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

TOM and CAROL WILLIS,
Plaintiffs and Appellees,
v.
CLIFFTON OPPEGAARD,
Defendant, and
WESTERN NATIONAL MUTUAL INSURANCE COMPANY,
Defendant and Appellant.

On Appeal from the Thirteenth Judicial District
Yellowstone County Cause No. DV-56-2020-0001647-PI,
Honorable Ashley Harada

APPELLEES TOM and CAROL WILLIS'S COMBINED ANSWER BRIEF and BRIEF IN SUPPORT OF WILLIS'S MOTION TO DISMISS

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STATEMENT OF THE ISSUES

1. Whether an appeal of a district court's order requiring Western National Mutual Insurance Company ("Western National") to advance pay medical expenses is moot when (a) Western National judicially admitted that liability was reasonably clear; (b) "reasonably clear" liability has subsequently been established by a jury; and (c)Western National has paid the judgment in full.

2. Whether the district court abused its discretion in denying Western National's Rule 60(b)(6) motion when Western National failed to provide any applicable legal support for its change in position and when Western National failed to demonstrate any of the threshold requirements to allow extraordinary relief.

STATEMENT OF THE CASE

On August 12, 2019, Western National's insured, Cliffton Oppegaard, ran a stop sign at speeds over 50 miles per hour while driving east at the intersection of Neibauer Road and 56th Street West in Yellowstone County, Montana. Oppegaard's failure to stop caused a collision with Tom Willis ("Willis"), who was driving north on 56th Street. (Order, App. A, p. 1). Willis was grievously injured, requiring numerous surgeries and lifelong pain. (App. A, p. 1; App. G).

Oppegaard admitted to running the stop sign and pled guilty to violation of § 61-8-344(3), Mont. Code Ann. (Order, App. B, p. 2; CR 55, Ex. A).

On December 23, 2020, Willis filed suit against both Oppegaard and Western National. In addition to the negligence claim asserted against Oppegaard, Willis separately sought a declaration judgment that "Western National is presently obligated to pay all outstanding medical bills incurred from the accident" pursuant to *Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997). (Complaint, Supp. App. H, ¶ 12).

On March 15, 2021, in response to a Request for Admission, Western National unequivocally admitted that Oppegaard's "liability for the accident is reasonably clear." (Request for Admission 13, CR 13, Supp. App. I).

On June 22, 2021, the district court granted summary judgment to Willis on the *Ridley* claim, based in large part on Western National's judicial admission "that liability is reasonably clear for the purposes of invoking the '*Ridley*' obligation to pay medical bills." ("the *Ridley* Order," App. A, p. 1, line 25). Judgment was entered against Western National on the *Ridley* claim on December 30, 2021. (CR 37). On September 8, 2021, the district court denied summary judgment to Willis on the negligence claim against Oppegaard. (App. B, "the summary judgment order"). The district court determined that issues of fact

existed as to the degree of Willis's comparative fault, "if any." (App. B, p. 3).

On September 15, 2022, Western National moved pursuant to Montana Rule of Civil Procedure 60(b)(6) to set aside the *Ridley* Order. (CR 52). Willis established that the insurer had not withdrawn its concession that liability was reasonably clear. (CR 47, p. 2). The district court heard argument on September 28, 2023. (App. F). The motion was deemed denied without a written order after the passage of 60 days. Rule 60(c)(1), M.R.Civ.P.

Willis's negligence claim against Oppegaard was tried to a jury from June 16, 2023 to June 21, 2023. (CR 107-112). The trial court determined that Oppegaard was negligent as a matter of law; the jury allocated 98% of fault to Oppegaard, and awarded damages of $750,494.64. (Verdict, App. G). On December 19, 2023, the district court ordered adjustments to the amount of the verdict. (CR 126). On December 20, 2023, the district court entered judgment against Oppegaard in the amount of $710,782.34. (CR 127).

By June 22, 2023, Western National had made *Ridley* payments of $77,872.01. (CR 117 , Ex. C, ¶ 2). On January 4, 2024, Western National paid the monetary judgment against Oppegaard in full. (Supp. App. L). Willis acknowledged satisfaction of both the judgment against Western National and the judgment against Oppegaard on February 5, 2024. (Supp. App. L).

On December 21, 2023, Western National filed Notice of Appeal from the final judgment against Oppegaard and all preceding orders. (CR 129). Oppegaard does not appeal.

STATEMENT OF THE FACTS

This appeal is the latest in a long string of attempts by Western National to excuse its protracted refusal to make advance medical payments pursuant to *Ridley*. Indeed, from the outset of the case, Western National unequivocally admitted that Oppegaard's liability was reasonably clear. (Supp. App. I; App. A). Yet Western National refused to take responsibility for Willis's medical expenses. Why? Western National would prefer to reimburse Medicare at the end of the case, with Medicare paying medical expenses at a much lower rate than the private insurer would be billed. Yet because of Western National's recalcitrance, Willis's social security payments were garnished and the United States Treasury was threatening legal action for reimbursement. (App. B, p. 3; Supp. App. J).

