IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA _____

STEVE and ROXANNE BLANCHARD, JASON SUBATCH and WILD HORSE CONTRACTING,

Petitioners,

v.

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY,

THE HONORABLE SHANE VANNATTA, PRESIDING JUDGE,

Respondent.

PETITION FOR WRIT OF SUPERVISORY CONTROL

Original Proceeding arising from Blanchard v. Wild Horse Trading Co. L.L.C., et al., Cause No. DV-32-2023-0000055-NE, Montana Fourth Judicial District Court, Missoula County, Hon. Shane Vannatta, District Court Judge

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INTRODUCTION

Control is not the dispositive element of Montana's inherently dangerous activity doctrine. *See Paull v. Park Cty.*, 2009 MT 321, ¶ 20, 352 Mont. 465, 470, 218 P.3d 1198, 1201 (explaining the doctrine as "a rule that the contractor is vicariously liable for injuries to others caused by a subcontractor's failure to take precautions to reduce the unreasonable risks associated with an inherently dangerous activity"). Disregarding blackletter law, the District Court decided that without a demonstration of control over a subcontractor, the doctrine does not apply.

"Extrinsic evidence may be used as an aid in interpreting contract provisions, however, only when the language contained therein is ambiguous." *Travelers Cas. & Sur. Co. v. Ribi Immunochem Rsch., Inc.*, 2005 MT 50, ¶ 27, 326 Mont. 174, 108 P.3d 469 (citing Mont. Code Ann. § 28–2–905). Further, "any ambiguity in an insurance policy must be construed in favor of the insured and in favor of extending coverage." *Hardy v. Progressive Specialty Ins. Co.,* 315 Mont. 107, 67 P.3d 892, 896 (2003). The District Court determined the applicable policy contains no ambiguity. Yet, the District Court relied upon extrinsic evidence to interpret and construe policy language against the insured.

Absent correcting these manifest errors, this case will be tried without a primary defendant and with the defense and indemnity obligations of an insurer in

limbo. Given the impact on the case theory of Plaintiffs and Defendants moving forward, Petitioners ask the Court to review the District Court's orders now.

Plaintiffs and Defendants Subatch, Hart and Wild Horse Contracting Services[1] join together in this petition for a writ of supervisory control. In fact, five of six parties to the litigation consented to certify the questions presented pursuant to Mont. Rule of Civ. Pro. 54(b). Only Defendant Pacific Western Lumber, Inc. ("PacWest") opposed, but only for the inherently dangerous activity doctrine issue.

Rather than pursue contested certification, and in the interest of judicial economy, Petitioners ask this Court to exercise supervisory control. No justification exists to review the issues in fits and starts. The District Court's errors will require two trials, at minimum, if not corrected now.

STANDARD OF REVIEW

Supervisory control is warranted where resolution of the issues will significantly shape the proceedings going forward, including the scope of trial and the legal theory under which the plaintiff seeks damages. *Great Falls Clinic v. Montana Eighth Jud. Dist. Ct.*, 2016 MT 245, ¶ 8, 385 Mont. 95, 381 P.3d 550; *see also Atlantic Richfield Company v. Mont. Second Jud. Dist. Ct.*, OP 16-0555 (Mont. 2016) (supervisory control warranted when, as here, "the issues are purely ones of law, they are substantial, and their resolution greatly impacts all aspects of this

[1] Joined Defendants maintain their denial of liability.

complex case, including the scope and the substance of trial"). "Judicial economy and inevitable procedural entanglements" are appropriate reasons to exercise supervisory control. *Truman v. Mont. Eleventh Jud. Dist. Ct.*, 2003 MT 91, ¶ 15, 315 Mont. 165, 68 P.3d 654.

FACTS

On August 12, 2022, PacWest directed trucking contractor, Steve Blanchard, to pick up some log bundles on PacWest's behalf. The log bundles were located at the facility of another of PacWest's contractors, Third-Party Defendant Clark Fork Posts, Inc. ("Clark Fork"). (Dkt. 81, Exh. 12.) Clark Fork is Amish-owned, and religious beliefs precluded it from operating the machinery required to lift the heavy logs onto waiting trailers.

