

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 25-0409

STEVE BLANCHARD, an individual; and
ROXANNE BLANCHARD, an individual,

Plaintiffs and Appellants,

v.

WILD HORSE TRADING CO., LLC, a Montana limited liability company with its principal place of business in Sanders County, Montana, WILDHORSE CONTRACTING SERVICES, an assumed business name for a Montana limited liability company with its principal place of business in Sanders County, Montana, JASON SUBATCH, an individual residing in Sanders County, RYAN HART, an individual residing in Sanders County, Montana, PACIFIC WESTERN LUMBER, INC., a Washington corporation with its principal place of business in Pierce County, Washington, NAUTILUS INSURANCE COMPANTY, an Arizona corporation with its registered agent in Missoula, Montana, SCOTTSDALE INSURANCE COMPANY, an Ohio corporation with its registered agent in Helena, Montana, and JOHN DOES 1-5, individuals whose names are currently unknown,

Defendants and Appellees.

PACIFIC WESTERN LUMBER, INC., WILDHORSE TRADING CO., LLC,
WILD HORSE CONTRACTING SERVICES, JASON SUBATCH,

Third-Party Plaintiffs,

v.

CLARK FORK POSTS, LLC, DAVID YODER,

Third-Party Defendants.

NAUTILUS INSURANCE COMPANY,

Counter-Claimant and Cross-Claimant,

v.

STEVE BLANCHARD and ROXANNE BLANCHARD,

Counter-Defendants,

and

WILDHORSE TRADING CO., LLC, JASON SUBATCH, and RYAN HART,

Cross-Defendants.

**APPELLEE PACIFIC WESTERN LUMBER, INC.'S
ANSWER BRIEF**

On Appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV-32-2023-0000055-NE
The Honorable Shane Vannatta, Presiding

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INTRODUCTION

The District Court correctly concluded that Appellee Pacific Western Lumber, Inc. (“PacWest”), did not owe Appellant Steve Blanchard (“Appellant” or “Mr. Blanchard”) a duty of care as a matter of law under either the negligent selection doctrine or the inherently dangerous activity exception to the independent contractor rule. These conclusions are based on the undisputed material facts establishing that Appellant was injured on property that PacWest did not own or control by the alleged actions of persons and entities over whom PacWest had no authority or control. The District Court therefore correctly concluded:

Considering the record in the light most favorable to the Blanchards, there are no material facts in dispute, no contractor-subcontractor relationship existed between PacWest and Clark Fork Posts and Wild Horse; and Clark Fork Posts and Wild Horse were not acting as PacWest’s agents. The underlying agency relationship upon which vicarious liability rests does not exist.

(Dkt. 119, p. 17.)

Appellants’ theories of vicarious liability require that the relevant parties have certain legal relationships for the doctrines to be applicable. The record is undisputed, however, that PacWest did not have an employer-contractor or other agency relationship with either Clark Fork Posts, LLC (“Clark Fork”), or Wild Horse Trading Co., LLC (“Wild Horse”¹). Accordingly, PacWest is entitled to judgment

¹ There is a factual dispute as to which Wild Horse entity Clark Fork contracted with to load its product and PacWest therefore generally refers to the various entities as “Wild Horse.” By doing

as a matter of law that it did not owe Mr. Blanchard a duty of care because it did not have the necessary legal relationships with these alleged tortfeasors. The District Court's Order should be affirmed.

STATEMENT OF THE ISSUES²

I. Whether the District Court correctly concluded that the negligent selection doctrine does not impose a duty on PacWest because PacWest did not have an employer-contractor relationship with Clark Fork.

II. Whether the District Court correctly concluded that the inherently dangerous activity exception does not impose a duty on PacWest because PacWest did not have an agency relationship with Clark Fork or Wild Horse.

STATEMENT OF THE CASE

Appellants filed suit after Mr. Blanchard sustained injuries on property owned and operated by Clark Fork, by the alleged actions of a Wild Horse employee using equipment owned by Wild Horse. (Dkt. 8, ¶¶ 23-37.) Appellants named PacWest and Wild Horse as Defendants. (Dkt. 8.) Appellants did not sue Clark Fork despite repeatedly alleging that Clark Fork's facility was dangerous and that the "negligence of Clark Fork Posts and its employees" caused Mr. Blanchard's injuries. (*E.g.*, Dkt.

so, PacWest is in no way taking a position as to which Wild Horse entity was involved in the loading operation.

² PacWest is not a party to Appellants' claims related to the interpretation of Appellee Nautilus Insurance Company's insurance policy and therefore does not respond to those issues for purposes of this Appeal.

8, ¶¶ 18, 92; Dkt. 81, pp. 9-11; Appellant’s Opening Br., p. 5.) Because Appellants failed or refused to name Clark Fork as a responsible party, PacWest had no choice but to file a Third-Party Complaint against Clark Fork seeking contribution and/or indemnification pursuant to § 27-1-703, MCA. (Dkt. 27, ¶¶ 4-5.)

Appellants’ claims that PacWest is liable for Mr. Blanchard’s injuries were initially premised upon their allegations that PacWest retained control over Clark Fork’s facility and its operations, including the work performed by Wild Horse. (E.g., Dkt. 8, ¶¶ 14-19, 86-92; Dkt. 48, ¶¶ 16-21, 85-92; Dkt. 105, ¶¶ 26-31, 87-94.³) PacWest filed its Motion for Summary Judgment fourteen months after Appellants filed their First Amended Complaint and after Wild Horse’s discovery responses and the depositions of the Wild Horse employee involved in the incident and Clark Fork’s owner confirmed that PacWest did not have an agency relationship with either Clark Fork or Wild Horse. (Dkt. 65; Dkt. 66, Ex. 1, 27:10-31:17, 35:17-36:16, 46:2-48 :17; App. 1, pp. 5-7, 10; Dkt. 66, Ex. 2, 12:18-13 :23, 15:2-17:4, 120:1-25; App. 2, pp. 2-4; Dkt. 90, Ex. A; App. 3, pp. 2-3.⁴)

The District Court granted PacWest’s Motion after concluding that Appellants

³ Appellants did not file their Third Amended Complaint until after the parties had fully briefed the underlying motion. (*Compare* Dkt. 105 *with* Dkt. 89.)

