

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 20-0514

PAUL WILKIE,

Plaintiff/Appellant,

v.

HARTFORD UNDERWRITERS INSURANCE COIMPANY, a/k/a THE HARTFORD;
RICHARD L. SPROUT and SHAUNA SPROUT,

Respondent and Appellee.

APPEAL FROM: District Court of the Eighteenth Judicial District
In and For the County of Gallatan, Cause No. DV-20-367B
Honorable Rienne H. McElyea, Presiding Judge

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INTRODUCTION

This case presents an opportunity to definitively settle whether an insurer, prior to suit and when liability is reasonably clear,¹ must disclose its negligent insured's policy information to the injured victim ("pre-suit disclosure"). Such a requirement would strengthen and promote numerous public policies deemed desirable by Montana statutes and common law. Because the issue naturally evades review given post-suit insurance disclosure obligations, the Court should seize this opportunity now.

ARGUMENT

I. PRE-SUIT DISCLOSURE WOULD STRENGTHEN PUBLIC POLICIES DEEMED DESIREABLE BY MONTANA'S STATUTORY AND COMMON LAW.

a. Pre-Suit Disclosure Promotes Fairness in Insurance.

Montana's Unfair Trade Practices Act (UTPA) expresses Montana's public policy of fairness in insurance by defining and prohibiting unfair insurance practices, including unfair settlement practices. Mont. Code Ann. §§ 33-18-101, 201 (Sec. 201). In 1983, *Klaudt* held insurers owed Sec. 201's enumerated duties to third-party claimants. *Klaudt v. Flink* (1983) 202 Mont. 247, 658 P.2d 1065.

¹ Despite the fact that Wilkie predicated his entitlement to Sprouts' policy information on the fact liability was reasonably clear (Doc. 2 at ¶¶ 7-8, 18, reiterated at Doc. 10 at 10), Hartford successfully distorted Wilkie's argument such to mislead the district court into believing Wilkie advocated for broad pre-suit disclosure in all instances (Doc. 38 at 3).

While the 1987 Legislature later limited a private right of action under Sec. 201 to six of its 14 sub-sections, Mont. Code Ann § 33-18-242,² all enumerated standards define insurer conduct and, collectively, inform Montana's public policy of fairness in insurance.

Ridley held that UTPA prohibited insurer's from leveraging an injured victim's post-injury financial condition to decrease settlement value when liability was reasonably clear. *Ridley v. Guaranty Nat'l. Ins. Co.* (1997) 286 Mont. 325, 951 P.2d 287. *Ridley's* is a case of statutory construction. *Id.* As its author, Justice Trieweiler, later explained:

The issue here is not what shelter from the law can be found in isolated language specific to the facts of each of our prior cases. The issue is simply what is required of a law-abiding insurer pursuant to §§ 33-18-201(4) (6) and (13), MCA. To me, that has been abundantly clear since December 24, 1997, the date of our decision in *Ridley v. Guaranty National Ins. Co.*[³]

Shilhanek v. D-2 Trucking, 2003 MT 122, ¶¶ 45-52, 315 Mont. 519, 70 .3d 721.

(Trieweiler, J., concurring and dissenting) (emphasis added). Other cases following

Ridley further applied the UTPA's mandate of fairness. *See, e.g., Watters v.*

Guaranty Nat. Ins. Co., 2000 MT 150, 300 Mont. 91, 3 P.3d 626; *Dubray v.*

² Hartford successfully confused the issue below by characterizing Wilkie's claims as sounding in third-party insurance bad faith. Wilkie's complaint is clear—he sought declaratory relief regarding an insurer's duties. Reference to Sec. 242 here is not made in connection to Wilkie's claim.

³ Justice Trieweiler authored *Ridley*.

Farmers Ins. Exch., 2001 MT 251, 307 Mont. 134, 36 P.3d 897. Notably, these cases were predicated on insurers using “Ridley” as shelter for other unfair conduct as opposed to abiding to the UTPA.

