

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP- _____

MARYLAND CASUALTY COMPANY,

Petitioner,

v.

THE ASBESTOS CLAIMS COURT, and THE HONORABLE AMY EDDY,
ASBESTOS CLAIMS COURT JUDGE,

Respondent.

**PETITION FOR WRIT OF SUPERVISORY CONTROL AND REQUEST
FOR STAY**

Original Proceeding Arising from the Montana Asbestos Claims Court, *In re Asbestos Litigation*, Cause No. AC-17-0694, The Honorable Amy Eddy Presiding Judge; Applicable to *Hutt v. Maryland Casualty Company, et al.*, Cascade County; Cause No. DDV-18-0175, Judge John Parker

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TABLE OF CONTENTS

| | |
|---|-----------|
| TABLE OF AUTHORITIES | ii |
| INTRODUCTION AND RELIEF SOUGHT..... | 1 |
| BACKGROUND FACTS AND PROCEDURAL HISTORY | 5 |
| Hutt’s Employment and the Libby Plant..... | 5 |
| Grace Bankruptcy | 6 |
| Asbestos Claims Court..... | 7 |
| STANDARD FOR A WRIT..... | 9 |
| ARGUMENT..... | 10 |
| A. SUPERVISORY CONTROL IS NECESSARY TO CORRECT A MISTAKE OF LAW MADE BY THE ASBESTOS CLAIMS COURT..... | 10 |
| B. THIS CASE INVOLVES ISSUES OF STATE-WIDE IMPORTANCE. | 15 |
| C. URGENCY AND EMERGENCY FACTORS EXIST MAKING THE NORMAL APPEAL PROCESS INADEQUATE. | 16 |
| CONCLUSION..... | 17 |
| CERTIFICATE OF COMPLIANCE | 18 |

TABLE OF AUTHORITIES

Cases

| | |
|--|----|
| <i>BNSF v. Sixth Judicial District Court</i> , 365 Mont. 556, 286 P.3d 591 (2012)..... | 9 |
| <i>Crisafulli v. Bass</i> , 2001 MT 316, ¶ 23, 308 Mont. 40, 46, 38 P. 842, 846..... | 11 |
| <i>Dorwart v. Caraway</i> , 2002 MT 240 ¶ 75, 312 Mont. 1, 22, 58 P.3d 128, 141 | 12 |
| <i>Emanuel v. Great Falls School Dist.</i> , 2009 MT 185, ¶ 12, 351 Mont. 56, 59, 209 P.3d 244, 247 & n.1..... | 15 |
| <i>Hale v. City of Billings, Police Dept.</i> , 1999 MT 213 ¶¶ 16-18, 295 Mont. 495, 500, 986 P. 2d 413, 417 | 12 |
| <i>Hutt, et al. v. Maryland Casualty Company</i> , 2016 LEXIS 3754, *6 (Bankr. D. Del. Oct. 17, 2016) | 7 |
| <i>In re: W.R. Grace & Co, et al.</i> , Bankruptcy Case No. 01-01139, Adv. Pro. No. 15-50766, Adv. Pro No. 18-50402 (Bankr. D. Del. Oct. 15, 2018) [D.I. 60]..... | 3 |
| <i>Jeffries v. United States</i> , 477 F.2d 52 (9th Cir. 1973) | 13 |
| <i>Lokey v. Breuner</i> , 2010 MT 216, ¶ 10, 358 Mont. 8, 10, 243 P.3d 384, 385 ... 10, 12 | |
| <i>Lopez v. Great Falls Pre-Release Servs., Inc.</i> , 295 Mont. 416, 424-425, 986 P.2d 1081, 1086 (1999)..... | 15 |
| <i>Meek v. Eighth Judicial District Court</i> , 2015 MT 130, ¶ 8, 379 Mont. 150, 349 P.3d 493 | 10 |
| <i>Mellott v. United States</i> , 808 F. Supp. 746, 749 n.3 (D. Mont. 1992)..... | 13 |
| <i>Olsen v. Milner</i> , 2012 MT 88, ¶ 37, 364 Mont. 523, 530, 276 P.3d 934, 940 | 12 |
| <i>Onsager v. Frontera Produce Ltd.</i> , 2014 WL 3828374, at *5 (D. Mont. 2014)..... | 13 |
| <i>Other Bull v. United States Dep't of Hous. & Urban Dev., Bureau of Indian Affairs</i> , 1994 U.S. App. LEXIS 719 (9th Cir. 1994)..... | 13 |
| <i>Prindel v. Ravalli County</i> , 2006 MT 62, ¶¶ 25, 36, 331 Mont. 338, 349-50, 355 133 P.3d 165, 174 | 15 |