Willis brought this declaratory claim to establish Western National's (then) **present** obligation to pay all outstanding medical bills incurred from the accident. (Supp. App. H, ¶ 12). As soon as Willis obtained Western National's admission in discovery that its insured's liability was reasonably clear, Willis immediately moved for summary judgment on the *Ridley* claim. (CR 12). Western National

opposed the motion, arguing only that *Ridley* does not apply if another insurer – in this case, Medicare – is paying the medical bills. (CR 17; Tr., Supp. App. K, p. 15). The district court granted summary judgment requiring Western National to advance pay Willis's medical expenses, relying heavily on Western National's judicial admission of clear liability and the evidence of economic distress. (App. A, pp. 1-2).

The story should have ended there, but Western National unilaterally decided that the *Ridley* Order was "narrowly tailored to require advance *Ridley* payments of medical bills over which Medicare was actively exercising its subrogation rights." (Opening Brief, p. 2). Western National continued to deny most of its *Ridley* obligations for over a year.

Willis moved to finalize the *Ridley* Order for immediate appeal (CR 43), but Western National resisted, claiming that the Order was subject to revision. (CR 45). Only then did Western National move to have the *Ridley* Order vacated. (CR 52). Western National's newest stall tactic, a 60(b)(6) motion, was based on the theory that the district court's denial of summary judgment on negligence *a year earlier* nullified the *Ridley* Order of fifteen months earlier. (CR 53, 57, 60).

In making the 60(b)(6) motion, Western National simply ignored its prior unequivocal judicial admission. The district court, however, did not. The court

repeatedly inquired of Western National's counsel why – and on what basis – Western National had "changed [its] theory," and "changed [its] position," (App. F, p. 7, p. 3). The district court stated the obvious – "So you're switching your argument now about *Ridley*, you're pivoting." (App. F, p. 6). In response, Western National's attorney incorrectly advised the court that an insurer can "change its mind" at any time. (Mr. Milch, App. F, p. 20). The trial judge asked Mr. Milch point blank: "So you're asking me to revisit my *Ridley* order?" Mr. Milch denied it: "No. I want a supplemental brief to address what I think is the court's erroneous understanding of what's going on here." (Supp. App. M, Tr. p. 21). In the supplemental brief, Western National again avoided mention of its admission and did not attempt to withdraw it. (CR 60).

The district court correctly rejected Western National's "pivot," and allowed the 60(b)(6) motion to be deemed denied on November 14, 2022. Six months later, the negligence claim against Oppegaard was tried to a jury for five days. The jury's verdict confirmed Oppegaard's clear liability for Willis's damages. (App. G). Western National paid the judgment in full on behalf of its insured, and Willis acknowledged satisfaction of both the judgment against Western National and the judgment against Oppegaard. (Supp. App. L).

Certainly, that should have been the end of it. But Western National brought this improper and moot appeal, asking this Court to retroactively vacate the trial court's *Ridley* Order. The *Ridley* issue is moot. All medical bills have been paid, albeit at Medicare's reduced rate. The judgments resulting from the *Ridley* Order and the jury trial have been satisfied. That Oppegaard's liability was reasonably clear – a question of fact judicially admitted by Western National as the basis for the *Ridley* Order – has been confirmed by a jury.

This appeal is another stall tactic. Western National's motive for seeking this meaningless "relief" is transparent: Western National seeks retroactive insulation from liability for the manner in which it handled – and continues to handle – Willis's claim.

STANDARDS OF REVIEW

Mootness, an issue of justiciability, presents a question of law, reviewed for correctness. *Matter of Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶ 7, 408 Mont. 187, 507 P.3d 169 (*"Big Foot Dumpsters"*); *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 6, 405 Mont. 259, 494 P.3d 892.

Review of a district court's denial of a Rule 60(b)(6) challenge of a summary judgment decision is reviewed for abuse of discretion. *Essex Ins. Co. v. Moose's Saloon Inc.*, 2007 MT 202, ¶ 18, 338 Mont. 423, 166 P.3d 451. A district

court abuses its discretion if it "act[s] arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting in substantial injustice." *Id.*, ¶ 19.

