IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. OP 19-0085

BNSF RAILWAY COMPANY,

Petitioner,

vs.

THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA, HONORABLE AMY EDDY, Presiding Judge,

Respondent.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (continued)

STATUTES

INTRODUCTION

For many years, W.R. Grace & Company ("Grace") operated a vermiculite mine near Libby, Montana. Throughout most of the life of the mine, the BNSF Railway Company[1] transported Graces's vermiculite concentrate produced by the mine into downtown Libby in railcars. The vermiculite concentrate BNSF transported into Libby contained highly toxic amphibole asbestos. Appendix Exhibit H, pp. 25, 28-29. The Plaintiffs in the proceeding now before the Court allege they suffer from serious diseases as a result of exposure to the asbestos BNSF transported into Libby.

In 2001, Grace filed a petition seeking bankruptcy protection in United States Bankruptcy Court. More than a decade later, the Bankruptcy Court entered a plan of reorganization for Grace which created a trust to assume Grace's liability for asbestos claims. See *In re W.R. Grace & Co.*, Case No. 01-1139, 2016 WL 6068092, at *2 (Bankr. D. Del. Oct. 17, 2016), *aff'd in part, vacated in part, remanded*, 900 F.3d 126 (3rd Cir. 2018). The Plaintiffs in this action have not settled, or otherwise recovered, from Grace or the Grace trust. Appendix Exhibit K, p. 12. Nonetheless, BNSF seeks to focus its defense against the Plaintiffs' claims on blaming Grace for the Plaintiffs' injuries, the classic empty chair defense. Consistent with established Montana law,

[1]For purposes of this brief, "Grace" and "BNSF" include their predecessor corporations.

on January 18 of this year, the Asbestos Claims Court ("ACC") entered an order prohibiting BNSF's empty chair defense. The manner in which BNSF seeks to overturn the ACC's ruling is contrary to Montana law and would violate the constitutional rights of countless tort victims throughout Montana. For the reasons set forth herein, the Court should affirm the ACC's ruling rejecting BNSF's non-party defense.

BACKGROUND FACTS

Grace operated the vermiculite mine near Libby from 1923 until 1990. From the late 1940's until the mine's closure, Grace utilized a conveyor system to load the vermiculite concentrate produced in the mine into BNSF's railcars at a loading facility adjacent to the Kootenai River. From there, BNSF transported all of the asbestos contaminated vermiculite into and through the town of Libby, in route to various parts of the United States. Dumping the asbestos contaminated vermiculite from the conveyor system onto BNSF's railcars resulted in spillage and substantial airborne dust which covered the surface of the cars. As BNSF carried the dust laden cars into Libby, it dispersed toxic asbestos onto the tracks and downtown railyard, and into the nearby community. Appendix Exhibit H, pp. 28-29. For several years beginning in 1999, the U.S. EPA ordered investigation and remediation activities in

Libby which documented extensive asbestos contamination along BNSF's tracks and railyard. Appendix Exhibit H, pp. 36-42.

Each of the Plaintiffs in this action alleges exposure to asbestos in Libby as a result of BNSF's activities. Each Plaintiff also alleges the asbestos exposure caused him or her to develop and suffer from a serious disease.

The Plaintiffs did not assert claims against Grace in this action, and the orders of the U.S. Bankruptcy Court would have precluded them from doing so. Likewise, BNSF did not, and could not, name Grace as a third party defendant. Although the Plaintiffs have asserted claims against the Grace trust, none of them have settled or otherwise recovered from the trust.

ARGUMENT

One of the fundamental purposes of tort law is to compensate victims for harm caused by the wrongful conduct of another. The common law recognizes that every outcome is theoretically attributable to a multitude of causes, rendering it all but impossible to identify a single event that produced a particular harm. Tort law addresses the complex reality of causation by imposing liability upon any party whose wrongful conduct was "a cause" of harm and not requiring the victim to prove the wrongful conduct of a particular party was the only cause of the harm. Thus, the common law, including Montana common law, favors joint and several liability for

tortfeasors. *Black v. Martin*, 88 Mont. 256, 292 P. 577, 580-81 (1930); *Azure v. City of Billings*, 182 Mont. 234, 596 P.2d 460, 469-70 (1979). In *Azure*, this Court cited a decision authored by Judge Learned Hand to endorse the important policy behind joint and several liability:

> [T]o impose upon the plaintiff the sometimes impossible burden of proving which tortious act did which harm, would be an expression of a judicial policy that it is better that a plaintiff, injured through no fault of his own, should take nothing simply because he could not prove which tortious act caused which harm. We believe on the other hand, that where the tortious act is established, it is better that the tortfeasor should be subject to paying more than his theoretical share of the damages in a situation where the tortious conduct has contributed to the confused situation making it difficult to prove which tortious act did the harm.

