

IN THE SUPREME COURT OF THE STATE OF MONTANA  
Cause No. DA 24-0122

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RESERVATION OPERATIONS CENTER, LLC, a Montana Limited Liability  
Company, d/b/a NATIONAL PARKS RESERVATIONS,  
Plaintiff, Appellant, and Cross-Appellee,

v.

PAYNE FINANCIAL GROUP, INC., a Montana Corporation; PAYNEWEST  
INSURANCE, INC., a Montana Corporation; STATE OF MONTANA  
COMMISSIONER OF SECURITIES AND INSURANCE,

Defendants, Appellees, and Cross-Appellant

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**APPELLANT'S APPEAL BRIEF**

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On Appeal from the Eleventh Judicial District Court, Flathead County  
Cause No. DV-15-1028-NE  
The Honorable Robert B. Allison, Presiding

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## INTRODUCTION

This case has been vigorously litigated over a matter of nine years. After substantial pleadings, an appeal, and several motions for summary judgment and motions in limine, the district court was exasperated with the case and issued an order stating “there will be no more motions” and rejected an unopposed motion for a status conference by the State Commissioner of Securities and Insurance (“State” or “Commissioner”). This chilled the filings before the court. Before two years passed, the district court issued a notice of failure to prosecute pursuant to MCA § 25-1-104 giving NPR 60 days to file a pleading or other activity in the court. NPR complied and met the 60-day deadline. The district court unilaterally dismissed the case anyway, in violation of its own order and the statute.

Regarding the cross-appeal, the State is unquestionably liable for failing to properly serve process, which directly caused NPR to lose a default judgment worth millions of dollars. NPR is a business, and that judgment was a significant economic loss of profit. NPR suffered not bodily harm or tangible property harm, and the punitive damage tort cap does not apply. To the extent there is a legal error, it is that the district court granted only partial summary judgment, when summary judgment on all elements of negligence per se and breach of contract should have been granted.

## STATEMENT OF ISSUES

1. Did the District Court Err by dismissing the case per MCA § 25-1-104 before two years of inactivity occurred, and when a pleading was filed before the 60-day deadline?
2. Absent a MRCP 41(b) motion by a defendant, did the district court err in dismissing the case for failure to prosecute and not addressing the *Becky* factors in its order?
3. Regarding the State's cross-appeal, Did the district court correctly grant summary judgment to NPR against the State on the issue of negligence as a matter of law and that the punitive damage caps did not apply?
4. Regarding the State's cross-appeal, Did the State fail to assert a claim of offset at the district court and are they precluded from doing so for the first time on appeal?

## STATEMENT OF THE CASE

This case is about a district court directing parties not to file any more motions, then dismissing the case for failure to prosecute when the parties complied. The district court ignored unambiguous rules regarding dismissal for failure to prosecute: first, the statutory two-year period must elapse before a case can be dismissed for failure to prosecute; and second, a filing within 60 days forecloses dismissal with prejudice. Absent a motion by a defendant, MRCP 41(b) simply does not apply. Next, the cross-appeal lacks merit because there is no dispute that the State of Montana's Commissioner of Insurance negligently served a party, which resulted in the loss of a valuable judgment, not limited by the State's statutory tort cap.

If anything, this Court should grant summary judgment on all elements of the claim and order summary judgment on NPR's breach of contract claim as well for the full amount of the default judgment lost due to the State's negligence and breach of contract.

### **STATEMENT OF FACTS**

The facts of this case have largely been determined by this Court already in *Reservation Operations Ctr. LLC v. Scottsdale Ins. Co.*, 2018 MT 128, 391 Mont. 383, 419 P.3d 121. The remaining relevant facts are reflected in the district court docket. This lawsuit began as an insurance coverage dispute between Plaintiff/Appellant Reservation Operations Center, LLC, d/b/a National Parks Reservations (NPR) and its insurer Scottsdale Insurance (Scottsdale) and its insurance broker, Payne Defendants (Payne). Both Scottsdale and Payne are now settled and released.

The district court entered default judgment against Scottsdale in the amount of \$515,758.02 in compensatory damages and \$4,641,822.18 in punitive damages, with interest at 10% per annum on April 28, 2017. Doc. 24. Scottsdale later appeared and sought relief from the default judgment but its MRCP 60(b)(4) motion was deemed denied after 60 days pursuant to MRCP 60(c)(1). Scottsdale appealed to the Montana Supreme Court, asserting that the Commissioner negligently served Scottsdale pursuant to Mont. Code Ann. § 33-1-603 (now

repealed). Scottsdale also alleged NPR did not properly serve it, but the Montana Supreme Court held that NPR “completed its statutory obligations for service to the Commissioner.” *Reservation Operations*, ¶22. Scottsdale prevailed and this Court granted Scottsdale’s MRCP 60(b)(4) motion, reasoning the Commissioner neglected to properly accomplish service, failed to track its service activities, and failed to verify that a mistake in service of process did not occur. *Reservation Operations*, ¶¶ 22-23. After this Court determined the Commissioner could not prove it had done its job of serving Scottsdale and set aside NPR’s default judgment, NPR amended its complaint to assert a claim against the Commissioner for the lost default judgment. Doc. 63. Cross-motions for summary judgment were filed, motions in limine were filed, and the case was vigorously litigated.

The district court made several critical decisions. First, the district court ordered that Payne was entitled to a \$1Million offset and NPR could not bring punitive damages against them. Doc. 124. This left NPR with an impossible task to prove compensatory damages it asserted to be \$515,758.02 in the default judgment hearing now exceeded the \$1 Million offset.

The second important decision was the district court ordering partial summary judgment in favor of NPR and against the Commissioner on its negligence claim, leaving only causation and damages for trial. Doc. 140, p.4. Thus, the damage case against the Commissioner and the liability and damage case

against Payne remained for trial, with the offset issue to be resolved thereafter. *Id.*

On April 19, 2021, the district court informed the parties in no uncertain terms

“there will be no more motions.”

27 |       The Court is aware of the following motions to be ruled upon: Payne’s second summary  
28 | judgment motion Doc. 132; Payne’s motion to exclude expert witness John Morrison Doc. 134;  
| and NPR’s motion in limine Doc. 118. The March 12, 2021 motion deadline having passed, there  
| will be no more motions. The Court’s internal schedule is to have all three pending motions ruled  
| upon not later than May 31, 2021. Counsel’s compliance with page 2 of Doc. 121 will then trigger

Doc. 147, p.1. In that order, it denied the State’s motion for a status conference to discuss pending issues. *Id.*

Precluded from filing further motions, the parties attended another mediation, which was unsuccessful. Doc. 151. Meanwhile, lead counsel for NPR, moved out-of-state for a job as a swim coach and semi-retired from the practice of law. The procedural hurdles and counsel’s semi-retirement admittedly slowed NPR’s prosecution of the case.

