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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

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

## INDEX TO ARGUMENTS

## I. LEGAL AUTHORITIES AND ARGUMENT

### 1. The existence of a duty is a question of law that turns on the foreseeability of injury.

The first step in evaluating Maryland Casualty Company's liability is to determine the existence and scope of the legal duties that are owed to the Plaintiff. This initial issue is a question of law which must be decided by the court:

> To succeed in a negligence claim, a plaintiff must establish that the defendant had a legal duty; the defendant breached that duty; the breach caused injury; and damages. *Lopez*, ¶ 18. Thus, any claim of negligence first requires that the defendant owe a legal duty to the plaintiff. *Lopez*, ¶ 18. Whether a legal duty exists is a matter of law to be decided by the court. *Massee*, ¶ 27. In determining whether duty exists, we consider whether imposing a duty comports with public policy and "whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff." *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 17, 342 Mont. 335, 181 P.3d 601. Thus, duty is mainly a question of foreseeability—whether the person injured was within the scope of risk created by the defendant's action. *Lopez*, ¶ 28.

*Bassett v. Lamantia*, 2018 MT 119, ¶ 10, 391 Mont. 309, 417 P.3d 299 (emphasis added).

The Montana Supreme Court has often discussed the considerations that go into the legal analysis of "foreseeability":

> The question of whether the State owed a legal duty to Kristin and Hunter and the scope of this duty are questions of law. *Webb v. T.D.* (1997), 287 Mont. 68, 72, 951 P.2d 1008, 1011. "The existence of a duty of care depends upon the foreseeability of the risk and upon a weighing of policy consideration for and against the imposition of liability." *Estate of Strever v. Cline* (1996), 278 Mont. 165, 173, 924 P.2d 666, 670. The policy considerations weighed to determine whether to impose a duty include:
>
> > (1) the moral blame attached to the defendant's conduct; (2) the desire to prevent future harm; (3) the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (4) the availability, cost and prevalence of insurance for the involved.

*Henricksen v. State*, 2004 MT 20, ¶ 21, 319 Mont. 307, 314, 84 P.3d 38, 45–46.

In the following arguments, Plaintiff will demonstrate that the same foreseeability analysis imposes duties on MCC in three ways:

(1) because the professional engineering and industrial hygiene undertakings were specifically directed at the safety and protection of workers including Ralph Hutt, injury to those workers was necessarily within the meaning of "foreseeable" consequence of industrial hygiene and engineering failures, such that MCC's industrial hygienist and engineers owed a duty of care to these workers, and a duty to warn of the asbestos hazard;

(2) through its provision of industrial hygiene services for the protection of workers, and its creation and implementation of a safety program, MCC was in a position of (a) relationship with respect to the workers, and (b) superior knowledge, including actual knowledge of ongoing injury, such that it owed a duty to warn the workers who would foreseeably be injured by the hidden hazard; and

(3) because MCC insured the workers claims for disability and medical benefits for occupational diseases including asbestosis, MCC owed, to workers who foreseeably would be injured by an absence of the insurer's good faith and candor, a duty of disclosure of the actual asbestos injury facts known to MCC which were necessary to the workers' timely presentation of occupational disease claims and the fulfilment of the purposes of the insurance undertaking.

**2. Montana law imposes on one who undertakes to perform professional services a duty to third persons who may foreseeably be injured by professional negligence**.

Montana case law clearly demonstrate that, in numerous types of specialized and professional services contexts, one with special expertise can owe a duty to third persons who would foreseeably be injured by the failure to exercise reasonable care in the performance of those services.

This line of cases was discussed by the Montana Supreme Court in *Redies v. Attorneys Liab. Prot. Soc.*, 2007 MT 9, ¶ 42, 335 Mont. 233, 150 P.3d 930. The *Redies* case is especially instructive because, in addition to describing the line of related third-party liability cases, the opinion explains why extension of that line of authority (i.e. to other service contexts) is something to be expected. (In the underlying case of *Watkins Trust*[1], the Montana Supreme Court had concluded for the first time that an attorney could have third party liability to a non-client. The insurance company contended that it acted in good faith reliance on the fact that the third-party liability rule had never before been applied to an attorney):

> [J]ust because the scope of Addy's duty may have been "undecided" in 2001 and 2002, it does not *necessarily* follow that ALPS's decision to contest Redies' claims against Addy was reasonable…
>
> ¶ 42 In this regard, although *Watkins Trust* was the first instance in which we explicitly held that an attorney owed a duty to a nonclient third party—specifically, we held that a drafting attorney owes a duty to nonclient beneficiaries named in the drafted instrument, *see Watkins Trust,* ¶¶ 21–22—our decision was not the watershed event suggested by ALPS and the District Court. Rather, our holding **was an extension of existing precedents**. Indeed, we observed that
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> > a finding of duty is *consistent with existing Montana law.* This Court has noted that a multi-factor balancing test adopted in other jurisdictions may be appropriate in deciding the duty owed by attorneys to nonclients in estate planning. *Rhode,* ¶ 17. Additionally, **we have recognized liability to nonclients in other professional contexts**. *See, e.g., Thayer v. Hicks* (1990), 243 Mont. 138, 793 P.2d 784 (accounting firm liable to nonclient); *Jim's Excavating Serv. v. HKM Assoc.* (1994), 265 Mont. 494, 878 P.2d 248 (professional engineer liable to nonclient); *Turner v. Kerin & Assoc.* (1997), 283 Mont. 117, 938 P.2d 1368 (professional engineer liable to nonclient).
>
> *Watkins Trust,* ¶ 22 (emphasis added).
>
> ¶ 43 Accordingly, the determinative question is whether this **progression in our case law** toward holding an attorney liable to certain nonclients had, by the time Redies stated her claims against Addy, reached the point at which ALPS's assertion that he owed her no duty no longer constituted "a reasonable basis in law" for contesting her claim.

