IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. DA-18-0436

EMPLOYERS MUTUAL CASUALTY COMPANY,

Plaintiff/Appellant,

v.

The ESTATE OF ZACHARY S. BUCKLES; BH FLOW TESTING, INC.; CONTINENTAL RESOURCES, INC.; JANSEN PALMER d/b/a BLACK GOLD TESTING; and DOES 1-10,

Defendant/Appellee.

CONTINENTAL RESOURCES, INC.,

Counterclaim Plaintiff and Appellee,

v.

EMPLOYERS MUTUAL CASUALTY COMPANY,

Counterclaim Defendant and Appellant.

APPELLANT EMPLOYERS MUTUAL CASUALTY COMPANY'S REPLY BRIEF

On Appeal from the Montana Seventeenth Judicial District, Valley County
Cause No. DV-2015-37, Honorable Yvonne G. Laird

(APPEARANCES ON NEXT PAGE)

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REPLY TO APPELLEES' STATEMENT OF FACTS

The Response Briefs of CRI and BH contain statements that are unsupported or directly refuted by the record.

Page 3 of BH's Response Brief alleges that CRI "entered into" an MSC "which applied to the services performed by Black Rock." Page 2 of CRI's Response similarly asserts that "CRI agreed to enter into an arrangement with Black Rock Testing, Inc. [] for Black Rock to perform certain services for CRI at, *inter alia*, the Well Site, including testing and oil gauging." These statements are inconsistent with the underlying complaint's allegations that Black Rock was a subcontractor of BH and with the undisputed fact that CRI never signed an MSC with Black Rock. Dkt 68, Order at Facts ¶3. CRI's MSC requires that CRI sign the agreement for "effective execution," and the only provision in the EMC policy providing additional insured coverage requires an "executed" written contract. *See* Dkt 40, Ex. A, Partially Executed MSC; EMC Opening Brief, pgs. 5-8.

Moreover, Black Rock did not attempt to enter into the MSC ***for work being conducted at the Well Site where Buckles died***. Black Rock had already entered into a subcontract with BH to perform testing and monitoring at the Well Site a year earlier. Black Rock had been working as a subcontractor for BH for more than a year before Black Rock even attempted to enter into an MSC with CRI. The MSC Black Rock attempted to enter into with CRI (which CRI refused to sign) came ***well***

after Black Rock had subcontracted the Well Site work from BH and ***was to be related to new and direct work assignments from CRI***. *See* Dkt 68, Facts ¶2; *Buckles by and through Buckles v. Continental Resources, Inc.*, 2017 MT 235, ¶4, 388 Mont. 517, 402 P.3d 1213.

Page 3 of BH's Response Brief alleges that "EMC received a copy of the MSC and, *thereafter*, issued an *untitled* endorsement to Black Rock's in-force insurance policy…" (emphasis added). The record is devoid of any evidence that EMC received a fully-executed MSC prior to issuing ***any*** endorsement to Black Rock regarding CRI. Further, the endorsement that BH claims was "untitled" was identified in ***four places*** within the schedules as Form CG2404, "waiver of subrogation Continental Resources, Inc." Dkt. 17, Ex. A, Policy, pgs. 59, 60, 61, and 65. BH's assertion that EMC issued an "untitled" endorsement after it received a fully-executed MSC from CRI is not accurate.

On page 3 of its Response, CRI claims that "no premium was charged for…the subrogation waiver." This is not true. The "general liability schedule," dated 4/07/2014, establishes that a $15.00 premium was charged to Black Rock for issuance of Form CG2404, a waiver of subrogation as to CRI. *See* Dkt 17, Ex. A, Policy Form CG 7001A.

On Page 5, CRI asserts that Black Rock believed that EMC's issuance of a subrogation waiver endorsement listing CRI as an "additional interested party" was

the same as adding CRI as an "additional insured." This is unsupported argument from counsel and improper for an appellate Statement of Facts.

Page 5 of CRI's Response argues that "EMC never proffered any evidence" that it had informed any party that the "additional interested party" endorsement did not constitute "additional insured" coverage for CRI. This statement ignores the plain terms of the EMC policy, which establish that CRI is not an additional insured as a matter of law.

