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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' REPLY BRIEF IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT Applicable to: *Barnes, et al. v. State of Montana, et al,* Lincoln County Cause No. DV-16-111

I. INTRODUCTION

Plaintiffs Tracie Barnes, Gerrie Flores, and Rhonda Braaten, submit this Reply to Defendants BNSF Railway's and John Swing's (collectively "BNSF") *Response to Plaintiffs' Motion for Partial Summary Judgment Re: Preemption and Abnormally Dangerous Activity*.

As set forth below, and in Plaintiffs' prior filings regarding the issues addressed herein,[1] Plaintiffs' claims are not preempted by the Hazardous Materials Transportation Act of 1975 ("HMTA"), the Federal Railway Safety Act of 1970 ("FRSA") or any other federal regulations or laws. Thus, this Court, in accord with the recent rulings by the U.S. District Court for Montana,[2]

[1] Plaintiffs' earlier brief in support of Plaintiffs' *Motion for Partial Summary Judgment*, the attendant *Statement of Uncontested Facts*, *Affidavit of Roger Sullivan* filed 10/5/18, *Plaintiffs' Response to BNSF's Motion for Summary Judgment*, and the attendant *Second Affidavit of Roger Sullivan* filed 10/26/18, are incorporated herein by this reference.

[2] *See* Order of United States District Court Judge Brian Morris entered in *Murphy Fauth v. BNSF Railway Co.,* USDC Cause No. CV-17-79-GF-BMM-JTJ, 2018 WL 3601235 (D. Mont.

should find BNSF's affirmative defense asserting preemption or preclusion fails as a matter of law.

In addition, BNSF's activities involving asbestos-contaminated vermiculite were the type of abnormally dangerous activities to which Montana law would attach strict liability for injuries resulting therefrom. In that regard, Montana not adopted § 521 of the Restatement (Second) Torts, and Montana Supreme Court precedent strongly indicates that Montana will not adopt § 521. As such, the Court should determine that BNSF is strictly liable for its abnormally dangerous activities relating to asbestos containing vermiculite.

II. ARGUMENT

A. Plaintiffs' Claims Are Not Preempted By The HMTA.

BNSF begins its Response to Plaintiffs' motion with this concession: "Defendants acknowledge that the HMTA and its implementing regulations do not expressly regulate the transportation of asbestos-containing mineral ore…" (BNSF's Response at 8.) Instead, BNSF argues that Plaintiffs' claims are barred by "negative preemption." (*Id.*, citing *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 178 (1978)). Specifically, BNSF contends that in promulgating regulations for the transport of pure commercial asbestos and deciding not to extend those regulations to asbestos containing materials, the Department of Transportation (DOT) intended to create a privileged area free of regulation which "constitutes negative preemption." (*Id.*) However, negative or inverse preemption is only available in the exceedingly rare circumstance where Congress, "after weighing and balancing the various considerations," expresses its "clear and manifest intent" "that an activity not be subject to any regulation or remedies, such that the

July 27, 2018) granting Libby claimants' motion for partial summary judgement re: preemption. Sullivan Aff., Ex. 65.

activity becomes privileged under federal law." *The People v. Union Pac. R.R. Co*., 141 Cal.App. 4th 1228, 1251 (2006), citing to U.S. Supreme Court precedents. As set forth below, negative preemption is inapplicable and BNSF's argument must be rejected.

1. Negative preemption does not apply here.

Ray v. Atlantic Richfield is clearly distinguishable from the present situation. It does, however, set forth the requirements necessary for a finding of preemption in a setting where an agency has not issued a regulation covering a specific activity. In *Ray*, Atlantic Richfield argued the that State of Washington regulations limiting the size of super tankers allowed to enter Puget Sound were preempted by the absence of tanker size limitation in the Sound under the Ports and Waterways Safety Act (PSWA). The Court found clear evidence to support the conclusion that the Coast Guard's decision not to issue regulations regarding tanker size in Puget Sound was an affirmative declaration that there should be no size restriction on tankers entering the Sound.

