Amy Eddy
District Court Judge
920 South Main
Kalispell, MT 59901
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IN THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA

IN RE ASBESTOS LITIGATION, *Consolidated Cases*.	Cause No. AC-17-0694 ORDER RE: PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PREEMPTION AND ABNORMALLY DANGEROUS ACTIVITY AND DEFENDANT BNSF'S COMBINED MOTION FOR SUMMARY JUDGMENT ON DUTY, STRICT LIABILITY AND PREEMPTION/PRECLUSION Applicable to *Barnes, et al. v. State of Montana, et al.,* Lincoln County Cause No. DV-16-111, Judge Matthew Cuffe

Pending before the Court is (1) *Plaintiffs' Motion for Partial Summary Judgment Re: Preemption and Abnormally Dangerous Activity*, filed October 5, 2018, BNSF filed its *Response* on October 26, 2018, to which Plaintiffs filed a *Reply* on November 9, 2018; and (2) *Defendant BNSF's Combined Motion for Summary Judgment on Duty, Strict Liability and Preemption/Preclusion*, filed October 5, 2018, Plaintiffs' filed their *Response* on October 29, 2018, to which BNSF filed a *Reply* on November 13, 2018. Both matters came before the Court for a three-hour oral argument on January 7, 2019. Having reviewed the file and being fully apprised, the Court hereby finds as follows:

ORDER

Plaintiffs' Motion for Partial Summary Judgment Re: Preemption and Abnormally Dangerous Activity is GRANTED in part, and MOOT in part, consistent with the below Rationale.

Defendant BNSF's Combined Motion for Summary Judgment on Duty, Strict Liability and Preemption/Preclusion is DENIED in part, and MOOT in part, consistent with the below Rationale.

RATIONALE

A. Procedural Background

Plaintiffs Tracie Barnes, Kenneth Braaten, as Personal Representative of the Estate of Rhonda R. Braaten, and Gerrie Flores filed their *Third Amended Complaint* on July 27, 2018. In relevant part, the Plaintiffs brought claims against the State for Negligence (First Claim), and Violation of the Montana Constitution (Second Claim); against BNSF for Negligence (Third Claim), and Common Law Strict Liability (Fourth Claim); and against Maryland Casualty Company for Negligence (Fifth Claim).

In its *Answer*, BNSF generally denied all claims against it and raised 15 affirmative defenses.

All Plaintiffs recently settled all of their claims against the State and are not pursuing their claims against Maryland Casualty Company, at least at this time, in relation to the U.S. Bankruptcy Court's channeling injunction.

Initially, the Court scheduled trial on all of the Plaintiffs' claims to proceed together. However, after discovery concluded, and upon further review of the file, the Court bifurcated the claims of each Plaintiff for trial. Despite bifurcation, this *Order* applies equally to all Plaintiffs.

B. Factual Background

(1) W.R. Grace Operations in Libby, Montana

Mineral Carbon and Insulating Company first mined vermiculite in Libby in approximately 1922. MCC Ex. 1, at 6. Mineral Carbon changed its name to Zonolite Company ("Zonolite") in 1923. W.R. Grace ("Grace") acquired the assets of Zonolite in 1963. The vermiculite was mined through open strip mining of Vermiculite Mountain, approximately seven miles outside of Libby. The vermiculite was processed first in Libby and then later at the mine site. After processing, the concentrate was trucked down to river storage and stored in large bins/silos in various grades. Beginning in the late 1940s the concentrate was released into tunnels below the river storage bins onto a conveyor belt and was moved across the Kootenai River where it was loaded onto BNSF railcars and transported into Libby. Libby was one of only three places in the world where vermiculite was being mined, and Grace's operations in Libby were the largest:

> [Hundred] of billions of pounds of vermiculite ore was excavated, processed and either dumped as waste or shipped into Libby by BNSF. The Libby mine produced approximately 80% of the world's vermiculite ore, which by 1970 amounted to over 29 billion pounds of ore (Bulletin 79, p. 147) and was estimated to exceed 35 billion pounds of ore from 1971 through 1981 alone. According to W.R. Grace, the average daily production from the mine and milling operation was between 500 and 1000 tons of finished vermiculite concentrate per day between the late 1960s and 1970s and between 800 to 1000 tons per day in the 1980s.

