IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP-19-0051

MARYLAND CASUALTY COMPANY,

Petitioner,

v.

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

Respondent.

REPLY BRIEF OF PETITIONER MARYLAND CASUALTY COMPANY

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

---

APPEARANCES:

Daniel W. Hileman
Kaufman Vidal Hileman Ellingson, P.C.
22 2nd Avenue, West
Kalispell, MT 59901
(406) 755-5700
dwh@kvhlaw.com
Attorney for Petitioner, Maryland Casualty Company

Allan M. McGarvey
Dustin Leftridge
345 1st Avenue East
Kalispell, Montana 59901
(406) 752-5566
Attorneys for Plaintiff Ralph V. Hutt

Edward J. Longosz, II
Mark A. Johnston
Kennedy C. Ramos
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1717 Pennsylvania Avenue, NW
12th Floor
Washington, D.C. 20006
(202) 659-6600 Telephone
elongosz@eckertseamans.com
mjohnston@eckertseamans.com
kramos@eckertseamans.com
Attorneys for Petitioner, Maryland Casualty Company

Hon. Amy Poehling Eddy
920 South Main
Kalispell, MT 59901
Asbestos Claims Court Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

SUMMARY OF THE ARGUMENT IN REPLY

Maryland Casualty Company ("MCC") petitioned this Court to exercise supervisory control to determine whether the Asbestos Claims Court ("ACC") committed a mistake of law in denying in part MCC's Motion for Summary Judgment based on its conclusion that MCC, a workers' compensation insurer, owed a common law duty to warn employees of its insured of hazardous conditions at the insured's facility. MCC's Petition for Supervisory Control, Op. 19-0051, Jan. 22, 2019. "The issue to be decided is the correct standard for determining duty; which is a legal determination." *Id.* This Court exercised supervisory control after concluding that MCC raised "a substantial legal issue." Order, Op. 19-0051, Feb. 19, 2019.

Plaintiff Ralph Hutt's ("Hutt") Opposition Brief either loses sight of or intentionally obscures the legal issue presented to this Court. Rather than articulating the application of a clear legal standard, Hutt focuses on mischaracterized and incomplete facts to argue that MCC owed him a duty. In so doing, Hutt ignores well-established common law principles, and misstates and misapplies the holdings of this Court. Both the ACC's Order of January 13, 2019 ("Order"), and Hutt's Opposition ("Hutt Br.") fail to provide a coherent legal framework for addressing the existence of a duty under these circumstances.

MCC submits that the Restatement (Second) of Torts ("Restatement") § 324A sets forth a comprehensive approach to determining whether and when an affirmative duty exists based on an undertaking. The Restatement framework is consistent with, and presents a natural outgrowth of, Montana common law on related duty issues. Principled application of this framework demonstrates that MCC did not owe a duty to Hutt.

ARGUMENT

I. The Legal Question Before This Court is What Standard Applies

At its heart, the case before this Court is about the determination of a legal duty. Of course, "[w]hether a legal duty is owed from one party to another is a question of law for the court." *Nautilus Ins. Co. v. First Nat. Ins., Inc.*, 254 Mont. 296, 299, 837 P.2d 409, 411 (1992).

Hutt fails to cohesively address how Montana tort law handles complex questions involving duty. Rather than articulating a basis for rejecting § 324A as the appropriate framework for analyzing this case, Hutt predictably devotes much of his Opposition to a rendition of distorted and parsed facts without legal context. Hutt's results-oriented stratagem only distracts from the legal question at hand: what standard applies under Montana law to determine whether a duty exists?

A. The Restatement (Second) of Torts § 324A is the Correct Standard

In essence, Hutt begins with the premise that a duty exists in this case, and then works backwards in an attempt to create novel factors or considerations to justify the imposition of a duty. *See* Hutt Br. at 1-5, 13-21. In contrast to Hutt's disjointed, *ad hoc* approach, the Restatement provides a complete and analytically sound framework for answering questions of legal duty. Further, the Restatement approach builds upon well-established Montana common law regarding the assumption of a duty based on an undertaking. Hutt offers no alternative. He offers no sound legal basis for not considering § 324, nor a focal point for deciding whether a legal duty exists in the first instance.

