Cause No. DA 24-0204

IN THE SUPREME COURT OF THE STATE OF MONTANA

MARK JOHNSON and MOLLY JOHNSON, Husband and Wife, individually and on behalf of all others similarly situated,

Plaintiffs and Appellants,

v.

STATE FARM MUTUAL AUTOMOBILE INS. CO. and STATE FARM FIRE AND CASUALTY CO.,

Defendants and Appellees.

On Appeal from the Montana Eleventh Judicial District Court, Flathead County
Cause No. DV-15-2019-934-NE, Hon. Dan Wilson

APPELLANTS' AMENDED OPENING BRIEF

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2. Is a dispute over an insurer's collection of subrogation that leaves the insured with unrecovered losses and/or unreimbursed attorney fees a justiciable controversy?
3. Does Johnsons' claim that State Farm wrongfully interfered with their tort claim property interest constitute a damage claim caused by "the handling of an insurance claim" so as to be preempted by §33-18-242(3), MCA?

STATEMENT OF THE CASE

Introduction

This case is modeled on the remedy approved by this Court in *Ferguson v. Safeco Ins. Co. of Am.*, 2008 MT 109, 342 Mont. 380, 180 P.3d 1164, when an insurer improperly subrogates before the insured has been made whole.

Despite approval by the *Ferguson* court of this procedure, and despite the firmly established made-whole rule (*Skauge v. Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 565 P.2d 628 (1977) and progeny), the district court dismissed Johnsons' claims on the grounds that there was no justiciable controversy. This

ruling deprived Johnsons of any remedy for the impairment of their third-party tortfeasor claim and for their loss of attorney fees pursuing that claim.

The district court also dismissed made-whole claims for conversion upon a conclusion that subrogation was the "handling" of an "insurance claim" that was preempted by §33-18-242(3), MCA, rather than distinct, post-claim handling conduct that interfered with Johnsons' independent tort and made-whole rights.

Factual Background

Molly Johnson was involved in an automobile accident caused by tortfeasor Vanmeter. District Court Record (hereafter "Doc.") Doc. 42 (see Appendix, Tab 3), ¶¶ 6, 17. The car was owned by the Johnsons and insured by State Farm.

In addition to the damage covered by their State Farm policy, Johnsons had other uncovered property losses and a tort action against Vanmeter. State Farm subrogated against Vanmeter and her insurer (GEICO), and collected the full amount it had paid Johnsons, without regard to (a) the impairment of the Johnsons' tort claim and depletion of liability insurance coverage, and/or (b) the attorney fees Johnsons incurred in recovering from the tortfeasor.

As a result, State Farm has paid a net of nothing and has borne no loss under the property damage coverage it was paid a premium to provide. The Johnsons bear the loss of a tort recovery depleted by their attorney fees.

Procedural Background

The original Complaint was filed September 26, 2019. Doc. 1. The case was removed to the United States District Court for the District of Montana by State Farm on May 5, 2020. Doc. 5.

On August 18, 2020, the case was remanded to state court upon State Farm's affirmative contention that the U.S. District Court lacked jurisdiction. Doc. 9.

After remand, Johnsons filed their First Amended Complaint on October 7, 2020. Doc. 10. That pleading mirrored the *Ferguson* form of action against State Farm[1] by seeking a declaratory ruling that, through a systematic program of subrogation without any made-whole determination, State Farm had deprived Johnsons and similarly situated class members of their made-whole rights.

The Honorable Dan Wilson granted State Farm's motion to dismiss the subrogation claims by finding that the First Amended Complaint failed to plead sufficient facts to demonstrate that Johnsons were not (or would not be) made whole. Doc. 33 (See Appendix, Tab 1). That ruling also dismissed Johnsons' claim based on the legal theory of conversion.

The Johnsons then moved for the district court's leave to file a Second Amended Complaint (Doc. 34) that detailed the amount of property losses,

[1] The First Amended Complaint also asserted a claim against State Farm for UIM benefits and brought a negligence action against the tortfeasor, Britanie Vanmeter.

attorney fees and subrogation. Judge Wilson denied leave to file the pleading upon the conclusion that the additionally pled facts did not cure the problem because it still was unknown what total amount Johnsons would eventually recover from the tortfeasor and her liability insurer:

> The defect is that the Johnsons' allegations, taken as a whole and taken as true, cannot establish that State Farm's exercise of its subrogation right caused the deprivation of the Johnsons' right to be made whole for their (so-far) uncompensated losses and injuries from other available sources of recovery.

Doc. 38 at p.3 (emphasis added, see Appendix, Tab 2).

The Johnsons applied for a writ of supervisory control. This Court denied the writ on the grounds that the pleadings did not establish the recoveries Johnsons might eventually recover from Vanmeter and her insurer or how a *preliminary* assertion of subrogation would affect the amount Johnsons *ultimately* would recover:

> Whether under the facts alleged in their first amended complaint, or in their proposed second amended complaint, Johnsons have not demonstrated here how State Farm's *mere preliminary assertion* of the *future right* to subrogation for the property loss compensation it previously paid to Johnsons *has already reduced, or necessarily will reduce*, the amount of compensation that they will ultimately be entitled to recover.

Johnson v. Mont. Eleventh Judicial Dist. Court (2021), 407 Mont. 440, 500 P.3d 581, p. 7 (emphasis added).

This uncertainty about future recoveries was thereafter resolved when Johnsons settled with Vanmeter and her insurer. Doc. 42, ¶2 (see Appendix, Tab 3). The case was settled for a total of $26,618 through a settlement agreement and release that did not apportion the payment between bodily injury and property damage. Doc. 42, ¶31. Vanmeter's insurance limits were $25,000 for bodily injury and $20,000 for property damage. *Id.* While Vanmeter's property damage limits were not exhausted by State Farm's and Johnsons' property damage, Johnsons have not received ***any*** of their $8,906 in attorney fees expended for seeking uncovered losses from Vanmeter. *Id.,* ¶34.

Vanmeter was then dismissed from the case (Docs. 43 and 45) and Johnsons filed (upon stipulated leave) a Third Amended Complaint (hereafter "TAC"). That pleading alleged "[t]he suit against Vanmeter has been settled and has been dismissed with prejudice (Doc. 42, ¶2), and that State Farm had subrogated "without any payment of attorney fees" (Doc. 42, ¶53) which necessarily reduced the Johnson's net recovery from the Vanmeter settlement.

State Farm then again moved to dismiss the TAC's made-whole claims. Doc. 46. The district court granted State Farm's motion. Doc. 54 (see Appendix, Tab 4). That order also reaffirmed the dismissal of Johnsons' conversion claim. These are the rulings challenged by this appeal. As a result of the dismissal of *Ferguson*-type claims, only the underinsured case remained.

Johnsons and State Farm then settled the underinsured claim and the district court dismissed it as fully settled upon the merits. Doc. No. 57. The district court had previously dismissed the *Ferguson*-type claims in the TAC. Thus, all claims in the case had been fully and finally addressed and the district court entered Final Judgment. Doc. No. 60.