SUMMARY OF ARGUMENT

Western National's appeal is moot. The judgments against Western National and its insured, Oppegaard, have both been satisfied. (Supp. App. L). The issue of whether Western National must "advance pay" Willis's medical bills is not a live issue because all medical bills have been paid and Oppegaard's clear liability has been conclusively established by Western National's judicial admission *and* the jury's verdict. With no live issue to resolve, and with no effective relief available to Western National, the issue before the Court is moot. *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 17, 364 Mont. 390, 276 P.3d 867, *citing Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 23, 358 Mont. 193, 244 P.3d 321.

This Court should not reach the issue of whether the district court abused its discretion in denying extraordinary relief. Nonetheless, the district court did not abuse its discretion in denying Western National's inadequate and unsubstantiated motion to vacate the *Ridley* Order. The legal premise of the motion is simply wrong. An insurer which has judicially admitted that its insured's liability is

reasonably clear cannot simply change its mind, and the finding that the comparative negligence must go to the jury does not "effectively nullify" a *Ridley* order based on the insurer's admission of clear liability. *Bilesky v. Shopko Stores Operating Co., LLC*, 2014 MT 300, ¶ 12, 377 Mont. 58, 338 P.3d 76. Moreover, Rule 60(b)(6) relief is available only under extraordinary circumstances, which Western National utterly failed to establish. *Essex*, 2007 MT 2002, ¶ 25.

ARGUMENT

I. WESTERN NATIONAL'S APPEAL IS MOOT.

Mootness is a threshold issue which must be resolved before this Court may address the substantive merits of a dispute. *Stuivenga*, 2012 MT 75, ¶ 17. "If the issue presented at the outset of the action has ceased to exist or is no longer 'live,' or if the court is unable due to an intervening event or change in circumstances to grant effective relief or to restore the parties to their original position, then the issue before the court is moot." *Id.* "Courts lack jurisdiction to decide moot issues insofar as an actual case or controversy no longer exists." *Id.*

A. All Judgments Having Been Satisfied, Western National's Appeal is Moot.

A defeated party's compliance with – or satisfaction of – the judgment renders the appeal moot "where the compliance makes the granting of effective relief by the appellate court impossible." *Id.*, ¶ 36. Willis obtained two judgments

in this case: (1) a declaratory judgment against Western National requiring Western National to advance pay Willis's medical expenses; and (2) a monetary judgment against Oppegaard. Both judgments have been satisfied with payment of the final judgment in full, making it impossible for this Court to grant effective relief. (Supp. App. L).

This Court recognizes an exception to the general rule that satisfaction of judgment renders the appeal moot when one of the parties has a right to restitution, or when reversal will result in a right of recovery. *Id.*, ¶ 24. Here, Western National does not seek restitution of amounts paid on behalf of Oppegaard pursuant to either the *Ridley* Order or the monetary judgment. To the contrary, in seeking relief from the *Ridley* Order, Western National's counsel assured the district court that "even if the Court vacates its [*Ridley*] order, we are not, certainly, going to request repayment of that amount, I mean its already paid, we are not going to go against the Willises to recover, we want to make that clear." (App. F, p. 9). Western National only seeks advisory relief. Oppegaard makes no claim at all.

Western National makes no claim for restitution or for any form of recovery. Thus, the usual rule applies: Satisfaction of the judgment moots the appeal.

B. No Live Issue Regarding *Ridley* Exists on Appeal.

Mootness "is the doctrine of standing set in a time frame." *Greater Missoula Are Federation of Early Childhood Educators v. Child Start, Inc.*, 2009 MT 362, ¶ 23, 353 Mont. 201, 219 P.3d 881. When the issue presented at the outset of the action has ceased to exist, the appeal is moot. *Id.*; *Stuivenga,* ¶ 17. The only issue presented in Willis's *Ridley* claim was whether Western National must **advance pay** medical expenses incurred by Willis as a result of Oppegaard's clear liability. (Complaint, Supp. App. H). *See Dubray v. Farmers Ins. Exch.*, 2001 MT 251, ¶ 14, 307 Mont. 134, 36 P.3d 897 ("the essence of our holding in *Ridley* is that where liability is reasonably clear, injured victims are entitled to those damages which are not reasonably in dispute without first executing a settlement agreement and final release.") While Western National did not timely comply with its obligation to advance pay all medical bills during the pendency of the case in district court, Western National has now paid all of Willis's medical bills – albeit at reduced Medicare rates – in satisfying the final judgment. (Supp. App. L). "Advance payment" under *Ridley* is as moot as moot can be.

As framed by Western National on appeal, the issue is now whether Oppegaard's liability was reasonably clear as a matter of law given the district court's determination that the issues of fact existed as to the negligence claim.

Even as framed by Western National, this appeal does not present a live issue. Whether Oppegaard was clearly liable was never in question because Western National judicially admitted that very fact. (Supp. App. I). This issue is certainly dead now; the jury has determined that Oppegaard was 98% responsible for the accident (App. G), and thus 100% responsible for Willis's damages. § 27-1-702, Mont. Code Ann.

