

APPLICATION FOR DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name: Seth Michael Cunningham
2. Birthdate: [REDACTED]
3. Current home address: [REDACTED]
4. Email address: [REDACTED]
5. Preferred phone number: [REDACTED]
6. Judicial position you are applying for: 13th Judicial District, Departments 9 and 10 (your application will be considered for either Department; you do not need to submit a separate application for each department).
7. Date you became a U.S. citizen, if different than birthdate: Same as birthdate.
8. Date you become a Montana resident: Same as birthdate.

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

Billings West High School, Billings, MT—High School Diploma—1996

United States Air Force Academy, Colorado Springs, CO—B.S. English, Spanish Minor—2000

Services Officer School, Wright-Patterson AFB, OH—Graduate—2001

University of Phoenix—Completed 8 credits toward Masters of Education—2004

U.S. Air Force Air University Squadron Officer School, Maxwell AFB, AL—Graduate—2005

University of Montana School of Law, Missoula, MT—J.D.—2009

U.S. Air Force Air University Air Command and Staff College, Maxwell AFB, AL—Graduate—2018

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

University of Montana School of Law:

Honors: Graduated with Honors. Academic Scholarship. Justice Frank and June Haswell Scholarship. Urban and Donna Roth Scholarship. Brown Law Firm Scholarship. S. Clark Pyfer Scholarship.

Activities: Summer and 3L Year Intern for Missoula City Attorney Office prosecuting and trying misdemeanor offenses. Summer intern for the U.S. Attorney's Office. Student Bar Association. Christian Legal Society. Intramural Ultimate Team.

United States Air Force Academy:

Honors: Dean's Academic Honor List, International English Honor Society, Parachutist Badge, Air Force Outstanding Unit Award.

Activities: Cadet Flight Commander. Combat Survival Training Instructor. Basic Cadet Training Cadre (drill instructor). Equestrian Team. Cadet Chorale. Protestant Choir. Intramural Sports (flag football, water polo, softball). Habitat for Humanity construction volunteer.

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

The Brown Law Firm, P.C., 315 N. 24th St., Billings, MT 59101
Managing Shareholder, January 2021 – Present
Shareholder Attorney, January 2016 – Present, full-time
Associate Attorney, September 2009 – December 2015, full-time

United States Air Force Reserve

September 2006 – May 2023, Retired as Lt Colonel (O5)

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

State Bar of Montana—Admitted October 2009.

U.S. District Court for the District of Montana—Admitted October 2009.

Department of Veterans Affairs Accreditation—February 2015—February 2017—I let this lapse because I did not use it. I found it was more effective to direct veterans to Veteran Service Organizations that specialize in veteran claims.

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation, criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).

I have a variety of experience in civil litigation including personal injury, product liability, contract disputes, insurance, construction & design, trust disputes, property disputes, medical malpractice, real estate, workers compensation, class action, discrimination, and employment matters. The majority of my practice has been defending civil suits, but I have taken some plaintiff cases in construction disputes, property disputes, denial of insurance coverage, auto accidents, and personal injury. I also have handled probate matters, drafted wills, drafted employment policies, drafted property agreements, and drafted contracts for real estate purchases, construction, business sales, and termination agreements.

My clients have been far-ranging as well. I have represented individuals from all vocational backgrounds including roofers, dentists, excavators, architects, ranchers, engineers, realtors, plumbers, board members, concrete contractors, therapists, truckers, nurses, loggers, and more. I have also represented entities such as schools, businesses, nonprofit organizations, healthcare providers, homeowners' associations, churches, and social clubs.

My experience as an intern prosecutor for the City of Missoula during my last year of law school included over 100 misdemeanor trials. This experience enabled me to provide some pro bono representation in criminal cases since then. I have also provided pro bono services in dependent neglect and adoption cases.

Overall, civil litigation constitutes 70% of my practice, labor and employment law constitutes 20%, and contracts/corporate law constitutes 10%.

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

I serve as the Managing Shareholder for my firm which involves day-to-day supervision of employees, business operations, and financial oversight. I have been asked to serve as a mediator in civil cases. I taught the firearms law portion of a certification course for firearms instructors. I have taught seminars on Montana law to insurers to explain Montana law regarding insurer obligations and liability apportionment. I have represented clients at the Montana Medical Legal Panel, and I have served as a member and/or chair of that same Panel.

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

I have participated and appeared in Municipal Courts, Justice Courts, the Montana Human Rights Commission, the Montana Department of Labor and Industry (wage claims, licensing disputes), State District Courts, the U.S. Equal Employment Opportunity Commission, U.S. District Court, the Montana Medical Legal Panel, and arbitrations. Most of my cases are in State District Courts throughout the State of Montana.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

Unreported Cases:

Daniel K. O'Connell, and Valery A. O'Connell v. Glastonbury Landowners Association, Inc. and current Glastonbury Landowners Board of Directors, DA 16-0530.

Daniel K. O'Connell, Valery A. O'Connell and Christal V. O'Connell, Shannon M. O'Connell, Vesta C. O'Connell v. Glastonbury Landowners Association, Inc. and current Glastonbury Landowners Board of Directors, DA 18-0349.

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

I. Multi-Year Contentious Pro Se Lawsuits

Beginning in 2013, I represented a landowners' association in a series of lawsuits brought by certain members acting *pro se*. The plaintiffs filed multiple actions alleging an array of grievances involving the association's operations, board conduct, budgeting, meeting procedures, and nonprofit corporate documents. Counterintuitively, the absence of legal counsel on their side made these matters more challenging. The plaintiffs disregarded established law, were unconstrained by time or money, and generated a multitude of unusual and convoluted filings.

The lawsuits had a divisive and disruptive impact on the community. Volunteer board members were routinely attacked in court filings. After years of litigation, we ultimately prevailed, and the plaintiffs were declared vexatious litigants, with court-ordered restrictions on future filings.

This experience underscored the ripple effects litigation can have on entire communities and the important role courts play in curbing frivolous claims. It also reinforced my belief that while all litigants must have access to the courts, that access is not unlimited and must be exercised in good faith with a reasonable basis in law and fact.

II. Complex Design and Construction Subrogation Case with Multiple Parties

From 2016 to 2021, I represented an architectural firm in a design and construction lawsuit filed by the building owner's insurer. The matter was highly complex, involving subrogation principles, sole-source procurement contracts, and the challenge of asserting Montana jurisdiction over an international party.

