IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 25-0409

STEVE and ROXANNE BLANCHARD
Appellants,
v.

Appellees.

APPELLANTS' OPENING BRIEF

On appeal 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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STATEMENT OF ISSUES

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2. Did the District Court misapply Montana's inherently dangerous activity doctrine by requiring proof of agency or control—contrary to this Court's decision in *Beckman v. Butte-Silver Bow County*—and thereby conflating the three *Beckman* exceptions?

3. Did the District Court improperly resolve genuine issues of material fact by relying on extrinsic evidence to interpret the Nautilus Insurance policy while simultaneously holding that the policy was unambiguous?

4. Did the District Court err by concluding Nautilus owed no duty to defend or indemnify where disputed facts and policy ambiguities exist?

STATEMENT OF CASE

On August 12, 2022, Defendant PacWest directed trucking contractor, Plaintiff Steve Blanchard, to pick up log bundles on PacWest's behalf. (Dkt. 82, Exh. 12). The log bundles were located at the facility of another of PacWest's contractors, Third-Party Defendant Clark Fork Posts, Inc. ("Clark Fork"). *Id*. PacWest admits it had "contractual relationships with Steve Blanchard [and] Clark Fork Posts" and PacWest regularly purchased log products from Clark Fork. (Dkt. 82, Exh. 1, at 27:12–16; *Id.* Exh. 2, at 23:14–23).

Clark Fork is Amish-owned, and religious beliefs precluded it from operating the machinery required to lift the heavy logs onto waiting trailers. (Dkt. 82, Exh. 2, at 11:3–14; 32:22–33:19). So, Clark Fork hired Defendant Jason Subatch

("Subatch") to load the logs. Subatch is the owner and sole manager of Wild Horse Trading Company, LLC ("Wild Horse"), which operates under the assumed business name, "Wild Horse Contracting Services." (App. at 7).

Plaintiff Steve Blanchard was catastrophically injured when Subatch's employee lost control of the 7,000 pound bundle of logs, causing it to tumble across Steve's body.

Plaintiffs filed this suit on January 13, 2023. (Dkt. 1). PacWest moved for summary judgment less than two months after answering the complaint, during the infancy of the discovery process. (Dkt. 65). Plaintiffs sought PacWest's Rule 30(b)(6) deposition and requested depositions of individuals identified by PacWest as having knowledge of the claim. (Dkt. 81, at 15; Dkt. 82, Exh. 13, Exh. 16). PacWest refused to allow the depositions. (Dkt. 82, Exh. 13). The District Court granted PacWest's motion on September 3, 2024 and refused to allow the sought-after depositions. (App. at 1–24).

Defendant Jason Subatch and Wildhorse Contracting Services were provided counsel by Subatch's insurer, Nautilus. (Dkt. 181, at 9). After defending for 23 months, Nautilus filed a motion for summary judgment seeking a declaration that no duty to defend or indemnify existed. (Dkt. 128). The District Court granted the motion, deciding—contrary to the Pleadings—that "no named Defendant is a[] [Nautilus] insured." (App. at 25–48).

Jason Subatch is a Named Insured under the Nautilus Policy and remains a Defendant. (App. at 87–116). Nevertheless, counsel provided to Subatch by Nautilus withdrew. (Dkt. 174). As a result, Subatch, Wild Horse and Blanchards all sought, unsuccessfully, a writ of supervisory control over the proceedings. *Blanchard et al. v. Vannatta*, No. OP 25-0224, 2025 WL 1042237, at *2 (Mont. Apr. 8, 2025).

After denial, Blanchards sought Rule 54(b) certification. Recognizing that "a reviewing decision may reinstitute counsel for Defendants Wild Horse Contracting Services and Subatch with a conclusion that there is a duty to defend," the District Court certified its Orders in Dkts. 119 and 171 as final under Mont. R. Civ. P. 54(b). (Dkt. 181). Blanchards timely appeal both Orders.

STATEMENT OF FACTS

PacWest is a Washington-based entity that produces and sells a host of wood and timber products across the western United States. PACIFIC WESTERN LUMBER, https://pacwestlumber.com/ (last accessed May 2, 2024). Some of PacWest's primary products are poles, pilings, and fence posts. *See* PACIFIC WESTERN LUMBER, POLE/PILINGS, https://pacwestlumber.com/poles-and-pilings (last accessed May 2, 2024).

Since 2019, PacWest has purchased the majority of Clark Fork's inventory. (Dkt. 82, Exh. 2, at 23:24–24:1, 66:22–24). PacWest has the logs delivered from

Clark Fork, where they are cut, to a plant in Stevensville for further production and treatment before the products are sold to the public. (*Id.* Exh. 1, at 16:24–17:8).

The log bundles stood approximately four to five feet tall, stretched 12 feet wide and weighed approximately 7,000 pounds. (App. 65–69, ¶ 10(c)). Loading the unstable log bundles came with inherent risks. (App. 62–71, ¶ 10). 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. *Id.*

Subatch sent new employee, Defendant Ryan Hart, to lift the log bundles onto Steve's trailer. *Id.* Though he understood loading was dangerous, Hart was untrained in 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.* Although lacking in experience, Mr. Hart acknowledged that loading 7,000-lb. log bundles was dangerous. (Dkt. 82, Exh. 4, at 53:3–16). The log bundles are pictured below:

On August 12, 2022, the predictable happened. Untrained Hart inappropriately approached Steve's trailer with the lift while Steve was securing a load. Hart lost control, knocking a log bundle onto Steve. (Dkt. 82, Exh. 2, at 97:6-98:4, Exh. 12 at 9-11). Hart braked suddenly, causing the log bundle to roll off the forks and into the side of Steve's trailer, which violently rocked the trailer and caused one of the log bundles Steve was securing to fall on top of Steve. (Dkt. 82, Exh. 12, at 10–11; Dkt. 82, Exh. 2, at 97:13–18). The impact broke Steve's legs, spine, and neck, and caused a brain injury.

Hart testified that he was never trained to do the sort of work he was instructed to do by Mr. Subatch. (Dkt. 82, Exh. 4, at 55:9-18). Hart also admitted he was not qualified to do the work that caused Steve's injuries. (Dkt. 82, Exh. 4, at 93:23-94:1; 94:9-15; 94:20-22).

Compounding the peril, Clark Fork's facility was ill-maintained and dangerous. (*See, e.g.,* App. at 65–69 ¶ 10(c)). 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. (App. at 69–71, ¶ 10(e)). Subatch asked Clark Fork to clear out the obstacles and debris due to safety concerns, and even asked Mr. Yoder to put in a new loading area, but Mr. Yoder declined due to the cost associated with doing so. (Dkt. 82, Exh. 3, at 33:4–34:14). PacWest knew about the dangerous conditions, as admitted by PacWest's

business partner.[1] (Dkt. 82, Exh. 5, at 17:23-18:22 ("It's a dangerous loading zone …their equipment isn't adequate…"). PacWest's longtime sales representative visited Clark Fork and witnessed the dangerous situation. (*Id.* at Exh. 1, at 19:5-9).