Azure, 182 Mont. at 253, 596 P.2d at 470-71.

In 1987, the Montana Legislature attempted to erode joint and several liability through a drastic revision to § 27-1-703, MCA. The statute authorized defendants to place non-parties on the verdict form thereby encouraging juries to allocate liability to "empty chairs" in the courtroom. In *Newville v. State, Dept. of Family Services*, 267 Mont. 237, 883 P.2d 793 (1994), this Court declared the statute unconstitutional. Because the statute required plaintiffs to exonerate non-parties, forcing them to marshal evidence and make arguments from the standpoint of an unrepresented and unpresent defendant, the Court held the 1987 version of § 703 violated the plaintiffs'

constitutional right to due process of law. *Newville*, 267 Mont. at 252, 883 P.2d at 802.

In response to *Newville*, the Legislature amended § 703 again in 1995. The Legislature once again attempted to authorize the empty chair defense, including new procedural requirements intended to address the due process violations identified in *Newville*. In *Plumb v. Fourth Jud. Dist. Court*, 279 Mont. 363, 927 P.2d 1011 (1996), this Court similarly held the 1995 version of § 703 unconstitutional. Despite new procedural requirements, the statute violated the due process rights of both tort victims and non-parties:

> [the non-party's] professional reputation and economic interests are jeopardized without an opportunity to personally appear on his own behalf . . .
>
> * * * * *
>
> [the plaintiff's] right to recover . . . is jeopardized by the potential this procedure affords for disproportionate assignment of liability to an unnamed, unrepresented, and nonparticipating third person.
>
> * * * * *
>
> As noted in *Newville*, "there is no reasonable basis for requiring plaintiffs to examine jury instructions, marshal evidence, make objections, argue the case, and examine witnesses from the standpoint of the unrepresented parties," and requiring the plaintiff's attorney to serve in such a dual capacity is actually antithetical to his or her primary obligation, which is to represent the plaintiff by proving the plaintiff's case.

Plumb, 279 Mont. at 377-78, 927 P.2d at 1020.

In 1997, the Legislature amended § 703 again purporting to rectify the constitutional defects identified in *Plumb*. The 1997 version of § 703 (which remains in effect today) authorizes a non-party defense as to "persons released from liability by the claimant and persons with whom the claimant has settled." § 27-1-703(4), MCA. However, the statute also requires defendants asserting the non-party defense to satisfy new procedural requirements. § 27-1-703(6), MCA. This Court has not addressed the constitutionality of the 1997 version of § 703.[2]

In a series of decisions culminating with *Faulconbridge v. State*, 2006 MT 198, 333 Mont. 186, 142 P.3d 777, this Court has also addressed defendants' attempts to assert the empty chair defense to negate causation. In *Faulconbridge*, this Court held a defendant may introduce evidence of non-party conduct only if the non-party conduct constitutes a superseding intervening cause of the plaintiff's damages. The Court further held a superseding intervening cause only exists when "an unforeseeable event" occurs "after the defendant's original act of negligence" which serves to "cut off defendant's liability." *Faulconbridge*, ¶ 81. Outside the context of a superseding intervening cause, introducing evidence of non-party conduct in an

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[2]In *Stone v. Atlantic Richfield Co.*, Montana Eighth Judicial District Court, Cause No. DDV-04-967 (July 25, 2006), Judge Dirk Sandefur held an interpretation of § 703 identical to the interpretation advanced by BNSF in this case would violate the plaintiffs' constitutional right to due process of law for the same reasons this Court held the prior versions of § 703 unconstitutional in *Newville* and *Plumb*. See Exhibit A attached hereto, p. 26.

effort to negate causation constitutes the same impermissible empty chair defense the Court prohibited in *Plumb. Faulconbridge*, ¶ 81.

In this case, BNSF argues it should be permitted to blame Grace for the Plaintiffs' exposures and damages, both in the form of a § 703 settled party defense and to negate causation. The ACC correctly analyzed and rejected BNSF's argument.

I. BNSF cannot assert a § 703 settled party defense in this action.

The settled party defense authorized by § 703 only applies, by its clear terms, to claims based on negligence. The Plaintiffs' remaining claims against BNSF in this matter are based on strict liability. Furthermore, Grace has never settled with any of the Plaintiffs and is not subject to the jurisdiction of the ACC or this Court, excluding it from consideration under § 703. Finally, even if BNSF could have asserted a settled party defense, it failed to comply with the mandatory procedural requirements of § 703.

