IN THE SUPREME COURT
OF THE STATE OF MONTANA
DA 24-0127

ROGER and THERESE HUTCHINSON,

Plaintiffs, Counter-defendants and Appellants.

v.

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY and JOHN HOLT,

Defendants, Counter-claimants and Appellees.

APPELLEES' RESPONSE BRIEF

On Appeal from the Fifth Judicial District
Madison County, Montana
Case No. DV-29-2022-107
Honorable Molly Owen

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I. STATEMENT OF ISSUES

Whether the District Court was correct in its determination that no claims or facts in the Underlying Action triggered coverage and that OR had no duty to defend Hutchinsons.

II. STATEMENT OF THE CASE

Hutchinsons sued their neighbors (Nugget Creek Ranch, LLC and Mark Miller) in an Underlying Action concerning the parties' use of gates on an access road to Hutchinsons' parcel. Specifically, Hutchinsons claimed rights to install and open gates on the access road per a 1991 Easement. The neighbors counterclaimed asserting multiple causes of action against Hutchinsons, nearly all of which arose from Hutchinsons' conduct on the access road. Namely, the neighbors alleged that Hutchinsons had tortiously abused the 1991 Easement and that the Hutchinsons, through their own actions, effectively extinguished the 1991 Easement. Importantly, there was no claim that the 1991 Easement was invalid or defective or that Hutchinsons lacked a right of access to their parcel.

Hutchinsons tendered the defense of the Defendants' Counterclaims to Old Republic National Title Insurance Company ("OR"), which had insured title to Hutchinsons parcel back in 2016. After assessing Hutchinsons' demand, considering all allegations of the operative pleadings in the Underlying Action (namely the Complaint and Counterclaims), OR determined that the pleadings

invoked no Covered Risk and/or presented no claims which were not excluded or excepted from coverage. As such, OR denied Hutchinsons' demand for defense.

OR monitored the Underlying Action which only confirmed OR's denial of the Hutchinsons' tender of defense: no party filed amended pleadings invoking coverage; nothing disclosed in discovery invoked coverage; the parties' filed draft pretrial order did not invoke coverage. The Underlying Action was ultimately dismissed by agreement of Hutchinsons, at their expense and with acknowledgment of Defendants' easement rights.

Unsatisfied with OR's denial of their demand, Hutchinsons brought a declaratory relief action against OR under their title insurance policy claiming OR had a duty to defend them against the Counterclaims in the Underlying Action. OR counterclaimed for declaratory relief asserting it did not owe a duty to defend Hutchinsons as the Counterclaims concerned no title defect, no lack of right of access, but rather the parties' use of gates on an access road to Hutchinsons' parcel occurring long after the effective date of the title insurance policy OR issued to Hutchinsons. Further, even if the Counterclaims did invoke a covered risk, such claims would be barred from coverage by the Title Policy's various terms, conditions, exclusions, and exceptions. Thus, coverage under the Title Policy was not triggered.

On cross-motions for summary judgment, the District Court found that none of the claims or facts in the Underlying Action triggered any of the title policy's covered risks, and thus OR had no duty to defend. Specifically, the District Court found the 1991 Easement was an express exception to the title policy and that the conduct in the Underlying Action occurred outside of the title policy either because all alleged actions occurred long after the title policy was issued or because of the tortious nature of Hutchinsons' own actions. The District Court also found Hutchinsons' arguments concerning conflicting acreage amounts did not relate back to the Underlying Action. Thus, the District Court determined that OR did not have a duty to defend[1]. This appeal followed.

III. STATEMENT OF FACTS

A. THE TITLE POLICY

1. Hutchinsons closed on their purchase of real property at 24 Deer Trail in Sheridan on August 25, 2016. Old Republic, through its agent, issued to Hutchinsons as insureds an Owner's Policy of Title Insurance, Policy No. 0X 10203198, effective as of that date (the "Policy" or "Title Policy"). Hutchinsons' insured property is described in Schedule A as follows:

[1] The District Court also determined that John Holt was acting in his role as an employee of OR and was thus shielded from personal liability, dismissing all claims against him. *See* Dkt. 28. Hutchinsons do not challenge this ruling of the District Court's Order.

4. The land referred to in this policy is described as follows:

A tract of land located in the S½ of Section 11, Township 4 South, Range 5 West, P.M.M., Madison County, Montana, more particularly described by metes and bounds as follows: Commencing at a point from which the North quarter corner of said Section 11 bears N4º25'W a distance of 4,326.62 feet; thence N14ºW a distance of 100 feet to the place of beginning of the tract herein being described, thence S37ºE a distance of 86 feet, thence S5º20'E a distance of 32 feet, thence S21º25'W a distance of 105 feet, thence S37º45'W a distance of 162.8 feet, thence S62º30'W a distance of 248 feet, thence S75º5'W a distance of 78 feet, thence North a distance of 578 feet, thence S69º30'E a distance of 373 feet, thence S84º50'E a distance of 18 feet to the place of beginning. Deed reference: Book 217, Page 445.

Dkt. 17[2].18.

2. The Title Policy provides title insurance coverage pursuant to the terms, definitions, conditions, exclusions, and exceptions set forth therein. The Policy follows the standard 2006 ALTA Owner's Policy format. The relevant portions of the COVERED RISKS insured against by the Policy are as follows:

COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY, a Minnesota corporation (the "Company") insures, as of Date of Policy and, to the extent stated in Covered Risks 9 and 10, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.

2. Any defect in or lien or encumbrance on the Title. . . .

* * *

4. No right of access to and from the Land.

* * *

5. The violation or enforcement of any law, ordinance, permit, or governmental regulation

[2] Given the length of Dkt. 17, each page has been individually marked in red to more readily direct the Court to the applicable reference. Thus, each citation to Dkt. 17 will contain the specific page number(s) such as Dkt. 17.page number.

(including those relating to building and zoning) restricting, regulating, prohibiting or relating to

(a) the occupancy, use, or enjoyment of the Land;
(b) the character, dimensions, or location of any improvement erected on the Land;
(c) the subdivision of land; or
(d) environmental protection
if a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, butonly to the extent of the violation or enforcement referred to in that notice.

Dkt. 17.11.

