IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 20-0514

PAUL WILKIE,

Plaintiff/Appellant,

vs.

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

Defendants/Appellees,

DEFENDANT/APPELLEE HARTFORD UNDERWRITERS INSURANCE COMPANY'S RESPONSE BRIEF

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, the Honorable Rienne H. McElyea Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv
STATEMENT OF ISSUES 1
STATEMENT OF THE CASE 1
STATEMENT OF FACTS 2
STANDARD OF REVIEW 6
SUMMARY OF ARGUMENT 6
ARGUMENT 9
I. The district court properly dismissed Wilkie's action because it no longer presented a justiciable controversy. 9
A. Wilkie received the relief he sought in the underlying declaratory judgment action and his claims are moot. 9
B. No exceptions to the mootness doctrine apply to Wilkie's claims and Hartford met its burden to establish their inapplicability. 13
1. The voluntary cessation exception is not applicable to Wilkie's action because he can point to no more than a single instance of the challenged conduct. 13
2. Wilkie cannot meet his burden to establish that his action falls within the capable of repetition yet evading review exception. 19
II. Wilkie's action is premised on an inaccurate interpretation of the facts and Montana law, and it fails on the merits. 20
A. Neither Montana's Unfair Trade Practices Act ("UTPA"), nor any other statutory scheme, requires insurers to disclose policy information to third-party claimants prior to litigation. 21
B. Neither *Johanek, Ridley*, nor any other Montana decisions suggest insurers owe third-party claimants a duty to disclose policy information where suit has not yet been filed. 27
C. The broad-sweeping disclosure duty Wilkie seeks to impose on insurers fails to protect recognized privacy interests. 31
D. Wilkie improperly asks the Court to engage in law-making and create new law to impose upon insurers throughout the state. 33

III. The declaration Wilkie seeks would require the Court to determine issues of fact, and it therefore cannot be imposed through a declaratory judgment action. 35

IV. Wilkie cannot recover his attorneys' fees under either the UDJA or under *Havre Daily News* as a "prevailing party." 37

A. Equity does not support an award of Wilkie's attorneys' fees. 37

B. Wilkie has not brought an action to enforce his rights under the Montana Constitution, and his request for fees under *Havre Daily News* must be denied. 40

CONCLUSION 41

CERTIFICATE OF COMPLIANCE 42

TABLE OF AUTHORITIES

Cases

Abbey/Land, LLC v. Glacier Constr. Partners, LLC, 2019 MT 19, 394 Mont. 135, 433 P.3d 1230 ..... 37, 38

Bateman v. National Union Fire Ins. Co. of Pittsburgh, Pa., 423 Fed. Appx. 763 (9th Cir. 2011).....21

Eastin v. Broomfield, 570 P.2d 744 (Ariz. 1977) 33

First Bank (N.A.)-Billings v. Heidema, 219 Mont. 373, 711 P.2d 1384 (1986).....12

Greater Missoula Area Federation of Early Childhood Educators v. Child Start, Inc., 2009 MT 362, 353 Mont. 201, 219 P.3d 881 ..... 9, 10, 11

Harrington v. Energy W. Inc., 2015 MT 233, 380 Mont. 298, 356 P.3d 441 6

Havre Daily News, LLC v. City of Havre, 2006 MT 215, 333 Mont. 331, 142 P.3d 864 ..... passim

High Country Paving, Inc. v. United Fire & Cas. Co., 2019 MT 297, 398 Mont. 191, 454 P.3d 1210..... 25, 30

Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961)..... 27, 28, 29

Larson v. State By and Through Stapleton, 2019 MT 28, 394 Mont. 167, 434 P.3d 241 20

Linder v. Smith, 193 Mont. 20, 629 P.2d 1187 (1981) 33

Maryland Cas. Co. v. Asbestos Claims Ct., 2020 MT 70, 399 Mont. 279, 460 P.3d 882 34

Mont. Sports Shooting Ass'n, Inc. v. State, Mont. Dep. of Fish, Wildlife, and Parks, 2008 MT, 344 Mont. 1, 185 P.3d 1003 29

Mungas v. Great Falls Clinic, LLP, 2009 MT 426, 354 Mont. 50, 221 P.3d 1230 38

N. Pac. Ins. Co. v. Stucky, 2014 MT 299, 377 Mont. 25, 338 P.3d 56.....34

Plan Helena, Inc. v. Helena Regional Airport Authority Bd., 2010 MT 26, 355 Mont. 142, 226 P.3d 567..... 11, 12

Powder River Cnty. v. State, 2002 MT 259, 312 Mont. 198, 60 P.3d 357..... 33, 34

Progressive Direct Ins. Co. v. Stuivenga, 2012 MT 75, 364 Mont. 390, 276 P.3d 867 9

Reichert v. State, 2012 MT 111, 365 Mont. 92, 278 P.3d 455 6
Richardson v. State, 2006 MT 43, 331 Mont. 231, 130 P.3d 634 12
Ridley v. Guaranty Nat. Ins. Co., 286 Mont. 325, 951 P.3d 987 (1997) 27, 30
Rogers v. Lewis & Clark Cnty., 2020 MT 230, 401 Mont. 228, 472 P.3d 171 22
Rohlfs v. Klemenhagen, LLC, 2009 MT 440, 354 Mont. 133, 227 P.3d 42 33
Ross v. City of Great Falls, 1998 MT 276, 291 Mont. 377, 967 P.2d 1103.....22
Seubert v. Seubert, 2000 MT 241, 301 Mont. 382, 13 P.3d 365 10
Shamrock Motors, inc. v. Ford Motor Co., 1999 MT 21, 293 Mont. 188, 974 P.2d 1150 10
Sheehy v. Commissioner of Political Practices for State, 2020 MT 37, 399 Mont. 26, 458 P.3d 309..... 34, 35
Shilhanek v. D-2 Trucking, 2003 MT 122, 315 Mont. 519, 70 P.3d 721 30
Spencer v. Kemna, 523 U.S. 1, 18 (1998).....19
Stowe v. Big Sky Vacation Rentals, Inc., 2019 MT 288, 398 Mont. 91, 454 P.3d 655 .....6, 16
Strauser v. RJC Investment, Inc., 2019 MT 163, 396 Mont. 348, 445 P.3d 803 ..... 35, 37
Tarlton v. Kaufman, 2008 MT 462, 348 Mont. 178, 199 P.3d 263..... 35, 36, 37
Trs. of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 Mont. 210, 69 P.3d 663.....38

Statutes

Mont. Code Ann. § 2-3-221 40
Mont. Code Ann. § 27-8-102.....35
Mont. Code Ann. § 27-8-313.....37
Mont. Code Ann. § 33-19-306.....32
Mont. Code Ann. § 33-18-201 ..... passim
Mont. Code Ann. § 33-18-242..... 22, 25

Other Authorities

Federal Practice and Procedure, vol. 13B, § 3533.1, 725-27).....10

Mont. Const., Art. II, § 9.....40

Mont. Const., Art. III, §1 33

Rules

Fed. R. Civ. P. 26 ..... 22, 27, 28

Mont. R. Civ. P. 12 ..... passim

Mont. R. Civ. P. 26 ..... passim

STATEMENT OF ISSUES

Hartford Underwriters Insurance Company restates the issues on appeal as follows:

1. Whether Paul Wilkie's declaratory judgment action against Hartford and its insureds, Richard and Shauna Sprout, was properly dismissed as moot after Wilkie, a third-party claimant, received the insurance policy that he sought.

STATEMENT OF THE CASE

This case arises from the district court's dismissal of Wilkie's declaratory judgment action after the action became moot. Wilkie brought the underlying declaratory judgment action following an automobile/pedestrian accident for the purported reason of obtaining Sprout's insurance policy from Harford. Wilkie asked the district court to create a broad duty that would require insurers, like Hartford, to provide third-party claimants a copy of the liability insurance policy and related declarations page issued to their insureds pre-litigation. Shortly after bringing the underlying action, Wilkie received the policy information that he sought, rendering the action moot.