In construing the UPTA, this Court has not acted as “super-legislature” as Hartford might argue. Doc. 18 at 2. Rather, it has appropriately performed its role as a separate and equal branch of our tripartite government by interpreting the intent of the Legislature. Judicial determination that the UTPA mandates pre-suit disclosure in clear liability cases would be wholly appropriate and would promote fairness, pre-suit settlement, and judicial economy and benefit Montana as a whole.

i. An insurer’s denial of pre-suit disclosure is unfair to the injured victim because it allows the insurer to leverage disparate knowledge to reduce settlement value.

It was long been settled that the disclosure of insurance information benefits the injured victim, the tortfeasor, and the judicial process. Such disclosure allowed both parties to realistically appraise the case based upon knowledge as opposed to speculation and was conducive to settlement and avoidance of protracted litigation. Fed. R. Civ. P. 26, 1970 adv. com. notes. In 1993, the Federal Rules were amended to require self-disclosure of “basic information” that “is needed in most cases [...] to make an informed decision about settlement,” which included insurance information. Fed. R. Civ. P. 26, 1993 adv. com. notes.

Insurers, however, understand that an injured victim who is forced to submit a demand without knowledge of insurance information, particularly policy limits, is at a disadvantage. *Boicourt v. Amex Assurance Co.* (Cal. 4th App. Div.) 78 Cal. App. 1390, 1397. Insurers also understand they benefit from delay by generating income off the injured victim’s settlement money kept in their possession. *Id.* In light of these and other factors, it appears well-accepted that insurers’ reticence to disclose policy limits is solely a “selfish” interest, i.e., “one that is peculiar to themselves.” *Id.* While there is nothing inherently wrong with insurers acting in a self-serving manner – in fact, it is good public policy to foster a competitive insurance marketplace where well-managed insurers can generate a reasonable profit – the UTPA prohibits self-serving conduct unfair to others involved in the insurance process.

In order for negotiations between injured victims and insurers to be fair, vital information must be exchanged. An insurer cannot evaluate a claim without proof of loss from the injured victim. Likewise, an injured victim cannot properly evaluate or prepare his claim without policy coverage and limits information. In a paper for insurance professionals, former Georgia Commissioner of Insurance and insurance industry consultant Tim Ryles, Ph.D., AAI, states:

In third-party claims, one of the most vital types of information is the amount of money available to compensate the victim(s). The amount of money potentially available is so important to some liability

insurers that they guard this "policy limits" information as if its disclosure endangers national security. [...]

By failing to disclose the information, or if it is only partly disclosed, an insurance company enjoys a tactical advantage of forcing the third-party claimant to negotiate in the dark and make a demand without benefit of knowing what is potentially available.

Disclosing Policy Limits in Liability Claims: A Landmine for Bad Faith, Tim Ryles, Ph.D, AAI, International Risk Management Institute (April 2019).⁴

ii. An insurer's denial of pre-suit disclosure is unfair to the injured victim because it prevents or delays his ability to assess important claim-related considerations.

There are many reasons why knowledge of information about insurance coverages and limits is vital to the injured victim's assessment of claim considerations, including: whether retention of counsel is in the injured victim's best interests; what constraints are appropriate on case costs; other sources of recovery such as injured victim's first-party coverage; whether the negligent insured's coverages are implicated by the injured victim's claims; and when to engage in settlement discussion, including whether to implicate *Ridley* in a policy limits demand. Doc. 11 at ¶¶ 8-15, Doc. 12 at ¶¶ 8-15.

In cases where the claim's value exceeds the potentially available insurance, it is critically important the injured victim have policy limits and coverage

⁴ Available at: <https://www.irmi.com/articles/expert-commentary/disclosing-policy-limits-in-liability-claims-a-landmine-for-bad-faith>.

information early in the claims process so he can: investigate whether the tortfeasor is judgment proof, plan for the potential fall-out (from injuries, recovery, finances, medical bills; vocational changes, etc.) and investigate other sources of recover. Claim processes naturally take time even without deliberate insurer delay. Further, insurers undervalue claims and are often slow to recognize that a claim's value exceeds available limits. Both factors lead to settlement delays. Pre-suit disclosure is vital to the injured victim's ability to assess and address these issues in a timely fashion.