A. The settled party defense set forth in § 703 does not apply to claims based on strict liability.

By its own terms, § 703 only applies "if the negligence of a party to an action is an issue. . ." § 27-1-703, MCA. Additionally, subpart (4), which authorizes the settled party defense, applies only to "a party against whom a claim is asserted for negligence. . ." *Hulstine v. Lennox Industries, Inc.*, 2010 MT 180, 357 Mont. 228,

237 P.3d 1277 (¶ 20). BNSF does not argue § 703 applies to strict liability claims, but nonetheless asks the Court to endorse its § 703 defense in this case. However, BNSF fails to articulate any legal basis to assert a defense which does not apply to the Plaintiffs' claims as presently pled.

B. Grace has not settled with any of the Plaintiffs and is not subject to the jurisdiction of the ACC or this Court.

Even if § 703 could apply in this case based on strict liability, it could not apply to Grace. It is undisputed that none of the Plaintiffs settled with, or otherwise received compensation from Grace or the Grace trust. BNSF argues Grace should be treated as a "settled party" simply because the Plaintiffs have asserted claims against the Grace trust.[3] Accepting BNSF's logic, any party against whom a claim is asserted would be deemed to have "settled," even while vigorously disputing all liability. The argument cannot be reconciled with either the language or the purpose of the statute.

Additionally, § 703 prohibits comparison of fault with any "person who is not subject to the jurisdiction of the court." § 27-1-703(6)(c)(ii), MCA. Regardless of whether the Grace trust eventually pays any compensation to any of the Plaintiffs, Grace is not a party subject to the jurisdiction of Montana state courts.

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[3]The question of whether some theoretical future payment by the Grace trust, pursuant to the Trust Distribution Procedures approved by the Bankruptcy Court, might constitute a settlement for purposes of § 703 is not properly before the Court. Here, the Plaintiffs have received nothing of value from the trust, and the trust may ultimately dispute any liability for their claims. Analyzing whether a payment from the trust constitutes a settlement with Grace would require the Court to consider the amount and circumstances of the payment, all of which is not possible because neither the Plaintiffs nor the trust have agreed to settle anything.

C. BNSF failed to satisfy the procedural requirements of § 703.

Even if § 703 applied to this strict liability action, and even if Grace could somehow constitute a "settled party," BNSF did not come close to satisfying the requirements of § 703. In response to the constitutional deficiencies *Plumb* identified in the 1995 version of the statute, the Legislature set forth several mandatory procedures in the 1997 amendment which any defendant asserting a settled party defense must satisfy. First, the defendant must "affirmatively plead the settlement or release as a defense in the answer." If the defendant gains knowledge of a settlement after filing the answer, it must "plead the defense of settlement or release with reasonable promptness, as determined by the trial court . . ." Additionally, the defendant must "notify each person who the defendant alleges caused the claimant's injuries" of the defense, by providing the answer asserting the defense to the non-party. The statute specifically requires notice to the non-party to allow it "an opportunity to intervene in the action to defend against the claims affirmatively asserted, including the opportunity to be represented by an attorney, present a defense, participate in discovery, cross-examine witnesses, and appear as a witness of either party." § 27-1-703(6)(f)-(g), MCA.

Here, BNSF's Answer only generically asserts that other, unidentified parties may be responsible for the Plaintiffs' injuries. The Answer makes no reference to an

alleged settlement, most likely because BNSF has never had any basis to contend Grace settled with anyone. Similarly, nothing in the record suggests BNSF ever notified Grace of the allegations against it. Allowing BNSF to assert an empty chair defense in this case based on the conduct of Grace would violate not only the plain language of § 703, but every decision of this Court which has addressed the constitutionality of the empty chair defense.

Significantly, BNSF's failure to properly assert the defense prejudiced the Plaintiffs' ability to respond. The statute requires detailed notice to the Plaintiffs in a timely fashion, to allow the Plaintiffs an opportunity to marshal evidence and prepare their case in light of the non-party defense. Likewise, although completely unrealistic as discussed below, the notice provisions in the statute also contemplate allowing the non-party to participate in discovery and defend the allegations against it. BNSF's approach in this case allowed neither.