On October 20, 2023, the district court issued a form Notice of Failure to Prosecute and Intent to Dismiss. That notice erroneously asserted a period of two years had passed without activity and stated “Pursuant to § 25-1-1-4, MCA, if a pleading, order, or other activity does not occur on or before December 20, 2023, the Court shall, on its own motion and without further notice or hearing, dismiss the above-entitled action without prejudice.” Doc. 152. NPR complied with the

order on December 19, by filing a Motion for Trial Setting and Status Conference. Doc. 153.

The Payne defendants opposed setting the case for trial, asserting issues still needed to be addressed, namely bifurcation was necessary. Doc. 154 (“...the case is not ready for trial. For one, it would be wholly impractical and unfairly prejudicial to have a trial on NPR’s claims against Defendants Payne [] and the State [].” Doc. 154 p. 3. Payne asserted “NPR’s case against the State is entirely distinct from its case against Payne, and trying them together would unfairly prejudice Payne and confuse the jury.” *Id.* NPR replied that it sought a status hearing to address the issue of bifurcation. Doc. 155.

Disregarding NPR’s compliance with its Notice the district court admonished NPR for not prosecuting the case in a timely manner and dismissed the case. Doc. 156. The State of Montana filed no motion, brief or other comment regard these issues. Importantly, no party moved to dismiss for failure to prosecute under MRCP 41(b).

### **STANDARD OF REVIEW**

Interpretation of a statute is a question of law that is reviewed for correctness. *Bluebird Energy LLC v. Dep't of Revenue*, 2024 MT 10, ¶ 7, 415 Mont. 48, 52, 542 P.3d 376, 378. Matters of law are reviewed *de novo*. *Spoja v. White*, 2014 MT 9, ¶ 9, 373 Mont. 269, 272, 317 P.3d 153, 156.

The appellate court should review whether the district court applied the statute correctly. It should not conflate the “abuse of discretion” standard applicable when the issue is a MRCP 41 motion, filed by a defendant. However, under that standard, the district court’s decision is reviewed for abuse of discretion. If the record reflects clear error in weighing the relevant factors the Montana Supreme Court will vacate the ruling. *ECI Credit, LLC v. Diamond S Inc.*, 2018 MT 183, ¶ 13, 392 Mont. 178, 180–81, 422 P.3d 691, 693.

Summary judgments are reviewed *de novo* for conformance with applicable M. R. Civ. P. 56 standards and requirements. Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3). A genuine issue of material fact exists only if the Rule 56 factual record manifests a non-speculative record fact that is materially inconsistent with proof of an essential element of an asserted claim or defense at issue. *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶ 13, 411 Mont. 269, 284, 525 P.3d 1183, 1193.

### **SUMMARY OF THE ARGUMENT**

Two years did not pass before the district court unilaterally attempted to dismiss the case under MCA § 25-1-104. NPR complied with the statutory obligation set forth in the court’s notice of intent to dismiss that NPR file a pleading or other matter within the 60-day limit imposed by the district court. No

MRCP 41(b) motion was filed by any defendant to eliminate the obligation of the district court to issue a warning before dismissal. The limited exceptions to the general rule that courts are public institutions charged with administering justice on the merits simply do not apply. Because the statutory criteria were not met, the district court's dismissal for lack of prosecution must be reversed as incorrect as a matter of law. However, the district court correctly concluded that the State of Montana Insurance Commissioner was negligent as a matter of law, leaving only the issue of damages. If anything, this Court should resolve the case in its entirety and order the district court to grant summary judgment on causation and damages as well in the amount of the lost default judgment.

### **ARGUMENT**

- I. THE DISTRICT COURT HAD NO LEGAL BASIS TO DISMISS NPR'S CASE UNDER MCA § 25-1-104 BECAUSE 522 DAYS IS NOT TWO YEARS AND NPR FILED A PLEADING WITHIN THE 60 DAY STATUTORY DEADLINE TO PREVENT DISMISSAL FOR FAILURE TO PROSECUTE.

Due process requires a party to receive notice before the extreme and harsh remedy of dismissal for failure to prosecute occurs. The policy behind the harsh remedy of dismissal was discussed by Justice Shea:

At its essence, the principle underlying a notice requirement in any statute or rule is to afford parties due process. See Mont. Const. art II, § 17. This is why, even though Rule 41(b) does not include a warning requirement as does § 25-1-104, MCA, we have nevertheless seen fit to impose it as a factor that warrants due consideration. These factors are not simply boxes to be checked—to merely acknowledge they

exist and then move on to a conclusion. A court must thoroughly consider each factor in making its decision. No particular factor is determinative; all the factors must be weighed in the light of the facts and circumstances of the case. *State v. Thompson*, 263 Mont. 17, 32, 865 P.2d 1125, 1135 (1993) (analyzing factors in the context of a defendant's right to a speedy trial); see also *United States v. O'Brien*, 560 U.S. 218, 224, 130 S.Ct. 2169, 2174, 176 L.Ed.2d 979 (2010) (“[f]actors may guide or confine a judge's discretion....”) (analyzing sentencing factors).

*ECI Credit, LLC v. Diamond S Inc.*, 2018 MT 183, ¶ 55, 392 Mont. 178, 190, 422 P.3d 691, 699 (Judge Shea dissenting)(discussing MRCP 41 cases).

The general rule is “trial on the merits.” The statute employed by the district court here is an exception to that general rule. “In every case, judgment must be rendered on the merits, except as provided in 25-1-104 and Rule 41, M.R.Civ.P.” Mont. Code Ann. § 25-9-101 (emphasis added). MCA § 25-9-101 makes clear that the two exceptions to “trial on the merits” are separate and distinct. They are the *only* two exceptions to the requirement that courts render judgment on the merits. The only relevant exception applicable to this case is MCA § 25-1-104. MCA § 25-1-104 states if activity “has not occurred for a period of 2 years” the parties have 60 days to file a pleading or “other activity” after notice is served by the court:

In a district court action in which it appears on the face of the record that activity by filing of pleadings, order of court, or otherwise has not occurred for a period of 2 years and no stay has been issued or approved by the court, the court or, if the court does not act, the clerk of court shall serve notice of lack of prosecution to each party at the party's last-known address. If a pleading, order, or other activity does not occur within the 60-day period following the service of the notice and if a stay is not issued or approved during the 60-day period, the

court shall, on its own motion and without further notice or hearing, dismiss the action without prejudice.

Mont. Code Ann. § 25-1-104.

First, the district court lacked a basis to file a notice of failure to prosecute under MCA § 25-1-104 because 2 years had not elapsed between activities. The district court admits as much.

