

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 25-0076

Amber Rose D’Hooge,

Plaintiff and Appellant,

v.

Cincinnati Insurance Company,

Defendant and Appellee.

On Appeal from the Fourth Judicial District Court, Missoula County

DV-32-2023-870

The Honorable Robert L. Deschamps, III

APPELLANT’S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIESV

ISSUES1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS3

I. Amber’s broken leg.3

II. Cincinnati convinces Amber not to gather evidence to support her claim, and accepts liability.5

III. Amber’s futile attempts to retrospectively marshal evidence supporting her slip and fall claim.7

IV. The adjuster testifies that her acceptance of liability was meant to include payments to Amber for all Amber’s special and general damages, including pain and suffering.9

V. Cincinnati prepares to contest the amount of Amber’s slip and fall damages at trial.11

VI. Cincinnati does not dispute Amber’s contention that the elements of promissory estoppel and contract formation are met.11

VII. The District Court rules that Cincinnati is liable for Amber’s slip and fall damages as a matter of law.13

VIII. After the District Court’s summary judgment ruling for Amber, and after discovery closes, Cincinnati advances new arguments.14

IX. The District Court rules that the 2023 UTPA bars Amber’s claims, then rules that it was wrong—the 2023 UTPA cannot bar Amber’s claims.15

X. The District Court grants Cincinnati’s motion for complete summary judgment.16

STANDARD OF REVIEW..... 17

SUMMARY OF THE ARGUMENT.....18

I. Causes of action against insurers.18

II. Amber, not Cincinnati, is entitled to summary judgment. Alternatively, Amber’s claims do not fail as a matter of law.18

ARGUMENT..... 19

I. Pursuant to Montana common law, third-party claimants, and contract holders, may sue insurers via causes of action other than common law and statutory bad faith. 19

A. Amber is not merely a third-party claimant. 20

B. This Court has never restricted a claimant’s available causes of action to only common law and statutory bad faith. 21

C. The cases relied upon below do not support the conclusion the District Court reached. 24

D. Other states permit actions in contract and equity to enforce an insurer’s agreement to accept liability for an injury claim.27

E. No legitimate public policy is served by limiting an injured claimant in Amber’s position to a bad faith cause of action alone.29

II. Amber, not Cincinnati, is entitled to judgment as a matter of law on her claims.30

A. Cincinnati waived/abandoned its arguments that Amber did not establish the elements of contract formation and promissory estoppel.31

B. Cincinnati did not properly move for complete summary judgment.35

C. Amber established the elements of contract formation, and is entitled to summary judgment.37

//

D.	Amber established the elements of promissory estoppel, and is entitled to summary judgment.	41
1.	A clear and unambiguous promise.	42
2.	Reliance by the promisee.	43
3.	Reasonableness and foreseeability of the reliance.	44
4.	Resulting injury to promisee.	44
E.	Alternatively, a jury should decide whether promissory estoppel applies. I.e., Cincinnati is not entitled to summary judgment when viewing the facts in the light most favorable to Amber.	47
F.	Amber is entitled to a jury trial on her other causes of action.	50
1.	Equitable Estoppel.	50
2.	Spoliation.	51
3.	Other causes of action under which the Amended Complaint reserves the right to recovery.	52
	CONCLUSION.....	54

TABLE OF AUTHORITIES

Cases

Am. Linen Supply Co. v. Dept. of Revenue,
189 Mont. 542, 617 P.2d 131 (1980).30

Carlson v. State Farm Mut. Auto. Ins. Co.,
76 F. Supp. 2d 1069 (D. Mont. 1999), aff'd, 11 Fed. Appx. 954 (9th Cir.
2001)(unpublished).24

Chipman v. N.W. Healthcare Corp., Applied Health Services, Inc.,
2014 MT 15, 373 Mont. 360, 317 P.3d 182.37, 38

Coleman Const., Inc. v. Diamond State Ins. Co.,
No. CV 05-148-M-JCL, 2008 WL 2357365 (D. Mont. June 5, 2008).
.....22, 51, 52

Cox v. Cox,
2015 MT 78N, 378 Mont. 541, 348 P.3d 673 (Unpublished).31

Dzintars v. Fireman's Fund Ins. Co.,
No. CV-24-45-BU-BMM, 2024 WL 4347887 (D. Mont. Sept. 30, 2024).
.....22, 23

Fire Ins. Exch. v. Weitzel,
2016 MT 113, 383 Mont. 364, 371 P.3d 457.53

Harrington v. Crystal B., Inc.,
2013 MT 209, 371 Mont. 165, 306 P.3d 342.17

Hayes v. Aetna Fire Underwriters,
187 Mont. 148, 609 P.2d 257 (1980).23

Order and Rationale on Motion to Dismiss, *Hepp v. Clay and Allstate*,
(Eleventh Jud. Dist. Jan. 20, 2002) (Cause No. DV-02-059).23, 24, 27

Jarussi v. Sandra L. Farber Tr.,
2019 MT 181, 396 Mont. 488, 445 P.3d 1226.39

//

Kephart v. Natl. Union Fire Ins. Co. of Pittsburgh Pennsylvania,
No. CV-06-97-BLG-CSO, 2008 WL 11347415 (D. Mont. Feb. 5, 2008).23

Klaudt v. Flink,
202 Mont. 247, 658 P.2d 1065 (1983).24, 25

Kubiak v. Cnty. of Ravalli,
32 F.4th 1182 (9th Cir. 2022).38, 39

Kunst v. Pass,
1998 MT 71, 288 Mont. 264, 957 P.2d 1.36, 52

Lawson v. Federated Rural Electric Ins. Exch.,
No. CV-23-61-GF-JTJ, 2024 WL 4905159 (D. Mont. Nov. 1, 2024). ..22, 23

Mark Ibsen, Inc. v. Caring for Montanans, Inc.,
2016 MT 111, 383 Mont. 346, 371 P.3d 446.21

Meadow Lake Estates Homeowners Ass'n v. Shoemaker,
2008 MT 41, 341 Mont. 345, 178 P.3d 81.48

Meidinger v. StarStone Specialty Ins. Co.,
No. CV 22-45-GF-BMM, 2022 WL 11805652 (D. Mont. Oct. 20, 2022).23

Montana Power Co. v. Pub. Serv. Commn.,
214 Mont. 82, 692 P.2d 432 (1984).42

Order on Motion to Dismiss, *Murphy v. Carpenter, et al.*
(Mont. Twelfth Jud. Dist. Nov. 20, 2003) (No. DV-03-069).27

Nationwide Ins. Co. v. Heck,
873 N.E.2d 190 (Ind. App. 2007).27, 28

Newlon v. Teck American, Inc.,
2015 MT 317, 381 Mont. 378, 360 P.3d 1134.23, 24

O'Fallon v. Farmers Ins. Exch.,
260 Mont. 233, 859 P.2d 1008 (1993).22, 24, 25

<i>Oliver v. Stimson Lumber Co.</i> , 1999 MT 328, 297 Mont. 336, 993 P.2d 11.	17, 48
<i>Perl v. Grant</i> , 2024 MT 13, 415 Mont. 61, 542 P.3d 396.	39
<i>Pilgeram v. Greenpoint</i> , 2013 MT 354, 373 Mont. 1, 313 P.3d 839.	35
<i>Rolan v. New W. Health Services</i> , 2022 MT 1, 407 Mont. 34, 504 P.3d 464.	41
<i>Safeco Ins. Co. of Illinois v. Montana Eighth Jud. Dist. Ct., Cascade Cnty.</i> , 2000 MT 153, 300 Mont. 123, 2 P.3d 834.	24
<i>Schantz v. Minow and Farmers Ins.</i> , 147 Mont. 228, 411 P.2d 362 (1966).	22
<i>Shepherd v. State ex rel. Dept. of Corrections</i> , 2021 MT 70, 403 Mont. 425, 483 P.3d 518.	29
<i>Sigmon v. State Farm</i> , No. 517CV00225KDBDCK, 2019 WL 3928641 (W.D.N.C. Aug. 19, 2019).	28, 39, 49
<i>Smith v. Farmers Union Mut. Ins. Co.</i> , 2011 MT 216, 361 Mont. 516, 260 P.3d 163.	17
<i>Smith v. Krutar</i> , 153 Mont. 325, 457 P.2d 459 (1969).	41
<i>S & P Brake Supply, Inc. v. STEMCO LP</i> , 2016 MT 324, 385 Mont. 488, 385 P.3d 567.	42
<i>State ex rel. Hereim v. Dist. Ct. of Sixth Jud. Dist.</i> , 154 Mont. 112, 460 P.2d 755 (1969).	23
<i>State ex rel. Hoagland v. Sch. Dist. No. 13 of Prairie Cnty.</i> , 116 Mont. 294, 151 P.2d 168 (1944).	31

<i>Sullivan v. Cherewick</i> , 2017 MT 38, 386 Mont. 350, 391 P.3d 62.	31, 33
Memorandum and Order on Motions For Summary Judgment, <i>Swank Enterprises v. Anaconda Plumbing and Heating, et al</i> , (Mont. First Jud. Dist. June 8, 2004) (No. CDV-2003-199).	27
<i>Ulrigg v. Jones</i> , 274 Mont. 215, 907 P.2d 937 (1995).	25, 26
<i>Unified Industries, Inc. v. Easley</i> , 1998 MT 145, 289 Mont. 255, 961 P.2d 100.	36
<i>U.S. v. Dutton</i> , 234 F.3d 1278 (9th Cir. 2000).	31
<i>Vigue v. Evans Products Co.</i> , 187 Mont. 1, 608 P.2d 488 (1980).	23
<i>Watters v. Guar. Nat. Ins. Co.</i> , 2000 MT 150, 300 Mont. 91, 3 P.3d 626.	23
<i>White v. State ex rel. Montana State Fund</i> , 2013 MT 187, 371 Mont. 1, 305 P.3d 795.	22, 23
<i>WLW Realty Partners, LLC v. Contl. Partners VIII, LLC</i> , 2015 MT 312, 381 Mont. 333, 360 P.3d 1112.	36, 37

Statutes

M. R. Civ. P. Appendix of Forms (2019)	53
M. R. Civ. P. 8(a) (2019)	52
M. R. Civ. P. 56(c)(3) (2019)	17
Mont. Code Ann. § 1-3-208 (2019)	19
Mont. Code Ann. § 1-3-214 (2019)	19

Mont. Code Ann. § 27-1-202 (2019)19

Mont. Code Ann. § 33-18-242(4) (2023)14, 29, 35

ISSUES

- I. Did the District Court err when it ruled: “the common law in Montana . . . provide[s] that a third-party claimant cannot bring any cause of action other than for bad faith or violation of the UTPA against an insurer”?