STATEMENT OF FACTS

Molly Johnson was involved in an automobile accident on November 2, 2017, caused by tortfeasor Vanmeter. Third Amended Complaint ("TAC") Doc.42, at ¶¶ 6, 17. The vehicle was owned by Molly Johnson and her husband, Mark Johnson, and was insured by State Farm.

The Johnsons made a claim under their collision coverage for property damages sustained in the accident. That collision coverage insurance claim was fully resolved, and the Johnsons have pled that they do not contend "their collision coverage claim was improperly handled." TAC, Doc.42 at ¶48.

The Johnsons had additional property losses and bodily injury not covered by their State Farm policy. They therefore presented a tort claim against Vanmeter and her insurer. State Farm subrogated against Johnsons' third-party tort cause of action to recover property damage amounts it had "paid under the collision and rental coverages of [Johnson's] policy with State Farm Mut. Auto. Ins. Co." *Id*. ¶5.

State Farm did so "without notifying (Johnsons) of the insureds' right to be made whole" and proceeded to collect and convert to its own use the full amount of the property damage payments State Farm had made to (Johnsons)." *Id*. ¶37.

From the subrogation recovery, State Farm reimbursed Johnsons' deductible but "made no determination that the insured was or could be made whole for the uncovered property damage and without any payment of the attorney fees [State Farm] knew would have to be incurred" by Johnsons to recover from their suit against Vanmeter. *Id*. ¶53.

The TAC alleges the effect of State Farm's subrogation. The settlement with GEICO constituted the exhaustion of GEICO's "policy limits" of "$25,000" for "bodily injury," and the payment of $1,618 for uncovered property losses (in addition to the vehicle damage previously paid to State Farm). *Id*. ¶59

Finally, the TAC establishes that the Johnsons incurred fees and costs in recovering the additional $1,618 (TAC, at ¶33), and that these fees were not recovered (*Id*. at ¶36) and could not be recovered (*Id*. at ¶10) from Vanmeter or GEICO. State Farm did not pay any fee expense and did not adjust its subrogation to account for the attorney fee element of Johnsons' made-whole rights. *Id*. at ¶53.

The TAC alleges State Farm's subrogation conduct was done as part of a program of "systematic subrogation procedures" that "do not require that presentation of the subrogation claim, or collection thereon be held in abeyance

until the insured has first collected uncompensated property damage losses [and] been reimbursed for her costs of collection, including attorney fees." *Id*. ¶59. *See also* ¶57:

> [State Farm's] systematic procedures for pursuit and collection of subrogation do not address the insured's attorney fee and collection expense for the insured's recoveries from the motor vehicle accident tortfeasor and the tortfeasor's liability insurer, nor do they address damages that are not covered by the first party portions of the insurance policy.

STANDARD OF REVIEW

The standard of appellate review for dismissal of a complaint for lacking justiciability is *de novo*. "Issues of justiciability -- such as standing, mootness, ripeness, and political question -- are questions of law, for which our review is *de novo*. *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455." *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶16, 366 Mont. 450, 288 P.3d 193.

The standard of appellate review for dismissal of a complaint for lack of subject matter jurisdiction is *de novo,* and affirmance requires that there be no possible set of facts which would present a justiciable claim for relief:

> The question of whether a district court properly granted a motion to dismiss is a conclusion of law which we review to determine if the court's interpretation and application of the law is correct." *[citation]* ... A motion to dismiss should be construed in a light most favorable to the non-moving party and *should not be granted unless it appears beyond a doubt that the non-moving party can prove no set of facts in*

> *support of its claim which would entitle it to relief*." *Bradley v. Crow Tribe of Indians,* 2003 MT 82, ¶ 12, 315 Mont. 75, ¶ 12, 67 P.3d 306, ¶ 12 (citations and quotations omitted).

Pub. Lands Access Ass'n, Inc. v. Jones, 2008 MT 12, ¶ 9, 341 Mont. 111, 176 P.3d 1005 (emphasis added).

SUMMARY OF ARGUMENT

A subrogation program that fails to account for all of an insured's property damage losses and attorney fees before collection violates Montana's "made-whole" rule because that rule requires that an insurer's use of its insured's claim must be subordinated to the insured's right to be made "whole" for all losses and the legal expense of recovering those losses. The rationale of the rule is that it would be inequitable for the insured to pay a net of nothing for a loss it was paid to insure while its insured bore an unrecovered loss.

Johnsons have presented a justiciable dispute over State Farm's subrogation because that collection was premature, done without the requisite made-whole "determin[ation]," and left Johnsons with an impaired claim and a concrete loss of attorney fees, while State Farm recovered all of the losses it was paid a premium to insure.

The claim that State Farm has wrongfully interfered with Johnsons' property interest in their tort claims is not preempted by §33-18-242(3), MCA. First, this statute does not address or eliminate the court's power to provide procedural relief

for violation of substantive duties. Second, the Johnsons' claims are not "claims handling" because they seek to enforce the distinct duties that attach when an insurer undertakes conduct of asserting and collecting subrogation under its insured's claim against the third-party tortfeasor, after the handling and full resolution of the Johnsons' insurance claim against State Farm. Third, the conversion claim is for a wrong that is independent of claim handling.

ARGUMENT

I. JOHNSONS' PLEADING ASSERTS FACTS WHICH, IF TRUE, ESTABLISH THAT STATE FARM'S PROGRAMMATIC SUBROGATION VIOLATED THE "MADE-WHOLE" RULE AND DEPRIVED THE JOHNSONS OF THEIR MADE-WHOLE RIGHTS IN KNOWN, CONCRETE MONETARY AMOUNTS.

a. Montana's Made-Whole Rule Requires that an Insurer's Use of its Insured's Claim Must be Subordinated to the Insured's Right to be Made "Whole" for All Losses and the Legal Expense of Recovering Against the Tortfeasor.

This case presents the question of whether Johnsons have pled a justiciable claim for relief for State Farm's systematic violation of Montana's "made-whole" rule in its subrogation program. The first issue is whether the TAC pleads a systematic violation of the made-whole rule when State Farm asserted and collected subrogation under Johnsons' tort claim.

The made-whole rule was first articulated by this Court in *Skauge v. Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 565 P.2d 628 (1977). This Court

held that, for equitable reasons, an insurer was not allowed to pursue subrogation until the insured had been made whole for all damages *and* the attorney fees expended in the collection of those damages:

> The basic rationale for this rule, in either of the two categories, is best stated in *St. Paul Fire & Marine Ins. Co. v. W. P. Rose Supply Co., supra*, 198 S.E.2d at 484:
>
> "* * * When the sum recovered by the Insured from the Tortfeasor is less than the total loss and thus either the Insured or the Insurer must to some extent go unpaid, *the loss should be borne by the insurer for that is a risk the insured has paid it to assume.*" (Emphasis supplied.)
>
> Again, we note, the doctrine of legal subrogation is applied to subserve the ends of justice and to do equity in the particular case under consideration. *Bower v. Tebbs, supra*.
>
> For these reasons we adopt the view that when the insured has sustained a loss in excess of the reimbursement by the insurer, the insured is entitled *to be made whole for his entire loss* and *any costs of recovery, including attorney's fees*, *before* the insurer can assert its right of legal subrogation against the insured or the tortfeasor.

