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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

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| IN RE ASBESTOS LITIGATION,<br><br>*Consolidated Cases* | Cause No. AC 17-0694<br><br>PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RE: DEFENDANT'S NON-PARTY AFFIRMATIVE DEFENSES AND BRIEF IN SUPPORT<br><br>Applicable to<br>*Hutt v. Maryland Casualty Co. et al.*,<br>DDV-18-0175 |

Comes now the Plaintiff, in accordance with the Court's scheduling order, and pursuant to Rule 56, M.R. Civ. P., moves this Court for an for Summary Judgment on all defenses purporting to assign responsibilities to non-parties, including Maryland Casualty Company's (herein MCC) Twelfth and ThirtyFifth Defenses.

This motion is brought on the grounds

1. There is no substantial question of material fact;
2. The defenses fail as a matter of law; and
3. Summary Judgment is necessary to avoid the significant risk that a jury may believe it can or should consider the actions of non-parties other than those with whom the

Plaintiff has settled, which risk arises because the jury does not know the rules and procedures for allocation, offset, and contribution.

This motion is supported by the Statement of Uncontroverted Facts, the Deposition of Ralph Hutt, and the Affidavit of Allan McGarvey contemporaneously filed in support of the Plaintiff's Motion for Summary Judgment on Liability.

## INTRODUCTION

Defendant Maryland Casualty Company ("MCC") filed its Answer to Plaintiff's Complaint on June 4, 2018. MCC's Answer includes the following defenses:

> *Twelfth Defense*
>
> Whatever damages were incurred by Plaintiff were the result of intervening and/or superseding acts or omissions of parties over whom this defendant had no control.
>
> *Thirty-Fifth Defense*
>
> This Defendant reserves the right to designate responsible non-parties at fault.

In asserting these affirmative defenses, MCC purports to shift liability in this case onto other entities, including non-parties. Montana law and the uncontroverted facts in this case dictate that MCC cannot maintain or rely on either of these defenses. Plaintiff therefore seeks summary judgment regarding MCC's Non-Party Affirmative Defenses.

## APPLICABLE STANDARD

Summary judgment is appropriate when a party can demonstrate that "there is no genuine issue as to any material fact and that [he] is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). The moving party has the initial burden to establish that no genuine issue of material fact exists, after which the burden shifts to the opposing party to establish otherwise. *See Sacco v. High Country Indep. Press*, 271 Mont. 209, 215, 896 P.2d 411, 415 (1995).

"The burden of proving an affirmative defense rests on the defendant." *Archer v. LaMarch Creek Ranch,* 174 Mont. 429, 435, 571 P.2d 379, 383 (1977),; *see also Speaks v. Mazda Motor Corp.*, 118 F.Supp. 3d 1212, 1223-24 (D. Mont. 2015).

**UNCONTROVERTED MATERIAL FACTS**

For purposes of Plaintiff's present motion, the following facts are uncontroverted:

1. W.R. Grace employed Plaintiff Ralph Hutt at its vermiculite mining and milling operation in Libby, Montana. Deposition of Ralph Hutt, 9/19/18, 21:3-10; 52:21—53:8.

2. During the period of Plaintiff's employment at W.R. Grace, MCC was the workers' compensation insurer for W.R. Grace. Plaintiff's Statement of Uncontroverted Facts, October 19, 2018 ("SUF"), ¶ 7.

3. Plaintiff Ralph Hutt has never received any money from any other tortfeasors for his asbestos injury, and has not settled any claims with any persons for any of his asbestos-related claims. Affidavit of Allan McGarvey at ¶3.

4. These and any other uncontroverted material facts being relied upon in this summary judgment motion and brief in support thereof are further identified and referenced in the contemporaneously filed Statement of Uncontroverted Facts filed with Plaintiff's Motion for Summary Judgment on Liability.

**ARGUMENT**

**I. This case is to determine the damages caused to Ralph Hutt by the negligence of MCC without respect to whether any other actor may also have liability.**

This case is to determine the liability of Defendant MCC to Ralph Hutt. That determination must be made without respect to whether any other actor may also have liability.

