IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 20-0052

Gary & Carolyn Kaul,

Plaintiffs and Appellants,

v.

State Farm Mutual Automobile Insurance Company,

Defendant and Appellee.

On Appeal from the Fourth Judicial District Court, Missoula County
DV-18-830
The Honorable Shane A. Vannatta

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT REQUESTED

Appearances:

Lincoln Palmer
Rex Palmer
Attorneys Inc., P.C.
301 W. Spruce St.
Missoula, MT 59802
Telephone: 406-728-4514
Facsimile: 406-728-5601
Email: lpalmer@attorneysincpc.com
firm@attorneysincpc.com
Attorneys for Appellants the Kauls

Bradley J. Luck
Katelyn J. Hepburn
Garlington, Lohn, & Robinson, PLLP
350 Ryman Street, P.O. Box 7909
Missoula, MT 59807
Telephone: 406-523-2500
Facsimile: 406-523-2595
Email: bjluck@garlington.com
kjhepburn@garlington.com
Attorneys for Appellee State Farm

Appearances (cont.):

Domenic A. Cossi
Western Justice Associates, PLLC
303 W. Mendenhall, Suite 1
Bozeman, MT 59718
Telephone: 406-587-1900
Facsimile: 406-587-1901
Email: domenic@westernjusticelaw.com
Attorney for Amicus Curiae Montana Trial Lawyers Association

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STATEMENT OF THE CASE

Plaintiffs and Appellants the Kauls purchased a Recreational Vehicle Insurance Policy for their 5th Wheel RV from Defendant and Appellee State Farm. In early 2017 Gary Kaul unwittingly drove the RV under a tree branch, creating a 12-15 foot tear in the roof membrane above the RV wall. Later, rain entered the tear, flowing into and damaging the wall panel. The covered roof tear was the proximate cause of the wall damage.

State Farm paid for the roof membrane repair, but denied coverage for the wall repair and the expenses the Kauls incurred protecting the RV from additional damage caused by the covered roof tear. The Kauls filed suit to obtain coverage, and to address State Farm's wrongful claim handling practices.

The parties filed cross-motions for partial summary judgment as to the wall damage. State Farm prevailed on this issue. The Kauls also sought summary

judgment for their expenses incurred protecting the RV from further damage. They prevailed as to certain expenses. This Court granted Rule 54(b) certification. The Kauls now appeal the summary judgment rulings on the wall damage and their expense incurred protecting the RV from additional damage.

STATEMENT OF FACTS

Background

Gary Kaul taught elementary school for 30 years before retiring. App. p. 26-27, attach. 3, aff. Gary Kaul ¶ 1, Feb. 19, 2019. In 2013, the Kauls purchased a new Northwood Arctic Fox 5th Wheel RV ("RV") to enjoy during their retirement. *See* Opinion and Order (Summary Judgment) at 4, 1, June 19, 2019, DV-18-830 (app. attach. 1). It cost $54,445. Having insured various property with State Farm for the previous 45 years, the Kauls insured the RV with State Farm as well. App. p. 27, ¶ 2, attach. 3.

Roof Damage

On a 2017 trip to Arizona and back, the outside roof membrane was somehow torn. Order at 5. The tear went unnoticed by the Kauls. App. p. 27, ¶ 3-4, attach. 3. By every indication, Gary unwittingly drove under a tree branch which ripped a 12-15 foot long tear into the roof membrane along the edge of the roof directly above the passenger wall. Order at 5. The tear occurred between March 24, 2017, when Gary inspected the roof of the RV before leaving for Arizona, and

April 17, 2017, when they returned to Missoula. *Id.* Being on the roof, about 13 feet high, the tear was not visible from the ground. App. p. 27, ¶ 4, attach. 3. Consequently, the Kauls were unaware of the tear even after returning to Missoula. *Id.*

Wall Damage

No rain fell during the trip. Order at 4. Upon returning to Missoula the Kauls parked the RV, uncovered, at Dry Dock RV and Yacht Storage from April 18 to May 16. *Id*. Dry Dock is less than 3/4 of a mile from the Missoula International Airport ("MSO"). *Id*. at 2-4.

Weather data from the National Weather Service Station at MSO shows .08 inches of rain fell April 20, 2017. *Id.* at 4. National Weather Service data also shows that the .08 inches of rain fell in 34 minutes. App. p. 30, 32-33, attach. 4.

The roof tear created an opening for water to freely flow into. App. p. 35, attach. 5, aff. Curt Hurst ¶ 7, Mar. 6, 2019. Water entering the tear was funneled into numerous cavities and electrical channels where the wall meets the roof. *Id*.

Once water leaks into the wall, it cannot escape because the wall is watertight. *Id.* ¶ 8. The plywood within the wall gradually expands and bubbles as it soaks up rainwater. *Id.* The bubbling, a symptom of the wall damage, appears over time, but the damage is done as soon as water enters the wall. *Id.* ¶ 8-13.

Uncontested expert testimony establishes that as little as one gallon of water

in the wall requires removal and replacement of the wall panel. *Id.* ¶ 13. Thus, while it continued to rain off and on during April, May, and June, the additional rain had no effect on the nature of the damage or the need for or cost of the repair. *See id.*

Kauls Discover the Damage

Having no reason to suspect any problems, Gary and Carolyn took the RV to Glacier National Park on May 26-29, 2017. *See* Order at 4. During that trip, they noticed one bubble on the passenger wall. *Id*. Not sure what the bubble was or if it would go away, Gary decided to keep an eye on it. *Id.* On a June 22-24 trip to Coeur d'Alene Gary noticed more bubbling and concluded it was not going away. App. p. 27, ¶ 7, attach. 3. On June 24 or June 25, Gary ascended a ladder and discovered the 12-15 foot long roof membrane tear that was not visible from the ground. Order at 4-5.

Kauls Act to Prevent Additional Damage

The Policy expressly requires the Kauls to protect the RV from additional damage when a loss occurs. Order at 15. Here, Gary promptly called the manufacturer, Northwood, on Monday, June 26, when its service department opened after the weekend. App. p. 28, ¶ 9, attach. 3. The Service Department told Gary how to make a temporary repair. *Id.* That same day Gary sealed the tear as instructed. Order at 5.