Skauge v. Mountain States Tel. & Tel. Co., 172 Mont. 521, 528, 565 P.2d 628, 632 (1977) (emphasis added in part).

For more than 45 years, this Court has consistently reaffirmed the above rule and specifically held that, when the insured has sustained a loss "in excess of the reimbursement by the insurer," the insured must also be made whole for "any costs of recovery, including attorney's fees" (*Skauge*, *supra.*) before the insurer can recover on a subrogation right.

For example, in *DeTienne Assocs. Ltd. P'ship v. Farmers Union Mut. Ins. Co.,* 266 Mont. 184, 191, 879 P.2d 704, 709 (1994), an insured (Park Plaza) sustained property damage when a train derailment caused a power outage that resulted in frozen and burst pipes. Park Plaza's insurer (FUMI) covered some of losses under its' policy but other property losses were not covered. FUMI and Park Plaza each brought actions against the railroad to recover their respective interests in the property damage losses and, following a consolidation of the actions, the court "ordered MRL to pay $411,155 to FUMI for the money it had paid Park Plaza and $122,441 to Park Plaza for the damages sustained *over and above the policy limits* of the FUMI policy." *Id.* at 266 Mont. at 187, 879 P.2d at 706 (emphasis added).

The sole issue on appeal was whether, before subrogation, the insurer had to account for the insured's attorney fees incurred in recovering the losses not covered by the FUMI policy. FUMI argued that its subrogation right should not be reduced by the insured's recovery expenses. This Court ruled that argument was inconsistent with the *purpose* of the made whole rule:

> *That purpose is not to ensure that the risk-taker, the insurer, be compensated* for all money it paid to policy holders …
>
> …
>
> We determined in *Skauge* that in a situation where the sum recovered by the insured from the tortfeasor is less than the total loss and thus, either the insured or the insurer must to some extent go unpaid, the loss

> should be borne by the insurer for that is a risk the insured has paid it to assume. *Skauge*, 172 Mont. at 528, 565 P.2d at 632. Likewise, we held in Skauge that *when the insured has sustained a loss* ***in excess of the reimbursement by the insurer****, the insured is entitled to be made whole for its entire loss and any costs of recovery, including attorney fees*, before the insurer can assert its right of legal subrogation against the insured or the tortfeasor. *Skauge*, 172 Mont. at 528, 565 P.2d at 632.
>
> …
>
> To do otherwise would mean that the insured looses money (money paid for litigation of excessive damage plus money paid as premiums to insurer) and the insurer gains by such a financial arrangement (insurer has received premiums plus has been fully recompensed for money it paid to the insured). In *Skauge* we determined that such a state of affairs is akin to *unjust enrichment* and *is not equitable*.

DeTienne, 266 Mont. at 189-90, 192 879 P.2d at 707-08,709 (emphasis added).

This rule and rationale assuring the insured is made whole for her attorney fee expended in securing *uncovered* losses has consistently been reaffirmed in every succeeding subrogation case before this Court. *See e.g., Swanson v. Hartford Ins., Inc*., 2002 MT 81, ¶24, 309 Mont. 269, 46 P.3d 584 ("the insured [must] recover all of her losses [and] *also all costs of recovery as well*, such as *attorney fees* and costs of litigation"); *Ferguson v. Safeco Ins. Co. of Am.*, 2008 MT 109, ¶5, 342 Mont. 380, 180 P.3d 1164 ("*unrecovered losses including her … attorney fees*"); *Diaz v. State*, 2013 MT 331, ¶ 11, 372 Mont. 393, 396–97, 313 P.3d 124, 127 ("all loss suffered"); *Van Orden v. United Servs. Auto. Ass'n*, 2014 MT 45, 374 Mont. 62, 318 P.3d 1042, ¶¶12-13("made whole for his entire loss and any costs of recovery, *including attorney's fees*, before the insurer can assert its right of legal

subrogation"); *State v. Lodahl*, 2021 MT 156, ¶ 19, 404 Mont. 362, 491 P.3d 661, 667("made whole for his entire loss *and any costs of recovery, including attorney's fees*").

The inequity of an insurer recovering everything it had been paid a premium to cover while leaving the insured to suffer loss is further amplified by the fact that subrogation is a use of *the insured's claim*. Such use presents the problem that subrogation depletes the available amount of the tortfeasor's liability insurance placing the tortfeasor's insurer at lesser risk when fighting the remaining property damage claim.

For example, when the insurer ignores the insured's priority right and makes a recovery of the larger and often low-hanging fruit in an auto accident property loss claim (e.g., the value of a totaled vehicle), the recovery of lesser losses (e.g., minor vehicle contents or short-term rental expense) becomes proportionally more difficult and expensive. Without the ability to recover fees, an insured could have to accept an unfair amount or walk away from further prosecution of the property damage claim because the cost of litigation of the claim is no longer justifiable. Certainly, the tortfeasor's liability insurer would have much lesser incentive to

settle once most of its liability exposure risk had been resolved with the subrogating insurer.[2]

For these reasons, equity demands that, if an insurer takes the benefit of using *its insured's claim*, it must bear all consequences to the insured of such subrogation. As this Court stated in *Swanson,* the "only practical way we can satisfy this principle is to allow full compensation to the plaintiff first, before subrogation is allowed." *Swanson,* at ¶ 27.

b. The Johnsons' Complaint Pleads All Facts Necessary to Establish that State Farm's Subrogation Systematically Deprived Them of Any Consideration of the Attorney Fees they Expended for Recovery of Uncovered Property Damage Sustained in the Motor Vehicle Accident.

With the above articulation of the made-whole rule and its equitable rationale in mind, the question becomes whether Johnsons have pled a violation of the rule.

To answer this question this Court is directed to the following allegations in the TAC which must be accepted as true for the purpose of this appeal. *Groo v. Montana Eleventh Jud. Dist. Ct*., 2023 MT 193, ¶ 21, 413 Mont. 415, 537 P.3d 111

[2] Doc. 49, pages 18-20, describes how, after an insurer settles its subrogation claim the remainder of the property damage claim may be too small to justify litigation, and, because the majority of the dollar amount has been removed from a property claim, insurance adjusters may be less likely to make a fair settlement.

("all well-pleaded allegations in the complaint are taken as true and construed in the light most favorable to the plaintiff").

