

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA 25-0076

AMBER ROSE D'HOOGHE,

Plaintiff/Appellant,

v.

CINCINNATI INSURANCE
COMPANY;

Defendant/Appellee.

**APPELLEE CINCINNATI
INSURANCE COMPANY'S
ANSWER BRIEF**

On Appeal From Montana Fourth Judicial District Court
County of Missoula - Cause No. DV 32-2023-870
The Honorable Robert L. Deschamps, III

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STATEMENT OF THE ISSUES

1. Did the District Court err when it granted Cincinnati Insurance Company's Motion for Summary Judgment dismissing with prejudice all of Amber D'Hooge's claims?

2. Did the District Court err by denying Amber D'Hooge's Motion for Partial Summary Judgment?

STATEMENT OF THE CASE

A. Nature of The Case

This is a strange case. Amber D'Hooge ("D'Hooge") claims that on December 7, 2020, she fell in the parking lot of The Tire Guys d/b/a Tire Rama Service Center ("Tire Rama") in Missoula, Montana and suffered personal injury damages. At the time, Cincinnati Insurance Company ("Cincinnati") provided insurance coverage to Tire Rama. D'Hooge correctly brought suit against Tire Rama for her alleged damages. However, what makes this case strange is that D'Hooge did not stop there: she brought the same cause of action directly against Cincinnati, seeking to hold Cincinnati, the insurance carrier for Tire Rama, liable for her personal injury damages despite the fact that Cincinnati did not have a duty to maintain the premises for its insured. D'Hooge did not sue Cincinnati for bad faith including any violation of the Unfair Trade Practices Act ("UTPA"), or even failing to comply with the advance payment requirements of *Ridley* and *Dubray* even

though these duties are the only ones Cincinnati owed to D’Hooge, a third-party claimant. In fact, Cincinnati complied fully and completely with those statutory and case law duties and D’Hooge takes no issue whatsoever with Cincinnati’s handling of the claim. Rather, D’Hooge ignored and continues to ignore decades of well-established, longstanding law in Montana and has incredibly sought to hold an insurance carrier directly liable for her premises liability claim and personal injury damages despite the fact that the insurance carrier had no control over the premises. In short, D’Hooge sued Cincinnati, for personal injuries stemming from a premises liability claim when Cincinnati had absolutely no control over the premises, was not present the day of the incident, and owed her no duty to maintain the premises. The District Court correctly granted summary judgment to Cincinnati and dismissed her claims with prejudice.

It goes without saying that a third-party claimant, D’Hooge cannot seek personal injury damages against Cincinnati or try to hold Cincinnati liable for its insured’s alleged negligence and failure to maintain its premises where D’Hooge fell in Missoula. Try as she might, the law has not changed – she just cannot accept that. She continues to try and sue an insurance company for injuries she alleges were caused by the insurance company’s insured.

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B. Procedural History

This litigation commenced with the filing of D’Hooge’s Complaint on August 17, 2023. (Doc. 1).¹ In her Complaint, only one defendant was named, Tire Rama. D’Hooge alleged that on December 7, 2020, while at Tire Rama’s location in Missoula, she slipped and fell “on an extremely slippery and/or icy substance covering some of the rear parking lot.” (*Id.*). D’Hooge, by way of her Complaint, alleged that Tire Rama acted negligently causing her to fall but also devoted a substantial amount of time in her Complaint discussing the alleged post-accident conduct of Tire Rama after her slip and fall giving rise to non-accident related alleged damages. (*Id.*). Rather than setting out each separate cause of action in her Complaint, D’Hooge specifically stated that she was not attempting to identify each particular cause of action brought against Tire Rama. (*Id.*). However, she did assert a premises liability claim of negligence against Tire Rama contending that Tire Rama failed to act with reasonable care under the circumstances in maintaining its property in a reasonably safe condition. (*Id.*). Other references to potential theories of recovery found in her Complaint included spoliation of evidence, res ipsa

¹ Cincinnati notes that D’Hooge’s Appellant Appendix included many documents that are not part of the record in this case, in violation of M.R.App.P. 8(1). Specifically, upon information and belief, D’Hooge’s Appendix pages 32-33, 40-58 were never filed in the district court, are not transcripts of proceedings, and are not a certified copy of the docket therefore were included in her Appendix in violation of M.R.App.P. 8(1).

loquitur, negligent and intentional infliction of emotional distress, breach of the duty to assist, promissory estoppel, equitable estoppel and/or quasi-estoppel and detrimental reliance. (*Id.*) In the WHEREFORE section of her Complaint, D’Hooge separated out her damage claims by first seeking compensation for all damages caused by Tire Rama due to her December 7, 2020 slip and fall accident (negligence claim) and secondly including a claim for additional compensation for damages caused by Tire Rama’s action and inaction after she had been injured. (*Id.*)

Although Tire Rama was the only defendant named in her Complaint, D’Hooge made references to Tire Rama’s insurance carrier by alleging that Cincinnati “was an agent of Tire Rama” and that as Tire Rama’s agent, “Cincinnati Insurance accepted liability for the slip and fall.” (*Id.*) In her Complaint, D’Hooge alleged that following her accident, she contacted Cincinnati which in turn commenced paying her alleged lost wages and medical bills. (*Id.*) She went further and alleged that she “understood and believes that neither Cincinnati Insurance nor The Tire Guys will ever contest liability for her injury claim” and therefore “have waived any potential denial of liability and have no right to contest liability” for her injury claims leaving the only issues “in this litigation” as being “causation and damages.” (*Id.*)

Tire Rama filed their Answer to D’Hooge’s Complaint on September 29, 2023. (Doc. 3). In response to the allegations found in her Complaint concerning the alleged agency relationship between Tire Rama and its insurance carrier, Cincinnati, Tire Rama either denied the allegations or asserted that the allegations called for legal conclusions or were directed towards a non-party entity thus no response was deemed required. (*Id.*). More importantly, Tire Rama specifically stated that it disputed the liability claim of D’Hooge and raised as one of its affirmative defenses, comparative negligence pursuant to §27-1-702, MCA. (*Id.*).

In light of the allegations found in the Complaint concerning the alleged “agency” relationship between Tire Rama and Cincinnati as well as other allegations, Cincinnati filed an unopposed motion to intervene as a party pursuant to Rule 24 of the Montana Rules of Civil Procedure. (Doc. 7). The District Court granted the Motion by Order filed October 11, 2023. (Doc. 8).

On November 21, 2023, D’Hooge filed a motion for leave to amend her Complaint. In her proposed First Amended Complaint, she alleged that Cincinnati had “legally contracted to be liable” for her damages and that it was “estopped, via several equitable doctrines, from disclaiming or revoking liability” for her damages. Also found within her proposed First Amended Complaint were the same claims previously brought against Tire Rama including her negligence claim that Tire Rama had failed to maintain its premises in a reasonably safe condition. D’Hooge

contended that she sought to recover her alleged damages arising from the slip and fall directly from Cincinnati, an insurer. In other words, D’Hooge brought her Amended Complaint naming Cincinnati as a defendant, seeking tort damages directly from Cincinnati as a result of a slip and fall even though it is undisputed that Cincinnati did not own the premises where D’Hooge fell and owed her no duty other than the duties an insurer owes a third-party claimant under Montana law.

