Edward J. Longosz, II, *pro hac vice*
Mark A. Johnston, *pro hac vice*
Kennedy C. Ramos, *pro hac vice*
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1717 Pennsylvania Avenue, NW
12th Floor
Washington, D.C. 20006
(202) 659-6600 Telephone
(202) 659-6699 Facsimile
elongosz@eckertseamans.com
mjohnston@eckertseamans.com
kramos@eckertseamans.com

Joe Seifert
KELLER LAW FIRM, P.C.
50 South Last Chance Gulch
P.O. Box 598
Helena, Montana 59624
(406) 442-0230 Telephone
(406) 449-2256 Facsimile
cjseifert@kellerlawmt.com

Attorneys for Maryland Casualty Company, n/k/a Zurich American Insurance Company, successor by merger to Maryland Casualty Company

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 RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON LIABILITY

Pursuant to Montana Rule of Civil Procedure 56, and this Court's local rules, Defendant Maryland Casualty Company ("MCC") submits this Response in Opposition to Plaintiff Ralph V. Hutt's ("Hutt") Motion for Summary Judgment on the issue of liability.

INTRODUCTION

Libby Claimants and Hutt specifically have repeatedly argued that the Restatement of Torts (Second) § 324A, concerning "Liability to Third Persons for Negligent Performance of Undertaking," governs their negligence claims against MCC. Specifically, Hutt previously argued before the U.S. Bankruptcy Court for the District of Delaware that his claims against MCC had "a sound basis under the Restatement of Torts and Montana caselaw," and cited to § 324A. Plaintiff's Reply Brief in Support of Motion for Summary Judgment, at 13, n. 35, Dkt. No. 27 in *In re W.R. Grace & Co. (Hutt v. MCC)*, No. 14-50867 (Bankr. D. Del., filed Aug. 18, 2015). Moreover, in Libby Claimants' appeal to the U.S. Court of Appeals for the Third Circuit addressing similar factual allegations against another workers' compensation provider, Libby Claimants stated, "The Montana Plaintiffs claim they were owed a duty of care by CNA – an assertion backed by Montana caselaw and the Restatement (Second) of Torts," and specifically referred to § 324A. 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). In a Supplemental Letter Brief to the Third Circuit, the Montana Plaintiffs stated "Montana caselaw also holds that a person who undertakes to provide services has a duty, to those who will foreseeably rely on those services, to use due care in performing them," and again cited § 324A. Supplemental Letter Brief of Appellant 2/21/2018 at 2-3, *In re W.R. Grace & Co.*, 900 F.3d 126 (3d Cir. 2018) (No. 01-01139, Adv. No. 15-50766). The Third Circuit, in turn, referred to § 324A in its Opinion affirming in part, and remanding in part, although it "reach[ed] no conclusion on whether § 324A of the Restatement of Torts applies to the Montana Claims,"

because it had not been fully briefed on a choice-of-law analysis, or whether the section had been adopted. *In re W.R. Grace & Co.*, 900 F.3d 126, 138, n.9 (3d Cir. 2018). Counsel for Libby Claimants and Hutt have represented to the bankruptcy court that they will seek certification of the issue to the Montana Supreme Court.[1] Letter Brief of Montana Plaintiffs 9/10/2018 at 5, *In re: W.R. Grace & Co. et al.*, No. 01-01130, D.E. No. 33052.

Notwithstanding Libby Claimants' and Hutt's previously unwavering representation that § 324A is both the correct standard and the law in Montana, Hutt's Summary Judgment Brief abruptly changes course, and reference to § 324A is nowhere to be found. MCC has filed a Motion for Summary Judgment on the absence of a duty under the applicable § 324A standard, putting Hutt's negligence claim in peril. As Hutt evidently now recognizes that the record evidence does not meet the stringent requirements of § 324A, he instead uses a line of inapplicable professional liability cases to argue that a duty exists based on foreseeability, or foreseeability and knowledge. For the reasons explained below, Hutt's summary judgment arguments are not supported by Montana case law, and this Court should deny his Motion for Summary Judgment in its entirety.

ARGUMENT

I. Hutt Ignores the Requisite § 324A Analysis

To prevail on a negligence action, a plaintiff must establish that the defendant owed him a legal duty, breach of that duty, causation, and damages. *Emanuel v. Great Falls School Dist.*, 2009 MT 185, ¶ 11, 251 Mont. 56, 59, 209 P.3d 244, 247. The existence of a duty is a question of law. *Kent v. City of Columbia Falls*, 2015 MT 139, ¶ 20, 379 Mont. 190, 195, 350 P.3d 9, 1.

[1] Certification to the Montana Supreme Court could materially impact the case before this Court.

As an initial matter, Hutt's Summary Judgment Brief repeatedly asserts that MCC "undertook" various services and activities,[2] but ignores the analysis that necessarily precedes any conclusion that an undertaking occurred. Rather than engage in the analysis necessary to determine whether MCC actually undertook to perform a service or assume a duty owed by Grace, which Libby Plaintiffs including Hutt have previously acknowledged as the necessary and appropriate inquiry for assessing the existence of a duty in these circumstances, Hutt urges this Court to begin and end with foreseeability. However, foreseeability alone is insufficient to establish the existence of a duty. Under the necessary Restatement of Torts (Second) § 324A analysis, Maryland Casualty Company did not assume or undertake any duty or obligation to Hutt, and therefore, Hutt's summary judgment arguments fail as a matter of law.