C. This Court Cannot Grant the Relief Requested by Western National.

Western National raises only one issue on appeal: whether the district court "erred in denying Western National's Rule 60(b)(6) motion to set aside and vacate its earlier [*Ridley* Order] when it subsequently ruled that the defendant's liability is not reasonably clear?" (Opening Brief, p. 1). Western National's framing contains two inaccuracies. First, the standard of review is not "error," but abuse of discretion. Second, in the subsequent order, the district court never held that Oppegaard's liability was not "reasonably clear," but only ruled that issues of fact existed with respect to Willis's comparative negligence. (App. B). The (moot) issue on appeal is whether the district court abused its discretion in refusing to vacate its *Ridley* Order, which incorporated Western National's judicial admission that liability was reasonably clear, when the district court subsequently ruled that the issue of comparative negligence must go to the jury. The only relief requested

by Western National cannot be granted by this Court because Western National is precluded from disputing, controverting, or challenging its own admission that Oppegaard's liability was reasonably clear.

"A judicial admission is an express waiver made to the court by a party or its counsel 'conceding for the purposes of trial that truth of an alleged fact.'" *Bilesky*, 2014 MT 300, ¶ 12. "The main characteristic of a judicial admission is the conclusive effect upon the party making the admission; no further evidence can be introduced by the party making the admission to prove, disprove, or contradict the admitted fact." *Bilesky*, 2014 MT 300, ¶ 12. This is true in the district court and on appeal. *See Heiser v. Hines Motor Company*, (1997), 282 Mont. 270, 275, 937 P.2d 45, 47 ("if a party admits to a fact by allowing its inclusion as uncontested in a pretrial order, the party will not be allowed to raise that particular factual issue on appeal").

Whether Oppegaard's liability was reasonably clear presents a question of fact. *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 39, 357 Mont. 293, 239 P.3d 904. At the outset of the declaratory action, Willis requested and obtained Western National's unequivocal admission of this most salient fact:

> **REQUEST FOR ADMISSION NO. 13**: Admit that liability for the accident is clear.
> **ANSWER**: Admit that liability for the accident is reasonably clear.

(Supp. App. I). Willis then moved for summary judgment on the *Ridley* claim based specifically on this admitted fact. (CR 13, Supp. App. I). Western National's counsel confirmed its admission of clear liability at the hearing on the *Ridley* motion. (Supp. App. K, p. 11 "[In *Ridley*] the liability insurer admitted that its insured, like this case, was at fault for an automobile accident that resulted in injuries to plaintiff."). The district court expressly relied on Western National's judicial admission, entering the *Ridley* Order based in large part on Western National's unequivocal admission "that liability is reasonably clear for purposes of invoking *Ridley* obligation to pay medical bills." (Order, App. A, pp. 1-2).

Of course Oppegaard's liability was reasonably clear – he ran a stop sign traveling over 50 miles per hour. Western National correctly admitted reasonably clear liability from the outset, and having done so Western National is precluded from disputing the admitted fact in the district court and on appeal. "[J]udicial admissions protect the integrity of the judicial process by preventing parties from playing fast and loose with the facts to suit the exigencies of self-interest." *Bilesky*, ¶ 20. Western National is playing fast and loose with an admitted fact – by bringing this appeal for the purpose of seeking retroactive immunity from its non-compliance with the *Ridley* Order. Western National seeks relief that this Court cannot give, and the issue is therefore moot.

D. No Exception to Mootness Applies in this Case.

In rare circumstances, this Court recognizes three exceptions to the mootness doctrine: (1) voluntary cessation, (2) capable of repetition, yet evading review, and (3) public interest. *Big Foot Dumpsters*, 2022 MT 67, ¶ 15; *Wilkie*, 2021 MT 221, ¶ 9. *Id.* None of the exceptions apply here.

1. Voluntary cessation.

The "voluntary cessation" exception "allows a case to proceed that 'would otherwise have been rendered moot by a defendant's voluntary cessation of the challenged action'" *Wilkie*, 2021 MT 221, ¶ 9*, quoting Montanans Against Assisted Suicide v. Bd. of Med. Exam'rs*, 2015 MT 112, ¶ 15, 379 Mont. 11, 347 P.3d 1244. "This exception addresses situations where a defendant attempts to moot a plaintiff's meritorious claims in order to avoid a judgment on the merits." *Big Foot Dumpsters*, ¶ 15; *Wilkie*, ¶ 9.

Just the opposite occurred here. Willis obtained judgments on the merits, and Western National satisfied those judgments. The exception for "voluntary cessation" is inapplicable.