He later reported the damage to State Farm. *Id.* Gary hauled the RV to the seller, Gardner's RV in Kalispell, and incurred expenses doing so. Order at 5, 17. Gardner's RV estimated $9,054.33 to fix the roof tear, but could not repair the wall damage. *Id.* at 5. Neither the Kauls nor State Farm could locate anyone to fix the RV wall in Montana, so the Kauls hauled the RV to Curt's RV Service in La Grande, Oregon, incurring further expenses. *Id.* at 5, 17.

When the Kauls arrived, the owner, Curt Hurst, found Gary's temporary repair to be watertight and secure, with no moisture directly under the seal. *Id.* at 5. Curt's RV charged only $5,474.79 to repair the roof, thereby saving State Farm $3,579.54 over the cost of Gardner's roof repair estimate. *Id.* at 6, 16. Without an in-person inspection, State Farm refused to cover the wall damage, even though the covered roof tear caused the wall damage. *See id.* at 5. The Kauls paid $10,669.84 out of pocket for Curt's RV to open up the damaged wall panel, permit drying, check for any residual water or moisture, and repair and replace the wall panel. *See id.* at 6, app. pp. 36-37, ¶ 14, attach. 5.

The Policy expressly requires State Farm to pay reasonable expenses incurred in protecting the RV from additional damage. Order at 15. On summary judgment, the Kauls prevailed in their request for $3,177 in mitigation expenses. This appeal raises the remaining issues of coverage for the RV wall repair.

STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3) (2019). Here, the material facts are undisputed.

This Court reviews summary judgment orders de novo. *Smith v. Farmers Union Mut.*, 2011 MT 216, ¶ 14, 361 Mont. 516, 260 P.3d 163.

The evidentiary issue here, regarding judicial notice of weather data, is also reviewed de novo. Excluding evidence from consideration on summary judgment "is not a discretionary function." *Id.* ¶ 15.

SUMMARY OF THE ARGUMENT

At issue is the $10,669 cost to repair the RV wall. Coverage is required under: 1) common law doctrine; 2) the policy's "sudden damage" clause; and 3) the policy's mitigation expense clause.

Efficient Proximate Cause

Montana's "efficient proximate cause doctrine" provides predictability to all manner of insurance coverage. The doctrine was established nearly 100 years ago in *Green* (1926). Specifically, after a covered loss, the doctrine mandates coverage of any subsequent loss proximately caused by the covered loss. This is true when

the subsequent loss is not itself covered or even when the subsequent loss is expressly excluded.

Here, State Farm concedes coverage of the roof tear. Likewise, State Farm does not deny, and the lower court found, that the roof tear proximately caused the wall damage. However, instead of applying the doctrine to the wall damage, the Order below creates an unprecedented exception to the doctrine. The court held the doctrine is inapplicable to policies in which the coverage language diverges from the coverage language in *Green*.

The exception actually swallows up the rule by finding no coverage for a subsequent loss unless that loss separately satisfies the policy's express coverage criteria. Courts around the country reject this approach and apply the efficient proximate cause doctrine to all manner of policies in the same way Montana has historically done.

"<u>Sudden Damage</u>"

The Policy expressly covers sudden damage. Uncontested expert testimony establishes sudden wall damage. As little as a gallon of water entering the wall immediately requires removal and replacement of the wall panel. Here, over two gallons of water entered the RV wall on April 20, 2017, in 34 minutes of rain. While the manifestations of the water damage appeared (via fiberglass bubbling) over time, the damage (entry of water requiring the wall to come off) occurred

suddenly, within 34 minutes of rain. This immediately impaired the RV's value.

The lower court finds the wall damage occurred over time rather than suddenly. First, it reaches this erroneous conclusion by taking judicial notice of *daily* weather data offered by State Farm, but rejecting more specific *incremental* weather data proffered by the Kauls. Not only are both sets of data sourced from government agencies, both sets are sourced directly from the Missoula International Airport government weather station. Notably, the incremental data confirms the daily data, simply revealing *when* the .08" of rain fell on April 20.

Second, the court wrongly interpreted "damage," a term State Farm declined to define in the Policy, in State Farm's favor and much more narrowly than the dictionary definition of damage. Applying a reasonable, common sense interpretation of "damage" as "loss of value" or "need to repair" to the Policy, the wall was "suddenly damaged" and thus covered. The need and the cost to repair the wall did not change after the 34 minutes of rain.

Kauls' Duty to Mitigate Damages

Under the caption "INSURED'S DUTIES" the Policy requires, "when there is a loss," the insureds must protect the RV from "additional damage." In turn, the Policy requires State Farm to pay for such mitigation. Uncontroverted expert testimony establishes that "once the roof tore" (a covered loss) "and allowed water entry, it was necessary to remove the wall panel and repair the wall panel in order

to check for moisture and to protect the RV from additional damage."

The Order below completely disregards this uncontroverted evidence. It also rewrites the Policy's mitigation provision by limiting compensable mitigation to protecting from additional "covered" damage. The Policy has no such limit. On its face the mitigation mandate encompasses protecting the RV from any "additional damage" following a covered loss. The Kauls protected the RV from additional damage after the covered roof tear by removing and repairing the wall panel, according to uncontested expert testimony.

ARGUMENT

Each of the Kaul's three arguments in favor of compensation stand independent of the other two. First, the efficient proximate cause doctrine requires coverage of the wall repair because the covered roof tear caused the wall damage. Next, when analyzed on its own merit, the wall sustained "sudden damage" and therefore satisfies the express grant of coverage. Finally, the Policy's mitigation provision mandates reimbursement for the wall removal and repair no matter the outcome of the coverage arguments.

I. Montana's "efficient proximate cause doctrine" mandates coverage.

Montana's "efficient proximate cause doctrine" applies here and mandates coverage of the wall repair because the covered roof tear proximately caused the wall damage.

The Supreme Court of the United States, speaking generally on the doctrine in 1877, stated:

> The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster.

Aetna Ins. Co. v. Boon, 95 U.S. 117, 130 (1877).

This doctrine is not complicated. When a covered loss proximately causes another loss, the insurer is liable for the ensuing loss as well. This is true if the subsequent loss is not covered or is even specifically excluded in the policy.

