DA 23-0319

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 48

JANICE M. DODDS,

Plaintiff and Appellant,

v.

GREGORY S. TIERNEY, M.D.,
BENEFIS HEALTH SYSTEM,
and JOHN and JANE DOES I-IV,

Defendants and Appellees.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. CDV-13-364
Honorable John A. Kutzman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John E. Seidlitz, Jr., Seidlitz Law Office, Great Falls, Montana

For Appellee:

Gary Kalkstein, Joe Newman, Hall Booth Smith, P.C., Missoula, Montana
(for Gregory S. Tierney, M.D.)

Julie A. Lichte, Crowley Fleck, PLLP, Bozeman, Montana
(for Benefis Health System)

Submitted on Briefs: December 20, 2023

Decided: March 12, 2024

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Plaintiff and Appellant Janice M. Dodds (Dodds) appeals from the deemed denial of her Rule 59 Motion to Alter or Amend Judgment or, in the Alternative, Rule 60 Motion for Relief of Order by the Eighth Judicial District Court, Cascade County. Dodds' motion for relief followed the District Court's February 14, 2023 Order Granting Defendants' Motions, which, as relevant to this appeal, (1) denied Dodds' motion to join the malpractice insurance company of Defendant Gregory S. Tierney, M.D. (Dr. Tierney), as real party in interest and (2) granted Dr. Tierney's motion to dismiss for insufficient service of process.

¶2 We address the following restated issues on appeal:

1. Whether the District Court abused its discretion by not granting Dodds' motion to alter or amend judgment.

2. Whether the District Court erred by granting Dr. Tierney's motion to dismiss for insufficient service of process.

¶3 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶4 In 2009, Dr. Tierney, while employed by Great Falls Orthopedic Associates, performed a total left knee replacement on Dodds. On May 7, 2013, Dodds filed a Complaint against Dr. Tierney and Benefis Health System (Benefis) alleging medical malpractice related to the knee replacement surgery. Dodds did not serve process on Dr. Tierney and Benefis at this time. In 2014, Dr. Tierney became a Benefis employee.

¶5 Dr. Tierney filed for bankruptcy in the United States Bankruptcy Court, District of Montana, on February 5, 2016. Upon filing for bankruptcy, Dr. Tierney became subject to

the Bankruptcy Code's automatic stay, which prohibits, among other things, "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the" bankruptcy case. 11 U.S.C. § 362(a)(1). Dodds thereafter served process on Dr. Tierney on May 2, 2016, and Benefis on May 3, 2016. On August 3, 2016, the Bankruptcy Court issued an Order of Discharge, granting Dr. Tierney his requested Chapter 7 discharge. Dodds did not attempt to serve Dr. Tierney with the Complaint after his discharge.

¶6 In November 2016, Dodds filed a Motion to Pursue Claim Covered by Insurance in the Bankruptcy Court. After briefing and a hearing, the Bankruptcy Court denied the motion without prejudice on December 9, 2016. Dodds again filed a Motion to Pursue Claim Covered by Insurance in the Bankruptcy Court on September 24, 2018. Dr. Tierney again opposed the motion. On February 25, 2019, the Bankruptcy Court granted Dodds' motion and issued an order which stated:

> Dodds may pursue her claim against Debtor in the Montana Eighth Judicial District Court, Cascade County Cause No. CDV 13-364 ("CDV 13-364") only to the extent necessary to establish liability, if any, against a third party.
>
> **IT IS FURTHER ORDERED** that:
>
> (A) Debtor shall only be a nominal party in CDV-13-364; provided that Debtor shall have full right to defend any claims against him and Dodds may obtain a judgment against Debtor solely to the extent necessary to obtain insurance coverage. Debtor shall have no economic interest or liability in the ultimate outcome of CDV 13-364.

> (B) Dodds may not execute and no writ of execution shall issue against Debtor either personally or against his assets on any judgment that Dodds may obtain in CDV 13-364.
>
> (C) No costs or expenses of CDV 13-364 shall be borne by Debtor.
>
> (D) This Court makes no ruling on the allegations of the Dodds complaint in CDV 13-364 and this Order shall not in any way affect either the substantive or procedural claims or defenses of any party, including Dodds or Debtor, in CDV 13-364.
>
> (E) In the event Debtor's insurance carrier denies coverage of the claims in CDV 13-364, Dodds shall reimburse and indemnify Debtor for any and all actual costs and fees, including attorney fees, incurred by him personally in defending claims against him in CDV 13-364 or in establishing the availability, or lack of, insurance coverage for Dodds' claims in CDV 13-364. Debtor will promptly notify Dodds of his intent to hire personal counsel that would be subject to this paragraph.
>
> (F) Upon request of Debtor, Dodds or Dodds' attorney shall provide a narrative explanation to any consumer credit reporting agencies that Debtor has no personal liability as a result of CDV 13-364 and is only named as a nominal party therein.