Hartford moved to dismiss Wilkie's action under Rules 12(b)(1) and (b)(6) of the Montana Rules of Civil Procedure on the basis that Wilkie's action no longer presented an ongoing case or controversy and that it failed to state a claim upon which relief could be granted. The district court dismissed Wilkie's action as moot

because, having received the policy information he sought, Wilkie lacked the necessary personal interest to continue to pursue the action. The district court therefore could not grant Wilkie any further relief.

STATEMENT OF FACTS

Wilkie alleged that he sustained bodily injury as a result of an October 7, 2019, automobile/pedestrian accident that involved a vehicle driven by Richard Sprout. Hartford's App. 1, Pl.'s Compl. for Decl. Relief, ¶¶ 5-6, March 27, 2020. Following the accident, but before filing suit against either Mr. Sprout or Hartford, Wilkie wrote to Hartford, requesting that it produce a copy of Mr. Sprout's liability insurance policy and the declarations page, or in the alternative, to provide Wilkie with the limit of liability insurance that applied to the claim. Appellant's App. 2, February 19, 2020, Letter, Wilkie's Counsel to Hartford Adjuster. When Wilkie requested Mr. Sprout's insurance policy from Hartford, he had not made a demand upon, or filed any action against Mr. Sprout or Hartford related to the accident. Hartford's App. 1, Pl.'s Compl. ¶ 10.

On February 20, 2020, a Hartford representative responded to Wilkie's request, stating that "I do not believe that we have any obligation at this time to provide you with a copy of our insured's policy, declaration page, or release his policy information to you, however, if you believe otherwise, please provide our office such information for review." Appellant's App. 2, Letter, Wilkie's Counsel

to Hartford Adjuster and Hartford response (emphasis added). Wilkie did not respond to Hartford's February 20, 2020 email request.

Instead, seeking to make new law, Wilkie ran to court and filed the declaratory judgment action against Hartford and the Sprouts on March 27, 2020. *See* Hartford's App. 1, Pl.'s Compl. Wilkie sought a declaration that Hartford had a duty, pre-litigation, to provide Wilkie, a third-party claimant, with a copy of the Sprouts' insurance policy, or in the alternative, a declaration that Hartford has a duty to disclose the amount of liability coverage available under the Sprouts' policy. Hartford's App. 1, Pl.'s Compl. ¶¶ 24-25.

As the basis for the action, Wilkie alleged that in response to his request to Hartford for such information, Hartford refused to provide the Sprouts' insurance policy. Hartford's App. 1, Pl.'s Compl. ¶ 13. Wilkie's characterization of the correspondence with Hartford failed, however, to mention that Hartford requested that Wilkie provide it with authority to support the request for the policy information. *See* Appellant's App. 2.

On April 23, 2020, counsel for the Sprouts gave Wilkie a copy of the Sprouts' policy and relevant declarations page. Appellee Sprouts' App. A, Letter from Patrick Sullivan to Robert Baldwin, April 23, 2020. Despite receiving all the information that he sought, Wilkie continued to pursue the declaratory action, seeking a ruling that "insurers in general" are obligated to provide insurance

policies to third-party claimants pre-litigation. Hartford's App. 1, Pl.'s Compl. ¶ 16. In Count One of his Complaint for Declaratory Judgment, Wilkie asserted he was "entitled to, and the Court should issue, a decree to the effect that The Hartford has a duty to provide to Paul [Wilkie], as an injured third-party claimant, a copy of the policy and applicable declaration page by which the Hartford insured the Sprouts," or "[i]n the alternative, . . . the Court should issue, a decree establishing that The Hartford has a duty to Paul [Wilkie], as an injured third-party claimant, to disclose to Paul [Wilkie] the amount of insurance coverage available under the liability coverage that the Hartford issued to its insureds." Hartford's App. 1, Pl.'s Compl., ¶¶ 24-25. Wilkie's requested relief was not limited to situations where liability is reasonably clear.

Hartford moved to dismiss Wilkie's claims under Montana Rules of Civil Procedure 12(b)(1) and (6) as moot because Wilkie had received the Sprouts' insurance policy, the very thing he sought in the declaratory judgment action. Hartford's App. 2, Hartford's Br. In. Supp. Mot. to Dismiss, at 4-8. Wilkie therefore lacked any continued personal interest in the action, and the district court could not grant Wilkie any further relief. Hartford also pointed out that the broad duty Wilkie asked to district court to create was not supported by either the underlying facts or Montana law. Hartford's App. 2, Hartford's Br. in Supp. Mot. to Dismiss, at 8-10.

Although Wilkie received the information he sought, he continued to litigate, and served Hartford with written discovery requests and draft notices of deposition to depose Hartford representatives. Appellant's App. 4, Wilkie's First Written Disc. Reqs. to Def. Hartford; Appellant's App. 7, Draft Rule 30(b)(6) Notice of Video Deposition of Hartford. Wilkie's written requests sought Hartford's claim file, notes, and memoranda; internal communications among Hartford representatives; communications between Hartford and its insureds; and information regarding Hartford's internal policies and procedures. Appellant's App. 4, Wilkie's First Written Disc. Reqs. to Def. Hartford, 2-4. Wilkie also sought to depose a 30(b)(6) witness, regarding, in part, whether Richard Sprout was liable to Wilkie for his alleged injuries; whether Hartford believed Richard Sprout was liable to Wilkie for additional damages; Hartford's internal policies, procedures, practices, and guidelines about providing insurance policies and policy information to third-party claimants; the reasons Hartford did not provide Wilkie with a copy of the policy it issued to the Sprouts; the communications Hartford had with the Sprouts; and Hartford's internal communications and documents regarding whether to provide Wilkie with a copy of the policy. Appellant's App. 7, Draft Rule 30(b)(6) Notice of Video Deposition of Hartford

The district court dismissed Wilkie's action as moot. The district court properly declined to issue a ruling on the merits of Wilkie's claims because any

ruling would amount to an advisory opinion. Order Dismissing Complaint for Decl. Relief, 1-2, attached.

STANDARD OF REVIEW

This Court reviews rulings under Mont. R. Civ. P. 12(b)(1) and 12(b)(6) de novo for correctness. *Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 12, 398 Mont. 91, 454 P.3d 655.

The focus of Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction is whether the court has the threshold authority to hear and adjudicate the type of claim at issue on the facts pled. *Harrington v. Energy W. Inc.*, 2015 MT 233, ¶¶ 9, 13, 380 Mont. 298, 356 P.3d 441. Mootness, which is an issue of justiciability, is a question of law that is reviewed de novo. *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455.

SUMMARY OF ARGUMENT

Wilkie's declaratory judgment action became moot as soon as Wilkie received the Sprouts' insurance policy, which is what he sought in his declaratory judgment action. Mootness is a threshold issue that courts must address prior to reaching the merits of an action, and no exceptions to the mootness doctrine saved Wilkie's action from dismissal. The voluntary cessation exception does not apply where the plaintiff, like Wilkie, points to only a single instance of the challenged

conduct. Wilkie has not alleged that Hartford ever withheld any other information from him.

Nor does the capable of repetition yet evading review exception save Wilkie's claims. That exception requires Wilkie to show that there is a reasonable expectation that he will be subject to the same action against Hartford. Wilkie fails to show that there is even a remote possibility that he will be subject to the same challenged conduct by Hartford at any point in the future. The district court properly dismissed the action on the grounds it could not provide Wilkie any further effective relief.

Even if Wilkie's claims were not moot, they were subject to dismissal because they failed to state a cognizable claim for relief. Wilkie failed to identify any legal right or duty that Hartford infringed upon or breached. Instead, Wilkie asked the district court, and now asks this Court, to create a new and sweeping duty requiring insurers to disclose their insureds' policy information to third-party claimants even in the absence of ongoing litigation. Both Wilkie and the Amicus Montana Trial Lawyers Association contend that Wilkie seeks a limited disclosure duty, one that arises only where "liability is reasonably clear." Wilkie's Complaint and request for declaratory relief, however, contain no such limitation. Wilkie's Complaint sought a declaration that Hartford owed a duty to Wilkie, as a third-party claimant, to disclose its insured's policy and policy limits information to him.

