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IN THE MONTANA ASBESTOS CLAIMS COURT

IN RE ASBESTOS LITIGATION,	)	Cause No. AC-17-0694
	)	
Consolidated Cases.	)	Applicable to
	)	*Hutt v. Maryland Casualty Co. et al.,*
	)	Eighth Judicial District Court,
	)	Cause No. DDV-18-0175
	)	
	)	

DEFENDANT MARYLAND CASUALTY COMPANY'S
BRIEF IN SUPPORT OF SUMMARY JUDGMENT

Defendant Maryland Casualty Company ("MCC"), n/k/a Zurich American Insurance Company, successor by merger to MCC as of December 31, 2015,[1] by and through its undersigned counsel, pursuant to Montana Rule of Civil Procedure 56, files this Brief in support of its Motion for Summary Judgment against Plaintiff Ralph V. Hutt ("Hutt"), and states as follows:

INTRODUCTION

This case arises from Plaintiff Ralph V. Hutt's alleged exposure to asbestos in 1968 and 1969 at the former W.R. Grace ("Grace") plant located in Libby, MT (the "Libby Plant"). From 1963 to 1990, Grace owned and operated the Libby Plant, which was located approximately seven miles north of Libby, Montana. The Libby Plant yielded ore used to create zonolite, which generated high volumes of asbestos dust, allegedly causing injury to mine workers, their families, and other members of the community. Persons alleging injuries from exposure to asbestos in Libby filed suit against Grace beginning in the 1970s. By 2001, Grace was involved in over 65,000 personal injury lawsuits arising from the alleged exposure to the asbestos dust generated by the Libby Plant.

At all times, Grace was responsible for the health and safety of its workers, as well as the conditions at the Libby Plant. It is alleged that throughout the 1960s asbestos dust levels at the Libby Plant were considered hazardous and in violation of well-accepted industrial hygiene standards. Grace's failure to comply with those standards included but was not limited to: failing to inform workers of the hazards of asbestos exposure and the importance of personal protective equipment; failing to implement adequate dust control measures; failing to require the use of

[1] For clarity and conformity with this case's extensive history, Defendant is referred to as "MCC."

respirators at the facility; failing to provide respirator training or a fit check program; and failing to provide an adequate medical surveillance program.

Grace was repeatedly informed by the State of Montana and others, including MCC, that conditions at the Libby Plant were unacceptable. Grace knew that corrections were necessary to protect the health of its workers exposed to asbestos from mining operations. However, Grace ignored these warnings and associated recommendations for addressing the hazardous conditions at the Libby Plant and failed to correct the dangerous conditions or otherwise protect its workers. The allegedly hazardous workplace conditions at the facility were the result of Grace's non-delegable duty and failure to comply with accepted industrial hygiene standards, not the result of any conduct by MCC.

UNDISPUTED FACTS

1. Grace's Operation of the Libby Plant

Mineral Carbon and Insulating Co. first mined vermiculite in Libby in approximately 1922. Ex. 1, Grace 2nd Resp. to EPA Req. for Info., at 6. Mineral Carbon changed its name to "Zonolite Co." in 1923. Grace acquired the assets of Zonolite Co. in 1963. *Id.* Grace was aware of the presence of tremolite in the vermiculite ore deposits when it purchased Zonolite in 1963. *Id.* at 13. By virtue of Grace's acquisition of Zonolite on or around April 16, 1963, MCC, as Grace's workers' compensation carrier, provided workers' compensation insurance for the Libby Plant. Ex. 2, Endorsement, MCC-000168. Royal Insurance Company ("Royal") was the previous workers' compensation provider for the Libby Plant.

The vermiculite was mined through open strip mining. Ex. 1, Grace 2nd Resp. to EPA Req. for Info., at 6. After overburden was removed, the areas of vermiculite were drilled and blasted, and the material was picked up and put in 85 ton open bed haul trucks which transferred

the material to a large hopper. The hopper separated vermiculite from large waste rock which was then sent to separate silos based upon grading and size. It was then combined via draw points at the bottom to produce a blended mill feed. *Id.*

The original dry mill was used from 1922 to 1974. *Id.* at 8. The dry mill was supplemented by a wet mill in 1954. Grace operated both mills beginning in April 1963 until 1974, when both were replaced with a new wet mill. The dry mill consisted of a series of screening operations which resulted in a concentrated vermiculite. Beginning in 1954, the material went from the transfer point to the wet mill where it was sprayed with water and sent through screenings to remove waste materials, and other processes that concentrated the ore. After leaving the wet mill, the concentrated ore went to the dry mill for further separation processes. The overall process remained consistent from 1954 through 1974. The average daily production of finished vermiculite concentrate in the 1960s and 1970s was between 500 and 1,000 tons. *Id.* at 9.

By the very nature of the mining operations at the Libby Plant, dust control was an ongoing issue which required constant attention by plant management. From time to time, Grace attempted to address the excess dust problem. At the dry mill, a larger exhaust fan was added on January 20, 1964, and a new cyclone was added in 1965. Grace purportedly required the use of respirators in the dry mill, but the policy was apparently neither followed by workers nor enforced by plant management. Respirators were provided to those who worked in the skip car loading and unloading processes and at the screen facility. Grace acquired dust count/monitoring equipment and trained personnel to measure dust concentrations within the dry mill. *Id.* at 11. Unfortunately, none of these measures adequately addressed the pervasive dust issues at the Libby Plant.

Not long after purchasing the Libby Plant, Grace became concerned with its ability to control dust in the dry mill and began investigating and researching the options for switching the milling to a completely wet process, which Grace was to engineer. However, it took Grace several years to fully engineer, test and construct the new wet mill. Finally, in 1974, the new wet mill was completed, thereby replacing the former dry and wet mill combination. At the new wet mill, as the wet concentrate was being dried, the exhaust air passed through a dust collection system. *Id.* at 12.

Since 1956, Grace and its predecessor, Zonolite, required pre-employment physical examinations of the workers at the Libby Plant. *Id.* X-ray screening of employees began in 1959, and starting in 1964, annual x-rays were taken of plant personnel. The x-rays were performed and evaluated by physicians selected by personnel at the Libby Plant. However, it was not until the early 1970s that Grace management met with employees individually to discuss their x-ray test results and to recommend further evaluation from a personal physician. *Id.* at 13.

2. Inspections by the State of Montana[2]

From the 1940s until 1990, when Grace ceased its operations in Libby, the State inspected or participated in inspections of the Libby Zonolite/W.R. Grace mine, mill and other operations, more than 20 times. *See* Ex. 3, Common Exhibit 10 (8/2/1944 letter from Montana Division of Industrial Hygiene to John Meyers, Universal Zonolite Company, referencing recent industrial hygiene visit). Each of the State's inspections was typically followed by a written report including conclusions and recommendations. *See infra.*

[2] While MCC had no enforcement or regulatory authority over Grace and its operations, the State of Montana (the "State") had a statutory duty to protect the safety of Grace miners in addition to enforcement authority. *Orr v. State*, 2004 MT 354, ¶ 46, 324 Mont. 391, 407, 106 P.3d 100, 111.

Benjamin Wake ("Wake"), the Industrial Hygiene Engineer for the State of Montana Division of Disease Control, conducted seven inspections of the Libby Plant from 1956 to 1967. Through his inspections, Wake repeatedly concluded that there was a significant hazard from exposure to asbestos at the Libby Plant.

a. September 21, 1956 State Report

Wake's first inspection was on August 8-9, 1956. Ex. 4, Common Exhibit 17, 9/21/1956 Letter from Wake to R.A. Bleich, Zonolite Company Division Manager ("Bleich"), including Report on an Industrial Hygiene Study of the Zonolite Company of Libby, Montana ("State Report"). During that inspection, the State took six samples to measure the dust concentrations in the air by the million parts per cubic foot ("mppcf"). *Id.* at 4.[3] The State was monitoring for free silica, which it determined to be 1.3% of the dust, setting a maximum level at 50 mppcf. Nuisance dust levels were considered safe under 50 mppcf.[4] However, Zonolite records stated the dust concentration was between 8-21% asbestos. *Id.* at 5. And Wake warned that, "the asbestos dust in the dust in the air is of considerable toxicity." *Id.* Based on the asbestos content in Zonolite records, Wake estimated that "the maximum concentration of dust in the air should not be greater than 25 to 30 mppcf." *Id.* at 3. Four of the six samples exceeded this limit. *Id.* at 4.

In the September 21, 1956 State Report, Wake noted 13 deficiencies in the operation of the dry mill and stated that these deficiencies are "illustrative of what would be poor policy in

[3] For clarity, pin citations to State Reports refer to the .pdf page number, rather than the page number included in the State Report.

[4] Wake defined "maximum allowable concentrations" ("MAC")" as "that concentration of any harmful material in a working atmosphere below which a worker's health will not be affected adversely." Ex. 4, 9/21/56 State Report at 3. The MACs Wake used in his study and report were "those recommended by the U.S. Public Health Service, the American Conference of Governmental Industrial Hygienists and the American Industrial Hygiene Association." *Id.*

matters of maintenance and operation of this plant." *Id.* at 6-7. The September 21, 1956 State Report made nine general recommendations for mitigation of employee exposure to dust. *Id.* at 7-8. The Report made it clear that Zonolite needed examination and repairs to the exhaust system, additional ventilation capacity, a system for cleaning the rafters and implementing and maintaining proper housekeeping measures, and mandatory use of respirators in the dry mill. However, the State's recommendations did not include informing employees of the potential health hazard. *Id.* The September 21, 1956 State Report cited a study by Drinker and Hatch (1954) which concluded pathological changes produced by asbestos causes diffuse fibrosis resulting in a serious decrease in lung capacity. *Id.* at 5.

b. January 12, 1959 State Report

The State conducted another industrial hygiene inspection of the Libby Plant on December 16 and 17, 1958. Ex. 5, Common Exhibit 21, Letter from Wake to Bleich including 1/12/1959 State Report. During that survey, the State conducted its own sampling of asbestos fibers within dust specimens. *Id.* at 3. The State found a range of 12-31% asbestos content at an average of 27%. The State noted this percentage may have been less than the actual concentration because it was not counting small fibers. *Id.* The January 12, 1959 State Report cited to a study by Ellman which addressed the fact that inhalation of asbestos dust must be expected sooner or later to produce pulmonary fibrosis, depending on the length of exposure and nature and concentration of the dust. The study warned that pulmonary asbestosis, once established, is a progressive disease with a poor prognosis; its treatment can only be symptomatic. *Id.* at 9.