There are several precautions that PacWest knew or should have known must be taken to mitigate the risks of heavy and round loads that are susceptible to rolling or shifting during and after the loading process. (App. at 53–56, ¶¶ 9, 11); (App. at 69–71, ¶ 10(e)); (Dkt. 82, Exh. 5, at 30:31–31:1). Safety precautions that must be taken in this circumstance include:

- Utilizing steel bunks, dunnage, or other structures to hold the load on the back of a semi-trailer to prevent it from rolling, shifting, or falling off of a semi-trailer:

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

- Using a crane, cherry picker, or grab machine to pick up and place the load.

(App. at 55–56, ¶ 11); (App. at 69–71, ¶ 10(e)); *see also* (Dkt. 82, Exhs. 15, 16).

These precautions are commonly used in the lumber industry to ensure workers are a safe distance from heavy logs that are susceptible to rolling and shifting. (App. at 56, ¶ 12). Using a crane and steel bunks more safely contains the logs onto a semi-trailer before they are fully secured. (App. at 55–56, ¶ 11); (App. at 69–71). These precautions minimize the inherent danger of the load shifting or rolling when the semi-truck driver must approach the load to secure it for transport. (App. at 56–57, ¶ 15); (App. at 71, ¶ 11).

PacWest's contractor now uses these precautions at the Clark Fork facility. (Dkt. 82, Exh. 2, at 80:20–82:12 (steel dunnage); *Id.* 84:17–21, 86:11–23 (crane); *Id.* 83:19–22). Had these precautions been taken at the Clark Fork facility on the day

that Steve Blanchard was there at PacWest's request to pick up PacWest's wood-pole bundles, Mr. Blanchard would not have been injured. (App. at 71, ¶ 11).

SUMMARY OF ARGUMENT

The District Court committed reversible error by granting summary judgment to PacWest and Nautilus. In both instances, the court misapplied settled Montana law, disregarded genuine issues of material fact, and usurped the jury's role in resolving disputed factual questions.

First, the District Court improperly rejected Plaintiffs' negligent selection claim against PacWest by holding that no subcontractor relationship existed between PacWest and Clark Fork—despite admissions of a contractual relationship and evidence that PacWest engaged Clark Fork to perform critical steps in the log delivery chain. Under *Restatement (Second) of Torts* § 411, which this Court has adopted, liability attaches when a company entrusts dangerous work to an incompetent contractor. The evidence supports that Clark Fork's loading conditions and subcontracting to an untrained loader like Ryan Hart created a foreseeable risk of catastrophic harm.

Second, the court refused to apply the inherently dangerous activity doctrine, even though this Court has squarely held that transporting and handling heavy log bundles is precisely the kind of dangerous activity that triggers a non-delegable duty. Disregarding blackletter law, the District Court decided that without a demonstration

of control over a subcontractor, the doctrine does not apply. 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. Its conclusion that PacWest could not be held vicariously liable directly conflicts with Montana law and creates dangerous precedent by shielding companies from responsibility for inherently hazardous work performed on their behalf.

Third, the court erred in concluding there was no coverage under the Nautilus policy. The District Court's ruling ignored the plain language of the pleadings and the insuring agreement, disregarded factual disputes about ownership, and impermissibly relied on extrinsic evidence to interpret a contract that it found to be unambiguous. The District Court determined that Jason Subatch had no ownership of Wild Horse. However, Jason Subatch was repeatedly identified—by Nautilus, witnesses, and even prior court orders—as the sole owner of Wild Horse and the insured under the policy. In fact, the parties submitted an "Agreed Fact" that Jason Subatch was the sole owner of Wild Horse on the date of the incident. Nevertheless, the District Court found no genuine issues of fact existed and that Jason Subatch was unequivocally ***not*** the owner of Wild Horse, and therefore not insured.

The court further compounded its error by resolving factual questions about whether Subatch and his entity were involved in the incident and whether coverage

applied using extrinsic evidence, such as a declaration from Nautilus's agent and emails she sent to Nautilus. Relying upon this extrinsic evidence, the District Court concluded Subatch was involved with two separate entities: one spelled "*Wild Horse* Contracting Services," and another spelled "*Wildhorse* Contracting Services." The District Court rejected argument and evidence that the difference in spelling was a mistake borne of Nautilus' agent's sloppiness. The District Court discounted contradictory evidence, including Sheehan's consistently inconsistent andinterchangeable use of the names Wildhorse and Wild Horse. In one email 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)."

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. The District Court ignored this well-established rule and relied upon extrinsic evidence to rebuff Appellants' factually supported position that Sheehan was just messy.

Because the court misapplied controlling precedent and disregarded substantial evidence that supports Plaintiffs' claims and coverage, its rulings should be reversed.

STANDARD OF REVIEW

A district court's summary judgment ruling is reviewed *de novo*. *Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620.

Summary judgment is proper only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Watkins Trust*, ¶ 16. All reasonable inferences from the evidence must be drawn in favor of the party opposing summary judgment. *Id*. (*citing Schmidt v. Washington Contractors Group*, 1998 MT 194, ¶ 7, 290 Mont. 276, 964 P.2d 34). If there is any doubt regarding the propriety of summary judgment, it should be denied. *360 Ranch Corp. v. R & D Holding* (1996), 278 Mont. 487, 491, 926 P.2d 260, 262.

ARGUMENT

I. The District Court Erred by Granting PacWest's Motion for Summary Judgment.

Substantial evidence exists from which a jury could conclude PacWest was negligent for contracting with Clark Fork. In addition, PacWest can be held vicariously liable for the failure of downstream contractors to take reasonable and necessary precautions during the inherently dangerous activity at issue. The District Court erred by dismissing PacWest early in the case, and denying Plaintiffs the ability to take material depositions.

A. A Jury Could Find PacWest Liable for Its Negligence in Selecting Clark Fork as a Contractor.

"The employer of a negligently selected contractor is subject to liability …for physical harm caused by his failure to exercise reasonable care to select a competent and careful contractor." Restatement (Second) of Torts § 411 (1965) (cmt. b). *Gurnsey v. Conklin Co.*, 230 Mont. 42, 54, 751 P.2d 151, 158 (1988) (adopting Restatement (Second) of Torts § 411) *see also Brookins v. Mote*, 2012 MT 283, ¶ 59, 367 Mont. 193, 292 P.3d 347. (Montana recognizes liability for negligent selection of a contractor under Restatement § 411). Negligent selection of a contractor is an alternative theory of liability to the inherently dangerous activity doctrine, which is discussed in the next section. *See Paull v. Park City*, 2009 MT 321, ¶ 63, 352 Mont. 465, 218 P.3d 1198 (Rice dissent).

