NO. DA 19-0085

IN THE SUPREME COURT OF THE STATE OF MONTANA

::

BNSF RAILWAY COMPANY,

Petitioner,

-vs-

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

Respondent.

::

PETITIONER'S AMENDED REPLY IN SUPPORT OF 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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I. PLAINTIFFS' CLAIMS ARE PREEMPTED.

Plaintiffs' claims are preempted under the express preemption clause of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20101 *et seq.* Opening Brief ("OB"), pp. 10-17.

A. No presumption against preemption applies.

Plaintiffs repeat the ACC's error by insisting a presumption against preemption applies despite the FRSA's *express* preemption clause. Answer Brief ("AB"), p. 12. That is incorrect, as the U.S. Supreme Court recently explained, *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016), and as other courts have concluded. *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018); *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017). In applying the FRSA's preemption clause, the U.S. Supreme Court has explained that "the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

Plaintiffs, while quoting a long-superseded version of the FRSA, accuse BNSF of "deceptively paraphrasing" the FRSA to suggest that Congress preempted any state law regarding "every area of railroad operations safety." AB, pp. 12-13 (quoting version pre-1994 amendment). BNSF correctly described the FRSA express preemption provision in language nearly identical to what the U.S. Supreme

Court says: "[A]pplicable federal regulations may pre-empt any state 'law rule, regulation, order, or standard relating to railroad safety,'" if those regulations "substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S. at 664 (quoting 45 U.S.C. §434, repealed July 5, 1994); OB, p. 12. Under that undisputed framework, Plaintiffs' claims are preempted.

B. The ACC erred in holding Plaintiffs' claims are not preempted.

First, FRA regulations preempt Plaintiffs' claims to the extent they are based on train speed and the selection, inspection, or repairing of freight cars. *Compare* 49 C.F.R. §213.9 *and* 49 C.F.R. §§215.009-215.203, *with* Ex.3 Complaint, Appx. p. 59-60, ¶¶ 94-95; OB, p. 13. Plaintiffs do not dispute that those regulations substantially subsume the subjects of train speed and railcar inspection. Instead, relying on an inapposite case from the Maryland intermediate appellate court, they contend that preemption does not apply if the relevant federal regulation is not "meant to prevent the type of injury alleged." AB, p. 15 (citing *CSX Transp., Inc. v. Miller*, 858 A.2d 1025 (Md. Ct. Spec. App. 2004)). The court in *Miller* held FRA regulations imposing minimum ballast requirements for supporting track did not preclude a FELA suit alleging ballast in a walking area of a railroad yard was unsafe – a different subject matter. *Miller,* 858 A.2d at 1050-53. And *Easterwood* held FRSA "does not … call for an inquiry into the Secretary's purposes." *Easterwood ,* 507 U.S. at 675. Because FRA regulations unquestionably cover the subject matters

of train speed and the selection, inspection, and repair of freight cars, Plaintiffs' claims directed at those subjects are preempted.

Second, Plaintiffs cannot dispute that the Secretary of Transportation "weigh[ed] and balance[ed]" "various considerations," evaluated "a large number of [public] comments," and decided that transporting mineral-bound asbestos did not "create an unreasonable asbestos exposure problem." Transportation of Asbestos, 43 Fed. Reg. 8562, 8563 , 8563(Mar. 2, 1978). That affirmative decision not to restrict the transportation of mineral-bound asbestos "takes on the character of a ruling that no such regulation is appropriate," *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978), and this "authoritative determination that the area is best left *un*regulated" has "as much pre-emptive force as a decision *to* regulate," *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 384 (1983). Further, that decision "substantially subsume[s]" Plaintiffs' claims: Plaintiffs' claims rest on allegations that "BNSF's business activities in handling, storing, transporting, loading, and using asbestos contaminated products were abnormally dangerous." Ex.3, Appx. p. 67, ¶ 125; *see also id.*, Appx. pp. 65-66, ¶¶ 118-21. Because Plaintiffs' claims are inconsistent with the Secretary's decision not to restrict the transportation of vermiculite, the claims are preempted.

