Cause No. DA 24-0204

IN THE SUPREME COURT OF THE STATE OF MONTANA

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

Plaintiffs and Appellants,

v.

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

Defendants and Appellees.

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

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INTRODUCTION

Automobile insurers in Montana, including State Farm, are defiantly breaching their duties to honor their insureds' made-whole rights when pursuing subrogation under their insured's tort cause of action. Under State Farm's contentions in this appeal, they may do so with impunity despite this Court's repeated affirmation of the mandatory prerequisites to subrogation including recovery of "attorney fees,"[1] and despite the declaratory relief remedy approved by this Court in *Ferguson v. Safeco Ins. Co. of Am.*, 2008 MT 109, 342 Mont. 380, 180 P.3d 1164.

This brief will demonstrate that making the causation rule the exclusive standard for justiciability is an incorrect application of that rule of law, and that it would unconstitutionally deny a large subset of litigants a judicial remedy when they seek equitable or declaratory relief.

This brief will further demonstrate that an insurer's subrogation in derogation of the insureds' made-whole rights to attorney fees incurred in recovering property damages excluded from coverage violates the made-whole rule – including as articulated by *Van Orden v. United Servs. Auto. Ass'n*, 2014 MT 45, 374 Mont. 62, 318 P.3d 1042, ¶¶12-13 ("including attorney's fees") – and that it

[1] *Skauge v. Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 565 P.2d 628, and progeny.

causes the inequitable result that the insureds bear the cost of recovering their property damage losses while the insurer recovers everything it was paid a premium to insure.

PROCEDURAL STATUS OF CASE

State Farm attempts to characterize this appeal as a rehashing of the issues this Court declined to address when the Johnsons applied for the discretionary and extraordinary writ of supervisory control.[2]

The essential points in the statement of the case in Johnsons' opening brief are: first, that the issues then before this Court arose from a pleading that the District Court held had insufficiently pled facts of the consequences to Johnsons from State Farm's "*mere preliminary assertion* of the *future right* to subrogation," including before Johnsons' property damage recovery from the automobile accident tortfeasor and resulting fees had been established[3]; second, that the instant appeal is from a ruling on a different pleading (Third Amended Complaint); and third, that the later pleading pled the fact and amount of the intervening settlement of the Johnsons' property damage case and resulting attorney fee expense, which State Farm refuses to reimburse.

[2] *Johnson v. Mont. Eleventh Jud. Dist. Court* (2021), 407 Mont. 440, 500 P.3d 581.
[3] *Id* at p.4 (italic emphasis in original).

The holding of this Court's decision not to grant the extraordinary remedy of a writ was that Johnsons' claim was not ripe:

> Based on our review of the limited record presented here, Johnsons have neither met their burden under M. R. App. P. 14(3) of demonstrating that the District Court erroneously dismissed their made-whole related individual and class claims as **unripe**, and thus **currently** unjusticiable. Nor have they demonstrated how extraordinary preliminary review is necessary to avoid a gross injustice for which ordinary appeal upon final judgment will be inadequate.

Johnson, at p. 7 (emphasis added).

That ripeness concern was fully resolved by the later settlement of all claims against the tortfeasor and the underinsured claim against State Farm. Following those later case developments – which were first pled in the Third Amended Complaint (herein, "TAC") – the "ripe[ness]" concern over a mere "preliminary" assertion of subrogation, was wholly eliminated.

State Farm also erroneously characterizes the procedural history of the case by arguing that, when ruling on the writ application, this Court substantively ruled that the tort of conversion was not available to remedy an insurer's misuse of its insured's third-party tort claim and the proceeds thereof. In reality, this Court simply ruled that the "same" insufficient allegations of a ripe "'violation of the made-whole doctrine"[4] did not meet the Johnsons' extraordinary supervisory control burden. This Court also ruled that Johnsons had not demonstrated how an

[4] *Id.*

inability to use the conversion tort theory "will to any extent prejudicially affect the ultimate application of the doctrine to facts and circumstances at issue below"[5] – which itself acknowledges that, on adequate pleading of ripeness, the doctrine may well be appropriately applied.