- II. Cincinnati Insurance accepted liability for Amber’s slip and fall claim and told Amber to stop gathering evidence. The adjuster agreed that her acceptance email meant “there would be payments for pain and suffering” and testified: payments for “all” “general damages and special damages” were “included” “in the acceptance of liability.” The District Court understood: “that’s what [Cincinnati] said. We’re accepting liability . . . and you don’t have to investigate it any further because we’re going to pay . . . the plaintiff took them at their word . . . I’m having a real hard time accepting . . . your [(Cincinnati’s)] argument -- that some somehow or another the plaintiff now, with their hands tied behind their back by your client, is responsible to . . . go out and prove a case. . . . I think you’re estopped. I really do.” The District Court ruled in Amber’s favor.

Did the court err by later reversing its summary judgment ruling for Amber, and ruling that even if Amber’s causes of action are permissible, Cincinnati is entitled to summary judgment?

STATEMENT OF THE CASE

Plaintiff and Appellant Amber D’Hooge slipped and fell on December 7, 2020, at a Missoula Tire Rama, breaking her leg.

Amber claimed to Tire Rama’s insurer, Defendant and Appellee Cincinnati Insurance, that Tire Rama negligently caused her fall. Amber offered to gather any and all evidence required to prove Tire Rama’s negligence, like the nearby security camera footage.

Cincinnati’s Senior Claims Specialist responded by emailing Amber:

I do not need you to do anything further to gather information to support your claim.

We are accepting liability for your claim.

...

Cheryl Lee

Amber followed this instruction, and gathered no evidence to support her claim that Tire Rama negligently injured her.

Later, the Cincinnati adjuster who accepted liability for the slip and fall testified that her acceptance of liability was meant to include payments to Amber for all Amber’s special and general damages, including pain and suffering.

In 2023, Amber sued Tire Rama, alleging liability was not at issue. Tire Rama disputed liability, claiming Amber was running when she fell.

But, three years after the fall, the evidence proving Tire Rama’s negligence

was lost, destroyed, and forgotten.

Cincinnati intervened as a party defendant. Amber amended her Complaint, claiming Cincinnati was directly liable for her slip and fall damages.

Amber sought partial summary judgment against Cincinnati on liability. Cincinnati did not dispute Amber's claim that the undisputed facts prove the elements of contract formation and promissory estoppel.

At oral argument, the court granted Amber's motion. Relying on this oral ruling, Amber proceeded to settle with Tire Rama.

Thereafter, ruling on new arguments Cincinnati had not raised in opposition to Amber's motion, the court reversed itself, granting Cincinnati's motion for summary judgment.

STATEMENT OF FACTS

I. Amber's broken leg.

Plaintiff/Appellant Amber slipped and fell on December 7, 2020, in the Tire Rama north parking lot on South Street in Missoula, Montana. Dkt. 22.1 at 1-3; App. p. 32, Dep. D'Hooze 14:6-8. The south and side parking lots were dry, and there had been no substantial precipitation during the prior eighteen days, so Amber expected no ice in the north parking lot. Dkt. 22.1 at 2.

Tire Rama employees, however, knew they needed to "walk very carefully" in the north parking lot because they knew it was usually very icy and slippery in

the wintertime. App. p. 46, Dep. White 75:2-10. On December 7, 2020, Tire Rama did not apply ice melter in the north parking lot prior to Amber's fall. App. p. 36, 88:12-17. Tire Rama states that it did not want customers to go into the north parking lot, but Tire Rama did not warn customers not to walk in the north parking lot, did not warn customers there was ice, and did not warn customers to walk carefully in the north parking lot. App. p. 42-43, 22:3-23:23.

Amber's fall broke her leg and she later developed Complex Regional Pain Syndrome, leaving her with permanent, excruciating pain, among many other symptoms. App. p. 33, 32:9-18; App. p. 49.

After her fibula broke, Amber was bleeding, and suffering shock and severe pain. Broken leg notwithstanding, Tire Rama left Amber on the ground, outside in the December cold, for approximately an hour. Tire Rama refused to assist her and her four-year-old, despite Amber's repeated requests for assistance (phone calls to store/calling out to workers). App. p. 37, 92:8-23. A Tire Rama employee then parked her car two parking spots away from her, even though there was an open spot in front of her, and handed Amber her keys while she was on the ground. *Id.*

Amber asked Tire Rama employees to help her to her car. *Id.* The employees refused. *Id.* Receiving no help from the employees, Amber asked for a broom to use as a crutch. Tire Rama testifies both that: 1) it told Amber it did not have a broom or anything like it; and 2) in actuality, it does have a broom in its shop. App. pp. 41, 47, 10:11-14, 92:14-93:15.

Next, Amber's son's babysitter arrived to take Amber to emergent care. She claims that when she arrived, Tire Rama would not allow her to park in its parking lot. *See* App. p. 45, 56:11-15. When Amber asked Tire Rama to complete an incident report, Tire Rama refused. App. p. 40, 127:9-13. The manager also refused to identify Tire Rama's insurer. *See id.* 127:5-8.

Amber's retained experts, and her treating doctors, conclude that Amber will suffer severe, life-altering symptoms for the rest of her life as a result of her fall. *See* App. p. 50-54. Even Cincinnati's expert agrees that Amber's current symptoms are likely permanent. App. p. 52-53, 112:23-113:17. Amber was forced to give up her career and life passion: yoga and fitness instructing. App. p. 38-39, 110:19-111:4. Amber's experts also conclude that as a result of the fall, the present value of Amber's lost earning capacity is between \$687,885 and \$1,139,089, while the present value of Amber's necessary future care and accommodations is between \$929,869 and \$1,340,598. App. p. 50-54.

II. Cincinnati convinces Amber not to gather evidence to support her claim, and accepts liability.

Tire Rama Corporate directed Amber to its insurer, Defendant/Appellee, Cincinnati Insurance. Amber had heard that an insurer in a situation like hers must pay the medical bills, so she asked Cincinnati to pay for her emergent care.

Cincinnati paid for Amber's emergent care incurred December 7. Cincinnati's payment for Amber's emergent care was not accompanied by any promise or

contract; therefore, the payment did not in any way bind Cincinnati to any future payments, or to liability.

On December 22, 2020, Cincinnati called Amber and discussed her slip and fall claim. Ex. A to Dkt. 14. On December 22, and the next day, Amber described her fall and provided her reasoning supporting her contention that Tire Rama was responsible for her fall. *Id.*

Amber then told Cincinnati:

Please let me know if you need any additional information to document liability. This was very clear error on Tire Rama's part and I am happy to provide anything you need to clearly document this. If you are missing something you need, just let me know. . . . Tire Rama told me they 'do not do incident reports' when I asked them to complete one.

Id. Amber offered to put Cincinnati in touch with a witness, and said, "I am also happy to gather photographs from the other businesses or the traffic light around Tire Rama that day" *Id.*

In a separate communication, Amber stated: "I am happy to get any other photographs from surrounding area of Tire Rama that would be helpful." *Id.*

Five days later, Cincinnati emailed Amber, stating:

Subject: RE: claim #3662499 slip/fall

Hi Amber,

I do not need you to do anything further to gather information to support your claim.

We are accepting liability for your claim.

...

Cheryl Lee, CPCU/AIC

Senior Claims Specialist

The Cincinnati Insurance Companies

Id. at 25.

III. Amber’s futile attempts to retrospectively marshal evidence supporting her slip and fall claim.

After Cincinnati’s acceptance and instructions, Amber “changed [her] plans.” Ex. B to Dkt. 14. She “had been planning to gather all necessary evidence to prove that Tire Rama was liable for [her] slip and fall.” *Id.* She “had intended to collect security camera footage from nearby, take pictures and video, obtain written statements from all witnesses (including the food truck worker [she] had purchased food from), collect other evidence, and retain an attorney if necessary.” *Id.* She even spoke to multiple attorneys in December 2020 about potential representation, and intended to retain one if Cincinnati denied the claim. *Id.* Instead, she “followed [Cincinnati’s] instruction and did not gather any evidence to support [her] claim that Tire Rama negligently caused [her] slip and fall.” *Id.*

In April 2021, four months later, Cincinnati switched adjusters on the claim. Amber emailed: “Hi Jewlet, Here is a copy of response from Cheryl accepting liability of the claim.” Ex. A to Dkt 14.

The second adjuster confirmed: “I’m not questioning liability. . . .” *Id.*

In December 2021, a year after the fall, Amber engaged in unrepresented negotiations with Cincinnati for global settlement, including general damages. During those negotiations, Amber wrote to Cincinnati that “Cincinnati Insurance

has already accepted full liability” *Id.* In response, Cincinnati never told Amber that she misunderstood the agreement, or that Cincinnati’s acceptance of her slip and fall claim was limited to *Ridley* payments, or that she would be required to prove Tire Rama’s negligence.

After settlement negotiations failed, Amber filed her Complaint against Tire Rama in August 2023, alleging that liability was not at issue. Dkt. 1. Tire Rama disputed liability and, conveniently, found a new witness. Tire Rama’s new witness was an employee with a brand new story. Despite never telling anyone this information in 2020, 2021, 2022, or 2023, Tire Rama’s employee now claimed that he had seen Amber running when she fell. App. p. 55-56.

Amber vehemently disputed the employee’s fabrication¹; she was walking when she fell. App. p. 34-35, 71:24-72:6. The undersigned attempted to marshal evidence to prove Tire Rama’s liability, and to prove Amber was not running. But it was impossible to do so three years after the fall.

First, the nearby security camera footage which would have shown portions of the south and side parking lots, and would have shown Amber walking instead of running, had been destroyed long ago. Ex. C to Dkt. 14.