Although not addressed by the Plaintiffs or the ACC, most likely due to BNSF's failure to properly plead and assert the defense, the 1997 version of § 703 suffers the same constitutional infirmities as the prior versions held invalid in *Newville* and *Plumb*. As Judge Sandefur observed in *Stone*, parties who settle claims asserted against them have "bought peace," and do so "specifically to get out of and away from [the] litigation. . ." Exhibit A, p. 25. Although technically allowed by the

statute, settled parties will have "no intention of getting back into [the] litigation to participate and defend themselves further." Exhibit A, p. 25. Although it has not settled with the Plaintiffs, Grace would likewise have no intention of getting back into this litigation to participate and defend itself further. Grace filed for bankruptcy protection and reorganized after more than a decade of litigation in Bankruptcy Court. Now, having emerged from bankruptcy immune from the claims BNSF asserts, the parties and Court can all share confidence that Grace will not voluntarily appear and participate in this litigation. Therefore, consistent with Judge Sandefur's ruling in *Stone*, allowing BNSF to assert a non-party defense in this action would place the Plaintiffs in the same position as the plaintiffs in *Plumb*, in violation of their constitutional right to due process of law.

II. BNSF cannot assert its invalid empty chair defense by characterizing it as a causation dispute.

As discussed in detail in *Newville* and *Plumb*, allowing a defendant to assert the fault of a non-party violates the plaintiff's due process rights. The defense improperly forces plaintiffs to "exonerate nonparties," and creates a likelihood that a "disproportionate share of liability" will be shifted to unrepresented parties. *Newville*, 267 Mont. at 252, 883 P.2d at 802; *Plumb*, 279 Mont. at 376-78, 929 P.2d at 1019-20. Allowing BNSF to blame Grace for the Plaintiffs' damages would violate

the same constitutional safeguards, whether couched as a causation defense or otherwise. *Faulconbridge*, ¶ 81.

In *Faulconbridge*, the plaintiffs' daughter was killed in a motorcycle accident near Missoula. She was a passenger on a motorcycle driven by Jason Weaver. The plaintiffs filed a wrongful death action against the State of Montana claiming the road on which the accident occurred was defectively designed and maintained. The State sought to introduce evidence that Weaver had consumed alcohol, was speeding, and was driving the motorcycle with a mis-aimed headlight. Although conceding that Weaver's fault was not a valid affirmative defense under *Plumb* and *Newville*, the State argued the evidence was admissible to negate causation citing this Court's decision in *Pula v. State*, 2002 MT 9, 308 Mont. 122, 40 P.3d 364. While recognizing that evidence of non-party conduct was admitted to establish a superseding intervening cause in *Pula*, the Court strictly limited application of the rule and held the evidence inadmissible:

> We conclude, after revisiting *Pula* and its subsequent application, that a defendant may introduce non-party conduct only for the purpose of demonstrating that the non-party conduct was a superseding intervening cause of plaintiff's damages. By "superseding intervening cause" we mean "an unforeseeable event that occurs after the defendant's original act of negligence ... [which] will generally serve to cut off defendant's liability." A defendant may not, however, introduce such non-party conduct in an attempt to merely diminish its own responsibility, for this

> would constitute an attempt to apportion fault to a non-party, in violation of *Plumb*.

Faulconbridge, ¶ 81.

As properly determined by the ACC, BNSF's empty chair defense cannot be characterized as a superseding intervening cause. As noted above, a superseding intervening cause is an unforeseeable act, occurring after the defendant's conduct, and breaking the chain of causation between the defendant's conduct and the injury. Acts of multiple parties which combine to produce an injury, on the other hand, are properly characterized as multiple, or concurrent causes. *Busta v. Columbus Hospital Corp.*, 276 Mont. 342, 371, 916 P.2d 122, 139-40 (1996). BNSF's allegations against Grace do not establish an act subsequent to BNSF's conduct which severs the chain of causation. In its brief, BNSF mischaracterizes the Plaintiffs' complaint, suggesting the allegations of BNSF's wrongdoing ended in 1978, while Grace's wrongdoing continued for many years later. Petitioner's Opening Brief, p. 25. To the contrary, the Plaintiffs allege exposure to asbestos throughout the time they lived in Libby, collectively from 1955 to the present, caused their injuries. Appendix Exhibit B, ¶¶ 14-16. Plaintiffs also allege BNSF's conduct caused the exposures throughout that time. Appendix Exhibit B, ¶¶ 86, 89, 92-94.