⁴ The relevant portions of Mr. Yoder’s deposition testimony, Ryan Hart’s deposition testimony, and Wild Horse’s discovery responses from the record relied upon in this Brief, are included as Appendix 1, Appendix 2, and Appendix 3, respectively. Future citations to the Appendices will include a reference to both the relevant docket number from the District Court record and the relevant Appendix page numbers (e.g. “App. 1, p. x.”)

failed to present sufficient evidence to refute the material evidence presented by PacWest that it had no authority or control over the other alleged tortfeasors or their operations. (Dkt. 119, pp. 10-17.) The District Court further concluded that Appellants were not entitled to additional discovery under Rule 56(f), Mont. R. Civ. P., because they failed to “provide specified reasons why they cannot present facts essential to justify their opposition to the Motion without a Rule 30(b)(6) deposition.” (Dkt. 119, p. 22.) Appellants sought Rule 54(b), Mont. R. Civ. P., certification seven months after the District Court issued the Order, which the District Court granted. (Dkt. 177; Dkt. 181.) Appellants timely appealed. (Dkt. 182.)

STATEMENT OF THE FACTS

PacWest is a wholesale lumber trading company that operates in the Northwest. (Dkt. 68, ¶ 2.) PacWest acts as an intermediary by purchasing wholesale lumber products from independent lumber product producers that it then sells to industrial and commercial clients. (Dkt. 68, ¶ 3.) PacWest purchases wholesale lumber products from dozens of independent producers across the northwestern United States, including Clark Fork and several others in Montana. (Dkt. 68, ¶ 4.)

Clark Fork owns and operates an independent lumber post and pole producing facility in Plains, Montana. (Dkt. 66, Ex. 1, 14:6-23; 16:21-23; App. 1, p. 2.) Clark Fork is a family business that is owned and operated by James Yoder. (Dkt. 66, Ex. 1, 14:24-16:6; App. 1, p. 2.) Clark Fork purchases the raw material it uses to produce

posts from independent loggers around the region. (Dkt. 66, Ex. 1, 16:21-19:21; App., pp. 2-3.) Once it finishes milling its posts and polls, Clark Fork sells them retail to local customers and wholesale to customers across Montana, Idaho, and Oregon. (Dkt. 66, Ex. 1, 20:21-21:13; App. 1, pp. 3-4.) At the time of the incident, Clark Fork contracted with Wild Horse to load Clark Fork's products for its customers because Mr. Yoder's religious convictions prohibit him from operating hydraulic equipment. (Dkt. 66, Ex. 1, 32:22-33:22; App. 1, pp. 6-7.)

PacWest has purchased bundles of fence posts, commonly referred to as "bunks," from Clark Fork since approximately March 2020. (Dkt. 69, ¶¶ 4-5, Ex. A; Dkt. 66, Ex. 1, 23:14-23; App. 1, p. 4.) PacWest's Lumber Sales Supervisor, Steve Wearne, oversees PacWest's purchases from Clark Fork. (Dkt. 69, ¶ 3; Dkt. 66, Ex. 1, 24:25-25:3; App. 1, pp. 4-5.) PacWest does not have a partnership arrangement with Clark Fork, nor does it have an agreement that PacWest will purchase all, or substantially all, of Clark Fork's inventory. (Dkt. 66, Ex. 1, 24:17-24; 30:8-13; App. 1, p. 6; Dkt. 119, pp. 4, 7.) PacWest's purchases from Clark Fork account for a very small percentage of PacWest's business. (Dkt. 69, ¶ 13.)

When PacWest places an order with Clark Fork, Mr. Wearne either calls Mr. Yoder or sends him a purchase order. (Dkt. 66, Ex. 1, 25:2-23; App. 1, p. 5.) When Clark Fork receives the purchase order, Mr. Yoder ensures Clark Fork has product to fulfill the order, bundles the order, and then calls PacWest and lets them know the

order is ready to pick up. (Dkt. 66, Ex. 1, 25:2-23; App. 1, p. 5.) PacWest then retains an independent trucking company to pick up the product and transport it to its destination. (Dkt. 69, ¶ 25.)

Mr. Wearne also coordinates with independent trucking companies to transport the products PacWest purchases from independent producers. (Dkt. 69, ¶ 20.) In January 2022, PacWest started using Blanchard Trucking Service (“Blanchard Trucking”) as an independent contractor to transport products it purchased from producers across Montana, including bunks purchased from Clark Fork. (Dkt. 69, ¶ 22, Ex. B; Dkt. 119, p. 7.) PacWest regularly contracted with Blanchard Trucking to transport lumber products up until the incident underlying this litigation. (Dkt. 48, ¶ 26; Dkt. 69, ¶ 23, Ex. B; Dkt. 119, p. 7.)