[1] *Watkins Trust v. Lacosta,* 2004 MT 144, 321 Mont. 432, 92 P.3d 620.

*Redies v. Attorneys Liab. Prot. Soc*., 2007 MT 9, ¶¶ 41-44, 335 Mont. 233, 150 P.3d 930 (emphasis in **bold** added).

The line of cases discussed in the above quote expressly recognize legal duties owed to third parties by "engineers," and further foreshadow the recognition of a professional industrial hygienist's duty to those who foreseeably would be injured by his negligence:

- ***Thayer v. Hicks* (1990).** An accountant, Bloomberg, prepared an audit for a corporation ("Intermountain") which was negligently performed by an overstating of inventory, and an overlooking of debts, resulting in an audit report of a profitable company with shareholder equity of $112,608 and working capital of $393,141, while in reality the company was both insolvent and losing money. In reliance on the audit a third party, Plaintiff "Montana Merchandising" purchased Intermountain and suffered the losses of the failing corporation.

  **Held:** Professional accountant owed a duty to a specific person known to be an intended purchaser of the corporation that had hired the accountant to perform an audit.

- ***Jim's Excavating Serv. v. HKM Assoc.* (1994).** A professional engineering firm (HKM), was hired by the Lockwood Water User's Association to design and supervise a water pipeline project. The engineer's specifications for pipe joints was erroneous and negligent, resulting in economic losses to the installing contractor ("Jim's Excavating").

  **Held:** A professional engineer or architect owes a duty of care to a foreseeable class of contractors when the design professional knows or should have foreseen that such contractors would be put at risk by using the professional's project specifications.

- ***Turner v. Kerin & Assoc.* (1997). A civil engineer ("**Kerin") was hired by property owner to bring subdivision's water system into compliance with standards of the State Department of Health Water Quality Bureau. The engineer negligently called for the re-

laying of pipe not meeting requisite pipe standards, resulting in impairment of value of property as security for a mortgagee.

**Held:** "[B]y contracting with the owners to perform engineering work on the property, [engineer] Kerin placed itself in a relation toward any party who held a security interest in the property that the law imposed upon him an obligation, sounding in tort and not in contract, to act in such a way that the security interest would not be injured." *Turner v. Kerin & Associates*, 283 Mont. 117, 126, 938 P.2d 1368, 1374 (1997).

- ***Watkins Trust v. Lacosta* (2004).** Steve Williams, a former partner of testator Watkins and beneficiary of a trust created by Watkin's will, sued the attorney who drafted and oversaw execution of the will alleging professional negligence in the drafting design and in the failures to comply with execution requirements, resulting in post probate attacks on the trust and resulting economic losses.

  **Held:** A drafting attorney owes a duty to non-client beneficiaries named in the drafted instrument.

- ***Redies v. Attorneys Liab. Prot. Soc*. (2007).** (In discussion of meaning of the above line of cases) "[I]n recognizing tort liability in the absence of privity, we have concomitantly limited the class of plaintiffs to identifiable third parties (typically, those who are known or are reasonably foreseeable by the professional …)." *Redies*, 2007 MT 9 at ¶ 50, 335 Mont. 233, 150 P.3d 930.

Two things are clear from the above cited cases. First, while never yet applied to a an industrial hygienist or the designer of a "safety program," Montana law recognizes that a variety of professional and specialized service providers, including engineers may owe a duty of care to those who are reasonably foreseen to be at risk of injury from negligent performance of those services.

Second, while the rule's application to expert service providers other than engineers, attorneys, accountants, and architects has not yet been addressed, the Montana Supreme Court has described the above line of cases as a "progression in our case law" in the form of "extension of existing precedent" to other "professional contexts." *Redies*, supra.

Highly significant to the analysis of the application of this "duty to third-parties" principle is the nature of the services provided. In each of the above cited cases, the positional relationship between the plaintiff and defendant was non-contractual and, to varying degrees, attenuated. The consistent measure of the duty in each case, turned not on a contract relationship or personal contact but on foreseeability of injury.

In this case, the "foreseeability" policy analysis is easier because the objects of the professional/expert undertakings are directed specifically at the **safety** of workers at W.R. Grace's operations in Libby. Moreover, MCC's engineering and industrial hygiene, safety program design and inspection services were specifically directed at the precise risk at issue: a recognized risk of asbestos injury to workers, which risk required specialized services to eliminate or mitigate.

**3. MCC provided three types of specialized professional expertise directed at protecting workers from Asbestos dust in Libby.**

MCC's engineering (design, recommendation and inspection) services, industrial hygiene and safety program design services, and epidemiological medical evaluation services were specifically directed at the precise risk at issue in this case: a recognized risk of asbestos injury to workers, which risk required specialized services to eliminate or mitigate. These undertakings are described and evidenced as follows:

*a. Engineering undertaking.* (See, generally SUF ¶4. All emphasis below is added)

With respect to its professional **engineering** services, MCC's specific undertaking was "formulating a **program for control** and prevention in relation to the dust problem." MCE-013. See also MCE-020 ("the dust problem has been referred to our **Engineering Division**, and they in conjunction with our Medical Division are presently formulating a program for control and prevention"); MCE-027 ("We [the "Accident Prevention Department" of MCC] are presently engaging in drafting an **overall program for the entire Zonolite operation and all phases of prevention and control of the dus**t conditions"); MCE-018 ("a program for control as well as prevention"); MCE-040 ("Should you have **recommendations**, by all means include them in your report so …I can prepare the necessary service letter and satisfy [Grace] that our **engineering service** is producing results. …. [Grace] **expects us to give them the benefit of our recommendations** any time we feel a recommendation is in order."); MCE-039 (identifying the goal "to determine means of **controlling the problem so that further occupational disease does not develop** and to arrange for job placement or rehabilitation where necessary to prevent claims arising from existing lung deficiencies"); MCE-022 ("Our aim in the program will be to see that **everything practical is done** to control dust, **protect personnel** who are exposed to dust which cannot be controlled, and follow through with periodic x-rays").. MCE-048 ("we can satisfactorily **engineer** this risk").

