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FILED

JUN 27 2003

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

MARK MATHEWS,	)	WCC No. 2001-0294
)	
Petitioner,)	
)	
vs.)	
)	
LIBERTY NORTHWEST INSURANCE CORP.,	)	MOTION RE:
	)	AFFIRMATIVE DEFENSE AND
	)	BRIEF
Respondent/Insurer.)	

MOTION

COMES NOW the above-named respondent pursuant to the Court's order entered at the hearing on June 25, 2003 and moves the Court to rule on its previously raised affirmative defense.

BRIEF

On July 16, 2001 Liberty served its Notice of Affirmative Defense, attached as Exhibit "A," in which is raised the defense of fraudulent inducement.

On July 26, 2001 Liberty served its Supplemental Brief In Support of Affirmative Defense, attached as Exhibit "B."

Attached as Exhibit "C" is the Second Affidavit of Brian Schroeder served on July 2, 2001.

In Mathews v. BJS Construction, 2003 Mont. 116 decided April 29, 2003 the Montana Supreme Court made three holdings at ¶¶ 21, 31 and 35. None of them address Liberty's affirmative defense and none of them preclude this Court from ruling on that affirmative defense.

At ¶ 36 the case was remanded for proceedings consistent with this opinion and there is nothing inconsistent with ruling on Liberty's affirmative defense.

In the underlying decision this Court made the following factual findings. A second affidavit of Brian Schroeder proves the additional uncontroverted facts:

1. A representation: claimant held himself out to BJS Construction as an independent contractor - ¶ 2j.

2. The falsity of the representation: claimant filed a claim for compensation - ¶ 2e.

3. The materiality of representation: BJS Construction would not have hired Mathews if it knew he would later claim to be an employee – second affidavit of ¶ 9.

4. Claimant's knowledge of the falsity of the representation: he filed a claim for compensation - ¶ 2e.

4. The speaker's ignorance of its truth: BJS relied on claimant's statements that he wanted to work as an independent contractor – second affidavit at ¶ 7.

5. Claimant's intent that the false representation should be relied on: claimant held himself out as an independent contractor, admitted in his deposition he was claiming to be an independent contractor and not an employee and he submitted invoices for work with no taxes withheld from his earnings - ¶ 2j.

6. BJS Construction's ignorance of the falsity of the representation: BJS construction relied on claimant's statements that he wanted to work as an independent contractor – second affidavit at ¶ 7.

8. BJS Construction's right to rely on the false representation; MCA §§ 39-71-120 and 401 allowed for independent contractors - ¶ 3.

9. Consequent and proximate injury caused by reliance on the false representation – Mathews Construction workers' compensation carrier having to pay workers' compensation benefits, unless the affirmative defense bars claimant's claim, with possible adverse affect on medication/experience factor and eligibility to receive workers' compensation dividends.

All of the elements of fraudulent inducement have been proved and Mathews' claim should be barred under that doctrine. Northing in the Workers' Compensation Act immunizes a

claimant from forfeiture of eligibility for workers' compensation benefits based on fraudulent inducement.

Claimant's petition on remand should be dismissed with prejudice.

DATED this 27 day of June, 2003.


Larry W. Jones
Senior Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of June, 2003, I served the original of the foregoing MOTION RE: AFFIRMATIVE DEFENSE AND BRIEF, by FAX (406) 444-7798 and first-class mail, postage prepaid, on the following:

Ms. Patricia J. Kessner
Clerk of Court
Workers' Compensation Court
P. O. Box 537
Helena, MT 59624-0537

and a copy of the same to the following:

Geoffrey C. Angel
Angel Law Firm
125 West Mendenhall
Bozeman, MT 59715
Via FAX (406) 585-7654 & U.S. Mail


Cindy Brown Felton

Larry W. Jones
Senior Attorney
Liberty Northwest Insurance Corp.
700 SW Higgins Avenue, Suite 250
Missoula, MT 59803-1429
(406) 543-4933, ext. 140
Attorney for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

MARK MATHEWS,	)	WCC No. 2001-0294
)	
Petitioner,)	
)	
vs.)	
	)	NOTICE OF AFFIRMATIVE
LIBERTY NORTHWEST INSURANCE CORP.,	)	DEFENSE
)	
Respondent/Insurer for)	
)	
BJS CONSTRUCTION, INC.,)	
a Montana corporation,)	
)	
Employer.)	

COMES NOW the above-named respondent and gives notice of its intent to raise the affirmative defense of FRAUDULENT INDUCEMENT, as specifically set forth below.

As previously set forth in Respondent's First Notice Of Additional Contentions, Witnesses & Exhibits, dated March 20, 2001, Respondent asserts that the claimant negligently and/or intentionally misrepresented his employment status to his employer and/or Liberty Northwest. Claimant's misrepresentation supports Respondent's affirmative defense of fraudulent inducement.

