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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: OP 19-0283

OP 19-0283

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 297

HIGH COUNTRY PAVING, INC.,

Plaintiff,

v.

UNITED FIRE & CASUALTY CO.,

Defendant.

ORIGINAL PROCEEDING: Certified Question, United States District Court,
In and For the District of Montana, Missoula Division,
Cause No. CV 18-163-M-DWM
Honorable Donald W. Molloy, Presiding Judge

COUNSEL OF RECORD:

For Plaintiff:

Robert K. Baldwin, Trent M. Gardner, Jeffrey J. Tierney, Goetz, Baldwin & Geddes, P.C., Bozeman, Montana

For Defendant:

Jon T. Dyre, Crowley Fleck PLLP, Billings, Montana

For Amicus Montana Defense Trial Lawyers:

Mikel L. Moore, Moore, Cockrell, Goicoechea & Johnson, P.C., Kalispell, Montana

For Amicus Montana Trial Lawyers:

Colin Gerstner, Gerstner Law PLLC, Billings, Montana

Submitted on Briefs: October 9, 2019

Decided: December 31, 2019

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to M. R. App. P. 15, the United States District Court for the District of Montana, Missoula Division, the Honorable Donald W. Molloy presiding, certified the following question of law to this Court:

> Where liability is reasonabl[y] clear, is it a breach of an insurer's duty to its insured to pay policy limits to a third party in a motor vehicle accident without a release of its insured where claimed special damages are below policy limits but total damages (including general damages) exceed policy limits?

¶2 We accepted the certified question as written, and now conclude the answer to the question is no, with certain qualifications.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 In accordance with M. R. App. P. 15(6)(a)(ii), the U.S. District Court set forth the relevant factual background to the certified question in its Certification Order, which we restate here.

¶4 High Country Paving, Inc. (High Country), is an asphalt paving company located in Bozeman. High Country purchased a liability insurance policy from United Fire & Casualty Co. (United Fire) which included three types of coverage: (1) commercial general liability (CGL) coverage in the aggregate amount of $2 million, with a $1 million per-occurrence limit; (2) commercial auto liability coverage in the amount of $1 million; and (3) commercial umbrella coverage in the amount of $2 million. In August 2016, during the policy period, one of High Country's employees was involved in an accident while operating an insured vehicle. In the accident, a loaded equipment trailer came unhitched while the vehicle was under way and collided with another vehicle. The driver of the other

vehicle was killed, and a passenger was seriously injured. High Country then notified United Fire of the accident.

¶5 United Fire hired attorney Nick Pagnotta of the Williams Law Firm to represent High Country. High Country separately retained attorneys Jeffrey Tierney and Trent Gardner of Goetz, Baldwin & Geddes, P.C. On October 31, 2017, attorney Chris Edwards of Edwards, Frickle & Culver, issued a demand letter on behalf of the parties injured in the accident, demanding payment of "High Country Paving's Policy Limits of $3,000,000.00 . . ." without a release for High Country. The demand letter included a description of the following claimed economic damages:

> Projected lost future income: $609,486.36
> Medical expenses, as of the demand date: $283,991.09
> Assisted living expenses, as of the demand date: $61,060.89
> Projected future assisted living expenses: $595,342.91

The total of the claimed economic damages was $1,549,881.25. Edwards's demand letter further explained that his clients would also be seeking compensation for general damages like pain and suffering and punitive damages.

¶6 On November 9, 2017, Tierney wrote to Pagnotta and United Fire, stating that High Country objected to any settlement that did not include a release for High Country. On November 14, Pagnotta responded to Edwards with a counteroffer to resolve the claims for $3 million, including a release for High Country. On November 27, Edwards refused Pagnotta's counteroffer and renewed his original demand for payment of $3 million without a release for High Country. Also on November 27, Edwards wrote to Tierney and demanded an additional $2.5 million from High Country.

¶7 On December 1, 2017, attorney Katherine Huso of Matovich, Keller & Murphy P.C., who had been retained by United Fire, wrote to Tierney, denying High Country's request for CGL coverage. Huso's letter further stated that United Fire was considering accepting Edwards's demand for payment of $3 million without a release for High Country. Huso advised Tierney that United Fire would continue to provide High Country defense if it decided to pay policy limits without a release. On December 5, Tierney replied to Huso, objecting to United Fire accepting Edwards's settlement offer unless it included a release for High Country. On December 8, Huso informed Tierney that United Fire was planning to accept Edwards's settlement offer and Tierney again reiterated High Country's objection. On December 8, 2017, United Fire accepted Edwards's demand for payment of $3 million without a release for High Country.

