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IN THE SUPREME COURT OF THE STATE OF MONTANA

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| |) | |
| |) | Cause No. AC 17-0694 |
| IN RE ASBESTOS LITIGATION, |) | |
| |) | DEFENDANT BNSF RAILWAY |
| |) | COMPANY’S REPLY BRIEF IN |
| |) | SUPPORT OF ITS MOTION |
| |) | FOR SUMMARY JUDGMENT ON |
| |) | DUTY, STRICT LIABILITY AND |
| |) | PREEMPTION/ PRECLUSION, AND |
| |) | BRIEF IN SUPPORT |
| |) | |
| |) | |
| |) | <i>Applies to Barnes, et al. v. State of</i> |
| |) | <i>Montana, et al.</i> |
| |) | |

COMES NOW Defendant, BNSF RAILWAY COMPANY (“BNSF”), by and through its attorneys of Knight Nicastro, LLC, and hereby submits its *Reply Brief in Support of its Combined Motion for Summary Judgment on Duty, Strict Liability, Preemption/Preclusion.*

I. LEGAL AUTHORITIES AND ARGUMENT

A. Plaintiffs have failed to establish that BNSF owed them a duty of care

The existence of a duty is predicated upon the satisfaction of two prerequisites: (1)

the risk must be foreseeable and (2) policy considerations must support the imposition of liability. *Estate of Strever v. Cline*, 278 Mont. 165, 173, 924 P.2d 666, 670, 1996 Mont. LEXIS 121, *11, 53 Mont. St. Rep. 576; *Gentry v. Douglas Hereford Ranch*, 1997 Mont. Dist. LEXIS 761, *5.

I. Foreseeability

"[F]oreseeability is of primary importance in establishing the existence of a duty." *Prindel v. Ravalli County*, 2006 MT 62, ¶39, 331 Mont. 338, 356, 133 P.3d 165, 178, 2006 Mont. LEXIS 75, *36. It is axiomatic that "[i]n the absence of foreseeability, there is no duty ..." *Jacobs v. Laurel Volunteer Fire Dept.*, 2001 MT 98, ¶13, 305 Mont. 225, 26 P.3d 730. Therefore, "[i]f a reasonably prudent defendant can foresee neither any danger of direct injury nor any risk from an intervening cause he is simply not negligent." *Prindel*, ¶39; *Emanuel v. Great Falls Sch. Dist.*, 2009 MT 185, ¶13, 351 Mont. 56, 59, 209 P.3d 244, 247, 2009 Mont. LEXIS 188, *6.

Plaintiffs here are unable to show foreseeability, and as a result, unable to establish a duty. In attempting to outline BNSF's alleged negligence, Plaintiffs cite to a number of irrelevant contentions. Plaintiffs claim that BNSF had knowledge of asbestos in Libby raw vermiculite ore dating back to the 1920s; that from the 1930s on, BNSF has been aware of the hazards of asbestos; and that BNSF's facilities were adjacent to downtown Libby which caused dust to enter the air of the Libby Community. *Response*, 29-30. Even assuming these allegations to be true, this would only show that there was an awareness that the raw vermiculite ore contained asbestos, that asbestos was potentially dangerous to someone

exposed at high enough concentrations and duration, and that railroad activities cause dust. There is no showing that BNSF knew or should have known that the refined vermiculite product tendered to it as a carrier contained asbestos in such a quantity that it would imperil citizens of Libby. This fails to demonstrate foreseeability.

It is important to note that the product that BNSF is alleged to have been hauling was not asbestos. Rather, BNSF was hauling processed and refined vermiculite, a mineral ore, that was contaminated with small amounts of asbestos. There is no allegation that W.R. Grace informed BNSF that the refined product they were loading onto BNSF trains was contaminated with asbestos. BNSF did not manufacture the vermiculite, mill the vermiculite, package the vermiculite or load the vermiculite.

