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 COMBINED REPLY BRIEF AND BRIEF OPPOSING WILLIS' MOTION TO DISMISS

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

Attorneys for Defendant/Appellant Western National Mutual Insurance Co.

Steven R. Milch
CROWLEY FLECK PLLP
P.O. Box 2529
Billings, MT 59103-2529
Telephone: 406.252.3441
smilch@crowleyfleck.com

Attorneys for Plaintiffs/Appellees Tom and Carol Willis

Randall G. Nelson
Thomas C. Bancroft
NELSON LAW FIRM. P.C.
2619 St. Johns Avenue, Suite E
Billings, MT 59102
Telephone: 406.867.7000
rgnelson@nelsonlawmontana.com
tbancroft@nelsonlawmontana.com

Martha Sheehy
SHEEHY LAW FIRM
P.O. Box 584
Billings, MT 59103
Telephone: 406.252.2004
msheehy@sheehylawfirm.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES AND RULES

I.

INTRODUCTION

On February 5, 2024, the appellant Western National Mutual Insurance Company ("Western National") filed its opening brief in this appeal. On February 27, 2024, the appellees Tom and Carol Willis ("Willises") filed a combined answer brief and brief in support of motion to dismiss. Western National hereby submits the following combined reply brief and brief opposing the motion to dismiss. For the reasons set forth herein and in appellant's opening brief, this Court should appropriately find that the District Court erred in declining to set aside and vacate its earlier *Order Regarding Ridley Payments* under Rule 60(b)(6) based upon its subsequent determination that the insured Cliffton Oppegaard's liability in the underlying lawsuit was not "reasonably clear" in its *Order Denying Plaintiffs' Motion for Summary Judgment on Issue of Liability*.

II.

ARGUMENT

A. Western National's Appeal is Not Moot.

1. Applicable Standard

"A case may become moot for the purpose of appeal where it has lost any practical importance to the parties because of a change in circumstances prior to the appellate decision." *Clark v. Dussault*, 265 Mont. 479, 484, 878 P. 2d 239, 242 (1994) (citing *Matter of T.J.F*, 229 Mont. 473, 475, 747 P. 2d 1356, 1357 (1987)).

"A party seeking to establish that an issue raised on appeal is moot has a heavy burden." *Clark*, 265 Mont. at 484-85, 878 P. 2d at 242 (emphasis added); see also *Butte – Silver Bow Local Gov't v. Olsen*, 228 Mont. 77, 82, 743 P. 2d 564, 567 (1987) ("The burden to establish that the issue raised in an appeal is moot is a heavy one.") (emphasis added). For the reasons which follow, the Willises cannot satisfy their heavy burden in proving that the issue involved in this appeal is moot.

A case is moot only when a court is unable to grant effective or meaningful relief. An authoritative treatise instructs as follows:

> The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief. A wise answer to this question is always bound by the facts of the specific case. … [C]ourts must be careful to appraise the full range of remedial opportunities.

13C C. Wright & A. Miller, *Federal Practice and Procedure* § 3533.3 (3d ed.) (emphasis added).

The Montana Supreme Court applies essentially the same standard in determining whether an issue is moot:

> A question is moot when, due to an event or happening, the disputed question has ceased to exist and no longer presents an actual controversy. In other words, a matter is moot when a court cannot grant effective relief or restore the parties to their original position.

In re Marriage of Gorton, 2008 MT 123, ¶ 16, 342 Mont. 537, 182 P. 3d 746 (citation omitted); see also *Awareness Group v. Bd. of Trustees of Sch. Dist. No. 4*, 243 Mont. 469, 475, 795 P. 2d 447, 451 (1990) ("Since meaningful relief is

determinable by a particular set of facts, a finding of mootness can only occur on a case-by-case basis.").

2. The Willises Intend to File a Bad Faith Action Against Western National Based Upon Alleged Conduct in the Underlying Lawsuit.

The Willis' attorney below, Randy Nelson, repeatedly represented to the undersigned that he intends to file a bad faith action against Western National at the conclusion of the underlying lawsuit.[1] The Willises clearly signal as much in their brief on appeal. See *Answer Brief*, p. 16 ("Western National did not timely comply with its obligation to advance pay all medical bills during the pendency of the case in district court."). The bad faith claims will presumably be based on statutory grounds under § 33-18-201(6), MCA, as well as alleged violations of an insurer's obligations under *Ridley v. Guaranty Nat'l Ins. Co.*, 286 Mont. 325, 951 P.2d 987 (1997).

Significantly, a necessary predicate to bad faith claims based on the foregoing grounds requires that liability in the underlying action be "reasonably clear." *See* § 33-18-201(6), MCA (making it unlawful for an insurer to "neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.")(emphasis added); see also

[1] Pursuant to § 33-18-242(6)(b), MCA, the Willises cannot file their bad faith claims against Western National until the underlying lawsuit fully concludes – including this appeal. *Graf v. Continental Western Ins. Co.,* 2004 MT 105, ¶ 34, 321 Mont. 65, 89 P. 3d 22 (Warner, J., concurring).