¶8 After United Fire's settlement, High Country continued to negotiate a separate settlement with Edwards in exchange for a release. Tierney wrote to United Fire on December 27, advising it that High Country had an opportunity to settle and secure a release in exchange for $1.275 million and the assignment of certain potential legal claims. High Country offered to either let United Fire fund the $1.275 million cash component of the settlement or reject the settlement and proceed with litigation if United Fire would agree to defend and indemnify High Country without reservation. On December 28, Huso responded to Tierney, again explaining why United Fire believed there was no CGL coverage and advising that United Fire was not willing to pay the proposed $1.275 million settlement or defend and indemnify High Country without any reservation. But, United Fire offered to defend High Country. On February 5, 2018, High Country settled with

Edwards's clients for $1.275 million and the assignment of certain potential legal claims, in exchange for a release.

¶9 High Country's liability for causing the accident was reasonably clear and, prior to its final settlement, United Fire had made all *Ridley* payments.[1]

STANDARD OF REVIEW

¶10 This Court may answer a question of law certified to it by another qualifying court. M. R. App. P. 15(3). This Court's review of a certified question is "purely an interpretation of the law as applied to the agreed facts underlying the action." *U.S. Specialty Ins. Co. v. Estate of Ward*, 2019 MT 72, ¶ 6, 395 Mont. 199, 444 P.3d 381 (quoting *N. Pac. Ins. Co. v. Stucky*, 2014 MT 299, ¶ 18, 377 Mont. 25, 338 P.3d 56).

DISCUSSION

¶11 "It is not the job of this Court to determine questions of fact or to apply the law to the facts presented to us." *BNSF Ry. Co. v. Feit*, 2012 MT 147, ¶ 7, 365 Mont. 359, 281 P.3d 225. In answering a certified question of law, we interpret the law "as applied to the agreed facts underlying the action." *U.S. Specialty Ins. Co.*, ¶ 6 (citation omitted). In its brief, High Country argues this Court should reformulate the certified question because the question "demands an unequivocal answer to an inherently factual question." High Country asserts the certified question must be rewritten because the question assumes total damages, including general damages, in this case exceed policy limits. High Country disputes that is the case; however, based on the agreed facts as presented by the U.S.

[1] *Ridley v. Guar. Nat'l Ins. Co.*, 286 Mont. 325, 334, 951 P.2d 987, 992 (1997) (An insurer has a duty to pay an injured third party's medical expenses in advance of settlement when liability is reasonably clear.).

District Court we may assume for purposes of the certified question that total damages exceeded High Country's $3 million policy limit. After United Fire settled for the $3 million policy limit, without obtaining a release for High Country, High Country continued to negotiate with counsel for the injured parties, who was asking for an additional $2.5 million from High Country. Eventually, High Country was able to obtain a release after paying another $1.275 million, along with the assignment of some potentially valuable legal claims. Though M. R. App. P. 15(4) allows this Court to reformulate a certified question, we decline to do so here.

¶12 High Country further asks this Court to consider facts beyond those certified by the U.S. District Court in its Certification Order. In its briefing, High Country repeatedly refers to facts not presented by the U.S. District Court. Though High Country appears to believe the factual background as presented to this Court is insufficient, we note that Judge Molloy's Certification Order presented the relevant facts to the controversy from which the question arose, "which have been stipulated by the parties[.]" It is therefore unnecessary to go beyond the facts as certified by the U.S. District Court.

¶13 As a preliminary matter, and as set forth in the U.S. District Court's factual background, we note it is undisputed that High Country's liability for causing the underlying accident in this case was reasonably clear. As a result of that accident, one person died and another was critically injured. Pursuant to its duties as outlined by this Court in *Ridley*, United Fire advance-paid the medical expenses of the injured parties prior to its final settlement. *Ridley*, 286 Mont. at 334, 951 P.2d at 992. High Country argues that any further payments to the injured parties beyond the required *Ridley* payments

without obtaining a release for High Country would violate United Fire's duties to High Country as its insured, as general damages are not a type of damages which are required to be advance-paid to an injured third party under *Ridley*. United Fire argues it was required by this Court's case law to tender a payment of policy limits to the injured parties, without a release for High Country, as it was reasonably clear that total damages exceeded policy limits. The U.S. District Court noted the apparently unresolved tension in our case law between an insurer's duty to a third-party claimant and its duty to its insured, and presented this Court with the foregoing certified question.

