IN THE SUPREME COURT FOR THE STATE OF MONTANA
DA 24-0204

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

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and STATE FARM FIRE AND CASUALTY COMPANY,
Defendants/Appellees.

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, Cause No. DV-15-2019-0000934-NE
Honorable Dan Wilson

APPELLEES' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

COUNTERSTATEMENT OF THE ISSUES

1. Did the District Court properly find under Montana law and this Court's order in *Johnson v. Mont. Eleventh Jud. Dist. Ct*., 407 Mont. 440, 500 P.3d 581, 2021 Mont. LEXIS 899 (Mont. Nov. 2, 2021) (the "Order"), that the Johnsons' claims for violation of the common law "made-whole" rule were not justiciable because the tortfeasor had more than enough policy coverage to reimburse State Farm and to satisfy all of the Johnsons' uncovered property damage losses?

2. Should this Court reach the question of whether § 33-18-242(3), MCA preempts the Johnsons' claims for declaratory relief and conversion, where the claims are not justiciable, the Johnsons failed to raise preemption of their declaratory relief claim below, and the Court in the Order found no error in the dismissal of the Johnsons' conversion claim with prejudice?

COUNTERSTATEMENT OF THE CASE

This appeal presents the same legal issues between the same parties that the Court already framed in the Order, which controls this appeal under the law of the case doctrine.[1] The issue is not whether the Johnsons had alleged cognizable claims

[1] The Order denied the Johnsons' petition for writ of supervisory control following the District Court's dismissal of the First Amended Complaint and denial of leave to file the Second Amended Complaint. (Dkt. 40). Although the Order was not reported in full in the Pacific Reporter, the Order was included in the table and the Court did not designate the Order as non-precedential pursuant to Internal Operating Rule Section I(3)(c). Other Courts, including the Ninth Circuit, have relied on the

that State Farm's subrogation recovery of its property damage payment to the Johnsons violated the "made whole" rule. The issue is whether they had alleged *justiciable* ones.

As this Court previously observed in the Order, a justiciable claim for violation of the "made whole" rule required the Johnsons to plead facts "demonstrat[ing]" that State Farm's "subrogation for the property loss compensation it previously paid to [the] Johnsons has already reduced, or necessarily will reduce, the amount of compensation that they will ultimately be entitled to recover for any element of damages from the third-party tortfeasor/GEICO and/or under their own UIM coverage." (Dkt. 40, p. 4). After four failed attempts to meet that burden, and this Court's denial of the Johnsons' Petition for Writ of Supervisory Control, the District Court correctly dismissed the Johnsons' claims for violation of the "made whole" rule with prejudice.

Because the Johnsons failed to allege justiciable claims under the standard that the Court previously articulated in this case, the Court need not and should not reach the merits of the other issues raised by the Johnsons on this appeal, including whether they have alleged cognizable claims for violation of the "made whole" rule

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Order as precedent. *See, e.g., James Lee Constr., Inc. v. Gov't Emps. Ins. Co*., 2023 U.S. App. LEXIS 1005, 2023 WL 195520 (9th Cir. Jan. 17, 2023) Regardless of any precedential value, issues of law addressed in the Order bind the parties to this case under Montana's longstanding law of the case doctrine. See *infra*, pp. 12-13.

and whether § 33-18-242, MCA preemption applies to their declaratory relief and conversion claims in this context.

STATEMENT OF THE FACTS

A. State Farm Removes the Lawsuit and the Federal Court Grants its Motion to Dismiss the Complaint

The Johnsons filed their original Complaint on September 26, 2019 against their auto insurer, State Farm, and Britanie Vanmeter.[2] They alleged that Ms. Vanmeter had caused a 2017 auto accident "in which the Johnsons suffered property damage and Molly Johnson suffered bodily injury." (Dkt. 1, ¶ 2). State Farm paid the Johnsons for their covered property losses and Ms. Vanmeter's insurer, GEICO, reimbursed State Farm. (Dkt. 1, ¶¶ 22-25). The Johnsons sought recovery of their remaining uncovered property damage losses and damages for Ms. Johnsons' bodily injury from Ms. Vanmeter. The Johnsons complained that State Farm violated the "made whole" rule by receiving reimbursement from GEICO before the Johnsons were "made whole" for all of their uncovered property losses. However, the Johnsons did not allege facts supporting that State Farm's subrogation recovery

[2] The Johnsons named two entities as defendants, State Farm Mutual Automobile Insurance Company ("SFMAIC"), which issued their automobile policies, and State Farm Fire and Casualty Company, which did not. For ease of reference, the entity defendants are collectively referred to herein as "State Farm". Although State Farm disputes that both entities are proper defendants in this case, that issue is not presented by this appeal.

prevented the Johnsons from recovering all of their uncovered property losses from Ms. Vanmeter/GEICO. (*Id*.)

State Farm removed the Complaint to federal court and filed a Motion to Dismiss arguing, among other things, that the Johnsons lacked injury in fact under Article III because they did not allege facts supporting their conclusory allegation that State Farm's conduct caused them harm.

The United States District Court agreed and granted State Farm's motion. *Johnson v. State Farm Mut. Auto. Ins. Co*., 2020 U.S. Dist. LEXIS 149096, 2020 WL 4784692 (D. Mont. Aug. 18, 2020) (Molloy, J.). Judge Molloy explained that the Johnsons' Complaint did not allege an "injury traceable" to State Farm's recovery of its property damage payments from Vanmeter's insurer, GEICO, as federal law required. *Johnson*, 2020 WL 4784692 at *2. More specifically, the Johnsons did "not allege facts to show that there is even a potential—let alone a substantial risk of—deficiency of coverage in light of State Farm's actions. [The Johnsons] have not alleged the amount of their damages, the amount State Farm subrogated, or Vanmeter's policy limits. … The absence of those allegations here are fatal." *Id.* at *2. The District Court thus granted the Motion to Dismiss based on lack of subject matter jurisdiction under Article III and remanded the case to Montana state court.

B. The District Court Grants State Farm's Motion to Dismiss the First Amended Complaint

Following remand, the Johnsons filed a First Amended Complaint ("FAC"), and State Farm filed another Motion to Dismiss, which the District Court granted on May 24, 2021. As the District Court explained, justiciability under both federal and Montana law requires "the plaintiff-insured to show a causal connection between the insurer's conduct and the insured's harm. It is not, as the Johnsons contend, simply a question of whether they have adequately pleaded that they have not and cannot be made whole …. The question is whether the Johnsons have alleged facts that they have not and cannot be made whole *as a result of State Farm's conduct*." (Dkt. 33, p. 14) (emphasis added).

