FILED
11/10/2025
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 25-0409

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

STEVE and ROXANNE BLANCHARD
Appellants,
v.

Appellees.

APPELLANTS' REPLY 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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I. PacWest Fails to Establish Summary Judgment Was Appropriate.

A. Liability for Negligent Selection of a Contractor Is Based Upon the Principal's Negligence; It Does Not Require Demonstrating Control or Agency.

Either to create a red herring or through misunderstanding, PacWest argues Blanchard seeks to impose *vicarious liability* upon PacWest through negligent selection of a contractor. *See* PacWest Resp. at 18. Springboarding from the false premise, PacWest argues Restatement (Second) of Torts § 411 "requires an agency-like relationship between the parties before the negligent selection doctrine is applicable." PacWest Resp. at 17. This is wrong.

Liability for negligent selection of a contractor is based on the "principal's own negligence in hiring or selecting an independent contractor." *Ruh v. Metal Recycling Servs., LLC*, 439 S.C. 649, 660, 889 S.E.2d 577, 583 (2023). Importantly, it "**is not a form of vicarious liability** nor is it an exception to the general rule that a principal is not liable for the negligence of the independent contractor." *Id.* (emphasis added) (*citing and discussing* Restatement (Second) of Torts § 411).

The focus of the negligent selection claim is *PacWest's own negligence* in sending Blanchard to pick up the log bundles at the dangerous facility of PacWest's selected contractor—Clark Fork—and not whether PacWest exercised sufficient control over Clark Fork to create vicarious liability.

In fact, demonstrating an agency relationship between PacWest and Clark Fork is unnecessary. As the Supreme Court of Michigan explained:

> The trial court also found that plaintiff's actions were barred because Michael Wood was an independent contractor. First of all, one of plaintiff's contentions was that defendant was negligent in employing or hiring Mr. Wood, a person with a poor driving record and a history of intoxication, as a traveling salesman in a job that required extensive driving. **Under this theory it would be unnecessary for plaintiff to show any agency relationship between Mr. Wood and defendant. This asserted negligence was negligence on the part of defendant itself, not on the part of its agent**.

Lincoln v. Fairfield-Nobel Co., 257 N.W.2d 148, 150 (1977) (emphasis added).

PacWest's argument—endorsed by the District Court—that Blanchard must prove an "agency-like" relationship in order to establish "vicarious liability" under a negligent selection theory is wrong. PacWest is responsible for its own negligence in selecting the dangerous Clark Fork facility and sending Steve Blanchard there to pick up PacWest's log bundles.

B. The Necessary Contractor/Independent Contractor Relationship Exists Between PacWest and Clark Fork.

Citing the District Court, PacWest argues—contrary to its own admission—that no contractor-subcontractor relationship existed between PacWest and Clark Fork Posts. PacWest Resp. at 1. Contrary to PacWest's legally unsupported argument, various courts have recognized a contractor/independent contractor

relationship in circumstances where a far more tenuous relationship exists between a saw mill or sawyer (such as Clark Fork) and timber company (such as PacWest).

In *Perkinson v. Thomas*, a sawyer named Lucye who was "buying, cutting and delivering the logs at the mill was carrying on an independent business, performing his own work according to his own methods, using his own equipment, employing his own servants and exercising exclusive supervision over them…**was an independent contractor**" of Thomas. 164 S.E. 561, 562 (1932) (emphasis added).

In *Ingram v. Parrish*:

> Parrish would cut the timber of the sizes set out in the contract of purchase between Allen and the seller, and that Allen would direct him as to what size boards to cut it into; that Allen did not direct as to when the timber was to be cut, but that Parrish had two years to carry out the contract; that Parrish owned his sawmill and his trucks and Allen had no interest therein; that Allen had no authority to control the time, manner or means of sawing and hauling the timber, and had no right to, and did not, exercise any authority as to whom and what men were employed by Parrish.
>
> **We think that under this state of facts the evidence discloses that Parrish was an independent contractor.**

58 Ga. App. 463, 198 S.E. 842, 842 (1938) (emphasis added).

In *Copeland v. Cherry*:

> [T]he timber company was merely interested in obtaining the lumber after it was sawed in accordance with the specifications. Cherry received $5 per thousand feet to saw the timber into lumber, and he employed his own hands and paid them. The timber company had no right to control the operation of the mill…. Taking the evidence as a whole, especially in view of the written

> evidence of the contract, **we are of the opinion that Cherry was an independent contractor**.