Plaintiffs suggest that the Secretary's decision not to regulate can never have preemptive force under the FRSA because the agency "has not 'adopted regulations

covering the subject matter'." AB, p. 16. That suggestion cannot be squared with numerous cases finding state regulations preempted by the FRSA where, as here, the Secretary made an authoritative federal determination that an area is best left unregulated. For example, in *CSX Transportation, Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005), the D.C. Circuit held FRSA preemption applied to an ordinance prohibiting rail shipments of hazardous materials near the U.S. Capitol because the Secretary had promulgated HMTA regulations covering railroad security and "specifically considered and rejected imposing particular security requirements" similar to the ordinance. *Id.* at 671. And in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983), the Ninth Circuit held the plaintiff could not support her negligence claim with "evidence regarding the effectiveness of various locomotive warning lights" because the Secretary had already decided regulations on the subject matter were "not justified." *Id.* .at 1153-54.

Plaintiffs primarily rely on the intermediate state-court decision in *People v. Union Pacific Railroad Co.*, 141 Cal. App. 4th 1228 (2006), to argue that the absence of regulation does not preempt their claims. But that case strengthens the argument for preemption here. Defendants there argued that HMTA preempted claims seeking remediation for spillage of calcium oxide because the Secretary regulated *air* transport of calcium oxide but not *rail* transport, but they cited *no* statements from the Secretary suggesting any affirmative determination that no regulation was

necessary. *Id.* .at 1246-47. Instead, they relied solely on the Secretary's silence. Unsurprisingly, the court held that the Secretary did not make an "affirmative decision" to exempt calcium oxide from regulation. *Id.* .at 1251. In stark contrast, here, the Secretary provided the evidence the court in *People* .demanded: "an affirmative decision, upon weighing and balancing the various considerations, that no regulation or remedies are appropriate." *Id.* .

Next, Plaintiffs mischaracterize the Secretary's decision as supposedly recognizing that mineral-bound asbestos "should be regulated by existing and proposed law, whether under OSHA, EPA, or *common law*." AB, p. 16 (emphasis added). Yet the statement Plaintiffs cite says nothing about state common-law claims—the Secretary named "regulatory controls already in existence or under consideration *by other federal agencies*." 43 Fed. Reg. at 8563 (emphasis added). Federal regulations require the product shipper to identify, package, and label any hazardous materials offered for transport, 49 C.F.R. §171.1(b), and, as the Secretary explained, the Environmental Protection Agency regulates asbestos emissions, and the Occupational Safety and Health Administration regulates asbestos concentrations in workplaces. 43 Fed. Reg. at 8563. These regulations – not the disparate common-law regimes of the 50 states – are the "regulatory controls already in existence or under consideration by other *federal* agencies" noted by the Secretary. *Id.*. (emphasis added). Nor, as Plaintiffs assert, must the Secretary

conclude that *all* regulation is unnecessary and that the subject matter is a "'privileged [area] under federal law.'" AB., p. 16 (quoting *People*, 141 Cal. App. 4th at 1251). FRSA preemption applies when the Secretary determines that the *federal government* should set the rules for the subject matter, a point Plaintiffs' own authorities make. AB, pp. 16-20.

Finally, Plaintiffs' reliance on a set of non-FRSA cases is misplaced. The lack of regulations governing truck stopping distances at issue in *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-87 (1995), resulted from a federal district court suspending the regulation, not from an affirmative decision not to regulate. And the express preemption clause at issue in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002), did "not encompass[] common-law claims." Moreover, the agency itself did not view its "refusal to regulate … as having any pre-emptive effect." *Id.* at 68. Here, the Secretary's considered decision that "specific regulation in transportation" of mineral-bound asbestos is not "warranted" leaves no room for Plaintiffs' claims.

II. THE ACC ERRED BY RESOLVING FACTUAL DISPUTES AND MAKING FACTUAL FINDINGS WHEN APPLYING THE SECTION 520 FACTORS FOR STRICT LIABILITY.

