IN THE SUPREME COURT OF THE STATE OF MONTANA

DA-21-0230

DEPOSITORS INSURANCE COMPANY,

Plaintiff and Appellee

and SARA THARP,

Plaintiff and Cross-Appellant,

v.

PATRICK SANDIDGE,

Defendant and Appellant.

On Appeal from the First Judicial District Court, Broadwater County
Cause No. CDV 2019-13, the Honorable Kathy Seeley, presiding

APPELLANT'S OPENING BRIEF

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2. Does Depositors Insurance Company have standing to sue for declaratory relief?
3. Does Depositors Insurance Company's suit present a justiciable controversy?
4. Is Mr. Sandidge entitled to summary judgment or do disputed issues of material fact preclude declaratory relief?
5. Is Mr. Sandidge entitled to attorney fees and costs?

STATEMENT OF THE CASE

This is a declaratory judgment action brought by the at-fault driver and her insurance company against the innocent victim of a motor vehicle versus motorcycle accident. On July 1, 2017 Sara Tharp pulled onto U.S. Highway 287 in Townsend, Montana into the path of Patrick Sandidge. The investigating Montana Highway Patrol Trooper Gifford McKenzie, investigated and charged Mrs. Tharp for her failure to yield the right-of-way to Mr. Sandidge in violation of Section 61-8-343, MCA. Mrs. Tharp's insurer, Depositors Insurance Company, investigated the cause of the accident, found her at-fault and accepted 100% liability. It then investigated and paid $89,983.95 in reasonable, necessary and causally related medical expenses and wage loss. When Mr. Sandidge retained counsel, Depositors Insurance Company stopped advance payments. This was no later than May 2018. Then in May 2019 Depositors Insurance Company and Mrs. Tharp sued Mr. Sandidge seeking a declaration that liability for the accident and liability for his medical expenses and wage loss were not reasonably clear.

Mr. Sandidge moved to dismiss because neither Mrs. Tharp nor Depositors Insurance Company could demonstrate a risk of harm absent declaratory relief. Mr. Sandidge also noted Mrs. Tharp was not a proper party to the issue of *Ridley* advance payments. The district court dismissed Mrs. Tharp.

The district court held Depositors Insurance Company did not lack standing but failed to address the absence of a justiciable controversy.

Mrs. Tharp then moved for Rule 54, M.R.Civ.P., certification of the district court's decision to dismiss her as an improper party. The court denied the motion.

Depositions Insurance Company moved for summary judgment. It argued because it obtained a medical records review that said Mr. Sandidge should have healed in six weeks, the district court should find it had no duty to make *Ridley* advance payments. Mr. Sandidge opposed the motion and filed a cross-motion for summary judgment. Mr. Sandidge noted that Depositors Insurance Company's medical records review by Dr. Lowell Anderson did not disagree with his three treating Orthopedic surgeons but said his injuries should have healed in six weeks. His three Orthopedists concurred that his bilateral shoulder, back, elbow, wrist and knee injuries were all caused by the accident. Mr. Sandidge requested a hearing in response to Depositor Insurance Company's motion and requested a hearing in support of his motion. The court did not hold a hearing. It denied Mr. Sandidge's motion and granted Depositor Insurance Company's motion. The district court held that both the cause of the accident and the cause of Mr. Sandidge's medical expenses were reasonably in dispute. The district court held it could not rely on the Montana Vehicle Accident Report because it was inadmissible hearsay.

It also held it could not rely on Mr. Sandidge's medical records or his doctor's letters because they were inadmissible hearsay. The district court said Mr. Sandidge failed to present competent evidence to create a genuine issue of material fact as to the cause of the accident or his need for medical treatment. At the time the district court ruled, Depositors Insurance Company had stopped *Ridley* advance payments more than three years beforehand.

Mr. Sandidge incurred more than $50,000 in costs and attorney fees defending against Mrs. Tharp and Depositor Insurance Company's request for declaratory relief. Mr. Sandidge requested fees against each defendant. The district court did not rule on Mr. Sandidge's requests for fees.

This appeal timely followed.

STATEMENT OF THE FACTS

These facts are taken from Depositor Insurance Company's and Tharp's Complaint for Declaratory Relief (Appendix A), Mr. Sandidge's Answer (Appendix B) and his briefs on summary judgment (Appendix C and D). The district court's Order on Motion to Dismiss (Appendix E) and Order on Cross-Motions for Summary Judgment (Appendix F) are also attached.

On September 1, 2017 Sara Tharp pulled in front of Patrick Sandidge while he was traveling Northbound along U.S. Highway 287 in Townsend, Montana. *Complaint for Declaratory Relief, ¶ 2.* Mr. Sandidge was traveling at the posted speed limit of 35 m.p.h. *Sandidge's Brief for Summary Judgment, Exhibit A, Montana Vehicle Crash Report, p. 2.* Mr. Sandidge was unable to take evasive action and Mrs. Tharp crashed into Mr. Sandidge's motorcycle. *Id, p. 3.* The investigating Highway Patrol Trooper Gifford McKenzie cited Mrs. Tharp for her failure to yield the right-of-way to Mr. Sandidge in violation of Section 61-8-343, Montana Code Annotated. *Id.* Mrs. Tharp was solely at fault for the accident. *Id.*

Due to the severity of the crash an ambulance was called to the scene. *Id.* Mr. Sandidge was evaluated at the scene by EMS but declined transport to the hospital. *Id.* Two days later Mr. Sandidge presented to the Emergency Department at Bozeman Deaconess Hospital for evaluation of a constellation of

symptoms including abdominal pain. *Sandidge's Brief for Summary Judgment, Exhibit B, Medical Records pp. 270-275.* The ER records note the following injuries: strain of muscle and tendon front wall thorax, injury of the low back and pelvis, abdominal injuries, shoulder, elbow, wrist and arm strain, forearm, elbow and knee abrasions, neck strain, cervical cranial and brachial syndrome among other injuries. *Id.* Due to the severity of the subjective and objective findings, Mr. Sandidge was evaluated with CT and MRI scans then discharged for primary care because he was 'stable.' *Id.*

Depositors Insurance Company accepted 100% liability, determined Mr. Sandidge's injuries and treatments were reasonable, necessary and caused by the accident. *Complaint, ¶ 4.* It then advance paid $89,983.95 in medical expenses and wages losses. *Id, ¶ 5.*

By May 2018 Depositors Insurance Company stopped advance payments. It hired Dr. Lowell Anderson to conduct a defense medical records review to support its position. *Complaint, ¶ 8.* Dr. Anderson found Mr. Sandidge suffered injuries to his thorax, low back, pelvis, abdomen, shoulders, arm, elbow, forearm, knee, neck, cervical and lumbar spine and right wrist. *Depositor's Motion for Summary Judgment, Exhibit B, Dr. Anderson's Medical Records Review, p. 8; Docket 45.* Dr. Anderson opined all of Mr. Sandidge's injuries and treatments

were caused by the accident but, without explanation, he feels they should have healed in exactly 6 weeks. *Id, p. 8.* Mr. Sandidge's treating physicians disagreed.