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).

Obviously, in pursuing those bad faith claims, the Willises and their attorneys will rely upon the District Court's *Order Regarding Ridley Payments*, dated June 22, 2021, wherein the District Court necessarily determined in the underlying action that the liability of Western National's insured Cliffton Oppegaard was "reasonably clear." That reliance would be supported by the legal doctrines of law of the case and/or res judicata.

The Willises note on appeal that Western National initially admitted in a Request for Admission that liability was "reasonably clear." They are precluded, however, from relying upon that admission in their subsequent bad faith action against Western National. See Rule 36(b), Mont.R.Civ.P. ("An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.") (emphasis added). This is why the District Court's *Order Regarding Ridley Payments* is so crucial to the Willises, and explains why they are vigorously opposing this appeal.

3. An Actual Controversy in this Case Remains, and this Court Can Grant Effective and Meaningful Relief on Appeal.

Western National's appeal to this Court is not moot. As thoroughly discussed in Western National's opening brief, the District Court plainly erred in refusing to set aside and vacate its earlier *Order Regarding Ridley Payments* under Rule 60(b)(6) based upon its subsequent determination that the insured Cliffton Oppegaard's liability in the underlying lawsuit was not "reasonably clear" in its *Order Denying Plaintiffs' Motion for Summary Judgment on Issue of Liability*.

As such, an actual controversy plainly remains in this case, and this Court can clearly grant effective and meaningful relief on appeal. Stated differently, the case on appeal has most definitely not "lost any practical importance to the parties." *Clark*, 265 Mont. at 484, 878 P. 2d at 242. Otherwise, Western National would not have taken the appeal in the first instance, and the Willises would not be aggressively opposing it. This Court should properly rule on the merits of Western National's appeal and hold that the District Court plainly erred 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*.

B. The Willises Mischaracterize Western National's Argument on Appeal.

In their Answer Brief, the Willises repeatedly mischaracterize the essence of Western National's argument on appeal. On page 16 of their Answer Brief,

they state:

> 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 issues of fact existed as to the negligence claim.

Answer Brief, p. 16. They do it again on page 22 of the brief:

> 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.

Answer Brief, p. 22. And again on page 24 of the brief:

> 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*.

Answer Brief, pp. 24-25.

The essence of Western National's argument is not so broadly confined. It is not simply a matter of the District Court determining that issues of fact existed with respect to Tom Willis' comparative negligence. The District Court's conclusion was much more narrow. After reviewing the parties' briefs, listening to their arguments, and viewing the evidence (including photographs) submitted at the hearing on the summary judgment motion, the District Court decisively concluded as follows:

> Due to the interplay between the comparative fault statute and the duties each driver had under the traffic code, <u>there exists the</u>

> 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]*.

If, based upon the facts presented, a District Court's conclusion that a reasonable jury could find the plaintiff to be 100% at fault does not equate to a determination that the liability of the defendant is not "reasonably clear," I don't know what does. Obviously, such a conclusion is tantamount to finding that the defendant's liability is not "reasonably clear."

C. The Jury's Verdict in the Underlying Action is Irrelevant and Lacks Any Probative Value.

In their Answer Brief, the Willises note that the jury in the underlying case allocated 98% of fault to the defendant on the Verdict Form. They then go on to repeatedly argue that such allocation confirms that the defendant Oppegaard's liability was "reasonably clear." See *Answer Brief*, p. 11 ("The jury's verdict confirmed Oppegaard's clear liability for Willis's damages."); *id*. at p. 12 ("That Oppegaard's liability was reasonably clear… has been confirmed by a jury."); *id*. at p. 13 ("Oppegaard's clear liability has been conclusively established by… the jury's verdict.").

The jury's verdict in the underlying action, however, is irrelevant and lacks any probative value as to whether the defendant's liability was "reasonably clear."

In *Graf v. Continental Western Ins. Co.*, 2004 MT 105, 321 Mont. 65, 89 P. 3d 22, the plaintiff was injured in a car accident. She sued the other driver, and a jury subsequently rendered a verdict in favor of the defendant. That case then settled on appeal.