The issues to be tried in this case are primarily the following:

1. Did MCC owe duties of reasonable care to W.R. Grace Libby mill workers arising from its undertakings, directed at the dust control and dust safety issues arising at the W.R. Grace Libby facility, of (a) providing

industrial hygiene services, (b) providing dust control engineering services and/or (c) designing a worker safety program?

2. Did MCC have a duty to warn Libby mill workers of the asbestos hazard at the W.R. Grace Libby facility?

3. Did MCC breach any duties to warn and/or duties of care?

4. Did MCC's breach of any duty cause Plaintiff Ralph Hutt to suffer asbestos disease?

5. What amount of damages has been sustained by Ralph Hutt as a result of his asbestos disease?

6. Does MCC's conduct warrant the assessment of punitive damages?

*See, e.g., Dulaney v. State Farm Fire & Cas. Ins. Co.*, 2014 MT 127, ¶ 10, 375 Mont. 117, 324 P.3d 1211 ("Four elements are required to prove a claim for negligence: (1) duty; (2) breach of duty; (3) causation; and (4) damages.").

While other actors may also be liable for their own wrongdoings, MCC's duties operate independently, and MCC's liability may therefore be adjudicated fully without respect to any other person's or entity's actions or liability. *See, e.g.,* § 27-1-701, MCA ("each person is responsible . . . for the results of [their] willful acts but also for an injury occasioned to another by the person's want of ordinary care"); § 27-1-202, MCA (Every person injured by the wrongful act of another "may recover from the person in fault a compensation therefor in money"). This does not mean that the Plaintiff can recover twice for the same injuries. *See generally Hulstine v. Lennox Indus., Inc.*, 2010 MT 180, 357 Mont. 228, 237 P.3d 1277, ¶¶ 22-23 (plaintiff is entitled to a "single satisfaction for a single injury"). Rather, the recovery of damages from various actors is handled by the law of apportionment of liability under § 27-1-703, MCA, the law governing contribution claims, and the rules governing pro-tanto (dollar-for-dollar) offset.

Under § 27-1-703 (4), MCA, respective shares of liability can be addressed in a single trial where parties whom defendants contend also have liability may be joined, or, in the event of that person's settlement with the plaintiff, an allocation made of each such person's comparative fault.

Further, a defendant found liable for all damages caused by its own wrongdoing has a right of "contribution" from any other wrongdoer whose negligence contributed to the plaintiff's injuries. *See* § 27-1-703(1), MCA.

Finally, where the defendant does not avail itself of the allocation provisions of § 27-1-703(1),(4), MCA, the plaintiff's recovery from that defendant may be reduced by an offset of the recoveries received from other persons so that the plaintiff will not receive double recovery for the same injury and damage. *See, e.g., Schuff v. A.T. Klemens & Son*, 2000 MT 357, 303 Mont. 274, 16 P.3d 1002; § 27-1-308, MCA; *see also Hulstine*, 2010 MT 180, ¶¶ 22-23 (pro tanto reduction to jury's verdict appropriate for plaintiffs' recovery from settling defendant even though § 27-1-703, MCA, not applicable).

While these rules assure that the plaintiff recovers no more than once for his damages, and while they provide procedures to give a defendant a fair opportunity to seek participation from other actors for the damages for which the defendant is also directly liable, ***the essential predicate is that the defendant is, in the first instance, individually liable for all damages caused by that defendant's own wrongdoing***. *See* § 27-1-202; § 27-1-701; § 27-1-703(1), MCA.

Notwithstanding this carefully crafted set of rules, there is significant risk that a jury may believe it can or should consider the actions of non-parties other than those with whom the Plaintiff has settled. This risk arises because the jury does not know the rules and procedures for allocation, offset, and contribution. The purpose of this motion is to assure that MCC does not

take advantage of that risk and attempt to improperly direct the jury's sense of justice to a misguided attempt at an improper allocation of responsibility, with the result that the jury awards less than the full amount of damages caused by MCC's own wrongdoing.

The following argument demonstrates that, because defendant MCC has not availed itself of the procedures in § 27-1-703, MCA, to formally allocate liability to any other alleged tortfeasors, it may not confuse the jury and interject fault apportionment concerns. Rather, the jury must determine the full measure of damages suffered by Plaintiff from MCC's own wrongdoing, with such amount only to be adjusted as appropriate after the verdict by application of the law of offset and/or any subsequent action for contribution.