SUMMARY OF REPLY

The district court erred as a matter of law in determining that CRI was an additional insured under the EMC policy. As a third-party stranger, CRI had the initial burden to prove it was an additional insured under Black Rock's policy. The district court improperly placed the burden to ***disprove*** CRI's claimed additional insured status on EMC, an error of law subject to *de novo* review.

Even under the erroneous burden of proof applied by the district court, however, the terms of the EMC policy unequivocally demonstrate that CRI is not an additional insured as a matter of law. CRI has failed to rebut the undisputed fact that CRI never signed the MSC, a threshold requirement for additional insured status under the only grant of additional insured coverage in the EMC policy. Likewise, CRI offers no argument that it qualifies as any of the specified entities for which the EMC policy affords additional insured coverage.

The district court further erred when it conflated "additional interested party" in the context of a subrogation waiver with "additional insured" status. CRI's disagreement as to the meaning of this endorsement does not create an issue of fact. The "additional interested party" language plainly refers to a subrogation waiver; it does not grant additional insured coverage as a matter of law. Accordingly, this Court should reverse.

The district court further erred by considering Appellees' denial of the cause of Buckles' death in the underlying action when determining whether the absolute pollution exclusion barred coverage. The duty to defend analysis has never incorporated a defendant's liability defenses; the analysis is instead based upon the allegations of the underlying complaint. The *Palmer* decision was correctly decided and should be followed here. EMC should be awarded summary judgment against CRI on the issues of duty to defend and coverage.

Finally, CRI improperly raises on appeal the issue of coverage by estoppel, an issue not before this Court and which CRI failed to establish below.

ARGUMENT

A. CRI Had the Initial Burden of Proving "Additional Insured" Status.

CRI's assertion that EMC has the initial burden to unequivocally *disprove* CRI's claimed status as an additional insured under Black Rock's policy with EMC is incorrect.

First, under Montana law, the duty to defend is based upon the four corners of the complaint read in context with the policy of insurance. *Fire Ins. Exch. v. Weitzel*, 2016 MT 113, ¶ 12, 383 Mont. 364, 368, 371 P.3d 457, 461. Here, the underlying complaint correctly alleged that Black Rock's involvement at the site was as a subcontractor to BH, and the EMC policy does not contain any provision under which CRI could qualify as an additional insured.

Second, this Court has consistently held that a named insured generally has the initial burden of proving coverage under a policy. *Travelers Cas. And Sur. Co. v. Ribi Immunochem Research, Inc.*, 2005 MT 50, ¶29, 326 Mont. 174, 108 P.3d 469; *Weitzel*, ¶13. It necessarily follows that a third-party stranger to an insurance contract like CRI bears the same burden, particularly where the allegations in the underlying complaint are inconsistent with the claim to additional insured coverage. The district court's requirement that EMC ***disprove*** CRI's claim to additional insured status was error.

CRI's contention that *Ribi* is inapplicable because EMC refused its tender of the defense is without support. EMC ***is defending*** its named insured, Black Rock, in the underlying *Buckles* lawsuit.[1] EMC is defending Black Rock because Black

[1] CRI's Response Brief complains that EMC has agreed to continue its defense of Black Rock in the underlying suit and has not appealed the district court's ruling as to its own insured. EMC's decision to continue defending its insured is irrelevant.

Rock is EMC's insured. CRI failed to carry the burden of establishing that it was an additional insured because it is undisputed that CRI never executed the MSC, a condition precedent to the only additional insured coverage provided by the EMC policy. Dkt 17, Ex. A, Policy, Form GC7578(1-13); EMC's Opening Brief, pgs. 22-23.