Hartford's App. 1, Pl.'s Compl., ¶¶ 24-25. Neither Montana law nor the facts support the creation of such a new broad duty. Rather, Rule 26 of the Montana Rules of Civil Procedure establishes that insurance policy information must be produced after litigation is filed, meaning that there is not a duty to produce the insurance policy pre-litigation.

Wilkie's characterization of the facts overlooks another important detail: Wilkie was not forced to bring the underlying action. Hartford questioned Wilkie's entitlement to policy information pre-suit, but asked Wilkie to provide it with information to support his request. Seeing an opportunity to create new law, Wilkie filed suit rather than responding to Hartford's request.

Wilkie fails to identify a legitimate need for the creation of such a broad new duty. Wilkie advances unwarranted concerns that Montana law does not sufficiently protect third-party claimants from unfair settlement practices, but disregards and misinterprets longstanding protections and remedies that Montana law affords third-party claimants.

Wilkie is not entitled to attorneys' fees. Wilkie's action is moot and the district court properly dismissed it. Even if it were not moot, Wilkie lacks any basis in law or the underlying facts to support the creation of this new duty, and Wilkie cannot be considered a prevailing party that would be entitled to recover its attorneys' fees. Wilkie's request for fees must be denied.

This Court should affirm the district court's dismissal, decline to expend limited resources on an issue that is moot and will not impact the parties, and deny Wilkie's request for attorneys' fees or any other relief.

ARGUMENT

I. The district court properly dismissed Wilkie's action because it no longer presented a justiciable controversy.

A. Wilkie received the relief he sought in the underlying declaratory judgment action and his claims are moot.

The "judicial power of Montana's court's is limited to justiciable controversies," and courts are limited to adjudicating actual and ongoing controversies between parties. *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 16, 364 Mont. 390, 276 P.3d 867. Courts lack jurisdiction to decide issues that would not affect the parties to the particular action. *Id.*, ¶¶ 16-17. The "constitutional requirement of a 'case or controversy'" requires that an actual and ongoing controversy exist between the parties. *Greater Missoula Area Federation of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881.

Courts lack jurisdiction to decide moot issues or to give advisory opinions where there is no actual "case or controversy." *Greater Missoula Area Federation of Early Childhood Educators*, ¶ 23. Mootness is a "threshold issue" that courts "must resolve before addressing the substantive merits of a dispute." *Havre Daily*

News, LLC v. City of Havre, 2006 MT 215, ¶ 31, 333 Mont. 331, 142 P.3d 864. Where the "issue presented at the outset of the action has ceased to exist or is no longer 'live,' or if the court is unable due to an intervening event or change in circumstances to grant effective relief . . . then the issue before the court is moot." *Greater Missoula Area Federation of Early Childhood Educators*, ¶ 23. The doctrine recognizes that "because the constitutional requirement of a 'case or controversy' contemplates real controversies and not abstract differences of opinion or moot questions," "courts lack jurisdiction to decide moot issues." *Id.*, ¶ 23 (citing *Seubert v. Seubert*, 2000 MT 241, ¶ 18, 301 Mont. 382, 13 P.3d 365; Wright et al., *Federal Practice and Procedure* vol. 13B, § 3533.1, 725-27). A question is moot "'when the court cannot grant effective relief.'" *Havre Daily News, LLC*, ¶ 31 (quoting *Shamrock Motors, inc. v. Ford Motor Co.*, 1999 MT 21, ¶ 19, 293 Mont. 188, 974 P.2d 1150).

Mootness is "the 'doctrine of standing in a set time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Havre Daily News, LLC*, ¶ 31 (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973) (emphasis added)). Where the court's resolution of the merits would result in an advisory opinion that only "advis[es] what the law would be upon a hypothetical state of facts or upon an abstract proposition," but

does not "resolv[e] an actual 'case or controversy,'" the court must dismiss the action. *Plan Helena, Inc. v. Helena Regional Airport Authority Bd.*, 2010 MT 26, ¶¶ 11-12, 355 Mont. 142, 226 P.3d 567.

Wilkie does not dispute that he received all the policy information that he sought in the declaratory judgment action, nor could he. *See* Appellant's Opening Br., 2. Wilkie brought the underlying action seeking a declaration that Hartford had a duty to provide Wilkie with a copy of the Sprouts' insurance policy and applicable declarations page, or in the alternative, a declaration that Hartford owed Wilkie a duty to disclose the amount of liability coverage available under the Sprout's policy. Hartford's App. 1, Pl.'s Compl., ¶¶ 24-25. A little over a month after filing suit, counsel for the Sprouts provided Wilkie with a copy of the policy and information that he sought. Appellee Sprouts' App. A, Letter from Patrick Sullivan to Robert Baldwin, April 23, 2020.

At that point, the issue Wilkie presented at the outset of the action ceased to exist, he no longer had a personal interest in the action, and the district court was therefore unable to provide Wilkie any effective relief. *Greater Missoula Area Federation of Early Childhood Educators*, ¶ 23; *Havre Daily News, LLC*, ¶ 31. Because the action no longer presented an ongoing and actual "case or controversy," the district court properly dismissed the action as moot. *Plan Helena, Inc.*, ¶ 11; Order at 2-3.

The district court properly declined to expend limited judicial resources on a moot issue where any ruling on the merits would only result in an advisory opinion. Order, 2-3. In the "era of crowded dockets" and limited judicial resources, taking up consideration of Wilkie's moot claims would not have had any impact on the rights and responsibilities of the parties, and would have "'deprive[d] other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism.'" *Richardson v. State*, 2006 MT 43, ¶ 57, 331 Mont. 231, 130 P.3d 634 (quoting *First Bank (N.A.)-Billings v. Heidema*, 219 Mont. 373, 376, 711 P.2d 1384, 1386 (1986)).

That is true today more than ever. In 2019, for example, 5,377 cases were either filed or reopened in Gallatin County District Court, with 2,234 of those being civil cases. *Montana District Courts, 2019 New Case Filings and Reopened Cases*, Montana Judicial Branch.[1] In 2020, that number grew to 5,661 total case filings, with 2,444 of those filings being civil filings. *Montana District Courts, 2020 New Case Filings and Reopened Cases*, Montana Judicial Branch.[2] In a 2021 District Court Workload Review of case filing statistics, workloads, and judicial resource needs, the Montana District Court Council determined the Eighteenth

[1] https://courts.mt.gov/portals/189/dcourt/stats/2019stat.pdf (last visited March 25, 2021).
[2] https://courts.mt.gov/portals/189/dcourt/stats/2020stat.pdf (last visited March 25, 2021).

Judicial District needed an additional 3.28 full-time equivalent judicial resources to meet workload demands. *2021 District Court Workload Review Judicial Resource Needs*, Montana Judicial Branch.[3]

Any decision on the merits of Wilkie's claims would be purely advisory about what Montana law might require on a hypothetical set of facts. This Court should affirm the district court's dismissal of Wilkie's action.

B. No exceptions to the mootness doctrine apply to Wilkie's claims and Hartford met its burden to establish their inapplicability.

Wilkie misconstrues the exceptions to the mootness doctrine. He fails to make any showing of the necessary criterion to bring his action within the terms of either the "voluntary cessation" or "capable of repetition but evading review" exceptions.

1. The voluntary cessation exception is not applicable to Wilkie's action because he can point to no more than a single instance of the challenged conduct.

The voluntary cessation exception applies only where the challenged conduct is of "indefinite duration" but is "voluntarily terminated by the defendant prior to completion of appellate review." *Havre Daily News, LLC*, ¶ 34. Where, as here, the "plaintiff points to only a single instance" of the defendant withholding

[3] https://courts.mt.gov/Portals/189/dcourt/stats/2021DC-needs.pdf (last visited March 25, 2021).

information and later disclosing it after suit has been filed, "the case generally will not fall within the 'voluntary cessation' exception to mootness." *Havre Daily News, LLC*, ¶ 38. A "hypothetical refusal to provide access" to information is insufficient to invoke the voluntary cessation doctrine because the possibility of a future controversy does not constitute a "recurrence of the same challenged conduct," which the party challenging mootness must show. *Havre Daily News, LLC*, ¶ 40. In other words, a plaintiff cannot avoid dismissal on mootness grounds by asserting a "conjectural and conclusory" possibility of the recurrence of a challenged practice. *Id.* ¶¶ 39-40.

