IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No.
DA 25-0335

LORI COLLINS,

Plaintiff/Appellee/Cross-Appellant,

v.

WHITEFISH HOUSING AUTHORITY,

Defendant/Appellant/Cross-Appellee.

On Appeal from the Montana Eleventh Judicial District
Flathead County Cause No. DV-23-1277, Hon. Amy Eddy

COMBINED APPELLEE'S RESPONSE BRIEF AND CROSS-APPELLANT'S OPENING BRIEF

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STATEMENT OF FACTS

Lori Collins was employed by the Whitefish Housing Authority (WHA) from 2007 to 2022. From 2007-2013, she was its Operations Manager. From 2013-2022, she was its Executive Director. (T.T. 249:19-24, 255:5-8) While employed, Lori managed the 50-unit Mountain View Manor and started the Home Ownership and Development Program that raised funds to buy land, buy houses, and buy down the purchase price of homes in Whitefish so that low- and moderate-

income households could purchase in town. *Id.,* 250. WHA started with zero homes and had acquired 11 homes by the time Collins resigned. *Id.,* 251:8-14. Collins also assisted in buying land, building a 49-unit low-income apartment complex known as the Alpenglow Apartments, and also purchased another plot of land for a second complex at the time of her resignation. *Id.,* 251-252. Collins also secured the "snow lot" in downtown Whitefish for yet another location for an apartment complex. *Id.,* 253:4-9. Collins took care of the rental assistance program, helped locate and purchase low-income housing in Whitefish, and helped identify, design, build, and rent several low-income apartments in Whitefish. *Id.,* 250, 256. Her service was exemplary. In her 15 years with WHA, Collins received positive reviews and had never been disciplined. *Id.,* 326:16-18.

In August 2022, a tenant at the Mountain View Manor apartments complained that Collins had preferentially placed another tenant in violation of HUD regulations. (Trial Exh. (T.E.) 108) Pam Meadows, the Operations Manager, described this tenant as a "troublemaker." (T.T. 619:4) Board members knew this tenant had made unfounded accusations against Collins. *Id.,* 479:25-480:9, 601:9-12. WHA engaged the services of attorney Sarah Simkins from Kalispell to conduct an independent investigation of the allegation. (T.E. 108, APP. 1) On September 8, 2022, Simkins issued her report and concluded that

Collins had not engaged in any wrongdoing, and there was no evidence of preferential treatment. *Id.*

The troublemaker continued with his allegations, and the Board, despite having Simkins' report, refused to defend Collins. (T.T. 295:20-296:7, 751) Lori Collins resigned on October 15, 2022.

In the Minutes of the October 19, 2022, Board Meeting, Commissioner Williams "stated for the record that previous executive director Lori Collins has given a lot of her time, love, energy and life to this community and to housing and we are very appreciative of her twenty plus years of service to the community and to the cause. She has worked tirelessly and she cares very deeply . . . ." (T.E. 8)

WHA hired Collins back on a contract basis for November and December 2022 while it searched for a new executive director. (T.T. 299:5-300:4) On January 3, 2023, following a nationwide search, WHA hired Dwarne Hawkins as its Executive Director. *Id.,* 455:7-11. Hawkins held the same position and had the same duties as Collins but WHA paid him $120,000 – twice as much as it had paid Collins. *Id.,* 455:20-456:21.

From December 31, 2022 to July 23, 2023, Collins had no involvement with WHA. *Id.,* 300:9-18.

On July 9, 2023, a reporter from the Daily Interlake newspaper called WHA Chairman Ben Johnson about running an article. *Id.,* 439:18. Following that call,

the Chairman did not know that the article would be about Lori Collins or her employment. *Id.*, 440:2-8. Johnson understood that the purpose of the article was to examine the challenges that the Housing Authority faced and look forward rather than backwards. *Id.*, 439:21-25. Johnson and the Board knew that its new Executive Director, Hawkins, was speaking with the reporter but believed he was speaking about his role as interim executive director at the Mountain View Manor. *Id.,* 453:8-15. Neither Johnson nor the Board knew that Dwarne Hawkins was speaking to the reporter about Lori Collins or the placement issue. *Id.,* 453:16-454:2, 548:10-15. The Board never provided Hawkins with approval to speak with the reporter about Lori Collins or the placement issue. *Id.,* 452:9-10.

On July 23, 2023, the Daily Interlake published an article entitled "*After scandal, Whitefish Housing Authority strives to rebuild trust.*" (T.E. 111, APP. 2) (hereinafter Article) In the Article, WHA's Executive Director made the following statements:

a. He described "his predecessor's actions as unethical." His predecessor was Lori Collins. (T.T. 306:6, 464:20, 548:25-549:5, 549:13-19, 575:24, 602:15-22)

b. He said Collins left the housing authority in a "really bad position."

c. He said "fixing the malfeasance of the prior administration" was his top priority. Lori Collins was the primary component of the "prior administration." *Id.,* 308:12, 465:13, 551:4-9, 575:22-24.

d. He said he apologized to the tenants for "Collins' misconduct."

e. He said "a lot of people were concerned about the Board hiring Collins back" on a contract basis.

WHA testified that no basis existed for its statements:

> Q. Let's go to Topic 3. Topic 3 is, quote, "Findings made against Lori Collins by the Board on the subject of the waitlist or placement issues after Simkins report –
> A. Uh-huh.
> Q. -- if any." Did the Whitefish Housing Authority Board ever make findings against Lori Collins on the subject of the waitlist or placement issue after Sarah Simkins' report of September 8, 2022?
> A. The Board made no such determination.
> Q. So no findings, correct?
> A. No findings.
> Q. Did the Board ever find Lori Collins was unethical for any reason at any time?
> A. The Board did not take a determination on that.
> Q. Did the Housing Authority ever tell Dwarne Hawkins that its position was that Lori Collins was unethical?
> A. No, it did not.
> Q. Did the Board ever find Lori Collins committed malfeasance for any reason at any time?
> A. That determination was never made.
> Q. Did the Housing Authority ever tell Dwarne Hawkins that its position was that Lori Collins engaged in malfeasance?
> A. No.
> Q. Did the Board find Lori Collins committed misconduct for any reason at any time?
> A. That determination was never made.

Q. Did the Housing Authority ever tell Dwarne Hawkins that its position was that Lori Collins engaged in misconduct?
A. No.

(T.T. 418-19)

A member of the Board testified that Hawkins' statements in the Article were "bullshit" and not reflective of the Board's position. *Id.,* 564-566. Not a single member of the Board testified that any of Hawkins' statements in the Article about Collins were true. *See, generally,* WHA's defense case in chief, T.T. 474-565. Meanwhile, many witnesses, including many of WHA's witnesses, testified to Lori's pristine reputation – the Whitefish City Mayor, John Muhlfeld (T.T. 572:17-20); the City Manager, Dana Smith (T.T. 586:15-23); WHA's former Chairwoman, Addie Brown Testa (T.T. 758-759); WHA's former Executive Director, Sueann Grogan-King (T.T. 647:12-648:21); WHA's former Board member, John Middleton (T.T. 461-7:11); and Whitefish community member, Alisha Blake (T.T. 661:3-23).

