

## IN THE ASBESTOS CLAIMS COURT FOR THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION,  <i>Consolidated Cases</i>	Cause No. AC 17-0694  [PLAINTIFFS' PROPOSED] ORDER ON MOTIONS FOR SUMMARY JUDGMENT RE: DUTY AND STRICT LIABILITY  Applicable to: <i>Barnes, et al. v. BNSF, et al.,</i> Lincoln County Cause No. DV-16-111
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[Plaintiffs' submit this proposed order for the Court's consideration, with detailed citation to the cited documents of record. For convenient reference, certain cited documents have been compiled into a binder. As noted herein, the materials are contained in the record and also identified by their Tab number in the binder.]

Defendant BNSF Railway Company (BNSF) has moved for summary judgement requesting the Court rule that BNSF owed no actionable duties of care to Plaintiffs Tracie Barnes, Rhonda Braaten, and Gerrie Flores (Plaintiffs), while Plaintiffs have requested that the Court rule that BNSF owed Plaintiffs actionable duties of care. In addition, Plaintiffs have moved for summary judgment requesting that the Court rule BNSF is strictly liable for having conducted an abnormally dangerous activity, while BNSF has moved for summary judgment requesting the Court's ruling that, as a common carrier, it is immune to Plaintiffs claims asserting strict liability.

This Court held a hearing on these motions on January 7, 2019. The Court has considered the briefing of the parties, their statements of uncontroverted facts, the presentations at the hearing, and the following submissions of evidence<sup>1</sup>:

1. The Affidavit of Roger Sullivan, October 5, 2018, with Exhibits 1-70.
2. The Second Affidavit of Roger Sullivan, October 25, 2018, with Exhibits 71-87.
3. The Third Affidavit of Roger Sullivan, January 4, 2019, with Exhibits 88-100.
4. The Affidavit of Nadia Patrick dated October 26, with attached Exhibits A-Q.

**ORDER**

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<sup>1</sup>With the exception of Sullivan Aff. Exhibit 5, neither party has contested the Court's consideration of the below referenced Exhibits. As set forth in *Plaintiffs' Motion in Limine as to Specific Document Admissibility*, the referenced documents in the Sullivan Affidavits fall within defined examples of authentication, survive potential hearsay objections, and are in any event appropriate reliance documents for experts.

1. BNSF's Motion seeking a ruling that it owed no actionable duties of care to Plaintiffs is DENIED; Plaintiffs' opposing request as to duties owed is GRANTED.
2. Plaintiffs' Motion seeking a determination that BNSF engaged in an abnormally dangerous activity is GRANTED; BNSF's Motion seeking a ruling that as a common carrier it is immune to claims asserting strict liability for injury resulting from abnormally dangerous activities is DENIED.

## RATIONALE

### A. Summary Judgment Standard

As to summary judgment, "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3); *Stanton v. Wells Fargo Bank*, 2007 MT 22, ¶ 17, 335 Mont. 384, 152 P.3d 115. The moving party has the initial burden to establish that no genuine issue of material fact exists, after which the burden shifts to the opposing party to establish otherwise. *See Sacco v. High Country Indep. Press* (1995), 271 Mont. 209, 215, 896 P.2d 411, 415. "The invocation of the power of a court to render summary judgment in favor of the moving party gives the court power to render summary judgment for his adversary provided the case warrants that result." *In re Estate of Marson*, 2005 MT 222, ¶ 9, 328 Mont. 348, 120 P.3d 382.

### B. BNSF's Duties

The existence of a legal duty is a question of law to be determined by the court. *Estate of Strever v. Cline* (1996), 278 Mont. 165, 171, 924 P.2d 666, 669. Under Montana law, "In analyzing whether a duty exists, courts consider whether the imposition of that duty comports with public policy, and whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff." *Fisher v. Swift Transport Co.*, 2008 MT 105, ¶17, 342 Mont. 335, 181 P.3d 601.

As to the public policy considerations, the Montana Supreme Court has explained:

The policy considerations weighed to determine whether to impose a duty include: (1) the moral blame attached to the 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 involved.

*Henricksen v. State*, 2004 MT 20, ¶ 21, 319 Mont. 307, 84 P.3d 38; quoting *Strever*, 278 Mont. at 173.

As to the foreseeability element of Montana's duty standard, "it is well-settled that neither the specific plaintiff nor the specific injury need be foreseen." *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶¶ 21-26, 342 Mont. 335, 181 P.3d 601. Rather, the issue is whether Plaintiffs were

“within the zone of risk” created by BNSF. *Id.* Accordingly, here the Court must assess whether BNSF knew or should have known during the time periods of Plaintiffs’ exposures that the Libby vermiculite it was handling was contaminated with asbestos, and whether BNSF knew or should have known of the hazards associated with exposure to asbestos. Finally, the Court will consider whether Plaintiffs were within the zone of danger created by BNSF’s actions.

**1. BNSF’s knowledge that Libby vermiculite was contaminated with asbestos.**

There is a substantial record that during the relevant periods BNSF had notice that the Libby vermiculite contained asbestos including the following:

1. BNSF’s corporate records demonstrate that in 1929 it undertook to investigate the Libby vermiculite deposit, obtaining publications noting that “much of the [ore] body has been altered to amphibole of a fibrous habit that is known commercially as amphibole asbestos.” (See, Sullivan 2<sup>nd</sup> Aff., Ex. 71 – Report of Dr. Julie Hart at ¶67, attaching as an exhibit correspondence and 5/13/1929 letter from geologist J.T. Pardee to Great Northern Railway’s President and attaching Bulletin 805-B [TAB 1].)<sup>2</sup>

2. Beginning in the 1950’s, BNSF’s Division of Economic Research funded multiple geological studies of the Libby vermiculite operation, which noted the asbestos content of the vermiculite ore, and that ore processing procedures were not able to fully separate out the asbestos contaminant. (See, Montana Bureau of Mines Bulletin 12, Sullivan Aff., Ex. 45 [TAB 2] (“Fibrous amphibole asbestos because its specific gravity is very near that of vermiculite, causes much trouble in milling the lower grade ores in which the asbestos is abundant. If a process could be perfected to make a clean separation of vermiculite and asbestos, both products would be marketable...”).) Former BNSF Director of Industrial Hygiene James Shea confirmed that these studies communicated to the railroad that 1) “current milling technologies were unable to separate the asbestos from the vermiculite,” and 2) that the railroad was aware there was “amphibole material in the vermiculite product.” (Deposition of James Shea, pp. 99-100, attached as Ex. 78 to Sullivan 2<sup>nd</sup> Aff. [TAB 3]; also discussed and attached as an exhibit to the Report of Dr. Julie Hart at ¶69, Sullivan 2<sup>nd</sup> Aff., Ex. 71.) BNSF’s Director of Environmental Operations, Melvin Burda, confirmed that a motivation of BNSF in funding Bulletin 12 was to explore the potential for shipments of the Libby asbestos to be made on its rail lines and admitted, with reference to Bulletin 12, that he was aware of the difficulty with separating the asbestos from the vermiculite concentrate. (Deposition of Melvin Burda, p. 55, attached as Ex. 87 to Sullivan 2<sup>nd</sup> Aff. [TAB 4].)

3. In addition to funding geological studies by the Montana Bureau of Mines, BNSF had both a Mineral Research and Development Department and a Geology Department which visited the Libby vermiculite facilities on multiple occasions including to collect samples. See, e.g., BNSF’s 1976 correspondence to W.R. Grace which states:

Dear Ray,

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<sup>2</sup>It is undisputed that Defendant BNSF Railway Company (BNSF) is a successor in interest to Burlington Northern Railway and the Great Northern Railway, and BNSF has assumed the liabilities of both. (See Sullivan 2<sup>nd</sup> Aff., Ex. 86.) “BNSF” refers to all of these entities.