3. The Policy includes various CONDITIONS AND STIPULATIONS relevant hereto, as follows:

CONDITIONS AND STIPULATION

1. DEFINITION OF TERMS

The following terms when used in this policy mean:

* * *

(g) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

* * *

5. DEFENSE AND PROSECUTION OF ACTIONS

The following terms when used in this policy mean:

* * *

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation is limited to only those stated causes of action alleging matters insured against by this policy. . . . . The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

* * *

Dkt. 17.14 – 17.15.

4. The Title Policy excludes from coverage various matters, set forth as follows, under that section labeled EXCLUSIONS FROM COVERAGE:

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

* * *

3. Defects, liens, encumbrances, adverse claims, or other matters
(a) created, suffered, assumed, or agreed to by the Insured Claimants;

* * *

(d) attaching or created subsequent to Date of Policy . . .

* * *

Dkt. 17.13

5. The Policy contains, as Schedule B thereto, EXCEPTIONS FROM COVERAGE, in relevant part as follows:

SCHEDULE B
Policy No.: OX 10203198

* * *

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

* * *

2. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.

* * *

4. Any encroachment, encumbrance, violation, variation, or adverse circumstance

> affecting the title including discrepancies, conflicts in boundary lines, shortage in area, or any other facts that would be disclosed by an accurate and complete land survey of the land and that are not shown in the public records.
>
> * * *
>
> 13. Provisions in Easement Deed, recorded May 6, 1999 in Book 429, page 954.
>
> * * *

Dkt. 17.19 – 17.20.

B. THE UNDERLYING ACTION

6. Hutchinsons initiated the Underlying Action against Nugget Creek Ranch, LLC and Mark Miller (collectively the "Defendants") by filing their Complaint in the Montana Fifth Judicial District Court, Madison County on September 28, 2020. The Complaint alleges facts concerning Hutchinsons' rights to alter, install, or remove, or keep open or closed, existing gates on a driveway easement granted in 1991, and recorded in 1999, serving their real property (the "1991 Easement"). *See* UA Dkt[3]. 1, §IV Background Facts.

7. Defendants Nugget Creek Ranch LLC and Mark Miller answered Hutchinsons' Complaint and filed Counterclaims (hereafter, the "Counterclaims") against Hutchinsons in the Underlying Action. The Counterclaims assert claims against Hutchinsons, all arising out of Hutchinsons' actions regarding the gates,

[3] Throughout this brief Appellees will cite to various docket entries from the District Court both in this action and the Underlying Action. The docket entries in this case will be cited as ("Dkt.") while the docket entries in the Underlying Action will be cited as ("UA Dkt."). These documents are also provided in the Appellees Appendix filed contemporaneously herewith.

either pre-existing or installed by Hutchinsons, on the access road easement. Defendants, in their Answer and Affirmative Defenses, allege that Plaintiffs [Hutchinsons] "have engaged in conduct that overburdens the servient estate or is incompatible with the nature of any easement they claim; as such, their 'easement' has been extinguished." UA Dkt. 2, Answer at ¶ 8. Defendants concede that Hutchinsons, to the extent they are successors in interest, enjoy the 1991 Easement grant subject to the terms thereof. *Id.* at Answer ¶ 10. Defendants allege that the subject gates were in place before Hutchinsons acquired any interest in their property, that Hutchinsons were aware of the existence of the gates, that "Plaintiffs' access rights are not restricted by the presence of the gates," and that Hutchinsons have unlawfully removed a gate. *Id.* at Answer ¶ 12. Defendants allege that "they have no obligation to allow Plaintiffs to dictate or control the 'type of gate used for ingress and egress by way of the easement.'" *Id.* at Answer ¶ 22. Defendants further reiterate certain of the above allegations as Affirmative Defenses Nos. 13, 14, 16, and 17.

8. Defendants in the Underlying Action, in the General Allegations of their Counterclaims, allege in relevant part as follows: There are, and have been, three gates across the access road to Hutchinsons' parcel. Hutchinsons removed one gate and installed a replacement gate on adjacent property. UA Dkt. 2 Counterclaim, ¶¶ 16 and 17. Hutchinsons, after their purchase, demanded that

Defendants remove the gates, install cattle guards, put gates on with electric openers, or leave gates open. *Id.* at Counterclaim ¶ 19. Hutchinsons have refused to keep closed the gates on the road. *Id.* at Counterclaim ¶ 22.

9. Count I of the Counterclaims in the Underlying Action alleges that the gates in dispute were in existence before Hutchinsons acquired their property and that Hutchinsons have interfered with the servient owners' property rights by removing a gate and by leaving gates open. Count I seeks a declaratory judgment that the servient owners have the right to maintain the existing gates and that Hutchinsons must replace the gate they removed and leave gates as they find them. UA Dkt 2, Counterclaims ¶¶ 36-38. Count II concedes that the 1991 Easement Deed is for the benefit of Hutchinsons' property, according to the terms of said Easement, and alleges that Hutchinsons have demanded that the servient owners "either remove their gates, leave them open, or install cattle guards or gates with electric openers,"; have removed one of the gates; and have refused to keep gates closed, which acts have overburdened the servient property and are incompatible with the easement. *Id.* Counterclaim at ¶ 49. Count II seeks a declaration that Hutchinsons' actions have overburdened the servient estate and Hutchinsons have used the roadway in a manner incompatible with the grant of the Easement, which is thereby extinguished. *Id.* at Counterclaim ¶¶ 53-55.

10. Count III of the Counterclaims in the Underlying Action alleges that

the above-specified acts by Hutchinsons, and other acts, such as allowing release of livestock and guest travel on the servient estate, constitute trespass. *Id.* at Counterclaim ¶¶ 58-61. Count IV alleges that the acts by Hutchinsons constitute a nuisance. *Id.* at Counterclaim ¶¶ 63-67. Count V alleges that Hutchinsons have been negligent. *Id.* at Counterclaim ¶¶ 69-71. Count VII alleges that Hutchinsons have engaged in vexatious litigation. *Id.* at Counterclaim ¶¶ 83-85. Count VIII alleges that Hutchinsons have slandered and defamed Miller. *Id.* at Counterclaim ¶¶ 88-89. Count IX alleges that Hutchinsons have acted intentionally, with actual malice, justifying punitive damages. *Id.* at Counterclaim ¶¶ 92-93.

11. Count VI of the Counterclaims alleges that Defendants' gates over the subject easement road have been in place for more than five years and satisfy the requirements for "reverse adverse possession for the placement and use of the gates." *Id.* at Counterclaim ¶¶ 75-81. On May 17, 2021, the District Court in the Underlying Action granted Hutchinsons' Motion to Dismiss Nugget Creek's claim of 'reverse adverse prescription' of Hutchinsons' express easement for failure to state a claim. UA Dkt. 41.