18 | of Montana’s motion for status conference. ECF No. 147. Less than one month later, on May  
19 | 11, 2022, this Court was informed the matter was not settled. ECF No. 151.  
20 | Five hundred and twenty-two (522) days later, the Court issued a Notice of Failure to  
Prosecute and Intent to Dismiss, ECF No. 152, which resulted in the immediate one-page

Doc. 156. 522 days is not two years (730 days is two years). There was simply no statutory basis to attempt to dismiss NPR’s case. On this basis alone, the district court must be reversed.

Second, in the event the appellate court defers to the district court and concludes preparing for and attending mediation is not “activity” in the case, NPR still complied with both the statute and the district court’s order to prevent dismissal for failure to prosecute. In Doc. 152, Judge Allison stated “[p]ursuant to § 25-1-104, MCA, if a pleading, order, or other activity does not occur on or before December 20, 2023, the Court shall, on its own motion and without further notice or hearing, dismiss the above-entitled action without prejudice.” In compliance with the Order, Plaintiff filed a motion for trial setting and status conference *before* December 20, 2023. Doc. 153 (Dec. 19, 2023). Rather than set the trial date or hold a status conference, the district court denied the motion and dismissed the

case, in contravention of its public purpose to hold trial on the merits. Further, the district court ignored its own edict that there be “no more motions” filed by any party. Doc. 147.

A district court cannot violate its own order regarding what was required of the Plaintiffs to avoid dismissal of this case. The court required a pleading or other activity to occur. NPR filed a timely motion (i.e. a pleading seeking a trial date and a status hearing, i.e. other activity). Defendant Payne filed a response brief to the Motion for Trial Setting and Status Conference. Doc. 155 (citing Doc. 154). NPR filed a reply brief generally offering a basis for the status conference request. Critically, no defendant filed a motion to dismiss the case under Rule 41. In refusing to set the case for trial or hold a status conference, the court then failed to adhere to its own order and unilaterally dismissed the case without warning. Doc. 156. The court simply did not adhere to the relevant statute or even its own order.

Given the lack of statutory compliance, the reasoning behind the district court’s dismissal is irrelevant. Doc. 152 (MCA § 25-1-104). However, the court did not even use the *Becky* factors, but that the case has been pending for 9 years and had occupied a lot of the court’s time. *Id.* Such reasoning does not support dismissing a case because a contentiously litigated complex case is evidence of prosecution, not neglect.

In sum, there are two possible avenues by which a court can dismiss a case for failure to prosecute. If a court proceeds under MCA § 25-1-104, two years must first elapse (not 17 months) and it must first provide notice and a 60-day notice opportunity to plead to comply with the statute. If a pleading occurs, the court cannot dismiss the case absent something more. This Court has allowed district courts discretion to avoid the statutory requirements *only if* a defendant moves to dismiss under MRCP 41. *See e.g. ECI Credit, LLC v. Diamond S Inc.*, 2018 MT 183, ¶ 10, 392 Mont. 178, 180, 422 P.3d 691, 693 (District Court realizing its mistake and vacating a dismissal under MCA § 25-1-104 absent a motion by another party, before looking at a Rule 41 motion).

Notably, the district court dismissed the case without any warning. It did not require a status report or issue an order to show cause about the delay before acting. *See e.g. Centron Servs., Inc. v. Delorean*, 2023 MT 30N, ¶ 6, 524 P.3d 469 (a non-cite opinion wherein this same district court was reversed for lack of a warning before dismissing a case). Instead of relying on the *Becky* factors, the district court focused on the amount of time and energy the case had already required of the court and would require in the future:

14 | place upon the party seeking relief the burden of demonstrating a reasonable excuse for  
15 | inaction.”). Due to the vast amount of Court resources this matter has required and will continue  
16 | to require, the inability of this Court to see an end to this litigation considering Plaintiff’s brand-  
17 | new efforts to bifurcate the matter, Plaintiff’s apparent lack of seriousness in resolving this  
matter, and Plaintiff’s refusal to explain its five hundred plus day delay without assigning blame  
to others, this matter is DISMISSED.

Doc. 156. While judicial economy is unquestionably important, it does not as a matter of statute override trial on the merits and the basic guardrails of MCA § 25-9-101. Ultimately, Plaintiff indisputably complied with the district court's directive to avoid dismissal of the case by moving for a trial setting and status conference, as specifically directed by the district court. Doc. 153. The Supreme Court must enforce the statute as written and require at least 2 years (not the court's admitted calculation of 522 days), to pass before a unilateral attempt to dismiss a case. It must also respect the 60-day notice obligation before a case can be dismissed under the statute. Here, the district court blatantly violated essential elements of the controlling statute and acted incorrectly, warranting reversal.

II. ABSENT A MOTION TO DISMISS BY A DEFENDANT, THE ANALYSIS UNDER M.R.C.P. 41 DOES NOT APPLY.

A district court cannot unilaterally dismiss a case pursuant to Rule 41(b). This rule – and every case interpreting it – is predicated upon a defendant filing a motion to dismiss, not the Court's unilateral acts. The rule reads “If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.” M. R. Civ. P. 41 (emphasis added). Here, no Defendant moved the court to dismiss this case. The District Court had no motion upon which to render a decision under Rule 41(b).

It is crystal clear MRCP 41(b) *cannot* apply absent a motion by a defendant, however, because unreported cases conflate the statutory exception with Rule

41(b), NPR takes the time to address the factors, *arguendo*. In determining whether a district court abused its discretion under MRCP 41(b), four factors are considered: (1) plaintiff's diligence in prosecuting its claims; (2) prejudice to the defense caused by plaintiff's delay; (3) the availability of other sanctions; and (4) existence of a warning to plaintiff of potential dismissal. *ECI*, ¶ 16 (citing *Becky v. Northwest Bank Dillon, N.A.* 245 Mont. 1, 798 P.2d 1011(1990)) (the *Becky* factors). The district court did not address these factors before unilaterally dismissing the case. See Doc. 156. Even under an abuse of discretion standard, failing to address all factors would be an abuse of discretion.

**A. Plaintiffs' diligence in prosecuting its claims.**

The Court based its order heavily on the fact that this case has been pending for 9 years and has taken a “vast amount of Court resources.” Doc. 156. NPR's diligence cannot be looked at in a vacuum. NPR first participated in informal proceedings with the Commissioner. The record shows 156 district court docket entries, not including the first appeal by Scottsdale. These include NPR obtaining a default judgment against Scottsdale, multiple summary judgment motions, three mediations, and now two appeals to the Montana Supreme Court. *Id.* The fact that the case has been litigated so contentiously over 9 years is evidence of prosecution, not neglect.

The district court singles out a “five hundred and twenty-two day” period of inaction in the case. Doc. 156. After being instructed NOT to file any more motions (Doc. 147), the parties attended a second mediation of the case in May of 2022, with the mediator’s report filed May 17, 2022.