¶7 In the District Court case, Benefis filed a motion for summary judgment on October 24, 2018, asserting Dr. Tierney was not a Benefis employee at the time of the knee replacement surgery in 2009 and imposing liability on Benefis under an ostensible agency theory was prohibited by Montana law. After the Bankruptcy Court issued its order granting Dodds' Motion to Pursue Claim Covered by Insurance, Dr. Tierney filed a Motion to Dismiss for Insufficient Service of Process under M. R. Civ. P. 12(b)(5). Dr. Tierney's motion asserted Dodds failed to serve process upon him within the three-year timeframe required under M. R. Civ. P. 4(t)(1), because Dodds' May 2, 2016 service was void due to the automatic bankruptcy stay and Dodds did not thereafter serve Dr. Tierney within 30

days of his Chapter 7 discharge as allowed by 11 U.S.C. 108. On March 28, 2019, Dodds filed a Rule 17 Motion to Join Real Party in Interest, seeking to join Dr. Tierney's malpractice insurance company as the real party in interest. After these motions were fully briefed, the District Court held oral argument on August 18, 2021. According to the District Court's minute entry, the court orally granted Benefis' summary judgment motion and Dr. Tierney's motion to dismiss at the close of the hearing.[1] The court's written Order Granting Defendants' Motions followed on February 14, 2023.

¶8 On March 13, 2023, Dodds filed a Rule 59 Motion to Alter or Amend Judgment or, in the Alternative, Rule 60 Motion for Relief of Order. In her motion, Dodds asserted the District Court "failed to note the effect of 11 U.S.C. § 524," which was referred to in the District Court's February 14, 2023 Order, and "erroneously denied" Dodds' motion to join Dr. Tierney's malpractice insurance company as the real party in interest. Dodds' motion made no mention of the applicable grounds for relief available under either Rule 59 or Rule 60, and also made no mention of the court's ruling granting summary judgment to Benefis. Both Dr. Tierney and Benefis filed briefs opposing Dodds' motion. In Dr. Tierney's brief, he noted 11 U.S.C. § 524 was both referenced in the District Court's order and in his

[1] Though Dodds' Notice of Appeal and Amended Notice of Appeal certified that "all available transcripts of the proceedings" had been ordered, no transcript of this hearing was provided. It is the duty of Dodds, as the appellant, to "present the supreme court with a record sufficient to enable it to rule upon the issues raised. Failure to present the court with a sufficient record on appeal may result in dismissal of the appeal or affirmance of the district court on the basis the appellant has presented an insufficient record." M. R. App. P. 8(2). While we affirm the District Court on the merits of the case, we also note Dodds' failure to provide this Court with the complete record of proceedings below.

previous briefing on the motion to dismiss and asserted it was "unreasonable and unlikely" the court failed to consider the statute. Benefis asserted Dodds' motion made no reference to the portion of the court's order granting summary judgment in favor of Benefis. The District Court did not rule upon Dodds' motion (or issue an extension of time for ruling) and it was deemed denied by the operation of law after 60 days. M. R. Civ. P. 59(f), 60(c)(1). Dodds appeals.

STANDARD OF REVIEW

¶9 We review a district court's denial of a motion for Rule 59(e) relief for an abuse of discretion. *Folsom v. Mont. Pub. Emps. Ass'n*, 2017 MT 204, ¶ 59, 388 Mont. 307, 400 P.3d 706. A district court's denial of relief pursuant to M. R. Civ. P. 60(b) is generally reviewed for an abuse of discretion. *Young v. Hammer, Hewitt, Jacobs & Floch, PLLC*, 2021 MT 180, ¶ 14, 405 Mont. 65, 491 P.3d 725 (citing *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶ 16, 338 Mont. 423, 166 P.3d 451). "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." *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 13, 402 Mont. 92, 475 P.3d 748.