There is generally no duty to act affirmatively, and no duty to warn, aid, or protect another, even when action or warning is necessary to protect another. *See* Restatement § 314; *Emanuel v. Great Falls School Dist.*, 2009 MT 185, ¶ 12, 351 Mont. 56, 59, 209 P.3d 244, 247 n.1. There are a number of exceptions to this rule

where the duty of reasonable care applies,[1] including when an actor under no obligation to act, ***undertakes to act*** for the benefit or protection of another, *see* Restatement § 323, or for a third-party, *see* Restatement § 324A.

Under these Restatement provisions, the existence of a duty does not turn on the mere invocation of the word "undertaking," as Hutt apparently contends.[2] Rather, liability may result only if there are certain circumstances present, connecting the plaintiff to the defendant and the alleged undertaking, and justifying the imposition of a duty. *See* Restatement § 323(a)-(b); Restatement § 324A(a)-(c). This is neither a novel approach nor one rejected by the Montana Supreme Court.

While Hutt contends that foreseeability is the only real touchstone to determination of a duty in Montana, the Restatement approach is consistent with and embedded in Montana Supreme Court jurisprudence regarding foreseeability. For instance, in *Nelson v. Driscoll*, this Court considered whether a legal duty to protect

---

[1] Other exceptions to the no-duty-to-act-or-protect rule include circumstances of custody or control over another person or property. *See, e.g., Lopez v. Great Falls Pre-Release Servs., Inc*., 295 Mont. 416, 424-25, 986 P.2d 1081, 1086 (1999) (special relationship of custody and control over pre-release resident imposed duty to protect those within foreseeable zone of risk created by negligent supervision on pre-release center), *overruled on other grounds as stated in Emanuel*, ¶ 14; *Prindel v. Ravalli County*, 2006 MT 62, ¶¶ 25, 36, 331 Mont. 338, 349-50, 355, 133 P.3d 165, 174, 178 (special custodial relationship over inmate justified imposition of duty to protect certain citizens from inmate).

[2] Hutt's Opposition asserts approximately 68 times that some form of "undertaking" occurred.

could exist under a number of Restatement exceptions, despite the general no-duty-to-protect rule. 1999 MT 193, ¶ 24, 295 Mont. 363, 372, 983 P.2d 972, 972-73, 978-79 (citing Restatement §§ 314A (special relations giving rise to duty to aid or protect), 319 (duty of those in charge of person having dangerous propensities), 323 (negligent performance of undertaking to render service), and 324 (duty of one who takes charge of another who is helpless)). This Court went on to consider whether the undisputed facts satisfied any of the exceptions to the no-duty-to-protect rule, *Nelson*, ¶¶ 25-38. This Court concluded that the defendant police officer assumed a duty to protect a motorist under § 323. *Id.*, ¶ 38. The officer knew the motorist had been drinking and thought it unwise for her to drive home in icy conditions, so he directed her to park her vehicle and monitored her from his car to ensure that she did not drive. *Id.* By taking these affirmative steps to "ensure [the motorist's] safety," this Court concluded the officer assumed a duty to protect her. *Id.* This Court then determined that the foreseeability of the harm analysis did not weigh against imposition of duty.[3] *Id.*, ¶ 39.

The flexibility and relative predictability of § 324A in particular has led to its broad application in cases involving similar circumstances. *See* MCC Br. at 25-28.

[3] In this way, this Court's analysis in *Nelson* demonstrates that in affirmative duty cases, foreseeability is a limit on the ***scope*** of a duty rather than the factor generating the duty.

In an effort to minimize the overwhelming majority of jurisdictions that have adopted or applied § 324A, Hutt draws a false distinction between insurance related activities and "extra insurance" activities. *See* Hutt Br. at 4. As is evidenced by the abundant case law cited in MCC's and Amicus' Opening Briefs, an insurer's loss control services can encompass a variety of activities, including industrial hygiene studies, referring employees for medical treatment, contributing to or assisting with an insured's safety plan or program,[4] site visits or safety inspections, and safety recommendations. *See* MCC Br. at 12, n.3; Amicus Br. at 8-9 n.7. Indeed, MCC's workers' compensation policy gave it the right (but not the obligation) to inspect Grace's workplace ***and*** make safety recommendations. Ex. 3.[5] Hutt's attempt to categorize certain activities as loss-control related, and others as separate services or "worker protection undertakings," is unpersuasive.