This determination was based on three decisive factors not found in the present case: First, there was clear Congressional intent that the federal government would exclusively occupy the field of regulation of vessel size and speed restrictions as evidenced by the PWSA's "positive statement that … State regulation of vessels is not contemplated" and the legislative history of Title I which shows that Congress intended that there be a single federal decision maker to promulgate limitations on tanker size. *Ray*, 435 U.S at 174. Second, there was a clear Congressional directive that the Secretary of Transportation (through delegation to the Coast Guard) was to regulate the field in whole by looking at each geographic area and issuing regulations where necessary, as demonstrated by the PWSA's "clear policy" that the Secretary was to "carefully consider 'the wide variety of interests which may be affected by the exercise of his authority,' § 1222(e), and that he shall restrict the application of vessel size limitations to those

areas where they are particularly necessary." *Id.* at 178. Third, there was the finding that the Coast Guard had actually exercised this regulatory authority in the geographic area at issue by limiting tanker size in Rosario Strait leading into Puget Sound and issuing "only a narrow limitation of the operation of supertankers in the Sound itself" thereby demonstrating the clear intent that there should be no limitation on tanker size in the Sound. *Id.*

Thus, in *Ray* the Secretary: 1) was granted the sole authority over the tanker size safety regulation at the specific exclusion of state involvement, 2) was operating under a specific mandate to investigate all areas falling under this authority and to issue the regulatory controls only in those limited areas where they were appropriate, and 3) the Secretary had done so in the very area at issue, thereby meeting the three requirements for a finding of negative preemption. Because the Coast Guard, through delegation from the Secretary, was the sole authority in the field and had affirmatively decided that no regulation of tanker size was appropriate in Puget Sound, the State laws limiting tanker size impermissibly interfered with federal law and were preempted.

Further instructive here, the *Ray* holding has been clarified and distinguished in subsequent cases addressing negative or inverse preemption. Closely analogous to the present situation is the most recent Supreme Court case addressing the issue of negative preemption, *Spreitsma v. Mercury Marine*, 537 U.S. 51 (2002). There, the Court assessed whether the Coast Guard's decision not to issue regulations requiring propeller guards on recreational boats negatively preempted Plaintiff's tort claim alleging injury as a result of a negligent failure to install such devices. In specifically distinguishing *Ray*, the *Spreitsma* Court held that in contrast to the PWSA statute at issue in *Ray*, the Federal Boat Safety Act (FBSA) did not contain the same Congressional directive to look at every area of recreational boat safety and issue regulations where necessary:

> [T]he FBSA, unlike Title II of the PWSA, does not *require* the Coast Guard to promulgate comprehensive regulations covering every aspect of recreational

> boat safety and design; nor must the Coast Guard certify the acceptability of every recreational boat subject to its jurisdiction.

Spreitsma, 537 U.S. at 69 (emphasis in original). Thus, as to the first requirement of negative preemption, there was no Congressional direction to address the area in full.

The *Spreitsma* Court also looked to the reasoning and history behind the decision not to regulate and found that the Coast Guard had appointed an advisory council subcommittee, which had engaged in an 18-month inquiry into propeller guards and found that then available data did not support the regulation of propeller guards. Then, a decade later, the advisory committee revisited the issue and recommended some specific propeller guard regulations for commercial vessels but excluded recreational boats from such regulations. The *Spreitsma* Court found the federal agency's "intentional and carefully considered" inquiry only revealed that available data did not support regulation under the Act. As such the decision not to issue regulations requiring propeller guards on recreational boats was "fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards." *Id.* at 65. As here, the Coast Guard's decision revealed only that available data did not meet the stringent criteria for federal regulation. Thus there, as here:

> The Coast Guard did not take the further step of deciding that, as a matter of policy, the States and their political subdivisions should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as unsafe. The Coast Guard's apparent focus was on the lack of any "universally acceptable" propeller guard for "all modes of boat operation." But nothing in its official explanation would be inconsistent with a tort verdict premised on a jury's finding that some type of propeller guard should have been installed on this particular kind of boat equipped with respondent's particular type of motor. Thus, although the Coast Guard's decision not to require propeller guards was undoubtedly intentional and carefully considered, it does not convey an "authoritative" message of a federal policy against propeller guards. And nothing in the Coast Guard's recent regulatory activities alters this conclusion.

Sprietsma, 537 U.S. at 67 (footnote omitted).

Summarizing the three requirements for negative preemption, the *Spreitsma* Court held that the federal agency: 1) was not required by Congress to address the area of recreational boat safety in whole; 2) had not affirmatively weighed and balanced the impacts of prohibiting laws and regulations in that area; and 3) had not expressed a clear and manifest intent that the area should be free of all state laws and regulations. Because none of the three negative preemption requirements were met, the state common law tort claim was allowed to proceed. This is precisely the situation we have here.

