IN THE SUPREME COURT OF THE STATE OF MONTANA

SUPREME COURT CAUSE NO. DA 20-0464

JOSEPH RICHARD GOSS,

Plaintiff/Appellant,

v.

USAA CASUALTY INSURANCE COMPANY, and DOES A-D, Inclusive,

Defendant/Appellee.

APPELLANT JOSEPH GOSS' OPENING BRIEF

On appeal from the Montana Eighth Judicial District, in and for the County of Cascade, Cause No. DDV-18-0038; Honorable Gregory R. Todd

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Attorneys for Plaintiff/Appellant:

Keith D. Marr
CONNER, MARR & PINSKI, PLLP
P. O. Box 3028
Great Falls, MT 59403-3028
Telephone: (406) 727-3550
Facsimile: (406) 727-1640
Email: keith@mttrials.com

Attorneys for Defendant/Appellee:

Dave M. McLean
McLEAN & ASSOCIATES, PLLC
3301 Great Northern Ave., Suite 203
Missoula, MT 59808
Telephone: (406) 541-4440
Facsimile: (406) 540-4425
Email: dave@mcleanlawmt.com

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Does USAA's owned automobile exclusion, which precludes its named insured from recovering personal and portable underinsured motorist and medical payments coverages, violate Montana public policy?

STATEMENT OF THE CASE

The dispositive coverage question is whether Plaintiff/Appellant Joseph Richard Goss can trigger underinsured motorist and medical payments coverage under the automobile policy he purchased from USAA Casualty Insurance Company ("USAA"). At the time of the subject collision, Goss paid premiums to insure three vehicles with USAA—a Chevrolet Caprice, a Chevrolet Silverado 2500, and a Ford Taurus. However, at the time of the collision, Goss was driving a motorcycle that he owned but did not insure with USAA. See Order Granting Defendant USAA's Motion for Summary Judgment, App. A.

After the collision, Goss recovered the full liability limit from Defendant Diann Stevens' liability insurer. Goss then submitted claims for underinsured motorist coverage and medical payments coverage to USAA. USAA initially accepted coverage for Goss' claims. Approximately two years after accepting Goss' claims, USAA reversed its coverage determination and denied underinsured motorist and medical payments benefits. USAA's about face was premised on an exclusion in the policy that rejects coverage when an insured suffers bodily injury while

occupying a motor vehicle the insured owns but does not insure with USAA. App. A.

Following USAA's denial of coverage, Goss sued USAA and Stevens on January 19, 2018. Goss alleged breach of contract and declaratory relief claims against USAA. Judge John Parker was assigned to the case. On September 10, 2018, USAA filed a motion for summary judgment on the coverage issues. USAA then petitioned this Court for a writ of supervisory control regarding a discovery issue on March 5, 2019. See OP 19-0139. This Court denied USAA's Petition and lifted the stay of proceedings on April 23, 2019. Goss then took the requested Rule 30(b)(6), M.R.Civ.P., deposition of a USAA corporate representative. Goss filed his motion for summary judgment on November 22, 2019.

On July 21, 2020, Judge Parker recused himself from the case. Judge Gregory Todd accepted jurisdiction over the case on July 27, 2020. On August 31, 2020, Judge Todd issued his Order Granting Defendant USAA's Motion for Summary Judgment. See App. A. On September 21, 2020, Goss filed a Rule 41 Stipulation to Dismiss Defendant Diann Stevens, signed by all parties. Goss filed his Notice of Appeal from the District Court's summary judgment order on September 22, 2020.

STATEMENT OF THE FACTS

On May 21, 2015, Goss was lawfully driving his 2002 Yamaha V Star motorcycle on 10th Avenue South in Great Falls, Montana. App. A, p. 2. At the

same time, Defendant Diann Stevens was driving in the opposite direction on 10th Avenue South in her Pontiac Torrent. App. A, p. 2. As Goss and Stevens approached the intersection of 10th Avenue South and 30th Street South, Stevens made a left turn on 30th Street South in front of Goss' motorcycle. App. A, p. 2. Goss had the right of way and was unable to avoid a collision. App. A, p. 2. His motorcycle struck the right front portion of Stevens' vehicle, causing permanent injuries and damages. App. A, p. 2. Law enforcement cited Stevens for failing to yield to hazardous traffic when making a left turn. App. A, p. 2.

At the time of the collision, Goss insured four vehicles with USAA. App. A, p. 2. Goss paid for underinsured motorist and medical payments coverages on three of the four vehicles. The motorcycle involved in the collision was not listed as a covered vehicle under the USAA Policy. App. A, p. 2.

After Stevens' automobile liability insurer paid its liability limit to Goss, Goss submitted a claim to USAA for underinsured motor benefits. App. A, p. 2. USAA initially accepted coverage under Goss' underinsured motorist coverage and advanced $25,000 in benefits. App. A, p. 2. USAA later reconsidered its coverage determination and denied underinsured motorist benefits under Goss' policy. App. A, p. 2.

The underinsured motorist coverage portion of the USAA policy provides:

> We will pay compensatory damages which a covered person is legally entitled to recover from the owner or operator of an underinsured motor

> vehicle because of [bodily injury] sustained by a covered person and caused by an auto accident.

App. A, p. 3. An "underinsured motor vehicle" means "a land motor vehicle or trailer of any type to which a liability bond or policy applies at the time of the accident but the amount paid for [bodily injury] under that bond or policy to a covered person is not enough to pay the full amount the covered person is legally entitled to recover as damages." Plaintiff's Statement of Undisputed Material Facts, App. B, ¶ 10. There is no dispute that Goss is a covered person under the USAA policy and the collision and damages at issue were caused by Stevens, the owner or operator of an underinsured motor vehicle. App. B, ¶ 11.

However, in reversing its initial acceptance of coverage, USAA claimed Goss' underinsured motorist coverage did not apply because he was operating a vehicle he owned but did not insure through USAA. USAA relied on Exclusion B for this proposition:

> We do not provide [underinsured motorist] Coverage for [bodily injury] sustained by any covered person while occupying, or when struck by, any motor vehicle owned by you or any family member which is not insured for [underinsured motorist coverage] under this policy.

App. B, ¶ 13.

As for the medical payments coverage, the policy provides USAA:

> [W]ill pay only the reasonable fee for medically necessary and appropriate medical services and the reasonable expense for funeral services because of [bodily injury] caused by an auto accident,

sustained by a covered person and incurred for services rendered within three years of the date of the accident.

