No. OP 19-0051

IN THE
Supreme Court of the State of Montana

MARYLAND CASUALTY CO.,
Petitioner

v.

THE ASBESTOS CLAIMS COURT, and
THE HONORABLE AMY EDDY, Asbestos Claims Court Judge
Respondents

On Writ of Supervisory Control to the Asbestos Claims Court
(*In re Asbestos Litigation*, No. AC-17-0694) (Eddy, J.)

BRIEF OF AMICUS CURIAE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER

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INTRODUCTION

The Asbestos Claims Court held that a workers' compensation insurer that undertakes ordinary insurance functions, such as performing workplace inspections and providing risk-control recommendations, can be held liable in tort for failing to warn workers of dangers created by the employer's operations. In so ruling, the court specifically declined to apply Section 324A of the Restatement (Second) of Torts, which provides a well-established and widely accepted framework for determining whether an entity (such as a workers' compensation insurer) that allegedly undertakes to render services to another for the protection of third parties can be liable to those third parties. The Asbestos Claims Court thus split from 38 courts around the country, which have consistently applied Section 324A as the governing test for whether a legal duty exists in such circumstances. *See* ACC Op. 17 n. 7 (acknowledging that its decision would likely "place Montana in the minority of jurisdictions"). The Asbestos Claims Court also departed from the precedent of this Court, which has long followed the Second Restatement, and has expressly adopted several of Section 324A's companion provisions.

Instead, the Asbestos Claims Court created a novel, *ad hoc* test under which a workers' compensation insurer apparently can acquire a duty to warn employees of hazards at an employer's facility if the insurer learns of possible dangers to workers by engaging in inspections and other risk-control activities. If allowed to

stand, the Court's holding could jeopardize the workers' compensation marketplace in Montana by exposing insurers to unpredictable tort liability for undertaking these routine and desirable services, over and above the liability for statutory compensation benefits for which they actually bargained. In doing so, it would discourage insurers from engaging in these socially beneficial risk-control activities. The Court should vacate the Asbestos Claims Court's decision and hold that Section 324A provides the exclusive framework for evaluating liability under the circumstances presented here.

INTEREST OF AMICUS CURIAE

The American Property Casualty Insurance Association ("APCIA") is the preeminent national trade association representing property and casualty insurers doing business nationwide and globally. APCIA's members, which range from small companies to the largest insurers with global operations, represent more than 50% of the U.S. property and casualty marketplace. On issues of importance to the property and casualty industry and marketplace, APCIA advocates sound public policies on behalf of its members in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before federal and state courts. This allows APCIA to share its broad national perspectives with the judiciary on matters that shape and develop the law. APCIA advocates for the

clear, consistent, and reasoned development of law that affects its members and the policyholders they insure.

ARGUMENT

As this Court has repeatedly stated, except in certain narrow circumstances, "there is no duty to protect others against harm from third persons." *Prindel v. Ravalli County*, 2006 MT 62, ¶ 25, 331 Mont. 338, 133 P.3d 165 (quotation marks omitted). In the decision below, the Asbestos Claims Court created a novel exception to this principle, holding that Maryland Casualty Company ("MCC") had a duty to warn Mr. Hutt of the hazards of asbestos exposure created by Grace's operations *solely* because (1) MCC "ha[d] developed a Safety Program, of which a duty to warn employees of hazards [was] an essential component," and (2) MCC, "through its own affirmative action of engaging in medical monitoring of workers," had obtained "actual knowledge" that "a known hazard [was] injuring workers." ACC Op. 17. Mr. Hutt, for his part, advances an even more far-reaching theory. In his view, the fact that an insurer can foresee harm, coupled with its superior knowledge of any risks, *alone* establishes a duty to warn.

The case law does not support either approach. Rather, the Asbestos Claims Court should have analyzed whether MCC owed a duty to Mr. Hutt under Section 324A of the Second Restatement. Because the lower court failed to apply this well-established test, this Court should vacate the decision below.