C. THE HUTCHINSONS' DEMAND TO OLD REPUBLIC

12. On March 3, 2022, Hutchinsons tendered to a demand to OR for their defense against the Counterclaims raised in the Underlying Action and demanded indemnity under the Policy as well as reimbursement of fees already incurred in

the Underlying Action. Dkt. 17.64-17.67.

13. In their tender of defense and demand for indemnity, Hutchinsons assert that the particular easement at issue in the Underlying Action was insured "as described in COS 7/1455," which is incorrect, and that Defendants have made claims in the litigation seeking to "negate the easement rights running with the land, (ii) limit easement rights conveyed by the Days, or (iii) reduce the size of the property conveyed by several feet, coupled therewith an unreasonable easement use and/or restriction." *Id*. There is no allegation in the Counterclaims regarding, or affecting, the size of the insured property. Hutchinsons also omit that all claims raised by the Counterclaims address, and arise from, their acts after they purchased the property. Also absent from Hutchinsons' demand is any mention that the District Court had already dismissed Defendants' "reverse adverse prescription" claim nearly one year earlier.

14. On March 14, 2022, OR denied that coverage arises from the Counterclaims, declined the tender of defense, and denied any obligation to indemnify. Dkt. 17.68-17.69. As grounds for its denial of coverage, rejection of the tender of defense, and denial of any obligation to indemnify, OR stated as follows: No specific easement was insured, including the one at issue in the Complaint and Counterclaims. Provisions of the 1991 Easement at issue, recorded in May of 1999, were specifically excepted from coverage. The Policy does not

cover tort claims and alleged actions taken by the insureds. The Counterclaims do not contest the Easement as a means for ingress and egress to the insured land and makes no allegation of a lack of right of access. The dispute strictly concerns the gates across the Easement. Actions allegedly taken by the insureds resulted in the Counterclaims alleging numerous tort actions which are not covered by the Policy's itemized Covered Risks. The claim of extinguishment of the Easement is based strictly on the insureds' alleged actions regarding the gates. The insureds' actions are post-Policy, created or agreed to by the insureds, and are excluded from coverage. Finally, Condition 5(a) precludes reimbursement of claimed fees. In sum, all Counterclaims address non-covered matters or matters excepted or excluded from coverage by the terms of the Title Policy.

15. On November 2, 2022, Hutchinsons retendered their demand for defense and indemnity to OR. This demand was not supplemented with any new pleadings or allegations. Dkt. 17.70-17.71. Accordingly, on November 8, 2022, noting that this demand was identical to their earlier demand, OR again declined the tender of defense and rejected Hutchinsons' demand for indemnity. Dkt. 17.72-17.73.

16. Neither Hutchinsons nor the Defendants filed amended pleadings in the Underlying Action. *See* Dkt. 17.74-17.82.

17. Hutchinsons did not tender any reiterated demand for defense or

indemnification based on any facts disclosed in discovery in the Underlying Action. Dkt. 17.8, ¶ 18.

18. The draft Final Pretrial Order submitted by the parties in the Underlying Action contains no claims left for trial other than those concerning the presence and use of gates on the access road to Hutchinsons' parcel. *See* UA Dkt. 104.

19. The Underlying Action has been settled and dismissed. Hutchinsons agreed to vacate their express easement to their parcel; to accept a new grant of easement, 14 feet wide, from Nugget Creek; to honor and not interfere with Nugget Creek's use of gates on the access road; and to pay the Defendants $25,000.00. *See* Dkt. 17.101-17.111.

20. On December 20, 2022 the Hutchinsons filed the instant lawsuit against OR and John Holt[4] alleging claims for breach of contract and unfair claim settlement practices. Dkt. 1. On January 18, 2023, OR and John Holt answered and counterclaimed seeking a declaration that there was no duty to defend the Hutchinsons in the Underlying Action, to pay for their representation or to indemnify them against any adverse result in that action, or to reimburse attorneys' fees they had already incurred. Dkt. 2.

[4] John Holt is OR's Vice President, and Rocky Mountain Regional Claims Manager for, OR.

IV. STANDARD OF REVIEW

OR agrees with Hutchinsons that The Montana Supreme Court reviews *de novo* appeals from a summary judgment ruling, but ads that—under that standard—the Court can affirm summary judgment on any grounds found within the record on appeal. *Safeco Ins. Co. of Am. v. Liss*, 2000 MT 380, ¶ 25, 303 Mont. 519, 16 P.3d 399; *Grimsrud v. Hagel* 2005 MT 194, ¶ 114, 328 Mont. 142, ¶ 14, 119 P.3d 47, ¶ 14. This Court applies the same criteria applied by the District Court, in that there must be both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Id.*

V. SUMMARY OF ARGUMENT

The District Court properly concluded that the Hutchinsons' Title Policy expressly excluded the 1991 Easement, that all Counterclaims in the Underlying Action occurred after the title policy date or were based on the Hutchinsons' post-policy conduct and were thus excluded from coverage. As a result, the District Court correctly determined that OR did not have a duty to defend Hutchinsons in the Underling Suit.

The District Court made that determination relying primarily on *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, 321 Mont. 99, 90 P.3d 381 and *Farmers Union Mut. Inc. Co. v. Rumph*, 2007 MT 249, 339 Mont. 251, 170 P.3d 934. That is, the District Court found that none of the allegations in the

Counterclaims alleged facts which represented a covered risk. Based upon the uncontested facts, the language of the policy, and persuasive authority from other jurisdictions, this Court should reach the same conclusion as the District Court – that OR had no duty to defend Hutchinsons in the Underlying Action. Accordingly, this Court should affirm the District Court's Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment ("Order").

VI. ARGUMENT

A. THE DISTRICT COURT PROPERLY DETERMINED THAT NONE OF THE CLAIMS IN THE UNDERLYING ACTION OR ANY FACTS TRIGGERED ANY OF THE COVERED RISKS IN THE TITLE POLICY

1. A Dispute About Gates On An Easement Is Not A Covered Risk.

a. The Duty to Defend is a Question of Law Determined by the Pleadings.