Barnes Ex. 71, ¶¶31.

(2) BNSF Activities in Libby, Montana

"BNSF carried up to 105,000 pounds of Libby Amphibole Asbestos into and out of downtown Libby per day in the late 1960s and 1970s and, based on a daily average of 900 tons per day, up to 126,000 pounds per day through the 1980s. This amounts to up to 383,000,000 pounds of asbestos carried into Libby in the 1970s and up to 460,000,000 pounds through the 1980s." Barnes Ex. 71, ¶31. During the loading process described above, "a cloud of vermiculite dust would be produced coating the rail cars and loading equipment in a layer of dust. In addition, a substantial amount of vermiculite would always spill onto the surface of the cars." Barnes Ex. 71, ¶32. "BNSF then brought each of the asbestos laden vermiculite shipments into the Railyard located in downtown Libby. From the Railyard, BNSF joined the vermiculite filled railroad cars to eastbound or westbound trains."

> Initially, box cars were used exclusively [at the River Loading Point]. Eventually, larger hopper cars became the primary means of shipping ore, although box cars were still used. Loading was performed five days per week, and sometimes more frequently, throughout the 40 plus years that the River Loading Site was used. The river loading point had a loading rate of 100 tons per hour and Grace was able to load one 50 ton car every 40 minutes.

Barnes Ex. 71, ¶35 (internal citations omitted).

The river loading process was extremely dusty. In 1962, the "airborne dust created during the processing and production of the vermiculite ore was sampled and found to contain approximately 40% asbestos." Barnes Ex. 71, ¶36. The loaded rail cars and the entire area were constantly coated in a layer of this vermiculite dust. Throughout the relevant time period, BNSF was also receiving such complaints from the community about the dust blowing off of the railcars that BNSF told Grace they either had to clean things up or BNSF would not ship their product. Barnes Ex. 19: *Swing Depo*., p. 105.

(3) Extent of Asbestos Contamination in Libby

(a) BNSF's Knowledge of the Asbestos Hazard

Asbestos exposure was a known hazard by at least the 1930s. The fact the vermiculite ore in Libby was laced with asbestos was well-known to BNSF from essentially the beginning of its relationship with Zonolite and then Grace. Barnes Ex. 45, 46, 47. In fact, BNSF's own Medical Director was lecturing on the dangers of asbestos exposure in 1937. Barnes Ex. 71, ¶46. Communications within the railroad industry, including BNSF, also recognized the risk was not just to workers, but to the community as well:

> A discussion was had concerning the best methods of protecting workers from Asbestosis and Silicosis. The men handling Asbestos or doing sand-blasting are not the only ones

> exposed to the danger of these diseases, as *the dusts they make in doing their work create a danger to others* that may be working in the vicinity.

Barnes Ex. 71, ¶55 (emphasis added).

In 1970, the State of Montana Bureau of Mines and Geology published Bulletin 79, Geology Deposits of Lincoln and Flathead Counties, Montana. This Bulletin prominently states, "This report has been prepared by the Montana Bureau of Mines and Geology under a cooperative agreement with the Great Northern Railway Company and the Pacific Power & Light Company." Barnes Ex. 3. The Bulletin also highlights the existence of tremolite in the vermiculite deposits was widely known.

All through the 1970s, regulations were tightening regarding asbestos-containing products and exposure to employee, and precautions that needed to be in place to protect from the hazard. OSHA was taking an increasingly active position regarding workplace safety vis-à-vis asbestos exposure, and BNSF was taking notice and being alert to the direction OSHA was taking. Barnes Exs. 56-59. In 1979, Dr. Skinner, BNSF's Chief Medical Officer, acknowledged, "it is not true that asbestos creates a hazard only during manufacture: the hazard exists whenever dust is produced during the life cycle of the product." Barnes Ex. 55. In 1977, Grace alleges it began placing asbestos warning placards on the railcars when BNSF was transporting the bags of vermiculite. Barnes Ex. 19: *Swing Depo*., p. 54. By at least 1977 and thereafter, railcars carrying the Libby Ore were marked with asbestos warning placards reading as follows:

CAUTION
Contains asbestos fibers.
Avoid creating dust.
Breathing asbestos dust may
cause serious bodily harm.