---

[4] According to Hutt, MCC's legitimate disputes regarding the authenticity, authorship, foundation, and implementation of the draft safety program, *see* MCC Br. 13-14 n.4, are speculation, *see* Hutt Br. at n.16. However, nothing in the documents to which Hutt cites (which generally refer to multiple safety programs) demonstrates that the document at issue, Ex. 37, labeled "W.R. Grace Co. Zonolite Division Safety Program & Organization," was drafted by MCC, or ever approved, finalized, or implemented by Grace. Other evidence in the record demonstrates that Grace was still discussing ***the need for*** a comprehensive safety plan well into 1968 and 1969. Exs. 5, 18, 8, 14.

[5] Loss control services are distinct from an unbundled contract or agreement to perform a safety service. *See Wilson v. Rebsamen Ins., Inc.*, 957 S.W.2d 678, 681-82 (Ark. 1997) (determining that independent safety consultant that contracted with employer to conduct inspections and safety recommendations owed duty under § 324A). No such unbundled contract or agreement existed in this case.

Hutt next contends that Montana cases recognize a "public policy interest to protect third persons," and cites a number of inapplicable cases.[6] Hutt Br. at 18. In reality, each case cited by Hutt is the product of specific analyses employing specific standards for when a duty to a third party exists. Each case employs different analytical requirements based on the claims alleged, none of which are analogous here. While duty analyses do reflect policy considerations, those considerations are embodied in principled legal frameworks, which in turn impose different requirements for extension of a duty (e.g., economic harm, control, detrimental reliance, etc.).[7] Those requirements are not employed or dispensed with at will, or

---

[6] *Redies v. Attorneys Liab. Prot. Soc.*, 2007 MT 9, 335 Mont. 233, 150 P.3d 930 (assessing unfair trade practices action and whether a duty was owed to a protected person); *Jim's Excavating Service, Inc. v. HKM Assocs.*, 265 Mont. 494, 505, 878 P.2d 248, 254-55 (1994) (applying Restatement § 552 covering "information negligently supplied for the guidance of others" to hold that third-party contractor could recover economic damages against design professional who should have foreseen that identifiable class of plaintiffs were at risk of relying on information supplied); *Turner v. Kerin & Assoc.*, 283 Mont. 117, 126-27, 938 P.2d 1368, 1374 (1997) (accord); *Thayer v. Hicks*, 243 Mont. 138, 793 P.2d 784 (1990) (accountant owed duty because accountant knew third party would rely upon the audit and there was sufficient nexus between accountant and third party); *Kent v. City of Columbia Falls*, 2015 MT 139, 379 Mont. 190, 350 P.3d 9 (statutory authority to compel modification over design and construction of trail system assumed a duty to trail users).

[7] Hutt contends that the Montana Safety Culture Act, § 39-71-1508, MCA, enacted in 1993, inherently acknowledged that Montana law recognizes liability for negligent provision of services absent the grant of immunity. Hutt Br. at 39, n.38. However, statutes do not "inherently acknowledge" common law duties by negative inference; they codify narrow and specific policy.

broadly packaged as "public policy considerations" in favor of imposing a duty to protect third parties as Hutt urges.

Moreover, Montana courts consider specifically enumerated public policy factors as a final step in the duty analysis.[8] This Court need not address Hutt's additional, novel factors, *see* Hutt Br. at 14-19, and there is simply no precedent for looking to freestanding public policy considerations in analyzing whether a duty exists. Doing so would create confusion and legal anarchy.