Fred and I had a very delightful and informative time during your guided tour of the Zonolite Mine. Thank you very much for taking the time to show us the geology and allow us to collect specimens.

I was particularly interested in vermiculite, having worked for Johns-Manville exploring for asbestos and knowing more than most geologists about industrial minerals. When I returned to the motel and washed some of the specimens I collected, I could see very clearly what you meant by the low temperature alteration solutions that produced vermiculite.

The thing that clearly indicated the low temperature of formation was the way the very large crystals of pyroxene (Enstatite?) were partially altered to tremolite-talc rock ....

(Letter submitted as an exhibit to the Report of Dr. Julie Hart at ¶64, attached to Sullivan 2<sup>nd</sup> Aff. as Ex. 71 [TAB 12].)

4. Beginning in 1977, W.R. Grace placed warning placards on railcars carrying vermiculite from Libby that communicated the following:

CAUTION  
Contains asbestos fibers.  
Avoid creating dust.  
Breathing asbestos dust may  
cause serious bodily harm.

(See, Report of Dr. Julie Hart at ¶70, attached to Sullivan 2<sup>nd</sup> Aff. as Ex. 71.)<sup>3</sup> While at the hearing on this matter, BNSF counsel denied that there was evidence that such placarding took place, BNSF's assertion is not supported by the record before the Court. Independent from the EPA administrative record, the placarding is corroborated by multiple sources including River Loading Point workers who remember affixing these warning signs on hopper cars. (See, Deposition of River Loading Point worker Robert Wilkens, attached as Ex. 79 to Sullivan 2<sup>nd</sup> Aff. [TAB 5].) Similarly, BNSF's Director of Industrial Hygiene, James Shea, testified in 2007 to his understanding that the placarding did in fact take place, and to his having spoken to Libby railroad workers who recalled the asbestos warnings on the cars. (See, 1/26/2007 Deposition of James Shea, pp. 96-98, attached as Ex. 78 to Sullivan 2<sup>nd</sup> Aff. [TAB 3].) Additionally, the record contains W.R. Grace correspondence discussing their rail car placarding efforts as well as correspondence between W.R. Grace and customers receiving placarded shipments. (See, Sullivan 2<sup>nd</sup> Aff., Ex. 71 – Report of Dr. Julie Hart at ¶ 70, attaching as exhibits Grace correspondence of 10/24/1972,

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<sup>3</sup> At the time of the hearing, BNSF's counsel objected to the admissibility of W.R. Grace's Response to the EPA's Second Request for Information Regarding the Libby Asbestos site, February 22, 2000, attached as Ex. 5 to Sullivan Aff. Regardless of its admissibility, it is an appropriate expert reliance document and its admissibility is not determinative here given the other extensive documentation before the Court that placarding did occur.

6/21/77, and 6/28/77; see also, Rebuttal Report of Dr. Julie Hart attaching as exhibits a 6/27/1978 letter from Scotts to Grace, and Grace correspondence of 11/16/1983 and 12/1/1983 [TAB 6-11].)

5. W.R. Grace shipped bagged vermiculite ore in BNSF boxcars, which beginning in March 1976 each carried a warning label reading:

CAUTION  
CONTAINS ASBESTOS FIBERS  
BREATHING ASBESTOS DUST MAY CAUSE  
SERIOUS BODILY HARM

See, Report of Dr. Julie Hart at ¶70, attached to Sullivan 2<sup>nd</sup> Aff. as Ex. 71. Due to the co-ownership of the Export Plant facility, BNSF's Libby manager John Swing inspected the Export Plant several times each year at which time these warnings would have been visibly apparent, and Swing likewise conceded that he probably saw government required signs at Grace's mine, which stated "Asbestos. Dust Hazard. Avoid breathing dust..." (9/13/16 Deposition of John Swing, at pp. 52, attached to Sullivan 2<sup>nd</sup> Aff. as Ex. 81.)

6. In light of the above-referenced record, BNSF and its predecessors were on clear notice as of 1929 and continuing thereafter, that the vermiculite ore coming from the Zonolite/W.R. Grace mine near Libby was intermixed with amphibole asbestos.

## **2. BNSF's knowledge of the hazards associated with exposure to asbestos.**

7. The warnings from the 1970's and 1980's, discussed above, put BNSF on notice that the asbestos in the vermiculite was hazardous. However, as documented at length in the Reports of Dr. Hart and Dr. Castleman, BNSF also had a long institutional familiarity with the hazards of asbestos. BNSF's predecessor railroads were members of the Association of American Railroads ("AAR") and their employees were members of the AAR Medical and Surgical Section. (See, Excerpts of AAR Annual Meeting Reports (highlighting the role and attendance of these officials throughout the AAR documents) attached as an exhibit to the Report of Dr. Julie Hart, Sullivan 2<sup>nd</sup> Aff., Ex. 71.) The AAR Medical and Surgical Section held annual meetings and issued reports on the meetings. Substantial railroad industry documents, including the Medical and Surgical Section Reports and the Alton Railroad General Managers Documents ("Alton Documents") demonstrate industry knowledge, and specifically BNSF's knowledge, stretching back to the 1930s, of the hazard of asbestos exposure including asbestosis, pulmonary fibrosis and cancer. (See, Report of Dr. Julie Hart at ¶¶45-56; Sullivan 2<sup>nd</sup> Aff., Ex. 71 [TAB 13].) These reports also demonstrate an in-depth understanding of how asbestos travels through the air, often to distant locations, and asbestos exposure prevention including through the use of protective equipment, wetting procedures to reduce dust and the necessity of separating non-essential workers from activities involving asbestos containing material. (Id.) These AAR and Alton documents consistently reference the involvement and specific attendance of high-ranking board officers and medical officials of BNSF's predecessor railroads. (Id.)

8. Other BNSF corporate documents in the record likewise confirm BNSF's knowledge of the hazard of asbestos. (See, Report of Dr. Julie Hart at ¶¶57-61; attached as Ex. 71

to Sullivan 2nd Aff. [TAB 13].) BNSF's predecessors, including the GNR, the Burlington Railroad and the Santa Fe Railroad were members of the Railroad Section of the National Safety Council, which published and disseminated numerous articles documenting the hazards of asbestos exposure in the 1930s and later. (Id. at ¶57; see also National Safety Council Railroad Section Chairman List and Discovery Request No. 68 (1987) attached as exhibits to the Report of Dr. Julie Hart.)

9. There are additional corporate documents which clearly establish BNSF's knowledge of the hazard of exposure to asbestos in later decades. (Id. at ¶ 58.) For instance, 11/18/1980 BNSF correspondence notes "Asbestos is one of the few materials which has been demonstrated to be capable of causing cancer in humans." (Id.) Additionally, BNSF was aware that "concerning asbestos containing products" "the hazard exists whenever dust is produced during the life cycle of the product." (See, 3/29/1979 BNSF Correspondence, attached as an exhibit to the Report of Dr. Julie Hart at ¶ 58 [TAB 14]). BNSF's knowledge in this regard was accompanied by its awareness and understanding of responsibilities set forth under federal regulations governing asbestos containing materials. (See, e.g, 1/9/1984 BNSF Memorandum, attached as an exhibit to the Report of Dr. Julie Hart at ¶ 60 [TAB 15]).