So, Clark Fork called Defendant Jason Subatch ("Subatch") to do it. Subatch owns Wild Horse Trading Company, LLC, ("WH Trading"), which operates under the assumed business name, "Wild Horse Contracting Services." Exh. 1 at 6.

The log bundles stood approximately four-to-five feet tall, stretched 12-feet wide, and weighed approximately 7,000 pounds. (Dkt. 105, Exh. 4.) Loading the unstable bundles came with inherent risks. Exhs. 3-4. Given the known risks of 7,000 pounds of logs prone to rolling, precautions are necessary to protect workers and bystanders from death or maiming. (Dkt. 81, Exhs. 3, 5.)

Subatch sent new employee, Defendant Ryan Hart, to lift the log bundles onto Steve's trailer. (*Id.*) Hart admits he was not trained for the job. (Dkt. 81, Exh. 4.) Thus, though he understood loading was dangerous, Hart was untrained about the precautions required to protect others, like: anchoring the logs; using dunnage to reposition before lifting; transporting logs with the forks tilted upwards to secure the load against the mast; and lowering the logs close to the ground during transport to preserve visibility and stability. (*Id.*; Exhs. 3-4).

Compounding the peril, Clark Fork's facility was ill-maintained and dangerous. (*See e.g.,* Dkt. 81.) Loaders had to navigate heavy loads through a lane of mud, clay, debris, and piles of posts and poles. (*Id.*) Clark Fork also failed to provide dunnage to prevent bundles from rolling off trailers. Exhs. 3-4.

PacWest knew about the dangerous conditions, as admitted by PacWest's business partner.[2] (Dkt. 81, Exh. 5.) PacWest's longtime sales representative also visited Clark Fork and witnessed the dangerous situation. (*Id.* at Exh. 1.)

And on August 12, 2022, the predictable happened. Untrained Hart inappropriately approached Steve's trailer with the lift while Steve was securing a load and lost control, knocking a log bundle onto Steve. (Dkt. 81, Exhs. 2, 12.) The impact broke Steve's legs, spine, and neck, and caused a brain injury.

[2] PacWest's third-party complaint against Clark Fork demonstrates PacWest's knowledge. (Dkt. 50.)

ARGUMENT

The District Court made two legal errors. First, the District Court dismissed claims against PacWest after deciding the inherently dangerous activity doctrine does not apply. Exh. 1. Second, the District Court determined Subatch's insurer, Nautilus Insurance Company ("Nautilus"), owes no duty to defend or indemnify, because "no named Defendant is a[] [Nautilus] insured." Exh. 2.

I. Legal Error 1: The Inherently Dangerous Activity Doctrine.

Prime contractors are "generally not liable for the torts of their independent contractors." But, the rule is "subject to certain exceptions which include: (1) where there is a nondelegable duty based on a contract; (2) where the activity is inherently or intrinsically dangerous; and (3) where the general contractor negligently exercises control reserved over a subcontractor's work." *Beckman v. Butte-Silver Bow Cnty.*, 2000 MT 112, ¶ 12, 299 Mont. 389, 393, 1 P.3d 348, 350.

This case fits squarely within the second, disjunctive exception. The seminal *Beckman* case identifies transporting giant logs as an inherently dangerous activity, considering the obvious risk the logs will fall and crush someone—a hazard not ordinarily encountered in the community and which calls for particular precautions to avoid. *Id.* at ¶ 22. Blanchard proffered substantial expert opinion to support his theory that the activity was inherently dangerous. Exhs. 3, 4.

The District Court considered none of it. Exh. 1 at 17.

Instead, the District Court found PacWest's purported lack of control over the jobsite dispositive and dismissed PacWest.

