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

Appellant's Reply Brief

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INTRODUCTION

In clear liability cases, insurers must: (i) attempt in good faith to reach a prompt and fair settlement; and (ii) not withhold settlement under one coverage to influence settlement under other coverages. §§ 33-18-201(6) and (13), MCA. These duties require payment to an injured third party—even up to policy limits—without suit or a release. *See Ridley v. Guaranty National Insurance Co.*, 286 Mont. 325, 951 P.2d 987 (1997) and its progeny. *Ridley* prevents carriers from seizing unfair negotiation leverage by withholding funds. So, now they withhold information about coverages and limits.

So it was with Hartford and Wilkie. Wilkie was receiving medical payments per *Ridley* but wanted to formulate a demand for the remaining elements of his damages. Hartford refused his request for the policy or information about coverage. Wilkie filed suit, not to assert personal injury or bad faith claims but, as in *Ridley* itself, for declaratory relief about the carrier's pre-suit obligations to him. Sprout came to Wilkie's counsel's office and announced his refusal to provide the policy. His counsel later sent the policy and defendants declared the case moot, seeking to avoid a merits judgment that carriers must provide the policy to a third-party claimant when liability is reasonably clear.

This appeal presents two primary issues.

First, did the defendants' post-filing conduct render the case moot, depriving the courts of the power to declare the law for the benefit of future injured claimants? Defendants do not even try to carry their "heavy burden" to show that the challenged conduct cannot reoccur, making **no commitment that Hartford will not withhold policy information in the future**, much less offer any proof. Instead, they counterattack and deflect.

Second, does the law which requires **payment** of insurance benefits to third-party claimants up to policy limits also require **disclosure** of those benefits and limits? Defendants never grapple with Wilkie's central argument that the same law that requires insurers to pay policy benefits up to the limits of coverage without requiring the claimant to file suit, also necessarily requires disclosure of what those benefits and limits are.

STANDARD OF REVIEW

Review is de novo. *See* Wilkie's Br. 6–7, Hartford's Br. 6; Sprouts' Br. 4.

I. THE CASE IS NOT MOOT.

A. Defendants abrogate their burden under the "voluntary cessation" exception.

The district court did not analyze the voluntary cessation exception, merely "declin[ing] to apply an exception to the mootness doctrine." App. 1, p. 3. The defendants pay lip-service to the exception but do not carry their burden.

1. Defendants invoked mootness based upon their voluntary conduct, so had a "heavy burden."

Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167 (2000), addressed a defendant's attempt to avoid a merits decision by voluntarily ceasing the challenged conduct after suit is filed:

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways.

Id. at 189 (internal citations, quotations omitted). This Court relied on *Laidlaw* in adopting the voluntary cessation exception, reiterating the "concern that a defendant may utilize voluntary cessation to manipulate the litigation process." *Havre Daily News LLC v. City of Havre*, 2006 MT 215, ¶ 34, 333 Mont. 331, 142 P.3d 864. More specifically, "[t]he concern is that a defendant will attempt to moot only a plaintiff's meritorious claims, thereby avoiding an undesirable judgment on the merits…." *Id.* ¶ 34, n.7. "This concern is particularly acute in situations when one would expect the same defendant to encounter substantially identical future controversies." *Id.*

To discourage such manipulation of the courts, defendants must meet a "stringent…standard…for determining whether a case has been mooted by the defendant's voluntary conduct." 528 U.S. at 189.

> A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Id. (internal citations, quotations omitted); *see also Lozano v. AT&T Wireless Serv.'s, Inc.*, 504 F.3d 718, 733 (9th Cir. 2007) ("[i]n determining mootness [under *Laidlaw*], the *defendant* bears the burden of showing that its voluntary compliance moots a case by convincing the court that 'it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to occur.'" (emphasis in original)); *Seneca v. Arizona*, 345 Fed. App'x 226, 228–29 (9th Cir. 2009) (defendant that terminated a challenged policy, but "fail[ed] to establish the permanency of the change…did not meet its burden of demonstrating mootness."); *JP Morgan Chase Bank NA v. Jones*, No. C15-1176RAJ, 2016 WL 1182153, at *10 (W.D. Wash. Mar. 28, 2016) (defendant "incorrectly reversed the burden of proving mootness" when it urged a finding of mootness based on voluntary cessation but failed to provide guarantees of nonrecurrence).

