IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 21-0321

DON DANIELS, as conservator of the Estate of SARAH DANIELS,
Plaintiff/Appellee

v.

GALLATIN COUNTY, RICK BLACKWOOD, AND JOHN DOES I-V
Defendants
ATLANTIC SPECIALITY INSURANCE COMPANY
Defendant/Appellant

On Appeal from the Montana Eighteenth Judicial District
Gallatin County Cause No. DV-18-17B
Honorable Judge Rienne H. McElyea

Atlantic Specialty Insurance Company's Opening Brief

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Statement of Issues

1. Whether the district court erred in holding that ASIC waived the liability cap in § 2-9-108, MCA merely by providing general liability limits greater than the cap, when the policy specifically limits coverage to amounts the county is legally obligated to pay and does not include an endorsement specifically waiving the liability cap.

2. Whether the district court erred in failing to conform the judgment against the county to $750,000, the maximum amount the county is legally obligated to pay under § 2-9-108(1), MCA.

Statement of the Case

This appeal centers on the district court's interpretation of both § 2-9-108, MCA and a liability insurance policy issued to co-appellant Gallatin County by appellant Atlantic Specialty Insurance Company ("ASIC"). The district court erroneously concluded (1) that judgment could be entered against the county in a tort action for $11,660,016.11, despite § 2-9-108's $750,000 liability cap, and (2) that ASIC waived the cap by providing coverage in excess of it. Orders, Ex. 2.

Following a car accident that seriously injured Sarah Daniels, ASIC paid appellee Don Daniels $750,000, the full limit of the county's liability under §2-9-108. Daniels, as conservator of his daughter, Sarah Daniels, later sued Gallatin County and one of its former employees, Rick Blackwood (collectively, the "county"), for damages resulting from the accident in which Ms. Daniels was injured. ASICApp. 001-005. In the same complaint, Daniels sought a declaratory judgment that ASIC owed the full limits of the policy issued to the county even

though § 2-9-108 limited the county's liability to $750,000 for the accident.

ASIC moved to dismiss Daniels' claims against it pending resolution of the liability case against the county or otherwise to bifurcate the coverage claim from the liability claim. Docs. 3-4. The district court denied ASIC's motion, reasoning that the claim against ASIC presented a pure question of law that would not become entangled with the liability claim. Orders, Ex. 1. All parties filed motions for summary judgment. The county sought summary judgment that it already had discharged the full extent of its obligation to Daniels by ASIC's payment of $750,000 to Daniels on the county's behalf. The district court denied that motion. Orders, Ex. 3. ASIC and Daniels filed competing motions for partial summary judgment about the proper interpretation of § 2-9-108(3) and the insurance policy. The district court granted Daniels' motion, concluding that ASIC waived the liability cap by providing coverage exceeding the cap and by not specifically referencing the cap in the policy. Orders, Ex. 2.

Daniels and the county tried the damages claim before the court in a non-jury trial. The district court found as a matter of fact that Blackwood caused $12,410,016.11 in damages to Sarah Daniels. The court entered judgment against the county for $11,660,016.11 ($12,410,016.11 in damages less the $750,000 ASIC already paid). Orders, Exs. 5, 7. Daniels then moved to tax the entire judgment against ASIC rather than the county by way of the Declaratory Judgment

Act's supplemental relief provision. Docs. 117-118. The district court denied that motion. Orders, Ex. 6. The county and ASIC then moved under Mont. R. Civ. P. 59(e) to conform the $11,660,016.11 judgment to the § 2-9-108(1) statutory cap. Docs. 137-138, 142. The district court failed to rule on that motion, and it was deemed denied under Rule 59(f).

Statement of Facts

This case arises from a car accident on January 12, 2017. Blackwood was clearing snow with a county-owned plow. Blackwood failed to stop at an intersection and hit Sarah Daniels' car, resulting in severe injuries to Daniels. Soon after receiving Daniels' claim from the accident, ASIC paid Daniels $750,000, the county's per-claim liability limit under § 2-9-108(1). The parents of a child who was a passenger in Sarah Daniels' car also made a claim against Gallatin County, and ASIC settled that claim within the per occurrence limit of the policy. Don Daniels, Sarah's father and conservator, then filed suit against Blackwood and the county for negligence. Daniels also sued ASIC, seeking a declaration of the amount of coverage available under the policy. Daniels claimed that ASIC waived the liability cap under § 2-9-108 solely by providing coverage limits greater than the cap. ASICApp. 002-003. Daniels raised an alternative constitutional claim, alleging that § 2-9-108 is unconstitutional and inapplicable to Daniels' claims. ASICApp. 003.

Gallatin County acknowledged that Blackwood was negligent, that he was acting within the scope of his employment, and that the county was liable for Daniels' injury up to the $750,000 cap. ASICApp. 013.

ASIC issued the county a policy including property, liability, auto, professional liability, and excess liability coverages effective July 1, 2016, through June 30, 2017. ASICApp. 016-371. Relevant here, the policy contains a "Business Auto" coverage limit of $1.5 million per occurrence, the same per-occurrence limit stated in § 2-9-108(1). ASICApp. 243. The policy additionally includes $5 million in "Excess Liability" coverage, which only applies when a particular claim exhausts the underlying coverage to which the excess coverage applies. ASICApp. 337.

ASIC issued the policy in response to an application the county submitted through its insurance broker, First West Insurance ("First West"). The county specifically requested liability coverage limits of $1.5 million per occurrence, the per-occurrence limit specified in § 2-9-108(1). ASICApp. 337-338, 423. The county chose the liability coverage and coverage limits with the understanding that § 2-9-108(1) would cap its liability for the claims described in § 2-9-101(1), MCA but that the county would need additional insurance to protect it from claims not subject to the cap. ASICApp. 377-383, 404-406, 422-424, 427-434, 447-448. For example, the policy protects the county from liability for claims not subject to the

cap, such as federal civil rights actions, liability resulting from car accidents outside Montana, and federal liability imposed while on federal property, including that part of Gallatin County that crosses into Yellowstone National Park. ASICApp. 381, 424-428, 448, 461; *Delaney & Co. v. City of Bozeman*, 2009 MT 441, ¶ 20, 354 Mont. 181, 222 P.3d 618; *see also Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015) (plaintiffs sued a municipality under 42 U.S.C. § 1983 alleging federal civil rights claims arising from catastrophic accident with a police vehicle).

Like all liability policies, this policy explicitly limits coverage to those amounts the county is legally obligated to pay. The business auto coverage states that ASIC "will pay all sums an 'insured' legally must pay as damages[.]" ASICApp. 252. The excess liability coverage contains a functionally identical limitation, and further states that excess coverage is only triggered if the underlying coverage is exhausted. ASICApp. 338. The policy contains no mention of § 2-9-108(1) or any other statutory cap. The policy also contains no language declaring any intent to waive the application of § 2-9-108(1) or any other statutory cap.

As reflected in the county's policy, ASIC also factored § 2-9-108(1) into its underwriting. ASIC knew when it issued the policy that the county's request for a $1.5 million liability limit was based on the statutory cap and accounted for the

statute to establish the premium.[1] Several county employees testified that they were well-aware of the § 2-9-108(1) statutory cap, factored it into their insurance needs, and expected it to apply to all claims within its ambit, regardless of any insurance the county purchased. ASICApp. 404-408, 422-432, 447-448. Tyler Delaney, the First West employee brokering the county's insurance purchase, also testified that he was aware of § 2-9-108(1) and that he shopped for insurance on the county's behalf with the expectation that the cap would protect the county from excess tort liability. ASICApp. 377-381. In short, all parties involved in the policy's creation—ASIC, the county, and First West—were aware of § 2-9-108(1), expected that § 2-9-108(1) would apply to claims against the county, and had no intent to waive it.

Standard of Review

This Court reviews summary judgment *de novo*. *Cramer v. Farmers Ins. Exch.*, 2018 MT 198, ¶ 8, 392 Mont. 329, 332, 423 P.3d 1067, 1070. "A de novo review affords no deference to the district court's decision and we independently

[1] ASIC's underwriting process uses actuarial software, known by the acronym "OGRE," to establish premiums for ASIC policies. OGRE accounts for any statutory caps applicable to the jurisdiction where the policy is issued. ASICApp. 389-390, 393, 395, 454-457, 467-468. Here, OGRE accounted for § 2-9-108(1) when it established the premiums for the county's policy, ensuring that the county's premiums were not inflated based on insurance the county would not need based on the cap. *Id*.

review the record, using the same criteria used by the district court to determine whether summary judgment is appropriate." *Siebkin v. Voderberg*, 2012 MT 291, ¶ 20, 367 Mont. 344, 291 P.3d 572.

Summary judgment is appropriate where the movant establishes the absence of genuine issues of material fact and entitlement to judgment as a matter of law. Mont. R. Civ. P. 56. All reasonable inferences must be drawn in the non-movant's favor. *Newbury v. State Farm Fire & Cas. Ins. Co. of Bloomington, Ill.*, 2008 MT 156, ¶ 14, 343 Mont. 279, 283, 184 P.3d 1021, 1024. Insurance contract interpretations present legal questions subject to *de novo* review. *Cramer*, 2018 MT 198, ¶ 8.

The standard of review on the county and ASIC's Rule 59(e) motion to amend the judgment is abuse of discretion. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 27, 304 Mont. 356, 22 P.3d 631. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law[.]" *Wohl v. City of Missoula*, 2013 MT 46, ¶28, 369 Mont. 108, 300 P.3d 1119.

Summary of Argument

The district court erred in holding that ASIC waived the liability cap under § 2-9-108 simply by providing the county with coverage in excess of the cap. The statute does not provide that the insurer waives the cap merely by having limits greater than the cap. Quite the opposite. The statute requires that an insurer must

"specifically agree[] by written endorsement to provide coverage…in an amount in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of **the limitation specifically waived**." § 2-9-108(3), MCA (emphasis added). ASIC never waived "specifically" or generally any limitation of the statute.

First, ASIC explicitly limited the amount of coverage to sums the county "legally must pay as damages" for bodily injury or property damage caused by an accident. It is undisputed that the amount the county "legally must pay as damages" is capped at $750,000 per § 2-9-108(1). An insurer cannot "specifically waive" the liability cap when its policy explicitly ties the scope of coverage to the total amount the county is legally obligated to pay. That explicit limitation in the policy resolves this case entirely, capping ASIC's liability at $750,000.

Second, even if the policy did not contain that limitation, providing coverage in excess of the cap does not "specifically waive" the liability limitation under § 2-9-108. The policy must include a "specific[] agree[ment] by written endorsement" to "specifically waive[]" the cap. Counties purchase coverage exceeding the cap so that they are insured for exposure for liability not limited by the cap, such as a federal civil rights claim or a claim arising in another state. ASIC's policy contains no written endorsement waiving the liability cap under § 2-9-108. In short, the statute requires an insurer to opt **out** of the liability cap. The district court

erred in holding that an insurer must instead opt **in** by including a specific reference to the liability cap.

Finally, the district court erred by entering a judgment against the county for $11,660,016.11—the total amount of damages it found at trial, minus the $750,000 ASIC paid Daniels on the county's behalf. The district court failed to conform the judgment against the county to $750,000, which is the total amount for which the county can be liable under § 2-9-108(1). The district court thus abused its discretion by failing to conform the judgment to the county's liability limit.

Because the district court repeatedly erred in interpreting the county's and ASIC's liability under the statute and the policy, this Court should reverse.

Argument

I. ASIC did not waive the statutory cap, and its policy insures only the county's liability.

The district court erroneously concluded that ASIC waived § 2-9-108's liability cap by providing coverage exceeding the cap and by not specifically referencing the cap in the policy. At issue are § 2-9-108(1) and (3), which provide in full:

> (1) The state, a county, municipality, taxing district, or any other political subdivision of the state is not liable in tort action for damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $750,000 for each claim and $1.5 million for each occurrence.
>
> [***]
>
> (3) An insurer is not liable for excess damages unless the insurer

> specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitation specifically waived.

It is undisputed that § 2-9-108(1) caps the county's liability for Ms. Daniels' injuries at $750,000. Daniels insists that he expects ASIC—not the county—to compensate Ms. Daniels' injuries. He also has conceded that the county cannot be required to pay more than the $750,000 ASIC paid on the county's behalf. ASICApp. 483-486.

ASIC's insurance contract with Gallatin County explicitly limits coverage to the amount the county is legally obligated to pay, which all parties agree is $750,000. The policy contains no endorsement specifically waiving the cap, and simply providing coverage that is available in situations where the cap is inapplicable does not constitute a waiver. The district court erred by disregarding the plain language of the statute and the policy, and by holding that an insurer is protected by the cap only if its policy specifically references it.