2. Capable of repetition, yet evading review.

This Court recognizes an exception to mootness when the conduct at issue is capable of repetition, yet evades review. "The exception only applies 'where

the challenged conduct *invariably* ceases before courts fully can adjudicate the matter.'" *Zunski v. Frenchtown Rural Fire Dept.*, 2013 MT 258, ¶ 22, 371 Mont. 552, 309 P.3d 21 (emphasis in original), *quoting Havre Daily News v. City of Havre*, 2006 MT 215, ¶ 33, 333 Mont. 331, 142 P.3d 864. In *Wilkie,* the exception applied because the insurer voluntarily terminated the action very quickly after the suit was filed, evading review of the issue of whether an insurer must provide copies of the insurance policy to third-party claimants in clear liability cases.

Unlike in *Wilkie*, the district court in this case reached the merits of the declaratory action and ordered Western National to make *Ridley* payments. (App. A). A declaratory judgment action over *Ridley* obligations does not "invariably" cease before adjudication, and – more importantly – did not cease before adjudication in this case. The exception to mootness does not apply.

3. Public Interest

The public interest exception applies when the case presents an issue of public importance and an answer to the issue will guide public officers in the performance of their duties. *Big Foot Dumpsters*, 2022 MT 67, ¶ 18; *quoting Ramon v. Short*, 2020 MT 69, ¶ 20, 399 Mont. 254, 460 P.3d 867) (*citing Gateway Opencut Mining Action Grp. v. Bd. of Cty. Comm'rs*, 2011 MT 198, ¶ 14, 361 Mont. 398, 260 P.3d 133). An issue is of public importance where it "implicate[s]

fundamental constitutional rights or where the legal power of a public official is in question." *Ramon*, ¶ 22. This appeal neither implicates a constitutional right nor involves the legal power of a public official. The public policy exception to mootness does not apply.

No live controversy exists. This Court should dismiss the appeal as moot.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING WESTERN NATIONAL'S LEGALLY UNSUPPORTABLE 60(b)(6)MOTION.

Western National asks this Court to determine "as a matter of law" that Oppegaard's liability was not reasonably clear because the district court subsequently ruled that Oppegaard's comparative negligence claim raised questions of fact which must go to the jury. Western National pins its argument on one sentence of the summary judgment order which notes that "there exists the possibility a jury could find either party fully or partially at fault for the accident." (App. B, p. 3). Western National's analysis is incorrect for two reasons. First, as argued by Willis below, Western National judicially conceded that Oppegaard's liability was reasonably clear, and that admission has not been withdrawn. (CR 47, p. 2). Second, "reasonably clear liability" is determined on a completely different standard than whether a claim for comparative negligence should go to the jury, and the two orders do not conflict.

A. Western National's Judicial Admission of its Insured's Reasonably Clear Liability Cannot be Controverted.

As shown above, at the outset of the case, Western National officially and unequivocally admitted that Oppegaard's "liability for the accident is reasonably clear." (Supp. App. I, Request for Admission 13). Willis moved for summary judgment based on this admission (Supp. App. I); Western National confirmed its admission at the hearing on the *Ridley* motion (Supp. App. K, p. 11); and the district court expressly relied on Western National's judicial admission in issuing the *Ridley* Order. (Order, App. A, pp. 1-2). Furthermore, when Western National moved the district court to vacate the *Ridley* Order pursuant to Rule 60(b)(6), Western National repeatedly confirmed its prior position. (App. F, p. 4, lines 3-7). Instead, Western argued that liability was not reasonably clear *anymore*, (App. F, p. 5, line 19) and claimed that Western National could change its mind at any time, relying on *Depositors Ins. Co. v. Sandidge*, 2022 MT 33, ¶ 21, 407 Mont. 385, 504 P.3d 477. (App. F, p. 20; Opening Brief, p. 17, fn 4).

Sandidge does not support Western National's attempt to controvert its judicial admission of clear liability. In *Sandidge,* this Court noted the absence of "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." *Id.* at ¶ 21. *Sandidge* does **not** hold that when an insurer **judicially admits**

that liability was reasonably clear for the purposes of *Ridley*, and an Order is issued based on that admission, the insurer can simply ignore the Order for over a year and then change its position. (App. A, pp. 1-2).

Western National's judicial admission has a "conclusive effect" upon Western National as the party making the admission. *Bilesky*, 2014 MT 300, ¶ 12. Western National "unalterably conceded" clear liability. So, no, Western National could not simply change its mind about its insured's liability being reasonably clear. *Id.* And certainly Western National could not change its position more than a year after the event which allegedly prompted the change – the district court's denial of summary judgment on negligence *per se.*

B. The *Ridley* Order and the Summary Judgment Order Do Not Conflict.

The district court properly concluded that liability can be reasonably clear for the purposes of *Ridley* and, at the same time, questions of comparative negligence can be required to go to the jury for determination. As correctly stated by the district court, "Courts deny summary judgment all the time, and plaintiffs still receive *Ridley* payments." (App. F, p. 19).

