

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2021 MTWCC 4**

**WCC No. 2020-5082**

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**JOHN RICE**

**Petitioner**

**vs.**

**MARY JO JOHNSTON**

**and**

**UNINSURED EMPLOYERS' FUND**

**Respondents.**

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**ORDER GRANTING RESPONDENT  
UNINSURED EMPLOYERS' FUND'S MOTION IN LIMINE**

**Summary:** Respondent UEF moves in limine to exclude evidence in support of Petitioner's fraud claims. Respondent UEF asserts that Petitioner's fraud claims are not properly before this Court under established Montana law because he did not plead the nine elements of fraud with particularity. Thus, Respondent UEF claims that evidence supporting Petitioner's fraud claims is irrelevant and inadmissible under M.R.Evid. 401 and 402.

**Held:** This Court granted Respondent UEF's Motion in Limine. Petitioner did not file a response brief to Respondent UEF's Motion in Limine, which this Court deems to be an admission that the motion is well-taken. Moreover, on the merits, Petitioner's fraud claims are not properly before this Court. Petitioner was notified at an early stage of this case that his fraud claims were not properly before this Court because he did not plead fraud with particularity. This Court gave him a chance to move for leave to amend his Petition for Trial. However, he did not do so. Thus, his fraud claims are not properly before this

Court and evidence supporting those claims is irrelevant and inadmissible under M.R.Evid. 401 and 402.

¶ 1 Respondent Uninsured Employers' Fund (UEF) moves in limine to exclude evidence in support of Petitioner John Rice's fraud claims. The UEF asserts that Rice's fraud claims are not properly before this Court under established Montana law because he did not plead the nine elements of fraud with particularity. Thus, the UEF asserts that evidence supporting Rice's fraud claims is irrelevant and inadmissible under M.R.Evid. 401 and 402.

¶ 2 Respondent Mary Jo Johnston supports the UEF's Motion in Limine but asserts that certain evidence is admissible for the purpose of proving that Rice paid Johnston hourly.

¶ 3 Rice informed the UEF that he would oppose its Motion in Limine. However, Rice did not file a response brief.

¶ 4 For the following reasons, this Court grants UEF's Motion in Limine.

#### FACTS AND PROCEDURAL HISTORY

¶ 5 The parties to this case dispute whether Johnston was an employee of Rice, who owns rental properties and does business as "Rice Properties." Johnston asserts that she was injured in the course of her employment with Rice. The UEF accepted liability for Johnston's injury and notified Rice that, as an uninsured employer, he was liable to the UEF for benefits it paid to Johnston, pursuant to § 39-71-504, MCA.

¶ 6 Rice contends that he is not liable to the UEF. When Rice's Petition for Trial and his other filings are broadly construed, he makes five claims, summarized as follows:

¶ 6a Rice contends that he was not an uninsured employer and not liable to the UEF because Johnston was an independent contractor, and not his employee, under Montana law.

¶ 6b Rice contends that Johnston cannot recover benefits because she engaged in fraud. Rice did not plead the nine elements of fraud in his Petition for Trial, as required by Montana law.<sup>1</sup> However, it appears from his Petition for Trial

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<sup>1</sup> See M.R.Civ.P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."). See also *Fossen v. Fossen*, 2013 MT 299, ¶ 9, 372 Mont. 175, 311 P.3d 743 (citation omitted) (stating, "To sustain a fraud claim, one must plead and prove: (1) a representation; (2) falsity of the representation; (3) materiality of the representation; (4) speaker's knowledge of the falsity of the representation, or ignorance of its truth; (5) speaker's intent that it should be relied upon; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation; (8) the hearer's right to rely on the representation; and, (9) consequent and proximate injury was caused by reliance on the representation.").

and his later filings, including the Affidavit of John Rice,<sup>2</sup> that Rice alleges that Johnston engaged in fraud by: (1) representing to him that she was a sole proprietor/independent contractor with her own workers' compensation coverage; (2) signing preprinted work order forms containing a paragraph above the signature line for the "Contract Maintenance Person" stating, in relevant part, "I agree that I am responsible for any and all state or federal taxes and insurance such as worker's compensation"; and (3) by filing her workers' compensation claim while knowing that she was not an employee and while knowing that she was not actually injured.

¶ 6c Rice contends that Part 5 of the Workers' Compensation Act is void for vagueness. However, Rice has informed this Court that he has abandoned this claim.

¶ 6d Rice contends that the UEF's interpretation of § 39-71-417, MCA, violates his right to substantive due process.

¶ 6e Rice contends, "Lack of funding for UEF to investigate fraud violates Petitioner's equal protection and due process rights."