## II. MCC failed to comply with the required procedures of § 27-1-703, MCA, and therefore cannot point to *any* non-party.

MCC's above-referenced affirmative defenses unquestionably assert that, because Plaintiff's injuries were the result of other, perhaps multiple wrongdoers, its liability for its own wrongdoing is diminished. That is not the law. Rather, a tortfeasor is liable for all damages caused by his wrongdoing, though that liability may be mitigated under a very specific set of rules. The Montana Supreme Court recently affirmed, "The Legislature has crafted a mechanism for allocation of responsibility where a plaintiff is injured by the acts or omissions of multiple tortfeasors." *Metro Aviation, Inc. v. U.S.*, 2013 MT 193, ¶ 25, 371 Mont. 64, 305 P.3d 832 (discussing § 27-1-703, MCA). Any rights or defenses that MCC might wish to rely upon for allocating responsibility to non-parties or other alleged tortfeasors must be judged in accordance with § 27-1-703, MCA, the due process constraints upon that statute, and the considerable history that supports it.

### A. Section 27-1-703 must be construed narrowly, with a presumption of constitutionality, and consistent with *Plumb*.

While the presumption of constitutionality is sometimes cited as a burden overcome when seeking to strike down a statute, it is really a rule of statutory construction: the Legislature is presumed to have intended to achieve a result that is consistent with the limitations of the constitution. Thus a statute must be construed, if possible, in a way that does not create constitutional infirmity. For example, in *City of Great Falls v. Morris*, 2006 MT 93, 332 Mont. 85, 134 P.3d 692, a person charged with driving under the influence of alcohol argued that a statute could be construed to deprive him of his constitutional presumption of innocence. The Supreme Court held that the statute at issue did not have to be construed as contended, that it could be construed in a manner that preserved constitutional rights and that, therefore, the statute had to be construed in a way that would not create constitutional infirmity:

> [A]ll statutes carry with them a presumption of constitutionality, and we construe statutes narrowly to avoid an unconstitutional interpretation if feasible. "Whenever possible, [this] Court will adopt statutory construction which renders challenged statutes constitutional rather than a construction which renders them invalid."

*City of Great Falls v. Morris*, ¶ 19 (citations omitted).

In the instant matter, § 27-1-703, MCA, must be construed in a manner that conforms to the constitutional problems of the "empty chair" defense as articulated by the Montana Supreme Court in *Newville v. State, Dep't of Family Servs.* (1994), 267 Mont. 237, 252, 883 P.2d 793, 802, and *Plumb v. Fourth Jud. Dist. Court* (1996), 279 Mont. 363, 927 P.2d 1101. Specifically, the statute must be interpreted and applied so that it provides sufficient procedural safeguards to permit the Plaintiff a "fair adjudication," without shifting the burden of proof to the Plaintiff, and without unreasonably saddling the Plaintiff with the unfair, if not impossible task of "anticipating" unstated claims against the non-party and the absent party's defenses thereto:

> [The 1987 version of 27-1-703] unreasonably mandates an allocation of percentages of negligence to nonparties without any kind of procedural safeguard. As a result, plaintiffs may not receive a fair adjudication of the merits of their claims. It imposes a burden upon plaintiffs to anticipate defendants' attempts to apportion blame up to the time of submission of the verdict form to the jury.

> Such an apportionment is clearly unreasonable as to plaintiffs, and can also unreasonably affect defendants and nonparties.

*Newville*, 267 Mont. at 252, 883 P.2d at 802.

The *Plumb* case reaffirmed these constitutional limitations and amplified on them. First it recognized that the constitution imposed:

> (1) the requirement that the burden of proving a nonparty's liability is on the defendant; (2) a requirement that the nonparty defense be affirmatively pled; and (3) a requirement that a nonparty be notified that he or she is being blamed for the plaintiff's injuries.

*Plumb,* 279 Mont. at 376, 927 P.2d at 1019. Second, *Plumb* identified a further constitutional violation when there is a denial of a fair and adequate "opportunity for an unnamed third person to appear and defend himself or herself." *Id.*

As will be demonstrated below, the required construction and application of the statute – i.e. so as to conform to the constitutional limitations of *Newville* and *Plumb* – requires the recognition that MCC has not conformed with the statutory requirements in a way that would satisfy the constitutional concerns of due process, notice, fairness and opportunity to be heard.