This is particularly true regarding underinsured motorist (UIM) coverage. Before an injured victim can make a UIM claim, the injured victim and the UIM carrier must know tortfeasor's policy limits. Even before settlement, an insurer's refusal to disclose the insured's limits prevents the injured victim from determining whether his UIM coverage may be implicated and putting his UIM carrier on notice of such a claim. This is particularly true because an injured victim can pursue UIM coverage without exhausting the tortfeasor's policy limits. *Augustine v. Simonson*, 283 Mont. 259, 940 P.2d 116 (1997). If the third-party claim has the potential be resolved without suit, it is unfair to both the insured and the injured party to force an injured party to file a lawsuit for the mere purpose of assessing whether his UIM coverage is implicated and establishing the propriety of such a claim with the UIM carrier.

iii. An insurer's denial of pre-suit disclosure is unfair to the injured victim and insured because it forces the injured victim to file suit prematurely and invites litigation upon the insured.

1. Regarding the injured victim.

Nobody wants to get hurt. Nobody wants to hire a lawyer. Nobody wants to file a lawsuit. People can tolerate, however, the mental strain and discomfort associated with seeking redress through the courts when such becomes necessary. The same cannot be said, however, when an insurer forces the injured victim to file suit prematurely or unnecessarily in response to a refusal to disclose policy information. Doc. 11 at ¶ 17. Doc 12 at ¶ 19.

2. Regarding insureds (generally).

The lower court misconstrued Wilkie's reliance on the UTPA as a steppingstone to bad faith litigation. Doc. 38 at 2-3. While issues relating to insurer duties, including pre-suit disclosure, naturally relate to potential third-party bad faith, the more concerning issue here is the insurer's breach of its duty to its insured and the first-party bad faith issues flowing therefrom.

When an insurer denies pre-suit disclosure, it creates an inherent conflict of interest between itself and its insured. The insurer's denial benefits the insurer's pecuniary self-interest while inviting unnecessary litigation upon the insured, who may then be exposed to "months [or years] of having a claim with a potential

excess verdict hanging over their heads, with the concomitant stomach-churning uncertainty characteristic of all litigation. *Boicourt*, 78 Cal. App. 4th at 1398. As described by Dr. Ryles:

To disclose or not to disclose, therefore is the point where in an insurance company's interest and the policyholders may diverge. Whereas, nondisclosure favors the insurer's economic interests, disclosure may serve the policyholders best interest because it:

1. aids purposeful settlement discussions;
2. is an essential component of evaluating a case;
3. may discourage a seriously injured victim from demanding more than the policy limits; and
4. may prevent litigation. [...]

What [litigation spawned by the insurer's failure to disclose insurance information] means for the policyholder is that because the insurer failed to make a key disclosure, she must set aside significant blocks of time for discovery, court appearances, stressful agony, and a prospect of an excess judgment. Further, once litigation commences, a policyholder establishes as a matter of public record that she has been a defendant in a lawsuit involving what is often very damning details of the underlying occurrence.

Disclosing Policy Limits in Liability Claims..., *supra* (online; see FN 3). This is inherently unfair to the insured.

3. Regarding insureds (Sprouts).

When liability is reasonably clear, a negligent insured generally has little if any involvement in the claims process and litigation unless there is a trial. This is consistent with the insured's reasonable expectation that insurers handle claims on their behalf. The average consumer of insurance products in Montana understands that while they have a duty to report claims or service of process, the insurer "will take care of it" after that. Had Hartford disclosed Sprouts policy limits when requested by Wilkie, the Sprouts would have likely experienced a similar claim process.