In ¶31, the TAC (Doc. 42) establishes that $1,618 in property loss was not covered by the State Farm collision coverage. This uncovered loss was recovered from Vanmeter's property liability coverage after the bodily injury policy limits had been exhausted ("The claims against the tortfeasor have been settled for $26,618, which constitutes the [$25,000 bodily injury] policy limits of the tortfeasor and an additional amount [$1,618] for property damage that was not paid or covered by the State Farm Mut. Auto. Ins. Co. policy." *Id.*)

Paragraph 33 establishes the "property damages not covered by the collision coverage of the [State Farm] policy," and the fact of the "attorney fees associated with recovering these losses from the automobile accident tortfeasor."

Paragraph 34 establishes the one-third "attorney fee" ("$8,906" of the $26,618 total recovery) the Johnsons incurred to secure each of their tort claim recoveries from Vanmeter.

In ¶37, the TAC establishes that "without notifying [Johnsons] of [their] right to be made whole before subrogation, [State Farm] asserted a subrogation interest in [Johnsons] cause of action against Vanmeter and her insurer and proceeded to collect and convert to its own use the full amount of the property damage payments [State Farm] had made to [Johnsons]."

Paragraph 38 establishes that Johnsons had "not been made whole for either their property damage or bodily injury at the time the subrogation was asserted, and subrogation payments were received by State Farm," and that Johnsons "have not been made whole at the time of the filing of this Second (sic) Amended Complaint."

Paragraph 59 establishes that, even after recovering subrogation, State Farm "still made no determination that the insured was or could be made whole for the uncovered property damage losses and without any payment of the attorney fees which Defendant Insurance Companies knew would have to be incurred."

Paragraphs 56 and 57 establish that State Farm's failure to consider Johnsons' attorney fees occurred because the "only recoveries that [State Farm] pursues in their systematic subrogation procedures are (a) the losses the insurer paid with respect to the first party (collision coverage) claim, and (b) the insured's deductible amount in such claim." Specifically, State Farm's systematic subrogation procedures "do not address the insured's attorney fee and collection expense for the insured's recoveries from the motor vehicle accident tortfeasor."

These allegations establish that State Farm asserted and recovered subrogation (a) before and, in derogation of, Johnsons' priority, (b) without paying, accounting for, or even considering Johnsons' *unrecoverable* attorney fees (or other losses in excess of State Farm's collision coverage), and (c) as part of a systematic

program of premature subrogation that would necessarily leave its insured less than "whole" for fees incurred in recovering those property damage losses.

II. THE JOHNSONS' CASE IS JUSTICIABLE BECAUSE STATE FARM'S SUBROGATION PROGRAM HAS FULLY AND PERMANENTLY DEPRIVED THEM OF THEIR RIGHT TO BE MADE WHOLE FOR ATTORNEY FEES.

a. The TAC Pleads All the Elements of a Justiciable Controversy, and the District Court's Conclusions Illogically Dispatches these Elements.

Notwithstanding that the TAC pleads a systematic program that permanently deprives Johnsons of any opportunity to be made whole for their attorney fees, the district court dismissed the claims on the grounds that the Johnsons had not pled a justiciable controversy.

The district court's analysis of this ground for dismissal is based on two facts: (1) that the Johnsons cannot collect their attorney fees from the tortfeasor, and (2) that Johnsons did not exhaust the property damage limits of the GEICO policy. Doc. 54, pages 4-7 (see Appendix, Tab 4).

The fact that Johnsons could not collect attorney fees from the tortfeasor does not negate that Johnsons incurred attorney fees or that they were not made whole for that loss, and therefore have a real and concrete interest in their made-whole rights.

The Johnsons indisputably incurred attorney fees in recovering property damage losses that were not covered by State Farm. Such fees are precisely what

this Court has repeatedly and explicitly held to be part of the insured's made-whole rights because otherwise the insurer would, through use of the insured's claim, pay a net of nothing and the insured would bear the expense of prosecuting a claim that had been impaired by subrogation:

> Park Plaza must be made whole *in terms of all losses -- including money it expended on the MRL litigation*.
>
> To do otherwise would mean that the insured loses money (money paid for litigation of excessive damage plus money paid as premiums to insurer) and the insurer gains by such a financial arrangement (insurer has received premiums plus has been fully recompensed for money it paid to the insured).
>
> In *Skauge* we determined that *such a state of affairs is akin to unjust enrichment and is not equitable*.

DeTienne Assocs. Ltd. Partnership, supra at, 266 Mont. 184, 192, 193, 879 P.2d 704, 709, 710 (emphasis added).

Under the facts pled by the TAC, State Farm left its insured (a) with the requirement that they incur attorney fees in separately pursuing the insured's share of property damage losses, (b) with having to pursue that claim after the majority of the insured's claim had been partially settled and the tortfeasor's risk thereby reduced, and (c) with certainty that the insured had no means of recovering the resulting fees. These facts constitute a concrete deprivation of made-whole rights which is a justiciable injury.

The reasoning of the district court does not make sense and is a misconception of the basic principle at issue. That principle is that an insured must be made whole for fees incurred in recovering uncovered property damage losses. Period.

The district court's rationale effectively defeats the well-established attorney fee element of the made-whole rule and leaves Montana insureds with no remedy when an insurer ignores this element of loss. Specifically, the TAC clearly alleges that Johnsons did not receive *any* of their attorney fees before State Farm subrogated. The amount of those fees is real and concrete, in an amount between $539.33 (fees expended only for the collection of unpaid property damage) and $8,906 (fees expended for the entire recovery of the property damage and bodily injury damage against the tortfeasor).

Johnsons have presented a ripe claim to remedy this concrete injury.

Next, the district court's reliance on the premise that Johnsons had not exhausted the property limits of the GEICO policy is both irrelevant and inconsistent with its first rationale. Whether tortfeasor Vanmeter's insurance had been exhausted or only depleted by State Farm's resolution of the majority of Johnsons' property damage claim, the inescapable (and well-pled) fact is that Johnsons would incur attorney fees in recovering those other property damage losses. The fact that those attorney fees never could be recovered from the

tortfeasor's insurer actually proves the irrelevance of the amount of GEICO's unexhausted property liability limit.

Moreover, Johnsons have alleged that State Farm did not even conduct a fact-based "determin[ation]" of whether Johnsons had been made whole. In *Ferguson*, this Court stated the following about the *determination* that is required to assure conformance with the made-whole rule:

> Thus, we established in *Swanson* that *an insurer has a* ***duty to first determine*** *whether the insured has been made whole before the insurer may collect subrogation*. *Swanson*, P.28. In so holding, we followed the law well-established in Montana since our decision 25 years earlier in *Skauge*.
>
> Nevertheless, the existence of a well-established duty does not eliminate the common fact issue of *whether Safeco has programmatically breached that duty*.
>
> * * * *
>
> Ferguson alleges in the instant case that Safeco engaged in "a common scheme of deceptive conduct," by taking subrogation recoveries *without an investigation into and* ***determination*** *of whether the insureds have been made whole*.
>
> *Ferguson*, *supra*. at ¶¶19 and 28 (Emphasis added).