WHA expressly did not deny that its Executive Director made the statements attributable to him:

Q. Isn't -- is Whitefish Housing Authority denying that Dwarne Hawkins made the statements that are quoted or attributed to him in the article in section -- in Exhibit 1?
A. We have not -- not made any determination on those.
Q: Okay. So you're not denying that he made the statements.
A: That's correct.

Id., 426:20-427:2.

Also, WHA only employs three people: Hawkins as Executive Director; Pam Meadows as Operations Manager, and a maintenance manager. *Id.,* 308:16-20. Meadows testified that she spoke to Hawkins about the article the day after it was published and he never denied making the statements:

> Q. Did you discuss the article with Dwarne Hawkins.
> A. Yes, the next day it was a conference call between me and the maintenance person and myself.
> Q. Did Mr. Hawkins ever deny making the statements that are in the newspaper which are attributed to him?
> A. No, he didn't.

Id., 630:4-11.

Also, in a meeting called by the Mayor and City Manager, in which Hawkins was present, requesting that WHA retract its statements, neither Hawkins nor the Chairman denied making the statements attributable to WHA:

> Q. In that meeting did either Mr. Johnson or Mr. Hawkins ever say that they did not make the statements to which they were quoted and attributed?
> A. No.

Id. (Mayor)*,* 580:5-9; (City Mgr.) 590:12-16.

In addition to the wide-county exposure from the newspaper, the Article was posted on Flathead 411's Facebook Group, which has 60,000 followers. (T.E. 65, APP. 3; T.T. 612) The Article was republished in the Whitefish Pilot newspaper on July 27, 2023. (T.E. 112) The Article was then republished by Yahoo! News which has 180 million followers. (T.E. 64, APP. 4)

The Article was the first hit on a Google search for "Lori Collins Whitefish." (T.E. 121, APP. 5) Collins' human resource expert testified that the standard of practice for any employer is to run a Google search on any prospective employee. (T.T. 519:5-522:10) He further testified that with the *Scandal* article, Collins was unlikely to pass an initial screening and receive an interview, especially for an executive position. *Id.,* 522:12-528:8.

When the *Scandal* article was published, the Mayor of Whitefish, who by law appoints all members of the board to WHA, wrote to Chairman Johnson decrying Hawkins' "derogatory" statements and "strongly encouraging" the Board retract. (T.E. 117; T.T. 581:4) After meeting with the Mayor, the Board described the Mayor as "paternalistic" and was offended. *Id.,* 552:15. The Board refused to retract. (T.E. 57; T.T. 425:19-426:4) Collins hired counsel and sent a letter demanding retraction or face a lawsuit. (T.E. 3; T.T. 324:22-24) Again, the Board refused to retract. *Id.,* 328:9-11.

Collins sued Hagadone Publishing and WHA. Hagadone settled before trial. WHA countersued Collins for the premium salary it paid Hawkins based on a theory that Collins owed a duty to provide sufficient notice she was quitting. (Doc. 10) As mentioned, in its deposition, WHA never disputed making the statements attributed to it in the article. This testimony was read at trial. (T.T. 426:20-25)

In the Pretrial Order, WHA also did not contend that it did not make the statements. (Doc. 123, pp.7-8, ¶¶ 23-27) Rather, WHA contended that the statements attributable to it did not mention Collins by name:

> 23. The subject article does not contain a quote of Hawkins stating that Collins was unethical.
>
> 24. The subject article does not contain a quote of Hawkins stating that Collins committed misconduct.
>
> 25. The quote in the subject article that refers to the "malfeasance of the prior administration" does not state that it pertains to Collins specifically.
>
> 26. The quote in the article that refers to the "issues that played out last summer and fall" does not state that it pertains to Collins specifically.
>
> 27. Collins cannot prove that any quotes of Hawkins that do appear in the subject article were made with malice.

Id.

The Pretrial Order further provided that the parties had until August 29, 2024, to lodge any objections to any exhibit identified by the other party. *Id.*, 9-10. Further, the parties agreed that "Failure to object to any exhibit will constitute a waiver of that objection." *Id.* Collins identified "Daily Interlake Article 7/23/23" as Exhibit 111 and "Whitefish Pilot Article 7/23/23" as Exhibit 112. (Doc. 144[1], APP. 6) WHA did not lodge an objection to either exhibit. *Id.* WHA also

[1] Exhibit 1 to the Pretrial Order inadvertently did not contain the objections. However, WHA had filed them in Doc. 144.

identified the two articles as its Exhibits 207 and 208. (Doc. 143[2], APP. 7) In the final Pretrial Order, WHA identified the articles as Exhibits U and V (stamped Hagadone 1-2 and 5-6, respectively). (Doc. 123, APP. 8) Upon its approval, the Court "ORDERED that this Pretrial Order shall supersede the pleadings and govern the course of the trial of this case." *Id.*, p. 15.

At the pretrial conference on the morning of trial, Collins requested leave to refer to the article in opening statements. (T.T. 15:2) For the first time, WHA lodged a half-objection: "If it's being offered as to the contents of the article, no objection, but if it's being offered as written evidence of what was said during the interview between Mr. Hawkins and the reporter. . . ." *Id.*, 15:17-21. Collins responded by pointing out that WHA failed to object to the Article in the Pretrial Order. *Id.*, 17:6-9. The Court then said:

> THE COURT: All right. Well, I'm looking at the Defendant's Notice of Filing Objections to Trial Exhibits, Document 144, Exhibit 111, which is the Daily Inter Lake article, then 112, which is the Whitefish Pilot article. No objection was noted.

Id., 17:16-21.

When Collins offered Exhibit 111 into evidence, WHA objected on the same basis at the pretrial conference. *Id.,* 302, 324-25. The Court admitted the Article. *Id.*, 303:2. The next morning, the Court indicated that it had read WHA's point

[2] WHA provided a description of its exhibits when disclosing them by the deadline set forth in the Pretrial Order, yet only referenced them by bates number without a description in Exhibit 2 to the Pretrial Order.

brief and still maintained its ruling admitting the Article. *Id.*, 337. The Court explained that Hawkins' statements are not hearsay under M.R.E. 801(d)(2)(A), (B), (C), and (D). *Id.*, 350-51.

Hawkins caught embezzling

During the litigation, WHA discovered that Hawkins had embezzled over $75,000. *Id.,* 459. It reported him to law enforcement. *Id.* Hawkins pled guilty to embezzlement in Missoula Federal District Court on or about October 9, 2024. (Exh. 2 to Point Brief, Doc. 175)

Pam Meadows worked closely with Dwarne Hawkins. She described him as "highly immoral and vicious." (T.T. 620:10-16) Hawkins had an agenda to discredit Lori Collins so he could continue with his embezzlement and, also, to gain favor with the tenants and the community. *Id.,* 620-621.

