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IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

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

MCC's argument for admission of evidence regarding union conduct is based on a summary of evidence calculated to lead this Court to factually erroneous inferences. MCC's argument demonstrates how MCC intends to lead the jury to speculate as to such impermissible inferences as well as to engage in impermissible assignment of duties and apportionment of fault. Specifically, MCC's brief lays out a road map for its proposed use of evidence relating to union conduct. The roadmap goes like this:

1. Evidence establishes that the union may have known of sufficient information to evaluate whether a hazardous asbestos exposure condition existed at the Grace Libby operation.

2. The jury should conclude the union therefore had a duty to tell its membership that the dusty conditions at the operation constituted an unsafe asbestos exposure hazard.

3. The union leadership might have told its membership of the essential information necessary for the workers to know there was an ongoing hazardous exposure and therefore the union did convey all such essential information.

4. The jury should therefore apportion fault to the union's breach of duty and thus relieve MCC of responsibility for MCC's failure to warn workers of MCC's detailed knowledge of the asbestos hazard.

In the following reply, Plaintiff will demonstrate that (a) the factual inferences MCC seeks to raise are false, (b) there is no foundational evidence that the union had sufficient information to evaluate whether the dusty conditions at the mill presented a dangerous and excessive asbestos exposure hazard, (c) the jury must not be allowed or encouraged to make a determination of whether the union may have owed a duty with respect to the asbestos exposure hazard, (d) the jury must not be permitted or encouraged to speculate in the absence of proof that meets MCC's burden of proof, and (e) apportionment of fault to the union violates Montana law regarding empty chair defenses.

ARGUMENT

A. MCC's summary of evidence is designed to raise factual inferences that are not supported by the actual evidence.

At pages 3-6 of its brief, MCC cites to evidence purporting to demonstrate both (a) the contention that the union had substantial knowledge of the essential facts demonstrating an asbestos hazard, and (b) the contention that such knowledge was conveyed to the workers.

Despite the design of MCC's recitation, the evidence does not support an inference of either contention.

First, MCC attempts to equate knowledge of "dust" and "dusty" conditions to knowledge of asbestos content at dangerous levels. Obviously, everyone knew the Libby operation was extremely dusty and that the dust was a considerable nuisance. As anyone who has driven up a busy forest service road in August understands, dust can irritate the lungs. But the dusty road does not suggest the presence of deadly toxins. None of the evidence of "dust" knowledge cited by MCC describes an exposure to dangerous levels of asbestos.

Second, MCC falsely equates the fact of "letters" between the union leaders and the State Board of Health with a disclosure of the State Boards "reports." MCC misleadingly contends "the union received **reports** from the State Board of Health and read them at union meetings." In fact, there can be no dispute that the state Board of Health reports were kept confidential by the State despite the union's written efforts seeking information. Indeed, the State of Montana has affirmatively acknowledged that it kept the reports confidential and only to be disclosed to Grace management because it felt constrained to maintain the confidentiality by reason of an Montana Attorney General opinion:

> The [Montana Industrial Hygiene] Act forbade public disclosure of reports of the industrial hygiene division ... Shortly after the enactment of this legislation, the State board of health requested the opinion of the Attorney General concerning the disclosure of reports [and the Attorney General opinied] *the legislature has restricted the use of all reports, records, and data of the division ...[t]hey are therefore, confidential in character."*

Respondent [State of Montana]'s Brief, Orr v State of Montana, Supreme Court Cause No. 02-693 (emphasis in **original).**

Consistent with this confidentiality, the state Board of Health stamped every one of its reports "CONFIDENTIAL ... not for distribution except to the management of the Zonolite Company." (See, e.g., MCE001, MCE002, MCE006, MCE010, emphasis added.) Moreover, MCC knew and relied on the facts that the reports had this "privileged character" (MCE102 at p.6), had not been disclosed to the "unions and the general public" (MCE102 at p.7), and that MCC therefore would benefit from a strategy to keep "the State Board reports ... out of the hands of the Industrial Accident Board, and through it, the general public." (MCE102 at p.2.)