The District Court explained that the Johnsons could not meet their burden by relying on allegations that Mrs. Johnson had unrecovered bodily injury damages under this Court's decision in *Van Orden v. USAA*, 2014 MT 45, 374 Mont. 62, 318 P.3d 1042. (Dkt. 33, pp. 15-16) ("The Montana Supreme Court declined to extend the made-whole doctrine to allow an insured to recover twice for one type of damages for the purpose of covering a separate type of loss when the policies clearly provided for separate coverage limits and the insured could not demonstrate any right to recover medical expenses under property damage coverage."). Similarly, the Johnsons' allegation that they had unrecovered (and unrecoverable) attorneys' fees did not support a justiciable claim. (*Id*., p. 16) ("[T]he Johnsons acknowledge

that they cannot recover attorneys' fees from Vanmeter because Montana adheres to the American Rule on attorney fees – in other words, not because of any conduct of State Farm. The Johnsons would have incurred the same attorney fees … regardless of what State Farm did with its subrogation right.").

Finally, the District Court dismissed the Johnsons' conversion claim, with prejudice, because § 33-18-242, MCA barred it and their own lawsuit "contradicts the allegation" that State Farm usurped or interfered with the Johnsons' claim against Vanmeter. (Dkt. 33, p. 18). "[T]he Johnsons actually name Vanmeter as a defendant and assert a negligence claim against her – a claim still pending in this action." (*Id*., p. 18).

C. The District Court Denies the Johnsons' Motion to File a Second Amended Complaint

The Johnsons then sought leave to file a Second Amended Complaint ("SAC"), which they claimed would allege with "clarity" their earlier allegations and "quantify[]" their damages allegations. (Dkt. 35, p. 3). In their proposed SAC, the Johnsons itemized their alleged uncovered property losses, including snow tires and $100 worth of CDs, which totaled $1,618. (Dkt. 34.1, ¶ 20(A)). The Johnsons also claimed attorneys' fees of $33.00 in securing recovery for the CDs, which GEICO had previously tendered. (Dkt. 34.1, ¶ 20(A)). Regarding bodily injury damages, the Johnsons alleged that Mrs. Johnson had incurred medical expenses "in

excess of $7,393.34" and loss of income "in excess of $630.42," as well as general damages and attorneys' fees. (Dkt. 34.1, ¶ 20(B), (C)).

The District Court denied the Johnsons' motion for leave to file the SAC. In its August 20, 2021 Order, the District Court recounted that it had previously dismissed the Johnsons' claims against State Farm because "their allegations of fact, taken as a whole and taken as true, did not suggest that the Johnsons could not recover the value of their uncompensated losses … as a result of State Farm exercising its subrogation right." (Dkt. 38, p. 2). The Johnsons' "view" that "the proposed SAC would cure the defect by fixing actual dollar amounts to these alleged losses, rather than alleging the losses in merely generalized terms" "misses the point." (Dkt. 38, pp. 2-3). The District Court continued:

> The defect in the Johnsons' First Amended Complaint is not merely that they failed to quantify the amount of their allegedly unrecoverable losses. 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. Merely by alleging [specific dollar amounts] does not change the calculus: the allegations in the Johnsons' proposed Second Amended Complaint, taken as a whole and taken as true, cannot establish that they have been deprived of their right to be made whole as a consequence of State Farm's exercise of its subrogation right for the payment State Farm already made to the Johnsons for a discrete element of their overall property loss claim.

(Dkt. 38, p. 3).

D. The Montana Supreme Court Denies the Johnsons' Petition for Writ of Supervisory Control

The Johnsons then filed a Petition for Writ of Supervisory Control with this Court. But they fared no better, as this Court denied and dismissed their Petition in the Order. (Dkt. 40).

In the Order, this Court agreed that the Johnsons had not alleged facts supporting that State Farm's conduct "has already reduced, or necessarily will reduce, the amount of compensation that they will ultimately be entitled to recover for any element of damages from the third-party tortfeasor/GEICO and/or under their own UIM coverage." (Dkt. 40, p. 4 (citing *Van Orden*, ¶¶ 21-25)). This Court also rejected the Johnsons' criticisms of the District Court's justiciability analysis, explaining: "Rather than the grafting of a new 'causation element' onto our test for unripeness-based justiciability as asserted by Johnsons, this aspect of the District Court's judgment of dismissal is manifestly based on application of the made-whole doctrine to their well-pled and proposed complaint allegations of fact." (Dkt. 40, p. 4, fn. 4).

The Court also favorably cited to the District Court's reliance on *Van Orden* in reasoning that the Johnsons' "inability to recover related attorney fees from the tortfeasor/GEICO did not trigger the made-whole doctrine." (Dkt. 40, p. 4). "State Farm's asserted right to subrogate its previously paid property loss compensation

would not limit or reduce the amount of their recovery of attorney fees from the tortfeasor/GEICO because they had no such right." *Id.*

Finally, the Court found no error with the District Court's dismissal of the Johnsons' "common law conversion claim (predicated on the same alleged 'violation' of the made whole doctrine) pursuant to § 33-18-242(3), MCA …." (Dkt. 40, pp. 4-5).

In short, the Johnsons had failed to meet their burden "of demonstrating that the District Court erroneously dismissed their made-whole related individual and class claims as unripe, and thus currently unjusticiable." (Dkt. 40, p. 5).

E. The Johnsons File a Third Amended Complaint

The Johnsons then settled their remaining claims against Ms. Vanmeter and filed a Third Amended Complaint ("TAC"), which still failed to allege facts supporting that State Farm caused them harm.

In the TAC, the Johnsons alleged that they settled their bodily injury and uncovered property loss claims against Ms. Vanmeter for $26,618, which constitutes the $25,000 bodily injury policy limits "and an additional amount for property damage that was not paid or covered by the State Farm Mut. Auto. Ins. Co. policy." (Dkt. 42, ¶ 31). That "additional amount" of $1,618 for uncovered property loss mirrors the amount of uncovered property loss the Johnsons specifically alleged in the proposed SAC. (Dkt. 34.1, ¶ 20(A)). In other words, the Johnsons' new factual

allegations reflected that they recovered *all* of their uncovered property losses from Ms. Vanmeter.

Because the Johnsons failed to allege facts supporting that State Farm's assertion of subrogation impaired the Johnsons' ability to be "made whole", and their settlement with Ms. Vanmeter reflected that they could *never* allege such facts, State Farm responded to the TAC with another Motion to Dismiss. (Dkt. 46).

In response, the Johnsons did not dispute that they had recovered all of their uncovered property losses from Ms. Vanmeter. Instead, they claimed that "the dispositive issue" was whether State Farm had to pay their attorneys' fees incurred in collecting their uncovered property losses from Ms. Vanmeter before subrogation. (Dkt. 49, p. 2). State Farm responded that unrecovered attorney's fees did not support a justiciable claim because State Farm did nothing to cause that loss, as the District Court had already reasoned and this Court echoed with approval in denying the Johnsons' Petition for Writ of Supervisory Control. (Dkt. 33, p. 16; Dkt. 40, p. 3).