The Illustrations within the comments of Restatement (Second) of Torts § 411 provide hypothetical scenarios which exemplify application of the blackletter rule and contextualize application of the law. Illustration 2 provides salient guidance on the present issue:

> The A Company, engaged in logging operations, hires B Company to haul large logs over the public highway. With the exercise of reasonable care in making inquiry A Company could, but does not, discover that B Company's only available equipment consists of converted lumber trucks unsuitable for hauling such large logs in safety and on which the logs cannot be securely fastened. While such a truck of B Company is hauling the logs, they are displaced while rounding a curve, and one of them falls upon the passing automobile of C, injuring C. A Company is subject to liability to C.

Restatement (Second) of Torts § 411 (Illustration 2).

Just like the "A Company, engaged in logging operations," PacWest, using reasonable care, should have discovered that the Clark Fork facility was dangerous, ill-maintained and lacked the requisite safety precautions necessary to minimize the inherent dangers of loading the log bundles. PacWest should have discovered that the loading area was filled with obstacles and debris. PacWest should have discovered that requests had been made to clean up or relocate the loading area, but that Clark Fork refused to do so. PacWest should have discovered that no crane, cherry picker, or grab machinery was being used on the site (like they are now). PacWest should have discovered that Clark Fork was not placing steel bunks on the trailer to prevent rolling (like it is now).

In addition, with reasonable inquiry PacWest would have discovered that the Amish owned business, which could not operate machinery, subcontracted the loading work to Subatch who employed an extremely – and admittedly – underqualified operator to load the dangerous log bundles. Hart testified that he was never trained to do the work that ultimately crushed Steve:

9	**Q. Now, had you been trained by Mr. Subatch**
10	**to roll with the -- to travel with the forks fully**
11	**engaged because that's safest?**
12	A. I've never been trained by -- in this
13	practice of loading of bunks.
14	**Q. Mr. Subatch never told you what the best**
15	**practice --**
16	A. No.
17	**Q. -- would be, right?**
18	A. Right.

(Dkt. 82, Exh. 4, at 55:9-18).

As is explained in the comments to Restatement §411, where, as here, the work is considerably dangerous, considerable investigation is required:

> if the work is such as will be highly dangerous unless properly done and is of a sort which requires peculiar competence and skill for its successful accomplishment, one who employs a contractor to do such work may well be required to go to considerable pains to investigate the reputation of the contractor and, if the work is peculiarly dangerous unless carefully done, to go further and ascertain the contractor's actual competence.

Restatement (Second) of Torts, §411, cmt. c.

Considering PacWest's sophistication coupled with the obvious inability of Clark Fork to operate the necessary machinery to load the logs, PacWest had an obligation to ascertain the competence of whomever Clark Fork would use for loading. This is particularly true where PacWest directed Steve Blanchard to receive the logs on a particular date at the Clark Fork facility. *See* Restatement (Second) of Torts, §411, cmt. c. (The existence of a relation between the parties may impose upon the one a peculiar duty of protecting the other).

Viewing the evidence in the light most favorable to the Appellants, genuine issues of fact prohibit granting summary judgment to PacWest. Sidestepping the issue, however, the District Court determined that because there was no contractor-subcontractor relationship between PacWest and Clark Fork, there was no need to analyze the Blanchards' claim for negligent selection. The District Court's order states:

> D. Negligence in selecting a subcontractor.
>
> The Blanchards also argue the Motion should be denied because PacWest is liable for its negligence in selecting a subcontractor. (Dkt # 81, p. 25). The Court has concluded above that PacWest was not a general contractor and as such it has not selected any subcontractors. PacWest was Clark Fork Posts' customer. Therefore, the Court does not further address the Blanchards' arguments on this point.

(App. at 22).

Contrary to the District Court's conclusion, PacWest's manager, Steve Wearne, admitted PacWest *had* a contractual relationship with Clark Fork.

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

(Dkt. 82, Exh. 1, at 27:12-16).[2]

[2] No other depositions of PacWest employees or representatives were allowed by the District Court. (App. at 22–23).

Also contrary to the District Court's determination, Illustration 2 of Restatement §411 does not premise liability upon a company's designation as a *general* contractor. Recall that Illustration 2 to Restatement §411 places liability upon a company "engaged in logging operations," just like PacWest, which hires another company to haul its logs. In this case, PacWest hired Clark Fork to cut the logs to size, bundle them, and then place the log bundles onto Steve Blanchard's trailer. Negligent selection of a contractor is an available remedy in this circumstance, as exemplified by the Illustrations to Restatement § 411. The District Court's decision – which cursorily dismissed Plaintiffs' negligent selection claim – should be reversed.

B. PacWest may be Held Vicariously Liable Under the Inherently Dangerous Activity Doctrine.

The general rule that owners and prime contractors are "not liable for the torts of their independent contractors" is subject to several exceptions, including where the activity is "inherently or intrinsically dangerous." *Beckman v. Butte-Silver Bow Cty.*, 2000 MT 112, ¶ 12, 299 Mont. 389, 1 P.3d 348. As this Court stated in *Beckman*:

> this [general] 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, ¶ 12.

The seminal *Beckman* case identifies transporting 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.*, ¶ 22. In response to PacWest's motion for summary judgment, which was filed nearly five months before the date agreed upon to exchange expert witness opinions, Blanchard nevertheless proffered substantial and unrebutted expert opinion establishing that the activity was inherently dangerous. (App. at 49–71).

The District Court considered none of it. (App. at 18). Instead, the District Court found PacWest's purported lack of control over the jobsite dispositive and dismissed PacWest. Disregarding blackletter law, the District Court decided that without evidence of control and consent to be controlled, the inherently dangerous activity doctrine does not apply. (App. at 16).

The District Court erroneously conflated the three disjunctive *Beckman* exceptions by importing the element of control from the first and third exceptions into the inherently dangerous activity element of the second. (App. at 13, 16–17). ("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 not dispositive with respect to the

inherently dangerous activity exception. *See Paull*, ¶ 20 (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").

Under the District Court's logic, before the inherently dangerous activity exception may be considered, the plaintiff must demonstrate proof that satisfies either exception (1) (a nondelegable duty based on a contract), or exception (3) (negligent exercise of control). But this logic defeats the purpose of recognizing exception (2) (where the activity is inherently or intrinsically dangerous).

The Restatement (Second) of Torts §427 guides Montana's inherently dangerous activity doctrine. 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. The doctrine contemplates liability running to the prime contractor *absent* the 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 by the failure to take reasonable precautions.

Nor does it matter that Clark Fork, rather than PacWest, paid Subatch to do the job. After all, this Court specifically referred to the obligations of the prime contractor as "non-delegable" where an inherently dangerous activity is undertaken. *Beckman*, ¶¶ 12–25. Steve was injured as a result of an inherently dangerous activity PacWest contracted with Clark Fork to accomplish. That Clark Fork hired its own subcontractor to carry out the task does not break the chain of liability flowing to PacWest or turn the non-delegable duty into a delegable duty. *See, e.g., Maryland Cas. Co. v. Asbestos Claims Ct.,* 2020 MT 70, ¶ 46, 399 Mont. 279, 312, 460 P.3d 882, 902 ("Characterization of a duty as "nondelegable" does not preclude delegation or assumption of the duty to or by another but, rather, merely leaves the first party vicariously liable for the tortious conduct of the delegee or assuming party within the scope of the duty.").

