IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 19-0085

BNSF RAILWAY COMPANY

Petitioner,

vs.

THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA, THE HONORABLE AMY EDDY, PRESIDING JUDGE,

Respondent.

PLAINTIFFS' RESPONSE TO PETITION FOR WRIT OF SUPERVISORY CONTROL

On Petition from the Asbestos Claims Court,
In re Asbestos Litigation, Cause No. AC-17-0694, Hon. Amy Eddy presiding;
Applicable to *Barnes v. BNSF Railway Co., et al*,
Lincoln County Cause No. DV-16-111, Judge Matt Cuffe

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Plaintiffs submit this summary response pursuant to this Court's February 12, 2019, Order, following the Petition of BNSF Railway Company ("BNSF") for Writ of Supervisory Control re Non-Party Defenses ("BNSF's Petition"), and the January 18, 2019, Order of the Asbestos Claims Court ("Asbestos Court"). The Asbestos Court's Order is attached hereto as Exhibit 1.

STATEMENT OF THE ISSUES

1. Did the Asbestos Court err in holding that § 27-1-703, MCA, does not apply so as to allow a defendant such as BNSF to apportion fault to non-parties in the context of strict liability?

2. Did the Asbestos Court err in concluding that BNSF failed as a matter of law in alleging or presenting a sufficient defense of superseding intervening cause?

3. Did the Asbestos Court err in concluding that BNSF may not apportion fault or avoid liability by arguing that non-parties caused Plaintiffs' injuries?

PROCEDURAL BACKGROUND

The parties sought summary judgment regarding BNSF's duties and liability. The Asbestos Court held BNSF strictly liable to Plaintiffs, provoking a separate petition for supervisory control from BNSF. *See* Case No. OP 19-0088. That ruling removed all negligence issues from this case.[1]

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[1] *See* Asbestos Court's January 15, 2019, Order in Case No. OP 19-0088, p.13 ("Based on the representation of Plaintiffs' counsel that they would not pursue their negligence claims if the Court were to find BNSF strictly liable . . . the Court does not reach this issue [of '*Whether BNSF owed the Plaintiffs a duty of care*'].").

Plaintiffs separately sought summary judgment regarding BNSF's non-party affirmative defenses.[2] The Asbestos Court granted Plaintiffs' motion. It held in part that "§ 27-1-703 only applies to negligence claims, and therefore no longer has any applicability herein."

BNSF's Petition, p.2, alleges that the Asbestos Court "erroneously prohibits BNSF from making any attempt at negating liability with evidence of a superseding intervening cause or the conduct of nonparties that have settled with Plaintiffs."

SUMMARY OF PLAINTIFFS' RESPONSE

There is no question about BNSF's improper desire to negate its own liability through reliance upon evidence of, argument about, and apportionment to the conduct of non-parties. Montana's rejection of BNSF's empty chair defenses occurred long ago. The Asbestos Court correctly applied that law.

The Asbestos Court relied on black letter Montana law and BNSF's own inadequate pleadings to properly reject the three affirmative defenses at issue in Plaintiffs' summary judgment motion. The concise order of the Asbestos Court addressing BNSF's non-party defenses did not make or rely on factual findings.

Having ordered this summary response to BNSF's Petition, this Court now has the power to "issue any other writ or order deemed appropriate in the circumstances." M.R. App. P. 14(7)(b). This Court can and should hold that

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[2] BNSF's Petition, pp.5-6, and this Court's February 12, 2019, Order permitting Plaintiffs' response, each identify the three affirmative defenses at issue. *See also* Exh.1, pp.1-2.

Montana law does not allow BNSF to assert the empty chair defenses that it seeks. No additional briefing is necessary for this Court to affirmatively (1) reject further extraordinary proceedings on this issue, and (2) hold that the Asbestos Court's non-party ruling comports with, and does not reflect any mistake under, Montana law. BNSF's contentions of error are and will remain without merit.