As pointed out in our earlier briefs, a case directly on point is *The People v. Union Pacific Railroad (UPR)*, 141 Cal.App.4th 1228, 1254 (2006), where the issue of negative preemption under the HMTA was specifically addressed. There, the Union Pacific Railroad made a nearly identical argument for preemption under the HMTA that BNSF advances here. UPR argued that the DOT decision to issue regulations over calcium oxide transport by air but not by rail evidenced Congressional intent to create a privileged area free of any State law which might otherwise apply to the rail shipment of this material. In rejecting this argument the Court held:

> We find nothing in HMTA clearly and manifestly establishing a congressional intent that transporters of material in commerce are to be wholly immune from state remedies for consequential injuries resulting from their activities. This is particularly true in view of the fact defendants claim immunity from state remedies, not because the federal government regulates the transport of calcium oxide by rail, but because it does not.

The People, 141 Cal.App.4th at 1254.[3] Consistent with the reasoning in *Spreitsma*, *The People* Court held that because the DOT had not affirmatively weighed and balanced the costs and benefits of law and regulation in that area and had not expressed clear and manifest intent that the area of calcium oxide shipment by rail should be privileged and free of all law and regulation, the State

[3]Unless otherwise indicated, all emphasis herein is added.

law claim was not preempted.

Negative preemption under the HMTA was also fully explored in *Waering v. BASF Corp.*, 146 F.Supp.2d 675 (M.D. Pa. 2001). There, the substance at issue, potassium metabisulfite, was not specifically regulated under HMTA. Nevertheless, just as BNSF does here, BASF

> argue[d] that common law claims springing from improper packing, handling or labeling of potassium metabisulfite would place requirements on regulated parties different from those imposed under the HMTA. Therefore, the argument goes, such common law claims are preempted.

Id. at 680. The *Waering* Court dismissed this argument holding that, because potassium metabisulfate was not a defined hazardous substance, the preemption provision of the HMTA was inapplicable and the absence of specific regulation did not equate with an affirmative decision that transporters of potassium metabisulfite should be free of all regulations and remedies for injury. *Id.* at 681.[4]

Nevertheless, citing to the HMTA regulations at issue here BNSF blithely criticizes both the compelling precedents relied on by Plaintiffs and the well-reasoned decisions of Judge Brian Morris and Magistrate Judge John Johnston of the Montana Federal District Court, which rejected the same arguments advanced by BNSF here. (BNSF's Response at 9.) As held by Judge Morris in specifically rejecting BNSF's negative or inverse preemption argument, "The Court agrees with Judge Johnston's determination that no conflict exists with any state law regarding vermiculite and the HMTA." USDC Order, 2018 WL 3601235, at *3, Sullivan Aff., Ex. 65.

A review of the operant provisions of the HMTA regulations confirms that the HMTA does not regulate vermiculite: a) As determined by the DOT, the HMTA applies only to pure asbestos

[4]BNSF's reliance on *Roth v. Norfalco LLC*, 651 F.3d 367 (3d Cir. 2011) is misplaced as the holding in that case was based on the fact that the substance at issue in that case, sulfuric acid, was a designated Hazardous Material under the HMTA "subject to [its] own unique set of detailed specifications" controlling its shipment and packaging. *Id.* at 376-77.

"produced by an asbestos mill" referred to as "crude asbestos" or "commercial asbestos" (43 Fed.Reg. 8,562-63; 43 Fed.Reg. 22626); b) the DOT recognized "there are certain mineral ores, ore concentrates and milled mineral products" "that contain certain amounts of asbestos" that is without "commercial value. The specific requirements for the control of asbestos fibers in transportation do not apply to such materials" (43 Fed.Reg. 56664-5); and c) the regulations provide that asbestos containing materials including "mineral ore" "are not subject to the requirements of this subchapter" (49 C.F.R. § 172.102 (c)(1)(156)).

The record clearly documents DOT's reasoning behind its decision that regulations for pure commercial asbestos would not apply to asbestos containing materials such as vermiculite: "In light of the regulatory controls already in existence or under consideration by other federal agencies, and until such time as the MTB has more specific and concrete information … the MTB does not believe their specific regulation in transportation is warranted." 43 Fed.Reg. 8,562-63 (Mar. 2, 1978).