It is unsurprising that Hutt omits any discussion of § 324A in his brief, because application of § 324A principles to the undisputed facts in the record demonstrates that MCC did not undertake any duty or service. Section 324A of the Restatement of Torts (Second) establishes those limited circumstances under which liability extends to a third party based on 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 (Second) of Torts, § 324A (1965).

[2] Hutt uses a variation of the word "undertaking" 21 times in his Summary Judgment Brief.

Here, as is explained in more detail in MCC's Brief in Support of Summary Judgment ("MCC's SJ Br."), MCC did not "undertake … to render services to another which [it] should recognize as necessary for the protection of a third person." Restatement (Second) § 324A. The language of MCC's workers' compensation policies clearly explained that MCC did not "undertake to perform the duty of any person to provide for the health or safety of [Grace] employees or the public." *See* Ex. 13 to MCC's SJ Br. at 5. The policy language further provided that any inspections performed were "not safety inspections," and MCC did "not warrant that [Grace's] workplaces [we]re safe or healthful." *Id.* Based on this policy language, MCC assumed no undertaking, clearly dictated that any inspections were not safety inspections, and provided that MCC did not warrant the safety of any Grace facility. Additionally, Grace exercised exclusive control over the Libby Plant, including safety measures and procedures employed. Grace repeatedly resisted and rejected MCC's recommendations regarding Libby Plant conditions, and continually performed its own internal dust monitoring and safety assessment procedures. MCC's SJ Br. at 13-19. During Hutt's employment, Grace was also soliciting, evaluating, and implementing at its discretion, recommendations and procedures provided by other sources, including the State of Montana ("the State"), the U.S. Public Health Service, and Johns-Manville ("J-M"). MCC's SJ Br. at 17-19. Grace alone controlled which procedures it implemented. Ex. 46 to MCC's SJ Br. (10/7/1969 letter from Peter Kostic, Grace Safety Administrator, stating "Following is an extraction and interpretation of the significant remarks of each of their [J-M's, the U.S. Department of Health's, and Grace employee, W.C. Nordin's] reports," and providing recommendations). As such, there is no evidence that MCC should have recognized its recommendations, provided for purposes of workers' compensation underwriting, as "necessary

for the protection of a third person." Because the facts do not support satisfaction of the first § 324A element, there is no duty under § 324A.

The subsequent § 324A requirements similarly demonstrate the absence of a duty. No conduct or activity by MCC *increased* the risk of harm at the Libby Plant, which is necessary for satisfaction of § 324A(a). Next, there was no undertaking to perform a duty owed by another, as is required under § 324A(b). In addition to the clear language contained in MCC's workers' compensation policies, there is no evidence that MCC in any way acted to displace duties owed by Grace or the State. Mont. Code Ann. § 50-71-201 (providing employer must provide safe place to work); *Olson v. Shumaker, Trucking and Excavating Contractors, Inc.*, 2008 MT 378, ¶ 58, 347 Mont. 1, 15, 196 P.3d 1265, 1275 (discussing non-delegable duty to ensure safe workplace); *Orr v. State*, 2004 MT 354, ¶ 46, 324 Mont. 391, 407, 106 P.3d 100, 111 (recognizing the State owed statutory duties).

Section 324A(c) only permits liability when harm suffered was due to reliance by the other or the third person upon the undertaking. Hutt did not rely on MCC whatsoever, as he had not even heard of MCC before initiating the instant litigation. Ex. 53 to MCC's SJ Br., Hutt Dep. at 94:22-95:16. Moreover, the record demonstrates that Grace did not rely on MCC. Grace often rejected and ignored MCC's recommendations. Ex. 20 to MCC's SJ Br. at 2 (1/25/1966 letter from R.A. Bleich, Zonolite Company Division Manager, stating, "I can see no reason for further limitations on us. Mr. Park's recommendations are unreasonable and impossible and unnecessary."). Additionally, Grace accepted and reviewed industrial hygiene input from at least three non-MCC sources: J-M, the U.S. Public Health Service, and the State. Exs. 24, 28, 46 to MCC's SJ Br. Grace also had its own safety employees, and conducted its own industrial hygiene

assessment through its internal safety committees, monthly dust counts, and dust control program. *See, e.g.,* Exs. 15, 16, 17, 29, 47 to MCC's SJ Br.

The record clearly demonstrates that Grace did not rely on MCC for worker health monitoring or reporting in any capacity. For instance, on December 16, 1964, G.W. Blackwood, a Grace official, wrote to Joseph Kelley, VP of Grace, "We cannot rely solely 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 …"). Additionally, on October 27, 1969, after Hutt terminated his employment at Grace, L.E. Park, an Engineering Analyst for MCC, wrote to Earl Lovick, Libby Plant Manager, "I would assume that all these men have been advised of their physical examination findings…" Ex. 56 to MCC's SJ Br. However, Hutt testified that Grace never told him of the results of any of the x-rays taken when he was hired or the following year. Ex. 53 to MCC's SJ Br., Hutt Dep. 66:16-67:11. Further, Grace rejected MCC's recommendations for more frequent x-rays at 6-month intervals. Ex. 23 to MCC's SJ Br. (12/9/1969 letter from Kostic to Park, stating "I too have studied all the reports … I question the idea of repeat x-ray examination in six months," and providing rationale); Ex. 24 to MCC's SJ Br. (12/23/1969 letter from Kostic, "My opinion would be that there should be no change in the annual schedule.").

Accordingly, the record demonstrates that Grace did not rely on MCC for dust control/engineering, industrial hygiene, safety, or worker health, and the fact of MCC's recommendations certainly did not induce Grace to forego other remedies or precautions. *See* Restatement (Second) § 324A, comment (e). Because the strict requirements of § 324A have not been met, no duty exists.

