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STATE OF MONTANA

Case Number: AC 17-0694

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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION	Cause No. AC 17-0694 RESPONSE TO PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT (STRIKING IP’S AFFIRMATIVE DEFENSES) <i>Applies to</i> <i>Raan v. International Paper Co., et al.,</i> Cascade County Cause No. CDV-18-0177
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Defendant, International Paper Company (“IP”), by and through counsel, submits this Response to Plaintiff’s Motion for Partial Summary Judgment (Striking IP’s Affirmative Defenses). Based on the discovery that has been conducted to date, IP agrees that some of the

affirmative defenses raised in its Answer are not applicable. However, it contends that several of the defenses challenged by Plaintiff are valid under Montana law and the facts of this case.

I. Workers' Compensation Exclusivity (Fourth Affirmative Defense)

As briefed in its Memorandum in Support of Summary Judgment, Plaintiff has presented no evidence of intentional and malicious injury to Decedent. In arguing that his claim is excepted from workers' compensation or Montana Occupational Disease Act ("MODA") exclusivity, Plaintiff notes only that his Complaint alleged intentional and malicious injury. P's Br. at 5. He appears to argue that this allegation is sufficient to bring him out of MODA exclusivity under *Lockwood*. *Id.* However, any such argument is fatally flawed.

A. Plaintiff's allegations fall short of the intentionality requirement established in *Lockwood*.

The plaintiff's complaint in *Lockwood* alleged that the defendants "knew or had ample reason to know that the defendants' acts or omissions created a high degree of risk or harm to [Decedent.]" *Lockwood v. W.R. Grace & Co.*, 272 Mont. 202, 209, 900 P.2d 314, 318 (1995). Observing that "this allegation properly can be read in a number of different ways[.]" the *Lockwood* court considered several possible meanings *Id.*

First, the court considered the reading that the defendants "'had ample *reason to know*' that their acts or omissions created a high degree of risk or harm to [Decedent]." *Id.* (emphasis added). It concluded that under this reading, the level of knowledge alleged would not be sufficient to constitute intentional harm. *Id.*

Next, the court considered the reading that "the defendants *knew* their acts or omissions created a high degree of *risk*... to [Decedent]." *Id.* (emphases added). This allegation was also found insufficient. *Id.* The court noted that "knowing operation of a hazardous and unsafe

workplace... did not constitute intentional harm directed at the claimant.” *Id.* (citing *Noonan v. Spring Creek Forest Products*, 216 Mont. 221, 700 P.623, 625-26 (1985)).

However, the court did find one possible reading that would allow the plaintiff in *Lockwood* to avoid dismissal – that “[defendant] knew its acts created a high degree of *harm* to [Decedent.]” *Lockwood*, 272 Mont. at 210, 900 P.2d at 319 (emphasis added). This reading of the allegation, the court found, “differs significantly from a mere allegation of known risk” and could suffice to “meet[] the requirement that a plaintiff allege ‘the presence of intentional *harm* which his employer maliciously and specifically directed at him...’” *Id.* (emphasis in the original) (citing *Blythe v. Radiometer America, Inc.*, 262 Mont. 464, 866 P.2d 218, 221 (1993)). In short, the Montana Supreme Court in *Lockwood* found that in order to escape MODA exclusivity, the employer must know that its acts or omissions caused a high degree of actual *harm* to its employee; knowledge of a high degree of *risk* is not enough.

Plaintiff nowhere alleges that IP knew Decedent suffered a high degree of harm, nor could any of his allegations be read to have such a meaning. Rather, he alleges that IP knew and disregarded “the high *probability* of injury” to Decedent. Complaint at ¶ 41 (emphasis added). It is beyond dispute that a high probability is equivalent to a high degree of risk. And that is precisely what the *Lockwood* court deemed insufficient to meet the requirements of an intentional and malicious injury that would elude MODA exclusivity.

B. Plaintiff has not presented any evidence that would meet the intentionality requirement in discovery.

Unlike *Lockwood*, in which the court considered a motion to dismiss based on the pleadings, *see Lockwood*, 272 Mont. at 204, 900 P.2d at 315, there has been discovery in the case at bar. All of Plaintiff’s fact witnesses have been deposed at this point, and Plaintiff has been afforded the opportunity to present evidence of the requisite intent by IP. He has not done so.

Rather, he gave only general, conclusory testimony that the company must have known of the hazards of asbestos, while also admitting that he does not believe the people working at the mill intentionally harmed him or his family. *See* Ex. A, P's Dep. at 101:2-16; 100:3-11.