To invoke the voluntary cessation exception, the plaintiff must show that the same party "has repeatedly withheld documents . . . and then fully disclosed those same documents upon the plaintiff's filing suit." *Havre Daily News, LLC*, ¶ 39. The exception does not apply if the plaintiff cannot point to any other instances in which the defendant has engaged in the challenged conduct. *Id.*, ¶¶ 39-40.

Wilkie misinterprets *Havre Daily News*, which makes clear that Wilkie's action does not implicate the voluntary cessation exception. Under a complete reading of *Havre Daily News*, a plaintiff contesting mootness must point to more than a "single instance" of the challenged conduct to invoke the voluntary cessation exception. *Havre Daily News, LLC*, ¶ 34. Wilkie cannot make that showing. Although the Court recognized the "heavy burden" on the party asserting

mootness to persuade the court that the "challenged conduct cannot reasonably be expected to start again," the Court's opinion did not stop there. *Havre Daily News, LLC*, ¶ 34. Wilkie's incomplete reading of *Havre Daily News* overlooks that the Court held "when a plaintiff points to only a single instance of an agency's withholding a document and later disclosing the same after suit has been filed, the case will generally not fall within the 'voluntary cessation' exception to mootness." *Havre Daily News, LLC*, ¶¶ 34, 38.

Wilkie ignores the limitation imposed in *Havre Daily News*, which dooms his claim to the exception. Wilkie has pointed to only a single instance of Hartford engaging in the challenged conduct. As this Court held, the voluntary cessation exception does not apply because it is "not generally reasonable to expect the 'same wrong' to recur." *Havre Daily News, LLC*, ¶ 38. The exception is not applicable because a ruling on the merits would not be of "any discernible future benefit to the litigants or the interests of judicial economy." *Id*. Wilkie does not allege or put forth any evidence that Hartford has withheld information from Wilkie on any other occasion. Instead, Wilkie makes speculative claims that insurers in general have an ongoing practice of withholding policy information from third-party claimants pre-litigation. *See* Appellant's Opening Br., at 22-23. That is insufficient.

The declarations Wilkie submitted in support of his brief in opposition to Hartford's motion to dismiss should not be considered. The "focus of a Rule 12 (b)(1) motion to dismiss . . . is whether the court has the threshold authority to hear and adjudicate the type of claim at issue on the facts pled." *Stowe*, ¶ 12. The declarations fall outside the "facts pled" by Wilkie and should not inform the Court's decision. Wilkie's contention that because Hartford's motion to dismiss addresses the "disputed fact" that he received the policy information he sought, the Court may consider evidence outside the pleadings, is unavailing. Appellant's Opening Br., 20. It is undisputed that Wilkie received the policy information he sought. In their Answer to Wilkie's Complaint, the Sprouts affirmatively allege Wilkie received the insurance policy he sought. Hartford's App. 3, Sprouts' Ans. to Pl.'s Compl., p. 3. Wilkie has never disputed this, and in fact acknowledges he received the policy. Appellant's Opening Br., 1, 2, 6. The reference to Wilkie's receipt of the policy information does not amount to a "factual challenge" that opens the door to the submission of additional evidence or declarations. Appellant's Opening Br., 20.

The Court should also reject the declarations because they do not demonstrate, or even allege, that Hartford has engaged in the same challenged conduct on any other occasion, let alone on an ongoing or repeated basis, which is

a necessary element of the voluntary cessation exception. *Havre Daily News, LLC*, ¶ 38.

The voluntary cessation exception is likewise inapplicable because Wilkie premises its application on an inaccurate set of facts and a misinterpretation of Montana law. Wilkie's opening brief ignores a critical fact in the underlying action: Hartford expressly requested that Wilkie provide information in support of his request for the policy and policy information. Wilkie was not "forced" to file the underlying action. *See* Appellant's Opening Br., at 25-26, 27, 31. He ignored Hartford's request for further information and instead ran to court seeking to create new law.

Similarly, Wilkie bases his claim on the unsupported theory that Hartford wrongfully withheld policy information, or that the law required Hartford to disclose the policy information pre-litigation. As discussed more fully in Section II., Montana law does not impose this duty on insurers, or even suggest that such a duty exists. Wilkie fails to identify any basis in Montana law that supports this duty and he cannot put forth any reason that would suggest such a broad duty is necessary.

Wilkie makes the unsupported, and erroneous assertion, that Hartford ignored its burden and improperly shifted it to Wilkie. *See* Appellant's Opening Br., at 17-18. Wilkie's contention is factually inaccurate, mischaracterizes the

record before the district court, and misinterprets *Havre Daily News*. In its brief in support of the motion to dismiss, Hartford argued that Wilkie's claims became moot when Wilkie received the Sprouts' insurance policy. Hartford's App. 2, Hartford's Br. In. Supp. Mot. to Dismiss, at 4-8. Wilkie's attempts to fault Hartford for not raising the exceptions to the mootness doctrine in its opening brief to dismiss the action should be rejected. *See* Appellant's Opening Br., at 17. Hartford was under no obligation to advance arguments or exceptions to mootness that might save Wilkie's claims from dismissal. Wilkie likewise ignores that after he asserted that his action implicated exceptions to the mootness doctrine, Hartford addressed both the voluntary cessation and capable of repetition yet evading review exceptions in its reply brief in support of the motion to dismiss. Hartford's App. 4, Hartford's Reply Br. In. Supp. Mot. to Dismiss, at 6-11. In its reply, Hartford demonstrated Wilkie had not and could not make the threshold showing of each criterion of the voluntary cessation exception. Because Wilkie pointed to only a single instance of Hartford's allegedly improper conduct, the voluntary cessation exception is inapplicable to his claim. Hartford's App. 4, Hartford's Reply Br. In. Supp. Mot. to Dismiss, at 7-9.

2. Wilkie cannot meet his burden to establish that his action falls within the capable of repetition yet evading review exception.

The "'capable of repetition, yet evading review'" exception "is properly confined to situations where the challenged conduct *invariably* ceases before the court can fully adjudicate the matter." *Havre Daily News, LLC*, ¶ 33 (citing *Spencer v. Kemna*, 523 U.S. 1, 18 (1998) (italics in original). The exception is inapplicable where the plaintiff "'has not shown . . . that the time between [the challenged wrong] and [the occurrence rending the case moot] is *always* so short as to evade review' and that "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Havre Daily News, LLC*, ¶ 33 (quoting *Spencer*, 523 U.S. at 18) (emphasis and alterations in original).

Wilkie does not deny he bears the burden to establish his claim invokes the exception, but he fails to meet his burden. *See* Appellant's Opening Br., at 17 (conceding the burden is "properly assigned" to Wilkie). Instead, Wilkie makes the inaccurate and speculative contention that there will "never" be a case allowing the court to address whether insurers have a duty to produce policy information to the injured claimant without first requiring a lawsuit. Appellant's Opening Br. at 25-26. Wilkie fails to make the critical showing that there is even a possibility that he, the complaining party, will be subject to the same action at any point in the future. In failing to do so, Wilkie fails to meet his burden.

Again, Wilkie does not contest that he received the underlying policy information he sought. He does not make any allegation that Hartford has withheld or failed to disclose any other information. It is not enough to assert a hypothetical possibility that some other party might face a similar situation in a different context. *Havre Daily News, LLC*, ¶ 33. Wilkie's argument is speculative, unsupported, and insufficient to give rise to a reasonable expectation that he will face the same situation again. Wilkie therefore cannot establish that the capable of repetition yet evading review exception applies to his action.

II. Wilkie's action is premised on an inaccurate interpretation of the facts and Montana law, and it fails on the merits.