Barnes Ex. 71, ¶70.

> The Libby Historical Society also has the attached rail car vermiculite ore warning label in its archives which was also used by Grace on cars carrying Libby vermiculite ore. River Loading Point workers remember affixing these warning signs on hopper cars going to private customers, and BNSF employees remember seeing these warnings on outgoing vermiculite cars. BNSF employees also remember a meeting of BNSF employees and management with W.R. Grace manager William McCaig after BNSF employees noticed the warnings on the outgoing railcars.

Barnes Ex. 71, ¶70.

Additionally, "[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." Barnes Ex. 71, ¶70.

While acknowledging the longstanding risks associated with asbestos dust, nonetheless, BNSF admitted in 1992 that its "asbestos program" had left something to be desired:

> The asbestos program within the Burlington Northern Railroad has been rather hit and miss since the inception of the program in the early 1980s. Various facilities have had asbestos materials removed successfully, while others have had some materials removed improperly or incompletely. In order to get a handle on the extent of asbestos throughout Burlington Northern facilities, a detailed methodical plan is required.

Barnes Ex. 60.

The BNSF rail yard was located in downtown Libby, and the tracks ran through town along the Kootenai River. Barnes Ex. 7. Four baseball fields are located in very close proximity to the tracks. Barnes Exs. 7-9, 13.

(b) EPA Involvement and Extent of Contamination

In response to concerns regarding possible exposure to asbestos in Libby, the EPA began conducting investigations and removal actions in 2000. EPA placed the site on the Superfund National Priorities List in 2002, which was 20-30 years after peak production at the mine during the 1970s and 1980s. When the EPA first became involved in Libby, it issued an *Initial Pollution Report: Libby Asbestos*, dated September 29, 2003. This *Report* describes the conditions as they existed in 2002 at the BNSF Rail Yard in Libby:

> Sampling shows that asbestos, a hazardous substance, is present in soil, raw ore, ore-concentrate and other soil-like materials at various locations in and around the community of Libby including BNSF railyard. Visible vermiculite has been found along the tracks and within the railyard and analytical results have shown asbestos levels in the soil from 2-5%.

Barnes Ex. 66.

The *Report* goes on to state:

> BNSF implemented its own investigations to determine if yard activities would entrain asbestos fibers into the air. Baseline monitoring along the track conducted by BNSF has found the highest concentrations measured during the sweeping ranges from 7 to 14 f/cc in air. A total of 22 surface soil samples collected along the railroad tracks and its railyard ranged from a trace to less than 1% fibrous amphibole asbestos by weight. In addition, visible unexpanded vermiculite remained at Tracks #1, #2 and #3.
>
> * * *
>
> Asbestos contaminated materials were hauled and shipped through the railyard, and spilled into the soil for decades. The soil around the tracks and under the ballast is contaminated and needs to be removed.

> BNSF has agreed to perform cleanup at the Libby railyards and its tracks . . . to address the high levels of asbestos. BNSF's work plan and sampling plan were approved on October 25, 2002. Cleanup began on August 13, 2003. Unfortunately, cleanup was not achieving satisfactory results, so work was stopped on August 21, 2003 and BNSF is reevaluating cleanup options. Work is expected to begin again in spring 2004.

Barnes Ex. 66.

Of course, all the reported testing mentioned above was done by BNSF at least a decade after vermiculite mining and operations in Libby had ceased, and after BNSF had attempted to excavate and remediate large swathes of its property. Barnes Ex. 94, 98. In 2009, for the first time in the history of the agency, EPA declared a Public Health Emergency in Libby to provide federal health care assistance for victims of asbestos-related disease.