¶10 We review a district court's findings of fact and conclusions of law regarding personal jurisdiction to determine whether the findings are clearly erroneous and whether the conclusions are correct. *Nolan v. Riverstone Health Care*, 2017 MT 63, ¶ 9, 387 Mont.

97, 391 P.3d 95 (citing *Semenza v. Kniss*, 2005 MT 268, ¶ 9, 329 Mont. 115, 122 P.3d 1203).

DISCUSSION

¶11 *1. Whether the District Court abused its discretion by not granting Dodds' motion to alter or amend judgment.*

¶12 As an initial matter, we must first consider what this Court is being asked to review in the present appeal. The District Court's February 14, 2023 Order granted summary judgment in favor of Benefis, denied Dodds' motion to add Dr. Tierney's malpractice insurance company as the real party in interest, and granted Dr. Tierney's motion to dismiss for insufficient service of process. Rather than appealing this order, Dodds instead filed her Rule 59 Motion to Alter or Amend Judgment or, in the Alternative, Rule 60 Motion for Relief of Order, which, as we have noted, made no mention of the applicable grounds for relief available under either Rule 59 or Rule 60. Dr. Tierney and Benefis each filed briefs opposing the motion, which was deemed denied by the operation of law after the District Court failed to issue a ruling (or issue an extension of time for ruling) after 60 days. After this motion was deemed denied, Dodds filed a timely notice of appeal in this Court.[2]

[2] On appeal, Dodds' opening brief made no mention of the propriety of the District Court's order granting summary judgment in favor of Benefis, focusing only on the claims related to Dr. Tierney. This Court ultimately dismissed Benefis as a party to the appeal after Benefis filed an unopposed motion to dismiss.

¶13 Both before the District Court and again on appeal, Dodds provides absolutely no citation to the standards applicable to either a M. R. Civ. P. 59 or 60 motion.[3] "Rule 59(e) relief is available in the discretion of the court only in extraordinary circumstances such as to: (1) 'correct manifest errors of law or fact upon which the judgment was based;' (2) 'raise newly discovered or previously unavailable evidence;' (3) 'prevent manifest injustice resulting from, among other things, serious misconduct of counsel;' or (4) 'bring to the court's attention an intervening change in controlling law.'" *Folsom*, ¶ 59 (quoting *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 75, 304 Mont. 356, 22 P.3d 631). "Rule 59(e) relief is not available to relitigate previously litigated matters, reconsider arguments previously made, or raise new arguments 'which could, and should, have been' previously made." *Folsom*, ¶ 59 (quoting *Lee*, ¶ 76). M. R. Civ. P. 60(b) enumerates six reasons a court may relieve a party from a final judgment or order: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been

[3] Inexplicably, the standards of review put forth by Dodds on appeal concern motions for summary judgment, including the standard applicable to "a district court's decision to deny a hearing on a summary judgment motion." First, the District Court did in fact hold a hearing on all of the motions at issue in this case. And while Benefis was granted summary judgment, Dodds did not appeal the court's decision in that regard, as her appeal concerns only the portions of the court's order granting Dr. Tierney's motion to dismiss and denying substitution of Dr. Tierney's malpractice insurance company as the real party in interest.

satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." "[A] Rule 60(b) motion may not be used as a substitute for appeal." *Donovan v. Graff*, 248 Mont. 21, 25, 808 P.2d 491, 494 (1991) (citations omitted).

¶14 We note Dodds' brief regarding her Rule 59 and/or Rule 60 motion was largely a rehash of her previous arguments that Dr. Tierney's malpractice insurance company should be substituted as the real party in interest and that service on Dr. Tierney was not required within 30 days of his Chapter 7 discharge. On appeal, Dodds has provided no briefing whatsoever regarding the deemed denial of her Rule 59 motion to alter or amend and/or Rule 60 motion for relief. "It is not the job of this Court to conduct legal research on a party's behalf, to guess at his precise position, or to develop legal analysis that may lend support to that position." *Whitefish Credit Union v. Sherman*, 2012 MT 267, ¶ 16, 367 Mont. 103, 289 P.3d 174. On this ground alone, any claims Dodds has regarding the deemed denial of her Rule 59 and/or Rule 60 motion fail. As such, the District Court did not abuse its discretion by not granting Dodds' Rule 59 motion to alter or amend and/or Rule 60 motion for relief.