10. BNSF also had an extensive exposure to applicable industrial hygiene standards of care throughout the years that it shipped Libby vermiculite. BNSF maintained a Medical Department, an Industrial Hygiene Department, a Safety Department, and a Geology/Mineral Research Department. (See, Report of Dr. Julie Hart, ¶ 59, Sullivan 2<sup>nd</sup> Aff., Ex. 71 [TAB 13].) In addition to being a member of the National Safety Council, the Association of American Railroads, and the Shop and Engineering Committee, BNSF's industrial hygienists were members of the American Industrial Hygiene Association as well as the American Society of Safety Engineers and BNSF's medical officers were members of the American Occupational Medical Association. (Id. at ¶57, attaching as exhibits BNSF's Response to Discovery Request No. 68, *Swanson v. BNSF*; BNSF's Response to Sixth Discovery Requests, *Kleleck v. BNSF*.) BNSF maintained a large industrial hygiene and occupational medicine library and received an extensive number of publications on the topic for the use of their Medical Department and industrial hygienists including various texts on asbestos hazards and prevention. (Id. at ¶57 [TAB 13] attaching as an exhibit a list of publications received by BNSF's Medical Department produced by BNSF in prior discovery.)

11. It has been known since at least 1930 that bystanders are at risk of significant asbestos exposure. That is, people who do not themselves work directly with asbestos materials or dust are at risk of significant exposure caused by others who are working with or around asbestos. (See, Sullivan 2<sup>nd</sup> Aff., Ex. 71 – Report of Dr. Julie Hart at ¶¶17-24, *citing* Alton Documents and relevant articles.) By the mid-1960's, Newhouse, et al., (1965) reported individuals with household and environmental exposures to asbestos were at an increased risk of mesothelioma. (See, Sullivan 2nd Aff., Ex. 71 – Report of Dr. Julie Hart at ¶23; see also Sullivan 2nd Aff., Ex. 75 - Frank Affidavit ¶¶67-89.)

12. Although BNSF has reserved objection on the use of the AAR and Alton Documents, courts have consistently admitted the documents for the purposes of demonstrating early railroad state of the art notice and knowledge in identifying and handling asbestos hazards.

See, e.g., *Kath v. Burlington N. R. Co.*, 441 N.W.2d 569, 575 (Minn. Ct. App. 1989); *Florida E. Coast Ry. Co. v. Osborne*, 699 So. 2d 724, 729 (Fla. Dist. Ct. App. 1997) (“In sum...the AAR documents, and the Alton Railroad documents are relevant and admissible on the question of what the FEC should have known prior to, and during, the time of plaintiff’s employment.”). Both BNSF and Plaintiffs have directed the Court’s attention to *Nelson v. CENEX*, 2008 Mont. Dist. LEXIS 444, attached as Exhibit 88 to Sullivan 2<sup>nd</sup> Aff. An understanding of the case is instructive here. 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 that there was no duty, Judge Sherlock carefully reviewed Dr. Spear’s report establishing that hazards of asbestos were generally known within industry 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.

13. Based on the above-referenced record, it is clear that BNSF had both early knowledge of asbestos in the Libby vermiculite and early knowledge of the hazards presented by asbestos exposure, including not only to workers but also “bystanders” through environmental exposures emanating from industrial activities.

### 3. Plaintiffs were within the zone of risk.

14. The strip mining, processing and the transporting of asbestos-containing vermiculite concentrate was conducted in the Libby area from 1923 until 1990. The mining operation involved the “mountain top removal” method of mining. Throughout the nearly 70 years of vermiculite mining, the top several hundred feet of Vermiculite Mountain was removed. (See Sullivan 2<sup>nd</sup> Aff., Ex. 71 – Report of Dr. Julie Hart at ¶ 31, attaching Mountain Top Removal Diagram and images from 1948, 1968, and 1971 showing stages of removal.) Hundreds of billions of pounds of vermiculite ore was excavated, processed and either dumped as waste or shipped into Libby by BNSF. The Libby mine produced 80% of the world’s vermiculite ore. By 1970 this amounted to over 29 billion pounds of ore, and was estimated to exceed 35 billion pounds of ore from 1971 through 1981 alone. (Id., ¶ 31, *citing* Grace Mine Production Reports.) 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. (Id.)

15. A 1982 Environmental Protection Agency (EPA) study reported that 0.3 to 7% (by weight) of the concentrated vermiculite was asbestos. (EPA/Atkinson et al., 1982; *see* Sullivan 2<sup>nd</sup> Aff., Ex. 71 – Report of Dr. Julie Hart at ¶13; the Exhibits submitted by both BNSF and Plaintiffs rely on this study, which is discussed at further length below.) Based on estimates of the asbestos content of the vermiculite ore (averaging between 0.3% and 7% asbestos) and using a daily average of 750 tons, BNSF carried approximately 100,000 pounds of Libby Amphibole Asbestos into and out of downtown Libby per day in the late 1960’s and 1970’s, and up to 126,000 pounds per day through the 1980’s. Thus, up to 383 million pounds of asbestos carried into Libby in the 1970’s and up to 460 million pounds of asbestos in the 1980’s. (See, Sullivan 2<sup>nd</sup> Aff., Ex. 71 – Report of Dr. Julie Hart at ¶31.)

16. The Railyard was the center of BNSF activities in Libby. It was located at the end of Mineral Avenue, Libby’s main street, in the heart of downtown Libby and was immediately surrounded on all sides by Libby’s residential neighborhoods, downtown businesses, places of employment, public parks, sporting fields, and the public swimming pool. (See, Sullivan 2<sup>nd</sup> Aff., Ex. 71 – Report of Dr. Julie Hart at ¶¶ 33, 37; *see also* aerial photo below.) The Railyard was extensive, spanning the entire north end of downtown Libby. (Id.)

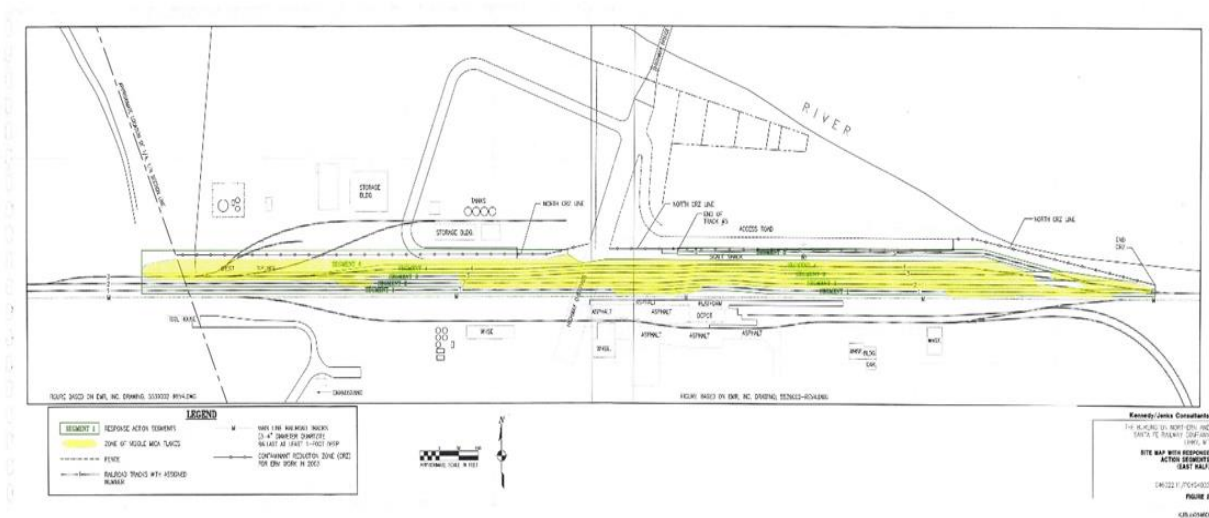


Photo taken 4/25/77, with Downtown Libby Railyard outlined in red. (See, Sullivan 2<sup>nd</sup> Aff., Ex. 71 – attached as an exhibit to the Report of Dr. Julie Hart ¶ 33.)



