IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 20-0514

PAUL WILKIE,

Plaintiff/Appellant,

v.

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

Defendants/Appellees.

On Appeal from the Eighteenth Judicial District Court, Gallatin County, Cause No. DV-20-367B, Hon. Rienne H. McElyea

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Appellant's Opening Brief

(Appearances on next page)

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STATEMENT OF ISSUES

Richard Sprout ("Sprout") hit Paul Wilkie ("Wilkie") with his truck, causing bodily injury. Sprout's liability to Wilkie is reasonably clear. Hartford refused Wilkie's request for a copy of Sprout's insurance policy (the "Policy"). Wilkie sued for declaratory relief that Hartford had a duty to provide the Policy. After Hartford forced Wilkie to sue to get the Policy, Sprout provided it and Hartford proclaimed the case moot. The district court agreed, dismissing the case.

The issues are:

1. Whether the district court erred in finding the case moot, particularly while disallowing discovery; and
2. Whether, under *Ridley* and its progeny, Hartford had a duty to reveal the Policy—or at least coverage limits—to Wilkie.

STATEMENT OF THE CASE

I. Nature of the case.

Hartford issued the insurance Policy covering Sprout's truck. Sprout negligently injured Wilkie. Sprout's liability is reasonably clear.

This is **not** a suit:

- Against the tortfeasor, Sprout, for monetary damages for Wilkie's personal injuries. That suit has not yet been filed; or

- Against Hartford for violations of the Unfair Trade Practices Act (the "UTPA," §§ 33-18-201, MCA, *et seq.*) or common law bad faith. Again, no such suit has been filed.

Instead, this suit seeks only declaratory relief regarding Hartford's obligations to Wilkie, an injured third party to whom the insured's liability is reasonably clear, under *Ridley v. Guaranty Nat. Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997), and its progeny.

II. Procedural background.

Hartford refused Wilkie's pre-suit demand for a copy of the Policy or information about coverage limits, so Wilkie sued. Dkt. 2. Because Sprout has an interest in disclosure of the Policy, Wilkie joined Sprout, who responded by coming to Wilkie's counsel's office to announce his continued refusal to provide the Policy. Dkt. 13.

Weeks later, after Hartford hired a lawyer for Sprout, that lawyer produced the Policy, and Hartford moved (Dkt. 5) to dismiss the case:

- As moot, pursuant to Rule 12(b)(1); and
- As failing to state a claim on the merits, pursuant to Rule 12(b)(6).

Wilkie sought discovery on factual issues raised by Hartford's Rule 12(b)(1) motion. Defendants refused to provide discovery and sought a protective order.

Wilkie cross-moved to compel.

The district court dismissed the case as moot, not reaching the merits. App. 1 (Dkt. 15). It denied as moot the parties' pending cross-motions about discovery. *Id.* Wilkie appeals.

STATEMENT OF FACTS

I. Wilkie's complaint.

Wilkie alleged: Hartford insured Sprout; Sprout negligently injured Wilkie; Sprout's liability is reasonably clear such that Hartford has accepted liability and is advancing Wilkie's medical expenses under *Ridley*; Wilkie has further physical and emotional injuries for which he has not yet made demand; and Wilkie requested from Hartford a copy of the Policy or, at least, information about applicable coverage limits. Dkt. 2, pp. 1-3, ¶¶ 1-12; App. 2. Hartford denied it had "any obligation…to provide you with a copy of our insured's policy, declaration page, or release his policy information…." *Id.* at 3, ¶ 13; App. 3.

The Complaint continued that insurance companies' practice of withholding insurance policies from injured third-party claimants is longstanding and deep-seated. *Id.* at 3, ¶¶ 14-15. This puts the injured claimants in an unfairly disadvantageous position vis-à-vis the insurers because the carriers obviously have access to coverage terms and amounts. *Id.* at 4, ¶ 16.

Wilkie stated a single count, seeking declaratory relief that Hartford had an obligation to disclose the Policy or, at a minimum, policy limits. *Id.* at 5-6. Wilkie did not seek monetary relief other than fees and costs as supplemental relief under the Uniform Declaratory Judgment Act, §§ 27-8-101, MCA, *et seq*. ("DJA").

II. Dismissal of the complaint.

Hartford moved to dismiss, and Sprout joined (Dkts. 5-7), on two bases:

- Defendants argued a lack of subject matter jurisdiction under Rule 12(b)(1) because production of the Policy after forcing Wilkie to file suit rendered the case moot; and
- They also argued the complaint failed to state a claim upon which relief can be granted, requiring dismissal under Rule 12(b)(6), because the law did not require disclosure of the Policy.

Wilkie responded that the "voluntary cessation" and "capable of repetition yet evading review" exceptions to mootness applied so the court should still address the merits. Dkt. 10, pp. 1-10. On the merits, Wilkie argued that various public policies favor disclosure of information to injured third-party claimants. And, just as the UTPA requires an insurer to pay a third-party claimant up to coverage limits when liability is reasonably clear, it also requires insurers to reveal what those coverages and limits are. *Id*. at 10-20.

After further briefing (Dkts. 18-19, 25-26, 28), the district court granted the motion to dismiss without a hearing or taking any evidence. App. 1. It reasoned that "[t]he dispute between the parties involved in this action has been resolved and is now moot," such that any ruling on the merits would be an advisory opinion. *Id.* at 2. It dismissed Wilkie's merits arguments under the UTPA and *Ridley* as an attempt to get "an advisory opinion as a stepping stone" to bad-faith litigation that the district court invited Wilkie to file. *Id.* at 2-3. With no further analysis or explanation, the court refused to apply any exception to the mootness doctrine. *Id.* at 3.

III. Refusal to allow discovery.

Defendants' motion to dismiss for mootness invoked Rule 12(b)(1) under which, unlike a 12(b)(6) motion, the parties may discuss facts beyond the complaint. Indeed, defendants' mootness argument rested upon them having provided the Policy after the complaint was filed—a fact obviously not alleged in the complaint. Moreover, the mootness argument implicated the "voluntary cessation" exception to mootness (discussed further below), and the factual issues which inhere in that analysis—including those bearing upon the possibility that Hartford could withhold policies from third-party claimants in the future.

Wilkie had served written discovery regarding the factual issues necessarily

raised by the defendants' anticipated mootness defense based upon their post-litigation conduct. *See* Apps. 4-5. Wilkie also sought to depose Sprout and Hartford representatives about the reasons for the initial non-disclosure and post-suit disclosure of the policy to explore whether, indeed, it was absolutely clear such conduct could not reoccur. *See* Apps. 6-8.

