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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: OP 19-0051

OP 19-0051

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 70

MARYLAND CASUALTY COMPANY,

Petitioner,

v.

THE ASBESTOS CLAIMS COURT, and THE HONORABLE AMY EDDY, Asbestos Claims Court Judge,

Respondent.

ORIGINAL PROCEEDING: Petition for Writ of Supervisory Control
In and For the County of Cascade,
Cause No. AC-17-0694
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Petitioner:

Daniel W. Hileman, Kaufman Vidal Hileman Ellingson, P.C., Kalispell, Montana

Edward J. Longosz, II, (argued), Mark A. Johnston, Kennedy C. Ramos, Eckert Seamans Cherin & Mellott, LLC, Washington, District of Columbia

For Respondent:

Amy Eddy, Asbestos Claims Court Judge, Kalispell, Montana

Allan M. McGarvey, (argued), Dustin Leftriddge, McGarvey, Heberling Sullivan & Lacey, PC, Kalispell, Montana
(for Plaintiff and Respondent Ralph V. Hutt)

Amicus Curiae:

Maxon R. Davis, (argued), Davis, Hatley, Haffeman & Tighe, P.C., Great Falls, Montana

Argued and Submitted: August 14, 2019

Decided: March 25, 2020

Filed:

Clerk

Justice Dirk M. Sandefur delivered the Opinion of the Court.

¶1 We previously assumed supervisory control over proceedings pending before the Montana Asbestos Claims Court in the matter of *In re Asbestos Litigation*, Consolidated Case No. AC-17-0694, as applicable to *Hutt v. Maryland Casualty Co.*, Cause No. DDV-18-0175, Montana Eighth Judicial District Court.[1] We now address on extraordinary review the assertion of Petitioner-Defendant Maryland Casualty Company ("MCC") that the court erroneously concluded that MCC owed a duty of care to warn third-party employees of its insured (W.R. Grace and Company ("Grace")) of a known risk of airborne asbestos exposure in or about Grace facilities in and about Libby, Montana, between 1963 and 1970. We restate the dispositive issue as:

> *Whether the Asbestos Court erroneously concluded that MCC had a common law duty to warn third parties of a known risk of harm caused by the conduct of its insured based merely on foreseeability of harm and related public policy?*

¶2 We reverse and remand for further proceedings in accordance with this opinion.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Vermiculite is a hydrous silicate mineral naturally occurring in asbestos-laden rock on Vermiculite Mountain in the Rainy Creek drainage of the Kootenai Forest about seven miles northeast of Libby, Montana. When heated, vermiculate expands and puffs

[1] By order filed February 19, 2019, we assumed supervisory control on MCC's petition, stayed proceedings below, and ordered full briefing. Plaintiff Ralph Hutt was originally one of 884 plaintiffs in *Adams, et al. v. Maryland Casualty Co.*, No. DDV-16-0786, Montana Eighth Judicial District Court. Upon assuming jurisdiction over that matter in Consolidated Case No. AC-17-0694, the Asbestos Court selected the *Hutt* case as the lead case for guiding litigation and directed the filing of a separate complaint instituting the particular litigation (*Hutt v. Maryland Casualty Co.*, No. DDV-18-0175, Montana Eighth Judicial District Court) from which this controversy arises.

(exfoliates) like popcorn. Exfoliated vermiculite has extraordinary thermal qualities useful for insulation, fire-proofing, and other commercial purposes. In the early 1920s, upon recognition of the economic potential of vermiculite and acquiring the mineral rights to large deposits on the top of Vermiculite Mountain, Edward Alley formed the Mineral Carbon and Insulating Company (rebranded as the Zonolite Company in 1923), which thereafter commenced large-scale vermiculite mining and processing operations in the Libby area. Grace acquired the Zonolite Company[2] in 1963 and continued its vermiculite mining and processing operations under Grace's Zonolite Division until ceasing Libby area operations in 1990.

Overview of Grace Vermiculite Extraction and Refining Process

¶4 Zonolite/Grace extracted vermiculite ore from the mountaintop mine site using various open-pit mining techniques. It trucked the extracted ore a short distance to an adjacent reduction mill facility located below the mine site. The processed vermiculite concentrate was then transported down the mountain from the mill to a screening/loading facility site that straddled the Kootenai River near Highway 37.

¶5 At the mountainside mill, trucks dumped raw vermiculite ore into a large hopper. The ore passed through steel "grizzly" bars on the top of the hopper to separate out large waste rock. The ore then passed through a mechanical shaker-screen in the hopper to

[2] The original Zonolite Company merged with the Universal Insulation Company in 1939 to form the Universal Zonolite Insulation Company. In 1948, Universal Zonolite Insulation Company merged with the Vermiculite and Asbestos Company to reform as the Zonolite Company. *W. R. Grace File Review Summary: Chronological Order of Events*, Mont. Dep't of Envtl. Quality, https://perma.cc/85N3-M4YD, and of record *In re Asbestos Litigation*, Consolidated Case No. AC-17-0694.

screen out additional waste rock. From approximately 1922-1954, the hopper-screened ore passed through a dry-mill process that used series of mechanical screening operations to further breakdown the ore and separate the vermiculite from waste slag. In 1954, Zonolite Company added a preliminary open wet-mill process that used a series of wet mechanical screening operations to produce a mill mix for further processing through the original dry mill. The original wet- and dry-mill processes operated in tandem until 1974 when Grace replaced both with a new closed wet-milling process. Prior to installation of the closed wet-milling process in 1974, the mill operations produced a great deal of asbestos-laden airborne dust in and about the facility. The extent to which the subsequent processing and handling of milled concentrates generated additional asbestos dust is unclear on the record.

¶6 At the Kootenai River screening/loading facility, Zonolite/Grace screened out different sizes/grades of milled vermiculite concentrate and temporarily stored them in large metal silos on the highway side of the river. For rail transportation, a conveyor system transported milled concentrates from the storage silos across the river to a rail car loading facility on a GN/BNSF rail spur line.[3] The loading facility loaded the bulk of the screened vermiculite concentrates into open rail cars for transportation to the Libby rail yard, train staging, and bulk shipment to vermiculite expanding/exfoliation plants around the country. Zonolite/Grace also shipped smaller quantities of vermiculite concentrate by truck or rail from the screening/loading facility to its 19-acre export area site in downtown Libby.

[3] The Great Northern Railroad, and its successors (Burlington Northern Railroad, Burlington Northern Santa Fe Railroad, and BNSF Railway Company), owned and operated the Libby rail yard and involved rail lines at all times pertinent.

¶7 At the Libby export facility site, Grace operated a heat-processing exfoliation facility from 1963-1969 that converted vermiculite concentrate into an end-use Zonolite product.[4] Also present on the export area site were various offices, a bagging facility, temporary storage facilities, and related operation areas. The bagging facility bagged exfoliated Zonolite product (1963-1969) and vermiculite concentrates (1963-1990) for special order shipments.

Co-Occurrence of Vermiculite and Amphibole Asbestos—Resulting Risk

¶8 Though not all vermiculite naturally occurs with asbestos, the United States Geological Service ("USGS") reported in 1929 that the vermiculite found on Vermiculite Mountain naturally occurs in rock mixed with amphibole asbestos.[5] Based on the silicate nature of vermiculite and co-occurrence of hazardous asbestos, the Industrial Hygiene Division of the Montana Board of Health regularly conducted industrial hygiene inspections and studies at Zonolite/Grace facilities in the Libby area. In the period of 1956-1963, various Board of Health studies repeatedly reported that excessively high levels of airborne dust in or about the Zonolite/Grace facilities and operations, particularly the mill facility, created a significant risk of silicosis and asbestos-related disease to

[4] It is unclear on the limited record when Zonolite first conducted expansion/exfoliation processing in Libby—apparently sometime in the late 1940s or 1950s. Grace continued the preexisting exfoliation facility in operation on the Libby export area site until 1969.

[5] J.T. Pardee & E.S. Larsen, *Deposits of Vermiculite and Other Minerals in the Rainy Creek District, Near Libby, Montana*, United States Geological Services Bulletin 805, 17-28 (1920). *See also Progress Report on Geologic Investigations in the Kootenai-Flathead Area, Northwest Montana*, Montana Bureau of Mines, Bulletin 12, 38-39 (July 1959).

exposed workers.[6] Despite warnings and dust control recommendations in earlier Board of Health reports since at least 1956, the 1962 report noted Zonolite's continuing disregard of the Board's recommendations. From 1963-1974, Board of Health inspectors continued to regularly inspect and report to Grace on the ongoing asbestos-related disease hazard caused by the high levels of asbestos-laden dust in and about its Libby area facilities and operations.

MCC Involvement as a Workers' Compensation Insurer

¶9 From 1963-1973, Grace acquired statutorily required workers' compensation insurance coverage for its Zonolite Division operations from MCC. *Inter alia*, Grace's MCC workers' compensation insurance policy included the following limiting language regarding MCC's right and role in conducting related inspections of Grace's Zonolite Division facilities and operations:

> We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may give you reports on the conditions we find. We may also recommend changes. While they may help reduce losses, 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. Insurance rate service organizations have the same rights we have under this provision.

MCC conducted its first site inspection of Grace's Libby area Zonolite Division facilities and operations in July 1964. In accordance with the foregoing policy language, MCC was

[6] Quoting Phillip Ellman, *Pulmonary Asbestosis*, XV J. of Indus. Hygiene 165 (July 1933), the 1959 Board of Health report noted that "[i]nhalation of asbestos dust must be expected sooner or later to produce pulmonary fibrosis . . . . Pulmonary asbestosis, once established, is a progressive disease with a bad prognosis; its treatment can only be symptomatic."

thereafter actively involved in inspecting, monitoring, and consulting with Grace regarding the ongoing asbestos dust problem in and about its Libby area facilities and operations.

¶10 The available documentary record from 1963-1973, as supplemented by the deposition record in this case, clearly indicates that the asbestos dust hazard in and about Grace's Libby area facilities and operations was an ever-present concern to Grace, MCC, and other involved government and private entities and individuals from 1963 forward.[7] Grace repeatedly received and considered dust hazard notices, warnings, and recommendations from the Montana Board of Health and other government and private entities including MCC. Grace continued the practice, started by Zonolite Company in 1956 and expanded in 1959, of requiring pre-employment physical examinations, with chest x-ray screening, of Zonolite Division workers for adverse lung conditions and respiratory ailments. In addition to the information and assistance provided by the Montana Board of Health, MCC, and others, Grace independently conducted its own workplace air quality monitoring/sampling and safety inspections between 1963 and 1974.

¶11 In August 1964, a Libby doctor (Dr. Woodrow Nelson) wrote to Grace advising of his observation and concern that Grace workers were developing adverse lung conditions associated with workplace asbestos exposure. Grace acknowledged Nelson's concern and advised that it had referred his report to its workers' compensation insurance carrier (MCC)

[7] In addition to available documentary evidence, Grace's designated M. R. Civ. P. 30(b)(6) ("Rule 30(b)(6)") representative testified that dust was a "grave concern" at the Zonolite mill throughout the period of 1964-1969.

for medical review and consideration.[8] Grace further advised Nelson that it was "definitely interested in the welfare of its employees" and that MCC would be "formulating a program for [hazardous dust] control and prevention" at Zonolite Division facilities. Internal MCC correspondence from September 14, 1964, indicates that, upon receipt of Dr. Nelson's report, MCC referred the report, together with its Accident Prevention Department/Engineering Division file regarding Grace's Libby operations, to MCC's Medical Director (Dr. Robert Chenowith). The next day, MCC notified Grace's procuring insurance agent that the Zonolite Division "dust problem has been referred to our Engineering Division and they in conjunction with our Medical Division are presently formulating a program for control and prevention."

¶12 On September 24, 1964, the assigned MCC Accident Prevention Department/Engineering Department Supervisor (Larry Park) corresponded with his supervisor (W.C. Trimmer) regarding MCC's "proposed safety program" for Grace's Zonolite operations. In reference to the then underway drafting of the proposed program by another MCC official or agent, Park outlined various dust control measures that he recommended for inclusion in the program. *Inter alia*, the internal correspondence noted that the anticipated:

> aim [of] the program will be to see that everything practical is done to control dust, protect personnel who are exposed to dust which cannot be controlled, and follow through with periodic [x]-rays of persons exposed to discover any incidents of lung damage or fibrous growth in the lung which may decrease breathing function.

[8] An internal Grace document, dated August 31, 1964, noted that Dr. Nelson had "potentially uncovered a potential health problem at the Libby mine and mill which could increase our insurance costs and endanger our employees."

The correspondence further noted MCC's desire to have the program "utilize local health authorities . . . [and] their records" regarding lung hazards and "to investigate" whether Grace "operations are in conformity with" prior inspections and recommendations made by the Montana Bureau of Mines. Subsequent internal correspondence, dated October 7, 1964, indicated MCC's internal expectation that "the contemplated program" for "prevention and control of dust conditions . . . will be most comprehensive[,] covering all phases of accident prevention as well as industrial hygiene as they relate to [Grace's] Zonolite operations."

¶13 Viewed in the light most favorable to Hutt, the evidentiary record indicates that, in consultation and cooperation with Grace and based on industry standards specified by third-party authorities, MCC ultimately produced a proposed dust control and safety program for consideration and implementation by Grace. The program included recommended: (1) dust control and prevention measures; (2) monitoring and evaluation of worker lung conditions; (3) development and implementation of workplace safety measures; and (4) measures for administration of workers' compensation and occupational disease claims. While it is unclear on the record presented to what extent Grace actually implemented all of MCC's recommendations, the record clearly indicates that Grace subsequently expanded its employee health screening program in 1964 to further require annual x-ray screening of all Zonolite Division employees and to provide for more frequent x-ray screening of selected employees on a discretionary case basis. MCC asserts that Grace made the results of its employee x-ray screening available to each employee's

personal physician and counseled employees to consult with their respective physicians regarding the results.[9] MCC further asserts that, in 1970, Grace instituted post-screening meetings with individual employees to directly advise them of their x-ray screening results and recommend further medical evaluation.[10] However, documentary evidence indicates that Grace specifically rejected MCC's recommendation, based on contemporary industry standards for asbestos-laden dust, that Grace establish and maintain workplace dust levels at no more than 5 million particles per cubic foot (5 mppcf). In internal correspondence, a Grace Zonolite Division Manager explained that:

> For our own purposes, we have voluntarily set our standards at 10 mppcf total dust. . . . I can see no reason for further limitations . . . . [MCC's] recommendations are unreasonable and impossible and unnecessary.

