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STATE OF MONTANA

NO. DA 19-0085

IN THE SUPREME COURT OF THE STATE OF MONTANA

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BNSF RAILWAY COMPANY,

Petitioner,

-vs-

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

Respondent.

::

PETITIONER'S OPENING BRIEF

On Review from the Asbestos Claims Court of the State of Montana, Cause No. AC-17-0694
Hon. Amy Eddy

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   A. The ACC erroneously applied a presumption against preemption standard despite the existence of express preemption provisions in the FRSA and HMTA.

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   C. The ACC erroneously found BNSF had not adequately plead its superseding intervening cause defense, even though Plaintiffs had notice of BNSF's intent to pursue such a defense.

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A. The ACC erred when, at the summary judgment stage, it entered findings of fact that were either plainly contradicted by the evidence or genuinely disputed.

B. The ACC erred when, despite Montana's adoption of other related provisions of the Second Restatement of Torts ("the Restatement"), it rejected the common carrier exception to strict liability codified at §521 of the Restatement.

C. The ACC erroneously applied the factors codified at §520 of the Restatement and found that BNSF engaged in abnormally dangerous activity.

STATEMENT OF THE CASE

This case stems from the mining and processing of vermiculite in and around Libby, Montana by a party not involved in the present litigation, W.R. Grace & Co. and its predecessors ("Grace"). BNSF's only role was as a common carrier–to transport railcars containing refined vermiculite concentrate packaged, prepared, documented, and tendered for shipment by Grace. Plaintiffs allege BNSF is liable for damages sustained from their exposure to asbestos contained in the vermiculite concentrate BNSF was legally required to transport. Plaintiffs assert common law negligence and strict liability claims. Third Amended Complaint ("Complaint"). BNSF asserts four relevant affirmative defenses. Three address other-cause evidence:

> 7. Plaintiffs' injuries and damages, if any, may have been caused by the action or conduct of persons whose conduct and actions Defendants had neither control, nor the right to control, and for whom the Defendants have no liability.

> 8. If Plaintiffs have incurred or sustained any losses, damages, or injuries, said losses, damages or injuries may have been contributed to and/or caused, by the carelessness or negligence of persons, corporations or entities other than Defendants.
>
> 15. Pursuant to 27-1-703, MCA, Plaintiffs' claims may have been partially, or fully caused by parties that they have settled with or released.

Amended Answer to Plaintiffs' Third Amended Complaint ("Answer"), pp. 5-6. The fourth (paragraph 13) contends that federal law preempts Plaintiffs' claims. *Id.*, p. 6.

The parties filed cross summary judgment motions. BNSF argued Plaintiffs' claims are preempted by federal law. *See* BNSF's Combined Motion for Summary Judgment. Plaintiffs contend their claims are not preempted, and BNSF is subject to strict liability for engaging in an abnormally dangerous activity. *See* Plaintiffs' Motion for Partial Summary Judgment re: Preemption and Abnormally Dangerous Activity ("Motion re: Preemption, Strict Liability"). Plaintiffs also sought summary judgment on the other-cause defenses listed above. Plaintiffs' Motion for Summary Judgment re: Defendant's Non-Party Affirmative Defenses ("Motion re: Non-Parties").

After a hearing, the ACC issued two orders, granting Plaintiffs' motions and denying BNSF's motion. Trans. 01/07/2019. In its first order, the ACC held (1) Plaintiffs' claims were not preempted, and (2) BNSF was subject to strict liability.

01/15/2019 Order, pp. 8-9, 13. In its second order, the ACC prohibited BNSF from presenting evidence of non-party conduct to negate causation. 01/18/2019 Order, p. 5.

BNSF sought writs of supervisory control. *See* Petition re: Preemption, Strict Liability; Petition re: Non-Parties. This Court granted the petitions, consolidated them into one appeal, and ordered full briefing. *See* Order Granting Supervisory Control.

STATEMENT OF FACTS

Vermiculite ore was discovered in the early 1900s in a mountain approximately 9 miles northeast of Libby. Ex. B,[1] Sept. 1985 Grace Report, at BNSF_404_0017-0006. Grace developed a mine at this site and solely operated "the largest vermiculite mining-milling operation in the world." *Id.* at BNSF_404_0017-0008. Grace drilled vertical holes into the mountaintop, inserted ammonium nitrate, and blasted the mountainside to extract raw vermiculite ore. *Id.* at BNSF_404_0017-0010. This "produced significant amounts of dust," and various studies revealed

[1] Plaintiffs' exhibits were numbered and submitted with three affidavits dated 10/05/2018 (Exhibits 1-70, in Exhibit C of Appendix to Petition re: Preemption, Strict Liability), 10/25/2018 (Exhibits 71-87, in Exhibit D of Appendix to Plaintiffs' Summary Response to Petitions), and 10/04/2018 (Exhibits 88-100, in Exhibit P of Appendix to Petition re: Non-Parties). BNSF's exhibits are lettered and were submitted with an affidavit dated 10/26/2018 (Exhibits A-Q, in Exhibit G of Appendix to Petition re: Preemption, Strict Liability).

Grace workers and their families suffered adverse health outcomes after being exposed to the dust. Ex. I-Sworn Expert Report of Dr. John Kind ("Kind Report"), §5.2, pp. 6-7. Testing revealed the airborne dust at the mine site contained up to 40% asbestos. Ex. L-1962 Montana Board of Health Study, p. 3.[2]

Grace processed the ore into a concentrate through a process called beneficiation, which involved separating the ore from coarse rock, feeding it through several wet vibrating screens, then sorting the vermiculite particles by size. Ex. B-Sept. 1985 Grace Report, at BNSF_404_0017-0012. The particles were thoroughly washed through a process specialized for each size of particle, then stored for shipping. *Id.* The resulting product– vermiculite concentrate–was shipped to processing plants and ultimately sold to the public as a safe product. *Id.* at BNSF_404_0017-0018, -0022 (the milling process removed an average of 98.8% of asbestos).

Grace tendered the vermiculite concentrate to BNSF for shipment. Ex. I-Kind Report, §5.3, p. 10. Once Grace contracted with BNSF to transport the concentrate, BNSF was legally obligated to carry it under both Montana and federal law. Montana law provides, "A common carrier shall, if able to do so, accept and carry whatever is offered to the carrier." §69-11-403, MCA. Federal law provides, "A

[2] The ACC erroneously attributes this 40% figure to loading operations, whereas this reading was actually taken miles away at the milling operation where the raw ore was processed.

rail carrier providing transportation or service...shall provide the transportation or service on reasonable request." 39 U.S.C. § 11101(a).

Grace was solely responsible for loading the vermiculite concentrate into railcars. Ex. F-Second Swing Dep., *Watson v. BNSF*, ADV-10-0740 ("Second Swing Dep."), 29:18-20, 32:15-19; Ex. G, Carrier Dep., *Watson v. BNSF*, ADV-10-0740 ("Carrier Dep."), 69:3-8. In furtherance of that duty, Grace's and BNSF's predecessors entered into a 1943 contract for the construction of a spur track, enabling a connection between Grace's facilities and BNSF's main line track–the contract provided that Grace would be solely responsible for the operational activities that took place on that property. Ex. C-1943 Agreement, pp. 38-39. In 1952, Grace and BNSF's predecessors entered into a contract for the use of BNSF's right of way property, allowing Grace to load railcars and position them on a track tied into the main line tracks, and allowing BNSF to fulfil its public duty of transporting the railcars tendered by Grace. Ex. D-Land Use Agreement, pp. 40-45. The parties also agreed Grace would indemnify the railroad against any liabilities arising out of Grace's occupancy and use of the property. Ex. 6-Affidavit of Jim Roberts, ¶¶8-10; *see also* Exs. 22-24 (agreements for use and occupancy of BNSF's right of way for loading operations and providing that Grace would indemnify the railroad). While Plaintiffs and the ACC characterized these agreements as reflecting some special relationship between BNSF and Grace beyond that of a shipper and

carrier, no evidence was presented to establish these basic agreements differ from those typically found when an industry seeks to access and utilize rail transport.