The District Court held oral argument on the Motion. During oral argument, the Johnsons' counsel suggested, for the first time, that in addition to their unrecovered attorneys' fees, the Johnsons had not recovered an additional $400 or $500 that they had "wanted" from Ms. Vanmeter and GEICO. (Reporter's Transcript of 2/7/23 Hearing, p. 45:9-11). The Johnsons' counsel did not offer any

facts supporting that the Johnsons had actually incurred additional uncovered property losses not included in their settlement with Ms. Vanmeter, or that the settlement had exhausted the property damage limits under the GEICO policy. To the contrary, the Johnsons' counsel conceded that "the property damage limits were not exhausted" by either State Farm's subrogation or the Johnsons' settlement. (RT 2/7/23, p. 16:19-22). Moreover, the Johnsons' counsel was "sure the property coverage could have covered four or five hundred dollars, but we settled it." (*Id*. p. 45:9-11).

On March 6, 2023, the District Court again rejected the Johnsons' claims for violation of Montana's "made whole" rule on justiciability grounds and granted State Farm's Motion. (Dkt. 54, pp. 2-3). The District Court correctly considered the pleadings, the papers, and even the new allegations at oral argument and found nothing to support that the Johnsons suffered any cognizable injury fairly traceable to State Farm's conduct.

The District Court reasoned that, even considering counsel's new claims, the Johnsons "procured their own loss of approximately $500 in settling their property damage claim for an amount less than their property damage claim is purportedly worth." The District Court continued:

> [T]he Johnsons did not receive less than the full amount of their property damage claim because the damages were in excess of the coverage available for reimbursement under the liable driver's policy. The Johnsons did not receive the full amount of their property damage

> claim in reimbursement from the liable driver's insurer because they elected, unilaterally, to accept an amount which was both less than the total value of their claim and less than the policy coverage available for their property damage claim. Consequently, the Johnsons were not 'made whole' for purposes of their analysis because they settled for less than the amount of their property damage claim and by operation of the American Rule, which provides, generally, that 'absent a specific statutory or contractual provision, a prevailing party generally is not entitled to recovery of its attorneys' fees in prosecuting or defending the action." *W. Tradition P'ship v. AG of Mont.*, 2012 MT 271, ¶ 9, 367 Mont. 112, 291 P.3d 545 (other citation omitted).

(Dkt. 54, pp. 5-8).

Following entry of the District Court's Order and dismissal of the "made whole" claims with prejudice, the Johnsons pursued their underinsured motorist claim against State Farm for Mrs. Johnson's bodily injuries. The Johnsons settled that claim, too, for less than the available policy limits. (Dkt. 56). The District Court then entered judgment for State Farm, and this appeal followed.

STANDARD OF REVIEW

Although issues of law, including justiciability, are generally subject to *de novo* review, the law of the case doctrine controls legal issues raised in the Johnsons' appeal and previously decided in the Order.

"Under the law of the case doctrine, a prior decision of this Court resolving an issue between the same parties is binding and may not be relitigated. [citation] This doctrine 'expresses the practice of courts generally to refuse to reopen what has been decided.'" *Murphy Homes, Inc. v. Muller*, 2007 MT 140, ¶ 56, 337 Mont. 411,

162 P.3d 106 (internal citation omitted); *Moody v. Northland Royalty Co*., 286 Mont. 89, 93, 951 P.2d 18, 20 (1997) ("The rule is well-established and long adhered to in this state where, upon an appeal, the Supreme Court in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal.") (internal quotation and citation omitted); *Fiscus v. Beartooth Elec. Coop*., 180 Mont. 434 (1979) (deciding whether change in the law permitted reopening final judgment under law of the case doctrine without addressing *de novo* standard of review).

The Court adheres to the law of the case doctrine regardless of whether it previously resolved the same issue in deciding an appeal after judgment or petition for writ of supervisory control. *Murphy Homes*, ¶ 56 (finding order denying writ of supervisory control constituted law of the case and barred revisiting the issue on appeal); *State v. Van Dyken,* 242 Mont. 415, 425, 791 P.2d 1350 (1990) (prior orders, including order denying writ of supervisory control, constituted law of the case).

The Court also will only review and decide issues first raised before the District Court. *In re M.A.L.*, 2006 MT 299, ¶¶ 55-58, 334 Mont. 436, 148 P.3d 606 (observing that "[i]t is well-established that this Court will not address an issue presented for the first time on appeal," and declining to address issue raised for the first time after the District Court's entry of judgment); *Nason v. Lesistiko*, 1998 MT

217, ¶ 18, 290 Mont. 460, 963 P.3d 1279; *Marsh v. Overland*, 274 Mont. 21, 29, 905 P.2d 1088 (1995) ("We will not address issues which were not properly raised before the District Court.").

SUMMARY OF THE ARGUMENT

The District Court correctly applied Montana law and the law of this case in finding that the Johnsons failed to allege a justiciable claim for violation of the "made whole" rule.

To state a justiciable claim here, the Johnsons were required to plead facts supporting that State Farm's subrogation recovery for its property damage payment from GEICO reduced, or necessarily would have reduced, the amount of compensation the Johnsons could recover for their uncovered losses. The Johnsons did not, and could not, allege such facts. Instead, the facts are the opposite. The Johnsons conceded that more than enough property limits remained under Ms. Vanmeter's GEICO policy to satisfy all of their uncovered property losses.

That the Johnsons later settled their claim against Ms. Vanmeter for less than they purportedly wanted conflicts with their factual allegations and, even if true, constitutes a self-inflicted injury not attributable to State Farm. The same is true of the Johnsons' uncovered and unrecoverable attorneys' fees. The Johnsons cannot recover their attorneys' fees because Montana adheres to the American Rule on attorneys' fees, not because of any conduct of State Farm.

Because the Johnsons failed to allege a justiciable claim against State Farm, this Court need not and should not reach their merits arguments regarding the applicability of the "made whole" rule or the extent of preemption under § 33-18-242(3), MCA. The Johnsons also failed to raise and preserve their new preemption arguments below, which separately bars consideration on this appeal.