The District Court erroneously conflated the three disjunctive *Beckman* exceptions by importing the element of control from the third exception into the inherently dangerous activity element of the second. Exh. 1 at 12; 15-16. ("However, with this argument, the Blanchards must still establish an agency relationship, *consent and control*.") (emphasis added)

But whether PacWest exercised control over the work (and whether the contractors consented to be controlled) is irrelevant. The Restatement (Second) of Torts § 427 guides Montana's inherently dangerous activity application. It contemplates a prime contractor's liability for the torts of an *independent* contractor:

> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which [the employer] contemplates or has reason to contemplate when making the contract is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger.

Beckman, ¶ 15. In other words, the doctrine contemplates liability running to the prime contractor *absent* exercise of control over the hazardous job. That is the point; the law prevents beneficiaries of dangerous work from hiding behind their independent contractors to escape liability when people are maimed.

Nor does it matter that Clark Fork, rather than PacWest, paid Subatch to do the job. Steve was injured as a result of an inherently dangerous activity PacWest

contracted with Clark Fork to do. That Clark Fork hired its own subcontractor to carry out the task does not break the chain of liability flowing to PacWest. *See, e.g., Maryland Cas. Co. v. Asbestos Claims Ct.,* 2020 MT 70, ¶ 46, n.29, 399 Mont. 279, 312, 460 P.3d 882, 902 (*citing Beckman*, ¶¶ 12-25). Further, PacWest knew Clark Fork would hire someone to move the logs by machine, due to ownership's Amish beliefs.

Moreover, the District Court's reliance on *Dick Irvin Inc. v. State* to find no cognizable relationship between PacWest and Clark Fork was misplaced. Exh. 1 at 12, 17 (citing 2013 MT 272, ¶ 50, 372 Mont. 58, 70, 310 P.3d 524, 532). There, the State did not request in *any capacity* for the roadwork at issue, nor was the State aware that the work was occurring. *Id.*, ¶¶ 9, 50. The State did not pay money to the subcontractor. *Id.*

Here, in contrast, PacWest had *contractual* relationships with Clark Fork and Steve.

> So the question is, PacWest has contractual relationships with Steve Blanchard, Frontier Posts, Clark Fork Posts and Frontier Wood Preserves; is that correct? 11:56:18
> A. Correct.

(Dkt. 81, Exh. 1.) Moreover, unlike the State's complete ignorance and nonparticipation in the activity in *Dick Irvin*, PacWest contracted with Clark Fork to

produce the logs, then contacted Steve, advised him the logs were ready, and directed him to pick them up on a certain date. (Dkt. 81, Exh. 12.)

The District Court's refusal to apply the inherently dangerous activity doctrine to hold PacWest vicariously liable was error. By dismissing a primary Defendant, Petitioner's legal theories are radically affected and any apportionment of fault on the verdict form will be subject to reversal.

II. Legal Error 2: Coverage Under the Nautilus Policy.

Confronted with factual disputes and tacitly recognizing policy ambiguities, the District Court concluded "no named Defendant is an insured, there is no coverage, and Nautilus is entitled to summary judgment." Exh. 2 at 23. This conclusion runs contrary to Rule 56 and fundamental principles of insurance law.

A. Rule 56 Error: A Named Defendant *Is* an Insured.

The applicable Nautilus policy ("Policy") identifies the Named Insured on the first page as Jason Subatch DBA Wildhorse Contracting Services. Plaintiffs' operative Third Amended Complaint names "Jason Subatch, an individual who was doing business as Wildhorse Contracting Services" as a Defendant.