B. MCC failed to join any other person whom it contends may have contributed to causing Plaintiff's injuries.

MCC's Thirty-Fifth Affirmative Defense seeks to "reserve[] the right to designate responsible non-parties at fault." This vague reservation fails to invoke the prerequisites to § 27-1-703, MCA. It utterly fails to implement the procedures that are designed to protect the rights for all parties, including the plaintiff and non-parties, that are implicated by a defendant's attempt to secure an apportionment of its liability to others.

Specifically, the statute requires that MCC "join as an additional party to the action" any other person whom it contends "may have contributed as a proximate cause to [Plaintiff's]

injury." § 27-1-703(4), MCA. (Emphasis added).[1] This part of the statute thus allows the jury to attribute percentages of liability "to each party" allegedly at fault by bringing them into the case to defend against the original defendant's allocation claim. This section of the statute also permits allocation of responsibility for damages to "persons released from liability by the claimant and persons with whom the claimant has settled . . . as provided in subsection (6)."[2] MCC has failed to join any such party or identify any person with whom the Plaintiff has settled. Rather, MCC's affirmative defense vaguely seeks to reserve defenses against "responsible non-parties," without any joinder of such persons, identification of such persons or fair opportunity to discover and defend the assertions of contributory fault against such persons.

This Court's deadline for joining additional parties or amending pleadings makes clear that MCC is entitled neither to such a reservation nor an unqualified right to assert claims against other potential joint tortfeasors. Moreover, MCC has not asserted any cross-claim or other right against any other defendant. MCC has simply ignored the plain requirements of § 27-1-703(4), MCA, and has thereby elected not to join any additional entities as alleged third-party defendants prior to the Court's deadline. MCC has therefore surrendered any potential right to shifting liability for its own wrongdoing to other potential joint tortfeasors. Plaintiff is entitled to summary judgment on MCC's Thirty-Fifth Affirmative Defense, as well as any other defense that MCC might rely upon as a basis for apportioning fault to those whom it failed to join as parties in this case.

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[1] Unless otherwise noted, all emphasis hereinafter is added.

[2] Plaintiff has not settled with or released from liability any other persons, leaving only the liability of the following persons at *potential* issue in this case: "claimant, injured person, defendants, and third-party defendants." § 27-1-703(4), MCA.

C. MCC cannot be deemed to have complied with § 27-1-703(4), MCA.

The above-stated failures by MCC to fulfill its duties under the statute are substantial and determinative. The Montana Supreme Court has "long held that a party waives an affirmative defense if not raised by answer." *Meadow Lake Estate Homeowners Ass'n v. Shoemaker*, 2008 MT 41, ¶ 29, 341 Mont. 345, 178 P.3d 81. Here, the language of § 27-1-703, MCA, is simple and clear. MCC failed to "join [other persons] as an additional party to the action," § 27-1-703(4), MCA.[4] The obligations created by the statute must be upheld by their terms. *See, e.g., In re Maynard*, 2006 MT 162, ¶ 5, 332 Mont. 485, 139 P.3d 803 ("When the language of a statute is plain, unambiguous, direct and certain, the statute speaks for itself and no further interpretation is required."). In interpreting the clear language of § 27-1-703(4), MCA, it was not enough that MCC's Answer merely identify the potential for pursuing other un-named persons.

To allow MCC to assign responsibility to other actors it has not joined raises the constitutional limitations of an empty chair defense described by the Montana Supreme Court in *Plumb*. *See, e.g., Faulconbridge v. State*, 2006 MT 198, ¶ 66, 333 Mont. 186, 142 P.3d 777 ("*Plumb* forbids a defendant from apportioning liability to a third party not present at trial."). The procedures incorporated (post-*Plumb*) into the current version of § 27-1-703, MCA, must be construed to conform to the *Plumb* Court's due process concerns which arise in litigation proceeding with unrepresented parties. Section 27-1-703, MCA, can only be applied in such a manner as to uphold the constitutional safeguards identified in *Plumb*.