STANDARD OF REVIEW

The standard of review for Rule 50 rulings on motions for judgment as a matter of law "is identical to that of the district court." *Schumacher v. Stephens*, 1998 MT 58, ¶ 14, 288 Mont. 115, 956 P.2d 76. "Judgment as a matter of law is properly granted only when there is a complete absence of any evidence which would justify submitting an issue to a jury and all such evidence and any legitimate

inferences that might be drawn from that evidence must be considered in the light most favorable to the party opposing the motion." *Id.*

Rule 59(a), M.R.Civ.P. rulings are reviewed for an abuse of discretion. *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 13, 402 Mont. 92, 475 P.3d 748. "An abuse of discretion occurs if a lower court exercises granted discretion based on a clearly erroneous finding of fact, erroneous conclusion or application of law, or otherwise arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *Id.*

Evidentiary rulings are reviewed for an abuse of discretion. *Simmons Oil Corp. v. Wells Fargo Bank, N.A.*, 1998 MT 129, ¶ 17, 289 Mont. 119, 960 P.2d 291.

Rule 59(e), M.R.Civ.P., rulings on a motion to alter or amend a judgment are reviewed for an abuse of discretion. *Meloy v. Speedy Auto Glass, Inc.*, 2008 MT 122, ¶ 11, 342 Mont. 530, 182 P.3d 741.

A ruling granting or denying attorney fees is reviewed for an abuse of discretion. *Brandt v. R&R Mt. Escapes, Ltd. Liab. Co.*, 2025 MT 155, ¶ 11, 423 Mont. 100, 572 P.3d 809.

SUMMARY OF ARGUMENT

Based on Appellant's framing of the issues, this Court should affirm regardless of whether the newspaper article was improperly admitted. Appellant's first issue is whether the District Court properly denied its Rule 50(b) motion, however, evidentiary rulings are not a proper basis for a Rule 50(b) motion. Appellant's second issue is whether the District Court properly denied its Rule 59(a) motion, however, the statute at issue only applies when objections are timely made and WHA failed to object to the Article in the Pretrial Order. Therefore, this Court should summarily affirm Appellant's first two issues.

If this Court addresses the third issue of whether the newspaper article was properly admitted, this Court should affirm because WHA waived any hearsay objection by failing to object to the Article in the Pretrial Order. Also, the defamatory statements were made by WHA, the declarant, and it was present at trial and could have defended against the statements if it claimed either that it did not make them or the published statements were inaccurate. WHA did neither. Instead, it defended the defamation claim on the basis of truth – which the jury rejected. Since WHA never denied making the published statements, admission would have been proper under Rule 803(24), M.R.Civ.P.

Regarding the fourth issue (Appellant's third issue), the District Court correctly denied amending the judgment to impose the statutory cap under § 2-9-

108(3), MCA, because Appellant was covered by an insurance policy of $2 million. Amending the judgment would remove any "legal obligation to pay" the amount awarded. If it is determined that no coverage applies, WHA has relief under Rule 60(b) or the limitation in § 2-9-108(1), MCA, would automatically operate as a matter of law.

Finally, WHA countersued Collins in bad faith for damages on the basis that she quit her job. Employees in Montana have a right to quit their job when they desire. Moreover, for damages, WHA frivolously claimed the additional $60,000 in salary they paid Hawkins. It also sued for claims it later conceded had no merit and for damages it admitted were never incurred. If § 25-10-711, MCA, has any meaning, this Court should reverse the District Court's denial of Collins' motion for fees for WHA pursuing frivolous and bad faith claims.

ARGUMENT

ISSUE 1: WHETHER THE DISTRICT COURT CORRECTLY DENIED WHA'S RULE 50(b) MOTION.

A. The District Court correctly denied Appellant's Rule 50(b) motion because evidentiary issues are not properly the subject for a motion for judgment as a matter of law.

Rule 50(a) allows a party to move at the close of evidence for judgment as a matter of law "if the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *See* Rule 50(a),

M.R.Civ.P.; *Wagner v. MSE Tech. Applications, Inc.*, 2016 MT 215, ¶ 18, 384 Mont. 436, 383 P.3d 727. In a Rule 50(b) motion, the Court "review[s] evidence in the light most favorable to the prevailing party, and reversal is rarely warranted." *Howard v. Replogle*, 2019 MT 244, ¶ 24, 397 Mont. 379, 450 P.3d 866. Moreover, "the courts will exercise the greatest self-restraint in interfering with the constitutionally mandated processes of jury decision. Unless there is a complete absence of any credible evidence in support of the verdict, a [judgment as a matter of law] motion is not properly granted." *Massee v. Thompson*, 2004 MT 121, ¶ 26, 321 Mont. 210, 90 P.3d 394.

At the close of Plaintiff's case, WHA moved for judgment as a matter of law pursuant to Rule 50(a), M.R.Civ.P. (T.T. 715-18) The basis for its motion was that the Article was hearsay. *Id.* WHA renewed its motion pursuant to Rule 50(b), M.R.Civ.P., again on the basis that the Article was hearsay. (Doc. 195, pp.4-7)

However, motions to reconsider evidentiary rulings are not a proper basis for motions under Rule 50(b). In *Elbert v. Howmedica, Inc.* (9th Cir. 1998), the Circuit Court held that "when ruling on a Rule 50(b) motion, a district court should not exclude evidence erroneously admitted at trial. The record should be taken as it existed when the trial was closed." 143 F.3d 1208, 1208-09 (quoting *Schudel v. General Elec. Co.* (9th Cir. 1997), 120 F.3d 991, 995); *see also Nelson v. Driscoll* (1997), 285 Mont. 355, 359, 948 P.2d 256, 258 (motions for reconsideration are

not authorized by the Montana Rules of Civil Procedure). Montana relies upon the federal interpretation of F.R.Civ.P. 50(b). *See Blue Ridge Homes, Inc. v. Thein*, 2008 MT 264, ¶¶ 27-32, 345 Mont. 125, 191 P.3d 374. Only the "sufficiency of the evidence" is a proper consideration of a Rule 50(b) motion. *Massee*, ¶ 26.

Since the basis of WHA's Rule 50(b) motion was that the District Court erred in admitting the Article, the District Court properly denied its Rule 50(b) motion. Sufficient evidence existed to support the verdict. This Court should reject Appellant's argument and AFFIRM the District Court's denial of WHA's Rule 50(b) motion.

ISSUE 2: WHETHER THE DISTRICT COURT CORRECTLY DENIED WHA'S RULE 59(a) MOTION.

A. The District Court correctly denied Appellant's Rule 59(a) motion for a new trial because it failed to timely object to the Article.

Appellant's second issue is similar to its first except that it moved for a new trial pursuant to Rule 59(a), M.R.Civ.P. *Opening Br.* at 27-34; Doc. 195, pp.9-12. The legal basis for its motion was § 25-11-102(7), MCA, which provides that a new trial may be granted upon "(7) error in law occurring at the trial *and excepted to by the party making the application*." (emphasis added)

As discussed in the next section, WHA failed to object to the Article in the Pretrial Order. Accordingly, subsection (7) is unavailing to WHA as a basis for a

new trial and, therefore, the District Court did not err in denying Appellant's Rule 59(a) motion. This Court should reject Appellant's argument and AFFIRM the District Court's denial of its Rule 59(a) motion.