On August 9, 2022, Mr. Wearne emailed Mr. Blanchard with information about an order of bunks PacWest was purchasing from Clark Fork and wanted Blanchard Trucking to transport to a treatment facility in Stevensville, Montana. (Dkt. 69, Ex. C, pp. 7-8.) Three days later, Mr. Blanchard arrived at Clark Fork’s facility, and a Wild Horse employee loaded Blanchard Trucking’s trailer using Wild Horse equipment. (Dkt. 48, ¶¶ 28, 31; Dkt. 66, Ex. 1, 52:1-8; App. 1, p. 11.) During the loading process, a bunk became dislodged and fell, injuring Mr. Blanchard. (Dkt. 48, ¶¶ 32-39.) No one from PacWest was present for, participated in, or involved in any way with the events leading to Mr. Blanchard’s injury. (Dkt. 66, Ex. 1, 53:5-

54:2; App. 1, p. 12.)

Steve and Roxanne Blanchard (“the Blanchards”) filed their initial Complaint on January 13, 2023. (Dkt. 1.) The Blanchards’ various Amended Complaints include the following representative allegations about PacWest’s relationships with Clark Fork and Wild Horse: that PacWest “retained express, actual, and/or implied control over Clark Fork Posts’ facility, including but not limited to the safety of workers on the jobsite, and/or the manner and/or means of loading pole bundles onto trailers,” (Dkt. 8, ¶ 19; Dkt. 48, ¶ 21; Dkt. 105, ¶ 31); that PacWest had a general contractor-subcontractor relationship with both Clark Fork and Wild Horse, (Dkt. 8, ¶ 86; Dkt. 48, ¶ 85; Dkt. 105, ¶ 87); and that PacWest “retained and/or exerted control over the manner and/or means of the work being performed at Clark Fork Posts facility—including the work performed by Defendant Wild Horse and its employees,” (Dkt. 8, ¶ 88; Dkt. 48, ¶ 87; Dkt. 105, ¶ 89). Each of the Blanchards’ legal theories relies upon PacWest’s alleged authority to control Clark Fork’s and Wild Horse’s operations, including both common law claims and statutory claims under the Montana Occupational Safety and Health Act, Title 50, Chapter 71, Mont. Code Ann. (“MOSHA”).⁵ (Dkt. 8, ¶¶ 86-93; Dkt. 48, ¶¶ 85-93; Dkt. 105, ¶¶ 87-95.)

The parties engaged in written discovery and the Blanchards initially chose to

⁵ The District Court concluded that “PacWest did not owe a duty of care to [Mr. Blanchard] under MOSHA, as a matter of law.” [Order, p. 20.] Appellants have not appealed this ruling.

depose Wild Horse employees Ryan Hart and Jack Woods. (Dkt. 82, Exs. 3, & 4.) Nearly five months later, the Blanchards deposed PacWest's only management-level employee who worked with both Clark Fork and Blanchard Trucking, Mr. Wearne. (Dkt. 82, Ex. 1.) Because the Blanchards' claims against PacWest are premised entirely upon PacWest's alleged relationship with Clark Fork, and by extension Wild Horse, PacWest chose to depose Clark Fork's owner, James Yoder. (Dkt. 66, Ex. 1; App. 1.)

Mr. Yoder expressly and definitively refuted each of the Blanchards' factual allegations regarding Clark Fork's alleged relationship with PacWest. (Dkt. 66, Ex. 1, 46:2-50:2; App. 1, pp. 10-11.) Mr. Yoder provided the following uncontested testimony: that PacWest and Clark Fork are independent businesses and that their business dealings at the time of the underlying incident were arms' length transactions, (Dkt. 66, Ex. 1, 30:8-31:17; App. 1, p. 6); that PacWest and Clark Fork were not financially intertwined nor were they mutually dependent at the time of the underlying incident, (Dkt. 66, Ex. 1, 46:7-49:-23; App. 1, pp. 10-11); that PacWest had, and has, no control or right to control Clark Fork, Clark Fork's facility, or any of Clark Fork's employees, agents, or representatives, (Dkt. 66, Ex. 1, 29:30:7; App. 1, p. 6); that PacWest had, and has, no control or right to control the working conditions at Clark Fork's facility or the way Clark Fork conducts its operations, including the safety measures implemented by Clark Fork at its facility, (Dkt. 66,

Ex. 1, 27:10-30:7; App. 1, pp.5-6); and that PacWest was not involved in Clark Fork's relationship with Wild Horse in any way and has never had authority to control any aspect of Clark Fork's loading operation. (Dkt. 66, Ex. 1, 35:17-36:16; App. 1, p. 7).

In other words, Mr. Yoder emphasized, PacWest is merely "a customer" of Clark Fork's. (Dkt. 66, Ex. 1, 46:19-22; p. 10.) If PacWest does not purchase from Clark Fork, Clark Fork simply sells its product to another one of its many retail and wholesale customers. (Dkt. 66, Ex. 1, 20:21-21:18; 24:17-24; 46:19-22; App. 1, pp. 4, 10.) Mr. Yoder further testified that he would have happily told the Blanchards' counsel that PacWest was simply a customer had they only asked when counsel came to interview him prior to filing the Amended Complaint. (Dkt. 66, Ex. 1, 39:7-41:23; 48:20-50:2; App. 1, pp. 9-11.)

Wild Horse's discovery responses and the deposition testimony of Ryan Hart, the Wild Horse employee involved in the incident, also confirm that PacWest had no authority or control over Wild Horse or any aspect of its operations. (Dkt. 66, Ex. 2, 12:18-13:23, 15:2-17:4, 120:1-25; App. 2, pp. 2-4; Dkt. 90, Ex. A; App. 3, pp. 2-3.) As Wild Horse unequivocally admits, it "was hired by Clark Fork . . . to load pole bundles onto the flatbed trailer owned by [Mr. Blanchard]" and Mr. Hart "was working as an employee of [Wild Horse] and acting within the course and scope of his employment." (Dkt. 90, Ex. A; App. 3, pp. 2-3.)