95 S.W.2d 1275, 1278–79 (1936) (emphasis added).

In *Moore, for Use of Chriceol v. Cochran & Franklin Co.*: "Defendant's only obligation … was to pay when the timber was delivered, and, except for designating the kind and size of logs needed, this was all that it did…. **Bynum's relationship with defendant was that of independent contractor**." 5 So. 2d 33, 34 (La. Ct. App. 1941) (emphasis added); s*ee also City of Evansville v. Senhenn*, 151 Ind. 42, 51 N.E. 88, 90 (1898) (Sawmill independent contractor even where the only relation existing was that of buyer and seller.)[1]

Here, PacWest admits a contractual relationship with Clark Fork exists. (Dkt. 82, Exh. 1) PacWest regularly purchased log products from Clark Fork, and purchased most of Clark Fork's inventory. (Dkt. 82, Exh. 1, at 27:12–16; *Id.* Exh. 2, at 23:14–23) PacWest contacted Clark Fork to order production of the logs and then, when they were fabricated, PacWest contacted Blanchard and directed him to pick them up at the Clark Fork facility on specified dates so that the logs could be transported to the next facility. (Dkt. 82, Exh. 12)

[1] Courts have long recognized that, due to the dangerous nature of the timber industry, efforts to insulate from liability by those profiting from the dangerous work should be viewed skeptically. *See e.g., Sones v. S. Lumber Co.*, 60 So. 2d 582, 585 (1952).

Because Clark Fork is, at a minimum, an independent contractor of PacWest, Blanchard may proceed against PacWest for its negligence in selecting that contractor and sending Blanchard to Clark Fork's dangerous facility. As shown below, Blanchard may also proceed on a vicarious liability theory deriving from the Inherently Dangerous Activity doctrine.

C. The District Court Erred by Dismissing Blanchard's Negligence Claim Arising from the Inherently Dangerous Activity Exception.

The Inherently Dangerous Activity Exception creates liability in two distinct ways. First, the Exception holds that where acts performed by an *independent* contractor are inherently dangerous, a principal is held vicariously liable for injury caused by the independent contractor's failure to employ precautions necessary to mitigate the dangerous nature of the work. *See Dvorak v. Matador Serv., Inc.*, 223 Mont. 98, 102, 727 P.2d 1306, 1308 (1986).

Second, "another species of the inherently dangerous exception" holds that "[a]n employer of an independent contractor has a duty to provide for precautions when the employer knows or should know that the work engaged in by the independent contractor is inherently dangerous." *Beckman v. Butte-Silver Bow Cnty.*, 2000 MT 112, ¶ 26, 299 Mont. 389, 399, 1 P.3d 348, 354. "This is a rule of personal or individual liability separate and distinct from an employer's vicarious liability." *Id.*

PacWest argues the Exception is inapplicable because the "underlying agency relationship upon which vicarious liability rests does not exist." PacWest Resp. at 1 (citing the District Court's Order at 17). This is erroneous. An agency relationship independently sufficient to create vicarious liability is unnecessary. Rather, the Exception both 1) imposes a non-delegable and direct duty upon the principal and 2) imputes liability for the actions of *independent* contractors where vicarious liability otherwise would not exist. *Beckman*, ¶ 26.

"If the contractor is under the control of the employer, he is a servant," and therefore vicarious liability exists regardless of the applicability of the Exception. *Kimball v. Indus. Acc. Bd.,* 138 Mont. 445, 449–50, 357 P.2d 688, 691 (1960).

However, if a contractor is "not under such control, he is an independent contractor." *Id.* In these "instances of safety where the subject matter is inherently dangerous circumstances," the Montana Court has imposed "a non-delegable duty exception." *See Maguire v. State*, 254 Mont. 178, 184, 835 P.2d 755, 759 (1992) (overruled on other grounds).

An "independent contractor," by definition, "has been and will continue to be free from control or direction" from the principal. Mont. Code Ann. § 39-71-417; *Lundberg v. Liberty Nw. Ins. Co.*, 268 Mont. 499, 503, 887 P.2d 156, 159 (1994). The Exception applies where the principal has engaged an *independent* contractor, who is necessarily free from control by the principal. *See Dvorak*, 223 Mont. at 102;

Beckman, ¶ 26 ("An employer of an independent contractor has a duty to provide for precautions when the employer knows or should know that the work engaged in by the independent contractor is inherently dangerous.")

