No. 23-973

IN THE

Supreme Court of the United States

RANDY TARUM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT L. LINDSAY, *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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In accordance with Sup. Ct. R. 15.8, Petitioners respectfully submit this Supplemental Brief based upon the February 27, 2024, Montana Supreme Court decision in *TCF Enterprises, Inc., d/b/a Malmquist Construction and Cincinnati Insurance Co. v. Rames, Inc. formerly d/b/a Central Insurance Agency*, Cause # DA 22-0731 cited as 2024 MT 38. The *TCF Enterprises* decision became a final decision on March 12, 2024, after the rehearing time limits expired under Mont. R. App. P. 20(2)(a). The finalization of the *TCF Enterprises* decision occurred after the Petition for Writ of Certiorari was docketed.

I. INTRODUCTION

Multiple times throughout this extensive litigation, Petitioners requested the federal courts certify questions concerning Montana's substantive law as to the duty of insurance professionals. Petitioners' motions, briefs, oral arguments, and requests for certification in briefings and during oral arguments in the District Court, in the Circuit Court, and by rehearing petition have all been summarily denied. (A.64a; A.28a; A.6a; and A.1a.) The denial of Petitioners' multiple certification requests left in place a magistrate's *sua sponte* findings and recommendations substituting New Hampshire law for determining the duty of Montana insurance professionals to be inclusive of "special relationship" requirements foreign to Montana law. These "special relationship" requirements created *sua sponte* by the magistrate as a component of Montana's insurance professionals' duty were ratified by the District Court (A.28a) and affirmed by the Circuit Court (A.1a). Petitioners have repeatedly argued that the inclusion of "special relationship" requirements for a Montana insurance professional was subject to rejection

by the Montana Supreme Court. Prior to the Circuit Court affirming summary judgment based upon the use of a "special relationship" requirement, there was no precise definition for the duty of a Montana insurance professional. Some Montana case law supported the likelihood that Montana would adopt the duty definition for a professional set forth in §299A of the Restatement (Second) of Torts (1965), as Montana has for doctors, lawyers, and accountants. *See Dulaney v. State Farm Fire & Cas. Ins. Co.*, 29014 MT 127, ¶ 15; 324 P.3d 1211, 1215; *Draggin' Y Cattle Co. v. Addink, et at.*, 2013 MT 319, ¶ 33; 312 P.3d 451, 458.

The Montana Supreme Court's *TCF Enterprises* decision, *supra*, has now clarified the duty of an insurance professional, and although not citing §299A, the *TCF* decision uses §299A's language for an insurance professional. (… "[A] general common law duty to use reasonable care under the circumstances to avoid causing foreseeable harm to others.") *TCF Enterprises, Inc., supra,* ¶22. *TCF Enterprises'* definition for a Montana insurance professional is not compatible with any "special relationship" requirements imposed by the federal courts. The *TCF Enterprises* decision dictates the need for granting certiorari, vacating the Circuit's Memorandum (A.1a), vacating the District Court's summary judgment (A.6a), and remanding to the Circuit Court with alternatives to either certify the Montana insurance professional duty questions to the Montana Supreme Court, or remand to the District Court, with instructions to certify to the Montana Supreme Court the following questions concerning a Montana insurance professional:

WHAT IS THE COMMON LAW DUTY OF A MONTANA LICENSED INSURANCE PROFESSIONAL IN A TORT-BASED NEGLIGENCE CAUSE OF ACTION?

HOW IS A BREACH OF DUTY TO BE ESTABLISHED IN A TORT-BASED NEGLIGENCE CAUSE OF ACTION AGAINST A LICENSED INSURANCE PROFESSIONAL?

II. ARGUMENT

A. Chronology of Events

The following modified chronology is submitted for the Court's benefit:

- **February 27, 2024**[1]: *TCF Enterprises, Inc., d/b/a Malmquist Construction and Cincinnati Insurance Co. v. Rames, Inc. formerly d/b/a Central Insurance Agency*, Cause # DA 22-0731 cited as 2024 MT 38
- **March 6, 2024**: Petition for Certiorari docketed as No. 23-923
- **December 4, 2023**: Petition for Panel and *En Banc* Rehearing denied (A. 64a)

1. This entry not in chronological order, placed first for emphasis as to timing of the Montana decision. *TCH Enterprises* became final at expiration of rehearing time on March 12, 2024.