Before the District Court ruled upon D’Hooge’s motion for leave to amend her Complaint, seven days later, on November 28, 2023, D’Hooge filed her Motion for Partial Summary Judgment on Liability against Cincinnati. At that point in the proceedings, D’Hooge’s Complaint had not yet been filed naming Cincinnati as a party and no theories of recovery for damages had been asserted against Cincinnati. D’Hooge requested an Order finding that Cincinnati, by “accepting liability”, eliminated her need for prosecuting and meeting her burden in her negligence case against Tire Rama and instead essentially substituting Cincinnati, an insurance company, for Tire Rama in her negligence case despite the fact that Cincinnati did not own, maintain, or control the premises at issue where she fell.

Cincinnati responded by opposing D’Hooge’s motion for leave as well as opposing plaintiff’s motion for partial summary judgment. (Cincinnati Opp. To Motion for Leave, Supp.Appx.000172-Supp.Appx.000181; Cincinnati Opp. To Motion for Partial Summary Judgment, Supp.Appx.000160-Supp.Appx.000171).

In opposing the motion for leave, Cincinnati argued that D'Hooge's proposed Amended Complaint did not have a clear, concise, short and plain statement of claims showing she was entitled to relief and further she could not bring any legally viable claim directly against Cincinnati, a carrier, so no cause of action against it would be appropriate under Montana law. (Supp.Appx.000172-Supp.Appx.000181). In opposing the motion for partial summary judgment, Cincinnati contended that since no Amended Complaint had been filed, no causes of action had yet to be asserted against Cincinnati and thus the motion was premature. (Supp.Appx.000160-Supp.Appx.000171). Cincinnati also argued that pursuant to Montana law, there were no available theories of recovery that could be asserted against Cincinnati as all claims handling causes of action are governed by Montana's Uniform Trade Practices Act and § 33-18-242, MCA, that specifically states that third-party claims cannot be pursued until the underlying claim against Tire Rama had been settled or a judgment entered in favor of the claimant. (*Id.*). Also, Cincinnati argued that as the insurance carrier for Tire Rama, it was not Tire Rama's agent and in no way could bind its insured with respect to liability determinations. (*Id.*). Cincinnati argued that liability determinations need to be resolved at the time of trial of the underlying case between D'Hooge and Tire Rama and this would not involve Tire Rama's insurer, Cincinnati. (*Id.*).

On May 13, 2024, approximately six months after D’Hooge filed her motion to amend her Complaint, the District Court granted D’Hooge’s Motion to Amend. With the issuance of the Court’s Order, D’Hooge’s First Amended Complaint became part of the record for the first time and Answers were filed by both Tire Rama and Cincinnati in response to D’Hooge’s First Amended Complaint. (Doc. 22, 23).

A hearing was held with the District Court in regard to D’Hooge’s motion for partial summary judgment on July 26, 2024. (Supp.Appx.000121-Supp.Appx.000159). Cincinnati’s counsel argued several points at that hearing, including that it was “a basic” and a “given” in Montana that Cincinnati cannot bind its insured, Tire Rama and Tire Rama cannot bind its insurance carrier Cincinnati. (July 26, 2024 Transcript, Supp.Appx.000136-Supp.Appx.000137). D’Hooge consistently argued that Cincinnati, a carrier, was liable for tort damages – even boldly stating “we are seeking that Cincinnati itself individually pay for Amber’s damages [. . .] not that we prove Tire Rama’s negligence for the slip and fall[.]”. (Supp.Appx.000154).

Judge DeChamps stated from the bench “at this time, I am going to grant your motion for partial summary judgment on liability for Cincinnati. I think they are estopped.” (Supp.Appx.000156). However, he then requested additional briefing on the issues this kind of a request for relief presented and told the parties

not to expect any final ruling until after the briefing scheduling was done. (Supp.Appx.000154-Supp.Appx.158). D’Hooge submitted a Proposed Order and Tire Rama and Cincinnati both submitted Responses that opposed D’Hooge’s Motion for Partial Summary Judgment, outlining all of the many factual and legal reasons why the Court should not grant the Motion and why it had the authority to deny it despite what was said from the bench. (Supp.Appx.000049-Supp.Appx.000120). Cincinnati’s Opposition was comprehensive and it detailed why not only Montana law prohibits third-party claimants like D’Hooge from suing a carrier like Cincinnati directly for negligence, but it also detailed why D’Hooge’s other “causes of action” were really just attempts to sue Cincinnati over claims handling practices and failed as a matter of law. (*Id.*).

On September 30, 2024, Cincinnati moved for summary judgment on D’Hooge’s entire Complaint, arguing as it did in its Opposition to Plaintiff’s Proposed Order as well as its Opposition to Plaintiff’s Motion for Partial Summary Judgment that D’Hooge’s claims all fail as a matter of law because she had no viable, legal cause of action that exists under Montana law against Cincinnati. (Supp.Appx.000028-Supp.Appx.000048).

On October 8, 2024, D’Hooge settled all of her claims with Tire Rama and stipulated to its dismissal with prejudice from this action, which was granted. (Doc. 70).

On November 8, 2024, the District Court issued its Order denying D’Hooge’s Motion for Partial Summary Judgment. (Nov. 8, 2024 Order, Appx.24-30). The Court held that all of D’Hooge’s claims against Cincinnati related to Cincinnati’s claims handling practices as they were all rooted in the communications, and the effect of those communications, between herself and Cincinnati’s claims handlers/adjusters. (*Id.*). The Court therefore denied D’Hooge’s Motion for Partial Summary Judgment against Cincinnati, finding that all of her claims against Cincinnati undeniably involved how her claim had been handled and any cause of action against Cincinnati would be governed by Montana’s UTPA. (*Id.*). Specifically, the Court held that § 33-18-242(4) stated that “[a] third-party claimant who has suffered damages due to the handling of an insurance claim may bring an action against the insurer for fraud or pursuant to this section, but not under any other theory or cause of action.” (*Id.*).

On November 13, 2024, D’Hooge filed a Rule 59(e) Motion to Alter or Amend Judgment, and Motion to Amend Ruling. (Supp.Appx.000016-Supp.Appx.000027). Cincinnati opposed D’Hooge’s Rule 59(e) Motion to Alter or Amend Judgment and Motion to Amend Ruling. (Supp.Appx.000001-Supp.Appx.000015).

On November 20, 2024, the Court held oral argument with the parties regarding the various outstanding motions.

On December 30, 2024, the District Court issued its Order granting Cincinnati's Motion for Summary Judgment and Denying Plaintiff's Motion to Alter or Amend. (Nov. 20, 2024 Order, Appx.1-23). The District Court thoroughly considered and detailed the history of Montana's common law bad faith and UTPA, holding that D'Hooge's "claims" were all rooted in Cincinnati's claims handling practices and could not move forward in the litigation. The District Court also addressed each "claim" D'Hooge attempted to bring against Cincinnati, ruling they all failed as a matter of law even if they could be pursued despite long standing common law and the UTPA. (*Id.*).

Cincinnati's sole role in this case is that it had a contract of insurance with its insured, Tire Rama, in which Tire Rama paid premiums for insurance coverage subject to certain contractual terms, exclusions and of course limits on the amount of insurance coverage available to respond to claims made against Tire Rama by third-party claimants such as D'Hooge. Cincinnati did not own the premises where D'Hooge claims she slipped and fell; it was not present that day; it was not part of any of the events of that day in any way yet D'Hooge brought an action against Cincinnati for her personal injury damages caused as a result of the alleged negligence of Tire Rama. Cincinnati owed no duty to D'Hooge in regard to her premises liability/negligence case yet she still persists in bringing that claim against Cincinnati. She should not be permitted to do so.

Cincinnati properly handled D’Hooge’s claim and in fact D’Hooge agrees, having never brought suit or complained about Cincinnati’s claims handling practices but rather has consistently represented to the District Court that 1) she was not pursuing a bad faith claim or a claim under the Unfair Trade Practices Act, § 33-18-201, MCA (“UTPA”) against Cincinnati in this action; and 2) she does not contend that Cincinnati inappropriately handled her claim.