| | |
|---|--------|
| <i>Samson v. State</i> , 2003 MT 133, ¶ 22, 316 Mont. 90, 96, 69 P.3d 1154, 1158 | 14, 15 |
| <i>Simms v. Montana Eighteenth Judicial District</i> , 2003 MT 89, ¶18, 315 Mont. 135, 68 P.3d 678 | 9, 10 |
| <i>Truman v. Eleventh Judicial District Court</i> , 2003 MT 91, ¶ 15, 315 Mont. 165, 68 P.3d 654 | 9 |

Statutes

| | |
|---|---|
| 11 U.S.C. § 524(g)10 | 7 |
| Article VII, Section 2(2) of the Constitution | 9 |

Other Authorities

| | |
|--|-------|
| Restatement (First) of Torts Intro. (1934) | 13 |
| Restatement (Second) of Torts § 324A..... | 1, 12 |
| Restatement (Second) of Torts § 323..... | 12 |

Rules

| | |
|----------------------------|----|
| M.R.App.P. Rule 14(3)..... | 10 |
|----------------------------|----|

INTRODUCTION AND RELIEF SOUGHT

Petitioner and Defendant Maryland Casualty Company, (“MCC”), seeks a writ of supervisory control to review the Asbestos Claims Court’s (“ACC”) Order of January 13, 2019, denying summary judgment on the legal issue of duty, and imposing a standard not accepted by the Montana Supreme Court. Order, January 13, 2019, Exhibit 1. The ACC is proceeding under a mistake of law which is of state-wide importance, affecting hundreds of cases against MCC in the ACC. MCC also seeks a writ at the invitation of the ACC, which acknowledged the unique importance of reaching correct and confirmed legal rulings in the lead ACC cases, with the importance of doing so before proceeding to trial:

As soon as we get done arguing those cases **I would encourage, of course, if you disagree with my rulings to take me up on a writ of supervisory control to the Supreme Court.** My feelings are not hurt, **I would rather get the Supreme Court’s opinion so we’re not trying all these cases under what might be my misapprehension of the law.** So that’s the way I would expect those cases to go, and the scheduling orders will be designed to accommodate that procedure.

Transcript of December 11, 2018 ACC Hearing at 64:2-11, “Exhibit 2” (emphasis added).

The ACC’s Order of January 13, 2019 deciding MCC’s motion for summary judgment (“Order”), addressed the legal issue of duty, which is a legal determination to be made by the trial court prior to trial. The ACC took the extraordinary step of concluding that MCC, as a workers’ compensation insurance provider, had a

common law duty to warn employees of its insured, W.R. Grace & Company (“Grace”), of hazardous conditions at Grace’s Libby, Montana facility (“Libby Plant”). In so holding, the ACC deviated from the Montana Supreme Court’s holdings regarding liability based on an undertaking; declined to review, analyze, or apply well-settled precedent regarding the lack of duty to protect others against harm from third persons; ignored this Court’s references to the Restatement (Second) of Torts’ § 324A (“§ 324A”) governing liability to a third-party based on an undertaking; and instead, contrary to this Court’s teachings, carved out a new, hybrid duty for insurers to warn and protect others of dangers created by their insureds based on foreseeability. The issue to be decided is the correct standard for determining duty; which is a legal determination.

The necessity of a writ in this matter is further enhanced by Plaintiff Ralph V. Hutt’s (“Hutt”) counsels’ representation to the U.S. Bankruptcy Court (“Bankruptcy Court”) in remand proceedings affecting the parties in this case, that they will seek certification of the legal elements of their negligence cause of action from this Court. Letter Brief of Libby Plaintiffs 9/10/2018 at 5, *In re: W.R. Grace & Co. et al.*, No. 01-01130, D.E. No. 33052, “Exhibit 3.” Thus, the issue of duty and defining the cause of action, if any, that Hutt and other similarly situated Libby plaintiffs (“Libby Plaintiffs”) may bring, is a legal determination of significant importance. For the parties to proceed under a mistake of law attaching to hundreds of cases throughout

the state grossly impacts judicial resources and economy. The writ and stay of proceedings allows for a speedy remedy for all involved parties.

