IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 13-0228

TIDYMAN'S MANAGEMENT SERVICES INC., a Washington corporation; LENORA DAVIS BATEMAN, VICKI EARHART, CAROL HEALD, THERESA YOUNGQUIST, BARBARA GAUSTAD, SHARON YOUNG, DIANE MOLES, KYLE BAILEY, MARK RADEMAN, DREW OLSEN, CHADNEY SAWYER, THOMAS NAGRONE, DAN NAGRONE, DARRELL NACCARATO, PAT DAHMEN, JANELLE SELLS, TERRI ORTON, WILLIAM EVANSON, BILL EVANSON, TAMMY EVANSON, LARRY THOMPSON, JASON GUICE, JAMIE GUICE, LAURA SQUIBB, RICK BAILLIE, JEFFREY TUCKER, AMY TUCKER, MARYBETH WETSCH, LAURA STOCKTON, JERRY STREETER, CLARA KUHN, NANCY MCDONALD, TED NUXOLL, CINDY NUXOLL, and DEAN CARLSON,

Plaintiffs, Appellees and Cross-Appellants,

vs.

MICHAEL A. DAVIS and JOHN MAXWELL,

Defendants and Appellees,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Defendant and Appellant.

***AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS & THE MONTANA TRIAL LAWYERS ASSOCIATION**

On Appeal From Montana Fourth Judicial District Court, Missoula County
Hon. Karen S. Townsend, Cause No. Dv-10-695

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I. STATEMENT OF ISSUE PRESENTED

When a carrier breaches its duty to defend and the policyholder then enters into a good faith stipulated judgment, which is approved by the district court after a hearing, is the carrier *per se* entitled to *additional* discovery and a *another* evidentiary hearing to challenge the enforcement of the stipulated judgment?

II. STATEMENT OF THE CASE

United Policyholders and the Montana Trial Lawyers Association (MTLA) agree with Plaintiffs' Statement of the Case.

III. STATEMENT OF FACTS

United Policyholders and the MTLA adopt Plaintiffs' Statement of Facts. The ten facts below are highlighted as critical to assessing the argument of National Union Fire Insurance Company of Pittsburgh, Pa. (NUFI) and the Montana Defense Trial Lawyers Association (MDTL's) that NUFI was denied due process—notice and an opportunity to be heard:

(1) On May 21, 2010, Plaintiffs filed a complaint against the policyholders claiming compensatory damages of $29 million, prejudgment interest, and punitive damages. CR1.

(2) While represented by sophisticated counsel, NUFI unequivocally denied a defense to the policyholders on at least three separate occasions. CR33: Ex. E: pp. 2-3 (8/5/10); CR56.8: Ex. V (10/28/10); CR109: Ex. A: BA067

(10/28/10); CR123: Ex. U (11/3/10). NUFI chose not to defend under a reservation of rights and file a declaratory judgment action on coverage.

(3) After its first refusal to defend, Plaintiffs amended to add NUFI as a party. CR10. As a party NUFI had full knowledge of the evidence being developed and was provided all pleadings, expert opinions and testimony from the underlying case, and all written communications between counsel concerning the stipulated judgments.

(4) Plaintiffs put NUFI on notice that its continued failure to defend would likely result in the parties entering into a stipulated judgment for which NUFI would be held liable. CR19.1.

(5) After notice to NUFI, and after NUFI again denied a defense, Plaintiffs filed stipulated judgments against the policyholders for $29 million. CR1, CR22, CR23. The amount of the stipulated judgment did not include any amount for punitive damages or prejudgment interest from 2006-2010. CR228: 35:10-25.

(6) Plaintiffs then filed a *Motion to Approve Stipulated Judgment*, and moved for summary judgment. CR21.

(7) Two years after *Plaintiff's Motion to Approve Stipulated Judgment* was fully briefed, the district court held a hearing. CR228.