Even if Wilkie's declaratory judgment action were not moot, it fails to identify a recognized legal right or duty that Hartford either breached or infringed. Instead, Wilkie's claim that pre-litigation disclosure of policy information to third-party claimants is necessary to enable claimants to value and negotiate their claims is based upon a mischaracterization of the underlying facts and Montana law.

To state a claim for relief, Wilkie was required to identify, at a minimum, that a "recognized legal right or duty" exists, and that the right or duty was infringed or breached. *Larson v. State By and Through Stapleton*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241. Wilkie essentially acknowledges that Montana law imposes no duty on insurers to disclose their insureds' insurance policy or

policy information to third parties pre-litigation. Appellant's Opening Br., 9-10. The Court should decline the invitation to create such a new duty because it is not provided for, or even suggested, under Montana law. As a result, Wilkie's Complaint failed to state a cognizable claim for relief, and even if the action were not moot, it was subject to dismissal under Mont. Rule Civ. P. 12(b)(6).

A. Neither Montana's Unfair Trade Practices Act ("UTPA"), nor any other statutory scheme, requires insurers to disclose policy information to third-party claimants prior to litigation.

Wilkie's reliance on the UTPA to assert that the duties expressed therein "suggest" a "concomitant duty" to disclose insurance policy and limits information to third party claimants is misplaced. *See* Appellant's Opening Br., at 34. Neither Title 33 of Montana Code Annotated, nor the UTPA, require insurers to disclose policy documents, policy limits, or coverage information to third-party claimants, like Wilkie, prior to litigation. As the Ninth Circuit recognized, Montana's "UTPA does not confer upon insurers a duty to disclose information in response to third-party claimants' requests for an explanation of coverage [and] policy limits . . . ." *Bateman v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 423 Fed. Appx. 763, 765 (9th Cir. 2011). Nor has Wilkie identified any other statutory scheme that imposes or even suggests such a requirement.

The Legislature has not suggested an intent to require pre-litigation disclosure of insurance policy information. The Legislature "is presumed to act

with deliberation and with full knowledge of all existing laws on a subject." *Ross v. City of Great Falls*, 1998 MT 276, ¶ 17, 291 Mont. 377, 967 P.2d 1103. Courts also "must presume the Legislature would not pass useless or meaningless legislation, but rather intended to make some change in existing law." *Rogers v. Lewis & Clark Cnty.*, 2020 MT 230, ¶ 32, 401 Mont. 228, 472 P.3d 171.

As discussed below, Rule 26 of the federal and Montana Rules of Civil Procedure require disclosure of insurance agreements as a part of discovery during ongoing litigation. The Legislature enacted Mont. Code Ann. § 33-18-201 of the UTPA in 1977, and it enacted § 33-18-242 in 1987. *See* Mont. Code Ann. §§ 33-18-201 and -242. The Legislature was presumed to "act with deliberation and with full knowledge of all existing laws" at the time it enacted sections 33-18-201 and -242, to include Rule 26 of the Montana Rules of Civil Procedure. *Ross*, ¶ 17. In 1977 and 1987, both the state and federal rules required the disclosure of insurance agreements in discovery after litigation had commenced. Fed. Adv. Comm. Note to 1970 Amendment to Fed. R. Civ. P. 26; Mont. Adv. Comm. Note to 1975 Amendment to Mont. R. Civ. P. 26. Although it could have changed the law and required disclosure pre-litigation, the Legislature did not do so when it enacted either Mont. Code Ann. §§ 33-18-201 or -242. To this day, the Legislature has not amended either section, or any other provision of the UTPA, to require pre-litigation disclosure of insurance agreements to third parties. Because the federal

and state discovery rules already required post-litigation disclosure, and courts must presume the Legislature would not pass meaningless legislation, the Legislature's failure to address pre-litigation disclosure in its enactment or amendments of the UTPA, the Legislature has rejected the pre-litigation disclosure requirement Wilkie seeks to create.

Although Wilkie and the Amicus are correct that the UTPA imposes certain duties on insurers to not misrepresent policy provisions regarding coverage; to act in good faith to negotiate settlement; to not withhold settlement when liability is reasonably clear; and to explain the basis in the policy for an offer of settlement, none of these duties either require or even "suggest" that insurers must disclose their insured's policies and policy information to third parties prior to litigation. *See* Appellant's Opening Br., at 33-35; MTLA Br. of *Amicus Curiae*, at 3. None of the UTPA duties include a requirement that insurers disclose policy or limits information to third-party claimants outside of litigation.

Nor do any of the UTPA duties "suggest a corresponding duty" to disclose policy information to third-party claimants in the absence of litigation. *See* Appellant's Opening Br., at 33-34. Wilkie and the Amicus contend that an insurer's failure to disclose policy information to a third-party claimant pre-suit amounts to misrepresentation, is not in good faith, and inappropriately allows the insurer to leverage its knowledge to reduce the claimant's settlement. These fears

of unfair negotiations and settlements are unsupported. Neither Wilkie nor the Amicus have put forth any legitimate reason that a third-party claimant is precluded from valuing his or her claim, making a demand upon the insurer, or negotiating a settlement without first reviewing the policy limits.

Third-party claimants, like Wilkie, are able to make demands and determine their damages without first obtaining a copy of the insured's policy and policy limits. Requiring the insurer to disclose the policy pre-litigation in every situation is not necessary or appropriate and would not impact the parties with respect to this action. Wilkie and the Amicus dismiss the fact that third-party claimants routinely can and do value their damages, make demands, and reach fair settlements based on the amount of the claimant's damages without first reviewing the insured's policy and policy limits. Appellant's Opening Br., 31, 36. Third-party claimants do so every time they make a settlement demand when there is not a limits problem.

Wilkie and the Amicus also ignore that Montana law already provides significant protections to claimants. When a third-party makes a pre-suit demand on an insurer that exceeds the available limits, Montana law already imposes a duty on the insurer to pay its policy limits when liability is reasonably clear and damages are likely to exceed the limits, or otherwise face the risk of an excess liability claim. *High Country Paving, Inc. v. United Fire & Cas. Co.*, 2019 MT

297, ¶ 29, 398 Mont. 191, 454 P.3d 1210 (recognizing that the UTPA requires an insurer to pay policy limits to an injured third party when liability is reasonably clear and it is reasonably clear the total damages exceed policy limits). Wilkie and the Amicus similarly disregard that Montana law already imposes a duty on insurers to act in good faith to settle claims, which necessarily involves paying a claimant policy limits when the claimant's damages exceed limits. *Id.*, ¶¶ 14, 29. There is therefore no danger that a third-party claimant's valuation of his claim will be hindered if the claimant does not have an opportunity to first review the policy and policy limits. Nor is there any concern that the claim settlement process will disadvantage the third-party claimant. Montana law already provides protections addressing these concerns with remedies if an insurer engages in bad faith or violates a duty to settle. *See* Mont. Code Ann. § 33-18-242(1) (providing a "third-party claimant" an "independent cause of action against an insurer for actual damages caused by the insurer's violation" of certain subsections of § 33-18-201). If an insurer engages in bad faith, a third-party claimant already has a remedy under Montana law. Mont. Code Ann. § 33-18-242(1).

Although Wilkie and the Amicus now attempt to limit the broad duty to situations where "liability is reasonably clear," Wilkie's Complaint and request for declaratory relief does not contain that limitation. Appellant's Opening Br., 16-17; MTLA Br. of *Amicus Curiae*, at 1-2. Neither the request for declaratory judgment

nor the prayer for relief contend that the duty Wilkie seeks to create is limited to situations were liability is reasonably clear. Hartford's App. 1, Pl.'s Compl., ¶¶ 21-28.

Hartford does not dispute that there may be situations where disclosure of policy information to third-party claimants pre-litigation is appropriate, but the underlying facts do not support the creation of the broad duty Wilkie and the Amicus seek. Disclosure of policy information might be appropriate where the available policy limits are low, the claimant's damages are substantial, and liability is reasonably clear. On the other hand, disclosure of the insurance policy is unnecessary and inappropriate where the available policy limits are high and the claimant's damages are minimal. For example, if Governor Gianforte, one of the wealthiest residents of the state, were involved in automobile accident that resulted in minor injuries, it would be inappropriate to require insurers to release all of Governor Gianforte's insurance policies. Not every case merits a policy-limits demand. Any declaration or ruling that goes beyond the facts of this case would be advisory, and the Court should decline to issue an advisory opinion.