Next, a key eyewitness in the parking lot when she fell, who could have

¹ The employee also claimed: Amber was alone, and the manager assisted Amber immediately after she fell. App. p. 55-56. Neither is true. In actuality, Amber’s four-year-old was with her, holding her hand, and also fell. App. p. 34-35, 71:24-72:6. Further, the manager did not speak with Amber until nearly an hour later; he claims he did not even know Amber fell until she called the store. App. p. 44, 35:20-21.

testified that Amber was not running, now could not remember a thing about that day. Ex. D to Dkt. 14.

Further, Tire Rama had substantially altered the exact area of Amber's fall by removing equipment that had been affixed to the ground, right near her fall. Ex.s B, E-F to Dkt. 14. This spoliation of evidence made it impossible for an expert to analyze the area in its original condition, as it was in December 2020.

As the undersigned was drafting a separate Complaint to file against Cincinnati directly, Cincinnati intervened in the instant lawsuit as a party defendant. Amber moved the court for leave to Amend her Complaint. Dkt. 10, 12.

Cincinnati objected, arguing that any amendment would be futile because there were no viable causes of action against Cincinnati. The court held that Amber's causes of action against Cincinnati were viable. Dkt. 22. Amber amended her Complaint to claim against Cincinnati contract formation, promissory estoppel, equitable estoppel, spoliation, and other causes of action, as well as "each and every claim and cause of action supported by the facts alleged in this Complaint." Dkt. 22.1 at 12-13.

IV. The adjuster testifies that her acceptance of liability was meant to include payments to Amber for all Amber's special and general damages, including pain and suffering.

Cincinnati resisted providing the adjuster's (now a former employee) contact information in discovery. Cincinnati even pretended it did not know who "Adjuster Cheryl" was. Cincinnati finally provided the information, instructing Amber's

counsel not to contact her. When Amber's counsel reached out, Adjuster Cheryl declined to speak with Amber's counsel. In hindsight, it was unsurprising that Cincinnati went to such great lengths to prevent the undersigned from speaking with her. At deposition, Adjuster Cheryl, who had accepted liability for the slip and fall, testified that her acceptance of liability was meant to include payments to Amber for all Amber's special and general damages, including pain and suffering. Dkt. 58 at 11.

Ex. A to Pl.'s Resp. Br.

D'HOOGHE v. THE TIRE GUYS INC, et al. 6/14/2024 CHERYL LEE

Page 35

8 Q. For Exhibit 19, what in here is telling
9 Amber that your acceptance of liability is limited
10 to medical and wage loss?
11 A. I don't understand the question.
12 Q. Okay. What words in this email are
13 conveying to Amber that your acceptance of
14 liability is not for the entire claim, but rather
15 for medical and wage loss only?
16 A. I don't know what other benefits there
17 would be.
18 Q. Well, there would be payments for pain
19 and suffering.
20 A. Oh, no, at this point that would be
21 included. I mean, there's general damages and
22 special damages, so that would've all been
23 included.
24 Q. In the acceptance of liability?
25 A. Correct.

V. Cincinnati prepares to contest the amount of Amber's slip and fall damages at trial.

Once it intervened, Cincinnati fully embraced its status as a party defendant who would be defending a damages claim at trial. It pursued substantial discovery into Amber's claims, deposing eight of Amber's witnesses. It also disclosed multiple experts of its own, specifically to contest Amber's harms and losses. Cincinnati relentlessly pursued discovery production from Amber, requiring Amber to disclose more than 8,900 pages of documents.

When Amber sought production of Cincinnati's claim file, however, Cincinnati flatly refused. Amber chose not to compel production of the file because, as discussed below, Cincinnati did not dispute that the elements of Amber's claims were met. Amber, thus, did not need the claims file to prove Cincinnati's intention to contract with her.

When Amber sought a Rule 30(b)(6) deposition of Cincinnati, Cincinnati ignored Amber's request for months, later indicated the deposition would have to occur after discovery closed, then filed a motion for protective order as soon as Amber noticed the deposition.

VI. Cincinnati does not dispute Amber's contention that the elements of promissory estoppel and contract formation are met.

Amber advised the District Court that her negligence claim against Tire Rama was compromised, and sought partial summary judgment against Cincinnati as to liability for her slip and fall damages. Dkt. 13, 14. In its Response Brief,

Cincinnati did not dispute Amber’s contention that the undisputed facts proved the elements of contract formation and promissory estoppel. Instead, it argued Amber’s claims were too early, or were barred. Dkt. 18 at 4.

Amber’s Reply Brief read: “Importantly, Cincinnati does not contest Amber’s assertion that all the elements of promissory estoppel are established. . . . Likewise Cincinnati does not contest that all the elements of contract formation have been met.” Dkt. 20 at 3 (underline in original).

At oral argument seven months later, Amber emphasized: “Cincinnati . . . does not contest that the undisputed material facts prove the elements of those claims.” Oral Arg. Tr. 8:3-5, July 26, 2024.

When Cincinnati responded at oral argument, it did not dispute 1) Amber’s claim that the elements of promissory estoppel and contract formation were met by the undisputed facts; and 2) Amber’s claim that Cincinnati had waived that argument.

The court later acknowledged this, holding that “[n]either Defendant [Cincinnati or Tire Rama] specifically addressed Amber’s arguments regarding promissory estoppel [or] breach of contract.” Dkt. 64 at 3; Dkt. 77 at 6.

At oral argument, the court told defense counsel:

Well, why did your client tell the plaintiff not to worry about it? We’re going to pay. Don’t worry about investigation. Don’t worry about going out and rounding up witnesses. Don’t look for any videos of the event. Don’t have any experts come and check out the scene or things of that nature. You know, that’s what they said. We’re

accepting liability, which -- and you don't have to investigate it any further because we're going to pay. That's what they said.

. . .
you're missing the point, Mr. Stacey. Your client basically told the plaintiff, Don't worry about it. You know, we're going to pay whatever it is, so just rest easy. Don't go out and do any investigation. . . . And so the plaintiff took them at their word and is now arguing that your client is estopped from making the very claim you're making . . . And I'm having a real hard time accepting . . . your argument -- that some somehow or another the plaintiff now, with their hands tied behind their back by your client, is responsible to somehow or another go out and prove a case . . . I think you're estopped. I really do.

Oral Arg. Tr. 17:4-12, 22:1-14, July 26, 2024.

VII. The District Court rules that Cincinnati is liable for Amber's slip and fall damages as a matter of law.

The court held: "at this time, I am going to grant [Amber's] motion for partial summary judgment on liability for Cincinnati. I think that they are estopped. I think that it's just -- it's totally unfair to require the plaintiff at this point to have to come and prove, you know, the liability issue for their normal damages." *Id.* 38:1-6. The court indicated there would be a trial to "determin[e] damages." *Id.* 36:25-37:1.

Later, at mediation, an excess insurer of Tire Rama refused to even participate, insisting that it could never be liable to pay any damages because Cincinnati had accepted liability and was therefore liable.

Acting in complete reliance on the court's oral ruling granting her Motion for Summary Judgment against Cincinnati, Amber proceeded to settle with Tire Rama. *See* Dkt. 70. Amber settled her emotional distress and punitive damage

claims against Tire Rama for how it treated her after the fall. Amber also released any claim she had against Tire Rama for premises liability. Amber specifically reserved all her claims against Cincinnati for all of her slip and fall damages.

The Settlement Release stated: “Releasor reserves all her claims against Cincinnati Insurance Company.” Further, as a part of the settlement with Tire Rama, Cincinnati stipulated: “Cincinnati Insurance agrees that the release of TireRama is not a release of Plaintiff’s reserved claims (reserved claims are for the slip and fall and resultant damages . . .) against it, and the fact that a release has been given to TireRama is not a defense to Plaintiff’s reserved claims.” App. p. 57-58.

VIII. After the District Court’s summary judgment ruling for Amber, and after discovery closes, Cincinnati advances new arguments.

Extensive discovery occurred for a total of eight months and three weeks. Four days after discovery closed, and well after the court’s bench ruling granting Amber’s Motion for Summary Judgment, Cincinnati argued for the first time that the elements of Amber’s claims were not met. Dkt. 36. Astonishingly, Cincinnati represented: “it is undisputed that D’Hooge cannot meet any of the elements of her claims against Cincinnati.” Dkt. 45 at 19.

Cincinnati also argued for the first time that the 2023 UTPA (§ 33-18-242(4)) barred Amber’s claims. Dkt. 45 at 2. Amber promptly moved to strike all of Cincinnati’s new arguments. Dkt. 39, 50.

IX. The District Court rules that the 2023 UTPA bars Amber’s claims, then rules that it was wrong—the 2023 UTPA cannot bar Amber’s claims.

The court refused to strike Cincinnati’s new argument, and then reversed its earlier holding in favor of Amber. Dkt. 64. It ruled that the 2023 UTPA barred Amber’s claims. *Id.* Within hours of receiving the court’s ruling, Amber moved to amend the ruling, because the 2023 statutory amendment was not retroactive and thus could not bar her claims, which were governed by the 2019 Montana Code and common law. Dkt. 68, 69.

The court again held oral argument. The court indicated that the 2023 UTPA actually did not apply to preclude Amber’s claims, stating “it’s clear that my decision [in November] was based on a statute that doesn’t apply to this case” Oral Arg. Tr. 45:7-9, Nov. 20, 2024. This was confirmed in the later Order: “Amber is correct that [§33-18-242] subsection (4) did not exist at the time her claim accrued” Dkt. 77.

Cincinnati made yet another brand new argument: Regardless of the contents of the UTPA, Montana common law bars all non-bad faith actions by third-party claimants made against insurers.

At oral argument, the court also noted it had changed its opinion; now, it believed the elements of promissory estoppel were “all questions of fact.” Oral Arg. Tr. 25:9-17, Nov. 20, 2024. The court stated that “at this point in time, I’m not inclined to grant summary judgment for anybody.” *Id.* 44:17-18.

X. The District Court grants Cincinnati's motion for complete summary judgment.

By December 2024, discovery had long since concluded, Amber had filed the Pretrial Order, and Amber had moved the court to set a ten-day trial on her slip and fall damages for January 2025.

In late December, the day before the Honorable Judge retired, he granted Cincinnati summary judgment. The court accepted Cincinnati's new arguments, advanced, for the first time, nine months after its Response Brief in opposition to Amber's Motion was due (and well after the court had granted summary judgment for Amber). The court again reversed its July 2024 oral ruling.