PacWest provided the Blanchards' counsel with notice that it intended to seek summary judgment shortly after taking Mr. Yoder's deposition. (Dkt. 90, ¶¶ 6-11, Exs. C-F.) Despite having over one month's notice, the Blanchards' counsel waited until three hours *after* PacWest filed the motion to serve their Rule 30(b)(6) deposition notice upon PacWest. (Dkt. 90, ¶¶ 6-8, Ex. C.) PacWest's counsel quickly responded and expressed concern "that the notice may be used as an attempt to delay the court's ruling on the Motion for Summary Judgment." (Dkt. 90, ¶ 9, Ex. D.) To circumvent this issue, PacWest offered to stipulate that Mr. Wearne's deposition testimony be considered PacWest's 30(b)(6) testimony on unobjectionable topics given that PacWest would designate Mr. Wearne as its 30(b)(6) designee regardless. (Dkt. 90, ¶ 9, Ex. D.) The Blanchards' counsel refused PacWest's offer and insisted that "there were numerous depositions to be taken." (Dkt. 90, ¶ 10, Ex. E.) Counsel did not, however, explain what facts they thought they could learn from the depositions that would assist in their opposition to PacWest's Motion. (Dkt. 90, ¶ 10, Ex. E.) Notwithstanding their counsel's documented communications with PacWest on these issues, Appellants now represent to the Court that PacWest "refused to allow" them to take PacWest's 30(b)(6) deposition.⁶ (Appellant's Op. Br., p. 2.)

In opposing PacWest's Motion before the District Court, the Blanchards

⁶ Appellants' focus on this issue is confusing because Appellants did not appeal the District Court's denial of their request for Rule 56(f) relief. PacWest addresses this issue to clarify the record on appeal.

repeatedly proclaimed that PacWest was acting as a “project manager,” a “general contractor,” and/or a “coordinator of the parties,” and that Clark Fork and Wild Horse were acting as PacWest’s “subcontractors.” (*E.g.*, Dkt. 81, pp. 2, 24, 30.) The Blanchards failed, however, to produce any evidence supporting these assertions beyond PacWest’s “contractual relationship” with Clark Fork, which was limited to PacWest’s purchase order for the bunks in question. (Dkt. 81, pp. 2-16.) As a result, the Blanchards effectively abandoned all the material factual claims in their Complaints concerning PacWest’s relationships with Clark Fork and Wild Horse. (*Compare* Dkt. 8, ¶¶ 14-19; Dkt. 48, ¶¶ 16-21; and Dkt. 105, ¶¶ 26-31, *with* Dkt. 81, pp. 2-16.) The Blanchards also abandoned nearly all their legal theories in the face of the overwhelming undisputed evidence that Mr. Blanchard was an independent contractor who was injured on property that PacWest did not own or control, by the actions of persons and entities over whom PacWest had no authority or control. (*Compare* Dkt. 8, ¶¶ 86-93; Dkt. 48, ¶¶ 85-93; Dkt. 105, ¶¶ 87-95 *with* Dkt. 81, pp. 16-30.) The Blanchards instead raised several new theories: that PacWest was negligent in selecting Clark Fork as its “subcontractor”; that the inherently dangerous activity exception applies in any instance where parties have “contractual relationships”; and that the inherently dangerous activity exception overrides MOSHA’s plain language. (Dkt. 81, pp. 18-31.)

In granting PacWest’s Motion, the District Court concluded that the

undisputed evidence confirmed that PacWest had no authority or control over Clark Fork or Wild Horse and therefore lacked the relationships necessary to invoke the Blanchards' theories. (Dkt. 119, pp 10-17.) The District Court declined to determine whether the elements of the inherently dangerous activity exception were met based on the Court's long-settled precedent that the exception applies only if the relevant parties have an agency relationship. (Dkt. 119, p. 17 (citing *Dick Irvin, Inc. v. State*, 2013 MT 272, ¶¶ 49-50, 372 Mont. 58, 310 P.3d 524).) The District Court also declined to address the negligent selection doctrine based on its conclusion that the parties lacked the requisite legal relationships. (Dkt. 119, p. 21.)

The District Court also concluded that MOSHA was inapplicable because the Act and the Court's unambiguous precedent make clear that the Act does not apply to independent contractors like Mr. Blanchard. (Dkt. 119, pp. 17-21.) The District Court ultimately concluded that Appellants failed to establish that PacWest had the legal relationships with Clark Fork and Wild Horse necessary to impose a duty upon PacWest under Appellants' vicarious liability theories. (Dkt. 119, pp. 17-21.) The District Court further denied Appellants' request for relief pursuant to Rule 56(f) because Appellants failed to put forth any facts they anticipated learning from additional discovery that would justify their opposition to the Motion. (Dkt. 119, pp. 21-22.) The District Court dismissed the claims against PacWest with prejudice. (Dkt. 119, p. 3.)

The litigation continued without PacWest’s active participation following the Order. (Dkt. 120-174.) Seven months after the District Court issued the Order, Appellants filed a motion for certification of the Order as final under Rule 54(b), Mont. R. Civ. P. (Dkt. 177.) The District Court certified the Order and Appellants timely appealed. (Dkt. 181; Dkt. 182.)

STANDARD OF REVIEW

“The primary policy and general purpose underlying summary judgment is to encourage judicial economy through the prompt elimination of questions not deserving resolution by trial.” *Gwynn v. Cummins*, 2006 MT 239, ¶ 12, 333 Mont. 522, 144 P.3d 82. Summary judgment should be entered when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” M. R. Civ. P. 56(c)(3). Once the moving party meets its initial burden, the burden “shifts to the opposing party to either show the existence of a genuine issue of material fact or that the moving party is nonetheless *not* entitled to judgment as a matter of law.” *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 17, 410 Mont. 239, 518 P.3d 840 (emphasis in original).