An insurer's duty to defend, and potentially indemnify, arises when the complaint (in this case, the Counterclaims) alleges facts which, if proven, would result in covered liability under the insurance contract. *Northwest Painting Inc.*, 2021 WL at *2; *Staples*, at ¶ 21. Coverage thus is determined based on the factual allegations within the four corners of the complaint. *Id.* In assessing its insured's demand for defense against claims allegedly invoking risks covered by the policy, the insurer examines the pleadings allegedly setting forth such claims and, depending on the posture of the underlying action, other filings or discovery in that action potentially

invoking coverage. *Revelation Indus., Inc. v. St. Paul Fire & Marine Ins. Co.,* 2009 MT 123, 350 Mont. 184, 206 P.3d 919. While the insurer must also consider facts it learns which may invoke coverage (*Neilsen v. TIG Insurance Co.,* 442 F. Supp. 2d 972 (D. Mont. 2006)) an insurer has no obligation to independently conduct a search for potential facts leading to potential claims. *Landa v. Assurance Co. of America,* 2013 MT 217, 371 Mont. 202, 307 P.3d 284 (Montana Supreme Court "expressly declined to require that insurers seek out facts beyond the complaint"). Thus, where the insurer has no knowledge of facts outside the complaint potentially triggering coverage, the complaint and the policy constitute the universe concerning the insurer's duty to defend. *Employers Mutual Casualty v. Hansen*, 2021 WL 961775 at *5 (D. Mont.). An insurer's duty to defend is not triggered "by speculating about extrinsic facts and unpled claims regarding potential liability." *Id.* quoting *Fire Ins. Exchange v. Weitzel*, 2016 MT 113, ¶ 21, 383 Mont. 361, 371 P.3d 457. Resolution of the issue of the duty to defend presents a question of law usually resolved without a factual record and on summary judgment. *Cincinnati Ins. Co.*, 2021 WL 3142163, at *10, citing *J & C Moodie Properties v. Deck*, 2016 MT 301, ¶ 20, 385 Mont. 382, 384 P.3d 466, 473.

While it may be true that the insurer carries the burden of proving the applicability of coverage exclusions and exceptions, insureds shoulder the initial burden of proving that their claims fall within the basic scope of coverage. "In disputes over insurance coverage, this Court 'allocates the respective burdens of

proof to the insured and the insurer consistent with the basic distinction between coverage clauses and exclusionary clauses.' *ALPS Prop. & Cas. Ins. Co. v. Keller, Reynold, Drake, Johnson & Gillespie, P.C.,* 2021 MT 46, ¶14, 403 Mont. 307, 482 P.3d 638; citing *Travelers Casualty & Surety Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, 326 Mont. 174, 108 P.3d 469. Only after coverage is proven does the burden shift to the insurer. Here, Hutchinsons cannot satisfy this initial burden because the litigation against them is fundamentally about their conduct, not about any title matter in the public record, and so falls outside of title insurance coverage.

The relevant pleadings in the Underlying Action dictate that this case was correctly resolved summarily. As properly determined by the District Court, the Counterclaims do not allege any facts invoking any covered risk under the Title Policy and, even if such claims arguably were covered, they would be excluded or excepted from coverage by clear Policy terms. Hutchinsons, in the packaging of their demand for defense to OR and in their arguments to the District Court, either mischaracterize the Counterclaims or omit essential facts. Hutchinsons fail to indicate that the Counterclaims only concern the parties' conduct regarding an access easement after the date of the policy. Hutchinsons also fail to reveal that Defendants' "reverse adverse prescription" claim (which would not have been covered anyway) had already been dismissed.

Although the Counterclaims' text alone is dispositive, subsequent developments in the Underlying Action confirm the lack of coverage. The parties there never amended their pleadings to bring the case within coverage. Moreover, despite their representation to this Court that they provided OR "additional facts and evidence adduced in the interim", they provide no text from the pleadings demonstrating how OR's reading is incorrect nor do they point to the "evidence" they allegedly adduced. The Hutchinsons own writings to OR confirm that Hutchinsons did not advise OR of any additional "facts and evidence" which they could claim invoked coverage. Indeed, Hutchinsons' March 3, 2022 demand and the demand they made eight months later on November 2, 2022 were *identical* in all material respects. *Compare* Dkt. 17.64-17.65 and Dkt. 17.70-17.71. The record is devoid of any "additional facts" or evidence nor do Hutchinsons point to any in their briefing to this Court. Even the Underlying Action's proposed pretrial order strictly concerned the parties' post-policy conduct over the access road. *See* UA Dkt. 104. The Underlying Action was ultimately dismissed, with Hutchinsons ceding away the 1991 Easement in exchange for a replacement easement and paying the Defendants $25,000. *See* Dkt. 17.101-17.111.

b. The Counterclaims Do Not Allege Any Defect in Hutchinsons' Title To Their Property – Only Claims about Hutchinsons' Post-Policy Conduct.

Most fundamentally, and dispositively, the Counterclaims allege no facts amounting to a defect in Hutchinsons' title, or a lack of right of access to Hutchinsons' property, and so no covered risk specified in the Policy is invoked. A title insurance

policy indemnifies the insured against loss resulting from "any defect in or lien or encumbrance on Title" to the insured parcel, other than those shown in the policy schedules. *Cherry Hills Farm Court, LLC v. First American Title Ins. Co.*, 2019 WL 6682835 at *2-4 (D. Colo. 2019) (no duty to defend counterclaim for value of encroaching improvements on insured land as not alleging adverse title claim). In addition, the policy indemnifies the insured if the property lacks a "right of access to and from the Land." The policy specifically and plainly limits the insurer's duty to defend the insured in litigation to those "stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy."

Accordingly, there is no duty to defend an action which does not allege facts amounting to an attack on the insured's title, or an assertion of no legal access to the parcel, and instead concerns the parties' conduct regarding their property. In *Stewart v. Old Republic National Title Insurance Co.*, 291 A.3d 1051, (Conn. App. 2023), neighbors sued the insureds for partially blocking an access easement. The insured tendered the defense and the insurer declined because the claims did not invoke a covered risk and the policy's description of the insured land did not include the easement. The Connecticut appeals court agreed that the complaint against the insureds did not attack title, or invoke a covered risk, but rather alleged only that the insureds had obstructed the subject easement. *Id*; *See also Hughes v. First American Title Ins. Co.*, 2021 WL 1217859 (Ind. App. 2021) (no coverage for judgment against insureds for interfering with neighbors' easement); *Sabatino v. First American Title Insurance*

Co., 721 N.E.2d 693 (Ill. App. 2 Dist. 1999) (policy does not protect insured against claim of tortious interference with easement burdening insured land; no duty to defend because complaint concerned tortious conduct, not an attack on validity of easement, and all conduct was post-policy).