App. A, p. 2. A "covered person" under the medical payments coverage means:

1. You or any family member while occupying your covered auto.
2. Any other person while occupying your covered auto.
3. You or any family member while occupying any of the following vehicles if they are not your covered auto:
    a. A private passenger auto or trailer;
    b. A moving truck or moving van, but only for your personal use while in the custody of or being operated by you or a family member; or
    c. a miscellaneous vehicle having at least four wheels.

App. A, p. 3. Finally, the medical payments coverage contains the following exclusion:

We do not provide benefits under this Part for any covered person for [bodily injury]:

1. Sustained while occupying any vehicle that is not your covered auto unless that vehicle is:
    a. A four or six wheel land motor vehicle designed for use on public roads with a rated load capacity of no more than 2000 pounds;
    b. A moving van for personal use;
    c. A miscellaneous vehicle having at least four wheels; or
    d. A vehicle used in the business of farming or ranching.

App. A, p. 3.

Goss filed this lawsuit on January 19, 2018. With respect to USAA, Goss sought a declaratory judgment that coverage exists under the underinsured motorist and medical payments portions of the USAA Policy. Goss further asserted a breach of contract claim against USAA. App. B, ¶ 8.

The parties ultimately filed cross motions for summary judgment. On August 31, 2020, the District Court granted USAA's motion for summary judgment and denied Goss' motion for summary judgment. App. A, p. 11. On September 21, 2020, Goss filed a Rule 41 stipulation, signed by counsel for all parties, dismissing Stevens. Rule 41 Stipulation to Dismiss Defendant Diann Stevens, App. C. This appeal followed.

STANDARD OF REVIEW

This Court reviews summary judgment rulings *de novo*. *Wendell v. State Farm Mut. Auto. Ins. Co.,* 1999 MT 17, ¶ 9, 293 Mont. 140, 974 P.2d 623. The interpretation of an insurance policy implicates questions of law. *Allstate Ins. Co. v. Wagner-Ellsworth*, 2008 MT 240, ¶ 8, 344 Mont. 445, 188 P.3d 1042. This Court reviews a district court's conclusions of law to determine whether the conclusions are correct. *Allstate Ins. Co.*, ¶ 7.

SUMMARY OF THE ARGUMENT

Goss, the named insured under the USAA automobile policy, paid valuable consideration to USAA for underinsured motorist and medical payments coverages. This Court has held that underinsured motorist and medical payments coverages are personal and portable. That means the coverages follow insured persons, not insured vehicles. As such, named insureds who pay premiums for these personal and portable coverages can recover these benefits whether they are "injured in an owned

vehicle named in the policy, **in an owned vehicle not named in the policy**, in an unowned vehicle, **on a motorcycle**, on a bicycle, whether afoot or on horseback or even on a pogo stick." *Jacobson v. Implement Dealers Mut. Ins. Co.*, 196 Mont. 542, 547-48, 640 P.2d 908, 912 (1982) (emphasis added).

Goss suffered permanent and disabling injuries in the collision in May 2015. He insured several vehicles with USAA at the time of the collision. He paid separate premiums to USAA for underinsured motorist and medical payments coverages. Consistent with Montana's personal and portable case law, Goss filed a claim with USAA for underinsured motorist and medical payments benefits. After initially accepting coverage, USAA now rejects coverage pursuant to an owned automobile exclusion. Because Goss owned the motorcycle, but did not insure it with USAA, USAA now denies Goss' claim for underinsured motorist and medical payments benefits.

This Court has not considered the owned automobile exclusion under the facts presented. However, this Court has repeatedly affirmed that (1) personal and portable coverages travel with the named insured and do not depend on the insured occupying a vehicle named in the policy and (2) an insurer may not place in an insurance policy a provision that defeats coverage for which it has received valuable consideration. It makes no difference whether a coverage inquiry like this implicates mandatory insurance coverage (liability and uninsured motorist coverage) or

optional insurance coverage (underinsured motorist and medical payments coverage).

This Court has carved out two narrow exceptions to the foregoing rules. First, a person must qualify as an insured under the policy to trigger the benefits of personal and portable coverages. Second, to avoid collusive claims among family members, this Court has upheld family member exclusions which except vehicles "owned by or furnished for the regular use of you or any family member" from the definition of an underinsured motor vehicle. Aside from these two narrowly tailored circumstances, this Court has steadfastly rejected limitations on personal and portable coverages.

The two unique exceptions to coverage do not apply here. Goss is the named insured under the USAA policy who paid premiums for the personal and portable coverages. Goss did not suffer the collision-related injuries at the hands of a family member or vehicle owned by a family member. As such, Goss' personal and portable underinsured motorist and medical payments coverages traveled with him on the day of the collision. Application of USAA's owned automobile exclusion to deny Goss the personal and portable coverages he purchased violates Montana public policy. The exclusion is, therefore, unenforceable.

ARGUMENT

I. Does USAA's owned automobile exclusion, which precludes its named insured from recovering personal and portable underinsured motorist and medical payments coverages, violate Montana public policy?

This Court has long recognized underinsured motorist and medical payments coverages as personal and portable to the named insured. This case contemplates whether an automobile insurer can unilaterally alter the fundamental nature of these personal and portable coverages, despite receiving valuable consideration for the coverages from the named insured. The District Court's summary judgment ruling upends the bedrock principles of personal and portable coverages and Montana's public policy considerations underlying the same. This Court should reverse the District Court's ruling and hold that USAA's owned automobile exclusion is unenforceable under the facts presented.

Insurance provisions are unenforceable if they violate Montana public policy or contravene good morals. *Fisher ex rel. McCartney v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 208, ¶ 25, 371 Mont. 147, 305 P.3d 861. As a general rule, the Legislature prescribes Montana's public policy through statutory enactment. *Fisher ex rel. McCartney*, ¶ 25. However, this Court has also voided insurance provisions as against public policy when they undermine judicially recognized doctrines. *Fisher ex rel. McCartney*, ¶ 33. In particular, the Court has voided provisions that

render coverage illusory by defeating coverage for which the insurer has received valuable consideration. *Fisher ex rel. McCartney*, ¶ 33.