During the 1958 inspection, the State took 13 samples in the dry mill, including 8 while it was operating at full capacity. *Id.* at 3. The State concluded that three of the eight samples

exceeded the maximum allowable level. *Id.* at 5. The State noted that, "some progress had been made in reducing dust concentrations in the dry mill but . . . such concentrations had, as yet, not been reduced to a satisfactory level overall." *Id.* at 10. The State provided six recommendations to reduce the dust and also recommended that the 1956 report be reviewed for dust control measures because many of them still applied. *Id.*

c. April 19, 1962 State Report

The State conducted another inspection of the Libby Plant on March 6-8, 1962. Ex. 6, Common Exhibit 39, Letter from Wake to Bleich including 4/19/1962 State Report. The inspection included the taking of 20 samples at the Libby Plant: 17 in the dry mill, 2 in the wet will and 1 at the mine. *Id.* at 4. The March 1962 inspection found the dry mill "during this study . . . as during all previous investigations, to be extremely dusty and in need of repair and modifications to reduce dustiness to acceptable limits." *Id.* at 3. Concentrations of dust in the dry mill were extremely high and had substantially over the MAC for asbestos dust, or even, in most cases, a nuisance dust. *Id.* at 5. All of the samples were substantially over those noted in the previous studies of 1956 and 1958. The dust in the air where the workers were present was measured to contain 40% tremolite asbestos. *Id.*

According to the April 19, 1962 Report, "it appeared that no progress had been made in reducing dust concentrations in the dry mill to an acceptable level and that, indeed, the dust concentrations had been increased, substantially, over those in the past." *Id.* at 6. The State reiterated that its previous recommendations be carried out and that "immediate attention be given to reducing dust concentrations in the dry mill to the acceptable levels of 12 mppcf." to lower asbestos levels to 5 mppcf. *Id.*

d. May 23, 1963 State Report

The State returned once again on April 11, 1963 to perform another inspection of the Libby Plant. Ex. 7, Common Exhibit 45, Letter from Wake to Bleich including 5/23/1963 State Report. The May 23, 1963 Report noted for the first time the prevalence of small diameter fibers and the increased danger and toxicity of small fibers. *Id.* at 5. All eight samples taken in the dry mill during the April 1963 inspection exceeded the State's MACs. Significantly, the State observed, "as noted in all previous reports, considerable efforts should be made, immediately, to improve the dust control procedures in the plant to reduce dustiness to an acceptable level. Any work done in the past has apparently been ineffective to the extent that more effort should be given to this feature than has been in the past." *Id.*

e. May 11, 1964 State Report

One year later, the State inspected the plant on April 29, 1964. Ex. 8, Common Exhibit 53, Letter from Wake to Bleich including 5/11/1964 State Report. The State inspected the dry mill and noted that some improvement to the ventilation system was made, but dust levels had not decreased due to "extremely poor housekeeping." *Id.* at 2. All five samples exceeded the American Conference of Governmental Industrial Hygienists ("ACGIH") MAC. *Id.* at 3. The May 11, 1964 State Report noted "the asbestos content of the material with which [Grace was] working appears to provide some serious potential for the development of disease if not properly controlled." *Id.* at 4. The Report made four specific recommendations, in addition to a review of its previous recommendations, including a careful program of housekeeping, and a continued effort "by the company to determine the dust concentrations in the building by frequent sampling and analysis." *Id.*

f. October 2, 1964 State Report

In September of 1964, the State conducted an inspection accompanied by the U.S. Public Health Service. Ex. 9, Common Exhibit 58, Letter from Wake to Bleich including 10/2/1964 State Report. The inspection was conducted, in part, "to correlate the dust collection and counting procedures with [Grace Research Engineer] Mr. [Robert "Bud"] Vinion to assist him in his evaluation of the effectiveness of any control measures instituted." *Id.* The report reiterated the need for a dust disposal system that did not "continuously contaminat[e] the whole plant work area" and it was recommended that the fan be "either raised substantially so that the dust-laden air discharges substantially above the plant area or that cleaning be provided." *Id.* at 2.

g. February 9, 1967 State Report

The next inspections by the State were made on January 30 and February 1, 1967. Ex. 10, Common Exhibit 90, Letter from Wake to Bleich including 2/9/1967 State Report.[5] The report noted that, although progress was made in the reduction of dustiness within the plant, close attention needed to be paid to the dust control system and that there must be a maintained effort to keep the dustiness at or below the level recommended by past reports. *Id.* at 3.

h. September 4, 1968 State Report

The following year, State inspectors visited the Libby Plant on June 25-26, 1968. Ex. 11, Common Exhibit 111, Letter from Wake to Bleich including 9/4/68 State Report. The September 4, 1968 State Report detailed new industrial hygiene standards and threshold limit values. *Id.* at 3. The report noted that the conditions at the mine were satisfactory by the 5 mppcf threshold limit value ("TLV"), but considered doubtful by the tentative 12 fiber/cc TLV since several concentrations approached or exceeded this value. *Id.* at 4.

[5] The only available copy of this letter is a poor photocopy, portions of which are difficult to read.

The September 4, 1968 State Report noted the ineffectiveness of the dry mill exhaust ventilation system. *Id.* at 4. In addition, inspectors noted that the respirator program in the mill was ineffective. "In general the dry mill poses a serious hazard to the health of the workers and some other areas are of doubtful safety." The September 4, 1968 State Report further noted the significant amount of dust churned up by dump trucks driving on the dirt road. *Id.* at 5. Consistent with prior instructions to Grace, the State recommended that: (1) the exhaust system at the dry mill should be improved; (2) the road surface of the mine should be treated to reduce dust; and (3) Bureau of Mines-approved respirators should be provided for all employees where practical.[6] *Id.*

The foregoing shows that Grace was repeatedly informed by the State that conditions at the Grace facility were hazardous. And yet, dust sampling at the Libby Plant repeatedly demonstrated Grace's noncompliance with industrial hygiene standards and that Grace failed to heed dust control and worker safety recommendations made by the State. Grace ignored and/or resisted all data and warnings regarding the unacceptable conditions at the Libby Plant.

3. MCC's Limited Role as Insurer of the Libby Plant

MCC was Grace's workers' compensation carrier from 1963 to 1973.[7] MCC's relationship with Grace arose solely by its provision of these insurance coverages to Grace.

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[6] On October 31, 1969, Earl Lovick, Plant Manager for the Libby Plant ("Lovick"), responded to Wake's letter regarding the September 4, 1968 State Report and resisted the State's recommendations. Ex. 12, Common Exhibit 115. Specifically, Lovick wrote, "We do not understand the statement that our respirator program is not effective…. These respirators are furnished to all employees working in areas where we have found the exposure to be high. It is mandatory that they be worn in these areas, and we try to strictly enforce this rule." *Id.*

[7] Royal was Zonolite's insurance provider before the Libby Plant was sold to Grace in April 1963. MCC became the workers' compensation provider for the Libby Plant by virtue of the purchase. Ex. 2, Endorsement, MCC-000168. MCC had no previous knowledge of the facility and did no pre-insurance underwriting.

MCC's Workers' Compensation and Employers Liability Insurance Policies defined its role with Grace and the facility and made clear that that MCC did not undertake to perform any duties related to the health or safety of the workers at the Libby Plant.

PART SIX—CONDITIONS

A. Inspection

> We have the right, but are not obliged to inspect your workplaces at any time. ***Our inspections are not safety inspections.*** They relate only to the insurability of the workplaces and the premiums charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, ***we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards.*** Insurance rate service organizations have the same rights we have under this provision.

Ex. 13, Policy, MCC-001194-001200 (emphasis added). The limited scope of any inspections performed by MCC was set forth in the Grace policy.

By policy terms, the inspections performed by MCC at the Libby Plant were related to the insurability of the workplace and the premiums charged; they were not done for the benefit of Grace or its workers, and they were not safety inspections. Any reports MCC gave to Grace on the conditions observed were merely recommendations based upon the express terms of the relevant insurance policies. This was reinforced in the service letters from Lawrence "Larry" Park, an Engineering Analyst for MCC ("Park"), to Grace, which concluded, "Our survey is not intended to cover every accident potential; it relates only to the hazards referred to herein." *See*, *e.g.*, Ex. 14, Common Exhibit 130. MCC did not warrant that the Grace facility was safe or healthful nor did it warrant that the conditions at the Libby Plant complied with applicable laws, regulations, codes or standards.

In contrast, Grace had its own employees who were specifically responsible for worker safety and daily plant conditions, including Ray Kujawa, Safety Engineer and Mill Superintendent ("Kujawa"), Don Carkener, Loss Prevention Engineer, *see* Ex. 15 MCC-001879-001882 (7/19-20/1965 report of MCC representative W.E. Walker ("Walker")), and Peter Kostic, Safety Administrator ("Kostic"), *see* Ex. 16 MCC-001860-001865 (6/1/1966 memo from Park) at MCC-001860. Moreover, Grace frequently and repeatedly rejected MCC's safety recommendations regarding reduction of dust and asbestos fibers. For instance, MCC representatives recommended that Grace maintain dust levels at the limit recommended by the ACGIH at the time for dust containing asbestos, 5 mppcf; however, Grace rejected this recommendation. Ex. 17 MCC-001887-001889 (10/18/1965 report of Walker, stating "The management at the Libby operation seem to feel that the total dust count is down to a level that is as good as present equipment can maintain."); Ex. 18, MCC-001878 (12/10/1965 letter from F.W. Rupp, Grace Treasurer ("Rupp"), to Park about introduction of 5 mppcf limit); Ex. 19, Common Exhibit 82 (12/28/1965 letter from Park to Rupp explaining ACGIH standards and 5 mppcf limit).

In internal Grace correspondence regarding Park's recommendation on January 25, 1966, Bleich wrote to Rupp that:

> In Mr. Ben Wake's report of May 23, 1963, Montana State Board of Health, the Maximum Allowable Concentration for us is 20 million particles per cubic foot of air total dust and 5 million particles per cubic foot of air for asbestos.
>
> ….
>
> These limits were referred to in Mr. Wake's report of October 2, 1964 and to our knowledge are still valid as far as the Montana State Board of Health is concerned. We have not been inspected since that time. For our own purposes, we have voluntarily set our standards at 10 mppcf total dust. I am enclosing our record of monthly dust counts.

> ***I can see no reason for further limitations on us. Mr. Park[']s recommendations are unreasonable and impossible and unnecessary.***

Ex. 20, Common Exhibit 83 (emphasis added).

Grace remained steadfast in its refusal to accept MCC's recommendations concerning acceptable dust levels. In July 1966, Walker wrote, after visiting the Libby Plant:

> Of the nine previous recommendations submitted, there are four outstanding, which should receive priority in being completed. Actually, of the nine recommendations submitted on my report dated 5-19-66, only #7 has been done.
>
> ….
>
> Mr. Kujawa, Mill Superintendent, flatly makes the statement that because they weren't supplied this form ***they were <u>not</u> going to meet <u>any</u> of these recommendations. By his statement they are not going to overhaul the dust collection system even though the money has been appropriated,*** unless specifically ordered to do so from their home office. Mr. Kujawa made the statement that ***our recommendations regarding total allowable dust concentrations based on the American Conference of Industrial Hygienists established threshold limits was now out-the-window.*** He states (and I quote) "A new threshold limit value has been established by the aforementioned group to cover tremolite ore."
>
> ….
>
> As for the other local management, they class us all as "arm chair generals." … Their inter-company politics are of no concern to me, but their improvement of exposures is.

Ex. 21, MCC-001858-001859 (emphasis added).