This time, the court ruled that pursuant to this Court's case law, a third-party claimant cannot bring any cause of action against an insurer other than: 1) common law bad faith; and 2) violation of the UTPA. Dkt. 77 at 22.

The court further held that if a person may indeed bring other causes of action besides bad faith against an insurer, all of Amber's claims nevertheless fail as a matter of law, and none should proceed to a jury trial. Dkt. 77 at 16. The court held that it was not sure whether the intention of the agreement was to accept liability for all of Amber's damages, or for something else. Dkt. 77 at 18.

In the Order, the court did not cite, analyze, or acknowledge the existence of the adjuster's testimony. Likewise, the court did not address its prior stated rationale in support of its bench ruling granting Amber summary judgment.

In the Order, the court further noted that Amber had advanced other claims, such as equitable estoppel. Cincinnati’s summary judgment motion and brief in support did not address equitable estoppel. The court did not analyze whether the facts could establish those other claims, like equitable estoppel. Nonetheless, the court still proceeded to grant Cincinnati complete summary judgment. Dkt. 77.

STANDARD OF REVIEW

This Court reviews summary judgment orders de novo. *Smith v. Farmers Union Mut.*, 2011 MT 216, ¶ 14, 361 Mont. 516, 260 P.3d 163.

“Summary judgment is an extreme remedy that should never be a substitute for a trial on the merits if a controversy exists over a material fact.” *Harrington v. Crystal B., Inc.*, 2013 MT 209, ¶ 10, 371 Mont. 165, 306 P.3d 342 (citation omitted). It is only proper “if the pleadings, the discovery[,] disclosure[s] . . . , and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” M. R. Civ. P. 56(c)(3).

. . . In a summary judgment proceeding, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences will be drawn therefrom in favor of the party opposing summary judgment.

Oliver v. Stimson Lumber Co., 1999 MT 328, ¶¶ 21-22, 297 Mont. 336, 993 P.2d 11.

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SUMMARY OF THE ARGUMENT

I. Causes of action against insurers.

Montana common law does not prohibit third-party claimants, contractees, or promisees, from suing insurers in actions other than bad faith.

Montana common law routinely and explicitly allows third-party claimants to sue insurers via any cause of action, as long as the plaintiff can prove the elements of the claim.

II. Amber, not Cincinnati, is entitled to summary judgment. Alternatively, Amber's claims do not fail as a matter of law.

The undisputed facts prove the elements of promissory estoppel and contract formation.

After her fall, Amber offered to procure evidence of Tire Rama's negligence. Cincinnati responded to Amber's plan by accepting liability, and instructing Amber not to gather any evidence.

The District Court was correct when it concluded that Cincinnati had agreed to pay for Amber's damages and Amber would not have to prove Tire Rama's negligence. This Court should uphold that ruling.

Later, the court reversed itself. It only did so, however, by completely ignoring the adjuster's own testimony that her acceptance of liability included "payments" for "all" of Amber's special and general slip and fall damages.

When viewed in the light most favorable to Amber, the evidence establishes

that Cincinnati's acceptance of liability included agreeing to payments for all of Amber's special and general damages. This precludes summary judgment against Amber.

Next, the court ignored that Cincinnati waived its arguments concerning contract formation and promissory estoppel, by not disputing that the elements were met until after the court granted Amber's motion—nine months too late.

Finally, Cincinnati never properly moved for summary judgment on many of Amber's claims.

ARGUMENT

I. Pursuant to Montana common law, third-party claimants, and contract holders, may sue insurers via causes of action other than common law and statutory bad faith.

“For every wrong there is a remedy.” Mont. Code Ann. § 1-3-214. “Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation for it in money, which is called damages.” Mont. Code Ann. § 27-1-202. Further, “[a] person may not take advantage of the person's own wrong.” Mont. Code Ann. § 1-3-208.

Amber claims she was harmed by Cincinnati Insurance because Cincinnati:

- 1) instructed Amber to stop gathering evidence to prove Tire Rama's negligence;
- 2) promised to pay for all Amber's slip and fall damages; 3) failed to pay Amber her damages; and 4) then insisted Amber must prove Tire Rama's negligence

despite the destruction/spoliation of necessary evidence.

The District Court granted summary judgment against Amber's claims via its conclusion that all her claims were barred, not by statute, but by common law. The District Court held: Montana common law "provide[s] that a third-party claimant cannot bring any cause of action other than for [common law] bad faith or violation of the UTPA against an insurer." The District Court is wrong.

A. Amber is not merely a third-party claimant.

Amber's relationship with Cincinnati was, at the beginning, exclusively a third-party claimant relationship. But when Cincinnati entered into an agreement with Amber to pay all her damages, Amber began a new, separate relationship with Cincinnati.

At that point, in addition to being a third-party claimant, Amber gained the status of a promisee, and/or a contractee. Any party to a contract may sue to enforce the contract, and a promisee may sue under promissory estoppel.

Thus, even if the District Court was correct that common law prevents third-party claimants from suing via any non-bad faith cause of action, Amber could still bring suit against Cincinnati because, on these facts, she is not merely a third-party claimant.

Consider the consequences if a claimant cannot sue to enforce an insurer's contract or a promise. If a claimant cannot enforce a contract, then an insurer needn't pay out when it settles a claim. An insurer can simply change its mind and

hold the settlement money indefinitely, with impunity. The third-party claimant has no remedy—no right to enforce the settlement contract because, if the District Court is correct, Montana common law precludes all suits by third-party claimants against insurers, except for bad faith claims.

When Amber raised this hypothetical situation below, Tire Rama insisted that a claimant could indeed sue the insurer to enforce the contract, the suit would just have to occur after the underlying claim had concluded. Dkt. 31 at 7. It argued the idea that a claimant could not enforce a contract “simply is not true.” *Id.*

Nevertheless, even after the underlying suit against Tire Rama was settled, the District Court still ruled that a claimant cannot ever sue an insurer via any cause of action other than bad faith.

B. This Court has never restricted a claimant’s available causes of action to only common law and statutory bad faith.

Montana courts routinely and explicitly permit third-party claimants to sue insurers via all applicable causes of action.

Generally, this Court holds: “purely common law causes of action based upon insurer misconduct are not precluded,” and “[a] party may always allege and recover damages in a common law cause of action upon proof of a common law claim.” *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 2016 MT 111, ¶ 41, 383 Mont. 346, 371 P.3d 446.

The specific examples proving the District Court’s conclusion incorrect are

far too numerous to individually analyze. Instead, Amber provides a truncated list of just some of the Montana cases showing a third-party claimant was permitted to sue the insurer via a cause of action that was neither common law bad faith, nor statutory bad faith.

The third-party plaintiff (not an insured) in the cases below, was permitted to sue the insurer via the cause of action: ²

1) contract rescission, a contract claim, *Schantz v. Minow and Farmers Ins.*, 147 Mont. 228, 244, 411 P.2d 362, 372 (1966);

2) spoliation, *Coleman Const., Inc. v. Diamond State Ins. Co.*, No. CV 05-148-M-JCL, 2008 WL 2357365, at *5, 12 (D. Mont. June 5, 2008) (denying dismissal of third-party spoliation claim against insurer, also holding third-party claimant could have sued insurer for spoliation within the same action the claimant had brought against the tortfeasor/insured).

3) malicious prosecution, *O'Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 238-241, 859 P.2d 1008, 1011-1013 (1993); *White v. State ex rel. Montana State Fund*, 2013 MT 187, ¶¶ 31-39, 371 Mont. 1, 305 P.3d 795;

4) intentional infliction of emotional distress, *Dzintars v. Fireman's Fund Ins. Co.*, No. CV-24-45-BU-BMM, 2024 WL 4347887, at *3 (D. Mont. Sept. 30, 2024); *Lawson v. Federated Rural Electric Ins. Exch.*, No. CV-23-61-GF-JTJ,

² While some of these causes of actions were ultimately dismissed, they were litigated on the merits.

2024 WL 4905159, at *2 (D. Mont. Nov. 1, 2024); *Kephart v. Natl. Union Fire Ins. Co. of Pittsburgh Pennsylvania*, No. CV-06-97-BLG-CSO, 2008 WL 11347415, at *1-2, 7 (D. Mont. Feb. 5, 2008); *Meidinger v. StarStone Specialty Ins. Co.*, No. CV 22-45-GF-BMM, 2022 WL 11805652, at *1 (D. Mont. Oct. 20, 2022); *White*, ¶¶ 40-45; *Hayes v. Aetna Fire Underwriters*, 187 Mont. 148, 151-155, 609 P.2d 257, 259-261 (1980);

5) negligent infliction of emotional distress, *Dzintars* at *3; *Lawson* at *2; *Kephart*, at *1-2, 7; *Meidinger*, at *1; *White*, ¶¶ 40-45; *Hepp v. Clay and Allstate*, Order at 5, Eleventh Jud. Dist., Cause No. DV-02-059, Jan. 20, 2002;

6) conversion, *Hayes*, 187 Mont. at 151-155, 609 P.2d at 259-261; *Vigue v. Evans Products Co.*, 187 Mont. 1, 3, 608 P.2d 488, 489 (1980);

7) fraud, *State ex rel. Hereim v. Dist. Ct. of Sixth Jud. Dist.*, 154 Mont. 112, 113, 460 P.2d 755, 755 (1969); *Hayes*, 187 Mont. at 151-155, 609 P.2d at 259-261; *Vigue*, 187 Mont. at 3, 608 P.2d at 489;

8) the tort of “economic duress”, *Vigue*, 187 Mont. at 3, 608 P.2d at 489;

9) contract formation/breach of contract, *Watters v. Guar. Nat. Ins. Co.*, 2000 MT 150, ¶ 40, 300 Mont. 91, 3 P.3d 626, overruled on other grounds (noting a third-party could bring an action against an insurer to enforce a contract); *Newlon v. Teck American, Inc.*, 2015 MT 317, ¶¶ 8-10, 381 Mont. 378, 360 P.3d 1134 (Teck was acting in its capacity as a workers’ compensation insurer—a third party

relationship);

10) equitable estoppel, *Carlson v. State Farm Mut. Auto. Ins. Co.*, 76 F. Supp. 2d 1069, 1077 (D. Mont. 1999), *aff'd*, 11 Fed. Appx. 954 (9th Cir. 2001)

(unpublished); *Newlon*, ¶¶ 8-10;

11) additionally, a *Ridley or DuBray* action by a third-party insured against an insurer is permitted, yet it is not (indeed, it cannot be), a cause of action alleging bad faith. *Safeco Ins. Co. of Illinois v. Montana Eighth Jud. Dist. Ct., Cascade Cnty.*, 2000 MT 153, ¶ 9, 300 Mont. 123, 2 P.3d 834 (“because this action does not directly seek bad faith damages for a violation of the [UTPA], there is no statutory bar . . .”). Likewise, Amber does not, in this action, seek UTPA damages.