With the foregoing as a backdrop, this Court has routinely enforced two fundamental principles in the field of automobile insurance:

- An insurer may not place in an insurance policy a provision that defeats coverage for which it has received valuable consideration (*Bennett v. State Farm Mut. Auto. Ins. Co.*, 261 Mont. 386, 389, 862 P.2d 1146, 1148 (1993)); and

- Underinsured motorist coverage and medical payments coverage are, by definition, personal and portable—i.e., coverage does not depend on the named insured occupying an insured vehicle. (*Hardy v. Progressive Specialty Ins. Co.*, 2003 MT 85, ¶¶ 40, 44, 315 Mont. 107, 67 P.3d 892; *Bennett*, 261 Mont. at 389, 862 P.2d at 1148; *Farmers Alliance Mut. Ins. Co. v. Holeman*, 1998 MT 155, 289 Mont. 312, 961 P.2d 114).

This appeal pits these elemental tenets, and their public policy underpinnings, against insurance policy exclusions which undermine the essence of first party, portable coverage. This Court should reverse the District Court and find the exclusions unenforceable as a matter of law.

A. USAA Received Valuable Consideration

Goss paid USAA valuable consideration for personal and portable underinsured motorist and medical payments coverages. Applying the exclusion USAA advocates would strip Goss of the insurance coverages he purchased and reasonably expected.

Unlike cases which trigger coverage for nonparties to an insurance contract, Goss is the named insured under the USAA policy. App. B, ¶ 18. Goss paid premiums to USAA for the underinsured motorist and medical payments coverages. App. B, ¶ 19. He paid three separate underinsured motorist and medical payments premiums for three automobiles listed on the USAA Policy. App. B, ¶ 20. The USAA Policy provides up to $300,000.00 in underinsured motorist coverage and $5,000 in medical payments coverage for each vehicle. App. B, ¶ 21 (see also App. B, p. 69). So, according to USAA, if Goss was hurt by an underinsured motorist while driving one of the vehicles identified in the USAA Policy, Goss would be entitled to stack his coverage, and recover up to $900,000.00 in underinsured motorist coverage, even though he did not occupy two of the three vehicles at the time of the collision. App. B, ¶ 22. Similarly, Goss is entitled to stack his medical payments coverage for up to $15,000 in medical payments benefits.

USAA does not dispute that Goss paid valuable consideration for the underinsured motorist and medical payments coverages. Yet, the exclusions at issue defeat coverage despite USAA's receipt of the valuable consideration. This runs afoul of the personal and portable nature of underinsured motorist and medical payments coverages.

B. Personal and Portable Insurance Coverage

This case involves injuries to a named insured who paid valuable consideration to USAA for underinsured motorist and medical payments coverage. In this context—injury to a named insured—this Court has rejected vehicle occupancy as the barometer for recovering underinsured motorist and medical payments benefits.

Over forty years ago, this Court considered whether uninsured motorist coverage is tied to an insured vehicle or an insured person. In *Chaffee v. United States Fidelity and Guar. Co.*, 181 Mont. 1, 591 P.2d 1102 (1979), Chaffee insured three vehicles with USF&G. Chaffee paid separate premiums for uninsured motorist coverage on each of his vehicles. Chaffee's son, also considered an insured under the policy, ultimately died in an automobile accident. The son did not occupy one of Chaffee's insured automobiles at the time of the accident. USF&G conceded that it owed one of the uninsured limits but denied that it had to pay the limit on the second and third vehicles. It raised a variation of the argument USAA asserts—the insured could not recover the uninsured motorist coverage on the second and third vehicles under the policy because he did not occupy them at the time of the crash.

This Court rejected the occupancy notion, concluding:

> The concept of uninsured motorist coverage although issued with the liability policy is not dependent on insured's negligence or that the insured occupy a vehicle named in the insured's policy to recover for the insured loss. An attempted reduction of coverage of this kind

> simply takes the heart out of the policy and erodes the coverage to a point of no value . . . .

Chaffee, 181 Mont. at 6, 591 P.2d at 1104. The Court agreed with the Washington Supreme Court that "[u]ninsured motorist coverage is not dependent on the insured occupying a vehicle named in the policy." Rather, uninsured motorist coverage protects and travels with the insured, not the vehicle. *Chaffee*, 181 Mont. at 7, 591 P.2d at 1105.

Three years later, this Court revisited the personal and portable nature of uninsured motorist coverage in the face of the same exclusion at issue here. In *Jacobson*, Harlan died in a motor vehicle accident while driving a tractor-trailer unit. Harlan had uninsured motorist coverage on a 1971 Ford pickup truck which he owned. However, the Ford truck was not involved in the accident. When Harlan's personal representative made a claim for the uninsured motorist coverage on the Ford truck, the insurer denied the claim. The insurer denied coverage based on an exclusion which said the policy did not apply to bodily injury to an insured while occupying an automobile owned by the named insured, other than an insured automobile. *Jacobson*, 196 Mont. at 543-44, 640 P.2d at 909-10. This is the same exclusion at issue in this case.

This Court held that the exclusion violated Montana public policy:

> There is no requirement that the insured be occupying an insured vehicle. Therefore, there is no connection between the insured and the automobile listed on the policy. The named automobile merely

> illustrates that the person has satisfied the legal requirement of purchasing insurance and has uninsured motorist coverage unless expressly waived. Montana's uninsured motorist coverage is personal and portable. This point was exemplified by the court in *Bradley v. Mid-Century Ins. Co.*, (1980), 409 Mich. 1, 294 N.W.2d 141, when it held:
>
> > "We conclude that once uninsured motorist coverage is purchased, the insured and his relatives insured for liability have uninsured motorist protection under all circumstances. Uninsured motorist coverage, like no-fault coverage, is personal and portable.
> >
> > "…They are insured when injured in an owned vehicle named in the policy, **in an owned vehicle not named in the policy**, in an unowned vehicle, **on a motorcycle**, on a bicycle, whether afoot or on horseback or even on a pogo stick."

Jacobsen, 196 Mont. at 547-48, 640 P.2d at 912 (emphasis added).

Chaffee and *Jacobson* involved uninsured motorist coverage, not underinsured motorist coverage. However, this Court extended the same personal and portable logic to the underinsured motorist coverage paradigm in *Bennett*.