(4) Historic Relationship Between BNSF and Grace

In 1942, BNSF granted Zonolite the exclusive license to load ore onto railcars at the loading dock in Libby. Barnes Ex. 6, p. 2. In 1959, BNSF's Division of Economic Research produced a report detailing its relationship with Zonolite, and exploring how BNSF could assist Zonolite in improving its market access and profitability. Barnes Ex. 36. The Division of Economic Research proposed assisting Zonolite in reducing the cost of their product by offering "attractive" rates on No. 1 grade vermiculite to be shipped to California, and then maintain the rates as low "as possible on the aggregate grade vermiculite so that the Zonolite Company can sell their large surplus of these grades." Barnes Ex. 36. However, as acknowledged by other individuals at BNSF in response to the Division of Economic Research's proposal:

> We have kept the Zonolite Company in competitive alignment with perlite from California and we have met the problem of market competition on aggregate grade of vermiculite throughout the eastern part of the United States as it is presented by perlite and also by the deposits of vermiculite operated by the Zonolite Company in South Carolina which is located much closed to the eastern markets.

Barnes Ex. 37.

When Grace purchased Zonolite in 1963, Zonolite also transferred all of its contracts with BNSF to Grace. These contracts included:

(a) Contract dated October 5, 1949 for the construction, maintenance and operation of a spur track four miles east of Libby, Montana.
(b) Contract dated December 3, 1956 for the continued maintenance and operation of a spur track located Libby, Montana.
(c) Contract dated April 20, 1950 [. . .] pertaining to the use occupancy of premises four miles east of Libby, Montana as the location for a loading dock, suspension bridge and belt conveyor.
(d) Contract dated September 25, 1943 pertaining to the construction, maintenance and operation of a four-inch steel water pipe at Libby, Montana.

(e) Contract dated December 15, 1942 pertaining to the use and occupancy of premises at Libby, Montana as the location for a loading platform.

(f) Contract dated September 12, 1956 for the use and occupancy of premise at Libby, Montana as a location for a lumber shed, storehouse and roadway, together with parking areas.

Barnes Exs. 11, 12.

In leasing this property to Zonolite and then Grace, and making improvements for its intended use, the cost and maintenance of some of those improvements was sometimes borne by BNSF, and sometimes by Grace. As such, Grace and BNSF also entered into multiple layers of insurance and indemnification agreements to protect themselves from the conduct of the other. In addition to numerous leases, ownership of various parcels shifted at given times between Grace and BNSF. Barnes Ex. 14. BNSF has represented it operated this loading facility for Grace. Barnes Ex. 21. 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.

After Grace purchased Zonolite, BNSF continued to strategize with Grace on how to expand distribution of vermiculite to European markets, including suggesting different routes and use of its ore docks for shipment by foreign ships. Barnes Ex. 38. In fact, after Grace purchased Zonolite and was making plans to triple, or possibly quadruple, the output of the Libby Plan, one of the senior executives for Grace, George Blackwood, commented on "the service [BNSF] give them and [BNSF] stressed how close our relations have been with them." Barnes Ex. 39. BNSF was not only assisting Grace with transportation issues, but also with geologic sample testing to determine whether certain by products could be put to other uses. Barnes Exs. 40, 41, 44. Part of this geologic investigation on the part of BNSF included individuals knowledgeable about asbestos who were particularly interested in exploring these particular deposits of vermiculite for this reason. Barnes Ex. 44.

C. Standard of Review for Motions for Summary Judgment

Summary judgment is proper only when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Rule 56(c), Mont.R.Civ.P. The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy this burden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. *Minnie v. City of Roundup*, 257 Mont. 429, 431, 849 P.2d 212, 214 (1993). The burden then shifts to the party opposing the motion to show, by more than mere denial and speculation, that there are genuine issues for trial. *Sunset Point v. Stuc-O-Flex Int'l*, 287 Mont. 388, 392, 954 P.2d 1156, 1159 (1998). The party opposing the summary judgment is entitled to have any inferences drawn from the factual record resolved in his or her favor. Rule 56(c), Mont.R.Civ.P.

Summary judgment motions encourage judicial economy through the elimination of unnecessary trial, delay and expense. *Bonawitz v. Bourke*, 173 Mont. 179, 182, 567 P.2d 32, 33 (1977). However, summary judgment is not to be utilized to deny the parties an opportunity to try

their cases before a jury. *Brohman v. State*, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988). "Summary judgment is an extreme remedy and should never be substituted for a trial if a material fact controversy exists." *Clark v. Eagle Sys., Inc*., 279 Mont. 279, 283, 927 P.2d 995, 997 (1996) (citations omitted). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied.