As in *Ferguson,* Johnsons have presented a justiciable claim of unrecovered attorney fee loss that was not accounted for in the prerequisite "determination," and that, as a result, they can never be compensated for – even though State Farm continues to hold the subrogation recoveries for insured losses and the profits from the premium paid to cover those very losses.

Finally, Johnsons have alleged that State Farm's premature subrogation injured them by *impairing* their property damage claim against Vanmeter. TAC (Doc. 42) ¶¶8, 9, 13, 38, 42, 46, 66, 95. This contention intersects with the rule and rationale for attorney fee recovery because the settling of the insurer's subrogation claim creates a circumstance where an insured must face the practicalities of expensive litigation to recover the smaller remaining property damage loss after the tort claim has been impaired by settlement of the larger loss.

While this case was dismissed without any discovery or evidentiary determination, Johnsons articulated for the district court how the insurer's settled subrogation claim impaired their claim and heightened the need for the insured's attorney expense.[3] Johnsons pointed out that:

> [W]e will present expert evidence that when the major portion of the property damage claim is removed by premature subrogation, the claim becomes less viable and harder to resolve. Some examples of claims diminishment are: (a) the remainder of the property damage claim may be too small to justify litigation causing the insured to give up damages that she actually incurred; (b) the residual claim after the major portion of it has been resolved by premature subrogation, may have been damaged by insurer's admissions during the arbitration procedure; and (c) when the majority of the dollar amount has been removed from a property claim, insurance adjusters may be less likely to make a fair

[3] In contrast, State Farm's Rule 12, M.R.Civ.P. burden was to establish "beyond doubt that the *plaintiff can prove no set of facts* in support of his or claim which would entitle him or her to relief. *Allison v. Unknown Heirs*, 1998 MT 141N, 971 P.2d 1249, citing *Farris v. Hutchinson* (1992), 254 Mont. 334, 336, 838 P.2d 374, 375.

> settlement because they know that the vast majority of people will take a lesser amount to avoid litigation expense.

Doc. 49, pages 18-20. (emphasis in original).

Thus, an impairment to the strength of the Johnsons' claim by premature subrogation has *also* been alleged and, if true, would constitute injury from violation of the made-whole rule – including the very attorney fee expense needed to address that impairment.

b. The TAC Presents a Justiciable Declaratory Judgment Case under the Three *Chipman* Elements of Justiciability.

The Johnsons' claim for declaratory relief is justiciable under controlling authority. In *Chipman*, *supra*, this Court set forth the requirements for a justiciable controversy in a declaratory judgment action:

> In determining whether a justiciable controversy exists, this Court engages in a three-part analysis:
>
> First, a justiciable controversy requires that parties have existing and genuine, as distinguished from theoretical, rights or interests. Second, the controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument invoking a purely political, administrative, philosophical or academic conclusion. Third, [it] must be a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships of one or more of the real parties in interest, or lacking these qualities be of such overriding public moment as to constitute the legal equivalent of all of them.

Chipman, at ¶19 citing *Powder River County v. State*, 2002 MT 259, P101, 312 Mont. 198, P101, 60 P.3d 357, ¶ 102; *Northfield Ins. Co. v. Mont. Ass'n of Counties*, 2000 MT 256, ¶ 12, 301 Mont. 472, 10 P.3d 813; *MedImmune Inc. v. Genentech, Inc.* (2007), 549 U.S. 118, 127 ("Our decisions have required that the dispute be '*definite and concrete, touching the legal relations of parties having adverse legal interests*'; and that it be '*real and substantial*' and '*admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts*.' … 'Basically, the question in each case is whether the facts alleged, under all the circumstances, *show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.*'").

The Johnsons' case passes the *Chipman* test. The first element is that the parties have existing real rights and interests at issue, rather than merely asserting a theoretical dispute. The TAC clearly alleges that Johnsons did not receive any of their attorney fees before State Farm subrogated. The amount of those fees is real and concrete. It is in the exact amounts of $539.33 (fees expended only for the collection of unpaid property damage) and $8,906 (fees expended for the entire recovery of the property damage and bodily injury damage against the tortfeasor under the settlement agreement Johnsons and Vanmeter executed). State Farm's

premature subrogation left and leave the Johnsons with unrecovered attorney fees and no ability to recover these concrete losses, even as State Farm walked away with no loss for the damages it was paid to insure.

The second element is also met by the request in the TAC and for declaratory relief under the Uniform Declaratory Judgment Act, §§27-8-201, 202, MCA. Beginning on page 26 (Doc. 42), the TAC sets forth the concrete relief the court may give that will fully address State Farm's wrongful subrogation. The action seeks declaration that under *Ferguson* and *Swanson*, State Farm must make a factual "determin[ation]" that the insured has been made whole *before* subrogating (Prayer, ¶1). Ancillary to such declaratory ruling, the TAC seeks the return to its insureds of all subrogation and interest thereon until such time as State Farm has completed the required made-whole determination (Prayer, ¶5) and a remedial order requiring State Farm to stop all subrogation activity before the made-whole determination is completed (Prayer, ¶6). This is concrete and available relief that will effectively operate upon the parties' actual rights and interests.

In addition to the concrete loss of attorney fees, State Farm's programmatic conduct with respect to them creates standing to bring this case to determine the *meaning* of the subrogation right under the Johnsons' contract with State Farm.

The TAC pleads a contract between the parties under which State Farm asserts subrogation. It pleads an actual controversy about the contract's meaning under the "made-whole" limitation to such subrogation, and an actual ongoing program of subrogation by which State Farm asserts and defends a right to systematically recover subrogation without consideration of the insured's made-whole rights. This is a "definite and concrete" dispute that "touches legal relations of parties having adverse legal interests" and is "a real and substantial controversy that enables relief through a decree of conclusive character." *Kageco Orchards, LLC v. Montana Dep't of Transportation*, 2023 MT 71, ¶ 12, 412 Mont. 45, 52, 528 P.3d 1097, 1102.

The TAC presents a need for a declaration of "rights, status, and other legal relations [under the subrogation clause of the insurance contract] whether or not further relief is or could be claimed." Section 27-8-201, MCA, ("any person interested under a … written contract"); *United Nat. Ins. Co. v. St. Paul Fire & Marine Ins. Co.,* 2009 MT 269, ¶ 36, 352 Mont. 105, 117, 214 P.3d 1260, 1270, ("an action to determine the scope of coverage under United National's insurance policy … squarely fits within the intent of the UDJA's liberally constructed purpose 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations....'"). *Strauser v. RJC Inv., Inc.,* 2019 MT 163, ¶ 17, 396 Mont. 348, 354, 445 P.3d 803, 807 (An action under UDJA seeking

"construction of the Agreement … and a determination whether certain of the construed provisions violate state law … fits squarely within UDJA's liberally constructed purpose.").

This case is not a "debate or argument invoking a purely … philosophical or academic conclusion." The declaratory relief sought will effectively operate to resolve the actual controversy over State Farm's contractual subrogation rights and Johnsons' made-whole rights.