¶14 In answering the certified question as presented, it is important to note our answer to the certified question is qualified upon several factors. First, liability for the underlying accident must be reasonably clear. Second, total damages caused by the accident must be reasonably proven to exceed policy limits. Third, an insurer may be required to continue to provide a defense of its insured, even after paying policy limits without a release, depending on the language of its contract with its insured. When these factors are met, it is not a breach of an insurer's duty to its insured to pay policy limits to an injured third party without first obtaining a release for its insured.

¶15 This case presents the dilemma faced by insurers in balancing its duties to both its insured and to injured third-party claimants. Insurers are prohibited from engaging in unfair trade practices by Montana's Unfair Trade Practices Act (UTPA). Section 33-18-201, MCA, provides, in relevant part:

> A person may not, with such frequency as to indicate a general business practice, do any of the following:

. . .

> (6) neglect to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear;
>
> . . .
>
> (13) fail to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage[.]

¶16 "Pursuant to *Ridley*, insurers are obligated to pay an injured third party's medical expenses prior to final settlement when liability for such expenses is reasonably clear." *Shilhanek v. D-2 Trucking*, 2003 MT 122, ¶ 16, 315 Mont. 519, 70 P.3d 721. "[L]iability is reasonably clear 'when a reasonable person, with knowledge of the relevant facts and law, would conclude, for good reason, that the defendant is liable to the plaintiff.'" *Teeter v. Mid-Century Ins. Co.*, 2017 MT 292, ¶ 16, 389 Mont. 407, 406 P.3d 464 (quoting *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 39, 357 Mont. 293, 239 P.3d 904).

¶17 As we have recognized since our 1997 decision in *Ridley*, and have consistently reaffirmed in the years since, insurers have a duty to advance-pay an injured third party's medical expenses when liability is reasonably clear. In this case, United Fire made all *Ridley* payments prior to settling with the injured parties as High Country's liability for causing the underlying accident was reasonably clear. All parties agree United Fire was required to make these *Ridley* payments to the injured third parties for their medical expenses. Beyond these *Ridley* payments, however, the parties sharply disagree on United Fire's responsibilities to both the injured parties and High Country.

¶18 The second factor we must address in answering the certified question, and that which is most disputed between United Fire and High Country, is whether the total damages incurred by the injured parties exceeded High Country's $3 million policy limit. High Country further argues that the amount of total damages is essentially irrelevant, because *Ridley* only authorized the advance payment of special damages—such as undisputed medical expenses. United Fire argues that it must consider the injured parties' total damages when determining whether to pay policy limits, and when they are reasonably proven to exceed policy limits, it is not required to obtain a release for its insured before settlement.

¶19 "[T]o absolutely require that a 'settlement' between a third-party claimant and a clearly liable party's insurer, under all circumstances, must include as a material element a full and final release of all liability would add judicial gloss to the statutory language of § 33-18-201(6), MCA[.]" *Watters v. Guar. Nat'l Ins. Co.*, 2000 MT 150, ¶ 41, 300 Mont. 91, 3 P.3d 626, *overruled in part on other grounds by Shilhanek*, ¶ 21. In addition, we have previously held that "nothing in the UTPA requires a general release of the insured or the insurer as a condition to a § 33-18-201(6) or (13), MCA, settlement." *Shilhanek*, ¶ 32.

¶20 United Fire cites to our decisions in *Watters* and *Shilhanek* for the proposition that it was required to pay policy limits without a release for High Country once it was reasonably clear the injured parties' total damages exceeded the $3 million policy limit. In opposition to United Fire's position, High Country cites to our decisions in *Hop v. Safeco Ins. Co.*, 2011 MT 215, 361 Mont. 510, 261 P.3d 981, and *DuBray v. Farmers Ins. Exch.*,

2001 MT 251, 307 Mont. 134, 36 P.3d 897, for the proposition that general damages are not plainly ascertainable and therefore are not authorized for advance payment pursuant to *Ridley*.