The District Court's reliance on *Dick Irvin Inc. v. State* to find no cognizable relationship between PacWest and Clark Fork was misplaced. (App. at 13, 18) ((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. *Dick Irvin*, ⁋⁋ 9, 50. The State did not pay money to the subcontractor. *Id.*

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

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

(Dkt. 82, 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. 82, Exh. 12).

The District Court's reliance on the outdated *Dvorak v. Matador Serv.* case was similarly misplaced. The *Dvorak* Court decided that because Matador did not engage Beall to undertake activities on behalf of Matador in Matador's relations with third parties or the public generally, the inherently dangerous activity doctrine did not apply. *Dvorak v. Matador Serv.*, 223 Mont. 98, 104, 727 P.2d 1306, 1310 (1986).

Dvorak was decided before this Court explicitly adopted and properly interpreted the Restatement (Second) of Torts §427 in *Beckman*. *See Beckman*, ¶ 19. In *Beckman,* this Court recognized the applicability of the inherently dangerous activity doctrine in the absence of any evidence that Simpson Excavating agreed to act on Butte—Silverbow's behalf. In *Beckman,* Vince Quinlan had a plan to develop property in Butte and the design required a six-inch water service line. *Beckman* ¶ 5. Butte–Silver Bow would not allow Quinlan to attach a six-inch extension to its two-inch main. *Id.* at ¶ 6. Butte–Silver Bow also informed Quinlan that it would not

be replacing its main line until later in the fall. *Id.* Therefore, Quinlan offered to replace Butte's main line if Butte would reimburse Quinlan for his costs. *Id.* at ¶ 6. Butte agreed, but had no written contract with Quinlan. *Id.* at ¶ 38. Quinlan then hired Simpson Excavating to do the trenching. *Id.* at ¶ 5. Beckman was employed by Simpson Excavating. *Id.* Butte–Silver Bow had no contractual relationship with Simpson Excavating. *Id.*

In this case, Clark Fork undertook activities on behalf of PacWest in PacWest's relations with third parties or the public generally to a greater degree than Simpson undertook activities on behalf of Butte–Silver Bow. PacWest hired Clark Fork to cut, bundle, and then place the logs onto the trailer of Steve Blanchard. Blanchard would then transport the logs to another of PacWest's contractors, who would further fabricate the logs for eventual sale to the public. PacWest could have undertaken the dangerous task of bundling, loading, and transporting the logs itself, but instead chose to contract with others to complete those dangerous tasks.

Montana law does not allow PacWest to delegate all responsibility for the safety of others where it contracted with Clark Fork to engage in an inherently dangerous activity. The District Court erred by conflating the three *Beckman* exceptions and refusing to consider the inherently dangerous activity doctrine for want of proof establishing the other, disjunctive exceptions to the general rule set out by this Court.

Because genuine issues of material fact exist and due to misapplication of Montana law, the District Court's Order dismissing PacWest should be reversed and remanded. As shown below, this Court should likewise reverse the District Court's decision that Jason Subatch's insurer, Nautilus, has no duty to either defend or indemnify him in this case.

II. Coverage Under the Nautilus Policy.

Nautilus Insurance Company issued Commercial General Liability Policy No. NN1404005 ("Policy") to Jason Subatch. Jason Subatch is the sole owner of Wild Horse Trading Co., LLC. The District Court determined that "[b]ecause no named Defendant is an insured, there is no coverage…" (App. at 48).

The District Court erred. As shown in more detail below, Defendants Jason Subatch and Wild Horse are both Insureds to whom the Policy provides coverage for Steve Blanchard's injuries. **First**, the Policy affords coverage because Jason Subatch was the sole owner of Wild Horse. (*See* Dkt. 180.1, Agreed Fact #4 ("Jason Subatch ("Subatch") is an individual residing in Plains, Sanders County, Montana. Subatch is, and was on August 12, 2022, the owner and manager of Wild Horse Trading Co., L.L.C. which operates under the assumed business name "Wild Horse Contracting Services.")).

Second, even if Jason Subatch was not the sole owner of Wild Horse Trading, he is insured in his individual capacity for the claims against him. Jason Subatch is

a named defendant who purchased the loader and sent the untrained Ryan Hart with direction to load the log bundles. Mr. Hart testified he answered only to Subatch, and that Subatch was directly responsible for failing to train him.

Third, the Policy is ambiguous as to whether Wild Horse Contracting is a named insured. The Policy designates Jason Subatch and Wildhorse Contracting Services *separately* as Named Insureds:

POLICY NUMBER: NN1404005
Named Insured: Jason Subatch
Wildhorse Contracting Services

(App. at 74–75, NAUTILUS 000002–3).

The District Court erred when it decided that no Defendant is an insured under the Policy.

A. Policy Definitions Regarding "Who Is an Insured."

The Policy's Commercial General Liability Coverage Form states:

> The word "insured" means any person or organization qualifying as such under Section II – Who Is An Insured.

(App. at 77, NAUTILUS 000017).

Policy Section II – Who Is An Insured provides:

If you are designated in the Declarations as:

> **a.** An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
>
> **c.** A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business.

> Your managers are insureds, but only with respect to their duties as your managers.

(App. at 85, NAUTILUS 000025).

All employees of an "insured" are also "insureds." (App. at 86, NAUTILUS 000026).

As shown below, the Policy provides coverage to Jason Subatch and his entity, Wild Horse and their employee, Ryan Hart.

B. Defendant Jason Subatch Is an Insured with Respect to the Conduct of Wild Horse Trading Because He Is the Sole Owner.

Section II of the Policy states, in part, that if the Policy is issued to an individual, that individual and his/her spouse is insured "with respect to the conduct of a business of which you are the sole owner." (App. at 88, NAUTILUS 000025). The District Court concluded – incorrectly as further explained below – that the Policy unambiguously designates an individual as the sole named insured. (Dkt. 128, at 13 ("The named insured is thus an individual, not a business entity.")

Assuming *arguendo* that the Policy solely designates an individual (Jason Subatch) as the Named Insured, summary judgment was inappropriate because issues of fact exist regarding whether Jason Subatch was the sole owner of Wild Horse.

