IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 19-0051

MARYLAND CASUALTY COMPANY,

Petitioner,

vs.

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

Respondent,

RESPONDENT RALPH HUTT'S RESPONSE BRIEF IN OPPOSITION TO WRIT

Original Proceedings 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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STATEMENT OF FACTS

There are two exceptional factual circumstances in this case:

1. MCC's actual knowledge of actual, ongoing, and serious injury.
2. MCC's affirmative and comprehensive engagement of the control of the asbestos hazard and protection of the workers therefrom.

These extraordinary and undisputed facts support the Asbestos Court's narrow holding.

Fact 1: Actual knowledge of ongoing injury

The "amount of care" demanded by reasonable conduct "must be in proportion to the apparent risk," such that the risk perceived "defines the duty to be obeyed."[1]The first compelling fact in this case is that MCC had actual knowledge - not of a merely 'foreseeable' risk or mere potential for injury, but that ongoing and serious injury was occurring.

MCC not only knew that high level exposures to asbestos "must be expected sooner or later to produce lung disease,"[2] but it knew that more than 60 workers had "signs of lung impairment."[3] MCC wrote and read reports of workers already

[1] *Estate of Strever v. Cline*, 278 Mont. 165, 173, 924 P.2d 666, 670 (1996); *Bassett v. Lamantia*, 2018 MT119, ¶25, 391 Mont. 309, 417 P.3d 299. *Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 162 N.E. 99, 100, 59 A.L.R. 1253.
[2] Exhibit MCE002, p.7; Shoup 116:19-22 Cited exhibits and depositions are in the Appendix.
[3] Shoup 145:5-24

diagnosed with pulmonary fibrosis that "will ultimately prove fatal,"[4] or who had died of lung cancer.[5] MCC not only failed to protect or warn but, with knowledge of worker ignorance, directed secrecy to prevent revelation of the problem:

> After a cursory review of the x-ray reports received this morning it would appear expedient that we develop some background information on a few of the personnel … require diplomacy and tact … without anyone else being in on the conversation.
>
> [The reports] are alarming when we see that nine employees must definitely be protected over and above the protection they have been afforded. Please keep this correspondence confidential … Please keep this between us."

Shoup 121:15-122:9;[6] MCE086; *see also* Shoup 28:9 -29:5; MCE039 (evaluation of worker disease studies "is highly confidential and must not get out of your own office.")

MCC pursued its strategy of secrecy knowing the problem had not been revealed to the workers and that suppression of knowledge would help avoid claims:

> I would hesitate to allow in evidence the State Board reports if it is possible to keep them out of the hands of the Industrial Accident Board and through it the general public
> * * *
> [S]tudies most certainly did indicate there to be present a great deal of lung abnormalities ... Dr. Little stated that we did indeed have a severe problem, and that we might expect a good many claims involving asbestosis.

[4] Shoup 136:16
[5] Shoup132:20 to 133:8
[6] Underlining in quotes in this brief is added.

> * * *
> …the only persons aware of the studies are the insured's officials and Dr. Little ... avoid having evidence presented that would reveal the extent and severity of the problem...
> * * *
> necessary to expose the entire situation to the Industrial Accident Board, whose records may be available to the unions and the general public.

MCE102 pp. 2,3,7.

Fact 2: Affirmative, comprehensive engagement specifically directed at the protection of a specific group from a specific acknowledged hazard.

In many undertakings like engineering, a concern for injury is not the primary focus. Yet even in functional design, safety may present a serious secondary concern warranting the imposition of a duty.[7] A trailer park operator's primary role is to provide facilities, but the misfortune of a hazard on neighboring property will trigger his duty to warn.[8] A psychiatrist's primary concern is the mental health of his patient, but a foreseeable risk of harm to others creates a duty to warn.[9]

This case presents the compelling circumstance of affirmative and comprehensive undertakings specifically directed at a specific and exceptionally dangerous asbestos hazard to specific endangered persons. MCC's statement of facts baldly asserts that its actions were "not done for the benefit of Grace or its

[7] Cf *Kent v. City of Columbia Falls*, 2015 MT 139, 379 Mont. 190, 350 P.3d 9.
[8] Cf *Piedalue v. Clinton Elem Sch. Dist. No. 32*, 214 Mont. 99, 692 P.2d 20 (1984)
[9] Cf *Gudmundsen v. State ex rel. Montana State Hosp. Warm Springs*, 2009 MT 56, 349 Mont. 297, 203 P.3d 813.

workers," pointing to a distinct contractual right to make "inspection" visits. Neither the issuance of an insurance policy nor the contractual inspection right contained therein created the undertakings or duties at issue. Instead, in addition to making insurance-related inspections, MCC's conducted extra-insurance undertakings for the protection of workers, to provide dust control engineering,[10] industrial hygiene exposure levels,[11] warnings to workers[12] and a workers' Safety Program.[13]

MCC expressly undertook, in no uncertain terms, to "see that everything practical is done to control dust, protect personnel who are exposed to dust [and] to discover any incidents of lung damage or fibrous growth." Shoup 150:10-16; MCE022.[14]

- ***MCC Engineered Dust Control***

[10] MCC made engineering recommendations which it assured Grace "would bring the atmosphere in the mill to acceptable levels" (Shoup 46:25- 47:5; MCE094.1). MCC's brief describes a short period of initial resistance from Grace's Libby mill managers. The record is clear, however, that by October of 1967 - before Plaintiff Hutt's employment - Grace had become wholly cooperative. MCE097 ("all of my previous recommendations have been completed .. they seemed eager for further help in any way possible").

[11] Shoup 146:12-15; MCE142.1

[12] MCC directed various warning signs (Shoup 159:2-160:1; 161:13-18), but none for asbestos (Shoup 162:10-13)

[13] MCC draft[ed] (MCE027),prepar[ed] (MCE037), approv[ed] (MCE049), the safety program, and undertook the "responsibility" to see it was "put into effect [and] followed" (MCE022 p.3)

[14] *See also* MCE020 (MCC's "Engineering Division [and] Medical Division are … formulating a program for control and prevention"); MCE013 ("program for control and prevention").

MCC made engineering recommendations for dust control, assuring Grace that they "would bring the atmosphere in the mill to acceptable levels." Shoup 46:25- 47:5; MCE094.1. Eventually, it became obvious MCC's recommendations were failing to achieve the promised acceptable levels. By the time Plaintiff Ralph Hutt was working at the mill, it was clear the recommendations had utterly failed and would continue to fail (Shoup 65:10-66:4; MCE139 ("Dust Concentration continues to be above recommended level … *we are in serious trouble"*); MCE134 ("Libby operation is becoming worse. Death of former Supt."); MCE138 ("only a new mill … will provide a safe working environment").

- ***MCC Set the Exposure Levels that Were Supposed to be "Safe."***

MCC established the dust exposure levels that Grace should pursue to keep the workers safe (Shoup 39:18-43:25). MCC advised the mill managers that 60 workers (including Plaintiff Ralph Hutt) who already had lung abnormalities could "**safely**" continue in exposures of 5mppcf (Shoup 146:12-15; MCE142.1). Though the dust was 60 to 80% asbestos,[15] MCC assured the 'safety' of this "whole dust" exposure level, disregarding the direct measurement of asbestos fibers which were "**10 to 100 times in excess of the safe limit**" (Shoup 93:1-13; MCE108).