Western National asks this Court to find that as a matter of law, when the district court denied summary judgment on negligence, Oppegaard's liability was not reasonably clear for purposes of requiring advance payment of medical

expenses under *Ridley*. (Opening Brief, p. 21). Such a ruling would effectively overturn the standard carefully and correctly enunciated in *Peterson*: "'[R]easonably clear' liability is established when it is 'clear enough' that reasonable people assessing the claim would agree on the issue of liability, and that the facts, circumstances, and applicable law leave little room for objectively reasonable debate about whether liability exists." *Peterson*, 2010 MT 187, ¶ 39. "Liability does not need to be certain in order to be reasonably clear." *Id.*, ¶ 40 (approving jury instruction). Based on the facts and Western National's admission in this case, the district court properly declared that Western National was obligated to make *Ridley* payments.

Subsequently, the district court denied summary judgment to Willis on its negligence claim against Oppegaard, holding that whether Willis was comparatively negligent, and in what amount, was a question of fact for the jury. (App. B). As stated by the district court, "the moving party [Willis] has the burden of showing a complete absence of any genuine issue as to all facts considered material." (App. B, p. 3). The court held that "normally, the issue of contributory negligence and the degree of comparative fault, if any, is an issue for the trier of fact to resolve, even if the opposing party is negligent as a matter of law," and denied Willis's motion for summary judgment. (App. B, p. 3).

The standard for determining whether Oppegaard's liability is reasonably clear for *Ridley* ("clear enough" for reasonable minds to agree) is completely different than the standard for obtaining summary judgment on comparative negligence (demonstration of a "complete absence of factual issues"). This is especially true in this case, because Western National admitted that liability was reasonably clear for the purposes of *Ridley*, even knowing its insured asserted comparative negligence as a defense from the outset. The *Ridley* Order and the summary judgment order do not conflict. The *Ridley* Order reflects that Western National admitted Oppegaard's clear liability, eliminating any factual dispute as to *Ridley*, while the summary judgment order reflects that Willis's comparative negligence, if any, must be determined by the jury.

III. WESTERN NATIONAL FAILED TO MEET THE THRESHOLD REQUIREMENTS OF RULE 60(b)(6).

Western National's motion to vacate the *Ridley* Order is based entirely on Rule 60(b)(6) – the "catch-all" provision which allows relief for "any other reason that justifies relief." This Court has repeatedly held that "a successful Rule 60(b)(6) motion requires that the movant demonstrate each of the following elements: (1) extraordinary circumstances; (2) the movant acted to set aside the judgment within a reasonable period of time; and (3) the movant was blameless." *Essex*, 2007 MT 2002, ¶ 25; *In re Paternity of C.T.E.-H.*, 2004 MT 307, ¶ 45, 323

Mont. 498, 101 P.3d 254, (*citing Bahm v. Southworth*, 2000 MT 244, ¶ 14, 301 Mont. 434, 10 P.3d 99). The district court did not abuse its discretion in denying Western National's motion because Western National did not meet its burden of establishing the necessary three elements for Rule 60(b) relief.

A. Western National Has Not Established Extraordinary Circumstances.

1. Western National has not eliminated the applicability of Rule 60(b)'s other five subsections.

Rule 60(b)(6) relief is appropriate only in extraordinary circumstances "which go beyond those covered by the first five subsections of the rule." *Id.*, ¶ 21. Before a party will be allowed to invoke Rule 60(b)(6) relief, the party must first show that none of the other five reasons in Rule 60(b) apply. *Id.* In three briefs filed in the district court and at the hearing, Western National did not address, much less eliminate, the other five subsections. (CR 53, 57, 60, App. F).

On appeal, Western National addresses the five subsections in a single footnote, asserting without legal or factual support:

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

(Opening Brief, p. 16, fn 3).

This toss-away footnote – raised for the first time on appeal – does not affirmatively demonstrate that the circumstances "go beyond" those covered by the other subsections. Inapplicability of the other subsections is not established by Western National's **choice** to rely only upon subsection (6).

Western National actually asserts that the district court made a mistake of law or fact when, after imposing *Ridley* obligations on Western National, the district court subsequently determined that Willis was not entitled to summary judgment on the issue of negligence *per se.* (See Opening Brief, p. 1). While often applied to mistakes of counsel, the ordinary meaning of the term "mistake" in Rule 60(b)(1) also includes a court's legal and factual errors. *Kemp v. United States*, 596 U.S. 528, 534 (2022). Western National also asserts that the summary judgment order "effectively nullified" the *Ridley* Order (Opening Brief, p. 17) – a claim which should have been brought under Rule 60(b)(4).