ARGUMENT

I. The District Court Correctly Found Under Montana Law and the Order that the Johnsons Failed to Allege a Justiciable Claim for Violation of the "Made Whole" Rule

"The judicial power of Montana's courts, like federal courts, is limited to 'justiciable controversies.'" *Moody's Market, Inc. v. Montana State Fund*, 2020 MT 217, ¶ 16, 401 Mont. 168, 471 P.3d 68, (internal citation omitted) (affirming dismissal for lack of justiciable controversy). Montana's Constitution "embodies the same limitations as are imposed on federal courts by the 'case or controversy' language of Article III." *Plan Helena, Inc. v. Helena Regional Airport Authority Board*, 2010 MT 26, ¶ 6, 355 Mont. 142, 226 P.3d 567; *Seubert v. Seubert*, 2000 MT 241, ¶ 17, 301 Mont. 382, 13 P.3d 365 ("The constitutional provision in Article VII, Section 4 of the Montana Constitution which extends original jurisdiction of a district court to 'cases at law and in equity,' has been interpreted as embodying the same limitations as those imposed on federal courts by the Article III 'case or controversy' provision of the United States Constitution."). "Accordingly, federal

precedents interpreting the Article III requirements for justiciability are persuasive authority for interpreting the justiciability requirements" under Montana law. *Plan Helena,* at ¶ 6.

Because justiciability "transcends" other issues, this Court reviews threshold issues of justiciability, including standing, ripeness and mootness, before reaching any other issue. *Plan Helena,* ¶¶ 11-13.

As the Court, the District Court and the United States District Court have all recognized, to allege a justiciable claim for violation of the "made whole" rule here, the Johnsons must allege facts supporting that State Farm's assertion of subrogation "reduced, or necessarily will reduce, the amount of compensation that they will ultimately be entitled to recover for any element of damages from the third-party tortfeasor/GEICO and/or under their own UIM coverage." (Dkt. 40, p. 4) (citing *Van Orden*, ¶¶ 21-25); (Dkt. 33, p. 18-19); *Johnson*, 2020 U.S. Dist. LEXIS 149096, *4, 2020 WL 4784692, *2 (D. Mont. Aug. 18, 2020).[3]

To meet that standard here, the Johnsons needed to allege facts supporting that "the amount of their damages resulting from their collision with Vanmeter exceeds the total amount of their potential sources of recovery and … that State Farm's subrogation caused such a shortfall." (Dkt. 33, p. 18-19); (Dkt. 40, p. 4); *Johnson*,

[3] The Johnsons characterized *Van Orden* as "unusual" and somehow inapplicable to this case in their briefing to the District Court even after this Court relied on it in the Order. (Dkt. 49, p. 8 & fn. 5). They have abandoned that claim on appeal.

2020 U.S. Dist. LEXIS 149096, *4, 2020 WL 4784692, *2 (Aug. 18, 2020); *Chandler v. State Farm Mutual Ins. Co*., 598 F.3d 1115 (9th Cir. 2010); *James Lee Constr., Inc. v. Gov't Emps. Ins. Co*., 478 F.Supp.3d 1057, 1061-1062 (D. Mont. 2020). In the words of this Court in *Van Orden*, the Johnsons only needed to allege facts supporting that State Farm potentially "[took] money out of [the Johnsons'] pocket" by obtaining a subrogation recovery from Ms. Vanmeter's insurer that could have been used to satisfy the Johnsons' remaining claims against her, and left Ms. Vanmeter with insufficient assets to satisfy those claims. *See, e.g., Van Orden*, ¶ 21. Absent that causal connection between State Farm's conduct and the Johnsons' alleged harm, the Johnsons' claims for violation of the "made whole" rule are purely "academic." *Moody's Mkt.,* ¶ 17.

The Johnsons could not allege those minimal facts after four attempts, and the record below now demonstrates that they never can. The Johnsons concede that they settled their claim for uncovered property damage against Ms. Vanmeter for less than her available GEICO property limits.[4] (RT 2/7/23, p. 45:9-11). The Johnsons also admit that Ms. Vanmeter's GEICO policy had more than enough remaining limits to settle the Johnsons' entire claim for uncovered property damage, even

[4] The Johnsons have also settled their bodily injury claim against both Ms. Vanmeter/GEICO and State Farm for less than the available UIM limits. (Dkt. 56, 58). Because those funds were never available to settle the Johnsons' property damage claim, they are not pertinent to the justiciability inquiry here. *Van Orden*, ¶¶ 17, 21; (Dkt. 40, p. 4).

assuming the Johnsons' claim for the first time at oral argument that they "wanted" about $400 or $500 more from Ms. Vanmeter. (RT 2/7/23, pp. 9:13-19, 45:9-11). The District Court correctly determined, based on Montana law and the Order that "the law does not provide a justiciable claim" in these circumstances. (Dkt. 54, pp. 8-9).

II. The District Court Correctly Applied the Causation Requirement in Montana's Threshold Justiciability Inquiry

The Johnsons previously argued to this Court that, in dismissing their "made whole" claims as nonjusticiable, the District Court added a new "causation element" unsupported by Montana law. This Court correctly rejected that argument. (Dkt. 40, Order, p. 4 fn. 4). The Johnsons now attempt to avoid causation entirely, by first arguing the merits of their "made whole" claims and later discussing justiciability without mentioning causation. Appellants' Opening Brief ("Appellant's Op. Br."), pp. 10-32. They employed the same tactics below, which the District Court correctly rejected. (Dkt. 33, p. 14).

A. The Johnsons Cannot Sidestep Justiciability by Arguing the Merits

The Johnsons contend that "[t]he first issue" in the justiciability inquiry "is whether the TAC pleads a systematic violation of the 'made-whole' rule …." (Appellants' Op. Br., p. 10). They are wrong.

Justiciability is a threshold issue that precedes any question of substantive law, including whether the Johnsons alleged a cognizable liability theory. *Plan*

Helena, ¶¶ 11-13. As this Court has repeatedly explained: "Whether an asserted claim is facially sufficient to state a cognizable claim entitling the claimant to relief on the facts pled 'is a question of substantive law on the merits' rather than a threshold issue of subject matter jurisdiction or related justiciability." *Gottlob v. DesRosier*, 2020 MT 210, ¶ 9, 401 Mont. 50, 470 P.3d 188 (citation omitted); *Larson v. State By and Through Stapleton*, 2019 MT 28, ¶ 19, 394 Mont. 167, 434 P.3d 241 ("Apart from threshold considerations of subject matter jurisdiction and justiciability, a complaint must also state a substantively cognizable claim for relief. [citation] Whether a complaint states a cognizable claim for relief is a question of substantive law on the merits rather than a threshold jurisdictional issue.").

Montana courts also adhere to the rule that liberality in pleading must be "tempered by the necessity that a justiciable controversy exists before courts exercise jurisdiction." *Murray v. Motl*, 2015 MT 216, ¶¶ 12-13, 380 Mont. 162, 354 P.3d 197 (affirming District Court's dismissal of declaratory relief claim under liberally-construed UDJA for lack of a justiciable controversy); *Northfield Ins. Co. v. Montana Ass'n v. Counties*, 2000 MT 256, ¶¶ 10-14, 301 Mont. 472, 10 P.3d 813 (affirming dismissal of claims against insurer as nonjusticiable, reasoning that "a justiciable controversy cannot exist based on hypothetical facts and abstract propositions").

