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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*	Cause No. AC 17-0694 PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION IN LIMINE RE: NON-PARTIES Applicable to *Hutt v. Maryland Casualty Co. et al.*, DDV-18-0175

Plaintiff has moved the Court for an order *in limine* preventing Defendant Maryland Casualty Company ("MCC") from argument, suggestion, examination, testimony or evidence regarding responsibilities of non-parties to this case, including collateral sources.

Once rung, a bell cannot be unrung. *Voir dire* questions, opening statement suggestions or introduction of evidence where no foundation has or can be established are the precise dangers to which a motion *in limine* is directed.

In addition to limiting argument and suggestion, Plaintiff seeks a specific ruling that (a) a limiting instruction must be given, (b) the instruction must clearly state that the jury is not to assign fault or liability to non-parties for their actions or failures, and (c) the instruction must clearly state that the jury may only consider evidence of the conduct of non-parties for the purposes of evaluating whether MCC met its own duties in the circumstances.

The following argument responds to MCC's objections to the requested relief.

A. An order *in limine* is required to conform the empty chair defenses to Section 27-1-703, MCA.

The instant motion *in limine* is required to give effect to the Constitutional limitations on the empty chair defense incorporated into Section 27-1-703, MCA. The jury may not assign fault or apportion liability to the conduct of non-parties, except as permitted by that statute. Comment or suggestion to the effect of assigning fault during *voir dire* or opening statement would defeat these Constitutional requirements. Similarly, while much evidence of conduct of others may be admissible to the extent it proves MCC's knowledge, a cautionary instruction is required lest the jury be misled to believe that apportionment of fault should be made by reason of the evidence.

1. MCC may not assign fault or liability to the conduct of W.R. Grace.

MCC urges that it is permissible to treat W.R. Grace as an empty-chair party because Grace is not subject to the jurisdiction of this Court. MCC is correct that Grace is not one of the "parties" all of whom are under the current[1] jurisdiction of this Asbestos Claims Court. However this does not mean that, in the absence of current jurisdiction over Grace, MCC is permitted to urge the jury to assign or apportion fault to Grace. Rather, Section 27-1-703(6)(c), MCA, makes absolutely clear that such assignment or apportionment is prohibited:

> (c) Except for persons who have settled with or have been released by the claimant, comparison of fault with any of the following persons is **prohibited**:
> (i) a person who is immune from liability to the claimant;
> (ii) a person who is not subject to the jurisdiction of the court; or

[1] While W.R. Grace may ultimately be subject to this Court's jurisdiction in trials over its liability, such jurisdiction cannot arise until the prerequisite "non-binding arbitration" of the claims for injury to Hutt has not been completed (Grace PI Trust TDP §7.6).

(iii) any other person who could have been, but was not, named as a third party.

§ 27-1-703(6)(c), MCA (emphasis added).

Notwithstanding this clear prohibition, MCC complains that it must be allowed to assign fault to Grace because Grace was not bound by MCC's misidentification of the appropriate dust controls, "safe" exposure levels, or worker hazard communications, and because Grace had control over implementing MCC's safety recommendations. Because it could not force Grace to follow its recommendations and safety design, it argues, MCC cannot be held liable for MCC's negligence in such recommendations and design, and therefore the responsibility lies, in part if not in whole, with Grace. This contention is exactly an argument to apportion responsibility to a non-party. It is impermissible.

In contrast, Plaintiff acknowledges that MCC may offer evidence of (a) MCC's knowledge of what Grace was and wasn't doing, and (b) what control MCC had over its safety undertakings. The distinction is clear: evidence or argument offered for the purpose of assigning fault to a non-party is not allowed; evidence and argument offered for the purpose of establishing what MCC did and the reasons for its actions are admissible.

Because evidence may serve a dual purpose, Rule 105, M.R.Evid., is triggered. A limiting instruction must be given with any evidence of non-parties' conduct. In addition, this Court should rule that comment, argument or suggestion to the jury regarding apportionment of fault is clearly impermissible.

The above holds true whether or not the evidence was used in Grace's criminal trial. If evidence used in that trial is relevant in this case to the show MCC's contemporaneous knowledge, and is limited by a Rule 105, M.R.Evid., instruction, the evidence is admissible

in this trial. What is not admissible and would be highly prejudicial, for example, is the fact that Grace was criminally prosecuted.