In establishing the ACC, this Court recognized “the need of all parties to have asbestos-related claims timely resolved, the extraordinary complexity and cost of these cases, and the enormous detrimental impact on the resources of Montana district courts if required to litigate these cases on an individual basis.” Order of November 28, 2017, “Exhibit 4.” This Court also recently increased the number of ACC Judges from one to seven “[i]n order to more equitably and efficiently meet the demands of this litigation.” Order Appointing Additional ACC Judges, December 11, 2018, “Exhibit 5.”

Of the total active ACC cases, at least **124** are worker¹ cases against MCC; on the Deferred Docket, at least **113** are worker cases against MCC. Accordingly, the legal issue—whether the ACC properly analyzed the existence of a duty owed by MCC to Grace workers under Montana law—cuts across hundreds of pending cases. Moreover, if MCC is successful at this single trial, the legal issue may not reach this Court before additional ACC cases against MCC proceed to trial under the same

¹ The non-worker cases pending against MCC are stayed pursuant to status quo orders from the Bankruptcy Court, pending briefing following a remand in a related case from the Third Circuit Court of Appeals. *In re: W.R. Grace & Co, et al.*, Bankruptcy Case No. 01-01139, Adv. Pro. No. 15-50766, Adv. Pro No. 18-50402 (Bankr. D. Del. Oct. 15, 2018) [D.I. 60].

mistake of law. Accordingly, the Montana Supreme Court's guidance is critically necessary at this important juncture.

Given the February 4, 2019 trial setting, if the Montana Supreme Court does not issue a stay and writ of supervisory control, this case will proceed to trial under a grave mistake of law at great expense and burden to the court system and the parties, and gross prejudice to MCC. As this case is the first against MCC set for trial by the ACC, the mistake of law at issue could potentially impact hundreds of cases pending in the Montana courts. Moreover, waiting for a trial outcome in this case solves nothing, because the mistake of law could be applied erroneously in other matters by Libby Plaintiffs to support their claims, which fail as a matter of law under the proper legal analysis.

This Court's exercise of supervisory control serves both justice and judicial economy. The ACC's decision could impact hundreds of cases pending before seven different district court judges, which would otherwise be susceptible to disparate outcomes and rulings. The legal issue regarding the proper approach under Montana law used in analyzing the existence of a duty is bound to reach this Court eventually, but without this Court's exercise of supervisory control, it will do so at great cost, expense, and prejudice. Supervisory control is an appropriate remedy in this case because the issues presented are purely legal questions. The instant petition provides this Court an opportunity to speak definitively, and provide direction on a

question of law at its outset. Accordingly, a writ and stay is both imperative and appropriate in this case.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Hutt's Employment and the Libby Plant

Hutt worked at the Libby Plant for a short period of time from March 1968 to October 1969. MCC was Grace's workers' compensation carrier from 1962 to 1973, including the period of Hutt's employment. MCC's policies with Grace provided that MCC had the right, but not the obligation, to inspect Grace's facilities, including the Libby Plant:

PART SIX—CONDITIONS

A. Inspection

We have the right, but are not obliged to inspect your workplaces at any time. *Our inspections are not safety inspections.* They relate only to the insurability of the workplaces and the premiums charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, *we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards.* Insurance rate service organizations have the same rights we have under this provision.

Policy, "Exhibit 6," (emphasis added). No other agreements existed between MCC and Grace.

The undisputed record evidence shows that Grace exercised exclusive responsibility and control over the safety and conditions of the Libby Plant: it had its own employees who were specifically responsible for worker safety and daily plant conditions; it frequently and repeatedly rejected MCC's safety recommendations regarding reduction of dust and asbestos fibers; it established its own rules and procedures regarding worker health; and it repeatedly solicited and received industrial hygiene and safety input from multiple non-MCC sources, including Johns-Manville, the U.S. Public Health Service, the State, and the Bureau of Mines. The record clearly established that Grace alone was responsible for the conditions and procedures in place at the Libby Plant, as well as the health and safety of its workers.

Grace Bankruptcy

Faced with the onslaught of thousands of personal injury claims, Grace commenced Chapter 11 bankruptcy proceedings on April 2, 2001, in the Bankruptcy Court, jointly administered at Case No. 01-01139.