NAUTILUS INSURANCE COMPANY
Scottsdale, Arizona

Transaction Type: Renewal
Policy No. NN1404005
Renewal of Policy # NN1262816
Rewrite of Policy #
Cross Ref. Policy #
NIC Quote # 160532101
Inspection Ordered: ☐ Yes ☒ No

Named Insured and Mailing Address
(No., Street, Town or City, County, State, Zip Code)
Jason Subatch
DBA Wildhorse Contracting Services
PO Box 1179

Issued in an unauthorized insurer under The Surplus Lines Insuran
insurance producer license No. 770329 and NOT covered by the pr
fund of this state if the unauthorized insurer becomes insol

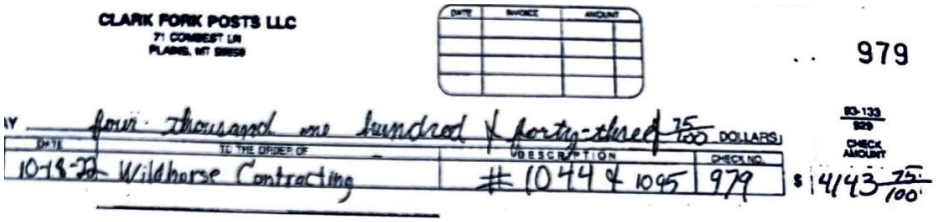
STEVE BLANCHARD, an individual; and ROXANNE BLANCHARD, an individual,
Plaintiffs,
v.
WILD HORSE TRADING CO. L.L.C., a Montana limited liability company with its principal place of business in Sanders County, Montana, d/b/a WILDHORSE CONTRACTING SERVICES, an assumed business name for Wild Horse Trading Co., LLC, a Montana limited liability company with its principal place of business in Sanders County, Montana; JASON SUBATCH, an individual residing in Sanders County, Montana who was doing business as Wildhorse Contracting Services; RYAN Hart, an individual residing in Sanders County, Montana; PACIFIC WESTERN LUMBER, INC., a Washington corporation with its principal place of business in Pierce County, Washington; NAUTILUS INSURANCE COMPANY, an Arizona corporation

Cause No. DV-32-2023-0000055-NE
Dept. 4: Jason Marks

THIRD AMENDED COMPLAINT FOR DAMAGES AND REQUEST FOR JURY TRIAL

Exh. 5; Exh. 6.

Subatch, dba Wildhorse Contracting Services, was heavily involved in the accident that crushed Steve and appropriately named in this case. Clark Fork's representative testified that Clark Fork "deal(s)" with Wild Horse Contracting Services, owned by Subatch. (Dkt. 145, Exh. 4.) Subatch sent his untrained employee to load the bundles onto Steve's trailer. (Dkt. 142, Exh. 3.) Hart answered only to Subatch, and Subatch was responsible for training him (or not). (Dkt. 142, Exh. 3.) While Hart was employed by WH Trading, Subatch registered "Wild Horse Contracting Services" as the assumed business name of WH Trading. Exh. 2 at 6. Subatch told Nautilus that "he [Jason Subatch] owns the loader" that knocked logs onto Steve. (Dkt. 145, Exh. 12.) Clark Fork sent the check for the job to Subatch, made out to Wildhorse Contracting.


CLARK FORK POSTS LLC
71 CONBEST LN
PLAINS, MT 59859

979

four thousand one hundred forty-three 75/100 DOLLARS

DATE | TO THE ORDER OF | DESCRIPTION | CHECK NO.
10-18-22 | Wildhorse Contracting | #10444 1045 | 979

$ 4143 75/100

(Dkt. 145, Exh. 10.)

The Court ignored these facts, in contravention of both Rule 56 and what an "established fact" means in a coverage dispute. "Established facts" in the coverage context must be entirely undisputed or decided by a fact finder. *State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 26, 372 Mont. 191, 312 P.3d 403. Moreover,

a party's *disputed* admission of its non-involvement or non-fault "should not be the arbiter of the policy's coverage." *Cf. Gon v. First State Ins. Co.*, 871 F.2d 863, 869 (9th Cir. 1989).