In sum, the operant provisions of the HMTA regulations completely contradict BNSF's position. The first clause of the commentary demonstrates that the decision not to regulate these materials was based on "the regulatory controls already in existence or under consideration by other entities." This is the antithesis of a clear and concise intent to create a privileged area free of regulation – instead demonstrating the DOT's explicit recognition that the area was already sufficiently regulated and did not need **additional** regulation under the HMTA. The DOT clearly intended to leave the area open to existing laws and regulations, which included State common law. *The People v. UPRR, supra*. The second clause of the commentary, deciding not to regulate "until such time as the DOT has more specific and concrete information that the normal packaging and handling of these forms of asbestos creates unreasonable asbestos exposure problems,"

likewise does not evidence any indication to create a privileged area free of regulation—and in fact leaves the door open for HMTA regulation—in addition to other existing and proposed regulations. Such a lack of sufficient information to support regulation is precisely what the Supreme Court found did not evidence intent that the area be free of all regulation in both and *Sprietsma, supra;* and *Freightliner v. Myrick,* 514 U.S. 280, 286-87. BNSF's negative preemption argument fails.

B. Plaintiffs' Claims Are Not Preempted By The FRSA.

Citing to the FRSA's savings and preemption provision BNSF argues that, "This provision has been given broad application." (BNSF's Response at 13.) To the contrary, the Supreme Court has made clear that, "In all preemption cases, we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996). Moreover, not only is preemption is a disfavored affirmative defense, but "FRSA preemption is even more disfavored than preemption generally." *S. Pac. Transp. Co. v. Pub. Util. Comm'n of State of Or.*, 9 F.3d 807, 813 (9th Cir. 1993), *citing to CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

With these guiding principles in mind, there are several clear reasons why the FRSA does not preempt Plaintiffs' claims:

1. There are no FRSA regulations even touching on let alone substantially subsuming the subject matter of Plaintiffs' claims – so there can be no conflict between the FRSA Regulations and Plaintiffs' claims and therefore there is no preemption.

2. BNSF directs the Court only to inapplicable and hypothetical general categories of regulations. (BNSF's Response at 15-16.) The Courts are decidedly unwilling to find FRSA preemption on the basis of general categories of regulation.[5]

[5]BNSF's reliance on *GMC v. Kilgore*, 853 So. 2d 171, 179 (Ala. 2002) is misplaced. *Kilgore* applies to the Federal Locomotive Inspection Act, a completely separate law with inapplicable provisions and controlling precedent regarding preemptive effect.

3. The categories of FRSA regulations referenced by BNSF do not specifically govern in the area of the allegedly negligent conduct, sounding in the casting of dangerous of dangerous substances into the environment, as required under the applicable standard.

4. Many of the alleged negligent activities in Plaintiffs' cases took place prior to the enactment of the FRSA – so the FRSA provisions referenced by BNSF cannot retroactively apply to those activities.

Specifically, BNSF makes a last–ditch effort to bootstrap Plaintiffs' claims into the purview of FRSA regulations which generally address the labelling of designated hazardous materials, inspection of freight cars, and train speed. (BNSF Response at p.16.) It is important to keep in mind that the FRSA expressly permits State law to operate in areas not specifically "covered" by existing FRSA regulations: "A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement." 49 U.S.C. §20106. The Ninth Circuit and the U.S. Supreme Court interpret this provision to mean that it is not enough to show that a FRSA regulation touches upon or relates to Plaintiffs' claims; instead BNSF has to demonstrate that a specific a Federal regulation substantially subsumes the subject matter of the claims:

> [P]etitioner must establish more than that the [specific FRSA regulations] 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

S. Pac. Transp. Co. v. Pub. Util. Comm'n of State of Or., 9 F.3d 807, 812 (9th Cir. 1993), citing *Easterwood*, 507 U.S. 658, 664 (1993) (brackets and emphasis added).

Here the subject matter of Plaintiffs' claims is the toxic exposure resulting from the casting of asbestos contaminated vermiculite dust from BNSF facilities into the Libby community. In that regard, the FRSA "does not speak to the transportation of dangerous materials or the discharge of such materials to the environment." *The People v. Union Pacific R. Co*., 47 Cal.Rptr.3d 92, 114