First, § 27-1-703, MCA, expressly applies only to negligence claims. It does not operate in cases involving strict liability. *See, e.g., Hulstine v. Lennox Indus., Inc.*, 2010 MT 180, ¶¶ 19-21, 357 Mont. 228, 237 P.3d 1277. Here, the Asbestos Court properly refused any BNSF defense relying on § 27-1-703, MCA, following the elimination of negligence issues. Even if negligence were at issue in this case, a plain reading of § 27-1-703(6)(c), MCA, requires rejection of BNSF's attempt to apportion fault to W.R. Grace. Factual questions have no part in this issue, and the Asbestos Court's summary judgment decision precluding any reliance on § 27-1-703, MCA, should be affirmed.

Second, BNSF did not make a *superseding* or *intervening* cause defense. BNSF's revisionist argument aside, its Seventh and Eighth affirmative defenses never mention these terms, but instead refer only to 'other' persons and non-parties who allegedly contributed to or caused Plaintiffs' injuries. *See* Asbestos Court's Order, p.3, n.1 ("the language of [BNSF's defense] does not satisfy any definition of a superseding or intervening cause under Montana law."). Neither the Asbestos

Court nor this Court need rely upon anything other than a plain reading of BNSF's own defenses to reach such conclusion, and there is simply no genuine issue of material fact involved.

Even assuming that BNSF had *stated* a superseding intervening cause defense, Montana law still does not allow introduction of the non-party conduct/defense that BNSF intends. This Court has affirmed that any attempt to introduce non-party conduct that does not meet the definition of superseding intervening cause for purposes of diminishing a party's own responsibility violates Montana law. *See Faulconbridge v. State*, 2006 MT 198, ¶ 81, 333 Mont. 186, 142 P.3d 777 (citing *Plumb v. Fourth Jud. Dist. Court* (1996), 279 Mont. 363, 927 P.2d 1011). The Court in *Faulconbridge* held:

> By "superseding intervening cause" we mean "an unforeseeable event that occurs after the defendant's original act of negligence . . . [which] will generally serve to cut off defendant's liability."

Id. (emphasis added)[3] (citation omitted).

Here, the Asbestos Court properly identified that the Grace conduct of which BNSF complains all occurred contemporaneously with BNSF's own conduct. As a matter of law, this precludes such non-party conduct from satisfying this Court's definition in *Faulconbridge* of an 'unforeseeable (i.e., subsequent) event.'

BNSF's Petition, pp.11-12, tries to present contested facts about, for example, what bills of lading meant or the presence of railcar placarding. However, there can

[3] Unless otherwise noted, all emphasis hereinafter is added.

be no dispute, in general or regarding the evidence that BNSF relies upon, as to ***when*** BNSF's and Grace's overlapping conduct occurred: Everyday that Grace operated, BNSF was equally and contemporaneously involved in transporting that asbestos-contaminated vermiculite. Therefore here, in the context of *Faulconbridge* and evaluating BNSF's non-party defenses, the Asbestos Court had no reason to and did not engage in fact-finding about what BNSF knew. It simply interpreted facts that demonstrate without potential contest when BNSF's conduct occurred in relation to the non-party conduct at issue. This properly led to its holding as a matter of law that Grace's non-party conduct could not satisfy the definition of a superseding intervening cause that would allow BNSF to meet the requirements of *Faulconbridge*, and thereby potentially cut off BNSF's own liability.

ARGUMENT

I. Section 27-1-703, MCA, does not apply here or authorize the non-party defenses that BNSF intends.

BNSF's Petition, p.7, correctly notes that the Asbestos Court's ruling regarding § 27-1-703, MCA, did not involve legal analysis of the statute or BNSF's 15th affirmative defense relying thereon. Instead, the Asbestos Court simply applied the plain language of the statute. It properly ruled that after the removal of negligence issues from this case pursuant to its initial summary judgment order, the statute and its express, limited applicability in negligence no longer operates in this case involving just strict liability issues. BNSF cannot avail itself of § 27-1-703,

MCA, in a case involving just strict liability.[4] BNSF does not appear to dispute this. *See* BNSF's Petition, p.8 ("The statute permits a defendant in a negligence action . . .").

To the extent that negligence issues may return to this case, § 27-1-703, MCA, still cannot be the basis for the non-party defense involving W.R. Grace that BNSF intends. BNSF's Petition, pp.7-8, does not seek to alter or contest the terms of the statute. Indeed, it cites several portions of § 27-1-703, MCA. *Id.*

In its reliance on § 27-1-703, MCA, BNSF's error occurs by **ignoring** the plain language of the statute that controls *any* application to Grace.

