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Mlekush v. Farmers Insurance Exchange: Defining the Standard for the Insurance Exception to the American Rule

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PRECAP; Mlekush v. Farmers Insurance Exchange: Defining the Standard for the Insurance Exception to the American Rule

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ORAL ARGUMENT is set for Wednesday, July 26, 2017 at 9:30 a.m., in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Building, Helena, Montana.

I. QUESTION PRESENTED

Under Montana law, does the insurance exception to the American Rule apply in disputes as to value of a claim when coverage is not at issue? Further, if the insurance exception does apply, what standard, if any, should be used to determine whether an insured was "forced" within the meaning of the insurance exception?

II. INTRODUCTION

Appellant Tanya Mlekush ("Mlekush") was injured in an automobile collision for which the driver of the other vehicle admitted liability.[1] In the underlying action, Mlekush sought reimbursement from her own auto insurance company, Farmers Insurance Exchange ("Farmers"), for her damages beyond the coverage limits of the other driver's insurance.[2] Upon the jury rendering a verdict in her favor, Mlekush moved the District Court for her attorney fees and costs.[3]

On appeal, Mlekush argues the District Court erred in determining that Mlekush could not recover attorney fees and litigation costs from Farmers.[4] Although Montana generally follows the "American Rule," which requires each party bear its own expenses "absent a contractual or statutory provision to the contrary," the Montana Supreme Court has recognized an "insurance exception" which entitles an insured to recover attorney fees in cases where an insurer forced the insured to "assume the burden of legal action to obtain the full benefit of the insurance contract." [5] Farmers concedes that, upon a finding that Mlekush was *forced* to resort to litigation, she would indeed be entitled to attorney fees and costs.[6]

[1] *Mlekush v. Farmers Ins. Exch.*, 2015 MT 302, ¶ 3, 318 Mont. 292, 358 P.3d 913.

[2] *Id.* ¶ 6.

[3] Doc. 73, Plaintiff's Motion for Attorneys' Fees and Non-Taxable Costs (Aug. 1, 2014).

[4] Appellant's Opening Brief, *Mlekush v. Farmers Ins. Exch.*, https://supremecourtdocket.mt.gov/search/case?case=20005# (Mont. Feb. 17, 2017) (DA 16-0670).

[5] *Winter v. State Farm Mut. Auto. Ins. Co.*, 2014 MT 168, ¶ 31, 375 Mont. 351, 328 P.3d 665; *Winter*, ¶ 31 (citing *Mont. W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 36, 315 Mont. 231, 69 P.3d 652) (emphasis added).

[6] Appellant's Reply Brief, *supra* note 1, at *13.

However, after complying with the Court's directive to further develop the record on remand, the district court concluded the record does not support a finding that Mlkekush was *forced* to initiate legal proceedings in order to obtain the full value of the insurance.[7] Arguing the district court to be in the best position to evaluate this issue, Farmers agrees with the district court's determination that, under the given circumstances, awarding attorney fees under the insurance exception would be improper.[8]

As Farmers did not explicitly or implicitly deny Mlekush coverage, but merely disputed the value of the claim, the question remains: Was she forced to litigate as a result of Farmer's valuation? The Montana Supreme Court has not yet addressed whether the insurance exception applies in disputes as to value of a claim when coverage is not at issue nor has it expressly established a standard to determine whether an insured was "forced" within the meaning of the insurance exception.

III. FACTUAL BACKGROUND

On January 15, 2011, Tanya Mlekush was injured in an automobile accident in which the driver of the other vehicle admitted liability.[9] As a result, Mlekush recovered $50,000 from the other driver's insurance policy limit for bodily injuries.[10]

At the time of the accident, Mlekush's vehicle was insured with Farmers under a policy that included underinsured motorist (UIM) coverage with a $200,000 policy limit.[11] On August 20, 2012, Mlekush executed a contingency fee agreement with her attorneys to represent her on her UIM claim, who then subsequently sent Farmers a letter of representation and asked Farmers to open a medical payments claim.[12] Correspondence continued over the following months and the parties exchanged information regarding Mlekush's ongoing medical treatment, including medical bills and reports, prior related injuries, and claims for lost wages.[13]