Western National's decision to rely only Rule 60(b)(6) does not satisfy Western National's burden of establishing the inapplicability of other subsections.

2. Western National has not shown an extraordinary circumstance.

Western National asserts that the district court's order denying summary judgment on negligence "effectively nullified" the earlier [*Ridley* Order]," creating an extraordinary circumstance. (Opening Brief, p. 17). Western National made

this same argument in the district court:

> This Court's ruling, subsequent ruling, denying [Willis's] motion for summary judgment effectively – on an entirely different motion – effectively nullifies this Court's prior ruling regarding *Ridley* payments, and I have to assume that doesn't happen very often, and that the reason these circumstances show extraordinary circumstances.

(App. F, p. 19). The district court immediately rejected Western National's assumption, stating: "No. That is not true. Courts deny summary judgment all the time, and plaintiffs still receive *Ridley* payments." (App. F, p. 19).

The district court is correct. The issuance of two orders, one addressing *Ridley* based on admitted fact of clear liability, and one addressing whether comparative negligence, is not extraordinary.

B. Western National's Rule 60(b) Motion was Not Timely.

Rule 60(b)(6) motions must be brought "within a reasonable time." The district court issued the *Ridley* Order on June 22, 2021 and the summary judgment order on September 8, 2021. In Western National's view, the summary judgment order "effectively nullified" the earlier *Ridley* Order, (Opening Brief, p. 17), yet Western National made no motion *for over a year after that event*. Such timing is unreasonable.[1]

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[1]As shown above, Western National could have – and should have – brought this motion pursuant to Rule 60(b)(1) – mistake or 60(b)(4) – void. Had it done so, the motion still would have been time barred and without legal support.

Western National argues it delayed seeking Rule 60(b)(6) relief while waiting for discovery. As below, Western National provides a lengthy description of alleged discovery abuses. None of these allegations were substantiated in the district court – hence the lack of citation to the record. Here, as below, the allegations are contained in briefs but unsubstantiated in the record.[2] Willis will not follow Western National down this rabbit hole by rebutting counsel's unsworn statements in a brief. Willis simply denies the allegations.

Nor will Willis ask this Court to review the merits of a discovery dispute not raised as such below. Had Western National had a legitimate discovery challenge, Western National is afforded the unextraordinary remedy of seeking relief pursuant to Rule 37, but is not afforded extraordinary relief under Rule 60(b)(6). Despite Western National's assertions that it waited months for discovery and that it was then was dissatisfied with Willis's production, the record is devoid of any action taken by Western National to raise and preserve these claims –much less resolve them – in the proper manner under Rule 37.

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[2]Western National has modified the record on appeal without following the procedures set forth in Rule 8(6), M.R.App.P. Western National adds a set of discovery as Appendix Tab D that was not filed in the district court. It is improper to add to the record on appeal to supplement an inadequate record. *Scott v. Robson*, (1979), 597 P.2d 1150, 1153, 182 Mont. 528, 534.

What is important for review of the timeliness of Western National's Rule 60(b)(6) motion is not whether there were discovery delays; what is relevant is whether delays in discovery justified Western National's failure to bring its Rule 60(b)(6) motion for 15 months. Clearly, discovery responses about ancillary matters were not necessary to the Rule 60(b)(6) motion – the motion is based on the district court's summary judgment order, which was in place for a year when Western National brought the Rule 60(b)(6) motion.

Apparently unfamiliar with the concept that "justice delayed is justice denied," Western National next argues that Willis never demonstrated prejudice from the insurer's delay. (Opening Brief, p. 19). This is a misstatement of the record. Willis argued that Western National's tardy Rule 60 motion seeks "an order judicially sanctioning [Western National's] desire to further delay Plaintiffs' justice for its insured's reckless driving." (Plaintiffs' Supplement Brief, CR 61, p. 2). Willis established that the 60(b)(6) motion constituted an attempt "to offload [the insurer's] responsibility to pay accident-related medical bills onto the tort victim and the taxpayers." (CR 55, p. 5).

A Rule 60(b)(6) motion filed 15 months after the order it seeks to vacate, and over a year after the order which allegedly caused the change in Western National's position, is untimely.

C. Western National is Not Blameless.

To establish extraordinary circumstances Western National must show that it was blameless in creating those circumstances, so Western National blames Plaintiff for seeking summary judgment on negligence in the first place. (Opening Brief, p. 20). This argument is nonsensical. A plaintiff is entitled to avail itself of motion practice to streamline the issues for trial. And Willis's efforts were ultimately successful; the district judge informed the jury that Oppegaard was negligent as a matter of law. (Special Verdict, App. G).