My client had designed a large data center whose owner insisted on using a novel cooling system manufactured by a Dutch company. The system failed, causing extensive property damage. After compensating the owner, the insurer sued the architect, the general contractor, and multiple subcontractors—alleging that the architect should have foreseen the risk of system failure. Notably absent from the suit was the Dutch manufacturer, due in part to difficulties in locating and serving them.

After extensive investigation into the Dutch entity's corporate structure, discovery of a subsidiary entity, and service of process under the Hague Convention, we succeeded in joining the manufacturer to the litigation. Ultimately, the court granted summary judgment in favor of my client.

This case reinforced the importance of identifying all potentially responsible parties early and clearly establishing their roles in the events at issue. That thoroughness not only strengthened the defense but enabled the court to evaluate the matter on a complete and accurate record.

III. Client Facing Multiple Lawsuits

In another matter, I represented a client named in both a class-action lawsuit and multiple individual actions stemming from engineering work performed years earlier under prior ownership. Although insured, my client's wasting policy limits were insufficient to sustain years of litigation or cover a large judgment. Even with strong defenses, the cumulative financial exposure threatened bankruptcy, business closure, and employee layoffs.

This case required a strategic resolution rather than prolonged litigation. Given the number of claims, defending each separately would have exhausted the policy on attorney's fees and expert costs alone, leaving no funds to pay a settlement or judgment. Moreover, multiple judgments would have resulted in competing bankruptcy claims.

The solution was to consolidate all claims into the class action. This resulted in an agreement to contribute policy limits directly to a global settlement rather than defend piecemeal lawsuits. The settlement barred future claims from plaintiffs and contribution claims from other parties, allowed claimants to seek repairs on a priority basis, and—importantly—enabled my client to continue operating and preserve its employees' livelihoods.

While not a perfect outcome, this resolution turned a lose-lose situation into a sustainable path forward. This outcome reflected the value of recognizing when a creative, negotiated solution serves justice better than prolonged litigation.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

None.

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

None.

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

I have provided a variety of pro bono services. I have drafted wills, living wills, and powers of attorney for people facing terminal illnesses and other life changes. I have helped people with deaths in the family to pass title to property through non-probate means and to discharge decedent debt.

I once represented a young woman who was the victim of identity theft as a minor who was being sued for tens of thousands of dollars of debt wrongfully accumulated in her name, and I was able to get the creditors to discharge all of it. I have also represented clients in landlord/tenant disputes and small auto accident cases. These types of cases are often difficult to find representation for because of the low amounts in controversy. However, for many people, the return of a security deposit or a higher reassessed value of vehicle damage can significantly improve their financial security.

I have also represented families in two adoptions and a dependent neglect case. I have represented clients pro-bono in criminal matters as well.

I previously served on the board of directors for non-profit Beartooth Christian Camp and provided general legal counsel to the organization. I have provided contract drafting services pro bono to other non-profit organizations as well.

Since 2023, I have been a volunteer with the Montana Legal Services Pro Bono Phone Advice program providing legal consultation to MTLA clients on a bi-weekly basis. Since summer of 2024, I have been a board member of the Veterans Navigation Network, a non-profit organization that serves veterans and their families. I provide legal advice to that organization on contracts, employment matters, referrals for veterans, and other miscellaneous matters.

Reported Pro Bono Hours:

2020 and 2021: The electronic reports submitted by me to the State Bar are unavailable prior to 2022. I believe that my hours were similar to those in 2022 through 2023.

2022: 55 hours

2023: 50 hours

2024: 55 hours

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

I served as a Board Member on the Yellowstone Area Bar Association from 2010 to 2013.

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

United States Air Force Academy, 1996-2000, Cadet

United States Air Force Active Duty, 2000-2006, Captain (O3), Honorable Discharge

United States Air Force Reserve, 2006-2023, Lt Colonel (O5), Retired May 31, 2023.

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

None.

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

While serving on active duty in the United States Air Force, I oversaw services and facilities including dining, lodging, fitness, library, honor guard, and mortuary affairs. My team included active-duty members, civilian employees, and contractors to provide essential services to military members and their families. This role gave me significant experience in leading people, managing resources, and engaging in both short- and long-term planning. It also developed my conflict resolution and problem-solving skills, as I often navigated disputes between individuals or organizations while keeping the mission on track.

My assignments included overseas service at Misawa Air Base, Japan, and deployment to Southwest Asia. These environments required adaptability, cultural awareness, and the ability to work effectively with people from a wide range of backgrounds. I also built and maintained relationships with local and international businesses to meet procurement needs, which sharpened my ability to negotiate, collaborate, and find practical solutions in complex situations.

As a Mortuary Officer, I was responsible for the dignified handling of remains and for assisting survivors with arrangements and property disposition. I also served on numerous honor guard funeral details for retirees and veterans. These duties required compassion and sensitivity in the most difficult circumstances, while maintaining the highest degree of professionalism and respect for those we served.

In my current role as Managing Shareholder of my law firm, I am entrusted with making difficult decisions that often have significant consequences for employees and their families. I strive to evaluate every situation fairly and thoroughly, understanding that even well-reasoned decisions may not be universally welcomed, yet must be made with integrity and consistency.

Finally, I serve as a Court Appointed Special Advocate in Yellowstone County, working in dependent neglect cases representing the best interests of children. This work has given me valuable insight into the roles of the various participants in these cases and the practical challenges in achieving just resolutions.

These experiences have strengthened my leadership, decision-making, and interpersonal skills, and have instilled in me a commitment to fairness, service, and excellence—qualities I will bring to the bench.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

I currently serve as a board member and Secretary for the Veterans Navigation Network, where I assist with the organization's general operations and strategic efforts to expand services for veterans and their families. In addition to my officer duties, I provide legal guidance to support the organization's mission.

Since 2024, I have served as a Court Appointed Special Advocate (CASA) in Yellowstone County, representing the best interests of children in dependent neglect cases. I have advocated for four children, meeting regularly with them as well as parents, foster parents, attorneys, social workers, and other stakeholders. My role includes making recommendations to the court to help ensure safe and stable outcomes for each child.

From 2017 to 2020, I served on the Board of Beartooth Christian Camp, contributing to organizational oversight, long-range planning, and financial stewardship. Along with legal counsel, I participated in hands-on service, including assisting with construction projects.

I have also been actively involved in youth programs. At my church, I have volunteered in children's ministries such as AWANA, Vacation Bible School, and Child Bridge, serving in roles ranging from teaching and leading activities to meal service. I have chaperoned Billings Central Catholic High School's science trip to Mexico and have supported student activities through the Billings Catholic Schools' annual "Running on Faith" fundraising fair.