Thus, to even reach the question of whether a complaint alleges a cognizable claim for relief, the Court must first find that the claim is justiciable. *North Star Dev. LLC v. Mont. Pub. Serv. Comm'n*, 2022 MT 103, ¶¶ 21-25, 408 Mont. 498, 510 P.3d 1232 (District Court's failure to consider affirmative defenses pleaded in complaint in dismissing suit not error where claims were not justiciable); *Plan Helena,* ¶¶ 11-13.

Because this appeal turns on whether the Johnsons alleged justiciable claims, not cognizable claims, the Johnsons' extended merits discussion of the contours of Montana's "made whole" rule does not assist them. (Appellants' Op. Br., pp. 10-18). None of the Johnsons' "made whole" cases involved a threshold justiciability challenge – they simply articulate Montana's "made whole" rule. *Ferguson v. Safeco Ins. Co. of America,* 2008 MT 109, 342 Mont. 380, 180 P.3d 1164 (considering class certification requirements under Mont. R. Civ. P. 23); *Swanson v. Hartford Ins. Co. of Midwest,* 2002 MT 81, 309 Mont. 269, 46 P.3d 583 (considering certified questions from the United States District Court regarding Montana public policy); *DeTienne Assocs. Ltd. P'ship v. Farmers Union Mutual Ins. Co*., 266 Mont. 184, 879 P.2d 704 (1994) (considering appeal from judgment on merits of "made whole" claim); *Skauge v. Mtn. States Tel. & Tel. Co.,* 172 Mont. 521, 565 P.2d 628 (1977) (involving appeal of judgment following trial).

The Johnsons' continued reliance on this authority illustrates how they have conflated the concepts of justiciability and cognizability throughout this case. The Johnsons previously relied on *Ferguson* and *Skauge* in arguing that the Court must either find a justiciable claim or "render unenforceable Montana's longstanding 'made whole' rule." (Petition for Writ of Supervisory Control, pp. 1, 10-11). That presented a false dichotomy, as State Farm explained in its response and this Court confirmed in entering the Order. (Response to Petition, pp. 12-13; Dkt. 40). Montana indisputably recognizes a "made whole" rule. The issue here is whether the Johnsons met their threshold burden of alleging facts supporting justiciable claims for violation of the rule. That required facts supporting that State Farm's conduct caused the Johnsons harm by preventing the Johnsons from recovering all of their uncovered property losses from Ms. Vanmeter/GEICO. (Dkt. 40, p. 4). The District Court correctly found that the Johnsons had failed to meet their burden.

B. The Johnsons Cannot Avoid the Causation Requirement of Justiciability

Indicative of their inability to meet their threshold burden here, the Johnsons do not mention "causation" anywhere in their justiciability discussion. (*See* Appellants' Op. Br., pp. 23-31). Ignoring causation does not avoid it.

There is no question that the applicable justiciability inquiry includes the requirement that State Farm's alleged conduct cause the Johnsons harm, because this Court already recognized the requirement in the Order, which constitutes the law of

this case. (Dkt. 40, p. 4 & fn. 4) (finding no error in the District Court's recognition of a "causation element" and dismissal of the Johnsons' claims as non-justiciable where they failed to allege facts supporting that State Farm's conduct "has already reduced, or necessarily will reduce, the amount of compensation that they will ultimately be entitled to recover for any element of damages" from Ms. Vanmeter/GEICO). The Order's articulation of the applicable legal standard controls here. *Moody*, 286 Mont. at 93, 951 P.2d at 20; *Murphy Homes*, ¶ 56.

Larson, similarly recognized that "[s]tanding is a threshold requirement of justiciability applicable to all claims for relief as a matter of constitutional law and related prudential policy considerations." *Larson*, ¶ 45. Further, the *Larson* Court added, standing requires that the "alleged wrong … has in fact caused, or is likely to cause, the plaintiff to personally suffer specific, definite and direct harm …." *Id*. at ¶ 46. The District Court below correctly relied on *Larson* in finding the Johnsons' proposition that no "causation" element exists in Montana's justiciability standard "unavailing" in dismissing the Johnsons' "made whole" claims alleged in the FAC. (Dkt. 33, p. 14). This Court echoed the District Court's reasoning, and acknowledged the causation requirement, in the Order. (Dkt. 40, p. 4 fn. 4).

Numerous other decisions from this Court, even more recent than the Order, are in accord. *350 Mont. v. State*, 2023 MT 87, ¶ 24, 412 Mont. 273, 529 P.3d 847 (District Court improperly adjudicated nonjusticiable question where plaintiffs

failed to show that the challenged preapproval process itself "will cause [their] electricity bills to rise"); *Hanson v. Town of Fort Peck*, 2023 MT 208, ¶ 22, 414 Mont. 1, 538 P.3d 404 (threshold justiciability requirement includes "assertion of a substantively cognizable claim for relief 'based on an alleged wrong or illegality that has in fact caused, or is likely to cause, the [claimant] to personally suffer specific, definite, and direct harm to person, property, or exercise of right'"); *Kageco Orchards, LLC v. Mont. DOT*, 2023 MT 71, 412 Mont. 45, 54-55, 528 P.3d 1097 (suit challenging mailbox placement did not present a justiciable controversy where no evidence suggested actual injury "due to the location of the mailboxes").

Ignoring causation entirely, the Johnsons instead argue that their "case passes the *Chipman* test" of justiciability. (Appellants' Op. Br., p. 24) (citing *Chipman v. New Healthcare Corp*., 2012 MT 242, ¶ 19, 366 Mont. 450, 288 P.3d 193). That the portion of *Chipman* on which the Johnsons rely did not discuss standing and causation among other threshold justiciability requirements does not mean that those requirements do not exist. This is particularly true because the very next section of *Chipman* acknowledged the standing requirement, which includes causation. *Chipman,* 2012 MT 242, ¶ 25 ("The central concepts of justiciability have been elaborated into more specific categories or doctrines—namely, advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions—each of which is governed by its own set of substantive

rules."). More recent authority, including the Order, leaves no doubt regarding the causation requirement in Montana's threshold justiciability standard. (Dkt. 40, p. 4 fn. 4); *Larson*, ¶¶ 45, 46; *350 Mont.*, ¶ 24; *Hanson*, ¶ 22.

C. The Johnsons Did Not Meet the Causation Requirement

Unable to meet the applicable causation standard here, i.e., allege facts supporting that State Farm's conduct "has already reduced, or necessarily will reduce, the amount of compensation that they will ultimately be entitled to recover for any element of damages" from Ms. Vanmeter/GEICO, (Dkt. 40, p. 4), the Johnsons argue other forms of purported harm. According to the Johnsons, State Farm's subrogation left them "with an impaired claim and a concrete loss of attorneys' fees." (Appellants' Op. Br., p. 9). They made the same arguments below, which the District Court properly rejected.