The District Court’s ruling is clear error. In actuality, this Court has never restricted a claimant’s available causes of action to bad faith alone.

C. The cases relied upon below do not support the conclusion the District Court reached.

The lower court relied on six cases. Dkt. 77 at 22. Remarkably, two of those cases (*O’Fallon* and *Hepp*) explicitly hold that third-party claimant **can** sue the insurer in a non-bad faith action. The other four cases, as well, are not consistent with the District Court’s conclusion.

For its conclusion that injured claimants may only sue insurers in bad faith, the District Court first cites *Klaudt v. Flink*, 202 Mont. 247, 251-252, 658 P.2d 1065, 1067 (1983). *Klaudt* holds that a third-party injured claimant may sue an

insurer for violating Mont. Code Ann. § 33-18-201(6), concurrent with the suit against the tortfeasor. *Id.* (later overruled in part). *Klaudt* does not hold that a third-party claimant may *only* sue an insurer in bad faith.

For its conclusion that an injured claimant may only sue insurers in bad faith, the District Court next cites *O'Fallon*, 260 Mont. at 240-245, 859 P.2d at 1012-1015. *O'Fallon*, the injured third-party, sued the tortfeasor's insurer for malicious prosecution. *Id.* 260 Mont. at 236, 859 P.2d at 1010. He also sued the insurer for statutory bad faith. *Id.* The district court dismissed both claims. *Id.* This Court reversed the district court, allowing the injured third-party to sue the insurer for malicious prosecution. *Id.* 260 Mont. at 238, 859 P.2d at 1011. Concerning the third-party malicious prosecution cause of action against the insurer, the Court held that "plaintiffs have stated a claim upon which relief can be granted under Montana law." *Id.* This case alone disproves the District Court's reasoning.

Next, the District Court cites *Ulrigg*. The District Court misses the point (and the most important facts) of *Ulrigg*. The court claims that the plaintiff brought suit against the insured driver, and the insured driver's insurer. Dkt. 77 at 10. The court is wrong. In *Ulrigg*, the plaintiff's attorney erroneously brought suit only against the owner of the car, not the driver/tortfeasor. *Ulrigg v. Jones*, 274 Mont. 215, 217-218, 223, 907 P.2d 937, 939, 943 (1995). When the defendant moved for summary judgment, it was too late to sue the actual tortfeasor/driver. *Id.* So the plaintiff moved to add the automobile insurer as a defendant, "simply because she

was left with no one else to sue.” *Id.* 274 Mont. at 225, 907 P.2d at 944. Of course, this Court held that the plaintiff could not sue the insurer simply because it insured the tortfeasor, and it held that claims against the insurer would be too early because no settlement or judgment had been entered. *Id.*

This Court explained: “Jodie has no direct cause of action against Safeco because she has not established any liability on the part of Safeco’s insureds and because there is no applicable Montana statute or theory under which Jodie can sue [the] insurer, absent her first establishing the insureds’ liability.” *Id.* 274 Mont. at 226, 907 P.2d at 944. This reasoning cannot apply to Amber because she is a direct contractee/promisee with Cincinnati. Moreover, she has settled with Tire Rama, so it cannot be too early for her to sue Cincinnati.

This Court continued: “Jodie has no contract with Safeco.” *Id.* Here, Amber asserts contract formation. Finally, the Court set out its final reasoning: “any liability on the part of Safeco for coverage of Jodie’s claims derives solely from the underlying liability of Safeco’s insureds.” *Id.* This is the most critical distinguishing element between *Ulrigg* and the instant case. This Court dismissed *Ulrigg* specifically because the liability that Jodie claimed against Safeco was exclusively due to Safeco insuring the tortfeasor. In the instant action, Cincinnati’s liability to Amber derives not from its contractual obligation to indemnify Tire Rama, but rather from Cincinnati’s independent relationship with Amber—a relationship established by direct agreement, including promises and

representations.

For its conclusion that injured claimants may only sue insurers in bad faith, the District Court also cites *Swank Enterprises v. Anaconda Plumbing and Heating, et al*, Mont. First Jud. Dist., Cause No. CDV-2003-199, June 8, 2004, and *Murphy v. Carpenter, et al.*, Mont. Twelfth Jud. Dist., Cause DV-03-069, Nov. 20, 2003. But those cases held that the action against the insurer was too early, not that a bad faith claim is the only viable cause of action an injured claimant may bring. For its conclusion that injured claimants may only sue insurers in bad faith, the District Court finally cites *Hepp v. Clay, et al.*, Eleventh Jud. Dist., Cause No. DV-02-059, Jan. 20, 2002. In *Hepp*, following a slip and fall injury, the claimant sued the tortfeasor and the insurer. *Id.* at 1-2. Included in the causes of action levied against the insurer was “infliction of emotional distress,” and also common law bad faith. *Id.* at 5. The court held that “the proper procedure . . . is to allow these actions to be filed,” but to stay the claims until resolution of the underlying claim. *Id.* at 5-6. *Hepp* therefore contradicts the District Court’s conclusion.

None of the cases the court relied upon actually hold that a third-party claimant may sue an insurer only for bad faith.

D. Other states permit actions in contract and equity to enforce an insurer’s agreement to accept liability for an injury claim.

In *Nationwide v. Heck*, an Indiana district court granted summary judgment against an insurer, in favor of an injured third-party plaintiff, after the tortfeasor’s

insurer accepted liability for the injured plaintiff's claim. *Nationwide Ins. Co. v. Heck*, 873 N.E.2d 190, 196 (Ind. App. 2007). After the insurer intervened, the district court ruled against the insurer in summary judgment via the equitable causes of action of promissory estoppel and laches. *Id.* The insurer appealed. *Id.* The appellate court, rather than finding the insurer liable via equitable doctrines, held the insurer was liable via contract. *Id.*

Similarly, in *Sigmon v. State Farm*, the tortfeasor's insurer allegedly accepted liability for the plaintiff's claim. No. 517CV00225KDBDCK, 2019 WL 3928641, at *2 (W.D.N.C. Aug. 19, 2019) ("State Farm accepted '100% liability' and/or told Sigmon that it was taking 'full responsibility' for the accident"). The acceptance of liability was not written, so the exact wording was at issue. *Id.* When the insurer later claimed the plaintiff was contributorily negligent, the plaintiff sued State Farm for his damages. *Id.* The Federal District Court held:

State Farm contends that Sigmon has no right to seek payment for his bodily injuries from State Farm prior to a judgment against Hennington, its insured. However, if State Farm made a promise to Sigmon to pay his damages arising from the accident on behalf of its insured and is equitably estopped from changing its position then Sigmon can recover those bodily injury damages in this action (in the amount found by a jury).

Id. at p. 5 n.2.

Once the agreements to accept liability were proven, the *Heck* and *Sigmon* plaintiffs were permitted to recover their personal injury damages directly from the insurers, due to the insurers' agreements.

E. No legitimate public policy is served by limiting an injured claimant in Amber’s position to a bad faith cause of action alone.

Allowing an insurer to ruin an injured claimant’s claim against its insured by convincing the claimant to stop gathering evidence against the insured does not serve Montana public policy.

If an insurer itself (not the insured tortfeasor), causes harm to a claimant by instructing the claimant not to gather evidence of its insured’s negligence, there must be a remedy for that harm. Unless the legislature directs otherwise, any claimant should be permitted to sue the insurer, to remedy the injury the insurer caused, via whatever causes of action apply.

Next, Mont. Code Ann. § 33-18-242(4) (2023) (which, per the court’s Order, does not apply here), currently prohibits certain claims by third-party claimants, against insurers, for damages resulting from claim handling. Importantly, the statute breaks the prohibition into two categories.

The first category is this: “A third-party claimant may not bring an action for [common law] bad faith in connection with the handling of an insurance claim.”

The second is: “A third-party claimant . . . may bring an action against the insurer . . . pursuant to this section, but not under any other theory or cause of action.”

“When the Legislature does not use identical language in different provisions of a statute, it is proper for us to assume that a different statutory meaning was intended.” *Shepherd v. State ex rel. Dept. of Corrections*, 2021 MT

70, ¶ 17, 403 Mont. 425, 483 P.3d 518. Further, “[a]n interpretation that gives effect is always preferred over an interpretation that . . . treats the statute as mere surplusage.” *Am. Linen Supply Co. v. Dept. of Revenue*, 189 Mont. 542, 545, 617 P.2d 131, 133 (1980).

Therefore, the statute recognizes that for claims accruing prior to its passage, a third-party claimant could sue for common law bad faith, and also pursuant to other theories and causes of action. Standing alone, this bedrock rule of statutory construction defeats the District Court’s holding.

In conclusion, no case holds common law/statutory bad faith to be the only available causes of action against a third-party insurer. Under the common law, injured claimants may sue an insurer via any cause of action which fits the facts. This Court should reverse the District Court’s dismissal of Amber’s lawsuit.

II. Amber, not Cincinnati, is entitled to judgment as a matter of law on her claims.

The District Court ruled *correctly* when it first granted Amber’s motion for partial summary judgment against Cincinnati. This holding should be affirmed.

Amber’s pending claims against Cincinnati may be broken into three categories: 1) contract formation/breach of contract; 2) promissory estoppel; and 3) the remainder of Amber’s claims.

As to the first two categories, Amber moved for summary judgment on those claims. Amber is entitled to summary judgment. This holding would then result in

a trial on damages alone.

Alternatively, at minimum, Amber is entitled to a jury trial on liability and damages on her claims.