(8) At the hearing Plaintiffs presented evidence regarding five separate, independent asset valuations establishing compensatory damages in the range of $25 million to $32 million. These valuations had been done for purposes of paying retirement benefits based on "current value" as required by federal law. Plaintiffs also presented an expert affidavit stating $29 million was the reasonable value of the lost assets. CR228.

(9) NUFI appeared and had an opportunity to be heard and present evidence at this hearing. However, NUFI failed to provide *any evidence* that the stipulated judgment was not entered in good faith; that the amount of the stipulated judgment was unreasonable; or that the stipulated judgment was the result of fraud or collusion. CR228.

(10) As a result of NUFI's unjustifiable breach of the duty to defend, the district court found NUFI was liable for the full amount of the stipulated judgment under well-established Montana law. CR222.

Based on the above facts, NUFI's and the MDTL's assertion NUFI was denied notice and an opportunity to be heard is incredible.

IV. ARGUMENT

Having made a business and tactical decision not to avail itself of all the protections it is entitled to, NUFI cannot now argue on appeal its due process rights were violated. Longstanding Montana law dictates that a carrier refusing to defend under a reservation of rights does so at its own peril and is liable for all damages resulting from an unjustified breach of the duty to defend. Having inexplicably taken this ill-fated path, and thereby waived all procedural safeguards, NUFI now seeks to avoid the consequences of its actions by asking this Court to impose additional procedural requirements contrary to existing statutes and case law.

Under Montana law, when a policyholder enters into a good faith stipulated judgment as a result of a carrier's unjustifiable breach of its duty to defend, the stipulated judgment is conclusively enforceable against the carrier. To avoid enforcement of the stipulated judgment, the carrier must either: (1) bear the burden of proving the stipulated judgment was not made in good faith under Mont. Code Ann. §28-11-316; or (2) move to set aside the stipulated judgment under Rule 60(b), Mont.R.Civ.P. Under either scenario, the carrier is not *per se* entitled to additional discovery and an evidentiary hearing. To allow the carrier to re-litigate the issues decided in the underlying action, after it has abandoned its policyholder and waived its opportunity to appear and present evidence, would defeat the fundamental protective purposes of insurance.

A. A carrier that denies coverage, but refuses to provide a defense under a reservation of rights while pursuing a declaratory judgment action on coverage, does so at its own peril, as it may give rise to an unjustifiable breach of the duty to defend.

In every jurisdiction, including Montana, a carrier's duty to defend is broader than its duty to indemnify. While the duty to indemnify arises only if coverage under the policy is actually established, the duty to defend is triggered by allegations of facts, which if proven, would result in coverage. *State Farm Mutual Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶26, 372 Mont. 191, 312 P.3d 403. Unless there is an "unequivocal demonstration" the contested claim does not fall within the policy's scope, the carrier has a duty to defend. *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶22, 321 Mont. 99, 90 P.3d 381.

Given the broad nature of the duty to defend, carriers must tread carefully in assessing whether a policyholder's claim implicates that duty. Where a carrier believes there is no coverage, the prudent approach is to provide the policyholder a defense under a reservation of rights, and to seek a judicial declaration as to the parties' rights and obligations under the policy. This Court has repeatedly counseled this is the preferred approach in Montana:

> An insurer should provide the insured a defense under a reservation of rights if the insurer believes that a question exists about the boundaries of coverage. The insurer then may file a declaratory judgment action to resolve coverage issues . . . An insurer's failure to follow this course leaves the insurer potentially liable for defense costs and judgments.

Horace Mann Ins. Co. v. Hanke, 2013 MT 320, ¶25, 312 P.3d 429; *Staples*, ¶28.

Defending under a reservation of rights furnishes a carrier with the right to participate in the defense and settlement of the claim. This allows the carrier to allege any potential defenses, challenge liability, consent to settlements, and test damages. Carriers defending under a reservation of rights also generally reserve the right to attempt to recoup any defense costs from the policyholder if it is ultimately determined there is no coverage for the claim. *Hanke,* ¶25. Montana law gives carriers more rights in that regard than they have under their insurance policies and under the precedent in many jurisdictions. *See, e.g., Am. & Foreign Ins. Co. v. Jerry's Sport Center, Inc*., 606 Pa. 584, 608, 2 A.3d 526, 540-41 (2010).