Section 27-1-703(6), MCA, states in relevant part:

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

Here, following its bankruptcy, Grace is plainly within the terms of § 27-1-703(6)(c), MCA, as a 'person' both: (i) immune from liability to the Plaintiffs, and (ii) not subject to the jurisdiction of the Asbestos Claims Court.[5] There is no explanation for BNSF's failure to mention § 27-1-703(6)(c), MCA, to this Court.

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[4] Plaintiffs' Response in OP 19-0088 separately challenges BNSF's claim that the Asbestos Court erred in concluding that BNSF is strictly liable.

[5] Grace's Chapter 11 bankruptcy history is an established matter of record throughout these proceedings before the Asbestos Court. Bankruptcy debtor and corporate entity W.R. Grace is unquestionably 'immune from liability to' the Plaintiffs, and likewise 'not subject to the jurisdiction of' the Asbestos Claims Court.

BNSF instead tries to assert some alternate application to Grace. BNSF's Petition, p.8, admits that "Grace is not yet a 'settled' and/or 'released' party as to these Plaintiffs," but implies unexplained significance to its claim that, "Grace may well become a 'settled' and/or 'released' party in this case."[6] However, "when a statute is plain and unambiguous on its face, it must be applied as written, and 'the courts may not go further and apply any other means of interpretation.'" *Connery v. Liberty NW Ins. Corp.* (1996), 280 Mont. 115, 119, 929 P.2d 222, 225 (quoting *Murer v. State Comp. Mut'l Ins. Fund* (1994), 267 Mont. 516, 520, 885 P.2d 428, 430). None of BNSF's effort can overcome the statute's clear terms and prohibition against *any* "comparison of fault" involving Grace, as properly identified in § 27-1-703(6)(c), MCA. Accordingly, even assuming that negligence were a part of this case and that § 27-1-703, MCA, *might* be applicable, BNSF

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[6] BNSF's reliance on Exh.L (*Notice of Supplemental Authorities*) is flawed. *See* BNSF's Petition, p.8.

First, all the bankruptcy documents that BNSF sought to introduce to the Asbestos Court (and now this Court) via its Exh.L *Notice* constitute inadmissible hearsay which, in the undisputed absence of an appropriate Rule 56, M.R. Civ. P. affidavit from BNSF, are not part of the summary judgment record. *See generally Disler v. Ford Motor Co.*, 2000 MT 34, ¶¶ 10-11, 302 Mont. 391, 15 P.3d 864; *see also* attached Exhibit 2, Plaintiffs' January 7, 2019, Response to BNSF's *Notice*, pp.3-4.

Second, BNSF's *Notice* misstates the legal effect of those bankruptcy documents on whether Grace might be considered a 'settled party' for purposes of § 27-1-703, MCA, in this case. *See* Exhibit 2, pp.5-8. Plaintiffs filed a proper Rule 56 affidavit from Plaintiffs' Bankruptcy Counsel, demonstrating that no individual claims against Grace were settled in the bankruptcy, and moreover, that *these* Plaintiffs were not a defined party to the "settlements" which BNSF alleged did occur in its *Notice*. *See* attached Exhibit 3, Affidavit of Daniel C. Cohn, January 4, 2019.

cannot rely on the statute to pursue the non-party defense argued in its Petition. The Asbestos Court's ruling should be affirmed based on this Court's own need to interpret and apply the plain language of § 27-1-703, MCA, to the uncontested and relevant facts at issue.

II. The Asbestos Court properly concluded that BNSF cannot sustain a viable superseding intervening cause defense under Montana law.

A. BNSF failed to affirmatively plead a superseding intervening cause defense.

BNSF's Petition, p.13, which argues that the Asbestos Court erroneously "eliminat[ed] BNSF's defense of superseding intervening cause," mischaracterizes BNSF's own pleadings and the Asbestos Court's holding. In fact, the Asbestos Court found that "BNSF *did not allege* superseding intervening cause as an affirmative defense." Exh.1, p.3. The plain language of BNSF's Seventh and Eighth Affirmative Defenses bears out that the Asbestos Court properly interpreted BNSF's failure:

> 7. Plaintiffs' injuries and damages, if any, may have been caused by the action or conduct of persons whose conduct and actions Defendants had neither control, nor the right to control, and for whom the Defendants have no liability.
>
> 8. If Plaintiffs have incurred or sustained any losses, damages, or injuries, said losses, damages or injuries may have been contributed to and/or caused, by the carelessness or negligence of persons, corporations or entities other than Defendants.

