

CASE NO. DA 22-_____

IN THE SUPREME COURT OF THE STATE OF MONTANA

RAMES, INC. FORMERLY D/B/A CENTRAL
INSURANCE AGENCY,

Petitioner,

-vs.-

MONTANA ELEVENTH JUDICIAL DISTRICT COURT,
FLATHEAD COUNTY, HONORABLE
ROBERT B. ALLISON, DISTRICT COURT JUDGE,

Respondent.

On Petition from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Robert B. Allison, Presiding
Flathead County District Court Cause No. DV-15-2020-0000521

PETITION FOR WRIT OF SUPERVISORY CONTROL

Appearances:

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1. Factual and procedural background

Malmquist Construction (“Malmquist”) is a general contractor in Kalispell. C&H Engineering (“C&H”) had an office in Kalispell. On May 8, 2017, Malmquist sent an e-mail to C&H requesting a bid for a geotechnical report on the 139 Second Street project (“139 project”), with C&H providing its proposal later that day. (Ex. C at pp. 91-93.) There is nothing in the e-mails between Malmquist and C&H, or the proposal, which deal with insurance or additional insured status.

On May 30, 2017, C&H e-mailed Malmquist information on survey costs for construction staking on the Solem project. Malmquist responded in a June 6, 2017, e-mail asking C&H to schedule its work on the Solem project. (*Id.* at pp. 113-114.) Malmquist’s e-mail also provided: “Please fill out the new vendor packet attached and return all required information.” The new vendor packet (Ex. C at pp. 115-124) included, *inter alia*, invoicing guidelines and a sample certificate of insurance (“COI”). The invoicing guidelines include the following:

DOCUMENTATION - The following are required to be on file before any work may begin or invoiced:

1. Current Worker’s Compensation Certificate or Exemption from the State.

2. Current General Liability Insurance Certificate, see attached sample certificate for coverage limits.
If you employ a subcontractor as part of this work, your Certificate of Insurance must contain the following: Waiver of Subrogation; TCF Enterprises, Inc. DBA Malmquist Construction is an additional insured.
3. IRS W-9, Request for Taxpayer Identification Number.

The sample COI (*id.* at p. 120) shows the policies and coverage limits required. The description of operations box includes language for when Malmquist is an additional insured:

TCF Enterprises Inc. DBA Malmquist Construction is named as an Additional Insured with respect to General Liability, including Primary/Non-Contributory and Completed Operations coverage, per forms CG2010 0413 and CG2037 0413 or equivalent. Waiver of Subrogation in favor of TCF Enterprises Inc. DBA Malmquist Construction on General Liability.

C&H filled out and returned the Subcontractor Information sheet and the W-9. (*Id.* at pp. 138-139.) The sample COI was e-mailed to CIA, C&H's insurance agent. C&H's e-mail stated:

Can you please send work comp and liability certificates to Malmquist Construction?

I attached their sample which shows what they need . . .

(*Id.* at p. 140.)

CIA e-mailed a COI to Malmquist later that day. The description of operations box provided:

The certificate holder is listed as an additional insured on a primary and noncontributory basis for General Liability per policy for CGD037 04/05, for ongoing and completed operations. Waiver of subrogation for General Liability applies to certificate holder.

(Id. at pp. 157-158.)

There is nothing on C&H's e-mail to CIA or CIA's e-mail to Malmquist to indicate they are for the Solem project or the 139 project.

On September 29, 2017, Malmquist contracted with the owner of the 139 project. The contract included a paragraph on subcontractor insurance:

- d. **Subcontractor insurance.** Contractor must obtain from any and all subcontractors and third parties providing or performing labor or services on the project proof that they have in force and effect Commercial General Liability insurance with limits of not less than \$1,000,000 per occurrence, \$2,000,000 aggregate covering injury to persons or property arising during the performance of the Work.

(Id. at pp. 167-168.)