A. The district court erred when it interpreted ASIC's policy to provide coverage that exceeded the county's liability.

1. ASIC's coverage is coextensive with the county's liability.

The simplest resolution of this case begins and ends with the general insuring clause in the policy, which ties coverage to the amounts that the county "legally must pay as damages." It is undisputed that $750,000 is what the county is

legally obligated to pay under § 2-9-108(1), and accordingly that is the extent of ASIC's liability. The district court erred in disregarding this threshold, dispositive question.

A court's review of an insurance policy begins at the policy's insuring clause. "When determining whether a policy provides coverage, a court first looks to the initial grant of coverage." *Wadzinski v. Auto-Owners Ins. Co.*, 2012 WI 75, ¶ 14, 342 Wis.2d 311, 818 N.W.2d 819. "The original point of embarkation upon the determination of insurance coverage questions must always be the insuring clause of the policy." *Nooter Corp. v. Allianz Underwriters Ins. Co.*, 536 S.W.3d 251, 299 (Mo. App. E.D. 2017); *Am. Star Ins. Co. v. Ins. Co. of the W.*, 232 Cal. App. 3d 1320, 1325 (Cal. App. 1991) ("If the claim does not fall within the insuring clause, there is no need to analyze further.").

The policy issued to the county contains general grants of coverage that define all liability coverage under the policy. The business auto coverage part provides liability coverage for damages the county is legally obligated to pay to an injured claimant:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."

ASICApp. 252. The excess liability coverage part likewise provides coverage up to the amount the county is legally obligated to pay to an injured claimant, but that

coverage part only applies upon exhaustion of the underlying coverage:

> We will pay those sums that the insured becomes legally obligated to pay as "damages" in excess of all "underlying insurance", but only after all "underlying insurance" has been exhausted by the actual payment of the Limits of Liability of the "underlying insurance".

ASICApp. 338.

By the policy's plain terms, a claimant's recovery is limited to that which the county "legally must pay as damages." If the county "legally must pay as damages" an amount meeting or exceeding the policy limit, then ASIC is obligated to pay the full limit. But the core question, regardless of the amount awarded as damages, is what amount the county "**legally must pay**" as damages.

Based on the plain language of §§ 2-9-101(1) and 108(1), the county "legally must pay as damages" an amount not to exceed $750,000. Since $750,000 is the most the county "legally must pay as damages" toward Daniels' claim, $750,000 is the limit of ASIC's responsibility to indemnify the county under the policy. Further, because ASIC already has paid $750,000, it has no greater obligation to indemnify its insured. The excess coverage part therefore is never implicated because the underlying business auto coverage was not exhausted by the $750,000 payment, but the result would be the same even if the excess coverage were implicated since it too is confined to what the county is "legally obligated to pay."

The district court erred in its interpretation of the policy's insuring

agreement, side-stepping the issue by determining that "**a jury** is not precluded from awarding damages against the County in excess of $750,000" and therefore that it is possible that the county "legally must pay" an amount exceeding $750,000. Orders, Ex. 2 at 7 (emphasis added). This reasoning is fundamentally wrong because it ignores the language of the cap, the language of the policy, and the basic difference between a jury verdict and a judgment amount. What a jury might award as a matter of fact is a separate question from what amount the county "legally must pay as damages" as a matter of law. A jury award does not constitute a legal requirement to pay a certain amount in damages absent a commensurate entry of judgment. Mont. R. Civ. P. 58. That is especially true here, where § 2-9-108(1) limits the amount Daniels can recover from the county to $750,000, regardless of the amount of damages awarded by the district court here as factfinder

Section 2-9-108(1) prohibits entry of judgment against the county for more than $750,000, and that limit cannot be waived. ASIC's contractual duty to indemnify the county is coextensive with—and is dictated by—the amount the county "legally must pay as damages," up to the policy's stated limit. Without a preexisting liability that triggers the county's legal requirement to pay damages, **there is no insurance coverage available to Daniels at all** because the county's legal requirement to pay damages is antecedent to ASIC's indemnity obligation.

The district court ruled that "[t]he Policy's stated limits of $1.5 million in auto coverage and $5 million in excess coverage are available to indemnify the County for Daniels' claim." Orders, Ex. 2 at 11. But simply because the policy's stated limits may be "available" to indemnify the county begs the question of what legal liability is indemnified by the policy. ASIC's duty to indemnify the county is governed by the language of the contract, which obligates ASIC to indemnify the county for sums the county "legally must pay as damages," **up to** the policy's stated limits if necessary. Here, the statutory cap limits the county's liability to $750,000. ASIC long ago paid that amount to Daniels, thereby discharging the full extent of its obligation under the policy.

This Court should confirm that ASIC's policy—providing that ASIC will indemnify the county in an amount equal to what the county "legally must pay as damages"—cannot be read to require ASIC to "indemnify" the county for a legal obligation it never incurred and never can incur. *See Heggem v. Capitol Indem. Corp.*, 2007 MT 74, ¶ 22, 336 Mont. 429, 154 P.3d 1189 (a court may not "rewrite an insurance policy by ignoring clear and unambiguous language to accomplish a 'good purpose.'").

2. Substantial case law supports the conclusion that ASIC's coverage obligation is restricted to the county's liability.

The district court ordered as follows in its summary judgment ruling:

ASIC may not claim the benefit of the statutory cap of $750,000 set

> forth in § 2-9-108, MCA. The Policy's stated limits of $1.5 million in auto coverage and $5 million in excess coverage are available to indemnify the County for Daniels' claim.

Orders, Ex. 2 at 11. ASIC has never disputed that the full policy limits are "available to indemnify" the county for damages the county is legally required to pay. But ASIC cannot be required to "indemnify" the county for an obligation the county never incurred. This fundamental principle of indemnify is definitional. *Indemnify*, *Black's Law Dictionary* (11th ed. 2019).

The county incurred a liability when its employee caused the accident; ASIC's involvement in this case arises from its contractual duty to indemnify the county for that liability. ASIC did not contract with the county to pay to an injured claimant more than the county itself is legally required to pay in damages. Rather, ASIC contracted with the county to indemnify the county for **the county's** legal liability— i.e., the $750,000 the county "legally must pay as damages."

Courts routinely affirm the basic principle that liability coverage is driven not by the policy's limits or by the damages suffered by an injured claimant but by the **insured's obligation** to the claimant. As the U.S. District Court for the Southern District of Texas succinctly explained, "[t]he 'legally obligated to pay' language unambiguously refers to obligations that are assessed **against a named insured** due to that insured's activities or omissions." *Acceptance Indem. Ins. Co. v. Maltez*, 619 F.Supp.2d 289, 302-303 (S.D. Tex. 2008) (emphasis added)

(*affirmed* 2009 WL 27448201 (5th Cir. June 30, 2009)); *see also Petrarca v. Fidelity and Cas. Ins. Co.*, 884 A.2d 406, 410 (R.I. 2005) ("[A]n insurer is liable for sums that its insured is legally obligated to pay; however, it cannot be held liable if its insured is under no obligation to pay."); *Moeller v. American Guar. & Liab. Ins. Co.*, 707 So. 2d 1062, 1068 (Miss. 1996) ("When an insured under a liability insurance policy is sued, the insurance company is contractually obligated to pay up to the limits of the policy all sums the insured becomes legally obligated to pay."); *Intelligent Digital Sys., LLC v. Beazley Ins. Co.*, 207 F.Supp.3d 242, 246 (E.D. N.Y. 2016) ("[A]n insurer's obligation to indemnify extends only to those damages the insured is legally obligated to pay[.]"); *Davenport v. Travelers Indem. Co.*, 283 N.C. 234, 238, 195 S.E.2d 529, 532 (N.C. 1973).[2] The policy's general insuring provisions represent the mutual intention of the parties—ASIC and Gallatin County—to the insurance contract. §§ 28-3-301 and -303, MCA. They constitute parts of the whole contract to which the court must give effect. § 28-3-202, MCA. And the mutual intention of the parties is undisputed, both from the written terms of the policy and from the testimony of the county's employees and broker. *See* Statement of Facts at 5-6, *supra*. There can be no dispute, as

[2] *See also Am. Family Mut. Ins. Co. v. Savickas*, 193 Ill.2d 378, 392, 739 N.E.2d 445, 453 (Ill. 2000); *Devitt v. Continental Casualty Co.*, 269 N.Y. 474, 479, 199 N.E. 765, 766 (N.Y. 1936); *Howard v. Allen*, 254 S.C. 455, 460, 176 S.E.2d 127, 129 (S.C. 1970); *Massachusetts Property Ins. Underwriting Assoc. v. Norrington*, 395 Mass. 751, 755, 481 N.E.2d 1364, 1367 (Mass. 1985).

expressed by the plain policy language and all witness testimony, that Gallatin County intended to procure—and ASIC intended to provide—liability coverage to indemnify Gallatin County for legal liabilities assessed against the county.

This Court addressed a similar issue in *Winter v. State Farm Mut. Auto. Ins. Co.*, 2014 MT 168, ¶ 16, 375 Mont. 351, 328 P.3d 665, where it analyzed the meaning of the term "incurred" in an insurance policy. The Court explained in pertinent part:

> Thus, a common sense understanding dictates that a person incurs medical expenses at the time of service because he is responsible for the charges from that moment forward. If a third party, such as an insurer, ultimately pays some or all of those charges, **the insurer is merely relieving the person of liability he has already assumed. At no point does the insurer become liable to the provider directly**.

Id. (emphasis added). So it is here. "At no point" does ASIC become liable to Daniels directly. Rather, ASIC "is merely relieving [the county] of the liability [it] has already assumed." *Id*.

This Court therefore should confirm that ASIC cannot be required to pay Daniels any amount exceeding the county's underlying liability. Daniels concedes that the county never can be required to pay him more than $750,000, pursuant to § 2-9-108(1). ASIC's duty to indemnify the county therefore is limited to that amount.

B. The district court erred when it concluded that ASIC waived application of § 2-9-108(1).

The district court erred in holding that ASIC waived application of § 2-9-108(1) because the policy does not contain the specific waiver by written endorsement required by § 2-9-108(3). Section 2-9-108(3) guarantees that an insurer is insulated from damages exceeding the § 2-9-108(1) liability limit **unless** the insurer "specifically agrees by written endorsement" to waive that protection. By its plain terms, this is an opt-**out** provision and not an opt-**in** provision, such that insurers automatically benefit from the statutory cap unless the policy contains a "specific[] agree[ment] by written endorsement" to waive it. It is impossible for ASIC to have issued the "specific[] agree[ment] by written endorsement" required to waive the cap when its policy does not mention § 2-9-108(1) or any statutory cap, much less declare an intent to waive application of any such provision.

The district court asserted two erroneous bases for its finding that ASIC waived § 2-9-108(1). First, the district court ruled that ASIC waived the cap because it did not include language in its policy specifically declaring its intent to rely on the cap. Orders, Ex. 2 at 6. Second, the district court found that ASIC waived the cap by writing policy limits greater than $750,000. *Id*. at 10-11. The district court's holdings ignore the plain language of § 2-9-108(3), which unambiguously requires that an insurance contract "specifically waive[]" the cap.

1. A policy silent on the § 2-9-108(1) statutory cap cannot "specifically agree[] by written endorsement" to waive it.

The policy issued to the county contains no specific agreement by written

endorsement to opt out of the statutory cap. Indeed, it is undisputed that the policy contains no mention of any statutory cap at all, much less any specific waiver of § 2-9-108(1). This undisputed fact is fatal to the district court's conclusion that ASIC waived the statutory cap since § 2-9-108(1) automatically applies unless "specifically" disclaimed by the insurer. The absence of any language in the policy referencing the cap means that ASIC may "claim the benefits" of the cap, not that it has waived them. § 2-9-108(3), MCA.

Section 2-9-108(1) limits a political subdivision's tort liability to $750,000 per claim and $1.5 million per occurrence. Section 2-9-101(1) establishes that the accident at issue here constitutes a single "claim" for purposes of § 2-9-108(1). *Delaney*, ¶ 20. Thus, "[§] 2-9-108 limits the damages that can be awarded against a government entity to $750,000.00 per claim." *Russo-Wood v. Yellowstone County*, 2019 WL 1102680, *13 (D. Mont. March 7, 2019).

Section 2-9-108(3), absolves insurers of responsibility to pay any damages in excess of the $750,000 cap absent a specific written endorsement waiving the cap. This provision is self-executing and does not require the insurer to take any affirmative action; rather, the insurer automatically "is not liable for excess damages **unless** the insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section[.]" § 2-9-108(3), MCA (emphasis added).

The Montana Legislature's intent is plain from the language of the statute. The legislature clearly understood that governmental entities would need, and insurers would write, liability policies with limits above the statutory cap because the cap only applies to a certain subset of claims. The legislature enacted § 2-9-108(3), assuming that governmental entities would obtain insurance limits above the cap to insure against claims not within the § 2-9-101(1) definition of a "claim."