Defendants refused to provide documents, answer interrogatories, or sit for depositions, instead seeking a protective order. *See* Dkts. 14-17. Wilkie cross-moved to compel. Dkt. 23. After further briefing (Dkts. 29, 31, 34), the district court denied all discovery motions as moot in light of its dismissal. App. 1, p. 3. Thus, when the district court decided the case was moot, it not only provided no analysis of the exceptions, but it also did not allow Wilkie to gather or present evidence on the factual issues inherent in its ruling.

STANDARD OF REVIEW

Mootness "presents a question of law" which this Court reviews de novo. *Montanans Against Assisted Suicide v. Bd. of Med. Examiners, Montana Dep't of Labor & Indus.*, 2015 MT 112, ¶ 7, 379 Mont. 11, 347 P.3d 1244 (analyzing voluntary cessation exception to mootness). As to the interpretation of Montana law regarding a duty to disclose the Policy, "[t]he correct interpretation of a statute is a question of law that we review de novo." *Montana Indep. Living Project, Inc. v. City*

of Helena, 2021 MT 14, ¶ 7, ___ Mont. ___, ___ P.3d ___.

SUMMARY OF ARGUMENT

ARGUMENT I: The case is not moot.

The defendants' claim of mootness based upon their post-suit conduct—providing the Policy—implicates the "voluntary cessation" exception to mootness. Defendants had a "heavy burden" to make it "absolutely clear" that the challenged conduct could not reasonably be expected to reoccur. They did not acknowledge, attempt to carry, or actually carry that burden.

Additionally, this conduct is inherently "capable of repetition yet evading review," a further exception to mootness. By definition, any time this issue is presented to a court, litigation will be pending and the plaintiff will have the right to obtain the insurance policy through discovery.

Unless one of these exceptions is applied, insurers will continue to manipulate the litigation process to forever avoid a straightforward judicial decree that they must provide policy information to injured third-party claimants when liability is reasonably clear.

ARGUMENT II: This Court should reach the merits and declare that, when liability is reasonably clear, insurers have a duty to provide policy information to the injured third-party claimant.

Strong public policies favor giving injured third parties the same information that the insurance company and its lawyers have. Such equal footing promotes fairness, encourages settlement, and avoids needless litigation.

The UTPA requires that, when liability is reasonably clear, insurance companies must pay injured third-party claimants even before a final settlement. That duty flows from subsections (6) and (13) of § 33-18-201, MCA, which prohibit insurers from refusing to pay damages which are already owed under the policy or withholding payment under one coverage to influence settlement under another. These duties to not manipulate coverages and to promptly pay up to policy limits require that the insurer also disclose what the coverages and policy limits are.

The Court should rule in favor of Wilkie on the merits and remand for an award of fees in Wilkie's favor.

ARGUMENT

Montana favors settlement and recognizes that adequate information about insurance will promote settlement. Allowing carriers to refuse to provide that information frustrates the public policy in favor of settlement and spawns litigation.

When liability is reasonably clear, §§ 33-18-201(6) and (13), MCA, "by their terms, impose…an obligation" to pay an injured third-party claimant's reasonably certain damages even without a final settlement. *Ridley*, 286 Mont. at 334, 951 P.2d

at 992. This obligation applies even before the claimant files suit. *Watters v. Guaranty Nat'l Ins. Co.*, 2000 MT 150, ¶ 57, 300 Mont. 91, 3 P.3d 626. An insurer has a duty to pay "up to the limits of its coverage" without requiring a release. *Shilhanek v. D-2 Trucking, Inc.*, 2003 MT 122, ¶ 22, 315 Mont. 519, 70 P.3d 721. This duty arises, in part, from subsection (13)'s prohibition on leveraging settlements under different coverages. *Ridley*, 286 Mont. at 336-337, 951 P.2d at 993-994.

Yet, insurers continue to refuse to disclose what those coverages and limits are. How can the duties not to manipulate settlements under the different coverages, and to advance pay reasonably certain damages up to the limits of coverage, be reconciled with a longstanding practice of withholding precisely that essential information from injured third-parties?

It is time for this Court to instruct that the same statutes which require payment of coverages up to policy limits when liability is reasonably clear also require that, in those circumstances, information necessary to ensure that duty is being fairly discharged be disclosed to the injured claimants.

If Hartford were correct that this case is moot, then insurers could avoid adjudication of this important issue indefinitely by "playing chicken" with injured Montanans—refusing to provide basic policy information, forcing them to file suit,

then yanking the rug out by providing the policy. Two mootness exceptions—"voluntary cessation" and "capable of repetition yet evading review"—apply to allow the court to reach the merits of the issue notwithstanding such maneuvering. While the two doctrines are related, they differ in allocation of the burden—the "voluntary cessation" exception imposes upon defendants who seek to avoid a decision on the merits a "heavy burden" to make it "absolutely clear" that the conduct cannot reoccur. If Montana courts do not apply one of these exceptions, Hartford and its cohorts could forever manipulate the process to deprive the courts of the opportunity to decide and declare the insurers' pre-suit duties.

I. The dispute is not moot.

The district court was required to determine whether it had authority to adjudicate Wilkie's claim for declaratory relief. *Stowe v. Big Sky Vaca. Rentals, Inc.*, 2019 MT 288, 398 Mont. 91, 454 P.3d 655 (citing *Harrington v. Energy W. Inc.*, 2015 MT 233, ¶¶ 9, 13, 380 Mont. 298, 356 P.3d 441). Clearly, it had jurisdiction over this type of case. *See* Mont. Const., Art. VII, § 4 (district courts have "original jurisdiction in…all civil matters and cases at law and in equity"); § 3-5-302(1)(b)-(c), MCA.

An otherwise justiciable case can become moot if the disputed issue "has ceased to exist or is no longer live." *Ramon v. Short*, 2020 MT 69, ¶ 20, 399 Mont.

254, 460 P.3d 867 (citations omitted); *Walker v. State*, 2003 MT 134, 316 Mont. 103, 68 P.3d 872, 878. But, "[e]ven if a case is technically moot," courts have inherent power to hear and decide a case "where the issues presented are important and of continuing interest." 1A C.J.S. Action § 80, Exceptions to Mootness Doctrine Generally (Mar. 2020 update); *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 38, 333 Mont. 331, 142 P.3d 864 ("Exceptions to the mootness doctrine allow courts to rule on non-extant controversies to provide guidance concerning the legality of expected future conduct.").

A. Under the "voluntary cessation" exception, defendants bear a heavy burden to show their eventual production of the Policy moots this case.