The plaintiff then sued the other driver's liability insurance company for bad faith. The District Court granted summary judgment to the insurance company on the basis that the defense verdict in the underlying action established that the insurer had a reasonable basis for denying the plaintiff's claims. The Montana Supreme Court reversed, on the grounds that whether liability is "reasonably clear" to trigger an insurer's duties under the UTPA is a distinct issue from the insured's liability in the underlying tort action. The Court explained as follows:

> The District Court's ruling is based on an assumption that a bad faith or UTPA claimant seeks to relitigate the underlying claim; that the issues in the underlying negligence claim and the issues in the UTPA claim are the same and, thus, if a jury has rendered a verdict adverse to the claimant in the underlying suit, those issues have been necessarily and conclusively resolved. This assumption is incorrect. The issues in a UTPA claim are separate from the issues in the underlying claim. In *Klaudt v. Flink* (1983), 202 Mont. 247, 252-53, 658 P.2d 1065, 1067-68, we held:
>
> > The obligation to negotiate in good faith and to promptly settle claims does not mean that liability has been determined. Section 33-18-203(6) states that the insurer's obligation arises when liability has become "reasonably clear." *In evaluating the insurance case, the jury must determine whether the insurer negotiated in good faith given the facts it then had. This consideration is separate*

> *and apart from the jury's ultimate consideration of the merits of any given action.*

Graf, ¶ 12 (emphasis added). See also *Coleman Const. Inc. v. Diamond State Ins. Co.*, 2008 WL 2357358, at *3 (D. Mont. 2008)(a subsequent jury finding of no liability on the part of the insured "is not relevant to the factual issue of whether an insurer should have found liability to be 'reasonably clear' at the time it adjusted a third party's insurance claim."). By the same token, "[a] finding of liability by a trier of fact under the preponderance of evidence standard in the negligence action does not necessarily imply that liability was 'reasonably clear' when the insurer was adjusting the claim." *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 39, 357 Mont. 293, 239 P.3d 904.

D. The Willises Improperly Raise New Arguments for the First Time on Appeal.

In their Answer Brief, and citing to the case of *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶ 21, 338 Mont. 423, 166 P. 3d 451, the Willises argue that denial of the Rule 60(b)(6) motion was proper because Western National failed to expressly argue below why the provisions of Rule 60(b)(1)-(5) are inapplicable. See *Answer Brief*, p. 27 ("In three briefs filed in the district court and at the hearing, Western National did not address, much less eliminate, the other five subsections.").

Ironically, however, in the two briefs the Willises filed below opposing Western National's Rule 60(b)(6) motion, the Willises failed to raise that particular argument with the District Court. [CR 55 (*Plaintiffs' Brief in Opposition to Western National' s Motion to Set Aside Judgment);* CR 61 (*Plaintiffs' Response to Western National' s Supplemental Brief in Support of Rule 60(b)(6) Motion)*]. The Willises also failed to raise that particular argument during the hearing on Western National's Rule 60(b)(6) motion.[2] Rather, the argument was first raised by new counsel on appeal.

"[W]e do not consider arguments that were not presented to the district court but raised for the first time on appeal." *Estate of Mandich v. French*, 2022 MT 88, ¶ 30, 408 Mont. 296, 509 P. 3d 6. See also *T.L.S. v. Montana Advocacy Program*, 2006 MT 262, ¶ 31, 334 Mont. 146, 144 P. 3d 818; *In re Estate of Kindsfather*, 2005 MT 51, ¶ 34, 326 Mont. 192, 108 P. 3d 487; *American Music Co. v. Higbee*, 2004 MT 349, ¶ 25, 324 Mont. 348, 103 P. 3d 518.

Furthermore, Western National expressly addressed the inapplicability of the other five subsections of Rule 60(b) in its opening brief on appeal:

> 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.

---

[2] While both parties have included excerpts of that hearing in their appendices, a full transcript of the Rule 60(b)(6) hearing is attached hereto as **Tab N**.

Appellant's Opening Brief, p. 16 n. 3.

In their Answer Brief, the Willises also argue that, early on in the case, Western National admitted in a Request for Admission that liability for the accident was "reasonably clear." They argue that Western National's early admission was "conclusive," that Western National never sought to withdraw the admission, and that Western National was somehow precluded from requesting that the District Court set aside and vacate it's *Order Regarding Ridley Payments.* See *Answer Brief*, pp. 22-24.

However, in the two briefs the Willises filed below opposing Western National's Rule 60(b)(6) motion, the Willises wholly failed to raise that particular argument with the District Court. [CR 55 (*Plaintiffs' Brief in Opposition to Western National's Motion to Set Aside Judgment);* CR 61 (*Plaintiffs' Response to Western National's Supplemental Brief in Support of Rule 60(b)(6) Motion)]*. The Willises also failed to raise that particular argument during the hearing on Western National's Rule 60(b)(6) motion. [**Tab N** (attached)]. Rather, the argument was first raised by new counsel on appeal.

Once again, this Court does "not consider arguments that were not presented to the district court but raised for the first time on appeal." *Estate of Mandich*, ¶ 30; see also *T.L.S.*, ¶ 31; *In re Estate of Kindsfather*, ¶ 34; *American Music*, ¶ 25.