I. Section 324A Sets Forth The Appropriate Framework For Analyzing Duty In This Case.

As mentioned above, Montana law contains no freestanding "duty to protect others against harm from third persons." *Prindel*, *supra*, ¶ 25; *see also* Restatement (Second) of Torts § 314 (1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."). In adopting this blackletter principle, Montana courts have distinguished between (1) tort claims based on an alleged failure to protect against dangers created by others and (2) claims of "misfeasance" in which the defendant allegedly "injur[ed] another by a positive affirmative act." *Emanuel v. Great Falls Sch. Dist.*, 2009 MT 185, ¶ 12, 351 Mont. 56, 209 P.3d 244. In the former category of cases, there is no liability for the failure to prevent harm caused by another—even if injury is foreseeable—unless the case falls within one of a narrow set of common-law exceptions[1] or is subject to a duty created by statute.[2]

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[1] *See, e.g., Piedalue v. Clinton Elementary Sch. Dist. No. 32*, 214 Mont. 99, 103, 692 P.2d 20 (1984) (recognizing exception under Second Restatement Section 373 for a business proprietor's traditional duty to provide "safe ingress and egress from the property" for invitees, including warning of dangers he did not create).

[2] *See, e.g., Gudmundsen v. State ex rel. Mont. State Hosp.*, 2009 MT 56, ¶¶ 15-31, 349 Mont. 297, 203 P.3d 813 (recognizing exception where state statute imposed duty on therapist to warn potential victims of a patient's violence); *Orr v. Montana*, 2004 MT 354, ¶¶ 10-47, 324 Mont. 391, 106 P.3d 100 (the State had a statutory duty to warn miners of known dangers in their workplace).

In this case, Mr. Hutt claims that MCC failed to protect him from, or warn him of, dangers created by Grace's operations. The only possible exception here to the general no-duty-to-protect rule is the framework recognized in Section 324A of the Second Restatement. Under that provision, an entity that "undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person" may be liable to that third person for failing to exercise reasonable care, but *only* if one of three facts is true:

> (a) his failure to exercise reasonable care increase[d] the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm [was] suffered because of reliance of the other or the third person upon the undertaking.

Restatement, *supra*, § 324A. Throughout several years of proceedings in federal bankruptcy court, Mr. Hutt consistently identified Section 324A as the key to determining whether MCC owed him a duty of care.[3] And with good reason.

This Court has long followed the Second Restatement in analyzing a defendant's duty in the context of negligent "undertakings" and injuries to third parties. In doing so, the Court has expressly adopted several of Section 324A's companion provisions. In *Nelson v. Driscoll*, 1999 MT 193, 295 Mont. 363, 983

[3] *See, e.g.*, Plf.'s Reply Br. in Support of Mot. for Summ. Judgment at 13 & n. 35, *In re W.R. Grace & Co. (Hutt v. MCC)*, Adv. Proc. No. 14-50867 (Bankr. D. Del., filed Aug. 18, 2015) (Dkt. No. 27).

P.2d 972, for example, the Court followed Sections 319 and 323 of the Restatement in assessing whether a police officer voluntarily assumed a duty to protect motorists. *Id.* ¶¶ 28, 37. Similarly, in *Lokey v. Breuner*, 2010 MT 216, 358 Mont. 8, 243 P.3d 384, the Court relied on Sections 323 and 324 in determining whether a driver assumed a duty of care when he waved at another motorist to make a left turn in front of him. *Id.* ¶ 10. These other provisions, previously cited by this Court, combine with Section 324A to form a single, coherent doctrine, with each provision addressing a different circumstance in which a defendant is liable for the harm resulting from its negligent "undertaking."[4]

Consistent with these authorities, the U.S. District Court for the District of Montana has recognized that this Court's precedent logically embraces Section 324A. Noting that this Court has expressly adopted Section 323, which "largely parallels" Section 324A, the federal district court applied Section 324A in determining whether an agricultural inspection service owed a duty of care under Montana law to consumers injured by a farm's produce. *Onsager v. Frontera Produce Ltd.*, No. 13-cv-66, 2014 WL 3828374, at *5 (Aug. 4, 2014).

