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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 PLAINTIFF'S BRIEF IN RESPONSE TO MARYLAND CASUALTY'S MOTION FOR SUMMARY JUDGMENT Applicable to *Hutt v. Maryland Casualty Co. et al.*, DDV-18-0175

Comes now the Plaintiff and files this Brief in Response to Defendant Maryland Casualty Company's Motion for Summary Judgment.

APPLICABLE STANDARD

Summary judgment may be granted only when there are no issues of material fact, such that the moving party is entitled to judgment as a matter of law. *See Thornton v. Flathead County*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395; Rule 56(c), M.R. Civ. P. The burden to prove that there is no disputed issue of material fact is on the moving party. *Id.* The evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in favor of the party opposing summary judgment. *Id.* A disputed fact is material if it involves an element of the cause of action or defense. *See Mountain West Bank*

v. Mine & Mill Hydraulics, Inc., 2003 MT 35, ¶ 19, 314 Mont. 248, 64 P.3d 1048. "Summary judgment is an extreme remedy that should never be a substitute for a trial on the merits if a controversy exists over a material fact." *Hughes v. Lynch*, 2007 MT 177, ¶ 7, 338 Mont. 214, 164 P.3d 913.

UNCONTROVERTED MATERIAL FACTS

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

1. Ralph Hutt was diagnosed with asbestos disease on October 8, 2002.

2. While Mr. Hutt had experienced difficulty breathing when working in the woods at high elevation (Ralph Hutt Deposition, 9/19/18 ("Hutt Deposition"), 24:21—25:15; 105:1-14) before his 2002 diagnosis, he never was told or had reason to believe that:

   a. he had lung disease,

   b. the disease was interstitial and pleural fibrosis and scarring,

   c. the fibrosis and scarring was caused by exposure to asbestos, or

   d. he had been exposed to high levels of asbestos while working at Grace.

3. Ralph Hutt was enjoined not to sue Maryland Casualty Company under the terms of an injunction in the Grace Bankruptcy.

4. The injunction remained "in full force and effect" through the effective date of the Grace Bankruptcy Plan[1] and "was lifted on February 3, 2014." *Watson v BNSF Ry. Co.*, 2017 MT 279, ¶21, 389 Mont. 292, 298, 405 P.3d 634, 638.

5. Ralph Hutt's action against MCC was commenced on September 23, 2016, in the case of *Nancy Adams, et al vs Maryland Casualty Company* (and, pursuant to order of this Court, was set forth in a stand-alone case by a separate Complaint filed on March 23, 2018).

[1] S*ee* Exhibit C to *Affidavit of John Lacey*, 10/30/18 ("Lacey Affidavit"), First Amended Joint Plan of Reorganization for W.R. Grace in the United States Bankruptcy Court for the District of Delaware, Case No. 01-1139, *Section 8.7.1*.

6. On repeated occasions MCC affirmed that it had undertaken (a) "formulating a program for control and prevention" of the dust problem at the Libby mill including providing the "best engineering services available," including undertaking "to determine means of controlling the problem so that further disease does not develop (MCE020) (MCE 039); (b) "preparing" a "Safety Program" covering "every phase of employment" which would "provide maximum personal protection to the employees" (MCE 037, MCE048, MCE 036); (c) making the essential recommendation for what levels of asbestos dust would be safe (MCE073); (d) making scores of specific recommendations for how Grace's dust ventilation system could attain MCC's prescribed "safe" dust level, with express understanding that Grace "expects us to give them the benefit of our recommendations," and that MCC's "engineering service is producing results" (MCE040); (e) review, through its Medical Division, the records and studies of worker disease which Grace forwarded to MCC "for recommendations and assistance" (MCE014 and MCE011—MCE016).

7. By reason of not knowing that he had sustained lung injury while working for W.R. Grace, Ralph Hutt's opportunity to file a claim for disability expired as it was "forever barred" effective one year from his last day of employment on October 7, 1969. (See copy of Sections 92-1312 and 92-1313 R.C.M. (1965), attached to the SUF in support of Plaintiff's Motion for Summary Judgment on Liability.)

8. MCC had actual knowledge that workers, including Ralph Hutt, were sustaining asbestos-related lung impairment as a result of their exposures to excessive levels of asbestos at the mill.

9. MCC concealed and failed to reveal (a) the past and ongoing injuries to workers including Ralph Hutt, and (b) the basis for those workers to present an occupational disease claim. Moreover, MCC did so with the deliberated knowledge that (1) the State reports (which showed excessive asbestos exposures) were confidential and not disclosed to workers, (2) the

studies (which showed a high incidence of disease among workers) were not known by anyone other than MCC, Grace officials, and Dr. Little, (3) to "reveal" the information on disease studies and asbestos exposures was to risk MCC facing a "good many claims" of occupational disease, and (4) such claims would be time barred if not presented within a year of last employment.

10. Plaintiff Ralph Hutt incorporates by this reference all of the facts and supporting exhibits in his Statement of Uncontroverted Facts filed with Plaintiff's Motion for Summary Judgment on Liability, as well as the documents filed with the Affidavits of Allan McGarvey (10/19/18) and John Lacey (10/30/18).

ARGUMENT

I. Montana law permits actions for bad faith, and does not insulate an insurer from claims of negligent performance of professional/specialized undertakings or for failure to warn.