As an Air Force Reservist, I served as an Admissions Liaison Officer and later as Liaison Officer Director for the State of Montana. In that capacity, I traveled statewide to meet with students interested in attending the U.S. Air Force Academy and Air Force ROTC, attended college fairs, visited schools, and presented awards. I also collaborated with Montana's Congressional delegation and participated in Academy Days events to guide applicants through the military academy nomination and selection process.

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

None.

E. PROFESSIONAL CONDUCT AND ETHICS

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.
- No.
28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.
- No.
29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

In the spring of 2002, while I was active duty in the Air Force, a coworker of mine brought his BB gun to work on base. While not a valid excuse, neither of us knew that BB guns were classified as firearms by base regulations and therefore illegal to fire on base. My coworker and I were shooting gophers in the field outside our building, and Security Forces apprehended us both. We were taken to their custody until our commander came to release us.

My commander declined to charge me with a criminal act under the uniform code of military justice and opted for administrative counseling instead. My commander removed the letter of counseling from my file three months later and shredded it so that it would no longer be part of my military record. This had no further impact on my career. My discharge from active duty was characterized as honorable. My commander's leadership in the situation was a great example of how to impart a "lesson-learned" while offering a second chance.

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

No.

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

No.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

Yes.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.

I am seeking judicial office because I believe deeply in the responsibility and privilege of public service. Judges play a vital role in preserving the rule of law, protecting individual rights, and ensuring that every person who comes before the court is treated with fairness, dignity, and impartiality. I want to contribute to that mission.

I retired from the Air Force in 2023, and I would like to continue my commitment to public service as a judge. One of the Air Force's core values is "service before self," and being a judge is about service: making difficult decisions with clarity and humility, listening carefully to all sides, and applying the law consistently, without favor or prejudice.

Ultimately, I seek to serve as a judge because I believe in the importance of a legal system that is transparent, predictable, and just. I have always appreciated practicing in front of judges who are prepared and make thoughtful, well-reasoned decisions. I hope to provide the same valuable service in Yellowstone County.

36. What three qualities do you believe to be most important in a good district court judge?

I believe integrity, discernment, and wisdom are the most important qualities a good district judge can possess.

Integrity is critical to establish and maintain confidence in the justice system. It means doing what is right, even when it is difficult, unpopular, or unseen. For anyone in a position of responsibility—especially a judge—integrity is essential because it assures the public that decisions are made fairly, lawfully, and without personal agendas.

Discernment is the ability to carefully weigh facts, evaluate arguments, and understand nuance. Discernment helps distinguish what is relevant from what is distracting. In the courtroom, it is what allows a judge to perceive and understand complex issues, perceive credibility, and focus on the facts that matter most.

Finally, wisdom is applying gained knowledge, insight, and experience to make sound judgments. Wisdom prevents over-reaching and fosters humility. It also helps a person recognize gaps in knowledge and experience and seek to remedy those gaps rather than ignoring them. Wisdom also helps a person foresee the consequences of a decision, an essential quality for a judge entrusted with the duty of making decisions affecting the lives of others.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

I believe the statutes and Constitution should be interpreted and applied using common sense, reasonableness, and respect for the meaning at the time of enactment. The role of the judge is not to redraft the law, infer intentions, or craft policy outcomes, but to faithfully apply the law as written. This approach preserves the separation of powers and their respective roles. This approach also ensures that parties can trust the law will be applied fairly and consistently.

In cases where judicial discretion is directed, rulings need to be supported with a rational basis grounded in the law and facts. Well-reasoned discretionary rulings streamline the judicial process by avoiding remand if a matter is appealed.

I believe these approaches to interpreting and applying statutes and the Constitution foster public confidence, provide predictability, and ensure equal justice.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, **not to exceed 20 pages**. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.

Please see attached "Defendant A&E Architects, P.C.'s Brief in Support of Its Motion for Summary Judgment."

39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

Hon. Blair Jones (ret.)
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CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

8/15/2025

(Date)



(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Tuesday, August 26, 2025.

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

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4 Fax (406) 248-3128
Attorneys for Defendants
A&E Architects, P.C.
5
6
7

8 **MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY**

9 LEXINGTON INSURANCE COMPANY a/s/o
10 STATE OF MONTANA and STATE OF
MONTANA,

11 Plaintiffs,

12 vs.

13
14 KYOTO COOLING INTERNATIONAL;
KYOTO, INC.; JACKSON CONTRATOR
15 GROUP, INC.; A&E ARCHITECTS, P.C.;
GPD, P.C.; TOTAL SITE SOLUTIONS, a
16 Fortress International Group Inc. Company, and
17 JOHN DOES 1-5,

18 Defendants.

19 A&E ARCHITECTS, P.C.,

20 Defendant/Cross-claimant,

21 vs.

22 KYOTO COOLING INTERNATIONAL;
23 KYOTO, INC.; JACKSON CONTRATOR
GROUP, INC.; TOTAL SITE SOLUTIONS, a
24 Fortress International Group Inc. Company, and
25 JOHN DOES 1-5,

26 Defendants/Cross-Respondents,

27 JACKSON CONTRACTOR GROUP, INC.,

28 Defendant/Third-Party Plaintiff,

Cause No. DDV-2013-258

Judge James P. Reynolds

**DEFENDANT A&E ARCHITECTS, P.C.'s
BRIEF IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

1 vs.
2 TRI-COUNTY MECHANICAL AND
3 ELECTRICAL, INC.,
4 Third-Party Defendant.

5 A&E ARCHITECTS, P.C.,
6 Defendant/Cross-Claimant/
7 Third-Party Plaintiff,

8 vs.
9 VTC, LLC d/b/a TOTAL SITE SOLUTIONS,
10 a Fortress International Group Inc. Company,
11 and KYOTOCOOLING INTERNATIONAL,
12 BV AND KYOTOCOOLING – NORTH
13 AMERICA, LLC,
14 Third-Party Defendants.

15 COMES NOW Defendant A&E Architects, P.C. (A&E), by and through counsel, and submits this
16 Brief in Support of its Motion for Summary Judgment.

17
18 **SUMMARY OF ARGUMENT**

19 Plaintiffs' claims fail as a matter of law because A&E had no duty under its contract with the State
20 of Montana nor any other law to select, design or construct the Kyoto Wheel Cooling System (Kyoto
21 system) that malfunctioned. A&E was contracted by the State of Montana for design services and
22 administration services for the Enterprise System Services Center in Helena, MT (Data Center) as outlined
23 in the contract attached as Exhibit A. The State of Montana specifically selected the Kyoto system as the
24 cooling system for the Helena Data Center contrary to recommendations. The units were shipped as pre-
25 packaged units that were put directly in place under the supervision of Kyoto Cooling International
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1 (Kyoto) employees. The Kyoto system was designed, manufactured and installed by Kyoto with no input
2 from A&E.