Plaintiffs are, essentially, asking the Court to allow them to proceed with theories of liability against BNSF, arguing that BNSF should have taken more precautions to protect a town that the railroad tracks ran through from an alleged hazardous substance that it did not know was indeed hazardous. Even if we assumed *arguendo* that the processed vermiculite contained harmful amounts of asbestos, there is substantial evidence and testimony that demonstrates that BNSF had no knowledge that the vermiculite was potentially hazardous. *See Defendants' Response Brief in Opposition to Plaintiffs' Motion for Summary Judgment re: Defendants' Non-Party Affirmative Defenses*, pp. 6-9.

To this point, W.R. Grace failed to placard the railcars used to ship the processed vermiculite as hazardous or as containing a harmful amount of asbestos. *See Wetsch v. BNSF Trial Transcript, Vol. 3* (6/6/2018, Testimony of Mitchell Cuffe) attached in part as

Exhibit A, pp. 592-3, 636:1-10; *Kampf Deposition*, attached in part as **Exhibit B**, p 57:6-9; *Barker Deposition*, attached in relevant part as **Exhibit C**, p. 83-84. Similarly, W.R. Grace certified on their bills of lading, as required by law, that the shipments contained only vermiculite and were not hazardous. *See e.g., W.R. Grace Bill of Lading*, attached as **Exhibit D**. As a result, BNSF's Chief Industrial Hygienist testified earlier this year that Grace was "saying that the material that we were shipping is safe to ship without any type of restrictions." *See Exhibit A*, p. 755:6-14 (testimony of BNSF Chief Industrial Hygienist Don Cleveland). This lack of foreseeability was compounded by the fact that, by 1974 W.R. Grace had adopted wet methods for processing the vermiculite ore, which The Montana Department of Environmental Quality reported was believed to remove all asbestos, such that "it should not be a problem in the product." *See DEQ Report*, p. 6 attached as **Exhibit E**.

II. Policy Considerations

In addition to the requirement that Plaintiffs show foreseeability, they must also demonstrate that policy considerations support the imposition of a duty. *See Estate of Strever v. Cline* (1996), 278 Mont. 165, 173, 924 P.2d 666, 670. These policy considerations include: (1) the moral blame attached to a defendant's conduct; (2) the desire to prevent future harm; (3) the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (4) the availability, cost, and prevalence of insurance for the risk involved. *Cline*, 924 P.2d at 670. Notwithstanding the lack of foreseeability, Plaintiffs are unable to show that

there are strong policy considerations weighing in favor of a duty.

i. Moral blame

Plaintiffs allege that there is moral blame as “BNSF knew that there was asbestos in the vermiculite it was hauling into the Libby community, and BNSF knew that asbestos was harmful.” *Response*, 26-7. Whether BNSF knew that asbestos was harmful, or that the vermiculite mined by W.R. Grace contained asbestos is irrelevant to moral blame. The proper issue, is whether BNSF knew that the processed vermiculite ore was harmful and that its shipment presented a danger to the community requiring it to take special measures when transporting it. As discussed, Plaintiffs point to no evidence that BNSF had knowledge that the processed vermiculite being transported contained harmful levels of asbestos, and BNSF received repeated and unanimous certifications that the material was not hazardous.

ii. Desire to prevent future harm

There is no relevant public policy related to deterrence of future harm in this case. The vermiculite mine has been shut down for decades, and the party behind the mine went bankrupt. As a result, no future harm from mining or transporting vermiculite from Libby, MT will arise.

Plaintiffs’ argument that BNSF was involved in business with W.R. Grace is irrelevant to this issue. As described above, BNSF had no knowledge that the processed ore being shipped was harmful or that it presented a danger to members of the community. Further, BNSF was acting as required by both state and federal law. *See* 49 USCS § 11101; MONT. CODE ANN. §69-11-403. BNSF was legally required, as a common carrier, to

provide transport to cargo that it is presented with. The imposition of a duty would not alter this legal requirement for BNSF to transport cargo that it is presented with in the future and would have no impact on future harm.

iii. Extent of burden to Defendants

Plaintiffs argue that BNSF had a burden to exercise reasonable care, alleging that should have:

(1) inquired, studied and evaluated the dust hazard to the human health of the Libby community; (2) taken measures to prevent the toxic dust from collecting upon and escaping from its property; and (3) warned plaintiffs and the community of the true nature of the hazardous effects of the dust.