- ***MCC Designed the Safety Program and Directed Warning Signs.***

[15] Shoup 88:24-25; MCE121 at p.2

MCC undertook protection of workers by preparing and approving the worker "Safety Program" (MCE036),[16] which it described as "most comprehensive covering all phases of accident prevention as well as industrial hygiene ...[for] the protection of personnel" (Shoup 153:22-154:18; MCE027; see also Shoup 148:1-155:18, and MCE048 at par. 5 ("well rounded program covering every phase"), which must be cleared by the Maryland Casualty "Home Office"(MCE049; MCE022, p.7). MCC described its undertaking in the Safety Program as follows:

> Our aim in the program will be to see that everything practical is done to control dust, protect personnel who are exposed to dust which cannot be controlled, and follow through with periodic X-rays … to discover any incidence of lung damage.

MCE022.

MCC has admitted that warning of a hidden hazard is an "essential element" of any worker safety program:

> Q. And would you agree that employee training, including warnings of workplace hazards, is an essential element of a safety program that complies with the industrial hygiene standards recognized by and accepted by industry?
> A. Yes.

[16]MCC speculates regarding its Safety Program's implementation. The unrefuted record shows MCC undertook the "responsibility" to see it was "put into effect [and] followed" (MCE022 p.3); MCC was "preparing this program" in November, 1964 (MCE037); it was in "final state of completion" in December, 1964 (MCE048); and had "first reading approval" from MCC's home office (MCE049); MCC committed to have "a successful program in operation before July, 1965 (MCE049); in April, 1965, MCC describes the program as "in effect" (MCE066), and, in March, 1966, comments on its "effectiveness" (MCE077, p.2).

Shoup 157:4-9.

MCC regularly directed the placement of signs warning of a variety of workplace hazards,[17] yet never warned the workers of the very hazard it had specifically undertaken to control and protect workers from.[18] It provided no asbestos warning, though expressly recognizing that the essential information in the State reports and the medical studies had not been revealed to the workers (DeBlock 54:4-23; MCE102, pp. 2, 3, 6).

These two extraordinary facts are established by MCC's own documents and Rule 30(b)(6) designees' testimony, and are controlling in any discussion of the arguments raised by MCC.

STANDARD OF REVIEW

The question on this writ application of whether the Asbestos Court committed a clear mistake of law is a pure legal question, reviewed for "correctness." *City of Missoula v. Duane,* 2015 MT 232, ¶ 10, 380 Mont. 290, 355 P.3d 729.

[17] Shoup 159:2-160:1(MCC's "low overhead" sign), MCE097 p.3; Shoup 160:11-20 (MCC's stop and go "warning signage"); Shoup 161:13-18 (sign directing respirator use in loading area)
[18] Shoup 162:1-13

SUMMARY OF ARGUMENT

The narrow ruling of the Asbestos Court is that MCC, an actor who *knew* others were *continuously* being injured, owed a duty to warn *because of* the actor's own affirmative and comprehensive undertakings to address and warn of that *very hazard.* These undertakings included (a) engineering asbestos dust control systems, with the assurance they "would bring the atmosphere in the mill to acceptable levels," (b) assuring Grace that workers could "continue safely" at MCC's identified safe exposure levels, (c) preparing a Safety Program which it described as "comprehensive" and specifically for the undertaken purpose of "the protection of personnel," (d) drafting of the warning and training elements which MCC admits were "essential" to that safety program, and (e) directing the content and location of warning signs - though none alerting workers to the asbestos hazard.

Under Montana law, a duty analysis (a) begins with the primary objective test of whether injury from a person's conduct is foreseeable,[19] (b) evaluates such foreseeable injury in view of how such risks relate to the actions of the defendant,[20]

[19] "Under Montana law, the duty element of negligence turns **primarily** on foreseeability." *Poole ex rel. Meyer v. Poole*, 2000 MT 117, ¶ 20, 299 Mont. 435, 440, 1 P.3d 936, 939.

[20] The risk perceived "defines the duty to be obeyed." *Estate of Strever v. Cline*, 278 Mont. 165, 173, 924 P.2d 666, 670 (1996).

and (c) analyzes policy considerations which support, detract from, or indicate modification of the duty.

MCC owed a duty to warn (a) because the foreseeable injuries at issue would be a direct consequence of negligence in MCC's affirmative and comprehensive undertakings to engineer and design control of the asbestos health hazard **and** worker protection therefrom, which included the warning elements of MCC's Safety Program, and (b) because public policy supports a duty in circumstances of actual knowledge of ongoing, needless, and catastrophic injury.

This is not a case imposing a duty to control another actor. It is not a case of bystander liability, custody of a dangerous person, or underwriting inspections. This is not a case where a court imposed a duty solely on the basis of foreseeable injury without respect to the actor's role in relation to the risk.

MCC's argument for an artificially narrow application of *Restatement* §324A should be rejected because (a) Montana's law of liability to third persons is consistent with the principles of this descriptive *Restatement* section, (b) most jurisdictions have not applied 324A as prescribing exclusive prerequisite elements, (c) Montana has expressly rejected 'reliance' or 'increased risk' as liability prerequisites, and (d) the facts of this case include both reliance and increased risk.

Montana's insurance market is fully protected by the 1993 Montana Safety Culture Act. There are no policy reasons to retroactively grant immunity to an

insurer who, with a motive to hide the severe problem to avoid claims it was paid to insure, knowingly watched workers get sick even as it contemporaneously withheld warnings and advised Grace that lung impaired workers could "continue safely."

ARGUMENT

1. The Asbestos Court correctly applied Montana's foreseeability rule to an actor's affirmative undertakings of the safety concerns of asbestos control and worker protection but failed to provide the admitted essential component of warning.

    a. *Montana law makes the objective test of foreseeability the touchstone to every analysis of duties attendant to a person's acts.*

Without authority, MCC argues that Montana's common law derives a duty of care solely through some sort of non-objective "policy" alchemy, and that foreseeability merely prescribes the scope of a duty so imposed. On the contrary, in Montana, the starting place for a duty analysis is foreseeability. It is the objective measure of what is reasonable under the circumstances, and is the primary consideration in determining whether a duty is owed:

> Under Montana law, the duty element of negligence turns primarily on foreseeability:
>
> > Foreseeability is of prime importance in establishing the element of duty, and the question of defendants' negligence, if any, must of necessity hinge on the finding of a breach of that duty. If a reasonably prudent defendant can foresee neither any danger of direct injury nor any risk from an intervening cause he is simply not negligent.
>
> *Busta v. Columbus Hosp. Corp.* (1996), 276 Mont. 342, 362, 916 P.2d 122, 134 (citation omitted). As it relates to the existence of a legal duty,

> foreseeability is "measured on a scale of reasonableness dependent upon the foreseeability of the risk involved with the conduct alleged to be negligent." *Lopez*, ¶ 27.

