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PREVIEW; *Maryland Casualty Company v. The Asbestos Claims Court, and the Honorable Amy Eddy, Asbestos Claims Court Judge: What Duty does a Workers' Compensation Insurer Owe the Employees of its Insured?*

Hannah Higgins*

The Montana Supreme Court will hear oral arguments in this matter Wednesday, August 14, 2019, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, MT. Kennedy C. Ramos and Daniel W. Hileman will likely appear on behalf of Petitioner. Alan M. McGarvey will likely appear on behalf of Respondent.

I. INTRODUCTION

This case presents two significant issues. The overarching issue is whether a Writ of Supervisory Control will be granted to resolve the underlying issue: what duty, if any, a workers' compensation insurer owes the employees of its insured. The resolution of the underlying issue will be an important one, both within the multitude of pending asbestos claims in Montana and beyond. The Petitioner, Maryland Casualty Company, claims the Asbestos Claims Court used an improper standard in determining that Maryland Casualty Company owed a duty of care to the employees of its insured, W.R. Grace & Company.¹

II. FACTUAL AND PROCEDURAL BACKGROUND

The Asbestos Claims Court ("ACC") was established in November 2017 to streamline asbestos-related cases in Montana.² Maryland Casualty Company ("MCC") provided workers' compensation insurance to W.R. Grace & Company ("Grace") from

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¹ Brief of Amicus Curiae American Property Casualty Insurance Association in Support of Petitioner at 3, *Maryland Cas. Co. v. The Asbestos Claims Court, and The Honorable Amy Eddy, Asbestos Claims Court Judge* (Mont. March 21, 2019) (No. OP 19-0051); Opening Brief of Petitioner Maryland Casualty Company at 1–2, *Maryland Cas. Co. v. The Asbestos Claims Court, and The Honorable Amy Eddy, Asbestos Claims Court Judge* (Mont. March 21, 2019) (No. OP 19-0051).

² Petition for Writ of Supervisory Control and Request for Stay at 3, *Maryland Cas. Co. v. The Asbestos Claims Court, and The Honorable Amy Eddy, Asbestos Claims Court Judge* (Jan. 22, 2019) (No. OP 19-0051).

1962 to 1973.³ Grace employed the Respondent, Ralph Hutt between 1968–1969.⁴ In 2001, Grace filed for Chapter 11 bankruptcy in the wake of countless asbestos-related suits.⁵ Hutt was designated to be a lead plaintiff and was instructed to file his own complaint against MCC and others.⁶ He did so, alleging that he was injured by asbestos exposure, which MCC was aware of, at Grace’s vermiculite mine in Libby, Montana (“Plant”).⁷

After the close of discovery, the ACC held oral argument on each party’s motion for summary judgment.⁸ It granted MCC’s motion in part, holding that MCC owed a duty to warn Grace’s employees of the asbestos hazard based on the fact that MCC could foresee the harm to Grace’s employees through its affirmative actions.⁹ These affirmative actions included developing dust control systems for Grace, conducting site inspections, providing warning signs for Grace’s employees, medically monitoring employees’ health, and specifically creating a Safety Program¹⁰ to protect the employees.¹¹

Upon receiving this holding from the ACC, MCC filed a Petition for Writ of Supervisory Control, asking the Montana Supreme Court to exercise control over the ACC and provide a legal determination of the applicable duty, if any, that MCC owed to Grace employees like Hutt.¹² The Supreme Court requested full

³ Petition for Writ of Supervisory Control and Request for Stay, *supra* note 2, at 5.

⁴ *Id.*

⁵ Opening Brief of Petitioner, *supra* note 1, at 3 (“Grace was involved in over 65,000 asbestos-related personal injury lawsuits . . .”).

⁶ Petition for Writ of Supervisory Control and Request for Stay, *supra* note 2, at 7; Opening Brief of Petitioner, *supra* note 1, at 13.

⁷ Petition for Writ of Supervisory Control and Request for Stay, *supra* note 2, at 8.