Here, as correctly determined by the District Court, the Underlying Action involves only the post-closing tortious conduct of Hutchinsons, or that of the Nugget Creek Defendants, over the 1991 Easement (recorded in 1999) which provides a right of access to the insured parcel. The Title Policy does not obligate the insurer to defend the insured against allegations that the insured has tortiously or intentionally interfered with the property rights of others. Such suits concern the insured's conduct, not title to the insureds' property. The distinction is between an attack on the validity of an easement (assuming that the easement is actually insured by the title policy, which is rare), and a claim that the insured, or neighbors, interfered with the use of the easement.

While there appears to be no Montana law on point, the national case law finding no title coverage for such post-policy conduct is overwhelming. *Murphy v. Ticor Title Insurance Co.*, 729 S.E.2d 21 (Ga. App. 2012); *See also Sanzotta v. Devor*, 2023 WL 1773936 (Ohio App. 2023) (neighbor sued insureds, alleging trespass, nuisance, and failure to maintain easement, but not to quiet title or terminate easement; no duty to defend because description of insured land did not include easement and all claims were "tortious in nature"); *Safeco Ins. Co. v. Fidelity National Title Ins. Co.*, 2021 WL 252236 (W.D. Wash. 2021) (no duty to defend insureds sued for trespass); *Chorches v. Stewart*

Title Guaranty Co., 48 F. Supp. 3d 151 (D. Conn. 2014) (no duty to defend insured who claimed that easement holders were trespassing on insured parcel).

In their Brief, Hutchinsons assert that the District Court incorrectly relied on *Ticor* and that *Ticor* is inapplicable because, among other things, it does not deal with any aspect of an insurers duty to defend. Hutchinson Br. 25. However, *Ticor* stands for the proposition that a neighbors' tortious conduct which blocked insured's access easement was post-policy and excluded from coverage. The appeals court there held that a title policy insuring a particular access easement did not protect against a neighbor's blockade of that easement 20 years after the policy date, in part because the blockade was a trespass, which is a tort, which is not covered by title insurance: "There is no allegation that, in 1987, there were any defects in the title conveyed to the Murphys and insured by Ticor as of that date;" the Court added "[w]e also note that there is no evidence to show that Murphy still does not have the legal right to use the easement, only that a neighbor is interfering with it." *Ticor* at 101.

Here, just like in *Ticor,* there are no allegations in the Underlying Action that there are any defects in title or that the Hutchinsons did not have a legal right of access as of the policy date. Instead, like *Ticor*, the Underlying Action alleges post-policy tortious conduct which the District Court correctly determined is not covered. Indeed, title insurance is indemnity insurance for title defects, not liability insurance protecting the insured against tort claims arising out of the insured's -- or a neighbor's -- conduct. Such claims are not adverse to the insured's title, but rather to the insureds individually. Even absent *Ticor*, as noted above, plenty of persuasive authority exists from a multitude of

jurisdictions. While those cases were not specifically cited by the District Court, they were not challenged by Hutchinsons nor did Hutchinsons offer any on-point Montana authority.

The District Court properly found that the alleged issues and conduct occurred after the title policy date. All of the Counterclaims' allegations, both factual and legal, concern the Hutchinsons own conduct. The Defendants allege overburdening and incompatible use of the 1991 Easement by Hutchinsons to the point of its extinguishment; unlawful use or interference by Hutchinsons with gates; interference with Defendants' rights as the servient owners; release of livestock and guest travel on the estate, constituting trespass; nuisance by Hutchinsons; negligence by Hutchinsons; vexatious litigation by Hutchinsons; slander or defamation by Hutchinsons; and intentional malice by Hutchinsons. Defendants also alleged, in their Count VI, that they had engaged in reverse adverse possession by gating the subject easement, but this Count was dismissed on Hutchinsons' motion. Thus, none of the Defendants' Counterclaims challenge Hutchinsons' title as of the policy date, but rather only their post-policy conduct, and so invokes no covered risk under the Policy.

c. The Counterclaims Do Not Allege a Lack of Right of Access to Hutchinsons' Property.

Likewise, Defendants' Counterclaims do not allege a lack of right of access to the insured property, or, more particularly, that the 1991 Easement serving the insured property is invalid. The Title Policy indemnifies the insured if, as of the date of policy, there was "no right of access to and from the Land." Dkt. 17.11.

Access coverage is invoked if there was no right of access to the insured land on the policy date. *James v. Chicago Title Insurance Co*., 2014 MT 325, ¶ 15, 377 Mont. 264, 339 P.3d 420 (Mont. 2014) (Covered Risk not triggered by insureds' assertions that access easement was deficient because it did not describe the path by centerline or depicted on map). The Policy does not assure that the access right on the date of the policy could not later be terminated or extinguished. Nor does access coverage obligate the insurer to protect the insured against subsequent disputes with other parties over the use of an easement's pathway, maintenance, gates, or blockade thereof if such disputes are not challenges to the legal right of access itself.

Nowhere in the Underlying Action do Defendants allege that Hutchinsons lack a right of access to their parcel. To the contrary, Defendants acknowledge that the 1991 Easement provides Hutchinsons with access. *See* UA Dkt. 12 at Counterclaim ¶¶ 43-47. Defendants bring no claim for declaratory relief, or for quiet title, regarding the insureds' easement or any other aspect of the insureds' parcel as one would reasonably expect if the Defendants were in fact challenging Hutchinsons' access or title. At most, Defendants allege that Hutchinsons' own intentional acts have interfered with, and are incompatible with, the express easement, and so have served to extinguish that express easement. *See* UA Dkt. 12 at Counterclaim ¶¶ 50-52. But, as discussed in Section A1b, the Hutchinsons'

intentional acts do not invoke coverage and, as discussed below, also are excepted from coverage as post-policy conduct by the insureds themselves.

2. The District Court Correctly Determined that the 1991 Easement is Not Part of the Insured Land and Was Expressly Excepted From Coverage.

a. The Title Policy Did Not Separately Insure the 1991 Easement as Part of the Insured Land.