With the infrastructure in place, Grace prepared railcars loaded with its product for shipment then certified to BNSF pursuant to federal law, in shipping documents called "bills of lading," that the product was not hazardous. *See, e.g.*, Ex. H-Bill of Lading; 35 Stat. 1088, §235; *Union P.R. Co. v. United States*, 125 Ct. Cl. 390, 402 (1953) (describing shipper's duty to disclose the nature of the products it tenders to carrier). The State of Montana corroborated Grace's representations, reporting that by 1974, Grace's processing methods rendered the vermiculite concentrate safe. Ex. Q-Montana Department of Health Memorandum. At no point did BNSF have knowledge that processed vermiculite concentrate was hazardous. Ex. F-Second Swing Dep., 49:1-50:10; Ex-G, Carrier Dep., 56:10-14.

Separate from the vermiculite concentrate, Grace introduced its crude vermiculite waste product, called "tailings," into Libby for various uses; Grace trucked tailings into town where the material was used in the construction of schools, conditioning of baseball fields, gardening, and other things. Ex. I-Kind Report, §5.2, pp. 6-9; Barnes Dep., 07/17/2018, 36:23-37:19. Grace also sold and leased asbestos-contaminated properties to community members without informing them of the contamination. *Id.*, p. 9.

STANDARDS OF REVIEW

This Court reviews grants of summary judgment *de novo*, "utilizing the same criteria used by the District Court initially under Rule 56." *Mead v. M.S.B., Inc.*, 264 Mont. 465, 470 (1994). Preemption is a legal determination reviewed *de novo*. *In re Marriage of Lutes*, 2005 MT 242, ¶7; *Commonwealth Edison Co. v. State*, 189 Mont. 191, 214 (1980).

The interpretation of statutes, like section 27-1-703(6), MCA, is reviewed *de novo*. *State v. Plouffe*, 2014 MT 183, ¶18; *cf. State v. Leprowse*, 2009 MT 387, ¶11 ("We review a district court's conclusions of law [regarding an affirmative defense] for correctness. However, if there are conflicting facts regarding the availability of an affirmative defense…the issue is properly submitted to a jury.").

The determination of whether an activity is abnormally dangerous is a legal question, also reviewed *de novo*. *Chambers v. City of Helena*, 2002 MT 142, ¶¶18-19.[3] A trial court errs when it undertakes an "incomplete" analysis regarding whether an activity is abnormally dangerous. *Id.*, ¶22. The analysis is "necessarily fact specific." *Roeder v. Atl. Richfield Co*., 2011 U.S. Dist. LEXIS 101870, 2011 WL 4048515, No. 3:11-cv-00105-RCJ-RAM, *12 (D. Nev. Sept. 8, 2011).

[3] A party seeking summary judgment on strict liability must still demonstrate there are no genuine issues of material fact; factual disputes therefore preclude the imposition of strict liability. Mont. R. Civ. P. 56(b). Granting summary judgment in such circumstances is legal error. *Mead*, 264 Mont. at 470 (grant of summary judgment is a legal conclusion reviewed *de novo*).

Although a trial court must engage in some factual analysis, it does not enjoy any deference. *Edwards v. Post Transp. Co*., 228 Cal. App. 3d 980, 983-85 (1991).

SUMMARY OF THE ARGUMENT

BNSF appeals three fundamental legal errors by the ACC. First, the ACC erroneously held Plaintiffs' claims are not preempted by federal law, contravening Supreme Court precedent by applying a presumption against preemption even though Congress enacted an express preemption provision in the FRSA. Congress intended for the FRSA to occupy the entire field of railroad safety regulation. Pursuant to regulations promulgated under the HMTA, the DOT determined asbestos that is naturally bound in mineral ore does not present an unreasonable risk to the public warranting special handling regulations. That determination constituted an affirmative decision preempting any state law regulation of the same material–including common law tort claims.

Second, the ACC erroneously held that section 27-1-703(6), as a negligence statute, did not apply because BNSF was strictly liable. Because the ACC's strict liability ruling was itself erroneous, the ACC's ruling was error; the statute applies, and BNSF may properly introduce evidence of Grace's conduct as a settled party because the compensation fund established during Grace's bankruptcy was created specifically to resolve claims against Grace. The ACC further erred when it concluded BNSF had not sufficiently pleaded its superseding intervening cause

defense. BNSF's pleadings put Plaintiffs on notice of its intent to pursue the defense, and the language used in BNSF's pleading tracks language this Court has held sufficient. The ACC further erred by disregarding evidence and resolving factual disputes, finding Grace's conduct foreseeable and contemporaneous with BNSF's conduct as a matter of law despite substantial evidence refuting each of those findings.

Finally, the ACC erred in finding BNSF was engaged in an abnormally dangerous activity, thereby triggering strict liability, and again in rejecting the common carrier exception to strict liability. The ACC misapplied the law concerning abnormally dangerous activities and disregarded a wealth of evidence advanced by BNSF, and resolved hotly-contested factual issues in favor of Plaintiffs. Jurisdictions that impose strict liability for abnormally dangerous activities have adopted the common carrier exception. Common carriers are required by law to accept goods tendered to them by shippers, regardless of their toxicity, and public policy compels that strict liability should not accompany this mandate.

ARGUMENT

I. THE ACC ERRONEOUSLY HELD PLAINTIFFS' CLAIMS ARE NOT PREEMPTED BY THE FRSA OR HMTA.

The ACC erred by summarily concluding that Plaintiffs' claims are not preempted under the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §20106, and the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §5125.

A. The ACC legally erred by relying on a presumption against preemption.

The ACC erred by applying a presumption against federal preemption of state law. 01/15/2019 Order, p. 8. Controlling Supreme Court precedent provides that where a federal statute contains an "express pre-emption clause," courts "do *not* invoke any presumption against pre-emption." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016). Instead, courts should "focus on the plain wording of the clause." *Id.* As set forth below, the FRSA contains an "express pre-emption clause." The ACC therefore erred as a matter of law by applying a presumption against preemption.

B. The ACC erred in holding Plaintiffs' claims are not preempted by the FRSA or HMTA.

Had the ACC properly analyzed the question of preemption by examining the "plain wording" of the FRSA, it would have concluded that Plaintiffs' claims are preempted in their entirety. The purpose of the FRSA is "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." *Nickels v. Grand Trunk W. R.R.*, 560 F.3d 426, 429 (6th Cir. 2009) (quoting *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 347 (2000)). The FRSA vests the Secretary of

Transportation ("Secretary") with authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103(a); 49 U.S.C. §103; 49 C.F.R. §§1.88-1.89. Under the FRSA, "[l]aws, regulations, and orders related to railroad safety … shall be *nationally uniform* to the extent practicable." 49 U.S.C. §20106(a)(1).