On November 27, 2012, Mlekush underwent surgery as a result of injuries sustained during the accident.[14] Over the following weeks, Mlekush gave Farmers updated medical and surgical reports and bills associated with her surgery and, as she had already incurred approximately $9,000 in medical expenses, requested Farmers to advance-pay her

[7] *Id.*
[8] *Id.*
[9] *Mlekush*, ¶ 3.
[10] *Id.*
[11] *Id.* ¶ 4.
[12] *Id.*
[13] Appellee's Answer Brief, *Mlekush v. Farmers Ins. Exch.*, https://supremecourtdocket.mt.gov/search/case?case=20005# (Mont. Apr. 18,2017) (No. DA 16-0670).
[14] *Mlekush*, ¶ 6.

anticipated bills.[15] However, according to Farmers, her treatment did not exceed the $50,000 she had received from the other driver's insurer and evidence was unclear whether an injury she had suffered ten years prior to the accident was causally related to her injury.[16] Farmers thus denied her request, stating: "We are not denying any demands. We are merely requesting additional information which is necessary for all parties to fully evaluate the matter."[17]

Two days after receiving this response, Mlekush sued Farmers for wrongfully questioning causation on a clear medical record and denying advance-pay of surgical costs.[18]

At trial, the Helena jury found for Mlekush and awarded her damages amounting to $450,000. However, because Mlkeush had initiated litigation before Farmers had an opportunity to fully assess her claim, the district court denied her request of attorney fees under the insurance exception to the American Rule.[19]

The Montana Supreme Court reversed this decision on appeal, stating the record as developed below was insufficient to allow for a conclusion either way.[20] As the district court found the facts that Farmers did not deny Mlekush's UIM coverage and Mlekush filed her complaint before the evidence was sufficiently developed dispositive on the issue, it never considered the other relevant factors necessary to determine whether the insurance exception applies such as:

> The amounts of the settlement offers, when they were made during the course of the litigation, whether they required a full and final release, what Mlekush's responses to the offers were, and what relationship, if any, the increasing settlement offers bore to Mlekush's increasing economic damages… [as well as] whether Mlekush made demands for advance payments or requested partial payments during the pendency of the litigation which were denied.[21]

Finding that the district court incorrectly interpreted Montana law when it relied solely on the circumstances surrounding the filing of Mlekush's complaint for its decision to deny attorney fees, the Court remanded the case back to district court for further proceedings to determine whether Farmers forced Mlekush to assume the burden of legal action to obtain the full benefit of her UIM policy, therefore entitling her to attorney fees under the insurance exception.[22]

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[15] Appellee's Answer Brief, *supra* note 15, at *4.
[16] *Id.*
[17] *Mlekush*, ¶ 5.
[18] *Id.* ¶ 6.
[19] *Id.* ¶ 7.
[20] *Id.* ¶ 14.
[21] *Id.* ¶ 12.
[22] *Id.* ¶ 14.

This case is being heard on appeal following the district court's second determination that the record does not substantiate Mlekush's claim of being "forced" to litigate to receive her entitled benefits under her UIM policy.[23] After complying with the Court's directive to develop the record concerning "the entire process leading up to the ultimate resolution of the claim," the district court, again, concluded Mlekush was not entitled to attorney fees and costs under the "insurance exception" to the American Rule.[24]

IV. SUMMARY OF ARGUMENTS

A. District Court

Originally, the district court determined Mlekush was not entitled to attorney fees under the insurance exception because Mlekush filed suit before evidence of the UIM claim sufficiently developed to settle.[25] However, after developing the complete relevant record on remand, and relying on the *entirety* of the evidence developed to evaluate whether the insurance exception should or should not be applied in this case, the District Court came to the same conclusion.[26]

The fully developed record showed that Farmers made appropriate settlement offers, which changed as the evidence developed.[27] Farmers asserts Mlekush was never forced to initiate legal action to recover her entitled compensation under the insurance contract.[28] Had she waited for the necessary evidence to support her UIM claim, there never would have been any reason to litigate matters in the first place.[29] As the Court opined in *Mlekush I*, however, further analysis and development of the record to "consider the entirety of the litigation" was necessary when determining whether an insured was "forced" to litigate within the meaning of the insurance exception.[30]

