

**IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 20-0279**

DANA ROLAN,
on her own behalf and on behalf of the class she represents,

Plaintiffs, Counter-Defendants and Appellees

v.

NEW WEST HEALTH SERVICES,
Defendant and Appellee

DARWIN SELECT INSURANCE COMPANY and ALLIED WORLD
ASSURANCE COMPANY and DARWIN NATIONAL ASSURANCE
COMPANY
Defendant, Counterclaimant, and Appellant

On Appeal from the Montana First Judicial District
Lewis & Clark County Cause No. CDV-2010-91
Honorable Kathy Seeley

**APPELLANT ALLIED WORLD ASSURANCE COMPANY'S
OBJECTION TO ROLAN'S MOTION TO SUPPLEMENT THE RECORD**

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I. ALLIED DOES NOT CONSENT TO SUPPLEMENTATION OF THE RECORD AND NO AUTHORITY SUPPORTS THE MOTION.

Appellee Dana Rolan's ("Rolan's") motion incorrectly states that Appellant Allied World Assurance Company ("Allied") consents to supplementation of the record. Allied objects to the supplementation and to the proposed order allowing supplementation submitted by Rolan.

Six months ago, Rolan's counsel inquired as to Allied's position on Rolan's request to supplement the record. Allied's counsel indicated that Allied would consent to supplementation if two conditions were met: (1) Allied would have the opportunity to respond to the supplementation; and (2) Allied's response, as appellant, would be the last word on the subject. Rolan did not file the motion.

Rolan did not inquire further until yesterday. Rolan asked Allied's counsel if Allied objected to a proposed motion. The motion did not meet the two conditions for Allied's consent, but instead requested a round of briefing to which Allied could later object. Therefore, consistent with its stated position, Allied responded that Allied objects to the motion.

Other than Allied's consent – which was not granted – Rolan cites to no authority or justification allowing supplementation of the record at this late date. The motion is prejudicial to Allied, given that Rolan attempts to submit the

material nearly six months after the documents were available and five months after the appeal was classified for *en banc* deliberation. Rolan’s motion to supplement the record should be denied.

II. ALLIED OBJECTS TO ROLAN’S FILING OF THE SUPPLEMENTATION WITHOUT COURT ORDER.

Appellee Rolan submitted the proposed supplementation as an exhibit to her Motion to Supplement. No order has been issued granting supplementation, and the exhibit should be disregarded.

III. THE PROPOSED SUPPLEMENTATION PROVIDES NO ADMISSIBLE EVIDENCE RELEVANT TO THE APPEAL.

Rolan’s Motion purports offer an indication of “the number of putative class members based on the response to the administrator’s initial notice.” (Motion, p. 1). The attached exhibit provides no such thing.

The Exhibit includes Plaintiff’s February 18, 2021 Status of Administration of the Class (“Status Report”) and an affidavit provided by David Kaufman of Heffler Claims Group. The Kaufman affidavit merely purports to establish the number of claim forms received by Heffler Claims Group. Kaufman does not opine as to how many of the forms received will result in qualified members of the class, if any. Kaufman’s sworn testimony provides no information relevant to the issues on appeal.

Plaintiff's Status Report indicates that no follow up has been conducted to determine whether the forms received by Heffler might qualify as members of the class, and that any inquiry has been delayed until resolution of this appeal.

Nonetheless, the Status Report contains counsel's unsworn and inadmissible estimate of how many people may eventually qualify as class members.

Statements of counsel do not constitute evidence. *City of Helena v. Whittinghill*, 2009 MT 343, fn 2, 353 Mont. 131, 219 P.3d 1244; *State v. High Elk*, 2006 MT 6, ¶ 17, 330 Mont. 259, 127 P.3d 432.

Because Kaufman's sworn testimony is not relevant to the issues on appeal, and because the attorney statements in the Status Report are not evidence, Rolan's motion for supplementation should be denied.

IV. IF SUPPLEMENTATION IS ALLOWED, ALLIED SHOULD BE ALLOWED TO RESPOND.

If this Court grants Rolan's motion to supplement the record, Allied requests the opportunity to file a substantive response to the Kaufman affidavit and Status Report. Allied requests a brief of 1,250 words due within ten days of the Order. Allied objects to any additional briefing by Rolan, given that reply briefs are not allowed with respect to motions and appellees are not entitled to reply briefs. Rule 16(3), Rule 12, M.R.App.P.

CONCLUSION

Rolan delayed six months to request supplementation of the record with irrelevant and inadmissible materials. Rolan's motion should be denied.

DATED this 4th day of August, 2021.

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BY /s/Martha Sheehy
Martha Sheehy

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27, M.R.App.P., I hereby certify that this brief is printed with proportionally spaced New York Times typeface of 14 points; is double-spaced except footnotes and block quotes; and the word count of 629 words, exclusive of tables and certificates, is less than the 1,250 word limit for responses to motions under Rule 16, M.R.App.P.

 /s/Martha Sheehy

Martha Sheehy

CERTIFICATE OF SERVICE

I, Martha Sheehy, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 08-04-2021:

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