Finally, to the extent that Hutt cites or attempts to rely on *Air & Liquid Sys. Corp. v. DeVries*, 139 S.Ct. 986 (2019), that decision is not applicable as it is a products liability case involving a manufacturer's duty to warn, and the Supreme Court repeatedly emphasized that its holding was limited to the maritime tort

[8] *See Jackson v. State*, 1998 MT 46, ¶ 39, 287 Mont. 473, 487, 956 P.2d 35, 44.

context. *See id.* at 994, 995, 996. Accordingly, *DeVries* has no precedential value to this Court.[9]

B. Hutt Misreads and Misapplies § 324A

Having established that § 324A is the appropriate framework, only a principled and complete application of § 324A can comport with this Court's duty precedent. Hutt's approach—which selects and disposes of necessary elements in a manner predictable only to Hutt—is not an example of such an application. Similarly, Hutt's contention that the ACC essentially applied § 324A is belied by the ACC's own words, where it "decline[d] to adopt or apply the Restatement (Second)

---

[9] Notwithstanding, in *DeVries*, Justice Gorsuch's well-reasoned dissent cautions against after-the-fact novel theories of duty such as the one advanced by Hutt:

> Decades ago, the bare metal defendants produced their lawful products and provided all the warnings the law required. Now, they are at risk of being held responsible retrospectively for failing to warn about other people's products. It is a duty they could not have anticipated then and one they cannot discharge now. They can only pay. Of course, that may be the point. In deviating from the traditional common law rule, the Court may be motivated by the unfortunate facts of this particular case, where the sailors' widows appear to have a limited prospect of recovery from the companies that supplied the asbestos (they've gone bankrupt) and from the Navy that allegedly directed the use of asbestos (it's likely immune under our precedents). The bare metal defendants may be among the only solvent potential defendants left. But how were they supposed to anticipate many decades ago the novel duty to warn placed on them today? People should be able to find the law in the books; they should not find the law coming upon them out of nowhere.

Id. at 999-1000 (Gorsuch, J., dissenting) (citation omitted).

of Torts, § 324A," despite recognizing that doing so "may place Montana in the minority of jurisdictions." Order, Ex. 42 at 17 n.7.[10]

Hutt's first error regarding the Restatement is its purpose. It is not a civil code, or "non-objective policy alchemy," Hutt Br. at 10, but a ***restatement*** of guiding common law principles. In fact, it is the relative flexibility and predictability of § 324A—a distillation of existing common law—that have caused jurisdictions across the country to adopt and apply it in similar circumstances. As pointed out by Amicus, the two states that have declined to adopt § 324A did so because they found it ***too lenient*** in imposing liability. Amicus Br. at 6-7 n.6.

Hutt's second error is in his application of § 324A. Liability guided by § 324A requires, *inter alia*, an ***undertaking to render services to another***, and that the undertaking must be one which the actor ***should recognize as necessary for the protection of a third person***. Restatement § 324A. These threshold factors are necessary but not sufficient to impose liability under the § 324A framework. Hutt contends that any conduct that can be described as an affirmative undertaking includes an assumption of liability that extends to third parties regardless of the presence of any additional circumstances linking the actor and the third party. *See*

[10] Although this Court has precedent addressing the Restatement approach, and federal courts applying Montana law have reasoned that this Court would likely adopt and apply § 324A, the ACC does not analyze or even cite to any of those opinions. *See* MCC Br. at 24-25, 31 n.13.

Hutt Br. at 13-14, 19-20. As an example, Hutt focuses exclusively on MCC's correspondence in a vacuum, without regard to what Grace did or, more importantly, did not do with MCC's input.

Under the correct application of § 324A, at least one of the following circumstances ***must*** also be present: (a) an increased risk of harm based on negligence in the undertaking that leaves the third party in a worse position than if no undertaking occurred in the first place; (b) an undertaking that supplants rather than supplements a duty owed by the other to the third party; or (c) the third party suffered harm because of his reliance or the other's reliance on the undertaking. *See* Restatement § 324A(a)-(c). The § 324A subfactors have consistently been applied as ***requirements*** necessary for imposition of liability to a third party based on an undertaking under § 324A. Failure to establish one of the subfactors means the facts are insufficient to impose a duty. Although he describes the § 324A subfactors as "artificial limitations," Hutt Br. at 30, Hutt fails to provide any support for his contention that courts apply § 324A without regard to its subfactors, Hutt Br. at 32-33. In fact, many of the cases Hutt cites include helpful discussion of the § 324A

subfactors,[11] while others simply failed to reach the subfactors because the threshold issue of whether an undertaking occurred in the first place was dispositive.[12]