Thus, the district court looked deeper into all facts relevant to all stages of litigation and found that, while it was clear Farmers questioned causation prior to litigation and the jury subsequently ruled in Mlekush's favor on this issue, it was not clear that its actions prior to litigation (requesting medical records related to an injury sustained in 2001) amounted to denial of her UIM claim.[31] Rather, the district court found the record indicated that Farmers engaged in a reasonable course –gathering

[23] Appellee's Reply Brief, *supra* note 15, at*1.
[24] *Id.* at *3.
[25] *Mlekush*, ¶ 9.
[26] Appellee's Answer Brief, *supra* note 15, at *3.
[27] *Id.* at *6-7.
[28] *Id.* at *10.
[29] *Id.*
[30] *Mlekush*, ¶ 9.
[31] Appellee's Answer Brief, *supra* note 15, at *12.

information in an attempt to value and resolve her claim.[32] Based on the information she provided, Farmers had reason to deny advance med-pay.[33] As Mlekush had received $4,000 in medical claim payments from Farmers and $50,000 from the other driver's insurer, and her bills at that point totaled $46,016.15, the district court determined Farmers was reasonable to refuse advance payment of her claims.[34] Since this refusal of advance payments did not amount to a denial of full benefits of the contract, the district court held the fully developed record only bolstered its earlier decision that Mlekush was not forced to turn to litigation which would entitle her to attorney fees and costs.[35]

The district court found further analysis of the completely developed record only reinforced its earlier decision to deny attorney fees in demonstrating that Farmers negotiated in good faith as to its valuation of the claim.[36] Shortly after Mlekush first demanded *Ridley* payments - payments an insurance company is statutorily obligated to make when liability is reasonably clear –and policy limits, Farmers offered $18,831.25 new money.[37] When they mediated after the Mlekush's second surgery, Farmers increased its offer to $57,000.[38] Shortly thereafter, in its proposed offer of judgment, the settlement offer increased to $60,000, and eventually Farmers agreed to $77,500 in"new money."[39] The record indicates Farmers increased its offers when Mlekush provided updated information about her treatment and prognosis.[40] Although Farmers did not offer the $200,000 policy limit she demanded, its offers were not unreasonably low given the information available.[41]

B. Appellant Tanya Mlekush

Mlekush appeals the district court's decision to deny her motion for attorney fees and costs, arguing that district court did not correctly apply the law to the facts developed on remand.[42] The Court remanded the case with directions to assess the fully developed record to determine if Farmers forced Mlekush to bear the burden of legal action to recover the full benefit of her insurance contract.[43] However, while the district court adhered to the Court's directive to evaluate all the relevant evidence –not just focusing on whether Mlekush initiated litigation prematurely—

[32] *Id.*
[33] *Id.* at *7.
[34] *Id.* at *12.
[35] *Id.*
[36] *Id.* at *15.
[37] *Id.* at *6.
[38] *Id.*
[39] *Id.*
[40] *Id.* at *7-8.
[41] *Id.* at 17.
[42] Appellant's Opening Brief, *supra* note 5, at *1.
[43] *Mlekush*, ¶ 14.

Mlekush argues it applied the wrong standard in determining whether she was "forced" to litigate within the meaning of the insurance exception.[44] According to Mlekush, current Montana jurisprudence and relevant policy considerations require this determination be made under the "Guessed Wrong" standard –where non-discretionary attorney fees and litigation expenses must be paid when an insurer "guesses wrong" and forces its insured to bear the burden of legal action to obtain the full benefit of her insurance contract.[45] Instead, the district court performed a bad faith analysis and determined that, since Farmers acted "reasonably" and in "good faith, the insurance exception did not apply.[46] Mlekush asserts that, had the district court applied the correct standard, it would have found the insurance exception to the American Rule did, in fact, entitle her to attorney fees and costs.[47]

C. Defendant and Appellee Farmers Insurance Exchange

Farmers argues that the district court did not err in finding the insurance exception did not apply because it completely adhered to the Court's directive to evaluate *all* the relevant evidence in coming to its determination.[48] Despite Mlekush's contention, Farmers maintains that nothing in *Mlekush I* prohibited the district court from evaluating whether Farmers' acted "reasonably" or in "good faith" in assessing whether it "forced" Mlekush to assume the burden of legal action within the meaning of the insurance exception.[49]