STATEMENT OF FACTS

Cincinnati had a contract of insurance with its insured, Tire Rama, in which Tire Rama paid premiums for insurance coverage subject to certain contractual terms, exclusions and of course limits on the amount of insurance coverage available to respond to claims made against Tire Rama by third-party claimants such as D’Hooge. (Nov. 8, 2024 Order, Appx.2; Doc. 72, ¶ 1].

D’Hooge claims that on December 7, 2020, she went to Tire Rama in Missoula, Montana to get a leak in her tire fixed. (Appx.2). She drove into the parking lot and parked her car in one of the parking spots on the south side of the building along South Avenue West. (Supp.Appx.000055; Supp.Appx.000087). D’Hooge first went into the Tire Rama store and told them that she needed her vehicle serviced then she bought food from a food truck in the Tire Rama parking lot for her and her son. (Supp.Appx.000055; Supp.Appx.000087-Supp.Appx.000088).

D’Hooge admitted that because the food truck was located on the south side of the Tire Rama building, the individual who was in the food truck would not have been able to see where she allegedly fell that day because the accident occurred on the opposite side of the Tire Rama building, which was totally obscured from vision. (Supp.Appx.000056; Supp.Appx.000089). This was the area north of the building, some distance from the food truck but more importantly at a location obscured by the building itself. (Supp.Appx.000056; Supp.Appx.000089). Stated otherwise, the food truck employee could not have seen the accident.

After getting food, a Tire Rama employee came out, got D’Hooge’s keys from her and drove her vehicle around the west side of the building to the north side and the area of the bays. (Supp.Appx.000056; Supp.Appx.000085-Supp.Appx.000092). D’Hooge had allegedly left some of the recently purchased french fries in her vehicle, so she and her son went around the west side of the building to get to the back area of the building in hopes of retrieving the fries. (*Id.*).

When heading back to the other side of the Tire Rama building, D’Hooge was with her son when she allegedly slipped and fell. (Doc. 1, ¶¶ 10, 13). She testified that she was not running. (Supp.Appx.000056; Supp.Appx.000094). However, when D’Hooge was seen shortly thereafter on the day of the accident for medical treatment it was reported in the medical note that D’Hooge “states she was running on ice and she fell a few hours.” (Supp.Appx.000056; Supp.Appx.000113).

When she was leaving the Tire Rama premises following the accident, D’Hooge took photographs of the area where she allegedly fell. (Supp.Appx.000056; Supp.Appx.000117).

D’Hooge has suggested that the manager of Tire Rama went out later and put ice melt/deicer down in the area where she fell, however, she also admitted that she never saw anyone apply ice melt. (Supp.Appx.000057; Supp.Appx.000095-Supp.Appx.000094). After the accident, she and her son moved to the front of the building, to a “grassy area” where she called the Tire Rama store from her cell phone rather than going into the store. (Supp.Appx.000057; Supp.Appx.000098-Supp.Appx.000099).

Cincinnati, an insurance carrier, did not own the premises where D’Hooge slipped and fell and suffered injuries that she claims in this matter. (Doc. 72, ¶ 3).

On the same day as her accident, D’Hooge contacted Tire Rama and Tire Rama’s insurance agent to report her claim. (Appx.25). Eventually D’Hooge’s claim made its way to Cincinnati and claims representative Cheryl Marie Lee (“Lee”) was assigned the claim. (Appx.2). On December 23, 2020, 16 days after the date of the accident, Lee and D’Hooge visited by phone. (*Id.*). D’Hooge reported to Lee how the accident occurred and during this conversation stated that “her attorney she has for family law” had told her “that she is owed Ridley meds and wage loss”. (*Id.*). This reference was obviously to the *Ridley* and *DuBray*

decisions of this Court interpreting §33-18-201, MCA requiring insurance carriers to advance pay reasonable, necessary and causally related medical payments and reasonable lost wages in situations where “liability has become reasonably clear”. (Supp.Appx.000059-Supp.Appx.000060).

By email dated December 28, 2020, Lee told D’Hooge that “We are accepting liability for your claim.” (Appx.2). D’Hooge was further told that she did not need to gather any additional information to support her claim. (*Id.*) However, there was no additional information that could have been gathered by D’Hooge to support her negligence claim. (Supp.Appx.000060). As stated previously, there were no witnesses to the accident. (*Id.*) D’Hooge admitted that the food truck individual could not have seen the accident occur. (*Id.*) Likewise, there is no evidence in the record that any other evidence could have been obtained to support D’Hooge’s negligence cause of action including surveillance video or other photographic evidence. (*Id.*) D’Hooge took photographs of the accident scene that very afternoon before leaving the Tire Rama premises and seeking medical treatment which show the condition of the accident scene on the day of the accident. (*Id.*) There was no additional evidence for D’Hooge to gather. (*Id.*)

After Cincinnati accepted liability for her claim, it began advance paying reasonable, necessary and causally related medical expenses as well as paying wage/income losses claimed by D’Hooge consistent with Montana law.

(Supp.Appx.000061; Appx.2). In fact, Cincinnati significantly overpaid D’Hooge for her loss of income claim. (Supp.Appx.000061). Cincinnati began and continued to advance pay D’Hooge over \$3,000 a month based upon an incorrect calculation of her monthly income. (*Id.*). In reality, based upon D’Hooge’s tax returns, verified by expert witnesses, D’Hooge, at most, prior to the accident made less than \$1,000 a month as a yoga and Pilates instructor. (*Id.*).

Lee testified that in determining whether or not to “accept” liability, she investigated the facts of the accident and stated that “there was – basically the 51 percent rule.” (Supp.Appx.000061). She stated in her deposition that “if there’s more than 51 percent that the – you know, that it occurred on our insured’s premises or, you know, the pieces all fall together that way, then that would be acceptable.” (*Id.*).

When Lee made a determination that liability was reasonably clear on the part of Cincinnati’s insured, Tire Rama, it triggered the obligation of Cincinnati to advance pay medical expenses and lost wages/income. (*Id.*) Cincinnati did do so for several years, both before and after D’Hooge commenced litigation. (Appx.2-3).

Cincinnati’s only connection to and correspondence with D’Hooge was solely related to its handling of her claim against Cincinnati’s insured, Tire Rama, and Cincinnati’s obligations under Montana law as an insurance carrier. (Appx.3).

D’Hooge consistently represented to the District Court that 1) she was not pursuing a bad faith claim or a claim under the Unfair Trade Practices Act, § 33-18-201, MCA (“UTPA”) against Cincinnati in this action; and 2) she did not contend that Cincinnati inappropriately handled her claim. The reason that D’Hooge has not and cannot make any claims handling claim against Cincinnati is because Cincinnati overpaid all advance payments for medical expenses and especially wage/income loss claims. If anything, Cincinnati erred to the benefit of D’Hooge for years in the handling of her claim.

STANDARD OF REVIEW

This Court reviews a district court’s grant or denial of summary judgment de novo, using the same standards as the district court under M.R.Civ.P. 56. *Putnam v. Cent. Mont. Med. Ctr.*, 2020 MT 65, ¶ 12, 399 Mont. 241, 460 P.3d 419. If the moving party can demonstrate no genuine issues of material fact exist and entitlement to judgment as a matter of law, the burden then shifts to the nonmoving party to prove, by more than mere denial or speculation, that a genuine factual issue does exist. *McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶ 19, 330 Mont. 48, 125 P.3d 1121. The party opposing the motion for summary judgment cannot rely on mere allegations in the pleadings but must present evidence raising genuine issues of material fact in the form of affidavits or other sworn testimony. *Arnold v. Yellowstone Mt. Club, LLC*, 2004 MT 284, ¶ 14, 323 Mont. 295, 100 P.3d 137.