Dr. Justin Schwartzenberger, a Board Certified Orthopedic Surgeon, opined:

> Patrick has sustained multiple injuries including bilateral shoulders, right elbow, wrist and knee from his accident on 9/1/17.

Sandidge's Brief for Summary Judgment, Exhibit D, Letter Dr. Schwarzenberger dated October 4, 2018.

Dr. Eugene Slocum, Board Certified in Physical Medicine and Rehabilitation opined Mr. Sandidge suffered:

> 1. Low back pain caused by aggravation of previously existing condition
> 2. The spondylolisthesis at L4-5 is a degenerative condition that was aggravated by the accident
> 3. The degenerative spondylolisthesis is permanent. His aggravation of law back pain will hopefully not be permanent.

Id, Letter Dr. Slocum dated September 5, 2018.

Dr. Alexander LeGrand, a Board Certified Orthopedic Surgeon, opined Mr. Sandidge suffered a medial meniscus tear of his right knee, his injuries cannot be apportioned to any pre-existing condition and the injuries are permanent. *Id, Letter Dr. LeGrand dated August 31, 2018.*

Dr. Mark Harris, a licensed Naturopathic Physician, opined Mr. Sandidge's onset of tinnitus, right shoulder, neck and knee pain were caused by a coup

contrecoup mechanism and are consistent with this accident. *Sandidge's Brief for Summary Judgment, Exhibit D, Letter Dr. Harris dated May 18, 2020.*

The imaging of Mr. Sandidge's elbow three months after the accident revealed fluid within the olecranon bursa which is concerning for olecranon brusitis. Olecranon bursitis is caused by a hard blow to the elbow. *Id, Exhibit C, Medical Records, pp. 182.* An MRI of the wrist revealed a "perforation in the radial aspect of the triangular fibrocartilage" "thinning of the cartilage oat the STT artuclation" and "septated lobulated volar radioal ganglion cyst." *Id, pp. 21-22.* Imaging of the cervical spine revealed a disc protrusion at C3-C4. *Id, pp. 17-19.* Imaging of the lumber spine revealed an annular tear of the left foraminal/lateral disc at L4-5 and a disc protrusion at L5-S1. *Id, pp. 26-28.* An MRI of the knee found:

> complex tear of the medical meniscus. Flap tear of the posterior horn with a very small displaced meniscal flap anterior to the free edge of the posterior horn near the posterior root attachment. Very small displaced meniscal flap along the superior medial joint line. Horizontal tears of the entire posterior horn and body segments wit ha small parameniscal cyst posterior to the posterior horn periphery

along with knee joint effusion, i.e. fluid within the joint. *Id, pp. 185-186.*

When faced with this evidence Dr. Anderson agreed Mr. Sandidge suffered the injuries set forth in the medical records. He simply, and without explanation, said they would heal within 6 weeks. *Dr. Anderson's Review, p. 8.*

By May 2018 Depositors Insurance Company stopped the advance payment of Mr. Sandidge's medical expenses after he hired an attorney. *Sandidge's Motion to Dismiss Tharp, Exhibit A, Letters dated May 2018.*

On May 15, 2019 Mrs. Tharp and Depositors Insurance Company sued Mr. Sandidge seeking a declaration to support the insurer's 2018 decision to stop advance payments. *Complaint.* At the time Mr. Sandidge had $6,853 in unpaid medical expenses. *Order on Cross-Motions, p. 3.* Thereafter, Mr. Sandidge was compelled to defend at a cost which exceeded $50,000 in costs including attorney fees. *Sandidge's Reply in Support of Motion to Dismiss, p. 6; Docket 19.*

SUMMARY OF THE ARGUMENT

Depositors Insurance Company lacks standing to seek declaratory relief because it is at no risk of harm absent declaratory relief. The suit does not present a case or controversy, and is not justiciable, because it is not based on a current controversy, i.e. Depositors Insurance Company stopped paying more than a year before filing suit. The *Ridley* duty to advance pay and the requirements of Section 33-18-201, MCA, are turned on their head if a tortfeasor and her insurer can sue the innocent victim based on any outstanding medical expense to cause the very financial ruin those protections are meant to shield against. In this case, Depositors Insurance Company's suit sought nothing more than an advisory ruling regarding its past conduct. The Court should dismiss the case.

Alternatively, Mr. Sandidge is entitled to summary judgment. The Montana Vehicle Accident Report, and Ms. Tharp's admission that she pulled in front of Mr. Sandidge, dispel any genuine debate about the cause of the accident. Similarly, Dr. Anderson's opinion Mr. Sandidge's injuries should have healed in 6 weeks does not create a reasonable debate about Mr. Sandidge's need for ongoing treatment. To the extent the accident report and the medical records require a foundation the district court erred by not holding a hearing. The Court should remand for a hearing with the costs and fees borne by Mrs. Tharp and her insurer.

ARGUMENT

Standards of Review

The Supreme Court reviews a district court's decision on a motion to dismiss for correctness. *Cape v. Crossroads Correctional Center, 2004 MT 265,* ¶ 10, 323 Mont. 140, 99 P.3d 171. When considering a motion to dismiss the determination of a party's standing to maintain an action is a question of law reviewed de novo. *Heffernon v. Missoula City Council, 2011 MT 91, 360 Mont. 207, 255 P.3d 80.* So too the determination of whether a case presents a justiciable controversy presents an issue of law reviewed de novo. *Montanans Against Assisted Suicide v. Bd. of Med. Examiners, 2015 MT 112, ¶ 7, 379 Mont. 11, 347 P.3d 1244.*

The Supreme Court reviews the district court's order on summary judgment applying the same standards under Rule 56, M.R.Civ.P. *Warrington v. Great Falls Clinic, 2019 MT 111, ¶ 8.* "Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issue of material fact and entitlement to judgment as a matter of law." *Stonehocker v. Gulf Ins. Co., 2016 MT 78, ¶ 9, 383 Mont. 140, 368 P.3d 1187 citing Rule 56, M.R.Civ.P.* The evidence and any reasonable inferences must be viewed in the light most favorable to the party opposing summary judgment. *Id.* When there are cross-motions for summary judgment, the court must evaluate each party's motion on its own merits.