Moreover, and without conceding that there is any merit to the argument, had the Willises raised that argument below, Western National would have formally moved to withdraw its earlier admission with the District Court on the grounds that it was originally based on the undisputed fact that its insured failed to stop at a flashing red light. However, Western National subsequently acquired additional facts and information that rendered its initial admission erroneous. Those additional facts and information were as follows: (1) that the plaintiff Tom Willis blew through a flashing yellow signal at the intersection of 56th Street West and Neibauer Road without proceeding with caution in violation of § 61-8-209(1)(b), MCA; (2) that its insured Cliffton Oppegaard had almost cleared the intersection when Mr. Willis crashed into the right rear quarter panel of Mr. Oppegaard's truck; and, most importantly, (3) that based upon these additional facts, the District Court concluded in a written Order that a reasonable jury could find the plaintiff to have been 100% at fault for the accident.

E. The Court Should Soundly Reject the Willis' Request for Attorney Fees on Appeal

The Willises argue that they are entitled to seek attorney fees on appeal as supplemental relief pursuant to Montana's Uniform Declaratory Judgment Act (UDJA). The argument is baseless.

To be sure, in a successful declaratory judgment action, attorney fees may be awarded under § 27-8-313, MCA, "if such an award is determined to be necessary

and proper." *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 43, 354 Mont. 50, 221 P. 3d 1230. And attorney fees may be awarded on the appeal of a UDJA action – provided the claimant prevailed on the underlying declaratory action and was awarded attorney fees below. As stated by the Court in *VanBuskirk v. Gehlen*, 2021 MT 87, 404 Mont. 33, 484 P. 3d 924:

> [W]hen an attorney fees award on a declaratory judgment is deemed necessary and proper to afford complete relief under the circumstances of a particular case, a supplemental award of attorney fees incurred in successfully defending the judgment on appeal may, in the discretion of the court, be similarly necessary and proper absent some particular equitable consideration to the contrary.

Id. at ¶ 28 (citing *Park Cty. Concerned Citizens v. DePuy*, 2008 MT 246, ¶ 32, 344 Mont. 504, 190 P. 3d 293).

Here, the Willises were not awarded any fees below because they did not prevail on their UDJA claim against Western National. As discussed in Western National's opening brief, the Willises sought a declaratory judgment requiring Western National to advance pay medical bills, even though they were already paid by Medicare or another third-party payor.

The District Court rejected their requested declaratory relief, and instead held that Western National was required to advance Ridley payments of medical bills over which Medicare was actively exercising its subrogation rights by garnishing Tom Willis' social security benefits. When the Willises and their attorneys finally got around to belatedly responding to Western National's written

discovery requests [Appx. D], it was learned 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. *Appellant's Opening Brief*, p. 10.

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. Given the circumstances, the Willises can hardly claim that they "prevailed" in the underlying declaratory action, which explains why their attorneys never petitioned for an award of attorney fees below. They are not entitled to attorney fees on appeal either.

The Willises also argue that they are entitled to an award of attorney fees pursuant to Rule 19(5), Mont.R.App.P. Rule 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." Mont.R.App.P. 19(5). Western National is simply exercising its right to appeal an erroneous decision of the District Court. Western National's appeal is based on reasonable grounds and is not frivolous or vexatious. A request for attorney fees under Rule 19(5) is clearly inappropriate.

III.

CONCLUSION

Liability was not "reasonably clear" in the underlying action. The District Court concluded as much in its *Order Denying Plaintiffs' Motion for Summary Judgment on Issue of Liability*. Consequently, the District Court erred in refusing to set aside and vacate its earlier *Order Regarding Ridley Payments* under Rule 60(b)(6), and this Honorable Court should so hold.

DATED this 8th day of March, 2024.

/s/ Steven R. Milch
Steven R. Milch
Crowley Fleck PLLP
P. O. Box 2529
Billings, MT 59103-2529

Attorneys for Defendant/Appellant Western National Mutual Insurance Company

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 3426 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 8th of March, 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
Steven R. Milch

SUPPLEMENTAL APPENDIX

Tab

TAB N

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

TOM and CAROL WILLIS, Cause No. DV 20-1647

Plaintiffs,

-vs-

WESTERN NATIONAL MUTUAL INSURANCE COMPANY and CLIFFTON OPPEGAARD,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Taken at Yellowstone County Courthouse
217 N. 27th Street
Billings, Montana
September 28, 2022

Before the HONORABLE ASHLEY HARADA, Judge Presiding

APPEARANCES:

For the Plaintiffs: RANDALL G. NELSON
Attorney at Law
2616 St. Johns Avenue, Suite E
Billings, Montana 59102

For the Defendant: (Western Mutual) STEVEN R. MILCH
CROWLEY FLECK
Attorneys at Law
PO Box 2529
Billings, Montana 59103

For the Defendant: (Oppegaard) PATRICK RILEY
Attorney at Law
PO Box One
Bozeman, Montana 59771

PROCEEDINGS

THE COURT: This is DC 2020-1647, Tom Willis versus Western National Mutual Insurance Company, and Cliffton Oppegaard, and this is the time set for a hearing on the motion for Rule 60(b) relief.

I've reviewed the briefing, and I'm a little confused so I'm hopeful everyone will just make sure I understand exactly what relief you are requesting and why. I'm going to let you go ahead and make your argument, but I will interject with questions.