To ensure national uniformity, the FRSA generally provides a state may not "continue in force a law" related to "railroad safety or security" when the Secretary has issued a "regulation or…order covering the same subject matter." 49 U.S.C. §20106. When the Secretary regulates in an area related to railroad safety or security, states may not also regulate in that area, including by imposing common-law tort duties. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Specifically, any state law tort action is preempted if a FRSA regulation "substantially subsumes" the subject matter of the suit. *Nickels*, 560 F.3d at 429-30.

Likewise, when the Secretary decides that "*no* such regulation is appropriate or approved pursuant to the policy of the statute, States are *not permitted* to use their police power to enact such a regulation." *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983) (quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978)). Stated plainly, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated,

and that even would have as much pre-emptive force as a decision *to* regulation." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002).

Under the FRSA, Plaintiffs' claims are preempted in two respects.

First, several of Plaintiffs' allegations are directed at subject matters covered by Federal Railroad Administration ("FRA") regulations. Plaintiffs allege, for example, that BNSF negligently built up trains consisting of up to 100 cars that "sped through the Libby Railyards at 50 mph." Complaint, ¶94. The FRSA preempts such a claims because the FRA has promulgated regulations that specifically address train operation speed limits. *See* 49 C.F.R. §213.9; *see also Easterwood*, 507 U.S. at 674-75 (the FRA's speed limits preempt state common-law claim). Plaintiffs also allege that spillage from railcars caused their alleged damages. Complaint ¶95. Again, such a claim is preempted because there are FRA regulations that specifically address the selection, the inspection, and the repairing of freight cars. 49 C.F.R. §§215.009-215.203.

Second, Plaintiffs' claims that BNSF should have taken special precautions to prevent dust or leakage from railcars are preempted by the HMTA regulations, which have express preemptive force through the FRSA insofar as they relate to railroad safety or security. *CSX Transp., Inc. v. Pub. Utils. Comm'n*, 901 F.2d 497, 501 (6th Cir. 1990); *see also* 49 U.S.C. § 5125 (additional HMTA-specific preemption provision). Congress made clear that federal restrictions similar to those

promulgated under the HMTA—such as "the Explosive and Other Dangerous Articles Act, a predecessor of the HMTD which provided for intermodal regulation of the transportation of hazardous materials"—have preemptive force through the FRSA. *CSX Transp., Inc. v. Public Utilities Com*., 701 F. Supp. 608, 613 (S.D. Ohio 1988) (citing H.R. Rep. No. 1194, 91st Cong., 2d Sess. (Appendix B)).

In 1978, the Secretary, pursuant to his authority granted by the HTMA, initiated rulemaking proceedings to determine whether to impose special handling obligations on carriers transporting mineral-bound asbestos. The Secretary performed a "weighing and balancing of various considerations" and invited interested parties to comment in December of 1976. The 1978 discussion states that "a large number of comments were received." Transportation of Asbestos, 43 Fed. Reg. 8563 (Mar. 2, 1978). The Secretary evaluated the methods and volume of transportation, as well as the expected rate of growth in the field. *Id.* at 8562-63. The dangers and science relating to asbestos exposure were likewise considered and balanced against the potential inflationary and economic impacts of the new rule. *Id.* at 8562.

After weighing these considerations, the Secretary concluded that transporting ore containing asbestos did not "create an unreasonable asbestos exposure problem" necessitating special handling, and therefore did "*not believe their specific regulation in transportation is warranted*." *Id.* at 8562-63. The agency expressly

exempted from special handling rules "[a]sbestos which is immersed or fixed in a natural or artificial binder material (such as cement, plastic, asphalt, resins or mineral ore)" on a finding that such regulation was not necessary to protect the public. *Id.* This deliberate exemption for asbestos immersed in a mineral ore—nearly identical in description to the refined vermiculite concentrate that was allegedly transported in the present case—remains in effect today. 49 C.F.R. §172.102(156).

The Secretary therefore made an "authoritative federal determination that" the transportation of mineral-bound asbestos "is best left *un*regulated." *Sprietsma*, 537 U.S. at 66. The Secretary's statement that his decision was made "[i]n light of the regulatory controls already in existence or under consideration by other federal agencies" does not alter the analysis, as the Secretary made clear in that same excerpt that he did "not believe [these forms of asbestos'] specific regulation in transportation is warranted." *Id.* at 8563. This is a "ruling that no such regulation is appropriate or approve pursuant to the policy of the statute," and Montana is therefore not "permitted to use [its] police power to enact such a regulation." *Atl. Richfield Co.*, 435 U.S. at 178.

The ACC did not substantively analyze BNSF's arguments regarding preemption, or the effect of the Secretary's affirmative conclusion that the transportation of mineral-bound asbestos should not be regulated. Instead, the court relied on and incorporated the holdings of three tangentially related Montana federal

district court orders that were not subject to appellate review because the plaintiffs voluntarily dismissed their claims: *Deason v. BNSF Ry. Co.*, 2018 U.S. Dist. LEXIS 126178, 2018 WL 3601236, *Murphy-Fauth v. BNSF Ry. Co.*, 2018 U.S. Dist. LEXIS 126180, 2018 WL 3601235, and *Underwood v. BNSF Ry. Co.*, 2018 U.S. Dist. LEXIS 126183, 2018 WL 3601238. Order, pp. 8-9. Those orders, in turn, relied on a magistrate's flawed findings that wrongly concluded state law could *never* be preempted when "FRSA explicitly excludes address[ing] mineral-bound asbestos." *Underwood*, *6.

To the contrary, the Secretary's considered decision that "specific regulation in transportation" of mineral-bound asbestos "is [not] warranted," leaves no room for states to impose legal duties with respect to transportation of that form of asbestos. *See, e.g.*, *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 671 (D.C. Cir. 2005) (when federal regulator had "specifically considered and rejected imposing particular security requirements," FRSA preempted states from imposing those requirements); *BNSF Railway Co. v. Doyle*, 186 F.3d 790, 801 (7th Cir. 1999) ("When the FRA examines a safety concern regarding an activity and affirmatively decides that no regulation is needed, this has the effect of being an order that the activity is permitted."); *Burlington N. R. Co. v. State of Mont.*, 880 F.2d 1104, 1107 (9th Cir. 1989) (finding Montana's mandatory caboose regulation preempted because the DOT "explicitly considered" and "refus[ed]" to adopt such a

requirement). The ACC thus erred by following the federal magistrate judge and district court in concluding otherwise.

II. THE ACC ERRONEOUSLY GRANTED SUMMARY JUDGMENT ON BNSF'S THIRD-PARTY DEFENSES.

A. The ACC Erroneously Held That §27-1-703(6) Does Not Allow BNSF to Introduce Evidence of Grace's Conduct.

The ACC erred as a matter of law when it held that §27-1-703(6), MCA does not apply in this case–an error that, if affirmed, would enable Plaintiffs to manipulate the posture of this litigation and pursue a windfall. 01/18/2019 Order, pp. 2-3.

The ACC reasoned that because it had already concluded BNSF is strictly liable, the issue of the statute's applicability was moot because the statute only applies in negligence cases. *Id.* However, the ACC's strict liability analysis was flawed in numerous respects and should be reversed.