Photo of baseball fields located immediately adjacent to the Railyard, with tracks and trains in background (See, Sullivan 2<sup>nd</sup> Aff., Ex. 71 – attached as an exhibit to the Report of Dr. Julie Hart at ¶ 33, Libby Heritage Museum Photo).

17. More than a decade after BNSF’s vermiculite related activities ceased, BNSF’s downtown Libby Railyard still contained extensive areas of visibly obvious vermiculite. “During sampling, areas with visible vermiculite or biotite were mapped for placement on the CADD map. Samples from these areas will not be collected.” See, 11/30/01 letter EMR to BNSF’s Manager Dave Smith; Ex. 92, attached to Sullivan 3<sup>rd</sup> Aff. [TAB 16]; see also Ex. 93 [TAB 17], Map of Areas of BNSF Railyard Covered in Visible Vermiculite:



Areas covered in visible vermiculite, which were not sampled for the presence of asbestos, are indicated in yellow; and the Railyard perimeter is indicated in green. Per the EPA’s order, these areas covered in vermiculite as well as the other areas of the downtown Libby railyard containing significant levels of amphibole asbestos required removal. (See, EPA’s Pollution Report for OU6, Sullivan Aff., Ex. 66 [TAB 32].) Thus, BNSF did not test the large majority of the railyard prior to initial removal efforts in 2003, which area was clearly contaminated. (See, Sullivan 3<sup>rd</sup> Aff., Ex. 92, 11/30/2001 EMR Correspondence to BNSF re: Results of October Sampling [TAB16].) The close proximity of Libby’s recreational facilities, community residences and businesses to this extensive visible asbestos-containing vermiculite placed individuals frequenting these areas within the “zone of risk” created by BNSF’s activities.

18. The Plaintiffs lived, recreated and worked in close proximity to BNSF’s downtown Libby Railyard, including: Tracie Barnes from 1955 to the present; Rhonda Braaten from 1960 to 2005 (with the exception of 1980 to 1983); and Gerrie Flores from 1979 to 1990. The Plaintiffs’ each lived in homes located near or adjacent to BNSF’s Libby properties where extensive amounts of asbestos contaminated vermiculite were shipped and released for decades. In addition, they each recreated, worked, and otherwise spent time on and around BNSF’s Libby properties. (See, Report of Dr. Julie Hart at ¶¶105-109; attached as Ex. 71 to Sullivan 2<sup>nd</sup> Aff.)

**4. Plaintiffs contend BNSF owed Plaintiffs various duties.**

19. In November 1972 federal regulations under OSHA required that, “Within 6 months of the publication of this section every employer shall cause every place of employment where asbestos fibers are released to be monitored” and that “all external surfaces in any place of

employment shall be maintained free of accumulations of asbestos fibers.” (See, 29 CFR §1910.93, attached to the Report of Dr. Julie Hart at ¶ 92, Sullivan 2<sup>nd</sup> Aff., Ex. 71, [TAB 18].)<sup>4</sup> Absent from the record is any indication that BNSF performed any air monitoring, OSHA mandated or otherwise, of its properties in Libby until the EPA required it in the 2000’s, some three decades after BNSF was required to do so. (See, Sullivan 2<sup>nd</sup> Aff., Ex. 71, Report of Dr. Julie Hart at ¶ 92.)

20. The 30(b)(6) testimony of BNSF’s Manager of Industrial Hygiene, Gerald McCaskill, concedes that knowledge of the asbestos contained in the Libby vermiculite came with an attendant duty of care:

Q: Well, if they did know it was asbestos in vermiculite that was being transported, and they didn’t tell the men, you agree that would not have been acceptable conduct on the part of the railroad?

A: I’ll agree. (Sullivan 2<sup>nd</sup> Aff., Ex. 85, 1/24/07 Deposition of Gerald McCaskill [TAB 19].)

21. Under the facts of this case Plaintiffs have articulated several negligence standards of care allegedly owed by BNSF not simply to workers, but to members of the Libby community. First, as developed at some length in the expert report of Drs. Hart and Castleman, Plaintiffs contend that applicable public health and industrial hygiene standards of care required a corporation such as BNSF to (a) study and monitor potential health hazards including specifically the asbestos contaminated vermiculite dust that its workers and others were exposed to; (b) warn those potentially exposed to the hazard of the risks associated therewith; and (c) to protect those potentially exposed from the risk. (See, Report of Dr. Julie Hart at ¶90 and Report of Dr. Barry Castleman at ¶32; attached as Ex. 71 and 72 to Sullivan 2<sup>nd</sup> Aff.)

22. Plaintiffs have also alleged that BNSF owed duties based on Montana’s premises liability laws, starting with the premise that, “The possessor of the premises has a duty to use ordinary care in maintaining the premises in a reasonably safe condition and to warn of any hidden or lurking dangers.” *Richardson v. Corvallis Sch. Dist.* (1997), 286 Mont. 309, 320-22. Plaintiffs point out that Montana likewise imposes liability on property owners who breach their duty of care by failing to remedy, or to warn of, dangerous conditions emanating from their property. *See, Burk Ranches, Inc. v. State* (1990), 242 Mont. 300, 304, 790 P.2d 443, 445, *citing* Restatement Torts (Second) §364 and §370. Montana likewise recognizes that a property owner's duty to keep his premises reasonably safe may extend beyond his premises. *Limberhand v. Big Ditch Co.* (1985), 218 Mont. 132, 146, 706 P.2d 491, 499, *citing Piedaloe v. Clinton Elem. School Dist.* (1984), 615 No. 32, 214 Mont. 99, 692 P.2d 20.

## **5. Public policy favors finding a duty owed by BNSF to Plaintiffs.**

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<sup>4</sup>At the time of the hearing, BNSF relied on the current OSHA asbestos regulations which were not applicable to BNSF’s duties during active shipping operations. Nonetheless, BNSF’s 2001 air sampling resulted in 21 separate exceedances of OSHA’s then permissible exposure levels, such that even under the then current regulations, monitoring was mandatory.

23. BNSF has presented no public policy arguments as to the four policy factors that the Court is required to consider in determining whether a duty is owed here, and the Court finds that policy considerations provide a solid basis to impose an actionable duty. *See, Henricksen v. State*, 2004 MT 20, ¶ 21. First, is the moral blame attached to the defendant's conduct. Here, it is alleged, and the record before the Court supports, that BNSF knew that there was asbestos in the vermiculite it was hauling into the Libby community. Likewise, it is alleged, and the record before the Court demonstrates, that BNSF knew or reasonably should have known, that asbestos was harmful. The second factor is the prevention of future harm. Holding a private corporation responsible for the harm it is alleged to have inflicted on unwitting citizens while pursuing its own commercial interests, would certainly act to prevent future harm. Third, is a weighing of the burden on the defendant versus harm to the community. Here, the “burden” as to the negligence claim is one of reasonable care. More specifically, under the negligence theories advanced by Plaintiffs, BNSF 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. (*See*, Third Amended Complaint at ¶121; Sullivan 2nd Aff., Ex. 71 – Report of Dr. Julie Hart at ¶¶ 90-104.) These burdens on the Defendant are reasonable, and are intended to prevent the very harm that BNSF is alleged to have caused the residents of the Libby community, including Plaintiffs. The final policy factor is availability of insurance. According to representations made by BNSF itself, insurance is available for the injuries alleged. *See*, Sullivan 2nd Aff., Ex. 83 - *BNSF v. Arrowood Indemnity, et al.*, Montana Thirteenth Judicial District Court, Cause (DV-14-225), BNSF’s Complaint. In sum, public policy supports the recognition of a duty of care owed by BNSF to the Plaintiffs.