(2006). Moreover, BNSF's own expert witness has conceded that the "FRSA has not promulgated any regulations that address exposure to asbestos in the railroad environment." (Sullivan Aff., Ex. 1, p. 11) Conspicuously absent from BNSF's arguments is citation to a single specific FRSA provision even touching on the subject matter of Plaintiffs' claims. How do general regulations regarding the placarding of Hazardous Material containers,[6] inspection and selection of railcars, or train speed specifically address the topic or safety concerns addressed by Plaintiffs' claims? Plaintiffs have not alleged a failure to adequately placard, inspect or select railcars, or that BNSF's trains were travelling at an excessive speed. The mere fact that BNSF shipped vermiculite in rail cars that were inspected and travelled at varying speeds over its tracks is far from sufficient to subject Plaintiffs' claims to preemption by such regulations. Rather, Plaintiffs' claims sound in discharge of asbestos into the Libby community, an area wholly beyond the purview of any FRSA regulation. BNSF cannot direct the court to a single regulation even touching upon this subject matter let alone substantially subsuming it.

Thus, while the preemption standard requires that the subject matter be substantially subsumed by promulgated regulations, BNSF's own expert concedes that there is no such regulation—and the Courts have determined that the FRSA does "does not speak to the transportation of dangerous materials or the discharge of such materials to the environment." *The People, supra.* There is a reason for the absence of such regulation: the FRSA is about the safety of the railway, its tracks, its rail cars and its crossings. It does not deal with dangerous substances or toxic exposures. Because there are no FRSA regulations regarding the subject matter of Plaintiffs' claims, State law is allowed to operate in the area.

[6] As explained above, vermiculite is not a designated Hazardous Material under the HMTA and placarding requirements referenced by BNSF are inapplicable.

The FRSA preemption analysis should properly end here. There is, however, an additional argument that BNSF makes, specifically that "The DOT's regulations under the HMTA…trigger the FRSA's preemption provisions." (BNSF's Response at p. 13.) In other words, BNSF would have the Court go back down the HMTA rabbit hole. And the basis for this attempted chicanery? The same negative preemption argument which was dispensed with above! (See BNSF's Response at p. 13.) It is irrelevant whether the HMTA or the FRSA preemption clause is applied as there is no reasonable way to construe an absence of HMTA regulation regarding vermiculite as "substantially subsuming" the various allegations supporting Plaintiffs' causes of action based on exposure to vermiculite. This very issue was considered and rejected by the court in *The People* holding that "the transportation of [vermiculite] is not regulated under the HMTA, and the preemption provisions of FRSA does not preclude state law where there is no federal regulation covering the subject matter." *The People* at 114.

In conclusion, BNSF has failed to meet its burden to overcome the strong presumption against preemption and failed to produce a single FRSA provision even touching on, let alone substantially subsuming, the subject matter of Plaintiffs' claims. Accordingly, consistent with the recent ruling by Judge Morris of Montana's Federal District Court, Plaintiffs are entitled to summary judgment on BNSF's attempted preemption affirmative defense.

C. BNSF Is Strictly Liable As A Matter Of Law For Damages Caused By Its Abnormally Dangerous Activities.

BNSF acknowledges that the determination of whether it conducted an abnormally dangerous activity is for the Court to determine, based on a consideration of the six factors set forth in *Chambers v. City of Helena*:

> (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
> (b) Whether the gravity of the harm which may result from it is likely to be great;
> (c) Whether the risk cannot be eliminated by the exercise of reasonable care;

(d) Whether the activity is not a matter of common usage;
(e) Whether the activity is inappropriate to the place where it is carried on;[7] and
(f) The value of the activity to the community.

Id., 2002 MT 142, ¶ 16, citing § 520 of the Restatement (Second) of Torts. (*See* BNSF's Response at pp.17-18.) However, BNSF makes two arguments against the Court finding BNSF strictly liable here. First, BNSF argues that it is immune as common carrier under the provisions of § 521 of the Restatement (Second) of Torts. (BNSF's Response at p.18.) And, "Alternatively, even if the common carrier exception from strict liability does not apply, the transportation of vermiculite is not an abnormally dangerous activity." (Id. at p.19.) Both arguments fail.

1. BNSF Is Not Immune To Claims Asserting Strict Liability for Injury Resulting From Abnormally Dangerous Activities.

As Plaintiffs have previously pointed out, while Montana has adopted §519 and §520, Montana has not adopted §521. *Chambers,* ¶ 16 ("In *Matkovic v. Shell Oil Co.* (1985), 218 Mont. 156, 159, 707 P.2d 2, 3–4, we adopted the Restatement (Second) of Torts §§ 519 & 520 (1976), to determine whether an activity is abnormally dangerous.").