Amber will first discuss incorrect analysis within the District Court's ruling which affects more than one cause of action, in subsections A-B below. Then Amber will specifically discuss each of the three categories mentioned above, in subsections C (contract), D-E (promissory estoppel), and F (remainder of Amber's claims).

A. Cincinnati waived/abandoned its arguments that Amber did not establish the elements of contract formation and promissory estoppel.

Concerning any given issue before the court, a party "abandons" arguments not raised in their briefs. *Sullivan v. Cherewick*, 2017 MT 38, ¶¶ 13-14, 386 Mont. 350, 391 P.3d 62; *see also U.S. v. Dutton*, 234 F.3d 1278, FN4 (9th Cir. 2000) (arguments not raised in briefing are deemed abandoned). Even "[o]ral argument is not a forum to present new evidence or legal theories that a party has not already submitted in its written filings." *Cox v. Cox*, 2015 MT 78N, ¶ 9, 378 Mont. 541, 348 P.3d 673 (Unpublished). Further, if a party raises an argument in briefing, but abandons the argument at oral argument, the argument is waived. *State ex rel. Hoagland v. Sch. Dist. No. 13 of Prairie Cnty.*, 116 Mont. 294, 151 P.2d 168, 169 (1944).

On November 28, 2023, Amber sought partial summary judgment on

Cincinnati's direct liability to compensate her for her harms and losses.

Amber argued the undisputed facts meet the elements of promissory estoppel and contract formation, among other causes of action. Dkt. 13-14. On December 19, 2023, Cincinnati responded. In its response, Cincinnati chose not to contest that Amber has proven all of the elements of her causes of action against Cincinnati. Dkt. 18.

Amber emphasized this in her Reply brief, stating: “Importantly, Cincinnati does not contest Amber’s assertion that all the elements of promissory estoppel are established. . . . Likewise, Cincinnati does not contest that all of the elements of contract formation have been met.” Dkt. 20 at 3 (Underline in original). Cincinnati did not submit any filing disputing this contention.

Amber further noted Cincinnati’s waiver in her initial proposed order, filed January 5, 2024. Prop. Or. at 5.

Eight months later, at the July 2024 oral argument, Amber argued:

[MR. LINCOLN PALMER] . . . Amber is entitled to summary judgment on her promissory estoppel claim, her contract formation claim, because not only are [Cincinnati’s] arguments moot and incorrect, Cincinnati does not dispute that Amber can meet the elements of her claims.

. . .

. . . to reiterate, Cincinnati is not contesting that the elements of contract formation and promissory estoppel are met by the undisputed facts here. . . .

THE COURT: That they are not met?

MR. LINCOLN PALMER: Cincinnati is not contesting those elements in this briefing.

THE COURT: Yeah.

Oral Arg. Tr: 12:3-7, 10:4–12, July 26, 2024.

Cincinnati then had its turn to respond at the hearing. Cincinnati: 1) did not dispute that the elements of contract formation and promissory estoppel were proven; and 2) did not dispute Amber’s assertion that Cincinnati had waived that argument.

After discovery closed, and after the District Court granted Amber’s Motion, Cincinnati then asserted the brand new argument that the elements of Amber’s claims were not met. Dkt. 45, 36.

But, under Montana law, the moment Cincinnati failed to challenge Amber’s assertion that the elements of her claims were met, in its December 2023 response brief, those arguments were “abandoned.” *Sullivan*, ¶¶ 13-14. Cincinnati’s new arguments were nine months too late. Even raising the new arguments at oral argument would have been far too late.

The Court noted that Cincinnati did not address Amber’s contract and promissory estoppel claims. Dkt. 77 at 5-6.

It was not harmless error to allow Cincinnati to assert brand new arguments after the District Court granted Amber summary judgment, and nine months after Cincinnati declined to contest the elements of Amber’s claims. Cincinnati made these arguments for the first time on September 4, 2024. Critically, discovery closed on August 31, 2024, four days earlier.

But Amber had relied upon Cincinnati's waiver in December 2023, right as the discovery period began, by not seeking additional discovery to help prove the elements of her claims. When Amber requested production of Cincinnati's claims file in discovery, and Cincinnati refused to produce it, Amber chose not to file a motion to compel the claims file.

Cincinnati's claims file undoubtedly contains evidence directly relevant to proving the elements of contract formation, promissory estoppel, and Amber's other claims. But, relying on Cincinnati's waiver, Amber chose not to pursue production of the claims file during the nine months of discovery.

When Cincinnati first contested the elements of Amber's claims, four days after discovery closed, Amber had no opportunity to engage in the discovery which would have aided in proving her claims.

Now, the District Court holds that the facts cannot possibly prove the elements of Amber's claims. This is entirely unfair and unduly prejudicial to Amber. If Cincinnati had timely contested the elements of Amber's claims during briefing, as required by the rules, discovery was at that time still open and Amber would have utilized the important evidence in Cincinnati's claims file.

This Court should disregard Cincinnati's waived arguments as untimely (resulting in summary judgment for Amber), or reverse the District Court's denial of Amber's motions to strike Cincinnati's waived arguments.

B. Cincinnati did not properly move for complete summary judgment.

When an issue is not raised in the briefing, “the movant never demonstrate[s] an absence of fact and entitlement on th[e] issue, nor d[oes] the non-movant have a chance to present substantial evidence refuting that absence or entitlement.” *Pilgeram v. Greenpoint*, 2013 MT 354, ¶¶ 22, 24, 373 Mont. 1, 313 P.3d 839 (appellees “ma[d]e no mention” of the argument “in their motions for summary judgment”). Summary judgment is, thus, improper. *See id.* ¶¶ 24, 27.

In its Motion for Summary Judgment, Cincinnati argued that Amber’s claims should be dismissed because “each and every claim fails as a matter of law.” Dkt. 44.

But, in its brief supporting its motion, Cincinnati did not specifically argue that each of Amber’s claims fail as a matter of law. Cincinnati articulated only five arguments in support of its motion: 1) that §33-18-242(4) (2023) bars Amber’s claims; 2) that “Cincinnati is not an actual or ostensible agent of Tire Rama;” 3) that “D’Hooge cannot establish the elements of promissory estoppel;” 4) that “D’Hooge’s claim against Cincinnati for ‘laches’ makes no sense;” and 5) that “D’Hooge’s waiver argument fails.” Dkt. 45 at 2, 6, 8, 16, 17.

Even though, in Amber’s November 2023 motion for partial summary judgment, Amber had demonstrated, element by element, that the undisputed facts meet all four elements of contract formation, Cincinnati still failed to argue that the

elements of contract formation were not met, in its brief (Dkt. 45) supporting its Motion (Dkt. 44).

Moreover, Cincinnati failed to argue, much less demonstrate, that the facts do not satisfy the elements of Amber's other claims. In her Amended Complaint, Amber's specifically enumerated claims include spoliation of evidence, equitable estoppel and / or quasi estoppel, and "every claim and cause of action supported by the facts alleged in th[e] Complaint," pursuant to Montana's notice pleading rules, and *Kunst v. Pass*, 1998 MT 71, ¶ 35, 288 Mont. 264, 957 P.2d 1.

In its motion and brief in support, Cincinnati did not claim that Amber had failed to prove, or could not prove, the elements of contract formation, spoliation of evidence, or equitable estoppel, even though those causes of action were specifically enumerated in Amber's Complaint. Dkt. 44-45.

Amber pointed this out to the court in her Response Brief.³

Cincinnati attempted to address some of these issues in its Reply Brief, for the first time. But ". . . a party [may not] raise an issue for the first time in its reply brief." *Unified Industries, Inc. v. Easley*, 1998 MT 145, ¶¶ 27-28, 289 Mont. 255, 961 P.2d 100. "Unified's argument that the elements of equitable estoppel were not satisfied is not properly before this Court" *Id.* "Although this is a rule of appellate procedure, the principle applies equally to reply briefs filed in the district

³ ". . . Cincinnati has not addressed [a number of causes of action] in its Motion for complete summary judgment. Even if the Court does not strike this motion, there is no circumstance under which the Court should grant Cincinnati's motion." Dkt. 58 at 6.

court.” *WLW Realty Partners, LLC v. Contl. Partners VIII, LLC*, 2015 MT 312, ¶ 20, 381 Mont. 333, 360 P.3d 1112.

Each of Amber’s causes of action which Cincinnati failed to specifically name, and attack as inadequate in its motion and brief supporting that motion, must stand (contract formation, spoliation of evidence, and equitable estoppel).

Cincinnati did not properly move for summary judgment on these causes of action, thereby failing to meet its initial burden as movant, while simultaneously denying Amber the opportunity to respond in briefing.

On this basis, this Court should reverse the District Court.

C. Amber established the elements of contract formation, and is entitled to summary judgment.

“The existence of a contract is a question of law.” *Chipman v. N.W. Healthcare Corp., Applied Health Services, Inc.*, 2014 MT 15, ¶ 12, 373 Mont. 360, 317 P.3d 182.⁴

After granting summary judgment for Amber on her contract claim, the District Court later reversed itself, ruling the facts could not establish the elements of contract formation. Its first ruling was correct; its second ruling was not.

Plaintiffs must establish four elements to prove the existence of a contract: (1) identifiable parties capable of contracting; (2) their

⁴ However, “[a] party’s intent regarding contract formation presents a question of fact,” so to the extent the District Court resolved a fact issue without properly accounting for Amber’s understanding, the adjuster’s understanding, and the Court’s prior understanding (all consistent), the Order requires reversal. *See AAA Const. of Missoula, LLC v. Choice Land Corp.*, 2011 MT 262, ¶ 21, 362 Mont. 264, 264 P.3d 709.

consent; (3) a lawful object; and (4) a sufficient cause or consideration.

Chipman, ¶ 15.

Consideration includes “some legal benefit and/or . . . some detriment.”

Kubiak v. Cnty. of Ravalli, 32 F.4th 1182, 1191 (9th Cir. 2022) (citations omitted).

Here, the undisputed facts establish all four elements. First, the parties capable of contracting are Amber and Cincinnati. Second, consent is established because Cincinnati manifested a willingness to enter into a bargain (the email), and Amber, by her actions (accepting the agreement, not gathering evidence), consented to the agreement. Third, “a lawful object” is established because contracting that one party is liable for another party’s damages is a common lawful object. Fourth and finally, as to consideration: Cincinnati accepting liability for Amber’s claim against Tire Rama is highly valuable to Amber. It allowed Amber to proceed with her life, her healing process, and her legal claim, without the time, trouble, and expense to prove that Tire Rama negligently maintained their parking lot / caused her injuries. This is a “legal benefit.”