The legislature's use of the word "waived," is commonly understood to mean the "intentional relinquishment of a known right." *Tvedt v. Farmers Ins. Group of Companies*, 2004 MT 125, ¶ 33, 321 Mont. 263, 91 P.3d 1. "A party cannot waive a right that it does not yet have." *Bechtelheimer v. Continental Airlines, Inc.*, 755 F.Supp.2d 1211, 1214 (M.D. Fla. 2010); *Kadambi v. Express Scripts, Inc.*, 2014 WL 2589673, *4 (N.D. Ind. June 10, 2014). The very fact that § 2-9-108(3) dictates how an insurer can "waive" the protection of the statutory cap means the insurer already enjoys the protection; otherwise the statute would describe how to make a claim on the protection rather than how to waive it.

Furthermore, for an insurer to "waive" the benefit of the cap, it must intentionally and "specifically" agree to do so by written endorsement, and it cannot be said to have waived § 2-9-108(1) by accident. *Tvedt*, ¶ 33 ("Waiver must be manifested in some unequivocal manner."); § 2-9-108(3), MCA. The legislature repeats the word "specifically" in § 2-9-108(3), requiring both specific

agreement and specific waiver. Both are important and highlight that any waiver must be explicit. First, the statute provides that an insurer must "specifically agree[] by written endorsement" to provide coverage in excess of "a limitation in this section," which ASIC did not do because its policy contains no reference to the statute. Then—only after the insurer provides the "specific agreement" described in the first clause of § 2-9-108(3)—the insurer "may not claim the benefits of **the limitation specifically waived**." § 2-9-108(3), MCA (emphasis added). The second use of "specifically" means the insurer must agree by specific written endorsement to waive the cap **and also** must "specify" the limitation waived. That latter requirement is necessary because § 2-9-108 contains two different limitations on the government's waiver of sovereign immunity: § 2-9-108(1) limits liability in tort claims, and § 2-9-108(2) limits liability for damages suffered by certain incarcerated individuals. The insurer therefore must identify "the limitation specifically waived" because the statute includes two different limitations, neither of which can be waived inadvertently. Absent both "specific" requirements, the insurer cannot waive § 2-9-108(1). *Tvedt*, ¶ 33.

The policy contains no written endorsement specifically waiving any liability limit described in § 2-9-108, or a written endorsement specifying § 2-9-108(1) rather than § 2-9-108(2) to be "the limitation specifically waived." The statutory cap therefore applies, as provided in § 2-9-108(1) and (3).

The district court's ruling is utterly at odds with the statute. The district court ruled as follows:

> ASIC's Policy specifically provides up to $1.5 million in auto coverage. ASIC's policy expressly provides up to $5 million in excess coverage. **The Policy contains no reference to a limit of $750,000, no reference to § 2-9-108, MCA, and no reference to statutory caps.** Based on the Insurance Code and case law, the Policy must be enforced as written, with limits of liability of $1.5 million in auto coverage and $5 million in excess coverage.

Orders, Ex. 2 at 6 (emphasis added). The district court got it backwards because § 2-9-108(3) imposes no duty on ASIC to "reference" the statutory cap in its policy to benefit from it. On the contrary, ASIC automatically benefits from § 2-9-108(1) "unless" it provides the specific waiver described in § 2-9-108(3). Simply put, the district court's finding as a matter of fact that ASIC's policy contains "no reference to § 2-9-108, MCA, and no reference to statutory caps" is impossible to square with its ruling as a matter of law that ASIC "specifically agree[d] by written endorsement" to waive § 2-9-108(1).

This Court should reverse the district court and confirm (1) that § 2-9-108(3) requires a clear, knowing, and "specific" agreement to waive § 2-9-108(1) by written endorsement along with a "specific" reference to that subsection so as not to confuse it with § 2-9-108(2); and (2) that if a policy does not mention § 2-9-108(1) specifically or contain language discussing any statutory cap broadly, that policy cannot satisfy the "specific waiver" requirements set forth in § 2-9-108(3).

Any other holding defies the plain language of § 2-9-108(3) by converting that statute from an opt-out provision to an opt-in provision.

2. ASIC did not waive the statutory cap merely by writing policy limits above $750,000.

The fact that the county's policy may provide coverage in excess of the cap when the cap does not apply to underlying claims does not constitute a "specific[] agree[ment] by written endorsement" to waive the cap. Section 2-9-108(3) provides the only mechanism by which an insurer can waive the protection of the statutory cap. The county's policy contains no such "specific[] agree[ment] by written endorsement," as discussed above, and ASIC therefore did not waive the cap. The district court's decision holding otherwise, is contrary to the plain language of § 2-9-108(3).

The district court found that ASIC waived the cap merely by writing policy limits in excess of $750,000:

> In this case, ASIC may not rely on the statutory cap of $750,000 which the insurer **specifically waived when it agreed in writing to provide auto coverage up to $1.5 million and excess coverage up to $5 million**.

Orders, Ex. 2 at 10-11 (emphasis added) (citation omitted). This ruling misconstrues § 2-9-108(3) and, if accepted, would render § 2-9-108(3) wholly superfluous. The statute, after all, necessarily assumes that the insurers it addresses in fact have written limits greater than the cap; otherwise there could be

no question of whether the insurer could be "liable for excess damages." Section 2-9-108(3) addresses only insurers that, like ASIC, have issued policies with limits greater than the cap, so merely issuing a policy greater than the cap cannot alone constitute waiver under the statute.

a. A policy limit is not a "written endorsement."

Section 2-9-108(3) (emphasis added) requires a "written endorsement" to effectuate a waiver: "[a]n insurer is not liable for excess damages unless the insurer specifically agrees **by written endorsement** to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section[.]" The district court located no language in the policy declaring any intent to waive § 2-9-108(1). What the district court located—and the language it used to find waiver—were the limits of different coverages provided in the policy. Policy limits, however, are not "written endorsements" by any reasonable definition of that term. An "endorsement" is a "written **modification** of the **coverage** of an insurance policy, usually liability or property policy." S. Plitt, D. Maldonado, J. Rogers, and J. Plitt, *Couch on Insurance 3d* § 1:3 (2021) (emphasis added).[3] Policy limits do not "modify" the "coverage" that the policy provides; rather, they

[3] The policy reflects this basic understanding of the term "endorsement," as it contains many endorsement pages specifically declaring, "THIS ENDORSEMENT CHANGES THE POLICY." *See* ASICApp. 047, 048, 050, 051, 186, 187, 192, 194, 198, 200, 202, 203, 209, 237, 239, 240, 253, 265-267, 270, 272-276, 279, 282, 283, 287, 290, 292, 294, 297, 335, 342, 343, 368-371.

state the dollar limit of coverage the policy may provide if a claim falls within the policy's insuring language.

This problem is highlighted most plainly by the district court's rewriting of § 2-9-108(3). The actual language of § 2-9-108(3) reads as follows (emphasis added):

> An insurer is not liable for excess damages unless the insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of **a limitation stated in this section**, in which case the insurer may not claim the benefits of the limitation specifically waived.

But the district court rewrote the statute in its order:

> An insurer may "specifically agree[] by written endorsement to provide coverage…in amounts in excess of **[the statutory cap of $750,000]**, in which case the insurer may not claim the benefits of the limitation specifically waived."

Orders, Ex. 2 at 10-11 (emphasis added). The district court's modification fundamentally changes the statute by altering the "written endorsement" the insurer must provide to effectuate a waiver.

The actual statutory language contains no reference to any number, $750,000 or otherwise. Rather, it requires the insurer to "specifically agree[]" to provide coverage in excess of "a limitation stated in this section," in which event the insurer cannot benefit from "the limitation specifically waived." Again, it is critical to remember that § 2-9-108 contains more than one "limitation stated in this section." A bare policy limit, devoid of other more specific language, is

insufficient to waive the liability cap under § 2-9-108(3) because it does not identify which of the two "limitation[s] stated in this section" the insurer "specifically" intends to waive.

The legislature therefore chose the language it drafted precisely to do the opposite of what the district court did here. The legislative history proves this. To arrive at § 2-9-108(3), the legislature repealed and replaced two prior statutes. First, §40-4402, R.C.M. 1977, provided that an insurer that "accepts a premium…from a political subdivision of the state" would be liable up to its limits of coverage and could not raise the county's immunity as a defense. Second, § 33-23-101, MCA (1978), required that all "policies of casualty insurance covering state-owned properties or state risks must contain an agreement on the part of the insurer waiving all right to raise the defense of immunity from suit…." These repealed statutes together prove beyond question that the legislature intended in § 2-9-108(3) to reject its former approach of imposing liability on the insurer solely based on the limits of the policy and further depriving the insurer of the protection of the statutory cap.

The requirement that the insurer "specifically agree[] by written endorsement" to waive "a limitation stated in this section" avoids the waiver-by-accident problem because the insurer must "specifically" identify which of the two "limitation[s] stated in this section" it is agreeing to waive. ASIC's policy contains

no language identifying § 2-9-108(1) as the limitation it specifically intends to waive, and the district court made no attempt to identify any such language. Rather, the district court rewrote the statute to say that an insurer can waive a particular (but unmentioned) "limitation stated in this section" merely by writing a policy with limits over a certain dollar amount, even though § 2-9-108(3) contains no mention of any dollar amount, much less the one the district court inserted.

The district court further misconstrued § 2-9-108(3) when it wrote, "[i]n this case, ASIC may not rely on the statutory cap of $750,000 which the insurer specifically waived when it agreed **in writing** to provide auto coverage up to $1.5 million and excess coverage up to $5 million." Orders, Ex. 2 at 11 (emphasis added). This is another mistaken edit of § 2-9-108(3), as the statute does not contain the words "in writing" at all, which phrase would suggest multiple ways to activate the waiver, so long as they are "in writing." Rather, the statute requires specific agreement "by written endorsement." As discussed above, the district court does not identify any "written endorsement" by which ASIC "specifically agrees" "to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section" or any place where the policy discusses § 2-9-108 or any statutory cap at all.

"The function of the courts is to interpret the law; that is, not to add to or take from the law, but to give effect to the intent expressed in the law itself." *State*

v. Moody, 71 Mont. 473, 230 P. 575, 578 (Mont. 1924). This Court's "role in interpreting statutes is to ascertain and carry out the Legislature's intent." *Mont. Fish, Wildlife and Parks v. Trap Free Mont. Pub. Lands*, 2018 MT 120, ¶ 14, 391 Mont. 328, 417 P.3d 1100. "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA.

The district court was bound to apply the statute the legislature wrote, and it erred when it altered the language of § 2-9-108(3) to imbue that subpart with a meaning more favorable to Daniels. The Legislature did not require ASIC to "specifically agree[] by written endorsement to provide coverage…in amounts in excess of [the statutory cap of $750,000]" in order to waive § 2-9-108(1), as the district court found. Rather, the Legislature required ASIC to "specifically agree[] by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section."

This Court therefore should reverse the district court and hold that merely issuing a policy with limits greater than the cap does not waive the protection of the cap and that a policy that does not mention § 2-9-108(1) or any statutory tort cap cannot be said to have "specifically" waived the "limitation stated" in § 2-9-108(1).

b. Providing a policy limit in excess of $750,000 does not waive § 2-9-108(1).

"The duty of this Court is to read and construe each statute as a whole so that we may give effect to the purpose of the statute." *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898 (quotations omitted). Section 2-9-108(3) would be useless if a given policy's limits were sufficient to waive it because § 2-9-108(3) only applies where a policy contains coverage limits in an amount exceeding the liability limits set forth in § 2-9-108(1) and (2).

Section 2-9-108(1) limits a political subdivision's tort liability to $750,000 per claim and $1.5 million per occurrence. *Delaney*, ¶ 23. Section 2-9-108(3) provides a mechanism whereby an insurer can agree to pay more than $750,000 for a particular tort claim if it "specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section[.]" But a recovery above $750,000 can **only** occur if (1) the policy already contains limits in excess of $750,000 per claim and $1.5 million per occurrence **and** (2) the policy contains a written endorsement waiving the protection of the cap. If the policy does not have limits greater than the cap, the political subdivision's liability coverage would be limited by the policy and not by § 2-9-108(1), and the insurer would never be liable for "excess damages" anyway. Accordingly, the exact—and only— purpose of § 2-9-108(3) is to allow insurers to write policies with limits exceeding the statutory liability caps **without**

automatically waiving those caps.

A review of § 2-9-108(2) further cements this point because that subpart contains no monetary limit at all. Rather, it establishes a complete liability shield for damages claimed by a prisoner except in cases of "serious bodily injury or death resulting from negligence or to damages resulting from medical malpractice, gross negligence, willful or wanton misconduct, or an intentional tort." § 2-9-108(2), MCA. If the district court's analysis were correct, an insurer would waive that liability shield by agreeing to provide **any** insurance, since any amount of coverage above zero would be viewed as a specific agreement to provide excess coverage and thus waive § 2-9-108(2). That obviously is not the intent of the statute.