The *Staples*, *Scentry* and *Tidyman's* cases likewise do not support CRI. The issue in *Staples* was not whether a third party to an insurance contract was an additional insured, or who had the burden to prove additional insured status. Rather, the issue was whether the insurer could rely on disputed facts (contrary to the allegations in the underlying complaint) to deny coverage to the insured and the ***admitted*** automatic additional insured. *Farmers Union Mut. Ins. Co. v. Staples*, 2004 MT 108, ¶ 6, 321 Mont. 99, 102, 90 P.3d 381, 383. FUMIC admitted that Staples would have been an additional insured but for the ownership of Frenchy the horse, which FUMIC disputed. *Staples*, ¶11.

Here, EMC has never admitted that CRI is an additional insured under the Black Rock policy. Rather, CRI initially claimed additional insured status under the EMC-Black Rock policy pursuant to an ***unexecuted*** MSC between CRI and Black Rock. It was only after EMC informed CRI that CRI was not an additional insured that CRI asserted that "additional interested party" in connection with a ***subrogation waiver*** endorsement was the same thing. CRI is a third-party stranger improperly

asserting additional insured status based upon an unsigned indemnity agreement and a subrogation waiver endorsement it equates to an "additional insured" endorsement. No coverage was extended to CRI. Dkt 17, Ex. A, Policy, Form GC7578(1-13); *see also* EMC's Opening Brief, pgs. 21-23.

Scentry is even less persuasive. *Scentry* does not address who has the initial burden to prove additional insured status and involves facts not present here. The insurer in *Scentry* was found to have breached the duty to defend an additional insured where the record "establishe[d] that Mid-Continental charged Scentry a premium of $150 to add W-E as an additional insured to its policy…[and issued] a certificate of insurance naming W-E as an additional insured and identif[ying] W-E as an additional insured in the Scentry policy." *Scentry Biologicals, Inc. v. Mid-Continent Cas. Co.*, 2014 MT 39, ¶ 45, 374 Mont. 18, 29, 319 P.3d 1260, 1267. Unlike here, the insurer in *Scentry* ***charged the insured for an additional insured endorsement and issued an additional insured certificate to the additional insured***.

Nothing in the record indicates that CRI qualified as an additional insured or that Black Rock paid for additional insured coverage for CRI. Nothing in the record indicates CRI was issued an additional insured certificate before Buckles' death. The burden to prove additional insured status was on CRI and the district court erred by shifting that burden to EMC.

Likewise, the *Tidyman's* cases do not support CRI. In *Tidyman's I*, the insurer ***withdrew*** its defense of its insureds after it had already defended the insureds in two lawsuits. *Tidyman's Mgmt. Servs. Inc. v. Davis*, 2014 MT 205, ¶ 5, 376 Mont. 80, 84, 330 P.3d 1139, 1143. Here, EMC is defending its named insured under a reservation. CRI—a stranger to EMC's policy with Black Rock—is claiming additional insured status. EMC has not unjustifiably refused to defend its insured, ***because CRI is not EMC's insured***.

The concept that a third-party stranger to an insurance policy claiming additional insured status should have the initial burden of proving insured status is both commonly held and common sense. *See e.g., Lexington Ins. Co. v. ACE American Ins. Co.*, 2014 WL 3406512 (S.D. Texas 2014) at fn. 16 ("additional insureds are strangers to an insurance policy and must bear the burden of proving additional insured status."); *WH Holdings, LLC v. ACE American Ins. Co.*, No. 07-7110, 2013 WL 2286107, *3 (E.D. La. May 23, 2013) (finding the party seeking additional insured status "bears the burden of proof as to its status as an insured under the policy."); *Mount Vernon Fire Insurance Company v. Munoz Trucking Corp.*, 213 F.Supp.3d 594, 602 (S.D.N.Y 2016) ("In order to trigger additional insured coverage, the one claiming such coverage bears the burden of proving it.").

This Court should follow these persuasive authorities and hold that the district court erred by placing the initial burden to ***disprove*** CRI's claim to additional insured status on EMC. That error requires reversal.

