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IN THE MONTANA ASBESTOS CLAIMS COURT

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

DEFENDANT MARYLAND CASUALTY COMPANY'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON AFFIRMATIVE DEFENSES

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 affirmative defenses.

INTRODUCTION

As much as Hutt would like to like to limit the claims and evidence in this case to the conduct of MCC[1], MCC's role as the workers' compensation carrier for W.R. Grace ("Grace"), and the actions taken by MCC as Grace's insurance carrier, can only be fully explained through the scope and limitations set forth in the insurance policy and MCC's limited relationship with Grace. Hutt's statement that "MCC's duties operate independently, and MCC's liability may therefore be adjudicated fully without respect to any other person's or entity's actions and liability[]" (Pl.'s Br. at 4) ignores the analysis necessary to determine whether MCC owed Hutt any duty in the first instance, as well as the basis for MCC's properly pled defense of intervening/superseding negligence.

The Montana Plaintiffs have spent years prosecuting claims on behalf of Libby workers against those responsible for the working conditions at the Libby Plant (*e.g.*, Grace and the State of Montana). In fact, the report of Hutt's industrial hygiene expert in this case details in great length the negligence of Grace and the State of Montana in providing a safe working environment to Hutt. Notwithstanding, Hutt contends that MCC's alleged liability must be determined without regard to the conduct of parties which the Montana Plaintiffs have repeatedly argued are responsible for the conditions at the Libby Plant.

[1] Hutt identifies six "issues to be tried in this case primarily…" Pl.'s Br. at 3-4. For the reasons set forth in MCC's Brief in Support of Summary Judgment ("MCC's SJ Br."), as well as in MCC's Opposition to Plaintiff's Motion for Summary Judgment on Liability filed herewith, Hutt misstates the relevant legal standard for his claims against MCC, as well as the facts relevant to the claims and defenses at issue in this case.

In his Motion for Summary Judgment, Hutt contends that he is entitled to summary judgment on MCC's Twelfth (intervening or superseding acts or omissions) and Thirty-Fifth (responsible non-parties) affirmative defenses. Each of Hutt's summary judgment arguments fails as a matter of law. Hutt's Motion should be denied because: (1) MCC complied with the provisions of Mont. Code Ann. § 27-1-703; (2) the conduct of Grace is directly relevant to the determination of whether MCC owed Hutt any duty; (3) the negligence of Grace, as well as the State of Montana, was not foreseeable to MCC; and (4) there are issues of fact concerning Grace's and the State of Montana's conduct which post-date MCC's alleged negligent acts.

LEGAL STANDARD

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." M. R. Civ. P. 56(c). Summary judgment represents an extreme remedy that should be granted only when no material factual controversy exists. *See Northern Cheyenne Tribe v. Roman Catholic Church ex rel.*, 2013 MT 23, ¶ 21, 296 P.3d 450, 454, 2013 WL 433180, ¶ 21. "Judgment as a matter of law is properly granted only when there is a complete absence of any evidence which would justify submitting an issue to a jury and all such evidence and any legitimate inferences that might be drawn from that evidence must be considered in the light most favorable to the party opposing the motion." *Bevacqua v. Union Pacific R. Co.*, 289 Mont. 36, 50, 960 P.2d 273, 281 (1998). Summary judgment is inappropriate where, based on the record, reasonable jurors could reach different conclusions as to a particular material fact. *Meadow Lake Estates Homeowners Ass'n v. Shoemaker*, 2008 MT 41, ¶ 25, 341 Mont. 345, 352, 178 P.3d 81, 86.

