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IN THE SUPREME COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,	)	**Cause No. AC 17-0694**
	)	**DEFENDANT BNSF RAILWAY COMPANY'S COMBINED MOTION FOR SUMMARY JUDGMENT ON DUTY, STRICT LIABILITY AND PREEMPTION/ PRECLUSION, AND BRIEF IN SUPPORT**
	)	***Applies to Barnes, et al. v. State of Montana, et al.***

COMES NOW Defendant, BNSF RAILWAY COMPANY ("BNSF"), by and through its attorneys of Knight Nicastro, LLC, and hereby submits its Combined Motion for Summary Judgment on Duty, Strict Liability, Preemption/Preclusion, and Brief in Support.

I. INTRODUCTION

Pursuant to Rule 56, M.R.Civ.P., this Court should grant summary judgment in

BNSF's favor for three reasons. First, Plaintiff has failed to establish that BNSF owed him any duty of care. Second, as a common carrier, BNSF is excepted from strict liability for its mandated transport of vermiculite. Finally, Plaintiff's claims are preempted and precluded by the Federal Railroad Safety Act. BNSF is therefore entitled to judgment as a matter of law.

II. BRIEF STATEMENT OF FACTS

1. In 1963, W.R. Grace & Co. ("W.R. Grace"), a non-party to this action, purchased and thereafter operated the Zonolite Company vermiculite mine and mill in Libby, Montana. *Third Amended Complaint and Demand for Jury Trial ("Complaint")*, ¶ 17].

2. Plaintiffs allege the methods used by W.R. Grace to extract and process the vermiculite created substantial asbestos-containing dust which could be could be found in any places the vermiculite ore was processed, bagged, stored, or transported. *Id*. at ¶¶ 20-21.

3. As a result of W.R. Grace's failure to control dust from the mining, milling, processing, bagging, transport and a variety of uses of the vermiculite, they were exposed to asbestos. *Id*.

4. Plaintiffs' Complaint asserts two causes of action against BNSF and John Swing. The first alleges general negligence. *Id*. at ¶¶ 111-122. The second is premised upon common law strict liability and alleges BNSF engaged in "abnormally dangerous

activities thereby causing the release of asbestos contamination and exposure." *Id*. at ¶ 125.

III. LEGAL STANDARD

Summary judgment is proper when the pleadings, affidavits, discovery and disclosure materials show there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 56(c)(3), M.R.Civ.P. Summary judgment provides a party the opportunity to avoid costly litigation by securing a just and speedy resolution of the action while relieving the courts of the burden and expense of unwarranted litigation. *Celotex Corp. v. Catrett*, 477 U.S. 317, 320–23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The moving party has the burden of demonstrating the absence of genuine issues of material fact. *Olympic Coast Inv., Inc. v. Wright*, 2005 MT 4, ¶ 20, 325 Mont. 307, 105 P.3d 743. "Material" facts are those that "involve the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact." *Mt. W. Bank, N.A. v. Mine & Mill Hydraulics*, 2003 MT 35, ¶ 28, 314 Mont. 248, 64 P.3d 1048 (internal quotations and citation omitted).

In negligence actions, summary judgment is appropriate if a plaintiff fails to offer proof of any one of the elements: duty, breach, causation, and damages. *Dulaney v. State Farm Fire & Cas. Inc. Co.*, 2014 MT 127, ¶ 10, 375 Mont. 117, 324 P.3d 1211. The question of preemption or preclusion is a matter of law for the Court to determine.

IV. LEGAL AUTHORITIES AND ARGUMENT

A. Plaintiffs have failed to establish that BNSF owed them a duty of care

In a negligence cause of action, a plaintiff cannot prevail unless he proves that

defendant:

> (1) owed a duty to the plaintiff;
> (2) breached that duty;
> (3) that the breach was the proximate cause of the;
> (4) injuries and damages to plaintiff.