The parties agree the trial court must determine whether BNSF was engaged in an abnormally dangerous activity. However, the court cannot make such a ruling at the summary judgment stage by resolving genuine factual disputes. *Major v. North Valley Hosp.* (1988), 233 Mont. 25, 27. Plaintiffs recite several purported

facts "over which there are no genuine issues," but which are explicitly disputed, including:

1. ***BNSF brought "asbestos-laden railcars" into Libby***. AB, pp. 3, 4. BNSF did not transport asbestos; it transported processed vermiculite concentrate containing such small traces of asbestos that it does not qualify as an "asbestos-containing material" under even current EPA standards. Ex.33 Unsworn Hart Rep., Appx. p. 442, ¶ 19; Ex.9 Sworn Kind Rep., Appx. pp.192-193. Soil and air samples further confirm BNSF's operations and rail cars were not "asbestos laden." Ex.9, Appx. pp. 197-198.

2. ***Baseball fields near BNSF's railyard rendered it an inappropriate location for BNSF's operations.*** AB, pp. 5, 24. No expert has opined that the fields were contaminated from BNSF operations or that Plaintiffs were exposed to asbestos at the fields. Exs. 37, 38, 39, Appx. pp. 461-62 (photographs of Libby); Ex. 40 1946 Sanborn Fire Insurance Maps, Appx. pp. 463-66. Random BNSF railcars shown in photographs an unknown distance from baseball fields is not evidence of contamination. More recent photographs show individuals under EPA supervision standing near the railyard and fields without respirators while activities disturbing the soil continue mere feet away. AB, p. 10.

3. ***Asbestos was a known hazard by the 1930s.*** AB, p. 5. This over-generalization ignores BNSF's state of the art evidence. As late as the 1980s, the scientific community believed only individuals working directly with or in close proximity to asbestos were at risk. Ex. 9, Appx. pp. 191-193. Plaintiffs assert a memorandum by BNSF's medical director in 1937 proves knowledge of the risk of community asbestos exposure. AB, pp. 5-6. But the memorandum did not address that topic (the scientific community had made no such link in the 1930s), nor did it pertain to Libby vermiculite. Plaintiffs' expert agrees the memorandum addressed *occupational* disease and the potential risk to *railroad workers* working with or in close proximity to asbestos materials such as boiler lagging on old steam locomotives. Ex. 33, Appx. pp. 445-446, ¶46.

4. ***BNSF was aware since the 1950s that Libby vermiculite concentrate shipments contained asbestos***, citing an out of context excerpt from a geological study by Montana's Bureau of Mines that Grace's milling process was "not able to fully separate out the asbestos." AB, pp. 5-6. The study does not state that un-separated vermiculite was being shipped from the Grace mine. The excerpt addressed mine waste and noted that a better milling process "would allow much material now mined ***and dumped as waste*** [to] be milled and made to yield a profit." Ex.45 July 1956 Montana Bureau of

Mines Study, Appx. p. 477 (emphasis added). Plaintiffs also cite James Shea's deposition where he merely acknowledged the same excerpt. Ex.48 Shea Dep. 01/26/2007, Appx. p. 486, 99:13-100:22.

5. ***"In addition to numerous leases, ownership of various parcels shifted at times between Grace and BNSF."*** AB, p. 6. Plaintiffs' cited exhibit begins with a two-page hearsay document by an unknown author dated in 2015. Ex.41, Purported Dec. 31, 2015 Chain of Title, Appx. pp. 467-68. Those pages are followed by some leases and land records without explanation of their relevance, and only two of them identify a BNSF predecessor company as a party.

6. ***"BNSF was an obvious beneficiary of its above described actions: Freight costs to ship its product with BNSF equaled 75% of Grace's production costs."*** AB, pp. 6, 33. Plaintiffs' cited document does not say this. It states that much of Grace's products are shipped to foreign countries resulting in significant freight costs. Ex. 8 Sept. 1985 Grace Report, Appx. p. 181. BNSF did not carry Grace products to foreign countries, and the memo nowhere states that *BNSF-related* freight costs accounted for 75% of Grace's production costs.

7. ***Grace and BNSF's activities were "extensively intertwined and went beyond a contractual supplier and common carrier relationship."*** AB, p. 7.