B. The EMC Policy Unequivocally Demonstrates that CRI is not an Additional Insured.

Even under the erroneous burden of proof utilized by the district court, the terms of the EMC policy unequivocally demonstrate that CRI is not an additional insured as a matter of law. The only grant of additional insured coverage in the EMC policy unambiguously requires: (i) a written contract requiring the provision of additional insured coverage that is "executed" prior to the occurrence for which coverage is sought; and (ii) that the "only" persons or organizations that qualify as an additional insured are the manager or lessor of premises leased to the named insured, any state or political subdivision with whom the named insured has contractually agreed to provide additional insured coverage, and any person or organization from which the named insured leases equipment. *See* Opening Brief at pp. 6-7. It is undisputed that CRI did not execute the MSC with Black Rock prior to Buckles' death, and CRI offers no argument that it would otherwise qualify as an additional insured under the terms of the policy's additional insured coverage. As discussed below, a waiver of subrogation is not a grant of additional insured coverage, and this Court should hold that CRI is not an additional insured under the EMC policy as a matter of law.

C. The District Court Erred as a Matter of Law by Failing to Rule on the Meaning of "Additional Interested Party" as Used in the Black Rock Policy.

CRI incorrectly argues that the district court properly held that there was an issue of fact regarding the ***meaning*** of "additional interested party" in connection with the subrogation waiver endorsement such that EMC owed it a duty to defend. The district court's treatment of this issue requires reversal.

First, the interpretation of an insurance contract is an ***question of law*** for the court to decide. *Modroo v. Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶23, 345 Mont. 262, 191 P.3d 389. Rather than making a legal determination as to the meaning of "additional interested party" in connection with the subrogation waiver endorsement, the district court concluded that the parties' competing interpretations created an issue of fact precluding summary judgment in EMC's favor. The district court's conclusion, and concurrent failure to answer the legal question regarding the interpretation of the policy's terms, were in error.

Second, the district court failed to properly analyze the plain meaning of "additional interested party" and the subrogation waiver endorsement in the context of the entire policy. In interpreting the terms of an insurance policy, this Court first looks to the plain language of the policy. *Monroe v. Cogswell Agency*, 2010 MT 134, ¶15, 356 Mont. 417, 234 P.3d 79. In reviewing the plain language "the terms and words used in an insurance contract [are given] their usual meaning and [courts]

construe them using common sense." *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research*, 2005 MT 365, ¶17, 326 Mont. 174, 108 P.3d 469. Where the plain meaning of the language used is clear, there is no ambiguity and the policy must be enforced as written. *Grimsrud v. Hagel*, 2005 MT 194, ¶ 35, 328 Mont. 142, 119 P.3d 47.

CRI argued to the district court that because the term "additional interested party" was not defined, the term ***must*** be ambiguous. The district court declared that an issue of fact existed as to the meaning of "additional interested party" such that EMC was obligated to defend CRI because it could not unequivocally show that "additional interested party" was not the same as "additional insured." This conclusion was clear error and common sense dictates otherwise.

There was no additional insured certificate issued to CRI prior to Buckles' death. There is no evidence Black Rock paid a premium for "additional insured" coverage for CRI. Nothing in the policy names CRI as an additional insured, and the policy specifically defines who qualifies as an additional insured. Dkt. 17, Ex. A, Policy, Form GC7578(1-13), pg. 43. These facts are undisputed.[2] Dkt. 68, Order at ¶21. In light of the terms of the policy specifying who qualifies as an "additional

[2] CRI objects to EMC's discussion of whether CRI would qualify as an "additional insured" under other parts of the EMC policy as beyond the scope of appellate review and does not address this issue in its Response Brief. This issue was briefed by EMC before district court.

insured," ***terms under which CRI does not qualify***, there is no plausible construction of the policy in which "additional interested party" could be construed to mean "additional insured."

"Additional interested party" is not ambiguous simply because it was left undefined, nor is the term ambiguous simply because the parties disagree as to its meaning. As this Court stated in *Fisher ex. rel. McCartney v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 208, ¶15, 371 Mont. 147, 305 P.3d 861:

> [A] provision is not ambiguous just because a claimant says so or just because the parties disagree as to its meaning. Courts should not seize upon certain and definite covenants expressed in plain English with violent hands and distort them so as to include a risk clearly excluded by the insurance contract.

Fisher, ¶15 (internal citations omitted, emphasis added).