Other jurisdictions have refused to apply §521 as well. *See Chavez v Southern Pacific Transp. Co.,* 413 F. Supp. 1203 (E.D. Cal. 1976) (declining to extend § 521 immunity to a railroad carrying government munitions that exploded in transit); *National Steel Service Center, Inc. v Gibbons*, 319 N.W2d 269 (Iowa 1982) (declining to accept the public policy duty exception of § 521 in holding a railroad carrier of propane tanks strictly liable for damages to warehouse). For

[7] As the Restatement points out regarding this factor, the same activity carried on in two different locations may be appropriate in one place and inappropriate in another. For instance, a magazine of high explosives … does not necessarily create an abnormal danger if it is located in the midst of a desert area, far from human habitation and all property of any considerable value. The same is true of a large storage tank filled with some highly inflammable liquid such as gasoline … On the other hand, the same ... huge storage tank full of gasoline or the blasting operations all become abnormally dangerous as they are carried on in the midst of a city. § 520, comment on clause (e).

several reasons The Montana Supreme Court is highly unlikely to grant railroads tort immunity under §521.

First, Montana Supreme Court precedent strongly indicates that Montana would not adopt § 521. In *Dutton v. Rocky Mountain Phosphates* (1968), 151 Mont. 54, 67, 438 P.2d 674, 681, the Montana Supreme Court articulated the principles undergirding Montana's abnormally dangerous activity standard, holding that "everyone must use his property as to not injure that of his neighbor." More recently, in *Chambers*, the Court applied strict liability for abnormally dangerous activity to the City of Helena arising out of its operation of a municipal dump. *Id.* at ¶ 15. Significantly, *Chambers* makes no reference to the public duty exception of § 521—despite the fact that the City was clearly a public entity in pursuance of a public duty. Additionally, in *Cash v. Otis Elevator Co*. (1984), 10 Mont. 319, 324, 684 P.2d 1021, the Montana Supreme Court held that:

> in the operation of an elevator, we feel the owner owes a higher degree of care. The elevator performs the function of a common carrier in transporting people from one floor to another.

Finally, a still viable Montana Supreme Court precedent is the case of *Wine v. Northern Pacific Railroad* (1913), 48 Mont. 200, 136 P. 387. In *Wine* the railroad used dynamite to remove an obstruction causing water to accumulate and threaten its tracks. The blast resulted in damage to plaintiff's property, for which plaintiff recovered at trial. On appeal the railroad argued that it was entitled to an instruction to the effect that,

> when the defendant, engaged as it is in the performance of a public duty, was confronted with the emergency…rendering its roadbed and track unsafe, and the necessity was thus created for it to act in order to remedy the dangerous condition and safeguard its passengers and freight, it had the right to adopt any means suitable to that end…

Id. at 388. In rejecting the railroad's appeal based on its argument that as a common carrier it was

entitled to "public duty" immunity, the Montana Supreme Court relied on the words of Sir William Blackstone that "the public good is in nothing more essentially interested than in the protection of every individual's private rights." *Id.* at 389, quoting 1 Bl. Com. 138. And on this basis then the Court concluded, "the defendant must be held liable. There is no question of negligence involved." *Id.*

Thus, Montana has not adopted § 521 and is highly unlikely to do so. Even assuming *arguendo* Montana were to adopt § 521, the exception does not apply when an entity engages in an abnormally dangerous activity for its own purposes, a principle recognized in *Murphy-Fauth v. BNSF Ry. Co.*, No. CV-17-79-GF-BMM-JTJ, 2018 WL 3601235, at *2 (D. Mont. July 27, 2018). Here, as detailed in Dr. Hart's Expert Report, based on a copious review of the undisputed documentary record, BNSF not only transported practically all of the asbestos contaminated vermiculite into and out of downtown Libby, but also voluntarily and for its own purposes:

- Played an early, in-depth role in developing Libby vermiculite operations and performed economic analyses of the vermiculite operations in conjunction with W.R. Grace;
- Engaged in its own geo-chemical samplings/analyses of the vermiculite ore and funded multiple studies of the vermiculite deposit assessing its production potential and geo-chemical characteristics;
- Owned, operated, and funded construction of portions of the Libby vermiculite facilities including the River Loading Facility at the base of the W.R. Grace mine;
- Engaged in extensive business dealings, contracts and property transactions with W.R. Grace and its predecessors; and
- Oversaw safety and operating procedures at the W.R. Grace loading, packaging, and export facilities. (Sullivan 2nd Aff., Ex. 71 - Hart Report, *passim*.)