MCC's first argument is that an employee's "exclusive remedy" is a claim for benefits under Montana's Workers' Compensation and Occupational Disease laws. The "exclusive remedy" provision is found in 92-1308 R.C.M. (1965). Quite simply, that statute, on its face and pursuant to constitutional requirements, is applicable only to claims "against the employer." It has no application and has never been applied to insurers with respect to the insurer's own liability for bad faith, negligence or failure to warn. Moreover, when a claim for benefits is extinguished by operation of the limitation period in the occupational disease law, the exclusive remedy provision cannot even be used to deprive a worker of a claim against his employer. *Gidley v. W.R. Grace & Co.*, 221 Mont. 36, 40, 717 P.2d 21, 24 (1986) ("We hold his common law right of action was preserved.")

Plaintiff's action pleads negligent provision of engineering and industrial hygiene services and negligent failure to warn. These claims raise MCC's liability for its own wrongdoing. They apply, just as they would to anyone else, to a workers' compensation insurer

who, in addition to its duties of candor in its capacity as insurer, has undertaken professional services, the design of a worker safety program, and is in a position of relationship and superior knowledge of a hidden hazard. The legal bases for these claims are described with ample authority in Plaintiff's Brief in support of his Motion for Summary Judgment. The authorities and argument which form the bases for Plaintiff's negligence and negligent failure to warn claims have nothing to do with an employee's "exclusive remedy" against an employer.

II. Ralph Hutt's statute of limitations has not run because it was first triggered by his diagnosis in 2002 and was tolled until the expiration of the Grace Bankruptcy Injunction on February 3, 2014.

a. A statute of limitations for latent asbestos disease does not run even on "suspected" disease until there is sufficient grounds for the plaintiff to know he has an injury that was caused by the defendant's wrongful conduct.

MCC hangs its first statute of limitations defense on the testimony of Ralph Hutt that he experienced shortness of breath in the 1990s when he worked at elevation, notwithstanding that his first knowledge that he was a victim of asbestos disease was in 2002.

MCC's contention is easily dispatched by comparing the holdings in *Hando v. PPG Indus., Inc.*, 236 Mont. 493, 771 P.2d 956 (1989), and *Kaeding v. W.R. Grace & Co.-Conn.*, 1998 MT 160, 289 Mont. 343, 961 P.2d 1256.

In *Hando*, the plaintiff experienced illness following exposure to defendant's paint. Even though she suspected that the paint was the cause of the illness, she could not get confirmation that she was injured by that product:

> [A]lthough Hando was very much aware of those continuing physical, emotional and mental ailments she suffered after her exposure to the paint, she did not know the cause of those injuries until May of 1984. Prior to that time, she . . . suspected that her ongoing ailments stemmed from her exposure to the paint manufactured by PPG. She even filed a workers' compensation claim in May of 1982 based upon this belief.

Hando, 771 P.2d at 962. The *Hando* court held that "the three-year statute of limitations did not begin to run until a medical opinion was rendered in April-May of 1984 linking her injuries to

her exposure to the PPG paint." *Id.*

In contrast, the plaintiff in *Kaeding* not only knew of his symptoms but failed to file a cause of action within three years after (a) he had a doctor's opinion that his medical condition was consistent with asbestosis and (b) he had constructive knowledge (through his attorney) of excessive exposures to asbestos at the Grace mill in Libby:

> [W]ith the numerous references to asbestosis in his medical records, Kaeding's knowledge of his risk for asbestos-related diseases from exposure at W.R. Grace, and the conclusions Dr. Whitehouse rendered in 1992, Kaeding should have discovered that he suffered from asbestosis by September or October of 1992, at the latest. By that date, Baiz had learned that Dr. Whitehouse found Kaeding's x-rays consistent with asbestosis and had used this information as leverage in a settlement offer to W.R. Grace. Kaeding's waiting several years to follow up with Dr. Whitehouse or to inquire further about his possible claim does not demonstrate due diligence.

Kaeding, at ¶ 27 (emphasis added).

In the instant case, the most that can be said from the record is that Ralph Hutt knew he had "shortness of breath" when working at elevation which, under examination by MCC counsel, he attributed to getting "old."

> 1 Q. Good. And then we just -- the only other
> 2 thing was the shortness of breath you had when you
> 3 were working on the Canadian border there.
> 4 A. Right.
> 5 Q. But you didn't follow up and get any medical
> 6 care or treatment for that?
> 7 A. No. I just figured it was just the
> 8 elevation and just -- you know, I was -- I don't know
> 9 how old I was then. Early 50s, I guess. I just
> 10 figured I was getting up there. I just added it to
> 11 that. When I got down to the low country, I was
> 12 breathing fine, so I didn't see any reason to go to
> 13 the doctor for it, and I just figured, Well, your time
> 14 is coming to an end of doing this kind of work.

Hutt Deposition at 105:1-14; *see also Id.*, 24:23—25:19.

The undisputed first evidence of any medical diagnosis regarding Mr. Hutt's lung injury occurred in 2002. Prior to that date, there is no evidence of any medical diagnosis or any medical record of a lung condition caused by asbestos exposure.

MCC identifies notes from medical visits in 2017 and 2018 that MCC purports as "admissions" by Mr. Hutt of his having been diagnosed with asbestos related disease in the late 1960's, or the mid-1990's at the latest.[2] Contrary to MCC's characterization, the *most* that can be said of these records is that they raise an inference regarding what statements Mr. Hutt made to his doctors in 2017 and 2018.[3] They are not evidence of any actual diagnosis or medical determination that Mr. Hutt might have an asbestos related lung condition. MCC fails to and cannot identify any medical evidence reflecting the interpretation of these very recent, second hand patient history entries that supports the fact that Mr. Hutt actually had a medical finding of any asbestos related disease process.

