

Asbestos/Bodily Injury Claims: Montana Supreme Court Addresses Preemption/Strict Liability Issues



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The Montana Supreme Court (“Court”) in a March 11th Opinion addressed issues arising out of asbestos bodily injury claims against BNSF Railway Co. (“BNSF”). See *BNSF Railway Co. v. Eddy*, 2020 WL 1164045 (Mont. 2020).

The issues considered on appeal included:

1. Did the Asbestos Court err by concluding Plaintiff’s claims were not preempted by the Federal Railroad Safety Act (“FRSA”) or the Hazardous Materials Transportation Act (“HMTA”)?
2. Did the Asbestos Court err by concluding BNSF is strictly liable to the Plaintiffs because it engaged in an abnormally dangerous activity?
3. Did the Asbestos Court err by concluding the Restatement (Second) of Torts, § 521 does not shield BNSF from strict liability?
4. Did the Asbestos Court err by holding BNSF was not entitled to offer evidence of W.R. Grace’s conduct to refute causation?

Plaintiffs were citizens of Libby, Montana. The area was a vermiculite mining site location. Vermiculite was mined and processed and the concentrate loaded onto BNSF’s railcars for transport.

BNSF’s railyard was located in downtown Libby. Its tracks ran through town.

The plaintiffs complained that industrial activity at BNSF facilities cast asbestos dust into the Libby community.

The parties filed in 2018 cross motions for summary judgment based on the issues of preemption of plaintiffs’ claims, BNSF’s strict liability, and the preclusion of BNSF’s defense of non-party conduct. The Asbestos Court granted plaintiffs’ motion in part concluding claims were not preempted by federal law, BNSF was strictly liable because its actions were abnormally dangerous, and BNSF could not present evidence of non-party conduct to negate causation.

BNSF filed a petition for writ of supervisory control to the Montana Supreme Court (“the Court”).

Regarding Issue (1) the Court noted that there is precedent for a strong presumption against preemption. However, even without the application of such presumption, the Court held it would still find that BNSF did not meet its burden of proving FRSA or HMTA preempted the claims.

The Court found that there was no FRSA preemption, because BNSF could not establish that FRSA's regulations substantially subsumed the subject matter of the claims.

Similarly, BNSF could not establish that the HMTA substantially subsumed the claims because it does not include ore containing asbestos as hazardous materials. Further, the Court found that the HMTA's language does not indicate that a jury's finding that BNSF mishandled vermiculite ore would be in conflict with federal law.

The Court then considered in Issue (2) whether strict liability applied due to BNSF having engaged in abnormally dangerous activity. It addressed the following factors:

- Existence of a high degree of risk of some harm to the person, land or chattels of others;
- Likelihood that the harm that results from it will be great;
- Inability to eliminate the risk by the exercise of reasonable care;
- Extent to which the activity is not a matter of common usage;
- Inappropriateness of the activity to the place where it is carried on; and
- Extent to which its value to the community is outweighed by its dangerous attributes.

The Court determined that every factor weighed in favor of holding BNSF strictly liable except for the fourth factor regarding common usage. It determined this factor weighed in favor of BNSF because the mined products were being provided to a wide range of individuals across the country. Therefore, the activity was common usage. However, that factor was not enough to outweigh each other factor weighing in favor of imposing strict liability against BNSF – especially the final factor, which weighed heavily in favor of strict liability.

In its discussion of Issue (3), the Court agreed with BNSF. It held that the Court should adopt the Restatement (Second) of Torts, § 521, to the extent that it provides:

... “[t]he 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 on the actor ... as a common carrier.”

Nevertheless, the Court determined that BNSF's activities other than transportation of vermiculite are not protected by the common carrier exception. The Court remanded this issue to determine which, if any, of BNSF's other activities were not undertaken pursuant to its statutory duty.

Finally, in its discussion of Issue (4), the Court determined that the Asbestos Court did not err by holding that BNSF was not entitled to offer evidence of W.R. Grace's (Grace) conduct to refute causation. The Court came to this conclusion based on two findings.

First, the Court held that BNSF may only use evidence of Grace's conduct as a nonparty for the purpose of proving Grace's conduct was a superseding intervening cause of the plaintiffs' injuries. Second, the Court held that Grace's conduct was not a superseding an intervening cause, because BNSF and Grace were acting contemporaneously on activities that allegedly caused plaintiffs' injuries.

For these reasons, the Court affirmed issues (1), (2), and (4). The Court reversed Issue (3) in part and remanded to determine which, if any, of BNSF's other activities were not undertaken pursuant to its statutory duty. Those actions would be subject only to claims for ordinary negligence.

A copy of the Opinion can be downloaded [here](#).