¶ 7 From the earliest stage of this case, the issue of whether Rice sufficiently pleaded his fraud claim has been before this Court. The UEF moved for summary judgment before any party conducted formal discovery. In its Brief in Support of UEF Motion for Summary Judgment, the UEF argued that Rice's fraud claims were not properly before this Court because he did not plead the nine elements of fraud with particularity, and cited case law supporting its position.<sup>3</sup> In her brief supporting the UEF's summary judgment motion, Johnston also asserted that Rice's fraud claims were not properly before this Court because he did not plead fraud with particularity.<sup>4</sup> In his response brief, Rice asserted, *inter alia*, that he should be allowed to amend his Petition for Trial to plead the nine elements of fraud with particularity, citing case law in which this Court granted a claimant leave to file an amended pleading to plead fraud with particularity under the policy that "leave to amend ' . . . shall be freely given when justice so requires.' "<sup>5</sup> At the summary

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<sup>2</sup> Docket Item No.14, Ex. 1.

<sup>3</sup> Docket Item No. 10 at 16 (citing *Haag v. Mont. Sch. Grp. Ins. Auth.*, 274 Mont. 109, 115, 906 P.2d 693, 697 (1995); *Higgins v. Liberty Nw. Ins. Co.*, 2004 MTWCC 31).

<sup>4</sup> Docket Item No. 13 at 5.

<sup>5</sup> Docket Item No. 14 at 7 (citing *Higgins*, 2004 MTWCC 31, ¶¶ 6, 11; M.R.Civ.P. 15(a)(2)). Rice also argued that *Haag* was no longer good law because the Legislature changed the law by amending § 39-71-606, MCA. However, his argument is without merit because the Legislature's amendment addressed an entirely separate issue. In *Haag*, the Montana Supreme Court first ruled that "when an insurer fails to act on a claim for compensation within thirty days, either by accepting or denying liability pursuant to § 39-71-606(1), MCA, or by beginning payments with a reservation of rights under § 39-71-608, MCA, the claim is deemed accepted as a matter of law." *Haag*, 274 Mont. at 115, 906 P.2d at 697. The court then considered the second issue, which was whether the insurer's fraud defense was properly before this Court. *Id.* The court held that because the insurer did not plead fraud with particularity, its fraud defense

judgment hearing on October 28, 2020, this Court questioned whether Rice's fraud claims were properly before this Court because of his failure to plead the nine elements of fraud with particularity. Rice's attorney indicated that he intended to file an amended Petition for Trial to plead fraud with particularity and to correct other errors.

¶ 8 In part because this Court favors trials on the merits over dismissals of claims under technical pleading rules, on November 5, 2020, it issued an order informing the parties that it was declining to rule upon the UEF's summary judgment motion under ARM 24.5.329(1)(a).<sup>6</sup> On November 9, 2020, this Court issued an Order Resetting Scheduling Order, which set the deadline to move to amend pleadings to January 22, 2021.

¶ 9 At the time this Court issued these orders, it anticipated that Rice would amend his Petition for Trial to plead the nine elements of fraud with particularity, that the parties would conduct discovery into his fraud claims, and that the parties would introduce evidence at trial to the issue of whether Johnston engaged in fraud.

¶ 10 Notwithstanding, Rice did not move for leave to amend his Petition for Trial.

¶ 11 This Court held a status conference on January 19, 2021, at the UEF's request, to clarify what claims were properly before this Court. The UEF again asserted that Rice's fraud claims were not properly before this Court because he had not pleaded fraud with particularity. Rice's attorney stated that he "offered" to amend Rice's Petition for Trial but did not file a motion for leave to amend because the UEF and Johnston stated that they would oppose the motion and he did not want to create "unnecessary" work for this Court or opposing counsel. The UEF's attorney confirmed that the UEF would oppose a motion for leave to amend but acknowledged that the deadline to do so had not yet passed. Rice's attorney initially stated that he was not planning on filing a motion for leave to amend, but thereafter stated that he would file an amended petition "over objections" to assert challenges to §§ 39-71-505 and -521, MCA.

¶ 12 Notwithstanding, Rice did not move for leave to amend his Petition for Trial.

¶ 13 The parties submitted a proposed Pretrial Order and attended the pretrial conference on February 22, 2021. In the proposed Pretrial Order, Rice contends that Johnston had represented to him that she was an "independent contractor" and "responsible for . . . her own workers' compensation insurance." However, he does not set forth any other allegations toward his fraud claims nor set forth a fraud claim in his list of issues to be determined.