Under Grace's Chapter 11 Plan, Grace established an Asbestos PI Trust funded by settlements with MCC, other insurers, and Grace's own contributions. The Plan further included an Asbestos PI Channeling Injunction that enjoins an entity from taking any action against an Asbestos Protected Party, including MCC, with respect to any Asbestos PI Claim to the extent authorized by 11 U.S.C.

§ 524(g)10. Simply put, “The Plan’s channeling injunction limits all holders of Asbestos PI Claims to recovery from the Asbestos PI Trust after the Plan’s Effective Date, and enjoins those claim holders from pursuing recovery from the Debtors and any other Asbestos Protected Party.” *Hutt, et al. v. Maryland Casualty Company*, 2016 LEXIS 3754, *6 (Bankr. D. Del. Oct. 17, 2016). Under the terms of the Plan, the Asbestos PI Trust is an Asbestos PI claim holder’s sole source of recovery. Hutt’s tort claims against Grace are channeled by virtue of the Asbestos PI Channeling Injunction. On February 28, 2015, Hutt filed a claim with the W.R. Grace PI Trust.

Asbestos Claims Court

Separately, on November 28, 2017, this Court, having identified at least 540 asbestos cases pending against various defendants including MCC in the Montana state district courts, issued an Order activating the ACC. *See* Exhibit 4, Order November 28, 2017.

Hutt was one of 884 plaintiffs listed in the *Nancy Adams, et al. v. Maryland Casualty Company, et al.*, DDV-16-0786 complaint which was filed on September 23, 2016 in Montana’s Eighth Judicial District, Cascade County. On March 20, 2018, the ACC designated Hutt as a lead case for trial against MCC and directed him to file a separate complaint. On or about March 23, 2018, Hutt filed the instant Complaint against MCC, Robinson Insulation Company, and Does A-Z.

The Complaint alleges that Hutt was injured due to, *inter alia*, asbestos exposure relating to Grace's mining operations in Libby during the short period of time he was employed by Grace from 1968-1969.

After the close of discovery, both parties moved for summary judgment on October 19, 2018. The ACC held oral argument on the summary judgment motions on January 7, 2019. On January 13, 2019, the ACC granted in part and denied in part MCC's Motion for Summary Judgment. The ACC held MCC, as Grace's workers compensation insurer, owed a common law duty to warn Grace workers of the hazards created by Grace at the Libby Plant on what it deemed "a straight foreseeability analysis." Order at 16.

MCC now seeks this Court's review because the legal determination that was made by the ACC's Order will significantly impact all future aspects of this proceeding and hundreds of other proceedings pending in the ACC. Supervisory control is the appropriate avenue for relief for Petitioner in order to provide clarity as to the operative duty analysis in these cases, given that proceeding to trial under a mistake of law will impose significant injustice and prejudice on MCC, and ostensibly the parties in this and potentially hundreds of other proceedings.

STANDARD FOR A WRIT

Article VII, Section 2(2) of the Constitution grants the Montana Supreme Court “general supervisory control over all other courts.” This Court exercises supervisory control in appropriate cases pursuant to Article VII, Section 2(2) and M.R.App.P. Rule 14(3). Acceptance of supervisory control is limited to cases involving purely legal questions, in which the district court is proceeding under a mistake of law causing gross injustice or in which constitutional issues of statewide importance are involved. M.R.App.P. 14(3)(a)-(b).

The Montana Supreme Court assumes supervisory control over a district court to direct the course of litigation if the court is proceeding based on a mistake of law which, if uncorrected, would cause significant injustice for which appeal is an inadequate remedy. *Simms v. Montana Eighteenth Judicial District*, 2003 MT 89, ¶ 18, 315 Mont. 135, 68 P.3d 678. “We have held that supervisory control is an appropriate remedy where a speedy remedy via supervisory control is necessary to serve justice.” *BNSF v. Sixth Judicial District Court*, 365 Mont. 556, 286 P.3d 591 (2012). “Judicial economy and inevitable procedural entanglements” are appropriate reasons to issue a writ as well as prevention of extended and needless litigation. *Truman v. Eleventh Judicial District Court*, 2003 MT 91, ¶ 15, 315 Mont. 165, 68 P.3d 654. Supervisory control is appropriate when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves

purely legal questions, and when one or more of the following circumstances exist:

(a) the other court is proceeding under a mistake of law and is causing a gross injustice; or (b) constitutional issues of state-wide importance are involved. *Meek v. Eighth Judicial District Court*, 2015 MT 130, ¶ 8, 379 Mont. 150, 349 P.3d 493; M.R.App.P. 14(3). Whether supervisory control is appropriate is determined on a case-by-case basis. *Simms*, ¶ 18.