**6. Foreseeability favors finding a duty owed by BNSF to Plaintiffs.**

24. We turn next to the issue of foreseeability. As the Montana Supreme Court has stated,

“we relied on Justice Cardozo's opinion in the *Palsgraf* case to explain the concept of foreseeability: ‘The risk reasonably to be perceived defines the duty to be obeyed.’...That is to say, a defendant owes a duty with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent in the first instance.”

*Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶¶ 21-26, 342 Mont. 335, 181 P.3d 601, quoting *Mang v. Eliasson* (1969), 153 Mont. 431, 437, 458 P.2d 777, 781, and citing *Palsgraf v. Long Island R. Co.*

The Montana Court in *Fisher*, ¶ 26, went on to explain *Palsgraf* as follows:

In *Palsgraf*, a guard on the railroad platform helped a tardy passenger jump from the platform on to the already-departing train. In the process of boarding the moving train, the passenger dropped a newspaper-wrapped package which contained explosives. The package exploded, sending a blast through the

station, and knocking over a set of scales at the opposite end of the platform. The scales struck Mrs. Palsgraf, a passenger waiting next to the scales on the platform. Justice Cardozo concluded that Mrs. Palsgraf could not recover from the railroad for her injuries, and emphasizes her distance from the guard: “The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away.” *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). 162 N.E. at 99.

\* \* \*

Furthermore, it is well-settled that neither the specific plaintiff nor the specific injury need be foreseen. *Prindel*, ¶ 39; *Eklund*, ¶ 41. In other words, it is not necessary to foresee that Fisher would be injured by the Swift truck sliding across the icy highway as it was being removed from the accident scene, as opposed to, for example, being struck by oncoming traffic. The manner of the accident and the nature of Fisher's injuries do not change the fact that Fisher was a foreseeable plaintiff within the zone of risk at the accident scene created by the Swift driver.

*Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶¶ 21-26, 342 Mont. 335, 340–42, 181 P.3d 601, 607–08

25. Here, BNSF pleads ignorance as to the asbestos contained within the Libby vermiculite and the hazard presented by that asbestos. However, the record before the Court demonstrates otherwise. Regardless, even assuming arguendo that BNSF lacked actual knowledge of the hazard, the relevant inquiry is not simply what BNSF knew, but also what BNSF reasonably should have known. The record here contains substantial documentation establishing that BNSF reasonably should have known of the asbestos hazard. Thus, BNSF's reliance on the *Palsgraf* case is misplaced. In reference to *Paslgraf*, the record demonstrates that BNSF was aware of what was in the “package” (knowledge of asbestos contained in vermiculite), knew that the “package” contained a dangerous material (knowledge of hazards associated with asbestos), and that Plaintiffs were in the zone of risk created by BNSF's activities regarding that “package” (living and recreating within feet of BNSF's industrial level activities which took place in a Railyard contaminated with asbestos). Actionable duties attended this knowledge, including those asserted by Plaintiffs under Montana's negligence and premises liability laws.

### **C. Application to Abnormally Dangerous Activity.**

26. Plaintiffs' allege that BNSF's Libby vermiculite activities were abnormally dangerous, and that strict liability should apply. BNSF opposes the imposition of strict liability, arguing that it is unsupported by the six elements set forth in Restatement 2<sup>nd</sup> of Torts § 520, and in any event as a “common carrier” the railroad is immune under Restatement 2<sup>nd</sup> of Torts § 521, which Montana has not adopted.

27. The parties acknowledge that the determination of whether BNSF conducted an abnormally dangerous activity as set forth in Restatement 2<sup>nd</sup> of Torts § 520 is for the Court to determine. As explained in *Chambers v. City of Helena*, 2002 MT 142, “it is no part of the province

of the jury to decide whether an industrial enterprise upon which the community's prosperity might depend is located in the wrong place..." *Chambers*, ¶18, quoting Restatement § 520, Comment 1.

28. In making the determination as to whether a particular activity is abnormally dangerous, the Chambers Court has instructed that the six factors set forth in § 520 of the Restatement (Second) of Torts be considered:

- (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; and
- (f) The value of the activity to the community.

*Id.*, 2002 MT 142, ¶ 16, citing § 520 of the Restatement of Torts.

29. The Chambers Court also clarified that "it is not necessary that each of them be present":

In determining whether the danger is abnormal, the factors listed in clauses (a) to (f) of this section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case and ordinarily several of them will be required for strict liability. On the other hand it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition.

*Chambers*, ¶ 21, quoting § 520, Comment f.

30. BNSF asserts the activity at issue is its transport of vermiculite. Plaintiffs assert that BNSF's "abnormally dangerous activity" includes decades of hauling asbestos-contaminated vermiculite containing hundreds of millions of pounds of asbestos into and out of BNSF's downtown Libby Railyard, which was located in close proximity to Libby's residential neighborhoods, businesses, and recreational areas. Given the available record demonstrating the asbestos content of the vermiculite concentrate, the amount shipped, and the location of the Railyard, there is no substantial dispute that this occurred.

31. Plaintiffs bolster their argument in favor of the determination that BNSF conducted an abnormally dangerous activity with particular reference to factor (e) "Whether the activity is inappropriate to the place where it is carried on." Plaintiffs rely on *Dutton v. Rocky Mountain Phosphates* (1968), 151 Mont. 54, 438 P.2d 674, which the Court finds instructive. In *Dutton*, the defendant moved its phosphate manufacturing business to the community of Garrison. The manufacturing of phosphate involved the removal of fluorine from the finely ground phosphate rock, releasing "a colorless, odorless, tasteless gas" into the surrounding community, contaminating adjacent hay fields and the cattle grazing in them. *Id.* at p. 58. The Montana

Supreme Court upheld the District Court’s determination of strict liability arising out of an abnormally dangerous activity, relying on both Prosser’s formulation and the rule from the seminal case of *Rylands v. Fletcher* (1866, Eng.):

[T]he true rule of law is, that the person who, for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is a natural consequence of its escape.

*Dutton*, 151 Mont. at 65 (quoting *Rylands v. Fletcher*). Plaintiffs point out that, as here, it wasn’t simply “manufacturing” that the *Dutton* Court found to be an abnormally dangerous activity—it was the conducting of an activity in a small Montana community which released a colorless, odorless toxin into the surrounding community. As the Restatement points out in regards to location, the same activity carried on in two different locations may be appropriate in one place and inappropriate in another. See Restatement § 520, Comment on clause (e):

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.

32. BNSF primarily argues under factors (a) and (b) of § 520 that there was neither evidence of BNSF’s vermiculite activities creating “a high degree of risk of some harm” nor evidence of the “the gravity of the harm which may result from it is likely to be great,” arguments repeated at the hearing. As to factor (b), it cannot be seriously disputed but that exposure to asbestos creates a risk of contracting asbestosis, lung cancer or mesothelioma. Thus, “the gravity of the harm which may result” is great.

33. The gravamen of BNSF’s argument thus hinges on factor (a). In essence, BNSF asserted in its “Supplemental Authority” and at the hearing that its vermiculite related activities did not “involve a high degree of risk of some harm to” Plaintiffs. In support of this argument, BNSF contends that “extensive soil sampling on BNSF property consistently found no or only trace amounts of asbestos fibers in the soil;” “airborne concentrations of asbestos fibers in the Libby rail yard were extremely low and mostly non-detectable even before remedial activities were conducted;” “the processed vermiculite being hauled by BNSF contained small amounts of asbestos, between .02% and .05% by weight;” and EPA’s pre-remediation soil sampling in Libby does not demonstrate a gradient of increased asbestos concentrations in soil near the railroad.<sup>5</sup>

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<sup>5</sup>BNSF has also filed a *Motion in Limine Regarding Evidence of Cleanup/Remediation Efforts and EPA Involvement at Libby Properties*, seeking exclusion of evidence regarding remediation efforts at its Libby properties. Of note, BNSF has itself submitted and extensively relied upon this same information both to argue that any injury to Plaintiffs was not foreseeable, and that its activities did not constitute an abnormally dangerous activity. BNSF cannot have it both ways: it concedes the appropriateness of consideration such information for purposes of summary judgement. In addition, many of the referenced Exhibits establish

Plaintiffs in turn filed a response to BNSF's supplemental authority on January 4, 2019 pointing out what they contend are inaccuracies in BNSF's representations. These arguments are addressed seriatim below.

