed to elicit the factual basis for the Fifth Affirmative Defense in Allied's Answer to Uhlig's Second Amended Complaint, which alleged that Allied offered to pay Uhlig's medical expenses before she filed this lawsuit. However, as already noted, offering to pay a sum that is clearly owed is not an affirmative defense against a *Ridley* claim for advance-payment.

medical expenses in an attempt to influence settlement of Uhlig's general damage claim in direct violation of § 33-18-201(13). Included with the release was a form letter from Miller to Uhlig dated June 20, 2017, which, without any explanation, gave the following misleading instruction to Uhlig: "to help us resolve this bodily injury claim as quickly as possible, please complete and return the enclosed form."

Interrogatory No. 7 asked Allied to identify each individual it intended to call as a witness at trial or evidentiary hearing, and to describe the relevant information known to each witness. Allied's Answer to Interrogatory No. 7 identified 34 witnesses, including 20 medical doctors even though there were no disputed facts regarding medical procedures or medical expenses. ROA 19, Ex. A., pp. 8-10. More importantly for the sake of our discussion, Marlee Miller was not identified in Allied's Answer to Interrogatory No. 7.

Uhlig filed her motion for summary judgment and supporting brief on July 19, 2018. ROA 14. Allied filed a cross-motion for summary judgment and a combined brief in support of its cross-motion and in opposition to Uhlig's motion. ROA 17, 18. Much to Uhlig's surprise, Allied supported these filings with a newly-created affidavit of Marlee Miller dated August 7, 2018. ROA 18, Ex. C. Allied did not offer Miller's affidavit to establish a material fact or to show the existence of a genuine issue of material fact, but to poison and clutter the record with untrue and immaterial statements. This tactic was clearly designed to increase

the labor, time and trouble for Uhlig to prevail in this litigation, and it achieved its desired result. In her affidavit Miller states that her correspondence of June 20, 2017 was not actually an offer, as Allied had asserted in its Response to Uhlig's Request For Admission No. 3, but confirmation of a verbal settlement agreement that Miller claims she reached with Uhlig over the telephone on June 20, 2017. ROA 18, Ex. C, ¶2.

All of the work that Uhlig had done in the case up to that point was focused solely on obtaining summary judgment. Miller's affidavit threatened to torpedo all of this by opening pandora's box to defeat the groundwork Uhlig had laid for summary judgment through careful pleading and discovery.

Uhlig spent time researching her legal options for resisting Miller's affidavit, most of which involved Hobson's choices for her next move. She considered filing a motion to strike the affidavit. She decided against taking that action for two reasons. A motion to strike would significantly increase the cost of the litigation and it would shift focus away from the merits of Uhlig's motion for summary judgment.

Uhlig also considered filing her own affidavit to correct Miller's false testimony that she had negotiated a verbal settlement of the claim with Uhlig in June, 2017. However, if Uhlig were to file her own affidavit disputing the allegation of a settlement, this would create an issue of fact. Not an issue of

material fact, but nevertheless a possible ground on which Uhlig feared the district court might deny her motion for summary judgment.

In the end Uhlig decided that she was entitled to prevail on the merits of her motion for summary judgment even if every single allegation in Miller's affidavit were taken to be true, as in a motion for judgment on the pleadings. She therefore elected not to file a motion to strike Miller's affidavit. Instead, her summary judgment reply brief asked the court to rule on the basis of the undisputed material facts, and not to consider the irrelevant and immaterial statements in Miller's affidavit. Allied's improper introduction of Miller's affidavit made it much more difficult to research and write the reply brief, most of which was devoted to arguing many (but by no means all) of the reasons why the affidavit was inadmissible and must be disregarded. ROA 19.

The district court granted Uhlig's motion for summary judgment without ruling on her objections to Allied's introduction of Miller's inadmissible affidavit. However, the court's discussion on page 4 of its ruling, including footnote 1, indicates that it did consider and give weight to Miller's affidavit, and that Uhlig's decision not to file a counter-affidavit caused concern for the court. ROA 25. After the court issued its order granting her motion for summary judgment, Uhlig filed a motion and brief to recover her attorney fees. ROA 28. She also supported the motion with her own affidavit (ROA 29) to correct the false testimony in

Miller's affidavit, and with the affidavit of her counsel (ROA 30) to establish the amount of her fees. Her supporting brief separately discussed each of the *Plath* factors. In a long opposing brief, Allied extensively cited and relied upon Miller's inadmissible affidavit testimony to completely mischaracterize the facts of the case and the *Plath* factors. ROA 33.

This forced Uhlig to file a motion to strike Miller's affidavit. Uhlig's supporting brief pointed out numerous rules that Allied had broken in filing the affidavit. ROA 36. Uhlig thereafter filed her reply brief in support of her motion for fees, arguing that Miller's inadmissible affidavit could not be considered in assessing the reasonableness of Uhlig's fees. ROA 38.