⁸ *Id.*

⁹ Order at 1, *Maryland Cas. Co. v. The Asbestos Claims Court and The Honorable Amy Eddy, Asbestos Claims Court Judge* (Jan. 29, 2019) (No. OP 19-0051); Respondent Ralph Hutt’s Response Brief in Opposition to Writ at 8, *Maryland Cas. Co. v. The Asbestos Claims Court and The Honorable Amy Eddy, Asbestos Claims Court Judge* (April 18, 2019) (No. OP 19-0051).

¹⁰ Order, *supra* note 9, at 1 (where the ACC relied on MCC’s affirmative actions, including development of a safety program and medically monitoring workers, to hold that MCC had a duty to warn Grace’s employees).

¹¹ Respondent’s Response Brief in Opposition, *supra* note 9, at 8.

¹² Petition for Writ of Supervisory Control and Request for Stay, *supra* note 2, at 2, 4, 17.

briefing to consider the substantial legal issue,¹³ and to decide if it must exercise supervisory control over the ACC's holding.¹⁴

III. SUMMARY OF ARGUMENTS

MCC claims that the ACC committed a mistake of law when it refused to apply Restatement (Second) of Torts § 324A in determining if MCC owed a duty to Grace's employees.¹⁵ Section 324A states that a party (i.e. MCC) is liable for the damages of third persons (i.e. Hutt) if it voluntarily chooses to render services to another (i.e. Grace) that it should "recognize as necessary" for the protection of the third person in three situations: (1) when his failure to exercise care increases the risk of harm; (2) if he undertook to perform a duty of the middle party owed to the third person; or (3) if the third party is injured because the third party or the middle party relied on the undertaking.¹⁶ The ACC's decision not to apply § 324A, if affirmed, would place Montana in the minority of jurisdictions.¹⁷ Hutt argues that solely applying § 324A is an unnecessarily narrow standard, and argues that the ACC did not make a mistake of law.¹⁸

The parties do not dispute that Grace exercised exclusive control and authority over the plant.¹⁹ However, they do disagree that the affirmative actions taken by MCC in relation to the Plant constituted an undertaking that created a duty towards Grace's employees. In making its decision, the ACC relied heavily on MCC's drafted Safety Plan for Grace, among other affirmative actions such as recommending solutions for dust control, establishing dust exposure goals for Grace, providing warning signs for the workers, and preparing a Safety Program.²⁰

¹³ Order at 2, *Maryland Cas. Co. v. The Asbestos Claims Court and The Honorable Amy Eddy, Asbestos Claims Court Judge* (Feb. 19, 2019) (No. OP 19-0051) (In this case the issue [MCC] raises is a substantial legal issue that may significantly impact not only the trial of this case, but potentially the trials of hundreds of other similar cases.”).

¹⁴ *Id.*

¹⁵ Opening Brief of Petitioner, *supra* note 1, at 1–2.

¹⁶ Restatement (Second) of Torts § 324A.

¹⁷ Brief of Amicus Curiae American Property Casualty Insurance Association in Support of Petitioner, *supra* note 1, at 1, 3–4.

¹⁸ Respondent's Response Brief in Opposition, *supra* note 9, at 9–10, 21.

¹⁹ *Id.* at 22; Opening Brief of Petitioner, *supra* note 1, at 8.

²⁰ Respondent's Response Brief in Opposition, *supra* note 9, at 8.

A. *Petitioner Maryland Casualty Company's Argument*

MCC argues that the ACC committed a mistake of law when it denied, in part, MCC's Motion for Summary Judgment.²¹ MCC contends that the ACC mistakenly based its decision regarding duty on a foreseeability analysis alone, instead of the correct analysis under § 324A.²²

Referencing its contract with Grace, MCC argues it owed no duty warn Grace's employees of any safety or health hazards.²³ Additionally, MCC points out that it was not the only party to conduct inspections of the Plant or consult with Grace regarding the Plant's health and safety conditions.²⁴ MCC asserts that only Grace had the ability to implement any recommendations received from any party,²⁵ and that Grace even chose to reject MCC's suggestions.²⁶ Further, MCC questions the credibility of the Safety Plan used to justify the ACC's holding, noting that this Safety Program document was never signed or dated and has no context or foundation because it is not on MCC letterhead.²⁷

MCC argues that the ACC did not evaluate whether a duty was even owed and used an unsupported analysis.²⁸ Under the § 324A standard, MCC contends no duty was owed because (1) MCC did not increase the risk of harm through the undertakings it took in conjunction with Grace; (2) MCC did not take on a duty that Grace owed to Hutt; and (3) because MCC did not cause the injury incurred by Hutt while working at the Libby Plant owned and operated by Grace.²⁹ To counter Hutt's argument that § 324A is too narrow, MCC points out that two states have not adopted § 324A because the Restatement is too lenient.³⁰

²¹ Opening Brief of Petitioner, *supra* note 1, at 1.