Therein, Bennett was a pedestrian who was hit by a truck while crossing the street. Bennett recovered the full liability limit from the tortfeasor's insurer. At the time of the incident, Bennett had underinsured motorist coverage on two separate State Farm policies. State Farm paid one of the limits but refused to pay the second limit. This Court began its analysis by noting Montana's public policy "that an insurer may not place in an insurance policy a provision that defeats coverage for which the insurer has received valuable consideration." *Bennett*, 261 Mont. at 389,

862 P.2d at 1148. State Farm argued that this public policy principle applied solely to uninsured motorist coverage because of the statutory requirement that insurers offer that coverage to all insureds. Because no such statutory requirement exists regarding underinsured motorist coverage, State Farm argued the above public policy consideration did not apply. This Court rejected State Farm's attempted distinction:

> The purpose of underinsured motorist coverage is to provide a source of indemnification for accident victims when the tortfeasor does not provide adequate indemnification. The public policy expressed in *Braun*, and in the earlier cases cited above, favors adequate compensation for accident victims. The absence of a statutory requirement is irrelevant, for the public policy considerations that invalidate contractual "anti-stacking" provisions in an uninsured motorist endorsement also support invalidating those provisions in an underinsured motorist endorsement.

Bennett, 261 Mont. at 389, 862 P.2d at 1148; see also *Hardy*, ¶ 21.

In *Bennett*, the policy provided that State Farm would "pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle." *Bennett*, 261 Mont. at 389, 862 P.2d at 1148. This Court held that "[t]his statement makes underinsured motorist coverage personal to the insured; **coverage does not depend on the insured person occupying an insured vehicle.**" *Bennett*, 261 Mont. at 389, 862 P.2d at 1148 (emphasis added). Accordingly, the Court held that, when Montanans purchase separate policies for underinsured motorist coverage, they will receive adequate compensation for losses

caused by an underinsured motorist up to the limits of the policies they have purchased. *Bennett*, 261 Mont. at 390, 862 P.2d at 1149.

Ten years after *Bennett*, this Court reaffirmed that "[underinsured motorist] coverage, by definition, is personal and portable." *Hardy*, ¶¶ 40, 44.[1] Therein, the Court found that "Progressive's anti-stacking provision destroys the personal and portable nature of [underinsured motorist] coverage by completely relieving Progressive of the obligation to pay damages to the insured." *Hardy*, ¶ 44. The Court invalidated the provision which permitted the insurer to reject coverage for which it received valuable consideration. *Hardy*, ¶ 42.

In *Mitchell v. State Farm Ins. Co.*, 2003 MT 102, ¶ 31, 315 Mont. 281, 68 P.3d 703, this Court again noted that "Montana public policy considerations that favor adequate compensation for accident victims apply to underinsured motorist coverage." Further, "Montana law recognizes that an insurance consumer reasonably expects that underinsured motorist coverage will provide *additional* coverage when the insured's damages exceed what is available from the tortfeasor." *Mitchell*, ¶ 31. *Mitchell* invalidated the limiting contract provision at issue because it "violated the consumer's reasonable expectation that underinsured motorist coverage was personal and portable." *Mitchell*, ¶ 42.

[1] This Court has also held that medical payments coverage is personal and portable. *Farmers Alliance Mut. Ins. Co. v. Holeman*, 1998 MT 155, 289 Mont. 312, 961 P.2d 114.

C. Application of Montana Public Policy

The foregoing distills to three fundamental principles: (1) underinsured motorist and medical payments coverages are personal and portable—i.e., they travel with the insured and do not depend on the insured occupying a vehicle named in the policy; (2) an insurer may not place in an insurance policy a provision that defeats coverage for which it has received valuable consideration; and (3) named insureds reasonably expect that personal and portable coverage they purchase will provide an additional layer of insurance coverage. This case fits squarely within the foregoing principles, rendering USAA's exclusions void and unenforceable as against public policy.

In *Bennett*, the underinsured motorist policy provided that State Farm would "pay damages for bodily injury an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle." *Bennett*, 261 Mont. at 389, 862 P.2d at 1148. This Court held that "[t]his statement makes underinsured motorist coverage personal to the insured; **coverage does not depend on the insured person occupying an insured vehicle.**" *Bennett*, 261 Mont. at 389, 862 P.2d at 1148 (emphasis added).

The USAA Policy contains the exact same coverage language as that in *Bennett*. The USAA Policy states, "[w]e will pay compensatory damages which a covered person is legally entitled to recover from the owner or operator of an

underinsured motor vehicle because of [bodily injury] sustained by a covered person and caused by an auto accident." App. B, ¶ 14. Accordingly, under *Bennett*, Goss' underinsured motorist coverage with USAA is personal and portable as a matter of law.

Further, Goss has satisfied all of the coverage predicates under the coverage provision. USAA designated Nichole Bloodworth to testify on its behalf under Rule 30(b)(6), M.R.Civ.P. Bloodworth testified that: "We" in the foregoing coverage provision refers to USAA; Goss constitutes a "covered person" under the provision; Goss suffered bodily injury in the collision as a result of Stevens' operation of an underinsured motor vehicle; and the collision constitutes an "auto accident" under the provision. App. B, ¶ 15.

Bloodworth testified that, when placing insurance coverage with insureds, USAA trains its employees to explain that underinsured motorist coverage applies when someone causes harm to the insured and, yet, the at-fault party's insurance limit is insufficient to cover the harms. App. B, ¶ 16. Yet, despite *Bennett* and the message USAA conveys to its insureds about underinsured motorist coverage, USAA claims the owned automobile exclusion precludes Goss from triggering the personal and portable underinsured motorist coverage he purchased.

The exclusion USAA relies on provides:

> We do not provide [underinsured motorist] Coverage for [bodily injury] sustained by any covered person while occupying, or when struck by,

> any motor vehicle owned by you or any family member which is not insured for [underinsured motorist coverage] under this policy.

App. B, ¶ 13. USAA argues Goss cannot trigger his underinsured motorist coverage for the subject collision because he owned but did not insure the motorcycle with USAA. This purported exclusion would, therefore, tie the underinsured motorist coverage to the vehicles rather than the named insured. Such a proposition runs afoul of the foregoing caselaw and USAA's concession that underinsured motorist coverage is personal and portable.