The third element of *Chipman* is met because this is an action where the court can render a judgment that is legally binding upon the parties and fully and effectively resolves the dispute. The Uniform Declaratory Judgment Act and the supplemental relief authorized by §27-8-313, MCA, give the court power to appropriately and effectively remedy State Farm's disregard of the Montana made-whole rule and the real economic harm suffered by Johnsons and all other similarly situated State Farm insureds.

Finally, because this action seeks *class* relief, it presents a special case for declaratory relief. The Johnsons pled that they have been subjected to subrogation conduct as part of a program State Farm applies to thousands of similarly situated insureds. There is nothing abstract or theoretical about the program of subrogation that has been alleged in the TAC. The TAC alleges that every member of the class *actually* is having their tort claims used by State Farm without the requisite

"determination" of the out-of-pocket losses and attorney fees these insureds have sustained:

> 55. Defendant Insurance Companies systematic procedures have, and continue to direct, the assertion and collection of recoveries from the motor vehicle accident tortfeasor and the tortfeasor's liability insurer upon a claimed contractual subrogation right whenever the insured has been fully compensated for each of the items of loss that are covered by the first party coverage of the policies.

To secure the needed adjudication of this programmatic conduct, Johnsons' pleading is modeled on the relief endorsed by this Court in *Ferguson, supra.* In that case, the district court had concluded that the only common issue was the *abstract* question of the meaning of the made-whole rule which had already been resolved by this Court's decision in *Swanson.* This Court reversed, holding that the action presented the *concrete* and justiciable common question of whether the plaintiff and plaintiff class were being denied the benefit of the law:

> The District Court denied class certification upon the rationale that this Court's establishment in *Swanson v. Hartford Ins. Co. of Midwest*, 2002 MT 81, 309 Mont. 269, 46 P.3d 584, of the legal duty for insurers taking subrogation eliminated the common issue ...
>
> Ferguson alleges in the instant case that Safeco [had concretely] engaged in "a common scheme of deceptive conduct," by taking subrogation recoveries [in violation of the *Swanson* rule]. In addition to this main issue, Ferguson alleges that this case raises many other common issues of fact and/or law, including whether Safeco has a duty to retroactively apply *Swanson* by returning subrogation recoveries taken before the *Swanson* decision, *otherwise, similarly situated insureds will get no more relief from this case than Ferguson got from Swanson.*

Ferguson, *supra* at ¶¶8, 28. (emphasis added).

The *Ferguson* decision also recognized that the alleged concrete and systematic conduct required judicial intervention and that class-wide relief was appropriate:

> Ferguson argues that while this action seeks to compel Safeco to apply the "made-whole" rule, it does not seek to adjudicate any individual "made-whole" entitlements.
>
> ...
>
> We agree with Ferguson that, in this case, *the efficient remedy of class-wide declaratory relief is appropriate* because the size of the average claim is so small that relief for the average class member is not economically available outside class litigation.

Ferguson at ¶¶ 39, 41. (emphasis added).

In short, concrete programmatic conduct is happening and with real monetary results. Until a court issues an order adjudicating whether State Farm's program violates Montana's made-whole rule, this conduct, and the real monetary consequences thereof, will continue to happen. State Farm's actual and ongoing pocketing of these concrete amounts presents a real controversy of *Ferguson*-like conduct with respect to which "declaratory relief is appropriate." *Ferguson* at ¶ 41.

c. <u>The Relief Sought in this Action is Justiciable Because it is Not Preempted by Montana's Claim-Settlement Statute.</u>

An essential element of justiciability is that the relief sought in the complaint is available under the legal theories pled, such that the controversy is "one upon which the judgment of the court may effectively operate." *Chipman*, at ¶19.

This third requirement of *Chipman* could not be met if all of Johnsons' claims were preempted by §33-18-242(3), MCA, which prescribes the exclusive relief for insurance claim handling wrongs. This concern is of no small moment given that some federal courts have ruled in Montana cases that declaratory judgment clams are preempted in situations like the one presented here, including in a subrogation case. *See, e.g., James Lee Constr., Inc. v. Gov't Emps. Ins. Co*., No. 22-35102, 2023 WL 195520 (9th Cir. Jan. 17, 2023).

This conclusion has been called into question by Montana federal district court judge Dana Christensen. Judge Christensen recognized that this precise preemption issue has never been directly addressed by this Court but that other Montana federal courts' conclusions were "inconsistent" with precedents of this Court that had allowed declaratory relief. *cf*., *Jacobsen v. Allstate Insurance Co.*, 310 P.3d 452 (Mont. 2013); *Ferguson, supra*. Judge Christensen ordered the question certified to this Court.

> Citing only nonbinding federal law, Safeco asserts it is entitled to judgment on Count I because Montana law precludes a first party plaintiff from obtaining declaratory relief under the UTPA.
>
> Having reviewed the parties' arguments, the Court has decided to certify this issue to the Montana Supreme Court. The Court believes

> *that a question that implicates the fundamental rights of first-party plaintiffs under Montana's insurance code* as interpreted by Montana's groundbreaking decision in *Ridley v. Guaranty National Insurance Company is best left to the State's highest court.*

Reeves v. Safeco Ins. Co. of Illinois, No. CV 20-69-M-DLC, 2020 WL 4933620, at *2 (D. Mont. Aug. 24, 2020) (emphasis added, see Appendix, Tab 5).

The *Reeves* case settled without this Court having ruled on the issue. Thus, it is now necessary for this Court to rule whether the causes of action brought by first-party claimants (Johnsons) are preempted and thus fail the third element of the *Chipman* justiciability test.

The preemption issue is whether subsection (3) of §33-18-242, MCA, that prescribes the exclusive "legal theories and causes of action" for "claims handling" violations also preempt (a) claims for *declaration* of duties owed by insurers, (b) claims for violations of duties that are *not* claim handling, and (c) claims arising under the subrogation clause of an insurance *contract*. The statutory provision at issue is as follows:

> (3) An insured who has suffered damages *as a result of the handling of an insurance claim* may bring an action against the insurer for breach of the insurance contract, for fraud, or pursuant to this section, but not under any other theory or cause of action. An insured may not bring an action for bad faith in connection with the handling of an insurance claim. (emphasis added)

Johnsons respectfully urge that this statute does not preclude declaratory relief, that it only operates with respect to actions for damages arising from bad

faith "claim handling," and, additionally, it expressly permits contract-based claims.

i. The statute does not preempt the procedural power of the court; rather, it only speaks to the available substantive legal theories for procedural judicial relief.

The above-quoted statute speaks exclusively to the *substantive* legal theories under which an insured may recover "damages" that result from claim handling. It says nothing about claims for relief other than "damages." It says nothing about limiting the judicial power to issue declaratory rulings. In contrast, Johnsons' prayer for a declaratory remedy is neither a claim for damages nor a substantive legal theory.