"[W]here a peril specifically insured against sets other causes into motion which, in an unbroken sequence, produce the result for which recovery is sought, the loss is covered, even though other events within the chain of causation are excluded from coverage." *Hiller v. Allstate Prop. and Cas. Ins. Co.*, 11-CV-0291-TOR, 2012 WL 2325603, at *5 (E.D. Wash. June 19, 2012). "An even more basic formulation of the rule is that a covered event which directly causes a non-covered loss will result in the loss being covered." *Id.*

When operating as intended, the doctrine provides predictability, reduces litigation, and fosters judicial economy; parties need not parse policy language and litigate whether a particular loss is covered on its own merit when it is clearly

proximately caused by a covered loss.

Here, the district court found there was a covered loss, the roof tear, and found that that covered loss was the efficient proximate cause of the second loss, the wall damage. Order at 15, 10-11.

The question on appeal here is whether Montana's efficient proximate cause doctrine is applicable to a physical damage insurance policy which requires the damage to be "sudden." Common law throughout the United States consistently applies the doctrine broadly, including to policies which use the word "sudden" in the grant of coverage.

A. *Green* establishes the doctrine in Montana and mandates coverage here.

Montana's longstanding efficient proximate cause doctrine mandates coverage where a covered loss proximately causes a subsequent loss.

"Insurer of a fire insurance policy containing an 'explosion' exemption, is liable for both the fire and explosion damage where the explosion is caused by a pre-existing fire 'since the fire is the proximate cause of the whole loss and the explosion is a mere incident.'" *Frontline Processing Corp. v. Am. Econ. Ins. Co.*, 2006, ¶ 30, 335 Mont. 192, 149 P.3d 906 (citing *Green*). This Court was describing *Green*, the 1926 case establishing the doctrine in Montana, though not in name. *Green v. Milwaukee Mechanics' Ins. Co.*, 77 Mont. 505, 252 P. 310,

(1926). *Green* explains that even in the face of an express *exclusion* of explosions, a fire insurance policy, as a matter of law, covers an explosion if it was proximately caused by a covered loss – i.e., a fire. *Id.* at 311.[1]

In *Green*, the loss allegedly caused by the covered loss was an excluded explosion. Here, State Farm contends the Policy does not cover the wall damage caused by the covered roof tear.

The District Court found "the roof damage was a covered loss . . ." and found "the water damage to the RV wall would not have happened but for the tear in the roof." Order at 15, 10-11. Neither finding has been appealed. These facts alone satisfy the efficient proximate cause doctrine. The District Court, however, proceeded to focus on the Policy's "sudden damage" requirement, finding that clause precludes application of the doctrine.

B. The efficient proximate cause doctrine applies broadly to a wide range of insurance policies, including those which use "sudden" in the grant of coverage.

The District Court found no coverage for the wall damage for one reason:

> the efficient proximate cause analysis is not appropriate when loss is defined in the Policy to include the combination of 'direct, sudden, and accidental damage.' To apply the analysis when loss is defined as direct, sudden, *and* accidental damage, would remove the requirement of sudden and accidental from consideration.

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[1] Ultimately, the Court found that the plaintiff could not prove a fire caused the explosion. *Id.* at 313.

Order at 11.

First, the court cited no authority supporting the reasoning that application of the doctrine would remove the sudden and accidental requirements from consideration. The reasoning falters because it fails to take into account that the "sudden" and "accidental" policy requirements were satisfied by virtue of the initial roof damage being "direct, sudden, and accidental," a covered loss. The doctrine only applies when the initial loss satisfies the coverage language in the Policy, as here by the covered roof tear.

The court further held the efficient proximate cause doctrine would only be applicable in cases which involve strictly the same policy language as *Green* - a grant of coverage using only the word "direct" - not in cases where the policies use the word "sudden." Order at 10. The court cited no authority for this conclusion.

"[An insurer's] contention that the efficient proximate cause doctrine is only applicable in cases involving the same policy language at issue in the cases that previously applied the doctrine is specious and unsupported by authority." *Kelly v. Farmers Ins. Co., Inc.*, 281 F. Supp. 2d 1290, 1297 (W.D. Okla. 2003). In *Kelly*, the insureds alleged that a covered loss, water entry into the wall of their home because of a broken pipe, proximately caused a later excluded loss, mold growth. *Id.* at 1295. The insureds argued the efficient proximate cause doctrine operates to

mandate coverage. *Id.*

The *Kelly* court considered prior applications of the doctrine. *Id.* at 1296. Farmers Insurance argued the doctrine was inapplicable because the policy language at issue differed from that of the policies in the two earlier Oklahoma cases (1946 and 1954) applying the doctrine. *Id.* at 1297. Unpersuaded, the court found "there can be little question that the efficient proximate cause doctrine, like all legal doctrines, is applicable in a variety of factual situations." *Id*. The court went on: "the efficient proximate cause doctrine has been described as 'the all but universal method used in the United States for resolving coverage issues involving the concurrence of covered and excluded perils.'"[2] *Id.* Concluding the analysis, the court noted "**the efficient proximate cause doctrine is not restricted in its application to cases involving specific policy language** . . . ." *Id*. at 1298 (bold added).

Courts throughout the United States not only apply the efficient proximate cause doctrine to a wide range of insurance policies ("all but universally") as stated in *Kelly*, they also apply the doctrine specifically to policies which require losses to be "sudden." In *Burgess*, the policy covered "sudden and accidental

[2] Again, note that in this case the wall damage is not even an excluded peril, merely one State Farm contends is not covered. The efficient proximate cause doctrine still applies when a covered loss proximately causes an arguably non-covered loss, rather than simply an excluded loss. *Hiller,* 2012 WL 2325603 at *5.

direct physical loss[es]." *Burgess v. Allstate Ins. Co.*, 334 F. Supp. 2d 1351, 1362 (N.D. Ga. 2003). The court found the efficient proximate cause doctrine applied to the policy, stating: "Far from being a novelty, this principle of determining causation in property loss cases is used in most jurisdictions." *Id.* at 1360-1364 (citation omitted). The court then found "[u]nder an efficient proximate cause analysis, therefore, the question becomes whether the water damage, a covered event, is the efficient proximate cause of the Plaintiff's loss even though the mold, an excluded event, contributed to the loss as well." *Id.* at 1361.[3]

Here State Farm argues, with the Policy covering "sudden damage," that while the initial loss was covered, the ensuing loss was gradual, thus the efficient proximate cause doctrine cannot apply. In *Burgess*, the covered loss was damage from sudden water intrusion. The subsequent loss was mold. Mold growth would generally be considered gradual, not sudden. Nonetheless, there the court applied the efficient proximate cause doctrine in the face of the policy's "sudden" requirement.