USAA concedes that underinsured motorist coverage exists to protect insureds against harms caused by the wrongful conduct of third parties. App. B, ¶ 17. There is no dispute that Goss is the named insured under the USAA Policy. App. B, ¶ 18. Goss paid premiums to USAA for the underinsured motorist coverage. App. B, ¶ 19. He paid three separate underinsured motorist coverage premiums for three automobiles listed on the USAA Policy. App. B, 20. The USAA Policy provides up to $300,000.00 in underinsured motorist coverage for each vehicle. App. B, ¶ 21. So, according to USAA, if Goss was hurt by an underinsured motorist while driving one of the vehicles identified in the USAA Policy, Goss would be entitled to stack his coverage, and recover up to $900,000.00 in underinsured motorist coverage, even though he did not occupy two of the three vehicles:

> Q: So under the hypothetical that we've described, [Goss] being involved in an accident caused by an underinsured motorist in one of the vehicles listed under the policy, [Goss] would be

entitled to up to $900,000.00 of [underinsured motorist] coverage, right?

A: Yes.

Q: And that's because the single limit under his policy for [underinsured motorist] coverage is $300,000.00, right?

A: Yes.

Q: And he has paid premiums for three separate $300,000.00 limits, correct?

A: That's correct.

Q: And that's the notion of stacking that we've talked about?

A: Yes.

Q: Now, in that scenario, an insured like [Goss] obviously can occupy only one of these listed vehicles at a time, right?

A: Yes.

Q: And so if he was driving the Chevy pickup under the hypothetical, he couldn't possibly occupy the Chevy Caprice or the Ford Taurus at that time, right?

A: That makes sense, yes.

Q: But even though [Goss] can only occupy one vehicle at a time, he's going to be entitled under the policy to all three [underinsured motorist coverage] limits, regardless of whether he was in the other two vehicles or not, correct?

A: That's correct.

App. B, ¶ 22. The reason for this is that underinsured motorist coverage is personal and portable. And, under this personal and portable notion, USAA admits there are

scenarios under the USAA Policy where underinsured motorist coverage would apply to Goss even if he is not occupying any of the listed vehicles. App. B, ¶ 23.

USAA admits Goss would have been entitled to underinsured motorist coverage in the collision at issue if:

- He was driving a motorcycle owned by a non-family member;
- He was a passenger on a motorcycle owned by a non-family member;
- He was driving a vehicle he did not own, provided the vehicle was not owned by another family member;
- He was occupying a vehicle he did not own as a passenger, provided the vehicle was not owned by another family member;
- He was test-driving a vehicle owned by an automobile dealer;
- He was driving a 4-wheeler owned by a non-family member;
- He was riding a bicycle, tricycle, unicycle, or skateboard;
- He was riding a horse or camel;
- He was a pedestrian on foot;
- He was on roller skates; and
- He was hopping down 10th Avenue South on a pogo stick.

App. B, ¶ 24. USAA concedes Goss could trigger underinsured motorist coverage under the USAA Policy in all of the forgoing scenarios even though he would not have been occupying any of the listed vehicles during the collision. App. B, ¶ 25. Even though none of the listed vehicles would have been involved under the above

scenarios, Goss would have been entitled to stack all three underinsured motorist coverage limits for a total available underinsured motorist coverage of $900,000.00. App. B, ¶ 26. USAA acknowledges Goss could trigger underinsured motorist coverage under all of the above scenarios because of the personal and portable nature of the coverage. App. B, ¶ 27. And, knowing that underinsured motorist coverage is personal and portable, USAA accepted premiums from Goss. App. B, ¶ 28.

USAA agrees the collision was not Goss' fault. App. B, ¶ 29. Rather, the actions of a third-party in this case triggered USAA's potential risk on Goss' claim. App. B, ¶ 30. USAA agrees Goss did nothing to increase the risk to USAA of paying on the underinsured motorist claim. App. B, ¶ 31. That is the fundamental premise upon which underinsured motorist coverage exists—to protect insureds against harms caused by the wrongful conduct of third parties. App. B, ¶ 32.

Permitting Goss to recover underinsured motorist and medical payments benefits if Goss was driving someone else's motorcycle but forbidding Goss the same coverage for driving his own motorcycle makes no sense under Montana's personal and portable coverage jurisprudence. To arbitrarily deny coverage to a named insured because of vehicle occupancy contravenes the very essence of the personal and portable coverages at issue.

Upon receiving notice of the incident, USAA obtained the police report, talked to witnesses, talked to Goss, determined Goss did not contribute to the

collision in any way, analyzed its policy and coverages in light of the facts, and assessed Goss' injuries. App. B, ¶ 33. USAA learned that Goss was operating a motorcycle in the collision shortly after the collision occurred. App. B, ¶ 34. USAA knew that Goss owned the motorcycle. App. B, ¶ 35. USAA assigned a bodily injury adjuster to Goss' claim who had been with the company for many years handling complex claims. App. B, ¶ 36. USAA had trained this adjuster on how to investigate underinsured motorist claims. App. B, ¶ 37. The adjuster had underinsured motorist coverage training materials available to her as she adjusted Goss' claim for underinsured motorist benefits. App. B, ¶ 38. She had experience, the USAA Policy, in-house electronic resources regarding coverage determinations, and senior-level USAA employees and managers at her disposal to assist in making a coverage determination in Goss' case. App. B, ¶ 39. Armed with the facts, the USAA Policy, and all of the coverage analysis resources, the adjuster initially assigned to Goss' claim accepted coverage under the underinsured motorist portion of the USAA Policy. App. B, ¶ 40.

Because of the severity of Goss' injuries, USAA then transferred the claim to a more senior adjuster. App. B, ¶ 41. This adjuster held the highest injury adjuster position with USAA when she assumed control over Goss' claim. App. B, ¶ 42. She had all of the above resources at her disposal, and even more experience to draw upon than the initial adjuster, in examining Goss' claim. App. B, ¶ 43. This senior

adjuster concurred with and followed the initial coverage determination. App. B, ¶ 44. Accordingly, within three weeks of the collision, USAA advanced Goss $25,000.00 in underinsured motorist coverage. App. B, ¶ 45. This was an initial advance and the parties anticipated further resolution under the underinsured motorist coverage as Goss' treatment and recovery progressed. This further fueled Goss' reasonable expectation of coverage and peace of mind.

Goss and USAA proceeded under the acceptance of coverage determination for over two years following the collision. App. B, ¶ 46. For more than two years, USAA assured Goss it would cover his excess damages under his underinsured motorist coverage. App. B, ¶ 47. Then, out of the blue, Goss received a letter from USAA dated June 3, 2017. App. B, ¶ 48. From the date of the collision (May 21, 2015), until June 3, 2017, the facts surrounding the collision never changed. App. B, ¶ 49. And the USAA Policy provisions that applied to Goss' claim never changed. App. B, ¶ 50. Nevertheless, for the first time in the life of the claim, on June 3, 2017, USAA reversed course and now denies coverage for Goss' claims. App. B, ¶ 51.