PacWest's position that the "premise of control underlies all relationships in which vicarious liability can be asserted, including under the inherently dangerous activity exception" is unsupported and ignores the "individual liability separate and distinct from an employer's vicarious liability" recognized in *Beckman*, ¶ 26. PacWest Resp. at 26.

PacWest relies upon *Paull v. Park Cnty.*, 2009 MT 321, ¶ 22, 352 Mont. 465, 470, 218 P.3d 1198, 1202, and *Dick Irvin Inc. v. State* 2013 MT 272, ¶ 50, 372 Mont. 58, 70, 310 P.3d 524, 532, neither of which support PacWest's position.

Paull states that "the first step in applying [the Exception] to the County is determining whether it was in a contractor-independent contractor relationship with AEI." *Paull*, ¶ 22. That is true, and here a contractor-independent contractor relationship exists between PacWest and Clark Fork. *See discussion supra. Paull* does not, however, require the exercise of *control* over the independent contractor. To the contrary, in *Paull* the independent contractor, AEI, "was left entirely to its own devices, at least as far as the State and County were concerned." *Paull*, ¶ 13.

Nor does *Dick Irvin* support PacWest. There, the Court found "essentially no relationship between the State and the alleged tortfeasor." *Dick Irvin*, ¶ 50. The State

did not request in *any capacity* for the roadwork at issue, nor was the State even aware that the work was occurring. *Id.*, ⁋⁋ 9, 50. By contrast, PacWest directed Blanchard on this and several other occasions to pick up PacWest's logs at the Clark Fork facility. PacWest purchased most of Clark Fork's inventory and PacWest sent a representative to the Clark Fork facility. PacWest admits it has a contractual agreement with Clark Fork and does not dispute that PacWest coordinated to ensure its logs were picked up by Steve Blanchard at the Clark Fork facility.

The Exception promotes safety by preventing principals, such as PacWest, from avoiding responsibility by offloading the performance of dangerous work to contractors who fail to take precautions necessary to mitigate the dangers inherent in the work. The Court should not undermine the Exception by affirming the District Court.

D. PacWest Owes a Duty.

Duty "is measured by the scope of the risk which negligent conduct foreseeably entails. … The question is whether the defendants reasonably could have foreseen that their conduct could have resulted in injuries to the plaintiff, though the specific injury need not be foreseeable." *Gourneau ex rel. Gourneau v. Hamill*, 2013 MT 300, ¶ 12, 372 Mont. 182, 311 P.3d 760. "The risk reasonably to be perceived defines the duty to be obeyed." *Fisher v. Swift Transp. Co., Inc.*, 2008 MT 105, ¶ 21, 342 Mont. 335, 181 P.3d 601.

This Court has emphasized the "long-standing principle of tort law that one who assumes to act . . . may thereby become subject to the duty of acting carefully, if he acts at all." *Nelson v. Driscoll*, 1999 MT 193, ¶ 37, 295 Mont. 363, 983 P.2d 972.

Further, and importantly, where there is a question as to whether the act of a third-party in causing harm to the plaintiff is foreseeable to the defendant, this is a "fact intensive inquiry" not typically susceptible to summary judgment. *S.W. v. State*, 2024 MT 55, ¶ 43, 415 Mont. 437, 454. *Fisher*, ¶ 48 (Question of foreseeability of a third party's act remanded for trial). And the 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. *Weber v. Interbel Tel. Coop.*, 2003 MT 320, ¶ 5, 318 Mont. 295, 80 P.3d 88.

In this case, PacWest contacted Blanchard and directed him to pick them up at the facility of its chosen contractor – Clark Fork – on the specified date. Opening Br. at 3-7. PacWest knew, or should have known, that the facility was dangerous and that Clark Fork would subcontract to load the logs. *Id.* PacWest also knew, or should have known, that the process of loading logs was incredibly dangerous, and the precautions necessary to mitigate the hazard were not implemented at the Clark Fork facility. *Id.* PacWest owes a duty to Blanchard, therefore his claim may proceed. *Paull*, ¶ 12.

II. Nautilus Fails to Establish Summary Judgment Was Appropriate.

A. Questions of Fact Regarding Ownership of Wild Horse Trading Exist.

Nautilus does not dispute coverage exists if Jason is the sole owner of Wild Horse Trading.