2. MCC may not assign fault or liability to the conduct of the State or other non-parties.

MCC contends that the State had enforcement authority over Grace and that therefore its fault is greater than MCC's. This argument (a) assumes the State had enforcement power, (b) ignores that MCC *and not the State* had undertaken and performed safety engineering, industrial hygiene services and Safety program design (including hazard communication) for the protection of Grace workers in Libby, and (c) ignores that, compared to the State, MCC had at least as much power and opportunity to warn workers of the asbestos hazard.

More importantly, the issue of whether the State is at fault is an impermissible consideration under § 27-1-703, MCA. As with Grace, much evidence regarding the conduct of the State is relevant and admissible because it is relevant to whether MCC met its duty of care. For example, the knowledge of MCC is relevant to the issue of whether MCC acted reasonably with respect to what it knew and did not know. What the Montana Board of Health inspectors did and did not find regarding the exposure levels and toxicity are therefore relevant **because** MCC received the reports of those inspections. Similarly, the confidential nature of the reports, including MCC's knowledge that they had not been disclosed to the workers is highly relevant to the question of what hazard communications were needed.

MCC is not limited in its defense of its conduct by the instant motion. The only thing MCC may not do with evidence of the State's actions is use it to assign or apportion fault to the State. There is no relevance, for example, to the later determination of the Montana Supreme Court that it was error to follow the Attorney General's opinion, since (a) that determination had no bearing on what MCC knew or didn't know at the time of its conduct,

and (b) the only purpose the evidence could serve would be to establish fault of the State of Montana, which is an impermissible consideration under § 27-1-703, MCA.

Similarly, no evidence of conduct or failures of any other entity (including the workers' union) is admissible for the purpose of proving that someone else (an empty chair) should be apportioned a share of responsibility.

B. The jury should be instructed that the Court will make all determinations of whether and how the jury's verdict may offset by other recoveries.

MCC affirmatively asserts its intention to inject into this case directly or indirectly considerations of recoveries from non-parties and other collateral sources. MCC's approach would clearly constitute a violation of Montana law.

1. Collateral sources and contribution offsets are to be performed by the trial court post-verdict.

The analysis begins with Montana law which carefully directs the jury to determine the damages caused by a defendant's conduct, and then requires the trial court to make adjustments to that verdict for offsetting third party recoveries and collateral sources.

First, recoveries from other responsible actors who are not included in a fault apportionment authorized by § 27-1-703, MCA, are handled by way of a court's determination of the ('*pro tanto*") offsetting amount from a jury verdict that assures the Plaintiff receives no double recovery:

> The District Court determined that Klemens was entitled to a *pro tanto* offset of the amounts Schuff received through her settlement, pursuant to this Court's decision in *State ex rel. Deere v. District Court* (1986), 224 Mont. 384, 730 P.2d 396, superseded in part by statute as provided in *Plumb v. Fourth Jud. Dist. Court* (1996), 279 Mont. 363, 927 P.2d 1011. In that case, which similarly involved multiple defendants, we held that an award entered against "remaining tortfeasors is to be reduced by a dollar credit in the amount of consideration paid by the settling tortfeasor ..." *Deere*, 224 Mont. at 386, 730 P.2d at 398. Thus, the District Court ... effectively reduced Schuff's jury verdict by the undisclosed sum received in settlement with the other defendants.

> [T]he underlying principle of the *pro tanto*, or "dollar-for-dollar" award reduction [is] that an injured party is entitled to but a single satisfaction for a single injury. See *Maddux v. Bunch* (1990), 241 Mont. 61, 67, 784 P.2d 936, 940....
> ¶ 106 Accordingly, we hold that the District Court did not err when it reduced Schuff's jury verdict award by the amount received prior to trial in settlement with the other named defendants.

Schuff v. A.T. Klemens & Son, 2000 MT 357, ¶¶ 103-106, 303 Mont. 274, 308, 16 P.3d 1002, 1023.

Second, the court also makes a post-verdict adjustment to account for collateral sources under a fairly sophisticated calculation that reflects the policy of Montana law:

> The jury shall determine its award without consideration of any collateral sources. After the jury determines its award, reduction of the award must be made by the trial judge at a hearing and upon a separate submission of evidence relevant to the existence and amount of collateral sources.

§ 27-1-308, MCA (emphasis added).