Disappointingly, the court denied Uhlig's motion to strike the Miller affidavit. ROA 43, 2:17-18. In a short one-paragraph ruling, the court instructed Uhlig to review the footnote on page 9 of its November 5, 2019 Order. The court then concluded:

> Additionally, a careful read of Uhlig's interrogatory on which the Motion is based only asks for identification of witnesses to be called at trial or in an evidentiary hearing. Allied introduced Miller's testimony in a summary judgment proceeding, which is neither trial nor an evidentiary hearing. Rule 56(f) provided the remedy for Uhlig to oppose Miller's affidavit when it was filed but in order to prevail on the cross-motions for summary judgment she did not seek to (sic) any relief then. The Court shall not grant any relief now.

ROA 43, 2:22-3:7. The footnote on page 9 of the court's November 5, 2019 Order (ROA 39) states in pertinent part that:

> Uhlig did not request relief under Rule 56(f) or Rule 37 in the summary judgment briefing period, which would have been an appropriate response for opposing that affidavit. Instead, as explained on page 12 of the Motion, Uhlig's counsel deliberately withheld testimony from his client out of concern it would lead to denial of his dispositive motion. While the Court need not rule that this sort of gamesmanship is illegitimate, it certainly hurts his appeal to fairness.

These quoted remarks by the district court demonstrate its misreading of the rules of civil procedure, leading to its abuse of discretion in denying the motion to strike Miller's affidavit. In both of the quoted excerpts the court refers to Rule 56(f) as providing a remedy for Uhlig to oppose Miller's affidavit. However, Rule 56(f) merely provides the remedy of a continuance when affidavits are unavailable. The Rule has no application here. The underlying assumption behind the court's ruling is that Uhlig was required to submit her affidavit during the summary judgment proceeding under Rule 56(f) or Rule 37. However, there is no such requirement in either rule.

Since Miller's affidavit contained only immaterial factual allegations and improper legal conclusions, the filing of a counter-affidavit by Uhlig during the summary judgment proceedings would have decreased the likelihood that Uhlig would prevail on her motion for summary judgment. While the district court views the decision not to immediately file a counter-affidavit as "withholding testimony" and "gamesmanship," we believe it is completely proper advocacy

under the rules to wait to do this until after the court has ruled on the parties' cross-motions for summary judgment.

The court abused its discretion in deciding that Allied was not required to identify Miller in its Answer to Uhlig's Interrogatory No. 3. Abuse of discretion is the standard of review for a district court's ruling on a discovery matter. *McKamey v. State,* 268 Mont. 137, 145, 885 P.2d 515, 520 (1994). Interrogatory No. 3 asked Allied to identify witnesses who would testify at trial or evidentiary hearing. The Court's reasoning that the question did not require Allied to identify Miller because her affidavit was used in a summary judgment proceeding and not a trial or evidentiary hearing makes little sense.

Time after time this Court has declared that "… the discovery rules are to be liberally construed to make *all relevant facts* available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage." *Cox v. Magers*, 2018 MT 21, ¶ 15, 390 Mont. 224, 229, 411 P.3d 1271, 1275. Parties have an obligation to fully respond to interrogatories under Rule 33. Id., ¶ 16. A summary judgment proceeding is an evidentiary-based proceeding. It was Uhlig's position in the district court, and it is her position in this appeal, that Allied's submission of Miller's affidavit without identifying her or her testimony in discovery was a blatant violation of the rules of discovery. Under Mont. R. Civ. P. 37(c)(1), the remedy for this violation is outright exclusion of Miller's affidavit.

Moreover, Rule 37 was not the only basis for Uhlig's objection to Miller's affidavit. Uhlig argued a host of other grounds, including that the affidavit introduced matters outside the pleadings, violated Mont. R. Civ. P. 56 (e)(1), and violated the rule of judicial admissions. This Court uses an abuse of discretion standard to review the district court's ruling on these evidentiary matters. *McClue v. Safeco Ins. Co. of Ill.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604.

The allegations in the affidavit concerning an alleged settlement were not made anywhere in any of Allied's three pleadings. Nor is there any reference to an alleged settlement in any of Allied's discovery responses, or in any of Allied's correspondence with Uhlig or her counsel. The pleadings play a key role in every stage of litigation. With regard to summary judgment, the function of the pleadings is "… to delimit the scope of the issues and frame the outer measures of materiality in a summary judgment proceeding." *Hutton v. Fidelity Nat. Title Co.*, 213 Cal.App. 4th 486, 493, 152 Cal. Rptr. 3d 584 (2013). Therefore, papers filed in opposition to a motion for summary judgment may not be used to create issues outside the pleadings. *Id*. Parties are prohibited from changing legal theories in such fashion, particularly after the filing of a summary judgment motion. *Peuse v. Malkuch*, 275 Mont. 221, 228, 911 P.2d 1153, 1157 (1996).

Mont. R. Civ. P. 56 (e)(1) requires affidavits to be "made on personal knowledge, set out facts that would be admissible in evidence, and show that the

affiant is competent to testify on the matters stated." In order to be admissible in evidence, the allegations of fact in Miller's affidavit must be relevant, either to Uhlig's claims or Allied's defenses. The allegations in Miller's affidavit concerning an alleged settlement do not satisfy this requirement. Just as concerning are the statements in paragraph 2 of Miller's affidavit that set forth inadmissible conclusions of law under Mont. R. Civ. P. 56 (e)(1).