The District Court correctly determined that the 1991 Easement is an exception to the Title Policy. A title policy may indeed recite an easement as part of the insured legal description in the policy's Schedule A, which means that the policy then indemnifies the insured if that specified easement is invalid or unenforceable. But unfortunately for the Hutchinsons, that did not happen here. The Title Policy's insured legal description uses a simple mete and bounds description without reference to any easement. *Horwood v. North American Title Insurance Co.*, 2020 WL 7635765 (Mich. App.) (no duty to defend insureds in trespass suit by neighbors for insureds' activity on easement over neighbors' land, where easement not insured in Schedule A).

Moreover, the Policy makes clear that it does not insure any property rights outside the legal description of the insured parcel, including any rights in adjacent streets and easements:

> (g) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways,

> but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

Policy, Definition of Terms, 1(g). The Policy insures title to the land as described on Schedule A. It does not protect the insured against an attack on the title to land lying beyond the boundaries of the parcel described in the policy, or any rights the insured may have in adjacent lands. *See 631 North Broad Street, LP v. Commonwealth Land Title Ins. Co.*, 2018 WL 4051798 (E.D. Pa. 2018) (no duty to defend claim for portion of common wall outside insured legal description); *Lawyers Title Guaranty Fund v. Milgo Electronics*, 318 So.2d 416 (Fla. App. 1975) (no policy coverage for claim to strip of land adjacent to insured parcel but not included in Schedule A description).

On appeal, and without any specific citation to the Counterclaims, Hutchinsons' attempt to nuance their arguments by stating that "the tort claims of trespass, nuisance and negligence were premised on the ownership dispute over the land upon which Gates 1 and 2 were located[.]" Hutchisons Br. at 10. If it was in fact true that the Counterclaims allege an ownership dispute, which they do not, one would think those allegations would have featured prominently in Hutchisons' arguments to not only this Court, but to the District Court below. Yet the Hutchinsons do not, because they cannot, point to any allegations in the Counterclaims remotely evidencing an ownership dispute.

b. The Title Policy Expressly Excepted the 1991 Easement from Coverage.

Hutchinsons' confusing argument concerning the Policy's coverage of an excluded easement is just flat wrong. As correctly determined by the District Court, not only did the Policy not include the 1991 Easement as part of the insured land, the Policy expressly excepted the 1991 Easement from coverage.

In addition to the standard printed exceptions, a policy's Schedule B contains "special" exceptions which detail matters that affect the title to the particular insured parcel for which the policy provides no coverage. As this Court has previously determined, a title insurer may except from coverage any public record item, or any other item for that matter, in the course of preparing a title commitment which sets forth the terms under which the insurer will issue a policy. *Phipps v. Old Republic Nat'l Title Ins. Co.,* 2021 MT 152, ¶23, 404 Mont. 336, 346, 489 P.3d 507, 513 (title insurer free to determine on what basis to offer a title insurance policy). Matters recited as exceptions on Schedule B of the policy are excepted (excluded) from coverage. *See Columb v. Cox*, 2022 WL 2046874 (Wis. App.) (easement exceptions preclude coverage for identified easements). An exception for a recorded instrument is sufficient to remove coverage for all disputes concerning the instrument or its subject, including actions to enforce the instrument. *See IQ Holdings, Inc. v. Stewart Title Guar. Co.*, 451 S.W.3d 861 (Tex. App. 2014) (exception for terms of condominium declaration negated

coverage for exercise of right of first refusal in instrument); *A. Gugliotta Development, Inc. v. First American Title Insurance Co. of New York*, 112 A.D.3d 559, (N.Y. 2 Dept. 2013) (exception for trail easement also excepted rights of travelers to use trail); *Heyse v. Case*, 971 A.2d 699 (Conn. App. 2009) (insurer had no duty to prosecute lawsuit to enforce violation of covenants excepted on Schedule B); *Stiles*, 81 Wash. App. 670, 916 (no duty to defend or indemnify insured for violation of restrictive covenants excepted in Schedule B).

Here, OR expressly excepted from coverage all claims arising from the terms, conditions, features, and provisions of the 1991 Easement. *See*, e.g., *Landfall Trust LLC v. Fidelity National Title Insurance Co.*, 2023 WL 3981269 (E.D. Va. 2023) (Schedule B exception for all terms and provisions of subdivision declaration precluded coverage for claims arising out of drainfields depicted on declaration)

On appeal, Hutchinsons argue that the District Court inappropriately relied on out of jurisdiction authority (*IQ Holdings*) for its determination that all disputes concerning the 1991 Easement are excepted from coverage. Hutchinson Br., 19-22. Hutchinsons contend that *IQ Holdings* is inapplicable because it was a real estate dispute, and not an easement defense case, misses the mark. In *IQ Holdings*, like here, the title policy excepted a recorded document (condominium declaration) from coverage. Noting that a title company can except a recorded document from

coverage without detailing the entirety of the contents of that recorded document in the title policy, the court determined that *all* title risks arising from the recorded document (including a right of first refusal) were excepted from coverage even if not specifically identified in the title policy. The fact that the recorded document in this case is not a condominium declaration has no bearing on the District Court's determination that any and all disputes arising from the 1991 Easement were excepted from coverage. In the absence of any Montana authority on point, of which Hutchinsons offered none, the District Court appropriately relied on *IQ Holidings* for its determination that any dispute concerning the 1991 Easement is excepted from coverage. Even if this Court agrees with Hutchinsons' strained argument concerning the *IQ Holdings* case, numerous other cited cases cited above support the District Court's determination that the 1991 Easement is not covered.

It is beyond serious dispute that the parties in the Underlying Action were litigating anything other than their rights and obligations under the terms of the 1991 Easement benefiting Hutchinsons' parcel. Use, or abuse, of the 1991 Easement, as measured by its terms ("provisions"), is all that the parties were fighting about in the Underling Action. But, the plain language of Schedule B excepted from coverage all liability for any claims arising out of that Easement.

3. The District Court Correctly Determined that All Claims in the Underlying Action Are Excluded From Coverage as Arising From Post-Policy Events.

a. The Title Policy's Standard Exclusions Bar Claims Arising From Post-Policy Conduct and any Pre-Policy Possession.

Even if the filings in the Underlying Action did invoke a Covered Risk, which they did not, the District Court correctly determined that multiple exclusions and exceptions in the Policy also precluded coverage. First, there is the fundamental matter of chronology: Title insurance looks backwards from the "Date of Policy" specified on Schedule A. A Federal Judge in Nevada recently described the nature of title insurance:

> Title insurance is necessarily a retrospective device. It cannot function prospectively or else it would subvert the title system entirely. Title insurance is premised on protecting against risks that are already in existence on the date the policy is issued. . . . . To force a title insurer to protect against title defects that do not -- and in this case could not -- exist on the date the policy was issued would undermine the business model of title insurance. It would allow the insured to pay a one-time fee that guaranteed defense of any future title dispute, effectively outsourcing all legal claims at a flat rate upon issuance of the policy.