Here, the District Court cited no authority and provided no explanation why

[3] Many courts apply the doctrine where a policy requires "sudden" and "accidental" loss. *Johnson v. Allstate*, 845 F. Supp. 2d 1170, 1172-1173 (W.D. Wash. 2012) (the plaintiffs alleged a covered windstorm was the efficient proximate cause of a home collapse because the windstorm caused waves which carried logs that collapsed the house); *Babai v. Allstate*, C12-1518 JCC, 2013 WL 6564353, at *2-5 (W.D. Wash. Dec. 13, 2013); and *Murray v. State Farm*, 509 S.E.2d 1, 11-16 (W. Va. 1998) ("A majority of jurisdictions use the 'efficient proximate cause' doctrine in adjudicating coverage issues for all-risk insurance policies, where both a covered and a non-covered peril contribute to a loss.").

Montana should diverge from the widespread application of the efficient proximate cause doctrine to policies containing a "sudden damage" requirement.

Once the doctrine is applied to the instant facts, coverage is clear. Even State Farm does not dispute that a covered loss proximately caused the wall damage.

The Order below interprets Montana's efficient proximate cause doctrine so narrowly as to effectively abrogate it. This Court should not leave the important doctrine in its current crippled state. This Court should reject the District Court's restricted application and hold that the doctrine applies broadly, to a wide range of insurance policies, regardless of coverage language, as does the rest of the country.

II. 34 minutes of water entry into the RV wall constitutes "sudden damage" because the RV immediately lost value and required repair.

"[This Court] has repeatedly held that general rules of contract law apply to insurance policies and that we will construe those policies strictly against the insurer and in favor of the insured." *Steadele v. Colony Ins. Co.*, 2011 MT 208, ¶ 18, 361 Mont. 459, 260 P.3d 145.

Pursuant to the Policy, State Farm "will pay for *loss* to a *covered vehicle*." App. p. 22, attach. 2. "*Loss* means: 1. Direct, sudden, and accidental damage to . . . a *covered vehicle*." *Id.* If the Court reaches this coverage issue, it need not analyze

whether the damage was accidental or direct, because State Farm did not contest those two elements below. The only question on appeal, as to this issue, is whether the RV sustained any "sudden" "damage."

The Kauls submitted weather data showing that the .08" of rain on April 20 occurred in 34 minutes. In that 34 minutes, more than two gallons of rain entered the wall. 34 minutes of water entry is "sudden." The 34 minutes of "sudden" water entry, at a volume of more than two gallons, "suddenly damaged" the wall. As a result, the wall damage is a covered "loss" pursuant to the Policy and State Farm is liable for the cost of repair.

A. The district court erred by declining to take judicial notice of the Kauls' weather data while simultaneously taking judicial notice of State Farm's weather data.

Pursuant to Mont. R. Evid. 201(b): "A fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Mont. R. Evid. 803(8) states: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:" "Public records and reports." "[D]ata compilations . . . of a public office or agency setting forth its regularly conducted and regularly recorded activities . . . ." The Kauls' proffered weather data complies with both rules of evidence.

The National Oceanic and Atmospheric Administration ("NOAA") releases daily weather data. The National Weather Service ("NWS") releases more specific incremental weather data. NOAA is NWS' parent agency. The NWS releases its incremental weather data through a public university platform called MesoWest. State Farm submitted daily weather data sourced from NOAA. The Kauls merely sought to introduce more specific weather data - down to the minute. The Kauls' data was sourced from the NWS.[4] In this day and age, evidence not subject to reasonable dispute should not be rejected because the medium of introduction is a screenshot. The District Court erred here in five respects.

First, the Kauls did not object to the court taking judicial notice of State Farm's NOAA weather data, and the court did just that. Similarly, State Farm did not object to the court taking judicial notice of the Kauls' more specific NWS weather data. The court, however, excluded only the Kauls' data. Order at 8-9. The court erred by excluding evidence which State Farm does not contest or object to.

Second, as to State Farm's NOAA weather data sourced from the MSO NWS station, the court found it was "not subject to reasonable dispute and is generally known . . . ." *Id.* at 8. As to the Kauls' NWS weather data sourced from

[4] NOAA leaves release of incremental weather data to NWS. The NWS station at the Missoula International Airport directs inquiries for incremental precipitation data concerning April 20, 2017, to https://mesowest.utah.edu/cgi-bin/droman/meso_base_dyn.cgi?product=&past=1&stn=KMSO&unit=0&time=LOCAL&day1=20&month1=04&year1=2017&hour1=23.This link retrieves weather data sourced from the NWS' Missoula International Airport location, and is the website the Kauls proffered as evidence below.

the MSO NWS station, the court reasoned that "[w]eather data is not generally known . . . ." *Id.* at 9.

Third, both State Farm's weather data and the Kauls' weather data are sourced from the Missoula International Airport NWS Weather Station.[5] The Kauls' incremental NWS data is confirmed by, and confirms, State Farm's NOAA data. State Farms' data shows .08 inches of rain fell on April 20, 2017. App. p. 40, attach. 7. The Kauls' data shows .08 inches of rain fell on April 20, 2017. App. p. 30-33, attach. 4; *see* footnote 8 herein. The only difference is that the Kauls' data shows exactly when the rain fell during the day.

Fourth, the court concluded "Meso West is not a public office or agency." Order at 9. In fact, MesoWest was started and is currently run by the University of Utah's Department of Atmospheric Sciences (a public university), and it is currently "funded primarily by the National Weather Service . . . ." MesoWest, MesoWest Main Help, https://mesowest.utah.edu/html/help/main_index.html, (last visited Apr. 2, 2020). More importantly, Mont. R. Evid. 803(8) allows "public records and reports," and MesoWest provides the public with the National Weather Service's public records. "MesoWest services . . . are used operationally by the National Weather Service to monitor weather conditions around the country

[5] The Kauls' data: under "Station Info" - "NAME: Missoula International Airport." App. p. 30, attach. 4. State Farm's data: "Station: MISSOULA INTERNATIONAL AIRPORT, MT US." App. p. 40, attach. 7.

in order to protect lives and property. They are used extensively by researchers . . . Meso West is also available to the educational community for use in the classroom." *Id.* Weather.gov, the NWS / NOAA website states: "Meteorological data from over 2800 automated environmental monitoring stations in the western United States are collected, processed, archived, integrated, and disseminated as part of the MesoWest program." MesoWest Frequently Asked Questions, weather.gov, https://www.weather.gov/wrh/wrh_mesowest_faq (last visited April 2, 2020).

