

IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CAUSE NO. DA 23-0742

TOM and CAROL WILLIS,

Plaintiffs/Appellees,

v.

CLIFFTON OPPEGAARD,

Defendant,

and

WESTERN NATIONAL MUTUAL INSURANCE
COMPANY,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

On appeal from the Montana Thirteenth Judicial District, In and for the County of
Yellowstone, Cause No. DV-56-2020-0001647-PI; Honorable Ashley Harada

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STATEMENT OF THE ISSUES

Whether the District Court erred in denying Western National's Rule 60(b)(6) motion to set aside and vacate its earlier *Order Regarding Ridley Payments* when it subsequently ruled that the defendant's liability is not reasonably clear?

STATEMENT OF THE CASE

This lawsuit was filed on December 23, 2020, and arises out of an automobile accident which occurred on August 12, 2019. Named as defendants in the action were Clifton Oppegaard, the driver of one of the vehicles, and Mr. Oppegaard's automobile liability insurer, Western National Mutual Insurance Company ("Western National"). With respect to the claim against Western National, the plaintiffs sought a declaratory ruling that Western National is presently obligated to pay all outstanding medical bills incurred from the accident. *Complaint*, ¶ 12 [*Clerk's Record (CR) 1*].

On March 31, 2021, the plaintiffs filed a motion for partial summary judgment on *Ridley [v. Guaranty Nat'l Ins. Co., 286 Mont. 325, 951 P.2d 987 (1997)]* obligation to advance pay medical bills. *Plaintiffs' Motion for Partial Summary Judgment on Ridley Obligation to Pay Medical Expenses [CR 12]*. The plaintiffs argued that Western National was required to advance pay medical bills, even though they were already paid by Medicare or another third-party payor. *Id.*

Western National opposed the motion and argued that the plaintiffs are not entitled to advance payment of medical bills that were already paid by other sources. [CR 17].

On June 22, 2021, the District Court granted *in part* the plaintiffs' motion for partial summary judgment on *Ridley* obligation. The Court's *Order Regarding Ridley Payments* was narrowly tailored to require advance *Ridley* payments of medical bills over which Medicare was actively exercising its subrogation rights:

In this case, Plaintiffs are receiving notices from the U.S. Treasury and garnishment of social security benefits is occurring. Therefore, *Ridley's* advance payment requirement applies to the facts in this case. Plaintiffs should not be placed in a situation where their social security checks are being garnished and there is financial stress or duress while this matter is being resolved.

Order Regarding Ridley Payments, June 22, 2021, p. 4 [CR 26; *Western National Appx. A*].¹

On March 16, 2021, the plaintiffs filed a motion for partial summary judgment on the issue of accident liability, seeking dismissal of defendant Oppegaard's affirmative defense of comparative fault on the part of the plaintiff Tom Willis. *Plaintiffs' Motion for Partial Summary Judgment on the Issue of Accident Liability* [CR 8]. The defendants Oppegaard and Western National opposed the motion and argued that Mr. Willis violated § 61-8-209(1)(b), MCA,

¹ The plaintiffs subsequently submitted an interlocutory Judgment on the Order, which the District Court entered on December 30, 2021. [CR 37].

by failing to proceed with caution through a flashing yellow signal as he approached and proceeded into the intersection of 56th Street West and Neibauer Road. [CR 10, 16]. Documentary evidence submitted at the hearing on the motion reflect that Mr. Oppegaard had progressed almost all the way through the intersection before Mr. Willis struck the right rear quarter panel of Mr. Oppegaard's truck. *Id.*

By Order dated September 8, 2021, the District Court denied the plaintiffs' partial summary judgment motion, stating in significant part as follows:

Due to the interplay between the comparative fault statute and the duties each driver had under the traffic code, there exists the possibility a jury could find either party fully or partially at fault for the accident.

Order Denying Plaintiffs' Motion for Summary Judgment on Issue of Liability, September 8, 2021, p. 3 (emphasis added) [CR 35; *Western National Appx. B*].

On September 15, 2022, Western National moved the District Court to set aside and vacate its earlier *Order Regarding Ridley Payments* dated June 22, 2021, and its subsequent interlocutory Judgment as to Western National entered on December 30, 2021, pursuant to Rule 60(b)(6), Mont. R. Civ. P. *Western National's Motion for Rule 60(b)(6) Relief* [CR 53]. The grounds for the motion were that (1) the plaintiffs have failed to identify any medical expenses incurred as a result of the automobile accident on August 12, 2019, over which Medicare was actively exercising its subrogation rights by garnishing the plaintiffs' social

security benefits, and (2) subsequent rulings which have occurred in the case demonstrate that the liability of the insured, defendant Oppegaard, is *not* reasonably clear for purposes of requiring advance payment of medical expenses under *Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997).