SUMMARY OF THE ARGUMENT

D’Hooge improperly sought, and continues to seek, to hold Cincinnati liable for her personal injury damages arising from a premises liability claim rather than prosecute an action for premises liability against the alleged tortfeasor, Tire Rama. The District Court correctly granted Cincinnati’s Motion for Summary Judgment based upon well established and long standing law in Montana including common law and the UTPA, § 33-18-201, MCA and it further correctly analyzed all the reasons why D’Hooge’s claims, even if not barred by the UTPA and common law bad faith laws, still fail as a matter of law.

D’Hooge will not stop pursuing claims and setting forth arguments that have no legal basis whatsoever. All of her “claims” against Cincinnati were properly rejected by the District Court on the basis that she cannot pursue any direct cause of action for personal injury damages allegedly caused by Cincinnati’s insured, Tire Rama. She cannot do so through a “contract” claim, promissory estoppel, or any other “cause of action.” She had no basis to bring suit against Cincinnati directly. D’Hooge has been told countless times she cannot do so, yet she will not stop trying. She nevertheless tries to argue to this Court that somehow, Cincinnati is the correct party for her to try her premises liability case against and ask for an award of personal injury damages against even though she has already settled with Tire Rama,

the premises owner and insured of Cincinnati. None of this makes any sense and the District Court agreed. This Court should affirm.

ARGUMENT

A. The District Court Correctly Granted Summary Judgment to Cincinnati

D’Hooge will not stop trying to argue that she can bring a cause of action directly against Tire Rama’s insurer, Cincinnati for alleged personal injury damages as a result of her slipping and falling in Tire Rama’s parking lot. D’Hooge argues to this Court that she can somehow pursue a cause of action for negligence against Cincinnati despite the fact that in order to do so, she would have to prove that Cincinnati owed her a duty, breached that duty, and that the breach caused her damages. Cincinnati did not own the premises where D’Hooge allegedly fell. It was not present that day. Stated otherwise, Cincinnati did not owe her any duties other than those related to the handling of her claim as she is a third-party claimant and did not cause her any damages. D’Hooge’s argument that somehow Cincinnati caused her damages due to a breach of a duty owed to her is not supported by either the facts or law applicable to this case.

All other attempts by D’Hooge to bring direct causes of action against Cincinnati fail. There is no merit to any of these claims, they are not supported by the facts, and most importantly they have no basis in law. Rather than accept that, D’Hooge keeps trying to argue that she is somehow not a third-party claimant

because she had some vague and ambiguous “contract” with Cincinnati despite no terms ever being discussed, no meeting of the minds, and no facts to support this idea that somehow a contract formed between the two. Even if a “contract” existed, it did not provide that Cincinnati would be the party that allegedly breached a duty to maintain Tire Rama’s premises resulting in D’Hooge being able to bring a premises liability/negligence action against Cincinnati, not Tire Rama. This “contract” did not exist and could never exist. The District Court correctly granted summary judgment in favor of Cincinnati.

1. All of D’Hooge’s Claims Against Cincinnati Are Barred by Well-Established Montana Law As The Only Claim That Could Be Brought Against Cincinnati Relates to Cincinnati’s Claim Handling Practices Which D’Hooge Concedes Was Proper

All of D’Hooge’s allegations against Cincinnati relate to Cincinnati’s decisions and claims handling practices following its notification of D’Hooge’s claim against Tire Rama. For example, D’Hooge contends that Cincinnati, as the insurer for Tire Rama, made a “contract” with her during its correspondence after she filed a claim, and in support of this “contract formation” argument, she cites to correspondence between herself and Cincinnati’s claims adjusters/handlers. She also basis the “contract” argument upon Cincinnati’s evaluation of liability, Cincinnati’s advance payment of lost wages and medical expenses pursuant to *Ridley* and *Dubray*, and all decisions and actions taken by Cincinnati during its

handling of her claim. These are, undisputably, all claims handling practices that Cincinnati was obligated to perform under well-established Montana law. Cincinnati was solely an insurance carrier for Tire Rama. Cincinnati did not have a written contract with D’Hooge, nor has D’Hooge presented any evidence of any contract established between her and Cincinnati as will be discussed further below. The only duties that Cincinnati owed D’Hooge were an insurer’s duties owed to third-party claimants under Montana law.

As is clear from the history of Montana bad faith law, historically under Montana law, a third-party claimant is barred from pursuing any cause of action directly against an insurer other than for common law bad faith or a violation of the UTPA after resolution of the underlying claim against the insured. *See Klaudt v. Flink*, 202 Mont. 247, 251-252, 658 P.2d 1065; *O’Fallon v. Farmers Ins. Exch.*, 260 Mont. 233, 244-45, 859 P.2d 1008, 1014-1015 (1993); *Ulrigg v. Jones*, 907 P.2d 937, 943, 274 Mont. 215 (1995); *Swank Enterprises v. Anaconda Plumbing and Heating, Inc.*, Cause No. CDV 2003-199, 2004 Mont. Dist. LEXIS 2024, *6-7 (1st Jud. Dist. Lewis and Clark County, June 8, 2004); *Murphy v. Carpenter*, Cause No. DV-03-069, 2003 Mont. Dist. LEXIS 3474 (12th Jud. Dist. Hill County, Nov. 20, 2003) *Hepp v. Clay*, Cause No. DV-02-059(B), 2003 Mont. Dist. LEXIS 3479 (11th Dist. Ct., Flathead County, Jan. 20, 2003); Insurance Law and Practice, § 4861, p. 568 (1981). In this case, D’Hooge has tried to argue that Cincinnati’s conduct in its

claims handling process and its evaluation of liability has given rise to “new” causes of action that she can pursue directly against it. To start, there can be no direct cause of action against Cincinnati other than for bad faith or violation of the UTPA, so any attempt by D’Hooge to bring a direct cause of action for any other claim against Cincinnati fails under well-established Montana law. Additionally, all of her “claims” against Cincinnati and the allegations to support them are entirely based upon Cincinnati’s claims handling process. D’Hooge has just attempted to label these as different causes of action, like “contract formation” and “promissory estoppel” to try and avoid well-established law in Montana, but they are, in fact, all related to Cincinnati’s claims handling – despite D’Hooge’s own admissions in pleadings and to the District Court that she has not pled these causes of action and that it is her belief that Cincinnati appropriately handled the claim.

In short, D’Hooge is barred under Montana law from bringing any cause of action directly against Cincinnati, the insurer for Tire Rama, other than a cause of action for bad faith or violation of the UTPA. Any attempt by D’Hooge to bring any other claim fails as a matter of law and the District Court correctly ruled this way. Additionally, all of D’Hooge’s “other claims” that she has attempted to bring against Cincinnati are all premised upon Cincinnati’s claims handling process and decisions. Confusingly, D’Hooge admits that she does not have and has not pled a UTPA or bad faith claim against Cincinnati, because Cincinnati appropriately

handled the claim in this case, yet she still argues in this litigation that Cincinnati's handling of her claim has given rise to new causes of action. D'Hooge cannot bring any direct causes of action against Cincinnati, an insurer, other than for bad faith or violation of the UTPA. She also cannot disguise bad faith or UTPA claims as "other causes of action" in this matter as they were never pled and at the time she filed her complaints, the underlying action against Tire Rama had not been resolved.