²² *Id.* at 15–16.

²³ *Id.* at 4 (“The language of MCC's workers' compensation policies circumscribed MCC's role with Grace and provided the following . . . ‘Our inspections are not safety inspections . . . we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards.’”).

²⁴ *Id.* at 6–7.

²⁵ *Id.* at 9–11 (where Grace would not pay for a study reducing dust and monitoring employee health, and did not inform its employees of the results of medical examinations for years).

²⁶ Opening Brief of Petitioner, *supra* note 1, at 9, 38.

²⁷ *Id.* at 12.

²⁸ *Id.* at 20.

²⁹ *Id.* at 16.

³⁰ Reply Brief of Petitioner Maryland Casualty Company at 10, *Maryland Cas. Co. v. The Asbestos Claims Court and The Honorable Amy Eddy, Asbestos Claims*

B. Respondent Ralph Hutt's Argument

Contrarily, Hutt presents a three-prong framework for a duty analysis: (1) whether injury from the conduct was foreseeable; (2) how the defendant's actions relate to foreseeability of the injury; and (3) the public policy behind the established duty.³¹ Hutt argues that MCC was aware that Grace employees were being exposed to asbestos dust and that the exposure could lead to serious injury.³² Hutt contends that this knowledge, along with MCC's affirmative actions to control the hazard and recommend a safety program, created a duty for MCC to warn Grace employees of the danger.³³ MCC's failure to do so while still undertaking to protect employees—including dust control engineering recommendations, establishing safe asbestos exposure goals, and developing a Safety program³⁴—Hutt argues, created an ongoing injury.³⁵ Hutt also argues, relying on policy evaluations in *Air & Liquid Sys. Corp. v. Devries*,³⁶ that public policy consideration should be strongly considered and, when evaluated, suggest that a duty existed here.³⁷

Perhaps the largest focus of Hutt's argument is the aspect of foreseeability, which he argues is the primary consideration in analyzing if a duty existed to a third party like himself, as Grace's employee.³⁸ Particularly, Hutt argues that the ACC correctly looked at how MCC's conduct allowed it to foresee a risk of injury to the employees of Grace, and thus created a duty.³⁹

Court Judge (May 2, 2019) (No. OP 19-0051); Brief of Amicus Curiae American Property Casualty Insurance Association in Support of Petitioner, *supra* note 1, at 8.

³¹ Respondent's Response Brief in Opposition, *supra* note 9, at 8–9.

³² *Id.* at 12–13.

³³ *Id.* at 13–14.

³⁴ *Id.*

³⁵ *Id.* at 12.

³⁶ 139 S. Ct. 986 (2019); Respondent's Response Brief in Opposition, *supra* note 9, at 14–15.

³⁷ Respondent's Response Brief in Opposition, *supra* note 9, at 14–19 (Hutt contends that public policy is in his favor based on (1) how much MCC was involved in the asbestos hazard; (2) the fact that injury to employees from asbestos was practically unavoidable; and, (3) the fact that MCC was resting on the ignorance of employees, mentioning the specific, extensive Safety Program MCC created that is at issue, the fact that the workers were likely reassured by the lack of warning given about the dangers and the fact that MCC debated to keep the information a secret while knowing that legal claims and numerous lung abnormalities were already present).

³⁸ *Id.* at 10.

³⁹ *Id.* at 12.