This Court adopted *Laidlaw*'s allocation of the "heavy burden" to the "party asserting mootness," emphasizing "the importance of properly assigning this burden." *Havre Daily News*, ¶ 34.

2. Defendants continue to neglect their burden.

Hartford and Sprouts sought dismissal based upon the cessation of their challenged conduct, i.e. withholding the policy. They thus assumed the burden to show that their conduct is unlikely to reoccur. *Havre Daily News*, ¶ 34. Yet, **Hartford never even claims that it will not continue to withhold policies from injured third-party claimants to whom liability is reasonably clear.** It does not even state—much less prove—that proposition.

Wilkie's opening brief (17–18) shows that the defendants did not attempt to carry their burden below. Hartford dismisses this as "unsupported," "erroneous," "inaccurate," a "mischaracteriz[ation]" and a "misinterpret[ation]." Hartford's Br. 17–18. Yet, it points to no instance where it represented or agreed that it would no longer withhold policy information from injured third-parties.

The bulk of Hartford's argument is generic discussion about live controversies and mootness. *Id.* at 9–13. Its argument about the voluntary cessation exception does not offer any assurance of nonrecurrence. *Id.* at 13–18.

Instead, Hartford brazenly doubles-down on its refusal to try to carry its burden, claiming "no obligation to advance arguments…." *Id*. at 18. Hartford had precisely that "obligation"—the "heavy burden" to show that the challenged conduct will not repeat. *Havre Daily News*, ¶ 34. Hartford's "no obligation"

argument is a stunning rejection of its burden of proof.

Heringer v. Barnegat Development Group, LLC, 2021 MT 100, ___ Mont. ___, ___ P.3d ___, demonstrates how a defendant claiming mootness based on a change in its behavior carries its "heavy burden." Condominium owners sued to invalidate an amendment to the condominium declaration. The developer revoked the amendment, the district court dismissed as moot, and this Court affirmed. The developer "consistently maintained" that it had engaged in the challenged conduct for specific reasons which had since been resolved. *Id.* ¶ 23. It "swore under oath in an affidavit" that the amendment was no longer needed and would not be repeated, "provid[ing] strong evidence that subsequent events had made it absolutely clear the allegedly wrongful behavior could not reasonably be expected to occur." *Id*. Reassurances in the briefing further indicated the developer would not repeat its behavior. *Id.* ¶ 23, n.3. The developer thus carried its burden because it was bound by its sworn assurances and offered proof that the reasons for its behavior were "resolved and…unlikely to recur." *Id*. ¶ 24; *see also Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019) (formal commitment not to reoffend—"significantly more than bare solicitude"—is required to prove mootness).

Hartford offers not even "bare solicitude." Hartford does not solemnly swear under oath, or even blithely suggest, that it will not continue to withhold

policies from injured third-party claimants. It does not identify the reasons for withholding the policies,[1] or show that those reasons were unique to this case and have been resolved. *See Havre Daily News*, ¶ 34, n.7 (concern about voluntary cessation is "particularly acute in situations when one would expect the same defendant to encounter substantially identical future controversies.").

Hartford has not said—much less proved—that it will not continue to withhold policies from injured third parties.

3. Hartford's misplaced "single instance" argument.

Hartford relies entirely upon this Court's language in *Havre Daily News* about a "single instance." *See* Hartford's Br. 13–15.

The "single instance" concept only arises while determining the likelihood of recurrence. *See Havre Daily News*, ¶ 38. There is no need to examine whether Wilkie adequately rebuts Hartford's argument about the likelihood of recurrence because Hartford never made that argument.

Substantively, Hartford's argument mistakes *Havre Daily News*. *See generally* Wilkie's Br. 11–13. *Heringer* held the district court erred by reading *Havre Daily*

[1] The closest it comes is citing the MIIPPA, but that is pretextual as evidenced by its concession that disclosure is still sometimes appropriate. Hartford's Br. 26. It is inconsistent to simultaneously claim the law precludes disclosure **and** that disclosure can be appropriate.