Hutt's third point of error: he contends that the subfactors comprise a non-exhaustive list, and that other, undefined circumstances can also justify the imposition of a duty under § 324A. Hutt Br. at 29, 33. Hutt fails to cite a single case in support of this proposition. The only authority he cites is a misleading and incomplete citation to a Restatement "caveat." Hutt Br. 28-29. The complete caveat states that:

> The institute expresses no opinion as to whether … (2) there may not be other situations in which one who has entered upon performance may be liable to a third person, ***where he is committed to the undertaking and cannot withdraw from it without leaving an unreasonable risk of harm to the third person.***

Caveat to Restatement § 324A (emphasis added). While Hutt suggests that the truncated caveat language he has selected opens the door for limitless, unenumerated

---

[11] *Yanmar Am. Corp. v. Nichols*, 166 So. 3d 70 (Ala. 2014) (applying increased risk of harm under § 324A(a)); *Wilson*, 957 S.W.2d at 678 (applying assumption of duty owed by another under § 324A(b)).

[12] For instance, Hutt's discussion of *Smith v. Alllendale Mut. Ins. Co.*, 303 N.W. 2d 702 (Mich. 1981), Hutt Br. at 29-30, neglects to point out that the *Smith* court did, in fact, apply § 324A to assess whether a fire insurer's inspections subjected it to liability, but it did not reach the subfactors. From the outset of the analysis, it concluded that there was no evidence that the insurer agreed to provide the insured with fire inspection services for the purpose of preventing fire hazards. *Id.* at 725, 740. The fire insurer's inspections were for its own benefit. *Id.* at 724-25. *See also Merrill v. Arch Coal.*, 118 F. App'x 37 (6th Cir. 2004); *Van Biene v. Era Helicopters*, 779 P.2d 315 (Ala. 1989); *Handler Corp. v. Tlapechco*, 901 A.2d 737 (Del. 2006).

circumstances where liability may also be imposed to a third person for negligent performance of an undertaking, a complete reading makes clear that the limited caveat contemplates a specific scenario, entirely inapplicable to the facts of this case.[13]

As a fourth point of error, Hutt argues without support that liability may attach under § 324A (a) and (c) based on his misguided and erroneous interpretation of those factors. Hutt contends that "increased risk" is satisfied because MCC's failure to warn the workers prolonged their exposure. Hutt Br. at 38. For liability based on an increased risk of harm, however, a plaintiff must "identify sins of commission rather than omission." *Patentas v. United States*, 687 F.2d 707, 716 (3d Cir. 1982) (allegation that Coast Guard's safety inspection failed to alert employees to defective tanker conditions that eventually caused explosion did not meet increased risk of harm requirement in § 324A(a)); *see also Turbe v. Gov't of Virgin Islands*, 938 F.2d 427, 432 (3d Cir. 1991) (for increased risk of harm under analogous § 323(a), "[T]he defendant's negligent performance must somehow put the plaintiff in a worse

[13] Further proof that the caveat contemplates a specifically described scenario—when one who has entered on performance of his undertaking and cannot withdraw from it without leaving an unreasonable risk of serious harm to another—and not unlimited potential routes to liability is found in comment f to § 324A and comments d and e to § 323.

situation than if the defendant had never begun the performance"). Accordingly, Hutt's contentions are insufficient.

Hutt contends that the "reliance" subfactor is essentially satisfied because workers had a reasonable expectation of safety. Hutt Br. at 36. This too, is insufficient, as "reliance" under § 324A(c) requires "proof of actual reliance on a contractual undertaking or representations by the defendant that resulted in acts or omissions by the party relying on the defendant's undertaking." *Stacy v. Aetna Casualty & Surety Co.*, 484 F.2d 289, 295 (5th Cir. 1973). "Reliance" requires a showing that the plaintiff's or the other party's reliance induced one or the other to "forgo other remedies or precautions against such a risk." Restatement § 324A, cmt e; *Ricci v. Quality Bakers of Am. Co-op. Inc*., 556 F. Supp. 716, 721 (D. Del. 1983) ("The plaintiff has not presented any facts indicating that Schmidt relied upon the defendant's inspection and in doing so forewent other remedies or precautions against the risk of harm to the plaintiff."). Given this backdrop, Hutt's contention that his "expectation" of a safe work environment somehow demonstrates ***reliance on MCC*** for purposes of § 324A is inadequate, especially given his undisputed testimony that he had never even heard of MCC prior to initiation of this lawsuit. Ex. 40 at 94:22-95:16. There is similarly no evidence that Grace ***relied on*** MCC's recommendations ***to the exclusion of other remedies***. *See* MCC Br. at 5-14.