Respondent contends that the following nine elements of fraudulent inducement (as set forth in Pare v. Morrison, 241 Mont. 218, 221-222, 786 P.2d 655 (1990) have been proved by the claimant's deposition and Brian Schroeder's affidavits:

1. a representation;
2. the falsity of the representation;

EXHIBIT A
TRANSMITTED TO
CLAIMS DEPT.
7-11-01

3. the materiality of the representation;
4. the speaker's knowledge of the falsity of the representation or the speaker's ignorance of its truth;
5. the speaker's intent that the false representation should be relied upon;
6. the hearer's ignorance of the falsity of the representation;
7. the hearer's reliance on the false representation;
8. the hearer's right to rely on the false representation; and
9. the consequent and proximate injury caused by the reliance on the false representation.

Pare v. Morrison, 241 Mont. 218, 221-22 (1990).

The following affirmative defense is raised only to preserve it if the Court does not grant judgment in Liberty's favor based on the other defenses previously raised.

DATED this 16 day of July, 2001.



Larry W. Jones
Senior Attorney

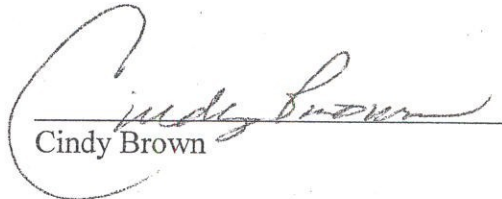
CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of July, 2001, I served the original of the foregoing NOTICE OF AFFIRMATIVE DEFENSE, by FAX (406) 444-7798 and first-class mail, postage prepaid, on the following:

Ms. Patricia J. Kessner
Clerk of Court
Workers' Compensation Court
P. O. Box 537
Helena, MT 59624-0537

and a copy of the same to the following:

Geoffrey C. Angel
Angel Law Firm
125 West Mendenhall
Bozeman, MT 59715
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Attorney for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

MARK MATHEWS,	)	WCC No. 2001-0294
)	
Petitioner,)	
)	
vs.)	
)	
LIBERTY NORTHWEST INSURANCE CORP.,	)	SUPPLEMENTAL BRIEF
	)	IN SUPPORT OF
	)	AFFIRMATIVE DEFENSE
Respondent/Insurer for)	
)	
BJS CONSTRUCTION, INC.,)	
a Montana corporation,)	
)	
Employer.)	

COMES NOW the above-named Respondent and submits the following Supplemental Brief in support of its affirmative defense of FRAUDULENT INDUCEMENT. As set forth in Respondent's initial Notice of Affirmative Defense, this affirmative defense is raised only to preserve it in the event the Court does not grant summary judgment in Liberty's favor based on the conclusive presumption that attaches to the Independent Contractor Exemption.¹ Although the Court has not yet ruled on Respondent's Motion for Summary Judgment, in light of Petitioner's Motion to Strike the Notice of Affirmative Defense, Respondent sets forth below the factual basis for the defense.

¹ The Court's ruling on Respondent's Motion for Summary Judgment is pending based on the briefing schedule ordered by Minute Entry dated July 2, 2001. Pursuant to the Court's order, Petitioner was required and has submitted his Brief in Opposition to Respondent's Motion for Summary Judgment on July 23, 2001. Pursuant to the Court's order, Respondent has until August 2, 2001, to submit its Response to Petitioner's Brief in Opposition.

EXHIBIT B

TRANSMITTED TO
CLERK OF COURT

7-26-01

Fraudulent inducement is defined at § 27-1-712, MCA, which provides:

(1) One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers.

(2) A deceit, within the meaning of subsection (1), is either:

(a) the suggestion as a fact of that which is not true by one who does not believe it to be true;

(b) the assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;

(c) the suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(d) a promise made without any intention of performing it.

(3) One who practices a deceit with intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that class who is actually misled by the deceit.

(Emphasis added.) Fraudulent inducement consists of the following nine elements:

1. a representation;
2. the falsity of the representation;
3. the materiality of the representation;
4. the speaker's knowledge of the falsity of the representation or the speaker's ignorance of its truth;
5. the speaker's intent that the false representation should be relied upon;
6. the hearer's ignorance of the falsity of the representation;
7. the hearer's reliance on the false representation;
8. the hearer's right to rely on the false representation; and

9. the consequent and proximate injury caused by the reliance on the false representation.

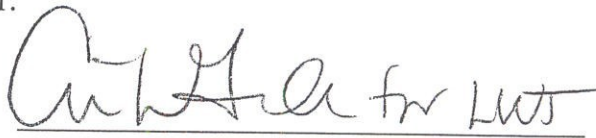
Pare v. Morrison (1990), 241 Mont. 218, 221-222. In the instant case, the elements are satisfied by the following facts, which Respondent will prove at trial in the event the Court denies Respondent's Motion for Summary Judgment.