Section 27-1-703(6)(a) provides, "In an action based on negligence, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a person with whom the claimant has settled or whom the claimant has released from liability." §27-1-703(6)(a), MCA.[4] The Grace Personal Injury Trust ("Trust"), established by order of the U.S. Bankruptcy Court, was created to broker settlement with all then-present and future Libby asbestos claimants, including Plaintiffs Barnes, Braaten, and Flores, who have submitted claims and will

[4] Unless otherwise noted, all emphasis is added.

ultimately settle those claims with the Trust. *See* Plaintiffs' Applications for Disbursement (submitted as Exhibits A, B, and C to BNSF's Response to Motion re: Non-Parties). The Grace bankruptcy documents[5] show the Trust was intended to function as a settlement fund. The Trust Agreement states that it is "intended to qualify as a 'qualified settlement fund'" within the meaning of applicable IRS regulations. *See* Trust Agreement (Exhibit A to BNSF's Response to Motion re: Non-Parties), p. 2. The Trust Agreement provides the purpose of the trust is to "assume all liabilities and responsibilities for all PI Trust claims," including future claims. *Id.*, §2.1; §1.4(c); §7.2(b)(i)(A) ("[The PI Trust shall terminate upon] the date on which the Trustees…deem it unlikely that new asbestos claims will be filed against the PI Trust.").

The Trust Distribution Plan ("TDP") confirms its procedures "provide for resolving all Asbestos PI Claims . . . including, without limitation, all asbestos-related personal injury and death claims caused by conduct of, and/or exposure to products for which, [Grace has] legal responsibility." TDP (attached as Exhibit B

5 These documents are on file in – and were the subject of – a matter of public record in federal court. *See, e.g., Hutt v. Md. Cas. Co. (In re W.R. Grace & Co.)*, Nos. 01-01139 (KG), 14-50867 (KJC), 2016 Bankr. LEXIS 3754 (Bankr. D. Del. Oct. 17, 2016) *aff'd* 900 F.3d 126 (3d Cir. 2018). Thus, as a matter of comity with the U.S. Bankruptcy Court, BNSF requests that this Court take judicial notice of the documents. *Golden v. Northern Pac. Ry.*, 39 Mont. 435, 447-48 (1909) (recognizing that the Montana supreme court may take judicial notice of the actions of a federal court).

to BNSF's Notice of Supplemental Authorities re: Motion re: Non-Parties), p. 1; *see also id.*, §1.1 ("[These procedures are] designed to provide fair, equitable and substantially similar treatment for all PI Trust Claims that may presently exist or may arise in the future."); §2.1 ("This [TDP] furthers…the intention of paying all claimants over time as equivalent a share as possible of the value of their claims.").

The Chapter 11 Joint Plan of Reorganization ("Reorganization Plan") further confirms this intent, stating, "This Plan constitutes a settlement of all Claims and Demands against the Debtors." Reorganization Plan (attached as Exhibit C to BNSF's Notice of Supplemental Authorities re: Non-Parties), p. 1. The Plan defines "Asbestos Claims" as including "any and all Asbestos PI Claims…and any and all Demands related thereto." *Id.*, §1.1(8), p. 4. It defines "Asbestos PI Claim" as "a Claim…Indirect PI Trust Claim…Grace-Related Claim, or Demand against, or any present or future debt, liability, or obligation of any of the Debtors." *Id.*, §1.1(34)(i), p. 11. It defines "Indirect PI Trust Claim" as including "any Claim or remedy, liability, or Demand against the Debtors, now existing or hereafter arising." *Id.*, §1.1(144), p. 29; see also *Id.*, §7.2.1(i), (iv), p. 63.

The Texas Supreme Court applied a similar statute under analogous circumstances, concluding the bankruptcy fund established to compensate people injured by the bankruptcy debtor's negligence was created to effectuate settlement. *MCI Sales and Serv. v. Hinton*, 329 S.W.3d 475, 504 (Tex. 2010) ("the negotiations

and terms of [the] agreement in every way resemble a settlement," and therefore, the bankruptcy debtor was a "settling person."). Accordingly, the court allowed the jury to consider evidence of the bankruptcy debtor's conduct in actions against other defendants. *Id.* at 505.

As in *Hinton*, the terms of the Grace bankruptcy "in every way resemble a settlement." *Id.* at 504. Plaintiffs have agreed by applying for injury compensation from the settlement fund. *See* Plaintiffs' Applications for Disbursement (attached as Exhibits A, B, and C to BNSF's Response to Motion re: Non-Parties). Grace is therefore a settled party under the statute, and BNSF may assert that Grace's conduct caused Plaintiffs' injuries.[6]

B. The ACC Erred When It Adopted an Overly-Broad Interpretation of *Faulconbridge* and Effectively Abrogated the Substantial Factor Doctrine.

Although "conduct of an unnamed third party is generally not admissible to apportion liability" BNSF does not seek to "merely diminish [their] own responsibility, for this would constitute an attempt to apportion fault to a non-party." *Faulconbridge v. State*, 2003 MT 198 ¶¶77, 81. Instead, BNSF seeks to refute

6 The Plaintiffs have also settled with the State of Montana. Accordingly, the State is a defendant "with whom the claimant has settled," and BNSF may also assert as a defense that the State's conduct caused Plaintiffs' injuries. §27-1-703(6)(a), MCA.

Plaintiffs' position that BNSF's conduct was a substantial contributing factor to Plaintiffs' injuries.

"In those cases where there are allegations that the acts of more than one person combined to produce a result…we acknowledge that the recommended cause-in-fact instruction would be confusing and misleading. Therefore, in those cases, we recommend continued use of the substantial factor instruction." *Busta v. Columbus Hosp.*, 276 Mont. 342, 371 (1996); *see also* MPI 2d 2.08 ("Negligence – Causation (Multiple Cause)") (2003). The causation analysis in the instant case is necessarily relative – the jury must determine whether a given defendant's conduct, relative to another party, was a substantial factor in causing the Plaintiffs' alleged injuries. *Busta*, 276 Mont. at 371 ("In those cases where there are allegations that the acts of more than one person combined to produce a result.").

Here, the ACC incorrectly conflated apportioning fault with refuting a plaintiff's burden of proving substantial factor causation:

> BNSF argues that the conduct of Grace is not being admitted to apportion liability to Grace, or to point to an empty chair, but instead to argue Grace was the substantial factor in causing the Plaintiffs' injuries, not BNSF. *Faulconbridge* establishes, however, that in the context of facts such as those presently before the Court, this is a distinction without a difference. Arguing that a non-party is a cause of a plaintiff's injuries is an impermissible attempt to apportion liability to that non-party.

01/18/2019 Order, p. 3 (citing *Faulconbridge*, ¶81). In so ruling, the ACC erroneously foreclosed evidence of other causative factors–leaving BNSF as the only remaining potential cause of Plaintiffs' alleged asbestos exposure. This factual fiction belies the substantial evidence that Grace's conduct was the only or primary source of exposure. Plaintiffs acknowledge that Grace mined raw ore, trucked it into town, and contaminated Libby. Complaint, ¶¶17, 20-21, 40, 45-46; *see also* Barnes Dep., 07/17/2018, 36:23-37:19 (describing piles of vermiculite in people's gardens that he rode his bike through as a child, asbestos contamination in schools and in at least one of his homes, and agreeing that those exposures were "wholly unrelated" to BNSF).

The ACC's ruling relieves Plaintiffs of their obligation to prove substantial factor causation and eliminates BNSF's ability to rebut Plaintiffs' evidence on this central element of Plaintiffs' claims.

C. The ACC Erred by Holding that BNSF Had Not Sufficiently Pleaded Its Superseding Intervening Cause Defense.

The ACC held BNSF "did not allege superseding intervening cause as an affirmative defense" because the terms "superseding intervening" were not used in the pleading. 01/18/2019 Order, p. 3. But, Montana law does not require explicit use of the phrase "superseding intervening cause." Rather, the question turns on whether the opposing party has had sufficient notice of the defendant's intent to pursue the defense. *Faulconbridge*, ¶¶83-84; *see also Chandler v. Madsen*, 197

Mont. 234, 241 (1982) (The key inquiry "is whether it gives fair notice of the defense.").