Poole ex rel. Meyer v. Poole, 2000 MT 117, ¶ 20, 299 Mont. 435, 1 P.3d 936; *accord, Fisher v. Swift Transp. Co.,* 2008 MT 105, ¶ 21, 342 Mont. 335, 340, 181 P.3d 601 ("turns primarily on foreseeability"); *Busta,* at 276 Mont. 360–62, 916 P.2d 133 ("The risk reasonably to be perceived defines the duty to be obeyed"); *Maguire v. State* (1992), 254 Mont. 178, 189, 835 P.2d 755, 762. ("duty of care depends upon the foreseeability of the risk and upon a weighing of policy considerations"); *Scott v. Robson*, 182 Mont. 528, 538, 597 P.2d 1150, 1156 (1979)(" Foreseeability is of prime importance ... Duty … is measured by the scope of the risk").

Montana cases do not evaluate foreseeability in a vacuum; rather, foreseeability is viewed in relation to the conduct of the defendant:

> "As it relates to the existence of a legal duty, foreseeability is 'measured on a scale of reasonableness dependent upon the foreseeability of the risk involved with the **conduct** alleged to be negligent.' " *Poole*, ¶ 20 (quoting *Lopez v. Great Falls Pre–Release Serv., Inc.,* 1999 MT 199, ¶ 27, 295 Mont. 416, 986 P.2d 1081). In other words, duty "is measured by the scope of the risk which negligent **conduct** foreseeably entails." … The question is whether the defendants reasonably could have foreseen that their **conduct** could have resulted in injuries to the plaintiff, though "the specific injury need not be foreseeable."

Gourneau ex rel. Gourneau v. Hamill, 2013 MT 300, ¶ 12, 372 Mont. 182, 311 P.3d 760; *accord, Busta* at 276 Mont. 360–63, 916 P.2d 133-34; ("'scope of the

risk which negligent **conduct** foreseeably entails'"; *Starkenburg v. State*, 282 Mont. 1, 17, 934 P.2d 1018, 1027 (1997) ("foreseeability of the risk involved with the **conduct** at issue").

The Asbestos Court did not merely conclude that MCC had superior knowledge or should have foreseen injury to the workers. Instead, it correctly analyzed whether such foreseeable injury would be a consequence of negligence in MCC's affirmative actions to engineer control of a specific hazard, and to provide worker protection - including the warnings "essential" to a proper Safety Program. MCC affirmatively acted such that, in the absence of reasonable care, injury would be and was the ongoing result.

Finally, Montana's foreseeability rule is not inflexible. Policy considerations may be employed to lessen or heighten the duty (as discussed below). *Estate of Strever v. Cline*, 278 Mont. 165, 173, 924 P.2d 666, 670 (1996) ("policy considerations to be weighed in determining whether to impose a duty").

In sum, under Montana law, a duty analysis (a) begins with the primary objective test of whether injury from a person's conduct is foreseeable, (b) evaluates the foreseeable injury view of how such risks relate to the actions, undertakings, and knowledge of the defendant, and (c) analyzes policy considerations which might indicate modification of the duty.

b. Foreseeability of injury is not disputed by MCC.

MCC makes no argument that injury was not foreseeable. Nor could it. Upon the admissions of MCC's witness designees, MCC knew that workers were continuously being injured by irreversible fibrotic disease and lung cancers. MCE102, p.3 ("great deal of lung abnormalities"); Shoup 132:20 to 133:8; 136:16 ("ultimately prove fatal")

c. A duty attaches because the foreseeable injuries at issue would be a direct consequence of negligence in MCC's affirmative undertakings.

MCC makes the elliptical argument that foreseeability of injury may be ignored since, like a "passerby" seeing another's unwitting approach to an open "manhole," it owed no duty. MCC brief p.33.

MCC utterly fails to explain how it could be a mere bystander, given its extensive, affirmative undertakings directed at ***the very hazard at issue.*** MCC undertook asbestos control and worker protection including (a) *affirmatively* making dust control engineering recommendations which MCC *affirmatively* assured Grace "would bring the atmosphere in the mill to acceptable levels" (Shoup 46:25- 47:5; MCE094.1); (b) *affirmatively* establishing what MCC identified as a "safe" asbestos exposure goal (Shoup 39:18-43:25), and *affirmatively* assuring that even 60 workers who already had lung impairment could "continue safely" at such level (Shoup 146:12-15; MCE142.1); (c) *affirmatively* preparing and approving a "Safety Program" specifically directed to "Dust Control & Personal Protection" (MCE036, p.25) and "maximum personal

protection" from the "atmospheric contamination" (MCE036,p.26), and of which program a hazard warning was admittedly an "essential" component (Shoup 156-157); (d) *affirmatively* directing various warning signs (Shoup 159:2-160:1; 161:13-18), but none warning of the asbestos hazard (Shoup 162:13); and (e) *affirmatively* strategizing to maintain nondisclosure of State inspection reports and medical studies which would reveal the disease epidemic problem to the workers (MCE102), and directing secrecy with respect to worker disease concerns.[21]

Rare is the case in which an actor's affirmative conduct more directly and wholly engages the very injury risks that define the duty of reasonable care than MCC's engagement of the asbestos hazard to workers.

d. Policy considerations strongly support a duty because of the degree of MCC's engagement of hazard control and protection, its certain knowledge that injury was ongoing, and the minimal burden of warning.

The foreseeability rule permits limitations on certain duties for policy reasons. An example of such policy evaluation is presented by *Air & Liquid Sys. Corp. v. DeVries*, 139 S.Ct. 986 (2019), in which the Supreme Court was called upon to fashion the federal common law[22] duty of warning in a negligence[23] case

[21] DeBlock 54:4-16; MCE102 at p.2, p.3 ("only persons aware of the studies are the insured's officials and Dr. Little. ... avoid [having to] reveal the extent and severity of the problem."); Shoup 121:15-122:9; MCE086; see also Shoup 28:9 - 29:5; MCE086; MCE039 ("highly confidential and must not get out of your own office.")

[22] In a maritime case, a federal court "acts as a federal 'common law court,' much as state courts do in state common-law cases." *DeVries, 139 S.Ct. at 992.*

under maritime jurisdiction. The issue was when a provider of a "bare-steel" part would owe a duty to warn of an asbestos hazard from another manufacturer's later addition of an asbestos containing part. The Third Circuit Court of Appeals applied the foreseeability test and imposed liability for a failure to warn of the hazards of "later-added asbestos-containing materials" where "the facts show the plaintiff's injuries were a reasonably foreseeable result." *In re: Asbestos Prod. Liab. Litig. (No. VI),* 873 F.3d 232, 240 (3d Cir. 2017).

In an archetypical example of applying policy considerations to tighten the benchmark foreseeability rule, the Supreme Court held that a duty to warn attaches to bare metal manufacturers only when they actually know that incorporation of a later added asbestos part will necessarily occur and that the resulting integrated product is likely to be dangerous:

> Many products can foreseeably be used in numerous ways with numerous other products and parts. Requiring a product manufacturer to imagine and warn about all of those possible uses—with massive liability looming for failure to correctly predict how its product might be used with other products or parts—would impose a difficult and costly burden on manufacturers, while simultaneously overwarning users. In light of that uncertainty and unfairness, we reject the foreseeability approach for this maritime context.
> ***
> [W]e hold that a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous

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[23] The plaintiff had waived any strict product liability allegation so the case was decided as a "negligence case." *Air & Liquid Sys. Corp., at 993; In re: Asbestos Prod. Liab. Litig. (No. VI),* 873 F.3d 232, 237 (3d Cir. 2017).