Wilkie has failed to advance any legitimate reasons under the facts that justify the creation of a requirement that insurers disclose their insureds' policy information to third-party claimant pre-litigation. The Court should decline to create such a broad new law. Wilkie and the Amicus attempt to read into the

UTPA a duty that is neither provided for nor suggested by the plain terms of the act. Wilkie has not identified any provisions under the UTPA, or any other statutory scheme, to support his position and the Court must reject it.

B. Neither *Johanek, Ridley*, nor any other Montana decisions suggest insurers owe third-party claimants a duty to disclose policy information where suit has not yet been filed.

Montana courts have never interpreted Montana law to impose a general rule on insurers to disclose policy information to third-party claimants pre-litigation. That is because no such duty exists. The concerns advanced by Wilkie and the Amicus of unfair settlement practices are already sufficiently addressed by Montana law, which the Court should not unnecessarily expand.

Wilkie's reliance on *Johanek v. Aberle*, 27 F.R.D. 272 (D. Mont. 1961), in conjunction with Rule 26(b)(2) of the Federal Rules of Civil Procedure and Rule 26(b)(5) of the Montana Rules of Civil Procedure, to argue that pre-litigation disclosure of the policy is necessary for good faith, is unpersuasive.

Neither *Johanek* nor the Montana or federal discovery rules impose a duty on insurers to disclose their insureds' policy information pre-litigation to third-party claimants. *Johanek* is inapplicable because it addressed only the discoverability of insurance information prior to judgment in a pending personal injury action. *Johanek*, 27 F.R.D. at 274. It was decided in 1961 and predates the 1970 amendment to Federal Rule 26(b)(2) and the 1975 amendment to the

Montana Rule that allowed for the discovery and disclosure of insurance agreements once litigation commenced. Fed. Adv. Comm. Note to 1970 Amendment to Fed. R. Civ. P. 26; Mont. Adv. Comm. Note to 1975 Amendment to Mont. R. Civ. P. 26. *Johanek* does not suggest that a pre-litigation duty exists as to a third-party claimant, and did not even address that issue. *Johanek* is limited in its application and does not support the broad duty that Wilkie and the Amicus ask the Court to create.

For similar reasons, Wilkie's reliance on Rule 26 of the Federal and Montana Rules of Civil Procedure fails. Rule 26(b)(5) of the Montana Rules of Civil Procedure and Rule 26(b)(2) of the Federal Rules of Civil Procedure govern the discoverability of insurance agreements after litigation has commenced. *See* Mont. R. Civ. P. 26(b)(5); Fed. R. Civ. P. 26(b)(2). Both rules acknowledge that the existence and contents of insurance agreements are discoverable, but discovery in the context of ongoing litigation is distinct from the broad pre-litigation duty Wilkie seeks to create. Wilkie attempts to disregard that the discovery rules contemplate disclosure as part of ongoing litigation. Appellant's Opening Br., at 30-31. That insurance agreements are discoverable during litigation does not suggest that insurers have a pre-litigation duty to disclose policy information to third-party claimants.

Rule 26 of the Montana Rules of Civil Procedure was amended in 1975 to require the disclosure of insurance agreements after litigation had commenced. The rules in effect prior to 1975 did not address the disclosure or discoverability of insurance agreements. When considering legislative intent, courts "must presume in construing th[e] statute[ ] that the Legislature intended to make some change in existing law." *Mont. Sports Shooting Ass'n, Inc. v. State, Mont. Dep. of Fish, Wildlife, and Parks*, 2008 MT ¶ 15, 344 Mont. 1, 185 P.3d 1003. Wilkie's reading of the discovery rules would render the amendments providing for post-litigation disclosure meaningless. There would be no need to amend Rule 26, or create a rule requiring production of insurance agreements in discovery after litigation commenced if the law already required insurers to produce insurance agreements and policy information pre-litigation. The fact that insurance agreements are discoverable after litigation begins does not suggest that insurers have a pre-litigation duty to disclose policy information to third-party claimants. It suggests the opposite.

Nor do *Johanek* or the discovery rules suggest that pre-litigation disclosure to third-party claimants is necessary for the claimant's valuation, making a demand, the negotiation of the claim, or settlement. Rather, *Johanek* and Rule 26 of both the Montana and Federal Rules of Civil Procedure are limited in their application to the discoverability of insurance agreements in pending actions.

Wilkie fails to identify any decision in which this Court, or any other Montana court, has suggested that insurers owe third-party claimants a duty to disclose policy information pre-litigation, or that it is encompassed in any other existing duty. *Ridley v. Guaranty Nat. Ins. Co.*, 286 Mont. 325, 951 P.3d 987 (1997) "and its progeny" do not support the creation of this duty. *See* Appellant's Opening Br., at 35-36. None of cases cited by Wilkie impose a general duty on insurers to disclose policy limits pre-litigation, nor do they suggest that such a duty exists under the current law or is necessary.

The duties recognized in *Ridley* and subsequent decisions confirm that Montana law provides sufficient protections for third-party claimants from unfair settlement practices. Where liability is reasonably clear, Montana law already provides that "pursuant to *Ridley*, insurers are obligated to pay an injured third-party's medical expenses prior to final settlement when liability for such expenses is reasonably clear." *Shilhanek v. D-2 Trucking*, 2003 MT 122, ¶ 16, 315 Mont. 519, 70 P.3d 721. This Court has held that where it is "reasonably clear that the amount required for final settlement of all claims –including general damages reasonably shown to have been caused by the insured's conduct—exceeds policy limits, an insurer has a duty to pay policy limits to an injured third party" without conditioning that payment "on obtaining a release for its insured." *High Country Paving, Inc.* ¶ 26. An insurer exposes itself to the risk of a judgment in excess of

coverage limits where it fails to settle a third-party liability claim against its insured within policy limits. *Id.*, ¶ 29.

Both Wilkie and the Amicus express an unfounded fear that third-party claimants are disadvantaged and unable to effectively value, negotiate, and settle their claims without the policy limits. These fears are illusory. The valuation of a claim does not depend on the tortfeasor's available coverage, the policy limits, or any other policy information. Rather, valuation is based on the facts of liability and the claimant's damages. Montana law already provides protections against Wilkie's and the Amicus's concerns, and the Court should reject their attempts to unnecessarily expand the law.

C. The broad-sweeping disclosure duty Wilkie seeks to impose on insurers fails to protect recognized privacy interests.

A declaration requiring insurers to disclose insurance policy information to third parties prior to litigation is overly broad and fails to consider any individual circumstances that could make disclosure unwarranted or otherwise inappropriate. On appeal, Wilkie now contends that he does not seek confidential or privileged information. Appellant's Opening Br., 38-40. The disclosure duty Wilkie seeks to create, however, is so broad that it fails to consider the privacy rights of insurers and their insureds regarding policy information. For example, a broad disclosure rule requiring insurers to disclose policy information to third parties prior to

litigation could subject insurers and their insureds to the disclosure of proprietary, personal, or confidential information to third parties, even in the absence of a demand or a suit being filed. Wilkie's response that he does not seek confidential information, or that insurers could simply redact confidential information, misses the point and fails to adequately address the privacy concerns implicated by the broad rule he advocates. Appellant's Opening Br., 39-40.

Montana protects privacy and personal information in numerous ways. Montana's Insurance Information and Privacy Protection Act, for example, limits disclosure of "personal or privileged information about an individual collected or received in connection with an insurance transaction," and acknowledges that much of the information maintained by insurance companies would be considered private by insureds, or privileged work product. Mont. Code Ann. § 33-19-306(1). Wilkie argues that he does not suggest he is entitled to an insured's protected and confidential information, or that insurers would simply redact such information, but he fails to address that the blanket rule he asks the Court to create does not take these privacy interests into consideration.