The *Ferguson* case, on which the Johnsons' declaratory relief claim is modeled, serves as a paradigm for the analysis. In that case, this Court endorsed declaratory relief as "appropriate" in exactly this type of systematic subrogation case. While the application of §33-18-242(3), MCA, was not addressed in the case, the *rationale* of *Ferguson,* recognizes that the declaratory relief is "appropriate" precisely because the claim did not seek "damages."

> [Ferguson's] class claims *do not seek a determination of entitlements for each class member and the payment of damages*; rather, her class claims seek a declaratory ruling that will be enforced to compel Safeco to follow the legal standard in its subrogation program.

Ferguson, at ¶ 34. (emphasis added).

As in *Ferguson*, Johnsons' declaratory relief claim seeks resolution of the meaning and application of the made-whole rule to an insurer's subrogation program, and instead of damages, the enforcement of the insurer's duty to make the requisite made-whole determination.

Second, a claim for declaratory relief is *not* a legal theory or a cause of action. It is a *procedural* remedy, and a procedural exercise of judicial power:

> We have long considered "the operation of the Declaratory Judgment Act" to be only "procedural," Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240, 57 S.Ct. 461, 81 L.Ed. 617 (1937), leaving "substantive rights unchanged," Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). See also Vaden v. Discover Bank, 556 U.S. 49, 70, n. 19, 129 S.Ct. 1262, 173 L.Ed.2d 206 (2009); Skelly Oil Co., 339 U.S., at 674, 70 S.Ct. 876 (noting the "limited procedural purpose of the Declaratory Judgment Act").

Medtronic, Inc. v. Mirowski Fam. Ventures, LLC, 571 U.S. 191, 199 (2014); *Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 352 (3d Cir. 1986) ("An action for declaratory judgment is procedural in nature and purpose ... it is settled law that, as a procedural remedy, the federal rules respecting declaratory judgment apply in diversity cases").

Montana's Declaratory Judgment Act does not create any substantive right. 22A Am. Jur. 2d Declaratory Judgments §2 ("a declaratory judgments statute does not create any substantive rights or causes of action"). Thus, while §33-18-242(3), MCA, limits the *substantive* source of actionable rights with the words "any other theory or cause of action," it does not in any way limit the explicit declaratory

power of a court under Montana's Declaratory Judgment Act or any other of a Montana court's constitutional procedural powers.

To add to the statute a proscription of a court's procedural powers would be to insert words, meaning, and a legislative intent to profoundly limit judicial power that are not found anywhere in the statute. *Cf*., §1-2-101, MCA, ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted"); *Sampson v. Nat'l Farmers Union Prop. & Cas. Co.*, 2006 MT 241, ¶21, 333 Mont. 541, 144 P.3d 797.

To read a limitation on declaratory relief into the statute would lead to the absurd result that courts could not even construe the meaning of the substantive rights and duties arising *under §33-18-201, MCA,* ***itself*** – the very source of substantive rights that §33-18-242, MCA, addresses.

This point is made by considering an action asserting insurance claim handling breaches. For example, while Johnsons contend that the legal basis for their claim is a rule of law that falls outside and after the handling of their settled claim for collision coverage benefits, if their claim were deemed to be an action based on substantive "claim handling" duties, a prohibition on declaratory relief would mean this Court could not issue a ruling declaring the meaning of the substantive claim handling rights and duties arising under §33-18-201, MCA. Such

a conclusion is not reconcilable to this Court's consistent jurisprudence of endorsing declaratory rulings resolving both the meaning of that statute as well as the meaning of subrogation duties.[4]

In sum, nothing in §33-18-242(3), MCA, can be construed as a limitation on the court's procedural power to issue declaratory rulings of the rights and duties arising under the separately established substantive law of this state.

ii. The statute does not preempt actions other than those for damages caused by wrongful claim handling.

A predicate clause in §33-18-242(3), MCA, defines the scope of preemption. The statutory subsection only applies to an "insured who has suffered damages *as a result of the handling of an insurance claim*."

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[4] *Ferguson, supra; Diaz v. Blue Cross & Blue Shield of Mont.*, 2011 MT 322, 363 Mont. 151, 267 P.3d 756 (*Diaz I*) and *Diaz v. State*, 2013 MT 219, 371 Mont. 214, 308 P.3d 38 (*Diaz II*) (class-wide declaratory relief available to apply made-whole rule to subrogation conduct); *Safeco Ins. Co. of Illinois v. District Court*, 2000 MT 153, ¶¶ 18, 31, 32, 34, 300 Mont. 123, 2 P.3d 834 (where the "declaratory judgment claim did not directly seek bad faith damages" it is allowed to resolve "the controversy or remove an uncertainty over the requirements [of the UTPA]"); *DuBray v. Farmers Ins. Exch*., 2001 MT 251, ¶ 16, 307 Mont. 134, 36 P.3d 897 ("DuBray's claims for declaratory relief [to resolve the UTPA requirement of] advance medical payments were authorized by Ridley and should have been allowed to proceed"); *Ridley v. Guar. Nat. Ins. Co*., 286 Mont. 325, 331, 951 P.2d 987, 990 (1997), as modified on denial of reh'g (Jan. 30, 1998) ("may ask the courts of this state to construe that statute for the purpose of declaring those rights"); *Renville v. Farmers Ins. Exch*., 2003 MT 103, ¶¶ 17, 25, 315 Mont. 295, 69 P.3d 217; *Marshall v. Safeco Ins. Co. of Illinois*, 2018 MT 45, ¶ 14, 390 Mont. 358, 413 P.3d 828 (plaintiff's UTPA "declaratory judgment claim … presents a justiciable controversy").

First, subrogation is *not* an insured's "insurance claim." Subrogation is a claim of the *insurer*. A subrogation right is a derivative right of the insured's automobile tort claim against the tortfeasor. *Skauge v. Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 526, 565 P.2d 628, 630–31 (1977) ("Subrogation is the substitution of another person in the place of the creditor"). The nature of subrogation claims is that they are the claims of the insurer against a third-party. Section 33-18-242(3), MCA, does not apply to subrogation or made whole claims because they are not *insurance claims handling matters*.

Second, subrogation only arises *after* the insured's claim has been fully handled and settled. Subrogation operates independently from the settlement of the insured's claim. The right to "invade" the insured's property right interest can only arise *after* the insurer has resolved and paid the insurance claim.

Third, the substantive rights and duties attaching to subrogation are not a *function* of the previous handling of Johnsons' fully settled insurance claim. The TAC makes clear that the basis for Johnsons' wrongful subrogation claim is wholly independent of how their first-party insurance claim was handled:

> 51. State Farm Mut. Auto. Ins. settled the covered portion of the losses, after applying the deductible, which was reimbursed to Plaintiffs. *Plaintiffs do not raise any issue with respect to this settlement or handling of that settled claim.*

TAC (Doc. 42) at p. 12. (emphasis added)

Because the wrongful subrogation claim presents an issue of the insurer's claim (not the insured), and an issue of subrogation conduct that is after and functions independently of the prior, fully resolved insurance claim of the Johnsons, it does not meet the definitional predicate for preemption under §33-18-242(3), MCA.