It is essential that insurers are able to write—and political subdivisions are able to obtain—liability insurance above the § 2-9-108(1) statutory cap without waiving that cap because § 2-9-108(1) only applies to a subset of claims that a political subdivision may face. § 2-9-101(1), MCA. Political subdivisions must be able to purchase liability insurance for the full range of claims they may face, not only those for which their liability already is limited by § 2-9-108(1). For just one example, Gallatin County faces potential uncapped liability for civil rights claims under 42 U.S.C. § 1983. *See Browder*, *supra*. Counties must be able to purchase insurance for those uncapped claims without voiding their statutory immunity.

Otherwise, they are faced with the improvident choice of either preserving their statutory immunity or covering themselves for claims for which their liability is not limited. The legislature wisely resolved that dilemma through § 2-9-108, which both (1) contains no mechanism for the political subdivisions to waive the liability limit and (2) ensures that the insurers also do not waive the cap merely by providing insurance in excess of the limitations stated in § 2-9-108.

Although the interpretation of § 2-9-108(3) is an issue of first impression for this Court, other state courts have confirmed that political subdivisions may procure insurance for claims not subject to statutory caps without automatically waiving the caps. Particularly insightful is the Pennsylvania Supreme Court's decision in *Zauflik v. Pennsbury Sch. Dist.*, 629 Pa. 1, 104 A.3d 1096 (Penn. 2014). The plaintiff in *Zauflik* was injured when a school bus collided with her. *Id.* at 9. The Pennsbury School District ("Pennsbury") admitted liability for the accident. *Id*. Pennsbury had a total of $11 million in liability and excess insurance coverage. *Id*. A jury awarded the plaintiff more than $14 million following a trial on damages. *Id*. at 10. Pennsbury then filed a post-trial motion to conform the damage award to Pennsylvania's $500,000.00 statutory liability cap. *Id*.; *see* 42 Pa.C.S.A. § 8553. The trial court granted Pennsbury's motion, entering judgment for $502,661.63, reflecting the statutory tort cap plus a small amount of "delay damages." *Zauflik*, 629 Pa. at 11. The plaintiff appealed, asserting, *inter alia*, the

same argument Daniels is making here: "that immunity should not apply at all where local agencies are free to purchase insurance or insure themselves." *Id*. at 18. As the Pennsylvania court summarized, "Appellant takes issue with the 'public fisc' rationale for a damages cap, arguing that it should not be determinative in a case like this, where Pennsbury actually purchased insurance coverage that, she alleges, could be used to satisfy a large part of the jury's verdict without endangering Pennsbury's treasury." *Id*. at 41-42.

The Pennsylvania court did not mince words in rejecting this argument:

> Obviously, Pennsbury—which is currently protected under Section 8553 from tort liability in excess of $500,000 in individual cases—purchased its excess insurance coverage for risks other than lawsuits arising from personal injuries like appellant's. The mere purchase of such insurance coverage, aimed at other kinds of risks, does not entitle appellant to its proceeds as a constitutional matter. **Nor does the purchase of such coverage somehow act as a waiver of the statutory cap.**

Id. at 42-44 (citations omitted) (emphasis added); *see also id.* at 44-46 (discussing the numerous negative policy implications of a ruling that insurance coverage acts as a waiver of the statutory cap).

The Pennsylvania Supreme Court easily concluded that Pennsbury purchased excess insurance coverage to protect from risks not subject to Pennsylvania's statutory cap and therefore that Pennsbury did not waive the cap for risks that are subject to the cap. The same is true here. The county's witnesses and its insurance broker uniformly testified that the county purchased insurance

above $750,000 per claim and $1.5 million per occurrence precisely to cover "risks other than lawsuits arising from personal injuries like" Daniels'. *Id*. at 44; ASICApp. 377-383, 404-406, 422-424, 427-434, 447-448.

The county is protected from tort liability for damages exceeding $750,000. § 2-9-108(1), MCA. ASIC likewise is protected from covering damages in excess of $750,000 **unless** it provides the specific waiver described in § 2-9-108(3). Nothing about § 2-9-108(3) suggests that the mere purchase of insurance can effectuate the waiver, and the district court erred by finding waiver. It should have found, like the Pennsylvania court did, that "[t]he mere purchase of such insurance coverage, aimed at other kinds of risks, does not entitle appellant to its proceeds as a constitutional matter. **Nor does it somehow act as a waiver of the statutory cap.**" *Zauflik*, 629 Pa. at 44 (emphasis added).

c. The district court's error is clear from a review of other states' counterpart statutes.

Section 2-9-108(3)'s plain language ensures that the mere purchase of insurance coverage in excess of $750,000 is not a waiver of the § 2-9-108(1) statutory cap. That conclusion is buttressed by comparing § 2-9-108(3) with waiver statutes from other jurisdictions and Montana's previous liability statute, which trigger waiver of liability caps simply by purchase of excess insurance coverage rather than the specific agreement by written endorsement that § 2-9-108(3) requires.

Idaho Code § 6-926(1) provides a liability cap of $500,000 "unless the governmental entity has purchased applicable, valid, collectible liability insurance coverage in excess of said limit, in which event the controlling limit shall be the remaining available proceeds of such insurance." The Idaho statute confirms that the mere purchase of "applicable" insurance coverage with a limit in excess of Idaho's $500,000 statutory cap supersedes that cap. A Kansas statute similarly indexes the statutory limit to the amount of excess insurance coverage the governmental entity purchased, raising the statutory cap accordingly. *See* K.S.A. 75-6111(a) (providing $500,000 liability cap except "where the contract of insurance provides for coverage in excess of such limitation in which case the limitation on liability shall be fixed at the amount for which insurance coverage has been purchased.").

Montana's own former sovereign immunity statute enshrined a scheme similar to Idaho's and Kansas's, which tied the government's liability "to a sum equal to the applicable limit stated in the policy." § 40-4402, R.C.M. 1947*; see also Boettger v. Employers Liability Assur. Corp.*, 158 Mont. 258, 263, 490 P.2d 717, 720 (Mont. 1971) ("[§] 40-4402, R.C.M. 1947 prohibits the defense of sovereign immunity if the city is insured.").

Montana's current statutory damages cap does not conform with Idaho's, Kansas's, or with Montana's former approach to sovereign immunity. Rather, § 2-

9-108 provides no mechanism for Montana's political subdivisions to waive their liability limits, and the statute ensures that the subdivisions' insurers also enjoy the benefit of the liability limits **unless** the insurers execute the specific waiver by written endorsement described in § 2-9-108(3). Nowhere does § 2-9-108(3) suggest that any liability limits can be waived by mere procurement of insurance, as the counterpart statutes in Idaho and Kansas clearly provide. And Montana certainly could have chosen to mirror Idaho's and Kansas's statutes if it wanted to, given that Idaho Code § 6-926(1) and K.S.A. 75-6111(a) both predate § 2-9-108, and given that Montana once had a statute with a similar effect. Instead, the Montana Legislature adopted a markedly different approach in § 2-9-108(3); it chose to require "specific[] agree[ment] by written endorsement" and a "limitation specifically waived" to waive the statutory cap.

As discussed at length, the county's policy contains no specific agreement by written endorsement to waive § 2-9-108(1), and § 2-9-108(3) does not permit a bare policy limit to stand as a waiver of the statutory cap. The district court erred when it found otherwise. This Court should reverse the district court and confirm that the waiver provision set forth in § 2-9-108(3) is not activated merely by an insurance policy containing a per-claim limit above $750,000.

II. The district court erred when it declined to rule on the county and ASIC's joint motion to conform the verdict to § 2-9-108(1).

The district court abused its discretion by refusing to conform the judgment

to the county's $750,000 liability cap, which all parties agree is the total amount for which the county can be liable under § 2-9-108(1).

The district court took evidence on Daniels' negligence claim at a bench trial and entered judgment against the county for $11,660,016.11, comprising $12,410,016.11 in damages less the $750,000 ASIC already had paid on the county's behalf. The county then moved under Mont. R. Civ. P. 59(e) to reduce the judgment to $750,000 in conformance with § 2-9-108(1), and ASIC joined that motion. The district court never ruled on the motion, and it was deemed denied under Mont. R. Civ. P. 59(f).

The district court erred by failing to conform the judgment against the county to the § 2-9-108(1) liability limit. While a political subdivision's insurer can waive the protection of the statutory cap as described in § 2-9-108(3), there is no such waiver provision for the political subdivision itself. Under no circumstance can the county face a judgment on Daniels' tort claim for an amount above $750,000.

The district court, acting as factfinder, determined that the county caused $12,410,016.11 in damages because of the accident. ASIC takes no position on the accuracy of that conclusion. But the amount of damages the county caused as a matter of fact is a different question than the amount of liability it can face as a matter of law. The amount of damages the county caused is not limited by § 2-9-

108(1), but its ultimate liability is. The district court abused its discretion when it ignored § 2-9-108(1) and refused to conform the judgment to the statutory cap.

"The function of the courts is to interpret the law; that is, not to add to or take from the law, but to give effect to the intent expressed in the law itself." *Moody*, 230 P. at 578; *Trap Free Mont. Pub. Lands*, ¶ 14; *see also* § 1-2-101, MCA. Here, the district court had no choice but to grant the Rule 59(e) motion and conform the judgment against the county to the § 2-9-108(1) statutory cap.

Although this Court has not yet confronted this precise issue, several other courts have, and it is appropriate for the Court to look to those cases for guidance. *See In re M.A.L.*, 2006 MT 299, ¶¶ 28-32, 334 Mont. 436, 148 P.3d 606. Courts in other jurisdictions have held that it is proper for courts to conform judgments to statutory caps in post-trial motions.

For example, in the Pennsylvania Supreme Court's decision previously discussed, *Zauflik v. Pennsbury School District*, the court affirmed a trial court's conformance of a judgment with that State's statutory cap. Notably, the *Zauflik* trial judge believed the order conforming the judgment to the statutory cap "directed an unfair and unjust result" but nevertheless adhered to the law and conformed the judgment. 629 Pa. at 10 (quotations omitted). The intermediate appellate court further explained that, "although the very tragic circumstances of this case weigh heavily, as an intermediate appellate court confronting significant

and unwavering precedent, our role must be one of restraint" and "concluded that it is the role of the General Assembly to make the difficult policy decisions and enact them into law if such decisions receive the support of the necessary majority." *Id*. at 12 (quotations omitted). The same is true here.

Similarly, the Supreme Court of New Mexico recently decided a case concerning a jury award of damages above a statutory cap. *Siebert v. Okun*, 485 P.3d 1265 (N.M. 2021). In *Siebert*, the plaintiff was injured due to a botched surgical procedure. *Id*. at 1267. New Mexico has a $600,000 per-occurrence statutory cap on nonmedical, nonpunitive damages against qualified health care providers. *Id*. A jury awarded the plaintiff approximately $1.6 million in relevant damages. *Id*. The district court denied the defendants' post-trial motion to conform the verdict to the statutory cap, entered judgment for the full amount of damages, and declared the statutory cap unconstitutional, finding that it violated Siebert's right to a trial by jury. *Id*. at 1268.

The New Mexico Supreme Court reversed and remanded with the instruction that the district court conform the judgment to the statutory cap. Specifically, the court explained that, where a jury's role is limited to that of fact-finder, "the right to a trial by jury is satisfied when evidence is presented to a jury, which then deliberates and returns a verdict based on its factual findings. **The legal consequence of that verdict is a matter of law, which the legislature has**

the authority to shape." *Id*. at 1277 (emphasis added). The court later clarified that "[i]n passing the damages cap of Section 41-5-6(A), the Legislature restricted the scope of the available legal remedy for injury…" *Id*.

Here, there is no extant constitutional challenge to § 2-9-108 because Daniels voluntarily dismissed it in advance of trial. Orders, Ex. 4 at 1-2. The Montana Legislature "restricted the scope of the available legal remedy" for Sarah Daniels' injuries to $750,000 when it passed § 2-9-108(1). The district court, in its role as factfinder, found the actual damages to be in excess of $12 million dollars. As in *Siebert*, the district court's post-trial role was not as factfinder but as arbiter of the law, and it had no choice but to conform the judgment to the legislature's unambiguous $750,000 limit. As the New Mexico court explained, while the district court's role as factfinder was to determine the amount of damages the county caused as a matter of fact, "[t]he legal consequence of that verdict is a matter of law, which the legislature has the authority to shape." *Siebert*, 485 P.3d at 1277. The legislature has determined that the county cannot be liable to Daniels for an amount exceeding $750,000, and the district court abused its discretion when it ignored § 2-9-108(1) and entered judgment against the county for a greater amount.