Here, by reason of MCC's failures to comply with all the requirements of § 27-1-703, MCA, the very due process concerns that the Court addressed in *Plumb* would be presented if MCC were permitted to point at empty chairs in the courtroom. Plaintiff should be awarded

[4] If MCC wishes to incorporate non-parties with whom Plaintiff has allegedly settled or otherwise released from liability, it has failed to "affirmatively plead the settlement or release as a defense in [its] answer." § 27-1-703(6)(f), MCA.

summary judgment on this basis as to MCC's Thirty-Fifth Affirmative Defense.

## III. MCC cannot avoid § 27-1-703, MCA, or introduce non-party conduct by arguing such non-parties negated its cause of Plaintiff's damages.

MCC's Twelfth Affirmative Defense seeks to shift fault from MCC to other persons whose "intervening and/or superseding acts or omissions" allegedly caused Plaintiff's damages. Since MCC has failed to invoke the procedures of § 27-1-703, MCA, its only remaining argument would be that the conduct of other actors cuts off the causal connection between MCC's wrongdoing and the resulting damages. This alternative route to pointing at the empty chair also fails because MCC cannot meet the requirements for a superseding cause defense.

### A. A defendant can introduce non-party conduct only to establish a well-plead superseding intervening cause defense.

In *Faulconbridge v. State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777, the Montana Supreme Court addressed the attempt of a defendant to end round the constitutional limitations on the empty chair defense through an argument of causation negation. The *Faulconbridge* court held that non-party conduct may not be introduced for purposes of arguing causation unless a defendant adequately pleads and can prove a superseding intervening cause.

*Faulconbridge* involved the death of 15-year old Elisha Faulconbridge from injuries she suffered as a passenger on a motorcycle being driven by Jason Weaver. *Faulconbridge*, ¶ 15. Her family brought suit against the state and local governments, as well as the railroad Montana Rail Link, that were involved in designing and maintaining the area of highway where Jason and Elisha crashed. *Id.*, ¶ 16. Plaintiffs did not sue Jason, although Jason was made a party by various third-party actions and cross- and counterclaims filed among the different defendants. *Id.* By the time the case went to trial, many of the parties had settled their claims against one another, and the State remained as the only defendant. *Id.*, ¶ 17. As a result, numerous issues

related to the State's attempts to apportion liability to third parties (including settled parties) not present at trial were addressed by the district court and ultimately the Montana Supreme Court.

During trial, the district court had denied the State's attempts to introduce evidence of Jason's negligence. *Id.*, ¶ 21. The State had argued that even though Montana law prevented the apportionment of liability to a non-party, "evidence of Jason's liability [should be] admissible to negate causation." *Id.*, ¶ 73. The Montana Supreme Court thoroughly analyzed its prior precedent regarding third-party negligence in the context of causation. *See generally*, *Id.*, ¶¶ 76-80.

After applying the constitutional limitations on the empty chair defense, the *Falconbridge* court turned to the cause negation issue. The court sustained the district court's decision to exclude evidence of Jason's negligence, describing the basis for its conclusion as follows:

> [Because of the unconstitutional effects of the empty chair defense], we conclude . . . that a defendant may introduce non-party conduct only for the purpose of demonstrating that the non-party conduct was a superseding intervening cause of plaintiff's damages. By "superseding intervening cause" we mean "an unforeseeable event that occurs after the defendant's original act of negligence . . . [which] will generally serve to cut off defendant's liability." *Whiting v. State* (1991), 248 Mont. 207, 216, 810 P.2d 1177, 1183.

*Faulconbridge*, ¶ 81.

The Court went on to elaborate on the requirements for a superseding or intervening cause:

> Under the law, only an unforeseeable superseding or intervening cause cuts off the chain of causation so as to absolve the named defendant. Inversely stated, foreseeable actions do not break the chain of causation.

*Faulconbridge*, ¶ 85 (citations omitted). Addressing specifically the foreseeability of a potential superseding intervening cause, the Court stated:

> '[a] defendant's liability for his wrongful act will not be severed by an intervening cause if the intervening cause is one that the defendant might reasonably foresee as probable or one that the defendant might reasonably anticipate under the circumstances.'

*Faulconbridge*, ¶ 88 (quoting *Thayer v. Hicks* (1990), 243 Mont. 138, 155, 793 P.2d 784, 795).