> for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger.

DeVries, 139 S.Ct. at 994, 995.

Under the Supreme Court's rationale, the scope of the duty was tailored to policy concerns while ***balancing*** those concerns against (i) the degree of defendant's engagement of someone else's hazard (i.e the knowledge that incorporation of another company's asbestos part is required), (ii) the likelihood that the resulting product would be dangerous, and (iii) the defendant's expectations of unwitting exposures. The analysis is instructive to this Court's resolution of a similar question of negligent duty to warn. In the case against MCC, if any modification of the foreseeability rule were indicated for policy reasons, the balancing task should take into account the same three factors: (i) MCC's degree of engagement of the asbestos hazard at the Grace operation, (ii) the likelihood of injury (or certainty thereof), and (iii) MCC's expectation of worker ignorance.

This is not a case where MCC designed a generic safety pamphlet; instead, MCC created a safety program specifically designed to address a specific serious asbestos problem and need for worker protection therefrom.[24] This is not a case where there were mere injury possibilities; rather, the policy balance must reflect MCC's actual knowledge of ongoing and increasing incidence of disease precisely from the very hazard MCC undertook to address.

[24] MCE036, p.25 ("DUST CONTROL & PERSONAL PROTECTION").

Nor is this a case of hazards otherwise known to the workers. On the contrary, public policy concerns favor the imposition of duty because asbestos is hidden and insidious. Unwitting exposures to this invisible toxic agent at excessive, uncontrolled levels will cause injuries which first become apparent to the worker decades later. Further, MCC (a) deliberated to keep a secrecy around this latent health hazard, (b) did so with express recognition that the State reports and disease studies had not been revealed to the workers, the union or the endangered public, and (c) did so with an expressly recognized expectation of a "good many" asbestosis claims. MCE102 p.3.

The U.S. Supreme Court's policy balancing corresponds to Montana limiting the foreseeability rule in cases involving control of a dangerous person. Where the actor's involvement is tangential, tenuous or insufficient to empower the actor to meaningfully address a risk, his responsibility should not be disproportionate to his role. Therefore, in such cases, the policy requires a significant degree of custody and control (*Prindel, Lopez, Emanuel*).

The instant case presents the opposite circumstance. Of course, MCC did not exercise control over joint-tortfeasor Grace, just as the bare steel parts manufacturer in *DeVries* did not control the manufacturer that added the asbestos component to create the resulting hazardous product. But MCC **did** undertake to address both the control of the asbestos hazard and worker protection therefrom -

specifically to "see that everything practical is done to control dust, protect personnel"[25]through its setting of "safe" exposure levels; a Safety Program to "provide maximum personal protection to the employees;"[26] and directing the posting of specific warning signs. Moreover, it actively controlled the dissemination and disclosure of asbestos hazard information through deliberated tactics of secrecy and withholding.

A further policy concern is the degree of burden on a defendant. Where, as here, MCC was regularly directing posting of a variety of its warning signs at the Grace worksite (Shoup 159:2-160:1; 161:13-18), there was no additional burden in posting warnings of the presence of the hidden and toxic asbestos.

Another policy concern is when an actor's undertaking for one person should create a duty of care with respect to third persons. A long line of Montana cases recognizes a public policy interest to protect third persons:

> [T]ort liability … to identifiable third parties (typically, those who are known or are reasonably foreseeable by the professional*, see Thayer,* 243 Mont. at 149, 793 P.2d at 791*; Jim's Excavating,* 265 Mont. at 506, 878 P.2d at 255).

Redies v. Attorneys Liab. Prot. Soc., 2007 MT 9, ¶ 50, 335 Mont. 233, 150 P.3d 930; *accord, Turner v. Kerin & Assocs*., 283 Mont. 117, 126, 938 P.2d 1368, 1374 (1997) ("It was foreseeable that failure to lay the proper pipe would damage an

[25] Shoup 150:10-16; MCE022
[26] MCE36 at p26.

identifiable class of plaintiffs"); *Thayer; Jim's Excavating; Kent v. City of Columbia Falls*, 2015 MT 139, ¶50, 379 Mont. 190, 350 P.3d 9 (City owed "duty to Sara" as "it has long been the rule in Montana that should one gratuitously assume to render a service, the entity so doing is 'bound to the exercise of reasonable care").

In sum, the policy considerations attendant to MCC's affirmative undertaking of worker safety strongly support a duty of care.

e. The duty of reasonable care in affirmative undertakings included a duty of MCC to warn of the asbestos hazard because MCC had undertaken to direct warning signs and to prepare the Safety Program of which warning was an essential component, and because MCC knew the workers were unaware of the hidden asbestos hazard and the high incidence of latent asbestos disease.

This Court has found a duty to warn in a variety of circumstances, including many where there was no control over the hazard, no reliance, or no relationship between the defendant and the plaintiff. In each case, the analysis focused on the position of superior knowledge of the hazard and/or the defendant's degree of engagement of the hazard such that the defendant was in a position where the giving of a warning would be expected. *See e.g. Piedalue v. Clinton Elementary Sch. Dist. No. 32*, 692 P.2d 20, 22–23 (Mont. 1984) (duty to warn of hazard on neighboring property because "true ground of liability …[is the defendant's] superior knowledge"): *Gudmundsen v. State ex rel. Montana State Hosp. Warm Springs*, 2009 MT 56, 349 Mont. 297, 203 P.3d 813 (mental health professional's

common law duty to warn others who might be injured by a patient is statutorily limited to circumstances of knowledge of actual threat to reasonably identifiable victim); *Bush v. Albert D. Wardell Contractor, Inc*., 528 P.2d 215, 218 (Mont. 1974), (subcontractor's duty to warn a general contractor's employees where the subcontractor had superior knowledge of workplace hazard); *Schmidt v. Washington Contractors Grp., Inc.*, 964 P.2d 34, 40 (Mont. 1998) ("duty is not one of a possessor of the premises … Rather, [both contractor and subcontractor] had a duty of acting as a reasonable, prudent person would under the circumstances" which required warning passing motorcyclists); *O'Brien v. Great N. Ry. Co*., 400 P.2d 634, 637 (Mont. 1965) (railroad's duty to warn highway users); *Orr v. State*, 2004 MT 354, 324 Mont. 391, 106 P.3d 100 (failure to warn miners about the dangerous levels of asbestos).

The distinguishing facts which make the instant case stronger than the above examples of warning failures are that (a) MCC specifically undertook to provide warnings as an "essential element of a safety program," which MCC drafted and approved (Shoup 156-157) and thus had a duty to do so with care, (b) MCC directed the placement of a variety of warnings, but never disclosed the presence of toxic asbestos which it had undertaken to control and protect workers from, and (c) MCC affirmatively directed secrecy and "confidentiality" upon express

recognition that the workers were unaware of the medical studies of latent disease and state reports of the hidden hazard, because they had not been "revealed."

f. The Asbestos Court properly applied the foreseeability rule to MCC's affirmative undertakings and actions, and evaluated attendant policy considerations.