Conclusion

For the foregoing reasons, the Court should reverse the district court's order

and remand with instructions that the district court conform the judgment to the $750,000 liability limit ASIC already paid to Daniels. The Court further should enter summary judgment for the county and ASIC because the liability cap under § 2-9-108(1) applies and ASIC did not waive the cap under § 2-9-108(3). Finally, the Court should order that ASIC's indemnity obligation is coextensive with the amount the county legally must pay as damages, which cannot exceed the $750,000 ASIC already paid.

Respectfully submitted on October 18, 2021,

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CERTIFICATE OF COMPLIANCE

I certify that this response is printed with proportionally spaced Times New Roman typeface of 14 points; is double-spaced except footnotes and block quotes; and contains 9,710 words or fewer excepting captions, signatures, tables, and certificates.

By: /s/ Peter F. Habein
Peter F. Habein

DISTRICT COURT ORDERS
(Electronic Version Hyperlinked and Bookmarked)

Tab 1

May 6, 2019 Order Denying Motion to Dismiss Count One or to Alternatively Bifurcate the Action (Doc. 13)

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * * * *

DON DANIELS, as conservator of the Estate of SARAH DANIELS,

Plaintiff,

vs.

GALLATIN COUNTY, ONE BEACON INSURANCE GROUP, LLC d/b/a ATLANTIC SPECIALTY INSURANCE COMPANY, RICK BLACKWOOD and JOHN DOES 1-V,

Defendants.

Cause No. DV-18-17B

ORDER DENYING MOTION TO DISMISS COUNT ONE OR TO ALTERNATIVELY BIFURCATE THE ACTION

Before the Court is Defendant One Beacon Insurance Group, LLC d/b/a Atlantic Insurance Specialty Insurance Company's ("AISC") Motion to Dismiss Count One or to Alternatively Bifurcate the Action. The motion has been briefed and the Court is fully advised.

"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of a claim that would entitle the plaintiff to relief." *Wise v. CNH America, LLC*, 2006 MT 194, ¶ 6, 333 Mont. 181, 142 P.3d 774. In considering a motion to dismiss made pursuant to Rule 12(b)(6), Mont. R. Civ. P., the Court will consider only the allegations made within the complaint, together with exhibits attached to the complaint. *Goodman Realty, Inc. v. Monson*, 267 Mont. 228, 230-231, 883 P.2d 121, 122-123

(1997). All well pleaded facts must be taken as true and viewed in a light most favorable to the plaintiff. *Wise*, ¶ 6.

Having reviewed the Complaint, the Court finds the allegations are sufficient to place AISC on notice of the claims against it and AISC has not shown beyond doubt that the plaintiff can prove no set of facts in support of a claim that would entitle Plaintiff to the relief requested. Therefore, AISC's Motion to Dismiss should be denied.

Alternatively, AISC moves to bifurcate the declaratory action claim asserted against AISC from the negligence claim asserted against Gallatin County and Rick Blackwood. Rule 42(b), Mont. R. Civ. P. provides, "For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any statutory or constitutional right to a jury trial."

In this case, the declaratory judgment claim merely seeks ruling as to coverage available to compensate Plaintiff under the insurance contract. This is an issue of law to be decided by the Court. *Cusenbary v. United States Fid. & Guar. Co.*, 2001 MT 261, ¶ 9, 307 Mont. 238, 37 P.3d 67. No trial will be necessary. Therefore, the Court finds that bifurcation is unnecessary.

IT IS HEREBY ORDERED that AISC's Motion to Dismiss or to Alternatively Bifurcate the Action is **DENIED**.

Dated May 6, 2019.

Hon. Rienne H. McElyea
District Judge

c: Jonathan Cok / Travis Kinzler
Roger Witt/James Zadick
Peter Habein/Pamela Garman
emailed 5-6-19

Tab 2

September 22, 2020 Memorandum and Order RE Cross Motions for Partial Summary Judgment on Count I of the Amended Complaint (Doc. 97)

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * * * * * * *

DON DANIELS, as conservator of the Estate of SARAH DANIELS

Plaintiff,

v.

GALLATIN COUNTY, ATLANTIC SPECIALITY INSURANCE COMPANY, RICK BLACKWOOD and JOHN DOES I-V,

Defendants.

Cause No. DV-18-17B

Hon. Rienne H. McElyea

MEMORANDUM AND ORDER RE CROSS MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON COUNT I OF THE AMENDED COMPLAINT

Before the Court are cross motions for summary judgment on Count I of the Amended Complaint. Plaintiff Don Daniels, conservator for Sarah Daniels ("Daniels"), moves for partial summary judgment, seeking a declaration that Atlantic Specialty Insurance Company ("ASIC") may not claim the benefit of the statutory cap of $750,000 set forth in § 2-9-108, MCA, but instead must provide the limits stated in the Policy. ASIC opposes Daniels' motion and cross-moves for summary judgment on Count I.

Defendants Gallatin County and Rick Blackwood ("the County") acknowledges that Count I seeks a declaratory judgment regarding the scope of Defendant ASIC's coverage and that Count I does not assert claims against the County Defendants. The County filed no briefs regarding the cross motions on Count I.

On September 10, 2020, all parties waived the right to a hearing on these motions.

UNDISPUTED FACTS

On January 12, 2017, a snowplow truck operated by Gallatin County employee Rick Blackwood ran a stop sign. The blade of the snowplow pierced through Sarah Daniels' automobile, severely injuring her. Gallatin County has admitted that Blackwood was negligent; that he was acting in the scope of his employment; and that the County is liable for Blackwood's acts. Additionally, the County has admitted that the damages incurred by Daniels as a result of the car accident exceed $750,000, and that Daniels suffered permanent and life-altering injuries.

At the time of the crash on January 12, 2017, ASIC provided insurance coverage to the County pursuant to Policy Number 791000853-0001, with a policy period from 7/1/2016 to 7/1/2017. ASIC does not dispute that the Policy provides coverage for the auto in question or the occurrence itself. The only issue before the Court in Count I concerns the limits of liability available under the Policy. Daniels asserts the Policy clearly provides coverage in the amounts of $1.5 million (business auto) and $5 million (excess), and that the Policy must be enforced as written. ASIC asserts that ASIC's contractual responsibility to insure the county for its negligence is capped at $750,000 per claim, pursuant to the Policy and to § 2-9-108(3), MCA.

PERTINENT POLICY PROVISIONS CITED BY THE PARTIES

The Policy's Automobile Coverage states a limit of liability of $1.5 million. The Policy's Excess Liability Coverage provides for a limit of liability of $5,000,000, and applies as excess to the auto liability. The parties agree that the Policy does not specify a limit of $750,000 per claim and does not contain any reference to the statutory caps or § 2-9-108, MCA.

The Auto Coverage Part states:

> **C. Limits of Insurance**
> Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for the total of all

damages . . . resulting from any one "accident" is the Limit of Insurance for Covered Autos Liability Coverage Shown in the Declarations."

(Dkt. 48, p. 19).

Business Auto Declarations

COVERAGES	COVERED AUTOS	LIMIT	PREMIUM
Liability Insurance	1	$1,500,000	$3,594

(Dkt. 48, Ex. 1, p. 6).

The Excess Coverage Part states:

Section IV – Limits of Insurance

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
   a. Insureds;
   b. "Claims" made or "suits" brought; or
   c. Persons or organizations making "claims" or bringing "suits."

(Dkt. 48, p. 50).

EXCESS LIABILITY COVERAGE PART DECLARATIONS

Limits of Insurance

Aggregate Limit: $5,000,000 All Claims excess of Underlying Insurance
Each Claim Limit: $5,000,000 Each Claim excess of Underlying Insurance

(Dkt. 48, p. 48).

The Policy provides in its "Common Policy Declarations":
In return for the payment of the premium, and subject to all terms of this policy, we agree with you to provide the insurance as stated in this policy.

(Dkt. 48, Ex. 1, p. 1).

In the Policy's "scope of coverage" provision, the Auto Coverage states:

We will pay all sums an "insured" legally must pay as damages because of

> "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto."

(Dkt. 48, Ex. 1, p. 2)

The Policy contains an endorsement, **"Montana Changes – Conformity with Statutes,"** which provides in part:

> Conformity with Montana statutes. The provisions of this policy or Coverage Part conform to the minimum requirements of Montana law and control over any conflicting statutes of any state in which you reside on or after the effective date of this policy or Coverage Part.

(Dkt. 52, Ex. C). The Excess Coverage Part contains a similar endorsement. (Dkt. 48, p. 54).

APPLICABLE LEGAL STANDARDS

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c)(3), M.R.Civ.P. Daniels and ASIC agree there are no material facts precluding summary judgment. ASIC has pled no contract defenses to coverage, such as mistake, reformation, or ambiguity.

The interpretation of an insurance contract is a question of law for the Court to determine. *Kilby Butte Colony, Inc. v. State Farm Mutual Automobile Ins. Co.*, 2017 MT 246, ¶ 10, 389 Mont. 48, 403 P.3d. 664. "General rules of contract law apply to insurance policies and courts construe them strictly against the insurer and in favor of the insured." *Id.* If the terms of an insurance policy are subject to two different interpretations, "the construction most favorable to the insured or other beneficiary must prevail, particularly if an ambiguous provision attempts to exclude the liability of the insurer." *State Farm Mut. Auto Co. v. Freyer*, 2010 MT 191, ¶ 15, 357 Mont. 329, 239 P.3d 143; *Pablo v. Moore*, 2000 MT 48, ¶ 17, 298 Mont. 393, 995 P.2d 460,

(*citations omitted*). Any doubts as to coverage are to be resolved in favor of extending coverage. *Steadele v. Colony Ins. Co.*, 2011 MT 208, ¶ 19, 361 Mont. 459, 260 P.3d 145.

CONSTRUCTION OF THE POLICY

ASIC's Policy is subject to the requirements of the Montana Insurance Code ("the Code"). The Montana Legislature enacted the Code in 1959 "to govern and regulate the business of insurance." *Shattuck v. Kalispell Reg. Med. Center, Inc.*, 2011 MT 229, ¶ 15, 251 P.3d 1021; *quoting Ogden v. Montana Power Company*, 229 Mont. 387, 393, 747 P.2d 201, 205 (1987). The Legislature specifically excluded governmental entities from the restrictions of the Code to the extent that governmental entities self-insure or engage in pooled insurance. § 33-1-102(9), MCA; *see City of Dillon v. Montana Mun. Ins. Authority ("MMIA")*, 2009 MT 393, ¶ 4, 220 P.3d 623 (MMIA is not subject to the Code). Here, Gallatin County did not self-insure or engage in pooled insurance but chose to procure insurance through ASIC. ASIC, as a company "transact[ing] a business of insurance in Montana" must comply with the provisions of the Code. § 33-1-102(1), MCA.

The Insurance Code strictly requires that a policy must contain all its terms. Section 33-15-302, MCA, provides in full:

> **Policy must contain entire contract.** The policy, when issued, shall contain the entire contract between the parties, and neither the insurer or any insurance producer or representative thereof nor any person insured thereunder shall make any agreement as to the insurance which is not plainly expressed in the policy. This provision shall not be deemed to prohibit the modification of a policy, after issuance, by written rider or endorsement duly issued by the insurer.

The statutory requirement that insurers include the entire agreement in the policy is amplified throughout the Code. The Policy "must specify . . . the risks insured against" and the "conditions pertaining to the insurance." § 33-15-303(1), MCA. Moreover, casualty policies "must include" a "notice section of important provisions." § 33-15-337(2), MCA.

The Montana Supreme Court consistently enforces the Code's requirements regarding the contents of an insurance policy. "Where the 'language employed in an insurance contract is clear, the language controls,' and the court must enforce it as written." *Grimsrud*, 2005 MT 194, ¶ 18; *Steadele,* 2011 MT 208, ¶ 19. "The Court may not rewrite contracts, but must enforce them as written if their language is clear and explicit." *Amer/ States Ins. Co. v. Flathead Janitorial & Rug Service*, 2015 MT 239, ¶ 12, 380 Mont. 308, 355 P.3d 735; *citing Stutzman v. Safeco Ins. Co. of Am.*, 284 Mont. 372, 376, 945 P.2d 32, 34 (1997).

ASIC's Policy specifically provides up to $1.5 million in auto coverage. ASIC's Policy expressly provides up to $5 million in excess coverage. The Policy contains no reference to a limit of $750,000, no reference to § 2-9-108, MCA, and no reference to statutory caps. Based on the Insurance Code and case law, the Policy must be enforced as written, with limits of liability of $1.5 million in auto coverage and $5 million in excess coverage.

ASIC asserts that the statutory caps should be read into its Policy, citing the Insurance Code's § 33-15-315, MCA. The statute provides in full:

> **Validity of noncomplying forms**. Any insurance policy, rider, or endorsement hereafter issued and otherwise valid which contains any condition or provision not in compliance with the requirements of this code shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this code.