II. Hutt's Professional Liability Arguments are Misplaced and Incorrect

Because Hutt cannot satisfy any of the elements necessary for imposition of a duty to a third party based on an undertaking under § 324A, Hutt instead urges this Court to rely on an inapposite line of professional negligence cases. *See* Hutt's SJ Br. at 3-5. The cases identified by Hutt are factually and legally distinguishable from the facts at hand:

- In *Thayer v. Hicks*, 243 Mont. 138, 793 P.2d 784 (1990), the Montana Supreme Court held that an accountant owed a duty in performing an audit to a third party with whom the accountant was not in privity, in part because the accountant knew that a specific third party would obtain and rely upon the audit, the accountant knew the audit was to be used for a particular purpose, and there was a sufficient nexus between the accountant and the third party. *Id.* at 147, 793 P.3d 790.

- In *Jim's Excavating Service, Inc. v. HKM Assocs.*, 265 Mont. 494, 505, 878 P.2d 248, 254-55 (1994), the Montana Supreme Court adopted the Restatement (Second) of Torts § 552[3],

[3] Section 552 of the Restatement, governing "Information Negligently Supplied for the Guidance of Others," provides:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, **supplies false information for the guidance of others in their business transactions**, is **subject to liability for pecuniary loss** caused to them by their **justifiable reliance upon the information**, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Restatement (Second) of Torts § 552 (1977) (emphasis added). Section 552 is clearly inapplicable to the facts here, as there was no information provided for the guidance of business transactions, Hutt does not seek recovery for pecuniary loss, and Hutt did not rely on any information provided by MCC.

and held that a third party contractor could recover economic damages against a design professional who should have foreseen that an identifiable class of plaintiffs were at risk in relying on the information supplied.

- In *Turner v. Kerin & Assoc.*, 283 Mont. 117, 126-27, 938 P.2d 1368, 1374 (1997), the Montana Supreme Court applied the law as stated in *Jim's Excavating Service*, (*i.e.*, § 552 of the Restatement (Second) of Torts) and held that a civil engineer who contracted to perform work on property had a duty with respect to the holder of a security interest in the property.

- In *Watkins Trust v. Lacosta*, 2004 MT 432, ¶¶ 21-22, 321 Mont. 432, 438, 92 P.3d 620, 625, the Court concluded that a non-client beneficiary of an estate plan had standing to bring a malpractice complaint against the drafting attorney because the attorney owed a duty to the non-client beneficiary as that was the mutual intent of the attorney and the client.

- In *Redies v. Attorneys Liab. Prot. Soc.*, 2007 MT 9, 335 Mont. 233, 150 P.3d 930, the Court addressed an unfair trade practices action brought by a former protected person against her former conservator's attorney's malpractice insurer. The Court, in assessing whether the insurer's defense to the claim had a reasonable basis in law, reviewed the aforementioned line of cases in order to determine whether and when Montana law was settled regarding whether an attorney retained by a conservator has a duty to the protected person. *Id.*, 2007 MT 9, ¶¶ 42-52, 335 Mont. at 248-51, 150 P.3d at 940-43.

These cases are clearly inapposite. They deal specifically with professional liability for economic loss based on representations produced through contractual undertakings. To be sure, MCC was not hired by Grace for professional industrial hygiene services. The only contract at issue is MCC's workers' compensation policy with Grace, which explicitly denied performing any safety-related services. *See* Ex. 13 to MCC's SJ Br.

Further, the professional liability cases consistently discuss *reliance* as an important limitation on the class of plaintiffs. *See Thayer*, 243 Mont. at 149, 793 P.2d at 791 ("this duty exists only if the accountant actually knows that a specific third party intends to rely upon his work product and only if the reliance is in connection with a particular transaction or transactions of which the accountant is aware when he prepares the work product …."); *Jim's Excavating Serv.*,

265 Mont. at 504-05, 878 P.2d at 254 (adopting § 552, which requires justifiable reliance upon information, by a person on whom the actor intends to influence through reliance); *Turner*, 283 Mont. at 125, 938 P.2d at 1374 (quoting reliance language from *Jim's Excavating Serv.*). Importantly, Hutt did not rely on any representation or conduct by MCC—he was not even aware of MCC until after the filing of this lawsuit. Ex. 53 to MCC's SJ Br., Hutt Dep. at 94:22-95:16.

To maintain his misapplied professional services argument, Hutt repeatedly references a "safety plan," purportedly designed and implemented by MCC; Hutt's SJ Br. at 7-8; Hutt's Statement of Material Facts ("Hutt's SOMF"), ¶¶ 3-6, 16, 22, but an examination of the record reveals no evidence that any such plan was ever seriously considered by Grace, let alone finalized or adopted. Indeed, the document on which Hutt relies as the "safety plan" is undated, unsigned, and quite obviously a draft, containing handwritten edits by an unknown author. *See* Hutt's SOMF ¶ 5, MCE 0036. The document is not written on MCC letterhead. There is no corresponding cover letter providing context or foundation for the draft plan. While MCC correspondence discusses drafting a plan together with Grace, there is no evidence that any plan, let alone the draft to which Hutt refers, was ever finalized or implemented.