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was not properly before this Court and that this Court "erred in addressing it." *Id.* The 1997 Legislature changed the law governing the first issue by adding a provision to § 39-71-606, MCA, stating, "Failure of an insurer to comply with the time limitations required in subsections (1) and (3) does not constitute an acceptance of a claim as a matter of law." § 39-71-606(5), MCA (1997-present). However, there has been no change in the law requiring fraud to be pleaded with particularity; thus, the holding of *Haag* that a fraud claim is not properly before this Court unless the party alleging fraud pleads it with particularity is still good law.

<sup>6</sup> See Docket Item No. 22.

## LAW AND ANALYSIS

¶ 14 In *Haag*, the Montana Supreme Court held that this Court erred in addressing a fraud claim because the party alleging fraud did not plead the nine elements of fraud with particularity.<sup>7</sup> The Supreme Court noted that the insurer had only generally alleged fraud by pleading that the “alleged accident never occurred.”<sup>8</sup> The insurer argued that this allegation was sufficient because, “when an insurer denies a claim on the basis the alleged accident never occurred, the insurer is, in effect, claiming the alleged accident was fabricated and the claim filed fraudulently.”<sup>9</sup> The court rejected this argument, reasoning that because the insurer did not plead the nine elements of fraud, “the fraud issue was not properly before the Workers’ Compensation Court and . . . the court erred in addressing it.”<sup>10</sup>

¶ 15 The UEF has moved in limine to preclude Rice from introducing any evidence in support of his claims that Johnston committed fraud, including the work orders from Rice Properties, and from using such evidence to support any of his claims or to argue that Johnston is “dishonest.” The UEF points out that Rice did not plead the nine elements of fraud with particularity and argues that Rice’s fraud claims are not properly before this Court under *Haag*. The UEF asserts that because Rice’s fraud claims are not properly before this Court, evidence of fraud is irrelevant and inadmissible under M.R.Evid. 401 and 402.

¶ 16 Johnston supports the UEF’s Motion in Limine. However, she asserts that while Rice should not be able to use the work orders as evidence of fraud, they are admissible for other purposes, including to prove that Rice paid Johnston by the hour, which is “a strong indication of an employer-employee relationship.”<sup>11</sup>

¶ 17 Rice informed the UEF that he would oppose its Motion in Limine. However, Rice did not file a response brief.

¶ 18 This Court grants the UEF’s Motion in Limine for two reasons. First, Rice has not filed a response brief, which, under the circumstances of this case, this Court deems to be an admission that the UEF’s Motion in Limine is well-taken under ARM 24.5.316(8), which states, in relevant part, “The court may deem the opposing party’s failure to timely file a response brief an admission that the motion is well-taken.”

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<sup>7</sup> *Haag*, 274 Mont. at 115, 906 P.2d at 697.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* See also *Hodge v. State Comp. Ins. Fund*, 1999 MTWCC 9A, ¶ 1 (ruling that if an insurer wanted to raise fraud as an affirmative defense, it must plead the nine elements of fraud with particularity).

<sup>11</sup> *Emergency Preparedness Sys., LLC v. Scobie*, 2009 MTWCC 28, ¶ 36 (citation omitted).

¶ 19 Second, the UEF and Johnston are correct that, under *Haag*, a fraud claim is not properly before this Court unless the party alleging fraud pleads the nine elements of fraud with particularity. Rice did not plead the nine elements of fraud, despite being notified early in this case that he had to do so. Rice had ample time to move for leave to file an amended Petition for Trial before the deadline to do so passed, and such motion would have almost certainly been granted because this Court freely allows parties to amend their pleadings.<sup>12</sup> Because Rice’s fraud claims are not properly before this Court, any evidence in support of such claims is irrelevant and inadmissible under M.R.Evid. 401 and 402, including the statement in the work orders stating, “I agree that I am responsible for any and all state or federal taxes and insurance such as worker’s compensation.” However, Johnston is correct that the parties can introduce the work orders for other purposes, such as to prove that Rice paid her by the hour.

¶ 20 Accordingly, this Court now enters the following:

ORDER

¶ 21 The UEF’s Motion in Limine is **granted**. Rice will not be allowed to introduce any evidence for the purpose of proving fraud, which is not an issue before this Court.

DATED this 25<sup>th</sup> day of February, 2021.

(SEAL)

/s/ DAVID M. SANDLER  
JUDGE

c: Bradley J. Jones  
Quinlan L O’Connor, Haley A. Nelson, and Ben Williams  
J. Kim Schulke

Submitted: February 16, 2021

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<sup>12</sup> See, e.g., *Spencer v. Mont. Sch. Grp. Ins. Auth.*, 2015 MTWCC 11 (explaining that this Court follows M.R.Civ.P. 15(a), which provides that leave to amend a pleading is to be freely given when justice so requires).