- **October 26, 2023**: Panel's Memorandum affirming district court denying certification (A.1a)
- **June 27, 2022**: District Court's Summary Judgment filed including denial of certification (A.6a)
- **June 2, 2020**: District Court's Order Adopting Findings Denying Certification (A.28a)
- **March 18, 2020**: Findings and Recommendations Magistrate including special relationship (A.52a)

B. Montana Supreme Court's *TCF Enterprises* Decision Demonstrates Error of Federal Court's "Erie Guess" of Montana's Substantive Law

The use of memoranda disposition by panels is the road well-traveled in the Ninth Circuit consisting of the route of about two-thirds of the Circuit's case load. However, this memoranda pathway bypasses a fork less traveled by trodding upon the use of certification of substantive law as the shortest distance to decisive decision-making. The Montana Supreme Court's *TCF Enterprises* decision demonstrates the Ninth Circuit Memorandum was the wrong choice, requiring rerouting and reversal to the less traveled certification road. Why? Because to the litigants and those similarly situated, it will make all the difference.

This Court has held that a Court of Appeals should consider in diversity cases whether a state supreme court decision calls its previous ruling into question where, as here, the Montana Supreme Court has issued a decision after the mandate. In *Lords Landing Village Condominium Council of Unit Owners v.Continental Insurance Company*, 520 U.S. 893, 894, 117 S. Ct. 1731 (1997), a decision of the Maryland Supreme Court called into question a circuit court decision. The issue before this Court in *Lords Landing* was whether "it is appropriate, in these circumstances, for this Court to grant the petition for certiorari, vacate the judgment of the lower court, and remand the case (GVR) for further consideration." *Id*. *Lords Landing* held that "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is ... potentially appropriate." *Id*. at 896 (internal quotation marks omitted.)

Lords Landing also explained that this rule is "…in keeping with our longstanding practice of vacating a court of appeals' decision based on a construction of state law that appears to contradict a recent decision of the highest state court." *Id*. (Internal quotation marks omitted).

Quoting with approval from Justice Scalia's concurring opinion in *Thomas v. American Home Products, Inc*., 519 U.S. 913, 117 S. Ct. 282 (1996), this Court added: "[A] judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by

the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones." *Lords Landing*, 520 U.S. at 896 (internal quotation marks omitted).

In *Thomas*, *supra*, Justice Scalia wrote that the GVR mechanism has been commonly used in the arena of cases concerning state substantive law in diversity jurisdiction matters, stating "Similarly, where a federal court of appeals' decision on a point of state law had been cast in doubt by an intervening state supreme court decision, it became our practice to vacate and remand so that the question could be decided by judges familiar with the intricacies and trends of local law and practice." *Id*. at 913-14.

As a result of the Panel Memorandum (A.1a), the Plaintiffs/Appellants lost their day in court, as also did thousands of those similarly situated. The Ninth Circuit's Memorandum (A.1a) will now be absolutely demonstrated to have been aberrant speculation as to Montana's substantive law. The District Court's use of a "special relationship" requirement was clearly a guess gone wrong by a magistrate who *sua sponte* inserted "special relationship" criteria into his speculation as to the duty definition for a Montana insurance professional based entirely on foreign law inclusive of New Hampshire's common law never recognized by Montana. The following comparison of the Circuit's Memorandum (A.1a) and the affirmed District Court rulings (A.28a and A.6a) with *TCF Enterprises*' holdings demonstrates the necessity for granting certiorari, vacating the Memorandum, and remanding with instructions to certify the proposed

questions concerning the duty of a Montana insurance professional to the Montana Supreme Court.

District Court Order (A.6a) Panel's Memorandum (A.1a)	**Montana Supreme Court's *TCF Enterprises* Decision Dated 2/27/24**
"Here, Plaintiffs do not allege that they asked their insurance agents to procure UIM coverage. Therefore, this case turns on whether the insurance agents had a heightened duty to offer and explain UIM coverage even though Plaintiffs did not ask for it. Plaintiffs have made no factual showing of a **special relationship** between the Plaintiffs and the insurance agents or other special circumstances that would give rise to a heightened duty to offer and explain UIM coverage." (A.3a) (Emphasis supplied.) "The Court does not disagree with State Farm that the circumstances here could render	¶ 22 "…all parties [have], a general common law duty to use reasonable care under the circumstances to avoid causing foreseeable harm to others." (Citations omitted). ¶ 22 "The existence of a duty turns primarily on foreseeability." (Citations omitted.) ¶ 22 "It is foreseeable that a party may be harmed when it believes it has insurance coverage but does not." ¶ 22 "Imposing a duty on an insurance business