BNSF's Petition, pp.5-6. These affirmative defenses, wrongly promoted now by BNSF as stating a superseding intervening cause defense, never even use such terms. They are instead nothing more than broad, non-party or alternate cause defenses.

BNSF cannot overcome its vagueness and establish now a specific affirmative defense that its pleadings failed to preserve. This Court has held:

> Nothing in M.R. Civ. P. 8(c) suggests that an affirmative defense may be raised later in the proceedings upon the showing of a lack of prejudice to the opposing party. This Court consistently has ruled against the circumvention of M.R. Civ. P 8(c)'s requirement that an affirmative defense be pled by answer. We long have held that a party waives an affirmative defense if not raised by answer.

Meadow Lake Estate Homeowners Ass'n, 2008 MT 41, ¶ 29, 341 Mont. 345, 178 P.3d 81. The Court has articulated the requirement for specific pleading in this exact context of preserving a superseding intervening cause defense. *See Faulconbridge*, 2006 MT 198, ¶ 84 ("the State should have included superseding intervening cause as an affirmative defense"). Moreover, an affirmative defense must actually state the intended defense and give adequate notice in the defendant's pleading. *See, e.g., Chandler v. Madsen* (1982), 197 Mont. 234, 241, 642 P.2d 1028, 1032 ("The key to determining the sufficiency of the pleading of an affirmative defense is whether it gives fair notice of the defense.").

BNSF elected in its Seventh and Eighth affirmative defenses to state broad, non-party or alternate cause defenses. As such, BNSF's pleadings are simply inadequate as a superseding intervening cause defense. No matter what evidence

BNSF might rely upon, the Asbestos Court had no choice in its application of Montana law to BNSF's affirmative defenses but to reject them as a superseding intervening cause defense.

B. As a matter of law, BNSF has failed to present evidence that can sustain a superseding intervening cause defense.

The Asbestos Court's holding is further buttressed by exposing BNSF's even *potential* superseding intervening cause defense under *Faulconbridge's* substantive analysis of 'superseding intervening cause.'

BNSF properly recognizes, "A superseding intervening cause, again, is 'an unforeseeable event that occurs after the defendant's original act of negligence.'" BNSF's Petition, p.13 (emphasis in original) (quoting *Faulconbridge*, ¶ 48 [sic]; see instead *Faulconbridge*, ¶ 81).[7] Montana law permits a court to determine foreseeability as a matter of law "when reasonable minds could reach but one conclusion." *Faulconbridge*, ¶ 86 (citing *Cusenbary v. Mortensen*, 1999 MT 221, ¶ 39, 296 Mont. 25, 987 P.2d 351); *see also Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶ 48, 350 Mont. 538, 208 P.3d 836.

[7] BNSF's Petition errs in its additional descriptions of *Faulconbridge*. For example, citing mysteriously again to ¶ 48, BNSF's Petition, p.14, states that the Asbestos Court misapplied the law and that *Faulconbridge* and Montana law hold that "any act of third-party negligence occur[ing] after the defendant's alleged negligence" constitutes a superseding intervening cause. *Faulconbridge* never says this, and BNSF's own Petition plainly misappropriates/misstates the applicable portion of *Faulconbridge*.

Here, the Asbestos Court appropriately recognized that the evidence, including that evidence relied upon by BNSF, permits only one conclusion: BNSF's and Grace's conduct occurred contemporaneously. *See* Exh.1, p.3; *see also* BNSF's Petition, pp.10-12 (highlighting BNSF's arguments/evidence about its alleged lack of knowledge regarding Grace's vermiculite). Contrary to the charges in BNSF's Petition, p.10, the Court did not make improper findings of fact, nor did it disregard BNSF's evidence or rely exclusively on Plaintiffs' exhibits. Instead, it identified that Grace's conduct could not reasonably be considered subsequent to BNSF's conduct. As a matter of law, Grace's conduct could therefore never be deemed unforeseeable and thereby cut off BNSF's potential liability. Thus, the Asbestos Court properly held that pursuant to the applicable standard in *Faulconbridge*, "there exist no genuine issues of material fact," and BNSF cannot prove that Grace's actions constitute a superseding intervening cause. Exh.1, p.3 ("Given the complete absence of evidence upon which the defense of superseding or intervening cause could be grounded, it fails as a matter of law even if it had been alleged.").