Nautilus argues Jason obtained ownership of WH Trading no sooner than December 7, 2023. (Dk. 162 at 16, 20) However, Nautilus's agent Tiffani Sheehan (formerly Weatherly) knew Jason owned WH Trading when she filled out the Nautilus application in 2020. Her file includes the following:

INSURED INFORMATION	REPORT INFORMATION	
WILDHORSE TRADING CO, LLC 109 W LYNCH PLAINS, MT 59859	Policy #:	CPS3306488
	Agent:	Tiffani Weatherly (135068)
	Order Date:	12/18/2019
	Inspection Date:	01/07/2020
	Effective Date:	10/16/2019

Business Operations

The insured operates a retail rental equipment and 2nd hand store. At this location, they sell used clothes, household supplies, and decorations. The insured Jason Subatch has owned this business since 06-2019. We interviewed Mr. Jason Subatch whose position is owner.

(Dkt. 149, Exh. 2 at 1, 6)

Nautilus also ignores that, on November 1, 2023 (before Nautilus claims Jason obtained ownership), WH Trading represented:

> 7 Mr. Subatch is the owner of Wild Horse Trading. Mr. Subatch will have general knowledge and information regarding the alleged acts and claims in the
> 8 underlying action. Such factual information bears directly on the issue of coverage in this action.

(Dkt. 145, Exh. 6 at 2)

In fact, Nautilus's internal investigation into this case (conducted on Dec. 5, 2022, *one year before* Nautilus argues Jason obtained ownership) revealed Jason employed Hart through his entity, WH Trading:

Insured Interview:

Jason Subatch
406-303-0133
P.O. Box 1086 Plains, MT 59859
Email: wildhoursetrco1@gmail.com

On 11/30/2022, I spoke with the Unsured. Mr. Subatch detailed the events that occurred on the loss date and answered the following questions.

a. Discuss the facts of this incident
Mr. Subatch stated that his employee Ryan Hart had been operating the forklift / Loader and placing "bunks" of long logs on the claimants trailer (Steve Blanchard).

b. Determine who was the actual employer of Ryan Hart on 8/12/22 at the Clark Fort Posts facility
Ryan Hart is an employee of Wild Horse Trading Co. He has worked for Mr. Subatch for approximately eight months.

(Dkt. 145, Exh. 12)

In *Scottsdale v. Wild Horse Trading, et.al.*, Judge Molloy likewise concluded Jason "is an Insured as he is a member… and manager …of Wild Horse [Trading] and "in October 2, 2019, Wild Horse [Trading] listed [Jason] Subatch as the owner of the company…" *Scottsdale Ins. Co. v. Wild Horse Trading Co., LLC*, No. CV 23-48-M-DWM, 2024 WL 3227125, at *6 (D. Mont. June 28, 2024).

While Nautilus relies heavily on its allegation Scottsdale was the intended insurer for the work at issue, Scottsdale stridently claimed the post-loading work was not covered and filed a declaratory relief action based on this belief. *Id.* at *8.

Just like Nautilus, Scottsdale filed the coverage action against Jason, not Tyler. *Id.* at *1. No party argued Tyler was Scottsdale's insured or a necessary party under Mont. R. Civ. Pro. 19, which would certainly be true if Nautilus's claim that Tyler exclusively owned Wild Horse until December 7, 2023 was accurate.[2] *See State ex rel. Slovak v. Dist. Ct. of Thirteenth Jud. Dist., In & For Yellowstone Cnty.*, 166 Mont. 485, 489, 534 P.2d 850, 852 (1975) (Insureds are real parties in interest in litigation). To the contrary, Scottsdale *added* Jason Subatch as a party to "ensur[e] that the present action fully and fairly adjudicates all its coverage obligations. *Scottsdale Ins. Co. v. Wild Horse Trading Co., LLC*, No. CV 23-48-M-DWM, 2024 WL 1607086, at *2 (D. Mont. Apr. 12, 2024).

Consistent with the above, WH Trading and Jason submitted the following Agreed Fact:

> 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 at 3)

Nautilus requests this Court ignore the Fact, and rely instead on unsigned and unverified discovery responses. (*See* Dkt. 128, Exh. B) However, unverified

[2] Under Scottsdale's occurrence-based policy, the owner of WH Trading on the date of the accident is the Insured. *Scottsdale Ins. Co. v. Wild Horse Trading Co., LLC*, 2024 WL 3227125, at *1

discovery responses are insufficient to rely upon for the purposes of Rule 56. *See Smith v. Burlington N. & Santa Fe Ry. Co.*, 2008 MT 225, ¶ 39, 344 Mont. 278, 292, 187 P.3d 639, 649. The responses Nautilus relies upon were never signed or verified by Jason or Tyler.