The broad disclosure rule Wilkie seeks to create could impose a requirement on insurers to disclose proprietary or confidential information. *See* Mont. Code Ann. § 33-18-201(1), (13). The disclosure duty Wilkie seeks is not recognized

under Montana law and is overly broad to the point of implicating privacy concerns. It should be rejected.

D. Wilkie improperly asks the Court to engage in law-making and create new law to impose upon insurers throughout the state.

The duty Wilkie asks the Court to create would impose a brand new affirmative duty on insurers to disclose insurance policies pre-litigation to third-party claimants nowhere recognized under Montana law. Wilkie's request is improper and invades the sole province of the Legislature to enact new law.

"The Montana Constitution demands that the three branches of government remain separate and distinct" to "keep each branch accountable to the people, and to prevent too much power from being lodging in any one branch." *Linder v. Smith*, 193 Mont. 20, 32, 629 P.2d 1187, 1194 (1981) (citing Mont. Const., Art. III, § 1). It is "the exclusive power of the legislature to enact laws of the state." *Powder River Cnty. v. State*, 2002 MT 259, ¶ 115, 312 Mont. 198, 60 P.3d 357. It is not the role of the judiciary to "determine to prudence of a legislative decision." *Rohlfs v. Klemenhagen, LLC*, 2009 MT 440, ¶ 20, 354 Mont. 133, 227 P.3d 42. Nor is it the "function of the courts to second-guess the legislature and substitute their judgment" for that of the legislature. *Rohlfs*, ¶ 18. The judicial power is, instead "'the power of the court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision,'"

but it does not include a general law-making power. *Linder*, 193 Mont. at 33 (quoting *Eastin v. Broomfield*, 570 P.2d 744, 750 (Ariz. 1977)). The role of the Court in interpreting statutes is to "ascertain and carry out the Legislature's intent." *Sheehy v. Commissioner of Political Practices for State*, 2020 MT 37, ¶ 13, 399 Mont. 26, 458 P.3d 309. Although courts have the discretion to "develop and prune common law," courts do so "sparingly only when necessary to 'prevent great injustice' or ensure that 'the common law is consonant with the changing needs of society.'" *Maryland Cas. Co. v. Asbestos Claims Ct.*, 2020 MT 70, ¶ 29 n. 23, 399 Mont. 279, 460 P.3d 882 (quoting *N. Pac. Ins. Co. v. Stucky*, 2014 MT 299, ¶¶ 20-21, 377 Mont. 25, 338 P.3d 56).

Wilkie does not ask the Court to "simply . . . declare what is stated by the plain terms" of the UTPA or "merely declar[e] what [is] already required" under Montana law. Appellant's Opening Br., at 38. Wilkie instead asks the Court to create an entirely new duty that is not recognized, or even suggested, under statutory or common law. It is beyond the province of the judiciary to implement or enact laws. The power to enact laws is the exclusive power of the Legislature. *Powder River County*, ¶ 115.

Nor does Wilkie merely ask the Court to interpret and enforce the law as the Legislature has decreed it. That is because the law does not provide for the relief Wilkie seeks. The broad duty Wilkie seeks is not supported by the UTPA, any

other statutory scheme, or the common law. The law Wilkie seeks would require the Court to improperly engage in law-making. The Court is tasked with interpreting and declaring what the law is as it has been decreed by the Legislature. *Sheehy*, ¶ 13. Wilkie improperly asks the Court to assume the function of the Legislature and decide what the law of the state ought to be. If the Legislature determines that the current law does not address the needs of the citizens of the state, it has the ability to determine whether a new and broad duty should be imposed and under what circumstances. The enactment of laws that will have broad and far-reaching impacts on individual and entities that are not parties to this action is best resolved by the Legislature, and the Court should decline Wilkie's request to create new law.

III. The declaration Wilkie seeks would require the Court to determine issues of fact, and it therefore cannot be imposed through a declaratory judgment action.

The purpose of the Uniform Declaratory Judgments Act ("UDJA") is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, ad other legal relations." Mont. Code Ann. § 27-8-102. Although the UDJA is "'primarily intended to determine the meaning of a law or a contract and to adjudicate the rights of the parties' therein,' it is clear that [the] UDJA is not intended 'to determine controversial issues of fact.'" *Strauser v. RJC Investment, Inc.*, 2019 MT 163, ¶ 16, 396 Mont. 348, 445 P.3d 803 (quoting *Tarlton v.*

Kaufman, 2008 MT 462, ¶ 33, 348 Mont. 178, 199 P.3d 263). Declaratory relief is not available where the proceeding involves disputed questions of fact, rather than the construction of a "definite stated right, status, [or] other relations." *Tarlton*, ¶ 35.

Whether and when an insurer is required to disclose its insured's policy information to third-party claimants is a factual inquiry, as Wilkie recognizes through the far-ranging discovery requests he submitted to Hartford. Through his discovery requests, Wilkie sought Hartford's claim file, notes, and memoranda; internal communications among Hartford representatives; communications between Hartford and its insureds; and information regarding Hartford's internal policies and procedures. Appellant's App. 4, Wilkie's First Written Disc. Reqs. to Def. Hartford, at 2-4. Wilkie also sought to depose a 30(b)(6) witness regarding, in part, whether Richard Sprout is liable to Wilkie for his alleged injuries; whether Hartford believes Richard Sprout is liable to Wilkie for additional damages; Hartford's internal policies, procedures, practices, and guidelines about providing insurance policies and policy information to third-party claimants; the reasons Hartford did not provide Wilkie with a copy of the policy it issued to the Sprouts; the communications Hartford has had with the Sprouts; and Hartford's internal communications and documents regarding whether to provide Wilkie with a copy

of the policy. Appellant's App. 7, Draft Rule 30(b)(6) Notice of Video Deposition of Hartford.

Wilkie's insistence on conducting discovery into these issues makes clear that the determination of whether policy information should be disclosed to third parties pre-litigation depends on the underlying facts and circumstances. *See* Appellant's Opening Br., at 5-6, 23-26. By seeking discovery from Hartford regarding its internal file and communications, Wilkie admits that the individual facts of this case are relevant and determinative of whether the broad duty he seeks should be created. If the underlying facts and circumstances did not matter, there would be no reason for Wilkie to conduct discovery. Declaratory relief is therefore unavailable because resolution of this action, as Wilkie recognizes, involves the determination of questions of fact. *Strauser*, ¶ 16; *Tarlton*, ¶ 35.

IV. Wilkie cannot recover his attorneys' fees under either the UDJA or under *Havre Daily News* as a "prevailing party."

A. Equity does not support an award of Wilkie's attorneys' fees.

Contrary to Wilkie's claim, an award of fees is not "necessary" or "proper." *See* Appellant's Opening Br., at 41. The supplemental relief provision under the UDJA, Mont. Code Ann. § 27-8-313, gives district courts the ability to award relief in the form of attorneys' fees, but the "availability of attorney fees is not automatically presumed, nor are fees warranted in garden-variety declaratory

judgment actions." *Abbey/Land, LLC v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 66, 394 Mont. 135, 433 P.3d 1230. "As a threshold question, the equities must support a grant of attorney fees." *Id.* Attorneys' fees are "only appropriate if equitable considerations support the award." *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 45, 354 Mont. 50, 221 P.3d 1230. This threshold determination "must be made before a court applies the criteria of the tangible parameters test." *Mungas*, ¶ 45. Only "if the equities support a grant of attorneys' fees" does the Court "consider three 'tangible parameters.'" *Abbey/Land, LLC*, ¶ 67. Fees are "necessary and proper" only if:

> (1) the other party 'possesses' what the party filing the declaratory judgment sought in litigation;
>
> (2) the party filing the declaratory judgment action needed to seek a declaration showing that it was entitled to the relief sought; and
>
> (3) the declaratory relief sought was necessary in order to change the status quo.

Abbey/Land, LLC, ¶ 67 (quoting *Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 45, 315 Mont. 210, 69 P.3d 663).

Wilkie cannot establish the threshold requirement that the "equities" support an award of fees under the UDJA. Wilkie's underlying declaratory judgment action was properly dismissed because it is moot and does not fall under any exceptions to

the mootness doctrine. Even if that were not the case, Wilkie sought to create a broad new duty that is not supported by the facts or Montana law.