ARGUMENT

I. NOT EVERY CASE'S JUSTICIABILITY IS TESTED BY THE CAUSATION RULE; RATHER, CASES ENFORCING EQUITABLE RIGHTS OR SEEKING DECLARATORY RELIEF ARE JUSTICIABLE WHENEVER THE PLAINTIFF HAS A CONCRETE INTEREST IN IMPAIRED RIGHTS WHICH CAN BE VINDICATED THROUGH JUDICIAL RELIEF.

State Farm and the District Court confusingly enmesh the substantive legal question in this case in a justiciability analysis. Instead of reaching a justiciability finding *which would give the court jurisdiction needed to rule on the merits*, the District Court dismissed the case with a cart-before-the-horse substantive ruling on the merits, holding that the Johnsons have no unmet made-whole rights. *See Gottlob v. DesRosier,* 2020 MT 210, ¶ 9, 401 Mont. 50, 56, 470 P.3d 188, 192 ("Whether an asserted claim is facially sufficient to state a cognizable claim … 'is a question of substantive law on the merits' rather than a threshold issue of subject matter jurisdiction or related justiciability").

[5] *Id.*

Ironically, the result is a ruling on the merits as the basis for the conclusion that the Court lacks jurisdiction (the jurisdiction needed to reach that very ruling). Worse, the District Court's substantive ruling is without precedent, as this Court has never held that the "attorney fee" recovery pre-condition to subrogation can be ignored.

The error of this misguided approach is compounded by State Farm's misapplication of the causation rule. State Farm argues that every case has a "Causation Requirement" whereby the "justiciability inquiry includes the requirement that State Farm's conduct cause the Johnsons' harm." State Farm Brief at p.21. State Farm's argument makes the causation rule the sole test of justiciability regardless of the nature of the case.

The role and limitations of the causation rule must be evaluated in view of its utility to meet the underlying purpose and mandate of the judiciary's constitutional powers and obligations.

First, the judiciary's Article VII power is not defined by arbitrary rules but is limited to real cases and controversies – as distinguished from hypothetical questions or questions in which the parties have no vested interest:

> The judicial power of Montana's courts is limited to "justiciable controversies." [citations] A justiciable controversy is one that is "definite and concrete, touching legal relations of parties having adverse legal interests" and "admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract

proposition."

McDonald v. Jacobsen, 2022 MT 160, ¶ 8, 409 Mont. 405, 410, 515 P.3d 777, 781.

It is this concern over the scope of constitutional judicial power – and this concern alone – that has yielded the Montana jurisprudence of justiciability, including several different tests for different circumstances and types of cases.

In cases for tortious injury or breach of contract, the "causation rule" works well because in such cases justiciability is usually found when concrete injury to the plaintiff is caused by such breaches of duty.

State Farm can cite no authority, however, for the proposition that the causation rule is always required to be met, or even that it is the appropriate test in other kinds of cases. Not only are there no such holdings, but this Court has often used other tests to establish justiciability invoking the constitutional power of the judiciary. Indeed, this Court has expressly ruled that causation of injury is <u>not</u> required in declaratory judgment cases where the plaintiff is entitled to declaration of clearly disputed rights and duties in which he has substantial and immediate interest:

> The State's position that Respondents lack standing because they have not been prosecuted under the statute is at odds with prior decisions of this Court as well as prior decisions of the United States Supreme Court. In *Lee v. State* (1981), 195 Mont. 1, 635 P.2d 1282, we did not require the plaintiff to suffer arrest to challenge a criminal statute.

Gryczan v. State, 283 Mont. 433, 444, 942 P.2d 112, 119 (1997).