Grace's refusal to allocate and spend the necessary funds for addressing workplace hazards at the mine persisted. In April 1967, MCC representative Joe Baker wrote, after an inspection of the Libby Plant:

> All of the recommendations appear to have been complied with – with the exception of the extension of the duct. … The dust problem does not seem any better or worse. … I understand from both Mr. Kujawa and Mr. Lovick, that the extension of the duct has been cancelled by the home office. ….
>
> This does not bother me as much as their seeming acceptance that the dust and exhaust from cyclones is not hazardous. From a check of x-ray reports with Mr. Lovick, some of the men are showing a worsening condition of the lungs. The

> odd part about this, is that all of these men do not work in the mill, some are truck drivers and grader men. Also one man who works in the lab and wears a respirator. This should give evidence that the dust from the mill is causing trouble. I think that if we could actually show that these men are facing an exposure, we would have more chance of getting somewhere.
>
> I believe that the design of the exhaust system is faulty and that the velocity is too great for the cyclones thereby allowing the overflow of dust. They have had engineering on this exhaust, with thought of putting up a stack, moving fan and running of the duct. Stack would cost $6,750. to $7,000., fan $9,150., and running duct $6,270. ***Home office seems to feel that the expenditure would not be in reason with the results, as they have been convinced by locals that dust from exhaust is not detrimental.***

Ex. 22, MCC-001780-001782 (emphasis added).

Grace also rejected MCC's recommendations regarding increased monitoring and reporting workers' health. Ex. 23, Common Exhibit 135.7 (12/9/1969 letter from Kostic to Park, "I question the idea of a repeat X-ray examination in six months of the sixty employees listed in your letter… The best approach to the overall problem, I think, is one of dust control.""); Ex. 24, Common Exhibit 130.4 at 11 (12/23/1969 letter from Lovick to H.A. Brown, Vice President of Manufacturing and Engineering in Grace's Construction Products Division ("Brown"), regarding frequency of x-rays, "My opinion would be that there should be no change in the annual schedule.").

Grace exercised exclusive responsibility and control over the safety and conditions of the Libby Plant. It internally monitored and reported on dust conditions, and established and implemented its own plans and programs for dust control. Ex. 25, Common Exhibit 65 (12/30/1964 letter from Bleich to Joseph A. Kelley, W.R. Grace Vice President ("Kelley"), reporting on dust control at Libby Plant); Ex. 26, Common Exhibit 99.3 (1/5/1968 letter from Kostic recommending Industrial Hygiene Survey). In a January 13, 1965 letter, Kelley reported on the "dust situation at Libby," stating:

> The second important decision made at Libby was that we would move as fast as possible to eliminate the dry mill. This has been our plan all along but because of our balance problem we could not see the light as to when this could be done. We must engineer the whole job and I would hope that we could tie down some kind of definite plan by September 1, 1965. We just simply could not afford the cost of rehabilitating the present dry mill concerning circuits to make it a modern and completely dust free operation.

Ex. 27, Common Exhibit 72.

Grace's monitoring and control of the Libby Plant dust control program was also internally documented. Ex. 28, Common Exhibit 85 at 1-4 (3/29/1966 letter from Kostic, summarizing Grace's chronology of correspondence regarding Libby Plant dust problems from 1959-1966). Grace took into account the recommendations and information it received from multiple sources and determined which recommendations to focus on or comply with. *Id.* at 4-8 (considering and discussing "conflicting remarks in the correspondence" regarding Libby Plant dust problems, and making recommendations for chest x-rays, MAC standards, scheduling air sampling, and improving ventilation and dust collection equipment).

Grace also took its own monthly dry mill dust samples. *See* Ex. 29, Combined Exhibit including Common Exhibit 89 (dust count 1/17/1967); Common Exhibit 102.3 (dust count 4/25/1968); Common Exhibit 102.7 (dust count 5/23/1968); Common Exhibit 103.1 (dust count 6/28/1968); Common Exhibit 106.1 (dust count 7/25/1968); Common Exhibit 110.2 (dust count 8/27/1968); Common Exhibit 112.2 (dust count 9/25/1968); Common Exhibit 115.1 (dust count 10/31/1968); Common Exhibit 115.95 (dust count 11/27/1968); Common Exhibit 116.5 (dust count 1/4/1969); Common Exhibit 116.9 (dust count 1/30/1969); Common Exhibit 118.9 (dust count 2/1969); Common Exhibit 122 (dust count 3/1969); Common Exhibit 123 (dust count 4/29/1969); Common Exhibit 124 (dust count 5/29/1969); Common Exhibit 125.5 (dust count 6/27/1969); Common Exhibit 129.5 (dust count 7/30/1969); and Common Exhibit 130.1 (dust

count 8/26/1969). Grace also conducted its own plant inspections. Ex. 27, Common Exhibit 72 at 2 ("I am directing … a thorough inspection as a follow-up ... on each of the various dust producing points").

In addition, Grace established its own rules and procedures regarding worker health, such as rules regarding the use of respirators. Ex. 30, Common Exhibit 99 (1/1/1968 Grace Rules for Use of Respirators). Grace engaged in its own internal deliberations and programming regarding worker health. Ex. 31, Common Exhibit 125 (6/19/1969 letter from Kostic stating, "Regarding our deliberations and questions having to do with pneumoconiosis cases, here are a few of my thoughts…"); Ex. 32, Common Exhibit 129.1 (7/26/1969 letter from Lovick discussing compiling x-ray results). Grace internally conducted and reported on worker health studies. Ex. 24, Common Exhibit 130.4 at 1-10 ("Study to Determine Relationship Between Years of Employment, Age, Smoking Habits and Chest X-ray Findings Zonolite/Libby Employees," signed by Kostic).

Grace also repeatedly solicited and received industrial hygiene and safety input from multiple non-MCC sources, including Johns-Manville ("J-M"), the U.S. Public Health Service, and the State. *See* Ex. 26, Common Exhibit 99.3 (1/5/1968 letter from Kostic discussing meeting with representative of J-M Research and Engineering representative in developing industrial hygiene survey); Ex. 33, Common Exhibit 101.7 (2/13/1968 letter from Kostic discussing meeting with U.S. Public Health Service, and addressing discrepancy between TLVs recommended by J-M and MCC); Ex. 34, Common Exhibit 101.9 (3/1/1968 letter from Kujawa to Bleich, "We are requesting Mr. Wake . . . to come during March" in order to check dust readings); Ex. 35, Common Exhibit 102 (3/19/1968 letter from Kostic discussing plans for J-M conducting Industrial Hygiene Survey); Ex. 36, Common Exhibit 103 (6/27/1968 letter from

Lovick discussing visit from U.S. Public Health Service to conduct dust studies and readings in mill and operating area); Ex. 37, Common Exhibit 110 (8/29/1968 letter from Kostic discussing consultation with J-M regarding U.S. Public Health Service's request for study of workers); Ex. 38, Common Exhibit 112 (9/18/1968 Industrial Hygiene Survey of Libby Plant by J-M); Ex. 39 Common Exhibit 126 (7/8/1969 letter from Brown concerning call with U.S. Public Health Service, requesting meeting, and suggesting working with U.S. Public Health Service and J-M for industrial hygiene, and participating in study of active and inactive employees); Ex. 40 Common Exhibit 127 (7/8/1969 letter from Brown regarding meeting with U.S. Public Health Service); Ex. 41, Common Exhibit 127.8 (letter from Brown discussing meeting with U.S. Public Health Service and two proposed studies, directing Lovick to gather information); Ex. 42, Common Exhibit 131 (10/15/1969 letter from Brown, including report, "Highlights of Meeting Between Representatives of U.S. Public Health Service and Construction Products Division W.R. Grace &. Co.")[8]; Ex. 43, Common Exhibit 132 (10/24/1969 letter from U.S. Public Health Service to Lovick, requesting Libby Plant submission to mortality study); Ex. 44, Common Exhibit 134 (10/31/1969 letter from Brown to Lovick, "You may advise … the Public Health Service that [they] may include our employees in the mortality study."). The Bureau of Mines also conducted safety inspections of the Libby Plant. Ex. 45, Common Exhibit 73.8 (Bureau of Mines, Health and Safety Inspection Report, Zonolite Strip Mine and Mill, February 1-3, 1965).

Grace internally evaluated and distributed the industrial hygiene information it received from these sources, and Grace alone controlled what was done with the information. Ex. 46, Common Exhibit 113 (10/7/1968 letter from Kostic summarizing results of industrial hygiene surveys conducted by J-M, the U.S. Public Health Service, and W.C. Nordin, a Grace employee

[8] There is no evidence that representatives from MCC were included in the August 28, 1969 meeting. Ex. 42, Common Exhibit 131 at 3.

at the Libby Plant, and providing comprehensive recommendations for the Libby Plant). Further, Grace controlled and administered the implementation of recommended procedures based on these many inputs. Ex. 47, Common Exhibit 119; Ex. 48, Common Exhibit 128.5 (7/25/1969 letter from Lovick re: "Dust Control of Dirt Roads at Mining and Milling Operations," discussing success and expense of different techniques for dust control on dirt roads); Ex. 49, Common Exhibit 129 (7/26/1969 letter from Lovick, "While we still have a ways to go to have a dust-free operation, we have done some things to improve conditions in the mill and in the surrounding area…"). In March 1969, Grace personnel reported on dust control for vermiculite mining, based on their initial studies of the dust control problems in a Report on Environmental Dust Controls for Vermiculite Mining and Expanding Operations. Ex. 47, Common Exhibit 119. The program that Grace designed called for monitoring by Grace personnel and training by J-M personnel. *Id.*, Report at 10-11. There is no evidence that MCC participated in drafting the 1969 Report or carrying out any of the plans or recommendations contained therein. *See generally id.*

Grace established an annual Safety Committee comprised of 12 Grace Libby Plant employees, as well as Kujawa and Lovick, which met monthly. Ex. 50, Common Exhibit 65.5 (12/30/1964 Notice regarding Safety Committee membership for 1965); Ex. 45, Common Exhibit 73.8 at 5-6 (Bureau of Mines Health and Safety Inspection Report, 2/1-3/1965, explaining Safety Committee function and procedure). Committee members and Kujawa inspected the Libby Plant and all departments monthly. *Id*. Grace sent employees to workshops on pollution, Ex. 51, Common Exhibit 83.9 (3/14/1966 letter from Vinion to Bleich regarding trip to Intermountain Workshop on Air Pollution), and asbestos related environmental hazards, Ex. 52, Common Exhibit 125.3 (letter from James Cintani, Zonolite District Manager, to Tom

Egan, Manager of Fireproofing Products 6/20/1969, regarding meeting entitled "Asbestos: An Unanticipated Environmental Hazard").

The record clearly establishes that Grace alone was responsible for the conditions and procedures in place at the Libby Plant, as well as the health and safety of its workers.

4. Plaintiff Ralph V. Hutt

Hutt worked at the Libby Plant for a short period of time from March 1968 to October 1969. Ex. 53, Deposition of Ralph Hutt ("Hutt Dep."), 52:21-24. During his time with Grace, Hutt worked in the dry mill doing cleanup work and operated the skip car/track. Ex. 55, Plaintiff Fact Sheet at 2; Ex. 53, Hutt Dep. 54:1-7, 58:11-17. He also ran the transfer point and drove CAT equipment in the mine near the dump pile for a period. Ex. 55, Plaintiff Fact Sheet at 2; Ex. 53, Hutt Dep. 61:13-14.