3 Finally, the State of Montana contractually waived all rights to damages which were covered by
4 insurance. (See Exhibit A, ¶ 1.12.3, p. 8). Therefore, Lexington Insurance Company, in this subrogation
5 action, has no right to make a claim against A&E.
6

7 STANDARD OF REVIEW

8 Summary judgment is appropriate where no genuine issues of material fact exist and the moving
9 party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c). Interpretation and construction of
10 contracts are questions of law, not facts. *Krajacich v. Great Falls Clinic, LLP*, 2012 MT 82, ¶ 13, 364
11 Mont. 455, ¶ 13, 276 P.3d 922, ¶ 13. It is the burden of the moving party to demonstrate that no genuine
12 issues of fact exist. *Portal Pipe Line v. Stonewall Insurance Co.*, 256 Mont. 211, 845 P.2d 746 (1993).
13 Once this burden is met, the burden shifts to the nonmoving party to show that issues of fact do exist.
14 *Richland National Bank & Trust v. Swenson*, 249 Mont. 410, 816 P.2d 1045 (1991). Generally, the Court
15 looks to the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits to
16 determine the existence or nonexistence of a genuine issue of material fact. *Cate-Schweyen v. Cate*, 2000
17 MT 345, ¶ 14, 303 Mont. 232, ¶ 14, 15 P.3d 467, ¶ 14. The evidence must be viewed in the light most
18 favorable to the nonmoving party. *Nelson v. Nelson*, 2005 MT 263, ¶ 15, 329 Mont. 85, ¶ 15, 122 P.3d
19 1196, ¶ 15. However, unsupported conclusory or speculative statements do not raise a genuine issue of
20 material fact. *Abraham v. Nelson*, 2002 MT 94, ¶ 26, 309 Mont. 366, ¶ 26, 46 P.3d 628, ¶ 26.
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24 FACTUAL BACKGROUND

25 A&E adopts the factual background as set forth by Defendant Jackson Contractor Groups, Inc.'s
26 Brief in Support of Summary Judgment. In addition to that, A&E sets forth these undisputed facts.
27
28

1 A&E and the State of Montana (State) entered into a contract on November 27, 2007 for the Data
2 Center project. (See Exhibit A). The contract, drafted by the State, is a standard form of agreement
3 between the owner and architect/engineer. (See Exhibit A). The contract provides:

4 "The Owner shall furnish information, in conjunction with the Architect/Engineer's services,
5 setting forth the Owner's objectives, schedule, constraints and criteria, including space
6 requirements and relationships, special equipment, systems and site requirements as applicable to
the Project." (Exhibit A, ¶ 1.5.1.1, p. 4).

7 The contract also provides that A&E was "entitled to rely on the accuracy and completeness of services
8 and information furnished by the Owner and/or the Agency." (Exhibit A, ¶ 1.5.2.6, p. 4). Under the
9 contract, A&E provided schematic design, design development, construction documents, bidding services
10 and construction contract administration. (Exhibit A at 2).

12 A&E contracted with Total Site Solutions¹ (TSS) to provide a Data Center Needs Assessment
13 Report (NAR) "in order to define the facility design parameters and provide site selection criteria...."
14 (Exhibit C at A&E 004750). The NAR was published on April 16, 2008 and addressed the environmental
15 control systems including which cooling system to use. (Exhibit C at A&E 004785). Data Centers require
16 dedicated air conditioning systems independent of comfort systems with a "high degree of control and
17 reliability." (Exhibit C at A&E 004785). The NAR evaluated several different cooling systems. (Exhibit
18 C at A&E 4787-4794).

20 On or about April 4, 2008, Mike Krings of the State of Montana Department of Administration
21 sent an email to A&E, TSS, and GPD, Inc.² regarding his discovery of the Kyoto system. (Exhibit B). He
22 referred them to www.kyotocoolling.com. Mike Krings also referred the Kyoto system to Total Site
23 Solutions (TSS) staff and asked them to look at it in the NAR. (Exhibit C at A&E 004790). It is undisputed
24 that the State discovered and directed the Kyoto system be evaluated. The State continually pushed the
25
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28 ¹ Total Site Solutions is the d/b/a of VTC, LLC—a subcontractor/consultant of A&E for this project.

² GPD, Inc. was the mechanical engineer subcontractor/consultant for A&E.

1 Kyoto system for its purported energy efficiency, and the State's overall energy use reduction goals. Aff.
2 William DuBeau at ¶ 2 (May 21, 2018) attached as Exhibit V. TSS evaluated the Kyoto system and noted
3 "At this time, the technology is relatively new...." (Exhibit C at A&E 004790). Overall, TSS
4 recommended a "Traditional Air Cooled DX with Outdoor Air Free Cooling" system over the Kyoto
5 system or any other system. (Exhibit C at A&E 004789-90.)
6

7 While the State maintains it selected the Kyoto system based on the input and advice of the various
8 Defendants, the undisputed evidence shows the input and advice of A&E and TSS recommended *against*
9 the Kyoto system. An energy study produced by TSS on June 20, 2008 analyzed the Kyoto system along
10 with other options and ranked four other cooling systems ahead of the Kyoto system. (Exhibit E at GPD
11 01031). On ranking system of 1 to 5 with 1 being best, the Kyoto system was ranked a 2, and four other
12 systems were ranked 1 including the "Air cooled DX with air side free cooling and minimal humidity
13 control" recommended in April. (Exhibit E at GPD 01031). The report noted that the Kyoto system was
14 'extremely energy efficient but will require significant modification to building program spaces.
15 Technology not yet "proven" as only on installation exists.' (Exhibit E at GPD 01031). TSS also warned
16 regarding the Kyoto system on June 11, 2008 'this new technology seems to be having problems and for
17 more than a month they have been reluctant to put estimates in writing; we are uncertain if we should be
18 the "Test/Trial & Error Case.'" (Exhibit F at A&E Emails 9721).
19
20

21 At a meeting on June 26 and 27 of 2008 among the State, A&E, TSS and GPD, the cooling system
22 options were discussed. Three different cooling systems were discussed. (Exhibit G). In regard to the
23 Kyoto system (identified as "Air to Air Energy Recovery Wheel") it was noted: "A good deal of
24 discussion took place revolving around all the attendees strong concerns with the new technology, the
25 stability of the company and availability of service, to list a few." The recommendation from the design
26 team was for a traditional cooling system for the server rooms in the Enterprise System Services Center.
27
28

1 The Kyoto Cooling system was pushed by State of Montana employees primarily for its advertised
2 energy efficiency. At the time, the State of Montana was engaged in an energy-use reduction program
3 with oversight by Governor Schweitzer's office. This program heavily influenced the decision by the
4 State of Montana to use the Kyoto Cooling system. Aff. DuBeau at ¶ 2. The end result was that Joe Triem,
5 of the State of Montana Department of Administration, stated he was going to discuss the three options
6 with the state budget director for the final decision. (Exhibit G).