Accordingly, there is no drawback to a carrier defending under a reservation of rights. This is why Montana courts at all levels have warned carriers to defend under a reservation of rights if there is any question as to the existence of coverage. In contrast, the consequences for unjustifiably refusing to defend exposes the carrier not just to policy limits, but to all damages flowing from the breach, including excess coverage and coverage by estoppel. Nonetheless, NUFI inexplicably failed to follow this prudent and customary process, instead abandoning its policyholders and leaving them without a defense after years of litigation in multiple venues.

B. Under almost a century of well-established Montana law, carriers that unjustifiably breach the duty to defend are liable for all damages flowing from that breach.

As noted by this Court, there is an important difference between the liability of a carrier performing its obligations, and that of a carrier breaching its contract. "The policy limits restrict only the amount the carrier may have to pay in the performance of the contract as compensation to a third person . . .; they do not restrict the damages recoverable by the insured for a breach of contract by the insurer." *Lewis v. Mid-Century Ins. Co.*, 152 Mont. 328, 449 P.2d 679, 682-683 (1968) (internal citations omitted). "Insurance companies who fail to render defense as required by the terms of their policies and the applicable law, do so at considerable risk as the financial penalties are considerable." *Nielsen v. TIG Ins. Co.*, 442 F.Supp.2d 972, 980 (D. Mont. 2006).

Montana courts have repeatedly held that a carrier that breaches the duty to defend is liable for all damages flowing from that breach, including judgments against its policyholder. *See Independent Milk & Cream Co. v. Aetna Life Ins. Co.*, 68 Mont. 152, 216 P. 1109, 1110 (1923) (stating that policyholder was "entitled to recover such damages as were the natural and ordinary consequences of the breach" of the duty to defend); *Hudson v. Edsall*, 30 M.F.R. 462, 466 (D. Mont. 2002); *Lee v USAA Cas. Ins. Co.*, 2004 MT 54, ¶¶19-22, 320 Mont. 174, 86 P.3d

562; *Staples*, ¶20; *Newman v. Scottsdale Ins. Co*., 2013 MT 125, ¶30, 370 Mont. 133, 301 P.3d 348.

These decisions reflect this Court's judgment for over 90 years that a wrongful refusal to defend has attendant consequences for the carrier because the fundamental protective purpose of the insurance policy is defeated. *Independent Milk*, 216 P. at 1110. Neither NUFI nor the MDTL challenge the bedrock principle that a carrier that unjustifiably breached its duty to defend is liable for damages that may be far broader in scope than had the carrier defended, fully or under a reservation of rights.

C. A good faith stipulated judgment entered as a result of the carrier's breach of its duty to defend is conclusively enforceable against the carrier.

1. Under the plain language of Mont. Code Ann. §28-11-316, a good faith stipulated judgment entered by a policyholder after a carrier has unjustifiably refused to defend, is conclusive as to the amount of damages arising as a result of the breach of the duty to defend.

The Montana Legislature has enacted the applicable standard for enforcement of stipulated judgments against carriers unjustifiably refusing to defend:

> [t]he person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses if he chooses to do so. If after request the person indemnifying neglects to defend the person indemnified, a recovery against the latter suffered by him in good faith is conclusive in his favor against the former.

Mont. Code Ann. §28-11-316 (emphasis added).

This statute, which is directly on point and controls this Court's analysis, is not even mentioned by NUFI or the MDTL. The statute requires that if policyholder suffers a recovery against him in "good faith," the recovery will be conclusive against the carrier. This Court has already determined "that the burden is upon the insurer to rebut the foregoing presumption" in Mont. Code Ann. §28-11-316. *Independent Milk*, 216 P. at 1111. Absent proof from the carrier that the stipulated judgment was not entered in good faith, the amount of the stipulated judgment is conclusive. *Washington Water Power Co. v. Morgan Elec. Co.*, 152 Mont. 126, 138, 448 P.2d 683, 689 (1968).