Scott v. Robson, 182 Mont. 528, 535-36 (Mont. 1979). The failure to establish any one of these elements is fatal to a plaintiff's case. *State ex rel. Burlington Northern, Inc. v. District Court* (1972), 159 Mont. 295, 301, 496 P.2d 1152, 1156. The existence of a legal duty is a question of law to be determined by the court. *Fisher v. Swift Transp. Co.*, 242 Mont. 335)(2008). In analyzing whether a duty exists, courts consider whether the imposition of that duty comports with public policy, and whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff. *Fisher v. Swift Transp. Co.*, 2008 MT 105, P17 (Mont. Apr. 1, 2008).

Under Montana law, the duty element of negligence turns on foreseeability. *Lopez v. Great Falls Pre-Release Servs*., 1999 MT 199, *P27 (Mont. Aug. 26, 1999). A defendant has potential liability only for injuries to others which to defendant at the time were reasonably foreseeable. *Versland v. Caron Transport*, 206 Mont. 313, 322 (Mont. Oct. 21, 1993). In the absence of foreseeability there is no duty and in the absence of duty, there is no negligence. *Lopez*, 1999 MT at *P26. "[I]n analyzing foreseeability in the duty context, we look to whether or not the injured party was within the scope of risk created by the alleged negligence of the tortfeasor – that is, was the injured party a foreseeable plaintiff. *Id*., at *P28, citing *Busta v. Columbus Hosp. Corp*. (1996), 276 Mont. At 360-61, quoting

Palsgraf v. Long Island Railroad Co., 248 N.Y. 339 (1928). [1]

"Proof of negligence in the air, so to speak, will not do. Negligence is the absence of care, according to the circumstances." *Palsgraf v. Long Island Railroad,* 248 N.Y. at 345. As Justice Cardozo wrote:

> [n]egligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, such as the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong.

Palsgraf, 248 N.Y. at 345-46.

In the present case, Plaintiffs are even further removed from foreseeability than the plaintiff in *Palsgraf*. Plaintiffs are asking the Court to find that BNSF

- knew or should have known the vermiculite ore being mined by W.R. Grace contained asbestos;
- knew or should have known the vermiculite ore mined by W.R. Grace was hazardous to transport because it contained asbestos;
- knew or should have known that transporting W.R. Grace's vermiculite ore would release dust particles into the open air; and
- knew or should have known that a citizen of Libby, not living on or adjacent to the railroad's operations, would be exposed to the asbestos at levels that provided a sufficient dose, duration and intensity to result in toxicity.

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[1] While the Complaint does not allege any specific Plaintiff was an employee of the railroad, reasonable foreseeability is an essential ingredient for there to be a duty as a matter of law in the context of a FELA claim. *CSX Transp. Inc., v. McBride,* 131 S. Ct. 2630 (U.S. 2011), *Gallick v. Baltimore & Ohio R. Co.,* 372 U.S. 108 (1963).

Yet Plaintiffs' Complaint fails to allege, and the evidence produced by Plaintiffs to date fails to show, that it should have been foreseeable to BNSF that *anyone* who lived in the town of Libby would be exposed to toxic levels of *asbestos* by BNSF's transport of *vermiculite*. Absent a showing of this key fact, Plaintiffs simply cannot prove that their alleged asbestos related diseases should have been foreseeable to BNSF. This is especially true because a defendant does not have a duty to protect everybody from all foreseeable harms.

The question of whether a legal duty of care exists is a question of law to be determined by the courts alone. *First Interstate Bank of Ariz., N.A. v. Murphy, Weir & Butler*, 210 F.3d 983, 986 (9th Cir. 2000). Montana courts consider two factors when determining whether a duty exists: (1) "whether the imposition of duty comports with public policy" and (2) "whether the defendant could have reasonably foreseen that his or her conduct could have resulted in an injury to the plaintiff." *Id.* There must be a nexus relationship to give rise to a duty on the part of the actor. The RESTATEMENT (SECOND) OF TORTS contains several sections on point:

> **§ 314 Duty to Act for Protection of Others**
> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

BNSF did not owe Plaintiffs any legal duty because there was no direct relationship between Plaintiffs and BNSF.