In *Faulconbridge*, this Court examined a defendant's pleading that stated:

> [D]amages the Faulconbridges suffered 'are the result of the active and primary negligence or fault on the part of the [S]tate's co-defendants and plaintiffs[.]'

Faulconbridge, ¶¶83-84. The Court found that such language provided plaintiff "sufficient notice of the State's intent to seek to establish intervening superseding cause, so that no unfair surprise resulted." *Faulconbridge*, ¶¶83-84.

BNSF similarly plead its defense:

> [Plaintiffs'] damages…may have been contributed to and/or caused, by the carelessness or negligence of persons, corporations, or entities other than Defendants.

Answer, pp. 5-6. BNSF has consistently asserted that Grace's conduct was the true cause of Plaintiffs' alleged injuries. *See, e.g.*, Ex. I-Kind Report, §4.2, pp. 5-6 ("The activities of the [Grace] resulted in the widespread contamination of residential areas of Libby, Montana with [Libby Amphibole asbestos]."); Barnes Dep., 19:24-25, 21:3-24:1 (inquiring as to whether Barnes was exposed on or near Grace properties or due to his father's employment with Grace). Plaintiffs cannot now argue they were surprised by BNSF's intent to establish that Grace was one of the primary "person[], corporation[], or entit[y] other than Defendants" contemplated in BNSF's answer.

Plaintiffs had sufficient notice of BNSF's intent to argue that the conduct of other entities caused Plaintiffs' injuries. Montana law requires nothing more. Accordingly, the ACC erroneously eliminated BNSF's superseding intervening cause defense.

D. The ACC Erred When It Engaged in Inappropriate Factfinding and Held That Grace's Conduct Was Foreseeable and Contemporaneous with BNSF's Conduct.

The ACC held that even if BNSF's superseding intervening cause defense was properly plead, there was a "complete absence of evidence upon which the defense…could be grounded." 01/18/2019 Order, p. 3. The ACC inappropriately resolved genuine issues of material fact at the summary judgment stage and misapplied the law to reach this conclusion. *Major v. North Valley Hosp.*, 233 Mont. 25, 27-28 (1988), *rev'd on other grounds in Blackburn v. Blue Mt. Women's Clinic*, 286 Mont. 60 (1997) ("[F]acts simply are not decided when summary judgment is granted.").

Causation is an essential element of every tort claim, and every plaintiff bears the burden of proving defendant's conduct caused his or her injuries by a preponderance of the evidence. *Folsom v. Mont. Pub. Emples. Ass'n*, 2017 MT 204, ¶32. A defendant may negate the plaintiff's attempt to prove causation by demonstrating that plaintiff's injuries were caused by a superseding intervening cause, or "an unforeseeable event that occurs after the defendant's original [alleged]

act of negligence." *Faulconbridge*, ¶48. The ACC erred when it found (1) Grace's conduct was foreseeable to BNSF; (2) Grace's conduct was "primarily contemporaneous" with BNSF's; and therefore (3) Grace's conduct could not have been a superseding intervening cause. 01/18/2019 Order, p. 3.

First, in finding that Grace's and BNSF's conduct was "primarily contemporaneous," the ACC conflated decades of alleged conduct on the part of Grace with that of BNSF–treating the conduct of each as one causative act committed in concert by both parties. Even Plaintiffs treat Grace's and BNSF's conduct as separate and distinct actions. Complaint, ¶¶17, 20-21, 86, 90. Moreover, Plaintiffs allege different exposure periods as a result of BNSF's negligence in the 1940s, 1950s, 1960s, and 1978, respectively. *Id.*, ¶14-16. Meanwhile, Plaintiffs allege Grace's activities continued well beyond those years, until the 1990s. *Id.*, ¶¶11, 17. As such, Grace's negligence occurred after the time that Plaintiffs allege they were harmed by BNSF. *Faulconbridge*, ¶48 (A superseding intervening cause . . . occurs after the defendant's original [alleged] act of negligence.").

The ACC also ignored evidence from which a jury could conclude that BNSF's negligence, if any, ended in 1974. The Montana Department of Environmental Quality ("MDEQ") reported that by 1974, asbestos had been removed from the product tendered to BNSF for transportation, as confirmed by testing that showed asbestos content below then-applicable exposure limits. Ex. O-

MDEQ W.R. Grace File Review, p. 6; Ex. Q-Montana Department of Health Memorandum. BNSF could not have been negligent in its transportation of a product that, as best as it knew as of 1974, was asbestos free. Yet, Plaintiff Barnes claimed his exposure continued through 1980. *See* Barnes Application for Disbursement (Exhibit A to BNSF's Response to Motion re: Non-Parties). In light of the evidence before the ACC, a jury could find that Grace's conduct – e.g., mining, dumping vermiculite waste, offering the waste for various uses in Libby's schools and other facilities – continued *after* 1974 and into the periods during which the Plaintiffs alleged they were exposed. Ex. 2-3/20/2000 MDEQ Health Update, p. 2. This is one example of the many evidentiary nuances the ACC ignored in finding Grace's conduct "primarily contemporaneous" with BNSF's. The ACC reversibly erred by ignoring or otherwise weighing conflicting evidence at the summary judgment stage. *Major*, 233 Mont. at 27-28. Another example is when the ACC summarily found that Grace's conduct was foreseeable to BNSF thereby foreclosing a superseding intervening cause defense. 01/18/2019 Order, p. 3.

A trial court may only determine foreseeability as a matter of law on issues of intervening cause "when reasonable minds may reach but one conclusion." *Cusenbary v. Mortensen*, 1999 MT 221, ¶39. "Typically, determinations of foreseeability in the context of intervening cause involve questions of fact properly reserved for the jury." *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175,

¶48. On this issue, the ACC made multiple factual findings that at a minimum were genuinely disputed:

- The ACC concluded "[b]y at least 1977 and thereafter, railcars carrying Libby Ore were marked with asbestos warning placards …" 01/15/2019 Order, p. 4.

This finding ignored sworn testimony that Grace had *not* affixed such warning placards. Ex. 19-First Swing Dep., *Watson v. BNSF*, ADV-10-0740, 52:15-18, 53:7-9, 53:25-54:4, 54:18-21; Kampf Dep., *Watson v. BNSF*, ADV-10-0740, 57:6-19 (attached as "Exhibit I" to BNSF's Response to Motion re: Non-Parties); Barker Dep., *Watson v. BNSF*, ADV-10-0740, 83:6-18, 84:4-11 (Exhibit J to BNSF's Response to Motion re: Non-Parties); Trial Testimony of Mitchell Cuffe, Tr. 06/06/2018, *Wetsch v. BNSF*, DV-16-1146, 636:1-10 (Exhibit G to BNSF's Response to Motion re: Non-Parties).

- The ACC also concluded that BNSF received "complaints from the community" regarding dust "throughout the relevant time period," citing to deposition testimony of John Swing. 01/15/2019 Order, p. 4.

The cited pages of Swing's testimony recounted a single complaint made by Bruce Carrier, a member of a BNSF train crew. Mr. Carrier stated "I touched on it lightly because I knew [Swing] couldn't do anything about it." Ex. G-Carrier Dep.,

53:22-24. Swing's testimony makes no reference to "complaints from the community." Ex. 19-First Swing Dep., 103:2-7, 105:9-13.