The district court should have reached the merits of this case pursuant to the voluntary cessation doctrine. *See Havre Daily News*, ¶¶ 33–34, 38. This mootness exception allows cases to proceed that "would otherwise have been rendered moot by a defendant's voluntary cessation of the challenged action." *Montanans Against Assisted Suicide v. Bd. of Med. Exam'rs*, 2015 MT 112, ¶ 15, 379 Mont. 11, 347 P.3d 1244 (citing *Havre Daily News,* ¶¶ 38-40). A defendant cannot moot a case by its voluntary conduct unless it is "**absolutely clear** that the allegedly wrongful behavior could not reasonably be expected to recur." *Havre Daily News*, ¶ 38 (emphasis added) (quoting *Friends of the Earth, Inc. v. Laidlaw Env'l Serv's*, 528

U.S. 167, 189 (2000)); *see also Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019 n. 1 (2017) (voluntary cessation does not moot a controversy unless subsequent events make it "absolutely clear" the behavior could not reasonably be expected to recur); 1A C.J.S. Actions § 80.

This exception responds to the concern that defendants may "manipulate the litigation process" to evade judicial review. *Havre Daily News*, ¶ 34 (quoting *Laidlaw*, 528 U.S. at 189). Consequently, a defendant who voluntarily ceases its challenged conduct and then argues mootness must carry a "**heavy burden**" to persuade the court that the conduct "**cannot reasonably be expected to start up again**." *Id.* (emphasis added).

For example, in right-to-know disputes where records custodians have refused to provide information only to immediately surrender it once suit is filed—in some ways an analogous problem—this Court held:

> If…a plaintiff could show that the same agency has repeatedly withheld documents (or information contained within documents) from public disclosure and then fully disclosed those same documents upon the plaintiff's filing suit to enforce its right to know, **the agency would shoulder a very hefty burden in attempting to persuade this Court that the "challenged conduct cannot reasonably be expected to [recur]**."…Thus, it becomes **reasonable to expect that if a substantially similar situation occurs, the agency will repeat the obstructive tactics** that the plaintiff challenges, perpetrating a substantially similar, though not identical, wrong. In such cases, final judicial

> adjudication may provide useful guidance that may obviate future violations of the right to know. Accordingly, a plaintiff may likely obtain adjudication of such past disputes under the "voluntary cessation" exception to mootness.

Havre Daily News, ¶ 39 (emphasis added).

B. Defendants did not carry their "heavy burden" to show their voluntary cessation mooted the case.

Defendants claim the issue is moot because, after suit was filed, they voluntarily ceased their conduct of withholding the Policy. This suggests "manipulation of the litigation process"—the concern that prompted this Court to impose a "heavy burden" to make it "absolutely clear" that the conduct will not recur. *Havre Daily News,* ¶ 34. This Court "appreciate[s] the importance of properly assigning this burden." *Id.*

Nonetheless, the district court's order did not mention the burden or discuss how defendants might have carried it. After recounting the briefing and discussing justiciability and mootness generally, the district court offered essentially two rationales, neither of which addressed the salient burden under the "voluntary cessation" exception, and referenced the defendants' briefing.

1. The district court's notion that Wilkie should have to file a different lawsuit.

The district court reasoned:

> If Plaintiff believes The Hartford's conduct rises to the level of bad faith, Plaintiff may pursue that action. This Court will not provide an advisory opinion as a steppingstone to that litigation.

App. 1, pp. 2-3. This is erroneous in several ways.

First, the same thing could be said about every *Ridley* declaratory judgment action. A prospective plaintiff aggrieved by an insurer's pre-litigation conduct could always just suffer the injustice and then seek compensation later in a bad-faith action. *Ridley* and its progeny, however, noted the devastation that could be visited upon injured third-party claimants if they were forced to wait and litigate for the damages to which they were entitled. *See, e.g.*, *Ridley*, 286 Mont. at 335, 951 P.2d at 993 (even minor injuries can inflict expenses that are "devastating to a family of average income"); *DuBray v. Farmers Ins. Exch.*, 2001 MT 251, ¶ 15, 307 Mont. 134, 36 P.3d 897. This economic pressure can leave tort victims vulnerable to leveraging and encourage "ill-advised settlement." *Ridley*, 286 Mont. at 335, 951 P.2d at 993; *see also Watters*, ¶ 56 ("coerced economic necessity" might motivate an injured claimant to settle improvidently).

Wilkie's request is, at most, a slight extension of that same reasoning. If the

insurers must make coverage available up to policy limits to prevent devastating collateral harm, they should also disclose what those coverages and limits are. Just as economic pressure could lead to imbalanced bargaining and thus settlements that are unfair to the victims, so, too, can ignorance about the available coverages and limits. Insurance companies should no more be allowed to cheat injured victims by enforced ignorance than by economic pressure.

Second, that another action could be filed that might allow for more complete relief (payment for the bad-faith damages) is no reason to withhold declaratory relief.

> Section 27–8–201, MCA, makes clear that that right to have statutes construed is **not dependent on whether further relief "is or could be claimed**." In other words, it is not a basis for denying declaratory relief that all of the "rights, status, or other legal relations" of the parties cannot be decided in the same proceeding.

Ridley, 286 Mont. at 330-331, 951 P.2d at 990 (emphasis added). That Wilkie could sue for bad faith "is not a basis for denying declaratory relief." *Id.* Otherwise, *Ridley* declaratory judgment actions could not exist.

The district court's terse dismissal of Wilkie's concerns, with instructions to sue for bad faith, defeats the whole purpose of affording *Ridley*-type benefits.

2. The district court's discomfort about a (fictional) broad ruling.

Wilkie's complaint specified that Sprout's liability to him was "reasonably clear," such that the Hartford was making *Ridley* payments of medical expenses. Dkt. 2, ¶ 7. It was in that context that Wilkie sought declaratory relief, just as *Ridley* and its progeny only apply when liability is reasonably clear.

Hartford confused the issue by misleadingly arguing that Wilkie sought a declaration "that insurers owe a duty…to disclose policies and coverage limits, **regardless of the circumstances**." Dkt. 6, p. 6 (emphasis added). Wilkie's response reiterated that he only alleged such a duty "WHEN LIABILITY IS REASONABLY CLEAR." Dkt. 10, p. 10; *see also id*. at 8 ("Wilkie's contention is that, when liability is reasonably clear, insurers like Hartford have a duty to produce policy information to the injured claimant without requiring a lawsuit"); 9 ("Wilkie claims a legal right to obtain Mr. Sprout's policy information once Hartford knew Sprout's liability for the collision was reasonably clear"); 13-15 (arguing the duties imposed by the UTPA and *Ridley* when liability is reasonably clear").

The district court took the bait that Hartford had dangled, "declin[ing] to apply an exception to the mootness doctrine to address whether an insurer, **in all circumstances**, has a duty…." App. 1, p. 3 (emphasis added).

If that had truly been Wilkie's request, the district court's reticence would be understandable. But it was not. The district court's refusal to recognize that Wilkie's request was limited ignores his pleading, the UTPA (§ 33-18-201(6) and (13), MCA, specifically apply only when liability is reasonably clear) and the entire *Ridley* body of jurisprudence addressing duties existing in those circumstances.