Farmers argues that since its actions were reasonable given the surrounding circumstances and acted in good faith, as demonstrated by the record, Mlekush lacks the necessary proof to support the assertion that she was forced to assume the burden of legal action within the meaning of the insurance exception.[50]

Farmers argues that, as evidenced above, the district court followed the Court's direction to consider both parties' actions during the entire process leading up to the ultimate resolution of the claim in determining whether the insurance exception applied.[51] Contrary to Mlekush's assertion, nothing in *Mlekush I* prohibited the district court from evaluating whether Farmers acted "reasonably" or in "good faith" in assessing whether it "forced" Mlekush to assume the burden of legal action within the meaning of the insurance exception.[52] Arguing the district court

[44] Appellant's Opening Brief, *supra* note 5, at *9.
[45] *Id.*
[46] Appellant's Reply Brief, *supra* note 1, at *5.
[47] *Id.* at *12.
[48] Appellee's Answer Brief, *supra* note 15, at *13.
[49] *Id.* at *15.
[50] *Id.*
[51] *Id.* at *15.
[52] *Id.*

to be in the best position to evaluate this issue, and nothing in *Mlekush I* suggested the district court could not characterize the evidence in whatever manner it saw fit, Farmers' contends no reversible error was made in reaching this factual determination. [53]

V. ANALYSIS

Generally, Montana adheres to the American Rule regarding attorneys' fees that requires each party to bear their own expenses.[54] Although Montana does allow exceptions to this rule, these exceptions are narrow.[55] Should the Court decide to accept Mlekush's argument and adopt the "Guessed Wrong" standard, however, the insurance exception may just do as Farmers asserts and swallow the rule.[56]

Considering only the Court's opinion in *Mlekush I* and the rationale behind the case's remand articulated within, it is unlikely the Court will overrule the district court's decision. Despite Mlekush's assertion that the insurance exception always applies whenever the insurer "guesses wrong," a closer reading of the Montana Supreme Court's last opinion on the subject clearly shows no such "bright-line" line rule was ever intended.[57] On the contrary, the Court held this exception was to be determined on a case-by-case basis, emphasizing the necessity for the district court to not just consider the insured's filing of the complaint, but "the entirety of the litigation in determining whether, and to what extent an insured was forced to assume the burden of legal action in order to recover the full benefit of the insurance contract."[58]

Despite the apparent mischaracterization of *Mlekush I*, the policy considerations behind the insurance exception provide sufficient weight to Mlekush's proposed "Guessed Wrong" standard to warrant an oral argument. As pointed out in *Mountain West Farm Bureau Mut. Ins. Co. v. Brewer*, the Montana Supreme Court has the authority to "interpret, modify, and apply common law principles in the absence of legislative preemption."[59] There is no dispute that the American Rule and its corresponding exceptions are derived from the common law. [60] Further, the Court has established that it has an obligation to reform common law "as justice requires."[61] Although the *Brewer* Court did not hold the insurance exception applied to the case presented, it effectively established a willingness to modify this exception should the moving party present

[53] *Id.* at *13.
[54] *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 23, 351 Mont. 464, 215 P.3d 649.
[55] *Id.*
[56] Appellee's Reply Brief, *supra* note 15, at *20.
[57] *Mlekush*, ¶ 9.
[58] *Id.* ¶ 11.
[59] 2003 MT 98, ¶ 24, 315 Mont. 231, 69 P.3d 652.
[60] *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 97, 303 Mont. 274, 16 P.3d 1002.
[61] *Pence v. Fox*, 248 Mont. 521, 524, 813 P.2d 429, 431 (1991).

"cited authority compelling to hold an insurer liable for attorney fees."[62] Should the policy considerations behind Mlekush's "Guessed Wrong" prove weighty enough, the Court may just expand the exception to avoid injustice.

So, which is it? Would the adoption of the "Guessed Wrong" standard completely swallow the American Rule –the rule which Montana has expressed as being "a foundation of our jurisprudence, and we must narrowly construe the exceptions lest they swallow the rule" –or do the policy considerations surrounding this case require the Court modify the insurance exception to automatically apply whenever the insurer "guesses wrong?" Either way, the Court's decision will have a far-reaching impact on Montana jurisprudence –effectively illustrating oral advocacy's true purpose and the essential role it plays in ensuring the sanctity of the justice system.

[62] *Brewer*, ¶ 36.