The plaintiffs filed a response to the Rule 60(b)(6) motion on September 20, 2022. Western National filed a reply brief in support of its Rule 60(b)(6) motion on September 23, 2022. [CR 57]. The District Court subsequently permitted the parties to file supplemental briefs on the Rule 60(b)(6) motion. [CR 60, 61].

The District Court, however, refused to rule on the Rule 60(b)(6) motion, and the motion was “deemed denied” on November 14, 2022. *See Green v. Gerber*, 2013 MT 35, ¶ 15, 369 Mont. 20, 303 P.3d 729 (“Rule 60(c)(1) . . . provides that if the court fails to rule on the 60(b) motion within 60 days after the motion is filed, ‘the motion must be deemed denied.’”); *see also* Rule 6(3)(b), M.R.App.P. (permitting a party to appeal “a ‘deemed denied’ motion that was made pursuant to Mont.R.Civ.P. . . . 60(b).”).

The plaintiffs’ claims against the defendant Clifton Oppegaard proceeded to a 5-day jury trial on June 12, 2023. The jury ultimately found in favor of the plaintiffs and awarded the plaintiffs the sum of \$750,494.69. *Special Verdict Form* [CR 115; *Western National Appx. G*]. The jury determined that the plaintiff Tom Willis was negligent, but that such negligence was not a cause of his injuries. *Id.*

On June 23, 2023, the defendant Oppegaard moved to reduce the jury verdict by the amount of collateral source payments pursuant to § 27-1-308, MCA. [CR 117]. On December 19, 2023, the District Court granted the motion, in part, and reduced the jury verdict by the sum of \$77,872.01, the amount of advance Ridley payments which had been made by Western National. [CR 126].

The District Court entered a final Judgment in the case on December 20, 2023. [CR 127]. The defendant Western National timely appealed on December 21, 2023.

STATEMENT OF THE FACTS

This lawsuit arises from an automobile accident which occurred on August 12, 2019, at the intersection of Neibauer Road and 56th Street West in Billings, Montana. The defendant Clifton Oppegaard was traveling east on 56th Street West, and the plaintiff Tom Willis was traveling north on Neibauer Road.

The defendant Oppegaard admitted that he entered the intersection without stopping at a flashing red light. The plaintiff Willis, while traveling north on Neibauer Road, was faced with a yellow flashing light, which required that he could only enter and proceed through the intersection with caution pursuant to § 61-8-209(1)(b), MCA. It was alleged that Mr. Willis failed to keep a proper lookout laterally and did not see Mr. Oppegaard approaching the intersection. Documentary evidence submitted to the District Court reflects that Mr. Oppegaard

had progressed almost all the way through the intersection before Mr. Willis struck the right rear quarter panel of Mr. Oppegaard's truck. *Oppegaard Truck Photo [Western National Appx. C]*.

The plaintiffs, Tom and Carol Willis, filed this lawsuit on December 23, 2020. *[CR 1]*. Named as defendants in the action were Clifton Oppegaard and Mr. Oppegaard's automobile liability insurer, Western National. With respect to the claim against Western National, the plaintiffs sought a declaratory ruling that Western National is presently obligated to pay all outstanding medical bills incurred from the accident. *Id.*

On March 31, 2021, the plaintiffs filed a motion for partial summary judgment on the *Ridley [v. Guaranty Nat'l Ins. Co., 286 Mont. 325, 951 P.2d 987 (1997)]* obligation to advance pay medical bills. *Plaintiffs' Motion for Partial Summary Judgment on Ridley Obligation to Pay Medical Expenses [CR 12]*. The plaintiffs argued that Western National was required to advance pay medical bills, even though they were already paid by Medicare or another third-party payor. *Id.* Western National opposed the motion and argued that the plaintiffs are not entitled to advance payment of medical bills that were already paid by other sources. *[CR 17]*.

During a hearing on the partial summary judgment motion, the plaintiffs represented to the District Court that Medicare was actively seeking

reimbursement of the medical bills they had paid by garnishing the plaintiffs' social security benefits. They, however, never presented any foundational documentation to support that representation.