*b. Industrial Hygiene and Worker Safety Program* (See generally SUF 5. All emphasis below is added)

In addition to engineering the dust control, MCC undertook to design and drafted a "**worker safety program**," which, once it was in "the final state of completing, MCC described as "a well rounded program covering every phase of employment from pre-employment examination to retirement." MCE-048. Specifically, this safety program was addressed to a very large extent to the asbestos dust and asbestos disease problem. MCE-049 (MCC will "guide the

assured in the preparation of a **division safety program** … we have been aware of the pneumoconiosis prevalent in the Montana area … we can and will have a successful program in operation before July, 1965.)

The "Zonolite Division "**Safety Program"** prepared by MCC (MCE-037), included, beginning at page 25, a section entitled "DUST CONTROL AND **PERSONAL PROTECTION**" addressed to all locations "in which personnel are exposed to determine extent of atmospheric contamination and to … eliminate dust or minimize its creation; and to **provide maximum personal protection to the employee** as needed." (MCE-036). MCC described its safety program undertaking as one that "must provide the best **safety engineering service** available on as frequent a basis as possible." (MCE-039 at p. 2).

*c. Study of worker injury and control of epidemiological data.* (See generally SUF6 (All emphasis below is added.)

MCC also undertook to evaluate worker lung x-rays and epidemiological and physiological studies including reports of studies and concerns of local physicians (that there was an "important increased incidence of chronic respiratory disease in Zonolite employees") were referred to MCC's Medical director Dr. Robert Chenowith (Ex MCE-012 and MCE-013) for MCC's "recommendations." (Ex MCE-014). With respect to these concerns and studies, MCC undertook to assure "continued follow-up." Ex MCE-018.

The Safety Program required that MCC's "Medical Director … be advised when positive cases [of respiratory involvement] are identified (MCE-036 at p. 30). Dr Chenowith was provided an analysis of the Libby asbestosis problem and also the University of Maryland's proposal for further studies (Ex MCE-059). Annual chest x-ray studies were performed on Libby employees and reported to MCC's Medical Division where they were analyzed for

progression of disease and strategies to move employees with worsening disease to less dusty environments (See, e.g. MCE-086 and MCE-142.1)

The epidemiologic data revealed to Dr. Chenowith and the MCC Medical Division that asbestos exposures at the Libby mill operation was in fact causing lung impairment. Importantly, MCC knew that, "apparently the only persons aware of the studies are the insured's [Grace's] officials, and Dr. Little" such that it would be advantageous to MCC to "avoid having [to] reveal the extent and severity of the problem." Ex MCE-102 at p.3.

Each of these specialized undertakings (a) to engineer the dust control and recommend solutions to make the workplace safe, (b) to design a worker safety program to maximize worker protection, and (c) to perform medical evaluation of epidemiological data of ongoing injury to workers, created circumstances of foreseeable injury to the very workers those undertakings would protect. The consequence of negligence in performing these services would necessarily be the absence of safety, the absence of warnings, and the risk, if not certainty, of injury. These undertakings therefore trigger the same duty of care to workers that was recognized in *Redies, Jim's Excavating, Thayer, Turner,* and *Watkins trust, supra.*

**4. Montana law recognizes that a duty to warn is imposed on one who has superior knowledge of a hidden hazard by reason of his position with respect to the hazard and the persons foreseeably at risk.**

Under Montana law, a duty to warn of a hidden hazard may be imposed on an actor whose position or undertaking vests him with superior knowledge with respect to others who are unwittingly and foreseeably at risk and who stand in such relation to the actor that the policies of "reasonable care" require action. This duty to warn attaches whether or not the hazard itself is in the control of another. Montana case law precedent recognizes that the duty to those who could be injured by a person's failure to warn of a hidden hazard is a function of (a) a foreseeability

analysis, (b) the responsibility that attaches to superior knowledge with respect to a hidden hazard, and (c) the relational position of the actor with respect to endangered persons.

Specifically, the duty to warn operates independently from whether the person owned or merely occupied the location of the hazard, and independently from whether the hazard was within his control. The guiding principles are discussed in the case of *Piedalue v. Clinton Elementary Sch. Dist. No. 32*, 214 Mont. 99, 103, 692 P.2d 20, 22–23 (1984). In that case, a trailer court tenant sued the trailer court owner for injuries occasioned while she drove into the trailer court and struck a ditch on the neighboring property of a school district:

> [I]t is not necessary that the owner or occupier own or control the property on which the hazardous ingress or egress exists or that the owner or occupier create the hazard, if the hazard created a foreseeable risk of harm to business invitees and the owner or occupier knew of its presence and should have taken reasonable precautions to eliminate it by such measures as posting warnings. …
>
> We said in *McIntosh* that the true ground of liability of a business proprietor to an invitee for injuries sustained on the premises is the superior knowledge of the business proprietor over that of the business invitee of the dangerous condition and the proprietor's failure to give warning of the risk.