D'Hooge's claims against Cincinnati in this case wholly involve the communications she had with Cincinnati related to her claim, the effect of those communications, and Cincinnati's evaluation and decisions regarding her claim and its handling of the same. In reality, these claims do not sound in contract, promissory estoppel, spoliation, or any other cause of action – they sound in bad faith but D'Hooge has admitted she never pled, is not pursuing, and does not even believe have merit to a bad faith claim based on her own admissions that the claim was handled appropriately.

Even if these "other causes of action" existed, which they do not, they cannot be pursued because Montana law is clear and has been since before the 2023 Amendment to the UTPA: third-party claimants cannot bring a cause of action against an insurer other than for claims handling practices whether common law bad faith or violations of the UTPA. D'Hooge's claims all fail as a matter of law in this instant litigation.

The cases in D’Hooge’s “truncated list” that she claims show her argument has merit are actually indicative of just how wrong D’Hooge is in her arguments. A few specific examples show this.

First, D’Hooge cites *Schantz v. Minow and Farmers Ins.*, 147 Mont. 228, 244, 411 P.2d 362, 372 (1966). This case involved a written and executed settlement agreement and release between an injured party and a carrier and the attempt by the plaintiffs to rescind that contract after discovery of additional injuries from the incident that made up the underlying subject of the written release. *Id.* at 244. Here, D’Hooge had no contract with Cincinnati and instead Cincinnati was making advance payments for her medical expenses and lost wages pursuant to their obligations under the UTPA. This case is just not applicable at all here.

D’Hooge cites *Coleman Const., Inc. v. Diamond State Ins. Co.*, No. CV-05-148-M-JCL, 2008 WL 2357365, * 5 (D. Mont. June 5, 2008). However, this case supports Cincinnati’s argument – that D’Hooge cannot bring a claim directly against Cincinnati that is not based on claims handling practices. In *Coleman*, the third-party claimants first brought suit, tried, and received a verdict from a jury against the tortfeasor. *Id.* at *2. Only then after litigating that underlying case against the tortfeasor did the third-party claimants bring suit against the carrier for violations of the UTPA and spoliation of evidence during the carrier’s investigation into the claim. *Id.* The Court in *Coleman* discussed at length the duties a carrier owes a

third-party claimant under the UTPA and Montana common law. *Id.* at *3-4. *Coleman* and the ability for the third-party claimant to bring a spoliation claim was to “prevent[] insurers from destroying evidence so that an injured third party cannot successfully assert a claim against their insured, whether that claim is or is not covered by the insurer.” *Philadelphia Indemnity Insurance Co. v. Great Falls Rescue Mission*, 548 F. Supp. 995, 1004 (D. Mont. 2021). This just further supports Cincinnati’s argument here that D’Hooge’s entire argument against Cincinnati is rooted in its handling of her claim – not for negligence or any other cause of action she has tried to label it as to circumvent the UTPA and bad faith common law.

D’Hooge also cites *O’Fallon v. Farmers*, 260 Mont. 233 and discusses it in her briefing – but again, *O’Fallon* further supports Cincinnati’s position. D’Hooge cites the case in support of an argument that a third-party claimant can sue a carrier for malicious prosecution. Not only is this irrelevant, because D’Hooge never brought a malicious prosecution claim against Cincinnati in this litigation, but it is also wrong. The malicious prosecution portion of the case in *O’Fallon* was only between the tortfeasor (the insured) and the injured party and did not involve the carrier at all other than the fact the attorneys for the insured were hired by the carrier. *Id.* at 238-240 (discussing the malicious prosecution claim brought against Burgmaier, the at-fault party and the insured).

D’Hooge cites to cases that actually support Cincinnati’s position. She misinterprets the facts and conclusions of those cases, thinking they somehow support her argument when they do not. She has done this to try and persuade this Court her arguments have merit when she should know they do not. For example, D’Hooge cites to *Lawson v. Federated Rural Electric Ins. Exchange*, No. 23-61-GF-JTJ, 2024 WL 4905159 (D. Mont. Nov. 1, 2024) but fails to advise this Court that yet again, this is a case involving a lawsuit against a carrier for violations of the UTPA *after* resolution of the underlying action against that carrier’s insured. *See Lawson v. Federated Rural Electric Ins. Exchange*, 2024 WL 4905507 (D. Mont. Sept. 10, 2024) (detailing the underlying Human Rights Bureau action brought against Federated’s insured, Norval).

In short, the cases cited by D’Hooge in her “truncated” list do not support her arguments and instead support Cincinnati’s arguments. *See Dzintars v. Fireman’s Fund Ins. Co.*, No. CV-24-45-BU-BMM, 2024 WL 4347887 (D. Mont. Sept. 30, 2024) (causes of action brought against insurer by third-party claimant *after* the underlying case against the tortfeasors was settled and resolved and after the carriers engaged in certain behaviors after reaching the settlement); *Kephart v. Natl. Union Fire Ins. Co. of Pittsburgh Pennsylvania*, No. CV-06-97-bl-cso, 2008 WL 11347415 (D. Mont. Feb. 5, 2008) (claims for violations of the UTPA brought against carrier after settling the underlying claim against the carrier’s insured); *Meidinger v.*

StarStone Specialty Ins. Co., No. CV-22-45-GF-BMM, 2022 WL 11805652 (D. Mont. Oct. 20, 2022) (claims for violations of the UTPA against carrier after carrier denied and refused to pay on the underlying claim); *White v. State ex rel. Montana State Fund*, 2013 MT 187 (suit against State Fund by a workers' compensation claimant and did not involve a tortfeasor or a private carrier); *Vigue v. Evans Products Co.*, 187 Mont. 1, 608 P.2d 488 (1980) (injury and suit covered by Workers' Compensation Act); *State ex rel. Hereim v. District Court of Sixth Judicial Dist.*, 154 Mont. 112, 4902 P.2d 755 (1969) (lawsuit related to a written settlement agreement and release executed between the tortfeasor's carrier and the injured party); *Watters v. Guar. Nat. Ins. Co.*, 2000 MT 150, 300 Mont. 91, 3 P.3d 626 (third-party claimant brought UTPA claim against carrier of insured who refused to pay limits without a full and final release of insured even when liability was reasonably clear and the damages exceeded the limits and the discussion of a "contract" claim was with respect to a settlement agreement).

D'Hooge has not cited one single case in her brief that supports her position that D'Hooge, a third-party claimant, can somehow bring a cause of action under Montana law directly against Cincinnati for personal injury damages allegedly caused by Cincinnati's insured's Tire Rama in lieu of litigating her negligence claims against the alleged tortfeasor, Tire Rama. That is because the law is that a third-party claimant cannot bring a cause of action directly against a carrier other

than for claims related to the carrier's claims handling practices, and it can only do so *after* the underlying claim against the insured tortfeasor is resolved. D'Hooge refuses to accept this as the law.

As for D'Hooge's numerous "claims" or "theories of recovery" referred to in her Brief, the District Court not only addressed them but also rejected each claim because they all ignore the basic concept that D'Hooge cannot bring her personal injury/premises liability/negligence cause of action against Cincinnati, not the party responsible for maintaining the parking lot at Tire Rama where she allegedly fell. The following issues, also addressed by the District Court, do not alter in any way the basic and fundamental rule that D'Hooge cannot seek damages against Cincinnati or for that matter any other person or party that did not owe her any duty to maintain the premises where she allegedly fell. D'Hooge ignores this undisputed fact and attempts to get around it by raising claims based upon agency theory, contract, promissory or equitable estoppel, spoliation, and others. Since D'Hooge has raised them, not only did the District Court address them but so does Cincinnati. Cincinnati takes the position that none of these attempts through these theories of recover alter the undisputed fact that Cincinnati did not owe D'Hooge a any duty to prevent her from falling in the Tire Rama parking lot in Missoula. All that Cincinnati did was to enter into a contract providing insurance coverage to Tire Rama with the further requirement to handle claims properly under Montana law

which D’Hooge agrees has been done correctly. Again, even though it is Cincinnati’s position that these “theories of recovery” asserted by D’Hooge lack merit without any discussion needed, Cincinnati will do as the District Court did and address these other “claims.”