To “meet the responsive Rule 56 burden of demonstrating that genuine issues of material fact preclude summary judgment, the non-moving party must in proper form, and by more than mere denial, speculation, or pleading allegation, ‘set out

specific facts’ showing the existence of a genuine issue of material fact.” *Kostelecky*, ¶ 18. Although a court “must view the Rule 56 factual record in the light most favorable to the non-moving party and draw all reasonable inferences in favor thereof,” a “court has no duty . . .to anticipate or speculate as to the existence of contrary material facts.” *Kostelecky*, ¶ 18.

The Court reviews a district court’s summary judgment ruling *de novo* to ensure “conformance with applicable M. R. Civ. P. 56 standards and requirements.” *Kostelecky*, ¶ 17. “Whether a genuine issue of material fact exists or whether a party is entitled to judgment as a matter of law are conclusions of law.” *Id.*, ¶ 18. Similarly, “[t]he existence of a legal duty and the scope of any duty are questions of law.” *Fabich v. PPL Mont. LLC*, 2007 MT 258, ¶ 23, 339 Mont. 289, 170 P.3d 943. Where the evidence concerning an alleged agency relationship “is reasonably susceptible of but a single inference, the question of [the parties’] legal relationship . . . is one purely of law.” *Elkins v. Husky Oil Co.*, 153 Mont. 159, 166, 455 P.2d 329, 333 (1969).

SUMMARY OF THE ARGUMENT

Appellants’ position that the District Court misapplied the vicarious liability theories at issue misinterprets the District Court’s Order and the applicable law. The District Court did not misapply Appellants’ proffered theories; instead, the District Court determined—based on the Court’s long line of explicit authority—that it was

not obligated to analyze the theories in the first place because PacWest did not have the requisite legal relationships with Clark Fork and Wild Horse. The District Court correctly concluded that the Rule 56 record undisputedly establishes that PacWest had no authority or control over Clark Fork or Wild Horse and that the Appellants failed to demonstrate how additional discovery would refute that fact. The District Court therefore correctly held that PacWest did not owe Mr. Blanchard a duty of care as a matter of law under any of Appellants' legal theories. The District Court correctly interpreted the undisputed evidence and applied the relevant law, and its Order should be upheld.

ARGUMENT

I. Whether the District Court correctly concluded that the negligent selection doctrine does not impose a duty on PacWest because PacWest did not have an employer-contractor relationship with Clark Fork.

Appellants' position that PacWest was negligent in selecting Clark Fork as a "contractor" is premised entirely upon Appellants' wholly unsupported assertion that PacWest's purchase of products from Clark Fork equates to the parties having an "employer-contractor" relationship. Appellants, however, offer no material evidence beyond the parties' "contractual relationships" to establish such a relationship. (Appellants Opening Br., pp. 11-16.) Appellants' failure to establish a prerequisite to applying the negligent selection doctrine is fatal to their position that the doctrine applies and the District Court's Order concluding as much should be

affirmed.

The negligent selection doctrine provides that “[a]n *employer*” may be held liable for injuries caused by an “*employer*[’s] . . . failure to exercise reasonable care to *employ* a competent and careful contractor.” *Restatement (Second) of Torts* § 411 (1965) (emphasis added). The *Restatement*’s plain language predicates liability under the negligent selection doctrine upon the parties having an “employer-contractor” relationship. Other provisions in the chapter of the *Restatement (Second) of Torts* under which § 411 is found, entitled “Liability of an Employer of an Independent Contractor,” further reinforce that § 411’s applicability is dependent upon the parties’ relationship. The comments to *Restatement (Second) of Torts* § 409, which espouses the general principle of which § 411 is an exception, expressly provide:

The words "independent contractor" are used throughout this Topic as describing any person who does work for another under conditions which are not sufficient to make him a servant of the other. It is immaterial whether the work is done gratuitously or is done for pay, or, indeed, if the latter, whether it is done under a specific contract or under a general contract of employment . . . [because] an agent may be either an independent contractor or a servant while engaged in work necessary to the exercise of his functions as agent.

Restatement (Second) of Torts § 409 (1965) (cmt. a). When read in conjunction with the *Restatement*’s definition of “independent contractor,” § 411 imposes liability upon employers who fail to exercise reasonable care in employing a person who engages in the functions of an agent to perform work for them. The plain language

of the *Restatement* accordingly requires an agency-like relationship between the parties before the negligent selection doctrine is applicable.

That the doctrine's applicability is dependent upon the parties' relationship is reinforced by the other authority upon which Plaintiffs rely. The issue before the Court in the case adopting § 411 was whether the defendant fertilizer company could be held liable for the actions of salesmen who were undisputedly "acting as agents" of the company. *Gurnsey v. Conklin Co.*, 230 Mont. 42, 751 P.2d 151 (1987). *Brookins v. Mote*, 2012 MT 283, 367 Mont. 193, 292 P.3d 347, involved claims by an injured patient of harm caused by a doctor who was credentialed by the hospital against whom an "analogous" doctrine was asserted, and while the doctor was using the hospital's facilities. *Brookins*, ¶¶ 7, 18-19. Neither *Gurney* nor *Brookins* stand for the proposition that the customer of a production facility that negligently loads the customer's product can be held liable for the manner in which the production facility conducts its product loading operations. Instead, the cases stand for the proposition that certain exceptions to the independent contractor rule of vicarious liability may be invoked when certain legal relationships exist.