The circumstance at issue here – reconsideration of whether liability was reasonably clear – arose because Western National attempted to *sotto voce* recant its judicial admission that Oppegaard's liability was reasonably clear. Western National attempts to shift the blame to the district court, asserting that at the hearing it became "apparent" that the District Court "misapprehend[ed] the applicable law." (Opening Brief, pp. 10-11).

At the hearing on the motion, Western National's counsel made this same accusation, and the district court appropriately indicated that any confusion was caused by Western National's "pivot" to a new theory:

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

Court: Potentially because this was not your argument at the time I ordered *Ridley* payments. You took a totally different approach. You never indicated that your client didn't have some liability.

(App. F, p. 20, lines 12-19).

Far from establishing that the trial judge "misapprehended" the law, the hearing transcript amply demonstrates the district court's dismay at the audacity of Western National's "pivot" to a "totally different approach." (App. F, pp. 3-7). On appeal, just as in the district court, Western National refuses to directly address its judicial admission. Western National merely states – in a footnote – that "Western National did not originally challenge the issue of whether liability is reasonably clear," when in fact Western National admitted, in Requests for Admission filed with the district court to support the *Ridley* Order, that Oppegaard's liability was reasonably clear. (Opening Brief, p. 17, fn 4).

The "circumstance" underlying Western National's 60(b)(6) motion is created entirely by Western National, which conceded clear liability from the outset, and did not inform the Court of its change of position until over a year after the order which supposedly justified that change of position.

IV. WILLIS SHOULD BE AWARDED ATTORNEY FEES ON APPEAL.

Montana generally follows the American Rule regarding attorney fees, where each party is ordinarily required to bear his or her attorney fees. *King v.*

State Farm Mut. Auto. Ins. Co., 2019 MT 208, ¶ 11, 397 Mont. 126, 447 P.3d 1043. Two exceptions apply to allow an award to Willis. First, fees are allowed as supplemental relief in this declaratory judgment action. Second, fees are allowed when, as here, an appellant forces a party to defend a frivolous appeal.

A third-party claimant, such as Willis, may seek fees in actions brought pursuant to Montana's Declaratory Judgment Act as supplemental relief. *Mountain West Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶¶ 40-41, 315 Mont. 231, 69 P.3d 652. Willis preserved its right to seek fees in its Complaint against Western National. (Supp. App. H, ¶ 13). An award of fees incurred on appeal is necessary and proper in this case because the matter had been fully concluded, and Western National forced the Willises to bear the expense of defending this moot appeal.

In addition, Montana Rule of Appellate Procedure 19(5) allows this Court to award attorney fees as sanctions for an appeal that is frivolous, vexatious, filed for purposes of harassment or delay, or taken without substantial or reasonable grounds. *Cooper v. Glaser*, 2019 MT 55, ¶ 16, 355 Mont. 342, 228 P.3d 443. Western National, a sophisticated litigant with unlimited resources and access to legal advice, has brought this frivolous appeal without substantial or reasonable grounds. Western National's appeal comes at great and unexpected expense to

Tom and Carol Willis, whose litigation against both Western National and its insured has been fully litigated and the judgment satisfied.

Rule 19(5) sanctions are particularly appropriate here because Western National blatantly ignores its prior admission. This appeal defeats the very purpose of seeking and obtaining judicial admissions on key undisputed facts – "to facilitate judicial efficiency and save the parties time, labor, and expense." *Bilesky*, 2014 MT 300, ¶ 20. Western National has saddled Willis with the expense of this moot appeal.

Willis requests that this Court award Tom and Carol Willis the fees they incurred on appeal, and remand to the district court for a determination of the amount reasonably and necessarily incurred.

CONCLUSION

Willis respectfully requests that this Court dismiss this appeal as moot.

In the alternative, Will requests that this Court reject Western National's specious motion for relief under Rule 60(b)(6).

In either event, Willis requests that the Court award fees to Willis, and remand to the district court for a determination of the reasonable amount of fees incurred.

DATED this 27th day of February, 2024.

NELSON LAW FIRM

SHEEHY LAW FIRM

/s/ Martha Sheehy
Martha Sheehy

Attorneys for Appellees

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 point, is double-spaced, and the word count as calculated by Corel Wordperfect is 6,698, excluding caption, tables, and certificates.

/s/ Martha Sheehy
Martha Sheehy

CERTIFICATE OF SERVICE

I hereby certify that on 27th day of February, 2024, I electronically filed the foregoing with the Clerk of the Montana Supreme Court using the Okta filing system. I certify that all participants in this appeal are registered eService users and will receive service electronically.

/s/ Martha Sheehy
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CERTIFICATE OF SERVICE

I, Martha Sheehy, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-27-2024:

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