On June 22, 2021, the District Court granted *in part* the plaintiffs' motion for partial summary judgment on Ridley obligation. The Court's *Order Regarding Ridley Payments* was narrowly tailored to only require advance Ridley payments of medical bills over which Medicare was actively exercising its subrogation rights:

In this case, Plaintiffs are receiving notices from the U.S. Treasury and garnishment of social security benefits is occurring. Therefore, Ridley's advance payment requirement applies to the facts in this case. Plaintiffs should not be placed in a situation where their social security checks are being garnished and there is financial stress or duress while this matter is being resolved.

Order Regarding Ridley Payments, June 22, 2021, p. 4 [CR 26; *Western National Appx. A*].²

In an effort to comply with the District Court's Order, Western National promptly served the plaintiffs with defendant Western National's First Discovery Requests on June 24, 2021. [*Western National Appx. D*]. In that discovery, Western National requested (1) that plaintiffs clearly describe all medical expenses which have been paid by Medicare; (2) that plaintiffs identify and produce all notices which Medicare (or any other entity) has asserted a subrogation interest or

² The plaintiffs subsequently submitted an interlocutory Judgment on the Order, which the District Court entered on December 30, 2021. [CR 37].

lien for the medical expenses incurred as a result of the automobile accident on August 12, 2019; and (3) that plaintiffs specifically describe each subrogation or repayment action undertaken against the plaintiffs for medical expenses incurred as a result of the automobile accident. *Id.*

The plaintiffs failed to respond to Western National's discovery requests for over eight (8) months. Finally, after Western National demanded that they respond to the outstanding discovery, the plaintiffs purported to respond to the discovery on March 3, 2022, by submitting a CD which contained 182 pages of assorted documents. There was nothing in the documents produced which identified any medical expenses incurred as a result of the automobile accident on August 12, 2019, over which Medicare was actively exercising its subrogation rights by garnishing the plaintiffs' social security benefits.

Contemporaneously with the foregoing events, the plaintiffs filed a motion for partial summary judgment on the issue of accident liability on March 16, 2021, seeking dismissal of defendant Oppegaard's affirmative defense of comparative fault on the part of the plaintiff Tom Willis. *Plaintiffs' Motion for Partial Summary Judgment on the Issue of Accident Liability [CR 8]*. The defendants Oppegaard and Western National opposed the motion and argued that Mr. Willis violated § 61-8-209(1)(b), MCA, by failing to proceed with caution through a flashing yellow signal as he approached and proceeded into the intersection of 56th

Street West and Neibauer Road. [CR 10, 16]. Documentary evidence submitted at the hearing on the motion reflect that Mr. Oppegaard had progressed almost all the way through the intersection before Mr. Willis struck the right rear quarter panel of Mr. Oppegaard's truck. *Oppegaard Truck Photo [Western National Appx. C]*.

By Order dated September 8, 2021, the District Court denied the plaintiffs' partial summary judgment motion, stating in significant part as follows:

Due to the interplay between the comparative fault statute and the duties each driver had under the traffic code, there exists the possibility a jury could find either party fully or partially at fault for the accident.

Order Denying Plaintiffs' Motion for Summary Judgment on Issue of Liability, September 8, 2021, p. 3 (emphasis added) [CR 35; *Western National Appx. B*].

On September 15, 2022, Western National moved the District Court to set aside and vacate its earlier *Order Regarding Ridley Payments* dated June 22, 2021, and its subsequent interlocutory Judgment as to Western National entered on December 30, 2021, pursuant to Rule 60(b)(6), Mont. R. Civ. P. *Western National's Motion for Rule 60(b)(6) Relief [CR 53]*. The grounds for the motion were that (1) the plaintiffs have failed to identify any medical expenses incurred as a result of the automobile accident on August 12, 2019, over which Medicare was actively exercising its subrogation rights by garnishing the plaintiffs' social security benefits, and (2) subsequent rulings which have occurred in the case demonstrate that the liability of the insured, defendant Oppegaard, is *not*

reasonably clear for purposes of requiring advance payment of medical expenses under *Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997).

The plaintiffs filed a response to the Rule 60(b)(6) motion on September 20, 2022. [CR 55]. In addition to producing a plethora of unnecessary and irrelevant documents, the plaintiffs' response produced for the first-time documents which Western National had requested fifteen (15) months ago in written discovery served upon the plaintiffs. Those documents reflect that Medicare had garnished portions of Tom Willis' social security benefits during a short 3-month period in 2021 in the total amount of \$630.76. [CR 56; *Western National Appx. E*].