Likewise, consideration flowed from Amber to Cincinnati. Cincinnati avoided the immediate expense of further investigation and preserving the scene. Amber did not hire a lawyer for over two years. Instead, she dealt directly with Cincinnati (including during settlement negotiations). Additional consideration is that Amber did not file suit immediately, she waited nearly three years to sue

Cincinnati's insured, only after settlement negotiations broke down. These are "legal benefits." (See the similar "benefits" the Sigmon insurer accepted. *Sigmon* at *5.) Finally, pursuant to *Kubiak*, 32 F.4th at 1191, Cincinnati incurred a detriment, e.g. waiving its right to deny liability, adding to the exchanged consideration.

After ruling in favor of contract formation as a matter of law (July oral argument), and after acknowledging that Cincinnati did not contest the elements of contract formation (Dkt. 64 at 3), the court reversed itself, reasoning that there was no meeting of the minds on all essential/material terms. *See Jarussi v. Sandra L. Farber Tr.*, 2019 MT 181, ¶ 16, 396 Mont. 488, 445 P.3d 1226.

But "[s]ubsidiary matters, collateral matters, or matters that go to the performance of the contract, do not constitute material terms." *Perl v. Grant*, 2024 MT 13, ¶ 15, 415 Mont. 61, 542 P.3d 396.

The agreement did not set out every possible term (like, e.g., the amount Cincinnati would pay Amber—which could not be known just weeks after the fall). But it did set out all essential terms. The essential terms to the contract are: 1) Amber agrees not to gather any evidence to prove that Cincinnati's insured negligently injured her, and 2) Cincinnati accepts liability for Amber's slip and fall claim.

The instruction to stop gathering evidence can only mean one thing: Amber will not have to prove Tire Rama's negligence, because Cincinnati will be paying her slip and fall damages. What other rational, non-fraudulent meaning could this

instruction convey? Indeed, the adjuster testified that she believed Amber would stop gathering evidence to support the claim, due to the agreement. Dkt. 58 at 10.

It is an unavoidable conclusion that there was a meeting of the minds between Amber and Ms. Lee, as they have both testified that their agreement included payments for all Amber's harms and losses from the slip and fall. Dkt. 58 at p. 11; Ex. B to Dkt. 14.

The District Court was correct when it described its understanding of the agreement at the July oral argument. *See* full quote at pp. 12-13 above. This understanding should be affirmed and upheld. Once the adjuster's uncontested testimony is taken into account, which the District Court failed to consider in the Dkt. 77 Order, it is abundantly clear that Cincinnati contracted to pay Amber her general and special damages resulting from the slip and fall. For this reason, this Court should affirm and uphold the District Court's original July 2024 ruling.

Separately, this Court need not reach the merits of each element of Amber's contract formation claim, because Cincinnati waived/abandoned any argument that the elements were not established. Cincinnati proceeded on this footing for the rest of the case, which foreclosed Amber's ability to compel production of the claims file because the claims file was not relevant to any contested issue.

Cincinnati only argued against Amber's contract formation cause of action, for the very first time, in its Reply Brief supporting its Motion for Summary Judgment. Dkt. 63.

On the merits, or due to the untimely assertion of Cincinnati's argument, Amber should win summary judgment on her claim of contract formation. On remand, she is entitled to a jury trial to establish the amount of her slip and fall damages. At such a trial, Cincinnati will retain its ability to vigorously contest causation and damages.

D. Amber established the elements of promissory estoppel, and is entitled to summary judgment.

Via the cause of action promissory estoppel, and her other equitable causes of action, Amber explicitly asked the District Court to "sit in equity." Dkt. 75 at 16.

"Estoppel 'prevent[s] a party from taking an unconscionable advantage of his own wrong while asserting his strict legal right,' is 'predicated on equity and good conscience, and will grant relief to prevent a party from suffering a gross injustice at the hands of the other party who brought about the situation or condition.'" *Rolan v. New W. Health Services*, 2022 MT 1, ¶ 20, 407 Mont. 34, 504 P.3d 464. Cincinnati created this situation. Estoppel applies here.

"Generally speaking, estoppel arises when a party by his acts, conduct or acquiescence, has caused another in good faith to change his position for the worse." *Smith v. Krutar*, 153 Mont. 325, 332, 457 P.2d 459, 463 (1969). "[E]stoppel . . . will be invoked where 'justice, honesty, and fair dealing' are promoted." *Id.*, ¶ 11.

If the Court finds that the emailed agreement between Cincinnati and Amber is not technically a contract, then an equitable remedy is necessary to prevent gross injustice.

“The basic principle of promissory estoppel is set forth in [the] Restatement of Contracts[]: ‘A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.’” *Montana Power Co. v. Pub. Serv. Commn.*, 214 Mont. 82, 96, 692 P.2d 432, 439 (1984). Promissory estoppel requires proof of four elements: “a clear and unambiguous promise, reliance by the promisee, reasonableness and foreseeability of the reliance, and resulting injury to the promisee. . . . [P]romissory estoppel does not require a showing of an intent to mislead. *S & P Brake Supply, Inc. v. STEMCO LP*, 2016 MT 324, ¶44, 385 Mont. 488, 385 P.3d 567.

Here, the undisputed facts establish the elements of promissory estoppel. Cincinnati did not argue otherwise until nine months after Amber moved for summary judgment, and after the court had ruled in Amber’s favor.

1. A clear and unambiguous promise.

Cincinnati’s December 28, 2020 email, Subject “claim #36624499 slip/fall,” responds to Amber’s eager and ready offers to marshal any evidence Cincinnati might deem necessary to determine Tire Rama’s liability. The acceptance: “I do

not need you to do anything further to gather information to support your claim. We are accepting liability for your claim.” – is a clear and unambiguous promise. The promise is made even more clear when taking into account the adjuster’s testimony describing her intention: Cincinnati was accepting liability for payments for all of Amber’s general and special damages including pain and suffering.

Cincinnati’s counsel’s untimely claim that the promise was ambiguous does not change the adjuster’s testimony, and does not render the promise ambiguous.

2. Reliance by the promisee.

Amber relied on Cincinnati’s promise.

Amber had plans to gather evidence proving Tire Rama’s liability, as described above. In reliance on Cincinnati’s acceptance of liability, Amber immediately ceased gathering evidence to prove Tire Rama’s liability. Ex. B to Dkt. 14. No affidavit or evidence contradicts Amber’s testimony.

Amber testifies: “I changed my plans.” *Id.* Amber did not approach the surrounding businesses to obtain security camera footage from the day of the slip and fall. *Id.*

Amber did not obtain testimony from the food truck worker who had parked in Tire Rama’s parking lot that day, a crucial independent witness. *Id.*

Two days after the slip and fall, on December 9, 2020, Amber spoke with at least one attorney about her potential claim. *Id.* When Cincinnati accepted liability, Amber decided not to hire representation for over two years, negotiating with

Cincinnati absent counsel.

Further, Amber did not return to the scene to take clear pictures and video. Finally, Amber did not hire a premises liability expert to observe and document the area of the slip and fall during December 2020. *Id.*

Cincinnati's promise unquestionably induced inaction from Amber.

3. Reasonableness and foreseeability of the reliance.

The Cincinnati adjuster testified:

9 Q. What was your belief that Amber would do
10 in terms of, is she going to continue to gather
11 information to support her claim or is she going to
12 stop?
13 A. I would think she would stop, since I'd
14 already made a liability decision.

Dkt. 58 at 10.

4. Resulting injury to promisee.

As soon as Tire Rama gave notice it was denying liability, and asserted its employee had seen Amber running, the undersigned attempted to marshal evidence to prove Amber was not running, and to prove Tire Rama's liability.

The attempts failed because: 1) Amber did not follow through with her plan to gather evidence to prove Tire Rama's liability (complying with Cincinnati's instruction); 2) Cincinnati did no further investigation, like interviewing witnesses; and 3) Cincinnati allowed the scene to be materially changed (Ex.s E-F, B to Dkt.

14) by failing to instruct Tire Rama to maintain the scene as it was at the time of the fall.

The security camera footage pointed in the direction of the south and side Tire Rama parking lots (which would have shown the state of the parking lot and would have shown Amber walking towards the rear parking lot, not running), had been destroyed long ago. Ex. C to Dkt. 14.

The undersigned also tracked down the food truck worker (despite that the food truck had long-since ceased operations, and the worker had moved to another state). Unfortunately, the worker, who had just sold Amber food, and who would have seen Amber walking, not running, towards the rear parking lot, remembered nothing about that day when he was contacted three years later. Ex. D to Dkt. 14.

In addition to this missing and forgotten evidence, Amber missed the opportunity to prepare to effectively prove her case by not hiring counsel for over two years, by negotiating and otherwise communicating with Cincinnati absent counsel, by not returning to the scene to take clear pictures and video, and by not hiring a premises liability expert in December 2020.

Importantly, in 2024 the scene could no longer be properly evaluated in person as Tire Rama made significant changes to the area of the fall during the prior three years. Cincinnati did not require, or even suggest, that Tire Rama preserve in place the large piece of equipment which was affixed to the parking lot,

in the exact area where Amber fell.⁵ Ex. E-F, B to Dkt. 14

Further, Tire Rama refused Amber's request to draft an incident report. Ex. A to Dkt. 14. This tipped Amber off to the fact that it was completely up to her to find and interview eyewitnesses, to take pictures and videos, and to evaluate the scene, as Tire Rama was refusing to document what had occurred. But Amber did not follow through with her plans to thoroughly investigate and document the slip and fall, because Cincinnati told her not to.

The resulting injury to the promisee, Amber, is plain. Cincinnati's promise and instruction undermined Amber's ability to prove Tire Rama's liability. Vital evidence was missing, destroyed, altered, and forgotten. Not one, or two, or three pieces of evidence – mountains of crucial evidence were simply not available. Both Amber and Tire Rama opted to forgo collecting contemporary evidence concerning the slip and fall for three years.

