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PREVIEW; BNSF Railway Company v. The Asbestos Claims Court of the State of Montana, Honorable Amy Eddy, Presiding Judge: *Does Allowing Defendants to Assign Liability to Non-Parties Violate Due Process?*

Mariah Johnson*

The Montana Supreme Court will hear oral arguments in this matter Wednesday, October 30, 2019 at 9:30 AM, in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, MT. Anthony M. Nicasastro will likely appear for Petitioner. Alan M. McGarvey will likely appear for Respondent.

I. INTRODUCTION

This case presents the issue of a Montana statutory defense’s constitutionality. It concerns whether BNSF can allege a non-party, W.R. Grace & Company’s (“Grace”), conduct absolves it of liability for the Plaintiffs’ injuries. Known previously as the “empty chair defense,” it is referred to here as a non-party defense, or the “settled party defense” based on the language added to the 2017 version of the statute. The Montana Supreme Court’s decision on BNSF’s ability to assert Grace’s conduct absolves it of liability will have important implications for the ability of injured plaintiffs to recover damages against named defendants. BNSF maintains the Asbestos Claims Court employed a flawed strict liability analysis in determining that the defense under MCA § 27–1–703(6) did not apply.

II. FACTUAL AND PROCEDURAL BACKGROUND

Grace mined vermiculite near Libby, Montana from 1922–1990.¹ BNSF transported the vermiculite concentrate, which was contaminated with amphibole asbestos, from the mine into downtown Libby.² Plaintiffs allege their diseases result from exposure to the asbestos BNSF transported into Libby.³ Grace later filed for bankruptcy, resulting in the creation of a trust to assume

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¹ Pl.’s Answer Br. at 2, June 14, 2019, No. OP 19-0085.

² Pl.’s Answer Br. at 2–3.

³ Pet’r’s Opening Br. at 2, May 16, 2019, No. DA 19-0085.

Grace's liability for asbestos claims.⁴ This trust led to a dispute over whether Grace was a "settled party," allowing BNSF to assert a non-party defense to liability under Montana statute.⁵ The Asbestos Claims Court ("ACC"), after consideration of the case, granted summary judgment to the Plaintiffs. Of particular note, it held that BNSF was precluded from raising non-party defenses.⁶ BNSF asserts the ACC's holding erroneously prohibited it from negating liability with the conduct of a non-party it contends settled with the Plaintiffs.⁷ BNSF applied for a writ of supervisory control to allow further consideration of the ACC's rulings, which the Court granted.⁸ The Court then ordered briefing to consider whether summary judgment in favor of the Plaintiff on BNSF's defenses was appropriate in preparation for oral argument.⁹

III. SUMMARY OF ARGUMENTS

BNSF contends that the fund formed by Grace's bankruptcy constitutes a settlement with the Plaintiffs, making Grace a "settled party" under § 27-1-703.¹⁰ Section 27-1-703(6)(a) states that, in a negligence action, a defendant may assert that the claimant's damages were caused in full or in part by a person with whom the claimant has settled or released from liability.¹¹ BNSF supports its claim that the fund is a settlement by pointing to the Trust Agreement stating the fund is a "qualified settlement fund;" the Trust Distribution Plan stating the fund is to "provide for resolving

⁴ Pet'r's Opening Br. at 18.

⁵ Pet'r's Opening Br. at 17-18; Pl.'s Answer Br. at 37.

⁶ Pl.'s Answer Br. at 1-2, 11-12.

⁷ Pet. for Writ of Supervisory Control at 2, Feb. 04, 2019, On review from No. AC-17-0694.

⁸ Order-the Court will take supervisory control of the January 15 and 18, 2019 rulings, Order for No. OP 19-0085 and OP 19-0088 (Mont. Apr. 16, 2019); *See also* Hannah Higgins, Oral Argument 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?*, 80 MONT. L. REV. ONLINE 1 (2019), https://scholarship.law.umt.edu/mlr_online/vol80/iss1/1.