ARGUMENT

I. MCC's Thirty-Fifth Affirmative Defense Complies with the Provisions of Mont. Code Ann. § 27-1-703

For its Thirty-Fifth affirmative defense, MCC reserved the right to designate responsible third-parties at fault for Hutt's alleged injuries: "This Defendant reserves the right to designate responsible non-parties at fault." *See* Ex. 69, Answer at 17. Hutt contends that MCC has failed to "join as an additional party to the action" those parties whom it contends caused or contributed to Hutt's injury, as well as those parties with whom Hutt has settled,[2] pursuant to Mont. Code Ann. § 27-1-703(4). Pl.'s Br. at 8-9. Hutt contends that MCC has "surrendered any potential right to shifting liability for its own wrongdoing to other potential joint tortfeasors" due to its failure to join any additional parties as third-party defendants. *Id.* at 9. Hutt's argument is contrary to the express language of § 27-1-703(4) and is without merit.

Mont. Code Ann. § 27-1-703(4) provides:

> (4) On motion of a party against whom a claim is asserted for negligence resulting in death or injury to person or property, any other person whose negligence may have contributed as a proximate cause to the injury complained of may be joined as an additional party to the action. For purposes of determining the percentage of liability attributable to each party whose action contributed to the injury complained of, the trier of fact shall consider the negligence of the claimant, injured person, defendants, and third-party defendants. The liability of persons released from liability by the claimant and persons with whom the claimant has settled must also be considered by the trier of fact, as provided in subsection (6). The trier of fact shall apportion the percentage of negligence of all persons listed in this subsection. Nothing contained in this section makes any party indispensable pursuant to Rule 19, Montana Rules of Civil Procedure.

Section 27-1-703(4) does not "shift liability" for one party's wrongdoing to other joint tortfeasors as Hutt suggests. Rather, § 27-1-703(4) provides the mechanism for apportionment of fault

[2] To date, Hutt has made a claim to the W.R. Grace P.I. Trust, but has not received payment from the Trust nor has he settled with any other party. *See* Ex. 55 to MCC's SJ Br.; *see also* Pl.'s Br. at 3, 9 fn. 2.

amongst joint tortfeasors such that each responsible party is adjudged liable only for its respective percentage of fault. By arguing that § 27-1-703(4) serves as a mechanism for "shifting" liability, Hutt makes clear his improper motives—to hold MCC 100% liable without regard to any determination of MCC's percentage of liability as a party whose alleged conduct purportedly contributed to Hutt's injuries. Clearly, Hutt would not have sustained injury but for the negligence of Grace and others, including the State of Montana. MCC is entitled to be adjudged responsible for no more than its percentage of fault relative to the percentage of fault ascribed to those parties responsible for Hutt's injuries.

More importantly, MCC cannot join Grace as an additional party to this action. Following the Grace bankruptcy, the First Amended Joint Plan of Reorganization for Grace ("Plan") was entered. The Plan, *inter alia*, created the W.R. Grace P.I. Trust ("Grace Trust") to assume all liabilities and responsibility for processing potential asbestos claims involving Grace; and entered a Permanent Channeling Injunction steering all asbestos claims to the Grace Trust and prohibiting claims against Grace. *See In re W.R. Grace & Co.*, No. 01-01139 (KG), 2016 WL 6068092, at *2 (Bankr. D. Del. Oct. 17, 2016), *aff'd in part, vacated in part, remanded*, 900 F.3d 126 (3d. Cir. 2018). Accordingly, MCC is enjoined from filing any third-party claim against Grace.[3]

Hutt argues that due process concerns foreclose MCC from presenting an "empty chair defense" in this case. However, there is no threat to Grace's due process rights because any liability ascribed to it has been discharged through the bankruptcy proceedings and any related

[3] To the extent Hutt argues that Grace is immune from suit pursuant to Mont. Code Ann. § 27-1-703(6)(c)(i), the Grace Trust established a process for Hutt to pursue a claim for Grace's negligence. Although not subject to any third-party claim in the present actions, Grace is not "immune from liability to the claimant" under § 27-1-703.

claims are channeled to the Grace Trust.[4] Similarly, the decision in *Orr v. State*, 2004 MT 354, 324 Mont. 391, 106 P.3d 100 put the State of Montana on notice that its negligence would be at issue in any case involving a former worker at the Libby Plant who develops asbestos related disease ("ARD"). Accordingly, Hutt has failed to establish any valid due process concerns with MCC introducing evidence of Grace's or the State of Montana's negligence in this case.