2. Cincinnati Is Not an Agent of Tire Rama

Even if this Court were to entertain D’Hooge’s arguments which ignore decades of well-established law in Montana, her causes of action lack merit and are not supported by any evidence in the record and fail as a matter of law. The District Court correctly ruled so. To start, all of the “causes of action” D’Hooge attempted to bring against Cincinnati in her First Amended Complaint were premised upon her baseless presumption that Cincinnati is an agent of its insured, Tire Rama or alternatively that Tire Rama is an agent of its carrier Cincinnati. It is undisputed that this is not the case.

Actual agents are statutorily defined as persons who are “really employed by the principal.” § 28-10-103, MCA. An individual is an employee of another when that other has the right to control the details, methods, or means of accomplishing the individual’s work. *Butler v. Domin*, 200 MT 312, ¶ 29, 302 Mont. 452, 15 P.3d 1189. In this case, it is obvious that Cincinnati Insurance is not an actual agent of Tire Rama. Tire Rama does not employ Cincinnati Insurance

Company nor does it control anything about the way individuals working at Cincinnati accomplish their work. Actual agency is not present here.

Cincinnati is also not an ostensible agent of Tire Rama. Section 28-10-103, MCA, provides in relevant part:

An agency is ostensible when the [putative] principal intentionally or by want of ordinary care causes a third person to believe another to be [the putative principal's] agent who is not really employed by [it].

The acts of the principal, not the putative employee, are the focus of an ostensible agency inquiry. *Sunset Point Partn. v. Stuc-O-Flex Intl., Inc.*, 1998 MT 42, ¶ 22, 287 Mont. 388, 954 P.2d 1156. “[O]ur ostensible agency statute focus[es] on the action or inaction of the putative principal which caused the third person to believe an employment relationship existed, and the reasonableness of the third person's corresponding belief.” *Butler*, ¶ 39. There is no evidence that supports D’Hooge’s claim that she was led to believe, through the actions of Tire Rama, that Lee and Cincinnati were Tire Rama’s employees. It was clear from the beginning, on December 7, 2020, that Cincinnati – a separate entity – provided insurance for Tire Rama and that was it. D’Hooge knew this, as she immediately asked for Tire Rama’s insurance information on December 7, 2020 so she could file a claim. There is no evidence of ostensible agency and therefore the District Court was correct when it held there was no agency relationship between Cincinnati and its insured Tire Rama.

3. D’Hooge’s Promissory Estoppel, Equitable Estoppel, and Contract Arguments Fail Because D’Hooge Cannot Establish The Elements Of Any of Them

D’Hooge continuously argues that somehow, the facts here show that D’Hooge and Cincinnati entered into a contract or that she can somehow show the elements of promissory estoppel or equitable estoppel have been met. She cannot, and there is no merit to any allegation that she entered into a contract with Cincinnati.

First, as discussed above, there is no agency relationship between Cincinnati and Tire Rama therefore Cincinnati could not “bind” Tire Rama by accepting liability. *See Turner v. Wells Fargo Bank, N.A.*, 2012 MT 213, 366 Mont. 285, 291 P.3d 1082. Even if it could, though, D’Hooge cannot establish the first element of promissory estoppel. The Montana Supreme Court has held that to establish a prima facie claim for promissory estoppel, the party asserting promissory estoppel must establish the following four elements: (1) a promise clear and unambiguous in its terms; (2) reliance on the promise by the party to whom the promise is made; (3) reasonableness and foreseeability of the reliance; and (4) the party asserting the reliance must be injured by the reliance. *Turner v. Wells Fargo*, ¶ 24, citing *Keil v. Glacier Park*, 188 Mont. 455, 462, 614 P.2d 502 (1980). The court in *Keil* as well as in several other cases found that no clear and unambiguous promise was made where a general promise was made but the finer details of the agreement had

not been determined. *Keil* at 462. The same is true here and prevents a finding of promissory estoppel and/or negligence against Cincinnati.

In *Keil*, Mr. Sammons with Search and Rescue for Glacier County contacted Mr. Keil by telephone and asked Mr. Keil if he could provide a pump for the East Glacier water system. *Kiel* at 457. The parties discussed payment, but the contents of that conversation were in dispute. *Id.* The Keils delivered a pump to the site at East Glacier and again there was another conversation regarding payment that was in dispute during the litigation. *Id.* at 458. The pump was used for a number of days, and the Keils presented a proposed agreement for a rental rate which Glacier would pay for the pump, but Glacier objected to the terms of that agreement. *Id.* A written agreement between the parties was ultimately signed calling for a per hour rental payment as well as other terms regarding moving time, service of the pump, and purchase of the fuel for the pump. *Id.* at 459. When Glacier removed the Keil's pump earlier than the contract period in the Agreement, the Keils filed suit seeking damages from the alleged breach. *Id.* at 460-463. Glacier argued that there was a valid contract, through promissory estoppel, before execution of the written agreement based on the oral conversations that the two parties had, and the agreement they had before the written agreement should be honored.

The court in *Keil* held that, with respect to the first element of promissory estoppel, the "terms of the promise must be certain, as there can be no promissory

estoppel without a real promise.” *Id.* at 462. Further, the court held that “[p]romissory estoppel cannot be based on preliminary negotiations and discussions or an agreement to negotiate the terms of a contract.” *Id.* With respect to Glacier’s argument, the court held that the parties had “nothing more than an agreement to agree that was in the initial stages of the negotiation process” because the only certain term was that the Keils would provide the pump, and all other material terms of a rental contract were absent including the specific rental rate and who was to provide the fuel for the pump. *Id.* Any argument by Glacier that those preliminary discussions about the pump somehow met the elements of promissory estoppel was rejected by the court.

Here, D’Hooge received no terms to any purported “promise” or “agreement” from Cincinnati. Her claim for promissory estoppel is even more attenuated than the claims in *Keil* and *Laks*. D’Hooge received four words: “[w]e are accepting liability”, but these four words do not contemplate a clear, unambiguous promise with clear, definite, final terms and in fact is just Cincinnati complying with its duties under the UTPA in its claims handling. These four words could mean several things and do not discuss any additional terms. These four words – the entire basis for D’Hooge’s promissory estoppel claim – are ambiguous, unclear, and not sufficient to establish the first element of promissory estoppel. There was no representation that Cincinnati would substitute itself in place of its insured, Tire

Rama, and assume the duties that its insured may have had with respect to maintaining the premises where she allegedly fell and injured herself.

This Court has held similarly in many other cases. *See, e.g. Cotton v. Butte Sch. Dist. No. 1*, 1991 Mont. Dist. LEXIS at *1-2 (holding that an advertisement for a position was not a clear and unambiguous promise); *Keesun Partners v. Ferdig Oil Co.* (1991), 249 Mont. 331, 334-336, 816 P.2d 417 (the parties exchanged letters, had in-person conversations to discuss a wellhead gas purchase contract, had an oral conversation, agreed to some terms but since there were a number of terms that were not agreed upon, there was not a clear and unambiguous promise); *Payne Realty & House v. First Sec. Bank*, 256 Mont. 19, 28-30, 844 P.2d 90 (1992) (although the bank argued entered into a buy-sell agreement, signed the agreement, and the buyer insisted on an early closing, the factual record established a dispute as to whether or not the buy-sell agreement was binding or whether the parties had a clear and unambiguous agreement that could constitute the first element of promissory estoppel).