Grace provided Hutt with a paper respirator, and Hutt's foreman/supervisor told him that he "could wear [it] if you wanted or not" because "it was just dust and it wouldn't hurt you. It was just a nuisance to you." Ex. 53, Hutt Dep. 54:23-25. Hutt testified that he tried the paper respirator, but it "plugged up," and he never wore one again because Grace's foreman/supervisor told Hutt that the dust would not hurt him. *Id.* at 54:22-55:6; *see also id.* at 63:22-64:2 ("He surely wouldn't tell you that the stuff wouldn't hurt you if it would hurt you."). When Hutt asked Grace for a supplied air respirator, Grace told him that he had to buy his own. *Id.* at 62:17-63:7.

Hutt's history with asbestos related disease ("ARD") has been longstanding. Hutt's pulmonary condition was medically evaluated as far back as his days at the Libby Plant. As part of an annual follow up on the radiological interpretation of worker x-rays, Hutt was identified in October 1969 by MCC as an employee whose health should be closely monitored by Grace.

On October 27, 1969, after Hutt terminated his employment at Grace, Park wrote to Lovick, "I would assume that all these men have been advised of their physical examination findings…" Ex. 56, Common Exhibit 133.[9] Consistent with MCC's understanding that Grace had in fact informed its employees of its findings, Hutt told his pulmonary and sleep specialist, Sukhraj Balhan, M.D. that he "was evaluated at [the time he worked at the Libby plant] and was told that he has asbestosis." Ex. 57, 4/26/17 Note of Dr. Balhan. And the Center for Asbestos Related Disease ("CARD") clinic documented Hutt's extensive history of ARD:

> Ralph started having significant problems with his breathing when he was working as a sawyer, which was his occupation most of his life. He had been working in Wyoming at altitudes as high as 9000 to 10,000 feet and was running out of breath, though gradually in the 1990s he could no longer do his work and left his job. He was evaluated in his region of Oregon for his lung problems and was diagnosed with asbestos related disease sometime in the early-to-mid 1990s.

Ex. 58, 6/19/18 CARD Note. Hutt testified:

> In the '90s I got—I was logging, and I know where I was logging there. I was logging at—for Tucker Engineering, and I was cutting right of way for him, and we was working up on the Canadian border out of Bonners Ferry, and I had to—I couldn't breathe. I had to quit, and I told him, and he wanted me to come back, but I said, I can't. I just can't do it. I can't breathe.
>
> I come down out of the mountains, and I was fine when I went down on the low ground. So that's about the time I quit the—had to find something else.

Ex. 53, Hutt Dep. 24:23-25:9. Consequently, Hutt was aware of his asbestos related disease as early as the late 1960s and no later than the mid-1990s.

On February 28, 2015, Hutt filed a claim with the W.R. Grace PI Trust. Ex. 55, Plaintiff Fact Sheet at 3; Ex. 59, Pl.'s Ans. to Interrogatories, Interrogatory No. 11. To date, Hutt has not filed any claim for workers' compensation or occupational disease benefits. Ex. 53, Hutt Dep. 12:12-15; Ex. 59, Pl.'s Ans. to Interrogatories, Interrogatory Nos. 11, 25. Hutt has never had a

[9] Hutt testified that Grace never told him the results of either the x-ray taken when he was hired, or the x-ray taken the following year. Ex. 53, Hutt Dep. 66:16-67:11.

workers' compensation claim for asbestosis rejected or denied. Ex. 53, Hutt Dep. 79:6-8. Hutt did not seek out the advice of an attorney until 2013, 11 years after he claims he was diagnosed and knew of his ARD. *Id.* at 12:3-8. Hutt did not hear about MCC when he was working at the Libby Plant and only learned about MCC after speaking with his lawyers in the instant case. *Id.* at 94:22-95:16.

5. Hutt's Claims Against MCC

Hutt was one of 884 plaintiffs listed in the *Nancy Adams, et al. v. Maryland Casualty Company, et al.*, DDV-16-0786 complaint which was filed on September 23, 2016 in Montana's Eighth Judicial District, Cascade County. On March 20, 2018, this Court designated Plaintiff Ralph V. Hutt as a lead case for trial against MCC and directed him to file a separate complaint. On or about March 23, 2018, Hutt filed the instant Complaint against MCC, Robinson Insulation Company and Does A-Z.[10] *See generally* Ex. 54, Complaint ("Compl.").

The Complaint alleges that Hutt was injured due to, *inter alia*, asbestos exposure relating to Grace's mining operations in Libby, Montana.[11] *Id.* at ¶ 9. The Complaint asserts two counts against MCC: "negligence in provision of industrial hygiene services" (First Claim) and "bad faith treatment of workers with rights to occupational disease benefits (breach of fiduciary duty,

[10] To date, Robinson Insulation Company has not appeared in this matter, nor has Hutt identified Does A-Z. It is unclear why Robinson is a defendant.

[11] The Complaint alleges that "Plaintiff was a homeowner, recreator, Grace worker, community member of Libby, Montana, or otherwise distinctly exposed to asbestos in unique exposure events and in a wide variety of temporally separated, geographically distinct, and highly differentiated routes and circumstances." *Id*. The Complaint further alleges "Dates of residence in the Libby area and exposure, including events of injurious exposure, are 1966 through 1990 and 2012 through 2015." Ex. 54, Compl. ¶ 12. Given that Hutt worked at the Libby Plant from only March 1968 to October 1969, Hutt's Complaint seeks damages arising from claims related to his community exposure. However, Libby plaintiffs, including Hutt, are prevented from pursuing any community exposure claims against MCC at this time. *See, e.g.*, Ex. 60, June 27, 2018 Order in *Hunt v. Maryland Casualty Company*, Adv. No. 18-50402 (ECF No. 8)(staying case against MCC involving claims of community exposure).

deceit, bad faith negligent misrepresentation and constructive fraud, malice" (Second Claim). *See* generally Ex. 54, Compl. With respect to the First Claim, Hutt alleges that MCC negligently designed an industrial hygiene program and failed to disclose and warn workers of the known hazards associated with asbestos at the Libby Plant. *Id.* at ¶¶ 13-37. With respect to the Second Claim, Hutt alleges in confusing fashion that MCC, acting in bad faith, failed to disclose and/or concealed facts that prevented him from pursuing and obtaining occupational disease benefits owed under the Montana Occupational Disease Act ("MODA").[12] *Id.* at ¶¶ 38-65.

LEGAL STANDARD

Montana Rule of Civil Procedure 56 provides that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). Summary judgment is appropriate when the moving party demonstrates both the absence of any genuine issues of material fact and entitlement to judgment as a matter of law. *Watson v. BNSF Ry. Co.,* 2017 MT 279, ¶ 15, 389 Mont. 292, 296, 405 P.3d 634, 637. Once the moving party has met its burden, the non-moving party must present substantial evidence essential to one or more elements of the case to raise a genuine issue of material fact. *Id.* "Disputed facts are material 'if they 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.'" *Mountain W. Bank, N.A. v. Mine & Mill Hydraulics, Inc.*, 2003 MT 35, ¶ 28, 314 Mont. 248, 257, 64 P.3d 1048, 1053 (quotation omitted). If a plaintiff fails to offer proof of any one of the

[12] Hutt's bad faith allegations in the Second Claim incorporate a number of legal theories such as breach of fiduciary duty, negligent misrepresentation and constructive fraud without setting forth separate causes of action against MCC. As shown below, notwithstanding Hutt's "kitchen sink" approach, the Complaint fails to assert any viable cause of action against MCC with respect to Hutt's failure to "timely present a claim occupational disease benefits" and related damages. Ex. 54, Compl. ¶ 64.

elements of a negligence claim—duty, breach, causation, or damages—summary judgment in favor of the defendant is proper. *See Dulaney v. State Farm Fire and Cas. Ins. Co.*, 2014 MT 127, ¶ 8, 375 Mont. 117, 120, 324 P.3d 1211, 1214.

ARGUMENT

Hutt's claims against MCC fail as a matter of law on numerous grounds. First, Hutt's claims are not permitted by Montana law governing claims for workers' compensation. Next, Hutt's claims are barred by the three-year statute of limitations applying to negligence or common law bad faith claims. Hutt's own testimony and medical records demonstrate that he knew of or should have discovered his asbestos related disease in the 1990s, when he suffered breathing difficulties. In addition, notwithstanding, Hutt's claims are time-barred by the express terms of an Order by the U.S. Bankruptcy Court establishing the tolling provisions for claims against MCC during the pendency of Grace's bankruptcy proceedings. These two grounds should end the inquiry and require dismissal of this case.

Separate and apart from the statute of limitations, MCC did not owe Hutt any duty as a matter of law. MCC's Workers' Compensation Insurance Policies made clear that MCC did not undertake to perform any duties outside the workers' compensation policies at the Libby Plant. Grace had a non-delegable duty to ensure its employees' safety. MCC did not and could not perform the non-delegable duty Grace owed to its employees to ensure a safe workplace—MCC never assumed that responsibility. More importantly, it is undisputed that Grace did not rely upon MCC's inspections and recommendations. To the contrary, Grace repeatedly ignored and declined to follow MCC's recommendations. Unlike the State of Montana, MCC did not have any enforcement authority or capabilities.

Finally, there is no basis in Montana law for Hutt's bad faith claim, as Hutt never submitted a claim for workers' compensation relating to his alleged asbestos related injuries. Thus, there is no basis for his allegation that a claim for workers' compensation was settled in bad faith and Count II fails as a matter of law.

I. Montana Workers' Compensation Law Does Not Permit Hutt's Claims

Hutt's claims are limited by the permanent Asbestos Personal Injury Channeling Injunction created by Grace's Chapter 11 Bankruptcy Plan. In describing the scope of the Asbestos PI Channeling Injunction as it relates to Hutt's claims, the United States Bankruptcy Court for the District of Delaware held:

> The Plaintiffs [including Hutt] contend that, as employees, the Negligence Claim and the Bad Faith Claim must arise under MCC's worker[s'] compensation policies. To the extent that the Plaintiffs can demonstrate that the Plaintiffs' Claims arise out of or are based on MCC's workers' compensation policies, the claims are not barred by the Asbestos PI Channeling Injunction and may be filed in state court.

Hutt v. Maryland Cas. Co. (In re W.R. Grace & Co.), 2016 Bankr. LEXIS 3754, *44 (Bankr. D. Del. 2016).