II. Hutt's Motion on MCC's Properly Pled Defense of Intervening/Superseding Negligence Should be Denied.

In the Answer to Hutt's Complaint, MCC pled intervening/superseding negligence for its Twelfth affirmative defense: "Whatever damages were incurred by Plaintiff were the result of intervening and/or superseding acts or omissions of parties over whom this defendant had no control." *See* Ex. 69, Answer at 13. The defense was properly pled by MCC and determinations of foreseeability and proximate cause should be left to the jury.

As an initial matter, Hutt incorrectly argues that "a defendant can introduce non-party conduct only to establish a well-plead superseding intervening cause defense." Pl.'s Br. at 11. This is simply wrong. Plaintiff relies upon the decision in *Faulconbridge v. State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777 for his far reaching statement. However, the issue in *Faulconbridge* was limited to whether the defendant could introduce non-party conduct to establish causation "in an attempt to merely diminish its own responsibility, for this would constitute an attempt to apportion fault to a non-party, in violation of *Plumb*[5]." *Id*., 2006 MT 198, ¶ 81, 333 Mont. at 207, 142 P.3d at 793.

[4] By contrast, it is MCC's right to due process which would be significantly impinged if the jury was not permitted to consider the conduct of Grace, which cannot be joined in this suit, when determining the relative percentage of fault of MCC pursuant to § 27-1-703(4).

[5] *Plumb v. Fourth Judicial Dist. Court*, 279 Mont. 363, 927 P.2d 1011 (1996). The facts in *Plumb*, which Hutt relies upon, are clearly distinguishable from the facts in the instant case. In *Plumb*,

Here, as shown in MCC's Opposition to Plaintiff's Motion for Summary Judgment on Liability (filed herewith), as well as in MCC's Motion for Summary Judgment, the conduct of Grace and the State is directly relevant to whether MCC owed Hutt any duty and the requisite analysis under the Restatement (Second) of Torts § 324A. Specifically, Grace's conduct bears directly on a determination of whether Grace relied upon any undertaking by MCC (which is expressly denied). *See* MCC's SJ Br. at 39-41. Similarly, the State conducted regular inspections of the dust conditions at the Libby Plant. Johns-Mannville, the U.S. Public Health Service, and the Bureau of Mines also conducted inspections and surveys of mine conditions, and thus, held superior knowledge. Exs. 26, 45 to MCC's SJ Br. And while MCC had no enforcement or regulatory authority over Grace and its operations, the State had a statutory duty to protect the safety of Grace miners in addition to enforcement authority. *Orr*, 2004 MT 354, ¶ 46, 324 Mont. at 407, 106 P.3d at 111. The conduct of these other parties bears directly on Grace's purported reliance on MCC's recommendations, and whether MCC owed Hutt any duty. As much as Hutt would like to ignore it, the conduct of Grace and the State of Montana is directly relevant to the claims and defenses in this case.

Nonetheless, the negligence of Grace, as well as the State of Montana, was not foreseeable to MCC during the relevant time period. Under Montana law, "[t]ypically, determinations of foreseeability in the context of intervening cause involve questions of fact properly reserved for the jury." *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶ 48, 350 Mont. 538, 553-554, 208 P.3d 836, 849, 2009 Mont. LEXIS 202, *31 (citing to *Fisher v. Swift Transp. Co., Inc.*, 2008 MT 105, ¶ 42, 342 Mont. 335, 181 P.3d 601; *Prindel v. Ravalli County*, 2006 MT 62, ¶ 45,

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there was no impediment to bringing the third-party defendant into the action. Here, MCC cannot bring a third-party claim against Grace as a result of the Asbestos PI Channeling Injunction.