D'Hooge's brief is riddled with allegations that Cincinnati "ruined her claim against Tire Rama" by "convincing her to stop gathering evidence." This is a misleading and confusing argument and just a red herring. Cincinnati accepted liability pursuant to their obligations in handling claims so whether or not she "stopped gathering evidence" in support of her negligence claim is irrelevant.

Further, there is absolutely no evidence D’Hooge could have gathered to support her claim irrespective of Cincinnati’s actions. This directly relates to the fourth element of promissory estoppel because D’Hooge has no evidence to show she was somehow injured by relying on Ms. Lee’s email stating she was accepting liability. D’Hooge fell on December 7, 2020. It is undisputed that there were no witnesses and there was no surveillance footage of the incident. She fell in the back of the building of Tire Rama, away from any street lights or other surveillance footage. D’Hooge did not reach out to Cincinnati to advise them that she was going to “gather photographs from other businesses or the traffic light around Tire Rama that day showing it was not a snowy or icy day” until December 23, 2020 – two full weeks later. She already had photographs from the day of the incident. There were no business or traffic lights around Tire Rama that would have captured her fall, let alone stored any footage from that day for over two weeks. She was not harmed in Cincinnati telling her that it was accepting liability as there was no evidence to gather to bolster her claim. D’Hooge cannot establish the fourth element of promissory estoppel. *See Eiselein v. Mont. Bank* (1991), 250 Mont. 71, 80-81, 818 P.2d 365 (concurring opinion stating that the plaintiff’s promissory estoppel claim failed because the plaintiff had no evidence that she suffered detriment in reliance on the alleged promise by the bank).

For the same reasons, D’Hooge cannot establish an existing contract with Cincinnati, either. To be enforceable, a contract must contain four essential elements: 1) identifiable parties capable of contracting, 2) consent between those parties, 3) a lawful object, and 4) consideration. It is a well-established rule that there must be mutual assent or a meeting of the minds on all essential elements or terms to form a binding contract. *Jarussi v. Sandra L. Farber Trust*, 2019 MT 181, ¶ 17, 396 Mont., 488, 445 P.3d 1226. D’Hooge argues that, without a written contract or any terms set forth and agreed upon by D’Hooge and Cincinnati, Cincinnati still can be properly named as a defendant in her persona injury action based upon Tire Rama’s alleged negligence with a further request that a jury determine the amount of damages D’Hooge is entitled to recover from Cincinnati for her personal injuries. Apparently, according to D’Hooge, Cincinnati agreed to all this simply by uttering four words: “we are accepting liability” which were stated pursuant to its obligations for claims handling. This argument has no merit.

There is no contract setting forth the terms of the contract yet D’Hooge contends that a contract apparently exists and as a result, with no citation to any law and absolutely contrary to long established Montana law that a third-party claimant can pursue a claims handling claim against an insurance carrier but no other cause of action, D’Hooge persists in her claims that Cincinnati made a contract with her whereby it agreed to assume the duties its insured owed to her to maintain its

property. The District Court correctly found no evidence of any existing contract for the same reasons outlined above regarding the failure of D’Hooge’s promissory estoppel claim, namely that she cannot meet a single element of a contract claim. *See Keesun Partners v. Ferdig Oil Co.*, 249 Mont. 331, 337, 816 P.2d 417, 421 (1991) (citation omitted) (holding that “the purported contract fails for lack of consent” because the record indicated that “the parties were involved in an ongoing negotiation process regarding many essential terms of the contract and no finalized agreement was ever reached”).

D’Hooge alleges that Cincinnati did not move for summary judgment on this “contract formation” issue and therefore it must still proceed to trial. This is not reality for several reasons. First, Cincinnati briefed this issue and presented arguments on it in its Reply Brief in Support of Summary Judgment. Like Cincinnati put in its Reply Brief, D’Hooge never even pled a breach of contract cause of action in her Complaints yet her position is, apparently, that Cincinnati was required to specifically point out each and every cause of action that D’Hooge might at some point in her lifetime bring against Cincinnati when she feels like doing so. She contends that if Cincinnati does not do so, then it has waived those arguments and D’Hooge gets to proceed to trial on whatever claims she feels like arguing at the time. This is not the way it works. Even if there was a contract, D’Hooge never even brought a breach of contract cause of action against Cincinnati. She alleged

that Cincinnati “contracted to be liable for Plaintiff’s harms and losses” and that is it. Cincinnati argued vehemently against this allegation on multiple grounds and on multiple occasions, including in its Reply Brief in Support of Summary Judgment. The undisputed facts show she has no contract claim. She does not have any facts to support a contract was formed, whether orally, via promissory estoppel, or any other way, and she definitely has no facts to support a breach of any contract that may have been formed. Her arguments all fail, just like the District Court held.

The same is true on D’Hooge’s attempt to convince this Court she has a viable claim for equitable estoppel. D’Hooge again argues that Cincinnati failed to argue she did not establish the elements of equitable estoppel, so she wins. This is not how it works, nor is this accurate. Cincinnati opposed D’Hooge’s motion for partial summary judgment entirely and argued that all of her claims failed as a matter of law and Cincinnati addressed why her equitable estoppel claim fails as a matter of law. The District Court had an opportunity to look at the facts in the case and determined that her equitable estoppel claim also failed as a matter of law even if it was not barred by the UTPA and common law bad faith. D’Hooge cannot escape the actual law by arguing that because she alleged it, it is therefore true even when the facts and the law do not support it at all. *See State v. Pizzola*, 283 Mont. 522, 942 P.2d 709 (1997) (holding that a deemed admission that a motion is well taken

cannot convert a motion which is incorrect as a matter of law into a motion which is well taken as a matter of law). With respect to equitable estoppel, Cincinnati argued and the District Court correctly ruled that it failed as a matter of law. D’Hooge cannot and has not met the “affirmative duty to establish the six elements by clear and convincing evidence” as is required. See *Let the People Vote v. Board of County Commissioners of Flathead County*, 2005 MT 225, ¶ 23, 328 Mont. 361, 120 P.3d 385 (holding that the plaintiff did not even meet the first element of equitable estoppel since it did not argue the defendant misrepresented a material fact). D’Hooge cannot prove, but more importantly none of the facts support any of the six elements of equitable estoppel and the District Court correctly ruled that this claim could not proceed to a jury because it failed as a matter of law.