Montana has a statutory workers' compensation scheme.[13] "Historically, the workers' compensation system was an outgrowth of tort law. It was premised on a compromise whereby workers gave up their right to sue employers in tort for work-related injuries in exchange for a guaranteed compensation system." *Henry v. State Compl. Ins. Fund*, 1999 MT 126, ¶ 12, 294 Mont. 449, 294, 982 P.2d 456, 458. The workers' compensation system provides limited remedies. It is generally an employee's exclusive remedy for an injury or disease obtained on

[13] The statute in effect on an employee's last day of work where he could have obtained an injurious exposure controls the law that applies to the claim. *See Nelson v. Cenex, Inc.*, 2008 MT 108, ¶ 34, 342 Mont. 371, 379, 181 P.3d 619, 625.

the job. §§ 92-1308, 92-1331, RCM (1965).[14] Montana courts have recognized several limited tort exceptions for an employer's deliberate acts specifically and actually intended to cause injury, *see Johnson v. W.R. Grace & Co.*, 642 F. Supp. 1102, 1104 (D. Mont. 1986), and for an insurer's intentional conduct that occurs outside of the scope of employment *Hayes v. Aetna Fire Underwriters*, 187 Mont. 148, 155, 609 P.2d 257, 261 (1980) (permitting claim against Plan 2 private insurer for bad faith in processing and adjusting a compensation claim). As Hutt's claims against MCC are clearly not statutory claims for benefits, nor can they, in the absence of a "claim," arise out of the processing or adjusting of a claim, they are not recognized under Montana law. No Montana case recognizes a cause of action based on the "tortious" provision of workers' compensation insurance, and Hutt's claims fail as a matter of law.

II. Hutt's Claims are Barred by the Statute of Limitations

On April 2, 2001, Grace filed for Chapter 11 Bankruptcy in the U.S. Bankruptcy Court for the District of Delaware. The Bankruptcy Court immediately entered and later extended a temporary restraining order enjoining further or future prosecution of actions against Grace and certain affiliated entities, but at the time, the initial injunction did not include MCC. *See* Ex. 61, April 2, 2001 Order & Ex. 62, April 12, 2001 Order.[15]

On May 3, 2001, the Bankruptcy Court entered a preliminary injunction providing that "the prosecution of all Actions are stayed and enjoined pending a final judgment in this

[14] In *Gidley v. W.R. Grace & Co.*, 221 Mont. 36, 40, 717 P.2d 21, 24 (1986), the Montana Supreme Court found that a claimant, who was not eligible for compensation under the pre-1979 MODA due to the statute of repose in effect at the time, could bring a common law claim against the employer due to an ambiguity in the pre-1979 statute. In contrast to the facts of the instant case, however, the plaintiff in *Gidley* actually filed for benefits under MODA and was denied. *Id.* at 37, 717 P.2d at 22.

[15] MCC respectfully requests that this Court take judicial notice of the undisputed existence and content of the Bankruptcy Court's orders. *See* Mont. R. Evid. 202(b)(6).

adversary proceeding or further order of this Court." *See* Ex. 63, May 3, 2001 Order. The May 3, 2001 Order defined "Actions" as "any case filed or pending in any court . . . against Affiliated Entities that arise from alleged exposure to asbestos indirectly or directly allegedly caused by Debtors." In the May 3, 2001 Order, MCC was expressly designated as an "Affiliated Entity." *See id.* at 2.

On January 22, 2002, the Bankruptcy Court modified the preliminary injunction to define the enjoined "Actions" as both "pending actions and actions that have not been filed or are not pending." *See* Ex. 64, January 22, 2002 Order at 2. MCC was again included as a protected Affiliated Entity. *Id.* The Bankruptcy Court further ordered that:

> The prosecution of all of the following actions are stayed and enjoined pending a final judgment in this adversary proceeding or further order of this Court:
>
> All Actions as defined above. Any additional Actions that are filed and served upon Affiliated Entities are, upon completion of service, stayed and enjoined pending a final judgment in this adversary proceeding or further order of this Court[.]

Id.

On February 4, 2002, Libby claimants sought to modify and/or clarify the scope of the preliminary injunction to permit them to pursue their asbestos-related claims against MCC. On June 20, 2002, the Bankruptcy Court denied the Libby claimants' motion, and ordered, in relevant part, that:

> [T]he Preliminary Injunction applies to any current or potential plaintiffs who may seek to proceed with any and all suits alleging causes of action similar to those alleged by the plaintiffs in the Baltimore action or the Montana Action which have been brought against or may be brought against Maryland Casualty Company and/or Continental Casualty Company or any other insurance carriers, as defined in the Preliminary Injunction, and proceeding with any similar suits without first obtaining relief from this Court shall be considered a contempt of this Court's Preliminary Injunction; and it is further ordered that as to any suit or potential claim against any insurance carrier that is stayed by this Preliminary

> Injunction and has not yet been commenced in any court, the statute of limitations or other applicable time bar established by statute or order is tolled and shall not expire until ***the later of either (1) its own expiration period or (2) 60 days after this preliminary injunction (a) expires*** and is not further extended, or (b) is terminated by the Court for all parties and claims subject to it; or (3) 60 days after entry of an Order as to a particular party who files an appropriate motion for relief from this preliminary injunction granting said motion.

Ex. 65, June 20, 2002 Order, at 2 (emphasis added).[16]

The Plan took effect on February 3, 2014 and the preliminary injunction expired on that date. *See Hutt*, 2016 Bankr. LEXIS 3754 at *5.

A three-year limitation period applies to each of Hutt's separate causes of action. Mont. Code Ann. § 27-2-204(1), (2); *O'Connor v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2004 MT 65, ¶ 11, 320 Mont. 301, 304, 87 P.3d 454, 456 (the statute of limitations for a common law bad faith claim is three years and begins to run when the claim or cause of action accrues). "The law sets such statutes of limitations as an equitable measure intended to prevent the litigation of stale claims by requiring that a party file a claim within a reasonable period of time while the evidence supporting the claim is still fresh." *Hando v. PPG Indus., Inc.*, 236 Mont. 493, 501, 771 P.2d 956, 961 (1989) (citation omitted). As shown below, all of Hutt's claims are time-barred because they accrued in the mid-1990s, at the latest, or alternatively, because the Complaint was not timely filed pursuant to the June 20, 2002 Order of the U.S. Bankruptcy Court. Therefore, all of Hutt's claims against MCC should be dismissed with prejudice.

[16] The district court vacated the Bankruptcy Court's ruling regarding modification of the preliminary injunction, but the June 20, 2002 Order was later reinstated in full by the Third Circuit. *In re W.R. Grace & Co. (Gerard v. W.R. Grace & Co.)*, 115 Fed. App'x 565 (3d Cir. 2004).

A. Hutt's Claims Accrued in the 1990s, at the Latest

Hutt's claims for negligence and bad faith accrued on the date on which he discovered his asbestos related injury, or on the date when he should have, with the exercise of due diligence, discovered his asbestos related injury. *See id.* This "discovery rule" is codified at Mont. Code Ann. § 27-2-102 which states in relevant part:

> (3) The period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party if:
>
> (a) the facts constituting the claim are by their nature concealed or self-concealing; or
>
> (b) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.

Although the Complaint does not include a date of diagnosis, Hutt alleges that the CARD clinic first diagnosed him with ARD on October 8, 2002. Ex.55, Pl.'s Fact Sheet. This is contradicted by his own admission to one of his treating physicians that he discovered he had asbestosis at the time he worked at the Libby Plant in the late 1960s. Ex. 57, 4/26/17 Note of Dr. Balhan. In addition to Dr. Balhan's April 26, 2017 note, the CARD clinic also documented Hutt's longstanding history of ARD: "He was evaluated in his region of Oregon for his lung problems and was diagnosed with asbestos related disease sometime in the early-to-mid 1990s." Ex. 58, 6/19/18 CARD Note. The facts demonstrate that Hutt was aware of his asbestos related disease as early as the late 1960s, and no later than the mid-1990s. Moreover, it is undisputed that the exercise of due diligence would have caused him to discover his ARD long before the CARD clinic's October 8, 2002 diagnosis.

Two cases illustrate the discovery rule: *Hando*, and *Kaeding v. W.R. Grace & Co.—Conn.*, 1998 MT 160, 289 Mont. 343, 961 P.2d 1256. In *Hando*, an employee worked at a strip coal mine in the early 1980s, where she was assigned to paint in the coal processing plant. She believed that the paint used caused her to suffer adverse physical reactions. 236 Mont. at 495, 771 P.2d at 958. Between 1982 and 1984, she saw numerous physicians to determine if the problems she was suffering were related to her paint exposure, but the physicians denied a causal relationship. In 1984, however, examinations confirmed that her exposure to the paint caused her ailments. The Supreme Court held that the statute of limitations on her claim did not accrue until the 1984 medical opinion linking her injuries to her exposure, because the plaintiff's failure to learn the cause of her injuries was not due to a lack of diligence. *Id.* at 502, 771 P.2d at 962.

In *Kaeding*, the Montana Supreme Court again examined the discovery rule. The *Kaeding* court held that the statute of limitations was not tolled until the plaintiff received an actual diagnoses in 1996, because his medical records contained references to asbestosis as far back as the 1960s, and a letter from a doctor in 1992 stated that the plaintiff's x-rays were consistent with asbestosis. 1998 MT 160, ¶¶ 5-13, 289 Mont. at 345-347, 961 P.2d at 1257-59. The Court explained that in *Hando*, it "did not hold that a medical diagnosis must be rendered before the statute of limitations may run." 1998 MT 160, ¶ 22, 289 Mont. at 350, 961 P.2d at 1260.

Here, Hutt does not dispute that he suffered breathing difficulty in the 1990s. Ex. 53, Hutt Dep., 24:23-25:9. His difficulty was so significant that it caused him to give up logging, which had been his occupation for approximately 25 years. Nevertheless, he did not go see a doctor. *Id.* at 25:10-12. Unlike the plaintiff in *Hando*, Hutt did not exercise diligence in attempting to discover the cause of his ailment.

Consequently, Hutt's claims related to his ARD clearly should have been discovered in the 1990s, at the latest, with the exercise of due diligence. Hutt's claims accrued and expired well before Grace filed for bankruptcy and before entry of the May 3, 2001 preliminary injunction. Hutt's claims against MCC are, therefore, time-barred as a matter of law.

B. Hutt's Claims are Time-Barred Based on the U.S. Bankruptcy Court's June 20, 2002 Order

Even anticipating that Hutt will argue that his cause of action accrued on October 8, 2002, his claims against MCC are nonetheless time-barred. Specifically, Hutt failed to file his claims within 60 days of the expiration of the preliminary injunction pursuant to the June 20, 2002 Order of the U.S. Bankruptcy Court. Under that Order, claims against MCC were tolled until "the later of either (1) [their] own expiration period or (2) 60 days after [the] preliminary injunction . . . expire[d] and [wa]s not further extended." Ex. 65 at 2. As the claims' "own expiration" period occurred during the pendency of the bankruptcy, Hutt's only option for timely filing claims against MCC was to do so within the 60-day period after the Plan became effective, as this was the latter option provided by the June 20, 2002 Order. Hutt's attorneys were party to the entry of the June 20, 2002 Order and were fully aware of the 60-day period at the time Hutt retained them in 2013.