Consequently, and in accordance with the District Court's *Order Regarding Ridley Payments*, dated June 22, 2021, Western National promptly issued a check in that amount made payable to Tom Willis.

On September 28, 2022, the District Court held a hearing on Western National's Rule 60(b)(6) motion. During the hearing, it became apparent that the District Court was misapprehending the applicable law in two major respects. First, the Court was under the erroneous impression that advance payment of medical expenses under *Ridley* does not require that the defendant's liability be "reasonably clear." As stated by the Court:

THE COURT: ... *Ridley* payments don't require there to be clear liability; correct? It doesn't have to be - - I mean that's not the purpose of *Ridley* payments; correct?

Hearing Tr., September 28, 2022, p. 3 [CR 59; *Western National Appx. F*].

Second, the Court misapprehended the significance of her holding that issues of fact existed with respect to the comparative fault of the plaintiff Tom Willis in entering the *Court's Order Denying Plaintiffs' Motion for Summary Judgment on Issue of Liability*:

THE COURT: ... When I ruled that there was an issue of fact that needed to go to a jury to determine comparative negligence, did that somehow change the position of Western National Insurance Company that liability was reasonably clear, because you, in recollection, always indicated, and your client, Mr. - - well, not your client, but Mr. Oppegaard pled guilty to running a stop sign. That doesn't mean that Mr. Willis doesn't have some responsibility for the accident, but isn't that a question for the jury?

* * *

... You said that my order saying fully or partially liable was a decision that somehow Mr. Willis is fully at fault; that is not my intention. My intention in my order was to describe a comparative fault in Montana. It was not intended to make any kind of ruling about who was at fault and what percentage they were at fault, because, again, that's a jury issue. That is not something I need to decide, nor would it be appropriate for me to decide that at this juncture so I'm not understanding, again, why you think that I'm saying Mr. Willis is somehow wholly at fault now because I described comparative fault in my order; and again, people get Ridley payments all the time, and the court will deny summary judgment because there are material issues of fact, that's why we have a factfinding jury so - -

MR. MILCH: And they denied the *Ridley* request by the Plaintiff because of that issue of fact, okay. You decided that there's issues of fact as to apportionment of fault between the parties, that, in and of itself, renders a plaintiff's claim for Ridley payments wrong; okay?

Judge, I would like to have a supplemental briefing so I can lay this out, and I'm thinking the Court is not – is misapprehending my argument here.

Hearing Tr., pp. 3, 19-20 [CR 59; *Western National Appx. F*].

At the conclusion of the hearing, the District Court permitted the parties to submit supplemental briefs on Western National's Rule 60(b)(6) motion. Western National submitted its supplemental brief on October 5, 2022. [CR 60].

In its supplemental brief, Western National explained that the duty to advance pay medical bills pursuant to *Ridley* requires an express finding that the insured defendant's liability is "reasonably clear." See *Ridley*, 286 Mont. at 334, 951 P.2d at 992; see also *Dannels v. BNSF Railway Co.*, 2021 MT 71, ¶ 30, 403 Mont. 437, 483 P.3d 495 ("The essence of our holding in *Ridley* is that where liability is reasonably clear, injured victims are entitled to payment of those damages which are not reasonably in dispute without first executing a settlement agreement and final release.") (emphasis added); *High Country Paving, Inc. v. United Fire & Cas. Co.*, 2019 MT 297, ¶ 17, 398 Mont. 191, 454 P.3d 1210 ("As we have recognized since our 1997 decision in *Ridley*, and have consistently reaffirmed in the years since, insurers have a duty to advance-pay an injured third party's medical expenses when liability is reasonably clear.") (emphasis added); *Shilhanek v. D-2 Trucking*, 2003 MT 122, ¶ 16, 315 Mont. 519, 70 P.3d 721 ("Pursuant to *Ridley*, insurers are obligated to pay an injured third party's medical

expenses prior to final settlement when liability for such expenses is reasonably clear.”) (emphasis added).