Just as importantly, Mr. Hutt has directly testified in this case that he was not aware that asbestos was present in the dust,[4] nor was he informed of the results from medical testing done during MCC's oversight of the employee safety program while he was employed at Grace. *See* Hutt deposition, 67:12-15 ("Did anybody ever tell you—did your employer, Grace, ever tell you

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[2] *See* Hutt Affidavit, ¶ 2.

[3] The April 26, 2017, note from Dr. Balhan is manifestly dubious. It states in relevant part:

> Patient is a lifelong nonsmoker however would and Libby Montana and of asbestos mine in 1967 for about 10 months. Patient was evaluated at that time and was told that he has asbestosis.

See Exh. 57 to MCC's Brief, 4/26/17 record. In short, transcription errors and/or communication failures related to at least the record, if not the underlying visit and conversation between patient and provider, must be acknowledged. Doubt over MCC's representation of its effect is therefore necessary, especially in the summary judgment context, where all factual inferences on this issue must be drawn in Plaintiff's favor. *See Thornton*, 2009 MT 367, at ¶ 13.

[4] *See* MCC's Brief, p.29 (citing Exh. 57, 4/26/17 record, and Exh. 58, 6/19/18 record).

what the result of the x-ray was? No.); Affidavit of Ralph Hutt, filed in support of Plaintiff's Motion for Summary Judgment, 10/19/18 ("Hutt Affidavit"), ¶ 10. He has further testified that he "never went to the doctors, I don't think, in the middle '90s," but that he instead saw doctors in Oregon "[f]or my lung problems in 2002, not in the middle '90s." *See* Hutt Deposition, 106:19-23. He testified he had "no idea" how Exh. 58 came to contain the impression that he was diagnosed in the 90's. *Id.*, 107:6-9.

Because MCC has no medical evidence of a a medical condition attributed to asbestos exposure having been made prior to 2002, its argument must rely wholly on second hand facts (a) which Plaintiff directly testified are not accurate histories, and (b) for which there are absolutely no medical findings or records of findings. Montana law precludes summary judgment in instances like this. *See Draggin' Y Cattle Co., Inc. v. Addink*, 2013 MT 319, ¶ 29, 372 Mont. 334, 312 P.3d 451 ("when material issues of fact exist about when a party discovered or reasonably should have discovered all the facts necessary to make out a claim, that issue is a question of fact for the jury"); *Nelson v. Nelson*, 2002 MT 151, ¶ 24, 310 Mont. 329, 50 P.3d 139 ("The rule in Montana, and in the majority of jurisdictions, is that when there is conflicting evidence as to when a cause of action accrued, the question of whether an action is barred by the statute of limitations is for the jury to decide.").

Moreover, even if Mr Hutt had been diagnosed in the late 1990s, at most he would have discovered the basis for a claim against W.R. Grace – **not** MCC. Mr. Hutt had no reason to know (a) that MCC had undertaken dust control worker safety and safety program for the Grace operations, (b) the facts of MCC's failures with respect to those undertakings, (c) MCC's actual knowledge that the workers were exposed to excessive levels of asbestos and were getting lung disease as a result, or (d) that the asbestos hazard and the high incidence of disease to workers was not revealed to workers by MCC because of its concern that revelation would create a "good

many claims" for asbestos-related occupational disease claims (See SUF at ¶24, pp.10-12). Further precluding MCC's request for summary judgment on these facts is that MCC is guilty of concealment from Plaintiff.

Section 27-2-102(3), MCA, contemplates that a period of limitations will be tolled when "(a) the facts constituting the claim are by their nature concealed or self-concealing; or (b) . . . the defendant has taken action which prevents [Plaintiff] from discovering the injury or its cause."

The facts constituting the basis for a claim include (a) knowledge that MCC played a role in Mr. Hutt's asbestos exposure, and (b) that it had withheld actual knowledge of all the elements necessary for him to bring a claim **precisely because** MCC was trying to avoid the claims it anticipated. These facts are inherently self-concealing. Similarly Mr. Hutt had no reason to suspect that a workers compensation insurer had undertaken dust control engineering services, safety program design and industrial hygiene responsibilities for the Libby workers. Any evidence of these professional roles would have been unknown, unrevealed and unexpected from the standpoint of the worker. The Montana Supreme Court has made clear that where facts are self-concealing a claim cannot arise until those facts were discovered or could have been discovered through reasonable diligence:

> The negligent act alleged by Blackburn is the withholding of accurate medical information by the Blue Mountain Clinic counselor. It is this alleged withholding of information which forms the basis for Blackburn's negligence claim. Nondisclosure of information is, by its nature, self-concealing. …
>
> Based on the foregoing, we conclude the facts constituting select portions of Blackburn's claims for negligence against the counselor, and therefore against Blue Mountain Clinic itself, were self-concealing as contemplated by the tolling provision of § 27–2–102(3), MCA. We hold that the facts constituting Blackburn's claims of negligence were self-concealing to the extent that Blackburn alleges clinic counselor Jane Doe failed to disclose the risks of abortion and failed to reveal the truth about the transmission of HIV.

Blackburn v. Blue Mountain Women's Clinic, 286 Mont. 60, 79-80, 951 P.2d 1, 12-13

(1997)(emphasis added).