Moreover, in innumerable cases, this Court has used a different test of justiciability where the causation rule had no logical application. *Chipman v. Nw. Healthcare Corp*., 2012 MT 242, ¶ 21, 366 Mont. 450, 288 P.3d 193 ("a determination on the nature and value of their interests and rights in CIB hours"); *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29 360 Mont. 207, 255 P.3d 80 ("personal stake in the outcome"); *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶ 41 356 Mont. 41,230 P.3d 808 ("affect the enjoyment of his property"); *Marshall v. Safeco Ins. Co. of Illinois*, 2018 MT 45, ¶ 10, 390 Mont. 358, 361, 413 P.3d 828, 831.

Second, Montana's Constitution provides that the judiciary must exercise its judicial power. Specifically, Article II, §16 of the Montana Constitution guarantees access to the courts and a right "to seek a remedy for wrongs recognized by common-law or statutory authority." *Meech v. Hillhaven W., Inc.*, 238 Mont. 21, 26, 776 P.2d 488, 491 (1989).

Under State Farm's contention for an exclusive "causation" test of justiciability, the constitutional right to a judicial remedy would be denied to many types of litigants, including those seeking declaratory or equitable relief. It would make non-justiciable a claim for unjust enrichment in which causation of injury is not an element.[6] It would make non-justiciable a case for resolution of adverse

[6] *N. Cheyenne Tribe v. Roman Cath. Church ex rel. Dioceses of Great Falls/Billings*, 2013 MT 24, ¶ 60, 368 Mont. 330, 345, 296 P.3d 450, 461 (plaintiff

claims to funds held in constructive trust. It would make unavailable an insurer's explicit statutory right to an interpleader action where the defendants are usually victims who have not caused injury to anyone. It would make non-justiciable an action to quiet title where each party was claiming under a different chain of title. Indeed, State Farm's proposed misuse of the causation rule would make non-justiciable any case where the defendant did not injure the plaintiff but refused to honor a legal duty which would benefit the plaintiff.[7]

Application of these two constitutional parameters is clear: State Farm is holding – against Johnsons' adverse claim thereto – the portion of proceeds of the Johnsons' tort cause of action needed to make the Johnsons whole. State Farm contends it is entitled to do so under its right of subrogation; the Johnsons contend that their "made-whole" priority in their tort cause of action requires that proceeds of that action must first be applied to the attorney fees they incurred in prosecuting a claim for property damages State Farm excluded from coverage.

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did not need to "establish evidence of loss by [plaintiff] or wrongdoing by the Diocese and St. Labre in order to make out a claim for unjust enrichment").

[7]Cf: *Montana Pub. Employees' Ass'n v. City of Bozeman*, 2015 MT 69, ¶ 14, 378 Mont. 337, 342, 343 P.3d 1233, 1237 ("The District Court was "in a position to grant effective relief" by either granting or denying MPEA's request that the City be required to submit to arbitration. [Citation.] MPEA's claim is accordingly justiciable.").

Since the made-whole rule is one of equity and is based upon equitable principles, justiciability of this case is fully established by the fact that the Johnsons have "sustained a loss" presenting a concrete and ripe dispute. The justiciable and ripe substantive dispute is whether (a) the Johnson's have an equitable "entitle[ment]" to the proceeds of their tort cause of action in the amount of the attorney fees they incurred in securing uncovered losses, or (b) State Farm can retain all of the proceeds of the Johnsons' claim by subrogation even though the Johnsons are not made whole for that sustained loss:

> Again we note, the doctrine of legal subrogation is applied to subserve the ends of justice and to do equity in the particular case under consideration. *Bower v. Tebbs, supra.*
>
> For these reasons we adopt the view that when the insured has sustained a loss in excess of the reimbursement by the insurer [State Farm], the insured is entitled to be made whole for his entire loss and any costs of recovery, including attorney's fees, before the insurer can assert its right of legal subrogation against the insured or the tort-feasor.