Here, the District Court not only erroneously concluded that "no named Defendant is an insured," but also found that "Nautilus's insured—'Jason Subatch DBA Wildhorse Contracting Services'—was not involved in the accident at issue in this case in any respect." Exh. 2 at 9, 24. While the District Court cited Nautilus's cross-claim (Exh. 7, ¶ 55) and WH Trading's answer thereto (Dkt. 118, ¶ 55)—where WH Trading "admitted" that Jason Subatch, dba Wildhorse Contracting Services, "was not involved," *i.e., not at fault*, for the accident—Plaintiffs denied that no-fault allegation. Exh. 8, ¶ 55. The District Court disregarded Petitioners' denial. For its part, Petitioner Jason Subatch dba Wildhorse Contracting Services never moved for summary relief and it is unclear to the parties to the underlying litigation how to proceed with the case in light of the District Court's decision.

B. Rule 56 Error: Genuine Issues of Fact About Who Owns Wild Horse Trading.[3]

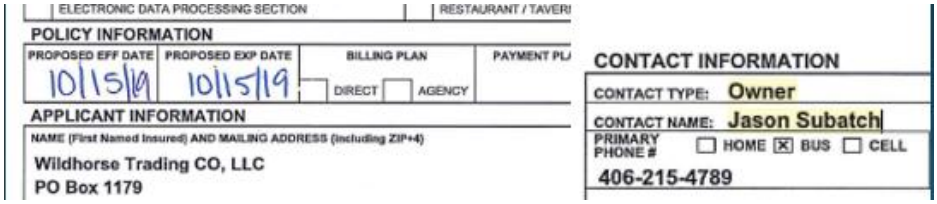
Section II of the Policy states, in part: "If you are designated in the Declarations as: [a]n individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner." Exh. 5.

Despite Petitioners' opposition, the District Court concluded the Policy unambiguously designates an individual as the Named Insured, that only WH Trading—and not Subatch—"was involved," in the actions leading to Steve's injuries and that the undisputed facts demonstrate *Tyler* Subatch owned WH Trading. Exh. 2 at 5.

Who owns WH Trading is far from undisputed, making summary judgment for Nautilus inappropriate. Setting aside that the Policy places no temporal restrictions on ownership, a limitation the Court wrote into the Policy (*see Id.* at 13), Jason Subatch maintains that he owned WH Trading and, at a minimum, a genuine issue of fact exists as to Nautilus's contention that *Tyler* Subatch was the owner in 2022.

[3] Subatch's sole ownership of WH Trading is not the only way to establish coverage. The genuine material fact issue regarding whether Subatch solely owns WH Trading, however, bars summary judgment in Nautilus' favor.

Jason Subatch is hardly asserting he owned WH Trading for the first time in this litigation. For example, in 2019, *Jason* Subatch represented *he* owned WH Trading.


ELECTRONIC DATA PROCESSING SECTION | RESTAURANT / TAVERN

POLICY INFORMATION

PROPOSED EFF DATE	PROPOSED EXP DATE	BILLING PLAN	PAYMENT PLAN
10/15/19	10/15/19	☐ DIRECT ☐ AGENCY	

APPLICANT INFORMATION

NAME (First Named Insured) AND MAILING ADDRESS (Including ZIP+4)

Wildhorse Trading CO, LLC
PO Box 1179

CONTACT INFORMATION

CONTACT TYPE: Owner
CONTACT NAME: Jason Subatch
PRIMARY PHONE # ☐ HOME ☒ BUS ☐ CELL
406-215-4789

(Dkt. 14, Exh. 1.) In 2022, shortly after Steve was injured, *Jason* Subatch again stated *he* owned WH Trading.


APPLICANT INFORMATION

NAME (First Named Insured) AND MAILING ADDRESS (Including ZIP+4)
Wildhorse Trading Company, LLC
Box 1179
Plains MT 59859

GL CODE | SIC 5191 | NAICS | FEIN OR SOC SEC # 84-2688122
BUSINESS PHONE # 406-826-2002
WEBSITE ADDRESS

☐ CORPORATION ☐ JOINT VENTURE ☐ NOT FOR PROFIT ORG ☐ SUBCHAPTER "S" CORPORATION
☐ INDIVIDUAL ☐ LLC NO. OF MEMBERS AND MANAGERS ☐ PARTNERSHIP ☐ TRUST