Plaintiffs claim BNSF assisted Grace with geologic sampling to determine whether certain byproducts could be put to other uses. AB, pp. 6-7. But the letters cited as evidence are not even addressed to Grace. Ex. 42 1963 Correspondence, Appx. pp. 469-71; Ex.43 1961 Correspondence, Appx. pp. 472-73; Ex.44 1976 Correspondence, Appx. pp. 474. Regardless, Plaintiffs presented no evidence of what a typical supplier-carrier relationship is or how Grace and BNSF's relationship went beyond a typical relationship.

8. ***EPA found asbestos levels from 2-5% in the soil at BNSF's railyard.*** AB, p. 7. The cited portion of the EPA report refers to soil samples taken "around the community of Libby" and is not specific to BNSF's railyard. *Id.*; Ex.46 2003 Initial Pollution Report, Appx. p. 479. In fact, the same EPA report states that 22 samples taken from the railyard revealed "trace to less than 1% asbestos." *Id.* The ACC adopted Plaintiffs' misrepresentation as a finding. Ex.1 Order 01/15/2019, Appx. p. 5.

9. ***Air sampling in downtown Libby from 1975 confirms community contamination from BNSF operations***. AB, p. 7, n.10. Plaintiffs cite an unsigned document with no witness to explain what the document purports to show, how the numbers were generated, whether any of the numbers are reliable, or whether any of the numbers relate to BNSF's operations. Ex.49 Purported 1975 W.R. Grace Sampling Results, Appx. p. 487.

10. ***"EPA's community-based safety threshold of 0.0009 f/cc" was exceeded by BNSF-caused contamination***, again ignoring voluminous air and soil sampling refuting this contention. AB, pp. 7-8, 27 (citing Ex.47 2014 IRIS Chemical Assessment Summary, Appx. p. 481). Moreover, the term "community-based safety threshold" appears nowhere in the cited report, and the report's principal study examined *occupational* exposures. Ex. 47, Appx. p. 484. The report further recognized that its findings were subject to "uncertaint[ies] spanning perhaps an order of magnitude." *Id.*, Appx. pp. 481, 484.

11. ***"By at least 1977 and thereafter, railcars carrying Libby Ore were marked with asbestos warning placards …"*** Ex.1, Appx. p. 4, ignoring direct testimony that Grace had *not* affixed such warning placards. Ex. 19, 52:15-18, 53:7-9, 53:25-54:4, 54:18-21; Ex.28 Kampf Dep. 11/15/2016, Appx. p. 427, 57:6-19; Ex.29 Barker Dep. 11/07/2016, Appx. p. 429, 83:6-18, 84:4-11; Ex.30 Trial Testimony of Mitchell Cuffe 06/06/2018, Appx. p. 431, 636:1-10. Despite this conflicting evidence, the ACC adopted Plaintiffs' assertion as a finding. Ex.1, Appx. p. 4.

12. Beyond these examples, the ACC legally erred by basing significant factual findings on the unsworn report of Plaintiffs' hired expert, Dr. Julie Hart. Unsworn expert reports may not be considered on summary judgment. *See*

Sigler v. Am. Honda Motor Co., 532 F.3d 469, 480-81 (6th Cir. 2008); *Carr v. Tatangelo*, 338 F.3d 1259, 1273 n. 27 (11th Cir. 2003). *Hopkins v. Superior Metal*, 2009 MT 48, does not rescue this error. The *Hopkins* Court held that documents must meet a minimum standard of trustworthiness *and* must be "on file" with the court. *Id.* at ¶13. An unsworn report does not meet the first criteria.