D. Legal Analysis

(1) Plaintiffs' Claims Against BNSF Are Not Preempted by Either the Hazardous Materials Transportation Act or the Federal Railroad Safety Act

"It is important to begin any discussion of preemption with the recognition that both the United States Supreme Court and this Court have consistently held that preemption is not easily favored." *Reidelbach v. BNSF Ry. Co*., 2002 MT 289, ¶21, 312 Mont. 498, 60 P.3d 418. "Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state law causes of action. In all pre-emption cases, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Favel v. American Renovation and Construction Co*., 2002 MT 266, ¶39, 312 Mont. 285, 59 P.3d 412. "This presumption against preemption 'can only be overcome by evidence of a clear and manifest intent of Congress to preempt state law.'" *Reidelbach*, ¶21 (quoting *Favel*, ¶39).

As the Montana Supreme Court has explained:

> In determining whether a federal law preempts a state law, including a common law cause of action, we must determine whether Congress intended the federal law to preempt state law. There are three ways in which state law may be superseded by federal law. First, the legislature may expressly include in the federal statute a preemption clause, making it clear that state law will not apply in the area governed by the federal statute. Second, congressional intent to preempt state law in a particular area may be implied where the regulation of the area is so comprehensive that it is reasonable to conclude that Congress intended to "occupy the field" and to leave no room for supplementary state regulation. Lastly, federal law may supersede state law when the state law actually conflicts with the federal law. This type of conflict manifests itself as an inability to comply with both the federal and state law, or because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Favel, ¶40 (internal citations omitted).

The Montana U.S. District Court, Great Falls Division, has recently issued three decisions finding that under identical circumstances neither the HMTA nor the FRSA preempted plaintiff's negligence or strict liability claims against BNSF for transporting vermiculite and thereby spreading asbestos dust which the plaintiff was exposed to while living in Libby. *Deason v. BNSF Ry*., 2018 U.S. Dist. LEXIS 126178, 2018 WL 3601236; *Murphy-Fauth v. BNSF Ry. Co*., 2018 U.S. Dist. LEXIS 126180, 2018 WL 3601235; *Underwood v. BNSF Ry. Co*., 2018 U.S. Dist. LEXIS 126183, 2018 WL 3601238. The Court finds these cases directly on point and the analysis

persuasive. The analysis of these cases is adopted herein.

Accordingly, the Court finds as a matter of law that the Plaintiffs' state law claims for negligence and strict liability that have been brought against BNSF in this case are not preempted by either the HMTA or the FRSA.

(2) BNSF was Engaged in an Abnormally Dangerous Activity Subjecting it to Strict Liability

In *Matkovic v. Shell Oil Co.*, 218 Mont. 156, 707 P.2d 2 (1985), the Montana Supreme Court first adopted strict liability standards where abnormally dangerous activities are involved. In so doing, *Matkovic* adopted the Restatement (Second) of Torts, §519 definition of strict liability, which states:

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Matkovic, 218 Mont. at 159, 707 P.2d at 3-4.

In adopting the §519 definition of strict liability in the context of an abnormally dangerous activity, *Matkovic* also adopted the Restatement (Second) of Torts, §520 definition of what is an abnormally dangerous activity:

> In determining whether an activity is abnormally dangerous, the following factors are to be considered:
> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Matkovic, 218 Mont. at 159-160, 707 P.2d at 5-6 (quoting *The Restatement (Second) of Torts*, §520).

When *Matkovic* adopted both §519 and §520, it recognized these principles were consistent with a similar theory adopted in *Dutton v. Rocky Mountain Phosphate*, 151 Mont. 54, 438 P.2d 674 (1968) (articulating a standard of strict liability for damage to crops and livestock caused by flouride being emitted from a phosphate plant). *Matkovic*, 218 Mont. at 159, 707 P.2d at 4. *Dutton* recognized these principles of strict liability had been established at least 100 years before in

Rylands v. Fletcher, (1866, Eng.) LR 1 Exch. 265, 4 Hurlst & C 263, 1 ERC 236, aff. LR 3 HL 330, 1 ERC. 256, and were well-established in Montana law.