The record before the Court undisputedly establishes that PacWest had no control or right to control Clark Fork or its operations, including the product-loading and safety measures implemented by Clark Fork at its facility. (Dkt. 66, Ex. 1, 27:10-31:17, 35:17-36:16, 46:2-48 :17; App. 1, pp. 5-7, 10.) The record also undisputedly

establishes that PacWest had “zero involvement with Clark Fork’s relationship with Wild Horse and its loading operations.” (Dkt. 66, Ex. 1, 36:13-16; App. 1, p. 7; Dkt. 66, Ex. 2, 12:18-13:23, 15:2-17:4, 120:1-25; App. 2, pp. 2-4; Dkt. 90, Ex. A App. 3, pp. 2-3.) Appellants have put forth no material evidence refuting that PacWest lacks the necessary relationships with Clark Fork and Wild Horse beyond PacWest’s “contractual relationship” with Clark Fork. (*E.g.*, Appellants’ Opening Br., pp. 8, 15.) PacWest’s contractual relationship with Clark Fork, however, undisputedly consists of PacWest submitting purchase orders to Clark Fork for products Clark Fork produces. (Dkt. 66, Ex. 1, 25:2-23; App. 1, p. 5.) Under Appellants’ strained interpretation of the negligent selection doctrine, any customer who purchases product from an entity that involves allegedly dangerous loading operations could be held liable for any injuries caused to third parties while the product it purchased was being loaded. Appellants’ interpretation stretches the doctrine beyond reason and should be rejected.

Appellants’ reliance on the various *Restatement* comments/illustrations and the Court’s precedent holding that logging operations and transporting logs may implicate vicarious liability is similarly misplaced. As Appellants stress, Illustration 2 of *Restatement (Second) of Torts* § 411 (1965), provides that a company that negligently engages a contractor to *haul* logs can be held vicariously liable if it fails to exercise reasonable care in retaining the contractor. (Appellants’ Opening Br., pp.

14-16.) As Appellants also emphasize, Comment d to *Restatement (Second) of Torts* § 416 (1965), and the Court’s holding adopting it in *Beckman v. Butte-Silver Bow County*, 2000 MT 112, 299 Mont. 389, 1 P.3d 348, similarly provide that a company that employs a contractor to *transport* logs can be held vicariously liable for the actions of the contractor because the activity is inherently dangerous. (Appellants’ Opening Br., p. 17.) Appellants’ authority therefore provides that a company may be held liable for the actions of the driver of a log-transporting truck because the company retained the driver to perform a service on the company’s behalf, *i.e.*, an employer-contractor relationship. Appellants’ authority does not stand for the proposition that the company that purchases the logs can be held liable for the actions of the company from which it purchased the logs or the company that loaded the logs, when it has no authority or control over either of the companies. The Court should decline to adopt Appellants’ tortured interpretation of *Restatement (Second) of Torts* §§ 411 & 416 (1965), and *Beckman*.

The District Court correctly concluded that PacWest does not have an employer-contractor relationship with Clark Fork that would invoke the negligent-selection doctrine: “PacWest was not a general contractor and as such it has not selected any subcontractors. PacWest was Clark Fork Posts’ customer.” (Dkt. 119, p. 21.) Appellants have failed to put forth material evidence demonstrating otherwise and the Court “has no duty . . . to anticipate or speculate as to the existence of [such]

material facts.” *See Kostelecky*, ¶ 18. The District Court did not err in declining to invoke the negligent-selection doctrine and its Order should be affirmed.

II. Whether the District Court correctly concluded that the inherently dangerous activity exception does not impose a duty on PacWest because PacWest did not have an agency relationship with Clark Fork or Wild Horse.

Appellants have failed to satisfy the pre-requisite to applying the inherently dangerous activity exception because they have not established that PacWest has an agency relationship with Clark Fork or Wild Horse. The District Court therefore correctly rejected Appellants’ argument that PacWest is vicariously liable for the alleged negligence of Clark Fork and Wild Horse simply because the work they performed is allegedly inherently dangerous. In repeating the same arguments on appeal, Appellants disregard the District Court’s rationale and the Court’s longstanding precedent holding that the inherently dangerous activity exception cannot apply when there is no agency relationship between the relevant parties. Accordingly, even if loading logs onto trucks is an inherently dangerous activity, which PacWest does not concede, the Court should decline Appellants’ attempt to invoke the exception because Appellants’ position “simply begs the question and entirely misses the point.” *See Dvorak v. Matador Serv.*, 223 Mont. 98, 103-04, 727 P.2d 1306, 1309 (1986).

The inherently dangerous activity exception must be applied narrowly. *Beckman*, ¶ 25. The Court has repeatedly held that the exception’s applicability is

predicated upon the relationships between the relevant parties. *Paull v. Park County*, 2009 MT 321, ¶ 22, 352 Mont. 465, 218 P.3d 1198 (holding that the “first step in applying [the exception] to the [defendant] is determining whether it was in a contractor-independent contractor relationship with [the tortfeasor]”); *Dick Irvin, Inc.*, ¶¶ 48-50 (holding that the exception does not apply when the defendant is not the tortfeasor’s “employer or principal”); *Dvorak*, 223 Mont at 104, 727 P.2d 1306 at 1309 (holding that a party cannot be liable under the exception when “the agency relationships which form the framework of the doctrine[] are absent”). When the agency relationship upon which liability under the exception relies is not present, as is the case here, the Court “need not inquire into whether [the activity] is inherently dangerous to conclude [that the alleged principal] was not vicariously liable for” the alleged tortfeasor’s torts. *Dick Irvin, Inc.*, ¶ 50; accord *Dvorak*, 223 Mont at 103, 727 P.2d 1306 at 1309 (holding that analyzing the exception is “to no avail [when] the underlying agency relationship upon which vicarious liability rests does not exist”).