Finally, Hutt's discussion of § 324A's "Illustration 2,"[14] Hutt Br. at 36, is also incorrect and misleading. Though Hutt attempts to argue that reliance or increased risk under § 324(a) and (c) are satisfied, Illustration 2 depicts liability under § 324A(b)–based on an undertaking to perform a duty owed by the other to the third person. Hutt makes no allegation or argument that MCC replaced Grace's exclusive, non-delegable duty to provide a safe workplace to its employees. Nor could he. Liability under § 324A(b) "entails a showing of intent to become the primary provider of a service for the protection a third person, and not merely a showing of intent to assist or supplement the service provided by the other." *Plank v. Union Elec. Co.*, 899 S.W.2d 129, 132 (Mo. Ct. App. 1995); *see also Stacy*, 484 F.2d at 294 n.6 (finding no liability under § 324A(b) because there was no evidence that company delegated, by contract or course of conduct, its duty to inspect its own premises to discover hazardous conditions, and proof of assistance in particular areas of operation fell "far short of systemwide assumption" of the company's duty to discover latent hazards).

[14] The illustration is incorrectly cited as "Illustration 3." Hutt Br. at 36.

II. The ACC's Legal Analysis is Incorrect and Unsupported

A. Neither "Foreseeability" Nor "Foreseeability Plus" Applies

The label for the ACC's analysis—whether it is "foreseeability" or "foreseeability plus superior knowledge"—is immaterial. However, the fact that the ACC's analytical approach is neither discernible nor replicable is indicative of its error. The core flaw in the ACC's approach is its failure to account for the important distinction in duty between harms created by one's actions and those suffered due to a failure to act. Imposing a duty to act affirmatively to warn or protect another based on foreseeability of the harm as the driving analytical factor, which is what the ACC purported to do, is a dramatic expansion of liability and a rejection of the common law, which has traditionally required special circumstances of custody or control to justify the imposition of liability on one who merely fails to act, warn, or protect another.

As previously discussed, the ACC's methodology cannot be reconciled with § 324A as Hutt urges because the ACC expressly rejected that approach. Moreover, while the ACC purported to apply Montana foreseeability case law, it expressly discussed a number of factors—such as "direct involvement," "actual knowledge of a known hazard," and "affirmative action"—that are irrelevant and immaterial to a foreseeability analysis. Order at 16-17. The ACC created its own methodology to the exclusion of Montana Supreme Court case law.

B. Hutt's Opposition Does Not Legitimize the ACC's Incorrect Legal Analysis

Hutt's attempts to reconcile the ACC's duty analysis with the common law or any replicable framework are futile. For example, while Hutt contends that the ACC applied third party liability cases and foreseeability, Hutt Br. at 21, the ACC's holding explicitly forecloses any such conclusion:

> [T]he Montana Supreme Court has extended duties of care to third-parties in numerous types of situations including premises liability, third-party beneficiaries of contractual relationships, special relationships, etc. ***These cases will not be cited or distinguished here because not only are they factually distinguishable***, but the facts of the present case reveal direct involvement on the part of MCC which calls instead for a straightforward foreseeability analysis in determining the scope of the defendant's duty of care ***which does not require application of any special rule*** to extend a duty of care to MCC under these circumstances.

Order at 16 (emphasis added).