[4] *See* Restatement, *supra*, § 319 (imposing liability when defendant "takes charge" of another person who causes injury to third party); § 323 (imposing liability when defendant "undertakes" to protect another individual when harm results to that individual); § 324 (imposing liability when defendant "takes charge of another who is helpless" and harm results to that person); *see also Wallace v. Dean*, 3 So. 3d 1035, 1050-52 (Fla. 2009) (explaining that Sections 323, 324, and 324A collectively "outline the parameters" of a defendant's duty).

By contrast, affirming the decision below would place Montana out of step with the vast majority of other jurisdictions. At least 38 states have adopted or relied on Section 324A in cases in which a plaintiff sought to impose liability on the theory that a defendant's undertaking failed to protect the plaintiff.[5] Two other

[5] *See Yanmar Am. Corp. v. Nichols*, 166 So. 3d 70, 84 (Ala. 2014); *Saddler v. Alaska Marine Lines, Inc.*, 856 P.2d 784, 788-89 (Alaska 1993); *Stanley v. McCarver*, 208 Ariz. 219, 223-24 (2004); *Wilson v. Rebsamen Ins., Inc.*, 330 Ark. 687, 695-98 (1997); *Artiglio v. Corning Inc.*, 18 Cal. 4th 604, 612-14 (1998); *DeCaire v. Pub. Serv. Co.*, 173 Colo. 402, 408-09 (1971); *Gazo v. City of Stamford*, 255 Conn. 245, 252-53 (2001); *Handler Corp. v. Tlapechco*, 901 A.2d 737, 747 (Del. 2006); *Wallace*, 3 So. 3d at 1050-52 (Fla.); *Herrington v. Gaulden*, 294 Ga. 285, 287 (2013); *Tabieros v. Clark Equip. Co.*, 85 Haw. 336, 358-59 (1997); *Bell v. Hutsell*, 955 N.E.2d 1099, 1104-05 (Ill. 2011); *Collip v. Ratts ex rel. Ratts*, 49 N.E.3d 607, 615 (Ind. Ct. App. 2015); *Sallee v. Stewart*, 827 N.W.2d 128, 156 (Iowa 2013) (Wiggins, J., concurring) (collecting decisions); *McGee v. Chalfant*, 248 Kan. 434, 438 (1991); *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 539 (Ky. 2003); *Bujol v. Entergy Servs., Inc.*, 922 So. 2d 1113, 1130 (La. 2004); *Blackwell v. Citizens Ins. Co. of Am.*, 457 Mich. 662, 674-75 (1998); *Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus*, 801 N.W.2d 193, 199 (Minn. Ct. App. 2011); *Galanis v. CMA Mgmt. Co.*, 175 So. 3d 1213, 1220 (Miss. 2015); *Plank v. Union Elec. Co.*, 899 S.W.2d 129, 131-32 (Mo. Ct. App. 1995); *Wright v. Schum*, 105 Nev. 611, 615-16 (1989); *Van De Mark v. McDonald's Corp.*, 153 N.H. 753, 757 (2006); *Fackelman v. Lac d'Amiante du Québec*, 398 N.J. Super. 474, 481 (App. Div. 2008); *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 140, 142 (2002); *Edwards v. GE Lighting Sys., Inc.*, 200 N.C. App. 754, 758-59 (2009); *Madler v. McKenzie County*, 496 N.W.2d 17, 18-20 (N.D. 1993); *Root v. Stahl Scott Fetzer Co.*, 88 N.E.3d 980, 990-91 (Ohio Ct. App. 2017); *Brewer v. Murray*, 292 P.3d 41, 48 (Okla. Civ. App. 2012); *Cantwell v. Allegheny County*, 506 Pa. 35, 39-41 (1984); *Schoenwald v. Farmers Co-op Ass'n of Marion*, 474 N.W.2d 519, 520-21 (S.D. 1991); *Grogan v. Uggla*, 535 S.W.3d 864, 872-75 (Tenn. 2017); *Seay v. Travelers Indem. Co.*, 730 S.W.2d 774, 776 (Tex. App. 1987); *Alder v. Bayer Corp.*, 61 P.3d 1068, 1077 (Utah 2002); *Derosia v. Liberty Mut. Ins. Co.*, 155 Vt. 178, 182-83 (1990); *Burns v. Gagnon*, 283 Va. 657, 672-73 (2012); *Butler v. Advanced Drainage Sys., Inc.*, 282 Wis. 2d 776, 783

states have declined to apply Section 324A in such circumstances only because they found it *too lenient—i.e.*, because it allowed for greater liability than the law of the jurisdiction.[6] Amicus is not aware of *any* state courts that have declined to adopt Section 324 because its liability standards are too demanding.