Plaintiffs' Complaint attempts to manufacture a legal duty by arguing that BNSF should have studied the health hazards of transporting of vermiculite concentrate it was

legally-mandated to carry, and that BNSF should have warned Plaintiffs of these hazards. However, BNSF has no duty to bystanders or town residents to test for, warn against, and protect from potential contaminated airborne fibers in vermiculite concentrate that were controlled and not disclosed by a third party, W.R. Grace. See *Prindel v. Ravalli County,* 331 Mont. 338, 349-350, (Mont. 2006); *Lopez v. Great Falls Pre-Release Servs.,* 295 Mont. 416, 422 (Mont. 1999); *Orr v. State,* 324 Mont. 391, 406 (Mont. 2004); *see also* W. Page Keeton & William Prosser, Prosser and Keeton on the Law of Torts § 56, at 385 (5th ed. 1984). BNSF is therefore entitled to summary judgment on Plaintiffs' negligence claims. because

B. As a common carrier, BNF is legally excepted from strict liability for its transport of W.R. Grace's vermiculite.

The basis for the Plaintiffs' common law, strict liability claim is that BNSF engaged in an abnormally dangerous activity "thereby causing the release of asbestos contamination and exposure of Plaintiff to deadly asbestos." *Complaint*, ¶ 125. Although Plaintiffs omit any reference to a specific code, statute, other standard, or basis for liability—the language in their Complaint mirrors the language found in Chapter 21 of the RESTATEMENT (SECOND) OF TORTS §§ 519-520 ("RESTATEMENT") – addressing liability for abnormally dangerous activities. Section 519 provides as follows:

> General Principle
>
> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm, and

> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Section 520 sets out a list of factors to be considered in determining whether an activity is abnormally dangerous as follows[2]:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
>
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

While Plaintiffs set out the elements of §519 and §520, their Complaint omits the next section, §521. Section 521 explicitly provides that the rules of strict liability for abnormally dangerous activities do not apply to common carriers:

> The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee ***or as a common carrier***.

(*emphasis added*).

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[2] Within the Plaintiffs' common law strict liability cause of action, Plaintiffs set forth six factors serving as the basis of the claim, also labeled "(a)" through "(f)" that exactly mirror the language found in section 520. *Complaint*, ¶ 125.

The 9th Circuit Court of Appeals explained in *Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co.*, 534 F.3d 986, 1005-06 (9th Cir. Wash. July 29, 2008) "*Hanford Nuclear Reservation Litig.*") that the comments to §519 indicate the common carrier exception is part and parcel of strict liability. Comment "a" to §519 states that "[t]he general rule stated in this Section is subject to exceptions and qualifications, too numerous to be included within a single section. It should therefore be read together with §§ 520 to 524A, by which it is limited." (RESTATEMENT, § 519, comment "a"). Comment "d" further limits the scope of strict liability and states that persons are accountable only for abnormally dangerous activities they undertake "for [their] own purposes." (*Id*., § 519, comment "d"). A key corollary to this point is that strict liability does not apply to activities carried on in pursuit of a public duty the actor was legally obligated to perform. *See* § 521; *Hanford Nuclear Reservation Litig.,* 534 F.3d at 1005-1006.

As stated by Plaintiffs, BNSF is a corporation engaged in interstate commerce. *Complaint*, ¶ 3. As a commercial railroad, BNSF is a common carrier of freight. BNSF was hired by W.R. Grace to transport its vermiculite. Just as commercial airlines are required to provide transport to any customer that purchases a ticket, railroad common carriers are mandated by federal law to deliver any freight it is contracted to transport. BNSF is a common carrier, and as such, is exempt from strict liability for alleged abnormally dangerous activities. *See, Lamb v. Martin Marietta Energy Sys*., 835 F. Supp.

959, 971 (W.D. Ky. July 26, 1993)(declining to recognize a cause of action for strict liability because the alleged abnormally dangerous activity – plutonium mining - was carried on in pursuance of a public necessity and that, pursuant to §521, abnormally hazardous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier.").