Because the exception only applies if the parties have an agency relationship, analyzing whether an agency relationship exists is the “first step” in applying the exception. *Paull*, ¶ 22. “An agent is one who represents another, called the principal, in dealings with third persons.” Section 28-10-101, MCA. “[A]gency is not presumed but must be proven and the burden of proving it must be borne by the party

who asserts it.” *Elkins*, 153 Mont. at 166, 455 P.2d at 333. It is well-established that “[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf *and subject to his control*.” *Weingart v. C&W Taylor Partnership*, 248 Mont. 76, 80, 809 P.2d 576, 579 (1991) (emphasis in original); *accord Wolfe v. Schulz Refrigeration*, 188 Mont. 511, 517-18, 614 P.2d 1015, 1018-19 (1979) (“Integral to any agency relationship are the elements of consent and control.”). If the alleged principal does not control the alleged agent, there can be no agency as a matter of law. *Weingart*, 248 Mont. at 80, 809 P.2d at 579 (holding that “[a]n agency relationship did not exist . . . because the [alleged agents] were not subject to the [alleged principals’] control”); *Wolfe*, 188 Mont. at 517-18, 614 P.2d at 1018-19 (reversing an agency determination because the evidence did not show “sufficient control to establish an agency relationship”).

Here, the undisputed material facts confirm that PacWest did not have an agency relationship with Clark Fork or Wild Horse. The record before the Court undisputedly establishes that PacWest had no control or right to control Clark Fork or its operations, including the product-loading and safety measures implemented by Clark Fork at its facility. (Dkt. 66, Ex. 1, 27:10-31:17, 35:17-36:16, 46:2-48 :17; App. 1, pp. 5-7, 10.) The record also undisputedly establishes that PacWest had “zero involvement with Clark Fork’s relationship with Wild Horse and its loading

operations.” (Dkt. 66, Ex. 1, 36:13-16; App. 1, p. 7; Dkt. 66, Ex. 2, 12:18-13:23, 15:2-17:4, 120:1-25; App. 2, pp. 2-4; Dkt. 90, Ex. A; App. 3, pp. 2-3.)

By failing to analyze whether an agency relationship exists, Appellants have chosen to disregard their burden of establishing the first step in determining whether the exception upon which they rely is even applicable. *See Elkins*, 153 Mont. at 166, 455 P.2d at 333; *Paull*, ¶ 22. Appellants have produced no evidence—much less material and substantial evidence—refuting any of the above evidence regarding the parties’ relationships. Instead, Appellants simply fall back on their wholly unsupported position that Clark Fork and Wild Horse were PacWest’s “subcontractors” because they had “contractual relationships.” Appellants’ unsupported assertions and pleading allegations fail to satisfy their burden on summary judgment and the Court “has no duty . . . to anticipate or speculate as to the existence of [such] material facts.” *See Kostelecky*, ¶ 18. The undisputed Rule 56 record therefore supports the District Court’s conclusion that Clark Fork and Wild Horse were not PacWest’s agents, as a matter of law. *E.g.*, *Weingart*, 248 Mont. at 80, 809 P.2d at 579; *Wolfe*, 188 Mont. at 517-18, 614 P.2d at 1018-19.

Appellants’ own authority supports the rule that the inherently dangerous activity exception’s applicability is contingent upon the underlying relationship between the parties. In *Beckman*, the City of Butte, against whom the exception was asserted, entered into an agreement with the tortfeasor regarding the inherently

dangerous activity, digging a trench for municipal utility lines. *Beckman*, ¶ 6. Because the utility lines would become part of the public water system, the City required the tortfeasor to dig the trench to the City's specifications using methods conforming with the City's requirements. *Id.*, ¶¶ 6-7. The City also required the tortfeasor to obtain the City's approval of the plans for digging the trench and obtain a permit to dig the trench. *Id.*, ¶¶ 7, 38. The permit required the City to monitor the trenching activities and the City's employees were present during the trenching process. *Id.*, ¶ 38.

The parties' relationships in *Beckman* are easily distinguishable from the relationship between PacWest and the alleged tortfeasors here. As Mr. Yoder testified, and the District Court concluded, PacWest is simply one of Clark Fork's "customers" and PacWest's purchase order for the implicated load of bundles is the extent of PacWest's relationship with Clark Fork for purposes of the incident. (Dkt. 66, Ex. 1, 25:2-23, 46:19-20, 48:20-50:2; App. 1, pp. 5, 10-11; Dkt. 119, p. 21.) The City in *Beckman* was not the alleged tortfeasor's "customer" purchasing product from the alleged tortfeasor; it was the permitting entity that entered into an explicit agreement controlling the allegedly tortious activity that granted the City the authority to review the plans for the allegedly tortious activity, dictate the methods used and specifications for completing the allegedly tortious activity, and monitor the activity to ensure the alleged tortfeasor complied with the agreement and

approved plans, all of which the City did. *Beckman*, ¶¶ 6-7, 38.