Instead of evidencing disclosure of the State Board reports, the documents and testimony cited by MCC demonstrates the union officials **failed** in its efforts to acquire information through "letters" exchanged with the State Board of Health. An example of such letters is attached to this brief as Exhibit A:

> "Dear Mr. Bundrock:
> Thank you for your letter ... concerning the Zonolite Company. We hope to get back to Libby soon and will make another review of the situation at the mill ...
> As you may know, the enforcement provisions of the Industrial Hygiene Act of 1939 are very poor, and **various opinions, over the years, from the Attorney General's Office** have not strengthened the Act any ...
> We appreciate your interest in this matter and will make another inspection of the Zonolite Plant at the first opportunity." (emphasis added)

No reports were attached to this or any other letter. Nothing in this or any other letter evidences disclosure of the State Board reports, the content of those "confidential" reports, or any other disclosure of a hazard of exposure to dangerous level of a deadly airborne toxin.

On their face, other "reports" described by MCC are reports of the union's "**dust** committee," a handful of union members with respect to whom there is no evidence they knew anything about a hazard of dangerously excessive asbestos exposures. Indeed, one of

the "dust committee" reports cited by MCC confirms the union's lack of information about what the confidential State Inspection Reports of the contemporaneous state inspection revealed: "no information is available yet" (Exhibit "D" to MCC's response brief at bottom of last page).

Third, MCC relies on testimony that **if** the state Board of Health reports had been disclosed they may have been read at union meetings. In contrast, the clear record established through union Secretary Art Bundrock is that none of the State Board reports **were** received by the union:

> Q: I would like to direct your attention to ... a report from the state Board of Health dated January 12, 1959 ...To the best of your knowledge was in fact that report kept confidential from the union?
> A: Yes.
> Q: Prior to [this litigation], had you seen that report previously?
> A: No.
>
> Q; Art, there are other reports [1962, 1963, 1964, 1965,1966,1967] Do you recall based upon your knowledge as to whether you or the union ever received a copy of those reports?
> A: None.
> *Art Bundrock deposition April 18,1997, at pp90-91 (attached as Exhibit B)*

MCC is correct that there is evidence that some of the union leaders were aware of the Lilas Welch Occupational Disease claim and that that claim may have been based on "silicosis or asbestosis." Information about an isolated occupational disease claim, however does not put union leadership (let alone union membership) on notice that (a) the dust at the mill was primarily toxic asbestos (40 to 80%), (b) exposure levels were in excess of every known standard of safety (by as much as 10 to 100 times), (c) long term exposures to excessive levels of asbestos regularly causes disabling fibrotic disease, or (d) there was a high incidence (at least 60 of some 200 workers) that already had lung abnormalities from

the exposure to the toxic properties of the dust. These latter (a-d) pieces of information were essential to knowledge that dust exposures at the plant was not merely a nuisance but presented an ongoing and ubiquitous unsafe exposure that was causing a high incidence of disease.

Moreover, there is absolutely no evidence that there was any communication to union membership of the facts of the Lilas Welch claim. Moreover, in contrast to the absence of evidence of union knowledge or distribution of the critical information, is unrefuted evidence that MCC was aware of worker ignorance and deliberately addressed methods to keep the problem under wraps: See, e.g. MCE102 ("the only persons aware of the studies are the insured's officials and Dr. Little [such that] it would be advantageous not to "reveal the extent and severity of the problem [of a good many occupational disease claims]"); MCE086 ""without anyone else being in on the conversation ... "confidentially give you this information ... ...keep this between us"). (Exhibits MCE102 and MCE086 are attached to Plaintiff's Statement of Uncontroverted Facts filed in support of Hutt's Motion for Summary Judgment.)

With the above clarification of the factual record, the following arguments address whether there is an evidentiary foundation for the jury to do more than speculate about the role of the union and its legal duties, and use any unfounded inferences and legal conclusions to improperly assign proportions of fault.

B. There is no evidence that the union leadership had sufficient knowledge to make a determination that there was a hazard of unsafe exposures to asbestos at the Libby operation.

MCC's argument is built on the false premise that it is entitled to introduce evidence without foundation. On the contrary, evidence is not admissible unless the fact it tends to prove is genuinely and legitimately "of consequence to the determination of the action." Rule 401 M.R.Evid.

Thus, before MCC can engage the jury on peripheral inquiries with the hope that a prejudicial seed will be planted that the union's presence somehow shields MCC from liability, it must lay a foundation that gives the evidence significance "of consequence."