On October 18, 2017, C&H e-mailed Malmquist its soils investigation report for the 139 project. *(Id. at pp. 174-178.)*

Malmquist uses an annual subcontractor alliance program (“ASA Program”) under which it has an all-encompassing agreement with a subcontractor and, when retained for a specific project, issues a scope of work for that specific project. (*Id.* at pp. 181-191.) The ASA Program includes general terms and conditions which apply to all projects the subcontractor works on. The “General Term and Conditions” include indemnity, insurance, and waiver of subrogation clauses. C&H was not in the ASA Program.

Malmquist never communicated with anybody at CIA. The only communication between them was two e-mails from CIA to Malmquist with COI’s attached. Malmquist’s only communication with C&H which included anything about additional insured status was the sample COI contained in the new vendor packet e-mailed on the Solem project.

The COI Malmquist received from CIA includes the following language: “This certificate is issued as a matter of information only and confers no rights upon the certificate holder”; “This certificate of insurance does not constitute a contract between the issuing insurers, authorized representative or producer, and the certificate holder”.

It is Malmquist's argument the sample COI required C&H to make it as an additional insured on its policy for all projects C&H worked on for Malmquist. There was never any written contract between Malmquist and C&H.

A problem with foundation settlement arose during the 139 project. The owner filed suit against Malmquist, which tendered the suit to Cincinnati Insurance ("Cincinnati"), which issued CGL and builders risk policies to Malmquist. Malmquist also tendered suit to Travelers, which issued the policy to C&H. Travelers denied the tender because there was no written contract between Malmquist and C&H for the 139 project which required Malmquist be named an additional insured. Malmquist settled the matter with Cincinnati making payments under the builders risk and CGL policies.

Malmquist filed a Complaint against CIA alleging CIA negligently failed to procure insurance coverage for it, represented and agreed to name it as an additional insured, and failed to secure additional insured coverage for it despite its representation and agreement to do so. (Complaint, ¶¶ 5, 6, 8-10 - **Exhibit A** at p. 2) Malmquist alleged CIA owed it a duty of

reasonable care and a duty of professional care which were breached. *Id.*, ¶ 18 at p. 4. CIA denied the allegations. (Answer - **Exhibit B**.)

Malmquist moved for summary judgment on CIA's liability. (*See* Motion and briefing collectively attached as **Exhibit C**.) CIA moved for summary judgment based on lack of duty. (*See* Motion and briefing collectively attached as **Exhibit D**.) Oral arguments on the motions was heard on February 8, 2022. (Minute Entry - **Exhibit E**.) Additional briefs were filed on February 18, 2022. (*See* Briefing collectively attached as **Exhibit F**.) CIA argued Malmquist was not covered under C&H's policy with regard to its own negligence per policy language and Mont. Code Ann. § 28-2-2111. (*Id.* at pp. 3-5.)

The Court issued its Order Re: Summary Judgment on February 28, 2022. (Order - **Exhibit G**.) The court found all contracts Malmquist enters with subcontractors "include insurance and indemnity clauses" and that "[a]ll such contracts require that Malmquist be named as an additional insured" on the subcontractor's policy. (*Id.* at p. 2.) The court found "[t]hese features . . . remain in place for all projects . . . supplemented only by an agreement as to the scope of work required on each . . . project." (*Id.*) The court found the new vendor packet "is not project specific" and

“continues to be applicable to subsequent projects . . .” (*Id.*) The court concluded the sample COI was a directive from Malmquist to C&H on two identifiable projects directing C&H to “take the necessary steps to add Malmquist as an additional insured . . . in strict compliance with the specifications set forth in” the sample COI. (*Id.* at p. 4.) The court found CIA “did not obtain additional insured coverage for Malmquist” because it “failed to procure coverage” per the forms described in the sample COI. (*Id.*) The court found CIA should have made Malmquist an additional insured pursuant to a scheduled additional insured endorsement instead of a blanket additional insured endorsement. (*Id.* at p. 5.)