In fact, the evidence in the record suggests that no such plan was ever implemented or adopted during Hutt's employment period or later. In January of 1968, Kostic reported on a meeting with representatives of J-M "to discuss dust problems and controls at Zonolite, and more specifically at Libby." Ex. 26 to MCC's SJ Br. at 1. In his letter, Kostic noted the need to conduct an industrial hygiene survey at Libby, and reported on dust control and maximum allowable concentrations, the need for air sampling and particle counting, employee education, and housekeeping. Kostic's letter and the proposals contained therein demonstrate that in 1968, Grace was soliciting input and formulating a plan of action. *See generally id.*; *see also* Ex. 33 to MCC's

SJ Br. (2/13/1968 letter from Kostic, discussing meeting with Jeremiah Lynch of the U.S. Public Health Service regarding dust controls, and stating that Lynch "agreed in general with our plan of approach to the problem."); Ex. 11 to MCC's SJ Br. at 1, 3 (9/4/1968 letter from Benjamin Wake, Director of Division of Air Pollution Control & Industrial Hygiene for the State, including "Industrial Hygiene Study" conducted jointly by State and U.S. Public Health Service, providing discussion of results and controls); Ex. 38 to MCC's SJ Br. (9/18/1969 letter from J-M reporting on July 1968 "Industrial Hygiene Survey of the Libby, Montana Mine and Mill"); Ex. 46 to MCC's SJ Br. (10/7/1968 letter from Kostic summarizing results of surveys performed by the State and the U.S. Public Health Service, J-M, and Libby Plant employee, and providing recommendations). Thus, in 1968, when Hutt began working at the Libby Plant, Grace was exercising exclusive control over the programming and conditions there and it was soliciting and evaluating safety and industrial hygiene input from multiple, non-MCC sources. Furthermore, Grace's internal discussions regarding the recommendations it received do not discuss any existing or contemplated safety plan or program, let alone one drafted by MCC.

In 1969, Grace personnel were still discussing the *need for* a comprehensive safety program. Ex. 47 to MCC's SJ Br. (3/3/1969 letter from R.M. Vining, President of the Grace Construction Products Division to R.E. Schneider, Chief Engineer for the Grace Construction Projects Division, "It is my recommendation that authorization be granted to proceed with the program outlined in the report."); *id.*, Report at 10-13 ("Program for Establishing Required Changes"); Ex. 31 to MCC's SJ Br. (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…. I shall be glad to set up a meeting with J-M's top medical and workmen's compensation personnel whenever you're ready."); Ex. 46 to MCC's SJ Br. at 5 (10/7/1969 letter

from Kostic to Vining and Grace personnel, stating "Employee health, growing concern over air pollution and the fact that the federal government is considering the adoption of an "Asbestos Workers Health Protection Act' **makes it essential that a company-wide program of dust control be established.**") (emphasis added). Accordingly, the year that Hutt terminated his employment, Grace personnel were still internally discussing the need for a dust control program, and evaluating what that program should entail. In any event, "undertaking" is a term of art in the duty analysis, subject to § 324A requirements, which have not been satisfied.

Hutt argues that even in the absence of an undertaking as specified by § 324A, or any professional services agreement, a duty exists based on foreseeability alone. Hutt's contention, which is essentially that a duty to protect a third party from another's conduct based on the foreseeability of an injury alone, extends[4] far beyond Montana law's duty calculus.

To put it simply, neither § 552 nor the professional liability standards advanced by Hutt are the right test; § 324A controls. Libby Claimants and Hutt specifically have previously acknowledged as much. For the reasons explained above and in MCC's Summary Judgment Brief, the requisite elements of § 324A have not been established. As such, this Court should deny Hutt summary judgment on the duty issue.

III. There is No Duty to Warn

In Montana, there is no duty to protect others against harm from third persons, absent a special relationship of custody or control. *See Prindel v. Ravalli County*, 2006 MT 62, ¶ 25, 331 Mont. 338, 349-350, 133 P.3d 165.

> In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm

[4] Hutt implicitly acknowledges that the novel duty theory advanced in his Brief is merely an "extension," rather than an application, of Montana law. *See* Hutt's SJ Br. at 3 (emphasizing "extension" and "progression" of case law).

> to them arising out of the act. **The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty.**

Restatement (Second) of Torts § 302 (1965), comment (a). The fact that action is necessary for another's protection does not of itself impose a duty to act. Restatement (Second) of Torts § 314; *see also Emmanuel v. Great Falls School Dist.*, 2009 MT 185, ¶ 14, 351 Mont. 56, 59, 209 P.3d 244, 247, n.1 (citing, with approval, § 302). Significantly, a duty may be created by an undertaking, as provided in § 324A, however the facts of this case do not support an undertaking as a matter of law. Restatement (Second) of Torts § 302, comment (a).

Contrary to these longstanding principles, Hutt maintains that a duty exists as a matter of law based on superior knowledge and foreseeability. Hutt's SJ Br. at 9. To reach this conclusion, Hutt impermissibly reaches beyond the facts and holdings of several cases.[5] For instance, *Piedalue v. Clinton Elementary Sch. Dist. No. 32*, 214 Mont. 99, 102-103, 692 P.2d 20, 22-23 (1984) is a premises liability case, where the Montana Supreme Court found a genuine issue of material fact as to whether a landowner owed a duty to a business invitee[6] to warn of a hidden danger involved in ingress or egress from the landowner's property. *Piedalue* stands for the limited proposition that "a property owner's duty to keep his premises reasonably safe may extend beyond his premises." *See Wilden v. Neumann*, 2008 MT 236, ¶ 30, 344 Mont. 407, 413, 189 P.3d 610 (discussing *Piedalue*, 214 Mont. 99, 692 P.2d 20).