*Piedalue v. Clinton Elementary Sch. Dist. No. 32*, 214 Mont. 99, 103, 692 P.2d 20, 22–23 (1984) (emphasis added).

The *Piedalue* case further demonstrates that Montana law imposes a duty to warn those who may foreseeably be injured whether or not others may have had the ability to control or mitigate the hazard. In *Piedalue*, the liability was not dependent on, or relieved by, the school district's responsibility for the existence of the hazard on its property. Rather the duty independently arose from the trailer court operator's superior knowledge and from the reasonable expectations in a tenant/landlord relation.

The Montana Supreme Court's imposition of the duty to warn in *Piedalue* is a typical application of the fundamental rule of reasonable care under Montana's "foreseeability" analysis.

To determine when a duty is owed, the foreseeability analysis looks to the likelihood of injury to others, and other "policy considerations," such as the expectations of others, the actor's positional relationship with respect to the persons at risk, the prevention of "harm," the degree of "burden" of taking action, and the "moral blame" attached to the actor's failures. *Henricksen v. State*, supra, at ¶ 21. As in the *Piedalue* case, all of these policy considerations point strongly to a duty to warn in the circumstances of MCC's knowledge of the ongoing injury to workers it had undertaken to protect.

The duty to warn is not limited to premises liability. Rather, the duty to act, including the duty to warn, may be found whenever an actor's failure to act creates a distinct risk to a foreseeable group of others. For example, in the case *Estate of Strever v. Cline*, 278 Mont. 165, 924 P.2d 666 (1996), a person who failed to secure a gun by leaving it in his unlocked vehicle was held to owe a duty to the general public, including the teenagers that broke into the vehicle, took the gun, and discharged it:

> Negligence denotes "a want of the attention to the nature or probable consequences of the act or omission that a prudent man would ordinarily give in acting in his own concerns." Section 1–1–204(4), MCA. Moreover, every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon any of his rights. Section 28–1–201, MCA.
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> [Montana has] abandoned the common-law classifications of invitee, licensee and trespasser and [has] adopted a **uniform standard of reasonable care under the circumstances**. ...
>
> The existence of a duty of care depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against the imposition of liability. *Maguire v. State* (1992), 254 Mont. 178, 189, 835 P.2d 755, 762. The **policy considerations** to be weighed in determining whether to impose a duty include: (1) the moral blame attached to the defendant's conduct; (2) the desire to prevent future harm; (3) the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (4) the availability, cost and prevalence of insurance for the risk involved. *Phillips v. City of Billings* (1988), 233 Mont. 249, 253, 758 P.2d 772, 775.

*Estate of Strever v. Cline*, 278 Mont. 165, 173, 924 P.2d 666, 670 (1996) (emphasis added).

The reach of the foreseeability analysis is informed by the case of *Fisher v. Swift Transp. Co.,* 2008 MT 105, 342 Mont. 335, 181 P.3d 601. In that case, the driver of a semi-truck operated by defendant Swift caused a second accident by sliding into the vehicles at the scene of a prior collision. Investigating officer Fisher was injured in a third (non-traffic) accident when the semi-truck, which had been winched away from the vehicles by the towing company and then released from the winch, slid into Fisher and pinned him to his car. Swift argued it owed no duty to officer Fisher because it was not foreseeable that the third (winching) accident could injure an investigating officer. The court found a duty was owed to Fisher by Swift:

> We have held that "the existence of a duty 'turns primarily on foreseeability.' " *Eklund,* ¶ 40 (citation omitted). In *Mang v. Eliasson,* we relied on Justice Cardozo's opinion in the *Palsgraf* case to explain the concept of foreseeability:
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> > "The risk reasonably to be perceived defines the duty to be obeyed." *Palsgraf v. Long Island R. Co.* [citation omitted]. That is to say, a defendant owes a duty with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent in the first instance.
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> *Mang v. Eliasson,* 153 Mont. 431, 437, 458 P.2d 777, 781 (1969). We ask "whether the defendant could have reasonably foreseen that his or her conduct could have resulted in an injury to the plaintiff." *Hinkle,* ¶ 30. A plaintiff is a foreseeable plaintiff if she or he is within the "foreseeable zone of risk" created by the defendant's negligent act. *See e.g. Prindel,* ¶ 38.
>
> ¶ 22 The District Court reasoned that "there is no question that when a person drives in a negligent manner, a reasonably prudent person could foresee that a law enforcement officer attending a resulting accident could be injured by oncoming traffic." We agree.

*Fisher,* at ¶¶ 21-22 (emphasis added).

No Montana case has yet applied this foreseeability analysis precisely to whether a duty to warn of a hidden asbestos hazard is owed by one who has undertaken to provide a safety program which specifically and "comprehensively"[2] addresses an asbestos exposure risk. As in

[2] MCE-027

the above cited cases however, the legal determination should be guided by the principle that "the risk reasonably to be perceived defines the duty to be obeyed." The rationales articulated in the *Piedalue, Estate of Strever,* and *Fisher* cases dictate this result: One who specifically undertakes to address a hidden asbestos hazard and who thereby acquires a high degree of knowledge of the hazard and the injuries the hazard is causing owes a duty to warn those unwittingly exposed to that hazard.