Indeed, this Court recently confirmed this principle in *Freyer*, where this Court drew a careful distinction between damages flowing from a breach of the duty to defend, versus from breach of the duty to settle. *Freyer*, ¶¶35-36. *Freyer* found stipulated judgments entered into while the carrier was defending under a reservation of rights and had filed a declaratory judgment action would not give rise to any presumption. In contrast, a stipulated judgment entered into as a result of a breach of the duty to defend is "presumptively enforceable" against the carrier. *Freyer*, ¶36. Quoting *Hamilton v. Maryland Cas. Co.*, 41 P.3d 128, 131 (Cal. 2002), this Court reasoned:

> Importantly, the *Hamilton* Court distinguished cases where the insurer had failed to defend from cases where the insurer did defend, and reasoned that a

> stipulated judgment was presumptively enforceable as the measure of damages only in the former instance, because the non-defending insurer has left its insured on its own to challenge liability, and the insurer should not be able to "reach back" and interject itself into a controversy it has sidestepped to "void a deal the insured has entered to eliminate personal liability."

Freyer, ¶36 (internal citations omitted) (emphasis added). Under this Court's sound analysis, NUFI should not be able to "reach back" to its policyholders' settlement with the Plaintiffs when it previously sidestepped its responsibilities to them.

2. Additional discovery and an additional evidentiary hearing are not required under Mont. Code Ann. §28-11-316.

The plain language of Mont. Code Ann. §28-11-316, does not require a district court to allow a carrier to depose claimants, policyholders and their experts and attorneys, and hold a separate evidentiary hearing. "In the construction of a statute, this Court's job is 'simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.'" *Kluver v. PPL Montana, LLC*, 2012 MT 321, ¶53, 368 Mont. 101, 293 P.3d 817 (quoting Mont. Code Ann. §1–2–101). Based on this authority, it would be improvident for the Court to legislate a *per se* requirement from the bench. While, the district court held a hearing in this case allowing Plaintiffs to provide foundational evidence and gave NUFI notice and an opportunity to meet its burden, the indemnity statute does not *require* additional discovery or an evidentiary hearing, which would be a redundant process.

While NUFI and the MDTL cite to Washington case law for the proposition that a separate evidentiary hearing is required to enforce a stipulated judgment, Washington's requirement for an evidentiary hearing is based on a mandatory statutory provision. *Bird v. Best Plumbing Group*, 260 P.3d 209 (Wash.App. 2011); R.C.W. 4.22.060. In contrast, Montana's indemnity statute is based on California's statutory structure, which also does not require a separate evidentiary hearing. Mont. Code Ann. §28-11-316; Cal. Civil Code §2778. For this reason, California law is instructive.

Under California law, if a carrier wrongfully refuses to defend, the policyholder is free to negotiate a settlement with the plaintiff, and that settlement creates an evidentiary presumption of liability and damages for purposes of a subsequent action against the carrier to enforce the settlement. *Pruyn v. Agric. Ins. Co*., 42 Cal.Rptr.2d 295, 299 (1995). The burden then shifts to the carrier to prove by a preponderance of the evidence that the stipulated judgment was the product of bad faith. *Pruyn*, 42 Cal.Rptr.2d at 530. Unless the carrier can meet that burden of proof, it is bound by the stipulated judgment. *Pruyn*, 42 Cal.Rptr.2d at 531. As a matter of public policy, the burden of proof "should fall upon the insurer whose breach has occasioned the settlement." *Id*. This analysis strikes a proper balance between the competing interest of the carrier and the abandoned policyholder, and

comports with Montana statutory and case law. *Pruyn*, 42 Cal.Rptr.2d at 527; *Independent Milk,* 216 P. at 1111.