Skauge, *supra,* at 172 Mont. 521, 528; 565 P.2d 628.

The dispute is well pled in the TAC, which states all facts necessary to the resolution of each party's rights to the proceeds of the Johnsons' claim. If State Farm has satisfied the requirements of the made-whole rule, the Court only has jurisdiction to substantively so rule if these circumstances do present a justiciable controversy. Similarly, if the Johnsons have sustained a loss in the form of attorney fees incurred to secure uncovered property damage, they present a

justiciable claim to a substantive ruling on what portion of their MVA tort claim proceeds (held by State Farm) they are entitled to. The pleading seeks declaratory and other relief which will fully resolve this dispute.

Next, even if the causation rule applied to this case, the question would not be whether State Farm caused the Johnsons to incur attorney fees, but whether State Farm caused a violation of the Johnsons' made-whole right to a portion of the proceeds of the Johnsons' MVA claim.

In short, what State Farm and the District Court have erroneously framed as a question of justiciability is really a question of what the made-whole rule requires. What that rule requires, and therefore what rights each party has in the disputed proceeds of the Johnsons' tort claim is an issue that is a well-pled, ripe, and concrete issue because the Johnsons assert a concrete legal and equitable interest in funds that State Farm withholds. Under Article VII and Article II, §16 of the Montana Constitution, this is a case that the judiciary has both the power and obligation to address.

Finally, the TAC also establishes a justiciable conversion claim. State Farm does not dispute that it is asserting adverse dominion over all proceeds of the Johnsons' MVA tort cause of action. The Johnsons' claim to a portion of those proceeds is no less justiciable than a dispute over a bike that plaintiff alleges was stolen by the person who sold it to the defendant. Whether or not the defense is

meritorious, the adjudication of the claim and defense is justiciable. Johnsons have presented a concrete and ripe conversion claim by pleading that State Farm asserts an adverse interest in the funds recovered under the Johnsons' MVA tort claim.

II. MONTANA'S MADE-WHOLE RULE REQUIRES A SUBROGATING INSURER TO BEAR THE LOSSES OF UNCOVERED PROPERTY DAMAGES AND RECOVERY COSTS AND FEES BEFORE IT CAN USE ITS INSUREDS' CLAIM TO REIMBURSE ITSELF FOR AMOUNTS IT CONTRACTED TO PAY ITS INSURED.

Whether or not the District Court incorrectly cast them as questions of justiciability, the core issues presented by this appeal are the substantive questions of (a) whether Montana's made-whole rule is violated by subrogation that leaves the insureds bearing the loss of attorney fees incurred to recover excluded property damage, and (b) whether the Johnsons have stated a cognizable claim for declaratory relief and/or a claim of conversion to remedy that violation.

a. The made-whole rule unquestionably requires reimbursement of the insured's attorney fees when pursuing uncovered property losses.

In their opening brief, Johnsons cited to more than a dozen cases which consistently reaffirm that Montana's made-whole rule applies to the insured's attorney fees. State Farm does not distinguish any of those rulings or make an argument for why the rule should now be reversed. This includes the "on point" case of *DeTienne Assocs. Ltd. P'ship v. Montana Rail Link, Inc.,* 264 Mont. 16, 20, 869 P.2d 258, 261 (1994), which specifically addresses the made-whole rule's

application to attorney fees that could not be recovered from the tortfeasor under the American rule.[8]

State Farm's only attempt to offer authority for reversal of the rule is its false contention that *Van Orden*, *supra*, somehow changed Montana's longstanding rule. State Farm is clearly wrong. First, the *Van Orden* opinion makes clear that Van Orden had no attorney fees in recovering property damage losses because the insurer had paid those losses in full. *Van Orden* at ¶2 ("the insured **has been** fully compensated by payment from his insurer for the property damage loss—**including all costs associated with the property damage loss**"). The decision could not have reached the conclusion that reimbursement of such costs and fees was not required because the issue was not presented.