Compounding the self-concealing nature of the injury is the fact that MCC in this case is alleged to have deliberately withheld warnings and other information from Plaintiff that would have allowed him to discover or be attentive to the elements of his potential claim. In fact, because MCC deliberately hid from Plaintiff its role and responsibility, Plaintiff would not even have any knowledge that MCC existed, let alone that it was a potential defendant.

Montana law recognizes that a defendant who withholds information that is the basis of a plaintiff's negligence claim—in this case both the fact of his exposure and that a duty to inform of potential claims from such exposure exists--cannot prevent a Plaintiff from relying upon the very purpose of the discovery rule in § 27-2-102(3), MCA. *See, e.g., Blackburn v. Blue Mountain Women's Clinic*, 286 Mont. 60, 79-80, 951 P.2d 1, 12-13 (1997). More than just whether an injury or its cause can be identified, Montana law further recognizes that a statute of limitations may be tolled so that a plaintiff may reasonably discover that a defendant's conduct was tortious. *See, e.g., Johnston v. Centennial Log Homes & Furnishings, Inc.*, 2013 MT 179, ¶ 34, 370 Mont. 529, 305 P.3d 781; *Dodd v. Champion Int'l Corp.*, 239 Mont. 236, 779 P.2d 901 (1989). Here, even if Mr. Hutt had been told by Grace at the time of his employment or by a doctor in the 90's that he had an asbestos injury, the **remaining elements of a claim** against MCC were not known or discoverable. The self-concealing nature of MCC's wrongdoing (failure to warn) as well as MCC's active concealment of the basis for a claim defeats MCC's statute of limitations defense.

MCC's motion for summary judgment based on the statute of limitations having run must be denied.

b. Under § 27-2-406, MCA, the period of limitations was tolled from April 2001 until February 3, 2014.

MCC's second statute of limitations argument has already been addressed by the Montana Supreme Court in *Watson v. BNSF Ry. Co.*, 2017 MT 279, ¶ 5, 389 Mont. 292, 405 P.3d 634. At ¶¶ 5-7 of that decision, the case recites the history of the injunction first entered in April of 2001, which continued until February 3, 2014. It is important to recognize that MCC vigorously litigated to enforce this injunction against Libby plaintiffs and their counsel.[5]

In the Watson case, BNSF offered the same arguments advanced by MCC in the instant motion. The *Watson* court rejected the arguments based upon the unequivocal holding that the injunction barred the filing of an action against any affiliated entity until February 3, 2014:

> The District Court's Order failed to acknowledge the Bankruptcy Court's January 22, 2002, Order that modified the May 3, 2001, Injunction for the express purpose of "reinstat[ing] the bar against the commencement of new actions against Affiliated Entities. . . .
>
> Approximately ten months passed between February 3, 2014, when the Bankruptcy Court's Injunction was lifted, until November 28, 2014, when Watson amended his Complaint.

Watson, at ¶¶ 20 -21.

MCC disingenuously tries to direct this Court's attention to one of the rulings applying the **same** injunction, by suggesting that the June 20, 2002, order of the Bankruptcy Court limited Hutt to filing within 60 days of the effective date of the Bankruptcy Plan.

First, the Bankruptcy Court did not attempt to, and had no authority to, alter the law of Montana by foreshortening the tolling period prescribed by § 27-2-406, MCA. *See Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938) (a federal court must apply state substantive law in diversity jurisdiction cases).

[5] On May 24, 2004, MCC obtained an order of the Bankruptcy Court imposing a sanction of over $50,000 for violation of the injunction notwithstanding that plaintiff's counsel had obtained a ruling of the District Court reversing the Bankruptcy's application of the injunction to a Libby Plaintiff's claim. *See* Exhibit D to Lacey Affidavit; *cf.* MCC's Brief, p.26, fn.15 (asking this Court to take judicial notice of orders from the Bankruptcy Court).

Further, the obvious purpose of the "sixty day" language (which is found only in the second and third routes to filing a new action listed in the Court's handwriting) is to provide that, for a person whose period of limitation would have already run (or was about to run) but for the enjoined filing of an action, there would be a grace period of sixty days built into the Bankruptcy Court's injunction's period of tolling. This grace period assured that such a person would not miss the statute of limitation by reason of having to act on the exact day the Bankruptcy Plan became effective.

In contrast, the June 20, 2002, Order recognizes and preserves Montana's substantive law of limitation of actions by making it the first of the three options for commencement of a later action: it expressly permits filing within the state law action's "own expiration period." That time period, under unequivocal Montana law, cannot include the time when the injunction was in effect. *See* § 27-2-406, MCA ("the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action"). The June 20, 2002, Order has no other reasonable construction, and, under *Erie,* can have no other effect.

III. Because Plaintiff would foreseeably be injured by negligent performance of its undertakings and services and/or by negligent failure to warn, MCC owed to Ralph Hutt duties of reasonable care in its provision of industrial hygiene services, engineering services, and in its safety program design, and it owed a duty to warn of the hidden asbestos hazard.

In Plaintiff's Brief in support of Plaintiff's Motion for Summary Judgment, Plaintiff discusses in depth the sources of the duties of care and duties to warn that arise from MCC's undertakings and position with relation to the workers it undertook to protect and insure. MCC tries to narrow the scope of these duties with an artificial construction of the *Restatement (Second) of Torts* § 324A, which construction ignores the purpose and rationale of the legal concept. MCC's argument fails because the legal bases for the claims asserted by Plaintiff do not depend on this Restatement section, and the preconditions that MCC reads into the language

of § 324A are not recognized by the Montana Supreme Court.

a. Under Montana law, a duty to third persons arises where it is foreseeable that negligent performance or undertaken services will injure another.