So, Mr. Milch, would you like to begin?

MR. MILCH: Yeah, I would, Judge. It was kind of my understanding that Randy Nelson's 54(b) certification was also at issue in this thing.

THE COURT: Well, yes, that is true, and we can talk about that as well.

MR. MILCH: Okay. Well, I will talk about that first. Rule 54(b) certification that Randy filed, 54(b) certification is proper -- and I will just read it from the rule -- "only if the Court expressly determines that there is no just reason for delay."

Now, there's just reason for delay here

because I've got a Rule 60(b)(6) motion, requesting that the Court set aside and vacate its order regarding Ridley payments based upon subsequent rulings that were made that rendered liability in this case not reasonably clear.

THE COURT: Well, let me ask you about that. 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 Mutual Insurance Company that liability was reasonably clear, because you, in my 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?

And *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? Initially you had argued that *Ridley* payments shouldn't be required because this was going to go -- this was going to potentially allow Mr. Willis to supposedly double dip or receive a secondary benefit. It was -- your assertion was

never that Mr. Oppegaard wasn't responsible in some way, shape or form or am I misunderstanding?

MR. MILCH: I've never taken that position, Your Honor. At the time of the Court's order regarding *Ridley* payments, Western National was not disputing that liability was reasonably clear, okay, and we were paying *Ridley* payments. I might say that, you know, contrary to what the Plaintiffs keep saying to the Court, Western National has paid $67,674.60 in *Ridley* payments, okay. We didn't dispute, you know, that liability was reasonably clear, and it wasn't until Randy Nelson filed his motion for summary judgment on the issue of liability that changed the matter, and in its order denying Randy's motion for summary judgment on the issue of liability, the Court concluded that a jury could reasonably conclude that either party was fully or partially at fault. Based upon that ruling, and based upon the *Ridley* cases, as a matter of law, *Ridley* -- or liability is not reasonably clear, okay, and that's the basis of the Rule 60(b)(6) motion.

THE COURT: But you just said liability is reasonably clear.

MR. MILCH: No, I can't say that it's

reasonable, and for purposes of a *Ridley* summary judgment claim, if there's a dispute as to whether liability is reasonably clear, there's no *Ridley* obligation, okay, and just because we were paying *Ridley* payments doesn't excuse the fact that, you know, Western National can now take the position, particularly based upon the Court's ruling -- subsequent ruling that liability now is not reasonably clear for purposes of advance paying of the *Ridley*, and I just referred to the *Sandidge* case that I cited in, I think, both my opening brief and reply brief, it's a 2022 case.

THE COURT: I don't know what a jury is going to decide, that's the reason we have juries, so if a jury decides that Mr. Willis was somehow comparatively negligent, even though you said that liability is reasonably clear, are you saying that --

MR. MILCH: It's not reasonably clear anymore, Your Honor --

THE COURT: But you have always taken the position --

MR. MILCH: -- based upon the Court's ruling. You said that so long as there is comparative fault that a jury could attribute

50 percent to the Plaintiff, liability is no longer reasonably clear for purposes of a *Ridley* obligation.

THE COURT: Okay. Was there anything else you wanted to say other than maybe I should proofread better?

MR. MILCH: Yeah, I guess I would just refer to my brief, and particularly that recent case, *Depositors Insurance Company versus Sandidge*, where the court specifically held that if issues of material fact exist, there may well be objectively reasonable debate for these facts for purposes of a *Ridley* action, and that's what we have, is an objectively reasonable debate whether Mr. Oppegaard is all responsible for this accident.

THE COURT: Well, that's interesting.

MR. MILCH: If there's feasibly objectively reasonable debate on liability or causation, then liability is not reasonably clear -- either not reasonably clear, insured does not have a legal obligation to advance payment through a *Ridley*. That's on Page 8 of my reply brief.

THE COURT: So you're switching your argument now about *Ridley*, you're pivoting.

MR. MILCH: I'm sorry, what was that, Your

Honor?

THE COURT: Well, this was not the original argument made at the time I ordered *Ridley* payments, and now you have changed your theory regarding why you should not be responsible for *Ridley* payments.

MR. MILCH: You know, yeah, I mean I'm relying upon what the Court ruled in response to Randy Nelson's motion for summary judgment on liability, and he obviously doesn't like the Court's ruling on it, but he didn't have to file the motion either. Now I've got a court determination that says, hey, either party can be fully or partially at fault, now liability is not reasonably clearly as a matter of law under *Ridley*, period.

THE COURT: What about the public policy behind *Ridley*? Have you taken any consideration of that.

MR. MILCH: Your Honor, that's what I've been waiting for in order to file this motion to set aside and vacate this Court's order regarding *Ridley* payments. I sent out discovery 15 months ago, asking for documents from the Plaintiffs that confirm their representation to this Court that Medicare was actively garnishing the *Ridley*

payments. This Court's order regarding *Ridley* payments required me to pay those payments that Medicare was actively garnishing, and it didn't produce anything -- as a matter of fact, they made no attempt to even answer my discovery for eight months until I told them, hey, I'm going to file a motion to compel.