Halenga v. Shwein, 2007 MT 80, ¶ 18, 336 Mont. 507, 155 P.3d 1242. On cross-motions for summary judgment the court is not called to resolve factual disputes but only draw conclusions of law which are reviewed for correctness. *Bud-Kal v. City of Kalispell, 2009 MT 93, ¶ 15, 350 Mont. 25, 204 P.3d 738.* "Summary judgment is an extreme remedy and should never be substituted for a trial if a material fact controversy exists." *Heiat v. Eastern Montana College, 275 Mont. 322, 327, 912 P.2d 787, 791 (1996).* "At the summary judgment stage, the court does not make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses." *Anderson v. Schenk, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 675.*

The Supreme Court reviews the district court's decision to deny a hearing on a summary judgment motion for an abuse of discretion. *Miller v. Goetz, 2014 MT 150, ¶ 9, 375 Mont. 281, 327 P.3d 483.* "A court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice. *RN & DB, LLC v. Stewart, 2015 MT 327, ¶ 14, 381 Mont. 429, 362 P.3d 61 (2015) citing Dollar Plus Stores, Inc. v. R-Mont. Assocs., L.P., 2009 MT 164, ¶ 15, 350 Mont. 476, 209 P.3d 216.*

Substantial injustice occurs when a substantial right of the appellant is affected, or when challenged evidence affected the outcome. *McColl v. Lang,*

2016 MT 255, ¶ 7, 385 Mont. 150, 381 P.3d 574. "Although a district court possesses broad discretion to determine the admissibility of evidence, judicial discretion must be guided by the Rules of Evidence, applicable statutes, and principles of law." *State v. Zimmerman, 2018 MT 94, ¶ 13, 391 Mont. 210, 417 P.3d 289.* "A district court is bound by Montana's Rules of Evidence and applicable statutes in exercising its discretion." *Larchick v. Diocese of Great Falls-Billings, 2009 MT 175, ¶ 39, 350 Mont. 538, 208 P.3d 836.*

Similarly, the Supreme Court reviews a district court's decision to deny attorney fees for an abuse of discretion. "[A]n abuse of discretion occurs when a district court denies attorney fees without some rationale in support of its decision." *Shockley v. Cascade Cnty., 2016 MT 34, ¶ 8, 382 Mont. 209, 367 P.3d 336.*

1. The district court erred when it failed to hold a hearing as Mr. Sandidge requested on the cross-motions for summary judgment

The district court failed to hold a hearing on the cross-motions for summary judgment because it erroneously believed neither party requested a hearing. The district court did not exercise its discretion to deny a hearing, it simply erred in its conclusion that neither party requested it. The district court's error affected Mr. Sandidge's substantial rights to be heard on summary judgment.

Rule 56(c)(2)(A), M.R.Civ.P., provides that the right to a hearing on summary judgment is waived unless a party requests a hearing. "The right to a hearing is waived unless a party requests a hearing within 14 days after the time for filing a reply brief has expired." *Id.* "The purpose of the hearing is for the district court to consider 'not so much legal arguments, but rather whether there exists genuine issues of material fact.'" *RN & DB, LLC, ¶ 43.* However, even when a party requests a hearing on summary judgment, a district court may exercise its discretion to deny a hearing and grant summary judgment. *Chapman v. Maxwell, 2014 MT 35, ¶ 11, 374 Mont. 12, 322 P.3d 1029 citing SVKV, LLC v. Harding, 2006 MT 297, ¶ 37, 334 Mont. 395, 148 P.3d 584.* Yet, a district court abuses its discretion if it acts without employment of conscientious judgment resulting in substantial injustice. *Miller, ¶ 9.*

The record is clear that the district court unintentionally failed to hold a hearing on summary judgment. That error cost Mr. Sandidge the opportunity to present testimony in support of the evidence he submitted on the cross-motions.

Mr. Sandidge moved for summary judgment because Dr. Anderson did not dispute the opinions of Drs. Schwartzenberger, Slocum, Legrand or Harris. Dr. Anderson agreed the injuries occurred but he thought they should have healed in exactly six weeks. Mr. Sandidge included in his brief in support a request to be

heard on the motion which was supported by the accident report and his medical records. *Sandidge's Brief for Summary Judgment, p. 14.* There can be no dispute. "Mr. Sandidge requests to be heard on this matter." *Id.* At the hearing, Mr. Sandidge and his witnesses would have laid a foundation and introduced testimony in support of his briefs if the district court would have held a hearing.

Mr. Sandidge also opposed Depositors Insurance Company's motion for summary judgment and requested a hearing. *Sandidge's Response in Opposition to Summary Judgment, p. 10.* "Mr. Sandidge requests to be heard on this motion." *Id.* Mr. Sandidge opposed the motion again relying on the content of the accident report, his medical records and the insurer's decisions based on these documents. Again, Mr. Sandidge would have laid the foundation for the accident report, his medical records and introduced evidence of the insurer's decisions to advance pay if the district court would have held a hearing as Mr. Sandidge requested.

But, the district court made no finding regarding the propriety of a hearing. Instead, it erroneously stated "neither party requested oral argument." *Order on Cross-Motions for Summary Judgment, p. 1.* The district court erred and the result of that error denied Mr. Sandidge a hearing on the cross-motions and the ability to lay the foundation and proffer testimony to support his defense to the suit.

For example, investigating Trooper Gifford McKenzie would have testified

her investigation found Mrs. Tharp pulled in front of Mr. Sandidge without sufficient time and distance for him to take evasive action. Trooper Gifford would have also testified there was no evidence Mr. Sandidge did anything to cause or contribute to the cause of the accident. She would have laid the foundation for her Montana Vehicle Crash Report. In addition, Mr. Sandidge would have testified he hit the pavement at 35 m.p.h. and suffered the injuries documented within his medical records. The foundation for the medical records would have been laid at the hearing if contested.

Mrs. Tharp would have had to admit she pulled into Mr. Sandidge's lane of traffic when it was unsafe to do so, caused a sudden emergency for Mr. Sandidge, because she couldn't see oncoming traffic. Mrs. Tharp would have to admit she didn't see Mr. Sandidge with sufficient time or space for her to avoid a collision.

Finally, Depositors Insurance Company would have had to admit it reviewed this precise information when it adjusted the claim. It interviewed Mrs. Tharp and Mr. Sandidge. It would have had to admit from July 2017 through May 2018, until Mr. Sandidge retained counsel, it found liability reasonably clear, it accepted 100% liability and made $89,983.95 in *Ridley* payments. Viewed in the light most favorable to Mr. Sandidge, Mrs. Tharp's liability for the accident and the medical treatments were never genuinely in dispute.