Finally, the court stated "the motion lacks foundation connecting the data to the National Weather Service." Order at 9. On the contrary, the Kauls' briefing below pointed out that the data was sourced from the National Weather Service. In fact, two sentences earlier, the court states "[t]he web page further identifies that the data is courtesy of the National Weather Service." *Id.*

No good reason exists to accept State Farm's NOAA daily weather data while rejecting the Kauls' more specific NWS incremental weather data, which itself confirms the NOAA data. The Kauls' NWS weather data is exactly the type of evidence to which the judicial notice rule is meant to apply. The NWS data provided to the public by MesoWest "cannot reasonably be questioned."[6] Likely

[6] *See Gruenbaum.* The defendant in *Gruenbaum* sought to exclude an expert who relied on MesoWest, weather data collected from nine different airports, hourly weather data, NWS forecasts, and other data sources. The court denied the motion, finding the expert's testimony was "based upon

this explains why State Farm did not question or object to it.

State Farm does not contest the MesoWest NWS data, and did not ask that it be excluded. The district court erred by excluding this evidence.

B. Conservatively, more than two gallons of rain entered the RV wall on April 20.

The Kauls parked the RV at Dry Dock RV on April 18, 2017. On April 20, NWS incremental weather data provided by the NWS station at the Missoula Airport less than a mile from Dry Dock RV shows .08 inches of rain fell in 34 minutes.[7]

Curt Hurst of Curt's RV Service explains: "As the roof is 8.5 feet wide and slopes away from the peak in the middle, rain that fell on the roof above the length of the tear would have drained into the tear. The area of the roof draining into the tear would have been a rectangle about 4.25 feet by 12-15 feet." App. p. 35, ¶ 6, attach. 5.

Based on Curt Hurst's explanation and simple math, a conservative

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'sufficient facts or data.'" *Gruenbaum v. Werner Enterprises, Inc.*, 09-CV-1041, 2011 WL 445508, at *5 (S.D. Ohio Feb. 2, 2011).

[7] The precipitation records from the Missoula International Airport National Weather Service weather station report the cumulative rain each hour, and reset around the :54 minute mark of each hour. On April 20, measurable rain began at 4:31 P.M. .06 inches accumulated by 4:53 P.M. After resetting to 0, another .02 inches accumulated by 5:05 P.M. Therefore, .08 inches of measurable rain occurred on April 20, in 34 minutes. App. pp. 30-33, attach. 4.

estimation is that 2.54 gallons of water entered the roof tear on April 20, 2017.[8] Those calculations were performed using a 12 foot tear. If the tear was actually 15 feet long, then over 3 gallons of water entered the roof tear on April 20.

C. 34 minutes of water entry is "sudden damage" because immediately upon entry, the wall required repair and lost its value.

34 minutes of rain is "sudden" under Montana law. When "damage" is defined not in the light most favorable to the insurer, but as a reasonable insured would define the term, the rain caused "sudden damage" to the RV.

i. The "sudden" requirement is met because the damage occurred during 34 minutes of water entry.

In the Policy at issue, State Farm's contract of adhesion, State Farm could have defined "sudden," but chose not to.

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[8] The tear is approximately 12-15 feet long. Order at 5. The RV roof is 8.5 ft wide, and sloped away from the middle. App. p. 35, ¶ 6, attach 5. .08 inches of rain fell on a rectangle that is 4.25 ft wide and, conservatively 12 feet long, an area of 51 sq. ft. This means that 2.54 gallons of rain ran into the tear above the wall on April 20, 2017.

Calculations:

Volume = Length X Width X Height

12 ft. long X 4.25 ft. wide X .08 in.	In other words: (area of roof rectangle) x (rainfall in 34 minutes on Apr. 20)
Divide .08 by 12	(Converts in. to ft.)
12 ft. X 4.25 ft. X .00666667 ft. = .34 ft^3	(Volume of rain that fell on the 51 sq. ft. roof rectangle)
7.48 gallons per 1 ft^3	(1 cubic foot of water = 7.48 US gallons of water)

7.48 X .34 = 2.54 gallons of rain that fell on the roof rectangle and ran into the tear.

Four or five weeks of smoke discharge and accumulation from burning candles is not "sudden damage." *Sokoloski v. Am. W. Ins. Co.*, 1999 MT 93, ¶ 16, 294 Mont. 210, 980 P.2d 1043. In *Sokoloski*, the Montana Supreme Court held that where homeowners burned candles for four or five weeks and "were aware the candles were releasing smoke and soot," the smoke damage was not "sudden" under the insurance policy's exception to the pollution exclusion. *Id.* The Court held that "sudden" can be "seconds, minutes, and might be stretched to hours, but not weeks." *Id.*; *see also Travelers Cas. and Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶ 37, 326 Mont. 174, 108 P.3d 469, 478 (Three years of intentionally dumping chemicals is not "sudden.").

Therefore, according to this Court in *Sokoloski* and *Ribi*, if the RV sustained any damage in seconds, minutes, or hours, but not weeks or years, State Farm is liable to pay for such damage, as it would be "sudden." The Court did not address "days" and thus left that period of time up in the air.[9]

Contrast *Sokoloski* and the instant case. In *Sokoloski*, the smoke emission continued for four to five weeks. Likewise, here, the off and on spring rain continued for more than five weeks. The cases differ because in *Sokoloski* the

[9] Even if this Court declines to take judicial notice of the National Weather Service data, State Farm's NOAA data shows the .08 inches fell in one day or less. One day of rain is sufficiently "sudden;" many courts have found "sudden" cannot mean a period of weeks, concluding "sudden" can mean any time period up to 13 days, but no more.

smoke damage only occurred on account of the cumulative smoke emission over many weeks. If the Sokoloski's had stopped burning their candles after the first 34 minutes, no lasting smoke damage would have occurred. Here, once a gallon or more of water entered the RV wall, the damage was immediately done; the wall had to be repaired. The continuing rain did not "damage" the RV wall any more, as the continuing smoke emission in *Sokoloski* did.

Since the 34 minutes of rain is sufficiently "sudden," the only remaining question is whether there was sudden "damage" to the wall on April 20, 2017.

ii. The "damage" *is* the water entry.