Second, *Van Orden* expressly repeats both the rule that fees must be reimbursed, and the reason for the rule. *Van Orden*, ¶19 ("the insurer may not assert subrogation rights until the insured has been fully compensated for his damages, including attorney fees and costs"); ¶13("When the sum recovered by the Insured from the Tortfeasor is less than the total loss and thus either the Insured or the Insurer must to some extent go unpaid, *the loss should be borne by the*

[8] State Farm's only discussion of *DeTienne* is the observation that justiciability was not raised (cf *DeTienne* at 266 Mont.188, 879 P.2d 70) ("what we must determine on review is not only the interpretation of this provision, but also what significance it has to the entire purpose of subrogation").

insurer[,] for that is a risk the insured has paid it to assume.") (emphasis in *original*)).

b. State Farm's argument would require a reversal of well-established law and complete elimination of the requirement that an insured be made whole for attorney fees before subrogation.

The District Court's dismissal of the case cannot be sustained without this Court substantively eliminating the long-standing rule of law that attorney fees are part of an insured's made-whole rights. In other words, the District Court's conclusion that attorney fees are not recoverable out of the proceeds State Farm's subrogation is the *sine qua non* of what the Court framed as a justiciability analysis.

Either the attorney fee component of the made-whole rule remains the law of Montana or it doesn't. If the substantive rule in Montana remains the same, then (a) State Farm has breached its duty and the Johnsons are deprived of their made-whole rights by State Farm's improper subrogation, collection and refusal to honor Johnsons' made-whole rights, and (b) the Johnsons are constitutionally entitled to a remedy for State Farm's breach of that equitable duty.

This Court should once again reaffirm Montana's made-whole rule and direct the District Court to rule on the remedies endorsed by this Court in the identical *Ferguson* case.

III. STATE FARM IS INCORRECT THAT MONTANA'S MADE-WHOLE RULE PLACES AN UNFAIR OR UNREASONABLE BURDEN ON THE SUBROGATING INSURER.

State Farm attempts to portray Montana's longstanding made-whole rule as unfair with rhetorical suggestions that (a) an insurer would "never [be able to] subrogate" when an insured hires an attorney, (b) the difficulties of trying to settle the remainder of a property damage claim after the insurer has settled the settlement-driving values of such a claim are "self-inflicted," and (c) the insured is not burdened by premature subrogation since the insured can be made whole "simply by not choosing to settle the property damage claim for less than it was worth."

Setting aside that such policy arguments are long-since resolved by this Court's adoption of the made-whole rule and the equitable reasons therefore, State Farm's complaints also lack substance.

The fact that the insured uses an attorney to recover property damage losses the insurer excluded from its coverage does not prevent subrogation, it merely requires the insurer to fulfill its duty to reimburse that fee expense from the prematurely collected subrogation.

To say that the impairment of the insured's claim is "self-inflicted" ignores that the State Farm alone, without consultation or even notice to its insured, settled its portion of the property damage claim, and further ignores the realities of case

settlement including those described by this Court in *Swanson v. Hartford Ins. Co. of Midwest*, 2002 MT 81, ¶ 26, 309 Mont. 269, 276, 46 P.3d 584, 589 ("a settling insurer, knowing full well that the plaintiff had medical payments coverage, takes this into account in its settlement offer and reduces its offer accordingly"). Certainly, a settling liability insurer similarly "takes into account" that it risks little in drawing a hard line with the tort victim once it has resolved the largest property damage values with the victim's insurer.

State Farm's argument further ignores that it easily avoids any impairment to its insured's claim in numerous non-burdensome ways including (a) cooperating with its insureds in presenting the property damage claim, (b) allowing the insureds to recover their losses first, (c) allowing the insured to recover the full amount from the tortfeasor and then reimbursing the insurer its share, and (d) paying the insured the amount of uncovered losses and taking an assignment of the whole of the property damage claim. It is State Farm, not the Johnsons, that chose to reject all of these alternatives in favor of undisclosed subrogation that would impair the insured's remaining claim.