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[5] Again, Hutt acknowledges that his failure-to-warn argument is not based on *Piedalue*'s holding, but rather, its "guiding principles." Hutt's SJ Br. at 10.

[6] Montana has since done away with distinguishing a duty of care in premises liability cases based on the status of the injured party, and instead recognizes a duty of ordinary care in the circumstances by the landowner. *See Limberhand v. Big Ditch Co.*, 218 Mont 132, 140, 706 P.2d 491, 496 (1985).

Hutt inappropriately cites *Estate of Strever v. Cline*, 278 Mont. 165, 924 P.2d 666 (1996) for the proposition that "[t]he duty to warn is not limited to premises liability," Hutt's SJ Br. at 11; but the opinion demonstrates that the Court approached the case as a premises liability question. *Estate of Strever*, 278 Mont. at 171-72, 924 P.2d at 669-70 (noting that common law premises liability rules "have been applied to trespassers on personal property."). More importantly, *Estate of Strever* did not impose a duty to warn; it found an issue of material fact as to whether a gun owner exercised ordinary care in "storing his gun and ammunition clip under the seat of his unlocked pickup." *Id.* at 172, 924 P.2d at 670.

Hutt also cites *Fisher v. Swift Transp. Co., Inc.*, 2008 MT 105, 342 Mont. 335, 181 P.3d 601 to advance his foreseeability argument. However, Hutt conveniently omits *Fisher's* duty analysis, which precedes the foreseeability analysis. *See id.*, 2008 MT 105, ¶¶ 16-19, 342 Mont. at 339-40, 181 P.3d at 606-607. The *Fisher* opinion first concludes that the defendant motorist owed specific statutory duties of care to the plaintiff when operating a vehicle and when approaching an emergency vehicle, in addition to the common law duty of reasonable care. *Id.* Only then did it address the question of whether the plaintiff, a law enforcement officer, was a foreseeable plaintiff within the zone of risk created by the defendant's conduct. *Id.*, 2008 MT 105, ¶¶ 21-23, 342 Mont. at 340-41, 181 P.3d at 607. The Court recognized that foreseeability served to limit the scope of the defendant's duty, because a defendant is not responsible for even those risks its own actions created if they were not foreseeable. *See, e.g., id.* (examining, after finding that defendant owed plaintiff a duty, whether that duty was negated by the foreseeability of plaintiff's injury).

Despite these limited, inapplicable holdings, Hutt argues that foreseeability and heightened knowledge alone create a duty to warn of a hidden hazard. In effect, Hutt's argument attempts to

turn an employer's non-delegable duty to provide a safe workplace on its head. *See* Mont. Code Ann. § 50-71-201; *Olson v. Shumaker Trucking and Excavating Contractors, Inc.*, 2008 MT 378, ¶ 58, 347 Mont. 1, 15, 196 P.3d 1265, 1275. Imposing a duty to warn based on foreseeability and superior knowledge alone effectively transfers an employer's non-delegable duty to ensure a safe workplace. This is undoubtedly inconsistent with Montana law.

For these reasons, Hutt's contention that Montana imposes a duty to warn based on superior knowledge and foreseeability alone is patently incorrect, and Hutt's motion for summary judgment on this basis should be denied.

Because there is no duty to warn, Hutt's summary judgment argument concerning the absence of warnings, Hutt's SJ Br. at 20-24, also fails. Nevertheless, it is important to point out that Hutt's argument regarding warnings is based on a misinterpretation of the record evidence. Specifically, Hutt describes a "Safety Program document prepared by MCC." For reasons explained *supra* in Section II, the document upon which Hutt relies is neither signed, dated, nor clearly prepared by MCC. It is a draft, and the record evidence demonstrates that it was not adopted or implemented by Grace. Accordingly, it cannot be interpreted in the way that Hutt urges. Hutt also includes purportedly "essential information," Hutt's SJ Br. at 22-23, which he argues should have been contained in warnings as a matter of law.[7] Hutt's SJ Br. at 25. Hutt does not provide citations for most of the "essential information," but one primary citation is a study prepared by Grace and apparently distributed internally. *Id.* at 23 (citing MCE 140). There is no evidence establishing that MCC participated in, or was even aware of this study.

[7] Hutt appears to ask this Court to rule that MCC had a duty as a matter of law to provide warnings containing the specific "essential information" that Hutt lists in his Summary Judgment Brief. Hutt's SJ Br. at 25. This inquiry is premature. Aside from the infirmity of information discussed *supra*, the state of the art of asbestos knowledge at the time of Hutt's employment is a question of fact, which will be the subject of expert testimony.

Further, Hutt's affidavit[8] provided in support of his Summary Judgment Brief, purports to provide testimony regarding his recollection of the content of warnings at Grace that is not only internally inconsistent, but also inconsistent with his deposition testimony. *Compare* Hutt Affidavit, ¶ 3 ("There were signs at the plant. I do not remember what they said, though they may have been to tell us to wear respirators in certain areas.") *with id.* at ¶ 4 ("I am certain that no sign or other warning was given that told me there was asbestos in the dust, or that the dust could cause serious permanent injury."), *and* Ex. 53 to MCC's SJ Br., Hutt Dep. at 56:3-6 ("Q. Did you see or observe any signs that W.R. Grace put in the facility about dust? A. I don't remember. There were signs, but I don't remember what was on them."). This inconsistent testimony should not be considered for purposes of summary judgment. *See Meadow Lake Estates Homeowners Ass'n v. Shoemaker*, 2008 MT 41, ¶ 46, 341 Mont. 345, 357, 178 P.3d 81, 90 (explaining that summary judgment need not hinge on a party's "sudden and unexplained revision of testimony," purporting to create an issue of fact). For these reasons, all of Hutt's summary judgment arguments relating to a duty to warn, or the content of warnings, should be denied.