Curt Hurst explains that "[g]iven the tear in the Kaul's roof and the fact that no water could escape once it entered the wall, as little as one gallon of water entering the tear and flowing to the entry points would have caused the bubbles I saw and required the repairs I undertook . . . ." App. p. 36, ¶ 13, attach. 5. That is because "[o]nce water leaks into such areas it has no way to escape; it soaks into the thin wood plywood-like (luan) layer which is sandwiched between the waterproof fiberglass exterior layer and the waterproof foam core." *Id.* at ¶ 8.

Mr. Hurst goes on to explain that the symptoms of the damage, the bubbles, manifest over time. "The bubbles do not appear instantly." *Id.* "It could take weeks for bubbles to appear." *Id.* However, the bubbling is simply the symptom of the water entry. The expansion and bubbling itself is not necessarily sudden, but as

Mr. Hurst explains, once a gallon of water enters the wall, the wall must be repaired; the damage is done immediately. The value of the RV is impaired in that instant.

The District Court reasoned "[w]hile Hurt [*sic*] also states that the wall panel would need to be removed after water entry because the water cannot escape [], this does not mean there would be damage to the wall when the water first entered the wall cavities." Order at 14.The entire issue of whether the wall damage is a "covered loss," on its own, comes down to this flawed conclusion.

The District Court found that even though the wall required removal after the first short rain, under the court's narrow definition of "damage" (apparently meaning only the gradually expanding luan layer and resulting bubbling of the fiberglass), the damage occurred over time.

There are two problems with the court's approach. First, State Farm chose not to define "damage" in its Policy. When the District Court found "damage" means, as to the wall, only the slow expansion of the luan and fiberglass, the court interpreted the word "damage" heavily in favor of State Farm, and against the insureds. Such a narrow interpretation of an undefined Policy term in favor of the insurer is contrary to Montana common law.

"When a court reviews an insurance policy, it is bound to interpret its terms according to their usual, common sense meaning as viewed from the perspective

of a reasonable consumer of insurance products." *Steadele*, ¶ 18.

Dictionary.com defines "damage" as "injury or harm that reduces value or usefulness." Merriam-Webster defines "damage" as "loss or harm resulting from injury to [] property . . . ." Lexico.com defines "damage" as "[p]hysical harm caused to something in such a way as to impair its value, usefulness, or normal function."[10] *See also Christ Church v. Guideone Mutual*, 2:19-11208, 2019 WL 6134793, at *2 (E.D. Mich. Nov. 19, 2019) ("The dictionary definition of 'damage' is: 'physical harm caused to something in such a way as to impair its value, usefulness, or normal function.'").

The undisputed material facts are that even one gallon of water entry requires removal of the wall. Here, more than two gallons of rain entered the roof tear during the first short rain the RV was exposed to on April 20. The "value" of the RV was unquestionably suddenly "impaired" and "reduced" because at 4:31 P.M. on April 20, the wall required $0 of repairs, and 34 minutes later it required over $10,000 of repairs.

The court erred here by adopting State Farm's remarkably narrow definition that "damage" can only mean slow bubbling, when the "common sense meaning"

[10] Dictionary.com, damage, https://www.dictionary.com/browse/damage?s=t (last visited Apr. 17, 2020); Merrian-Websert.com, damage, https://www.merriam-webster.com/dictionary/damage (last visited Apr. 17, 2020); Lexico.com, damage, https://www.lexico.com/en/definition/damage (last visited Apr. 17, 2020).

of "damage" is much broader – that the value of the RV was impaired when the wall cavities were filled with water.

The second problem with the District Court's reasoning is that it is incongruous with the ways other courts have parsed the difference between "sudden" and "gradual" damage. The court agreed with State Farm's argument that

> . . . water undisputedly continued to infiltrate the tear for at least another two months, maybe longer, before Plaintiffs located and attempted to seal the tear. This simply is not a 'sudden' occurrence by any stretch of the imagination.

Def's. Reply in Support of Cross-Mtn. for Summ. Judg. at 3. This argument – that because the wall was exposed to water for an extended period of time there can be no sudden damage – diverges substantially from persuasive common law.

In *Whitely*, "[t]he undisputed fact that the property was exposed to water for more than fourteen days did not establish that the loss occurred on the fourteenth or later day of exposure . . . ." *Whitely v. Am. Integrity Ins.*, 249 So. 3d 1312, 1314 (Fla. 5th Dist. App. 2018).

In *Hicks*, the homeowner policy excluded "constant or repeated seepage or leakage of water . . . over a period of 14 or more days." *Hicks v. Am. Integrity Ins.*, 241 So. 3d 925, 926 (Fla. 5th Dist. App. 2018). Hicks' water supply line to his refrigerator leaked "almost one thousand gallons a day" for "five weeks or more."

Id. Hicks' expert "calculate[d] the amount of damage to Hicks' home within the first thirteen days of the leak." *Id.* at 927. The court found coverage for damage occurring within the first 13 days. *Id.* at 928.

The uncontested evidence here readily allows determination of the "sudden damage" issue. The only expert testifies that an accumulation of one gallon of water in the wall necessitates repairs. That accumulation occurred in 34 minutes – "sudden damage" by definition.

Curt Hurst's affidavit is the only expert evidence. Accordingly, statements therein, made "to a reasonable degree of RV repair certainty," are uncontested and must be taken as fact. Critically, State Farm *itself* characterizes Curt Hurst's testimony as **"an expert affidavit which asserts that the full extent of the damage likely occurred instantly upon the water entering the wall."** Def's. Reply in Support of Cross-Mtn. for Summ. Judg. at 4-5 (bold added). State Farm could not be more accurate in its description of Mr. Hurst's testimony.

State Farm's recognition of the meaning of the uncontested expert testimony is the end of the matter.

According to the above analysis, the "sudden damage" clause requires: a "loss of value" within seconds, minutes, hours, and maybe days. This Court should find that within 34 minutes the RV lost value, in the amount it would cost to repair the wall, thereby sustaining "direct, sudden, and accidental damage" covered

under the Policy.

III. The wall repair is covered as a mitigation expense because the only expert testifies it was necessary to protect the RV from additional damage.

This final issue concerns mitigation duty and mitigation expense. This issue stands independent of the foregoing coverage arguments.