Astonishingly, MCC assigns to the Asbestos Court's opinion the unprincipled illegitimacy of having been "designed to achieve a particular result."[27] On the contrary, the Asbestos Court judge applied, in the disciplined and reasoned fashion required of Montana jurists, Montana's long line of third party liability cases as well as this jurisdiction's bedrock foreseeability rule.

The Asbestos Court opinion places the conduct of MCC in the context of the actions of Grace, and the State of Montana (pp.2-3); discusses the multiple levels and degree of Maryland Casualty's undertakings and services directed at control of the hazard and protection of the workers therefrom (pp. 4-8); systematically applies Montana's objective foreseeability test to MCC's extensive engagement of worker protection and knowledge of ongoing harm; and evaluates such application against important "policy considerations," including the "minimal" burden of providing a warning where it was already providing warning signs for other far less serious hazards, and the "catastrophic consequences" of needless ongoing injury.

[27] MCC brief at 32.

The Asbestos Court recognized that the absence of warning, which MCC had undertaken to provide, had caused ongoing cumulative exposures and thus increased the risk of harm to the workers so exposed, and that the danger was further increased by MCC's practice of directing warning signs so as to create an expectation among workers that they were being apprised of known risks.

Finally, the Asbestos Court thoroughly analyzed and weighed MCC's 'no duty to protect third persons' argument against Montana cases which have "extended duties of care to third parties in numerous types of situations" (p16), and made a thoughtful analysis of *Restatement* §324A, in view of such Montana case law.

2. MCC's straw man arguments incorrectly portray Montana's foreseeability rule and the Asbestos Court's application of this objective touchstone to duty analysis.

    a. *MCC's control over Grace is wholly irrelevant because this case addresses MCC's liability for its **own** affirmative actions to control the asbestos hazard and protect workers therefrom.*

MCC devotes the majority of its statement of facts to the acts and failings of entities not party to this litigation and over which MCC had 'no control.' Similarly, the Amicus brief bases its argument on the principle that a person ordinarily owes no duty to protect others from harm from a dangerous third person (such as the knife wielding perpetrator in *Prindel v. Ravalli County,* 2006 MT 62,331 Mont. 338, 135 P.3d 165, the high school student who purposely ran plaintiff over in

Emanuel v. Great Falls Sch. Dist., 2009 MT 185, 351 Mont. 56, 209 P.3d 244, or the potentially dangerous felon escapee in *Lopez v. Great Falls Pre–Release Serv., Inc.,* 1999 MT 199, ¶ 27, 295 Mont. 416, 986 P.2d 1081).

The instant case obviously does not present the exceptional circumstance where the third person himself is the agency of injury such that the scope of the limited duty must depend on the degree of custody or control over his actions. Rather, this is the more common-place case of duties with respect to an inanimate hazard. Here the agency of injury is not Grace (as if Grace were assaulting its employees). Nor is it the State of Montana, the federal agencies or Johns-Manville. The agency of injury is precisely the presence of an asbestos contaminant at a vermiculite mine which, if not properly addressed, presented a risk of deadly disease.

The aim of MCC's lengthy recitation of the acts and failings of Grace and others is to set up the argument beginning on page 21 of its brief, citing *Emanuel, Prindle,* and *Lopez* for the proposition that one must have custody or control of a person before he can be held responsible for the other's actions. The proposition is beside the point. This case does not allege that MCC negligently exercised custody or control over Grace; it pleads that MCC ***itself*** undertook actions to control an asbestos hazard and protect workers therefrom.

In *DeVries, supra,* the defendant similarly tried to direct the U.S. Supreme Court's attention to the failings of the asbestos end-product manufacturer over whom the defendant parts manufacturer had no control. The Supreme Court acknowledged the absence of a duty to control the conduct of someone else. *Id.* at 994 ("That is true, but it is also beside the point"). The Court then addressed the real issue of whether the defendant's involvement and knowledge required **it** to warn - regardless of whether anyone else owed a duty or could be controlled. *Id.* at 994.

The bare steel manufacturer owed a duty to warn because of its own contribution to the integrated product and its knowledge that the resulting product would present an asbestos hazard. Innumerable cases recognize a duty notwithstanding that the actor had no control over other joint tortfeasors. A surgical nurse has no control over the operating physician but would nevertheless be liable for breach of the duty of care to count the sponges.[28] In *Piedalue v. Clinton Elementary School District No. 2*, 214 Mont.99, 692 P.2d 20 (1984), the defendant had no control over his neighbor or the hazard on the neighbor's property, but was nevertheless liable for *his own* failure to warn.

[28] *Rudeck v. Wright*, 218 Mont. 41, 709 P.2d 621 (1985)

The issue in this case is whether a warning duty is owed because of MCC's *own* affirmative undertakings and actions to provide control of, and protection from, known, ongoing asbestos exposures.

b. MCC's contention the Asbestos Court found a duty based "solely" on foreseeability is a false, strawman argument which ignores that the Asbestos Court applied Montana's foreseeability rule to MCC's affirmative acts.

MCC grossly mischaracterizes the Asbestos Court's ruling as exclusively based on whether injury was foreseeable (i.e. without regard to the defendant's conduct). Beginning at p.32, it then argues that, if a duty could attach solely upon a finding that injury was foreseeable, any passerby who noticed the risk of "an uncovered manhole on the street could potentially become charged with warning all future passersby."[29] Like the preceding strawman argument, the contention is easily dispatched. While a mere passerby would owe no duty, a person is not a mere passerby if he has affirmatively undertaken to design the security of the manhole cover, established the safety rules for cover removal, and designed and directed how and when to place warning signs and protective barriers when utility holes are accessed. It is because MCC had taken numerous actions to address the

[29] The insurer Amicus similarly accuses Hutt of urging liability based on superior knowledge and foreseeability of injury "alone." This ignores the essential predicate to Plaintiff's case is the affirmative and comprehensive engagement of the control of the hazard and the protection of workers therefrom.

control of the asbestos hazard and the protection of the workers therefrom that it owed a duty to exercise care ***in its actions***.

c. Amicus' concern for underwriting inspections has no application to a comprehensive undertaking directed at controlling a hazard and protecting workers therefrom.

Amicus contends the rule of law applied by the Asbestos Court would make an insurer liable "solely because of the knowledge it gains through routine inspections … and risk-control recommendations." Hutt acknowledges that an insurer should be able to make insurance-related inspections and impose underwriting-related conditions on an insured without expanding its responsibilities to the protection of workers or hazard control. Hutt further concurs that, in the instant case, MCC had a contractual right under its insurance contract to perform insurance inspections without triggering duties unrelated to their contractually-stated purpose. A different outcome, however, is required when an actor separately undertakes to protect others.

The great majority of cases that have addressed the question of when an insurer (which is not within the umbrella of an exclusive remedy statute) should be afforded protection from liability arising from insurance-related inspections,[30] have held that protection of the insurer is afforded only where its undertakings were exclusively for underwriting or other insurance-related reasons. These cases hold

[30] These cases address mere inspections, as distinguished from the greater responsibility attendant to hazard control and worker protection services.

that where the insurer pursues a distinct and further undertaking *for the benefit of others* – specifically to provide physical (non-insurance) protection to workers, it owes a duty to do so with care.[31]

Moreover, in Montana, the duty is not contractual. The tort duty of care arises from the foreseeability of injury from negligent performance of services; the contract itself is merely an "incidental fact" *Redies supra* at ¶ 91 ("the **incidental fact** of the existence of a contract … does not negative the defendant's responsibility when he enters upon a course of affirmative conduct 'which may be expected to affect the interests of another person'").