State Farm's rhetoric reaches the absurd when it contends that its insured is not harmed by premature subrogation because all the insured has to do (albeit without an attorney or any other cost of proving his claim) is "simply" not "choos[e] to settle" their claim (until and unless the tortfeasor should graciously

offer full value). The realities of claim resolution, including that full value is far more likely to be secured through the services of an attorney[9], disprove this pollyannish suggestion.

Nor is the cost of an attorney the only reasonable cost an insured bears to secure excluded property damage. Whether or not an attorney is retained, most claims require substantiation that may include appraisals, estimates, and presentation of copied bills in an orderly demand letter.

In contrast to State Farm's insubstantial complaints with the made-whole rule, this Court has put its finger right on the nub of the issue: somebody must bear the loss of uncovered property damage including the cost of recovering those losses, and, since the insurer has been paid a premium to provide the payments it seeks to recoup through subrogation, "the loss should be borne by the insurer." *Skauge*, *DeTienne*, *Swanson*, *Van Orden*, etc.

IV. THE JOHNSONS HAVE STATED VIABLE CLAIMS FOR DECLARATORY RELIEF AND CONVERSION.

This Court declined to exercise discretionary supervisory control over the District Court's denial of declaratory relief because, under the pleadings **then** at

[9]Numerous studies, including one by the Insurance Research Council (*Attorney Involvement in Auto Injury Claims*, IRC report, May, 2014) have found that personal injury victims represented by attorneys receive settlements nearly three and a half times higher than those without legal representation.

issue the Johnsons had failed to show the made-whole rule would necessarily be violated by State Farm's "*mere preliminary assertion* of the *future right* to subrogation".[10] The Court's ruling on the writ cannot be law of the case[11] on the substantive question that was not reached: whether declaratory relief would be available should later occurring facts establish the fact and amount of attorney fees permanently withheld from subrogation proceeds after all claims had been resolved. That substantive question now must be addressed.

Similarly, this Court declined to exercise discretionary supervisory control over the District Court's ruling that conversion was a preempted cause of action because the pleading then at issue failed to establish the fact and amount of property losses that Johnsons would incur and therefore whether State Farm was withholding proceeds of the Johnsons' tort claim. It further ruled that it was premature to determine the "ultimate application of the [made-whole] doctrine." This Court certainly did not determine whether conversion is an appropriate cause of action to apply to violations of the doctrine. That issue is also now before this Court under the pleadings in the TAC.

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[10] *Johnson, supra* at p.4 (italic emphasis in original).

[11] Law of the case applies "only on those issues that the court previously has decided." The rule applies to holdings, and not to "dictum." *In re Estate of Snyder*, 2007 MT 146, ¶¶ 27, 29, 337 Mont. 449, 162 P.3d 87. Because of the ripeness concern, this Court did not and could not reach a substantive ruling on the merits of Johnsons' made-whole case. The sole holding of the writ denial was that the case was not yet ripe.

Also before this Court is the issue of preemption because this Court cannot conclude that this case is justiciable if a violation of the made-whole rule is not remediable (as it would be the case if §33-18-242 (3), MCA, preempted both conversion and declaratory relief).

The following arguments will demonstrate that both conversion and declaratory judgment are available forms of relief, and that they are not preempted.

a. The Johnsons have stated a claim for conversion because State Farm's use of the Johnsons' tort claim and withholding of Johnsons' share of the proceeds of the recovery on that claim is an act of wrongful dominion over that share of proceeds.