Evidence with respect to a contention regarding the conduct of the union requires the foundational elements: (1) that the union's conduct is a permissible issue (see arguments C and E below); and (2) that the evidence has factual foundation. A factual foundation is missing here because there is absolutely no evidence that the union had the three facts that are essential to recognition of an exigent toxic hazard in the workplace. Specifically, there is no evidence that the union leadership had knowledge that:

1. the pervasive dust was something profoundly different from the apparent nuisance to the health of workers, and specifically that the dust was 40 to 80 percent toxic, deadly **asbestos**;
2. the levels of asbestos were not just minor exposures typical of the frequent use of asbestos in industrial workplace (e.g. pipe insulation etc.), but were consistently at levels known by MCC to exceed every recognized standard of safety by as much as 10 to 100 times, and therefore presented an exigent hazard; and
3. the exposure hazard did not present a mere typical workplace "risk" that might cause injury, but was in fact causing lung impairment and disease at epidemic proportions.

In the absence of evidence that the union knew any let alone all of the above three facts, there is neither a basis to impose a duty to act (warn) nor a factual foundation for the suggestion that the union should have or did warn its membership.

Similarly, in the absence of foundational evidence making it more likely than not that the state Board of Health broke the commands of the Montana Attorney General opinion and delivered to the union the reports stamped "CONFIDENTIAL ... not for distribution except to the management of the Zonolite Company," MCC may not make suggestion or offer evidence urging the jury to speculate that MCC's own attorney's (Larrick's) statements regarding the unrevealed and privileged character of those reports is "impeached" (See MCC Response Brief at p. 7 ("would impeach Larrick's statements").

C. MCC must be prohibited from suggesting that the jury may decide that the union owed a duty to its members to warn of a safety hazard.

MCC contends that evidence of union conduct is relevant to prove that the union owed a "duty" to warn. The fact that MCC makes this argument demonstrates why the evidence is inherently prejudicial: the jury must not be allowed to make the legal determination of whether the union owed a duty. The jury would necessarily be confused by evidence or argument offered to direct the jury to such legal conclusion.

Even if the duty of the non-party union were a relevant consideration (it is not- see argument E below) the legal determination of whether a duty is owed requires a legal analysis of foreseeability of injury. In short, without knowledge of any of the three key facts listed in the preceding argument, MCC's duty argument collapses.

D. Even if the union leadership had known the essential facts of the asbestos hazard, MCC must not be allowed to ask the jury to speculate on the possibility

that it communicated such knowledge to membership, in the absence of sufficient evidence to meet MCC's burden of proof.

The reason for the requirement of a foundation of relevance to a fact of "consequence" (Rule 401, M.R.Evid.), is that without such foundation the jury is at best confused and at worst led to an impermissible inference of apportionment of liability. Because of this concern, even evidence that could be relevant should be excluded in the absence of sufficient foundation. Thus, the Montana Supreme Court sustained the trial court's exclusion of evidence of safety related conduct of BNSF where there was not sufficient evidence of relationship to an asbestos exposure in Somers, Montana:

> The District Court granted BN's motion in limine to preclude admission of evidence, including several letters, which referenced non-asbestos OSHA violations by BN and its refusal to permit access, at other plants, to OSHA inspectors without a warrant. The District Court acknowledged the evidence could be admissible under Rule 406 as habit evidence, but excluded it under Rule 403, reasoning that "the evidence does not appear particularly relevant to show that there were violation of OSHA regulations concerning occupational asbestos exposure at the Somers Tie Plant.

Daley v. Burlington N. Santa Fe Ry. Co., 2018 MT 197, ¶ 13, 392 Mont. 311, 425 P.3d 669, reh'g denied (Sept. 18, 2018) (emphasis added); *accord Stokes v. Ford Motor Co.,* 2013 MT 29, ¶ 25, 368 Mont. 365, 300 P.3d 648, (failure to establish foundation that "proposed evidence satisfied the requirement of substantial similarity"); *Nelson v. Hartman*, 199 Mont. 295, 299, 648 P.2d 1176, 1178 (1982) ("Evidence that a driver has no license and has been designated a habitual offender for driving purposes is highly prejudicial [and] could not be used to prove any specific act of negligence .... The court was correct in ... demanding that a proper foundation be laid [that the evidence supported a conclusion of lack of capacity] prior to admitting the evidence.")