The policy exclusively employs "additional insured" where it discusses who may also qualify as an "insured" under the policy. *See* Dkt. 17, Ex. A, Policy, Form GC7578(1-13), pg. 43. Conversely, the policy exclusively utilizes the term "additional interested party" to indicate a fundamentally different meaning, and this meaning is unambiguous. The Black Rock policy "endorsement schedule" lists all of the policy forms and endorsements included to describe the limits of coverage. The ***only endorsement*** that refers to CRI is Form CG 2404, which is identified as "waiver/transfer of rights of recovery," otherwise known as a subrogation waiver

endorsement. There is no "additional insured" endorsement form listed. *See Dkt* 17, Ex. A, Policy Form IL 7131A.

Page 2 of the "Montana Policy Changes" schedule identifies ***one change***—"Class 87734 and Form CG 2404 have been amended ***adding waiver of subrogation Continental Resources, Inc***." *See Dkt* 17, Ex. A, Policy Form IL 1208A. Form CG 2404 ***is a waiver of subrogation endorsement***. There is no "additional insured" endorsement listed.

If these two schedules were not clear enough, the policy's "General Liability Schedule" shows that a $15.00 premium was charged on April 4, 2017 for "***waiver of transfer of right of recovery against others by us CG 2404…Additional Interest (1-334) Continental Resources, Inc***." Dkt 17, Ex. A, Policy Form CG 7001A, pg. 61. There is no "additional insured" endorsement listed on the General Liability Schedule and nothing in the schedule indicates that CRI was an additional insured. The language of Form CG2404 is even more clear. Form CG2404 makes a very limited change to the commercial general liability and products completed operations provisions of the policy by waiving subrogation rights against CRI—nothing more, nothing less. Dkt 17, Ex. A, Form CG2404 (5/09).

Despite CRI's claim that Form CG2404 "made Continental an additional insured party *and* waived subrogation," there is nothing in Form CG2404 even remotely suggesting that CRI had been added as an additional insured. Nothing in

the policy endorsement schedules suggest anything further than the additional interest of CRI being those rights granted by CG 2404—for which EMC agreed to waive subrogation rights for $15. To interpret these policy provisions any differently would distort them so as to include a risk clearly not added by the limited endorsement. *Fisher*, ¶15. The district court erred by failing to interpret the plain language of the subrogation waiver endorsement. The district court should be reversed, and EMC should be granted summary judgment.

D. CRI's Case Citations Do Not Support a Finding that an "Additional Interested Party" is the same as an "Additional Insured."

EMC informed this Court that at least one other jurisdiction has held that the terms "additional interested party" and "additional insured" are not the same. *Portnoy v. Allstate Indem. Co.*, 2010 WL 11478886 (N.Y. Sup.) (Trial Court), aff'd 82 A.D.3d 1196. Without any support or relevant citation, CRI claims that the *Portnoy* decision was "wrong, even in New York." CRI Response Brief, pg. 31. That assertion cannot be reconciled with the fact that *Portnoy* was ***affirmed on appeal.*** Further, in finding that "additional interested party" did not equate to "additional insured," the *Portnoy* court noted that, as is the case here, nowhere in the Allstate insurance policy was the claimant listed as either an insured or additional insured. *Portnoy*, at *3.

Portnoy is supported by the decisions of other courts holding that "additional insured" and "additional interested party" have very different meanings in the

context of insurance. In *Westview Drive Investments, LLC v. Landmark American Insurance Co.*, 522 S.W.3d 583 (Tex. App. 2017), the court dismissed the assertion that being listed as having an "additional interest" in an insurance policy was the same as being an "additional insured." Like the *Portnoy* court, the Texas Court of Appeals distinguished the two terms.

> According to Westview, an 'additional interest' is the same as an 'additional named insured' or an 'additional insured,' and as such, an 'additional interest' is entitled to the same coverage provided to the named insured. This is incorrect.

Westview Drive Investments, LLC, 522 S.W.3d at 594-95; *see also General Insurance Company of America v. Wagenbrenner*, 2018 WL 1734683 (Conn. Sup. March 6, 2018) at *2.