When they finally produced stuff, none of it showed any documents showing that garnishment was actually occurring, and it wasn't until I filed this Rule 60(b)(6) motion that I finally get it, and that's the *Ridley* obligation. That's a public policy. I'm required to pay that pursuant to the Court's order to the extent that Medicare was garnishing their Social Security benefits, and the documents that they finally produced showed that garnishment did, in fact, occur for $630.76.

I immediately got ahold of Western National and informed them of that, they issued a check, I delivered a -- hand delivered that check to Nelson's office on Monday with the request that he immediately forward that to his client. That satisfied the *Ridley* obligation. They are under no duress anymore, all of their medical has been paid for, and the garnishment that occurred, wrongful as

it may have been, we compensated for it with that $630 check.

THE COURT: Thank you. Was there anything else you wanted to say?

MR. MILCH: Just again, Your Honor, the fact that, you know, if the Court grants my motion, sets aside and vacates its order regarding *Ridley* payments -- I don't foresee that the Willises are going to have any further medicals anyway, but I just want to remind the Court that Western National has paid $67,674 in *Ridley* payments, and even if the Court vacates its order, we are not, certainly, going to request repayment of that amount, I mean it's already paid, we are not going to go against the Willises to recover, we want to make that clear.

THE COURT: Okay.

MR. MILCH: That's all I have.

THE COURT: Patrick, did you want to weigh in on anything or are you just listening in today?

MR. RILEY: I'm primarily listening, Your Honor. I mean Mr. Oppegaard, he does not have a dog in the *Ridley* fight. The Court's ruling on the summary judgment motion filed by Plaintiff on the liability of Mr. Oppegaard is the correct ruling, the comparative fault is a question for the jury,

and I just -- I want to assure that with the current motions being heard today that really those concerns are a separate playing field and the liability case as against my client, I don't think there's any cause or reason that the prior order on the summary judgment motion be revisited.

Other than that, I really don't have anything further to say on the issues present before the Court. Thank you.

THE COURT: Mr. Nelson, can you help? Maybe I need to proofread better.

MR. NELSON: No, I think I can clear this up. Thank you. And I'm going to speak slowly.

So let's back up and just cover a little lay of the land. This is an auto accident case where one party had a stop sign and a flashing red light, and the other party had the right-of-way and a yellow caution light. The party with the stop sign and the red flashing light was Mr. Oppegaard.

Now, before the Court are two motions, and both of them turn on Western National's fixation on one word in your second order. We moved to have you expressly certify the *Ridley* order as a final judgment, and the sole opposition to that was Western wanting to then file a motion to set aside

the judgment.

The Court's sentence that Western National is focused upon can be read one of two ways; we think he meant it in one of the ways, and I will explain. You could read that sentence as a correct comment on Montana's comparative fault law which it is in that generally under the comparative fault scheme, either party may be found partially or wholly at fault. That's one way to read your order. It didn't say anything other than that because you weren't asked to determine any specific percentage of fault by those motions.

The second way that your order can be read which is the way Western National is reading it is that your use of the word "fully" as applying it to either party constituted a judicial determination that Mr. Willis could be found fully at fault for this accident. We don't think you meant that.

THE COURT: Most certainly not, because that's not my role.

MR. NELSON: Right.

THE COURT: That's the jury's role.

MR. NELSON: Right. The Montana Supreme Court would never uphold a ruling where the party with the red light and the stop sign was less at

fault than the party with the right-of-way so it's sort of ridiculous that it's being suggested that that's what you were saying, and so -- but that's how Western National is reading your order.

The only -- now I will go back to the motions -- the only opposition to the motion for 54(b) certification is that they wanted you to alter or amend your judgment, okay, that was the sole reason offered, so our position is, Your Honor, there is no reason not to go ahead and order expressing a Rule 54(b) certification of that ruling.

As to the motion to set aside the judgment, the law requires, A, the movant show good cause; B, they timely move; and, C, they are blameless, and Western has not met any of those three requirements, and the only thing Western is doing is misreading your earlier order and contending, whereas you asked him, look, I'm confused, before -- at all points up to this case, you were conceding that liability was reasonably clear; now why are you changing that, and Western's answer is because of one sentence in your order.

Well, the facts of the accident didn't change, and so it's an improper reading of your

order to say that you made a judicial determination that Tom Willis could be found a hundred percent responsible for this accident. That's sort of a -- let's just call it a meritless proposition when one party has the right-of-way, and the other has the stop sign.

You could have a debate, as you've said, about whether Mr. Willis had some small percentage of the percentage of fault, but you weren't asked to determine that on the cross motions, and you didn't rule on that so if there's anything to clarify in the liability ruling is that you were just talking generally about the comparative fault scheme and not making a determination from which Western National can now seize upon that sentence and say that it is exonerated from its *Ridley* obligations under Montana law so that's both of those motions.