MCC urges that, while it has never adopted Section 324A of the *Restatement of Torts*, Montana law nevertheless recognizes a prerequisite requirement that services be "necessary" for the protection of third persons, and that such necessity element is not satisfied if MCC's undertaking was for its own benefit. Montana law imposes no such "necessity" element as portrayed by MCC.

In Plaintiff's Brief in support of his Motion for Summary Judgment, pp.4-5, Plaintiff discusses the line of authority imposing the third party duty in the cases *Thayer v. Hicks*, 243 Mont. 138, 793 P.2d 784 (1990) (accounting firm liable to nonclient); *Jim's Excavating Serv. v. HKM Assoc.*, 265 Mont. 494, 878 P.2d 248 (1994) (engineer liable to nonclient); *Turner v. Kerin & Assoc.*, 283 Mont. 117, 938 P.2d 1368 (1997) (engineer liable to nonclient); *Watkins Trust v. Lacosta*, 2004 MT 144, 321 Mont. 432, 92 P.3d 620. Plaintiff's Brief also demonstrates that the Montana Supreme Court has announced that this line of authority constitutes a "progression in our case law," the extension of which to corresponding fact patterns and professional undertakings is expected. *Redies v. Attorneys Liab. Prot. Soc.*, 2007 MT 9, ¶ 43, 335 Mont. 233, 150 P.3d 930.

These authorities do not derive from *Restatement* § 324A; rather, they are an extension of the long established rule in Montana that one who affirmatively undertakes to perform services, the negligent performance of which would foreseeably injure another, owes a duty of care. For example, in *Kent v. City of Columbia Falls*, 2015 MT 139, 379 Mont. 190, 350 P.3d 9, a city had undertaken a supervisory role over the engineers' and contractors' work on the trail system of a subdivision, including numerous on-site visits and inspections. The Montana Supreme Court found the City owed a duty to a member of the public who was injured by the

faulty design and construction based on a long-recognized law of duty arising from rendering of a service:

> The City argues it had no duty to Sara. However, it has long been the rule in Montana that should one gratuitously assume to render a service, the entity so doing is "bound to the exercise of reasonable care in the performance of the services so voluntarily assumed." *Vesel v. Jardine Mining Co.*, 110 Mont. 82, 92, 100 P.2d 75, 80 (1939). See also *Nelson*, ¶ 37 ("[O]ne who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all. . . . The rule has been applied in several Montana cases where this Court has imposed a duty of reasonable care in the performance of an undertaking.").

Kent, at ¶50 (emphasis added).

The *Vesel* case, cited in the above quote, included an early articulation by the Montana Supreme Court of the principle that a statutory or legal duty to perform the undertaking is not an element of the legal theory of liability:

> There was no duty imposed by statute or contractual obligation upon the respondent to render medical care or attention to appellant, but once having gratuitously assumed to render such services, respondent was bound to the exercise of reasonable care.

Vesel, 110 Mont. at 92, 100 P.2d at 80; *accord, Nelson v. Driscoll*, 1999 MT 193, ¶¶ 36-37, 295 Mont. 363, 983 P.2d 972; *Stewart v. Standard Publishing Co.* 102 Mont. 43, 50, 55 P.2d 694, 696 (1936).

This legal principle has also been addressed in the context of affirmative contractual undertakings. The point of the *Thayer*, *Jim's Excavating*, *Turner*, and *Watkins Trust* cases is that the legal principle is not a function of the contract of undertaking, and is not limited to the contracting parties. Under the legal principles adopted by the Montana Supreme Court, it is the foreseeability of injury to another that would arise from the negligent performance of the undertaking that imposes the duty. *See Jim's Excavating*, 878 P.2d at 255 ("knew or should have foreseen that the particular plaintiff for an identifiable class of plaintiffs were at risk"). Indeed, these cases make clear that the reason for the undertaking is wholly incidental to the imposition

of the duty:

> The incidental fact of the existence of the contract with A does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.

Turner v. Kerin & Assocs., 283 Mont. at 125-26, 938 P.2d at 1374 (quoting L. Prosser, The Law of Torts, § 93 (4th ed.1971)) (emphasis added).

In accord with these principles, the Supreme Court in *Kent,* found that a duty arose from the City's oversight of the engineers and contractors and its inspection of their work:

> The Dissent distinguishes this case from *Cope*, concluding that Sara "has done nothing to show that the City created the dangerous grade on the walk path." To the contrary, as was the case in *Cope*, Sara's claim is premised upon affirmative actions taken by the City. As the District Court found, the City did not merely approve the walkway; it took an active role in monitoring, determining, and approving the engineering aspects of the trail system. It walked the walkway and gave instruction on the design. Having undertaken this active role, the City assumed a duty to act reasonably.

Kent at ¶ 49.

No urged construction of *Restatement* § 324A can change Montana's well-established law or the rationale therefore.

b. *Restatement* § 324A does not impose a necessity prerequisite.

In contrast to the above-described law of Montana, MCC urges that *Restatement* § 324A imposes a prerequisite requirement that services be "necessary" for the protection of third persons, such that, if there were other sources of protection, or other reasons for the performance, no duty would attach. MCC misreads the *Restatement* section. A fair reading of § 324A leads to the conclusion that it may be construed in a manner consistent with the above described foreseeability analysis utilized by the Montana Supreme Court.