Yet, the district court held, without giving Mr. Sandidge the benefit of a hearing, he "provided no admissible evidence regarding Tharp's liability." *Order on Cross-Motions, p. 6.* The district court refused to consider the accident report because Mrs. Tharp and Depositors Insurance Company had 'no opportunity afforded to confront the writer and question [her] as to their veracity." *Id citing State v. Nelson, 172 Mont. 65, 71, 560 P.2d 897, 901 (1977).* The district court relied on *State v. Nelson* which predated the Montana Rules of Civil Procedure and excluded hearsay within hearsay under the old code statutory exception to police reports as hearsay. *See 93-901-1, R.C.M. 1947.* The district court also held "the medical records are not properly authenticated, or explained" and "the notes and letters from treating physicians, like the accident report, are hearsay." *Order on Cross-Motions, p. 8.* "There is not admissible evidence that 'it is reasonably clear that the additional medical expenses are causally related to the accident.'" *Id citing Ridley v. Guaranty Nat. Ins. Co., 286 Mont. 325, 334, 951 P.2d 987, 992 (1997).* The district court's rationale for refusing to consider the crash investigation report, the medical records and letters emphasize the prejudice to Mr. Sandidge when the district court failed to honor his request for a hearing. This district court's ruling that the medical records were hearsay was incorrect. *Rule 803, Montana Rules of Evidence.*

By contrast, the district court accepted Mrs. Tharp's version of events even though it stands in stark contrast to the accident investigation and it defies common sense. Mrs. Tharp says Mr. Sandidge was traveling at a high rate of speed, at or above 35 m.p.h., fell off his motorcycle and 'stopped short of Tharp's vehicle on his feet.' *Order on Cross-Motions, p. 2.* The district court then found liability was not reasonably clear regarding Mrs. Tharp's liability because an issue of material fact exists. Under this rationale, unless there is a complete absence of genuine issues of material fact, then liability for the accident cannot be reasonable clear. This is not the standard.

However, even if it were the standard, Depositors Insurance Company found that standard met by the competing evidence, including Mrs. Tharp's report when it made $89,983.95 in *Ridley* advance payments. No new information had come forth and nothing had changed from the time of the accident in 2017 until the Court's decision in April 2021 other than the insurer's decision to stop the advance payment of medical expenses by May 2018.

This Court should find when Mrs. Tharp sued Mr. Sandidge in 2019 there was no case, controversy or standing and the matter should be dismissed. Alternatively, this Court should reverse the decision of the district court and remand for a hearing on the cross-motions for summary judgment or grant

Mr. Sandidge's motion for summary judgment as discussed herein.

2. Depositors Insurance Company lacks standing to sue for declaratory relief

The district court correctly found Mrs. Tharp lacked standing. Depositors Insurance Company also lacked standing because it was at no risk of harm.

In order to establish standing the well-pled allegations of Plaintiff's complaint must satisfy the following criteria: (1) the complaining party must clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be likely to the complaining party. *Geil v. Missoula Irr. Dist., 312 Mont. 320, 328, 59 P.3d 398, 404 (2002).* Mrs. Tharp's insurer Depositors Insurance Company lacks standing because it is at no risk of injury. It did not plead a wrong by Mr. Sandidge that has caused, or is likely to cause, specific, definite and direct harm that can be remedied by a declaratory judgment. In an unprecedented move, the tortfeasor and her insurer sued the innocent victim of a motor vehicle accident for an advisory declaration regarding the insurer's liability for the duty to advance pay medical expenses and lost wages. This has never been done before and for good reason. The insurer and the insured tortfeasor are not the victim of an unlawful wrong that has caused or is likely to cause specific, definite and direct harm. The desire to save one's self from one's own wrongful conduct is not sufficient to establish standing for declaratory relief.

The relief requested in Depositors Insurance Company's complaint amounts to nothing more than a request for an advisory ruling. This is because it stopped the advance payment of medical expenses and wage loss by May 2018. It didn't file suit until May 2019. The effect is to use *Ridley*, the UTPA and the Uniform Declaratory Judgment Act to exacerbate the harm inflicted upon Mr. Sandidge by this tragic accident, not to save Mrs. Tharp or Depositors Insurance Company from impending harm. The suit uses *Ridley* to inflict further harm on the innocent victim without the potential for plaintiffs' affirmative relief from likely harm.

Depositors Insurance Company never disputed that it owed the $89,983.95 in medical expenses and wages losses to Mr. Sandidge due to the negligence of its insured. Instead, it sued Mr. Sandidge to compel him to incur the costs of litigation so that it could get a judicial declaration that its past liability was not reasonably clear. This is directly at odds with the stated purpose of the *Ridley* duty to advance pay. It is also insufficient to establish standing.

Depositors Insurance Company's failure to plead probable harm that it may suffer is dispositive of standing. Whether Depositors Insurance Company violated *Ridley* and Section 33-18-201, MCA, when it refused to make advance payments in 2018, is a factual dispute that may need to be resolved by a jury in a UTPA action filed by Mr. Sandidge against it at some point in the future. The issues is

not proper for resolution by the district court under the Declaratory Judgment Act.

In *Watters* the Supreme Court explained the duty to advance pay exists because 'compelling an innocent third-party claimant . . . to proceed to trial to recoup that which is already owed is entirely inconsistent with the declared public policy of Montana to encourage settlement and avoid unnecessary litigation.' *Watters v. Guaranty Nat. Ins. Co., 2000 MT 150, ¶ 57, 300 Mont. 91, 3 P.3d 626.* In this case, Depositors Insurance Company filed this unnecessary litigation, exacerbating the financial burdens on Mr. Sandidge in order to get approval for its 2018 decision to stop advance payments. This is contrary to *Ridley*, it is contrary to Section 33-18-201, MCA, and the Uniform Declaratory Judgment Act.

"The purpose of the Declaratory Judgment Act, after all, is to 'settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." *Safeco Ins. Co. v. Montana Eighth Judicial District Court, 2000 MT 153, ¶ 31, 300 Mont. 123, 2 P.3d 834 citing Section 27-8-102, Montana Code Annotated.* "While the focus of the Act is on construing written instruments, see § 27-8-202, MCA, a court is not restricted in 'any proceeding where declaratory relief is sought in which a judgment or decree will terminate the controversy or remove an uncertainty.'" *Id citing Section 27-8-205, Montana Code Annotated.* "Thus, a court has the liberal discretion to 'declare rights, status, and

other legal relations whether or not further relief is or could be claimed.'" *Id citing Section 27-8-201, Montana Code Annotated.* While the Declaratory Judgment Act is broad in scope it does not extend to what amounts to nothing more than an advisory ruling.

In this case Depositors Insurance Company seeks a declaratory judgment to escape its own wrongdoing, the unsupported decision to cease advance payments in early 2018, which is insufficient for standing in 2019 for declaratory relief.