## 1. Soil Sampling

34. Soil Sampling performed on BNSF's Libby properties demonstrates dangerous levels of asbestos. The record before the Court demonstrates that while many soil samples taken on certain of BNSF's Libby properties found no or only trace amounts of asbestos, this soil sampling did not begin until a decade after active Libby vermiculite operations had ceased and excluded extensive areas of the Railyard which contained "visibly obvious asbestos" and "visible vermiculite." See Map of Visible Vermiculite above in ¶ 16, Sullivan 3<sup>rd</sup> Aff., Ex. 93 [TAB 17]; see also 11/30/2001 EMR Correspondence to BNSF re: Results of October Sampling, Id. Ex. 92 [TAB 16]. Even after removal of surface soils containing vermiculite by large vacuum trucks (see photos attached Exhibits 94 and 98 to Sullivan 3<sup>rd</sup> Aff. [TAB 20]), sampling performed in these areas of the Railyard with visible vermiculite demonstrated consistent asbestos levels of 2% and ranging to over 3% asbestos.<sup>6</sup> See Sullivan 3<sup>rd</sup> Aff., Ex. 97 [TAB 21]. The documentary record demonstrates that 11 of the 18 soil samples taken during the referenced sampling effort exceeded 1%, including the three 2% composite samples discussed above. The latitude and longitude coordinates of these samples demonstrate that they spanned several hundred feet. These 18 samples are the only samples in the record that are representative of pre-removal conditions in the large area of the yard containing visible vermiculite. This remediation and sampling effort was stopped on the basis of these high test results. (See, EPA's Pollution Report for OU6, Sullivan Aff., Ex. 66 [TAB 32].) The assertion that "sampling on BNSF property consistently found no or only trace amounts of asbestos fibers in the soil" is further refuted by additional sampling performed on BNSF properties, such as sampling taken at the Railroad Loading Station where an additional 29 samples in 1999 exceeded 1% asbestos and ranging to over 4% asbestos. (See, Railroad Loading Station Soil Sampling Results, Sullivan Aff., Ex. 49 [TAB 22].)

35. Finally, BNSF's assertion that soil levels below 1% are safe is contradicted by its own Exhibit G (the Millette study from 2015 [TAB 23]) attached to BNSF's Supplemental Authorities. That study acknowledges that, "It has been shown that as little as 0.001% of asbestos in loose clay soil can produce around 0.1 fibers/cc of asbestos in the air." This is equivalent to the current OSHA permissible workplace exposure limit, and is more than 1,000 times the EPA's community based safety threshold of 0.00009 f/cc. (See, EPA Chemical Assessment Summary - Libby Amphibole Asbestos RfC attached to Sullivan 2<sup>nd</sup> Aff., Ex. 67 [TAB 28].) As acknowledged by BNSF's contractor EMR, there is "evidence to suggest that vermiculite material with an asbestos content as low as 0.1% may generate airborne fiber concentrations ranging between 5 and

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the conditions on Railroad properties, and they pre-date BNSF's remediation efforts in Libby. They are properly before the Court.

<sup>6</sup>Three "composite samples" were prepared by combining each of the three sets of individual soil samples taken during this effort. Thus, these combined samples are most representative of the overall or average percentage of asbestos contamination in the area. All three composite samples demonstrated asbestos contamination at 2%.

10 f/cc.” (See, Sullivan 2<sup>nd</sup> Aff., Ex. 71, BNSF\_501\_0014\_0008, attached to the Report of Julie Hart at ¶ 21 [TAB 24].)

36. In sum, although BNSF excluded from its soil testing extensive areas of the Railyard which contained “visibly obvious asbestos” and “visible vermiculite,” the limited test results taken demonstrated that even after removing the top several inches of soil by vacuum equipment, the area still had dangerously high levels of asbestos in the soil.

## 2. Air Sampling

37. Even more than a decade after active vermiculite operations ceased, air sampling on BNSF properties demonstrated dangerous conditions still existed. BNSF references extensive air monitoring performed during EPA supervised remediation of its Libby Railyard between 2003 and 2005 to assert that no danger was presented by its vermiculite related activities in Libby. This sampling didn’t begin until 13 years after active vermiculite operations had ceased in Libby, and was performed with strict EPA enforced safety and dust control procedures in place including thorough wetting of all soils and surfaces. See Health and Safety Plan for Removal Action, Sullivan 3<sup>rd</sup> Aff. Ex. 88 [TAB 25]. This sampling is not representative of conditions decades earlier when active vermiculite operations were ongoing without any dust controls in place. Despite the use of safety and dust control measures, air monitoring results obtained during these remediation efforts regularly detected asbestos. (See, BNSF’s Supplemental Authorities pp. 3-4.)

38. The only air sampling of the Libby Railyard performed prior to the EPA supervised remediation took place in Spring of 2001. This 2001 air sampling demonstrated 21 samples exceeding the OSHA permissible workplace exposure limit, including personal and area sample results of 2.6 f/cc, 3.1 f/cc, 7.2 f/cc, 9.6 f/cc, and 14 f/cc.<sup>7</sup> (See, April 24-25 2001, Railyard Maintenance Activity Air Sampling Results, Sullivan 3<sup>rd</sup> Aff., Ex. 90 [TAB 26].) These results, obtained long after any vermiculite was shipped through Libby, also exceed the EPA’s community-based safety threshold of 0.00009 f/cc by more than 28,000 to 150,000 thousand times. (See, EPA Chemical Assessment Summary - Libby Amphibole Asbestos, Sullivan Aff. Ex. 67 [TAB 28].) The results of this 2001 testing are confirmatory of the only available air monitoring for the downtown Libby area in the vicinity of BNSF’s Railyard during active vermiculite operations. These 1975 air monitoring results ranged from 0.67 to 1.5 f/cc (i.e., 6.7 to 15 times the current OSHA workplace standard). (See, Exhibit 91 to the Sullivan 3<sup>rd</sup> Aff. [TAB 29].) Further support is found in tree bark sampling “collected 7 miles west of the town [and 14 miles west of the W.R. Grace Mine] next to a railroad line [that] had concentrations of 19 million fibers/g.” (Ward et al., *Trees as reservoirs for amphibole fibers in Libby, Montana*, Sci. Total Environ. 2006 Aug 15;367(1) attached as an exhibit to the Report of Dr. Julie Hart, Sullivan Aff. 2<sup>nd</sup>, Exhibit 71 [TAB 30].)