News to preclude application of the voluntary cessation exception when there was only a "single instance" of the offending conduct. *Heringer*, ¶ 21. That "may not carry great weight or be dispositive in every case." *Id.* ¶ 21. The lack of a pattern of conduct militates against application of the voluntary cessation exception when the propriety of the conduct is "a heavily fact-dependent inquiry…." *Id.* In such a case, "a decision on the merits…would provide limited meaningful guidance for future disputes." *Id.* Thus, *Havre Daily News* declined to apply the "voluntary cessation" exception because of the "literally infinite assemblage of variables that could arise in a future dispute[,]" rendering a decision of "limited meaningful guidance" as to disputes between "hypothetical future parties." *Id.* ¶ 38.

This case, in contrast, merely involves an inquiry—reasonably clear liability—that insurers must already undertake under the UTPA. The requested ruling adds no complexity, much less an "infinite assemblage of variables," to that inquiry. A ruling here would be of tremendous value to future injured claimants.

4. At a minimum, the district court's ruling was premature without jurisdictional discovery about voluntary cessation.

Hartford's problematic inversion of the burden of proof is compounded by Wilkie's inability to conduct jurisdictional discovery. Even if Hartford *had* carried its initial burden to show that the challenged conduct is not likely to recur, Wilkie should have been allowed discovery to prove otherwise.

For example, Hartford faults Wilkie for citing only a single instance of Hartford withholding policy information. *See* Hartford's Br. 13–15 (repeatedly arguing that a plaintiff must "point to" more than a single instance). But Hartford refused to provide discovery about its policies and practices regarding disclosure of policy information to third-party claimants. Hartford does not say that withholding policy information is *not* its routine practice; just that Wilkie cannot prove it.

When a defendant moves to dismiss based on a factual challenge to subject matter jurisdiction, as when it claims mootness, courts should allow discovery "appropriate to the nature of the motion to dismiss." *Douglas v. U.S.*, 814 F.3d 1268, 1275–75 (11th Cir. 2016) (citing *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981)); *accord Bloedorn v. Keel*, No. 6:09-cv-55, 2012 WL 777318, at *2 (S.D. Ga. Mar. 6, 2012); *Smith v. Morgan*, No. 5:18-cv-01111, 2019 WL 1930764, at *6 (N.D. Ala. May 1, 2019).

When mootness is claimed based on voluntary cessation, the likelihood of reoccurrence often turns on motive, intent, and past practices—information "peculiarly within" the defendant's knowledge. *Bloedorn*, 2012 WL 777318 at *2–4 (reversing to allow discovery about whether challenged conduct might recur which was "appropriate to the nature of the motion"); *see also Smith*, 2019 WL 1930764, at *4–6 (denying motion to dismiss where plaintiff had "not yet had an opportunity

to conduct discovery" about defendant's past practices which "may undermine the Defendants' assurances that [its conduct] is unlikely to recur."); *Mercer v. Jericho Hotels, LLC*, No. 19-CV-5604, 2019 WL 6117317, at *3–4 (S.D.N.Y. Nov. 18, 2019) (ordering jurisdictional discovery about defendant's motives and professed intent because, without that, "the Court and a plaintiff will be unable to meaningfully address a defendant's assertion that 'the allegedly wrongful behavior could not reasonably be expected to recur.'").

Defendants' mootness claim raised numerous factual issues that Wilkie was not permitted to explore in discovery. Did Hartford ask Sprouts for permission to disclose the policy prior to Hartford's refusal? Did Hartford refuse on its own volition as a matter of corporate policy? Why did Sprouts' counsel ultimately provide the policy? Was it a put-up job by Hartford, calculated to deprive the court of jurisdiction and avoid an adverse adjudication? *See Havre Daily News*, ¶ 34, n.7 ("The concern is that a defendant will attempt to moot only a plaintiff's meritorious claims, thereby avoiding an undesirable judgment on the merits while vigorously contesting those cases in which he expects to prevail.").

Sprouts argue there is no controversy because they allegedly were not asked to provide the policy, they never refused to provide it, and they have not resisted. In fact, the only **evidence** of record is that, even after suit was filed, Mr. Sprout

came to Wilkie's counsel's office to announce he would not provide the policy. *See* Dkt. 13 (Nelson Dec.). Sprouts deny that, Sprouts' Br. 9, n.4, but offered no contrary evidence.