¶15 2. *Whether the District Court erred by granting Dr. Tierney's motion to dismiss for insufficient service of process*.

¶16 Though the District Court properly denied Dodds' Rule 59 and/or Rule 60 motion, we nevertheless address the court's underlying order which granted Dr. Tierney's motion to dismiss and denied Dodds' motion to add Dr. Tierney's malpractice insurance company

as the real party in interest. The District Court granted Dr. Tierney's Rule 12(b)(5) motion to dismiss after Dodds failed to serve him within the three-year time period for service prescribed by Rule 4(t)(1), which was extended by 30 days by operation of 11 U.S.C. § 108 following Dr. Tierney's Chapter 7 discharge. Dodds asserts Dr. Tierney lacks standing in the present case after his Chapter 7 discharge, such that the malpractice insurance company was required to be substituted as the real party in interest and service upon Dr. Tierney within 30 days of his bankruptcy discharge was neither required nor allowed. Dr. Tierney contends the District Court properly applied both bankruptcy and state law and correctly determined dismissal of the claims against him under Rule 12(b)(5) for insufficient service of process "was not only appropriate but mandatory." We agree with Dr. Tierney.

¶17 "On or after filing the complaint, the plaintiff or the plaintiff's attorney must present a summons to the clerk for issuance. The clerk must issue and deliver a properly completed summons to the plaintiff or the plaintiff's attorney, who must thereafter deliver it for service upon the defendant as prescribed by these rules. Service of the summons must be accomplished within the times prescribed by Rule 4(t)." M. R. Civ. P. 4(c)(1). "A plaintiff must accomplish service within three years after filing a complaint. Absent an appearance by defendant(s), the court, upon motion or on its own initiative, must dismiss an action without prejudice if the plaintiff fails to do so." M. R. Civ. P. 4(t)(1).

¶18 "Rules for service of process are mandatory and must be strictly followed. If service of process is flawed, the court acquires no jurisdiction over the party[.]" *Semenza*, ¶ 18 (internal citation omitted). The rules for service of process contain the clear directive that

a plaintiff "must" deliver the summons upon a defendant and "must" accomplish service within three years after filing a complaint. A plaintiff's failure to accomplish service within this timeframe means a court "must" dismiss the action. "Both 'shall' and 'must' are mandatory, rather than permissive." *Montco v. Simonich*, 285 Mont. 280, 287, 947 P.2d 1047, 1051 (1997).

¶19 Dodds filed her complaint in the present case on May 7, 2013, and service upon Dr. Tierney was required within three years of that date. M. R. Civ. P. 4(t)(1). While Dodds did serve the complaint upon Dr. Tierney on May 2, 2016, this service was void and defective because of the automatic stay in place since February 5, 2016, due to his bankruptcy proceeding. 11 U.S.C. § 362(a)(1). Dr. Tierney then received his requested Chapter 7 discharge on August 3, 2016, ending the automatic stay. 11 U.S.C. § 362(c)(2)(C). The discharge triggered, pursuant to the bankruptcy code, a 30-day grace period for service of process on Dr. Tierney because Rule 4(t)(1)'s three-year time limitation had expired during the pendency of his bankruptcy proceeding. That section of the bankruptcy code provides:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108(c).

The exception referenced in the preceding section provides:

> A discharge in a case under this title—
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1192, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and
>
> (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1192, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

11 U.S.C. § 524(a).

¶20 Dodds argues Dr. Tierney was subject to the § 524(a) exception upon his Chapter 7 discharge, and therefore she could not serve Dr. Tierney unless and until the Bankruptcy Court allowed her to do so. Dodds further contends that Dr. Tierney lacked standing to contest the allegations against him after the Chapter 7 discharge because the discharge

removed Dr. Tierney's economic interest in the case. Dr. Tierney asserts, and the District Court found, that Dodds' claims against him were not subject to the § 524(a) exception and Dodds could have served him under § 108's 30-day grace period to meet the time requirement of Rule 4(t)(1).