¶14 Manifesting both parties' specific awareness of the asbestos dust hazard, the MCC-Grace workers' compensation insurance policy included a special asbestosis coverage endorsement. Incident to the provision of general and special workers' compensation insurance coverage to Grace, MCC also provided substantial risk management support and guidance to Grace from 1963-1974 including: (1) the assignment of various personnel (i.e., Park, Chenowith, and two safety/loss control inspectors) to investigate, monitor, and report on the problem; (2) recommendation of a related workplace

[9] In correspondence following an on-site inspection in 1966, MCC's assigned Accident Prevention Supervisor (Park) commended Grace for its implementation of certain aspects of the new dust control/safety plan previously recommended by MCC. In 1967, Park again positively noted Grace's implementation of various recommended dust control measures.

[10] Hutt no longer worked for Grace at the time it purportedly instituted post-screening meetings with individual employees.

safety program for implementation by Grace; and (3) consulting medical review of worker x-ray screens thereunder, with recommendation for additional x-ray monitoring of specific employees on a case basis. In addition to consideration of Dr. Nelson's report to Grace, Dr. Chenowith reviewed the Grace-required x-ray screens/surveys of Zonolite Division workers and, on at least one occasion, forwarded them to an independent medical expert (Dr. William S. Spicer of the University of Maryland Medical School) who concurred in the asbestosis hazard.[11] From 1964 forward, MCC conducted quarterly on-site inspections of Zonolite Division facilities and operations due to its awareness of the "unusually high incidence (approximately one-third) of basilar fibrosis" observed in the 1959 x-ray screening of Zonolite Company employees and similar observation in 1964 of "important increases" in "inciden[ce] of chronic respiratory disease . . . in Zonolite employees who had prolonged exposure to dust."[12]

¶15 Internal MCC documents from the period of 1966-1967 further manifest the state of MCC's knowledge and awareness of the asbestos dust hazard in Grace's Zonolite operations. A September 7, 1966 communication from MCC Accident Prevention Supervisor Park expressed continuing concerns regarding the results of the x-ray monitoring of Grace workers from 1965-1966. In November 1967, in an internal MCC

[11] Upon review of Zonolite employee x-ray screens forwarded by Dr. Chenowith, Dr. Spicer opined that the ongoing dust exposure in the Zonolite Division workplace and resulting adverse effects on workers was an "important health problem" likely to be twice as pervasive as then-indicated on the limited data available.

[12] On each occasion, MCC loss control inspectors met with Grace management personnel, toured the facilities, and provided oral and written risk management recommendations.

memorandum regarding a workers' compensation claim pending against Grace, assigned insurance defense counsel noted the ongoing health hazard resulting from Grace's inability or unwillingness to reduce asbestos-laden dust levels at the Zonolite mill below the recommended industry standard of 5 mppcf. Counsel further noted Grace's disregard of the significant body of information about the risk "furnished by" State Board of Health reports between 1956 and 1963[13] and counsel's only recent awareness of the high incidence of significant "lung abnormalities" found in ongoing chest x-ray screening of Zonolite Division employees since 1963-1964. Counsel noted that the extent and severity of the asbestos-related adverse health effects on Grace workers would make it "necessary to expose the entire situation to the Industrial Accident Board, whose records may well be available to unions and the general public."[14] Counsel thus recommended that MCC and Grace settle the claim to avoid "the necessity of expos[ing] of all of the more damaging aspects of our own situation."

¶16 The documentary record further manifests that MCC was also contemporaneously aware that on-site testing by the U.S. Department of Public Health indicated that the asbestos fiber content airborne dust at the Zonolite mill was between 60-80%—a level significantly higher than the limit deemed safe by that agency. The record indicates that

[13] Counsel stated further that "it has even occurred to me that [Grace's] inability to curb the problem at the State Board's recommendations through the years, might be alleged at least to have constituted willful and wanton conduct on its part."

[14] Counsel further observed that it "now must be considered" that the facts that "a great many of [Grace] employees suffer from lung abnormalities and [that] a good many of them have probably never been in the mill . . . means that they are contracting the disease in the yard or in fact at any point where a dust condition may exist."

MCC was aware of a similar finding in a Montana Board of Health study. MCC documents indicate that it was specifically aware that asbestos-laden dust levels at the Zonolite Division mill continued to exceed industry standards throughout the period of 1967-1969.

¶17 Through its corporate representative designated in this case pursuant to M. R. Civ. P. 30(b)(6), MCC acknowledged and admitted that warnings to employees of workplace hazards, particularly latent health hazards, should have been an essential element of any workplace safety program that would comply with generally accepted industrial hygiene standards. In that vein, there is no record evidence that, prior to 1972, MCC ever recommended that Grace in any manner warn Zonolite Division employees of the health hazard posed by exposure to asbestos-laden dust in Zonolite Division workplaces. It is undisputed that MCC made no independent effort to warn Grace workers of the asbestos dust hazard in and about Grace's Libby area facilities and operations.

Ralph Hutt's Experience at Grace and Claims Against MCC

¶18 Ralph Hutt worked in Grace's Zonolite Division for approximately 18 months in 1968-1969. He worked at the mountainside mill but also "ran the transfer point" and operated equipment at the mine site near the waste dump. Hutt gave unrebutted testimony that a Grace supervisor provided him a paper respirator/mask that he could "wear if [he] wanted or not" because "it was just dust" and would not hurt him. He testified further that he requested that Grace equip him with a safer air respirator, but that Grace denied the request. The evidentiary record indicates that Hutt first experienced respiratory problems

in 1990 while working at altitude as a logger. He testified that respiratory difficulty ultimately forced him to leave that job.

¶19 In October 1969, after review of forwarded radiological reports regarding Grace workers, MCC recommended that Grace increase the x-ray screening frequency of sixty employees, including Hutt, from once a year to every six months to better track their progression of respiratory disease. The typewritten MCC recommendation included a handwritten note to Grace's safety administrator that "all of these men have fibrotic changes" but can "safely" continue working if protected "against high dust concentrations"—"our criteria for [dust] control by respirator protection" must be 5 mppcf. However, Grace's safety administrator rejected MCC's recommendation, stating:

> I question the idea of a repeat [x]-ray examination in six months of the sixty employees listed in your letter. . . . The best approach to the overall problem, I think, is one of dust control.

The Grace official further reasoned that "there have been no [substantial] changes since the previous [x]-ray," only one of the sixty employees was "strongly suspected" of an actual increase of disease, and, given the slow progression rate of the disease, "how much change can there possibly be and how much can we learn in a six-month interval?" The Grace official further stated that, even if x-rays showed a negative change, Grace had no dust-free jobs and could not just terminate the listed employees for that reason.

¶20 Hutt recalls undergoing a Grace-directed chest x-ray before his hiring and another prior to leaving his employment. He has no recollection, however, of Grace ever informing him of the results of those x-rays or any indication of an asbestos related disease. Hutt

alleges his workplace exposure to asbestos dust during his 18-month term of employment caused him to suffer an incurable asbestos-related respiratory disease. He subsequently asserted various claims for relief against MCC including negligent causation of workplace injury and various tort claims singularly characterized by the Asbestos Court as a common law insurance bad faith claim.

¶21 Following substantial discovery, the parties filed cross-motions pursuant to M. R. Civ. P. 56 regarding Hutt's negligence and common law bad faith claims. In response, MCC asserted that: (1) Hutt's common law bad faith claim was insufficient as a matter of law on the Rule 56 record; (2) the applicable three-year statute of limitations[15] time-barred the negligence claim; and (3) MCC in any event owed no duty of care to protect Hutt against injury caused by the conduct of Grace. Upon consideration of the parties' cross-motions, the Asbestos Court ultimately granted MCC summary judgment on Hutt's insurance bad faith claim based on the fact that he never asserted a predicate workers' compensation claim. On the stated ground that genuine issues of material fact remained "as to when Hutt, in the exercise of due diligence, knew or should have discovered that he had an asbestos[-]related disease," the Court denied both parties summary judgment on whether the applicable statute of limitations time-barred the negligence claim. However, on the stated ground that MCC owed him and other Grace workers a legal duty of care based on foreseeability of the risk of harm and related public policy considerations, the court granted Hutt summary judgment on the duty element of his negligence claim. We

[15] Section 27-2-204, MCA.

previously assumed supervisory control and now address MCC's assertion of error regarding the duty element of the negligence claim.

STANDARDS OF REVIEW

¶22 We review summary judgment rulings de novo for conformance to M. R. Civ. P. 56. *Dick Anderson Constr., Inc. v. Monroe Prop. Co.*, 2011 MT 138, ¶ 16, 361 Mont. 30, 255 P.3d 1257. Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3). The questions of whether a genuine issue of material fact exists or whether a party is entitled to judgment as a matter of law are conclusions of law subject to de novo review for correctness. *Dick Anderson Constr.*, ¶ 16.

DISCUSSION

¶23 *Whether the Asbestos Court erroneously concluded that MCC had a common law duty to warn third parties of a known risk of harm caused by the conduct of its insured based merely on foreseeability of harm and related public policy?*

¶24 In denying MCC summary judgment on the duty element of Hutt's negligence claim, the Asbestos Court concluded that:

> under circumstances where a workers' compensation insurer has developed a Safety Program, of which a duty to warn employees of hazards is an essential component; and through its own affirmative action of engaging in medical monitoring of workers has actual knowledge a known hazard is injuring workers, the workers' compensation insurer has a common law duty to warn workers of the hazard.

MCC asserts there is no common law duty to warn another of a risk of harm directly caused by a third party based merely on foreseeability of harm and related public policy. In the absence of a special relationship giving rise to a special duty of care, MCC asserts that no

special duty to warn another of a foreseeable risk caused by a third party exists except under the criteria specified in Restatement (Second) of Torts § 324A (Am. Law Inst. 1965). MCC accordingly asserts that it is entitled to judgment as a matter of law on the duty element of Hutt's negligence claim because none of the special circumstances giving rise to a special duty of care under Restatement § 324A are present on the Rule 56 factual record in this case. Hutt contrarily asserts that the Asbestos Court correctly concluded that MCC owed him and other Grace workers a duty of care based on the foreseeability of harm and related public policy considerations. He asserts that application of Restatement § 324A is unnecessary and contrary to existing Montana law. As a fallback, he asserts that the Court's ruling was consistent with Restatement § 324A in any event.

¶25 As reflected in early Montana statutes[16] and except as otherwise provided by statute, negligence is a common law cause of action or claim for relief. *See Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99-100 (N.Y. 1928); *Beinhorn v. Griswold*, 27 Mont. 79, 90, 69 P. 557, 559 (1902) (noting that § 2296 Civ. C. 1895 was merely "declaratory of the common law"); W. Page Keeton et al., *Prosser & Keeton On The Law Torts* §§ 28, 30 at 160-61, 164-65 (5th ed. 1984). *Accord Bassett v. Lamantia*, 2018 MT 119, ¶ 24, 391 Mont. 309, 417 P.3d 299 (noting that §§ 27-1-701 and 28-1-201, MCA, "are consistent with" the common law duty of reasonable care). The essential elements of a negligence claim are: (1) a legal duty owed by the tortfeasor to the claimant; (2) breach of that duty;

[16] In 1895, Montana codified 1865 formulations of common law duty and negligence theory from earlier California enactments of David Dudley Field's proposed, but never-enacted, New York Civil Code (1865). *See, e.g.*, §§ 1-1-204(4) , 27-1-317, 27-1-701, and 28-1-201, MCA.

(3) harm caused by the breach; and (4) resulting damages. *Krieg v. Massey*, 239 Mont. 469, 472, 781 P.2d 277, 278-79 (1989). The issue here is whether MCC owed a common law duty of care to Hutt and other Grace employees regarding the risk of asbestos-related disease caused by vermiculite mining and processing operations conducted by Grace in its Libby area facilities and operations.

General Common Law Duty of Reasonable Care

¶26 The predicate legal duty for a negligence claim may arise from statutory or common law. *See* §§ 1-1-105, -107, -108, and -109, MCA; *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 16, 342 Mont. 335, 181 P.3d 601; *Prindel v. Ravalli County*, 2006 MT 62, ¶ 29, 331 Mont. 338, 133 P.3d 165. Apart from duties imposed by statute, statutory and common law authorities recognize that all individuals generally have a common law duty to use reasonable care under the circumstances to avoid reasonably foreseeable risks of harm to the person or property of others. *See* §§ 1-1-204(4), 27-1-317, 27-1-701, and 28-1-201, MCA; *Bassett*, ¶¶ 23-24; *Fisher*, ¶ 16; *Jackson v. William Dingwall Co.*, 145 Mont. 127, 135, 399 P.2d 236, 240 (1965). More particularly, however, reasonable care under the circumstances is the general *standard* of duty of care owed when one owes a common law duty of care to another under the circumstances of a particular case. *See Fisher*, ¶ 16; *Prindel*, ¶¶ 35-42; *Lopez v. Great Falls Pre-Release Servs., Inc.*, 1999 MT 199, ¶¶ 24-31, 295 Mont. 416, 986 P.2d 1081; Keeton et al., *supra*, § 56, at 377. The more fundamental question in every negligence case is whether the alleged tortfeasor owed a legal duty of care to the claimant(s) under the particular circumstances of that case, as a threshold matter

of law. *Bassett*, ¶ 10; *Lopez*, ¶ 18; *Nautilus Ins. Co. v. First Nat'l Ins., Inc.*, 254 Mont. 296, 298-99, 837 P.2d 409, 411 (1992); *Roy v. Neibauer*, 191 Mont. 224, 226, 623 P.2d 555, 556 (1981); *Mang v. Eliasson*, 153 Mont. 431, 434-39, 458 P.2d 777, 779-82 (1969); *Kakos v. Byram*, 88 Mont. 309, 317, 292 P. 909, 911 (1930).

¶27 One generally owes a common law duty of care to another in a particular case only if the harm at issue is of a type reasonably foreseeable under the circumstances and, if so, imposition of such duty and liability comports with public policy under those circumstances. *Prindel*, ¶¶ 36-42; *Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 360-72, 916 P.2d 122, 133-40 (1996) (generally confining foreseeability of harm to consideration of duty except for jury consideration of independent intervening or superseding causation); *Mang*, 153 Mont. at 434-39, 458 P.2d at 779-82; *Palsgraf*, 162 N.E. at 99-100.[17] The harm at issue in a particular case is or was of a type reasonably foreseeable under the circumstances only if it occurs or occurred within the scope or zone of the risk of direct harm to other persons or property reasonably likely to result from the subject conduct under the circumstances at issue. *Gourneau ex rel. Gourneau v. Hamill*, 2013 MT 300, ¶ 12, 372 Mont. 182, 311 P.3d 760; *Emanuel v. Great Falls Sch. Dist.*, 2009 MT 185, ¶ 13,

[17] *Accord Grizzly Sec. Armored Express, Inc. v. Bancard Servs.*, 2016 MT 287, ¶ 57, 385 Mont. 307, 384 P.3d 68; *Newman v. Lichfield*, 2012 MT 47, ¶ 31, 364 Mont. 243, 272 P.3d 625; *Fisher*, ¶ 17; *Henricksen v. State*, 2004 MT 20, ¶ 21, 319 Mont. 307, 84 P.3d 38; *LaTray v. City of Havre*, 2000 MT 119, ¶¶ 17-28, 299 Mont. 449, 999 P.2d 1010; *Lopez*, ¶ 28; *Estate of Strever v. Cline*, 278 Mont. 165, 173-75, 924 P.2d 666, 670-71 (1996); *Maguire v. State*, 254 Mont. 178, 189, 835 P.2d 755, 762 (1992); *Phillips v. City of Billings*, 233 Mont. 249, 253, 758 P.2d 772, 775 (1988). *See also Bassett*, ¶¶ 23-24 (applying foreseeability of harm and public policy analysis in conjunction with consideration of application of common law public duty doctrine).