Hutt attempts to further subvert the fundamental distinction between action and inaction by mischaracterizing purported actions taken on behalf of MCC. For instance, Hutt claims that MCC "engaged" the asbestos hazard, made "comprehensive" undertakings, Hutt Br. at 3, and undertook to control worker safety, *id.* at 19; ignoring the reality that MCC's authority was limited to merely ***making recommendations*** to Grace, and MCC only visited the Libby Plant on a quarterly basis. Grace alone had the authority to assess MCC's recommendations, along with those it was soliciting and receiving from at least four other sources, and

Grace alone controlled which recommendations, if any, went into effect and when.[15] *See* MCC Br. at 6-11. Hutt also ignores the difference between actors who have exercised control to create a danger or increase a risk, and actors who fail to warn or protect from injuries created by others. *See* Hutt Br. at 19-20; *but see* Amicus Br. at 13-18. Aside from being inaccurate and incomplete, Hutt's factual allegations fail to conform to any analytical framework for assessing duty and do nothing to aid this Court's analysis.

C. Hutt's Opposition Misrepresents Applicable Facts and Law Regarding Control

In an effort to distract this Court from the requisite legal analysis, Hutt makes a number of unsupported or incomplete factual claims and characterizations, particularly with respect to MCC's role and authority vis-à-vis Grace and the Libby Plant. For instance, Hutt repeatedly refers to MCC's "asbestos control and worker protection," Hutt Br. at 13, and states that MCC "actively controlled the dissemination and disclosure of asbestos hazard information," Hutt Br. at 18. Hutt's contentions that MCC had ***any*** "control" at the Libby Plant are completely unsupported. MCC's only role with respect to Grace was as workers' compensation

[15] Hutt incredibly describes Grace as "wholly cooperative" with MCC by October 1967, despite the overwhelming record evidence of instances where Grace rejected and ignored MCC's recommendations after 1967 and throughout the policy period. *See, e.g.*, Ex. 7 (Grace rejection of MCC recommended dust level in 1968); Exs. 34, 35 (Grace rejection of MCC recommended x-ray schedule in 1969).

provider. Ex. 3. In that role, MCC could only make recommendations. At all times and in all circumstances, the Libby Plant and all Grace employees who worked there remained under Grace's exclusive control.

MCC's lack of control is important to the duty calculus. At least two of the cases on which Hutt relies are inapposite to this case because of the issue of control. In *Piedalue v. Clinton Elementary Sch. Dist.* No. 32, 214 Mont. 99, 102-103, 692 P.2d 20, 22-23 (1984), this Court found a fact issue as to whether a landowner owed a duty to a business invitee to warn of a hidden danger involved in ingress and egress from the landowner's property. While Hutt describes this case as one where the defendant lacked control over the hazard but nevertheless had a duty to warn, it is inapplicable because the landowner had access to and control over communications with his business invitees. *See* Amicus Br. at 17.

Hutt relies on *Kent* primarily to argue that Montana law rejects § 324A's subfactors, Hutt Br. at 33-35, 39; however, *Kent* did not involve any claims analyzed under § 324A, nor did it involve a failure to warn or protect. In *Kent*, this Court considered whether summary judgment had properly been granted based on the public duty doctrine. *Kent*, ¶ 2. It went on to address whether the City assumed a duty with respect to the condition of a walkway when the City "did not merely approve the walkway; [but] it took an active role in monitoring, determining, and approving the engineering aspects of the trail system … walked the walkway and

gave instruction on the design." *Kent*, ¶ 49. This Court noted that the City was actively involved in the design of the path, knew of its dangerous grade, had the ***statutory authority to compel a modification***, and yet exercised its statutory and contractual authority to approve it." *Id.*, ¶ 52 (emphasis added). This Court remanded the case after concluding that the City "could be held liable" if the plaintiff could "establish her claims premised on violation of statutory duty and/or the voluntary assumption of a duty." *Id*. As this Court was not asked to reach any questions involving § 324A in *Kent*, Hutt's argument that applying § 324A here would require overruling *Kent* is baseless.

CONCLUSION

This Court exercised supervisory control in order to address the substantial legal issue of determining which standard applies under the circumstances of this case. The methodology used by the ACC is inscrutable and not replicable. Rather than set forth a clear and supported legal framework, Hutt provided this Court with incomplete and mischaracterized "facts" unmoored from any useful analytical context. This Court should follow the analytical framework aligned with and provided by § 324A for determining whether a duty existed in this case.

For the reasons stated in MCC's Opening Brief and herein, this Court should reverse the ACC's mistake of law, apply the appropriate duty standard, and conclude that MCC owed no duty to Hutt.