The Montana Supreme Court in *Faulconbridge* went on to hold that the question of foreseeability of the alleged intervening act could be decided **as a matter of law** "when reasonable minds could reach but one conclusion." *Faulconbridge*, ¶ 86 (quoting *Cusenbary v. Mortensen,* 1999 MT 221, ¶ 39, 296 Mont. 25, 987 P.2d 351). Specifically, the Court held for purposes of remand that a party allegedly responsible for a highway's design, maintenance, and/or construction should reasonably foresee as probable or anticipate that drivers such as Jason might operate their vehicle negligently. *Faulconbridge*, ¶¶ 89-92. Accordingly, it recognized as a matter of law that, even if non-party Jason was negligent, his conduct was foreseeable and therefore it could not constitute a superseding intervening cause. *Id.*

B. MCC has failed to adequately plead an affirmative defense of superseding intervening cause.

MCC has failed to identify the basis that would support the defense it seeks to raise regarding other intervening and/or superseding acts or omissions. Montana law requires that affirmative defenses not raised by answer will be waived. *See Meadow Lake Estate Homeowners Ass'n*, 2008 MT 41, ¶ 29. In *Faulconbridge*, the Montana Supreme Court specifically stated that "the State should have included superseding intervening cause as an affirmative defense." *Faulconbridge*, ¶ 84. In *Faulconbridge*, however, the court determined that the plaintiffs had adequate notice of the specifics of the defense from the pleadings of the specific third-party claims and counterclaims that had been filed. Those other pleadings included the particular entities and facts of non-party conduct for the causation defense.

In contrast, here, MCC has given Plaintiff absolutely no facts or basis to determine (a) what other persons, or (b) what acts or omissions that occurred "after" MCC's conduct were unforeseeable, and form the basis for its defense. In short, MCC's lack of specificity makes it impossible for the Plaintiff to address the defense in the abstract.

Just like the pleadings in a complaint, affirmative defenses must be stated with sufficient

particularity as will enable the opposing party to identify the basis of the defense and afford the plaintiff a fair opportunity to prepare his case to address that contention:

> Rule 8(c) requires a party to set forth affirmatively all matters constituting avoidance or affirmative defenses. The rationale for requiring that these defenses be affirmatively pleaded is simple: **the same principles of fairness and notice** which require a plaintiff to set forth the basis of the claim require a defendant to shoulder a **corresponding duty** to set out not merely general denials as appropriate, but also those specific defenses not raised by general denials by which a defendant seeks to avoid liability, rather than merely to controvert plaintiff's factual allegations.

*Brown v. Ehlert* (1992), 255 Mont. 140, 146, 841 P.2d 510, 514; accord, *Chandler v. Madsen*, 197 Mont. 234, 241, 642 P.2d 1028, 1032 (1982) ("The key to determining the sufficiency of the pleading of an affirmative defense is whether it gives **fair notice** of the defense."); *Meadow Lake*, 2008 MT 41, ¶ 28 ("8(c)'s requirement that an affirmative defense be pled by answer serves the same principles of fairness and notice that require a plaintiff to set forth the **basis** of a claim in a complaint"); *Tobacco River Lumber Co. v. Yoppe* (1978), 176 Mont. 267, 271, 577 P.2d 855, 857 ("**definite enough to enable the opposing party to prepare**").

MCC's pleading failure must be evaluated in light of the due process concerns articulated in *Plumb* and *Newville* because, in the absence of even minimal specificity of any superseding act or actor, there is "a burden upon plaintiffs to anticipate defendants' attempts to apportion blame up to the time of submission of the verdict form to the jury." *Newville*, 267 Mont. at 252, 883 P.2d at 802. MCC's pleading failure leaves Plaintiff without fair notice of the basis of its contentions, such that Plaintiff is entitled to summary judgment on MCC's Twelfth Affirmative Defense.

C. As a matter of law, MCC cannot demonstrate the existence of any superseding intervening cause in this case to cut off its own liability.

*Faulconbridge*, ¶ 86, affirms that where "reasonable minds may reach but one conclusion," a district court may properly award summary judgment and determine foreseeability as a matter of law on issues of intervening cause. *See also Fisher v. Swift Transp. Co., Inc.*, 2008 MT 105, ¶ 42,

342 Mont. 335, 181 P.3d 601 ("where reasonable minds may reach but one conclusion, foreseeability may be determined as a matter of law for summary judgment purposes").