2. The Court Must Carefully Analyze The Abnormally Dangerous Activities At Issue.

BNSF offers the Court a red herring, arguing that "the transportation of vermiculite is not an abnormally dangerous activity." (BNSF's Response at p. 19.) Instead, the undisputed facts establish the abnormally dangerous nature of BNSF's actual activities. According to W.R. Grace, the average daily production from the mine and milling operation was between 500 and 1000 tons

of finished vermiculite concentrate per day between the late 1960s and 1970s and between 800 to 1000 tons per day in the 1980s. (SUF ¶3.) The vermiculite concentrate was transferred by underground conveyor to the river and on a suspended conveyor belt over the Kootenai River where it was emptied into BNSF rail cars at the River Loading Facility. (SUF ¶5.) From there, the cars were pushed into downtown Libby to be weighed, switched, and stored until being shipped to various expanding plants across the country. *Id.* BNSF's Libby Railyard spanned the entire north end of downtown Libby and was surrounded by Libby's residential neighborhoods, businesses, and recreational areas. *Id.*

Asbestos contaminated materials were hauled and shipped through the railyard and spilled into the soil for decades. (SUF ¶33.) Soil sampling performed in the BNSF's Libby Railyard in 2002 demonstrated the presence of Libby asbestos throughout despite that it had been more than a decade since Grace had shut down its mining operations in Libby. (SUF ¶28.) Mapping of visible "biotite" (vermiculite) on the rail beds of the Railyard at that time demonstrated extensive visible vermiculite remaining throughout the rail beds, in which analytical results have shown asbestos levels in soil from 2-5%. (*Id.*; SUF ¶33.) Visible vermiculite was also identified and sampled at the River Loading Facility where asbestos was detected in a majority of the soil samples taken at levels of up to 4% Libby asbestos. (SUF ¶28.)

Activity based sampling in downtown Libby in 2000s, more than a decade after active mining operations ceased, demonstrated that BNSF activities in downtown Libby were still capable of producing airborne asbestos levels of up to 14 fibers per cubic centimeter, far in excess of permissible exposure limits for asbestos and the EPA's reference concentration of .00009 fibers per cubic centimeter for Libby Amphibole Asbestos. (SUF ¶33.) "Epidemiology studies demonstrate consistent results pertaining to the association between LAA exposure and various

forms of respiratory effects, with effects seen in both occupationally exposed worker populations and in community populations with nonoccupational exposure." (SUF ¶34.)

Applying the undisputed facts to the § 520 factors: (a) BNSF's activities created a high risk of contamination to Plaintiffs who resided in the community of Libby; (b) the asbestos contamination resulting from BNSF's activities is great as evidenced by its continued presence more than a decade after shipping operations ceased; (c) the risk of exposure to asbestos due to BNSF's business activities cannot be reasonably eliminated for people living and working in close proximity to the Libby Railyard; (d) BNSF's vermiculite related activities were not a matter of common usage; (e) BNSF's activities involving asbestos-contaminated vermiculite occurred in downtown Libby in close proximity to residences, businesses, and recreational areas making the location inappropriate; and (f) the profoundly toxic dangers of BNSF's activities outweigh the value of those activities to the community. While *Chambers* makes clear that not all factors must be present for the Court to find as a matter of law that BNSF's activities were abnormally dangerous, those factors are present here.

BNSF cites to several cases in an effort to discourage the Court from reaching this conclusion. The cited cases are instructive and distinguishable. First, BNSF relies on *Nelson v. CENEX,* 2008 Mont. Dist. LEXIS 444. A full understanding of *Nelson* is instructive, and it is attached as **Exhibit 88** for convenient reference. The Plaintiff in *Nelson* installed asbestos containing insulation at a CENEX refinery and was exposed to asbestos at the refinery from 1952 to 1966. He was diagnosed with asbestos related disease decades later. *Id.* *1. Defendants first sought to exclude the expert opinions of Dr. Terry Spear and Dr. Barry Castleman (both experts here), as well as reliance documents (also similar to reliance documents in this case) which established the known dangers of asbestos from the 1920's forward. On Defendants' motion to