Standing is a threshold jurisdictional question. *Fleenor v. Darby School District, 2006 MT 31, ¶ 7, 331 Mont. 124, 128 P.3d 1048.* To establish standing to bring suit for a declaratory judgment, the plaintiff must establish a threatened injury. *Id.* It is "well established that persons who fail to allege any personal interest or injury * * * lack standing." *Id at ¶ 9.* The injury alleged must be personal to the plaintiff. *Id.* "The challenged action [here the advance payment of medical expenses] must result in a 'concrete adverseness' personal to the party staking a claim in the outcome." *Id citing Bryan v. District, 2002 MT 264, 312 Mont. 257, 60 P.3d 381.*

The declaratory judgment Depositors Insurance Company seeks is, in essence, a request for the district court to decide whether its decision years ago to stop the advance payment of medical expenses was reasonable. This decision rests

upon the interpretation and evidentiary weight given a course of medical treatment which is not proper under the Declaratory Judgment Act. The dispute would not conclude the controversy over the tort claim or whether a violation of the UTPA occurred. It would not stop the advance payment of medical expenses because that occurred long ago.

Whether Depositors Insurance Company's complaint states a cognizable claim for relief is a question of law. *Anderson v. Recon Trust Co., N.A., 2017 MT 313, ¶ 17, 390 Mont. 12, 407 P.3d 692.* "Though substantively cognizable, a claim for declaratory relief is nonetheless not justiciable if the plaintiff lacks standing to assert the claim." *Larson v. State, 2019 MT 28, 394 Mont. 167, 434 P.3d 241.* The test for whether a plaintiff has legal standing to assert a claim to relief is if (1) the claim is based on an alleged wrong that has caused, or is likely to cause, the plaintiff to personally suffer specific, definite and direct harm; and (2) the alleged harm is a type that the relief can effectively alleviate, remedy or prevent. *Id at ¶ 46.* A general or abstract interest in the legality of one's own conduct "is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered, or likely to be personally suffered, by the plaintiff." *Id.* Depositors Insurance Company's potential exposure for its past violation of the mandates of *Ridley* and the UTPA is

insufficient to demonstrate 'specific, definite and direct' harm.

The sum and substance of Depositors Insurance Company's complaint is that it sought a medical records review and its defense medical expert has opinions that Mr. Sandidge's course of treatment should have concluded sooner. Dr. Anderson states "I am unable to opine that there was precipitation or significant exacerbation, aggravation or acceleration of these preexisting musculoskeletal conditions or his preexisting lumbar condition. *Anderson Report, p. 4.* However, nowhere in the report does Dr. Anderson attack the opinions of Mr. Sandidge's treating physicians, explain how the injuries could have been treated in 6 weeks or the basis for that opinion.

This same situation arose in *Safeco Ins. Co. v. Montana Eighth Judicial Dist. Ct., 2000 MT 143, 300 Mont. 123, 2 P.3d 834,* and the Supreme Court affirmed the district court's decision, despite conflicting evidence, that liability was reasonably clear. In *SAfeco* the insurer's medical expert disputed causation. The district court found the insurer had a duty to make the advance payment of medical expenses because, contrary to the insurer's expert, the treating physician's opined the accident caused the injuries in question. The Supreme Court affirmed and reasoned that, although the insurer's expert opined causation was not reasonably clear, he did not dispute the treating physician's opinions, but simply

had different opinions.

> The court concluded that no material facts were in dispute concerning the causal relationship between the accident and Hill's medical claims, because Safeco's lone piece of evidence, the affidavit of Dr. Eddy, did not contradict material facts.

Safeco v. Eighth Judicial District at ¶ 20. Safeco's defense expert, Dr. Eddy, opined "he could not 'to a reasonable degree of medical certainty, make a causal connection between the [car accident] and Mr. Hill's continuing medical complaints." *Id at ¶ 8.* "The district court reasoned 'nowhere in his affidavit does Dr. Eddy contradict the affidavits of plaintiff or Dr. Peterson.'" *Id.* The Supreme Court affirmed the district court's decision to rely on the treating physicians and find liability was reasonably clear when the defense expert couldn't make a causal link. While this supports a finding in Mr. Sandidge's favor on the substantive issue, it amounts to nothing more than an advisory ruling when the challenge is brought by the insurer.

Safeco v. Eighth Judicial District involved a claim by the claimant against the insured whose duty it is to make advance payments. Similarly, the plaintiff in *Ridley, Watters* and every other declaratory judgment case concerning the duty to advance pay medical expenses was brought by the injured party who could demonstrate specific, definite and direct harm by an insurer's unlawful conduct. By comparison, an insurer who makes the decision to ceases advance payments

then months or years later seeks an advisory ruling regarding its own past conduct lacks standing and does not have a justiciable case or controversy. For both of these reasons the Court should order the matter dismissed with an award of costs and fees to Mr. Sandidge as discussed below.

3. Depositors Insurance Company's suit does not present a justiciable case or controversy

The burden to establish standing, and a justiciable case or controversy, always rests with the plaintiff who filed suit. *Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)*. Under Montana's Declaratory Judgment Act the plaintiff must allege a likelihood of harm that will be alleviated by declaratory relief.

The Supreme Court emphasized in *Mitchell v. Glacier County, 2017 MT 258, 389 MT 122, 406 P.3d 427*, "[u]nder the constitutional case-or-controversy requirement, the plaintiff must show, 'at an irreducible minimum,' that he or she 'has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action.'" *Mitchell at ¶ 10 citing Schoof v. Nesbit, 2014 MT 6, ¶ 15, 373 Mont. 226, 316 P.3d 831.* The requirement to demonstrate standing rests with the plaintiff and is a Constitutional requirement to maintain an action. *Schoof at ¶ 15.* This Constitutional requirement is 'absolute.' *Id.*

Declaratory relief is improper to resolve disputes as to liability or causation.

"[I]n *Safeco Ins. Co. v. Eighteenth Judicial District Court*, we held that disputed issues of fact should be left to a jury." *Id at ¶ 18 citing Safeco, 2000 MT 153, 300 Mont. 123, 2 P.3d 834.* "[W]e concluded that based on the purpose of the Declaratory Judgment Act and our *Ridley* cases, **a *Ridley* declaratory claim is an inappropriate method to adjudicate issues of material fact as to causation**." *Teeter v. Mid-Century Ins. Co., 2017 MT 292, ¶ 18, 389 Mont. 407, 406 P.3d 464.*

"The judicial power of Montana's courts, like the federal courts, is limited to 'justiciable controversies.'" *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd., 2010 MT 26, 355 Mont. 142, 226 P.3d 567 citing Greater Missoula Area Fedn. v. Child Start, Inc., 2009 MT 362, ¶ 22, 353 Mont. 201, 219 P.3d 881.* Article III, Section 4 of the Montana Constitution confers original jurisdiction on district courts in 'all civil matters and cases at law and in equity.' *Mont. Const. Art. VII, § 4(1)*. The 'cases at law and in equity' language of Article VII, Section 4(1) embodies the same limitations as are imposed on federal courts by the 'case or controversy' language of Article III. *Plan Helena at ¶ 6.* The Supreme Court has consistently held that courts of this state do not render advisory opinions. *Id at ¶ 9.* The 'case' or 'controversy' requirement does not include 'differences of opinion.' *Id.* If a court concludes the relief sought would be advisory in nature, it lacks jurisdiction, and 'may take no further action in the case other than to dismiss

it.' *Id at ¶ 11.* In this case the Court should dismiss.