The recognition of MCC's legal duty to warn workers is appropriate because (a) MCC had extensive superior knowledge of the hazard through its industrial hygienist, inspectors, safety engineers and medical officer, (b) asbestos-related occupational disease was the specific object of MCC's undertakings, (c) MCC had direct knowledge of the workers being exposed, including knowledge that injury was in fact happening on a continuing basis, (d) the hazard at issue was an invisible asbestos hazard,[3] of serious latent disease such that workers would have no reason to know they were ex[osed to more than a dust nuisance, (e) the reasonable expectations and public policy rationale that the industrial hygienist and safety engineers and the safety program they designed would warn of hidden hazards (since that is the very nature of the "safety" undertaking), and (f) the foreseeability that, without such warning, those exposed to asbestos at the known excessive levels would be and were being unwittingly injured.

The application of the foreseeability analysis to MCC's failure to warn is further aided by the foreseeability discussion in *Orr v. State*, 2004 MT 354, 324 Mont. 391, 106 P.3d 100[4], which

[3] Asbestos has no "onion" properties that would signal a danger. Moreover, the injury caused is a latent disease such that the exposed person may not even know he has been injured until many years later. Thus, in the absence of a warning, a person may continue unwittingly to encounter dangerous exposures.

[4] The *Orr* case found a statutory duty owed by the State of Montana and therefore had no need to address a common law duty. Nevertheless the foreseeability analysis is identical.

addresses the State of Montana's failure to warn workers of the exact same asbestos hazard at the very same W.R. Grace Libby operations:

> The State argues that it could not foresee that the Mine owner would not fulfill its legal obligations as landowner and employer. This rings hollow in light of obvious and objective indications that neither Zonolite nor Grace was protecting its employees. Plainly, the State knew as a result of its inspections that the Mine's owner was doing nothing to protect the workers from the toxins in their midst. The question of whether the risks were foreseeable had been answered as early as 1956; the dangers to the workers were already clear and present by that time.

*Orr* at ¶ 37.

If the State of Montana could foresee the injury to the workers at these Grace operations based on the state's inspections, certainly worker injury was foreseeable to MCC who not only had the State's inspection reports but had much more information on (a) the asbestos levels, (b) the danger of those levels, (c) the actual incidence of disease revealed by worker studies sent to MCC Medical Officer Dr. Chenowith, and (d) the failures of the MCC dust control engineering recommendations to reduce dust levels. Moreover, while the State had knowledge of an asbestos dust hazard that was superior to that of the workers, MCC had even greater knowledge but (a) affirmatively assured W.R. Grace that workers (even workers who already had lung impairment) could "safely" continue" to be exposed at levels as high as 5 mppcf,[5] and (b) was responsible for the absence of ANY warnings or other hazard communications from the worker "Safety Program" it designed for the workers at the mine and mill.

[5] MCE-142.1 is an October 27, 1969 letter from MCC industrial hygienist L.E. Park to the manager of the Libby Grace operation identifying dozens of workers (including Plaintiff Ralph Hutt) who had lung impairment but who, Park advised, could "**continue safely**" provided they protect themselves by use of respirators when the asbestos dust exceeded "**5,000,000 particles per cubic foot**". This industrial hygiene advice not only ignored the fact that the 5mppcf standard could not be applied to injured workers but that (a) it was a level which was too high to protect any worker,(b) it was a level a least 10 times higher than the contemporaneously recognized BOSH standard of 2 fibers/ml, and (c) had been superseded by the 1968 ACGIH recommendation of 2 mppcf or 12fibers/ml.

Outside of Montana, a number of courts have used a "foreseeability" analysis similar to Montana's to conclude that one may owe a duty with respect to asbestos exposures not just of workers but of an employee's family members – family members with whom the defendant has no direct relationship. *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, 965 N.E.2d 1092 (2012)("what is considered reasonably foreseeable depends on what information about the nature of asbestos was known [and] defendant could reasonably be held accountable for knowing"); *Schwartz v. Accuratus Corp.*, 225 N.J. 517 139 A.3d 84(2016) ("duty-of-care question for take-home toxic-tort liability 'devolves to a question of foreseeability'"); *Kesner v. Superior Court*, 1 Cal.5th 1132 (2016)(" foreseeability factors weigh in favor of finding a duty here").

**5. Under Montana law, a workers' compensation insurer owes duties of good faith, candor and fairness to workers who are injured within the course and scope of their employment, such that the worker will have the intended benefit of his disability and medical benefit coverage, and the insurer does not enjoy a windfall through its concealment of known injuries.**

Montana law recognizes a cause of action for bad faith conduct by an insurer which was ultimately codified in Section 33-18-242, MCA. This motion does **not** seek summary judgment on Plaintiff Ralph Hutt's "bad faith" claim. The relationship between a workers' compensation insurer and the workers it insures, however, also is relevant to the duties of hazard disclosure and warning to which this motion is directed.

The elements of the insured/insurer relationship and the duties and expectations attendant to that relationship have long been recognized. For example, in *Yurkovich v. Industrial Accident Board* 132 Mont. 77, 83, 314 P.2d 866, 870 (1957), this Court recognized that, since the worker gives up his right to sue the employer for on the job injuries, the Workers' Compensation Act must be construed so as to give the employee "the greatest possible protection within the purposes of the act," such that to conceal from a worker his rights and obligations when the insurer knows the worker is injured would defeat the purposes of the act:

> While it may not be the duty of the Board to go out and solicit claims, … yet we deem it the duty of the Board to fully advise an industrial injured workman, when he comes to the Board as here and asks for information, as to what he should do. The Board as trustee of the funds which are provided for the benefit of such workmen as beneficiaries, and when dealing with the beneficiary, is under a legal and moral duty to deal fairly with him and to disclose to him all matters affecting his interests, either beneficially or otherwise.
>
> R.C.M.1947, § 86–301, provides as follows: 'In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.'
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> Here, within the year after the injury, the Board …recognized that the plaintiff had suffered a compensable industrial accident. It was the duty of the Board standing in the position of trust in relation to this plaintiff, after receiving such information of his industrial accident, to see to it that his rights under the law were protected. A very high degree of good faith, impartiality, and fairness is to be shown by the Board in protecting its beneficiaries' interests, and in dealing with such claimants… From the record it is apparent that plaintiff was misled to his prejudice by the Board's withholding, perhaps unconsciously, the information that plaintiff was required to file a claim under oath, thereby concealing such requirement from him. (emphasis added)

The good faith candor and honesty expectations attendant to the relationship between a workers compensation insurer and an injured claimant have continued to be recognized throughout Montana jurisprudence:

> [A]ny party involved in the business of insurance knows it rights and responsibilities as well as its obligation to deal in good faith and with fairness toward those who are entitled to the protection of the Workers' Compensation Act.

*Hayes v. Aetna Fire Underwriters,* 187 Mont. 148, 157, 609 P.2d 257, 262 (1980) (Plan II); *Birkenbuel v. Montana State Comp. Ins. Fund*, 212 Mont. 139, 144, 687 P.2d 700, 702 (1984) (With respect to Plan III insurer these obligations are "equally true today").

Indeed, such candor and good faith is attendant to every contract in Montana:

> Under our caselaw, "every contract, regardless of type, contains an implied covenant of good faith and fair dealing." *Story v. City of Bozeman*, 242 Mont. 436, 450, 791 P.2d 767, 775 (1990). "In essence, the covenant is a mutual promise implied in every contract that the parties will deal with each other in good faith, and not attempt to deprive the other party of the benefits of the contract through dishonesty or abuse of

> discretion in performance." *Beaverhead Bar Supply v. Harrington*, 247 Mont. 117, 124, 805 P.2d 560, 564 (1991) (citing *Story*, 242 Mont. at 450, 791 P.2d at 775); cf. Restatement (Second) of Contracts § 205 cmt. a (1981) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party....").

*Phelps v. Frampton*, 2007 MT 263, ¶¶ 28-29, 339 Mont. 330, 341, 170 P.3d 474, 482(emphasis added).

The meaning of the "good faith" that is part of every contract is amplified in the case of insurance because of the "special relationship" an insurer has due to the insured's vulnerability and superior knowledge and position of the insurer. This relationship has since been identified as the basis for the creation of causes of action in recent decades, as in the *Story* and *Thomas* cases below. The recently developed causes of action, however, are not at issue in this motion. Rather, the important point is that the reason for the causes of action is the "special relationship" that has always existed between an insurer and an insured. The later-recognized causes of action did not create that special relationship, rather, the special characteristics of the relationship, which have always existed, were "scrutinized" by the courts to determine what legally enforceable duties would be recognized by law:

> In *Stephens,* we reviewed an action brought by insureds against their property insurer. Writing for the Court, Justice McDonough … **scrutinized the relationship** between the insured and the insurer to determine whether a special relationship existed to allow the bad faith claim. In carefully evaluating the relationship between the insured and insurer against the five elements of *Story,* Justice McDonough concluded that such a special relationship existed:
> *Story* adopted five elements to be applied in determining whether the parties have a special relationship:
>
> > (1) the contract must be such that the parties are in inherently unequal bargaining positions; [and] (2) the motivation for entering the contract must be a non-profit motivation, i.e., to secure peace of mind, security, future protection; [and] (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party "whole"; [and] (4) one party is *368 especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability.

*Story,* 791 P.2d at 776.

> When these five elements are applied to this case, the special relationship is established.

*Thomas v. Nw. Nat. Ins. Co.,* 1998 MT 343, ¶¶ 42-43, 292 Mont. 357, 973 P.2d 804 (emphasis added).

While the "bad faith" causes of action have changed over the years, the nature of the insurance relationship and the responsibilities and expectations attendant thereto have consistently been recognized since the 1940s. Thus, in *McDonald V. Northern Ben. Ass'n.,* 113 Mont. 595 (1942) the Court stated:

> "Each party to a contract of insurance must communicate to the other, in good faith, all the facts within his knowledge which are, or which he believes to be, material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty." (Rev.Codes, § 5570 [now Sec. 8085].).

The duties of candor must also be considered in light of the statutory duty of an insurer to report injuries. Specifically, a workers' compensation insurer had a duty under 1964 Occupational Disease Act (1965) to report injuries 92-1334, Plan II, Section 10:

> Every insurance company transacting business under this act shall, at the time and in the manner prescribed by the board, make and file with the board such reports of accidents as the board may require.

MCCs failure to report Hutt and others known lung impairment to the Industrial Accident Board compounds its failure to disclose to these workers that they had been, and continued to be, injured by exposure to dust at the Libby operations.

Application of the above principles of the insurance relationship, raises three questions for purposes of this summary judgment motion:

First, given the relationship between a workers' compensation insurer and an injured worker described above, did MCC owe a good faith duty to disclose to workers (a) the fact that they were continuously being exposed to asbestos at levels in excess of all known exposure

standards, and (b) the fact that a high percentage had incurred lung disease? In the ordinary case of work related injury, it is the worker who knows of the injury and has the duty to timely report it to the insurer, lest his claim be forever barred. At a minimum, the duty of candor and good faith owed to a person who is insured for work-related injuries must require an **equivalent** duty of disclosure where the fact of an injurious occupational exposure is known to the insurer and unknown to the worker. The duty of candor certainly should also mean disclosure is required where the knowledge will not merely permit the fulfilment of the purpose of disability payments but could actually prevent further injury.