In this case, one element of missing foundation is that there is no substantial evidence that would meet MCC's burden to prove the connecting piece: that the union leadership conveyed whatever knowledge of the hazard it may have had to the workers, and specifically to Hutt. The best that MCC can offer is that Hutt may have attended one or two union meetings in 1968 and 1969 (e.g. not at meetings in which there is evidence that dust conditions were addressed).

Given the absence of evidence that the leadership knew of the three key facts constituting a hazard ***and*** the absence that any information concerning asbestos hazard (or indeed, any workplace safety issue) was communicated to workers, the jury could only speculate as to the possibility that the asbestos hazard was understood by union leadership and conveyed to Hutt.

Such a mere possibility utterly fails to meet MCC's burden of proof that the essential foundational facts are more likely than not. (*Labair v. Carey*, 2016 MT 272, ¶ 25, 385 Mont. 233, 383 P.3d 226, ("the threshold question for the jury should have been whether the Labairs had proven that they more probably than not would have recovered a settlement" but for their attorney's negligence); *Tin Cup Cty. Water &/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 43, 347 Mont. 468, 479, 200 P.3d 60, 69 ("even if [the district court] would have allowed Tin Cup's expert witnesses to testify, none of them had opined that the alleged breach more likely than not caused Tin Cup's alleged injury)).

Because MCC cannot meet its burden of proof that the union had substantial knowledge of a dangerous asbestos problem and conveyed that information to workers including Hutt, it must not be permitted to introduce evidence or argument directed at mere speculation.

E. There is no foundational evidence that MCC knew of the union meetings or minutes.

A further foundation flaw to introduction of evidence of union leader meetings is that it cannot be relevant to the reasonableness of MCC's conduct unless MCC knew of the content of such meetings when MCC acted. There is no evidence of such knowledge. Thus, even if the union leaders had been informed of the exigent asbestos hazard (they did not), the evidence lacks relevance.

F. Argument, suggestion, or evidence offered for the purpose of attributing fault to the non-party union would violate Montana's law on empty chair defenses.

MCC's attempt to introduce evidence of the union's conduct suffers yet another fatal flaw: the issue which MCC purports to be of consequence is precisely an issue that the jury must not be allowed to consider: the apportionment of fault or liability to an "empty chair" non-party. As demonstrated in Plaintiff Hutt's Motion for Summary Judgment Re: Defendant's Non-party Affirmative Defenses, and his Motion In Limine Re Non-parties, admission of evidence for the purpose of proving that a non-party is all or partly at fault violates the Constitutionally required limitations on the empty chair defense. MCC's brief makes clear that the primary, if not sole, purpose of offering the evidence is to establish a duty and breach thereof by the union. To permit such evidence would be patently reversible error.

CONCLUSION

The Court should issue an order *in limine* precluding comment, evidence or suggestion of knowledge of the union regarding the asbestos hazard at the Libby mill in

Plaintiff Hutt's case. Specifically the Court should rule that no comment or evidence is permissible with respect to:

a. the Mack deposition testimony and exhibits, or

b. the 4/19/1962 Letter from Wake to Bleich

(all attached to MCC's Response Brief) until after foundational elements have been satisfied and concerns identified herein (including that MCC knew of the union leaders discussions) are addressed, and then only upon cautionary instruction under Rule 105, M.R. Evid. instructing the jury that the evidence may not be used to assign fault to the non-party union.

DATED this 7th day of December, 2018.

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54

This is a true and correct copy of a document on file in my office.

Andrea Vickory, Mont. Dept. of Environmental Quality

April 13, 1964

Arthur Bundrock, Secretary
International Union of Operating Engineers
Local Union No. 361, Route 1, Box 346C
Libby, Montana

Dear Mr. Bundrock:

Thank you for your letter of March 23, 1964 concerning the Zonolite Company. We hope to get back to Libby soon and will make another review of the situation at the mill.

We have been disappointed with the progress made at this plant in past years, but hope that something significant has been accomplished since our last visit.

As you may know, the enforcement provisions of the Industrial Hygiene Act of 1939 are very poor, and various opinions, over the years, from the Attorney General's Office have not strengthened the Act any when we have attempted to use certain portions of the Act to achieve compliance with recommendations.