Response, p. 28. However, Plaintiffs manufacture a legal duty where none exists by arguing that BNSF should have studied the health hazards of transporting of refined vermiculite concentrate it was legally-mandated to carry and should have warned Plaintiffs of these hazards. However, BNSF has no duty to bystanders or town residents to test for, warn against, and protect them from, asbestos fibers that were entrained in vermiculite concentrate that was controlled by a third party — W.R. Grace — and not disclosed to BNSF. *Prindel v. Ravalli County*, 331 Mont. 338, 349-350, (Mont. 2006); *Lopez v. Great Falls Pre-Release Servs.*, 295 Mont. 416, 422 (Mont. 1999); *Orr v. State*, 324 Mont. 391, 406 (Mont. 2004); *see also* W. Page Keeton & William Prosser, Prosser and Keeton on the Law of Torts § 56, at 385 (5th ed. 1984).

Plaintiffs' argument misplaces these substantial burdens on BNSF. As a common carrier, BNSF is required to haul cargo presented to it by the shipper. *See* Mont. Code Ann. § 69-11-403; 49 U.S.C. § 11101(a). BNSF has no duty to warn; rather, the burden is on the

product shipper to identify and alert the railroad to any hazardous materials.¹ To hold otherwise would require transportation companies like BNSF to inspect all items that it was transporting, and in many cases, conduct chemical analysis, or toxicology studies for each individual item that it is not equipped to do without substantial consumption of time and money. This is a substantial burden for a transportation company and has been properly allocated by law to the cargo shipper.

III. Premises Liability and Attractive Nuisance

Plaintiffs next argue that BNSF owes additional duties pursuant to the theories of premises liability and attractive nuisance. *Response* pp. 31-34. However, Plaintiffs fail to recognize that if premises liability is the sole basis for BNSF's legal duty, it can only be applied insofar as they entered BNSF's property. More simply put — a claim under premises liability cannot extend to the imposition of liability for failing to warn of alleged dust hazards, or anything relating to BNSF's operating trains through town. Furthermore, as conceded by Plaintiffs, both premises liability and liability under the attractive nuisance doctrine still require a showing of foreseeability or knowledge.

Montana premises liability law holds that a party is not liable for injuries “resulting from open and obvious dangers *if he should not have anticipated harm to occur.*”

¹ *E.g.*, 49 C.F.R. §§ 171.2(a) (2014) (“No person may offer or accept a hazardous material for transportation in commerce unless that person is registered in conformance with subpart G of Part 107 of this chapter, if applicable, and the hazardous material is properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized...”); § 173.22 (2014) (“Except as otherwise provided in this part, a person may offer a hazardous material for transportation in a packaging or container required by this part only in accordance with the following” requirements.); § 173.31(a) (2014) (“No person may offer a hazardous material for transportation in a tank car unless the tank car meets the applicable specification and packaging requirements of this subchapter or, when this subchapter authorizes the use of a non-DOT specification tank car, the applicable specification to which the tank was constructed.”).

Richardson v. Corvallis Pub. Sch. Dist. No. 1, 286 Mont. 309, 321, 950 P.2d 748, 756, 1997 Mont. LEXIS 287, *24, 54 Mont. St. Rep. 1422 (emphasis added). Instead, whether the possessor of the premises should have anticipated harm depends on “the degree of ordinary care which reasonable persons would use under the same or similar circumstances.” *Limberhand v. Big Ditch Co.*, 218 Mont. 132, 145, 706 P.2d 491, 499, 1985 Mont. LEXIS 896, *22. This standard of care is heightened to willful and wanton misconduct, however, when the injured party used the property for recreational purposes at the time of injury. Pursuant to MCA 70-16-302:

A person who uses property, including property owned or leased by a public entity, **for recreational purposes**, with or without permission, **does so without any assurance from the landowner that the property is safe for any purpose if the person does not give a valuable consideration to the landowner** in exchange for the recreational use of the property. **The landowner owes the person no duty of care with respect to the condition of the property, except that the landowner is liable to the person for any injury to person or property for an act or omission that constitutes willful or wanton misconduct.** For purposes of this section, valuable consideration does not include the state land recreational use license fee imposed under 77-1-802 or other funds provided under 77-1-815.