331 Mont. 338, 133 P.3d 165). Summary judgment is appropriate in only limited circumstances: "a district court may properly award summary judgment and determine foreseeability as a matter of law on issues of intervening cause when reasonable minds may reach but one conclusion." *Id*.; *see also Lopez v. Great Falls Pre-Release Servs.*, 1999 MT 199, ¶ 35, 295 Mont. 416, 422, 986 P.2d 1081, 1088, 1999 Mont. LEXIS 207, *22, 56 Mont. St. Rep. 771 ("it is only when reasonable minds could reach but one conclusion that the question of foreseeability may be determined as a matter of law for purposes of summary judgment.").

Grace, as Hutt's employer, owed Hutt a duty to ensure a safe workplace. *See* Mont. Code Ann. § 50-71-201. Grace's duty was non-delegable. *See Olson v. Shumaker Trucking and Excavating Contractors, Inc.*, 2008 MT 378, ¶ 58, 347 Mont. 1, 15, 196 P.3d 1265, 1275 (listing cases affirming that Mont. Code. Ann. § 50-71-201 confers a non-delegable duty to provide a safe workplace on the employer). Grace's failure to comply with its non-delegable, statutory duty was unforeseeable to MCC. Grace's refusal to implement recommendations by MCC constitutes intervening/superseding negligence which persisted until the end of MCC's policy period. Grace's conduct postdated MCC's alleged drafting of a safety plan.

Grace frequently and repeatedly rejected MCC's safety recommendations regarding reduction of dust and asbestos fibers. For instance, MCC representatives recommended that Grace maintain dust levels at the limit recommended by the ACGIH at the time for dust containing asbestos, 5 million particles per cubic foot ("mppcf"); however, Grace rejected this recommendation. Ex. 17 to MCC's SJ Br. (10/18/1965 report of MCC representative W.E. Walker, stating "The management at the Libby operation seem to feel that the total dust count is down to a level that is as good as present equipment can maintain."); Ex. 18, to MCC's SJ Br. (12/10/1965 letter from F.W. Rupp, Grace Treasurer ("Rupp"), to Lawrence Park, MCC

Engineering Analyst, about introduction of 5 mppcf limit); Ex. 19 to MCC's SJ Br. (12/28/1965 letter from Park to Rupp explaining ACGIH standards and 5 mppcf limit). In internal Grace correspondence regarding Park's recommendation of a 5 mppcf limit on January 25, 1966, R.A. Bleich, Zonolite Company Division Manager, wrote to Rupp that:

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

Ex. 20 to MCC's SJ Br. (emphasis added). Grace remained steadfast in its refusal to accept MCC's recommendations concerning acceptable dust levels. In July 1966, Walker wrote, after visiting the Libby Plant:

> Mr. Kujawa, Mill Superintendent, flatly makes the statement that because they weren't supplied this form ***they were <u>not</u> going to meet <u>any</u> of these recommendations. By his statement they are not going to overhaul the dust collection system even though the money has been appropriated,*** unless specifically ordered to do so from their home office. Mr. Kujawa made the statement that ***our recommendations regarding total allowable dust concentrations based on the American Conference of Industrial Hygienists established threshold limits was now out-the-window.*** He states (and I quote) "A new threshold limit value has been established by the aforementioned group to cover tremolite ore."

Ex. 21 to MCC's SJ Br. (emphasis added).

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

> I believe that the design of the exhaust system is faulty and that the velocity is too great for the cyclones thereby allowing the overflow of dust. They have had engineering on this exhaust, with thought of putting up a stack, moving fan and running of the duct. Stack would cost $6,750. to $7,000., fan $9,150., and running duct $6,270. ***Home office seems to feel that the expenditure would not be in reason with the results, as they have been convinced by locals that dust from exhaust is not detrimental.***

Ex. 22 to MCC's SJ Br. (emphasis added). Grace also rejected MCC's recommendations regarding increased monitoring and reporting workers' health. Ex. 23 to MCC's SJ Br. (12/9/1969 letter

from Peter Kostic, Grace Safety Administrator, to Park, "I question the idea of a repeat X-ray examination in six months of the sixty employees listed in your letter… The best approach to the overall problem, I think, is one of dust control.""); Ex. 24 to MCC's SJ Br. (12/23/1969 letter from Earl Lovick, Libby Plant Manager, to H.A. Brown, Vice President of Manufacturing and Engineering in Grace's Construction Products Division, regarding frequency of x-rays, "My opinion would be that there should be no change in the annual schedule.").