Sprouts also deny that they invoked their privacy interest to prevent disclosure to Wilkie. *See* Sprouts' Br. 6, n.2. But they argued that Montana law allowed them to block production of their policy. *See* Dkt. 7, p. 2, n.1. By stating that they "waive" their right to block production of the policy to Wilkie, they are necessarily claiming such a right.[2]

Given these factual disputes, Wilkie sought discovery on: communications between the defendants about whether to give Wilkie the policy; Hartford's internal deliberations and policies and procedures on this topic; and Sprouts' reasons for withholding consent and related communications. *See* Apps 4–5.

Even if it *were* Wilkie's burden to show a likelihood of reoccurrence—and it is not—such information was necessary for the court to decide the likelihood of recurrence. The defendants did not provide necessary information about these topics in support of their motion to dismiss, Wilkie was deprived of the opportunity to discover it, and the court did not make the necessary findings.

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[2] This is also irrelevant because Hartford continues to tout the MIIPP Act as a reason to refuse to provide the policy. *See* Hartford's Br. 32.

B. The "capable of repetition yet evading review" exception also applies.

Hartford deems the "capable of repetition yet evading review" exception inapplicable because the time between the challenged conduct (withholding policy information) and the occurrence mooting the case (surrendering it) must be "*always* so short as to evade review…." Hartford's Br. 19 (citing *Havre Daily News*, ¶ 33). The cited passage about timing was not a rule, but an example supporting a broader rule that this mootness exception applies when the "challenged conduct invariably ceases" before the matter can be adjudicated. *See Havre Daily News*, ¶ 33 (citing, *e.g.*, *Spencer v. Kenma*, 523 U.S. 1 (1998), describing timing considerations relevant to parole revocations).

Hartford's argument overlooks the inherent impossibility of review in cases like this. Wilkie seeks a declaration about pre-suit duties. Before any court can declare the relevant law, suit will be filed and the claimant will have the right to obtain the policy in discovery. Any controversy over "pre-suit" disclosure obligations "invariably ceases" upon filing.

Insurance companies can, and do, repeat this conduct over and over. *See* Dkts. 11 and 12. If defendants are correct, no court will ever be able to address this problematic practice. This Court should not allow insurance companies to continue to thus manipulate the process to avoid a merits decision.

C. Defendants' accusation that Wilkie declined to do Hartford's research but, instead, "ran" to court to "make new law."

When it rejected Wilkie's request for a copy of the policy, Hartford invited him to submit information supporting his position. Hartford's Br. 2–3. Hartford complains that Wilkie did not do so, but "ran to court" to file this action in an attempt to make new law. *Id.* at 3. Hartford obliquely questions Wilkie's motives, claiming his "purported" reason for filing suit was to get the policy. *Id.* at 1. Of course, that is precisely what the complaint asks for.

Hartford cites no legal or logical reason why it should be able to shift to Wilkie its own obligation to know and perform its duties under Montana law, or why its attempt to do so precludes relief so as to be an "important detail." *Id.* at 8. Hartford profits from selling coverage in Montana and, presumably, has a legal staff and budget. Wilkie does not. Hartford should ascertain and comply with Montana law regardless of whether an injured claimant educates it.

Hartford's gripe seems to be that Wilkie did not afford it an opportunity to avoid a decision on the merits about the impropriety of its conduct, but this leads nowhere. Even now, after this matter was briefed below and on appeal, Hartford persists in its position. What good would it have done for Wilkie to incur further expense and delay by writing back to Hartford, beseeching it to relent? Hartford's victim-blaming is a distraction.

The district court, however, was distracted. It suggested Wilkie sought declaratory relief as a "steppingstone" to bad faith litigation, and that Wilkie should just suffer the wrong and then sue for bad faith. App. 1, pp. 2–3. This overlooks that they are different types of actions serving different purposes. A declaratory judgment action like *Ridley* seeks clarification about the claimant's rights and the insurer's obligations before the claimant sues for personal injuries and even before it can sue for bad faith. *See* § 33-18-242(6)(b), MCA. *Ridley* reversed and remanded for entry of such a declaratory judgment. It could have, like the district court here, told Ridley to go suffer the consequences of violation of those duties and then sue for bad faith. *See also Safeco v. Mont. Eighth Jud. Dist. Ct.*, 2000 MT 153, ¶¶ 31–34, 300 Mont. 123, 1 P.3d 834 (declaratory action to clarify rights is proper, without seeking bad-faith damages); *DuBray v. Farmers Ins. Exch.*, 2001 MT 251, ¶ 13, 307 Mont. 134, 36 P.3d 89 (district court properly dismissed part of case but erred by dismissing request for declaratory relief regarding insurer's obligations to pay certain damages under *Ridley*).