¶21 First, service of process and continuation of the medical malpractice case against Dr. Tierney was not prohibited by § 524(a)(2) in this case, because § 524(a) enjoins the "commencement or continuation" of proceedings to recover discharged debts "as a personal liability of the debtor[.]" 11 U.S.C. § 524(a)(2). Section 524's "injunction applies only to the debtor's personal liability and does not inhibit collection efforts against other entities." *In re Beeney*, 142 B.R. 360, 362 (B.A.P. 9th Cir. 1992) (collecting cases). Here, Dodds' malpractice suit against Dr. Tierney could proceed for the purposes of collecting on his insurance policy in the event Dodds was able to prove her claims. Quite simply, § 524's injunction was not applicable to the present case because "an action naming the debtor solely to establish the debtor's liability in order to collect on an insurance policy is not barred by Bankruptcy Code § 524." *In re Beeney*, 142 B.R. at 363. With § 524(a)(2) lacking applicability under the facts presented here, Dodds was able to serve Dr. Tierney within 30 days of his Chapter 7 discharge pursuant to 11 U.S.C. § 108(c)'s safe harbor provision. She did not.

¶22 Second, Dodds asserts requiring service on Dr. Tierney within 30 days of his Chapter 7 discharge to comply with Rule 4(t)(1)'s state law deadline would render the Bankruptcy Court's Order allowing Dodds to pursue her claim covered by insurance a

nullity. We disagree. Dodds filed two motions to pursue claim covered by insurance in the Bankruptcy Court, the second of which the Bankruptcy Court granted on February 25, 2019. In her briefing, both before the District Court and on appeal, Dodds repeatedly misquotes the Bankruptcy Court's February 25, 2019 order.[4] As pertinent here, and conspicuously missing from the argument section of Dodds' briefs, the Bankruptcy Court explicitly held that its Order was making "no ruling on the allegations of the Dodds complaint in CDV 13-364" and declaring its "Order shall not in any way affect either the substantive or procedural claims or defenses of any party, including Dodds or Debtor, in CDV 13-364." The District Court recognized as much, noting in its Order that the Bankruptcy Court "was applying bankruptcy law to the bankruptcy dispute at issue, not state law. This short, two-page *Order* did not undertake to constrain the operation of state substantive or procedural law." Dodds asserts Dr. Tierney was required to raise his service of process claim before the Bankruptcy Court or have the procedural defense forever waived, but the Bankruptcy Court's Order itself makes clear the February 25, 2019 order does not, in any way, affect the substantive and procedural defenses available to Dr. Tierney in the medical malpractice case.

¶23 "Waiver is a voluntary and intentional relinquishment of a known right or claim. It may be proved by express declarations or by a course of acts and conduct which induces the belief that the intent and purpose was waiver. To establish a waiver, the party asserting

[4] Dodds' briefing does, intermittently, correctly quote from the order.

waiver must demonstrate the other party's knowledge of the existing right, acts inconsistent with that right, and resulting prejudice to the party asserting waiver." *Edwards v. Cascade Cty.*, 2009 MT 229, ¶ 30, 351 Mont. 360, 212 P.3d 289 (internal citation omitted). Laches, meanwhile, "is a concept of equity which can apply when a person is negligent in asserting a right, and where there has been an unexplained delay of such duration or character as to render the enforcement of the asserted right inequitable." *Edwards*, ¶ 32. We find neither waiver nor laches are applicable here. Dr. Tierney, in litigating against Dodds' motions in the Bankruptcy Court, asserted bankruptcy law defenses. The Bankruptcy Court recognized as much, by explicitly holding that its order did not, in any way, affect the substantive and procedural defenses available to Dr. Tierney in the medical malpractice case. Upon returning to the District Court, Dr. Tierney swiftly moved to dismiss for insufficient service of process, one of the substantive and procedural defenses which remained available to him after the Bankruptcy Court's order.

¶24 Dodds' assertion Dr. Tierney lost standing after his Chapter 7 discharge because he "no longer had a personal stake in the outcome of the legal dispute" fares no better. We initially note that standing "is determined as of the time the action is brought." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 30, 360 Mont. 207, 255 P.3d 80 (citations omitted). We have cautioned that standing is not to be confused with mootness as "[s]tanding requires the plaintiff to have a personal stake in the outcome of the controversy at the commencement of the litigation, whereas mootness doctrine requires this personal stake to continue throughout the litigation." *Heffernan*, ¶ 30. "[A] justiciable controversy

in which the parties have a personal stake must exist at the beginning of the litigation, and at every point thereafter, unless an exception to the doctrine of mootness applies." *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 31, 333 Mont. 331, 142 P.3d 864. Standing versus mootness confusion aside, Dodds' assertion Dr. Tierney lacked a personal stake in the medical malpractice case against him following his Chapter 7 discharge is simply incorrect.