IV. Hutt Misinterprets and Misapplies the Duty of Good Faith and Fair Dealing

Hutt next makes an argument relating to the duty of good faith and fair dealing. Hutt confusingly cites to irrelevant, inapplicable language from cases involving entirely distinct causes of action in an effort to bolster his argument that a duty exists, where clear legal principles demonstrate that it does not.

First, Hutt discusses language relating to the Industrial Accident Board's duty, as a trustee of workers' compensation funds, to a claimant. *See* Hutt's SJ Br. at 16 (citing *Yurkovich v.*

[8] As of the date of filing this Opposition, the only affidavit with which MCC has been served is unsigned and undated.

Industrial Acc. Bd., 132 Mont. 77, 81-82, 314 P.2d 866, 868-69 (1957)). The duties of a regulatory board, which is in a position of trustee to a claimant/beneficiary with a statutory duty to act in good faith and avoid concealment, are not transferrable to or equivalent with the duties of a workers' compensation insurer. Hutt's attempt to demonstrate a false equivalence fails, and any duty the Industrial Accident Board may have had to a claimant/trust beneficiary would have no bearing on MCC, a workers' compensation provider.

Next, Hutt cites language relating to the relationship between an insurer and an insured. Hutt's SJ Br. at 16-18. Hutt cites *Thomas v. Northwestern Nat. Ins. Co.*, 1998 MT 343, 292 Mont. 357, 972 P.2d 804 (discussing special relationship between commercial insurer and insured permitting breach of implied covenant and fair dealing claim); *Phelps v. Frampton*, 2007 MT 263, ¶¶ 28-29, 339 Mont. 330, 341, 170 P.3d 474, 482 (assessing covenant of good faith and fair dealing claim based on partnership agreement), and *Story v. City of Bozeman*, 242 Mont. 436, 791 P.2d 767 (1990) (addressing covenant of good faith and fair dealing in construction contract), *overruling on other grounds recognized by Puryer v. HSBC Bank USA, et al.*, 2018 MT 124, ¶ 23, 391 Mont. 361, 370, 419 P.3d 105, 112.

Hutt's discussion of these cases conspicuously omits an important fact: MCC's policy was with Grace, not Hutt. Grace was the insured. Any discussion of duties an insurer owes to an insured would only apply to Grace, not Hutt. These cases dealing with contractual relationships and any attendant duties are irrelevant to the position of a workers' compensation provider to its insured's employee. There are causes of action in Montana dealing with the specific duties of a workers' compensation provider to a claimant, but Hutt expressly avoids[9] that discussion. Hutt

[9] Hutt understandably avoids discussion of Montana law regarding bad faith claims against a workers' compensation insurer, because for reasons explained in MCC's Motion for Summary Judgment, the facts of this case do not support any such claim.

instead alludes to the existence of a fiduciary or fiduciary-like obligation, but Montana case law is clear that none exists between a workers' compensation provider and a third-party claimant. In *Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, 315 Mont. 231, 69 P.3d 652, the Montana Supreme Court specifically explained why the language cited by Hutt *does not apply* to a third-party claimant:

> As a third-party dispute, this case does not present the traditional, contractual relationship associated with an insurer and insured. The Christensens [third-party claimants] **did not purchase a contract of insurance** from Mountain West [driver's insurer]. As such, Mountain West **has not exploited an inherently unequal bargaining position** or **frustrated a justifiable expectation of insurance protection**. The Christensens **did not expend their own funds to obtain a previously bargained for benefit**. Further, Mountain West owes no duty to the Christensens to defend them in any proceeding. In short, the Christensens point to **no contractual corollary which would impose fiduciary obligations** upon Mountain West.

Id., 2003 MT 98, ¶ 38, 315 Mont. at 244–45, 69 P.3d at 661 (emphasis added). In *Suzor v. Int'l Paper Co.*, 2016 MT 344, ¶¶ 19-21, 386 Mont. 54, 59-60, 386 P.3d 584, 589, the Montana Supreme Court had occasion to reaffirm this holding in the context of a Plan I workers' compensation self-insurer. Before holding that the third-party claimant was not owed a fiduciary duty by the self-insured employer, the Court explained that "If International Paper had purchased workers' compensation insurance through a private insurer under plan No. 2 or the State Fund under plan No. 3, **it would be beyond dispute that International Paper was the insured, and no fiduciary duties would extend beyond that insurer-insured relationship.**" *Id.*, 2016 MT 344, ¶ 23, 386 Mont. at 60–61, 386 P.3d at 590 (emphasis added).

As MCC's relationship to Hutt was plainly ***not*** that of an insurer to an insured, it is "beyond dispute" that no fiduciary duty extended to Hutt. Accordingly, Hutt's meandering discussion of the duty of good faith and fair dealing is misplaced, and his accompanying summary judgment argument fails.

CONCLUSION

Any purported duty owed by MCC to Hutt is to be determined by the requirements of § 324A. For the foregoing reasons, in addition to those set forth in MCC's Motion for Summary Judgment and Supporting Brief, MCC owed no duty to Hutt. Hutt's Motion for Summary Judgment, therefore, should be denied.