3. The district court's passing reference to the defendants' briefs.

Finally, the district court dismissed "[b]ased on the argument and authority cited by Defendants…." App. 1, p. 3. It would be incorrect to surmise that the district court referenced something in the defendants' briefs that carried their heavy burden.

Neither defendant mentioned the exception or acknowledged the burden in their opening briefs. Dkts. 5-7.

Even after Wilkie's opposition brief (Dkt. 10) pointed out this omission, Hartford continued to ignore its burden. To be sure, when addressing the "capable of repetition yet evading review" exception, Hartford's reply (Dkt. 18) properly assigned the burden to Wilkie. *Id.* 10-11. But neither the word "burden," nor any recognition that it rested with Hartford, appear in its discussion of the "voluntary cessation" doctrine. Dkt. 18, pp. 6-9.[1] To the contrary, Hartford's reply is replete

[1] Sprout's reply at least acknowledged Paul's argument about the burden, Dkt. 19,

with the incorrect argument that Wilkie had not carried **his burden**. *See* Dkt. 18, p. 1 (asserting Wilkie failed to establish his claims are not moot); 7 (argument heading that Wilkie's allegations failed to establish voluntary cessation exception; not recognizing the burden on Hartford); 8 (chiding Wilkie for failing "to establish that the voluntary cessation exception applies"); 9 (scoffing that Wilkie "offers only speculative allegations" that conduct might reoccur and dismissing Cossi and Stalpes declarations as failing to adequately disprove the proposition on which defendants actually bore the burden).

The defendants stubbornly refused to recognize their burden. Not surprisingly, then, Hartford's failure to meet its burden was absolute. It did not merely fail to prove with "absolute [clarity]" that its conduct—withholding policies from claimants—"cannot reasonably be expected to start up again." **Hartford never even stated that proposition**. It never even pretended to promise that it would not continue this practice in the future. And it prevented discovery that might have illuminated the likelihood for reoccurrence, including its reasons for withholding the Policy, discussions with Sprout about producing the Policy, and changes in Hartford's guidelines and procedures that might make it act differently

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p. 2, but does not attempt to carry it, instead deflecting to Hartford. The district court never mentioned the burden.

in the future.[2]

Whatever the district court intended when it referenced the defendants' "argument and authority," there was nothing in the record that even arguably carried the defendants' burden.

C. The challenged conduct will reoccur.

It was defendants' burden to make "absolutely clear" that the conduct will not continue. They could not have made that showing even if they had tried.

1. Facial challenges

When the Rule 12(b)(1) motion makes a facial challenge to jurisdiction, it is analyzed as under Rule 12(b)(6). The court does not look beyond the pleadings, must accept all well-pleaded allegations as true, and construes the facts in the light most favorable to the plaintiff. 2 Moore's Fed. Prac., § 12.30[4] (3d Ed.) (citations omitted); *see, e.g.*, *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 362–65 (1st Cir. 2001). Thus, if defendants' challenge was facial, it was to be presumed that

[2] Even while obstructing factual development, Hartford argued that the district court could not decide the merits without factual development. *See* Dkt. 6, p. 10 (arguing "the limited set of facts…is insufficient to justify the adoption of such a broad rule" and "Plaintiff's characterization of the underlying facts…is not complete."); Dkt. 18, p. 3 (asserting Paul's declaratory action relies on "an insufficient set of facts" and "attempts to impose new duties on insurers, on an insufficient factual record."); p. 5 (insisting Paul's requested relief "cannot be imposed on the incomplete set of facts Plaintiff has presented….").

Hartford's refusal is pursuant to a deep-rooted, long-standing, and common practice of Hartford and insurance companies generally. *Id.* ¶¶ 14–15. Given these presumed facts, defendants could not carry their "heavy burden" to show it is "absolutely clear" they will not again withhold policy information. Instead, Wilkie had made a prima facie showing of a custom and practice that was likely to continue, as in *Havre Daily News*, *supra*.

2. Factual challenge.

If a Rule 12(b)(1) motion turns on disputed facts outside the pleadings, courts can receive evidence in determining subject matter jurisdiction. *Stowe*, ¶ 12, n. 6 (citing *Harrington*, ¶¶ 9–11); Rule 43(c), M.R.Civ.P. Courts may also permit discovery about jurisdictional facts. Moore's, *supra*, § 12.30[3].

Here, defendants obviously invoked facts outside the complaint, i.e., the post-suit production of the Policy. Sprout also argued a lack of a pre-litigation demand upon him. Dkt. 7, p. 2. Even with these facts, defendants did not carry their "heavy burden." Indeed, as discussed above, Hartford never even said—much less proved—that it would not continue to withhold policies from injured claimants.

(i) That it took this lawsuit to change defendants' behavior in this case belies their argument.

The fact that this lawsuit was required—with Sprout insisting on non-disclosure even thereafter—provokes "a natural suspicion…that recurrence…[is] a realistic possibility." *Adams v. Bowater Inc.*, 313 F.3d 611, 615 (1st Cir. 2002) (finding employees' claim was not moot where employer restored benefits only after suit was filed); *see also Havre Daily News*, ¶ 39.

(ii) Defendants' continuing insistence that they acted correctly further belies any suggestion that they will not repeat their behavior.

Defendants' merits argument to the district court—that they had no obligation to provide policy information—negates any suggestion that they will not resume their practice of withholding such information. Defendants did not say "we were wrong and will not do it again," but insisted that they were fully justified in withholding the Policy. *See, e.g.*, Dkt. 6, pp. 8–10 (Hartford arguing the lack of duty); Dkt. 7, p. 2, n.1 (Sprout arguing the same); Dkts. 10, 11 (similar replies).

Both defendants invoke Montana's Insurance Information and Privacy Protection Act, § 33-19-306, MCA, (the "MIIPP Act"). *See* Dkt. 6, pp. 9–10; Dkt. 7, p. 2, n.1. Their argument that Montana law requires them to withhold policy information precludes a finding that it is "absolutely clear" their conduct will not recur. Hartford cannot plausibly argue that it is "absolutely clear" that it will no

longer withhold the very information that it argues elsewhere it **must** withhold under the MIIPP Act.

Defendants correctly argue that the Rule 26(b)(5) discovery obligation to disclose policy information does not apply pre-litigation. Dkt. 6, p. 9; Dkt. 7, p. 2, n.1. Defendants' argument that the Rules absolve them of **pre-litigation** duties is suspect.[3] But the present point is that defendants' lock-step insistence that they were justified in withholding policy information leaves no room for them to now argue it is "absolutely clear" that they will never do it again.

Defendants' argument appears to be that "we were justified, or even required by law, to withhold the Policy, but we promise to never do it again." This is internally inconsistent and does not meet the "heavy burden" to show it is "absolutely clear" this problem will not reoccur.