Second, does MCC' workers' compensation insurance relationship present a circumstance where, because of superior knowledge and/or position, it has a duty to warn workers of injurious occupational exposure to a hidden hazard? The rationale of *Piedalue* and *Estate of Strever*, *supra* dictates that, for a workers' compensation insurer, the uniform standard of "reasonable care under the circumstances" found in Sections 1–1–204(4), Section 28–1–201, MCA, includes a duty to warn insured workers of their injurious occupational exposures.

Third, since permitting the insurer to delay the worker's discovery of his injury until the latent disease manifests years after retirement would defeat the purpose of the workers compensation contract, does workers' compensation insurer MCC owe a heightened duty to disclose or warn workers of injurious occupational exposures to asbestos? The principle applied in *Fisher v. Swift Transp. Co. supra,* that "the risk reasonably to be perceived defines the duty to be obeyed" has special application where the nature of the injury is inherently hidden and latent. Under the 1965 Occupational Disease Act in effect at the time of Ralph Hutt's employment, a claim for disability would be "forever barred" if notice thereof was filed more than "one year after the last day upon which the employee actually worked." Sections 92-1312, 92-1313 R.C.M.

(1965).[6] By hiding the fact of injury from the employees until this one year time period passed, MCC could, and on numerous occasions did, deny liability for asbestosis claims as untimely.

**6. There is no substantial question over the facts that (a) MCC did not provide for warnings of the asbestos hazard when it designed the worker safety program or (b) that MCC failed to communicate the essential facts of the hazard to the workers it knew were being injured.**

In most warning cases there are disputes of fact about who said what and whether the content of a warning was reasonable under the circumstances. In this case, there are no witnesses to what MCC did or didn't do. Rather, the record on this motion for summary judgment consists of:

(a) Ralph Hutt's testimony that he did not know he was exposed to asbestos let alone to dangerously excessive and injurious levels of asbestos; and

(b) The documents that constitute the record of the actions taken by MCC.

With respect to the dust control engineering and recommendations by MCC, two facts are uncontroverted. First, MCC knew that its dust control recommendations utterly failed to control the dust levels as they consistently exceeded even MCC's proposed "goal" of 5mppcf through the last day of Ralph Hutt's employment. (See McGarvey Affidavit Ex. A (chart of dust level measurements). MCC knew that these excessive dust levels were unsafe. MCC industrial hygienist observed in a 1969 note (Ex MCE-136) to MCC's underwriter at MCC's New York Office that the "Libby Operation is becoming worse," further noting the "death of Former Supt."[7] On July 7, 1969 (Ex MCE-138) Park wrote to the Safety administrator at Grace

[6] Application of the time limitations of this statute to a 1967 claim for benefits for asbestosis disease is discussed by MCC attorney in Ex MCE-089 at pp.12-13.

[7] This note is in the context of Superintendent Bleich's death from lung cancer. On April 17, 1968, (Ex MCE-110 (Spear 87) MCC inspector Baker wrote to Park about Bleich's death:

> I think Mr. Bleich's death from lung cancer has registered rather hard, although he [Libby plant manager Lovick] was quick to assure us that conditions at the Mine & the

acknowledging that "**only a new mill** with built-in dust control equipment will provide a **safe** working environment." On August 26, 1969 Park wrote to Grace (Ex MCE-139) to say "unless these readings improve immediately, we are in serious trouble."

Second, despite this clear knowledge that its engineering of the dust control had failed, MCC gave no warning to the workers. Worse, it affirmatively and falsely assured the managers at the Grace facility that workers (including Ralph Hutt) who were already showing lung impairment could "safely" continue to work as long as dust levels were within the superseded standard of 5 mppcf. MCE-142.1.

A further uncontroverted fact is the complete absence of any identification, proposal or design of any warning in the Safety Program document prepared by MCC. The issue isn't the adequacy of a warning; rather, NO warning was given that the workers were exposed to toxic asbestos. The worker safety program (MCE-036) contains no direction for the content or elements of an asbestos hazard warning complying with industrial hygiene standards. Nor is there any hazard communication procedure or protocol anywhere found in the Safety Program document or otherwise.

The Safety Program document section titled "DUST CONTROL & PERSONAL PROTECTION" specifically discusses dust control. MCE-036 (beginning at p. 25). But the section says nothing about warning workers of the presence of any carcinogenic or fibrotic toxin, or of the dangers of exposures to asbestos. Indeed, the word "asbestos" is conspicuously missing from ANYWHERE in the "safety program" document, leaving the impression that the dust concern was one of controlling the levels of contaminants in the "nuisance" dust, and a goal to

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Mill had nothing to do with his condition and death, but Larry we have both seen the results of his x-ray."

"eliminate dust or control and minimize its creation." MCE-036. This careful characterization of the dust concern corresponds to Ralph Hutt's understanding that "it was just a nuisance to you." (Hutt Depo at p. 54, l. 25.)

While the Safety Program calls for use of "respirators for emergency use," and while other documents demonstrate periodic recommendations by MCC that respirators be worn in the dry mill and other places where dust concentrations would exceed 5 mppcf, (e.g. MCE-142.1), there is no evidence that MCC ever gave a warning or recommendation to provide to the workers the essential information they needed to be apprised of the hazard. For example, an October 27,1969 letter to Libby mill manager Earl Lovick, addresses studies of workers (including Ralph Hutt) who already had signs of lung impairment. In it, MCC's industrial hygienist Park directed:

> "[I]f I had any one suggestion to offer to the individual, it would be to refrain from smoking cigarettes as well as be habitual in the wearing of respiratory protection while in a dusty environment."