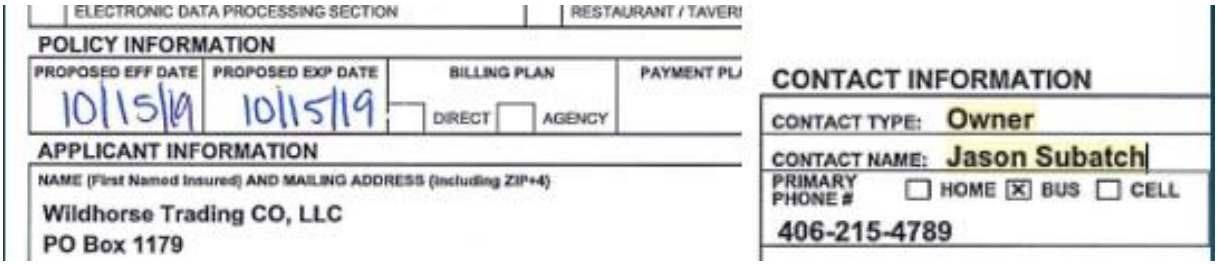
The District Court determined "The undisputed facts show that Tyler [Jason's Son] Subatch was the sole member of WH Trading at the time of the accident." (App. at 38). This conclusion ignores significant evidence demonstrating Jason's

ownership and Tyler's purported ownership is certainly disputed. In the Pretrial Order, for example, the Parties stipulated that Jason Subatch was the owner of Wild Horse on the date of the Incident:

> **I. AGREED FACTS**
>
> 4. Jason Subatch ("Subatch") is an individual residing in Plains, Sanders County, Montana. Subatch is, and was on August 12, 2022, the owner and manager of Wild Horse Trading Co., L.L.C. which operates under the assumed business name, "Wild Horse Contracting Services."

(Dkt. 180.1).

Jason Subatch consistently represented that he owned Wild Horse Trading, even before Steve was injured. For example, in 2019, Jason Subatch represented he owned Wild Horse Trading in an insurance application:


ELECTRONIC DATA PROCESSING SECTION | RESTAURANT / TAVERI

POLICY INFORMATION

PROPOSED EFF DATE	PROPOSED EXP DATE	BILLING PLAN	PAYMENT PL
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 Wild Horse Trading.


APPLICANT INFORMATION

NAME AND MAILING ADDRESS: Wildhorse Trading Company, LLC Box 1179 Plains MT 59859

GL CODE | SIC 5191 | NAICS | FEIN OR SOC SEC # 84-2688124

BUSINESS PHONE # 406-826-2002

WEBSITE ADDRESS

CORPORATION | JOINT VENTURE | NOT FOR PROFIT ORG | SUBCHAPTER "S" CORPORATION

INDIVIDUAL | LLC NO. OF MEMBERS AND MANAGERS 1 | PARTNERSHIP | TRUST

Jason Subatch
Policyholder/Applicant's Signature

Wildhorse Trading Co
Named Insured/ Business Name

Jason Subatch
Print Name

Policy Number, if available

10/19/2022
Date

CONTACT INFORMATION

CONTACT TYPE: Owner

CONTACT NAME: Jason Subatch

PRIMARY PHONE # 1-406-303-0133 ☑ HOME ☐ BUS ☐ CELL

SECONDARY PHONE # ☐ HOME ☐ BUS ☐ CELL

(Dkt. 149, Exh. 3).

When asked by Plaintiffs in discovery in this case, Subatch did not quibble that 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 Wild Horse Trading, and denied there was any other owner. (Dkt. 145, Exh. 1–2). Jason Subatch's employee, Hart, identified Jason as Wild Horse Trading's owner and the only person with authority to tell him what to do. (Dkt. 142, Exh. 3: at 13:24–14:8; 15:2–16:7). Jack Woods, another operator, also testified that he worked for Jason Subatch, who owned Wild Horse Trading. (Dkt. 145, Exh. 5, at 12:19–23). James Yoder testified consistently with Hart and Woods.

> Q. So you deal with Wild Horse Contracting?
> **A. Wild Horse Contracting.**
> Q. Is that an LLC?
> **A. I believe so. I'm not sure about the letters.**

Q. And Jason Subatch --
A. Is the owner.
Q. Of Wild Horse Contracting?
A. Yes.

(Dkt. 145, Exh. 4, at 34:7–15).

Further demonstrating genuine issues of fact exist, the District Court previously concluded that Subatch owned Wild Horse Trading and that Hart was an employee of Jason Subatch's entity. For example, on September 3, 2024, the District Court concluded:

> [Jason] Subatch is the owner and sole manager of Wild Horse Trading Co., *L.L.C.* (Dkt # 105, ¶¶ 7, 17). Subatch also owns and operates Wildhorse Contracting Services. (Dkt # 105, ¶ 17) (Dkt # 76, ¶ 4) (Dkt # 77, ¶ 4). Wildhorse Contracting Services is an assumed business name of Wild Horse Trading Co., L.L.C. (Dkt #105, ¶ 8) (Dkt # 76, ¶ 4) (Dkt # 77, ¶ 4). Hart was an employee of Subatch's entity Wild Horse Trading Co., LLC, d/b/a Wildhorse Contracting Services. (Dkt # 105, ¶ 20).

(App. at 7) (emphasis added).

The District Court's June 21, 2024 Order acknowledges that the parties do not differentiate between Subatch and his entity:

> On May 2, 2024, WH Contracting filed an answer to the [Second Amended Complaint] ("SAC") (Dkt # 76), and WH Trading, Subatch, and Hart filed an answer to the SAC (Dkt # 77). **In both answers, these defendants admit that [Jason] Subatch is the owner of WH Trading** (Id. ¶ 3), admit that WH Contracting is an assumed business name for WH Trading, and deny that WH Contracting is an assumed business name for Subatch (Id. ¶ 4). In answering paragraphs ¶¶ 6, 9 regarding which entity employed Hart and which entity was Nautilus' insured, **these defendants do not differentiate in their answer between WH Contracting, WH Trading, or Subatch**. (Id. ¶¶ 5, 7).

(Dkt. 104, at 6–7 (emphasis added)).

The District Court later found this evidence unpersuasive compared to a singular disputed fact. The District Court reasoned: "At the time of the accident, the Secretary of State records indicate that Tyler Subatch was the sole member of WH Trading which Subatch has admitted." (App. at 38). From there, the District Court determined "[i]t is undisputed that Jason Subatch was not the sole owner of WH Trading at the time of the accident." *Id*.

No legal authority grants Secretary of State filings the legal potency afforded to them by the District Court.[3] Rather, the factual dispute should have been viewed in the light most favorable to the non-movant Appellants. Even Nautilus conceded Jason Subatch was a member (owner) of Wild Horse in 2022. (Dkt. 128, at 9). In Nautilus's brief in support of summary judgment, Nautilus states: "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)") *Id.* (emphasis added).

[3] The filing with the Secretary of State document was corrected to accurately reflect ownership in Wild Horse Trading Co., LLC, as shown in an Article of Amendment:

LLC Management

LLC Managed By — Managers

Managers

Dissociated	Name Of Individual Or Business Entity	Business Mailing Address	Email Address
☐ ~~Dissociated~~	~~Tyler T Subatch~~	~~P.O. Box 1086 Plains, MT 59859~~	~~wildhorsetrco@gmail.com~~
☐ Dissociated	Jason Subatch	P.O. BOX 1086 PLAINS, MT 59859	wildhorsetrco@gmail.com

(Dkt. 145, Exh. 6). The Montana Secretary of State now correctly reports Jason Subatch as the sole member of Wild Horse Trading Co., LLC. (Dkt. 129, at 15 (Exhibit C)).