As a guide to evaluation of the §520 factors, the Montana Supreme Court has adopted §520, *comment f*, which states:

> In determining whether the danger is abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance. Any one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability. On the other hand, it is not necessary that each of them be present, especially if others weigh heavily. Because of the interplay of these various factors, it is not possible to reduce abnormally dangerous activities to any definition.

Chambers, ¶21.

Chambers went on to hold, "that while one factor may end up weighing more heavily than the others, a trial court's consideration of whether an activity is abnormally dangerous must at least explicitly consider all the factors listed in Restatement §520." *Id*. (citing *Dutton*, 151 Mont. 66-67, 438 P.2d 681 (discussing factors to be considered for strict liability previous to adoption of Restatement §520 and finding courts look to the character of the activity in question, the place and manner in which it is maintained, its relation to its surroundings and customs of the community, and the natural fitness or adaptation of the premises for the purpose)). "The determination of whether an activity is abnormally dangerous, thereby subjecting the operator to strict liability, is a question of law for the courts to decide." *Chambers v. City of Helena*, 2002 MT 142, ¶18, 310 Mont. 241, 49 P.3d 587.

The Plaintiffs in this case argue that all the §520 factors weigh in favor of a finding of an abnormally dangerous activity. BNSF, in contrast, argues: (1) it was not engaged in an abnormally dangerous activity because the risk could be eliminated by the exercise of care §520(c), making this a classic negligence action; and, alternatively (2) that even if it was engaged in an abnormally dangerous activity, the Court should adopt the Restatement (Second) of Torts §521 and find it is protected from liability by common carrier immunity. The Court considers these arguments, albeit in reverse order:

(a) BNSF is not protected from common carrier liability under §521

BNSF urges this Court's adoption and application of the Restatement (Second) of Torts §521, which states, "The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier." BNSF argues that because Mont. Code Ann. §69-11-403 requires BNSF, "if able to do so, accept and carry whatever is offered to the carrier, at a reasonable time and place, of a kind that the carrier undertakes or is accustomed to carry," it is engaged in a public duty entitling it to immunity. Of course, nothing in the plain language of Mont. Code Ann. §69-11-403, grants BNSF immunity for its services. Moreover, BNSF has not presented a cogent argument as to why its activities in Libby were in "pursuance of a public duty," and did not also further its own purposes.

The Montana Supreme Court has not adopted §521, nor does the Court believe it would be inclined to do so under the circumstances of this case. Generally, the law in Montana has disfavored any form of immunity, including for railroads. *See Wine v. Northern Pac. Ry*., 48 Mont. 200, 136 P. 387 (1913) (rejecting railroad's argument it is not subject to liability based on its status as a common carrier).

While §519, *comment a*, anticipates §519 will be read in conjunction with the corresponding sections of the Restatement, the Montana Supreme Court has not uniformly adopted Restatement sections in a blanket manner. Instead, the Montana Supreme Court has picked and chosen amongst them those that most correlate with Montana law. *See* Restatement (Second) of Torts §402A; *Emery v. Federated Foods, Inc*., 262 Mont. 83, 863 P.2d 426 (1993) (relying on portion of §402A, *comment j*); *Riley v. American Honda Motor Co*., 259 Mont. 128, 856 P.2d 196 (1993) (rejecting the notion that it had adopted all the language in *comment j*); *Sternhagen v. Dow Co*., 282 Mont. 168, 935 P.2d 1139 (1997)(rejecting the argument that simply because it had adopted the duty to warn framework in *comment j* did not mean it had also adopted the state-of-the-art defense in *comment j*).