This is what happened in the present case in the context of a summary judgment motion and hearing. Plaintiffs presented competent credible evidence of five separate, independent asset valuations. The evidence demonstrated Maxwell and Davis relied upon these valuations in operation of TMSI. Accordingly, all evidence presented demonstrated the $29 million stipulated judgment was done in good faith as a reflection of the value of assets lost in the merger. In fact, it would have been bad faith for Maxwell or Davis to deny the validity of these asset valuations, having relied upon them in the ordinary course of business. CR228: p. 21:21-25. Moreover, Maxwell and Davis did not agree to a stipulated judgment amount in excess of the median asset valuation for compensatory damages; that contained punitive damages; that contained prejudgment interest from 2006-2010; and did not agree to a stipulated judgment for which they would receive any financial remuneration. CR228: p. 21:21-25. This is far more than the law requires.

In contrast, NUFI submitted no evidence of fraud or bad faith. Other than an speculative and unsupported allegation of collusion, NUFI presented no evidence to satisfy its burden of proof in responding to the motion for summary judgment, either in its briefing or at the hearing.

3. The standard articulated in Mont. Code Ann. §28-11-316 is consistent with Rule 60(b), Mont.R.Civ.P., wherein a carrier has an opportunity to set aside a judgment for fraud, misrepresentation, or misconduct.

Under Montana Rule of Civil Procedure 60(b)(3), a final judgment may be set aside where the moving party demonstrates "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." This clause "allows a party to file an independent action for relief from a final judgment or order under [these] very limited circumstances." *Glickman v. Whitefish Credit Union Assoc*., 1998 MT 8, ¶ 13, 287 Mont. 161, 951 P.2d 1388 (internal citations omitted). When considering a Rule 60(b) motion, the district court is not required to hold an evidentiary hearing when a party had notice and opportunity to be heard in motion practice and failed to present any evidence. *Puhto v. Smith Funeral Chapels, Inc.*, 2011 MT 279, 362 Mont. 447, 264 P.3d 1142, 1142. A final judgment is subject to attack only on limited grounds. A final judgment is not subject to attack just because an insurance company thinks that it is unreasonable.

4. Legislating the rule urged by NUFI and the MDTL would place carriers who have breached the duty to defend in a better position than if they had fulfilled their contractual obligations to their policyholders.

If the Court *per se* allows the carrier additional discovery and an evidentiary hearing, the carrier's incentive to satisfy its obligation to defend will be reduced

because there will be little tangible impact on the carrier if it refuses to do so. If the carrier is dissatisfied with the settlement amount, it would then have the opportunity to engage in an *ex post facto* challenge to the judgment's reasonableness. This would allow the carrier to utilize its vastly superior resources against its policyholder in an attempt to leverage a lower settlement. Such a process is not required under Montana law, nor warranted where a carrier has improperly forced its policyholder to fend for himself.

An insurance company should not be permitted to second guess and relitigate the underlying case when it was obligated, but failed, to defend in the first place. To ensure an equitable result, the Court should simply adopt the Legislature's directive that a carrier that improperly refuses to defend may only challenge enforcement of a stipulated judgment against it by meeting its burden of proof that the stipulated judgment was not entered in good faith. If a carrier is confident enough to make a unilateral determination that it has no duty to defend, then the amount reached in any settlement by its policyholder should be of no consequence. If the carrier's claim of nonliability is correct, a settlement amount of zero or $1 billion would have the same effect. *See, e.g.*, *Metcalf v. Hartford Acc. & Ind. Co.*, 126 N.W.2d 471, 476 (Neb. 1964).

Here, NUFI had ample notice and chance to be heard when the policyholders tendered the suit. NUFI received additional notice and opportunity to be heard by

being brought into the case as party. NUFI received additional notice and opportunity to be heard by fully briefing and being able to present evidence at the hearing. Having rejected its right to participate in the defense and raise any objections to the action's disposition, NUFI should not be permitted to reach back to void an agreement the policyholders have entered to eliminate their personal liability. This Court should not reward a carrier's unilateral reallocation of risks to its policyholder.