WHA's argument on pages 27-34 is a repeat of its earlier argument on hearsay and the admissibility of the Article. Appellee discusses that issue in the next section and incorporates its arguments as if stated herein.

WHA's argument on page 32 warrants special attention. WHA argued that Appellee "compounded the error" and "misstated the law by framing the hearsay issue as a 'chain of custody' issue" and therefore "mischaracterize[d] the legal standard." *Opening Br.* at 32. Appellant did not assert this argument in its Rule 59(a) motion below. (Doc. 195) Its argument lacks context and is unpersuasive, especially as it relates to the issue on appeal.

Nevertheless, WHA, in its opening statement, told the jury, "[I]t will be up to you to determine whether, based on the evidence presented to you or not presented to you, one, were statements even made by Mr. Hawkins." (T.T. 233:19-22) In response to this claim, Collins discussed in closing arguments the jury's right under Instruction 2 to weigh the reasonableness of WHA's position:

> One of their defenses is there's no proof that Dwarne Hawkins made the statements. Remember in voir dire, again, anticipating what's happening in cases like this, what standard are you going to hold me to? The Judge said it's 51 percent, more than likely than not. Are you going to hold me to an absolute standard? No. Because that's not what the law says.

> What they [WHA] want you to do is to hold me to an absolute standard. They want you to prove the chain of custody that it came out Dwarne's mouth, went into Knowler's ear, went onto Knowler's pad, went into Knowler's computer, came out of the press just like that, that's what they want. The law does not require that.
>
> How do I know? Because Instruction 2 that we just looked at says you have the right to consider the evidence in light of your own general knowledge, experience and common sense.
> . . .
>
> Dwarne Hawkins didn't make the statements. Really? What happens when you don't make a statement, you're falsely accused? You're like, I didn't say that, I didn't say that. Sorry, Ben, I didn't say that. Sorry, mayor, I didn't say that, [sic] that never happened. Why not? That's just the way the law works. You can completely disregard and distrust everything that's coming out of the Housing Authority at this point.
>
> The other question -- the other point on this is that I asked specifically in my 30(b)(6) deposition is the Whitefish Housing Authority -- well, the second question was this, so you're not denying that he made these statements. Answer. That's correct.

(T.T. 824-826)

Therefore, WHA's argument is unpersuasive and has nothing to do with the issue on appeal.

ISSUE 3: WHETHER THE DISTRICT COURT CORRECTLY ADMITTED INTO EVIDENCE THE NEWSPAPER ARTICLE.

Even though Appellant's two main arguments hinge on the central issue of whether the District Court properly admitted the Article into evidence, if this Court

affirms the District Court's rulings on Appellant's motions for the reasons stated above, it need not address the issue of admissibility.

A. WHA waived any objection to the article, including hearsay, by failing to lodge an objection in the Pretrial Order.

The District Court properly admitted the Article because WHA waived any objection to it by failing to lodge an objection in the Pretrial Order.

"[T]he [pretrial] order controls the course of the action unless the court modifies it." Rule 16(e), M.R.Civ.P. The importance of the pretrial order was discussed in *Workman v. McIntyre Const. Co.*, 190 Mont. 5, 617 P.2d 1281 (1980). In reversing the district court's ruling admitting an exhibit which had not been listed in the pretrial order, this Court held:

> The pretrial order "… controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." Rule 16, M.R.Civ.P. The whole purpose of the pretrial conference and the pretrial order is to prevent the type of situation that occurred in this case. . . . These tactics are contrary to the letter and spirit of all pretrial discovery which is to prevent surprise, to simplify the issues, and to permit counsel to prepare their case for trial on the basis of the pretrial order.

Id. at 11-12, 617 P.2d at 1285.

This Court has held several times that if a party fails to lodge an objection to an exhibit identified in the Pretrial Order, that objection is waived. For example, in *Crockett v. Billings*, 234 Mont. 87, 97, 761 P.2d 813, 819-20 (1988), a case involving nearly identical circumstances, the pretrial order contained exhibit lists

which gave a brief description of each exhibit and a place to note objections. *Id.* The plaintiff made no objection in the pretrial order to several of the defendant's exhibits, which the district court then admitted over plaintiff's objections at trial. *Id.* On appeal, the Montana Supreme Court held that the district court did not err in admitting the exhibits despite their lack of foundation:

> Having stipulated to the admission of documents without foundation, a party may not later raise a hearsay objection at trial. *Swenson v. Buffalo Bldg. Co.* (Mont. 1981), [Mont. ,] 635 P.2d 978, 984, 37 St.Rep. 1588, 1594. The District Court did not err by admitting the exhibits without foundation as agreed to by both parties in the pre-trial order. We thus need not discuss whether the exhibits were properly admissible under Rule 803(6), M.R.Evid.

Id.

Similarly, in *Strong v. State*, 183 Mont. 410, 600 P.2d 191 (1979), the parties agreed to and signed a pretrial order which stipulated that certain exhibits could be offered at trial without proof of foundation and subject only to objections as to relevancy or materiality. *Id.* at 414, 600 P.2d at 193. The plaintiff's exhibits were attached as Appendix C and contained an EEOC determination. *Id.* At trial, the defendant objected on the basis of hearsay. *Id.* at 413, 600 P.2d at 192. The District Court admitted the EEOC determination into evidence. *Id.* at 412, 600 P.2d at 192. This Court upheld the District Court's ruling because the defendant "ha[d] waived its right to enter any objections, other than as to relevancy and materiality, concerning the introduction of the EEOC findings." *Id.* at 414, 600

P.2d at 193 (original emphasis). *See also Swenson v. Buffalo Bldg. Co.*, 194 Mont. 141, 150, 635 P.2d 978, 983 (1981) (having agreed in pretrial order to admission of report without foundation, defendant's objection to report as hearsay was properly denied); *Benson v. Heritage Inn, Inc.*, 1998 MT 330, ¶ 17, 292 Mont. 268, 971 P.2d 1227 ("We have repeatedly upheld the binding effect pretrial orders have on future case proceedings.").

Here, Collins listed the Article as Exhibits 111 and 112. (See Doc. 123) The parties stipulated that "Failure to object to any exhibit will constitute a waiver of that objection." *Id.*, p.9-10. WHA filed its *Notice of Filing Objections to Plaintiff's Trial Exhibits* on August 29, 2024, but lodged no objection to Collins' Exhibits 111 and 112. (APP. 6) WHA also disclosed these same two Articles in its exhibit list. (APP. 7) Under Rule 16, M.R.Civ.P., and the holdings in *Crockett, Strong,* and *Swenson*, WHA waived any objection to the admission of the article, including on the grounds of hearsay, and the District Court properly admitted them. This Court "need not discuss whether the exhibits were properly admissible under Rule 803…." *Crockett*, 34 Mont. 87, 97, 761 P.2d 813, 820.