In so ruling, and while not cited by either party, this Court acknowledges that, faced with different facts, certain Montana District Courts have applied §521. *See Anderson v. BNSF Ry. Co*., 2010 Mont. Dist. LEXIS 73 (First Judicial District, Judge McCarter); *Griffin v. Mont. Rail Link*, 2000 ML 2438 (Fourth Judicial District, Judge McLean) (Alberton train derailment releasing large cloud of toxic chemicals); *Walsh v. Mont. Rail Link*, 2001 ML 1418 (fourth Judicial District, Judge Langton) (Alberton train derailment releasing large cloud of toxic chemicals). Each of these decisions relied on the following rationale:

> 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 refusing to impose strict liability persuasive, based on the public policy that materials such as those involved in the Alberton derailment 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 for 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 safety concerns which outweigh public policy reasons for imposing strict liability.

Walsh, ¶27.

The facts of the present cases before the Court are distinguishable, because they are not simply focused on the transportation of a hazardous material to market for the public good. Instead, these cases embody all of BNSF's activities in the Libby community, which extend far

beyond the mere transportation of a hazardous material. As such, these cases establish the point of demarcation between transportation of material with hazardous properties and engagement in an abnormally dangerous activity. As outlined above, BNSF played a central role in the vermiculite operations that took place in Libby that far exceeded a relationship that could fairly be described as simply that between a common carrier and a shipper, and instead borders on a common cause.

Accordingly, the Court finds as matter of law BNSF is not entitled to common carrier immunity under §521 under these specific circumstances.

(b) BNSF was engaged in an abnormally dangerous activity when considering the §520 factors

(i) existence of a high degree of risk of some harm to the person, land or chattels of others;

There is no question that through BNSF's activities in Libby there was a high degree of risk of some harm to the members of the community exposed to asbestos dust, potentially including these Plaintiffs as the jury may determine. This factor weighs heavily in favor of a finding of an abnormally dangerous activity.

(ii) likelihood that the harm that results from it will be great;

There is no question that through BNSF's activities in Libby there was a likelihood that the harm resulting from its activities would be great. BNSF had actual knowledge of the consequences of asbestos dust exposure, stemming from both concentration of exposure and duration, and knew that asbestos dust exposure could cause latent diseases. This factor weighs heavily in favor of a finding of an abnormally dangerous activity.

(iii) inability to eliminate the risk by the exercise of care;

BNSF primarily relies on a number of cases where courts in other jurisdictions have found that the installation or transportation of asbestos was not an abnormally dangerous activity—in particular reliance on the fact that in those cases the risk could be eliminated through the exercise of care. Of course, the fact a risk can be eliminated through the exercise of due care is the hallmark of a negligence claim. This Court does not disagree with that analysis.

The present case, however, presents a distinctly different picture. Here, the risk of exposure was not limited to employees and contractors directly subject to BNSF supervision, control and safety programs. Instead, the risk of exposure was widespread throughout the community of Libby, the members of which were not remotely within the sphere of BNSF control or influence. This is not a case in which a prudent safety program could conceivably have mandated community-wide use of qualified respirators or showers and a change of clothes for anyone and everyone randomly exposed to BNSF's asbestos

dust while going about their business and engaging in normal activities of daily living in Libby.

(iv) extent to which the activity is not a matter of common usage;

While the transportation of vermiculate to market was a matter of common usage, BNSF's other activities were not. This factor tilts in favor of a finding of an abnormally dangerous activity.

(v) inappropriateness of the activity to the place where it is carried on; and

BNSF's activities were conducted in a dense urban/residential neighborhood where numerous community members risked exposure by visiting the baseball fields, going to the hospital, shopping downtown, or simply being at home. This factor tilts in favor of a finding of an abnormally dangerous activity.

(vi) extent to which its value to the community is outweighed by its dangerous attributes.

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.

(3) Whether BNSF owed the Plaintiffs a duty of care

Based on the representation of Plaintiffs' counsel that they would not pursue their negligence claims if the Court were to find BNSF strictly liable for engaging in an abnormally dangerous activity, the Court does not reach this issue.

CONCLUSION

The Court finds a matter of law that the BNSF is strictly liable to these Plaintiffs for engaging in an abnormally dangerous activity vis-à-vis its operations in Libby, Montana.

DONE and DATED this 15th day of January, 2019.

/s/ Amy Eddy

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Amy Eddy, Asbestos Claims Court Judge

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Dated: 01-15-2019