Jason Subatch
Policyholder/Applicant's Signature

Wildhorse Trading Co
Named Insured/ Business Name

Jason Subatch
Print Name

07-03193497
Policy Number, if available

10/19/2022
Date

CONTACT INFORMATION

CONTACT TYPE: Owner
CONTACT NAME: Jason S. Baxter
PRIMARY PHONE # 406-303-0133 ☐ HOME ☐ BUS ☐ CELL
SECONDARY PHONE # ☐ HOME ☐ BUS ☐ CELL

(Dkt. 149, Exh. 3.) *Jason* Subatch's employees also identify *Jason* Subatch as WH Trading's owner. (Dkt. 142, Exh. 3.)

When asked by Plaintiffs, Subatch admitted he owned WH Trading at the time of the incident.

> 9. Wild Horse Trading CO. L.L.C. owner Jason Subatch was not present at the time of the incident.
>
> **RESPONSE:** Admit. Jason Subatch arrived approximately 20-25 minutes after the incident had occurred.

(Dkt. 130, Exh. M.) In other companion coverage litigation, Subatch admitted he owned WH Trading, and denied there was any other owner. (Dkt. 145, Exh. 1-2.)

Nautilus only advanced its "Tyler-as-sole-owner" argument at the summary judgment phase, long after discovery closed. And Nautilus cannot keep its ever-changing litigation position straight. For example, in its brief in support of summary judgment, Nautilus conceded Jason Subatch was a member (and thus *owner* of WH Trading) in 2022. (Dkt. 128 at 9.) ("Ryan Hart was not, at the time of the accident, an employee of Jason Subatch individually (*i.e., outside Subatch's capacity as a member of WH Trading*)") (emphasis added).

In the face of this dispute, the District Court found Secretary of State filings to be dispositive. Petitioners are unaware of authority granting such legal potency. The factual dispute should have been viewed in the light most favorable to the non-movants, not disregarded.

C. Insurance Law Error: Ambiguities Were Ignored and Construed Against Coverage.

An insurance contract is ambiguous if it is "reasonably subject to two different interpretations." *Modroo v. Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶ 23, 345 Mont. 262,191 P.3d 389. Whether an ambiguity exists is determined "from the viewpoint of a consumer with average intelligence, but untrained in the law or the insurance business." *Id.* Ambiguities are construed "against the insurer and in favor of extending coverage." *Id.*

Here, from the viewpoint of a consumer with average intelligence, the Policy insures Wild Horse Contracting Services (the assumed business name of WH

Trading), or at least Subatch, in his capacity as a member, for the conduct of WH Trading.

Section II of the Policy provides, in part, that if a Named Insured is a limited liability company, its members (*i.e.,* Subatch) are also insureds with respect to the conduct of the business.[4] Exh. 5 at 9. The Policy sometimes includes a "DBA" when referring to the Named Insureds and sometimes does not, depending on the page.

POLICY NUMBER: NN1404005

Named Insured: Jason Subatch
Wildhorse Contracting Services

See e.g. Exh. 5 at 2-3. This creates a reasonable interpretation that the Policy insures both Jason Subatch and *also insures* the entity as a Named Insured. In fact, the Policy states the "first Named Insured" is financially responsible for premiums, indicia of two Named Insureds. Exh. 5 at 4.

The District Court rejected that reasonable interpretation, deciding instead that Wild Horse Contracting (as the abn for WH Trading) unequivocally had no coverage, because the Policy's "'Who is an Insured' section (Section II) directs the reader to the "Declarations" to determine whether the Named Insured is an individual or a business entity, and the Declarations states that the Named Insured is an Individual. Exh. 2 at 12.

[4] A business description in a declaration page does not limit available coverage absent a specific exclusion. *Mt. Vernon Fire Ins. Co. v. Belize NY, Inc.,* 277 F.3d 232 (2d Cir. 2002). There is no such exclusion here. While activities falling outside of the business description might trigger a premium audit, they do not create a loss of coverage. (Exh. 5 at 28).