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<sup>7</sup>At the time of the hearing, BNSF counsel displayed a PowerPoint slide representing that the highest of these air sample results had two asterisks next to them. By combining and conflating other documents that were cut and pasted into the PowerPoint, counsel misrepresented that the samples that were redeposited for analysis and that no asbestos was detected. A review of the testing results of record demonstrates that this misstates the sampling results as there is no indication that the fiber levels measured were non-detect or inaccurate. [Compare TAB 26 and TAB 27]

### 3. Asbestos Content of Libby Vermiculite

39. The record demonstrates that Libby vermiculite contained dangerous levels of asbestos. BNSF's asserts that "BNSF hauled only a refined vermiculite product that contained at most trace amounts of residual asbestos." As support for this argument, BNSF cites to the Millette and Compton study entitled *Analysis of Vermiculite and Screening for Vermiculite from Libby Montana*, which provides that in 1980 W.R. Grace self-reported that the vermiculite concentrate it was shipping contained an average level of 0.5% asbestos. (See, Sullivan 3<sup>rd</sup> Aff., Ex. 99 [TAB 23].) That same study goes on to reference Federal agency studies refuting the 0.5% level. For example, the referenced study by Millette and Compton goes on to note that in 1977 the EPA found:

After mining, vermiculite is processed to remove impurities, however, attempts to remove all contaminants have been unsuccessful and tremolite asbestos remains as a contaminant in the vermiculite obtained from the Libby mine at a concentration of at least 1%.

The Millette and Compton study also reproduces the following table from the 1982 EPA study which determined that the Libby vermiculite concentrate contained high levels of fibrous asbestos—up to 7%:

Sample	Fibrous phases	
	Estimated mass, %	Mineral types
Grade 1, 270-I	4-6	Tremolite-actinolite
Grade 2, 276-I	4-7	Tremolite-actinolite
Grade 3, 259-I	2-4	Tremolite-actinolite
Grade 4, 282-I	0.3-1	Tremolite-actinolite
Grade 5, 264-I	2-4	Tremolite-actinolite
Grade 5, 267-I (1-day)	2-5	Tremolite-actinolite
Screen Plant Composite (288-I)	2-5	Tremolite-actinolite

Dr. Hart's Report cites this 1982 EPA study and summarizes its findings as follows:

A 1982 Environmental Protection Agency (EPA) study reported that approximately 21 to 26% of the unprocessed ore and 0.3 to 7% (by weight) of the concentrated vermiculite was asbestos (Atkinson et al., 1982). The lowest asbestos content of any of the composite sample results was identified with Grade 4 vermiculite at 0.3%-1%, which result was an outlier among the rest of the composite data which ranged from 2-4% asbestos to 4-7% asbestos. The mean asbestos content in the vermiculite concentrate based on this composite sample data is approximately

3.5%. Asbestos content likely significantly exceeded this level in the preceding decades when the processing methods were less refined. (See, Hart Report attached to Sullivan Aff. 2<sup>nd</sup>, Exhibit 71 at ¶ 13.)

40. BNSF's asserted asbestos content in the vermiculite concentrate is also based in part on W.R. Grace self-reported levels of asbestos in expanded vermiculite products. As to reported asbestos content in various vermiculite products, important distinctions must be made regarding both the geographic source of the vermiculite product and the stage of processing of vermiculite sampled. In 2001, the ATSDR made these distinctions in confirming the reported asbestos content of unexpanded Libby vermiculite ore as compared to expanded vermiculite products or vermiculite from other source locations not containing fibrous asbestos, reporting that "asbestiform fibers represented ... 0.3 to 7% of the weight of vermiculite concentrate samples from Libby, Montana." (ATSDR Report submitted as an exhibit to the Expert Report of Dr. Julie Hart at ¶ 13, Sullivan Aff. 2<sup>nd</sup>, Exhibit 71 [TAB 31].) Lastly, the fact that the EPA has reported that, "Visible vermiculite has been found along the tracks and within the railyard and analytical results have shown asbestos levels in the soil from 2-5%," refutes BNSF's assertion. (See, EPA's Pollution Report for OU6, Sullivan Aff., Ex. 66 [TAB 32].)

#### **4. A High Degree of Risk of Some Harm**

41. With reference to the risk of harm, even assuming BNSF's assertions as to asbestos content of the vermiculite are correct, as discussed above dangerous airborne asbestos levels result from the disturbance of asbestos containing materials containing significantly less than 1% asbestos. See, e.g. Millette 2015, Exhibit 99 to the Sullivan 3<sup>rd</sup> Aff. [TAB 23] ("It has be shown that as little as 0.001% of asbestos in loose clay soil can produce around 0.1 fibers/cc of asbestos in the air," which is equivalent to the OSHA workplace exposure limit) and BNSF\_501\_0014\_0008, attached as an exhibit to the Expert Report of Julie Hart at ¶ 21, Sullivan 2<sup>nd</sup> Aff., Ex. 71 [TAB 24], (BNSF's contractor noting "There is empirical evidence to suggest that vermiculite material with an asbestos content as low as 0.1% may generate airborne fiber concentrations ranging between 5 and 10 f/cc when disturbed and without any applied engineering controls.").

42. As to BNSF's argument that the EPA's pre-remediation soil sampling in Libby does not demonstrate a "gradient" of increased asbestos concentrations in soil near the railroad, Plaintiffs' experts reply that the EPA's soil sampling is not capable of supporting such a conclusion nor was it designed to address such issues. Among other limitations expressed by Plaintiffs' experts, the sampling was not performed in a systematic grid as required for modeling a distribution gradient, and instead was largely "selected" to test areas where Libby area residents had self-reported deposition of vermiculite for a variety of purposes including gardening, soil amendment, etc. While there may indeed be a number of pathways for distribution of vermiculite throughout the Libby community, the salient point here is that there the record before the Court provides substantial evidence of significant levels of asbestos in the air and soil at the downtown Libby Railyard—even long after shipments of vermiculite ceased. Moreover, the record reveals the only contemporaneous air monitoring available was performed by W.R. Grace in 1975 and reported airborne asbestos concentrations at locations near the downtown BNSF Railyard in 1975 at up to 1.5 f/cc, more than 16,000 times higher than the EPA safety threshold for Libby Asbestos.

(See, Results of W.R. Grace 1975 Dust Surveys – Source Emissions attached as Exhibit 91 to the Sullivan 3<sup>rd</sup> Aff.; and 1975 Dust Survey Sampling Log attached as an exhibit to the Expert Report of Dr. Julie Hart, Sullivan 2<sup>nd</sup> Aff., Ex 71 [TAB 29].) Further support is found in the fact that tree bark samples “collected 7 miles west of the town [and 14 miles west of the W.R. Grace Mine] next to a railroad line had concentrations of 19 million fibers/g.” Ward et al., *Trees as reservoirs for amphibole fibers in Libby, Montana*, Sci. Total Environ. 2006 Aug 15;367(1) (submitted as an exhibit to the Expert Report of Dr. Julie Hart, Sullivan Aff. 2<sup>nd</sup>, Exhibit 71 [TAB 30].) Thus, the available record indicates that BNSF’s vermiculite activities during active vermiculite operations and prior to the extensive cleanup of its properties released significant levels of asbestos fibers into the air and the surrounding community.

43. In sum, given the close proximity of BNSF’s facilities to Libby’s recreational facilities, residences, and businesses, there is sufficient evidence on the record to demonstrate under Restatement § 420 (a) “a high degree of risk of some harm” attended its decades of vermiculite-related activities, including hauling substantial quantities of the asbestos laden vermiculite into and out of the Libby community. In addition, as to factor (b), the likelihood that “the harm which may result from it is likely to be great” is satisfied under the facts discussed above; there is simply no substantial dispute that asbestos exposure is recognized as causing scarring of the lungs, lung cancer, and mesothelioma—the very diseases alleged by Plaintiffs here.

## **5. Application of § 520 Factors**

44. Applying the § 520 factors to the facts of this case:

(a) BNSF’s activities, which brought hundreds of millions of pounds of highly toxic asbestos fibers into downtown Libby, created a high degree of risk of serious harm to Plaintiffs—who allege they suffer from severe ARD, lung cancer, and mesothelioma.

(b) The gravity of the harm was likely to be great: asbestos is deadly, and the gravity of the harm of contamination of the community is manifest by what the EPA has declared to be the Country’s first and only environmental public health emergency.