- The ACC found, "[b]eginning in 1974, Grace supplied Material Safety Data Sheets to customers receiving shipments of vermiculite ore stating that it contains the "Hazardous Ingredient" tremolite asbestos and advises to avoid creating airborne dust and to use dust control techniques when handling the material."

As evidence, the ACC cited solely to the unsworn report of Julie Hart. Regardless, BNSF was not a customer, and the record is devoid of evidence that BNSF received a single MSDS from Grace.

The ACC then ignored evidence that Grace certified pursuant to a federal law requiring true and accurate reporting of shipment contents in bills of lading, that the product it tendered to BNSF was not hazardous and did not require placarding or special handling. Ex. H-Bill of Lading; 35 Stat. 1088, §235 ("It shall be unlawful for any person to deliver…to any common carrier engaged in interstate or foreign commerce . . . any…dangerous article…without informing the agent of such carrier in writing of the true character thereof, at or before the time such delivery or carriage is made."); *Union P.R. Co. v. United States*, 125 Ct. Cl. 390, 402 (1953) ("This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations

prescribed by the Interstate Commerce Commission.") (quoting compliant certification in bill of lading); *Estate of Strever v. Cline*, 278 Mont. 165, 176 (1996) ("In the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.") (internal quotations omitted). The ACC concluded that Grace's conduct was foreseeable as a matter of law despite evidence that Grace certified the safety of every shipment tendered to BNSF, without exception. Trial Testimony of BNSF Chief Industrial Hygienist Don Cleveland, Tr. 06/06/2018, Wetsch v. BNSF, DV-16-1146, 755:6-14 (Exhibit G to BNSF's Response to Motion re: Non-Parties).

The ACC's findings further ignore evidence presented on state of the art, which establishes that BNSF had no reason to believe that transporting a product containing small amounts of asbestos (assuming BNSF was aware of its presence) would present a risk of injury to residents of a nearby town. Exhibit I-Kind Report, §5.4, pp. 10-11 ("[up until the first studies were conducted regarding non-worker exposures in 2000], there was no information to suggest that workers other than those involved directly in the mining, processing, or expansion of Libby vermiculite were receiving LA exposures sufficient to cause an increased incidence of adverse health effects.").

Finally, the ACC's conclusion that Grace's conduct was foreseeable as a matter of law belies the fact that no regulatory agency with a duty of oversight over

Grace's activities took action until the EPA first became aware of media reports of asbestos-related problems in Libby in 1999. Ex. I-Kind Report, §5.4, p. 11.

There was ample evidence showing either that Grace's conduct was unforeseeable to BNSF, or that there were genuine issues of material fact regarding foreseeability. This Court has held that in such circumstances, the foreseeability determination should be left for the jury, not for the ACC to resolve via summary judgment.

III. THE ACC ERRED WHEN IT HELD BNSF STRICTLY LIABLE.

A. The ACC Erred When It Refused to Adopt Section 521 of the Second Restatement of Torts and Held that Even If Montana Recognizes Section 521, It Would Not Apply in This Case.

Montana law ascribes strict liability for injuries resulting from abnormally dangerous activities. *Matkovic v. Shell Oil Co.*, 218 Mont. 156, 159 (1985) (citing Restatement (Second) of Torts, §519 (1976)). The Restatement commentary to section 519 expressly provides that this general rule should be read together with §§520 to 524A, by which it is limited." Restatement (Second) of Torts, §519 cmt. a. One exception provides that strict liability "do[es] not apply <u>if the activity is carried on in pursuance of a public duty imposed upon the actor . . . as a common carrier</u>." Restatement (Second) of Torts, §521.

Public policy dictates §521 should be applied in conjunction with §519. There is a public need for the transportation of all manner of materials, including

potentially dangerous ones. To that end, Montana's federal and state courts have uniformly, until now, applied §521. In *Walsh v. Mont. Rail Link*, the court explained:

> The case at bar involves conflicting public policies, in that there is a clear and undeniable public need to provide nation-wide transportation for commonly used materials regardless of the characteristics of such materials; however, there is also a clear and undeniable public need to provide for safe transportation of hazardous materials to whatever extent is reasonably possible. To that end, the majority of jurisdictions apply the "reasonable care" standard which, of course, is the general negligence standard. This Court finds the majority rule persuasive, based upon public policy that [such] materials…are commonly and widely used throughout the nation for the general good of the public, and thus, transportation of such materials is a necessary part of modern society. The common carrier exception to strict liability activities involving the transportation of hazardous materials is intended to resolve the public policy conflict based on the conviction that general negligence law and federal and state regulatory provisions are sufficient to serve public policy reasons for imposing strict liability. Therefore, the Court joins the majority position in rejecting the Plaintiffs' argument that MRL should be held strictly.

2001 ML 1418, at * 20-21. Federal and state law mandate that carriers like BNSF accept and transport goods tendered to them by shippers. *See* Mont. Code Ann. §69-11-403 ("A common carrier shall, if able to do so, accept and carry whatever is offered to the carrier, at a reasonable time and place."); 49 U.S.C. §11101(a) ("A rail carrier providing transportation or service . . . shall provide the transportation or service on reasonable request."). As the *Walsh* court noted, this mandate supports

the carrier exception: "[t]he mandatory nature of this federal provision supports the public policy behind the common carrier exception." 2001 ML 1418, at *26.

In *Griffin v. Montana Rail Link*, 2000 ML 2438, at *11, Judge Debra Griffin in Missoula county, likewise held the exception applies:

> the common carrier exception to strict liability for activities involving the transportation of hazardous materials is intended to resolve the public policy conflict based on sound public policy that outweighs public policy reasons for imposing strict liability. Therefore, the Court rejects the Plaintiffs' argument that MRL should be held strictly liable.

In *Anderson v. BNSF Railway Co.,* 2010 Mont. Dist. LEXIS 73, at *P7, Judge McCarter held:

> Section 521 of the Restatement has not been expressly recognized by the Montana Supreme Court. However, there is no reason to believe that this section should not be recognized as well, since so numerous other sections of the Restatement of Torts have been adopted. See *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, P36, 338 Mont. 259, 165 P.3d 1079. Moreover, numerous other jurisdictions have adopted this section.

As Judge McCarter noted, most jurisdictions that have adopted §519 of the Restatement have also adopted §521. *See, e.g. Collins v. Liquid Transporters*, 262 S.W.2d 382, 383 (Ky. 1953); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1005-06 (9th Cir. 2008) (Washington state likely to adopt); *Pecan Shoppe of Springfield, Inc. v. Tri-State Motor Transit Co.*, 573 S.W.2d 431, 435 (Mo. Ct. App. 1978) (adopting and characterizing section 521 as the majority view); *Town of East*

Troy v. Soo Line Railroad Co., 409 F. Supp. 326 (E.D. Wis. 1976); *Christ Church Parish v. Cadet Chemical Corp.*, 25 Conn. Sup. 191, 199 (1964); *Albig v. Mun. Auth. Of Westmoreland Cty.*, 348 Pa. Super. 505, 516 (1985); *Reddick v. General Chemical Co.*, 124 Ill. App. 31 (1905); *Ruiz v. S. Pac. Transp. Co.*, 638 P.2d 406, 412 (1981); *Pope v. Edward M. Rude Carrier*, 75 S.E.2d 584 (W. Va. 1953); *Peneschi v. Nat'l Steel Corp.*, 295 S.E.2d 1, 10 (W. Va. 1982); *State v. Valstad*, 165 N.W. 2d 19, 25 (Minn. 1969); *Cairl v. St. Paul*, 268 N.W. 2d 908, 911 (Minn. 1978); *Voelker v. Delmarva Power & Light Co.*, 727 F. Supp. 991, 994 (D. Md. 1989); *Ace Pallet Corp. v. Conrail*, 2016 U.S. Dist. LEXIS 93438, *9 (D. N.J. July 18, 2016).