Specifically, § 324A does not focus on whether an undertaking was needed or why it was undertaken, but whether the undertaking – even a gratuitous one – invokes a concern for the protection of others, such that the actor should recognize the risk the others would be put to by

negligent performance:

> 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

The examples in the *Restatement* comments demonstrate the intent of this language:

> A operates a grocery store. An electric light hanging over one of the aisles of the store becomes defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the store who is walking down the aisle. B Company is subject to liability to C. . . .
>
> The A Telephone Company employs B to inspect its telephone poles. B negligently inspects and approves a pole adjoining the public highway. Because of its defective condition the pole falls upon and injures a traveler upon the highway. B is subject to liability to the traveler.

Moreover, MCC fails to demonstrate that a failure to trigger the elements of § 324A **negates** liability. On the contrary, attached to the Section is a "Caveat" exemplifying other circumstances for liability:

> The Institute expresses no opinion as to whether . . . there may not be other situations in which one who has entered upon performance may be liable to a third person, where he is committed to the undertaking and cannot withdraw from it without leaving an unreasonable risk of harm to the third person.

MCC gets no help from its citation to federal court application of §324A under the federal tort claims act. *Jeffries v. United States*, 477 F.2d 52, 56 (9th Cir. 1973) held a duty was not imposed because "a right of inspection does not, without more, impose . . . a legal duty such as to render it liable for injuries suffered by the employees of its independent contractors," and *Other Bull v. U.S. Dept. of Housing*, 1994 WL 6653, *3-4 (9th Cir., Jan. 10, 1994), recognized that "merely conducting a safety inspection program" was not an "undertaking to perform services." In contrast, here MCC not only had a contractual right (without contractual obligation) to "inspect," but also affirmatively made the following undertakings AND actually performed each of the following services and functions:

- Making the industrial hygiene recommendation of the "safe" level of asbestos dust for the workers at the Libby mill;
- Making specific engineering recommendations for the control of dust;
- Making recommendations for the protection of the workers from the dust hazards;
- Drafting a "Safety Program" that would provide "maximum personal protection to the employee;" and
- Analyzing the epidemiological data for the purpose of providing safety advice with respect to workers who were already demonstrating lung impairment.

For MCC to argue that the negligent performance of these engineering and industrial hygiene undertakings would not present increased risk to the workers is a patent absurdity. The essential purpose of each of these functions is ***precisely*** to address the increased risk of occupational disease that would arise from their negligent performance. This is why MCC explained its undertaking as follows:

> [T]he 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.

MCE020; *see also* MCE 020 ("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 . . . to discover any incidence of lung damage."); MCE048 ("It is my personal opinion that we can satisfactorily engineer this risk"); MCE039 ("we must provide the best engineering service available").

The genuine prerequisites to a third party duty under Montana law are (a) the undertaking or performance of services directed at a risk to third parties, and (b) the foreseeability of injury from that risk if the services are negligently performed. Given that MCC under took and performed a program to control dust and protect the Libby workers, and given that asbestos disease to workers was not merely foreseeable but a known consequence of its failures, a more clear example of the application of the doctrine can scarcely be imagined.

c. MCC cannot contractually limit its liability.

Montana law is clear that the existence of a contract is merely "incidental" to the duties to third persons arising from a contractual undertaking. It is equally true that one on whom the duty is imposed cannot evade liability for his negligence by contractual provision. *See* § 28-2-702, MCA; *Miller v. Fallon Cty.*, 222 Mont. 214, 721 P.2d 342 ("pursuant to the clear and unambiguous language of § 28–2–702, MCA, an entity cannot contractually exculpate itself from liability for willful or negligent violations of legal duties, whether they be rooted in statutes or case law").

d. Apart from the undertaking of services duty, MCC owed a duty to warn workers of the hidden asbestos hazard.

In Plaintiff's Brief in support of Summary Judgment on Liability, Plaintiff has demonstrated that, in addition to its professional undertaking duties, MCC owed a duty to warn workers of the asbestos hazard. The brief demonstrates that this 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. *See Piedalue v. Clinton Elementary Sch. Dist. No. 32*, 214 Mont. 99, 103, 692 P.2d 20, 22–23 (1984); *Yurkovich v. Industrial Accident Bd.*, 132 Mont. 77, 83, 314 P.2d 866, 870 (1957); *Orr v. State*, 2004 MT 354, 324 Mont. 391, 106 P.3d 100.

Specifically, the duty to warn workers attaches to MCC because (a) through its undertaking and performance of dust control program, its study of worker disease, and its determination of worker safety recommendations, MCC had superior knowledge of the excessive levels of asbestos and the ongoing injury to workers; (b) by undertaking to prepare the "Safety Program" for Libby workers, MCC undertook to design the appropriate worker warnings

required in a safety program; and (c) by contracting to provide coverage for workers compensation injuries to workers, MCC had a duty of candor to the insured workers.

In the instant case, the duty to warn is amplified because (a) workers were ignorant of the asbestos hazard (which was hidden by its invisibility, by its lack of onion properties and by its latent disease process[6] that would first belie the impression the dust was only a "nuisance"[7] decades after the exposure), (b) MCC knew that neither the "State Board reports" of asbestos levels nor the medical "studies" of asbestos disease among workers had been "reveal[ed],"[8] and (c) MCC knew that, by avoiding revelation of the asbestos exposure and disease problem, it could avoid litigation on the "good many claims involving asbestos"[9] it anticipated.[10]

Upon the authority and reasoning discussed in section 4 (pages 9-15) of Plaintiff's Brief in support of Summary Judgment on Liability, this Court should rule that MCC owed the workers, including Ralph Hutt, a duty to warn of the asbestos hazard.