Thus, Plaintiffs would have to show willful or wanton misconduct by BNSF if they were to pursue claims relating to their entry onto BNSF property to recreate in the vermiculite piles. Montana law defines “recreational purposes” as including “hunting, fishing, swimming, boating, waterskiing, camping, picnicking, pleasure driving, biking, winter sports, hiking, touring or viewing cultural and historical sites and monuments, spelunking, or other pleasure expeditions...” 70-16-301.

Case law has further discussed this issue, finding that walking to and from one’s

home in a residential area of a city is not the type of “recreational purpose” contemplated by Mont. Code Ann. § 70-16-302, *Dobrocke v. City of Columbia Falls*, 2000 MT 179, 300 Mont. 348, 8 P.3d 71, 57 Mont. St. Rep. 718, 2000 Mont. LEXIS 165 (Mont. 2000) *See also Fisher v. United States*, 534 F. Supp. 514, 1982 U.S. Dist. LEXIS 11060, (a school field trip to a wildlife refuge was a recreational activity, not an educational activity); *Weinert v. City of Great Falls*, 2004 MT 168, 322 Mont. 38, 97 P.3d 1079, 2004 Mont. LEXIS 253 (Mont. 2004) (sledding in city park was recreational). Importantly, the fact that a railroad is aware that an area of its property is frequently crossed by trespassers does not create the duty to fence or patrol the area. *Ballard v. MT Rail Link*, 1993 Mont. Dist. LEXIS 669, *16 (internal citations omitted).

Where there is a recreational purpose to the injured party’s conduct, and no willful or wanton conduct by the property owner, summary judgment is an appropriate recourse. *See e.g. Saari v. Winter Sports, Inc.*, 2003 MT 31, 314 Mont. 212, 64 P.3d 1038, 2003 Mont. LEXIS 33 (Mont. 2003) (Summary judgment was properly granted to the ski resort owner on the grounds that the owner, pursuant to the statute, owed no duty of care to the decedent for using the property after hours and, consequently, the survivors’ claims were precluded.)

As described above, there is no evidence that Plaintiffs’ alleged injuries were foreseeable to BNSF, or that BNSF had knowledge of a harmful condition on its property. Even if we assume, *arguendo*, that Plaintiffs’ alleged injuries were foreseeable to BNSF, they entered onto BNSF’s property for recreational purposes. Therefore, summary

judgment would still be appropriate because Plaintiffs have failed to show willful or wanton conduct on behalf of BNSF.

Plaintiffs additionally allege that BNSF had a duty under the doctrine of attractive nuisance. Plaintiffs Barnes and Braaten are alleging that they played in piles of vermiculite as children.² Plaintiffs again do not deny that there is a foreseeability requirement for a duty to be imposed under attractive nuisance doctrine. And in fact, Montana case law requires such a finding before a duty is imposed. In *Gagnier v. Curran Constr. Co.*, 151 Mont. 468, 475, 443 P.2d 894, 898-899, 1968 Mont. LEXIS 336, *10-11, the Montana Supreme Court favorably discussed an issue similar to the present case — whether piles of sand, from a construction site constituted an attractive nuisance:

It should be noted that up to now the Montana case law has not faced a case involving an excavation cave-in, a sandpile or clay bank, but ***there is a substantial body of case law in other jurisdictions holding these conditions to be duplicates of a natural condition, familiar to the average child, and do not call for the application of the attractive nuisance doctrine.*** See *Zagar v. Union Pac. R. Co.*, 113 Kan. 240, 214 P. 107; *Knight v. Kaiser Co.*, 48 Cal.2d 778, 312 P.2d 1089; *Edwards v. Maule Industries, Inc.*, Fla.App., 147 So.2d 5; *Ratte v. Dawson*, 50 Minn. 450, 52 N.W. 965; *Anderson v. Reith-Riley Const. Co.*, 112 Ind. App. 170, 44 N.E.2d 184; *Puckett v. City of Louisville*, 273 Ky. 349, 116 S.W.2d 627; *Alvis' Adm'r v. Weaver*, 206 Ky. 95, 266 S.W. 888; *Kotowski v. Taylor*, 31 Del. 430, 114 A. 861; *Plante v. Lorraine Mfg. Co.*, 78 R.I. 505, 82 A.2d 893; *Ann Arbor R. Co. v. Kinz*, 68 Ohio St. 210, 67 N.E. 479.

(emphasis added). Relying on these other courts, the Montana Supreme Court held that “[w]e believe ... that the correct view is that certain conditions in or about buildings under construction are not the type of conditions that can be classified as attractive nuisances.”

² Plaintiff Flores makes no such allegations.

Gagnier v. Curran Constr. Co., 151 Mont. 468, 475-476, 443 P.2d 894, 899, 1968 Mont. LEXIS 336, *11. Further, “although this doctrine is frequently exposed to extension through the influence of sympathy, it is and must be limited so that not everything a jury might find or a court rule upon as being attractive to children be admitted.” *Id.* The holding that attractive nuisances do not exist where the conditions duplicate a natural condition was similarly followed in *Limberhand v. Big Ditch Co.*, 218 Mont. 132, 140, 706 P.2d 491, 496, 1985 Mont. LEXIS 896, *12. There, the Court held that “the doctrine of attractive nuisance as such does not apply to such artificial streams or bodies of water any more than it applies to natural streams or bodies of water.”

Plaintiffs Barnes and Braaten have failed to present any evidence that the vermiculite piles they played in as children were any different on their face than naturally occurring piles of dirt and rocks. Furthermore, Plaintiffs have failed to present any evidence that BNSF was aware that the refined vermiculite it hauled contained asbestos. As such, Plaintiffs Barnes and Braaten’s allegations of attractive nuisance are boiled down to allegations that they were injured while playing in piles of, what was believed to be, regular soil.

IV. Duty: Conclusion

Plaintiffs are unable to make a showing of foreseeability, and as a result, cannot establish a duty. Even if Plaintiffs’ contention that community members were exposed to harmful amounts of asbestos from processed vermiculite is taken as true, there is no evidence that BNSF knew or should have known about this hazard. Further, there is

substantial evidence that BNSF was actively kept in the dark about any such hazards, as Grace did not placard their railcars and failed to indicate on bills of lading that the vermiculite contained harmful amounts of asbestos as required by law. As a result, there is no foreseeability, and without foreseeability, there is no duty. *Jacobs*, 2001 MT 98, ¶13.

Additionally, for a duty to exist, there must be a nexus relationship to give rise to a duty on the part of the actor. *See e.g.* The RESTATEMENT (SECOND) OF TORTS § 314 (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”) Here, BNSF did not owe Plaintiffs any legal duty because there was no direct relationship between Plaintiffs and BNSF.

B. As a common carrier, BNF is legally excepted from strict liability for its transport of W.R. Grace’s vermiculite.

As stated above, Plaintiffs are attempting to hold BNSF liable for doing something it is legally bound to do — accept goods properly tendered to it as a common carrier. Plaintiffs’ argument in support of strict liability fails because it (1) erroneously concludes that Defendants were engaged in an abnormally dangerous activity, and (2) ignores the fact that, under longstanding principles of common law liability, common carriers are exempt from strict liability for abnormally dangerous activities.³

Plaintiffs base their argument against BNSF’s motion for summary judgment on strict liability on the fact that Montana has not formally adopted §521. *See e.g. Response*,

³ *See also, Defendants’ Response to Plaintiffs’ Motion for Partial Summary Judgment re: Preemption and Abnormally Dangerous Activity*, which Defendants incorporate by reference.

p. 35. Section 521 provides that "[t]he rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier."