The court determined two disputed facts central to its decision: (1) the new vendor packet was not project specific, and (2) no subcontractor can work on any Malmquist project until the new vendor packet requirements have been met, including the sample COI. (*Id.* at p. 12.) With regard to fact (1), the court rejected CIA’s argument that there were questions of fact as to whether the new vendor packet only applied to the Solem project. (*Id.* at pp. 12-13.) The court also rejected CIA’s argument that the subcontractor billing guidelines did not require Malmquist to be made an additional insured. (*Id.* at pp. 13-14.)

With regard to negligence, the court concluded CIA “did not procure the coverage which was expressly requested for the benefit of Malmquist”. (*Id.* at p. 14.) The court concluded the sample COI was a request by Malmquist to be added as an additional insured. (*Id.*) The court concluded CIA’s failure to do so was a breach of the standard of care and CIA is liable for the coverage it did not procure. (*Id.*) The court concluded CIA was liable for misrepresentation based on the COI sent to Malmquist. (*Id.*) “Agency is liable for both negligence and negligent misrepresentation.” (*Id.*) The court relied on *R.H. Grover v. Flynn Ins. Co.*, 238 Mont. 278, 281-82, 284 (1989). (*Id.*) “Clearly, the breach of an agreement to procure coverage for a third party is actionable; Engineering requested Agency to procure specified additional insured coverage for Malmquist’s benefit, and Agency agreed to do so. Agency, therefore, had an absolute duty to procure the coverage and is liable for damages for failing to do so. *Bailey v. State Farm Mut. Auto Ins. Co.*, 2013 MT 119, ¶ 20.” (*Id.* at p. 15.)

With regard to negligent misrepresentation, the court found the COI provided to Malmquist contained false representations of existing facts. (*Id.* at p. 16.) The court found Malmquist was justified in relying on the

representation made in the COI. (*Id.*)(citing *W. Leasing, Inc. v. Acordia of Ky., Inc.*, 2010 Ky. App. LEXIS 81 at 20-21).

The final pretrial conference was held on March 2, 2022. (Pretrial Order - **Exhibit H.**) Malmquist contends it incurred damages in an amount to be proven at trial, including the indemnity coverage that would have been available if Malmquist had been an additional insured. (*Id.* at pp. 2-3.) CIA contends Malmquist would only be entitled to the coverage as allowed under the terms of the policy if it had been considered an additional insured under C&H's policy. (*Id.* at p. 5.)

The parties subsequently submitted briefs on the application of Mont. Code Ann. § 28-2-2111. (*See* briefs collectively attached as **Exhibit I.**) The court issued its Order Re: Remaining Issues on April 26, 2022. (Order - **Exhibit J.**) The court concluded the statute does not apply and, if it did, it was waived. (*Id.* at p. 3.)

The court held a second pretrial conference on August 3, 2022. (Minute Entry - **Exhibit K.**) The parties submitted additional briefs on exclusion of two Malmquist witnesses and contentions CIA could make at trial. (*See* briefing collectively attached as **Exhibit L.**) It was CIA's position that it should be able to present evidence on the damages suffered

by Malmquist based on the coverage provided in the insuring agreement language of the various policies at issue. (*Id.* at p. 14.) The court issued an Order on 8/9/22 which completely eliminated any defense argument CIA could make on damages with regard to the coverage Malmquist would have had if it had been an additional insured. (**Exhibit M** - Order Regarding Witnesses and New Defense.)

2. Basis for accepting jurisdiction and argument on anticipated issues

The Court should accept jurisdiction in this case for several reasons. First, the court incorrectly concluded there is a duty running from CIA to Malmquist. Second, the court incorrectly concluded Mont. Code Ann. § 28-2-2111 does not apply. Third, the court decided issues of fact against CIA in granting Malmquist's motion for summary judgment. And Fourth, the court has eliminated the legal requirement of causation in proving damages.