The Supreme Court applies "the justiciable controversy test to actions for declaratory judgment to prevent courts from determining purely speculative or academic matters, entering anticipatory judgments, providing for contingencies that may arise later * * * or giving abstract or advisory opinions." *Northfield Ins. Co. v. Ass'n of Counties, 2000 MT 256, ¶ 12, 301 Mont. 472, 10 P.3d 813.* In *Northfield* the Supreme Court found the insurer's request for a declaratory ruling that it had no duty to idemnify MACO was not a 'case or controversy' to establish standing.

Here, Depositors Insurance Company argued, without authority, that it is Mr. Sandidge's burden to establish its lack of standing. It said "he cannot carry his burden" to disprove standing. *Depositors Response Brief, p. 2.* The burden to establish standing remains with the plaintiff in all cases at law and in equity.

Montana's Constitutional language embodies the same Article III requirements for justiciability as discussed by the federal courts. *Olson v. Dep't of Revenue, 223 Mont. 464, 726 P.2d 1162 (1986).* Thus, federal precedent on Article III standing are persuasive authority for interpreting the Article VII requirements for standing under Montana law. *Flathead at ¶ 22.*

Standing is founded "in concern about the proper – and properly limited –

role of the courts in a democratic society." *Warth v. Seldin, 422 U.S. 490, 501 (1974).* In order to establish standing a party must establish an invasion of a legally protected property interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).* There must also be a causal relationship between the alleged likely harm and the challenged conduct and a likelihood the injury will be alleviated by a favorable ruling. *Id.* The burden on establishing standing always rests with the plaintiff. *Id.*

"Under the constitutional case-or-controversy requirement, the plaintiff must show, 'at an irreducible minimum,' that he or she 'has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action.'" *Mitchell at ¶ 10 citing Schoof v. Nesbit, 2014 MT 6, ¶ 15, 373 Mont. 226, 316 P.3d 831.* This begs the question: what alleged injury will Depositors Insurance Company suffer if it is not afforded declaratory relief? The answer is simple: none.

Depositors Insurance Company argues the fact that it sued Mr. Sandidge to avoid further advance payments, rather than waiting for Mr. Sandidge to do so, "is of no consequence." *Depositors' Response to Motion to Dismiss, p. 4.* It could not be more wrong in the context of its duty to establish standing under the

Declaratory Judgment Act. The plaintiff who seeks declaratory relief, as noted above, must establish a likelihood of harm in order to establish standing. It is this 'irreducible minimum' and Constitutionally absolute required showing that is absent from the allegations of the complaint and which an insurer cannot meet.

As explained in *Mitchell* a party must alleged sufficient factual matter to establish standing to file the complaint in the first place. Under the Declaratory Judgment Act, *Mitchell* again explained that this must include a likelihood of injury that can be alleviated by declaratory relief. That is what is completely missing in this case.

Depositors Insurance Company, as an insurance company operates in the area of risk management and is often in the business of risk avoidance. If the Declaratory Judgment Act can be used as a shield to immunize the insurer from its past adjustment decisions then a frequent many adjustment decisions will be resolved through litigation with the defendant being the innocent tort victim. More significantly, if an insurer can use the *Ridley* duty to advance pay coupled with the Declaratory Judgment Act, to threaten to sue an innocent victor for a declaration regarding outstanding medical expenses then these statutes will defeat the very purpose for which they were created. The insurer will further burden an innocent victim with additional accident related expenses, while preventing further

medical care, with the goal of obtaining a preemptive judicial declaration regarding its past decision to cease advance payments. Such a tool would prove very persuasive in the realm of forcing a disputed settlements.

While the case should not have proceeded in the first place, Mr. Sandidge was entitled to summary judgment or disputed issue of material fact precluded a declaratory judgment.

4. The district court should have granted Mr. Sandidge's motion for summary judgment or at least found disputed issues of material fact preclude summary judgment for the insurer

The district court found Dr. Anderson's opinion "that Sandidge's injuries from the accident could be treated within six weeks" persuasive and controlling. It did not find this medical opinion, that competed with the course of treatment, created a genuine issue of material fact. Instead, the district court considered the opinions of Mr. Sandidge's treating Orthopedists as compared to Dr. Anderson's medical records review, and found liability for Mr. Sandidge's injuries was not reasonably clear. This means it found the treatment unnecessary and should have stopped at 6 weeks.

However, it is clear the district court did not view the competing opinions in the light most favorable to Mr. Sandidge. If it had it would have found Dr. Anderson did not dispute the opinions of Drs. Schartzenberger, Slocum,

Legrand or Harris. It should have recognized Dr. Anderson did not dispute the cause of Mr. Sandidge's injuries, he agreed the injuries were caused by the accident. He simply opined, without explanation, that the injuries could have been treated within six weeks. "Dr. Anderson opined that Sandidge's injuries from the accident could be treated within six weeks." *Order on Cross-Motions, p. 3.*

The district court should have found in favor or Mr. Sandidge's course of treatment by Drs. Schwartzenberger, Slocum, Legrand and Harriss rather than being persuaded by Dr. Anderson's opinion given without explanation. Dr. Anderson did not explain how the complex tear of the medical meniscus in Mr. Sandidge's knee, the olecranon bursitis in his elbow, the perforation of the cartilage in his wrist, the disc protrusion at C3-4, annual tear at L4-5 or disc protrusion at L5-S1 could be treated within six weeks.

Fatal to Dr. Anderson's opinion, he apparently was unaware of the treating providers opinions or just had a personal opinion that treatment could have been completed expeditiously. It is also fatal to his opinion that he understands this was 'a relatively low speed accident' when, in fact, the Vehicle Crash Report, notes Mr. Sandidge was traveling at the posted 35 m.p.h. speed limit and Mrs. Tharp's affidavit says he was traveling at a "high rate of speed.' This is critical evidence given he was on a motorcycle and fell onto the highway at 35

m.p.h. which is not a relatively low rate of speed by any standard. A hearing would have established these facts.

This is not a situation were Depositors Insurance Company was 'so clearly entitled as a matter of law' to summary judgment that the district court could dispense with Mr. Sandidge's requests for hearing. The requests were timely made in July and August 2020 and the district court did not issue its ruling until April 2021. Mr. Sandidge should have had his day in Court.