Plaintiffs assert that the Montana Supreme Court has not explicitly adopted §521, and argues that it is "highly unlikely to adopt §521." *See Response*, 38. However, Plaintiffs' argument that §521 does not apply was explicitly rejected in *Walsh v. Mont. Rail Link*, 2001 ML 1418, at *25-28 where the district court explained as follows:

Federal law provides in pertinent part that "[a] rail carrier providing transportation or services subject to the jurisdiction of the Board [of Transportation] under this part shall provide the transportation or service on reasonable request." 49 U.S.C. § 11101(a), (emphasis supplied). The mandatory nature of this federal provision supports the public policy behind the common carrier exception

Id. at *26.

Likewise, this same exact argument was present in *Anderson v. BNSF Railway Co.*, 2010 Mont. Dist. LEXIS 73, at *P7. In *Anderson*, the Court wrote as follows:

Section 521 of the Restatement has not been expressly recognized by the Montana Supreme Court. However, there is no reason to believe that this section should not be recognized as well, since so numerous other sections of the Restatement of Torts have been adopted. See *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, P36, 338 Mont. 259, 165 P.3d 1079. Moreover, numerous other jurisdictions have adopted this section.

Importantly, the comments to §521 explicitly provides that §519 must be read together with §521. The 9th Circuit Court of Appeals explained in *Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co.*, 534 F.3d 986, 1005-06 (9th Cir.

Wash. July 29, 2008) “*Hanford Nuclear Reservation Litig.*”) that the comments to §519 indicate the common carrier exception is part and parcel of strict liability. Comment “a” to §519 states that “[t]he general rule stated in this Section is subject to exceptions and qualifications, too numerous to be included within a single section. It should therefore be read together with §§ 520 to 524A, by which it is limited.” (RESTATEMENT (SECOND), § 519, comment “a”).

There is no genuine dispute that BNSF’s hauling of Grace’s vermiculite was for the purposes of interstate commerce, with Plaintiffs expressly pleading that 80% of the nation’s vermiculite originated from the Libby mines. *Response* at 5. Further, the majority of jurisdictions have found that the allegations raised in the strict liability cause of action are actually negligence claims. The Court in *Walsh* wrote as follows:

The case at bar involves conflicting public policies, in that there is a clear and undeniable public need to provide nationwide transportation for commonly used materials regardless of the characteristics of such materials; however, there is also a clear and undeniable public need to provide for safe transportation of hazardous materials to whatever extent is reasonably possible. To that end, the majority of jurisdictions apply the “reasonable care” standard which, of course, is the general negligence standard. This Court finds the majority rule persuasive, based upon public policy that materials such as those involved in the Alberton derailment are commonly and widely used throughout the nation for the general good of the public, and thus, transportation of such materials is a necessary part of modern society. The common carrier exception to strict liability activities involving the transportation of hazardous materials is intended to resolve the public policy conflict based on the conviction that general negligence law and federal and state regulatory provisions are sufficient to serve public policy reasons for imposing strict liability. Therefore, the Court joins the majority position in rejecting the Plaintiffs’ argument that

MRL should be held strictly liable as a result of the Alberton derailment.

Walsh, 2001 ML 1418 * 20-21. As BNSF was engaged in interstate commerce and not engaged in an abnormally dangerous activity, there is no fact or circumstances that could possibly give rise to a strict liability claim. As such, the strict liability cause of action must be dismissed.