1. The District Court Correctly Rejected the Johnsons' "Impaired" Tort Claim Theory of Harm

The District Court correctly found that State Farm did not "impair" the Johnsons' property damage claim against Ms. Vanmeter. The Johnsons named Ms. Vanmeter as a defendant in this case. They also recovered every item of uncovered property damage that they specifically alleged in their proposed SAC in their settlement with Ms. Vanmeter. (Dkt. 34.1, ¶ 20(A) (itemizing $1,618 in uncovered property losses); Dkt. 42 (alleging that the Johnsons settled with Ms. Vanmeter for $26,618, which constitutes the $25,000 bodily injury limits under the GEICO policy

plus "an additional amount for property damage" not covered under their State Farm policy). At oral argument, for the first time, the Johnsons' counsel claimed that the Johnsons had "wanted" an additional $400 or $500 from Ms. Vanmeter. (RT 2/7/23, pp. 9:13-19). But, the Johnsons' counsel did not offer any facts supporting that the Johnsons had actually suffered an additional uncovered property loss in that amount. (*Id*.). The Johnsons' counsel also conceded that Ms. Vanmeter's GEICO policy had more than enough limits remaining to satisfy that purported claim, even assuming it was valid, but "we settled it." (RT 2/7/23, p. 45:9-11).

The District Court correctly rejected the Johnsons' claim of a purported "impaired claim" injury as "speculative" and insufficient to support a justiciable claim in this context. (Dkt. 54); *Kageco Orchards, LLC, supra*, 2023 MT 71, 412 Mont. 45, 54 (no justiciable controversy where the allegedly hazardous mailbox placement by the defendant constituted only a "speculative harm … inadequate to establish an actual concrete injury under the case or controversy requirement").

The Johnsons' purported injury – choosing to settle their property damage claim for less than they had wanted – is also purely self-inflicted. The Johnsons offer no authority supporting that a self-inflicted injury supports a justiciable claim, and ignore that courts have repeatedly rejected that proposition. *Clapper v. Amnesty International USA*, 568 U.S. 398, 416 (2013) ("Respondents cannot manufacture standing by merely inflicting harm upon themselves."); *McConnell v. Federal*

Election Com'n, 540 U.S. 93, 228, 124 S.Ct. 619 (2003) (diminished ability to compete or participate in electoral process stemmed from plaintiffs' "personal choice" to not solicit or accept large contributions, not an injury "fairly traceable" to the challenged action by the defendant); *Pennsylvania v. New York*, 426 U.S. 660, 664 (1976) (injuries to plaintiff states' fiscs were "self-inflicted," and no state "can be heard to complain about damage inflicted by its own hand"); *Twitter, Inc. v. Paxton*, 56 F.4th1170, 1176 (9th Cir. 2022) ("[T]o the extent Twitter argues that any actions it has taken in response to the [challenged conduct] create an Article III injury, those injuries are self-inflicted because the actions were voluntary" and do not support standing); *Petro-Chem Processing, Inc. v. E.P.A.*, 866 F.2d 433, 438 (D.C. Cir. 1989) (the alleged harm "insofar as it is incurred voluntarily, is simply not an injury that 'fairly can be traced to the challenged action,' as required by Supreme Court decisions interpreting Article III of the Constitution").[5]

2. The District Court Correctly Found that State Farm did Not Cause the Johnsons' Inability to Recover Attorneys' Fees

State Farm also did not cause the Johnsons' inability to recover the attorneys' fees they incurred in pursuing recovery of their uncovered losses against Ms. Vanmeter. As the District Court correctly observed below, the American rule on

[5] As mentioned above, federal decisions on Article III are persuasive authority in this Court. *Supra*, pp. 15 (citing, *inter alia*, *Plan Helena*, ¶ 6)

attorneys' fees barred that recovery, not any conduct of State Farm. (Dkt. 54, p. 6) (citing *W. Tradition P'Ship*, 2012 MT 271, ¶ 9, 367 Mont. 112, 291 P.3d 545).

Montana adheres to the American rule on attorneys' fees which provides that, "absent a specific statutory or contractual provision, a prevailing party generally is not entitled to recovery of its attorneys' fees in prosecuting or defending the action." *W. Tradition P'Ship.*, ¶ 9. Moreover, no statute or contract provision allowed the Johnsons to recover their attorneys' fees from Ms. Vanmeter or GEICO here. (Dkt. 54) ("None of the parties contend that the liable driver's insurance policy includes coverage to reimburse the Johnsons for their attorney fees incurred in representing the Johnsons on their claim against the liable driver."). The District Court made a similar observation in its first dismissal order:

> The Johnsons acknowledge that they cannot recover attorney fees from Vanmeter because Montana adheres to the American Rule on attorney fees – in other words, not because of any conduct of State Farm. The Johnsons would have incurred the same attorney fees to recover compensation for the [property] not covered under the Policy regardless of what State Farm did with its subrogation right.

(Dkt. 33, p. 16). This Court recounted that reasoning with approval in the Order. (Dkt. 40, p. 4) (the Johnsons' "inability to recover related attorney fees from the tortfeasor/GEICO did not trigger the made-whole doctrine because State Farm's asserted right to subrogate its previously paid property loss compensation would not limit or reduce the amount of their recovery of attorney fees from the tortfeasor/GEICO because they had no such right").

Even more recently, the United States District Court echoed that reasoning in dismissing, with prejudice, a similar class action filed by the Johnsons' counsel. *James Lee Constr., Inc. v. Gov't Emps. Ins. Co*., 2022 WL 19353, 2022 U.S. Dist. LEXIS 325 (D. Mon. Jan. 3, 2022), *aff'd* 2023 U.S. App. LEXIS 1005, 2023 WL 195520 (9th Cir. Jan. 17, 2023). As to the theory that the insurer in *James Lee*, GEICO, had violated the "made whole" rule by subrogating for its property damage payment before the plaintiffs recovered their uncovered losses, including attorneys' fees, Judge Molloy explained:

> …Plaintiffs fail to allege facts that plausibly show that GEICO's subrogation conduct reduced the amount by which they would or could ultimately recover from the third-party tortfeasor. *See Johnson*, 2021 Mont. LEXIS 899, 2021 WL 5088743, at *2. **Plaintiffs themselves argue that they could not recover attorney fees from the tortfeasor, [citation], and therefore GEICO did not "tak[e] any money out of [Plaintiffs'] pockets."** *Van Orden*, 318 P.3d at 1047. The facts of this case simply do not support Plaintiffs' subrogation challenge.

2022 WL 19353, 2022 U.S. Dist. LEXIS 325 at * 12 (emphasis added).

In short, Montana state and federal courts agree that unrecovered (and unrecoverable) attorneys' fees do not support a justiciable claim for violation of the "made whole" rule.