Appellant admitted that it failed to lodge an objection in the Pretrial Order (*Opening Br.* at 36) but argued it nevertheless timely objected on the morning of trial. *Opening Br.* at 34-39. Appellant further argued that the District Court's

ruling on the admissibility of the article was a sanction under Rule 16(f), M.R.Civ.P. *Id.* Neither argument has merit.

Appellant relied on *Kizer v. Semitool* as support for the proposition that objections are timely when made "as soon as the grounds for the objection become apparent." *Opening Br.* at 34-35. WHA's reliance upon *Kizer* is misplaced because it had nothing to do with lodging objections to exhibits in a pretrial order. Rather, it dealt with whether Semitool timely objected to a witness's testimony at trial to preserve it for appeal. 251 Mont. 199, 207, 824 P.2d 229, 230 (1991). *Kizer* offers no support for the proposition that either an objection made on the morning of trial to a previously un-objected-to exhibit is timely, or that objecting on the morning of trial after having waived any objection overrules this Court's holdings in *Crockett, Strong,* and *Swenson*.

The Court should also recognize that Appellant's dubious assertion – that it was not until the morning of trial that it learned of Collins' intent to use the article to prove what statements WHA had made – is nothing more than an attempt to manufacture surprise at the eleventh hour. *Opening Br.* at 35. From the allegations in the Complaint, through every request Collins made or question asked in discovery, to Collins' contentions in the Pretrial Order, it was obvious that Collins was using the Article to establish her claim for defamation. (Amd. Compl., Doc. 8, ¶¶ 19-26; Pretrial Order, pp.3-4, ¶¶ 8, 9, 14, 15, 20) Even WHA knew that

Collins' intended to offer the Article to prove her claim, as demonstrated by the following: "If it's being offered as to what Mr. Hawkins said at the interview -- because that of course is an element of the slander claim that's been brought, ..." (T.T. 16:4-7)

Appellant next argued that, under *Stevenson v. Felco Indus. Inc.*, the District Court cannot sanction WHA for failing to lodge an objection by admitting "clearly inadmissible evidence." *Opening Br.* at 37. *Felco* is distinguishable and unsupportive. *Felco* did not involve a party's failure to lodge an objection to an exhibit identified in a pretrial order. Rather, the issue was whether a district court could sanction a party by failing to allow any objection at trial if that party failed to file a motion in limine by the scheduling order deadline. 2009 MT 299, ¶ 45, 352 Mont. 303, 216 P.3d 763. This Court held that waiver of the right to object to inadmissible evidence at trial was a sanction. *Id.*, ¶¶ 33-34, 37. This Court then distinguished past decisions where sanctions were imposed pursuant to another rule, like Rule 37, that allowed for such sanctions, while Rule 16(f) does not contemplate the admission of demonstrably inadmissible evidence as a sanction. *Id.*, ¶ 36. Ultimately, this Court held that the district court erred after balancing the equities. *Id.*, ¶¶ 43-47.

Unlike in *Felco*, WHA did not file a motion in limine beyond the deadline in the scheduling order, nor did the District Court sanction it under Rule 16(f).

Rather, Appellant stipulated by its signature in the Pretrial Order that any objection to any exhibit not lodged in the Pretrial Order would be deemed a waiver of that objection. (Doc. 123, p.10) "Having stipulated to the admission of documents without foundation, a party may not later raise a hearsay objection at trial." *Crockett v. Billings*, 234 Mont. at 97, 761 P.2d at 819-20 (citing *Swenson v. Buffalo Bldg. Co.*, 194 Mont. at 150, 635 P.2d at 984)

In sum, WHA waived any objection to the article, including hearsay, by failing to lodge an objection in the Pretrial Order.

B. The District Court did not abuse its discretion in admitting the article.

The following discussion is unnecessary if this Court agrees that Appellant waived its objections by failing to make them in the Pretrial Order.

1. The District Court properly admitted the statements of WHA as non-hearsay.

To be clear, WHA made false and defamatory statements. WHA was the named Defendant. WHA made its false and defamatory statements through its employee, Dwarne Hawkins. Hawkins was acting within the course and scope of his employment at the time of his statements. (Order, Doc. 120, p.6; WHA's Resp. to RFA 13, attached as exh. 7 to Doc. 98) Thus, the District Court properly admitted the newspaper article as non-hearsay under Rule 801(d)(2), which provides:

> A statement is not hearsay if: …

> (2) **Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of that relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

WHA stipulated that Hawkins was acting in the course and scope of his employment when he spoke with the reporter and the District Court ruled that WHA, not Hawkins, made the statements. (Doc. 30; Order re Motions for S.J., Doc. 120, p.6 ("The published statements were made by the WHA through its employee/agent Hawkins.")) Further, WHA, the declarant, did not deny making the statements.

> Q. Okay. So, you're not denying that he made those statements?
> A. That's correct.

(Depo WHA 30(b)(6), B. Johnson, 76:9-17, read in at T.T. 427:1-3)

Therefore, WHA's statements are non-hearsay under 801(d)(2)(A) because it is "[WHA's] own statement, in either an individual or a representative capacity," and under 801(d)(2)(D) because it was made by "[WHA's] agent or servant concerning a matter within the scope of the agency or employment, made during the existence of that relationship."

In addition, the statements were properly admitted as non-hearsay under 801(d)(2)(B) because WHA "has manifested an adoption or belief in its truth." In its opening, WHA said "[truth] will definitely be used here;" "in order to prove the statements of Mr. Hawkins are true…we have to do a deep-dive and scrutiny into Ms. Collins' job performance;" "an overwhelming amount of proof of the truth will come directly from Ms. Collins herself;" "So when you are shown the article, please keep these things in mind… Ms. Collins did leave the Authority in a really bad position, her actions did amount to misconduct, and the malfeasance of the prior administration . . . needed to be fixed;" and "the statements in the article are true." (T.T. 224-240)

In addition, the statements were properly admitted as non-hearsay under 801(d)(2)(C) because WHA testified that Hawkins was "a person authorized by [WHA] to make a statement concerning the subject." *Id.,* 421:19-23 ("approval [to speak with the newspaper] wasn't – wasn't necessary. It's within his -- within his job description and duties as executive director.")

In sum, this Court properly admitted the statements of WHA as non-hearsay.

2. WHA's statements do not meet the definition of hearsay because Collins did not offer them for the truth of the matter asserted.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R.Evid. 801(c). WHA made statements that Collins was unethical, a

malfeasant, engaged in misconduct, caused the WHA damage, and that everybody was concerned about hiring her back. These statements were false and not offered to prove what WHA asserted, and therefore not hearsay. *Knowles v. Ohio State Univ.* (2002), 2002 Ohio App. LEXIS 6779, ¶ 32 ("However, a statement is not hearsay if it is offered to prove merely that the declarant made the statement, and not to prove the truth of the statement."); *Kesey, LLC v. Francis* (U.S. Dist. Or. 2009), 2009 U.S. Dist. LEXIS 28078, *108-09 ("The article is being offered only to prove that the *New York Times* published a positive review of the Novel, not to prove that the statements made in the article were true. What was said in the article is not nearly as important as the fact that it was said. As such, the article is not hearsay and is admissible."); *Momah v. Bharti*, 144 Wash. App. 731, 749, 182 P.3d 455, 466 (2008) ("Since the articles were offered for the purpose of showing republication and not to prove the truth of the contents, the printouts of the *Journal* articles are not excludable as hearsay.").