C. Plaintiffs' claims are preempted and precluded by the FRSA and the HMTA

Plaintiffs' claims should be preempted and precluded by the Federal Railroad Safety Act of 1970, 49 U.S.C. §§20101-20153 and/or the Hazardous Materials Transportation Act, 49 U.S.C. §§5101-5128 ("HMTA").⁴ These acts warrant the dismissal of Plaintiffs' claims, as well as specific portions of Plaintiffs' claim that allege BNSF was negligent in:

- Failing to warn;⁵
- Failure to inspect freight cars;⁶
- Allowing dust to escape its railcars;⁷
- The selection of railcars for transporting material.⁸

Through application of the HMTA, the federal government, which has exclusive jurisdiction over this subject matter, determined that asbestos bound in minerals is not a hazardous material that requires special packaging or handling during transportation. *See*

⁴ *See also, Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment re: Preemption and Abnormally Dangerous Activity*, 7-17.

⁵ *See e.g.*, 49 C.F.R. § 171.2(a) (2014) (burden is on the shipper to ensure that hazardous material is properly classed and packaged).

⁶ *See In re Derailment Cases*, 416 F.3d 787, 793-4, 2005 U.S. App. LEXIS 15834 (8th Circuit, 2005).

⁷ *See* 49 C.F.R. § 213.9 et seq (regulations concerning train speed).

⁸ *Roth v. Norfalco LLC*, 651 F.3d 361, 370-372.

49 C.F.R. § 172.102(c)(1)(156) (“Asbestos that is immersed or fixed in a natural or artificial binder material, such as cement, plastic, asphalt, resins or mineral ore, or contained in manufactured products is not subject to the requirements of this subchapter.”); *see also* 43 Fed. Reg. 8563 (March 2, 1978) (“[T]he [DOT] does not believe their specific regulation is warranted.”) The federal government has concluded that no such special packing or transportation is necessary in order to carry this material safely on a rail line. The plaintiffs cannot contend otherwise in this case.

A state law claim may also be barred by what is referred to as “negative” or “inverse” preemption. Negative preemption occurs “ ‘where failure of . . . federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute[.]’ ” *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)). In such situations, “States are not permitted to use their police power to enact such a regulation.” *Ray*, 435 U.S. at 178. In other words, a considered decision not to regulate a given subject invokes preemption to the same extent as a decision to regulate. *Id.*

Here, Congress has addressed this area in full and has affirmatively expressed clear intent that area of non-hazardous railroad carrying should be privileged and free of state law and regulation. Congress enacted HMTA in 1975 “to protect against the risks to life, property and the environment that are inherent to the transportation of hazardous material in intrastate, interstate and foreign commerce.” 49 U.S.C. §5101. HMTA set out to define

what constitutes a hazardous material, how it must be packaged, how it must be designated and how it must be shipped. 49 U.S.C. §5125. The HMTA does not include a savings clause exempting common law requirements from the bundle of those non-federal laws and regulations displaced by the federal scheme. *Roth v. Norfalco, LLC* 6561 F. 3d 367, 378-379 (3d Cir. 2011). Similarly, the FRSA preempts covered state law tort claims, in addition to covered statutes and regulations. *CTX Tranp., Inc. v. Easterwood*, 507 U.S. 658 at 663 (1993). Both the HMTA and FRSA show Congress' clear intent to regulate the transportation of hazardous materials and railroad safety to provide uniformity among the states and both decline to include naturally occurring mineral ore that may contain asbestos as a hazardous material requiring greater safety.

Plaintiffs' common law claims about whether BNSF had a legal duty to take greater precautions with regard to its carrying of the vermiculite mineral ore seeks to impose legal duties upon Defendants that stand as an obstacle and intrude upon a field of regulation that has been historically reserved to the federal government. *See, Major v. CSX Transp.*, 278 F. Supp. 2d 597, 607 (D. Md. 2003). The argument for preemption is particularly strong where "the State regulates in an area where there has been a history of significant federal presence" such as railroad safety and hazardous materials. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005) (quoting *United States v. Locke*, 529 U.S. 89, 107, 146 L. Ed. 2d 69, 120 S. Ct. 1135 (2000)). The power of the federal government to preempt state law in areas in which the federal government has the power to legislate is generally assumed to stem from the Supremacy Clause. *Garcia v. San Antonio Metro. Transit Auth.*,

469 U.S. 528, 554-56 (1985). There is no dispute that the vermiculite being hauled by BNSF then entered the stream of interstate commerce – with Plaintiffs alleging in the Complaint that the Libby mines produced 80% of the world’s vermiculite ore. Vermiculite continues to be sold in gardening and home improvement stores around the world. BNSF is a common carrier and is mandated under both federal and state law to accept cargo for transport upon any reasonable request.