In its supplemental brief, Western National also explained why the insured Cliff Oppegaard’s liability was *not* “reasonably clear” for purposes of requiring the continued advance payment of medical expenses in this case. It was pointed out that the Court’s determination during the Rule 60(b) hearing that the apportionment of fault between the parties in this case is a matter for the jury was entirely correct. However, if the facts in the case would permit a jury to apportion comparative fault to the plaintiff, as the District Court expressly concluded was the case in its *Order Denying Plaintiffs’ Motion for Summary Judgment on Issue of Liability*, the liability of the defendant is not “reasonably clear” for purposes of requiring advance payment of medical expenses under *Ridley*. See *Giambra v. Travelers Indem. Co.*, 2003 MT 289, ¶ 16, 318 Mont. 73, 78 P.3d 880 (where issues of fact exist as to the defendant’s negligence and the plaintiff’s comparative negligence, “[the defendant’s] liability is not reasonably clear, and [the insurer] has no obligation under *Ridley* to advance payment of [plaintiff’s] medical expenses.”); *Pruitt v. St. Paul Fire & Marine Ins. Co.*, 2006 U.S. Dist. LEXIS 101722, at **7-8 (D. Mont. Jan. 10, 2006) (“Factual issues surrounding Plaintiff’s own negligence compel a finding that [defendant’s] liability was not reasonably clear, and that [the insurer] has no obligation under *DuBray* to advance pay Plaintiff’s lost wages.”)

(citing *Giambra*, 78 P.3d 880, 882 (Mont. 2003)).

The plaintiffs submitted a Response to Western National’s Supplemental Brief in Support of Rule 60(b)(6) Motion. [CR 61]. Their response was entirely rhetorical, encompassing a total of five (5) sentences, and made no effort whatsoever to challenge the legal points being made in Western National’s supplemental brief. *Id.*

The District Court, however, refused to rule on Western National’s Rule 60(b)(6) motion, and the motion was “deemed denied” on November 14, 2022. *See Green v. Gerber*, 2013 MT 35, ¶ 15, 369 Mont. 20, 303 P.3d 729 (“Rule 60(c)(1) . . . provides that if the court fails to rule on the 60(b) motion within 60 days after the motion is filed, ‘the motion must be deemed denied.’”); *see also* Rule 6(3)(b), M.R.App.P. (permitting a party to appeal “a ‘deemed denied’ motion that was made pursuant to M.R.Civ.P. . . . 60(b).”).

STANDARD OF REVIEW

“Our standard of review of a district court’s ruling on a motion pursuant to M. R. Civ. P. 60(b) depends on the nature of the final judgment, order, or proceeding from which relief is sought and the specific basis of the Rule 60(b) motion.” *Essex Ins. Co. v. Moose’s Saloon, Inc.*, 2007 MT 202, ¶ 16, 338 Mont. 423, 166 P.3d 451. As a general rule, and under the facts of this case, the abuse of discretion standard applies. *Essex Ins. Co.*, ¶ 16. An abuse of discretion occurs if

a court exercises discretion “based on a clearly erroneous finding of material fact, an erroneous conclusion or application of law, or otherwise acts arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice.” *In re Marriage of Bessette*, 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894 (internal quotations and citation omitted).

ARGUMENT

A. Summary of the Argument.

On September 15, 2022, Western National filed a motion pursuant to Rule 60(b)(6), Mont. R. Civ. P., requesting that the District Court set aside and vacate its earlier *Order Regarding Ridley Payments*, dated June 22, 2021. The grounds for the motion were that the Court’s subsequent *Order Denying Plaintiffs’ Motion for Summary Judgment on Issue of Liability*, dated September 8, 2021, specifically concluded that issues of fact exist regarding the plaintiff Tom Willis’ own comparative negligence in the case. In fact, the District Court concluded as follows: “Due to the interplay between the comparative fault statute and the duties each driver had under the traffic code, there exists the possibility a jury could find either party fully or partially at fault for the accident.” (Emphasis added). As such, and as a matter of law, it simply cannot be said that defendant Oppegaard’s liability is “reasonably clear” for purposes of requiring advance payment of medical expenses under *Ridley v. Guaranty Nat’l Ins. Co.*, 286 Mont. 325, 951

P.2d 987 (1997), and “for reasons of fairness and equity” under Rule 60(b)(6), *Wagenman v. Wagenman*, 2016 MT 176, ¶ 11, 384 Mont. 149, 376 P.3d 121, the District Court erred in refusing to set aside and vacate its earlier *Order Regarding Ridley Payments*.

