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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 PLAINTIFFS' MOTION IN LIMINE RE: UNION KNOWLEDGE AND BRIEF IN SUPPORT THIS DOCUMENT RELATES TO: *Barnes, et al. v. State of Montana, et al.*, Lincoln County Cause No. DV-16-111 Judge Matt Cuffe

Come now Plaintiffs, in accordance with the Court's scheduling order, and respectfully submit the following motion *in limine* to prevent Defendants from arguing on the basis of, or submitting testimony or evidence regarding, knowledge that leaders of the union representing W.R. Grace workers may have had.

The issues raised in this motion *in limine* are intended to be broadly applicable to all parties before the Asbestos Claims Court. They are therefore appropriate for resolution here, rather than in the District Court at the trial of just these Plaintiffs' claims.

INTRODUCTION

Plaintiffs' claims in this case stem from their residence in Libby. They suffered dangerous exposures to asbestos as a result of their proximity to railroad property and railroad activities in Libby.

Plaintiff Tracie Barnes also maintains a case against the State of Montana. He is a lifelong Libby resident, whose exposure to asbestos occurred not just from his personal proximity to railroad property and activities, but also as the family member of someone who worked for W.R. Grace and the railroad.

Plaintiffs anticipate that the Defendants will attempt to argue that their liability in this case should be diminished as a result of limited evidence that the union representing workers at the W.R. Grace Libby operations was aware of the asbestos hazard. As described herein, Defendants State of Montana ("State"), and BNSF Railway Company and John Swing (collectively "BNSF") should be precluded from relying upon such a "union defense" and the evidence that would support it.

APPLICABLE STANDARDS

The purpose of a motion in limine is to prevent the introduction of irrelevant, immaterial, or unfairly prejudicial evidence. *See Hulse v. State, Dept. of Justice, Motor Vehicle Div.*, 1998 MT 108, ¶ 15, 289 Mont. 1, 961 P.2d 75. Motions in limine are a preferred means to prevent references to inadmissible evidence, and thereby avoid otherwise necessary objections, which only call attention to prejudicial matters. *See Cooper v. Hanson*, 2010 MT 113, ¶ 38, 356 Mont. 309, 234 P.3d 59.

This Court has recognized its need to "sit on motions that affect broad categories of plaintiffs, or defendants, or whose resolution will be important for trial or settlement purposes." Asbestos Claims Court Hearing, January 31, 2018, 84:19-22

Here, BNSF's status as a seasoned and sophisticated corporate litigant, with an established "pattern of practice that relies on misconduct to prevail in court," further justifies and requires that this Court define the limits of improper evidence prior to trial. *See Anderson v.*

BNSF, 2015 MT 240, ¶¶ 84-87, 380 Mont. 319, 354 P.3d 1248 (Wheat, J., concurring) (citing *Spotted Horse v. BNSF*, 2015 MT 148, ¶¶ 23-27, 379 Mont. 314, 350 P. 3d 52).

ARGUMENT

For several reasons, evidence of alleged knowledge of union leaders regarding the presence of asbestos at the W.R. Grace mine is not admissible to demonstrate Plaintiffs' own knowledge of the asbestos hazard. First, there is no evidence demonstrating communication regarding asbestos from either the union leadership to its membership, *or to the family members of its membership, or to the broader Libby community*. Second, the union had no legal duty to warn the workers of Grace family members or the broader Libby community. Finally, the State had a duty to warn workers and their family members.

I. There is no evidence that the union had information that asbestos containing dust generated at Grace's operation could be harmful to miner family members, nor is there any evidence to demonstrate that union leadership disseminated information regarding asbestos dust to its general membership.

Introduction of evidence regarding union leaders' knowledge of the presence or hazard of asbestos would lead to unfair prejudice predicated on speculative evidence. Plaintiffs' motion seeks to exclude prejudicial evidence that may create an improper inference regarding the ***Plaintiffs'*** knowledge. It would prohibit Defendants from speculatively arguing that W.R. Grace workers, and even more indirectly Plaintiffs personally, by and through Grace's union leadership, were aware of the presence of asbestos at the Libby operation, and also the hazard posed by asbestos exposure. Such evidence would not only be predicated on speculation, but would also be unfairly prejudicial..

Rule 403 M. R. Evid., dictates that even relevant evidence should be excluded where its probative value is outweighed by the danger of prejudice, confusion or misleading the jury. "Unfair prejudice from the admission of evidence may arise from evidence that . . . confuses or

misleads the trier of fact, or unduly distracts the jury from the main issues." *State v. Franks*, 2014 MT 273, ¶ 16, 376 Mont. 431, 335 P.3d 725. Additional risk exists and justifies exclusion where "evidence [is] speculative at best, and . . . of such a highly prejudicial nature in comparison to its probative value that its admission could constitute error." *Krueger v. General Motors Corp.* (1989), 240 Mont. 266, 275, 783 P.3d 1340, 1346.

Here, the fact remains that there is no evidence that union leadership disseminated information regarding asbestos dust to its general membership or family members. There is also no evidence that union leadership or union membership had any information that asbestos they were exposed to at Grace's operation could be harmful to the workers' family members. Accordingly, there is no foundation for evidence reflecting minimal asbestos knowledge by certain union leaders being relevant in this case.