Dated: October 30, 2018

By: */s/ Edward J. Longosz, II*

Edward J. Longosz, II, *pro hac vice*
Mark A. Johnston, *pro hac vice*
Kennedy C. Ramos, *pro hac vice*
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1717 Pennsylvania Avenue, NW
12th Floor
Washington, D.C. 20006
(202) 659-6600 Telephone
(202) 659-6699 Facsimile
elongosz@eckertseamans.com
mjohnston@eckertseamans.com
kramos@eckertseamans.com

Joe Seifert
Keller Law Firm, P.C.
50 South Last Chance Gulch
P.O. Box 598
Helena, Montana 59624
(406) 442-0230 Telephone
(406) 449-2256 Facsimile
cjseifert@kellerlawmt.com

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:

Hon. Amy Poehling Eddy
920 South Main
Kalispell MT 59901
Asbestos Claims Court Judge

Allan M. McGarvey
John Lacey
Dustin Leftridge
345 1st Avenue E
Kalispell MT 59901
Representing: Adams, et al

Dated this 30 day of October, 2018.

/s/ Edward J. Longosz, II

CERTIFICATE OF SERVICE

I, Kennedy C. Ramos, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to the following on 10-30-2018:

Amy Poehling Eddy (Attorney)
920 South Main
Kalispell MT 59901
Representing: Amy Eddy
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Allan M. McGarvey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Jon L. Heberling (Attorney)
345 First Ave E
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

John F. Lacey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Ethan Aubrey Welder (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Jeffrey R. Kuchel (Attorney)
305 South 4th Street East
Suite 100
Missoula MT 59801
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC
Service Method: eService

Danielle A.R. Coffman (Attorney)
1667 Whitefish Stage Rd
Kalispell MT 59901
Representing: Accel Performance Group LLC, et al, MW Customs Papers, LLC
Service Method: eService

Gary M. Zadick (Attorney)
P.O. Box 1746
#2 Railroad Square, Suite B
Great Falls MT 59403
Representing: Honeywell International
Service Method: eService

Gerry P. Fagan (Attorney)
27 North 27th Street, Suite 1900
P O Box 2559
Billings MT 59103-2559
Representing: CNH Industrial America LLC
Service Method: eService

G. Patrick HagEstad (Attorney)
PO Box 4947
Missoula MT 59806
Representing: Crane Co., United Conveyor Corporation, Riley Stoker Corporation et al
Service Method: eService

Rachel Hendershot Parkin (Attorney)
PO Box 4947
Missoula MT 59806
Representing: Crane Co.
Service Method: eService

Mark Andrew Thieszen (Attorney)
Poore Roth & Robinson, P.C.

1341 Harrison Ave
Butte MT 59701
Representing: The William Powell Company, Atlantic Richfield Company, et al
Service Method: eService

Patrick M. Sullivan (Attorney)
1341 Harrison Ave
Butte MT 59701
Representing: The William Powell Company, Atlantic Richfield Company, et al
Service Method: eService

Jennifer Marie Studebaker (Attorney)
210 East Capitol Street
Suite 2200
Jackson MS 39201
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Joshua Alexander Leggett (Attorney)
210 East Capitol Street, Suite 2200
Jackson MS 39201-2375
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Vernon M. McFarland (Attorney)
200 South Lamar Street, Suite 100
Jackson MS 39201-4099
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, International Paper Co.
Service Method: eService

Jean Elizabeth Faure (Attorney)
P.O. Box 2466
1314 Central Avenue
Great Falls MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, Borg Warner Morse Tec LLC, International Paper Co.
Service Method: eService

Jason Trinity Holden (Attorney)
1314 CENTRAL AVE
P.O. BOX 2466
Montana
GREAT FALLS MT 59403
Representing: Goulds Pump LLC, Grinnell Corporation, ITT LLC, et al, Borg Warner Morse Tec LLC, International Paper Co.
Service Method: eService

Chad E. Adams (Attorney)
PO Box 1697

Helena MT 59624
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore, Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American Inc.
Service Method: eService

Katie Rose Ranta (Attorney)
Faure Holden, Attorneys at Law, P.C.
1314 Central Avenue
P.O. Box 2466
GREAT FALLS MT 59403
Representing: Borg Warner Morse Tec LLC
Service Method: eService

John Patrick Davis (Attorney)
1341 Harrison Avenue
Butte MT 59701
Representing: Atlantic Richfield Company, et al
Service Method: eService

Stephen Dolan Bell (Attorney)
Dorsey & Whitney LLP
125 Bank Street
Suite 600
Missoula MT 59802
Representing: Ford Motor Company
Service Method: eService

Dan R. Larsen (Attorney)
Dorsey & Whitney LLP
111 South Main
Suite 2100
Salt Lake City UT 84111
Representing: Ford Motor Company
Service Method: eService

Peter L. Helland (Attorney)
311 Klein Avenue, Suite A
P.O. Box 512
Glasgow MT 59230
Representing: Ford Motor Company
Service Method: eService

Kelly Gallinger (Attorney)
315 North 24th Street
Billings MT 59101
Representing: Maryland Casualty Corporation
Service Method: eService

Charles J. Seifert (Attorney)
P.O. Box 598
Helena MT 59624
Representing: Ford Motor Company, Maryland Casualty Corporation
Service Method: eService

Robert J. Phillips (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: BNSF Railway Company
Service Method: eService

Emma Laughlin Mediak (Attorney)
Garlington, Lohn & Robinson, PLLP
P.O. Box 7909
Missoula MT 59807
Representing: BNSF Railway Company
Service Method: eService

Daniel Jordan Auerbach (Attorney)
201 West Railroad St., Suite 300
Missoula MT 59802
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company
Service Method: eService