In contrast, the essential information that the workers were **not** warned of included:

- That the dust was not merely a nuisance, but contained 40 to 80% asbestos.
- That asbestos is a highly toxic fiber that causes disabling asbestosis, cancer and death.
- That the toxic exposure to asbestos in the nuisance dust will not be discerned by what the worker experiences because it is invisible, odorless and does not produce symptoms of fibrosis or cancer for decades.
- That excessive asbestos dust levels in the mill were consistently measured at well above every asbestos dust exposure standard (and had been described by the U.S. Department of Health as "10 to 100 times in excess of the safe limit").
- That asbestos exposures at the Libby mill operation were in fact causing lung impairment, including that a great many of the insured's employees suffer from lung abnormalities (MCE 102 at p.5), and that there had been demonstrated a "marked rise

(45%) beginning with the 11th year of service, climbing to 92% in the 21 to 25 years service group." MCE-140 at p.3

While there is some evidence in the MCC documents of warnings or directions concerning avoidance of extreme exposures to what appeared to the workers to be merely a nuisance dust, and while there were signs prescribed by MCC[8] to direct workers in certain areas to use respirators, nowhere in the documents (which constitute the only evidence of MCC's conduct) is there any evidence that MCC communicated a warning of any, let alone all, of the above-listed essential facts.

The failure to disclose the pattern of actual lung impairment in the studies overseen by Dr. Chenowith in MCC's Medical Department is especially troublesome since MCC knew the studies were undisclosed and that they would reveal to the workers the hidden danger and the severity of the asbestos exposure and resulting disease. Worse, MCC recognized that, while the workers continued to be unwittingly exposed to high[9] asbestos dust levels, revelation of the information presented a concern of workers' compensation claims. Specifically, in November, 1967, MCC's attorney wrote:

> "Dr. Little stated that we did indeed have a severe problem, and that we might expect a good many claims involving asbestosis. …
>
> [A]pparently the only persons aware of the studies are the insured's officials and Dr. Little. Again, as you may well realize, I would very much like to avoid having evidence presented by the opposing party which would reveal the extent and severity of the problem with which we are concerned."

[8] MCC did undertake to prescribe other warnings and warning signs. See, e.g. MCC's 1966 recommendation that a low clearance passage be marked with "**our** 'low overhead' signs"(MCE-079); MCC's "**our** stop and go symbols are in evidence at all locations" (MCE-097 at p.3; and MCC's direction to "Post a sign at loading docks (expansion plant) "WEAR YOUR RESPIRATORS" (MCE117).

[9] Levels described by the U.S. Dept of Health as 10-100 times in excess of the safe limit"

The attorney went on to describe a consequence of revealing this "severe problem" was that it "would expose the entire situation to the Industrial Accident Board, whose records may well be available to unions and the general public."

Finally, MCC cannot escape its duty to warn by pointing the finger at W.R. Grace. First, the managers at the Grace Libby operation were not industrial hygienist or safety engineers. They were relying on MCC's provision of services and assurances that worker safety could be achieved by pursuing dust level goal of 5 mppcf.

More importantly, the fact that the Grace Libby managers themselves failed to give the necessary warnings does not excuse the wrongdoing of MCC. Indeed, it only heightens the need for a warning. In this regard, the *Piedalue* case is particularly instructive. In that case, the hidden hazard was on neighboring property of co-defendant school district and out of control of the trailer park owner. By failing to address the hidden hazard on its property, and failing to provide warnings thereof, the school district clearly breached its own duty. But the Montana Supreme Court held that a duty also attached to the neighbor because he knew (had "superior knowledge") of the hazard, its hidden characteristics and the foreseeability of injury to trailer court tenants. *Piedalue v. Clinton Elementary Sch. Dist. No. 32*, supra 214 Mont. at 103, 692 P.2d at 22–23.

## II. CONCLUSION

MCC owed a duty to warn of the asbestos hazard under three well-supported legal rules: (a) the duty of reasonable care owed to persons who would foreseeably be injured by negligent performance of professional safety services (industrial hygiene, safety engineering, safety program design, medical epidemiologic analysis), which duty is recognized in *Redies* line of cases; (b) the *Piedalue*-type duty to warn of a hidden hazard, which duty arises from a special position of superior knowledge in relation to those foreseeably at risk; and (c) the duty of candor

that arises from the workers compensation insurer/insured relationship as recognized in *Yurkovich* (1956) and *McDonald* (1942).

By this motion, Plaintiff asks this Court to conclude, as a matter of law, that the warning duty so imposed requires an affirmative act to warn those at risk of the essential information, which, in the case of asbestos exposure, included at a minimum, the fact, known to MCC of worker exposure to **excessive levels asbestos**, and the fact, known to MCC, that asbestos can cause and was causing **ongoing serious injury** to the workers.

By this motion, Plaintiff furhter asks this Court to find that there is no substantial question of fact but that MCC failed to give these essential elements of information in a warning to the workers.

Upon these conclusions of law and findings of uncontroverted fact, this Court should grant Summary Judgment on the issues of duty and breach of duty, leaving for trial the questions of what damages were caused by MCC's wrongdoing, and what remedies should be afforded the Plaintiff.

Respectfully submitted this 19th day of October, 2018

McGARVEY, HEBERLING, SULLIVAN
& LACEY, P.C.

By: /s/ Allan M. McGarvey
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