There's no good -- there's not -- Western put nothing in front of you to meet any of the three criteria for a Rule 60(b) motion, it moved a year later, and the only reason that it opposes the 54(b) certification is to ask you to set aside the judgment, so if you don't set aside the judgment, there's no reason not to also grant the 54(b) certification.

Western -- now, onto a digression that --

THE COURT: Before you digress, didn't Mr. Oppegaard plead guilty?

MR. NELSON: He did. And he -- this isn't a case where someone rolled up to the stop sign, stopped, looked both ways and then proceeded out into traffic and got hit by somebody with the right-of-way, that's a different accident, that's not what happened here. He didn't even know where he was on the road. He admitted he didn't even see the stop sign, and he didn't break, and he traveled through it at 55 or 60 miles an hour so that's what Mr. -- and his guilty plea is admissible in civil law, but again, the only way that you have to worry about the percentages of responsibility at this point is to prevent Western from completely misconstruing your Court order's language so that they can conveniently decide that they don't have any obligations under *Ridley*. That's exactly what they would like to do, they would like to read you're your court order as excusing any obligations that they have to the Willises.

THE COURT: Well, and, frankly, I was shocked that that was their interpretation of my sentence, because obviously I wasn't in the position

to be making that decision.

MR. NELSON: You were simply commenting on the comparative fault scheme in general.

THE COURT: Right.

MR. NELSON: Yeah. So now Western takes the position -- has just taken the position before you today, well, gosh, when we actually found out that the Willis' social security payments had been garnished, we immediately made that up because that's all we had to do. That's not what your *Ridley* order said.

The issue in the *Ridley* cross motions for summary judgment was whether, if there are alternate sources of payment, like health insurance or Medicaid or Medicare benefits, regardless of whatever the other source of payment, the tort feasor's insurer can't offload their obligation to pay those bills by saying, well, somebody else has already paid them so Mr. Milch is misreading your Court's order.

Now, that's not really on the table here today, but he is misreading your order. Your order didn't say you have to pay the Willis' medical bills only to the extent that they are actually out of pocket, your order said your obligation as the

at-fault tort feasor insurer is to pay all causally related medical bills regardless of whether another source has paid them, and the reason you said that is not to allow double dipping, but because other sources of payment always have a subrogation right. That's true of Blue Cross, and that's true of Medicaid so the amount that Western National reimbursed really doesn't mean anything. There's still $25,000 that Medicaid will take back from Mr. Willis, and all Western has done is offload that onto the taxpayers for now, but when Mr. Willis receives a judgment that he will have to pay that amount back to the US government under the CMS system so really Western National is taking the position that it can offload those responsibilities, and that's not what your order said.

Now, that's exactly why you should order 54(b) certification as a final judgment. Western National doesn't need to be a party to this action any longer. The trial of this case will be who was at fault; and if Mr. Oppegaard is at fault, what amount of damages does he owe. Western is not going to come in here and participate in the trial, in fact, they probably don't want evidence of liability insurance admitted into the trial, and Rule 411 as a

general rule says that evidence of liability insurance isn't admissible.

I, for one, do enough defense work, I agree that the amount of damages that Mr. Oppegaard owes is not increased or diminished by the presence of his insurance. In other words, the jury makes its ruling against Mr. Oppegaard, and then the insurance company indemnifies. We are not a direct action state. I think someplace crazy like Louisiana lets you skip over the policyholder and just sue directly against the insurer; that's not how Montana has chosen to operate so the judgment will be against Mr. Oppegaard.

Western doesn't need to be in this case anymore, and if Western wants to read your order the way it is, which is wrong, then it can take it up to the Montana Supreme Court where I suspect it will be roundly spanked, but that's for another day, but if that's how they want to read it, let's let them get it up there.

So that's why you should grant the 54(b) certification, and that's why you should deny the motion to amend. Thank you.

THE COURT: Is there anything else you wanted to say in response to that, Mr. Milch?

MR. MILCH: Yeah, I would, Judge. Randy misreads this Court's order regarding *Ridley* payments, and I'm going to read directly from it, okay. Here is what you ruled: "In this case Plaintiffs are receiving notices from the US Treasury, and garnishment of Social Security benefits is occurring, therefore *Ridley's* advance pay 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."

Any reading of that that says I've got to pay everything that Medicare has paid, that's not what it says. It says I've got to pay that amount that's being garnished from their Social Security benefits, and that's exactly what we did when we cut the check for $630.76 and delivered it to Randy's office on Monday.

And as far as Randy's argument, he wants you to change your order denying his motion for summary judgment on liability, and he wants you to remove the term "fully" from it, okay, now that argument implicitly recognizes that that ruling makes liability not reasonably clear anymore.

In ordinary circumstances, the three elements that Randy brought up -- this Court's ruling -- subsequent ruling denying his 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's the reason these circumstances show extraordinary circumstances.