"[A]n insured claimant has a reasonable expectation to recover up to the limits for which the insurer receives separate premiums when the coverage is personal to the insured." *U.S. Specialty Ins. Co. v. Estate of Ward*, 2019 MT 72, ¶ 16, 395 Mont. 199, 444 P.3d 381. This Court has repeatedly referred to underinsured motorist and medical payments coverages as personal and portable coverages. *Bennett*, 261

Mont. at 389, 862 P.2d at 1148; *Hardy*, ¶¶ 40, 44; *Mitchell*, ¶ 42; *Farmers Alliance Mut. Ins. Co. v. Holeman*, 1998 MT 155, 289 Mont. 312, 961 P.2d 114. By definition, under Montana's steadfast public policy, personal and portable coverage does not require that a named insured occupy an insured vehicle to trigger coverage. USAA's binding testimony confirms this fundamental public policy tenet. Under the exact same collision scenario, USAA concedes Goss would have been entitled to underinsured motorist coverage if he was: driving a non-family member's vehicle, including a motorcycle; a passenger in a non-family member's vehicle, including a motorcycle; a pedestrian, a skateboarder, a roller-skater; riding a unicycle, bicycle, tricycle; bouncing on a pogo stick; or riding a horse or camel. App. B, ¶ 24. Under the facts of this case, there is no basis in law for USAA to carve out a narrow exception to the personal and portable coverage—i.e., driving an owned vehicle not listed on the policy.[2]

D. The District Court Erred in its Analysis

The District Court upheld USAA's exclusions citing: (1) a purported distinction between underinsured and uninsured motorist coverage, (2) *Stutzman v. Safeco Ins. Co. of America*, 284 Mont. 372, 945 P.2d 32 (1997), and *Monroe v. Cogswell Agency*, 2010 MT 134, 356 Mont. 417, 234 P.3d 79, and (3) Judge

[2] The bulk of the argument to date has focused on the underinsured motorist coverage exclusion. However, given that medical payments coverage is likewise personal and portable, the analysis is the same.

Molloy's decision in *Hamilton v. Trinity Universal Ins. Co.*, 465 F.Supp.2d 1060 (D. Mont. 2006).

1. Underinsured Versus Uninsured Motorist Coverage

USAA suggests that a distinction exists between what it deems "mandatory insurance coverage" (liability and uninsured motorist coverage) and "optional insurance coverage" (underinsured motorist and medical payments coverage). The District Court appears to have accepted this notion. App. A, p. 6. However, this Court expressly rejected this purported distinction in *Bennett*. Therein, the Court held that "[t]he absence of a statutory requirement is irrelevant, for the public policy considerations that invalidate contractual 'anti-stacking' provisions in an uninsured motorist endorsement also support invalidating those provisions in an underinsured motorist endorsement." *Bennett*, 261 Mont. at 389, 862 P.2d at 1148; see also *Hardy*, ¶ 21 ("Public policy considerations that favor adequate compensation for accident victims apply to UIM coverage in spite of the fact that UIM coverage is not mandatory in Montana."); *Ruckdaschel v. State Farm Mut. Auto. Ins. Co.*, 285 Mont. 395, 399, 948 P.2d 700, 703 (1997) ("[T]he public policy concerns which apply in statutorily required insurance coverage contexts also apply to optional types of insurance coverage such as, in this case, medical payment coverage."). In other words, Montana's public policy regarding the purchase of personal and portable

insurance coverage does not turn on statutorily mandated insurance coverage versus optional insurance coverage.

2. *Stutzman* and *Monroe*

The District Court cites *Stutzman* for the proposition that "parties may freely contract, including exclusions" regarding underinsured motorist coverage. App. A, p. 6. This notion tracks USAA's argument which derives from the following dicta in *Stutzman*:

> [T]here is no statutory mandate for underinsured motorist coverage in Montana. Pursuant to § 61-6-103(8), MCA, optional underinsured motorist coverage is not subject to the provisions of Montana's Motor Vehicle Safety Responsibility Act. Therefore, the parties may freely contract to produce exclusions or limitations on underinsured motorist coverage.

Stutzman, 284 Mont. at 380-81, 945 P.2d at 37. However, the "freely contract to produce exclusions or limitations" notion is not the sweeping edict USAA claims. Six years after *Stutzman*, this Court clarified that *Stutzman* constitutes a "narrow holding." *Hardy*, ¶ 26.

In *Hardy*, Ned Hardy suffered serious injuries while riding as a passenger in a vehicle negligently struck by the tortfeasor. The tortfeasor's liability insurer paid its full $50,000.00 liability limit to Hardy. However, this was insufficient to compensate Hardy for his injuries. Hardy, therefore, filed a claim with his own insurance company for underinsured motorist coverage. Hardy owned three vehicles at the time of the collision and paid separate premiums for $50,000.00 in

underinsured motorist coverage on all three vehicles. As such, Hardy argued he was entitled to stack the three coverages for a total of $150,000.00 in underinsured motorist coverage. The insurer denied Hardy's claim for several reasons.

This Court rejected the insurer's overtures on all fronts, noting:

> Public policy considerations that favor adequate compensation for accident victims apply to [underinsured motorist] coverage in spite of the fact that [underinsured motorist] coverage is not mandatory in Montana. The purpose of underinsured motorist coverage is to provide a source of indemnification when the tortfeasor does not provide adequate indemnification.

Hardy, ¶ 21. Contrary to the foregoing public policy, Progressive's insurance policy contained an anti-stacking provision which barred insureds from aggregating the limits of multiple coverages to increase the total amount of underinsured motorist coverage available. This Court held the provision unenforceable as violative of Montana's public policy:

> In *Bennett*, 261 Mont. at 389, 862 P.2d at 1148, we concluded that a provision that defeats coverage for which valuable consideration has been received violates Montana public policy. We held that [underinsured motorist] coverage, by definition, is personal and portable. Therefore, a Montanan could reasonably expect coverage up to the aggregate limit of the separate policies when a separate premium for [underinsured motorist] coverage was charged for each.
>
> . . . .
>
> [A]n anti-stacking provision in an insurance policy that permits an insurer to receive valuable consideration for coverage that is not provided violates Montana public policy.
>
> . . . .