He argues that MCC undertook specific affirmative actions that perpetuated the injuries, and those injuries were foreseeable through the undertakings.⁴⁰ Hutt relies on *Kent v. City of Columbia Falls*,⁴¹ which establishes that in Montana, if one gratuitously undertakes to do something then that person has a duty to take reasonable care in doing so.⁴²

He also argues that Montana has rejected the aspects of reliance and increased risk that are set up in § 324A.⁴³ Even so, Hutt contends that if these elements were pertinent under Montana law, they would still impose liability upon MCC because Grace’s employees did rely on MCC’s lack of action—taking it to mean that the risk was low—and by doing so were exposed to an increased risk.⁴⁴

IV. ANALYSIS

A. *Existence of a Duty*

The difficult issue before the Court is what duty exists for a workers’ compensation insurer to its insured’s employees. Whether a duty exists is a question of law.⁴⁵ Under Montana law, every person has a duty to act in a reasonable manner, such to not injure another person.⁴⁶ Foreseeability is a crucial factor that must be considered,⁴⁷ because a duty arises when injury to another is a reasonably foreseeable result of a person’s conduct.⁴⁸

Generally there is no duty to protect others from the acts of third parties,⁴⁹ but liability can arise to third persons for affirmative

⁴⁰ *Id.* at 13, 22.

⁴¹ 350 P.3d 9 (Mont. 2015); Respondent’s Response Brief in Opposition, *supra* note 9, at 19.

⁴² 350 P.3d at 19.

⁴³ Respondent’s Response Brief in Opposition, *supra* note 9, at 33.

⁴⁴ *Id.* at 36–38.

⁴⁵ *Emanuel v. Great Falls Sch. Dist.*, 209 P.3d 244, 247 (Mont. 2009).

⁴⁶ MONT. CODE ANN. § 28–1–201 (2017).

⁴⁷ *Mang v. Eliasson*, 458 P.2d, 777, 781 (Mont. 1969) (where if harm is foreseeable to a reasonable person—with a reasonable person being defined as someone who would have foreseen the harm to happen—then that both creates a duty not to cause the harm and creates a limitation of liability, and if no foreseeability of harm from the act can be seen by a reasonable actor then the actor cannot be negligent).

⁴⁸ *Emanuel*, 209 P.3d at 247 (“[i]f a reasonably prudent defendant can foresee neither any danger of direct injury nor any risk from an intervening cause he is simply not negligent.” (citation omitted)).

⁴⁹ *Lopez v. Great Falls Pre-Release Servs.*, 986 P.2d 1081, 1086 (Mont. 1999) (overruled on other grounds); *Knapton v. Monk*, 347 P.3d 1257, 1260 (Mont. 2015) (where a standard negligence action has four crucial elements: (1) a duty

undertakings, as detailed by § 324A.⁵⁰ Hutt contends that Montana law comports with § 324A, but rejects “reliance” and “increased risk” and believes that § 324A is “rigid and unreasoned” because there may be other situations in which liability can arise.⁵¹

In making its decision, the Supreme Court must consider MCC’s affirmative actions, as they are the crux of whether or not a duty exists. Hutt argues that these affirmative actions made the harm clearly foreseeable to MCC⁵² and increased the employees’ risk,⁵³ creating a duty which MCC breached by failing to warn Grace’s employees. MCC counters that the § 324A standard provides a well-established, comprehensive analysis of duty.⁵⁴ Under this analysis, (a) MCC did not increase the risk of harm compared to what the risk would have been without MCC’s actions;⁵⁵ (b) MCC did not replace Grace in owing its employees a duty to provide a safe work environment, but merely supplemented Grace’s duty by providing recommendations and drafting a safety plan in collaboration with Grace’s input and ultimate implementation;⁵⁶ and, (c) Hutt could not have relied on MCC because he hadn’t ever heard of MCC and Grace did not rely on MCC because it refrained from implementing MCC’s recommendations and sought recommendations from other companies.⁵⁷

The Court’s decision will play a crucial role in the ACC moving forward, and will affect the outcome of hundreds of claims. If the Court finds that the ACC did commit a mistake of law, and holds that § 324A is the correct standard, this precedential decision could potentially inhibit successful outcomes for many plaintiff asbestos claims. Due to a majority of jurisdictions accepting § 324A,⁵⁸ the fact that MCC believes this is the correct standard, and the fact that Hutt agrees Montana law already comports with §

must exist; (2) that duty must be breached; (3) the breach must have caused the plaintiff’s injury; and, (4) damages were incurred).