The Court issued its Notice of failure to prosecute on October 24, 2023, stating “there has been no substantive activity in this action for a period of more than two (2) years.” Doc. 152. This was patently untrue - the period was not two years, but roughly 17 months. Regardless, NPR moved to set the trial and request a status hearing to address issues with how the case was positioned for trial prior to the court’s 60-day requirement. This is not a failure to prosecute.

The Montana Supreme Court has asserted that a 17-month delay is not *per-se* unreasonable, especially in a complex case involving multiple parties, contracts, and cross-motions.

Although the State offers little excuse for its conduct, in this complex case involving multiple parties, contracts, and cross-motions, we conclude that the seventeen-month delay, like the twelve-month delay in *Hobble–Diamond*, was “not *per se* unreasonable.” *Hobble–Diamond*, 272 Mont. at 41, 899 P.2d at 534.

*A.M. Welles, Inc. v. Montana Materials, Inc.*, 2015 MT 38, ¶ 22, 378 Mont. 173, 180, 342 P.3d 987, 992.

It is undisputed that the district court actively dissuaded the parties from filing documents with the court after April 19, 2021. Doc. 147. For example, the

district court refused the State’s unopposed motion for a pre-trial status conference to seek clarification on pre-trial orders on summary judgment. Doc. 147 (April 19, 2021). The district court unambiguously directed the parties not to file anything with the court:

“there will be no more motions.”

28 || judgment motion Doc. 132, Payne’s motion to exclude expert witness John Robinson Doc. 134, and NPR’s motion in limine Doc. 118. The March 12, 2021 motion deadline having passed, there will be no more motions. The Court’s internal schedule is to have all three pending motions ruled

Doc. 147. The parties took the hint and prepared for another mediation, which was ultimately unsuccessful. Doc. 151 (May 17, 2022). It is telling how many filings occurred before vs. after the district court’s warning to stop filing motions.

In the face of the court’s directive not to file any more motions, there was *no way* for the parties to address issues created or perceived to be created by the court’s pretrial rulings. Even Payne articulated the problematic procedural posture in its response to NPR’s motion for a trial setting, supporting bifurcation of the case.

88 at 28-31.) Needless to say, NPR’s case against the State is entirely distinct from its case against Payne, and trying them together would unfairly prejudice Payne and confuse the jury. Mont. R. Evid. 403. Moreover, depending on how NPR pursues damages against the State, a recovery against the State may give rise to additional offsets that would diminish or, more likely, eliminate any potential recovery against Payne.

Doc. 154. The district court's order not to file more motions put NPR in a very difficult position: ignore the court's directive and face its wrath by filing either 1) a motion to bifurcate, or 2) an interlocutory appeal, or 3) trying a case it was set up to lose because of the \$1 Million dollar offset that protected Payne from liability. After being told to proceed, NPR chose the third option, but was then dismissed entirely.

NPR litigated this case against three highly sophisticated and well-funded defendants; an insurance company, an insured insurance brokerage, and the Commissioner of insurance. It obtained and lost a default judgment, briefed an appeal, attended two mediations, settled against one Defendant; briefed summary judgment motions and motions in limine, obtained summary judgment on liability against the State, lost a critically important offset entitlement issue to Payne, attended another mediation, and tried to set the case for trial while seeking some clarification from the court to on its orders. These facts do not demonstrate a failure to prosecute in the overall arc of the case.

The district court relied on *Shackleton v. Neil*, 207 Mont 96, 672 P.2d 1112, and *Calaway v. Jones*, 177 Mont. 516, 520 (1978), to assert that it had broad deference to dismiss the case and that NPR should have unilaterally shown good cause for the delay and showing a "reasonable excuse" for its inaction. Doc. 156

3:4-17. Again, these cases dealt with MRCP 41(b) motions, which is not at issue here. Both predate the relevant statute, which was enacted in 2011.

The district court did not require NPR to set forth a reason for the delay. Even so, NPR has no blame, if any blame exists, it is on NPR's counsel. When counsel attempted to address the issue, the district court took umbrage with the 522 days (17 months) of inactivity after the mediation, and castigated counsel. In that time, NPR's lead counsel semi-retired, moved out of state to work as a swim coach, greatly reduced his practice, and is now in the process of retiring from law. This left NPR with one attorney to manage a significant caseload. Counsel knows better than to make an excuse of being busy and owns the delay. But any delay is attributed not to NPR, the client. Nonetheless, Courts must understand that people need access to the justice system, which is a fundamental right. Rights that cannot be enforced are illusory. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 58, 310 Mont. 123, 141, 54 P.3d 1, 13, on reh'g in part, 2002 MT 129A, ¶ 58, 57 P.3d 41. Significant work has occurred in this case and the district court abused its discretion by dismissing the case in the manner it did.

**B. Prejudice to the defense caused by plaintiff's delay.**

The district court did not consider any evidence of prejudice, just presumed it. Doc. 156. The State of Montana presented no evidence of prejudice to the district court. Payne agreed that it was proper to bifurcate the case from the State.

Doc. 154. To the extent there was evidence of prejudice, it was against Payne, who agreed additional issues needed to be addressed. The State did not file any brief in response to NPR's motion to set trial or seek a status conference. Nonetheless, NPR anticipates the State will assert prejudice for the first time before this Court. The State did not provide the district court with a brief, affidavit, or other argument asserting prejudice. This Court generally will not address an issue raised for the first time on appeal. *In re Marriage of Gerhart*, 2003 MT 292, ¶ 31, 318 Mont. 94, 99, 78 P.3d 1219, 1223. It should not do so now.

The State simply did not comment on the district court's action. Liability against the State was already determined. The only issue to be addressed was what measure of damages was sufficient due to the Commission's negligence? The State is now in a position to cross-appeal summary judgment before going through a trial on damages. There is no prejudice to the State.

### **C. The availability of other sanctions.**

The district court considered no alternative sanctions. While a district court need not determine a total unavailability of other sanctions prior to dismissal, there should be some evidence in the record that the court considered some action beside dismissal. Here, some lesser sanction such as an Order to Show Cause was a viable alternative.

In *Hauschulz*, this Court noted that the record reflected the district court had “made every reasonable effort to encourage [Plaintiff’s] participation, and there was nothing that could have been accomplished in sanctioning [Plaintiff]...thus imposition of a sanction was not a viable alternative.” *Hauschulz v. Michael L. Firm*, 2005 MT 189, ¶ 25, 328 Mont. 95, 102, 117 P.3d 908, 912. This is juxtaposed to this case where the district court instructed the parties not to file any more motions. Doc. 147. At a minimum, the district court should address alternative sanctions, as “dismissals should be imposed sparingly and must remain the exception rather than the rule.” *Hobble-Diamond Cattle Co. v. Triangle Irr. Co.*, 272 Mont. 37, 42, 899 P.2d 531, 535 (1995).