Pursuant to *Faulconbridge*, unless MCC were unfairly permitted to delinquently identify a party whose conduct constituted a later, non-foreseeable, superseding intervening cause, Plaintiff is entitled to summary judgment. Moreover, MCC has not and cannot identify such a party or such a later, unforeseeable act.

For example, nothing about the State of Montana's conduct could be considered unforeseeable to MCC. MCC's conduct in this case occurred with full knowledge of the State of Montana's own conduct at W.R. Grace's ongoing Libby operation.[5] It is undisputed that MCC had copies of the reports and could have itself warned the workers of the findings therein. Moreover, MCC actually relied upon the fact that the state's reports were confidential and privileged and had not been disclosed:

> [A]s I informed you, I would hesitate to allow in evidence the State Board reports if it is possible to keep them out of the hands of the Industrial Accident Board, and through it, the general public.

The letter goes on to acknowledge the intended value of keeping the state reports confidential and privileged:

> [W]e have a good argument with respect to the **privileged character of** State Board reports . . . [If we proceed with this case] it would appear that it will be necessary to expose the entire situation to the Industrial Accident Board, whose records may well be available **to unions** and the general public.

*See, e.g.,* SUF ¶ 6 (citing MCE102). As a matter of law, there is no way for this Court to conclude that any conduct of the State of Montana that might have led to Plaintiff's exposure

[5] In *Orr v. State*, 2004 MT 354, ¶ 30, 324 Mont. 391, 106 P.3d 100, the Montana Supreme Court addressed the key contention that the State had labelled as confidential and failed to disclose the reports of its Bureau of Mine inspections. The State contended that they were privileged. The Montana Supreme Court disagreed:

> ¶ 30 It seems clear that either Attorney General Bonner misinterpreted the question, or the BOH misconstrued the answer. The unfortunate result of their individual or combined failings was the State's decision to withhold from the workers at the Libby Mine investigation reports that revealed that they were being exposed to deadly toxins on a daily basis.

was unforeseeable to MCC, and thereby an intervening superseding cause that might cut off MCC's liability.

Moreover, the Montana Supreme Court in *Faulconbridge* expressly defined a superseding intervening cause as "an unforeseeable event that occurs *after* the defendant's original act of negligence . . . [which] will generally *serve to cut off* defendant's liability." *Faulconbridge*, ¶ 81. The actions of the State to keep its reports confidential happened **before** MCC's conduct. The State's role and conduct was not only foreseeable but was **known by** and relied on by MCC. Therefore, under Montana law, the State's conduct cannot be considered as an intervening superseding cause in this case, and MCC must be precluded from relying upon the non-party conduct of the State as a way to shift or absolve its own liability. Similarly, MCC has not identified and cannot identify any actions that were not foreseeable by MCC (and likely were subjectively known by MCC).

Moreover, MCC has not and cannot identify ***any*** intervening cause that occurred **after** MCC's conduct. Specifically, MCC's failures to (a) control and (b) warn of the asbestos hazard continued throughout the period of Plaintiff Ralph Hutt's exposure. There simply are no later acts or events, let alone superseding causes.

Plaintiff is entitled to summary judgment on MCC's Twelfth Defense and any other defense that it might raise that relies on a non-party as an intervening superseding cause, because MCC has not **identified** any such superseding cause, because MCC cannot demonstrate that any conduct of any other person happened **after** MCC's actions, and because MCC cannot demonstrate any conduct or cause that was **unforeseeable** to MCC.

## CONCLUSION

Based upon the above, Plaintiff respectfully asserts that summary judgment should be entered in Plaintiff's favor, on all defenses purporting to assign responsibilities to non-parties,

and specifically striking MCC's Twelfth and Thirty-Fifth affirmative defenses.

DATED this19th day of October 2018.

McGARVEY, HEBERLING, SULLIVAN
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## CERTIFICATE OF SERVICE

I, John F. Lacey, hereby certify that I have served true and accurate copies of the foregoing Motion - Other to the following on 10-19-2018:

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