III. The Asbestos Court properly rejected BNSF's intention to pursue empty chair defenses that are not allowed by Montana law.

The Asbestos Court correctly characterized BNSF's non-party affirmative defenses/position in this case as an attempt to use "the conduct of Grace to argue that BNSF did not cause the Plaintiffs' injuries." Exh.1, p.3. The Asbestos Court relied on *Faulconbridge*, ¶ 81, where this Court held:

> A defendant may not, however, introduce such non-party conduct in an attempt to merely diminish its own responsibility, for this would constitute an attempt to apportion fault to a non-party, in violation of *Plumb*.

Exh.1, pp.3-4. Applied to BNSF's defenses in this case, the Asbestos Court properly stated that, "[a]rguing that a non-party is a cause of plaintiff's injuries is an impermissible attempt to apportion liability to that non-party." Exh.1, p.3.

BNSF's Petition makes no legal challenge regarding the applicable law or its meaning. It does not contest that part of the Asbestos Court's Order, pp.4-5, that (1) faulted BNSF's reliance on caselaw preceding *Faulconbridge*, and (2) found such authority as having been squarely rejected by this Court through *Faulconbridge*. Indeed, as plainly summarized by the Asbestos Court, Montana law regarding non-party defenses is clear:

> [It] prohibits ANY argument based upon facts involving the conduct of others—not even for the limited purpose of negating causation—unless it is a superseding or intervening cause.

Exh.1, p.5. The Asbestos Court was therefore correct in rejecting BNSF's erroneous, and indeed unsubstantiated, belief that it "can still talk about the fault of Grace." Exh.1, p.3, n.2 (quoting BNSF's summary judgment briefing).

A Montana defendant's ability to rely upon a defense of non-party conduct is narrowly limited to situations where that non-party conduct constitutes a potential

superseding intervening cause.[8] As stated above, BNSF in this case is precluded on two distinct grounds from satisfying that limited exception:

(1) its pleading failed to state and preserve such a superseding intervening cause defense, and

(2) it cannot as a matter of law demonstrate that Grace's conduct, contemporaneous as it was with BNSF's own conduct in this case, meets the *Faulconbridge* definition of a superseding intervening cause.

The Asbestos Court was correct in its application of the law. Allowing BNSF to pursue the empty chair defenses it seeks against Grace would run afoul of the constitutional safeguards that this Court recognized long ago in *Newville v. State, Dep't of Family Servs.* (1994), 267 Mont. 237, 252, 883 P.2d 793, 802, *Plumb v. Fourth Jud. Dist. Court* (1996), 279 Mont. 363, 927 P.2d 1101, and most recently *Faulconbridge*.

BNSF's Petition does not, and indeed cannot, overcome the clear conclusion that as recognized by the Asbestos Court, BNSF's non-party defenses are simply not allowed by Montana law in this case.

CONCLUSION

Based respectfully upon the above, Plaintiffs submit that no additional briefing is warranted or necessary in this original proceeding. This Court should

[8] While § 27-1-703, MCA, obviously contemplates a defendant's ability to rely upon non-party conduct when a claimant has settled with or released a person from liability, the statute only applies in cases involving negligence and therefore no longer applies here.

exercise its M.R. App. P. 14(7)(b), authority and enter an appropriate Order, which fully and finally affirms the Asbestos Court's January 18, 2019, Order granting Plaintiffs' Motion for Summary Judgment re: BNSF's Non-Party Affirmative Defenses.

RESPECTFULLY SUBMITTED this 13th day of March, 2019.

By: _____

John F. Lacey
Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman typeface of 14 point size; is double-spaced; and contains not more than 4,000 words, excluding certificate of service and certificate of compliance.

Dated this 13th day of March 2019.

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I hereby certify that on March 13th, 2019, a true and correct copy of the foregoing was e-mailed to the following:

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