By its terms, § 33-15-315 only allows construction of a policy with reference to statutes that are part of the Insurance Code, to comply with the Insurance Code. Section 2-9-108, MCA – the statutory cap – is not part of the Insurance Code. In addition, § 33-15-315, MCA, only allows construction of a policy with reference to the Code if the insurance policy "contains any condition or provision not in compliance with the requirements of this code" – defined as the Insurance Code, Title 33. § 33-1-101, MCA. ASIC has not identified a provision of its Policy, as written, which conflicts with Title 33, the Insurance Code. More specifically, the provisions

at issue in this case, the limits of liability, do not conflict with the Insurance Code. In expressly stating policy limits of $1.5 million in auto coverage and $5 million in excess coverage, the Policy is not out of compliance with any provision of the Code, and § 33-15-315, MCA, does not apply to allow reformation of the Policy.

ASIC also asserts that two provisions in its Policy incorporate the statutory cap of $750,000 into the Policy: the scope of coverage provision and the "Conformity with Statutes" Endorsement. ASIC claims that the scope of coverage provision imports to the policy the statutory cap, and that through the "conformity" endorsement, the statutory limits become part of the Policy even though they are not stated verbatim in the policy itself. As ASIC concedes, its interpretation of these two provisions requires consideration of terms not contained in the Policy itself. Because the Policy must contain the entire contract pursuant to § 33-15-302, MCA, any attempt to incorporate terms into the Policy fails as a matter of law. The limits of liability stated in the Policy are clear and must be enforced as written. *Steadele*, ¶ 19.

In addition, the two policy provisions cited by ASIC do not operate to limit coverage as urged by ASIC. ASIC's scope of coverage provision states that ASIC will pay "all sums an 'insured' legally must pay as damages. . ." ASIC asserts that because the County's liability is capped at $750,000 by § 2-9-108(1), MCA, that is the limit of ASIC's responsibility to insure the county under the policy's auto liability coverage. However, a jury is not precluded from awarding damages against the County in excess of $750,000, and § 2-9-108(3), MCA, establishes that an insurer "may not claim the benefits" of the statutory caps when the insurer "specifically agrees by written endorsement to provide coverage to the governmental entity" in excess of the statutory cap. Here, ASIC agreed in the written Policy to provide $1.5 million in auto coverage and $5 million in excess coverage, without any reference to limitations related to the statutory caps.

With respect to its "Conformity with Statutes" endorsement, ASIC argues that while the Policy does not refer to the statutory cap specifically or directly, this endorsement explicitly conforms the policy with the minimum requirements of Montana law. This assertion ignores the Code's strict requirement that the Policy contain the entire contract. § 33-15-302, MCA. Even if applied, § 2-9-108, MCA would only provide minimum requirements, and those minimum requirements are met by providing coverage of $750,000 per claim. Section 2-9-108(3), MCA, specifically contemplates that a governmental entity may procure coverage which exceed those limits, as in the ASIC policy. The conformity endorsement creates a floor for minimum statutory requirements, not a ceiling.

In summary, ASIC "is responsible for the language which the policy contains." *State Farm Mut. Auto Ins. Co. v. Queen*, 212 Mont. 63, 65, 685 P.2d 934, 937 (1984). The Insurance Code provides that the Policy, "when issued, shall contain the entire contract between the parties." § 33-15-302, MCA. ASIC may not incorporate the statutory caps into the Policy by implication, whether through §33-15-315 or the Policy's scope of coverage provision or conformity endorsement. Longstanding statutory and common law rules of insurance contract construction require this Court to enforce the Policy as written. *Steadele*, ¶ 19; *Amer. States Ins. Co.*, ¶ 12. The Policy unequivocally provides $1.5 million in auto coverage and $5 million in excess coverage and therefore the stated limits of $6.5 million are available to indemnify the County for Daniels' claim.

THE STATUTORY CAPS

Because the Policy must contain the entire agreement, and the Policy is devoid of any mention of the statute, the caps, or the amount of $750,000, this Court need not address the application of § 2-9-108, MCA. To conclude otherwise requires the Court to ignore the plain

meaning of the Policy's stated limits and to rewrite the Policy. Nonetheless, analysis of § 2-9-108, MCA, yields the same result as to the available limits.

It is important to note that § 2-9-108(3), MCA, allows a governmental entity to procure insurance above the statutory cap of $750,000. Section 2-9-108(3), MCA, provides:

> An insurer is not liable for excess damages unless the insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitation specifically waived.

Coverage in excess of the caps may be procured to provide adequate protection, above the statutory caps, to protect citizens who suffer catastrophic losses.

The parties dispute the mechanism by which an insurer waives the statutory caps pursuant to § 2-9-108(3), MCA. Daniels asserts that ASIC's agreement to provide coverage in the amount of $6.5 million constitutes an express waiver of the statutory cap. ASIC contends that the statute is self-executing, automatically incorporating the statute's caps into its Policy.

The County specifically applied to ASIC for coverage above the capped limits, in the amounts of $1.5 million in auto coverage and $5 million in excess coverage. Knowing that the County's single claim limit was $750,000, ASIC agreed in writing to provide the requested auto coverage of $1.5 million. (Rios Dep., Dkt. 48, Ex. 2, p. 50). More to the point, ASIC agreed to provide coverage specifically designated as "excess" in the amount of $5 million. *Id.* The Auto Coverage Part states that the "most [ASIC] will pay for the total of all damages. . . is the Limit of Insurance for Covered Autos Liability Coverage shown in the Declarations." (Dkt. 48, p. 19). The Excess Coverage Part also indicates that the "most [ASIC] will pay" is the "Limits of Insurance shown in the Declarations." (Dkt. 48, p. 50). The Policy's Declarations state limits of $1.5 million for auto, and $5 million for excess. Furthermore, ASIC fortified the Policy's clear statement of the Policy limits by a written endorsement to the Policy, the

"Common Policy Declarations," which state that in return for the premium, ASIC "agrees with you to provide the insurance as stated in this Policy." (Dkt. 48, Ex. 1, p. 1).

The rules of statutory construction require this Court to "ascertain the legislature's intent" and "give effect to the legislative will. Legislative intent is to be ascertained, in the first instance, from the plain meaning of the words used . . ." *Van der hule v. Mukasey*, 2009 MT 20, ¶ 10, 349 Mont. 88, 217 P.3d 1014. "Further, statutory construction should not lead to an absurd result if a reasonable interpretation can avoid it." *Id., citing State v. Letasky*, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288. The plain meaning of § 2-9-108(3), MCA, evidences the Legislature's intent to allow a governmental entity to obtain insurance in excess of the statutory caps. Concurrently, the plain meaning of the Insurance Code evidences the Legislature's intent to require private insurers, such as ASIC, to include in the Policy the entire agreement between the parties. Given this legislative intent, it would be absurd to conclude that a Policy which expressly states limits of liability of $1.5 million in auto coverage, and also provides excess coverage up to $5 million, silently precludes coverage over $750,000 – a limit never stated in the Policy.

ASIC argues that it need not take any affirmative action in order for the cap to govern its duty to the county or to plaintiff. ASIC states that a governmental liability policy silent on the statutory cap will not cover damages above the cap. ASIC posits that § 2-9-108(3), MCA, is self-executing; an insurer is not liable for damages above the cap unless the insurer specifically opts out of it.

ASIC's theory that silence creates coverage directly conflicts with the Insurance Code's requirement that the policy must contain the entire agreement. Moreover, the theory conflicts with the plain language and intent of § 2-9-108, MCA. An insurer may "specifically agree[] by written endorsement to provide coverage . . . in amounts in excess of the [statutory cap of

$750,000], in which case the insurer may not claim the benefits of the limitation specifically waived." § 2-9-108(3), MCA. Here, ASIC specifically agreed in writing to provide coverage of $6.5 million.

In this case, ASIC may not rely on the statutory cap of $750,000 which the insurer specifically waived when it agreed in writing to provide auto coverage up to $1.5 million and excess coverage up to $5 million. Given the clear language of the Policy, the express requirements of the Insurance Code, and the statute's stated method of waiving the limits by agreeing to provide additional coverage, ASIC may not claim the benefits of the County's cap.

DECLARATION OF RIGHTS

Both parties seek a declaration of rights and responsibilities under the Policy. Based on the Policy, the controlling statutes, and longstanding Montana law, the Court declares that the Policy clearly and unambiguously provides $1.5 million in auto coverage and $5 million in excess coverage. The Policy is devoid of any limitations on those limits based on the statutory caps available to the County. The insurance contract must be enforced as written. *Steadele*, ¶ 19; *Amer. States Ins. Co.*, ¶ 12.

IT IS HEREBY ORDERED:

1. Daniels' motion for partial summary judgment on Count I is GRANTED.
2. ASIC's cross motion for summary judgment on Count I is DENIED.
3. ASIC may not claim the benefit of the statutory cap of $750,000 set forth in § 2-9-108, MCA. The Policy's stated limits of $1.5 million in auto coverage and $5 million in excess coverage are available to indemnify the County for Daniels' claim.

DATED this 22 day of September, 2020.

Hon. Rienne H. McElyea
District Court Judge

c: Peter Habein/Pamela Garman/Justin Harkins
Roger Witt/James Zadick
Jonathan Cok/Travis Kinzler/Martha Sheehy

emailed 9-24-20

Tab 3

September 22, 2020 Memorandum and Order RE Gallatin County's Motion for Summary Judgment on Count II (Doc. 98)

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * * * * * *

DON DANIELS, as conservator of the Estate of SARAH DANIELS

Plaintiff,

v.

GALLATIN COUNTY, ATLANTIC SPECIALITY INSURANCE COMPANY, RICK BLACKWOOD and JOHN DOES I-V,

Defendants.

Cause No. DV-18-17B

Hon. Rienne H. McElyea

MEMORANDUM AND ORDER RE GALLATIN COUNTY'S MOTION FOR SUMMARY JUDGMENT ON COUNT II

Defendants Gallatin County and Rick Blackwood ("the County") have moved the Court for summary judgment. The County acknowledges that Count I (declaratory relief) does not assert claims against the County Defendants. The County seeks summary judgment on Count II (negligence) and Count III (constitutional violation). The motion on County III is not yet fully briefed. The Court addresses Count II (negligence).

The parties waived the right to a hearing on these motions.

UNDISPUTED FACTS

On January 12, 2017, a snowplow truck operated by Gallatin County employee Rick Blackwood ran a stop sign. The blade of the snowplow pierced through Sarah Daniels' automobile, severely injury her. Gallatin County has admitted that Blackwood was negligent; that he was acting in the scope of his employment; and that the County is liable for Blackwood's acts. Additionally, the County has admitted that the damages incurred by Sarah Daniels as a result of the car accident exceed $750,000, and that Daniels suffered permanent and life-altering injuries.

98

APPLICABLE LEGAL STANDARDS

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c)(3), M.R.Civ.P.; *Tonner v. Cirian*, 2012 MT 314, ¶ 7, 367 Mont. 487, 291 P.3d 1182.

ANALYSIS

The County seeks summary judgment on Count II's claim of negligence on the theory that "County Defendants have admitted the only claims of liability asserted against them and have paid the full amount of potential tort damages liability – $750,000 – that Montana law permits against any governmental entity." (Dkt. 55, p. 4). The County's motion is premised on the assertion that "there is no remaining live controversy regarding the County Defendants for this Court to determine."

Plaintiff is required to prove each of the four elements of negligence: duty, breach of duty, causation, and damages. *Dulaney v. State Farm Fire & Cas. Ins. Co.*, 2014 MT 127, ¶ 10, 375 Mont. 117, 324 P.3d 1211. While the County has admitted that Sarah Daniels' damages exceed $750,000, and that Daniels suffered permanent and life-altering injuries, the County has not conceded causation or admitted to a specific amount of damages. These elements of the claim constitute a "live controversy" which requires resolution by a trier of fact.

Upon review of its motion, the County is not asking the Court to enter summary judgment in favor of the County on the negligence claim as there is no basis to support summary judgment in favor of the County when the County has admitted liability. Rather, the County seeks dismissal of the County Defendants as parties to this action. The County has not provided any legal basis for dismissal of a party based on admission of two elements of a negligence claim. Rule 56 does not govern the dismissal of parties. Moreover, courts and juries often hear

cases in which a defendant has admitted liability. *See, e.g., State ex rel. Gadbaw v. Montana Eighth Judicial District Court*, 2003 MT 127, 315 Mont. 25, 75 P.2d 1238.

The County claims that it is "different from any other defendant which has admitted liability due to § 2-9-108, MCA." (Dkt. 76, p. 3). Yet the County has not identified any authority to support dismissing a defendant prior to the adjudication of causation and damages in an amount certain.

IT IS HEREBY ORDERED that the County's motion for summary judgment on the negligence claim, and the County's request to be dismissed from this action, are DENIED.