The district court's approach ignores the harm detailed in *Ridley* at 335–36, 951 P.2d at 993 (withholding payment can cause financial stress, leading to ill-advised settlement) and *Watters v. Guaranty National Ins. Co.*, 2000 MT 150, ¶ 56, 300 Mont. 91, 3 P.3d 626 (concerns about coercive pressure). Withholding

information similarly cripples an injured claimant's ability to negotiate on an even playing field. *See discussion, infra*, re: *Johanek* and public policy reasons behind civil rules' requirement that insurance be discoverable; *see also* Dkts. 11 and 12, ¶¶ 8–15 (explaining the need for third-party claimants to know about policy provisions).

The court incorrectly viewed a *Ridley* declaratory relief case as a "steppingstone" to bad faith litigation. But, such a case does not even seek to determine whether an insurer "violated the UTPA, or acted in bad faith…." *Safeco*, ¶ 34. It seeks to clarify the claimant's rights and the insurer's duties. *Id*.

Finally, different standards apply. This declaratory judgment action asks what the carrier's pre-suit obligations are. A bad faith action asks, among other things, whether the insurer is protected from liability because it had a reasonable basis in law or fact for its conduct. *See* § 33-18-242(5), MCA. Thus, for instance, the existence of *Bateman*, *infra*, could possibly immunize Hartford against a UTPA claim. That is precisely what happened in *Watters*, in which the Court agreed with the claimant about the carrier's pre-suit duties, but ultimately ruled that the carrier was not liable under § 33-18-242(5) because it had relied upon contrary prior case law. *See also*, *e.g.*, *Shilhanek v. D-2 Trucking, Inc.,* 2003 MT 122, ¶¶ 3-31, 315 Mont. 519, 70 P.3d 721 (insurer violated *Ridley* but no UTPA liability because it had a reasonable, if incorrect, basis in law for its actions).

Ridley, itself, drives the nail into the "steppingstone"—indeed, the mootness—coffin. There, Guaranty National argued its conduct was permitted under prior federal decisions (*Young* and *Jensen*, *infra*). *Ridley*, 286 Mont. at 331–32, 951 P.2d at 991. Ridley "correctly point[ed] out" that those cases prevent him from obtaining compensation because § 33-18-242(5) means that he "cannot enforce his rights to compensation." *Id.* "In other words, even if they are correct, Ridley's rights under the [UTPA] are unenforceable." *Id.* "For these reasons," this Court held the district court had "erred as a matter of law when it held that the relief sought by Ridley did not present a justiciable controversy." *Id.*

The district court erred in refusing to declare the parties' rights as in *Ridley* and *Safeco*, instead condemning Wilkie to sue for a UTPA violation, while *Bateman* likely dooms that effort. The court's reasoning guarantees no sane litigant will ever attempt to vindicate this right.

II. HARTFORD HAD A DUTY TO PROVIDE THE POLICY TO WILKIE REGARDLESS OF SPROUT'S OBJECTIONS.

A. This duty inheres in the UTPA.

Neither § 33-18-201(6) nor (13), MCA, explicitly require payment to a third-party claimant before suit and without a release. Yet, that conclusion follows so inexorably from the text and purpose of the statute that those sections, "by their terms, impose such an obligation." *Ridley*, 286 Mont. at 334, 951 P.2d at 992. Later

cases have held that these subsections may require payment up to policy limits. *See Watters, supra; High Country Paving, Inc. v. United Fire & Cas. Co.*, 2019 MT 297, 398 Mont. 191, 454 P.3d 1210.

The obligation to **pay** coverages, up to limits, in clear liability cases necessarily implies a corollary duty to **disclose** those coverages and limits in those circumstances. Wilkie's Br. 33–36. Defendants never really grapple with this.