351 Mont. 56, 209 P.3d 244; *Fisher*, ¶¶ 21-26; *Prindel*, ¶¶ 34-43; *LaTray*, ¶¶ 24-26; *Lopez*, ¶¶ 26-31; *Mang*, 153 Mont. at 437-38, 458 P.2d at 781; *Palsgraf*, 162 N.E. at 99-100. Under this standard, harm may be reasonably foreseeable regardless of the foreseeability of the precise harm, injured party, or mechanism or sequence of injury that actually occurred. *Fisher*, ¶¶ 21-26; *Mang*, 153 Mont. at 437-48, 458 P.2d at 781. If the harm at issue was of a type reasonably foreseeable under the circumstances, the existence of a legal duty then generally depends on consideration of relevant public policy considerations. *Fisher*, ¶ 17; *Estate of Strever*, 278 Mont. at 173, 924 P.2d at 670; *Maguire*, 254 Mont. at 189, 835 P.2d at 762.[18] Threshold questions regarding the existence and scope of legal duty in a particular case are generally questions of law for judicial determination. *Bassett*, ¶ 10 (citing *Massee v. Thompson*, 2004 MT 121, ¶ 27, 321 Mont. 210, 90 P.3d 394); *Henricksen*, ¶ 21; *Busta*, 276 Mont. at 360-72, 916 P.2d at 133-40; *Nautilus Ins. Co.*, 254 Mont. at 299, 837 P.2d at 411; *Roy*, 191 Mont. at 226, 623 P.2d at 556; *Kakos*, 88 Mont. at 317, 292 P. at 911.

General Limitation and Special Extensions of Common Law Duty in re Harm Caused by Others

¶28 Even when harm to another may be of a type reasonably foreseeable and public policy would otherwise support a finding of duty, the common law has historically

[18] In the absence of a pertinent legislative determination of public policy, relevant public policy considerations include the: (1) extent of "moral blame" or fault reasonably assignable to the conduct at issue; (2) degree of risk of harm under similar circumstances; (3) resulting burden or societal consequences; and (4) availability and cost of insurance to cover the risk involved. *Phillips*, 233 Mont. at 253, 758 P.2d at 775.

distinguished between liberal imposition of liability for harm to others directly caused by an individual's own intentional, reckless, or negligent acts or omissions and the more limited liability for harm to others directly caused by the tortious conduct of third parties beyond the first party's control. *See* Keeton et al., *supra* § 56, at 373-85; Restatement (Second) of Torts §§ 314 and 315. *Accord* Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 37 (Am. Law Inst. 2012).[19] Based on this historical distinction, there is generally no common law duty to protect others from risks of harm directly caused or created by third parties unless a qualifying special relationship or affirmative undertaking existed or occurred under the circumstances at issue. *See Lokey v. Breuner*, 2010 MT 216, ¶¶ 9-17, 358 Mont. 8, 243 P.3d 384; *Prindel*, ¶¶ 34-36; *LaTray*, ¶¶ 23-26; *Lopez*, ¶¶ 24-26; *Nelson v. Driscoll*, 1999 MT 193, ¶ 37, 295 Mont. 363, 983 P.2d 972; *Krieg*, 239 Mont. at 472, 781 P.2d at 279; Restatement (Second) of Torts §§ 314, 314A, 315-20, 323, and 324A; Keeton et al., *supra* § 56, at 373. *Accord* Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 37.[20] Thus, in the case of risks of harm to others directly caused by third

[19] The apparent policy rationale for this historical distinction is that the former subjects injured parties to new risks of harm under the circumstance while the latter merely deprives injured parties of secondary aid from others. *See* Keeton et al., *supra* § 56, at 373.

[20] The traditional limitation on liability for the tortious acts of third parties does not apply where the alleged negligence is the direct cause of the harm at issue. *See, e.g.*, *Gatlin-Johnson ex rel. Gatlin v. City of Miles City*, 2012 MT 302, ¶¶ 12-23, 367 Mont. 414, 291 P.3d 1129 (finding public duty doctrine inapplicable and applying general rule of premises liability in conjunction with foreseeability of harm and related public policy analysis); *W. Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶¶ 31-46, 359 Mont. 34, 249 P.3d 35 (CPA duty of care to third party in re client financial audit); *Stanley L. & Carolyn M. Watkins Trust v. Lacosta*, 2004 MT 144, ¶¶ 22-23, 321 Mont. 432, 92 P.3d 620 (attorney duty of care to third-party will/trust beneficiaries); *Glacier Tennis Club at the Summit, LLC v. Treweek Constr. Co.*, 2004 MT 70, ¶ 23, 320 Mont. 351, 87 P.3d 431 (architect/engineer duty to third-party contractor) *overruled in part on other grounds by Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 21, 336 Mont. 105, 152 P.3d 727; *Turner v. Kerin*

parties beyond the control of the alleged tortfeasor,[21] the threshold question of whether the alleged tortfeasor owed a common law duty of care in a particular case depends on whether: (1) a qualifying special relationship or affirmative undertaking existed or occurred under the circumstances at issue; (2) the harm at issue was of a type reasonably foreseeable under the circumstances; and (3) imposition of liability comports with public policy under the circumstances. *See Emanuel*, ¶¶ 12-16; *Prindel*, ¶¶ 34-42; *LaTray*, ¶¶ 23-26; *Lopez*, ¶¶ 24-31. *See also Fisher*, ¶ 16; *Maguire*, 254 Mont. at 186-90, 835 P.2d at 761-63; *Phillips*, 233 Mont. at 252-53, 758 P.2d at 774-75; Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm §§ 6 and 7(b) (Am. Law Inst. 2010).[22]

& Assocs., 283 Mont. 117, 121-27, 938 P.2d 1368, 1371-74 (1997) (construction engineer duty of care to third-party mortgagee of client/property owner); *Jim's Excavating Serv., Inc. v. HKM Assocs.*, 265 Mont. 494, 502-06, 878 P.2d 248, 253-55 (1994) (construction engineer duty of care to third-party contractor); *Thayer v. Hicks*, 243 Mont. 138, 144-49, 793 P.2d 784, 788-91 (1990) (CPA duty of care to third party in re client financial audit); *Limberhand v. Big Ditch Co.*, 218 Mont. 132, 139-41, 706 P.2d 491, 495-97 (1985) (premises liability—landowner duty of reasonable care to third parties foreseeably on premises); *Piedalue v. Clinton Elementary Sch. Dist. No. 32*, 214 Mont. 99, 103-04, 692 P.2d 20, 23 (1984) (premises liability—landowner duty of care owed to third parties foreseeably on premises); Restatement (Second) of Torts § 552 (duty of care to avoid reasonably foreseeable risks to third parties resulting from provision of professional guidance in re business transaction of another).

[21] As to the separate question of employer or principal liability to third parties for the tortious conduct of employees, agents, and independent contractors, see Restatement (Third) of Agency §§ 7.03-7.08 (Am. Law Inst. 2006); Restatement (Second) of Torts §§ 317 and 409-29.

[22] *See also Orr v. State*, 2004 MT 354, ¶¶ 44-47, 324 Mont. 391, 106 P.3d 100 (holding that state health board owed Grace workers a special duty of care under the protected-class, specific protective action, and justifiable reliance exceptions to public duty doctrine); *Nelson*, ¶¶ 20-40 (combining special relationship exceptions to public duty doctrine with Restatement (Second) of Torts § 319 (duty owed to others in re undertaking charge of dangerous third party) and Restatement (Second) of Torts § 323 (duty owed upon affirmative performance of services/undertaking)). The general rule of the public duty doctrine is a special application or variant of the traditional common law limitation on foreseeability-based duty of care narrowly

¶29 Here, it is beyond genuine material dispute that the conduct of a third party (Grace) was the direct cause of the risk of asbestos-related disease to Hutt and other Grace workers on the summary judgment record in this case. It is further beyond genuine material dispute that MCC had no control over Grace and was not the owner or lessee of the property upon or by which Hutt and other Grace workers were injured. Thus, whether MCC owed Hutt and other Grace workers a legal duty to protect them from the risk of asbestos related disease caused by the conduct of Grace's vermiculite mining and processing operations first depends on whether a qualifying special relationship or affirmative undertaking existed or occurred, giving rise to a special common law duty of care.[23]

¶30 The common law recognizes various qualifying special relationships giving rise to a special duty of care to protect others from harm directly caused by third parties. *See Prindel*, ¶¶ 34-42 (custodian/tortfeasor); *Lopez*, ¶¶ 24-26 (custodian/tortfeasor); *Krieg*, 239 Mont. at 472, 781 P.2d at 279 (custodian/person at risk of suicide); Restatement

applicable to government entities and actors under certain circumstances. *See, e.g.*, *Bassett*, ¶¶ 11-29; *Prindel*, ¶¶ 25-26; *Phillips*, 233 Mont. at 253, 758 P.2d at 775.

[23] We acknowledge that we have discretion to develop and prune the common law to address public policy exigencies unaddressed by statute. *See* § 1-1-108, MCA (common law is "the law and rule of decision" except where in conflict with statute). However, in deference to the constitutional prerogative of the Legislature, we carefully exercise our common law prerogative sparingly only when necessary to "prevent great injustice" or ensure that "the common law is consonant with the changing needs of society" in the absence of a contrary legislative determination. *See N. Pac. Ins. Co. v. Stucky*, 2014 MT 299, ¶¶ 20-21, 377 Mont. 25, 338 P.3d 56 (quoting *Miller v. Fallon County*, 222 Mont. 214, 217-18, 721 P.2d 342, 344 (1986)); *Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶¶ 21-25, 315 Mont. 231, 69 P.3d 652; *Crisafulli v. Bass*, 2001 MT 316, ¶¶ 23-28, 308 Mont. 40, 38 P.3d 842. Here, the narrow legal and public policy issue before us is whether Restatement (Second) of Torts § 324A is a consistent application or extension of existing Montana common law principles.

(Second) of Torts § 314A and 315-20 (principal/subordinate, common carrier/passenger, parent/child, master/servant, property owner/persons on property, person in control of dangerous person, or custodian/ward). *Accord* Keeton et al., *supra* § 56, at 375-85. Here, however, Hutt does not assert, and has not shown, the existence of any recognized special relationship giving rise to a corresponding special common law duty of care. Thus, it is beyond genuine material dispute in this case that MCC owed Hutt no special common law duty of care based on a qualifying special relationship.

¶31 As pertinent here, the common law also recognizes two classes of affirmative undertakings giving rise to a special duty of care where none would otherwise exist. *See* Restatement (Second) of Torts §§ 323 and 324A (duty based on affirmative undertaking to another and duty to third parties based on undertaking to another). *See also* Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm §§ 42-43. In the first instance, Restatement (Second) of Torts § 323 recognizes that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323. In other words, one who undertakes affirmative action to render aid or services to another has a duty to use reasonable care in rendering the aid or the service to avoid foreseeable risks of harm to the other. *Nelson*, ¶¶ 36-37 (citing Restatement (Second) of Torts § 323; *Vesel v. Jardine Mining Co.*, 110 Mont. 82,

92, 100 P.2d 75, 80 (1939); and *Stewart v. Standard Pub'g Co.*, 102 Mont. 43, 50, 55 P.2d 694, 696 (1936), *inter alia*).

¶32 In *Nelson*, we held that the public duty doctrine did not shield a police officer from duty and resulting liability for the wrongful death of an impaired pedestrian struck and killed by another vehicle after the officer released her from a traffic stop but directed her to leave her vehicle at the scene. *Nelson*, ¶¶ 6-17, 21-24, and 36-40. Applying Restatement § 323 as the legal predicate for the affirmative protective action exception to the public duty doctrine, we held that, by directing the driver to leave her vehicle as a precaution based on the icy streets and her impaired condition, and then circling the block three times to ensure her compliance, the officer assumed a special duty to use reasonable care to protect her from foreseeable risks of harm under the circumstances. *Nelson*, ¶¶ 22-24 and 36-40.

¶33 Here, in contrast to the scenario in *Nelson* and the principle stated in Restatement § 323, Hutt does not assert, and no evidence indicates, that MCC, as Grace's workers' compensation insurance carrier, affirmatively rendered aid or services directly to Hutt or other Grace workers apart from risk management services provided to Grace. As a matter of law, the special duty arising from the affirmative rendering of aid or services to another under *Nelson* and Restatement § 323 is a duty owed to the party to whom the subject rendered the aid or service rather than to third parties. *See Nelson*, ¶¶ 37-38; Restatement (Second) of Torts § 323. Thus, on the Rule 56 record presented, MCC owed no special

duty of care to Hutt and other Grace workers based on an affirmative undertaking under the rule of *Nelson* and Restatement § 323.

Restatement § 324A: Affirmative Undertaking Giving Rise to Duty to Others

¶34 As a separate class of affirmative undertakings giving rise to a special duty of care where none otherwise would exist, the common law further distinctly recognizes that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A. In other words, a party owes a special duty of care to protect others from foreseeable risks of harms caused or created by a third party beyond the first party's control if:

(1) the first party, gratuitously or for consideration, affirmatively undertakes to render aid or services to the third party;

(2) the first party reasonably should recognize that such aid or services are necessary under the circumstances for the protection of other persons or property; and

(3) one or more of the following special circumstances exist:

(A) the failure of the first party to use reasonable care in the performance of the undertaking increases the preexisting risk of harm at issue;

(B) the first party affirmatively assumes the third party's responsibility to perform a preexisting legal duty of care owed by the third party to the other(s) at issue; or

(C) harm occurs because the other(s), or the third party, relied on the first party to competently perform the subject undertaking.

See Restatement (Second) of Torts § 324A. We have not previously adopted or applied Restatement (Second) of Torts § 324A.

¶35 However, by its terms, Restatement § 324A is an extension of the principal essence of the theory and rule of Restatement § 323 as applied to third parties who secondarily benefit from an affirmative undertaking to another. *See* Restatement (Second) of Torts § 324A cmt. a.[24] In the absence of a contrary legislative determination of public policy,[25] Restatement § 324A comports with the general public policy underlying Montana's common law of torts in favor of requiring parties who create, contribute to, enhance, or induce others to subject themselves to foreseeable risks of harm to act with reasonable care regarding those risks and to compensate others for harm caused by the failure to do so. *See Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 48, 298 Mont. 213, 994 P.2d 1124. Nonetheless, even when Restatement § 324A may otherwise indicate a duty, reasonable foreseeability and related public policy considerations remain as independent safeguards against concerns of unpredictable or limitless liability. *See Busta*, 276 Mont. at 372, 916 P.2d at 140; *Mang*, 153 Mont. at 437-39, 458 P.2d at 781-82 (citing *Palsgraf*, 162 N.E. at 100).