These and other factual errors led the ACC to err in its application of the Section 520 factors:

1. 520(a) and (b)

The ACC adopted Plaintiffs' mischaracterization that "[t]he asbestos contamination was so extensive that even after vacuum removal of surface soils in these large areas of the railyard with visible vermiculite … sampling demonstrated persistent asbestos levels of 2% to over 3% asbestos." AB, p. 26. The ACC ignored voluminous air and soil testing showing no contamination as well as BNSF's expert evidence confirming same. *See supra* § II(1). Undeterred by the evidence, Plaintiffs still argue that "it cannot be genuinely disputed that exposure to Libby asbestos creates a risk of great harm…" AB, p. 27. But as support, Plaintiffs cite Dr. John Kind's general statement that exposure to the substance asbestos can cause illnesses. *Id.* at 28. The §520 factors (a) and (b) look at whether the *activity* causes a risk of great harm, not whether the substance can cause harm. *See Splendorio v. Bilray*

Demolition Co., Inc., 682 A.2d 461, 465-66 (R.I. 1996); *see also G.J. Leasing Co. v. Union Electric Co*., 854 F. Supp. 539, 568, (S.D. Ill. June 6. 1994), *aff'd* 54 F.3d 379 (7th Cir. 1995).

Plaintiffs then argue that whether contamination from BNSF activities was harmful to Plaintiffs goes to causation, not the strict liability analysis, citing *In re Hanford Nuclear Reservation Litig.*, 350 F. Supp. 2d 871, 877 (E.D. Wash. 2004), *aff'd* 534 F.3d 986 (9th Cir. 2008). BNSF does not contest specific causation here, though it will at trial. Rather, BNSF presented evidence that its operations did not create a risk of great harm to Plaintiffs.[1]

2. §520(c)

Plaintiffs argue that BNSF was aware the milling process did not remove all asbestos. AB, p. 29. Regardless of the relevance to this factor, vermiculite concentrate hauled by BNSF does not meet the threshold for an "asbestos-containing material" even under current federal standards, which requires at least 1% asbestos content. 40 C.F.R. Appendix A to subpart M of part 61, National Emission Standards for Hazardous Air Pollutants ("NESHAP"). More to the point though, the ACC's

[1] The ACC erred by applying the Restatement factors generically to the town of Libby. The analysis is specific to the three Plaintiffs in this action. *Hanford,* 350 F. Supp. 2d at 877 *(*"An activity that is abnormally dangerous ordinarily involves a high degree of risk of serious harm to the person, land or chattels of another.") (citing the Restatement comments). The risk of harm to Plaintiffs is individual and highly fact specific, including each's individual proximity to BNSF's operations. The ACC performed no such analysis.

conclusion that the exercise of reasonable care cannot mitigate risks associated with transporting vermiculite containing small amounts of asbestos ignores substantial case law, including in Montana, recognizing that asbestos hazards can be mitigated with reasonable care (OB, p. 41), case law holding that materials actually designated as hazardous can be transported in a reasonably safe manner (OB, p. 40), and that the federal government has determined that transporting ores containing asbestos does not pose an unreasonable risk of harm. (43 Fed. Reg. at 8563).

3. §520(d)

Plaintiffs argue that BNSF's operations in Libby "are most certainly not matters of common usage." AB, p. 23. Plaintiffs have no evidence of this, and they misunderstand the meaning and application of "common usage." This factor looks to whether the activity is common within the industry, not the population at large. *Apodaca v. AAA Gas Co*., 134 N.M. 77, 89 (2003). Transportation of materials containing asbestos is common in the industry, in particular during the time period at issue in this lawsuit. "During the ten-year period ending 1976, the total amount of new asbestos introduced into the U.S. transportation system averaged approximately 1,700,000 short tons annually." 43 Fed. Reg. at 8562. In fact, the ACC acknowledged that transportation of vermiculite was a matter of common usage, only to then find that "BNSF's other activities were not." The ACC neither identified the specific other activities, nor explained by reference to any evidence how they are

not matters of common usage in the industry. Ex.1, Appx. p. 13. The ACC's erroneous reference to "other activities" is addressed further below.

4. §520(e)

BNSF conducted its rail operations on railroad tracks and in a railroad yard, wholly appropriate locations. Railroad tracks and yards are found in cities across the country, and materials actually deemed hazardous by the federal government are transported over and through them every day. Ex.36 Hearing Tr. 01/07/2019, Appx. p.459. Libby is not unique because it has a railyard in town. See *Ind. H. B. RR. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1181 (7th Cir. 1990) ("It is no more realistic to propose to reroute the shipment of all hazardous materials around Chicago than it is to propose the relocation of homes adjacent to the Blue Island switching yard to more distant suburbs.").