Section 324A is not only widely accepted around the country, but it has also been routinely applied in cases involving claims *exactly* like those at issue here. For example, in *Fackelman v. Lac d'Amiante du Québec*, 398 N.J. Super. 474 (App. Div. 2008), the court considered "whether [a] workers' compensation insurer which performed industrial hygiene studies for plaintiff's employer . . . had a duty to educate and warn employees of" the dangers of asbestos exposure at the employer's facility. *Id.* at 476 (footnote omitted). Like Mr. Hutt, the plaintiff in that case claimed that the insurer, Aetna, had assumed a duty of care by virtue of its administration of "dust studies, inspections," and similar services at the employer's facility. *Id.* at 477. Applying Section 324A, the court held that Aetna had not breached any duty of care. *Id.* 481-87. In particular, the court found no indication that Aetna had "increased the risk of harm" to the employees, or that it

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(Ct. App. 2005), *aff'd*, 294 Wis. 2d 397 (2006); *Rice v. Collins Commc'n, Inc.,* 236 P.3d 1009, 1014 (Wyo. 2010).

[6] *See Gushlaw v. Milner*, 42 A.3d 1245, 1259-60 (R.I. 2012) (describing Section 324A as "more relaxed" than Rhode Island law); *Miller v. City of Camden*, 329 S.C. 310, 316 (1997) (opinion of Burnett, J.) (explaining that majority rejected Section 324A because it "expands liability" beyond existing scope of South Carolina law).

had "assumed responsibility for workplace safety." *Id.* at 485. As relevant here, the *Fackelman* court noted that Section 324A "is the princi[pal] theory on which" courts around the country have imposed liability on insurers, but "only in instances in which at least one of the three circumstances identified by section 324A has been met." *Id.* at 484. The court also specifically rejected the contention that "foreseeability of harm" by an insurer was "determinative" of the question of duty. *Id.* at 486 (quotation marks omitted). Other courts are in accord.[7]

The only explanation offered by the Asbestos Claims Court for its decision *not* to apply Section 324A was that "the existing common law of Montana," by itself, "is adequate to make a determination of duty in this case." ACC Op. 17. But of course, the Second Restatement is itself intended to articulate the "common-law rule," *Beckman v. Butte-Silver Bow County*, 2000 MT 112, ¶ 27, 299 Mont.

[7] *See, e.g.*, *Blackwell*, 457 Mich. at 673-76 (workers' compensation insurer did not owe duty to employee because referring employee for medical treatment was not an "undertaking" under Section 324A); *Evans v. Liberty Mut. Ins. Co.*, 398 F.2d 665, 667 (3d Cir. 1968) (workers' compensation carrier did not owe duty to employee because there was no evidence that carrier had increased risk of harm, that plaintiff had relied on carrier, or that carrier had undertaken to inspect employer's plant, as required by Section 324A); *Commercial Union Ins. Co. v. DeShazo*, 845 So. 2d 766, 770-71 (Ala. 2002) (workers' compensation insurers did not owe duty to employee because carriers' inspections and audits were not done for benefit of employees, and thus did not constitute "undertakings" under Section 324A); *Schoenwald*, 474 N.W.2d at 522 (casualty insurer did not owe duty to employees because there was no evidence that safety inspections were undertaken for employees' benefit as required by Section 324A); *cf. Jeffries v. United States*, 477 F.2d 52, 54-56 (9th Cir 1973) (relying on Section 324A in case applying Montana law to hold that government's right to inspect a facility did not create duty of care for employee safety).

389, 1 P.3d 348, and there is no reason that Montana common law should depart from the nationwide consensus on this issue, particularly since this Court has already adopted Section 324A's companion provisions.