exclude reference to historical asbestos studies Judge Sherlock ruled, "One issue is what Defendants actually did know. Another issue is what Defendants should have known. Therefore, Defendants' motion to exclude reference to certain asbestos studies at trial is DENIED." *Id. *5.* Likewise, Judge Sherlock denied Defendants' motions to exclude the expert testimony of Drs. Spear and Castleman reasoning that, "It appears to the Court that Dr. Castleman's testimony would be of great help to the jury, since one of the key issues in this case seems to be the historical knowledge of the health hazards of asbestos." *Id.* *10. The rationale for those rulings also provided the basis for Judge Sherlock's ruling on Defendants' argument that they were entitled to summary judgment on Plaintiff's negligence claim based on an absence of evidence that corporate representatives knew of the dangers of asbestos at the time Plaintiff was exposed. "Thus, argues Defendants, there was no legal duty. Defendants suggest that they did not know of the dangers of asbestos until the 1970's." *Id.* *16. In rejecting Defendants' motion, Judge Sherlock carefully reviewed Dr. Spear's report establishing that hazards of asbestos were generally known within industry known by the 1930's, as well as industrial hygiene protocols to address the dangers of asbestos: "Thus, although specific employees of Defendants may not have known of the dangers of asbestos, Dr. Spear's affidavit creates a factual question as to whether Defendants and their employees should have known of the dangers of asbestos in the 1950s." *Id.* *17.

In addition, Plaintiff moved for summary judgment on his abnormally dangerous activity claim. The *Nelson* Court reviewed the six factors set forth in §520, ruling:

> The Court notes that the factors in *Section 520 (a)* and *(b)* are clearly in the Plaintiff's favor, since <u>there is no question that asbestos, whether created in the manufacturing process or the installation of asbestos insulation, creates a high degree of risk.</u> Further, <u>the harm that would result from asbestos is unquestionably extreme</u>.

Id. *15. However, the Court also noted that based on the record before it, it was unable to evaluate

the other factors in § 520 and thus, "The Court is unable to make a decision as a matter of law at this stage of the proceedings that Defendants are strictly liable for conducting an abnormally dangerous activity." *Id.* *16.

The other cases cited by BNSF are inapposite. Contrary to Montana precedent, *Splendorio v. Bilray Demolition,* 682 A.2d 461 (R.I. 1966), rejected the rule of strict liability as established in *Rylands v. Fletcher. Id*., 682 A.2d at 464. Moreover, even applying strict liability principles, the *Splendorio* Court simply determined that the inspection company involved in the demolition process was not itself conducting an abnormally dangerous activity. *Id*. at 466.

BNSF next relies on *PSI Energy v. Roberts,* 829 N.E.2d 943 (Ind. 2005), which did not even involve strict liability for abnormally dangerous activities. Instead, *PSI* involved the issue of whether under Indiana law the employer of an independent contractor hired to perform "inherently or intrinsically dangerous work" could be held vicariously liable for injuries sustained by the contractor's employee. First, this negligence theory is addressed in §§416 and 427 of the Restatement (Second)—not §420! Second, *PSI* was in any event subsequently overruled. *See*, *Helms v. Carmel High School*, 854 N.E.2d 345 (Ind. 2006).

Finally, BNSF's reliance on *Van Fossen v. MidAmerican Energy Co*., 777 N.W.2d 689 (Ia. 2009), is similarly flawed. Again, *Van Fossen* did not involve a claim of strict liability under § 420 for an abnormally dangerous activity; instead it involved claims of liability for an inherently dangerous activity under §§ 416 and 427. These theories of liability sound in negligence and not strict liability, and are inapposite.

In contrast, here there is a well-developed record upon which the Court can complete the analysis begun in *Nelson*. (*See* SUF ¶¶3-34.) As explained above, applying the undisputed facts to the § 520 factors to this case clearly allows this Court to find BNSF's activities were inherently

dangerous.

III. CONCLUSION

As Judge Morris recently determined under similar circumstances in granting Plaintiffs summary judgment, "No conflict exists with any state law regarding vermiculite and the HMTA" or "with the FRSA regulations." USDC Order, 2018 WL 3601235, at *3. Moreover, BNSF's activities involving asbestos-contaminated vermiculite were the type of abnormally dangerous activities to which Montana law would attach strict liability for injury resulting therefrom. For the reasons articulated in Plaintiffs briefs and the record before the Court, Plaintiffs respectfully request that the Court grant their *Motion for Partial Summary Judgment*.

RESPECTFULLY SUBMITTED this 9th day of November, 2018.

MCGARVEY, HEBERLING, SULLIVAN
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