U.S. Bank as Trustee v. Stewart Information Systems Corp., 2022 WL 17253787 at *3 (D. Nev.) (no coverage for post-policy assessment liens). The covered risks specified in the title policy are limited to those that already exist on the date of the policy. Defects arising after that date both are not covered and are expressly excluded from coverage. The Preamble to the Policy makes clear that it protects

the insured only against title defects existing "as of the Date of Policy." That coverage limitation is reiterated as exclusion 3(d), which precludes coverage for loss or damage arising out title defects or adverse claims or other matters "attaching or created subsequent to Date of Policy." The Hutchinsons' acts of installing gates, or leaving gates open, or trespassing outside of the bounds of their Easement, all occurred post-policy and so all claims against them arising therefrom are precluded.

OR admits that the Defendants did initially take a shot at a futile "reverse adverse prescription" claim against Hutchinsons, alleging that Defendants controlled the gates over the 1991 Easement sufficient to constitute adverse possession. However, the District Court quickly dismissed that claim as failing to state any claim against an express easement and as applicable only to prescriptive easements. Importantly, the District Court's May 17, 2021 dismissal of Defendants "reverse adverse possession" claim came months before Hutchinsons' March 3, 2022 demand to OR.

As discussed above, any such claim based on third-party physical possession of the insured property is precluded by what is known as the "parties in possession" exception. Again, as discussed in Section A1b above, the national case law is replete with decisions that claims by third-parties based on their alleged adverse possession of the insured property are excepted from coverage. While this

exception typically applies to pre-policy possession claims, to the extent possession is alleged as post-policy, it will also be barred by the Policy exclusion 3(d) against post-policy events.

Also concerning the conduct of the insureds, Policy exclusion 3(a) states that the insurer is not liable for matters that the insured has caused ("created"), permitted ("suffered"), taken subject to ("assumed"), or to which it has consented to be bound ("agreed to"). "Created" means that the insured took some deliberate action, resulting in the fact or event that gives rise to the claim of defect of title for which he seeks indemnity or defense. *Fidelity National Title Ins. Co., v. Osborne III Partners,* 524 P.3d 820 (Ariz. 2023).

Here, to the extent Hutchinsons' actions of removing gates, opening gates, or installing their own gate resulted in the Counterclaims, the Hutchinsons created those claims by their own intentional acts. Likewise, since Hutchinsons acquired their property with knowledge of the gates on the road, they suffered or assumed the risk that the Nugget Creek Defendants would exercise their rights to close those gates. Adverse claims which result from the insured's use of the land after the Policy Date, in alleged violation of encumbrances excepted from coverage in Schedule B of the Policy, such as the 1991 Easement, are excluded as having been "agreed to" by the insured. *Dickins v. Stiles,* 916 P.2d 435 (Wash. App. 1996). Hutchinsons were aware of the gates when they purchased the property, as the

gates were there on the ground, and Hutchinsons accordingly suffered and assumed the risk that Nugget Creek would use those gates.

4. Hutchinsons New Reasonable Expectations Theory Fails.

On appeal, Hutchinsons present a new argument, or rather a new theory for why OR had a duty to defend Hutchinsons in the Underlying Action. While this Court generally does not address issues raised for the first time on appeal, *Vader v. Fleetwood Enterprises, Inc.*, 2009 MT 6, ¶ 37, 348 Mont. 344, 201 P.3d 139, OR will briefly address this theory out of an abundance of caution.

Under their new reasonable expectations theory, Hutchinsons contend that they had a "reasonable expectation" that OR would provide them a defense when "access and ownership were challenged" in the Counterclaims. Hutchinson Br. at 27. However, their reasonable expectations theory is premised on the same flawed and inaccurate assertion that access and ownership to their property were being challenged by Defendants' Counterclaims in the Underlying Suit. Of course OR has established, and the District Court has correctly determined, that no such challenges to Hutchinsons' property were encompassed by the Counterclaims.

Moreover, Hutchinsons' reliance on *Meadow Brook, LLP v. First Am. Title Ins. Co*., 2014 MT 190, 375 Mont. 509, 329 P.3d 608 for the proposition that their Title Policy provided for prospective or future protection in misplaced. In *Meadow Brook*, the insured developer specifically requested and purchased an endorsement

to its title policy that would cover losses if its planned subdivision was not accessible to future lot owners via three specific roads. When homeowners in adjacent developments contended that they had sole and exclusive use of the three roads, the insured sent a notice of claim to its title insurer. Because the insured developer had purchased an endorsement specifically guaranteeing future access via the three specific roads, this Court affirmed that the insured could reasonably expect its claims to be covered by the policy. Of course, there is no such endorsement for prospective protection here and the 1991 Easement is expressly excepted from coverage. Hutchinsons' expectations are contrary to clear exclusions from coverage and as such, are not objectively reasonable. *Counterpoint, Inc. v. Essex Insurance Co*., (1998), 291 Mont. 189, 194, 967 P.2d 393, 396.

B. NO GENUINE QUESTION OF DISPUTED MATERIAL FACT EXISTS.

Hutchinsons' arguments concerning a disputed issue of material fact are more appropriately characterized as an attempt to *create* a disputed issue of material fact through mischaracterization and false impressions. Just like Hutchinsons' opposition to OR's motion for summary judgment to the District Court below, Hutchisons' arguments here consist of nothing more than arguments of counsel, without a shred of controverting evidence.

1. Arguments About Acreage of the Land Conveyed Are a Red-Herring and do Not Constitute a Material Issue of Disputed Fact.

Like they did to the District Court, on appeal Hutchinsons make vague allegations about a boundary line dispute, or confusion as to boundary location, ownership of gates and an acreage shortfall. However, Defendants' Counterclaims in the Underlying Action contain no reference to the location of any boundary line, or either party's acreage, and the Title Policy itself likewise makes no such representations. In any case, assuming for purposes of discussion only that there is such a claim somewhere in the pleadings, it also would be excepted from coverage.