D. An analysis under Mont. Code Ann. §27-1-302, the general damages statute, does not compel a different result.

Mont. Code Ann. §27-1-302, generally provides, "[d]amages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered." "Good faith" under the indemnity statute goes hand in hand with "reasonableness" under the general damages statute. For example, if it was proven a stipulated judgment "unconscionable" or "grossly oppressive," then by definition it could not have been entered in good faith. Accordingly, as a matter of law, a stipulated judgment entered into in good faith would also be reasonable.

A district court's determination of damages is a finding of fact, which must be supported by substantial credible evidence. *Harding v. Savoy*, 2004 MT 280, ¶45, 323 Mont. 261, 100 P.3d 976. As acknowledged by the MDTL, this Court has

found that a "district court is best situated to determine proper damages, and its decision will remain undisturbed unless the amount awarded reflects an abuse of discretion." *Watson v. West*, 2011 MT 57, ¶30, 360 Mont. 9, 250 P.3d 845 (citing *Harding*, ¶45). "A district court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or so exceeds the bounds of reason as to work a substantial injustice." *McCormack v. Andres*, 2008 MT 182, ¶ 22, 343 Mont. 424, 185 P.3d 973. Montana does not impose on its district courts the obligation to conduct an evidentiary hearing in every instance of disputed fact. Instead, the determination of whether an evidentiary hearing will be held is typically within the discretion of the district court. *Puhto v. Smith Funeral Chapels, Inc*., 2011 MT 279, 362 Mont. 447, 264 P.3d 1142, 1142.

In this case, it cannot be found the district court abused its discretion in finding NUFI failed to meet its burden in this case. The district court only entered the stipulated judgment against NUFI after: (1) allowing the parties to fully brief the *Motion to Approve Stipulated Judgment*; (2) holding a hearing where all the evidence regarding the underlying basis of the amount of the stipulated judgment was reviewed; and (3) finding "the $29 million judgment is based upon the estimated value at the time of the Tidyman's Inc. and SuperValu merger." CR222: p. 19:5-7. It cannot be said the district court abused its discretion. Moreover, nothing in Mont. Code Ann. §27-1-302 requires a district court to hold a separate

evidentiary hearing and neither NUFI nor the MDTL cite any such authority. Such matters should instead be left to the discretion of the trial court as in this case where the district court only entered judgment after it had already been presented with fully briefed motions for summary judgment, with supporting evidence, and held a hearing on such.

Britton v. Brown, 2013 MT 30, 368 Mont. 379, 300 P.3d 667 does not direct a different result. *Britton* involved an equitable partition action and is distinguishable on its facts, as well as on the statutory and regulatory process implicated in partition actions. *Britton* did not consider whether an evidentiary hearing was required to determine reasonableness. Instead, *Britton* determined when an evidentiary hearing was required to challenge the findings of partition referees. *Britton*, ¶23. In resolving this issue *Britton* held that an evidentiary hearing is only warranted after the requesting party submits "sufficient evidence" to support its objection. *Id*. To the extent *Britton* is even relevant, it is undisputed NUFI presented no evidence to support its burden of proof in this case, and would not be entitled to an evidentiary hearing under *Britton*.

Likewise, *Washington Water*, another central case relied upon by NUFI and the MDTL, also supports the analysis advocated herein. In *Washington Water* the carrier sought to challenge the reasonableness of the settlement entered into as a result of its breach of its duty to defend. The case was submitted to the district

court (there is no mention of a hearing), which enforced the settlement against the carrier. On appeal, this Court enforced the amount of the settlement finding:

> Additionally [the insurance companies] cannot refuse to defend, participate, or settle on the basis that they have no liability under the indemnity agreement, 'lie in the weeds' and allow [the parties] to settle in good faith for a figure known to them in advance and not objected to, and then attack its reasonableness at the trial. They are estopped by their own conduct and implied acquiescence.

Washington Water, 52 Mont. 139, 448 P.2d 690.