⁹ Order-the Court will take supervisory control.; Pet. for Writ of Supervisory Control at 5-6.

¹⁰ Pet'r's Opening Br. at 20.

¹¹ MONT. CODE ANN. § 27-1-703(6)(a) (2017) (As of the time of this preview, the 2019 version of the Montana Code Annotated has been released. No changes were made to this particular statute).

all Asbestos PI Claims;” and the Reorganization Plan stating the fund “constitutes a settlement.”¹² BNSF relies on these documents and *MCI Sales and Serv. v. Hinton*,¹³ wherein Texas applied a similar statute and found a similar fund to constitute a settlement, to argue Grace is a settled party under the statute and it may therefore bring in Grace’s conduct as the cause of the Plaintiffs’ injuries to absolve its liability.¹⁴

Respondents argue § 27–1–703 does not apply because this is a strict liability case; and further, Plaintiffs have not settled with Grace, so even if the statute did apply, Grace would not qualify as a settled party.¹⁵ According to Respondents, while Plaintiffs filed claims with Grace’s fund, they have not received money or otherwise settled any claims. They point out that the existence of an unsettled claim is necessary to recover from Grace’s fund.¹⁶ They further contend that the mere existence of the fund does not render Grace a settled party and that the bankruptcy terms make clear that claims to the fund could become personal injury lawsuits.¹⁷ Respondents also assert that the language of § 27–1–703(6) itself precludes its use in this case because it uses the past tense; as the trust claims are still pending, Grace cannot be a “settled party.”¹⁸ In response to BNSF’s use of *Hinton*, Respondents note that the Texas Court relied heavily on portions of its law that are missing from Montana’s; therefore, they argue, the Texas law cannot be used to decide this case.¹⁹

IV. ANALYSIS

The primary issue before the Court is whether a party can absolve its liability by presenting evidence of a non-party’s conduct under § 27–1–703. Previous legislative attempts to allow this defense in Montana have been held unconstitutional.²⁰ Two primary

¹² Pet’r’s Opening Br. at 18–19.

¹³ 329 S.W.3d 475 (Tex. 2010); Pet’r’s Opening Br. at 19.

¹⁴ Pet’r’s Opening Br. at 19–20.

¹⁵ Pl.’s Answer Br. at 36–38.

¹⁶ Pl.’s Answer Br. at 36–37.

¹⁷ Pl.’s Answer Br. at 37.

¹⁸ Pl.’s Answer Br. at 38.

¹⁹ Pl.’s Answer Br. at 38–39.

²⁰ Brief of Amicus Curiae Montana Trial Lawyers Association at 4–6, June 13, 2019, No. OP 19-0085.

challenges to the defense exist: *Newville v. State, Dept. of Family Services*²¹ and *Plumb v. Fourth Judicial Dist. Court, Missoula County*.²² In *Newville*, the Court ruled that apportioning liability to non-parties violated plaintiffs' substantive due process.²³ The Court reasoned that plaintiffs would not receive fair adjudication of their claims because allowing the defense meant plaintiffs had to anticipate defendants implicating non-parties to effectively make their case.²⁴ In *Plumb*, an amended version of the statute was similarly held unconstitutional because it did not allow the unnamed third party to defend itself against defendants' apportionment of liability.²⁵ The Court contended the amendment ignored the central point of *Newville*; any apportionment of liability to a party that did not appear would be an inaccurate reflection of the true degree of that party's fault and thus violate substantive due process.²⁶

Precedent, then, indicates that the Court is hesitant to allow a non-party defense for fear it would affect plaintiffs' and non-parties' due process rights. This worry is substantially backed by reason. Allowing the implication of any non-party precludes injured plaintiffs from collecting the full damages they may be due by law simply because a defendant can point to another party. Such a situation, where a party responsible for the plaintiff's injury may not have to pay full damages, seems diminish the point of bringing a lawsuit for the plaintiff; it makes no sense for the plaintiff to expend resources if their claim can be pushed onto a non-party. Further, if a non-party cannot defend itself, it may be held unfairly liable for something it may not have had a hand in or was involved in to a lesser degree than the defendant asserted. Having to pay damages that may not accurately represent the non-party's responsibility can be financially damaging to the non-party. The Court must decide, considering the interests of plaintiffs and non-parties, whether the 2017 version of the statute addresses these due process concerns.