¶25 Though Dodds frames Dr. Tierney's assertions he maintained a personal stake in the case because of his interest in defending himself against Dodds' assertions of malpractice which could irreparably affect his "professional reputation, license, employability, insurability, and/or insurance rates" as a "new argument on appeal," which would mandate an evidentiary hearing before the District Court and asserts "[n]o such evidentiary hearing occurred," the record is clear that Dr. Tierney did raise the assertion he maintained a personal stake, beyond simply economic liability, below. In opposing Dodds' motion to join his malpractice insurance company as the real party in interest, Dr. Tierney argued that "it is Dr. Tierney's conduct, not the conduct of his insurer, that is at issue in the case. And it is Dr. Tierney, not his insurer, who has personal knowledge regarding the treatment provided to Ms. Dodds. Finally, it is Dr. Tierney's reputation, not the reputation of his insurer, that stands to be negatively affected by the allegations in the suit. Thus, it is Dr. Tierney, not his insurer, that has an interest in the suit." Dr. Tierney's assertions relating to his personal stake in the medical malpractice claim filed against him as a physician beyond just economic liability from a possible judgment against him are also

common sense. Far more consequences than having his insurance company pay out a judgment would flow from a determination Dr. Tierney committed malpractice. There are clear reputational and employment dangers for a doctor who is found to have committed malpractice. As to Dodds' assertion no evidentiary hearing occurred, we have already noted the District Court did in fact hold a hearing on all pending motions—including Dr. Tierney's motion to dismiss and Dodds' motion to join Dr. Tierney's insurance company as the real party interest—and it is Dodds who failed to provide this Court with the transcript of that hearing as required by M. R. App. P. 8(2). The District Court's minute entry reflects that both parties gave oral argument on the motion and "review[ed] the bankruptcy order." Whether the specific personal stakes raised by Dr. Tierney in his appellate briefing were spelled out at that hearing is both unknown to this Court because of Dodds' failure to comply with M. R. App. P. 8(2) and irrelevant due to already being raised in Dr. Tierney's briefing before the District Court.

¶26 Ultimately, the District Court correctly granted Dr. Tierney's motion to dismiss for insufficient service of process. Dodds' assertions relating to Dr. Tierney's lack of standing following his Chapter 7 discharge, the applicability of § 524, and the import of the Bankruptcy Court's February 25, 2019 order are incorrect and unpersuasive. In sum, Dodds did not serve Dr. Tierney with her lawsuit within the three-year time period required by Rule 4(t)(1), as extended following his Chapter 7 discharge from bankruptcy by 11 U.S.C. § 108. With service not being accomplished in the required timeframe, the District Court was required to dismiss the action. M. R. Civ. P. 4(t)(1).

¶27 Because Dr. Tierney was properly dismissed due to insufficient service of process, the court also correctly denied Dodds' motion to add Dr. Tierney's malpractice insurance company as the real party in interest. "[A]n insurer's duty to indemnify arises only if coverage under the policy is actually established." *State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 26, 372 Mont. 191, 312 P.3d 403. "Put another way, while an insurer's duty to defend is triggered by allegations, [a]n insurer's duty to indemnify hinges not on the facts the claimant alleges and hopes to prove but instead on the facts, proven, stipulated or otherwise established that actually create the insured's liability." *Freyer*, ¶ 26 (internal quotation marks and citation omitted). Here, Dodds has never established whether Dr. Tierney is in fact liable for medical malpractice related to the knee replacement surgery and his malpractice insurance company was under no duty to indemnify based on Dodds' unproven claims. Dr. Tierney maintained a personal stake in demonstrating he was not liable for medical malpractice throughout the proceedings and his malpractice insurance company would only have a duty to indemnify him once Dodds proved her malpractice claims. The malpractice insurance company was never the real party in interest here. Accordingly, the District Court properly denied Dodds' motion to add Dr. Tierney's malpractice insurance company as the real party in interest.

CONCLUSION

¶28 The District Court did not abuse its discretion by denying Dodds' Rule 59 motion to alter or amend judgment and/or Rule 60 motion for relief. In addition, the District Court's underlying order dismissing Dr. Tierney for insufficient service of process and

denying Dodds' motion to add Dr. Tierney's malpractice insurance company as the real party in interest was correct.

¶29 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ JIM RICE