Evidence of union or worker knowledge would arguably be admissible only if: (a) it tended to make more likely the fact that the Plaintiffs knew that they were being exposed to hazardous levels of asbestos, and an asbestos dust hazard was being created in their homes; and (b) the Defendants' failures to investigate, warn and protect the Plaintiffs would not be a breach of duty because such duty was abrogated by the union knowledge, even though Tracie Barnes's father (<u>though not the Plaintiffs</u>) purportedly knew of these hazards. None of that is the case here.

There is limited evidence that certain union leaders had some knowledge about the presence or significance of asbestos. However, there is no evidence of union leadership sharing any information regarding asbestos with their membership, let alone with the Libby community, Tracie Barnes's father, or Plaintiffs personally.

The Defendants, and in particular the State, may attempt to rely on documents that contain information from union leadership meetings to create the prejudicial inference that the union membership knew there was asbestos in the dust at the mine. The additional prejudicial inference that Defendants seek would be that any concern of some union officials regarding the health of workers based on exposure to dangerous levels of dust meant that knowledge was also shared with membership and family members. Again, there is no documentary evidence regarding the extent of knowledge among union leaders about the extent or hazard of asbestos. More importantly, there is no evidence of any kind that such information was ever disseminated beyond the few individuals in positions of union leadership. There is zero evidence that Plaintiffs personally, or Tracie Barnes's father, received any information from union leadership, W.R. Grace, or the State of Montana.

None of the family members of the Plaintiffs in this case were union leaders. The Plaintiffs did not work for W.R. Grace and therefore were not members of the union. They did not attend union meetings, did not access union documents or minutes, and did not have conversations with union officials regarding any problems with excess dust at the mine. Plaintiffs were children during the time at issue, including when Tracie Barnes's father worked at Grace. As a result, any knowledge obtained by union officials cannot be legally or logically imputed to the Plaintiffs.

Without foundation regarding dissemination of information beyond a handful of union leaders, the evidence cannot tend to show that either Plaintiffs or anyone to whom they were related knew they were being exposed to dangerous levels of asbestos. In short, any evidence regarding union knowledge must be deemed wholly speculative and irrelevant to the Plaintiffs' claims in this case. Any introduction of evidence regarding union or worker knowledge would

result in unfair prejudice from an unsupported and erroneous deduction. It would be a distraction for the jury from the main issue of the Defendants' duties and failures, and would not make it more probable that Tracie Barnes's father, let alone the even more removed Plaintiffs, knew of the asbestos hazard. Furthermore, any knowledge that may have been held by union leadership did not mitigate the Defendants' own duties regarding the asbestos hazard.

II. The State owed a duty to workers and family members to warn of the asbestos hazard.

The State of Montana had an unequivocal duty to the miners and their families to protect public health and safety by warning them of the hazards posed by asbestos dust from the W.R. Grace mine and mill operation.

"Determining whether there is a legal duty is an issue of law for the court. Determining whether there was a breach of duty is an issue of fact for the fact finder in the case." *Gatlin-Johnson ex rel. Gatlin v. City of Miles City,* 2012 MT 302, ¶ 13, 367 Mont. 414, 291 P.3d 1129. In *Orr v. State of Montana*, 2004 MT 354, 324 Mont. 391, 106 P.3d 100, the Montana Supreme Court held that under public health statutes from 1907 to 1999, the State had the mandatory obligation to gather public health-related information and provide it to the people. *See Orr*, ¶ 23. The State had the statutory obligation to "make investigations, disseminate information, and make recommendations for control of diseases and improvement of public health to persons, groups, or the public." Section 69- 4110(3), RCM (1947) (1969, 2d Replacement, Vol.4). In addition, § 69-4202, RCM (1967-1971), required the State to "correct or prevent conditions which are hazardous to health at any place of employment." The *Orr* Court held, "The provisions of th[ese] law[s] bound the State to do something to correct or prevent workplace conditions known to be hazardous to health." *Orr*, ¶ 38.

The State was in the exclusive position to control information regarding the presence of asbestos and the hazard it posed to workers and through the workers their families. The State conducted numerous industrial hygiene investigations beginning in 1956 that found hazardous levels of asbestos at the mine and mill operation and chose to limit distribution of these reports to company management. Despite having this important information, the State did not (a) give the inspection reports to union leadership; or (b) warn the workers or the public of the asbestos hazard. As a result, any information obtained by union leadership was filtered through W.R. Grace, who the State knew was not protecting the health of workers. "Plainly, the State knew as a result of its inspections that the Mine's owner was doing nothing to protect the workers from the toxins in their midst." *Orr*, ¶ 37.

Plaintiffs anticipate the State may argue that its duty was mitigated in part because the union, and by association the workers, had information regarding the presence of an asbestos hazard. Therefore, the purported dissemination of inspection reports by the State to the workers, their family members, and the community would not have been novel information. The State may argue that if the workers already knew of the hazard by and through information obtained by union officials, there was no need for the State to exercise its duty. However, aside from the speculative and unsubstantiated nature of such assertions, the duty of the State was statutory in nature and thus was non-delegable. The State cannot attempt to assert an imputed contributory negligence defense to diminish its mandatory duty under the public health statutes from 1907 to 1999 to gather public health-related information and provide it to the people. *See Orr*, ¶ 23.