B. The District Court Erred in Refusing to Set Aside and Vacate its Earlier Order Regarding Ridley Payments.

Western National sought post-judgment relief from the District Court pursuant to Rule 60(b)(6), which provides in relevant part as follows:

Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: ... (6) any other reason that justifies relief.

Mont. R. Civ. P. 60(b)(6).³ To obtain relief under Rule 60(b)(6), the moving party must show that “something prevented a full presentation of the cause or an accurate determination of the merits that for reasons of fairness and equity redress is justified.” *Wagenman v. Wagenman*, 2016 MT 176, ¶ 11, 384 Mont. 149, 376 P.3d 121 (*quoting In re Orcutt*, 2011 MT 107, ¶ 11, 360 Mont. 353, 253 P.3d 884). The Rule “is designed to be applied primarily as an exception to the finality of a judgment where a party was wronged through no fault of its own.” *Id.* at ¶ 11 (*quoting In re Marriage of Hopper*, 1999 MT 310, ¶ 29, 297 Mont. 225, 991 P.2d 960). The moving party must show the following elements: (1) extraordinary

³ It is readily apparent that none of the provisions in Mont.R.Civ.P 60(b)(1)-(5) apply to the undisputed facts of this case. Western National does not claim that a mistake, neglect, or fraud occurred, or that the case involves newly discovered evidence or a void or discharged judgment.

circumstances; (2) the movant acted to set aside judgment or order within a reasonable time; and (3) the movant was blameless. *Id.* at ¶ 12.

All the requisite elements for Rule 60(b) relief were clearly satisfied in this case. There can be no question that “extraordinary circumstances” existed in this case. In its earlier *Order Regarding Ridley Payments*, the Court granted, in part, the plaintiffs’ motion for partial summary judgment on *Ridley* obligation. In doing so, the Court necessarily determined that the defendant Oppegaard’s liability was “reasonably clear.”⁴ The Court’s subsequent *Order Denying Plaintiffs’ Motion for Summary Judgment on Issue of Liability*, wherein the Court specifically concluded that issues of fact exist regarding the plaintiff’s own comparative negligence, however, effectively nullified the earlier *Order Regarding Ridley Payments*. The unique factual situation which exists in this case plainly constitutes “extraordinary circumstances.”

The second element of a Rule 60(b)(6) motion, which requires the movant to act within a “reasonable time,” was clearly present in this case as well. The Montana Supreme Court discussed Rule 60(b)(6)’s “reasonable time” element in

⁴ The fact that Western National did not originally challenge the issue of whether liability is reasonably clear and, in fact, had at that time advance paid medical expenses under *Ridley* in this case in the amount of \$67,674.60 does not prohibit Western National from subsequently requesting that the District Court set aside and vacate its earlier *Order Regarding Ridley Payments*. See *Depositors Ins. Co. v. Sandidge*, 2022 MT 33, ¶ 21, 407 Mont. 385, 504 P.3d 477 (recognizing that there exists no authority “for the position that when an insurance company makes any advance payments, it is unalterably conceding that its insured’s liability is reasonably clear.”).

In re Marriage of Waters, 223 Mont. 183, 724 P.2d 726 (1986), stating as follows:

What is a reasonable time will depend on the particular facts of the individual case. Questions of timeliness under the rule are addressed to the sound discretion of the court, and the court's judgment will be overturned only upon a showing of abuse of discretion. Relevant to the determination of timeliness is prejudice to the party opposing the motion and the basis for the moving party's delay.

Waters, 223 Mont. at 189, 724 P.2d at 730 (citations omitted).

Here, after the District Court issued its *Order Regarding Ridley Payments* on June 22, 2021, Western National promptly served the plaintiffs with Defendant Western National's First Discovery Requests on June 24, 2021. In that discovery, Western National requested that the plaintiffs produce documentation which identified medical expenses over which Medicare was actively exercising its subrogation rights by garnishing the plaintiffs' social security benefits, so that Western National could comply with the Court's *Order Regarding Ridley Payments*.

The plaintiffs utterly ignored and made no attempt to even respond to the discovery for over eight (8) months. Even after Western National threatened to move to compel, and seek its attorney's fees in doing so, the plaintiffs still failed to produce any documentation demonstrating that Medicare was actively exercising its subrogation rights by garnishing the plaintiffs' social security benefits. Even as late as the deposition of Tom Willis on July 18, 2022, the plaintiffs were claiming that such documentation existed. *See Defendant Western National's Reply Brief in*

Support of Rule 60(b)(6) Motion, pp. 4-5 [CR 57]. Nevertheless, and despite yet another request during the deposition that they provide Western National with those documents, no responsive documents were produced.