The uncontroverted facts establish all four elements of promissory estoppel. Cincinnati should be estopped from claiming it is not liable to pay Amber her general and special slip and fall damages. Amber is entitled to partial summary judgment on Cincinnati's liability.

It is inequitable to allow an insurer to sabotage an injured party's tort claim against the insurer's insured without consequence. It is inequitable not to enforce

⁵ Tire Rama concealed this substantial alteration of the scene, via its discovery responses, which claimed no changes to the scene had been made. Ex. G to Dkt. 14 .

an agreement or promise that the insurer describes as including payments for all general and special damages.

Equitable remedies were created for situations just like this, where the promisor induces inaction by the promisee, and “injustice can be avoided only by enforcement of the promise.”

This Court should uphold the District Court’s July 2024 holding granting summary judgment for Amber on her promissory estoppel claim.

E. Alternatively, a jury should decide whether promissory estoppel applies. I.e., Cincinnati is not entitled to summary judgment when viewing the facts in the light most favorable to Amber.

The District Court’s understanding:

On July 26, 2024, the court articulated its interpretation of Cincinnati’s December 2020 agreement with Amber.

The court understood Cincinnati to mean: “We’re accepting liability . . . and you don’t have to investigate it any further because we’re going to pay . . . we’re going to pay whatever its is, so just rest easy. Don’t go out and do any investigation.” Oral Arg. Tr. 17:4-12, 22:1-14, July 26, 2024. *See* full quote above.

Amber’s understanding:

Amber understood the agreement exactly as the court understood it. Ex. B to Dkt. 14, ¶¶ 3-5.

Cincinnati’s understanding:

Importantly, this is how Cincinnati understood it too. The Cincinnati

adjuster who authored this agreement agreed that “there would be payments for pain and suffering” and testified: payments for “all” “general damages and special damages” were “included” “in the acceptance of liability.” Dkt. 58 at p. 11.

Despite Cincinnati via its adjuster, Amber, and the court all understanding the agreement to mean the same thing, the court later accepted Cincinnati’s counsel’s untimely argument to the contrary. In so doing, the District Court ruled for Cincinnati, stating it was not sure what the agreement meant. Dkt. 77 at 18.

Summary judgment requires that all evidence must be viewed in the light most favorable to the non-moving party. *Oliver*, ¶¶ 21-22. Here, the court was ultimately not sure whether Cincinnati was agreeing to pay for all Amber’s general and special damages. It did not view the evidence in the light most favorable to Amber.

The adjuster testified that her acceptance of liability included payments for “all” Amber’s “general damages and special damages.” Viewing this evidence in the light most favorable to Amber, a reasonable juror could find that the adjuster intended her acceptance of liability to include payments for all Amber’s general and special damages. No witness says otherwise.

“Summary judgment is inappropriate where . . . reasonable jurors could reach different conclusion as to a particular material fact.” *Meadow Lake Estates Homeowners Ass'n v. Shoemaker*, 2008 MT 41, ¶ 25, 341 Mont. 345, 178 P.3d 81.

The court itself reached different conclusions as to the meaning of the

agreement. It was illogical for the court to then grant summary judgment to Cincinnati. First holding that Amber proved the elements of promissory estoppel, then based on the same evidence, proceeding to hold that no reasonable juror could find that the elements of promissory estoppel were met, was irrational and unjust. The undersigned speculates that this ruling occurred only because Cincinnati represented to the court: “it is undisputed that D’Hooge cannot meet any of the elements of her claims against Cincinnati.” Dkt. 45 at 19.

Amber submits that even viewing the evidence (the plain language of the agreement/the adjuster’s testimony) *in the light most favorable to Cincinnati*, no reasonable juror could understand anything other than this: Cincinnati intended to agree to pay for Amber’s general and special damages from her slip and fall.

The District Court failed to view the evidence in the light most favorable to Amber—indeed, the court failed to even mention, much less analyze, the critical testimony of the adjuster. Dkt. 77. Therefore, it could not and did not view such evidence in the light most favorable to Amber. This failure requires reversal.

Persuasively, in *Sigmon*, the Federal Court held that the plaintiff was entitled to a trial to determine the extent to which State Farm had accepted liability. Here, the exact words of the adjuster are not at issue, because they were conveyed via email, rather than a phone call. Additionally, Amber’s claim is far stronger than *Sigmon* because the *Sigmon* insurer did not instruct the injured party to stop gathering evidence, and the *Sigmon* adjuster did not testify as to her exact intention

when accepting liability, as occurred here.

Amber is entitled, at a minimum, to a jury trial to determine whether the elements of promissory estoppel are met by the facts.

F. Amber is entitled to a jury trial on her other causes of action.

1. Equitable Estoppel.

Amber alleged equitable estoppel as a cause of action against Cincinnati. Dkt. 22.1 at 13. In its brief supporting its motion for summary judgment, Cincinnati failed to argue that Amber did not or could not establish the elements of equitable estoppel. Dkt. 45. Amber pointed this out in her response. Dkt. 58 at 5-6; *See* footnote 3 above.

Summary judgment for Cincinnati was inappropriate once Cincinnati failed to challenge the equitable estoppel cause of action.

To make matters worse, in the Order granting Cincinnati summary judgment, the court even acknowledged that equitable estoppel was a cause of action Amber lodged against Cincinnati. Dkt. 77 at 3. Yet, the court did not analyze the elements of equitable estoppel, or hold that Amber could not establish those elements. Dkt. 77.

Amber never had the chance to point out to the court how the facts, viewed in the light most favorable to Amber, met the elements of equitable estoppel. The court, nevertheless, noted that one of Amber's causes of action was equitable estoppel, and then inexplicably dismissed the entire case without analyzing

equitable estoppel.

This requires reversal.

2. Spoliation.

Amber set out the cause of action of spoliation in her Complaint against Cincinnati. Dkt. 22.1 at 12.

In her brief responding to Cincinnati's motion for summary judgment, Amber argued: "Cincinnati does not contest or even address Amber's spoliation claim." Dkt. 58 at 5. Cincinnati did not specifically seek summary judgment on Amber's spoliation claim.

Undeterred by this fact, the lower court dismissed Amber's spoliation cause of action.

The District Court held that Cincinnati had no duty to take actions to preserve evidence. Dkt. 77 at 20-21. This is incorrect.

The *Coleman* Court considered this issue. The Court analyzed the duty of a third-party insurer to preserve evidence so as not to hamper the claimant's ability to maintain an action against the insurer's insured / the tortfeasor. *Coleman Const.*, at *5. The Court held that the insurer owed a duty to the third-party claimant to take reasonable steps to preserve the scene and thereby preserve evidence relating to the claim until liability was adequately investigated, because the insurer's insured could face potential liability in the claim. *Id.* at 5-6. The Court held that claimants may bring spoliation actions against third-party insurers when their legal

claims against the insured are “hampered” by the non-preservation of evidence. *Id.*

Here, especially because Cincinnati told Amber to stop gathering evidence, and it would later deny liability and argue that Amber must prove her claim against Tire Rama, Cincinnati had a duty to take reasonable steps to preserve evidence concerning Tire Rama’s liability.

Cincinnati did not take those steps. It did not instruct Tire Rama to preserve the scene, which resulted in Tire Rama removing the equipment which was affixed in the exact area where Amber fell, substantially altering the scene. Cincinnati did not conduct timely interviews of the witnesses and Tire Rama employees. It did not send a preservation of evidence notice to the owner of the security cameras. Cincinnati allowed all this evidence, and more, to be lost, destroyed, and forgotten, all while instructing Amber to stop gathering evidence.

Amber can prove the elements of spoliation, as stated in *Coleman*, at *4. Both procedurally and on the merits, the court was wrong to dismiss Amber’s spoliation claim.

3. Other causes of action under which the Amended Complaint reserves the right to recovery.

Montana is a notice pleading jurisdiction. *Kunst*, ¶ 35. A complaint need only “put a defendant on notice of the facts the plaintiff intends to prove; the facts must disclose the elements necessary to make the claim; and the complaint must demand judgment” *Id.* “A pleading . . . must contain: (1) a short and plain

statement of the claim showing the pleader is entitled to relief; and (2) a demand for the relief sought.” M. R. Civ. P. 8(a).

Even when a complaint does not explicitly name a cause of action, or plead the elements of that cause of action, the court still must determine whether the complaint alleges facts which state a claim for a certain cause of action by reasonable inference. *Fire Ins. Exch. v. Weitzel*, 2016 MT 113, ¶ 20, 383 Mont. 364, 371 P.3d 457. Indeed, the Rules of Civil Procedure provide an example complaint for suit on a promissory note. M. R. Civ. P. Appendix of Forms, Form 2. Nowhere in the example complaint is there a specific cause of action listed; nowhere is the cause of action “breach of contract” or “contract formation” specifically named.

In her Complaint, Amber specifically “reserve[d] the right to recovery under each and every claim and cause of action supported by the facts alleged in this Complaint” Dkt. 22.1 at 12.

Amber responded to Cincinnati’s Motion for Summary Judgment in part by arguing that the facts alleged in her Complaint also give rise to these causes of action: unjust enrichment, negligent and intentional interference with prospective economic advantage, and constructive fraud. Dkt. 58 at 5-6.

The District Court, however, declined to even consider these causes of action simply because the specific names of those causes of action were not pled in the Complaint. Dkt. 77 at 13. The court did so, regardless of whether the facts

alleged in the Complaint could prove those causes of action.

The court ignored Amber's assertion in her response brief that the facts met the elements of these causes of action. *See* Dkt. 58 at 5.

This alone requires reversal.

CONCLUSION

This Court should reverse the District Court and grant partial summary judgment to Amber.

DATED this 12th day of June, 2025.

ATTORNEYS INC., P.C.

By: /s/ Lincoln Palmer

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, and pursuant to this Court's May 2, 2025 Order granting Appellant's Motion for Over-length brief of no more than 12,500 words, I certify that Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted and indented material, headings, the Statement of the Issues, the Table of Contents, and the Table of Authorities; and the word count calculated by WordPerfect is 12,489 words, excluding certificate of service, certificate of compliance, title page, Table of Contents, and Table of Authorities.

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CERTIFICATE OF SERVICE

I, Lincoln Palmer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 06-12-2025:

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