Unlike in *Beckman*, PacWest had no agreement of any kind with Clark Fork or Wild Horse about how they were to load the product, did not instruct Clark Fork or Wild Horse how to load the trailer, did not review or approve Clark Fork's or Wild Horse's procedures for loading the trailer, did not oversee how Clark Fork and Wild Horse loaded the trailer, and had no representatives on site during the loading operation. (Dkt. 66, Ex. 1, 35:17-36:16; App. 1, pp. 7; Dkt. 66, Ex. 2, 12:18-13:23, 15:2-17:4, 120:1-25; App. 2, pp. 2-4; Dkt. 90, Ex. A; App. 3, pp. 2-3.) The parties' relationships in *Beckman* are distinct from the relationships at issue here and the Court should accordingly reject Appellants' position that *Beckman* stands for the proposition that the inherently dangerous activity exception applies regardless of the parties' relationship. Additionally, as addressed above, the fact that *Beckman* adopts the *Restatement* example of hauling logs is inapposite to the situation here because the *Restatement's* example only makes PacWest potentially liable if Mr. Blanchard negligently injured a third party, and Appellants' arguments otherwise should be disregarded.

The Court should likewise disregard the Appellants' contentions that "the District Court erroneously conflated the three disjunctive *Beckman* exceptions by importing the element of control" into the inherently dangerous activity exception. (Appellants' Opening Br., p. 17-18.) First, Appellants' position that exception (3) is

the only exception that requires the element of control ignores that the exception explicitly applies when a contractor “*negligently exercises control reserved* over a subcontractor’s work.” *Beckman*, ¶ 12 (emphasis added). The exception’s plain language is concerned with how the contractor exercises the control it has over the subcontractor’s work; not whether the contractor has control to begin with. *See e.g., Beckman*, ¶¶ 30-37 (analyzing the exercise of control under the third exception). In fact, the exception’s use of “reserved” to describe the control the contractor retains over the subcontractor’s work indicates that the contractor had control to begin with, which makes sense since the contractor ultimately controls the project.

The Court’s precedent makes clear that this premise of control underlies all relationships in which vicarious liability can be asserted, including under the inherently dangerous activity exception. *E.g., Paull*, ¶ 22; *Dick Irvin, Inc.*, ¶¶ 48-50; *Dvorak*, 223 Mont at 104, 727 P.2d 1306 at 1309. Again, the “first step in applying [the exception] to [PacWest] is determining whether it was in [an agency] relationship with [the tortfeasors].” *Paull*, ¶ 22; *accord, Dick Irvin, Inc.*, ¶¶ 48-50; *Dvorak*, 223 Mont at 104, 727 P.2d 1306 at 1309. Whether an agency relationship exists hinges on whether the alleged principal has the right to control the alleged agent. *E.g., Weingart*, 248 Mont. at 80, 809 P.2d at 579; *Wolfe*, 188 Mont. at 517-18, 614 P.2d at 1018-19. According to the Court’s precedent, then, determining whether the exception applies mandates an initial determination about whether the

element of control is present. Nothing in *Beckman* overturns this precedent and the Court should reject Appellants' unsupported arguments otherwise.

The Court has repeatedly held that a party asserting that the inherently dangerous activity exception applies must do more than simply establish that the activity is inherently dangerous, as the Appellants argue; the party must first establish that the underlying legal relationship upon which vicarious liability exists is present between the relevant parties. *Paull*, ¶ 22; *Dick Irvin, Inc.*, ¶¶ 48-50; *Dvorak*, 223 Mont at 104, 727 P.2d 1306 at 1309. There is no such relationship here because PacWest “was not [Clark Fork’s or Wild Horse’s] employer or principal” and Clark Fork and Wild Horse were “not acting as [PacWest’s] agent[s].” *See Dick Irvin, Inc.*, ¶ 50. Appellants provide “no authority on which to base vicarious liability where there is essentially no relationship between [PacWest] and the alleged tortfeasor[s].” *Id.* The Court accordingly “need not inquire into whether [loading bunks] is inherently dangerous to conclude that [PacWest] was not vicariously liable for [Clark Fork’s and Wild Horse’s alleged] torts.” *Id.*

The District Court correctly concluded that Appellants have not satisfied the first step in applying the inherently dangerous activity exception because they have failed to offer any evidence establishing that Clark Fork and Wild Horse were acting as agents of PacWest in relation to the underlying incident. The District Court was accordingly correct in holding that PacWest did not owe Mr. Blanchard a duty of

care under the inherently dangerous activity exception as a matter of law. The District Court's Order should be affirmed.

CONCLUSION

The undisputed Rule 56 record establishes that no one from PacWest was present for, participated in, or was involved in any way with the events leading to Mr. Blanchard's injury. (Dkt. 66, Ex. 1, 53:5-54:2; App. 1, p. 12.) The undisputed Rule 56 record also establishes that PacWest had no authority or control, express or implied, over either Clark Fork or Wild Horse or any aspect of their operations. (Dkt. 66, Ex. 1, 27:10-31:17, 35:17-36:16, 46:2-48 :17; App. 1, pp. 5-7, 10; Dkt. 66, Ex. 2, 12:18-13:23, 15:2-17:4, 120:1-25; App. 2, pp. 2-4; Dkt. 90, Ex. A; App. 3, pp. 2-3.) Because the theories underlying Appellants' vicarious liability arguments require that the relevant parties have certain legal relationships, and PacWest undisputedly does not have these threshold relationships with either alleged tortfeasor, PacWest is entitled to judgment as a matter of law as to Appellants' claims. The District Court's Order should be affirmed.

DATED this 22nd day of October, 2025.

CHRISTENSEN & PREZEAU, PLLP

By: 

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 11(4)(e), Mont. R. App. P., that the Answer Brief is submitted in compliance with the Montana Rules of Appellate Procedure by using the Times New Roman font, proportionately spaced 14 point typeface, double-spacing except as allowed under Rule 11, and the word count is 6,930 words.

DATED this 22nd day of October, 2025.

By: _____

A handwritten signature in blue ink, appearing to be "C. P. [unclear]", written over a horizontal line.

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