(iii) The additional factual submissions.

By going beyond the allegations of the complaint, defendants opened the door to factual submissions that corroborate Wilkie's allegations that this is a pervasive problem. Wilkie submitted declarations from Domenic Cossi and Justin

[3] By definition, the Civil Rules only govern "civil actions and proceedings in the district courts." Rule 1. It is incorrect to argue that, because the Rules require certain conduct in litigation, that conduct is not required before litigation. For instance, the Rules require good faith in litigation. *See, e.g.*, Rules 11; 16(f)(1)(B); 26(g)(1); 37(a)(1). That does not mean that, pre-litigation, bad faith is permitted.

Stalpes, both well-regarded plaintiff's attorneys. Their declarations each attested to the ongoing and repeated practice of insurers to withhold policy information, *see* Dkt. 12 (Cossi Decl.), ¶ 20; Dkt. 11 (Stalpes Decl.), ¶ 18, and explain the resulting disadvantages and difficulties to injured claimants, *see* Dkt. 12, ¶¶ 8–20; Dkt. 11, ¶¶ 8–18. Defendants have not even attempted to carry their "heavy burden," so there is little need to resort to extrinsic evidence. However, this evidence of custom and practice certainly allows a reasonable inference that Hartford will also continue to withhold policy information.

Sprout argues the lack of a demand upon him, inviting the Court to infer that he had no objection and would have complied. Dkt. 7, p. 2. This is untrue. After being served, Sprout initiated several terse communications with Wilkie's counsel's staff—including a trip to counsel's office—making clear he would not provide his insurance policy. *See* Dkt. 13 (Nelson Decl.).

(iv) If the district court did not deny the motion to dismiss outright, it should have allowed discovery.

The district court should have rejected the mootness argument outright because defendants did not attempt to carry their burden. But, if the court were inclined to entertain the mootness argument, it should have allowed discovery, followed by further evidentiary submissions or a hearing.

Following a voluntary cessation, the mootness analysis requires inquiry into

the likelihood of reoccurrence. Thus, Wilkie sought to discover Hartford's reasons for refusing to disclose the Policy before Wilkie sued and for the disclosure after suit was filed. App. 4, pp. 3-4 (Hartford, Int. 3-4 and RFP 3-4). Wilkie specifically sought information about any policy or procedure Hartford had adopted to prevent a reoccurrence. *Id.*, Int. 4 and RFP 4 (asking about any policy Hartford had adopted since its initial refusal regarding disclosure of policies to injured third parties in clear liability cases). Wilkie also sought to depose defendants on these matters. *See* Apps. 6-8.

Evidence that the same party has "repeatedly withheld documents" and engaged in other "obstructive tactics" is highly relevant in analyzing the voluntary cessation doctrine. *See, e.g., Freedom From Religion Found., Inc. v. Mercer Cnty. Bd. of Edu.*, No. 1:17-00642, 2019 WL 3491241, at *2 (S.D.W. Va. July 31, 2019) (slip copy). There, the plaintiffs filed a motion for leave to conduct limited discovery related to mootness. The defendant opposed, contending that, because the County passed a resolution[4] that it will "never offer or employ the BITS [Bible in the Schools] program in any of its schools," the case was moot. *Id.* at *1. Applying the voluntary cessation exception, the court concluded the case was not clearly moot

[4] In that case, a formal resolution was insufficient, by itself, to carry the burden. Here, Hartford never even said it would change its conduct, and resisted inquiry into whether it had adopted such a policy.

because the County failed to carry its burden of showing it was "absolutely clear" that the suspended version of the BITS program would not return in the same form. *Id.* (citing *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 191-92 (4th Cir. 2018)). Thus, the Court granted plaintiff's motion to engage in discovery regarding the issue of mootness. *Freedom From Religion,* 2019 WL 3491241, at *2.

Declaring the case moot without allowing inquiry into the truth of the underlying assumption that the challenged conduct would not reoccur—a proposition that defendants had a "heavy burden" to make "absolutely clear"—rewarded Hartford's manipulation of the litigation process. *See Havre Daily News*, ¶ 34; *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721 (2013) (voluntary cessation exception prevents a defendant from "engag[ing] in unlawful conduct, stop[ping] when sued to have the case declared moot, then pick[ing] up where he left off"); *Pashby v. Dehlia*, 709 F.3d 307, 316 (4th Cir. 2013) (applying voluntary cessation doctrine).

D. The capable of repetition yet evading review exception.

A completely separate mootness exception—"capable of repetition yet evading review"—also applies. Wilkie contends that, when liability is reasonably clear, insurers have a duty to produce policy information to the injured claimant without requiring a lawsuit. However, there will never be a case in which a court

can address this issue but where the injured claimant does not, by virtue of having been forced to file suit, have the right to obtain the policy in discovery. Thus, the issue of an insurer's pre-litigation duty "invariably ceases" upon filing and would forever evade review. Indeed, if the district court's decision were correct, the very act of seeking review of the issue would prevent review. This is a separate and further ground upon which the district court should have denied Hartford's motion. *See Havre Daily News*, ¶ 33 (citations omitted); 1A C.J.S. Action §§ 80, 82.

The district court did not discuss this exception either.

E. This is a justiciable controversy and does not merely seek an advisory opinion.

A case presents a justiciable dispute, as opposed to an advisory matter, where: (i) it involves "an honest and actual antagonistic assertion of rights by one [party] against another[,]" and (ii) the court is "empowered to issue a decision that serves as more than an advisement or recommendation." *Ctr. for Bio. Div. v. U.S.F.S.*, 925 F.3d 1041, 1047-48 (9th Cir. 2019) (citations omitted). "A party does not seek an advisory opinion where 'valuable legal rights…[would] be directly affected to a specific and substantial degree' by a decision from the court." *Id.*

Wilkie claimed a legal right to obtain the Policy once Hartford knew Sprout's liability for the collision was reasonably clear. Wilkie requested that information, hoping to settle his injury claim without going to court, but Hartford refused.

Wilkie is now asking this Court to declare his rights to the policy under the DJA. The purpose of the DJA is "to settle and to afford relief from uncertainty and insecurity as to [those] rights." § 27-8-102, MCA. The DJA is remedial and "is to be liberally construed and administered." *Strauser v. RJC Inv., Inc.*, 2019 MT 163, ¶ 15, 396 Mont. 348, 445 P.3d 803 (district court erred in dismissing DJA claim requesting clarification of purchaser's rights under a contract (quoting § 7-8-102, MCA, and *Lee v. State*, 195 Mont. 1, 6, 635 P.2d 1282, 1284 (1981))). Importantly, courts have the power to "declare rights…and other legal relations **whether or not further relief is or could be claimed**." § 27-8-201, MCA (quoted by *Strauser*, ¶ 15) (emphasis added).