III. THE ACC ERRED WHEN IT HELD THE COMMON CARRIER EXCEPTION DOES NOT APPLY.

A. The common carrier exception in Section 521 is "part and parcel" with Section 520.

Plaintiffs cite *Oberson v. Federated Mut. Ins. Co.*, 2005 MT 329, though it has nothing to do with strict liability and does not involve a common carrier acting in pursuance of a legally-imposed public duty. *Id. Oberson* addressed choice of law, generally stating that Montana adopts Restatement provisions "in light of Montana's public policies." *Id.* at ¶13. Plaintiffs' reliance on *Chambers v. City of*

Helena, 2002 MT 142 is also misplaced. *Chambers* did not apply section 521 because the issue was not raised. *Id.* at ¶¶12-22.

Plaintiffs also cite to *Chavez v. Southern Pac. Transp*., 413 F. Supp. 1203 (E.D. Cal. 1976) arguing that California declined to adopt section 521. AB, pp. 32-33. However, in *Henderson Bros. Stores, Inc. v. Smiley*, 120 Cal. App. 3d 903 (1981), the California Court of Appeals later found that California *has* "adopt[ed] the rule of the [Restatement] ***§§519-523*** ('ultrahazardous' activities)." *Id.* at 917 n.7 (citing *Luthringer v. Moore*, 190 P.2d 1 (Cal. 1948)) (emphasis added). Jurisdictions adopting the Restatement on abnormally dangerous activities have repeatedly adopted the entire section. OB, pp. 32-33.

Plaintiffs then cite *Brandenburger v. Toyota*, 162 Mont. 506, 514 (1973) , to argue that applying the exception will unjustly force tort victims to bear the cost of their injuries. AB, p. 33. *Brandenburger* did not involve sections 519-521. *Id*. *Id.* at 513-15. And Plaintiffs' policy argument incorrectly assumes section 521 would grant BNSF absolute immunity. A negligence theory of recovery remains an adequate mechanism to justly distribute the cost of potential injuries. *Walsh v. Mont. Rail Link,* 2001 ML 1418, *27 ("[G]eneral negligence law and … regulatory provisions are sufficient to serve public policy reasons for imposing strict

liability.");[2] *Griffin v. Montana Rail Link*, 2000 ML 2438, *11; *Anderson v. BNSF Ry. Co.*, No. ADV-2008-101, 2010 Mont. Dist. LEXIS 73, *3, (Apr. 8, 2010); OB, pp. 31-32.

B. The ACC's Section 520 analysis should have been limited to the actual activity Plaintiffs allege is abnormally dangerous.

Plaintiffs repeat the ACC's erroneous finding that BNSF's abnormally dangerous activity consisted of "other activities" beyond its transportation of vermiculite. Plaintiffs and the ACC point to BNSF's "'operations in Libby' including extensive geological research of the asbestos-laden mineral; ownership, operation and inspection of the vermiculite facilities; numerous real estate transactions to facilitate exploitation of the mineral…" AB, pp. 23, 34-35. Plaintiffs and the ACC cite to *Murphy-Fauth v. BNSF Ry. Co.*, No. CV-17-79-GF-BMM-JTJ, 2018 U.S. Dist. LEXIS 126180, (D. Mont. July 27, 2018) that also described these "other activities" as potentially subject to strict liability, though that court reached no conclusion that strict liability in fact applied. AB, pp. 34-35.[3]

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[2] Plaintiffs contend *Walsh* is inapposite because Judge Langton later "refused to dismiss [a] strict liability claim … arising out of a common carrier's transport of gasoline[.]" AB, p. 34 (citing *Kohler v. Keller Transport*, 2009 Mont. Dist. LEXIS 624 (Dec. 7, 2009) . The exception was never raised in *Kohler*, and it appears nowhere in Judge Langton's analysis.

[3] The decision was not subject to appellate review because the plaintiff voluntarily dismissed her lawsuit after the ruling.