Finally, and only after exhausting all attempts to obtain documentation which demonstrated that Medicare was actively garnishing the plaintiffs' social security benefits so that Western National could comply with the Court's *Order Regarding Ridley Payments*, did Western National ultimately move to set aside the Court's Order on September 15, 2022, pursuant to Rule 60(b)(6). Thus, under "the particular facts of [this] case," Western National's motion was timely. *Waters*, 223 Mont. at 189, 724 P.2d at 730. Moreover, the plaintiffs never claimed that they were prejudiced by the timing of Western National's Rule 60(b)(6) motion. *See id.* ("Relevant to the determination of timeliness is prejudice to the party opposing the motion"). Indeed, and as the District Court was informed during the hearing on the Rule 60(b) motion, Western National had at that time advance paid Mr. Willis' medical expenses in the amount of \$67,674.60, as well as paid an additional \$630.76 to compensate Mr. Willis for Medicare's wrongful garnishment of his social security benefits. *Hearing Tr.*, September 28, 2022, pp. 4, 8, 9 [CR 59; *Western National Appx. F*]. If anything, the plaintiffs clearly benefited from any purported delay in the filing of Western National's Rule 60(b)(6) motion.

Finally, no blame can properly be attributed to Western National with

respect to the procedural posture of this case. *In re Marriage of Orcutt*, 2011 MT 107, ¶ 15, 360 Mont. 353, 253 P.3d 884 (“Rule 60(b)(6) ... is designed primarily for situations where a party is wronged through no fault of its own.”) Even before Western National retained the undersigned to represent it in this declaratory action, Western National chose not to challenge the issue of whether liability was reasonably clear in this case, and Western National was content with advance payment of Mr. Willis’ medical expenses under *Ridley*. Western National opposed the plaintiffs’ motion for partial summary judgment on *Ridley* obligation – which briefing ultimately culminated in the Court’s *Order Regarding Ridley Payments* – only to the extent that the plaintiffs were arguing that Western National must advance pay medical bills which had already been paid by other sources.

Ironically, it was the plaintiffs who chose to upset the proverbial apple cart and place the issue of Mr. Willis’ own comparative negligence squarely before the District Court when they moved for partial summary judgment on the issue of accident liability, seeking dismissal of defendant Oppegaard’s affirmative defense of the plaintiff’s comparative fault. Thus, it was the plaintiffs’ own motion which ultimately resulted in the District Court’s finding that issues of fact existed with respect to Mr. Willis’ comparative negligence in this case. *See Order Denying Plaintiffs’ Motion for Summary Judgment on Issue of Liability*, p. 3 (“Due to the interplay between the comparative fault statute and the duties each driver had

under the traffic code, there exists the possibility a jury could find either party fully or partially at fault for the accident.”) (emphasis added) [*CR 35; Western National Appx. B*]. Based upon that finding, and as a matter of law, the defendant Oppegaard’s liability is *not* “reasonably clear” for purposes of requiring advance payment of medical expenses under *Ridley*. Consequently, and “for reasons of fairness and equity,” *Wagenman*, ¶ 11, the District Court plainly erred in failing to set aside and vacate its earlier *Order Regarding Ridley Payments* pursuant to Rule 60(b)(6), Mont. R. Civ. P.

CONCLUSION

For the reasons set forth herein, and based on established law, the District Court plainly abused its discretion in refusing to rule upon and deeming denied Western National’s Rule 60(b)(6) motion to set aside and vacate its *Order Regarding Ridley Payments*.

Dated this 5th day of February, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a), Mont. R. App. P. I certify that the foregoing brief is printed with a proportionately-spaced Times New Roman text typeface of 14 points, is double-spaced, and the word count as calculated by Microsoft Word is 4936 words, excluding caption, table of contents, table of citations, certificates of service and compliance.

/s/ Steven R. Milch
Steven R. Milch

CERTIFICATE OF SERVICE

I hereby certify that on the 5th of February, 2024, I electronically filed the foregoing with the Clerk of Court for the Supreme Court of the State of Montana, by using the Okta filing system. I certify that all participants in the case are registered eService users and that service will be accomplished by the Okta Filing System.

/s/ Steven R. Milch _____
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CERTIFICATE OF SERVICE

I, Steven Robert Milch, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-05-2024:

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