In *Hobble-Diamond*, the Supreme Court reversed a district court’s grant of a Rule 41 motion when “it is clear that other sanctions were available.” *Hobble-Diamond Cattle Co. v. Triangle Irr. Co.*, 272 Mont. at 42, 899 P.2d at 535. Those same alternative sanctions were available here: i.e. an Order to Show Cause, setting trial in short order, or sanctioning a party or counsel. Notably, NPR *asked* for a trial setting in short order. All those remedies were available here.

**D. The existence of a warning to plaintiff of a potential dismissal.**

It is undisputed that no warning of dismissal for failure to prosecute was given to NPR. The court’s Notice set conditions to avoid dismissal: file something

within 60 days. Despite NPR's compliance, the district court dismissed the case anyway.

**E. The Court strayed from the four *Becky* Factors in deciding to dismiss the case.**

The district court's primary reason to dismissing NPR's case rests on its displeasure with the work required by this case: "the vast amount of Court resources this matter has required and will continue to require and the inability of this Court to see an end to this litigation considering Plaintiff's brand new efforts to bifurcate the matter." Doc. 156. Limited judicial resources is a legitimate concern. However, courts are obligated to pursue trial on the merits and only attempt a unilateral dismissal after two years has passes. MCA § 25-1-104.

The court incorrectly presumed delay was a result of "Plaintiff's apparent lack of seriousness in resolving this matter and Plaintiff's refusal to explain its five hundred plus day delay without assigning blame to others." *Id.* This suggests what the court really wanted was an explanation for the lack of motions, despite no motions occurring after it specifically directed the parties to stop filing motions. Doc. 147. It is notable that the parties all complied with the court's order not to file anything else after Doc. 147 (other than one of the State's attorney's notice of withdrawal). No party filed *anything* after the court's admonition and directive to stop.

When the court made clear it demanded an explanation, NPR complied. Doc. 155. That document is a sincere effort to explain why no further motions were filed. Summed up, NPR was directed to try a case without the ability to assert punitive damages against Payne, in the face of a \$1 Million offset. NPR's settlement with Scottsdale unquestionably exceeded every party's calculation of only compensatory damages, and was thus, at least in part, a settlement of intentional acts and punitive damages. NPR's reasoning why the offset was wrong was fully briefed to the Court and will not be restated here. *See* Docs. 110-115, 124. Payne received the extraordinary benefit of a \$1 Million offset hurdle and a directive by the court to try the case anyway. Respectfully to the district court, these issues created significant problems to efficiently resolve the case and are not due to a lack of seriousness.

Next, the question of bifurcation was not superfluous. NPR was simultaneously trying a case against the Commissioner for lost profits due to the loss of the default judgment and Payne for negligent procurement. Given NPR's actual compensatory damages were under \$1 Million, NPR could not beat the offset. This ruling put NPR in the unhappy position of being forced to try a case upon which it would never recover so that it could appeal. Frankly, NPR was concerned about the potential waste of its own resources, jury time, and judicial resources given this procedural posture. The district court had already refused to

hold a status conference and warned the parties not to file further motions, making it clear it was unwilling to address the parties concerns about the clumsiness of the case posture. The district court was unsympathetic to these issues, and was not interested in bifurcating the case, which was NPR's proposed solution.

When a court directs you not to file a motion, the motion you then file better be a good one. NPR's lack of filings was an effort to respect the court's order, not needlessly delay.

### CROSS APPEAL ISSUES

#### III. SUMMARY JUDGEMENT AGAINST THE STATE OF MONTANA IS PROPER.

The facts surrounding the State's breach of its statutory duties under MCA §§ 33-1-601 through 603 to assure proper service of Scottsdale are undisputed. The relevant facts are established in the Montana Supreme Court decision *Reservation Operations*, 2018 MT 128. The doctrine of law of the case precludes the parties from relitigating facts established in the Supreme Court's decision. *Renville v. Farms Ins. Exchange*, 2003 MT 103, ¶15, 315 Mont. 295, 69 P.3d 217. The State, by providing ample affidavits concerning the facts of how it served Scottsdale participated meaningfully in these established facts.

NPR was statutorily required to serve Scottsdale through the office of the Commissioner of Securities and Insurance ("Commissioner") as required by MCA §§ 33-1-601 through 603. Service of a foreign insurer through conventional

methods was legally invalid and could lead to discipline against the attorney refusing to follow §§ 33-1-601 through 603. These statutes were, at the time, the “exclusive means of serving process on a foreign insurer.” See *LaFontaine v. State Farm Mut. Auto. Ins. Co.*, 215 Mont. 402, 404-405, 698 P.2d 410, 411-412 (1985); *Matter of LaFountain*, 226 Mont. 296, 738 P.2d 472 (1987).

Section 33-1-603 required NPR provide the Commissioner with duplicate copies of the Summons and Complaint to be served upon the foreign insurer and pay with a \$10 fee in exchange for service. MCA § 33-1-603(1); *Reservation Operations*, ¶4. The indisputable facts show that NPR completed its obligations. *Reservation Operations*, ¶¶14-17. The Commissioner’s former Chief Legal Counsel, Jesse Laslovich (“Laslovich”), swore under oath that NPR had performed the service of process tasks imposed upon NPR for effectuating service against Scottsdale and that he signed an Acknowledgement of Service indicating that the Commissioner had in fact received copies of the Summons and Complaint. *Reservation Operations*, ¶16.

NPR was not contributorily negligent because, upon providing the Commissioner with copies of the Summons and Complaint, NPR completed its obligations imposed under MCA §§ 33-1-601 through 603 and had “no control over the service of process once it complete[d] its statutory obligation for service to the Commissioner.” *Reservation Operations*, ¶22; Doc. 120 p.15-16.

The Commissioner represented under penalty of perjury that it served Scottsdale on April 5, 2016. *Reservation Operations*, ¶20. After Scottsdale did not appear, the district court entered a partial default judgment. After a damages hearing, the District Court entered judgment for NPR as follows: \$515,758.02 in compensatory damages, and after a separate punitive damages hearing, \$4,641,822.18 in punitive damages, with accruing interest at 10% per annum, entering a final judgment on May 9, 2017. *Id.* ¶4.