However, "other activities" may not factor in the analysis under §520 and may not take BNSF's transportation activities outside of the protections of §521 . The Restatement in §519 holds a defendant responsible only for the harm that "arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity." RESTATEMENT (SECOND) TORTS, §519(1); *id.* at §519 cmt. d (emphasis added); *Grand Pier Ctr. LLC v. Tronox, LLC*, No. 03-C-7767, 2008 U.S. Dist. LEXIS 88201, *7(N.D. Ill. Oct. 31, 2008) ("The liability arises out of the abnormal danger of the activity itself, and the risk of harm it creates to those in the vicinity.") (citing *Am. Cyanamid Co.*, 916 F.2d at 1176-78; *In re Chicago Flood Litig.*, 176 Ill. 2d 179 (Ill. 1997)); *Branham v. Rohm & Haas Co.*, No. 3590, 2013 Phila. Ct. Com. Pl. LEXIS 234, *9 (June 26, 2013) ("We must look to the nature of the activity itself.").

BNSF's "other activities" are not the activity itself (transportation of vermiculite concentrate) subject to §519 scrutiny. And entering into contracts and engaging in business activities do not "involve[] a high degree of risk of serious harm" to those in the vicinity. RESTATEMENT (SECOND) TORTS, §520 cmt. g; *id.* at §519(2) ("liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous."). Courts have regularly held that entering into contracts to sell a property where ultrahazardous activity occurred is not abnormally dangerous. *Seats v. Hooper*, No. 96-3244, 1997 U.S. Dist. LEXIS 14919, *13-14

(E.D. Pa. Jan. 21, 1997); *Gordon v. AMTRAK*, No. 10753, 2001 Del. Ch. LEXIS 168, *55 (Apr. 5, 2002); *In re Asbestos Litig.*, No. 99C-12-254, 2002 Del. Super. LEXIS 604,*15 (Nov. 6, 2002) (citing *Bell v. Celotex Corporation*, Nos. 85C-FE-25 and 85C-AP-60, 1988 Del. Super. LEXIS 13, *4 (Jan. 19, 1988)).

IV. THE ACC ERRONEOUSLY ELIMINATED BNSF'S STATUTORY THIRD-PARTY DEFENSE.

Plaintiffs argue that MCA § 27-1-703 cannot apply because BNSF is strictly liable. AB, p. 36. However, strict liability should not apply in this case, and only a negligence claim may potentially remain. OB, pp. 30-43. The ACC made no other substantive ruling on this issue, so this Court should consider no other arguments by Plaintiffs or the Amicus.

Should this Court entertain the additional substantive arguments made by Plaintiffs and the Amicus, they should be rejected. Plaintiffs contend that section 27-1-703(6)(c)(ii) excludes Grace as an immune party. However, Plaintiffs ignore the subsection's first clause: "Except for persons who have settled ..." AB, p. 38; §27-1-703(6)(c)(ii). A bankruptcy trust established and funded for the purpose of paying out injury claims is a settling party, particularly one such as the Grace Trust that allows a party to opt out of the settlement and pursue a lawsuit. *MCI Sales and Serv. v. Hinton*, 329 S.W.3d 475, 504 (Tex. 2010), held precisely that. Plaintiffs attempt to distinguish *Hinton* because the Texas equivalent to MCA §27-1-703 contains a

statutory definition for "settling person." AB, p.38. But the Texas statute provides only a plain usage definition that in no way changes the analysis:

> "Settling person" means a person who at the time of submission has paid or promised to pay money … to a claimant at any time in consideration of potential liability … with respect to the personal injury … for which recovery of damage is sought.

Tex. Civ. Prac. & Rem. Code §33.011(5) (eff. Sept. 1, 1995)..

Plaintiffs then argue Grace is not a settled party, because the Trust has not yet disbursed settlement payments to Plaintiffs. AB, pp. 36-38. However, Plaintiffs express no concern that the Trust will fail to disburse their settlement funds in due time. OB, pp. 17-20. So, this Court should deem Grace a settled party, or alternatively, order that judgment on BNSF's defense should wait until it becomes ripe when the settlement funds are disbursed.[4] The Amicus appears to advocate for this result. MTLA's Brief ("MTLA"), p. 8 n.3.