[24] *See also* Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 43 cmt. a.

[25] *See, e.g.*, § 39-71-1508(1), MCA (1993 Mont. Laws ch. 295, § 9—precluding workers' compensation insurer liability to third-party insureds in re workers' compensation insurance and related activities).

¶36 Here, unmoored from Restatement (Second) of Torts §§ 323 and 324A, Hutt points to MCC's affirmative non-underwriting undertakings (i.e., "dust control engineering," recommending safe asbestos-dust exposure levels, warning workers of non-asbestos-related workplace safety hazards, and designing, proposing, and monitoring a worker safety program to allow them to "continue safely" working) as the factual predicates for a stand-alone duty based on mere foreseeability of harm and related public policy considerations. Citing *Kent v. City of Columbia Falls*, 2015 MT 139, 379 Mont. 190, 350 P.3d 9; *Vesel*; *Stewart*; *Jim's Excavating Service*; *Redies v. Attorneys Liability Protection Society*, 2007 MT 9, 335 Mont. 233, 150 P.3d 930; and *Turner*, Hutt asserts that application of Restatement § 324A is unnecessary and contrary to Montana law because its "core principle" (i.e., duty arising from affirmative undertakings) is already "well developed" under Montana law without the additional "artificial limitations" imposed by § 324A. However, in pertinent part, *Kent*, *Vesel*, and *Stewart* are merely applications of the principle stated in Restatement § 323 which imposes a duty of care for the protection of the intended beneficiaries of the affirmative undertakings rather than third parties thereto. *See Kent*, ¶¶ 35-53 (citing *Nelson*, ¶ 37 (citing Restatement § 323 and *Vesel*, 110 Mont. at 92, 100 P.2d at 80, *inter alia*)); *Vesel*, 110 Mont. at 92-93, 100 P.2d at 80; *Stewart*, 102 Mont. at 50, 55 P.2d at 696. Likewise, in pertinent part, *Redies*, *Turner*, and *Jim's Excavating Service* are merely cases where the third parties at issue were at foreseeable risk of harm from the negligent acts or omissions of persons who were the direct cause of the harm at issue—not, as here, parties who were at foreseeable risk of harm

caused by the conduct of another beyond the first party's control. *See Redies*, ¶¶ 39-52 (citing *Turner*, 283 Mont. at 126-27, 938 P.2d at 1374 and *Jim's Excavating Serv.*, 265 Mont. at 502, 506, 878 P.2d at 252-53, 255, et al.); *Turner*, 283 Mont. at 121-27, 938 P.2d at 1371-74 (construction engineer duty of care to third-party mortgagee of client/property owner); *Jim's Excavating Serv.*, 265 Mont. at 502-06, 878 P.2d at 253-55 (construction engineer duty of care to third-party contractor). Thus, none of the cases cited by Hutt have any application to whether a party who affirmatively undertakes to render aid or services to a third party has duty to protect others from risks of harm caused by the third party.

¶37 While Restatement § 324A "parallels" the rule stated in § 323 imposing duty and liability upon affirmative undertakings, it further extends that core principle to additionally "deal[] with liability to third persons" other than the intended beneficiary of the undertaking. Restatement (Second) of Torts § 324A cmt. a.[26] Thus, the "artificial limitations" of § 324A derided by Hutt are the very distinctions upon which the common law authority from which Restatement § 324A derives further adapted and *expanded* the theory of liability stated in § 323 to similarly impose a special duty of care to protect others from harm caused by the third party to whom the first party rendered aid or service. *See* Restatement (Second) of Torts § 324A; Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 43 cmt. c. *Compare* Restatement (Second) of Torts § 323. Consequently, the cited Montana cases applying the principle stated in Restatement § 323, or imposing

[26] *See also* Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 43 cmt. a.

liability to third parties for harm directly caused by the alleged tortfeasor, do not address the distinct scenario addressed by Restatement § 324A, nor do they render the additional requirements or distinctions embodied in § 324A artificial or unduly restrictive as a matter of public policy.

¶38 Restatement (Second) of Torts § 324A is widely recognized and applied in the common law jurisprudence of other state and federal courts. Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 43 Reporter's Note cmt. c. Hutt thus attempts to avoid or minimize application of § 324A by characterizing various foreign authorities as analytically consistent with his stand-alone, affirmative undertaking based, foreseeability of harm analysis of duty. He further asserts that the majority of cases from foreign jurisdictions that have addressed similar fact patterns have found individuals, including insurers, who conduct safety, quality, and risk management inspections for third-party clients, to owe a duty to protect others from harm independently caused by those third-party clients. However, the central body of foreign cases that have recognized and applied Restatement (Second) of Torts § 324A does not manifest any significant divide in the analytical manner or standards by which it applies. Upon close examination, any apparent analytical inconsistency in those cases results primarily, if not exclusively, from the wide variety of facts and circumstances at issue in particular cases. The vast majority of cases from other jurisdictions that have applied Restatement § 324A across a multitude of varying fact patterns indicate that it is a fairly balanced and predictably consistent analytical framework for dealing with the difficult public policy issues implicated in

imposing liability on parties for failing to protect others from harm directly caused by third parties or circumstances beyond their control.

¶39 While we are aware of few reported decisions applying Restatement § 324A under circumstances similar to those at issue here, *Fackelman v. Lac d'Amiante du Quebec*, 942 A.2d 127 (N.J. Super. Ct. App. Div. 2008) illustrates the distinct applicability and utility of the analytical framework of § 324A. At issue there was whether a workers' compensation insurer had a common law duty to warn workers of its insured about the dangers of airborne asbestos dust in the workplace. *Fackelman*, 942 A.2d at 128-29. The case involved two companies that "mined, manufactured and supplied asbestos products to [the] plaintiff's employer, Owens Corning Fiberglass Corporation." *Fackelman*, 942 A.2d at 128-29. The plaintiff was diagnosed with asbestosis in 2002 after earlier working in the Owens Corning plant for a ten-month period in 1967-68 at age nineteen. *Fackelman*, 942 A.2d at 129. During that period, the Owens Corning manufacturing process generated significant amounts of airborne asbestos dust in the workplace to the extent that "[s]ometimes it was tough to see"—"like a bad, foggy day." *Fackelman*, 942 A.2d at 129 (alteration in original). When the plaintiff started at Owens Corning:

> [he] was placed on a practice line to determine if he had the dexterity to do the job. His employer gave him no information about asbestos. He was not required to wear a mask or other breathing protection, although "white painting masks" were available for use by employees and some employees wore these masks. . . . [A]t some time during his employment a co-worker was given a device to wear on his chest by "strangers" to test the air. Some of these strangers examined equipment, some observed how the workers performed their job functions. . . . [T]he employees were not informed of the results of any testing. [Plaintiff testified that] [h]e expected his employer or the company that performed the tests to inform the employees or their union

> of the test results and "if it was anything dangerous or something [that] would hurt us or whatever."

Fackelman, 942 A.2d at 129.

¶40 During the period between 1958 and 1972 when it provided workers' compensation insurance coverage to Owens Corning, the insurer:

> performed various air sample surveys, industrial hygiene studies, and special hazard studies at the . . . plant. The [insurer's] engineering department . . . performed inspection and advisory work for [the insurer's] underwriters on new and existing accounts. [The insurer] "serviced [its] larger insureds in various safety matters, training programs, literature, helping them hold safety meetings, assisting them as best [they] could in their particular safety program." Between 1958 and 1965 [the insurer] may have been the only entity performing air sampling at the . . . plant. Following receipt of results of periodic air sampling, representatives from [the insurer] met with Owens Corning representatives to review the results, to discuss the Owens Corning response and to offer advice. The purpose of the meetings was to prompt Owens Corning to reduce high exposure levels and to contain the dust in the plant.
>
> . . . [T]here were occasions when dust levels at various places or worksites at the . . . facility exceeded air quality thresholds. At other times, dust levels were at or under air quality thresholds. During this period, air quality thresholds progressively declined from 10,000,000 particles per cubic foot to 5,000,000 particles per cubic foot and eventually to 2,000,000 particles per cubic foot. The record also reveals that [the insurer] acknowledged and commented positively when conditions had improved and when masks or other protective devices or measures had been implementedby [sic] Owens Corning.

Fackelman, 942 A.2d at 129-30. The record further reflected that:

> Owens Corning had personnel assigned to workplace safety company-wide and at the [plant at issue]. In August 1969, Owens Corning adopted a safety program. Upon receipt of the program, [the insurer] requested its personnel to "attempt to determine whether or not the plant is complying with the program." [The insurer's] personnel were encouraged to advise and help the plant to implement the program. The Owens Corning program recommended the creation of a plant safety committee. The program addressed the entire

> spectrum of safety issues from workplace accidents and investigations to special hazard surveys that addressed industrial noise, machine guarding, health hazards of materials, fire and explosion, and other industrial exposures. The program anticipated that "[the insurer's] engineers will assist local personnel in their follow-through of a corporate loss control program—working with management, safety personnel, and supervisors at each plant."

Fackelman, 942 A.2d at 130. In discussing earlier New Jersey and related federal authority analyzing the third-party duty and liability of workers' compensation insurance carriers engaged in affirmative risk management activities in other workplace scenarios, the New Jersey Superior Court Appellate Division noted that:

> These authorities are entirely consistent with the law on this issue throughout the country. One leading commentator notes that the field of third-party litigation is "volatile" and "few were so dramatic and fast-moving for a time as the line of cases in whichinjured [sic] employees have attempted to treat the compensation carrier as third party for purposes of tort suits." 6 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 114.01 (2007). Section 324A of the *Restatement* is the principle theory on which liability has been imposed on an insurer in those jurisdictions where such liability has not been precluded by legislative action and then only in instances in which at least one of the three circumstances identified by section 324A has been met. Amy Schulman, *Recent Developments in Self-Insurance and Risk Management*, 31 Tort & Ins. L.J. 479, 480-81 (1996). *See also* John Dwight Ingram, *Liability of Insurers for Negligence in Inspection of Insured Premises*, 50 Drake L. Rev. 623 (2002). Moreover, the primary bases for imposing liability on the insurer are the assumption by the insurer of the employer's duty to provide a safe place to work or representations by the insurer to induce reliance on its safety program. *See Pratt v. Liberty Mut. Ins. Co.*, 952 F.2d 667, 670-71 (2d Cir.1992) (plaintiff must prove that insurer has substituted itself for the insured's normal accident prevention activities); *see also* Ingram, *supra*, 50 Drake L. Rev. at 628–32; Schulman, *supra*, 31 Tort & Ins. L.J. at 482–84.

Fackelman, 942 A.2d at 133.

¶41 We similarly find that Restatement (Second) of Torts § 324A is an entirely consistent extension of existing Montana common law tort principles. Therefore, in

conjunction with analysis of foreseeability of harm and related public policy considerations when implicated in a particular case pursuant to *Busta*, *Mang*, *Palsgraf*, et al., and except where such liability may be independently precluded by statute,[27] we hold that our foregoing elemental formulation of Restatement (Second) of Torts § 324A is a distinct prerequisite in the determination of the threshold question of whether an alleged tortfeasor owed a common law duty of reasonable care to a particular claimant or class based on an affirmative undertaking to render aid or services to a third party who was the direct cause of the harm at issue.[28] As with other aspects of duty, this threshold determination under Restatement (Second) of Torts § 324A is generally a question of law for judicial determination. *See Gliko v. Permann*, 2006 MT 30, ¶ 24, 331 Mont. 112, 130 P.3d 155 (in re determination of fiduciary duty based on qualifying common law special relationship). However, if the threshold determination of duty necessarily depends on resolution of genuine issues of material fact, the court must submit the case to the finder of fact with sufficient alternative instructions to effect an ultimate determination as a matter of law based on the factfinder's resolution of the predicate facts in dispute. *See Gliko*, ¶ 24 (when duty turns on genuine issues of material fact, finder of fact must determine predicate facts but the ultimate conclusion to be drawn on those facts ultimately remains a question of law

[27] *See, e.g.*, § 39-71-1508, MCA (1993 Mont. Laws ch. 295, § 9—precluding workers' compensation insurer liability to third-party insureds in re workers' compensation insurance and related activities).

[28] Here, apart from the Asbestos Court's failure to apply Restatement (Second) of Torts § 324A in conjunction with consideration of foreseeability of harm and related public policy considerations, MCC has not challenged the balance of the court's foreseeability of harm and related public policy analysis.

for judicial determination); Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 7 cmt. b. *See also Busta*, 276 Mont. at 371-72, 916 P.2d at 140 (requiring crafting of necessary jury instructions without reference to "foreseeability").

Restatement § 324A: Alternative Duty Predicates

¶42 In addition to other generally applicable elements, Restatement (Second) of Torts § 324A includes three alternative factual predicates required to give rise to a special duty and resulting liability—increased risk, assumption of another's legal duty, or reliance on the undertaking. We turn to the analytical standards for each.

Restatement § 324A(a): Increased Risk

¶43 Under the first alternative predicate giving rise to a special duty of care under Restatement § 324A, a claimant must state, for purposes of M. R. Civ. P. 12(b)(6), or show, for purposes of Rule 56, sufficient facts upon which to conclude that the first party's failure to use reasonable care in the performance of the subject undertaking increased the preexisting risk of harm at issue. Restatement (Second) of Torts § 324A(a). Because the duty depends on increased risk, the mere fact that the first party may have negligently failed to act to protect others from harm caused by a third party is insufficient alone to show that the first party increased the preexisting risk of harm. *Myers v. United States*, 17 F.3d 890, 903 (6th Cir. 1994) (test is not whether the alleged failure to act increased the risk). In other words, under Restatement § 324A(a), the alleged breach of duty cannot be the predicate for the threshold existence of that duty. To establish the threshold existence of a duty of care under § 324A(a), the claimant must state, for purposes of M. R. Civ.

P. 12(b)(6), or show, for purposes of Rule 56, facts upon which to conclude that some particular affirmative action by the first party caused an actual change in preexisting conditions, thereby increasing the risk of harm at issue beyond the preexisting risk created by or resulting from the third party's conduct or other independent circumstances. *Myers*, 17 F.3d at 902-03; *Canipe v. Nat'l Loss Control Serv. Corp.*, 736 F.2d 1055, 1062 (5th Cir. 1984); *Patentas v. United States*, 687 F.2d 707, 716-17 (3d Cir. 1982) (claimant must "identify sins of commission rather than omission"); *Ricci v. Quality Bakers of Am. Co-op.*, 556 F. Supp. 716, 720 (D. Del. 1983) (merely allowing continuation of existing risk insufficient to establish increased risk under § 324A(a)).