In sum, neither existing law nor its fair extension supports a requirement that a carrier that has improperly abandoned its policyholder must be provided discovery and a hearing on the reasonableness of the policyholder's stipulated judgment. To the contrary, existing Montana law counsels in favor of disallowing such measures. Such a determination should be left to the sound discretion of the district court.[1]

[1] The issue before the Court is whether additional discovery and an evidentiary hearing is required in all cases where a carrier has breached its duty to defend, forcing a policyholder into a stipulated judgment. UP and MTLA acknowledge that depending on the circumstances surrounding liability or damages, a separate evidentiary hearing may be prudent or necessary, but this should not be the general rule. For example, Mont. Code Ann. §72-5-408 requires court approval of settlements on behalf of minors, and Rule 23(e), Mont.R.Civ.P., permits class settlements only upon court approval. Likewise, there may be instances it might be prudent for a party to request such a process—incapacitated injured party, client dynamics, division of recovery, etc. An insurance company is not the type of vulnerable party protected by Montana statutes requiring an evidentiary hearing. This is especially true when the insurance company breached its duty to defend.

E. Requiring district courts to delve into the underlying circumstances of each settlement violates Montana's mediation confidentiality statute, Rule 408, Mont.R.Evid., as well as long standing policies to encourage settlement.

Requiring a district court to reopen and examine all such settlements would undermine Montana's long-standing public policy to encourage settlements and avoid unnecessary litigation. *Augustine v. Simonson*, 283 Mont. 259, 266, 940 P.2d 116, 120 (1997). This Court has recognized that a myriad of considerations enter into settling a claim, and a court should not "interject its opinion regarding what factors and circumstances parties may consider in negotiating a settlement." *Miller v. State Farm Mut. Auto. Ins. Co.*, 2007 MT 85, ¶13, 337 Mont. 67, 155 P.3d 1278. "Settlement is a process that belongs to the parties. The declared public policy of this State is to encourage settlement and avoid unnecessary litigation. The reasons for encouraging settlement are numerous. Settlement eliminates cost, stress, and waste of judicial resources." *Miller*, ¶14 (internal citations omitted).

Furthermore, Montana law generally prohibits introduction of confidential settlement negotiations for any reason. Mont. Code Ann. §26-1-813(3); Rule 408, Mont.R.Evid. In fact, this Court has adopted a "zero-tolerance policy" in regard to discussion of these types of negotiations. *Harrell v. Farmers Educational Co-op Union of America, Montana Div.*, 2013 MT 367, ¶72 (citing *Kluver*, ¶ 58-60). For these reasons, it was surprising and wholly inappropriate for NUFI to rely on this evidence on appeal and this Court should disregard such arguments.

F. NUFI's due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article II, §17 of the Montana Constitution are well protected under existing law.

While no absolute standard exists for what constitutes due process, it does require notice and an opportunity to be heard. *McDermott v. McDonald*, 2001 MT 89, ¶10, 305 Mont. 166, 24 P.3d 200; *Goldberg v. Kelly* (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287. The process due in any given case varies according to the factual circumstances of the case, the nature of the interests at stake, and the risk of making an erroneous decision. *Sage v. Gamble*, 279 Mont. 459, 465, 929 P.2d 822, 825 (1966).

However, due process rights can be waived. Having walked away from all the due process protections available to it, NUFI cannot now argue it was denied due process under the law. Indeed, the district judge provided far more procedural protections to NUFI than NUFI had any right to demand or expect. NUFI had an opportunity to protect itself by defending its policyholder. NUFI waived that right. Nevertheless, the district court had a hearing at which NUFI had the opportunity to be heard and to present evidence. NUFI chose not to present anything. NUFI should not be heard to complain that those procedures were infirm in some way, because they were far more extensive than NUFI had any right to expect.

V. CONCLUSION

For the foregoing reasons, *Amici* respectfully request this Court to affirm the district court's approval of the stipulated judgment in this case.

DONE and DATED this ___ day of December, 2013.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16 of the Montana Rules of Appellate Procedure, the undersigned hereby certifies that this brief is printed with a proportionately spaced Times New Roman text; typeface of 14 points; is double spaced; and the word count is 4,928, excluding the Cover, Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

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