certification to the Montana Supreme Court appropriate under Montana Rule of Appellate Procedure 15(3). As explained above, however, Judge Johnston's Findings and Recommendations prove consistent with existing Montana law…. Judge Johnston's conclusion that an insurance agent could owe an insured a duty to offer and explain UIM coverage if a **special relationship** exists between the two proves entirely consistent with that precedent." District Court Order, A.49a, 50a. (Emphasis supplied.)	to act with reasonable care and not misinform its customers regarding their insurance coverage clearly comports with public policy considerations."

The inaccuracy of the imposition of a "special relationship" requirement as a prerequisite for there to be an insurance professional's duty to advise as to coverage is clearly proven in the conflicting language of the District Court and the Panel's Memorandum and the *TCF Enterprises* decision of the Montana Supreme Court. *TCF Enterprises* involved the question of professional negligence of an insurance agent—the exact claim asserted by the Plaintiffs/Appellants. If Montana were to adopt the "special relationship" requirements *sua sponte* imposed by the magistrate, ratified by the District Court,

and then affirmed by the Panel, the Montana Supreme Court would have done so in *TCF Enterprises*. Nowhere in the *TCF Enterprises* decision do the words "special relationship" exist. *TCF Enterprises, Id.*

The lower federal courts have created erroneous Montana substantive law now rejected by Montana's highest court. The *TCF Enterprises* decision, while not citing §299A Restatement of Torts (Second)(1965), essentially uses §299A's duty definition, i.e., " . . . one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession..." The Circuit Court was recently requested to recall the mandate, and denied the request. *See* Circuit DktEntry: 70, 71. *TCF Enterprises* is now the most definitive definition of the duty of a Montana insurance professional. Granting certiorari, vacating the Circuit Court's Memorandum, vacating the District Court's Summary Judgment, and remanding with instructions to certify the proposed questions are the appropriate relief.

C. Court-Ordered Certification of Substantive Law is Proper Remedy

Recent rulings from this Court support the use of a GVR memorandum decision under the present undisputed factual circumstances. An incorrect "*Erie* Guess" has now been relegated to the proverbial judicial waste basket. Although a discussion in a dissenting opinion, the rationale for a GVR memorandum is amply supported by prior rulings of this Court. "Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable

probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. Whether a GVR order is ultimately appropriate depends further on the equities of the case…". *Grzegorczyk v. United States,* 142 S.Ct. 2580, 2583 (Mem) (2022), citing *Lawrence v. Chater,* 516 U.S. 163, 167-168, 116 S. Ct. 604, 133 L.Ed.2d 545 (1996) (per curiam).

Here, the equities are of great magnitude. Petitioners project that they are potentially class representatives of a F. R. Civ. P. 23(b)(3) damage class consisting of hundreds, if not thousands, of State Farm insureds, and that there is also a high probability there is a F. R. Civ. P. 23(b)(2) class of State Farm insureds who are unknowingly unprotected from catastrophic damages due to State Farm agents omitting underinsured motorist coverage (UIM) without explaining or offering the coverage, and without requiring a signed rejection in the event UIM coverage is declined. Petitioners presented proof through expert witness disclosures that State Farm's actions through its captive agents were deviations from the professional standard of care for a Montana insurance professional. The equities weigh heavily in favor of a GVR memorandum to place this derailed litigation back on track.

III. CONCLUSION

TCF Enterprises is a definitive decision articulating the parameters of the duty definition for a Montana insurance professional diametrically distinction from the "*Erie* Guess" utilized by the magistrate, ratified by the district court, and affirmed by the Panel's Memorandum. Although a very credible conclusion exists that Montana now has defined and pronounced the duty of a Montana insurance professional, the best approach is to provide absolute accuracy through the use of the certification process and the advancing of the proposed questions to the Montana Supreme Court, which has historically been extremely responsive to similar federal court requests. Why certification was totally ignored by the lower courts remains a mystery, since certification of insurance issues to a state's highest court ought to be the primary consideration in diversity cases. Perhaps, just perhaps, the district court did not want to deal with relinquishing the controlling issue of a potential massive class action for determination by the Montana Supreme Court. A GVR ruling is absolutely the correct conclusion given the recent definitive *TCR Enterprises* decision.

Respectfully submitted,

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