Although the Montana Supreme Court has not addressed this issue in the context of a newspaper article, it has made the same holding in other contexts. In *Strong*, *supra*, an action for wrongful discharge from employment, the court correctly received a copy of a report of the United States Equal Employment Opportunity Commission (EEOC) into evidence over the objection of appellant that the report constituted hearsay. 183 Mont. at 413, 600 P.2d at 193. This Court

held that the report was not hearsay since it was not offered to prove the truth of the matter asserted but only to show that the EEOC had not terminated its intervention. *Id.* In another case, *Moats Trucking Co. v. Gallatin Dairies*, 231 Mont. 474, 478, 753 P.2d 883, 885 (1988), the district court allowed a witness for Gallatin Dairies to testify, in response to a question about why it did not provide sufficient notice to Moats about terminating a hauling contract, about a conversation he had with another Gallatin employee. *Id.* at 478, 753 P.2d at 885-86. This Court affirmed and held that the statements from the other employee were not offered for the truth but to show why Gallatin waited to provide notice to Moats. *Id.* at 479, 753 P.2d at 886.

Likewise, here Collins did not offer the statements in evidence to prove the truth of the matter asserted and, thus, the statements were not hearsay.

The authority relied upon by WHA is distinguishable. WHA primarily relied upon *Two Leggins v. Gatrell*, 2023 MT 160, 413 Mont. 172, 534 P.3d 668. *Opening Br.* at 20. However, that case neither discussed nor held that statements in a newspaper article are hearsay. While the district court ruled the newspaper article was hearsay, the issue on appeal was whether the district court erred in limiting the evidence in a punitive damage hearing to net worth, thereby excluding the newspaper article that contained allegedly race-based statements. *Id.*, ¶¶ 3, 5, 6, 24. The opinion never explained the district court's rationale for ruling that the

newspaper article was hearsay, and it was never discussed on appeal. *Id.*, ¶5. Therefore, *Two Leggins* does not support WHA's position that it was either hearsay or that the District Court abused its discretion in admitting it.

WHA also relied upon *Larez v. City of Los Angeles* (9th Cir. 1991), 946 F.2d 630. *Opening Br.* at 20. *Larez* involved a civil rights action following the LAPD's search of his home. The court bifurcated the matter into two trials, one against the six officers involved and one against the city and its Chief, Daryl Gates. In the second trial after Gates testified, he was questioned by reporters outside the courtroom about his reaction to the jury's verdict in the first trial. Larez moved to admit Gates' statements from the articles and defense counsel objected, not to what was said, but to the context and the need "subject to voir dire as to the circumstances in which these were offered. . . ." *Id.* at 642. The trial court admitted the article. Larez used them to "show Gates's purported contempt for the judicial process." *Id.* at 644.

Upon review, the Court held that "Gate's actual out-of-court statements pose no admissibility problem" under Rule 801(d)(2)(A), F.R.Civ.P. *Id.* But, as to the reporter's statements, the Court noted that they were statements made out-of-court that were not subject to the rigors of cross-examination. *Id.* Ultimately, the Court found the error harmless and held, "we cannot say that the statements' admission,

which violated Gates's substantial right to cross-examine witnesses against him, more likely than not did not improperly influence the jury." *Id.* at 644.

Unlike in *Larez* where the defendant objected on the basis that it could not cross-examine the reporters on the context in which the statements were made, WHA made no such claim. Rather, it attempts to win on a technicality of the hearsay rule when, in fact, it never denied making the statements the newspaper attributed to it. WHA expressly stated it had "no objection" to the "contents of the article." (T.T. 15:18-16:3) In its Point Brief, WHA argued hearsay on the grounds of whether the statements were made, not the context of the statements. (Doc. 177, p.2) On the second morning of trial, WHA counsel argued it "[didn't] know those things were said," even though its client, WHA, testified under oath that it was not denying the statements were said. (T.T. 351:19)

WHA next cited to *United States Football League v. Nat'l Football League* (S.D.N.Y. May 16, 1986), 1986 WL 5803, but that case is distinguishable. There, the NFL objected to the admission of a newspaper article offered by the USFL that quoted "sources" in the NFL. *Id.* at *2. The statements were being offered to prove the substance of the quotes, ie, that the NFL had placed pressure on ABC television. *Id.* at *3. Ultimately, the Court rejected the article because the article's sources were unknown and the USFL had failed to establish it had firsthand knowledge of any pressure applied by the NFL on ABC. *Id.* at *4.

Unlike the unknown source of the quotes in *United States Football League*, the source of the quotes in the Daily Interlake article was undisputedly the WHA through its Executive Director. The WHA was present for trial and could have defended the statements if it claimed to have never made them, which it did not. Also, unlike *United States Football League* where the substance of the statements were offered for their truth, Collins did not offer the statements in the Article to prove their substance was true.

In situations where no dispute exists as to whether the defendant made the statements attributed to it, Courts have held that newspaper articles are not hearsay. For example, in *Shimozono v. May Dep't Stores Co.* (C.D. Cal. Nov. 19, 2002), 2002 U.S. Dist. LEXIS 28478, at *34, the Court ruled that a newspaper article containing statement made by representative of a department store was admissible as non-hearsay under Rule 801(d)(2) in a suit against department store.

Similarly, where a declarant's statements are not "assertions" under Rule 801, but are verbal acts, they are admissible non-hearsay. "Under the verbal act doctrine in Montana, statements may be admitted 'for the purpose of establishing the fact that the words had been said by defendant.'" *Phillip R. Morrow, Inc. v. FBS Ins. Mont.-Hoiness Labar, Inc.*, 236 Mont. 394, 398-400, 770 P.2d 859, 861-62 (1989) (citing State v. *Collins*, 178 Mont. 36, 44, 582 P.2d 1179, 1183 (1978)). In *Morrow*, a subcontractor who lost a bid testified that the contractor told him that the

contractor's bonding company pressured him to not award the contract to the subcontractor. 236 Mont. at 397, 770 P.2d 859 at 860. The bonding company objected, and the district court excluded the statement on the basis of hearsay. *Id.* 236 Mont. at 398, 770 P.2d 859 at 861. The Montana Supreme Court reversed and held, "The trial court should have admitted the second statement as non-hearsay under Rule 801(c), M.R.Evid., because the statement constituted a 'verbal act', in the sense that it goes to prove the operative facts of the alleged tort, i.e., pressuring Fisher." *Id.* 236 Mont. at 398, 770 P.2d at 861. Citing to *Weinstein's Evidence,* this Court explained that "[i]t is applied, when as in the case of the defamation examples above, the utterance is an *operative fact* which gives rise to legal consequences." *Id.* citing 4 J. Weinstein, M. Berger, *Weinstein's Evidence* para. 801(c)[01] at 801-71-72 (1988) (original emphasis). "[W]here the issue is the existence of statements, not the truth of the matters asserted within them, Montana recognizes the verbal act doctrine." 236 Mont. at 399, 770 P.2d 862 (citing *Collins*, 178 Mont. 36, 44, 582 P.2d at 1183).