DATED this 22 day of September, 2020.

Hon. Rienne H. McElyea
District Court Judge

c: Peter Habein/Pamela Garman/Justin Harkins
Roger Witt/James Zadick
Jonathan Cok/Travis Kinzler/Martha Sheehy
emailed 9-24-20

Tab 4

September 29, 2020 Order RE: Count III

(Doc. 105)

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * * * *

DON DANIELS, as conservator of the Estate of SARAH DANIELS, Plaintiff, vs. GALLATIN COUNTY, ONE BEACON INSURANCE GROUP, LLC d/b/a ATLANTIC SPECIALTY INSURANCE COMPANY, RICK BLACKWOOD and JOHN DOES I-V, Defendants.	Cause No. DV-18-17B **ORDER RE: COUNT III**

Before the Court are cross motions for summary judgment on Count III of Plaintiff's Amended Complaint regarding the constitutionality of § 2-9-108, MCA as applied to Plaintiff's claims. In its brief, Plaintiff states, "Daniels' constitutional challenge is contingent on this Court's rulings on the application of the statute with respect to ASIC's Policy in Count I. If the Policy is enforced as written, with proceeds of $6.5 million available, this Court need not address Plaintiff's 'as applied' challenge to § 2-9-108, MCA."

On September 22, 2020, the Court issued a Memorandum and Order RE Cross Motions for Partial Summary Judgment on Count I of the Amended Complaint. The Court

found in favor of Plaintiff holding, "ASIC may not claim the benefit of the statutory cap of $750,000 set forth in § 2-9-108, MCA. The Policy's stated limits of $1.5 million in auto coverage and $5 million in excess coverage are available to indemnify the County for Daniels' claim."

Based on Plaintiff's representations regarding Count III, this Court's order regarding Count I, and the general policy that the Court should avoid deciding constitutional issues whenever possible, the Court finds Count III of Plaintiff's Amended Complaint should be dismissed. *See Donaldson v. State*, 2012 MT 288, ¶ 10, 367 Mont. 228, 292 P.3d 364.

IT IS HEREBY ORDERED that Count III of Plaintiff's Amended Complaint is **DISMISSED**.

Dated this 29 day of September 2020.

Hon. Rienne H. McElyea
District Judge

c: Jonathan M. Cok / Travis W. Kinzler
Peter F. Habien / Pamela C. Garman emailed 9/30/20
Roger T. Witt

Tab 5

March 10, 2021 Findings of Fact, Conclusions of Law and Order (Doc. 156)

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * * * * * * * *

DON DANIELS, as conservator of the Estate of SARAH DANIELS

Plaintiff,

v.

GALLATIN COUNTY, ATLANTIC SPECIALITY INSURANCE COMPANY, RICK BLACKWOOD and JOHN DOES I-V,

Defendants.

Cause No. DV-18-17B

Hon. Rienne H. McElyea

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came before the Court for a non-jury trial on November 16, 2020. Travis W. Kinzler and Jonathan M. Cok of Cok Kinzler, PLLP, and Martha Sheehy, Sheehy Law Firm, represented the Plaintiff. Roger T. Witt and James R. Zadick of Ugrin Alexander Zadick, P.C. represented Defendants Gallatin County and Rick Blackwood. After hearing the evidence, the Court makes the following:

FINDINGS OF FACT

1. On January 12, 2017, Gallatin County employee, Rick Blackwood, was operating a snowplow in the course and scope of his employment.

2. The snowplow was built in 1981 by International. The snowplow weighed over 16 tons.

3. Rick Blackwood was operating the snowplow on Frontage Road in Bozeman, Montana on January 12, 2017. Rick Blackwood ran the stop sign at the intersection of Kelly Canyon and Frontage Road. He drove directly into the path of a vehicle driven by Sarah Daniels (Sarah). The speed limit on the Frontage Road was 60 mph. The snowplow blade penetrated the driver's compartment of Sarah's vehicle.

4. Gallatin County (The County) admits it was negligent and its negligence caused injuries to Sarah. The County admits its negligence caused $6,500,000.00 in damages to Sarah.

5. The collision severely injured Sarah who was transported to Bozeman Deaconess Hospital.

6. Dr. Cody Hood treated Sarah at the Emergency Room. Dr. Hood assessed Sarah's brain injury. One test he used was the Glasgow Coma Scale. The Glasgow Coma Scale is a test used for assessment of brain injury. The scale range of the test is from 1 to 15. A score of under 9 is associated with severe injury. The lower the score, the more severe the injury. A score of 3 is barely alive. Sarah admitted with a score of 4.

Sarah had a large scalp laceration. A CT of her brain showed a large subarachnoid hemorrhage with a cerebral edema. The bleeding in Sarah's brain caused her brain to swell which put pressure on her brain stem. Dr. Hood described Sarah's condition in terms of "on the verge of dying" and "imminent death." Sarah was transported by air to St. Vincent Hospital in Billings, Montana.

7. Sarah was treated at St. Vincent Hospital for 4 weeks. The medical team at St. Vincent Hospital kept Sarah in a medically induced coma for 2 weeks. Sarah had a right frontal intracranial pressure monitor inserted into her skull to drain the blood from her brain and prevent further brain swelling. Sarah's medical team performed a tracheotomy. Sarah had trouble swallowing and was fed through an inserted gastric feeding tube. At St. Vincent Hospital, Sarah experienced aspiration pneumonia.

8. Sarah was admitted to Craig Hospital in Colorado on February 15, 2017 for intensive inpatient rehabilitation. Sarah presented with significant deficits. She was minimally conscious. She was mute upon arrival but tried to whisper words. She perseverated, frequently caught in looping behaviors she was unable to stop. She suffered sympathetic storming, a circumstance where Sarah's nervous system perceived danger and her heart rate, body, sweat glands and breathing reacted to the perceived danger. The left side of her body was compromised. Sarah could not walk, talk, bathe, dress, or feed herself upon admission to Craig Hospital.

9. Sarah underwent a comprehensive, multidisciplinary specialized brain rehabilitation program at Craig Hospital. She was evaluated and treated by various disciplines including neurology, rehabilitation nursing, physical therapy, occupational therapy, speech and language pathology, recreation therapy, and neuropsychology. Sarah relearned how to speak, walk, control her body functions and other basic daily living activities including feeding, dressing, and bathing.

10. Sarah was a hard worker while at Craig Hospital. Her family was, and are, present, supportive, and engaged.

11. Sarah spent 2 months at Craig Hospital and made improvements. She arrived with infantile behavior and left with the ability to walk and talk. However, Sarah did not and will not achieve full recovery. Dr. Michael Makley is a neurologist and co-director at Craig Hospital. Dr. Makley was part of Sarah's treatment team. Dr. Makley described an individual with Sarah's injury as "looking good from a galloping horse." To an outside observer upon quick consideration, Sarah appears whole. However, Sarah continues to experience physical, cognitive, emotional, and behavioral impairments necessitating outpatient physical therapy, occupational therapy, speech therapy, neuropsychological intervention, vision therapy, psychotherapy, and psychiatric intervention.

12. Sarah experienced physical and emotional pain and suffering during her hospitalizations and rehabilitation.

13. Sarah sustained a severe brain injury. Sarah's brain suffered intracranial hemorrhaging with extensive diffuse axonal tearing. The axonal injury caused diffuse atrophy or brain shrinkage. The term diffuse means the injury affects a wide swath of neuronal populations. The result is widespread neuronal death and degeneration. The brain shrinks. The diffuse axonal injury occurred when Sarah's brain hit her skull during the abrupt stop imposed by the snowplow. Dr. Doherty described an axonal injury as the "most serious of injuries."

14. An axonal shearing injury disrupts the chemical messengers in the brain. Some information gets through and some does not. Some is very slow. Some gets rerouted. Some gets distorted. The brain fatigues more easily and brain stamina is significantly compromised. This fatigue limits Sarah's activity to 4-5 hours per day.

When Sarah experiences a brain overload, she cannot function and needs to retreat to a quiet space.

15. Sarah's brain injury affected most of her brain, including her frontal lobe, temporal lobe, brain stem, and central part of the brain. Sarah's brain no longer processes information efficiently. Sarah now has difficulty with multitasking, executive function, social interactions, memory, and coding retrieval.

16. Sarah is at risk for greater and earlier cognitive decline.

17. Sarah has left hemiparesis due to the severe traumatic brain injury. This includes reduced coordination of the left hand, reduced balance on uneven surfaces, a left sided visual cut in both eyes, and a left sided visual extinction. Sarah has problems with visual integration (visual perceptual processing) and vision stamina.

18. As a result of this injury, Sarah's IQ was reduced from an estimated 75th to 90th percentile to the 14th percentile. Sarah now has a depressive disorder and anxiety disorder. Further, Sarah has persistent physical problems that include:

a. Inability to detect hunger or satiation
b. Weight gain
c. Fatigue
d. Left side neglect
e. Left side weakness
f. Left side visual restriction
g. Reduced balance
h. Tingling in left hand and foot
i. Back pain
j. Insomnia

19. Sarah has visible scarring. She has a scar on her neck from her tracheotomy. She has a scar from the feeding tube. She developed a maladaptive behavior of picking at her skin and has scars from picking. Sarah is embarrassed by her visible scars and keeps them covered.

20. Sarah's life expectancy has been shortened because of the injuries she suffered.

21. The injury prevents Sarah from retrieving her memories. She will never be the same person as before the accident. Prior to the accident, Sarah was a college graduate, a photographer, an employee, and a fiancé. Sarah cannot retrieve all the memories that made up her first 27 years of life. She has limited memories. Sarah remembers the person who is her mother but not her relationship with her mother. Relationships are built on shared experiences. Sarah lost this history. Sarah does not know who she was before the accident. She has no memory of her fiancé before the accident.

22. Sarah no longer has the ability to understand what other people are feeling from their emotional and physical cues. The social graces she lived and learned are obliterated. Sarah's brain injury has reduced her capacity for empathy. Sarah will have difficulty with relationships. It is hard to maintain a relationship or be a good partner when one cannot understand or respond to social cues.

This impact of Sarah's injury has already occurred. Sarah and her fiancé called off the engagement. Sarah's friends have slowly retreated. Only Sarah's best friend and family have maintained their bond with her. This injury results in loneliness and depression. In 2019, Sarah was suicidal. Her parents moved Sarah into their house for two months.

23. Sarah just wants to be normal. She is embarrassed by her limitations and does not want people to know she has a brain injury.

24. Sarah experiences anosognosia, which is a denial of deficit. This is a common result of her type of brain injury. Sarah denies that she cannot accomplish some tasks and she attempts to mask some of her disabilities.

25. Sarah has her driver's license and drives. However, her driving abilities are restricted. Sarah drives only to familiar places and mostly during the day. Her family is both appreciative and concerned. Sarah's family appreciates the independence the driver's license affords Sarah in her now restricted world. Their concern stems from Sarah's limited understanding of problem solving and left side deficit. Sarah will sit at an uncontrolled intersection for as long as it takes to have an absolute clear lane of traffic. She has a difficult time judging distances and does not want to place herself at risk. While this can work with low volume traffic, it can be problematic with Bozeman's busy streets and Montana's winter weather.

26. Sarah purchased a condominium before the accident. She lives alone but is not independent. Sarah's family provides significant support. Sarah's mother engages in Sarah's daily planning, assisting with Sarah's appointments and personal needs. Sarah's dad helps with property maintenance and serves as her financial fiduciary. Sarah's sister helps with creative ways to keep Sarah engaged and active.

27. Sarah is unable to be competitively employed due to the extent of her cognitive problems. Sarah volunteers on a limited basis. She spends an hour a week as a CAP mentor and an hour a week with the elderly. Her volunteer work does not suggest she is employable. Sarah's limited volunteer work helps her address symptoms of loneliness and depression.

28. Because of Sarah's cognitive deficits, Sarah cannot prepare and plan healthy meals. Sarah's mother has tried to create easy to follow recipes for Sarah to use without her mother's help. Sarah cannot follow the written steps necessary to shop, assemble, and cook a basic recipe. Her brain is unable to process the multiple steps involved with cooking. As a consequence, Sarah eats premade snacks, meals, and salads where only a refrigerator and microwave are needed.

29. Dr. Dawn Osterweil is a clinical and neurological psychologist with a focus on patients with brain injury. Dr. Osterweil assessed Sarah and found Sarah has the following:

a. A major neurocognitive disorder (formerly called dementia) due to traumatic brain injury;

b. A major depressive disorder, recurrent; and,

c. Other specified anxiety disorder.

Sarah is functioning in a range that qualifies as dementia. Dr. Osterweil found Sarah will make no further improvements going forward. Sarah will only get worse, not better. The care, support, and therapy recommendations for Sarah are meant to help Sarah preserve the limited amount of independence she has found for as long as possible.