In setting aside the default judgment, this Court faulted *only* the Commissioner for lack of sufficient evidence of service. *Id.* ¶¶18-23. In sum, the Montana Supreme Court’s reversal of NPR’s \$5.2 million judgment places blame squarely on the State’s negligent failure to perform a statutory duty:

Personal jurisdiction can only be obtained through “strict compliance” with the rules of service. “If doubt exists concerning whether a default should be set aside, the doubt should be resolved in favor of the motion to set it aside.” Scottsdale has established that doubt exists regarding whether service was properly completed by the Commissioner, and thus has met its burden of proof. The totality of the circumstances supporting reversal include: (1) [Scottsdale’s Corporate Service agent, CSC’s] attestation that the mailing from the Commissioner, upon its opening, did not include the 21-page Complaint, and consequently, it was not uploaded into CSC’s online portal, but that the 16-page First Discovery Requests was included and uploaded; (2) the attestations of other CSC and Scottsdale employees that there was no record of a Complaint received from the Commissioner in their databases, but that the First Discovery Requests was so recorded; (3) Laslovich’s clarification that he could attest to custom and practice of the Commissioner’s office but had no personal knowledge of whether the Complaint was enclosed in his letter to Scottsdale; (4) Laslovich’s cover letter to Scottsdale failed to

accurately describe the documents enclosed; (5) no attestations are made by anyone with personal knowledge about whether the Complaint was actually enclosed in the mailing; and (6) the Commissioner had no internal system that would permit identification at a later time of the specific documents actually received from the plaintiff and actually mailed from its office to Scottsdale.

*Reservation Operations Center*, ¶23 (internal citations omitted).

The result was the complete failure of personal jurisdiction over Scottsdale because of the Commissioner. The *Reservation Operations* decision clearly establishes that the State, through the Commissioner, negligently served Scottsdale.

The Supreme Court held as a matter of fact and law that the State failed to retain sufficient records and evidence that it delivered the complaint to Scottsdale, breaching its duty to NPR. *Id.* A cause of action for negligence requires four elements: duty, a breach of that duty, causation, and damages. *Henricksen v. State*, 2004 MT 20, ¶ 20, 319 Mont. 307, 84 P.3d 38. “The existence of a legal duty is a question of law to be determined by the court.” *Fisher v. Swift Transportation Co.*, 2008 MT 105, ¶ 17, 342 Mont. 335, 181 P.3d 601 (citations omitted).

### **1. Summary Judgment on Duty and Breach in Negligence is proper.**

It is black letter law that violation of a statutory duty is negligence. *See* MPI2d 2.15 (violation of a statute is negligence). Legal duty often arises by statute; such as the heightened legal duties established by the Dram Shop Act imposed upon tavern owners. *Fisher*, ¶ 16, (citing *Cusenbary v. Mortensen*, 1999 MT 221, ¶ 38, 296 Mont. 25, ¶ 38, 987 P.2d 351, ¶ 38.). The Supreme Court of Montana has

definitively determined that the Commissioner breached its statutory duty – it follows that the Commissioner breached the reasonable standard of care established as a matter of law.

The breach of duty is further established by the conflicting affidavits of counsel for the Commissioner of Insurance, Jesse Lazlovich. First, Lazlovich swore he performed his duty by placing a summons and complaint in a certified letter to Scottsdale’s agent. He later capitulated, saying he could only show his custom and practice was to place both the complaint and summons in the letter. *Reservation Operations Center*, ¶20.

Breach of the State’s statutory duties is negligence per se. Negligence per se is simply “[n]egligence established as a matter of law,” and negligence per se usually “arises from a statutory violation.” *Giambra v. Kelsey*, 2007 MT 158, ¶ 46, 338 Mont. 19, 35, 162 P.3d 134, 144. ¶ 23 The elements of negligence per se are: 1) the defendant violated the particular statute; 2) the statute was enacted to protect a specific class of persons; 3) the plaintiff is a member of that class; 4) the plaintiff’s injury is of the sort the statute was enacted to prevent; and 5) the statute was intended to regulate members of defendant’s class. *Schwabe ex rel. Estate of Schwabe v. Custer’s Inn Assocs., LLP*, 2000 MT 325, ¶ 23, 303 Mont. 15, 22, 15 P.3d 903, 908, overruled on other grounds by *Giambra v. Kelsey*, 2007 MT 158, ¶ 23, 338 Mont. 19, 162 P.3d 134. The elements of negligence per se are met here

because MCA §§ 33-1-601 through 603 are intended to protect the rights of plaintiffs by affording a single method to obtain personal jurisdiction over foreign insurers whereby they are beholden to Montana law, and subject to judgments of Montana courts. NPR could obtain personal jurisdiction over Scottsdale only through the State via these statutes. The Statutes were enacted to protect the right of plaintiffs to pursue personal jurisdiction (and thus, judgments) against foreign insurers like Scottsdale. The statute was intended to regulate the insurance industry and place regulatory obligations specifically to the Commissioner of Securities and Insurance of the State. “Upon receiving the service, the commissioner shall promptly forward a copy by certified mail to the person last designated by the insurer to receive the service.” MCA § 33-1-603(1). The law of the case is clear that the State breached this duty. The Supreme Court held that the Commissioner did not or could not attest that it had performed its statutory obligations, causing personal jurisdiction to rendered void and NPR’s judgment against Scottsdale lost due to the Commissioner’s negligent breach of its statutory obligations to Plaintiff.

MCA §§ 33-1-601 through 603 was repealed because of this case. District 4 Representative Matt Regier sponsored the repeal bill and specially cited the NPR’s

\$5.2 million claim as the reason for repeal in his January 21, 2019, testimony in support of House Bill 65<sup>1</sup>:

House Bill 65, it does one thing, it removes the State Auditor from being the process server on domestic and foreign insurers ... Along with siphoning valuable time away from the State Auditor, this also opens up Montana taxpayers to litigation and this is the big part of it ... currently there is a claim that is pending that is going through that

is a \$5 million lawsuit and it exposes the state to huge liability and that was from 2015.

Mr. Regier's testimony on behalf of the State statement makes clear that the State was very aware that its negligence made it culpable for Plaintiff's lost judgment.

**2. To the extent there was error by the district court, it was in not granting NPR summary judgment on the element of Causation and Damages.**

The sole cause for the Supreme Court vacating NPR's judgment was the failure of the State to be able to prove that it accomplished its statutory duty. Doc 120, p. 11-12; *Reservation Operations*, ¶23. The State failed to maintain reasonable records to establish that it had served Scottsdale as it swore to in its affidavit of service. *Id.* Damages are clear and non-speculative. NPR lost the default

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<sup>1</sup> <https://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/34524?agendald=121475>;  
[https://laws.leg.mt.gov/legprd/LAW0240W\\$CMTE.ActionQuery?P\\_SESS=20191&P\\_COM\\_NM=\(H\)+Business+and+Labor&P\\_ACTN\\_DTM=01/21/2019&U\\_ACTN\\_DTM=01/21/2019&Z\\_ACTION2=Find](https://laws.leg.mt.gov/legprd/LAW0240W$CMTE.ActionQuery?P_SESS=20191&P_COM_NM=(H)+Business+and+Labor&P_ACTN_DTM=01/21/2019&U_ACTN_DTM=01/21/2019&Z_ACTION2=Find)

judgment for a specific sum: \$515,758.02 in compensatory damages, and after a separate punitive damages hearing, \$4,641,822.18 in punitive damages, with accruing interest at 10% per annum, entering a final judgment on May 9, 2017.