The Agreed Facts were entered while the District Court's decision was interlocutory. On de novo review, this Court is "free to examine the entire record" on appeal. *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶ 14, 411 Mont. 269, 285, 525 P.3d 1183, 1193. Nautilus provides no authority or rationale to explain why it should have authority to prevent its insured from stating a fact in litigation that is consistent with his many previous representations about his sole ownership of WH Trading.

Nautilus fails to eliminate questions of fact regarding ownership and summary judgment was inappropriate. The only potentially conclusive document, the Articles of Organization, do not exist, or at least have not been found. Nautilus's reliance on a document from the Montana Secretary of State's office – but not from the Blackfeet Tribe where the entity was formed – demonstrating Tyler was a manager – but not necessarily a member – in 2022 is not dispositive. (*See* Dkt. 129 at Exh. D; Dkt. 115) Rather, the record contains numerous representations from Jason and WH Trading from 2019 to the present that Jason owned WH Trading. At a minimum, a trial on ownership is required.

B. Nautilus Fails to Establish the Absence of Ambiguity or Inapplicability of the *Idem Sonans Doctrine.*

Burying the Court with thousands of pages of extrinsic evidence, Nautilus convinced the District Court that Subatch was involved with two separate entities: the LLC *Wild Horse* Contracting Services, and the sole proprietorship *Wildhorse* Contracting Services and that the Nautilus Policy only insures the sole proprietorship. App. at 31. The District Court rejected argument and evidence that the difference in spelling was a mistake borne of Nautilus' agent's sloppiness, accepting Nautilus's claim Ms. Sheehan purposefully used a different spelling and carefully differentiated between distinct entities.

Nautilus is wrong. Sheehan filled out the Nautilus application seeking coverage for "Jason Subatch dba Wildhore Contracting Services." (Dkt. 145, Exh. 7) Sheehan *knew* Jason owned WH Trading at the time. (Dkt. 145, Exh. 12) And, "Wildhorse Contracting Services is an assumed business name of [WH Trading.]" App. at 7.

While Nautilus claims Jason unambiguously intended the Scottsdale policy to cover the work at issue, Scottsdale claimed the opposite. According to Scottsdale, *Nautilus* insured the assumed business name of WH Trading (Wildhorse Contracting Services) whom Scottsdale believed may have directed Hart:

> Wild Horse [Trading] conducts business under approximately eight assumed business names. (SDF ¶ 48.) <u>One of these companies was insured by Nautilus</u>

> at the time of the incident. As such, it is not unreasonable for Scottsdale to reserve its right on Hart's status as an insured.

Scottsdale Ins. Co. v. Wild Horse Trading Co., LLC, No. CV 23-48-M-DWM, Dkt. 61 at 19 (emphasis added).

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.*

Nautilus's contrary argument is premised upon a one-sided and self-serving interpretation of extrinsic evidence. A reasonable reading of this Policy permits coverage on these facts. After all, *Jason* sent his employee, Hart, who answered exclusively to Jason, to load the bundles. (Dkt. 142, Exh. 3; Dkt. 145, Exh. 12) And, Clark Fork delivered the check for the work at issue to Jason, made out to *Wildhorse* Contracting. (Dkt. 145, Exh. 10)

Further, the "slight variation in spelling" noted by the District Court (failure to capitalize "h" and conflation to a single word) where "the same sound is preserved" satisfies the test for *idem sonans*. See Opening Br. at 44-45. Based on these facts, it is entirely reasonable – if not required by the doctrine of *idem sonens* – to read the Policy to contain a specific reference to the assumed business name of WH Trading. The District Court erred by drawing all reasonable inferences in favor

of Nautilus – an insurer seeking summary judgment – contrary to all established maxims of insurance law and Rule 56.

C. Nautilus Fails to Distinguish *Modroo* and Other Authorities.

Nautilus claims *Modroo* is distinguishable because, there, a “disparity between the UIM Named Insured block and the Business Auto Coverage Form block” existed. Nautilus Resp. at 21. As Nautilus points out, in *Modroo* the named insured block in the Declarations identified: “CASSIUS H & MARY J HARDY & HARRY MODROO DBA MODROO FARM” whereas, the named insured block in the UIM section identified: “CASSIUS H & MARY J HARDY &.” Nautilus Resp. at 21. Nautilus claims the ambiguity resulted solely from this disparity. *Id.* While Blanchard disagrees with this narrow reading, Nautilus nevertheless overlooks the same inconsistency in its own Policy.