The basis for Plaintiffs' claims against BNSF is strict liability for conducting an abnormally dangerous activity. The ACC's finding that BNSF engaged in an abnormally dangerous activity is based on BNSF's conduct throughout the time it participated in the transportation and distribution of asbestos contaminated vermiculite in Libby. ACC order (January 15, 2019), pp. 9-13. The operations spanned from the 1940's until after Grace closed the mine in 1990. ACC order (January 15, 2019), p. 2-7. The Plaintiffs' exposures occurred over a long period of time as a result of the abnormally dangerous activity which also spanned decades. The conduct of Grace, which BNSF seeks to rely upon as a defense, occurred throughout the same time period and cannot be a superseding intervening cause.

In its brief, BNSF cites *Busta* and acknowledges the allegations in this case involve multiple, combining causes. Petition's Opening Brief, p. 21. As recognized by the ACC, a concurring cause which combines with the Defendant's conduct to produce a result is distinct from a superseding intervening cause. ACC order (January 18, 2019), p. 3. *Faulconbridge* prohibits evidence of non-party fault in a multiple cause case, outside the context of a true superseding intervening cause.

Furthermore, even if BNSF could establish discreet and independent conduct by Grace which was subsequent to its own wrongdoing, it could not establish a superseding intervening cause. To constitute a superseding intervening cause, the

conduct of the non-party must be unforeseeable. *Faulconbridge*, ¶ 85. Although BNSF argues foreseeability is a question of fact for the jury, this Court has held foreseeability should be addressed by the Court "when reasonable minds could reach but one conclusion. . ." *Faulconbridge*, ¶ 86.

In *Faulconbridge*, the Court determined the conduct of Weaver, speeding with a defective headlight under the influence of alcohol, was foreseeable as a matter of law. Because a party responsible for highway design should reasonably anticipate that some people will operate vehicles negligently, Weaver's conduct was not a superseding intervening cause. *Faulconbridge*, ¶¶ 89-92.

In *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, 350 Mont. 538, 208 P.3d 836, a student playing lacrosse in an unsupervised gym class suffered a serious injury when another student aggressively struck him with his lacrosse stick. The injured student asserted a negligence claim against the school, and the school argued the conduct of the other student was a superseding intervening cause. This Court affirmed the trial court's ruling excluding all evidence, argument, or suggestion that the other student caused the injury. In other words, the Court determined as a matter of law that it was foreseeable one student would strike another in an unsupervised gym class. *Larchick*, ¶¶ 12, 16, 50.

Similarly, in *Cusenbary v. Mortensen*, 1999 MT 221, 296 Mont. 25, 987 P.2d 351, the plaintiff was minding his own business at the Town Tavern in Great Falls when a drunk driver crashed through the tavern wall injuring him. Just prior, the drunk driver had been served in the Town Tavern in an obviously intoxicated state. The plaintiff filed a claim against the bar, and the bar argued the drunk driver's criminal act was a superseding intervening cause. Again, the Court determined as a matter of law that the conduct, however outrageous, was foreseeable to a bar overserving customers. *Cusenbary*, ¶¶ 9, 11, 30.

In this case, it is undisputed that BNSF hauled asbestos contaminated vermiculite from the Grace mine into Libby, and to other parts of the country, for decades. Its conduct resulted in asbestos exposure to the Plaintiffs over a period of many years. Appendix Exhibit H, pp. 28-36. Throughout the same time period, BNSF entered leasing agreements with Grace, transferred easements and real estate with Grace, and inspected Grace operations conducted on property owned by BNSF. Appendix Exhibit K, pp. 3-4. BNSF and Grace jointly procured insurance and negotiated indemnification agreements to protect themselves from the conduct of the other. As observed by the ACC, "[i]t 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." ACC order (January 15,

2019), p. 7. BNSF also consulted with Grace regarding how to expand distribution of its vermiculite, and the two collaborated on geologic sampling to explore new uses of the products in the mine. Appendix Exhibit K, pp. 6-8. In short, BNSF was continually involved with and had extensive knowledge of the conduct it seeks to assert as a non-party defense. Because BNSF was aware of Grace's conduct, which occurred throughout the same time-frame as its own wrongdoing, the conduct was not unforeseeable and cannot be a superseding intervening cause.

CONCLUSION

The empty chair defense asserted by BNSF in this matter is contrary to Montana law, and, if authorized, would threaten the rights of tort victims throughout the state. This Court has consistently protected tort victims from the unconstitutional empty chair defense, and the ACC properly applied Montana law to prevent BNSF from asserting the defense in this matter.

DATED this 13th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count, calculated by WordPerfect X3, is not more than 5,000 words, excluding table of contents, table of authorities, certificate of service, certificate of compliance, and any appendix containing statutes, rules, regulations, and other pertinent matters.

DATED this 13th day of June, 2019.

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