ARGUMENT

A. SUPERVISORY CONTROL IS NECESSARY TO CORRECT A MISTAKE OF LAW MADE BY THE ASBESTOS CLAIMS COURT.

The ACC's Order made a mistake of law concerning the proper test used to determine the existence of a duty. Duty is a legal determination to be made by the trial court as a matter of law. Specifically, although the Montana Supreme Court has described the Restatement (Second) of Torts' § 323's ("§ 323") principles, governing the performance of undertaking to render services to another, as "long-standing," *Nelson v. Driscoll*, 1999 MT 193, ¶ 37, 295 Mont. 363, 377, 983 P.2d 972, 981,² the ACC rejected and failed to substantively discuss § 323 and its companion provision, § 324A, governing performance of an undertaking for the benefit of a third party.

² See also *Lokey v. Breuner*, 2010 MT 216, ¶ 10, 358 Mont. 8, 10, 243 P.3d 384, 385 (citing §§ 323 and 324).

Section 324A provides a method for determining liability to third persons for the party's performance of an undertaking, and parallels the rule stated in § 323, which sets forth the liability of the actor to the one to whom he has undertaken to render services. Ironically, Libby Plaintiffs, and Hutt specifically, have repeatedly argued that § 324A applies to their negligence claims against MCC and the manner in which to determine whether a duty is owed to third persons.

While the ACC declined to address and apply § 324A as seen through the lens of *Lokey* and *Nelson*, the ACC concluded that “the existing common law of Montana is adequate to make a determination of duty in this case.” Order at 17. In doing so, the ACC appears to misunderstand both the existing common law in Montana, and the Restatement's application to the cases filed in the ACC. Restatements, including the Restatement (Second) of Torts, are compilations of common law; not a codification. Restatement (First) of Torts Intro. (1934) (“The object of the Institute in preparing the Restatement is to present an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years.”). The Montana Supreme Court has adopted and applied a number of the Restatement (Second) of Torts' individual provisions: *See, e.g., Crisafulli v. Bass*, 2001 MT 316, ¶ 23, 308 Mont. 40, 46, 38 P. 842, 846 (adopting § 316 on

parental liability for acts of a child); *Dorwart v. Caraway*, 2002 MT 240, ¶ 75, 312 Mont. 1, 22, 58 P.3d 128, 141 (recognizing cause of action for violation of state constitutional rights based on English common law as adopted by Montana, and § 874A); *McAlpine v. Rhone-Poulenc Ag Co.*, 2000 MT 383, ¶ 23, 304 Mont. 31, 1059, 16 P.3d 1054, 1059 (noting that § 402A, governing strict liability, mirrored Montana statute, and interpretation of the statute, in effect, interpreted the Restatement); *Hale v. City of Billings, Police Dept.*, 1999 MT 213, ¶¶ 16-18, 295 Mont. 495, 500, 986 P.2d 413, 417 (“The Restatement (Second) of Torts has been referenced as a reliable authority in myriad defamation cases in Montana ...,” and applying §§ 614 and 617); *Olsen v. Milner*, 2012 MT 88, ¶ 37, 364 Mont. 523, 530, 276 P.3d 934, 940 (applying § 165 regarding tort of reckless or negligent trespass).

The Montana Supreme Court has also acknowledged and discussed the concepts of §§ 323 and 324A. *See e.g., Lokey*, 2010 MT 216, ¶¶ 10-12, 358 Mont. at 10–11, 243 P.3d at 385–86 (citing §§ 323 and 324); *Nelson*, 1999 MT 193, ¶ 37, 295 Mont. at 377, 983 P.2d at 981 (citing § 323 for “long-standing” principle of tort law, and also applying § 319, governing duty of those in charge of person having dangerous propensities).

Rather than cite to and discuss the concepts of §§ 323 and 324A relative to *Lokey* and *Nelson*, or analyze the logical progression of the Montana Supreme Court’s opinions relying upon those principles, the ACC dismisses this Court’s case

law and inserts its own view and analysis. Indeed, the ACC acknowledges in its Order that the rejection of § 324A may place “Montana in the minority of jurisdictions.” Order at 17, n.7.