The "essential elements of an action for conversion are the plaintiff's ownership and right of possession of the personalty, its conversion by defendant, and resulting damages." *Gebhardt v. D.A. Davidson & Co.,* 203 Mont. 384, 389, 661 P.2d 855, 858 (1983); *Johnson v. Clark* (1957) 131 Mont. 454, 311 P.2d 772. Conversion is defined as a "distinct act of dominion wrongfully exerted over one's property in denial of, or inconsistent with, the owner's right, or an unauthorized assumption of dominion over personalty in hostility to the right of the owner." *Gebhardt, supra*; *Interstate Mfg. Co. v. Interstate Products Co.* (1965) 146 Mont. 449, 408 P.2d 478.

The TAC pleads that State Farm has affirmatively asserted an interest in Johnson's legal title and interest in their tort cause of action, and done so in defiance of the Johnsons' priority right in the proceeds of that cause of action. It

further alleges State Farm received and now holds these proceeds while admitting the Johnsons have not been made whole for the costs they incurred to secure uncovered property losses. The elements of conversion are therefore stated by the TAC.

b. The Johnsons have stated a claim for declaratory relief because State Farm is applying its wrongful subrogation conduct to the Johnsons' tort claim proceeds.

As in the *Ferguson* case, declaratory relief is "appropriate" here to resolve the ongoing dispute over the subrogor's and subrogee's interests and rights in Johnsons' MVA tort claim and proceeds thereof. Indeed, the very "purpose" of the Declaratory Judgment Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered. §27–8–102, MCA." *United Nat. Ins. Co. v. St. Paul Fire & Marine Ins. Co.,* 2009 MT 269, ¶ 35, 352 Mont. 105, 117, 214 P.3d 1260, 1270; *Ridley v. Guar. Nat. Ins. Co.*, 286 Mont. 325, 331, 951 P.2d 987, 990 (1997).

State Farm offers no authority or rationale for disregarding this Court's ruling in *Ferguson* at ¶ 41, that "the efficient remedy of class-wide declaratory relief is appropriate."

Nor does State Farm attempt to distinguish the numerous cases in which this Court has held that declaratory relief is available to persons seeking relief for both

claim handling and non-claim handling cases notwithstanding the "preemption" provision in §33-18-242 (3), MCA.

This Court should conclude that the made-whole rule is remediable (as it must be under Montana's Constitution Art. II, §16), and that declaratory relief is an appropriate legal avenue to secure the remedy for wrongful subrogation. *Chipman, supra* at ¶ 19 ("a controversy the judicial determination of which will have the effect of a final judgment in law or decree in equity upon the rights, status or legal relationships").

c. The Johnsons' conversion and declaratory relief claims are not preempted by §33-18-242 (3), MCA.

The Johnsons' opening brief in this appeal (pp. 29-38, 39-40) provides three-fold rationale, supported by ample caselaw, that demonstrates why neither declaratory relief nor conversion is preempted relief for violation of (non-claim handling) breach of subrogation duties.

State Farm makes no attempt to distinguish this Court's numerous holdings in cases in which, notwithstanding the "preemption" provision in §33-18-242 (3), MCA, declaratory relief was available (*see, e.g.,* declaratory judgment cases, footnote 4, p. 35 of Johnsons' opening brief). Nor does State Farm attempt to distinguish the cases that hold that actions which do not seek damages for claims "handling" are outside of preemption. *Williams, Thomas, and Christensen* cases discussed *id.* at pp. 37-38.

For the reasons detailed in Johnsons' opening brief (Argument II. C. i., ii., pp. 32-38 and Argument III, pp. 39-41), this Court should rule that declaratory relief and conversion are not preempted, and are clear examples of "other" claims an insured may pursue against an insurer (§33-18-242 (7)(a), MCA, "An insured may file an action under this section, together with any other cause of action the insured has against the insurer.").

CONCLUSION

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

DATED this 13th day of August, 2024.

/s/ Allan M. McGarvey
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e), Montana Rules of Appellate Procedure, I certify that this Reply 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 4,897 words, excluding the caption, signature block, certificate of service, certificate of compliance, table of contents and table of authorities.

DATED this 13th day of August, 2024.

/s/ Allan M. McGarvey
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