In the Nautilus Declarations, the named insured block identified “Jason Subatch dba Wildhorse Contracting Services,” whereas the named insured block on the Schedule of Forms and Endorsements eliminates the dba (just like in Modroo):

POLICY NUMBER: NN1404005

Named Insured: Jason Subatch
Wildhorse Contracting Services

App. at 73–75.

Nautilus argues the inconsistency is irrelevant because the "Who Is An Insured" section unequivocally directs the reader to the Declarations to determine whether the Named insured is an individual or a business. Nautilus Resp. at 18.

The *Modroo* insurer made the same argument:

> Nationwide responds that the language in the UIM endorsement's Named Insured block is irrelevant because the 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.

Modroo, ¶ 27.

The *Modroo* Court responded:

> Nationwide presents a reasonable interpretation of the policy; Nationwide's interpretation, however, is not the only reasonable interpretation. Modroo's contention that the UIM coverage applied to Mary Modroo and Hardy as individuals finds support from the disparity between the UIM Named Insured block and the Business Auto Coverage Form block, in addition to the customary listing of only three individuals in the UIM endorsement's Named Insured block.

Id. ¶ 28.[3]

In response to the many other analogous cases cited by Blanchard, Nautilus only states: "If Nautilus's Policy identified the Named Insured as "Jason Subatch d/b/a Wild Horse Trading Co., LLC," then the cited cases may have some bearing." Nautilus Resp. at 22. Nautilus ignores that "Wildhorse Contracting Services is an

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[3] Adding to the ambiguity, Nautilus's Declarations incorporates other portions of the Policy, including the Forms and Endorsements that Nautilus encourages this Court to ignore. (*See* Dkt. 130, Exh. K at 1)

assumed business name of Wild Horse Trading Co., LLC." App. at 7. An assumed business name is simply another name for an existing individual or entity. Mont. Code Ann. §30-13-201(1)–(3). As conceded by Nautilus, these cases do have bearing because a reasonable reading of the Policy is that the Named Insured is "Jason Subatch d/b/a Wild Horse Trading Co., LLC."

Just like the cases cited by Blanchard on pages 38-39, Nautilus's Policy is ambiguous and one reasonable interpretation is that it specifically names WH Trading through reference of its assumed business name. At the time of application, Nautilus's agent knew Jason owned WH Trading and that it used Wild Horse Contracting Services as an assumed business name. In fact, in this case the entity was operating under that assumed business name as evidenced by the check issued for the services at issue. (Dkt. 145, Exh. 10)

D. Nautilus Does Not Refute that a Misstatement by Its Agent May Not Invalidate Coverage.

On pages 42- 44 of the Opening Brief, Blanchard explained why a mistake by Sheehan (who is Nautilus's agent for the purposes of filling out the application) for the "slight variation" in spelling cannot void coverage. Importantly, Nautilus does not meaningfully reject the operation of law creating agency between Nautilus and Sheehan or distinguish *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 39, 356 Mont.

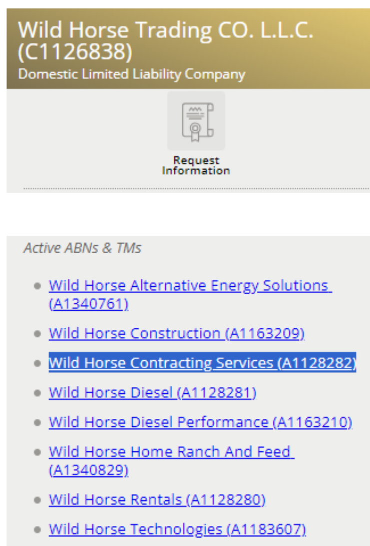
417, 430, 234 P.3d 79, 88 (For purposes of "procuring the insurance and preparing the application, insurance agencies are agents for the insurer.")[4]

Nautilus claims "there is not a shred of evidence" Sheehan made any mistake. Nautilus Resp. at 24. Sheehan clearly made mistakes. For example:

1. Applicant: Jason Subatch DBA Wildhorse Contracting Services

(Dkt. 145, Exh. 7)

Jason asked Sheehan to procure insurance that would defend and indemnify him for all of the Wild Horse operations, including this claim. Opening Br. at 43. As part of its operations, WH Trading has several assumed business names:



(Dkt. 115 at ¶ 61)

[4] While Nautilus suggests Subatch should sue Sheehan for failure to procure, the claim is neither ripe nor necessary because the mistake is imputed to Nautilus by the *Monroe* decision.