The Asbestos Court instead focused on MCC's actions independent of underwriting concerns. MCC affirmatively addressed engineering control of the asbestos and the protection of the workers. The factual premise supporting the court's ruling includes that MCC (a) proposed engineering systems, and advised they "would bring the atmosphere in the mill to acceptable levels" of exposures to workers (Shoup 46:25- 47:5; MCE094.1), (b) assured Grace that workers could "continue safely" at the exposure levels MCC identified (MCE142.1), (c) designed a Safety Program (MCE036) which it described as "comprehensive" and specifically for the undertaken purpose of "the protection of personnel" (Shoup

[31] See cases in footnotes 32 and 33 below, e.g. *Smith II v. Allendale Mut. Ins. Co., Mich.Supr.*, 303 N.W.2d 702, 712 (1981) ("It must be shown that the defendant assumed an obligation or intended to render services for the benefit of another, not merely an inspection and loss prevention suggestions").

153:22-154:18; MCE027), (d) undertook worker warning and training which MCC as they were admittedly essential to the worker safety program prepared by MCC (Shoup 156-157), and (e) directed the content and location of warning signs - though none alerting workers of the asbestos hazard (Shoup 159:2-160:1; 161:13-18; 162:13). Upon these predicate facts and the further fact that MCC knew injury was continuing, the Court recognized the duty attendant to these worker protection (as opposed to insurance-related) undertakings.

3. Montana law of liability to third persons from an affirmative undertaking is wholly consistent with the principles in §324A and the Asbestos Court correctly applied those principles.

The core of MCC's argument is that the Asbestos Court should have constrained its analysis of duty to a rigid and unreasoned application of *Restatement* §324A. The following discussion will demonstrate four reasons that MCC is incorrect.

a. Montana law is consistent with the rule of the majority of jurisdictions described in Section 324A.

Consideration of 324A of the *Restatement of Torts, Second* must begin with a recognition that it describes circumstances generally recognized as sufficient for a duty of care to attach. It does not purport to be a statement of limitation to liability. Indeed the *Restatement* makes clear it expresses "no opinion as to whether ... there may not be other situations" in which a duty to third persons arises. 324A,

Caveat (2). These could include undertaking a safety program and then failing to follow through with the prescription of warnings essential to that commitment.

More fundamentally, the *Restatement's* distillations are not the means by which our common law system is reduced to a civil "code" to be applied only to identical circumstances, or artificially and rigidly without respect to the rules' underlying purpose and meaning. Rather, the role of the *Restatement* is to compile and describe the well-established circumstances that various jurisdictions would agree are sufficient to trigger liability:

> The application of a common-law rule to a particular set of facts does not turn upon whether those facts can be characterized in the language of the Restatement section corresponding to the common-law rule. Unlike a statute, which expresses a legislative directive for the treatment of future cases, the Restatement seeks primarily to distill the teachings of decided cases and is descriptive.

Smith v. Allendale Mut. Ins. Co., 410 Mich. 685, 712–13, 303 N.W.2d 702, 709 (1981).

In *Smith*, the Court held that the principles of 324A would not be applied where the undertaking was no more than an inspection exclusively for the benefit of the insurance company's underwriting decisions. Recognizing that 324A should not be mechanically applied to an insurer's self-serving inspections, the *Smith* court also recognized the converse:

> If the insurer promises to provide complete fire inspection services to alert the insured to fire hazards on the premises, its failure to exercise

> reasonable care in performing that undertaking will subject it to liability under the rule of §324A.

Smith, at 410 Mich. 718, 303 N.W.2d 712.

The core principle of 324A is that undertaking services that address a risk of injury to third persons can create a duty of care. Montana's law on this question of duties to third-parties in affirmative undertakings is well developed in *Kent, Vesel, Stewart* (see discussion in subsection *c,* below) as well as in *Jim's Excavating*, *Redies, Turner, et al,* (*see* pp. 18-19 above). These Montana holdings are entirely consistent with this core principle of Section 324A, and do not place the artificial limitations urged by MCC on this core principle's application.

b. The majority of cases applying 324A to inspections or safety services support a finding of liability in the fact pattern of MCC's comprehensive undertaking.

While a minority of jurisdictions strictly apply 324A as a sort of codification that binds the court's application of common law principles, most recognize the *Restatement's* descriptive role, and find application of 324A's principles to a variety of undertakings in accordance with foreseeability touchstone – especially in cases where the undertaking has a safety purpose. Nearly all of the 324A cases cited by MCC (see MCC brief, p. 26 footnote 10) would support liability for an insurer who, in addition to performing 'inspection' services for its own underwriting purposes, affirmatively undertook safety inspections to protect workers: At least 12 of the 20 cases acknowledge an insurer's duty to workers can

arise from no more than a negligent safety inspection (i.e. let alone MCC's engineering, industrial hygiene and worker protection undertakings).[32] Five more of the cases implicitly acknowledge that liability can arise unless the SOLE purpose of inspection was gathering rate information for the insurer.[33]

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[32]E.g. *Am. Mut. Liab. Ins. Co. v. St. Paul Fire & Marine Ins. Co*., 48 Wis. 2d 305, 318, 179 N.W.2d 864, 870 (1970)("sufficient to spell out a cause of action against an insurer who has negligently performed a gratuitously undertaken inspection"); *Patton v. Simone*, No. CIV. A. 90C-JL-219, 1993 WL 54462, at *6–7 (Del. Super. Ct. Jan. 28, 1993), citing *Smith II v. Allendale Mut. Ins. Co., Mich.Supr*., 303 N.W.2d 702, 712 (1981) ("intended to render services for the benefit of another, not merely an inspection and loss prevention suggestions"); *Johnson v. Aetna Cas. & Sur. Co*., 348 F. Supp. 627, 628 (M.D. Fla. 1972)(324A applies if defendant "contracted … to provide safety engineering services … in order to detect any conditions which might prove to be hazardous"); *Sims v. Am. Cas. Co*., 131 Ga. App. 461, 473, 206 S.E.2d 121, 130, *aff'd sub nom. Providence Washington Ins. Co. v. Sims,* 232 Ga. 787, 209 S.E.2d 61 (1974)("duty may arise … from undertaking actual inspections"); *Thompson v. Bohlken,* 312 N.W.2d 501, 507 (Iowa 1981) ("The Restatement rule is consistent with the holding of ... other jurisdictions. See, e. g., *Evans v. Otis Elevator Company*, 403 Pa. 13, 168 A.2d 573 (1961) (employee's action against elevator company based upon negligent inspection of employer's elevator); **Prosser, supra** §**56**, at 347-50; Annot., Compensation Carrier-Negligence, 93 A.L.R.2d 598 (1964)"); In accord are *Kennard, Smith, Hartford*, *Wurst, Cline, and Kohr.*

[33] *Commercial Union Ins. Co. v. DeShazo*, 845 So. 2d 766, 770 (Ala. 2002) ("inspection was solely for the benefit of the defendants"); *Derosia v. Liberty Mut. Ins. Co.,* 155 Vt. 178, 186, 583 A.2d 881, 885 (1990) ("no evidence … [of] obligation to provide a safe workplace"); *Schoenwald v. Farmers Co-op. Ass'n of Marion*, 474 N.W.2d 519, 522 (S.D. 1991) ("unless it agreed or intended to benefit the …employees"); *Leroy v. Hartford Steam Boiler Inspection & Ins. Co*., 695 F. Supp. 1120, 1127 (D. Kan. 1988) ("purpose other than for their own loss reduction and underwriting"); *Obenauer v. Liberty Mut. Ins. Co.*, 908 F.2d 316, 317 (8th Cir. 1990)("inspections …did not constitute an 'undertaking' … to protect persons exposed").