Restatement § 324A(b): Assumption of Legal Duty of Another

¶44 Under the second alternative liability predicate under Restatement § 324A, a claimant must state, for purposes of M. R. Civ. P. 12(b)(6), or show, for purposes of Rule 56, sufficient facts upon which to conclude that, in undertaking to render the aid or service at issue to a third party, the first party assumed the third party's responsibility to perform a preexisting legal duty of care owed by the third party to another. Restatement (Second) of Torts § 324A(b). In other words, a claimant must state or show sufficient facts upon which to conclude that the first party knowingly undertook to perform or satisfy a preexisting legal duty of care owed by the third party to another. *See* Restatement (Second) of Torts § 324A(b). *See also, e.g.*, *Fackelman*, 942 A.2d at 133-34 (no assumption of employer duty of safety by workers' compensation insurer where employer remained fully responsible for workplace safety and treated insurer safety inspections, hazard information,

and safety recommendations in re workplace asbestos dust hazard as informational only); *Myers*, 17 F.3d at 903 (performance of federal mine safety inspectors' duty to monitor and enforce operator compliance with federal safety regulations insufficient alone to establish that inspectors assumed the independent duty of the mine operator to provide safe working conditions).

¶45 However, proof of assumption of another's duty does not necessarily require proof that the first party intended to completely assume, displace, or supplant the other party's duty to the claimant(s)—only that the first party affirmatively undertook to assume a distinct aspect of the third party's duty to others alleged or shown to be causally related to the harm at issue. *Canipe*, 736 F.2d at 1062-63; *Hill v. James Walker Mem'l Hosp.*, 407 F.2d 1036, 1042 (4th Cir. 1969); *Peredia v. HR Mobile Servs., Inc.*, 236 Cal. Rptr. 3d 157, 172 (Cal. Ct. App. 2018); Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 43 cmt. g. The fact that the subject duty was a nondelegable duty as a matter of law does not necessarily preclude a finding of another's assumption of the duty or a relevant aspect of that duty. *Gazo v. City of Stamford*, 765 A.2d 505, 512 (Conn. 2001) (nondelegable duty merely causes primary duty holder to remain liable as a joint tortfeasor under nondelegable duty exception to independent contractor doctrine). *Accord Peredia*, 236 Cal. Rptr. 3d at 172-73.[29]

[29] Although the question here is not whether any duty owed by Grace was nondelegable, such a duty is an exception to the general common law rule that one who hires an independent contractor to perform a task or function is not vicariously liable to third parties for harm caused by the tortious conduct of the contractor. *See* Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 57 cmt. a-b. *See also, e.g., State v. Silver-Bow County*, 2009 MT 414, ¶¶ 24-29, 353 Mont. 497, 220 P.3d 1115 (state vicariously liable for county negligence under state highway maintenance

¶46 Moreover, while a contractual assumption or delegation of duty may certainly evince an assumption of another's duty of care to others, proof of an act or intent to assume another's duty of care does not necessarily require proof of a contractual undertaking or delegation of duty. Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 43 cmt. h. Nor does a contractual disclaimer of duty or liability necessarily preclude a finding that one party assumed all or part of a third party's duty to others. *Derosia v. Liberty Mut. Ins. Co.*, 583 A.2d 881, 885 (Vt. 1990). In the absence of a contractual assumption of a third party's duty of care to others, or even in the face of contractual disclaimer, a claimant may yet establish that another assumed a third party's responsibility to perform a duty to others based on that party's affirmative acts or a course of performance indicating the intent or act to do so. *See Derosia*, 583 A.2d at 885-88 (evidence of affirmative risk management activities of workers' compensation insurer, insurer advertising that its inspection services would relieve the employer of the burden of workplace safety/loss-prevention monitoring, and employer reliance on insurer for safety/loss prevention advice sufficient to support inference of the insurer's act or intent to assume employer's duty of safety to workers); Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 43 cmt. h (contract terms "may be relevant to the existence and scope of an undertaking" but are not necessarily

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contract based on county breach of non-delegable state duty); *Beckman v. Butte-Silver Bow County*, 2000 MT 112, ¶¶ 12-25, 299 Mont. 389, 1 P.3d 348 (government vicariously liable to employee of subcontractor for subcontractor's breach of government's nondelegable duty regarding inherently dangerous activity). Characterization of a duty as "nondelegable" does not preclude delegation or assumption of the duty to or by another but, rather, merely leaves the first party vicariously liable for the tortious conduct of the delegee or assuming party within the scope of the duty. Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 57 cmt. b.

dispositive of "whether a duty exists"). *Accord Pratt v. Liberty Mut. Ins. Co.*, 952 F.2d 667, 671 (2d Cir. 1992) (citing *Derosia*, 583 A.2d at 886-87). However, whether in regard to a complete assumption of another's duty, or merely some aspect thereof, Restatement (Second) of Torts § 324A(b) requires proof that the first party intended the undertaking to assume, displace, or supplant the relevant aspect of the original obligor's responsibility to perform that duty rather than merely aiding or supplementing the other's continuing responsibility to do so. *See Fackelman*, 942 A.2d at 133-34; *Davis v. Liberty Mut. Ins. Co.*, 525 F.2d 1204, 1207 (5th Cir. 1976); *Santillo v. Chambersburg Eng'g Co.*, 603 F. Supp. 211, 215 (E.D. Pa. 1985) (reconciling *Canipe* and *Davis*); *Ricci*, 556 F. Supp. at 721; *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348, 1355 (D. Md. 1982); *Smith v. Allendale Mut. Ins. Co.*, 303 N.W.2d 702, 712 (Mich. 1981). *See also Peredia*, 236 Cal. Rptr. 3d at 172 (citing *Canipe*, 736 F.2d at 1062-63 and *Santillo*, 603 F. Supp. at 215); Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 43 cmt. h.

Restatement § 324A(c): Reliance on the Undertaking

¶47 Under the third predicate for liability under Restatement § 324A(c), a claimant must state, for purposes of M. R. Civ. P. 12(b)(6), or show, for purposes of Rule 56, sufficient facts upon which to conclude that either the claimant, or the third party whom the other undertook to aid or serve, in fact relied on the subject party to perform the undertaking or aspect of the undertaking at issue. Restatement (Second) of Torts § 324A(c). Under § 324A(c), a claimant, or the party whom the first party undertook to aid or serve, in fact relied on the first party to competently perform the undertaking, or a distinct aspect of the

undertaking, only if the claimant or third party was in fact aware of the undertaking, or a distinct aspect of it, and that awareness induced or caused the subject to forgo other precautionary or remedial measures against the type of risk at issue. *Patentas*, 687 F.2d at 717; *Davis*, 525 F.2d at 1208; Restatement (Second) of Torts § 324A cmt. e. *See also H.E. Simpson Lumber Co. v. Three Rivers Bank of Mont.*, 2013 MT 312, ¶ 22, 372 Mont. 292, 311 P.3d 795 (applying reliance element of equitable estoppel from *Dagel v. City of Great Falls*, 250 Mont. 224, 234-35, 819 P.2d 186, 192-93 (1991)); *Detrimental Reliance*, *Black's Law Dictionary* (11th ed. 2019) (detrimental reliance is "[r]eliance by one party on the acts or representations of another, causing a worsening of the first party's position"); Restatement (Third) of Torts: Liab. for Phys. & Emot. Harm § 43 cmt. e ("[a]n undertaking may create an appearance of safety or make alternative arrangements appear unnecessary"). Restatement (Second) of Torts § 324A(c) does not necessarily require proof that a claimant or third party whom the other undertook to aid or serve elected to cease, limit, avoid, omit, or otherwise forgo any particular type of precautionary or remedial action. *Universal Underwriters Ins. Co. v. Smith*, 322 S.E.2d 269, 272 (Ga. 1984). A claimant may satisfy the reliance requirement of § 324A(c) merely by showing facts upon which to conclude that the subject: (1) was in fact aware of the first party's undertaking, or aspect of the undertaking at issue;[30] (2) reasonably believed or assumed

[30] Proof that one relied on another to competently perform an undertaking protective of others does not require proof that the first party *exclusively* relied on the other's undertaking to protect others. *Canipe*, 736 F.2d at 1062-63. "[P]artial reliance on . . . the [other's] undertaking will suffice"—Restatement § 324A(c) merely requires proof that, in reliance on the other's undertaking, the first party neglected, reduced, or did not itself perform or carry out some distinct safety measure or aspect of its own safety program. *Canipe*, 736 F.2d at 1063.

that the first party would competently provide the aid or service or aspect of the aid or service at issue; and (3) thus did not take other or additional precautionary or remedial action. *Universal Underwriters*, 322 S.E.2d at 272-73. *Accord Orr*, ¶¶ 45-47 (awareness and reliance of Grace workers on state health board inspections as exception to public duty doctrine); *Nelson*, ¶ 22 (reliance on government performance of a public duty requires proof that the awareness of an affirmative government conduct "reasonably induce[d]" the individual to rely on the government for protection from that type of harm); *Vesey v. Chi. Housing Auth.*, 583 N.E.2d 538, 545-47 (Ill. 1991) (no tenant reliance on housing authority to remediate or protect tenants against premises hazard on landlord's property where tenants had no "specific expectation" of such action); *Canipe*, 736 F.2d at 1063 (reliance established by evidence that subject reduced or neglected to take own safety measures); *Davis*, 525 F.2d at 1208 (no reliance absent evidence that subject neglected own safety measures).[31]

[31] Hutt asserts that, if adopted, Restatement (Second) of Torts § 324A would impose a standard of reliance inconsistent with the standard of reliance referenced in *Kent*, ¶¶ 32-52 (holding that a city owed a special duty of care to a third party injured as a result of a hazardous walking trail established on private property in accordance with conditions of subdivision approval). Regardless of imprecision as to the particular legal basis upon which we concluded that the general rule of the public duty doctrine did not apply to preclude a duty to the injured plaintiff, *Kent* did not address the standard of reliance under either the reliance exception to the public duty doctrine or Restatement (Second) of Torts § 323(b). *See Kent*, ¶¶ 35-52. We briefly referenced reliance in *Kent* only in factually distinguishing our application of the public duty doctrine analysis in *Prosser v. Kennedy Entrs., Inc.*, 2008 MT 87, 342 Mont. 209, 179 P.3d 1178. *See Kent*, ¶¶ 31-43. In turn, our statement in *Prosser*, repeated without elaboration in *Kent*, ¶ 24, that reliance required proof of "direct contact" and "express assurances" from the party relied on was merely an application of the standard of reliance previously recognized in *Orr* and *Nelson*, as narrowly tailored and applied to the factual contentions at issue in *Prosser*. *See Prosser*, ¶ 36.

Application of Restatement § 324A(b)-(c) to Rule 56 Record

¶48 Under Restatement (Second) of Torts § 324A(b), Grace, as an employer, had a general common law duty to provide a reasonably safe workplace and instrumentalities for employees regarding reasonably foreseeable risks of harm in the workplace. *Allen v. Smeding*, 138 Mont. 367, 377, 357 P.2d 13, 18-19 (1960); *Masich v. Am. Smelting & Ref. Co.*, 44 Mont. 36, 45-46, 118 P. 764, 765-66 (1911).[32] *Inter alia*, the duty generally included the duty to warn employees of latent dangers. *Masich*, 44 Mont. at 45-46, 118 P. at 765-66. In the context of the employer's underlying duty of safety, Montana's statutory workers' compensation scheme has from the outset effected a careful balance of otherwise competing public policy interests—to protect workers by eliminating harsh common law obstacles to compensation for work-related injuries and, on the other hand, to protect employers from the broad scope of damages to which that they would otherwise be exposed at common law. *See Madison v. Pierce*, 156 Mont. 209, 213-14, 478 P.2d 860, 863 (1970); *State ex rel. Morgan v. Indus. Accident Bd. of Mont.*, 130 Mont. 272, 278-79, 300 P.2d 954, 958 (1956); *Lewis & Clark County v. Indus. Accident Bd. of Mont.*, 52 Mont. 6, 10-11, 155 P. 268, 270 (1916). *See also Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325, 1334 (8th Cir. 1985); *Swift v. Am. Mut. Ins. Co. of Bos.*, 504 N.E.2d 621, 623 (Mass. 1987). While one of the legislative purposes of mandatory workers' compensation insurance is to protect and benefit workers, workers' compensation insurers generally do not undertake to provide insurance and related risk management activities and programs to or for the direct benefit

[32] *See also* § 50-71-201, MCA (enacted 1969 Mont. Laws ch. 341), as amended.

of third-party workers. *See Kifer*, 777 F.2d at 1336; *Swift*, 504 N.E.2d at 623; *Brown v. Travelers Ins. Co.*, 254 A.2d 27, 30-31 (Pa. 1969). As a matter of contract, absent some contrary indication of affirmative intent, insurers generally undertake to provide workers' compensation insurance, and related risk management programs and activities, for the direct benefit of the insured employer. *See Kifer*, 777 F.2d at 1336; *Swift*, 504 N.E.2d at 623; *Brown*, 254 A.2d at 30-31. *See also Turner v. Wells Fargo Bank, N.A.*, 2012 MT 213, ¶¶ 13-19, 366 Mont. 285, 291 P.3d 1082 (noting and applying distinction between foreseeable third-party beneficiaries of contracts and intended third-party beneficiaries with standing to enforce contract). Consequently, the mere undertaking of affirmative workplace risk management programs and activities incident to providing workers' compensation insurance is generally insufficient alone to establish an act or intent to assume all or part of an employer's independent duty to provide workers with a reasonable safe working environment. *See, e.g.*, *Fackelman*, 942 A.2d at 133-34; *Stacy v. Aetna Cas. & Sur. Co.*, 484 F.2d 289, 292-93 (5th Cir. 1973). *See also Wells Fargo*, ¶¶ 13-19.

¶49 Here, it is beyond genuine material dispute that, despite the significant affirmative risk management services undertaken by MCC, Grace continued to perform its own workplace air quality monitoring, continued to conduct its own safety inspections, determined the acceptable level of airborne asbestos-laden dust (10 mppcf rather than 5 mppcf as recommended by MCC), retained control over dust control measures, and both reserved and exercised the right to reject workplace safety recommendations made by MCC. The record also clearly manifests a question of fact as to what extent Grace adopted

and implemented the comprehensive workplace safety program devised and recommended by MCC. Thus, the Rule 56 record either does not indicate that, or at least manifests a question of fact as to whether, MCC *completely* assumed performance of the safety duty owed by Grace to its workers. The question nonetheless remains, however, whether MCC assumed a distinct aspect of Grace's safety duty pertinent to the harm at issue.