"[C]ourts have permitted an insured to recover mitigation expenses from an insurer providing first party property coverage, based on either an insured's common law duty to mitigate damages or an insured's contractual duty to mitigate damages." *Chang v. Brethren Mutal*, 897 A.2d 854, 862 (Md. Spec. App. 2006).

Here, the Policy contains a mitigation clause which creates reciprocal obligations for the Kauls and State Farm. At policy page 26, Section 5 of the "INSURED'S DUTIES," it states: "When there is a loss, you [] must: a. protect the ***covered vehicle*** from additional damage. ***We*** will pay any reasonable expense incurred to do so that is reported to us . . . ." (Emphasis in original). App. p. 24, attach 2.

"[This Court] has repeatedly held that general rules of contract law apply to insurance policies and that we will construe those policies strictly against the insurer and in favor of the insured." *Steadele*, ¶ 18 (citations omitted).

The Kauls reported all expenses to State Farm,[11] so this coverage question

[11] App. p. 39, attach. 6, Fourth aff. of Kaul ¶ 3, July 17, 2019.

becomes a simple two-step process: 1) Is there a "loss" to the RV under the Policy? and 2) Did the insureds incur reasonable expenses protecting the RV from additional damage?

As to the wall repair, both elements are satisfied. First, there is a loss that triggers Section 5. The District Court held the roof tear was a loss that triggers this provision - at least as to the Kauls' other mitigation activities, like travel. Order at 15. Moreover, State Farm concedes the roof tear is a "loss." Therefore, State Farm must reimburse the Kauls any reasonable expense incurred protecting the RV from additional damage, after this loss.

Second, the only expert in this case explains it was "necessary" for the Kauls to remove and repair the wall panel "to protect the RV from additional damage." App. pp. 36-37, ¶ 14, attach 5.

In summary, after the roof tear loss, the Kauls protected the RV from additional damage by removal and replacement of outer wall panel. The Policy requires the Kauls' mitigation efforts and, in turn, requires State Farm to pay.

A. The roof tear is a loss that triggers Section 5 coverage.

The Order below correctly held: "Because the roof damage was a covered loss, State Farm must pay any reasonable expense Kaul incurred to protect the RV from additional damage that Kaul reported to them." Order at 15. The Kauls incurred reasonable expenses to protect the RV from additional damage in several

instances.

First, the Kauls sealed the roof with a temporary seal, as directed by the RV manufacturer. The Kauls also hauled the RV to Kalispell for a repair estimate. The Kauls then hauled the RV to La Grande, Oregon for repairs. Later, the Kauls drove back to Oregon to pick the RV up. After the Court held the travel and temporary repair expenses were reasonable and incurred to protect the RV from additional damage, State Farm tendered payment of $3,177 as compensation under Section 5.

The District Court properly concluded that Section 5 is triggered for mitigation expenses. The only remaining issue is whether removing and replacing the wall panel is a "reasonable expense" incurred "to protect the covered vehicle from additional damage."

In *Chang*, the court compared the case before them to a separate case with a mitigation clause with no reimbursement language. 897 A.2d at 863. The court went on to say:

> by contrast, in our case, in a first party coverage context, with an express mitigation expense provision, it is undisputed that a covered loss had already occurred. The measures taken by appellants were to prevent further loss. The question here is whether snow removal costs were mitigation expenses within the meaning of the property coverage form . . . .

Id. Here, as in *Chang*, "it is undisputed that a covered loss had already occurred," and that "measures taken by appellants were to prevent further loss." *Chang*

presents a question of whether "snow removal was necessary and effective in preventing further loss." In contrast, there is no question here as to whether the wall removal and repair was necessary. App. pp. 36-37, ¶ 14, attach. 5. The record contains only one uncontested expert opinion on the topic. *See id.*

B. No evidence contradicts Curt Hurst's expert testimony that the wall repair was a "necessary" expense required "to protect the RV from additional damage."

Curt Hurst testifies: "Once the roof tore and allowed water entry, it was necessary to remove the wall panel and repair the wall panel in order to check for moisture and to protect the RV from additional damage." *Id.* ¶ 14. Mr. Hurst owns the Oregon RV facility which repaired the wall and had the expertise required to make the wall repair, which the Montana dealer lacked.

The only evidence of record establishes that once the roof tore (the "loss" that triggers Section 5 mitigation coverage), allowing water entry, the Policy mandate to protect the RV from additional damage requires removal and replacement of the wall panel. Thus the Kauls did precisely what the Policy requires.

Mr. Hurst's affidavit links the roof tear, admittedly a loss, to the actions the Kauls took to protect the RV from further damage. While water entry through the tear instantly damages the wall, because of the loss of value, it also inevitably damages other RV components over time as the wood layer expands, molds, and

rots. Checking for moisture, removing the moisture, and checking all the internal components requires removing the wall panel which cannot be reused.

In the face of Mr. Hurst's statement that the wall repair was necessary to protect the RV from additional damage, State Farm asserts only this: "[w]hether the steps taken by Plaintiffs to protect the RV from additional damage were reasonable, sufficient, or successful is in dispute." Order at 16; Def.'s Br. Supporting Cross-Mtn. at 20. The district court found State Farm's one sentence denial (as to the Kauls' other mitigation expenses, at least) insufficient. It held "State Farm has not proven, by more than mere denial, that a genuine issue of material fact exists."Order at 17. State Farm did not cross-appeal on that issue.

The uncontested evidence is that the wall removal and repair was necessary to protect the RV from additional damage. Therefore, the expenses incurred in this process were "reasonable" and are covered under the mitigation clause.

C. The district court erred when it declined to apply Section 5 to the wall repair by reasoning the wall "is not a covered loss." The court's rationale is inconsistent and rejects the actual Policy language.

"[W]hen the language of a policy is clear and explicit, the policy should be enforced as written." *Steadele*, ¶ 19.

The District Court and State Farm make two mistakes in addressing this topic. State Farm asserts that "if this Court finds no coverage for the wall damage

then there is no need to analyze whether payments are necessary under the 'additional damage' provision." Def.'s Reply Br. Supporting Cross-Mtn. at 12.

The court spent only one sentence in its eighteen-page Order addressing this issue: "The Court finds that the costs directly related to the costs to repair the RV wall because of water infiltration cannot now be recovered under this provision for the same reasoning set forth above; it is not a covered loss." Order at 15. The lower court errs by inserting the word "covered" where it does not exist in the Policy as written. By this reasoning, after the roof tear the Kauls had a duty to protect the RV only from additional "covered" damage. The provision at issue, however, is unambiguous, clear, and explicit.