If the Court accepts the District Court's logic that the spelling difference is material, Nautilus's agent made an error on the application. Summary judgment was inappropriate.

E. Ryan Hart Is an Insured.

Nautilus relies on the District Court's erroneous conclusion that: "Because Hart is not an employee of the Named Insured, Hart is not an insured under the Policy." (Dkt. 171 at 17) Nautilus ignores the actual Policy language.

The Policy indicates Jason's employees are also Insureds, "but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business." (Dkt. 130 at 46) Even Nautilus, in its motion for summary judgment, conceded: "[A]t the time of the accident"…Ryan Hart was an employee of Jason "in his capacity as a member of WH Trading." (Dkt. 128, at 9)

Notably, Nautilus's internal investigation (conducted on Dec. 5, 2022, *one year before* Nautilus argues Jason obtained ownership of WH Trading) revealed Hart was employed by Jason. (Dkt. 145, Exh. 12 at p. 2-3) ("[Jason] Subatch stated that his employee Ryan Hart had been operating the forklift… Ryan Hart is an employee of Wild Horse Trading Co. He has worked for [Jason] Subatch for approximately eight months.") Hart answered only to Jason and Jason was exclusively responsible for the failure to train Hart. (Dkt. 142, Exh. 3 at 15:2–16:7)

Nautilus claims its concession only "allows for the possibility of Subatch's partial ownership of WH Trading" at the time of the accident, but does not establish sole ownership. *See* Nautilus Br. at 41. But Jason's sole ownership is unnecessary under the Policy for Hart—an employee of Jason in Jason's capacity as a member of WH Trading—to qualify as an Insured. Under the Policy terms, Hart is an additional Insured.

F. Coverage Exists for Jason Subatch dba Wildhorse Contracting Services.

Even if the Policy unequivocally and unambiguously failed to insure Hart or any conduct of WH Trading, which Blanchard disputes, Nautilus ignores and altogether fails to defend the District Court's erroneous conclusion that "no named Defendant is an insured." (Dkt. 171 at 23) Blanchard's operative Complaint names Jason Subatch, dba Wildhorse Contracting Services. (Dkt. 105) Jason Subatch dba Wildhorse Contracting Services never moved for summary relief and remains a defendant. Clark Fork's representative testified he "deal(s)" with Wildhorse Contracting Services, owned by Subatch. (Dkt. 145, Exh. 4) In Nautilus's internal investigation, Subatch admitted that "he [Jason Subatch] owns the loader" that knocked logs onto Steve. (Dkt. 145, Exh. 12 at 3) Clark Fork sent the check for the job to Jason, made out to Wildhorse Contracting. (Dkt. 145, Exh. 10)

While Nautilus argues that its cross-claim (Dkt. 108, ⁋ 55) and WH Trading's answer thereto (Dkt. 118, ⁋ 55)—establish that Jason Subatch, dba Wildhorse

Contracting Services, "was not involved," *i.e., not at fault*, for the accident—Blanchard denied that no-fault allegation. (Dkt. 115, ⁋ 55) The District Court ignored the well-founded denial, in contravention of both Rule 56 and what an "established fact" means in a coverage dispute. *State Farm Mut. Auto. Ins. Co. v. Freyer*, 2013 MT 301, ¶ 26, 372 Mont. 191, 312 P.3d 403; *Cf. Gon v. First State Ins. Co.*, 871 F.2d 863, 869 (9th Cir. 1989).

The alleged no-fault admission was never signed by Jason. It is a representation made by Nautilus's appointed counsel, who withdrew from representing Jason Subatch dba Wildhorse Contracting Services—without Jason's consent—as soon as Nautilus obtained summary judgment for itself. (Dkt. 173) Nautilus's Named Insured remains a Defendant and summary judgment was inappropriate.

DATED this 10th day of November, 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 4,761 words is less than the 5,000 word limit, exclusive of tables and certificates.

RESPECTFULLY SUBMITTED this 10th day of November 2025.

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