Many other cases recognize that, under the principles of 324A, a duty arises in circumstances of affirmative, specific safety undertakings because workplace injury is necessarily a consequence of negligent safety services: *Yanmar Am. Corp. v. Nichols*, 166 So. 3d 70, 83 (Ala. 2014)("voluntarily assumed a duty to warn of the safety hazards"); *Wilson v. Rebsamen Ins., Inc*., 330 Ark. 687, 696, 957 S.W.2d 678, 682 (1997) ("the safety consultant owes a duty of care under Restatement § 324A(b) because it is reasonably foreseeable that if the inspections are done improperly a third-party employee will be injured"); *Merrill ex rel. Estate of Merrill v. Arch Coal, Inc*., 118 F. App'x 37, 44–45 (6th Cir. 2004) ("undertook to advise [on] specific roof control problems in the Darby Fork Mine ... for the benefit of miners"); *Madler v. McKenzie Cty.,* 496 N.W.2d 17, 19 (N.D. 1993) ("duty was dependent upon … the nature and extent of the responsibilities undertaken"); *Van Biene v Era Helicopters, Inc.* (1989, Alaska) 779 P.2d 315, 322 ("liability will attach [to] negligent failure to discover fire hazards which would be brought to light by an inspection conducted with ordinary care") *Handler Corp. v. Tlapechco,* 901 A.2d 737, 747 (Del. 2006)(defendant who "only assumed some responsibility for workplace safety … would be liable").

While some cases appear to have recast 324A's 'increased risk' or 'reliance' or 'duty of another' as exclusive routes to liability,[34] in the context of safety undertakings directed expressly at the protection of workers, the Asbestos Court's application of the principles in 324A is entirely supported by the majority of cases nationwide, and, specifically, Montana third party liability case law.

c. *Montana case law rejects reliance or increased risk as essential prerequisite elements*.

MCC urges that liability to third parties can only arise where the actor has increased the risk or where the injured party knew that the actor had undertaken to protect him and was relying on such protection. This is not the law of Montana. Indeed, to impose these limitations on liability to third parties foreseeably harmed by lack of care would require reversal of at least one Montana case.

In *Kent, supra*, a municipality undertook a mere "supervisory" role over a developer's engineering work on a subdivision's trail system, including numerous "on-site visits and inspections." There was absolutely no contention that the city's review increased the risk or that the plaintiff's decedent, who fell when

[34] *E.g. Evans v. Liberty Mut. Ins. Co.,* 398 F.2d 665 (3d Cir. 1968)("'spot' inspections" of the employers premises, did not result in reliance or increase of the risk of harm from a cutting machine the insurer had NOT inspected; in *Fackelman v. Lac d'Amiante du Quebec,* 398 N.J. Super. 474, 485, 942 A.2d 127, 133 (App. Div. 2008*),* the court found reliance or increase of risk not triggered where there was no "basis to find that Aetna assumed responsibility for workplace safety," and there was no allegation that the dust studies were negligently performed or not reported).

skateboarding on a steep grade on the subdivision's trail system, had relied on the city.

In *Kent*, the district court had ruled that the public duty doctrine allowed liability only under a "special relationship exception" which required the same 'reliance' requirement urged by MCC's interpretation of 324A. This Court acknowledged the preconditions to duty under the special relationship exception to the public duty doctrine[35] but held that the city's conduct had not triggered the public duty doctrine and, therefore, the duty should be analyzed under the general principles of tort law:

> [C]ourts should first determine whether a governmental defendant has a specific duty to a plaintiff arising from "generally applicable principles of law" that would support a tort claim. If a private person would be liable to the plaintiff for the acts that were committed by the government, then the governmental entity would similarly be liable. Where such a specific duty and breach exists, the public duty doctrine has no application.

Kent at ¶39.

The *Kent* decision ruled that Montana's general principles of tort law imposed a duty on the city to exercise reasonable care in its engineering by reason of the city's affirmative actions – i.e. *regardless* of increased risk or reliance:

> Sara expressly argued that the City had duties defined under other generally applicable principles of law that rendered application of the public duty doctrine erroneous.

[35] *Kent* at ¶ 24 (Special relationship exception to the public duty doctrine can apply to "governmental actions that reasonably induce detrimental reliance").

* * *

> Sara's claim is premised upon affirmative actions taken by the City. As the District Court found, the City did not merely approve the walkway; it took an active role in monitoring, determining, and approving the engineering aspects of the trail system. It walked the walkway and gave instruction on the design. Having undertaken this active role, the City assumed a duty to act reasonably.
>
> The City argues it had no duty to Sara. However, it has long been the rule in Montana that should one gratuitously assume to render a service, the entity so doing is "bound to the exercise of reasonable care in the performance of the services so voluntarily assumed."

Kent at ¶¶ 42, 49,50, citing *Vesel v. Jardine Mining Co*., 110 Mont. 82, 92, 100 P.2d 75, 80 (1939); accord, *Nelson v. Driscoll,* 1999 MT 193, ¶¶ 36-37, 295 Mont. 363, 983 P.2d 972; *Stewart v. Standard Publishing Co.,* 102 Mont. 43, 50, 55 P.2d 694, 696 (1936).

Montana law is clear. A 'special relationship,' 'reliance,' or 'increase of risk' are not essential preconditions to the general tort duty to exercise reasonable care in an affirmative undertaking. These preconditions certainly do not apply where the very focus and degree of the undertaking is such that others would be injured in the absence of care. In this case, MCC's undertakings were affirmative and comprehensive. And they were directed at safety. MCC undertook affirmative actions with respect to a specific asbestos hazard, and the protection of workers therefrom. Moreover, injury resulting from its failures - including its failure to warn - was not merely foreseeable, but was, to MCC's certain knowledge, ongoing

and of catastrophic consequence. The principles of 324A, as incorporated in well-established Montana law, clearly recognize a duty of care under these facts.

d. The facts of this case sufficiently establish reliance and increased risk.

Even if this Court were to reverse *Kent* and impose reliance or increased risk prerequisites to general tort liability for one who undertakes safety-related services, on the uncontroverted facts in this case such "elements" of a claim are established.

First, it should be observed that the *Restatement* does not describe artificial thresholds on what the various Courts have recognized as circumstances of increased risk, reliance, or undertaking another's responsibilities. Indeed, the case against MCC is strikingly comparable to a *Restatement* example:

> The A Telephone Company employs B to inspect its telephone poles. B negligently inspects and approves a pole adjoining the public highway. Because of its defective condition the pole falls upon and injures a traveler upon the highway. B is subject to liability to the traveler.