¶21 *Hop* involved a claimant who filed a declaratory action—and sought class certification—seeking residual diminished value (RDV) payments from an insurance company after his car was damaged in an accident. Hop argued the insurance company failed to investigate essentially every RDV claim in the state. The district court ultimately certified the class. *Hop*, ¶¶ 1-8. On appeal, we found the district court abused its discretion by certifying the class, because Hop had neither individual standing to raise his claim nor the "requisite typicality to raise a claim on behalf of the class he purports to represent." *Hop*, ¶ 20. We held that RDV did not qualify "as the type of damage that must be paid in advance as not reasonably in dispute." *Hop*, ¶ 19 (quotations omitted). We reasoned that RDV claims were "wholly subjective in nature and not plainly ascertainable in amount" and were therefore not authorized for advance payment pursuant to *Ridley*. *Hop*, ¶ 19.

¶22 *DuBray* involved a claimant who sought a declaratory judgment that an insurer was required to advance-pay his medical expenses following a motor vehicle accident. In addition, DuBray sought a declaratory judgment holding the insurance company was also liable for compensatory and punitive damages. The insurance company found its insured was primarily responsible for the underlying accident and advanced payment for some medical expenses and property damage, before declining to advance further payments. *DuBray*, ¶¶ 1-5. The district court dismissed DuBray's complaint for failure to state a claim upon which relief could be granted. *DuBray*, ¶ 7. On appeal, we partially reversed

the district court, finding DuBray's declaratory judgment with regard to medical expenses should have been allowed to proceed pursuant to *Ridley*. *DuBray*, ¶ 16. We affirmed the district court with respect to DuBray's claims for general and punitive damages, however, holding "the general and punitive damages DuBray sought in his complaint were not authorized pursuant to *Ridley*[.]" *DuBray*, ¶ 16.

¶23 High Country is partially correct in its interpretation of *Hop* and *DuBray*. General damages are indeed not authorized for advance payment to an injured third party by an insurer pursuant to *Ridley*. Where High Country errs, however, is in conflating settlement with advance payment. High Country repeatedly argues *Hop* and *DuBray* stand for the proposition that only damages that are plainly ascertainable in amount must be paid in advance, and therefore insurers may not make a settlement due to the amount of general damages exceeding policy limits. But, settling with an injured third party for policy limits without a release, as United Fire did here, is not a payment made in advance of settlement—it is settlement.

¶24 In *Watters*, we held it would be a deceptive practice within the meaning of § 33-18-201(6), MCA, for an insurer to deny payment of mandatory minimum policy limits required by Montana's Motor Vehicle Safety-Responsibility Act (MVRA)[2] when a third-party claimant's damages exceeded that amount. *Watters*, ¶ 60. We found it would be an unfair trade practice per se for an insurer to condition the payment "of the owed mandatory minimum policy limits on the third party's agreement to provide a full and final

[2] The MVRA has since been renamed the "Motor Vehicle Insurance Responsibility and Verification Act." Section 61-6-101, MCA.

release of all liability in favor of an insured." *Watters*, ¶ 61. Three years after we decided *Watters*, we partially overruled it in *Shilhanek*, finding nothing in the UTPA indicates it is limited by the MVRA, and therefore an insurer's obligation to pay an injured third party's undisputed medical expenses before final settlement is not limited to the minimum coverage required by the MVRA. *Shilhanek*, ¶ 21. Neither *Watters* nor *Shilhanek* held that there is language in the UTPA limiting an insurer's duty to settle to only special damages.

¶25 We have long held that a full and final release of all claims is not required by § 33-18-201(6), MCA, for there to be a "settlement" between an injured third party and an insurer. *Watters*, ¶ 41. The UTPA also does not require a release before either a § 33-18-201(6) or (13), MCA, settlement. *Shilhanek*, ¶ 32. Ultimately, what is clear from our previous decisions is that insurers have a duty to make two related, but separate, types of settlements after an accident. Pursuant to *Ridley* and its progeny, an insurer must make advance payments of certain claims when liability is reasonably clear prior to settlement. An insurer has a further duty to complete a final settlement of all claims. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 167, 345 Mont. 12, 192 P.3d 186 (citing *Ridley*, 286 Mont. at 334, 951 P.2d at 992). High Country appears to take the position that all general damages are illusory and unable to be determined with any certainty other than by a jury. This is an odd position, as insurance companies value claims daily. United Fire determined the deadly accident caused by High Country was valued at well above $3 million. The injured parties came to the same conclusion, as they swiftly refused United Fire's offer to settle for policy limits if it included a release for High Country and responded by demanding an

additional $2.5 million directly from High Country. There are factual considerations when determining whether it is reasonably clear that total damages exceed policy limits, however it is not an impossible proposition as High Country contends.