Instead, Hartford's denial of pre-trial disclosure resulted in Sprouts being sued. Wilkie's complaint defined their involvement as being a party who "may claim an interest in the relief Paul requests." Doc. 2 at ¶ 4. Upon being served, Mr. Sprout called and then personally appeared at Wilkie's lawyer's office to explain why he was not negligent and inform counsel he would not produce his insurance information. Doc. 13 at ¶ 3-9.⁵ Thereafter, Hartford assigned counsel to Sprouts who promptly and predictably, determined it was in Sprouts' best interests to send Sprouts' policy to Wilkie and seek dismissal. Doc. 6 at 3. In their answer, Sprouts denied having an interest in the relief Wilkie requested. Doc. 4 at 4.

⁵ Mr. Sprout likely shared his subjective beliefs about his liability with Hartford too. Hartford nonetheless determined liability was reasonably clear.

Sprouts joined Hartford’s motion to dismiss, asserting that Wilkie “never made a demand on Sprouts to produce their policy and because the Sprouts have produced their policy, the required ‘justiciable controversy’ could never have existed with respect to the claim against Sprouts.” Doc. 7 at 3. Sprouts characterized Wilkie’s suit against them “baseless”⁶ and “Sprouts have been forced to defend this action, incurring unnecessary litigation expenses.”⁷ *Id.*, 3. Contrary to their denial of an interest in the case, Sprouts also argued the Insurance Information and Privacy Protection Act (IIPPA) prohibits an insurer from disclosing an insured’s “personal or privileged information.” Doc. 7 at 2, FN 1 (*citing* Mont. Code Ann. § 33-19-306). Sprouts statement that they “have agreed to release their policy and, therefore, have waived their privacy right,” can only be interpreted to mean Sprouts believed policy limits and coverage information was personal and confidential. In a later filings, Sprouts noted Wilkie’s dispute was with Hartford, not Sprouts, and continued to argue for dismissal. Doc. 16 at 2, Doc. 31 at 2-3.

⁶ Had Wilkie not sued Sprouts, Hartford might have moved to dismiss for failure to join an indispensable party, although such would have been an extremely bold invitation for suit against its own insured. This proposition is supported by Sprouts indirect assertion policy limits and coverage information is private and confidential information protected by the IIPPA.

⁷ Hartford, not Sprouts, were defending the action and paying litigation expenses.

Sprouts' involvement in this case can be characterized as trying to get out of the case without stepping on Hartford's toes. Because the district court prohibited discovery, it is unknown whether Sprouts privately criticized Hartford for inviting suit upon them.

All of what occurred here was unnecessary. Hartford, as an institution, knew its denial of pre-suit disclosure significantly increased the risk Sprouts would be sued and potentially face judgement in excess of coverage. It is logical to conclude Hartford, being an insurance company, has weighed the aggregate benefit of withholding policy limits information with the aggregate risk associated with first-party bad faith liability and concluded the benefits outweighed the risk. Sprouts, on the other hand, got sued and realized nothing from it. Moreover, Mr. Sprout's response to being served demonstrates the type of emotional agitation predictably experienced by an individual defendant after being served with process.

b. Pre-suit Disclosure Increases the Probability of Pre-Suit Settlement.

Montana's declared public policy is to encourage settlement and avoid unnecessary litigation because settlement eliminates cost, stress, and waste of judicial resources. *Augustine v. Simonson* (1997) 283 Mont. 259, 266, 940 P.2d 116, 120; *Durden v. Hydro Flame Corp.*, 1999 MT 186, ¶ 20, 295 Mont. 318, P20, 983 P.2d 943, P20. The law has long recognized knowledge of policy limits promotes settlement and reduces unnecessary litigation:

This court has witnessed the dismal waste of time and effort, both on the part of the parties and the court, in cases where an early disclosure of limited policy limits would have led to prompt settlements that were not reached until the eve of the trial, when such information was first revealed after needless pretrial discovery and preparation for trial. Aside from such unnecessary consumption of time and effort resulting from inability to learn such crucial information until the very last minute, the effect frequently is to disrupt the court's schedule and cause loss of trial time for many needy prospective litigants.

Clauss v. Danker, 264 F. Supp. 246, 248 (S.D. N.Y. 1967); *see, also, Johaneck v. Aberle*, 27 F.R.D 272, 278.

c. Pre-Suit Disclosure Promotes Judicial Economy.