Finally, this Court should disregard the Amicus's perfunctory argument that the statute is unconstitutional. *First*, the issue was not raised or ruled on below. MTLA, p. 10; *State v. Ferguson*, 2005 MT 343, ¶67 ("[T]his Court will not address an issue raised for the first time on appeal or a party's change in legal theory."). In

[4] The parties agree the State is a settled party. AB, p. 40. Plaintiffs' assert that BNSF failed to satisfy the statute's pleading and notice requirements prior to the ACC ruling on the subject motion. However, Plaintiffs and the State did not complete their settlement until *after* the ACC ruled. BNSF promptly and properly fulfilled its pleading and notice requirements after the settlement was completed. MCA §27-1-703(6)(f).

fact, the Amicus contradicts Plaintiffs' position that the statute should be presumed constitutional. Ex.7 Plaintiffs' Motion for Summary Judgment re: Non-Party Affirmative Defenses, Appx. pp. 158-159; MTLA's Motion to Appear *Amicus Curiae*, p. 3; Mont. R. App. P. 12(7). *Second*, this Court has stated the statute's constitutionality should be addressed after final judgment with the benefit of a full record. *Steichen v. Mont. Eighth Judicial Dist. Ct.*, No. OP-13-0405, 2013 Mont. LEXIS 378, *2-3 (Aug. 20, 2013) (citing *Brostuen v. First Judicial Dist. Ct.*, 322 Mont. 528 (2004)).

V. THE ACC ERRONEOUSLY ELIMINATED BNSF'S SUPERSEDING INTERVENING CAUSE ("SIC") DEFENSE.

Plaintiffs rely on *Meadow Lake Homeowners v. Shoemaker*, 2008 MT 41, where the defendant failed to plead a statute of limitations defense, then tried to amend its answer to add the defense years later. *Id. at* ¶31. BNSF did not fail to plead its SIC defense, so *Meadow Lake* does not apply. Plaintiffs alternatively argue BNSF failed to plead its SIC defense with sufficient particularity. AB, p. 43. But this Court has held a defense worded virtually identical to BNSF's was sufficient. OB, pp. 22-23.

Plaintiffs then assert that, as a matter of law, Grace's conduct was both contemporaneous with BNSF's alleged negligence and foreseeable to BNSF. Like the ACC, Plaintiff glosses over and ignores voluminous evidence refuting both findings, including that Grace described the shipments as benign vermiculite in

hundreds of bills of lading under a legal duty to truthfully and accurately disclose the contents of a shipment. OB, pp. 24-30. Plaintiffs do not even attempt to address this evidence.

VI. THE ACC MISAPPLIED *FAULCONBRIDGE.*

Plaintiffs continue to conflate the distinction between apportionment of liability and Plaintiffs' burden of proving substantial factor causation. BNSF seeks to introduce evidence refuting Plaintiffs' burden to prove that BNSF's conduct was a substantial contributing factor to Plaintiffs' injuries. Such evidence is permissible where, as here, "there are allegations that the acts of more than one person combined to produce a result (e.g., … when there are multiple defendants) … [I]n those cases, we recommend continued use of the substantial factor instruction[.]" *Busta v. Columbus Hosp.*, 276 Mont. 342, 371 (1996). Under that instruction, the jury is not asked to apportion fault, but to determine which of multiple tortfeasors' conduct is the *legal cause* of the plaintiff's injury. *Rudeck v. Wright*, 218 Mont. 41, 53-54 (1985).

Faulconbridge does not mention the substantial factor doctrine or *Busta*. *Busta* has never been overruled. In fact, *Pula* – on which *Faulconbridge* relies – cites *Busta* favorably. *Pula v. State*, 2002 MT 9, ¶¶15, 31, 36; *Faulconbridge v. State*, 2006 MT 198, ¶81. Moreover, this Court acknowledged *Busta* and the substantial factor test after *Faulconbridge*. *Neal v. Nelson*, 2008 MT 426, ¶32.

Respectfully submitted this 14th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Amended Reply in Support of 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 Microsoft Word 2016 is 4,891 words excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

Respectfully submitted this 14th day of October, 2019.

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