*Reservation Operations*, ¶4. Other nonspeculative ascertainable damages included lost time and lost work attempting to fix the issue of personal jurisdiction. Lost time and costs and fees associated with establishing personal jurisdiction are foreseeable. Doc. 120 p.13-15.

**3. The district court erred by denying NPR’s summary judgment motion on the breach of contract claim.**

The district court denied summary judgment on breach of contract by asserting there was no mutual consent to contract. Doc. 140 p.7 (citing *Rudio v. Yellowstone Merchandising Corp.* 200 Mont. 537, 543-44). *Rudio* simply states “[i]t is hornbook law that a promise to perform an existing legal obligation does not constitute consideration for a contract.” *Rudio*, 200 Mont. at 543-4, 652 P.2d 1166-7 (1982). This ignores the fact that no legal obligation exists absent NPR paying for the service. The State can set the consideration for the service by statute. NPR paid for the service and the State’s participation was conditioned upon payment. There was no legal obligation independent of the *consideration* paid by NPR. While the duties were identified in statute, the service was still contractual.

Further, the State, through the legislature, consented to enter the private marketplace by making itself the exclusive means of serving a foreign insurer. The duty to serve process in exchange of a fee would exist absent any statute. If a private process server accepted payment in exchange for service, then could not produce evidence of service causing the loss of a default judgment, it would unquestionably be a breach of contract. The district court erred in concluding that service was a completely statutory obligation. The issue of consent was addressed in the underlying summary judgment briefing. *See* Doc. 128, p.6-12.

It is essential to the existence of a contract that there be: (1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. MCA § 28-2-102. Contract formation is based on the assent of the parties to the essential terms to form a binding agreement. *Lenz v. FSC Sec. Corp.*, 2018 MT 67, ¶ 18, 391 Mont. 84, 93, 414 P.3d 1262, 1271–72. Here, the service of process statutes formed the terms of a captive contract notwithstanding the statutes’ creation of a legal duty. “Claims of breach of a professional service contract can sound either in contract or in tort.” *Tin Cup Cty. Water &/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 25, 347 Mont. 468, 474, 200 P.3d 60, 66. The State’s decision to serve as a captive agent for service of process upon a foreign insurer is equivalent to a “professional service” that can sound in contract or tort.

A valid contract was formed here. The Parties to the contract are NPR and the State (Commissioner of Insurance). Each consented to the agreement. NPR paid a fee charged by the Commissioner to enlist the Commissioner's professional services. The lawful object was that the Commissioner would properly complete service so the Montana courts would obtain jurisdiction over Scottsdale. There was adequate consideration, the State named its price (\$10) to accomplish proper service, which was paid by NPR.

All damages for breach of contract, whether natural or contemplated, are subject to limitations of causation, certainty, and foreseeability. They must be clearly ascertainable in their nature and origin. Section 27-1-311, MCA. They must be reasonable. Section 27-1-302, MCA. *Ehly v. Cady*, 212 Mont. 82, 97, 687 P.2d 687, 695 (1984). Damages "for all the detriment caused thereby" include all damages which in the ordinary and natural course of things are proximately caused by the breach itself. These damages are the natural result of the breach. Damages under the statute may also be recovered "which in the ordinary course of things would be likely to result therefrom." Our court, and courts everywhere, recognize this provision as permitting recovery for consequential damages within the contemplation of the parties when they entered into the contract, and such as might naturally be expected to result from its violation. *Id.*

For breach of an obligation arising from a contract, the appropriate measure of damages is the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary course of things would likely result therefrom. § 27-1-311, MCA. Damages which are not clearly ascertainable in both their nature and origin cannot be recovered for a breach of contract. § 27-1-311, MCA. Furthermore, no person can recover a greater amount of damages for a contract breach than would be gained by full performance unless a greater recovery is specified by statute. § 27-1-303, MCA.

In contract actions, lost profits will be allowed only if the loss is proven with a reasonable degree of certainty. 22 Am Jur.2d Damages § 624 (1988). Lost profits may be awarded if the loss is shown to be the “natural and direct result of the act of the defendant” and if the loss is not speculative. *Riverview Homes II, Ltd. v. Canton*, 2001 MT 309, ¶ 28, 307 Mont. 517, 526, 38 P.3d 848, 854. “Plaintiffs are entitled to lost profit or other prospective gain from the operation of plaintiffs’ business. Damage for lost profits or other gains are recoverable only to the extent that the evidence affords a reasonable basis for their determination. However, recovery cannot be denied simply because damages are difficult to determine.” MPI 25.42.

Economic losses such as lost profits or other gains are recoverable breach of contract damages so long as the evidence affords a reasonable basis for its

determination. *Delaney & Co. v. City of Bozeman*, 2009 MT 441, ¶ 42, 354 Mont. 181, 190, 222 P.3d 618, 625. The amount is not speculative. The question is whether the lost profit is a natural and direct result of the act of the defendant. The promise of the State is to legally serve foreign insurers in exchange for a statutory fee. The natural consequence of the State's failure to perform its job is the failure of service and loss of personal jurisdiction, and the loss of judgments against insurers. Here, the expected result occurred – service failed, the prospect of gaining a judgment against the foreign insurer was lost, and NPR's judgment was vacated. For this reason, the state is liable for NPR's prospective gain of the judgment.

The office of the Insurance Commissioner breached its statutory promises to NPR. The Court identified a fatal breach of the State's performance in its findings on the service issue, stating: "it is clear that the certified letter failed to reference all of the documents that were to be served upon Scottsdale, and thus raises doubt about whether its description of the enclosures was accurate, and the Complaint was included." *Reservation Operations Ctr.* ¶ 21. The Court went on to say that the Insurance Commissioner could not attest based on personal knowledge that he actually enclosed the Complaint with the service mailing. *Id.* ¶ 23.

The proper objective of an award of damages for wrongful breach of contract is to place the party wronged in as good position as if the contract had been performed. *Kirby v. Kenyon-Noble Lumber Company* (1976), 171 Mont. 329,

332, 558 P.2d 452, 454. Damages for lost economic gain must be awarded if not speculative. *Silfvast v. Asplund* (1935), 99 Mont. 152, 161, 42 P.2d 452, 456.

“Plaintiffs are entitled to the amount of money which will reasonably and fairly compensate them for all loss caused by the defendant(s), regardless of whether such loss could have been anticipated.” MPI 25.00 (emphasis added).