Illustration 3, Restatement (Second) of Torts § 324A (1965).

The essence of a reliance concern is whether the defendant has undertaken responsibilities with respect to conditions that present for others a reasonable expectation of safety or reliability - e.g. by overseeing the engineering of the trail system (though unbeknownst to a later injured plaintiff) in *Kent*, or by being the inspector of a defective pole adjoining the public highway in the *Restatement's* hypothetical. It does not advance the rationale of the reliance concept further to require that the injured person be in direct contact with the person undertaking

such services or even know who was performing the services. A person reasonably and rightfully relies on the appropriate assumptions that whoever is performing essential safety services is doing so with care, and that, if there were an extreme hazard of excessive toxic exposures, there would be a warning.[36]

In the instant case, the workers at Grace had reasonable expectations that the workplace was reasonably safe, that levels of the apparent nuisance dust were being monitored and appropriately controlled, and that they would be warned if there were excessive levels of a toxic chemical and certainly if there were ongoing, incurable latent disease injuries. MCC undertook to comprehensively address each of the matters which formed these reasonable expectations. MCC further directed the placement of various warning signs including signs warning of a dangerous overhang (Shoup 159:2-160:1) and directing use of respirators in a few especially dusty operations (Shoup 161:13-18; MCE117). Workers would reasonably rely on the fact that if, in addition to overhang and nuisance dust hazards, there was an extraordinary high-level toxic hazard, they would be so warned. A worker would reasonably expect that, if respirators were required (as the MCC-directed signs stated – MCE117) in particular areas (loading dock or the dry mill), that dust in

[36] *DeCaire v. Pub. Serv. Co.,* 173 Colo. 402, 407–08, 479 P.2d 964, 966 (1971)("No good reason appears to limit the liability … to the parties who requested the inspection. It was foreseeable … that someone other than the Shattucks might be occupying the premises in the future.)

other parts of the operation were so insignificant that even protection from nuisance dust was unnecessary. MCC can cite to no case in modern jurisprudence which holds that, for purposes of Section 324A, these are insufficient circumstances to create a reality of reliance.

Similarly, MCC's acts increased the risk. The workers' asbestosis and cancer risk was a function of (a) high levels of hidden asbestos, (b) the workers ignorance of its presence and their protection needs, and (c) the ongoing cumulative exposures. While MCC's recommendations did not make asbestos exposure levels higher, MCC took affirmative actions that contributed both to exposure durations and to worker ignorance resulting in each worker's cumulative exposure increasing.

First, MCC affirmatively recommend the continuation of the worker exposures. After reviewing the x-rays of 60 workers (*including Plaintiff Ralph Hutt*) all of whom already had radiological signs of fibrosis or other lung involvement, MCC affirmatively assured Grace that all of these workers could "continue safely" (MCE 142.1 at p.2).[37] Second, MCC directed secrecy and "confidentiality" and thus contributed to the continuation of additional unprotected exposures.

[37] *Cf Wallace v. Dean*, 3 So. 3d 1035, 1052 (Fla. 2009)(defendant increased risk within meaning of 324A by providing assurances that decedent was merely sleeping, thus "inducing third parties—who would have otherwise rendered further aid … to forebear from doing so).

In sum, even if this Court were to reverse *Kent* and impose 'reliance' or 'increased risk' preconditions to liability, this Court should conclude that such 'elements' are more than adequately established on the uncontroverted factual record.

4. Amicus' concern for Montana's insurance market is fully addressed by Montana Safety Culture Act

Amicus unnecessarily advocates for a special immunity for insurers. It is within the prerogative of the legislature to grant limited immunity, as might be done in legislation that imposes concomitant duties on insurers in exchange therefore. In 1993, the Montana legislature did so.[38] As a result, the Amicus' contention that the Asbestos Court's holding prospectively "could jeopardize the workers' compensation marketplace," is wholly without merit.

However, the 1965 Occupational Disease Act did not contain an immunity provision, and, of course, no special *ex post facto* immunity can be granted retroactively. Mont. Const. Art. II, § 31. Nor should the policy for limited immunity be applied in the absence of the matching statutory duty to provide industrial hygiene services which the later enactment imposes. In other words, the legislature paired its grant of immunity with a corresponding duty (39-71-1507,

[38] Section 39-71-1508, MCA, inherently acknowledges that Montana law recognizes liability for negligent provision of such services absent such special immunity.

MCA: "shall provide safety consultation services"), and neither that duty nor the attendant immunity can or should be separately applied.

Moreover, the policy reasons for creating such immunity would not exist in cases of knowing conduct like MCC's. Thus, under Section 39-71-1508(c), MCA, immunity does not cover actions involving "actual malice" (defined in Section 27-1-221, MCA as acting with intentional disregard of knowledge of a high probability of injury). Here, MCC knew the workers were continuing to be injured in the absence of the warning it withheld and information it suppressed.

The later enacted immunity effectuates a legislative policy to require insurers to provide safety services without concern that, by reason of incidental observations of workplace hazards, they could be liable for potential accidents happening thereafter. Such policy would not extend to the insurer's negligent conduct while it was providing such services (i.e. when the insurer could contemporaneously see the consequences of its ongoing negligence). For example, in this case, the withholding of a warning from workers of their ongoing injury even as the insurer was advising the employer that workers with such ongoing injury could "continue safely,"[39] would fall well outside of such policy's purpose. Just so, the immunity created by Section 39-71-1508 does not apply to injury occurring "during the actual performance" of services, while the service provider

[39] Exhibit MCE142.1 at p.2.

watches the injury happen without even uttering a warning. §39-71-1508(2)(a), MCA.

Montana's workers' compensation insurance market is currently protected from unwarranted liability by Section 39-71-1508, MCA. In contrast, having (a) affirmatively and contemporaneously advised that dangerously exposed workers could continue "safely," and (b) suppressed state reports and medical studies information and directed secrecy, knowing worker ignorance was a route to avoid the expected "good many claims" for the ongoing injurious exposures, MCC is hardly in a position to claim a retroactive immunity for public policy reasons.

CONCLUSION

This Court should conclude that, (1) where an insurer steps beyond the role of providing insurance to actively and extensively undertake the protection of workers it will, like any other entity performing such undertakings, owe a duty of care to those who would foreseeably be injured by negligent performance; (2) such duty is independent of the incidental contract of insurance, and (3) where those services include directing placement of warning signs and the design of a worker "Safety Program" (of which warning is an essential component) and defendant knows that workers are continuously being injured by a hidden hazard, a duty to warn arises.

Respectfully submitted this 18th day of April, 2019.

McGARVEY, HEBERLING, SULLIVAN
& LACEY, P.C.

By: _/s/ Allan M. McGarvey_____
Allan M. McGarvey

CERTIFICATE OF COMPLIANCE

I certify that this Response is presented using a proportionately-spaced Times New Roman typeface of 14 points and has a word count of 9,997 as calculated by Microsoft Office Word and conformed to the requirements of Rule 11, M.R.App.P.

_/s/ Allan McGarvey_____
Allan M. McGarvey

CERTIFICATE OF SERVICE

I, Allan M. McGarvey, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 04-18-2019:

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