The rule of judicial admissions prohibits a party from asserting a fact or position in a judicial proceeding and later asserting a contrary fact or position to the detriment of its opponent. A party who makes a judicial admission cannot later introduce evidence to contradict the admission. *Bilesky v. Shopko*, 2014 MT 300, ¶ 20, 377 Mont. 58, 338 P.3d 76; *Stevens v. Novartis Pharmaceuticals Corp.*, 2010 MT 282, ¶ 74, 358 Mont. 474, 247 P.3d 244. Judicial admissions prevent intentional self-contradictions from being used as a means of obtaining unfair advantage. *Bilesky,* ¶ 20. The rule of judicial admissions serves two purposes. One is to "… facilitate judicial efficiency and save the parties time, labor, and expense." *Id.* The second purpose of the rule is to "…protect the integrity of the judicial process by preventing parties from playing fast and loose with the facts to suit the exigencies of self-interest." *Id.*

In its discovery responses, dated July 2, 2018, Allied asserts that Miller's June 20, 2017 correspondence makes an offer. Miller's affidavit, dated a little

more than a month later and created to oppose Uhlig's motion for summary judgment, says something very different. Miller's affidavit does not say that her letter offers to pay Uhlig's medical expenses. Instead, Miller's affidavit says that her letter requests Uhlig "to sign and return a release to complete the settlement agreement we had negotiated." Allied gave the following explanation for offering Miller's contradictory affidavit into evidence: "As the case progressed and additional facts developed, it became clear that the letter was more than a settlement offer." ROA 33, p.18. This is litigation by ambush, it is completely wrong and unfair, and it is prohibited by the rule of judicial admissions.

Miller's affidavit also contradicts the very documentary evidence that it references. Miller claims that she made a verbal offer to Uhlig during a phone call on June 20, 2017, that Uhlig verbally accepted the offer, and that she "sent Uhlig a letter that same date requesting Uhlig to sign and return a release to complete the settlement agreement we had negotiated." But Miller's letter makes no mention of "the settlement agreement we had negotiated." It asks Uhlig to sign and return the release that was enclosed "to help us resolve this bodily injury claim as quickly as possible." Miller's letter says absolutely nothing about her telephone conversation with Uhlig on June 20, 2017, or about an offer that was allegedly communicated by Miller to Uhlig during the telephone conversation, or about an alleged acceptance that was communicated by Uhlig to Miller during the telephone

conversation, or about any alleged settlement agreement that was reached between the two of them.

Even Miller's claim that she offered "up to $8,000 for [Uhlig's] medical expenses" is disingenuous. The proposed release didn't say that. The release offered payment of "all reasonable expenses for necessary medical services related to this accident incurred within one day [February 1, 2017] following the day of the accident not to exceed $8,000 for any one person," which by that time Allied knew was a total of $4,830. In short, Allied offered to pay what it unconditionally owed to Uhlig only if she would agree to fully and finally release all claims against Allied and its insured.

After the district court granted her motion summary judgment, it became necessary for Uhlig to file her own affidavit to correct the distorted record created by Allied's improper introduction of Miller's affidavit. ROA 29. Uhlig therein testified that she did not agree to accept any settlement offer during her phone conversation with Miller. *Id*., ¶ 4. Nor did she negotiate a settlement of her claims against Allied during that conversation. *Id.*, ¶ 5. Miller's June 20, 2017 correspondence caused Uhlig to retain the undersigned attorney to understand her rights and to represent her in all further dealings with Allied. *Id.*

6. The District Court Erred In Denying The Motion To Strike Miller's Affidavit

As demonstrated in the previous section, the district court abused its discretion in denying Uhlig's motion to strike Marlee Miller's affidavit. Should this Court reverse the district court's decision on fees and remand with instructions to enter judgment for the full amount of her requested attorney fees, Uhlig would agree to waive consideration of the issues raised by the district court's denial of her motion to strike Miller's affidavit. However, should this Court reverse and remand for further proceedings in the district court, Uhlig requests the Court to remand with instructions to grant her motion to strike and to hold a hearing on fees to be awarded to Uhlig in bringing that motion.

VII. CONCLUSION

This Court should reverse the district court's decision on attorney's fees and remand with instructions to enter judgment in favor of Uhlig for the full amount of her requested attorney fees. Alternatively if the case is remanded for further proceedings on the amount of fees to be awarded to Uhlig, the Court should reverse the district court's denial of Uhlig's motion to strike the affidavit of Marlee Miller with instructions to grant the motion and to hold a hearing on fees to be awarded to Uhlig in bringing that motion.

Dated this 5th day of May, 2020.

/s/ Paul Sharkey

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count as calculated by Microsoft Word 2019 is 9,896 words, excluding Certificate of Service and Certificate of Compliance.

Dated this 5th day of May, 2020.

/s/ Paul Sharkey
Attorney for Plaintiff/Appellant Sharon Uhlig

CERTIFICATE OF SERVICE

I, Paul M. Sharkey, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-05-2020:

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