In addition to the Montana Supreme Court’s repeated reference to the long-standing principles embodied in §§ 323 and 324A, which were not addressed or acknowledged by the ACC, Montana federal courts have consistently recognized the applicability of § 324A under Montana law. *Onsager v. Frontera Produce Ltd.*, 2014 WL 3828374, at *5 (D. Mont. 2014) (noting that Montana Supreme Court “has not yet had occasion to expressly adopt § 324A, “but predicting that it would do so if presented with the facts before the U.S. District Court”); *Other Bull v. United States Dep't of Hous. & Urban Dev., Bureau of Indian Affairs*, 1994 U.S. App. LEXIS 719 (9th Cir. 1994); *Jeffries v. United States*, 477 F.2d 52 (9th Cir. 1973); *Mellott v. United States*, 808 F. Supp. 746, 749 n.3 (D. Mont. 1992). The ACC Order neglects to mention and flatly rejects by omission the Montana federal cases’ analysis. The ACC did not look to nor cite *Onsager*, *Lokey*, *Nelson*, or any other Montana precedent. Rather, the ACC carved out a hybrid analysis for insurers who allegedly fail to protect and warn their insured’s workers of dangers created by the insured by focusing on foreseeability to sidestep the Montana Supreme Court’s holdings on duty to protect others from a known danger, and imposes a flawed and mistaken analysis to create a new failure to warn cause of action.

Moreover, without immediate guidance from this Court, there essentially exists a conflict between the Montana state trial courts and the Montana federal courts: Under the ACC Order, a common law duty to warn exists based on foreseeability alone. However, for asbestos cases pending against MCC in federal court,³ whether a duty exists would presumably be governed by § 324A. This disparity between the state and federal courts' interpretations of the law of Montana will persist until this Court resolves the legal question. This Court's recent appointment of 6 additional judges to the ACC increases the possibility of disparate rulings absent a speedy, final, and definitive ruling from this Court.

The ACC's Order fundamentally misunderstands the role of foreseeability in the duty analysis. The foreseeability inquiry does not create the duty; it determines to whom the duty of reasonable care is owed. Put another way, foreseeability determines the scope of the risk created by an actor's conduct. *See Samson v. State*, 2003 MT 133, ¶ 22, 316 Mont. 90, 96, 69 P.3d 1154, 1158. Foreseeability is necessary, but not by itself sufficient, to impose a duty. It cannot on its own supplant the Montana Supreme Court's precedent requiring special circumstances for imposition of a duty to warn or protect another. *Lopez v. Great Falls Pre-Release*

³ *Schull et al. v. Maryland Casualty Company, et al.*, CV-17:76-CCL, is currently pending in the United States District Court for the District of Montana. The negligence claims pending against MCC in *Schull* are essentially identical to the negligence claim in *Hutt*.

Servs., Inc., 295 Mont. 416, 424-25, 986 P.2d 1081, 1086 (1999), *as amended on denial of reh'g* (Oct. 14, 1999), *and holding modified by Samson*, 2003 MT 133, ¶ 24, 316 Mont. at 90, 69 P.3d at 1154; *Prindel v. Ravalli County*, 2006 MT 62, ¶¶ 25, 36, 331 Mont. 338, 349-50, 355 133 P.3d 165, 174; *Emanuel v. Great Falls School Dist.*, 2009 MT 185, ¶ 12, 351 Mont. 56, 59, 209 P.3d 244, 247 & n.1. As such, the ACC rejected the Montana Supreme Court's teachings and analysis on duty, and inserts its own duty analysis.

B. THIS CASE INVOLVES ISSUES OF STATE-WIDE IMPORTANCE.

The ACC's Order that MCC owed a duty to Hutt could potentially apply to more than 237 total worker cases pending against MCC. In addition, given the increased number of judges on the ACC, there could be as many as seven different judicial opinions. The question of whether MCC owed any duty to Hutt is purely legal. It would be unduly prejudicial and a waste of judicial resources for MCC or any party to proceed with litigation before the ACC, including trial in the *Hutt* case and discovery in other pending matters, pursuant to the ACC's erroneous ruling. The issue of what test applies to determine whether MCC owed Hutt any duty could impact hundreds of cases pending in various Montana District Courts state-wide. Such decision-making would be contrary to this Court's original charge to the ACC. Justice and judicial economy are served by the Court's exercise of supervisory

control over the ACC as the issue is likely to reach the Montana Supreme Court. This Court's decision could impact hundreds of cases.