There is also uncontroverted evidence that Grace's failure to inform employees, and Hutt in particular, of x-ray results was unforeseeable. Specifically, on October 27, 1969, after Hutt terminated his employment at Grace, Park wrote to Lovick, "I would assume that all these men have been advised of their physical examination findings…" Ex. 56 to MCC's SJ Br. Park also makes the recommendation that the individuals identified receive a "follow up x-ray no longer than six months from the past ex-ray [sic] examination." *Id.* Record evidence demonstrates that Grace rejected both of these recommendations. 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."); Ex. 53 to MCC's SJ Br., Hutt Dep. 66:16-67:11 (stating he was not informed of his x-ray results). Simply stated, Grace's conduct cannot be considered foreseeable as a matter of law.

Similarly, the State of Montana's negligence in failing to shut down the Libby Plant could not have been foreseeable to MCC.[6] The State of Montana had a statutory duty to "gather public

[6] Hutt focuses on the confidentiality of the State reports in concluding that the State's conduct was foreseeable. Pl.'s Br. at 15. However, the contents of the reports and whether or not they were confidential are irrelevant. The sole issue is whether or not the State's failure to exercise its statutory duties was, as a matter of law, foreseeable to MCC at the time. At the very least, there are questions of fact concerning whether the conduct of the State of Montana was foreseeable.

health-related information and provide it to the people," and to "do something to correct or prevent workplace conditions known to be hazardous to health." *Orr*, 2004 MT 354, at ¶¶ 23, 38, 324 Mont. at 401, 106 P.3d at 110. There are no facts that support any allegation that MCC assumed any such duty. Similar to Grace, the State's failure to perform its statutory duties occurred after MCC's alleged negligence. Therefore, the State of Montana's conduct was unforeseeable to MCC.

Finally, any argument by Hutt that he lacks sufficient information to determine the basis of MCC's affirmative defense of intervening/superseding negligence is disingenuous at best. Hutt cannot complain that he was not on notice of MCC's intent to argue that his injuries were caused by the negligence of Grace. Here, MCC's discovery responses cite repeatedly to Grace documents demonstrating Grace's negligence. MCC also designated the opinions of Hutt's own industrial hygiene expert against Grace and the State of Montana:

> To the extent required or necessary, MCC reserves the right to call Dr. Spear as a witness for the purpose of providing his previously stated opinions regarding the obligations and failures of W.R. Grace and the State of Montana with respect to the W.R. Grace facility.

Ex. 70, MCC's Expert Witness Disclosure. MCC's designation summarized the opinions offered by Dr. Spear against W.R. Grace and the State of Montana upon which MCC would rely in this case. *Id*. at 6-7. MCC detailed the basis of its affirmative defense through its expert witness disclosure. *See Norris v. Fritz*, 2012 MT 27, ¶ 33, 364 Mont. 63, 71 270 P.3d 79, 86 ("The inquiry should focus on whether the objecting party had adequate notice of the non-retained expert's proposed testimony. The discussion in *Faulconbridge* parallels the principle established through M. R. Civ. P. 26(b)(4)—that opposing counsel have adequate notice of the identity of an expert and the expert's opinions to prevent unfair surprise"). Discovery is ongoing and Hutt can claim no prejudice concerning MCC's failure to disclose the bases for its intervening/superseding negligence defense.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion for Summary Judgment.

Dated: October 30, 2018

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