2. Recoveries from Grace may be reduced following the jury's award.

MCC argues that the jury can be told that the Plaintiff may recover from Grace for its role in the cause of his injury, by way of introduction of claim information Hutt has presented to the Trust. Not only is that a legally inappropriate consideration because it engages the jury in liability apportionment in violation of §27-1-703, MCA, but it leads the jury to speculation that is factually unfair.

First, Hutt may not recover from Grace in proportion to Grace's causation of injury. For example, if the separate jury in the case against Grace[2] were to find that the damages caused by Hutt's asbestosis are **less** than the damages found by the jury in this case against MCC Hutt will get no recovery from Grace by reason of the offset rule (*Schuff, supra).* Second, even if the jury in a case against Grace awarded **more** in damages, the excess

[2] See footnote 1.

amount would be reduced by the payment percentage under the Grace PI Trust TDP, which permits payment of **only 26 per cent** of the resulting judgment against Grace. (TDP § "Subject to the applicable Payment Percentage") The jury simply must not be permitted to speculate as to such outcomes and adjust its verdict based on such speculation. Rather all of these considerations are the exclusive province of the trial court judge.

3. To protect from juror confusion or erroneous assumption, the jury should be instructed that other recoveries are addressed by the trial court post-verdict, and defense counsel must be precluded from improper suggestion or inference.

Given the presence of the multiple actors who are arguably at fault, and the age of the Plaintiff which triggers the jury's knowledge of Medicare coverage (though not necessarily of the "secondary payer" provisions of Medicare law that permit Medicare to recover its payments out of a tort verdict), there is a substantial ***inherent*** danger that the jury will be confused as to how to assign damages to MCC's wrongdoing in a way that fairly accounts for these concerns. Montana law describes this danger in strong terms constituting reversible error:

> [W]e determined that the District Court in *Thomsen* erred in allowing the admission of the collateral source evidence and we remanded for a new trial. Furthermore, the California Supreme Court's statement regarding admissibility of collateral source evidence was worded far more strongly against the admission of that evidence than MRL suggests:
>
> > The potentially prejudicial impact of evidence that a personal injury plaintiff received collateral insurance payments varies little from case to case. Even with cautionary instructions, there is substantial danger that the jurors will take the evidence into account in assessing the damages to be awarded to an injured plaintiff. Thus, introduction of the evidence on a limited admissibility theory creates the danger of circumventing the salutary policies underlying the collateral source rule. Admission despite such ominous potential should be permitted only upon such persuasive showing that the evidence sought to be introduced is of substantial probative value. [Emphasis added.]
>
> *Thomsen*, 253 Mont. at 463, 833 P.2d at 1078 (quoting *Hrnjak v. Graymar, Inc.* (1971), 4 Cal.3d 725, 94 Cal.Rptr. 623, 484 P.2d 599, 604).

Mickelson v. Montana Rail Link, Inc., 2000 MT 111, ¶ 38, 299 Mont. 348, 356–57, 999 P.2d 985, 991 (emphasis added).

The danger of prejudice which inheres in this case is further amplified given MCC's affirmative assertion that it intends to offer evidence of Hutt pursuing other claims (e.g. against the Grace Bankruptcy Trust).

In view of the inherent and enhanced danger, this Court should rule both that (a) collateral recoveries and non-party recoveries and offsets are inadmissible and cannot be brought to the attention of the jury by argument, comment or inference, and (b) the jury should be instructed[3] so as to assure it is speculating as to such other recoveries and taking them into account when calculating the damages caused by MCC's wrongdoing. The instruction should be on Montana law under § 27-1-308, MCA, and § 27-1-703, MCA, with an instruction substantially similar to the following:

> The law provides procedures and rules by which the Court will determine whether damages determined by the jury may be offset by other sources of recoveries, if any. You also may not apportion fault to individuals who are not parties to this action. The determinations of any necessary offsets are to be made by the Court, and are not to be considered by you when determining what damages, if any, should be awarded under the damage instructions given to you.

CONCLUSION

Plaintiff respectfully requests that the Court grant this motion *in limine* and preclude Defendants from mentioning, insinuating, or introducing evidence regarding the non-party and collateral source matters identified above.

[3] "Even with cautionary instructions, there is substantial danger that the jurors will take the evidence into account in assessing the damages to be awarded to an injured plaintiff. *Hrnjak v. Graymar, Inc.*, 4 Cal. 3d 725, 732, 484 P.2d 599, 604 (1971)(emphasis added); *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541, 552, 257 P.3d 1130, 1135 (2011).

DATED this 7th day of December 2018.

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