4. Spoliation Fails As A Matter of Law

Once again, D’Hooge’s best argument on this claim is that the District Court erred in dismissing it as a matter of law because “Cincinnati did not specifically seek summary judgment” on it. She again ignores the facts and the law. The fact is Cincinnati addressed her “spoliation claim” in its Reply Brief in Support of Summary Judgment. Cincinnati contended it failed as a matter of law because it was related to claims handling practices and even if it did not fail on that basis, it still failed because she cannot meet any of the elements. The seven elements set forth in *Oliver v. Stimson Lumber Co*, 1999 MT 328, 297 Mont. 336, 993 P.2d 11

for an independent cause of action for spoliation of evidence are as follows: 1) existence of a potential civil action; 2) a legal or contractual duty to preserve evidence relevant to that action; 3) destruction of that evidence; 4) significant impairment of the ability to prove the potential civil action; 5) a causal connection between the destruction of the evidence and the inability to prove the lawsuit; 6) a significant possibility of success of the potential civil action if the evidence were available; and 7) damages. None of these have been established by D’Hooge. To begin, what duty did Cincinnati have to preserve evidence for D’Hooge? It was not there the day D’Hooge allegedly fell, it did not witness anything, it did not take any photographs the day of the alleged incident, it did not have any involvement whatsoever in the events that took place on December 7, 2020. It received a claim from D’Hooge, investigated, and made determinations regarding whether liability was reasonably clear just as it is required to do under the law. With respect to any “destroyed” evidence, there is none. D’Hooge herself admitted that there were no other witnesses to her fall other than the ones already identified because the individual who was in the food truck would not have been able to see where she allegedly fell that day. D’Hooge took photographs of the accident scene immediately after she fell that day which are evidence in the case. There were no video surveillance cameras or other photographs that could have been collected. There were no other witnesses. Any argument by D’Hooge that the food truck

driver might have seen something is completely contrary to her deposition testimony where she testified the food truck driver had no ability to see where she fell. There are no facts that support D’Hooge’s claim for spoliation against Cincinnati, and the District Court properly dismissed this claim as a matter of law.

5. Claims That Were Never Pled

Finally, D’Hooge makes a last ditch effort to argue that she can bring whatever claims she wants whenever she wants at any time including at trial and does not need to give any notice of them to Cincinnati in her Complaint, therefore summary judgment is inappropriate. This is just meritless. D’Hooge does not get to make her causes of action against Cincinnati a constantly moving target and use her manipulative of the pleadings to escape the law in Montana. Any claim that was never pled in her Complaint or Amended Complaint was properly ignored by the District Court. *See Mysse v. Martens*, 279 Mont. 253, 266, 926 P.2d 765, 773 (1996) (Liberal application of Rule 8(a), M.R.Civ.P., does not excuse omission of facts necessary to entitle relief); *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 155 P.3d 1247 (the complaint must state something more than facts which, at the most, would breed only a suspicion” that the claimant may be entitled to relief). D’Hooge’s attempt to bring new causes of action against Cincinnati that have never been pled, long after the close of discovery, will not be permitted here. *See e.g. Brilz v. Metlife Auto & Home*, 251 Fed. Appx. 458 (9th Cir. 2007) (holding that even

though the plaintiff had alleged the defendant violated the UTPA, the complaint made no mention of any common law claim and therefore no meaningful notice of any purported common law claim existed).

D'Hooge's contention that because Cincinnati did not address every cause of action that exists under Montana law that may be alleged sometime is not grounds for overturning the well-reasoned and legally correct ruling by the District Court dismissing D'Hooge's claims with prejudice. *See Pizzola*, 283 Mont. 522 (an admission that a motion is well taken cannot convert a motion which is incorrect as a matter of law into a motion which is well taken as a matter of law). The District Court's Order granting summary judgment in favor of Cincinnati must be affirmed.

B. The District Court Correctly Denied D'Hooge's Motion for Partial Summary Judgment Against Cincinnati

The reasons put forth above also support the argument that D'Hooge's Motion for Partial Summary Judgment against Cincinnati was properly denied. All of the claims D'Hooge attempted to bring against Cincinnati fail as a matter of law and therefore she could not prevail on her motion for partial summary judgment.

Additionally, D'Hooge seems to argue that Cincinnati did not oppose many of her arguments in its briefing in opposition to her motion, therefore she wins and the District Court erred in not granting her Motion. As discussed above, and will be briefly discussed here, this is not true. Cincinnati opposed D'Hooge's Motion

for Partial Summary Judgment before the First Amended Complaint had even become the Complaint of record in the case – meaning, D’Hooge moved for partial summary judgment against a defendant, Cincinnati, that she did not even have any claims against. Out of an abundance of caution, Cincinnati opposed her motion entirely even though there were no claims against it at that time.

Following the July 26, 2024 hearing, where the Court asked the parties to submit additional briefing because it still needed to “sort out exactly how it’s going to go moving forward,” Cincinnati prepared a detailed and comprehensive Response in Opposition to Plaintiff’s Proposed Order for Partial Summary Judgment where Cincinnati detailed why each and every cause of action brought by D’Hooge failed as a matter of law. Cincinnati requested that the Motion for Partial Summary Judgment heard by the Court but yet to be finally decided with supporting authority be denied based upon the reasons found in the brief. The Court did exactly that, denying with supporting authority D’Hooge’s Motion, which it had ample authority to do. *See Smith v. Foss*, 177 Mont. 443, 447, 582 P.2d 329, 332 (1978) (a court possesses plenary power over its interlocutory order sand, as long as the court retains jurisdiction, it may reconsider, rescind, or modify those orders for any reason the court deems sufficient) (quoting 7 Moore’s Federal Practice P 60.20, p. 242).

There was no error by the District Court in denying D’Hooge’s Motion for Partial Summary Judgment. The Court had authority to do so and correctly did so.

D'Hooge even filed a Motion to Alter or Amend after the Motion was denied, which was considered by the Court and denied after additional briefing on the exact issues raised by D'Hooge again in this appeal. The extensive briefing which outlined the undisputed facts supported the Court's decision and the denial of D'Hooge's attempt to seek partial summary judgment against an insurance carrier on causes of action that not only legally cannot be pursued but have no merit based on the facts. The District Court's denial must be affirmed.

CONCLUSION

The precise relief Cincinnati seeks in regard to this matter is affirmation of the District Court's Order Granting Cincinnati summary judgment and dismissing all of D'Hooge's claims with prejudice. The reason why this relief should be granted is due to the fact that there are no claims that can be brought against Cincinnati under the facts and applicable law of this case. Cincinnati's role in D'Hooge's premises liability/negligence cause of action against Tire Rama was to respond to her claim against Tire Rama, Cincinnati's insured, and to comply Montana law. Cincinnati did so. As an insurance company, it met its obligations under the UTPA and cases like *Ridley* and *Dubray*. D'Hooge agrees that Cincinnati acted properly in regard to the handling of her claim and in fact Cincinnati settled D'Hooge's claims against its insured, Tire Rama, and obtained a Release of Tire Rama from any and all claims D'Hooge may have had against it. Despite all

of this, D’Hooge somehow believes that she should be allowed to prosecute her premises liability/negligence cause of action not against Tire Rama who she has settled with but against Cincinnati, its insurance carrier, despite the fact that Cincinnati did not own the premises at issue, did not maintain the premises at issue, did not act negligently in causing D’Hooge to slip and fall, and did not in any way cause her alleged resultant injuries and damages. Instead, Cincinnati acted as an insurance carrier is required to do in Montana yet is now faced with a claim by D’Hooge that it owes her more money for the alleged negligence of its insured, Tire Rama, who has been released from any and all claims. Cincinnati previously described this case as a strange one, because it truly is strange since D’Hooge’s claims against Cincinnati should have never been asserted and filed. The District Court agreed and we respectfully request that this Court also agrees.

DATED this 13th day of August, 2025.

STACEY & FUNYAK

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure and the Court's May 2, 2025 Order, I hereby certify that this *Appellee Cincinnati Insurance Company's Answer Brief* is printed with a proportionately spaced Times New Roman text typeface of 14 point; is double-spaced; and has a word count as determined by Microsoft Word of **10,908** which is less than the Court's ordered maximum 12,500 word limit.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2025, a copy of the foregoing was served upon the following counsel of record via CM/ECF:

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I, Morgan MacKenzie Sorena, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-13-2025:

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