Standard Schedule B Exception No. 4 precludes from coverage "conflicts and boundary lines, shortage in area, or any other facts that would be disclosed by an accurate and complete land survey of the land. . . ." A disagreement between adjoining owners as to where their boundary lies on the ground is excepted from coverage. As long as there is no record description conflict, the issue strictly is where the true line is located. *American Title Ins. Co. v. Carter*, 670 So.2d 1115 (Fla. App. 1996), later app., 710 So.2d 1020 (boundary line dispute excepted from coverage where deeds called to the same line and the issue was not an overlap but location on ground).

The Title Policy's survey exclusion also makes it clear that there is no assurance as to the quantity of acreage being conveyed. In *Walter Rogge, Inc. v. Chelsea Title & Guar. Co*., 536 A.2d 1309 (A.D. 1998), aff'd in part, 562 A.2d

208 (1989); appeal after remand, 603 A.2d 557 (1992), the insured claimed that it thought it was receiving more acres than it did. The court determined that the insured received exactly the land owned by the seller, that land was conveyed to the insured and the policy did not make any representation to the contrary. Thus, there was no defect in title: "In the absence of a recital of acreage, a title company does not insure the quantity of land. . . . Only a survey can reveal the actual size of a piece of property and the amount of land included in a deed." *Id*.; *see also Contini v. Western Title Ins. Co.*, 40 Cal.App.3d 536, 542-43, 115 Cal. Rptr. 257, 260-61 (1974).

2. OR Appropriately Evaluated Pleadings in the Underlying Action For its Coverage Determination.

Hutchinsons fault OR looking to the pleadings in the Underlying Action for its coverage determination. Instead, relying on *Burns v. Underwriters Adjusting Co.*, 765 P.2d 712 (Mont. 1988) Hutchinsons argue that OR should have looked at the "acts giving rise to coverage" and not the language of the Counterclaims. Hutchinson Br. 31. In *Burns,* this Court affirmed that the insurer had no duty to defend or indemnify the insured in a suit alleging negligence when the insurer had actual knowledge that the insureds' acts were intentional, and not negligent, as alleged in the complaint. For *Burns* to be remotely applicable here, there would first have to be facts (not arguments of counsel) that Defendants were challenging

title to Hutchinsons' property or challenging their right of access to the insured property. Second, OR would have had to *known* those facts.

Here, Hutchinsons vaguely argue that OR "had a plethora of unquestionable facts and covered risks from which to find issues" yet they fail to identify a plethora of facts, or even a single fact one for that matter. Moreover, even if such fact existed, which it did not, Hutchisons never apprised OR of such fact. Because no such facts exist, there can be no logical argument that OR had a duty to defend. Indeed, as discussed herein, an insurer's duty to defend is not triggered "by speculating about extrinsic facts and unpled claims regarding potential liability." *Hansen, 2021 WL 961775 at *5* quoting *Fire Ins. Exchange v. Weitzel*, 2016 MT 113, ¶ 21, 383 Mont. 361, 371 P.3d 457. Consistent with Montana law, OR appropriately considered the pleadings in the Underlying Suit to make its coverage decision.

3. Hutchinsons' Objections to OR's Undisputed Facts Are Insufficient to Create a Genuine Issue of Material Fact.

Hutchinsons' final argument is that the District Court was presented with multiple disputes regarding OR's undisputed facts and that the District Court inaccurately stated that "neither party asserts a dispute." Hutchinson Br. 33.

This argument is disposed of by a review of the record below. OR's Motion for Summary Judgment included the requisite Statement of Undisputed Facts. *See* Dkt. 16. Each enumerated fact was in turn supported specifically by the Mr. Holt's

Affidavit. *See* Dkt. 17.1-17.10. Mr. Holt's Affidavit then relies on authenticated documentary evidence, predominantly the pleadings in the Underlying Action, other filings in that Action, and the operative Title Policy. *Id*. When a motion for summary judgment is properly made and supported, "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." Rule 56(e)(2), Mont. R. Civ. P. Hutchinsons' Brief in opposition to OR's Motion containing Hutchinsons' objections to OR's Undisputed Facts consists of nothing more than argument of counsel, and that argument consisted only of objections without any controverting evidence. *See* Dkt. 19. Nor does Hutchinsons Response Brief set for any *specific* facts establishing a genuine issue for trial. Thus, Hutchinsons failed to establish any genuine issues of material fact to be resolved at trial when they failed to present the District Court with any admissible, controverting evidence.

Furthermore, Hutchinsons' objections to OR's Undisputed Facts are frivolous. To the extent Hutchinsons recite additional text from the Underling Action's pleadings in their objections to OR's Undisputed Facts, the quoted language describes certain post-policy conduct of Hutchinsons themselves, which only reinforces OR's position that the Counterclaims concern Hutchinsons' own

post-policy conduct, which does not invoke coverage and is excepted from coverage as discussed in Section A above.

Hutchinsons also erroneously asserted to the District Court that the text of their Answer to the Counterclaims somehow creates issues of fact preventing OR from denying any defense duty. However, such an assertion is absurd. It goes without saying that Hutchinsons will deny Defendants' claims against them, but it is the factual content of those claims which govern the duty. *Staples*, at ¶ 21. Not to mention that under Rule 56, Hutchinsons cannot create genuine issues of material fact by bare reference to their own pleadings.

Similarly absurd is Hutchinsons' objection to OR's recitation of policy terms in its Undisputed Facts. Again, it is the application of policy provisions to the factual allegations of the adverse claims which dictates the duties of defense and indemnification. *Employers Mutual Casualty*, 2021 WL 961775 at *5. Hutchinsons do not allege that OR inaccurately states policy provisions and, indeed, cites to no decision or opinion controverting Old Republic's interpretation of any Policy term or provision.

Thus, while the District Court's language that "neither party asserts a dispute" did not acknowledge that Hutchinsons had objected to OR's Undisputed Facts, Hutchinsons' objections were wholly unsupported by controverting evidence

or frivolous. Regardless of the language of the Order, the result is the same -- there is no genuine dispute of any material fact.

VII. CONCLUSION

Based on the arguments set forth above, Appellees respectfully requests this Court affirm the District Court's Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment.

Dated this 24th day of July, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word is 9,297 words, excluding the Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

By /s/ *Jenny M. Jourdonnais*
Jenny M. Jourdonnais

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing document with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies upon each attorney of record, and each party not represented by an attorney in the above-referenced action, as follows:

Dated this 24th day of July, 2024.

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