Maybe that is one reasonable interpretation. But it is not the only one. Indeed, this Court has already said as much.

In *Modroo*, the insured identified an ambiguity regarding whether a commercial policy provided UIM coverage to an individual, or only to the partnership and its covered autos. *Modroo v. Nationwide Mut. Fire Ins. Co.*, 2008 MT 275, ¶¶ 8-14, 345 Mont. 262, 191 P.3d 389. Similar to the Policy here, the Named Insured in the Declarations was CASSIUS H & MARY J HARDY & HARRY MODROO DBA MODROO FARM." *Id.* at ¶ 11. The insurer argued, like Nautilus here, that there was no ambiguity because the policy specifically stated in the Declarations that the Insured was a Partnership and the UIM endorsement's "'Who is an insured' section unequivocally directs a reader to the 'Declarations' to determine whether the Named Insured is designated as an individual or as a business entity." *Id.* at ¶¶ 2, 4, 27.

This Court acknowledged Nationwide's interpretation was reasonable, *but it wasn't the only reasonable interpretation*. *Id.* at ¶¶ 28-32. "The Named Insured block does however include the names of three individuals—Hardy, Mary Modroo, and Harry Modroo—who are doing business together as Modroo Farm. *A reasonable reading of the Named Insured block is that the Named Insureds include Hardy, Mary Modroo, and Harry Modroo, as individuals, and Modroo Farm, as some form of entity*." *Id.* at ¶ 29 (emphasis added); s*ee also D.C. Concrete Mgmt., Inc. v. Mid-*

Century Ins. Co., 39 P.3d 1205, 1207 (Colo. App. 2001) (Even though policy form indicates the insured was an individual, designation of "Rafael Sanchez DC Concrete Management" was ambiguous as to whether policy refers to an individual or a business.); *Boling v State Farm Mut. Auto. Ins. Co.*, 466 S.W.2d 696, 698 (Mo. 1971) (designation of named insured as "Paul Hunt, d/b/a Hunt Materials Co." was ambiguous and raised a question as to whether the policy was issued to an individual or an entity, even though the policy indicated the insured was an individual).

The District Court erred by deferring to the insurer's interpretation. The error should be corrected now.

D. Insurance Law Error: Extrinsic Evidence Was Used to Construe a Purportedly Unambiguous Policy.

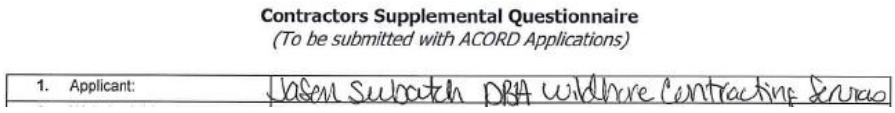
"Extrinsic evidence may be used as an aid in interpreting contract provisions, however, *only when the language contained therein is ambiguous*." *Ribi Immunochem*, ¶ 27 (emphasis added). "Any ambiguity in an insurance policy must be construed in favor of the insured and in favor of extending coverage." *Hardy*, 67 P.3d at 896.

The District Court determined the Policy contains no ambiguity. Exh. 2 at 18, 20. Nevertheless, it relied upon extrinsic evidence to construe the Policy in the insurer's favor and against coverage. *See, e.g., id.* at 4-6. In particular, the District Court relied upon a Declaration of Tiffani Sheehan, mistakenly identified as

Subatch's agent.[5] (*Id.* at 6 (citing Dkt. 129, Ex. A).) The District Court also relied upon Sheehan's emails, the application she filled out, and other documents not incorporated into the Policy. (*Id.,* at 4-6.)

Relying upon this extrinsic evidence, the District Court concluded Subatch was involved with two separate entities: one spelled *Wild Horse* Contracting Services, and one spelled *Wildhorse* Contracting Services. Exh. 2 at 6.