> Progressive's anti-stacking provision destroys the personal and portable nature of [underinsured motorist] coverage by completely relieving Progressive of the obligation to pay damages to the insured.
>
> We conclude that Progressive's anti-stacking provision belies the insurance consumer's reasonable expectation that he has purchased [underinsured motorist] coverage, which by definition, is personal, portable, and, therefore, stackable. For this reason, we conclude the anti-stacking provision in this case violates Montana public policy.

Hardy, ¶¶ 40, 42, 44-45. Accordingly, despite the purported dicta in *Stutzman* that insurers may freely incorporate exclusions in underinsured motorist coverage policies, this Court invalidated Progressive's offset and anti-stacking provisions based on the personal and portable nature of underinsured motorist coverage and Hardy's reasonable expectation of coverage upon payment of valuable consideration.

So, this Court has rejected insurers' mantra of free reign to restrict underinsured motorist coverage. After all, if *Stutzman* applied as broadly as insurers insist, the exclusions in *Hardy* would have withstood scrutiny. They did not because of Montana's strict public policy protecting an insured's right to personal and portable insurance coverage when the insured pays valuable consideration for the same.

Admittedly, people's entitlements to underinsured motorist coverage are not absolute. This Court has acknowledged two narrowly tailored circumstances where insurers can limit entitlement to underinsured motorist coverage. First, to trigger the

reasonable expectations, an injured party must qualify as an insured under the policy. Second, an injured party cannot trigger underinsured motorist coverage when he/she is injured at the hands of a family member. These are the only two scenarios recognized by this Court where underinsured motorist coverage policy exclusions **will withstand scrutiny**.[3]

a. An Injured Party Must be an Insured Under the Policy

Kilby Butte Colony, Inc. v. State Farm Mut. Auto. Ins. Co., 2017 MT 246, 389 Mont. 48, 403 P.3d 664, holds that a party must constitute an "insured" to trigger coverage under a policy. In *Kilby Butte Colony*, Mary Ann and Ivan Stahl were injured in an automobile accident. At the time of the accident, the Stahls were members of a Canadian Hutterite colony and passengers of a motor vehicle owned by the colony. The Stahls did not personally own any vehicles and were not listed as named insureds on any automobile insurance policies. The colony did not maintain underinsured coverage on the vehicle involved in the collision. However, the colony did maintain underinsured motorist coverage on an uninvolved 2006 Freightliner. The colony submitted a claim on behalf of the Stahls for underinsured

[3] Along with *Stutzman* and *Monroe*, the District Court cites *American Family Mut. Ins. Co.* v. *Livengood*, 1998 MT 329, 292 Mont. 244, 970 P.2d 1054, for the proposition that this Court has "upheld limitations in coverage not related to stacking." App. A, p. 8. The District Court's reference to *American Family Mut. Ins. Co.* is curious as it bears no relationship to the issue presented. *American Family Mut. Ins. Co.* examined the existence of liability coverage, under two potentially competing liability policies, in the face of a "nonowned automobile exclusion." *American Family Mut. Ins. Co.* does not implicate personal and portable underinsured motorist or medical payments coverage or address a factual background even remotely similar to the one at issue. As such, *American Family Mut. Ins. Co.* maintains no relevance to this case.

motorist coverage under the 2006 Freightliner policy. The insurer denied coverage for the Stahls under the 2006 Freightliner policy because the Stahls did not meet any definition of an insured under the policy.

In litigation, the colony argued that, because underinsured motorist coverage is personal and portable, the Freightliner coverage should apply to Mary Ann and Ivan Stahl. This Court noted that, "[a]n exception to this rule, however, exists for corporate or business auto insurance policies that require occupancy of the corporate owned vehicle as a condition of coverage." *Kilby Butte Colony*, ¶ 13. *Kilby Butte Colony* did not implicate any insurance policies issued to individual insureds. Rather, the colony corporation was the named insured on the policies at issue. Since the Stahls were not named insureds, the only way they could qualify as insureds under the policy was to occupy an insured vehicle. Such was not the case. Accordingly, the Stahls did not constitute "insureds" under any applicable policy. See also *U.S. Spec. Ins. Co.*, ¶ 15; *Stonehocker v. Gulf Ins. Co.*, 2016 MT 78, ¶¶ 15-17, 383 Mont. 140, 368 P.3d 1187; *Lee v. Great Divide Ins. Co.*, 2008 MT 80, ¶ 16, 342 Mont. 147, 182 P.3d 41; *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 2003 MT 174, ¶ 22, 316 Mont. 382, 73 P.3d 800; *Chilberg v. Rose*, 273 Mont. 414, 417-19, 903 P.2d 1377, 1379-80 (1995).

This exception does not apply here as USAA concedes Goss is the named insured under the subject policy.

b. Family Member Exclusion

In *Monroe*, the plaintiffs were injured in a single vehicle accident. The plaintiffs owned the vehicle involved in the accident. However, they were injured while riding in it as passengers. The vehicle was being driven by plaintiffs' daughter-in-law at the time of the accident. Plaintiffs recovered liability insurance from the daughter-in-law's policy and from their own liability policy as it extended liability coverage to the daughter-in-law by virtue of her operating plaintiffs' vehicle as a permissive user. Plaintiffs then sought to recover underinsured motorist coverage under their policy.

The policy excepted any vehicle "owned by or furnished for the regular use of you or any family member" from the definition of an underinsured motor vehicle. *Monroe*, ¶ 16. Since plaintiffs were injured by the vehicle in which they were passengers, and since they owned that vehicle, it did not constitute an underinsured motor vehicle under the policy.

This Court also considered a family member exclusion in *Fisher ex rel. McCartney*. *Fisher ex rel. McCartney* involved a single vehicle accident in which the husband, Les, was driving and ran into a parked car. His wife, Sharon, was a passenger in the vehicle Les was driving and suffered serious injuries in the incident. Les had two insurance policies with State Farm at the time of the incident—an automobile liability policy and an additional umbrella policy. State Farm paid the

automobile liability limit to Sharon. Sharon then filed a claim for benefits under the umbrella policy. State Farm denied coverage under the umbrella policy because of a family member exclusion.

This Court upheld the family member exclusion. It did so for two reasons: (1) the exclusion helped to keep umbrella policies affordable by avoiding coverage for family members who frequently ride with the insured—given that umbrella liability policies were designed to protect insureds against excess judgments by third parties; and (2) to avoid collusive claims among family members—permitting insureds to convert inexpensive coverage into otherwise expensive liability coverage. *Fisher ex rel. McCartney*, ¶¶ 36-37.