THE COURT: No. That is not true. Courts deny summary judgment all the time, and plaintiffs still receive *Ridley* payments. That is not the standard for *Ridley* payments. I feel like we are talking about totally different things. 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.

THE 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.

MR. MILCH: You've got to refer to the *Sandidge* case, the 2022 case, Judge. Just because an insurance company takes a position that liability is reasonably clear, it doesn't unalterably allow them to not change their mind, okay, based upon this Court's ruling that liability is -- or the

apportionment is an issue of fact for the jury.

Now, that in and of itself -- really, I would like do a supplemental brief, Judge, because I can lay out the case that shows why Randy Nelson's *Ridley* motion should have been denied based upon what we know now.

THE COURT: Well, so you're asking me to revisit my *Ridley* order?

MR. MILCH: No. I want a supplemental brief to address what I think is the Court's erroneous understanding of what's going on here.

MR. NELSON: In other words, revisit.

THE COURT: I don't know that I need additional briefing, but I'm not going to prohibit you from doing so.

Would you like a chance to respond to his supplemental briefing, Mr. Nelson?

MR. NELSON: Yeah, I mean I will be forced to respond -- I'm not cherishing the opportunity, but I will certainly respond.

THE COURT: When would you like to file your supplemental brief, Mr. Milch?

MR. MILCH: Your Honor, if I could get -- I'm kind of swamped right now, but if I could request two weeks.

THE COURT: So October 14th would work for you?

MR. MILCH: That will work.

THE COURT: And October 28th, Mr. Nelson?

MR. NELSON: I can have it in a week instead of two.

THE COURT: October 21st?

MR. NELSON: Yep.

THE COURT: Okay. Well, was there anything else you wanted to say?

MR. MILCH: Not here, Your Honor.

MR. NELSON: No, ma'am. Thank you.

MR. RILEY: Your Honor, may I just speak briefly?

THE COURT: Yes.

MR. RILEY: Again, I just -- I really would very much urge the Court -- I think Your Honor's approach to these issues during this hearing doesn't concern me, but I cannot overstate, I just want to assure that these issues in no way limit my client's rights in regard to the substantive defenses he's able to present on liability as well as the damage issue.

And importantly, I noted in the discussion some talk about Medicare subrogation rights, and in

this case it's -- many of the bills have been paid by Medicare at a reduced rate from what the face amount of the bills were from the medical providers so just perhaps something for the Court to consider in evaluating any changes to the existing order is the application of Section 27-1-308 which became effective -- so that my client is not prevented from presenting any substantive damage argument based on the *Ridley* payment issues.

THE COURT: Mr. Nelson?

MR. NELSON: That's completely incorrect, Your Honor. Senate Bill 251 was enacted in April of 2021 and applies to all claims arising after that date so I don't know why Mr. Riley would encourage this Court to engage in an incorrect application of the statute that has no application in this claim.

The one thing that Mr. Riley and I can agree about is if his client wants to come in before the jury and deny responsibility for the accident, he is welcome to do so.

THE COURT: I thought that's where we were in the case. I thought we were getting to that point. I'm not really sure how we've gotten so far off track, but we will hopefully get back on track, and I look forward to supplemental briefing.

Mr. Riley, I did not ask you, did you want to submit a supplemental brief since you indicated you don't really have a dog in this fight?

MR. RILEY: No, thanks, Your Honor. I think I'm fine without one.

THE COURT: I figured. All right. That's great. We will be in recess. Thank you.

REPORTER'S CERTIFICATE

I, JAN HANSEN BARRY, a Registered Professional Reporter, certify that the proceedings were reported by me in machine shorthand and thereafter reduced to writing; that this is a true and correct record of the above-entitled proceedings.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in the action.

IN WITNESS WHEREOF, I have set my hand and seal at Billings, Montana this 5th day of October, 2022.

s/s Jan Hansen Barry

Jan Hansen Barry
Registered Professional Reporter
1028 Picador Way
Billings, Montana 59105
(406) 698-7629

CERTIFICATE OF SERVICE

I, Steven Robert Milch, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-08-2024:

Patrick C. Riley (Attorney)
1705 West College
Bozeman MT 59715
Representing: Cliffton Oppegaard
Service Method: eService

Amy Claire McNulty (Attorney)
1705 West College Street
Bozeman MT 59715
Representing: Cliffton Oppegaard
Service Method: eService

Thomas C. Bancroft (Attorney)
2619 St. Johns Ave., Suite E
Billings MT 59102
Representing: Carol Willis, Tom Willis
Service Method: eService

Randall George Nelson (Attorney)
2619 St. Johns Ave., Suite E
Billings MT 59102
Representing: Carol Willis, Tom Willis
Service Method: eService

Martha Sheehy (Attorney)
P.O. Box 584
Billings MT 59103
Representing: Carol Willis, Tom Willis
Service Method: eService

Electronically signed by Jill Smith on behalf of Steven Robert Milch
Dated: 03-08-2024