Here, the District Court instructed the jury that "Slander is a false and unprivileged oral statement made either in person or by radio or television or by any other means which tends directly to injure such party in respect to the office, profession, trade or business . . . ." (T.T. (Instruction 16) 799) Also, "The defamatory nature of a statement or publication must be determined by its natural

and probable effect on the mind of the average reader." (T.T. (Instruction 18) 799) Therefore, WHA's statements are non-hearsay under Rule 801(d)(2)(A)-(E) and, under the verbal acts doctrine, the newspaper was properly admitted as non-hearsay for the purpose of establishing that the WHA violated the law on slander.

3. If the article contained hearsay, it was properly admitted under Rule 803(24).

The residual exception contained in Rule 803(24), M.R.Civ.P. "provides for new and unanticipated situations which demonstrate a trustworthiness within the same spirit of the specifically stated exceptions." *State v. Brown*, 231 Mont. 334, 337-38, 752 P.2d 204, 206-07 (1988). This Court in *Brown* cited to a seminal case where this residual exception was used to admit a newspaper article:

> The rationale behind a residual exception was first expressed in *Dallas County v. Commercial Union Assurance Co.* (5th Cir. 1961), 286 F.2d 388. In *Dallas*, an unsigned newspaper article written fifty years earlier was admitted as an exception to hearsay. The article described a fire in the local courthouse while it was under construction. Although the article did not fit into any recognized exception, it was admitted because it was probative of structural weakness in the courthouse. The article also possessed an adequate guarantee of trustworthiness because a newspaper would probably not falsely report a courthouse fire. *Dallas* was cited by the United States Senate when Congress was drafting the Federal Rules of Evidence.

Id. at 337-38, 752 P.2d at 206.

The *Brown* Court further explained how the rules commission considered this rule:

> When the Montana Advisory Commission on the Rules of Evidence considered Rules 803 and 804, it believed the residual exceptions should allow room for "growth and development" of the law of evidence in the area of hearsay. The Commission stated: "The adoption of this exception changes existing Montana law to the extent that it allows the court to admit hearsay because an equivalent guarantee of trustworthiness exists even though there is no specific exception allowing it." *Commission Comments* on Rule 803(24), Mont.R.Evid. The residual exceptions of Rules 803 and 804 are consistent with the policy expressed in Rule 102.

Id. at 338, 752 P.2d at 206-07.

Under the facts of this case, the District Court properly admitted the article as it would have qualified under the residual exception of Rule 803(24). The District Court was in the best position to determine if it had any concerns about the trustworthiness of the statements. In the Pretrial Order, WHA never denied making the statements, rather it contended that the statements did not mention Collins by name. At trial, WHA testified it was not denying that it made the statements that appeared in the Article. Evidence was also admitted showing WHA's Executive Director never denied making the statements to Pam Meadow, the Mayor, and City Manager, nor did it deny making them when threatened with a lawsuit. The District Court can take judicial notice of the Daily Interlake's excellent reputation as a newspaper in Flathead County. Ben Johnson testified that the reporter accurately quoted him in the article. (T.T. 473:7-11) In light of this evidence, WHA did not

sponsor a single witness to deny the statements were made or even that they were inaccurate. Instead, WHA defended the case on the basis that statements were true.

WHA argued that Hagadone's "retraction" presents a reasonable basis to assume the newspaper misquoted WHA's statements. *Opening Br.* at 24. Not so. The newspaper published a "correction" of the findings from Simkins' letter. Yet, WHA's objection addressed whether it made the statements, not their accuracy. Despite the overwhelming evidence from WHA witnesses that it was not denying that the statements were made to the reporter, only WHA's lawyers were disingenuously arguing that the published statements were not made.

In sum, the evidence is overwhelming, and certainly outweighed any evidence gained by Hagadone's correction, to establish the trustworthiness that WHA made the statements attributed to it in the newspaper. Thus, the Court did not abuse its discretion in admitting the Article into evidence.

4. If the Article was improperly admitted, the error was harmless.

If the article is held to be hearsay, any error caused by its admission would have been harmless. The declarant, who made the statements in the Article, was the WHA, and it was present in Court to defend itself against those statements. If WHA had denied making the statements, it would simply have sponsored a witness to establish its denial. Yet, it never denied making the statements and, instead, defended the case on the basis of truth – which the jury rejected.

Regarding WHA's argument about malice on page 25, malice was a factor in this case only if the jury found that Collins was a public official, which it did not. *See* Jury Instruction 25, T.T. 801-802.

In sum for this issue, this Court need not address the admissibility of the Article based on the way Appellant framed its first two issues. If it elects to rule on admissibility, this Court should affirm its long-standing holdings that a party waives the right to object to an exhibit if it fails to lodge an objection in the Pretrial Order. Regarding the merits of the ruling, this Court should rule that the District Court did not abuse its discretion in admitting the Article as either non-hearsay or as an exception to hearsay for the reasons stated above.

ISSUE 4: WHETHER THE DISTRICT COURT CORRECTLY DENIED WHA'S MOTION TO AMEND THE JUDGMENT TO IMPOSE THE STATUTORY CAP WHEN IT WAS COVERED BY AN INSURANCE POLICY FOR MORE THAN THE CAP.

The statutory cap applies only if WHA was not insured with policy limits in excess of the cap. Since WHA is insured for defamation up to $2 million, WHA's argument should be rejected.

WHA was insured by Housing Authority Risk Retention Group (HARRG) under a Commercial Liability Policy providing for $2,000,000 in coverage for Personal and Advertising Injury, including defamation. (Exh. 1 to Collins' Resp.

to WHA's 2nd Rule 59 Mot., Doc. 200) HARRG declined to pay the Judgment and filed a declaratory judgment action in Federal court to declare its rights. *Id.*, Exh 2.

Normally, the cap in § 2-9-108(1), MCA would apply because WHA is a "political subdivision," "claim" is defined to include personal injury, and "personal injury" includes defamation. §§ 2-9-101(1), (4), MCA. However, regardless of whether the cap would apply to WHA, it does not apply to its insurer, HARRG:

> (3) An insurer is not liable for excess damages unless the insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitation specifically waived.

§ 2-9-108(3), MCA. Subsection (3) of the statute applies here because HARRG provided the endorsement contemplated thereby. This plain reading of the statute has been explicitly confirmed by the Montana Supreme Court in *Daniels v. Gallatin Cty.*, 2022 MT 137, 409 Mont. 220, 513 P.3d 514.

It is axiomatic that a judgment sets the amount that a party is legally obligated to pay. *Daniels*, ¶ 18. HARRG's policy has similar limiting language wherein it agrees to pay "those sums that the insured becomes legally obligated to pay." (Policy, Coverage B, Exh. 1 to Doc. 200) Thus, if the District Court had granted WHA's motion and reduced the judgment to $750,000, HARRG would arguably no longer be obligated to pay more than $750,000 contrary to § 108(3).