“Plaintiffs are entitled to lost profit or other prospective gain from the operation of plaintiffs’ business. Damage for lost profits or other gains are recoverable only to the extent that the evidence affords a reasonable basis for their determination.

However, recovery cannot be denied simply because damages are difficult to determine.” MPI 25.42. NPR would have paid taxes on the proceeds of the default judgment, it was a profit. It is foreseeable that improper service can result in the loss of jurisdiction and judgments. This was the business the State chose to get into. This Court cannot make a “results driven” decision and ignore the law.

The proper measure of damages that NPR is entitled to is the amount of the lost judgment, interest thereon, and its reasonable attorney’s fees expended in undoing the State’s neglectful breach.

#### IV. THE DISTRICT COURT CORRECTLY CONCLUDED THE STATUTORY CAP ON DAMAGES DID NOT APPLY TO THE ECONOMIC DAMAGES OF THIS CASE.

Montana statute caps some kinds of tort liability at \$750,000.00. Mont. Code Ann. § 2-9-108. A “claim” to which § 2–9–108(1), MCA, applies is defined as:

“Claim” means any claim against a governmental entity, for money damages only, that any person is legally entitled to recover as damages because of personal injury or property damage caused by a negligent or wrongful act or omission committed by any employee of the governmental entity while acting within the scope of employment, under circumstances where the governmental entity, if a private person, would be liable to the claimant for the damages under the laws of the state. For purposes of this section and the limit of liability contained in 2-9-108, all claims that arise or derive from personal injury to or death of a single person, or damage to property of a person, regardless of the number of persons or entities claiming damages, are considered one claim.

MCA § 2-9-101(1). “Property damage,” for the purposes of § 2-9-101(1), MCA, means “injury or destruction to tangible property, including loss of use of the property, caused by an occurrence for which the state may be held liable.” MCA § 2-9-101(6). Economic loss is not property damage nor personal injury and the tort cap does not apply to NPR’s economic loss because of the vacated judgment. The Montana Supreme Court held lost profits like the damages sustained by NPR are not within the statutory cap. *Delaney & Co. v. City of Bozeman*, 2009 MT 441, ¶ 20, 354 Mont. 181, 185, 222 P.3d 618, 622.

NPR has not suffered physical injury or damage to tangible property. Its loss is economic. In *Delaney*, the City of Bozeman wrongfully interfered with Delaney’s business plan to develop a commercial property, causing him to lose \$3 Million in profit. Similarly, the Commissioner’s breach of duty resulted in an economic loss to NPR of over \$6 Million. That loss was not “personal injury” nor

“property damage” and is not subject to the cap. The Court in *Delany* explained why the Tort cap does not apply to damages like those at issue in this case:

¶ 23 Section 2–9–108(1), MCA, which contains the \$750,000 limit on damages, only applies to those tort actions which constitute a “claim” as defined in § 2–9–101(1), MCA. As there is no personal injury in this case, the claim must be for property damage as described in § 2–9–101(6), MCA, in order for the limit on damages to apply. The District Court held that the phrase “loss of use of the property” in § 2–9–101(6), MCA, does not include a loss of use of property when there has been no injury or destruction to tangible property.

11 ¶ 24 The only reasonable meaning of the phrase “including loss of use of the property” in § 2–9–101(6), MCA, is that it refers to tangible property that has been injured or destroyed. It adds an element of damage that may be recovered; however, any recovery must be the result of an injury to or destruction of tangible property. In this case, Bozeman tortiously interfered with Delaney's ability to acquire the Mandeville property, causing Delaney to suffer a loss of profits. See *Continental Ins. Co. v. Bones*, 596 N.W.2d 552, 557 (Iowa 1999). In this case there is no damage to tangible property. Lost profits are in the nature of an intangible economic interest. See *Graber v. State Farm Fire & Cas. Co.*, 244 Mont. 265, 269, 797 P.2d 214, 216 (1990).

*Delaney* ¶¶ 23-24.

In the *Delany* case, Justice Morris (joined by Cotter, McGrath and Rice) stated that the City’s entry into the market erased any expectation of a statutory cap. Similarly, the State, under the former version of the service statutes, entered the business as acting as a registered agent for insurers. In so doing, the State too has no business seeking protection under the tort cap statute. *Id.* ¶ 48. It cannot inflict such extensive damages to NPR and then hide behind the cap.

V. THE STATE HAS NO BASIS TO ASSERT AN OFFSET BECAUSE OF SCOTTSDALE’S PUNITIVE DAMAGE SETTLEMENT.

The district court allowed Payne an offset of \$1 million against any recovery, rendering a trial against Payne to be essentially worthless to NPR. Doc. 124. NPR believes the district court erred, but, through attrition, resolved the claim against Payne through settlement. Regardless, the district court noted that the State (CSI) did not file a brief or state a position as to the issue of an offset.

16 Payne is not the only alleged tortfeasor remaining in this case after the departure of  
17 Scottsdale; CSI is also alleged to be a tortfeasor. CSI has not filed a brief stating its position  
18 relative to the pending cross-motions. The Court, therefore, infers CSI is not claiming a pro tanto  
19 offset concerning the Scottsdale settlement with NPR. The Court understands NPR's claim of  
20 alleged injury caused by CSI – loss of the default judgment against Scottsdale and related expenses  
21 (Second Amended Complaint) – to be entirely different from the injury caused by Payne and  
22 Scottsdale – loss of coverage and defense.

Doc. 124. For this reason, there is no basis to allow the State to offset any settlement amounts of other parties. *In re Marriage of Gerhart*, ¶ 31.

## CONCLUSION

Montana law requires this case to be resolved on the merits. Neither limited exception to dismissal for lack of prosecution applies, especially given the Court's order not to file further motions. Ultimately Court are a public service employed as an instrument of government for the citizens. At the very least, this Court should reverse the district court's dismissal for failure to prosecute and direct the case's remaining issue – cause and damages against the State - to be tried.

The correct remedy in this case is for the Court to enter summary judgment on causation and damages for the amount of the lost judgment.

As to the cross-appeal, NPR requests the Court not disturb the grant of summary judgment on its negligence claim.

Dated this 10<sup>th</sup> day of May, 2024.

SCHMIDT BERKOFF, PLLC

By /s/ Carey B. Schmidt  
*Attorneys for Plaintiff, Appellant, and  
Cross-Appellee*

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that the foregoing Opening Appellate Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for quoted and indented material, and contains approximately 9298 words, excluding the Table of Contents, Table of Authorities, and Certificate of Compliance.

Dated May 10, 2024.

SCHMIDT BERKOFF LAW FIRM PLLC.

/s/ Carey Schmidt  
Counsel for Appellant / Plaintiff NPR

## CERTIFICATE OF SERVICE

I, Carey Schmidt, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-10-2024:

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Dated: 05-10-2024