The Policy - a contract of adhesion - imposes this duty: "[w]hen there is a *loss,*" the Kauls must "[p]rotect the covered vehicle from additional damage." Not merely "additional *covered* damage." State Farm could have drafted the sentence to read "additional *covered* damage," but it chose not to. State Farm saw a benefit by requiring mitigation of any additional damage, not the narrower "additional covered damage." Here, State Farm and the court simply inserted an entirely new word into the contract when the contract was unambiguous as written.

The second problem with the court's reasoning is that it held the wall removal and repair was not covered under Section 5 because it was not itself a "covered loss" - to wit - the wall repair was not covered elsewhere in the policy.

Order at15. This makes no sense. Section 5 is meaningless if it only grants coverage of expenses covered elsewhere in the Policy.

In addition, the ruling is inconsistent with the court's treatment of travel expenses and temporary repair expenses. The court correctly found coverage of both types of expenses under Section 5 yet neither are covered elsewhere in the Policy. Neither travel nor temporary repairs are a "covered loss," yet the court correctly found that because they were incurred protecting the RV from additional damage, they must be reimbursed pursuant to Section 5. The court did not explain why the travel and repair expenses are covered under Section 5, yet the wall panel removal and repair is not covered under Section 5, when neither (according to the court) are a "covered loss" elsewhere in the Policy.

The court's single-sentence reason for denying the Kauls' argument on this issue fails because Section 5 clearly operates to mandate coverage for expenses incurred to protect the RV, where those expenses are not covered elsewhere in the Policy.

D. The Policy *requires* the Kauls to protect the RV by removing and replacing the wall panel. Not doing so would constitute breach of contract by failure to mitigate damages.

The first words of the Policy, written on the cover page, are: "Please read the policy carefully. If there is an accident . . . (See 'INSURED'S DUTIES' in this policy booklet.)." App. p. 19, attach 2.

A contract provision requiring the insured to complete certain mitigation duties after a loss is not optional, and non-compliance is a breach of the contract. *Shifrin v. Liberty Mut. Ins.*, 592 Fed. Appx. 512, 515 (7th Cir. 2014). In *Shifrin*, a tornado damaged the roof of the insured's house. *Id*. at 514. Water damage occurred after the tornado when the insureds failed to re-roof the house. *Id.* The Seventh Circuit held that where the policy required the insureds to "protect the property from further damage," the insureds "breached their policy by not repairing their roof after the tornado." *Id.* at 515.

State Farm aggressively employs its mitigation provisions against customers. For example, in *Merrick*, an insured sought compensation for damage resulting from Hurricane Katrina. *Merrick* v. *State Farm Fire and Cas. Co.*, CIV A 07-7798, 2008 WL 4586498, at *1 (E.D. La. Oct. 14, 2008). State Farm denied liability for all damages "caused by failure to mitigate." *Id*. at *4.

Here, State Farm's claim handling notes reveal it considered denying coverage if it could find a way to claim the Kauls' failed to mitigate. App. p. 42, attach. 8 ("there may be an issue of mitigation of damages," ". . . question of damage if it would be a covered loss due to non mitigation of damage"). In fact, at one point State Farm told Gary Kaul there was no coverage because the wall damage was not "accidental" damage, claiming without proof that improper maintenance must be the cause. *Id.* p. 41.

State Farm later backed away from that argument. Still, it shows State Farm pursued every possible avenue, on first-party coverage no less, when attempting to shift its own liability onto the backs of its premium-paying insureds.

State Farm wants to cherry pick when to use the mitigation provision of its insurance policies. This Court should not allow State Farm to selectively apply Section 5 to its advantage, but disclaim applicability after an expert explains the wall repair was necessary to protect the RV from additional damage.

The Kauls were obligated to protect the RV from additional damage by the water infiltration. Repairing the wall was the only way to comply with that contractual duty. The cost, $10,669, is thus a covered expense.

CONCLUSION

Even if the Court rules in favor of the Kauls on the efficient proximate cause argument, the Kauls seek a ruling on all three arguments because the other two are not moot. Rulings on all of the Kauls' theories of liability will impact any future bad faith litigation at the district court level on the issue of State Farm's alleged unfair claims settlement practices as to the RV wall coverage.

This Court should first hold: 1) that the efficient proximate cause doctrine is still good law in Montana; 2) that it applies broadly to insurance policies - including those which require the damage or loss to be "sudden;" and 3) applied here, the doctrine entitles the Kauls to summary judgment because their covered

RV roof tear loss proximately caused the wall damage.

Next, the Court should hold that the wall damage is a covered loss because, when "damage" is defined as a reasonable insured would expect, two-plus gallons of water entering a watertight RV wall in 34 minutes, immediately requiring repair, constitutes "sudden damage."

Finally, the Court should hold that, based on Mr. Hurst's uncontested testimony, the Policy's Section 5 mitigation clause requires the Kauls to remove and repair the RV wall to protect the RV from additional damage, and requires State Farm to pay for the removal and repair.

The Kauls seek reversal of the district court's order on all three coverage arguments. This Court should order the District Court to enter summary judgment for the Kauls.

DATED this 6th day of May, 2020.

ATTORNEYS INC., P.C.

By: /s/ Lincoln Palmer
Lincoln Palmer

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that Appellants' Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted and indented material, headings, the Statement of the Issues, the Table of Contents, and the Table of Authorities; and the word count calculated by WordPerfect is 9,150 words, excluding certificate of service, certificate of compliance, title page, Table of Contents, and Table of Authorities.

CERTIFICATE OF SERVICE

I, Lincoln Palmer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-06-2020:

Rexford L. Palmer (Attorney)
301 W Spruce
Missoula MT 59802
Representing: Carolyn Kaul, Gary Kaul
Service Method: eService

Bradley J. Luck (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: State Farm Mutual Automobile Insurance Company
Service Method: eService

Katelyn Jennifer Hepburn (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: State Farm Mutual Automobile Insurance Company
Service Method: eService

Domenic Cossi (Attorney)
303 W. Mendenhall, Ste. 1
Bozeman MT 59715
Representing: Montana Trial Lawyers Association
Service Method: eService

Electronically Signed By: Lincoln Palmer
Dated: 05-06-2020