The preliminary injunction expired when the Plan became effective on February 3, 2014. The period of time allotted for claims such as Hutt's (i.e., those that expired by their own limitations periods during the bankruptcy) terminated on April 4, 2014, 60 days after the Plan's effective date. The *Adams* Complaint was not filed until September 23, 2016, nearly two and a half years after the Plan became effective and clearly outside the window permitted by the June 20, 2002 Order. Accordingly, Hutt's claims against MCC would be time-barred under the tolling order should the Court find they accrued on October 8, 2002.

Hutt may argue that his stale claims are saved by Mont. Code Ann. § 27-2-406 which provides:

> When the commencement of an action is stayed by injunction or other order of the court or judge or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

However, the provisions of Mont. Code Ann. § 27-2-406 are inapplicable here where the U.S. Bankruptcy Court expressly provided that all claims were to have been brought by the later of the expiration of the applicable limitations period or 60 days after the Plan's effective date. There would be no reason for the U.S. Bankruptcy Court to include the 60 day provision if Mont. Code Ann. § 27-2-406 applied to the filing of claims such as Hutt's. Therefore, the June 20, 2002 Order by its terms excludes the provisions of Mont. Code Ann. § 27-2-406.

III. MCC Did Not Owe a Duty to Hutt

Montana's Workers Compensation Act allows a plaintiff to sue a person other than his employer. Mont. Code Ann. § 39-71-412. "To maintain an action in tort against a third party, however, the injured worker must establish that the third party owed the worker a duty, the breach of which caused the injuries sustained." *Mitchell v. Shell Oil Co.*, 579 F. Supp. 1326, 1331 (D. Mont. 1984). To maintain an action for negligence, a plaintiff must prove four elements: (1) the defendant owed a plaintiff a legal duty; (2) the defendant breached that duty; (3) the breach was the actual and proximate cause of an injury to the plaintiff; and (4) damages resulted. *Peterson v. Eichhorn*, 2008 MT 250, ¶ 23, 344 Mont. 540, 546, 189 P.3d 615, 620–21.

Montana recognizes the well-established common law principle of a duty of reasonable care in the performance of an undertaking:

> where a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on

> the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of negligent failure so to perform it.

Stewart v. Standard Pub. Co., 102 Mont. 43, 55 P.2d 694, 696 (1936) (quoting to 45 C. J. 650) (holding that where plaintiff slipped on icy sidewalk, defendant – who owned land in front of sidewalk, constructed sidewalk, maintained sidewalk after construction, had control of sidewalk for purposes of snow removal, and employed janitors to clean the sidewalk – had assumed the duty of constructing, maintaining, and removing snow from the sidewalk); *Vesel v. Jardine Mining Co*., 110 Mont. 82, 100 P.2d 75, 80 (1939) (employer who gratuitously assumed to render medical services to injured employee was bound to exercise reasonable care in performance of such services); *Sult v. Scandrett,* 119 Mont. 570, 573, 178 P.2d 405, 406–07 (1947) (holding that seller of cattle assumed a gratuitous duty to either continue its weighing service, or give reasonable notice of its discontinuance, when he undertook the performance of the weighing service); *Kopischke v. First Continental Corp.*, 187 Mont. 471, 481–82, 610 P.2d 668, 673–74 (1980) (dealer who undertook to repair and recondition a used truck for resale owed a duty to the public to use reasonable care); *Jackson v. Department of Family Servs*., 1998 MT 46, ¶ 48, 287 Mont. 473, 490, 956 P.2d 35, 46 (adoption agencies assumed a duty to refrain from making negligent misrepresentations when they begin volunteering information to potential adoptive parents); *Nelson v. Driscoll*, 1999 MT 193, ¶ 38, 295 Mont. 363, 378, 983 P.2d 972, 982 (defendant police officer assumed duty of care to protect decedent from harm when officer prevented decedent from driving her vehicle and kept a close eye on her from his car to ensure that she did not attempt to drive); *but see Headley v. Hammond Bldg.*, 97 Mont. 243, 33 P.2d 574, 577–78 (1934) (defendant building owner did not assume to maintain sidewalk in good state of repair by nailing metal strips on sidewalk). This rule echoes the long-standing principle of tort law that "one who assumes to act, even though gratuitously, may thereby become subject to

the duty of acting carefully, if he acts at all." *Lokey v. Breuner*, 2010 MT 216, ¶¶ 10-12, 358 Mont. 8, 10–11, 243 P.3d 384, 385–86 (citing the Restatement (Second) of Torts, § 323 and § 324); *Nelson*, 1999 MT 193 ¶ 37, 295 Mont. at 377, 983 P.2d at 981.

A. There is No Duty Under § 324A[17]

The Restatement 2d of Torts, which was published in 1965, embodies the principle of the duty of care for an assumed undertaking in § 323 and § 324A. Section 324A holds a party liable to a third party for the party's negligent performance of an undertaking:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The Restatement 2d of Torts, § 324A (1965). Section 324A, which deals with liability to third persons, parallels the rule stated in § 323,[18] which sets forth the liability of the actor to the one to whom he has undertaken to render services. *Id.* (cmt. a).

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[17] In connection with the Third Circuit's remand of bankruptcy-related issues in *In re W.R. Grace & Co.*, 900 F.3d 126 (3d Cir. 2018), Hutt's counsel informed the U.S. Bankruptcy Court that they intend to seek certification of the § 324A issue to the Montana Supreme Court, which could materially impact the case before this Court.

[18] Section 323, Negligent Performance of Undertaking to Render Services, provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Montana recognizes the assumed undertaking principles as defined by the Restatement (Second) of Torts. *Lokey*, 2010 MT 216, ¶¶ 10-12, 358 Mont. at 10–11, 243 P.3d at 385–86; *Nelson*, 1999 MT 193, ¶ 37, 295 Mont. at 377, 983 P.2d at 981 (citing § 323 for "long-standing" principle of tort law); *Onsager v. Frontera Produce Ltd.*, 2014 WL 3828374, at *5 (D. Mont. 2014) (noting that Montana Supreme Court "has not yet had occasion to expressly adopt § 324A, "but predicting that it would do so if presented with the facts before the U.S. District Court"). In addition, Federal courts, in deciding cases brought under the Federal Torts Claims Act ("FTCA"), have applied § 324A in cases rising under Montana law. *Other Bull v. United States Dep't of Hous. & Urban Dev., Bureau of Indian Affairs*, 1994 U.S. App. LEXIS 719 (9th Cir. 1994); *Jeffries v. United States*, 477 F.2d 52 (9th Cir. 1973); *Mellott v. United States*, 808 F. Supp. 746, 749 n.3 (D. Mont. 1992).

"[A]n analysis concerning legal duty is incomplete without a discussion of foreseeability." *Nelson*, 1999 MT 193, ¶ 39, 295 Mont. at 378, 983 P.2d at 982. Absent foreseeability, there is no duty. *Id.* (quotation omitted). The Court will also need to address policy considerations in determining whether or not to impose a duty of care, including (1) the moral blame attached to a defendant's conduct; (2) the prevention of future harm; (3) the extent of the burden placed on the defendant; (4) the consequences to the public of imposing such a duty; and (5) the availability and cost of the insurance involved. *Jackson v. State*, 1998 MT 46, ¶ 39, 287 Mont. 473, 487, 956 P.2d 35, 44. The existence of a legal duty is a matter of law to be determined in the first instance by the trial court. *Hinkle v. Shepherd Sch. Dist. # 37*, 2004 MT 175, ¶ 31, 322 Mont. 80, 90, 93 P.3d 1239, 1245.

Turning to the case before the Court, there are no facts in the record that would support a finding that MCC owed Hutt a duty under § 324A. Hutt generally alleges that MCC undertook

to design a program for control and prevention of asbestos dust and disease, Ex. 54, Compl. ¶¶ 21-22; and to address warnings at the mine, *id.* at ¶ 24. However, the plain language of MCC's workers' compensation policies clearly forecloses the idea MCC *undertook to render services* for Grace. *See* Ex. 13, Policy, Part 6. Not only did MCC clearly communicate that it would not be *obliged* to inspect workplaces, its inspections *were not* safety inspections, and it would not be *undertaking* the performance of any duty; the very nature of the language demonstrates that any inspections were not for Grace's benefit, but for MCC's. Specifically, MCC made clear that any inspections "relate[d] only to the insurability of the workplaces and the premiums charged." MCC would not consider its performance of rights and obligations under its workers' compensation policies to be "necessary for the protection of a third person." *See* Restatement (Second) § 324A. Accordingly, from the outset, no duty was owed by MCC under a § 324A analysis because MCC did not undertake "to render services to another which [it] should [have] recognize[d] as necessary for the protection of a third person." *Id.*

The U.S. Court of Appeals for the Ninth Circuit considered application of Montana law to similar questions in *Jeffries*, 477 F.2d at 52, and *Other Bull*, 1994 U.S. App. LEXIS at 719. The plaintiff in *Jeffries* was injured in a mining accident on a project that was subject to inspections by the Government Corps of Engineers. 477 F.2d at 54. A Corps safety inspector actually inspected the operations on each shift, and the inspector would give orders to fix unsafe conditions. *Id.* Nevertheless, the Ninth Circuit affirmed on appeal the district court's conclusion that there was no duty based on the first § 324A question, or whether the Government undertook to render services to another, based on its contractual right to inspect. *Id.* at 57.

In *Other Bull*, the appellant argued that the Department of Housing and Urban Development ("HUD") undertook a duty under § 324A to occupants of a home to ensure that the

home was safe, based on its contractual right to review and approve plans and construction of the home. 1994 U.S. App. LEXIS, at *5, *8. The Ninth Circuit rejected this contention at the first step of the § 324A analysis, and affirmed the district court's determination that "by merely conducting a safety inspection program the Government as not undertaking a legal duty to render services." *Id.* at *9. Similarly, here, a contractual right to inspect Grace facilities to ensure MCC's own interests does not support the undertaking of any duty to ensure safety.

1. There Was No Increased Risk of Harm Under § 324A(a)

There was no unbundled service, contract, or undertaking, and further, the facts do not support any of the three prongs under the § 324A analysis. First, there are no allegations that MCC's conduct relating to the Grace mine *increased* the risk of harm, as is required under § 324A (a).[19] While there is no Montana case law interpreting this section, other courts' analyses reveal that, in order to satisfy subsection (a), the increase in harm must be compared to the risk that would have existed had the defendant not engaged in the undertaking. *See, e.g.*, *Butler v. Advanced Drainage Systems, Inc.*, 282 Wis. 2d 776, 797 (2005) (applying Wisconsin law); *Myers v. United States*, 17 F.3d 890, 903 (6th Cir. 1994) (applying Tennessee law to FTCA case). No facts in the record support any contention that any conduct by MCC increased any risk of harm to Hutt. Because there are no allegations that would satisfy the first prong of the § 324A analysis, there can be no duty under § 324A(a).

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[19] The Restatement (Second) provides the following illustration of § 324A(a):

> 1. A operates a grocery store. An electric light hanging over one of the aisles of the store becomes defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the store who is walking down the aisle. B Company is subject to liability to C.