An insurer, with its unlimited resources and high litigation risk tolerance, should not be permitted to sue the victim of its insured's negligence for a decree that it was correct to stop the advance payment of medical expenses.
This turns the Motor Vehicle Responsibility Act, the Unfair Trade Practices Act and *Ridley* on their head. These are all intended to protect the innocent victim of a motor vehicle accident from its financial consequences. By contrast, the insurer and insured have no such risk. Yet, they have been able to strap Mr. Sandidge with tens of thousands of dollars in attorney fees merely to get a declaration saying the action the insurer took in 2018 was factually correct. But that decision must be judged based on what Depositors Insurance Company knew at the time not based on the opinions of a defense medical expert. The factual question is not whether Depositors Insurance Company can find a medical doctor to arrive at a

different opinion from the treating providers but whether the medical evidence leaves room for an objectively reasonable debate about the cause of the injuries.

In this case, all of the treating medical providers, and the defense expert, agree Mr. Sandidge suffered injuries to his abdomen, neck, shoulders, arms, elbows, wrist, knees, cervical and lumbar spine **and most importantly** Depositors Insurance Company paid to treat these injuries.

Following *Safeco Ins. Co. v. Montana Eighth Judicial Dist. Ct., 2000 MT 143, 300 Mont. 123, 2 P.3d 834* this Court should find when a defense medical expert has a difference of opinions, but does not challenge the treating medical providers opinions, liability for the injuries is reasonably clear. The absence of an objectively reasonable debate does not require that no hired gun will arrive at an opinion different from the treating providers but that the injuries themselves, based on the treating records, appear to be causally related to the accident. Besides, Mr. Sandidge's injuries before Depositions Insurance Company stopped making advance payments in 2018 are the same injuries which require treatment now. Depositors Insurance Company found, after reviewing Mr. Sandidge's medical records, it was reasonably clear his injuries were caused by the accident. The insurer now simply seeks to reverse course as the medical expenses and wage loss exceed $100,000. It has already advance paid $89,983.95.

The policy limits total $300,000.

Also fatal to the request for a declaratory judgment, Depositors Insurance Company has not identified in its pleadings, discovery or briefing precisely what medical expenses it seeks to avoid as the complaining party, it is assumed this applies to all treatments after 6 weeks as Dr. Anderson suggests[1].

Dr. Anderson summarized over 8 pages Mr. Sandidge's course of medical treatment without comment. He then expresses the following opinion:

> Initial soft tissue therapy for the first six weeks would be considered appropriate for this claim. All subsequent care would be related to the natural progression of his preexisting multiple musculoskeletal/degenerative conditions. No evidence, on review of contemporaneous medical records, of significant aggravation of the preexisting conditions. I am unable to opine that there was precipitation of or significant exacerbation, aggravation or acceleration of these preexisting musculoskeletal conditions or his preexisting lumbar condition.
>
> All subsequent care after six weeks would be related to the natural progression of his preexisting conditions not effected by this incident.

Dr. Anderson Report, p. 9. What Dr. Anderson fails to identify is what he means by "preexisting musculoskeletal conditions." Mr. Sandidge's medical records make clear he had no pre-existing conditions of the neck, shoulders, elbows, wrist or knees. He had asymptomatic degeneration, at 45 years of age, in the cervical,

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[1]This position is problematic for Depositors Insurance Company because it arrived at a different opinion and continued to pay to treat the injured body parts for months.

thoracic and lumber spine without prior medical treatment.

By contrast, Dr. Schwartzenberger treats Mr. Sandidge's shoulders, elbow, wrist and knee. Dr. Slocum treats Mr. Sandidge's neck and back. Dr. LeGrande treats Mr. Sandidge's knee. Dr. Harris treats Mr. Sandidge's tinnitus, and provides palliative care for his shoulder, neck and knee pain. All of these physicians ordered imaging in their evaluation.

The imaging of Mr. Sandidge's elbow three months after the accident revealed fluid within the olecranon bursa which is concerning for olecranon brusitis. Olecranon bursitis is caused by a hard blow to the elbow.

An MRI of the wrist revealed a "perforation in the radial aspect of the triangular fibrocartilage" "thinning of the cartilage oat the STT artuclation" and "septated lobulated volar radioal ganglion cyst."

Imaging of the cervical spine revealed a disc protrusion at C3-C4. Imaging of the lumber spine revealed an annular tear of the left foraminal/lateral disc at L4-5 and a disc protrusion at L5-S1.

An MRI of the knee found:

> complex tear of the medical meniscus. Flap tear of the posterior horn with a very small displaced meniscal flap anterior to the free edge of the posterior horn near the posterior root attachment. Very small displaced meniscal flap along the superior medial joint line. Horizontal tears of the entire posterior horn and body segments wit ha small parameniscal cyst posterior to the posterior horn periphery

along with knee joint effusion, i.e. fluid within the joint.

Mr. Sandidge has unpaid medical expenses of $6,853[2] as of August 2018 which he paid a small amount each month in an effort to save his credit until he no longer could do so. These are for the imaging and treatment of his cervical spine by Dr. LeGrand, his shoulder by Dr. Schwartzenberger and his lumbar spine by Dr. Slocum. These three doctors practice together at Bridger Orthopedics & Sports Medicine.

Dr. Anderson's personal opinion that these injuries should have resolved 6 weeks after the accident is contrary to the medical records, is without a proper foundation and is therefore incompetent. The later opinion is not based on medical science, it is simply his personal opinion without the benefit of examining Mr. Sandidge or even speaking to him. This latter opinion is not a matter of expert testimony but is merely Dr. Anderson's opinion based on nothing more than speculation and conjecture.

After considering the evidence, "a reasonable person, with knowledge of the relevant facts and law, would conclude, for good reason, that" Ms. Tharp is liable to Mr. Sandidge for the injuries for the duration the treating physicians saw

[2]The total for all providers is something more than $15,000, including a arthroscopic debridement of the knee joint. This is significant because Mr. Sandidge never had any issues, evaluation or treatment of the knee before the accident. After the accident imaging of his knee showed significant traumatic tears and abrasions requiring surgery 24 weeks after the accident.

necessary to evaluate and treatment them. Depositors Insurance Company has not come forward with any opinions to contradict the treating physicians' opinions that Mr. Sandidge's "bilateral shoulders, right elbow, wrist and wright knee" "low back pain" "medial meniscus tear of his right knee" headaches and tinnitus are due to anything other than the accident. There is no factual foundation to conclude the injuries would heal without treatment or that the evaluation and treatments could be concluded in 6 weeks.

Furthermore, it would be unreasonable to conclude, with knowledge of the accident, the injuries and the course of treatment that Mrs. Tharp was only liable to Mr. Sandidge for the first 6 weeks of treatment. The Court should reject Dr. Anderson's opinion, due to a lack of proper foundation, and find Ms. Tharp's liability for Mr. Sandidge's injuries is reasonably clear. Alternatively, the Court should find, when weighing the opinions of Dr. Anderson as compared to Drs. Schwartzenberger, Slocum, LeGrand and Harris that a material fact exists and deny declaratory relief.