Nor is this a technical parsing of the words in the predicate phrase. Rather, there is fundamentally important *meaning* to those words. Obviously, an insurer has duties other than good faith in handling insurance claims. It may not assault, or steal from an insured, nor may it breach any other duties that arise independently from claim handling. Indeed, this Court has explicitly recognized that preemption under §33-18-242(3), MCA, does *not* apply to breach of duties other than insurance claim handling duties.

In *Williams v. Union Fid. Life Ins. Co*., 2005 MT 273, ¶ 55, 329 Mont. 158, 123 P.3d 213, even though the insured's application representations "were used (in claim handling) to deny the insurance claim, the challenged conduct was not itself "the handling of an insurance claim". In *Thomas v. Nw. Nat. Ins. Co*., 1998 MT 343, ¶¶ 33-34, 292 Mont. 357, 973 P.2d 804, this Court recognized that the causes of action at issue "focus on Northwestern's conduct during the renewal of the policy, not on the improper handling of the claim". *See also*, *Christensen v. Mountain W. Farm Bureau Mut. Ins. Co.,* 2000 MT 378, ¶10, 303 Mont. 493, 22

P.3d 624 (upholding the insured's action for declaration "that additional coverage was available pursuant to the 'after acquired vehicle provision,'" though the insurer had refused to apply "after acquired vehicle coverage" *when adjusting* the insured's claim).

The instant case presents an issue of conduct *during subrogation*. It addresses the insurer's failure to observe the *duties* that attach when an insurer undertakes the *conduct* of asserting and collecting subrogation under its insured's *claim* against the third-party tortfeasor.

In sum, the Johnsons' claim for declaratory relief meets the third element of a justiciable case and controversy because declaratory relief is available and appropriate and is not preempted by §33-18-242(3), MCA.

iii. Section 3-18-242(3), MCA, expressly permits contract based claims.

Even if this Court were to conclude that a claim to enforce the made-whole rule during subrogation fell within the scope of "claims handling," §33-18-242(3), MCA, expressly permits an insured to bring an action for subrogation if it presents a claim for "breach of the insurance contract." To the extent a right to subrogation arises under State Farm's contract with Johnsons, wrongful subrogation (in violation of the made-whole rule) is a breach of the contract. *Swanson*, s*upra., at* ¶28 ("We therefore hold that it is the public policy in Montana that an insured must be totally reimbursed for all losses as well as costs, *including attorney fees*,

involved in recovering those losses before the insurer can exercise *any* right of subrogation, *regardless of any contract language providing to the contrary.*" (emphasis added)).

III. THE DISTRICT COURT ERRED BY DISMISSING JOHNSONS' CONVERSION CLAIM BECAUSE CONVERSION OF THE RECOVERIES OF THEIR THIRD-PARTY TORT CLAIM IS NOT PREEMPTED BY §33-18-242(3), MCA.

In addition to their claim for declaratory relief, Johnsons also seek to litigate the propriety of State Farm's subrogation conduct under the legal theory of conversion. The conversion claim is based on the premise that a collection of subrogation *under an insured's claim*, if done in derogation of the insured's made-whole rights, is a usurpation of Johnsons' property rights in their third-party tort claim. In addition to the *per se* duty not to "collect subrogation without first determining that its insurer has been made whole" (*Ferguson*, *supra* at ¶ 17, citing *Swanson, supra)*, Johnsons contend that such collection of subrogation is a conversion of their third-party claim, or at least that portion of the proceeds of their claim that they need to be made whole.

The district court dismissed the Johnsons' conversion claim in its first Order dismissing the First Amended Complaint (Doc. 33, pages 22-23, see Appendix, Tab 1) and again in its ruling on the TAC (Doc. 42, p. 9). In dismissing the conversion claim, the district court followed the analysis in the federal court decision *James*

Lee Const., Inc. v. GEICO, 478 F. Supp. 3d 1057 (D. Mont. Aug. 11, 2020). Specifically, the Montana district court ruled that the contention that State Farm was wrongfully asserting title to Johnsons' third-party tort claim was a preempted claim under "[t]he plain language of §33-18-242(3), MCA."

The Johnsons ask this Court to rule that the preemptive effect of §33-18-242(3), MCA, has no application to Johnsons' conversion contention and reverse the dismissal of that claim.

First, the district court's order is erroneous because the plain language of §33-18-242(3), MCA, only applies to an "insured who has suffered damages *as a result of the handling of an insurance claim*." As demonstrated above, neither this wording nor the obvious meaning thereof is subject to a construction that would preempt claims for breach of legal duties that are *not* based on insurance claim handling.

Specifically, subrogation is an equitable right that is derived from the insured's legal title and right to the automobile damage tort case – a cause of action that is the property of the insured (*Skauge*, *supra* at 628, 631 ("only an *equitable right* passes to the subrogee [insurer] and the *legal title* to the claim is never removed from the subrogor [insured].")) Thus, even if the procedures of a made-whole "determin[ation]" (*Ferguson, Swanson*) were deemed to be some kind of adjustment or "handling" of this equitable insurance-*related* right, the conversion

claim pleads[5] the later conduct by which legal title to the insured's tort claim is usurped through the collection and retention of proceeds of that claim.

Second, as further argued above, wrongful subrogation presents an issue (a) of the insurer's claim (not the insured), (b) over conduct that is after Johnsons fully resolved their insurance claim, and (c) addresses subrogation and made-whole procedures that function independently of settled first party insurance claim.

Finally, the wrongful conversion of Johnsons' ownership rights in their tort claim against Vanmeter is the type of independent action which the statute expressly recognizes may be remedied together with a claims handling case. Section 33-18-242(7), MCA ("An insured may file an action under this section, *together with* any *other cause of action* the *insured* has *against the insurer*."). As this Court noted in *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 2016 MT 111, ¶41, 383 Mont. 346, 371 P.3d 446:

> As the foregoing cases establish, purely common law causes of action based upon insurer misconduct are not precluded. ... A party may always allege and recover damages in a common law cause of action upon proof of a common law claim, ...".

[5] In par. 37 of the TAC (Doc. 42) the Johnsons have pled that State Farm "asserted a subrogation interest in Plaintiffs' cause of action against Vanmeter and her insurer ***and*** *proceeded to collect and convert to its own use the full amount of the property damage payments* [it] had made to Plaintiffs." (emphasis added).

CONCLUSION

The Johnsons respectfully urge this Court to rule that, as a matter of law, the TAC states justiciable claims for violation of Montana's made-whole rule including a non-preempted claim for declaratory relief. This Court should reverse the district court's dismissal of Plaintiffs' Third Amended Complaint and reinstate this case with direction to resolve this dispute through the procedures this Court endorsed in the substantially identical *Ferguson* case.

DATED this 16th day of May, 2024.

/s/ Allan M. McGarvey
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a normal, proportionally spaced typeface using font size 14 Times New Roman font.

DATED this 16th day of May, 2024.

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CERTIFICATE OF SERVICE

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