¶50 In that regard, the following facts are beyond genuine dispute on the Rule 56 record. From the outset, Grace and MCC agreed that continued pre-employment medical examinations, including chest x-rays, for adverse lung conditions and respiratory ailments was a necessary risk management and worker safety measure. In response to an independent doctor's 1964 report that Grace workers were developing adverse lung conditions associated with workplace asbestos exposure, Grace acknowledged the problem and advised that it had forwarded the report to MCC for risk management and medical review and "formulat[ion] [of] a program for control and prevention." In response, MCC internally resolved to develop a workplace safety program for Grace with the "aim [of] . . . see[ing] that everything practical is done to control dust, *protect personnel who are exposed to dust which cannot be controlled, and follow through with periodic* [*x*]*-rays of persons exposed, to discover any incidents of lung damage or fibrous growth in the lung* which may decrease breathing function." (Emphasis added.) Accordingly, MCC ultimately produced and recommended that Grace adopt and implement a proposed safety program that, *inter alia*, recommended more frequent medical monitoring and evaluation of worker lung conditions.

¶51 Regardless of any factual question as to whether or to what extent Grace adopted or implemented other aspects of MCC's proposed safety program, it is beyond genuine material dispute on the Rule 56 record that, consistent with MCC's recommendation, Grace subsequently expanded its employee health screening program in 1964 to additionally require annual x-ray screening of all Zonolite Division employees and to provide for more frequent x-ray screening of selected employees on a discretionary case basis. In that regard, it is further beyond genuine material dispute that MCC, not Grace, was the party who, through its in-house medical director (Dr. Chenowith) and assigned risk management staff, then received and provided employee-specific medical diagnosis, prognosis, and related recommendations and opinions to Grace as to whether or under what conditions those employees could continue to safely work for Grace.[33]

¶52 Unlike the situation with workplace air quality monitoring and determination of dust control standards and measures, MCC has made no responsive factual assertion, much less a showing, that Grace was independently engaged in employee-specific medical monitoring and evaluation. Consequently, it is beyond genuine material dispute that MCC was exclusively providing the only employee-specific, asbestos-disease-related professional medical evaluations, recommendations for more frequent radiological

[33] For example, in October 1969, after review by its medical staff of forwarded radiological reports regarding Grace workers, MCC recommended that Grace increase the x-ray screening frequency of sixty employees, including Hutt, from once a year to every six months to better track their progression of respiratory disease. The typewritten MCC recommendation included a handwritten note to Grace's safety administrator that "all of these men have fibrotic changes" but can "safely" continue working if protected "against high dust concentrations"— "our criteria for [dust] control by respirator protection" must be 5 mppcf. In that case, Grace's safety administrator disagreed and rejected MCC's recommendation.

monitoring, and recommendations as to whether and under what circumstances those employees could continue to safely work for Grace. The record thus reflects that Grace utilized a two-pronged workplace safety/risk management approach to deal with the airborne asbestos hazard—monitoring and managing of workplace environmental conditions and employee-specific medical monitoring to gauge the actual effect of environmental conditions on worker health and safety. While it administered and controlled the former, Grace delegated performance of the latter to MCC. Thus, regardless of whether or how Grace acted on the medical monitoring evaluations and recommendations provided by MCC, it is beyond genuine material dispute on the Rule 56 record that MCC's performance of the employee-specific medical monitoring of Grace workers constituted an assumption by MCC of that distinct aspect of the performance of Grace's safety duty to workers regarding the airborne asbestos hazard. Upon de novo review of the Rule 56 record, we hold that MCC owed a direct common law duty of care to Hutt and other Grace workers under Restatement (Second) of Torts § 324A(b) to use reasonable care under the circumstances to protect them from the known risk of exposure to airborne asbestos in the workplace.

¶53 In regard to the alternative duty predicate under Restatement (Second) of Torts § 324A(c), MCC asserts that there is no record evidence upon which to conclude that Hutt and other Grace workers relied on MCC, or that Grace relied on MCC, to provide for worker safety. Although Hutt and other Grace workers were unquestionably aware that they were subject to pre-employment and other medical monitoring required by Grace (and

thus had a reasonable expectation that they would be informed if it revealed a work-related health or safety problem), they have pointed to no evidence on the Rule 56 record upon which to conclude that they were in fact aware of MCC's involvement in worker medical monitoring or other workplace safety measures. Consequently, we agree with MCC that Hutt has failed to meet his Rule 56 burden of showing facts upon which to conclude that he and other Grace workers in fact relied on MCC to provide for their safety in any regard.

¶54 However, whether Grace relied on MCC to provide worker-specific medical evaluations and recommendations as a component of Grace's workplace safety and risk management efforts is another matter. Like § 324A(b), Restatement § 324A(c) does not require proof that the third party whom the other undertook to aid or serve thus completely neglected or forsook to provide or perform a "particular aspect of its safety program"—only that the third party partially relied on the first party to perform some distinct aspect of the third party's safety program. *Canipe*, 736 F.2d at 1063. Here, for the same reasons that we held that MCC owed a duty to Hutt and other Grace workers under Restatement § 324A(b), it is similarly beyond genuine material dispute on the Rule 56 record that, regardless of whether or how Grace ultimately acted on the worker-specific medical monitoring evaluations and recommendations provided by MCC, Grace in fact relied on MCC to perform that distinct aspect of the workplace safety and risk management precautions that Grace deemed necessary to take. Therefore, upon de novo review of the Rule 56 record, we similarly hold that MCC owed a direct common law duty of care to Hutt and other Grace workers under Restatement (Second) of Torts § 324A(c) to use

reasonable care under the circumstances to protect them from the known risk of exposure to airborne asbestos in the workplace.

¶55 As to the scope of the duty owed in this case under Restatement § 324A(b)-(c), it is beyond genuine material dispute that MCC had no authority or practical ability to directly abate or reduce the workplace airborne asbestos hazard created by or resulting from Grace's vermiculite mining and processing operations. It is further beyond genuine material dispute that the substantial efforts made by MCC to influence Grace to abate or further reduce the hazard had no effect on Grace. Therefore, based on the record in this case, we hold that the scope of duty owed by MCC to Hutt and other Grace workers was to use reasonable care under the circumstances to warn them of the known risk of exposure to airborne asbestos in and about Grace workplace(s).

CONCLUSION

¶56 In addition to foreseeability of harm and related public policy considerations when implicated under *Busta*, 276 Mont. at 372, 916 P.2d at 140, and *Mang*, 153 Mont. at 437-39, 458 P.2d at 781-82 (citing *Palsgraf*, 162 N.E. at 99-100), we adopt our foregoing elemental formulation of Restatement (Second) of Torts § 324A as an additional prerequisite for determining whether one who affirmatively undertakes to render aid or services to a third party owes a duty of reasonable care to others regarding foreseeable risks of harm directly created or resulting from the conduct of the third party. Accordingly, we hold that the Asbestos Court erroneously granted Hutt summary judgment on the duty

element of his negligence claim without applying Restatement (Second) of Torts § 324A to the Rule 56 factual record in this case.

¶57 However, we will affirm a district court decision that reaches the correct result even if for the wrong reason. *Hudson v. Irwin*, 2018 MT 8, ¶ 12, 390 Mont. 138, 408 P.3d 1283; *Talbot v. WMK-Davis, LLC*, 2016 MT 247, ¶ 6, 385 Mont. 109, 380 P.3d 823; *Estate of Willson v. Addison*, 2011 MT 179, ¶ 29, 361 Mont. 269, 258 P.3d 410; *Cheff v. BNSF Ry. Co.*, 2010 MT 235, ¶ 37, 358 Mont. 144, 243 P.3d 1115; *Wells Fargo Bank v. Talmage*, 2007 MT 45, ¶ 23, 336 Mont. 125, 152 P.3d 1275. Accordingly, upon de novo review of the Rule 56 record, we hold that MCC owed Hutt and other Grace workers a direct common law duty under Restatement (Second) of Torts § 324A(b)-(c) to use reasonable care under the circumstances to warn them of the known risk of exposure to airborne asbestos in the Grace workplace(s).[34] As a matter of Montana common law, MCC's duty does not arise as a result or function of, and is not dependent upon, its independent contractual duty to Grace or Grace's common law duty to its workers. Rather, MCC's duty arises independently under our common law adoption and application of Restatement § 324A to the facts of this case. MCC's duty, and any resulting liability for breach thereof, thus arises based solely on MCC's own knowledge of conditions and circumstances in and about Grace facilities and operations, and its own conduct, wholly independent of its independent

[34] Contrary to the assertion in Justice McKinnon's concurrence, we do not "conclude there are insufficient facts to support the existence of a duty under [§ 324A](a)." This opinion simply states the applicable legal criteria under § 324A(a) and then stops short of applying it to the factual record in light of our holdings under § 324A(b)-(c).

contract duty to Grace, Grace's independent common law duty to its workers, or any act or omission by either in breach thereof.

¶58 Affirmed and remanded for further proceedings in accordance with this Opinion.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ JIM RICE
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON

Justice Ingrid Gustafson, concurring.

¶59 I concur with the majority's opinion. However, on de novo review under M. R. Civ. P. 56, I would apply Restatement § 324A to the record before us and find MCC owed a duty of care to Hutt and other Grace workers under subsections (a), (b), and (c).

¶60 First, on the record before us, under Restatement § 324A(a), I believe there are sufficient facts upon which to conclude MCC's affirmative actions in concealing the known asbestos risk and worker injuries from workers and the Industrial Accident Board caused increased or prolonged exposure to asbestos, thereby increasing the risk of harm to workers beyond the preexisting risk created by Grace. The Court accurately notes, "To establish the threshold existence of a duty of care under § 324A(a), the claimant must state . . . facts upon which to conclude that some particular *affirmative action* by the first party

caused an *actual change in preexisting conditions*, thereby increasing the risk of harm at issue beyond the preexisting risk created by or resulting from the third party's conduct or other independent circumstances." Opinion ¶ 43 (emphasis added) (citations omitted). On the record before us, I believe there is ample evidence to support a duty of care owed by MCC to Hutt under Restatement § 324A(a). MCC's contemporaneous correspondence and records and the depositions of its representatives under M. R. Civ. P. 30(b)(6) readily support a determination that MCC's actions increased the risk of harm to workers at Grace's Libby area Zonolite Division facilities (the "Mill") over the preexisting risk created by Grace. MCC's goal was to avoid having to pay occupational disease claims. MCC partly sought to accomplish this goal by improving worker safety; however, MCC also sought to accomplish this goal by concealing the extent of the danger the workers faced from the asbestos-laden dust and by preventing workers from discovering that some of them were developing asbestos-related disease.

¶61 MCC informed Grace it would develop a Safety Program to implement at the Mill which Grace represented would be used to control and prevent the dust problem. After Dr. Nelson made Grace aware of his concerns about the Mill workers in August 1964, F.W. Rupp, the Treasurer for Grace's Zonolite Division, informed Dr. Nelson that Grace was "definitely interested in the welfare of its employees. Maryland Casualty Company is formulating a program for control and prevention in relation to the dust problem." On September 15, 1964, V.W. Zanone, MCC's Assistant Resident Manager, informed Grace that MCC's Engineering Division, in conjunction with MCC's Medical Division, was

formulating a program for control and prevention of the "dust problem" at the Mill. From the correspondence of both Grace and MCC representatives, it is clear both parties understood that MCC, not Grace, was developing the Safety Program, and that MCC's program would include managing the "dust problem."

¶62 It is also clear from the record that both MCC and Grace used "dust problem" as a euphemism for the workers' exposure to airborne asbestos. During this time, the dust at the Mill consisted of up to 80% asbestos and almost every reading taken at the Mill indicated the dust exposure the workers experienced was above the level believed to be safe. However, there is no indication that Grace or MCC ever informed the workers that the dust contained asbestos, asbestos was dangerous, and workers were suffering lung ailments because of it. The record further indicates that not only did MCC fail to warn the workers, but it took *affirmative* actions to conceal this information from the workers, effectively increasing the risk of additional harm to Mill workers from further asbestos exposure.

¶63 On September 24, 1964, L.E. (Larry) Park, MCC's Home Office Supervisor in its Accident Prevention Department, sent a lengthy letter to W.C. Trimmer, a supervisor in Grace's Accident Prevention Department, about the Safety Program. Park explained that an MCC safety engineer was drafting the Safety Program for the Mill, and the engineer was directed to clear the draft through Park's office before providing it as a proposal to Grace. Park explained, "Our aim in the program will be to see that everything practical is done to control dust, protect personnel who are exposed to dust which cannot be controlled,

and follow through with periodical x-rays of persons exposed to discover any incidents of lung damage or fibrous growth in the lung which may decrease breathing function." Park's letter indicated MCC would require Grace to implement and abide by the Safety Program MCC was developing. He advised:

> In regard to employees, it is absolutely essential that an X-ray be taken of the lungs and heart prior to employment and the X-ray studied by a qualified radiologist. The findings of this radiologist must be closely followed to prevent the employment of any person who already has changes in either the respiratory system or the circulatory system indicative of either inflammatory symptoms or pneumoconiosis type disease. Periodic X-rays must then be made at least annually of all exposed employees to locate and remove from the musty atmosphere any employee who is being affected by the breathing of dusts.

Park further explained Grace would need to comply with MCC's program for reemployment examination and standards, and that this program would "be very carefully spelled out to prevent the hiring of known Silicotics, tuberculosis victims or persons suffering from other lung impairment." Park advised, "Our responsibility for coordination between the examining physicians, the personnel manager of the particular plant and the W. R. Grace management is, therefore, most important to see that not only is an adequate program put into effect, but that it is followed." Park gave examples of procedures which he anticipated MCC would include in the Safety Program that were intended to ensure that Grace would not hire "unsuitable applicants." The Safety Program would require each applicant to be "[g]rad[ed] . . . based upon his physical condition" and this grade would control whether Grace could consider the applicant for employment.

¶64 On October 7, 1964, Zanone wrote to the Zonolite Division of Grace about the "dust problem" at the Mill. He reminded Grace, "We are presently engaging in drafting an overall program for the entire Zonolite operation and all phases of prevention and control of dust conditions will be part of that program." He assured Grace that MCC's Safety Program "will be most comprehensive[,] covering all phases of accident prevention as well as industrial hygiene." Zanone further stated that Dr. Nelson's recent correspondence had caused MCC to wish to see the x-rays and radiological reports Dr. Nelson had referred to. He asked Grace to forward these items to Dr. Robert F. Chenowith, M.D., MCC's Medical Director.

¶65 On MCC's behalf, Dr. Chenowith began reviewing the studies of x-rays and lung function done on the Mill workers. Grace agreed to forward all radiological reports for all Mill workers to Dr. Chenowith to review and compare with previous studies. MCC directed Grace to obtain new x-rays of every worker and send these films to Dr. Chenowith, which Grace did.