Ample additional evidence exists from which a jury could disagree with the District Court's read of the evidence and conclude Jason Subatch was the sole owner. No witness in this case mentioned Tyler Subatch, referenced Tyler Subatch as owner, or mentioned that Tyler Subatch had any involvement with the operations of Wild Horse Trading. Because genuine issues of material fact exist, summary judgment was granted in error.

C. Jason Subatch Is an Insured Even if He Was Not the Sole Owner of Wild Horse Trading.

As observed by the District Court, "Nautilus argues that Subatch is not an insured because at the time of the accident he was not the sole owner of WH Trading (which employed, trained, and supervised Hart)." (App. at 37). However, even if Subatch was not the sole owner of Wild Horse Trading, he is nevertheless a named Defendant in this litigation as well as a named Insured.

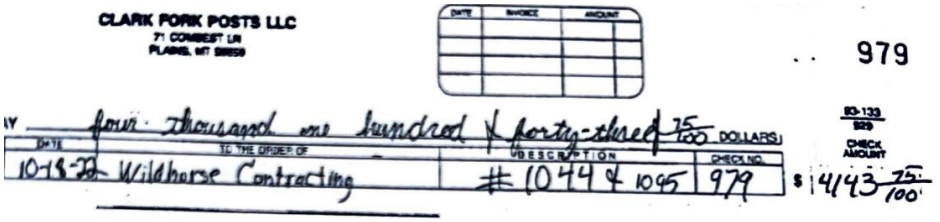
The District Court found that: the Policy designates "Jason Subatch DBA Wildhorse Contracting Services" as the Named Insured and "Form of Business: Individual." *Id*. If the Policy was issued to an individual (Subatch) as the District Court concluded, coverage exists. A sole proprietorship has no separate legal existence or identity apart from the sole proprietor. 18 C.J.S. Corporations § 4; *Goodwin v. John*, 624 F. Supp. 3d 1196, 1199 (D. Nev. 2022). An assumed business name for a sole proprietorship is not a distinct legal entity. Mont. Code Ann. §30-13-201(1)–(3) (an assumed business name is simply another name for an existing

individual or entity). Because there is no difference between the assumed business name of a sole proprietorship and an individual, the District Court's logic that Jason Subatch was not an Insured was flawed and requires reversal.

Jason Subatch was involved and his negligent acts and omissions are central to the case. Jason Subatch sent Hart to load the bundles onto Steve's trailer. (Dkt. 142, Exh. 3, at 14:4–8). Hart testified that he answered only to Jason Subatch, and he was exclusively responsible for the failure to train Hart. (*Id.* at 15:2–16:7). Hart did not state that he answered in any respect to Tyler Subatch. Rather, Hart testified Jason Subatch is "my boss," and while "Wild Horse Trading Company is what's on my check…There's a few different names that he has on business cards." (*Id.* at 15:22–23; 16:19–21). Hart also admitted that he had no training to operate the loader and it was not a job he had sufficient experience to do. (App. at 63–65, ¶ 10(b)) (citing Hart Dep. 91:13–94:22).

Clark Fork's representative, James Yoder, similarly testified that he dealt with Jason Subatch, who he understood owned Wild Horse Contracting, though he's not sure about whether it was an LLC or not. (Dkt. 145, Exh. 4, at 34:7–15). Yoder delivered the check for the work at issue to Jason Subatch, made out to Wildhorse[4] Contracting:

[4] The District Court found that *Wild Horse* Contracting is the assumed business name of Wild Horse Trading owned by Tyler Subatch, but *Wildhorse* Contracting is the assumed business name of Jason Subatch's sole proprietorship. (App. at 31).


CLARK FORK POSTS LLC
71 CONNEST LN
PLAINS, MT 59859

979

four thousand one hundred & forty-three 75/100 DOLLARS

DATE: 10-15-22
TO THE ORDER OF: Wildhorse Contracting
DESCRIPTION: #1044 & 1045
CHECK NO.: 979
$ 4143 75/100

(Dkt. 145, Exh. 10).

Even Nautilus's internal investigation revealed heavy involvement by Jason Subatch, including Jason's ownership of the loader in question. (Dkt. 145, Exh. 11, at NAUTILUS 000769; Dkt. 145, Exh. 12, at NAUTILUS 000624 ("[Jason] Subatch stated he owns the loader.")).

Jason Subatch remains a named Defendant. He did not seek summary relief. He was intimately involved and the evidence demonstrates he acted negligently, at a minimum, for failing to train Hart and by sending the unqualified Hart to complete the dangerous work.

D. No Policy Exclusion Applies or Limits Coverage to the Business Description.

The Nautilus Policy's Insuring Agreement contains a broad coverage grant. The Policy states:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> b. This insurance applies to "bodily injury" and "property damage" only if:

> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;"
>
> (2) The "bodily injury" or "property damage" occurs during the policy period; and
>
> (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part.

(App. at 77, NAUTILUS 000017).

Steve Blanchard suffered "bodily injury" caused by an "occurrence" within the "coverage territory" during the policy period. (App. at 37). Steve's injuries are covered by the Policy's Coverage Grant and no exclusion applies.

Effectively reading a Business Description Exclusion into the Policy, the District Court determined coverage did not exist because the Policy was meant "to secure liability coverage for a new general contractor business that would perform residential construction. (App. at 31, (citing Dkt. 108, ¶ 9)); (Dkt. 118, ¶ 9); (Dkt. 129, Ex. A, ¶ 4). The court stated:

> The Declarations indicate "Business Description: General Contractor," "Form of Business: Individual," and identify the insured's work as "[c]arpentry - construction of residential property not exceeding three stories in height" and "[c]ontractors - subcontracted work in connection with building construction, reconstruction, repair or rection - 1 or 2 family dwellings." (Dkt # 130, Ex. K, 1, 15). Nautilus insured this risk in the Policy.

(App. at 46).

The District Court's conclusion that the only risk insured is work within the Business Description was error. It is well-established that a business description in a commercial general liability policy's declarations page does not restrict the available coverage absent a specific exclusion to that effect. *Philadelphia Indem. Ins. Co. v. 1801 W. Irving Park, LLC*, 2012 WL 3482260, at *3 (N.D. Ill. Aug. 13, 2012) ("If PIIC intended to limit its coverage to only those actions taken by 1801 in its capacity as a "Condominium Association," it should have specifically said so); *Reliance Ins. Co. v. Fisher*, 164 Mont. 278, 284, 521 P.2d 193, 196 (1974) (Applying a specific 'business pursuit' exclusion to find no coverage.); *Mt. Vernon Fire Ins. Co. v. Belize NY, Inc.,* 277 F.3d 232 (2d Cir. 2002); *Ruiz v. State Wide Insulation and Const. Corp.,* 269 A.D.2d 518, 519, 703 N.Y.S.2d 257 (N.Y.App.Div.2000) (policy expressly "limited the operations from which a claim could arise to those described in the schedule of insurance"); *Harkless v. Sylvester,* 961 So.2d 535, 537 (La. Ct. App. 2007) (same).