We appreciate your interest in this matter and will make another inspection of the Zonolite Plant at the first opportunity.

Sincerely yours,

Benjamin F. Wake
Industrial Hygiene Engineer
Division of Disease Control

BFW/dl

EXHIBIT
54

EXHIBIT A

Q. (BY MR. SULLIVAN) IF THE COMPANY HAD NOT KEPT THIS INFORMATION FROM YOU AND IT HAD INSTEAD DISCLOSED THIS INFORMATION TO YOU, WOULD YOU HAVE CONTINUED WORKING AT THE MINE AND MILL?

MR. GRAHAM: SAME OBJECTIONS.

THE WITNESS: NO WAY.

Q. (BY MR. SULLIVAN) I WOULD LIKE NEXT TO DIRECT YOUR ATTENTION TO PLAINTIFF'S EXHIBIT NUMBER 21 AND THAT IS A REPORT FROM THE STATE BOARD OF HEALTH DATED JANUARY 12, 1959, AGAIN AUTHORED BY MR. WAKE. THE COVER PAGE TO THAT REPORT LIKEWISE PROVIDES THAT DISTRIBUTION TO THIS REPORT IS CONFIDENTIAL AND NOT FOR DISTRIBUTION EXCEPT TO THE MANAGEMENT OF THE ZONOLITE COMPANY OF LIBBY, MONTANA.

DO YOU SEE THAT?

MR. GRAHAM: OBJECTION TO THE FORM OF THE QUESTION ON THE BASIS IT IS NOT PROBATIVE OF ANYTHING.

THE WITNESS: YES.

Q. (BY MR. SULLIVAN) TO THE BEST OF YOUR KNOWLEDGE, WAS IN FACT THAT REPORT KEPT CONFIDENTIAL FROM THE UNION?

MR. GRAHAM: OBJECTION; FOUNDATION.

THE WITNESS: YES.

Q. (BY MR. SULLIVAN) PRIOR TO YOUR HAVING BEEN SHOWN A COPY OF THIS REPORT DURING THE COURSE OF LITIGATION IN THE LAST COUPLE OF YEARS, HAD YOU SEEN THAT REPORT PREVIOUSLY?

A. NO.

EXHIBIT B

MR. GRAHAM: WHAT NUMBER WAS THAT AGAIN?

MR. SULLIVAN: THAT'S PLAINTIFF'S EXHIBIT NUMBER 21.

MR. GRAHAM: 21.

Q. (BY MR. SULLIVAN) ART, THERE ARE OTHER REPORTS FROM THE STATE BOARD OF HEALTH THAT WERE DISTRIBUTED TO THE COMPANY AND THEY WOULD INCLUDE REPORTS OF APRIL 19, 1962, WHICH IS PLAINTIFF'S EXHIBIT NUMBER 39; MAY 23, 1963, WHICH IS PLAINTIFF'S EXHIBIT 45; MAY 11, 1964, WHICH IS PLAINTIFF'S EXHIBIT NUMBER 53; OCTOBER 2ND, 1964, WHICH IS PLAINTIFF'S EXHIBIT NUMBER 58; OCTOBER 28, 1965, WHICH IS PLAINTIFF'S EXHIBIT NUMBER 81; MARCH 3, 1966, WHICH IS PLAINTIFF'S EXHIBIT NUMBER 86; FEBRUARY 9, 1967, WHICH IS PLAINTIFF'S EXHIBIT NUMBER 90.

DO YOU RECALL BASED UPON YOUR KNOWLEDGE AS TO WHETHER YOU OR THE UNION EVER RECEIVED A COPY OF THOSE REPORTS?

MR. GRAHAM: OBJECTION; VAGUE, AMBIGUOUS, FOUNDATION.

THE WITNESS: NONE.

Q. (BY MR. SULLIVAN) TO THE BEST OF YOUR KNOWLEDGE --

A. TO THE BEST OF MY KNOWLEDGE.

Q. -- NEITHER THE UNION OR YOURSELF RECEIVED A COPY OF THOSE REPORTS?

MR. GRAHAM: OBJECTION; LEADING.

EXHIBIT B

CERTIFICATE OF SERVICE

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