The District Court rejected argument and evidence that the difference in spelling was a mistake borne of Nautilus' agent's sloppiness. *See* (Dkts. 145, 146). Sheehan wrote that the applicant is "Jason Subatch DBA Wildhore (sic) Contracting Services:"


Contractors Supplemental Questionnaire
(To be submitted with ACORD Applications)

1. Applicant: Jason Subatch DBA Wildhore Contracting Services

(Dkt. 145, Exh. 7.)

Sheehan's use of Wildhorse and Wild Horse was consistently inconsistent. In one email (related to a separate policy) Sheehan wrote: "I insured **Wildhose** (sic) Trading Co LLC." (Dkt. 145, Exh. 8.) In another: "This was a standard renewal for **Wildhorse trading company** (sic)." *Id.*

[5] For purpose of "procuring the insurance and preparing the application, insurance agencies are agents for the insurer." *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 39, 356 Mont. 417, 430, 234 P.3d 79, 88.

An insurer is not permitted to void coverage by taking advantage of a misstatement in the application material to the risk which is due to mistake or negligence of the agent, and not to fraud or bad faith on the part of the insured. *Hier v. Farmers Mut. Fire Ins. Co.*, 104 Mont. 471, 67 P.2d 831 (1937) (reformation of application and policy to cure mistake by an agent who filled out the policy as to description of land on which insured buildings were situated proper in absence of equitable bar); *see also, Den Hartog v. Home Mut. Ins. Ass'n of Iowa*, 196 N.W. 944, 946 (Iowa 1924).

The District Court ignored this well-established rule and relied upon extrinsic evidence to rebuff Petitioners' factually supported position that Sheehan was just messy. The District Court also refused to consider the doctrine of *idem sonans*, which dictates "that absolute accuracy in spelling names is not required in a legal document or proceedings either civil or criminal; that if the name, as spelled in the document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted methods, a sound practically identical with the correct name as commonly pronounced, the name thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error." *Davison v. Bankers' Life Ass'n*, 150 S.W. 713, 715 (Mo. 1912); *Matter of Henrichs*, 237 Mont. 59, 61, 771 P.2d 967, 969 (1989) (demonstrating *idem sonans* is sufficiently reliable to uphold criminal convictions).

Idem sonans applies to insurance contracts (*See* e.g. *Cobbs v. Unity Indus. Life Ins. Co.*, 158 So. 263, 264 (La. Ct. App. 1935)) and even voting (*Rennie v. Nistler*, 226 Mont. 412, 416, (1987) ("The principle of *idem sonans* would indicate that the individual written in was the same as the Democratic candidate.")). Applying *idem sonans*, the Policy plainly identifies Jason Subatch DBA WH Trading (through its assumed business name) in the Declarations, eliminating any confusion regarding whether coverage applies. The District Court erred by failing to apply this logical and well-accepted legal rule. *See* Exh. 2 at 17.

CONCLUSION

Absent correction of the plain legal errors, a complex case will become more entangled and complicated and almost certainly result in several trials as well as ancillary litigation regarding payment of attorneys' fees. The legal and factual theories to be presented at trial by Plaintiffs and Defendants depend upon legal clarity, and the issues this Court is asked to assess are purely legal questions of significant import. The denial of a speedy remedy by supervisory control would be a denial of justice to Plaintiffs and Defendants.

DATED this 26th day of March, 2025.

/s/ Justin P. Stalpes
BECK AMSDEN & STALPES, PLLC

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. Pro. 14, I hereby certify that this writ is printed with proportionally spaced Times New Roman typeface of 14 points; is double-spaced except footnotes and block quotes; and the word count of 3,999 words is less than the 4,000 word limit, exclusive of tables and certificates.

RESPECTFULLY SUBMITTED this 26th day of March 2025.

/s/ Justin Stalpes

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Justin P. Stalpes, hereby certify that I have served true and accurate copies of the foregoing Petition - Writ to the following on 03-26-2025:

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Dated: 03-26-2025