Leo Sean Ward (Attorney)
PO Box 1697
Helena MT 59624
Representing: Weir Valves & Controls USA, Cyprus Amex Minerals Company, Fischbach and Moore, Inc. et al, American Honda Motor Co., Inc., Harder Mechanical Contractors, Nissan North American Inc.
Service Method: eService

Robert B. Pfennigs (Attorney)
P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Rick A. Regh (Attorney)
P.O. Box 2269
GREAT FALLS MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Mark Trevor Wilson (Attorney)
300 Central Ave.
7th Floor

P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company, Zurn Industries, Inc., Mazda Motor of America, Inc.
Service Method: eService

Robert M. Murdo (Attorney)
203 N orth Ewing
Helena MT 59601
Representing: Mine Safety Appliance Company LLC
Service Method: eService

Murry Warhank (Attorney)
203 North Ewing Street
Helena MT 59601
Representing: Mine Safety Appliance Company LLC
Service Method: eService

Ben A. Snipes (Attorney)
Kovacich Snipes, PC
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Mark M. Kovacich (Attorney)
Kovacich Snipes, PC
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Ross Thomas Johnson (Attorney)
P.O. Box 2325
Great Falls MT 59403
Representing: Backen et al, Sue Kukus, et al
Service Method: eService

Randy J. Cox (Attorney)
P. O. Box 9199
Missoula MT 59807
Representing: A.W. Chesterson Company
Service Method: eService

Zachary Aaron Franz (Attorney)
201 W. Main St.
Suite 300
Missoula MT 59802
Representing: A.W. Chesterson Company
Service Method: eService

M. Covey Morris (Attorney)
Tabor Center
1200 Seventeenth St., Ste. 1900
Denver CO 80202
Representing: FMC Corporation
Service Method: eService

Robert J. Sullivan (Attorney)
PO Box 9199
Missoula MT 59807
Representing: Ingersoll-Rand, Co.
Service Method: eService

Dale R. Cockrell (Attorney)
145 Commons Loop, Suite 200
P.O. Box 7370
Kalispell MT 59904
Representing: State of Montana
Service Method: eService

Vaughn A. Crawford (Attorney)
SNELL & WILMER, L.L.P.
400 East Van Buren
Suite 1900
Phoenix AZ 85004
Representing: The Proctor & Gamble Company et al
Service Method: eService

Tracy H. Fowler (Attorney)
15 West South Temple
Suite 1200
South Jordan UT 84101
Representing: The Proctor & Gamble Company et al
Service Method: eService

Martin S. King (Attorney)
321 West Broadway, Suite 300
P.O. Box 4747
Missoula MT 59806
Representing: Foster Wheeler Energy Services, Inc.
Service Method: eService

Maxon R. Davis (Attorney)
P.O. Box 2103
Great Falls MT 59403
Representing: Continental Casualty Company
Service Method: eService

Tom L. Lewis (Attorney)
2715 Park Garden Lane
Great Falls MT 59404
Representing: Harold N. Samples
Service Method: eService

Keith Edward Ekstrom (Attorney)
601 Carlson Parkway #995
Minnetonka MN 55305
Representing: Brent Wetsch
Service Method: eService

William Rossbach (Attorney)
401 N. Washington
P. O. Box 8988
Missoula MT 59807
Representing: Michael Letasky
Service Method: eService

Edward J. Longosz (Attorney)
1717 Pennsylvania Avenue NW
Suite 1200
Washington DC 20006
Representing: Maryland Casualty Corporation
Service Method: eService

Chad M. Knight (Attorney)
929 Pearl Street
Ste. 350
Boulder CO 80302
Representing: BNSF Railway Company
Service Method: eService

Anthony Michael Nicastro (Attorney)
401 North 31st Street
Suite 770
Billings MT 59101
Representing: BNSF Railway Company
Service Method: eService

Nadia Hafeez Patrick (Attorney)
929 Pearl Street Suite 350
Boulder CO 80302
Representing: BNSF Railway Company
Service Method: eService

Kevin A. Twidwell (Attorney)
1911 South Higgins Ave
PO Box 9312

Missoula MT 59807
Representing: Libby School District #4
Service Method: eService

Jinnifer Jeresek Mariman (Attorney)
345 First Avenue East
Kalispell MT 59901
Representing: Adams, et al
Service Method: eService

Stephanie A. Hollar (Attorney)
P.O. Box 2269
Great Falls MT 59403
Representing: Stimson Lumber Company
Service Method: eService

Michael Crill (Other)
PO Box 145
Rimrock AZ 86335
Service Method: Conventional

Michael D. Plachy (Attorney)
1200 17th Street
Denver CO 80202
Representing: Honeywell International
Service Method: Conventional

Conor A. Flanigan (Attorney)
1200 17th Street
Denver CO 80202
Representing: Honeywell International
Service Method: Conventional

Fredric A. Bremseth (Attorney)
601 Carlson Parkway, Suite 995
Minnetonka MN 55305-5232
Representing: Brent Wetsch
Service Method: Conventional

Walter G. Watkins (Attorney)
210 E. Capitol Street, Ste. 2200
Jackson MS 39201
Representing: International Paper Co.
Service Method: Conventional

Jason Eric Pepe (Attorney)
519 Southwest Boulevard
Kansas City MO 64108
Representing: BNSF Railway Company

Service Method: Conventional

Peter A. Moir (Attorney)
701 Poydras Street, Suite 2200
New Orleans LA 70139-6001
Representing: International Paper Co.
Service Method: Conventional

Electronically Signed By: Kennedy C. Ramos
Dated: 10-30-2018