The district court should have adjudicated Wilkie's pre-litigation rights.

F. The Court should not condone Hartford's manipulation of the litigation process to avoid a merits ruling.

Having forced Wilkie to file suit, Hartford should not be permitted to strip the courts of this state of jurisdiction so it can avoid an adverse decision and continue engaging in the same injurious conduct.

The Court has an interest in preventing litigants from manipulating "the Court's jurisdiction" to avoid an unfavorable ruling. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000); *Laidlaw*, 528 U.S. at 189 (allowing parties to manipulate the system by voluntary cessation would let them dodge responsibility then return

to their "old ways" (quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

Likewise, the public has an interest in obtaining answers to the questions posed by Wilkie's complaint. *See W.T. Grant Co.*, 345 U.S. at 632 (the public's interest in having the legality of challenged practices settled "militates against a mootness conclusion."); *see also* J. Davis and N. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 Yale L.J. Forum 325 (2019) (the voluntary cessation exception "prevents gamesmanship and preserves judicial resources" by holding defendants to a strict standard when they "change their conduct" to claim mootness).

The district court erred by refusing to declare the parties' rights.

II. Wilkie's complaint stated a claim.

On a Rule 12(b)(6) motion to dismiss, the court determines whether the complaint is "facially sufficient to state a cognizable legal claim entitling the claimant to relief on the facts pled." *Stowe*, ¶ 12 (citations omitted). Such a motion should be granted only if it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cowan v. Cowan*, 2004 MT 97, ¶ 10, 321 Mont. 13, 89 P.3d 6 (quoting *Powell v. Salvation Army*, 287 Mont. 99, 102, 951 P.2d 1352, 1354 (1997)). The well-pleaded allegations in the complaint are taken as true and the complaint is construed in the light most

favorable to the plaintiff. *Id.*

A. Montana law requires disclosure of the Policy to injured third-party claimants when liability is reasonably clear.

Almost sixty years ago, the venerable Judge Jameson opined that an insurance company's refusal to disclose policy limits "may in some cases result in liability on the part of the insurer in excess of its policy limits." *See Johanek v. Aberle*, 27 F.R.D. 272, 280 (D. Mont. 1961). Although this was in the context of an already-filed suit and pre-dated the Rule amendments specifically allowing discovery of insurance policies, Judge Jameson's warning was both powerful and prescient:

> A fifth situation [potentially exposing the insurer to excess liability] is closing the door to settlement negotiations by refusal to disclose the policy limits. * * * The company has no right to protect itself from excess liability by stating that it will not disclose its policy limits, when **such effectively forecloses the possibility of receiving an offer of less than the policy limits. Such constitutes bad faith** exercised in complete derogation of the rights of the policy holder. Many states now require the disclosure of policy limits; but, even in those jurisdictions which do not, **the company is playing with fire** when it cuts off the possibility of receiving an offer within the policy limits by its refusal to open the door to reasonable negotiations.

Id. (emphasis added) (quoting J. Appleman, *Circumstances Creating Excess Liability* 315 (ABA 1960). *Johanek* permitted discovery of policy information because disclosure is consistent with the Rules of Civil Procedure and has a "tendency to

eliminate secrets, mysteries and surprises and should promote disposition of cases without trial and substantially just results in those cases which are tried." *Johanek*, 27 F.R.D. at 280 (quoting *Lucas v. Dist. Court*, 345 P.2d 1064, 1070 (Colo. 1959)).

Events since *Johanek* have only strengthened the conclusion that the terms of an implicated policy are relevant and, in fact, necessary to allow good faith negotiations on an even playing field.

1. Both Federal and State Rules allow discovery of insurance information because it is highly relevant to settlement and necessary for fair negotiations.

Nine years after *Johanek*, insurance agreements became discoverable in federal court. Rule 26(b)(2), Fed.R.Civ.P. (1970). And, since 1993, federal litigants must provide insurance agreements with their initial disclosure. 8 Wright & Miller Fed. Prac. & Proc. Civ. § 2010 (3d ed.). In 1975, Montana also specifically authorized discovery of insurance policies. *See* Rule 26(b)(5), M.R.Civ.P.; Adv. Comm. Note to Rule 26 (amending Montana rules to conform to Federal practice).

As the Federal Rules Advisory Committee explained, the rules governing disclosure of insurance policy information were revised to follow the lead of cases like *Johanek* that emphasize:

> the practical significance of insurance in the decisions lawyers make about settlement and trial preparation…. Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case,

> so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases….

1970 Fed. Adv. Comm. Notes; *see also* 23 Am.Jur.2d Depos. and Disc. § 38; *Conerly v. Flower*, 410 F.2d 941, 943 n. 3 (8th Cir. 1969) (early disclosure of policy information "could help eliminate congested trial court dockets by encouragement of out of court settlements."); *Deveau v. Millis Transp. Co.*, 43 F.R.D. 505, 507–508 (D. Conn. 1967) (disclosure of policy information "can, and in many instances does, facilitate the settlement" such as when coverage is limited and the plaintiff must realistically assess the prospects for a potential judgment which "will encourage plaintiffs to seriously consider settlement in cases, which otherwise would probably require a trial.").

Ignoring this reasoning, Hartford suggested below that injured claimants "historically have been…able to make initial demands without first obtaining a copy of the insured's policy and policy limits." Dkt. 6, p. 7. That proves nothing. With insurers routinely refusing to provide information, claimants have done the best they can. That does not shed any light on whether the insurers have a duty to disclose such information or whether the practice of withholding it has unfairly disadvantaged injured third-party claimants, who have "historically" then been forced to proceed in insurer-imposed ignorance.

The public policy of Montana is "to encourage settlement and avoid unnecessary litigation." *Augustine v. Simonson*, 283 Mont. 259, 266, 940 P.2d 116, 120 (1997). The above cases convincingly explain how disclosure of insurance information advances that policy.

Against these strong public policy considerations, defendants argued only that judicial economy mandates dismissal of this action to make room for other litigation. Dkt. 6, pp. 7–8. But, allowing carriers to continue their practice of withholding this information will have the opposite effect, spawning more litigation. Stalpes and Cossi explained that the need to obtain policy information to fairly negotiate, coupled with insurers' refusal to provide that information pre-suit, motivates them to file suit, when they otherwise would not, to level the playing field. *See* Dkt. 11, ¶¶ 8, 16-18; Dkt. 12, ¶¶ 8, 16-18. Defendants effectively asked the district court to save the court system the burden of a single case and, in the process, invite many more.

On the other hand, a decree clarifying that insurers must provide policy information when liability is reasonably clear would promote settlement of many cases and would forestall unnecessary litigation by eliminating the weapon (withholding information) with which insurers force injured claimants either to negotiate at a disadvantage or to file suit just to discover the insurance policy.