Once BNSF was contracted by W.R. Grace to transport vermiculite ore by rail, under both federal and Montana law, BNSF was legally obligated to carry the ore. MONT. CODE ANN. §69-11-403 sets out Montana's requirements for common carriers and provides as follows:

> 69-11-403. Acceptance of Freight.
>
> A common carrier ***shall***, if able to do so, accept and carry whatever is offered to the carrier, at a reasonable time and place, of a kind that the carrier undertakes or is accustomed to carry.

(*emphasis added*). Similarly, 49 USCS § 11101 establishes federal requirements for the services a railroad carrier is obligated to perform and provides that a rail carrier providing transportation or service ***shall*** provide the transportation or service on reasonable request. 49 USCS §11101(a)(*emphasis added*).

There can be no dispute that as a common carrier, BNSF was required by law to briefly store and transport vermiculite on behalf of W.R. Grace. Therefore, based upon the RESTATEMENT §§519 and 520, and pursuant to the exception provided by §521, BNSF is entitled to judgment as a matter of law.

C. Plaintiff's claims are preempted and precluded by the Federal Railroad Safety Act

Federal preemption derives from the Supremacy Clause of the United States Constitution, which provides that the laws of the United States "shall be the supreme Law of the land." U.S. Const. Art. VI, cl. 2. In *Cipollone v. Liggett Group*, the United States Supreme Court restated the longstanding general rule regarding preemption by federal law:

> [S]ince our decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L. Ed. 579 (1819), it has been settled that state law that conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746, 68 L. Ed. 2d 576, 101 S. Ct. 2114 (1981). Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress. Accordingly, the purpose of Congress is the ultimate touchstone of pre-emption analysis.
>
> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (select citations, quotations, and modifications omitted). The argument for preemption is particularly strong where "the State regulates in an area where there has been a history of significant federal presence'" such as railroad safety. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (quoting *United States v. Locke*, 529 U.S. 89, 107, 146 L. Ed. 2d 69, 120 S. Ct. 1135 (2000)). Although the Montana Supreme Court disfavors federal preemption, the presumption against preemption can be overcome "by evidence of a clear and manifest

intent of Congress to preempt state law." *Orr v. State*, 2004 MT 354, ¶ 50, 324 Mont. 391, 106 P.3d 100 (citations and quotations omitted).

When Congress has legislated a subject within its constitutional control, and has manifested its intention to address the subject in full, the authority of local jurisdiction is necessarily excluded. *Northern Pacific Railway Co. v. State of Washington*, 222 U.S. 370, 378 (1912). Plaintiffs' claims attempt to impose liability on BNSF for the transportation of vermiculite ore it was required to transport as a common carrier. These claims seek to impose duties upon BNSF that directly conflict with federal law, stand as an obstacle to the execution of congressional intent embodied in the law, and intrude upon a field of regulation that has historically been reserved to the federal government. *E.g.*, *Major v. CSX Transp.*, 278 F. Supp. 2d 597, 607 (D. Md. 2003). The Federal Railroad Safety Act ("FRSA") regulates BNSF's activities as a common carrier, and this legislation is controlling to the extent that state law or Plaintiffs' claims conflict with those regulations.

Plaintiff's claims are also preempted by the FRSA. Congress enacted the FRSA in 1970 "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA gives the Secretary of Transportation broad powers to prescribe rules, regulations, orders, and standards for all areas of railroad safety. 49 U.S.C. § 20103(a). The Secretary in turn has delegated the authority to "carry out all functions vested in the Secretary" by the FRSA to the Federal Railroad Administration (FRA). 49 C.F.R. § 1.49(m).

The FRSA includes an express savings and preemption clause:

> **(a) National Uniformity of Regulation.—**
>
> **(1)** Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> **(2)** A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
>
> **(A)** is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> **(B)** is not incompatible with a law, regulation, or order of the United States Government; and
>
> **(C)** does not unreasonably burden interstate commerce.