To properly balance the issue created by subsections (1) and (3), this Court should affirm the District Court's denial of WHA's motion. If HARRG prevails on its federal action and no coverage exists, then subsection (3) would no longer apply as a matter of law and WHA could either petition for relief from the Judgment under Rule 60, M.R.Civ.P., or subsection (1) would automatically operate as a matter of law to prevent Collins from executing for more than $750,000.

In sum, with adequate relief available under Rule 60, M.R.Civ.P. and protection afforded under § 2-9-108(1), MCA, if HARRG prevails on its coverage action, Appellee requests that this Court AFFIRM the District Court's denial of Appellant's motion to amend the Judgment to impose the statutory cap under § 108(3) until the issue of insurance coverage is determined.

ISSUE 5: WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLEE'S MOTION FOR ATTORNEYS' FEES TO DEFEND COUNTERCLAIMS MADE IN BAD FAITH.

WHA countersued Collins in negligence and claimed damages. (Doc. 10, ¶¶ 4-7) WHA made four separate allegations of breach in ¶¶ 5(a)-(d). It eventually conceded any claims raised in allegations ¶¶ 5(a), 5(d), and 6. (Depo WHA 30(b)(6), 44:14, 46:5-10, exh. 8 to Doc. 73, APP. 9)

In ¶ 5(b), WHA sued Collins for the extra $60,000 per year it agreed to pay Hawkins. (Doc. 10) WHA testified it incurred damages in having to "hir[e] an Interim Executive Director at higher than usual salary upon Collins' departure," and explained that its basis for this claim was that Lori Collins provided insufficient notice of her resignation. (APP. 9, 47:6-12) Collins successfully moved for summary judgment on the basis that she was neither an indentured servant nor employed pursuant to a contract, and she had no duty to remain employed longer than she desired. (Doc. 73; Order, Doc. 120) Further, to demonstrate the frivolousness of WHA's claim, even though Collins resigned on four days' notice, the evidence established that she generously helped the Operations Manager with any questions for the two weeks until WHA rehired her on a contract basis from November 4 until December 31, 2022, to provide time for WHA to find an interim executive director. (Doc. 73, p.6) In short, Collins continued working for WHA immediately after she resigned and for as long as WHA needed her.

In ¶ 5(c), WHA sued Collins for the increased costs of Hawkins' salary. In its search for a replacement of Lori Collins as Executive Director, WHA hired a non-profit consultant who advised it to hire an *interim* executive director rather than a *permanent* executive director. (Depo B. Johnson, 144:14, exh. 6 to Doc. 73, APP. 10) According to the WHA, hiring an interim executive director costs more

due to supply and demand. (APP. 9, 46:22-47:4) Then, despite claiming his wages were exorbitant, WHA made Hawkins the permanent executive director on July 17, 2023, at the same rate of pay without ever posting an advertisement for the position, taking applications, or conducting interviews. (*Id.*, 49:10-50:1; Depo K. Williams, 24:13, exh. 9 to Doc. 73, APP. 11) The allegation in ¶ 5(c) was made in bad faith to blame Collins for WHA failing to take the steps necessary to find and hire an executive director at market rate.

The basis for WHA's claim in ¶ 7 of its Counterclaim was that WHA received a bad score by HUD and "may be barred from applying for certain grants and other HUD-funded opportunities." (Doc. 10) Yet, WHA admitted that it had never applied for any grants or "other opportunities," and therefore had not been barred. (APP. 9, 55-57:11) When asked directly, WHA admitted it had not suffered any monetary loss because of the scorecard:

> Q. Okay. Has the trouble designation on the REAC report caused the housing authority to suffer any monetary loss. [sic]
>
> **A. No.**

Id., 62:16-19.

WHA absolutely knew that it suffered no damages at the time it asserted its claim against Plaintiff, and all the way through May 23, 2024, when it testified to the fact that it suffered no loss.

Under the American rule, a party is entitled to recover her attorney fees when allowed by statute. *Foy v. Anderson*, 176 Mont. 507, 511, 580 P.2d 114, 116 (1978). In this case, Section 25-10-711, MCA, provides:

> **25-10-711. Award of costs against governmental entity when suit or defense is frivolous or pursued in bad faith.** (1) In any civil action brought by or against the state, a political subdivision, or an agency of the state or a political subdivision, the opposing party, whether plaintiff or defendant, is entitled to the costs enumerated in 25-10-201 and reasonable attorney fees as determined by the court if:
> (a) the opposing party prevails against the state, political subdivision, or agency; and
> (b) the court finds that the claim or defense of the state, political subdivision, or agency that brought or defended the action was frivolous or pursued in bad faith.

WHA is a political subdivision. § 7-15-4402(1), MCA; § 2-9-101(1)(e), MCA (tort claims); 1981 Mont. AG LEXIS 9, *6. "A claim or defense is frivolous or in bad faith under § 25-10-711(1)(b), MCA, when it is 'outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion.'" *Jones v. City of Billings*, 279 Mont. 341, 344, 927 P.2d 9, 11 (1996) (citing *Armstrong v. State, Dept. of Justice*, 250 Mont. 468, 469-70, 820 P.2d 1273, 1274 (1991)).

Suing any employee for quitting is outside the bounds of legitimacy. Suing a former employee for the increased salary paid to her replacement is outside the bounds of legitimacy. Suing for damages never suffered because the suing party never applied for nor was denied funding is outside the bounds of legitimacy. If §

25-10-711, MCA, has any meaning, Collins requests an order REVERSING the District Court's denial of her motion for fees and REMANDING to determine the fees to be awarded.

CONCLUSION

Appellee requests that this Court AFFIRM on all of Appellant's issues and REVERSE AND REMAND on Appellee's issue.

DATED this 5th day of September, 2025.

FRAMPTON PURDY LAW FIRM

By: _____
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CERTIFICATE OF COMPLIANCE

I, Sean S. Frampton, attorney for Appellees, hereby certify that Appellee's Opening Brief complies with the Montana Rules of Appellate Procedure:

A: Document has double-line spacing and is proportionately spaced in Times New Roman text typeface of 14 points;

B: Word count, exclusive of tables and certificates, does not exceed 10,000;

C: Margins are 1";

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I am relying on the word count of the word processing system used to prepare the brief (Microsoft Office Word) in calculating the document's length.

DATED this 5th day of September, 2025

FRAMPTON PURDY LAW FIRM

By: _____
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CERTIFICATE OF MAILING

The undersigned does hereby certify that on the 5th day of September, 2025, a true and correct copy of the foregoing document was served upon the persons named below, at the addresses set out below their names, as indicated below.

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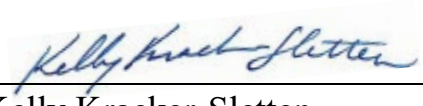

Kelly Kracker-Sletten

CERTIFICATE OF SERVICE

I, Sean S. Frampton, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee and Cross to the following on 09-05-2025:

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