The allegations and evidence offered by Plaintiff are plainly insufficient to meet the legal standard for application of the exception to workers' compensation/MODA exclusivity. Accordingly, Plaintiff's exclusive remedy is in the workers' compensation system, and his claims here are barred.¹

II. Non-Party Fault (Fifth, Fifteenth, Eighteenth, Twenty-Fifth, and Thirty-First Affirmative Defenses)

IP's Fifteenth and Twenty-Fifth Affirmative Defenses do not allege non-party fault. Rather, they allege that IP was not the cause of Plaintiff's alleged injuries (Fifteenth Affirmative Defense); and that to the extent Plaintiff was exposed to asbestos, it was by no fault of IP's or that there was an intervening cause (Twenty-Fifth Affirmative Defense).

III. Comparative Fault (Sixth Affirmative Defense)

It is not yet known whether this defense would or could be raised. The reports and depositions of experts and corporate representatives have not yet been given, and evidence from those sources could necessitate the use of this defense. Therefore summary judgment is not appropriate at this time.

IV. Plaintiff's Common Law Strict Liability Cause of Action (Eighth Affirmative Defense)

One of the elements of a prima facie case for strict liability is that the defective product is traceable to the defendant. *Brown v. North Am. Mfg. Co.*, 176 Mont. 98, 105-106, 576 P.2d 711, 716 (1978).

¹ Plaintiff has not alleged that any other exception to Workers' Compensation/MODA exclusivity apply.

Plaintiff fails to establish a case for strict liability because he has failed to identify any exposure by Decedent to *any* product traceable to IP. He has offered no evidence that Decedent was ever exposed to products purchased from IP's retail store.² Neither Plaintiff nor any of his family members recalled ever purchasing Zonolite from the retail store, nor are they aware of Decedent purchasing any Zonolite from the store. Ex. B, P's Dep., at 109:6-12; Dep. of Barbara McMillan, at 35:7-10; Dep. of Don Ron, at 25:7-9; Dep. of James Raan, at 20:2-7; Dep. of Rose Lockman, at 18:18-19:8. Further, there was no vermiculite insulation in his parents' home, where Decedent lived most of his life. Ex. C at 73:12-15. Decedent's brother Don Raan recalled their father once put Zonolite in his garden; however, he does not know whether it was from IP or W.R. Grace. Ex. D at 25:10-26:2. There is simply no evidence that Decedent was exposed to any product for which IP could be held strictly liable. Thus, IP's affirmative defense that Plaintiff cannot prosecute a claim based on strict product liability is absolutely appropriate and should not be stricken.

V. Legal Duty (Sixteenth Affirmative Defense)

Contrary to Plaintiff's argument, IP does not dispute the common law duty to exercise the care a reasonable person would exercise under the same circumstances. See P's Br. at 15. Rather, it contends that it did not owe a duty that "would give rise to liability to Plaintiff." IP's Answer at 14. The nature, scope, and extent of IP's duty to Decedent – i.e., what constitutes reasonable care under the circumstances – is a question of fact for the jury, and thus not amenable to summary judgment.

VI. Proximate Cause (Twenty-Second and Twenty-Third Affirmative Defenses)

² While the actual entities involved vary, for the sake of ease, IP will use "IP" throughout to signify entities for which it holds liability.

It is the Plaintiff's burden to prove that IP was a proximate cause of Decedent's injury, and IP anticipates raising its lack of proximate causation as a defense. As Plaintiff noted, "the *jury* must determine if IP's actions and inactions were a substantial factor" in Decedent's injury. P's Br. at 19 (emphasis added). Thus, summary judgment would be clearly inappropriate.

VII. Set-Offs (Twenty-Sixth Affirmative Defense)

Under Montana law, if the actions of more than one tortfeasor caused "one, indivisible injury" the tortfeasors are jointly and severally liable. *Hulstine v. Lennox Industries, Inc.*, 2010 MT 180 ¶ 23, 357 Mont. 228, 237 P.3d 1277 (2010). As a corollary to joint and several liability, there is afforded a "single satisfaction for a single injury." *Id.* at ¶ 22. Therefore, where there is a single injury, a *pro tanto*, dollar-for-dollar reduction must be given for any recovery received from a joint tortfeasor who settles. *Id.*

In the case at bar, there is a single, indivisible injury – namely, Decedent's mesothelioma. While Plaintiff asserts that he has filed no other litigation, he is eligible to recover from one or more asbestos bankruptcy trusts. The amounts offered for settlement by the trusts are calculable based on their published criteria and values, and any recovery Plaintiff is granted in this action must be reduced by the amounts he would be eligible to recover from the trusts. Alternatively, Plaintiff could assign to IP the right to file bankruptcy trust claims for Decedent's injury, with IP retaining those funds as a partial reimbursement for its payment of any verdict. However arranged, Plaintiff is permitted only a single satisfaction for Decedent's injury, and IP is entitled to the set-offs claimed in its affirmative defense.

CONCLUSION

Based on the foregoing, IP requests that the Court DENY the Plaintiff's request for summary judgment on the affirmative defenses discussed above.

Respectfully submitted this the 2nd of November, 2018.

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