This Court "has general supervisory control over all other courts." Mont. Const. Art. VII, § 2(2); Mont. R. App. P. 17. Supervisory control is an extraordinary remedy to be used on a case-by-case basis. Mont. R. App. P. 14(3); *Great Falls Clinic LLP v. Mont. Eighth Jud. Dist. Ct.*, 2016 MT 245, ¶ 6, 385 Mont. 95, 381 P.3d 550. "Acceptance of supervisory control

is limited to cases involving purely legal questions. (Citation omitted.) Promoting judicial economy and avoiding ‘inevitable procedural entanglements’ are appropriate reasons for exercising the writ. (Citation omitted.)” *Id.* Supervisory control enables the Court “to control the course of litigation in the inferior courts where those courts are proceeding within their jurisdiction, but by a mistake of law . . . are doing gross injustice, and there is no appeal, or the remedy by appeal is inadequate.” *Plumb v. Mont. Fourth Jud. Dist. Ct.*, 279 Mont. 363, 369, 927 P.2d 1011, 1014 (1996) (superceded on other grounds).

A. Duty

Whether there is a legal duty is an issue of law for the court. *Gatlin-Johnson v. City of Miles City*, 2012 MT 302, ¶ 13, 367 Mont. 414, 291 P.3d 1129. Whether an insurance agency owes a duty to a third party was addressed in *Seal*:

The court finds that, as a matter of law, the issuance of a Certificate of Insurance to a certificate holder who is not the customer of the insurance agent issuing the certificate, fails to create a duty from the certificate issuer to the certificate holder.

* * *

An insurance agent . . . owes no duty to ensure that a party is named as an insured on a policy when there was no oral or written agreement to obtain insurance coverage between the

party and the agent and when the party never contacted the agent or any other insurance agent about procuring coverage. ...

Seal v. Hart, 2002 MT 149, ¶ 34, 310 Mont. 307, 50 P.3d 522

(quoting *Lu-An-Do, Inc. v. Kloots*, 721 N.E.2d 507, 510 (Ohio App. 1999)).

Seal's conclusion was reaffirmed by the COI: “This Certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.” *Id.*, ¶ 36. In *Lu-An-Do*, the court concluded the issuance of a COI to a certificate holder who was not the customer of the agent failed to create a duty from the certificate issuer to the certificate holder. *Lu-An-Do*, 721 N.E.2d at 510. In *W. Houston Airport, Inc. v. Millennium Ins. Agency, Inc.*, 349 S.W.3d 748 (Tex. App. 2011), the court concluded there was no duty running from an agency to a non-client even when the client requested the procurement of a policy with a COI designating the non-client as an additional insured. *W. Houston Airport*, 349 S.W.3d at 751. The court reached this conclusion even though there was a written contract between the client and the non-client that required the client to make the non-client an additional insured. *Id.* at 750. In the case at bar, there is no contract requiring C&H to make Malmquist an additional

insured and certainly no basis for the court to have found a duty running from CIA to Malmquist.

The district court's reliance on *R.H. Grover* is misplaced. The agency issued a COI which showed Fire Protection had an E&O policy when no such policy was issued. *R.H. Grover*, 238 Mont. at 281-81, 777 P.2d at 340. Fire Protection assigned its rights against the agency to Grover in exchange for a covenant not to execute, with Grover proceeding against the agency directly. *Id.* at 282, 777 P.2d at 340. *R.H. Grover* never examined the issue of a duty running from the agency to an additional insured.

The district court's reliance on *W. Leasing, supra*, is also misplaced. Although *Western Leasing* concluded a duty existed under the Restatement (Second) of Torts § 552, *id.* at *11-12, the facts were distinguishable. The parties in *Western Leasing* had a written contract requiring Centennial Resources to insure equipment in its possession after it was sold to Senstar Finance. The contract required Centennial to make Senstar Finance an additional insured on the policy. *Id.* at *2. In the case at bar, there was no such contract between Malmquist and C&H. (Ex. D at p. 11.) There is no duty running from CIA to Malmquist since C&H had no obligation to make Malmquist an additional insured.