IV. Ralph Hutt's "bad faith" cause of action does not require that there be bad faith adjustment of a claim where MCC's conduct was precisely directed at preventing a claim from being brought.

In addition to his claims for MCC's negligent performance of its safety undertakings and MCC's negligent failure to warn, Plaintiff Ralph Hutt has pled a cause of action for "bad faith" interference with his workers compensation claim.[11]

MCC contends that Ralph Hutt's "Bad Faith" cause of action (Complaint ¶¶ 38-65) fails as a matter of law because (a) Hutt did not file a workers' compensation claim, (b) any "bad

[6] Affidavit of Terry Spear, filed 10/19/18, in support of Plaintiff's Motion for Summary Judgment on Liability, ¶¶ 1-5.

[7] Hutt Deposition, 54:25; Hutt Affidavit, ¶ 4.

[8] MCE102 at p. 2 ("State Board reports"), p. 3 ("only persons aware of the studies").

[9] MCE102 at p.3.

[10] MCE102 at p.3, 5, 7.

[11] Plaintiff has not moved for summary judgment on his bad faith claim, but has cited to the "special relationship" of MCC as a workers' compensation insurer for purposes of evaluating MCC's duty to warn.

faith" claim is time barred, and (c) a workers compensation insurer owes no good faith duty to an insured worker.

a. Neither statutory nor common law "bad faith" requires that an underlying claim be presented.

MCC contends that no bad faith cause of action can lie against a workers compensation insurer who, in bad faith, conceals from a worker the basis for the worker's claim until the presentation of a claim is "forever barred." MCC's argument is that Montana law countenances a legal proposition that an insurer may escape liability for bad faith by the very conduct which is bad faith: concealment.

MCC's argument is built upon the false premise that bad faith cannot exist before a claim is presented. While it is true that it is a rare case where the presentation of a claim does not precede the alleged bad faith of the insurer, no case has ever held that presentation of a claim is prerequisite to an insurer's good faith duties. Section 33-18-201(1), MCA, illustrates the point. That subsection recognizes that it is an unfair "claim" settlement practice to "misrepresent pertinent facts or insurance policy provisions relating to coverages." The idea is that, if an insurance investigator misleads a claimant with respect to the facts of an accident investigation or affirmatively leads the claimant to believe that the accident is not "covered," he is breaching the insurer's good faith duties precisely by leading the claimant to believe he has no claim. Such conduct clearly constitutes grounds for a bad faith action. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 132, 345 Mont 12, 192 P.3d 186 ("[U]nder § 33-18-201(1), MCA, the insurer's duty is simply to be truthful in its representations regarding coverage provisions of an insurance policy.").

It is also a fair reading of § 33-18-201(6), MCA, that an insurer can "neglect" to act promptly and in good faith with respect to a claim before the claim is properly presented. Indeed, any other construction would encourage delinquent adjusters to undermine the claim

presentation lest his good faith duties attach. That is precisely the circumstance in the case of *Yurkovich v. Industrial Accident Bd.*, 132 Mont. 77, 83, 314 P.2d 866, 870 (1957):

> While it may not be the duty of the Board to go out and solicit claims, as intimated by counsel for such Board, 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.
> …
> 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 . . . From the record it is apparent that plaintiff was misled to his prejudice by the Board's withholding.

In the instant matter, Plaintiff contends that MCC's withholding of the essential information to enable a claimant to preserve his claim states a claim for breach of the duty of good faith. Moreover, Plaintiff contends that the information (excessive asbestos exposure and high incidence of worker disease) was withheld (a) with the deliberated intent to avoid timely presentation of claims, and (b) with knowledge—not only that the claim would be barred—but that MCC's silence exposed the worker to further serious personal injury. In the absence of a statutory or case law pronouncement that no duty can attach before a claim is presented, MCC's defense must fail.

b. The common law bad faith claim is not time barred because it was filed within 3 years of diagnosis and discovery of MCC's concealment.

MCC contends that a statutory cause of action under § 33-18-242, MCA, is time barred as (after consideration of the tolling provisions discussed above) it was neither commenced within one or two years. Plaintiff agrees. The only bad faith claim that is not time barred is Plaintiff's common law cause of action.

The viability of the common law claim is clear from the holding of the Montana Supreme Court in *Brewington v. Employers Fire Ins. Co.*, 1999 MT 312, ¶ 16, 297 Mont. 243, 992 P.2d

237, which holds both that a common law cause of action is not superseded by Section 33-18-242, MCA, and that the appropriate limitation period is three years:

> [Plaintiff] contends that *Hayes v. Aetna Fire Underwriters* (1980), 187 Mont. 148, 609 P.2d 257 and *Vigue v. Evans Products Company* (1980), 187 Mont. 1, 608 P.2d 488, establish a common law cause of action for bad faith, which was not affected when the legislature passed § 33–18–242, MCA. We agree. …
>
> The statute of limitations for 'bad faith' or 'breach of the covenant of good faith and fair dealing' is the three-year statute applicable to torts, § 27–2–204(1), MCA.