30. Physical Medicine & Rehabilitation Specialist Deborah Doherty, MD prepared a lifecare plan and made recommendations based upon Sarah's medical/physical/psychological deficits. Dr. Doherty outlined Sarah's future needs to cope and address her physical limitations and cognitive dysfunction all related to her brain injury. This includes the following:

a. Sarah will need treatment from the physicians and caregivers that include primary care/internist, physical medicine and rehabilitation, psychiatrist, orthopedist, neurologist, neuro-ophthalmologist, ear nose and throat, neurosurgeon, sleep specialist, dietician, optometrist, acupuncturist, yoga, neuropsychologist, physical therapy, massage therapist, occupational therapy, speech therapy, and vocational therapy.
b. Sarah will have emergency room/urgent care visits and hospitalizations.
c. Sarah will need safety equipment, cognitive aids, and therapy equipment.
d. Sarah will need medication to treat depression, treat anxiety, help her sleep, and help with concentration and focus.
e. Sarah will need to attend brain injury conferences.
f. Sarah will need a gym membership to maintain her PT program.
g. Sarah will need help with transportation for the times she is unable to drive.
h. Sarah will need case management service and personal care attendant services to assist her in daily living activities.
i. Sarah will need a handyman or other all-purpose helper for household jobs beyond her capability.
j. Sarah will need a fiduciary to manage her finances.

31. Carol Hyland is a rehabilitation case manager and assessed the financial costs associated with Dr. Doherty's life care plan. Dr. Doherty recommended Sarah secure a cooking coach to help her make and plan meals. Ms. Hyland misunderstood Dr. Doherty's recommendation for a cooking coach and instead included the services of a chef. Ms. Hyland recommended Sarah have a personal chef 1 ½ hours per week. A

personal chef is able to serve the same purpose as a cooking coach at 1 ½ hours per week. The assessed cost for a chef is reasonable.

32. Dr. Doherty recommended and Carol Hyland assessed the cost of nanny services. This inclusion assumes Sarah will have children. Sarah's family testified that Sarah always wanted to be a mother. Sarah is physically capable of having children and is certainly capable of loving children. However, Sarah's brain injury renders her unable to safely care for children. Sarah dreamed of becoming a mother prior to her injury. However, in light of the life and dream altering reality Sarah now faces, the cost of a nanny in the Life Care Plan is speculative. The present value estimate for services of a nanny are estimated to be $1,227,188.00. Nanny services are speculative and are not reasonable.

33. Prior to the accident, Sarah enjoyed taking photos and planned to start her own photography business. At the time of the accident, Sarah was employed as a nanny. Sarah had given notice to her employer. She intended to start her photography business in the spring of 2017. Sarah continues to take photos and is auditing classes at Montana State University. She is unable to operate a business.

34. Defendant Gallatin County did not present their own life care plan, value calculation, expert testimony or witnesses on Plaintiff's damages instead choosing to rely on select issues for cross examination.

35. The parties stipulate that Sarah has incurred medical bills and expenses in the amount of $777,626.61.

36. Doug Abbot, PhD (Abbot) calculated the present value of Sarah's lost wages and benefits. The average wage for a photographer in the State of Montana is

$29,280.00 per year. This wage equates to $14.00 per hour. The estimated present value of the Sarah's lost wages and benefits based upon the State of Montana's average wage is $870,067.00. The County contends the high earner photographers across the State have skewed the hourly rate. However, the average annual salary for a photographer in Bozeman, Montana is $51,000.00 per year, well above the State of Montana's average salary. Utilizing the State of Montana's average salary of $29,280.00 is reasonable. The reasonable present value for Sarah's lost wages and benefits is $870,067.00.

37. Abbot calculated the reasonable present value of future services for Sarah in the amount of $4,989,560.50. This is the average of the low and high-cost alternatives calculated by Abbot. Nanny services are removed, reducing the reasonable present value of future services for Sarah to $3,762,372.50.

38. Based on the evidence presented at trial the reasonable value for Sarah's past and future physical pain and suffering is $1,500,000.00.

39. Based on the evidence presented at trial the reasonable value for Sarah's past and future emotional distress is $1,500,000.00.

40. Based on the evidence presented at trial the reasonable value for Sarah Daniels' loss of course of life is $4,000,000.00.

41. Plaintiff's total damages are $12,410,066.11.

Based on the Foregoing Finds of Fact, the Court makes the following:

CONLUSIONS OF LAW

1. The parties admit and agree, and this Court concludes, that Defendant

Blackwood was negligent.

2. The parties admit and agree, and this Court concludes, that Defendant Blackwood's negligence caused injury to Sarah Daniels.

3. The parties admit and agree, and this Court concludes, that Defendant Gallatin County is legally liable for Defendant Blackwood's negligence

4. It was foreseeable that Defendant Blackwood's conduct would cause injury to Sarah Daniels.

5. The snowplow slicing into Sarah's car caused the injuries described in the findings of fact.

6. Ms. Daniels's damages include the reasonable value of necessary care, treatment, and services received and those reasonably probable in the future. *Meek v. Montana Eighth Jud. Dis. Court,* 2015 MT 130, ¶12, 379 Mont. 150, 349 P.3d 493; *Tynes v. Bankers Life Co.*, 224 Mont. 350, 730 P.2d 1115 (1987). This element of damage includes the reasonable value of any service, whether paid or not, which Sarah would normally have performed for herself or others, but can no longer perform. *Kuhnke v. Fisher*, 210 Mont. 114, 683 P.2d 916 (1984).

7. Sarah's damages include the reasonable value of any loss sustained to date and in the future based on Sarah's inability to pursue an occupation. *Walls v. Rue*, 233 Mont. 236, 759 P.2d 169 (1988); *Tynes*, 224 Mont. 350, 730 P.2d 1115 (1987); *Smith-Carter v. Amoco Oil Co.*, 248 Mont. 505, 813 P.2d 405 (1991).

8. Sarah's damages include reasonable compensation for any pain and suffering. The law does not set a definite standard by which to calculate compensation for mental and physical pain and suffering. The compensation must be just and

reasonable. *Tynes,* 224 Mont. 350, 730 P.2d 1115 (1987). *Johnson v. Murray*, 201 Mont. 497, 656 P.2d 170 (1982).

9. Sarah's damages include reasonable compensation for any mental and emotional suffering she experiences and is likely to experience in the future. The law does not set a definite standard to calculate compensation of emotional distress. This element of damages includes all highly unpleasant mental reaction, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea. There is no requirement that any witness express an opinion as to the amount of compensation required. The compensation must by just and reasonable. MPI2d.25.02, adopted by the Montana Supreme Court in *Ammondson v. Northwest Corp*, 2009 MT 331, ¶ 76, 353 Mont. 28, 220 P.3d 1; *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 66, 351 Mont. 464, 215 P.3d 649.

10. Sarah's damages include the loss of ability to purse an established course of life which compensates her for the impairment of the ability to pursue one's chosen pursuits in life, separate from the loss of earning capacity. *Henricksen v. State*, 2004 MT 20, ¶ 76, 319 Mont. 307, 84 P.3d 38. The claim need not be premised on a physical limitation. *Id.* Sarah's permanent injuries preclude her from pursuing her established course of life as an active wife, mother, sister, friend, and professional photographer.

11. The Court incorporates into these Conclusions of Law the damages from Findings of Fact paragraphs 35, 36, 37, 38, 39, 40 and 41 and concludes the damages are reasonable.

ORDER

1. Plaintiff is entitled to judgment against Defendant Gallatin County in the

amount of $12,410,016.11.

2. By separate order filed concurrently with these Findings of Fact, Conclusions of Law and Order, the Court denied Plaintiff's Motion for Supplemental Relief.

3. Within 5 days of the date of this Order, Plaintiff shall submit a proposed judgment in conformance with this Order and the Order Denying Motion for Supplemental Relief.

DATED the 10 day of March 2021.

Rienne H. McElyea
District Court Judge

c: Jonathan M. Cok / Travis W. Kinzler/ Martha Sheehy
Roger T. Witt /James R. Zadick
Peter F. Habien / Pamela C. Garman

emailed 3/11/21 mb

Tab 6

March 10, 2021 Order Denying Motion for Supplemental Relief (Doc. 157)

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

* * * * * * * * * * *

DON DANIELS, as conservator of the Estate of SARAH DANIELS

Plaintiff,

v.

GALLATIN COUNTY, ATLANTIC SPECIALITY INSURANCE COMPANY, RICK BLACKWOOD and JOHN DOES I-V,

Defendants.

Cause No. DV-18-17B

Hon. Rienne H. McElyea

ORDER DENYING MOTION FOR SUPPLEMENTAL RELIEF

This matter came before the Court for a non-jury trial on November 16, 2020. Travis W. Kinzler and Jonathan M. Cok of Cok Kinzler, PLLP, and Martha Sheehy, Sheehy Law Firm, represented the Plaintiff. Roger T. Witt and James R. Zadick from Ugrin Alexander Zadick, P.C. represented Defendants Gallatin County and Rick Blackwood. Defendant Atlantic Specialty Insurance Company did not participate in the trial.

After the conclusion of the trial, Plaintiff filed a Motion for Supplemental Relief. Plaintiff requests the Court entered judgment in favor of Plaintiff directly against Defendant Atlantic Specialty Insurance Company "ASIC." Plaintiff contends Plaintiff is

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entitled to the requested relief pursuant to the Claim for Declaratory Relief as stated in the Amended Complaint as Count One. Plaintiff also requests the language of the judgment comport with the request for supplemental relief and reflect the terms of the stipulation reached between Defendant Gallatin County and Plaintiff.

ASIC objects to Plaintiff's Motion for Supplemental Relief. ASIC contends Plaintiff did not allege any direct relationship in the Amended Complaint that would give rise to ASIC having a first party coverage obligation in favor of Plaintiff. Further, ASIC argues Plaintiff's motion fails to support a proper application for supplement relief pursuant to § 27-8-313, MCA.

§ 27-8-313, MCA, states:

> **Supplemental relief.** Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by a declaratory judgment or decree to show cause why further relief should not be granted forthwith.

Count I, Declaratory Relief, is the only count directly against ASIC. ASIC filed a Motion to Dismiss, or in the Alternative Motion to Bifurcate on February 22, 2019. This Court denied ASIC's Motion on May 6, 2019 and reasoned,

> In this case, the declaratory judgment claim merely seeks ruling as to coverage available to compensate Plaintiff under the insurance contract. This is an issue of law to be decided by the Court. *Cusenbary v. United States Fid. & Guar. Co.*, 2001 MT 261, ¶ 9, 307 Mont. 238, 37 P.3d 67. No trial will be necessary. Therefore, the Court finds that bifurcation is unnecessary.

The law of this case limited ASIC's involvement to an issue of law. The Court determines supplemental relief pursuant to § 27-8-334, MCA, is not appropriate in this case.

IT IS HEREBY ORDERED that Plaintiff's Motion for Supplemental Relief is **DENIED.**

DATED the 10 day of March 2021.

Rienne H. McElyea
District Court Judge

c: Jonathan M. Cok / Travis W. Kinzler/ Martha Sheehy
Peter F. Habien / Pamela C. Garman
Roger T. Witt / James R. Zadick

emailed 3/11/21

Tab 7

March 16, 2021 Judgment (Doc. 160)

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

DON DANIELS, as conservator for the Estate of SARAH DANIELS,

Plaintiff,

-vs-

GALLATIN COUNTY, ATLANTIC SPECIALTY INSURANCE COMPANY, RICK BLACKWOOD and JOHN DOES I-V,

Defendants.

Cause No. DV 18-17B
Hon. Rienne H. McElyea

JUDGMENT

Pursuant to previous orders issued in this case and the Findings of Fact and Conclusions of Law issued March 10, 2021, the Court hereby enters the following Judgment:

On Plaintiff's declaratory judgment claim, judgment is entered in favor of the Plaintiff and against Atlantic Specialty Insurance Company, with the Court finding, "the Policy's stated limits of $1.5 million in auto coverage and $5 million in excess coverage are available to indemnify the County for Daniels' claim."

On Plaintiff's negligence claim against Gallatin County, this Court has ordered that "Plaintiff is entitled to judgment against Gallatin County in the amount of $12,410,016.11." Gallatin County is entitled to an offset of $750,000.00 for amounts already paid. Judgment is entered for the Plaintiff and against Gallatin County in the amount of $11,660,016.11.

DATED this 16 day of March 2021.

Hon. Rienne H. McElyea
District Court Judge

c: Peter Habein/Pamela Garman
Roger Witt/James Zadick
Jonathan Cok/Travis Kinzler/Martha Sheehy emailed 3/17/21

CERTIFICATE OF SERVICE

I, Peter F. Habein, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 10-18-2021:

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Electronically Signed By: Peter F. Habein
Dated: 10-18-2021