No exclusion limiting coverage to the Business Description exists in the Policy. (*See* Dkt. 162 fn. 4 (Nautilus admits no exclusion exists to void coverage based on the policy's business description.)). To be sure, the Policy expressly excludes specific activities—*by way of exclusions*—from the coverage grant. None of these exclusions were raised as a defense to coverage by Nautilus or relied upon by the District Court. (*See generally* App. at 25–48). Tellingly, many of the Policy's

exclusions, such as the Aircraft or Watercraft exclusion and the Liquor Liability exclusion, would be entirely superfluous if coverage were limited to the Business Description, as postulated by the District Court. (App. at 78–80, NAUTILUS 000018–000020).

The District Court erred by relying upon the Business Description to limit and void coverage afforded to Jason Subatch. No applicable exclusion exists, and the court added a term otherwise not included by Nautilus. Nautilus could have, but did not, include a Business Description Exclusion.

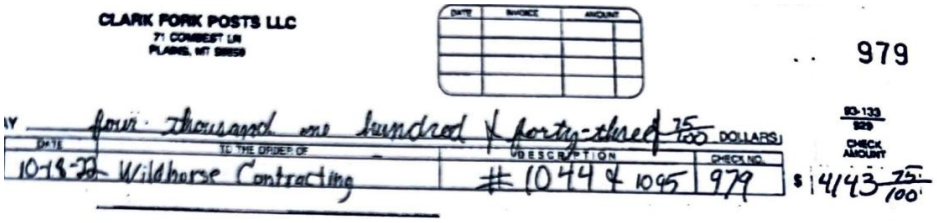
E. The District Court Inappropriately Resolved a Disputed Fact Regarding Involvement of the Sole Proprietorship.

There is no doubt Jason Subatch's tortious acts are at issue and there is no differentiation between a sole proprietorship and an individual. Nevertheless, the District Court found dispositive Nautilus's allegation that Subatch's sole proprietorship was not involved in the incident.

Even if Montana law allowed a sole proprietorship to exist separately from an individual, the District Court erroneously found that Jason Subatch's sole proprietorship, named Jason Subatch DBA Wildhorse Contracting Services "was not involved in the accident at issue in this case in any respect." (App. at 34). To determine this was an established and undisputed fact, the District Court relied solely upon an allegation in Nautilus's cross-claim (App. at 132, ¶ 55) and Wild Horse Trading's answer thereto. (Dkt. 118, ¶ 55). In those pleadings, Wild Horse Trading

"admitted" that Jason Subatch, dba Wildhorse Contracting Services, "was not involved," *i.e., not at fault*, for the accident.

Plaintiffs, however, denied that allegation. (App. at 172, ¶ 55). The District Court disregarded Plaintiffs' denial wholesale. Further, the District Court ignored the fact that Yoder made out the check to Subatch's sole proprietorship, Wildhorse Contracting:


CLARK FORK POSTS LLC
71 CONNEST LN
PLAINS, MT 59859

979

four thousand one hundred forty-three 75/100 DOLLARS

DATE 10-15-22 | TO THE ORDER OF Wildhorse Contracting | DESCRIPTION #1044 & 1045 | CHECKING 979 | $ 4143.75

(Dkt. 145, Exh. 10).

The District Court's decision that the sole proprietorship was not involved contravenes 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. However, 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). Genuine issues of material fact exist which prevent the District Court from determining Jason Subatch's sole proprietorship "was not involved in the accident at issue in this case in any respect." (App. at 34).

Even if a sole proprietorship could exist independently from an individual, genuine issues of fact exist which preclude determination that it was not involved. The District Court's Order should be reversed.

F. Wild Horse Trading Is an Insured, Even if Not Solely Owned by Jason Subatch.

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.*

1. The Policy Is Ambiguous Because a Reasonable Reading of the Policy Is that Jason Subatch and Wildhorse Contracting Are Insureds.

On page one of the declarations page, the Policy designates Jason Subatch DBA Wildhorse Contracting Services as a Named Insured. (App. at 73, NAUTILUS 000001). On pages two and three, the Policy designates Jason Subatch and Wildhorse Contracting Services *separately* as Named Insureds:

POLICY NUMBER: NN1404005

Named Insured: Jason Subatch
Wildhorse Contracting Services

(App. at 74–75, NAUTILUS 000002–3).

As the District Court correctly observed, "Wildhorse Contracting Services is an assumed business name of Wild Horse Trading Co., L.L.C." (App. at 7 (citing (Dkt. 105, ¶ 8)) (Dkt. 76, ¶ 4) (Dkt. 77, ¶ 4)). "Hart was an employee of Subatch's entity Wild Horse Trading Co., LLC, d/b/a Wildhorse Contracting Services." (App. at 7 (citing (Dkt. 105, ¶ 20)).

The Policy contemplates that more than one Named Insured can exist. For example, the Policy explains that the "first Named Insured" is responsible for payment of premiums. (App. at 76, NAUTILUS 000004).

From the viewpoint of a consumer with average intelligence, the Policy insures Wild Horse Trading. 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. (App. at 37).

Assuming *arguendo* that the District Court's interpretation was reasonable, it is not the only reasonable interpretation. Indeed, this Court has already said as much in a case on all factual fours. In *Modroo*, the insured identified an ambiguity regarding whether a commercial policy provided UIM coverage to an individual or only to a partnership. 2008 MT 375, ¶¶ 8-14. 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).

Other courts agree. For example, in *D.C. Concrete Mgmt., Inc. v. Mid-Century Ins. Co.*, the named insured was "Rafael Sanchez DC Concrete Management." 39 P.3d 1205, 1207 (Colo. App. 2001). The policy contained a printed legend stating: "The named insured is an individual unless otherwise stated." *Id.* While the policy form included boxes for indicating that the named insured was a business entity, such as a corporation, partnership, or joint venture, none of those boxes were

checked. *Id.* Mid-Century's contention was that the named insured was an individual, not the entity. The court held "one cannot tell whether there is one named insured or two. Nor can it be ascertained whether DC Concrete Management is intended as a d/b/a designation for an individual or refers to a separate business entity." *Id.* at 1208. The court continued: "where, as here, an ambiguity is found in policy language, it is to be construed against the insurer who drafted the policy and in favor of the insured." *Id.*; *see also 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).

In sum, the Policy is ambiguous with respect to whether the Policy insures an individual (Jason Subatch) or an individual and an entity (Wild Horse Contracting). This Court should rule, just as it did in *Modroo*, that the ambiguity prevents the insurer from avoiding coverage.

2. The Policy Is Ambiguous as to Whether "Wildhorse Contracting Services" Refers to a Sole Proprietorship or the Assumed Business Name of Wild Horse Trading Co.