In fact, the comments to §521 explicitly provide that §519 must be read together with §521. The 9th Circuit Court of Appeals explained in *Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co*., 534 F.3d 986, 1005-06 (9th Cir. Wash. July 29, 2008) that the comments to §519 indicate the common carrier exception is part and parcel of strict liability. Comment "a" to §519 states that "[t]he general rule stated in this Section is subject to exceptions and qualifications, too numerous to be included within a single section. It should therefore be read together with §§520 to 524A, by which it is limited." (RESTATEMENT (SECOND), §519, comment "a").

Here, BNSF transported processed vermiculite concentrate in pursuance of a public duty imposed by both state and federal law. Yet, the ACC refused to apply

§521, citing to the existence of various contracts, leases, and other business dealings between Grace and BNSF to find, "It would be a fair characterization to say Grace and BNSF's operations in Libby were extensively intertwined and went beyond a contractual supplier and common carrier relationship." 01/15/2019 Order, pp. 6-7, 12 (stating the relationship "far exceeded a relationship that could fairly be described as simply that between a common carrier and shipper, and instead borders on common cause.").[7] Despite making such an inherently comparative finding, the ACC did not look to any evidence to establish what the typical "shipper and common carrier relationship" would be; instead, the ACC simply proclaimed that the relationship between BNSF and Grace was unusual because they engaged in a series of contracts. But those contracts were integral to any shipper-carrier relationship and were necessary to enable the parties to fulfil their respective duties. *See supra* pp. 13-14; Ex. C-1943 Agreement, pp. 38-39 (providing for construction of a spur track that connected Grace facilities and BNSF's main line track); Ex. D-Letter, Permit, and Land Use Agreement, pp. 40-45 (enabling Grace to occupy and use BNSF's property for purposes of loading processed vermiculite concentrate onto railcars); Exs. 22-24 (lease agreements enabling Grace's use and occupancy of BNSF's property to fulfil Grace's duty to load the railcars and BNSF's duty of

[7] It is unclear what the ACC meant by "common cause." The order provides no law or explanation. To BNSF's knowledge, "common cause" is not a legal principal applicable here.

transporting the product Grace tendered). There is simply no evidence from which to conclude as a matter of law that BNSF and Grace's contractual relationship exceeded a typical shipper-carrier relationship.

The ACC further erred in its interpretation of the common carrier exception finding it dispositive that BNSF benefitted from the services it provided. 01/15/2019 Order, p. 10. However, the Restatement asks only whether the carrier's services were undertaken "in pursuance of a public duty imposed upon the actor . . . as a common carrier." Restatement (Second) of Torts, §521. The exception says nothing of a carrier also furthering its own economic purposes, and for good reason; if the ACC's interpretation were correct, the exception would only apply to non-profit carriers. Nothing in the Restatement supports such a sweeping limitation, and the multitude of decisions cited *supra* adopting §521 involved for-profit railroads.

B. The ACC Erred When It Relied Upon Improper Factual Findings and Misapplied Section 520 of the Second Restatement of Torts to Hold that BNSF Was Engaged in an Abnormally Dangerous Activity.

When it adopted §519 of the Restatement, this Court also adopted §520, which provides six factors to be weighed by a court when determining whether an activity is abnormally dangerous. *Matkovic*, 218 Mont. at 159-60. Those factors are:

1. existence of a high degree of risk of some harm . . .;
2. likelihood that the harm that results from it will be great;
3. inability to eliminate the risk by exercise of care;
4. extent to which the activity is not a matter of common usage;

5. inappropriateness of the activity to the place where it is carried on; and
6. extent to which its value to the community is outweighed by its dangerous attributes.

Id.; Restatement (Second) of Torts, §520.

The ACC erred by accepting Plaintiffs' incorrect and self-serving factual assertions as true, disregarding BNSF's evidence, and resolving factual issues when examining the factors. The ACC's findings rely almost exclusively on an unsworn and unauthenticated report by Plaintiffs' retained expert. *See, e.g.*, 01/15/2019 Order, pp. 3-4 (citing report 10 times); Ex. 71-Hart Report. Unsworn expert reports may not be considered on summary judgment. *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 480-81 (6th Cir. 2008); *Carr v. Tatangelo*, 338 F.3d 1259, 1273 n. 26 (11th Cir. 2003). For this reason alone, the ACC reversibly erred.

Pertaining to the first and second factors – high degree of risk of some harm and likelihood that the harm would be great – the ACC found, "[Hundred] of billions of pounds of vermiculite ore was excavated, processed and either dumped as waste or shipped into Libby by BNSF." 01/15/2019 Order, p. 2 (brackets original). However, the evidence shows that BNSF had *no role* in excavating, processing, dumping, or bringing raw ore and waste into town; an MDEQ report confirms Grace was solely responsible for operating the mine and mill–and Grace was responsible for "dumping" vermiculite waste. Ex. 2-3/20/2000 MDEQ Health Update, pp. 1, 2; Ex. B-Sept. 1985 Report by Grace's Construction Products Division, at

BNSF_404_0017-0006 (confirming Grace oversaw all mining and milling operations); Ex. F-Second Swing Dep., *Watson v. BNSF*, ADV-10-0740, 29:18-20 (testifying BNSF employees did not participate in loading railcars with processed vermiculite concentrate). The evidence shows it was *Grace* who brought vermiculite waste into town; Grace provided its waste for use in conditioning baseball fields, building tracks at local schools, constructing an ice rink, and other uses. Ex. I-Kind Report, pp. 8-9. The ACC also concluded as established fact, "BNSF then brought each of the asbestos laden vermiculite shipments into the Railyard located in downtown Libby." 01/15/2019 Order, p. 3, citing solely to the unsworn report of Julie Hart, which itself cites to no supporting evidence. The evidence actually shows that the vermiculite concentrate BNSF transported did not contain dangerous levels of asbestos. Ex. B-Sept. 1985 Grace Report, at BNSF_404_0017-0022 (98.8% of asbestos had been removed in processing the vermiculite concentrate). Studies of vermiculite concentrate employing transmission electron microscopy ("TEM") methodology found only trace amounts of asbestos fibers "TEM: <0.1% tremolite/actinolite." Ex. 71, Hart Report, ¶19. With only trace amounts of asbestos, the vermiculite concentrate hauled by BNSF does not even meet the threshold for an asbestos-containing material under current federal standards, which requires at least 1% asbestos content. 40 CFR Appendix A to subpart M of part 61, National Emission Standards for Hazardous Air Pollutants ("NESHAP"). Thus, the ACC's

conclusion that BNSF's cars were "asbestos laden" is refuted by significant evidence, including that they were not laden with any asbestos-containing material.