⁵⁰ Restatement (Second) of Torts § 324A.

⁵¹ Respondent’s Response Brief in Opposition, *supra* note 9, at 28–29, 33.

⁵² *Id.* at 13.

⁵³ *Id.* at 38.

⁵⁴ Reply Brief of Petitioner, *supra* note 30, at 2–4.

⁵⁵ Opening Brief of Petitioner, *supra* note 1, at 36 (“ . . . the correct inquiry is whether the defendant’s undertaking increased the risk *compared to what the risk would have been absent the undertaking.*”).

⁵⁶ *Id.* at 37.

⁵⁷ *Id.* at 38–39.

⁵⁸ *See, e.g.,* Fackelman v. Lac d’Amiante du Quebec, 398 N.J. Super. 474 (App. Div. 2008).

324A,⁵⁹ the Montana Supreme Court may find this to be the correct standard. This seems to be the most likely outcome.

Nevertheless, the Court may be sympathetic to Hutt's argument and find that the standard application of § 324A leaves asbestos plaintiffs at a disadvantage, since workers' compensation insurers who were aware of the ongoing injury, and the injury was foreseeable to them, are potentially not liable under a § 324A analysis. This would leave many plaintiffs with one less avenue of recovery. In this case, the Supreme Court could potentially establish a middle ground⁶⁰ between the two arguments, that doesn't leave either party at a disadvantage.

B. *Writ of Supervisory Control*

The exercise of supervisory control is an extraordinary remedy and appropriate when urgency or emergency is present making the normal appeals process inadequate, when a legal question must be decided, and when one or more of the following circumstances exist: when a mistake of law has been made leading to gross injustice, when constitutional issues having a state-wide effect are involved, or when a motion to substitute a judge has been denied in a criminal proceeding.⁶¹ The Montana Supreme Court evaluated these factors in their decision to request full briefing in regards to MCC's Petition for Writ of Supervisory Control.⁶²

After considering ACC's standard compared to established Montana law, it seems likely that the Montana Supreme Court will grant the Petition for Writ of Supervisory Control and take supervisory control to determine the correct duty, if any, that a workers' compensation employer owes the employees of its insured.

⁵⁹ Respondent's Response Brief in Opposition, *supra* note 9, at 28–30 (arguing that Montana law is consistent with § 324A because it also applies a duty of care to those who undertake a service that deals with a risk of injury to a third party).

⁶⁰ *See, e.g., Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019) (holding that in a maritime context a middle ground was the most appropriate solution because it did not impose a costly burden on manufacturers or an over warning for consumers).

⁶¹ Mont. R. App. P. 14(3) (2017).

⁶² MONT. CONST. art. VII, § 2(2); Order, *supra* note 13, at 1–2; Respondent's Response Brief in Opposition, *supra* note 9, at 7; Reply Brief of Petitioner, *supra* note 30, at 1; *See, e.g., Lamb v. Dist. Court of the Fourth Jud. Dist. Of Mont.*, 234 P.3d 893 (Finding that a writ of supervisory control was the appropriate solution because the normal appeals process was not adequate, urgency factors existed, it was a purely legal question, and the District Court made a mistake of law when it granted a motion to stay on a bad faith claim pending the total receipt of medical benefits that would continue for the remainder of the plaintiff's lifetime).

Establishing a duty to a third party solely based on foreseeability of injury from a party's affirmative actions, as the ACC did, creates a new analysis of duty that the Court has not yet considered. Even if the Court is sympathetic to Hutt's argument, it still seems likely that Court will not accept the ACC's duty and will exercise supervisory control to format the standard to better comport with § 324A and established precedent.

V. CONCLUSION

While foreseeability plays a huge role in establishing a duty, the Restatement (Second) of Torts provides an established, widely accepted analysis of liability to a third party for affirmative undertakings. The Court will likely grant the Petition for Writ of Supervisory Control to ensure the ACC is employing the correct standard. The Court may find that the correct applicable standard is found in § 324A, or it may look for a standard that leaves both parties without disadvantage. Ultimately, the decision of the Supreme Court to grant or deny the Petition will carry heavy ramifications in asbestos litigation for all parties involved, whether they are insurers, employers, or injured employees.