¶66 The Safety Program that MCC ultimately produced for the Mill was 37 pages long. While the document covered dust control and personal protection, among other topics, it did not mention the dust contained asbestos or any hazardous substance. Although MCC did not mandate any warnings about asbestos or the dangerous content of the dust, it mandated Grace "reassign" any employee who develops "signs or symptoms of respiratory involvement" and to notify MCC of any such reassignments.

¶67 In addition to the Safety Program, MCC developed standardized warning signs it provided to employers and directed them to use. MCC directed the use of such signs at the Mill, including "stop and go symbols" that Grace installed at MCC's direction. After an MCC safety engineer visited the Mill, MCC followed up with a letter to Grace directing it to post a sign at the loading docks that said, "Wear your respirators." However, there is no evidence that MCC ever provided any signs or directed Grace to post any signs that warned workers that the dust contained asbestos or that airborne asbestos was hazardous. There is no evidence that the Mill contained any warning signs about asbestos prior to December 1972.

¶68 On November 9, 1964, Park wrote a letter to W.E. Walker, MCC Safety Inspector in the Accident Prevention Department of MCC's Seattle office. Park advised Walker that MCC had obtained information from a whistleblower advising MCC that medical surveys had been performed on Mill workers that indicated they exhibited increased symptoms of chronic respiratory disease, and that local doctors were independently carrying out studies to confirm these findings. According to the letter, after visiting the Mill in July, Walker recommended quarterly "service" of the risk to Mill workers, but in October, Walker reported MCC planned to "service" the Mill annually. Park demanded an explanation for this revision in light of the medical studies that had come to MCC's attention. He informed Walker, "[W]e must provide the best safety engineering service available on as frequent a basis as possible." However, he cautioned Walker that the reports of increased respiratory disease in the Mill workers "is highly confidential and must not get out of your own

offices." He further added, "Our problem is to determine means of controlling the problems so that further occupational disease does not develop and to arrange for job placement or rehabilitation where necessary to prevent claims arising from existing lung deficiencies." Although Park's letter indicates MCC's commitment to improving safety at the Mill, it also lays bare the concealment aspect of MCC's plan to avoid paying claims. As Park admits, MCC's strategy was to prevent workers from filing claims—even though the medical findings indicated these workers had been injured at the Mill.

¶69 On December 29, 1964, Park wrote to Zanone, his supervisor, about ongoing concerns with the Mill. He praised the Safety Program that MCC was developing for the Mill, advising Zanone that the draft was nearing completion and that it was "a well rounded program covering every phase of employment from pre-employment examination to retirement." He further noted the rehabilitation section "limits the likelihood of our exposures to claims under the occupational disease act even below what would normally be expected for this type of risk." He added, "It is my personal opinion that we can satisfactorily engineer this risk . . . ." At the time Park wrote this letter, MCC knew at least 30 Mill workers had asbestos-related disease.

¶70 Park also wrote to T.B. McMath, the Director of the Accident Prevention Department of the Zonolite Division of Grace, that day. He discussed the progress of MCC's Safety Program draft, advising McMath that Grace had approved MCC's first draft. He further noted that MCC was aware of chronic lung disease issues prevalent in the area of the Mill and noted MCC had endorsed its policy to cover asbestosis because MCC

understood it "would only be liable for those cases which became totally disabled during our policy period" and MCC was confident Grace would cooperate with MCC's development and maintenance of an occupational disease control program at the Mill. Park further noted he anticipated Grace's cooperation in providing Dr. Chenowith with any information he needed to evaluate the present physical conditions of the Mill workers, including x-ray films. However, as later correspondence indicated, MCC did not use this medical information Grace provided pursuant to the Safety Plan to inform workers of their illness and to provide them with medical treatment; instead, MCC used this information to "reassign" workers with lung damage to less dusty areas of the Mill as a way of delaying claim filings.

¶71 Sometime after September 7, 1966, Park forwarded to Peter Kostic, the Safety Administrator at Grace, a letter he had initially written to Walker in which Park suggested a course of action regarding some of the x-rays and radiologic reports of Mill workers that MCC had received. In the letter to Walker, Park stated, "[A]fter a cursory review of the x-ray reports received this morning, it would appear expedient that we develop some background information on a few of the [Mill] personnel." However, Park advised Walker, gathering this background information "will require diplomacy and tact," and he directed Walker to wait until his next in-person visit to the Mill to discuss the matter in confidence with E.D. Lovick, the manager of Grace's Zonolite Libby Operation, "without anyone else being in on the conversation." Park provided Walker with a list of nine Mill workers whom he desired for Walker to confidentially collect additional information about—questions

such as whether the worker showed any sign of illness. Park advised Walker he was only to seek this information if Lovick could provide it confidentially. In forwarding this letter to Kostic, Park added a handwritten note asking Kostic to keep the letter confidential and to not share the information until MCC had more time to investigate. Park noted he had informed Rupp that the radiologic reports of nine Mill workers were concerning, but he did not share the workers' names with Rupp, and he wished Kostic to also not share the names of the workers listed in the letter. In other words, although MCC was now aware that nine specific workers had concerning radiologic findings, MCC affirmatively acted to conceal the identities of those workers indefinitely.

¶72 On August 29, 1967, Park wrote to the Vice President of Grace's Zonolite Division and expressed approval for Grace's plan to relocate a ventilation fan, as recommended by MCC, in order to improve the air quality in the Mill. Park assured Grace once it made the recommended correction, "the atmosphere in your mill will return to acceptable levels." Again, it was MCC, not Grace, who dictated the dust control steps taken in the Mill.

¶73 Joe A. Baker, an MCC Safety Inspector, wrote a report about his October 18, 1967 visit to the Mill. He noted Grace had implemented all of the recommendations Baker had made upon his previous visit. Baker also met with Lovick to discuss seven specific Mill workers. Baker made note of the workers' ages, whether they smoked, and their previous places of employment. Baker commented the information Grace had available on these workers was inadequate, and he instructed Lovick to obtain better information on future hires.

¶74 After a Mill worker filed a claim alleging he suffered from asbestos-related disease as a result of working in the Mill, MCC took affirmative steps to prevent the public from learning about the problems at the Mill. On November 25, 1967, S. Y. Larrick, an MCC attorney based in Maryland, wrote a letter to John Hopkins, an MCC employee based in Oregon, that followed up on a recent telephone conversation they had had about a workers' compensation claim that had been filed by Lilas D. Welch, a Mill worker. Larrick recited some of the history of the Mill's "dust problem," explaining the Montana State Board of Health (State Board) had made note of this "dust problem" after it first inspected the Mill in 1956. Later inspections revealed the dust at the Mill contained asbestos and the dust concentrations "far exceed[ed] what were considered . . . allowable . . . ." The State Board made recommendations to Grace, but Grace was slow to implement the recommendations. By 1962, the State Board recognized the high asbestos content of the dust and it opined Grace had made "no progress" in dust mitigation. In 1963, the State Board urged Grace to take immediate action to lower the dust levels.

¶75 Larrick explained MCC intended to conceal as much information as possible about the nature and extent of the asbestos issue at the Mill. He urged Hopkins to keep the State Board reports regarding the Mill's chronic "dust problem" "out of the hands of the Industrial Accident Board, and through it, the general public." He expressed particular concern the Mill workers' union or local attorneys could become aware of the scope of the lung damage issues at the Mill.

¶76 Larrick also informed Hopkins that William Little, a Libby physician, had been conducting studies that indicated "a good many of the employees suffered from lung abnormalities which could be the result of encroaching asbestosis" and that when MCC learned this, MCC immediately sent representatives to Libby to meet with him. Dr. Little informed the MCC representatives that a significantly greater proportion of Mill workers suffered from lung abnormalities than would be expected in a normal population. He advised MCC that this was a "severe problem" and it should anticipate many occupational disease claims for asbestosis. However, Larrick informed Hopkins that the workers had not been informed of Dr. Little's conclusions. Instead, "apparently the only persons aware of the studies are [Grace's] officials, and Dr. Little." And Larrick intended to keep it that way: "Again, as you may well realize, I would much like to avoid having evidence presented by [Welch] which would reveal the extent and severity of the problem with which we are concerned."

¶77 Larrick informed Hopkins of the affirmative actions he had taken to avoid anyone else learning of the danger to the Mill workers. He explained that since Welch worked in a different area of the Mill than the area where the State Board conducted its dust testing, Larrick did not provide the State Board's reports to the Industrial Accident Board when it requested information about the dust conditions in the Mill because he was only required to provide "relevant" information—even though, as Larrick acknowledged later in the letter, the air from the area where the State Board conducted its dust testing was exhausted into the area where Welch had worked and therefore even MCC's own expert would be

forced to admit the relevancy of the testing "were he in fact examined." Larrick added, "The fact also now must be considered that a great many of [Grace's] employees suffer from lung abnormalities and a good many of them have probably never been in the mill, which of course simply means that they are contracting the disease in the yard or in fact at any point where a dust condition may exist." Larrick acknowledged the expert opinions he had obtained indicated that Welch likely had a compensable occupational disease. He urged Hopkins to try to settle Welch's claim so as to avoid "the more damaging aspects of our own situation" becoming evident at the hearing. Larrick opined it would be better for MCC if the dust problem was alleviated at the Mill "prior to facing either the Industrial Accident Board, or a competent claimant's attorney."

¶78 Hutt deposed Neil DeBlock, MCC's Vice President of Workers' Compensation, pursuant to M. R. Civ. P. 30(b)(6). During that deposition, DeBlock acknowledged under the occupational disease statutes in effect during the subject time period, if a worker failed to make a claim for an occupational disease within one year of his last day of employment, the claim was time-barred. DeBlock testified he did not consider MCC to know of any Mill worker that developed asbestosis, lung cancer, or mesothelioma from exposure to asbestos dust at the Mill. He explained Park's letters—which name workers with "lung involvement"—did not provide MCC with any knowledge of such because MCC only has "knowledge" of an injury if a worker actually files a workers' compensation claim, and that even if MCC's Medical Division determined that injuries had occurred, MCC would nonetheless have no "knowledge" of such. Thus, DeBlock asserted MCC had no obligation

to inform any of its insured's workers they may have been injured, and, "Until a claim is filed, [MCC] would not pursue any type of recourse or treatment" and would not disclose any information to the worker.

¶79 DeBlock was further questioned as to whether MCC used "reassignments" as a way to keep workers with radiologic findings of lung damage from learning they had asbestos-related disease until it was too late to file a claim. He stated he did not "know for a fact" MCC used "reassignments" in this manner. He further denied knowing of any instances in which MCC denied a claim as untimely; when confronted with denial letters from MCC which discussed the fact that the claim was filed more than one year after the worker's last day of employment, DeBlock either denied that the letter was a denial, or he maintained that the basis for the denial was unclear from the letter.

¶80 The record establishes clear, affirmative actions that MCC undertook to act as industrial hygienist for Grace's workers, including drafting a Safety Program covering every phase of employment from pre-employment examination to retirement and working in coordination with Grace to implement the Safety Program. This program included dust control and prevention measures, medical monitoring and evaluation of worker lung conditions, and development and implementation of workplace safety measures in addition to administration of workers' compensation and occupational disease claims. The record contains ample evidence of MCC supervising and conducting the medical monitoring of Mill workers through MCC's Engineering Division and Medical Division which included but was not necessarily limited to collecting and analyzing air samples to monitor dust

prevention measures, obtaining and analyzing pre-employment x-rays and annual x-rays for employees who showed lung damage, directing Grace which types of prospective employees were ineligible for employment, and directing Grace to re-assign workers who showed signs of lung damage. Beyond merely undertaking industrial hygiene services and implementing a Safety Plan, the record establishes extensive communication between MCC and Grace revealing affirmative efforts by MCC to conceal early signs of asbestosis and other lung disease in Grace and Zonolite workers. Grace and MCC worked together to transfer ill employees to areas with reduced concentrations of asbestos dust in order to avoid insurance liability. MCC was not merely negligent in its failure to act; rather, in strategically recognizing the latency period for asbestosis to develop, MCC engaged in affirmative actions to conceal the asbestos exposure risk and worker injuries to avoid liability, effectively increasing the risk of additional harm to Mill workers from further asbestos exposure. Based on these facts, I would also conclude MCC owed a duty of care to Hutt under Restatement § 324A(a).

¶81 Next, I concur with the Court in concluding MCC owed a duty of care to Hutt under Restatement § 324A(b). Grace had a general common law duty to provide workers with a safe work environment. Additionally, workers' compensation insurers generally provide workers' compensation insurance and related risk management programs for the benefit of the insured employer and the undertaking of providing such incidental to providing workers' compensation insurance is insufficient to establish a duty pursuant to § 324A(b). Here, however, on the record before us, I believe it is beyond any material dispute that

MCC through its affirmative actions as generally outlined above and in the Court's opinion, went far beyond providing usual risk management services incidental to providing workers' compensation insurance and assumed much of Grace's duty to provide a safe work environment. As such, I concur MCC owed a direct common law duty of care to Hutt and other Grace workers under Restatement § 324A(b) to use reasonable care to protect them from the known risk of exposure to asbestos in the workplace.

¶82 Finally, while I concur with the Court's conclusion that MCC owed a duty to Hutt under § 324A(c), I believe the Court applies Restatement § 324A(c) too narrowly to these facts. The Court writes, "[W]e agree with MCC that Hutt has failed to meet his Rule 56 burden of showing facts upon which to conclude that he and other Grace workers in fact relied on MCC to provide for their safety in any regard." Opinion, ¶ 53. I disagree. While Hutt was employed at Grace, MCC was engaged in medical monitoring of certain Mill workers. Hutt received multiple chest x-rays, one of which reflected fibrotic changes to his lung tissue. Hutt had no recollection of ever being informed of the results or diagnosed with early stages of a lung-related disease. Nonetheless, the fact that MCC did not communicate the x-ray results or diagnosis, standing alone, suggests that there was reliance by Hutt. His reliance is akin to one who sees a doctor, is subject to testing revealing early stages of cancer, and then assumes his health is satisfactory because there is no follow-up from the doctor's office.

¶83 Further, it is entirely reasonable under the facts for an employee such as Hutt to deduce that the safety program and medical testing that take place as a result of his

workplace environment are designed to protect him. It is not a matter of concern to the employee whether the medical testing was conducted by MCC or Grace. His reliance on the lack of follow-up on his testing is focused on the doctor or other medical professional conducting the tests, irrespective of whether that medical professional was employed by MCC or Grace. Accordingly, based on Hutt's reliance on MCC's services, I would also conclude MCC owed a duty of care to Hutt under Restatement § 324A(c).

/S/ INGRID GUSTAFSON

Justice James Jeremiah Shea and Justice Laurie McKinnon join in the concurring Opinion of Justice Gustafson.

/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON

Chief Justice Mike McGrath, concurring.