8 On July 2, 2008, Joe Triem informed A&E that '[t]he decision has been made to incorporate the
9 "Kyoto Cooling Wheel" in the design of the Helena Enterprise Systems Services Center. Director Ewer
10 is on board, and was a major factor in this decision.' (Exhibit H). The State directed A&E to proceed with
11 the Data Center design using the Kyoto system. (Exhibit I). Further, in discovery the State admitted it
12 selected the Kyoto system and directed its use. (See Exhibit D, Response to Req. for Admission Nos. 2
13 and 4). The design team recommended against the Kyoto Cooling system because it was an untested and
14 unproven system. Despite this, the State of Montana continued to push for the system to be used because
15 of its energy efficiency. Aff. DuBeau at ¶ 3. It is undisputed that the State made the final decision to select
16 the Kyoto system against the reservations of A&E and its consultants.

18 Jackson Contractor Group, Inc. (JCG) was selected as the general contractor for the project, and
19 they entered into a separate contract with the State on November 6, 2008. (See Exhibit H to Defendant
20 Jackson Contractor Group, Inc.'s Brief in Support of Summary Judgment filed November 15, 2017).
21 Construction proceeded and on July 22, 2009, a change order to the State's contract with JCG stated JCG
22 "shall have manufactured three" Kyoto cooling units. (Exhibit P).

24 The Kyoto system is a patented system which consists of a "factory-built" packaged system.
25 (Exhibit Q). The three Kyoto cooling units comprising the Kyoto system at the Data Center were set on
26 the ground outside the building. (Exhibit R). Internal compressors were located inside the units in the
27
28

1 return air flow to the building. (Exhibit R at 2-3). Kyoto sent a component list for its units noting the
2 Bitzer compressors used in their design. (Exhibit S). Kyoto sent JCG instructions directing how the pre-
3 assembled pieces of the Kyoto units constructed in the Netherlands were to be bolted together and placed
4 at the Data Center. (See the Installation & Operation Manual attached as Exhibit J). The manual specifies
5 the foundation for the units and how to connect the pieces. The Kyoto units were put in place under the
6 supervision of Kyoto employees and tested by a Kyoto engineer. The software controlling the units was
7 supplied and programmed by Kyoto. (Exhibit K, see Plaintiffs' answer to Interrogatory No. 17). The
8 Kyoto system utilized Kyoto's "Eco Controller" system to regulate the cooling units. (Exhibit U).

10 The Kyoto Cooling system consisted of three individual cooling units that would sit outside the
11 building and be connected via ductwork and electrical connections. A&E had no part in the design of the
12 Kyoto units. They were manufactured in the Netherlands and shipped in five sections which were bolted
13 together and the systems connected within upon arrival by Jackson Contracting Group and/or its sub-
14 contractors. Kyoto employees supervised and helped with the assembly and start-up of the Kyoto units.
15 The internal components, including the fans and compressors were installed in the Netherlands. A&E was
16 not consulted nor asked about the internal design of the Kyoto units or what components were used or
17 where they were placed within the units. A&E did not provide any recommendations on the size, number
18 or capacity of the Kyoto units. Aff. DuBeau at ¶ 4.

21 Kyoto signed a separate agreement with the State of Montana. (Exhibit L). This agreement licenses
22 the controlling software to the State, and Kyoto agrees to update it at least once a year. (Exhibit L at ¶
23 3.1). Kyoto also provides a 3 year warranty from the date of substantial completion. (Exhibit L at ¶ 5.1.
24 Kyoto also protected its patented system within the agreement with the State. (Exhibit L at § 6 and
25 Attachment A). The Data Center was substantially complete on February 26, 2010 and accepted by the
26 State on March 19, 2010. (Exhibit M).

On April 5, 2011, an internal compressor within a Kyoto unit failed and blew a head gasket. The compressor failed due to issues with the Kyoto software controlling its start-up cycle. Oil and refrigerant from the compressor entered the return air stream and coated equipment within the server room causing the alleged damages. A diagram of the Kyoto system is attached as Exhibit N. Plaintiffs allege negligent design or improper manufacture of the Kyoto system caused the compressor to fail. It is undisputed, however, that the Kyoto system was not designed, manufactured, selected, assembled or installed by A&E. A claim adjuster for Plaintiff Lexington Insurance Company who investigated the failure noted “[t]he compressors were manufactured by Bitzer and are part of a total package as provided by Kyoto.” (Exhibit O at LEXINGTONCLAIM000085).

After the incident, Kyoto provided a design to retrofit their cooling units with filters to prevent any contaminants from entering the server room in the future. (Exhibit T). The State adopted and installed this retrofit. (See answer to Request for Admission No. 8 in Exhibit D). Notably, the basic design of Kyoto’s cooling units now shows the compressors located within the units in a manner that places them outside the return air stream. (Exhibit Q at 4). This evidence shows Kyoto exerted ownership and control over the design of the Kyoto system.

A&E did not design, manufacture, construct or install the Kyoto system. A&E via their Structural Engineering consultant designed the foundations on which the three Kyoto units sat. A&E also designed a plenum wall within the Enterprise System Services Center which diffused the return air ducted from the Kyoto units. The plenum wall was designed on the recommendation of Kyoto personnel and the airflows required as calculated by GPD Inc. Kyoto supplied the flexible ducting to connect their units to the building. Kyoto also directed the electrical connections and how to connect the units to the building via their product literature. Aff. DUBeau at ¶ 5.

1 A&E did not place any of the compressors within the Kyoto units; the compressors came already
2 installed. A&E did not designate the location of fans, compressors or any other internal components of
3 the Kyoto units. All the Kyoto components were selected and installed before the units were shipped to
4 Montana. A&E did not provide any recommendations on the size, number or capacity of the Kyoto
5 cooling units. Aff. Bill DuBeau at ¶ 4.