Judicial economy is an important policy. *See, e.g., Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Mont. Twentieth Judicial Dist. Court*, 2021 MT 13, ¶ 11, ___ Mont. ___, ___ P. ___. This is particularly true when burgeoning demand for judicial services strains judicial resources and causes backlogs impeding the speedy administration of justice mandated by the Montana Constitution. The Montana judiciary is working to address these issues, which are not likely to abate insofar as the Montana Legislature continues to withhold funding for additional judgeships in Montana’s busiest districts (as the 2019 Legislative did regarding the Eighteenth Judicial District⁸). In light of these concerns, Pre-suit disclosure is a

⁸ This occurred despite enthusiastic support from the Montana Bar Association, the Montana Judges Association, MTLA, the Montana Defense Trial Lawyers

triple-positive for judicial economy: more cases will settle prior to suit leading to fewer cases being filed leading to an increase in available judicial resources.

d. Pre-suit disclosure is consistent with the UTPA's mandate of fairness in insurance and related common law precedent.

The UTPA mandates fairness in insurance and applies to injured victims.⁹ An insurer's denial of pre-suit disclosure is unfair. *Supra*. Thus, required pre-suit disclosure naturally flows from the UTPA, on the whole, and particularly from Sec. 201(1), (6) and (13) construed together. These provisions require insurers to accurately represent policy provisions and coverages during settlement when liability is reasonably clear. Required pre-suit disclosure is also consistent with established precedent, i.e., *Ridley* and its progeny, *supra*, both in their holdings and their consideration of Sec. 201's sub-parts together to construe meaning.

Thus, a holding against pre-suit disclosure would require special justification. *See, e.g., Petterson v. McLean Credit Union* (1989) 491 U.S. 164, 172, 109 S. Ct. 2363, 2370, 10 L. Ed. 2d. 132 147. Here, there is no justification, let alone special justification. The only interests served by such a holding would be insurers' pecuniary self-interests, which must be weighed against other policies such as those discussed above. While insurers' pecuniary self-interests are

Association, individual members of the bar and judiciary and various other non-legal organizations.

⁹ Sec. 201(7) and (10), however, only apply to insureds.

important, such interests are significantly outweighed by the resounding negative impact such a holding would have on important Montana public policies.

e. Pre-suit Disclosure Does Not Implicate the IIPPA

The IIPPA's stated purpose is to balance an insurer's need for personal data necessary to conduct business with the public's need for fairness in information practices and right to ascertain what information has been collected. Mont. Code Ann. § 33-19-102. It is difficult to understand how IIPPA policies relate to an insurer's obligation to disclose its insured's policy limits and coverage information to an injured victim when liability is reasonably clear, particularly when such information must be disclosed after suit is filed.

The relevant issue here is whether the insured's right to privacy to policy limits and coverage information outweighs the injured victim's right to disclosure. In 1961, United States District Judge William Jameson (Montana) held "automobile liability insurance protection is not in the same category [of privacy interest] as other assets," because "it exists for the sole purpose of satisfying the liability that it covers." Given Montana's financial responsibility law declares that "an insurance contract is no longer a secret, private, confidential arrangement [but] an agreement that embraces those whose person or property may be injured by the negligent act of an insured." *Johanek v. Aberle*, 27 F.R.D 272, 278-279. Thus, as a matter of law, an insured's reasonable expectation of privacy in his insurance

policy limits and coverages is, at best, minimal, in the context of the insured's reasonably clear negligence that injured another person.

To put it bluntly, Hartford's reliance on IIPPA to support non-disclosure of Sprouts' policy information for the benefit of Sprouts' privacy right is misplaced. Non-disclosure only serves Hartford's own pecuniary self-interests and has the potential to significantly harm its insured. The fact Sprouts promptly produced the policy and denied any interest in the relief requested by Wilkie after being assigned counsel indicates they valued dismissal more than a privacy interest in their policy information. It seems certain the average insurance consumer's subjective interest avoiding getting sued far outweighs any subjective interest in the privacy rights associated with insurance policy limits and coverages.