Mr. Sandidge respectfully requests the Court find liability for the injuries is reasonably clear or find that the conflict medical opinions create a genuine issue of material fact that must should be resolved in Mr. Sandidge's favor on summary judgment or resolved by the trier of fact. In either case Mr. Sandidge requests

costs and fees as the innocent victim.

5. The district court should have awarded Mr. Sandidge his attorney fees and costs

The district court should have saved Mr. Sandidge from the costs and attorney fees he incurred so he could be made whole pursuant to the insurance exception, Section 37-61-421, MCA, or the supplemental relief provision of the Declaratory Judgment Act. Mr. Sandidge was the victim of Mrs. Tharp's poor driving which caused him to incur $89,983 in medical expenses and lost wages. Ms. Tharp then sued him together with her insurer to get approval for its earlier decision to stop advance payments. The insurer is free to pay or not subject to a violation of the duty expressed in *Ridley* and required by Section 33-18-201, MCA. This case was brought to insulate the insurer, with an advisory ruling, from potential liability from its own choices made in 2018. Mrs. Tharp's participation and motion for Rule 54, M.R.Civ.P., certification was found by the district court to be confounding. Mr. Sandidge should not be left tens of thousands of dollars worse off simply to satisfy Depositors Insurance Company's desire for a shield against its potential future liability. Mrs. Tharp was not a proper party.

The district court had express authority under the Declaratory Judgment Act and Section 37-61-421, Montana Code Annotated, to provide Mr. Sandidge relief. The Court also had implied authority pursuant to the insurance exception which

should be extended to third-party innocent victims sued for declaratory relief in order to make the victim whole.

In *Trustees of Indiana University v. Buxbaum, 2003 MT 97, 315 Mont. 210, 69 P.3d 663*, the Supreme Court "held that '§ 27-8-313, MCA, authorizes a court to award attorney fees when the court, in its discretion, deems such an award 'necessary and proper.'" *Mountain West Farm Mut. Ins. Co. v. Brewer, 2003 MT 98, ¶ 17, 315 Mont. 231, 69 P.3d 652 citing Trustees at ¶ 42.* Supplemental relief under the UTDA is necessary and proper to save Mr. Sandidge form the economic consequences of having to defend against these claims.

As to Mrs. Tharp's attempts to insert herself into the *Ridley* issue, which includes her request for Rule 54 certification, those efforts served no legitimate purpose and the Court has additional authority to shift the burden under Section 37-61-421, MCA:

> **Attorney's Or Litigant's Liability for Excess Costs**
> **37-61-421. Attorney's or litigant's liability for excess costs.** An attorney or party to any court proceedings who, in the determination of the court, multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct.

"It is within a district court's discretion to award fees under § 37-61-421, MCA." *In re Estate of Bayers, 2001 MT 49, ¶ 9, 304 Mont. 296, 21 P.3d 3 citing*

Rocky Mountain Ent. v. Pierce Flooring, 286 Mont. 282, 951 P.2d 132 (1997). "Section 37-61-421, MCA, was modeled after 28 U.S.C. § 1927, with only minor changes made to clarify its applicability to *pro se* litigants as well as attorneys, and to establish that attorney fees may be awarded as damages." *In re Estate of Bayer, ¶ 12.* "It was adopted in 1985 to provide redress against persons who abuse the judicial process for their convenience, tactical reasons, personal gain, or the satisfaction of vengeful motives. *Id.* In this inquiry "it is the unreasonable multiplication of court proceedings that is germane." *Id at ¶ 13.* Mrs. Tharp's request for declaratory relief then for an interlocutory appeal unnecessary multiplied these proceedings and her arguments, discussed later, were unsound.

In this case where Depositors Insurance Company pursued a court order to approve its 2018 decision to stop advance payments, there was nothing to be gained by Mrs. Tharp's claims or her appeal.

"[I]nsurance contracts 'have the effect of placing absolute and exclusive control over the litigation in the insurance carrier'." *Tigart v. Thompson, 244 Mont. 156, 159, 796 P.2d 582, 584 (1990) quoting Jessen v. O'Daniel, 210 F.Supp. 317, 331 (D. Mont. 1962).* In *Tigart* the Supreme Court upheld an award of attorney fees against Thompson's insurer under Section 37-61-421, MCA, although the insurer, Safeco, wasn't even a party. It did so because the insurer

controlled the litigation and therefore was responsible for unnecessarily multiplying the proceedings for strategic reasons. "This Court followed that reasoning in Safeco Insurance Co. v. Ellinghouse (1986), 223 Mont. 239, 725 P.2d 217, holding that the insurance carrier has 'the correlative duty to exercise diligence, intelligence, good faith, honest and conscientious fidelity to the common interests of the parties." *Tigart, 244 Mont at. 159, 796 P.2d at 584.* Depositors Insurance Company breached that duty when it paid to champion Mrs. Tharp's claims and subsequent bid for a premature appeal.

In response to Mr. Sandidge's request for attorney fees in his motion to dismiss, in opposition to Mrs. Tharp's request for Rule 54 certification and in the cross-motions for summary judgment, the district court failed to rule. When the district court dismissed Mrs. Tharp as an improper party it said the motion for costs and fees was 'premature. *Order on Motion to Dismiss, p. 7* Then when the district court dismissed Ms. Tharp's request for Rule 54 certification finding it was confounding the court was silent as to costs and fees. Finally, when the district court granted Depositors Insurance Company declaratory relief it again failed to address Mr. Sandidge's request for costs and attorney fees. The innocent victim of a motor vehicle accident, who incurred $89,000 in associated losses, should not be burdened by a declaratory judgment action which seeks an advisory ruling.

CONCLUSION

The cause of the accident was Mrs. Tharp's poor decision to pull in front of Mr. Sanadidge along U.S. Highway 287. Depositors Insurance Company correctly determined liability for the accident and Mr. Sandidge's injuries were not reasonably in dispute when it paid $89,983.95 in reasonable, necessary and causally related medical expenses and wages losses. Nothing changed between 2017 when the accident happened and 2018 when the insurer stopped paying. The district court abused its discretion when it inadvertently failed to hold a hearing on Mr. Sandidge's repeated requests on the cross-motions for summary judgment. This Court should dismiss this matter because Depositors Insurance Company cannot demonstrate specific, definite and direct harm absent declaratory relief and the case does not present a case or controversy.

Alternatively, the Court should grant summary judgment for Mr. Sandidge or remand the matter for a hearing with costs and attorney fees to be borne by the at-fault tortfeasor and her insurer.

DATED this 9th day of August 2021

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Rules 27(a) through (c) of the Montana Rules of Appellate Procedure (2010). In accordance with Rule 27 (b) the required portions of the brief are double-spaced and printed in Times New Roman proportionately spaced 14 point typeface with a total word count of 9,556 (less than 10,000 words).

DATED this 10th day of August 2021

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