6
7 Kyoto also provided all drawings of the Kyoto units. Attached to this Brief in Support of Summary
8 Judgment as Exhibit R are the design drawings created by Kyoto for this project showing the compressor
9 that failed. Also attached as Exhibit N is a diagram created by William DuBeau showing the location of
10 the compressor within the drawings and in a photo of the Kyoto unit. The Kyoto units arrived on site with
11 the compressors installed. Kyoto personnel did all the work necessary to start the units up and program
12 their operation. Aff. DuBeau at ¶ 6.

13
14 The Kyoto system was selected by the State of Montana despite the reservations of an untried
15 system and over the alternative recommendations from A&E and their consultants. Kyoto supplied
16 flexible duct connections for the unit. Further, Kyoto supplied the requirements for hooking the units up
17 and specified the manner in which the unit would be connected to the Data Center. All connections and
18 programming of the units was done by Kyoto according to their specifications.

19 ARGUMENT

20
21 Plaintiffs allege breach of contract and negligence claims against A&E. Under Count V—Breach
22 of Contract (A&E), Plaintiff's Complaint alleges:

23
24 A&E breached its contract with Montana by failing to provide reasonable design services and
25 architectural services for the safe and effective construction and operation of the Helena Data
26 Center as the subject design allowed the compressors to be placed in front of the fans so that
27 when the compressors failed, oil was blown into the server clean room, and such that the
28 compressors used were caused to fail when the coolant within the compressors were cooled by
the system and migrated throughout the compressor causing it to fail." Pl.'s Com. at ¶ 38. (Apr.
1, 2013).

1 Additionally, Count VI of the Complaint alleges A&E was negligent by

2 [F]ailing to reasonably design the system such that when the compressor failed, which they
3 knew or should have known could happen, oil and other materials would not be negligently
4 introduced into the clean server room, and by negligently designing the system, and/or utilizing
5 compressors that were not adequate for the operation, in such a way as to allow foreign materials
6 to infiltrate the compressor causing them to fail.” Pl.’s Com. at ¶ 43 (Apr. 1, 2013).

7 Both claims are predicated on the assertion that A&E failed to reasonably design the Kyoto system.

8 Notably, nearly identical language is used in Plaintiffs’ breach of contract and negligence claims against

9 Kyoto Cooling International and Kyoto, Inc., the actual designers and manufacturers of the Kyoto units.

10 It stands to reason there is only one designer and manufacturer of the Kyoto system.

11 Plaintiffs’ claims against A&E fail for three reasons. First, A&E was not the designer,
12 manufacturer or installer of the Kyoto units. Second, A&E did not have a duty to review or re-design the
13 internal components of the Kyoto units. Third, if Plaintiffs’ claims survive summary judgment, the State
14 of Montana and its insurer waived any claim to damages covered by insurance.

15 **1. A&E did not design the Kyoto units, and it had no contractual duty to do so.**

16 Plaintiffs first assert a breach of contract claim against A&E. Plaintiffs cannot show any
17 contractual duty supporting their claim for breach of contract. As the undisputed facts show, A&E did not
18 design the Kyoto units. Plaintiffs have failed to produce any design or specification produced by A&E
19 substantiating their claims. A&E sent the following Request for Admission to Plaintiffs:

20 REQUEST FOR ADMISSION NO.3: Please admit that the Kyoto Wheel Cooling System was
21 designed and manufactured by someone other than A&E.

22 RESPONSE: Plaintiffs object to this Request as vague and ambiguous as terms “designed” and
23 “Kyoto Wheel Cooling System” are not defined. Subject to and without waiving said objections,
24 deny. Plaintiffs understand that a majority of the system was designed and supplied by Kyoto.
25 Further, Kyoto worked with a separate manufacturer (Rox) to build the Kyoto Cooling Units.
26 However, A&E, Jackson, GPD, TSS and/or Tri-County reviewed the design of the system,
27 provided comments on the design of system, installed the system, supervised the installation of
28 the system and/or commissioned the system. Further discovery is required in this regard.
(Exhibit D at 4).

1 This “object and then answer” response is evasive to the extreme and provides nothing to dispute the facts
2 cited above. It is indeed true that A&E’s subcontractor TSS reviewed the Kyoto system’s energy
3 efficiency and recommended **against** it—a fact Plaintiffs fail to acknowledge or explain how
4 recommending against the Kyoto system constitutes breach of contract. Plaintiffs fail to explain how a
5 review of the system’s efficiency constitutes design and manufacture of the units. TSS evaluated the
6 advertised performance and not the design. As noted, the newness of the technology precluded any
7 evaluation of historical performance.
8

9 Further, A&E did not select or designate the location of any internal components of the Kyoto
10 system, including the compressor that failed. A&E was not asked to review the internal design of the
11 Kyoto units. Aff. DuBeau at ¶ 4. Additionally, it is undisputed that A&E did not install or supervise the
12 installation of the Kyoto system. Kyoto had its own personnel on site to do that. Aff. DuBeau at ¶ 4.
13 Finally, the State, as shown by the undisputed facts, discovered and proposed the Kyoto system. The State
14 made the final decision to use the Kyoto system and wrote the change order in a way that specifically
15 directed the use of the Kyoto system.
16

17 A&E also asked Plaintiffs for the specific facts supporting their allegations that A&E breached its
18 contract:
19

20 **INTERROGATORY NO. 3:** State each and every fact upon which you rely for your
21 allegations that A&E Architects breached its contract with the State of Montana.

22 **ANSWER:** Plaintiffs object to this Interrogatory as overly broad and unduly burdensome.
23 Plaintiff further objects to this Interrogatory as it prematurely seeks expert witness opinions and
24 may improperly seek information subject to the consulting expert privilege. Plaintiff further
objects to this Interrogatory as it calls for a legal conclusion and seeks information subject to the
work-product privilege. (Exhibit D at 8).
25

26 Plaintiffs assert it is “unduly burdensome” to provide A&E with any factual basis for the claims they have
27 asserted that A&E designed and manufactured the Kyoto system. Plaintiffs’ non-answer should be taken
28 as an admission that there are no such facts. To the contrary, the undisputed facts show Kyoto designed

1 and manufactured the Kyoto system. A&E was not responsible for overseeing or verifying the
2 performance or adequacy of Kyoto's design. Plaintiffs have produced no evidence otherwise.