Dated: May 2, 2019

By: */s/ Kennedy C. Ramos*

Edward J. Longosz, II, *pro hac vice*
Mark A. Johnston, *pro hac vice*
Kennedy C. Ramos, *pro hac vice*
ECKERT SEAMANS CHERIN & MELLOTT, LLC
1717 Pennsylvania Avenue, NW
12th Floor
Washington, D.C. 20006
(202) 659-6600 Telephone
(202) 659-6699 Facsimile
elongosz@eckertseamans.com
mjohnston@eckertseamans.com
kramos@eckertseamans.com

Daniel W. Hileman
Kaufman Vidal Hileman Ellingson, P.C.
22 2nd Avenue, West
Kalispell, MT 59901
(406) 755-5700
dwh@kvhlaw.com

Attorneys for Petitioner, Maryland Casualty Company

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(3) of the Montana Rules of Appellate Procedure, I certify that this Brief is double spaced (except for point headings, footnotes and quotes), printed with proportionately spaced Times New Roman Typeface, 14 point, and contains 4,977 words as calculated by Word, excluding any table of contents, table of citations, certificate of service, certificate of compliance, and Ex. or exhibits.

Dated: May 2, 2019 */s/ Kennedy C. Ramos*

CERTIFICATE OF SERVICE

I hereby certify that I have served true and accurate copies of the foregoing Opening Brief of Petitioner Maryland Casualty to the following on May 2, 2019:

Hon. Amy Poehling Eddy
920 South Main
Kalispell, MT 59901
Asbestos Claims Court Judge

Allan M. McGarvey
John Lacey
Dustin Leftridge
345 1st Avenue E
Kalispell, MT 59901
Representing: Ralph V. Hutt

Dated: May 2, 2019 */s/ Kennedy C. Ramos*

CERTIFICATE OF SERVICE

I, Kennedy C. Ramos, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-02-2019:

Daniel W. Hileman (Attorney)
22 Second Ave. W., Suite 4000
Kalispell MT 59901
Representing: Maryland Casualty Corporation
Service Method: eService

Allan M. McGarvey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Ralph V. Hutt
Service Method: eService

Dustin Alan Richard Leftridge (Attorney)
345 First Avenue East
Montana
Kalispell MT 59901
Representing: Ralph V. Hutt
Service Method: eService

Edward J. Longosz (Attorney)
1717 Pennsylvania Avenue NW
Suite 1200
Washington DC 20006
Representing: Maryland Casualty Corporation
Service Method: eService

Joseph M. Sullivan (Attorney)
101 River Drive North
Great Falls MT 59401
Representing: Transportation Insurance Co., American Property Casualty Insurance Association
Service Method: eService

Maxon R. Davis (Attorney)
P.O. Box 2103
Great Falls MT 59403
Representing: Transportation Insurance Co., American Property Casualty Insurance Association

Service Method: eService

John F. Lacey (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Ralph V. Hutt
Service Method: eService

Roger M. Sullivan (Attorney)
345 1st Avenue E
MT
Kalispell MT 59901
Representing: Ralph V. Hutt
Service Method: eService

Jinnifer Jeresek Mariman (Attorney)
345 First Avenue East
Kalispell MT 59901
Representing: Ralph V. Hutt
Service Method: eService

Ethan Aubrey Welder (Attorney)
345 1st Avenue East
Kalispell MT 59901
Representing: Ralph V. Hutt
Service Method: eService

Amy Eddy (Respondent)
920 S. Main, Ste. 310
Kalispell MT 59901
Service Method: Conventional

Tammy Peterson (Interested Observer)
Asbestos Court Clerk
Helena MT 59601
Service Method: Conventional

Matthew Cuffe (Interested Observer)
512 California
Libby MT 59923
Service Method: Conventional

Charles J. Seifert (Attorney)
50 S. Last Chance Gulch 3rd Fl.
P.O. Box 598
Helena MT 59624
Representing: Maryland Casualty Corporation
Service Method: Conventional

Mark A. Johnston (Attorney)
1717 Pennsylvania Ave. NW, 12th Floor
Washington DC 20006
Representing: Maryland Casualty Corporation
Service Method: Conventional

Electronically Signed By: Kennedy C. Ramos
Dated: 05-02-2019