The 2017 version of the statute still authorizes defendants to assert non-parties are liable by allowing implication of parties with

²¹ 882 P.2d 793, 799 (Mont. 1994).

²² 927 P.2d 1011, 1016 (Mont. 1996).

²³ *Newville*, 882 P.2d. at 803.

²⁴ *Id.* at 802.

²⁵ *Plumb*, 927 P.2d at 1018–19.

²⁶ *Id.* at 1020–21.

whom the claimant has settled or released from liability.²⁷ The language is like that which was found unconstitutional in *Newville* and *Plumb*; the primary difference is the addition of the settled party language.²⁸ Merely adding the settled party language does not seem to solve the issue of ensuring injured plaintiffs can fairly collect damages. A party settling with a plaintiff does not necessarily mean that the plaintiff was able to collect damages from that party. Further, just because a party settled does not mean that it admitted liability. The “settled party defense” thus seems to duplicate exactly what the Court was worried about in *Newville* and *Plumb*: plaintiffs may not be able to fully litigate their claims for damages, and defendants may be unfairly apportioned liability.²⁹ The 2017 version of the statute, however, seems to address the Court’s primary due process concerns in another part.

The 2017 version of the statute allows the non-party to defend itself and, further, allows the plaintiff to answer to the defense.³⁰ The Court noted in *Horn v. Bull River Country Store Properties, LLC*,³¹ that the defect it found in previous versions was the lack of such provisions, which lead juries to apportion inappropriate liability to unrepresented parties. While the Court did not directly address whether these provisions remedied the due process issues, it did seem to imply that their presence would prevent the due process issues of previous versions of the statute.³² Allowing a non-party to defend itself of course eliminates the concern that it previously could not do so. Perhaps more importantly, allowing plaintiffs to answer to the non-party’s defense supports fair adjudication of their claims. When a non-party can present a defense as to why it is not liable, a plaintiff can prepare a case which either rebuts or supports the apportion of liability while having access to the non-party’s information via discovery. As such, there is a fair chance to make the case for damages against all parties. Thus, regardless of whether BNSF properly asserted its defense or Grace qualifies as a settled party, it seems likely that, under the current version of § 27–1–703(6), the Court will find that

²⁷ MONT. CODE ANN. § 27–1–703(6)(a) (2017).

²⁸ *Newville*, 883 P.2d at 804; *Plumb*, 927 P.2d at 1018

²⁹ *Newville*, 883 P.2d at 802; *Plumb*, 927 P.2d at 1020.

³⁰ MONT. CODE ANN. § 27–1–703(6)(f)(ii)–(iii).

³¹ 288 P.3d 218, 222 (Mont. 2012).

³² *Id.*

the “settled party defense” as it now stands does not violate substantive due process.

V. CONCLUSION

Previous iterations of § 27-1-703 have been held unconstitutional for violating the due process rights of plaintiffs and non-parties. The Court was concerned that the statute afforded no opportunity for non-parties to defend themselves in court, requiring that plaintiffs must prove a absent party was not responsible for their injuries in order to collect damages from named parties. However, the 2017 version of the statute addresses the Court’s concerns by allowing non-parties to defend themselves against defendants’ claims and plaintiffs to answer to that defense. This removes the biggest due process concerns by ensuring everyone has a say in court, which makes it likely the Court will allow the “settled party defense.” The Court will thus likely rule this version of § 27-1-703 constitutional, doing so because the legislature has addressed the concerns brought up in *Newville* and *Plumb*.