Hartford's defense of the Sprout's privacy interest is also belied by its *carte blanche* authority to control pre-suit claims handling, defense, and litigation:

It is a well recognized fact [...] that where there is insurance coverage the insurer takes control of the defense of any action brought against one of its insured. The insurer not only defends the suit, but also makes such investigation, negotiations, and settlement as it deems expedient. The standard policy expressly so provides.

Johanek v. Aberle, 27 F.R.D. at 278. Hartford's policy with the Sprouts is no different. It states: "[w]e will settle or defend, as we consider appropriate, any claim or suit asking for [covered] damages." Hartford Personal Auto Policy Montana at 3 (emphasis added). In considering these issues, Judge Jameson

recognized “[j]udges need not be more naïve than other men,” i.e., it was necessary to “take cognizance of the role of insurance companies in such litigation [by an injured victim] against their insured” because “the insurance company is virtually substituted as a party.” *Johanek v. Aberle*, 27 F.R.D. at 278. It is insightful to consider Hartford’s assertion of Sprouts’ right of privacy through this lens.

II. THE COURT SHOULD DEFINITELY SETTLE THE ISSUE IN FAVOR OF PRE-SUIT DISCLOSURE.

Principles of law should be definitively settled if possible. *State v. Wolf*, 2020 MT 24, ¶ 22, 398 Mont. 403, 457 P.3d 218. Definitive settlement promotes stability, predictability, and equal treatment. *Id.* In *Wolf*, this Court recognized not only its right but its duty to consider previously decisions carefully and correct previous errors if possible. *Id.* MTLA urges the Court to also recognize such a duty in the context presented by this case, i.e., the opportunity to definitively settle an issue in a way that will strengthen recognized and desirable public policies.

Definitive settlement is much more desirable than remand. MTLA understands “the search for truth involves a slow progress of inclusion and exclusion, involving both trial and error,” *Wolf*, ¶ 22, and the Court prefers, when possible, to allow the organic process of the law to follow the usual path of district court adjudication followed by appeal. However, remand here will likely result in wasted resources, appeal, and this Court finding itself contemplating this same issue again in short order.

The *Mlekush* cases are instructive. *Mlekush v. Farmers Ins. Exchange*, 2015 MT 302, 381 Mont. 393, 358 P.3d 913 (*Mlekush I*) and 2017 MT 256, 389 Mont. 99, 404 P.3d 704 (*Mlekush II*). In *Mlekush I*, the Court remanded the case with instructions providing a discretionary framework. *Id.*, ¶ 12-13. On appeal for the second time, the *Mlekush II* Court recognized *Mlekush I*'s rule was unworkable and affirming it “would inevitably result—as it did here—in another round of legal proceedings... imposing additional expense and litigation burden on the insured [and potentially] require[ing] inquiry into [confidential information].” *Id.*, ¶ 21. Instead, *Mlekush II* rendered a definitive rule easy for parties to understand and courts to apply. *Id.*, ¶ 22. While the insurers certainly would have preferred a different outcome, once the Court settled the issue, insurers absorbed it into their underwriting and claims processes and moved on.

Like *Mlekush*, this case involves an unsettled rule and an opportunity for definitive settlement through a simple, easily-implemented rule. While required pre-suit disclosure in clear liability cases may negatively impact insurers' pecuniary self-interests by equalizing bargaining power and reducing delay, any negative impact is significantly outweighed by the resounding positive effect on public policy, particularly fairness in insurance, recognized by the Legislature and this Court.

CONCLUSION

For the foregoing reasons, MTLA urges the Court to rule, pursuant to the UTPA, insurers must disclose their negligent insured's policy limits to the injured victim prior to suit when liability is reasonably clear.

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 11(4), M.R.App.P., that the foregoing brief is proportionally spaced, printed in a 14-point Times New Roman type-face, is double spaced, and is not more than 10,000 words (3,976 words), excluding the Caption, Table of Contents, Table of Authorities, and this Certificate of Compliance.

DATED this 3rd day of February, 2021.

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