2. The UTPA.

In 1977, the Montana legislature adopted the UTPA, imposing upon insurers duties that necessarily suggest a corresponding duty to disclose the policy to injured third parties, at least in clear liability cases.

First, insurers must not misrepresent provisions respecting coverage. § 33-18-201(1), MCA. It would be most curious if the insurance company's duty to honestly represent coverage provisions nonetheless allowed it to completely withhold information on that topic.

Second, insurers must act in good faith to attempt to negotiate a prompt, fair, and equitable settlement when liability is reasonably clear. § 33-18-201(6), MCA. Given Judge Jameson's sound observations that withholding policy information can hamper negotiations and prevent prompt settlement, and the mass of later authorities joining his reasoning, it cannot be "good faith" for an insurer to withhold information to try to retain bargaining advantage in the hope that an ignorant claimant might leave money on the table. Taking advantage of injured victims by enforced ignorance is no more "fair, and equitable" than doing so by the economic coercion prohibited by *Ridley*.

Third, insurers must not withhold settlement when liability is reasonably clear under one coverage to "leverage" a concession under other coverage. § 33-

18-201(13), MCA. How can an injured claimant know whether his rights are being violated if the carrier refuses to even disclose what coverages are available? Clearly, this duty suggests that the insurer must provide policy information.

Fourth, an insurer must explain "the basis in the insurance policy" for an offer of settlement. § 33-18-201(14), MCA.[5] How can an insurer explain an offer that is influenced by the coverage terms or limits without disclosing those terms and limits? How can a claimant evaluate the offer without that information?

And, insurers have a common law duty to handle third-party claims fairly and in good faith. *See* MPI2d 8.05 (citing *Brewington v. Emp's Fire Ins.*, 1999 MT 312, 297 Mont. 243, 992 P.2d 237).

All of these duties suggest that, in a clear lability case, the insurance company has a concomitant duty to disclose the insurance policy and limits information to the injured third-party claimant.

Defendants seemed to acknowledge the existence of such a duty in some cases. *See* Dkt. 6, pp. 6–7 (suggesting disclosure is appropriate in some cases but not in other cases). But, does "appropriate" mean "required?" If not, what does it mean? Moreover, Hartford did not explain who it thinks should get to determine

[5] That a violation of this subsection is not actionable under § 33-18-242 is irrelevant. The issue is whether the legislature imposed a duty, not whether a breach is independently actionable.

when disclosure is "appropriate" or not. Apparently, Hartford would reserve that power to itself and expects that the injured third-party should take the insurance company's word for it, just as the hens should trust the fox.

All of this, taken together, strongly suggests that the insurance company should also disclose the policy and limits to injured third-party claimants. Indeed, several courts have recognized the bad faith liability may be predicated on a "refusal to disclose policy limits." *See, e.g., Boicourt v. Amex Assurance Co.*, 78 Cal.App.4th 1390, 1394, 93 Cal.Rptr.2d 763 (2000) (citing *Johanek* and explaining how the non-disclosure of policy information may give rise to conflicts of interest); *Powell v. Prudential Property & Cas.*, 584 So.2d 12, 14 (Fla. Dist. Ct. App. 1991), *Szarmack v. Welch*, 289 A.2d 149, 153 (Pa. 1972); *Cernocky v. Indem. Ins. Co. of N. Amer.*, 216 N.E.2d 198, 205 (Ill. 1966)).

3. Ridley and its progeny.

Since the amendments of the discovery rules, this Court has developed a body of substantive law about when an insurer must pay an injured third-party claimant's damages in "advance," i.e., prior to final settlement, which also implicates coverage questions.

Under *Ridley*, *supra*, and its progeny, insurers in clear liability cases must pay certain damages, notably including medical expenses and lost wages and other

reasonably certain damages—up to policy limits—without a release. *See High Country Paving, Inc. v. United Fire & Cas. Co.*, 2019 MT 297, ¶ 16, 398 Mont. 191, 454 P.3d 1210 (citing *Shilhanek*, ¶ 16); *DuBray*, ¶ 15; *Watters*, ¶ 60. Recent guidance from this Court clarifies that the duty to pay up to policy limits, without conditioning such payment on a release for the insured, even extends to general damages. *High Country Paving*, ¶ 26. A breach of this duty is a violation of the UTPA. *See id.*

How can claimants effectively determine whether damages exceed policy limits, or make a demand for policy limits, if the insurer refuses to disclose those limits? It would be highly inconsistent to impose upon an insurer a duty to pay an injured third-party claimant up to policy limits, while permitting the insurer to withhold from the claimant information about what policy limits are.

Clearly, the duty to pay up to policy limits in a clear-liability case carries with it a related duty to disclose what those limits are.

4. UIM coverage.

Injured parties can seek recovery under their own underinsured motorist coverage even before finalizing settlement with the tortfeasor, but the UIM carrier gets credit for the amount of the tortfeasors' coverage. *Augustine*, *supra*. How can an injured claimant analyze these issues if the tortfeasor and her carrier need not

even disclose coverage? How would the claimant even know if the tortfeasor were underinsured?

5. Considered together, these factors establish a duty to reveal the policy and declarations in a clear liability case.

When Judge Jameson cautioned that insurers were "playing with fire" and refusing to "open the door to reasonable negotiations" by withholding policy information, none of the foregoing developments had yet occurred. The Rules did not recognize the automatic right to discovery of this information because it is so highly relevant to negotiations; the legislature had not imposed the foregoing duties on insurers which strongly suggest that the claimant must have information about the policy and limits; *Ridley* had not held that insurance companies must pay policy limits without a release in certain circumstances; and this Court had not announced that injured claimants could seek recovery under their own underinsured motorist coverage even before a final settlement with the tortfeasor.

All of those subsequent developments lend further gravitas to Judge Jameson's warning and analysis, compelling a conclusion that, when liability is reasonably clear, insurers must disclose policy information even prior to litigation.

B. Ruling in Wilkie's favor would not be improper legislation.

Hartford argued that granting Wilkie's requested relief would be to act as a "super-legislature" and "enact a new law." Dkt. 18, pp. 1-6.

When *Ridley* held that, in clear liability cases, insurers must pay certain damages even without a final settlement, this Court was not legislating or enacting new law. Indeed, it was cognizant that its role was "simply to declare what is stated by the plain terms of the statute and not to insert what has been omitted." *Ridley*, 286 Mont. at 330, 951 P.2d at 990. This Court merely declared what was already required under section 201(6) and (13), "by their terms…." *Id*. at 334, 951 P.2d at 992. Likewise, declaring that those same statutes also require disclosure of the Policy is not legislating—the duty Wilkie asks this Court to recognize already resides in the UTPA.