III. The Johnsons' Theory that an Insurer Can Never Subrogate Whenever an Insured Retains Counsel to Pursue the Tortfeasor Fails

In any event, even if the Court goes beyond the threshold question of justiciability, and reaches the Johnsons' argument that they alleged a cognizable

liability theory, which it should not do for all the reasons detailed above, the argument fails.

The Johnsons' liability theory rests on the premise that they can never be made whole by suing Ms. Vanmeter, because, even though State Farm fully compensated them for their covered loss, they retained counsel to pursue their other, uncovered losses. As a result, the Johnsons incurred attorneys' fees that they cannot recover because of the American Rule – not because of any conduct of State Farm. In other words, according to the Johnsons, an insurer can *never* subrogate whenever the insured retains counsel to pursue uncovered losses. Under the Johnsons' view, subrogation cannot proceed even if the insurer has paid all of the insured's covered losses and the tortfeasor can satisfy all of the insured's uncovered losses, because the insured can never recover their attorneys' fees from the tortfeasor. The Johnsons ignore that this Court rejected a similar argument in *Van Orden, supra*.

In *Van Orden*, the insured, Van Orden, incurred vehicle repair costs, vehicle rental costs, and bodily injuries as a result of an accident caused by another driver. His insurer, USAA, paid his vehicle repair and rental costs.

Van Orden retained counsel to pursue recover for his bodily injury losses, which he claimed exceeded the limits of all available insurance coverage. Meanwhile, USAA recovered its property damage payments from the at-fault driver's insurer in subrogation. Van Orden then filed a class action complaint

against USAA for violation of the "made whole" rule, arguing that USAA could not subrogate for its property damage payments unless and until he and other class members had recovered all of their other losses, including unrecoverable attorneys' fees.

The Court rejected that argument. It found USAA's exercise of subrogation entirely proper, even though Van Orden had not been made whole for his bodily injury losses or the costs of recovering them, because he had "been made whole for the element of damage for which he purchased insurance." *Id.* at ¶ 17. The Court squarely rejected the suggestion that, had USAA not subrogated, Van Orden could have recovered the at-fault driver's property coverage limits, put them into a single "pot" with any other insurance proceeds, and somehow allocated them towards his unrecoverable attorneys' fees. *Id.* at ¶¶ 21-22. Van Orden could not recover from the at-fault driver's insurer for the same losses that USAA had already satisfied, because Montana law and public policy barred such duplicate recoveries. *Id.* at ¶ 18. Under the public policy of Montana, "an insured should not receive duplicate payments for the same element of loss." *Id.* at ¶ 19 (citing *Swanson*, 2002 MT 81, ¶ 23). "To hold otherwise," the *Van Orden* Court added, "would not give effect to § 33-23-203(2), MCA," which explicitly permits nonduplication provisions in motor

vehicle and other insurance policies.[6] *Van Orden*, 2014 MT 45, ¶ 18. Even assuming that Van Orden could never be made whole (because of the attorneys' fees he incurred in pursuing uncovered losses), USAA's subrogation recovery did not violate Montana's "made-whole" rule because it did not prevent Van Orden from recovering his uncovered losses. *Id.* at ¶ 21. "USAA [wa]s not taking any money out of Van Orden's pocket."[7] *Id.* at ¶ 21 (emphasis added).

Consistent with that injury principle, the District Court below explained why the Johnsons' liability theory did not further the policies underlying the "made whole" rule:

> Under the Johnsons' reading of the "made whole" doctrine, no one in the Johnsons' position—once having hired an attorney to assert their claims against the liable driver's insurance policy—could ever be considered to be "made whole" because the liable driver's insurer would not reimburse the claimant for his or her attorney fees. However, a self-represented claimant in the same position as the Johnsons could

[6] Consistent with § 33-23-203(2), MCA, and Montana public policy, the Johnsons' State Farm Policy includes a nonduplication provision which serves "to prevent duplicate payments for the same element of loss." (Dkt. 17, Exh. A, Policy, p. 26); *Van Orden*, ¶ 18.

[7] This Court relied on that same injury principle in *Gibson v. United States*, 2021 MT 309, ¶ 13, 406 Mont. 450, 499 P.3d 1165. *Gibson* involved the collateral source rule and cited *Van Orden* in support of its own holding that the plaintiff could not recover written-off medical expenses as damages. *Gibson*, ¶ 21 (because the providers had forgiven the expenses, failing to compensate Gibson for them "is not taking any money out of [her] pocket"). More recently, the United States District Court for the District of Montana dismissed a similar class action filed by the Johnsons' counsel on the same reasoning. *James Lee Constr., Inc. v. Gov't Emps. Ins. Co*., 2022 WL 19353, 2022 U.S. Dist. LEXIS 325, *12 (D. Mon. Jan. 3, 2022) (citing *Van Orden* for the observation that the insurer's subrogation recovery "did not 'tak[e] any money out of [Plaintiffs'] pockets.'").

> be made whole in the Johnsons' circumstances simply by not choosing to settle the property damage claim for less than it was worth and, at the same time, for an amount less than the coverage limit available to satisfy the claim.
>
> Under the Johnsons' analysis, virtually any time a plaintiff hires an attorney to pursue a personal injury/property damage claim against a liable driver's insurer in Montana, the plaintiff's own insurer could never exercise its right of subrogation—even when there is an excess policy limit to accommodate the subrogation claim—because the plaintiff will not recover his or her attorney fees from the liable driver's insurer. Accordingly, the right of the plaintiff's insurer to seek subrogation against the liable driver's insurer has less to do with whether the plaintiff has been reimbursed for the full amount of the plaintiff's bodily injury and property damage claim than whether the plaintiff is represented by counsel.

(Dkt. 54, pp. 6-7). The District Court also recounted the Johnsons' counsel's admission at oral argument that, under their view, "State Farm would not be obliged to pay the Johnsons' attorney fees in this instance had State Farm elected not to exercise its right to subrogation." (Dkt. 54, p. 7). "[B]ut," the District Court reasoned, "the Johnsons would be no better (or worse) off for it. They still would have settled their property damage claim for less than it was worth (and less than the available policy coverage provides) and still would have incurred the attorney fee for which there would be no right of reimbursement from either the liable driver's insurer or – as the Johnsons contend – from State Farm." (Dkt. 54, p. 7).

The Johnsons offer no response to this reasoning on appeal. Instead, they pivot. Now, rather than focus on attorneys' fees as they did below, they center their policy arguments on the unsupported theory that subrogation by an insurer

necessarily diminishes an insured's ability to recover their uncovered losses, even when the tortfeasor has more than enough policy limits remaining to satisfy all of the insured's recoverable losses. (Appellants' Op. Br., pp. 14-15, 22-23). Not only does that theory fail as entirely speculative, as the District Court observed, (Dkt. 54, p. 8), but it also conflicts with *Van Orden* and the Order, which control. Both *Van Orden* and the Order recognize that subrogation can proceed in certain circumstances before the insured recovers all of their recoverable losses. (Dkt. 40, pp. 4-5) (citing *Van Orden* with approval).