B. Mont. Code Ann. § 28-2-2111

“If [the agent] is instructed to procure specific insurance and fails to do so, he is liable to his principal for the damages suffered by reason of the want of such insurance.” *Fillinger v. Northwestern Agency*, 283 Mont. 71, 83, 938 P.2d 1347, 1355 (1997). If Malmquist was an additional insured, the policy would not provide coverage for Malmquist’s own negligence. Mont. Code Ann. § 28-2-2111(a). It would have only provided coverage for Malmquist’s damages from C&H’s negligence. Mont. Code Ann. § 28-2-2111(2)(a). The statute clearly applies. *See Walsh Const. Co. v. Mut. of Enumclaw*, 104 P.3d 1146 (Ore. 2005) (insurer has no obligation to provide coverage to additional insured when only alleged that additional insured was negligent); *Security Nat’l Ins. Co. v. Sunset Presbyterian Church*, 408 P.3d 233 (Ore. App. 2017) (insurer not required to provide coverage for general’s own negligence); *Montara Owners Ass’n v. La Noue Dev., LLC*, 353 P.3d 563 (Ore. 2015)(same).

The statute is not an affirmative defense which must be asserted. *See* Mont. R. Civ. P. 8(c). Rule 8(c) is not all inclusive as there are other “matters of avoidance” which must be raised. *Masters Group Int’l, Inc. v. Comerica Bank*, 2015 MT 192, ¶¶ 46-47, 380 Mont. 1, 352 P.3d 1101, n. 5

(citing *Ammondson v. Northwest Corp.*, 2009 MT 331, ¶ 57, 353 Mont. 28, 220 P.3d 1 (advice of counsel); *Orr v. State*, 2004 MT 354, ¶ 55, 324 Mont. 391, 106 P.3d 100 (immunity); *Brown v. Ehlert*, 255 Mont. 140, 146, 841 P.2d 510, 514 (1992) (work comp exclusivity)). An affirmative defense asserts a plaintiff's cause of action no longer exists because a statute or rule permits the defendant to avoid liability. *Id.* Mont. Code Ann. § 28-2-2111 does not allow CIA to avoid liability; it defines the scope of liability. It is not an affirmative defense.

C. The court decided questions of fact

The court improperly decided facts in granting Malmquist's motion for summary judgment. The court must view the evidence in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in favor of the opposing party. *Hutzenbiler v. RJC Inv., Inc.*, 2019 MT 80, ¶ 7, 395 Mont. 250, 439 P.3d 378. Negligence actions are not ordinarily susceptible to summary judgment because they involve questions of fact. *Craig v. Schell*, 1999 MT 40, ¶ 12, 293 Mont. 323, 975 P.2d 820.

The court found all of Malmquist's contracts with subcontractors include insurance and indemnity clauses; they require Malmquist be named as an additional insured; and these features remain in place for all projects.

(Ex. G at p. 2.) This is incorrect since C&H had no written contract with Malmquist for the 139 project or Solem project. (Ex. D at p. 11.) The court's finding is referring to Malmquist's ASA Program, which did not include C&H. (*Id.* at pp. 9-10.)

The court found the typical subcontract was initiated with Malmquist providing the subcontractor with a new vendor packet the first time the subcontractor worked on a project and the new vendor packet was not project specific. (Ex. G at p. 2.) This is not accurate for C&H. Malmquist e-mailed C&H the new vendor packet on the Solem project. (Ex. D at p. 5.) Malmquist did not tell C&H the new vendor packet applied to every project. C&H had no contractual obligation to indemnify or make Malmquist an additional insured since it was not part of the ASA Program. Drawing all reasonable inferences in favor of the CIA, the court should have concluded the new vendor packet only applied to the Solem project.

The court found the sample COI was a directive from Malmquist to C&H on two projects [139 and Solem] directing C&H to add Malmquist as an additional insured in compliance with the sample COI, with CIA providing Malmquist with a COI to provide notice of its compliance. (Ex. G at p. 4.) This finding makes several inferences in favor of Malmquist.