Moreover, Wilkie was not forced to file suit to obtain the policy or policy information. *See* Appellant's Opening Br., at 42. Hartford responded to Wilkie's request for the policy with a request that Wilkie provide it with support for his belief that he was entitled to the Sprouts' insurance policy. Wilkie ignored Hartford's request and raced to court. He continued to pursue the underlying action even after receiving the relief he sought. The equities do not support an award of his attorneys' fees.

For the same reasons, Wilkie cannot establish that the "tangible parameters" support an attorneys' fee award. Wilkie was not forced to file suit or incur attorneys' fees. Wilkie chose to pursue the declaratory judgment action after ignoring Hartford's request for information in support of his position. There is no basis in Montana law or the underlying facts for the broad duty Wilkie seeks. Not only does Wilkie lack the requisite personal interest to pursue the declaratory action, he complains of an invented and entirely speculative problem. Wilkie has provided no evidence that Hartford has engaged in the challenged conduct on an ongoing basis. There is no basis for an award of attorneys' fees under the UDJA. Wilkie's request must be denied.

B. Wilkie has not brought an action to enforce his rights under the Montana Constitution, and his request for fees under *Havre Daily News* must be denied.

Wilkie is not entitled to recover is fees as a "prevailing party" and his citation to *Havre Daily News* in support of that proposition is misplaced. *See* Appellant's Opening Br., at 42. In *Havre Daily News,* this Court recognized that Mont. Code Ann. § 2-3-221 provides that a "'plaintiff who prevails in an action brought in district court to enforce his rights under Article II, section 9 of the Montana constitution may be awarded his costs and reasonable attorneys' fees.'" *Havre Daily News*, ¶ 44 (quoting Mont. Code Ann. § 2-3-221) (emphasis added). The Court did not expand the availability of a fee award to any other context. Article II, section 9 of the Montana Constitution, in turn, provides that "[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions." Mont. Const. art. II, section 9. It does not address a third-party claimant's right to the insurance policy of an alleged tortfeasor or an insurer's duty to disclose its insured's policy information to third parties.

Wilkie did not bring a declaratory judgment action pursuant to Article II, section 9 of the Montana Constitution. He has not alleged he was deprived any right to examine the documents of public bodies or agencies of the state government. Wilkie has only argued Hartford's alleged refusal to disclose policy

information violated general insurance law and the UTPA. Appellant's Opening Br., 28-37. His claims do not fall under or even implicate Article II, section 9, or any other article or section, of the Montana Constitution. Wilkie's reliance on *Havre Daily News* to support his request for fees is therefore inapposite. Wilkie's request for fees should be rejected.

CONCLUSION

The district court properly dismissed Wilkie's Complaint. Once Wilkie received the Sprouts' insurance policy, no justiciable controversy existed between Wilkie and Hartford, and the district court lacked jurisdiction to grant Wilkie effective relief. Neither the voluntary cessation nor the capable of repetition yet evading review exceptions are applicable to Wilkie's claims. Wilkie has not identified a recognized right or duty to support his claim that pre-litigation policy disclosure is necessary or appropriate under Montana law. This Court should affirm the district court's dismissal of Wilkie's action and deny Wilkie's request for fees.

DATED this 5th day of April, 2021.

CROWLEY FLECK PLLP

/s/Ian McIntosh
Ian McIntosh
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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; and the word count calculated by Microsoft Office Word is 9,513 words excluding the caption, table of contents, table of authorities, this certificate of compliance, and the certificate of service.

DATED this 5th day of April, 2021.

/s/ Ian McIntosh
CROWLEY FLECK PLLP

District Court Orders

Document Title	Tab
Order Dismissing Complaint for Declaratory Relief (Dkt. 38)	1

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY
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PAUL WILKIE, Plaintiff, vs. HARTFORD UNDERWRITERS INSURANCE COMPANY, a/k/a THE HARTFORD; RICHARD L. SPROUT; and SHAUNA SPROUT, Defendants.	Cause No. DV-20-367B **ORDER DISMISSING COMPLAINT FOR DECLARATORY RELIEF**

On March 30, 2020, Plaintiff filed a Complaint for Declaratory Relief. Plaintiff alleges that while he was crossing the street in a cross walk, defendant Richard Sprout hit him with his vehicle causing Plaintiff to sustain injuries. Plaintiff alleges Richard Sprout's insurer, The Hartford accepted liability for the accident. Plaintiff alleges he has not yet made a demand upon Richard Sprout or The Hartford for payment but has requested a copy of Richard Sprout's policy or for The Hartford to at least inform Plaintiff as to the limit of liability insurance that applies to Plaintiff's claim. Plaintiff alleges Defendants refused to provide the requested information. As a result, Plaintiff filed his Complaint for Declaratory Judgment seeking a declaration from the Court that The Hartford has a duty to provide Plaintiff, a third-party claimant, a copy of the policy and applicable declaration page, or, in the alternative, that The Hartford has a duty to disclose to Plaintiff the amount of insurance coverage available for his claim.

On April 23, 2020, counsel for the Sprouts provided Plaintiff with a copy of the Policy, including the relevant declarations page. On May 12, 2020, The Hartford filed a

Motion to Dismiss. On May 18, 2020, defendants Richard and Shauna Sprout filed a Joinder in Hartford's Motion to Dismiss. Defendants argue that because Plaintiff has now been provided a copy of the insurance policy and declarations page, the issues raised in his Complaint are moot. Plaintiff argues his request for declaratory relief should proceed under an exception to the mootness doctrine.

"The judicial power of the courts of Montana is limited to justiciable controversies." *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881.

> [I]f the issue presented at the outset of the action has ceased to exist or is no longer 'live,' or if the court is unable due to an intervening event or change in circumstances to grant effective relief or to restore the parties to their original position, then the issue before the court is moot. And because the constitutional requirement of a 'case or controversy' contemplates real controversies and not abstract differences of opinion or moot questions, courts lack jurisdiction to decide moot issues insofar as an actual 'case or controversy' no longer exists.

Id., ¶ 23 (internal citations omitted). In proceeding to rule on the merits of an otherwise moot issue, the opinion constitutes an impermissible advisory opinion, "i.e., one advising what the law would be upon a hypothetical state of facts or upon an abstract proposition, not one resolving an actual 'case or controversy.'" *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 12, 355 Mont. 142, 226 P.3d 567 (internal citation omitted).

The dispute between the parties involved in this action has been resolved and is now moot. Issuing a ruling with regard to the specific facts presented in this case would amount to an advisory opinion. Plaintiff relies heavily on the Unfair Trade Practices Act and *Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997), to support his argument regarding an insurer's duties pre-litigation. 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. The Court declines to apply an exception to the mootness doctrine to address whether an insurer, in all circumstances, has a duty to provide third-party claimants with a copy of the applicable insurance policy and declarations page, or to disclose the limits of liability, prior to litigation. Based on the argument and authority cited by Defendants, Plaintiff's Complaint for Declaratory Relief should be dismissed as a non-justiciable controversy.

The Court notes that Plaintiff moved to file a sur-reply brief in response to the Motion to Dismiss. The Court did not rule on the motion to file a sur-reply brief, but the brief was inadvertently filed rather than lodged by the Clerk of District Court. The Court considered arguments raised in all of the briefing filed, including the sur-reply brief. Therefore, the Court grants the motion to file sur-reply.

IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Leave to File Sur-Reply Brief is **GRANTED**.
2. Defendant's Motion to Dismiss is **GRANTED**. Plaintiff's Complaint for Declaratory Relief is **DISMISSED**.
3. All other pending motions are **MOOT**.

Dated this 25 day of September 2020.

Hon. Rienne H. McElyea
District Judge

c: Robert K. Baldwin / Jeffrey J. Tierney / Katherine B. DeLong
Ian McIntosh / Kristen Meredith
Patrick Sullivan

emailed 9-25-20

CERTIFICATE OF SERVICE

I, Ian McIntosh, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-05-2021:

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