II. The Asbestos Claims Court's Decision Marks A Dramatic Expansion Of The Liability Faced By Workers' Compensation Insurers In Montana.

Under the Asbestos Claims Court's test, a workers' compensation insurer may owe employees a duty of care solely because of the knowledge it gains through routine inspections undertaken at, and risk-control recommendations relating to, the employer's workplace. But a test that allows such routine activities to trigger liability could be used to turn workers' compensation insurers into guarantors of worker safety—expanding their liability for statutory compensation benefits to include liability in tort for injuries caused by workplace operations over which insurers have no control. The Court should reject such a dramatic transformation of Montana workers' compensation law.

Virtually all industrial workplaces present risks of injury to employees. As part of their statutory and contractual undertakings, workers' compensation insurers agree to accept premiums in exchange for adjusting workplace injury claims and providing benefits to injured workers at levels established by statute. In connection with that process, insurers must of necessity "evaluat[e] which risks to insure and at what price." Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412,

1420 (2013). To do so, insurers underwriting policies reserve the contractual right (as MCC did here) to inspect an employer's workplace and review its records to ascertain the risks present and determine the premiums to be charged. *See* George E. Rejda, PRINCIPLES OF RISK MANAGEMENT AND INSURANCE 112 (11th ed. 2011) ("In . . . casualty insurance, the underwriter may require a physical inspection before the application is approved. For example, in workers' compensation insurance, the inspection may reveal unsafe working conditions[.]"). Likewise, in the course of providing coverage, "[a]ll major liability insurance carriers . . . offer risk management or loss control services"—including safety recommendations—in order to reduce the injury rate and minimize their exposure. Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 210 (2012); *see also* Rejda, *supra*, at 125.[8] Indeed, since 1993 Montana law has *required* "[e]ach [workers' compensation] insurer" to

[8] *See also* David F. Utterback et al., U.S. DEP'T OF HEALTH HUMAN SERVS., Pub. No. 2014-110, WORKERS' COMPENSATION INSURANCE: A PRIMER FOR PUBLIC HEALTH 22 (2014), http://www.cdc.gov/niosh/docs/2014-110/pdfs/2014-110.pdf ("Many insurance carriers have loss prevention programs to identify and describe the particular risks that exist at policyholders' establishments, make recommendations for their abatement, and offer loss prevention services to help policyholders manage these risks."); INSURANCE INFORMATION INSTITUTE, *Commercial Insurance*, "Company Operations," http://www.iii.org/publications/commercial-insurance/how-it-functions/company-operations ("Loss control activities aimed at preventing or reducing the size of losses due to accidents . . . have been integral to the insurance industry as far back as 1752[.]").

"provide safety consultation services to each of its insured employers who request the assistance." Mont. Code Ann. § 39-71-1507(1).

Importantly, however, these inspections and risk-control services are undertaken so the insurer can better assess premiums and minimize risk, not for the benefit of employees or even the policyholder employer—although they may have the incidental benefit of encouraging the employer to provide a safer workplace, thus indirectly benefiting all stakeholders and society more broadly. Standard insurance contracts confirm that any inspections or risk-control or safety consultation services are not undertaken for the benefit of employees, and thus do not create duties to warn or otherwise protect those employees from their employers' operations. MCC's contract with Grace is a case-in-point. The contract expressly stated that:

> 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.

ACC Op. 4. Language like this is standard in the industry. *See, e.g.*, *Commercial Union Ins. Co. v. DeShazo*, 845 So. 2d 766, 770-71 (Ala. 2002) (defendant insurers did not owe a duty to employees to guarantee workplace safety because, *inter alia*, the language of their contracts confirmed that inspections and audits were not

undertaken for the benefit of employees); *see generally* John Dwight Ingram, *Liability of Insurers for Negligence in Inspection of Insured Premises*, 50 DRAKE L. REV. 623, 624 n. 6 (2002) (recognizing that such policy limitations are standard, while also concluding that risk-control efforts also promote overall safety).

