

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 WESTERN NATIONAL'S RESPONSE IN OPPOSITION TO
WILLIS' MOTION FOR LEAVE TO FILE A REPLY BRIEF**

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

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Appellees Tom and Carol Willis (“Willises”) filed a motion to dismiss this appeal based on mootness. Appellant Western National Mutual Insurance Company (“Western National”) opposed the motion to dismiss in a combined reply brief and brief opposing Willis’ motion to dismiss. In its combined brief, Western National disclosed that 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. *Appellant’s Combined Reply Brief*, p. 3. In light of those undisputed facts, it was explained that an actual controversy in this case remains, and that this Court can grant effective and meaningful relief on appeal. *Id.* at pp. 3-5.

The Willises have presently sought leave to file a reply brief in support of their motion to dismiss, something which Rule 16(3), Mont.R.App.P., *specifically prohibits*. They intend to argue that Western National has improperly raised new facts as discussed above, including “matters outside the record of the case,” in opposing their motion to dismiss on mootness grounds. *Willis’ Opposed Motion for Leave*, p. 2. The Willises, however, are mistaken, and Western National was clearly entitled to explain why the issue on appeal is not moot.

The general rule that an appellate court is confined to the trial court record does not always apply. Consideration of new facts by the appellate court may be proper where, as here, a question arises as to whether or not the case has become

moot on appeal. See, e.g., Cedar Coal Co. v. United Mine Workers of America, 560 F. 2d 1153, 1166 (4th Cir. 1977)(“We think [the new facts] may be considered in ascertaining whether the cases are moot . . . because there was no mootness question before the district court, so we are not reviewing that. Rather, we are deciding whether the cases are now moot.”); *Johnson v. Rancho Santiago Cmty. College Dist.*, 623 F. 3d 1011, 1020 n.3 (9th Cir. 2010)(“Because the new facts that the defendants seek to establish bear on whether the controversy before us is moot, we exercise our discretion to supplement the record on appeal so that we may determine whether we have jurisdiction”). Indeed, the “[c]onsideration of new facts may even be mandatory, for example, when developments render a controversy moot and thus divest [the appellate court] of jurisdiction.” *Lowry v. Barnhart*, 329 F. 3d 1019, 1024 (9th Cir. 2003)(citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997)).

That all being said, if the Willises do **not** intend to file a bad faith action against Western National at the conclusion of this case, they certainly could have so informed this Court in their most recent pleadings. They declined to do so. Indeed, if the Willises were to admit and certify to this Court that they will **not** be filing a bad faith action at the conclusion of this case, Western National would gladly file a motion to voluntarily dismiss this appeal pursuant to Rule 16(4), Mont.R.App.P.

DATED this 19th day of March, 2024.

/s/ Steven R. Milch

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th 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

CERTIFICATE OF SERVICE

I, Steven Robert Milch, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 03-19-2024:

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Electronically signed by Jill Smith on behalf of Steven Robert Milch
Dated: 03-19-2024