Congress made a considered decision to exempt asbestos-containing mineral ore from regulation. “[W]hen Congress intends that an activity not be subject to any regulation or remedies, such that the activity becomes privileged under federal law, then state regulation and remedies are precluded.” *People v. Union Pac. R. Co.*, 141 Cal. App. 4th 1228, 1251 (2006). Federal regulations also prohibit placing warnings on trains (ie. placarding) unless, *inter alia*, the cargo is specifically defined as a hazardous material. For example, *see* 49 C.F.R. 172.502(a).

Plaintiffs incorrectly argue that, in addition to a statute or regulation governing a railroad’s conduct relating to allegations of negligence, BNSF must show that the regulation “is meant to prevent the type of injury alleged.” *Response*, 44. In support of this, Plaintiffs point to the Maryland lower court case, *CSX Transp., Inc. v. Miller*, 858 A.2d 1025 (Md. App. 2004). In *Miller*, the lower court held that 49 C.F.R. § 213.103, ballast regulation, applied to track structure and concerned the safe movement of trains, not the quality of work place provided for employees. *Id.* at 1050. Therefore, a plaintiff’s claim that he hurt his knees from walking on ballast was not preempted.

This analysis was rejected by more recent cases, including the 6th Circuit case, *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 2009 U.S. App. LEXIS 5746, 2009 FED App. 0104P (6th Cir.) The plaintiff in *Nickels* similarly alleged he was injured because his job required him to walk on track ballast. *Id.* 428. Nickel claimed that the railroad failed to provide a safe working environment by using large mainline ballast -- instead of smaller yard ballast. *Id.* The 6th Circuit held that this claim was precluded under the FRSA's ballast regulation, stating "49 C.F.R. § 213.103 covers the issue of ballast size and precludes the plaintiffs' FELA claims." *Nickels*, 433.⁹ While the intent of the regulation relates to track stability, the regulation has a preemptive effect on allegations of negligence related to walking on the ballast.

Under the same analysis, Plaintiffs' specific claims referenced above are preempted.

II. CONCLUSION

For the reasons set forth herein, the Court should grant summary judgment in BNSF's favor.

Knight Nicastro, LLC
Respectfully submitted,

s/ Nadia H. Patrick

⁹ See also *Gailey v. Norfolk S. Ry. Co.*, No. 4:13CV2830, 2015 U.S. Dist. LEXIS 96596, 2015 WL 4509071 (M.D. Pa. July 24, 2015) (§ 213.103 precluded FELA claims related to injuries sustained in track areas on which ballast was used to contribute to track's support, stability, and drainage.); *Crabbe v. Consolidated Rail Corp.*, 2007 U.S. Dist. LEXIS 80895, 2007 WL 3227584 (E.D. Mich. Nov. 1, 2007) (claim for work injury due to requirement that plaintiff walk on improper or oversized ballast precluded by FRSA); *McCain v. CSX Transp., Inc.*, 708 F. Supp. 2d 494, 504 (E.D. Pa. 2010) (Robreno, J.) (finding the plaintiff's claims based on the nature and size of the track ballast were precluded, in persuasive reliance on *Nickels*); and *Munns v. CSX Transp., Inc.*, 2009 U.S. Dist. LEXIS 30394, *5-7, 2009 WL 805133 (N.D. Ohio Mar. 27, 2009) (holding that federal law precluded Plaintiff's theories as to the size of ballast which he had to work on.)

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