Instructive here is the seminal case of *Shannon v. Wright Const. Co.* (1979), 181 Mont. 269, 593 P.2d 438, where the defense of contributory negligence was precluded on the grounds that the owner/employer had primary control over the workplace conditions, and therefore the

Court in *Shannon* recognized that the duty for workplace safety rests upon those in control of the work place. *See also Stepanekv. Kober Const. Co.* (1981), 191 Mont. 430, 625 P.2d 51;*Steiner v. Department of Highways* (1994), 269 Mont. 270, 887 P.2d 1228; *Slater v. Central Plumbing and Heating* (1996), 275 Mont. 266, 912 P.2d 780.

These cases instruct that when a duty exists, the defendant "cannot avoid liability by attempting to shift responsibility for those duties to someone else." *Slater*, 912 P.2d at 783; *see also Steiner*, 269 Mont. at 275-76, 887 P.2d at 1232; *Nave v. Harland Jones Drilling* (1992), 252 Mont. 199, 202-03, 827 P.2d 1239, 1241. Here, the duty of the State to "make investigations, disseminate information" and to "correct and prevent conditions which are hazardous" was statutory and non-delegable. After carefully reviewing the framework of Montana's public health statutes, the *Orr* Court found that statutory duties for protection from known health hazards was placed on the State, and "ran to the public and to persons whose employment subjected them to health hazards." *Orr*, at ¶ 39.

The State of Montana's duty to disseminate information regarding the presence and significance of the asbestos hazard under *Orr* was owed not to the union, but to the population at risk: workers and community members. Any information the union leadership may have obtained from W.R. Grace regarding the presence of asbestos could not displace the State's duty to protect the health of workers and to prevent the spread of asbestos to others. In contrast, there was no duty for union leadership to disseminate this information, nor can this information be imputed to the union membership, let alone their families.

III. The union had no duty to warn membership of potential hazards because the union is not an agent for workers and any knowledge obtained by union officials is not imputed to their membership.

For the reasons stated above, the State had the duty to warn the at risk population regarding the asbestos hazard which the State knew of. In contrast, the union had no legal duty to warn its membership, let alone their family members of potential hazards at the W.R. Grace mine. Such a legal duty cannot be manufactured here through legal doctrines such as agency.

Montana law defines agency as follows:

> An agency is either actual or ostensible. An agency is actual when the agent is really employed by the principal. An agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent who is not really employed by him.

§ 28-10-103, MCA. "It must be the principal, not the agent, who intentionally or by want of ordinary care causes a third person to believe another to be his agent." *Sunset Point Partn. v. Stuc-O-Flex Intern., Inc.*, 1998 MT 42, ¶ 122, 287 Mont. 388, 954 P.2d 1156. In *Miller v. Cascade Northern Co.*, 181 Mont. 66, 69, 592 P.2d 156, 158 (1979), the Montana Supreme Court recognized that liability under a theory of ostensible agency may exist only where the alleged principal, "by reason of some act on his part," leads another to believe that an agency relationship existed. Accordingly, the union could not be the agent of the State of Montana, or of W.R. Grace, with respect to duties owed directly to workers and family members.

Additionally, Title 29 USC Ch. 11 §§ 401, et seq. offers guidance on what duties are owed by union leadership to their members. In particular, § 435 details the requirement that reports and documents are public information. Section 501 details the fiduciary responsibilities of officers of labor organizations. These sections note that any information garnered by the union leadership is public to membership, but there is no legal responsibility to the membership to fully report all proceedings to membership.

The union is not an agent for their membership with respect to conveying health hazard information, as neither an actual or ostensible agency relationship existed. Individuals in union

leadership may be agents for the union as an entity; however, the union is not an agent for the entirety of its membership. Therefore, any knowledge of the hazard known to members of union leadership cannot be imputed to the membership of the union nor its membership's family members. In short, there is no legal basis to establish a duty under Montana law for union leadership to communicate any information regarding asbestos health hazards it may have obtained from W.R. Grace to their membership, let alone to the families of workers.

Ultimately, this motion *in limine* seeks to exclude evidence that is potentially prejudicial and confusing, as well as evidence that cannot be foundationed with requisite facts. Any knowledge of union officials regarding the existence and toxicity of asbestos at the mine cannot be legally, logically, or factually imputed to the father of Tracie Barnes or Plaintiffs themselves. The State owed a duty to disseminate information regarding the hazards of asbestos from the mine and mill operation and protect the workers and community. Knowledge of this hazard by union officials does not mitigate this duty, and the State should be prohibited from offering evidence, testimony, or reference to suggest otherwise.

CONCLUSION

Based upon the above, Plaintiffs respectfully request that all testimony and evidence regarding potential union knowledge involving Grace workers be precluded.

DATED this 21 day of November 2018.

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