C. Pre-litigation disclosure does not violate the MIIPP Act.

Citing § 33-19-306(1), MCA, defendants argued below that insurers cannot be compelled to disclose policy information because it is "personal or privileged information[,]"[6] restricted from disclosure outside of litigation. Dkt. 6, pp. 9-10;

[6] Section 33-19-104(21), MCA, defines personal information as "any individually identifiable information gathered in connection with an insurance transaction from which judgments can be made about an individual's character, habits, avocations, finances, occupation, general reputation, credit, health, or any other personal characteristics." Personal information further includes "an individual's name and

Dkt. 7, p. 2, n.1. This argument is legally unsupported and defies common sense.

First, insurance policies are generally comprised of standard form language and cannot be construed as confidential or privileged. Wilkie is not suggesting that he is entitled, pre-litigation, to an insured's personal financial information, claims history, or other privileged information. Underscoring the difference, courts have rejected the notion that discovery of insurance information would "pave the way" for improper inquiry into sensitive personal matters.

> [I]nsurance coverage is in a class by itself in that the specific and sole purpose of the policy is to compensate for damages caused by the insured. On that basis, there is a clear line of delineation between the policy and the defendant's other assets, and there would be no difficulty in drawing such a line for discovery purposes.

Clauss v. Danker, 264 F. Supp. 246, 249 (S.D.N.Y. 1967). And, as Judge Jameson aptly noted:

> Particularly in view of the financial responsibility law in Montana and the provisions of the standard insurance policy, discussed supra, "an insurance contract is no longer a secret, private, confidential arrangement between the insurance carrier and the individual, but it is an agreement that embraces those whose person or property may be injured by the negligent act of the insured."

Johanek, 27 F.R.D. at 278–79 (citing *Maddox v. Grauman*, 265 S.W.2d 939, 942

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address and medical record information." *Id.*

(Ky. App. 1954)).

Second, to the extent any such privileged or sensitive information actually appears in an insurance policy, insurers could simply redact it before producing it.

Third, even under the MIIPP Act, an insurer can disclose "personal or privileged information" with the insured's written consent. § 33-19-306(2), MCA; *see also Boicourt*, *supra* (criticizing insurer's self-interested refusal to disclose without checking with the insured). Both defendants suggested that the Act prohibited disclosure, but never stated whether Hartford asked Sprout or whether Sprout consented or objected. Defendants invite the court to draw inferences but played coy and resisted discovery on the topic.

D. This Court should not merely reverse, but decide the merits too.

Wilkie seeks a declaration that, when the insured's liability to an injured third party is reasonably clear, the insurer must disclose the insurance policy to the claimant. This presents an equitable issue. *Karlson v. Rosich*, 2006 MT 290, ¶ 7, 334 Mont. 370, 147 P.3d 196 ("Declaratory relief is an equitable remedy."). "In equity cases…the supreme court shall…determine…questions of law…." § 3-2-204(5), MCA; *see Davis v. Westphal*, 2017 MT 276, ¶ 11, 389 Mont. 251, 405 P.3d 73 (§ 3-2-204(5) imposes "mandatory review of all…questions of law implicated on record in equity cases"); *Bordeaux v. Bordeaux*, 43 Mont. 102, 115 P. 25, 29 (1911)

("Having reached the conclusion that the decree must be reversed…it becomes our duty under [now § 3-2-204] to determine the questions of law…presented by the record…and to make such disposition of it as the circumstances require.").

It makes sense that this Court should construe the UTPA instead of remanding to the district court. After all, this is a question of law. *Montana Indep. Living Project*, *supra*. This Court's task is the same whether or not the district court has first ruled.

E. Fees.

Regardless of how this Court rules, the remand should direct the district court to assess fees in Wilkie's favor.

First, if Wilkie obtains a reversal, he will be entitled to fees under the DJA. An award of attorney fees is "necessary and proper" in this declaratory judgment action. *See* § 27–8–313, MCA. This is not a garden-variety action for declaratory relief; rather, the equities support an award of attorney fees. *See Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶¶ 66–67, 394 Mont. 135, 433 P.3d 1230 (citations omitted). The Court further considers three "tangible parameters" to assess whether fees are "necessary and proper":

(1) the other party "possesses" what the party filing the declaratory judgment sought in the litigation;

(2) the party filing the declaratory judgment action needed to seek a declaration showing that it is entitled to the relief sought; and

(3) the declaratory relief sought was necessary to change the status quo.

Id. ¶ 67 (citing *Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 45, 315 Mont. 210, 69 P.3d 663; *Renville v. Farmers Ins. Exch.*, 2004 MT 366, ¶ 27, 324 Mont. 509, 105 P.3d 280).

The equitable considerations in this case support an award of attorney fees under § 27-8-313, MCA. Wilkie had to file this lawsuit to get the Policy. Defendants possessed the power to provide it but refused. Wilkie sued to change this status quo, and it is necessary and proper that he recover his fees. *See Abbey/Land,* ¶ 67.

Second, even if Wilkie does not obtain reversal, he is already deemed the prevailing party by filing suit and forcing the defendants to provide the relief he requested. *See Havre Daily News*, ¶ 44.

CONCLUSION

This Court should:

1. Reverse the district court's ruling that the case is moot;

2. Declare that, when an insured's liability to a third-party claimant is reasonably clear, the insurer must disclose the insurance policy to the claimant; and

3. Remand for determination of fees and costs to be paid to Wilkie.

February 3, 2021.

GOETZ, BALDWIN, & GEDDES, P.C.

By: */s/ Robert K. Baldwin*

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 Equity Text A (a Roman-style, non script) type-face, is double spaced, and is not more than 10,000 words (9,216 words), excluding the Caption, Table of Contents, Table of Authorities, the Index to Appendix, and this Certificate of Compliance.

DATED this 3rd day of February, 2021.

GOETZ, BALDWIN, & GEDDES, P.C.

By: */s/ Robert K. Baldwin*

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2	02/19/20	Letter, Wilkie's counsel to Hartford adjuster	Dkt. 2, Ex. 1
3	02/20/20	Email, Hartford adjuster to Wilkie's counsel	Dkt. 2, Ex. 2
4	05/05/20	Wilkie's First Discovery Requests to Hartford	Dkt. 10, Ex. 1
5	05/05/20	Wilkie's First Discovery Requests to Sprout	Dkt. 10, Ex. 2
6	06/03/20	Letter, Wilkie's counsel to defendants' counsel	Dkt. 23, Ex. 1
7	n/a	Draft Rule 30(b)(6) deposition notice - Hartford	Dkt. 23, Ex. 1
8	n/a	Draft Notice of Deposition of Hartford adjuster	Dkt. 23, Ex. 1
9	n/a	Draft Notice of Deposition of Sprout	Dkt. 23, Ex. 1

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