C. URGENCY AND EMERGENCY FACTORS EXIST MAKING THE NORMAL APPEAL PROCESS INADEQUATE.

The instant case is scheduled for trial on February 4, 2019; only weeks after the ACC's Order. The ACC has explicitly recognized that the legal issues controlling lead cases like the instant case cut broadly across hundreds of cases pending in the ACC, and the correct judicial determination should be made by the Montana Supreme Court before any of the cases proceed to trial. Proceeding to trial under the mistaken legal conclusion that MCC owed Hutt a duty in the first instance, or that the proper application of duty principles do not apply in Montana would cause gross injustice to MCC and the litigants, and substantially delay and complicate adjudication of the hundreds of other cases pending against MCC in the ACC.

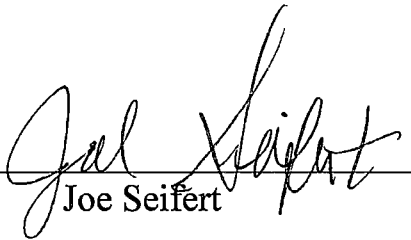
Further, there is no guarantee that this issue will reach this Court through the normal appeals process in this case. The parties and the court system would be required to undergo additional, repetitive, and costly proceedings in order to once again litigate the duty issue, which could result in many different appeals. Accordingly, emergency and urgency factors exist counseling in favor of this Court's grant of a writ of supervisory control. MCC requests that this Court stay future proceedings in this case, and proceed with the petition of supervisory control of this issue.

future proceedings in this case, and proceed with the petition of supervisory control of this issue.

CONCLUSION

Petitioner MCC respectfully requests the Montana Supreme Court stay the proceedings in the District Court, grant the petition for writ of supervisory control, and issue a Writ of Supervisory Control reversing the ACC's Order and remand for dismissal of the case.

Dated: January 22, 2019

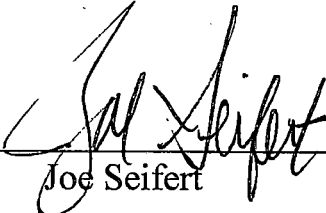


Joe Seifert

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11(4)(c) and 14(9)(b) of the Montana Rules of Appellate Procedure, I certify this Petition is double spaced (except for point headings, footnotes and quotes), printed with proportionately spaced Times New Roman Typeface, 14 point, and contains 3,969 words as calculated by Word, excluding any table of contents, table of citations, certificate of service, certificate of compliance, and appendix or exhibits.

Dated: January 22, 2019



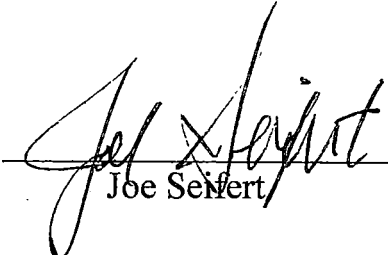
Joe Seifert

CERTIFICATE OF SERVICE

I, Joe Seifert, hereby certify that I have served true and accurate copies of the foregoing Petition for Writ of Supervisory Control to the following on 01-22-2019:

Hon. Amy Poehling Eddy
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Joe Seifert

Dated: 01-22-2019

**TABLE OF CONTENTS FOR EXHIBITS IN SUPPORT OF
MCC'S PETITION FOR WRIT OF SUPERVISORY CONTROL AND
REQUEST FOR STAY**

1. Exhibit 1 – Asbestos Claims Court Order Re: Defendant Maryland Casualty Company's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment, January 13, 2019
2. Exhibit 2 - Transcript of December 11, 2018 Asbestos Claims Court Hearing
3. Exhibit 3 - Letter Brief of Montana Plaintiffs September 10, 2018, *In re: W.R. Grace & Co. et al.*, No. 01-01130, D.E. No. 33052 (Bankr. D. Del.)
4. Exhibit 4 – Montana Supreme Court Order Establishing the Asbestos Claims Court and Consolidating Cases, November 28, 2017
5. Exhibit 5 – Montana Supreme Court Order Appointing Additional ACC Judges, December 11, 2018
6. Exhibit 6 – Maryland Casualty Company Workers' Compensation Policy