Brewington, 1999 MT 312, ¶16, ¶ 23; *accord O'Connor v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2004 MT 65, ¶ 20, 320 Mont. 301, 87 P.3d 454 ("MUTPA does not prohibit a party from asserting a common law claim for bad faith and the applicable statute of limitations for such a claim is three years").

Based on these rulings, the statute of limitations for the bad faith claim devolves to the same tolling law discussed in Section I above, because Plaintiff did not and could not have presented a claim for damages until he had both (a) contracted a totally disabling asbestos disease, and (b) learned of MCC's concealment. Neither of these things did or could have happened before 2002 when Hutt was diagnosed.

c. A workers compensation insurer owes common law duties of good faith to workers it insures.

MCC's final argument is that no good faith duty was owed to the worker whose medical and disability benefits were insured by MCC because a worker is not a "first party" insured.

While the relationship between a workers' compensation insurer and a worker has elements of both a first party and third party claimant,[12] and while § 33-18-242, MCA, distinguishes between first party and third party claimants, for purposes of the common law bad faith claim, the question, is what common law duties are owed by a workers' compensation

[12] In one respect, a workers' compensation insurer is "directly and primarily liable" to the employee to pay worker disability benefits 92-1334, Plan Two, Section 10; in another respect the employer is insured by MCC.

insurer to a worker.

A cause of action to enforce a duty of good faith owed to third party claimants, just as to first party claimants, was first recognized in *Klaudt v. State Farm Mut. Auto. Ins. Co.*, 202 Mont. 247, 252, 658 P.2d 1065, 1067 (1983) ("The intent of the legislature is clear; under section 33–18–201, MCA, an insurer has an obligation to claimants as well as insureds where unfair trade practices are concerned."). But the duties owed to workers' compensation claimants was recognized long before. In *Yurkovich, supra,* the duty of candor and good faith was described and applied as follows:

> 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.

Since *Klaudt,* numerous cases have recognized that a workers' compensation claimant can enforce these bad faith duties in a common law cause of action. *Hayes v. Aetna Fire Underwriters,* 187 Mont. 148, 155-57, 609 P.2d 257, 261-62 (1980) ("right of a claimant to bring an action in District Court against an insurer and its adjuster for independent intentional torts committed in the processing of a workers' compensation claim"); *Vigue v. Evans Prod. Co.,* 187 Mont. 1, 4, 608 P.2d 488, 489 (1980) ("commission of independent intentional torts in the settlement of a Workers' Compensation claim").

More recently, the Montana Supreme Court applied this common law good faith duty to the State Fund workers' compensation insurer:

> The "essence" of an insurance bad faith claim is "failure to deal fairly and in good faith with an insured." *Ellinghouse*, 223 Mont. at 251, 725 P.2d at 225. White does not contend, however, that he would have a common law bad faith claim if the State Fund had not terminated his benefits. Nor does the Dissent identify authority for the position that White's allegations establish a common law claim for bad faith independent of the denial of benefits. Dissent, ¶¶ 4–5. Thus, as the District Court properly recognized, a reasonable basis for terminating White's

benefits is fatal to his common law bad faith claim.

White v. State ex rel. Montana State Fund, 2013 MT 187, ¶ 26, 371 Mont. 1, 305 P.3d 795; *see also Robinson v. State Comp. Mut. Ins. Fund*, 2018 MT 259, ¶ 24 (a workers' compensation "claimant also has remedies against an abusive insurer under the common law of bad faith");

*Birkenbuel v. Montana State Comp. Ins. Fun*d, 212 Mont. 139, 143–44, 687 P.2d 700, 702 (1984):

> Birkenbuel pled a breach of common-law and statutory duties of good faith in insurance settlement negotiations. The State Fund argued that it is not a private insurance company and not subject to the provisions of the insurance code.
>
> Bad faith in claim settlement is an actionable tort independent of the insurance code; we need not reach the question of the applicability of the code to the State Fund. In *Lipinski v. Title Ins. Co*. (Mont.1982), 655 P.2d 970, 977, 39 St.Rep. 2283, 2291, we held "... insurance companies have a duty to act in good faith with their insureds, and that this duty exists independent of the insurance contract and independent of the statute.

While it may be true that, in pure third-party context of genuine indemnity insurance, the duties owed to a third party are different than the good faith owed to first party claimants, in the context of workers compensation, that distinction is not useful and is superseded by the Montana Supreme Court's explicit recognition of a common law cause of action for a workers' compensation insurer's "bad faith" dealings with insured workers.

CONCLUSION

The uncontroverted facts demonstrate that Ralph Hutt has asbestos disease from having worked at the W.R. Grace mine and mill in Libby. Also uncontroverted is that MCC was actively involved in undertaking to perform numerous efforts regarding the dust problem that caused Mr. Hutt's disease. Throughout that entire period and for decades afterwards, MCC's deliberated efforts were designed to, and served to, conceal and protect it from the claims it expected from the hidden asbestos hazard and high incidence of disease to the workers MCC insured.

Montana law renders each person responsible for their own wrongdoing. As thoroughly presented in Plaintiff's Motion for Summary Judgment on Liability, MCC's duties in this case are clear under Montana law. Summary judgment on the issue of duty is appropriate in this case, but in Plaintiff's favor, not MCC's.

Therefore, Plaintiff respectfully submits that MCC's Motion for Summary Judgment should be denied.

DATED this 30th day of October, 2018.

McGARVEY, HEBERLING, SULLIVAN
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