49 U.S.C. § 20106(a)(1). This section has been given broad application. *In re Derailment Cases*, 416 F.3d 787, 793 (8th Cir. 2005). It not only preempts state laws that impair or are inconsistent with FRA regulations, but all "state regulations aimed at the same safety concerns addressed by FRA regulations." *Burlington N. R.R. Co.*, 880 F.2d at 1105–06. Plaintiff's state-law claims are preempted (and his FELA claims precluded) "if the federal regulations substantially subsume the subject matter of the relevant state law." *In re Derailment Cases*, 416 F.3d at 793 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 123 L. Ed. 2d 387, 113 S. Ct. 1732 (1993)). Moreover, by its plain terms, § 20106 is not limited to FRA regulations, but rather applies to "any regulation 'adopted' by the Secretary…, regardless of the enabling legislation." *Easterwood*, 507 U.S. at 663.

As such, the FRSA's preemption clause applies to the HMTA as it relates to the

transportation of hazardous materials by rail. *CSX Transp., Inc. v. Pub. Utils. Comm'n*, 901 F.2d 497, 501–02 (6th Cir. 1990), *cert. denied*, 498 U.S. 1066. The DOT regulations of the HMTA, therefore, trigger the FRSA. As explained above, because the DOT has explicitly determined that special measures—handling, loading, transporting, warning, etc.—are not warranted, Plaintiff's state law claims with respect to such measures are preempted. *See Easterwood*, 507 U.S. at 661.

Not only are all of the instant claims preempted by 49 C.F.R. § 172.l02(c)(1)(156) because they concern the loading, handling, and transporting of vermiculite; FRSA regulations also preempt the specific allegations. It is not necessary that a regulation address the challenged conduct in specific detail; rather, the claim will be preempted if a federal regulation generally applies to the area at issue. *E.g.*, *Burlington N. & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 796 (7th Cir. 1999).

BNSF has no duty to warn; rather, the burden is on the product shipper to identify and alert the railroad to any hazardous materials.[3] Similarly, the FRA has adopted extensive regulations regarding the inspection of freight cars, which preempt state-law negligent inspection claims. *See In re Derailment Cases*, 416 F.3d at 793–94 (discussing regulations

[3] *E.g.*, 49 C.F.R. §§ 171.2(a) (2014) ("No person may offer or accept a hazardous material for transportation in commerce unless that person is registered in conformance with subpart G of Part 107 of this chapter, if applicable, and the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized…."); § 173.22 (2014) ("Except as otherwise provided in this part, a person may offer a hazardous material for transportation in a packaging or container required by this part only in accordance with the following" requirements.); § 173.31(a) (2014) ("No person may offer a hazardous material for transportation in a tank car unless the tank car meets the applicable specification and packaging requirements of this subchapter or, when this subchapter authorizes the use of a non-DOT specification tank car, the applicable specification to which the tank was constructed.").

on inspection and finding plaintiffs' negligent inspection claims to be preempted by the regulations). Third, Plaintiffs' allegations that BNSF was negligent because it failed to prevent dust from escaping its railcars are preempted by the extensive regulations concerning train speed.[4] Finally, the regulations concerning the choice of railcar for transporting materials are so extensive that they indicate Congress' intent to occupy the field exclusively, preempting any other state requirements. *Roth*, 651 F.3d at 370 (preempting claims relating to choice of railcar under the HMTA).

D. Causation

The parties are currently in the midst of conducting discovery, and expert disclosures in the case are not due until October 26, 2018. In light of these facts, BNSF hereby reserves the right to seek leave to file motions for summary judgment in the event Plaintiffs' fail to offer sufficient evidence of causation—either specific or generic— to satisfy their burden of proof.

V. CONCLUSION

For the reasons set forth herein, the Court should grant summary judgment in BNSF's favor.

Knight Nicastro, LLC
Respectfully submitted,

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[4] *See* 49 C.F.R. § 213.9 et seq.

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I hereby certify that I have served true and accurate copies of the foregoing Combined Motion for Summary Judgment on Duty, Strict Liability, Preemption/ Preclusion, and Brief in Support to the following on October 5, 2018:

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Dated: 10-05-2018