Regardless, this Court need not and should not decide whether subrogation under the circumstances of this case violated the "made whole" rule. For this Court to reach the issue of whether the Johnsons alleged a cognizable claim for violation of the "made whole" rule, the Johnsons first had to allege justiciable claims, which they failed to do.

IV. The Court Should Not Reach the Johnsons' Arguments Regarding § 33-18-242 MCA Preemption, Which Fail in Any Event

The Court should not reach the Johnsons' arguments related to § 33-18-242(3), MCA preemption, either, based on the Johnsons' failure to allege justiciable claims. (Appellants' Op. Br., pp. 30-41). Thus, offering an opinion on preemption here would amount to an improper advisory opinion. Plan Helena, ¶¶ 9-13 ("[T]his Court does not render advisory opinions.").

Alternatively, the Court should disregard the Johnsons' preemption arguments because they failed to raise and preserve them below. *See, e.g.*, *In re M.A.L.*, ¶¶ 55-58. Only State Farm raised preemption below, and limited its argument to the Johnsons' conversion claim. Specifically, in moving to dismiss the FAC, State Farm argued that the Johnsons' common law conversion claim failed both because no facts suggested that State Farm had usurped the Johnsons' tort claims against Ms. Vanmeter, and because § 33-18-242(3), MCA preempted the conversion claim. (See Dkt. 33, pp. 20-23). The Johnsons offered only a cursory response that attempted to distinguish a single decision. (See Dkt. 20, pp. 21-22) (citing *James Lee Constr., Inc. v. Gov't Emps. Ins. Co*., 478 F.Supp.3d 1057 (D. Mont. Aug. 11, 2020)). The District Court agreed with State Farm that preemption under Montana's Unfair Trade Practices Act ("UTPA") applied to the conversion claim and dismissed that claim with prejudice. (Dkt. 33) ("The plain language of § 33-18-242(2), MCA clearly bars the Johnsons' claim and class claim for conversion ….") The Johnsons then sought writ relief, and this Court found no error. (Dkt. 40). In this Court's words, the Johnsons did not meet "their burden of showing that the court erroneously dismissed their related common law conversion claim (predicated on the same alleged 'violation' of the made-whole doctrine) pursuant to § 33-18-242(3), MCA (UTPA limitation of first-party insurance claims handling related claims). " (Dkt. 40, pp. 4-5). Most recently, in response to State Farm's Motion to Dismiss the TAC,

the Johnsons again offered only a brief preemption discussion that cited a single case. (See Dkt. 49, pp. 17-18) (citing *Mark Ibsen, Inc. v. Caring for Montanans, Inc*., 2016 MT 111, 383 Mont. 346, 371 P.3d 446).

In stark contrast to their prior briefing in this case, the Johnsons now devote ten pages of their Brief to a new preemption argument centering on their declaratory relief claim. (Appellants' Op. Br., pp. 30-39) (arguing that their declaratory relief claim is justiciable because § 33-18-242(3), MCA should not preempt it). The Johnsons' new theory improperly conflates justiciability and preemption, and is not cognizable on this appeal because neither the Johnsons nor State Farm raised the issue of whether § 33-18-242(3), MCA preemption applied to the declaratory relief claim below. *See, e.g., Marsh v. Overland*, *supra,* 274 Mont. at 29 ("We will not address issues which were not properly raised before the district court.").

Even if the Johnsons had properly preserved that issue for appeal, the preemption issue does not excuse the lack of justiciability. Justiciability applies to every claim alleged, including declaratory relief, as the Johnsons' own authority reflects. *Northfield Ins. Co.,* 2000 MT 256, ¶¶ 12-16, (affirming dismissal of declaratory relief claim as nonjusticiable based on, among other things, the failure to show an actual or immediately threatened injury caused by the insurer). A finding that § 33-18-242(3), MCA preemption did not apply to the Johnsons' declaratory

relief claim would thus not cure their threshold failure to satisfy the causation requirement of justiciability.[8]

Finally, the only preemption issue raised below – whether UTPA preemption applied to the conversion claim – has already been resolved and should not be revisited. This Court directly considered the issue in the Order, and found no legal error in the District Court's dismissal of the conversion claim based on UTPA preemption. (Dkt. 40, pp. 4-5). That finding constitutes the law of this case and controls.

[8] If the Court reaches the merits of this preemption issue, notwithstanding the Johnsons' failure to raise the issue below and the lack of justiciability, it should join the numerous other Montana courts holding that the UTPA does not permit declaratory relief. *Cooper v. State Farm Mut. Auto. Ins. Co*., 2024 U.S. Dist. LEXIS 15531, 2024 WL 325395 (D. Mont. Jan. 29, 2024) ("[T]he UTPA neither creates a right of action for declaratory relief, nor does it allow declaratory relief."); *James Lee Constr., Inc. v. Gov't Emps. Ins. Co*., 2023 U.S. App. LEXIS 1005, 2023 WL 195520 (9th Cir. Jan. 17, 2023) ("declaratory relief is not a permissible 'theory or cause of action' allowed under [the UTPA]"); *Woodman Std. Ins. Co*., 2021 U.S. Dist. LEXIS 46061, *6, 2021 WL 927373 (D. Mont. Mar. 11, 2021) ("Declaratory relief is unavailable as a cause of action and as a remedy [under the UTPA]."); *Byorth v. USAA Cas. Ins. Co*., 2019 U.S. Dist. LEXIS 212701, *7-8, 2019 WL 6715970 (D. Mont. Dec. 10, 2019) ("Pursuant to the plain language of the Act, and the legislative history supporting its narrow construction, it is reasonable to construe § 33-18-242 as prohibiting an insured from bringing an independent cause of action against an insurer for declaratory judgment."); *Bateman v. National Union Fire Ins. Co*., 423 Fed. Appx. 763, 766 (9th Cir. 2011) (declaratory relief "is not a remedy available under the UTPA").

CONCLUSION

For the foregoing reasons this Court should affirm the District Court's Judgment below.

Respectfully submitted this 15th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Appellees' Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Windows is 9,049 words, excluding the caption, signature block, certificate of service, certificate of compliance, table of contents and table of authorities.

Respectfully submitted this 15th day of July, 2024.

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I, Breanne Pritchett, a paralegal of the law firm, MOORE, COCKRELL, GOICOECHEA & JOHNSON, P.C., do hereby certify that the Appellees' Brief was electronically filed with the Clerk of the Montana Supreme Court on July 15, 2024, at approximately 4:00 p.m. I also certify that I served a copy of the Appellees' Brief by mailing (first class postage prepaid) and emailing a copy thereof, to the following:

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