Hartford cites *Bateman v. NUFIC*, 423 Fed. App'x 763, 765 (9th Cir. 2011). Hartford's Br. 21. *Bateman* affirmed dismissal of a misrepresentation claim "because Plaintiffs do not allege there was any affirmative misrepresentation…." *Id.* at 765. Its subsequent musings about duty are dicta. Additionally, liability was not reasonably clear. *See Bateman v. NUFIC,* No. CV-08-96, 2009 WL 10678815, at *12 (D. Mont. Nov. 19, 2009). Because the court did not deem its opinion worth publishing, it is "not precedent." Ninth Cir. Rule 36-3(a). Even an on-point holding in a published federal opinion would not control. *See Marie Deonier & Assoc.'s. v. Paul Revere Life Ins.*, 2000 MT 238, ¶ 34, 301 Mont. 347, 9 P.3d 622 (federal decision applying Montana law "is not binding…"). Hartford's best argument thus relies on dicta from a factually distinguishable, nonprecedential, and nonbinding case.

And *Bateman* is wrong. *Ridley* cited two federal decisions that "insurers are

not obligated pursuant to § 33-18-201, MCA, to pay…prior to final settlement…." *Id.* at 332, 951 P.2d at 991 (citing *Young v. Simenson*, CV-87-062-GF (D. Mont. June 6, 1987); *Jensen v. State Farm Mut. Auto. Ins. Co.,* 8 Mont. Fed. Rep. 262 (D. Mont. 1990)). This Court held directly the opposite, i.e., that the state district court "erred when it concluded that the statute in question does not require an insurer to pay an injured third party's medical expenses…." *Id.* at 334, 951 P.2d at 992. Instead, subsection (6) and (13), "by their terms, impose such an obligation." *Id.* Clearly, this Court has a history of deciding these issues of state law directly contrary to federal holdings.

B. Hartford insists upon misreading Wilkie's arguments.

Defendants ignore that, as in *Ridley*, the text, structure and purpose of the UTPA impose the relevant obligation. Unable to refute this idea, Hartford twists Wilkie's arguments and then refutes those arguments that Wilkie did not make.

1. Hartford misinterprets Wilkie's argument about Johanek and the Rules of Civil Procedure.

Wilkie cited *Johanek v. Aberle*, 27 F.R.D. 272 (D. Mont. 1961), to demonstrate that disclosure of policy terms is "necessary to allow good faith negotiations on an even playing field." Wilkie's Br. 30. The provisions of the State and Federal Rules of Civil Procedure allowing discovery of insurance also demonstrates the critical relevance of this information to settlement negotiations.

Id. at 30–32. Instead of addressing these weighty policy implications, Hartford responds as if Wilkie claimed these authorities impose a pre-suit obligation to disclose policies, Hartford's Br. 27–31, refuting an argument Wilkie does not make.

2. Hartford misreads Wilkie's complaint as seeking a "broad" ruling.

Hartford claims Wilkie seeks a "ruling that 'insurers in general' are obligated to provide insurance policies…pre-litigation." Hartford's Br. 3–4 (citing Complaint [Hartford's App. 1], ¶ 16). Wilkie sought no such thing. The cited paragraph of the complaint seeks nothing, merely alleging nondisclosure by "Hartford, and insurers in general," has certain deleterious effects. *Id*. Wilkie's prayer for relief seeks "[d]eclaratory relief as set forth above," i.e., "that The Hartford has a duty…" to disclose to Wilkie. Dkt. 2, ¶ 24 and Prayer for Relief.

Hartford's next tactic is to fault Wilkie's pleading as not specifying that the relief sought pertains only when liability is reasonably clear. Hartford's Br. 4 ("Wilkie's requested relief was not limited to situations where liability was reasonably clear."). This, too, is incorrect. The requested relief was a declaration that **Hartford** had a duty to disclose to **Wilkie**. Dkt. 2, ¶ 24 and Prayer for Relief. Wilkie's complaint specified that Sprout's liability was reasonably clear. *Id*. ¶ 7; *see also id*. ¶ 18.[3] The obligation that Wilkie asks the Court to recognize would, like

[3] Hartford accepted liability and was paying medical expenses. *See* Sprouts' Br. 2.