3 The evidence shows the State directed Kyoto to design and manufacture the Kyoto units according
4 to the State's specifications via the change order attached as Exhibit P. A&E had no say where the internal
5 compressor that failed was placed or how it was chosen. Kyoto selected the compressor and decided
6 where to place it within the unit. (Exhibit O at LEXINGTONCLAIM000085). Plaintiffs' claim that
7 A&E's design "allowed the compressors to be placed in front of the fans so that when the compressors
8 failed, oil was blown into the server clean room" is demonstrably false. Pl.'s Com. at ¶ 38. (Apr. 1, 2013).
9 A&E had no part in what internal components were used in the Kyoto system nor in where they were
10 located. Exhibit N shows the compressors were internal components installed in the Kyoto units in the
11 factory. No party other than Kyoto had any say where those compressors were located. Likewise, the
12 software controlling the compressor and how it started and stopped was a Kyoto product and programmed
13 by Kyoto. Kyoto retained ownership of the software and its patents. The Kyoto units were shipped fully
14 designed, built and ready-to-assemble by Kyoto. A&E had no role in the design, manufacture or assembly
15 of the Kyoto units.
16

17
18 Plaintiffs' mere denials do not create issues of material fact. "Mere denial, speculation, or
19 conclusory statements are insufficient to raise genuine issue of material fact." *Arnold v. Yellowstone*
20 *Mountain Club, LLC*, 2004 MT 284, ¶ 15, 323 Mont. 295, ¶ 15, 100 P.3d 137, ¶ 15. Further, an "opposing
21 party's facts must be material and of substantial nature, not fanciful, frivolous, gauzy, nor merely
22 suspicions." *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1265 (1997).
23
24

25 The Kyoto system was a brand new, untested, and untried technology. It was proprietary to Kyoto.
26 Plaintiffs can point to no contractual duty or common law duty on the part of A&E to assess the internal
27 workings of the units. Indeed, it was for this reason, A&E's subcontractor, TSS, recommended against
28

1 the unproven technology—there was no history of its performance as compared to proven technology.

2 The Kyoto system was selected solely by the State of Montana. The Montana Supreme Court has held:

3 [T]he law in Montana establishes “that a contractor can rely on the plans and specifications and
4 need not ... verify them.... [T]he owner, here the State, warrants and is responsible for the
5 accuracy of the descriptions in the plans and specifications of the contract that are issued.”
6 *Sornsin Const. Co. v. State* (1978), 180 Mont. 248, 254-255, 590 P.2d 125, 129. The contract
7 impliedly warrants that the plans and specifications are suitable and accurate. This implied
warranty is as much a part of the contract as the express terms. *Lutey Construction-The
Craftsmen v. State of Montana*, 257 Mont. 387, 393, 851 P.2d 1037, 1040 (1993).

8 The State directed the use of the Kyoto system via a change order to JCG’s contract. It directed the use
9 of the Kyoto plans and specifications. A&E was a contractor of the State, and it was not in a position to
10 question the Kyoto plans and specifications nor did it have a duty to do so. Under both case law and
11 A&E’s contract with the State, A&E was “entitled to rely on the accuracy and completeness of services
12 and information furnished by the Owner and/or the Agency.” (See Exhibit A, ¶ 1.5.2.6, p. 4).

14 The Kyoto system was selected by the State long after A&E had finished the design of the Data
15 Center. The State delayed so long on selecting a cooling system that A&E simply designed everything
16 else without knowing what the State would ultimately select. It made little difference because it was
17 represented that the Kyoto units were “drop in place” units that required little site prep and foundation
18 design. Further, the Kyoto system was purchased as a change order to the State’s contract with JCG, not
19 the State’s contract with A&E. The A&E contract is silent on the issue and no duty can be established.

21 The change order establishes that it was Kyoto’s responsibility to provide the “drawings” for the
22 units meaning “the graphic and pictorial portions of the Contract Documents showing the design, intent,
23 location, and dimensions of the Work, generally including plans, elevations, sections, details, schedules
24 and diagrams for the Units.” (Exhibit P at 8). Kyoto retained all ownership of the “unit specifications”
25 meaning “materials, equipment, components, systems, standards, performance and workmanship relating
26 to all aspects of the manufacture, assembly and installation of the units.” (Exhibit P at 10). The change
27
28

1 order, not A&E's contract, outlines duties in regard to drawings, plans, elevations, sections, details,
2 schedules and diagrams. No change order was issued to A&E regarding the Kyoto units.

3 The compressor that failed was an internal component of the Kyoto unit. (Exhibit O). The State
4 provided its specifications to Kyoto for the cooling system, and Kyoto designed and manufactured the
5 Kyoto units in accordance with those specifications. Kyoto selected which compressors to use. A&E was
6 not asked to provide specifications or design or manufacture of the units nor did it do so. "The contractor
7 is not responsible for errors or defects in the plans and is not liable, absent negligence on his part, where
8 the owner's plans and specification prove defective." *Ace Plumbing & Heating, Inc. v. Helena Flats Sch.*
9 *Dist. 15*, 204 Mont. 81, 86, 662 P.2d 1327, 1330 (1983). Here, the change order establishes that it was
10 Kyoto's responsibility to provide the design to the State. As the State's contract architect, A&E is not
11 responsible for any errors within Kyoto's design. Simply put, Plaintiffs have to show A&E provided a
12 faulty design, and they cannot do so. As the evasive discovery answers show, they have nothing to support
13 their allegations over 7 years since the compressor failed and over 5 years into litigation.

14
15
16 The undisputed facts show it was Kyoto's responsibility to produce the design documents for their
17 cooling system. A&E was entitled to rely on the plans and specifications provided by Kyoto and the State
18 of Montana to any extent it needed to for its work on the Data Center. Plaintiffs cannot establish any
19 contractual duty on the part of A&E because A&E did not design or manufacture the Kyoto system nor
20 was it required to do so. Therefore Plaintiffs' claim of breach of contract against A&E is fatally flawed
21 and A&E is entitled to summary judgment dismissing this claim.