¶84 I concur with the Court's Opinion[1] along with the concurring Opinion of Justice Gustafson. I feel compelled, however, to address a residual issue, evident in the record before the Asbestos Court although not raised in the briefing, regarding the possibility of Grace's bankruptcy precluding Hutt's and other Grace and Zonolite workers' claims

[1] While joining the Opinion, I am not entirely in agreement with the Court's analysis of the application of Restatement § 324A(c) to the extent the subsection could apply to the reliance of W.R. Grace, the debtor. As the Gustafson Concurrence notes, the reliance of Hutt and other Grace workers, particularly those that were x-rayed, is an important factor here.

against MCC upon this Court's adoption of Restatement § 324A. Indeed, MCC explicitly argues for the adoption of Restatement § 324A in its brief, presumably under the assumption that it may use Grace's bankruptcy to shield itself from potential liability. However, by adopting the Restatement on third party duty, it becomes clear that MCC's duties owed to Hutt and other Grace and Zonolite workers are not derivative of MCC's contractual duties owed to Grace. Accordingly, Grace's Chapter 11 bankruptcy stay[2] will not preclude Hutt and other potential plaintiffs' recovery from MCC pursuant to § 524(g) of the Bankruptcy Code provided these plaintiffs can prove MCC breached its duty in implementing its industrial hygiene services and safety programs and/or breached its duty to warn of the hazards of asbestos dust such that its breach proximately caused plaintiffs' injuries.

¶85 Section 524(g) of the Bankruptcy Code creates a channeling injunction in asbestos bankruptcies, enjoining certain types of third-party claims against the debtor's insurers from proceeding in state court. *See Cont'l Cas. Co. v. Carr*, 900 F.3d 126, 130 (3d Cir. 2018). Section 524(g) requires a debtor's insurer to satisfy two requirements in order for this injunction to apply: (1) the tort claims filed by plaintiffs in state court against the debtor's insurer must be derivative of the debtor's misconduct, and (2) the insurer's provision of insurance owed to the debtor is legally relevant to the elements of the tort claims. *In re W.R. Grace & Co.*, 607 B.R. 419, 423 (Bankr. D. Del., Sept. 23, 2019). If

[2] In 2014, Grace's Chapter 11 bankruptcy reorganization plan became effective, establishing a channeling injunction pursuant to § 524(g) of the Bankruptcy Code. This stay enjoined holders of asbestos personal injury claims from attempting to recover against Grace and certain protected parties outside the bankruptcy process.

the insurance company fails to establish either of these requirements, then the tort claims may proceed in state court. *W.R. Grace & Co.*, 607 B.R. at 423.

¶86 Under bankruptcy law, a claim against an insurer is derivative if: (1) it seeks to recover from the debtor's insurance policy, constituting the debtor's res, and (2) is based on the debtor's, rather than the insurer's, conduct. *W.R. Grace & Co.*, 607 B.R. at 442 (citing *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 92-93 (2d. Cir. 1988); *see also In re Tronox Inc.*, 855 F.3d 84, 99 (2d Cir. 2017). In deciding whether a claim is derivative, a bankruptcy court must consider both the factual origin of the claim as well as whether an insurer has a legal duty under state law in its dealing with plaintiffs, independent of the insurer's contractual obligations to the debtor to indemnify those injured by the debtor's conduct. *In re Johns-Manville Corp.*, 517 F.3d 52, 67 (2d Cir. 2008) (*rev'd on other grounds sub nom. Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 129 S. Ct. 2195 (2009)).

¶87 I echo the Bankruptcy Court's holding in *W.R. Grace & Co.* that upon this Court's adoption of Restatement § 324A (or under a traditional common law negligence analysis), Hutt's negligence and duty to warn claims asserted against MCC do not satisfy the derivative liability requirement of § 524(g) necessary to be enjoined by Grace's channeling

injunction.[3] *W.R. Grace & Co.*, 607 B.R. at 447. Under the Restatement, MCC owed a duty to Hutt and other potential plaintiffs independent of its contractual indemnification obligations owed to Grace.[4] *W.R. Grace & Co.*, 607 B.R. at 447. The nature of the harm suffered by Hutt and other Grace and Zonolite workers is predicated on MCC's misconduct, not Grace's, such that neither the negligence claim nor the duty to warn claim

[3] The procedural history of *W.R. Grace & Co.* stems from two Bankruptcy Court cases for the District of Delaware, *Cont'l Cas. Co. v. Carr (In re W.R. Grace & Co.)*, 2016 Bankr. LEXIS 3753 (Bankr. D. Del., Oct. 17, 2016), and *Hutt v. Md. Cas. Co. (In re W.R. Grace & Co.)*, 2016 Bankr. LEXIS 3754 (Bankr. D. Del., Oct. 17, 2016). Both cases were decided by the same judge on the same day, concerned the same general facts, and addressed the same issue—whether Grace's asbestos channeling injunction precluded Montana plaintiffs from filing negligence and duty to warn claims in Montana state court against Grace's insurers. The primary difference between the two cases is that *Cont'l Cas. Co.* concerned claims against CNA (Continental Casualty Company and Transportation Insurance Company), Grace's primary commercial and general liability insurers beginning in 1973, while *Hutt* concerned Hutt's claims against MCC, Grace's primary general liability and workers' compensation insurer from 1962-1973. In both cases, the Bankruptcy Court determined that the Montana plaintiffs' claims against Grace's insurers were barred in Montana state court by Grace's channeling injunction. On direct appeal to the Third Circuit, the appellate court vacated the Bankruptcy Court's holdings that the Montana claims satisfied the derivative liability and statutory relationship requirements under § 524(g)(4)(A)(ii) and remanded the issues back to the Bankruptcy Court with instructions. *See Carr*, 900 F.3d at 139. On remand, the court in *W.R. Grace & Co.* determined that the derivative and statutory requirements for § 524(g) of the Bankruptcy Code were not satisfied such that Montana plaintiffs' claims were not precluded against CNA in Montana state court. *W.R. Grace & Co.*, 607 B.R. at 454. For the same reasons, Hutt's negligence and duty to warn claims against MCC are also not precluded in Montana state court.

[4] In fact, on remand, the Bankruptcy Court held that regardless of whether the Restatement or the common law standards applied, Grace's insurers' legal duty to Montana plaintiffs under Montana law is completely independent of the insurers' contractual duties owed to Grace under its insurance policies. *W.R. Grace & Co.*, 607 B.R. at 447. In addition, the court found that Grace had no right to sue its insurers for negligence or breach of a duty to warn under the Restatement or common law standards, given that plaintiffs' claims are not derivative under the *Tronox* analysis. *W.R. Grace & Co.*, 607 B.R. at 448.

is derivative under Restatement § 324A. *W.R. Grace & Co.*, 607 B.R. at 447.[5] Accordingly, any recovery will not affect Grace's res, but rather, will be satisfied directly through MCC's assets. *W.R. Grace & Co.*, 607 B.R. at 448. Furthermore, although Hutt's injuries may have "arisen" out of Grace's insurance relationship with MCC, this relationship does not disavow the legal duty MCC independently owed to Hutt and other Grace workers under the Restatement. *W.R. Grace & Co.*, 607 B.R. at 447 (citing *Tronox*, 855 F.3d at 106 (holding that plaintiffs *would* have had a nonderivative claim against debtor's insurer if they had alleged that the insurer had been negligent in its supervision of the cleanup of a toxic tort site)).

¶88 Under these facts as applied to the Restatement, in implementing its safety program and providing industrial hygiene services, MCC independently owed a duty of reasonable care to Hutt and other Grace and Zonolite workers, including a duty to warn them of the known risk of exposure to airborne asbestos in and about Grace's workplace(s). Because Hutt's claims against MCC are not derivative of Grace's conduct, Grace's bankruptcy channeling injunction does not preclude Hutt's claims in Montana state court or shield MCC from potential liability for any breach of its duties owed to Hutt. I otherwise join in

[5] Because both the derivative action and statutory relationship prongs must be satisfied for the Montana claims to be barred in Montana state court by Grace's bankruptcy channeling injunction, it is not necessary to address the statutory relationship prong. However, the Bankruptcy Court also determined that CNA's insurance provision to Grace is not legally relevant to the elements of the Restatement. *W.R. Grace & Co.*, 607 B.R. at 454. The Restatement only requires performance of a service under a contract; there is no requirement a defendant must provide insurance for the defendant's duty to arise, let alone any mention of insurance at all. *W.R. Grace & Co.*, 607 B.R. at 454. Likewise, MCC cannot demonstrate its provision of insurance to Grace satisfies the requisite statutory relationship under § 524(g)(4)(A)(ii)(III). *W.R. Grace & Co.*, 607 B.R. at 454.

the Court's adoption of Restatement § 324A and in the Gustafson Concurrence's application of subsections (a), (b), and (c) of Restatement § 324A in defining MCC's duty of care owed to Hutt and other Grace and Zonolite workers.

/S/ MIKE McGRATH

Justice Ingrid Gustafson and Justice Laurie McKinnon joins the concurring Opinion of Chief Justice Mike McGrath.

/S/ INGRID GUSTAFSON
/S/ LAURIE McKINNON

Justice Laurie McKinnon, concurring.

¶89 I join the Court's opinion, as well as the opinions of the Chief Justice and Justice Gustafson.

¶90 The Court's opinion adopts § 324A, but concludes there are insufficient facts to support the existence of a duty under subsection (a). The opinions of the Chief Justice and Justice Gustafson conclude that a duty is also owed under subsection (a) of § 324A. I agree there are sufficient facts to support the existence of a duty under all subsections.

¶91 While I concur that sufficient facts support the majority's conclusion that a duty was owed by MCC to Grace and Zonolite workers under *all* subsections of § 324A, in my opinion § 324A is a circuitous and unnecessary route for identifying the existence of a duty. Our precedent provides an adequate framework to determine the existence of a duty of care. I would conclude that MCC owed workers a duty of care when it acted affirmatively

to implement an industrial hygiene program; conducted chest x-rays of workers and accumulated health care information for individual workers; failed to inform workers of the results of medical testing, which indicated lung-related disease; and then coordinated with Grace to develop a program to minimize MCC's liability after it learned through its medical monitoring that workers would get sicker if not transferred to different units. While analyzing these facts through the third-party framework of § 324A does not produce an inconsistent or contrary result, I would conclude that Montana's precedent clearly supports the imposition of a duty of care owed by MCC directly to the workers.

¶92 We have long recognized that "[a]t the most basic level, we all share the common law duty to exercise the level of care that a reasonable and prudent person would under the same circumstances." *Fisher*, ¶ 16; *Bassett*, ¶ 23; *see also* § 27-1-701, MCA ("[E]ach person is responsible . . . for an injury occasioned to another by the person's want of ordinary care or skill in the management of the person's property or person . . . ."); § 28-1-201, MCA ("Every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon any of another person's rights."). Thus, a person has a duty to exercise the same level of care that a reasonable and prudent person would when placed in a position where, if he did not use such care, he would injure another's person or property. *Bassett*, ¶ 23. In determining whether a duty exists, courts consider "whether the imposition of that duty comports with public policy, and whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff." *Fisher*, ¶ 17; *Bassett*, ¶ 23.

¶93 Here, MCC took affirmative acts to manage and implement Grace's industrial hygiene program and to affirmatively monitor and gather workers' health care information. There is also extensive communication between MCC and Grace to prevent workers from knowing the results of their health care monitoring and the effects of asbestos exposure. These constitute affirmative actions taken by MCC. Whether MCC was required to warn the workers of asbestosis and their x-ray results informs whether MCC carried out its duty reasonably. However, by engaging in these affirmative actions, the first consideration in determining whether a direct duty should be imposed is satisfied—MCC *acted* in a way which, if it did not exercise reasonable care, would cause injury to another person. In doing so, "[a]t the most basic level," MCC had to act in a manner that was reasonable and prudent under the circumstances. *Fisher*, ¶ 16; *Bassett*, ¶ 23. Had MCC not taken these affirmative actions, the analysis of whether a duty arises between MCC and the workers ends. In my opinion, however, MCC's implementation of an industrial hygiene program, medically monitoring workers, and transferring workers to different locations of the plant were affirmative acts which could establish a direct duty of care between MCC and the workers. Whether a duty should be imposed is next informed by foreseeability and considerations of public policy.

¶94 "Foreseeability is of prime importance in establishing the element of duty . . . ." *Busta*, 276 Mont. at 362, 916 P.2d at 134. For a duty to be imposed, a reasonably prudent defendant must foresee a danger of injury as a result of a defendant's failure to exercise reasonable care. Here, MCC had gathered health care information about individual

workers through MCC's medical personnel and MCC was advised by its medical experts evaluating the health care information that further asbestosis exposure would harm workers. The workers were clearly foreseeable persons who would be harmed if MCC did not exercise reasonable care in implementing a medical monitoring and industrial hygiene program. Clearly, health injuries in the form of the onset or worsening of asbestosis to workers was a foreseeable danger if MCC did not act in a reasonable and prudent manner. Injuries to workers were therefore foreseeable if MCC failed to exercise reasonable care.

¶95 The final consideration for imposition of a duty is whether it comports with public policy. Certainly, public policy should encourage development of adequate safety plans for workers. Conversely, MCC's affirmative actions in gathering workers' health care information and developing a policy designed to minimize liability by not disclosing medical results to workers and transferring workers to different locations to minimize exposure and avoid claims, is contrary to the safety of workers and therefore to public policy. While MCC's development of a safety plan for workers may have helped some workers by minimizing exposure, MCC failed to advise workers of the results of its medical monitoring and the health risks of continued exposure to asbestos. MCC undertook health care monitoring and never advised the person being monitored of the results. In the context of workers' health care information, public policy supports imposition of a duty upon MCC to utilize the health care information it accumulated and implement a safety plan in a way that was reasonable and prudent, and that did not injure another person—in this case, the workers.

¶96 I would conclude that MCC owes a direct duty of care to Grace and Zonolite workers because it conducted medical monitoring of the workers and implemented an industrial hygiene plan for the workers. These were affirmative acts taken by MCC; injury to workers was foreseeable if MCC did not act with reasonable care; and public policy supports imposition of a duty. I do not disagree that the facts also support imposition of a duty under all subsections of § 324A, but I think imposing a duty pursuant to a third-party analysis is unnecessarily complicated, particularly given the facts present here and the affirmative acts taken by MCC.

/S/ LAURIE McKINNON

Justice James Jeremiah Shea, concurring.

¶97 Since this case has generated so many concurrences, that it requires a scorecard to keep track, I am reluctant to add to the pile. However, I feel compelled to make a single brief observation regarding Chief Justice McGrath's concurring opinion as to whether, and to what extent, this Opinion may intersect with Grace's bankruptcy. While I find no fault with the Chief Justice's analysis, I decline to join his concurrence solely because, as noted in the concurrence, McGrath Concurrence, ¶ 84, this issue has not been raised in the briefing before us. Because this Opinion will impact the progression of a number of cases, I certainly understand the motivation to address this issue at this juncture; nevertheless, I would defer addressing it until it has been briefed.

/S/ JAMES JEREMIAH SHEA