Ridley, necessarily arise in the context of reasonably clear liability.

As if there were any doubt, Wilkie responded to this same argument below by reiterating that he contended for a duty of disclosure only "WHEN LIABILITY IS REASONABLY CLEAR." *See* Dkt. 10, p. 10; *see* Wilkie's Br. 16–17.

Hartford merely highlights a failure to redundantly invoke the "reasonably clear liability" mantra to forestall Hartford's deliberate misreading. The rights of an injured Montanan do not turn on such trivialities. *See* Rule 1, M.R.Civ.P. (Rules to be administered to secure a just result).

3. The Gianforte example.

Hartford suggests Wilkie seeks imposition of a "broad duty" that would require insurers "to release all of" a wealthy person's policies, even in an "automobile accident that resulted in minor injuries…." Hartford's Br. 26.

Insurers already must assess whether damages exceed policy limits. *See, e.g.*, *Watters, supra* (with clear liability, insurer must pay up to policy limits without a release) and *High Country Paving, supra* (insurer must pay up to policy limits where even general damages exceed those limits). Having analyzed the likely damages, it is no more onerous to require insurers to then disclose the implicated policies, for instance, revealing the first layer of insurance (the automobile policy) but not excess coverages. Carriers must already analyze the likely amount of damages to

determine whether to pay policy limits without a release. Requiring them also to reveal what those policy coverages and limits are imposes no new analytical difficulties.

Hartford's straw-man argument also ignores that the **type** of coverage, and not just limits, is important. Wilkie submitted affidavits explaining the "resulting disadvantages and difficulties to injured claimants" from withholding policy information. *See generally* Wilkie's Br. 22–23. Injured claimants must know the type of coverages available. *See* Dkt. 11, ¶¶ 8–15; Dkt. 12, ¶¶ 8–15. Section 33-18-201(13), MCA, prohibits leveraging settlement under "one portion of the insurance policy **coverage**…to influence settlements under other portions of the insurance policy **coverage**…." *Id.* (emphasis added). That was one of the provisions that *Ridley* specifically held "by their terms, impose…an obligation" to pay the claimant when liability is clear. It is obviously of tremendous significance for the injured third-party claimant to be able to know, not just limits, but also what those "portion[s] of the insurance policy coverage" are.

C. Hartford's reliance on the MIIPPA is also misplaced.

Hartford assumes, but does not show, that standard-form policy provisions and limits information are protected. The MIIPPA protects "personal information" "about [natural persons] in connection with insurance transactions,"

e.g., underwriting files, medical records, etc. *See* § 33-19-102, MCA (statement of purpose); § 33-19-104(21), MCA ("personal information" defined). Nothing prohibits disclosure of transactional information about resulting insurance contracts, i.e., the types or limits of coverage.

Moreover, Montana law recognizes that injured claimants have a superseding interest in such information. *See* Rule 26(b)(5), M.R.Civ.P. (policy information discoverable regardless of the insured's consent). The MIIPPA allows for disclosure of protected information "as required by law." § 33-19-306(6)(b), MCA. Wilkie is simply asking this Court to clarify that, sometimes, the law requires pre-suit disclosure just as it sometimes requires pre-suit payment.

D. This Court should decide the merits.

If this Court finds this case is not moot, it should also decide the merits. Wilkie's declaratory judgment claim seeks equitable relief based on a purely legal question. *See Davis v. Westphal*, 2017 MT 276, ¶ 11, 389 Mont. 251, 405 P.3d 73 (appellate review of all questions of law presented is "mandatory" in equitable cases unless the taking of further evidence is required (citing § 3-2-204(5), MCA)).

III. CONCLUSION

Ridley duties cannot be reconciled with the practice of withholding policy information from injured claimants. Disclosure of such information, without having

to file a potentially avoidable lawsuit, levels the playing field and encourages settlement. The Court should reverse, find there is a live controversy under the exceptions to mootness, and declare that, when liability is reasonably clear, insurers are obligated to disclose implicated insurance policies and limits.

May 19, 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 5,000 words (4,990 words), excluding the Caption, Table of Contents, Table of Authorities, and this Certificate of Compliance.

May 19, 2021.

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