These standard terms exist for a good reason. Insurers do not control the entities they insure, or possess the authority to direct their conduct. Thus, a workers' compensation carrier cannot force an employer to undertake any particular safety measure or to post warnings of possible dangers. The decision of the Asbestos Claims Court thus imposes workplace safety duties on insurers that are at odds with the insurer-employer relationship and would expose insurers to liability merely for engaging in standard measures to understand and minimize risk. The result of such an approach could perversely lead to *less* safe workplaces, by discouraging workers' compensation insurers from undertaking socially beneficial risk-control services for fear of incurring new liabilities outside the scope of their policies.

III. Plaintiff Relies On Inapposite Cases, Which Do Not Establish "Foreseeability" As A Freestanding Test For Legal Duty.

Mr. Hutt urges an even more expansive theory of legal duty. He argues that foreseeability of harm, coupled with superior knowledge of dangers in the workplace, is *by itself* sufficient to establish a duty of insurers to warn or otherwise protect employees. But Mr. Hutt bases this claim on inapposite decisions. He

relies most heavily on cases in which a defendant, through its *own* voluntary actions, actually created the foreseeable danger to the third party. But those decisions have no bearing here, where MCC allegedly failed to protect Mr. Hutt from a danger created by *others*. *See supra*, pp. 3-4 (describing general rule that a party is *not* liable for failing to prevent foreseeable injuries from risks created by others). And the remaining cases he cites involve exceptions to the no-duty-to-protect rule which are not applicable here.

Virtually all of the cases that Mr. Hutt has cited (either in this Court or in his briefing below) involve dangers created by the defendant. For example, in *Estate of Strever v. Cline*, 278 Mont. 165, 924 P.2d 666 (1996), the Court recognized a duty of care for a gun owner *who himself created a risk* by "storing his gun and ammunition in an unlocked vehicle on a public street with numerous other items of attractive personal property in plain view easily accessible to thieves or simply to curious small children." 278 Mont. at 173-75. Similarly, in *Fisher v. Swift Transportation Co.*, 2008 MT 105, 342 Mont. 335, 181 P.3d 601 (2008), the Court held that where a tractor-trailer created a risk by sliding into vehicles on the side of the road, causing an accident, the operator owed a duty to a person who was subsequently injured when the truck was removed from the scene. *Id.* ¶¶ 18-20.[9]

[9] *See also Bush v. Albert D. Wardell Contractor, Inc.*, 165 Mont. 312, 313-17, 528 P.3d 215 (1974) (defendant subcontractor, a mason, constructed the wall that collapsed and injured plaintiff); *White v. Murdock*, 265 Mont. 386, 388-89, 877

Notably, in none of these cases did the Court suggest that the foreseeability of harm was sufficient on its own to create a legal duty. Rather, the Court recognized that foreseeability served to *limit* the scope of the defendant's duty, because a defendant is not responsible for even those risks its own actions created if they were not foreseeable. *See, e.g.*, *Fisher*, *supra*, ¶¶ 21-26 (examining whether a duty was negated by the unforeseeability of plaintiff's injury).

Mr. Hutt also relies on cases involving third-party claims of professional negligence. But in those cases, too, the defendant's conduct actually created the risk of harm to the third party—which, as noted above, is not the case here. In addition, the third party in those cases was a known beneficiary of the professional's services. Those cases thus present materially different scenarios than the one presented here. Moreover, those cases involved the application of other sections of the Restatement, analogous to Section 324A—thus confirming this Court's wide acceptance and application of the Second Restatement.

For example, in *Jim's Excavating Service, Inc. v. HKM Associates*, 265 Mont. 494, 878 P.2d 248 (1994), this Court adopted Section 552 of the Second Restatement and held that a project engineer may be liable to third-party contractors who rely on the engineer's plans. 265 Mont. at 506. As the language

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P.2d 474 (1994) (defendant driver struck a moose, which plaintiff's car then collided with); *O'Brien v. Great N. Ry. Co.*, 145 Mont. 13, 15-17, 400 P.2d 634 (1965) (defendant railway operated train that collided with plaintiff's car at track crossing that defendant controlled).