The two cases CRI cited on page 32 of its Response Brief for the proposition that "additional interest" and "additional insured" are the same thing do not remotely support that proposition. Neither *Economy Premier Assur. Co. v. Gould*, 2013 WL 673495 (D. S.D. 2013), nor *McClaney v. Utility Equipment Leasing Corp.*, 560 F.Supp. 1265 (N.D.N.Y 1983), concluded that "additional interest" and "additional insured" are the same thing. Rather, both courts noted that the "additional interest endorsement" included within the policies at issue ***specifically named the claimants as "additional insureds***." The "additional interest" added to the policies described in those two cases were additional insured endorsements for which an additional insured premium was paid.

The additional interested party notation in the EMC policy declarations is specifically limited to Form CG 2404—an endorsement which by its clear language simply waives EMC's subrogation rights against CRI. There is no additional insured endorsement in the EMC policy naming CRI. There is no evidence CRI was ever added as an additional insured prior to Buckles' death. There is no evidence that CRI was issued an "additional insured" certificate. "Additional interest" is not the same as "additional insured," and the policy's use of these terms reflects their different meanings. The district court erred and must be reversed.

E. The District Court Erred by Considering Defenses raised to the allegations of the Underlying Complaint When Applying the Pollution Exclusion.

CRI and BH contend that because they contest the cause of Buckles' death in the underlying action, the district court properly held that an issue of fact precluded application of the EMC policy's absolute pollution exclusion. CRI further argues that the concurrent *Palmer* case is inapplicable because EMC's absolute pollution exclusion only applies to environmental damage claims. These contentions are incorrect.

This Court has consistently held that "an insurer's duty to defend its insured arises when the plaintiff's complaint ***alleges*** facts which represent a risk covered by the terms of an insurance policy." *Farmers Union Mut. Ins. Co. v. Rumph*, 2007 MT 249, ¶ 14, 339 Mont. 251, 170 P.3d 934. Here, the EMC policy's pollution exclusion

unequivocally bars coverage for the underlying Buckles allegations. The underlying Buckles Complaint alleges that Buckles died as a result of exposure to hydrocarbon fumes, and this Court adopted that fact in its *Buckles* opinion. *Dkt* 19, Ex. B, *Buckles* Complaint, ¶16; *Buckles by & through Buckles*, ¶ 3. The EMC policy's pollution exclusion bars coverage for "'bodily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants'" where any insured or contractors or subcontractors working directly or indirectly on an insured's behalf perform operations. Dkt. 17, Ex. A, Form CG 22 73 07 98, pg. 30. However, the district court improperly considered CRI's affirmative defenses in its Answer to the underlying suit, instead of applying the allegations of the underlying Buckles Complaint to the EMC policy. This was contrary to Montana's duty to defend analysis. A defendant's affirmative defenses or denial of the allegations in an underlying lawsuit have never been considered in determining coverage. The allegations of the underlying Buckles Complaint clearly fall within the ambit of the EMC policy's pollution exclusion.

Likewise, the *Palmer* decision is on point. *Palmer* involved the same underlying facts and parties and interprets almost precisely the same pollution exclusion language found in the EMC policy. The only difference is that Judges Ostby and Watters correctly applied the exclusion to the ***facts alleged in the underlying complaint***, rather than relying on a causation defense raised by CRI and

BH in their respective Answers. The federal district court, observing that Buckles Estate's Complaint alleged that Buckles' cause of death was "exposure to hydrocarbon vapors," held that "[t]he Oil/Gas Exclusion unequivocally excludes the decedent's claim as alleged ***because the decedent's death would not have occurred but for the release of pollutants, which includes contaminant vapors. Likewise, the exclusion unequivocally excludes the heirs' claims as alleged because the heirs' injuries would not have occurred but for the release of pollutants***[.]" *Palmer v. Northland Cas. Co.*, No. CV 15-58-BLG-SPW, 2016 WL 5820191, at *3 (D. Mont. Oct. 5, 2016) (emphasis added).[3] The district court clearly erred when it considered CRI's denial of liability as to the cause of Buckles' death when determining whether EMC's pollution exclusion precludes coverage.