1. Petitioner held himself out as an independent contractor to BJS Construction.
2. Despite having held himself out as an independent contractor, Petitioner now claims that he was not an independent contractor.
3. Petitioner's representation that he was an independent contractor was material to the employment agreement between Petitioner and BJS Construction.
4. Petitioner either knew that his representation was false or was ignorant of the truth of his representation.
5. Petitioner intended BJS Construction to rely on the representation.
6. BJS Construction did not know that the representation was false.
7. BJS Construction relied on the representation.
8. BJS Construction had the right to rely on the representation.
9. BJS Construction has been injured by its reliance on the false representation.

Petitioner asserts in his Motion to Strike that Respondent's Notice of Affirmative Defense constitutes "trial by ambush." In response, Respondent would again (as stated in the original Notice) refer Petitioner to Respondent's First Notice Of Additional Contentions, Witnesses & Exhibits, dated March 20, 2001, wherein Respondent specifically asserted that Petitioner negligently and/or intentionally misrepresented his employment status to BJS Construction.

///

DATED this 20th day of July, 2001.



Larry W. Jones
Senior Attorney

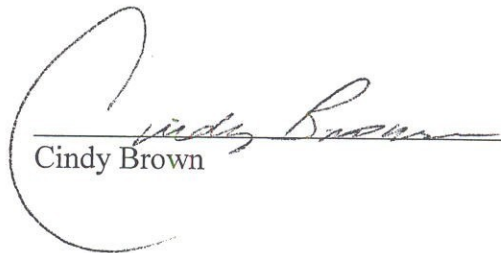
CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of July, 2001, I served the original of the foregoing SUPPLEMENT BRIEF IN SUPPORT OF AFFIRMATIVE DEFENSE, by first-class mail, postage prepaid, on the following:

Ms. Patricia J. Kessner
Clerk of Court
Workers' Compensation Court
P. O. Box 537
Helena, MT 59624-0537

and a copy of the same to the following:

Geoffrey C. Angel
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Attorney for Respondent/Insurer

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

MARK MATHEWS,	)	WCC No. 2001-0294
)	
Petitioner,)	
)	
vs.	)	SECOND AFFIDAVIT OF
	)	BRIAN SCHROEDER
LIBERTY NORTHWEST INSURANCE CORP.,)	
)	
Respondent/Insurer for)	
)	
BJS CONSTRUCTION, INC.,)	
a Montana corporation,)	
)	
Employer.)	
STATE OF MONTANA)	
)	
: ss.)	
County of Missoula)	

1. That I am the President of BJS Construction, a Montana corporation.
2. That I am the Brian referred to in Mathews' deposition as the person with whom he spoke about being hired to work for BJS Construction.
3. That I offered to let Mathews work as an employee for BJS Construction on a 40 hour week when I initially discussed with Mathews the possibility of working for BJS Construction.
4. Mathews said he wanted to work as an independent contractor to keep what money he made and not to have to pay taxes.

EXHIBIT C

TRANSMITTED TO
CLAIMS DEPT.
7-13-01

5. That on June 8, 2000 I had employees working for me who were covered by workers' compensation insurance.

6. That I received from Mathews an independent contractor exemption for carpentry work, marked as Exhibits "B" attached to Liberty's Motion for Summary Judgment and Supporting Brief.

7. That I relied on Mathews' statements to me that he wanted to work as an independent contractor and his independent contractor exemption in deciding to hire Mathews to work as an independent contractor for BJS Construction doing carpentry work.

8. That when I hired Mathews as an independent contractor with an independent contractor exemption I believed BJS Construction workers' compensation insurer would not be liable to pay workers' compensation benefits to Mathews if he were hurt while working for BJS Construction as an independent contractor and that BJS Construction's workers' compensation modification/experience factor and eligibility to receive workers' compensation dividends would not be adversely affected if Mathews was hurt while working for BJS Construction.

9. That had I known Mathews would later claim to be an employee of BJS Construction if injured, I would have either not hired him at all, not hired him as an independent contractor or would have hired him only if he agreed to work as an employee of BJS Construction at 40 hours a week for wages with all employee withholdings at an hourly rate consistent with employee status.

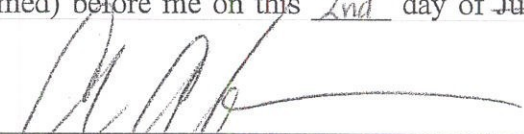
DATED this 2 day of ^{July} ~~June~~, 2001.



Brian Schroeder

STATE OF MONTANA)
 : ss.
County of Gallatin)

Signed and sworn to (or affirmed) before me on this 2nd day of ^{July} ~~June~~, 2001, by Brian



Notary Public for the State of Montana
My Commission Expires: 01-17-05