23 **2. A&E had no duty under tort theory to Plaintiffs.**

24
25 Plaintiffs have also asserted a negligence claim against A&E. To establish negligence Plaintiffs
26 must show A&E owed a duty, breached that duty, the breach caused Plaintiffs' injury and that Plaintiffs
27 suffered damages as a result. *Bonilla v. Univ. of Mont.*, 2005 MT 183, ¶ 14, 328 Mont. 41, 45. In regard
28

1 to Plaintiffs' negligence claim, they cannot show A&E owed a duty in regard to the design of the Kyoto
2 system. The existence of a duty is a question of law for the court to decide. *Debcon v. City of Glasgow*,
3 2001 MT 124, ¶ 29, 305 Mont. 391, 28 P.3d 478. Without a duty, no breach can be established, and a
4 negligence claim fails as a matter of law. *Id.*

5 Additionally, Plaintiffs must establish a duty independent of the contract to maintain both a tort
6 claim and a breach of contract claim. *Dewey v. Stringer*, 2014 MT 136, ¶ 8, 375 Mont. 176, 325 P.3d
7 1236. "Separate tort liability depends on whether the breaching party violated a legal duty that would
8 exist in the absence of a contract." *Id.* It is without question that absent the contract here, Plaintiffs would
9 have no cause of action against A&E. The contract is the sole reason why A&E did the work it was asked
10 to do. Plaintiffs' claims are premised on the contract and not on a separate tort. If the contract did not
11 exist, there would be no claims against A&E.

12 Plaintiffs have yet to articulate any separate basis for the negligence action. Count VI of the
13 Complaint alleges A&E was negligent by
14

15 [F]ailing to reasonably design the system such that when the compressor failed, which they
16 knew or should have known could happen, oil and other materials would not be negligently
17 introduced into the clean server room, and by negligently designing the system, and/or utilizing
18 compressors that were not adequate for the operation, in such a way as to allow foreign materials
19 to infiltrate the compressor causing them to fail." Pl.'s Com. at ¶ 43 (Apr. 1, 2013).

20 Again, this is a demonstrably false accusation. A&E had no part in where the internal compressors were
21 located or what kind of compressors were used. Attempting to blame A&E for the failure of the
22 compressor is akin to blaming A&E if a light bulb in the Data Center burnt out because it was
23 manufactured wrong. The decisions on what components to use in the Kyoto system were decided in the
24 Netherlands by Kyoto, the designer and manufacturer. Plaintiffs' attempt to conjure some independent
25 duty on the part of A&E to re-design the Kyoto merely restates the claims made in regard to the breach
26 of contract claim.
27
28

1 A&E also asked Plaintiffs for the specific facts supporting their allegations of breach of contract
2 and negligence. A&E's discovery requests included the following interrogatory:

3 **INTERROGATORY NO. 2:** State each and every fact upon which you rely for your
4 allegations that A&E Architects failed to properly design the Helena Data Center.

5 **ANSWER:** Plaintiffs object to this Interrogatory as overly broad and unduly burdensome.
6 Plaintiff further objects to this Interrogatory as it prematurely seeks expert witness opinions and
7 may improperly seek information subject to the consulting expert privilege. Plaintiff further
8 objects to this Interrogatory as it calls for a legal conclusion and seeks information subject to the
9 work-product privilege. Exhibit D at 7-8.

10 Plaintiffs declined to provide any factual basis for their claims they have asserted that A&E. This is
11 because they have none and they cannot establish an independent duty sounding in tort.

12 Plaintiffs claim they relied on the advice of A&E and the other Defendants when selecting the
13 Kyoto system, but the facts show that is not true either. A&E and its consultants did *not* recommend the
14 Kyoto system. It was unproven technology and posed a risk. The State blithely ignored these warnings
15 and directed its use anyway. The State now wants the Court to save it from its own decision to not follow
16 the advice it was given. The evidence here shows only one possible conclusion: the State was the sole
17 decider on the use of the Kyoto system, and Kyoto was the sole designer and manufacturer of the Kyoto
18 system. Once the State's decision was made, A&E had no ability to countermand it. No evidence shows
19 A&E had any duty under a negligence theory in regard to the design or manufacture of the Kyoto system.
20 "Mere denial, speculation, or conclusory statements are insufficient to raise genuine issues of material
21 fact." *Arnold* at ¶ 15. A&E is therefore entitled to summary judgment on Plaintiffs' negligence claims.

22
23 **3. Plaintiffs are not entitled to any damages covered by insurance.**

24 Section 1.12.3 of the A&E/State contract states:

25 To the extent damages are covered by either's insurance, the Owner and the Architect/Engineer
26 waive all rights against each other and against contractors, consultants, agents, and employees of
27 the other for damages, except such rights as they may have to the proceeds of such insurance
28 current as of the date of this Agreement.

1 Under the plain terms of the contract, the State cannot recover any damages from A&E if those damages
2 were covered by its insurance. The State waived any such rights. Plaintiff Lexington Insurance Company
3 is claiming subrogation rights and trying to recover \$686,890.46 from A&E for insurance payments it
4 made to the State. However, the State has waived any right to claim damages paid by its insurer,
5 Lexington.

6
7 As a subrogee, Lexington stands in the shoes of the State of Montana and is bound by the terms
8 of the State's contract with A&E including any defenses. *Montana Petroleum Tank Release Comp. Bd. v.*
9 *Capitol Indem. Co.*, 2006 MT 133, ¶ 15, 332 Mont. 352, 356, 137 P.3d 522, 526. As a matter of law,
10 Lexington cannot recover the insurance payments it made because it is put in the same position as the
11 State and any claim to damages covered by insurance were waived. A&E is entitled to partial summary
12 judgment on this issue—namely any claim for damages paid for by Lexington or any other insurer is
13 foreclosed pursuant to the plain meaning of the contract.
14

15 It is worth noting, the State drafted the contract with A&E, and the contract is the “Standard Form
16 of Agreement between Owner and Architect/Engineer” promulgated by the State of Montana Department
17 of Administration. Section 1.12. is “clear and unambiguous and, as a result, susceptible to only one
18 interpretation” *Ophus v. Fritz*, 2000 MT 251, ¶ 23, 301 Mont. 447, 453, 11 P.3d 1192, 1196. To the extent
19 that the State argues there is any ambiguity in it, such ambiguities are to be construed against the State
20 and its subrogee. *Id.* at ¶ 31.
21

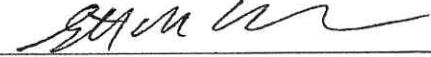
22 CONCLUSION

23
24 For the reasons argued above, the claims against A&E should be dismissed as a matter of law. If
25 the Court does not outright dismiss these claims, then A&E is entitled to partial summary judgment
26 limited damages against it to only those not covered by insurance pursuant to the plain language of the
27 contract drafted by the State.
28

1 DATED this 29th day of May, 2018.

2 BROWN LAW FIRM, P.C.

3
4 BY



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was duly served on counsel of record by U.S. mail, postage prepaid, and addressed as follows this 29th day of May, 2018:

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