of Section 552 makes clear, bare foreseeability of risk does not trigger liability; rather, the defendant must create the risk of injury by supplying false or misleading information—and must also *intend* to supply that information for the benefit and reliance of third parties (or at least *know* that he is doing so). Similarly, in *Thayer v. Hicks*, 243 Mont. 138, 793 P.2d 784 (1990), this Court held that an accountant who harmed third parties through a negligent audit could "owe a duty of care to [those] third parties." 243 Mont. at 149. There too, the circumstances in which such a duty arises are narrow: "this duty exists," the Court explained, "only if the accountant actually knows that a specific third party intends to rely upon his work product and only if the reliance is in connection with a particular transaction or transactions of which the accountant is aware when he prepares the work product." *Id.*[10] There is no suggestion in these cases that the defendant acquired a duty to someone merely because harm to that person was foreseeable from another's conduct.

[10] *See also Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 21, 321 Mont. 432, 92 P.3d 620 (holding that an attorney who harmed non-clients through poor drafting of estate documents could owe a duty of care to those non-clients, but only because that was consistent with "the mutual intent of the attorney and client"); *Kent v. City of Columbia Falls*, 2015 MT 139, ¶ 45, 49, 379 Mont. 190, 350 P.3d 9 (recognizing liability of City that "took an active role" in construction of a trail system, because "[m]any of the City's actions were similar to those that would be typically undertaken by the architects, contractors, and engineers"); *see also Schmidt v. Washington Contractors Grp., Inc.*, 1998 MT 194, ¶ 3, 290 Mont. 276, 964 P.2d 34 (recognizing that contractors at construction site failed to keep roadway in reasonably safe condition).

Next, Mr. Hutt relies on a premises-liability case, *Piedalue v. Clinton Elementary School District No. 32*, 214 Mont. 99, 692 P.2d 20 (1984), but that case equally fails to support his efforts to collapse the issue of legal duty into a question of foreseeability. As this Court explained, the duty in *Piedalue* derived from the well-established common law concept that a business proprietor ordinarily owes business invitees a duty of "safe ingress and egress from the property." 214 Mont. at 103. *Piedalue* merely recognized that such a duty is not bounded by formal property lines: a proprietor must "warn of an unsafe ingress and an unsafe egress from his property" even if the hazard itself is "beyond the premises actually owned by [the proprietor]." *Id.* Here again, Mr. Hutt is wrong to suggest that Montana law recognizes an all-encompassing duty to warn of foreseeable injuries. Instead, the duty discussed in *Piedalue* is directly related to a defendant's control of his *own land*—one of the special circumstances that gives rise to an exception to the general no-duty-to-protect rule. *See supra*, p. 4 & n. 1. The facts here are not remotely comparable.

Finally, Mr. Hutt relies on *Orr v. Montana*, 2004 MT 354, 324 Mont. 391, 106 P.3d 100, and *Gudmundsen v. State ex rel. Mont. State Hosp.*, 2009 MT 56, 349 Mont. 297, 203 P.3d 813, which allegedly imposed on defendants a duty to warn of the dangerous conduct of others. But those decisions expressly rested on duties created by statute. *See supra*, p. 4 & n. 2. "Legislatures in the Anglo-

American system"—including the Legislature of this state—"have long been held to possess the authority to expand . . . claims and remedies available at common law." *Meech v. Hillhaven W., Inc.*, 238 Mont. 21, 32, 776 P.2d 488 (1989). Indeed, state statute makes clear that "there is no common law in any case where the law is declared by statute." Mont. Code Ann. § 1-1-108. Accordingly, *Orr* and *Gudmundsen* have no bearing on the question whether MCC owed Mr. Hutt any *common-law* duty.

CONCLUSION

For the foregoing reasons, Section 324A governs this dispute, and the Asbestos Claims Court erred in disregarding that provision. The Court should vacate the decision below.

March 21, 2019

Respectfully submitted,

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This brief complies with the typeface, text style, and length requirements of M. R. App. P. 11(2) and 11(4)(a). Excluding the sections exempted by Rule 11(4)(D), the brief contains 4,879 words, as calculated by Microsoft Word 2010 (Version 14). The brief is printed doubled-spaced, using 14-point Times New Roman, a proportionally spaced typeface.

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