Whether the new vendor packet applied to the 139 project is a question of fact. Whether the documents in the new vendor packet, taken together, required C&H to make Malmquist an additional insured created questions of fact. *Lewis & Clark Cnty. v. Wirth*, 2022 MT 105, ¶¶ 25-26, 409 Mont. 1, 510 P.3d 1206 (“[W]here a contract term is ambiguous or obscure or uncertain of meaning, the interpretation of the language . . . is a matter . . . left to the . . . [fact-finder]”). The invoicing guidelines referred to the sample COI for coverage limits. (Ex. C at p. 80.) The invoicing guidelines noted Malmquist needed to be an additional insured only if C&H employed a subcontractor. (*Id.*) Drawing reasonable inferences in favor of CIA, there were conflicts between the billing guidelines and the sample COI which created questions for the jury.

The court determined disputed facts when it found CIA “did not procure the coverage . . . expressly requested for the benefit of Malmquist.” (Ex. G at p. 14.) C&H e-mailed the sample COI to CIA with the message: “Can you please send . . . liability certificates to Malmquist Construction?” and “I attach their sample which shows what they need . . .” (Ex. C at p. 71.) It’s unclear what C&H was requesting and for what project. There were factual questions for the jury.

The court found Malmquist could justifiably rely on the COI. (Ex. G at p. 15.) The COI provided that it was “issued as a matter of information only”, it conferred “no rights upon the certificate holder”, and it “does not constitute a contract between the issuing insurers, authorized representative or producer, and the certificate holder.” (Ex. C at p. 76.) A COI cannot be justifiably relied upon for coverage given the warning language. *Lu-An-Do*, 721 N.E.2d at 514; *Ann Taylor, Inc. v. Heritage Ins. Servs.*, 259 S.W.3d 494, 498-99 (Ky. App. 2008). Whether a party’s reliance was justified is a question of fact. *W. Leasing*, 2010 Ky. App. LEXIS at *14. Whether Malmquist could justifiably rely on the COI for the 139 project is a question of fact.

D. The court has eliminated causation

The elements of a negligence claim are: (1) duty, (2) breach of duty, (3) causation, and (4) damages. *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 17, 390 Mont. 12, 407 P.3d 692. The elements of negligent misrepresentation include that the plaintiff, as a result of its justified reliance on a representation, sustains damages. *Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶ 45, 375 Mont. 38, 324 P.3d 1167. Malmquist is only entitled to damages for the coverage that would have been in place if it had

been an additional insured. Malmquist will present evidence of the payments made under the builders risk policy and its own CGL policy. Although this would establish the amounts paid by Cincinnati, it does not establish what amount would have been paid if Malmquist was an additional insured on C&H's policy. The court will not allow any evidence of what payments would have been made if Malmquist had been an additional insured on C&H's policy. This eliminates causation. The Court needs to step in and rectify this situation.

E. Stay of the trial

If the Court orders a summary response, it should stay the trial, which is set for September 6, 2022.

DATED this 12th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure (2019), I certify that this *Petition for Writ of Supervisory Control* is printed with a proportionately spaced Times New Roman typeface of 14 points, is double spaced; and the word count calculated by Corel WordPerfect 8.0 (or higher) for Windows is not more than 10,000 words, not averaging more than 280 words per page, and contains 3841 words, excluding Certificate of Service and Certificate of Compliance.

DATED this 12th day of August, 2022.

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CERTIFICATE OF SERVICE

The undersigned, a representative of the law firm of Bohyer, Erickson, Beaudette & Tranel, P.C., hereby certify that I served a true and complete copy of the foregoing document on the following persons by the following means:

<u>1-3</u>	E-File/Service
_____	Mail
_____	E-Mail

1. Clerk of Court

2. Todd A. Hammer
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3. Hon. Robert Allison
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DATED this 12th day of August, 2022.

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CERTIFICATE OF SERVICE

I, Jesse Beaudette, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 08-12-2022:

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