Based on these erroneous findings, the ACC concluded "[t]here is no question" BNSF's activities created a high degree for risk of great harm to the Plaintiffs. Though, as discussed *supra* Part I, the DOT affirmatively determined the transportation of mineral-bound asbestos is not hazardous. 49 C.F.R. §172.102(156); 43 Fed. Reg. 8562, 8566 (Mar. 2, 1978)[8]. The ACC's ruling is further refuted by evidence of hundreds of soil and air samples and EPA maps showing that, prior to any cleanup, virtually no asbestos was present on or around BNSF's tracks, its railyard, or the air surrounding its properties. BNSF Statement of Disputed Facts ("SDF"), ¶28; Supplemental SDF, ¶¶1-19. Thus, BNSF could not have created a high degree of risk of harm to people even further remote than the testing locations, and any harm resulting from its activities would not have been great. Restatement (Second) of Torts, §520(a), (b). At the very least, the evidence created a genuine issue of material fact. The ACC reversibly erred when it resolved

[8] For the reasons set forth in the previous section regarding federal preemption, the finding by the ACC that BNSF's activities in transporting a vermiculite concentrate is "abnormally dangerous" is in conflict with and is preempted by the Secretary's determination that transporting such material does not place the public at an unreasonable risk of harm. As such, the ACC's finding of strict liability is also preempted by federal law.

those genuine issues via summary judgment and found that the first and second factors were met.

The ACC erred in applying the third factor: whether the "high degree of risk" may be reduced to reasonable levels by the exercise of ordinary care. Restatement (Second) of Torts, §520(c); *Apodaca v. AAA Gas Co*., 73 P.3d 215, 225 (N.M. Ct. App. 2003); *Ind. H. B. R.R. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1177 (7th Cir. 1990) ("One might start with [subsection (c)]…[If] the hazards of an activity can be avoided by being careful . . . there is no need to switch to strict liability."). The ACC erroneously found that BNSF's activities caused "widespread" asbestos contamination throughout the community. 01/15/2019 Order, pp. 12. Yet, data collected from 48,782 soil samples taken between 1999 and 2009 showed asbestos contamination did not occur on BNSF properties, did not emanate from BNSF activities, and the contamination in Libby bore no relation to BNSF's activities. Ex. I, Kind Report, §6.0, pp. 13-17 ("[Asbestos] detection in soil is not clustered around the BNSF rail yard or the BNSF tracks…some of the highest concentrations are measured many miles away from BNSF property. These observations are consistent with reports of the widespread residential use of vermiculite and vermiculite waste supplied by [Grace] to community members throughout the area…This would indicate that the railroad property is not a significant source of [community] exposure."). At the very least, the evidence created a genuine issue of material fact.

The ACC then applied a faulty and illogical analysis of whether the exercise of care could have reduced any risk to a reasonable level. The ACC found that it was *impossible* to eliminate the risk of asbestos exposure by the exercise of care, focusing exclusively on BNSF's supposed inability to mandate or provide respirators, showers, or clothing to Libby residents. *Id.* In *Am. Cyanamid Co.*, 916 F.2d at 1179 (7th Cir. 1990), the Seventh Circuit rejected the plaintiffs' theory that the defendant's transportation of acrylonitrile – a flammable, corrosive, and carcinogenic chemical – was abnormally dangerous: "[Acrylonitrile] is not so corrosive or otherwise destructive that it will eat through or otherwise damage or weaken a tank car's valves although they are maintained with due (which essentially means, average) care. No one suggests . . . that the leak in this case was caused by the *inherent* properties of acrylonitrile. It was caused by carelessness." *Id.* at 1179 (emphasis original). Thus, the correct analysis would have asked whether the exercise of care *could have* reduced to reasonable the risk of releasing asbestos fibers from BNSF's railcars into Libby in harmful concentrations. The ACC failed to undertake this analysis. Like in *Am. Cyanamid*, there is no evidence that reasonable care in the packaging of vermiculite concentrate cannot reduce any risks to reasonable levels, particularly in light of the evidence showing no harmful contamination emanating from BNSF's activities and property.

Multiple jurisdictions have held the risks of handling even pure asbestos can be ameliorated with the exercise of care, and therefore, handling asbestos is not abnormally dangerous. *See, e.g.*, *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 466 (R.I. 1996); *PSI Energy, Inc. v. Roberts*, 829 N.E.2d 943, 954-55 (Ind. 2005); *Tatera v. FMC Corp.*, 2010 WI 90, ¶36; *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 695 (Ia. 2009). This Court should follow other jurisdictions and hold that, as a matter of law, the exercise of care would eliminate risks resulting from BNSF's activities in this case.

The ACC also erred in applying the fourth factor, finding that BNSF's activity was not a matter of common usage. 01/15/2019 Order, p. 13; Restatement (Second) of Torts, §520(d). It is the activity, not the substance, that is evaluated for common usage. *Ind. H. B. R.R. Co. v. Am. Cyanamid Co*., 916 F.2d 1174, 1181 (7th Cir. 1990). The ACC acknowledged that transporting vermiculite by rail is a matter of common usage. 01/15/2019 Order, p. 13. However, the ACC then held, without explanation, "BNSF's other activities were not." 01/15/2019 Order, p. 13. To the extent the ACC was referring to BNSF's business activities and entering into contracts, those activities are not alleged to be dangerous. Moreover, the ACC cites no competent evidence that entering into leases with Grace to construct facilities was uncommon in a shipper and carrier relationship. To the contrary, such contracts are necessary to enable a shipper to connect its industry track to a carrier's main line track to enable

rail shipments. *See supra* pp. 13-14; Ex. C-1943 Agreement, pp. 38-39 (providing for construction of a spur track that enabled a connection between Grace facilities and BNSF's main line track); Ex. D-Letter, Permit, and Land Use Agreement, pp. 40-45 (enabling Grace to occupy and use BNSF's property for purposes of loading processed vermiculite concentrate onto railcars); Exs. 22-24 (lease agreements enabling Grace's use and occupancy of BNSF's property to fulfil Grace's duty to load the railcars and BNSF's duty of transporting the product).

Finally, the ACC erred as a matter of law in applying the final factor – whether the value of BNSF's activity was outweighed by its danger. Restatement (Second) of Torts, §520(e). The ACC did not engage in any analysis here; it simply stated, "The tragic history, consequences and enormous cost of asbestos related disease in Libby is well known and need not be recounted in this Order. Suffice it to say that this factor also weighs heavily in favor of a finding of an abnormally dangerous activity." 01/15/2019 Order, p. 13. As discussed throughout this brief, the evidence doesn't support a summary finding that BNSF's conduct is linked to injurious asbestos exposures within Libby. Moreover, in addition to the clear public need for rail transportation, Plaintiffs' evidence demonstrates "mineral mining in Montana <u>is a basic and essential activity that makes an important contribution</u>" to the economy. Ex. 2-3/2/2000 MDEQ Health Update. Thus, the value of BNSF's service as a

common carrier vastly outweighed the danger, if any, it posed. Restatement (Second) of Torts, §521(f).

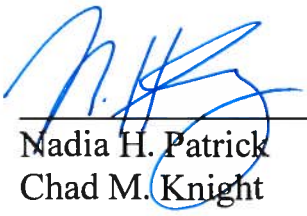
The ACC relied upon inappropriate factual findings and failed to engage in proper legal analysis of the Restatement factors.

CONCLUSION

BNSF respectfully requests that this Court reverse the ACC and hold (1) Plaintiffs' state law claims are preempted; (2) BNSF's non-party affirmative defenses are properly pleaded and may be asserted; and (3) BNSF is not strictly liable.

Respectfully submitted this 16th day of May, 2019.

KNIGHT NICASTRO, LLC



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by

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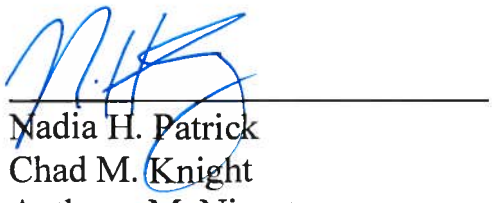
Respectfully submitted this 16th day of May, 2019.



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