(c) The toxic asbestos dust was integral to BNSF’s activities in downtown Libby: the risk of deadly exposure attendant to bringing hundreds of millions of pounds of asbestos into the heart of the Libby community could not be eliminated even if BNSF had exercised reasonable care.

(d) BNSF’s vermiculite-related activities were not a matter of common usage: BNSF hauled close to one billion pounds of deadly asbestos into its yard in downtown Libby—which cannot be fairly described as a matter of “common usage.”

(e) BNSF brought the deadly toxin into the heart of Libby: its railyard was in close proximity to residences, businesses, and recreational areas—meaning that the activity was inappropriate to the place where it was carried on.

(f) Any value to the community from bringing the asbestos-contaminated vermiculite into the heart of Libby was manifestly outweighed by its dangerous attributes.

While *Chambers, supra*, 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.

#### **D. Whether BNSF is Immune to Claims Asserting Strict Liability Under §521.**

45. BNSF contends that it is immune from strict liability under the public duty exception stated in §521 of the Restatement (Second) of Torts. The Montana Supreme Court has not adopted §521. Therefore, this Court must predict whether it is likely Montana will do so in the future. Even if it did, the Court must further consider whether BNSF's voluntary vermiculite related activities in Lincoln County, performed for its own purposes, exceeded the scope of any public duty imposed upon it as a common carrier such that the exception proposed in § 521 would not apply.

46. In its recently-filed "Supplemental Authority," BNSF points to a Montana case in support of its motion, *Walsh v. Montana Rail Link*, 2001 ML 1418, decided by District Court Judge Jeffrey Langton in 2001. As Judge Langton acknowledged, "rulings in other district court cases do not constitute binding authority over legal issues raised" in the *Walsh* case. *Id.* at \*6. Judge Langton also severely criticized the poor performance of plaintiffs' counsel, who failed to make any liability expert disclosures, for which he considered dismissing the case. *Id.* at \*17. Not surprisingly, Judge Langton himself acknowledged the "absence" of a Montana Supreme Court case adopting §521 of the Restatement. *Id.* \*25. Eight years after *Walsh*, in the case *Kohler, et al v. Keller Transport, Inc., et al*, Case No. DV 09-1, Montana Twentieth Judicial District Court, Judge Langton denied the transport companies' motion to dismiss plaintiffs' claim of strict liability arising out of an abnormally dangerous activity, noting:

Plaintiffs allege Defendants' transport and handling of toxic substances, including gasoline, at the release site constituted abnormally dangerous and ultra-hazardous activity in that the activity: (a) creates a high degree of risk of serious harm to the environment, persons, land, and chattels of others; (b) creates a strong likelihood that great harm will result from an escape of the toxic substances; (c) was not a matter of common usage which would be carried on by the great mass of mankind of many people in the community; (d) was inappropriate based on the prevailing conditions including close proximity to residential property; and (e) has value which is outweighed by the likelihood of resulting harm, based on the close proximity to residential property in which it was carried on. (Opinion & Order of 12/9/09 at p. 11; Sullivan 2nd Aff., Ex. 84.)

Judge Langton noted that after discovery, the Court could review the evidentiary record to determine whether the specific facts adduced supported the claim. *Id.* The salient point to emphasize here is that when Judge Langton had the opportunity to consider a well presented and briefed claim of strict liability against a transport company, he acknowledged the viability of the claim—and did not apply immunity under § 521. Notably, the allegations of abnormally

dangerous activity for which Judge Langton denied the defendants' motion to dismiss in *Kohler v. Keller Transport* are almost identical to the allegations at issue here. *Cf.* Third Amended Complaint at ¶125.

47. BNSF also cites to *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1006 (9th Cir. 2008) to support its claim that §521 should apply. In *Hanford*, the Ninth Circuit extended Washington state tort law and found that the producers of uranium were not immune from their abnormally dangerous activities, no public duty exception applied, and the producers were strictly liable for their emissions. That said, *Hanford* does not discuss Montana law and whether the Montana Supreme Court would adopt §521 if presented with the issue.

48. As noted, Montana has not adopted §521. For several reasons the Court concludes that it is unlikely to do so. In essence, BNSF argues that since Montana has adopted §§ 519 and 520, it therefore has implicitly adopted § 521. However, as the Montana Supreme Court has made clear, “This Court has not adopted the Restatements of Law whole cloth, opting instead to evaluate the language and provisions of the Restatements in light of Montana's public policies . . .” *Oberson v. Federated Mut. Ins. Co.*, 2005 MT 329, ¶ 13, 330 Mont. 1, 126 P.3d 459 *citing numerous authorities including Sternhagen v. Dow Co.* (1997), 282 Mont. 168, 173–74, 935 P.2d 1139, 1142, (where notwithstanding previous adoption of Restatement (Second) of Torts § 402A, the court rejected corresponding Comments to that section regarding defenses inconsistent with established Montana law and policy).

49. Here, 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.” 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 operating in pursuance of a public duty. Finally, as to Montana Supreme Court precedent, the case of *Wine v. Northern Pacific Railroad* (1913), 48 Mont. 200, 136 P. 387 is instructive. 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 the railroad was engaged in a public duty and had to remedy a dangerous condition to safeguard passengers and freight. *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.*

50. Plaintiffs point to other jurisdictions which have refused to apply §521. *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). The Court finds *Chavez* instructive. In *Chavez* the court noted that “there is no logical reason for creating a ‘public duty’ exception when the rationale for subjecting the carrier to absolute liability is the carrier’s ability to distribute the loss to the public.” *Chavez*, 413 F. Supp. 1203. Thus, the court determined that it could not justifiably apply the public duty exception, and the defendant common carrier railroad could be held strictly liable for conducting an abnormally dangerous activity. Significantly, the same loss distribution capacity relied on by the California court was one of the public policy factors noted by the Montana Supreme Court in adopting strict liability for product liability in the seminal case of *Brandenberger v. Toyota* (1973), 162 Mont. 506, 514, 513 P.2d 268, 273. Based on Montana precedent and the policies underlying them, this Court predicts that the Montana Supreme Court would reach the same result here.

51. Finally, even assuming *arguendo* that §521 applies, BNSF undertook extensive additional activities in the furtherance of the vermiculite operations that were not required of a common carrier and or performed under any public duty which contributed to the asbestos contamination at issue. As described in Dr. Hart’s Report, based on her review of the 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*.)

52. Emblematic of BNSF’s extensive and voluntary involvement in the Libby vermiculite operation, for its own purposes, were its activities in relation to the River Loading Facility located at the base of the W.R. Grace Mine. BNSF owned the property where this facility was located, funded much of its construction, and oversaw dust control, safety, construction, and modifications at the River Loading Facility during the entire period from its construction in 1950 until the last car-load of vermiculite was shipped out in the early 1990’s. (*Id.* at ¶36.) Authority cited by BNSF for the proposition that §521 should apply actually noted how such additional activities fall outside of the scope of §521. “It is therefore most likely that the Washington

Supreme Court would apply strict liability when the defendant was performing a dangerous activity for ‘his own purpose...’ *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1006 (9th Cir. 2008). Even assuming *arguendo* that §521 applies, because BNSF was under no public duty to engage in all of its vermiculite related activities, the proposed public duty exception would not apply to injuries resulting from these activities. *Accord, Murphy-Fauth v. BNSF*, No. CV-17-79-GF-BMM-JTJ, 2018 WL 3601235, at \*2 (D. Mont. July 27, 2018).

53. The Court concludes that 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. *Murphy-Fauth v. BNSF Ry. Co.*, *supra*, at \*2 (denying BNSF’s arguments identical to those raised herein in the context of BNSF’s motion to dismiss).

This PROPOSED Order is respectfully submitted this 15th day of January 2019.

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