2. There Was No Undertaking of a Duty Owed by Another Under § 324A(b)

Next, with respect to § 324A(b), it was clear from the outset of the contractual relationship between Grace and MCC that MCC did not assume or undertake any duty owed by Grace with respect to conditions at the mine. Liability under § 324A(b) exists when

> [A] managing agent who takes charge of a building for the owner, and agrees with him to keep it in proper repair, assumes the responsibility of performing the owner's duty to others in that respect. He is therefore subject to liability if his negligent failure to repair results in injury to an invitee upon the premises who falls upon a defective stairway, or to a pedestrian in the street who is hurt by a falling sign.

Restatement (Second) § 324A, comment d. There is no evidence here that MCC *assumed* or *displaced* the responsibility for ensuring a safe workplace, or warning employees of unsafe conditions or the health effects of asbestos.

By contrast, Grace, as Hutt's employer, owed Hutt a duty to ensure a safe workplace. *See* Mont. Code Ann. § 50-71-201.[20] Grace's duty was non-delegable. *See Olson v. Shumaker Trucking and Excavating Contractors, Inc.*, 2008 MT 378, ¶ 58, 347 Mont. 1, 15, 196 P.3d 1265,

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[20] Each employer shall:

> (1) furnish a place of employment that is safe for each of the employer's employees;
>
> (2) with the exception of footwear, purchase, furnish, and require the use of health and safety devices, safeguards, protective safety clothing, or other health and safety items, including but not limited to air masks, hardhats, and protective gloves, that may be required by state or federal law, the employer, or the terms of an employment contract unless the terms of a collective bargaining agreement provide otherwise;
>
> (3) adopt and use practices, means, methods, operations, and processes that are reasonably adequate to render the place of employment safe; and
>
> (4) do any other thing reasonably necessary to protect the life, health, and safety of the employer's employees.

Mont. Code Ann. § 50-71-201 (1969).

1275 (listing cases affirming that Mont. Code. Ann. § 50-71-201 confers a non-delegable duty to provide a safe workplace on the employer). Moreover, the State of Montana had a statutory duty to "gather public health-related information and provide it to the people," and to "do something to correct or prevent workplace conditions known to be hazardous to health." *Orr,* 2004 MT 354 ¶¶ 23, 38, 324 Mont. at 401, 405, 106 P.3d at 107, 110. There are no facts that support any allegation that MCC assumed any such duty.

3. There Was No Reliance Under § 324A(c)

Furthermore, the record does not support the necessary elements under § 324A(c), concerning harm suffered because of reliance of the other or the third person upon the undertaking. Comment (e) to § 324A provides that liability may arise under this scenario "Where the reliance of the other, or of the third person, has induced him to forgo other remedies or precautions against such a risk." Accordingly, this provision would require justifiable reliance by Grace or Hutt that induced either to forgo other remedies or precautions against a risk. No such facts are established in the record.

Indeed, the record evidence demonstrates the opposite. As Hutt had never even heard of MCC during his employment by Grace, he could not have relied on MCC or its conduct for any purpose. Ex. 53, Hutt Dep. 94:22-95:16. Additionally, the record clearly demonstrates that Grace did not rely on MCC. *See* Ex. 66, Common Exhibit 62 (12/16/1964 letter from G.W. Blackwood to Kelley: "We cannot solely rely on Maryland Casualty Company's doctor to be 'interested in this problem'. Zonolite, and you particularly, must direct the effort to minimize Grace's exposure. … Please draw up a program and report to me …"). During and prior to Hutt's employment, Grace was soliciting input from at least three other sources that conducted on-site industrial hygiene surveys of the Libby Plant: J-M, the U.S. Public Health Service, and

the State. Ex. 46, Common Exhibit 113. In addition, Grace alone had the authority to compare, evaluate, and eventually implement, recommendations and information received from these sources. Ex. 47, Common Exhibit 119.

Grace did not rely on MCC to ensure a safe workplace for its employees or to warn them of any unsafe condition. The record affirmatively demonstrates that MCC's visits to the Libby mine were for MCC's purposes of assessing Grace's insurability and the premiums to be charged. Ex. 13, Policy. To the extent MCC made recommendations to Grace about safety procedures, they were just that: recommendations. In *Windsor v. Pittsburg Coal*, a Montana district court examined whether a parent corporation of a mine/employer owed an employee an independent duty based on § 324A principles. 1993 Mont. Dist. LEXIS 707, *4-6 (Mont. Dist. Ct. 1993) (citing *Miller v. Bristol-Myers Co.*, 485 N.W.2d 31 (Wis. 1992)). The court noted that "Merely providing recommendations . . . to assist the subsidiary in fulfilling its duty to provide a safe work place and assisting in safety inspections has been held not sufficient to impose a duty on the parent to provide for safety at the subsidiary's work place." *Windsor*, 1993 Mont. Dist. LEXIS 707, at *5 (quotation omitted). The *Windsor* court determined that no independent duty existed based on the absence of evidence showing that the parent corporation affirmatively undertook to provide a safe working environment, or that it intervened in or directed any safety operations at the mine. *Id.*

Likewise, MCC had no control over Grace's ownership and management of the facilities or management of Grace's employees. The ultimate decision regarding whether to implement MCC's recommendations, or any other safety measures or recommendations, belonged exclusively to Grace. Similarly, any references to safety proposals make clear that any programs were designed by Grace, or in collaboration and conjunction with Grace. Grace's participation

in design and/or implementation of any safety program or program for industrial hygiene necessarily preclude Grace' reliance on MCC. Grace's repeated rejection of MCC's recommendations and suggestions also affirmatively demonstrates that Grace did not rely on MCC to ensure the safety of its facility.

There is similarly no evidence that Grace relied on MCC detrimentally, or that Grace chose to forego other remedies or precautions against the risk caused by its workplace conditions. *See* Restatement (Second) § 324A, comment (e). Indeed, Grace had its own safety employees and designated safety committees at the Libby Plant. Grace conducted its own monthly dust sampling and reporting. It regularly solicited industrial hygiene recommendations and input from the State, the federal government, and other industrial companies, such as J-M.[21] The State was regularly performing inspections and making recommendations to Grace. Accordingly, the record does not support any theory that Grace actually relied on MCC's recommendations for safety.

Hutt cannot establish the elements of § 324A necessary to establish a duty owed by MCC. Accordingly, Hutt's negligence claim fails as a matter of law.

B. Cases Previously Cited by Libby Plaintiffs Are Inapposite

Counsel for Hutt have previously contended that Montana case law supports the existence of a duty under similar circumstances[22]; however, the cases cited in support of this assertion are inapposite. In *Hawthorne v. Kober Construction Company, Inc.*, 196 Mont. 519, 640 P.2d 467 (1982), the Montana Supreme Court determined that the plaintiff subcontractor could maintain

[21] The State conducted seven on-site inspections, followed by seven written Reports, including dust control and worker safety recommendations. Additionally, J-M conducted an industrial hygiene survey of the Libby Facility.

[22] Brief for Appellant at 4, n.13, *In re W.R. Grace & Co.*, 900 F.3d 126 (3d Cir. 2018) (No. 01-01139, Adv. No. 15-50766).

an action against the defendant contractor for negligence in the performance of duties flowing from a contract despite the absence of contractual privity, because the contractor had reason to know that the subcontractor was relying on its contractual performance. 196 Mont. at 523-24, 793 P.2d at 470. In *Thayer v. Hicks*, 243 Mont. 138, 793 P.2d 784 (1990), the Montana Supreme Court considered the extent to which an accountant owes a duty in performing an audit to a third party with whom the accountant is not in privity. The Court concluded that the facts before it fit the narrowest approach to determining the scope of an accountant's liability. 243 Mont. at 147, 793 P.2d at 790. In *Jim's Excavating Service, Inc. v. HKM Assocs.*, 265 Mont. 494, 878 P.2d 248 (1994), the Montana Supreme Court adopted the Restatement of Torts (Second) § 552, and held that a third party contractor could successfully recover for purely economic loss against a design professional who knew or should have foreseen that a plaintiff or identifiable class of plaintiffs were at risk in relying on the information supplied. 265 Mont. at 505, 878 P.2d at 254-55.

Montana case law has used the term "near privity" to discuss the circumstances under which a third party can assert a tort claim based on services performed or information supplied under a contract. The cases relied upon by counsel for Hutt address professional negligence and/or negligent misrepresentation, and seek recovery for purely pecuniary losses, not personal injury. *See Onsager*, 2014 WL 3828374, at *4-5 (distinguishing near privity cases as "inapposite" from personal injury cases, and concluding that § 324A governed personal injury case involving liability to third persons based on an assumed undertaking). Here, Hutt does not make a claim for negligent misrepresentation, nor would one lie. MCC's contract with Grace was for provision of workers' compensation insurance, not for industrial hygiene services.

IV. Hutt's Bad Faith Claim Fails as a Matter of Law

Hutt's Second Claim is for "Bad faith treatment of workers with rights to occupational disease benefits (breach of fiduciary duty, deceit, bad faith negligent misrepresentation and constructive fraud, malice)." Montana law does not support the bad faith claim as pled by Hutt. In addition, the alternative theories that Hutt borrows from or attempts to piggyback are insufficient as a matter of law.

Hutt's bad faith claim against MCC, like his negligence claim, is limited to specific workers' compensation policies issued by MCC. *See* Ex. 54, Compl. ¶ 39 ("Maryland Casualty provided for the Mine workers, under Policies R-00590, R-00591, R-00592, *et. seq.*, the disability insurance prescribed by Montana's Workers' Compensation and Occupational Disease laws."); *id.* at ¶ 40 ("Maryland Casualty owed duties with respect to workers' rights to occupational disease benefits …"); *id.* at ¶ 41 ("Maryland Casualty contracted to provide workers compensation/occupational disease coverage to employees …"). The claim goes on to allege that MCC failed to disclose or suppressed facts in order to hide from the workers the fact that they had right to occupational diseases benefits under MODA. *Id.* at ¶¶ 52-58. According to Hutt, his right to occupational disease benefits "was lost after the expiration of the prescribed period for presentation of a claim for benefits and before he had knowledge that he had sustained an injurious exposure to occupational disease qualifying him for benefits under MODA." *Id.* at ¶ 59.

Montana's Unfair Claims Settlement Act provides a specific procedure by which a plaintiff/third-party claimant can assert a claim of bad faith denial against a workers' compensation insurer. Specifically, Mont. Code Ann. § 33-18-242(1) provides a private right of action to an insured or a third-party claimant against an insurer for damages caused by an

insurer's unfair claim settlement practices.[23] *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) ("Montana permits insureds and third party claimants to proceed under § 33–18–201 against an insurer for bad faith in the settlement process.").