The concerns and factual predicates at issue in *Monroe* and *Fisher ex rel. McCartney* do not exist here. This case does not implicate a single vehicle accident involving family members. Goss suffered harms because of the negligence of a third party who operated a vehicle with no connection to Goss. This case does not involve potentially collusive claims among family members—the predicate justifying enforcement of the family member exclusion.

c. Judge Molloy's Decision in *Hamilton*

The District Court cited Judge Molloy's decision in *Hamilton* as persuasive, nonbinding authority. In *Hamilton*, Zach Hamilton was injured in an automobile collision caused by a Progressive insured. Progressive paid the liability limit and

Zach filed a claim for underinsured motorist benefits under his parents' insurance policy with Trinity Universal Insurance Company ("Trinity"). The Toyota pickup Zach was driving was not one of the insured vehicles under his parents' insurance policy with Trinity.

At the time of the collision, Zach was 23 years old and lived with his parents. He had not purchased any insurance for the Toyota pickup and did not constitute a named insured under his parents' policy—presumably confirming he did not pay any premiums for his parents' insurance coverage with Trinity. The Trinity policy contained an exclusion precluding recovery of underinsured motorist benefits when the bodily injury was sustained "[b]y a 'family member' . . . [w]ho owns an auto, while 'occupying,' or when struck by, any motor vehicle owned by you or any 'family member' which is not insured for this coverage under this policy." *Hamilton*, 465 F.Supp.2d at 1062. Trinity denied Zach's claim for underinsured motorist coverage because "Zach [was] a family member who sustained bodily injury while occupying a motor vehicle owned by a family member (Zach) that was not insured under the policy." *Hamilton*, 465 F.Supp.2d at 1062.

Judge Molloy cited this Court's case law which "protect[s] insurers from 'schemes' by insureds." *Hamilton*, 465 F.Supp.2d at 1066. Judge Molloy identified the "scheme" in *Stutzman* as "receiving benefits at a cheaper rate." *Hamilton*, 465 F.Supp.2d at 1066. While slightly different than *Stutzman*, Judge Molloy felt Zach

sought to perpetrate an analogous scheme. Zach did not purchase any automobile insurance and he did not pay for his parents' insurance coverage. As such, the "scheme" which troubled Judge Molloy in *Hamilton* was Zach's attempt to receive benefits that he did not pay for. *Hamilton*, 465 F.Supp.2d at 1066. Under the circumstances, Judge Molloy felt Zach's case fell outside the principle articulated by this Court in *Hardy*—i.e., "that insureds should not be denied coverage for which they have paid adequate consideration." *Hamilton*, 465 F.Supp.2d at 1066. Given the scheme at issue in *Hamilton*, Judge Molloy upheld the denial and the exclusion Trinity relied upon.

Factually, *Hamilton* aligns with the family member exclusion concerns and case law cited above. This case, however, does not implicate a scheme whereby one family member, who maintains no insurance coverage and pays no premiums for coverage, seeks to trigger coverage under another family member's insurance policy. Goss is the named insured under the USAA policy and paid valuable consideration for the personal and portable insurance coverages.

CONCLUSION

At first blush, reviewing the catalogue of automobile insurance cases appears daunting. However, a bright line rule has truly emerged from the analyses and distinct factual predicates. "[W]hen coverage is personal to the insured, there is no connection to the 'automobile listed on the policy.'" *U.S. Spec. Ins. Co.*, ¶ 18. Under

Montana law, underinsured motorist and medical payments coverages unequivocally fall into this personal and portable paradigm. *Hardy*, ¶¶ 40, 44; *Farmers Alliance Mut. Ins. Co. v. Holeman*, 1998 MT 155, 289 Mont. 312, 961 P.2d 114. To trigger the applicable public policy protections, the injured party must constitute an insured under the policy. And, if the tortfeasor is an unrelated party, the family member exclusion case law does not apply. Therefore, a person is entitled to personal and portable underinsured motorist and medical payments coverage, regardless of a particular vehicle's involvement, if he/she is the named insured under the subject policy, paid valuable consideration for the coverages, and did not suffer harm at the hands of a family member.

Goss indisputably meets these criteria. He was the named insured under the USAA Policy. App. B, ¶ 18. He paid valuable consideration for the underinsured motorist and medical payments coverages with USAA. App. B, ¶¶ 19-20. This case does not implicate a single vehicle accident, or one caused by a family member. Rather, Goss suffered the injuries and damages at the hands of an unrelated, underinsured, third-party tortfeasor. App. B, ¶¶ 29-31.

USAA and the District Court's analyses erroneously stray from the personal and portable nature of these coverages. Instead of focusing on the critical inquiries—portability for injuries to a premium-paying insured—USAA and the District Court focus on the vehicle. This Court, in its most recent and relevant

pronouncement on insurance coverage, reaffirmed that "when coverage is personal to the insured, there is no connection to the 'automobile listed on the policy.'" *U.S. Spec. Ins. Co.*, ¶ 18.

Montana law prohibits USAA from inserting provisions in its insurance policies which defeat coverage for which it has received valuable consideration. *Bennett*, 261 Mont. at 389, 862 P.2d at 1148. The exclusions USAA relies upon do just that. Accordingly, the Court should reverse the District Court's summary judgment ruling and hold that the subject exclusions violate Montana public policy and are, therefore, unenforceable.

Respectfully submitted this 24th day of November, 2020.

/s/ Keith D. Marr
Keith D. Marr
CONNER, MARR & PINSKI, PLLP
P. O. Box 3028
Great Falls, MT 59403-3028
Attorneys for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced, except for footnotes and quoted and indented material; has left, right, top and bottom margins of one inch; and the word count calculated by Microsoft Word is not more than 10,000 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, Certificate of Service, and Appendix.

Dated this this 24th day of November, 2020.

/s/ Keith D. Marr

Keith D. Marr
CONNER, MARR & PINSKI, PLLP
P. O. Box 3028
Great Falls, MT 59403-3028
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I, Keith D. Marr, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 11-24-2020:

David Matthew McLean (Attorney)
3301 Great Northern Ave., Suite 203
Missoula MT 59808
Representing: USAA Casualty Insurance Co.
Service Method: eService

Electronically signed by Clari Davis on behalf of Keith D. Marr
Dated: 11-24-2020