F. <u>CRI's "Coverage by Estoppel" Argument Lacks Merit</u>.

CRI, and to a lesser extent BH, argue that this Court should *sua sponte* conclude that EMC's refusal to defend CRI under a reservation of rights

[3] In a similar scenario the absolute pollution exclusion precluded coverage for hydrocarbon-related personal injury claims at oil production sites. *See, Hiland Partners GP Holdings, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 2015 WL 11143072 (D. N.D. 2015). CRI's contention that such exclusions only apply to environmental losses is in error. *Enron Oil Trading & Transportation Co. v. Walbrook Ins. Co.*, 132 F.3d 53 (9th Cir. 1997) is outdated and addresses a much different pollution exclusion.

automatically prevents EMC from relying on the policy's pollution exclusion. The coverage by estoppel argument is not properly before this Court and is without merit.

First, neither CRI nor BH have filed a cross-appeal. It is axiomatic that "[i]n order to preserve an issue not raised by an appellant, a respondent must file a notice of cross appeal." *Billings Firefighters Local 521 v. City of Billings*, 1999 MT 6, ¶ 31, 293 Mont. 41, 973 P.2d 222. The failure to file a cross-appeal bars CRI and BH from raising coverage by estoppel.

Second, the district court made no ruling on coverage by estoppel. In fact, the issue has never been briefed by CRI, BH, or any other party.

Third, even if this Court were to address the merits of the coverage by estoppel argument, the idea that any insurer who refuses a tender of defense is automatically estopped from asserting coverage defenses is an inaccurate description of Montana law. This Court has consistently held that an insurer who refuses to defend an insured on the basis that there is no coverage only breaches the duty to defend and potentially waives policy defenses ***if there is first a determination that the allegations set forth in the complaint fall within coverage applying the terms and exclusions of the policy.*** *See e.g., McAlear v. Saint Paul Ins. Companies*, 158 Mont. 452, 493 P.2d 331 (1972); *Landa v. Assurance Co. of America*, 371 Mont. 202, 307 P.3d 284 (2013); *Lloyd A. Twite Family Partnership v. Unitrin Multi Line Insurance*, 346 Mont. 42, 192 P.3d 1156 (2008).

The decision in *King v. State Farm Fire and Cas. Co.*, 2010 WL 4920906 (D. Mont. 2010), applying Montana law, is on point. The court held that an insurer is not estopped from asserting exclusions barring coverage where it refuses to defend and the putative insured must prove all six elements of estoppel including reliance and detriment. *King*, 2010 WL at *4, *citing St. Paul Fire and Marine Ins. Co. v. American Bank*, 33 F.3d 1159, 1161 (9th Cir.1994) (applying Montana law).

Additionally, CRI and BH's argument places the breach of the duty to defend before the coverage analysis is complete. EMC has the right to assert, and did properly assert at the outset, its coverage defenses, including CRI's lack of insured status and application of the absolute pollution exclusion. As in *Palmer*, the pollution exclusion excluded coverage of the claims in the underlying action. Absent coverage, there can be no duty to defend and no claim of coverage by estoppel.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting summary judgment to CRI. The Court should determine as a matter of law that CRI was not an additional insured under the EMC policy. Finally, because the EMC pollution exclusion unambiguously excludes coverage based on the allegations of the underlying complaint, this Court should hold that EMC had no duty to defend CRI even if additional insured status could be established.

DATED this 28th day of February, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Office Words is 4990, excluding the table of contents, table of authorities, table of appendices, this certificate of compliance, and certificate of service.

DATED this 28th day of February, 2019.

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13 Landfill Road
Glasgow MT 59230-8500
Service Method: Conventional

Christopher Clark Stoneback (Attorney)
490 N. 31st St., Ste. 500
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Billings MT 59103-2529
Representing: BH Flow Testing
Service Method: Conventional

Electronically signed by Andrea J Callender on behalf of Gary M. Zadick
Dated: 02-28-2019