¶26 When it is reasonably clear that the amount required for a final settlement of all claims—including general damages reasonably shown to have been caused by the insured's conduct—exceeds policy limits, an insurer has a duty to pay policy limits to an injured third party, without conditioning such a payment on obtaining a release for its insured. As we recognized in *Watters*, when "the monetary consequences of a person's tortious conduct undisputedly exceed policy limits, and liability is clear, the only incentive for an injured third-party claimant to settle for policy limits and provide the insured with an absolute release is some form of coerced economic necessity." *Watters*, ¶ 56. Restated, the only reason for an insurer to demand a release for its insured when it is reasonably clear that both liability for the accident is clear and it is clear that damages exceed policy limits would be to leverage the injured third party into settling for less than the amount of his or her damages to avoid the time and expense of trial. Such behavior is improper and would constitute a violation of the UTPA.

¶27 This discussion is of course limited by our holding in *Gibson v. Western Fire Ins. Co.*, 210 Mont. 267, 682 P.2d 725 (1984), where we held that an insurer has a "duty to accept a reasonable offer within policy coverage limits[.]" *Gibson*, 210 Mont. at 275, 682 P.2d at 730. Obviously, if an injured third party makes a reasonable offer to settle within policy limits or to provide a release for the insured, an insurer has a duty to accept that offer. But an insurance company may be found to have engaged in bad faith if it refuses

to tender the policy limit payout to an injured party when it is reasonably clear his or her damages far exceed that amount.

¶28 The third factor we must take into consideration when answering the certified question is whether an insurer has a continuing duty to defend its insured, even after paying policy limits to a third party without obtaining a release of liability for the insured. We hold that an insurer may have a continuing duty to defend its insured in such a situation, but that duty arises from the language of the insurance contract, not the UTPA. High Country expresses concern that allowing, or requiring, insurers to settle for policy limits without obtaining a release for its insured could serve to bankroll further litigation against the insured. Such a concern is unfounded. In this case, High Country received the benefit of its insurance contract with United Fire by having United Fire pay the injured parties $3 million. United Fire further continued to defend High Country, even after paying out High Country's policy limits to the injured parties. United Fire was not bankrolling litigation against High Country—it paid policy limits to the injured parties as required by the UTPA and continued to defend High Country.

¶29 Ultimately, the UTPA, as interpreted by this Court in *Ridley* and its progeny, requires an insurer to advance pay special damages to an injured third party when liability is reasonably clear. The UTPA, as interpreted by this Court in *Watters* and *Shilhanek*, further requires an insurer to pay policy limits to an injured third party when both liability is reasonably clear and it is reasonably clear that total damages caused by the insured—including both special and general damages—exceed policy limits. An insurer

cannot condition its payment of policy limits on obtaining a release for its insured in such a situation without violating the UTPA.

CONCLUSION

¶30 The answer to the certified question is a qualified no. An insurer does not breach its duty its insured when it pays policy limits to an injured third party, without a release for its insured, after a motor vehicle accident when both liability for the accident is reasonably clear and it is reasonably clear that total damages caused by the insured exceed policy limits.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JIM RICE
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ DIRK M. SANDEFUR

Justice Jim Rice, concurring.

¶31 I concur with the Court's opinion. Perhaps the general rule goes without saying: that the conclusion we reach is based upon the facts of this case, which, here, are the limited facts provided with the certified question. My reason for mentioning this is that I view the question of whether *liability* is "reasonably clear" to be a very different kind of question than whether it is "reasonably clear" that *damages* exceed policy limits. Opinion, ¶ 26.

The question of whether liability is reasonably clear is assessed within substantive parameters in the law that make it a largely objective determination. *See State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 48, 372 Mont. 191, 312 P.3d 403 ("To determine whether an insurer had 'a reasonable basis in law . . . for contesting the claim or the amount of the claim,' it is necessary first to survey the legal landscape as it existed during the relevant time period." (citing *Redies v. Attys. Liab. Protec. Socy.*, 2007 MT 9, ¶ 29, 335 Mont. 233, 150 P.3d 930, quoting § 33-18-242(5), MCA)). However, an assessment of the amount of damages that have been incurred lacks similar guiding parameters, and often will be a subjective determination. Thus, the facts of each individual case will heavily influence that question, as well as the insurer's obligation to settle under the principles articulated herein.

/S/ JIM RICE