To the extent Hutt purports to advance a claim under this statutory section, any such claim fails for several reasons. First and most importantly, Hutt does not allege that he ever submitted a workers' compensation claim. *See* Mont. Code Ann. § 33-18-242(6)(b) ("A third-party claimant may not file an action under this section until after the underlying claim has been settled or a judgment entered in favor of the claimant on the underlying claim."); *Safeco Ins. Co. of Ill. v. Montana Eighth Judicial Dist. Court, Cascade County*, 2000 MT 153, ¶ 28, 300 Mont. 123, 131, 2 P.3d 834, 838–39 (holding that third-party claimant who wishes to bring an independent action under Unfair Trade Practices Act is required until after the underlying claim has been settled in favor of the claimant on the underlying claim). The purpose of this requirement is to ward against frivolous claims. 2000 MT 153, ¶ 28, 300 Mont. at 131, 2 P.3d at 839. Hutt admits that he never submitted a workers' compensation claim based on his alleged

[23] The specific unfair claim settlement practices are Mont. Code Ann. § 33-18-201: (1), misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue; (4) refusing to pay claims without conducting a reasonable investigation based upon all available information; (5) failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; (6) neglecting to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear; (9) attempting to settle claims on the basis of an application that was altered without notice to or knowledge or consent of the insured; or (13) failing to promptly settle claims, if liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage. Mont. Code Ann. § 33-18-242(1) ("An insured or a third-party claimant has an independent cause of action against an insurer for actual damages caused by the insurer's violation of subjection (1), (4), (5), (6), (9), or (13) of 33-18-201.").

exposure to asbestos while employed by Grace.[24] Ex. 53, Hutt Dep. 12:9-15; Ex. 59, Pl.'s Ans. to Interrogatories, Interrogatory Nos. 11, 25. Because Hutt did not submit a claim for workers' compensation benefits, he cannot assert that any such claim was adjusted, denied, or settled in bad faith.[25]

Even if the Court were to conclude that a statutory claim accrued when Hutt discovered his ARD, despite having never submitted a claim for workers' compensation benefits, any resulting bad faith claim would nonetheless be plainly time-barred. *See* Mont. Code Ann. § 33-18-242(7) ("The period prescribed for commencement of an action under this section is: … (b) for a third-party claimant, within 1 year from the date of the settlement of or the entry of judgment on the underlying claim.").

Hutt's common law bad faith claim also fails. The Unfair Claims Settlement Practices Act is a codification of the common law on bad faith. *White v. State ex rel. Montana State Fund*, 2013 MT 187, ¶ 25, 371 Mont. 1, 8, 305 P.3d 795, 802. Montana recognizes the right of a worker to assert a separate claim for tortious conduct occurring outside the employment relationship and during the processing and settlement of a workers' compensation claim. *Birkenbuel v. Montana State Compensation Ins. Fund*, 212 Mont. 139, 146, 687 P.2d 700, 703 (1984). However, a common law bad faith claim also requires judgment or settlement in an underlying workers' compensation claim. *Grenz v. Orion Group, Inc.*, 243 Mont. 486, 491, 795 P.2d 444, 447 (1990) (affirming dismissal of plaintiff's statutory and common law bad faith

[24] The various bankruptcy injunctions, both during the bankruptcy and post-confirmation, had no effect on a claim for workers' compensation benefits.

[25] Indeed, the absence of judgment or settlement on an underlying workers' compensation claim deprives a district court of jurisdiction over a related bad faith claim. *See Poteat v. St. Paul Mercury Ins. Co.*, 277 Mont. 117, 121, 918 P.2d 677, 680 (1996) (affirming that district court lacked subject matter jurisdiction over Unfair Trade Practice Act case where underlying workers' compensation claim was unresolved by Workers Compensation Court).

claims against workers' compensation insurer because claims were premature); *Brewington v. Employers Fire Ins. Co.*, 1999 MT 312, ¶ 15, 297 Mont. 243, 248, 992 P.2d 237, 240 (explaining holding in *Grenz*, that third-party claimant could not bring a bad faith claim based on improper adjustment prior to resolution of the underlying claim).

In recognizing that such a claim may be stated against an insurance carrier, the Montana Supreme Court reasoned:

> [T]he courts have upheld the right to bring an action for independent intentional torts because the tortious conduct, which gives rise to the action, does not arise out of the original employment relationship. It occurs after employment and arises out of the employee's relationship with the insurance carrier after the employment relationship has been terminated. It is predicated on an act after the injury and during the settlement of the claim. The insurance carrier is no longer the "alter ego" of the employer but rather is involved in an independent relationship to the employee when committing such tortious acts.

Hayes, 187 Mont. at 155, 609 P.2d at 261.

Hutt's claim ignores the distinction relied upon by the Montana Supreme Court in recognizing the viability of a separate bad faith claim arising out of a relationship separate and apart from the original employment relationship. In contrast to the type of injury contemplated in *Hayes*, the injury that Hutt alleges occurred during the employment relationship. It is not distinct in time or place from the injury that Hutt alleges occurred on the job, and it is not based on acts that occurred during the investigation or payment of a claim. *Cf., id.* (explaining the concept of bad faith claims in insurance settlement context when an "'action is based not on the original work-related injury but on a second and separate injury resulting from the intentional acts of the insurer and its agents while investigating and paying a claim.'") (quoting *Coleman v. Am. Universal Ins. Co.*, 273 N.W. 2d 220 (Wis. 1970)).

Again, Hutt did not make a workers' compensation claim. There is no underlying workers' compensation case. *See O'Connor*, 2004 MT 65, ¶ 22, 320 Mont. at 308, 87 P.3d at

458 ("In other words, we determine the accrual date of a bad faith claim arising out of a separate and independent disputed issue by determining whether that particular issue has been ultimately resolved, regardless of the existence or absence of a resolution of other issues within the workers' compensation case."). Thus, there can be no bad faith in processing or settlement of a claim, and there is no support for Hutt's attempted claim under Montana law.[26]

Furthermore, Hutt cannot selectively pick and choose statutory and common law elements in alleging a claim. *White*, 2013 MT 187, ¶ 20, 371 Mont. at 7, 305 P.3d at 801 (holding that plaintiff could not graft the statutory requirements of the insurance code onto a common-law bad faith claim). To the extent that Hutt's "bad faith" claim purports to incorporate a number of additional theories, including breach of fiduciary duty, deceit, bad faith negligent misrepresentation and constructive fraud, and malice, the claim also fails.

First, contrary to Hutt's allegations, MCC did not owe Hutt any fiduciary duty as the workers' compensation provider for Grace. "The terms of an insurance policy may create fiduciary duties that insurers owe to their insureds." *Suzor v. Int'l Paper Co.*, 2016 MT 344, ¶ 20, 386 Mont. 54, 59, 386 P.3d 584, 589 (citing *Gibson v. W. Fire Ins. Co.*, 210 Mont. 267, 275, 682 P.2d 725, 730 (1984)). "Those fiduciary duties arise from the contractual nature of the insurer-insured relationship." *Suzor*, 2016 MT 344 ¶ 20, 386 Mont. at 59, 386 P.3d at 589. As a third-party claimant does not have a contractual relationship with an insurer, the fiduciary duty does not flow to the third-party claimant as well. *See id.* (citing *Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, 315 Mont. 231, 69 P.3d 652) (declining to expand fiduciary

[26] The requirement of an underlying workers' compensation case is more than a formality. Bringing an actual workers' compensation claim is a condition precedent to a statutory or common law bad faith claim. In contrast, Hutt's unsupported theory depends on impermissible speculation as to what would have happened or would not have happened if Hutt had in fact brought a claim when he purports to have discovered his alleged asbestos related disease, which is far beyond the bounds of Montana law concerning bad faith insurance practices.

duties to an employee-claimant in the context of employer self insurance, and explaining that if employer had workers' compensation insurance through a private insurer, "it would be beyond dispute" that the employer was the insured, and no fiduciary duties would extend beyond that insurer-insured relationship."); *see also Briese v. Amerigas, Inc.*, 2009 WL 10677368 at *9 (D. Mont. 2009) (a workers' compensation claimant pursuing a bad faith claim against an insurance carrier is a third-party claimant).

This reasoning also disposes of Hutt's constructive fraud claim. Constructive fraud is the breach of a fiduciary duty. *Morse v. Espeland*, 215 Mont. 148, 151, 696 P.2d 428, 430 (1985). If there is no fiduciary duty in the first place, constructive fraud will not lie. *Id.* For the reasons explained in Section II, no other duty exists that would otherwise support a constructive fraud claim. *Harris v. St. Vincent Healthcare*, 2013 MT 207, ¶ 30, 371 Mont. 133, 142, 305 P.3d 852, 858 (citing Mont. Code Ann. § 28-2-406 concerning constructive fraud and stating that a legal duty is an essential element of a claim for constructive fraud). In any event, any claim premised on constructive fraud is time-barred. Mont. Code Ann, § 27-2-203 (constructive fraud subject to two-year statute of limitations).

It appears that Hutt includes reference to the tort of negligent representation in his complaint to the extent such a claim is akin to a claim for constructive fraud. *See* Ex. 54, Compl. ¶ 63; *Bushnell v. Cook*, 221 Mont. 296, 301, 718 P.2d 665, 668 (1986) ("In Montana an action for negligent misrepresentation is an action for fraud …"). Negligent misrepresentation requires, *inter alia*, proof that the defendant made an untrue representation as to a past or existing material fact, with the intent to induce the plaintiff to rely on it, and the plaintiff must have been unaware of the falsity of the representation, acted in reliance upon the truth of the representation, and been justified in relying upon the representation. *See Morrow v. Bank of Am., N.A.*, 2014 MT 117,

¶ 45, 375 Mont. 38, 51, 324 P.3d 1167, 1180. To the extent that Hutt alleges an independent claim for negligent representation, the claim fails. First, the conduct by MCC that Hutt cites is essentially its silence, and the record does not support Hutt's reliance on MCC's silence. To the contrary, Hutt had never heard of MCC prior to initiating this lawsuit. Ex. 53, Hutt Dep. 94:22-95:16. Further, for the reasons explained in Section III, the record does not support any reliance by Hutt, let alone any *justifiable* reliance. Accordingly, to the extent there is any claim for negligent misrepresentation, the claim fails as a matter of law.

Next, a claim for deceit requires, *inter alia,* proof of "the suppression of a fact by one who is bound to disclose it." Mont. Code Ann. § 27-1-712. For the reasons discussed in Section III, no such obligation exists here. Furthermore, any claim for fraud, malice or deceit is also time-barred. *See Osterman v. Sears, Roebuck & Co.*, 2003 MT 327, ¶¶ 22-23, 318 Mont. 342, 349, 80 P.3d 435, 440–41 (time limit for action upon liability created by statute must be commenced in two years under Mont. Code Ann. § 27-2-211(1)); Mont. Code Ann. § 27-2-203 (action based on fraud or mistake must be commenced within two years).

Hutt's statutory and common law "bad faith" claim is an attempt to jam a square peg into a round hole, and it fails as a matter of law. Moreover, to the extent Hutt attempts to string together a number of other theories, the essential elements of Hutt's causes of action are without support in the record, and Hutt's claims are time-barred.

CONCLUSION

For the foregoing reasons, each of Hutt's claims against MCC fail as a matter of law and the Complaint should be dismissed in its entirety with prejudice.

Dated: October 19, 2018

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing document was filed via the Montana Courts Electronic Filing system and served upon the following individuals:

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Dated this 19 day of October, 2018.

/s/ Edward J. Longosz, II

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Dated: 10-19-2018