Using extrinsic evidence, the District Court determined that Subatch was involved with two separate entities: the LLC *Wild Horse* Contracting Services, and the sole proprietorship *Wildhorse* Contracting Services and that the Policy only

insures the sole proprietorship. (App. at 31). In particular, the District Court relied upon a Declaration of Tiffani Sheehan, mistakenly identified as Subatch's agent.[5] *Id.* (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. (App. at 29–31). Relying upon this extrinsic evidence, the District Court concluded that the Policy insures a sole proprietorship *Wildhorse* Contracting Services but not Wild Horse Contracting Services. (App. at 31, 40) ("The undisputed facts show that '*Wildhorse* Contracting Services' is not an LLC or incorporated business and it was represented as a DBA in the Policy.")

For his part, and contrary to the extrinsic evidence relied upon by Nautilus and the District Court, Jason Subatch sought to procure insurance that would defend and indemnify him for all of the various Wild Horse operations. (*See* Dkt. 145, Exh. 9, at Rogg. No. 3). As Jason Subatch answered in discovery:

> Tiffani Sheehan/Weatherly Agency was contacted for purposes of procuring insurance, and during this process, Subatch expressed the need for insurance for the various Wild Horse operations, which were described to Ms. Sheehan/Weatherly. Subatch and the various Wild Horse entities paid valuable insurance premiums for what they believed to be insurance that would apply to the various business entities and business operations and functions which were described to Ms. Sheehan/Weatherly. Subatch believed that the insurance agent was acting on behalf of the various insurance agencies she sold insurance for at the time.

[5] For purposes 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.

> Then, once the Blanchard matter was filed in January of 2023, Subatch was under the impression that Nautilus would defend and indemnify him (until very recently). Subatch has been under the reasonable assumption that Nautilus would continue to defend and indemnify them, Nautilus is attempting to escape its obligations to defend and indemnify its insureds and to escape coverage.

(*Id.* at Ans. to Rogg. No. 5).

The District Court rejected Subatch's position as well as ample evidence that the Policy's use of *Wildhorse* was meant to identify Wild Horse and the mistake in spelling was borne of Nautilus' agent's sloppiness. *Compare* Dkts. 171 to 145, 146. For example, Sheehan wrote that the applicant to the Nautilus Policy 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 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.*

The District Court's decision that the Policy unambiguously insures Wildhorse (but not Wild Horse) Contracting Services should be reversed.

3. Extrinsic Evidence Was Inappropriately Used by the District Court to Construe a Purportedly Unambiguous Policy.

The District Court determined the Policy contains no ambiguity. (App. at 43, 45). Nevertheless, as explained above, it relied upon extrinsic evidence to construe the Policy in the insurer's favor and against coverage. (*See, e.g.,* App. at 29–31).

"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*, 2005 MT 50, ¶ 27, 326 Mont. 174, 108 P.3d 469 (emphasis added). "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.*, 2003 MT 85, ¶ 14, 315 Mont. 107, 67 P.3d 892. The District Court ignored these well-established rules and relied upon extrinsic evidence to rebuff Appellants' factually supported position that Sheehan was just messy and failed to write Wild Horst Contracting Services. *See* (Dkts. 145, 146).

4. A Misstatement by the Agent in the Application Not Attributable to Fraud or Bad Faith on the Part of the Insured Does Not Invalidate Coverage.

For purposes 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 a policy 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) (emphasis added) (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); *Den Hartog v. Home Mut. Ins. Ass'n of Iowa*, 196 N.W. 944, 946 (Iowa 1924); *Stevens v. Equity Mut. Fire Ins. Co.*, 66 Mont. 461, 213 P. 1110 (1923); *Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak Fire & Marine Ins. Co.*, 31 Conn. 517, 517 (Conn. 1863) ("It is the settled policy of our law to treat local agents of insurance companies, who are authorized to procure and forward applications for insurance, as the agents of the companies and not of the applicants, in any mistakes of the application made by them or by the applicant under their direction.").

Here, Jason Subatch asked Sheehan to procure insurance that would defend and indemnify him for all of the Wild Horse operations and it was his understanding that this claim was the type that would be covered. (*See* Dkt. 145, Exh. 9, at Rogg. No. 3). The District Court relied upon extrinsic evidence to rebuff the factually supported position that Nautilus's agent made a typographical error when she applied for coverage for "Jason Subatch DBA Wildhore (sic) Contracting Services." (Dkt. 145, Exh. 7).

Subatch intended for the Policy to insure all of the Wild Horse operations. (Dkt. 145, Exh. 9). If Subatch intended to acquire a Policy for an Individual, as the

District Court found, there was no reason for Sheehan to add an unregistered assumed business name of a sole proprietorship to the Policy. At a minimum, questions of fact precluding summary judgment exist as to whether Tiffani's statement that the applicant is "Jason Subatch DBA Wildhore (sic) Contracting Services" unequivocally precludes coverage for Wild Horse Contracting Services.

5. The District Court Erred by Refusing to Apply the *Idem Sonens* Rule.

The doctrine of *idem sonans* dictates "that absolute accuracy in spelling names is not required; 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) (emphasis added); *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.")).

In this case, the "slight variation in spelling" (failure to capitalize "h") where "the same sound is preserved" satisfies the test for *idem sonans*. "Wildhorse Contracting Services" and "Wild Horse Contracting Services" "sound alike in their pronunciation." *See, e.g., Henrichs,* 237 Mont. at 62, 771 P.2d at 969. Applying *idem sonans*, the Policy identifies Jason Subatch DBA Wild Horse Trading (through its assumed business name Wild Horse Contracting Services)[6] in the Declarations, eliminating any confusion regarding whether coverage applies.

Nautilus's agent consistently misspelled Wild Horse. The District Court's decision granting Nautilus a windfall from its agent's clerical error must be reversed.

CONCLUSION

The District Court's rulings disregard genuine disputes of material fact and misapply precedent. Plaintiffs have a cognizable claim for negligent selection of a contractor against PacWest and the court's cursory dismissal of the claim was error. Further, the court inappropriately conflated the three separate *Beckman* exceptions, effectively neutering the inherently dangerous activity doctrine. The court also improperly construed the Nautilus policy to eliminate coverage. The law does not permit a company to escape responsibility for inherently dangerous work carried out

[6] 18 C.J.S. Corporations, ASSUMED OR FICTITIOUS NAME AND USE OF SEVERAL NAMES**,** § 135 (2018) (noting that "[w]hen a corporation does business under another name, it does not create a distinct entity.")

on its behalf, nor does it allow an insurer to avoid its duty to defend through strained reliance on extrinsic evidence and clerical errors. For these reasons, Appellants respectfully request that this Court reverse the District Court's summary judgment orders and remand for trial on the merits.

DATED this 22nd day of August, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. Pro. 14, I hereby certify that this brief 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 9,855 words is less than the 10,000 word limit, exclusive of tables and certificates.

RESPECTFULLY SUBMITTED this 22nd day of August 2025.

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